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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2014-NMCA-112

Filing Date: May 14, 2014

Docket No. 32,059

DEBORAH RAINALDI, SHONNA BACA, and ROBERT KESSEL, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

CITY OF ALBUQUERQUE,

Defendant-Appellee.

Youtz & Valdez, P.C.
Shane C. Youtz
Stephen Curtice
Albuquerque, NM

for Appellants

City of Albuquerque
David Tourek, City Attorney
Samantha M. Hults, Assistant City Attorney
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Albuquerque, NM

for Appellee

OPINION

HANISEE, Judge.

In this single issue appeal, we are called upon to resolve a matter of first impression: whether the City of Albuquerque's (the City) overtime compensation schedule for Albuquerque Police Department (APD) employees violates the statutory time payment provisions required of New Mexico employers. *See* NMSA 1978, § 50-4-2(A) (2005) (requiring the designation of regular pay days on at least a semimonthly basis and that compensation for services rendered be postponed no later than ten days after the close of the pay period). The district court granted the City's motion for summary judgment and dismissed the collective action complaint brought by certain affected APD employees (Plaintiffs), ruling that the City's two-week processing delay of overtime accrued during the second week of a given bi-weekly pay period complies with Section 50-4-2(A). We hold that the City's overtime compensation schedule violates the statutory requirement of Section 50-4-2(A) that employees be compensated for "all services rendered" within ten days after the close of a given pay period, and that the City is not exempt from compliance. We reverse.

BACKGROUND

APD employees are paid on a bi-weekly basis. Prior to July 3, 2009, employee paychecks included compensation for both regular and overtime services provided during a given pay period. This practice ended pursuant to Department Special Order 09-53, issued by the APD Chief of Police on June 10, 2009, which changed the manner in which time sheets were submitted for administrative payroll processing. As a result of the

modification, on days they are paid, APD employees receive overtime pay accumulated during the first week of the particular pay period, combined with that from the second week of the preceding pay period. Stated differently, compensable overtime performed during the second week of a particular pay period is processed during the subsequent pay period. APD maintained that the modification was designed to reduce timesheet revisions and to improve supervisory capacity to "track and audit time and identify discrepancies."

Nearly two years after APD implemented the modification, Plaintiffs filed a lawsuit in district court alleging that the City's overtime pay structure violates the statutory requirements for employee compensation. Section 50-4-2(A) states, in relevant part:

> An employer in this state shall designate regular pay days, not more than sixteen days apart, as days fixed for the payment of wages to all employees paid in this state. The employer shall pay for services rendered from the first to the fifteenth days, inclusive, of any calendar month by the twenty-fifth day of the month during which services are rendered, and for all services rendered from the sixteenth to the last day of the month, inclusive, of any calendar month by the tenth day of the succeeding month.

The City answered and sought summary judgment based on an absence of material factual disputes and various theories, discussed herein, under which the City asserted it was entitled to judgment as a matter of law. Following a hearing, the district court agreed and granted the City's motion for summary judgment. Plaintiffs appeal, arguing that although the City satisfies the statutory requirement to "designate regular pay days[] not more than sixteen days apart," its manner of pay violates the second statutory requirement that employees be paid for all services rendered during a particular pay period in accordance with the prescribed time line. Plaintiffs additionally contend that the City's proffered bases for exemption do not liberate it from compliance with Section 50-4-2(A).

DISCUSSION

A. Standard of Review

Summary judgment is proper when there are no genuine issues of material fact and the moving party 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. "[I]f no material issues of fact are in dispute and an appeal presents only a question of law, we apply de novo review." *City of Albuquerque v. BPLW Architects & Eng'rs, Inc.*, 2009-NMCA-081, ¶ 7, 146 N.M. 717, 213 P.3d 1146.

B. The City's Overtime Compensation Schedule for APD Employees Does Not Comply With Section 50-4-2(A)

On appeal, Plaintiffs do not assert that summary judgment was improper due to the existence of genuine issues of material fact. Instead, Plaintiffs argue that the City "[u]nquestionably [v]iolates" the "[c]lear and [u]nambiguous [c]onstraints" of Section 50-4-2(A) as a matter of law, and none of the City's "proffered defenses excuse [its] failure to abide by the plain language of the statute[.]"

Section 50-4-2(A) imposes on employers

two distinct wage payment requirements: (1) that employers "shall designate regular pay days, not more that sixteen days apart, as days fixed for the payment of wages to all employees paid in [the] state[,]" and (2) that employers "shall pay for services rendered from the first to the fifteenth days . . . by the twenty-fifth day of the month during which services are rendered, and for all services rendered from the sixteenth to the last day of the month . . . by the tenth day of the succeeding month." *Id.* The parties do not dispute that the City's bi-weekly compensation schedule, designating pay days every fourteen days, is in compliance with the frequency of compensation requirement. The parties disagree, however, as to whether the City complies with the second statutory requirement establishing the timing by which compensation for services is due. *See* § 50-4-2(A).

Plaintiffs assert that because the City does not compensate for overtime earned during the second week of a pay period until the pay day following the subsequent pay period, which occurs twenty-one days later, the City is afoul of the requirement that payment for all services rendered be made by the tenth day following conclusion of any given period. The City initially responds that because its pay days occur more frequently than is required by Section 50-4-2(A), it is in compliance with the statute. Our review of the wording of the statute, however, provides no indication that employers choosing to schedule pay periods at a greater frequency than is statutorily required are consequently freed from having to compensate employees for all services rendered by the time payment is otherwise due. In fact, with the limited exception of "state employees, other than employees of institutions of higher education," whose salaries and wages are governed by the rules of the department of finance and administration, "an employer shall pay wages in full[.]" Section 50-4-2(B).

We recognize that Section 50-4-2(A) facially illustrates a semimonthly payment schedule, requiring one pay day by the twenty-fifth day of the month for services rendered between the first and fifteenth days, and another by the tenth day of the succeeding month for services rendered between the sixteenth and last days of the month. As we have noted, the City does not utilize this semimonthly schedule, but rather a bi-weekly payment schedule; thus, the specific semimonthly payment deadlines are inapplicable here. Nonetheless, we have previously observed the statutory compensation time line to require payment within ten days after the close of any given pay period, not just a bi-monthly one. *See N.M. Dep't of Labor v. A.C. Elec., Inc.*, 1998-NMCA-141, ¶ 20, 125 N.M. 779, 965 P.2d 363 (citing Section 50-4-2(A) as requiring "payment of wages on at least semi[]monthly basis with payment deferred no later than ten days after close of pay period"). The City's current overtime compensation schedule does not render payment for overtime services within ten days after the close of the given pay period, but defers payment for the second week of the pay period until the subsequent pay day, twenty-one days following the conclusion of the pay period. This delayed compensation of accrued overtime is not consistent with the ten-day payment window specified in Section 50-4-2(A).

Accordingly, we conclude that the manner in which the City compensates its APD employees is inconsistent with that statutorily required of employers in New Mexico. We must next resolve whether the City has asserted any basis on which it is excluded or is

otherwise exempt from the category of employers governed by Section 50-4-2(A).

C. The City's Proffered Exemptions Do Not Liberate it from Compliance With Section 50-4-2(A)

The City argues that even if its overtime compensation schedule is disallowed by Section 50-4-2(A), it is exempt from compliance on any of four distinct bases: (1) Section 50-4-2(B) provides an exception for state public employers, and as an auxiliary of the state, the City is likewise exempt; (2) the Legislature did not intend Section 50-4-2(A) to apply to any public employers; (3) public employers are explicitly excluded from the definition of "employer" under Section 50-4-21 of the New Mexico Minimum Wage Act (MWA), NMSA 1978, §§ 50-4-19 to -30 (1955, as amended through 2009); and (4) as a home rule municipality, the City may "exercise all legislative and policy making functions[.]" We address each of the City's arguments below and conclude that none exempt it from the statutorily mandated compensation time line of Section 50-4-2(A).

1. The City Does Not Qualify for Exemption Under Section 50-4-2(B) Despite Being an Auxiliary of the State

First, the City argues that it is exempt from compliance with Section 50-4-2(A) because Section 50-4-2(B) excepts "payment of salaries and wages to state employees[.]" As an "auxiliary of the state[,]" the City asserts that it is included within the grouping of statutorily exempt *state* public employers. The City relies on *Morningstar Water Users Ass'n v. Farmington Municipal School District*, 1995-NMSC-052, ¶ 37, 120 N.M. 307, 901 P.2d 725, and *City of Albuquerque v. New Mexico Public Regulation Commission*, 2003-NMSC-028, ¶ 3, 134 N.M. 472, 79 P.3d 297 for this proposition.

We conclude that Plaintiff's reliance on both cases is misplaced. While *Morningstar Water Users Ass'n* does state, as the City contends, that a municipality "is an auxiliary of the state government," this relationship does not equate municipalities such as the City with the state for the purposes of benefits or privileges. *See Morningstar Water Users Ass'n*, 1995-NMSC-052, ¶ 37 (citing *Loeb v. City of Jacksonville*, 134 So. 205, 207 (Fla. 1931), which stated that, "[a] 'city' is a mere auxiliary to the state government. It is a public institution for self-government and local administration of the affairs of state"); *Hurley v. Vill. of Ruidoso*, 2006-NMCA-041, ¶ 7, 139 N.M. 306, 131 P.3d 693 (declining to recognize the proposition that a municipality is an auxiliary of the state as pertinent to the analysis of whether a municipality is afforded the same benefits and immunities possessed by the state). Likewise, *Public Regulation Commission* does not establish the proposition that municipalities are treated identically to the state for purposes of benefits such as statutory exemption, but instead holds that political subdivisions of the state possess "only such powers as are expressly granted to it by the Legislature[.] 2003-NMSC-028, ¶ 3 (internal quotation marks and citation omitted). *See New Mexicans for Free Enter. v. City of Santa Fe (NMFE)*, 2006-NMCA-007, ¶ 13, 138 N.M. 785, 126 P.3d 1149 (stating that because the municipality is an auxiliary of the state, the municipalities are "subordinate to the state government").

More tellingly, the plain wording of Section 50-4-2(B) expressly exempts only the State from the payment rigors to which New Mexico employers must adhere.

Because municipalities such as the City are not discharged from compliance by the statutory language chosen by the Legislature and are not otherwise assisted by our jurisprudence, we will not ourselves supply exemption. *Reule Sun Corp. v. Valles*, 2010-NMSC-004, ¶ 15, 147 N.M. 512, 226 P.3d 611 (stating that under the plain meaning rule, "[w]e will not read into a statute language which is not there, especially when it makes sense as it is written" (internal quotation marks and citation omitted)). *See Sims v. Sims*, 1996-NMSC-078, ¶ 17, 122 N.M. 618, 930 P.2d 153 (stating that the plain meaning rule requires a court to "give effect to [the statute's] language and refrain from further statutory interpretation" when the language is clear and unambiguous). We conclude that the lone delineated exception to the payment schedule contained in Section 50-4-2(B) is expressly applicable to the compensation of certain "state employees" only and does not by extension apply to auxiliaries of the state, such as the City.

2. The City is Not Excused From Compliance With Section 50-4-2(A) on the Basis That the Phrase "Public Employer" is Absent From the Definition of "Employer" Contained in Section 50-4-1(A)

As a second basis for exemption, the City argues that the Legislature intended the City to be excused from compliance with Section 50-4-2(A) because the phrase "public employer" is not expressly included within the definition of "employer" under Section 50-4-1(A). In pertinent part, Section 50-4-1(A) defines "employer" as "every person, firm, partnership, association, corporation, receiver or other officer of the court of this state, and any agent or officer of any of the above mentioned classes[.]" We conclude this language includes New Mexico employers of any category.

Our perspective is supported by the purposeful and carefully limited exclusion of salaries and wages paid to most state employees as permitted by Section 50-4-2(B). This provision would be needless were Section 50-4-2(A) inapplicable to the State in its capacity as a public employer. This necessary exemption is then limited insofar as it applies only to wages paid to state employees "other than employees of institutions of higher education." Section 50-4-2(B). We view this language to constitute the State's limited exemption from compliance with Section 50-4-2(A) excluding employees in higher education occupations that are paid according to the schedule and time limitations established within Section 50-4-2(A). *See* § 50-4-2(B). By so exactingly describing the nature of the State's exclusion from the statute, we must presume that were other exclusions to exist, they would not have gone unmentioned or otherwise wholly omitted from the statute. When the Legislature has spoken with precision on a topic—here establishing a lone category of exclusion from the statute's otherwise general application—it is not the proper role of the judiciary to make plural that which is singular. *See City of Deming v. Deming Firefighters Local 4521*, 2007-NMCA-069, ¶ 20, 141 N.M. 686, 160 P.3d 595 ("As a matter of statutory construction, we do not read language that is not present into a statute."); *Swink v. Fingado*, 1993-NMSC-013, ¶ 29, 115 N.M. 275, 850 P.2d 978 ("Legislative silence is at best a tenuous guide to determining legislative intent.").

The City makes several arguments geared toward our application of something

other than this general approach to statutory construction. First, it maintains that "when the [L]egislature wants to include governmental employers in its statutes, it does so explicitly." We are not persuaded by this overly general assertion. Our examination of NMSA 1978, Chapter 50, Article 4 (1933, as amended through 2013) indicates that when the Legislature did not intend a statutory provision to apply to specific entities—the state and all of its political subdivisions—it instead explicitly provided broader exemption. For example, in the separate definitional section applicable to the MWA, also set forth in Chapter 50, Article 4, the Legislature expressly excluded "the state or any political subdivision of the state" from the definition of an "employer." *See* § 50-4-21(B). Contrary to the City's argument, within Chapter 50, Article 4, we see no indication that when the Legislature intended a statutory provision to apply to specific governmental employers, it explicitly added those employers. We do, however, observe that where the Legislature did not want to include governmental employers, it expressly excluded them. Section 50-4-21(B). Yet Section 50-4-1 does not contain the express exclusion contained in Section 50-4-21. Considering the manners in which exclusions within both statutes were expressed, we are not persuaded that Section 50-4-2(A) silently intended that its payment mandates were inapplicable to municipalities simply because municipalities were not affirmatively identified as employers within the statute.

Second, the City asserts that the legislative history of NMSA §§ 50-4-1 to -12 (1937, as amended through 2005) compels the conclusion that Section 50-4-2(A) is "clearly not applicable to public employees." Indeed, when the Act was originally passed, it was entitled "An Act to Establish Regular Pay[]Days and to Regulate the Payment of Wages and Compensation for Labor or Service in *Private Employment* and Repealing All Acts in Conflict Herewith." 1937 N.M. Laws, ch. 109 (emphasis added). The City asserts that due to the original title's application to solely "[p]rivate [e]mployment," the current version of the statute must intend all public employers to be exempt. *Id.* We are not persuaded that changes to the title of the statute lead to such a conclusion for two reasons. First, the statute no longer contains a title implicating only private employers; the chapter is currently entitled "Employment Law." *See* NMSA 1978, Chapter 50. We cannot construe modification of the original titling language to contradictorily indicate the Legislature's intent to continue to exclude public employers from the statute's breadth. Second, we have noted that the Legislature subsequently included the provision within Section 50-4-2(B) that exempts certain state employers from compliance. This single, limited exemption appears to indicate that non-exempt state employers and other public employers are, consistent with the elimination of the "[p]rivate [e]mployment" descriptor contained within the enacting title of the legislation, subject to compliance with Section 50-4-2(A) unless otherwise specified.

Third, the City argues that not only was the title of the Act changed, but the 1937 iteration of the statute utilized the phrase "every employer," while the current Section 50-4-2(A) applies to "[a]n employer." *Compare* 1937 N.M. Laws, ch. 109, § 2, *with* Section 50-4-2(A). Yet we cannot construe such a minute and seemingly indistinct alteration to the way employers are described to transformatively exclude all public employers from the statutory definition. As we have noted, Section 50-4-2(B)'s express

exclusion of the state in its capacity as an employer would be plainly unnecessary were all public employers otherwise exempted. *See* Section 50-4-2(B).

The City's fourth assertion that the Legislature did not intend for municipalities to be included in the definition of "employer" under Section 50-4-1(A) is based on the fact that the payment of wages to public employees is not addressed in Chapter 50, Article 4, but rather in NMSA 1978, § 10-7-2(A) (2005). This argument is likewise unavailing. Like Section 50-4-2(B), Section 10-7-2(A) is only applicable to "[p]ersons employed by or on behalf of the state[.]" As we discussed above, a municipality is not to be equated with the state for the purpose of the statutory interpretation of Section 50-4-1(A).

In rejecting the City's arguments in these regards, we note that if public policy or unique circumstances such as those in existence with regard to APD overtime justify the addition of municipalities as excluded employers for purposes of Section 50-4-2, it is the Legislature's prerogative to modify the statute it wrote. We hold that as written, the City is not excluded from the definition of employer under Section 50-4-1(A) based on its absence from the exclusionary statutory language, and we will not read the further exclusion of municipalities into Section 50-4-1(B) where such language does not there appear.

3. The City is Not Exempt From Compliance with Section 50-4-2(A) by Virtue of the Definition of "Employer" Under the MWA

As its third proffered exception, the City argues it is exempt from compliance with Section 50-4-2(A) because the payment of overtime wages is collaterally addressed within Section 50-4-22(D) of the MWA, and under its definition of employer, political subdivisions of the state are explicitly excluded. The MWA defines "employer" as "any individual, partnership, association, corporation, business trust, legal representative . . . but shall not include . . . the state or any political subdivision of the state[.]" Section 50-4-21(B). The parties agree that in this context the City is excluded from this definition of employer; however, they dispute whether exclusion under the MWA bears the reach to exempt the City from compliance with Section 50-4-2(A). Plaintiffs contend that because Section 50-4-2(A) is not contained within the MWA itself, the City cannot be peripherally exempted from compliance with Section 50-4-2(A) based on an inapplicable statutory definition of employer contained within a separate and distinct act. *See* § 50-4-20 (stating that "Sections 50-4-19 through 50-4-30 . . . may be cited as the 'Minimum Wage Act.' ")[1] Conversely, the City argues that because Section 50-4-22(D) of the MWA governs the very necessity of employee compensation for overtime services, and because the City is not an employer required to provide overtime compensation for purposes of Section 50-4-21(B), it is exempted from a statutorily mandated pay schedule with regard to overtime compensation.

Here, the City has opted not to utilize

[1]Some confusion existed on the part of Plaintiffs with regard to the MWA. In their original complaint, Plaintiffs asserted a violation of Section 50-4-2 and referenced this section as part of the MWA. The MWA, however, only contains Sections 50-4-19 through 50-4-30. *See* § 50-4-20. Plaintiffs acknowledge this mistake in their brief in chief and now contend that the MWA "has no bearing on this case."

its statutory exemption from overtime compensation and has instead decided to pay its employees for such additional services. But even in this circumstance, we find no authority to support the assertion that by electing to compensate its employees for overtime services, the City is automatically exempted from the statutorily mandated compensation schedule for "all services rendered." Section 50-4-2(A). Because work completed during overtime hours constitutes a service rendered by the employee, determined by the City to be compensable, Section 50-4-2(A) continues to mandate that the City must pay its employees within ten days of the end of a particular pay period.

In conjunction with this argument, the City argues that we should interpret the MWA guided by federal law. *See Garcia v. Am. Furniture Co.*, 1984-NMCA-090, ¶ 13, 101 N.M. 785, 689 P.2d 934 (stating that it is appropriate to look to the decisions of federal courts when interpreting a New Mexico statute when the federal and New Mexico statutory provisions are similar). The City asserts that Section 50-4-22(D), the overtime provision of the MWA, is similar to the federal overtime provision, 29 U.S.C. § 207(a) (2012), set forth within the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 (2012). Accordingly, it contends we should look to federal law to determine whether the City's overtime compensation schedule is improper.

The FLSA requires non-exempt employers to compensate employees at a rate of at least one and one-half times the regular rate when employees work in excess of forty hours per week, similar to Section 50-4-22(D). *See* 29 U.S.C. § 207(a)(1). Under federal law, "[t]he general rule is that overtime compensation earned in a particular work[]week must be paid on the regular pay day for the period in which such work[]week ends." 29 C.F.R. § 778.106 (2013). However, when the proper amount of overtime cannot be determined until after the end of the regular pay period, the employer may compensate for overtime "as soon after the regular pay period as is practica[l]" without violating the Act. *Id.*

The City contends that its fourteen-day delay in processing overtime is in compliance with the federally analogous "prompt payment requirement" of the FLSA and is, therefore, not in violation of Section 50-4-2(A). For this contention, the City relies on *Nolan v. City of Chicago*, 162 F. Supp. 2d 999, 1003-04 (N.D. Ill. 2001). *Nolan* held that a delay in overtime compensation of approximately twenty-eight days was not in violation of 29 C.F.R . § 778.106 because payment was made "as soon as is practica[l]." *Nolan*, 162 F. Supp. 2d at 1005. However, *Nolan* is distinguishable from the present case. In *Nolan*, the City of Chicago was a recognized employer under the FLSA and directly subject to the overtime compensation requirements. *Nolan*, 162 F. Supp. 2d at 1001. Here, as the City notes, by virtue of Section 50-4-21(B), it is exempt from Section 50-4-22(D) and therefore not required to compensate for overtime services. Furthermore, the *Nolan* court acknowledged that the overtime calculation process at issue was a highly complex system, and although the City of Chicago was working to implement a more efficient automated system, it was, at the time, unable to implement a system that could process overtime in a timely manner. *Nolan*, 162 F. Supp. 2d at 1001. In the present case, prior to July 3, 2009, the City compensated APD employees for accrued overtime hours in a timely manner. It was not until the APD Chief of Police modified the time sheet submission requirements that the City encountered delays in processing time.

Additionally, there was no indication from the City that it was working to create a more timely and efficient system. Because the City is not an employer for the purposes of the mandatory compensation of overtime and has shown a previous ability to provide timely calculation of overtime hours, we determine this case is not analogous to *Nolan* and decline to extend the *Nolan* interpretation to contrary New Mexico law. In any event, nothing within *Nolan* provides a basis in law by which we or the City can conclude that the payment requirements of Section 50-4-2(A), even considered in the light of the MWA, may be circumvented.

4. The City is Not Vested With the Authority to Implement its Own Pay Schedule, in Conflict with Section 50-4-2(A), by Virtue of its Status as a Home Rule Municipality

In its final exemption argument, the City asserts that it has the right to administer its currently implemented pay schedule under the home rule provision of Article X, Section 6 of the New Mexico Constitution. The home rule provision provides that "[a] municipality which adopts a charter may exercise all legislative powers and perform all functions not expressly denied by general law or charter." N.M. Const. art. X, § 6(D). A" 'general law' " is a "law that applies generally throughout the state, or is of statewide concern, as contrasted to a 'local' or 'municipal' law[.]" *City of Albuquerque v. N.M. State Corp. Comm'n*, 1979-NMSC-095, ¶ 7, 93 N.M. 719, 605 P.2d 227. A determination of whether the state has expressly denied a municipality's authority to act "involves an inquiry into whether the statute evinces any intent to negate the municipal legislative power at issue[.]" *Prot. & Advocacy Sys. v. City of Albuquerque*, 2008-NMCA-149, ¶ 47, 145 N.M. 156, 195 P.3d 1 (alterations, internal quotation marks, and citation omitted). The general law need not have explicit language of negation; "words or expressions which are tantamount or equivalent to such a negation are equally effective." *State ex rel. Haynes v. Bonem*, 1992-NMSC-062, ¶ 22, 114 N.M. 627, 845 P.2d 150.

Our first step in determining if the City's creation of its own overtime compensation schedule is expressly denied by general law is whether Section 50-4-2 is a general law. "A general law impacts all inhabitants of the state rather than just the inhabitants of a municipality." *NMFE*, 2006-NMCA-007, ¶ 18. Although Section 50-4-2(B) does create a limited exception for the compensation of many state employees, employee compensation is a subject that affects working individuals statewide, not solely within the local bounds of the municipality of Albuquerque. Section 50-4-2 is a "general law because it applies generally throughout the state, relates to a matter of statewide concern, and impacts workers across the entire state." *NMFE*, 2006-NMCA-007, ¶ 18.

In order to determine if Section 50-4-2 expressly denies the City the power to create an overtime compensation schedule that varies from the time line articulated in Section 50-4-2(A), we must consider whether Section 50-4-2(A) "evinces any intent to negate such municipal power, whether there is a clear intent to preempt that governmental area from municipal policymaking, or whether municipal authority to act would be so inconsistent with [Section 50-4-2(A)] that [Section 50-4-2(A)] is the equivalent of an express denial." *NMFE*, 2006-NMCA-007, ¶ 19. Here, Section 50-4-2(A) expressly creates an employee compensation time line in which an employer

must pay its employees for all services rendered within ten days after the completion of the pay period. *See A.C. Elec., Inc.*, 1998-NMCA-141, ¶ 20. As we have determined, the City is included in the definition of an "employer" under Section 50-4-1(A), the definitional provision applicable to Section 50-4-2(A), and we conclude that the creation of an exemption on the basis of the City's home rule status would in effect defeat the Legislature's apparent intent to preempt municipal action in this area. Because Section 50-4-2(A) articulates an express compensation schedule for all services rendered and contains no broadly worded exception into which municipalities such as the City fall, we conclude that the statute's timeliness mandate serves as an express denial of the City's proffered authority to create its own overtime compensation schedule for APD employees.

Although the City argues that the compensation of its employees is a "locally limited proprietary function and falls within the home rule" and that it has the autonomy to act without state interference in matters of local concern, the City is not acting in an area of purely local concern. While it is true that the state cannot constitutionally deprive a home rule municipality from legislating on purely local affairs, *see Apodaca v. Wilson*, 1974-NMSC-071, ¶ 16, 86 N.M. 516, 525 P.2d 876, the specific issue of concern here is not the compensation of all City employees, but the overtime compensation of employees of the City's *police* department. The operation of a police force is not a local or proprietary function, but a governmental one. *Barnett v. Cal M, Inc.*, 1968-NMSC-159, ¶ 8, 79 N.M. 553, 445 P.2d 974 ("It is firmly established by the great weight of authority that the operation of a police department is a governmental function[.]"). As a governmental function, the City acts in this analysis as an agent of the state; thus, the compensation of employees of its police force is not incidental to its authority under the home rule. *See N.M. State Corp. Comm'n*, 1979-NMSC-095, ¶ 8 (concluding that a municipality carrying out a governmental function is acting as an agent of the state, and only when a municipality is acting in a proprietary capacity is a power incidental to the home rule). Here, because the City acts in a governmental capacity in this area of general public concern, it does not have the autonomy to act free from legislative interference by the state and is bound by the general law directives of Section 50-4-2(A).

CONCLUSION

For the foregoing reasons, we reverse the district court's decision to grant summary judgment to the City and remand for further proceedings consistent with this Opinion.

IT IS SO ORDERED.

J. MILES HANISEE, Judge

WE CONCUR:

CYNTHIA A. FRY, Judge

MICHAEL E. VIGIL, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2014-NMCA-113

Filing Date: July 29, 2014

Docket No. 32,924

MONIQUE SAMBRANO, Individually and as Personal Representative of the ESTATE OF ANGEL VALE and EDWARD LUCERO, Individually,

Plaintiffs-Appellees,

v.

SAVAGE ARMS, INC.,

Defendant-Appellant,

and

N.A.D. CORPORATION, JOYCE CRAWFORD, and DE ANGELO MONTOYA,

Defendants.

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OPINION

WECHSLER, Judge.

An intruder broke into the home of Angel Vale and killed her using a rifle manufactured and distributed by Defendant Savage Arms, Inc. (Savage). Savage had sold the rifle with a cable lock manufactured by Defendant N.A.D. Corporation (NAD). The complaint alleged, among other things, that the lock was not fit for its intended purpose and that Savage was negligent for pairing and selling the lock with the rifle. Savage moved to dismiss on the basis that the Protection of Lawful Commerce in Arms Act (the PLCAA), 15 U.S.C. §§ 7901-03 (2012), precludes this action against Savage and the intentional criminal acts of the intruder constitute an independent intervening cause that precludes Savage's liability as a matter of law. The district court denied the motion. We hold that the PLCAA, which insulates a firearm manufacturer from suit "caused by the criminal or unlawful misuse of firearm products . . . by others when the product functioned as designed and intended[,]" embraces this action. 15 U.S.C. § 7901(b)(1). Because the PLCAA dictates reversal, we do not reach the argument by Savage that tort liability does not apply.

BACKGROUND

Plaintiffs, Monique Sambrano, individually, and as personal representative of the Estate of Angel Vale, and Edward Lucero, allege in their complaint that an intruder, Defendant De Angelo Montoya, entered the home of Vale and Lucero, her fiancé. Lucero owned a rifle with a lock. The rifle was manufactured and distributed by Savage, and the lock was distributed by NAD. Savage and

NAD "paired" the rifle and the lock for sale to the general public as a packaged set. While in the home, Montoya took possession of the rifle and opened the lock "with a key that was not a designated key for unlocking" the lock. Vale returned home, confronted Montoya, and he shot and killed her with the rifle. The complaint asserts claims for negligence, strict liability, misrepresentation and/or breach of warranty, res ipsa loquitur, damages for wrongful death, loss of consortium, and punitive damages. The claims center on the allegations that Savage and NAD negligently selected the lock that was not fit for its intended purpose; should not have paired the lock with the rifle; failed to use ordinary care in inspecting, testing, packaging, importing, and pairing the lock with the rifle; and failed to use the required care to package and distribute a safe product.

Based on the PLCAA, Savage moved to dismiss the complaint under Rule 1-012(B)(6) NMRA for failure to state a claim upon which relief can be granted. The district court denied the motion, and over Plaintiffs' objection, ultimately included language certifying the case for an interlocutory appeal in its order. This Court granted Savage's application for leave to file an interlocutory appeal, accepting the appeal.

STANDARD OF REVIEW

We review a district court's action on a motion to dismiss under Rule 1-012(B)(6) under de novo review. *Valles v. Silverman*, 2004-NMCA-019, ¶ 6, 135 N.M. 91, 84 P.3d 1056. We accept all well-pleaded factual allegations as true and determine "whether the plaintiff might prevail under any state of facts provable under the claim." *Id.* (internal quotation marks and citation omitted).

PLCAA QUALIFIED CIVIL LIABILITY ACTION

Congress designed the PLCAA to prohibit claims against manufacturers and distributors of firearms "for the harm solely caused by the criminal or unlawful misuse of firearm products . . . by others when the product functioned as designed and intended." 15 U.S.C. § 7901(b)(1). A "qualified civil liability action" under the PLCAA must be dismissed. 15 U.S.C. § 7902(b). As relevant to the case, such an action is generally brought against a manufacturer or seller of a "qualified product" for damages resulting from criminal or unlawful misuse of the product by the plaintiff or a third party. 15 U.S.C. § 7903(5)(A). A "qualified product" includes a firearm and the component parts of a firearm. 15 U.S.C. § 7903(4).

To ascertain Congress's intent in enacting the PLCAA, we first look to the language that Congress used. *See Baker v. Hedstrom*, 2013-NMSC-043, ¶ 11, 309 P.3d 1047 (stating that the plain language of a statute is the primary indicator of legislative intent). Viewing the language of the PLCAA, it requires for a qualified civil liability action that the action (1) be brought against a manufacturer or seller of a qualified product, (2) for relief including damages, (3) that resulted from the criminal or unlawful misuse of a qualified product by the plaintiff or a third party. 15 U.S.C. § 7903(5)(A). On its face, the PLCAA applies to the allegations of the complaint in this case in that Plaintiffs have brought suit (1) against Savage, a manufacturer or seller of a firearm, (2) for damages, (3) that result from the criminal misuse of the rifle by Montoya, a third party.

Although Plaintiffs do not dispute that a third party, Montoya, criminally misused

Savage's rifle to cause them damage, the issue concerning the applicability of the PLCAA arises because Plaintiffs contend that the PLCAA does not apply because they base their claims on Savage's actions related to the lock rather than on Montoya's criminal action. Indeed, the complaint alleges, among other allegations, that (1) Savage was negligent because, with NAD, it selected the lock as a cost-saving measure and the lock was unfit for its intended purpose; and (2) Savage and NAD did not exercise ordinary care in pairing the lock with the rifle and in adopting proper safety devices for the rifle, and the pairing of the lock and the rifle created a foreseeable danger of injury and serious harm.

Plaintiffs' argument raises the question of the scope of the intent underlying the PLCAA. *See Rayellen Res., Inc. v. N.M. Cultural Props. Review Comm.*, 2014-NMSC-006, ¶ 38, 319 P.3d 639 (stating that the first step in statutory construction is to discern and give effect to the intent of the Legislature). Congress expressed its intent by stating its purposes in adopting the PLCAA. It stated, in part, that it intended to

> prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms . . . for the harm solely caused by the criminal or unlawful misuse of firearm products . . . by others when the product functioned as designed and intended. . . [, and] prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce.

15 U.S.C. § 7901(b)(1), (4). Subject to exceptions for negligent entrustment, negligence per se, and product liability that do not apply in this case, 15 U.S.C. § 7903(5)(A)(ii), (v), the PLCAA establishes a new legal standard for actions that fall within the definition of a qualified civil liability action that preempts common law claims based on general tort liability. *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 395 (2d Cir. 2008); *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1135 (9th Cir. 2009).

The allegations concerning the pairing of the Savage rifle with a lock do not alter the congressional intent. The lock was merely an accessory. Even assuming that the lock was defective or unfit for its intended use, Plaintiffs' claimed damages nevertheless resulted from a third party's criminal or unlawful misuse of the rifle. One purpose of the PLCAA is to prevent handgun manufacturers from defending against negligence claims based on the criminal misuse of their firearms. *See* H.R. Rep. No.109-124, at 8 (2005) ("Handgun manufacturers have no duty to control the conduct of third parties."). The rifle "functioned as designed and intended." 15 U.S.C. § 7901(b)(1). The PLCAA does not contain exceptions for a defective accessory or negligent distribution.

Plaintiffs specifically argue that their action is not a qualified civil liability action because the lock, as an accessory to the rifle, is not a qualified product under 15 U.S.C. § 7903(4). Savage does not dispute that the lock was an accessory rather than a component of the rifle such that the lock does not fall within the definition of a "qualified product." Plaintiffs' argument, however, misses the mark. Although Plaintiffs have framed their complaint to focus upon the lock as opposed to the rifle, Montoya nonetheless used a qualified product, the rifle, as the instrument to commit the crime that resulted in the harm to Plaintiffs. As a result, the congressional

intent embraces Plaintiffs' action. The PLCAA does not preclude Plaintiffs' claims against NAD, the lock distributor.

We note that the PLCAA expresses the necessary connection between a plaintiff's damages and a third party's criminal or unlawful misuse of a firearm twice in its provisions using different terminology. In stating its purposes, Congress describes its intent to prohibit claims "for the harm solely caused by" a third party's criminal or unlawful misuse. 15 U.S.C. § 7901(b)(1). In defining a qualified civil liability action, Congress included an action for damages "resulting from" a third party's criminal or unlawful misuse. 15 U.S.C. § 7903(5)(A). We see no distinction in the intent. Under the PLCAA, to be a qualified civil liability action, the harm or damages must result from the third party's criminal or unlawful misuse of a firearm, as has occurred in this case. *Id.*

PLCAA EXCEPTION

Plaintiffs further argue that, even if their action is a qualified civil liability action under the PLCAA, their claims fall within the exception to a qualified civil liability action contained in 15 U.S.C. § 7903(5)(A)(iv). **[AB 19-23]** That exception applies to "an action for breach of contract or warranty in connection with the purchase of the product[.]" *Id.* But, as Plaintiffs assert, this exception depends on the lock being "considered a 'product' that brings Plaintiffs' action within the ambit of the PLCAA[.]" **[AB 21]** The lock is not a qualified product under the PLCAA.

CONCLUSION

We reverse the district court's order denying Savage's motion to dismiss. The PLCAA applies to this action and requires that it be dismissed. Because the PLCAA dictates dismissal, we do not reach the argument by Savage that tort liability does not apply.

IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

I CONCUR:

RODERICK T. KENNEDY, Chief Judge

MICHAEL E. VIGIL, Judge (specially concurring).

VIGIL, Judge (specially concurring).

I completely agree with the analysis of the PLCAA in the majority opinion. I write separately because, in my view, Defendants owed no duty to Plaintiffs in this case. Because no duty was owed, the analysis under the PLCAA is unnecessary.

Rodriguez v. Del Sol Shopping Ctr. Assocs., 2014-NMSC-014, ¶ 1, 326 P.3d 465 holds that "foreseeability is not a factor for courts to consider when determining the existence of a duty, or when deciding to limit or eliminate an existing duty in a particular class of cases." *Rodriguez* also requires courts to "articulate specific policy reasons, unrelated to foreseeability considerations, if deciding that a defendant does not have a duty or that an existing duty should be limited." *Id.*

The question presented under the facts of this case is whether Defendants owed a duty to control Montoya's criminal actions of breaking into Plaintiffs' home, stealing the rifle, opening the lock, loading the rifle, and then shooting and killing Vale when she returned home and confronted him. In my

view, it is contrary to public policy to require the manufacturer of a firearm to control the criminal conduct of a third party who steals the firearm and then intentionally misuses the firearm to shoot and kill an innocent person. There is no relationship between the manufacturer, the shooter, and the victim that justifies imposing such a legal duty upon the manufacturer. Further, the manufacturer played no role in creating the risk suffered by Plaintiffs, nor is there any ability on the part of the manufacturer to control that risk.

I therefore conclude that Defendants owed no duty to Plaintiffs in this case under the reasoning of the following authorities: *City of Philadelphia v. Beretta U.S.A., Corp.*, 126 F. Supp. 2d 882, 898-903 (E.D. Pa. 2000), *aff'd*, 277 F.3d 415, 425 (3d Cir. 2002) (concluding that gun manufacturers are under no legal duty to protect citizens from the deliberate and unlawful use of their products by applying a five factor test to determine if sound public policy dictates that a particular plaintiff is entitled to protection); *Bloxham v. Glock Inc.*, 53 P.3d 196, ¶¶ 6-11 (Ariz. Ct. App. 2002) (considering public policy and holding that a gun manufacturer owed no duty to plaintiffs where the gun was sold at a gun show and the purchaser later used the gun to shoot and kill the victims); *First Commercial Trust Co. v. Lorcin Eng'r, Inc.*, 900 S.W.2d 202, 214-216 (Ark. 1995) (holding that the manufacturer of a handgun owed no duty to the victim who was murdered); *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1059-1063 (N.Y. App. 2001) (holding that handgun manufacturers do not owe a duty of reasonable care in the marketing and distribution of their handguns to persons killed or injured through the use of illegally obtained handguns, and concluding that public policy does not justify imposing such a duty).

Since the foregoing authorities are consistent with New Mexico law, *see Romero v. Giant Stop-N-Go of N.M., Inc.*, 2009-NMCA-059, ¶ 7, 146 N.M. 520, 212 P.3d 408 (stating that as a general rule, in the absence of a special relationship, a person does not have a duty to protect a person from the criminal acts of a third person), I would reverse the district court order without resorting to the PLCAA.

MICHAEL E. VIGIL, Judge

Certiorari Denied, October 31, 2014, No. 34,868

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2014-NMCA-114

Filing Date: August 12, 2014

Docket No. 32,199

CHARLES E. MARTIN and PATRICIA G. MARTIN,

Plaintiffs-Appellants,

v.

COMCAST CABLEVISION CORPORATION OF CALIFORNIA, LLC,

Defendant-Appellee.

J. Ronald Boyd
Santa Fe, NM

for Appellants

Rodey, Dickason, Sloan, Akin & Robb, P.A.
Edward Ricco
Robert L. Lucero
Albuquerque, NM

for Appellee

OPINION

BUSTAMANTE, Judge.

Charles and Patricia Martin (collectively, Appellants) sued Comcast Cablevision Corporation of California, LLC (Comcast) for trespass. Having prevailed in the district court, they now appeal the amount and nature of the damages awarded. Appellants argue that the district court erred in awarding a lower amount for statutory rent than they requested and in not awarding restitution for unjust enrichment or punitive damages. We affirm.

BACKGROUND

Appellants live on a residential lot located in White Rock, New Mexico. The property is burdened by an easement along its east boundary within which stand two utility poles. Two cables—one for electric power and one for telephone service—were strung on the poles. In early May 1999 Mr. Martin noticed that a third cable, which he identified as a cable television line, had been strung on the poles without his knowledge or permission. The date the third cable was installed is unknown. For ease of reference and because the electrical and telephone cables are not at issue here, we will refer to the television cables as "the cable(s)."

Mr. Martin immediately objected to the presence of the cable to Mickelson Media, the predecessor in interest to Comcast. Roughly a month later, Mr. Martin delivered to Mickelson Media a letter demanding payment of rent of $800 per month or removal of the cable. Later he proposed an alternate pricing scheme in which the rent amount would be decreased or eliminated depending on Mickelson Media's satisfaction of certain conditions, such as placing the cable underground. After Mr. Martin also threatened to remove the cable himself using a "pneumatic rotary cutter," Mickelson Media obtained an injunction barring Mr. Martin from removing the cable. At least one additional cable was later installed.

Comcast purchased Mickelson Media in 2000 or 2001 and became the owner of the cables. Mr. Martin continued to object to the presence of the cables and ultimately filed the present suit in 2009. After a bench trial, the district court entered written findings of fact and conclusions of law in which it granted Appellants' request for ejection of the cables from their property, required all Comcast cable television cables in Appellants' subdivision to be buried, and awarded Appellants damages of $200 per month "for diminished use and enjoyment of their property" running from June 1999 until the cables are buried. Since it concluded that Comcast did not act wilfully and deliberately, it denied Appellants' request for $1 million in punitive damages. With a few exceptions, which are addressed in our discussion of Appellants' arguments, Appellants do not challenge the district court's findings of fact.

We therefore do not detail the unchallenged findings. An unchallenged finding of the district court is binding on appeal. *See Stueber v. Pickard*, 1991-NMSC-082, ¶ 9, 112 N.M. 489, 816 P.2d 1111.

Finally, we note that the parties stipulated to amendment of the judgment to reflect certain damages noted in the district court's findings of fact but omitted from the conclusions of law and final judgment. The district court entered a finding of fact to the effect that Appellants are entitled "to collect statutory rent from [Comcast of] $200 per month." But neither the conclusions of law nor the final judgment reflect this finding. Hence, after mediation of this issue, the parties agreed that the judgment should be modified to reflect the district court's finding of fact and that Appellants could challenge the amount of the statutory rent on appeal.

DISCUSSION

Appellants raise three issues on appeal. First, they maintain that the district court should have awarded them statutory rent of $800 per month, rather than $200 per month. Second, they argue that the district court erred in not ordering Comcast to pay $2000 per month as restitution for its unjust enrichment. Third, Appellants argue that it was error to not award punitive damages. We address each argument in turn.

Amount of Statutory Rent

As outlined above, the parties stipulated that the district court's conclusions of law and the final judgment should have included an award for statutory rent in addition to the damages awarded for loss of enjoyment. They also stipulated that Appellants could appeal the amount of statutory rent awarded. Consistent with the stipulation, Appellants' first argument is that the district court erred in finding Comcast liable for statutory rent in the amount of $200 per month, rather than the $800 per month that Appellants requested. They argue that the higher amount should have been awarded because "[n]obody under New Mexico law can control the rent [they] ask for" and "[t]he $800 per month rent is reasonable, considering the trouble and expense Defendant has put [Appellants] through." Appellants rely on NMSA 1978, Section 42-4-9 (1907), which states that "[i]f the plaintiff prevail[s in an ejectment action], he shall recover for damages the value of the rents and profits of such premises." Since this language does not state whether the value should be based on an objective standard or a subjective standard, Appellants maintain that the district court should have ordered the amount set by Appellants.

Appellants' position—that their subjective assessment of appropriate rent must be honored—is contrary to the purpose behind damages in ejectment, which is compensation of the rightful possessor. *See* 28A C.J.S. *Ejectment* § 239 (2014) ("Compensation constitutes the purpose and basis of damages in actions or proceedings to recover mesne profits or damages in ejectment."); Dan B. Dobbs, *Law of Remedies* § 1.1, at 3 (2d ed. 1993) ("The damages remedy is a money remedy aimed at making good the plaintiff's losses."). It is also contrary to the general rule that "compensation is ordinarily the fair or reasonable rental of the land for the time . . . the defendant was in wrongful possession." 28A C.J.S. *Ejectment* § 239 (2014); *accord Hertz v. Hertz*, 1983-NMSC-004, ¶ 39, 99 N.M. 320, 657 P.2d 1169 (remanding to the district court to determine whether there had been an ouster of a cotenant and, if so, to "consider[] the fair rental value

of the property" in determining the amount owed to the ousted cotenant); Dobbs, *supra*, § 5.8(2), at 530 ("The rental market value of the land . . . represents the value of possession or use."). Finally, it runs against the principle that an award of damages must be based on evidence adduced at trial, the corollary to which is that the amount of damages is an objective measure. *See Sanchez v. Martinez*, 1982-NMCA-168, ¶ 20, 99 N.M. 66, 653 P.2d 897 ("A party seeking to recover damages has the burden of proving the existence of injuries and resulting damage with reasonable certainty."); Dobbs, *supra*, § 5.8(2), at 530 ("Rental value is ordinarily an objective measure, based on an estimate of the price others would pay to rent the land, not on what the trespasser personally would pay.").

Here, Mr. Martin testified that he asked Comcast for $800 per month "to get[] them to . . . remove the cable from [his] yard." He specified that the purpose of his fee schedule was to get Comcast to remove their equipment, "not to collect rent." He also stated that he selected the $800 amount because he "wanted it to be big enough so it was enough trouble for them to alleviate this problem by removing this cable from my property. I do not want to rent an easement." Thus, by Mr. Martin's own admission, $800 per month is an amount a tenant would find so unreasonable that it would prefer to remove the cables than keep them in place. We discern no error in the district court's rejection of this amount.

Unjust Enrichment

Appellants next argue that the district court should have awarded restitution for Comcast's unjust enrichment in the form of a portion of the profits Comcast earned by providing cable service while the cables ran across Appellants' property. They base this contention on the fact that the district court found that "[f]or the period of time Defendant and its predecessor have been trespassing, they have been utilizing [Appellants'] property for their financial gain, i.e., unjustly enriched. Their enrichment has been at least $2,000 per month." In spite of this finding, the district court did not enter a conclusion related to restitution and the final judgment does not include an order for restitution.

"The restitutionary goal is to prevent unjust enrichment of the defendant by making him give up what he wrongfully obtained from the plaintiff." Dobbs, *supra*, § 1.1, at 4. Damages for unjust enrichment differ from compensatory damages in that "[t]he measure of compensatory damages is the plaintiff's loss or injury, while the measure of restitution is the defendant's gain or benefit." *Cent. Sec. & Alarm Co. v. Mehler*, 1996-NMCA-060, ¶ 12, 121 N.M. 840, 918 P.2d 1340; *see* Dobbs, *supra*, § 1.1, at 4. Restitution is an equitable remedy. *See Arena Res., Inc. v. Obo, Inc.*, 2010-NMCA-061, ¶ 15, 148 N.M. 483, 238 P.3d 357.

Because the district court entered a finding of fact specifically on unjust enrichment, including the amount by which Comcast was enriched, it is possible that omission of a corresponding conclusion of law and order for restitution was an oversight as Appellants argue. Nevertheless, we conclude that restitution in the form of profits is not appropriate in this case and therefore affirm. *See Westland Dev. Co. v. Romero*, 1994-NMCA-021, ¶ 2, 117 N.M. 292, 871 P.2d 388 ("An appellate court will affirm a lower court's ruling if right for any reason."). *See Cont'l Potash, Inc. v. Freeport-McMoran, Inc.*, 1993-NMSC-039, ¶ 26, 115 N.M. 690, 858 P.2d 66 (stating that while it is within the

district court's discretion to award equitable remedies, "[s]uch discretion is not a mental discretion to be exercised as one pleases, but is a legal discretion to be exercised in conformity with the law").

Here, since nothing was taken from the land, Comcast's gain was simply the rent-free use of Appellants' land. Appellants' argument rests on the premise that Comcast benefitted unjustly because it earned income by providing cable service to customers using the lines crossing Appellants' property. But the provision of cable television and resulting income were the product of Comcast's business enterprise and not the use of Appellants' land. *See* Dobbs, *supra*, § 5.9, at 533 ("If the defendant should be liable to make restitution of gains, they should be gains identified with the land, not gains resulting from his enterprise."). Thus, the benefit to Comcast is better understood as the savings it realized by using Appellants' property without paying for the privilege, i.e., the rental value of the land. *See* 42 C.J.S. *Implied Contracts* § 9 (2014) ("A 'benefit' for purposes of an unjust enrichment claim is any form of advantage that has a measurable value including the advantage of being saved from an expense or loss."); Restatement (Third) of Restitution and Unjust Enrichment § 40 cmt. b (2011) (stating that "[the] more common form [of interference with property] is that the defendant has made a valuable use of the [owner's] property without paying for it" and that "[t]o the extent that the defendant's unjust enrichment may be identified with ordinary rental value, the owner's entitlement to restitution is captured in the claim to damages for 'use and occupation.'"); *cf. Peters Corp. v. N.M. Banquest Investors Corp.*, 2008-NMSC-039, ¶ 32, 144 N.M. 434, 188 P.3d 1185 ("The remedy [of disgorgement] may not be used punitively, and thus a causal connection must exist between the breach and the benefit sought to be disgorged.").

Because Appellants were awarded the rental value of the land in compensatory damages, an additional award of rent for unjust enrichment would be duplicative. "New Mexico does not allow duplication of damages or double recovery for injuries received." *Hale v. Basin Motor Co.*, 1990-NMSC-068, ¶ 20, 110 N.M. 314, 795 P.2d 1006; *see Cent. Sec. & Alarm Co.*, 1996-NMCA-060, ¶ 12 ("The plaintiff may be able to pursue several theories of recovery; if liability is found on each, the plaintiff would be required to make an election among awards if duplication or double recovery would otherwise result."). We conclude that Appellants are not entitled to an additional award of rent for unjust enrichment.

Appellants rely on the concept of "mesne profits" to support their contention that Comcast should pay $2000 per month of trespass on their property. "Mesne profits" are "the profits which accrue between two given times—and [are] defined as the value of use or occupation of land during the time it is held by one in wrongful possession of it." 25 Am. Jur. 2d *Ejectment* § 49 (2014). We are unpersuaded by Appellants' argument. There is nothing about mesne profits that exempts them from the principle discussed above, which is that a plaintiff is entitled to no more than the amount associated with the benefit derived from the wrongful use of the property itself. *See* Dobbs, *supra*, § 5.8(2), at 531 (stating that cases in which "the trespasser's profits from occupation of the land exceed the rental value . . . raise difficult problems in determining how much of the 'profit' is due to the defendant's labor and how much is due to the plaintiff's property"); *cf.* 66 Am. Jur. 2d *Restitution and Implied Contracts* § 2 (2014)

("The purpose of restitution-based claims, such as unjust enrichment, is not punitive."); *Krejci v. Capriotti*, 305 N.E.2d 667, 670 (Ill. App. Ct. 1973) ("The trial judge could therefore accurately determine the profits wrongfully derived from the use of the land by measuring the fair market rental value for the period of the trespass."). Thus, we conclude that Appellants are not entitled to a portion of Comcast's profits over and above the amount awarded for rental of their property.

Punitive Damages

Finally, Appellants argue that the district court erred when it denied their request for punitive damages. They maintain that, although the district court specifically concluded that Comcast had not acted "willfully and deliberately," other findings indicate behaviors that qualify for punitive damages. They also point to evidence in the record that they believe supports an award of punitive damages. We disagree that the district court's findings are inconsistent with its conclusion or that the evidence in the record requires an award of punitive damages.

"We review a [district] court's decision not to award punitive damages for abuse of discretion, and we will only reverse that decision if it is contrary to logic and reason." *Peters Corp.*, 2008-NMSC-039, ¶ 43 (internal quotation marks and citation omitted). "In New Mexico, it is well settled that because the limited purpose of punitive damages is to punish and deter persons from certain conduct, there must be some evidence of a culpable mental state." *Paiz v. State Farm Fire & Cas. Co.*, 1994-NMSC-079, ¶ 24, 118 N.M. 203, 880 P.2d 300 (internal quotation marks and citation omitted). Hence, such damages are appropriate "only when the wrongdoer's conduct may be said to be maliciously intentional, fraudulent, oppressive, or committed recklessly or with a wanton disregard of the plaintiffs' rights." *Green Tree Acceptance, Inc. v. Layton*, 1989-NMSC-006, ¶ 9, 108 N.M. 171, 769 P.2d 84 (internal quotation marks and citation omitted); *see* UJI 13-1827 NMRA. The Uniform Jury Instructions provide further guidance on the conduct that warrants punitive damages: "Malicious conduct is the intentional doing of a wrongful act with knowledge that the act was wrongful. Willful conduct is the intentional doing of an act with knowledge that harm may result. Reckless conduct is the intentional doing of an act with utter indifference to the consequences." UJI 13-1827. "[P]unitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003).

Appellants point to a number of findings as evidence that the district court found willful and deliberate conduct by Comcast. For instance, the district court found that Comcast had "deliberately disregarded" a provision in the franchise agreement requiring cables to be buried in certain neighborhoods and that after Mr. Martin contacted Comcast to request removal of the cables, they were "uncooperative and dismissive of his protest." The district court also found that Comcast was aware that it did not have permission to install cables on Appellants' property as early as May 1999 and that because Comcast violated the franchise ordinance and pole license, its actions were illegal. None of the findings identified by Appellants involve the type of findings necessary to support a punitive damages award because the findings do not pertain to

the mental state required. We conclude that the district court's conclusion that Comcast's conduct was not willful and deliberate is not inconsistent with its other findings.

As to Appellants' argument that this Court should remand for entry of punitive damages because there is evidence in the record supporting such an award, we note that "[t]he question on appeal is not whether there is evidence to support an alternative result but, rather, whether the [district] court's result is supported by substantial evidence." *Bagwell v. Shady Grove Truck Stop*, 1986-NMCA-013, ¶ 23, 104 N.M. 14, 715 P.2d 462. We therefore examine the record for evidence that Comcast's conduct did not merit punitive damages rather than the evidence to which Appellants direct us. *See id.* ("The appellate court, in reviewing the [district] court['s] decision, disregards all evidence and all inferences unfavorable to the [district] court's result."). The area vice president of Comcast testified that "[i]t was [Comcast's] understanding that there was a utility easement that we were able to use [on Appellants' property]." He also indicated that, at the time Comcast responded to Appellants' request to remove the cables and based on advice by Comcast's attorney, he understood that Los Alamos County had granted Comcast the right to "use the Martin property for its cables[.]" Comcast's construction coordinator testified that after Appellants made their objection to the cables known, he obtained a plat of the property from the county and discussed it with the construction manager. He testified that he understood the plat to indicate that the poles were situated in a utility easement and that "the cable provider, with a franchise agreement within the municipality, would have a right to be within that utility corridor." This evidence supports the district court's conclusion that Comcast's conduct was not willful or deliberate. *See Padilla v. Lawrence*, 1984-NMCA-064, ¶ 29, 101 N.M. 556, 685 P.2d 964 (affirming denial of punitive damages where "[t]here [was] substantial evidence in the record to support the [district] court's refusal to award [them]"). The district court did not err in denying Appellants' request for punitive damages.

CONCLUSION

{20} For the foregoing reasons, we affirm.

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

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

M. MONICA ZAMORA, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2014-NMCA-115

Filing Date: August 18, 2014

Docket No. 32,674

SHANNON SPOON, individually and as Personal Representative of Daniel Spoon, Deceased,

Plaintiff-Appellee,

v.

ARTURO MATA and BURN

CONSTRUCTION COMPANY, INC.,

Defendants,

and

KORINA FLORES, as Parent, Guardian and Next Friend of minor Noah Spoon,

Intervenor-Appellant.

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

OPINION

FRY, Judge.

Korina Flores (Petitioner) appeals the district court's order denying her petition to intervene and to be appointed co-personal representative in a wrongful death action brought by Plaintiff, Shannon Spoon, wife of Decedent, Daniel Spoon, who was the father of Petitioner's child (Child). Petitioner sought to intervene to assert Child's loss of consortium claim and further sought appointment as co-personal representative in the wrongful death action in order to protect Child's interests as a statutory beneficiary. Petitioner argued that Child's interests were not adequately represented by Spoon's counsel because a conflict of interest existed due to Spoon's role as personal representative and her pursuit of individual claims against Defendant.

We agree with Petitioner that the district court erred in not permitting Petitioner to intervene to assert Child's loss of consortium claim. However, we disagree that there is currently a conflict of interest as we understand that phrase. As we explain below, a conflict of interest is something that affects an attorney's relationship with his or her client, and no such conflict has yet developed in the relationship between Spoon and her attorney. Instead, what exists in this case may be called an "adversity of interest" between Spoon and Child. We conclude that this adversity of interest cannot be resolved by

appointing Petitioner as a co-personal representative, as Petitioner argues. Accordingly, although we reverse and remand to allow Petitioner to intervene to assert Child's loss of consortium claim, we affirm the district court's decision denying Petitioner's appointment as co-personal representative.

BACKGROUND

Decedent Daniel Spoon died as a result of a motorcycle accident allegedly caused by an employee of Defendant Burn Construction Company, Inc. Decedent was married to Shannon Spoon at the time of his death. In the year preceding his death, Decedent had also fathered Child with Petitioner.

Spoon filed suit shortly after the accident against the driver of the vehicle and Burn Construction. Spoon was appointed the personal representative for purposes of the wrongful death action and also pursued claims, in her individual capacity, for bystander recovery and loss of consortium. At the time the complaint was filed, Spoon did not name Child as an heir of Decedent in the complaint because Decedent's paternity had not yet been established.

Once paternity was established, Petitioner moved to intervene in the lawsuit to assert Child's claim for loss of consortium and to represent Child's interest in the wrongful death action. In order to protect Child's interest, Petitioner sought appointment as a co-personal representative with Spoon. Following a hearing, the district court found that there was no evidence that Child's interests in the wrongful death action were not adequately represented. The district court further found that Spoon's counsel did not have a conflict of interest in representing Spoon both in her capacity as personal representative in the wrongful death action and in her individual capacity in regard to her loss of consortium and bystander recovery claims. The district court accordingly denied Petitioner's motion to intervene. Petitioner appeals.

DISCUSSION

Petitioner's arguments on appeal can be succinctly grouped into two main contentions. First, she claims that the district court erred in not allowing her to intervene to assert Child's loss of consortium claim. Second, she contends that the district court erred in not allowing her to serve as co-personal representative due to her belief that Spoon's counsel could not adequately represent Child's interest in the wrongful death action. We address these issues in turn.

I. The District Court Erred in Not Permitting Petitioner to Intervene to Assert Child's Loss of Consortium Claim

Spoon appeared to concede in briefing that Petitioner should have been permitted to intervene in the suit to assert Child's loss of consortium claim. We appreciated counsel's forthrightness in this matter because we agree that there was no basis to preclude Petitioner's intervention to pursue Child's individual loss of consortium claim. *See* Rule 1-024 NMRA. At oral argument, however, Spoon's counsel stated that it was Spoon's position that Child should not be permitted to intervene, but counsel provided no substantive argument as to why it would be impermissible. Because counsel has offered no reason to preclude Child's intervention and because we see none ourselves, Petitioner shall be permitted to intervene for this purpose on remand.

II. The District Court Properly Denied Petitioner's Motion Seeking Appointment as Co-Personal Representative

Standard of Review

Before stating the standard of review, we provide context and distinguish between the terms "conflict of interest" and "adversity of interest" because Petitioner often conflates these two differing concepts. First, insofar as the issues in the case are concerned, a conflict of interest is one that arises within the attorney/client relationship. *See* Rule 16-107(A) NMRA (defining a conflict of interest as impacting an attorney's representation of one or more clients). In a wrongful death action, the attorney/client relationship exists between the personal representative and his or her attorney. *Spencer v. Barber*, 2013-NMSC-010, ¶ 9, 299 P.3d 388. We therefore consider the relationship between the personal representative and his or her attorney when considering the attorney's responsibilities of loyalty, confidentiality, and *conflicts. Id.*

Although a statutory beneficiary is not in an attorney/client relationship with the attorney of the personal representative, the statutory beneficiary is an intended beneficiary of the attorney/client relationship that exists between the personal representative and his or her attorney. *See id.* ¶ 10. Because a statutory beneficiary is an intended beneficiary of this attorney/client relationship, both the attorney and the personal representative owe a duty to act with reasonable care regarding the interests of the statutory beneficiary. *Id.* ¶¶ 8, 13. Thus, where there is a significant risk that an attorney's representation of the personal representative will be materially limited by the attorney's responsibilities to the statutory beneficiary, a conflict of interest may exist between the personal representative and his or her attorney. *See* Rule 16-107 (stating that a concurrent conflict of interest exists where there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to a third person).

In this case, however, Petitioner does not assert that the attorney's representation of Spoon in her individual or representative capacities will be materially limited by the attorney's duties to Child as a statutory beneficiary. Instead, Petitioner asserts that Child's interests will not be protected by Spoon's or her counsel's representation. Thus, Petitioner is not asserting that a conflict of interest exists between Spoon and her counsel but rather what would more appropriately be termed an "adversity of interest" between Child and Spoon that Petitioner argues should preclude Spoon from serving as personal representative.

Having established that Petitioner is asserting the existence of an adversity of interest rather than a conflict of interest, in order to determine the standard of review, we first clarify our understanding of Petitioner's argument as to the remedy she seeks. Petitioner is often unclear in briefing as to whether Spoon should be disqualified from acting as personal representative in general or whether Petitioner simply seeks appointment as co-personal representative. After extensive review of Petitioner's brief, we understand Petitioner to request that her counsel be permitted to represent Child's interests as a statutory beneficiary and in his individual claims while Spoon's counsel represents Spoon's interests as a statutory beneficiary and in her individual claims.

Petitioner frames her argument under

the rule pertaining to mandatory intervention. *See* Rule 1-024(A)(2). Under this framework, Petitioner argues that if we conclude that Spoon cannot adequately represent Child's interest in the wrongful death action due to an adversity of interest, we should order that Petitioner be appointed co-personal representative to protect Child's interest. *Id.* ("[A]nyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."). This Court has previously disapproved of—but not foreclosed—the use of mandatory intervention by a wrongful death statutory beneficiary. *See Dominguez v. Rogers*, 1983-NMCA-135, ¶ 16, 100 N.M. 605, 673 P.2d 1338 ("We do not believe the legislature intended Rule [1-0]24[(A)] to operate as a device by which a party could thwart the representative form of action authorized in wrongful death suits. Otherwise, there would be no reason why every statutory beneficiary could not intervene as a matter of right."). Regardless, because we have already concluded that Petitioner may intervene to assert Child's loss of consortium claim, we review Petitioner's arguments according to the merits of the alleged adversities of interest that Petitioner asserts, not under the test for mandatory intervention.[1]

Even though we are addressing whether an adversity of interest exists sufficient to preclude Spoon's serving as the personal representative, we apply the de novo standard of review applicable to the determination of whether a conflict of interest exists. *See State ex rel. Children, Youth & Families Dep't v. Tammy S.*, 1999-NMCA-009, ¶ 19, 126 N.M. 664, 974 P.2d 158 (stating we review whether a conflict of interest exists de novo). Although we distinguished above between an adversity of interest and a conflict of interest, we believe the determination of whether either exists is sufficiently similar to warrant application of the same standard of review. Accordingly, we review Petitioner's argument de novo.

A. Adversity of Interest

Petitioner argues that an adversity of interest exists because Spoon's conduct in the related probate proceedings evinces a hostility toward Child's rights as an heir and because Spoon's individual claims against Defendant make Spoon's and Child's interests in the distribution of any recovery adverse to one another. Petitioner contends that these adversities of interest can be resolved by disqualifying Spoon from representing Child's interest in the wrongful death action and appointing Petitioner co-personal representative.

Petitioner first contends that the facts surrounding Spoon's appointment as personal representative for the estate—not the wrongful death action—establishes an adversity of interest. Petitioner claims that before paternity was established, Spoon sought appointment as the executor of Decedent's estate without notifying Child and represented to the probate court that she was aware of no other heirs besides herself and Decedent's

[1]Petitioner also argues that Spoon's attorney's representation on behalf of the statutory beneficiaries has been "inadequate." The district court rejected this argument, and we see no reason to second-guess that assessment.

mother. Petitioner contends that this conduct by Spoon indicates that Spoon's interests are directly adverse to Child's and, therefore, she cannot fulfill her duties as the personal representative in the wrongful death action.

We are unpersuaded that this conduct indicates an adversity of interest sufficient to preclude Spoon from representing Child as the personal representative. Under the Act, Spoon is required to distribute any recovery under the claim in strict accordance with the statutory distribution provisions. NMSA 1978, § 41-2-3 (2001); *Spencer*, 2013-NMSC-010, ¶ 22 ("[T]he personal representative has a nondiscretionary duty to distribute the wrongful death proceeds in the ratio prescribed by the [Act]."). Under these provisions, Spoon and Child will each receive fifty percent of any recovery based on the wrongful death action. Section 41-2-3(B).

During the time Spoon sought appointment as personal representative of the estate, test results confirming that Decedent was Child's father were still being processed. Once paternity was established, Spoon consistently maintained, both below and on appeal, that Child became entitled to his statutory share of any wrongful death recovery and that she intends to fulfill her duty toward him. Spoon's acknowledgment of this duty stands in sharp contrast to the facts in *Spencer*, where the personal representative's challenge to another statutory beneficiary's entitlement to his share of the wrongful death proceeds created a conflict of interest.[2] 2013-NMSC-010, ¶ 25. Accordingly, we do not agree with Petitioner that Spoon's conduct in the probate proceedings creates an adversity of interest that requires her disqualification or the appointment of a co-personal representative.

Second, as to Petitioner's argument that Spoon's pursuit of her individual claims conflicts with her role as personal representative, we briefly summarize the nature of the adversity of interest that Petitioner alleges. Petitioner argues that Spoon, invested with settlement authority in her capacity as personal representative, has an incentive to allocate settlement proceeds toward her individual claims and away from the wrongful death action. Petitioner claims that this creates an adversity of interest necessitating the appointment of Petitioner as co-personal representative to protect Child's interest because otherwise Spoon will have every incentive to maximize her recovery to the detriment of Child.

We recognize that there is an adversity of interest but conclude that in this context it does not require that Spoon be removed. We cannot speculate whether Spoon will ultimately comply with her statutorily mandated responsibilities to Child in the event of a recovery. As we discuss below, however, her failure to do so would expose both her and her attorney to significant liability. Here, we merely conclude that the fact that a personal representative is also pursuing individual claims in the suit is not a sufficient basis by itself to presume that the interests of the personal representative and the statutory beneficiaries are so adverse as to preclude the individual from representing the statutory beneficiaries' interests in the action.

[2]The personal representative's actions in *Spencer* created a *conflict* of interest, in part, because once the attorney learned that the personal representative was disputing a statutory beneficiary's entitlement to recovery, the attorney could no longer simply distribute the proceeds of the wrongful death action because doing so would violate his duties to his client. *Id.* ¶¶ 24-25.

Cf. Gresham v. Strickland, 784 So.2d 578, 581-82 (Fla. Dist. Ct. App. 2001) (stating that "[h]ostility or tension between a trustee and potential beneficiaries" or "disagreements over litigation" are not grounds for removal of a personal representative).

We recognize that this adversity of interest between Child and Spoon could conceivably evolve into a conflict of interest between Spoon and her attorney with respect to Spoon's individual claims, on the one hand, and her claim as a statutory beneficiary of the wrongful death estate, on the other hand. For example, if the tortfeasor's insurer were to offer policy limits that could not reasonably compensate all claims, then Spoon's attorney may find that his representation of Spoon's individual claims materially limits his responsibilities to her wrongful death action, or vice versa. But such a conflict has not yet developed in this case and may never develop.

As amici curiae have pointed out, where one of the beneficiaries is a minor, it is often the practice to seek court approval of any settlement and appointment of a guardian ad litem to advise the district court on the appropriateness of the allocation of settlement amounts. *See Collins ex rel. Collins v. Tabet*, 1991-NMSC-013, ¶¶ 30-31, 111 N.M. 391, 806 P.2d 40 ("[W]e have no reason to doubt [] that it is the general practice in New Mexico for a guardian ad litem to be appointed to represent the interests of a minor in any proceeding to secure court approval of a settlement involving the minor. . . . The guardian ad litem thus may fulfill the dual role of providing information to the court to enable it to pass on the reasonableness of a settlement, while at the same time protecting the ward's interests by zealous advocacy and thorough, competent representation."). We encourage the parties to consider this process in the event that a settlement is reached.

B. Appointing Co-Personal Representatives Would Not Remedy Any Potential Adversity of Interest

Although we conclude that the adversity of interest we have recognized does not require removal of Spoon as the personal representative, we acknowledge that Petitioner's concerns are not entirely unfounded. *See Home Ins. Co. v. Wynn*, 493 S.E.2d 622, 626 (Ga. Ct. App. 1997) (holding that a personal representative breached her fiduciary duty to wrongful death beneficiaries by allocating settlement proceeds in such a way as to prioritize her individual claims over the wrongful death action). We are mindful that disagreements may arise between the beneficiaries themselves and between the beneficiaries and the personal representative in wrongful death actions regarding the prosecution of the claim. *See generally Holmes v. McClendon*, 76 S.W.3d 836, 839 (Ark. 2002); *Spencer*, 2013-NMSC-010, ¶ 2. We therefore also consider Petitioner's argument that her concerns would be remedied by the appointment of a co-personal representative.

Petitioner relies on *Dominguez* and *Lajeuenesse* to argue that the appointment of a co-personal representative is an accepted practice in New Mexico. *In re Estate of Lajeuenesse, ex rel. Boswell v. Bd. of Regents of UNM*, 2013-NMCA-004, 292 P.3d 485, ¶ 17 (noting that "[e]ven if there were co-personal representatives, they serve the singular purpose of bringing the wrongful death action"); *Dominguez*, 1983-NMCA-135, ¶ 11 (observing that the then applicable version of Section 41-2-3 refers to the appointment of "personal representative or

representatives" (internal quotation marks omitted)). Petitioner's argument utilizes some selective use of quotations. For instance, the only portion of *Dominguez* that could support Petitioner's argument is a quotation from an earlier version of the wrongful death statute stating that a wrongful death action "shall be brought by and in the name [or names] of the personal representative [or representatives]." *Dominguez*, 1983-NMCA-135, ¶ 11 (citing Section 41-2-3 (Repl. Pamp. 1982)). We reject Petitioner's reliance on an earlier version of the statute cited in *Dominguez*, especially where the statute, in its current form, could be read to foreclose Petitioner's argument because an amendment explicitly removed the reference to multiple personal representatives. Section 41-2-3 (stating that a wrongful death action "shall be brought by and in the name of the *personal representative* of the deceased person" (emphasis added)). Furthermore, even when the statute did provide for multiple representatives, the *Dominguez* Court stated that "[t]he reference in the wrongful death statute to the possibility of multiple representatives does not automatically give potential intervenors the right to join [as co-personal representatives]," which is precisely what Petitioner is seeking in this case. 1983-NMCA-135, ¶ 11.

[redacted] We are similarly unpersuaded that *Lajeuenesse* supports Petitioner's argument. In stating that it is possible to designate more than one personal representative, this Court cited to *Wachocki v. Bernalillo County Sheriff's Department*, 2010-NMCA-021, ¶ 2, 147 N.M. 720, 228 P.3d 504. In *Wachocki*, the "co-personal representatives" were parents of the decedent and, more importantly, represented by the same attorney. *Id.* While this practice could easily be called into question by both the statutory language and our case law, the multiple representation in *Wachocki* was never challenged. *See In re Estate of Lajeuenesse*, 2013-NMCA-004, ¶¶ 16-17 (emphasizing that the personal representative is the "single person" who brings the wrongful death action and noting the Legislature's use of the "singular" in designating who may bring the action). Regardless, we note the significant difference between the prosecution of the claim by two parents of a deceased child represented by one attorney and the dual appointment Petitioner seeks in this case.

[redacted] Petitioner seeks appointment as co-personal representative due to the adversity of interest between Child, as a statutory beneficiary, and Spoon, as personal representative. We fail to see how allowing Petitioner—who also has an individual claim against Defendant—to serve as co-personal representative would remedy this adversity. If Petitioner is appointed co-personal representative, Petitioner will owe the same duties of care to Spoon as a statutory beneficiary that Spoon, in her capacity as personal representative, owes to Child. *See Spencer*, 2013-NMSC-010, ¶ 8 ("The personal representative has a duty to act with reasonable care regarding the interests of the statutory beneficiaries[.]"). Petitioner fails to explain how placing herself into the very adversity that she argues should disqualify Spoon would remedy the adversity she argues already exists.

[redacted] As we noted above, Petitioner foresees a situation in which Spoon's attorney represents her interests in the wrongful death action and in her individual claims, while Petitioner's attorney would represent Child's similar respective interests. Along these lines, Petitioner argues that Child has the right to choose his own counsel to represent his interests in the wrongful death action and that

a court should not override this right, absent compelling circumstances. *See Chappell v. Cosgrove*, 1996-NMSC-020, ¶ 7, 121 N.M. 636, 916 P.2d 838 (noting similar argument and quoting *Ramsay v. Boeing Welfare Benefit Plans Comm.*, "The court is also mindful that a person's right to select his own counsel, although not an absolute right, may be overridden only where compelling reasons exist." 662 F. Supp. 968, 970 (D. Kan. 1987)). Petitioner contends that allowing Spoon's counsel to prosecute the wrongful death action on Child's behalf violates this right.

Although we agree with Petitioner that generally a litigant has the right to choose his or her own counsel, we conclude that the structure and purpose of the Wrongful Death Act militates against recognizing a right by statutory beneficiaries to prosecute the claim on their own behalf. As this Court recently stated, the personal representative "remains distinct from the beneficiaries as the party who must bring the wrongful death action and as the only party to the action pursuing the claims for damages that result from the injuries." *In re Estate of Lajeuenesse*, 2013-NMCA-004, ¶ 12; *see Dominguez*, 1983-NMCA-135, ¶ 10 ("The personal representative is the only one who may bring the action."). As the sole party pursuing the claims, the personal representative also has the right to choose counsel. *See Leyba*, 1995-NMSC-066, ¶ 22 (noting that the personal representative is vested with control over litigation decisions); *see also Brewer v. Lacefield*, 784 S.W.2d 156, 158 (Ark. 1990) (stating that it is the duty of the personal representative to choose counsel to pursue the wrongful death action).

This comports with the Legislature's determination that the personal representative stands in place of the statutory beneficiaries in bringing a wrongful death action. *See Chavez v. Regents of UNM*, 1985-NMSC-114, ¶ 8, 103 N.M. 606, 711 P.2d 883 ("The personal representative is only a nominal party who was selected by the Legislature to act as the statutory trustee for the individual statutory beneficiaries."). The Act's purpose in utilizing a personal representative to "centralize the claims and prevent multiple and possibly contradictory lawsuits" presents a compelling reason to deny statutory beneficiaries the right to intrude on the role of an otherwise properly appointed personal representative. *Id.* ¶ 10; *cf. Spencer*, 2013-NMSC-010, ¶ 8 ("Statutory beneficiaries are generally not permitted to join as parties in a wrongful death lawsuit because the personal representative is the beneficiary's trustee[.]"); *Mackey v. Burke*, 1984-NMCA-028, ¶ 12, 102 N.M. 294, 694 P.2d 1359 ("If each potential beneficiary was considered a personal representative, the suits could be unending and contradictory."), *overruled on other grounds by Chavez*, 1985-NMSC-114.[3]

Furthermore, we believe any potential adversity of interest that arises can be remedied by applying well-established principles of New Mexico law, not by the appointment of co-personal representatives. As we stated above, both Spoon and her

[3]Petitioner argues in the alternative that if she is not appointed co-personal representative, Spoon's counsel should be precluded from taking any fees or costs from Child's portion of the wrongful death recovery. The issue of which attorney is entitled to fees out of Child's wrongful death recovery has been quite conspicuous throughout Petitioner's arguments on appeal. At least one jurisdiction that has addressed this issue has held that an attorney hired by a beneficiary to protect his or her interests is hired at the beneficiary's expense. *Brewer*, 784 S.W.2d at158-59. However, we think this issue, if it arises in the future course of litigation, should be addressed by the district court in the first instance.

counsel owe a duty to Child to act with reasonable care regarding his interests. *Spencer*, 2013-NMSC-010, ¶¶ 8-13. This includes their duties to ensure that Child receives a proper allocation of any recovery from the wrongful death action. *Id.* ¶ 22 (explaining that "the personal representative has a nondiscretionary duty to distribute the wrongful death proceeds in the ratio prescribed by the Wrongful Death Act"); *Lebya*, 1995-NMSC-066, ¶ 28 (holding that an attorney has a duty to "exercise reasonable care to ensure that the statutory beneficiaries actually receive the proceeds of any wrongful death action"). Failure to comply with these duties could potentially expose both Spoon and her counsel to significant legal liabilities. *Spencer*, 2013-NMSC-010, ¶ 10 (stating that where an attorney breaches his duty to the personal representative to render services with reasonable skill and care, the statutory beneficiary has a claim against the attorney); *Dominguez*, 1983-NMCA-135, ¶ 19 (recognizing that statutory beneficiaries can assert a cause of action against a personal representative who fails to properly fulfill his or her statutory responsibilities). Proceeding in the face of a conflict of interest in the attorney's relationship with his client, the personal representative, without taking action to resolve the conflict can also constitute a breach of the attorney's duty.[4] *Spencer*, 2013-NMSC-010, ¶ 27. Finally, as our Supreme Court has recognized, a statutory beneficiary is not precluded from pursuing traditional tort claims such as misrepresentation, fraud, or collusion. *Id.* ¶ 5. We believe that the risk of potential liability provides a strong incentive to a personal representative and his or her counsel to ensure that the statutory beneficiaries' interests are properly protected.

In sum, although we recognize that in some circumstances a personal representative's interests can become adverse to those of the statutory beneficiaries such that action must be taken to resolve the adversity, we decline to hold as a matter of law that a statutory beneficiary with individual claims against the defendant is precluded from serving as the personal representative in a wrongful death action. While we conclude that Spoon can remain as the wrongful death personal representative, it is imperative that Spoon's counsel remain vigilant to ensure that his representation of Spoon in both her individual and representative capacities does not run afoul of his duty to Child and that Spoon remain mindful of her statutory duties. *Spencer*, 2013-NMSC-010, ¶ 13; *see also Holmes*, 76 S.W.3d 836; *Leyba*, 1995-NMSC-066.

CONCLUSION

For the foregoing reasons, we remand to the district court for proceedings consistent with this opinion.

IT IS SO ORDERED.

CYNTHIA A. FRY, Judge

I CONCUR:

JAMES J. WECHSLER, Judge

MICHAEL D. BUSTAMANTE, Judge (specially concurring).

[4]Proceeding in the face of a conflict without resolving the conflict can also result in serious disciplinary sanctions. *See In re Montoya*, 2011-NMSC-042, 150 N.M. 731, 266 P.3d 11 (indefinitely suspending attorney for, in part, proceeding with representation in wrongful death action despite clear conflicts of interest between his clients and improperly allocating settlement amounts).

Bustamante, Judge (specially concurring).

I concur in the Opinion and the conclusion that there is not currently an adversity of interest that necessitates the removal of Shannon as personal representative or the appointment of Petitioner as co-personal representative. I write separately to emphasize one particular animosity in this case that threatens to injure the interests of both statutory beneficiaries long before any adversity claimed by Petitioner will: the animosity between the attorneys.

The record below, the briefing in this Court, and counsels' oral argument all reveal an unacceptable level of personal rancor. It has been disheartening to witness the attorneys unnecessarily exacerbate the animosity that is prone to otherwise exist between Shannon and Petitioner under these circumstances. I cannot know the cause of this undue animosity—perhaps there is a history of conflict between counsel; perhaps the potential for division of fees has overtaken common courtesy. Whatever the source, I fear that practically speaking, the relationship between the attorneys has deteriorated to such an extent that the attorneys risk subjugating the interests of their respective clients to their own personal vendettas. Perhaps most concerning, I am not sure that counsel appreciate where their clients' interests end and their own personal animosity begin.

My concerns lead me to disagree with the Opinion's suggestion that use of a guardian ad litem should be "considered" by the parties and the district court. In my view, the possibility that the attorneys can work together toward the best interest of their clients is so bleak that I would require the immediate appointment of a guardian ad litem to ensure that Child's interests are protected. I do not condemn zealous advocacy. But zeal as an end unto itself can quickly come unmoored from the client's best interest and risk, as this case demonstrates, pushing the parties further away from a swift and reasonable resolution of their case.

MICHAEL D. BUSTAMANTE, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2014-NMCA-116

Filing Date: August 19, 2014

Docket No. 33,126

JASON B. DAMON and MICHELLE T. DAMON,

Plaintiffs-Appellees,

v.

STRUCSURE HOME WARRANTY, LLC,

Defendant-Appellant,

and

BRIAN MCGILL, an individual; JANELLE MCGILL, an individual; CARRIE TRAUB, individually and as a licensed associate real estate broker; JUMP, INC. d/b/a COLDWELL BANKER LEGACY, a New Mexico corporation; VISTA DEL NORTE DEVELOPMENT, LLC, a New Mexico

Limited Liability Company; and STILLBROOKE HOMES, INC., a New Mexico corporation,

Defendants.

Tal Young, P.C.
Steven Tal Young
Albuquerque, NM

for Appellees

Brownstein Hyatt Farber Schreck, LLP
Eric R. Burris
Adam E. Lyons
Albuquerque, NM

for Appellant

OPINION

VANZI, Judge.

In this case, we address whether a party to a home warranty contract can enforce an arbitration provision contained in that warranty against a nonparty who nevertheless seeks to invoke its benefits. Plaintiffs Michelle and Jason Damon sued Defendant StrucSure Home Warranty, LLC, (StrucSure) and others for structural defects in their home. StrucSure filed a motion to compel arbitration pursuant to a provision in the home warranty it issued to the builder and original purchasers of the property. The district court denied the motion on the basis that Plaintiffs were not parties to the StrucSure warranty and, because they did not bargain for or acknowledge the arbitration provision, they could not be bound by it. We reverse. We hold that a nonparty who directly seeks the benefits of a warranty agreement is equitably estopped from refusing to comply with a reasonable arbitration provision contained in the same agreement.

BACKGROUND

StrucSure is a warranty administrator providing express limited warranty protection for homeowners. The warranty at issue in this case was part of a contract between the builder (Stillbrooke Homes) and the original purchasers of Plaintiffs' home. It includes an enrollment application form signed by a representative of StrucSure, the builder, and the original owners, as well as a warranty coverage booklet, which describes the terms of the warranty. The enrollment application form states that, by signing, the parties specifically acknowledge that they agree with all of the requirements in the warranty coverage booklet. The warranty coverage booklet provides that:

> [w]ithin the limitations described within these two documents, your Builder warrants that your home will be free from qualifying structural defects, and, if provided, will be free from defects in workmanship/ materials and the delivery portion of systems (piping, wiring, ductwork).

It also contains a binding arbitration agreement, which states, in relevant part:

> Any claims, disagreements, disputes or controversies involving You, Your Builder, the Administrator, or the Insurer, or in any combination thereof, which involves this Warranty, the Builder, the Home, the construction or sale of the Home by the Builder, or the real property upon

> which the Home is constructed, shall be submitted to arbitration. . . . The decisions of the arbitrator will be final and binding, and may be entered as such in any legal proceeding before any court having competent jurisdiction thereof.

A "claim, disagreement, dispute or controversy" is defined as:

> an unresolved complaint or claim made under this Warranty; tort allegations, involving misrepresentation, nondisclosure, execution or performance of any contract (including this Warranty or this arbitration agreement); negligence, allegations regarding the breach of the duty of good faith or fair dealing, construction defects or deceptive trade practices.

The stated purpose of the arbitration agreement is to allow any party to the contract "to achieve a legally binding resolution (through an independent third-party arbitration service) of any dispute without resorting to costly and time-consuming litigation." Finally, the agreement, which states that it is self-activating, provides that issues regarding arbitrability are governed by the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-6 (2012).

The original owners conveyed the home to Cartus Financial, which sold the home to Plaintiffs. The warranty documents were not part of Plaintiffs' purchase documents with Cartus, and Plaintiffs did not sign either document comprising the warranty. Nevertheless, they assert that the warranty "induced" them to buy the home. At the same time, they assert they did not know about the arbitration agreement in the warranty until after they purchased the home.

The underlying dispute arose after the home began to exhibit signs of structural failure. Plaintiffs initially filed a warranty claim with StrucSure but ultimately filed this lawsuit against multiple defendants, including StrucSure. Plaintiffs' complaint alleges that StrucSure "served to insure the structural integrity" of their home by issuing the warranty and conducting the investigation after Plaintiffs discovered the structural defects and that the warranty made Plaintiffs expect the home and property were "of a certain quality" and that the defendants, including StrucSure, would honor the warranty and remedy any structural issues that arose. Plaintiffs also allege StrucSure was aware of the structural issues with their home and refused to rectify them. The complaint asserts nine claims: breach of contract, unjust enrichment, negligent misrepresentation, negligence, professional negligence, breach of the New Mexico Unfair Practices Act, rescission, breach of warranty, and a claim for punitive damages, although it is unclear which claims are specifically asserted against StrucSure.

StrucSure moved to compel arbitration of Plaintiffs' claims against it pursuant to the terms of the arbitration agreement. The district court denied the motion, and StrucSure timely appealed.

DISCUSSION

This Court reviews de novo both the denial of a motion to compel arbitration and the applicability and construction of a contractual provision requiring arbitration. *Barron v. Evangelical Lutheran Good Samaritan Soc'y*, 2011-NMCA-094, ¶ 13, 150

N.M. 669, 265 P.3d 720. The parties do not dispute that the arbitration agreement in the warranty provision is subject to the FAA. We discuss the district court's ruling before turning to the applicability of equitable estoppel to the facts of this case. We then address Plaintiffs' alternative arguments as to why the district court's decision should be affirmed.

The district court in this case relied on two cases in reaching its decision that Plaintiffs cannot be bound to arbitrate their claims against StrucSure. Both *Clay v. New Mexico Title Loans, Inc.*, 2012-NMCA-102, ¶ 14, 288 P.3d 888, and *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648 (1986), expressly state that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." (Internal quotation marks and citation omitted.) This language was the linchpin of the district court's ruling. Notwithstanding the holdings of *Clay* and *AT&T*, however, we are unpersuaded that these cases are analogous to the issue here. We explain.

In *Clay*, the plaintiff failed to repay a loan secured by his vehicle from New Mexico Title Loans. *Clay*, 2012-NMCA-102, ¶ 2. Two employees of the company hired to enforce the lender's security interest tried to repossess the plaintiff's truck. *Id.* The plaintiff resisted, and one of the employees shot him, leaving him unable to walk. *Id.* After the plaintiff sued the lender, among others, the lender moved to compel arbitration, invoking a provision in the lending agreement that committed to arbitration "any claim, dispute or controversy . . . that in any way arises from or relates to this Agreement or the Motor Vehicle securing this Agreement." *Id.* (alteration and internal quotation marks omitted). The arbitration provision, however, excluded the lender's right to enforce its security interest "by using self-help." *Id.* ¶ 17 (internal quotation marks omitted). At issue was whether the plaintiff's claims fell within the scope of the provision. *Id.* ¶¶ 14-28. Although we held that the plaintiff's contract claim fell within its scope, we held that the plaintiff's tort claims against the lender were not subject to the arbitration agreement. We noted that, "[i]n order to fall within the scope of the arbitration clause, the claims at issue must bear a 'reasonable relationship' to the contract in which the arbitration clause is found." *Id.* ¶ 14 (citation omitted). And nothing in the provision demonstrated that the plaintiff agreed to arbitrate claims such as those arising from the shooting during the repossession of his truck. *Id.* ¶ 24. At most, *Clay* deals with the subject matter of the *claims* subject to arbitration, not *who* is bound to arbitrate.[1]

AT&T Technologies addresses an even more remote issue: whether a court or an arbitrator must decide in the first instance whether parties to a collective bargaining agreement intended to arbitrate their grievances concerning layoffs. 475 U.S. at 644. The answer to that question has no bearing on the issue in this case. In the course of deciding that issue, the *AT&T Technologies* Court noted the general rule that "a party

[1]On appeal, Plaintiffs also cite *Aiken v. World Fin. Corp. of S.C.*, 644 S.E.2d 705 (S.C. 2007); *Campos v. Homes by Joe Boyden, L.L.C.*, 2006-NMCA-086, 140 N.M. 122, 140 P.3d 543; and *Santa Fe Techs., Inc. v. Argus Networks, Inc.*, 2002-NMCA-030, 131 N.M. 772, 42 P.3d 122. These cases are discussed in *Clay* and, like *Clay*, address the kinds of claims that are subject to the arbitration clause at issue. *See Clay*, 2012-NMCA-102, ¶¶ 21-25. Plaintiffs do not dispute that the claims they asserted against StrucSure fall under the scope of the arbitration agreement and, therefore, these cases are inapposite.

cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). There are well recognized exceptions to the general rule, however, and we turn to them now.

The single issue in this case is whether Plaintiffs, as subsequent purchasers of the home, are bound by the arbitration provision contained in the warranty coverage booklet originally given to the initial buyers. StrucSure contends that Plaintiffs cannot voluntarily seek the benefits of the warranty without bearing the burdens of the arbitration agreement contained in it. StrucSure also asserts that Plaintiffs are bound by all of the warranty's provisions, including the arbitration agreement, because they voluntarily enforced their rights as assignees under the warranty after taking title to the home. Because we hold that Plaintiffs are equitably estopped from avoiding arbitration in this case, we need not decide whether they are also assignees under the warranty.

The question of who may be bound by an arbitration provision subject to the FAA is governed by federal law. *Arthur Andersen LLP*, 556 U.S. at 630. At least two federal appellate courts "have recognized five theories for binding nonsignatories to arbitration agreements: 1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel." *Thompson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995); *see Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 417 (4th Cir. 2000). We believe the appropriate principle for evaluating whether Plaintiffs here are bound by the arbitration provision in the warranty is estoppel, commonly referred to as "equitable estoppel." In the arbitration context, equitable estoppel "recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him." *Int'l Paper Co.*, 206 F.3d at 418; *see Trinity Health Sys. v. MDX Corp.*, 180 Ohio App.3d 815, 2009 Ohio 417, 907 N.E.2d 746, at ¶ 25 (observing that a party to a contract may raise equitable estoppel where the nonparty attempts "to enforce some aspect of the contract" and noting that relying on one part of the contract may estop the nonparty from avoiding an arbitration clause in the contract). Consequently, a nonparty "is estopped from refusing to comply with an arbitration clause when it receives a direct benefit from a contract containing an arbitration clause." *Int'l Paper Co.*, 206 F.3d at 418 (internal quotation marks and citation omitted).

This Court has twice touched upon the doctrine of equitable estoppel in the arbitration context, but we have never ultimately decided whether New Mexico would apply the doctrine against a nonparty claimant under facts similar to this case. *See Murken v. Suncor Energy, Inc.*, 2005-NMCA-102, ¶¶ 6-13, 138 N.M. 179, 117 P.3d 985; *Horanburg v. Felter*, 2004-NMCA-121, ¶¶ 17, 18, 136 N.M. 435, 99 P.3d 685. In *Horanburg*, we considered whether a *nonparty* to an arbitration agreement could bind a *party* to the agreement to arbitrate—the reverse of the situation in this case. 2004-NMCA-121, ¶ 18. Although we observed that nonparties to an arbitration agreement generally "are not bound by the agreement and are not subject to, and cannot compel, arbitration[,]" we recognized that there are exceptions to this general rule, including an

exception for equitable estoppel. *Id.* ¶¶ 16-17. However, we concluded that, even assuming New Mexico recognizes equitable estoppel in the arbitration context, applying it was inappropriate under the facts of the case. *Id.* ¶ 18. In *Murken*, we considered whether a *party* to an arbitration agreement could bind a *nonparty* to arbitrate. *Murken*, 2005-NMCA-102, ¶¶ 6-13. There, as here, the defendant was a party to the agreement and sought to enforce the agreement against the plaintiff, who was not. *Id.* ¶ 13. This Court noted that "even if New Mexico recognized the doctrine of equitable estoppel in the arbitration context, its application would not be appropriate in [the] case" because the nonparty plaintiff was not "alleged to have embraced and directly benefitted from the agreement[.]" *Id.* ¶¶ 12, 13.

The facts of this case are markedly different from *Murken*. Here, Plaintiffs filed a warranty claim with StrucSure and then later sued StrucSure, claiming the warranty issued to the builder and original owners induced them to buy their home and that StrucSure failed to fulfill the duties it owed Plaintiffs under the warranty. Clearly, Plaintiffs' case against StrucSure hinges on its asserted rights under the warranty agreement from which they seek to directly benefit. We recognize that Plaintiffs contend they never signed the arbitration agreement and that, even though they were aware of the warranty before they purchased the home, they did not know it included the arbitration agreement until after they purchased the home. However, unlike the *Murken* plaintiff, Plaintiffs here voluntarily seek to directly benefit from the warranty by enforcing some of its terms while simultaneously attempting to avoid one of its perceived burdens.

Although we have no case on point, we find persuasive decisions from other jurisdictions that have applied equitable estoppel under a similar set of facts. For example, in *International Paper Co.*, a buyer who was dissatisfied with an industrial saw sued the manufacturer based on a contract between the manufacturer and distributor. 206 F.3d at 413. The manufacturer sought to compel arbitration based on a provision in the manufacturer-distributor contract to which the buyer was not a party. *Id.* at 414-15. As in this case, the buyer argued that it had no knowledge of and could not be bound by the contract containing the arbitration provision. *Id.* at 415. The federal district court rejected the buyer's argument and reasoned that, because the buyer sought to take advantage of certain commitments made by the manufacturer to the distributor in the manufacturer-distributor contract, "it was bound by all commitments in that contract, including the arbitration provision." *Id.* The Fourth Circuit Court of Appeals agreed and, applying principles of equitable estoppel, upheld the district court's decision. *Id.* at 416. The appeals court observed that the manufacturer-distributor contract provided part of the factual foundation for every claim asserted by the buyer; the complaint alleged that the manufacturer failed to honor the warranties in the contract, and the buyer sought damages in accordance with that contract. *Id.* at 418. Thus, it reasoned, the buyer could not "seek to enforce those contractual rights and avoid the contract's requirement that any dispute arising out of the contract be arbitrated." *Id.* (internal quotation marks omitted).

In *Ex parte Dyess*, 709 So. 2d 447, 448 (Ala. 1997), a customer who was injured while test driving a car brought suit against the car dealership's insurer under the uninsured motorist provision of a policy issued to the

dealership. There, as here, the plaintiff sought a benefit under the policy while attempting to avoid the arbitration clause in the policy. *Id.* at 449-50. The Alabama Supreme Court determined that under those circumstances, the plaintiff could not "pick and choose the portions of the contract that he wants to apply." *Id.* at 451. It concluded that to enforce the uninsured motorist provision and not to enforce the arbitration clause would be inconsistent with the FAA and with decisions of the United States Supreme Court. *Id.*; *see also Avila Group, Inc. v. Norma J. of Cal.*, 426 F. Supp. 537, 542 (S.D.N.Y. 1977) ("To allow [the nonparty] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the [FAA].").

Based on the reasoning of the above cases, we hold that Plaintiffs, having voluntarily chosen to seek a direct benefit from the warranty by attempting to enforce its terms against StrucSure, may not now seek to repudiate one of the warranty's provisions. If Plaintiffs wished to exempt themselves from the arbitration clause, they could have chosen not to claim and enforce any of the rights under the warranty. However, once Plaintiffs voluntarily sought to embrace and invoke the benefits created by the warranty, they could not avoid the arbitration provision in the warranty.

On appeal, Plaintiffs make several alternative arguments as to why the arbitration provision should not be imposed upon them. First, Plaintiffs contend that StrucSure did not prove in the district court that it had a valid arbitration agreement with the original owners and, therefore, Plaintiffs cannot be bound by a contract to arbitrate. Plaintiffs' argument is without merit. StrucSure attached the signed home enrollment application and the arbitration provision to its motion to compel arbitration, and Plaintiffs never contested their validity. Moreover, if there was no valid warranty between StrucSure and the original owners, Plaintiffs, as subsequent owners, would have no basis upon which to state any warranty claims against StrucSure. *See Camino Real Mobile Home Park P'ship v. Wolfe*, 1995-NMSC-013, ¶ 18, 119 N.M. 436, 891 P.2d 1190 ("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. Cent. N.M. Elec. Co-op, Inc.*, 2013-NMSC-017, 301 P.3d 387.

Plaintiffs also contend that enforcing the arbitration agreement against them would be unfair and unconscionable and that the agreement is a procedurally unconscionable contract of adhesion. The district court did not rule on either of these arguments, and Plaintiffs provide no support for their generalized assertions on appeal. We therefore do not address them here. *See Muse v. Muse*, 2009-NMCA-003, ¶ 72, 145 N.M. 451, 200 P.3d 104.

We conclude that the doctrine of equitable estoppel is appropriate in this case. Plaintiffs seek to receive a direct benefit from the agreement, and their claims against StrucSure are therefore also subject to the arbitration provision contained in the warranty coverage booklet. The district court's ruling is reversed.

CONCLUSION

For the reasons set forth above, we reverse.

IT IS SO ORDERED.

LINDA M. VANZI, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

CYNTHIA A. FRY, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2014-NMCA-117

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Docket No. 32,990

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

CLINTON SKIPPINGS,

Defendant-Appellant.

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OPINION

WECHSLER, Judge.

Defendant Clinton Skippings appeals the district court's denial of his motions to suppress evidence, having reserved the issue of whether his motions were properly denied in his conditional plea agreement. Defendant argues that police officers lacked reasonable suspicion to stop him based on a confidential informant's tip and also asserts that he was subject to a de facto arrest without probable cause, tainting Defendant's consent and making the evidence discovered fruit of an illegal search. Accordingly, Defendant asks this Court to reverse the district court's denial of his motions to suppress. We conclude that Defendant's motions were properly denied and therefore affirm the district court.

BACKGROUND

The factual context in this case is central to the resolution of this appeal and is established by the testimony of Defendant and Lea County Drug Task Force (Task Force) Agents Byron Wester and Keith Clayton at the hearings on Defendant's motions to suppress evidence. On August 29, 2012, Agents Wester and Clayton were working with a confidential informant in Hobbs, New Mexico. With the officers present, the informant set up a purchase of crack cocaine with Defendant in a cell phone conversation. The informant provided the following details regarding the deal: (1) Defendant immediately

would be in the parking lot of Big Lots with the crack cocaine; and (2) Defendant would be in one of two vehicles that he was known to drive (either a white passenger car or a gold-colored pickup). The Drug Task Force had used this confidential informant on numerous past occasions, and the confidential informant had provided reliable information that led to multiple arrests and convictions.

Upon receiving the informant's tip, Agent Wester proceeded to the Big Lots parking lot, where he observed Defendant and a female passenger in a white vehicle, as described by the informant. Agent Wester watched Defendant drive across the street to an apartment complex, at which time he briefly lost sight of the vehicle; Defendant returned shortly thereafter in the same vehicle but without the female passenger. Defendant then exited the parking lot and drove south on Dal Paso Street. At that time, Agent Wester requested that the Hobbs Police Department stop Defendant. The parties stipulated below that the sole purpose of the stop was to further the agents' investigation of Defendant based on the informant's information.

Hobbs police officers stopped Defendant at approximately 7:25 p.m., when there was still daylight. Agent Wester arrived at the scene within a few minutes, at which time he observed Defendant standing outside his vehicle with a police officer. Agent Wester approached Defendant, explained who he was, and told Defendant that he was not under arrest but being detained for investigative purposes. Agent Wester patted down Defendant for weapons. Defendant was then handcuffed and read his *Miranda* rights. Defendant indicated his willingness to talk with the agent, he and Agent Wester sat down on a curb, and Agent Wester engaged Defendant in a conversation. Agent Wester testified that Defendant was handcuffed for safety purposes because Defendant had a history of violence. Several other officers were present, but they did not engage in conversation with Defendant. Agent Wester told Defendant about the investigation into his alleged trafficking of crack cocaine.

Within ten minutes of the initial stop, while speaking to Agent Wester, Defendant told Agent Wester that he was willing to consent to a search of his vehicle. At that time, Defendant's handcuffs were removed so that he could sign a consent form. Agent Clayton read the consent form to Defendant and gave it to Defendant to sign. The handcuffs were not placed back on Defendant; Defendant was in handcuffs no more than ten minutes. After signing the consent form, Defendant and Agent Wester resumed sitting on the curb and conversing, while other agents performed the search of Defendant's vehicle. As soon as the agents opened the door of Defendant's vehicle, the agents discovered marijuana.

During the search, Agent Wester and Defendant continued to sit on the curb and talk about Defendant's alleged involvement in narcotics activity in the area. Agent Wester also talked to Defendant about whether he would be willing to do some work for the Task Force and various other topics, including Defendant's addiction to narcotics. Agent Wester maintained a professional and non-threatening tone of voice throughout his conversation with Defendant. After the search of the vehicle was complete, Agent Wester asked Defendant "if he had anything on him" and asked for consent to search his person, which Defendant gave. Agent Wester found approximately $1200 and a plastic bag of crack cocaine on Defendant. By that time, approximately forty-five minutes had passed since the stop. Defendant was then arrested

for trafficking a controlled substance contrary to NMSA 1978, Section 30-31-20 (2006).

Defendant moved to suppress all contraband found and seized by the Task Force, asserting that (1) the agents lacked reasonable suspicion to initiate an investigatory detention based on a confidential informant's tip, and (2) Defendant was subjected to a de facto arrest requiring probable cause and tainting his consent to search his vehicle and his person. The district court denied his motions, and Defendant entered a conditional plea in which he reserved the right to appeal the denials of the motions. Defendant renews both arguments on appeal.

STANDARD OF REVIEW

"[R]eview of a district court's ruling on a motion to suppress involves a mixed question of fact and law." *State v. Rowell*, 2008-NMSC-041, ¶ 8, 144 N.M. 371, 188 P.3d 95 (internal quotation marks and citation omitted). We review factual questions under a substantial evidence standard and the application of law to facts de novo. *State v. Pacheco*, 2008-NMCA-131, ¶ 3, 145 N.M. 40, 193 P.3d 587. We recognize that "the district court has the best vantage from which to resolve questions of fact and to evaluate witness credibility. Accordingly, we review the facts in the light most favorable to the prevailing party" provided that substantial evidence exists to support the factual findings. *State v. Sewell*, 2009-NMSC-033, ¶ 12, 146 N.M. 428, 211 P.3d 885 (internal quotation marks and citation omitted). Finally, we "review the application of the law to those facts, making a de novo determination of the constitutional reasonableness of a search or seizure." *Id.*

LEGALITY OF THE INITIAL STOP

It is well established that "stopping an automobile and detaining its occupants constitute a seizure under the Fourth and Fourteenth Amendments." *State v. Werner*, 1994-NMSC-025, ¶ 11, 117 N.M. 315, 871 P.2d 971 (alteration, internal quotation marks, and citation omitted); *State v. Funderburg*, 2008-NMSC-026, ¶ 13, 144 N.M. 37, 183 P.3d 922. However, only unreasonable searches and seizures are proscribed. *Werner*, 1994-NMSC-025, ¶ 11. Under New Mexico and federal case law, "[p]olice may make an investigatory stop in circumstances that do not rise to the level of probable cause for an arrest if the officers have a reasonable suspicion that the law has been or is being violated." *State v. Alderete*, 2011-NMCA-055, ¶ 15, 149 N.M. 799, 255 P.3d 377 (internal quotation marks and citation omitted); *see Werner*, 1994-NMSC-025, ¶ 11 ("Under *Terry v. Ohio*, 392 U.S. 1 . . . (1968), and its progeny, police officers may stop a person for investigative purposes where, considering the totality of the circumstances, the officers have a reasonable and objective basis for suspecting that particular person is engaged in criminal activity." (internal quotation marks and citation omitted)). "A valid investigatory stop allows an officer to detain suspects briefly to verify or quell that suspicion." *Sewell*, 2009-NMSC-033, ¶ 13.

To justify a stop based on reasonable suspicion, there must be "specific and articulable facts that, together with the rational inferences from those facts, reasonably warrant the intrusion." *Alderete*, 2011-NMCA-055, ¶ 15 (internal quotation marks and citation omitted). This Court's case law establishes that information supplied by a confidential informant may support a reasonable suspicion, thereby justifying an

investigatory detention. *See, e.g.*, *id.* ¶¶ 2, 18-20 (upholding a traffic stop based in part on information from a confidential informant that the house from which the vehicle had departed was being used as a stash house for large quantities of marijuana); *State v. Robbs*, 2006-NMCA-061, ¶¶ 2-4, 12-19, 139 N.M. 569, 136 P.3d 570 (holding that a tip received from a confidential informant that accurately described the vehicle, route, and time of movement, supplied reasonable suspicion justifying a traffic stop); *State v. De Jesus-Santibanez*, 1995-NMCA-017, ¶¶ 11-13, 119 N.M. 578, 893 P.2d 474 (upholding a traffic stop based on a "Be-On-the-Lookout" alert premised on information supplied by a confidential informant, who had supplied a description of the vehicle, time and direction of travel, route, and the origin of the vehicle's license plate).

Because "[r]easonable suspicion depends on the reliability and content of the information possessed by the officers[,]" *Robbs*, 2006-NMCA-061, ¶ 13, we look to the information processed by the agents in this case. The agents were working with an informant that the Task Force had used on numerous occasions and who had proven to be a reliable source of information. The agents were present when the informant telephonically arranged the drug deal with Defendant. The informant supplied the agents with specific information, including a description of the vehicle that Defendant would be in, the type of drug Defendant would be selling, and the time and location of the drug deal. The informant was able to predict Defendant's future behavior, indicating that the informant had access to reliable information about the person's illegal activities. *See id.* ¶ 14.

This case is similar to *Robbs*, in which the informant (1) told detectives that the defendant would be delivering methamphetamine to an address in a city in New Mexico, and (2) described the defendant's vehicle with a personalized license plate. *Id.* ¶ 2. In that case, we concluded that the tip was enough to support reasonable suspicion necessary for the investigatory stop of the defendant's vehicle. *Id.* ¶ 19. The informant in this case provided a similar level of detail, and the agents verified the information when the movements of Defendant accorded with the informant's tip. Under the totality of the circumstances, specific and articulable facts supported the agents' suspicion that Defendant was engaged in drug trafficking.

To the extent that Defendant argues the stop was "pretextual" under *State v. Ochoa*, we do not agree; the issue in this case is one of reasonable suspicion, not whether officers engaged in an unreasonable, pretextual stop. 2009-NMCA-002, ¶¶ 39-42, 146 N.M. 32, 206 P.3d 143; *see id.* ¶ 25 ("A pretextual traffic stop is a detention supportable by reasonable suspicion or probable cause to believe that a traffic offense has occurred, but 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."). Having determined that reasonable suspicion supported the agents' decision to have Defendant stopped, we turn to the second issue: whether the lawful investigatory detention became a de facto arrest requiring probable cause.

INVESTIGATORY DETENTION AS A DE FACTO ARREST

While an investigatory detention supported by reasonable suspicion is

permitted, an arrest requires probable cause. *State v. Wilson*, 2007-NMCA-111, ¶ 18, 142 N.M. 737, 169 P.3d 1184.. "When an officer with reasonable suspicion but without probable cause detains an individual in an unreasonable manner, the detention may amount to a de facto arrest, rather than an investigatory detention." *Id.* There is no bright-line test for evaluating when an investigatory detention becomes invasive enough to become a de facto arrest. *Werner*, 1994-NMSC-025, ¶ 13. However, there are several factors that we consider, including (1) "the government's justification for the detention," (2) "the character of the intrusion on the individual," (3) "the diligence of the police in conducting the investigation," and (4) "the length of the detention." *Robbs*, 2006-NMCA-061, ¶ 21. We are also guided by the circumstances in other cases in which investigative detentions have been held to be de facto arrests or impermissibly invasive. *Pacheco*, 2008-NMCA-131, ¶ 22.

The State points out, and the facts when viewed in the light most favorable to the prevailing party indicate, that contraband was discovered within ten minutes from the time the agents made contact with Defendant, but did not then result in an arrest. If the ten minute detention of Defendant was impermissibly invasive, Defendant's consent to search his vehicle and his person would be tainted, and the evidence should have been suppressed. *See State v. Jutte*, 1998-NMCA-150, ¶ 14, 126 N.M. 244, 968 P.2d 334 ("[I]f [the defendant's] detention constituted a de facto arrest prior to the search, then that arrest was unlawful and it may have tainted his consent to the search."). If, however, the ten minute detention was a valid investigatory detention, at the point that the agents found contraband, they had probable cause to arrest Defendant for possession of a controlled substance contrary to NMSA 1978, Section 30-31-23 (2011) and to search his person. *See State v. Weidner*, 2007-NMCA-063, ¶¶ 18-20, 141 N.M. 582, 158 P.3d 1025 (explaining the "search incident to arrest" exception to the warrant requirement and concluding that even if a search occurs before formal arrest, it is lawful if the evidence discovered was not necessary to justify the arrest). Thus, we focus our inquiry on the time between Defendant's stop and the discovery of the marijuana.

In support of his argument that he was subject to a de facto arrest, Defendant states that "officers swarmed the scene and demanded his identity" and that he was removed from his car, handcuffed, patted down, seated on the ground, and read his *Miranda* rights. Defendant asserts that, based on the duration and circumstances of his detention, his consent was invalid and the contraband discovered should have been suppressed. For the following reasons, we do not agree.

With regard to the first factor—the government's justification for intrusion— we have explained that "[i]f the nature and extent of the detention minimally intrude on an individual's Fourth Amendment interests, opposing law enforcement interests can support a seizure based on less than probable cause." *Robbs*, 2006-NMCA-061, ¶ 20 (internal quotation marks and citation omitted). The government has a significant interest in preventing the use and distribution of drugs like cocaine. *See Pacheco*, 2008-NMCA-131, ¶ 20 (explaining that prevention of use and distribution of methamphetamine was a significant governmental interest); *Robbs*, 2006-NMCA-061, ¶ 22 (same). Therefore, "[i]nsofar as [the agents] had a reasonable, articulable suspicion that drug-related criminality was afoot, the justification

for the intrusion was substantial." *Pacheco*, 2008-NMCA-131, ¶ 20.

The second factor—the character of the intrusion—requires careful parsing in this case. While Defendant was only detained for ten minutes and told he was not under arrest, he was handcuffed and given his *Miranda* rights. There exists no New Mexico case addressing this unique set of circumstances; accordingly, we examine, in light of the authority that we do have, where on the continuum this case falls. Those cases that conclude that an initially lawful investigatory detention became a de facto arrest all present circumstances in which the defendant was detained for at least one hour. *See, e.g.*, *Werner*, 1994-NMSC-025, ¶¶ 11-20 (holding that when the defendant was told that he was not free to leave and detained for one hour, including forty-five minutes in the back of a patrol car while awaiting identification, it was a de facto arrest); *see also Jutte*, 1998-NMCA-150, ¶¶ 14-20 (holding that one-hour detention at an inspection checkpoint ripened into an improper de facto arrest when the officers had exhausted the means of investigation by which they could confirm or dispel their suspicions quickly); *State v. Hernandez*, 1997-NMCA-006, ¶ 22, 122 N.M. 809, 932 P.2d 499 (concluding that a nearly two-hour detention in a trailer at a checkpoint while waiting for a female agent who had to be summoned from another location to search the female defendant after search of vehicle turned up no contraband, constituted a de facto arrest); *State v. Flores*, 1996-NMCA-059, ¶¶ 4, 15, 122 N.M. 84, 920 P.2d 1038 (holding that a two- to three-hour detention in handcuffs at a police warehouse after a one-hour roadside detention constituted a de facto arrest). Although the duration of detention is not dispositive, as we note below, it is an important consideration as evidenced by our case law.

Perhaps even more. helpful to our analysis are those cases in which investigative detentions were held not to have become de facto arrests. *See, e.g.*, *Sewell*, 2009-NMSC-033, ¶¶ 15-25 (holding that a ten minute detention during which time officers questioned the defendant outside his vehicle about possible drug trafficking and performed search of his vehicle after obtaining consent was not a de facto arrest); *see also Pacheco*, 2008-NMCA-131, ¶¶ 19-25 (holding that thirty minute roadside detention was not impermissively invasive or extended); *Robbs*, 2006-NMCA-061, ¶¶ 29-30 (holding that thirty-five to forty minute detention while awaiting a canine unit to perform a narcotics investigation was reasonable); *State v. Lovato*, 1991-NMCA-083, ¶¶ 23-32, 112 N.M. 517, 817 P.2d 251 (holding that the defendants were not arrested when they were pulled over, ordered to get out of the vehicle at gunpoint, and handcuffed prior to questioning). While at first glance this case appears to be analogous to *Sewell*, when examined more carefully, the circumstances in this case were more invasive. Although Defendant was only detained for ten minutes, he was also patted down for weapons, handcuffed, and read his *Miranda* rights. Nevertheless, even these circumstances do not indicate that Defendant's lawful investigatory detention had become a de facto arrest.

The evidence indicates that Defendant was patted down for weapons and handcuffed because of Agent Wester's concern for officer safety because Defendant had a history of violence. The defendant in *Flores*, in which we concluded the defendant was subject to a de facto arrest, was handcuffed; however, he was detained for two

to three hours and handcuffed for most of that time. 1996-NMCA-059, ¶ 15. Additionally, he was "faced with heavy weaponry in a hostile environment, while subjected to a second search that differed significantly in scope and location from the first." *Id.* ¶ 26. In *Lovato,* the defendants were handcuffed upon exiting their vehicle, and we concluded that the level of force did not convert the investigatory detention into an arrest. 1991-NMCA-083, ¶¶ 24-27, 32. Therefore, while we consider the fact that Defendant was handcuffed, it is not determinative. *See Wilson*, 2007-NMCA-111, ¶ 19 ("[I]n the context of the Fourth Amendment, without transforming a seizure from an investigatory detention to a de facto arrest, courts have upheld the use of handcuffs . . . and other measures of force." (internal quotation marks and citation omitted)); *see also In re David S.*, 789 A.2d 607, 614 (Md. 2002) ("[A]n investigatory stop is not elevated automatically into an arrest because the officers handcuffed the suspect."). In this case, as in *Lovato* and unlike in *Flores*, Defendant was handcuffed due to his known history of violence and consequent officer safety concerns. Agent Wester testified that upon removing the handcuffs, Defendant remained calm and was no longer a safety concern and was therefore not recuffed. Based on the foregoing and viewing the facts most favorable to the prevailing party, the agents did not act unreasonably in dealing with the risk that they faced and were not unreasonable in patting down and handcuffing Defendant; therefore, the fact that Defendant was handcuffed does not transform the detention into an arrest. *See Lovato*, 1991-NMCA-083, ¶¶ 26-27 (explaining that officers may adopt precautionary measures, including performing a protective frisk and handcuffing, based on reasonable fears).

We pause to note that we reach this conclusion with very limited evidence before us. There was little testimony at the suppression hearing regarding Defendant's alleged "history of violence." By comparison, in *Lovato*, 1991-NMCA-083, ¶¶ 24-32, the basis for the use of handcuffs was apparent, and we determined that the use of force was reasonable because the officers stopped a vehicle carrying suspects in a drive-by shooting that had been committed minutes before. This case is not as clear. However, we must view the facts in the light most favorable to the prevailing party (here, the State), and Defendant failed to present any evidence to the contrary or to challenge the reasonableness of the use of handcuffs under these circumstances either below or on appeal. We avoid "unrealistic second-guessing of police officers' decisions in this regard" and do not require that they use the least intrusive means, only reasonable ones. *United States v. Melendez-Garcia*, 28 F.3d 1046, 1052 (10th Cir. 1994) (internal quotation marks and citation omitted). Thus, because there was uncontroverted evidence that Defendant was known to be violent, we cannot conclude that handcuffing Defendant was unreasonable. The evidence presented at the suppression hearing indicates that the agents relied on their knowledge of Defendant's history of violence in determining that he needed to be handcuffed; thus, while the State bears the burden in proving the reasonableness of the detention, we cannot say that the agents' fears were unfounded without evidence to the contrary. It is also significant that Defendant's handcuffs were removed within ten minutes and he was not recuffed, because, according to Agent Wester's testimony, Defendant's calm demeanor during the detention led him to believe that Defendant did not pose a safety threat any longer.

[redacted] We are likewise not convinced that the fact Defendant was given his *Miranda* rights turned the detention into a de facto arrest. *Miranda* warnings are designed to safeguard Fifth Amendment protections. *Cotton v. State*, 872 A.2d 87, 97 (Md. 2005).

> Although the giving of those warnings may be considered along with more relevant factors as part of all that occurred, it should have no special significance in determining whether a temporary detention constitutes an arrest for Fourth Amendment purposes because it may well be required even when there is clearly no arrest.

Id.; *see Wilson*, 2007-NMCA-111, ¶ 20 ("[I]f police officers take highly intrusive steps to protect themselves from danger, they must similarly provide protection to their suspects by advising them of their constitutional rights." (internal quotation marks and citation omitted)); *accord United States v. Perdue*, 8 F.3d 1455, 1465 (10th Cir. 1993). In *Wilson*, 2007-NMCA-111, ¶ 21, we rejected the argument that "*Miranda* warnings are never required during an investigatory detention." Relying on federal case law, we explained that "'[i]f a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him 'in custody' for practical purposes, he will be entitled to the full panoply of protections prescribed by [*Miranda*].'" *Id.* ¶ 20 (quoting *Berkemer v. McCarty*, 468 U.S. 420, 421 (1984)). In other words, during an investigatory detention, a defendant may also be subject to a custodial interrogation, and, if that is the case, *Miranda* warnings need to be given. *Cotton*, 872 A.2d at 97 ("*Miranda* warnings need to be given whenever there is a custodial interrogation, and a custodial interrogation can arise from a pure *Terry* stop that never crosses into an arrest."). As a result, a "cautious or gratuitous recitation of *Miranda* warnings" is not determinative of whether a defendant has been subject to a de facto arrest. *Id.* In *Cotton*, the court explained,

> [I]f the police proceed to interrogate a person seized and temporarily detained pursuant to *Terry* and do not give *Miranda* warnings, any incriminating evidence revealed by that interrogation may, depending on the circumstances, be held inadmissible as the product of a custodial interrogation and thereby doom the validity of an ensuing arrest based on that evidence. The law should encourage police to give those warnings when questioning a suspect, not discourage them by regarding the warnings as converting a good *Terry* stop into a bad arrest.

Id.

[redacted] In *Wilson*, we concluded that "in deciding whether a defendant is in *Miranda* custody, the question is not whether he or she is being questioned as a part of an investigatory detention." 2007-NMCA-111, ¶ 20. Whether *Miranda* rights are violated and whether a defendant is subject to an investigatory detention are different inquiries. However, whether a defendant is given *Miranda* rights can and should be considered, along with all the other circumstances in a case, in determining whether a defendant was subject to a de facto arrest. In this case, Defendant was read his *Miranda* rights before Agent Wester began asking him questions about his alleged involvement in trafficking cocaine. The reading of his rights did not

convert the investigatory detention into an arrest. *See Perdue*, 8 F.3d at 1463 (concluding that when officers employ force normally associated with an arrest during an investigative detention, *Miranda* warnings are required).

Finally, we turn to the duration of the detention and the diligence of the agents' investigation. *See Pacheco*, 2008-NMCA-131, ¶ 19 (addressing duration and diligence prongs together because they "both rest on the same underlying premise, an impermissibly protracted detention"). "A valid investigatory stop allows an officer to detain suspects briefly to verify or quell . . . suspicion." *Sewell*, 2009-NMSC-033, ¶ 13. The evidence in this case, when viewed in the light most favorable to the prevailing party, indicates that, in the first ten minutes of the detention before the discovery of contraband, Defendant was stopped, patted down, given *Miranda* rights, and handcuffed. Agent Wester then talked to Defendant for a short time to investigate his suspicion. At that point, after removing Defendant's handcuffs, explaining the consent form, and allowing Defendant to sign it, the search of Defendant's vehicle began and contraband was discovered almost immediately. The length of the detention (ten minutes) was reasonably limited to the time required to perform all of these activities. There is nothing to indicate that the agents delayed the investigation or were otherwise unreasonable in conducting the investigation. Under these circumstances, the agents were diligent in their investigation and detained Defendant no longer than necessary to verify or quell their suspicion.

While "[t]emporal duration is neither the controlling nor the only factor" to consider, our Supreme Court remarked in *Sewell*, "we have found no reported case in which a New Mexico court has ever held that a ten minute detention was impermissibly long in any set of circumstances where there was reasonable suspicion to make a roadside drug stop." 2009-NMSC-033, ¶¶ 17, 18. That statement is still true, and, taking into account duration and all of the other factors, this case does not present circumstances in which a ten minute detention turned into a de facto arrest. Because Defendant was not subject to a de facto arrest, "the ensuing consensual search of the vehicle [and his person] was not tainted." *Pacheco*, 2008-NMCA-131, ¶ 25.

CONCLUSION

The agents in this case had reasonable suspicion to conduct an investigatory detention, and that detention did not become a de facto arrest prior to the agents' discovery of contraband. Therefore, the district court properly denied Defendant's motions to suppress. We affirm.

IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR:

RODERICK T. KENNEDY, Chief Judge

M. MONICA ZAMORA, Judge

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2014-NMSC-036

Filing Date: September 8, 2014

Docket No. 34,366

LIVING CROSS AMBULANCE SERVICE, INC.,

Appellant,

v.

NEW MEXICO PUBLIC REGULATION COMMISSION and AMERICAN MEDICAL RESPONSE AMBULANCE SERVICE, INC., d/b/a AMERICAN MEDICAL RESPONSE, EMERGICARE,

Appellees.

Joseph E. Earnest
Tesuque, NM

for Appellant

New Mexico Public Regulation Commission
Margaret Kendall Caffey-Moquin
Lisa Adelman
Santa Fe, NM

for Appellee New Mexico Public Regulation Commission

Miller Stratvert, P.A.
Jennifer Davis Hall
Stephen B. Waller
Albuquerque, NM

for Appellee American Medical Response Ambulance Service, Inc.

OPINION

CHÁVEZ, Justice.

This case is a direct appeal from a final order of the Public Regulation Commission (PRC) granting a permanent certificate to American Medical Response Ambulance Service, Inc. d/b/a American Medical Response, Emergicare (AMR) for both emergency and nonemergency ambulance service in Valencia County. Living Cross Ambulance Service, Inc. (Living Cross) asks this Court to vacate the final order of the PRC, claiming that the PRC acted arbitrarily and capriciously by granting AMR's certificate because there was no evidence of need for nonemergency ambulance service in Valencia County, and because there was insufficient evidence of need for additional emergency ambulance service. Living Cross also claims that the PRC abused its discretion by allowing Living Cross's former attorney to represent AMR in an initial hearing before ruling on its motion to disqualify the attorney. AMR and the PRC ask this Court to affirm, alleging that there was a sufficient showing of public need, and that evidence of need for nonemergency service is not required. Additionally, they contend that any error in allowing Living Cross's former attorney to represent AMR in the initial hearing was harmless, and that Living Cross waived its objections. We hold that the PRC decision to allow the former Living Cross attorney to appear for AMR during the hearing for the temporary permit was contrary to law, and that the wholesale admission of the record from that hearing as evidence in the hearing for the permanent certificate was plain error, requiring reversal. Because we determine that the attorney disqualification issue is dispositive, we do not reach the other issues in this case.

I. BACKGROUND

There is no hospital in Valencia County. People in Valencia County who are faced with a medical emergency must (1) deal with the emergency itself, and (2) find a way to travel twenty to thirtyfive miles to an Albuquerque hospital. Ambulances coming from Valencia County can take two hours or longer to transport a patient to the nearest hospital, process the patient, and return. The long turnaround times mean that ambulance companies sometimes run at full capacity, or "zero status," and cannot respond to calls from new patients because all available ambulances are in use.

Since 1987, Living Cross has been the only ambulance company in Valencia County operating under a permanent certificate from the PRC. Living Cross has been at zero status and unavailable to transport patients for less than one percent of ambulance service requests. When Living Cross is at zero status, dispatch requests mutual aid from a nearby ambulance company, and if those mutual aid ambulances are also unavailable, the municipality whose EMTs first responded to the scene must transport the patients at the municipality's expense.

AMR is the largest private ambulance company in America. On March 13, 2013, AMR petitioned the PRC for both temporary authority and a permanent certificate to operate from points in Valencia County. AMR alleged that Living Cross was providing deficient service, and that there was an urgent and immediate public need for another ambulance company to fill that void in service. AMR filed affidavits in support of its petition from five people, all of whom were Valencia County EMTs and fire department employees, stating that there had been "numerous times" when Living Cross ambulances were unavailable. AMR also provided responder documentation of particular occasions when Living Cross was unavailable or the response times were too long.

Living Cross moved to intervene in the PRC hearings on AMR's application, maintaining that it was not providing deficient service and emphasizing that its ambulance service was unavailable for less than one percent of calls received. It maintained that a lessthanonepercent rate of unavailability is consistent with rates of unavailability that the PRC has previously found to be compliant with regulations for other ambulance companies, and therefore AMR could not show a public need for additional ambulance service. Living Cross further argued that it should be allowed to try to remedy any problems before another company steps in to the Valencia County ambulance services market, potentially driving Living Cross out of business.

Living Cross also moved to disqualify AMR's attorney, W. Ann Maggiore, stating that she had previously represented Living Cross in proceedings before the PRC, before this Court, and in a private lawsuit, and that her current representation of AMR in opposition to Living Cross involved "precisely the same issues involved" in those previous matters when she represented Living Cross. In addition, Living Cross pointed out that one year earlier, during a dispute over an operating certificate in Bernalillo County, a PRC hearing examiner disqualified Maggiore from representing AMR against Living Cross because she had been Living Cross's attorney in previous matters, and because the potential that she had learned confidential information she could use against Living Cross created a

conflict of interest. In this case, Living Cross requested that the PRC either stay the proceedings on AMR's certification application pending the resolution of the disqualification issue or grant Living Cross an interlocutory appeal to this Court.

The PRC neither stayed the proceedings nor granted Living Cross an interlocutory appeal. Instead, the five PRC commissioners held a public hearing on April 3, 2013, during which they decided the application for temporary authority, but postponed consideration of the motion to disqualify. During the daylong hearing, they allowed Maggiore to appear on behalf of AMR, give an opening statement, direct the examination of five AMR witnesses, and crossexamine the Living Cross witnesses. After the hearing, the PRC granted AMR temporary authority and appointed a hearing examiner to determine whether AMR's attorney should be disqualified.

On April 15, the appointed hearing examiner recommended Maggiore's disqualification, finding that this proceeding and prior proceedings in which Maggiore represented Living Cross "are substantially related matters within the meaning of Rule 16109 [NMRA] of the Rules of Professional Conduct. The matters involve the same provider (Living Cross), the same issues (the adequacy of Living Cross's service), the same service area (Valencia County) and certain of the same individuals . . . ." However, the hearing examiner recommended denying Living Cross's motion to strike all materials prepared by or in consultation with Maggiore because Living Cross did not identify specific materials prepared by Maggiore, and because "Living Cross will have the opportunity to object to any incompetent evidence at an appropriate time."

On May 1, the PRC adopted the hearing examiner's recommendations on disqualification and ordered that Maggiore be disqualified. The PRC found that AMR's exceptions—that counsel had not used confidential information, that the parties were not adverse, and that disqualification would be extremely prejudicial to AMR—were "not sufficient to overcome the analysis set forth in great detail in the Recommended Order on the conflict of interest presented by the representation of this counsel for [AMR] in the remainder of this proceeding." However, it also denied both Living Cross's motion to stay and Living Cross's motion to strike the materials prepared by Maggiore. By adopting the hearing examiner's recommendations in full, the PRC incorporated the hearing examiner's reasoning for denying Living Cross's motion to strike.

The final hearing on the grant of a permanent certificate was held before a hearing examiner on June 27, 2013. The transcript of the entire April 3 hearing was admitted into evidence at the final hearing, as well as written testimony from various witnesses that was taken virtually verbatim from what Maggiore had elicited in the April 3 hearing before the commission. Living Cross did not object to the admission of this evidence. After the final hearing, the hearing examiner recommended that the PRC grant the permanent certificate to AMR, and the PRC again adopted the hearing examiner's recommendations. Living Cross appeals from the final order of the PRC granting the permanent certificate to AMR to operate in Valencia County, NMPRC Docket No. 1300079TRM, September 20, 2013.

II. STANDARD OF REVIEW

A final order of the PRC under the

Motor Carrier Act, NMSA 1978, §§ 652A1 to 41 (2003, as amended through 2013), will be overturned on appeal only if it is arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, or otherwise not in accordance with law. Section 652A35(C). A decision that is plainly erroneous is not in accordance with law. *United States v. Lujan*, 268 F.3d 965, 967 (10th Cir. 2001) (citations omitted). "In general, we review [a tribunal's] evidentiary rulings for an abuse of discretion when they are properly preserved for appellate review." *State v. Allen*, 2000NMSC002, ¶ 17, 128 N.M. 482, 994 P.2d 728 (citation omitted). To preserve an error for appellate review, a party must fairly invoke a ruling from the tribunal. Rule 12216(A) NMRA ("To preserve a question for [appellate] review it must appear that a ruling or decision by the [tribunal] was fairly invoked."). If an evidentiary issue is not properly preserved, this Court may review for plain error. Rule 11103(E) NMRA. Plain error will be determined where the error affected a party's substantial rights. Rule 11103(A); *see also City of Albuquerque v. PCA-Albuquerque #19*, 1993-NMCA-043, ¶ 17, 115 N.M. 739, 858 P.2d 406 (setting aside the judgment because there was a high probability that improper admission of expert testimony influenced the jury's verdict, which affected a "substantial right" of the city (internal quotation marks omitted)). A party is entitled to relief when plain error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Lujan*, 268 F.3d at 967 (alteration in original) (internal quotation marks and citations omitted).[1]

III. DISCUSSION

The PRC erred by allowing Maggiore to represent AMR in a daylong hearing despite Living Cross's pending motion to disqualify her. Living Cross's motion to disqualify was timely. Living Cross moved to disqualify Maggiore on March 25, 2013, shortly after receiving notice of AMR's initial application, and specifically requested that the PRC rule on the motion "prior to taking any substantive action" on AMR's application. The PRC should have stayed the proceedings while it or a hearing examiner determined whether AMR's counsel was disqualified. This failure is especially egregious in light of the fact that the PRC was aware that one of its own hearing examiners had already disqualified Maggiore from representing AMR when Living Cross was an adverse party in another proceeding only eight months earlier.

"In the practice of law, there is no higher duty than one's loyalty to a client." *Roy D. Mercer, LLC v. Reynolds*, 2013NMSC002, ¶ 1, 292 P.3d 466. As such, our Rules of Professional Conduct prohibit attorneys from representing clients where a conflict of interest exists. *See, e.g.*, Rule 16107(A)(1) NMRA (stating that attorneys cannot represent a client if the representation would be "directly adverse to another client"); *see also* Rule 16110 NMRA (the conflicts of interest of a single attorney are imputed to the entire firm). The Rules of Professional Conduct place an affirmative duty on attorneys to protect their clients, even after the representation of a client

[1]Review of unpreserved error under appellate preservation Rule 12216(B)(2) does "not preclude the appellate court from considering . . . , in its discretion, questions involving . . . fundamental error or fundamental rights of a party." However, fundamental error applies "solely to prevent a miscarriage of justice," while "review [of unpreserved error] on the basis of plain error is less stringent." *State v. Lucero*, 1993NMSC064, ¶¶ 12-13, 116 N.M. 450, 863 P.2d 1071 (internal quotation marks and citation omitted). "Plain error, however, applies only to evidentiary matters." *Id.* ¶ 13.

has ended, by not working on cases that are materially adverse to the interests of a former client. Rule 16109(A) (proscribing an attorney's representation of a client "in the same or a substantially related matter" if the client's interests are "materially adverse" to those of a former client); *Mercer*, 2013NMSC002, ¶ 14 ("Clients must be secure in their understanding that attorneys will maintain their confidences, even after the termination of an attorney-client relationship."). We have previously indicated that disqualification based on a conflict of interest should take place before a hearing on the merits under Rule 16110. *See Mercer*, 2013NMSC002, ¶ 39 ("In failing to disqualify the . . . firm, the district court misapplied the plain language of Rule 16110(C) mandating disqualification. [The client] would have been forced to go through a trial on the merits with the potential of a breach of client confidences. That potential breach is simply unacceptable.").

Other courts have also held that disqualification must be determined prior to moving forward with substantive proceedings. "[W]hen counsel is disqualified, a court should not reach the other questions or motions presented to it through the disqualified counsel." *Bowers v. Ophthalmology Grp.*, 733 F.3d 647, 654 (6th Cir. 2013). In *Bowers*, the Sixth Circuit Court of Appeals vacated the district court's summary judgment in favor of a defendant where the plaintiff had moved to disqualify the defendant's attorney because another attorney at the firm of the defendant's attorney had previously represented the plaintiff. *Id.* at 649. The court reasoned as follows:

> A district court must rule on a motion for disqualification of counsel prior to ruling on a dispositive motion because the success of a disqualification motion has the potential to change the proceedings entirely. . . . The reason is simple: if counsel has a conflict from previously representing the party seeking disqualification . . . there is a risk that confidential information could be used in preparing or defending the [dispositive] motion. . . . In other words, a potentially conflicted counsel's confidential information could infect the evidence presented to the district court. Therefore, a district court must reach the merits of a disqualification motion before ruling on a dispositive motion.

Id. at 65455 (citation omitted). Thus, once a party moves to disqualify an adverse party's counsel based on counsel's former representation of the movant, all substantive proceedings must cease until the tribunal determines whether counsel is disqualified.

In this case, after a thorough record review, the hearing examiner correctly determined that Maggiore was disqualified because she had previously represented Living Cross in "substantially related matters." The hearing examiner discussed a series of substantially related prior proceedings in which either Maggiore or her law firm represented Living Cross, stemming "from an incident in Valencia County . . . [in which] a minor child died at a scene to which a Living Cross ambulance had been dispatched and provided emergency services." First, Maggiore's law firm defended Living Cross in a wrongful death action in which the child's family alleged that a contributing cause of the child's death was Living Cross's delay in arriving on scene. Second, a year after the

child's death, PRC staff initiated an investigation of Living Cross, and the PRC ordered Living Cross to show cause why it should not be fined for violations of the Motor Carrier Act because of the child's death. Maggiore defended Living Cross against the show cause order, and her law firm represented Living Cross in the subsequent appeal from those proceedings in this Court. The hearing examiner explained that Maggiore and her law firm "were involved in the discovery and investigation by [PRC] Staff in the Show Cause investigation and proceeding, the discussions related to that investigation, and the wrongful death claim . . . . [T]he issues addressed in those matters encompassed every aspect of Living Cross operations."

The hearing examiner quoted Rule 16109 and correctly characterized the legal standard to be applied to these facts. "Matters are 'substantially related' for purposes of [Rule 16109] if . . . there . . . is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." Rule 16109 cmt 3. The hearing examiner recognized that not only does the rule require disqualification when factual information was actually disclosed, but that "the prohibition should also be extended to the 'appearance' that confidential information might have been given to the attorney in the prior representation." *See State v. Barnett*, 1998NMCA105, ¶¶ 18, 24, 125 N.M. 739, 965 P.2d 323 ("[W]hether there is a substantial relationship turns on the . . . appearance thereof." (internal quotation marks and citations omitted)).

Once the tribunal determines that there was a substantial relationship between the former representation and the current proceedings, "an irrebuttable presumption arises that the former client revealed facts requiring the attorney's disqualification." *Koch v. Koch Indus.*, 798 F. Supp. 1525, 1536 (D. Kan. 1992). "The court need not inquire into whether the confidential information was actually revealed or whether the attorney would be likely to use the information to the disadvantage of the former client. To conduct such an inquiry would frustrate the former client's interest in the confidential information." *Id.* (citations omitted). "Doubts as to whether a substantial relationship exists should be resolved in favor of disqualification." *Id.* at 1537.

Despite the hearing examiner's finding that ample grounds for disqualification existed in this case, the hearing examiner did not craft an adequate remedy because he put the burden on Living Cross to object to "specific materials" that were prepared by Maggiore. Objecting to specific materials would not have cured the defect because the PRC had already ignored the conflict of interest issue that Living Cross raised and allowed Maggiore to appear on behalf of AMR, give an opening statement, direct the examination of five witnesses, and crossexamine Living Cross's witnesses. On the basis of Maggiore's representation, AMR was granted temporary authority and began operating in Valencia County. Had proper procedures been followed, AMR would have had to procure other counsel before the hearing on temporary authority, and it could not have received the benefit of Maggiore's knowledge of confidential information regarding Living Cross. In this case, objecting piecemeal to evidence that Living Cross believed was tainted by the conflict would in no way vindicate the underlying interests protected by Rule 16109: preserving client

confidences and the fairness of hearings. We must presume that confidential information was used against Living Cross in the first hearing, *see Koch*, 798 F. Supp. at 1536, and that AMR had already gained an advantage by using that impermissible information. Objection at the permanent certification hearing would not change that fact.

Another troubling aspect of the procedure in this case is that our review of the record reveals no justification for why the PRC allowed Maggiore to represent AMR at the April 3 hearing in the face of a motion to disqualify her. Commission Chairman Ben Hall stated at the very beginning of the hearing, "the motion to disqualify the counsel filed by Living Cross will not be addressed in this public hearing. Due to the emergency of this proceeding, decision on the motion will be addressed by the Commission during the regular agenda later on today." The PRC did not state any reasons for its characterization of the hearing as an emergency, either in that initial statement or at any time during the proceeding, nor did the PRC explain why the hearing had been conducted on an emergency basis in its written order granting temporary authority issued the following day. The parties did not ask the PRC to hold an emergency hearing. AMR's original application does not appear to include a request to expedite the hearing or to grant temporary authority on an emergency basis, nor did testimony at the hearing establish a need for the hearing to be conducted on an emergency basis. To the contrary, AMR's only two witnesses to address the subject both stated that there were no lifethreatening emergencies to date due to Living Cross's alleged failures. Commissioner Espinoza asked AMR's first witness, Valencia County Fire Chief Steven Gonzales, whether he could talk about any lifethreatening incidents that had resulted from Living Cross's unavailability. Chief Gonzales responded that "we don't have any that were lifethreatening or critical, per se." Division Chief Nicholas Moya of the Valencia County Fire Department also stated, "[l]uckily, for the majority of the part there haven't been too many lifethreatening injuries, but it's only going to take that one where we have nobody to respond that's going to make a difference." On this record, it is not possible to discern why the PRC maintained that it was acting in an emergency situation such that the Rules of Professional Conduct should suddenly cease to apply. This procedure was entirely inadequate in protecting the integrity of the judicial process.

After Maggiore was disqualified, AMR submitted prefiled testimony as exhibits in support of its application for permanent authority. That testimony was nearly a wordforword transcription of the direct examinations Maggiore conducted at the April 3 hearing. At the opening of the final hearing, AMR moved into evidence a complete transcript of the entire April 3 hearing. The prefiled testimony was separately admitted into evidence during the final hearing as well, although the substance of that testimony consisted of the questions Maggiore posed to witnesses in the April 3 hearing and the answers the witnesses gave to her questions.

Living Cross objected neither to the admission of the prefiled testimony nor to the admission of the entire contents of the April 3 hearing, arguing in this appeal that such objection would have been pointless before a hearing examiner who has no independent power to exclude testimony that the PRC had already allowed. Living Cross did raise the objection again in its exceptions to the recommended decision after the hearing examiner issued her recommended decision,

which was filed with the PRC. AMR contends that Living Cross's failure to make a timely objection waived the objection. Nevertheless, the PRC's error in failing to disqualify Maggiore prior to conducting substantive proceedings is an error that runs directly contrary to the procedure mandated by case precedent and the mandates of our Rules of Professional Conduct. Indeed, the PRC had the benefit of our December 2012 opinion in *Mercer*, in which we instructed tribunals not to proceed with any substantive matters until it decided the merits of a pending motion to disqualify counsel. 2013NMSC002, ¶ 39.

Failing to stay the proceedings until a determination of whether counsel was disqualified was "simply unacceptable," *id.*, and we accordingly hold that the PRC committed reversible error when it allowed a potentially disqualified attorney to conduct a hearing over the objection of opposing counsel. We take this opportunity to stress the absolute importance of the conflict of interest provisions of the Rules of Professional Conduct. It is essential that a tribunal determine whether an attorney or a law firm is disqualified from a case immediately upon being alerted to a potential conflict of interest. Until that determination is made, no further proceedings may take place. Conflicts of interest, left unchecked, could taint an entire case and call into question the integrity of the attorneyclient relationship. A potentially conflicted attorney has a duty to step down from the case immediately upon discovering the conflict of interest. If the attorney flouts his or her professional duty to do so, the tribunal has a duty to immediately stay the proceedings to determine whether a conflict exists. Failing to stay the proceedings was error that seriously affected the fairness, integrity, or public reputation of the proceedings. Living Cross should have persisted in its objection to the admission of any evidence elicited by Maggiore, even before the hearing examiner. Nevertheless, because the PRC ultimately concluded that Maggiore did have a conflict of interest, it was plain error for the PRC to admit the prefiled testimony and the entire contents of the April 3 hearing as evidence in the permanency hearing. We reverse and vacate the grant of temporary authority and the permanent certificate to AMR without prejudice to AMR's right to file a new application under current law for temporary authority and/or a permanent certificate.

IV. CONCLUSION

The PRC erred when it allowed an attorney to represent a party in a daylong hearing, including direct and crossexamination of eight witnesses, when opposing counsel had previously moved to disqualify that attorney for a conflict of interest. The wholesale admission of the record from the hearing for a temporary permit as evidence in the hearing for a permanent certificate was plain error. Accordingly, we vacate the grant of temporary authority and the permanent certificate to AMR. AMR may file a new application for a permanent certificate to operate in Valencia County according to the laws in effect at the time of the new application.

IT IS SO ORDERED.

EDWARD L. CHÁVEZ, Justice

WE CONCUR:

BARBARA J. VIGIL, Chief Justice

PETRA JIMENEZ MAES, Senior Justice

RICHARD C. BOSSON, Justice

CHARLES W. DANIELS, Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2014-NMSC-037

Filing Date: November 6, 2014

Docket No. 34,128

SARA BENAVIDES,

Worker-Petitioner,

v.

EASTERN NEW MEXICO MEDICAL CENTER and ZURICH AMERICAN INSURANCE COMPANY,

Employer/Insurer-Respondents.

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Albuquerque, NM

for Petitioner

Hale & Dixon, P.C.
Timothy S. Hale
Albuquerque, NM

for Respondents

OPINION

MAES, Justice.

When a worker's injury "results from the negligence of the employer in failing to supply reasonable safety devices in general use for the use or protection of the worker," the Workers' Compensation Act (the Act) provides that a worker's benefits shall be increased by 10%. NMSA 1978, §§ 52-1-1 to -70 (1929, as amended through 2013). In this case we determine whether a "wet floor" sign is a safety device and whether a nurse who slips on a recently mopped floor at work is entitled to a 10% increase in benefits when a "wet floor" sign was not posted near the mopped floor. We hold that a "wet floor" sign is a safety device and that the nurse's injury resulted from the negligence of the employer in failing to supply reasonable safety devices in general use. In addition, we hold that Section 52-5-1 of the Act does not violate the doctrine of separation of powers.

I. FACTS AND PROCEDURAL HISTORY

Sara L. Benavides (Worker), a registered nurse working for Eastern New Mexico Medical Center (Employer), slipped and fell on a wet floor in the Medical Center and sustained compensable injuries in 2006. Worker seriously injured her right leg, right hip, lower back, and neck. Soon after, Worker began receiving temporary total disability benefits of $585.89 per week, the maximum rate for a 2006 injury. Worker has continued to receive benefits at this rate.

In 2011, Employer filed a complaint seeking a determination of permanent partial disability benefits and maximum medical improvement. Worker filed an amended

answer and counterclaim requesting, among other things, a 10% increase in benefits due to a failure to supply a safety device pursuant to Section 52-1-10(B). Worker claimed that "wet floor" signs are a safety device and because they were not posted in or around the patient's room where she fell, she was entitled to the 10% safety device penalty. Employer denied the safety device allegation and demanded strict proof which resulted in a full evidentiary hearing before the Workers' Compensation Judge (WCJ).

At the hearing, only three witnesses testified: Worker; William Fladd, Employer's Director of Environmental Services; and Rose Blount, another registered nurse who worked for Employer. Mr. Fladd testified that it has been his practice to supply each housekeeping cart with two to four "wet floor" signs. He said that it is Employer's policy and procedure to place a "wet floor" sign near the entrance of the room being mopped before mopping and to remove the "wet floor" sign after the floor has dried. Mr. Fladd stated that the purpose of a "wet floor" sign is "to notify people of a potentially dangerous situation." At trial, Mr. Fladd stated that he had disciplined employees in the past who failed to post "wet floor" signs.

Ms. Blount testified that on the same day that Worker suffered her injury, she also slipped but did not fall on a wet floor when she was attending to a patient, and that no "wet floor" signs were posted in or around the room. Ms. Blount warned her patient not to get out of bed after the patient informed her that "housekeeping just mopped the floor." Ms. Blount stated that she walked up and down the hall looking for a housekeeper, but she could not find one, nor did she see a housekeeping cart or a "wet floor" sign. Ms. Blount then asked the unit secretary to call housekeeping to request a "wet floor" sign while she watched the door to make sure that nobody was injured.

Worker testified that as she entered a patient's room to administer medication, she took about three steps and "just slipped," landing on her pubic bone and twisting her whole torso. Worker described the pain as feeling as if somebody had sliced the back of her calf with a knife and that her whole foot was throbbing. Worker remained on the floor for at least five minutes until she crawled to the sink to gather paper towels to place over the floor because she "noticed it was very wet" and she "didn't want anybody else to fall." As Worker left the room, she noticed that there was not a "wet floor" sign outside of the patient's room and she did not see any other "wet floor" signs in the hall. Worker witnessed Ms. Blount at the nurse's station requesting that somebody post "wet floor" signs. Soon after, "wet floor" signs were posted.

The WCJ entered a compensation order finding that "wet floor" signs were safety devices, and that Employer did supply "wet floor" signs but that they were not deployed as they should have been. Nevertheless, the WCJ concluded in his compensation order that "Employer provided all safety devices which were appropriate, as required by statute, or in general use," and that increased benefits under Section 52-1-10(B) were inappropriate.

Worker timely appealed. The Court of Appeals affirmed, holding that *Jaramillo v. Anaconda Co.*, 1981-NMCA-030, 95 N.M. 728, 625 P.2d 1245, is controlling in this case. *Benavides v. Eastern N.M. Med. Ctr.*, No. 32,450, mem. op. ¶ 4 (N.M. Ct. App. Mar. 25, 2013) (non-precedential). In *Jaramillo*, the Court of Appeals held that the "failure to

provide" language in Section 52-1-10(B) did not apply to a situation where a safety device is provided by an employer but is not properly employed by a fellow employee. *Jaramillo*, 1981-NMCA-030, ¶ 8. Because this was "precisely what happened here," the Court of Appeals denied the 10% increase in benefits. *Benavides*, No. 32,450, mem. op. ¶ 3.

Worker appealed the following issue to this Court: "Whether an injured worker is entitled to an increase in benefits pursuant to [Section] 52-1-10(B) if an employer fails to provide a safety device at a potentially dangerous or hazardous work site." We granted certiorari.

II. STANDARD OF REVIEW

"We review factual findings of Workers' Compensation Administration judges under a whole record standard of review". *Dewitt v. Rent-A-Center, Inc.*, 2009-NMSC-032, ¶ 12, 146 N.M. 453, 212 P.3d 341. "Substantial evidence on the record as a whole is evidence demonstrating the reasonableness of an agency's decision, and we neither reweigh the evidence nor replace the fact finder's conclusions with our own." *Id.* (internal citation omitted). We will uphold the Board's decision if we "find evidence that is credible in light of the whole record and that is sufficient for a reasonable mind to accept as adequate to support the conclusion reached by the agency." *Herman v. Miners' Hosp.*, 1991-NMSC-021, ¶ 6, 111 N.M. 550, 807 P.2d 734 (internal quotation marks and citation omitted). "[A]lthough the evidence may support inconsistent findings, we will not disturb the agency's finding if supported by substantial evidence on the record as a whole." *Id.*

"In reviewing a WCJ's interpretation of statutory requirements, we apply a de novo standard of review". *Dewitt*, 2009-NMSC-032, ¶ 14.

> "We look first to the plain meaning of the statute's words, and we construe the provisions of the Act together to produce a harmonious whole. "After we determine the meaning of the statutes, we review the whole record to determine whether the WCJ's findings and award are supported by substantial evidence."

Id. (citation omitted).

III. DISCUSSION

Section 52-1-10(B) provides:

> In case an injury to, or death of, a worker results from the failure of an employer to provide safety devices required by law or, in any industry in which safety devices are not prescribed by statute, if an injury to, or death of, a worker results from the negligence of the employer in failing to supply reasonable safety devices in general use for the use or protection of the worker, then the compensation otherwise payable under the Worker's Compensation Act shall be increased ten percent.

Worker and Employer both argue that the statutory language is unambiguous as to the requirement to provide safety devices. The parties differ, however, as to whether a "wet floor" sign is a safety device and what is required by the language "supply reasonable safety devices."

A. A "wet floor" sign is a safety device

Worker argues that a "wet floor" sign is a safety device because its purpose is to warn of a potential danger or hazard. Employer answers that signs promote safety, which is different from an actual safety device, such as a machine guard.

What is a reasonable safety device is a factual question. *Martinez v. Zia Co.*, 1983-NMCA-063, ¶ 15, 100 N.M. 8, 664 P.2d 1021. A safety device is something which "'will lessen danger or secure safety,' as something tangible, concrete, that can be seen, touched or felt—an 'instrumentality'—as opposed to a rule or course of conduct." *Montoya v. Kennecott Copper Corp.*, 1956-NMSC-062, ¶¶ 13-14, 61 N.M. 268, 299 P.2d 84. "[W]hat is or is not a safety device depends on the purpose involved." *Martinez*, 1983-NMCA-063, ¶ 15. "The term 'safety device' must be given a broad interpretation so as to include any practical or reasonable method of lessening or preventing a specific danger to which a workman is exposed." *Jaramillo*, 1981-NMCA-030, ¶ 23.

Examples of tangible safety devices that lessen a specific danger include the following: goggles used to protect workers' eyes from flying particles, *Pino v. Ozark Smelting & Mining Co.*, 1930-NMSC-057, ¶¶ 5, 14, 35 N.M. 87, 290 P. 409; guard rails on a platform to protect workers from falling, *Thwaits v. Kennecott Copper Corp., Chino Mines Div.*, 1948-NMSC-019, ¶¶ 13, 18, 52 N.M. 107, 192 P.2d 553; a gas indicator to give notice of the presence of deadly gases, *Apodaca v. Allison & Haney*, 1953-NMSC-048, ¶¶ 12, 21, 57 N.M. 315, 258 P.2d 711; cable clamps to prevent a drill cable from falling into a water well and entangling a worker, *Flippo v. Martin*, 1948-NMSC-060, ¶¶ 2, 3, 7, 52 N.M. 402, 200 P.2d 366; a rear view mirror on a tractor that allowed the operator to see behind him or her, *Martinez*, 1983-NMCA-063, ¶¶ 12, 16; a manhole cover to protect workers from falling into an open manhole, *Jaramillo*, 1981-NMCA-030, ¶ 4.

"However, not all things which promote safety can be considered as safety devices, and even those things which might be safety devices for one purpose may not be so for another purpose." *Hicks v. Artesia Alfalfa Growers' Ass'n*, 1959-NMSC-076, ¶ 9, 66 N.M. 165, 344 P.2d 475. In *Hicks*, an employee was injured when unloading sections of a prefabricated steel building from a railroad car. *Id.* ¶¶ 3-4. The injury occurred because all of the heavy gauge steel wires holding the sections in place were cut at the same time instead of separately for each section. *Id. Hicks* held that the method of removing the wires during unloading "would not ordinarily be considered as having any relationship to safety devices to be used for unloading." *Id.* ¶ 9. Besides courses of conduct, ordinary hand tools, such as a wrench, are not safety devices. *Rowland v. Reynolds Elec. Eng'g Co.*, 1951-NMSC-046, ¶¶ 8-9, 55 N.M. 287, 232 P.2d 689.

From our reading of the statute as a whole and our interpretation of New Mexico case law, we conclude that a safety device is something specific and tangible that prevents a specific danger; courses of conduct, rules, or ordinary hand tools are not safety devices. Accordingly, we find that a "wet floor" sign is "something tangible, concrete, that can be seen, touched or felt," *Montoya*, 1956-NMSC-062, ¶ 14, not a rule or course of conduct like the unloading of a railroad car. *See Hicks*, 1959-NMSC-076, ¶ 3.

A "wet floor" sign warns of the

specific danger of a slippery floor, just as eye goggles protect a worker from the specific danger of flying particles and a gas indicator warns workers of the specific danger of harmful gasses. *See Pino*, 1930-NMSC-057, ¶¶ 5, 14; *Apodaca*, 1953-NMSC-048, ¶¶ 12, 21. Mr. Fladd testified that the purpose of a "wet floor" sign is to "notify people of a potentially dangerous situation." Ms. Blount recognized the specific danger of a wet floor when she warned her patient not to get out of bed because of the danger of slipping and falling. Worker overcame her injuries to clean up the wet floor with paper towels to reduce the specific risk of a wet floor. We also interpret the term safety device broadly in order to protect employees from specific dangers to which they are exposed. *Jaramillo*, 1981-NMCA-030, ¶ 23. Accordingly, we conclude that a "wet floor" sign is a safety device because it is a tangible device that lessens a specific danger and helps to keep workers safe.

Section 52-1-10(B) also requires that the safety device be in "general use." "General use" means "prevalent, usual, extensive though not universal, wide spread." *Martinez*, 1983-NMCA-063, ¶ 17 (internal quotation marks and citation omitted). General use "is a matter of fact and not of opinion" and "proof of the fact may be established either by testimony of specific uses, or by evidence of general practice of contractors." *Romero v. H. A. Lott, Inc.*, 1962-NMSC-037, ¶ 12, 70 N.M. 40, 369 P.2d 777 (citations omitted).

Mr. Fladd testified that it was Employer's usual practice and policy to display "wet floor" signs before mopping and to remove them once the floor has dried. Mr. Fladd also stated that he reprimanded his employees for failing to use "wet floor" signs. Based on Mr. Fladd's testimony of specific and general uses of "wet floor" signs, we hold that "wet floor" signs were in general use and that a "wet floor" sign is a safety device in general use under Section 52-1-10(B).

B. Worker is entitled to a 10% increase in benefits because Employer failed to supply a "wet floor" sign

The safety device statute "was passed to compel employers to supply reasonable safety devices in general use for the protection of the workmen where safety devices are not specified by law. Only by observing it may employers avoid liability under it for compensable injuries to their employees." *Apodaca*, 1953-NMSC-048, ¶ 11. The penalty statute "is a recognition of and an attempt to correct the disproportion which might exist between the misconduct and the penalty. . . . The result is an incentive to both parties to observe safe practices". *Baca v. Gutierrez*, 1967-NMSC-021, ¶ 11, 77 N.M. 428, 423 P.2d 617. We have not found any ordinance or statute that requires "wet floor" signs, nor do the parties cite to any such law; thus the key question is whether Employer negligently failed to "supply" a "wet floor" sign. *Cf. Jones v. Int'l Minerals & Chem. Corp.*, 1949-NMSC-015, ¶¶ 8,12, 53 N.M. 127, 202 P.2d 1080 (explaining that an improved electrical switch was required by the Mine Safety Act).

Worker contends that it "defies logic and reason" to conclude that Employer supplied a "wet floor" sign when it was not posted near or around the wet floor. The fact that Employer had "wet floor" signs on nearby carts, Worker asserts, is not sufficient to prove that Employer supplied "wet floor" signs. Worker also argues that the Court of Appeals' decision is contrary to NMSA 1978, Section 52-1-8 (1989), titled "Defenses to action by employee." Because

part of the "no fault" system of the Act, several common law defenses previously available to employers were abolished, including negligence of "a fellow servant," Worker contends that housekeeping staff were "fellow servants," therefore the WCJ erred by attributing negligence to the staff instead of Employer.

Employer counters that Section 52-1-10(B) is unambiguous in its requirement that an employer only supply safety devices; the language does not make the employer the "insurer of his employees' safety." Employer cites to *Jaramillo* in support of its argument that reading the statute to obligate employers to monitor all devices at all times, or to "watchdog" careless employees, is to read more into the statute than it contains.

The first guide to statutory interpretation is the actual wording of the statute. *Dewitt*, 2009-NMSC-032, ¶ 29. However, this Court has advised that a literal interpretation of the Act is not always appropriate because "the provisions of the [Act] are imprecise. . . . This serves as a warning that the plain language rule may not be the best approach to interpreting this statute." *Chavez v. Mountain States Constructors*, 1996-NMSC-070, ¶ 25, 122 N.M. 579, 929 P.2d 971. When the statutory language is ambiguous "we can consider principles of statutory construction that are employed with statutes that are unclear. In doing so, we must attempt to construe a statute according to its obvious spirit or reason." *Dewitt*, 2009-NMSC-032, ¶ 29 (internal quotation marks and citation omitted). Additionally, "we strive to read related statutes in harmony so as to give effect to all provisions." *N.M. Indus. Energy Consumers v. PRC*, 2007-NMSC-053, ¶ 20, 142 N.M. 533, 168 P.3d 105.

"Supply" is defined as, "[t]o furnish or provide (a person) *with* something." XVII The Oxford English Dictionary 256 (2d ed. 1989) (alteration in original). We do not read anything in the definition of "supply" nor glean anything from its common understanding that specifies whether furnishing or providing a person with a safety device means requiring the use of the safety device. Thus, we turn to precedent and other tools of statutory construction.

In *Usery v. Kennecott Copper Corp.*, the Tenth Circuit held that "provide" does not mean "require use." 577 F.2d 1113, 1118-1119 (10th Cir. 1977). According to *Usery*, this result is mandated by the plain meaning of the word "provide," which must be used in interpreting the Occupational Safety and Health Act, which does not require the prevention of "all accidents, but to provide American employees with safe and healthful working conditions 'so far as possible.'" *Id.* at 1118. We find the *Usery* interpretation too formalistic and in contradiction of the requirement that the plain language rule does not end our inquiry. *See also* NMSA 1978, § 50-9-21(A) (1993) ("Nothing in the Occupational Health and Safety Act shall be construed or held to supersede or in any manner affect the Workers' Compensation Act.").

Instead, we must also construe the statute "according to its obvious spirit or reason." *Dewitt*, 2009-NMSC-032, ¶ 29. (internal quotation marks and citation omitted). "The legislature enacted [this section] as a penalty system, placing the duty on the employer to furnish adequate safety devices in general use . . . , and in the event of his failure to do so, making him liable to be found guilty of negligence and subject to the

penalty provided." *Baca*, 1967-NMSC-021, ¶ 13.

> The legislative history of the [Occupational Safety and Health] Act is clear that "final responsibility for compliance with the requirements of this Act remains with the employer." It is difficult to conceive of any rationale that, in the face of employee head, eye, hand, and other injuries, permits an employer to escape responsibility and compliance duties under the [Occupational Safety and Health] Act by simply pointing to shelves filled with unused hardhats, goggles, gloves, and other protective equipment.

Mark A. Rothstein, *Occupational Safety and Health Law*, § 5:7 (2013 ed.).

In this case, the Court of Appeals held that *Jaramillo* is controlling. In *Jaramillo* a mine worker fell through a manhole when an insecure cover shifted as he stepped on it. 1981-NMCA-030, ¶ 2.The safety device in question in *Jaramillo* was a manhole cover, provided by the employer at the work site but "left uncovered by the negligence of fellow employees." *Id.* ¶¶ 4-5. We hold that *Jaramillo* is not controlling in this case because a "wet floor" sign was not near the site of the accident. Moreover, the negligence of the fellow employee in this case was the complete failure to deploy a "wet floor" sign after mopping, not merely deploying the sign incorrectly.

This case is more analogous to *Martinez*, 1983-NMCA-063, and *State, ex rel. Weich Roofing, Inc. v. Industrial Comm'n of Ohio*, 590 N.E.2d 781 (Ohio Ct. App. 1990). In *Martinez*, an equipment operator was injured while operating a Bobcat tractor that was not equipped with a rear view mirror. 1983-NMCA-063, ¶¶ 11-12. The employer had other Bobcats equipped with rear view mirrors. *Id.* ¶ 12. The Court of Appeals found that a rear view mirror was a safety device, that the employer failed to provide a rear view mirror, and affirmed the district court's award of an increase of benefits pursuant to Section 52-1-10(B). *Martinez*, 1983-NMCA-063, ¶¶ 16, 20, 26. The facts are similar here. Employer provided "wet floor" signs but one was not used at the accident site.

In *Weich Roofing*, a roofing employee ascended to the roof using a ladder equipped with safety feet in accordance with an applicable safety regulation. 590 N.E.2d at 782-83. While the employee was on the roof, a co-worker removed the ladder and substituted a wooden ladder without safety feet in its place. *Id.* at 783. The wooden ladder was the upper portion of an extension ladder. *Id.* The lower portion of the extension ladder had safety feet, but the upper portion did not. *Id.* When the employee descended from the roof, the wooden ladder slid out from under him causing injury. *Id.* The employer in *Weich Roofing* had specifically instructed employees to place safety shoes on the upper portion of an extension ladder when it was used separately and had made feet available on the crew's equipment truck. *Id.*

On appeal, the employer argued that safety feet were made available in the equipment truck and were therefore provided. *Id.* The employer also argued that the "co-employee's negligent removal of and failure to use available safety equipment in violation of company policy" relieved it of liability. *Id.* The Ohio court rejected employer's arguments, stating:

> Relator thus contends that the specific safety regulations require an employer to make required safety equipment available, not to ensure its proper use by employees. Nevertheless, this is not the law of Ohio. Specific safety requirements are enacted to protect the lives, health, or safety of employees. The employer, not the employee, has the obligation to comply with specific safety requirements. Although an employee or third-party may be assigned by the employer to ensure compliance with a specific safety requirement, the ultimate responsibility for failure to comply with such a requirement remains with the employer . . . . As this court recently observed, specific safety regulations are intended to protect employees from their own negligence, folly, or stupidity, in addition to providing them with a safe working environment.

Id.(internal quotation marks and citations omitted).

Weich Roofing is slightly different from this case because safety feet for ladders were specifically required by the Ohio Administrative Code. There is no such requirement for "wet floor" signs in New Mexico. Nonetheless, we find the rationale compelling and in line with the purpose and spirit of the Act that employers must create a safe work environment for their employees.

Having determined that a "wet floor" sign is an essential safety device at a work site where nurses are expected to promptly attend to the needs of numerous patients to provide critical care, we conclude that safety devices cannot effectuate their purposes if they are kept in utility closets or in storage. They must be "supplied" and "used" to prevent accidents. The mere fact that Employer had written policies and procedures in place and that "wet floor" signs were provided to custodians does not satisfy the spirit and purpose of the Act. Section 52-1-10(B) places the final responsibility and duty on the employer to furnish adequate safety devices for its workers. *See Baca*, 1967-NMSC-021, ¶ 13.

Worker was not warned of a dangerous situation when she entered the patient's room because there was not a "wet floor" sign posted near the room nor did she see any posted down the hallway. Further, the testimony from Mr. Fladd and Ms. Blount establish that this was not the only time that "wet floor" signs were not placed near a wet floor. Mr. Fladd testified that he had disciplined numerous of his employees for failing to post "wet floor" signs before Worker's accident. Ms. Blount testified that she also nearly fell on a slippery floor the same day as Worker and that no "wet floor" signs were posted. Worker and Ms. Blount had to take safety precautions into their own hands when Worker dried the wet floor with paper towels and Ms. Blount requested that "wet floor" signs be posted and stood watch to ensure that nobody else was injured on the slippery floor.

We also agree with Worker's contention that Section 52-1-8 prohibits shifting the blame for providing safety devices to the custodial staff. Section 52-1-8(B) states that it shall not be a defense "that the injury or death was caused, in whole or in part, by the want of ordinary care of a fellow servant." This language affirms that Section 52-1-10(B) imposes a responsibility on the employer to create a safe work environment by ensuring

that safety devices are supplied and properly employed.

The rights of workers and the rights of employers must be subject to the same standards. *See* Section 52-5-1; *Delgado v. Phelps Dodge Chino, Inc.*, 2001-NMSC-034, ¶1, 131 N.M. 272, 34 P.3d 1148. Section 52-1-10(A) provides that a worker's benefits shall be decreased by ten percent if an injury results from the worker's "failure to use a safety device provided by [the] employer." When Subsection (A) and (B) are read together, if a worker's failure to "use" a safety device results in a 10% decrease in benefits, then an employer's failure to "supply" a safety device should likewise result in a 10% increase in benefits.

We hold that Employer failed to supply a safety device and that Worker is entitled to a 10% increase under Section 52-1-10(B). We are not unmindful that under the Act an employer is not to be held strictly liable for all violations. We do not hold here that Employer must provide constant over-the-shoulder supervision for each of its employees, but we do hold that in order to fulfill its statutory obligation, Employer must do more than issue written policies and procedures to its employees or conduct "department training" shortly after hiring them.

C. Section 52-5-1 does not violate the doctrine of separation of powers

Worker asserts that interpretation of the laws is a power vested solely in the judiciary and that Section 52-5-1 is contrary to established case law that the Act should be interpreted under the rule of liberal construction. *See Mascarenas v. Kennedy*, 1964-NMSC-179, ¶4, 74 N.M. 665, 397 P.2d 312 ("We are firmly committed to the doctrine that the Workmen's Compensation Act is remedial legislation and must be liberally construed to effect its purpose."); *Avila v. Pleasuretime Soda, Inc.*, 1977-NMCA-079, ¶ 10, 90 N.M. 707, 568 P.2d 233 ("It requires no citation of authority that the Workmen's Compensation Act must be liberally construed to accomplish beneficent purposes for which it was enacted, and that all reasonable doubts must be resolved in favor of employees."). Section 52-5-1, titled "Purpose," reads in relevant part:

> It is the specific intent of the legislature that benefit claims cases be decided on their merits and that the common law rule of "liberal construction" based on the supposed "remedial" basis of workers' benefits legislation shall not apply in these cases. . . . Accordingly, the legislature declares that the Workers' Compensation Act . . . [is] not remedial in any sense and [is] not to be given a broad liberal construction in favor of the claimant or employee on the one hand, nor are the rights and interests of the employer to be favored over those of the employee on the other hand.

Employer answers that this issue was not preserved because it was raised for the first time in this appeal. In the alternative, Employer's only argument is that when the statutory language is clear and unambiguous, it must be given effect.

"To preserve a question for review it must appear that a ruling or decision" below was fairly invoked. Rule 12-216(A) NMRA. In *Montez v. J & B Radiator, Inc.*, the Court of Appeals held that claimant's failure to raise a

constitutional attack on the statute before the Workers' Compensation Division did not preclude appellate review, inasmuch as the Division had no authority to decide the issue. 1989-NMCA-060, ¶ 7, 108 N.M. 752, 779 P.2d 129. *Montez* further stated that "[r]aising such an issue before the hearing officer was not required in order to preserve it because he had no authority to decide the issue." *Id.*

The situation is similar here. Worker did not raise her constitutional argument in front of the WCJ. However, in her docketing statement to the Court of Appeals Worker did raise the question of "[w]hether the WCJ erred in his interpretation of § 52-1-10(B)." The Court of Appeals issued its Memorandum Opinion dismissing her appeal before any briefs were submitted. We hold that Worker's issue was preserved.

Worker's argument was previously advanced in *Garcia v. Mt. Taylor Millwork, Inc.*, 1989-NMCA-100, 111 N.M. 17, 801 P.2d 87. The Court of Appeals concluded that Section 52-5-1 was not an attempt to undermine the jurisprudence developed by the appellate courts. *Garcia*, 1989-NMCA-100, ¶ 9. Instead, the Court found Section 52-5-1 to be "a prospectively applicable statement of legislative intent that neither attempts nor purports to retroactively dismantle established workers' compensation case law enunciated under the rule of liberal construction." *Garcia*, 1989-NMCA-100, ¶ 9.

"We have repeatedly held that every presumption is to be indulged in favor of the validity and regularity of legislative enactments. A statute will not be declared unconstitutional unless the court is satisfied beyond all reasonable doubt that the legislature went outside the constitution in enacting the challenged legislation." *McGeehan v. Bunch*, 1975-NMSC-055, ¶ 7, 88 N.M. 308, 540 P.2d 238 (internal quotation marks and citations omitted). Where "a statute is susceptible to two constructions, one supporting it and the other rendering it void, a court should adopt the construction which will uphold its constitutionality." *Huey v. Lente*, 1973-NMSC-098, ¶ 6, 85 N.M. 597, 514 P.2d 1093. "The constitutional doctrine of separation of powers allows some overlap in the exercise of governmental function[s]." *Mowrer v. Rusk*, 1980-NMSC-113, ¶ 25, 95 N.M. 48, 618 P.2d 886.

By virtue of Worker's argument that Section 52-5-1 violates the doctrine of separation of powers and the holding in *Garcia* that it is only a statement of legislative intent, it is evident that Section 52-5-1 is susceptible to two constructions. We are not convinced "beyond all reasonable doubt" that the legislature overstepped its bounds in enacting Section 52-5-1. We agree with the Court of Appeals in *Garcia* that the legislature did not intend the courts to disregard precedent by applying liberal construction. *Garcia*, 1989-NMCA-100, ¶9. We also agree with the Court of Appeals that liberal construction can still be applied by this Court as it is but one of many tools employed in construing legislation. *Id.* ¶ 11. We hold that Section 52-5-1 does not violate the doctrine of separation of powers.

IV. CONCLUSION

Section 52-1-10(B) imposes a duty on employers to ensure that they maintain a safe work environment by providing necessary safety devices. Employer cannot be said to have supplied "wet floor" signs just because they were made available to custodians. Employer must ensure that such safety devices are properly employed to avoid accidents such

as Worker's. Therefore, Worker is entitled to a 10% increase in benefits. We also hold that Section 52-5-1 is constitutional.

IT IS SO ORDERED.

PETRA JIMENEZ MAES, Justice

WE CONCUR:

BARBARA J. VIGIL, 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: 2014-NMSC-038

Filing Date: November 6, 2014

Docket No. 34,531

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

WALTER ERNEST BROWN,

Defendant-Appellant.

Jody Neal-Post
Albuquerque, NM

Jorge A. Alvarado, Chief Public Defender
Jeff Rein, Assistant Public Defender
Albuquerque, NM

for Appellant

Office of the District Attorney
Guinevere Ice
Albuquerque, NM

for Appellee

OPINION

DANIELS, Justice.

The Bill of Rights of the New Mexico Constitution guarantees that "[a]ll persons . . . before conviction" are entitled to be released from custody pending trial without being required to post excessive bail, subject to limited exceptions in which release may be denied in certain capital cases and for narrow categories of repeat offenders. N.M. Const. art. II, § 13. Our rules of criminal procedure provide the mechanisms through which we honor this constitutional right to pretrial release. The rules require that a defendant be released from custody on the least restrictive conditions necessary to reasonably assure both the defendant's appearance in court and the safety of the community. *See* Rule 5-401 NMRA. In this case, Defendant Walter Brown presented the district court with uncontroverted evidence demonstrating that nonmonetary conditions of pretrial release were sufficient to reasonably assure that Defendant was not likely to pose a flight or safety risk. Despite this evidence, the district court ordered that Defendant be held in jail unless he posted a $250,000 cash or surety bond, based solely on the nature and

seriousness of the charged offense. We conclude that the district court erred by requiring a $250,000 bond when the evidence demonstrated that less restrictive conditions of pretrial release would be sufficient. We therefore entered an order reversing the district court's pretrial release order and instructing the district court to release Defendant on appropriate nonmonetary conditions. We now issue this precedential opinion to explain the basis for our decision, to clarify the purposes and controlling legal principles for setting bail, and to provide guidance for future pretrial release decisions.

I. FACTUAL AND PROCEDURAL BACKGROUND

Defendant Walter Brown was arrested on May 26, 2011, and indicted two weeks later on an array of charges, including first-degree felony murder and, alternatively, second-degree murder. The district court imposed a $250,000 cash or surety bond at Defendant's 2011 arraignment. After spending more than two years in pretrial custody awaiting trial because he lacked the financial resources to post such a high bond, Defendant moved the district court to review his conditions of release and to release him under the supervision of the Second Judicial District Court's pretrial services program with appropriate nonmonetary conditions of release. Defendant agreed to accept conditions of release that included monitoring by a GPS device, living with his father, making regular contact with the pretrial services program, and maintaining employment at a local restaurant that had agreed to hire him.

In support of his motion, Defendant provided the district court with extensive information about his personal history and characteristics. Defendant's nineteenth birthday occurred two months before his arrest in this case. An only child who has always lived with one or both of his parents, he cannot live independently due to developmental and intellectual disabilities. He attended special education classes throughout his school years in Albuquerque and has a second-grade comprehension level for math, writing, and reading. Defendant dropped out of high school during his senior year and subsequently worked at several local restaurants. In spite of his disabilities, while in pretrial detention he successfully completed a variety of educational and counseling programs and obtained a high school diploma.

At a hearing on his motion for release on nonmonetary conditions, Defendant presented testimony from Dr. James Harrington, a psychologist with the district court's pretrial services program who had interviewed and evaluated Defendant to determine whether he would be an appropriate candidate for supervised pretrial release. Dr. Harrington characterized Defendant as compliant, cooperative, and honest during the interview. Dr. Harrington concluded that Defendant exhibits none of the factors typically correlated with dangerousness or a risk of flight, such as prior criminal history or a history of mental illness or substance abuse. Dr. Harrington also verified that Defendant has the capacity to understand and comply with the proposed conditions of supervised release. Based on his evaluation, Dr. Harrington opined that Defendant was an appropriate candidate for release under the supervision of the pretrial services program with GPS monitoring.

The State declined to cross-examine Dr. Harrington or to present any evidence of its own. Instead, the State simply argued that the $250,000 bond should remain in place due to

the serious nature of the criminal charges against Defendant. In support of its argument, the State proffered an undisputed account of the factual circumstances underlying the charges. On the day of the alleged homicide while she was highly intoxicated, Defendant's acquaintance Rebecca Duran got into an altercation with several people at a house. Before leaving the house, Duran threatened to come back and "get even" with the people there. After leaving, Duran sought out Defendant and an acquaintance named Eugene Helfer and asked them to accompany her back to the house, where neither Duran nor Helfer nor Defendant lived, to retrieve Duran's personal belongings. Neither Defendant nor Helfer had been present during the earlier altercation.

When Duran returned to the house with Defendant and Helfer, they knocked on the front door; when there was no answer, they went around to the back of the house and entered by opening a sliding glass door. Once inside, Duran attacked several people and hit the victim in the head with a wrench. As explained by the State, Duran was "the one mostly arguing" and "starting stuff." At some point the victim pushed Helfer, who is Defendant's friend. Defendant reacted by stabbing the victim once with a folding pocket knife, fatally piercing the victim's heart.

After hearing from Defendant and the State, the district court orally denied Defendant's motion for release on nonmonetary conditions on the ground that Defendant's charge of first-degree felony murder carried a possible life sentence that would require at least thirty years of imprisonment. The district court subsequently filed a written order setting forth detailed factual findings. Based on the evidence presented at the motion hearing, the district court found that the pretrial services program could fashion appropriate conditions of release for Defendant and that Defendant could live with his father and return to his former job if released. The district court also found that Defendant's IQ is 70, that Defendant has longstanding ties in the community, and that Defendant has the support of both of his parents. The district court's findings included Dr. Harrington's conclusions that Defendant has no alcohol or substance abuse issues and no pending criminal proceedings or history of violence outside the allegations in this case. The district court found that Defendant had "been entirely compliant for the entirety of his pretrial incarceration of over 2 years and 4 months" and had "appeared timely and without incident at all scheduled hearings in this case." The district court called its findings "uncontroverted." And the district court explicitly found that the State had presented no information indicating that Defendant would commit new crimes, pose a danger to anyone, or fail to appear in court if released from custody. Despite these findings, the district court kept Defendant's $250,000 bond in place due to "the nature and seriousness of the alleged offense."

After several more months of pretrial confinement, Defendant filed a second motion, again seeking release under the supervision of the pretrial services program with appropriate nonmonetary release conditions. At a hearing on the second motion, defense counsel reiterated the information presented at the first hearing five months earlier and argued that Defendant's unique personal history made him likely to comply with conditions of release and unlikely to commit additional crimes while released. Dr. Harrington testified again that he deemed Defendant to be a good candidate for nonmonetary pretrial release. Defendant also

presented the testimony of Patrick Wojtowicz, the pretrial services officer likely to supervise Defendant if released. Mr. Wojtowicz verified that Defendant could live with his father and return to work if released. Mr. Wojtowicz confirmed that Defendant would be capable of using public transportation to get to the pretrial services office for appointments. And Mr. Wojtowicz agreed with Dr. Harrington that pretrial release with GPS monitoring and supervision by the pretrial services program would be a good fit for Defendant. Without specifically controverting the evidence presented at the hearing, the State argued against any change to Defendant's conditions of release on the theory that the seriousness of the charges alone justified the requirement of a $250,000 bond for release pending trial.

After hearing from the parties, the district court judge admitted that he was "absolutely impressed" with Defendant's presentation but "hesitant to act upon it." The district court orally denied Defendant's second motion to amend the conditions of pretrial release. Defense counsel asked the district court judge to clarify the reasons for his decision. The judge explained that the nature of the allegations and the potential sentence led the judge to believe that releasing Defendant "may present a danger of either flight or to other members of the community." The district court did not file a written order disposing of the second motion.

After the district court denied Defendant's second motion to amend the conditions of release, Defendant appealed to the Court of Appeals by filing a motion under Rule 12-204 NMRA, which provides the procedure for appealing a district court's pretrial release order. Defendant asked the Court of Appeals to reverse the pretrial release order and to enter an order setting appropriate conditions of release. The Court of Appeals transferred the appeal to this Court, which has exclusive appellate jurisdiction over cases involving potential sentences of life imprisonment. *See State v. Smallwood*, 2007-NMSC-005, ¶ 11, 141 N.M. 178, 152 P.3d 821 (holding that "the legislature intended for [the Supreme Court] to have jurisdiction over interlocutory appeals in situations where a defendant may possibly be sentenced to life imprisonment or death").

After hearing oral arguments from the parties, this Court filed an order (1) accepting the transfer from the Court of Appeals, (2) reversing the district court's pretrial release order, and (3) remanding this case to the district court to set appropriate nonmonetary conditions of release, including GPS monitoring and supervision by the district court's pretrial services program.

II. DISCUSSION

A. This Court Has Exclusive Jurisdiction over Defendant's Appeal Because He Faces a Possible Sentence of Life Imprisonment

As a preliminary matter we consider whether Defendant's appeal should be heard by this Court or by the Court of Appeals. The extent of this Court's appellate jurisdiction is a question of law that we review de novo. *See Lion's Gate Water v. D'Antonio*, 2009-NMSC-057, ¶ 18, 147 N.M. 523, 226 P.3d 622.

Article VI, Section 2 of the New Mexico Constitution gives this Court exclusive appellate jurisdiction over appeals from final district court judgments "imposing a sentence of death or life imprisonment" as

well as jurisdiction over other appeals "as may be provided by law." In this case, Defendant appeals from an interlocutory pretrial release order, not a final judgment. *See Tijerina v. Baker*, 1968-NMSC-009, ¶ 8, 78 N.M. 770, 438 P.2d 514 (per curiam) (concluding that a pretrial release order is interlocutory); *State v. David*, 1984-NMCA-119, ¶ 13, 102 N.M. 138, 692 P.2d 524 (explaining that an "interlocutory bail determination is not a final judgment").

Defendant's right to file this interlocutory appeal arises under NMSA 1978, Section 39-3-3(A)(2) (1972), which permits an appeal from a district court "order denying relief on a petition to review conditions of [pretrial] release." We have held that Section 39-3-3(A), in conjunction with Article VI, Section 2 of the New Mexico Constitution, gives this Court exclusive appellate jurisdiction over interlocutory appeals in criminal cases where the defendant faces a possible sentence of life imprisonment or death. *See Smallwood*, 2007-NMSC-005, ¶¶ 6-11. In *Smallwood*, we identified Section 39-3-3 as "the one statute dealing specifically with appellate jurisdiction over interlocutory appeals in criminal cases" and noted that the statute permits a defendant to appeal to either "'the supreme court or court of appeals, as appellate jurisdiction may be vested by law in these courts.'" *Smallwood*, 2007-NMSC-005, ¶ 9 (quoting Section 39-3-3(A)). Because the New Mexico Constitution vests this Court with exclusive appellate jurisdiction over final district court judgments imposing a sentence of life imprisonment or death, we concluded that Section 39-3-3(A) confers "this Court with jurisdiction over a criminal defendant's interlocutory appeal in cases where a sentence of life imprisonment or death *could be* imposed." *Smallwood*, 2007-NMSC-005, ¶ 10.

In this case, Defendant is charged with first-degree felony murder, an offense that carries a possible sentence of life imprisonment. *See* NMSA 1978, § 30-2-1(A) (1994); NMSA 1978, § 31-18-14 (2009). We therefore hold that this Court has exclusive appellate jurisdiction to consider Defendant's appeal.

Although this Court has exclusive appellate jurisdiction to hear Defendant's appeal, Defendant filed his appeal in the Court of Appeals. It appears that an inadvertent omission in our procedural rules may have caused Defendant's error. Under Rule 5-401(G), a person who has been unable "to meet the bail set[] shall, upon motion, be entitled to have a hearing to review the amount of bail set."[1] And if a person "continues to be detained" after such a hearing "because of a failure to meet a condition imposed," then that person may appeal "to the *Supreme Court or Court of Appeals*, as jurisdiction may be vested by law, in accordance with the Rules of Appellate Procedure." Rule 5-405(A) NMRA (emphasis added).

And although Rule 5-405(A) recognizes this Court's appellate jurisdiction to review certain pretrial release orders, Rule 12-204 NMRA of the Rules of Appellate Procedure instructs litigants to initiate such appeals by filing a motion in the Court of Appeals. *See* Rule 12-204(A) ("An appeal provided for by

[1]The term "bail" as used in this opinion may refer to either (1) the "process by which a person is released from custody either on the undertaking of a surety or on his or her own recognizance" or (2) the "security such as cash, a bond, or property" that a person must provide in order to gain such release. Black's Law Dictionary 167 (10th ed. 2014).

NMSA 1978, § 39-3-3A(2), and Rule 5-405 of the Rules of Criminal Procedure shall be taken by filing a motion with the clerk of *the court of appeals* within ten (10) days after the decision of the district court and serving a copy on the district attorney and the appellate division of the attorney general." (emphasis added)). We conclude that Rule 12-204 should be amended to reflect this Court's exclusive jurisdiction over interlocutory appeals from pretrial release orders in cases where the defendant faces a possible sentence of life imprisonment or death, and we ask our Rules of Appellate Procedure Committee to draft proposed rule amendments for this Court's consideration.

B. The District Court Failed to Impose the Least Restrictive Conditions of Release That Would Reasonably Assure Defendant's Appearance in Court and the Safety of the Community

We now turn to the merits of Defendant's appeal. Defendant argues that the district court erred by disregarding the undisputed evidence concerning his suitability for pretrial release and by basing its pretrial release order solely on the nature of the charges, excluding consideration of other factors that the district court must consider under Rule 5-401(C) of the Rules of Criminal Procedure for the District Courts. The State has maintained that a $250,000 bond is justified by the nature and seriousness of the charges in this case. In order to fully explain why we set aside the district court's pretrial release order in this case, we begin with an abbreviated review of the origins and history of bail and an examination of the bail provisions in the New Mexico Constitution and our rules of criminal procedure.

1. Constitutional Right to Bail in New Mexico

The New Mexico Constitution affords criminal defendants a right to bail in Article II, Section 13, which provides that "[a]ll persons shall, before conviction be bailable by sufficient sureties" and that "[e]xcessive bail shall not be required." These provisions were first incorporated into the written law of territorial New Mexico when Brigadier General Stephen Kearny promulgated the Kearny Bill of Rights in 1846. *See Kearny Bill of Rights*, cl. 9 (1846, reprinted in Vol. 1 of NMSA 1978) ("[A]ll persons shall be bailed by sufficient sureties, except in capital offenses where proof of guilt is evident."); *Kearny Bill of Rights*, cl. 10 ("[E]xcessive bail shall not be required."). Article II, Section 13 enshrines the principle that a person accused of a crime is entitled to retain personal freedom "until adjudged guilty by the court of last resort." *Tijerina*, 1968-NMSC-009, ¶ 9; *see Bandy v. United States*, 81 S. Ct. 197, 197 (1960) ("The fundamental tradition in this country is that one charged with a crime is not, in ordinary circumstances, imprisoned until after a judgment of guilt.").

Notwithstanding the presumption that all persons are bailable pending trial, the right to bail "is not absolute under all circumstances." *Tijerina*, 1968-NMSC-009, ¶ 9. Article II, Section 13 contains two exceptions that restrict the right to bail as to certain persons. First, the district court may deny bail altogether to a person charged with a capital offense if "the proof is evident or the presumption great." N.M. Const. art. II, § 13. Second, the district court may deny bail

> for a period of sixty days after the incarceration of the defendant by an order entered within seven days after

the incarceration, in the following instances:

A. the defendant is accused of a felony and has previously been convicted of two or more felonies, within the state, which felonies did not arise from the same transaction or a common transaction with the case at bar;

B. the defendant is accused of a felony involving the use of a deadly weapon and has a prior felony conviction, within the state. The period for incarceration without bail may be extended by any period of time by which trial is delayed by a motion for a continuance made by or on behalf of the defendant.

Id. A court cannot refuse to set bail and detain a defendant pending trial under either of these exceptions without first providing the defendant with adequate procedural due process protections, including the right to counsel, notice, and an opportunity to be heard. *See David*, 1984-NMCA-119, ¶ 23 (citing *Tijerina*, 1968-NMSC-009).

Once released, a defendant's continuing right to pretrial liberty is conditioned on the defendant's appearance in court, compliance with the law, and adherence to the conditions of pretrial release imposed by the court. *See* Rule 5-403(A) NMRA (providing that the court may revoke release "upon a showing that the defendant has been indicted or bound over for trial on a charge constituting a serious crime allegedly committed while released pending adjudication of a prior charge"); *State v. Segura*, 2014-NMCA-037, ¶ 8, 321 P.3d 140 (explaining that the court may revoke bail to ensure "the proper administration of justice" or "for violation of a condition of pretrial release" (internal quotation marks and citation omitted)). Accordingly, if a defendant fails to appear in court, commits additional crimes, or violates conditions of pretrial release, the court may, upon notice and hearing, revoke the defendant's release and remand the defendant into custody. *See Tijerina*, 1968-NMSC-009, ¶ 11 (noting that due process requires "notice and an opportunity to be heard before bond can be revoked and a defendant remanded to custody"); *Segura*, 2014-NMCA-037, ¶ 23 (concluding that the state has the burden of establishing facts to support a revocation of bail and that the defendant has a due process right to contest the state's evidence). *But cf. State v. Romero*, 2006-NMCA-126, ¶¶ 1-2, 140 N.M. 524, 143 P.3d 763 (holding that a bail bond may be forfeited for failure to appear but not for violation of other conditions of release), *aff'd*, 2007-NMSC-030, ¶ 6, 141 N.M. 733, 160 P.3d 914. Under all other circumstances, the New Mexico Constitution requires that "[a]ll persons shall . . . be bailable by sufficient sureties" and that "[e]xcessive bail shall not be required." N.M. Const. art. II, § 13.

2. Origins and History of Bail in England

The right to pretrial release set forth in the New Mexico Constitution has roots that extend back to medieval England, where bail originated "as a device to free untried prisoners." Daniel J. Freed & Patricia M. Wald, *Bail in the United States: 1964* 1 (1964); *see* IV William Blackstone, *Commentaries on the Laws of England in Four Books* 1690 (Rees Welsh & Co. 1902) (1769) ("By the ancient common law, before and since the [Norman] conquest, all felonies were bailable, till murder was excepted by statute; so that persons might be admitted to bail before conviction almost in every case." (footnotes omitted)). *See generally* William F.

Duker, *The Right to Bail: A Historical Inquiry*, 42 Alb. L. Rev. 33, 34-66 (1977) (describing the origins and history of bail in England); Elsa de Haas, *Antiquities of Bail* 128 (1940) (concluding that the "root idea of the modern right to bail" came from "tribal custom on the continent of Europe").

During the Anglo-Saxon period in England before the Norman conquest, the penalty for most crimes was a monetary fine paid as compensation to the victim. *See* June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 Syracuse L. Rev. 517, 519-20 (1983). Under this system of justice, the sheriff often required the accused to secure a third party, or surety, to guarantee the appearance of the accused for trial and the payment of the fine upon conviction. *See id.* at 520; *see also Bail: An Ancient Practice Reexamined*, 70 Yale L.J. 966, 966 (1961). The amount of money pledged as bail was identical to the penalty prospect upon a conviction, and the surety was required to pay the fine if the accused failed to appear for trial. Carbone, *supra*, at 520. This system of bail ensured victim compensation and deterred pretrial flight because the surety bore financial responsibility for payment of the penalty and had an incentive to produce the accused for trial. *Id.*

Following the Norman conquest of 1066, capital and corporal punishment began gradually to replace monetary fines as the penalty for most offenses, and accused persons faced longer delays between accusation and trial as they waited for traveling judges to arrive and dispense local justice. *See id.* at 519, 521; *see also* Freed & Wald, *supra*, at 1 ("Disease-ridden jails and delayed trials by traveling justices necessitated an alternative to holding accused persons in pretrial custody."). The development of corporal and capital punishment complicated the use of bail because the amount of money pledged no longer correlated directly to the potential punishment. Carbone, *supra*, at 522. The endowment of local sheriffs with discretion in setting bail led to rampant corruption and abuse. *See United States v. Edwards*, 430 A.2d 1321, 1326 (D.C. Cir. 1981) (en banc) (explaining that sheriffs "exercised a broad and ill-defined discretionary power to bail" prisoners and that this "power was widely abused by sheriffs who extorted money from individuals entitled to release without charge" and who "accepted bribes from those who were not otherwise entitled to bail").

In response to historical abuses, the common law right to bail was codified into written English law. In 1215, the principles that an accused is presumed innocent and entitled to personal liberty pending trial were incorporated into the Magna Carta, which proclaimed that "no freeman shall be taken or imprisoned . . . [except by] the judgment of his peers or by the law of the land." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 186 (1963) (internal quotation marks and citation omitted). In 1275, the English Parliament enacted the Statute of Westminster, which defined bailable offenses and provided criteria for determining whether a particular person should be released, including the strength of the evidence against the accused and the accused's criminal history. *See Bail: An Ancient Practice Reexamined*, *supra*, at 966; Carbone, *supra*, at 523-26. In 1679, Parliament adopted the Habeas Corpus Act to ensure that an accused could obtain a timely bail hearing; and in 1689, Parliament enacted an English Bill of Rights that prohibited excessive bail. *See* Carbone, *supra*, at 528. In crossing the Atlantic, American colonists

carried concepts embedded in these documents that became the foundation for our current system of bail. *See id.* at 529.

3. Bail in the United States

The presumption that defendants should be released pending trial became widely adopted throughout the United States in both the state and federal systems. *See Bail: An Ancient Practice Reexamined*, *supra*, at 967. One commentator who surveyed the bail laws in each of the states found that forty-eight states have protected, by constitution or statute, a right to bail "by sufficient sureties, except for capital offenses when the proof is evident or the presumption great." Matthew J. Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 Ariz. L. Rev. 909, 916 (2013). States modeled these provisions on the Pennsylvania Constitution of 1682, which provided that "'all Prisoners shall be Bailable by Sufficient Sureties, unless for capital Offenses, where proof is evident or the presumption great.'" *See* Carbone, *supra*, at 531-32 ("[T]he Pennsylvania provision became the model for almost every state constitution adopted after 1776.").

At the federal level, the first United States Congress established a statutory right to bail by enacting the Judiciary Act of 1789, which provided an absolute right to bail in noncapital cases and bail at the discretion of the judge in capital cases. *See* Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91; *see also* Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. Pa. L. Rev. 959, 971 (1965) (explaining that the "bail problem" was before the first Congress in the spring and summer of 1789). The first Congress also proposed that the states adopt the Eighth Amendment to the United States Constitution, which, like the New Mexico Constitution and English Bill of Rights, prohibits excessive bail. *See* U.S. Const. amend. VIII; N.M. Const. art. II, § 13; *see also Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 294 (1989) (O'Connor, J., concurring in part and dissenting in part) (explaining that the first Congress based the Eighth Amendment "on Article I, § 9, of the Virginia Declaration of Rights of 1776, which had in turn adopted verbatim the language of § 10 of the English Bill of Rights"). But unlike the New Mexico Constitution, the United States Constitution does not contain an explicit right to bail clause and guarantees only that "[e]xcessive bail shall not be required." U.S. Const. amend. VIII; *see Carlson v. Landon*, 342 U.S. 524, 545-46 (1952) (explaining that the United States Constitution can be construed only as a prohibition against excessive bail in those cases in which it is proper to grant bail because the Eighth Amendment does not provide a "right to bail"). The United States Supreme Court has held that "[b]ail set at a figure higher than an amount reasonably calculated to fulfill [the] purpose [of adequately assuring the presence of the accused] is 'excessive' under the Eighth Amendment." *Stack v. Boyle*, 342 U.S. 1, 5 (1951). As the Court explained,

> From the passage of the Judiciary Act of 1789, 1 Stat. 73, 91, to the present Federal Rules of Criminal Procedure, Rule 46(a)(1), 18 U.S.C.A., federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of

> punishment prior to conviction. See Hudson v. Parker, 1895, 156 U.S. 277, 285 . . . . Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.

Id. at 4.

Despite the ancient origins and broad recognition of the right to bail in this country, studies of the administration of bail in the twentieth century raised a number of concerns about its widespread misuse. *See* Field Study, *A Study of the Administration of Bail in New York City*, 106 U. Pa. L. Rev. 693 (1958); Note, *Compelling Appearance in Court: The Administration of Bail in Philadelphia*, 102 U. Pa. L. Rev. 1031 (1954); Arthur L. Beeley, *The Bail System in Chicago* (1927). *See generally* Wayne H. Thomas, Jr., *Bail Reform in America* 3-19 (1976); Ronald Goldfarb, *Ransom* (1965); Foote, *supra*; Freed & Wald, *supra*, at 9-21. The studies all concluded that the system of money bail in the United States discriminates against indigent defendants who lack the financial resources to post bail. *See, e.g.*, Thomas, *supra*, at 11, 19 ("The American system of bail allows a person arrested for a criminal offense the right to purchase his release pending trial. Those who can afford the price are released; those who cannot remain in jail. . . . The requirement that virtually every defendant must post bail causes discrimination against defendants who are poor."). Researchers also found that defendants incarcerated pending trial were held "under harsher conditions than those applied to convicted prisoners," even though many of those defendants ultimately were either acquitted or given no sentence of imprisonment upon the disposition of their cases. Foote, *supra*, at 960.

These concerns were accompanied by criticism of the growing role commercial bail bond agents played in determining whether defendants would be released pending trial. *See* Notes, *Preventive Detention Before Trial*, 79 Harv. L. Rev. 1489, 1490 (1966). No commercial bail bond industry existed in medieval England, where pretrial release was conditioned upon the accused securing a reputable friend or relative to personally assure the accused's appearance for trial. *See* Thomas, *supra*, at 11-12; *see also* F.E. Devine, *Commercial Bail Bonding* 5 (1991) (explaining that sureties in eighteenth-century England "were viewed as actively exercising a friendly custody of the accused"). To the contrary, the English judicial system has always found the concept of commercial sureties repugnant. *See generally* Devine, *supra*, at 37 (explaining that, in the nineteenth century, the English common law treated an agreement to pay a surety for bail as an "unenforceable illegal contract contrary to the public interest" and, in the twentieth century, as a "crime of conspiracy to effect a public mischief" or a crime of "conspiracy to obstruct the court of justice"); *id.* at 45 (explaining that the English Bail Act of 1976 sets forth criminal penalties for agreeing to indemnify a surety in a criminal proceeding, effectively barring any commercial bail bond industry). England is not alone in its rejection of the commercial bail bond industry. "Viewed from an international perspective, the commercial bail bonding system has provoked an almost universally unfavorable reaction" in common law judicial systems, and "only one country, the Philippines, has adopted a commercial bail bonding system similar to the American system." *Id.* at 15.

Contrary to this international trend, a commercial bail bond industry emerged in the early United States. Contributing factors

included the near-absolute right to bail set forth in the Judiciary Act of 1789 and in most state constitutions, the unavailability of friends and relatives who might serve as personal sureties, and the ability of defendants to flee into the vast American frontier. *See Thomas, supra*, at 11-12. By the middle of the twentieth century in the United States, commercial bail bond companies who charged defendants a nonrefundable fee for their services, typically ten percent of the bond amount, frequently posted money bail. *See id.* at 11; Freed & Wald, *supra*, at 22-24.

A commercial bail bond may enable a defendant to post money bail required by the court as additional assurance that the defendant will appear for trial. *See Stack v. Boyle*, 342 U.S. at 5 ("Like the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused."). But critics argued that the commercial bail bond industry inappropriately delegated to private agents the power to determine which defendants get released. *See Preventive Detention Before Trial, supra*, at 1490. As one federal judge observed, the effect of the commercial bail bond industry

> is that the professional bondsmen hold the keys to the jail in their pockets. They determine for whom they will act as surety—who in their judgment is a good risk. The bad risks, in the bondsmen's judgment, and the ones who are unable to pay the bondsmen's fees, remain in jail. The court [is] relegated to the relatively unimportant chore of fixing the amount of bail.

Pannell v. United States, 320 F.2d 698, 699 (D.C. Cir. 1963) (Wright, J., concurring).

Some fifty years ago, widespread concerns about problems and inequities in bail practices sparked national interest in establishing new bail procedures and pretrial programs that would treat the rich and the poor more equitably by facilitating pretrial release without the requirement of monetary bonds. The modern bail reform movement began with the Manhattan Bail Project, conducted in the 1960s by the Vera Foundation in New York City. *See* Thomas, *supra*, at 3, 20-27; Goldfarb, *supra*, at 150-72. Through the Manhattan Bail Project, defendants were interviewed prior to their first appearance in court to evaluate whether they were good candidates for pretrial release on recognizance; that is, release "on one's honor pending trial." Goldfarb, *supra*, at 153-54. The standard interview questions included an inquiry into a defendant's personal background, community ties, and criminal history. *Id.* The interviewer scored a defendant's answers using a point-weighing system and verified answers for accuracy, usually over the telephone with references the defendant provided. *Id.* at 154-55, 174-75. The interviewers gave the resulting information to the court and made recommendations regarding which defendants should be released on recognizance. *Id.* at 155. The Manhattan Bail Project proved successful. During the first three years of the experiment, defendants released on recognizance at the recommendation of the Vera Foundation were about three times more likely to appear for trial than defendants in control groups deemed eligible for release on recognizance who instead were released on money bail. *Id.* at 155, 157. The Manhattan Bail Project "showed that defendants could be successfully released pretrial without the

financial guarantee of a surety bail agent if verified information concerning their stability and community ties were presented to the court." Thomas H. Cohen & Brian A. Reaves, *Pretrial Release of Felony Defendants in State Courts* 4 (U.S. Dep't of Justice Nov. 2007). The success of the Manhattan Bail Project increased national interest in bail reform and triggered the creation of pretrial services programs across the country. *See* Timothy R. Schnacke et al., Pretrial Justice Inst., *The History of Bail and Pretrial Release* 10 (2010); *see also* Marie VanNostrand et al., *Our Journey Toward Pretrial Justice*, 71 Fed. Probation, no. 2, 2007, 20, 20 (discussing pretrial services agencies "as providers of the information necessary for judicial officers to make the most appropriate bail decision" and to "provide monitoring and supervision of defendants released with conditions pending trial").

Driven by the same concerns that inspired the Manhattan Bail Project, Congress enacted the Bail Reform Act of 1966, the first major reform of the federal bail system since the Judiciary Act of 1789. *See* Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214 (repealed 1984). The stated purpose of the Bail Reform Act of 1966 was "to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges . . . when detention serves neither the ends of justice nor the public interest." *Id.* Sec. 2. The Act included the following key provisions to govern pretrial release in noncapital criminal cases in federal court: (1) a presumption of release on personal recognizance unless the court determined that such release would not reasonably assure the defendant's appearance in court, (2) the option of conditional pretrial release under supervision or other terms designed to decrease the risk of flight, and (3) a prohibition on the use of money bail in cases where nonfinancial release options such as supervisory custody or restrictions on "travel . . . or place of abode" are sufficient to reasonably assure the defendant's appearance. *See id.* Sec. 3, § 3146(a); *see also* VanNostrand et al., *supra*, at 20 (explaining that the 1966 Act "established a presumption of release by the least restrictive conditions, with an emphasis on non-monetary terms of bail"). By emphasizing nonmonetary terms of bail, Congress attempted to remediate the array of negative impacts experienced by defendants who were unable to pay for their pretrial release, including the adverse effect on defendants' ability to consult with counsel and prepare a defense, the financial impacts on their families, a statistically less-favorable outcome at trial and sentencing, and the fiscal burden that pretrial incarceration imposes on society at large. *See* H.R. Rep. No. 89-1541 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2293, 2299.

Congress again revised federal bail procedures with the Bail Reform Act of 1984, enacted as part of the Comprehensive Crime Control Act of 1984. *See* Bail Reform Act of 1984, Pub. L. No. 98-473, § 202, 98 Stat. 1837, 1976 (codified at 18 U.S.C. §§ 3141-3150 (2012)). The legislative history of the 1984 Act explains that Congress wanted to "address the alarming problem of crimes committed by persons on release" and to "give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released." S. Rep. 98-225, at 3 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3185. The 1984 Act, as amended, retains many of the key provisions of the 1966 Act but "allows a federal court to detain an arrestee pending trial if the Government demonstrates by clear and

convincing evidence after an adversary hearing that no release conditions 'will reasonably assure . . . the safety of any other person and the community.'" *United States v. Salerno*, 481 U.S. 739, 741 (1987) (omission in original) (quoting the Bail Reform Act of 1984) (upholding the preventive detention provisions in the 1984 Act); *see also* 18 U.S.C. § 3142(a) (providing generally the current federal procedure for ordering either release or detention of a defendant pending trial), *held unconstitutional on other grounds by, e.g., United States v. Karper*, 847 F. Supp. 2d 350 (N.D.N.Y. 2011).

Twentieth-century advances in pretrial justice notwithstanding, the administration of bail in the United States remains problematic. *See* John S. Goldkamp, *Judicial Responsibility for Pretrial Release Decisionmaking and the Information Role of Pretrial Services*, 57 Fed. Probation 28, 30 (1993) ("Even after decades of bail reform, serious questions about the fairness and effectiveness of pretrial release in the United States have not been resolved."). A recent United States Department of Justice report, which provides statistics about state court felony defendants in the nation's seventy-five largest counties between 1990 and 2004, reflects some of the enduring inequalities in our nation's system of bail. *See* Cohen & Reaves, *supra*. The report demonstrates that, in the last two decades, states have again increased their reliance on commercial surety bonds while decreasing the use of personal recognizance releases. *See id.* at 1-2 ("Beginning in 1998, financial pretrial releases, requiring the posting of bail, were more prevalent than non-financial releases."). As a result, the number of pretrial inmates in jail populations has grown "at a much faster pace than sentenced inmates, despite falling crime rates." Kristin Bechtel et al., Pretrial Justice Inst., *Dispelling the Myths: What Policy Makers Need to Know About Pretrial Research* 1-2 (Nov. 2012). Most of the defendants who remain in custody pending trial stay in jail because they cannot afford the bail set by the court, not because they have been denied bail altogether. *See* Cohen & Reaves, *supra*, at 1 ("Among [felony] defendants detained until case disposition, 1 in 6 had been denied bail and 5 in 6 had bail set with financial conditions required for release that were not met."). "Hispanics were less likely than non-Hispanic defendants to be released, and males were less likely than females to be released." *Id.* Twenty percent of these detained defendants "eventually had their case dismissed or were acquitted," so many of them could have avoided imprisonment altogether if only they had the resources to post bail. *Id.* at 7.

To address the persistent inequities and inefficiencies in our current administration of bail, a number of national entities have promulgated standards and best practices for pretrial release programs. *See, e.g.*, Am. Bar Ass'n, *ABA Standards for Criminal Justice: Pretrial Release* (3d ed. 2007) (hereinafter *ABA Standards*); Nat'l Ass'n of Pretrial Servs. Agencies, *Standards on Pretrial Release* (3d ed. 2004); Nat'l Dist. Attorneys Ass'n, *National Prosecution Standards*, Standards 4-4.1 to 4-4.5, at 56-57 (3d ed. 2009). Renewed interest in pretrial justice has led some commentators to suggest that the criminal justice system in the United States has begun to experience a new wave of bail reform in the twenty-first century. *See* Bechtel et al., *supra*, at 2 n.1; Schnacke et al., *supra*, at 21-27 (noting that "jurisdictions across the United States have become significantly more interested in the topic of bail and pretrial release").

4. The New Mexico Pretrial Release Rules

The New Mexico Rules of Criminal Procedure provide the mechanism through which a person may effectuate the right to pretrial release afforded by Article II, Section 13 of the New Mexico Constitution. *See* Rule 5-401 (providing procedures for district courts); Rule 6-401 NMRA (providing procedures for magistrate courts); Rule 7-401 NMRA (providing procedures for metropolitan court); Rule 8-401 NMRA (providing procedures for municipal courts). New Mexico modeled its bail rules, which were first adopted in 1972, on the federal Bail Reform Act of 1966. *See* NMSA 1978, Crim. P. Rule 22 (Repl. Pamp. 1980; including the May 1972 New Mexico Supreme Court order); *see also* Committee commentary to Rule 5-401 (explaining that the rule is modeled on the Bail Reform Act of 1966). Like the Bail Reform Act of 1966, the New Mexico bail rules establish a presumption of release by the least restrictive conditions and emphasize methods of pretrial release that do not require financial security. *See* Rule 5-401(A); *State v. Gutierrez*, 2006-NMCA-090, ¶ 17, 140 N.M. 157, 140 P.3d 1106 (recognizing "that the purpose of the Federal Bail Reform Act of 1966, from which our rule is derived, was to encourage more releases on personal recognizance").

Originally, the only valid purpose of bail in New Mexico was to ensure the defendant's appearance in court. *See* Crim. P. Rule 22(a) (requiring the judge to make a pretrial release decision that would "reasonably assure the appearance of the person as required"); *see also State v. Eriksons*, 1987-NMSC-108, ¶ 6, 106 N.M. 567, 746 P.2d 1099 ("[T]he purpose of bail is to secure the defendant's attendance to submit to the punishment to be imposed by the court."). To further incentivize appearance in court, in the early 1970s the Legislature granted courts statutory authority to order forfeiture of bail upon a defendant's failure to appear, *see* NMSA 1978, § 31-3-2(B)(2) (1972, as amended through 1993), and enacted separate criminal penalties for failure to appear, *see* NMSA 1978, § 31-3-9 (1973, as amended through 1999). Following recognition in the federal Bail Reform Act of 1984 that public safety is a valid consideration in pretrial release decisions, this Court amended our rules to require judges to consider not only the defendant's flight risk but also the potential danger that might be posed by the defendant's release to the community in determining which conditions of release should be fashioned. *See* Rule 5-401 NMRA (1990) (prescribing that judges consider "the appearance of the person as required" and "the safety of any other person and the community").

If a person is bailable under Article II, Section 13 of the New Mexico Constitution, our rules of criminal procedure require the trial court to set the least restrictive of the bail options and release conditions that "will reasonably assure appearance of the person as required" and "the safety of any other person and the community." Rule 5-401(A)-(D). In doing so, the court must evaluate the available information about the defendant and the extent of the flight risk and safety concerns posed by the defendant. To guide the courts in accomplishing this task, the rule provides a list of factors that the court must take into account:

> (1) the nature and circumstances of the offense charged, including whether the

offense is a crime of violence or involves a narcotic drug;

(2) the weight of the evidence against the person;

(3) the history and characteristics of the person, including:

(a) the person's character and physical and mental condition;

(b) the person's family ties;

(c) the person's employment status, employment history and financial resources;

(d) the person's past and present residences;

(e) the length of residence in the community;

(f) any facts tending to indicate that the person has strong ties to the community;

(g) any facts indicating the possibility that the person will commit new crimes if released;

(h) the person's past conduct, history relating to drug or alcohol abuse, criminal history and record concerning appearance at court proceedings; and

(i) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal or completion of an offense under federal, state or local law;

(4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release; and

(5) any other facts tending to indicate the person is likely to appear.

Rule 5-401(C).

Rule 5-401 prioritizes five increasingly exacting bail options pending trial: (1) release on the defendant's personal recognizance; (2) release upon the execution of an unsecured appearance bond; (3) release upon the execution of an appearance bond accompanied by a cash deposit to the court of a specified percentage of the total amount set for bail; (4) release upon the execution of a bond secured by property belonging to either the defendant or an unpaid surety; and (5) release upon either execution of a bond by a licensed bail bond agent or execution of an appearance bond by the defendant accompanied by a cash deposit of one hundred percent of the amount set for bail. *See* Rule 5-401(A)-(B). The trial court must consider this hierarchy of release options in the order set forth in the rule, beginning with the least restrictive option. *Id.*; *see Gutierrez*, 2006-NMCA-090, ¶¶ 9-10 (specifying that the options "'are set forth in the order of priority [in which] they are to be considered by the judge'" (quoting Rule 5-401 Committee commentary)). Whenever possible, the court should dispense with the requirement of any financial security and should release the defendant either on the defendant's "personal recognizance or upon the execution of an unsecured appearance bond in an amount set by the court." Rule 5-401(A). But if the court makes specific written findings demonstrating that nonfinancial release options "will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community," the court may require the defendant to execute one of the types of secured bonds enumerated in the rule. Rule 5-401(B).

In addition to choosing an appropriate bail option, the trial court should consider whether to impose additional nonmonetary conditions to limit and monitor

the defendant's conduct while released pending trial. *See* Rule 5-401(D). The court may condition the defendant's continued pretrial release on refraining from further criminal conduct while awaiting trial. *See* Rule 5-401(D)(1). Rule 5-401(D)(2) sets forth a range of other potential conditions that the court may consider and instructs the court to order the least restrictive condition or combination of conditions that "will reasonably assure the appearance of the person as required, the safety of any other person and the community and the orderly administration of justice." The court has a duty to tailor the conditions of pretrial release to the needs and risks posed by each individual defendant. *See id.* For example, if a defendant is charged with a crime of violence against a household member, the additional conditions might include a limitation on the possession of weapons and a requirement that the defendant avoid contact with the alleged victim or witnesses. *See* Rule 5-401(D)(2)(e), (h). Or, if the defendant is charged with a crime involving controlled substances, the court might order the defendant to undergo drug testing and substance abuse treatment. *See* Rule 5-401(D)(2)(j)-(k).

5. The District Court Requirement of a Monetary Bond in This Case Was Unsupported by Evidence and Contrary to Law

In brief, a pretrial release determination under the New Mexico Constitution and our rules of criminal procedure includes three main inquiries. First, is the defendant bailable pending trial, or should the defendant be detained under one of the exceptions in Article II, Section 13 of the New Mexico Constitution? Next, if bailable, which of the release options stated in Rule 5-401 is the least restrictive in reasonably assuring appearance while maintaining the safety of the community? *See* Rule 5-401(A)-(B). And finally, should any additional nonmonetary conditions of release be imposed to place limitations on the defendant's conduct while released pending trial? *See* Rule 5-401(D).

This Court will reverse a district court's pretrial release decision "only if it is shown that the decision: (1) is arbitrary, capricious or reflects an abuse of discretion; (2) is not supported by substantial evidence; or (3) is otherwise not in accordance with law." Rule 12-204(C). Although this Court may set aside a pretrial release order for any one of these three reasons, we conclude in this case that reversal is warranted on all three grounds. *See N.M. Attorney Gen. v. N.M. Pub. Regulation Comm'n*, 2013-NMSC-042, ¶ 10, 309 P.3d 89 (explaining that a decision "is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record" (internal quotation marks and citation omitted)); *State v. Cebada*, 1972-NMCA-140, ¶ 9, 84 N.M. 306, 502 P.2d 409 ("An abuse of discretion occurs when the court exceeds the bounds of reason, all the circumstances before it being considered."). "Substantial evidence is such relevant evidence that a reasonable mind would find adequate to support a conclusion." *State ex rel. King v. B&B Inv. Group, Inc.*, 2014-NMSC-024, ¶ 12, 329 P.3d 658 (internal quotation marks and citation omitted).

The district court necessarily determined that Defendant was bailable by entering a pretrial release order at Defendant's arraignment in 2011 but then imposed the most restrictive type of bail available under Rule 5-401, a full cash or surety bond in the amount of $250,000. *See* Rule 5-401(B)(3). The court also prohibited Defendant from

possessing firearms, alcohol, or illegal drugs; violating the law; leaving the county without the court's permission; entering liquor establishments; or making contact with any alleged victim, codefendant, or witness in the case. Additionally, the district court required that Defendant maintain weekly contact with his attorney and notify his attorney of any changes to his contact information.

It is not clear from the record before this Court what, if any, information the district court had when it first entered the pretrial release order at Defendant's arraignment, and we do not review that earlier decision. We address only the ruling that has been appealed to us, the refusal to modify the $250,000 cash or surety bond that Defendant was unable to post.

After the first bail review hearing, the district court found there were no facts indicating that Defendant would likely "commit new crimes," pose "a danger to anyone," or "be unlikely to appear if released." The information Defendant presented at the second review hearing was consistent with the information he presented in support of his first motion. The State failed to present any new information at the second hearing or to controvert Defendant's evidence and continued to rely solely on the nature of the crime charged. The district court, without a further written order, declined to change the conditions of release, stating merely that Defendant "*may* present a danger of either flight or to other members of the community," in contrast to the court's own finding following the first motion hearing that Defendant did not pose a flight or safety risk (emphasis added).

Contrary to the explicit requirements set forth in our rules, the district court failed to explain in the record any rational connection between the facts in the record and the ruling of the court, perhaps because there was no such connection. *See* Rule 5-401(G) ("Unless the release order is amended and the person is thereupon released, the court shall state in the record the reasons for continuing the amount of bail set."); *see also Gutierrez*, 2006-NMCA-090, ¶ 21 (cautioning judges to follow the directives of Rule 5-401 when "exercising their discretion to set conditions of release"). We hold that the district court's decision was arbitrary and capricious and that the court abused its discretion by issuing a ruling at the second motion hearing that was contrary to both the record and the district court's previous findings of fact, without articulating any principled reason or factual basis for the decision.

All of the evidence Defendant presented supported a modification of Defendant's bail, and none of the evidence supported the district court's decision to keep the $250,000 bond in place. The State failed to controvert Defendant's evidence, offered no evidence of its own, and declined to cross-examine Defendant's witnesses. The district court denied Defendant's first motion despite the court's express finding that there were no facts indicating that Defendant would pose a flight or safety risk if released. The district court denied Defendant's second motion without entering any findings of fact to support its decision, explaining only that "the nature of the allegations" and "the exposure that is contained within the various counts of the indictment" led the court to conclude that releasing Defendant "may present a danger of either flight or to other members of the community." This conclusion is inconsistent with the record and unsupported by substantial evidence.

The district court's decision was contrary to Rule 5-401, which sets forth the mandatory procedure for district courts to follow when making a pretrial release decision. The district court was required to evaluate and balance each of the factors set forth in Rule 5-401(C) and to impose the least restrictive of the bail options and release conditions necessary to reasonably assure that Defendant would not pose a flight or safety risk. The record makes it clear that the court did not comply with the law.

The findings of fact the district court entered following the first motion hearing demonstrate that all of the information regarding Defendant's personal history and characteristics supported a reduction of Defendant's bond. The district court found that Defendant "would have an appropriate place to live with his father," that Defendant's "former employers were seeking his return to employment," and that Defendant's "ties in the community are longstanding and continuing with the familial support of his parents." The district court also found that Defendant had no pending criminal charges, no alcohol or substance abuse problems, and no history of violence outside the allegations in this case. And the district court found that Defendant had "been entirely compliant for the entirety of his pretrial incarceration of over 2 years and 4 months" and had "appeared timely and without incident at all scheduled hearings in this case." Finally, the district court documented the absence of any facts indicating that Defendant would predictably "commit new crimes," pose "a danger to anyone," or "be unlikely to appear if released." Although the district court noted that it had drawn no conclusions "as to the weight of the evidence" against Defendant, it denied Defendant's first motion solely because of "the nature and seriousness of the alleged offense."

It is clear that the district court based its pretrial release decision on only one of the factors identified in Rule 5-401(C)—"the nature and circumstances of the offense charged"—to the exclusion of all other factors. While a judge has discretion to evaluate and balance each of the factors set forth in Rule 5-401(C), the judge "shall" consider and weigh all of the factors, and no single factor automatically controls. *See* Rule 5-401(C). Appropriately, the district court considered the charges and potential punishment in this case in assessing flight risk and danger to the community posed by this Defendant, but the district court failed to balance this information with the evidence presented in support of Defendant's motion. Because the district court failed to give proper consideration to all of the factors set forth in Rule 5-401(C), its continued imposition of the $250,000 bond was contrary to law.

Neither the Constitution nor our rules of criminal procedure permit a judge to base a pretrial release decision solely on the severity of the charged offense. Bail is not pretrial punishment and is not to be set solely on the basis of an accusation of a serious crime. As the United States Supreme Court has emphasized, "[t]o infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act." *Stack v. Boyle*, 342 U.S. at 6. The State has argued that $250,000 is a standard bond for an offense that can result in life imprisonment. This argument runs contrary to both the letter and purpose of Rule 5-401, which requires the judge to make an informed, individualized decision about each defendant and does not permit the judge to put a price tag on a

person's pretrial liberty based solely on the charged offense. *See ABA Standards*, Standard 10-5.3(e), at 110 ("Financial conditions should be the result of an individualized decision taking into account the special circumstances of each defendant, the defendant's ability to meet the financial conditions and the defendant's flight risk, and should never be set by reference to a predetermined schedule of amounts fixed according to the nature of the charge."). Empirical studies indicate that the severity of the charged offense does not predict whether a defendant will flee or reoffend if released pending trial. *See* Curtis E.A. Karnow, *Setting Bail for Public Safety*, 13 Berkeley J. Crim. L. 1, 14-16 (2008) (reviewing studies indicating that "evidence does not support the proposition that the severity of the crime has any relationship either to the tendency to flee or to the likelihood of re-offending"); 4 Wayne LaFave et al., *Criminal Procedure*, § 12.1(b), at 12 (3d ed. 2007) (citing studies and stating that the "likelihood of a forfeiture does not appear to depend upon the seriousness of the crime"). Setting money bail based on the severity of the crime leads to either release or detention, determined by a defendant's wealth alone instead of being based on the factors relevant to a particular defendant's risk of nonappearance or reoffense in a particular case. *See Hairston v. United States*, 343 F.2d 313, 316-17 (D.C. Circ. 1965) (Bazelon, C.J., dissenting) ("Setting high bail to deny release discriminate(s) between the dangerous rich and the dangerous poor and masks the difficult problems of predicting future behavior which is, in itself, fraught with danger of excesses and injustice." (alteration in original) (internal quotation marks and citation omitted)). Because of this, judges "should exercise care not to give inordinate weight to the nature of the present charge in evaluating factors for the pretrial release decision." *ABA Standards*, Standard 10-1.7, at 50.

Neither the New Mexico Constitution nor our rules of criminal procedure permit a judge to set high bail for the purpose of preventing a defendant's pretrial release. *See* N.M. Const. art. II, § 13; Rule 5-401; *see also Bandy*, 81 S. Ct. at 198 ("It would be unconstitutional to fix excessive bail to assure that a defendant will not gain his freedom."). Intentionally setting bail so high as to be unattainable is simply a less honest method of unlawfully denying bail altogether. If a defendant should be detained pending trial under the New Mexico Constitution, then that defendant should not be permitted any bail at all. Otherwise the defendant is entitled to release on bail, and excessive bail cannot be required. N.M. Const. art. II, § 13; *cf.* 18 U.S.C. § 3142(c)(2) (providing that a federal "judicial officer may not impose a financial condition that results in the pretrial detention of the person"), *held unconstitutional on other grounds by, e.g., Karper*, 847 F. Supp. 2d 350.

We understand that this case may not be an isolated instance and that other judges may be imposing bonds based solely on the nature of the charged offense without regard to individual determinations of flight risk or continued danger to the community. We also recognize that some members of the public may have the mistaken impression that money bonds should be imposed based solely on the nature of the charged crime or that the courts should deny bond altogether to one accused of a serious crime. We are not oblivious to the pressures on our judges who face election difficulties, media attacks, and other adverse consequences if they faithfully honor the rule of law when it dictates an action that is not politically popular, particularly when there is

no way to absolutely guarantee that any defendant released on any pretrial conditions will not commit another offense. The inescapable reality is that no judge can predict the future with certainty or guarantee that a person will appear in court or refrain from committing future crimes. In every case, a defendant *may* commit an offense while out on bond, just as any person who has never committed a crime *may* commit one. As Justices Jackson and Frankfurter explained in reversing a high bond set by a federal district court, "Admission to bail always involves a risk that the accused will take flight. That is a calculated risk which the law takes as the price of our system of justice." *Stack v. Boyle*, 342 U.S. at 8 (Jackson, J., joined by Frankfurter, J., specially concurring).

III. CONCLUSION

For the reasons stated in this opinion, we reaffirm our prior order holding that the district court unlawfully failed to release Defendant pending trial on the least restrictive of the bail options and release conditions necessary to reasonably assure Defendant's appearance and the safety of the community, our reversal of the district court's continued imposition of a $250,000 bond, and our order that Defendant be released on nonmonetary conditions pending trial.

IT IS SO ORDERED.

CHARLES W. DANIELS, Justice

WE CONCUR:

BARBARA J. VIGIL, Chief Justice

RICHARD C. BOSSON, Justice

EDWARD L. CHÁVEZ, Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2014-NMSC-039

Filing Date: April 15, 2013

Docket No. 33,376

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

v.

SARA GONZALES,

Defendant-Respondent.

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

for Petitioner

Law Works, LLC
John A. McCall
Albuquerque, NM

for Respondent

OPINION

VIGIL, Justice.

We granted certiorari to review the Court

of Appeals' opinion in this case. After reviewing the record, the parties' briefs, and hearing oral argument, we issued an order quashing the writ of certiorari. However, we find the procedural history of this case and a related case troubling and are compelled to write a decision to explain why we quashed certiorari and to caution appellate practitioners that adverse consequences can result when the Rules of Appellate Procedure are not followed.

In this case and a related case, the Second Judicial District Attorney's Office ("District Attorney") violated Rule 12-208 NMRA, which addresses the requirements for docketing an appeal. The violation ultimately wasted the time of the appellate courts and the parties and, perhaps most troubling, precipitated the issuance of contradictory opinions by the Court of Appeals on related appeals not only involving the identical issue, but involving the same ruling by the same judge regarding the legal sufficiency of the same search warrant.

We require that all appellate practitioners comply with the Rules of Appellate Procedure so that unnecessary procedural conflicts do not arise that prevent the effective and efficient administration of justice. In order to fully grasp the impact of this rule violation, a brief background of this case and the related case is necessary.

I. FACTUAL AND PROCEDURAL BACKGROUND

On March 5, 2009, the State filed indictments in the Second Judicial District Court against Raymundo Maso ("Maso") and Sara Gonzales ("Gonzales"), charging each with drug related offenses after a search warrant authorizing a search of their shared apartment revealed incriminating evidence against them. The State filed a Statement of Joinder and the cases were joined. Maso filed a motion to suppress the evidence, which Gonzales joined. On August 14, 2009, the district court issued an order granting the suppression of evidence motion, concluding the search warrant was invalid because it "did not include sufficient specific facts to establish probable cause for the issuance of a search warrant" under either the United States or New Mexico Constitution.

On August 21, 2009, the State then separately appealed this suppression order to the New Mexico Court of Appeals for each defendant. The Court of Appeals decided the appeal involving Maso on its summary calendar, and in a memorandum opinion by Judge Wechsler, the Court reversed the suppression order and remanded to the district court for further proceedings. *See State v. Maso*, No. 29,842, slip op. (N.M. Ct. App. April 14, 2010) (non-precedential), *cert. denied*, S. Ct. No. 32,398 (August 25, 2010). Maso petitioned for a writ of certiorari, which this Court denied on August 25, 2010. Conversely, the State's appeal in this case was assigned to the Court of Appeals' general calendar, and in a memorandum opinion by Judge Kennedy, the Court affirmed the same suppression order, with Judge Garcia concurring and Judge Wechsler dissenting. *See State v. Gonzales*, No. 29,843, slip op. (N.M. Ct. App. December 9, 2011) (non-precedential), *cert. granted*, S. Ct. No. 33,376 (February 16, 2012). The State successfully petitioned this Court for a writ of certiorari in this case, primarily on the ground that the Court of Appeals had issued diametrically opposite rulings upholding the search warrant in *Maso* and holding it unlawful in this case.

We ultimately agreed with the reasoning

and conclusion of the Court of Appeals in this case and, therefore, quashed the writ of certiorari. Although the quashing of our writ in this case may appear to leave a decision in place that would allow Maso to be prosecuted with evidence that was suppressed as to Gonzales – despite no appreciable difference in their situations – we hasten to add that after the Court of Appeals issued *Gonzales*, the State dismissed the charges against both Gonzales and Maso, even though it could have proceeded in its case against Maso. As such, any continuing concern about the inconsistent application of the law for these two co-defendants has been alleviated. Nonetheless, we are concerned by the fact that the Attorney General was apparently unaware that the District Attorney had filed a nolle prosequi in this case, as it did not disclose to this Court–either in its petition for writ of certiorari, its briefs or in its oral argument–that a nolle prosequi had been filed in this case. Although this nolle prosequi does not strip this Court of its jurisdiction, it is nonetheless essential information regarding the procedural history of this case since it stripped the district court of its jurisdiction in this case. However, while it is important that this Court be made aware of essential pieces of information such as this, the Discussion in this Decision focuses on the more serious rule violation the District Attorney committed in these cases and explains the impact of the violation.

II. DISCUSSION

The inconsistent Court of Appeals memorandum opinions at issue stemmed from the District Attorney's failure to comply with Rule 12-208, which addresses the requirements for docketing an appeal. Specifically, Paragraph D of Rule 12-208 dictates that "[a] docketing statement shall contain . . . a reference to all related or prior appeals." Rule 12-208(D)(7). However, the District Attorney filed *Gonzales* and *Maso* in the Court of Appeals on the same day within one minute of each other without any reference in either docketing statement alerting the Court of Appeals that the appeals were related. In fact, both docketing statements specifically include the statement, "There are no related or prior appeals."

As a consequence, the Court of Appeals was not informed in a timely manner that it had two related appeals raising the same issue resulting from the same suppression ruling. In fact, when the Attorney General's Office finally notified the Court of Appeals that it was responsible for related cases, it was too late to join them, as the Court had already issued its memorandum opinion in *Maso*. Thus, the only way to avoid the issuance of a contradictory opinion at that point was if the second panel, after hearing different arguments made by a different defendant, agreed with the reasoning and conclusion of the first panel regarding whether to uphold the suppression order, which it obviously did not. We recognize that by the time the Court of Appeals issued its opinion in *Gonzales* it was well aware of its contrary decision in *Maso*. Nonetheless, the dilemma was created by the failings of the District Attorney, and we do not fault the Court of Appeals for taking a different approach after considering the additional arguments raised by a new defendant and concluding that a different result was warranted. The conflict in the Court of Appeals' memorandum opinions was a matter for this Court to address when it granted certiorari.

But we cannot emphasize enough that if the District Attorney had complied with Rule 12-208(D)(7), the cases could have been

joined in the Court of Appeals, foreclosing the possibility of an inconsistent result for each defendant and saving a great deal of time for all concerned. Proper disclosure by the District Attorney of the related appeals in the docketing statements would have alerted the Court of Appeals, early on, of the need to assign the cases to the same calendar and would have likely eliminated the confusion that resulted from the assignment of the related cases to different calendars.

Likewise, by notifying the Court of Appeals of the related appeals in the docketing statements, the cases could have been assigned to one panel. If the cases had been heard and decided together, a single panel could have resolved any conflicting views about how to apply the law in a single memorandum opinion with the benefit of the arguments from all parties at one time. At the very least, the Court of Appeals could have delayed a decision in *Maso* until the Court could hear the appeal in *Gonzales*. But due to the District Attorney's failure to comply with Rule 12-208(D)(7), procedural confusion resulted in the issuance of inconsistent opinions by the Court of Appeals.

We were then faced with having to address the contradictory Court of Appeals opinions. The State suggests that the conflict could be resolved simply by reversing *Gonzales*. However, as noted above, we agree with the Court of Appeals' reasoning and conclusion in *Gonzales* and disagree with the State's assertion that the second Court of Appeals panel was bound to decide *Gonzales* as the first panel decided *Maso*. Thus, after a thorough review of the procedural quagmire and careful consideration of the basis for the *Gonzales* opinion issued by the Court of Appeals, we decided that the writ of certiorari was improvidently issued in this case and should be quashed. However, we remain deeply concerned by the fact that the State's fundamental basis for this appeal was the inconsistent rulings by the Court of Appeals, which would not have occurred had the District Attorney complied with Rule 12-208(D)(7).

Rule 12-208 was enacted to eliminate the difficulty that occurred with the inconsistent rulings in these related appeals. The situation that arose as a result of the rule violation demonstrates that each and every rule has a purpose and consequences can be severe if mandatory rules are not followed. With that in mind, this decision serves to remind all appellate practitioners, and especially district attorneys, of something each of us already knows but that bears repeating. We require that all lawyers docketing an appeal comply with Rule 12-208 (and all other Rules of Appellate Procedure for that matter). Failure to do so is no small matter, which these related appeals so clearly demonstrate.

III. CONCLUSION

Because we ultimately considered the legal analysis and conclusion of the Court of Appeals with regard to the Fourth Amendment search and seizure issue raised in this appeal to be proper, we quashed the writ of certiorari. We did so amidst our serious concerns about the procedural hornet's nest and unwarranted inconsistencies in opinions that would have been easily avoided had the District Attorney complied with the Rules of Appellate Procedure.

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: 2014-NMSC-040

Filing Date: September 12, 2013

Docket No. 34,187

STATE OF NEW MEXICO,

Plaintiff-Appellant,

v.

CHARLES SUSKIEWICH,

Defendant-Appellee.

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for Appellee

OPINION

CHÁVEZ, Justice.

The district court granted Defendant Charles Suskiewich's motion to suppress evidence. The State is permitted by both statute and procedural rule to appeal a district court order suppressing evidence within ten days after the order is filed. *See* NMSA 1978, § 39-3-3(B)(2) (1972); Rule 12-201(A)(1) NMRA. The State may also ask the district court to reconsider its ruling. In this case, we discuss the procedure for the State to seek (1) a district court's reconsideration of a suppression order while at the same time preserving its right to appeal the suppression order, and (2) whether the State adhered to the statutory procedure in this case. We hold that the State may ask the district court to reconsider a suppression order while at the same time preserving the State's right to appeal the suppression order, provided that the State files its motion to reconsider within ten days of the filing of the suppression order. In this case, the State filed its motion to reconsider after the ten-day time period had expired, and therefore, although the district court could still reconsider the suppression order, the State failed to preserve its right to appeal. We therefore dismiss the appeal as untimely filed.

BACKGROUND

On January 19, 2012, a grand jury indicted Defendant on one count of first-degree murder, one count of tampering with

evidence, and one count of receiving stolen property. On July 27, 2012, Defendant filed a motion to suppress "(1) all statements made by [Defendant] before he was given warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966); (2) the physical evidence of a gun; and (3) the custodial interrogation of [Defendant]." The district court held an evidentiary hearing on Defendant's motion and entered an order on December 6, 2012, granting the motion.

On January 4, 2013, the State filed a motion asking the district court to reconsider the suppression order. On February 15, 2013, the case was reassigned to a new judge, who denied the State's motion to reconsider on April 9, 2013, on the ground that the State had failed to establish that any of the prior judge's rulings were clearly erroneous or manifestly unjust.

Nine business days later, on April 22, 2013, the State filed a notice of appeal to the Court of Appeals "from the Order Denying the State's Motion to Reconsider." The appeal was transferred from the Court of Appeals to this Court on June 5, 2013. *See State v. Smallwood*, 2007-NMSC-005, ¶ 11, 141 N.M. 178, 152 P.3d 821 (concluding "that the legislature intended for [this Court] to have jurisdiction over interlocutory appeals in situations where a defendant may possibly be sentenced to life imprisonment or death"); *see also* NMSA 1978, § 34-5-10 (1966) ("No matter on appeal in the supreme court or the court of appeals shall be dismissed for the reason that it should have been docketed in the other court, but it shall be transferred by the court in which it is filed to the proper court.").

On June 13, 2013, Defendant filed a motion to dismiss the State's appeal, arguing that the appeal was neither timely nor authorized by Section 39-3-3. In response, the State asks this Court to deny Defendant's motion to dismiss because (1) motions to reconsider should be encouraged in order to further judicial economy, and (2) Defendant waived his objection to the timeliness of the State's appeal because he failed to object in the district court to the timing of the State's motion for reconsideration, which was filed outside of the ten-day appeal period permitted by Section 39-3-3(B)(2). In reply, Defendant contends that this Court lacks jurisdiction to consider the merits of the State's untimely appeal.

DISCUSSION

Defendant argues that the State's appeal should be dismissed because (1) no statutory or constitutional provision grants the State a right to appeal the district court's denial of a motion to reconsider, and (2) even if the State's appeal is construed as an appeal from the underlying suppression order, the appeal is untimely. We review de novo whether the State's notice of appeal is effective and timely under the statutes and procedural rules governing appeals from suppression orders. *See State v. Hall*, 2013-NMSC-001, ¶ 9, 294 P.3d 1235 ("Interpretation of a statute is an issue of law that we review de novo."); *Grygorwicz v. Trujillo*, 2009-NMSC-009, ¶ 7, 145 N.M. 650, 203 P.3d 865 ("Determining whether Defendant's appeal was timely involves the interpretation of court rules, which we review de novo.").

"Generally, the State cannot appeal proceedings from a judgment in favor of the defendant in a criminal case absent a constitutional provision or statute conferring that right." *State v. Sanchez*, 2008-NMSC-066, ¶ 7, 145 N.M. 311, 198 P.3d 337 (internal quotation marks and

citations omitted). Defendant argues that the State's appeal in this case must be dismissed because the State has neither a statutory right nor a constitutional right to appeal from the district court's denial of a motion to reconsider. The State responds that it has a right to appeal a district court order suppressing evidence and asks this Court to construe its appeal from the motion to reconsider as an appeal from the underlying suppression order. *See* § 39-3-3(B)(2); *see also State v. Heinsen*, 2005-NMSC-035, ¶ 12, 138 N.M. 441, 121 P.3d 1040 (noting that "an appeal of a suppression order has been held to be a statutory right, rather than a constitutional right").

This Court has "stated [a] policy of facilitating the right of appeal by liberally construing technical deficiencies in a notice of appeal otherwise satisfying the time and place of filing requirements." *Govich v. N. Am. Sys., Inc.*, 1991-NMSC-061, ¶ 12, 112 N.M. 226, 814 P.2d 94; *see also Wakeland v. N.M. Dep't of Workforce Solutions*, 2012-NMCA-021, ¶ 7, 274 P.3d 766 ("New Mexico courts have not been stringent about the form and content requirements of documents filed in an effort to seek appellate review, so long as the information provided in the non-conforming document is adequate to convey the basic intent of the party filing the document."). Thus, the State's notice of appeal is not necessarily invalid merely because it refers to the district court order denying the motion to reconsider, rather than referencing the underlying, appealable suppression order.

Defendant argues that, even if this Court were to construe the State's notice of appeal as pertaining to the underlying suppression order, the State's appeal must be dismissed because the appeal was not timely filed within ten business days of the suppression order. *See* § 39-3-3(B)(2) (allowing the State ten days to file a notice of appeal from an "order of a district court suppressing or excluding evidence"); Rule 12-201(A)(1) (same); *see also* Rule 12-308(A) NMRA ("When the period of time prescribed or allowed is less than eleven (11) days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation").

The State concedes that it filed its motion to reconsider almost a month after the district court entered its order suppressing evidence and that it filed the notice of appeal nine business days after the district court's denial of the motion to reconsider, almost four months after the entry of the suppression order. The State argues, however, that Defendant waived his right to challenge the timeliness of the State's appeal because Defendant failed to object to the timing of the State's motion to reconsider in district court. For the reasons that follow, we disagree that Defendant was obligated to object in district court to the timing of the State's motion to reconsider.

A district court possesses inherent power to modify an order suppressing evidence at any time prior to the entry of final judgment in a case. *See Sims v. Sims*, 1996-NMSC-078, ¶ 59, 122 N.M. 618, 930 P.2d 153 ("District courts have plenary power over their interlocutory orders and may revise them . . . at any time prior to final judgment." (internal citation omitted)); *see also Heinsen*, 2005-NMSC-035, ¶ 12 (explaining that suppression orders are interlocutory rulings).

Although our procedural rules do not grant the State an express right to file a motion to reconsider a suppression order, the common law has long recognized the validity and utility of motions to reconsider in criminal cases. *See*

State v. Roybal, 2006-NMCA-043, ¶¶ 14, 16, 139 N.M. 341, 132 P.3d 598 (finding authority for motions to reconsider in the common law, despite the fact that there is no "rule of procedure that specifically allows the State to file a motion to reconsider or set aside an order of dismissal in a criminal case"). Motions to reconsider "are a traditional and virtually unquestioned practice and serve judicial economy by permitting lower courts to correct possible errors and thus avoid time-consuming and potentially unnecessary appeals." *Id.* ¶ 16 (internal quotation marks and citation omitted); *see also State v. Gonzales*, 1990-NMCA-040, ¶ 43, 110 N.M. 218, 794 P.2d 361 (recognizing that motions to reconsider enable lower courts to correct errors, relieve appellate courts of unnecessary burdens, and may result in more expedient dispositions of criminal cases).

Accordingly, the State may move the district court to reconsider an order suppressing evidence at any time prior to the entry of a final judgment. In this case, Defendant had no cause to object when the State filed a motion to reconsider almost one month after the entry of the suppression order but before the entry of a final judgment. The State's motion to reconsider constituted a timely, valid means to seek relief in the district court.

However, unlike a motion to reconsider, a notice of appeal from a suppression order must be filed within the ten-day period prescribed by Section 39-3-3(B)(2) and Rule 12-201(A)(1). The State admits that its notice of appeal was filed outside this ten-day period but relies on *Roybal*, 2006-NMCA-043, ¶¶ 16-17, to argue that a motion to reconsider tolls the appeal period until after the district court has ruled on the motion. Although we agree that a motion to reconsider filed within the permissible appeals period can toll the time to appeal, we conclude that the appeal time was not tolled in this case.

In *Roybal*, our Court of Appeals considered whether a motion to reconsider a district court order, filed within the permissible time period for filing a notice of appeal, can operate to suspend the finality of the court order and toll the time to appeal until the district court has ruled upon the motion. *Id.* ¶¶ 7, 16-17. Several days after the district court entered an order dismissing the case against Roybal, the State filed two motions asking the district court to reverse the dismissal. *See id.* ¶¶ 4-6. Approximately four months later, the district court denied the State's post-dismissal motions and entered an amended order of dismissal. *Id.* ¶ 6. The State then filed a notice of appeal within thirty days of the district court's denial of the motions. *Id.*; *see generally* Rule 12-201(A)(2) (allowing a party thirty days to file a notice of appeal from an appealable district court judgment or order, other than an order suppressing evidence).

The *Roybal* court concluded that "the State's post-dismissal motions suspended the finality of the original dismissal order and delayed the time for appeal until the trial court disposed of the State's motions." 2006-NMCA-043, ¶ 7. Under those circumstances, the full thirty-day time period for filing an appeal began to run when the district court disposed of the post-dismissal motions. *Id.* ¶ 17. The Court of Appeals held that the State's notice of appeal was timely filed because (1) the State filed its motions to reconsider within the permissible time to appeal, thus tolling the thirty-day appeal period, and (2) the State's notice of appeal was filed within thirty days following the district court's disposition of the motions to reconsider. *Id.*

We agree with the Court of Appeals that a motion to reconsider filed within the permissible appeal period suspends the finality of an appealable order or judgment and tolls the time to appeal until the district court has ruled on the motion. *See id.* This rule is consistent with our Rules of Appellate Procedure, which provide that certain post-judgment motions suspend the time to appeal until such motions have been determined by the district court. *See* Rule 12-201(D) ("If a party timely files a motion pursuant to Section 39-1-1 NMSA 1978, Paragraph B of Rule 1-050 NMRA, Paragraph D of Rule 1-052 NMRA, or Rule 1-059 NMRA, the full time prescribed in this rule for the filing of the notice of appeal shall commence to run and be computed from the entry of an order expressly disposing of the motion."); *see also Grygorwicz*, 2009-NMSC-009, ¶ 8 (explaining that "if a party makes a post-judgment motion directed at the final judgment . . . , the time for filing an appeal does not begin to run until the district court enters an express disposition on that motion").

Applying these principles to this case, it is clear that the State cannot take advantage of the rule in *Roybal* because its motion to reconsider was filed outside the permissible ten-day appeal period set forth in Section 39-3-3(B)(2) and Rule 12-201(A)(1). The State concedes that it filed its motion to reconsider twenty-nine days after the order suppressing evidence, "fifteen days too late under *Roybal*." Accordingly, the motion to reconsider did not toll the appeal period, and the State's notice of appeal was untimely.

Finally, we reject Defendant's contention that this Court must dismiss the State's untimely appeal for lack of jurisdiction, and note that this Court retains subject matter jurisdiction to consider an untimely appeal. *See Govich*, 1991-NMSC-061, ¶ 12 (explaining that this Court has subject matter jurisdiction to consider an untimely appeal). We do, however, require an appellant to properly invoke this Court's jurisdiction by complying with mandatory requirements regarding the time and place of filing a notice of appeal. *See id.* (noting that this Court will "decline to exercise discretion to excuse or justify any improper attempt to invoke our jurisdiction"). This Court will excuse the untimely filing of an appeal only if the appellant has demonstrated that unusual circumstances justify the late filing. *See Gulf Oil Corp. v. Rota-Cone Field Operating Co.*, 1973-NMSC-107, ¶ 2, 85 N.M. 636, 515 P.2d 640 (per curiam) (declining to consider an untimely petition for writ of certiorari "absent some unusual circumstance justifying such late filing"); *see, e.g., Schultz ex rel. Schultz v. Pojoaque Tribal Police Dep't*, 2010-NMSC-034, ¶ 21, 148 N.M. 692, 242 P.3d 259 (excusing delay caused by the United States Postal Service because it constituted an unusual circumstance outside the appellant's control).

Although this Court has discretion to consider the merits of an untimely appeal, the State presents no unusual circumstances that justify its late filing in this case. Accordingly, we decline to consider the merits of the State's appeal and grant Defendant's motion to dismiss.

CONCLUSION

The State failed to file its notice of appeal within the ten-day period prescribed by Section 39-3-3(B)(2) and Rule 12-201(A)(1). The State's motion to reconsider did not toll

the time to appeal because it was filed outside the permissible ten-day appeal period. We therefore grant Defendant's motion to dismiss the State's appeal as untimely and remand this case to the district court for further proceedings consistent with this decision.

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: 2015-NMSC-001

Filing Date: December 4, 2014

Docket No. 34,646

STATE OF NEW MEXICO, ex rel., HON. CARLOS R. CISNEROS, and HON. GEORGE K. MUNOZ, As members of the New Mexico Legislature and Citizens of New Mexico, HON. ALAN M. MALOTT, HON. J.C. ROBINSON, HON. JEFF FOSTER MCELROY, and HON. LOUIS P. MCDONALD, As New Mexico State District Court Judges and Citizens of New Mexico, THE DISTRICT JUDGES ASSOCIATION OF NEW MEXICO, INC., a/k/a The District and Metropolitan Judges Association of New Mexico, HON. DUANE K. CASTLEBERRY, HON. DAVID JOEL GARNETT, HON. KAREN P. MITCHELL, and HON. WARREN WALTON, As New Mexico Magistrate Court Judges and Citizens of the State of New Mexico, and THE NEW MEXICO MAGISTRATE JUDGES ASSOCIATION,

Petitioners,

v.

HON. SUSANA MARTINEZ, Governor of the State of New Mexico, and HON. DIANNA J. DURAN, Secretary of State of New Mexico,

Respondents.

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for Respondent Dianna J. Duran

OPINION

PER CURIAM.

In the waning hours of the 2014 legislative session, the Legislature passed the General Appropriations Act of 2014, 2014 N.M. Laws, ch. 63, §§ 1-14 (Appropriations Act), which included a pair of salary increases for judges and justices of the New Mexico state judiciary (collectively, judges). The first increase, funded in Section 4(B) of the Appropriations Act, was a 5% raise, the appropriation for which was lumped in with various other appropriations to the judicial branch to pay the salaries of all judicial employees, including judges. *See* 2014 N.M. Laws, ch. 63, § 4(B) (appropriating, for example, $7,049,600 to the First Judicial District Court for "[p]ersonal services and employee benefits," which included funds for a 5% judicial pay increase for the judges of that district). The 5% raise was not separately identified in the language of Section 4(B).

The second increase, separately funded in Section 8(A) of the Appropriations Act, was the same 3% raise authorized for all eligible state employees, including judges. *See id.* § 8(A). Section 8(A)(2) in particular allocated $579,937 to fund the 3% raise for judges and increased the salary of a Supreme Court Justice to $134,922, a sum that included both the 5% and the 3% raises.

Calling out what she referred to as a "dramatic 8% raise," Governor Martinez used her partial veto authority to strike the following language from Section 8(A) before signing the Appropriations Act into law:

> Section [8(A)] . . . The salary increases shall be effective the first full pay period after July 1, 2014, and distributed as follows:
>
> . . .
>
> ~~(2) five hundred seventy-nine thousand nine hundred thirty-seven dollars ($579,937) to provide the justices of the supreme court a salary increase to one hundred thirty-four thousand nine hundred twenty-two dollars ($134,922) and to provide the chief justice of the supreme court, the chief judge of the court of appeals, and judges of the court of appeals, district courts, metropolitan courts and magistrate courts a salary increase pursuant to the provisions of Section 34-1-9 NMSA 1978;~~

Id. § 8(A)(2). Significantly, the Governor did *not* veto any of the appropriation language or dollar amounts set forth in Section 4(B) which included the funds for a 5% raise.

Thereafter, a group of judges, judicial associations, and legislators (collectively, Petitioners) petitioned this Court under Article VI, Section 3 of the New Mexico Constitution to issue a writ of mandamus to the Governor and Secretary of State Duran to declare the Governor's veto of Section 8(A)(2) unconstitutional. *See* N.M. Const. art. VI, § 3 ("The supreme court shall have original jurisdiction in . . . mandamus against all state officers, boards and commissions . . . ."). Petitioners also asked this Court to order the Governor and the Secretary of State to reinstate Section 8(A)(2) and to implement the full 8% raise passed by the Legislature, or alternatively to implement the 5% raise separately funded in Section 4(B).

Citing a possible appearance of

impropriety or bias about ruling on the issues raised in the petition, the Chief Justice, the Senior Justice, and two Associate Justices of this Court recused themselves from this proceeding. *See* Order, *State ex rel. Cisneros v. Martinez*, No. 34,646 (N.M. Sup. Ct. Apr. 16, 2014) (designating Justice Richard C. Bosson as Chief Justice under the rule of necessity for the purpose of appointing justices *pro tempore* and presiding over this petition); *see also Pierce v. State*, 1996-NMSC-001, ¶ 5, 121 N.M. 212, 910 P.2d 288 (recognizing the rule of necessity articulated by the United States Supreme Court that sometimes requires members of a jurisdiction's highest tribunal, as a matter of duty and necessity, to sit and not recuse). In their place, a quartet of retired jurists, consisting of a former Chief Justice, two former Chief Judges of the Court of Appeals, and a former Chief Judge of the First Judicial District Court, agreed to serve as justices *pro tempore* for this proceeding. *Accord State ex rel. Chavez v. Vigil-Giron*, 1988-NMSC-103, ¶ 3, 108 N.M. 45, 766 P.2d 305 (explaining that four district judges were appointed as justices *pro tempore* after the chief justice, senior justice, and two associate justices recused themselves from appellate review of constitutional reforms to the manner of selecting and retaining future state judges, including members of the Supreme Court).

After ordering full briefing and hearing the arguments of the parties, the Court denied the petition in part, ruling from the bench that the Governor's veto was effective with respect to the 3% raise set forth in Section 8(A)(2). The Court also granted the petition in part, ruling that the 5% raise separately funded in Section 4(B) of the Appropriations Act was never vetoed and therefore survived intact. We issued a writ of mandamus consistent with our ruling and ordered the Secretary of the Department of Finance and Administration (DFA) to implement the 5% raise.[1] We now issue this opinion to set forth our reasoning in more detail.

BACKGROUND

As we will explain more fully in this opinion, Petitioners maintain that the Governor's veto of Section 8(A)(2), which we upheld, had no effect on the 5% raise included in Section 4(B). In response, the Governor challenges the legality of the Legislature's method of appropriating funds for the 5% pay raise in Section 4(B), separate from Section 8(A)(2) and without any language that specifically identified the 5% raise. We therefore inquire whether any source of law prohibits the Legislature from using an appropriation like that set forth in Section 4(B)—which included funds for a pay raise but without an explicit mention of a raise—to establish a judicial salary that includes a salary increase. This is a matter of first impression, and we thus begin with a brief overview of the various methods the Legislature has used in the past to establish judicial salaries and pay raises.

Historical Approaches To Establishing Judicial Salaries

Until 1953, judicial salaries were set forth in the New Mexico Constitution. *See* N.M. Const. art. VI, § 11 (as amended through 1952) (providing that the annual salary of a Supreme Court Justice shall be $6,000); *id.* art. VI, § 17 (as amended through 1952) (providing that the annual salary of a district court judge shall be $4,500). As a result,

[1]We joined the DFA Secretary as a party to the order for the purpose of implementing our ruling.

salaries could be changed only by amending the Constitution; that is, through a formal proposal and vote in the Legislature followed by a popular election. *See* N.M. Const. art. XIX, § 1.

In 1953, a pair of constitutional amendments removed the specific judicial salary figures from the Constitution and permitted the Legislature to "fix" or "provide" judicial salaries "by law." *See* N.M. Const. art. VI, § 11 ("The justices of the supreme court shall each receive such salary as may hereafter be fixed by law."); *id.* art. VI, § 17 ("The legislature shall provide by law for the compensation of the judges of the district court."). Two years later, the Governor signed two statutes into law that set forth the annual salaries of justices and district court judges. *See* NMSA 1953, § 16-2-1.1 (1955) (providing that a Supreme Court Justice shall receive an annual salary of $15,000); *id.* § 16-3-33.1 (1955) (providing that a district court judge shall receive an annual salary of $12,500); *see also id.* § 16-7-3 (1966) (providing that a court of appeals judge shall receive an annual salary of $18,500). For roughly the next 40 years, judicial salaries could be changed only by formally amending the relevant statutes; that is, by passing a bill through both chambers of the Legislature and presenting it to the Governor for signature. *See* N.M. Const. art. IV, § 22.

In 1993, the Legislature repealed the statutes that had been used to "fix" or "provide" judicial salaries "by law" and replaced them with NMSA 1978, Section 34-1-9 (1993, amended 2007), which the Governor signed and which remains in effect to this day. *See* 1993 N.M. Laws, ch. 278, § 1 (repealing NMSA 1978, Sections 34-2-2, 34-5-3, and 34-6-3 (1990)). Section 34-1-9 simply provides that Supreme Court Justices shall receive an annual salary that "shall be established by the legislature in an appropriations act." Section 34-1-9 also sets forth a formula for calculating the salaries of the Chief Justice and all other judges and magistrates, using a Justice's salary as the baseline. For example, the Chief Justice's annual salary "is two thousand dollars ($2,000) more than the annual salary of a justice of the supreme court," § 34-1-9(A); the annual salary of a judge of the court of appeals "is ninety-five percent of the annual salary of a justice of the supreme court," § 34-1-9(D)(1); a district judge's salary "is ninety-five percent of the annual salary of a judge of the court of appeals," § 34-1-9(D)(2); and so on.

Requiring judicial salaries to be established "by the legislature in an appropriations act" appears to have had at least two important consequences. First, it has simplified the process of establishing judicial salaries by eliminating the need for substantive legislation that must be separately signed by the Governor, and instead allowing judicial salaries to be included within the legislative budget process. *See, e.g.*, NMSA 1978, § 2-5-4(C) (1967) ("Each state agency, department and institution shall furnish to the legislative finance committee a copy of its appropriation request made to the department of finance and administration at the same time such request is made to such department."). Second, it has required judicial salaries to be established annually because an appropriations act, by design, expires or sunsets at the end of a fiscal year. *See, e.g.*, 2014 N.M. Laws, ch. 63, § 3(C), (E) (providing that the amounts set forth in Section 4 of the General Appropriations Act of 2014 are appropriated "for expenditure in fiscal year 2015" and that any unexpended balances at the end of the fiscal year shall

revert to the general fund). And like any other general appropriations act, an appropriation for judicial salaries is subject to a valid exercise of the Governor's partial-veto authority. *See* N.M. Const. art. IV, § 22 ("The governor may . . . disapprove any part or parts, item or items, of any bill appropriating money."). We discuss the Governor's partial-veto authority in more detail later in this opinion. Unless properly vetoed, however, judicial salaries including pay raises become law as part of the appropriations process.

Legislative Approaches To Establishing Judicial Salaries Under Section 34-1-9

Since Section 34-1-9 was enacted in 1993, the Legislature has used three principal methods for establishing judicial salaries. Two of the methods have been used when the Legislature sought to increase judicial salaries. The third method has been used when salaries were to remain unchanged from the previous year's levels.

The first method appeared in the General Appropriations Act of 1994, in which the Legislature sought to give judges a 3% raise. *See* 1994 N.M. Laws, ch. 6; *see also* 1995 N.M. Laws, ch. 30. That year, the Legislature funded judicial salaries, including the 3% raise, in Section 4(B) through the general appropriations to the appellate courts and judicial districts to pay the salaries of all employees of each court or judicial district. *See* 1994 N.M. Laws, ch. 6, § 4(B); *see also* 1995 N.M. Laws, ch. 30, § 4(B). Like the 2014 appropriations we are examining in Section 4(B), these were lump-sum appropriations that did not include a separate item for the salaries of particular employees or classes of employees. For example, the 1994 appropriation to the Supreme Court for employee salaries simply provided:

SUPREME COURT:

Item	General Fund	Total
(a) Personal services	[$1,249,400]	[$1,249,400]
(b) Employee benefits	[$348,700]	[$348,700]

1994 N.M. Laws, ch. 6, § 4(B). The Legislature explained in a separate section of the 1994 Act that the appropriations in Section 4(B) included funds for a 3% pay increase for all judicial employees, including judges, and it set forth the prior salary and the new salary of a Supreme Court Justice. *See* 1994 N.M. Laws, ch. 6, § 3(L)(c) ("[J]ustices of the supreme court shall receive a three percent salary and benefit increase, from [$77,250] to [$79,567] . . . ."); *see also* 1995 N.M. Laws, ch. 30, § 3(N)(3) ("[J]ustices of the supreme court shall receive a three percent salary and benefit increase, from [$79,567] to [$81,954] . . . .").

Since 1997, the Legislature has preferred a second method for establishing judicial salaries that included a pay increase, electing to fund only existing salaries along with the general appropriations to the judiciary in Section 4(B), and funding any raise through a separate appropriation to the DFA, a part of the executive branch, in another section of the act much like the present Section 8(A)(2). *Compare, e.g.*, 1997 N.M. Laws, ch. 33, § 4(B) (appropriating funds to the judicial branch for "[p]ersonal services" and "[e]mployee benefits"), *with id.* § 9 (appropriating funds to the DFA to provide a 2% raise to all eligible state employees) (vetoed). Under this approach, the Legislature's appropriation to the DFA specifically provided that judges would receive the raise, either by identifying a percentage increase or by stating the new salary. *Compare, e.g.*, 1997 N.M. Laws, ch. 33, § 9(C)(2) (providing that judges and

justices shall receive a 2% raise) (vetoed), *with, e.g.*, 1999 N.M. Laws, 1st Spec. Sess., ch. 3, § 8(A)(1) (providing a salary increase to $87,773).

The third method of establishing judicial salaries has arisen by implication in years when judges did not receive a salary increase. In those years, the appropriations acts were silent about judicial salaries, with no language that specifically mentioned judicial pay. Only the dollar figures set forth in the general appropriations to the judiciary in Section 4(B) showed by mathematical inference the Legislature's intent to establish judicial salaries at the previous years' levels. *See, e.g.*, 2009 N.M. Laws, ch. 124, § 4(B) (appropriating, for example, $2,797,300 to the Supreme Court for "[p]ersonal services and employee benefits"); 2010 N.M. Laws, 2d Sess., ch. 6, § 4(B) (appropriating, for example, $2,813,100 to the Supreme Court for "[p]ersonal services and employee benefits"); 2011 N.M. Laws, ch. 179, § 4(B) (appropriating, for example, $2,711,400 to the Supreme Court for "[p]ersonal services and employee benefits"); 2012 N.M. Laws, ch. 19, § 4(B) (appropriating, for example, $2,777,000 to the Supreme Court for "[p]ersonal services and employee benefits").

A comparison of these three methods reveals a notable difference about the recipient of the appropriations for judicial salaries. In years when the Legislature used the first or third method, it appropriated the entire amount for judicial salaries to the judicial branch. In years when it used the second method, however, the Legislature appropriated funds for existing salaries to the judicial branch, and it appropriated funds for the raise to the executive branch, to be distributed by the DFA. The Legislature has never provided an explanation for the different recipients or the different methods of providing judicial salaries and raises.

All three methods also share important similarities. First, under each method the appropriations in Section 4(B) have always been lump-sum appropriations without item-by-item language, and as such Section 4(B) has never included a separate line or item for judicial salaries, even in years when it included funds for a judicial salary increase. Instead, the money appropriated in Section 4(B) for judicial salaries has been an inseparable, unspecified portion of a larger appropriation to a court or judicial district. And second, when the Legislature has sought to increase judicial salaries, it has expressly identified the raise elsewhere in the appropriations act, apart from the general appropriations for judicial employee salaries in Section 4(B).

The 2014 Approach—A Hybrid Method

In 2014, the Legislature tried something different, a hybrid of sorts. Borrowing from the first method described above, the Legislature appropriated funds for existing judicial salaries in Section 4(B), plus sufficient funds for a 5% pay raise through the general appropriations to the judicial branch. And borrowing from the second method, the Legislature in Section 8(A) separately appropriated funds for a 3% raise through an appropriation to the DFA. *See* 2014 N.M. Laws, ch. 63, § 8(A) ("Nineteen million seven hundred ninety-one thousand six hundred dollars ($19,791,600) is appropriated from the general fund to the department of finance and administration for expenditure in fiscal year 2015 to provide salary increases of three percent to employees in budgeted positions who have completed their probationary period subject to satisfactory job performance.").

[redacted]

[redacted] As part of the appropriation for the 3% raise, the Legislature directed the DFA to distribute $579,937 of the appropriation "to provide the justices of the supreme court a salary increase to . . . $134,922," and to provide the Chief Justice and other judges and magistrates with a salary increase under Section 34-1-9. *See id.* § 8(A)(2). The parties agree that the $134,922 salary in Section 8(A)(2) did not match the 3% raise funded in that same provision; it was $9,994 more than the previous year's salary of $124,928 and represented a total increase of 8%. *Compare id.* § 8(A)(2) (increasing the salary of a Supreme Court Justice to $134,922), *with* 2013 N.M. Laws, ch. 227, § 8(A)(2) (increasing the salary of a Supreme Court Justice to $124,928).

[redacted] We pause to emphasize a critical point. In this writ proceeding, there is no serious dispute that the appropriations for personal services and employee benefits in Section 4(B) did, in fact, include funds for the 5% raise, though the funds were not specifically identified as such. Indeed, Petitioners appended to their reply brief several documents purporting to prove that the 5% raise was part of the Section 4(B) appropriations, including an affidavit from Senator George Munoz, a party to this proceeding and an LFC member, testifying that Section 4(B) included funds for a 5% raise. Senator Munoz's affidavit included two attachments in support of his testimony: a pre-session recommendation by the Legislative Finance Committee (LFC) to appropriate funds in the Appropriations Act to provide a 5% pay increase to justices and judges; and a post-session LFC report explaining that Section 4(B) included funds for a 5% judicial pay raise. Similarly, the Governor appended an affidavit from the Director of the State Budget Division of the DFA explaining certain elements of the budgetary process and acknowledging that Section 4(B), "contains more funding than is necessary to fund judges' salaries at the fiscal year 2014 level." The Director states that this additional funding can be used for other expenses or revert to the general fund, but he never contradicts the premise that the additional funds were intended to provide a 5% raise to judges or that they can be used for that purpose. No party objected to or moved to strike any of these exhibits.

[redacted] While none of these documents is talismanic, we consider them insofar as they support the obvious conclusion: the Legislature's unusual, two-phased approach to funding judicial salaries was a matter of common knowledge. Everyone involved in the budgetary process seems to have understood that the Legislature gave judges two raises: the same 3% raise in Section 8(A)(2) provided to all qualified state employees, and a separate 5% raise in Section 4(B), commingled with the appropriations for the salaries of all judicial employees and publicized in key legislative documents. *See, e.g.*, LFC FY2015 Budget Recommendations, *available at* http://www.nmlegis.gov/lcs/lfc/lfcdocs/budget/2015RecommendVolII.pdf, at 14 ("[T]he courts requested an additional [$617,000] to provide all judges a 5 percent compensation increase . . . . The [LFC] recommendation provides adequate funding for . . . a 5 percent compensation increase for judges . . . .").[2]

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[2]The LFC also noted that its recommendation

> took into account the findings of the legislatively created Judicial Compensation Commission which recommended increasing judicial salaries by 11 percent to bring New Mexico judge salaries in line with those in Oklahoma. The 5 percent salary increase

Recognizing that the new salary figure set forth in Section 8(A)(2) was the sum of both the 5% and 3% raises, the Governor vetoed that provision in its entirety, explaining:

> I have vetoed the compensation increases for . . . elected judges throughout the state.
>
> . . .
>
> [T]hough I would have supported a more modest 3% increase in pay for judges that would have put them on par with other pay raises in the budget, I cannot support the dramatic 8% raise requested in the budget.

Senate Executive Message No. 112 (Mar. 11, 2014), *available at* http://governor.state.nm.us/uploads/FileLinks/8c4df00e70964948058c836188fb9d5/SEM112_1.pdf. Based on her explanation, it seems clear that the Governor believed that her veto of Section 8(A)(2) eliminated both raises. We now turn to that question: whether the Governor's veto was effective in regard to either section of the Appropriations Act.

DISCUSSION

On previous occasions when this Court has been called upon to consider the proper exercise of the Governor's partial veto authority, we have tried to articulate a set of guiding principles, rooted in the idea that the partial veto power is "a negative power, or a power to delete or destroy a part or item, and . . . not a positive power, or a power to alter, enlarge or increase the effect of the remaining parts or items." *State ex rel. Sego v. Kirkpatrick*, 1974-NMSC-059, ¶ 18, 86 N.M. 359, 524 P.2d 975. Thus, a partial veto must "destroy[] the whole of an item or part [without] distort[ing] the legislative intent." *Id.*; *see also State ex rel. Smith v. Martinez*, 2011-NMSC-043, ¶ 8, 150 N.M. 703, 265 P.3d 1276 ("Our case law emphasizes the limitation of the Governor's partial veto power by requiring that the veto eliminate the *whole* of an item or part and prohibiting the striking of individual words that result in legislation inconsistent with the Legislature's intent."). These broad principles provide only the starting point of our analysis; ultimately, each situation has come down to the particular facts of a particular appropriation and a particular veto. *See, e.g.*, *Sego*, 1974-NMSC-059, ¶ 11 (separately analyzing the validity of seven vetoes). This case is no less fact bound than those that have come before us in the past.

At oral argument before this Court the Governor took the position that regardless of what the Legislature's original intent may have been to make two separate appropriations, that intention changed or evolved as the Appropriations Act took final form. Relying on the one, lump sum salary figure set forth in Section 8(A)(2), the Governor argued that the Legislature's ultimate intent was to provide a single 8% raise in Section 8(A)(2) which the Governor duly vetoed. This argument is not without a certain logic because, as we have indicated, that lump sum salary figure ($134,922) is the total sum of both appropriations.

But we do not find the Legislature's

> requested would increase a district judge's salary from $113 thousand to $119 thousand. The commission found that New Mexico's district court judges are the lowest paid in the country.

LFC FY2015 Budget Recommendations, *supra*, at 14.

intent so easy to discern from Section 8(A)(2). The unexplained mismatch in that provision between the funds allocated for the 3% raise and the salary that represented an 8% raise—a mismatch the Governor recognized—renders the meaning of Section 8(A)(2) unclear. At the very least, the mismatch signaled that Section 8(A)(2) was not the only portion of the Appropriations Act that concerned a judicial pay increase.

When legislative language is "unclear, ambiguous, or reasonably subject to multiple interpretations," we look to other indicators of legislative intent, including "the history, background, and overall structure of the statute." *See State v. Almanzar*, 2014-NMSC-001, ¶ 15, 316 P.3d 183. Based on the Appropriations Act's structure, we are convinced that the Legislature intended two raises. To conclude otherwise would require us to overlook the Legislature's own choice to fund these raises through two separate appropriations, contained in two separate sections of the Appropriations Act, and made to two separate branches of government—5% to the Judiciary and 3% to the DFA. Under these circumstances, we are persuaded that the Legislature intended two separate raises and provided appropriations for them in two separate sections of the Appropriations Act, one of which the Governor vetoed, the other of which remained intact.

The salary figure set forth in Section 8(A)(2) does not compel a different conclusion. Rather than showing that the Legislature intended to provide a single 8% raise, we view the salary as signaling the Legislature's unusual approach to establishing judicial salaries in the Appropriations Act. The salary on its face is more than the 3% raise appropriated in Section 8(A), indicating that the Legislature had appropriated a separate 5% raise for judges elsewhere in the Act—not in Section 8(A)(2)—which the parties knew to be Section 4(B). Having concluded that the Legislature intended two separate raises, we now consider the veto's effect on each raise in turn.

The Veto Eliminated the 3% Raise

The veto's effect on the 3% raise strikes us as a fairly easy question. The parties do not dispute that the Legislature intended the money allocated in Section 8(A)(2) to fund the same 3% raise for judges that was given to other state employees in Section 8(A). Nor do they dispute that the Governor's veto removed from the Appropriations Act every trace of the 3% raise for judges by eliminating all language related to the 3% raise, the entire allocation for the 3% raise, and the salary that included the raise. Everything related to the 3% raise for judges was confined to Section 8(A)(2), which the Governor vetoed in its entirety. Our case law requires nothing more. *See, e.g.*, *State ex rel. Dickson v. Saiz*, 1957-NMSC-010, ¶28, 62 N.M. 227, 308 P.2d 205 ("It mattered not where in the bill they rested if they constituted an integral part of the subject being partially vetoed—out they came!"). The veto "destroy[ed] the whole" of the 3% raise for judges and therefore was an effective exercise of the Governor's partial veto authority.

The Veto Did Not Eliminate the 5% Raise

The closer question is whether the veto of Section 8(A)(2) had any effect on the 5% raise funded in Section 4(B). Petitioners contend that even if the veto of the 3% raise was effective, the 5% raise was unaffected because the Governor did not veto the appropriations in Section 4(B) that included funds to pay for the 5% raise. In a series of

related arguments, the Governor counters that because her veto of Section 8(A)(2) eliminated the Appropriations Act's only explicit mention of a judicial pay increase ("to provide the chief justice [and other judges] a salary increase pursuant to the provisions of Section 34-1-9"), her veto simply left salaries intact at the previous year's levels. In other words, the Governor takes the position that her veto of Section 8(A)(2) reached beyond the 3% raise funded in that provision and also eliminated the 5% raise funded in Section 4(B). We now turn to a more detailed examination of the Governor's arguments.

The Legislature's historical practice, though informative, does not necessarily control how the Legislature may choose to act in a different legislative session

The Governor relies heavily on years when the general appropriations acts were silent about judicial pay to argue that her veto of Section 8(A)(2) eliminated the 5% raise in Section 4(B). She contends that the vetoed Appropriations Act "looks identical to the general appropriations acts in dozens of other years . . . when the legislature has simply omitted any authorization of new judicial salaries" and judges continued to be paid at the previous year's salary levels. By contrast, in years when the Legislature has sought to give judges a raise, the Legislature has explicitly identified the raise in a separate provision of the appropriations act. The Governor therefore maintains that judges must continue to be paid at their 2014 salary levels. Like previous years when judges did not receive a raise, her veto left no language in the Appropriations Act to explicitly "authorize" a raise, whether 3%, 5%, or both.

Petitioners respond that nothing in the law requires the Legislature to "authorize" a raise in the manner the Governor prescribes. Rather, the New Mexico Constitution and Section 34-1-9 require only that judicial salaries be "fixed," "provided," or "established" by the Legislature in an appropriations act, without specifying where or how in the act the Legislature must do so or what language or detail the Legislature must employ to establish judicial salaries. Petitioners also point to years when the appropriations acts were silent about judicial salaries as evidence that the Legislature may "establish" judicial salaries with a mere appropriation. In this instance, Petitioners have the more accurate argument.

As previously explained, under Section 34-1-9 judicial salaries must annually be "established by the Legislature in an appropriations act" because appropriations acts expire or sunset after a year. Thus, in those years when the appropriations acts did not explicitly reference judicial pay, the general appropriations to the judiciary in Section 4(B), which included unspecified amounts to fund judicial salaries, were sufficient to "establish" judicial salaries as required by statute.[3] As was true this year, it

[3]The evolution of Section 34-1-9 supports this view. From its enactment in 1993 until it was amended in 2004, Section 34-1-9(A) provided, "Justices of the supreme court shall each receive an annual salary of seventy-seven thousand two hundred fifty dollars ($77,250)." The statute also provided, "For [fiscal year 1995] and all subsequent fiscal years, the annual salary for justices of the supreme court . . . shall be established by the legislature in an appropriations act." Between 1993 and 2004, the annual salaries of judges were increased at least four times, including in 2000, when the annual salary of a Supreme Court Justice was increased to $90,407. *See* 2000 N.M. Laws, 2d. Sess., ch. 5, § 10. But the following two years, the appropriations acts were silent about judicial salaries. In 2001, the Governor vetoed the appropriations to the DFA for compensation increases for all state employees, leaving only the general

was understood in those years that the Legislature had appropriated funds to pay judges at a particular level, even without specific language in the act to provide a base figure for the formula in Section 34-1-9.

And while in recent years it may have been the Legislature's historical practice—and perhaps even the better practice—to explicitly identify a judicial salary increase separately from Section 4(B), we have found nothing in the law that *requires* the Legislature to do so. We are unable to find support for the Governor's contention to the contrary. No constitutional or statutory provision limits how the Legislature may choose to establish judicial salaries, including pay raises, as long as they are "established by the legislature in an appropriations act." Section 34-1-9 (E). The details for establishing judicial salaries—like many parts of the appropriations process—appear to be entrusted to the discretion of the Legislature. The Constitution requires only that every law "making an appropriation" shall "specify" the "sum appropriated" and the "object to which it is to be applied." N.M. Const. art IV, § 30. No party challenges the 5% pay raise under Article IV, Section 30. Absent any such limitation clearly imposed on a co-equal branch of government, whether by constitution or statute, principles of judicial restraint and respect for the constitutional separation of powers dictate that we not invent one. *See* N.M. Const. art. III, § 1 ("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 . . . .").

More importantly, to treat the vetoed Appropriations Act the same as previous appropriations acts—when legislative silence about judicial salaries maintained the status quo—would be to ignore a critical difference. Even after the veto, this year's appropriations in Section 4(B) still included money for a raise, when the prior years' appropriations did not. To ignore this distinction would be to turn a blind eye to the obvious—to treat the appropriation for the 5% raise as though it were hidden in plain sight. We decline to do so. The appropriations in Section 4(B) were sufficient to "establish" judicial salaries, including a 5% raise. More to the point, nothing in the law dictates that the Legislature could not establish judicial salaries in that fashion.

To veto the 5% raise, the Governor had to veto the appropriations in Section 4(B)

In support of a related argument, the Governor cites our recent opinion in *Stewart* to argue that the money appropriated in Section 4(B) to fund the 5% raise cannot be used for its intended purpose because her veto eliminated all of the "language" in the Appropriations Act related to a judicial salary increase. *See Stewart*, 2011-NMSC-045, ¶ 15 ("All *language* that relates to the subject to be proscribed by the veto must be vetoed for the veto to be valid." (emphasis added)). The

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appropriations for existing salaries in Section 4, *see* 2001 N.M. Laws, ch. 64, § 9 (vetoed), and in 2002, the appropriations act did not include any language about judicial salaries, other than the general appropriations in Section 4(B), *see* 2002 N.M. Laws, Extraordinary Sess., ch. 4. In each of those years, judicial salaries seemingly would have reverted to the 1993 level still codified in Section 34-1-9(A), but for the appropriations in Section 4(B) that "established" salaries—with or without language to that effect—at the same level established in the 2000 general appropriations act.

Governor asserts that the judicial entities that received the additional money in Section 4(B) may spend it on any expenses related to personal services or employee benefits—except to increase judicial salaries. She alternatively suggests that the courts may follow the DFA's established procedures for transferring funds between appropriated categories, or may allow the money to revert to the general fund at the end of the fiscal year.

The Governor's argument overlooks the distinct facts of this case. The Legislature gave judges a 5% raise through the appropriations in Section 4(B), without any "pay raise language" to veto but the appropriations themselves. Under these circumstances, the general rule articulated in *Stewart* that "[a]ll *language* that relates to the subject to be proscribed by the veto must be vetoed for the veto to be valid" simply does not apply. *See Stewart*, 2011-NMSC-045, ¶ 15 (emphasis added). The Legislature having left no language to veto in Section 4(B), the Governor could not rely on her veto of other language elsewhere in the Act appropriating other money. We do not read *Stewart* so narrowly that it alters the Governor's underlying responsibility when exercising her partial-veto authority: to "destroy[] the whole of an item or part [without] distort[ing] the legislative intent." *Sego*, 1974-NMSC-059, ¶ 18. Consistent with our admonition in *Sego*, the Governor had to veto the "whole" appropriation where the Legislature placed it. The appropriations in Section 4(B) represented the only "language" for the Governor to veto if she disapproved of the 5% raise.

Petitioners argue that the Governor's assertion—that the funds for the 5% raise may be spent on anything but a 5% raise—supports their position that they should receive both the 5% and 3% raises passed by the Legislature. Petitioners contend that the veto of Section 8(A)(2), itself, was unconstitutional under *Sego* because it "alter[ed] . . . the effect" of the funds intended for the 5% raise by requiring them to be spent on something other than the raise, effectively "creat[ing] new legislation." *See Sego*, 1974-NMSC-059, ¶ 18 ("The power of partial veto is . . . a negative power, or a power to delete or destroy a part or item, and . . . not a positive power, or a power to alter, enlarge or increase the effect of the remaining parts or items. It is not the power to enact or create new legislation by selective deletions."). We do not reach this argument because of our determination that the Legislature intended two separate raises. The veto of Section 8(A)(2) had no effect on the 5% raise funded in Section 4(B). The only way to eliminate the 5% raise was to veto the appropriations in Section 4(B) that included the funds for that purpose.

Including the 5% raise in the Section 4(B) appropriations was not unconstitutional "subtle drafting"

Finally, the Governor contends that, if the veto of Section 8(A)(2) did not also eliminate the 5% raise in Section 4(B), the entire appropriation in Section 4(B) "is improper and should be stricken" due to "careful drafting of legislation" aimed at "circumvent[ing] or preempt[ing] the Governor's veto power." This argument is based on our suggestion in *Sego* that "[t]he Legislature may not properly abridge [the Governor's partial veto] power by subtle drafting of conditions, limitations or restrictions upon appropriations." 1974-NMSC-059, ¶ 12. However, *Sego* did not apply or otherwise develop that language or consider the possible results of "subtle

drafting" on a properly exercised partial veto.

Not until *State ex rel. Coll v. Carruthers* were we faced with a situation that required us to consider the limitation that we had placed on the Legislature in *Sego*. *See* 1988-NMSC-057, 107 N.M. 439, 759 P.2d 1380. In *Coll*, the petitioners challenged Governor Carruthers' veto of a restriction or condition imposed by the Legislature upon an appropriation that prohibited the Second Judicial District Attorney's Office from spending any of its general appropriation on "rental of parking space." *Id.* ¶ 10. The Court first considered the restriction itself, which the parties agreed would have affected only $4,000 of a $4,500,000 appropriation—less than 0.1% of the appropriation—and held that it violated separation-of-powers principles by intruding on the executive function by "attempt[ing] to make detailed, min[u]scule, inconsequential executive management decisions." *Id.* ¶ 11. The Court then rejected the petitioners' fallback argument that the veto was invalid because it distorted the Legislature's intent in violation of *Sego*:

> The legislature may not artfully draft conditions or restrictions that would force the governor to veto an entire appropriation to a particular agency in order to reach a limitation or condition he finds constitutionally offensive. If this line of reasoning were followed the governor would be left with the option of either vetoing the entire appropriation of $4,500,000 or accepting the restriction. The restriction was not a proper restriction or condition and as such was subject to veto by the governor. The legislature left the governor no reasonable alternative. The veto was valid.

1988-NMSC-057, ¶ 15. *Coll* remains the only instance in which this Court has rejected a challenge to a partial veto based, at least in part, on a refusal to validate "artful drafting" by the Legislature.

Upon close examination, we think *Coll* is of little use here. In 2014 the Legislature imposed no condition—minuscule or otherwise—upon its appropriations for judicial pay raises. Sections 8(A)(2) and 4(B) are stand-alone, unconditional, and separate appropriations, and as such must be vetoed in their entirety like any other appropriation of which the Governor disapproves in whole or in part.

With respect to Section 4(B) in particular, the Legislature routinely includes funds in general appropriations acts, like the funds for the 5% raise, that are earmarked for certain purposes but that are not identified in separate lines or items; rather, they are combined with other, similarly situated funds sharing a common "object to which [the appropriation] is to be applied." N.M. Const. art IV, § 30. The Governor provides no authority for the proposition that the Legislature must treat funds for judicial raises differently by separating them from the general object of the appropriation—personal services and employee benefits.

More importantly, reading *Coll* to prevent the Legislature from acting as it did in this case would lead to absurd results. Nothing in the New Mexico Constitution requires the Legislature to make appropriations easy to veto by identifying each appropriation in a separate line or item in an appropriations act. If that were *Coll*'s holding, general

appropriations acts would necessarily become immense. They would be transformed into highly detailed documents that would have to identify the specific object of every dollar appropriated by the Legislature. That was clearly not *Coll*'s intended effect, and the New Mexico Constitution does not require anything like it. *See Coll*, 1988-NMSC-057, ¶ 11 (holding a provision of the 1988 appropriations act unconstitutional because the Legislature had "attempt[ed] to make detailed, min[u]scule, inconsequential executive management decisions" about how the district attorney's office could spend a portion of its base budget).

To the extent that the Governor invites us to interpret the notion of "subtle drafting" to fit the circumstances of this case, we are unwilling to do so. The Governor has not provided a limiting principle to distinguish subtle drafting from drafting that is not-so-subtle, and we do not consider it wise to fashion one on our own. *See Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 70, 309 P.3d 53 ("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."). Outside of the facts of *Coll*, in which we refused to allow the Legislature to use *Sego* to shield an unconstitutional restriction from the Governor's veto pen, we remain respectful of constitutional separation of powers and accordingly prefer to allow the legislative process to play out free from judicial interference, so long as the process is open and transparent. *Cf. Martinez v. Jaramillo*, 1974-NMSC-069, ¶ 9, 86 N.M. 506, 525 P.2d 866 ("The mischief to be prevented [by Article IV, Section 16 of the New Mexico Constitution] was hodge-podge or log-rolling legislation, surprise or fraud on the legislature, or not fairly apprising the people of the subjects of legislation so that they would have no opportunity to be heard on the subject.").

The appropriations process offers the best solution

In truth, the appropriations process is largely unregulated; our constitution has left it that way for over one hundred years. As we explained forty years ago in *Sego*,

> The legislative power of the State of New Mexico is vested in the Legislature. Except for interest or other payments on the public debt, money shall be paid out of the treasury of the State only upon appropriations made by the Legislature, and every law making an appropriation shall distinctly specify the sum appropriated and the object to which it is to be applied. The supreme executive power of the State is vested in the Governor, whose principal function, insofar as legislatively enacted law is concerned, is to faithfully execute these laws. [She] does, however, have the power to exercise veto control over the enactments of the Legislature to the extent that this power or authority is vested in [her] by Art. IV, § 22, supra. As to bills appropriating money, [she] clearly has the power to veto a "part or parts" or "item or items" thereof.

1974-NMSC-059, ¶ 12 (internal citations omitted).

The New Mexico Constitution also provides the political and logistical framework within which the appropriations process takes

place. The Legislature is tasked with passing a general appropriations act each year and with submitting it to the Governor for approval. *See* N.M. Const. art. IV, § 22. The Governor may, and often does, participate in and influence the legislative process as the bill takes shape. *See, e.g.*, NMSA 1978, § 6-3-21(A) (2004) ("The governor shall prepare the budget and submit it to the legislative finance committee and each member of the legislature not later than January 5 in even-numbered years and not later than January 10 in odd-numbered years."). Direct, oftentimes frank discussions may take place. If a particular appropriation amounts to a "deal breaker" for the Governor, the Legislature then has to weigh the value of that particular appropriation against the likelihood of a gubernatorial veto and even the possibility of a special session. This is all part of the give and take of any legislative session, and it is where the competing interests of those two co-equal branches of state government are best played out.

But with a few exceptions that are not relevant here, *see* N.M. Const. art. IV, § 16, the act's form and substance are left to the Legislature. Once the act is presented to the Governor, her role is a limited one. If an act is presented to her more than three days before the end of a legislative session, she may refuse to sign it, note her objections, and send it back to the Legislature. *See* N.M. Const. art. IV, § 22. In that event, the act cannot become law unless two-thirds of the members of the house and senate vote to override the Governor's objections. *See id.* If the act is presented to the Governor during the last three days of a session, she may refuse to sign it, or she may "disapprove any part or parts, item or items" of the bill and sign the remainder into law. *Id.* In the event that the Governor vetoes the entire appropriations act or an essential portion, she may call the Legislature back for a special session. *See* N.M. Const. art. IV, § 6.

Historically, this is a process in which the judicial branch has been reluctant to interfere, a "delicate constitutional balance between the executive and the legislative branches of government." *Coll*, 1988-NMSC-057, ¶ 9 (quoting *Colorado General Assembly v. Lamm*, 704 P.2d 1371, 1377 (Colo. 1985) (en banc)). We will not speculate about the Legislature's motive for choosing this particular method of providing the 5% raise. A clear effect of that choice, however, was to make the raise more challenging for the Governor to veto if she found it objectionable; she had to veto the entire appropriation. We are unable to find any legal basis to conclude that this amounted to legislative overreach, especially when the Governor had notice of the Legislature's intent and when she had other tools in the political process at her disposal. We reiterate that the New Mexico Constitution does not prescribe a particular method that the Legislature must follow when it appropriates funds. Accordingly, the Legislature remains free to use any of the methods that it has used in the past, or to create new ones, provided that the Governor receives sufficient notice to permit her to meaningfully exercise her partial-veto authority. *See* N.M. Const. art. IV, § 22.

Finally, we note the unusual context in which this case has arisen; to a great extent it is unlike any of our precedents. To our knowledge, the Legislature's method of appropriating funds to increase judicial salaries was novel, as was the Governor's attempt to eliminate both raises by vetoing only one appropriation and leaving the other intact. With this ruling, we are upholding the valid exercise of the Governor's partial veto authority, while at the same time we uphold

the Legislature's broad authority to fashion general appropriations acts in its discretion, absent a specific prohibition in the New Mexico Constitution.

CONCLUSION

The Governor's veto of Section 8(A)(2) successfully "destroy[ed] the whole" of the 3% judicial pay increase. The veto had no effect on the 5% increase separately funded in Section 4(B).

IT IS SO ORDERED.

RICHARD C. BOSSON, Justice, Chief Justice, Sitting by Designation

PATRICIO M. SERNA, Justice, Retired, Sitting by Designation

A. JOSEPH ALARID, III, Judge, Retired, Sitting by Designation

CELIA F. CASTILLO, Judge, Retired, Sitting by Designation

JAMES A. HALL, Judge, Retired, Sitting by Designation

Certiorari Granted, December 19, 2014, No. 34,929

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-001

Filing Date: September 10, 2014

Docket No. 32,542

JERALD W. FREEMAN, THE TEA LEAF, INC., and THOMAS NYGARD, INC.,

Plaintiffs-Appellees,

v.

PAUL W. FAIRCHILD, JR.,

Defendant/Cross-Claimant-Appellee,

v.

RICHARD H. LOVE and R.H. LOVE GALLERIES, INC.,

Defendants-Appellants.

Keleher & McLeod, P.A.
Thomas C. Bird
Kurt Wihl
Christina Muscarella Gooch
Albuquerque, NM

for Plaintiffs-Appellees Jerald W. Freeman, The Tea Leaf, Inc., and Thomas Nygard, Inc.

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for Defendant/Cross-Claimant-Appellee Paul W. Fairchild, Jr.

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Santa Fe, NM

for Appellants

OPINION

FRY, Judge.

The Opinion filed on July 30, 2014 is withdrawn, and the following is substituted for it. Defendants' motion for rehearing is denied.

Plaintiffs Jerald W. Freeman, The Tea Leaf, Inc., and Thomas Nygard, Inc., owned a painting that they agreed to sell to Paul Benisek. Benisek, in turn, agreed to sell the painting to Defendants R.H. Love Galleries, Inc., and Richard H. Love (collectively referred to as Love). Love then sold the painting to Defendant Paul W. Fairchild, Jr. Fairchild paid Love in full for the painting, but Love never completely paid Benisek, and Benisek never completely paid Plaintiffs. In this controversy over possession of the painting and amid the claims, cross-claims, and counterclaims asserted, we reverse summary judgment entered in favor of Plaintiffs against Love because they failed to make a prima facie showing of the elements necessary to support their claims. Accordingly, we also reverse the district court's award of damages on Plaintiffs' claims against Love. We affirm summary judgment in favor of Fairchild against Love and the district court's later award of damages on Fairchild's claims against Love.

BACKGROUND

Plaintiffs jointly owned a painting by Albert Bierstadt titled "Sunset Over the Plains" (the painting). Freeman, on behalf of himself and the other Plaintiffs, negotiated with Benisek and agreed to sell the painting to Benisek for $240,000. In the written purchase agreement dated October 28, 2002, Benisek agreed to pay Freeman for the painting in twelve monthly installments. He further agreed that "[t]itle in the [painting] shall remain with [Freeman] until the [p]urchase [p]rice is paid in full" and that he would execute "UCC or similar documents as [Freeman] may reasonably require." The agreement also provided that "[Benisek] shall be in possession" of the painting.

On the same day that Freeman and Benisek entered into their written agreement (the Freeman/Benisek agreement), Benisek entered into a written agreement to sell the painting to Love for $300,000 (the Benisek/Love agreement). As in the Freeman/Benisek agreement, the Benisek/Love agreement provided that Love would pay for the painting in twelve monthly installments, but the due date for each payment was scheduled to occur several days before each of Benisek's corresponding payments to Freeman. The remaining terms of the Benisek/Love agreement were similar to the terms of the Freeman/Benisek agreement, including the provision that title to the painting would remain with the seller (Benisek) until the purchase price had been paid in full and the provision that the buyer (Love) would be in possession of the painting. Thus, the two agreements were in conflict as to who had title to and who would retain possession of the painting. The other material difference between the two agreements—apart from the names of the parties, the amounts of the purchase price and the installment payments, and the due dates of payments—was the provision in the Benisek/Love agreement that "[t]he [painting] constitutes security for payment of the [p]urchase [p]rice." In addition, the

Benisek/Love agreement referred to Benisek as "[s]eller's [a]gent" rather than as "[s]eller," which was the designation applied to Freeman in the Freeman/Benisek agreement.

Despite the express terms of the Freeman/Benisek agreement, Benisek had orally agreed—prior to the execution of either agreement—to sell the painting to Love, and he had also given possession of the painting to Love. Also prior to the execution of the two agreements and contrary to the express terms of the Benisek/Love agreement, Love had orally agreed to sell the painting to Fairchild for $375,000 and had given Fairchild possession of the painting in exchange for cash and three other paintings. The cash and three paintings constituted payment in full from Fairchild to Love for the painting.

In summary, Benisek agreed to purchase the painting from Freeman and sold and delivered the painting to Love, who in turn sold and delivered the painting to Fairchild, all before Benisek signed the written agreement with Freeman promising to retain possession of the painting and before Love signed a similar agreement with Benisek also promising to retain possession of the painting. The only person who paid for the painting in full was Fairchild.

Love made the first four installment payments owed to Benisek, and Benisek in turn made the first four installment payments to Freeman. Then, in April 2003, Love told Benisek that he was declaring a moratorium on any further payments due to financial troubles, and Love's check for the fifth installment payment bounced. Benisek had already made his fifth installment payment to Freeman, so he informed Freeman about Love's moratorium and asked Freeman to return the fifth payment to him.

Although the details are far from clear, Love and Freeman apparently made contact at some point after this because Love sent a letter to Freeman's attorney explaining that he was experiencing financial difficulties. In the letter, Love proposed to liquidate various assets and to allow creditors to assert liens on certain assets "in amounts and on terms to be negotiated." The letter further provided that creditors would forebear enforcing their liens or claims for a period of time until Love could reestablish his gallery. Finally, the letter stated that Love would make his financial information available to Freeman if Freeman signed and returned a non-disclosure agreement. Freeman did sign the non-disclosure agreement, which essentially provided that Freeman would "enter discussions concerning past and potential business transactions with [Love]" and that Freeman would "use best efforts to assure that any confidential and/or proprietary information disclosed in connection with such discussions will be kept confidential." The record does not disclose any further details about other discussions, if any, between Love and Freeman.

In February 2004, Fairchild apparently placed the painting on consignment with Owen Gallery, and Freeman saw an Owen Gallery catalog offering the painting for sale. Freeman asked Owen Gallery if he could view the painting, and Owen Gallery shipped the painting from New York to a gallery in Santa Fe, New Mexico, where Freeman was located. Freeman then took possession of the painting and refused to return it to Owen Gallery.

Shortly after Freeman regained possession of the painting, he filed suit against Benisek, Love, and Fairchild. Freeman sought (1) a declaratory judgment establishing that his rights to possession of the painting were

superior to the rights of Defendants, and (2) damages for breach of contract, conversion, negligent misrepresentation, fraud, prima facie tort, and breach of the implied covenant of good faith and fair dealing. Freeman later amended his complaint to add the other Plaintiffs. Fairchild then filed counterclaims against Plaintiffs for declaratory judgment, conversion, and fraud, and cross-claims against Love for fraud, negligent misrepresentation, and violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (Illinois Act).

After nearly six years of litigation, Plaintiffs filed a motion seeking partial summary judgment against Love on their claims for breach of contract, negligent misrepresentation, and fraud. Following a hearing, the district court granted the motion, holding that there were no material issues of fact that (1) Love had breached the contract with Benisek "as agent for Plaintiffs" by failing to maintain possession of the painting, by failing to pay Benisek, and by failing to perfect a security interest in the painting; (2) Love negligently represented that he would keep possession of the painting and perfect a security interest in it; and (3) Love was guilty of fraud because he intended that "Plaintiffs, through their agent Benisek," rely on Love's misrepresentations and because he misrepresented to Plaintiffs, "through their agent Benisek" that he would keep possession of the painting and perfect a security interest in it while being aware that he had already sold and delivered the painting to Fairchild. Thus, the district court's summary judgment in favor of Plaintiffs depended on the notion that Benisek was acting as Plaintiffs' agent in his dealings with Love. The district court ordered that damages would be determined at a subsequent trial.

Meanwhile, Fairchild had filed his own motion seeking partial summary judgment against Love. Instead of responding to the motion, Love's counsel moved to withdraw, and the district court granted the motion and advised Love in its order that Love would have twenty days in which to retain substitute counsel. Love did not retain substitute counsel and appeared pro se by telephone at the hearing on Fairchild's motion a month and a half later. At the hearing, Fairchild's counsel argued only that Love had not responded to Fairchild's motion for summary judgment, and the district court announced that "[b]ecause there ha[d] not been a substantive response to the motion, . . . the motion shall be granted." The court concluded that it would determine damages "at a later proceeding."

Plaintiffs and Fairchild settled their respective claims against one another. Plaintiffs filed a motion for summary judgment on their claims against Benisek, which the district court granted only as to the claim for breach of contract. Plaintiffs and Benisek reached a settlement whereby Benisek agreed to pay Plaintiffs $38,000 for the breach of contract, and Plaintiffs dismissed their other claims against Benisek.

The issue of damages to be assessed against Love in favor of Plaintiffs and in favor of Fairchild was tried to the district court over two days. Again, Love appeared pro se by telephone. At the conclusion of the trial, the district court awarded Plaintiffs $731,744 in compensatory damages and $4,390,645 in punitive damages. The court awarded Fairchild $1,942,446 in compensatory damages and $9,712,232 in punitive damages. Thus, the district court found Love liable for a total of $16,777,067 in damages. The

district court denied Love's motion for a new trial. This appeal followed.

DISCUSSION

Love argues that the district court erred in granting summary judgment to Plaintiffs and Fairchild and in its assessment of damages. We conclude that the district court erroneously entered summary judgment in favor of Plaintiffs. We further conclude that summary judgment in favor of Fairchild was appropriate.

We review summary judgment de novo. *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." *See* Rule 1-056(C) NMRA. The appellate courts "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). The party moving for summary judgment must make a prima facie showing and come forward with "such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted." *Rivera v. Brazos Lodge Corp.*, 1991-NMSC-030, ¶ 5, 111 N.M. 670, 808 P.2d 955.

I. Summary Judgment in Favor of Plaintiffs

Love maintains that Plaintiffs failed to make a prima facie showing that Benisek was acting as their agent in his dealings with Love. Because Plaintiffs and Love had no direct interaction with each other, Love contends, the only way Plaintiffs could prove their claims of breach of contract, misrepresentation, and fraud was by establishing an agency relationship between Plaintiffs and Benisek. We agree with Love and, as a result, we need not address Love's alternative arguments challenging the summary judgment in favor of Plaintiffs.

Before considering the substance of Plaintiffs' motion for summary judgment, it is useful to place the motion in context. When Freeman filed his initial complaint against Defendants, he alleged, among other things, that "Benisek was introduced to Freeman as a buyer for the [p]ainting . . . on or about October 28, 2002," and that Freeman entered into an agreement to sell the painting to Benisek. The complaint went on to recite the details of the Freeman/Benisek agreement and that Benisek had transferred possession of the painting to Love in violation of the agreement. The complaint then alleged that "in purchasing the [p]ainting from Freeman, Benisek was acting as agent for Love" and that Freeman "believe[d] that Defendants colluded to defraud Freeman of the [p]ainting." Nowhere in the initial complaint did Freeman allege that Benisek was acting as his (Freeman's) agent.

The first amended complaint added Thomas Nygard, Inc. and The Tea Leaf as Plaintiffs and made allegations similar to those in the original complaint. Specifically, the amended complaint alleged that "[a]t all times, Benisek was acting as agent and/or partner for Defendants" and that "in purchasing the [p]ainting from Freeman, Benisek was acting as agent for Love . . . and Fairchild." The amended complaint further alleged that "Defendants entered into a partnership to purchase the [p]ainting and to defraud Plaintiffs of the [p]ainting." Once again, the amended complaint never alleged that Benisek

was acting as Plaintiffs' agent. Plaintiffs never amended their complaint again in order to change their theory of the case.

Plaintiffs' next major undertaking in the case was their motion for partial summary judgment against Benisek in which they alleged that Benisek was liable for breach of contract, negligent misrepresentation, and fraud. As undisputed material facts, Plaintiffs alleged that they had entered into an agreement to sell the painting to Benisek, that Benisek had stopped making the payments required by the agreement, and that Benisek had violated the agreement by failing to retain possession of the painting. At no point in this motion did Plaintiffs suggest that Benisek was ever their agent for any purpose. Indeed, in an excerpt from Freeman's deposition attached to the motion, counsel, noting that Benisek identified himself as "[s]eller's [a]gent" in several documents, asked Freeman if Benisek was Freeman's agent. Thus, as of this point in the litigation—some six years after the suit was filed—the pleadings and evidence had given no indication that Plaintiffs believed Benisek was their agent. Yet, on the very same day that they filed their motion for summary judgment against Benisek, Plaintiffs filed their motion for summary judgment against Love, in which they rested their entire argument on the notion that Benisek was their agent. Against this contextual backdrop, we turn now to the substantive aspects of that motion.

It is undisputed that Plaintiffs did not have any direct contact or a direct contractual relationship with Love at the relevant times when the painting was being sold and possession was being transferred. Consequently, Plaintiffs could not establish that Love breached a purported contract with them or that Love made any misrepresentations to them unless they proved that Benisek was acting as their agent when he entered into the Benisek/Love agreement and when Love allegedly misrepresented to Benisek that he (Love) would keep possession of the painting.[1] And, as we have noted, Plaintiffs' argument in their motion for summary judgment was based on their contention that Benisek was their agent when he entered into the Benisek/Love agreement.

"An agent is a person who, by agreement with another called the principal, represents the principal in dealings with third persons or transacts some other business, manages some affair, or does some service for the principal, with or without compensation." *Barron v. Evangelical Lutheran Good Samaritan Soc'y*, 2011-NMCA-094, ¶ 16, 150 N.M. 669, 265 P.3d 720 (alteration, internal quotation marks, and citation omitted). While the authority of an agent may be actual or apparent, Plaintiffs do not argue that Benisek's authority was anything other than actual. "Actual authority is given to the agent by the principal in terms that are express, or in terms that are implied from words or conduct of the principal to the agent or from the circumstances of the relationship." *Id.* (internal quotation marks and citation omitted). An agency relationship does not arise until the principal "manifests assent to [the agent] that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests

[1] We recognize that third-party beneficiaries may be able to recover for breach of contract under some circumstances. *See Fleet Mortg. Corp. v. Schuster*, 1991-NMSC-046, ¶ 4, 112 N.M. 48, 811 P.2d 81 (stating that a third party may have an enforceable right against an actual party to a contract if the third party is an intended beneficiary of the contract). However, Plaintiffs do not argue that they are third-party beneficiaries of the Benisek/Love agreement.

assent or otherwise consents so to act." *Maes v. Audubon Indem. Ins. Group*, 2007-NMSC-046, ¶ 17, 142 N.M. 235, 164 P.3d 934 (internal quotation marks and citation omitted). Significantly, "[t]he existence of agency is a question of fact." *Santa Fe Techs., Inc. v. Argus Networks, Inc.*, 2002-NMCA-030, ¶ 26, 131 N.M. 772, 42 P.3d 1221. Therefore, in order to establish entitlement to summary judgment, it was Plaintiffs' burden to make a prima facie showing of an agency relationship between themselves and Benisek. *See id.*

We pause to address Plaintiffs' contention that Love never argued in response to the motion for summary judgment that Plaintiffs failed to establish the existence of an agency relationship with Benisek. This contention is unavailing because, even if Love had not responded at all to Plaintiffs' motion, we would still have to consider whether Plaintiffs made a prima facie showing of entitlement to summary judgment. *See Brown v. Taylor*, 1995-NMSC-050, ¶ 8, 120 N.M. 302, 901 P.2d 720 (explaining that "[t]he moving party may not be entitled to judgment even if the non-moving party totally fails to respond to the motion" because "until the moving party has made a prima facie case that it is entitled to summary judgment, the non-moving party is not required to make any showing with regard to factual issues" (internal quotation marks and citation omitted)). Moreover, Love clearly argued at the summary judgment hearing that Plaintiffs' claim of agency was questionable.

Plaintiffs asserted numerous allegedly undisputed material facts to support their motion for summary judgment against Love, including the following:

- Plaintiffs owned the painting and, through Freeman, they began negotiating with Benisek about selling the painting in October 2002.

- Freeman entered into the Freeman/Benisek agreement by which Benisek purchased the painting and, on the same day, Love agreed to purchase the painting from Benisek.

- Love agreed to keep possession of the painting until Benisek was paid in full, but Love did not do this because he sold it to Fairchild. In the Benisek/Love agreement, Love agreed to execute UCC or similar documents, and the filing of a "UCC Form 1" was "[a]n important part of the [Freeman/]Benisek [a]greement."

- "Freeman relied on the provision in the [Freeman/]Benisek [a]greement that prohibited Benisek from alienating the [p]ainting before he had paid for it in full."

- Love did not pay Benisek as required by the Benisek/Love agreement and, as a result, Benisek did not fully pay Plaintiffs.

- Love issued a moratorium by which he stopped paying his financial obligations.

The above alleged material facts do not shed any light on whether there was an agency relationship between Plaintiffs and Benisek. At most, they suggest that Love's only contractual relationship was with Benisek, and there is no material fact suggesting that Plaintiffs and Benisek had any relationship other than as sellers and buyer. No fact gives rise to any inference that Plaintiffs and Benisek explicitly or implicitly manifested to each other the assent necessary

to establish the relationship of principal and agent.

The only alleged material facts that appear to even remotely address the question of agency were as follows:

- Following Love's issuance of his moratorium, "Love's representative negotiated directly with Freeman's lawyer regarding Love's indebtedness to . . . Plaintiffs."

- Freeman signed a non-disclosure agreement stating that "the individuals who have signed as individual creditors . . . have agreed to enter discussions concerning past . . . business transactions with Love." (Alterations omitted and omissions in original).

- "The [Benisek/]Love agreement provide[d] that Benisek was Plaintiffs' agent for selling the [p]ainting to Love."

These alleged material facts also fail to establish the existence of an agency relationship between Plaintiffs and Benisek. The evidence that Love negotiated directly with Freeman and that Freeman viewed himself to be Love's creditor may be indicative of a relationship Freeman and Love may have established *after* the various sales of the painting. This evidence says nothing about whether Plaintiffs and Benisek had an agency relationship *at the time of* the sales. As for the Benisek/Love agreement's alleged provision that Benisek was acting as Plaintiffs' agent in the sale to Love, the evidence offered in support of this allegation does not support the proposition. The Benisek/Love agreement did nothing more than identify "Paul D. Benisek (Seller's Agent)" as a party to the agreement, and the body of the agreement referred to Love as "Purchaser" and Benisek as "Seller's Agent." Again, this nomenclature reveals nothing about whether Plaintiffs and Benisek manifested assent to each other to enter into an agency relationship of any kind, and such assent is essential to establishing the existence of agency. "[A]n agency relationship arises only when the elements [of mutual assent, among other things,] are present. Whether a relationship is characterized as agency in an agreement between parties or in the context of industry or popular usage *is not controlling*." Restatement (Third) of Agency § 1.02 (2006) (emphasis added).

Plaintiffs maintain that Love conceded the existence of an agency relationship between Plaintiffs and Benisek because Love signed the agreement referring to Benisek as "Seller's Agent" and because he entered into negotiations with Freeman directly after he stopped paying Benisek. We are not persuaded by either argument. First, as we have already noted, Benisek's label as "Seller's Agent" is meaningless without evidence that Plaintiffs and Benisek manifested assent *to one another* that an agency existed. *See* Restatement (Third) of Agency § 1.02 cmt. c ("How the parties characterized the relationship is not dispositive, nor is popular usage."). Second, whatever negotiations Love entered into with Plaintiffs *after* the sale from Benisek to Love are irrelevant to the existence of a Plaintiffs/Benisek agency relationship. Perhaps Love and Plaintiffs entered into their own direct agreement about payment for the painting, but Plaintiffs did not present any evidence about the details of any such purported agreement. To the extent Plaintiffs argue that Love "ratifi[ed] Benisek's agency for . . . Freeman," an agent's conduct can only be "ratified" by the putative principal, which

in this case would be Plaintiffs. *See* Restatement (Third) of Agency § 4.03 (2006) (stating that "[a] person may ratify an act if the actor acted or purported to act as an agent *on the person's behalf*" (emphasis added)).

We also decline Plaintiffs' invitation to conclude that Plaintiffs ratified Benisek's sale agreement with Love. Apparently conceding that they did not make this argument in the district court, Plaintiffs argue that we can affirm on this "right for any reason" basis. An appellate court may "affirm the district court if it is right for any reason and if affirmance is not unfair to the appellant." *Bd. of Cnty. Comm'rs v. Chavez*, 2008-NMCA-028, ¶ 12, 143 N.M. 543, 178 P.3d 828 (internal quotation marks and citation omitted). We conclude that affirming on this basis would be unfair to Love for two reasons. First, Love had no opportunity in the district court to respond to the unasserted argument about ratification. Second, the question of ratification is highly fact-dependent, and Plaintiffs did not present evidence sufficient for the district court to determine whether Plaintiffs had made a prima facie showing of ratification. *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)).

In summary, we hold that Plaintiffs failed to make a prima facie showing of an agency relationship between themselves and Benisek. Without the existence of such a relationship, Plaintiffs could not establish that Love breached any contract with them because Plaintiffs have not shown the existence of a contract between themselves and Love. Plaintiffs further could not show that Love made any negligent or fraudulent misrepresentations to them because all of Love's relevant representations were made only to Benisek. Therefore, summary judgment in favor of Plaintiffs against Love was improper. Because summary judgment was improper, the award of damages to Plaintiffs was also in error.

II. Summary Judgment in Favor of Fairchild

Fairchild sought partial summary judgment against Love on the issues of liability for fraud, negligent misrepresentation, and violation of the Illinois Act. Love, whose counsel had withdrawn, filed no response to the motion. At the hearing on the motion, which Love attended by phone, Fairchild's counsel did not argue the merits of the motion but instead argued only that Love was "in default" and that Fairchild was entitled to summary judgment. Love responded that he filed no response because he had no counsel. He also contended that he was not at his office due to ill health and did not often get his mail. He stated, "If there is some way to reconsider this, I would like to." The district court responded, "I find that there is not a sufficient basis upon which to allow . . . Love additional time in which to respond. Because there has not been a substantive response to the motion, under the Rules . . . I find that the motion shall be granted." And, as it did in connection with Plaintiffs' summary judgment, the district court reserved the issue of damages to be determined at a later proceeding.

We agree with Love that it was error for the district court to grant Fairchild's motion for summary judgment solely on the

basis of Love's failure to respond to the motion. *See Brown*, 1995-NMSC-050, ¶ 8 ("The moving party may not be entitled to judgment even if the non-moving party totally fails to respond to the motion."). The district court should have deemed admitted the facts alleged in Fairchild's motion and then determined whether those facts made a prima facie showing of entitlement to summary judgment. *See id.* (explaining that "until the moving party has made a prima facie case that it is entitled to summary judgment, the non-moving party is not required to make any showing with regard to factual issues" (internal quotation marks and citation omitted)). Because our review is de novo, we undertake this task and conclude that Fairchild did establish a prima facie case of entitlement to summary judgment, and we affirm on the ground that the district court was right for another reason. *See Vargas*, 2008-NMSC-019, ¶ 8.

A. Negligent Misrepresentation

In order to prevail on his claim of negligent misrepresentation, Fairchild had to make a prima facie showing that (1) Love made a material misrepresentation of fact to Fairchild, (2) Fairchild relied upon the representation, (3) Love knew the representation was false at the time it was made or he made it recklessly, and (4) Love intended to induce Fairchild to rely on the representation. *See Saylor v. Valles*, 2003-NMCA-037, ¶ 17, 133 N.M. 432, 63 P.3d 1152. A misrepresentation can be made by either commission or omission. *In re Stein*, 2008-NMSC-013, ¶ 35, 143 N.M. 462, 177 P.3d 513.

Fairchild alleged in his motion for summary judgment that Love did not own the painting, had not paid for it, had no bill of sale showing ownership when he sold the painting to Fairchild, and that Love knew these facts and did not disclose them to Fairchild when he sold the painting. Fairchild further alleged that he would not have bought the painting or paid the purchase price had he known that Love did not own the painting and had not paid for it and that he relied on Love's misrepresentations by omission. In addition, Fairchild alleged that Love knew Fairchild was relying on him to be honest. Fairchild presented evidence supporting these allegations. Thus, Fairchild established a prima facie case of Love's liability for negligent misrepresentation.

B. Fraud

The elements of fraudulent representation are virtually the same as the elements of negligent misrepresentation except that the elements must be proved with clear and convincing evidence. *See Encinias v. Whitener Law Firm, P.A.*, 2013-NMSC-045, ¶ 22, 310 P.3d 611. Under the procedural posture of this case, the heightened burden of proof should have no impact. Fairchild supported his allegations of fact with evidence establishing each element. Therefore, we conclude that Fairchild established the prima facie liability of Love on the claim of fraudulent misrepresentation.

C. Illinois Act

In order to prove a private claim under the Illinois Act, a claimant must establish "(1) a deceptive act or practice by the defendant, (2) the defendant's intent that the plaintiff rely on the deception, (3) the occurrence of the deception in the course of conduct involving trade or commerce, and (4) actual damage to the plaintiff (5) proximately caused by the deception." *Avery v. State*

Farm Mut. Auto. Ins. Co., 835 N.E.2d 801, 850 (Ill. 2005). These elements are similar to the elements of negligent and fraudulent misrepresentation discussed above. The only additional element is that the deception must occur "in the course of conduct involving trade or commerce." *Id.* The Illinois Act defines the terms "trade" and "commerce" as "the advertising, offering for sale, sale, or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value . . . and shall include any trade or commerce directly or indirectly affecting the people of this [s]tate." 815 Ill. Comp. Stat. 505/1(f) (2007). Given the evidence Fairchild submitted in support of his claims for negligent and fraudulent misrepresentation, plus evidence that Love's alleged deception occurred in the course of his sale of the painting to Fairchild, it is clear that Fairchild also made a prima facie showing of entitlement to judgment on the claim under the Illinois Act.

Because Fairchild established prima facie entitlement to judgment under all of his claims against Love, we conclude that the district court's entry of summary judgment in favor of Fairchild was proper for a reason other than Love's failure to file a response to Fairchild's motion. It is not unfair to Love to employ this "right for any reason" analysis because Love had the opportunity to respond to Fairchild's prima facie showing and failed to do so. We therefore turn to the question of whether the district court's award of damages to Fairchild was proper.

III. Damages Awarded to Fairchild

As previously mentioned, the district court conducted a hearing on damages and awarded Fairchild $1,942,446 in compensatory damages and $9,712,232 in punitive damages. Love argues that the damages awards were erroneous because (1) part of the compensatory damages were awarded for Fairchild's loss of the "use of the money" he had spent to purchase the painting, which is simply prejudgment interest in disguise, and Illinois law does not permit the recovery of prejudgment interest; (2) the award of attorney fees, costs, and interest was contrary to Illinois law and, even if such damages were compensable, the district court failed to exclude fees and costs attributable to work unrelated to this case; (3) nothing in the Illinois Act permitted the district court to award Fairchild compensation for his own time expended in the course of the litigation; and (4) the punitive damages award was insupportable because it was based on the grossly erroneous award of compensatory damages and because it was based in part on evidence of Love's "bad acts" that were unrelated to his conduct in connection with the sale of the painting.

At first blush, it does seem extraordinary that Fairchild should be awarded in excess of $11 million for the fraudulent sale of a painting worth in the neighborhood of $400,000. But we need not analyze Love's arguments attacking the damages awards because, as Fairchild contends, Love failed to preserve his arguments in the district court.

Fairchild presented the testimony of several witnesses, both live and by deposition, as well as documentary evidence on the question of damages. Love cross-examined some of the witnesses. Love introduced no evidence of his own apart from a very short direct examination of Fairchild. At no point did Love make any of the arguments challenging the damages award that he now makes on appeal.

Love maintains that he preserved his arguments in his motion for a new trial, which he filed after the district court entered judgment in favor of Fairchild. We are not persuaded. The motion for a new trial argued that "the [j]udgment is excessive, that [it] violated [Love's] rights to due process of law, and for error in evidentiary rulings." The motion provided no elaboration on these points. More importantly, a motion for new trial cannot make up for the failure to preserve issues at trial. *See Goodloe v. Bookout*, 1999-NMCA-061, ¶ 13, 127 N.M. 327, 980 P.2d 652 ("Raising the matter in [the] motion for a new trial came too late; objections must be raised in time for the [district] judge to correct the error to prevent prejudice."), *superseded by rule on other grounds as stated in Acosta v. Shell W. Exploration & Prod., Inc.*, 2013-NMCA-009, 293 P.3d 917.

Love next argues that we should exercise our discretion to review the unpreserved arguments for fundamental error. *See* Rule 12-216(B) NMRA (stating that the appellate court may, in its discretion, review questions that were not preserved in the district court if they involve jurisdiction, general public interest, or fundamental error or fundamental rights of a party). Our Supreme Court has observed that it "has applied the doctrine [of fundamental error] in civil cases under the most extraordinary and limited circumstances." *Estate of Gutierrez ex rel. Jaramillo v. Meteor Monument, L.L.C.*, 2012-NMSC-004, ¶ 33, 274 P.3d 97. The Court pointed to two cases that applied the doctrine. In one case, the Court in its discretion considered unpreserved arguments related to jury instructions on the theory of successive tortfeasors because, at the time, there was very little case law on the theory, and there were no applicable uniform jury instructions. *Payne v. Hall*, 2006-NMSC-029, ¶ 37, 139 N.M. 659, 137 P.3d 599. In the other case, the Court considered an argument made for the first time on appeal because the factual basis for the argument did not even occur until after the initial appeal was filed. *Rivera v. Am. Gen. Fin. Servs., Inc.*, 2011-NMSC-033, ¶¶ 9, 19-20, 150 N.M. 398, 259 P.3d 803. However, in *Estate of Gutierrez*, the Court declined to consider an unpreserved argument regarding jury instructions even though there were no uniform jury instructions because established case law provided the necessary guidance. 2012-NMSC-004, ¶ 34. The circumstances in the present case bear no resemblance to those in *Payne* and *Rivera*.

Along similar lines, this Court has noted that "the common element in civil cases that have been reversed for unpreserved error has been the total absence of anything in the record of the case showing a right to relief in the person granted relief." *Gracia v. Bittner*, 1995-NMCA-064, ¶ 25, 120 N.M. 191, 900 P.2d 351. In the present case, we cannot say that the record is devoid of evidence supplying a basis for the damages awarded to Fairchild; indeed, Love does not argue that the evidence was insufficient to support the award.

In response to Fairchild's argument that Love failed to preserve the damages issues raised on appeal, Love relies on a statement in *Gracia* in urging us to consider the arguments made for the first time on appeal. We stated in *Gracia* that "[w]hen a statute does not grant a right to relief in a particular situation, it is fundamental error to grant relief based on the statute." *Id.* ¶ 26. Thus, Love contends, it was fundamental error for the district court to award damages not allowed under the Illinois Act.

We have difficulty with Love's contention. The portions of the transcript

Love relies on to demonstrate the district court's alleged error comprise arguments of Fairchild's counsel or the testimony of Fairchild's original attorney. These portions of the transcript are meaningless in the absence of legal argument by Love to the district court to provide context. Love made no attempt below to relate the testimony to the legal argument he makes for the first time on appeal. In addition, the exhibits Love points to in support of his argument show total attorney fees charged and itemized attorney fee statements, but these documents shed no light on which charges may or may not be permitted by the Illinois Act.

As a result, we fail to see a valid basis for exercising our discretion to consider Love's arguments that were not brought to the district court's attention in the first place. As we noted in *Gracia*, "[w]here there exist theories of recovery that are both within the pleadings and within the evidence, we should not reverse on an issue raised for the first time on appeal after the opportunity has passed to timely correct any error presented by the issue." 1995-NMCA-064, ¶ 28. To reverse in these circumstances "would countenance sandbagging by trial attorneys" and a "waste of resources by both our trial and appellate courts." *Id.*

We recognize that Love may have been at a disadvantage during the damages trial because he was not represented by counsel. However, "a pro se litigant, having chosen to represent himself, is held to the same standard of conduct and compliance with court rules, procedures, and orders as are members of the bar." *Woodhull v. Meinel*, 2009-NMCA-015, ¶ 30, 145 N.M. 533, 202 P.3d 126. It was incumbent upon Love, as it is upon any attorney, to raise his arguments challenging the claimed damages at a time when the district court had the opportunity to consider them and correct any error. *Kilgore v. Fuji Heavy Indus. Ltd.*, 2009-NMCA-078, ¶ 50, 146 N.M. 698, 213 P.3d 1127 ("The primary purposes for the preservation rule are: (1) to specifically alert the district court to a claim of error so that any mistake can be corrected at that time, (2) to allow the opposing party a fair opportunity to respond to the claim of error and to show why the district court should rule against that claim, and (3) to create a record sufficient to allow this Court to make an informed decision regarding the contested issue."). Love did not do this, and we do not consider his arguments to rise to the level of extraordinary circumstances triggering our discretion to address them under the doctrine of fundamental error. *See Estate of Gutierrez*, 2012-NMSC-004, ¶ 33 (explaining that the doctrine should be applied in civil cases only "under the most extraordinary and limited circumstances"). We therefore affirm the district court's award of damages to Fairchild.

CONCLUSION

For the foregoing reasons, we reverse summary judgment and the resulting damages award entered in favor of Plaintiffs against Love. We affirm the judgment in favor of Fairchild.

IT IS SO ORDERED.

CYNTHIA A. FRY, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

LINDA M. VANZI, Judge

Certiorari Granted, December 19, 2014, No. 34,940

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-002

Filing Date: September 23, 2014

Docket No. 32,709

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

GUADALUPE FLORES,

Defendant-Appellant.

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for Appellant

OPINION

ZAMORA, Judge.

Guadalupe Flores (Defendant) appeals her convictions for murder in the second degree, three counts of aggravated battery with a deadly weapon, and one count of aggravated battery on a household member. Defendant contends that systematic removal of Spanish-only speaking jurors from the jury panels from which her jury was chosen violated her right to a fair and impartial jury. Defendant also claims that the district court abused its discretion by failing to sever the charges, which stemmed from two separate incidents. We conclude that Defendant failed to establish a prima facie case of systematic exclusion of Spanish-only speakers from jury panels. We further conclude that the district court did not abuse its discretion in denying Defendant's motion to sever. Accordingly, we affirm.

BACKGROUND

Defendant and Anthony Mah (Mah) were romantically involved, lived together, and had four children together. The charges against Defendant stemmed from two separate incidents involving Defendant and Mah; one occurred in February 2011, and the other in November 2011.

On February 12, 2011, Defendant went looking for Mah, who was out. Defendant found Mah sitting in his parked vehicle outside a residence with a female passenger. Defendant was upset. Witnesses reported seeing Defendant drive her vehicle into the back of Mah's vehicle several times. Defendant later told police that she had run into Mah's car because he was with another

woman. Defendant was charged with aggravated battery on a household member.

Defendant and Mah continued their relationship. On November 1, 2011, Mah was driving around with a friend, Brandon Vann (Vann), and three female passengers. Defendant spotted the group and approached their vehicle. When Mah noticed Defendant, he drove away and Defendant followed in her vehicle. Defendant pursued Mah and rear-ended the vehicle he was driving multiple times. Eventually, as Mah began to pull to the side of the road, Defendant hit the vehicle from the side, and the vehicle flipped several times. Vann was pronounced dead at the scene. Following the crash, Defendant was charged with one count of second degree murder and four counts of aggravated battery with a deadly weapon.

The charges against Defendant from the February incident and the November incident were joined. Prior to trial Defendant moved to sever the charges. The motion was denied and the matters were tried jointly. Defendant was convicted of all charges.

Defendant moved for a new trial after learning that all prospective jurors who spoke Spanish only and required an interpreter were systematically excluded from the jury panels from which her trial jury was selected. The district court held a hearing on the issue. The court clerk responsible for selecting jury panels testified at the hearing. The clerk testified that in creating jury panels, she put all Spanish-only speaking prospective jurors on one panel in order to minimize the cost of interpreters. In this case, the jury pool was comprised of approximately one thousand prospective jurors. The clerk divided them into five panels and assigned all Spanish-only speakers to panel three. Defendant's jury was selected from panels one and two. In her motion for a new trial, Defendant claimed that the clerk's practice deprived her of a fair and impartial jury. The motion was denied. This appeal followed.

DISCUSSION

A. Systematic Exclusion of Prospective Jurors

1. Preservation

The State argues that Defendant failed to preserve her objection to the composition of the jury venire because she failed to alert the district court to the basis of her claim with the requisite specificity to satisfy preservation requirements. We disagree.

Rule 12-216 NMRA provides that a question is preserved for appellate review if it "appear[s] that a ruling or decision by the district court was fairly invoked . . . [and f]urther, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party."

> The primary purposes of the preservation requirements are: (1) to specifically alert the district court to a claim of error so that the error may be corrected at that time, (2) to allow the opposing party adequate opportunity to respond to a claim of error, and (3) to create a sufficient record to allow this Court to make an informed decision regarding the contested issue.

State v. Moncayo, 2012-NMCA-066, ¶ 5, 284 P.3d 423.

In this case, Defendant was not aware of the clerk's jury panel selection procedures until after her trial. Once Defendant became aware that Spanish-only speaking prospective jurors were excluded from the two jury panels from which her jury was selected, she moved for a new trial. The State responded, and the district court held a hearing on the motion. At the hearing, the court clerk testified regarding her jury panel selection process. After hearing the testimony and arguments from the parties, the district court ruled on the merits of the motion. Because the district court was alerted to Defendant's claim of error and had a sufficient opportunity to fully address it, the issue was sufficiently preserved for our review.

2. Waiver Pursuant to NMSA 1978, § 38-5-16 (1969)

The State also argues that because Defendant did not object to the jury venire composition prior to the empaneling of the jury, Defendant waived her right to object under Section 38-5-16. We are not persuaded.

Determining whether Section 38-5-16 bars Defendant's objection to the clerk's jury selection process even though Defendant was not aware of the procedure until after her trial is an issue of statutory interpretation. Accordingly, our review is de novo. *United Rentals Nw., Inc. v. Yearout Mech., Inc.*, 2010-NMSC-030, ¶ 7, 148 N.M. 426, 237 P.3d 728. The guiding principle when construing statutes is to "determine and give effect to legislative intent." *OS Farms, Inc. v. N.M. Am. Water Co.*, 2009-NMCA-113, ¶ 19, 147 N.M. 221, 218 P.3d 1269 (internal quotation marks and citation omitted). To discern the Legislature's intent, "we look first to the plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different one was intended." *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶ 9, 146 N.M. 24, 206 P.3d 135 (alteration, internal quotation marks, and citation omitted). Statutory language that is clear and unambiguous must be given effect. *Trinosky v. Johnstone*, 2011-NMCA-045, ¶ 11, 149 N.M. 605, 252 P.3d 829.

Section 38-5-16 states, in pertinent part, that a criminal defendant "may challenge the jury panel on the ground that the members thereof were not selected substantially in accordance with law. . . . Such a challenge is waived if not raised before the trial jury panel has been sworn and selection of the trial jury commenced." By definition, waiver is "[t]he voluntary relinquishment or abandonment . . . of a legal right or advantage[.]" Black's Law Dictionary 1717 (9th ed. 2009). "The party alleged to have waived a right must have had both knowledge of the existing right and the intention of forgoing it." *Id.*

In this case, Defendant was not aware of the clerk's policy to segregate Spanish-only speaking prospective jurors at the time her jury was being empaneled. She could not have objected to the procedure in accordance with Section 38-5-16 because she did not know that her objection was warranted until after her trial. We do not believe that the Legislature intended for Section 38-5-16 to bar objections to unlawful jury selection where a party does not know the selection process has been unlawful prior to swearing in the prospective jury panel and jury selection has been commenced. We decline to apply the statute in that way. *See State v. Stevens*, 2014-NMSC-011, ¶ 15, 323 P.3d 901 ("It is the high duty and responsibility of the judicial branch of government to facilitate and promote the [L]egislature's accomplishment of its purpose.

Although we look first to the language of the statute, we will reject a formalistic and mechanical statutory construction when the results would be absurd, unreasonable, or contrary to the spirit of the statute." (internal quotation marks and citation omitted)). Accordingly, we conclude that Defendant did not waive her right to object to the composition of the jury venire.

3. Representative Cross-Section of the Community

We turn now to Defendant's claim that she was deprived of a fair and impartial jury as a result of the systematic exclusion of Spanish-only speakers from the majority of jury panels in Curry County. Article II, Section 14 of the New Mexico Constitution entitles criminal defendants to a "trial by an impartial jury," which requires that the jury represent a "fair cross[-]section of the community." *State v. Aragon*, 1989-NMSC-077, ¶¶ 5, 25, 109 N.M. 197, 784 P.2d 16. Defendant relies heavily on *Aragon* to support her contention that the systematic exclusion of Spanish-only speakers from jury panels is unconstitutional.

However, Defendant's reliance on *Aragon* is misplaced. *Aragon* involved a constitutional challenge to a prosecutor's purposeful, discriminatory, and systematic exercise of peremptory strikes to exclude members of a cognizable racial group from the jury panel. *Id.* ¶¶ 9, 15-16. This type of alleged violation requires an examination of the prosecutor's conduct, and inferences that can be made about the prosecutor's discriminatory intent. *Id.* ¶ 17 ("[T]he party may show that [the prosecutor] has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of peremptories against the group. He may also demonstrate that the jurors in question share only this one characteristic—their membership in the group—[or] . . . the failure of [the prosecutor] to engage the same jurors in more than desultory voir dire, or indeed to ask them any questions at all." (internal quotation marks and citation omitted)).

This type of analysis is distinguishable from the analysis we apply to claims that the jury selection process as a whole has resulted in systematic exclusion of a particular group. This Court has adopted a two-step test for determining whether there was a violation of a defendant's constitutional right to a jury selected from a fair cross-section of the community from the United States Supreme Court, *Duren v. Missouri*, 439 U.S. 357 (1979). First, the defendant must establish whether there was a prima facie violation of the fair cross-section requirement.

> [T]o show a prima facie violation of the fair cross-section requirement, a defendant must demonstrate that (1) the group alleged to be excluded is a 'distinctive' group in the community, (2) the group's representation in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community, and (3) this under-representation results from the systematic exclusion of the group in the jury-selection process.

State v. Casillas, 2009-NMCA-034, ¶ 13, 145 N.M. 783, 205 P.3d 830 (citing *Duren*, 439 U.S. 357, 364). If there was a prima facie violation, the second part of the test provides the government an opportunity to defend its practices by demonstrating that a significant state interest is advanced by the process that

results in the exclusion of a distinctive group. *Duren* at 367-68.

Here, Defendant relies primarily on authority related to prosecutorial discrimination, and does not address the *Duren* test. As a result, Defendant has not fully developed her argument regarding a prima facie violation of the fair cross-section requirement. This Court will not rule on an inadequately-briefed issue where doing so would require this Court "to develop the arguments itself, effectively performing the parties' work for them." *Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 70, 309 P.3d 53, *cert. denied,* 134 S. Ct. 1787 (2014); *see id.* ("[W]e 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." (internal quotation marks and citation omitted)). Our Court has been clear that it is the responsibility of the parties to set forth their developed arguments, it is not the court's responsibility to presume what they may have intended. *See Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 M.M. 339, 110 P.3d 1076 (holding that this Court has no duty to review an argument that is not adequately developed or guess at what the argument might be); *see also In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 (holding where a party cites no authority to support an argument, we may assume no such authority exists). To do otherwise is setting a very dangerous precedent. Moreover, for us to unilaterally develop Defendant's constitutional argument, and rule on that basis here, would deprive the State of an opportunity to advance any argument it may have regarding a significant state interest served by the challenged process. This would result in a substantial disadvantage to the State.

The same disadvantage exists regarding Defendant's assertion that Article II, Section 14 of the New Mexico Constitution provides greater protection than the federal constitution. The dissent believes that Defendant has presented an argument that *Aragon* should be extended to prohibit the actions of a court official that result in all Spanish-only speakers being segregated. However, *Aragon*, only related to prosecutorial misconduct. The mere statement that the New Mexico Constitution provides greater protection does not articulate how the greater protection offered by Article II, Section 14 applies in this context and, therefore, provides no basis for response by the State. The dissent believes that the *Duren* test is "out of place" and should not apply, but if it does not, it is not clear what would apply. Although the principle of *Aragon* may conceivably be applicable, that, without more, is not argument. In sum, we conclude that Defendant has not met her burden and has failed to establish the systematic exclusion of Spanish-only speakers from the jury panels.

The district court has an affirmative responsibility to empanel jurors in a random manner. NMSA 1978, § 38-5-11(A) (2005). Accordingly, it is important to stress that the Ninth Judicial District's court clerk's systematic policy of impermissibly manipulating the jury selection process is a miscarriage of that responsibility and borders on the egregious. By placing all Spanish-only speaking prospective jurors in one panel, the clerk has effectively excluded them from all of the other panels. This process can potentially

violate both the prospective jurors' right to serve and the criminal defendant's right to a fair and impartial jury. *See State v. Samora*, 2013-NMSC-038, ¶ 7, 307 P.3d 328 ("This Court has recognized more than once that Article VII, Section 3 [of the New Mexico Constitution] unambiguously protects the rights of Spanish-only speakers to serve on our state juries."); *see also Aragon*, 1989-NMSC-077, ¶ 25 ("Article II, Section 14, [of the New Mexico Constitution] entitl[es the defendant] to a jury representing a fair cross[-]section of the community[.]").

In this case, although the clerk's action is inexcusable, the record does not reveal whether Spanish-only speaking members of the jury pool were actually prevented from serving as a result of the clerk's policy. It is also unclear whether the policy resulted in trial juries that were not representative of the community.

B. Defendant's Motion to Sever Charges

Prior to trial, Defendant moved to sever the charge of aggravated battery on a household member related to the February incident from the charges of second-degree murder and four charges of aggravated battery with a deadly weapon related to the November incident. The district court denied the motion to sever finding that the evidence would have been cross-admissible, that Defendant failed to show undue prejudice resulting from the joinder of charges, and that the evidence of the February incident was relevant to rebut Defendant's claim that the November crash was an accident. We review the denial of a motion to sever for an abuse of discretion. *State v. Lovett*, 2012-NMSC-036, ¶10, 286 P.3d 265.

Defendant argues that the evidence of the aggravated battery on a household member would not be cross-admissible because it was improper evidence under Rule 11-404(B) NMRA. Defendant further argues that, even if the evidence were cross-admissible, it should have been kept out because the probative value was substantially outweighed by the danger of unfair prejudice under Rule 11-403 NMRA. The State contends that the evidence would be cross-admissible because it shows intent (that the collision between the two vehicles was not an accident), and because it was not more prejudicial than probative.

Rule 5-203(A) NMRA requires the State to join certain charges if the offenses "(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." *State v. Gallegos*, 2007-NMSC-007, ¶¶ 10, 141 N.M. 185, 152 P.3d 828. However, "a [district] court may abuse its discretion in failing to sever charges" if there is prejudice to the accused. *Id.* ¶¶ 9, 16.

In determining whether a district court's failure to sever resulted in prejudice to the defendant, we must first determine whether the evidence pertaining to each charge would be cross-admissible in separate trials. *Id.* ¶ 19 ("[T]here is a high risk of undue prejudice whenever joinder of counts allows evidence of other crimes to be introduced in a trial of charges with respect to which the evidence would otherwise be inadmissible. On the other hand, cross-admissibility of evidence dispels any inference of prejudice." (alterations, internal quotation marks, and citations omitted)).

We determine cross-admissibility through an analysis of Rule 11-404(B). *See*

Lovett, 2012-NMSC-036, ¶ 37; *Gallegos*, 2007-NMSC-007, ¶¶ 20-21. Rule 11-404(B)(1) states: "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." Nonetheless, evidence of a crime, wrong, or other act may be used for another purpose, "such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Rule 11-404(B)(2). The district court may admit evidence of prior acts where such evidence is relevant to a material issue other than the defendant's character. *State v. Martinez*, 1999-NMSC-018, ¶ 30, 127 N.M. 207, 979 P.2d 718. However, the state must "identify and articulate the consequential fact to which the evidence is directed." *Gallegos*, 2007-NMSC-007, ¶ 22.

Here, the evidence relevant to the charge of battery on a household member, arising from the February incident, would have been cross-admissible under Rule 11-404(B)(2). The evidence of the first incident, during which Defendant purposefully ran her vehicle into Mah's vehicle after finding him in the company of another woman, could show that she purposefully collided with the vehicle Mah was driving in November, when she once again found him in the company of other women. This evidence does not necessarily imply that Defendant has the propensity or character to behave dangerously, which would be improper character evidence under Rule 11-404(B)(1). Rather, it is permissible under Rule 11-404(B)(2). We conclude that the district court did not abuse its discretion by denying Defendant's motion to sever.

CONCLUSION

For the foregoing reasons we affirm.

IT IS SO ORDERED.
M. MONICA ZAMORA, Judge

I CONCUR:

JAMES J. WECHSLER, Judge

LINDA M. VANZI, Judge, (dissenting).

VANZI, Judge (dissenting)

Defendant has argued in the district court and on appeal that the systematic and complete exclusion of Spanish-only speakers from the panels from which her petit jury was drawn violated her right to a venire that represented a cross-section of the community. The jury clerk for the Ninth Judicial District testified that she intentionally manipulated the jury venire to ensure that all Spanish-only speakers were placed on a single separate panel in order to save the costs of hiring additional interpreters. This practice of segregating Spanish-speaking venire members potentially violates the sixth amendment to the United States Constitution, Article II, Section 14 of the New Mexico Constitution, and Section 38-5-11(A) ("The court shall empanel jurors in a random manner."). Given the nature of the rights at stake of both a prospective juror's right to serve and a criminal defendant's right to a fair and impartial jury, I cannot join in ¶¶ 14-19 of the majority's Opinion.

I am fully aware of the importance of ensuring that litigants adequately brief

relevant issues on appeal. However, this concern should not prevent review of an alleged constitutional violation that the majority itself recognizes is a "miscarriage" of judicial responsibility that "borders on the egregious." Majority Op. ¶ 18. I also believe that Defendant's briefing is adequate. Defendant argues that Article II, Section 14 of the New Mexico Constitution provides greater protection than its federal counterpart. Defendant cites *Aragon*, which adopted California's "Wheeler Doctrine," extending the state constitution's fair cross-section guarantee to prevent prosecutors from using racially discriminatory peremptory challenges at the impaneling stage. 1989-NMSC-077, ¶¶ 21-23; *see State v. Gonzales*, 1991-NMCA-007, ¶ 34, 111 N.M. 590, 808 P.2d 40 (holding that the same rationale applies to prevent discrimination on the basis of gender). In *Aragon*, our Supreme Court departed from federal cross-section precedent, reasoning that "the state should not be able to accomplish indirectly at the selection of the petit jury what it has not been able to accomplish directly at the selection of the venire." 1989-NMSC-077, ¶ 23. I interpret Defendant's argument as an invitation to extend this reasoning to Defendant's situation, where a court official rather than the State has intentionally manipulated the venire panels to totally exclude Spanish-only speakers from the actual jury.

I see no reason why we cannot consider Defendant's argument. I, like Defendant, find it difficult to distinguish between a prosecutor's exercise of peremptory challenges to exclude a particular group from the jury panel, and a court official's ability to unilaterally accomplish the same result. While the standards for measuring the discriminatory use of peremptory strikes may be of no use here, in my view, the majority's test adopted from *Duren* seems to be equally out of place.[1] Majority Op. ¶¶ 16-17.

The *Duren* approach focuses on underrepresentation, proven by statistically quantifiable disparity levels between the jury pool and the jury-eligible population, and is unconcerned with the makeup of the actual petit jury panel. *See Lockhart v. McCree*, 476 U.S. 162, 173 (1986). Requiring Defendant to prove that Spanish-only speakers, who are constitutionally protected in this state, constitute a distinctive group, and requiring Defendant to present census data and other statistical evidence to demonstrate that—at an inclusion rate of zero percent—they are systematically underrepresented, seems to me an exercise in futility that ignores the heart of the issue: Does Article II, Section 14 of the New Mexico Constitution allow a court official to remove all Spanish-only speakers from a jury panel, solely based on their language, when a prosecutor likely cannot?

Even if the *Duren* approach applies, I disagree with the majority's statement that applying the test and ruling on the issue would deprive the State of an opportunity to advance its interest in continued exclusion. The State articulated its interest in a written response and at a hearing on Defendant's motion for a new trial. I do not believe that economic concerns, leave alone unsubstantiated ones,

[1] I also note that we applied this test in *Casillas* only because the defendant in that case did not preserve an argument that the state constitution was violated. 2009-NMCA-034, ¶ 11. Defendant here has preserved her argument under Article II, Section 14 of the New Mexico Constitution.

can justify the Ninth Judicial District's practice of systematically stacking its jury panels—a practice that appears to remain in effect today. I respectfully dissent.

LINDA M. VANZI, Judge

Certiorari Granted, December 19, 2014, No. 34,978

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-003

Filing Date: October 15, 2014

Docket No. 32,028

UTTI ATHERTON, LAURA JARAMILLO, JOHN DOE 1-99, and JANE DOE 1-99,

Plaintiffs-Appellees,

and

STATE OF NEW MEXICO, ex rel., GARY K. KING, Attorney General,

Plaintiff-Appellee,

v.

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OPINION

BUSTAMANTE, Judge.

We are presented with a legal Gordian knot that has defied all attempts to neatly unravel. As we will explain, certain aspects of the case tempted us to simply slice through the knot and affirm. Other aspects suggested that reversal was more appropriate. We conclude that reversal is required.

Michael J. Gopin appeals from a judgment entered against him under the New Mexico Unfair Practices Act (UPA). NMSA 1978, §§ 57-12-1 to -26 (1967, as amended through 2009). The judgment included treble damage awards in favor of twelve individual Plaintiffs totaling $216,222.57, $757,358.56 in favor of the New Mexico Attorney General as restitution for 110 consumers, and $1,570,000 in civil penalties in favor of the Attorney General. Gopin asserts four broad theories of error: (1) that the district court improperly granted a partial summary judgment against him early in the litigation after it refused to allow him to file a late factual response to Plaintiffs' motion; (2) that the district court compounded its initial error by applying the partial summary judgment in favor of Plaintiffs who were later allowed to join the litigation; (3) that the district court erred in deciding that Gopin violated the UPA and that it applied an improperly low standard of conduct when it concluded that Gopin's violations were willful; and (4) that the awards of civil penalties and restitution are excessive and thus arbitrary.

We conclude that the district court did err when it refused to allow Gopin to file a factual response to the early motion for partial summary judgment. Its error stemmed from a misreading of our opinion in *Lujan v. City of Albuquerque*, 2003-NMCA-104, 134 N.M. 207, 75 P.3d 423. The partial summary judgment thus entered materially influenced the litigation as it progressed because it settled the question of basic UPA violations and other substantive contractual issues for the remainder of the litigation. Once the partial summary judgment was entered and then applied in favor of all later-joined parties, the only issue left to be litigated was whether the violations were willful within the meaning of the UPA.

We reverse the finding of willfulness in favor of the Attorney General because it is not clear what the legal standard of conduct is or what standard the district court applied. We also conclude that—in any event—it was error for the district court to grant the Attorney General summary judgment on the issue. We reverse the judgment for treble damages in favor of the individual Plaintiffs because it is reliant on the initial improper summary judgment and because, again, it is not apparent what standard of conduct the district court applied.

PROCEDURAL BACKGROUND

Gopin—a lawyer licensed to practice only in Texas—is the sole owner of the Law Offices of Michael J. Gopin, a personal injury law firm with offices in El Paso, Texas. In late 2004, Gopin opened an office in Las Cruces, New Mexico. Gopin ran the practice at all applicable times as a sole proprietorship. Though he was not licensed in New Mexico, Gopin employed attorneys who were licensed in New Mexico to help staff the Las Cruces office.

On December 4, 2007, two of Gopin's former clients filed a complaint for damages against him asserting violations of the UPA and asserting generally that Gopin's advertising was misleading because legal services were improperly being provided by non-lawyer staff contrary to Section 57-12-2(D)(5), (7), (9), and (17). The complaint also asserted that Gopin was engaged in the unauthorized practice of law. The complaint purported to be filed on behalf of John and Jane Does 1-99 and named the Attorney General as an involuntary Plaintiff. The complaint and first round of discovery requests were served on December 5, 2007. Gopin answered the complaint with a general

denial on January 7, 2008. The answer was signed by an attorney/employee of the Las Cruces office. The record does not reveal whether Gopin responded to the discovery requests at that point.

Two months later, Plaintiffs filed a motion for partial summary judgment as to four specific propositions:

> I. Declaring having non-attorneys interview and contract with clients for legal services constitutes the unauthorized practice of law and Plaintiffs' contracts and all such similar contracts are void; and
>
> II. Declaring . . . Gopin's practice of taking assignment of an undivided interest in Plaintiffs' causes of action violates the [r]ules of [p]rofessional [c]onduct for the legal practice in New Mexico and Plaintiffs' contracts and all such contracts are void; and
>
> III. Declaring . . . Gopin's practice of charging a contingent fee for collecting personal injury protection (PIP)/med pay insurance benefits in Plaintiffs' causes of action violates the [r]ules of [p]rofessional [c]onduct for the legal practice in New Mexico and Plaintiffs' contracts and all such contracts are void[; and]
>
> IV. Declaring . . . Gopin's advertising of his law practice and the operation of his law practice in New Mexico is in violation of the [UPA].

We note that propositions II and III were not mentioned in the complaint. The motion was served on Gopin on March 3, 2008. Gopin did not respond to the motion within the fifteen-day period set by Rule 1-056(D)(2) NMRA. On April 4, Plaintiffs filed a motion for entry of judgment based on Gopin's failure to respond.

On April 22, Gopin filed a motion seeking an extension of time to respond to the motion for partial summary judgment. His rationale was that he had been seeking counsel and insurance coverage and had just determined that his insurance carriers were not going to extend coverage to the case. He had hired private counsel who entered his appearance a few days before. Gopin also asserted that he had been in contact with Plaintiffs' counsel and had been under the impression that the matter might be dismissed because Gopin did have New Mexico-licensed attorneys in the Las Cruces office. After a hearing, the district court allowed Gopin to file a response on "legal issues only" but did not permit him to respond to any factual assertions. Rather, "all material facts asserted and properly supported in the summary judgment motion" were accepted as true.

Gopin's memorandum in opposition to the motion for partial summary judgment conceded, per the district court's prior ruling, that he was bound by the facts properly supported in the motion, but he argued that certain of the facts were not supported by evidence. In particular, he argued that his advertising did not indicate that he was licensed in New Mexico. He also argued that there were no facts to support the notion that his fee structure was different or higher than

other attorneys. Interestingly, Gopin attached an affidavit signed by his Las Cruces staff attorney addressing the form of retainer contract used by the Gopin firm in New Mexico as well as the way the Las Cruces office was organized and operated. The affidavit could be read to confirm at least some of the factual assertions of the motion for summary judgment.

The district court held what turned out to be a pro forma hearing on the motion—pro forma because the parties relied on their briefs with no elaboration. Gopin did, however, point out that Plaintiffs' reliance on the attorney code of professional conduct was improper given the caution in the code's commentary that "[v]iolation of a rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached." Rules of Professional Conduct Scope cmt. NMRA.

The district court nonetheless granted the motion for partial summary judgment. The order in fact attached the motion as an exhibit. Thus, Gopin's retainer agreement was voided as of June 2008. In addition, his advertising and operation of his law practice were held to be in violation of the UPA.

After entry of the order granting partial summary judgment, Gopin settled with the original named plaintiffs, with the exception of the issue of attorney fees, and they were dismissed from the action as of May 2009.

Regardless of their dismissal, the suit continued, first in the person of the Attorney General and later by twelve individuals who were allowed to intervene. By stipulation, the Attorney General was allowed to become a full Plaintiff in May 2008, and he filed his own complaint at that time. The Attorney General's complaint tracked the original complaint to the extent that it relied on Gopin's advertising to support its assertion that Gopin misrepresented his licensure status. The Attorney General's complaint added two allegations. It alleged that Gopin had an arrangement with a local chiropractor for soliciting clients that violated NMSA 1978, Section 36-2-29 (1949). The Attorney General alleged that the retainer agreements thus generated were void pursuant to NMSA 1978, Section 36-2-35 (1949). In addition, the Attorney General's complaint explicitly alleged that Gopin's retainer agreement was void as an unconscionable trade practice because it was presented to clients by non-lawyer staff and because it gave Gopin an ownership in the case rather than a lien on the proceeds of any recovery. A few months later, the Attorney General was allowed to amend his complaint to add an explicit request for restitution as a remedy. The claim for restitution was premised on the partial summary judgment previously entered in favor of the now- dismissed original plaintiffs.

As the Attorney General's claims were being litigated, twelve individuals sought to intervene as substitutes for the Jane and John Does. The district court allowed them to intervene over Gopin's objection. The order allowing the individuals to intervene provided that "all of the [o]rders and [j]udgments entered in this matter should be binding on all of the parties to the case, including movants." Thus, all active Plaintiffs were provided the benefit of the partial summary judgment entered in favor of the now-dismissed original plaintiffs.

Explicitly relying on the previously entered partial summary judgment and its

finding of a UPA violation, the individual Plaintiffs and the Attorney General moved for summary judgment on the issue of willfulness under the UPA. After a combined oral argument on the motions, the district court denied the individual Plaintiffs' motion but granted the Attorney General's motion. It is unclear how the district court differentiated between the motions. It appears likely it concluded that the standard of willfulness under the UPA for civil penalties sought by the Attorney General differed from the standard required for treble damages sought by the individuals.

Immediately upon granting the Attorney General's motion, the district court imposed the maximum civil penalty allowed under the UPA—$5,000—per "violation." On inquiry, the district court clarified that the penalty was per client. The district court did not elaborate at the hearing on the basis for its decision to impose the maximum penalty. The order entered after the hearing similarly does not explain the basis for the finding of willfulness or imposition of the maximum penalty. The order simply relies on the earlier partial summary judgment.

The parties proceeded to a bench trial on the issue of willfulness only as to the individual Plaintiffs. The pretrial order recognized willfulness as the only issue and noted the 2008 partial summary judgment. With regard to the Attorney General, the sole issue was the amount of restitution payable to the 110 clients who responded to the Attorney General's letters informing all of Gopin's former clients of the existence of the action. At the close of testimony, the district court dictated findings of fact from the bench, which largely reflect the written findings he later entered. The district court started its oral findings by stating: "First, I will adopt as findings of fact all of the undisputed facts from the March 13th, 2008 summary judgment order." This appeal followed.

DISCUSSION

A. The 2008 Summary Judgment

1. Standard of Review

Gopin argues that the district court erred when it refused to allow him to respond to the factual assertions in the partial summary judgment motion because he demonstrated excusable neglect. We review the argument under our abuse of discretion standard. *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." (internal quotation marks and citation omitted)). But our case law is also clear that "we may characterize as an abuse of discretion a discretionary decision that 'is premised on a misapprehension of the law.' " *N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-028, ¶ 7, 127 N.M. 654, 986 P.2d 450 (alteration and citation omitted).

2. The 2008 Partial Summary Judgment is Appealable

Before we address the merits of the issue, we must address Plaintiffs' argument that Gopin's appeal is untimely. Plaintiffs maintain that the June 2008 partial summary judgment was final enough when it was entered that Gopin should have appealed then. Plaintiffs recognize that their argument may be contrary to our well-grounded antipathy to piecemeal appeals. Citing *Kelly Inn No. 102, Inc. v. Kapnison*, 1992-NMSC-005, ¶ 26, 113 N.M. 231, 824 P.2d 1033, they acknowledge our strong preference that all issues of law and

fact be determined to the fullest extent possible in the district court. Plaintiffs argue that an exception should be made in this case because the partial summary judgment became the final word on basic UPA violations and "[was] determinative of the remaining issues in the case." Plaintiffs also note that this Court treated the 2008 order as final in a prior appeal stemming from this action. *See Atherton v. Gopin*, 2012-NMCA-023, 272 P.3d 700.

We disagree with Plaintiffs that the 2008 order was final enough to require an appeal from it then. We note first that the order on its face reflects the grant of a partial summary judgment. The word "partial" provides a clue—if not a red flag—that the order was not intended to be final, at least for purposes of appeal. The order left damages, attorney fees, and the issue of willfulness undecided. Our case law following *Kelly Inn No. 102, Inc.* would not regard such an order as appealable. *See Gates v. N.M. Taxation & Revenue Dep't*, 2008-NMCA-023, ¶ 8, 143 N.M. 446, 176 P.3d 1178. Plaintiffs cite to Rule 1-054(B)(1) and (2) NMRA but make no effort to state why they apply or support their position. Neither rule applies. The district court never made the "express determination that there is no just reason for delay" under Rule 1-054(B)(1). And there was never a judgment entered "adjudicating all issues" as to the original plaintiffs under Rule 1-054(B)(2). Instead, Gopin and the original plaintiffs settled their cases, and an order of dismissal based on the settlement was entered.

Our opinion in the prior appeal is not to the contrary. The finality of the partial summary judgment order was not an issue in the case. Rather, the case addressed an issue that arose after the settlement: the availability of a multiplier in awarding attorney fees under the UPA. *Atherton*, 2012-NMCA-023, ¶¶ 1, 2. Thus, we proceed to the merits.

3. The District Court Misapplied *Lujan*

As explained above, Gopin did not file a response to the motion for partial summary judgment within the fifteen-day period required by Rule 1-056(D)(2). The district court's comments at the hearing for extension of time and its order denying the request make clear that it thought that *Lujan* prevented it from considering or granting any request for an extension of time and that the concept of excusable neglect was now irrelevant under *Lujan*. At the hearing, the district court quoted part of *Lujan* and opined that the failure to meet the rule deadline resulted in an irrevocable waiver of the right to respond to factual assertions in the motion. The order denying an extension of time to respond states:

> This [c]ourt is mandated to follow appellate precedent such as *Lujan* . . . , holding that by failing to file a response to a motion for summary judgment within the time specified by rule, the non-moving party waives the right to respond to or to controvert the facts asserted in the summary judgment motion and the [c]ourt should accept as true all material facts asserted and properly supported in the summary judgment motion[.]

This statement clearly indicates that the district court thought that *Lujan* prevented it from considering any reason for the failure to file a timely response. This is a misreading of *Lujan*, though perhaps an understandable one.

In *Lujan*, the district court granted a

summary judgment of dismissal after the plaintiffs failed to timely respond in any way to three motions for summary judgment. The district court in *Lujan* relied on Rule 1-007.1(D) NMRA (2005). *Lujan*, 2003-NMCA-104, ¶¶ 1, 4. At the time of the partial summary judgment motion, Rule 1-007.1(D) read:

> Unless otherwise specifically provided in these rules, any written response and all affidavits, depositions or other documentary evidence in support of the response shall be filed within fifteen (15) days after service of the motion. Failure to file a response within the prescribed time period constitutes consent to grant the motion, is a waiver of the notice provisions of Paragraph C of Rule 1-058 NMRA, and the court may enter an appropriate order.

Lujan, 2003-NMCA-104, ¶ 15.

As we noted in *Lujan*, despite the language of Rule 1-007.1(D) that a failure to timely respond "constitutes consent to grant the motion,"[1] when the motion at issue is for summary judgment, it is improper to resort to the "consent" clause as a basis for granting the motion. *Lujan*, 2003-NMCA-104, ¶¶ 12, 18. Rather, "the district court must assess [despite the lack of a response] whether, on the merits, the moving party satisfied the burden under Rule 1-056(C)." *Lujan*, 2003-NMCA-104, ¶ 18. This is the ruling and the message of *Lujan*.

[1]This language was deleted from Rule 1-007.1(D) in November 2008.

To illustrate and emphasize the message, *Lujan* quoted a passage from *Reed v. Bennett*, 312 F.3d 1190, 1195 (10th Cir. 2002), reflecting the same rule in the federal courts. In the middle of the quote from *Reed* appears the sentence that the district court below relied on for its ruling: "By failing to file a response within the time specified by the local rule, the nonmoving party waives the right to respond or to controvert the facts asserted in the summary judgment motion." *Id.*

This sentence does not represent New Mexico's approach to considering summary judgment motions. The entire quote from *Reed* came from a paragraph in which it summarized the prior discussion in the case. The reference to the "local rule" was to Kansas Local Rule 7.4. By referring to it, the Tenth Circuit was not making the local rule apply generally; it was merely being descriptive. This was made clear in *Sutton v. Corrections Corp. of America*, No. 06-CV-01606-DME-KLM, 2008 WL 2797008 (D. Colo. July 17, 2008). In *Sutton*, a party moving for summary judgment cited *Reed* and argued that because the plaintiff had not timely responded, he had waived the right to controvert the facts in the motion. Tenth Circuit Judge Ebel, sitting as a district judge, rejected the argument, noting that "the District of Colorado does not have such a local rule[.]" *Sutton*, 2008 WL 2797008 at *2.

New Mexico does not have such a rule. Indeed, to our mind, it would be passing strange to import such a draconian procedure into New Mexico summary judgment law. It would be antithetical to our strong bent in favor of deciding matters on their merits. And there is simply no reasonable basis on which *Lujan* can be read to negate the applicability of our concept of excusable neglect. If a

failure to respond does not result in consent to grant the motion, neither should it result in a waiver of the ability to respond. We reject any such reading of *Lujan*.

Given that the district court misread and misapplied the law applicable to Gopin's request for an extension of time, it necessarily abused its discretion in denying it.[2]

The issue that arises now is the proper remedy. Normally, of course, a mistake this basic at the very beginning of a case would require reversal if the judgment entered after the mistake ended the case. The effect of the district court's error was to prevent Gopin from controverting the facts contained in the motion. In this circumstance, it would be improper to consider the motion on the merits as described in *Lujan*. In addition, although the judgment did end consideration of certain basic issues, it merely set the stage for the litigation that ensued. The question arises what we should—or can—do with the factual material that came to light as the case progressed.

None of the parties address this problem and neither takes into account facts that came to light as the litigation progressed. Their approach to this part of the appeal is binary. Gopin argues that a full reversal is the only fair resolution, while Plaintiffs insist that we should conduct a merits review and that affirmance is the proper outcome given the presentation in the original motion.[3] Both approaches would have us ignore the facts that came to light as the litigation progressed, though to different effect and for different reasons. Gopin must appreciate that the later-produced evidence—including all of his retainer agreements and settlement disbursement statements, and the revelations about his arrangement with the chiropractor—work to his detriment. On the other hand, Plaintiffs have an interest in preserving the partial summary judgment since it is the sole basis for their assertion that Gopin violated the UPA as to them but at the expense of providing Gopin no remedy for the district court's early mistake.

Hence our dilemma: is it possible to remedy the early error without ignoring the march of litigation events? We see no straightforward solution.

We conclude that reversal of the partial summary judgment without examining the rest of the record is the best course for a number of reasons. First, it best honors New Mexico's approach to summary judgment and clarifies the apparent misinterpretation of *Lujan* that drove the district court's decision.

Second, it results in a remand to a forum better positioned to reconsider the question of UPA violations on a fuller record.[4] The early partial summary judgment short-circuited any full consideration of the nature of the UPA violations present and the particular UPA sections at work. As a result, the partial summary judgment is vague, if not enigmatic. For example, the first three of the

[2]Given this determination, we need not consider the parties' arguments about the excusable neglect aspects of Gopin's motion for an extension of time.

[3]Only at oral argument did the Attorney General and counsel for some of the individuals obliquely assert that the trial cured whatever error may have occurred before.

[4]It would technically be possible for this Court to undertake a full review of the record, but we cannot provide a forum for the full panoply of potential arguments we foresee on remand. And because such an approach requires a Monday morning quarterback-type hindsight, it seems quite problematic.

four subjects of the partial summary judgment address contractual aspects of Gopin's retainer agreement. Even if accurate, we do not see how they constitute violations of the UPA. We note that the district court did not declare the provisions unconscionable, though that would provide a basis for a UPA violation. No other basis for a UPA violation appears in the judgment. We expect that on remand the parties and the district court will address these analytical issues explicitly. Item IV of the summary judgment refers to "advertising," which is a subject of the UPA. But it also refers to the "operation of his law practice in New Mexico" as being in violation of the UPA. It is unclear what this phrase refers to. We decline to speculate further and again expect clarification on remand.

Third, reversal obviates the need to address Gopin's challenges to the district court's decision to apply the partial summary judgment in favor of the later-joined Plaintiffs and the Attorney General. That decision presents thorny practical and legal questions. As a practical matter, it seems problematic to apply a summary judgment based on the experience of two clients in favor of hundreds of other clients. To generalize that way might be possible on a proper record, but here it was done before the district court was privy to any broader information about how Gopin ran the practice in Las Cruces. We are also skeptical that the law of the case doctrine sufficiently supports the district court's decision. But we need not resolve these issues if we remand for reconsideration. The Attorney General and the individual Plaintiffs can make their own independent case for whether Gopin violated the UPA as to them.

Fourth, as we will explain later in this Opinion, we have determined that the summary judgment entered in favor of the Attorney General as to willfulness must be reversed at any rate.[5] Thus, the matter must be remanded for reconsideration of that issue, and it is apt to allow the district court to reconsider the foundation of the case in a fully adversarial posture.

Finally, we conclude that this is not an appropriate case for application of the "right for any reason" approach to appellate review. Generally, an appellate court may affirm a trial court ruling on a ground not relied on below if reliance on the new ground would not be unfair to the appellant. *Meiboom v. Watson*, 2000-NMSC-004, ¶ 20, 128 N.M. 536, 994 P.2d 1154. When applying the right for any reason rationale, appellate courts must be careful not to "assume the role of the trial court and delve into fact-dependent inquiries." *Id.* (alterations, internal quotation marks, and citation omitted). "[W]e 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." *State v. Wasson*, 1998-NMCA-087, ¶ 16, 125 N.M. 656, 964 P.2d 820.

To apply the right for any reason rationale here would require us to speculate that there was no factual presentation Gopin could have made in response to the motion for partial summary judgment that could have swayed the district court. We will not so speculate.

We next consider whether we should analyze any of the facts developed as the

[5]We also reverse the conclusion of willfulness as to the individual Plaintiffs though on slightly different grounds.

litigation progressed to see if they support affirmance. We conclude we cannot and should not because to do so would be to "look beyond" the factual picture the district court initially considered. The same limitation applies to the evidence admitted at the trial finally held in 2012. We, of course, recognize that some of the evidence admitted at trial can be seen as relevant to the issues decided by the partial summary judgment. If the trial had been conducted by the parties to encompass all issues, we could perhaps rely on it to, in a sense, cure the early error. *Cf. Corona v. Corona*, 2014-NMCA-071, ¶¶ 8-9, 329 P.3d 701. But as we noted above, the parties and the district court were clear that the only triable issue was whether Gopin acted willfully under the UPA. Despite the Venn diagram-like overlap of evidentiary relevance, we conclude that considering the trial evidence would have us acting as a trier of fact, considering and weighing evidence in a way the district court did not. It is improper for us to do so. Rather, the trial court should undertake the task in the first instance.

Since we have concluded that the partial summary judgment must be reversed and that it is not appropriate for this Court to comb the record for ways to excuse the error, we could summarily reverse all of the ensuing substantive orders and remand for further proceedings. After all, without a basic finding of a UPA violation, it is inappropriate to consider and rule on whether the violations were willful. We have decided not to rule summarily, however, because the parties have argued issues that are sure to recur on remand, and it would be useful to address them in aid of the work to be done on remand yet to be done by the district court. In particular, the parties have addressed what constitutes "willful" conduct under the UPA and the propriety of the penalty imposed by the district court. We will address both.

B. Summary Judgment in Favor of the Attorney General as to Willfulness Was Improper

A few months before trial, the Attorney General moved for summary judgment as to whether Gopin's "advertisement willfully violated the [UPA] when [he] failed to disclose his jurisdictional limitation and failed to deliver a 'free initial consultation.' "[6] As was the norm in the case at that point, the motion relied on the original partial summary judgment—in this instance, items I and IV—for its foundation. The motion posited fifteen statements of undisputed material facts describing how Gopin ran the Las Cruces office and the advertising he used for the practice. The most salient of the assertedly undisputed facts were that his yellow pages advertising willfully did not disclose his jurisdiction limitation and that none of Gopin's clients ever met or spoke with an attorney before they were presented with and signed a retainer agreement. The motion included excerpts from Gopin's deposition in which he agreed that he had a say in or controlled the content of all his advertising. The motion then incorporated in full several prior motions filed with the district court, including the original motion for partial summary judgment and the Attorney General's responses to earlier motions filed by Gopin. As Gopin noted in his response to the motion, the Attorney General did not include any analysis of the factual showing needed to prove willfulness.

[6]The individual plaintiffs had previously filed their motion for summary judgment as to willfulness.

Gopin's response noted generally that the Attorney General's facts were disputed or were simply irrelevant to the issue of willfulness. Gopin's factual response relied on his own affidavit and letters from the Disciplinary Board of the Supreme Court approving—with some exceptions and suggestions—his ability to open a law office in New Mexico and advertise it so long as he had New Mexico-licensed attorneys actually staffing the office. As to the applicable legal standard, Gopin argued that in order to distinguish the required element of "knowing" action under the UPA, the concept of willfulness should be interpreted to require an intent to do wrong or cause injury or an utter disregard for the consequences of one's acts or failure to act.

1. Willfulness Standard

The district court held one hearing on the individual Plaintiffs' and the Attorney General's motions. During the hearing, the district court displayed some uncertainty as to the applicable definition for willfulness. With regard to the individual plaintiffs' motion, he stated he was inclined to apply the UJI definition, but opined that application of the standard might be different depending on whether he ruled as to Gopin in his individual capacity as opposed to in his capacity as the owner of a sole proprietorship. In the end, the district court denied summary judgment to the individual Plaintiffs.[7]

In contrast, the district court granted the Attorney General's motion opining that "there is not the same willfulness standard applied to the [A]ttorney [G]eneral's complaint as it applies to the individual clients."[8] The district court's rationale was that "Judge Robles has already declared his method, act, and practice unlawful under the UPA" and that Gopin had consciously made all the decisions about advertising and, as such, his decisions were willful.

The order of summary judgment did not explain the district court's rationale any further. The operative paragraphs of the order provide:

> 1. The [o]rder [g]ranting [Plaintiffs' m]otion for [p]artial [s]ummary [j]udgment filed March 13, 2008, by this [c]ourt dated June 3, 2008 declared that Defendant's method, act and practice of advertising for legal services, was unlawful.
>
> 2. There are no disputed issues of material fact that the advertising used by . . . Gopin violated the [UPA].
>
> 3. The advertising put forth by . . . Gopin was done willfully.
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> 4. . . . Gopin is subject to civil money penalties under the [UPA].

It is impossible to glean from this record any clear understanding of the legal standard the district court used in making its decision that Gopin acted willfully, other than

[7]The district court specifically relied on the original partial summary judgment to state that a violation of the UPA had already been determined.

[8]We note that Plaintiffs concede on appeal that the standard for willfulness is actually the same for treble damages and civil penalties.

that Gopin acted "intentionally." The district court did not articulate how or whether Gopin's intentional acts differed from acts "knowingly made," which is the requirement for actionable misrepresentations under the UPA. Section 57-12-2(D). We are left with the distinct impression that the district court equated "knowingly made" with "willful." To do so would be error.

The three essential elements of basic UPA claims are:

> (1) the defendant made an oral or written statement, a visual description or a representation of any kind that was either false or misleading; (2) the false or misleading representation was knowingly made in connection with the sale, lease, rental, or loan of goods or services in the regular course of the defendant's business; and (3) the representation was of the type that may, tends to, or does deceive or mislead any person.

Lohman v. Daimler-Chrysler Corp., 2007-NMCA-100, ¶ 5, 142 N.M. 437, 166 P.3d 1091; *see* § 57-12-2(D).

Our case law makes clear that "knowingly made" is an integral part of all UPA claims and that it must be the subject of actual proof. *Stevenson v. Louis Dreyfus Corp.*, 1991-NMSC-051, ¶¶ 13-15, 18, 112 N.M. 97, 811 P.2d 1308 (holding that the defendants' motion for directed verdict should have been granted because there was no evidence that the defendants knowingly made any false or misleading statements). *Stevenson* does not require proof of actual knowledge in all circumstances. Rather, knowledge can be proven by showing that "in the exercise of reasonable diligence [the defendant] should have been aware that the statement was false or misleading." *Id.* ¶ 17; *see Diversey Corp. v. Chem-Source Corp.*, 1998-NMCA-112, ¶ 17, 125 N.M. 748, 965 P.2d 332 ("The gravamen of an unfair trade practice is a misleading, false, or deceptive statement made knowingly in connection with the sale of goods or services.").

The UPA provides for two tiers of monetary remedies for individuals. For a basic violation, a private party can recover "actual damages or the sum of one hundred dollars ($100), whichever is greater." Section 57-12-10(B). For more aggravated circumstances—where the defendant "has willfully engaged in the trade practice"—"the court may award up to three times actual damage or three hundred dollars ($300), whichever is greater[.]" *Id.*

The UPA similarly provides for two tiers of remedy in actions brought by the Attorney General. For basic violations of the UPA, the Attorney General can seek injunctive relief and restitution. Section 57-12-8. For more aggravated circumstances—where a person has "willfully used a method, act or practice declared unlawful by the [UPA]"—the Attorney General can seek "a civil penalty of not exceeding five thousand dollars ($5,000) per violation." Section 57-12-11.

Given the material difference in the available remedies, it is clear that the Legislature contemplated proof of some culpable mental state to demonstrate "willfulness." *Sloan v. State Farm Mut. Auto. Ins. Co.*, 2004-NMSC-004, ¶ 2, 135 N.M. 106, 85 P.3d 230 (equating a "culpable mental state" with "willful"). Unfortunately, the Legislature did not provide a definition in the

UPA. And, interestingly, no New Mexico case has addressed the issue. Perhaps the lack of case law explains why our Uniform Jury Instructions also do not address the issue. *See* UJI 13-1707 NMRA.[9]

Gopin argues that willfulness should be deemed to include an "actual or deliberate intention to injure or harm another." *Matthews v. State*, 1991-NMCA-116, ¶ 21, 113 N.M. 291, 825 P.2d 224. We agree with the Plaintiffs that this is a step too far and would unduly restrict the ability of individuals and the Attorney General to enforce what is clearly a remedial statute.

Plaintiffs argue that willfulness can be distinguished by requiring an element of design or deliberateness. They draw a distinction between acting by design rather than as a result of "confusion, mistake or faulty memory." The Plaintiffs' approach, however, does not provide any discernable distance between "knowingly made" and "willfully made." The distinction Plaintiffs argue for is in most ways inherent in the concept of "knowingly made." Something more is required.

For that something more, we turn to the definition of willful found in UJI 13-1827. This is the jury instruction used for consideration of punitive damages, but we conclude that it provides useful guidance—if only because treble damages and the UPA civil penalties are forms of remedy intended to punish a wrongdoer. *McLelland v. United Wis. Life Ins. Co.*, 1999-NMCA-055, ¶ 10, 127 N.M. 303, 980 P.2d 86.

UJI 13-1827 provides that "[w]illful conduct is the intentional doing of an act with knowledge that harm may result." This definition does not include the intent to harm element desired by Gopin, but it does provide a clear method for proof of a culpable mental state by requiring a showing of deliberation and a disregard for foreseeable risk. Proof of these two elements provides a solid foundation for punishment. *See Pub. Serv. Co. of N.M. v. Diamond D Constr. Co.*, 2001-NMCA-082, ¶¶ 2, 59, 131 N.M. 100, 33 P.3d 651 (holding that a finding of willful conduct would support an award of 15% as a post-judgment rate). On remand, the district court should reconsider the Plaintiffs' requests for treble damages and penalties in light of this discussion.[10]

2. Amount of the Penalty

At the conclusion of the hearing on the motions for summary judgment on willfulness, the district court imposed the maximum UPA-allowed penalty of $5,000 per client against Gopin. The district court did not provide any explanation for its decision, either at the hearing or in the order it later entered. Gopin argues that imposing the maximum penalty is excessive and constitutes an abuse of discretion.

Since we are reversing the entire judgment, we will not consider the issue on

[9]We also note that UJI 13-1707 does not include any reference to "knowingly made." In contrast, UJI 13-1718 NMRA addressing punitive damages for insurance bad faith claims refers to UJI 13-1827 NMRA for its definitions of culpable mental state.

[10]It is unclear what standard for willfulness the district court applied to the individual claimants at trial, but its conclusion of law "U" ("All of the actions were known by and under the direction of . . . Gopin and are therefore willful and deliberate.") can be read to equate knowing with willful.

the merits.[11] We note, however, that the lack of any rationale from the district court could well have led us to remand for an explanation sufficient to allow review. *See State ex rel. Human Servs. Dep't v. Coleman*, 1986-NMCA-074, ¶ 26, 104 N.M. 500, 723 P.2d 971, *abrogated on other grounds by State v. Alberico*, 1993-NMSC-047, 116 N.M. 156, 861 P.2d 192. On remand, if the trial court reaches the stage of considering a penalty, it should provide an explanation of all factors leading to its decision. The explanation should take into consideration the purpose of the UPA plus the "enormity and nature of the wrong and any aggravating circumstances." *Green Tree Acceptance, Inc. v. Layton*, 1989-NMSC-006, ¶ 9, 108 N.M. 171, 769 P.2d 84. The district court should also keep in mind that there are likely procedural and substantive due process implications to how it arrives at its decision and to its final determination. *Aken*, 2002-NMSC-021, ¶¶ 13, 20 (discussing procedural and substantive due process as they relate to punitive damages).

C. PROCEEDINGS ON REMAND

We are fully aware of the implications of our decision to reverse in this case. The matter was the subject of ongoing—albeit improperly truncated—litigation for over four years. Much of the factual development necessary to decide the case has likely occurred. Our reversal will allow Gopin to bring to bear whatever new facts and arguments he may be able to muster as to whether his acts constitute a violation of the UPA and the issue of willfulness. We see no need for the parties to repeat the trial that has already been held. The district court can rely on the testimony already provided. But we leave the process of evidentiary production to the district court to determine.

Gopin will not be allowed to argue that attorneys as a profession are not subject to the UPA. He failed to make the argument previously, and this remand is not an opportunity to make the argument for the first time. *See Grassie v. Roswell Hosp. Corp.*, 2011-NMCA-024, ¶¶ 84-87, 150 N.M. 283, 258 P.3d 1075.

Finally, we urge the parties and the district court to clarify and specify which provisions of the UPA are at work and how they apply. The orders entered previously refer vaguely to UPA violations with no detail. The asserted violations flowing from Gopin's advertising are relatively clear, but others, *e.g.*, the form of Gopin's retainer agreement and the relationship with the chiropractor, are more obscure. Identification of the provisions violated would be very helpful if the matter returns for further appeals.

CONCLUSION

The matter is reversed and remanded for further proceedings consistent with this Opinion.

IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:

RODERICK T. KENNEDY, Chief Judge

LINDA M. VANZI, Judge

[11] An argument could be made that under *Aken v. Plains Electric Generation & Transmission Cooperative, Inc.*, 2002-NMSC-021, ¶ 17, 132 N.M. 401, 49 P.3d 662, our review should be de novo; but, again, we need not deal with that question here.

Certiorari Granted, December 19, 2014, No. 34,993

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-004

Filing Date: October 24, 2014

Docket No. 32,666

T.H. MCELVAIN OIL & GAS LIMITED PARTNERSHIP, a New Mexico limited partnership; KAREN ANN HANDLEY ANDERSON, an individual; SUSAN R. HANDLEY MCGREW, an individual; BILLIE L. PHILLIPS, an individual; BILLIE L. PHILLIPS RECOVERABLE TRUST DATED APRIL 23, 1996, BILLIE L. PHILLIPS TRUSTEE, JUDY LYNN QUINT, an individual; RONALD CHARLES WEEBER, an individual; LUCILE ALICE NORTHCOTE TRUST DATED MAY 29, 1996, BILLIE L. PHILLIPS, SUCCESSOR TRUSTEE,

Plaintiffs-Appellants,

v.

GROUP I: BENSON-MONTIN-GREER DRILLING CORP., INC., a Delaware corporation; ELIZABETH JEANNE TURNER CALLOWAY, an individual; KELLY R. KINNEY, an individual; KATHERINE P. MILLER, an individual; RONALD MICHAEL MILLER, an individual; VICKIE ROANN MILLER, an individual; THOMAS R. MILLER, an individual; FRED E. TURNER, LLC, a Delaware limited liability company; JOHN LEE TURNER, an individual; LINDA VOITL a/k/a LINDA DAVIS, an individual; ESTATE OF WILLIAME G. WEBB, deceased, JOHN G. TAYLOR, independent executor,

GROUP II: CHERYL U. ADAMS, an individual; E'TWILA J. AXTELL, an individual; BP AMERICA PRODUCTION COMPANY, a Delaware corporation; COASTAL WATERS PETROLEUM COMPANY, INC., a Louisiana corporation; ENERGEN RESOURCES CORPORATION, an Alabama corporation; THE ESTATE OF ANNE B. LITTLE, FIRST SECURITY BANK OF NEW MEXICO, as personal representative; LANA GAY PHILLIPS, an individual; HENRIETTA SCHULTZ, an individual; THE FRANK AND HENRIETTA SCHULTZ REVOCABLE TRUST DATED JANUARY 2, 1990, HENRIETTA SCHULTZ TRUSTEE; SCHULTZ MANAGEMENT LTD., a Texas limited partnership; J. GLENN TURNER, JR. LLC, a Delaware limited liability company; MARY FRANCES TURNER JR. TRUST, JP MORGAN CHASE BANK, NA TRUSTEE,

GROUP III: ALL UNKNOWN CLAIMANTS OF INTEREST IN THE PREMISES ADVERSE TO THE PLAINTIFFS,

Defendants-Appellees.

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Denver, CO

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John F. McCarthy Jr.
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Farmington, NM

for Appellees Henrietta Schultz, The Frank and Henrietta Schultz Revocable Trust, Henrietta Schultz Trustee, Schultz Management Ltd., Elizabeth Jeanne Turner Calloway, Fred E. Turner, LLC, John Lee Turner, J. Glenn Turner, Jr. LLC, Mary Frances Turner Jr. Trust, JP Morgan Chase Bank, N.A. Trustee, and Benson-Montin-Greer Drilling Corp., Inc.

Miller Stratvert P.A.
Dylan O'Reilly
William T. Denning
Farmington, NM

for Appellees E'Twila J. Axtell, Lana Gay Phillips, and Cheryl U. Adams

OPINION

SUTIN, Judge.

The Opinion filed in this case on October 16, 2014, is withdrawn and the following Opinion is substituted in its place.

This case presents a difficult issue of whether constructive notice of an action to quiet title to property, including underlying oil and gas interests located in San Juan County, New Mexico, was effective. Title was quieted in 1948 to property in which the oil and gas interests had been reserved by the grantors of the property in a 1928 warranty deed. Presumably unbeknownst to the grantors who had reserved their oil and gas interests, the decree quieted title to those oil and gas interests in favor of the quiet title plaintiff whose title clearly stemmed from a warranty deed that contained the reservation.

Evidence indicated that the quiet title plaintiff knew or should have known in 1948 that the grantors who reserved the oil and gas interests resided in San Diego, California at the time of the 1928 deed. Evidence also indicated that upon inquiry in San Diego, the quiet title plaintiff may have been able to locate the grantors. Yet, service of process was obtained solely through constructive notice published in a local San Juan County newspaper with no attempt shown in the record to discover the location of those grantors for personal service or to otherwise give notice of the action to those grantors.

In 2002 a group searching for locations to pursue oil and gas exploration discovered, by examining the chain of title to the property, that the oil and gas interests had been reserved by the 1928 warranty deed before the 1948 quiet title action. Based on that discovery, the group was able to locate heirs (the Wilson heirs) to the reserved interests with the result that Plaintiffs sued the heirs of the quiet title plaintiff's purchasers to establish the Wilson heirs' ownership rights in the reserved oil and gas interests. From an unfavorable district court summary judgment, Plaintiffs appeal, contending that the constructive notice was

not effective to permit adjudication of their reserved interests and thus violated due process. We conclude that the Millers failed to undertake a good faith effort to provide the Wilson heirs adequate notice of their 1948 quiet title suit. We, therefore, reverse the district court's grant of summary judgment to Defendants and remand for further proceedings.

BACKGROUND

Plaintiff T.H. McElvain Oil & Gas Limited Partnership (McElvain) entered into a mineral lease agreement in 2002 with the Wilson heirs, specifically, Judy Lynn Quint and Ronald Charles Weeber, pertaining to the mineral interests associated with 160 acres of property in San Juan County (the property). Ms. Quint, Mr. Weeber, and a number of other individuals, are heirs of one of the original grantors, Mabel G. Wilson (later known by her married name, Weeber). Mabel Weeber, who, along with her mother and father, Eva C. Wilson and Judson Wilson (the Wilsons), sold the property to David Miller in 1928, reserving in their warranty deed to David Miller the "oil and gas existing or found" on the property. McElvain and the Wilson heirs are Plaintiffs in the present case.

The property consists of 160 acres lying beneath the surface of Navajo Lake in San Juan County. In 1927 the Wilsons, as joint tenants, acquired a general warranty deed to the property from W.W. McEwen. The 1927 deed from McEwen to the Wilsons listed "Judson Wilson and Eva C. Wilson and Mabel G. Wilson of San Diego, California" as purchasers of the property. When the Wilsons conveyed the property to David Miller in 1928, the warranty deed contained the following express exception and reservation:

> excepting and reserving to the grantors herein the oil and gas existing or found therein, with the right to enter on for prospecting or developing same, provided they must pay all damage to land or crops in prospecting or development.

The deed from the Wilsons to David Miller was recorded in San Juan County in 1928.

By a 1931 quitclaim deed, David Miller conveyed his interest in the property to his brother, Thomas Miller, who had paid one-half of the purchase price for the property at the time that David Miller purchased it from the Wilsons. The quit claim deed executed by David Miller, in which he conveyed his interest in the property to Thomas Miller was recorded in 1937, four days after David Miller's death. By a 1948 quiet title action in the San Juan County district court, Thomas Miller was adjudged to be the fee simple owner of the property.

The numerous named Defendants in the present case were the various lessees and lessors of the mineral interests in the property whose interests stemmed from Thomas Miller's fee simple ownership in the property. The district court appointed a special master "to assist . . . in determining the ownership of the mineral rights[.]" The following background is based on the special master's statement of undisputed facts.

Judson Wilson died in 1929, and Eva Wilson died in 1944. By the time that Eva Wilson died, Mabel Wilson had married and changed her name to Mabel Weeber. Mabel Weeber, the remaining joint tenant in the 1927 warranty deed to the property, died in 1970.

In October 1948, Miller filed a quiet

title action in the district court for San Juan County alleging, in relevant part, that he was the fee simple owner of the property. In his complaint to quiet title in the property, Miller named Judson Wilson, Eva Wilson, and Mabel Wilson, along with other individuals who are not relevant to this appeal, as defendants "if living, or if deceased, by their unknown heirs." Miller's complaint included a sworn statement by Miller's attorney that, in relevant part, the Wilsons' heirs were "unknown to . . . Plaintiff, and Plaintiff [had] been unable to learn or determine the names, places of residence, [p]ost [o]ffice addresses[,] and whereabouts of the . . . unknown heirs[] after diligent search and inquiry[.]" Additionally, the San Juan County Sheriff submitted a sheriff's return stating that he had "diligently searched and inquired for the [Wilsons]," but "after such search and inquiry, [was] unable to find [them] in San Juan County . . . and [was] unable to find [their p]ost [o]ffice addresses, places of residence, or whereabouts[.]"

Miller served the Wilsons and their heirs (hereinafter, the Wilsons) with notice of his quiet title action by publication in a Farmington, New Mexico newspaper for four successive weeks. The Wilsons did not respond to the notice. On December 20, 1948, the district court entered judgment quieting title to the property in favor of Miller. In its judgment, the court determined "that after [a] diligent search and inquiry[,] the post office addresses, places of residences, and whereabouts of . . . the [d]efendants" were "unknown"; and, therefore, the defendants could not "be personally served with process in this cause." The judgment concluded that Miller was the owner of the property in fee simple title.

In 1950 Miller conveyed the property to V.H. McRee, but reserved three-fourths of the mineral rights therein. In 1953 Miller and McRee entered into oil, gas, and mineral leases; as of September 24, 2012, those leases remained in effect. The heirs of McRee's purchasers, who are Defendants in this case, claim royalty interests from those leases.

After Mabel Weeber's death in 1970, her estate, which was probated in San Diego, did not identify or include any interest in any New Mexico property. Mabel Weeber's husband, Charles Weeber, died in 1978; his estate also did not mention any interest in any New Mexico property.

Between 1928, when they deeded the property to David Miller, and 2002, when a landman representing McElvain wrote a letter to Judy Lynn Quint and Ronald Charles Weeber informing them that they were the "current owners of the oil and gas" under the property, neither the Wilsons nor their heirs took any action in regard to the property. By September 2012, the mineral interests in the property were valuable because in 2007 Energen Resources, a named Defendant in this case, successfully drilled under Navajo Lake, thus including the property in two Fruitland coalbed well spacing units.

In September 2010, Plaintiffs (the Wilson heirs and McElvain) filed a lawsuit against Defendants (McRee's purchasers' heirs and their mineral lessors) seeking a declaration that, owing to the Wilsons' 1928 oil and gas reservation, Defendants were barred and enjoined from asserting any claim to the mineral interests in the property, and seeking a decree quieting title in Plaintiffs' favor to all of the mineral interests in the property. Defendants answered and also filed counterclaims seeking a declaration of certain Defendants' ownership of the mineral interests

in the property. All of the parties moved for summary judgment.

Owing to "the highly complex issues contained" in the case, the district court determined that it was necessary to appoint a special master "who has an expertise in dealing with the specific issues of determining the ownership of mineral rights." Ultimately, the parties chose a retired New Mexico District Court judge to serve as special master in this case. We are not made aware of whether the special master held any evidentiary or other hearing. The special master filed a report on September 24, 2012.

In his report, the special master identified the central issue in the case as "the validity of the [j]udgment in the 1948 quiet title action which purports to grant fee simple title in [the property to] . . . Miller." In the proceedings before the special master, Defendants' position was that the judgment was valid, therefore, their interests that flowed from Miller's title were also valid while Plaintiffs posited that the judgment was void because the 1948 service by publication failed to satisfy the Wilsons' right to due process. Having reviewed the parties' evidence that was attached to their motions for summary judgment, the special master recommended that the district court grant summary judgment in favor of Defendants because (1) the undisputed material facts supported the legal conclusion that there was no violation of due process in connection with the 1948 quiet title proceeding; (2) Plaintiffs' effort to challenge the validity of the 1948 judgment constituted a collateral attack on the judgment that would only succeed if the judgment reflected an absence of jurisdiction, and an absence of jurisdiction was not reflected in the 1948 judgment; and (3) the undisputed facts established that Plaintiffs' claims of ownership were barred by laches, waiver, and judicial estoppel. Plaintiffs objected to the special master's report by submitting to the special master a motion to reconsider the report and moving the district court to reconsider the special master's findings before entering judgment. The district court's judgment adopted the special master's report in its entirety. In its summary judgment order, the district court quieted title to the property in favor of Defendants. Plaintiffs appeal from the court's judgment.

On appeal, Plaintiffs argue that the district court erred in each of the foregoing legal determinations. We conclude that Plaintiffs' evidence established that, as a matter of law, Miller failed to exercise diligence and good faith to notify the Wilsons of his quiet title action against them. We also conclude that Plaintiffs' action is not an improper collateral attack, and we further conclude that the evidence in this record does not support the court's conclusion that equitable principles barred Plaintiffs' lawsuit. We therefore hold that the district court erred in granting summary judgment in favor of Defendants.

DISCUSSION

Summary Judgment Standard of Review

"We review the district court's decision to grant summary judgment de novo." *Hydro Res. Corp. v. Gray*, 2007-NMSC-061, ¶ 14, 143 N.M. 142, 173 P.3d 749. Summary judgment is appropriate where the facts are undisputed, and the movant is entitled to judgment as a matter of law. *Id.* We review the facts in a light most favorable to the non-moving party. *Wilde v. Westland Dev. Co.*, 2010-NMCA-085, ¶ 12, 148 N.M. 627, 241 P.3d 628. Further, "[a]ll reasonable

inferences from the record should be made in favor of the non[-]moving party[.]" *J.R. Hale Contracting Co. v. Union Pac. R.R.*, 2008-NMCA-037, ¶ 27, 143 N.M. 574, 179 P.3d 579 (internal quotation marks and citation omitted). New Mexico courts view summary judgment with disfavor. *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 8, 148 N.M. 713, 242 P.3d 280.

I. The Due Process Issue

Plaintiffs argue that because the Wilsons were not personally served with notice of the 1948 quiet title action, or, at a minimum, notified of the lawsuit by publication in a San Diego newspaper or by mail at the Pershing Avenue address, the 1948 judgment that effectively deprived the Wilsons of their oil and gas interests in the property violated their right to due process and was, therefore, void. Plaintiffs argue that the undisputed facts show that Miller knew or with reasonable diligence could have learned of the Wilsons' address of 3767 Pershing Avenue in San Diego (the Pershing Avenue address) at which Mabel Weeber could have been personally served in 1948. They argue further that Miller's 1948 complaint contained a conclusory and self-serving representation that despite a diligent inquiry, he was unable to learn of the Wilsons' whereabouts to effect personal service upon them. Plaintiffs contend that the court in the 1948 action compounded the due process violation by finding, based on the sheriff's return, that the Wilsons could not be personally served with process when, in fact, the return merely stated that they could not be served in San Juan County.

The issue whether the Wilsons were afforded due process is a question of law. *See Burris-Awalt v. Knowles*, 2010-NMCA-083, ¶ 15, 148 N.M. 616, 241 P.3d 617. Because we are reviewing the due process issue in the context of an appeal from a summary judgment, we indulge all reasonable inferences in favor of Plaintiffs who opposed Defendants' summary judgment motion. *See Smith v. Durden*, 2012-NMSC-010, ¶ 5, 276 P.3d 943 (stating that in reviewing an appeal from a summary judgment, we indulge all reasonable inferences and view the facts in the light most favorable to the party opposing the summary judgment); *see also Turner v. Bassett*, 2003-NMCA-136, ¶¶ 9-10, 134 N.M. 621, 81 P.3d 564 (reviewing a quiet title decree entered in the context of summary judgment and viewing the evidence in a light most favorable to the nonmoving party), *rev'd on other grounds by* 2005-NMSC-009, 137 N.M. 381, 111 P.3d 701. Whether the district court had jurisdiction over the Wilsons in the 1948 quiet title action is a question of law that we review de novo. *See Sproul v. Rob & Charlies, Inc.*, 2013-NMCA-072, ¶ 6, 304 P.3d 18 ("The determination whether a district court has personal jurisdiction over a nonresident defendant is a question of law that we review de novo.").

In rejecting Plaintiffs' due process argument, the special master concluded that the undisputed facts did "not support the proposition that the 1948 mailing address for the Wilsons would have been identified through the exercise of reasonable diligence." In support of its conclusion, the special master stated that the sheriff's return "specifically found that, after [a] diligent search and inquiry, . . . Defendants could not be located and personally served with process." Further, the special master stated, "[b]y 1948, both Judson Wilson and Eva Wilson had died; only Mabel Wilson was alive to potentially receive personal service"; and "[b]y 1948, Mabel

Wilson had married and was known as Mabel Weeber." The special master observed that there were no facts in the record indicating that Miller knew of Mabel's married name or the name of her husband. The special master rejected "Plaintiffs['] attempt to raise an issue of fact as to the availability of information regarding the location of Mabel Weeber" by showing that phone listings for Mabel and Charles Weeber included the Pershing Avenue address on the basis that these listings only reflected Mabel's married name.

In order to comport with due process, Miller was required to undertake a diligent and good faith effort to ascertain the location of the Wilsons and to personally serve them with process in the 1948 quiet title action. *See Campbell v. Doherty*, 1949-NMSC-030, ¶¶ 27, 30-31, 53 N.M. 280, 206 P.2d 1145 (examining the record from a 1946 lawsuit and recognizing the requirement of diligence and good faith in attempting to discover the names and places of residence of the defendants and or his or her heirs); *Owens v. Owens*, 1927-NMSC-053, ¶¶ 2, 11, 14, 32 N.M. 445, 259 P. 822 (requiring a diligent and good faith effort to effect personal service of process); *see also Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 309, 314-18 (1950) (considering the adequacy of notice given to necessary parties in a 1947 lawsuit and explaining that within the bounds of reasonableness and practicality, notice of process must be certain to reach the affected party). In 1948 notice by publication would have been permissible only out of necessity. *See Campbell*, 1949-NMSC-030, ¶ 31 (" 'Constructive service is in derogation of the common law. It is harsh. It lends itself to abuse. It is only resorted to from necessity.' " (quoting *Owens*, 1927-NMSC-053, ¶ 12)); *see Mullane*, 339 U.S. at 315, 317 (recognizing that notice by publication comports with due process only where the parties are unknown or missing).

To support their argument that Miller knew or with reasonable diligence could have learned of Mabel Weeber's identity and whereabouts, Plaintiffs rely on the following evidence in the record that was before the special master. The 1928 deed from the Wilsons to David Miller was notarized in San Diego. In 1926 and in 1930, the San Diego city directory listed the Wilsons' address at the Pershing Avenue address. In 1928, when David Miller acquired the property from the Wilsons, Thomas Miller paid half the purchase price of the property. Eva Wilson's death certificate, which was issued by the Assessor/Recorder/County Clerk of San Diego County reflected that Eva Wilson lived at the Pershing Avenue address, and it listed Mrs. Weeber, who also lived at the Pershing Avenue address, as the "informant." An obituary for Eva Wilson was printed in "The San Diego Union" newspaper in December 1944 and stated, in relevant part, that Mrs. Wilson was survived by her daughter, Mrs. Mabel W. Weeber. Evidence presented to the special master showed that Mabel Weeber resided at the Pershing address from 1926 until her death in 1970. No evidence in the record shows that the Wilsons ever resided in San Juan County.

Additionally, Plaintiffs look to Miller's knowingly false allegation in his 1948 quiet title action stating he was "the owner in fee simple" of the property. Plaintiffs argue that this information could only have been gleaned by Miller or his attorneys having conducted a title examination of the property. Miller's 1948 complaint stated that Miller had diligently searched and inquired for the "unknown heirs" of the defendants and for the "unknown persons and parties" who claimed

"some right, title, interest, equity, lien, claim[,] or demand in, to, or against" the property, but that he could not determine the identities or whereabouts of the unknown heirs and the unknown claimants. Miller's complaint did not, however, state that he had searched diligently or otherwise for the living defendants who were not residents of New Mexico, that is, for Mabel Wilson who was alive and going by her married name, Mabel Weeber. Further, the 1948 sheriff's return stated, in relevant part, that the "Sheriff of San Juan County, New Mexico" certified that he had "diligently searched and inquired for the [d]efendants . . . ; that after such search and inquiry, I have been unable to find any of the [d]efendants in San Juan County, New Mexico, and I have been unable to find the [p]ost [o]ffice addresses, places of residence, or whereabouts of the [d]efendants[.]" Relying on the sheriff's return that indicated a search limited to San Juan County, the 1948 court found, in relevant part, that the Wilsons could not be personally served there with process.

Based on the foregoing, Plaintiffs argue that because Miller contributed to his brother's purchase of the property and because the information regarding the Wilsons' residence was in his chain of title, Miller knew or should have known that the Wilsons lived in San Diego and that they had reserved the oil and gas interests in the property. They argue that had Miller wished to fulfill his due process obligations, with reasonable diligence, he could have ascertained Mabel Weeber's identity and address, and have personally sent notice to her of his quiet title action. At the very least, they argue Miller could have effected notice by publication in a San Diego newspaper. Plaintiffs argue further that Mabel Wilson was a named defendant in the quiet title action and, as such, she was neither an unknown heir nor was she an unknown claimant; therefore, Miller's complaint blatantly lacked any attestation as to a diligent search for her whereabouts.

Plaintiffs also argue that the 1948 district court erred in finding, based on the sheriff's return, that the Wilsons could not be personally served. In Plaintiffs' view, the sheriff's return merely confirmed that the sheriff was unable to find any of the defendants in San Juan County, New Mexico; therefore, according to Plaintiffs, the 1948 court's finding went "well beyond" what the sheriff's return stated.

Plaintiffs theorize that Miller's failure in good faith to attempt to personally serve Mabel Weeber with notice of his quiet title action may reasonably be viewed as having been intentional and self-serving, as Miller's aim in seeking to quiet title to the property was to acquire the rights to the Wilsons' oil and gas interests in the property. Plaintiffs support their ascription of Miller's mal-intent by pointing to the fact, also in the record, that "shortly after" the 1948 quiet title action, in 1950, Miller conveyed his interest in the property to McRee, but reserved three-fourths of the mineral interests for himself. Plaintiffs argue that Miller's failure to attempt to personally serve Mabel Weeber with process or at least to publish notice of the action in a San Diego newspaper or to mail notice of the action to the Pershing Avenue address was in derogation of the principle that the notice employed must be more than a mere gesture, it must reflect a desire on behalf of the party effecting service of actually informing the absentee of the lawsuit. *See Mullane*, 339 U.S. at 315 ("[W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of

actually informing the absentee might reasonably adopt to accomplish it."). In sum, according to Plaintiffs, because Miller's obvious goal in quieting title to the property was to gain ownership of the Wilsons' oil and gas interests in the property, his actions were designed to avoid giving the Wilsons notice of his lawsuit.

In response, Defendants argue that summary judgment should be affirmed because Plaintiffs failed to demonstrate that Mabel Weeber was not on notice of the 1948 quiet title action. Because our standard of review mandates that we view the evidence in the light most favorable to and indulge all reasonable inferences in favor of Plaintiffs in this case, we reject this argument. *See Wilde*, 2010-NMCA-085, ¶ 12 (stating the standard of review applicable to an appeal from summary judgment); *J.R. Hale Contracting*, 2008-NMCA-037, ¶ 27 (same). Although it is true that Plaintiffs have failed to affirmatively demonstrate that Mabel Weeber did not see the notice published in the Farmington paper, it is axiomatically difficult to prove something in the negative, particularly several decades after the death of the knowledgeable party. Based on the fact that Mabel Weeber did not enter an appearance in the 1948 action, and the further facts that while Mabel Weeber only lived in San Diego from 1926 and notice of Miller's lawsuit was published exclusively in a Farmington, New Mexico newspaper, a reasonable inference is that Mabel Weeber was not on notice of Miller's 1948 action.

Alternatively, Defendants argue that the special master correctly concluded that Plaintiffs' evidence failed to raise a question of fact as to the validity of the 1948 court's finding that, notwithstanding a diligent search or inquiry, Miller could not locate the Wilsons. In support of their argument, Defendants point to the special master's conclusions that (1) "there is nothing to indicate that . . . Miller had information regarding Mabel Weeber's whereabouts . . . in 1948"; and (2) "[t]here are no facts in the record which would indicate that . . . Miller or anyone attempting to achieve service on Mabel knew of Mabel's married name or the name of her husband." Defendants contend that Plaintiffs' evidence does not contradict these conclusions. We disagree.

Evidence in the record reflects that every transaction involving the Wilsons and the property showed that the Wilsons resided in San Diego during 1926-28, and no evidence showed that the Wilsons had resided any place except San Diego. Thus, as noted earlier, it is reasonable to infer that Miller was aware of the Wilsons' San Diego residence in 1927 and 1928 and likely could have ascertained their San Diego residence in 1948. Further, with nothing to suggest otherwise, it would be reasonable for Miller to have, in good faith, assumed that in 1948 the Wilsons were still in San Diego.

The absence of anything in the record to indicate that Miller knew that Mabel Wilson had become Mabel Weeber does not support summary judgment for Defendants. Having apparently made no attempt to locate the Wilsons in San Diego, Miller's inability to learn of Mabel Wilson's married name was not caused by the fact that her name had changed, but by the fact that his efforts to locate her were limited to the State of New Mexico. *See Owens*, 1927-NMSC-053, ¶ 10 (stating that one cannot remain willfully, studiously, or deliberately ignorant of a means of personal service and honestly swear that the adversary's residence is unknown). It is possible that had Miller attempted to locate the Wilsons in San Diego, he would have been

stymied by Mabel Wilson's changed name. It is equally possible that a phone call or letter to the county clerk in San Diego, who had issued Eva Wilson's death certificate, which listed Mrs. Weeber as the informant of Eva Wilson's death, would have led to the Wilsons' address, at which Mabel Weeber continued to reside with her husband as reflected by the 1947-48 San Diego City Directory that listed "Weeber Chas E (Mabel W)" at the Pershing Avenue address.

The special master concluded that Mabel Weeber's due process was not violated in the 1948 case because "there is nothing to indicate that . . . Miller had information regarding Mabel Weeber's whereabouts or that her whereabouts could be identified through reasonable diligence[.]" But reasonable inferences drawn from the evidence in favor of Plaintiffs require the conclusion that had Miller been interested in serving the Wilsons in 1948 with notice of the quiet title action, his search would and should have included San Diego and would have likely led to the possibility of learning Mabel Weeber's identity and address. Thus, the attempted constructive service in this case did not pass constitutional due process muster, and summary judgment in favor of Defendants was not appropriate.

The Collateral Attack Issue

Because Plaintiffs sought, in the present lawsuit, to have the 1948 judgment declared void as to the Wilsons, their lawsuit constituted a collateral attack on the 1948 judgment. *See Hanratty v. Middle Rio Grande Conservancy Dist.*, 1970-NMSC-157, ¶¶ 4-5, 82 N.M. 275, 480 P.2d 165 (defining a "collateral attack" as an attempt in a separate action to impeach "a judgment by matters dehors the record" (internal quotation marks and citation omitted)). A judgment entered against a party who did not receive effective service of process is subject to a collateral attack because a court has no jurisdiction over parties who have not been notified of a lawsuit against them. *See Rodriguez v. La Cueva Ranch Co.*, 1912-NMSC-028, ¶¶ 1, 19, 22, 17 N.M. 246, 134 P. 228 (permitting a collateral attack on a land grant partitioning decree by a party that claimed adverse possession in the at-issue land, but who had not received notice of the partition suit and was, therefore, not subject to the decreeing court's jurisdiction); *see also Harlan v. Sparks*, 125 F.2d 502, 505 (10th Cir. 1942) (applying New Mexico law to hold that a probate court's decree of heirship and apportionment of the decedent's property was open to a collateral attack on the ground that certain interested parties did not receive effective service of process); *Jueng v. N.M. Dep't of Labor*, 1996-NMSC-006, ¶ 8, 121 N.M. 237, 910 P.2d 313 (stating that "failure to serve a party with process in a proper manner generally means only that the court has no power over that party and cannot render a judgment binding that party" (alteration, internal quotation marks, and citation omitted)). In this case, based on his having stated no more than that there was "nothing in the 1948 [j]udgment indicating a lack of jurisdiction[,]" the special master concluded that "Plaintiffs' collateral attack on the judgment fails as a matter of law."

Relying on the principle that a judgment cannot be collaterally attacked unless the judgment or the record affirmatively shows that the court lacked jurisdiction over the party contesting its validity, Defendants argue that the 1948

judgment is not subject to Plaintiffs' collateral attack because, on its face, the judgment does not reflect an absence of jurisdiction. *See In re Estate of Baca*, 1980-NMSC-135, ¶ 11, 95 N.M. 294, 621 P.2d 511 (stating that judgments cannot be collaterally attacked "unless lack of jurisdiction appears affirmatively on the face of the judgment or in the judgment roll or record, or is made to appear in some other permissible manner"); *Swallows v. Sierra*, 1961-NMSC-063, ¶ 4, 68 N.M. 338, 362 P.2d 391 (holding that a former judgment could not be collaterally attacked because the party contesting its validity had not claimed that the judgment failed to affirmatively show a lack of jurisdiction). Because the permissibility of a collateral attack of the 1948 judgment on the basis of lack of personal jurisdiction over the Wilsons was considered in the context of a summary judgment, we view the facts in the light most favorable to Plaintiffs and indulge all reasonable inferences in their favor. *See Smith*, 2012-NMSC-010, ¶ 5 (stating that in reviewing an appeal from a summary judgment, we indulge all reasonable inferences and view the facts in the light most favorable to the party opposing the summary judgment). We review de novo whether the court correctly applied the law to the facts. *Gomez v. Chavarria*, 2009-NMCA-035, ¶ 6, 146 N.M. 46, 206 P.3d 157.

Defendants point to the fact that the 1948 judgment states that the Wilsons could not be located or served in San Juan County, notice of the lawsuit was published, and the Wilsons were named in the publication. The court found that the Wilsons could not be personally served, the Wilsons did not answer the published notice, and the judgment stated that the court had jurisdiction over the Wilsons. Defendants also assert that the sheriff's return supports the 1948 district court's finding that the Wilsons could not be personally served. We are not persuaded.

As discussed earlier in this Opinion, Plaintiffs' evidence supports a reasonable inference that Miller, either by having contributed to the purchase price of the property when his brother purchased it from the Wilsons, or by the title examination that led him to name each of the Wilsons as defendants in his quiet title action, knew or should have known that the Wilsons lived in San Diego at the time of the deed. Nevertheless, neither Miller's complaint nor the sheriff's return show that the search for the Wilsons or their "unknown heirs" exceeded the bounds of San Juan County or New Mexico, nor did the complaint acknowledge the fact or the possibility of the Wilsons' out-of-state residence. By omitting from his 1948 complaint the fact that the Wilsons were non-residents of San Juan County or of New Mexico, Miller avoided having to aver that he had, in good faith, attempted to locate them in their home state. *See Bowers v. Brazell*, 1926-NMSC-003, ¶¶ 4, 11, 31 N.M. 316, 244 P. 893 (stating that where a plaintiff sought to provide service by publication of a defendant residing in a foreign jurisdiction, the plaintiff was required to state in an affidavit that a defendant who is owed service of process resides out of the state); *see also Campbell*, 1949-NMSC-030, ¶ 30 (recognizing the continuing validity, in 1949, of the *Bowers* decision related to notice and jurisdiction). Further, because Miller did not advise the 1948 court of the Wilsons' non-residence, the court had no basis on which to consider the effectiveness of notice by publication in a Farmington, New Mexico newspaper, nor did it have the opportunity to consider whether, owing to the possibility of ineffective notice, it lacked jurisdiction over the Wilsons.

Additionally, Defendants argue that an averment in Miller's complaint that "if [the Wilsons] . . . are living, and reside in or have their places of residence in the State of New Mexico, [they] have secreted themselves so that service of process cannot be had upon them" was sufficient to comport with the then-applicable Rule of Civil Procedure. Defendants' argument is premised on the notion that the then-applicable rule, stated in *Campbell*, provided that the plaintiff was required to "file a sworn pleading . . . stating that any defendant resides or has gone out of the state, or has concealed himself within the state, . . . so that process cannot be served upon . . . them" and, if this was done, service by publication was permissible. 1949-NMSC-030, ¶ 24 (internal quotation marks and citation omitted). Thus, Defendants argue, under the rule stated in *Campbell*, Miller could, in keeping with due process, either state that the Wilsons resided out of State *or* he could state that if they lived in New Mexico, they had secreted themselves. We disagree.

It would run contrary to due process to interpret the then-applicable service of process rule to allow a plaintiff to avoid making any effort beyond only publishing in a local newspaper where the property was located to pursue service on a quiet title defendant, who was known to reside in a foreign jurisdiction at the time that the parties conducted their business related to the property, and who was never known to have resided in New Mexico, merely by stating that the defendant may have secreted himself in New Mexico. *See Campbell*, 1949-NMSC-030, ¶ 31 (recognizing that in accord with the "plain purpose" of the then-applicable constructive notice statute, one may not willfully, studiously, and deliberately avoid knowledge of an adversary's residence and yet claim that the adversary's residence is unknown). Under the circumstances of this case, where a reasonable inference is that Miller knew of the Wilsons' residence outside New Mexico at the time that the Wilsons purchased the property from McEwen and at the time that the Wilsons conveyed the property to Thomas Miller, due process required that he so state and that he exert a good faith effort to effect personal service. *See Campbell*, 1949-NMSC-030, ¶ 35 ("Diligence is a relative term and must be determined by the circumstances of each case."); *Owens*, 1927-NMSC-053, ¶ 4 (holding that due process required personal service of a plaintiff whose whereabouts, in another state, could have been ascertained but for the plaintiff having wholly failed to make an effort to do so); *see also Mullane*, 339 U.S. at 315 ("The means [of notice] employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.").

In sum, the 1948 quiet title record, including the complaint and the judgment, affirmatively shows that Miller failed to either investigate strong indications known to him of the Wilsons' whereabouts as required, or to fully apprise the court of the circumstance of the Wilsons' San Diego residence during their transactions in regard to the property. In turn, he was able to effectively avoid any requirement or potential mandate that he attempt to personally serve the Wilsons in San Diego. *See Owens*, 1927-NMSC-053, ¶¶ 4, 10 (holding that the plaintiff, who avoided a requirement to notify the non-resident defendant of his action by stating that he did not know the defendant's address, acted in bad faith because, had he so desired, he could easily have found the defendant's address). We hold that the district court erroneously determined that Plaintiffs' claim was barred under the collateral attack doctrine.

II. The Equity Issues

The district court concluded that an alternative ground for granting summary judgment in favor of Defendants was that the undisputed facts demonstrated that Plaintiffs' claim was barred by the equitable doctrines of laches, waiver, and judicial estoppel. Defendants argue that the district court's application of laches, waiver, and judicial estoppel should be reviewed for an abuse of discretion. We disagree. When an equitable determination is made in the context of summary judgment, the appellate court reviews the evidence in the light most favorable to the nonmoving party to determine whether the district court erred as a matter of law in applying the equitable principles. *See Brown v. Trujillo*, 2004-NMCA-040, ¶ 20, 135 N.M. 365, 88 P.3d 881 (recognizing that ordinarily an equitable determination is reviewed for an abuse of discretion, but where the equitable determination was made "in the context of summary judgment, we view the evidence in the light most favorable to the nonmoving party"). We review issues of law de novo. *Helena Chem. Co. v. Uribe*, 2013-NMCA-017, ¶ 28, 293 P.3d 888.

In order to permit a legal conclusion that the doctrine of laches applied, the undisputed facts before the district court had to show that (1) Defendants' conduct gave rise to the situation of which the complaint was made and for which Plaintiffs seek a remedy; (2) Plaintiffs had knowledge or notice of Defendants' conduct and an opportunity to institute a lawsuit, but delayed in asserting their rights; (3) Defendants lacked knowledge or notice that Plaintiffs would assert the right on which they based their lawsuit; and (4) Defendants would suffer injury or prejudice in the event Plaintiffs were to prevail or their lawsuit was allowed to proceed. *See Garcia v. Garcia*, 1991-NMSC-023, ¶ 31, 111 N.M. 581, 808 P.2d 31 (stating the elements of laches).

In order to support the legal conclusion that the doctrine of waiver applied, the undisputed facts had to demonstrate that Plaintiffs knew they were entitled to enforce a right, but neglected to do so for so long that Defendants could fairly infer that Plaintiffs waived or abandoned the right. *See Magnolia Mountain Ltd. P'ship v. Ski Rio Partners, Ltd.*, 2006-NMCA-027, ¶ 29, 139 N.M. 288, 131 P.3d 675 (defining waiver by acquiescence). "[A] trial court should not infer acquiescence from doubtful or ambiguous acts." *Id.* (internal quotation marks and citation omitted).

The court based its laches and waiver conclusions on the facts that (1) neither the Wilsons nor their successors did anything to claim ownership in the oil and gas interests connected to the property from the date of the deed to David Miller in 1928 until 2002 when McElvain sought to enter into a lease with them, and (2) Plaintiffs only "stepped forward to contend they [had] an interest in the property after" a well was successfully completed in 2007. While Defendants maintain that each of the district court's laches and waiver holdings should be affirmed, at oral argument before this Court, Defendants did not discuss waiver and concentrated on and emphasized their view that the doctrine of laches was properly applied in this case. Accordingly, although we hold that neither laches nor waiver were properly applied here, we address Defendants' laches argument in some detail.

In regard to laches, Defendants argue in their answer brief and emphasized at oral argument that because Miller recorded his

quiet title judgment pursuant to NMSA 1978, Section 14-9-1 (1886, amended 1991), and because subsequent conveyances of the property were likewise recorded as required by law, the Wilsons and their heirs were, pursuant to NMSA 1978, Section 14-9-2 (1915), charged with "notice" of Miller's quiet title action and of subsequent transactions involving the property. *See* § 14-9-1 (requiring all writings affecting the title to real estate, including deeds, mortgages, and leases, to be recorded in the office of the county clerk in the county in which the property is located); § 14-9-2 (stating that county clerk records of instruments affecting real estate, as required by Section 14-9-1, "shall be notice to all the world of the existence and contents of the instruments so recorded from the time of recording"). In Defendants' view, this notice was sufficient to meet the laches element of Plaintiffs' notice of Defendants' quiet title decree and later lease transactions and their opportunity to institute a lawsuit but delayed in asserting their rights. *See Garcia*, 1991-NMSC-023, ¶ 31 (stating the elements of laches). Defendants' reliance on Sections 14-9-1 and -2 is misplaced.

The phrase "all the world" as it is used in Section 14-9-2 "has been limited to mean persons who are bound to search the record," such as subsequent purchasers. *Allen v. Timberlake Ranch Landowners Ass'n*, 2005-NMCA-115, ¶ 34, 138 N.M. 318, 119 P.3d 743. Neither Section 14-9-2 nor any authority of which we are aware imposes a duty upon the owner of an interest in real property to constantly peruse the records of the county clerk to determine whether he or she has been divested of his or her property right in a lawsuit of which he or she was not notified. In this case, we will not interpret Section 14-9-2 to stand for the proposition that the Wilsons were "bound to search the record," *Allen*, 2005-NMCA-115, ¶ 34, after they sold the property subject to an oil and gas reservation, such that they should be held to have had constructive notice of Miller's quiet title action as a result of the recording of a quiet title judgment and later leasehold transactions in the San Juan County records.

Defendants argue further that *Skaggs v. Conoco, Inc.*, 1998-NMCA-061, 125 N.M. 97, 957 P.2d 526, and *Farrar v. Hood*, 1952-NMSC-095, 56 N.M. 724, 249 P.2d 759, support the application of the doctrine of laches to the circumstances here. In *Skaggs*, in 1994 the plaintiffs sought to declare void a 1927 drilling and operating agreement between Mr. Skaggs (the decedent) and the prospecting company, Marland Oil Company of Colorado, permitting Marland to explore, drill, develop, produce, and market any oil and gas on the at-issue property. 1998-NMCA-061, ¶¶ 3-4, 7. The plaintiffs claimed that the 1927 agreement was void because the decedent's wife at the time of the conveyance had not joined in the conveyance, and as a result of the allegedly void conveyance, the plaintiffs, who were the decedent's wife's heirs, sought to quiet title to the property in their favor. *Id.* ¶¶ 2-3, 7-8, 10. The defendants claimed that laches, among other defenses, barred the plaintiffs' lawsuit. *Id.* ¶ 7. The record on appeal before the *Skaggs* Court included undisputed evidence that as early as 1951, the decedent's wife knew of her husband's allegedly void conveyance to Marland and of his subsequent conveyance to third parties of any royalty interest from Marland's activities. *Id.* ¶ 11. The *Skaggs* Court held that under those circumstances, where it was evident that the decedent's wife was on notice of her husband's conveyances, yet neither she nor the heirs attempted to enforce any rights related to the property until more than forty years later, during which time

the defendants had invested "substantial sums in prospecting and developing" the property, the doctrine of laches was properly applied. *Id.* ¶ 13.

Farrar involved a transaction in which one party, the conveyor, conveyed mineral interests in exchange for a share of a speculative security sold by another party, the seller. 1952-NMSC-095, ¶ 3. The seller was not authorized to engage in the sale of speculative securities at the time of the transaction. *Id.* ¶¶ 2, 8-11. The seller induced the conveyor into the sale by representing that the speculative security venture would be profitable, however, five years after the transaction, the seller informed the conveyor that the venture was less than half as valuable as the seller had earlier represented. *Id.* ¶¶ 12, 14. Nevertheless, the conveyor did not attempt to escape the effect of his mineral deed transfer to the seller until nineteen years later, when the conveyor sought to void the original transaction based on a prohibition against the unauthorized sale of speculative securities. *Id.* ¶¶ 14, 16, 33. By the time the conveyor sought to void the original transaction, the mineral interests that the conveyor had conveyed to the seller had become twenty times more valuable than they were at the time of the conveyance. *Id.* ¶ 33. The *Farrar* Court held that laches barred the conveyor's lawsuit because it violated the principle that "[a] person may not withhold his claim, awaiting the outcome of an enterprise, and then, after a decided turn has taken place in his favor, assert his interest, especially where he has thus avoided the risks of the enterprise." *Id.* ¶ 35 (internal quotation marks and citation omitted).

In both *Skaggs* and *Farrar*, the parties that were barred by laches were on notice of the allegedly wrongful transaction underlying their lawsuits years before they sued to vindicate their rights. Notably, in concluding that waiver and laches applied in the case now before this Court, the district court did not find that the undisputed facts of this case demonstrated that the Wilsons knew or had notice of Miller's quiet title action, or of Miller's subsequent actions in regard to the mineral interests in the property. Nor, on this record, with regard to the question whether the Wilsons' due process right to notice was violated, could the district court reasonably have concluded that, as a matter of undisputed fact, the Wilsons were on notice of Miller's quiet title action. Unlike the plaintiffs in *Skaggs* and *Farrar*, Plaintiffs have not been shown to have delayed legal action to vindicate a wrong of which they were indisputably on notice. We conclude, therefore, that the record did not support a legal determination that Plaintiffs' lawsuit was barred by laches, and we further conclude that *Skaggs* and *Farrar* do not support Defendants' laches argument. *See Garcia*, 1991-NMSC-023, ¶ 31 (stating that a finding of laches requires that the complaining party had notice of the defendant's actions).

There is no evidence to support an inference or a conclusion that the Wilsons or their heirs knew that they were entitled to enforce their right to the oil and gas interest in the property against Miller or his heirs, but neglected to do so. The district court could not properly have determined that waiver applied. *See Magnolia Mountain*, 2006-NMCA-027, ¶ 29 (defining waiver). Having not been notified that their ownership of the oil and gas interests in the property were threatened and later unlawfully terminated by Miller's quiet title action, the Wilsons and their heirs cannot be said to have waived their rights.

Judicial estoppel is applied to prevent a party from maintaining inconsistent positions in judicial proceedings. *Citizens Bank v. C & H Constr. & Paving Co.*, 1976-NMCA-063, ¶ 36, 89 N.M. 360, 552 P.2d 796. "Where a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, [judicial estoppel precludes him from] thereafter assum[ing] a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Id.* Here, the special master determined that judicial estoppel barred Plaintiffs' lawsuit because Mabel Weeber and her husband, Charles Weeber, whose estates have gone through probate, did not indicate ownership in the subject property at the time of their respective deaths. Thus, according to the special master, Plaintiffs' present lawsuit was inconsistent with their actions in the probate proceedings.

In our view, judicial estoppel does not apply under the circumstances of this case. That the inventories in Mabel and Charles Weeber's probate proceedings omitted the oil and gas interests in the property is of little, if any, probative value on the matter of ownership of or right to the oil and gas interests in the property. The wills did not mention any particular properties and the inventories were prepared after the two were deceased. Indeed, it is not unheard of that a will would dispose of some, but not all, of a decedent's property. *See* Cal. Probate Code, § 6400 (West 2014) (stating that "[a]ny part of the estate of a decedent not effectively disposed of by will passes to the decedent's heirs"); *see also* NMSA 1978, § 45-2-101(A) (1993) (stating that "[a]ny part of a decedent's estate not effectively disposed of by will passes by intestate succession to the decedent's heirs"). Moreover, the parties do not point to any evidence in the record that reflects that Mabel Weeber or, later, her husband, affirmatively acknowledged their lack of ownership or right to the oil and gas interests in the property. Thus, what this record shows is an absence of any legal position taken by Mabel or Charles Weeber or their heirs in regard to the oil and gas interests in the property. Under these circumstances, we conclude that judicial estoppel is not supported by the undisputed facts in the record.

In sum, the record demonstrates that the Wilsons, particularly Mabel Weeber, did not receive constitutionally adequate notice of Miller's 1948 quiet title action. Further, nothing in the record reflects that they were placed on notice of the quiet title decree or later oil and gas transactions. Under these circumstances, we cannot uphold the district court's application of the equitable principles as a bar to Plaintiffs' lawsuit.

Defendants' Presumed Grant Argument

Defendants argue that we should affirm the district court's summary judgment on the basis of the doctrine of presumed grant. Neither the special master nor the district court considered or ruled on this issue. It is therefore not properly before this Court, and we decline to consider the issue. *See Luginbuhl v. City of Gallup*, 2013-NMCA-053, ¶ 41, 302 P.3d 751 (stating that, where the district court did not consider or rule on an issue, the issue was not properly before this Court).

CONCLUSION

Having concluded that Miller failed to attempt, in good faith and with reasonable diligence, to serve Mabel Weeber with notice

of his 1948 quiet title action, we hold that the quiet title action was subject to a collateral attack and was void as to the Wilsons. We also hold that the facts in this record did not support the district court's application and determinations of laches, waiver, and judicial estoppel. We reverse the order of the district court granting summary judgment in favor of Defendants. We remand for further proceedings consistent with this Opinion.

IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:

RODERICK T. KENNEDY, Chief Judge

MICHAEL E. VIGIL, Judge

Certiorari Denied, November 21, 2014, No. 34,910

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-005

Filing Date: August 4, 2014

Docket No. 31,883

MONICA LUJAN, as Personal Representative of the Estate of PEGGY LUJAN-SILVA, Decedent,

Plaintiff-Appellant,

v.

NEW MEXICO DEPARTMENT OF TRANSPORTATION,

Defendant-Appellee.

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OPINION

VIGIL, Judge.

Monica Lujan (Plaintiff), as personal representative of Peggy Lujan-Silva (Decedent), sued the New Mexico Department of Transportation (the Department) for wrongful death arising from a single-car accident, alleging that the Department's negligent failure to keep the roadway clear of dangerous debris caused the accident. The district court granted the Department's motion for summary judgment. We reverse.

BACKGROUND

On October 29, 2004, Decedent was driving south on Interstate-25 (I-25) adjacent to the exit ramp for the St. Francis Road exit

at approximately 2:00 p.m. when she encountered pieces of semi-truck tire debris on the roadway, and either struck the debris or swerved to avoid it. Decedent lost control of her vehicle, and it went into an uncontrolled slide and flipped four times, ejecting Decedent from the vehicle. Decedent died at the scene. The roadway at the location of the accident is straight and level, and at the time of the accident the weather was clear, the pavement was dry, and the center and the edge lines were clearly marked. There is no evidence of precisely how long the tire debris was on the roadway, and the Department had no actual notice of the tire debris at that location prior to the accident.

The Department moved for summary judgment, asserting that the undisputed material facts demonstrate that the Department had no actual notice or constructive notice of the tire debris. It being undisputed that the Department had no actual notice, the Department contended that it had no constructive notice of the debris because Plaintiff was unable to pinpoint how long the debris was on the road where the accident took place. Plaintiff's response centered on its contention that the Department was negligent in failing to identify debris on the highway in a timely manner and that the Department's inspection protocols are unreasonably lax and not complied with.

The district court granted summary judgment in favor of the Department on the grounds that the Department did not have actual or constructive notice of the tire debris and that Plaintiff's argument that the Department's failure to have a stronger or more consistent policy for the removal of debris was too speculative to prove proximate cause. Plaintiff appeals, asserting that the summary judgment order must be reversed because: (1) there are factual issues about whether the Department breached its duty to locate the tire debris on the roadway, and (2) there are factual issues regarding proximate cause.

STANDARD OF REVIEW

On appeal, our review of an order granting summary judgment is de novo. *Summers v. Ardent Health Servs., L.L.C.*, 2011-NMSC-017, ¶ 10, 150 N.M. 123, 257 P.3d 943. We affirm an order granting summary judgment when there is no evidence raising a reasonable doubt about any genuine issue of material fact, and the moving party 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. Thus, "the movant has the burden of showing a complete absence of any genuine material issue of fact and that such party is entitled to judgment as a matter of law." *Durham v. Sw. Developers Joint Venture*, 2000-NMCA-010, ¶ 42, 128 N.M. 648, 996 P.2d 911. "[O]nce the movant makes a prima facie showing that he is entitled to summary judgment, the burden shifts to the party opposing the motion to demonstrate the existence of specific evidentiary facts which would require trial on the merits." *Cain v. Champion Window Co. of Albuquerque, LLC*, 2007-NMCA-085, ¶ 7, 142 N.M. 209,164 P.3d 90 (internal quotation marks and citation omitted). In our de novo review of the summary judgment record, "[w]e resolve all reasonable inferences in favor of the non-movant and view the pleadings, affidavits, depositions, answers to interrogatories, and admissions in a light most favorable to a trial on the merits." *Id.* ¶ 6. We do so because New Mexico courts "view summary judgment with disfavor, preferring a trial on the merits." *Romero v. Philip Morris, Inc.*, 2010-NMSC-035, ¶ 8, 148 N.M. 713, 242 P.3d 280.

DISCUSSION

Plaintiff's complaint against the Department is for negligence under the roadway maintenance exception of the Tort Claims Act, NMSA 1978, § 41-4-11(A) (1991), which waives sovereign immunity for damages caused by the government's negligent maintenance of highways. Plaintiff's negligence action falls under this exception because "the identification and remediation of roadway hazards constitutes maintenance under Section 41-4-11." *Rutherford v. Chaves Cnty.*, 2003-NMSC-010, ¶ 25, 133 N.M. 756, 69 P.3d 1199.

NMSA 1978, Section 41-4-2(B) (1976) of the Tort Claims Act provides in part that liability under the 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." Thus, liability under the Act is "premised on traditional concepts of negligence." *Brenneman v. Bd. of Regents of Univ. of N.M.*, 2004-NMCA-003, ¶ 10, 135 N.M. 68, 84 P.3d 685 (quoting *Methola v. Cnty. of Eddy*, 1980-NMSC-145, ¶ 19, 95 N.M. 329, 622 P.2d 234). *See Silva v. State*, 1987-NMSC-107, ¶ 47, 106 N.M. 472, 745 P.2d 380 (Stowers, J., dissenting) ("The phrase 'traditional concepts of duty and the reasonably prudent person's standard of care, . . . refers to theories of negligence."), *limited on other grounds by Archibeque v. Moya*, 1993-NMSC-079, ¶ 14, 116 N.M. 616, 866 P.2d 344. "It is axiomatic that a negligence action requires that there be a duty owed from the defendant to the plaintiff; that based on a standard of reasonable care under the circumstances, the defendant breached that duty; and that the breach was a cause in fact and proximate cause of the plaintiff's damages." *Romero v. Giant Stop-N-Go of N.M., Inc.*, 2009-NMCA-059, ¶ 5, 146 N.M. 520, 212 P.3d 408. The absence of any of these elements is fatal to a plaintiff's claim. *Id.* We address each of these elements in turn.

1. Duty

Whether the defendant owes a duty to the plaintiff, is a legal question for the courts to decide. *Id.* ¶¶ 5-6. In *Rodriguez v. Del Sol Shopping Ctr. Assocs.*, 2014-NMSC-014, ___ P.3d ___ (Nos. 33,896 and 33,949, May 8, 2014), our Supreme Court recently corrected inconsistences in New Mexico case law on how courts are to determine whether a legal duty is owed. The Court held that "[f]oreseeability is not a factor for courts to consider when determining the existence of a duty[.]" *Id.* ¶ 1. We follow that holding in this case.

In *Lerma v. State Highway Department of New Mexico*, our Supreme Court stated that "the Department has a duty to exercise ordinary care in the maintenance of its highways." 1994-NMSC-069, ¶ 11, 117 N.M. 782, 877 P.2d 1085. However, the *Lerma* Court framed the duty inquiry around protecting the public from "*foreseeable harm*" on New Mexico's roadways. *Id.* ¶ 8. Our appellate courts have continued to use *Lerma*'s foreseeability of harm language in negligent roadway maintenance cases. *See, e.g., Rutherford*, 2003-NMSC-010, ¶ 12 ("[The government entity] has the common law duty to exercise ordinary care to protect the general public from foreseeable harm on its roadways."); *accord Ryan v. N.M. State Highway & Transp. Dep't*, 1998-NMCA-116, ¶ 12, 125 N.M. 588, 964 P.2d 149.

Furthermore, in cases where the government did not itself create the condition, New Mexico's negligent highway maintenance

case law was developed to examine not just whether harm was generally foreseeable, but also whether the government had notice of the particular dangerous condition at issue. *See Blackburn v. State*, 1982-NMCA-073, ¶ 32, 98 N.M. 34, 644 P.2d 548 ("[W]here the State has not created the dangerous condition, no duty to remedy the dangerous condition arises until actual or constructive notice is present."). Thus, the inquiry into the government's duty to exercise ordinary care in the maintenance of its roadways has been fact-intensive, focusing on whether the government entity had actual or constructive notice under the specific circumstances of the case. *See, e.g., Martinez v. N.M. Dep't of Transp.*, 2013-NMSC-005, ¶¶ 41-50, 296 P.3d 468 (determining that the Department's duty to erect barriers depended upon whether it had notice that collisions occurred along the stretch of highway where the collision at issue occurred); *Ryan*, 1998-NMCA-116, ¶ 7 (determining that the Department's duty depended upon whether it had actual or constructive notice of wild animal crossings creating a dangerous condition on a particular stretch of highway).

In *Rodriguez*, our Supreme Court rejected such a fact-intensive inquiry to determine whether a duty exists. *See Rodriguez*, 2014-NMSC-014, ¶¶ 1, 3, 11 (holding that "[f]oreseeability is a fact-intensive inquiry relevant only to breach of duty and legal cause considerations. . . . not [to] whether a duty exists" and overruling prior cases insofar as they conflict with the appropriate duty analysis). The Court also warned that foreseeability can mask itself behind other terms. *See id.* ¶¶ 12-13 (explaining that considering the "remoteness" of a potential harm, by inviting a discussion of the particularized facts in the case, is essentially a foreseeability driven analysis). Thus, we do not consider "actual or constructive notice" of the tire debris Decedent encountered as determinative of the Department's duty to Decedent.

Nevertheless, the Department's duty in this case is settled: the government has "the duty to maintain roadways in a safe condition for the benefit of the public." *Martinez*, 2013-NMSC-005, ¶ 18. This includes a duty to conduct reasonable inspections of roadways, of which identification and removal of dangerous debris from roadways are necessary corollaries. *See Blackburn*, 1982-NMCA-073, ¶¶ 17, 32 (stating that liability for a dangerous condition on a roadway involves situations "in which the State did not create the dangerous condition, but knew or should have known about it, and corrected it"); *see also Rutherford*, 2003-NMSC-010, ¶ 12 ("The identification of hazards on roadways is essential if governmental entities are to fulfill their responsibilities of keeping the highways safe for the motoring public."). We therefore conclude that the Department owed a duty to Decedent to identify and remove dangerous debris from the highway.

2. Breach

"The responsibility for determining whether the defendant has breached a duty owed to the plaintiff entails a determination of what a reasonably prudent person would foresee, what an unreasonable risk of injury would be, and what would constitute an exercise of ordinary care in light of all the surrounding circumstances." *Pollock v. State Highway & Transp. Dep't*, 1999-NMCA-083, ¶ 11, 127 N.M. 521, 984 P.2d 768 (alteration, internal quotation marks, and citation omitted). One can be negligent by either acting or failing "to do an act which one is under a duty to do and which a reasonably prudent person, in the exercise of ordinary

care, would do in order to prevent injury." UJI 13-1601 NMRA. Ordinary care is "that care which a reasonably prudent person would use in the conduct of the person's own affairs." UJI 13-1603 NMRA. What constitutes ordinary care will vary under the circumstances. *Id.* "As the risk of danger that should reasonably be foreseen increases, the amount of care required also increases." *Id.* All of the surrounding circumstances should be considered when evaluating whether ordinary care was used. *Id.*

The Department argued that it owed Decedent no duty to clear the debris because it had no actual or constructive knowledge of its presence at the particular location and the particular time that the accident occurred. Following *Rodriguez*, and having concluded that the Department had a duty in this case, we consider notice to determine whether there is a question of fact as to whether the Department breached its duty of reasonable inspection. *See Martinez*, 2013-NMSC-005, ¶ 21 ("[T]he term maintenance requires a reasonable response to a *known* dangerous condition on a roadway." (emphasis added)); *Blackburn*, 1982-NMCA-073, ¶ 17 (stating the plaintiff must prove that the defendant "had actual or constructive notice of the dangerous condition a sufficient time prior to the time of the accident so that measures could have been taken to protect against the dangerous condition").

Here, although it is undisputed that the Department had no actual notice of the particular debris at issue, the Department does not argue that it was not aware of the risk to motorists that roadway debris creates generally. Indeed, in the Department's motion for summary judgment, it acknowledged that its maintenance responsibilities include identifying and removing hazardous litter from roadways. Thus, the issue before us in this case is whether there are material issues of fact about whether the Department can be charged with constructive notice of the tire debris. *See Phillips v. N.C. Dep't of Transp.*, 684 S.E.2d 725, 731 (N.C. Ct. App. 2009) (stating that constructive notice "is defined as information or knowledge of a fact imputed by law to a person (although he may not actually have it), because he could have discovered the fact by proper diligence, and his situation was such as to cast upon him the duty of inquiring about it." (quoting *State v. Poteat*, 594 S.E.2d 253, 255-56 (N.C. Ct. App. 2004)); *Kemer v. Ohio Dep't of Transp.*, No. 09AP-248, 2009 WL 3495006, at * 5 (Ohio Ct. App. Oct. 29, 2009) ("Constructive notice of a defective condition can be imputed to a defendant when the plaintiff presents evidence establishing that the defect could or should have been discovered.").

The depositions of the Department's employees who were responsible for maintaining the stretch of road where the accident occurred are sufficient for us to determine whether summary judgment was properly granted to the Department. Edward Martinez is the Department's maintenance supervisor for the Santa Fe area. He reports to Mark Anaya, the area maintenance supervisor which includes Santa Fe County. Mark Anaya's supervisor in turn is Miguel Gabaldon, the maintenance engineer, and Mr. Gabaldon in turn reports to John McElroy, the District 5 engineer.

Mr. Martinez is in charge of all maintenance of state highways in the area where the accident occurred. His responsibilities include litter pickup as well as repair of potholes, signs, guardrails, fences, snow removal, and traffic control at accidents. However, he has received no training

regarding procedures for removal of litter or debris from state highways and, before this accident, to his knowledge, no members of his crew received training on removal of debris or litter from roadways.

His crew members are responsible for removing debris from the highway within a "reasonable amount of time"—within two hours—once they are notified of debris on the highway. In addition, his crew is told to remove debris, such as a tire tread, from the highway when they actually see it, whether or not they are performing their duties at the time. On the day of the accident, two crew members passed the scene of the accident on their way to work, sometime before 7:30 a.m. when their shift started, and they did not report seeing any debris on the highway at the accident scene.

According to Mr. Martinez, the Department has an obligation to patrol highways with enough frequency to locate debris on the highway that is not reported in a call to the Department. Thus, the Highway Maintenance Management System (HMMS) Handbook requires "litter pick up" which "means to go out there and pick up litter in right of way fences of New Mexico DOT." However, there is no specification in the HMMS Handbook as to how often to conduct "litter pick up." Moreover, although Mr. Martinez recognizes that a highway with dangerous debris on it has a greater chance for an accident than a highway with less traffic, he has not made a set schedule for doing litter pick up, and it is performed randomly at his discretion.

The HMMS Handbook also requires that "road patrols" be conducted, and if tire tread is encountered during a road patrol, it is to be picked up. However, the HMMS Handbook in effect on the day of the accident did not specify how often a road patrol should be conducted, even on a heavily traveled road such as I-25. The daily work reports which he or his assistant prepares every day show that between October 25 and October 29, 2004, his crew performed no work in the area around I-25 and the St. Francis exit. He also cannot tell from the daily work reports when a road patrol was last performed by the Department where the accident occurred before October 29, 2004. In fact, Mr. Martinez did nothing to identify and remove debris from the highway, other than to remove debris actually reported to the Department, although he recognizes that the Department also has an obligation, at some point, to remove dangerous debris from the highway that is not reported.

Mr. Martinez's supervisor is Mark Anaya, the area maintenance supervisor for the Santa Fe area. Mr. Anaya agrees that the Department is responsible for keeping highways safe for the motoring public, and this includes removing hazards from the highway. Its responsibility notwithstanding, Mr. Anaya is unaware of any administrative directives put out by the Department that outline a policy for dealing with debris in roadways that create hazards to the motoring public.

Mr. Anaya testified that the Department has a duty to remove hazards that are reported to exist in the highway. The Department also has an obligation to conduct road patrols to go out and discover unreported road hazards. At some point, the Department should discover an unreported hazard, but he cannot state how long—one hour, one day, one week, or one month—before it is unacceptable for the hazard to remain undiscovered.

These duties notwithstanding, he has never considered requiring an employee to drive every day in both directions of the area of I-25 under his supervision to make sure there are no hazards or dangerous conditions in the highway due to the volume of traffic it handles. Furthermore, he cannot say that Mr. Martinez's crew performs daily visual inspections of I-25 where the accident occurred, and he cannot tell when, before October 29, 2004, Mr. Martinez's crew last performed a road patrol on I-25 in the area of the accident. The only documented litter pick up done in the area was by an inmate crew on October 28, 2004.

Miguel Gabaldon is the Department maintenance engineer for the area where the accident occurred. He said there is no written standard of care in the HMMS Handbook regarding removal of debris from state highways. However, he testified the Department satisfies its obligation to remove debris from the highways, such as the tire debris in this case, by requiring the Department workers to remove it if they see it while performing their duties, and by removing it as soon as possible upon being notified of such debris. As to unreported debris, such as the tire debris in this case, Mr. Gabaldon stated that the Department should find it "[w]ithin a reasonable time frame" if the Department employees are doing their patrols. In this regard, while the Department has no criteria for how often a highway maintenance crew worker should drive the highways, the HMMS Handbook does specify that the supervisor (Mr. Martinez) is to drive or patrol all of the roads he is responsible for once per week, if possible. Mr. Gabaldon said that according to the HMMS Handbook, the last documented patrol of the accident scene should have been the week before the accident by Mr. Martinez, the supervisor.

John McElroy was the District 5 engineer for the Department. Before October 2004, the means for identifying road debris in District 5 consisted of road patrols by the Department personnel going to work sites, and notification to the Department by a member of the public or a police agency. Mr. McElroy believes there are signs placed on the highway with a 1-800 number to call, although he does not know where such signs are placed.

Mr. McElroy testified that before October, 2004, there was a big problem with a lot of debris on this stretch of I-25 where the accident occurred. Because of this problem, the area should have been given a lot of priority in terms of where maintenance crews were performing their patrols. From his perspective, the Santa Fe patrol crew should have been conducting litter pickup on this stretch of I-25 on a regular basis, probably twice per week. However, before October 2004, the patrol supervisor was not required to travel on I-25 where the accident occurred to survey the roadway for debris that might present a hazard or danger.

Mr. McElroy testified that if the Department has actual notice that semi-truck debris is on the highway, it is "probably not" acceptable for the debris to remain on the highway for one hour. If the Department has no actual notice of such debris, it is not acceptable, according to Mr. McElroy, for it to remain on the roadway for one day, twelve hours, or even six hours before the Department identifies and removes it. It is unknown how long the tire debris was on the highway in this case before the accident.

The foregoing evidence notwithstanding, the Department points to daily work reports, which it asserts show that between January 1, 2004, and the date of the

accident on October 29, 2004, six hundred and seventy-six "separate activities" were logged and that one hundred fifty-seven "separate litter pickup activities" were performed on I-25 "between Glorieta and La Bajada Hill," which includes the area where the accident occurred. Moreover, according to the Department, these same daily work reports show that in the twenty-nine days prior to the accident, the Santa Fe Patrol performed ten litter pickup activities "within a few miles of the accident location" and five road patrols between Glorieta and La Bajada Hill. These included "five separate litter pickup activities, all within five miles of the accident location" between October 25, 2004, and the date of the accident. In addition to the foregoing, the Department states that under contract with the Department of Corrections, inmate crews performed litter pickup "at or near the accident location" on thirty-five separate locations between January 17, 2003, and November 10, 2005, and that "one of these events" was the day before the accident.

We conclude that the foregoing evidence raises issues of fact as to whether the Department had constructive notice of the tire debris and whether the Department breached its duty to Decedent to timely identify it and remove it. Specifically, the evidence presents issues of fact about whether the Department failed to exercise ordinary care in its duty to perform reasonable inspections of the roadway and remove dangerous tire debris from it by: (1) failing to provide its employees and supervisors with adequate training to remove litter or debris from the highway; (2) failing to patrol the highway with sufficient frequency to locate and remove dangerous debris from the highway; (3) failing to comply with its own standards on how often the highway should be patrolled; (4) failing to locate and remove the tire debris in a timely manner; (5) failing to have an adequate system by which it can be notified of debris on the highway. Thus, whether the Department had constructive notice of the tire debris is a question of fact for the jury to decide. *See Rutherford*, 2003-NMSC-010, ¶ 15 ("Whether a governmental entity exercises ordinary care in the identification of the hazard is a question of fact for the jury."); *Herrera v. Quality Pontiac*, 2003-NMSC-018, ¶ 33, 134 N.M. 43, 73 P.3d 181 (refusing to address whether the defendant breached the duty of ordinary care because it is a question of fact for the jury); *Ryan*, 1998-NMCA-116, ¶ 8 (stating constructive notice is a question of fact); *cf. Martinez*, 2013-NMSC-005, ¶ 41 ("Notice becomes a question of law only if no room for ordinary minds to differ exists." (internal quotation marks and citation omitted)).

The Department nevertheless argues that because it is unknown how long the tire debris was actually on the road before the accident occurred, and imputing constructive notice of a danger depends on how long the dangerous hazard was present, it is entitled to summary judgment. We disagree. *Ortega v. Kmart Corp.*, 36 P.3d 11, 13 (Cal. 2001), acknowledged that in a premises liability case, a plaintiff has the burden of proving that the business owner had actual or constructive notice of the defect in sufficient time to correct it. In light of this requirement, the question presented in that case was:

> If the plaintiff has no evidence of the source of the dangerous condition or the length of time it existed, may the plaintiff rely solely on the owner's failure to inspect the premises within a reasonable period of time in order to establish an inference that the defective condition existed long enough for a reasonable person

exercising ordinary care to have discovered it?

Id. The court held: "[E]vidence of the owner's failure to inspect the premises within a reasonable period of time is sufficient to allow an inference that the condition [existed] long enough to give the owner the opportunity to discover and remedy it." *Id.* We agree. When there is a duty to inspect, evidence showing that there was a failure to inspect within a reasonable period of time under the circumstances is evidence that the dangerous condition could or should have been discovered but for the untimely inspection. "Where a condition has existed for such a length of time that the public entity might have known of the condition by the exercise of reasonable care and diligence, constructive notice exists." *Mtengule v. City of Chicago*, 628 N.E.2d 1044, 1048 (Ill. App. Ct. 1993).

The foregoing principles were applied in *Imburgia v. Ohio Department of Transportation*, 114 Ohio Misc.2d 38, 759 N.E.2d 482 (Ohio Ct. Cl. 1999), a "Decision of Liability" made by a trial judge sitting on the Ohio Court of Claims. After the car in which the plaintiff was a passenger pulled over onto a highway median with a flat tire, she got out of the car and stepped into an electrical junction box, severely injuring her left foot, ankle, and calf. *Id.* at 40-41, 759 N.E. at 484. These boxes are cylindrical in shape and recessed into the ground in the median next to roadway lights with underground lighting circuit cable splices. *Id.* at 40, 759 N.E.2d at 484. They are normally covered with a concrete lid, but the concrete lid on this box was broken and had partially fallen into the junction box, which was cluttered with additional debris. *Id.* at 40-41, 759 N.E.2d at 484. The court first determined that the Ohio Department of Transportation (ODOT) had a duty to maintain the electrical boxes as part of its duty to maintain the roadways in a reasonably safe condition. *Id.* at 41, 759 N.E.2d at 485. The ODOT had no actual notice that the concrete lid covering the box was damaged, and the case turned on whether the ODOT was charged with constructive notice of the damage. *Id.* at 42, 759 N.E.2d at 486. The ODOT had no policy regarding routine inspection of the boxes, but it had actual notice that mowers had previously damaged such boxes in other locations, and upon becoming aware that a concrete lid was broken, it would make the necessary repairs. *Id.* at 4, 759 N.E.2d at 485-86. Given the condition of the box, and its concrete lid, and the apparent length of time that the debris had accumulated in the box, the court concluded, as a fact finder, that the ODOT had constructive notice of the dangerous condition of the box. *Id.* at 42, 759 N.E.2d at 486. *See City of Jackson v. Internal Engine Parts Grp., Inc.*, 2003-CA-02772-SCT (¶ 10) (Miss. 2005) (affirming the trial court finding that the defendant city had either actual or constructive notice of debris obstructions in a drainage ditch by its negligent failure to inspect and maintain the drainage ditch). We find these cases and their reasoning persuasive and consistent with New Mexico jurisprudence. *See Pollock*, 1999-NMCA-083, ¶ 13 (rejecting the Department's argument that the plaintiff needed to show where a wrong-way driver entered the highway and how long she had been driving the wrong way to establish notice); *Martinez*, 2013-NMSC-005, ¶ 42 (rejecting the defendant's argument that it needed notice of a recurring accident problem at the particular accident site and concluding "more latitude" was appropriate to decide the question of notice). This case presents no basis for modifying our existing precedent. We therefore do not require Plaintiff to supply

evidence demonstrating precisely how long the tire debris was on the highway to overcome summary judgment.

We emphasize that the length of time which must pass before constructive notice may be found varies with each specific situation, and the fact that a dangerous condition exists is not sufficient, by itself, to conclude that a duty to inspect was breached. Furthermore, nothing we have said herein is meant to imply that the Department is an insurer of the safety of the highways in New Mexico. However, when the Department has actual or constructive knowledge of a dangerous condition on the highways, it has a duty to exercise ordinary care under the circumstances to prevent injury to the motoring public.

The jury must decide whether the Department's system for identifying and removing specific pieces of debris is so lacking as to impute notice of this particular debris on the Department or if the Department's actions were reasonable under the circumstances. Reasonable minds could differ in answering that question. A reasonable juror could agree with Plaintiff that the Department's policies of identifying and removing dangerous debris were inadequate; or the jury could conclude that the Department acted reasonably and that any additional policies would be unreasonable. "Questions of 'reasonableness' are quintessential issues for a jury to resolve. In our system of justice, we place special confidence in juries to sort through conflicting evidence and come to a reasonable conclusion." *Martinez*, 2013-NMSC-005, ¶ 47.

3. Proximate Cause

The Department argues that even if it owed Decedent a duty and breached that duty, her death was not the proximate result of its negligence.

This element concerns "whether and to what extent the defendant's conduct foreseeably and substantially caused the specific injury that actually occurred." *Herrera*, 2003-NMSC-018, ¶ 8. "An act or omission may be deemed a 'proximate cause' of an injury if it contributes to bringing about the injury, if the injury would not have occurred without it, and if it is reasonably connected as a significant link to the injury." *Talbott v. Roswell Hosp. Corp.*, 2005-NMCA-109, ¶ 34, 138 N.M. 189, 118 P.3d 194; *see* UJI 13-305 NMRA (defining causation); *Galvan v. City of Albuquerque*, 1973-NMCA-049, ¶ 18, 85 N.M. 42, 508 P.2d 1339 ("Proximate cause is that which, in a natural or continuous sequence, produces the injury and without which the injury would not have occurred."). Determining proximate cause is a question of fact for the jury. *Id.* ¶ 12. Only when the facts are undisputed "and the reasonable inferences from those facts are plain and consistent," does proximate cause become an issue of law. *Id.*

The Department argues that even if Plaintiff shows that the Department breached its duty by failing to provide more litter patrols, without being able to show that the tire debris was on the road for an unreasonable length of time, Plaintiff cannot prove that the Department's failure to act proximately caused the accident. The Department insists that since the "tire debris *could* have been deposited mere seconds before the accident[,]" no reasonable juror could find that the Department's negligence caused the accident. (Emphasis added.) This argument is too speculative to decide as a matter of law. The jury must decide whether remedies could have

prevented this accident. *See Ryan*, 1998-NMCA-116, ¶ 17 (deciding that the jury must decide between the parties' disputing theories about whether animal crossing warning signs could have prevented the plaintiff's collision with an elk). We are therefore unpersuaded that no reasonable juror could find proximate cause under the facts before us.

CONCLUSION

The district court order granting summary judgment in favor of the Department is reversed.

IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

J. MILES HANISEE, Judge

Certiorari Denied, November 20, 2014, No. 34,925

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-006

Filing Date: September 17, 2014

Docket No. 32,988

DEBORAH BROWN, Individually and on Behalf of Her Minor Children, H.B and B.S.,

Plaintiff-Appellant,

v.

ROBERT KELLOGG, M.D., ROBERT OLSEN, M.D., and PRESBYTERIAN HEALTHCARE SERVICES d/b/a KASEMAN PRESBYTERIAN HOSPITAL,

Defendants-Appellees.

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OPINION

GARCIA, Judge.

Plaintiff, Deborah Brown, appeals from the district court's grant of summary judgment in favor of Defendants, Robert Kellogg, M.D., Robert Olsen, M.D., and Presbyterian Healthcare Services d/b/a Kaseman Presbyterian Hospital. Plaintiff contends the district court erred in failing to recognize that Defendants had a legal duty to order that Plaintiff's husband, Jeremy Brown, undergo a fitness for duty evaluation before releasing

him to return to work as a police officer. We agree with the district court that Defendants did not have a legal duty to order a fitness for duty evaluation. We affirm.

BACKGROUND

Jeremy Brown was a detective with the Pueblo of Laguna Police Department. On May 17, 2007, Brown presented himself to the emergency room with thoughts of suicide stemming from the breakup of his marriage. Brown was found to exhibit "[n]o current . . . psychosis" and was discharged after a few hours. Brown returned to the emergency room on May 21, 2007, and was admitted to the hospital "in order to evaluate [his] dangerousness in view of expressed suicidal ideation and to evaluate for depression."

On May 23, 2007, Brown was discharged from the hospital with a diagnosis of depression and adjustment reaction with anxiety and depression. The follow-up plan provided for individual therapy and for Brown to contact a psychologist at work. Brown received medical authorization from his doctors to return to work without restriction on May 26, 2007. A fitness for duty examination was not performed on Brown before he received authorization to return to work. On June 8, 2007, Brown used his service weapon to shoot Plaintiff and kill himself. Plaintiff suffered permanent brain injuries as a result of the shooting and lost custody of her minor children.

Plaintiff, individually and on behalf of her minor children, filed a complaint against Defendants on May 14, 2010, asserting a claim for medical malpractice. Defendants filed a motion to dismiss that was denied by the district court. Defendants next filed a motion for summary judgment, arguing that they did not owe a duty to Plaintiff as a matter of law. Following a hearing, the district court granted Defendants' motion and entered summary judgment in favor of Defendants. Plaintiff appeals from this order granting summary judgment.

DISCUSSION

We review the district court's grant of summary judgment de novo. *See Farmington Police Officers Ass'n v. City of Farmington*, 2006-NMCA-077, ¶ 13, 139 N.M. 750, 137 P.3d 1204. Summary judgment should be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 1-056(C) NMRA.

"To prove medical malpractice, a plaintiff must show that (1) the defendant owed the plaintiff a duty recognized by law; (2) the defendant breached the duty by departing from the proper standard of medical practice recognized in the community; and (3) the acts or omissions complained of proximately caused the plaintiff's injuries." *Diaz v. Feil*, 1994-NMCA-108, ¶ 5, 118 N.M. 385, 881 P.2d 745. The district court concluded that Defendants did not owe a duty to Plaintiff as a matter of law. Plaintiff contends the district court erred in failing to recognize that Defendants had a duty to order a fitness for duty evaluation for Brown before authorizing him to return to work as a police officer with access to a service weapon.

In *Wilschinsky v. Medina*, our Supreme Court explained that "[t]he finding of a duty involves the court in a careful balancing." 1989-NMSC-047, ¶ 7, 108 N.M. 511, 775

P.2d 713. In determining whether to recognize a duty, the court "must take into account the likelihood of injury, the magnitude of the burden of guarding against it and the consequences of placing that burden upon the defendant." *Id.* (internal quotation marks and citation omitted). Our Supreme Court has recently clarified that "foreseeability is not a factor for courts to consider when determining the existence of a duty . . . [because it] is a fact-intensive inquiry relevant only to breach of duty and legal cause considerations." *Rodriguez v. Del Sol Shopping Ctr. Assoc.*, 2014-NMSC-014, ¶ 1, 326 P.3d 465. "Instead, courts must articulate specific policy reasons, unrelated to foreseeability considerations, when deciding whether a defendant does or does not have a duty or that an existing duty should be limited." *Id.* ¶ 25. We thus undertake an analysis of the policy considerations and interests involved without regard to whether the injury sustained by Plaintiff was foreseeable. Unfortunately, the district court addressed the issue of whether Defendants owed Plaintiff a duty to require Brown to undergo a fitness for duty evaluation prior to the issuance of the Supreme Court's ruling in *Rodriguez*. As a result, neither party developed a significant record addressing the policy-based considerations to be weighed by the district court. This Court's analysis of Defendant's duty to Plaintiff is reflective of the limited record that was developed in the district court.

Our courts have recognized three sources of duty for medical professionals to third parties. *See Wilschinsky*, 1989-NMSC-047, ¶ 8. In the first instance, a doctor or institution can potentially be liable for injury caused by patients with known "dangerous propensities" if the doctor exerts control over the patient. *See id.*; *see e.g.*, *Kelly v. Bd. of Trustees of Hillcrest Gen. Hosp. Inc.*, 1974-NMCA-139, ¶¶ 5-7, 87 N.M. 112, 529 P.3d 1233 (holding summary judgment was improperly entered in favor of the defendant because the defendant failed to make a prima facie showing that it did not have actual knowledge of patient's "dangerous propensities"); *see also Stake v. Woman's Div. of Christian Serv.*, 1963-NMSC-221, ¶¶ 4-5, 73 N.M. 303, 387 P.2d 871 (recognizing the potential duty to warn of patient's "dangerous propensities" when the defendant has actual knowledge of such propensities). In the second instance, a doctor who is aware of specific threats to the life of an individual can potentially be liable for failing to disclose those threats to the authorities or to the person threatened. *See Wilschinsky*, 1989-NMSC-047, ¶ 9 (discussing *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976)). In the third instance, a doctor who administers powerful drugs in his office that result in impairment to a patient can potentially be liable to those injured by the impaired patient. *Wilschinsky*, 1989-NMSC-047, ¶¶ 11, 28.

Plaintiff does not suggest that the duty it seeks to impose on Defendants falls within any of the three categories identified in *Wilschinsky*. Instead, Plaintiff argues that under *Wilschinsky*, a duty exists based upon a factual analysis of 1) foreseeability—a likelihood of injury to the plaintiff, and 2) the burden placed upon a defendant—the magnitude of the burden on a defendant and the consequences of doing so. *See id* ¶ 9. Plaintiff bases her argument on a consideration of "the uniquely dangerous perspective posed by law enforcement officers who are trained in all aspects of lethal force, combined with the well known need among mental [healthcare] professionals to order a fitness for duty evaluation under these [factual] circumstances." Effectively, Plaintiff

argues that this Court should impose a new, more focused duty to order a fitness for duty evaluation on independent healthcare professionals who treat individuals with access to firearms as part of their workplace environment. Plaintiff cites to neither New Mexico nor outside authority that would impose such a duty on independent healthcare professionals. The only fitness for duty examination requirement identified and recognized under existing law would apply to certain federal law enforcement agencies.[1] Even under the federal regulation referenced by Plaintiff, it is the discretionary function of the federal agency, as employer, to consider imposing a psychiatric evaluation on a federal employee. *Id.* Plaintiff does not even assert that such a duty is imposed upon Brown's employer in this case. In addition, Plaintiff does not dispute that a fitness for duty evaluation is not imposed on public agencies in New Mexico and is not required by independent healthcare professionals pursuant to existing law. Finally, Plaintiff's fact-based analysis of foreseeability is inconsistent with the policy-based analysis required under *Rodriguez.* 2014-NMSC-014, ¶¶ 1, 25.

Based upon the record presented in this case, there appear to be good policy reasons for rejecting the imposition of a fitness for duty legal obligation on independent healthcare professionals who treat individuals with access to firearms as part of their workplace environment. It appears from the testimony of Plaintiff's own expert, Peter DiVasto, a fitness for duty evaluation is a complex evaluation that "takes about two weeks to complete." DiVasto also testified that he has never been in a situation where a hospital has ordered a fitness for duty evaluation. It is unclear who would conduct the evaluation, who would pay for the evaluation, and how the outcome of the evaluation would affect a patient's medical care and workplace limitations. It is also unclear what negative effects a fitness for duty evaluation requirement on independent healthcare professionals would have on law enforcement personnel and their desire to seek medical assistance.

We do not believe it is appropriate for this Court to impose an entirely new and novel legal duty upon healthcare professionals without an extensive development of the policy considerations in the record for review. A balancing of the various policy interests presented in this case does not clearly support the imposition of such a new duty. These are the types of policy considerations that should be publicly addressed as part of the legislative process if a fitness for duty evaluation is to be imposed as a new duty upon healthcare professionals. We find the following Supreme Court language to be particularly instructive:

> Policy determines duty. With deference always to constitutional principles, it is the particular domain of the [L]egislature, as the voice of the people, to make public policy. Elected executive officials and executive agencies also make policy, to a lesser extent, as authorized by the constitution or the [L]egislature. The judiciary, however, is not as directly and politically responsible to

[1] Plaintiff cites to a portion of the Office of Personnel Management regulations setting forth the circumstances under which a federal agency has discretion to order a psychiatric examination. *See* 5 C.F.R. § 339.301(e)(1) (2014). However these regulations involve the federal agency as an employer, do not address the specific situation involving independent healthcare professionals presented in the present case, and do not place a duty on any healthcare professional to order or compel a fitness for duty evaluation upon a patient.

the people as are the legislative and executive branches of government.

Torres v. State, 1995-NMSC-025, ¶ 10, 119 N.M. 609, 894 P.2d 386.

DiVasto testified at his deposition that he believed Defendants' responsibility was to provide Brown with an outpatient appointment upon discharge, and Defendants satisfied that responsibility. Brown's follow-up plan also required him to contact a psychologist at work. The Legislature and our courts have not imposed any additional duty upon healthcare professionals regarding their patients with jobs that involve carrying firearms as part of their workplace functions. In addition, this Court is not aware of any other jurisdiction that has recognized a duty on the part of a healthcare professional to order a fitness for duty evaluation under similar circumstances. *See* 5 C.F.R. § 339.301(e)(1). The duty imposed upon federal law enforcement agencies would be evaluated under a different and distinct set of policy considerations focusing upon employment and workplace considerations. The relationship between a healthcare professional and a patient is uniquely different, necessitating policy considerations that focus on the medical circumstances present. We agree with the district court that Defendants did not have a legal duty to order Brown to undergo a fitness for duty evaluation before releasing him from the hospital and later authorizing him to return to the workplace as a police officer pursuant to the specific requirements set forth in his medical follow-up plan.

CONCLUSION

For the foregoing reasons, we affirm the district court's grant of summary judgment in favor of Defendants.

IT IS SO ORDERED.

TIMOTHY L. GARCIA, Judge

WE CONCUR:
RODERICK T. KENNEDY, Chief Judge

JAMES J. WECHSLER, Judge

Certiorari Denied, December 11, 2014, No. 34,939

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-007

Filing Date: September 22, 2014

Docket No. 31,787

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

JOHN GREEN,

Defendant-Appellant.

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for Appellee

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for Appellant

OPINION

HANISEE, Judge.

This appeal follows the revocation of Defendant's probation and his ensuing return to incarceration in order to conclude his original term of imprisonment in full. In 2003, after pleading guilty to second-degree kidnapping and murder, Defendant was sentenced to nineteen years, of which nine were suspended by the district court. In 2008, after about five years in prison, Defendant was released on probation. Within months of his release, however, the State began to allege what became a series of ensuing violations that culminated in the revocation of Defendant's probation. Ultimately, the district court ordered Defendant to serve the balance of his sentence in prison, including a previously imposed one year habitual offender enhancement. Defendant appeals both the revocation of his probation, as well as the conditions of probation. We affirm.

BACKGROUND

In 2001 Defendant was indicted for the kidnapping, rape, and murder of Kathryn Dockweiller, an Albuquerque attorney, in 1988. Defendant was allowed to plead guilty, pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970) (holding that a district court may accept a defendant's guilty plea despite an absence of admission to criminal wrongdoing), to second-degree murder, contrary to NMSA 1978, § 30-2-1(B) (1980) and kidnapping, contrary to NMSA 1978, § 30-4-1 (1973).[1] During the plea hearing, Defendant did not oppose the State's request that the district court take judicial notice of the grand jury proceedings and content of the indictment to establish a factual basis for the plea.

The record reveals that Detective Bill Peters of the cold-case unit of the Bernalillo County Sheriff's Department provided testimony to the grand jury that indicted Defendant. He informed the grand jury that Ms. Dockweiller had disappeared on May 12, 1988, and was found several days later in a shallow grave, still bound and gagged. The Office of the Medical Investigator (OMI) concluded that the nature and manner of death had been homicide by strangulation. Pursuant to the death investigation conducted by OMI, vaginal swabs were taken from Ms. Dockweiller that revealed the presence of semen within Ms. Dockweiller's body that had been deposited there "at or near the time of her death." Defendant was originally a suspect in Ms. Dockweiller's murder, and following a report from his ex-wife over a decade later, wherein she disclosed her discovery of Ms. Dockweiller's calendar concealed within Defendant's vehicle, Detective Peters obtained a search warrant for Defendant's DNA, which was found to match the DNA obtained from Ms. Dockweiler's body. Based on this

[1]We note that on the "Repeat Offender Plea and Disposition Agreement" (plea agreement), the words "no contest" are crossed out and the phrase "guilty pursuant to *Alford*" is written in its place. The plea agreement, which also established the sentencing parameters agreed to by the parties, was signed by the prosecutor as well as by Defendant and his attorney.

discovery, Defendant was indicted and chose to plead guilty in lieu of trial.

Following the plea colloquy, the district court observed that the murder of Ms. Dockweiller was in fact the second murder Defendant had committed. A pre-sentencing report informed the district court that Defendant had been previously sentenced to serve a twenty-year period of imprisonment in Texas based upon an unrelated homicide and attempt to commit criminal rape in 1979.[2] Based on the circumstances of the instant case and in light of Defendant's past criminal history, the district court ordered that he serve the statutory maximum penalty of nine years for the second-degree murder of Ms. Dockweiller, nine additional years for her kidnapping, and an extra year because he was a habitual offender. Due to the ten-year sentencing cap established within the plea agreement, however, the district court suspended nine of Defendant's nineteen year cumulative sentence. It imposed the maximum available period of probation of five years, alongside two years of supervised parole. In its judgment and sentence, the district court ordered probation to be wholly conditioned upon Defendant "obey[ing] all rules, regulations[,] and orders of the [p]robation [a]uthorities."

When Defendant was released from prison, he signed a sex offender behavioral contract. Although not required to register as a sex offender under the Sex Offender Registration and Notification Act (SORNA), NMSA 1978, §§ 29-11A-1 to -10 (1995, as amended through 2013), Defendant was compelled to comply with various sex-offender-related terms of probation, including abstention from the purchase, possession, or subscription to "any sexually oriented or sexually stimulating material." In the contract, Defendant agreed that probation authorities were free to examine any computer Defendant could access for inappropriate content, including, but not limited to pornography. Within months of Defendant's release and placement on probation in 2008, probation authorities alleged that he was in violation of specific prohibitions to which he had agreed. Specifically, the probation violation report alleged that Defendant had associated with other probationers and parolees, responded to personal dating ads on the internet, and left the county without permission. He was arrested on the probation violations, and the State sought revocation of his probation.

At the time, Defendant challenged the allegations on the grounds that the sex offender behavioral contract he was required to sign was not reasonably related to the charges of conviction, and that the "overbroad, pervasive, and undifferentiated restrictions" associated with sex offender probation violated his due process rights. He relied on *State v. Williams*, in which we held that a defendant not convicted of a sex offense under SORNA cannot be subjected to SORNA requirements. 2006-NMCA-092, ¶ 12, 140 N.M. 194, 141 P.3d 538. The State, through the New Mexico Corrections Department (NMCD), filed a response, maintaining that the crimes of conviction, considered alongside what was known regarding his prior murder conviction, justified the probationary supervision he received. NMCD asserted that probation authorities have broad discretion to supervise probationers with those conditions it deems appropriate and that NMSA 1978,

[2]Although the record does not shed light on how much of his sentence Defendant actually served in Texas, it was clearly less than the twenty years as he murdered Ms. Dockweiller in 1988, merely nine years later.

Section 31-21-4 (1963) requires that the post-release probationary treatment of persons convicted of crimes "shall take into consideration their individual characteristics, circumstances, need[s,] and potentialities." Following a hearing, the district court denied Defendant's motion to modify the terms and conditions of his probation, yet did not then revoke Defendant's probation.

In May 2011 Defendant was again arrested for what were alleged to be additional probation violations. This time, the probation report asserted that Defendant: (1) was in violation of his behavioral contract as he was found to have pornographic imagery on his computer; (2) had responded to personal advertisements on his laptop computer in violation of the behavioral contract; and (3) had violated his probation by associating with other probationers and parolees. During the ensuing violation hearing, Officer Baum, Defendant's probation supervisor, testified that when Defendant had initially signed the behavioral contract and Defendant had reviewed the conditions contained within it, specifically including the conditions on computer usage that disallowed pornography and sexually explicit material. The officer testified that upon opening and examining Defendant's computer, he observed a "photo of a nude woman." Officer Baum testified that he asked Defendant if "there [were] any porn images" on the computer, and Defendant replied that there were. Officer Baum stated that he and a colleague later conducted a forensic examination of the computer and found numerous pornographic images. Over Defendant's objection as to foundation, a collage of the images found were entered into evidence as State's Exhibit 2 (Exhibit 2) during Defendant's revocation hearing. Following the hearing, the court revoked Defendant's probation and ordered that he serve the remainder of his original sentence.

Defendant appeals the revocation of his probation on three bases, arguing that: (1) the requirement that he sign a sex offender behavior contract was an illegal condition of probation; (2) there was insufficient evidence to support any of the probation violations found by the district court or, in the alternative, he lacked notice that his conduct could constitute violations of the conditions of probation; and (3) the images found on Defendant's laptop lacked a proper foundation and should have been determined to be inadmissible.

LEGALITY OF CONDITIONS OF PROBATION

New Mexico law places squarely within purview of the district court the authority to order a defendant to "satisfy any other conditions reasonably related to . . . rehabilitation." NMSA 1978, § 31-20-6(F) (2007). An award of probation is a discretionary act of the sentencing court, and a challenge to its terms and conditions is reviewed on appeal only for an abuse of discretion. *Williams*, 2006-NMCA-092, ¶ 3. "However, a sentencing court may not impose an illegal sentence. [I]t does not have the discretion to impose a probation term or condition that is contrary to law." *Id.* ¶ 4. "We review the legality of a [criminal] sentence under the de novo standard of review." *Id.*

The Conditions of Probation Imposed by NMCD were Authorized by the District Court

Defendant first contends that the conditions of probation to which he was required to adhere were illegal because

NMCD lacked the authority to mandate that his release be conditioned upon his being party to any "sex offender behavior contract" that included conditions not expressly provided within the district court's judgment and sentence. To support his argument, Defendant relies upon Section 31-20-6, which requires that the sentencing court attach to its order "reasonable conditions as it may deem necessary to ensure that the defendant will observe the laws of the United States and the various states and the ordinances of any municipality." Defendant additionally relies on *State v. Martinez*, which states that "[c]onditions [of probation] may not be added by amendment subsequent to imposition of a valid original judgment." 1972-NMCA-135, ¶ 4, 84 N.M. 295, 502 P.2d 320.

Considering this same issue, our Court determined that a district court's enumeration of a special probationary condition that the defendant "comply with any other reasonable conditions specified by the Probation and Parole Division[,]" is sufficient indicia to justify placement of a defendant on sex offender supervision. *State v. Leon*, 2013-NMCA-011, ¶ 24, 292 P.3d 493 (internal quotation marks omitted), *cert. quashed*, 2013-NMCERT-010, 313 P.3d 251. In *Leon*, we cited to *Martinez*, where the defendant "argued that the conditions imposed by the probation office were without legal effect because they were not part of the district court's order deferring his sentence." *Leon*, 2013-NMCA-011, ¶ 25. We determined that the language of the order in *Martinez* made the conditions imposed by the probation office the conditions of the defendant's probation. 1972-NMCA-135, ¶ 5.

Here, the district court's order generally stated that "Defendant is ordered to be placed on supervised probation . . . on condition that Defendant obey all rules, regulations[,] and orders of the [p]robation [a]uthorities." As in both *Martinez* and *Leon*, the district court's judgment and sentence incorporates language which justified specific, individual requirements of probation. "That the terms and conditions set by the probation office were not spelled out in the order itself did not establish that those terms and conditions were not imposed by the court." *Leon*, 2013-NMCA-011, ¶ 26. On both our precedent and the facts of this case, we determine that the conditions of probation were sufficiently stated in the district court's original judgment and sentence.

Relying on *United States v. Carter*, 463 F.3d 526 (6th Cir. 2006), Defendant nonetheless argues that NMCD failed to adequately justify its decision imposing sex offender conditions upon Defendant and that it never established that a sexual offense was committed in the first place. *Carter* stated that a district court must justify special conditions of supervised release at the time of sentencing and must "state in open court the reasons for its imposition of the particular sentence[.]" *Id.* at 528 (internal quotation marks and citation omitted). But we do not find *Carter* to be helpful or supportive of Defendant's position. Specifically, *Carter* does not support Defendant's contention that NMCD was required "to state its reasons and rationale for mandating special sex offender conditions of probation." *Carter* imposes, in a federal context, explanatory requirements solely upon the district court, not upon any probationary entity. More importantly, this requirement is imposed pursuant to federal statute, 18 U.S.C. § 3553(c) (2010), a mandate the New Mexico Legislature has not adopted. *See State v. Lack*, 1982-NMCA-111, ¶ 15, 98 N.M. 500, 650 P.2d 22 ("Authority to grant probation is a matter of legislative grace, and the district

court's power to impose probation is purely statutory.").

We conclude that Defendant has not established that *Carter*, or any argument he has made regarding the behavioral contract, is able to overcome the probationary discretion authorized by *Martinez* and *Leon* that extends from the district court to probation authorities when worded as the district court did in this case. The behavioral contract Defendant was required to sign upon his release from prison and commencement of probation was a proper exercise of probationary authority pursuant to the judgment and sentence that followed and was based upon the plea agreement Defendant also signed. Defendant's signature on the plea agreement, provided in the presence of his attorney, acknowledged his understanding of its terms that included the five-year period of probation and warned that any violation could lead to Defendant's return to incarceration for the balance of the original sentence imposed.

The District Court Did Not Err in Denying Defendant's Motion to Modify the Conditions of Probation

Defendant next argues that the district court abused its discretion in denying Defendant's motion to modify the conditions of release as no reasonable relationship existed between Defendant's convictions and the conditions of probation. He additionally argues that there was insufficient evidence in the record to support sex offender probation. Among other conditions, the sex offender supervision behavioral contract required that Defendant abstain from purchasing, possessing, or subscribing "to any sexually oriented or sexually stimulating material." He was also prohibited from possessing pornography. Defendant asserts that he was not convicted of a sexual offense, nor was there a factual basis or evidence supporting an inference that a sexual offense occurred, and therefore, these conditions were not reasonably related to his convictions of second-degree murder and kidnapping.

Under the abuse of discretion standard appropriate for our review of conditions of probation, "we will not set . . . aside [the terms and conditions of a probation] unless they[:] (1) have no reasonable relationship to the offense for which the defendant was convicted, (2) relate to activity which is not itself criminal in nature, and (3) require or forbid conduct which is not reasonably related to deferring future criminality." *Williams*, 2006-NMCA-092, ¶ 3 (emphasis, alteration, internal quotation marks, and citation omitted). "To be reasonably related, the probation condition must be relevant to the offense for which probation was granted." *State v. Gardner*, 1980-NMCA-122, ¶ 19, 95 N.M. 171, 619 P.2d 847. On appeal, it is Defendant's burden to persuade us that the district court erred and abused its discretion in holding that a reasonable relationship existed between Defendant's kidnapping and murder convictions and his conditions of probation. *Leon*, 2013-NMCA-011, ¶ 28; *State v. Baca*, 2004-NMCA-049, ¶ 16, 135 N.M. 490, 90 P.3d 509. We determine Defendant failed to do so, and we remain unpersuaded by his conclusions to the contrary.

As we have stated, Defendant pleaded guilty to the second-degree kidnapping of Ms. Dockweiler. The statute at the time of her kidnapping and murder defined kidnapping as "the unlawful taking, restraining or confining of a person, by force or deception, with intent that the victim . . . (3) be held to service against the victim's will." Section 30-4-1(A)(3). Our Supreme Court has

recognized that " 'h[olding] for service[s]' " can include holding a victim for sexual purposes. *See State v. McGuire*, 1990-NMSC-067, ¶¶ 8, 12, 110 N.M. 304, 795 P.2d 996. The district court record indeed contains evidence supporting the State's assertion that there was a sexual element to Defendant's crime. There was testimony before the grand jury that Defendant's semen was located within Ms. Dockweiler's deceased body and that it was "deposited at or near the time of her death." Furthermore, Defendant had been indicted by the grand jury on a charge of first degree criminal sexual penetration, a fact that the district court addressed at the hearing on Defendant's motion to modify in response to Defendant's assertion that the State did not present evidence that it believed a sex crime was committed. Lastly, the pre-sentence report indicates that this was not the first instance in which Defendant was charged with a sexually based crime; Defendant was previously charged with "[a]ttempt to [c]ommit [c]riminal [r]ape" in the state of Texas.

Thus, Defendant's contention that the requirement that he sign and adhere to a sex offender behavior contract bore no relation to facts suitable for the district court's or probation authorities' reliance is inaccurate and incomplete. His contention that these things are too remote in time or that he "never had an opportunity to challenge those assertions" misunderstands the distinction between what would have been required to convict him of sex offenses during a trial on the merits and what is properly relied upon to inform those tasked with maintaining community safety at the time Defendant was permitted to leave prison before his sentence was complete.

Again in this regard, we rely on *Leon*, 2013-NMCA-011, ¶¶ 27-34. There, the defendant pled no contest to contributing to the delinquency of a minor and selling or giving alcohol to a minor. *Id.* ¶ 2. Upon suspension of his sentence, the defendant was ordered by NMCD to sign a sex offender behavior contract. The defendant already had a prior felony conviction for a sex offense. *Id.* ¶ 3. This Court acknowledged that the defendant's current convictions involved criminal contact with minors and based on these circumstances, in addition to the defendant's criminal history, the district court did not err in determining that a sex offender behavior contract was reasonably related to the current convictions, rehabilitation, and public safety. *Id.* ¶¶ 30-31.

Although we recognize that in the case before us Defendant had not been convicted of a sexual offense, as had the defendant in *Leon*, such is not fatal to the conditions of Defendant's probation. Defendant was in fact charged with a sexual offense on two prior occasions and indicted by a grand jury on one of those charges. As in *Leon*, Defendant's current conviction involved criminal contact with Ms. Dockweiller, and what is more crucial to our analysis is, not only was it criminal contact, but of a sexual nature. What had become the cold case of Ms. Dockweiller's murder was solved solely as a result of the discovery that the semen found in her deceased body was Defendant's. It would be inappropriate that our Legislature's instruction that probation authorities study a defendant's case to determine that individual's "characteristics, circumstances, needs and potentialities[,]" Section 31-21-4, somehow be viewed to require exclusion of such a material fact. Given the available facts regarding Defendant's current convictions, considered alongside his alarmingly similar criminal history, we cannot conclude that the district court abused its discretion in ruling that the

conditions of his probation were reasonably related to his current convictions, rehabilitation, or public safety. *See Leon*, 2013-NMCA-011, ¶ 27 ("The court has broad discretion to effect rehabilitation and may impose conditions designed to protect the public against the commission of other offenses during the term, and which have as their objective the deterrence of future misconduct." (internal quotation marks and citation omitted)); *Baca*, 2004-NMCA-049, ¶ 36 ("The general purposes of probation . . . are rehabilitation and deterrence for community safety[.]").

SUFFICIENCY OF EVIDENCE TO SUPPORT PROBATION REVOCATION

Defendant next asserts that there was insufficient evidence to support any of the alleged probation violations upon which his probation was revoked. The probation violation report alleged numerous violations, one being violation of the sex offender behavior contract that directly prohibited possession of sexual images on Defendant's laptop.[3] Defendant contends that this condition was overly vague such that a "reasonable person would not have known that the nude images would be considered pornography[,]" and thus he contends that the evidence was insufficient to support revocation of his probation. The State argues that the images depict pornographic, sexually oriented, or sexually stimulating photographic depictions, the very content Defendant was disallowed from possessing and was forewarned would constitute violative conduct.

Proof of a probation violation need not be established beyond a reasonable doubt. *State v. Martinez*, 1989-NMCA-036, ¶ 4, 108 N.M. 604, 775 P.2d 1321. Instead, the evidentiary standard is that the violation must be established with a reasonable certainty, such that a reasonable and impartial mind would believe that the defendant violated the terms of probation. *State v. Sanchez*, 2001-NMCA-060, ¶ 13, 130 N.M. 602, 28 P.3d 1143. The burden of proving a violation with reasonable certainty lies with the State. *Leon*, 2013-NMCA-011, ¶ 36. "We review [a district] court's decision to revoke probation under an abuse of discretion standard. To establish an abuse of discretion, it must appear the [district] court acted unfairly or arbitrarily, or committed manifest error." *Martinez*, 1989-NMCA-036, ¶ 5 (citations omitted). We conclude that the State has met its burden, and the district court did not abuse its discretion in revoking Defendant's probation.

Upon his release from custody, Defendant signed the sex offender behavior contract, and he acknowledged that he "read, or . . . had read to [him], and underst[ood] these additional supervision conditions." The contract stated, under condition A of the "computers/electronics/entertainment" provision, that Defendant was prohibited from possessing "any sexually oriented or sexually stimulating material." The condition explains that this "includes, but is not limited to: [s]exual devices, books, magazines, video/audio tapes, DVDs, CD ROMs, and [i]nternet websites." Condition C of the same provision stated that any computer to which

[3]Because we affirm the district court's ruling with regard to the violation of the sex offender behavior contract, contrary to Condition 5 of Defendant's conditions of probation, we will not reach the issue of whether there was sufficient evidence to prove the State's remaining allegations of probation violations. *See Leon*, 2013-NMCA-011, ¶ 37 (stating that "although [the d]efendant challenges the sufficiency of the evidence supporting each of his probation violations, if there is sufficient evidence to support just one violation, we will find the district court's order was proper").

Defendant had access would be subject to examination for inappropriate content, including but not limited to pornography or adult websites. Officer Baum had reviewed the conditions of probation with Defendant, and specifically informed Defendant that probation authorities would have "full access to [his] computer to do any searches on it for pornography or sexually explicit material." He testified that he informed Defendant that he was not to possess "any sexually explicit material[,]" including "[p]ictures[,] [n]aked women [or] [m]en. Anything that's sexually explicit."

Baum additionally testified that upon performing a field visit, he and another probation officer located and searched Defendant's computer. Baum explained that in conducting the computer search he initially saw "a photo of a nude woman," and that Defendant "acknowledged that there was pornography on his computer[.]" Baum testified that he was present during a forensic examination that was conducted on Defendant's computer and viewed the resulting report containing the nude images. Exhibit 2 is the report and collage of nude images the State entered into evidence. At the conclusion of the hearing, the district court found that Defendant violated paragraph C of the "computers/electronics/entertainment" provision of the sex offender behavior contract, ruling that the images discovered on Defendant's computer were in fact pornography and revoked Defendant's probation.

Although our case law contains little guidance on the definition of adult pornography, we are helped by our Supreme Court's definition of " 'sexually explicit exhibition' " and our Legislature's definition of "sexual conduct" in the context of sexual exploitation of children and sexually oriented material harmful to minors, respectively. Our Supreme Court has defined the term "sexually explicit exhibition" as a "graphic and unequivocal display or portrayal of nudity or sexual activity." *State v. Myers*, 2009-NMSC-016, ¶ 19, 146 N.M. 128, 207 P.3d 1105. Furthermore, our Legislature defines "sexual conduct" as an "act of masturbation, . . . physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be female, breast[.]" NMSA 1978, § 30-37-1(C) (1973). We conclude each of these definitions encompasses that which is "sexually oriented" within the terms of Defendant's sex offender behavior contract. Moreover, each such category was included within the many images collected by Defendant on his laptop hard drive.

What Defendant contends to be "mere nudity," we, like the district court before us, hold to be at least nine images of or depicting sexual activity and/or physical contact with unclothed female genitals or buttocks. Given the highly sexual nature of these images, in conjunction with Officer Baum's testimony that he informed Defendant that possession of these types of images were disallowed under the sex offender behavior contract, we conclude that not only did Defendant have notice of the prohibitions, but that there was sufficient evidence for a reasonable mind to conclude that Defendant violated this condition of probation and that the district court's revocation of Defendant's probation did not constitute an abuse of discretion.

ADMISSIBILITY OF PHOTOGRAPHS

As his last point of appeal, Defendant argues that the photographs contained in Exhibit 2 were improperly admitted on the

basis that the State failed to properly authenticate or lay a sufficient foundation for their admission. "We review the district court's evidentiary rulings for an abuse of discretion." *State v. Neal*, 2007-NMCA-086, ¶ 36, 142 N.M. 487, 167 P.3d 935. Although Defendant acknowledges that the rules of evidence do not apply to probation revocation hearings, he nonetheless argues that his due process rights were violated because Exhibit 2 was improperly admitted.

At the probation revocation hearing, Officer Baum testified that, after he saw the initial nude photograph on Defendant's computer, he arrested Defendant for a probation violation, and was present while another officer conducted a forensic examination on Defendant's computer. Baum testified that he saw the report containing the images that was generated from the examination and printed that report. Baum identified Exhibit 2 as the report he printed from the scan of Defendants computer based on a sticky note he placed on the document and the document itself. When the State sought admission of Exhibit 2 into evidence, Defendant objected on the grounds that the State had failed to lay the proper foundation. Defendant argued that another officer ran the software on Defendant's computer, and Baum merely "went and grabbed documents off the printer[, and] he ha[d] no idea how it all happened before then." Defendant asserted that it was too far of a stretch for Baum "to say that [the images] that came off the printer necessarily [were] on [Defendant's] computer." The district court disagreed and admitted the photos into evidence, explaining that Baum "was present at all times that the forensic examination was conducted[,]" and that he was "able to identify it . . . in court as the material that he saw at the time that the scan was done."

Defendant now argues that Officer Baum could not provide proper authentication testimony to establish that Exhibit 2 was originally located on Defendant's computer. He also suggests that the images were placed on the computer by the software used by probation authorities, and notes that Baum cannot testify that the images were not already stored on the software prior to the forensic analysis of Defendant's computer. Defendant additionally contests Baum's identification of the document containing the images, asserting that "[i]t is inconceivable that Officer Baum actually recognized the images themselves from a single prior viewing" and that "Baum's recognition of the sticky note is an improper authentication for admission of the attached packet."

The primary problem with Defendant's challenge to the admission of Exhibit 2 is that rules of evidence do not apply during probation revocation hearings. *See* Rule 11-1101(D)(3)(d) NMRA; Rule 11-901 NMRA. Moreover, Defendant fails to cite any authority in support of his request that we apply an evidentiary standard to the contrary. Despite the detail in which he addresses what he perceives to be the failed evidentiary and admissibility underpinnings of Exhibit 2, we will not consider this argument. *See State v. Vaughn*, 2005-NMCA-076, ¶ 42, 137 N.M. 674, 114 P.3d 354 (stating that "this Court will not consider an argument that lacks citation to any legal authority in support of that argument").

Defendant additionally argues that he was denied the opportunity to question the officer who performed the forensic scan of his computer regarding the forensic software or the administration of the scan. Defendant asserts that the technique used in the software search to locate the images on Defendant's

computer is vital to establishing that Defendant had knowledge that the images were on his computer, and the district court erred in finding knowing possession "without any foundational testimony." Although Defendant acknowledges that he is not alleging a confrontation violation, he maintains that his due process rights were violated as a result of allowing Officer Baum to lay the foundation for the admission of Exhibit 2. We disagree.

In our review of the record we notice that Officer Baum testified that after he located the first nude image on Defendant's computer, he questioned Defendant about whether "there [were] any porn images" on the computer, and Defendant acknowledged that there were. In probation violation hearings, the district court performs two separate roles, fact finding and disposition. *Martinez*, 1989-NMCA-036, ¶ 11. In this context, Officer Baum's testimony bore the capacity to establish that Defendant knew there was prohibited material on his computer. "It is the court's sound judgment that is invoked, and the exercise of that judgment will not be reversed on appeal unless it was mistakenly exercised." *Id.* (internal quotation marks and citation omitted). Given this testimony, we cannot conclude that the district court's decision to revoke Defendant's probation was "clearly against the logic and effect of the facts and circumstances of the case[,]" or that its ruling was "clearly untenable or not justified by reason." *State v. Layne*, 2008-NMCA-103, ¶ 6, 144 N.M. 574, 189 P.3d 707 (internal quotation marks and citation omitted). Accordingly, we affirm.

CONCLUSION

For the foregoing reasons, we affirm the revocation of Defendant's probation.

IT IS SO ORDERED.

J. MILES HANISEE, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

M. MONICA ZAMORA, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-008

Filing Date: October 16, 2014

Docket No. 32,460

STATE OF NEW MEXICO,

Plaintiff-Appellant,

v.

CHRIS TALAYUMPTEWA,

Defendant-Appellee.

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Jorge A. Alvarado, Chief Public Defender
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OPINION

VIGIL, Judge.

The State appeals from an order of the district court suppressing statements made by Defendant during police questioning. The district court suppressed Defendant's statements on the basis that they were the product of coercive police conduct in the form of promises of leniency and were involuntary under the totality of the circumstances. We affirm the district court.

BACKGROUND

The alleged victim gave a SAFE house interview in which she accused Defendant of sexual assault. Officers from the McKinley County Sheriff's Office left messages at Defendant's home that they wanted to speak with him, and Defendant came to the Sheriff's Office voluntarily, and agreed to speak with police. Defendant was questioned there by two police officers, Anthony Ashley and Owen Pena, for around ninety minutes. During the course of the interview, Defendant made a written statement, in the form of an apology letter, and oral statements. Defendant moved to suppress the statements arguing that they were involuntary because police did not give him *Miranda* warnings prior to questioning him and because they were induced by promises of leniency by the police.

After an evidentiary hearing, at which both officers testified, and review of the transcript of the interview, the district court ordered Defendant's statements suppressed. In its written order, the district court first rejected Defendant's *Miranda* argument, finding that he was not in custody during the interview, and *Miranda* therefore did not apply. The district court specifically found that Defendant was not in custody because he was informed at the outset of the interview that he was free to leave, the officers told him that he would not be arrested that day, and the officers did not threaten him. However, the court found that his statements were nonetheless involuntary because of police overreaching in the form of implied promises of leniency. The district court found that immediately at the start of questioning, the officers began making implied promises of leniency, which continued throughout the interview. The district court found that the multitude of the implied promises of leniency outweighed other factors that might indicate the statements were voluntary. The State appeals. Additional facts are included in the discussion below.

ANALYSIS

The State challenges both the district court's determination that officers made implied promises of leniency and its ruling that the implied promises of leniency outweighed other factors that might indicate that the statements were voluntary. "We review de novo the voluntariness of confessions." *State v. Evans*, 2009-NMSC-027, ¶ 32, 146 N.M. 319, 210 P.3d 216; *see also State v. Leeson*, 2011-NMCA-068, ¶ 21, 149 N.M. 823, 255 P.3d 401 (same). "Voluntariness means freedom from official coercion." *State v. Sanders*, 2000-NMSC-032, ¶ 6, 129 N.M. 728, 13 P.3d 460 (internal quotation marks and citations omitted). Promises of leniency

on the part of police can be coercive and may render a subsequent statement involuntary. *See Evans*, 2009-NMSC-027, ¶ 42 (noting that threats and promises may rise to the level of coercive behavior by the police); *see also State v. Tindle*, 1986-NMCA-035, ¶ 25, 104 N.M. 195, 718 P.2d 705 (stating that an express promise of leniency "renders a confession involuntary as a matter of law"); *State v. Gutierrez*, 2011-NMSC-024, ¶ 25, 150 N.M. 232, 258 P.3d 1024 (stating that "unlike an express promise of leniency, which can render a confession inadmissible as a matter of law, evidence of an implied promise is only a factor in the totality of the circumstances that courts consider in determining whether a confession is voluntary").

Implied Promises of Leniency

We first address the State's argument that the district court erred in determining that police made implied promises of leniency during the interview. "The test in such a case is 'whether the accused could reasonably have inferred a promise going to the punishment for the crime to be confessed.'" *State v. Munoz*, 1998-NMSC-048, ¶ 34, 126 N.M. 535, 972 P.2d 847 (quoting *State v. Wickman*, 1935-NMSC-035, ¶ 36, 39 N.M. 198, 43 P.2d 933). Our review of the transcript supports the district court's determination that the officers made numerous implied promises of leniency to Defendant throughout the interview in exchange for statements that accorded with the alleged victim's version of events.

Defendant responded to the officers' questions by saying that he could not remember what happened because he was intoxicated when the alleged incidents occurred. In response, the officers repeatedly told Defendant they would be meeting with the district attorney, that his claims not to remember were legally invalid, and that they had the ability to influence the district attorney with respect to the level of charges Defendant faced. Among other similar statements, Officer Pena told Defendant:

> You're giving us nothing and that's what we're gonna [sic] go to the D.A.s with . . . is that he gave us nothing . . . he tried to use the old . . . I don't remember because I was intoxicated defense . . . . And that's what we're gonna tell the D.A. . . . . He came in and he gave us a convenient excuse . . . . Oh I was drunk . . . . Oh I don't remember . . . . It coulda [sic] happened, but I don't know if it did . . . or anything like that. . . . So if you do remember what happened, just come clean with us . . . . We're trying to help you here . . . . Okay, but we can only help you so much. . . . Okay, I can't go to the D.A.s and be like hey let's . . . you know let's cut this guy a break or . . . or let's . . . you know let's do this or . . . let's uh . . . you know let's think about it second [sic] if you won't tell us what happened cuz [sic] I can't go to the D.A. with that . . . . Okay, I can't . . . . The D.A. ain't gonna [sic] buy that either.

The officers also began to inform Defendant that he was facing multiple felony charges and that they could help him, but only if he remembered. Officer Pena told Defendant:

> Okay . . . . I tried to help you here, I tried to give you a life line, I tried to

help, I tried to give you that life preserver for you to help yourself, you don't wanna [sic] take it that's fine. . . . I'll . . .we . . . Investigator Ashley will go forward to the . . . to the D.A.s with what we have based off what her . . . what she's saying 'cuz [sic] you don't want to recant anything she's saying by just saying I was intoxicated, I don't remember. . . that's fine, if that's . . . that's the road you wanna [sic] go down . . . that's fine, okay. . . when the warrant comes and when we're putting you in jail . . . for multiple felonies okay . . . don't say oh wait a minute, I wanna [sic] talk now, because that's gonna [sic] be gone, once you get cuffed and put in jail.

In the specific exchange cited by the district court, the officers also discussed the range of prison terms for different degrees of felonies in response to Defendant's question about how much jail time he was facing. The following discussion then occurred:

> Defendant: Is there a way I can like . . . . The only way I can help myself is to remember, right?
>
> Officer Pena: That would be a big help.
>
> Defendant: And then if I remember and that is what happened I'm still looking at those right?
>
> Officer Pena: No[t] necessarily, uh . . . it's still . . . we still have to . . . it's not like we sit here and we're like okay, we're gonna [sic] charge him for this okay . . . we need to get everything done . . . we still got some interviews to do and stuff like that, we're gonna [sic] do . . . we're gonna [sic] interview everybody then we take our whole case and we give it to the D.A.s and the D.A.s is the one who say . . . this and that . . . okay?
>
> Officer Ashley: [S]eriousness of the crime is way up here, we can help eventually bring it back down to maybe almost down to nothing. . .
>
> Officer Pena: That also depends on . . . us being able to go to the D.A.s . . . being able to say to the judge you know, he was very . . . sorry it was an accident, it was [a] stupid mistake that he did while he was intoxicated . . . he came in he was honest about it, he was up front about it . . . he did remember finally, he came back in and said hey this is what I remembered.

These statements and the others like them constitute implied promises of leniency because their import was that Defendant would be arrested on serious felony charges if he continued to claim a lack of memory, but that if he made certain admissions, officers would intercede with the district attorney on his behalf, and that they had the ability to have charges reduced or not brought at all. *See Munoz*, 1998-NMSC-048, ¶ 34 (stating that an implied promise of leniency occurs when the accused could reasonably have inferred a promise going to the punishment for the crime to be confessed); *cf. State v. Lobato*, 2006-NMCA-051, ¶ 18, 139 N.M. 431, 134 P.3d 122 (finding no implied promise of leniency where the officer told the defendant he would get treatment if he confessed, but did not tell the defendant he would receive treatment instead of prison time).

The State characterizes the officers as merely suggesting to Defendant that his claims not to remember were not believable and that cooperation would be more helpful to him than denial. *See Evans*, 2009-NMSC-027, ¶ 43 ("[T]hreats that merely highlight potential real consequences, or are 'adjurations to tell the truth,' are not characterized as impermissibly coercive."). The State also argues that Defendant could not have inferred a promise of leniency because the officers told him that any charging decision was ultimately up to the district attorney. Defendant counters that Officer Ashley's statement that the charges could be reduced "maybe down to almost nothing" rose to the level of an express promise of leniency, and the statements are therefore inadmissible as a matter of law. *See Lobato*, 2006-NMCA-051, ¶ 19 (stating that an express promise of leniency will render a confession inadmissible as a matter of law).

We cannot agree with Defendant's argument that Officer Ashley's statement rose to the level of an express promise because it was not an unequivocal guarantee that Defendant would receive leniency if he gave a statement. *See State v. Munoz*, 1990-NMCA-109, ¶ 13, 111 N.M. 118, 802 P.2d 23 (stating that a promise of leniency was implied where the officer merely speculated about what might happen if the defendant was cooperative). However, we also disagree with the State's assertion that the officers only suggested that Defendant could help himself by being cooperative. The transcript contains numerous statements by the officers throughout the interview, the effect of which was to say that if Defendant gave a statement they would act on his behalf and had the ability to get the charges reduced. This was more than a mere offer to bring Defendant's cooperation to the attention of the district attorney, which courts have found acceptable. *See State v. Sanders*, 2000-NMSC-032, ¶ 10 (stating that "merely promising to bring a defendant's cooperation to the attention of the prosecutor is not objectionable").

Additionally, the fact that the officers told Defendant that the final decision on charges was up to the district attorney does not mean that there was no official promise of leniency. *See State v. Benavidez*, 1975-NMCA-013, ¶ 7, 87 N.M. 223, 531 P.2d 957 (stating that an unlawful inducement that renders a confession involuntary need not be made by a person in an actual position of authority, but the situation must be such that the person confessing might reasonably consider the promisor as a person able to afford him aid). The officers' other statements during the interview gave rise to the understanding that, if Defendant made a statement, they had the ability to influence the district attorney, and Defendant would face less time in prison, if any. The reasonableness of this understanding was reinforced by Officer Pena talking about another suspect who "finally remembered" and confessed to burglary, who it "still worked out for" because the confession gave Officer Pena the ability to argue for leniency with the district attorney. *Cf. State v. Barr*, 2009-NMSC-024, ¶¶ 10, 27, 146 N.M. 301, 210 P.3d 198 (finding no implied promise of leniency where the officer told the suspect that he could not offer him a deal but offered to speak to the district attorney on his behalf if he made a statement), *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008, 275 P.3d 110; *Munoz*, 1990-NMCA-109, ¶ 16 (holding the confession voluntary where the officer responded to the defendant's question by stating that "in his experience, first offenders who cooperated were less likely to go to jail than other defendants"). Under these circumstances, we believe that Defendant

could reasonably infer a promise going to the crime confessed based on the officers' statements during the interview. *See Munoz*, 1998-NMSC-048, ¶ 34 (stating that an implied promise of leniency occurs when the accused could reasonably have inferred a promise going to the punishment for the crime to be confessed).

Voluntariness

We next turn to the overall question of voluntariness. *See Gutierrez*, 2011-NMSC-024, ¶ 25 (stating that "evidence of an implied promise is only a factor in the totality of the circumstances that courts consider in determining whether a confession is voluntary"). "On a claim that police coerced a statement, the prosecution bears the burden of proving by a preponderance of the evidence that a defendant's statement was voluntary." *Evans*, 2009-NMSC-027, ¶ 34. "[W]e review the entire record and the circumstances under which the statement or confession was made in order to make an independent determination of whether a defendant's confession was voluntary." *State v. Fekete*, 1995-NMSC-049, ¶ 34, 120 N.M. 290, 901 P.2d 708. "[T]he preponderance of the evidence must establish that the confession was not 'extracted from an accused through fear, coercion, hope of reward, or other improper inducements.'" *State v. Cooper*, 1997-NMSC-058, ¶ 30, 124 N.M. 277, 949 P.2d 660 (quoting *State v. Turnbow*, 1960-NMSC-081, ¶ 41, 67 N.M. 241, 354 P.2d 533).

Again, our review of the transcript of the interview supports the district court's ruling. As the district court found, there were a multitude of implied promises of leniency that started at the outset of the interview and continued throughout, constituting coercive police overreaching. We also find it significant that prior to making both the oral and written statements at issue, Defendant indicated that he was acting in an effort to avoid prison. *See Munoz*, 1998-NMSC-048, ¶ 21 (stating that "[f]or the confession to be involuntary, there must be an 'essential link between coercive activity of the State . . . and a resulting confession by a defendant'" (omission in original)). Before writing the apology letter at the request of the officers, Defendant said: "I'll do anything to avoid jail cuz [sic] I don't wanna [sic] to miss out on my daughter[']s life." Also, while making statements purporting to remember the events of the evening, Defendant repeatedly said that his motivation was to avoid jail: "I'm trying to remember because I really don't want to go to jail or anything else . . . . I'm trying to remember because I wanna [sic] be able to just put this behind me and just move on." "I'm trying to remember but it's . . . like I will do anything it takes to avoid jail time." "I'm just trying to remember so I don't . . . I just . . . you know, I don't wanna [sic] to go to jail." *See State v. Watson*, 1971-NMCA-104, ¶ 11, 82 N.M. 769, 487 P.2d 197 (stating that "[i]f the accused confesses because he was induced by the promise that his punishment will not be so severe as it otherwise might be, the confession is not admissible because it was not voluntary"); *cf. Gutierrez*, 2011-NMSC-024, ¶ 28 (rejecting the argument that a confession was obtained through promises of leniency where the suspect indicated that he did not expect leniency upon confession).

The State points to the fact that Defendant came voluntarily to the police station, was informed that he was free to leave, and did not appear sleepy, nervous, or intoxicated to the officers. The State also notes that the officers reminded Defendant that they personally would not be making the

charging decision. However, while these factors may weigh in favor of voluntariness to some extent, based on the totality of the circumstances, we agree with the district court that they are insufficient to outweigh the coercive effect of the numerous implied promises of leniency made to Defendant by the officers throughout the interview. *See Barr*, 2009-NMSC-024, ¶ 24 (stating that a confession is coerced when the defendant's will is overborne and his capacity for self-determination is critically impaired). We therefore agree with the district court the State did not meet its burden to show that the statements were voluntary by a preponderance of the evidence, and we affirm its order suppressing the statements. *See Evans*, 2009-NMSC-027, ¶ 34 (stating that the State's failure to make such a showing requires a ruling that the confession was involuntary as a matter of law).

CONCLUSION

The order of the district court is affirmed.

IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

MICHAEL D. BUSTAMANTE, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-009

Filing Date: October 16, 2014

Docket No. 32,905

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

TREVOR M.,

Child-Appellant.

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for Appellee

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OPINION

BUSTAMANTE, Judge.

Child appeals the revocation of his probation. We conclude that Child had a statutory right to confront the witnesses against him that was violated when the district court permitted a witness to testify by

telephone without determining that telephonic testimony was necessary to further an important public interest. We also conclude that the admissible evidence was insufficient to support a conclusion that Child willfully violated his conditions of probation. We reverse and remand.

BACKGROUND

Child pled guilty to residential burglary and was sentenced to supervised probation for two years. Roughly six months later, Child admitted that he violated the conditions of probation and was sentenced to one year commitment to the Children, Youth and Families Department, which was suspended in favor of a new two-year term of supervised probation. One of the terms of the probation agreement signed by Child required him to "[a]ttend and successfully complete an [o]ut[-]of[-h]ome [p]lacement." Child was placed with New Visions Group Home in Clovis, New Mexico.

After New Visions staff suspected Child of taking drugs or alcohol, they decided to discharge him from the program. While Child was being discharged, he walked out of the group home, and a warrant was issued for his arrest. Child was arrested nine days later. The State filed a petition to revoke Child's probation based on his failure to complete the out-of-home placement. An adjudicatory hearing on the petition was held before a special master. The State presented testimony of a social worker at New Visions Group Home and the juvenile probation officer (JPO) assigned to Child's case. The social worker testified by telephone over Child's objection.

The special master found that Child had willfully violated the probation agreement by failing to successfully complete the out-of-home placement, and the district court adopted the special master's findings and revoked Child's probation. Child's exceptions to the special master's report were denied. Additional facts are provided as necessary to our discussion.

DISCUSSION

Child makes four arguments for reversal of the district court's ruling and/or for a new hearing. First, Child maintains that his right to confront witnesses against him was violated when the social worker testified by telephone. *See* U.S. Const. amends. VI, XIV. Second, he contends that the State failed to demonstrate that he willfully violated his probation conditions. Third, he argues that the district court erred in admitting hearsay testimony by both of the State's witnesses. Finally, Child argues that the hearing was faulty because he did not consent to the appointment of a special master as required by the Children's Code. We conclude that Child's confrontation rights were violated and that there was insufficient evidence supporting the special master's determination that Child willfully violated his probation conditions. We address Child's evidentiary arguments in our discussion of the sufficiency of the evidence. Because it was not preserved for appeal, we do not consider Child's argument as to the appointment of a special master. We reverse and remand for a new hearing.

"The . . . issue of whether the admission of evidence violates an accused's rights under the [Sixth Amendment] is a question of law which is reviewed de novo on appeal." *In re Darcy S.*, 1997-NMCA-026, ¶ 13, 123 N.M. 206, 936 P.2d 888. Child argues that (1) the Sixth Amendment's guarantee of the right to confrontation applies to juvenile probation revocation hearings; (2) he is entitled to due

process of law—including confrontation of witnesses—by the Fourteenth Amendment; and (3) regardless of whether the Sixth Amendment applies here as a matter of constitutional law, the Legislature has guaranteed the right to confrontation through NMSA 1978, Section 32A-2-24(B) (2009). *See* U.S. Const. amends. VI, XIV. Because we agree with the latter argument, we need not address the first two.

It is well established that juveniles have the same rights at trial as adults, including 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 (emphasis added) (citing *In re Gault*, 387 U.S. 1, 33-34, 41, 55-56 (1967)); *see* NMSA 1978, § 32A-2-14(A) (2009) ("A child subject to the provisions of the Delinquency Act is entitled to the same basic rights as an adult, except as otherwise provided in the Children's Code, including rights provided by the Delinquency Act[.]"); § 32A-2-1 (2007) (stating that "Chapter 32A, Article 2 NMSA 1978 may be cited as the 'Delinquency Act.' "); Form 10-424 NMRA ("Advice of rights by judge" form listing the rights a child gives up by entering a plea or consent decree, including "the right to confront the witnesses against the child and to cross-examine them"). Unlike adult probation revocations, which are decidedly different from trials, "[a]n allegation of a juvenile probation violation is treated as if it were a charge brought in a delinquency proceeding." *State v. Erickson K.*, 2002-NMCA-058, ¶ 15, 132 N.M. 258, 46 P.3d 1258; *see State v. Guthrie*, 2011-NMSC-014, ¶ 10, 150 N.M. 84, 257 P.3d 904 (discussing adult probation revocation hearings and stating that "[b]ecause loss of probation is loss of only conditional liberty, 'the full panoply of rights due a defendant in a [criminal trial] do [ ] not apply' " (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972)). This approach to probation revocation hearings is reflected in the Children's Code and Children's Court rules. For instance, Section 32A-2-24(B) provides that "proceedings to revoke probation shall be governed by the procedures, rights and duties applicable to proceedings on a delinquency petition." Similarly, Rule 10-261(C) NMRA provides that "[p]roceedings to revoke probation shall be conducted in the same manner as proceedings on petitions alleging delinquency. The child whose probation is sought to be revoked shall be entitled to all rights that a child alleged to be delinquent is entitled to under law and these rules[.]" The effect of this language is plain: since juveniles have the right to confront witnesses during delinquency proceedings, they must be accorded that right in probation revocation hearings.

The State concedes that "[b]y virtue of the [fact that] Section 32A-2-24[(B)] [provides] that a juvenile has the same rights at a probation revocation hearing as an adjudication of delinquency, Child undoubtedly had a statutory right to face-to-face confrontation at the hearing." The State maintains, however, that this Court should not address Child's statutory argument because Child failed to preserve it. In response to the State's motion for permission for its witness to testify by telephone, Child filed a written objection citing his right to confront witnesses under the Sixth Amendment. The objection did not mention the Children's Code or Section 32A-2-24(B). The district court granted the State's motion without a hearing. At the probation revocation hearing before the special master, Child objected again on confrontation grounds but did not specify the basis for the right asserted. The State argues

that because Child did not cite Section 32A-2-24(B), his objection was insufficient to alert the district court or special master to the argument that his right to confrontation derives from statute. *See State v. Varela*, 1999-NMSC-045, ¶ 25, 128 N.M. 454, 993 P.2d 1280 ("In order to preserve an error for appeal, it is essential that the ground or grounds of the objection or motion be made with sufficient specificity to alert the mind of the trial court to the claimed error or errors, and that a ruling thereon then be invoked." (internal quotation marks and citation omitted)). We disagree.

Here, inherent in Child's invocation of the Sixth Amendment were two questions: (1) whether Child had a right to Sixth Amendment-like confrontation in a probation revocation hearing, and (2) whether the right would be violated by telephonic testimony. In our view, it was thus not necessary to refer specifically to the statute to raise the first question because, although in this context the specific source of the right is statutory, the nature and scope of the right is the same as that under the Sixth Amendment.

The State cites *State v. Jason F.*, 1998-NMSC-010, ¶¶ 8-9, 125 N.M. 111, 957 P.2d 1145 for the proposition that "[w]hen a statute or rule provides greater protection than the constitution, an appellant does not fairly invoke a ruling on the greater protection by exclusively arguing a constitutional violation." *Jason F.* is inapposite. In that case, the child objected to appointment of a special master on constitutional grounds. *Id.* ¶ 8. On appeal, he argued that appointment of the special master was error because the appointment did not comply with the rule governing such matters. *Id.* ¶ 7. The Court held that "[the child] did not invoke a ruling on the application of [the rule]" and therefore the issue was not preserved. *Id.* ¶ 9. The distinguishing feature between *Jason F.* and the present case is that the child's constitutional objection at trial was entirely unrelated to his rule-based argument on appeal. In contrast, here, the right provided by Section 32A-2-24(B) is the right guaranteed by the Sixth Amendment and, consequently, the analysis of an alleged violation of the right is the same whether Child invoked the Sixth Amendment alone or Section 32A-2-24(B). *Cf. State v. Guthrie*, 2009-NMCA-036, ¶¶ 10, 13, 145 N.M. 761, 204 P.3d 1271 (recognizing that the confrontation rights guaranteed under the Sixth Amendment and Fourteenth Amendments differ, distinguishing between an objection based on the confrontation clause and one based on a "more general constitutional argument regarding confrontation," and holding that the latter was sufficient to preserve a due process challenge for appeal), *rev'd on other grounds*, 2011-NMSC-014. We conclude that the district court was sufficiently apprised of Child's argument.

Having concluded that Child was entitled to confront the State's witnesses, we turn now to whether that right was violated when the social worker testified by telephone. "[T]he [c]onfrontation [c]lause [of the Sixth Amendment] 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 citations omitted). The right is not absolute and deviation from live, face-to-face testimony may be permitted when an "exception is necessary to further an important public policy." *State v. Schwartz*, 2014-NMCA-066, ¶ 6, 327 P.3d 1108, *cert. denied*, 2014-NMCERT-006, 328 P.3d 1188 (internal quotation marks and citation omitted). Any exception must be supported by "a

particularized showing of necessity [by the district court]." *State v. Smith*, 2013-NMCA-081, ¶ 8, 308 P.3d 135, *cert. denied*, 2013-NMCERT-006, 304 P.3d 425. "Where there are requirements of important public policy and showing of necessity, mere inconvenience to the witness is not sufficient to dispense with face-to-face confrontation." *State v. Almanza*, 2007-NMCA-073, ¶ 12, 141 N.M. 751, 160 P.3d 932.

Here, the district court did not make any findings on the necessity of telephonic testimony. Moreover, the State's motion stated only that telephonic testimony was "in the best interest of judicial economy." The State advised the court at the probation revocation hearing that, if the motion was not granted, it would need a continuation to a later date in order to have the social worker present. This position implies that the witness could be present but just not on the day of the hearing and amounts to "mere inconvenience." *Id.* There being no particularized findings of necessity and the State's justification being insufficient, we conclude that the social worker's testimony by telephone violated Child's right to confront the witness. *See id.* (holding that "the [witness's] busy schedule and the inconvenience that would be caused by either requiring his testimony or postponing the trial until he was able to testify are just the sort of considerations that do not satisfy the exceptions to the [c]onfrontation [c]lause.").

"A violation [of the right to confrontation] alone, however, does not require a new trial. Rather, only when a violation of the confrontation clause is harmful to the defendant does the violation require a new trial." *Schwartz*, 2014-NMCA-066, ¶ 15. The burden is on the state to demonstrate that admission of the telephonic testimony was harmless. *Id.* Here, the State's only arguments related to the confrontation clause are that it does not apply in juvenile probation revocation hearings and that Child failed to preserve the issue properly. The State did not address whether any violation was harmless and therefore failed to meet its burden.

We next address Child's contention that there was insufficient evidence that he willfully violated the conditions of his probation. More specifically, Child maintains that the State failed to prove that it was Child's willful behavior that caused him to be discharged from New Visions Group Home. *See In re Bruno R.*, 2003-NMCA-057, ¶ 11, 133 N.M. 566, 66 P.3d 339 ("To establish a violation of a probation agreement, the obligation is on the [s]tate to prove willful conduct on the part of the probationer so as to satisfy the applicable burden of proof."). "The test for sufficiency of the evidence is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Duran*, 2006-NMSC-035, ¶ 5, 140 N.M. 94, 140 P.3d 515 (internal quotation marks and citation omitted). We examine the evidence in the light most favorable to the district court's ruling. *See id.* In our analysis, we focus only on admissible evidence. *See Erickson K.*, 2002-NMCA-058, ¶ 22.

Because we have already determined that the social worker's testimony was improperly admitted, we consider only the JPO's testimony. Child argues that the JPO's testimony "consisted largely of inadmissible hearsay, which should have been excluded." *See* Rules 11-801, -802 NMRA; *Erickson K.*, 2002-NMCA-058, ¶ 20 (holding that the rules of evidence apply in the adjudicatory phase of

juvenile probation revocation hearings). He points to the JPO's testimony that she is based in Hobbs while New Visions Group Home is in Clovis, and maintains that the JPO's testimony about Child's conduct and discharge was based on what New Visions staff told her. For instance, the JPO testified that

> [her] understanding [] is that the incident occurred while they were trying to take him to school, he got off the van, they found him a short time later under the influence. At that time was when they had informed me about that, and that they were going to discharge him. And I had asked him, I'm like, well, if he's under the influence of Spice, can you please obtain that UA for me. And shortly after that is when they called me again stating that he left the premises.

The State argues that this argument was not preserved for review. We disagree. Child moved for a directed verdict at the conclusion of evidence. In his motion, he argued that the JPO's testimony was both nonspecific and "secondhand." He stated, "[The JPO] was not supervising [Child], so what she presented to you in large part was . . . what had been relayed to her from people in Clovis." These statements are sufficient to alert the district court of the basis of the objection and preserve a hearsay objection for appeal. *See State v. Johnson*, 1995-NMCA-127, ¶ 6, 121 N.M. 77, 908 P.2d 770 (holding that even though the defendant did not mention the specific right at issue, the "[defendant's] arguments . . . were adequate to alert the trial court to the basis for [the d]efendant's proffer"), *rev'd on other grounds*, 1997-NMSC-036, 123 N.M. 640, 944 P.2d 869.

In what we understand to be a request that we apply the "right for any reason" principle, the State also argues that it "likely would have sought to admit the statements under the business records exception to the hearsay rule" had Child objected during the testimony. *See Scott v. Murphy Corp.*, 1968-NMSC-185, ¶ 10, 79 N.M. 697, 448 P.2d 803 ("It is hornbook law that the decision of a trial court will be upheld if it is right for any reason."); Rule 11-803(6) NMRA. We note, however, that the State did not seek to admit any documents that would fit within the business records exception. *See Erickson K.*, 2002-NMCA-058, ¶ 22 ("[T]he [s]tate made no attempt to present documentation that might have been admissible under a recognized hearsay exception."). Nor does it provide on appeal any foundation for admission of any evidence as a business record. *See* Rule 11-803(6); *State ex rel. Elec. Supply Co. v. Kitchens Constr., Inc.*, 1988-NMSC-013, ¶¶ 10-11, 106 N.M. 753, 750 P.2d 114 (discussing the foundational requirements for business records). Further, the State does not explain how the JPO's statements would have been admissible under the business record exception. This argument is therefore unavailing. *Cf. Gracia v. Bittner*, 1995-NMCA-064, ¶ 1, 120 N.M. 191, 900 P.2d 351 ("Every litigated case is tried at least three times: there is the trial the attorneys intended to conduct; there is the trial the attorneys actually conducted; and there is the trial that, after the verdict, the attorneys wished they had conducted.").

After a review of the testimony, we agree with Child that the JPO's testimony as to the events in Clovis was improperly admitted because it was based on what she had been told by others. *See Erickson K.*, 2002-NMCA-058, ¶ 22 (concluding that the

testimony of a juvenile probation officer was insufficient to prove that a juvenile defendant failed to complete an out-of-home placement where the officer did not have firsthand knowledge that the defendant had been discharged and why, and "[t]he [s]tate did not present the testimony of a [group home] staff member who might have had firsthand knowledge of [the d]efendant's situation"). Thus, since all of the testimony presented by the JPO and the social worker on Child's conduct before he was discharged from New Visions Group Home was improperly admitted, we conclude that the evidence was insufficient to support a finding that Child's discharge was the result of willful conduct. *See id.*

Nevertheless, we remand for a new hearing. "While it is true that the State failed to present sufficient admissible evidence to support the revocation of [Child's] probation, we must consider all of the evidence presented, including the wrongfully admitted evidence, to determine whether to remand for a new hearing." *Id.* ¶ 25; *see State v. Post*, 1989-NMCA-090, ¶ 22, 109 N.M. 177, 783 P.2d 487 ("If all of the evidence, including the wrongfully admitted evidence, is sufficient, then retrial following appeal is not barred."). Here, the social worker testified that Child had "absconded" from school and was not compliant with the group home's rules prohibiting substance abuse. This evidence supports a determination that Child willfully violated his conditions of probation. We note that Child argues that there was inadequate foundation for the social worker's opinion testimony that Child was under the influence of "something" when he returned to the group home. *See* Rule 11-701 NMRA. We need not address this contention, however, because, even if that testimony was improperly admitted, we still consider it in our analysis of the appropriateness of remand for a new hearing.

Finally, we do not address Child's argument that revocation of his probation should be reversed because he did not consent to appointment of a special master. *See* Rule 10-163(C) NMRA ("[T]he special master shall not preside at a[n] . . . adjudicatory hearing or dispositional hearing without concurrence of the parties."). Child did not object to the appointment of the special master when the district court ordered the hearing before a special master, nor at any time before or during the hearing. Child's failure to object and participation in the hearing without objection is akin to a waiver of any objection to the appointment. *See Jason F.*, 1998-NMSC-010, ¶ 10 (stating that the child's failure to object to appointment of a special master based on non-compliance with the rule was a waiver of the objection). In addition, Child objected to the special master only after the hearing was completed and the special master's report filed. This untimely objection was insufficient to preserve Child's argument.

CONCLUSION

Child's right to confront the witnesses against him was violated when one of the witnesses testified by telephone without the district court's determination that telephonic testimony was necessary to further an important public interest. In addition, the admissible evidence was insufficient to prove the required elements of a probation violation. We therefore reverse the revocation of Child's probation. But because the entirety of the evidence supports a conclusion that Child violated his conditions of probation, we remand for a new hearing.

Finally, both parties agree that the

judgment and disposition erroneously included a count that was dismissed pursuant to the plea agreement. On remand, the district court should correct the judgment to reflect the plea agreement.

IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:

MICHAEL E. VIGIL, Judge

M. MONICA ZAMORA, Judge (specially concurring).

ZAMORA, Judge (specially concurring).

I concur in Judge Bustamante's opinion as it pertains to Child's first three arguments. I understand that *Jason F.*, 1998-NMSC-010, ¶ 10 is controlling as it applies to Child's fourth argument that he did not consent to the appointment of a special master to preside over his probation revocation hearing. *See Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶ 33, 125 N.M. 721, 965 P.2d 305 ("Stare decisis is the judicial obligation to follow precedent, and it lies at the very core of the judicial process of interpreting and announcing law."). This special concurrence is for the purposes of requesting that the Supreme Court invite the Children's Court Rules Committee to modify Children's Court Rule 10-163(C) to clarify who has the burden of requesting and showing that there was concurrence of the parties allowing a special master to preside over the proceedings. Rule 10-111(C) NMRA (1995) as it applied in *Jason F.* and its recompilation as Rule 10-163(C) are identical. My concern, in both *Jason F.* and this case, lies with the Child's failure to either preserve the issue for appeal or to timely object to the appointment. The question raised is whether a Child's right to trial by a judge can be so casually waived, where the intent of appointing a special master was for purposes of expeditious handling of children's court cases and was meant to be the exception rather than the rule.

M. MONICA ZAMORA, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-010

Filing Date: October 20, 2014

Docket No. 32,901

ROLAND LUCERO and R & L STRAIGHTLINE TILE, LLC a/k/a R & L STRAIGHTLINE TILE,

Plaintiffs-Appellants,

v.

RICHARD SUTTEN,

Defendant-Appellee.

Law Offices of Daymon B. Ely
Daymon B. Ely
Albuquerque, NM

William Gilstrap
Albuquerque, NM

for Appellants

Tucker Law Firm, P.C.
Steven L. Tucker
Santa Fe, NM

for Appellee

OPINION

VANZI, Judge.

The Memorandum Opinion filed in this case on September 29, 2014, is hereby withdrawn, and this Opinion is substituted in its place.

Roland Lucero and his company, R & L Straightline Tile, (collectively, Plaintiff) appeal from a judgment entered in favor of Defendant Richard Sutten following a bench trial on the issue of legal malpractice. The district court found that Defendant negligently failed to apprise Plaintiff of the dangers of providing an unsecured $300,000 loan to a Las Vegas development company. However, the district court applied the doctrine of independent intervening cause, a defense that had not been previously raised in Defendant's proposed findings prior to trial, and concluded that the real estate market collapse of the mid-to-late 2000s severed the connection between Defendant's professional negligence and Plaintiff's damages claimed therefrom. On appeal, Plaintiff argues that the district court erred in applying the doctrine of independent intervening cause to these facts. We agree. We reverse and remand for consideration of damages in light of this Opinion.

BACKGROUND

The district court's following findings of fact in this case are not challenged on appeal. Plaintiff was able to amass substantial savings in the course of his business in the tile industry. In February 2008, Plaintiff was approached by Mark Brady, an old friend, about loaning $300,000 to a developer for a mixed-use real estate development project in Las Vegas, Nevada. By the terms of the proposed "bridge loan," Plaintiff was to receive a $360,000 payment one month after making the loan. Brady, who was also the friend of an officer of the development company, stood to receive a "finder's fee" of up to $30,000 for assisting in the transaction. These terms were contained in a document entitled "Secured Promissory Note," (the Note) which was forwarded to Brady by the developer.

Brady suggested to Plaintiff that Defendant, a licensed attorney, review the document on Plaintiff's behalf. Defendant reviewed and made minor changes to the document without notifying Plaintiff that the purported the Note did not, in fact, create any security interest. Nor did Defendant apprise Plaintiff of any of the inherent risks involved in engaging in such a transaction. Instead, Defendant returned the Note with his edits to Brady but did not communicate directly with Plaintiff. Shortly after making the loan, the real estate market in Las Vegas, Nevada, suffered a "cataclysmic decline," and the Las Vegas developer filed for bankruptcy. Plaintiff was never repaid any portion of the loan he had made because the senior lienholder's interests exceeded the value of the secured property after the market collapse.

Plaintiff sued Defendant for professional malpractice, and the district court held a bench

trial on the merits. The district court found that the parties had entered into an attorney-client relationship and that Defendant's actions fell below the standard of care and were negligent because he failed to adequately review the Note or advise Plaintiff about the nature and dangers of the proposed transaction. Nevertheless, the district court found that the decline in the Las Vegas real estate market operated as an independent intervening cause, severing the connection between Defendant's professional negligence and Plaintiff's losses. This appeal followed.

DISCUSSION

Standard of Review

At the outset, the parties disagree about the standard of review we should apply in this case. Plaintiff contends that this matter should be reviewed de novo, while Defendant argues that Plaintiff "gets off on the wrong foot with the standard of review" and that we should instead determine whether the factual issues are supported by substantial evidence. We agree with Plaintiff. While the determination of whether something is an independent intervening cause is a question of fact, *Govich v. North American Systems, Inc.*, 1991-NMSC-061, ¶ 24, 112 N.M. 226, 814 P.2d 94, this appeal, involving undisputed facts, presents a question of law: whether the doctrine of independent intervening cause should have even been considered by the fact finder in the first place. We have previously reviewed this issue de novo in cases tried by juries, *see, e.g.*, *Chamberland v. Roswell Osteopathic Clinic, Inc.*, 2001-NMCA-045, ¶ 11, 130 N.M. 532, 27 P.3d 1019, and we see no reason to afford a more deferential review when the fact finding is conducted by a judge. *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 reviewed de novo on appeal). We therefore review the district court's decision to apply the doctrine of independent intervening cause de novo.

The Doctrine of Independent Intervening Cause Should Not Have Been Considered by the Fact Finder

Plaintiff makes two arguments on appeal: (1) that the district court incorrectly applied the doctrine of independent intervening cause and (2) that the district court's decision creates immunity for a person or entities whose negligence caused harm. Because our reversal is based on the issue of the independent intervening cause, we need not reach Plaintiff's second argument. Before turning to our analysis, however, we note again one curious aspect of the district court's decision. Our review of the record indicates that Defendant did not raise the doctrine of independent intervening cause in his pre-trial findings and conclusions or during the trial, including during closing argument. It was only after the district court raised the doctrine sua sponte in his letter decision that Defendant added to his post-trial findings and conclusions that the "market collapse was an independent intervening force" that severed the connection between Defendant's negligence and Plaintiff's losses. Accordingly, the doctrine, which then became part of the district court's findings and conclusions, was never properly raised by Defendant or argued by the parties below. *See Chamberland*, 2001-NMCA-045, ¶ 25 (noting that it was the defendant's duty to request an instruction and present the issue of independent intervening cause to the jury). Notwithstanding the lack of a fully developed record on the issue, we proceed to address the district court's ruling.

"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." *Encinias v. Whitener Law Firm, P.A.*, 2013-NMSC-045, ¶ 8, 310 P.3d 611 (alteration, internal quotation marks, and citation omitted). At trial, the district court found that the first two elements of representation and negligence were met, but it concluded that the collapse of the real estate market in Las Vegas, Nevada, constituted an independent intervening cause, severing Defendant's negligence from Plaintiff's losses. As a result, the sole issue before this Court is the third element, proximate cause. *See Torres v. El Paso Elec. Co.*, 1999-NMSC-029, ¶ 17, 127 N.M. 729, 987 P.2d 386 ("A finding of an independent intervening cause represents a finding against the plaintiff on proximate cause[.]"), *overruled on other grounds by Herrera v. Quality Pontiac*, 2013-NMSC-018, 134 N.M. 43, 73 P.3d 181.

"An independent intervening cause is a cause which interrupts the natural sequence of events, turns aside their cause, prevents the natural and probable results of the original act or omission, and produces a different result, that could not have been reasonably foreseen." *Id.* ¶ 12 (internal quotation marks and citation omitted). In *Torres*, our Supreme Court recognized that the doctrine is incompatible with our system of comparative negligence and potentially in conflict with our use of several liability. *See id.* ¶¶ 18-19. Thus, our appellate courts have "virtually eliminated" the doctrine's application in cases involving only negligent, as opposed to intentional, conduct. *Silva v. Lovelace Health Sys., Inc.*, 2014-NMCA-086, ¶ 14, 331 P.3d 958, *cert. granted*, 2014-NMCERT-008, 334 P.3d 425. While the defense may still be available in limited cases, for example where the alleged intervening cause is a "force of nature"—the sort of event that "cannot be prevented by human care, skill or foresight"—*Chamberland*, 2001-NMCA-045, ¶ 24 (internal quotation marks and citation omitted), for the reasons discussed below, we find it unnecessary to decide whether "market decline" constitutes a force of nature in this case.

When the intervening cause does not involve intentional conduct, New Mexico follows the rule that "any harm which is in itself foreseeable, as to which the actor has created or increased the recognizable risk, is always proximate, no matter how it is brought about." *Andrews v. Saylor*, 2003-NMCA-132, ¶ 22, 134 N.M. 545, 80 P.3d 482 (alteration, internal quotation marks, and citation omitted). Thus, the doctrine is inapplicable in New Mexico in cases where a non-intentional intervening force causes the same harm as that risked by the actor's conduct. *See Collins ex rel. Collins v. Perrine*, 1989-NMCA-046, ¶ 19, 108 N.M. 714, 778 P.2d 912 ("An independent intervening cause is a cause that interrupts the natural sequence of events and produces a *different* result that could not be reasonably foreseen."). The principle cited in *Andrews*, *Torres*, and *Collins* is adopted from the Restatement (Second) of Torts, which applies equally to forces of nature:

> If the actor's conduct has created or increased the risk that a particular harm to the plaintiff will occur, . . . it is immaterial to the actor's liability that the harm is brought about in a manner which no one in his position could possibly have been expected to foresee or anticipate. This is true not only where the result is produced by the direct operation of the actor's

> conduct upon conditions or circumstances existing at the time, but also where it is brought about through the intervention of other forces which the actor could not have expected, *whether they be forces of nature*, or the actions of animals, or those of third persons which are not intentionally tortious or criminal.

Section 442B cmt. b (1965) (emphasis added).

Our application of Restatement (Second) of Torts Section 442B to an allegedly intervening force in the legal malpractice context of *Collins* is instructive. In *Collins*, the defendant-attorney negligently settled a complex medical malpractice case without performing a minimum level of discovery. 1989-NMCA-046, ¶ 13. After settling with the original defendants, the plaintiffs sued Indian Health Services (IHS) in federal court and obtained a much larger judgment, with damages apportioned between IHS and the original defendants. *Id.* ¶ 8. Despite the previous settlement with the original defendants, the plaintiffs' attorney planned on collecting all damages from IHS through principles of joint and several liability. *Id.* ¶ 16. However, while the second suit was pending, New Mexico abolished the concept of joint and several liability. *Id.* ¶ 17. Thus, as a result of the attorney's negligence in settling the original case, together with the change in state tort law, the plaintiffs were unable to collect a substantial portion of the damages awarded in the federal judgment. *Id.* ¶ 8.

At trial for legal malpractice and on appeal, the defendant-attorney in *Collins* argued that the unforeseeable change in the law acted as an independent intervening cause. *Id.* ¶¶ 16-18. This Court rejected that argument, stating:

> The Restatement of Torts addresses this point clearly. In Section 442B, the Restatement explains that where the negligent conduct of an actor creates or increases the risk of a particular harm and is a substantial factor in causing that harm, the fact that the harm is brought about through the intervention of another force does not relieve the actor of liability.

Collins, 1989-NMCA-046, ¶ 20. Applying Restatement (Second) of Torts Section 442B, we reasoned that the attorney's negligence created a particular risk—the risk that the plaintiffs would not be able to recover damages caused by the original defendants. We therefore held that the "intervention of the change in law," whether foreseeable or not, brought about a foreseeable harm and could not relieve the attorney of liability. *Collins*, 1989-NMCA-046, ¶¶ 20-21.

In light of these authorities, the district court should not have considered the doctrine of independent intervening cause in this case. The district court found that Defendant gave the transaction the attorney "seal of approval," negligently creating or increasing the risk of the loss of Plaintiff's investment by failing to warn Plaintiff of the dangers inherent in loaning $300,000 to a Las Vegas developer in an unsecured transaction. In the absence of any allegation that the intervening cause was the result of intentional tortious conduct, the principles articulated in Restatement (Second) of Torts Section 442B and adopted in *Collins* apply. As discussed above, these principles apply whether or not the market decline is considered a "force of nature." The district court should not have

dismissed this case but, instead, it should have determined whether Defendant's negligence was the proximate cause of Plaintiff's loss and, if applicable, employed a standard comparative fault analysis.

Citing to several out-of-state and federal cases, Defendant asks us to consider whether the collapse of the Las Vegas real estate market was foreseeable. However, Defendant's characterization of the issue relies on the same contention that we specifically rejected in *Collins*: that the manner in which the harm occurs is somehow relevant to the analysis. *See Collins*, 1989-NMCA-046, ¶¶ 17-21. We have made clear that in cases not involving intentional intervening conduct, when the risk of harm is foreseeable, the manner that the foreseeable harm is brought about need not itself be foreseeable. *Id.* ¶ 21 ("Nor does it matter whether [the attorney] could have foreseen the change in law."). Accordingly, we find Defendant's citations to extra-jurisdictional opinions evaluating the foreseeability of the 2008 real estate market collapse inapposite. We conclude that the district court erred in applying the doctrine of independent intervening cause to its factual determination that the parties had entered into an attorney-client relationship and that Plaintiff made the loan in reliance, at least partially, on Defendant's seal of approval.

CONCLUSION

We reverse the district court's decision dismissing Plaintiff's complaint with prejudice and remand for consideration and apportionment of damages using a comparative fault analysis.

IT IS SO ORDERED.

LINDA M. VANZI, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

J. MILES HANISEE, Judge

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
Opinion Number: 2015-NMSC-002

Filing Date: January 8, 2015

Docket No. 34,365

JEFFREY POTTER,

Plaintiff-Petitioner,

v.

CHRIS PIERCE, WILLIAM DAVIS, DAVIS & PIERCE, P.C., and JOHN DOE LAW FIRM,

Defendants-Respondents.

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Law Office of William G. Gilstrap
William Grant Gilstrap, II
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for Petitioner

Domenici Law Firm, P.C.

Pete V. Domenici, Jr.
Lorraine Hollingsworth
Albuquerque, NM

for Respondents

OPINION

DANIELS, Justice.

Res judicata is a judicially created doctrine designed to promote efficiency and finality by giving a litigant only one full and fair opportunity to litigate a claim and by precluding any later claim that could have, and should have, been brought as part of the earlier proceeding. In this case, we examine the preclusive effect of a fee proceeding in bankruptcy court on a later lawsuit for legal malpractice allegedly committed in the course of the bankruptcy. We hold that the elements of res judicata are met and that Petitioner was sufficiently aware of his malpractice claim, which he could and should have brought in the bankruptcy proceeding. We affirm the dismissal of Petitioner's subsequent malpractice suit but emphasize that barring a claim on res judicata grounds requires a determination that the claimant had a full and fair opportunity to litigate the claim in the earlier proceeding.

I. BACKGROUND

One month prior to filing for voluntary Chapter 11 bankruptcy on May 19, 2005, Petitioner Jeffery Potter sold his interest in a limited partnership known as Monte Mac. Petitioner was represented in the bankruptcy proceedings by Respondents. During these proceedings, Petitioner, through Respondents as counsel, filed his schedules and his statement of financial affairs (SOFA). The SOFA requires that the debtor list all property transferred within the year immediately preceding the bankruptcy petition, other than property transferred in the ordinary course of business or financial affairs. *See* Official and Procedural Bankruptcy Forms, Form 7, 11 U.S.C. (2003). Petitioner testified under oath that he had reviewed the schedules and the SOFA and that they were true and correct. Neither the schedules nor the SOFA listed Petitioner's sale of the Monte Mac interest.

Referring to "a fundamental disagreement," Respondents filed a motion to withdraw as counsel for Petitioner, which the bankruptcy court granted one year after Petitioner's Chapter 11 filing. After moving for withdrawal, Respondents also filed an application for fees, to which Petitioner filed an objection on May 22, 2006. The objection from Petitioner did not specifically mention the undisclosed Monte Mac transfer but alleged, among other things, that Respondents had threatened Petitioner with their withdrawal, had caused Petitioner to file inaccurate financial disclosures, and had obtained his signature on these disclosures by fraud. The bankruptcy court held a fee hearing on April 10, 2007. After hearing objections, the bankruptcy court analyzed billing records and disallowed some fees as excessive, duplicative, clerical, or administrative in nature. The bankruptcy court approved the rest in a final fee award entered on June 4, 2007, addressing the services performed, rates charged, and time billed but not specifically mentioning the allegations made in the objections. Petitioner did not appeal or move the bankruptcy court to reconsider its judgment.

Following Respondents' withdrawal, the bankruptcy court converted Petitioner's bankruptcy from Chapter 11 to Chapter 7. When questioned about the Monte Mac sale

on the day after the fee hearing and prior to the entry of the final fee judgment, Petitioner testified to his creditors that he had owned an interest in Monte Mac but had sold it for $72,000 and could not recall when he sold it.

On March 21, 2008, Petitioner filed a motion in bankruptcy court alleging damages from malpractice that included over one million dollars for his exposure to a denial of his discharge.

Petitioner never filed an amended schedule or SOFA to include the sale of his interest in the Monte Mac partnership. Finding this to be a knowing and fraudulent omission, the bankruptcy court denied the discharge of Petitioner's debts on June 23, 2009.

Petitioner then brought a separate action for legal malpractice, breach of fiduciary duty, and misrepresentation in the Second Judicial District Court. In his complaint, Petitioner made broad allegations of malpractice against Respondents. Respondents moved to dismiss Petitioner's complaint as barred by the res judicata effect of the bankruptcy court fee award. Petitioner responded that his malpractice claim had not accrued until he had been denied a discharge, because until then he had not suffered injury, and so approval of the fee award did not bar his claim. The district court found that this argument "fails on the facts" because Petitioner alleged both malpractice and damages sustained from that malpractice in the bankruptcy fee proceedings and in subsequent pleadings prior to the denial of his discharge. The district court granted summary judgment for Respondents on grounds of res judicata. Petitioner appealed, the Court of Appeals affirmed, and we granted certiorari. *Potter v. Pierce*, 2014-NMCA-002, ¶ 1, 315 P.3d 303, *cert. granted*, 2013-NMCERT-011.

II. STANDARD OF REVIEW

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. *Zamora v. St. Vincent Hosp.*, 2014-NMSC-035, ¶ 9, 335 P.3d 1243; Rule 1-056(C) NMRA. We review a grant of summary judgment de novo. *Zamora*, 2014-NMSC-035, ¶ 9. In reviewing an order on summary judgment, we examine the whole record, considering the facts and drawing all reasonable inferences in a light most favorable to the nonmoving party. *Id.* "Whether the elements of claim preclusion are satisfied is a legal question, which we [also] review de novo." *Kirby v. Guardian Life Ins. Co. of Am.*, 2010-NMSC-014, ¶ 61, 148 N.M. 106, 231 P.3d 87.

III. DISCUSSION

Petitioner argues that New Mexico precedent does not allow a nonadversarial fee proceeding to preclude a later claim for legal malpractice; and he reasons that because he did not suffer any injury until the denial of his discharge, his malpractice claim could not have been brought earlier.

"[R]es judicata is designed to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, . . . prevent [] inconsistent decisions, [and] encourage reliance on adjudication." *Computer One, Inc. v. Grisham & Lawless, P.A.*, 2008-NMSC-038, ¶ 31, 144 N.M. 424, 188 P.3d 1175 (alterations in original) (internal quotation marks and citation omitted). Federal law and New Mexico law are consistent on the general standards governing claim preclusion. *Deflon v. Sawyers*, 2006-NMSC-025, ¶ 2, 139 N.M. 637, 137 P.3d 577. A party asserting res

judicata or claim preclusion must establish that (1) there was a final judgment in an earlier action, (2) the earlier judgment was on the merits, (3) the parties in the two suits are the same, and (4) the cause of action is the same in both suits. *Kirby*, 2010-NMSC-014, ¶ 61. In addition to those elements, as we discuss in this opinion, res judicata will preclude a malpractice claim only if the claim reasonably could and should have been brought during the earlier proceeding. The decision rests on the prior opportunity to litigate, and neither the type of proceeding nor the damages sought are determinative. We address the two elements contested by Petitioner, whether the cause of action was the same in both proceedings and whether Petitioner's malpractice claim could and should have been brought in the bankruptcy proceedings.

A. The Legal Malpractice Claim Involves the Same Cause of Action for Res Judicata Purposes as the Fee Claim Because Both Were Based on the Nature and Quality of Respondents' Legal Services During the Bankruptcy Representation

Both the Tenth Circuit and New Mexico have adopted the transactional approach in analyzing the single-cause-of-action element of res judicata. *See Petromanagement Corp. v. Acme-Thomas Joint Venture*, 835 F.2d 1329, 1335-36 (10th Cir. 1988) (adopting the Restatement (Second) of Judgments §§ 24-25 (1982) in determining what constitutes a single cause of action for res judicata purposes in the Tenth Circuit); *Three Rivers Land Co. v. Maddoux*, 1982-NMSC-111, ¶ 27, 98 N.M. 690, 652 P.2d 240 (same in New Mexico), *overruled on other grounds by Universal Life Church v. Coxon*, 1986-NMSC-086, ¶ 9, 105 N.M. 57, 728 P.2d 467. The transactional approach considers all issues arising out of a "common nucleus of operative facts" as a single cause of action. *Anaya v. City of Albuquerque*, 1996-NMCA-092, ¶ 8, 122 N.M. 326, 924 P.2d 735 (internal quotation marks and citation omitted). The facts comprising the common nucleus should be identified pragmatically, considering (1) how they are related in time, space, or origin, (2) whether, taken together, they form a convenient trial unit, and (3) whether their "treatment as a single unit conforms to the parties' expectations or business understanding or usage." *Id.* ¶ 12.

Neither New Mexico nor the Tenth Circuit has specifically considered the preclusive effect of a final fee award in bankruptcy court on a later action for legal malpractice, but other jurisdictions that have addressed this issue have uniformly concluded that they are the same cause of action for the purposes of res judicata. *See, e.g.*, *Capitol Hill Group v. Pillsbury, Winthrop, Shaw, Pittman, LLC*, 569 F.3d 485, 491 (D.C. Cir. 2009) (holding that a fee application in bankruptcy court and a malpractice claim based on the same legal services arise out of the same nucleus of facts and satisfy the cause-of-action identity requirement of res judicata); *Grausz v. Englander*, 321 F.3d 467, 473 (4th Cir. 2003) (holding that fee applications and a legal malpractice claim based on the same representations arose from the same core of operative facts); *Iannochino v. Rodolakis (In re Iannochino)*, 242 F.3d 36, 46-49 (1st Cir. 2001) (holding that a fee application and a malpractice claim based on the same representation met the cause-of-action identity requirement of res judicata); *Osherow v. Ernst & Young, LLP (In re Intelogic Trace, Inc.)*, 200 F.3d 382, 388-89

(5th Cir. 2000) (holding that a fee application and a trustee's malpractice claims concerned the same nucleus of operative facts and met the transactional test); *Breslin Realty Dev. Corp. v. Shaw*, 893 N.Y.S.2d 95, 100 (N.Y. App. Div. 2010) (holding that res judicata barred a malpractice claim based on legal services considered in a prior claim for fees, litigated and awarded, for the alleged-negligent services); *Stangel v. Perkins*, 87 S.W.3d 706, 710-11 (Tex. App. 2002) (holding that fee-application and malpractice claims based on the same representations concerned the same nucleus of operative facts and met the transactional test). Under the United States Bankruptcy Code, the bankruptcy court must consider "the nature, the extent, and the value" of services to determine reasonable compensation before awarding fees. *See* 11 U.S.C. § 330(a)(3) (2012). In these cases, courts have reasoned that because an action for legal malpractice concerns the same issues of quality necessarily considered by the bankruptcy court, the claims are based on the same cause of action.

Although not in the bankruptcy context, New Mexico cases have also concluded that a claim for attorney fees can have a res judicata effect on a later claim for malpractice. In *Brunacini v. Kavanagh*, the Court of Appeals determined that a suit for legal fees and a later suit for malpractice had a common origin and subject matter. *See* 1993-NMCA-157, ¶ 21, 117 N.M. 122, 869 P.2d 821. In *Moffat v. Branch*, the Court of Appeals affirmed a res judicata bar applied to a contract-related claim for attorney fees in the state district court after a federal court denied the attorney a charging lien, concluding that the two claims arose from the common nucleus of the attorney's representation in the underlying case. *See* 2005-NMCA-103, ¶¶ 17-21, 138 N.M. 224, 118 P.3d 732. In *Bennett v. Kisluk*, addressing res judicata under the compulsory counterclaim provisions of Rule 1-013 NMRA, the three-justice majority acknowledged that a claim for attorney fees was "related substantially enough" to bar a later action for malpractice. *See* 1991-NMSC-060, ¶ 10, 112 N.M. 221, 814 P.2d 89.

We hold here that this reasoning extends to claims of malpractice after a bankruptcy fee proceeding concerning the same legal services. Petitioner's two claims are rooted in a common nucleus of operative facts. The claim for legal malpractice concerns the same service period and alleged deficiencies in the same legal services that were the subject of the bankruptcy fee proceeding. Petitioner's claims would have formed a convenient trial unit because the bankruptcy court is already required to consider the quality of these services in determining the appropriate fees and has procedures available to hear objections and institute an adversarial proceeding if necessary. *See* 11 U.S.C. § 330(a)(1), (3)-(4) (requiring the bankruptcy court to determine that legal services were necessary and reasonable before approving fees); Fed. R. Bankr. P. 9014(a), (c) (2004) (requiring notice and the opportunity for a hearing in a contested matter and outlining the procedural rules that will apply). Treatment as a single unit would also conform to the parties' expectations because objections to services rendered must be raised in response to fee applications, *see* Fed. R. Bankr. P. 9014(a), advisory committee's note (2004), and because Petitioner did raise malpractice allegations in his objections to Respondents' fees. For claim preclusion purposes, Petitioner's malpractice claim constitutes the same cause of action as the earlier fee proceeding in bankruptcy court.

B. Res Judicata Precludes Petitioner's Malpractice Claim Because He Had a Full and Fair Opportunity to Litigate It in the Bankruptcy Fee Proceeding

Even if two actions are the same under the transactional test and all other elements are met, res judicata does not bar a subsequent action unless the plaintiff could and should have brought the claim in the former proceeding. *In re Intelogic Trace, Inc.*, 200 F.3d at 388; *see also Bank of Santa Fe v. Marcy Plaza Assocs.*, 2002-NMCA-014, ¶¶ 24-27, 131 N.M. 537, 40 P.3d 442 (discussing in consideration of res judicata whether a party was aware at a prior proceeding of its claim of overpayments). "Res judicata is a judicial creation ultimately intended to serve the interests of justice." *Kirby*, 2010-NMSC-014, ¶ 65 (italics omitted). "[A] party's full and fair opportunity to litigate is the essence of res judicata." *Brooks Trucking Co. v. Bull Rogers, Inc.*, 2006-NMCA-025, ¶ 11, 139 N.M. 99, 128 P.3d 1076. The adjudication of fees does not provide a safe haven to lawyers or other professionals later charged with malpractice. To the contrary, res judicata will only preclude a malpractice claim if the facts demonstrate that it could and should have been brought during the earlier proceeding.

After a bankruptcy fee hearing and after determining cause-of-action identity under the transactional test, federal courts have considered additional factors in determining whether res judicata bars a subsequent malpractice claim. These factors "include whether the fee hearing was an adversary proceeding or contested matter, the nexus between the order awarding [professional] fees and the claims now being asserted, and 'the amount of time that has elapsed since the case commenced.'" *In re Intelogic Trace, Inc.*, 200 F.3d at 388 (quoting *In re Howe*, 913 F.2d 1138, 1146 n.28 (5th Cir. 1990) (discussing the res judicata effect of bankruptcy court confirmation of a reorganization plan on a later claim in a state court for lender liability)). The fundamental determination is the fairness of preclusion under the totality of the circumstances in each case. This determination rests on the prior opportunity to litigate, and neither the type of proceeding nor the damages sought are determinative. *See, e.g.*, *In re Howe*, 913 F.2d at 1146 & n.28 ("We do not intimate that whether an adversary proceeding preceded a confirmation hearing is a litmus test for determining whether the action is barred by res judicata . . . . The critical question for res judicata purposes is whether the party could or should have asserted the claim in the earlier proceeding. Whether the proceeding was an adversary proceeding or contested matter, however, may be an important factor in determining if the claim could or should have been effectively litigated in the earlier proceeding.").

Petitioner asserts, relying on this Court's opinion in *Computer One*, that litigation on the issue of attorney fees based on a motion or lien can have no preclusive effect on a later claim for malpractice. *Computer One* reversed a grant of summary judgment that had precluded a legal malpractice claim because of the earlier approval of an attorney's charging lien in a suit between the client and a tortfeasor to which the attorney was not a party. 2008-NMSC-038, ¶¶ 1-3. *Computer One* followed *Bennett* to prohibit using Rule 1-013(A) to preclude claims of legal malpractice after nonadversarial fee proceedings because that Rule, applicable only to "'opposing parties'" to an action, requires a formal adversarial relationship in order to give such parties fair notice of the obligation to assert all defenses

or compulsory counterclaims. *Computer One*, 2008-NMSC-038, ¶¶ 23-25. Although the *Computer One* Court reserved judgment as to whether broader concepts of res judicata would apply, it did not expressly decide that issue because the defendant law firm had conceded in the earlier fee proceeding that the plaintiff client would be able to bring a later malpractice suit. *Id.* ¶ 36 & n.3. Accordingly, *Computer One* did not determine the issue now before us, whether res judicata will bar a later claim that could have been litigated in an earlier proceeding initiated by a motion for attorney fees. *See Fernandez v. Farmers Ins. Co. of Ariz.*, 1993-NMSC-035, ¶ 15, 115 N.M. 622, 857 P.2d 22 (stating the general rule that "cases are not authority for propositions not considered" (internal quotation marks and citation omitted)).

In the Rule 1-013 analysis in *Bennett* that *Computer One* relied on, the *Bennett* majority did suggest a possible distinction between the res judicata effect of a motion for fees and that of a separate fee lawsuit, but *Bennett* cited no authority for this distinction beyond the "opposing party" wording of our compulsory counterclaim rule and did not address long-established principles of res judicata beyond the requirements of Rule 1-013. *Bennett*, 1991-NMSC-060, ¶ 10. To the extent that *Bennett* could suggest such a rigid distinction, we clarify here that the application of res judicata does not depend on whether an earlier claim for fees is initiated procedurally through a motion or as a separate lawsuit, although the type of proceeding may be a factor in determining if the subsequent claim could or should have been litigated earlier. The reasoning of *Bennett* and *Computer One* concerning Rule 1-013 does not apply equally to the general principles of res judicata at issue here because the notion of fairness is built into the doctrine of res judicata and must be independently considered in its application. Allowing the type of proceeding to be determinative would defeat the broad case-by-case analysis required to determine whether there has already been a full and fair opportunity to litigate a claim.

Petitioner does not argue that his earlier bankruptcy fee proceeding did not allow him to bring a malpractice claim, and it is clear that under federal law bankruptcy court procedures would have allowed such a claim. *See, e.g.*, *Capitol Hill Group*, 569 F.3d at 489-90 (holding that malpractice claims stemming from services provided in bankruptcy proceedings fall within the jurisdiction of the bankruptcy court); *Grausz*, 321 F.3d at 474 (holding that a claim for affirmative relief from malpractice could have been filed in bankruptcy court with an objection to a fee application); *In re Intelogic Trace, Inc.*, 200 F.3d at 389-91 (recognizing that a fee application in bankruptcy court is a contested matter to which an objection may be filed and that an affirmative malpractice claim may be filed with such an objection to initiate an adversary proceeding, and holding that bankruptcy court procedures would allow a malpractice claim to be effectively asserted).

Petitioner contends that because his bankruptcy discharge was not denied until more than two years after the proceeding to determine Respondents' fees, he was unable during the fee hearing to bring the particular malpractice claim he alleges here, the failure to list the transfer of the Monte Mac asset in his bankruptcy schedules, because he had not yet suffered injury from that omission. In New Mexico, a malpractice claim accrues when the plaintiff suffers actual injury and discovers, or through the exercise of reasonable diligence should discover, the facts essential to the claim. *Sharts v.*

Natelson, 1994-NMSC-114, ¶ 11, 118 N.M. 721, 885 P.2d 642. Although Petitioner clearly alleged malpractice in his objection to Respondents' fees, the factual nature of those allegations is distinct from the failure to list the Monte Mac asset, the claim at issue here. And to bar this malpractice claim, Petitioner must have been specifically aware of the failure to list Monte Mac in his bankruptcy schedules, must have suffered injury attributable to that failure, and must have been aware of that injury. However, the requirement that Petitioner suffered injury does not mean, as Petitioner now asserts, that he could not have brought this claim until his discharge was denied. Bankruptcy courts do not have discretion to deny discharge to a debtor unless certain rules of that court are violated, including the knowing and fraudulent failure to declare an asset. *See* 11 U.S.C. § 727(a)(4) (2012) (listing exceptions to mandatory discharge). By failing to list the transfer of the Monte Mac asset, Petitioner was exposed to the possibility that his bankruptcy discharge could be denied. This exposure was the loss of a legal right to have his debts discharged, in itself an actual injury. *See Sharts*, 1994-NMSC-114, ¶ 12 ("[W]hen malpractice results in the loss of a right, remedy, or interest, or in the imposition of a liability, there has been actual injury." (internal quotation marks and citation omitted)).

The record shows that Petitioner was aware of the sale of his interest in Monte Mac because that sale occurred only one month prior to his filing for bankruptcy. He was or should have been aware that this sale was not listed in his bankruptcy schedules because he reviewed those schedules and testified to their accuracy. He was also aware that those schedules were not accurate because he stated in his objection to Respondents' fee application, filed May 22, 2006, that he had instructed Respondents to withdraw his disclosure statement because it did not accurately depict his financial affairs. Finally, he was aware that the failure to disclose this transfer exposed him to a denial of discharge because he was questioned by creditors regarding the sale and because he alleged this denial of discharge as damages attributable to malpractice in a motion to the bankruptcy court filed before the actual denial of his discharge.

We agree with the courts below that Petitioner was aware of his claim and could and should have brought that claim in the bankruptcy proceeding. Petitioner alleged malpractice based on inaccuracies in his financial disclosures a year before the bankruptcy fee hearing. While the questioning regarding Monte Mac did take place after the fee hearing, it was only one day later and was before the entry of the final fee judgment. Even after the entry of that judgment, Petitioner had the opportunity to move for a new trial, to move to alter or amend the judgment, or to appeal. *See* Fed. R. Bankr. P. 9023 (1983) (applying Fed. R. Civ. P. 59 (1995) (allowing a motion for a new trial, Subsection (b), or the alteration or amendment of a judgment within 10 days of the entry of judgment, Subsection (e))); Fed. R. Bankr. P. 8002(a) (1997) (allowing a notice of appeal to be filed within 10 days after the entry of judgment). Petitioner's motion alleging the potential for a denial of discharge as damages from malpractice was filed over a year before the actual denial of his discharge and less than a year after the fee judgment, at which point he could still have requested postjudgment relief. *See* Fed. R. Bankr. P. 9024 (1991) (applying

Fed. R. Civ. P. 60(b) (1987) (allowing relief from final judgment due to newly discovered evidence within one year of the entry of judgment)). We therefore conclude that Petitioner had a full and fair opportunity to litigate his malpractice claim in the bankruptcy court and that res judicata applies to preclude it in this second proceeding.

IV. CONCLUSION

We affirm the grant of summary judgment to Respondents.

IT IS SO ORDERED.

CHARLES W. DANIELS, Justice

WE CONCUR:

BARBARA J. VIGIL, Chief Justice

PETRA JIMENEZ MAES, Justice

RICHARD C. BOSSON, Justice

LINDA M. VANZI, Judge

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMSC-003

Filing Date: December 15, 2014

Docket No. 34,583

IN THE MATTER OF MAHDJID B. and ALIAH B., children,

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

Petitioner-Petitioner,

v.

DJAMILA B.,

Respondent-Respondent,

and

ABDEL M. B.,

Intervenor.

New Mexico Children, Youth and Families Department
Charles E. Neelley, Chief Children's Court Attorney
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for Petitioner

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OPINION

CHÁVEZ, Justice.

Respondent Djamila B. (Guardian) was appointed by a family court as kinship guardian to Mahdjid and Aliah (Children). Petitioner Children, Youth and Families Department (CYFD) brought abuse and neglect proceedings in children's court against Guardian and Children's biological parents pursuant to the Abuse and Neglect Act (ANA), NMSA 1978, §§ 32A-4-1 to -34 (1993, as amended through 2009). Prior to seeking adoption for Children, CYFD filed a motion to dismiss Guardian from the abuse and neglect proceedings, arguing that Guardian was not an appropriate party to a termination of parental rights hearing because Guardian is not Children's biological parent. The children's court granted CYFD's motion to dismiss Guardian without revoking the kinship guardianship in accordance with the revocation procedures set forth under the Kinship Guardianship Act (KGA), NMSA 1978, §§ 40-10B-1 to -15 (2001). The Court of Appeals reversed the children's court ruling, holding that Guardian was a necessary and indispensable party to the abuse and neglect proceedings. *State ex rel. Children, Youth & Families Dep't v. Djamila B.* (*In re Mahdjid B.*), 2014-NMCA-045, ¶ 20, 322 P.3d 444. This Court granted certiorari review. *State v. Djamila B.*, 2014-NMCERT-004.

We affirm the Court of Appeals on different grounds. We hold that while kinship guardians are not necessary and indispensable parties to abuse and neglect proceedings, kinship guardians, nonetheless, have a statutory right to a revocation hearing in accordance with the revocation procedures of the KGA prior to being dismissed from abuse and neglect proceedings. Such procedures require an evidentiary hearing and compliance with the Rules of Evidence. There is no need for separate filings and hearings in the original family court that appointed the kinship guardian because the children's court presiding over the abuse and neglect proceeding has jurisdiction over the kinship guardian and the subject matter of the case to make decisions that are ultimately in the best interests of the children.

Children's biological father (Father) intervened in this appeal after this Court granted certiorari. Father argues that his due process rights were violated because he was not given a fair opportunity to voice concerns in the dismissal of Guardian from the abuse and neglect proceedings. Although we briefly discuss Father's claim, we do not decide this issue because it is unnecessary in view of our holding on the primary issue. If CYFD continues to believe that a revocation hearing is warranted, Father will have the opportunity to participate in Guardian's revocation hearing.

I. BACKGROUND

Guardian, who is Children's paternal aunt, became Children's kinship guardian pursuant to the KGA in May 2007 through a separate proceeding in family court. Children lived with Guardian from that time until June 2010, when Children were placed in CYFD's custody.

In June 2010, CYFD filed an abuse and neglect petition in children's court against Children's mother, Father, and Guardian pursuant to the ANA. On June 30, 2010, the children's court issued a notice of custody hearing set for July 8, 2010. The children's court ordered a treatment plan requiring

Guardian to submit to psychological and/or psychiatric evaluations, domestic violence and substance abuse assessments, and random drug testing as directed by CYFD. CYFD's initial assessment plan, which was attached to the children's court order, proposed permanent reunification of Children with Guardian by July 2, 2010. Reunification with Guardian remained the goal of the proceedings in orders following the first judicial review on November 2, 2010, the second judicial review on February 3, 2011,and two permanency hearings on May 10, 2011 and August 9, 2011. On August 9, 2011, the children's court adopted CYFD's proposed reunification plan pursuant to Sections 32A-4-24 and 32A-4-25.1, and Children were scheduled for a trial home visit to transition back to living with Guardian beginning on August 12, 2011 as Guardian continued with her treatment plan.

On February 16, 2012, CYFD filed a motion to dismiss Guardian from the abuse and neglect proceedings. At a permanency hearing on February 28, 2012, CYFD changed its permanency plan for Children from reunification with Guardian to adoption. CYFD's motion to dismiss also announced its intent to pursue termination of the parental rights of Children's biological parents. CYFD argued, in part, that it was "filing a motion for Termination of Parental Rights and [Guardian] does not have parental rights to terminate and will not benefit from following a treatment plan and whether she follows a treatment plan does not affect final permanency for the children." Furthermore, without reference to any external authority that would support the requirement of "[p]er CYFD policy," CYFD asserted that Guardian was not eligible either to adopt Children or to be a foster placement for them. In an order filed on April 17, 2012, the children's court adopted CYFD's proposed changes to the permanency plan. Guardian timely opposed CYFD's motion to dismiss her from the case.

On May 8, 2012, the children's court held an evidentiary hearing on CYFD's motion to dismiss. Prior to commencing the hearing, the children's court addressed preliminary matters with the parties and ruled that "[t]he formal rules of evidence [would] not apply" during the hearing. The children's court explained that the formal rules of evidence do not apply during abuse and neglect proceedings except for adjudicatory or termination of parental rights hearings. The children's court also advised the parties that it would instead "weigh[] and balance[]" all of the evidence presented to "see whether the motion [to dismiss] should or should not be granted."

After hearing all of the evidence presented during the May 8, 2012 hearing, the children's court granted CYFD's motion to dismiss. The children's court briefly addressed the issue of the ongoing kinship guardianship, but it ultimately ruled that the children's court lacked jurisdiction to revoke a kinship guardianship appointed by a family court. The children's court also ruled that a kinship guardianship is "always a temporary status," and that Guardian was not Children's legal parent. Specifically, the children's court expressed its opinion that the appointment of a kinship guardian does not divest the rights of the biological parents, and thus it cannot vest Guardian with full parental rights. The children's court ultimately ruled that CYFD had custody of Children, and because Guardian was not a legal parent, CYFD had complete discretion regarding Children's placement.

On July 2, 2012, the children's court granted CYFD's motion to dismiss Guardian

in an order devoid of findings of fact or conclusions of law. Guardian timely appealed the children's court order dismissing her from the abuse and neglect proceedings. In her docketing statement, Guardian argued, inter alia, that dismissal from the abuse and neglect proceedings was improper until her kinship guardianship rights were revoked pursuant to the KGA.

The Court of Appeals held that "[t]he [children's] court erred in dismissing Guardian from the proceedings while she remained the kinship guardian of Children because she was a necessary and indispensable party to the pending case." *Djamila B.*, 2014-NMCA-045, ¶ 20. The Court of Appeals reversed the children's court order dismissing Guardian and "all subsequent orders entered in the case in proceedings that took place without notice first having been provided to Guardian" and remanded the case "to the district court to reinstate Guardian as a party respondent in the matter and for further proceedings in accordance with law." *Id.*

CYFD appealed to this Court, and we granted certiorari review. 2014-NMCERT-004. Father intervened in this appeal after this Court granted certiorari review.

II. DISCUSSION

A. Kinship guardians shall not be involuntarily dismissed from abuse and neglect proceedings unless the kinship guardianship is first properly revoked in accordance with the revocation procedures of the KGA and the New Mexico Rules of Evidence

CYFD argues that the Court of Appeals erred in concluding that Guardian was a necessary and indispensable party to the abuse and neglect proceedings, and therefore she could not be dismissed from the abuse and neglect proceedings until her kinship guardianship was first properly revoked pursuant to the KGA. Resolving this issue requires a survey of the interrelationship between two groups of statutes, the ANA and the KGA. "Statutory interpretation is a question of law, which we review de novo." *Bank of New York v. Romero*, 2014-NMSC-007, ¶ 40, 320 P.3d 1.

1. *The Legislature enacted the ANA and the KGA with the intent to preserve family unity*

a. The ANA

The New Mexico Children's Code, NMSA 1978, §§ 32A-1-1 to -24-5 (1993, as amended through 2009), incorporates the ANA and qualifies ANA policy and procedure. The central purpose of the Children's Code is to protect the health and safety of children covered by its provisions while "preserv[ing] the unity of the family whenever possible." Section 32A-1-3(A). To achieve these goals, the ANA "details the procedures and timelines the State must follow when it invokes the jurisdiction of the district court to take physical and/or legal custody of a child whom it alleges to be abandoned, neglected, or abused." *State ex rel. Children, Youth & Families Dep't v. Maria C.* (*In re Rudolfo L.*), 2004-NMCA-083, ¶ 18, 136 N.M. 53, 94 P.3d 796. The ANA procedures serve the express purpose of the Children's Code by "assur[ing] that 'the parties [receive] a fair hearing and their constitutional and other legal rights are recognized and enforced.' " *Id.* ¶ 23 (second alteration in original) (quoting Section 32A-1-3(B)). Accordingly, the ANA guarantees the child's

parent, guardian, or custodian notice and participation in proceedings prior to the termination of parental rights. Sections 32A-18 to -20, -22, -25, -25.1.

An abuse and neglect case begins when CYFD files a petition alleging abuse or neglect. *See* § 32A-4-7(D) ("Reasonable efforts shall be made to prevent or eliminate the need for removing the child from the child's home, with the paramount concern being the child's health and safety. In all cases when a child is taken into custody, the child shall be released to the child's parent, guardian or custodian, *unless [CYFD] files a petition within two days from the date that the child was taken into custody.*" (emphasis added)). Upon the filing of a petition, "counsel shall be appointed for the parent, guardian or custodian of the child." Section 32A-4-10(B). Within ten days of filing, the children's court holds a custody hearing to determine whether the child should remain in CYFD custody or whether CYFD should return legal custody to the child's parent, guardian, or custodian pending an adjudicatory hearing. Section 32A-4-18(A), (C). The children's court shall return legal custody to the child's parent, guardian, or custodian unless it finds probable cause for abuse or neglect. Section 32A-4-18(C).

An adjudicatory hearing is held within sixty days from when CYFD serves the abuse and neglect petition. Section 32A-4-19(A). The adjudicatory hearing focuses on whether the child was abused or neglected as defined under the ANA. Sections 32A-4-2, -20(H). The children's court determines whether the child was abused or neglected based on a valid admission from the parties or on clear and convincing evidence. *Id.* If the children's court finds abuse or neglect, the court may address disposition immediately or hold a dispositional hearing within thirty days after the adjudicatory hearing where it hears evidence and determines the best interests of the child as to the child's custody. Section 32A-4-20(H), -22(A). Additionally, if the children's court finds the child to be abused and/or neglected, "the court shall also order [CYFD] to implement and the child's parent, *guardian* or custodian to cooperate with any treatment plan approved by the court." Section 32A-4-22(C) (emphasis added). Within sixty days of disposition, the children's court holds an initial judicial review hearing to determine the effectiveness of the treatment plan. Section 32A-4-25(A).

Within six months of the initial judicial review of the dispositional order, the children's court holds an initial permanency hearing to determine whether the child should be returned home to the child's parent, guardian, or custodian or remain in CYFD's custody. Section 32A-4-25.1(A), (B).

> At the conclusion of the permanency hearing, the [children's] court shall order one of the following permanency plans for the child:
>
> (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 [CYFD] with the child placed in the home of a fit and willing relative; or

> (5) placement in the legal custody of [CYFD] 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).

"If the court adopts a permanency plan of reunification, the court shall adopt a plan for transitioning the child home and schedule a permanency review hearing within three months" to ensure that the child's parent, guardian, or custodian has made good progress. Section 32A-4-25.1(C). "At the permanency review hearing, all parties and the child's guardian ad litem or attorney shall have the opportunity to present evidence and cross-examine witnesses." Section 32A-4-25.1(E). Notably, the Rules of Evidence do not apply in permanency review hearings. Section 32A-4-25.1(I); *see also* Rule 11-1101(D) NMRA ("These rules—except for those on privilege—do not apply to the following: . . . (3)(f) dispositional hearings in children's court proceedings, and (g) the following abuse and neglect proceedings: (i) issuing an ex parte custody order; (ii) custody hearings; (iii) permanency hearings; and (iv) judicial review proceedings."). If the child is returned home, the case can either be dismissed or the children's court can order continuing supervision. Section 32A-4-25.1(E)(2)-(3). At the permanency review hearing, if the children's court finds that reunification is still not possible, it will initiate proceedings for a permanent guardianship or termination of parental rights (adoption). *See* § 32A-4-31 (permanent guardianship); § 32A-4-28 (termination of parental rights).

Terminating parents' right to reunite with their child, thereby extinguishing the family unit, is a mechanism of last resort under the ANA. The ANA provides that a children's court shall terminate parental rights only when:

> (1) there has been an abandonment of the child by [the child's] parents;
>
> (2) the child has been a neglected or abused child as defined in the [ANA] and the court finds that the conditions and causes of the neglect and abuse are unlikely to change in the foreseeable future despite reasonable efforts by [CYFD] or other appropriate agency to assist the parent in adjusting the conditions that render the parent unable to properly care for the child. . . . [; or]
>
> (3) the child has been placed in the care of others, including care by other relatives, either by a court order or otherwise and the following conditions exist . . . .

Section 32A-4-28(B). CYFD or any of the other parties to the proceeding may file a motion to terminate parental rights at any time during abuse and neglect proceedings. Section 32A-4-29(A). However, "[t]he grounds for any attempted termination shall be proved by clear and convincing evidence." Section 32A-4-29(I). Unlike the ANA provisions for initial permanency reviews, adjudicatory hearings, or dispositional hearings prior to termination, the procedures for the termination of parental rights fail to mention guardians.

In summary, the ANA limits the procedures and time frame under which parents or custodians and, by extension,

guardians can rehabilitate themselves and reunite with their children in line with the overall purpose of the Children's Code. *Maria C.*, 2004-NMCA-083, ¶¶ 18-22. While the ANA serves to protect children in New Mexico against abuse and neglect, preserving the family relationship between the child and the child's parent, guardian, or custodian remains the ultimate goal of ANA proceedings until the children's court finds that reunification is simply not possible.

b. The KGA

Similar to the overall purpose of the Children's Code, the KGA recognizes New Mexico policy that the "interests of children are best served when they are raised by their parents." Section 40-10B-2(A). However, when neither parent is able or willing to raise their child, the Legislature enacted the KGA in 2001 to establish procedures whereby "a child should be raised by family members or kinship caregivers." *Id.* The KGA applies to cases where a child has been left by the child's parents "in the care of another for ninety consecutive days [or more] and that arrangement leaves the child . . . without appropriate care, guidance or supervision." Section 40-10B-2(B).

Ultimately, "[t]he KGA establishes procedures and substantive standards for effecting legal relationships between children and adult caretakers who have assumed the day-to-day responsibilities of caring for a child." *Debbie L. v. Galadriel L. (In re Guardianship of Victoria R.)*, 2009-NMCA-007, ¶ 4, 145 N.M. 500, 201 P.3d 169; *see also* § 40-10B-2(C) ("The purposes of the Kinship Guardianship Act are to: (1) establish procedures to effect a legal relationship between a child and a kinship caregiver when the child is not residing with either parent; and (2) provide a child with a stable and consistent relationship with a kinship caregiver that will enable the child to develop physically, mentally and emotionally to the maximum extent possible when the child's parents are not willing or able to do so."). Kinship guardians possess all of "the legal rights and duties of a parent except the right to consent to adoption of the child and except for parental rights and duties that the court orders retained by a parent." Section 40-10B-13(A); *see also* § 40-10B-3(A) ("As used in the Kinship Guardianship Act[,] . . . 'caregiver' means an adult, who is not a parent of a child, with whom a child resides and who provides that child with the care, maintenance and supervision consistent with the duties and responsibilities of a parent of the child.").

A petition for kinship guardianship may be filed by a "kinship caregiver," Section 40-10B-5(A)(1), a designation that includes three categories of caregivers: (1) an adult relative, godparent, or member of the child's tribe or clan, Section 40-10B-3(A), (C); (2) "an adult with whom the child has a significant bond," *id.*; and (3) a guardian appointed directly by a court under the KGA, Sections 40-10B-7(A), -8(A). "Upon hearing, if the court finds that a qualified person seeks appointment, the venue is proper, the required notices have been given, the requirements . . . of this section have been proved and the best interests of the minor will be served by the requested appointment, it shall make the appointment." Section 40-10B-8(A). A kinship guardian "has authority to make all decisions regarding visitation between a parent and the child" unless otherwise ordered by the court. Section 40-10B-13(B).

A motion to revoke the kinship guardianship may be filed by any person. Section 40-10B-12(A). Because of the rights

and interests involved, our Rules of Evidence apply in these kinship guardianship revocation proceedings. *See* Rule 11-101 NMRA (governing the scope of our Rules of Evidence); Rule 11-102 NMRA ("These rules should be construed so as to administer every proceeding fairly . . . and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."); Rule 11-1101 (governing the applicability of our Rules of Evidence and listing the specific exceptions to their applicability; notably, KGA revocation hearings are not a listed exception). To revoke the kinship guardianship, the moving party has the burden of showing that "a preponderance of the evidence proves a change in circumstances and the revocation is in the best interests of the child." Section 40-10B-12(B). A preponderance of the evidence makes it easier to return a child to his or her biological parents when the child's biological parents are able and willing to care for the child. Through this lower burden of proof, the KGA provides the proper statutory mechanism for preserving the unity of family for New Mexico children without severely disrupting the important role of a parent for the child, regardless of whether that parental role is fulfilled by the child's biological parent or a kinship guardian. *See* § 40-10B-2(A) ("[W]henever possible, a child should be raised by family members or kinship caregivers.").

2. *The Legislature intended that kinship guardians participate in all abuse and neglect proceedings until the kinship guardianship is properly revoked in accordance with the revocation procedures of the KGA*

CYFD argues that the omission of guardians from the statutory provisions of the ANA concerning parental rights termination procedures precludes Guardian's ability to further participate in the abuse and neglect proceedings because Guardian lacks any parental rights to divest. However, the omission of the term "guardian" from the parental rights termination procedures in the ANA does not determine whether Guardian has a statutory right to participate in all abuse and neglect proceedings until her kinship guardianship is properly revoked. The Legislature enacted the Children's Code and the KGA to create mechanisms for elevating guardians to the status of a child's biological parents when the biological parents are unwilling or unable to properly care for the child. These statutory mechanisms support the overall purpose of the Children's Code and the KGA concerning family unity. The KGA bestows parental rights on kinship guardians, which must be properly revoked prior to involuntarily dismissing kinship guardians from abuse and neglect proceedings or before appointing a permanent guardian other than the kinship guardian. *See* §§ 32A-4-25.1(B)(3), -31, -32. We hold that the Legislature intended that kinship guardians participate in all abuse and neglect proceedings until the kinship guardianship is first properly revoked in accordance with the revocation procedures of the KGA and our Rules of Evidence.

"Our principal goal in interpreting statutes is to give effect to the Legislature's intent." *Griego v. Oliver*, 2014-NMSC-003, ¶ 20, 316 P.3d 865. In interpreting statutory language, "[w]e look first to the plain language of the statute." *Freedom C. v. Brian D. (In re Guardianship of Patrick D.)*, 2012-NMSC-017, ¶ 13, 280 P.3d 909 (alteration in original) (internal quotation marks and citation omitted). However, "we look not only to the language used in the statute, but also to the purpose to be achieved and the wrong to be

remedied." *Jolley v. Associated Elec. & Gas Ins. Servs. Ltd.*, 2010-NMSC-029, ¶ 8, 148 N.M. 436, 237 P.3d 738 (internal quotation marks and citation omitted). We analyze a "statute's function within a comprehensive legislative scheme." *State v. Rivera*, 2004-NMSC-001, ¶ 13, 134 N.M. 768, 82 P.3d 939.

The ANA, "as part of the Children's Code, . . . must be read as an entirety and each section interpreted so as to correlate as faultlessly as possible with all other sections." *State ex rel. Children, Youth & Families Dep't v. Benjamin O. (In re Lakota C.)*, 2007-NMCA-070, ¶ 34, 141 N.M. 692, 160 P.3d 601 (internal quotation marks and citation omitted). "Additionally, the provisions of the Children's Code should be interpreted in such a manner as to effectuate its purposes, which include preservation of family unity when possible." *Id.* (internal quotation marks and citations omitted). " 'In other words, a statutory subsection may not be considered in a vacuum, but must be considered in reference to the statute as a whole and in reference to statutes dealing with the same general subject matter.' " *State ex rel. Children, Youth & Families Dep't v. Maurice H. (In re Grace H.)*, 2014-NMSC-034, ¶ 34, 335 P.3d 746 (quoting *Rivera*, 2004-NMSC-001, ¶ 13 (internal quotation marks and citation omitted)). "Whenever possible, we must read different legislative enactments as harmonious instead of as contradicting one another." *Smith*, 2004-NMSC-032, ¶ 10 (internal quotation marks and citation omitted).

The harmonious common purpose of the ANA and the KGA is to preserve family unity whenever possible. In line with this purpose, the ANA and the KGA both elevate guardians to a level of responsibility synonymous with that of parents. The KGA, enacted to provide a mechanism for family members to legally step into the shoes of parents when a child's biological parents are unable or unwilling to care for that child, grants kinship guardians the same legal rights and responsibilities that a biological parent would have.

This Court rejects "a formalistic and mechanical statutory construction when the results would be absurd, unreasonable, or contrary to the spirit of the statute." *Smith*, 2004-NMSC-032, ¶ 10. Each provision defining the harms and neglect within the ANA includes the term "guardian" in addition to the terms "parent" and "custodian" as persons who are responsible for those harms. Section 32A-4-2(B)(1)-(5), (E)(1)-(4). Additionally, the term "guardian" appears in numerous other provisions of the ANA. *See, e.g.*, § 32A-4-2 (defining abuse and neglect by parties including guardians); § 32A-4-6(A) (describing conditions under which a child may be taken into custody, including when guardians commit certain acts); § 32A-4-7(A) (listing guardians as persons to whom CYFD may release children in CYFD's custody); § 32A-4-22(C) (requiring guardians to comply with court-ordered treatment plans implemented by CYFD); § 32A-4-25(H)(7) (empowering a court during periodic judicial review hearings to issue an order to show cause or to order a hearing on the merits of a motion to terminate parental rights if a parent or guardian has not followed their treatment plan).

Pursuant to the ANA, a kinship guardian can be accused of abuse and neglect, § 32A-4-6(A), summoned to participate in all abuse and neglect proceedings, §§ 32A-4-10(B), -18(B)-(C), and ordered to follow a court-ordered permanency and treatment plan implemented by CYFD, § 32A-4-22(C). Prior to the termination hearing, CYFD and the

children's court treated both Guardian and Children's biological parents alike. Guardian was the only party who made consistent efforts to comply with her court-ordered treatment plan. Most importantly, Guardian was Children's only parental figure for nearly three years between May 2007 and June 2010. Nonetheless, CYFD improperly maintains a rigid textual interpretation of the ANA precluding Guardian from further participating in the abuse and neglect proceedings. Precluding kinship guardians from participating in abuse and neglect termination of parental rights hearings, while ordering them to comply with CYFD's permanency plans for reunification with children, leads to a result that is either "absurd, unreasonable, or contrary to the spirit of the statute[s]." *State v. Smith*, 2004-NMSC-032, ¶ 10, 136 N.M. 372, 98 P.3d 1022; *see also Maria C.*, 2004-NMCA-083, ¶ 25 (recognizing that the process for terminating parental rights is a "continuum of proceedings" beginning with the filing of the neglect or abuse petition).

We recognize that the Legislature did not expressly include the term "guardian" within the ANA provisions concerning the termination of parental rights. However, the Legislature's omission is not dispositive of whether kinship guardians have a statutory right to a revocation hearing prior to being involuntarily dismissed from abuse and neglect proceedings. "The legislature is presumed to be aware of existing statutes when it enacts legislation." *State v. Fairbanks*, 2004-NMCA-005, ¶ 9, 134 N.M. 783, 82 P.3d 954. Accordingly, the Legislature is presumed to have been aware of both the ANA and the KGA. Because the Legislature intended that the ANA and the KGA work in harmony, the revocation procedures of the KGA naturally complement the ANA provisions concerning termination of parental rights. By enacting compatible legislation, the Legislature intended that courts presiding over abuse and neglect proceedings first hold a revocation hearing in accordance with KGA revocation procedures and our Rules of Evidence prior to involuntarily dismissing a kinship guardian from abuse and neglect proceedings.

This interpretation allows children's courts to ensure that the ANA is applied in a manner which adheres to the spirit of the Children's Code and the KGA. Although the ANA fails to explicitly include the term "guardian" within its statutory procedures for terminating parental rights, kinship guardians nonetheless possess rights equivalent to the parental rights being terminated by the children's court through abuse and neglect proceedings.

Cases that come under the ANA and the KGA often involve unconventional family structures and unconventional facts. *See In re Guardianship of Patrick D.*, 2012-NMSC-017, ¶¶ 1, 29 (court found both parents unfit to raise child; maternal grandparents granted guardianship); *In re Guardianship of Victoria R.*, 2009-NMCA-007, ¶¶ 2, 12 (affirming the district court's award of guardianship to adult caregivers with whom the child formed a bond where father had limited contact with child, mother had emotional problems, and mother informally left the eighteen-month-old child with the adult caregivers, who raised the child for several years). The ANA and the KGA need to work in harmony to preserve family unity when children have unconventional family structures involving both biological parents and kinship guardians. It would undermine the spirit of both acts to allow a children's court to involuntarily dismiss kinship guardians from abuse and neglect proceedings merely based on a strict interpretation of the ANA focused on the

omission of "guardian" from the ANA provisions concerning termination of parental rights. Such a result would be antithetical to the Legislature's intent in enacting both statutes.

Consistent with legislative intent, we hold that kinship guardianships must be revoked in accordance with the revocation procedures of the KGA and our Rules of Evidence before involuntarily dismissing a kinship guardian from abuse and neglect proceedings. The KGA requires the party moving for revocation to prove that "a preponderance of the evidence proves a change in circumstances and the revocation is in the best interests of the child." Section 40-10B-12(B). If the court finds that the burden of proof has been met, the court shall grant the motion to revoke the guardianship and dismiss the kinship guardian from the abuse and neglect proceedings. Section 40-10B-12. The court shall also "(1) adopt a transition plan proposed by a party or the guardian ad litem; (2) propose and adopt its own transition plan; or (3) order the parties to develop a transition plan by consensus if they will agree to do so." Section 40-10B-12(B).

3. *Family courts that appoint kinship guardians have concurrent jurisdiction with the children's court in overseeing a kinship guardianship revocation hearing during abuse and neglect proceedings*

The KGA provides that "[t]he court appointing a guardian pursuant to the [KGA] retains continuing jurisdiction of the matter." Section 40-10B-14. The children's court in this case interpreted continuing jurisdiction to mean exclusive jurisdiction. Accordingly, the children's court ruled that it lacked jurisdiction to revoke the kinship guardianship pursuant to Section 40-10B-14 of the KGA. We disagree. Such an interpretation is contrary to the plain text of the KGA and contrary to the functional purposes of the revocation provisions of both the KGA and abuse and neglect proceedings.

First, although the KGA provides for "continuing" jurisdiction, it does not grant exclusive jurisdiction to district courts that appoint kinship guardianships. *See* § 40-10B-4 ("The district court has jurisdiction of proceedings pursuant to the [KGA]. . . . Proceedings pursuant to the [KGA] shall be in the district court of the county of the child's legal residence or the county where the child resides, if different from the county of legal residence."); *see also* § 40-10B-14 ("The court appointing a guardian pursuant to the [KGA] retains continuing jurisdiction of the matter."). The continuing jurisdiction provision of the KGA differs from our child custody statutes, which explicitly necessitate "*exclusive*, continuing jurisdiction." NMSA 1978, § 40-10A-202 (2001) (emphasis added); *see also Elder v. Park*, 1986-NMCA-034, ¶ 17, 104 N.M. 163, 717 P.2d 1132 (recognizing that the primary purpose of the New Mexico Child Custody Jurisdiction Act, NMSA 1978, §§ 40-10-1 to -24 (1981, as amended through 1989), "is to avoid jurisdictional competition and conflict in making custody awards" and facilitate the "orderly resolution of child custody disputes between parents located in different states" (repealed by 2001 Laws, ch. 114, § 404 and recodified in the Uniform Child-Custody Jurisdiction and Enforcement Act, NMSA 1978, §§ 40-10A-101 to -403 (2001))). A children's court holding a kinship guardianship revocation hearing during abuse and neglect proceedings does not give rise to concerns

of competing judicial decrees. In situations such as this case, children's courts have jurisdiction over kinship guardians during abuse and neglect proceedings. The children's court is in a better position than the family court to evaluate the "change in circumstances and [whether] the revocation is in the best interests of the child." Section 40-10B-12(B).

Second, the Legislature enacted both the KGA and the Children's Code with the purpose of preserving family unity. In revoking a kinship guardianship, both family courts and children's courts have concurrent objectives in trying to preserve notions of family unity while effecting the child's best interests.

Consistent with legislative intent, we hold that family courts which appoint kinship guardianships have continuing concurrent jurisdiction over the kinship guardianship, with children's courts presiding over abuse and neglect proceedings. CYFD may petition to revoke the rights of a kinship guardian within those abuse and neglect proceedings. Our holding bridges the divide between the KGA and the ANA and provides courts with symbiotic authority to make rulings that are ultimately in the child's best interests. After receiving a proper motion to revoke a kinship guardianship during abuse and neglect proceedings, the children's court may conduct a full evidentiary hearing in accordance with our Rules of Evidence and act according to the revocation procedures of the KGA to revoke the kinship guardianship if the burden of proof has been met. Once the kinship guardianship has been properly revoked, the kinship guardian shall be dismissed from further participation in the abuse and neglect proceedings.

4. ***Although we hold that kinship guardians have a statutory right to a revocation hearing prior to being dismissed from abuse and neglect proceedings, kinship guardians are not necessary and indispensable parties pursuant to Rule 1-019 NMRA***

The Court of Appeals held that the children's court erred in dismissing Guardian because she was a necessary and indispensable party to the abuse and neglect proceedings until her kinship guardianship was revoked pursuant to the KGA. *Djamila B.*, 2014-NMCA-045, ¶ 20. The Court of Appeals reasoned that the KGA conveyed to Guardian the "legal rights and duties of a parent except the right to consent to adoption" or the "rights and duties that the court orders retained by a parent." *Id.* ¶ 13 (internal quotation marks citation omitted).

> A kinship guardian is therefore entitled to the statutory benefits of the [KGA], including the right that [r]easonable efforts shall be made to preserve and reunify the family, with the paramount concern being the child's health and safety. . . . [T]he kinship guardian has the same right as a parent to be a party in a proceeding to terminate parental rights and to advocate or object to the termination of parental rights based on the best interest of the child until the kinship guardianship is properly terminated.

Id. ¶ 13 (second alteration in original) (internal quotation marks and citation omitted).

The legal concept of a necessary and indispensable party is set forth in Rule

1-019(B). However, Rule 1-019 is a rule of civil procedure that does not govern children's court cases concerning the Children's Code. *See* Rule 10-101(A)(1)(c) NMRA ("[T]he Children's Court Rules [of Procedure] govern procedure in the children's courts of New Mexico in all matters involving children alleged by the state . . . to be abused or neglected as defined in the [ANA] including proceedings to terminate parental rights which are filed pursuant to the [ANA]."). Rule 10-121(B)(2) NMRA provides that a guardian must be a party to the abuse and neglect proceedings. "In proceedings on petitions alleging neglect or abuse or a family in need of court-ordered services, the parties to the action are: . . . (2) a parent, guardian or custodian who has allegedly neglected or abused a child or is in need of court-ordered services." Rule 10-121(B). This rule does not state that the named parties are necessary and indispensable, and instead unambiguously directs that a guardian must be a party to the action.

This Court agrees with the outcome reached by the Court of Appeals on different grounds. Kinship guardians do have a statutory right to a revocation hearing pursuant to the KGA prior to being involuntarily dismissed from abuse and neglect proceedings. However, we hold that kinship guardians are not necessary and indispensable parties to ANA proceedings as defined by Rule 1-019. We clarify the holding of the Court of Appeals on this ground.

B. Father's due process rights were not violated during the hearings on the motion to dismiss Guardian from the abuse and neglect proceedings

Father filed a motion to intervene in this appeal after this Court granted certiorari. In his briefing, Father raised issues of procedural due process, arguing that he was not given a fair opportunity to voice concerns in the dismissal of Guardian from the abuse and neglect proceedings. Specifically, Father asks this Court to hold that "a natural parent's expressed wish for family reunification via the auspices of placement with a relative must be taken into account prior to dismissal of the relative from abuse and neglect proceedings." Father further argues that his fundamental liberty interests based in the Fourteenth Amendment allow him to influence placement decisions for Children. CYFD argues that Father's claim was not properly preserved in the district court and cannot be raised for the first time on appeal. *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 usually review denial of due process rights de novo. *State ex rel. Children, Youth & Families Dep't v. Pamela R.D.G.* (*In re Pamela A.G.*), 2006-NMSC-019, ¶ 10, 139 N.M. 459, 134 P.3d 746. However, we do not issue a holding on this question because it is unnecessary due to our holding that Guardian is entitled to a revocation hearing prior to dismissal from the abuse and neglect proceedings.

Father had various opportunities to meaningfully participate in the proceedings to dismiss Guardian from the abuse and neglect proceedings. At the February 28, 2012 hearing on permanency that resulted in the children's court's approval of a plan of adoption and that first considered the motion to dismiss Guardian, Father's counsel and Father were present. Father's attorney was excused from a subsequent hearing on the motion to dismiss on March 27, 2012 to work on other pleadings because Father would remain a party to the

abuse and neglect proceedings, regardless of the outcome of the hearing on the motion to dismiss Guardian. Father and his counsel both attended but did not participate in the May 8, 2012 evidentiary hearing on the motion to dismiss Guardian from the abuse and neglect proceedings, and again they stated no position on the motion to dismiss. Finally, Father did not intervene in the Court of Appeals action that preceded this appeal. As a result, CYFD argues that this Court lacks jurisdiction to consider the issue. *See* NMSA 1978, § 34-5-14 (1972) (providing that this Court has jurisdiction over original writs, decisions of the Court of Appeals, and actions certified to this Court by the Court of Appeals).

The circumstances surrounding Father's lack of participation in Guardian's dismissal and this late intervention raise troubling questions. However, all of these questions are irrelevant given our holding that Guardian is entitled to a revocation hearing in accordance with the KGA and our Rules of Evidence prior to being involuntarily dismissed from the abuse and neglect proceedings. Because Father's rights had not been terminated as of the time of this appeal, he will have an opportunity to participate in any proceeding initiated to revoke Guardian's kinship guardianship status if he so chooses.

III. CONCLUSION

We reverse the children's court ruling to dismiss Guardian as contrary to law. We affirm the Court of Appeals on different grounds and hold that while kinship guardians are not necessary and indispensable parties to abuse and neglect proceedings, a kinship guardian is nonetheless entitled to a revocation hearing in accordance with the KGA and our Rules of Evidence prior to dismissal from abuse and neglect proceedings. We remand this case to the children's court to conduct a revocation hearing if CYFD continues to believe that such a hearing is warranted.

IT IS SO ORDERED.

EDWARD L. CHÁVEZ, Justice

WE CONCUR:

BARBARA J. VIGIL, Chief Justice

PETRA JIMENEZ MAES, Justice

RICHARD C. BOSSON, Justice

CHARLES W. DANIELS, Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMSC-004

Filing Date: February 20, 2015

Docket No. 33,632

THE FIRST BAPTIST CHURCH OF ROSWELL, THE HISTORICAL SOCIETY FOR SOUTHEAST NEW MEXICO, INC., and THE ROSWELL WOMAN'S CLUB, INC., individually and on behalf of a class of similarly situated persons and entities,

Plaintiffs-Petitioners,

v.

YATES PETROLEUM CORP.,
a New Mexico corporation,

Defendant-Respondent.

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OPINION

VIGIL, Chief Justice.

The opinion filed on September 15, 2014, is withdrawn, and the following is substituted for it. Defendant's motion for rehearing is denied.

This case presents the issue of whether payees who are entitled to interest on suspended oil and gas production proceed payments can contract away their statutorily mandated interest payments. Defendant Yates Petroleum Company (Yates) argues that Petitioners are not entitled to interest on the funds pursuant to a provision in Yates' standard form division order and marketing agreement (form division order), which was signed by each Petitioner. According to Yates, its form division order allows it to withhold payment of oil and gas royalties pending the resolution of title issues, and when it eventually disburses royalties, to pay the proceeds without interest. The district court awarded interest payments from Yates to Petitioners on the basis that NMSA 1978, Section 70-10-4 (1991) mandates that payees be paid interest on funds to which they are entitled. The district court found that this provision of Yates' form division order was unenforceable because it contravened Section 70-10-4, and therefore Yates owed the interest to Petitioners. Yates appealed this decision and the Court of Appeals reversed, holding that the parties could contract around the provisions of the statute. *First Baptist Church of Roswell v. Yates Petroleum Corp.*, 2012-NMCA-064, ¶ 23, 281 P.3d 1235. We reverse the Court of Appeals and affirm the district court's ruling.

I. BACKGROUND

Petitioners and the class members on behalf of whom they sued each own interests under oil and gas leases located in the State of New Mexico on which Yates paid initial production revenues. Yates is the payor on the production proceeds from these leases. When these wells began to produce, Yates had proceeds to distribute to the interest owners. Yates sent form division orders to each Petitioner for signature, which required

Petitioners to satisfy certain title requirements before they would be paid their share of the proceeds from the well. The form division order provided that in the event that a Petitioner failed to prove marketable title, "[Yates] is authorized to withhold payments without payment of interest until the claim is settled." In late May and early June of 2003, Petitioners executed and delivered the division orders to Yates. Approximately three years later, Yates sent the initial payments to each Petitioner without interest.

Petitioners demanded that Yates pay them interest on the payments that had been held in suspense accounts beyond the six month statutory deadline set forth in Section 70-10-3 of the Oil and Gas Proceeds Payments Act (the Act), NMSA 1978, §§ 70-10-1 to -6 (1985, as amended through 1991). The district court found that the deadline by which Yates should have paid Petitioners under the statute was March 2003, and that because Yates failed to make payments by that deadline, it was required to hold Petitioners' payments in a suspense account. While Yates did comply with the Act by placing the payments owed in suspense accounts until Petitioners returned the signed division orders and satisfied title requirements, it refused to pay interest on said amounts when it finally disbursed the funds. The district court found that it was standard procedure for Yates to withhold funds held in suspense. This procedure was based on Yates' form division order, which each Petitioner signed, that provides that no interest will be paid on funds held in suspense.

The district court concluded that Section 70-10-4 of the Act unambiguously requires Yates to pay interest on the funds held in suspense. It further concluded that Section 70-10-4 expresses a strong public policy and that Yates' form division order violates that public policy by attempting to subvert the mandatory requirement to pay interest on suspended funds. Accordingly, the district court concluded that the provision in Yates' form division order denying payment of interest was unenforceable. The district court ultimately concluded that Petitioners are entitled to receive interest on the suspended funds.

Yates appealed the district court's ruling, and the Court of Appeals reversed. *Yates Petroleum Corp.*, 2012-NMCA-064, ¶ 1. The Court of Appeals reasoned that "the mere fact that the Legislature enacted or modified a statute providing for a benefit does not establish that the Legislature intended that the policy embedded in the statute will, in all cases, outweigh the parties' right to contractually modify or waive the benefit." *Id.* ¶ 22. Further, the Court of Appeals held that since the Legislature provided that parties could contract around the deadline provision in Section 70-10-3, it was consistent to hold that Section 70-10-4, which makes no reference to the parties' ability to contract around it, also allowed contractual agreements to waive interest on suspended funds. *Yates Petroleum Corp.*, 2012-NMCA-064, ¶¶ 21, 23.

The Court of Appeals also cited this Court's holding in *Murdock v. Pure-Lively Energy 1981-A, Ltd.*, 1989-NMSC-048, ¶¶ 16-17, 108 N.M. 575, 775 P.2d 1292, for the proposition "that contractual agreements to waive compensatory interest during a title dispute are valid and enforceable." *Yates Petroleum Corp.*, 2012-NMCA-064, ¶ 24. The Court of Appeals reasoned that when the Legislature amended Section 70-10-4 in 1991, it was well aware of the *Murdock* holding, yet it did not add language that abrogated that holding. *Yates Petroleum Corp.*, 2012-NMCA-064, ¶ 24. It therefore concluded that

the Legislature must agree that interest on suspended funds can be waived. *Id.* Finally, the Court of Appeals concluded that allowing parties to contract around the compensatory interest provision does not "manifestly tend to injure the public," as "the failure to accrue compensatory interest [under the provisions of the division order] is attributable to the interest holder's delay in proving marketable title, and not [to] any action of the payor." *Id.* ¶ 25 (alteration in original omitted) (internal quotation marks and citation omitted).

This Court granted certiorari, and for the reasons that follow, we reverse the Court of Appeals and affirm the district court. *First Baptist Church of Roswell v. Yates Petroleum Corp.*, 2012-NMCERT-006. We hold that Section 70-10-4 is unambiguous and supports a public policy that entitles payees to receive interest on the oil and gas production proceeds that are held in suspense for a period longer than six months, and this statutory provision cannot be contracted around.

II. DISCUSSION

As the Court of Appeals stated, "[t]his case turns upon whether the right to interest on the proceeds from production codified in Section 70-10-4 outweighs New Mexico's strong public policy favoring parties' rights to contract." *Yates Petroleum Corp.*, 2012-NMCA-064, ¶ 6. This requires us to interpret Section 70-10-4. "Statutory interpretation is a question of law, which we review de novo." *Bank of New York v. Romero*, 2014-NMSC-007, ¶ 40, 320 P.3d 1 (internal quotation marks and citation omitted). "When interpreting a statute, our primary goal is to ascertain and give effect to the intent of the Legislature." *Lobato v. State Env't Dep't*, 2012-NMSC-002, ¶ 6, 267 P.3d 65 (internal quotation marks and citation omitted). "[W]e begin our analysis by examining the language utilized by the Legislature, as the text of the statute is the primary indicator of legislative intent." *Bank of New York*, 2014-NMSC-007, ¶ 40 (internal quotation marks and citation omitted). "Under the rules of statutory construction, [w]hen a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation." *Id.* (alteration in original) (internal quotation marks and citations omitted). When gleaning legislative intent, we look to the language of the Act as a whole. *See T.W.I.W., Inc. v. Rhudy*, 1981-NMSC-062, ¶ 10, 96 N.M. 354, 630 P.2d 753 ("Legislative intent is determined by looking to the Act as a whole.").

A. Section 70-10-4 Expresses a Strong Public Policy in Favor of Interest Owners' Right to Receive Interest on Suspended Funds to which They Are Entitled

Petitioners argue that Section 70-10-4, which provides that interest *shall* be paid on suspended funds, cannot be contracted around. Section 70-10-4, which provides the right to compensatory interest on suspended funds, states:

> A. . . . In instances where payments cannot be made within the time period provided in Section 70-10-3 NMSA 1978, the payor shall create a suspense account on his [or her] books for such interest or may interplead the suspended funds into court.
>
> B. The person entitled to payment from the suspended funds

> shall be entitled to interest on the suspended funds from the date payment is due under Section 70-10-3 NMSA 1978. The interest awarded shall be the discount rate charged by the federal reserve bank of Dallas to member banks plus one and one-half percent on the date payment is due. Payment of principal and interest on the suspended funds shall be made to all persons legally entitled to the funds within thirty days from the date that the persons are determined to be entitled to the suspended funds by a final legal determination.

The statute has two requirements. Subsection A requires that when proceeds cannot be paid on time, the funds shall be held in a suspense account or interpleaded into court. *Id.* Subsection B provides that interest owners shall be entitled to receive interest on suspended funds that they are legally entitled to receive. *Id.* The language in the statute clearly reflects the Legislature's intent to mandate that interest owners who are legally entitled to proceeds, but who are not paid on time, shall receive interest on funds that are rightfully owed to them. The Court of Appeals agreed that this is plainly the object of the statute. *See Yates Petroleum Corp.*, 2012-NMCA-064, ¶ 17 ("We agree with the district court that Section 70-10-4 . . . plainly states that interest accrues on funds held in suspense during the time title questions prevent disbursement, and once title is resolved, both principal and accrued interest are payable."). We agree with the both the Court of Appeals and the district court on this point.

Yates argues that by signing the form division order, Petitioners contracted away their statutory right to receive interest on suspended funds, and therefore it is relieved of the obligation to pay interest. Yates' form division order reads:

> If any claim is made which adversely affects title to any interest credited hereunder, or such title is unmarketable in the opinion of a licensed New Mexico attorney, the parties credited with such interest severally agree to furnish abstracts or other evidence of title acceptable to [Yates], and to cure any defects which render the title of the Interest Owners unmarketable, without expense to [Yates]. In the event of failure to furnish such evidence of marketable title, [Yates] is authorized to withhold payments *without payment of interest* until the claim is settled.

(Emphasis added.) This provision in Yates' form division order contravenes the clear mandate expressed by the Legislature in Section 70-10-4.

Because this provision contravenes the requirements of Section 70-10-4, the question is whether the parties can contract around it to waive interest on the oil and gas royalties held in suspense accounts. We have held that "New Mexico . . . has a strong public policy of freedom to contract that requires enforcement of contracts unless they clearly contravene some law or rule of public morals." *Berlangieri v. Running Elk Corp.*, 2003-NMSC-024, ¶ 20, 134 N.M. 341, 76 P.3d 1098 (alteration in original) (internal quotation marks and citations omitted); *accord Acacia Mut. Life Ins. Co. v. Am. Gen. Life Ins. Co.*, 1990-NMSC-107, ¶ 1, 111 N.M. 106, 802 P.2d 11 ("The right to contract is jealously

guarded by this court, but if a contractual clause clearly contravenes a positive rule of law, it cannot be enforced."). As the Court of Appeals correctly noted below, contracts are "void as being contrary to public policy, [when] they are clearly contrary to what the legislature or judicial decision has declared to be the public policy, or they manifestly tend to injure the public in some way." *Yates Petroleum Corp.*, 2012-NMCA-064, ¶ 20 (internal quotation marks and citations omitted). The basis of Yates' argument is that there is no clear policy statement in the language of the statute, therefore the parties should be free to contract around its mandate. We disagree. Every statute is a manifestation of some public policy. Just because the Legislature did not expressly include a statement of what the public policy is in the text of the statute does not mean that it does not intend to further a strong public policy. In this case, the public policy is in favor of interest owners.

Consistent with the principles of statutory interpretation, we glean from the language of the Act a strong public policy in favor of establishing the rights of interest owners. *See Quynh Truong v. Allstate Ins. Co.*, 2010-NMSC-009, ¶ 37, 147 N.M. 583, 227 P.3d 73 ("The first and most obvious guide to statutory interpretation is the wording of the statutes themselves." (internal quotation marks and citation omitted)). The Act sets terms for payment of oil and gas proceeds to interest owners. This evidences the Legislature's acknowledgment of interest owners' lack of bargaining power in oil and gas transactions. Yates' own internal standard practice is a clear example of this imbalance in bargaining power. As a matter of standard practice, Yates unilaterally decided that it would not comply with the mandates of Section 70-10-4, and it effectuated that decision in its form division order. This form division order is routinely sent to Yates' interest owners, like Petitioners, who have no real choice but to accept its terms in order to receive their royalties. Yates maintains that the form division order could have been amended if Petitioners did not agree to its terms, and in fact some Petitioners did just that. Despite the fact that some Petitioners amended the division orders to exclude the interest waiver provision, Yates continued to withhold the payment of interest owed to them.

In acknowledging this disparity in bargaining power, the Legislature unequivocally established the basic terms by which oil and gas proceeds are to be paid. It did so in numerous sections of the Act. Section 70-10-3, which articulates that proceeds shall be paid to those legally entitled to them, establishes a firm deadline by which they must be paid. Section 70-10-3.1(C) states that "[i]f the purchaser or payor is unable to locate any person listed by the operator or lessee then the purchaser or payor shall notify the operator or lessee that he [or she] has been unable to locate or obtain the address of the person entitled to payment." Section 70-10-4, the provision at issue in this case, mandates that when proceeds payments are delayed pending the resolution of who is entitled to payment, then upon resolution that person shall be entitled to interest on the suspended funds. Section 70-10-5 imposes a penalty on the payor for failing to pay the proceeds promptly. Finally, Section 70-10-6 provides that reasonable attorneys' fees shall be recovered by the prevailing party in any action under the Act. Because actions are most likely to be brought by the interest owner who has not been paid according to the terms mandated

by the Act[1], the specific provision for attorney fee shifting can be read as encouraging payees to enforce the provisions of the Act. The Act puts the onus on the payor, in this case Yates, to furnish the correct party with a division or transfer order setting forth proper interest to which the owner is entitled, to pay that party on time, and to pay interest on proceeds owed if there is either any delay in identifying the party to be paid or if the payor simply fails to pay on time. By protecting the interests of the payee in every section of the Act, the Legislature furthers a strong public policy that equalizes the bargaining power between the parties in oil and gas transactions.

Principles of contract law usually enable parties to establish the terms of a contract. Yates argues that freedom of contract principles should prevail, and therefore the parties should be allowed to contract around the provisions of the Act by the use of its form division order. We disagree. For the reasons stated above, we read the Act as establishing specific terms of oil and gas contracts to equalize the parties' bargaining positions. The mandated terms in the Act clearly express the Legislature's intent that the basic terms of payment in oil and gas transactions are established by the Act.

Yates relies on Section 70-10-3, which provides that parties to the oil and gas transaction may come to their own terms as to when the proceeds may be paid. Section 70-10-3 provides, in pertinent part:

> The oil and gas proceeds derived from the sale of production from any well producing oil, gas or related hydrocarbons in New Mexico shall be paid to all persons legally entitled to such payments, commencing not later than six months after the first day of the month following the date of first sale and thereafter not later than forty-five days after the end of the calendar month within which payment is received by payor for production unless other periods or arrangements are provided for in a valid contract with the person entitled to such proceeds.

Yates argues that since the Legislature allows parties to determine when proceeds are paid, it intended to allow the parties to contract around the interest payments mandated by Section 70-10-4. We do not read the Legislature's permission to contract in Section 70-10-3 and its silence on this issue in Section 70-10-4 as its express permission to contract around Section 70-10-4, particularly when the Legislature explicitly allowed for contractual modification in Section 70-10-3. *See Sims v. Sims*, 1996-NMSC-078, ¶ 22, 122 N.M. 618, 930 P.2d 153 ("'[T]he courts will not add to such a statutory enactment, by judicial decision, words which were omitted by the legislature.'" (quoting *State ex rel. Miera v. Chavez*, 1962-NMSC-097, ¶ 7, 70 N.M. 289, 373 P.2d 533)).

Because the Legislature explicitly allowed for contractual modification in Section 70-10-3, it could have expressly provided for the same in Section 70-10-4 had it intended to allow the parties to modify the obligations in that section. We will not read

[1]It is difficult to envision a scenario in which a payor would bring suit because *it* failed to pay proceeds, Section 70-10-3; failed to pay proceeds on time, Section 70-10-3; failed to locate the interest owners to whom funds were owed, Section 70-10-3.1; failed to pay interest on suspended funds, Section 70-10-4; or failed to pay penalty interest, Section 70-10-5.

language into Section 70-10-4 that does not exist. *Sims*, 1996-NMSC-078, ¶ 22.

Yates reads these two sections together, as did the Court of Appeals, to conclude that if the Legislature allowed a contractual waiver of the statutory right in Section 70-10-3, then its silence in Section 70-10-4 must also mean that it approved the same kind of waiver regarding interest on suspended funds. *Yates Petroleum Corp.*, 2012-NMCA-064, ¶ 23. Its rationale is that if the Legislature allows the parties to decide *when* an interest owner must be paid, they may also decide *whether* such payment should be placed in a suspense account, and whether interest must be paid on those funds. Yates reasons that a payor and a payee could conceptually agree that payment was not due until all title issues are resolved. Yates asserts that if nothing would therefore be owed, nor required to be held in a suspense account, then no interest could be earned.

While the parties may be free to agree when payment on production is due to the interest owners under Section 70-10-3, thereby theoretically negating the need to place the funds in a suspense account, Yates' form division order does not provide such a mechanism. To the contrary, the division order closely tracks language in Section 70-10-3. Therefore, we conclude that when Yates failed to pay Petitioners after six months, it was obligated pursuant to Section 70-10-4 to place the funds in a suspense account where it would accrue interest until it was paid to Petitioners.

This Court recognizes the need for certainty in business dealings. It is true that "[g]reat damage is done where businesses cannot count on certainty in their legal relationships and strong reasons must support a court when it interferes in a legal relationship voluntarily assumed by the parties." *Berlangieri*, 2003-NMSC-024, ¶ 20 (internal quotation marks and citations omitted). However, Yates can hardly claim uncertainty when the Legislature made it clear in the Act nearly thirty years ago that compensatory interest shall be paid on suspended funds in New Mexico, nor is Yates damaged by any alleged uncertainty. By entering into these business dealings, Yates could not have reasonably expected that it would have been entitled to withhold the statutorily mandated interest earned on funds rightfully owed to others. Since the statute specifically provides for a calculation of interest, the cost of such interest, if any, comes as no surprise to Yates. Furthermore, the statute provides that these funds may be interpleaded into court, which would relieve Yates of the interest obligation. Section 70-10-4(A).

For the foregoing reasons, we hold that Section 70-10-4 expresses a clear public policy in favor of Petitioners' right to interest on funds to which they are entitled, and this statutory provision cannot be contracted around.

B. *Murdock* Is Distinguishable

The Court of Appeals based its rationale in this case in part on this Court's holding in *Murdock*, stating that "contractual agreements to waive compensatory interest during a title dispute are valid and enforceable." *Yates Petroleum Corp.*, 2012-NMCA-064, ¶ 24 (citing *Murdock*, 1989-NMSC-048, ¶¶ 16-17). The Court of Appeals noted that "when the Legislature amended the Act in 1991, it did not enact language prohibiting contractual agreements in division orders from waiving compensatory interest while a title question is being resolved." *Yates*

Petroleum Corp., 2012-NMCA-064, ¶ 24. Therefore, the Court of Appeals reasoned, "*Murdock*'s holding was in no way addressed or changed by the Legislature in the 1991 amendments." *Yates Petroleum Corp.*, 2012-NMCA-064, ¶ 24. As a result, the Court of Appeals concluded "that the Legislature did not intend the 1991 amendments to modify or conflict with *Murdock*'s holding." *Id.* Yates asserts that this Court has held that contractual clauses waiving compensatory interest on suspended funds are valid, despite statutory language in Section 70-10-4 mandating payment of interest. We are unpersuaded because there is a critical distinction between this case and *Murdock*, which did not consider the specific statutory mandate we now review in Section 70-10-4.

In *Murdock*, we held that a division order provision, much like the one at issue in this case, permissibly waived statutory interest provided for by NMSA 1978, Section 56-8-3(B) (1983). *Murdock*, 1989-NMSC-048, ¶ 12. In that case, like here, a royalty interest owner sought interest on suspended royalty proceeds. *Id.* ¶ 1. However, the interest owner's "sole legal theory for recovery of interest . . . was NMSA 1978, Section 56-8-3(B) (Cum.Supp. 1985)." *Murdock*, 1989-NMSC-048, ¶ 11. Section 56-8-3(B) is a statute regarding commercial instruments and transactions which provides that "[t]he rate of interest, in the absence of a written contract fixing a different rate, shall be not more than fifteen percent annually . . . on money received to the use of another and retained without the owner's consent expressed or implied . . . . " In evaluating the royalty interest owner's claim in *Murdock*, we concluded that "Section 56-8-3(B) does not create a liability for interest if the retention of a payable obligation is proper." 1989-NMSC-048, ¶ 12. Hence, we held that "[w]hen an express provision of a contract stipulates that a payable obligation is to bear no interest, there can be no implied contract to pay interest under Section 56-8-3." *Murdock*, 1989-NMSC-048, ¶ 12.

The important distinction between *Murdock* and the case now before us is that the Court is now called upon to analyze an entirely separate legislative mandate. In *Murdock*, we weighed the freedom of contract against a statutory interest provision that the Legislature intended to apply to commercial instruments and commercial transactions generally. In *Murdock*, this Court was not asked to, nor did it consider the clear public policy expressed in the Act when it considered the enforceability of the division order. This Court specifically acknowledged that "[t]he New Mexico legislature has addressed the issue of oil proceeds payments, including interest on late payments, in the Oil and Gas Proceeds Payment Act," but the Act was "[e]nacted after the relevant events in the instant case." *Murdock*, 1989-NMSC-048, ¶ 19 (citation omitted). This distinction is important to the analysis upon which we base our holding in this case—the express language of Section 70-10-4, which requires in no uncertain terms that interest on suspended funds *shall* be paid. In contrast, Section 56-8-3 clearly allows for contractual modification of the statutory interest rate by stating "in the absence of a written contract fixing a different rate." Similar language does not exist in Section 70-10-4.

Finally, *Murdock* did not consider the principle of the freedom of contract in light of the very specific mandates of the Act, as we do here. Rather, its holding was based on a completely distinct, general statute that does not specifically address the uniqueness of oil and gas transactions. The Court of Appeals

adopted Yates' assertion that because the Legislature did nothing to abrogate the *Murdock* holding in subsequent amendments to the Act, it must have acknowledged the right to contract around Section 70-10-4. *Yates Petroleum Corp.*, 2012-NMCA-064, ¶ 24. "[A]mendments by implication are not favored." *Johnston v. Bd. of Educ. of Portales Mun. Sch. Dist. No. 1, Roosevelt Cnty.*, 1958-NMSC-141, ¶ 36, 65 N.M. 147, 333 P.2d 1051. We rest our holding on the clear and unequivocal mandate in Section 70-10-4 that interest *shall* be paid on suspended funds. Accordingly, we distinguish *Murdock*—its rationale regarding Section 56-8-3 does not apply in light of the very specific mandate of Section 70-10-4.

III. CONCLUSION

We conclude that the provision waiving the statutory right to compensatory interest in Yates' form division order is unenforceable because it contravenes a clear, strong public policy set forth in Section 70-10-4, which mandates that interest owners be paid interest on funds that they are legally entitled to receive. Accordingly, we reverse the Court of Appeals, affirm the district court, and remand for further proceedings consistent with this opinion.

IT IS SO ORDERED.

BARBARA J. VIGIL, Chief Justice

WE CONCUR:

PETRA JIMENEZ MAES, 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: 2015-NMSC-005

Filing Date: January 12, 2015

Docket No. 34,311

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

v.

CESAR FAVELA,

Defendant-Respondent.

Gary K. King, Attorney General
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Santa Fe, NM

for Petitioner

Jorge A. Alvarado, Chief Public Defender
Karl Erich Martell, Assistant Appellate Defender
Santa Fe, NM

for Respondent

OPINION

VIGIL, Chief Justice.

This case concerns the weight to be given to two types of evidence in evaluating prejudice in immigration-related ineffective assistance of counsel claims: judicial warnings of immigration consequences and the strength of the State's evidence against the defendant. Defendant Cesar Favela filed a motion requesting permission to withdraw his guilty plea, alleging ineffective assistance of counsel after his attorney failed to advise him that his guilty plea would result in deportation. The district court denied the motion. The Court of Appeals reversed, holding that where a defendant's attorney fails to advise that defendant of the specific immigration consequences of entering a guilty plea, a warning of such consequences by a judge during a plea colloquy does not, by itself, cure the prejudice suffered by the defendant as a result of the attorney's deficient performance and should only be afforded minimal weight in the analysis of prejudice. The State appealed.

We affirm the Court of Appeals' holding that a judge's warning of such consequences during a plea colloquy cannot alone cure the prejudice caused by the attorney's deficient performance, and, accordingly, we affirm the Court of Appeals' decision to reverse and remand the district court's order. *State v. Favela*, 2013-NMCA-102, ¶ 1, 311 P.3d 1213, *cert. granted*, 2013-NMCERT-010. However, we decline to go so far as to declare that any particular type of evidence should be afforded minimal weight in deciding all claims of immigration-related ineffective assistance of counsel. Rather, we maintain that the determination of the weight to be afforded to evidence of prejudice is appropriately made on a case-by-case basis.

I. BACKGROUND

Defendant, who is a Mexican national and, at the time, was a lawful permanent resident of the United States, pleaded guilty to four counts of aggravated battery with a deadly weapon contrary to NMSA 1978, Section 30-3-5(C) (1969) and one count of driving while under the influence of intoxicating liquor, his second conviction contrary to NMSA 1978, Section 66-8-102(F) (2003). *Favela*, 2013-NMCA-102. At the plea and disposition hearing, during the plea colloquy, the district judge asked Defendant whether he had read the documents related to his plea agreement and discussed them with his attorney, and Defendant testified that he had. The district judge then asked Defendant if he understood the charges to which he was pleading guilty and the rights he would be giving up as a result of the plea, and Defendant testified that he understood. Before the judge accepted Defendant's plea, the following exchange occurred:

> Judge: Counsel, I just noticed the place of birth on this form. Is there an immigration consequence in this case?
>
> Defense Counsel: There will be. He's here legal and everything, he has his paper documentation and everything, but more than likely will have a great consequence on . . . his papers being taken away.
>
> Judge: Mr. Favela, before I accept the plea and approve it at this point, I want to be sure you understand, as your attorney said, that a conviction will have an effect on your immigration status and that effect would be deportation, which is now

called removal, exclusion from the United States and denial of naturalization under the laws of the United States. Do you understand that, sir?

Defendant: Yes, your Honor.

Judge: All right, and is it still your desire to enter your plea of guilty, sir?

Defendant: Yes, your Honor.

Judge: All right, the court then approves that.

The district court accepted Defendant's guilty plea.

Defendant was sentenced to twelve years and 364 days imprisonment, to be followed by two years of parole and a $1,000 fine. All of his prison sentence except three years was suspended; those three years were to be followed by five years of supervised probation and parole. With good time credit, Defendant served a total of twenty-one months at the New Mexico Department of Corrections. Upon his release, Defendant was immediately taken into the custody of the U.S. Immigration and Customs Enforcement (ICE) and detained in the Otero County Processing Center to await removal.

Shortly after being taken into ICE custody, Defendant, through new counsel, filed a motion for relief from judgment or order and a request for an evidentiary hearing pursuant to Rule 1-060 NMRA. Defendant asked the district court for an order allowing the withdrawal of Defendant's guilty plea on the grounds that his trial attorney did not inform him of the immigration consequences of pleading guilty. Therefore, Defendant maintained that the guilty plea did not constitute a willful, knowing, and intelligent waiver of his rights. On July 6, 2011, the district court issued an order summarily dismissing Defendant's motion and request for hearing. Stating that it was "[t]aking as true the factual allegations in the motion . . . for the purposes of this order," the district court's findings of fact included:

5. The defendant's trial counsel did not explain to the defendant prior to the plea hearing that he would certainly be deported as a result of his plea and conviction in this case.

6. Prior to accepting the defendant's guilty pleas, defense counsel stated to the Court and the Court itself admonished the defendant that his plea and conviction in this case would surely result in his being deported. The defendant personally told the Court that he understood that he would be deported.

The district court's conclusions of law included:

5. The defendant must demonstrate, not only that his attorney's assistance was deficient in failing to advise him of the certainty of deportation if convicted, but that he was prejudiced by his attorney's ineffective action or omission in that he would have gone to trial had he been adequately informed.

> 6. In this case, the defendant was clearly made aware prior to entering his guilty pleas that deportation would be an inevitable result of the conviction. His decision to plead guilty in the face of this certainty was knowing, intelligent and voluntary. His guilty plea cannot now be set aside.

(Citations omitted.) Accordingly, the district court dismissed Defendant's motion.

Defendant filed a motion to reconsider the dismissal and a supporting affidavit. The district court held a hearing on the motion to reconsider on November 21, 2011. Defendant testified that his trial counsel did not advise him that he would be deported as a result of pleading guilty. Defendant testified that he entered the guilty plea because his attorney told him to do so. Specifically, Defendant testified that he entered the plea because his attorney had instructed him to "just say yes, yes, yes and plead guilty 'cause we already had signed [the plea agreement] and so nothing was going to change." Additionally, Defendant testified that he did not understand what the district judge presiding over his plea hearing was saying to him and that he would not have pleaded guilty had he known it would result in deportation because "[his] whole life is here in the United States." Nonetheless, the district court denied Defendant's motion to reconsider "for the reasons set forth in the July 6, 2011 Order" without further explanation.

Defendant appealed the denial of his motion to the Court of Appeals. *Favela*, 2013-NMCA-102, ¶ 1. In resolving the issue, the Court of Appeals issued two holdings concerning "what weight, if any, should be given to the trial court advising Defendant during the plea colloquy that he would be deported." *Id.* ¶ 23. The Court of Appeals held that "a court's warning or advisement to a defendant regarding possible immigration consequences of accepting a plea is never, by itself, sufficient to cure the prejudice that results from ineffective assistance of counsel in that regard." *Id.* ¶ 26. Second, the Court held that "judicial statements made during the plea colloquy about the immigration consequences of a [defendant's] plea do not cure counsel's deficient representation and should only be given minimal weight in determining whether a defendant has demonstrated prejudice under *Strickland v. Washington*, 466 U.S. 668, 695-98 (1984)." *Id.* ¶ 1. Additionally, the Court of Appeals noted:

> Although our courts have recognized a direct relationship between the strength of the case against a defendant and the likelihood that he or she will plead guilty . . . , when viewed in light of our acknowledgment that immigration consequences may often be the overriding concern of a criminal defendant, the strength of the evidence against a defendant is less indicative of whether the defendant may have taken a chance at trial.

Id. ¶ 30 n.4 (internal quotation marks and citation omitted). The Court of Appeals reversed the district court's dismissal of Defendant's motion for reconsideration and remanded to the district court for further proceedings. *Id.* ¶¶ 30-31.

The State appealed to this Court, arguing that the Court of Appeals erred in "holding that judicial statements made during a plea

colloquy about the immigration consequences of a guilty plea, as well as the strength of the State's evidence against a defendant, should only be afforded minimal weight in evaluating an immigration-related ineffective assistance of counsel claim."

II. DISCUSSION

A. Standard of review

"A motion to withdraw a guilty plea is addressed to the sound discretion of the trial court, and we review the trial court's denial of such a motion only for abuse of discretion." *State v. Paredez*, 2004-NMSC-036, ¶ 5, 136 N.M. 533, 101 P.3d 799 (internal quotation marks and citation omitted). "A denial of a motion to withdraw a guilty plea constitutes manifest error when the undisputed facts establish that the plea was not knowingly and voluntarily given." *State v. Garcia*, 1996-NMSC-013, ¶ 7, 121 N.M. 544, 915 P.2d 300. "Where, as here, a defendant is represented by an attorney during the plea process and enters a plea upon the advice of that attorney, the voluntariness and intelligence of the defendant's plea generally depends on whether the attorney rendered ineffective assistance in counseling the plea." *State v. Barnett*, 1998-NMCA-105, ¶ 12, 125 N.M. 739, 965 P.2d 323. "We afford de novo review of mixed questions of law and fact concerning the ineffective assistance of counsel." *Id.* ¶ 13.

B. Immigration-related ineffective assistance of counsel claims

New Mexico has adopted the United States Supreme Court's holding in *Strickland*, 466 U.S. at 687, for evaluating a claim of ineffective assistance of counsel under the Sixth Amendment of the United States Constitution. *See, e.g.*, *Paredez*, 2004-NMSC-036, ¶ 13. Under the two-prong test in *Strickland*, in order to prevail on a claim of ineffective assistance, "a defendant must show: (1) 'counsel's performance was deficient,' and (2) 'the deficient performance prejudiced the defense.'" *Paredez*, 2004-NMSC-036, ¶ 13 (quoting *Strickland*, 466 U.S. at 687). A defense attorney's failure to advise a client of the "specific immigration consequences of pleading guilty, including whether deportation would be virtually certain" renders that attorney's performance deficient, which satisfies the first prong of the *Strickland* test. *Paredez*, 2004-NMSC-036, ¶ 19. Here, the district court found that "trial counsel did not explain to the defendant prior to the plea hearing that he would certainly be deported as a result of his plea and conviction in the case." Thus, the first prong of Defendant's ineffective assistance of counsel claim was satisfied. *See id.* Having established the first prong of the *Strickland* test, we turn our focus to the second prong of the analysis concerning prejudice.

In cases involving plea agreements, prejudice is proven where the defendant demonstrates "that there is a reasonable probability that, but for counsel's errors, he [or she] would not have pleaded guilty and would have insisted on going to trial." *Id.* ¶ 20 (alteration in original) (internal quotation marks and citation omitted). The defendant "is not required to prove that a trial would have resulted in acquittal," but rather must show that with sufficient legal advice from his or her counsel, "there is a reasonable probability that the defendant would have gone to trial instead of pleading guilty or no contest." *Patterson v. LeMaster*, 2001-NMSC-013, ¶ 18, 130 N.M. 179, 21 P.3d 1032 (internal quotation marks and citation omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

(internal quotation marks and citation omitted).

C. A judicial warning of immigration consequences cannot, by itself, cure prejudice

After establishing that the first prong was satisfied, the district court correctly recognized that Defendant was also required to prove that he was prejudiced by counsel's deficient performance. *See Paredez*, 2004-NMSC-036, ¶ 13. In the findings and conclusions contained in its order, the district court did not cite any factual basis for its decision to deny Defendant's motion other than the exchange that occurred between the district judge, Defendant, and defense counsel during the plea colloquy. Because the first prong of the test was established by a finding that defense counsel failed to advise Defendant of the immigration consequences of his plea, the district court's denial of Defendant's motion was apparently based on lack of prejudice. In determining that Defendant did not suffer prejudice, the district court relied solely upon the admonition made to Defendant during the plea colloquy by the district judge who accepted the plea.

Although this Court has repeatedly found that a judicial warning is insufficient to cure an attorney's deficient performance under the first prong of the *Strickland* test, we have not yet considered such warnings in evaluating prejudice. *E.g.*, *Ramirez v. State*, 2014-NMSC-023, ¶ 17, 333 P.3d 240 ("[W]e have held in other cases where counsel has failed to properly advise a client during the plea entry phase that not even a record of the court's adherence to the plea colloquy cures the ineffective assistance of counsel."); *Paredez*, 2004-NMSC-036, ¶ 12 ("[A] sufficient advisement from the trial court regarding the immigration consequences of a defendant's plea does not entail that [the defendant] has received effective assistance of counsel in evaluating or responding to such advisements." (second alteration in original) (internal quotation marks and citation omitted)). The Court of Appeals' opinion in this case extended this line of reasoning to its analysis of prejudice, noting that "[e]ven where warnings [by judges] are more specific, judges, given their position, cannot gauge defendants' priorities, counsel defendants on how to proceed, or use the information strategically in negotiating pleas." *Favela*, 2013-NMCA-102, ¶ 27 (internal quotation marks and citation omitted). Essentially, the Court of Appeals recognized, "[a] defendant who has been 'advised' of the immigration consequences of his [or her] plea by the trial court during the plea colloquy has not been provided the same assistance of counsel as an attorney who has represented a client with knowledge that the defendant faced possible deportation." *Id.* Further, the Court of Appeals "note[d] concerns with the efficacy of immigration warnings given by the trial court," adding that a "nervous defendant taking a plea in front of a criminal judge will rarely be able to meaningfully process the many formalized warnings included in the plea colloquy." *Id.* ¶ 28 (internal quotation marks and citation omitted).

It is imperative that every defendant entering into a plea agreement which could result in immigration consequences possesses a clear understanding of those immigration consequences in order to protect both the rights of the pleading defendant and to avoid the uncertainty resulting from post-conviction challenges. By first determining that a defendant understands the consequences of pleading guilty before accepting a plea agreement, district court judges serve a crucial

gate-keeping function, allowing admittance of only those plea agreements which are entered into knowingly. Therefore, a district court judge's determination of a defendant's understanding of the immigration consequences of entering a plea is crucial to the fairness and finality of the plea process, and we take this opportunity to give additional guidance to district court judges when making such determinations. It is within the district court's discretion to determine, in light of the circumstances of each case, which, if any, of these steps will aid in assessing whether or not the defendant possesses the requisite understanding to knowingly enter into a plea agreement.

While Forms 9-406 to -408C NMRA provide guidance in conducting a plea proceeding, a judge is not limited to merely reading the language used on the forms and asking the defendant whether the defendant understands. An effective inquiry into a defendant's actual understanding of immigration consequences may require more than simple "yes" answers on the part of the defendant, who may or may not be able to fully process the formalistic questions and instructions from the judge under the pressure of being questioned during a plea colloquy. We encourage judges to carefully inquire of the defendant and the defendant's attorney, on the record, whether the two discussed the potential immigration consequences and what defendant's actual understanding of those consequences is. By the same token, we encourage defense attorneys to thoroughly discuss any potential immigration consequences with their clients so that their clients are able to respond knowingly to the judge's questioning. If a judge has any doubts concerning the sufficiency of the defendant's understanding of the immigration consequences of a guilty plea, the judge may consider taking a recess and giving both client and counsel an opportunity to conference privately to discuss the specific consequences. Following such an opportunity for discussion, if the defendant and defense counsel indicate that the defendant still wishes to enter into the plea agreement, the judge can again ask the defendant to confirm on the record the defendant's understanding of potential consequences. Ultimately, a district court judge should not accept a plea agreement unless that judge determines, on the record, that the defendant has an adequate understanding of the potential adverse immigration consequences resulting from that plea agreement and that in light of those consequences, the defendant still wishes to enter into that plea agreement.

We agree with the Court of Appeals' recognition that "judicial statements made during the plea colloquy about the immigration consequences of a plea do not cure counsel's deficient representation" when evaluating whether or not a defendant has proven the first prong of the *Strickland* test. *Favela*, 2013-NMCA-102, ¶ 1. We also agree that because such an advisement by a judge cannot render sufficient an attorney's otherwise deficient performance in failing to advise his client of the immigration consequences of his plea, the same advisement cannot, *by itself*, cure the prejudice created by such a failure to advise. *See id.* ¶ 26. Here, the district court's order denying Defendant's motion relied solely upon the district judge's advice to Defendant to find that Defendant was not prejudiced by his attorney's failure to advise him of the immigration consequences of his guilty plea. The order did not indicate whether or not there was additional factual support for its decision to deny the motion. For these reasons, we affirm the Court of

Appeals' decision to reverse and remand the matter back to the district court.

D. The weight afforded to specific types of evidence of prejudice shall be determined on a case-by-case basis

The Court of Appeals explicitly held that "judicial statements made during the plea colloquy about the immigration consequences of a plea . . . should only be given minimal weight in determining whether a defendant has demonstrated prejudice under *Strickland*." *Favela*, 2013-NMCA-102, ¶ 1. Additionally, in considering the weight to be afforded to the strength of the State's evidence against a defendant, the Court of Appeals noted that "when viewed in light of our acknowledgment that immigration consequences may often be the overriding concern of a criminal defendant, the strength of the evidence against a defendant is less indicative of whether the defendant may have taken a chance at trial." *Id.* ¶ 30 n.4.

The State argues that the Court of Appeals erred in holding that these two types of evidence should be afforded minimal weight in the prejudice analysis of an immigration-related ineffective assistance of counsel claim. Defendant argues that the Court of Appeals decided the matter correctly under the law. We conclude that the appropriate weight to be afforded to any evidence of prejudice cannot be determined in the abstract, but must be evaluated in light of the circumstances of the individual case in which the evidence is presented.

There is no formulaic test for determining whether a defendant has demonstrated prejudice. Such a determination is made on a case-by-case basis, in light of the facts of that particular case. *See Roe v. Flores-Ortega*, 528 U.S. 470, 485 (2000) ("As with all applications of the *Strickland* test, the question whether a given defendant has made the requisite showing will turn on the facts of a particular case."); *see also Patterson*, 2001-NMSC-013, ¶ 29 ("We have identified two types of additional evidence that are pertinent to the analysis *in this case*.") (emphasis added); *Barnett*, 1998-NMCA-105, ¶ 32 ("[T]here are no mechanical rules for determining prejudice."). This Court has noted that in assessing whether a defendant has been prejudiced by an attorney's deficient performance, "courts are reluctant to rely solely on the self-serving statements of defendants." *Patterson*, 2001-NMSC-013, ¶ 29. Thus, a defendant will often need to provide additional, objective evidence of prejudice. *Id.* For example, our courts typically consider the strength of the State's evidence against the defendant and a defendant's pre-conviction statements and actions, such as assertions of innocence or statements of intent to go to trial. *Id.* ¶¶ 30-31.

An inquiry into the objective evidence of prejudice is not limited to the strength of the State's evidence or the defendant's pre-conviction statements and actions because such objective evidence will be sparse in many cases. *State v. Carlos*, 2006-NMCA-141, ¶ 21, 140 N.M. 686, 147 P.3d 897. As a result, our analysis may require turning to "what the defendant would have been motivated to do if given accurate information." *Id.* In *Carlos*, the Court of Appeals reasoned that "Defendant's testimony that he has lived in the United States virtually his whole life, having been brought to [t]his country right after he was born, may have been an important factor in his decision whether to

enter a plea." *Id.* Therefore, the Court of Appeals held that it was appropriate to consider such testimony when evaluating prejudice. *Id.* ¶¶ 22-23.

Because every defendant and every case present a variety of interests and circumstances, it is inappropriate to declare that the strength of the State's evidence against a defendant or judicial statements during a plea colloquy should necessarily be afforded minimal weight in assessing prejudice. In making such an assessment, it is appropriate for courts to consider the degree to which the record contains sworn testimony by the defendant and defense counsel that strongly indicates that the defendant knowingly and voluntarily entered into a plea agreement despite potential adverse immigration consequences. Therefore, we decline to endorse the Court of Appeals' holdings assigning minimal weight to such evidence, and we clarify that the weight to be given to a particular type of evidence of prejudice will depend on the particular facts of the case in which the evidence is presented.

III. CONCLUSION

The district court's order does not indicate that it considered factors other than judicial statements during the plea colloquy to find that Defendant was not prejudiced by his attorney's failure to advise him that his guilty plea would lead to his deportation. Because such judicial statements alone cannot cure prejudice, we affirm the Court of Appeals' decision to reverse the district court's denial of Defendant's motion. Additionally, we clarify that the weight to be afforded to particular types of evidence of prejudice shall be determined on a case-by-case basis in light of the particular facts and circumstances of each individual case. We remand the matter to the district court for further proceedings consistent with this opinion.

IT IS SO ORDERED.

BARBARA J. VIGIL, Chief Justice

WE CONCUR:

PETRA JIMENEZ MAES, Justice

RICHARD C. BOSSON, Justice

EDWARD L. CHÁVEZ, Justice

CHARLES W. DANIELS, Justice

Certiorari Denied, October 24, 2014, No. 34,841

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-011

Filing Date: July 24, 2014

Docket No. 32,511

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

LEILANI LOPE,

Defendant-Appellant.

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L. Helen Bennett
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for Appellant

OPINION

VIGIL, Judge.

This is a driving while intoxicated (DWI) case in which Defendant asserts that her motion to suppress was improperly denied. Following a convoluted history, which we describe in detail below, the case comes before us for the second time more than five and one-half years after the judgment and sentence was filed in the magistrate court where the case originated. We address: (1) whether we have jurisdiction over the appeal; (2) whether the appeal is moot; and (3) whether Defendant's motion to suppress was improperly denied. We hold that we have jurisdiction based on the conclusive presumption of ineffectiveness of counsel established in *State v. Duran*, 1986-NMCA-125, ¶¶ 4-6, 105 N.M. 231, 731 P.2d 374 and that the appeal is not moot. On the merits, we affirm the denial of Defendant's motion to suppress.

I. JURISDICTION TO HEAR APPEAL

A. Facts

On March 13, 2008, a criminal complaint was filed in the magistrate court charging Defendant with driving under the influence of intoxicating liquor (second offense), driving with an open container of alcohol, and driving with a suspended license. After Defendant's motion to suppress was denied in the magistrate court, the parties entered into a plea and disposition agreement which was approved by the magistrate court. Pursuant to the agreement, Defendant pled guilty to driving while under the influence (non-aggravated, first offense), the remaining charges were dismissed, and Defendant reserved her right to appeal the order denying her motion to suppress. Defendant was sentenced in the magistrate court on January 15, 2009, and Defendant appealed to the district court.

The appeal to the district court was de novo, NMSA 1978, Section 39-3-1 (1955), and on June 16, 2009, an evidentiary hearing was held on the motion to suppress, the only issue raised on appeal. At the conclusion of the hearing, the district court orally denied Defendant's motion to suppress, and the prosecutor was instructed to prepare an order remanding the case to the magistrate court. The order for remand, filed on February 17, 2010, directs that the case "hereby is remanded to [m]agistrate [c]ourt for further proceedings," but fails to state that the motion to suppress was denied.

Defendant then appealed from the district court to this Court. In that appeal, we issued

an order on April 27, 2010, "requiring Defendant to obtain a final written order, disposing of the motion to suppress, within thirty days." We issued the order because we could not determine whether the appeal was from a final order, in that it was unclear whether the district court order remanded the case to the magistrate court only to enforce the magistrate court judgment or to address other remaining issues. Defense counsel did not obtain a final order disposing of the suppression motion, but simply refiled a copy of the original order of remand. We therefore dismissed the appeal on the basis that there was no final written order before us on appeal, and mandate issued on August 23, 2010.

Upon receipt of our mandate, the district court concluded that "Defendant's appeal has reached final disposition" and remanded the case to the magistrate court on August 25, 2010. Because execution of the sentence imposed on January 15, 2009, by the magistrate court was not stayed during the appeal, the district court directed that, to the extent the sentence had not been fully executed, the sentence be executed "with date and time adjustments made as necessary by the Magistrate after hearing." The case lingered in the magistrate court for unexplained reasons from January 26, 2011, when the district court order of remand was filed in the magistrate court, until October 25, 2011, when a new judgment and sentence was filed in the magistrate court.

Upon entry of the judgment and sentence in magistrate court on October 25, 2011, Defendant once again appealed to the district court. The district court recounted the foregoing history and found that Defendant was now seeking to obtain the appellate review that she had failed to previously obtain because she had not secured a final order from the district court as directed in this Court's April 27, 2010 order. The district court concluded that because Defendant "was given ample opportunity to perfect her appeal in the Court of Appeals which she failed to do"; that no procedure under the circumstances allowed a second appeal on precisely the same issue; and that "[i]t is difficult to imagine that attorney neglect could support a second appeal almost two years after the first appeal was dismissed and three years after this Court ruled that . . . Defendant's motion to suppress was denied," the appeal should be dismissed. The district court entered its order dismissing the appeal, and it is from this order that Defendant brings the present appeal before us.

B. Analysis

We reject the State's argument that we have no jurisdiction to decide the appeal by applying the conclusive presumption of ineffective assistance of counsel rule adopted in *Duran*, 1986-NMCA-125, ¶¶ 4-6.

"The timely filing of a notice of appeal is a mandatory precondition to this Court's exercise of jurisdiction." *State v. Vigil*, 2014-NMCA-__, ¶ 7, __ P.3d __, (No. 32,166, Mar. 12, 2014). In *Duran*, the notice of appeal was filed more than one year late. 1986-NMCA-125, ¶ 1. Nevertheless, we considered the appeal on the merits by adopting a conclusive presumption of ineffective assistance rule. Specifically, where defense counsel fails to timely file a notice of appeal, we conclusively presume that the failure resulted from ineffective assistance of counsel and entertain the appeal. *Id.* ¶¶ 2-6. We recently applied the presumption in *State v. Dorias*, 2014-NMCA-__, ¶ 7, __ P.3d __, (No. 32,235, May

21, 2014), when the defendant's lawyer failed for four years to file a notice of appeal. *See also Vigil,* 2014-NMCA-__, ¶ 16 (applying the *Duran* principle when "an untimely notice of appeal is filed following the district court's on-record review of a metropolitan court decision"); *State v. Leon,* 2013-NMCA-011, ¶ 15, 292 P.3d 493 (extending the *Duran* presumption in situations where counsel fails to timely file a notice of appeal from an order revoking probation), *cert. quashed,* 2013-NMCERT-010, 313 P.3d 251; *State v. Eger,* 2007-NMCA-039, ¶ 5, 141 N.M. 379, 155 P.3d 784 (holding "that the *Duran* presumption of ineffectiveness of counsel extends to [the d]efendant's right to appeal his magistrate court conditional plea agreement to district court"); *State ex rel. Children, Youth & Families Dep't v. Lorena R.,* 1999-NMCA-035, ¶¶ 9-10, 126 N.M. 670, 974 P.2d 164 (applying the *Duran* presumption of ineffective assistance of counsel when the notice to appeal the termination of parental rights was filed one day late).

Defendant's counsel in this case did file a timely notice of appeal the first time the case came before us in 2010. However, defense counsel was also obligated to obtain from the district court a final written order denying the motion to suppress pursuant to our April 27, 2010 order. This was not done, and counsel's inaction resulted in dismissal of the appeal. There is no material difference between an attorney who fails to timely file a notice of appeal and an attorney who files a timely notice of appeal but causes the appeal to be dismissed due to his inaction. The result in each situation is the same: it denies the defendant her constitutional right to appeal. *See Olguin v. State,* 1977-NMSC-034, ¶ 7, 90 N.M. 303, 563 P.2d 97 (concluding that where counsel filed a timely notice of appeal but did not perfect the appeal because the docketing statement was not filed on time, dismissal of the appeal was not warranted). Thus, we extend the *Duran* conclusive presumption of ineffective assistance of counsel to this case with the result that we have jurisdiction to decide this appeal.

II. WHETHER THE APPEAL IS MOOT

A. Facts

Due to the amount of time that has passed since Defendant was sentenced, and because execution of the sentence was not stayed during the pendency of the appeal, Defendant has completed serving her sentence. The State therefore argues that the appeal is moot, and we should not address Defendant's appeal on the merits. We disagree.

B. Analysis

We generally do not decide a case when it has become moot, that is, when we cannot grant the appellant any relief. *State v. Favela,* 2013-NMCA-102, ¶ 13, 311 P.3d 1213, *cert. granted,* 2013-NMCERT-010, 313 P.3d 251. However, we still review criminal convictions where the conviction has continuing collateral consequences, "such as mandatory sentence increases for subsequent offenses, limitations on eligibility for certain types of employment, and voting restrictions." *State v. Sergio B.,* 2002-NMCA-070, ¶ 10, 132 N.M. 375, 48 P.3d 764. Our DWI statute, NMSA 1978, § 66-8-102 (2007, amended 2010), requires mandatory sentence increases for subsequent DWI convictions. Thus, even assuming the State is correct that our decision cannot affect Defendant's sentence for this conviction, it is nonetheless not moot because our decision may have collateral consequences for Defendant in the future.

III. THE MOTION TO SUPPRESS

A. Facts

Officer Rempe was the only witness that testified at the suppression hearing, and he testified as follows. He was parked in his patrol car at a gas station watching for traffic infractions and "running plates," when he observed a red pickup truck with three or more people in the cab and a dog in the back parked at the gas pumps. Defendant was the driver of the truck, but she did not get out. Instead, a passenger got out to pump the gas, which Officer Rempe found "unusual."

Officer Rempe turned his attention to the white car parked at the pump behind Defendant's truck, and after "running" the vehicle's plate, he determined the registration was expired. As he approached the white vehicle, he saw Defendant's truck drive away. Officer Rempe told the driver of the white car why he was being detained and asked for his license. The driver, Emerson Yazzie, produced his license and asked, "Why are you stopping me? There are other people out there." Officer Rempe asked him what he meant and Mr. Yazzie responded, "That red pickup with the dog in the back—they're wasted, bro." Officer Rempe handed Mr. Yazzie back his license, abandoned writing him a citation, and pursued the red truck "as fast as [he] could." As soon as he located Defendant's truck, he activated his emergency lights to initiate a stop, which led to Defendant's DWI charge.

Officer Rempe also testified that in deciding to pursue the red pickup, he had compared the worst-case scenarios of abandoning an expired plate stop versus failing to pursue a potential DWI. He concluded that if Mr. Yazzie was lying, he had all of his information already and could send him a ticket in the mail, but if he was correct, a DWI posed a greater threat to public safety.

On cross examination, Officer Rempe testified that he never saw Defendant outside of the vehicle at the gas station, nor did he see her ever speak or interact with Mr. Yazzie, who was merely parked behind her at the pump. He also confirmed that when he stopped Defendant, it was based on the information that the driver of the red pickup with the dog in the back was "wasted," and not on any driving behavior witnessed by him.

B. Analysis

An appeal from the denial of a motion to suppress involves an application of the law to the facts, which we review de novo. *State v. Contreras*, 2003-NMCA-129, ¶ 4, 134 N.M. 503, 79 P.3d 1111. Our review entails determining "whether the law was correctly applied to the facts, viewing them in a manner most favorable to the prevailing party." *State v. Jason L.*, 2000-NMSC-018, ¶ 10, 129 N.M. 119, 2 P.3d 856 (internal quotation marks and citation omitted). "Determinations of reasonable suspicion are reviewed de novo." *State v. Garcia*, 2009-NMSC-046, ¶ 9, 147 N.M. 134, 217 P.3d 1032.

Defendant challenged the justification for Officer Rempe's stop under *Contreras*, 2003-NMCA-129, ¶¶ 1-3, a case addressing whether an anonymous tip was sufficient to establish reasonable suspicion to stop a vehicle under the Fourth Amendment. No argument was made or preserved by Defendant that our state constitution affords her greater protection than the Fourth Amendment. Federal precedent under to the Fourth Amendment is therefore applicable and binding on us here.

"Before a police officer makes a traffic stop, he must have a reasonable suspicion of illegal activity." *State v. Hubble*, 2009-NMSC-014, ¶ 7, 146 N.M. 70, 206 P.3d 579 (internal quotation marks and citation omitted); *see State v. Munoz*, 1998-NMCA-140, ¶ 8, 125 N.M. 765, 965 P.2d 349 ("Law enforcement officers can constitutionally stop a motor vehicle if they have a reasonable suspicion that the law has been or is being violated." (internal quotation marks and citation omitted)). "We will find reasonable suspicion if the officer is aware of specific articulable facts, together with rational inferences from those facts, that, when judged objectively, would lead a reasonable person to believe criminal activity occurred or was occurring." *Hubble*, 2009-NMSC-014, ¶ 8 (internal quotation marks and citation omitted). Whether the police have a reasonable suspicion depends on the totality of the circumstances and depends "on both the content of information possessed by the police and its degree of reliability." *Contreras*, 2003-NMCA-129, ¶ 5.

Defendant argues that *Contreras* supports her argument that Officer Rempe's stop of her truck was not supported by reasonable suspicion, while the State argues that *Contreras* supports its argument that the stop was based on reasonable suspicion. In *Contreras*, an anonymous motorist called to notify police that a possible drunk driver in a grey van towing a red Geo was driving erratically. *Id.* ¶ 2. Police officers made contact with the defendant's vehicle, which matched that description and initiated a stop without observing any erratic driving. *Id.* The defendant was arrested for DWI following that stop. *Id.* The defendant moved to suppress the evidence obtained as a result of that stop, arguing that because the police themselves did not observe any suspicious or criminal behavior to justify the stop, the tipster's information was not corroborated, and therefore there was no reasonable suspicion for the stop. *Id.* ¶ 3. The district court granted the motion. *Id.*

In the State's appeal, we examined whether, under the totality of the circumstances, the tip "contained sufficient information and was sufficiently reliable to provide the deputies with reasonable suspicion that a crime was being or was about to be committed, or if the possible danger to public safety was sufficient for the deputies to conduct the investigatory stop." *Id.* ¶ 7. Reversing the district court, we concluded that the facts of the case allowed "the inference that the anonymous caller was a reliable concerned motorist; the information given was detailed enough for the deputies to find the vehicle in question and confirm the description; and the caller was an apparent eyewitness to the erratic driving." *Id.* ¶ 21.

Defendant argues that unlike the tipster in *Contreras*, Mr. Yazzie is not a reliable concerned citizen because he was deflecting Officer Rempe's attention away from his own illegal behavior, and ultimately succeeded in getting Officer Rempe to abandon writing him a ticket. *See State v. Evans*, 692 So. 2d 216, 219 (Fla. Dist. Ct. App. 1997) (stating that Florida courts presume that citizen-informants are reliable because they have nothing to gain by giving the information to authorities).

This argument overlooks the fact that Officer Rempe had Mr. Yazzie's identifying information and Officer Rempe's testimony that he planned to hold Mr. Yazzie accountable by mailing him his ticket if he later determined Mr. Yazzie was lying. *See State v. Robbs*, 2006-NMCA-061, ¶ 13, 139

N.M. 569, 136 P.3d 570 (concluding that a person willing to identify himself to the police when providing a tip was more reliable than an anonymous tipster because he "could have been held accountable if the information was false"). Thus, the balance here weighs in favor of finding Mr. Yazzie to be a reliable citizen-informant, and we reject Defendant's argument. *See Contreras*, 2003-NMCA-129, ¶ 21 (stating that the reliability of tips must be judged on the facts of each case).

The fact that Mr. Yazzie was a reliable tipster is not enough. We must also determine whether Mr. Yazzie's information provided Officer Rempe with a reasonable suspicion that Defendant was committing a crime, that is, driving while intoxicated. In *Contreras*, we stated that in determining the existence of reasonable suspicion, Fourth Amendment jurisprudence requires us to "weigh the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." 2003-NMCA-129, ¶ 13. We came to this conclusion based on the United States Supreme Court decision in *Florida v. J.L.*, 529 U.S. 266, 273-74 (2000), which stated that under the Fourth Amendment, public safety considerations, coupled with a diminished expectation of privacy, may warrant conducting a protective search on the basis of information which may be otherwise insufficient to justify a search. *See Contreras*, 2003-NMCA-129, ¶ 6. We therefore determined that "we must balance the possible threat of drunk driving to the safety of the public with [the d]efendant's right to be free from unreasonable seizure." *Id.* ¶ 13. After noting New Mexico's serious drunk driving problem and the threat of potential injury or death that drunk drivers pose to innocent citizens, we concluded that "the gravity of the public concern and the public interest served by the seizure, weigh heavily in the balancing test." *Id.* ¶ 14. We also noted that moving vehicles with intoxicated drivers pose a greater threat than other possessory types of crimes like carrying a concealed weapon, yet a brief investigatory stop is less intrusive than, for example, a pat-down search. *Id.* ¶¶ 14-16. In such circumstances, we noted, various courts had concluded post *J.L.* that investigatory stops based on anonymous tips describing possible drunk driving are justified, where information provided by the tip such as a description and location of the vehicle, was corroborated. *Contreras*, 2003-NMCA-129, ¶¶ 17-20; *see also State ex rel. Taxation & Revenue Dep't Motor Vehicle Div. v. Van Ruiten*, 1988-NMCA-059, ¶¶ 2-3, 8-11, 107 N.M. 536, 760 P.2d 1302 (concluding that a police officer had a reasonable suspicion that the defendant was driving while intoxicated when he received a radio dispatch that an unidentified person called the police and said he had observed a man in a 7-11 store who was "very intoxicated," that the intoxicated man left the store driving south on a certain highway in a truck he particularly described, and the police officer saw the described truck driving south on that highway fifteen minutes later). Here, Officer Rempe testified that his concern for public safety trumped any concern he had about Mr. Yazzie's expired registration, and this concern is what prompted him to immediately seek out Defendant's vehicle.

For the foregoing reasons, we hold that under the totality of the circumstances of this case, and viewing the facts in the light most favorable to the State as the prevailing party, Officer Rempe's investigatory stop of Defendant's truck was supported by reasonable suspicion under a Fourth Amendment analysis.

CONCLUSION

The district court order denying Defendant's motion to suppress is affirmed.

IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

TIMOTHY L. GARCIA, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-012

Filing Date: November 18, 2014

Docket No. 31,998

STATE OF NEW MEXICO,

Plaintiff-Appellant,

v.

LARRY B. TAYLOR,

Defendant-Appellee.

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OPINION

VIGIL, Judge.

This is another Sixth Amendment speedy trial case. The central question presented is whether a defendant permanently waives his constitutional right to a speedy trial because his attorney moves for a trial setting to be vacated due to a scheduling conflict with another trial setting and stipulates that the resulting delay will not be attributable to the State. The district court concluded, "it is not reasonable to say that this 'waiver' would allow a one (1) year, three (3) months and six (6) days delay" and dismissed the criminal information with prejudice on grounds that Defendant's constitutional right to a speedy trial was violated. We agree and affirm.

BACKGROUND

On January 25, 2010, police responded to a domestic abuse call, which resulted in Defendant's arrest. The following day two separate criminal complaints were filed in the magistrate court. The first charged Defendant with criminal sexual penetration in the third degree, and the second alleged misdemeanor battery with respect to the same victim. After posting bond, Defendant was released on February 2, 2010. Defendant filed a written demand for a speedy trial in the felony case on

February 11, 2010, and a written demand for a speedy trial in the misdemeanor case on February 16, 2010. A waiver of preliminary hearing and presentation to the grand jury was filed on February 17, 2010, and the case was bound over to the district court. On March 5, 2010, a criminal information was filed in the district court charging both criminal sexual penetration in the third degree and misdemeanor battery on a household member.

On June 15, 2010, a jury trial was scheduled to commence before Judge Tatum on July 27, 2010. However, on July 6, 2010, Judge Tatum voluntarily recused himself from the case, and it was assigned to Judge Hartley. On July 12, 2010, the State recused Judge Hartley from hearing the case, and on July 26, 2010, Judge Orlik was assigned to the case. On September 17, 2010, trial was set to commence on October 6, 2010 before Judge Orlik. On October 5, 2010, Defendant filed a motion to vacate the trial on grounds that Defendant's attorney had another jury trial set on the same date and time. The State concurred in the motion with Defendant's stipulation that "any delay resulting from a continuance will not count against the State in speedy trial determinations." However, at no time after this motion was granted, did the State request a new trial setting.

Judge Orlik passed away on May 28, 2011, and Judge Mowrer was appointed to replace him. The case was then erroneously assigned to Judge Quinn on June 6, 2011, and when the mistake was discovered, the case was re-assigned to Judge Mowrer on July 19, 2011. Judge Mowrer voluntarily recused herself from the case on September 5, 2011, because as the prior Deputy District Attorney, she had appeared on behalf of the State in the case at a prior hearing. Ten days later, on September 15, the case was re-assigned to Judge Quinn. On his own motion, Judge Quinn held a pretrial conference on December 13, 2011, and set the case to commence trial on January 11, 2012. At the pretrial conference, defense counsel alerted the court that there were speedy trial problems, and the day before trial, Defendant filed a motion to dismiss on speedy trial grounds, which Judge Quinn granted on January 12, 2012. The State appeals.

STANDARD OF REVIEW

On appeal from an order of dismissal for a violation of a defendant's right to a speedy trial, we give deference to the district court's factual findings but review the speedy trial factors de novo. *State v. Spearman*, 2012-NMSC-023, ¶ 19, 283 P.3d 272. The speedy trial factors we consider are those set forth in *Barker v. Wingo*, 407 U.S. 514, 530-32 (1972): "(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. Collier*, 2013-NMSC-015, ¶ 39, 301 P.3d 370 (internal quotation marks and citation omitted). "Each of these factors is weighed either in favor of or against the State or the defendant, and then balanced to determine if a defendant's right to a speedy trial was violated." *Spearman*, 2012-NMSC-023, ¶ 17. No single *Barker* factor is "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant." *Barker*, 407 U.S. at 533. Thus, in applying the *Barker* factors, we reject a bright-line analysis and analyze each case on an ad hoc basis in light of its own unique factual circumstances. *State v. Garza*, 2009-NMSC-038, ¶ 14, 146 N.M. 499, 212 P.3d 387.

SPEEDY TRIAL ANALYSIS

The Sixth Amendment directs that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial[.]" *Id.* ¶ 10 (internal quotation marks and citation omitted). In a similar vein, Article II, Section 14 of the New Mexico Constitution guarantees to an accused "a speedy public trial[.]" *Garza*, 2009-NMSC-038, ¶ 10 n.1. Thus, in our analysis, we are mindful that "[t]he right to a speedy trial is a fundamental right of the accused[,]" *id.*, that is "guaranteed by both the Sixth Amendment of the United States Constitution and Article II, Section 14 of the New Mexico Constitution." *Spearman*, 2012-NMSC-023, ¶ 16. *See Barker*, 407 U.S. at 533 (stating that "because we are dealing with a fundamental right of the accused," the balancing process of the *Barker* factors "must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution"). The first step in our analysis is to determine whether the length of pretrial delay is "'presumptively prejudicial.'" *Garza*, 2009-NMSC-038, ¶ 23 (quoting *Barker*, 407 U.S. at 533). Only when the length of delay is "presumptively prejudicial" do we proceed to consideration of all of the *Barker* factors. *See Garza*, 2009-NMSC-038, ¶ 21 (stating that a "presumptively prejudicial" length of delay is "simply a triggering mechanism, requiring further inquiry into the *Barker* factors").

The district court found, and the State does not dispute, that this is a simple case. *See State v. Plouse*, 2003-NMCA-048, ¶ 42, 133 N.M. 495, 64 P.3d 522 ("We give due deference to the district court's findings as to the level of complexity."). In *Garza*, our Supreme Court adopted "one year as a benchmark for determining when a simple case may become presumptively prejudicial." 2009-NMSC-038, ¶ 48. Here, Defendant's right to a speedy trial attached upon his arrest. *See State v. Laney*, 2003-NMCA-144, ¶ 10, 134 N.M. 648, 81 P.3d 591 ("The right [to a speedy trial] attaches when the defendant becomes an accused, either at the time of arrest or upon the issuance of an indictment or information."). Thus, the almost twenty-four-month delay between Defendant's arrest on January 25, 2010, and his January 11, 2012 trial date surpasses the twelve-month threshold for simple cases. We therefore proceed to analyze and weigh the four *Barker* factors.

A. Length of Delay

"Considering the length of delay as one of the four *Barker* factors, the greater the delay the more heavily it will potentially weigh against the State." *Garza*, 2009-NMSC-038, ¶ 24; *see also Doggett v. United States*, 505 U.S. 647, 652 (1992) (noting that, once a defendant establishes that delay was presumptively prejudicial, "the court must then consider, as one factor among several, the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim").

Here, the delay was almost two years, nearly twice as long as the twelve-month threshold for simple cases. We therefore weigh this factor heavily against the State. *See State v. Vigil-Giron*, 2014-NMCA-069, ¶¶ 19, 65, 327 P.3d 1129 (concluding that the length of delay, which was twice as long as the length of delay considered to be presumptively prejudicial, weighed heavily against the State), *cert. denied*, 2014-NMCERT-006, 328 P.3d 1188; *State v. Marquez*, 2001-NMCA-062, ¶ 12, 130 N.M. 651, 29 P.3d 1052 (holding that a nine-month delay that extended beyond the

then-nine-month threshold for simple cases weighed heavily against the State).

B. Reasons for Delay

Analysis of this *Barker* factor requires us to address the central question posed in this case: whether the reasons for the almost two-year delay should be weighed against the State, and to what extent. *Garza*, 2009-NMSC-038, ¶ 25. "*Barker* identified three types of delay, indicating that 'different weights should be assigned to different reasons' for the delay." *Garza*, 2009-NMSC-038, ¶ 25. At one end of the spectrum, "a valid reason, such as a missing witness, should serve to justify appropriate delay." *Id.* ¶ 27 (internal quotation marks and citation omitted). At the other end of the spectrum, "'official bad faith in causing delay will be weighed heavily against the government,' and excessive bad-faith delay may present an overwhelming case for dismissal.'" *Id.* ¶ 25 (quoting *Doggett*, 505 U.S. at 656). In the middle lies negligent or administrative delay. Although "negligent," the delay is nonetheless weighed against the State, "'since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant,'" but such a reason is not weighed heavily. *Garza*, 2009-NMSC-038, ¶ 26 (quoting *Barker*, 407 U.S. at 531).

The State acknowledges that the thirty-nine day delay between Defendant's arrest on January 25, 2010, and the filing of the criminal information in the district court on March 5, 2010, weighs slightly against the State. We agree. *See State v. Parrish*, 2011-NMCA-033, ¶ 24, 149 N.M. 506, 252 P.3d 730 (stating that the two-month delay due to the State's dismissal of charges in magistrate court and refiling the same charges in the district court was negligent delay that weighed slightly against the State). We also agree with the State that during the four-month period from March 5, 2010, when the criminal information was filed in the district court, until July 6, 2010, when Judge Tatum voluntarily recused himself on July 6, 2010, the case was progressing in a normal fashion, with the result that this period is to be weighed neutrally. *See id.* ¶ 25 (stating that four and one-half month delay should be weighed neutrally because "the case progressed with customary promptness during this period"). This was followed by a delay of approximately three months, from July 6, 2010, until October 5, 2010, during which the case was assigned to Judge Hartley, and then reassigned to Judge Orlik, who set the case for trial to commence on October 5, 2010. Again, we agree with the State that this reassignment of judges "falls within the administrative burdens on the criminal justice system" and is weighed as negligent delay against the State. *Garza*, 2009-NMSC-038, ¶ 29.

This brings us to the pivotal period of delay in this case. That period spans from the October 6, 2010 trial setting before Judge Orlik, which was vacated on Defendant's motion, to the January 11, 2012 trial setting made by Judge Quinn. This period was calculated by the district court to be "four hundred sixty-three (463) days, or one (1) year, three (3) months and six (6) days."

We begin our analysis with Defendant's October 5, 2010 motion to vacate the October 6, 2010 trial setting. The State acknowledges in its brief "that this long of a delay was probably not contemplated by Defendant in his motion for continuance." We agree. Defendant asked that the trial setting be vacated on grounds that Defendant's counsel had another trial scheduled on the same date at the same time before another

judge. The motion added that "the parties stipulate that any delay resulting from a continuance will not count against the State in speedy trial determinations." With this agreement, the State concurred in the motion. By its own terms, the motion only stipulated that delay *resulting* from the continuance would not count against the State in a speedy trial determination; it did not permanently waive Defendant's constitutional right to a speedy trial. Thus, Defendant's concession anticipated a reasonable delay for the State to bring the case to trial rather than a grant to the State of an unlimited time to do so.

In assessing how this period of delay is to be considered, we remain mindful that our Supreme Court has rejected bright-line rules in speedy trial analyses, opting instead for an evaluation of the circumstances in each individual case. *Garza*, 2009-NMSC-038, ¶ 13 (noting that the *Barker* factors analysis "specifically rejects inflexible, bright-line approaches to analyzing a speedy trial claim"). Defendant accurately portrays the circumstances of this case in stating that after his motion to continue was granted, "[o]ne month passed and the State did nothing. Six months passed and the State did nothing. A year passed and the State did nothing. After 15 months, the trial court sua sponte ordered a status conference and set a date for trial." The district court made the same assessment and concluded that the long delay after Defendant's continuance motion "was caused by the State during which time the State took no steps to obtain a trial setting."

In *Vigil-Giron*, we examined the administrative delay in a case that was delayed for thirty-six months and concluded that the State "did not go far enough in providing evidence or explanation showing that this case was properly and efficiently managed or showing that the case could not have been managed considerably better for societal purposes and to protect [the d]efendant's right to a speedy trial." 2014-NMCA-069, ¶ 66. Yet, in that case the state had actually taken action to move the case forward, filing motions requesting the court to clarify the status of the case and requesting the court to address the outstanding motions as soon as possible. *Id.* ¶¶ 4, 6. In this case, on the other hand, the State did *nothing* to bring the case to trial after the continuance motion, and offers no explanation for its inaction. We therefore agree with the district court and conclude that this entire period of delay is attributable to the State. *See Marquez*, 2001-NMCA-062, ¶ 15 ("The State has a constitutional duty to make a diligent, good-faith effort to bring [a d]efendant to trial.").

We are therefore left to consider what weight to assign to this period of delay. Negligent delay is not ordinarily weighed heavily against the state, *Garza*, 2009-NMSC-038, ¶ 26, but this is not a case of mere negligence. Instead, this is a case in which the State was inexcusably indifferent to its affirmative obligation to bring a simple case to trial. *See State v. Gallegos*, 2010-NMCA-032, ¶ 21, 148 N.M. 182, 231 P.3d 1124 (noting our concern for the States's "lack of progress" in moving the case forward and holding that the elapsed time weighed heavily against the State (internal quotation marks omitted)); *Cf. Spearman*, 2012-NMSC-023, ¶ 30 (agreeing with the district court's conclusion that the State's extremely dilatory conduct warranted weighing the reason for the delay heavily against the state); *State v. Lucero*, 1999-NMCA-102, ¶ 25, 127 N.M. 672, 986 P.2d 468 (noting that the prosecutor candidly acknowledged that his negligence in failing to know the contents of the prosecution file could possibly rise to bad faith). We

recognize that various judge reassignments were made after Judge Orlik passed away and that we would ordinarily weigh such a delay neutrally. However, because the State did nothing to obtain a trial setting between the time that the continuance motion was granted and the time that Judge Orlik passed away (a span of 235 days), or at any time after that, we do not do so in this case.

We therefore hold that the delay which the State allowed to elapse after Defendant's motion to vacate should be weighed heavily against the State. *See State v. Urban*, 2004-NMSC-007, ¶ 20, 135 N.M. 279, 87 P.3d 1061 (considering the State's "complete lack of an acceptable reason for fourteen months" of delay between the defendant's arrest and his indictment as significant in its determination that the defendant's speedy trial right was violated); *Ruffin v. State*, 663 S.E.2d 189, 199 (Ga. 2008) ("[T]he weight we assign to official negligence compounds over time as the presumption of evidentiary prejudice grows. Thus, our toleration of such negligence varies inversely with its protractedness.").

C. Assertion of the Right

The right to a speedy trial is fundamental and is not waived even if never asserted. *See Garza*, 2009-NMSC-038, ¶ 32 ("Rights under this amendment are fundamental in nature so that a failure to assert them does not constitute waiver, but the timeliness and vigor with which the right is asserted may be considered as an indication of whether a defendant was denied needed access to speedy trial over his objection or whether the issue was raised on appeal as afterthought."). Defendant did not raise the claim as an afterthought. He asserted his right to a speedy trial in the magistrate court, and clearly still had speedy trial considerations on his mind when he stipulated that the delay caused by his motion to continue would not count against the State, before ultimately filing his motion to dismiss on speedy trial grounds. These actions are sufficient to support the conclusion that Defendant adequately asserted his right and did not acquiesce in the delay. We give no consideration to the State's assertion that "[a]lthough it is not Defendant's responsibility to take himself to trial, Defendant did have the responsibility to explicitly reassert his right when the delay became unacceptable to him." The State cites no authority for this proposition so we assume there is none. *In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 ("We assume where arguments in briefs are unsupported by cited authority, counsel after diligent search, was unable to find any supporting authority.").

D. Prejudice

Our Supreme Court in *Garza* explained how the prejudice factor is to be examined as follows:

> The United States Supreme Court has identified three interests under which we analyze prejudice to the defendant: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. As to the first two types of prejudice, some degree of oppression and anxiety is inherent for every defendant who is jailed while awaiting trial. Therefore, we weigh this factor in the defendant's favor only where the pretrial incarceration or the anxiety suffered is undue. The

> oppressive nature of the pretrial incarceration depends on the length of incarceration, whether the defendant obtained release prior to trial, and what prejudicial effects the defendant has shown as a result of the incarceration. . . . However, without a particularized showing of prejudice, we will not speculate as to the impact of pretrial incarceration on a defendant or the degree of anxiety a defendant suffers.

Garza, 2009-NMSC-038, ¶ 35 (alterations, internal quotation marks, and citations omitted).

Here, Defendant was released on bond nine days after being arrested and was therefore exposed to minimal pretrial incarceration. Defendant's counsel argued, and the district court accepted, the traditional prejudicial concerns such as "restriction on his movement, restrictions on his liberty, excessive worrying about the charges against him," and concern that the delay could have caused the defense to be impaired. However, this is not sufficient by itself to demonstrate particularized prejudice caused by the delay. *See id.* ¶ 37 (noting that the district court had found "some actual prejudice in the form of restrictions imposed by pre-trial conditions of release and stress" but holding that "some non-particularized prejudice is not the type of prejudice against which the speedy trial right protects" (alteration and internal quotation marks omitted)); *Gallegos*, 2010-NMCA-032, ¶ 27 (holding that the defendant's loss of his job, and his assertions of sleeplessness and nervousness did "not constitute the particularized prejudice required for dismissal under a speedy trial violation"). No testimony or documentary evidence was offered or admitted into evidence in support of counsel's assertion that Defendant was prejudiced. *Spearman*, 2012-NMSC-023, ¶ 39 ("[T]he claimed showing of prejudice came in the form of allegations of counsel, both in the written motion to dismiss and at the hearing. Allegations of counsel are not generally considered evidence. [The d]efendant should have offered some actual evidence in the form of affidavits, testimony, or documentation in support of the allegations of lost employment and bankruptcy." (citation omitted)).

Likewise, Defendant presented no evidence that his defense was actually impaired by the delay. Although this last type of prejudice is the "most serious," our Supreme Court emphasized that a defendant must "substantiate this type of prejudice." *Garza*, 2009-NMSC-038, ¶ 36 (internal quotation marks and citation omitted). Nevertheless, our Supreme Court also acknowledged that while prejudice is obvious if a witness dies or disappears during the delay, "[t]here is also prejudice if defense witnesses are unable to recall accurately events of the distant past[,]" and this type of prejudice "is not always reflected in the record because what has been forgotten can rarely be shown." *Id.* (internal quotation marks and citation omitted). We acknowledge that such may be the case, but here we have nothing more than allegations of counsel, and we will not speculate that important witness testimony was lost due to impaired memories caused by the delay.

We therefore conclude that the arguments of counsel concerning Defendant's worry, anxiety, and the possibility that his defense could have been impaired failed to establish the particularized showing of prejudice as required by *Garza*. *Cf. Vigil-Giron*, 2014-NMCA-069, ¶¶ 51-53, 57 (citing the defendant's testimony regarding her

increased anxiety, insomnia, and development of an autoimmune disease related to the stress—which was supported by medical records—as well as her loss of employment and inability to find employment as a result of the indictment, and actual impairment to her defense due to the death of a witness).

E. Balancing Test

As in *Garza*, "[t]he primary issue raised by the facts of [the] case is whether a court can find a violation of a defendant's speedy trial right without a particularized showing of prejudice." 2009-NMSC-038, ¶ 38. In *Garza*, the Court noted that a showing of actual prejudice may not always be possible and adopted the position of the United States Supreme Court in *Doggett*, 505 U.S. 647, and many other lower courts that a showing of particularized prejudice is not necessary in cases in which the other *Barker* factors weigh heavily in the defendant's favor and the defendant has not acquiesced in the delay. *Garza* states:

> We similarly hold [as in *Doggett* and many other lower courts] that generally a defendant must show particularized prejudice of the kind against which the speedy trial right is intended to protect. However, if the length of delay and the reasons for the delay weigh heavily in [the] defendant's favor and [the] defendant has asserted his right and not acquiesced to the delay, then the defendant need not show prejudice for a court to conclude that the defendant's right has been violated.

2009-NMSC-038, ¶ 39.

This holding in *Garza* reiterates that we are engaged in *balancing* the *Barker* factors, none of which is itself dispositive, to determine whether the constitutional right to a speedy trial has been violated. *See Cantu v. State*, 253 S.W.3d 273, 280-81 (Tx. Crim. App. 2008) ("Thus, the greater the [s]tate's bad faith or official negligence and the longer its actions delay a trial, the less [a] defendant must show actual prejudice or prove diligence in asserting his right to a speedy trial."); *State v. Farrell*, 727 A.2d 501, 518 (N.J. Super. Ct. App. Div. 1999) ("As a matter of logic and decency, given that the four factors of *Barker* call for a balancing of considerations, when the delay in concluding a trial is excessively long by any measure, as here, the burden upon a defendant to satisfy the other factors is correspondingly diminished.").

The length of the delay here was excessively long. All parties agree that this is a simple case, and almost two years elapsed from Defendant's arrest on January 25, 2010, to the trial setting of January 11, 2012. This is twice the amount of time to presume prejudice in a simple case. The State is responsible for 463 days of this delay, and because the delay resulted from the State's inexcusable neglect and complete lack of diligence in seeking a trial setting, the period of delay weighs heavily against the State. Defendant adequately asserted his right to a speedy trial, and in moving to vacate the initial trial setting, Defendant did not permanently waive or abandon that right. We therefore hold that notwithstanding Defendant's failure to make a particularized showing of prejudice resulting from the delay, he is entitled to relief. *See Farrell*, 727 A.2d at 518 (concluding that because the delay was far beyond what was reasonable, and the reasons for the delay were the prosecutions "clear inattention to its responsibilities" together with the court's failure to prepare itself to try the matter, no

showing of prejudice was required for the defendant to succeed on his argument that he was denied his adequately asserted right to a speedy trial). We therefore affirm.

CONCLUSION

The order of the district court dismissing this case on speedy trial grounds is affirmed.

IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

J. MILES HANISEE, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-013

Filing Date: November 18, 2014

Docket No. 32,942

STATE OF NEW MEXICO,

Plaintiff-Appellant,

v.

JOSEPH MARTINEZ,

Defendant-Appellee.

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OPINION

ZAMORA, Judge.

The central issues presented in this case are: (1) whether this Court can consider the State's new argument against suppression of the alleged victim's testimony in light of the procedural posture of the case, and (2) if so, did the district court err in denying the State's motion for reconsideration of the suppression order.

I. BACKGROUND

A. Factual Background

Bernalillo County Sheriff's Deputies were dispatched to Defendant's home in response to an "open-line" static 911 call. The deputies entered the large rural home based on the 911 call and what appeared to be a disheveled room behind an unlocked sliding glass door. They did not find an active emergency but discovered drugs and drug paraphernalia, as well as videos and photographs that appeared to be child pornography. The deputies called

the Bernalillo County Sheriff's Office to prepare a search warrant.

In the meantime, Defendant arrived home. He was transported from his home to the sheriff's office in downtown Albuquerque and questioned. Defendant admitted that the drugs in the house were for personal use. He also admitted that he had dozens of pornographic videos, some of which involved him engaging in sexual acts with an underage male.

Based on the observations of the deputies conducting the search and on Defendant's statements, a search warrant was issued permitting the seizure of drugs and drug paraphernalia, as well as videos and photographs containing child pornography from Defendant's residence. Pursuant to the warrant, deputies seized camcorders, videos, photographs, marijuana, and drug paraphernalia.

A review of the seized evidence revealed ten VHS videos, twelve 8 mm videos, four mini DVDs, and twenty-nine Polaroid photographs depicting a minor engaging in sexually explicit conduct. Sheriff's deputies conducted an investigation based on the photographs found in Defendant's home and Defendant's statements, and were able to identify the alleged victim (E.L.). E.L. was interviewed and disclosed sexual abuse that had occurred for eleven years.

Defendant was arrested and indicted by a grand jury on forty-four counts of Criminal Sexual Penetration of a Child; and one count each of Sexual Exploitation of a Child; Possession with Intent to Distribute Marijuana; Possession of Drug Paraphernalia; and Possession of Cocaine. Defendant was also indicted by a federal grand jury on two counts of Production of a Visual Depiction of a Minor Engaged in Sexually Explicit Conduct. The state and federal cases against Defendant proceeded concurrently.

B. Procedural Background

After Defendant was indicted in district court, he challenged the legality of the warrantless search of his home and moved to suppress all evidence obtained as a result of the search. After a hearing on Defendant's motion, the district court found that the search of Defendant's home was illegal, and ordered suppression of all physical evidence seized from his home and vehicle, all statements made by Defendant to law enforcement agents, and the testimony of E.L.

The State appealed the suppression order to this Court. On appeal, the State argued that the warrantless search of Defendant's home was not illegal. The State also argued that even if the search was illegal, Defendant's statements and E.L.'s testimony were sufficiently attenuated from the search to purge the taint of the illegality, and should not be suppressed. This Court proposed to affirm both the illegality of the search and the suppression of the evidence.

As to the suppression of E.L.'s testimony, we proposed to affirm because the district court's findings indicated that E.L. was identified and questioned based on evidence and statements of Defendant that followed the illegal search, and because the State did not explain how it proved to the district court that E.L. would have independently contacted police, nor did the State describe an intervening event or attenuation. The State did not oppose the proposed result, however it did request that we clarify whether our affirmance would preclude E.L. from testifying in future proceedings. In our memorandum opinion

affirming the suppression order, we clarified that we were not deciding what effect, if any, the suppression order would have on E.L.'s right to testify in any future proceeding. *State v. Martinez*, No. 31,242, mem. op. (N.M. Ct. App. Mar. 28, 2012) (non-precedential).

Meanwhile, Defendant pleaded guilty to the charges in the federal indictment. In Defendant's plea agreement with the United States, he admitted that E.L. voluntarily disclosed details of the years of sexual abuse he suffered at the hand of Defendant, and that E.L. was willing to testify about the abuse at trial. The State then moved for reconsideration of the district court's suppression of E.L.'s testimony. The State argued to the district court that when determining whether evidence obtained as the result of an illegal search is sufficiently attenuated from the illegality as to purge the taint and render the testimony admissible, under *United States v. Ceccolini*, 435 U.S. 268 (1978), the live testimony is analyzed differently than other forms of evidence. To support this new argument, the State offered new authority that was not considered in the first appeal. The district court denied the State's motion for reconsideration. This appeal followed.

II. DISCUSSION

On appeal, the State challenges the district court's order denying its motion to reconsider suppression of E.L.'s testimony, arguing that the district court erroneously focused solely on the question of whether E.L. would have independently come forward to police, prior to the time police searched Defendant's home. We agree with the State's argument.

Defendant does not respond to the State's arguments related to the suppression of E.L.'s testimony. Instead, he argues that under the law of the case doctrine, this Court's prior affirmance of the suppression order, which included suppression of E.L.'s testimony, is binding on the remainder of the proceedings in this case, and precludes reconsideration.

A. The Law of the Case Doctrine Does Not Preclude Reconsideration of the Suppression Order

Generally, under the law of the case doctrine, "a decision by an appeals court on an issue of law made in one stage of a lawsuit becomes binding on subsequent [district] courts as well as subsequent appeals courts during the course of that litigation." *State ex rel. King v. UU Bar Ranch Ltd. P'ship*, 2009-NMSC-010, ¶ 21, 145 N.M. 769, 205 P.3d 816. However, "[a]pplication of this doctrine is a matter of discretion and is not an inflexible rule of jurisdiction." *State v. House*, 2001-NMCA-011, ¶ 10, 130 N.M. 418, 25 P.3d 257.

In *House*, the defendant appealed his DWI-related and reckless driving-related convictions and the corresponding sentences. *Id.* ¶¶ 1, 5. Our Supreme Court affirmed the convictions and remanded for re-sentencing. *Id.* ¶ 1. The defendant appealed again to this Court, presenting new arguments related to his sentence. *Id.* ¶¶ 1, 10. The state objected, arguing that the law of the case doctrine foreclosed our ability to hear any argument not made on the defendant's first appeal. *Id.* ¶ 10. Finding the state's argument unpersuasive, we concluded:

> [T]he [law of the case] doctrine traditionally applies only where a matter has been *specifically* ruled upon in a prior and final appellate proceeding. . . . Neither this Court,

> nor our Supreme Court, has passed upon any of the issues *specifically* presented in this appeal, and while it would have been preferable for [the d]efendant to have brought these claims in his prior appeal, the doctrine of law of the case does not preclude our review.

Id. (emphasis added) (citations omitted).

Similarly, it could be argued here that the State could have and should have made its *Ceccolini* argument the first time suppression was addressed. It is worth noting that "the [law of the case] doctrine leaves considerable discretion to appellate courts to interpret what, precisely, the law of the case is[.]" *King*, 2009-NMSC-010, ¶ 27. In its motion for reconsideration, the State presented the district court with a new issue not specifically addressed by the previous sitting district court or this Court on Defendant's motion for suppression. We have considered the merits of the parties' arguments within a motion for reconsideration, even where the motions were supported by new evidence, new arguments, or new authority. *See State v. Gamlen*, 2009-NMCA-073, ¶¶ 4-5, 146 N.M. 668, 213 P.3d 818 (permitting the defendant to make new arguments on a motion to reconsider suppression).

In the case before us now, the State first advanced its *Ceccolini* argument in its motion to reconsider suppression. Defendant did not respond to this argument, rather, he argued that the district court was bound by this Court's affirmance in the first appeal. At the hearing on the State's motion for reconsideration, the district court rejected Defendant's assertion that it was bound by our affirmance. We conclude that it was appropriate for the district court to consider the State's motion for reconsideration that was based on new argument and new authority.

B. State's Motion to Reconsider Suppression

On appeal, the State argues that the district court erred in focusing solely on whether E.L. would have independently contacted police. The district court found that, because the State could not prove that E.L. would have independently contacted police, his testimony was not sufficiently attenuated from the illegal search as to make it admissible. The district court also noted that E.L's willingness to testify was irrelevant. As a result of its erroneous focus, the district court never analyzed the applicability of *Ceccolini* in this case.

We have not yet deviated from federal precedent as it pertains to the attenuation of illegally obtained evidence as an exception to the exclusionary rule. *State v. Garcia*, 2009-NMSC-046, ¶¶ 14, 23, 147 N.M. 134, 217 P.3d 1032 (following the "fruit of the poisonous tree" and attenuation doctrines set forth in *Wong Sun v. United States*, 371 U.S. 471, 488 (1963) and *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975)); *see also State v. Murry*, 2014-NMCA-021, ¶ 33, 318 P.3d 180 (citing *Wong Sun*, 371 U.S. at 488, for general suppression principles). This Court has not specifically considered whether we will adopt the *Ceccolini* attenuation analysis of witness testimony, and we decline to do so here. *See City of Las Cruces v. El Paso Elec. Co.*, 1998-NMSC-006, ¶ 18, 124 N.M. 640, 954 P.2d 72 ("We avoid rendering advisory opinions."). While we are not deciding the applicability of *Ceccolini*, we are required to analyze it within the context of the State's argument in support its Motion for Reconsideration and make the determination

of whether there was substantial evidence to support the district court's decision.

Motions to reconsider suppression in criminal cases involve mixed questions of law and fact. *See State v. Hicks*, 2013-NMCA-056, ¶ 5, 300 P.3d 1183, *cert. denied*, 2013-NMCERT-004, 301 P.3d 858; *State v. Eric K.*, 2010-NMCA-040, ¶ 14, 148 N.M. 469, 237 P.3d 771. Factual determinations by the district court are reviewed "under a substantial evidence standard and legal questions [are reviewed] de novo." *Hicks*, 2013-NMCA-056, ¶ 5 (internal quotation marks and citation omitted).

In *Ceccolini*, the United States Supreme Court included a lengthy discussion of the uniqueness of live witness testimony compared to inanimate evidentiary objects, touching directly on the concerns presented:

> Witnesses are not like guns or documents which remain hidden from view until one turns over a sofa or opens a filing cabinet. Witnesses can, and often do, come forward and offer evidence entirely of their own volition. And evaluated properly, the degree of free will necessary to dissipate the taint will very likely be found more often in the case of live-witness testimony than other kinds of evidence. The time, place and manner of the initial questioning of the witness may be such that any statements are truly the product of detached reflection and a desire to be cooperative on the part of the witness. And the illegality which led to the discovery of the witness very often will not play any meaningful part in the witness' willingness to testify.

Ceccolini, 435 U.S. at 276-77. The Court went on to state that "[t]he fact that the name of a potential witness is disclosed to police is of no evidentiary significance, per se, since the living witness is an individual human personality whose attributes of will, perception, memory and volition interact to determine what testimony he will give." *Id.* at 277.

Given this distinction, the Court held that courts should be cautious to use the exclusionary rule for the testimony of live witnesses, and admonished courts to apply it with circumspection to determine its usefulness in any particular context. The Court was particularly concerned with a situation in which the "exclusion would perpetually disable a witness [who is not a putative defendant] from testifying about relevant and material facts, regardless of how unrelated such testimony might be to the purpose of the originally illegal search or the evidence discovered thereby." *Id.* Under such circumstances, the Court held that "since the cost of excluding live-witness testimony often will be greater, a closer, more direct link between the illegality and that kind of testimony is required." *Id.* at 278. Thus, the significance of the State's request that this Court clarify whether E.L. was precluded from testifying in future proceedings.

Applying these principles to the facts of that case, the Court held that the witness's testimony, though causally related to the illegal search, had become sufficiently attenuated because (1) the free will that the witness exhibited made it more likely that she would eventually have come forth on her own, *see id.* at 276-77, 279; (2) the Supreme Court is less willing to exclude live-witness testimony than to exclude inanimate

documents or objects, *id.* at 277; (3) other illegally seized evidence was not used in questioning the witness, *id.* at 279; (4) "[s]ubstantial periods of time elapsed between the time of the illegal search and the initial contact with the witness," and "between [the contact with the witness] and the testimony at trial," *id.*; and (5) it did not appear that the officer conducted the illegal search with the intent of seeking out evidence, *id.* at 280.

We agree with the State that the district court's focus was erroneous. Under *Ceccolini*, the likelihood that a testifying witness will be discovered through independent, legal means is not determinative of attenuation, but rather is a function of the witness's willingness to testify. *See id.* at 276 ("The greater the willingness of the witness to freely testify, the greater the likelihood that he or she will be discovered by legal means and, concomitantly, the smaller the incentive to conduct an illegal search to discover the witness."). Here, the key considerations in determining attenuation of E.L.'s testimony are: (1) whether E.L. will willingly testify against Defendant; and (2) whether the purpose served by excluding E.L.'s testimony outweighs the cost of forever precluding him from testifying against his abuser.

The State had the opportunity to present relevant evidence at the hearing on the motion for reconsideration in support of its argument of the application of *Ceccolini* and specifically, E.L.'s willingness to testify, but failed to do so. State's counsel provided only information about E.L.'s alleged willingness to testify included as an admission by Defendant, in Defendant's federal plea agreement, that E.L. was prepared to willingly testify about the abuse in federal court as detailed in E.L.'s wife's affidavit. *See also State v. Cochran*, 1991-NMCA-051, ¶ 8, 112 N.M. 190, 812 P.2d 1338 (noting that "argument of counsel is not evidence").

Defendant's federal plea agreement was not relevant to show that because E.L. was willing to testify in the federal proceeding he was therefore willing to testify in the state proceeding. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Gonzales*, 2010-NMCA-023, ¶ 4, 147 N.M. 735, 228 P.3d 519 (alteration, internal quotations and citations omitted). Rule 11-401 NMRA (2011) defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." The State failed to tender relevant evidence to show E.L. was also willing to testify in the state court proceedings so that the district court could consider even the first of the *Ceccolini* factors. The State had the opportunity to present E.L.'s testimony, in person or by affidavit, to show his willingness to testify, but chose not to do so. We conclude that the district court appropriately denied the State's motion for reconsideration.

Based on the foregoing, we affirm the district court's order denying the State's motion for reconsideration.

IT IS SO ORDERED.

M. MONICA ZAMORA, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

MICHAEL E. VIGIL, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-014

Filing Date: October 29, 2014

Docket No. 33,171

KIM HOLLAND and KRQE NEWS 13,

Petitioners-Appellants,

v.

CITY OF ALBUQUERQUE and Deputy Police Chief ALLEN BANKS,

Respondents-Appellees.

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for Appellees

OPINION

SUTIN, Judge.

Petitioners KRQE News 13 and its reporter Kim Holland appeal from an adverse summary judgment dismissing their claims against Respondents City of Albuquerque and Albuquerque Police Department (APD) Deputy Chief Allen Banks for penalties for violation of the New Mexico Inspection of Public Records Act (the IPRA), NMSA 1978, §§ 14-2-1 to -12 (1947, as amended through 2013). The claims arose from a request by Ms. Holland for lapel videos relating to certain arrests. The issue is whether Ms. Holland's request was verbal, in which case penalties are unavailable under the Act, or written, in which case penalties are available. *See* § 14-2-8(A), (D). We hold that the request was verbal and that Respondents did not violate the Act, and we affirm the summary judgment.

BACKGROUND

On July 10, 2012, Ms. Holland spoke to APD public information officer, Marie A. Martinez, on the telephone and requested lapel videos. Ms. Martinez emailed APD records custodian, Reynaldo L. Chavez, asking Mr. Chavez to treat the email as a request from Petitioners for the lapel videos. The lapel videos were not made available to Petitioners within the time required under the IPRA were the request to have been written. *See* § 14-2-8(D). It was not until August 16, 2012, when the City held a press conference with all local media outlets, that the City released the lapel videos. Petitioners sued Respondents for violation of the IPRA based on the time delay and that the delay was illegitimate in that "the request caught APD off guard and it was

scrambling to keep the lapel videos from going to the public."

DISCUSSION

The applicable section of the IPRA states:

> Any person wishing to inspect the public records may submit an oral or written request to the custodian. However, the procedures set forth in this section shall be in response to a written request. The failure to respond to an oral request shall not subject the custodian to any penalty.

Section 14-2-8(A). Petitioners contend that Ms. Martinez's email to Mr. Chavez turned the oral request made by Ms. Holland into a written request made by Ms. Holland. Petitioners also contend that Ms. Martinez was Ms. Holland's agent, thereby making the email that of Ms. Holland. We reject these contentions.

That Ms. Martinez then emailed the request to Mr. Chavez did not convert Ms. Holland's oral request into a written request made by Ms. Holland. Petitioners provide no authority supporting this argument. We see no reason to hold that an APD information officer's documenting an oral request, which would appear to be a good practice, should constitute transformation of an oral request into a written request for the purposes of the IPRA.

Ms. Martinez was not acting as an agent of Ms. Holland such that Ms. Martinez's email constituted a written request by Ms. Holland. There exists no evidence supporting such a legal relationship, and in addition to lack of evidence, Petitioners provide no authority that supports it. In particular, other than that the circumstances are obviously outside the scope of agency, there exists no evidence that Ms. Martinez consented to or acted in a manner to create an agency relationship, nor is there any evidence that Ms. Holland agreed to or acted in any manner to create an agency relationship. *See Maes v. Audubon Indem. Ins. Grp.*, 2007-NMSC-046, ¶ 17, 142 N.M. 235, 164 P.3d 934 (stating that an agency relationship does not arise until the principal "manifests assent to [the agent] that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act" (internal quotation marks and citation omitted)); *Freeman v. Fairchild*, 2014-NMCA-___, ¶ 22, ___ P.3d ___ (No. 32,542, Sept. 10, 2014) (recognizing that the existence of an agency relationship is a question of fact that requires evidence that the principal manifested assent to the agent and the agent manifested assent or otherwise consented so to act). Ms. Martinez's request to Mr. Chavez that Ms. Holland's request be treated as an IPRA request on Ms. Holland's behalf constituted nothing more than documenting Ms. Holland's verbal request and bringing it to the attention of the proper IPRA person in the APD. *See* § 14-2-8(E).

We agree with Respondents' concern that to accept Petitioners' agency theory would mean that every oral request documented by the APD would automatically, upon documentation, constitute a written request emanating from the requester. We also agree with the concern that oral requests can be fraught with potential for misunderstanding and misinterpretation. Petitioners' reliance on *San Juan Agric. Water Users Ass'n v. KNME-TV*, 2011-NMSC-011, 150 N.M. 64, 257 P.3d 884, is of no assistance to Petitioners. In that case, the person who requested information

was an attorney who was acting as the attorney, and therefore, the agent of his client, when the requester was the client who sought the information, using his attorney-agent to obtain it. *Id.* ¶¶ 1-7, 19, 43, 45. This is not the situation before us.

CONCLUSION

We affirm the district court's summary judgment granted in favor of Respondents.

IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

MICHAEL E. VIGIL, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-015

Filing Date: December 16, 2014

Docket No. 32,530

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

JESSE DURAN,

Defendant-Appellant.

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for Appellant

OPINION

GARCIA, Judge.

Defendant, Jesse Duran, appeals from his conviction for criminal sexual penetration of a minor in the first degree (CSPM). He contends, among other things, that the district court erred by allowing the individual who conducted the S.A.F.E. House interview of the victim to testify, as a lay witness, that a majority of children she interviewed delayed in disclosing sexual abuse. We agree. This delayed disclosure testimony was the proper subject for expert testimony as opposed to lay testimony. We also conclude that the error was not harmless. Accordingly, we reverse Defendant's conviction and remand for a new trial.

BACKGROUND

Defendant was accused of digitally penetrating his girlfriend's daughter (Victim) sometime between 1996 and 1998. Defendant

was not charged with CSPM until May 2006. Victim was twenty-one years old at the time she testified at Defendant's trial.

Victim testified that Defendant abused her when she was in either second or fourth grade. Defendant was Victim's mother's boyfriend at the time, and Victim was sleeping on a mattress with Victim's sister in the living room of Defendant's mother's house. Victim testified that she woke up to Defendant "touching [her]." She said that Defendant placed his fingers in her vagina while she was asleep. She stated Defendant asked her "if it felt good," and that she responded by pushing him away. Victim said that she then got up and went to school. She stated that, after this incident, she "tried to stay away [from Defendant] as much as [she] could" and "never felt comfortable in front of him[.]"

Victim testified that she did not tell anyone about the incident at the time because she "was scared" and that she "[didn't] know" why she was scared. She said that she later told her sister, three of her cousins, and two of her close friends. None of these six family members or friends testified at trial. When Victim was in sixth grade, she told her mother that Defendant had touched her. Victim's mother confronted Defendant, who denied the allegation, and Victim's mother did nothing further. Victim told her mother again in the fall of 2004, a few months after her mother had broken off her relationship with Defendant. This time, Victim's mother reported the incident to law enforcement, who conducted an investigation. Victim was interviewed by Denise Clement, a forensic interviewer at a child S.A.F.E. House on January 25, 2005.

Clement testified at trial that a child S.A.F.E. House is a child advocacy center where professionals interview children who are suspected to be victims of sexual abuse, physical abuse, or who have witnessed violent crimes. She testified about her interview of Victim and her experience as a S.A.F.E. House interviewer in general. Clement testified that she worked as a S.A.F.E. House interviewer from 2002 to 2008 and conducted between 1400 and 1600 interviews during that period of time. She described the interview as "a structured conversation with a child" that is "designed to try and elicit accurate events about the child['s] . . . account." She explained that "the goal of the interview is to either refute or corroborate the allegation."

During a lengthy bench conference during Clement's testimony, defense counsel argued that Clement should not be allowed to testify about the percentage of children who delay reporting sexual abuse. Defense counsel argued that this was a subject for expert testimony, and Clement was not qualified as an expert. The district court overruled Defendant's objection, stating:

> Well, it seems to me that, really, this is an issue in the case, and everybody realizes that it is an issue, and it's an issue in many child sexual abuse cases. This witness, based upon her training, and most especially, her experience in meeting with these children who are victims of sexual assault, this is not an expert opinion, but is more of a lay opinion, based upon her experience in the unit. And so I'm going to go ahead and allow the testimony.

The jury was excused for further questioning of Clement. The prosecutor asked Clement: "[B]ased on your experience, what percentage of the children that you personally

interviewed have a delayed disclosure. Do you know what I mean by that?" Clement answered, "Yes, I do. It's been awhile since I reviewed the statistics, but it's greater than 50 percent." Clement explained that this percentage was based on her personal experience and the S.A.F.E. House's internal record-keeping. Clement later clarified: "I was really referring to what I'm remembering about the data. I certainly can't say what percentage of kids I interviewed, because I didn't keep track of that."

When the jury returned, the prosecutor asked Clement, "Can you put a percentage on how many children delay in disclosing?" Clement stated that she could not give a percentage, but that "[i]n the majority of children that I've interviewed at the [S.A.F.E.] House, there is a delay in disclosure." When the issue was raised once again prior to closing arguments, the district court stated, "I think it's fairly well-known and considered of people in the field that . . . delayed reporting is common in these types of cases. . . . I don't find it in any way to be a stretch or outside, you know, learned treatises and other facts[.]"

In its closing argument, the State told the jury that it was "to determine whether or not [it] believe[d Victim]" and that if it "believe[d] that she was telling the truth . . . , then the State has proven its case[.]" The jury found Defendant guilty of CSPM. Defendant was sentenced and this appeal followed.

DISCUSSION

Defendant raises two issues on appeal. First, he contends the district court erred in allowing Clement to testify that a majority of children she interviewed delayed in disclosing sexual abuse because her statement was not a lay opinion, and she was not qualified as an expert to offer such testimony. Second, he contends the district court erred in failing to excuse three jurors for cause. Because we agree that the district court erred with respect to Clement's lay testimony about delayed disclosure, and because we conclude that the error was not harmless, we reverse Defendant's conviction and do not address the juror issue.

A. The Behavior of Child Victims of Sexual Abuse in General is Not a Proper Subject for Lay Testimony

Defendant contends the district court erred in allowing Clement to testify about the frequency of delayed disclosure of sexual abuse in children because this is not a proper subject for lay testimony. Generally, we review a district court's evidentiary rulings for an abuse of discretion. *State v. Martinez*, 2008-NMSC-060, ¶ 10, 145 N.M. 220, 195 P.3d 1232. But we review de novo "[a] misapprehension of the law upon which a court bases an otherwise discretionary evidentiary ruling[.]" *Id.*; *see also State v. Torres*, 1999-NMSC-010, ¶ 28, 127 N.M. 20, 976 P.2d 20 ("[T]he threshold question of whether the trial court applied the correct evidentiary rule or standard is subject to de novo review on appeal.").

New Mexico courts have reported numerous decisions addressing the admissibility of expert testimony on the subject of the behavior of children who allege sexual abuse. *See, e.g.*, *State v. Casaus*, 1996-NMCA-031, ¶¶ 31-32, 121 N.M. 481, 913 P.2d 669 (affirming admission of expert testimony about how a child remembers an event); *State v. Newman*, 1989-NMCA-086, ¶¶ 11, 15, 109 N.M. 263, 784 P.2d 1006 (affirming admission of expert testimony concerning the general characteristics of

sexually abused children). However, we have no published authority addressing the admissibility of lay testimony on the subject of children's behavior when alleging sexual abuse.

Rule 11-701 NMRA governs the admissibility of opinion testimony by lay witnesses and provides:

> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is
>
> A. rationally based on the witness's perception,
>
> B. helpful to clearly understanding the witness's testimony or to determining a fact in issue, and
>
> C. not based on scientific, technical, or other specialized knowledge within the scope of Rule 11-702 NMRA.

Rule 11-702 allows a witness "who is qualified as an expert" to testify "in the form of an opinion or otherwise" if the witness has "scientific, technical, or other *specialized knowledge*" that "will help the trier of fact to understand the evidence or to determine a fact in issue." (Emphasis added.)

Defendant contends that the frequency of delayed reporting of sexual abuse by children is not a proper subject for lay testimony and can only be admitted through expert testimony. Defendant characterizes Clement's testimony as "generalities in a specialized area in the abstract." The State argues that Clement's testimony was properly admitted under Rule 11-701 because it was based on Clement's personal observations, not any specialized knowledge. We disagree with the State.

Other authorities have concluded that testimony about the behavior of sexually abused children must be admitted as expert testimony and not lay testimony. In *State v. Gonzalez*, 834 A.2d 354, 356-59 (N.H. 2003), the New Hampshire Supreme Court held that a social worker's and detective's testimony about the frequency of victim recantations or denials and of delayed disclosure of sexual abuse could not be admitted as lay opinion. There, the detective testified at trial that he was trained to interview child victims of sexual abuse and that based on his experience as a lead investigator, "it is not unusual for a sexual assault victim to delay disclosure." *Id.* at 359. The court concluded that this testimony should have been excluded. It explained, "While [the detective's] testimony was based upon his personal observations while investigating sexual assault cases, his observations and conclusions regarding the frequency of delayed disclosures required specialized training, experience[,] and skill not within the ken of the ordinary person." *Id.* (internal quotation marks and citation omitted); *see also* 1 Paul DerOhannesian II, *Sexual Assault Trials* § 11.17 at 856 (3d ed. 2006) ("Opinions about sexual abuse victims' denials and recantations ordinarily require training, observations, and experience not within the common knowledge of the general public and are not admissible as lay witness testimony."). We agree with these authorities and conclude that statements about the behavior of children alleging sexual assault is not a proper subject for lay testimony because it is neither the kind of personal observation that a lay person is capable of making nor common knowledge within the general public.

The record reflects that the district court conflused the requirements of Rule 11-701 and Rule 11-702. The district court explained that it would allow Clement to testify about delayed disclosure "based upon her training, and most especially, her experience in meeting with these children who are victims of sexual assault[.]" The fact that, as part of Clement's training and experience, she learned that delay occurred in a number of cases of alleged child abuse is not a legitimate basis for admitting the opinion of a lay witness; it can be important in admitting the opinion of an expert witness. *See* Rule 11-702 (defining an expert witness as "[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education"). Training and experience are factors to be considered in evaluating expert testimony, not lay testimony. The court also explained that the frequency of delayed reporting is well-known by people in this field and reflected in learned treatises. Knowledge contained in treatises and understood by practitioners in their particular field is the type of testimony presented by an expert witness because it is not the type of information generally known by an ordinary citizen or the general public. *See Hopkins v. State*, 639 So. 2d 1247, 1252-53 (Miss. 1993) (reversing the defendant's conviction where a social worker testified as a lay witness regarding the defendant's prior crime of a pedophilic nature to establish that such a crime was relevant for the propensity of truthfulness and to impeach the defendant's credibility without additional expert testimony relying on statistical studies or treatises).

Moreover, during her voir dire examination Clement said that her statement on delayed disclosure was based not just on her personal observations, but also on specific statistics compiled in the S.A.F.E. House's specialized work environment. She explained that, in answering the prosecutor's question about the frequency of delayed disclosure, she "was really referring to what [she was] remembering about the data." Thus, her statement about delayed disclosure data was based on "specialized knowledge" and thus should not have been admitted under Rule 11-701. *See* Rule 11-701 (stating that lay witness opinion testimony cannot be "based on scientific, technical, or other specialized knowledge within the scope of Rule 11-702").

We conclude that the district court erred in allowing Clement to testify as a lay witness that "[i]n the majority of children that I've interviewed at the [S.A.F.E.] House, there is a delay in disclosure." We reach this conclusion because this statement was based on "specialized knowledge" within the purview of experts under Rule 11-702 and infers that Victim's delayed disclosure was consistent with most of the children that Clement has interviewed.

B. The Error in Allowing the Interviewer to Testify Regarding the Frequency of Delayed Reporting in Child Abuse Victims Was Not Harmless

We next consider whether the district court's error in admitting Clement's testimony on delayed disclosure was harmful. *See State v. Tollardo*, 2012-NMSC-008, ¶ 25, 275 P.3d 110 ("Improperly admitted evidence is not grounds for a new trial unless the error is determined to be harmful."). "We review improperly admitted evidence for non-constitutional harmless error." *State v. Serna*, 2013-NMSC-033, ¶ 22, 305 P.3d 936. A non-constitutional error is harmless "when there is no reasonable *probability* the error affected the verdict." *Tollardo*, 2012-NMSC-008, ¶¶ 36, 42 (internal quotation marks and citation omitted) (stating that the "central inquiry" of

non-constitutional harmless error analysis is "whether [the] error was likely to have affected the jury's verdict").

In " 'assessing the probable effect of evidentiary error,' " we " 'should evaluate all of the circumstances surrounding the error.' " *Serna*, 2013-NMSC-033, ¶ 23 (quoting *Tollardo*, 2012-NMSC-008, ¶ 43). These circumstances include "the source of the error [and] the emphasis placed on the error," *Serna*, 2013-NMSC-033, ¶ 23; "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[,]" *State v. Leyba*, 2012-NMSC-037, ¶ 24, 289 P.3d 1215; "the importance of the erroneously admitted evidence in the prosecution's case," *State v. Lovett*, 2012-NMSC-036, ¶ 55, 286 P.3d 265 (alteration, internal quotation marks, and citation omitted); and "whether the error was cumulative or instead introduced new facts[,]" *Tollardo*, 2012-NMSC-008, ¶ 43 (alteration, internal quotation marks, and citation omitted). We remain mindful that "[t]hese considerations, however, are not exclusive[.]" *Serna*, 2013-NMSC-033, ¶ 23. "[T]hey are merely a guide to facilitate the ultimate determination—whether there is a reasonable probability that the error contributed to the verdict." *Id.* The State bears the burden to prove that the error was harmless. *See State v. Stephen F.*, 2008-NMSC-037, ¶ 38, 144 N.M. 360, 188 P.3d 84.

The State contends that any error was harmless because there was sufficient evidence of Defendant's guilt even in the absence of Clement's testimony about delayed disclosure. We disagree for the following reasons.

First, the State was "the source of the error," not Defendant. *See Serna*, 2013-NMSC-033, ¶ 23. Defendant did not elicit Clement's improper testimony—the State did.

Second, the delayed disclosure testimony was not "cumulative"—it presented the jury with the "new fact[]" that in "the majority of children [Clement interviewed at the S.A.F.E. House], there was a delay in disclosure." *See Lovett*, 2012-NMSC-036, ¶ 55.

Third, although the State did not place "emphasis" on the delayed disclosure testimony, this testimony was important to its case. *See Serna*, 2013-NMSC-033, ¶ 23; *Lovett*, 2012-NMSC-036, ¶ 55. It was important, no matter how briefly it was discussed, because it was designed to lead the jury to infer that Victim's delay in disclosing the incident was justified—an inference that would support Victim's credibility. *See Miller v. Commonwealth*, 77 S.W.3d 566, 571 (Ky. 2002) (determining that "[t]here could be only two possible purposes for [questioning an expert about what percentage of children delay in reporting sexual abuse]: (1) to prove that [the victim] had, in fact, been abused because, like other abused children, she delayed reporting the abuse; or (2) to disprove an inference of fabrication arising from the delay in reporting").

Fourth, although we agree with the State that the other non-objectionable evidence admitted at trial would be sufficient to uphold the conviction, we do not analyze this evidence for "sufficiency"; instead, we look at it "to evaluate what role the [erroneously admitted evidence] played at trial." *Leyba*, 2012-NMSC-037, ¶ 24. The only other evidence was Victim's testimony, her mother's testimony that Victim had told her about the incident, and Defendant's denials to the Victim's mother and the police.

The State told the jury in its closing argument that this case was about "whether or not [the jury] believe[d Victim.]" Thus, the "role" of the delayed disclosure testimony was to support Victim's credibility, which, as the State recognized in its closing argument, was the central factual issue that the jury was to determine at trial—whether Victim "was telling the truth."

We conclude that there is a reasonable probability that Clement's lay testimony on delayed disclosure affected the verdict. Where, as here, the improperly admitted evidence goes to the primary issue of credibility in a sexual abuse case, it is more likely to be prejudicial. Clement testified to her extensive training and experience working with victims of child sexual abuse over a six-year period with between 1400 to 1600 S.A.F.E. House interviews that she conducted. As a result, Clement's delayed-reporting testimony had the reasonable probability of carrying sufficient weight to have an impact and effect upon the jury. *See State v. Marrington*, 73 P.3d 911, 917 (Or. 2003) (concluding that erroneously admitted expert testimony about delayed reporting was harmful because the case "involved a swearing contest[, t]he victim claimed that there had been sexual contact in the form of inappropriate touching[, the] defendant denied that it had occurred[, with there being] no other witnesses to the touching, and there was no physical evidence of any kind that corroborated the alleged abuse[, thus t]he victim's delayed reporting was not a tangential issue, but [was] a central factual issue in this case"); *see also Stephen F.*, 2008-NMSC-037, ¶¶ 41-42 (concluding that the improper exclusion of a victim's motive to fabricate was not harmless error in an alleged rape case because our courts "cannot overlook the fact that this [type of] case—like so many of its kind—boils down to a question of credibility"); *State v. Fairweather*, 1993-NMSC-065, ¶¶ 19-20, 116 N.M. 456, 863 P.2d 1077 (holding that erroneous admission of expert's testimony about sexual abuse victim's truthfulness was harmful because "[c]redibility . . . was a pivotal issue at trial"); *State v. Lucero*, 1993-NMSC-064, ¶¶ 21-22, 116 N.M. 450, 863 P.2d 1071 (concluding that an erroneous admission of expert testimony as to a sexual abuse victim's credibility was not harmless error because "[t]he only witnesses to the alleged abuse were the defendant and the complainant" and "credibility was a pivotal issue in [the] case"); *cf. State v. Marquez*, 2009-NMSC-055, ¶ 25, 147 N.M. 386, 223 P.3d 931 (concluding improperly admitted evidence was not harmless because it undermined the defendant's credibility), *overruled on other grounds by Tollardo*, 2012-NMSC-008, ¶ 37 n.6.

CONCLUSION

Defendant's conviction is reversed. Because Victim's testimony provided sufficient other evidence to support a conviction, we remand to the district court for a new trial. *See State v. Dowling*, 2011-NMSC-016, ¶ 18, 150 N.M. 110, 257 P.3d 930 (recognizing that double jeopardy protections do not bar retrial where sufficient evidence was presented to support a conviction).

IT IS SO ORDERED.

TIMOTHY L. GARCIA, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

MICHAEL E. VIGIL, Judge

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMSC-006

Filing Date: February 5, 2015

Docket No. 34,271

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

v.

DONNIE SILVAS,

Defendant-Respondent.

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for Respondent

OPINION

BOSSON, Justice.

A jury convicted Defendant Donnie Silvas of 1) trafficking a controlled substance by possession with intent to distribute pursuant to NMSA 1978, Section 30-31-20(A)(3) (2006), and 2) conspiracy to commit the same crime pursuant to NMSA 1978, Section 30-28-2(A) (1979). Notably, both charges stemmed from one point in time and a single sale of drugs by Defendant. The Court of Appeals overturned the conspiracy conviction based on an expanded use of a judicial presumption, of somewhat ancient origin, known as Wharton's Rule. While we agree with the decision to reverse the conspiracy charge, we do so on a different ground. As explained herein, we conclude that double jeopardy is the better analysis, and in so doing we expressly discourage any future expansion of Wharton's Rule beyond its original contours.

BACKGROUND

Defendant, under suspicion of selling illegal drugs out of his motel room in Lordsburg, New Mexico, was placed under surveillance by a federal Border Operations Task Force, acting jointly with the Lordsburg Police Department. In the course of that surveillance, on March 14, 2008, Lordsburg police officer Rodney Plowman saw a white car leaving Defendant's motel and followed it. Officer Plowman eventually pulled the car over for a traffic violation in front of the Budget Inn. As soon as the vehicle stopped, Patricia Ortega, a passenger, ran from the car into her room at the Inn, where she placed two small packages containing methamphetamine in a desk drawer.

Ortega ultimately let Officer Plowman into her motel room and gave him the two packages. When subsequently interviewed about the source of the drugs, Ortega admitted to her purchase from Defendant. Three days later, acting under a warrant, Lordsburg police officers arrested Defendant and charged him with trafficking a controlled substance by possession with intent to distribute, and conspiracy to commit the same crime, both charges stemming from his sale to Ortega. A jury convicted Defendant on both charges.

Court of Appeals Opinion

On appeal, our Court of Appeals reversed the conspiracy charge on the basis that it violated Wharton's Rule. For purposes of clarity, we provide a brief explanation. "Wharton's Rule provides an exception to the general rule that conspiracy and the substantive offense planned by the conspirators are separate crimes." *Johnson v. State*, 587 A.2d 444, 452 (Del. 1991). The 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. Silvas*, 2013-NMCA-093, ¶ 31, 310 P.3d 621 (citation omitted), *cert. granted*, 2013-NMCERT-009, 311 P.3d 452. Historically, the prototypical Wharton's Rule offenses were adultery, incest, bigamy, and dueling, crimes which usually involve an agreement between two persons for their commission. *Iannelli v. United States*, 420 U.S. 770, 782 (1975).

Wharton's Rule serves as a kind of judicial presumption that precludes separate punishment of the conspiracy in the absence of clear legislative intent to punish both crimes. *Id.* at 782. More specifically, 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.

Silvas, 2013-NMCA-093, ¶ 32 (citation omitted). "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.* (omission in original) (internal quotation marks and citation omitted).

Applying Wharton's Rule to the present case, our Court of Appeals held that "[t]he 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." *Id.* ¶ 38. Continuing, the Court explained that "[t]he agreement between Defendant and Ortega to sell and purchase the methamphetamine was logically necessary for the transferring of the methamphetamine from one to another." *Id.* ¶ 40. Accordingly, the Court of Appeals concluded in the particular context of this case that Wharton's Rule prohibited Defendant from being convicted for both conspiracy and possession with intent (trafficking). *Id.* ¶ 41.

As we stated earlier, Wharton's Rule is of somewhat ancient origins. It "emerged at a time when the contours of the law of

conspiracy were in the process of active formulation." *Iannelli*, 420 U.S. at 781. Since then, our double jeopardy jurisprudence has evolved in a way that now covers most, if not all, circumstances in which Wharton's Rule could theoretically be applied. When the Court of Appeals concluded, describing Wharton's Rule, that "conspiracy and the substantive offense are the same crime" because "concerted action [was] logically necessary to the substantive offense," *Silvas*, 2013-NMCA-093, ¶ 32, it could well have been describing a multiple-punishment, double-description analysis under principles of double jeopardy. Accordingly, rather than expand Wharton's Rule beyond its original context, we proceed to analyze this case under double jeopardy principles and reach the same result.

DISCUSSION

Double jeopardy protects against multiple punishments for the same offense. *See State v. Montoya*, 2013-NMSC-020, ¶ 23, 306 P.3d 426. Cases involving multiple violations of a single statute are referred to as "unit-of-prosecution" cases, while cases involving violations of multiple statutes are "double-description" cases. *Id.* ¶ 30. In double-description cases like the one before us, "[t]he Supreme Court has fashioned a double jeopardy analysis in which the polestar guiding courts is the [L]egislature's intent to authorize multiple punishments for the same offense." *Swafford v. State*, 1991-NMSC-043, ¶ 9, 112 N.M. 3, 810 P.2d 1223.

This Court has long recognized a two-part test for analyzing double description cases. First, the defendant's conduct must be unitary. *Id.* ¶ 25. If the conduct is not unitary, the analysis ends and double jeopardy does not apply. *Id.* If the conduct is unitary, however, then the second part of the analysis is to determine if the Legislature intended to punish the offenses separately. *Id.* "Only if the first part of the test is answered in the affirmative, and the second in the negative, will the double jeopardy clause prohibit multiple punishment in the same trial." *Id.*

Unitary Conduct

Conduct is unitary when not sufficiently separated by time or place, and the object and result or quality and nature of the acts cannot be distinguished. *Id.* ¶ 28. Although the parties did not argue this issue below, double jeopardy can be raised at any time. NMSA 1978, § 30-1-10 (1963). At oral argument before this Court, the State conceded that Defendant's conduct was unitary, and for good reason. As we shall see, the State's theory of the case as reflected in its presentation to the jury focused solely on the exact moment when Defendant and Ortega exchanged drugs for money. The State used evidence of that single moment in time to prove *both* Defendant's possession with intent and Defendant's conspiratorial agreement with Ortega to commit that same crime. Therefore, the two crimes, as charged by the State in this particular case, were based on one illegal act, making the charged conduct not only unitary, but identical.

Legislative Intent to Punish Both Crimes Separately

Given unitary conduct, we now inquire whether Defendant has been punished twice for the same offense, and if so, whether the Legislature intended that result. To determine legislative intent, we look first to the language of the statute. *State v. Swick*, 2012-NMSC-018, ¶ 11, 279 P.3d 747. "[W]here the [L]egislature has explicitly

authorized multiple punishment the judicial inquiry is at an end, [and] multiple punishment is authorized and proper." *State v. Gutierrez*, 2011-NMSC-024, ¶ 50, 150 N.M. 232, 258 P.3d 1024 (first and third alterations in original) (quoting *Swafford*, 1991-NMSC-043, ¶ 11). Absent a clear intent for multiple punishments, we apply the *Blockburger* test. *Swafford*, 1991-NMSC-043, ¶ 30. *See Blockburger v. United States*, 284 U.S. 299, 304 (1932).

Blockburger provides that "the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger*, 284 U.S. at 304. If the *Blockburger* test shows that one statute is subsumed within the other, then the analysis ends and the statutes are considered the same for double jeopardy purposes. *Swafford*, 1991-NMSC-043, ¶ 30. If one statute requires proof of a fact that the other does not, then the Legislature is presumed to have intended a separate punishment for each statute without offending principles of double jeopardy. *Swick*, 2012-NMSC-018, ¶ 13.

"That presumption, however, is not conclusive and it may be overcome by other indicia of legislative intent." *Swafford*, 1991-NMSC-043, ¶ 31. "[W]e 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." *Montoya*, 2013-NMSC-020, ¶ 32 (internal quotation marks and citations omitted).

Blockburger continues to retain a place in our jurisprudence as a kind of surrogate for construing legislative intent. In recent years, however, when interpreting generic, multipurpose criminal statutes which may in the abstract "require proof of a fact [the other does] not," this Court has modified the *Blockburger* test to require more. We now consider not only whether each statute *in the abstract* requires "proof of a fact that [the other does] not," but also whether the statute, as *applied* by the State in a given case, overlaps with other criminal statutes so that the accused is being punished twice for the same offense. *Gutierrez*, 2011-NMSC-024, ¶¶ 57-58. "[W]hen a statute is vague and unspecific, our courts must evaluate legislative intent by considering the State's legal theory independent of the particular facts of the case. Our courts may do this by examining the charging documents and the jury instructions given in the case." *Swick*, 2012-NMSC-018, ¶ 21 (internal quotation marks and citations omitted).

Gutierrez is a helpful model for the present case. In *Gutierrez*, the jury convicted the accused of both armed robbery and the unlawful taking of a motor vehicle, both crimes arising out of the single act of stealing a car. 2011-NMSC-024, ¶ 1. Because the armed robbery statute is a generic, multipurpose statute, we considered not only the statutory elements in the abstract but also the armed robbery statute as applied by the State to that particular prosecution, as revealed in the charging documents and jury instructions. *See id.* ¶ 58.

In so doing, we concluded that although armed robbery could be committed in various ways that would not involve the unlawful taking of a car, in this particular case the theft of the car was the basis for both convictions. *See id.* ¶ 60. The crime of unlawfully taking a car was completely subsumed within the crime of armed robbery as applied to that case, thereby punishing the accused twice for the same offense in violation

of the double jeopardy clause. *See id.* This Court held "that Child's armed robbery conviction [in the context of that case] required proof of the taking of [a] 1996 Oldsmobile, and it therefore subsumed the [separate charge for the] unlawful taking of [the same] motor vehicle conviction, [thereby] placing Child in double jeopardy." *Gutierrez*, 2011-NMSC-024 ¶ 60.

Gutierrez controls this case.[1] Here, the State charged Defendant under the Controlled Substances Act, § 30-31-20(A)(3)(c), which provides that to "traffic" means *inter alia*, "possession with intent to distribute . . . methamphetamine, its salts, isomers and salts of isomers." In addition, the State charged Defendant under the conspiracy statute, § 30-28-2(A), which provides that "[c]onspiracy consists of knowingly combining with another for the purpose of committing a felony within or without this state." These two statutes are different and in the abstract they contain different elements. However, applying the principles of *Gutierrez*, we see the conspiracy statute as a generic, multipurpose statute that can apply to various forms of conduct. Therefore, we must narrow our focus and consider the statute in light of the particular conspiracy alleged in this case. In so doing, we look to the charging documents and the instructions to the jury. They are very telling.

As instructed, the jury had to find that "[t]he defendant intended to transfer [methamphetamine] to another" for the charge of trafficking by possession with intent to distribute. The jury instruction providing the elements for the conspiracy charge included, "[t]he defendant and another person by word or acts agreed together to commit Possession with Intent to Distribute (methamphetamine)." According to the instructions, then, the State appears to have directed the jury to the same act for both crimes—the sale of drugs from Defendant to Ortega—as the basis to convict for both crimes.

Our reading of the instructions is confirmed when we look to how the prosecutor asked the jury to apply these instructions. The State's legal theory for both crimes rested upon Defendant's unitary conduct of transferring the drugs from his hand to Ortega's hand and Ortega transferring the money to Defendant. In the State's closing argument, the prosecutor said:

> I want to narrow it down like a laser beam. . . . We are talking about that instant in time whenever he passed . . . the two baggies of methamphetamine from his hand to Patricia Ortega's hand on March 14. That's the only instance that is of importance here. That is the crux of the charges against him, is whenever it went from his hand to hers, what was in his mind whenever he gave it to her.

The prosecutor further argued, "All we have to prove is that he possessed it, he intended to give it to another person, and he gave it to another person. That's it." Finally, he said "Defendant possessed. Defendant gave it to Patricia Ortega. He intended to do so, and he did it on March 14. Period. Boom. End of story."

The prosecutor also emphasized his

[1]We acknowledge that these charges against Defendant were tried a year before our opinion issued in *Gutierrez*, which might explain why double jeopardy was not an issue at trial.

belief that the agreement necessary for the conspiracy charge can stem from the same act.

> I went through the process of how she agreed with the defendant, Donnie Silvas, by words. We agreed that she asked for narcotics. He gave her narcotics; he agreed to do that. . . . He told her how much. She gives him the money. That's words. By acts, there's a transaction between the two people.

Moreover, the prosecutor asked Ortega, "So you agreed and he agreed? He agreed to give it to you by act and he gave it to you, and you agreed to take it by act and you took it, correct?" Ortega agreed that she did. Notably, the State did not offer evidence of any other agreement on which to base its conspiracy charge.

The State relied on the sale of the narcotics to support its theory under both charges. As Defendant correctly describes it in his briefing to this Court, "[t]herefore, the jury in this case was asked to answer one question twice: whether [Defendant] agreed to give and then gave methamphetamine to Ms. Ortega." The State asked the jury to infer Defendant's intent and his agreement with Ortega from the same conduct. Importantly, the State did not ask the jury to infer a conspiracy from anything other than the simple act of exchanging drugs for money. Thus, as the State presented this case to the jury, the inescapable conclusion is that Defendant was convicted twice and is being punished twice for the same offense.

In Most Cases Conspiracy Can Still Be Separate from the Substantive Offense

Unlike this case, conspiracy is typically treated separately from the substantive offense. Federal courts have long recognized "that conspiracy to commit a crime is not the same offense as the substantive crime for double jeopardy purposes, because the agreement to do the act is distinct from the [completed] act itself." *United States v. Fornia-Castillo*, 408 F.3d 52, 69 (1st Cir. 2005) (alteration in original) (internal quotation marks and citations omitted); *see also United States v. Felix*, 503 U.S. 378, 390 (1992); *see also Murr v. United States*, 200 F.3d 895, 902 (6th Cir. 2000). The United States Supreme Court has held that evidence of certain overt acts for conspiracy can be based on the substantive offense and not violate double jeopardy. *Felix*, 503 U.S. at 380-81. However, the cases cited above involved multilayered conduct in which evidence of the conspiracy did not rely solely on evidence of the substantive crime—a single act in time and space.

For example, in *Fornia-Castillo*, the defendant was charged with conspiracy and later charged with substantive drug offenses. 408 F.3d at 58. The conspiracy charge stemmed from a surveillance task force following suspected drug dealers who delivered large amounts of money to the defendant on a certain date. *Id.* at 56-57. Evidence of the defendant's substantive drug charges arose from three separate instances—different dates from the conspiracy charge—when the defendant and two co-conspirators arranged for the delivery of drugs. *Id.* at 59-61. Overall, the defendant was charged with criminal conduct that spanned over three years. *Id.*

Likewise in *Murr*, the defendant operated a drug ring that operated over the course of an entire year. 200 F.3d at 898-900. The defendant and his co-conspirators

traveled to purchase the drugs, sold the drugs, and also laundered money through the defendant's business partner. *Id.* When discussing the double jeopardy issue, the trial judge stated: "Here, the two indictments charge different violations on different days, in different places, which involve different people." *Id.* at 901-02.

Finally, in *Felix*, the defendant was charged with manufacturing, possessing, and distributing methamphetamine as well as conspiracy over a four-month period. 503 U.S. at 382. The defendant also was named in nine overt acts as support for the conspiracy charge, two of which were based on the substantive crime for which he was previously convicted. *Id.*

Each of these cases offered evidence of a conspiracy that was at least partially distinct from the evidence of substantive crimes. While there may be a crossover of evidence, the conspiracy charge involved more than just the substantive crime. New Mexico law also requires evidence of more than just the substantive crime.

Under New Mexico law, courts have upheld separate convictions for conspiracy to commit trafficking and the act of trafficking when the evidence showed more than just the exchange of drugs for money. In *State v. Armijo*, 1976-NMCA-125, ¶ 3, 90 N.M. 10, 558 P.2d 1149, the Court determined that evidence supporting the distribution counts was clearly relevant to the conspiracy charge. The case involved more than just a single sale, however. There was evidence of "transactions between defendant and [her co-conspirator] on December 31, 1974, and January 4, January 9, January 22, January 30, February 1, February 13 and February 19, 1975." *Id.* ¶ 4. The State also introduced evidence that the transactions were in an amount that suggested a conspiracy to resell at least part of the drugs to others. *Id.* ¶ 8. There was also evidence of communications between the parties separate from the actual purchase. *Id.* ¶¶ 7-8.

The *Armijo* Court held that "[t]he size, frequency and manner of the transactions in this case were evidence sustaining defendant's conviction for conspiracy . . . to traffic in heroin. The jury could properly conclude that the heroin defendant supplied . . . was for resale." *Id.* ¶ 8. *See also State v. Borja-Guzman*, 1996-NMCA-025, 121 N.M. 401, 912 P.2d 277, ¶ 29 (holding that there was sufficient evidence for the conspiracy charge because the defendant and his co-conspirator received a counteroffer to sell heroin and methamphetamine to undercover agents, the two conferred, agreed to accept the new price, and agreed to meet at the same location later that day to conclude the transaction); *see also Ontiveros v. Dorsey*, No. 96-2036, 1996 WL 603276, at *1-3 (10th Cir. Oct. 22, 1996) (unpublished) (upholding the conspiracy conviction because the defendant said his co-conspirator would be in El Paso, the co-conspirator stated that his source was reliable, the van used to transport the cocaine belonged to the co-conspirator, and finally, the co-conspirator was involved in hiding and transporting the cocaine to New Mexico). The present case, of course, presents the converse scenario involving a complete overlap in evidence.

CONCLUSION

For the reasons stated, we affirm the decision of the Court of Appeals to reverse Defendant's conviction for conspiracy. We base our holding on principles of double jeopardy and not on Wharton's Rule. We

remand for further proceedings consistent herewith.

IT IS SO ORDERED.

RICHARD C. BOSSON, Justice

WE CONCUR:

BARBARA J. VIGIL, Chief Justice

PETRA JIMENEZ MAES, Justice

EDWARD L. CHÁVEZ, Justice

CHARLES W. DANIELS, Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMSC-007

Filing Date: February 16, 2015

Docket No. 33,684

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

MICHAEL ASTORGA,

Defendant-Appellant.

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Santa Fe, New Mexico

for Plaintiff

Jorge A. Alvarado, Chief Public Defender
David Henderson, Assistant Appellate Defender
Santa Fe, New Mexico

for Defendant

OPINION

CHÁVEZ, Justice.

A jury convicted Defendant Michael Astorga (Defendant) of one count of first-degree murder, two counts of tampering with evidence, and one count of being a felon in possession of a firearm. These convictions stemmed from the March 2006 shooting death of Deputy James McGrane during a traffic stop in the East Mountain area of Bernalillo County. Because Deputy McGrane was an on-duty peace officer, and because the shooting occurred prior to July 1, 2009, the effective repeal date of the death penalty, the State opted to seek a sentence of death. *See* NMSA 1978, § 31-20A-5 (1981) (listing aggravating circumstances for capital felony sentencing determinations, including the victim's identity as "a peace officer who was acting in the lawful discharge of an official duty when he was murdered," that could support a sentence of death prior to July 1, 2009); 2009 N.M. Laws, ch. 11, §§ 1 to 7 (abolishing the death penalty for all crimes committed on or after July 1, 2009).

At Defendant's request, the district court impaneled a jury under Rule 5-704(D) NMRA (2004) to decide only the question of his guilt. After a full trial on that issue (the guilt phase),

the jury returned a guilty verdict on all counts. A separate jury was then impaneled to consider whether Defendant should "be sentenced to death." Rule 5-704(D). After a second trial, which was limited to determining whether Defendant should receive the death penalty (the penalty phase), the sentencing jury did not unanimously agree that Defendant should be sentenced to death. The district court therefore sentenced Defendant to life imprisonment for the first-degree murder conviction, followed by 13-1/2 years for the remaining convictions.

Defendant advances five grounds for reversal, all limited to purported errors that occurred during the guilt phase of his trial. We consider each argument below and affirm.

BACKGROUND

Deputy McGrane was patrolling the area around Tijeras during the early hours of March 22, 2006, when he radioed the dispatch operator that he was pulling over a silver Dodge pickup truck with New Mexico license plate number 459-CDS. About five minutes later, an area resident called 911 and reported that: (1) he had heard two gunshots; (2) he could see a police vehicle pulled over on the side of the road; and (3) it looked like an officer was lying on the ground about ten feet from the vehicle with his flashlight on. The caller also reported that after he heard the shots, his girlfriend saw a white truck "peel[] out of there."

When officers arrived at the scene, they found Deputy McGrane lying face-up on the road with "an apparent gunshot wound to the face." Near Deputy McGrane's body, the officers recovered two spent 10-millimeter casings, both of which had been fired from a Glock handgun. At trial, a pathologist testified that Deputy McGrane had been shot from a distance of "less than 12 inches" and that the bullet had struck him in the chin, severed his spine, and killed him instantly. The pathologist further testified that Deputy McGrane's left leg had multiple abrasions, which "could be" consistent with being run over.

The license plate number given to the dispatch operator by Deputy McGrane was registered to a Dodge truck owned by Defendant. Cash Mart sold the Dodge truck to Defendant, but the title to the truck was still in Cash Mart's name. At the time of the shooting, Defendant was a convicted felon and also had an outstanding warrant for his arrest. Earlier in 2006, Defendant had purchased property in the East Mountains under the name of Donnie Sedillo, looking to make a new life for himself and his family. At about the same time, Defendant had become a regular customer at the Ten Points General Store, where he was known as Donnie Sedillo. Approximately two months before Deputy McGrane's death, Defendant had shown the owner of the general store his 10-millimeter Glock handgun. The 10-millimeter Glock used to kill Deputy McGrane was never recovered. Defendant's truck, however, was found at a residence about 160 yards from Defendant's property.

After the shooting, law enforcement identified Defendant as a potential suspect in Deputy McGrane's death and embarked upon a multiagency investigation. Defendant was eventually apprehended in Mexico and deported back to New Mexico, where he faced charges relating to Deputy McGrane's death.

Defendant was tried for an open count of murder, two counts of tampering with evidence (for hiding the truck and the 10-

millimeter Glock handgun), and one count of being a felon in possession of a firearm. In addition to the evidence described above, several witnesses testified during the guilt phase about statements that Defendant had made after the shooting and before his capture in Mexico. One of Defendant's friends testified that Defendant came to the friend's house shortly after the shooting and told him, "[The Sheriff's Office] fucked it up again, and I started to do good again, and they fucked it up." Another witness testified that she had first met Defendant in Ciudad Juárez, Mexico during a trip to buy marijuana, and that Defendant had volunteered to her, "I'm Michael Astorga, I blasted that cop." The same witness recounted that, on the same occasion, Defendant had tried to sell her guns, and when she asked him whether any of the guns had been used to kill "the cop," Defendant answered, "No, I got rid of that one."

Defendant testified at trial and denied shooting Deputy McGrane. He claimed that he was in Albuquerque at the home of two of his friends at the time of the shooting. When Defendant learned that he was wanted for Deputy McGrane's murder, he fled to Mexico because he was "terrified" that he was "going to be killed by the police." The jury rejected Defendant's alibi and convicted him on all counts.

The penalty phase of Defendant's trial then was held before a separate jury to decide whether Defendant should receive a death sentence. The penalty-phase jury found that Defendant knew or should have known that Deputy McGrane was a peace officer performing his duties, and that Defendant intended to kill Deputy McGrane or acted with reckless disregard for Deputy McGrane's life. However, the jury did not unanimously agree that Defendant should be sentenced to death. This appeal followed.

This Court has jurisdiction over Defendant's direct appeal under Article VI, Section 2 of the New Mexico Constitution and Rule 12-102(A)(1) NMRA. Defendant advances five grounds for reversal, all limited to purported errors that occurred during the guilt phase of his trial: (1) trial counsel's failure to litigate certain evidence amounted to either fundamental error or ineffective assistance of counsel; (2) the district court improperly excluded a prior inconsistent statement during Defendant's cross-examination of a key witness for the State; (3) the State improperly questioned Defendant's alibi witness about Defendant's alleged involvement in another murder; (4) the State failed to introduce sufficient evidence of deliberation to support a conviction for first-degree murder; and (5) the district court abused its discretion by denying Defendant's motion for a change of venue.

DISCUSSION

I. Failure to Litigate Certain Evidence: The "10-8" Call

Defendant's first argument for reversal hinges on a piece of evidence that defense counsel claims to have overlooked during the guilt phase of the trial. At the beginning of its case-in-chief, the State played a recording for the jury of Deputy McGrane's call to the dispatch operator shortly before his death. In the recording, Deputy McGrane can be heard describing his location and a vehicle:

> McGrane: South 14 and 66, New Mexico, 459, Charles-David-Sam, silver

	Dodge pickup, one inside.
Dispatch:	10-9 you're . . . South 14 and what mile marker?
McGrane:	Mile marker 29. It's cross with 66.
Dispatch:	10-4.

At the same time as the "10-4," a voice can be heard stating, "10-8," the code that means that an officer has cleared the last call and is back in service. Defense counsel claimed during the penalty phase that he "didn't catch" the 10-8 call during the guilt phase of the trial, and therefore failed to argue its significance to the jury. He also argued that if the "10-8" was Deputy McGrane clearing the call involving Defendant's truck, "then [Defendant] should have never been a suspect. He shouldn't have been a target, much less convicted," because the shooter was someone else.

Defendant now maintains that defense counsel's failure to litigate the 10-8 call during the guilt phase—"whether Deputy McGrane cleared the call . . . 4-1/2 minutes before the report of shots fired"—requires reversal for two reasons. First, citing *Montoya v. Ulibarri*, Defendant argues that the 10-8 call was evidence of his "actual innocence" and that as a result, defense counsel's failure to litigate the call was fundamental error. *See* 2007-NMSC-035, ¶¶ 14, 23-25, 142 N.M. 89, 163 P.3d 476 (holding that Article II, Sections 13 and 18 of the New Mexico Constitution support an actual innocence claim in a habeas corpus proceeding, absent any other constitutional violation at trial). Second, Defendant maintains that the failure to litigate the 10-8 call violated his right to effective assistance of counsel under the Sixth Amendment of the United States Constitution. We address each argument in turn.

A. Failure to litigate the 10-8 call was not fundamental error

Under the doctrine of fundamental error, an appellate court has the discretion to review an error that was not preserved in the trial court to determine if a defendant's conviction "shock[s] the conscience" because either (1) the defendant is "indisputably innocent," or (2) "a mistake in the process makes a conviction fundamentally unfair notwithstanding the apparent guilt of the accused." *State v. Barber*, 2004-NMSC-019, ¶¶ 8, 17, 135 N.M. 621, 92 P.3d 633 (internal quotation marks and citations omitted); *see also* Rule 12-216(B)(2) NMRA. When reviewing for fundamental error, "we first determine if error occurred; if so, we next determine whether that error was fundamental." *Campos v. Bravo*, 2007-NMSC-021, ¶ 8, 141 N.M. 801, 161 P.3d 846.

Defendant argues that the error in this case was defense counsel's failure to litigate the 10-8 call during the guilt phase, purportedly in violation of Defendant's "right . . . to have this critical evidence introduced at the trial that determined his guilt or innocence." The State concedes that the failure to litigate the 10-8 call was an oversight on defense counsel's part, but it disagrees that the call was evidence of Defendant's actual innocence; instead, from the State's perspective, defense counsel's focus on the call during the penalty phase was merely a "shift in trial strategy" after "the guilt-phase jury rejected [Defendant's] alibi."

We conclude that defense counsel's potential oversight, while possibly an "error" in layman's terms, is not the sort of legal error that the fundamental error doctrine is intended to remedy. Whether to litigate certain evidence at trial is a matter entrusted to the

discretion of defense counsel. *See, e.g., Lytle v. Jordan*, 2001-NMSC-016, ¶ 47, 130 N.M. 198, 22 P.3d 666 (" 'The decision whether to call a witness is a matter of trial tactics and strategy within the control of trial counsel.' " (quoting *State v. Orosco*, 1991-NMCA-084, ¶ 35, 113 N.M. 789, 833 P.2d 1155)). Similarly, whether defense counsel erred by failing to discover the importance of certain evidence is a question of reasonableness considered in light of the record. *See State v. Arrendondo*, 2012-NMSC-013, ¶¶ 38-39, 278 P.3d 517 (noting that for the Supreme Court to remand to the trial court an ineffective assistance of counsel claim raised on direct appeal, a defendant has to demonstrate that "defense counsel's performance" fell outside "the range of reasonable representation," relying upon a defendant's development of the record "with respect to defense counsel's actions" to evaluate said counsel's performance, and refusing to speculate about the reason for trial counsel's delay in discovering potentially exculpatory evidence). Thus, to claim that defense counsel's failure to "catch" the 10-8 call during the guilt phase was error, is really just to challenge the adequacy of defense counsel's performance at trial. This is not a claim of fundamental error, but one of ineffective assistance of counsel, a claim to which we now proceed.

B. Defendant has not made a prima facie claim of ineffective assistance of counsel

Defendant contends that defense counsel's failure to litigate the 10-8 call was ineffective assistance of counsel under the Sixth Amendment of the United States Constitution. "To establish ineffective assistance of counsel, a defendant must show: (1) 'counsel's performance was deficient,' and (2) 'the deficient performance prejudiced the defense.' " *State v. Paredez*, 2004-NMSC-036, ¶ 13, 136 N.M. 533, 101 P.3d 799 (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). On direct appeal, the record is frequently inadequate to either evaluate counsel's performance or to determine prejudice. *Arrendondo*, 2012-NMSC-013, ¶ 38 ("The record is frequently insufficient to establish whether an action taken by defense counsel was reasonable or if it caused prejudice."). As a result, we prefer an ineffective assistance of counsel claim to be brought in a habeas corpus proceeding, "so that the defendant may actually develop the record with respect to defense counsel's actions." *Id.* However, if the defendant presents a prima facie case on direct appeal, we will remand the ineffective assistance of counsel claim to the district court. *Id.* Absent a prima facie case, we presume that counsel's performance was reasonable. *Id.*

To determine if defense counsel's performance was deficient, we consider whether it " 'fell below an objective standard of reasonableness.' " *State v. Hunter*, 2006-NMSC-043, ¶ 13, 140 N.M. 406, 143 P.3d 168 (quoting *Strickland*, 466 U.S. at 688). This is not an easy standard for convicted defendants to meet because "[w]e indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Hunter*, 2006-NMSC-043, ¶ 13 (internal quotation marks omitted). "A prima facie case for ineffective assistance of counsel is not made if there is a plausible, rational strategy or tactic to explain the counsel's conduct." *State v. Ortega*, 2014-NMSC-017, ¶ 55, 327 P.3d 1076 (quoting *Jordan*, 2001-NMSC-016, ¶ 26).

In this case, defense counsel stated that he "made a mistake and overlooked evidence" concerning the 10-8 call. Defendant contends that this admission demonstrates that the failure to litigate the call was a mistake and not the result of trial tactics or strategy. We disagree. Without further factual development, defense counsel's statement is ambiguous and therefore insufficient to support a prima facie ineffective assistance claim, particularly since the State has not had an opportunity to cross-examine counsel about his alleged oversight. When defense counsel stated that he "didn't catch . . . at trial" the evidence concerning the clearing of the call, he may have meant, as Defendant suggests, that he did not *notice* the 10-8 call until after the jury returned its guilty verdict against Defendant. But the State offers an alternative meaning: that defense counsel noticed the call and disregarded it for some strategic reason until he "caught" its significance after the jury found Defendant guilty.

The State's interpretation of defense counsel's words appears plausible, given that defense counsel reasonably could have concluded that the 10-8 call was not helpful to Defendant's case. Defense counsel could have decided not to emphasize the 10-8 call because the jury had the recording of the entire call to dispatch during its deliberations and, as we explain more fully below, the phrase "10-8" sounds as though it may have been made on an overlapping airwave by an officer other than Deputy McGrane. Alternatively, defense counsel may have concluded that even if the 10-8 call had been made by Deputy McGrane, the call would not have proved that Deputy McGrane necessarily terminated all contact with Defendant. Under these circumstances, we cannot determine whether defense counsel's performance "fell below an objective standard of reasonableness" without affording the State an opportunity to question defense counsel about the precise meaning of his statement and whether he chose to not litigate the 10-8 call as a matter of trial strategy. *Hunter*, 2006-NMSC-043, ¶ 13 (internal quotation marks and citation omitted); *see also Arrendondo*, 2012-NMSC-013, ¶ 38-39 (noting that the record is "frequently insufficient to establish whether an action taken by defense counsel was reasonable" and refusing to speculate, for example, as to why a defense counsel delayed in learning of a piece of evidence, so as to conclude that the defendant had failed to make a prima facie claim of ineffective assistance of counsel).

Even assuming that defense counsel's performance was deficient, Defendant has not established that he was prejudiced by the deficient performance. To prove prejudice,

> [A] defendant must demonstrate that counsel's errors were so serious, such a failure of the adversarial process, that such errors undermine[] judicial confidence in the accuracy and reliability of the outcome. A defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. Bernal, 2006-NMSC-050, ¶ 32, 140 N.M. 644, 146 P.3d 289 (second alteration in original) (internal quotation marks and citations omitted).

Defendant forcefully argues that the result of the guilt phase would have been different had defense counsel litigated the 10-8 call. He contends that the dispatch call was

central to the State's case, including the State's argument that the call showed that Deputy McGrane "had acted as a witness to his own murder." According to Defendant, the 10-8 call potentially flips the meaning of the dispatch call on its head by suggesting that Deputy McGrane had already cleared his investigation of Defendant's truck "minutes before he was killed."

We are not persuaded that, had defense counsel litigated the 10-8 call during the guilt phase, there was a reasonable probability that the result would have been different. We agree with the State that the relevance of the 10-8 call went to the question of Defendant's identity as the shooter. Defense counsel argued as much during the penalty phase: "If . . . th[e] dispatch tape is correct and [Deputy McGrane] cleared that scene, then [Defendant] should have never been a suspect. He shouldn't have been a target, much less convicted." However, the guilt-phase jury heard ample additional evidence from which it could have concluded that Defendant killed Deputy McGrane. Such evidence includes Defendant's own admissions concerning his role in the shooting, the facts supporting the inference that Defendant owned a Glock handgun (which was the murder weapon), and the facts indicating that the truck Deputy McGrane had pulled over prior to his murder was owned by Defendant. Cash Mart sold the Dodge truck to Defendant, but the title to the truck was still in Cash Mart's name. In the face of all of the evidence of Defendant's identity as Deputy McGrane's killer, we are not persuaded, to a reasonable probability, that litigating the 10-8 call would have changed the outcome of the guilt phase of Defendant's trial. The 10-8 call was just another piece of evidence for the jury to weigh in deciding whether Defendant murdered Deputy McGrane.

Our conclusion is based on more than mere speculation. Due to the procedural history of this case, the State effectively had to re-litigate the question whether Defendant murdered Deputy McGrane during the penalty phase, and defense counsel took full advantage of the second opportunity to argue Defendant's innocence. *See* UJI 14-7014 NMRA (providing that, to find the defendant guilty of the aggravating circumstance of "murder of a peace officer," the jury must find, inter alia, that "the defendant knew or should have known that *(name of victim)* was a peace officer" and that Defendant "intended to kill or acted with a reckless disregard for human life and knew that [his] [her] acts carried a grave risk of death"). The 10-8 call featured prominently in that phase of the proceedings, and the jury heard conflicting testimony about whether the call had been made by Deputy McGrane or by another officer on an overlapping airwave. Significantly, defense counsel placed the 10-8 call front-and-center during his closing remarks:

> You know, Folks, I should sit down now. This case should be over with because [the dispatch recording] alone, if anybody would have ever taken the time to look at it, to think about it, to study, to get the CAD[1] reports to listen to what was really said in this case should have ended this. Why? Because [Deputy McGrane] went 10-8. The State may get up and say, well, we don't think

[1]CAD reports are "everything that the [law enforcement] dispatcher types in on [his or] her computer." These CAD reports include information concerning the "call, the location," etc. Dispatchers "dispatch[] [law enforcement] units to their calls and tak[e] care of all units."

> that was his voice. I'm sorry, it was your dispatch tape. It was your operator. It was your dispatch operator, it was your exhibit. You're the one that admitted it. You're the one that told us that. I'm sorry, that is what they said. There is no way around that, and there is no way around it for a jury either. It's cold and clear as you can get it.

The penalty-phase jury considered this conflicting evidence and argument together with the recording and transcript of the dispatch call, and unanimously found the aggravating circumstance of "murder of a peace officer." Thus, even after the 10-8 call was fully litigated, the penalty-phase jury unanimously concluded that Defendant had murdered Deputy McGrane. We therefore cannot say to a reasonable probability that litigating the 10-8 call during the guilt phase would have produced a different result.[2]

We hold that Defendant has not made a prima facie case of ineffective assistance of counsel on direct appeal. However, Defendant is not precluded from pursuing this claim in a separate habeas proceeding, where he may get the opportunity to fully litigate the reasonableness of defense counsel's failure to litigate the 10-8 call and whether he was prejudiced by that failure. *See Arrendondo*, 2012-NMSC-013, ¶¶ 42-44 (noting that although there was not "enough evidence to properly address" the defendant's ineffective assistance of counsel claim, the defendant was "free to pursue habeas corpus proceedings where he may actually develop the record" with respect to said claim).

II. Gonzales's Prior Inconsistent Statement

Defendant next argues that the district court improperly prevented him from calling a witness to impeach the testimony of Ernest Gonzales, the owner of the Ten Points General Store, who testified that he had seen Defendant several weeks before Deputy McGrane's death with a 10-millimeter Glock handgun—the same type of handgun used to shoot Deputy McGrane. Gonzales testified that Defendant was a regular customer at Gonzales's convenience store and that on one occasion, Defendant noticed the 9-millimeter Glock handgun that Gonzales carried on his hip and said "I've got one similar to that." Some time later, Defendant again visited Gonzales's store and said, "Oh, I brought that gun so I could show you the one that I had like yours." Gonzales testified that he picked up Defendant's gun and saw that it said "Glock" and " '10 mm' right on it."

On cross-examination, defense counsel asked Gonzales about his previous statement to a defense investigator about why Gonzales thought that the gun Defendant had shown him was a 10-millimeter Glock. According to defense counsel, Gonzales told the investigator that he actually never saw the "10 mm" stamp, and that instead, Defendant had told Gonzales that it was a 10-millimeter handgun when Defendant pulled it out of his pocket. Defense counsel pressed Gonzales

[2]At oral argument, this Court questioned Defendant's appellate counsel about whether the phrase "10-8" was actually part of the larger phrase, "two-oh-nine, 10-8," that can be heard immediately preceding and overlapping with the dispatch operator's "10-4." The parties were granted leave to file supplemental briefing to address the issue, and both acknowledged that the larger phrase, "two-oh-nine, 10-8" or "two-one-niner, 10-8," can be heard on the recording. Defendant's appellant counsel acknowledges that the significance of this larger phrase was neither argued nor raised during Defendant's trial.

about his prior statement that he had not actually looked at the stamp, and Gonzales responded, "From what I saw, that's what I saw," but he did not remember exactly what he had told the investigator about seeing the stamp.

Defendant later tried to call the investigator to testify about Gonzales's prior statement. The State objected, arguing that Gonzales had not testified in a manner that was inconsistent with the prior statement. In considering the objection, the district court asked sua sponte, "Prior inconsistent statements, don't they have to be under oath as well, Counsel?" Defense counsel responded, "No, not under the rule. That changed some years ago." Unconvinced, the district court asked counsel for both the State and the defense to research the "prior inconsistent rule" over recess. Upon their return, the court conferred with counsel off the record and disallowed the investigator's testimony, apparently because Gonzales's prior statement was not given under penalty of perjury as required for prior inconsistent statements admitted under Rule 11-801(D)(1)(a) NMRA (2006). Defense counsel then made the following statement "to make a record":

> I understand the Court has examined the rule and that rule requires that that be under oath before we can impeach in the fashion that I desire to do such. I respectfully disagree with the rule. I think that it denies us the opportunity to present evidence that would contradict what Mr. Gonzales is saying, but I do understand the rule.

Defendant argues on appeal that the district court erred by disallowing the investigator's testimony under Rule 11-801(D)(1)(a), contending for the first time that the testimony was admissible under Rule 11-613(B) NMRA (1993) as extrinsic evidence of a prior inconsistent statement for impeachment purposes. We review de novo whether the district court applied the correct evidentiary rule to exclude the investigator's testimony. *See, e.g.*, *State v. Torres*, 1999-NMSC-010, ¶ 28, 127 N.M. 20, 976 P.2d 20 ("[T]he threshold question of whether the trial court applied the correct evidentiary rule or standard is subject to de novo review on appeal."). Given the apparent confusion that arose in this case, we take this opportunity to clarify the different purposes and effects of these two rules, which both relate to the admissibility of prior inconsistent statements.

A. Rules 11-613 and 11-801(D)(1)(a) govern different aspects of the admissibility of a prior inconsistent statement

Under the New Mexico Rules of Evidence, a prior inconsistent statement has three elements: (1) the statement was made by a witness who testifies at trial; (2) the statement was given before the witness testifies at trial; and (3) the statement is inconsistent with the witness's trial testimony. *See* Rule 11-801(D)(1)(a). Because of the second element, a prior inconsistent statement is not given "at the current trial or hearing"; thus, the admissibility of this prior statement invariably implicates the rule against hearsay. Rule 11-801(C) (defining hearsay as a statement that is not made while testifying at the current trial or hearing and that is offered to prove the truth of the matter asserted in the statement); Rule 11-802 NMRA (providing that hearsay is inadmissible except as provided by rule or statute).

[redacted]

[redacted] However, courts have long recognized that prior inconsistent statements differ from other types of out-of-court statements in several important ways. First, prior inconsistent statements are inherently relevant for a "non-hearsay" purpose: impeaching a witness's credibility. *See, e.g.*, *State v. Carlton*, 1971-NMCA-019, ¶ 34, 82 N.M. 537, 484 P.2d 757 ("It is fundamental that a statement, written or oral of a witness as to a material matter inconsistent with his testimony at trial is admissible for impeachment purposes."); *see also* 3A John Henry Wigmore, *Evidence in Trials at Common Law* § 1017, at 993 (James H. Chadbourn ed., 1970) ("We place [the witness's] contradictory statements side by side, and, as both cannot be correct, we realize that in at least one of the two he must have spoken erroneously. Thus, we have detected him in one specific error, from which may be inferred a capacity to make other errors."). As a result, a prior inconsistent statement used for impeachment is not hearsay because it is not admitted for the truth of the matter asserted; rather, "it is the fact of the inconsistency that is admissible, not the substantive truth or falsity of the prior statement." *State v. Macias*, 2009-NMSC-028, ¶ 20, 146 N.M. 378, 210 P.3d 804, *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008, 275 P.3d 110.

[redacted] A second distinguishing feature of a prior inconsistent statement is the declarant's presence in the courtroom. *See* Rule 11-801(D)(1)(a). Because the declarant actually testifies at trial and is subject to cross-examination about the prior statement, the usual concerns about the reliability of the out-of-court statement are greatly diminished. *See, e.g.*, 4 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 8:1, at 9 (4th ed. 2013) (noting that prior inconsistent statements, inter alia, "are often more reliable than testimony because [prior inconsistent statements are] closer in time to the matter reported and less likely to have been influenced by the controversy").

[redacted] Rules 11-613 and 11-801(D)(1)(a) codify the differences between prior inconsistent statements and other out-of-court statements, albeit in a somewhat indirect manner. Rule 11-613 is a procedural rule that governs two aspects of how a prior inconsistent statement may be used for impeachment purposes. Our focus here is on Rule 11-613(B), which provides that "[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require." The rule thus presumes that a witness may be impeached by questioning the witness about a prior inconsistent statement, and the rule allows, but does not require, extrinsic evidence of the prior statement when the requirements of the rule have been satisfied. *See* 4 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence*, § 613.05[1] (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 2014) ("Rule 613 does not require a party who seeks to impeach a witness through alleged prior inconsistent statements to present extrinsic evidence of the statements.").

[redacted] Rule 11-801(D)(1)(a), by contrast, embodies a limited recognition of the notion that a prior inconsistent statement is more reliable than other types of out-of-court statements. Rule 11-801(D)(1)(a) singles out one category of prior inconsistent statements as "not hearsay" because of the circumstances

under which the statements are made.[3] *See* 5 Weinstein & Berger, *supra*, § 801.21[1] ("[P]rior inconsistent statements that fulfill the requirements of Rule 801(D)(1)(A) are uttered under circumstances that make them at least as reliable as in-court testimony."). Under Rule 11-801(D)(1)(a), a prior inconsistent statement is "not hearsay" when the declarant testifies and is subject to cross-examination about the prior statement, and the statement was "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition." Because the statement is "not hearsay," it can be admitted as substantive evidence—"to prove the truth of the matter asserted" in the statement and not just for impeachment. Rule 11-801(C)(2) NMRA. This can be particularly important in a case in which the prior statement is the only evidence presented on a particular element of a crime. *Cf.* 5 Weinstein & Berger, *supra*, § 801.21[5] ("If a statement admitted under Rule 801(d)(1)(A) is the only evidence on an element in an offense charged, the court must determine whether the nature of the evidence is sufficient for conviction.").

Thus, extrinsic evidence of a prior inconsistent statement—including a statement admitted under Rule 11-801(D)(1)(a)—is always admissible for impeachment purposes, subject to the requirements of Rule 11-613 and to the general rules governing relevance. *See, e.g.*, *State v. Davis*, 1981-NMSC-131, ¶¶ 18-20, 97 N.M. 130, 637 P.2d 561 (holding that the district court properly relied on Rule 11-403 NMRA to exclude extrinsic evidence of a prior inconsistent statement when the probative value of the evidence was substantially outweighed by the "needless presentation of cumulative evidence"). However, to introduce a prior inconsistent statement for its truth—as substantive proof of the matter asserted in the prior statement—the statement must have been given under "penalty of perjury" as provided in Rule 11-801(D)(1)(a) or fall within a hearsay exception under Rule 11-803 NMRA (1993). Due to the potential for misuse of a statement admitted only for impeachment purposes, a limiting instruction is often appropriate when a prior inconsistent statement cannot be considered for its truth. *See* UJI 14-5009 NMRA (articulating jury instructions concerning the admission of evidence for a limited purpose); *see also* 3 Mueller & Kirkpatrick, *supra*, § 6:99, at 614 ("Of course the court on request should give an appropriate limiting instruction advising the jury that the statement is admissible only for whatever light it might shed on the credibility of the witness, and not as proof of what the statement asserts . . . .").

B. The district court erred by relying on Rule 11-801(D)(1)(a) to exclude extrinsic evidence of Gonzales's prior inconsistent statement

In this case, Defendant's cross-examination of Gonzales emphasized that Gonzales's in-court testimony (about having seen the "10 mm" stamp on the Glock handgun) was inconsistent with his previous statement to the investigator that he never actually saw the stamp. The record also shows that Defendant gave Gonzales a chance during cross-examination to explain or deny his prior statement and that the State had the opportunity to question Gonzales about the

[3]Before 1995, Rule 11-801(D)(1)(a) excluded *all* prior inconsistent statements from the definition of hearsay. Rule 11-801(D)(1)(a) NMRA (1973, amended 1993). The rule was amended in 1995, consistent with Federal Rule of Evidence 801(d)(1)(a), to exclude only statements "given under oath subject to the penalty of perjury." Rule 11-801(D)(1)(a) (1995, amended 2012).

prior statement during his re-direct examination. These circumstances easily satisfy the requirements for the admission of extrinsic evidence of a prior inconsistent statement for the purpose of impeachment under Rule 11-613(B).

Further, nothing specific in the record indicates that Defendant intended to argue the prior statement for its truth. Indeed, in responding to the State's objection to the investigator's testimony, defense counsel explicitly stated that he had laid the proper foundation to "impeach" Gonzales, although he did not directly reference Rule 11-613. Thus, Defendant's purpose for the investigator's testimony seemingly was to cast doubt on Gonzales's credibility—not to prove that Gonzales did not actually see the "10 mm" stamp. Under these circumstances, when the prior statement was offered only to impeach Gonzales and not to prove its truth, Rule 11-801(D)(1)(a) simply was not implicated.

The State argues that irrespective of the rule upon which the district court relied to exclude the investigator's testimony, Gonzales's trial testimony was not inconsistent with his prior statement. Because Gonzales only testified that he could not remember what he might have said and did not dispute what he may have told the investigator, the State maintains that Gonzales "made no prior inconsistent statement."

The State's argument misses the mark. In evaluating whether a witness's trial testimony is inconsistent with the witness's prior statement, the question is not whether the witness denies—or even recalls—having made the *prior statement.* In fact, under "current practice," the witness need not even be confronted with the prior statement before extrinsic evidence is presented as long as the witness has an opportunity to "explain or deny" the statement at some point during the proceeding. *See State v. Dominguez*, 2007-NMSC-060, ¶¶ 18-19, 142 N.M. 811, 171 P.3d 750 ("[T]he federal rule, identical to our Rule 11-613(B), 'permits departure from the traditional, although often still preferred, method of confronting a witness with his inconsistent statement prior to its introduction in to evidence.' " (quoting *State v. Gomez*, 2001-NMCA-080, ¶ 14, 131 N.M. 118, 33 P.3d 669)); *see also* 3 Mueller & Kirkpatrick, *supra*, § 6:101, at 638-39 ("Rule 613 does not specify any particular time or sequence, so the chance for explanation or denial (and for additional questioning by parties defending or repairing the witness' credibility) may be provided either before or after the statement has been proved by extrinsic evidence." (internal quotation marks and footnote omitted)).

The question, instead, is simply whether the *substance* of the witness's trial testimony is inconsistent with the prior statement. *See, e.g., State v. Varela*, 1999-NMSC-045, ¶ 36, 128 N.M. 454, 993 P.2d 1280 (holding that "there must be substantive inconsistencies" to justify admitting a prior inconsistent statement into evidence). In this case, Gonzales testified at trial that he actually saw the "10 mm" stamp on the Glock handgun. Defendant sought to impeach Gonzales with his prior statement that he did not actually look at the stamp. These statements are clearly inconsistent, irrespective of Gonzales's ability to recall the prior statement.[4] The requirements of Rule 11-

[4]The State does not argue, and we do not decide, whether extrinsic evidence of a prior inconsistent statement is admissible when the witness admits having

613(B) were therefore satisfied, and the investigator's testimony was admissible to impeach Gonzales, subject to the district court's broad discretion under Rule 11-403. We note that defense counsel failed to cite Rule 11-613(B) to the district court when he conceded that the testimony did not meet the required elements for admissibility under Rule 11-801(D)(1)(a) and did not emphasize his intent to simply introduce the evidence as impeachment evidence. Nonetheless, excluding the extrinsic evidence of Gonzales's prior inconsistent statement under Rule 11-801(D)(1)(a) was error when the evidence was offered only for the purpose of impeachment. We now address whether the improper exclusion of the investigator's testimony requires reversal.

C. The error was harmless

The State contends that Defendant failed to preserve his argument that the evidence was admissible under Rule 11-613(B), and we therefore must limit our review to fundamental error. As we previously recounted, the record suggests that defense counsel conceded that the testimony was inadmissible under Rule 11-801(D)(1)(a) and did not alert the district court to its admissibility under Rule 11-613(B). Under a crabbed reading of our preservation requirements, we could limit our review either to plain error under Rule 11-103(E) NMRA or to fundamental error. *See, e.g.*, *Azar v. Prudential Ins. Co. of Am.*, 2003-NMCA-062, ¶ 22, 133 N.M. 669, 68 P.3d 909 (explaining that Rule 12-216(A) NMRA requires a party to object to a trial court's ruling "on the same grounds argued in the appellate court" (internal quotation marks and citations omitted)); *see also State v. Lucero*, 1993-NMSC-064, ¶ 12, 116 N.M. 450, 863 P.2d 1071 (" 'Even if the defendant did not raise proper objections at trial, he may be entitled to relief if the errors of which he complains on appeal constituted plain error . . . or fundamental error.' " (quoting *State v. Barraza*, 1990-NMCA-026, ¶ 17, 110 N.M. 45, 791 P.2d 799) (internal citations omitted)). However, defense counsel's explanation that he intended to offer the investigator's testimony for the purpose of impeachment—a non-hearsay purpose firmly embedded in our Rules of Evidence—was sufficiently specific to preserve the issue for appellate review.

When an error is preserved, we review for harmless error, and our inquiry depends on whether the error was constitutional. *See Tollardo*, 2012-NMSC-008, ¶ 36. Defendant contends that the exclusion of the investigator's testimony violated his Sixth Amendment right of confrontation and his Fourteenth Amendment right to due process. The State persuasively argues that these contentions lack merit, and it appears that Defendant abandoned them in his reply brief. Even so, we note that Gonzales testified at trial, and defense counsel actually cross-examined him about his prior statement. Further, defense counsel argued in his closing remarks that Gonzales was not a credible witness based, in part, on his inconsistent statements about having seen the "10 mm" stamp. We therefore fail to see how excluding the investigator's testimony implicated Defendant's confrontation or due process rights.

made the prior statement. *See, e.g.*, *United States v. Soundingsides*, 820 F.2d 1232, 1240 (10th Cir. 1987) (holding that it was error to admit extrinsic evidence of prior inconsistent statements when the witnesses acknowledged having made the inconsistent statements; there was no need for further proof of the statements).

Absent a constitutional violation, we look to whether there is a reasonable probability that the error affected the verdict. *See id.* Defendant bears the initial burden of demonstrating that he was prejudiced by the error. *State v. Holly*, 2009-NMSC-004, ¶ 28, 145 N.M. 513, 201 P.3d 844. Apart from the claimed constitutional errors addressed above, Defendant contends that the absence of the investigator's testimony "permitted the jury erroneously to infer [that] the statement had not in fact been made." We disagree. Defense counsel impeached Gonzales with his prior inconsistent statement during cross-examination, and Gonzales did not deny that he may have told the investigator that he did not actually look at the "10 mm" stamp when Defendant showed him Defendant's handgun. Also, irrespective of whether Gonzales saw the "10 mm" stamp or Defendant told him that the handgun was a 10-millimeter Glock, both statements confirmed that Defendant had shown Gonzales the type of weapon used to kill Deputy McGrane. Thus, extrinsic evidence of the prior statement was minimally relevant to Gonzales's credibility on the material issue at hand, and therefore such evidence could have been excluded as causing "undue delay, wasting time, or needlessly presenting cumulative evidence." Rule 11-403; *see also Davis*, 1981-NMSC-131, ¶¶ 17-20 (holding that the district court did not abuse its discretion by excluding extrinsic evidence of a prior inconsistent statement when the defense attorney had cross-examined the witness about the statement and argued the inconsistencies to the jury during closing arguments).

We could affirm the exclusion of the investigator's testimony on the basis of Rule 11-403 alone. *See, e.g.*, *Macias*, 2009-NMSC-028, ¶ 17 ("The trial record does not clearly reveal the trial court's specific reason for admitting the statements, but we may uphold the judge's decision if it was right for any reason."). However, we also conclude that the exclusion of the investigator's testimony was harmless error because whether the investigator saw the stamp on the gun or Defendant told the investigator that the gun was a 10-millimeter Glock, there is no reasonable probability that impeachment of the investigator would have affected the verdict.

III. Improper Questioning about Defendant's Involvement in Another Murder

Defendant next contends that his conviction should be reversed because of a question asked by the State during its cross-examination of one of Defendant's alibi witnesses, Yolanda Saiz, that improperly referred to Defendant's suspected involvement in a prior homicide. Approximately five months before Deputy McGrane's death, Defendant had been charged with an open count of murder for the death of Candido Martinez, and a warrant had been issued for Defendant's arrest. In a pretrial motion, the State argued that evidence of the outstanding warrant was "essential to prove the defendant's motive and intent at the time of the shooting" of Deputy McGrane. The State therefore asked the district court to "admit evidence that a warrant had been issued for the defendant for [the] previous murder, and that the warrant was in effect at the time of the murder of Deputy McGrane."

Over Defendant's objection, the district court granted the motion in part, ruling that the State could inform the jury that Defendant had an outstanding arrest warrant at the time of Deputy McGrane's death. However, the court also ruled that the State

could not introduce evidence that the warrant was for murder, reasoning that such evidence would be highly prejudicial to Defendant. The district court later rejected the State's follow-up request to introduce evidence that the warrant was simply for a felony.

The State repeatedly and forcefully renewed its motion to inform the jury that the warrant was for murder, also arguing that the evidence was necessary to provide context for a central theme of the defense: that several defense witnesses had given inconsistent statements to law enforcement because they had been terrorized during the manhunt for Defendant. The State contended that the only way to rationalize the aggressive search for Defendant by law enforcement not only was to explain that Defendant was suspected of Deputy McGrane's murder, but he also was a convicted felon who was wanted for another murder, and who was believed to be armed and dangerous. The district court denied many such requests by the State, reasoning each time that the fact that the warrant was for murder would be highly prejudicial to the defense.

Before the State's cross-examination of Saiz, the State renewed its request to inform the jury that the outstanding warrant was for murder. Saiz had given several conflicting statements to the police about her knowledge of Defendant's whereabouts at the time of Deputy McGrane's death. In the midst of questioning Saiz about a number of inconsistencies between one of her prior statements and her trial testimony, the State asked the following question:

> Q: In fact, what you said [was], "If you guys would have caught him before, he wouldn't have killed somebody else," that's what you said in your first statement, isn't it?
>
> A: I mean, that's what it says there, yes.

The question and answer were admitted without objection, without any reaction from defense counsel or the district court, and were never alluded to again during the proceedings.

Defendant contends that the State "intentionally used a statement concerning [the] other homicide to impeach a key defense witness" in violation of the district court's repeated rulings that "evidence regarding the unrelated homicide should be excluded." Defendant acknowledges that the asserted error was not preserved, and therefore asks this Court to review for plain error. *See* Rule 11-103(E) ("A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved."). The State counters that we should limit our review to the more stringent fundamental error standard. Under either standard, we must be convinced that "admission of the evidence in question 'creates grave doubts concerning the validity of the verdict.' " *State v. Rojo*, 1999-NMSC-001, ¶ 45, 126 N.M. 438, 971 P.2d 829 (quoting *Lucero*, 1993-NMSC-064, ¶ 12).

The first step in a plain or fundamental error analysis is to determine whether the evidence in question was erroneously admitted. *See Campos*, 2007-NMSC-021, ¶ 8 ("[W]e first determine if error occurred; if so, we next determine whether that error was fundamental."). Defendant contends that the State's question was unrelated to the impeachment of Saiz and that "its only connection to the issues before the jury was as highly improper propensity evidence." We disagree. Saiz testified that

Defendant was at her house until sometime "after midnight" on the morning of March 22, 2006, the morning that Deputy McGrane was killed shortly after 12:44 am. As a result, her prior inconsistent statement to the police that, "If you guys would have caught him before, he wouldn't have killed somebody else," was relevant to her credibility. Saiz's prior statement clearly acknowledged that she found Defendant's involvement in Deputy McGrane's death to be at least plausible, which would not be true had Defendant been at her house that morning. Thus, the prior statement was relevant to show that Saiz had been untruthful, either in her statement to the police or in her testimony at trial. *See Macias*, 2009-NMSC-028, ¶ 20 ("We place [the witness's] contradictory statements side by side, and, as both cannot be correct, we realize that in at least one of the two he must have spoken erroneously. Thus, we have detected him in one specific error, from which may be inferred a capacity to make other errors." (alteration in original) (quoting 3A Wigmore, *supra*, § 1017, at 993)).

Given the relevance of the prior statement, it could only have been excluded if its relevance was "substantially outweighed by a possibility of . . . unfair prejudice." Rule 11-403. The district court had determined that evidence that the warrant was for murder was inadmissible under Rule 11-403, and it had staunchly adhered to that holding throughout the trial—with the vigorous support of defense counsel. That neither the district court nor defense counsel reacted to the State's question leads us to conclude that, in the context of the trial, the question was not as "highly prejudicial" as Defendant now contends. In fact, the State renewed its request to inform the jury that the warrant was for murder during Saiz's redirect examination—*after* it had asked the question in dispute—and neither the district court nor defense counsel took issue with the State's previous question.

The single question and answer was the lone reference to Saiz's prior statement that the jury heard in a trial that lasted more than two weeks, a trial that, as explained later in this opinion, included abundant evidence of Defendant's guilt. Thus, even under the harmless error standard that applies to errors that are properly preserved, the admission of the question would not require reversal. *See State v. Serna*, 2013-NMSC-033, ¶ 23, 305 P.3d 936 ("When assessing the probable effect of evidentiary error, 'courts should evaluate all of the circumstances surrounding the error.' 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." (quoting *Tollardo*, 2012-NMSC-008, ¶ 43)). As a result, even if the admission of the State's question was erroneous, the error does not require reversal under either the plain or fundamental error doctrines.

Defendant also suggests that we should evaluate the State's question under the standard applied to prosecutorial misconduct arising from the intentional introduction of evidence about a defendant's post-arrest silence, as in *State v. Hennessy*, 1992-NMCA-069, ¶¶ 21-23, 114 N.M. 283, 837 P.2d 1366, *overruled on other grounds by Lucero*, 1993-NMSC-064. In *Hennessy*, the Court of Appeals reversed the defendant's conviction based on a finding of fundamental error after the prosecution impeached the defendant using his "failure" to contact the police to correct a false statement that he had made upon his initial arrest. *Hennessy*, 1992-

NMCA-069, ¶ 7. On re-direct examination, the defendant explained that his attorney had counseled him "not to say anything to anybody about the case." *Id.* During closing arguments, the prosecution referred to the defendant's testimony as evidence that the defendant "never bothered" to tell the truth, and that his attorney had told him not to tell the truth. *Id.* The Court reasoned that fundamental error occurred because the prosecution "intentionally elicited direct comment on the exercise of [the] defendant's rights, despite [the Court of Appeals'] repeated admonitions not to do so." *Id.* ¶ 23.

Even if we were to agree that the State's question in this case amounted to prosecutorial misconduct, *Hennessy* is not on point. The questioning in *Hennessy* implicated the defendant's Fifth Amendment right to remain silent, whereas here, Defendant does not contend that the State's question about Saiz's prior statement violated anything other than Rule 11-403. In addition, unlike the single, fleeting question in this case that was never referred to again, the prosecution in *Hennessy* repeatedly questioned the defendant about his purported failure to correct the false statement and referenced the exchange during closing arguments. *Id.* ¶¶ 7-8. Thus, *Hennessy* is neither controlling nor persuasive.

We acknowledge that the State's decision to impeach Defendant with that particular statement was very near the line that had been drawn by the district court. The better practice would have been to ask to approach the bench to confirm that the question was permissible in light of the court's ruling to exclude evidence that the warrant was for murder. But under the circumstances, the State's questioning was sufficiently distinct from the substance of the court's ruling that we will not second-guess the lack of a reaction from the court or from defense counsel. Indeed, defense counsel could have reasonably concluded that objecting to the State's questioning may have merely highlighted the prejudice such that the better course of action was to remain silent. *See, e.g.*, *Anderson v. Sternes*, 243 F.3d 1049, 1057-58 (7th Cir. 2001) (noting that a counsel's strategy of avoiding emphasis of prejudicial evidence may reasonably encompass the eschewing of limiting instructions). Moreover, we will assume that the court permitted the State's questioning under its broad discretion to control the examination of witnesses and the overall fairness of the presentation of evidence. *See, e.g.*, *State v. Jett*, 1991-NMSC-011, ¶ 13, 111 N.M. 309, 805 P.2d 78 ("A trial court's ruling as to the permissible scope of cross-examination is also reviewed under the abuse of discretion standard." (internal quotation marks and citation omitted)).

IV. Substantial Evidence to Show Deliberation

Defendant argues that his first-degree murder conviction must be reversed because the State failed to prove the essential element of deliberation. *See* NMSA 1978, § 30-2-1(A)(1) (1994) ("Murder in the first degree is the killing of one human being by another without lawful justification or excuse, by any of the means with which death may be caused . . . by any kind of willful, deliberate and premeditated killing . . . ."); *see also* UJI 14-201 NMRA (providing that willful and deliberate murder requires proof beyond a reasonable doubt that "[t]he killing was [done] with the deliberate intention to take away the life of [the victim]").

When reviewing for substantial evidence, we ask "whether substantial evidence of either a direct or circumstantial

nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Sutphin*, 1988-NMSC-031, ¶ 21, 107 N.M. 126, 753 P.2d 1314. We "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. Duran*, 2006-NMSC-035, ¶ 5, 140 N.M. 94, 140 P.3d 515 (internal quotation marks and citation omitted). "Contrary evidence supporting acquittal does not provide a basis for reversal because the jury is free to reject [the defendant's] version of the facts." *Id.* (internal quotation marks and citations omitted). Instead, we ask whether a "rational jury *could* have found beyond a reasonable doubt the essential facts required for a conviction." *Id.* (internal quotation marks and citation omitted).

To support a conviction for first-degree murder by deliberate killing, the State must prove beyond a reasonable doubt that Defendant killed Deputy McGrane with the deliberate intention of taking away his life. UJI 14-201.

> A deliberate intention refers to the state of mind of the defendant. A deliberate intention may be inferred from all of the facts and circumstances of the killing. The word deliberate means arrived at or determined upon as a result of careful thought and the weighing of the consideration for and against the proposed course of action. A calculated judgment and decision may be arrived at in a short period of time. A mere unconsidered and rash impulse, even though it includes an intent to kill, is not a deliberate intention to kill. To constitute a deliberate killing, the slayer must weigh and consider the question of killing and his [or her] reasons for and against such a choice.

Id.

Defendant contends that the evidence introduced and relied upon by the State to prove deliberation was insufficient to prove that the homicide was "more than an impulsive killing." *See State v. Garcia*, 1992-NMSC-048, ¶ 22, 114 N.M. 269, 837 P.2d 862. He argues that although the State introduced substantial evidence that the shooting occurred during a traffic stop, the record is "silent regarding how the shooting took place." Without an eye-witness account to describe the details of the shooting, Defendant contends, the State's evidence was "equally consistent with an impulsive, panicked reaction to being pulled over by the police as it is [with] a deliberate-intent murder."

A deliberate intention is rarely subject to proof by direct evidence and often must be inferred from the circumstances. *See Duran*, 2006-NMSC-035, ¶ 7 ("Intent is subjective and is almost always inferred from other facts in the case, as it is rarely established by direct evidence." (internal quotation marks and citations omitted)); *see also* UJI 14-201 ("A deliberate intention may be inferred from all of the facts and circumstances of the killing."). The State contends that it introduced "ample evidence" at trial to allow the jury to infer Defendant's deliberate intention to kill Deputy McGrane. In particular, the State maintains that the circumstances of the shooting itself support an inference of a deliberate intention. The jury reasonably could have concluded that Defendant complied when Deputy McGrane pulled him over, retrieved his gun while he

waited for Deputy McGrane to approach the truck on foot, and when Deputy McGrane neared the window, shot twice at Deputy McGrane from point-blank range.

Defendant compares these facts to those in *Garcia* and contends that the evidence relied on by the State shows merely that Defendant had an *opportunity* to deliberate, not that he actually deliberated. *See* 1992-NMSC-048, ¶ 28. In *Garcia*, this Court found insufficient evidence of a deliberate intention when the evidence showed that the defendant and the victim argued, appeared to reconcile, and argued again, ending with the defendant stabbing the victim to death. *Id.* The Court reasoned that, even though the defendant had time between the arguments to form a deliberate intention, "nothing in the evidence enabled the jury to infer that this is when he formed the requisite deliberate intent, or that he *ever* formed such an intent." *Id.* ¶ 30.

Garcia represents the high-water mark of what this Court has required on appeal to show substantial evidence of a deliberate intention. *See Flores*, 2010-NMSC-002, ¶ 21 ("The facts in *Garcia* have been distinguished many times by this Court from the facts in cases where there was sufficient evidence of deliberation."). We take this opportunity to emphasize that the factual basis for our holding in *Garcia* was narrow. Despite abundant evidence that the killing in *Garcia* was intentional, our concern was that the State had utterly failed to introduce evidence that the killing was anything other than "rash and impulsive":

> [W]e believe that the evidence was not only insufficient to allow a rational jury to find the essential element of deliberation in [the defendant's] stabbing of [the victim]; it was *altogether lacking* to serve as a basis for any such inference. There was *no* evidence to support the jury's conclusion that, as contemplated by the trial court's instruction, [the defendant] decided to stab [the victim] as a result of careful thought; that he weighed the considerations for and against his proposed course of action; and that he weighed and considered the question of killing and his reasons for and against this choice.

Garcia, 1992-NMSC-048, ¶ 28 (first emphasis added).

The circumstances of this case are far removed from those of *Garcia*. Rather than proving only "a rash and impulsive killing," *Garcia*, 1992-NMSC-048, ¶ 28, the evidence in this case supported an inference beyond a reasonable doubt that Defendant "weigh[ed] and consider[ed] the question of killing and his reasons for and against such a choice." UJI 14-201. We agree with the State that the manner of the killing alone supported an inference of deliberation. The jury could have reasonably inferred that, once Defendant saw that he was being pulled over, he faced several options, including whether: (1) to cooperate with Deputy McGrane during the stop and likely be arrested on the outstanding warrant; (2) to attempt to flee from Deputy McGrane; or (3) the option that he chose—to wait for Deputy McGrane to approach the truck and shoot him in the face at point-blank range. The jury could have found that Defendant contemplated all of these choices and, even if he did not make his final decision until the last second, the decision to kill Deputy McGrane was nonetheless a deliberate one. *See State v. Sosa*, 2000-NMSC-036, ¶ 14, 129 N.M. 767, 14 P.3d 32 ("Based upon the evidence, a

reasonable jury could determine that [the] [d]efendant intended to kill [the victim] when he went to [the victim's] home armed with a gun, waited for him to arrive, and then shot the unarmed victim numerous times."); *see also* UJI 14-201 ("A calculated judgment and decision may be arrived at in a short period of time."); *cf. People v. Mendoza*, 263 P.3d 1, 13-15 (Cal. 2011) (finding substantial evidence of "premeditated and deliberate murder" when the defendant obeyed an officer's command to sit on a curb, hid behind another person to conceal drawing his gun, and shot the officer in the face).

We also agree with the State that other evidence introduced at trial supported finding a deliberate intention to take away the life of Deputy McGrane. The jury could have inferred that Defendant had a motive for the shooting, which may be probative of a deliberate intention. *See, e.g.*, *State v. Motes*, 1994-NMSC-115, ¶¶ 14-15, 118 N.M. 727, 885 P.2d 648 (relying in part on evidence of the defendant's motive to find a deliberate intention to kill his ex-wife). The jury could have found that Defendant killed Deputy McGrane to avoid arrest because Defendant knew that he was wanted on an outstanding arrest warrant and had organized his life to hide his identity by driving a truck registered in someone else's name, purchasing a mobile home under an alias in the isolated East Mountains, and making himself known under that alias. *Cf. Mendoza*, 263 P.3d at 14-15 (finding evidence of a "preexisting motive" when the defendant was on parole and knew that he would be arrested and sent back to prison if the victim-officer found that the defendant was in possession of a firearm).

The jury also could have found that Defendant's actions after the killing aided in proving a deliberate intention. Shortly after the shooting, Defendant told his friend, "[The Sheriff's Office] fucked it up again, and I started to do good again, and they fucked it up." Moreover, Defendant fled to Mexico after the shooting, where he informed a new acquaintance, "I'm Michael Astorga, I blasted that cop." While these statements, standing alone, might have been insufficient to prove Defendant's deliberate intention, they were probative of deliberation in the context of all of the evidence introduced on that element of first-degree murder. *See Duran*, 2006-NMSC-035, ¶ 9 (finding evidence of a deliberate intention based in part on the defendant's statement after the killing that he had "straight up murdered some bitch"); *see also Flores*, 2010-NMSC-002, ¶ 23 ("Not only may [the] [d]efendant's acts before and during the crime provide evidence of intent, evidence of flight or 'an attempt to deceive the police' may prove consciousness of guilt." (quoting *State v. Martinez*, 1999-NMSC-018, ¶¶ 29-30, 127 N.M. 207, 979 P.2d 718)); *Rojo*, 1999-NMSC-001, ¶ 23 ("[J]ust because each component may be insufficient to support the conviction when viewed alone does not mean the evidence cannot combine to form substantial, or even overwhelming, support for the conviction when viewed as a whole."); *cf. Mendoza*, 263 P.3d at 14-15, 18 (affirming the defendant's conviction based on substantial evidence of "planning activity, preexisting motive, and manner of killing").

In sum, the circumstances of this case are nowhere near the circumstances of *Garcia*. The State introduced abundant evidence of Defendant's deliberate intention to take away the life of Deputy McGrane.

V. Change of Venue

For his last argument, Defendant claims that the district court abused its

discretion when it denied his motion for a change of venue before the guilt phase of his trial. Defendant filed a pretrial motion for change of venue, claiming the jury pool in Bernalillo County would be prejudiced against him due to extensive media coverage of the case. After an evidentiary hearing on the motion, the district court denied Defendant's request, citing a lack of evidence that the entire jury pool was presumptively prejudiced. After the guilt phase, however, the district court granted Defendant's renewed motion for a change of venue, reasoning that the guilt-phase trial had generated "a lot of public excitement" and that the court had received a low number of responses to the juror questionnaires sent out to potential members of the penalty-phase jury pool. Defendant contends that the district court's decision to change the venue for the penalty phase shows that the court abused its discretion when it denied Defendant's motion before the guilt phase. We disagree.

We review the denial of a motion for change of venue for an abuse of discretion. *State v. House*, 1999-NMSC-014, ¶ 31, 127 N.M. 151, 978 P.2d 967. The trial court may change venue based on presumed prejudice or on actual prejudice. *Id.* ¶ 45-47. Presumed prejudice arises when "evidence shows that the community is so saturated with inflammatory publicity about the crime that it must be presumed that the trial proceedings are tainted." *Id.* ¶ 46. However, if the court concludes that presumed prejudice is not present and instead proceeds to voir dire, "we will limit our review to the evidence of actual prejudice." *State v. Barrera*, 2001-NMSC-014, ¶ 16, 130 N.M. 227, 22 P.3d 1177. "Actual prejudice requires a direct investigation into the attitudes of potential jurors [during voir dire] . . . to establish whether there is such widespread and fixed prejudice within the jury pool that a fair trial in that venue would be impossible." *House*, 1999-NMSC-014, ¶ 46. A finding of no actual prejudice must be supported by substantial evidence and "necessarily precludes a finding of presumed prejudice." *See Barrera*, 2001-NMSC-014, ¶ 16.

In this case, the district court found insufficient evidence of presumed prejudice and proceeded to voir dire. Potential jurors filled out extensive questionnaires, and over the course of the voir dire, each potential juror was questioned regarding actual prejudice. Jurors who could not be impartial were excused, and the jury that was finally impaneled was composed of jurors who affirmed their ability to remain impartial.

Defendant does not offer, and we are unable to find, any evidence in the record of actual prejudice against Defendant held by the members of the guilt-phase jury panel. We also note that Defendant did not renew his motion for a change of venue after voir dire, tacitly agreeing that there was no evidence of actual prejudice among the members of the guilt-phase jury panel. This procedure was adequate to safeguard Defendant's right to a fair and impartial jury. *See Barrera*, 2001-NMSC-014, ¶ 18 (noting that the trial court determined "through voir dire that the jurors, although they may have heard of the case, were not incapable of impartiality" and that "[m]ore is not required" (quoting *State v. Chamberlain*, 1991-NMSC-094, ¶ 6, 112 N.M. 723, 819 P.2d 673)); *see also State v. Lasner*, 2000-NMSC-038, ¶ 27, 129 N.M. 806, 14 P.3d 1282 (holding that the trial court did not abuse discretion in denying change of venue where the defendant was able to question jurors and challenge those who indicated partiality).

The district court's decision to grant the renewed motion for a change of venue—after the highly publicized guilt-phase trial—does not lead us to a different result. Rather, we view the district court's grant of the renewed motion as indicative of its ability to maintain a fair and open mind throughout the complicated and lengthy proceedings of this case. The district court did not abuse its discretion when it denied Defendant's motion for a change of venue.

CONCLUSION

We affirm all of Defendant's convictions.

IT IS SO ORDERED.

EDWARD L. CHÁVEZ, Justice

WE CONCUR:

PETRA JIMENEZ MAES, Justice

RICHARD C. BOSSON, Justice

CHARLES W. DANIELS, Justice

Certiorari Denied, January 14, 2015, No. 34,962

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-016

Filing Date: September 16, 2014

Docket No. 32,178

STEVEN JONES, D.O., BRANT BAIR, M.D. AND SANFORD DAVID SCHULHOFER, D.P.M. and THE NORTHERN NEW MEXICO ORTHOPAEDIC CENTER, P.C.,

Plaintiffs/Counter-Defendants/Appellees,

v.

WAYNE K. AUGÉ, II, Individually and as Trustee of the Covalent Global Trust U/T/I dated 12/1/03,

Defendant/Counter-Plaintiff/Appellant.

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OPINION

BUSTAMANTE, Judge.

Appellees Steven Jones, D.O., Brant Bair, M.D., Sanford David Schulhofer, D.P.M., and the Northern New Mexico Orthopaedic Center, P.C. (NNMOC) brought suit against Wayne K. Augé, II, M.D. (Appellant) for fraud in the inducement, misrepresentation, breach of contract, securities fraud, breach of fiduciary duty to shareholders, breach of fiduciary duty to corporation, and prima facie tort after Jones, Bair, and Schulhofer discovered that, unbeknownst to them, Appellant had included in his shareholder employment agreement a deferred compensation clause that was significantly different from—and more generous than—theirs. In the course of discovery, Appellees also learned that Appellant had caused NNMOC to overcompensate him by over $370,000. After a bench trial, the district court found in favor of Appellees and awarded compensatory and punitive damages. Appellant appeals. We affirm the judgment with the exception of one item of compensatory damages that we remand for reconsideration.[1]

PREFATORY MATTERS

The district court entered 234 findings of fact and forty-five conclusions of law. Appellant challenges fifty-nine of the findings of fact. In addition to the arguments in his brief in chief, Appellant makes several new arguments in his reply brief. In reviewing his arguments, we are guided by several principles of appellate review. First, "[o]n appeal, a reviewing court liberally construes findings of fact adopted by the fact finder in support of a judgment[.]" *Toynbee v. Mimbres Mem'l Nursing Home*, 1992-NMCA-057, ¶ 16, 114 N.M. 23, 833 P.2d 1204. Second, "such findings are sufficient if a fair consideration of all of them taken together supports the judgment entered below." *Id.* Third, "[w]e have long held that findings are sufficient where they justify the judgment, though they intermingle matters of fact and conclusions of law." *Watson Land Co. v. Lucero*, 1974-NMSC-003, ¶ 5, 85 N.M. 776, 517 P.2d 1302. Fourth, appellate courts generally "do not address issues raised for the first time in a reply brief, [unless] the arguments in [the a]ppellants' reply brief . . . are 'directed only to new arguments or authorities presented in the answer brief.' " *Mitchell-Carr v. McLendon*, 1999-NMSC-025, ¶ 29, 127 N.M. 282, 980 P.2d 65 (quoting Rule 12-213(C) NMRA (1999)). Fifth, "[w]e will not review unclear arguments, or guess at what [an appellant's] arguments might be." *Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076.

Applying these principles, we decline to review Appellant's arguments that "[v]irtually all 'overpayment' from 2007 through 2009 resulted from . . . adding depreciation to the expenses attributable to each shareholder" and that Appellees failed to prove damages related to securities fraud, because they were first raised in the reply brief. We also decline to address Appellant's contentions that the district court intermingled findings of fact and conclusions of law or other arguments, the resolution of which would have no impact on the judgment.

Rule 12-213(A)(3) requires appellants to provide "a summary of the facts relevant to

[1]Though not a matter of particular substance in this case, we also reverse the conclusion that a prima facie tort was committed.

the issues presented for review." New Mexico case law is clear that this requirement compels appellants to set out a full summary of the pertinent evidence admitted at trial, including the facts supporting the district court's findings and conclusions, and that this Court may decline review for failure to do so. *See, e.g., Chavez v. S.E.D. Labs.*, 2000-NMCA-034, ¶ 26, 128 N.M. 768, 999 P.2d 412 ("[W]e review substantial evidence claims only if the appellant apprises the Court of all evidence bearing upon the issue, both that which is favorable and that which is contrary to appellant's position. Failure to do so may result in our deeming the issue waived." (citations omitted)), *aff'd in part, rev'd in part*, 2000-NMSC-034, 129 N.M. 794, 14 P.3d 532; *see also Gish v. Hart*, 1966-NMSC-028, ¶ 10, 75 N.M. 765, 411 P.2d 349. Rule 12-213(A)(3) reflects the standard of review we apply to challenges to factual findings where "it is the supporting evidence, not that adverse to the finding, that ordinarily determines the issue." *Gish*, 1966-NMSC-028, ¶ 10. Here, Appellant's summary of the evidence comes perilously close to being too one-sided for review. We conclude that Appellant complied with the rule sufficiently to allow review. *See State v. Martinez*, 1996-NMCA-109, ¶ 13, 122 N.M. 476, 927 P.2d 31 (stating that non-compliance with Rule 12-213(A)(3) "does not require this Court to disregard an issue when an appellant fails to comply with its provisions"). But we again urge all counsel appearing before us to abide by the spirit and letter of the rule.

BACKGROUND

The Parties

The NNMOC is a professional corporation of orthopaedic surgeons founded by Appellant in 1998. Dr. Wise was an NNMOC shareholder from 1998 to 2008. Drs. Jones, Bair, and Schulhofer joined NNMOC as shareholders in 2007, 2008, and 2009, respectively. The shareholders each owned the same amount of stock in NNMOC.

Shareholder Agreements

Jones, Bair, Schulhofer, and Appellant each signed a shareholder employment agreement, a shareholder agreement, and a subscription agreement that collectively set out their rights and obligations as shareholders of NNMOC. Because the terms of the shareholder employment agreements are most at issue, we provide a summary of their critical terms. Details about the other agreements are provided as needed in our discussion.

The shareholder employment agreement governs the shareholders' compensation, deferred compensation, and termination. Compensation for each shareholder is based on each physician's "direct physician gross revenue," which is defined as "all revenues *collected* by NNMOC on account of medical services provided by Physician to NNMOC patients net of New Mexico gross receipts taxes." The compensation clause goes on to state that:

> Physician shall be entitled to receive as compensation for all services rendered by Physician under this Agreement during the term hereof ("Physician's Compensation") an amount equal to:
>
> the sum of:
>
> (i) Direct Physician Gross Revenues, *plus*
>
> (ii) a percentage of revenues collected by NNMOC on account of Ancillary Services

equal to the percentage of the total common stock of NNMOC owned by Physician,

less:

the amount of NNMOC's overhead attributable to Physician.

"Ancillary services" are defined as "x-rays, physical, occupational and other therapy services, physician assistant services, soft goods, medications, cast supplies, medical supplies, and other products or services not provided directly by Physician[.]"

Under the compensation clause, each shareholder is paid a salary based on the "anticipated amount of Physician's Compensation." In addition, "[a]t the end of each quarter, if Physician's Compensation exceeds the amount of Physician's [s]alary during such quarter, the difference will be paid to Physician as additional salary." The parties referred to this payment as a "bonus." If, on the other hand, the salary is more than Physician's Compensation for the quarter, each shareholder "will be liable to repay NNMOC the difference between [the s]alary and Physician's Compensation." The compensation clause is the same for all shareholders.

In contrast to the compensation clause, Appellant's deferred compensation clause differs from that in Appellees' shareholder employment agreements. The deferred compensation clause in Appellees' shareholder employment agreement provides for payment of sixty percent of direct physician gross revenues for six months after termination in compliance with the termination clause. Appellant's deferred compensation clause provides for eighty percent of direct physician gross revenues for six months and twenty percent of ancillary services revenue for three years after termination. This difference and, more importantly, how it came about, forms the basis for Appellees' fraud claims, as well as a portion of their breach of fiduciary duty claims.

Procedural Background

Appellees sued Appellant for fraud, misrepresentation, breach of contract, securities fraud, breach of fiduciary duty to shareholders, breach of fiduciary duty to corporation, and prima facie tort. They also sought declaratory judgment that the deferred compensation clause in Appellant's shareholder employment agreement is void to the extent it differs from that in Appellees' shareholder employment agreements. Appellant denied all claims and counterclaimed, alleging breach of contract, minority shareholder oppression, breach of fiduciary duty, and tortious interference with contract. He also requested "an accounting of the assets and liabilities of NNMOC."

Just before trial, the district court granted Appellees' motions for summary judgment both with regard to the proper methodology for calculating the value of NNMOC shares when a shareholder's employment is terminated and the exclusion of non-shareholder physician employee revenues from ancillary services revenue. It denied summary judgment as to when Appellant had ceased being a shareholder and whether Appellant's deferred compensation clause violated 42 U.S.C. § 1395nn (2012), which "prohibit[s] physicians from making referrals to, and prohibit[s] laboratories from billing

Medicare for, services ordered by physicians who have a financial interest in the laboratory." *Atl. Urological Assocs., P.A. v. Leavitt*, 549 F. Supp. 2d 20, 22 (D.D.C. 2008). The parties proceeded to trial on all other issues.

After a bench trial, the district court entered extensive findings of fact and conclusions of law. In sum, the district court concluded, among other things, that Appellant made knowing misrepresentations to Jones, Bair, and Schulhofer; committed securities fraud by inducing them to become shareholders; fraudulently induced Jones, Bair, and Schulhofer into signing the shareholder employment agreements; committed a continuing fraud and breached his fiduciary and other duties to Appellees and NNMOC by knowingly overcompensating himself and by concealing from Appellees that he had done so; breached his shareholder employment agreement and shareholder agreement; and committed prima facie tort. It also found that "all of the claims brought by [Appellant] in this matter [are] without merit" and denied Appellant's request for an accounting.

The final judgment ordered Appellant to pay NNMOC $527,821.49 for his negative balance with the corporation, which includes the amount Appellant was overcompensated and the amount he failed to pay in overhead costs. Appellant was also ordered to pay $72,936.32 for the negative value of his NNMOC shares. The district court also awarded $1 million in punitive damages. Finally, the district court granted Appellees' request for declaratory relief that "Paragraph 8 of [Appellant's] [s]hareholder [e]mployment [a]greement is null and void to the extent it grants deferred compensation to [Appellant] which is different than that set forth in [Appellees'] deferred compensation provision[]."

The district court based its conclusions of law and judgment on the findings of fact, which reflect a pattern of self-dealing and misrepresentation made possible by Appellant's control of corporate records and financial matters. If the district court's findings of fact are supported by substantial evidence in the record, the judgment must be affirmed.

The findings of fact reveal that Appellant founded NNMOC in 1998. In 2005, after Appellee Jones became a non-shareholder employee, Appellant began talking to him about becoming a shareholder in NNMOC. Jones decided to become a shareholder based on Appellant's representations that NNMOC would be a firm of equals. Appellant, with the help of NNMOC's attorney, prepared a form of shareholder employee agreement. Appellant led Jones to believe that his shareholder employment agreement was the same as Appellant's with two exceptions: Appellant did not have a non-compete clause, and he could be terminated for cause only. Jones accepted the proposed shareholder employment agreement with the understanding that both the current and deferred compensation provisions were identical to Appellant's. Jones signed his agreements on or about July 31, 2007.

Unbeknownst to Jones, Appellant modified his shareholder employment agreement within a month or two thereafter, putting in place a materially more generous deferred compensation package for Appellant. Appellant never told Jones about the changes he had instituted.

Later, in 2008 and 2009, Appellant induced Appellees Bair and Schulhofer to become shareholders of NNMOC in part by making the same representations he had made to Jones concerning the compensation package. Appellant never showed his shareholder employment agreement to Jones, Bair or Schulhofer. In fact, Appellant kept tight control of the corporate records as a whole, keeping them with him and not making the records available at the offices of NNMOC.

Jones, Bair, and Schulhofer did not discover that the deferred compensation packages differed until January 2010. Appellant had approached them a few months before with the idea of taking a leave of absence, and it was during the negotiations for the terms of the leave that the difference was disclosed by NNMOC's attorney. After disclosure of the difference between the shareholder employment agreements, negotiations for the leave of absence could not be successfully completed, and Appellant resigned in November 2010.

After his resignation, Appellees started this litigation seeking damages and a declaration nullifying Appellant's shareholder employment agreement to the extent it was different from the other shareholder employment agreements with regard to deferred compensation. In the course of discovery, Appellees learned that Appellant had substantially overcompensated himself in 2008 and 2009 and had hidden the overcompensation from his fellow shareholders, NNMOC's external accountant, and its internal practice manager. Appellant was able to hide the overpayments because he maintained control of corporate finances—in particular the calculation of bonuses under the shareholder employment agreements—to the exclusion of everyone else. Appellant alone calculated the bonuses. Appellant controlled and kept in his possession the paper files on which he reported his calculations and did not share them or his calculations with anyone. The overpayments in 2008 and 2009 amounted to over $370,000, an amount which materially adversely affected his fellow shareholders and NNMOC.

Other pertinent findings of fact will be outlined as needed in the following discussion.

DISCUSSION

Appellant makes five main arguments: three relate to liability issues and two relate to damages. As to liability, Appellant maintains that Appellees failed to prove fraud and argues that a breach of fiduciary duty cannot be based on contractual duties. Appellant also argues that the prima facie tort cannot be based on the same facts as other torts. In relation to damages, he argues that the amount of compensatory damages should be reduced and that the award of punitive damages was improper. We begin with the liability arguments.

I. Liability

A. Fraud

Appellant makes two arguments to the effect that Appellees failed to prove fraud in the inducement or securities fraud. We address them in turn.

1. Voidness/Materiality

Appellant argues that Appellees failed to prove fraud in the inducement or

securities fraud because his deferred compensation clause was void ab initio or because his representations about the clause were immaterial. Both arguments are based on misinterpretations of the district court's findings.

Appellant's position that the deferred compensation clause was void ab initio rests on two of the district court's conclusions. First, Appellant relies on the district court's use of the term "void ab initio" to argue that the deferred compensation clause in Appellant's agreement "never could have had any legal effect." Appellant overstates the significance of the district court's use of the term. The referenced conclusion states, "The language of [Appellant's] [s]hareholder [e]mployment [a]greement regarding his deferred compensation benefit based on a percentage of ancillary services revenue is void ab initio because it violates [42 U.S.C. § 1395nn]." (Emphasis omitted.) This language refers specifically to the provision in Appellant's agreement entitling him to a percentage of the ancillary services revenue for three years after termination from NNMOC. It does not address the other portion of Appellant's deferred compensation clause that is different from the clauses in Appellees' agreements, i.e., the provision giving him eighty percent of direct physician gross revenues. Thus, the district court concluded only that the ancillary services revenue provision violated 42 U.S.C. § 1395nn and that only that provision was void. It did not conclude that the entire clause was void ab initio.

Second, Appellant points to the district court's conclusion that "[t]he [s]hareholder [e]mployment [a]greement of [Appellant] is not a valid contract between him and [NNMOC]." He directs us to *AMX International, Inc. v. Battelle Energy Alliance, LLC*, a federal district court case, in which AMX sued Battelle, its client, for tortious interference with contract after Battelle hired several AMX employees in spite of the fact that the employees' contracts with AMX included non-compete clauses precluding them from working for AMX clients. 744 F. Supp. 2d 1087, 1089-90 (D. Idaho 2010). Battelle argued that it could not have interfered with AMX's contracts with its employees because the contracts were unenforceable because the non-compete clause was contrary to public policy. *Id.* at 1093. The court stated that although "protection is extended against unjustifiable interference with contracts even though the contract is voidable or unenforceable in an adversary proceeding[,] . . . this protection does not extend to contracts void ab initio." *Id.* (alteration, internal quotation marks, and citation omitted). It concluded that "[c]ontracts that are void ab initio are deemed never to have existed in the eyes of the law and cannot form the basis for a tortious interference action." *Id.* Having set out this rule, the court went on to examine whether the non-compete clause in AMX's contract was "void ab initio or simply voidable." *Id.* It concluded that because AMX's non-compete clause was unreasonably broad, it violated public policy and was, therefore, void ab initio. *Id.* at 1095. It concluded that "the contracts, which were unenforceable as written, cannot support AMX's action against Battelle for tortious interference with contract." *Id.*

AMX is distinguishable from this case. While contract clauses that violate public policy are void, i.e., "[o]f no legal effect[,]" *Black's Law Dictionary* 1709 (9th ed. 2009), where, as here, there is fraud in the inducement to enter into the contract, the

contract is merely voidable, i.e., "capable of being affirmed or rejected at the option of one of the parties." *Id.*; *see McLean v. Paddock*, 1967-NMSC-165, ¶ 10, 78 N.M. 234, 430 P.2d 392 (stating that "[w]here [fraud] is in the inducement, the instrument is voidable," not void), *overruled on other grounds by Duke City Lumber Co. v. Terrel*, 1975-NMSC-041, 88 N.M. 299, 540 P.2d 229. When a contract or clause is voidable, it remains in effect "until the fraud by which [the defrauded party] had been induced to sign [is] discovered." *Gross, Kelly & Co. v. Bibo*, 1914-NMSC-085, ¶ 35, 19 N.M. 495, 145 P. 480. Thus, here, unlike in *AMX* and contrary to Appellant's position, the deferred compensation clause continued in full force and effect until Appellees' request for modification of it was granted by the district court.

Finally, we interpret the district court's conclusion that the agreement was "not a valid contract" to incorporate both the district court's determination that Appellant's deferred compensation clause was voidable and that it was in fact void at the request of Appellees. *See Golden Cone Concepts, Inc. v. Villa Linda Mall, Ltd.*, 1991-NMSC-097, ¶ 8, 113 N.M. 9, 820 P.2d 1323 ("When a party is challenging a legal conclusion, [we examine] whether the law correctly was applied to the facts, viewing them in a manner most favorable to the prevailing party, indulging all reasonable inferences in support of the court's decision, and disregarding all inferences or evidence to the contrary."). This interpretation is supported by the fact that Appellees' complaint sought modification of the deferred compensation clause, not avoidance of the entire contract and the judgment orders only reformation of the clause, not rescission of the entire contract.

We turn next to Appellant's contention that his representations about the deferred compensation clause were immaterial. He argues that "a representation about . . . [the deferred compensation clause], which was not intended to be enforced, cannot support a fraud claim, because fraud requires clear and convincing proof that a *material* fact was misrepresented or concealed." Appellant relies on the district court's finding that "[Appellant] told . . . Bair that the [deferred compensation clause] w[as] put in only as a safety net in the event that a new corporation . . . would be formed by the [Appellees that did not include Appellant]. He assured . . . Bair that the provision no longer applied." Appellant interprets this statement as a finding that he in fact did not intend to enforce the clause and characterizes it as a finding that the deferred compensation clause was not a material term of the agreement. But this finding merely reflects the district court's determination that Appellant made certain statements and does not indicate that the district court found that Appellant did not actually intend to enforce the clause. Appellant's reading would not be consistent with the tenor of the district court's findings about how the clause came into existence and the lengths Appellant went to hide its existence from his fellow shareholders and the numerous findings that they in fact relied on his misrepresentations. Thus, the finding has no bearing on the materiality of Appellant's representations.

Appellant also makes a cursory argument that, because the district court concluded that execution of the later agreements "constitute[s] a corporate modification of [Appellant's] deferred compensation provision[,]" his deferred

compensation clause was not a material, enforceable term at the time Appellees signed their shareholder employment agreements and, therefore, he could not have committed fraud by misrepresenting it. This argument rests on the premise that Appellant's deferred compensation clause would never have been enforceable. But there is nothing inherent about the shareholder employment agreements that would make differing clauses necessarily unenforceable. In fact, Appellees did not raise any arguments related to the other differences in the shareholder employment agreements. Just as they agreed to those terms, it is possible that the parties might have agreed to Appellant's deferred compensation provision, or some variation of it, had he not lied about it. Instead, it was because of Appellant's misrepresentation of the terms that Appellees challenged Appellant's deferred compensation clause. The fact that the district court concluded after trial that Appellant's deferred compensation clause was modified does not preclude a finding that Appellant's misrepresentations about his deferred compensation clause were material to Appellees when made. To treat them otherwise would be absurd: Appellees would be deprived of a remedy because they proved that the clause should not be enforced.

In sum, we conclude that the deferred compensation clause, with the exception of the language contrary to 42 U.S.C. § 1395nn, was in full force and effect until it was reformed and, therefore, was an adequate basis for Appellees' fraud in the inducement claim. We also conclude that neither Appellant's statements about his intent to enforce his deferred compensation clause nor the district court's conclusion that it was modified preclude a finding that Appellant's deferred compensation clause was a material term of his shareholder employment agreement.

2. Justifiable Reliance

Appellant next argues that Appellees failed to prove fraud when they failed to prove an essential element—that they justifiably relied on his representations. Although he styles this argument as a challenge to the district court's findings, several of his assertions relate more to the legal significance of the district court's findings than to the findings themselves. For instance, Appellant maintains that "[w]here, as here, the alleged misrepresentations were with respect to a document all [Appellees] admitted they were told to read, justifiable reliance was absent as a matter of law." Appellant's statement of the law is incorrect. Although "each party to a contract has a duty to read and familiarize himself with the contents of the contract, each party generally is presumed to know the terms of the agreement, and each is ordinarily bound thereby," *Ballard v. Chavez*, 1994-NMSC-007, ¶ 8, 117 N.M. 1, 868 P.2d 646, where a party acts in good faith and "in accordance with reasonable standards of fair dealing[,]" *id.* (internal quotation marks and citation omitted), failure to do so does not automatically preclude a finding of justifiable reliance. *See Sisneros v. Citadel Broad. Co.*, 2006-NMCA-102, ¶ 23, 140 N.M. 266, 142 P.3d 34 (holding that summary judgment as to whether a party justifiably relied on the other party's representations when the first party failed to read the entire contract was improper where the "[p]laintiff . . . produced evidence giving rise to factual inferences that could reasonably support the determination that his failure to read the agreement was justified by [the other party's] conduct"). Furthermore, because "[a] fraudulent misrepresentation is an intentional tort[,] . . . the plaintiff's recovery is not barred by his own negligence which has contributed to his loss." Restatement (Second) of Torts § 545A cmt. a

(1977). Finally, negligent reliance may be justified "when there is a relation of trust and confidence between the parties or the defendant has made successful efforts to win the confidence of the plaintiff and then takes advantage of it to deceive him." *Id.* cmt. b.

The determination of whether a party's reliance on the other party's representations was justified "is fact-specific and includes consideration of the conduct of both parties." *Sisneros*, 2006-NMCA-102, ¶ 22. Thus, we examine the record to see whether the evidence supports the district court's finding of justifiable reliance. *See Varbel v. Sandia Auto Elec.*, 1999-NMCA-112, ¶ 18, 128 N.M. 7, 988 P.2d 317 ("A finding of fraud normally requires proof by clear and convincing evidence."). In doing so, we "view the evidence in the light most favorable to the prevailing party, and . . . determine therefrom if the mind of the fact[]finder could properly have reached an abiding conviction as to the truth of the fact or facts found." *Duke City Lumber Co.*, 1975-NMSC-041, ¶ 5.

Jones, Bair, and Schulhofer all testified that Appellant told them that the shareholders of NNMOC would be equal partners and that the shareholder employment agreements were the same with the exception of the termination and non-compete clauses. They testified that these representations were critical to their decisions to become shareholders in NNMOC. Jones's conversations with Appellant about the shareholder arrangements and the structure of the corporation had continued over months or years. Jones considered Appellant a mentor and friend. Schulhofer and Bair testified that Appellant did not tell them about the deferred compensation clause in his agreement even when they questioned him about the agreements. Bair testified that Appellant kept the corporate documents, including the shareholders' agreements, in his possession, not at the NNMOC offices. And the practice manager for NNMOC testified that no corporate documents were kept at the NNMOC offices. Appellees first learned of the deferred compensation clause in Appellant's agreement in early 2010. This evidence is sufficient to support the district court's findings that Appellees justifiably relied on Appellant's representations about the shareholder agreements.

To the extent Appellant argues that, after becoming shareholders and officers of NNMOC, Appellees breached their duty to properly oversee NNMOC and that "their claims resulted in large part from their ongoing failure to meet their fiduciary duties[,]" we are unpersuaded. Appellant relies on NMSA 1978, § 53-11-35(B) (1987), which states that "[a] director shall perform his duties . . . in good faith, in a manner the director believes to be in . . . the best interests of the corporation, and with such care as an ordinarily prudent person would use under similar circumstances in a like position." He maintains that "[h]aving steadfastly ignored their duties of care and oversight, . . . none of [Appellees] could establish justifiable reliance on [Appellant's mis]representation or non-disclosure" after they became officers of NNMOC. But Appellant overlooks the remainder of Section 53-11-35(B)(1), which provides that "a director shall be entitled to rely on . . . reports or statements, including financial statements and other financial data, in each case prepared or presented by . . . officers . . . of the corporation whom the director reasonably believes to be reliable and competent in the matters presented[.]" Here, Appellant founded NNMOC and was its president and treasurer for approximately nine

years before Appellees became shareholders. When Bair joined in 2008, Appellant became its treasurer and secretary. Several witnesses testified that Appellant controlled NNMOC's financial matters. Given this history, we conclude that the evidence supports the district court's findings that Appellees reasonably relied on Appellant's representations and that these findings support the district court's conclusion that "[Appellees] had no duty to audit or otherwise discover [Appellant's] misdeeds."

Finally, Appellant argues that Appellees' reliance on his representations was obviated by clauses stating that the written agreements supersede all other agreements and representations, including oral representations. For instance, the shareholder employment agreement states,

> This Agreement constitutes the entire agreement and understanding of the parties with respect to the subject matter hereof, and supersedes all prior oral or written agreements, arrangements, and understandings with respect thereto. No representation, promise, inducement, statement[,] or intention has been made by any party hereto that is not embodied herein, and no party shall be bound by or liable for any alleged representation, promise, inducement, or statement not so set forth herein.

Appellant's reliance on these clauses is misplaced because "in New Mexico exculpatory clauses do not preclude liability." *Golden Cone Concepts, Inc.*, 1991-NMSC-097, ¶ 6. A party fraudulently induced to enter into a contract "cannot be precluded from seeking redress by a provision inserted in the contract by the party perpetrating the fraud, designed to shut the mouth of the adverse party as to such fraudulent representations which led up to the making of the contract." *Id.* (internal quotation marks and citation omitted) (holding that the district court correctly permitted the plaintiff to proceed on its fraud and misrepresentation claims when the contract included an exculpatory clause similar to that here). We conclude that the clauses referenced by Appellant do not present a barrier to Appellees' suit or Appellant's liability.

B. Breach of Fiduciary Duty

Appellant argues that "the judgment based upon breach of fiduciary duty must be reversed" because the district court's findings of a breach of fiduciary duties were based on Appellant's failure to pay his share of overhead costs and the negative value of his NNMOC shares, which, he maintains, are duties imposed by the shareholder employment agreement and the shareholder agreement, respectively. He argues that "breach of fiduciary duty claims cannot be based on contractual duties."

Appellant's argument is both factually and legally flawed. First, the district court's findings related to Appellant's breach of fiduciary duties to Appellees and NNMOC are not based on Appellant's failure to pay overhead or the negative share value. Rather, the district court found that the fiduciary duty was breached when Appellant (1) failed to inform Appellees of "bonuses paid by him to him without appropriate basis"; (2) failed to inform Appellees of "material facts and information relating to [NNMOC's] business and financial affairs"; (3) "knowingly" submitted incorrect information about his bonuses to Appellees at shareholder meetings; (4) "knowingly and intentionally" paid himself

bonuses "to the substantial economic detriment of [Appellees] . . . as well as to [NNMOC] itself." Thus, Appellant's position that the breach of fiduciary duty findings are based only on contractually-imposed duties is not supported by the record.

Second, this Court has held that a breach of duties imposed by contract may also constitute a breach of the fiduciary duties of "loyalty, good faith, inherent fairness, and the obligation not to profit at the expense of the corporation." *See Walta v. Gallegos Law Firm, P.C.*, 2002-NMCA-015, ¶¶ 41, 46-47, 131 N.M. 544, 40 P.3d 449 (adopting the holding of *Fought v. Morris*, 543 So. 2d 167, 171 (Miss. 1989), and stating that "breach of [a] shareholder agreement could also be a breach of [a] fiduciary duty"). Although Appellant is correct in pointing out that not all breaches of a contract are necessarily breaches of a fiduciary duty, determination of "whether a breach of fiduciary duty has occurred will normally be a question of fact." *Walta*, 2002-NMCA-015, ¶ 47. Since the district court resolved this question in favor of Appellees and Appellant challenges the district court's findings, we examine the record for evidence supporting that determination. *See Bagwell v. Shady Grove Truck Stop*, 1986-NMCA-013, ¶ 23, 104 N.M. 14, 715 P.2d 462 (stating that in reviewing a district court's factual determination for substantial evidence, "[t]he appellate court . . . disregards all evidence and all inferences unfavorable to the [district] court's result").

We begin by defining "fiduciary duty." "The duty between shareholders of a close corporation is similar to that owed by directors, officers, and shareholders to the corporation itself; that is, loyalty, good faith, inherent fairness, and the obligation not to profit at the expense of the corporation." *Walta*, 2002-NMCA-015, ¶ 41. In other words, a fiduciary duty is "[a] duty of utmost good faith, trust, confidence, and candor owed by a fiduciary (such as a . . . corporate officer) to the beneficiary (such as a . . . shareholder)" and involves "a duty to act with the highest degree of honesty and loyalty toward another person and in the best interests of the other person (such as the duty that one partner owes to another)." *Black's Law Dictionary* 581 (9th ed. 2009). "An act that is detrimental to the interests of someone to whom a fiduciary duty is owed[,] esp[ecially] an act that furthers the actor's own interests" is a breach of loyalty. *Id.* at 214. The common thread between these statements is the idea that a fiduciary may not promote his interests above the interests of those to whom a duty is owed.

Based on this principle, we examine the record for evidence that Appellant advanced his interests at the expense of Appellees or NNMOC. Under the substantial evidence standard, we "indulge[] all reasonable inferences in support of the prevailing party." *Las Cruces Prof'l Fire Fighters v. City of Las Cruces*, 1997-NMCA-044, ¶ 12, 123 N.M. 329, 940 P.2d 177. We conclude that the evidence supports the district court's findings of breach.

Two witnesses testified about the amount overpaid to Appellant. NNMOC's accountant conducted an audit of the compensation of shareholders. She discovered that the amount paid to Appellant was "off" by "hundreds of thousands" of dollars. Edward Street, an expert in "accounting, business valuation, review and analysis of financial documents, and forensic accounting," testified that he compared the amount of compensation due to Appellant with the amount of compensation actually paid to determine if Appellant had been overpaid.

Based on this analysis, he concluded that Appellant had been overpaid by $173,187.54 in 2007-2008, $199,233.83 in 2009, and $185,424.89 in 2010, for a total of $557,846.47, which was adjusted to $527,821.49. He also described the consequences of overpayment, stating, "if one of the doctors has been overpaid by several hundred thousand dollars, other doctors have to be underpaid by several hundred thousand dollars or the corporation has to be negative, has to spend more money than, in total, it has earned. . . . So if somebody is drawing more money than what is due them, it has to come from someplace else."

In addition, the evidence supports the district court's finding that Appellant was the only person calculating "bonus" payments to shareholders on the shareholder allocation sheets that the shareholders used to track their compensation. Several witnesses testified that Appellant was either in charge of or closely involved with the generation of the shareholder allocation sheets. NNMOC's external accountant testified that she prepared the shareholder allocation sheets and gave them to Appellant. She stated that she would enter "the breakdown of the income and the allocation of the expenses" but not the bonuses on the draft allocation sheet and send the sheet to Appellant. She and NNMOC's internal practice manager both testified that Appellant was their main point of contact for financial matters through early 2010. The internal practice manager never saw the allocation sheets prior to the litigation. Bair and Schulhofer testified that Appellant brought a single copy of the shareholder allocation sheets to meetings with the shareholders approximately monthly and that Appellant would take the copy with him after the meetings. He stated that "none of [the Appellees] had any active role in the finances until . . . 2010" when Appellant stopped working at NNMOC. Schulhofer described Appellant as "controll[ing]" the shareholder allocation sheets. We conclude that this evidence supports the district court's findings of breach of fiduciary duty based on Appellant's overcompensation.

As to the findings of a breach of fiduciary duty based on Appellant's failure to inform Appellees of material facts related to NNMOC's finances, such as his deferred compensation clause, we conclude that the evidence also supports these findings. Appellees testified about Appellant's failure to inform them of the deferred compensation clause in his shareholder employment agreement, as discussed above. Appellant's deferred compensation clause would provide him with eighty percent of direct physician gross revenues and twenty percent of ancillary services revenue for three years, in contrast to Appellees' deferred compensation clause, which provides them with only sixty percent of direct physician gross revenue for six months and no income based on ancillary services revenue. Jones's testimony supports an inference that the effect of Appellant's deferred compensation clause would be to reduce the amount of ancillary services revenue for NNMOC and the other shareholders, contrary to what they understood when they signed the agreement. Schulhofer testified that having to pay Appellant according to his deferred compensation clause would be devastating to NNMOC, and possibly to him personally as well, stating that if the clause were valid "it[would not be] in [his] interest to continue working. . . . So I would resign, which would mean, I assume, a bankruptcy for the business, and depending on the outcome of that, possibly a personal bankruptcy for myself to cover whatever

liabilities we didn't meet." This evidence supports the district court's findings to the effect that Appellant promoted his own interests to the detriment of Appellees and NNMOC. We discern no error in the district court's conclusions related to breach of fiduciary duty.

C. Prima Facie Tort

Appellant argues that the district court erred in concluding that "[Appellant] committed a prima facie tort against [Appellees] and [NNMOC]." Appellees concede that the facts on which the prima facie tort was based "duplicate[Appellees'] fraud and breach of fiduciary duty claims" and appear to agree that the district court's conclusion is, therefore, improper. We agree. *See Guest v. Allstate Ins. Co.*, 2009-NMCA-037, ¶ 33, 145 N.M. 797, 205 P.3d 844 ("New Mexico appellate courts have held that where a plaintiff does not assert any separate factual basis to support its prima facie tort claim, and the plaintiff's proof is susceptible to submission under another tort, the action should be submitted to the jury on the other cause of action and not as a prima facie tort claim"), *aff'd in part, rev'd in part*, 2010-NMSC-047, 149 N.M. 74, 244 P.3d 342. In Appellees' complaint, the only facts alleged in support of the prima facie tort claim were those "as set forth" in the fraud, securities fraud, breach of fiduciary duty, and breach of contract claims. No separate factual basis for the prima facie tort was established at trial. Thus, the district court's conclusion as to prima facie tort must be reversed. *See Bogle v. Summit Inv. Co., LLC*, 2005-NMCA-024, ¶ 24, 137 N.M. 80, 107 P.3d 520 (holding that prima facie tort was not available when "existing causes of action provided reasonable avenues to a remedy for the asserted wrongful conduct").

II. Damages

We turn now to Appellant's arguments as to the damages awarded. Appellant argues that the amount of compensatory damages should be reduced and that punitive damages were improperly awarded.

A. Compensatory Damages

"Generally, we review findings regarding damages to determine whether they are supported by substantial evidence." *Miller v. Bank of Am., N.A.*, 2014-NMCA-053, ¶ 28, 326 P.3d 20, *cert. granted*, 2014-NMCERT-005, 326 P.3d 1112. "Substantial evidence is that which a reasonable mind accepts as adequate to support a conclusion." *Id.* (internal quotation marks and citation omitted). We address each of Appellant's five arguments for reduction of the compensatory damages in the order presented.

1. Overhead Expenses

As discussed above, each shareholder's compensation consists of the sum of their direct physician gross revenues and ancillary services revenue less a portion of NNMOC's overhead costs. Hence, each shareholder is responsible for his or her share of overhead expenses. Appellant argues that the compensatory damages award must be reduced by $154,655.55 because he ceased being a shareholder in January 2010, and thus he was no longer responsible for a portion of NNMOC's overhead expenses. Although Appellant does not dispute that he submitted a letter of resignation in November 2010, he maintains that Appellees had agreed during negotiations over his leave of absence to make his termination date retroactive to January 2010 if he did not return to work after six

months. Since he did not return to work, he contends that the January termination date should apply.

The district court found that Appellant's status as a shareholder was terminated on December 30, 2010, thirty days after Appellant submitted a letter of resignation, and that his shareholder status was terminated as of that date pursuant to paragraph 7.1(d) of the shareholder employment agreement. It also found that Appellant "never sought termination" during the leave of absence negotiations and that "[h]e did not terminate those negotiations, or terminate his employment as he sought advantage in the negotiation." Hence, the district court implicitly rejected Appellant's argument that the parties had agreed to a termination date of January 2010. Based on the finding of a termination date of December 2010, the district court found that Appellant "continued to be responsible for his share of overhead" until that date. Finally, the district court found that Appellant continued to receive a share of ancillary services revenue and other revenue from NNMOC during the leave of absence negotiations. Because Appellant challenges each of these findings, we review the record to determine whether they are supported by substantial evidence. *See Bagwell*, 1986-NMCA-013, ¶ 23.

The heart of Appellant's challenge to these findings is his contention that Appellees agreed to make his termination date retroactive to January 2010 during the leave of absence negotiations. We therefore address that issue first. Bair testified that early in the negotiations Appellees proposed a termination date that would be retroactive to the date the leave of absence began, rather than the date it ended. Bair also testified, however, that in the course of negotiations Appellees reversed this position and proposed that the termination date would not be retroactive. Finally, he testified that no agreement on the terms of Appellant's leave of absence was ever reached. This testimony is supported by several exhibits admitted at trial, including (1) an email sent to Bair by Appellant in March 2010 in which Appellant acknowledges that agreement on the terms of the leave of absence had not been reached and stating, "It may be best for me to resign"; (2) a letter sent on June 7, 2010, in which Bair informed Appellant that NNMOC still considered him an employee of the corporation and that he was still responsible for his share of overhead costs; and (3) an email exchange in which Appellant acknowledges that the terms related to his termination date had not been resolved as late as June 29, 2010. This evidence is sufficient to support the district court's finding that the parties did not agree to a termination date in January 2010. Furthermore, since Appellant's only argument as to why the shareholder employment agreement's termination provision does not apply to him is that he had been terminated in January 2010, we conclude that substantial evidence also supports the district court's determination that that provision governed Appellant's termination.

Turning to the district court's determination that Appellant continued to receive income through December 2010 and was responsible for a portion of overhead expenses incurred during that time, we conclude that these findings are supported by the record. Edward Street, Appellees' forensic accounting expert, testified that a portion of non-shareholder employee physician revenue and ancillary services revenue had been allocated to Appellant in 2010 and that Appellant had received a salary of over $30,000 in 2010. Street agreed with

Appellees' counsel that these payments were pursuant to the shareholder employment agreement. He also agreed with counsel that "so long as [Appellant is] employed, he has to pay his share of the overhead." Appellant's shareholder employment agreement also requires that calculation of a shareholder's compensation must incorporate each shareholder's portion of overhead expenses. Thus, the terms of the shareholder employment agreement obliges shareholders to cover their portion of NNMOC's overhead expenses. We conclude that there is substantial evidence in the record to support these findings.

To the extent that Appellant maintains that the district court's finding that he was terminated in December 2010 is inconsistent with its finding that his share value should be determined as of January 2010, we disagree. The employment termination date is governed by paragraph 7 of the shareholder employment agreement, whereas the date of valuation of the shares is governed by paragraph 6 of the shareholder agreement. The shareholder agreement provides that "upon the occurrence of a [t]riggering [e]vent, the [c]orporation shall redeem the shares of stock owned by the [s]hareholder . . . upon the terms and for the purchase price set forth in [paragraph] 11." Paragraph 6(D) provides that "in the case of the termination of the [s]hareholder's employment," the "triggering event" shall be "the earlier to occur of (i) the date set forth in the [s]hareholder's resignation . . ., or (ii) the last day on which the [s]hareholder actually performs services for the [c]orporation." The district court found that the "triggering event" here was the date that Appellant stopped providing services, which is the earlier of the two options stated in paragraph 6(D). Thus, it treated the termination of employment as a condition antecedent to the triggering event, which is consistent with the plain language of paragraph 6(D). We discern no inconsistency in the district court's findings as to the employment termination date and the date for valuation of Appellant's shares.

2. Inconsistent Accounting Treatment

Appellant next argues that the district court's findings based on Street's calculations of the damages are erroneous because Street handled a certain transaction differently than the NNMOC board of directors did. Street testified that when Schulhofer became a shareholder, he paid $137,500 for his shares. One-third of this amount was allocated to each of the other shareholders (Appellant, Bair, and Jones) on the shareholder allocation sheets. When Street examined the NNMOC financial records and calculated the amounts paid to shareholders, he noted that stock purchase payments should be treated as capital contributions to the corporation, rather than income to shareholders. Accordingly, he reallocated $43,833.33 each from Appellant, Bair, and Jones to NNMOC. According to Street, this adjustment had the effect of reducing the amount NNMOC owed to Bair and Jones, whereas it increased the amount Appellant owed to NNMOC because he was already running a deficit. Street's testimony supports the district court's finding that reallocation of the stock purchase payment of $137,500 "is required by sound accounting practices and [principles.]"

Appellant also argues that, because all of the shareholders had agreed to treat the stock purchase payment as income years before Street examined NNMOC's financial records, that treatment cannot "form the basis for a finding of breach of fiduciary duty" or breach of contract. After a careful review of

the district court's findings, we conclude there is no finding or conclusion by the district court indicating that it based its conclusions as to breach of contract or fiduciary duty specifically on the way these funds were treated. Thus, we need not address this contention further.

3. Responsibility for Dr. Wise's Negative Balance

Appellant's third argument against Street's calculations is that the district court erred in finding that "[Appellant] was responsible for, directed and/or intended the entries reflecting his absorption of . . . Wise's [who ceased being a shareholder at the end of 2008] negative running balance and [Appellant] should be estopped from repudiating that action." Although the finding does not state the type of estoppel invoked, the language of the district court's finding evinces a reliance on the doctrine of acquiescence, "a species of estoppel." *Scott v. Jordan*, 1983-NMCA-022, ¶ 20, 99 N.M. 567, 661 P.2d 59. "[A]cquiescence arises where a person who knows that he is entitled to . . . enforce a right neglects to do so for such a length of time that, under the circumstances of the case, the other party may fairly infer that he has waived or abandoned his right." *Id.* (internal quotation marks and citation omitted). "Whether the defense of acquiescence has been established is a factual issue which must be decided under the facts existing in each case." *Id.* ¶ 21.

Here, according to the shareholder agreement, Wise's negative balance could have been borne by Appellant and Jones, who were the two shareholders at the time Wise left NNMOC. Thus, Appellant was not obligated to allocate the balance to himself. However, Appellees testified that the monthly shareholder allocation sheets, including the one reflecting Wise's negative balance, were completed and/or brought to shareholder meetings by Appellant, and NNMOC's accountant testified that although she provided drafts of the allocation sheets to Appellant, Appellant completed them. The allocation sheet in question was completed in early 2008, nearly two years before Appellant stopped working at NNMOC in January 2010, and nearly four years before trial. This evidence supports the district court's finding that Appellant was responsible for the allocation of Wise's negative balance to himself and that he failed to correct any error for nearly four years.

4. Improper Allocation of Jones's Revenue

Finally, Appellant argues that the compensatory damages award must be adjusted because revenue generated by Jones before he was a shareholder was improperly allocated to Jones by Street. He maintains that accounts receivable based on Jones's work as a non-shareholder employee physician should have been allocated to Appellant and Wise, rather than credited to Jones as either direct physician gross revenue or non-shareholder employee physician revenue. Appellant testified at trial that the effect of this adjustment would be a reduction of $75,303 in the amount Appellant owes in compensatory damages. Appellees argue that the amount allocated to Jones on the shareholder allocation sheets by Street had already been adjusted to exclude revenues generated by Jones before he was shareholder and, therefore, no further adjustment is necessary.

Under our standard of review of damages awards, we review the record and affirm the district court's findings as to the treatment of revenue attributed to Jones if

there is substantial evidence to support them. *See Miller*, 2014-NMCA-053, ¶ 28 (stating that damages awards are reviewed for substantial evidence). The district court made only one finding of fact related to the allocation of revenues to Jones. That finding states,

> When . . . Jones executed his [s]hareholder [e]mployment [a]greement, that [a]greement superseded his prior [e]mployment [a]greement under the terms of his [s]hareholder [e]mployment [a]greement and he is entitled to his proportionate share of all [a]ncillary [s]ervices and [n]on-[s]hareholder [p]hysician revenues, there being no limitation language in his [a]greement.

This finding states only that Jones is entitled to a proportionate share of revenue from ancillary services and non-shareholder employee physician services. It does not address whether Jones was or was not credited with direct physician gross revenue generated before he was a shareholder. This finding is supported by the text of the shareholder employment agreement, in which we too find no language preventing the allocation of those revenues to Jones. *See Maestas v. Martinez*, 1988-NMCA-020, ¶ 15, 107 N.M. 91, 752 P.2d 1107 ("Where an issue to be determined rests upon the interpretation of documentary evidence, an appellate court is in as good a position as the trial court to determine the facts and draw its own conclusions.").

To the extent we might infer from the district court's acceptance of Street's testimony as to the total amount Appellant owes NNMOC that it found that the revenue allocated to Jones had already been adjusted to exclude revenue earned before he was a shareholder, we conclude that the evidence does not support such a finding, even viewed in the light most favorable to the judgment. *See Weidler v. Big J Enters., Inc.*, 1998-NMCA-021, ¶ 30, 124 N.M. 591, 953 P.2d 1089 ("In reviewing a sufficiency of the evidence claim, this Court views the evidence in a light most favorable to the prevailing party and disregard[s] any inferences and evidence to the contrary." (alteration in original) (internal quotation marks and citation omitted)). Street testified that NNMOC "may have made an adjustment" to exclude Jones's non-shareholder employee revenue from Jones's compensation. He based his statement that such an adjustment may have been made on his review, apparently on the witness stand, of shareholder allocation sheets for the first six months that Jones was a shareholder. In this review, he noted that the revenue allocated to Jones in the first two months after becoming a shareholder was significantly less than that in the following four months, and stated that "there is indication that the revenue reflected . . . may have been adjusted based on the amounts [for the first two months] compared to the subsequent [four months]." But Street also acknowledged that he "didn't ask or didn't test that" question as part of his analysis and that he "[didn't] know if [NNMOC made] an adjustment." This testimony is too speculative to amount to substantial evidence.

Nevertheless, we conclude that remand for recalculation is appropriate. Based on the district court's finding that Jones is entitled to a portion of non-shareholder physician revenue, including that generated by him, we next examine the record for evidence indicating that amount and whether he was properly credited with it. The district court did not make an explicit finding as to the

amount that should have been allocated to Jones and, as discussed above, we cannot infer that the amounts shown on the allocation sheets were adjusted properly. Confusingly, on the allocation sheets admitted at trial, on which both Appellant and Street relied, the revenues allocated to Jones are labeled as "direct physician revenue," and there is no line item indicating how much revenue was attributed to Jones from his services rendered as a non-shareholder, although other non-shareholder physician revenues are identified by physician name. Given that there is no specific finding as to the correct amount of non-shareholder physician revenue that should have been allocated to Jones and that "[a]s an appellate court, we will not originally determine the questions of fact[,]" we remand for calculation of the amounts attributable to Jones's direct physician revenue and his portion of the non-shareholder physician revenue, including that generated by him prior to becoming a shareholder. *Guidry v. Petty Concrete Co.*, 1967-NMSC-048, ¶ 13, 77 N.M. 531, 424 P.2d 806.

5. Shareholder Approval of Bonuses

Appellant next challenges the district court's finding that there was no "corroborating evidence or testimony to support [Appellant's] contention that [NNMOC] owed him any amount for loans, or that the other [s]hareholders agreed to give him any bonus or other payment inconsistent with the . . . [s]hareholder [e]mployment [a]greement." Jones testified that "[u]nder no circumstances other than those in the [shareholder e]mployment [a]greement have [the NNMOC shareholders] ever okayed any bonus for any partner." Bair testified to the effect that bonuses were not given to shareholders just for doing a good job because "[t]hat's not how the corporation was set up." He also stated that he never discussed with Appellant any monies Appellant claimed were owed to him by NNMOC. Street testified that he did not find any "loans for capital contributions made in 2008 reflected on the financial statements for the year ended December 31, 2008, from [Appellant]." We conclude that the district court's finding is supported by substantial evidence.

B. Punitive Damages

Appellant argues that "because not even nominal damages were awarded on the fraud claims the punitive damages award is erroneous." *See* UJI 13-1827 NMRA (permitting a jury to award punitive damages "only if" it finds the plaintiff "should recover compensatory [or nominal] damages." (alteration in original)). We are unpersuaded for two reasons: (1) punitive damages are appropriate when an actor willfully breaches fiduciary duties and Appellant's acts in overpaying himself fit that category, and (2) Appellant's argument is based on the faulty premise that money damages are the only available remedies for fraud.

First, New Mexico does not require a finding of fraud in the classical sense to support a punitive damage award. *See Akins v. United Steel Workers of Am.*, 2010-NMSC-031, ¶ 28 n.3, 148 N.M. 442, 237 P.3d 744 (allowing punitive damages for breach of duty of fair representation); *Skeen v. Boyles*, 2009-NMCA-080, ¶¶ 36-38, 146 N.M. 627, 213 P.3d 531 (allowing punitive damages for egregious breach of well-sharing agreement). And it is settled in New Mexico that punitive damages are available for breaches of fiduciary duties owed by and between shareholders in close corporations. *Walta*, 2002-NMCA-015, ¶¶ 55-58. The most salient question to be considered in any case in which

punitive damages are requested is whether the actor acted with a culpable mental state. *Id.* ¶¶ 57-58.

Here, the district court made a number of relevant factual findings concerning overpayments of bonuses to Appellant that Appellant does not challenge. The district court found that Appellant maintained control of the financial aspects of NNMOC at least until the beginning of 2010. Thus, Appellant alone determined the bonuses to be paid to shareholders of NNMOC. His decisions were not subject to review by NNMOC's external accountant because of limitations he placed on her. Appellant provided a single shareholder allocation sheet at meetings with the other shareholders, and the single sheet was always retrieved by Appellant after the meeting. The shareholder allocation sheets were not kept as part of the financial records of NNMOC. Although the sheets were prepared in part by the NNMOC accountant, Appellant adjusted the entries to and sometimes changed the format of the sheets without input from her. These sheets were often inaccurate and misleading.

In 2008 and 2009 Appellant gave himself bonuses that were in excess of and not related to the amounts he had billed and collected from services provided. The excess bonuses totaled approximately $370,000 by the end of 2009. The bonuses were not approved by the other shareholders. In fact, the excess bonuses were not discovered until Appellees' forensic accounting expert found them during the litigation.

It is reasonable to infer from those findings of fact that Appellant knowingly overpaid himself; that he used his control of corporate finances to do so; that he intentionally and successfully hid the overpayments from his fellow shareholders and NNMOC's accountant; and that he was aware the overpayments were detrimental to the economic health of NNMOC and his fellow shareholders. The district court came to the same conclusion as evidenced by its findings and conclusions of law. The picture painted by the Appellant's self-dealing with regard to his excess bonuses supports the district court's conclusions that:

> 13. The actions of [Appellant] in regard to each of Jones, Bair[,] and Schulhofer after becoming shareholders in [NNMOC] constitute continuing fraud by [Appellant] on each of them and [NNMOC].
>
> 14. The actions of [Appellant] subsequent to Jones, Bair[,] and Schulhofer becoming shareholders in [NNMOC] constitute a breach of fiduciary duty by [Appellant] to each of them and [NNMOC].
>
> . . . .
>
> 17. [Appellant's] misrepresentations to . . . Jones, Bair[,] and Schulhofer constitute knowing misrepresentations to them and [NNMOC].
>
> . . . .
>
> 19. [Appellant] committed fraud and continuing fraud against . . . Jones, Bair[,] and Schulhofer and [NNMOC].
>
> 20. [Appellant] breached his [f]iduciary duty to act with

loyalty, utmost good faith, and inherent fairness towards his fellow shareholders and [NNMOC].

. . . .

24. [NNMOC] is a close corporation and the [s]hareholders owe each other a fiduciary duty higher than the duty of good faith and fair dealing imposed on all contractual relationships, which fiduciary duty was breached by [Appellant].

25. The fiduciary duty between [s]hareholders of a close corporation to each other and to [NNMOC] is one of loyalty, good faith, . . . inherent fairness[,] and the obligation not to profit at the expense of [NNMOC], which fiduciary duty was breached by [Appellant].

These conclusions of law and their supporting factual findings obviously carry with them the culpable mental state required to support an award of punitive damages.

In addition, money damages are not the only remedy for fraud. Here, Appellees requested declaratory judgment as to the deferred compensation clause. Specifically, Appellees sought a statement that the deferred compensation clause in Appellant's shareholder employment agreement has no effect to the extent that it differs from the deferred compensation clause in Appellees' agreements. Thus, Appellees' request was not so much for a declaration of their "rights, status[,] and other legal relations" but rather for modification of Appellant's deferred compensation clause to match theirs. *See* NMSA 1978, § 44-6-2 (1975). We conclude that the remedy sought was an equitable one. A declaratory judgment action may sound in either law or equity.

> An action for a declaratory judgment is sui generis, and whether an action is to be treated as one at law or one in equity is to be determined by the nature of the dispute. . . . [D]eclaratory judgment actions, being statutory creatures, are neither inherently legal nor inherently equitable but may depend upon equitable considerations. The legal or equitable nature of a declaratory judgment proceeding is to be determined by the pleadings, the relief sought, and the nature of each case.

22A Am. Jur. 2d *Declaratory Judgments* § 2 (2004) (footnotes omitted). Because Appellees sought not to avoid the obligations of Appellant's agreement altogether but to make his agreement congruent with theirs, their request falls squarely within the definition of contract reformation, which is "[a]n equitable remedy by which a court will modify a written agreement to reflect the actual intent of the parties, usu[ally] to correct fraud or mutual mistake in the writing[.]" *Black's Law Dictionary* 1394 (9th ed. 2009). Reformation is a remedy for fraud. *See Chromo Mountain Ranch P'ship v. Gonzales*, 1984-NMSC-058, ¶¶ 6, 9, 101 N.M. 298, 681 P.2d 724 (stating that "reformation is the proper remedy for constructive fraud regarding a land sale contract" and citing the Restatement (Second) of Contracts § 166 (1979)); *Buck v. Mountain States Inv. Corp.*,

1966-NMSC-090, ¶ 7, 76 N.M. 261, 414 P.2d 491 ("[A] court of equity may grant reformation of a contract where . . . through mistake on the part of one party and fraud . . . on the part of the other party, the written instrument drafted to evidence a contract fails to express the real agreement and intentions of the parties."); *Pacheco v. Martinez*, 1981-NMCA-116, ¶ 32, 97 N.M. 37, 636 P.2d 308 (stating that reformation is an equitable remedy); Restatement (Second) of Contracts § 166 (1981) ("If a party's manifestation of assent is induced by the other party's fraudulent misrepresentation as to the contents or effect of a writing evidencing . . . an agreement, the court . . . may reform the writing to express the terms of the agreement as asserted . . . if the recipient was justified in relying on the misrepresentation[.]"). The district court granted Appellees' request in the final judgment.

Having concluded that Appellees were granted equitable relief, we next address whether such relief may form the basis for an award of punitive damages and conclude that it can. In *Madrid v. Marquez*, Mr. and Mrs. Madrid, an elderly couple, agreed to transfer their home to their neighbor, Marquez, in exchange for his promise to care for them and to let them live in the home rent free for the rest of their lives. 2001-NMCA-087, ¶ 2, 131 N.M. 132, 33 P.3d 683. After Marquez obtained the deed to the Madrids' home, he "began harassing, threatening, and intimidating the elderly and ill couple and ultimately attempted to force the Madrids from their home." *Id.* After a bench trial, the district court ordered the deed rescinded or reformed such that the Madrids would retain a life estate in the home with a remainder interest in Marquez. *Id.* ¶ 1. It also awarded $20,000 in punitive damages. *Id.*

On appeal, Marquez made the same argument that Appellant makes here, that "punitive damages cannot be recovered without recovery of compensatory or nominal damages." *Id.* ¶ 3. While this Court agreed that "Marquez correctly state[d] the general law of New Mexico regarding punitive damages," it nevertheless held that "justice is better served by allowing the award of punitive damages in those equity cases where the conduct of the wrongdoer warrants [such] damages in order to deter clearly unacceptable behavior." *Id.* Under this so-called "modern approach . . . [r]equiring an award of compensatory damages as a prerequisite to an award for punitive damages is a technical rule that should not be applied blindly[.]" *Id.* ¶ 8. Noting that the purpose of the rule requiring compensatory or nominal damages "is that it first insures that some legally protected interest has been invaded [and] prevents the assessment of punitive damages against one who may have caused damage without legal injury[,]" this Court held that "[t]here is no reason why an award of equitable relief may not fulfill this same function[.]" *Id.* (internal quotation marks and citation omitted). Thus, where "[a] plaintiff [has] establish[ed] a cause of action in equity and the wrongdoer's misconduct [is] willful, wanton, malicious, reckless, . . . or fraudulent and in bad faith" punitive damages are allowable to "do[] complete justice." *Id.* (internal quotation marks and citation omitted).

Here, in awarding the equitable remedy of modification of Appellant's deferred compensation clause, the district court acknowledged the legal injury to Appellees due to Appellant's fraudulent misrepresentation. The next inquiry is whether the evidence supports the district court's findings that Appellant had a culpable state of mind related to the fraud, which

Appellant challenges. In addition to the evidence discussed above related to Appellees' reliance on Appellant's representations, the evidence supports an inference that Appellant not only knew about, but actively engineered a better deferred compensation clause for himself than for the other shareholders. For instance, there were several email exchanges in September 2007 between Appellant and the NNMOC attorney, who was also Appellant's personal attorney, in which the attorney highlighted the differences between Appellant's shareholder employment agreement and Jones's agreement. The fact that Appellant told Bair that he did not intend to enforce the deferred compensation clause, but included it in his agreement in case Appellees formed a different company without him indicates that he was aware of the differences in the agreements at the time they were drafted. The evidence also supports an inference that Appellant acted to hide the differences in the deferred compensation clauses from Appellees. For example, although Schulhofer and Bair asked Appellant about the terms of the agreements, Appellant did not tell them about the deferred compensation clause in his agreement. Several people testified that Appellant kept the corporate documents, including the shareholders' agreements, in his possession and that no corporate documents were kept at the NNMOC offices. This evidence is sufficient to support the district court's findings to the effect that Appellant knowingly and intentionally misled Appellees about the shareholder employment agreements.

We conclude that, under *Madrid*, the equitable remedy provides an independent basis supporting the award of punitive damages. The final judgment acknowledged that Appellees established a cause of action in equity and the evidence supports a finding of a culpable state of mind. Together, these elements are sufficient to support an award of punitive damages. *See id.* Consequently, we affirm on this issue.

CONCLUSION

We affirm the district court's judgment with two exceptions. For the reasons stated above, the finding of a prima facie tort is reversed. As to the amount of compensatory damages due to NNMOC, we affirm the district court's findings as to calculations of the damages in all respects except for the calculation and allocation of non-shareholder employee revenue generated by Jones before he became an NNMOC shareholder. We remand for recalculation of this amount.

IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:

RODERICK T. KENNEDY, Chief Judge

LINDA M. VANZI, Judge

Certiorari Denied, January 14, 2015, No. 34, 964

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-017

Filing Date: October 7, 2014

Docket No. 32,656

LISA A. BURCIAGA SEGURA,

Plaintiff-Appellee,

v.

TERRY A. VAN DIEN and NINA A. LAUERMAN,

Defendants-Appellants.

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for Appellee

Nancy Ann Richards
Las Vegas, NM

for Appellants

OPINION

ZAMORA, Judge.

Terry Van Dien and Nina Lauerman (Defendants) appeal a judgment granting Lisa Burciaga Segura (Plaintiff) an easement to use a common driveway over their property. In this appeal, we must determine whether an unrecorded oral permissive easement gives rise to an easement by prescription after the prescriptive period. Following the Restatement (Third) of Property, we hold that prescriptive use may be either adverse use or use pursuant to the terms of an intended but imperfectly created easement, or the enjoyment of the benefit of an intended but imperfectly created easement. Restatement (Third) of Prop.: Servitudes § 2.16 (2000). Applying this holding to the facts of this case, we affirm.

BACKGROUND

In 1996, Plaintiff and her then husband (collectively the Seguras) purchased an undeveloped tract of land (Tract B-1) on which they planned to build a house. Shortly after the Seguras purchased Tract B-1, Richard and Janine Duncan (the Duncans) purchased an adjacent tract (Tract B-2) for the same purpose. At that time, neither tract had a house nor a driveway on it. Both tracts were set back from State Road 94 and had limited access to the road. The Seguras and the Duncans agreed to build a single common driveway to serve both tracts. They did so, agreeing on the location of the driveway and sharing the costs of building it. The driveway provided access to both the Seguras' and the Duncans' residences and it was used for that purpose continuously until 1999. Then the couples agreed to realign the driveway, again splitting the expense. The realigned driveway was used by the Seguras and the Duncans to access their respective properties until 2006. Though the couples intended to reduce their agreement to writing, they never did, nor did they record Plaintiff's easement over the property.

In 2006, the Duncans sold Tract B-2 to Defendants. The deed did not mention the easement, however, the realigned driveway giving access to Tracts B-1 and B-2 remained in continuous use by Plaintiff and Defendants. The relationship between Plaintiff and Defendants deteriorated. In 2010, Mr. Van Dien wrote Plaintiff a letter announcing that he would be closing the common driveway.

Defendants attempted to exclude Plaintiff from the use of the driveway and, according to Plaintiff, Mr. Van Dien also threatened and harassed Plaintiff and her children. Plaintiff sued and was granted a preliminary injunction, enjoining Defendants from interfering with her use of the driveway and from threatening or harassing Plaintiff and her children. Both parties moved for summary judgment. The motions were denied and after a non-jury trial, the district court entered a judgment in favor of Plaintiff, granting her a prescriptive easement over the driveway. This appeal followed.

DISCUSSION

On appeal, Defendants argue that the district court erred in denying their motion for summary judgment and in granting Plaintiff a prescriptive easement where Plaintiff failed to show adverse use of the driveway. Plaintiff contends that her agreement with the Duncans to build and share the driveway in 1996 created an unrecorded easement that ripened into a prescriptive easement over what is now Defendants' property. This case was submitted to the district court based on stipulated facts. Thus, resolution of the parties' dispute over Plaintiff's right to use the driveway depends on whether the intended but imperfect easement created by her agreement with the Duncans gives rise to a prescriptive easement. This is a legal issue that we review de novo. *Amethyst Land Co. v. Terhune*, 2014-NMSC-015, ¶ 9, 326 P.3d 12.

We have not found any New Mexico case to have addressed this precise issue. For authoritative guidance on the law pertaining to easements, we look to the Restatement (Third) of Property: Servitudes. *E.g.*, *City of Rio Rancho v. Amrep Sw. Inc.*, 2011-NMSC-037, ¶ 33, 150 N.M. 428, 260 P.3d 414; *Algermissen v. Sutin*, 2003-NMSC-001, ¶¶10-11, 133 N.M. 50, 61 P.3d 176; *Cox v. Hanlen*, 1998-NMCA-015, ¶ 15, 124 N.M. 529, 953 P.2d 294; *Cunningham v. Otero Cnty. Elec. Coop., Inc.*, 1992-NMCA-116, ¶ 15, 114 N.M. 739, 845 P.2d 833.

According to the Restatement, a servitude is created by a prescriptive use of land where the prescriptive use is open or notorious and continued without effective interruption for the prescriptive period. Restatement (Third) of Prop.: Servitudes § 2.17 (2000). A prescriptive use of land is defined as either:

> (1) a use that is adverse to the owner of the land or the interest in land against which the servitude is claimed, or
>
> (2) a use that is made pursuant to the terms of an intended but imperfectly created servitude, or the enjoyment of the benefit of an intended but imperfectly created servitude.

Restatement (Third) of Prop.: Servitudes § 2.16, at 221-2.

Our Supreme Court adopted the Restatement's first definition of prescriptive use in *Algermissen*: "[W]e follow the example of the recently published Restatement (Third) of Property: Servitudes . . . . According to this model, an easement by prescription is created by an adverse use of land, that is open or notorious, and continued without effective interruption for the prescriptive period (of ten years)." *Algermissen*, 2003-NMSC-001, ¶ 10. Here, Plaintiff urges us to adopt the Restatement's second definition of prescriptive use, which arises from an

intended but imperfectly created easement or servitude.

This approach uses prescription to perform a title-curing function where "people try to create a servitude but fail, initially because they do not fully articulate their intent or reduce their agreement to writing, or because they fail to comply with some other formal requirement imposed in the jurisdiction." Restatement (Third) of Prop.: Servitudes § 2.16 cmt. a, at 222. In these situations, if the parties "act as though they have been successful in creating the servitude, and continue to do so for the prescriptive period," a servitude may be created by prescription if the other requirements (open and continuous use) are met. Restatement (Third) of Prop.: Servitudes § 2.16 cmt. a, at 222. By observing the terms of the intended servitude for the prescriptive period, the parties demonstrate the "existence and terms of the servitude and resolve[ ] any doubts as to [their] intent that may have been created by their failure to comply with the formality." Restatement (Third) of Prop.: Servitudes § 2.16 cmt. a, at 222.

Although an easement by prescription without adversity was not included in the Restatement until 2000, it "has always been present in American servitudes law[.]" Restatement (Third) of Prop.: Servitudes § 2.16 cmt. a, at 222. Some jurisdictions have expressly recognized an exception to the adversity rule. *See, e.g., Clinger v. Hartshorn*, 89 P.3d 462, 466 (Colo. App. 2003) ("An easement by prescription is acquired when the use is open or notorious, continuous without effective interruption for an eighteen-year period, and either adverse or pursuant to an attempted but ineffective grant."); *Walker v. Hollinger*, 968 P.2d 661, 665 (Idaho 1998) (stating that prescriptive use can be established where the use is adverse or by a claim of right); *Nat'l Props. Corp. v. Polk Cnty.*, 386 N.W.2d 98, 105 (Iowa 1986) ("[W]e have modified the [adversity] requirements to establish an easement by prescription in those instances in which the original entry upon the lands of another is under an oral agreement or express consent of the servient owner and the party claiming the easement expends substantial money or labor to promote the claimed use in reliance upon the consent or as consideration for the agreement." (internal quotation marks and citation omitted)).

Other jurisdictions, as well as some commentators, focus on statute-of-limitations theory and categorize uses made pursuant to oral grants and other intended but imperfectly created servitudes as hostile or adverse. Restatement (Third) of Prop.: Servitudes § 2.16 cmt. a, at 222; *see also Kirby v. Hook*, 701 A.2d 397, 404 (Md. 1997) (holding that use based on an ineffective oral grant of easement was adverse, not permissive); James W. Ely, Jr. and Jon W. Bruce, *The Law of Easements & Licenses in Land*, *available at* Westlaw LELL § 5:10 ("[U]se of land under an invalid grant of an express easement does not negate its adverse character because such usage does not depend on the landowner's sufferance.").

The rationale behind this approach is that "the use derogates from the owner's title, or that the use is adverse because it can be made wrongful by revocation of the license created by the imperfect servitude." Restatement (Third) of Prop.: Servitudes § 2.16 cmt. a, at 222. "To avoid these convoluted explanations and the errors that follow literal applications of the terms 'adverse' and 'hostile,' [the Restatement] adopts a definition of prescriptive uses that

straightforwardly recognizes the two types of uses that can lead to prescriptive rights"[:] adversity and an attempted but ineffective grant. Restatement (Third) of Prop.: Servitudes § 2.16 cmt. a, at 223. We agree with the Restatement's rationale and we follow it here.

It is undisputed that the Seguras and the Duncans, together, built a common driveway for the benefit of both Tract B-1 and B-2; they agreed on the location of the driveway and shared the expense of its construction. It is also undisputed that the Duncans intended to grant Plaintiff an easement over the common driveway, but that they ultimately failed to reduce their agreement to writing. Applying the Restatement's principles to this situation we conclude that Plaintiff's use of the common driveway was pursuant to an intended but imperfectly created easement and thus, constitutes prescriptive use.

To the extent that Defendants argue that the district court's findings of fact are insufficient to support its conclusions because the findings do not include a start date for the prescriptive period, we disagree. It is uncontroverted that Plaintiff openly used the common driveway from its inception in 1996 until the ten year period ran. This establishes that Plaintiff's prescriptive use of the driveway was open, notorious, and continuous for the ten-year prescriptive period. As a result, we conclude that the district court did not err in granting Plaintiff an easement by prescription over the common driveway.

CONCLUSION

For the foregoing reasons we affirm.

IT IS SO ORDERED.

M. MONICA ZAMORA, Judge

WE CONCUR:

MICHAEL E. VIGIL, Judge

TIMOTHY L. GARCIA, Judge

Certiorari Denied, January 14, 2015, No. 35,026

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-018

Filing Date: October 15, 2014

Docket No. 32,119

DR. NATHAN E. BOYD ESTATE, by JAMES SCOTT BOYD, Personal Representative, and JAMES SCOTT BOYD, Individually,

Plaintiffs-Appellants,

v.

UNITED STATES, ELEPHANT BUTTE IRRIGATION DISTRICT, and CITY OF LAS CRUCES,

Defendants-Appellees.

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OPINION

ZAMORA, Judge.

James Scott Boyd, in his individual capacity, and as representative for the Estate of Dr. Nathan E. Boyd (Boyd) appeals from the district court's order dismissing his claims to water rights in the Lower Rio Grande adjudication area. Boyd was permitted to intervene in ongoing water rights adjudication proceedings in the district court. The district court dismissed Boyd's claims on the grounds that Boyd failed to assert a cognizable claim to water rights, and that Boyd's claims were barred by the principles of res judicata. We affirm.

I. BACKGROUND

Boyd's claimed water rights stem from activities of his predecessor in interest, the Rio Grande Dam and Irrigation Company (the Company) over a century ago. In 1891, an Act of Congress (the 1891 Act) granted rights of way through public lands to irrigation companies. *See* Act of March 3, 1891, ch. 561, 26 Stat. 1101. The Company was formed in 1893 to build a network of dams, canals, and reservoirs for irrigation of the area surrounding the Lower Rio Grande. *See Boyd v. United States*, No. 96-476L, slip op. at 2 (Fed. Cl. Apr. 21, 1997). In 1895, the Company received permits from the Secretary of the Interior and began work on the irrigation project. To help finance an irrigation project along the Rio Grande, the Dam and Irrigation and Land Company Limited (the English Company) was created, and in 1896, the Company leased all of its rights in the project to the English Company. *Id.* The English Company also acquired control of all of the Company's stock. The English Company later transferred all rights and interests in the Company to Dr. Nathan Boyd.

Also in 1896, the Secretary of the Interior issued a suspension order or embargo suspending work on the irrigation project. The United States sought to enjoin the Company from completing the irrigation project and was granted a temporary injunction. *Id.* at 3. After a hearing, the injunction was dissolved and the suit was dismissed. *Id.* The Supreme Court of

the Territory of New Mexico affirmed the dismissal, however, the United States Supreme Court reversed and remanded the case to the district court for a determination regarding the irrigation project's impact of the navigability of the Rio Grande. *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 695-96, 710 (1899).

The district court determined that completion of the irrigation project would not substantially diminish the navigability of the Rio Grande and dismissed the United States' complaint. The United States appealed to the Supreme Court of the Territory of New Mexico, which affirmed the dismissal and remanded the case back to the district court for additional hearings. *United States v. Rio Grande Dam & Irrigation Co.*, 1900-NMSC-042, ¶ 15, 10 N.M. 617, 65 P. 276, *rev'd*, 184 U.S. 416, 425.

The United States supplemented its complaint in the district court, alleging that the Company had forfeited its interest in the irrigation project because the project had not been completed within the five-year time frame set forth in Section 20 of the 1891 Act. The Company failed to respond to the supplemental complaint and the district court entered a default judgment, finding that the Company had forfeited its rights to complete the project and permanently enjoined the Company from attempting to complete the project. *United States v. Rio Grande Dam & Irrigation Co.*, 1906-NMSC-013, ¶ 3, 13 N.M. 386, 85 P. 393, *aff'd sub nom. Rio Grande Dam & Irrigation Co. v. United States*, 215 U.S. 266 (1909). The forfeiture was affirmed by both the Supreme Court of the Territory of New Mexico and the United States Supreme Court. *Rio Grande Dam & Irrigation Co.*, 1906-NMSC-013, ¶ 47; *Rio Grande Dam & Irrigation Co.*, 215 U.S. at 278.

Despite the passage of many years, the English Company and Boyd continued to pursue related claims, including an action in the United States Court of Federal Claims. *See Boyd*, No. 96-476L, slip op. at 5. In that case, Boyd alleged that the United States' control over irrigation works that began as part of the Company's irrigation project constituted a taking of his property and sought just compensation and punitive damages. *Id.* Boyd also alleged fraud. *Id.* The court held that Boyd's taking claims were barred by the statute of limitations and that it did not have jurisdiction as to the fraud claims. *Id.* at 8, 10.

Most recently Boyd intervened in ongoing water rights adjudication proceedings before the Third Judicial District Court of New Mexico. That adjudication involved water rights to the Lower Rio Grande Stream System, to which the United States of America, the Elephant Butte Irrigation District (EBID), the City of Las Cruces, and the State of New Mexico Office of the State Engineer were all parties. The district court issued an order commencing an expedited *inter se* proceeding to determine Boyd's claims. The order directed Boyd to file a statement of claim, describing in detail all of the water rights claimed in the Lower Rio Grande adjudication area. For each water right claimed, Boyd was to specify "the elements of the water right including[:] the priority date, source of water, purpose of use, place of use, point of diversion, location and amount of irrigated acreage, the amount of water claimed and the bases for the elements of the claimed water right(s)."

After Boyd filed his statement of claims, the United States and EBID moved to dismiss Boyd's claims pursuant to Rules 1-012(B)(1), (6) NMRA. The City of Las Cruces also moved to dismiss, alleging that Boyd had

failed to comply with the requirements of the district court's case management order and with the requirements for a decree as described in NMSA 1978, Section 72-4-19 (1907). The district court granted the motions to dismiss, finding that Boyd had failed to state a claim upon which relief could be granted and that his claims were barred by the principles of res judicata. This appeal followed.

II. DISCUSSION

As a preliminary matter, we note that Boyd's arguments regarding his claimed water rights are interwoven with discussion of the water rights of other "Claimants." However, the district court's order on appeal in this case pertains only to claims brought by Boyd. Accordingly, we do not address Boyd's arguments related to the water rights claims of other parties.

Boyd makes a number of arguments in support of reversal. His arguments center on the assertion that the federal government seized irrigation infrastructures, rights-of-way, and water rights from his predecessor in interest in the early 1900s. Because our review is limited to the district court's decision to dismiss Boyd's claims based on (1) Boyd's failure to state a claim upon which relief can be granted; and (2) principles of res judicata, we only consider Boyd's arguments related to those issues.

A. Failure to State a Claim

1. Standard of Review

"A district court's decision to dismiss a case for failure to state a claim under Rule 1-012(B)(6) is reviewed de novo." *Valdez v. State,* 2002-NMSC-028, ¶ 4, 132 N.M. 667, 54 P.3d 71. "A Rule [1-0]12([B])(6) motion is *only* proper when it appears that plaintiff can neither recover nor obtain relief under any state of facts provable under the claim." *Id.* (internal quotation marks and citation omitted). "In reviewing a district court's decision to dismiss for failure to state a claim, we accept as true all well-pleaded factual allegations in the complaint and resolve all doubts in favor of the complaint's sufficiency." *Nass-Romero v. Visa U.S.A. Inc.*, 2012-NMCA-058, ¶ 6, 279 P.3d 772 (internal quotation marks and citation omitted).

2. Boyd's Claims to Water Rights

Boyd argues that the district court erred in finding that he failed to state a cognizable claim to an existing water right. We disagree. The purpose of water rights adjudication in New Mexico is to determine existing water rights. *See* N.M. Const. art. XVI, § 1 ("All existing rights to the use of any waters in this state for any useful or beneficial purpose are hereby recognized and confirmed."); *see also State ex rel. Reynolds v. Pecos Valley Artesian Conservancy Dist.*, 1983-NMSC-044, ¶ 2, 99 N.M. 699, 663 P.2d 358 ("The object of an adjudication suit is to determine all claims to the use of the water in a given stream system.").

To establish an existing water right, a claimant must demonstrate his intent to appropriate the water and he must show that he has actually diverted the water and applied it to beneficial use. *See State ex rel. Reynolds v. Miranda*, 1972-NMSC-003, ¶ 9, 83 N.M. 443, 493 P.2d 409 (holding that "man-made diversion, together with intent to apply water to beneficial use and actual application of the water to beneficial use, is necessary to claim water rights by appropriation in New Mexico"); *see also Snow v. Abalos*, 1914-

NMSC-022, ¶ 12, 18 N.M. 681, 140 P. 1044 (holding that the continuing right to divert and utilize water must be preceded by "[t]he intention to apply to beneficial use, the diversion works, and the actual diversion of the water"); *Carangelo v. Albuquerque-Bernalillo Cnty. Water Util. Auth.*, 2014-NMCA-032, ¶ 43, 320 P.3d 492 ("There must be an ultimate, actual beneficial use of the water resulting from the diversion." (internal quotation marks and citation omitted)), *cert. denied by Carangelo v. N.M. State Eng'r*, 2014-NMCERT-002, 322 P.3d 1062.

Boyd's claims, which are based on the Company's initial work on the irrigation project in 1896, cannot serve as the basis for existing water rights. Boyd acknowledges that he is not currently diverting or using the water to which he claims rights and that neither he nor the Company has diverted or distributed irrigation water for more than one hundred years. Boyd also acknowledges that the district court entered a decree of forfeiture as to the Company's rights to its irrigation project and water rights which was affirmed by both the Supreme Court of the Territory of New Mexico and the Supreme Court of the United States in 1909. *See Rio Grande Dam & Irrigation Co.*, 1906-NMSC-013, ¶ 47; *Rio Grande Dam & Irrigation Co.*, 215 U.S. at 277. Nonetheless, Boyd argues that his claimed rights remain intact because governmental interference prevented the Company from completing the project and fully developing its water rights. We are not persuaded.

Boyd's argument relies primarily on what he calls the *Mendenhall* doctrine, referring to *State ex rel. Reynolds v. Mendenhall*, 1961-NMSC-083, 68 N.M. 467, 362 P.2d 998. Boyd contends that, under *Mendenhall*, water rights cannot be forfeited for non-use where certain circumstances prevent the owner from perfecting those rights. We find Boyd's reliance on *Mendenhall* misplaced.

In *Mendenhall*, a landowner drilled a well and used the water supply to irrigate crops. *Id.* ¶ 3. Shortly before the landowner completed construction of the irrigation works, the State Engineer declared the lands to be part of the Roswell Artesian Basin. *Id.* ¶¶ 1-3. A statutory suit for adjudication of rights to water in the basin was filed. *Id.* ¶ 3. The district court found that the landowner had not acquired a valid right to irrigate because the irrigation works were not complete at the time the waters were declared as part of the Basin. *Id.* ¶ 4. Our Supreme Court held that the landowner, who lawfully initiated development of his water right and diligently carried it to completion, did acquire a valid water right with a priority date as of the beginning of his work, notwithstanding the fact that the lands involved were put into the declared basin before work was completed and water put to beneficial use. *Id.* ¶ 29.

The present case is distinguishable from *Mendenhall* because here, the Company, by failing to answer the United States' supplemental complaint before the district court in 1903, forfeited its water rights and did not diligently carry out its project to completion.

B. Boyd's Claims of Fraud and Conspiracy

Boyd denies that his water rights were forfeited or abandoned. He asserts that the United States government and the Company's attorneys entered into a conspiracy to fraudulently "void" the Company's water rights. According to Boyd, the "U.S.'s

Attorneys" conspired with the Company's attorneys to file a supplemental complaint in the initial navigation litigation, which the Company's attorneys purposely failed to answer. As a result, the district court entered the default judgment in favor of the United States and ordered the forfeiture of the Company's water rights. Boyd contends that because the forfeiture action was the direct result of conspiracy and fraud by the United States and the Company's attorneys, it is invalid. We are not persuaded.

Our review of the record reveals that one of the Company's attorneys may have suggested a legal strategy to the U.S. Attorney for forfeiture of the Company's water rights. Subsequently, the Company's attorneys failed to answer the United States' supplemental complaint for forfeiture and as a result, the district court entered a decree declaring the Company's water rights to be forfeited. These facts—by themselves—do not establish a conspiracy between the United States and the Company's attorneys to commit fraud. *See Cain v. Champion Window Co. of Albuquerque, LLC*, 2007-NMCA-085, ¶ 28, 142 N.M. 209, 164 P.3d 90 (explaining the three elements of conspiracy: "(1) that a conspiracy between two or more individuals existed, (2) that specific wrongful acts were carried out by [the d]efendants pursuant to the conspiracy, and (3) that [the p]laintiffs were damaged as a result of such acts" (alterations, internal quotation marks and citation omitted)); *see also State ex rel. Peterson v. Aramark Corr. Servs., LLC*, 2014-NMCA-036, ¶ 39, 321 P.3d 128 (stating that the elements of fraud are "that the other party (1) made a misrepresentation of fact . . . (2) with the intent to deceive and to induce the injured party to act upon it, (3) and upon which the injured party actually and detrimentally relies" (omission in original) (internal quotation marks and citation omitted)).

If a fraud was indeed perpetrated, it was a fraud on the Company by its own attorneys, the remedy for which would not be for this Court to reverse the Third Judicial District's 1903 decree of forfeiture as Boyd suggests. Rather, the Company could have brought an action against its attorneys for malpractice. *See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 396 (1993) (stating that "clients must be held accountable for the acts and omissions of their attorneys"); *see also Resolution Trust Corp. v. Ferri*, 1995-NMSC-055, ¶ 17, 120 N.M. 320, 901 P.2d 738 (stating that the "remedy for attorney failure lies in malpractice suit."). To the extent that Boyd alleges fraud against the United States, the Federal Tort Claims Act "provides the exclusive remedy for tort actions against the federal government[.]" *Rehoboth McKinley Christian Healthcare Servs., Inc. v. U.S. Dep't of Health & Human Servs.*, 853 F. Supp. 2d 1107,1112 (D.N.M. 2012) (internal quotation marks and citation omitted). Accordingly, Boyd does not have a cause of action for fraud against the United States in state court. We conclude that Boyd's claims of conspiracy and fraud are irrelevant and are unsupported by the record.

C. Res Judicata

The doctrine of claim preclusion, or "res judicata is founded on principles of fairness and justice." *Kirby v. Guardian Life Ins. Co. of Am.*, 2010-NMSC-014, ¶ 61, 148 N.M. 106, 231 P.3d 87 (emphasis omitted). It "ensures finality, advances judicial economy, and avoids piecemeal litigation." *Bank of Santa Fe v. Marcy Plaza Assocs.*, 2002-NMCA-014, ¶ 14, 131 N.M. 537, 40 P.3d 442. "The principle of claim preclusion

precludes a claim when there has been a full and fair opportunity to litigate issues arising out of that claim." *Tunis v. Country Club Estates Homeowners Ass'n, Inc.*, 2014-NMCA-025, ¶ 19, 318 P.3d 713 (internal quotation marks and citation omitted), *cert. denied,* 2014-NMCERT-001, 321 P.3d 936. Res judicata applies if four elements are met: "(1) the parties must be the same, (2) the cause of action must be the same, (3) there must have been a final decision in the first suit, and (4) the first decision must have been on the merits." *Id.* ¶ 20 (internal quotation marks and citation omitted). "Whether the elements of claim preclusion are satisfied is a legal question, which we review de novo." *Id.* (internal quotation marks and citation omitted).

In this case, the forfeiture action was litigated extensively in the Third Judicial District Court, the Supreme Court of the Territory of New Mexico and in the United States Supreme Court. *See Rio Grande Dam & Irrigation Co.*, 215 U.S. 266; *see also United States v. Rio Grande Dam & Irrigation Co.*, 1906-NMSC-013. Boyd also litigated a taking claim in the Federal Court of Claims. *Boyd*, No. 96-476L, slip op. at 5.

In light of these prior decisions, the district court found that res judicata applied because: (1) the parties did not dispute that the first element had been met (that the parties in all the suits were the same); (2) the cause of action in the earlier decisions was the same, stemming from the Company's initial claims irrigation project and related water rights; (3) the prior decisions were final because the initial forfeiture was a final order of the district court, as it was subsequently affirmed by the Territory of New Mexico Supreme Court and Boyd was denied post-judgment relief; and (4) the prior decisions were on the merits of Boyd's claims because both appellate courts evaluated the merits of the forfeiture and ruled on that basis. We agree with the district court's reasoning with respect to the second, third and fourth elements.

The critical issue before this court is the first res judicata element. Boyd asserts that, in its order to dismiss, the district court incorrectly stated that the parties did not dispute that this element had been met. According to Boyd, he has continually alleged that because Dr. Boyd himself was not a party to the forfeiture proceedings, the first element of res judicata is *not* satisfied. He reiterates that argument on appeal.

"Res judicata prevents a party or its privies from repeatedly suing another for the same cause of action." *Deflon v. Sawyers,* 2006-NMSC-025, ¶ 2, 139 N.M. 637, 137 P.3d 577. Because Dr. Boyd was not a named party in the previous litigation, we must determine whether he was in privity with the Company, which *was* a party to the litigation.

> There is no definition of "privity" which can be automatically applied in all cases involving the doctrines of res judicata and collateral estoppel. Thus, each case must be carefully examined to determine whether the circumstances require its application. This is so, notwithstanding the general assumption that res judicata applies only if the parties in the instant action were the same and identical parties in the prior action resulting in a judgment. Privity requires, at a minimum, a substantial identity between the issues in controversy and showing that the parties in the two actions are really and substantially in interest the same.

Id. ¶ 4 (internal quotation marks and citation omitted). Privity may exist where the parties have a "concurrent relationship to the same property right" or a "successive relationship to the same property or right." *Id.* (internal quotation marks and citations omitted).

In the present case, Boyd asserts that the Company transferred its interests in the irrigation project to the English Company, which in turn transferred the same interests to Dr. Boyd. Boyd's claims necessarily depend on his assertion that he is successor in interest to the water rights of the Company. This puts him in privity with the Company and accordingly, for the purposes of res judicata, he is considered the same party. Therefore, we conclude that all four elements of res judicata are met and that Boyd's claims are precluded as a result.

III. CONCLUSION

For the foregoing reasons, we affirm the decision of the district court.

IT IS SO ORDERED.

M. MONICA ZAMORA, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

J. MILES HANISEE, Judge

Certiorari Granted, February 6, 2015, No. 34,995

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-019

Filing Date: November 4, 2014

Docket No. 31,413

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

DEANGELO M.,

Child-Appellant.

Gary K. King, Attorney General
Pranava Upadrashta, Assistant Attorney General
Santa Fe, NM

for Appellee

Robert E. Tangora, L.L.C.
Robert E. Tangora
Santa Fe, NM

for Appellant

OPINION

KENNEDY, Chief Judge.

DeAngelo M. (Child) appeals his convictions for second-degree murder, burglary, larceny, and tampering with evidence. Child appeals the district court's denial of his motion to suppress statements he

made during an interrogation by three investigating officers and contends that the State did not overcome the rebuttable statutory presumption that his statements were inadmissible against him because he was thirteen years of age. *See* NMSA 1978, § 32A-2-14(F) (2009).

We evaluate whether the State successfully rebutted the presumption of inadmissibility of statements made by a thirteen-year-old child under Section 32A-2-14(F). We conclude that the evidence presented by the State to the district court did not rebut the presumption of inadmissibility with clear and convincing evidence. *State v. Adam J.*, 2003-NMCA-080, ¶¶ 10-11, 133 N.M. 815, 70 P.3d 805. Therefore, Child's statements were improperly admitted. We reverse the district court on its denial of the motion to suppress Child's statements. We affirm on the issues of denial of his motion to sever, request for a bill of particulars, and demand for a twelve-person jury. Accordingly, we remand this case for a new trial.

I. BACKGROUND

Child was eight days past turning age thirteen when he was interrogated by three investigators in connection with the murder of Angel Vale. The officers interviewed neighbors and witnesses, including Child's mother. On July 23, two retired police officers, who were acting as agents of the district attorney, and a uniformed police officer drove Child and his mother to the Roosevelt County Law Enforcement Complex where they questioned him. His mother was present throughout the interrogation. One officer read and explained Child's *Miranda* rights to him, which, according to the officer's testimony, Child appeared to understand. During the interrogation, Child made inculpatory statements to the officers regarding the burglary of Vale's home. Child was arrested.

Child filed a motion to suppress his statements. Two of the investigators and Child's teacher at the Curry County Juvenile Detention Center testified at the suppression hearing. The district court found that Child had knowingly, intelligently, and voluntarily waived his rights and denied his motion to suppress his statements. Child also filed a motion to sever the murder, aggravated burglary, one count of tampering with evidence from larceny, and the second count of tampering, a motion for a bill of particulars, and a motion to compel the State to allow the case to be heard by twelve jurors instead of six. The district court denied each motion. Defendant timely filed this appeal.

II. DISCUSSION

A. Child's Motion to Suppress His Statements

Prior to trial, Child filed a motion to suppress his statements that were obtained during the interrogation by the two district attorney investigators and a police officer based on the State's failure to rebut the presumption of inadmissibility for a thirteen-year-old child's statements under Section 32A-2-14(F). The district court denied the motion. The denial of a motion to suppress is reviewed de novo. *See State v. Gutierrez*, 2011-NMSC-024, ¶ 7, 150 N.M. 232, 258 P.3d 1024; *State v. Jade G.*, 2007-NMSC-010, ¶ 15, 141 N.M. 284, 154 P.3d 659.

Child argues that the standard created in *Adam J.* for the State to rebut the

"presumptive inadmissibility" of statements by a child under the age of fifteen years is contrary to legislative intent because it requires comparison of the accused's ability to give a knowing, intelligent, and voluntary waiver of rights to an average of other protected young children, instead of requiring an individualized determination of whether the child has the ability to understand legal consequences and not to be unduly influenced by authority figures. Child further argues that, even if *Adam J.* was correct, the State did not sufficiently rebut the presumption that his statements to the police were inadmissible. 2003-NMCA-080, ¶ 7.

The State argues that the *Adam J.* standard is appropriate and that the State rebutted the presumption that Child's statements were inadmissible by presenting evidence from the two investigating officers and his teacher regarding his personal traits that supported the district court's finding that he had the ability to knowingly, intelligently, and voluntarily waive his rights.[1] For the reasons that follow, we conclude that *Adam J.*, while equating a particular age to a legislative line between children who do or do not have the developmental maturity to make a valid waiver, nevertheless significantly expands the range of inquiry to assess factors "particular to an individual child." *Id.* ¶ 8. Viewing this case in light of the expansive evaluation of circumstance and personal characteristics that *Adam J.* and Subsection (F) require to be conducted by the district court with regard to thirteen-year-old children, we conclude that the State's evidence was insufficient to rebut the presumption that Child was incapable of a valid waiver of his right under Section 32A-2-14(F).

1. The Two-Tier Analysis of Ability to Waive Rights and Knowing, Intelligent, and Voluntary Waiver Under Section 32A-2-14 of the Children's Code

The capacity to waive Fifth Amendment rights is assumed for children over fifteen and for adults. *See State v. Jonathan M.*, 1990-NMSC-046, ¶ 8, 109 N.M. 789, 791 P.2d 64; *see also Gutierrez*, 2011-NMSC-024, ¶ 7 (requiring the same assessment for adults and children when determining the legitimacy of a *Miranda* waiver); *State v. Martinez*, 1999-NMSC-018, ¶¶ 14-15, 127 N.M. 207, 979 P.2d 718 (determining that the factors used in evaluating a waiver of constitutional rights for juveniles over the age of fourteen are essentially the same as those used for an adult). This is because Section 32A-2-14 of the Children's Code assumes that children fifteen years old and older are more similar in development and maturity to adults and, therefore, are better able to protect their rights. *See Jonathan M.*, 1990-NMSC-046, ¶ 8 (explaining that children over fifteen and adults are unlikely to make involuntary statements after *Miranda* warnings due to their higher level of sophistication); *see also Martinez*, 1999-NMSC-018, ¶ 18 (stating that Section 32A-2-14 codifies that the adult rule for a successful waiver of rights applies to children fifteen years old and older). When a defendant fifteen years old and older raises his lack of capacity to waive Fifth Amendment rights, the state must prove that he waived his rights by a preponderance of the evidence. *Gutierrez*, 2011-NMSC-024, ¶ 7.

However, the Children's Code emphasizes the difficulty a child younger

[1]Child does not challenge the adequacy of the advice of *Miranda* rights given to him by the officers in this case.

than fifteen experiences due to a lack of maturity and development when waiving Fifth Amendment rights. The Children's Code protects children younger than fifteen years old by creating a rebuttable presumption that statements given by thirteen- or fourteen-year-old children are inadmissible. Section 32A-2-14(F); *see In re Francesca L.*, 2000-NMCA-019, ¶ 7, 128 N.M. 673, 997 P.2d 147 (holding that the Children's Code grants heightened protection only for the statements of those under fifteen years old), *overruled on other grounds by Adam J.*, 2003-NMCA-080, ¶ 10. The rebuttable presumption of inadmissibility created by Subsection (F) "stresses age in its effort to draw the line between children who are too young to waive their rights and those who are not." *Adam J.*, 2003-NMCA-080, ¶ 8. The presumption is based on a legislative recognition that most children under fifteen are less capable of understanding and protecting their legal interests than are older children and adults. *E.g.*, *Jonathan M.*, 1990-NMSC-046, ¶ 8 (interpreting previous version of Section 32A-2-14 to reflect that young children do not have the capacity to understand or protect their constitutional rights). Subsection (F) creates a constitutional classification based on age that requires this level of protection. *Francesca L.*, 2000-NMCA-019, ¶ 12. It is an age-based presumption that is intended to "draw the line between children who are too young to waive their rights and those who are not." *Adam J.*, 2003-NMCA-080, ¶ 8.

The child's "[a]ge is particularly pertinent because Subsection [(F)] creates a distinction based upon the age of a child." *Francesca L.*, 2000-NMCA-019, ¶ 12. A child's proximity in age to thirteen is also relevant to this determination and can alone serve as an indication that the state did not rebut the presumption. *See Adam J.*, 2003-NMCA-080, ¶ 5 (stating that the district court could have determined that the state did not rebut the presumption based exclusively on the fact that the child had only recently turned thirteen). Without sufficient intellectual and emotional development, not only are young children unable to understand and protect their legal interests, they are also unable to understand the legal consequences of their statements. They may also be affected by the inherent intimidation of questioning by authority figures such as police. *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962) (stating that a fourteen-year-old child is unequal to police in knowledge and understanding of consequences of interrogation questions and is unable to protect his interests). For these reasons, our Legislature has required the state to rebut a presumption that a child of thirteen years is incapable of giving a valid waiver of his rights before his statement can be used against him. Section 32A-2-14(F); *Adam J.*, 2003-NMCA-080, ¶ 6.

Section 32A-2-14(F) specifically provides heightened protection to thirteen-year-old children beyond the specific requirements of Subsection (E). *Adam J.*, 2003-NMCA-080, ¶¶ 3, 10. Thus, before ever deciding admissibility based on whether the waiver was knowing, intelligent, and voluntary, the district court must make an initial determination of whether a thirteen-year-old child who has made a statement is capable of such a waiver. *Id.* ¶ 10; *Francesca L.*, 2000-NMCA-019, ¶ 10. The statutory expectation is simply that thirteen-year-old children are presumed incapable of a valid waiver absent a showing that the child had at least the same ability to give a knowing, voluntary, and intelligent waiver as an average fifteen-year-old child. *See Adam J.*, 2003-

NMCA-080, ¶¶ 9-11.[2] The child's personal traits, including "background, maturity, intelligence, ability to understand and react to new situations, and other relevant personal factors" are examined to determine whether the child is sufficiently above average as to rebut the presumption. *Id.* ¶ 8.

Even while "an analysis of the circumstances may assist the children's court in understanding the child's personal traits, such analysis is secondary to, and does not substitute for, an analysis of the child's personal traits" under Subsection (F). *Adam J.*, 2003-NMCA-080, ¶ 10. Thus, under Section 32A-2-14, the determination of whether a thirteen-year-old child knowingly, intelligently, and voluntarily waived his rights first requires an analysis of the child's "personal traits." The focus in this case must be on the child's maturity, intelligence, and development. In short, the state must affirmatively distinguish the particular child's ability to waive rights from the presumptive inability to do so established by Subsection (F) of any child under the age of fifteen. *Adam J.*, 2003-NMCA-080, ¶¶ 9-11. If the district court is not satisfied that the rebuttable presumption of incapacity has been overcome based on competent evidence of the personal traits of the child beyond age alone, then the court's inquiry is complete at that point, and the statement is excluded. *Id.* ¶ 10 (holding that the child's ability to waive is a threshold determination and must be decided before determining the statement's admissibility as the product of a knowing, intelligent, and voluntary waiver).

For the state to make such a distinction, the characteristics of an average fifteen-year-old child must be established by the evidence, as well as the individual characteristics of the child. We note that, upon the question of competency being raised by the adult defendant in a criminal case, evaluating his or her competency to stand trial "must be professionally evaluated by a qualified professional." *State v. Flores*, 2005-NMCA-135, ¶ 17, 138 N.M. 636, 124 P.3d 1175. We do not regard competency being that a defendant "understands the nature and significance of the proceedings, has a factual understanding of the charges, and is able to assist his attorney in his defense" to be so far removed in concept or scope from determining a thirteen- or fourteen-year-old child's developmental status with regard to having the ability to waive Fifth Amendment rights. *Id.* ¶ 16 (internal quotation marks and citation omitted). This consideration is particularly acute when the child, as here, has only recently turned thirteen. *See Francesca L.*, 2000-NMCA-019, ¶ 12; *see also Adam J.*, 2003-NMCA-080, ¶ 5 (acknowledging that "the children's court's finding that the child had only recently turned thirteen . . . was relevant to its conclusion that the child was entitled to a heightened protection because of her age" (internal quotation marks and citation omitted)). We regard as beyond the ability of lay witnesses, such as were presented by the State in this case, the task of rebutting a presumption that a thirteen-year-old does not possess the developmental attributes to render him capable of a waiver and distinguishing those characteristics head-to-head against the developmental level of an average fifteen-year-old child. We believe that a hearing that is equivalent to a competency hearing in the

[2]Although *Adam J.* and *Francesca L.* speak of comparing the child-defendant to the average thirteen- or fourteen-year-old, Child here is only days past his thirteenth birthday. Even if he was advanced for his age to the developmental level of an average fourteen-year-old child, he would still presumptively have given an inadmissible statement.

quality of its evidence is required. At that hearing, the state must present evidence as to both the benchmark to be reached and the qualities of the child that meet it and that the thirteen-year-old child possessed personal faculties equivalent to what is required to find an ability to waive rights that would satisfy an adult standard for waiver. Anything less is insufficient. In this case, the poorly presented evidence of two retired police officers and a teacher, who had no background with Child beyond being a half-day teacher to all of the children in the juvenile detention facility, is insufficient as we discuss below. Although competency to stand trial must meet only a preponderance standard, this situation is different. We next take this opportunity to establish the standard of proof required to rebut the presumption of inadmissibility of Child's statements.

2. Clear and Convincing Evidence is Required to Rebut the Presumption

The question of the proper standard of proof is generally a matter for judicial resolution. *In re Valdez*, 1975-NMSC-050, ¶ 12, 88 N.M. 338, 540 P.2d 818. Although the parties did not raise the issue of the level of evidence required to show that Child did not have the ability to waive his rights, we take this opportunity to clarify the law.

For persons older than fifteen years where a valid waiver is presumed by law, waiver may be proved by a preponderance of the evidence. *Gutierrez*, 2011-NMSC-024, ¶ 7. For children thirteen or fourteen years old, there is a rebuttable presumption of inadmissibility, which, by providing "heightened protection" of constitutional proportions to those children, necessarily alters the level of proof required for the state to meet its burden. Our Supreme Court has held that where fundamental liberties are involved and matters involving psychological testimony are subject to some interpretation, the standard of proof must reflect the gravity of the interests at stake. *Valdez*, 1975-NMSC-050, ¶ 20. Specifically, our Supreme Court has held that the state must meet a "heavy burden" in order to overcome a statutory rebuttable presumption. *State v. Gallegos*, 2011-NMSC-027, ¶ 55, 149 N.M. 704, 254 P.3d 655. Other cases indicate that the gravity of the burden requires clear and convincing evidence. *See Weeks v. Bailey*, 1927-NMSC-048, ¶ 9, 33 N.M. 193, 263 P. 29 (stating that "only clear and convincing evidence can overcome [a rebuttable] presumption" (internal quotation marks and citation omitted)); *see also In re Adoption of J.J.B.*, 1995-NMSC-026, ¶ 59, 119 N.M. 638, 894 P.2d 994 (stating that "presumption favoring the natural parent can be rebutted by showing serious parental inadequacy with clear and convincing evidence"); *Lucero v. Lucero*, 1994-NMCA-128, ¶ 24, 118 N.M. 636, 884 P.2d 527 (holding that substantial evidence supported the district court's finding that "presumption of a lack of testamentary capacity was overcome by clear and convincing evidence" (internal quotation marks and citation omitted)), *superseded on other grounds by statute as stated in Clinesmith v. Temmerman*, 2013-NMCA-024, 298 P.3d 458, *cert. denied*, 2013-NMCERT-001, 299 P.3d 863; *Valdez*, 1975-NMSC-050, ¶ 20 ("For evidence to be clear and convincing, it must instantly tilt the scales in the affirmative when weighed against the evidence in opposition and the fact finder's mind is left with an abiding conviction that the evidence is true." (internal quotation marks and citation omitted)).

Thus, we hold that rebutting the presumption in Section 32A-2-14(F) requires

the state to present clear and convincing evidence that, in the totality of the circumstances, the child's personal traits give him an above-average ability to knowingly, intelligently, and voluntarily waive his rights in the way the statute presumes a fifteen-year-old child can. We now apply this standard to the proceedings in this case.

3. The District Court Erred in Denying Child's Motion to Suppress His Statements to Police Officers

Child's statements cannot be properly admitted unless the State proves that, by clear and convincing evidence, he was capable of a knowing, intelligent, and voluntary waiver of his rights.[3] We need to go no farther in this case than examining the evidence presented concerning Child's individual attributes to conclude that he was not capable of effectively waiving his rights in this instance. The State presented evidence from three persons during the suppression hearing: two of the three investigating officers who interrogated Child, Agents Dan Blair and Dan Aguilar;[4] and Ron Allen, who had been Child's teacher at the detention center.

Agents Blair and Aguilar testified that, based on their experience interviewing children of similar age, Child was articulate, inquisitive, and aware of his constitutional rights, was more mature and intelligent than average and, in their opinion, had knowingly, intelligently, and voluntarily waived his rights. Agent Blair testified about Child based only upon the contact he had with Child during the interrogation. He did not review any school or other records concerning Child. Agent Blair stated that Child engaged in conversations with adults, seemed interested in learning, was aware of his surroundings, and asked questions about his rights and stated he understood. Agent Blair also testified initially that Child's mother had stated that he was an "A" and "B" student, but mentioned, on cross-examination, that she had also stated that he had "C" and "D" grades in some classes and had not told Agent Blair about an "F" grade. No evidence of Child's actual grades was presented. Agent Blair stated that Child was articulate and had checked out a young adult book of over four hundred pages from the library on the day before the interrogation. There was no evidence as to why he chose that book or that he had read any of it yet.[5] From this, however, Agent Blair concluded that Child seemed mature and more intelligent than most children his age and, based solely on the interview, he believed Child's waiver was knowing, intelligent, and voluntary. No comparison beyond "children his age" was ever provided. This is insufficient under the standard we have enunciated in *Francesca L.* and *Adam J.*

Agent Aguilar testified that Child was more inquisitive about his rights as compared to other children he had interviewed, was more independent, understood the officers' questions, and appeared to understand his rights. Any statement relating Child's capacity specifically to the standard we employ was not provided to

[3]We note that, although the State claims that Child was party to a voluntary interview and not a custodial interrogation, he does not raise the issue.

[4]Agents Blair and Aguilar were both investigators from the District Attorney's Office. Both were retired police officers.

[5]Child was in the eighth grade at the time. The book has been designated at a fourth-grade reading level. http://www.scholastic.com/teachers/book/twilight#cart/cleanup.

the district court. He testified that Child seemed more advanced than the average thirteen-year-old child with whom he had come into contact as a detective in crimes against children. Agent Aguilar felt that Child was actively involved in the explanation of his rights. This testimony was similarly inadequate.

Allen, Child's teacher, testified that Child was well-read, inquisitive, and readily corrected the grammar and vocabulary of the other juveniles in the detention center and, in his opinion, Child was more intelligent than the average detainees in his age group. Allen testified that he had only taught half time between an alternative school and the juvenile detention center where Child was being held and, therefore, compared Child only to other children in the alternative school. He had no other contact with Child prior to his arrest or knowledge of the capabilities of children not in an alternative school. Allen stated that the reading levels of the students at alternative schools ranged from far below average to average or above, that the students were typically behind, and that Child's intelligence was generally above the other average alternative school students. Allen was unable to define "average" beyond the students at the school whose ages were not mentioned. Allen stated that Child seemed well-read and read more than the other children and was intelligent and inquisitive, though he was at an average math level.

However, Allen did not mention Child's school records, nor was he asked to testify regarding Child's grades or testing scores prior to being in custody, or otherwise asked to conclude that Child had the maturity and discernment of an average fifteen-year-old child. *See Moreno v. State*, 510 S.W.2d 116, 119 (Tex. App. 1974) (evaluating extensive records, including psychiatric diagnostic reports, to determine that the sixteen-year-old child had average intelligence and was more socially mature than average). Nor did Allen make any conclusion regarding Child's ability to understand complex legal rights and having sufficient capacity to waive those rights. We conclude that the evidence presented by the three witnesses did not establish that Child had the maturity and intelligence of an average fifteen-year-old child to understand his situation and the rights he possessed.

Evaluating the evidence against *Adam J.* and the standards we have enunciated here, we note first that Child's age is at the very lowest possible end of the age range at which his statements can be used at all. Particularly important is the proximity of his age to that which would render his statements conclusively inadmissible. *Adam J.*, 2003-NMCA-080, ¶ 5; *Francesca L.*, 2000-NMCA-019, ¶ 6 (holding proximity to age thirteen to be of possibly conclusive significance). Comparing him to other thirteen-year-old children, or other children whose ages and developmental levels are either not stated or irrelevant, does not provide evidence that he is as advanced as a fifteen-year-old child, leaving the presumption of Subsection (F) intact as to his own age of thirteen.

We conclude that the evidence presented by the State through answers to a significant number of leading questions did not amount to clear and convincing evidence of Child's ability to waive his legal rights. The testimony of the investigating officers was based solely on their single interaction with Child during the interrogation. Each officer provided no more than the knowledge they had about Child based on the interaction during the interrogation and some statements from his mother. On this basis alone, they

concluded that Child seemed more intelligent and mature than most children of unknown ages that they have worked with and was able to waive his rights. They did not compare Child's abilities and maturity to the panoply of other average juveniles of any stated age level. The officers also did not testify in detail about the quality of the other children they had previously dealt with or the nature of those contacts. The investigators, given the likelihood of bias stemming from their role as Child's accusers, can be assumed to have colored views of their own opinions and actions. *See State v. Gomez*, 1997-NMSC-006, ¶¶ 36, 38, 122 N.M. 777, 932 P.2d 1 (stating that law enforcement is a competitive enterprise); *see also State v. Bomboy*, 2007-NMCA-081, ¶ 14, 141 N.M. 853, 161 P.3d 898 (stating that the competitive pressures of law enforcement may compromise judgment), *rev'd on other grounds*, 2008-NMSC-029, 144 N.M. 151, 184 P.3d 1045. Furthermore, Allen's testimony, showing his lack of contact with Child prior to being held at the detention center, meant he could only compare Child to other children in the detention center and alternative school. He neither made reference to average thirteen-year-old children in general nor spoke to objective measures, such as Child's school records or testing scores from his regular school. Allen's testimony similarly does not fulfill the State's burden of presenting clear and convincing evidence in a matter of such gravity as this.

The question in cases where the child benefits from the rebuttable presumption of inadmissibility is not simply whether the child seems to be intelligent or mature, which seems to have been the State's sole thrust in its case. Instead, the question for the district court is whether, under a clear and convincing standard of proof, the State presented evidence that Child has above-average intelligence, maturity, and other relevant personal traits compared to average thirteen-year-old children that show that he has the capacity to understand his rights and understand the consequences of waiving those rights in the way a fifteen-year-old child would. The State did not do so here. Whether Child reads books, converses with adults, corrects vocabulary and grammar, and "seems" more intelligent and mature than other children from the perspective of his arresting officers is not clear and convincing evidence that he had an above-average ability based on his personal traits and understanding of the situation to allow him to waive his rights. More evidence is needed to overcome the statutory presumption against admitting the statements of a thirteen-year-old child. As such, Child's statements were inadmissible, and we reverse the district court's denial of Child's motion to suppress and remand for a new trial. We now address Child's other arguments that may arise should this case be tried again.

B. Child's Motion to Sever the Charges

Child filed a motion to sever the murder, aggravated burglary, and one count of tampering with evidence charges from larceny and the second count of tampering. The district court denied the motion to sever on the grounds that the courses of conduct alleged in all five charges were based on a connected series of acts, the evidence would have been cross-admissible, and Child failed to show sufficient prejudice to warrant severance of the charges. The denial of a motion to sever is reviewed under an abuse of discretion standard. *State v. Lovett*, 2012-NMSC-036, ¶ 10, 286 P.3d 265.

Child argues that the evidence of the larceny, primarily his confession, would not

be cross-admissible because it was improper evidence under Rule 11-404(B) NMRA. Child further argues that, even if the evidence was cross-admissible, it should have been kept out because the probative value was substantially outweighed by the danger of unfair prejudice under Rule 11-403 NMRA. The State argues that the evidence would be cross-admissible because it is proper other act evidence because it shows intent, opportunity, knowledge, and absence of mistake. The State points out that Child did not fully argue his reasoning for the inadmissibility of the evidence under Rule 11-403, but the State argues that the probative value of the evidence is the other act evidence of intent, opportunity, knowledge, and absence of mistake and that the potential prejudice is diluted by the varying time frames between the alleged acts and the nature of the crimes charged.

Rule 5-203(A) NMRA requires the state to join certain charges if the offenses "are of the same or similar character, even if not part of a single scheme or plan[] or . . . are based on the same conduct or on a series of acts either connected together or constituting parts of a single scheme or plan." *State v. Gallegos*, 2007-NMSC-007, ¶ 10, 141 N.M. 185, 152 P.3d 828. Even when offenses are properly joined, a district court may abuse its discretion in failing to sever charges if there is prejudice to the accused. *Id.* ¶¶ 9, 16.

The first step of this inquiry requires determination of whether the evidence pertaining to each charge would be cross-admissible in separate trials. *Id.* ¶ 19. The defendant may be prejudiced by admission of evidence that would be otherwise inadmissible. *Id.* "On the other hand, cross-admissibility of evidence dispels any inference of prejudice." *Id.* (alteration, internal quotation marks, and citation omitted).

Cross-admissibility is determined through an analysis of Rule 11-404(B). *See Gallegos*, 2007-NMSC-007, ¶¶ 20-21. Under Rule 11-404(B)(1), "[e]vidence 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." Nevertheless, evidence of a crime, wrong, or other act may permissibly be used for another purpose, "such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Rule 11-404(B)(2). "It remains within a [district] court's discretion to admit evidence of . . . prior acts . . . when the [s]tate shows that such evidence is relevant to a material issue other than conformity with character." *Martinez*, 1999-NMSC-018, ¶ 30 (alteration, internal quotation marks, and citation omitted). The state must "identify and articulate the consequential fact to which the evidence is directed." *Gallegos*, 2007-NMSC-007, ¶ 22.

The evidence in this case would have been cross-admissible because the evidence was proper other act evidence in accordance with Rule 11-404(B)(2). The evidence of the larceny, including Child's statement, was evidence of his knowledge and opportunity in relation to the eventual murder of Vale. From this evidence, the jury could infer that Child knew how to gain access to Vale's house and that he had the opportunity to do so previously and could have done so again. This does not require the inference that Child has the propensity or character to commit larceny and, therefore, murder, which would be improper character evidence under Rule 11-404(B)(1). Instead, it is permissible under Rule 11-404(B)(2). We conclude that the district court did not abuse its discretion by denying Child's motion to sever. We affirm the district court on this issue.

C. Child's Motion for Bill of Particulars/Statement of Facts

Child argues that the denial of his motion for a bill of particulars violated his due process rights because he required an understanding of the State's theory for connecting the crimes charged and the specific evidence that would be used in order to adequately prepare his defense. The State argues that Child was able to adequately prepare his defense because the delinquency petition described the offenses. He was given a witness list and had access to 1200 documents due to the State's open file policy. We review the district court's denial of a motion for a bill of particulars for an abuse of discretion. *State v. Mankiller*, 1986-NMCA-053, ¶ 18, 104 N.M. 461, 722 P.2d 1183.

As our precedent indicates, "[t]he object of a bill of particulars . . . is to enable [an accused] to properly prepare his defense[.]" *State v. Mosley*, 1965-NMSC-081, ¶ 4, 75 N.M. 348, 404 P.2d 304; *State v. Archuleta*, 1970-NMCA-131, ¶ 32, 82 N.M. 378, 482 P.2d 242. The bill of particulars must "give [the accused] and the court reasonable information as to the nature and character of the crime charged." *State v. Shroyer*, 1945-NMSC-014, ¶ 70, 49 N.M. 196, 160 P.2d 444; *see Mosley*, 1965-NMSC-081, ¶ 4. However, these requirements do not require the state to "plead evidence[.]" *Mosley*, 1965-NMSC-081, ¶ 4. A bill of particulars/statement of facts is generally not required when the state maintains an open file policy. *Mankiller*, 1986-NMCA-053, ¶ 18. In determining whether to require a bill of particulars, the district court must consider the whole record. *Archuleta*, 1970-NMCA-131, ¶ 33. In order to satisfy due process, the primary determination is whether the accused had enough information to adequately prepare his defense. *Mosley*, 1965-NMSC-081, ¶ 4.

In his request for a bill of particulars, Child asked for the following:

1. Each fact, stated with specificity and particularity, upon which the State relies to prove each element of the offense charged.
2. The theory of the case.
3. Each witness or exhibit that will prove the facts described.
4. A description with as much detail and precision as possible, and the manner in which the alleged offense was committed.
5. A description with as much detail and precision as possible, and the means by which the alleged offense was committed.

As the State indicates, Child was previously furnished with the State's witness list and all of the State's 1200 documents and, as a result, appears to have had access to all material relevant to the State's case against him. The delinquency petition stated with particularity each of the crimes charged, including the dates and locations of the alleged offenses, the crimes charged and the relevant statutory provisions, and the items stolen or moved. Therefore, there would be no question as to the nature and character of the crimes charged.

Child asserts that "simply knowing what was in the State's file was not enough." However, our precedent indicates that access to the state's files normally is enough for the accused to prepare a defense. Other cases have considered similar requests to Child's and have determined that knowledge of the

evidence on which the state would rely, the particular acts that were being relied on, and the means, manner, or method were not necessary for the accused to adequately prepare a defense. *Archuleta*, 1970-NMCA-131, ¶ 33 (stating that providing the defendant with the evidence on which the state would rely would require it to plead evidence, which is not necessary); *State v. Coulter*, 1973-NMCA-019, ¶ 9, 84 N.M. 647, 506 P.2d 804 (holding that the defendant was not prejudiced when the state had made available all the information in its files to defense counsel). This is especially true when the state maintains an open file because the child already has access to the entirety of the evidence and the witnesses the state will use against him. *Coulter*, 1973-NMCA-019, ¶ 11. In the present case, Child's request, including that he "needed to know how the State intended to connect all the crimes charged" and the theory of the case, if not within the documents already in Child's possession, would require the State to plead evidence, which is not required to satisfy due process. We fail to see how Child was prejudiced. Child does not allege how he was prejudiced by proceeding to trial with the information contained in the charging documents and provided in discovery. Child was aware of the crimes with which he was charged and had access to all of the State's documents. There was nothing more to be given.

The district court was in the best position to assess the whole record and determined that Child had sufficient information to prepare his defense. *See Archuleta*, 1970-NMCA-131, ¶¶ 33-34. Because Child had access to the entirety of the State's documents and witness list, and the delinquency petition stated with particularity the charges against him, we hold that Child had enough information to prepare his defense in accordance with due process. The district court did not abuse its discretion by denying Child's motion for a bill of particulars. We affirm the district court.

D. Child's Motion to Compel the State to Allow a Twelve-Member Jury

Child filed a motion to compel the State to allow the case to be heard by twelve jurors instead of six. The district court denied the motion to compel. An appellate court reviews issues of statutory interpretation de novo. *Schuster v. State Dep't of Taxation & Revenue*, 2012-NMSC-025, ¶ 9, 283 P.3d 288.

Child argues that, under *State v. Lorenzo P.*, 2011-NMCA-013, ¶ 11, 149 N.M. 373, 249 P.3d 85, he is entitled to a twelve-member jury because an adult facing the same charges would be entitled to a twelve-member jury and that NMSA 1978, Section 32A-2-16(A) (2009) and Section 32A-2-14(A) entitle him to the same rights as an adult. The State argues that, under Section 32A-2-16(A), Child is entitled only to a six-member jury unless he is subject to adult penalties and, because the State did not seek adult penalties, he is not entitled to a twelve-member jury.

"A child . . . is entitled to the same basic rights as an adult, *except as otherwise provided in the Children's Code*[.]" Section 32A-2-14(A) (emphasis added). The relevant section of the Children's Code, Section 32A-2-16(A), specifically provides that, if a "child [is] facing a juvenile disposition[, he] shall be entitled to a six-member jury." If the state has "invoke[d] an adult sentence," the child is entitled to a twelve-member jury. *Id.* While the crimes charged are serious offenses and would entitle an adult to a twelve-member jury, whether the child is entitled to a twelve-

member jury is not determined by the charges, but by the state's decision to invoke an adult sentence. *Id.* That is not the case here. The State's petition for delinquency terms Child as a "delinquent child." The jury instructions describe the offenses as a "delinquent act," and the State did not seek an adult sentence. We have stated that we apply the Children's Code as written. *Lorenzo P.*, 2011-NMCA-013, ¶ 21. Section 32A-2-16(A) is a specific circumstance in which the rights of the child are otherwise provided for in the Children's Code. A child is entitled to a six-member jury unless subject to an adult sentence. Child acknowledges this clear language of the statute. Thus, Child was not entitled to a twelve-member jury, and we affirm the district court's denial of his motion to compel.

III. CONCLUSION

We hold that the State is required to present clear and convincing evidence that Child had an above-average ability based on his personal traits and understanding of the situation to waive his rights in order to rebut the presumption of inadmissibility under Section 32A-2-14(F). The State did not meet this burden, thus, Child's statements were inadmissible. We reverse the district court's order denying Child's motion to suppress his statements and affirm the district court's denial of his motion to sever, the motion for a bill of particulars, and the motion to compel a twelve- member jury. This case is remanded for further proceedings in accordance with this Opinion.

IT IS SO ORDERED.

RODERICK T. KENNEDY, Chief Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

M. MONICA ZAMORA, Judge

Certiorari Denied, January 14, 2015, No. 35,032

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-020

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Docket No. 31,049

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

SIDNEY PATRICK ORTIZ,

Defendant-Appellant.

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OPINION

HANISEE, Judge.

This case comes to us a second time following a "limited remand" previously ordered by this Court to obtain discovery and information regarding the calculation of Defendant Sidney Patrick Ortiz's earned meritorious deductions. Following an amended judgment and order, Defendant contends that the district court erred in determining that the Earned Meritorious Deductions Act (EMDA), NMSA 1978, Section 33-2-34 (1999, amended 2006), does not apply to a term of probation, even when the probation is served during a period of incarceration on another sentence. Defendant also challenges the imposition of parole, maintaining that New Mexico law does not require him to serve multiple periods of parole on consecutive counts. We affirm the rulings of the district court.

BACKGROUND

In May 2001, pursuant to a plea agreement, Defendant pled no contest to five felony counts of third-degree forgery, contrary to NMSA 1978, Section 30-16-10 (1963, amended 2006), in CR-01-69 (Case 69). The district court sentenced Defendant to a fifteen-year period of imprisonment. However, it suspended twelve of those years and ordered that Defendant be incarcerated for three years, followed by two years of parole to run concurrent with five years of supervised probation.

Several months later, in a separate case, CR-01-242 (Case 242), Defendant pled guilty to seven fourth-degree felonies and two misdemeanors. As a result of his previous conviction in Case 69, the district court classified Defendant as a habitual offender and sentenced him to eighteen months of incarceration on each felony count, enhanced by one year for Defendant's habitual offender status. The district court ran Counts 1, 2, and 3 consecutive to each other and concurrent with Counts 4, 5, 6, and 7. Additionally, the district court sentenced Defendant to three hundred sixty-four days for each misdemeanor. The district court suspended all but the mandatory habitual offender time, resulting in a three-year sentence to run consecutive to the sentence imposed in Case 69. Upon completion of the sentence, the district court ordered one year of mandatory parole to run concurrent with five years supervised probation. Upon his release from prison in 2004, Defendant was serving his periods of probation in Cases 69 and 242. But by 2010, Defendant had been reincarcerated on previous probation violations, and ultimately, the State filed a petition for probation revocation on both cases, alleging that Defendant had again violated the conditions of his probation. Defendant pled no contest to the violations, and the district court required him to serve the balance of his sentence, which it calculated to be eight and one-half years less seventy-eight days for the time he had already served on the prior probation violations. Following sentencing, Defendant sought reconsideration by written motion to the district court, which was denied.

Defendant initially appealed imposition of his remaining suspended sentence to this

Court, arguing that the district court abused its discretion in imposing the balance of Defendant's sentence as it "unfairly interfered with his life's goals and ambitions." We initially proposed summary affirmance; however, after Defendant filed a memorandum in opposition to the proposed affirmance, we referred the matter to our Appellate Mediation Office. The parties agreed to a "limited remand," during which we ordered that discovery be obtained and information gathered regarding calculation of Defendant's good-time credit.

On remand, Defendant filed a motion seeking recalculation of his sentence, arguing to the district court that it had improperly calculated his sentencing credits and failed to credit him with meritorious deductions he earned toward his probation on Case 69 while still incarcerated for Case 242. After a hearing, the district court found that "the time Defendant served was not properly credited[,]" and it ordered the Department of Corrections to calculate Defendant's credits in accordance with the district court's revised findings. However, the district court additionally found that the "Earned Meritorious Deduction Act does not apply to probation, even when the probation is served during a period of incarceration on another sentence." Defendant appeals this ruling.

DISCUSSION

Earned Meritorious Deductions Do Not Apply to Reduce Probation Sentences

Defendant argues that probation time served during a period of incarceration is eligible for earned meritorious deductions under the EMDA. Specifically, Defendant maintains that because the sentences for Case 69 and Case 242 were served consecutively, he served probation for Case 69 while incarcerated in Case 242, and the district court erred in refusing to apply meritorious deductions, earned while he was incarcerated on Case 242, to his probationary sentence in Case 69. In support, Defendant relies on the EMDA itself, stating that it contains a list of circumstances under which inmates are ineligible for meritorious deductions, none of which exclude relief from a sentence of probation. *See* § 33-2-34(F), (G). He additionally maintains that because the "EMDA expressly applies to inmates who have been released from an incarcera[tive] sentence but are serving in-house parole[,]" the intention of the Legislature was to apply the EMDA to non-incarcerative sentences, including probation.

Because eligibility for and the award of earned meritorious deductions are governed by statute, we must analyze whether the Legislature intended meritorious deductions acquired under the EMDA to apply to reduce a term of probation. Questions of statutory interpretation are questions of law, which we review de novo. *State v. Tafoya*, 2010-NMSC-019, ¶ 9, 148 N.M. 391, 237 P.3d 693. In interpreting a statute, our task is to "ascertain and give effect to the intent of the Legislature." *Id.* ¶ 10 (internal quotation marks and citation omitted). In order to accomplish this, we look to the plain meaning of the statute; however, when "the plain meaning of the statute fails to result in a reasonable or just conclusion," we look to the legislative history and the statute's structure and function within the "comprehensive legislative scheme." *Id.* (internal quotation marks and citation omitted).

The EMDA governs prisoner eligibility for and award of good-time deductions in the

state prison system.[1] Section 33-2-34; *Tafoya*, 2010-NMSC-019, ¶ 11; While incarcerated, an inmate may earn meritorious deductions through active participation in authorized prison programs and upon the recommendation of a supervisor and approval of the warden. Section 33-2-34(B). These deductions "decrease the maximum amount of time an inmate must serve in prison before being eligible for parole or release." *Tafoya*, 2010-NMSC-019, ¶ 11. While the EMDA does permit award of earned meritorious deductions for: (i) offenders who are incarcerated, (ii) those released from confinement to serve parole terms, and (iii) those confined following a revocation of parole, the act does not afford the same benefits to those serving probation while incarcerated or while released into the community. Section 33-2-34(A), (M). Thus, the plain language of the EMDA only directly manifests a legislative intent that meritorious deductions be earned by offenders who are currently incarcerated, incarcerated following parole revocation, or who have been released on parole. *Id.* Likewise, the EMDA's plain language indicates to us legislative intent that its credits and deductions apply only to periods of incarceration or parole. *Id.*; *Garcia v. Dorsey*, 2006-NMSC-052, ¶ 19, 140 N.M. 746, 149 P.3d 62.

Defendant asserts that such a plain language interpretation—where earned meritorious deductions are applied to parole but not probation—creates an absurd result when both parole and probation "are served under the liberty restraints of incarceration." However, it is our Legislature that articulated a distinction between parole and probation. NMSA 1978, § 31-21-5(A), (B) (1991). "Probation" is defined as "the procedure under which an adult defendant, found guilty of a crime . . . is released by the court without imprisonment under a suspended or deferred sentence and subject to conditions[.]" Section 31-21-5(A). "Parole," on the other hand, is "the release to the community of an inmate of an institution by decision of the board or by operation of law subject to conditions imposed by the board and to its supervision[.]" Section 31-21-5(B). The key distinction is that an individual on parole, although released into the community, remains in the legal custody of the institution from which that individual was released. NMSA 1978, § 31-21-10(E) (1997, amended 2009).

Nonetheless, Defendant contends that legislative silence in the EMDA on the topic of probation was not intentional, but rather the result of the lack of contemplation by the Legislature due to the rarity of serving probation while incarcerated. Our Supreme Court's interpretation of the EMDA reveals otherwise. In *Garcia*, the Court determined that meritorious deductions are to be "deducted from the maximum *unsuspended* portion of a sentence for the purpose of determining a prisoner's release date and concomitant eligibility for parole." 2006-NMSC-052, ¶ 20 (emphasis added). First, we note that "probation" is defined as "a suspended or deferred sentence," and therefore, it is definitionally afield of the scope of the allowed deductions under EMDA. Section 31-21-5(A). Furthermore, we reiterate that probation is intended to be served "without imprisonment." Section 31-21-5(A). Thus, meritorious deductions applied to an inmate's probation would not serve to shorten the amount of time that individual served while imprisoned, as intended by

[1] We use the terms "meritorious deductions" and "good-time credits" interchangeably throughout our analysis in this Opinion.

EMDA, but rather to solely shorten an already suspended sentence. *See* § 31-21-5(A); *Tafoya*, 2010-NMSC-019, ¶ 19. We determine that this result was not intended by the Legislature.[2]

Although Defendant argues that New Mexico's dual credit system for probation and parole supports the argument that Defendant should receive good-time credits for the probation he served on Case 69 while incarcerated on Case 242, he failed to develop this argument. Defendant does not explain how New Mexico's allowance of crediting time served on parole as time served on probation warrants the application of meritorious deductions to a suspended portion of Defendant's sentence. Accordingly, we decline to review this portion of Defendant's argument. *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.").

Lastly, Defendant argues that under the rule of lenity, the district court is required to credit Defendant with earned meritorious deductions for his probationary sentence. "The rule of lenity counsels that criminal statutes should be interpreted in the defendant's favor when insurmountable ambiguity persists regarding the intended scope of a criminal statute." *State v. Ogden*, 1994-NMSC-029, ¶ 25, 118 N.M. 234, 880 P.2d 845. "[L]enity is reserved for those situations in which a reasonable doubt persists about a statute's intended scope even after resort to the language and structure, legislative history, and motivating policies of the statute."). *Id.* ¶ 26 (emphasis, internal quotation marks, and citations omitted). Because we conclude that the statute's meaning is plain and unambiguous under these circumstances, we need not consider Defendant's argument that the rule of lenity affords him relief.

Parole Must Be Served for Each Offense, Even in Cases of Consecutive Sentences

Defendant additionally argues, pursuant to *State v. Franklin*, 1967-NMSC-151, ¶ 9, 78 N.M. 127, 428 P.2d 982, and *State v. Boyer*, 1985-NMCA-029, ¶¶ 17-24, 103 N.M. 655, 712 P.2d 1, that he should not be required to again serve parole after he already served one period of parole. He maintains that the parole statutes do not provide for multiple parole periods to be served on consecutive counts. We note at the outset that Defendant's argument is vague and appears to be incomplete. *See Headley*, 2005-NMCA-045, ¶ 15 (declining to entertain a cursory argument that relied on several factual assertions that were made without citation to the record). However, because the argument is presented to us pursuant to *Franklin* and *Boyer*, we address it to the extent we are able.

Our Legislature has provided that the period of parole that follows a sentence of imprisonment "shall be deemed to be part of the sentence of the convicted person." NMSA 1978, § 31-18-15(C) (1999, amended 2007). Furthermore, our Supreme Court has already determined that "in the case of consecutive sentencing, the parole period of each offense

[2]The State argues, in part, that Defendant is not entitled to an award of meritorious deductions toward a term of probation unrelated to his incarcerative sentence as the statute "limits . . . eligibility based on the crime for which an inmate is confined for committing." *Tafoya*, 2010-NMSC-019, ¶ 12 (internal quotation marks and citation omitted). Because we determine that the EMDA does not apply to a probationary sentence, we need not address this argument.

commences immediately after the period of imprisonment for that offense, and such parole time will run concurrently with the running of any subsequent basic sentence then being served." *Brock v. Sullivan*, 1987-NMSC-013, ¶ 13, 105 N.M. 412, 733 P.2d 860. Accordingly, we determine that Defendant must serve each period of parole to which he was separately sentenced by the district court.

CONCLUSION

For the foregoing reasons, we affirm the district court.

IT IS SO ORDERED.

J. MILES HANISEE, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

MICHAEL E. VIGIL, Judge

Certiorari Denied, February 16, 2015, No. 35,100

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-021

Filing Date: November 26, 2014

Docket No. 33,192

STATE OF NEW MEXICO,

Plaintiff-Appellant,

v.

KEVIN SHEEHAN,

Defendant-Appellee.

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for Appellee

OPINION

FRY, Judge.

The State appeals the district court's order granting Defendant's motion to suppress evidence gathered during Defendant's arrest for driving while intoxicated. Officer Cory Crayton detained Defendant after observing what he believed to be an unconscious female passenger in Defendant's vehicle, which was parked on the side of the road. The district court concluded that Officer Crayton did not have reasonable suspicion to perform an investigatory detention and that the community caretaker exception to the Fourth Amendment did not apply to Officer Crayton's actions. Because we conclude that the district court applied the wrong standard in analyzing Officer Crayton's actions, we reverse.

BACKGROUND

The following facts are taken from Officer Crayton's testimony at the suppression hearing. Officer Crayton was patrolling state highway 48 in Lincoln County when he noticed a Jeep parked on the shoulder of the road. It was just after midnight. The driver's side door was open and the interior light was on. Inside the Jeep were two people; Defendant was in the driver's seat, and a woman was in the passenger seat. Officer Crayton testified that the woman was crouched to the side with her head tilted completely back, such that he could "see her esophagus." He stated that it did not look like a position one would choose to sleep in. Officer Crayton testified that Defendant was "leaning" over her.

Believing that something might be wrong, Officer Crayton stopped beside the Jeep and asked whether they were okay. Defendant responded that they were and then, according to Officer Crayton, he anxiously began attempting to leave. At this point, Officer Crayton backed up, activated his lights, and pulled in behind the vehicle. He testified that he did not see any indication that something violent or criminal had taken place between Defendant and the female passenger. Instead, he was concerned for the woman because, although she may have been sleeping, she did not look like she was in a sleeping position, and he believed that she may have been unconscious. Officer Crayton testified that at that point, he intended to detain the vehicle in order to ensure the female passenger's safety.

Officer Crayton approached the vehicle on the passenger side. At that point, the woman "came to" and said something to Officer Crayton. Officer Crayton testified that his concern for the female passenger was alleviated by her speaking. He testified, however, that he smelled an odor of alcohol coming from the Jeep. He therefore asked Defendant to exit the Jeep. As Officer Crayton spoke to Defendant, he smelled alcohol on Defendant's breath. Officer Crayton asked Defendant to perform a field sobriety test. Defendant was subsequently arrested and charged with driving while intoxicated.

Defendant filed a motion to suppress, arguing that he was unconstitutionally seized the moment Officer Crayton turned on his emergency lights and pulled behind Defendant's car. The district court agreed with Defendant and concluded that there was no evidence that there was an emergency requiring the assistance of Officer Crayton nor was there reasonable suspicion that criminal activity was underway. Accordingly, the district court suppressed any evidence obtained by Officer Crayton after the stop. The State now appeals.

DISCUSSION

The State argues that the district court relied on the wrong standard in granting Defendant's motion to suppress because it relied on the higher standard of the community caretaker exception that applies to warrantless entries into residences. We agree with the State that the district court applied the wrong test in determining that the stop violated Defendant's constitutional rights.

Standard of Review

On appeal from a district court's ruling on a motion to suppress, we review findings of fact to determine if they are supported by substantial evidence and we review legal conclusions de novo. *State v. Leyba*, 1997-

NMCA-023, ¶ 8, 123 N.M. 159, 935 P.2d 1171. In determining whether the law was correctly applied to the facts, we 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. However, because the facts are largely undisputed in this case, we review only the legal conclusions of the district court in granting Defendant's motion to suppress. *State v. Morales*, 2005-NMCA-027, ¶ 8, 137 N.M. 73, 107 P.3d 513.

Officer Crayton Validly Stopped Defendant Pursuant to the Community Caretaker Exception

There is no dispute that the initial encounter between Defendant and Officer Crayton was appropriate. As stated above, however, the district court concluded that a seizure occurred once Officer Crayton activated his lights and pulled behind Defendant. The district court concluded that Officer Crayton did not have reasonable suspicion for such a stop. In turning to the community caretaker exception, the district court stated that the standard for analyzing this encounter was whether there were "reasonable grounds to believe that there is an emergency at hand and an immediate need for [police officer] assistance for the protection of life or property." The district court noted that despite repeated opportunities to do so, Officer Crayton never testified that he thought there was an emergency. The district court therefore concluded that the community caretaker exception did not apply.

We agree with the district court that Officer Crayton did not have the requisite reasonable suspicion to undertake an investigative detention of Defendant when he first activated his lights and pulled in behind him. *State v. Walters*, 1997-NMCA-013, ¶ 10, 123 N.M. 88, 934 P.2d 282 (stating that investigatory stops, which constitute a seizure for Fourth Amendment purposes, require reasonable suspicion). The issue then is whether Officer Crayton was acting pursuant to his role as a community caretaker when he detained Defendant. *Id.* (recognizing that "in some circumstances, without reasonable suspicion of criminal activity, police may intrude upon an individual's privacy to carry out community caretaker functions that further public safety"). "An officer who is acting as a community caretaker does not violate the Fourth Amendment." *Schuster v. State Dep't of Taxation & Revenue*, 2012-NMSC-025, ¶ 26, 283 P.3d 288. Therefore, "[w]hen police act as community caretakers, . . . the existence of reasonable suspicion or grounds for probable cause are not appropriate inquiries." *State v. Ryon*, 2005-NMSC-005, ¶ 20, 137 N.M. 174, 108 P.3d 1032. "When determining whether a warrantless search or seizure is reasonable on the basis of the community caretaker exception, we must measure the public need and interest furthered by the police conduct against the degree of and nature of the intrusion upon the privacy of the citizen." *Id.* ¶ 24 (internal quotation marks and citations omitted).

Due to differing expectations of privacy, however, not all actions by police that invoke the community caretaking exception are analyzed under the same standard. *Id.* ¶ 25. In this case, the district court stated that the standard was whether there were "reasonable grounds to believe that there is an emergency at hand." This language comes from the first element of the "emergency aid doctrine." *Id.* ¶¶ 25, 29 ("First, the police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the

protection of life or property." (alteration, internal quotation marks, and citation omitted)). The emergency aid doctrine is only one of three distinct doctrines within the broadly-termed "community caretaker exception," the other two being the automobile impoundment and inventory doctrine, and the redundantly-titled community caretaking doctrine, also known as the public servant doctrine. *Id.* ¶ 25. To avoid confusion, we will refer to the third doctrine as the public servant doctrine. While these doctrines share the "common characteristic" of applying to situations in which the police officer's actions "are motivated by a desire to aid victims rather than investigate criminals," because each doctrine involves separate types of intrusions involving distinct expectations of privacy, the doctrines are analyzed by different standards. *Id.* (internal quotation marks and citations omitted).

The emergency aid doctrine "applies specifically to warrantless intrusions into the home."[1] *Ryon*, 2005-NMSC-005, ¶ 31. Our Supreme Court has stated that the inquiry under the emergency aid doctrine is "unique" because "a search within a home raises unique concerns." *Id.* ¶ 22. "[I]ntrusion into the privacy and sanctity of the home must be guarded with careful vigilance and permitted only in carefully thought-through and clearly justifiable circumstances." *Id.* ¶ 19 (internal quotation marks and citation omitted). Therefore, the burden for justifying a warrantless entry into a private residence under the emergency aid doctrine is significantly higher than the standards under the other community caretaker doctrines. *Id.* ¶ 26 ("Since the privacy expectation is strongest in the home only a genuine emergency will justify entering and searching a home without a warrant and without consent or knowledge."); *see State v. Baca*, 2007-NMCA-016, ¶ 31, 141 N.M. 65, 150 P.3d 1015 ("This standard is high because it reflects the bedrock constitutional principle that a warrantless entry into a home presents unique concerns."). The encounter in this case did not involve a warrantless entry into a home. Thus, because the district court applied the emergency aid doctrine to the encounter, it relied on the wrong standard in granting the motion to suppress.

The proper standard to apply to the encounter in this case is the public servant doctrine. The "public servant doctrine deals primarily with warrantless searches and seizures of automobiles." *Ryon*, 2005-NMSC-005, ¶ 26 (internal quotation marks and citation omitted). Because "there is a lesser privacy expectation in a vehicle on a public highway, an involuntary search or seizure there is judged by a lower standard of reasonableness[than the emergency assistance doctrine]." *Id.* Under the public servant doctrine, "a police officer may stop a vehicle for a specific, articulable safety concern, even in the absence of reasonable suspicion that a

[1]We recognize that our Supreme Court made an earlier statement in *Ryon* that appears somewhat contradictory to this later statement. Our Supreme Court stated that "[t]he emergency doctrine applies to, but is not limited to, warrantless intrusions into personal residences." *Id.* ¶ 26 (internal quotation marks and citation omitted). We do not construe this statement as limiting our conclusion in this case because the Court immediately thereafter stated that the emergency assistance doctrine may justify more intrusive searches of the home or person than the lower standard of reasonableness that applies to an involuntary search or seizure of a "vehicle on a public highway." *Id.*; *Laney v. State*, 117 S.W.3d 854, 861 (Tx. Crim. App. 2003) (en banc) ("[T]he [public servant] doctrine deals primarily with warrantless searches and seizures of automobiles . . ., while the emergency doctrine deals with warrantless entries of, but is not limited to, private residences.").

violation of law has occurred or is occurring." *Apodaca v. State, Taxation & Revenue Dep't*, 1994-NMCA-120, ¶ 5, 118 N.M. 624, 884 P.2d 515; *see State v. Reynolds*, 1993-NMCA-162, ¶ 8, 117 N.M. 23, 868 P.2d 668 ("Part of the function of police officers is to carry out community caretaking functions to enhance public safety. It is appropriate, then, for police officers to stop vehicles for a specific, articulable safety concern."), *rev'd on other grounds*, 1995-NMSC-008, 119 N.M. 383, 890 P.2d 1315. This is an "objective test to determine whether a vehicle stop is based on a reasonable concern for public safety." *Ryon*, 2005-NMSC-005, ¶ 30. "The scope of any intrusion following the stop must be limited to those actions necessary to carry out the purposes of the stop, unless . . . reasonable suspicion or probable cause arises." *Apodaca*, 1994-NMCA-120, ¶ 5.

We conclude that Officer Crayton sufficiently articulated a specific concern for the safety of the female passenger to permit him to detain the vehicle to alleviate that concern. Officer Crayton repeatedly emphasized during his testimony that he detained the vehicle due to his concern for her safety. These safety concerns were rooted in his observation of the female passenger's position in the vehicle, specifically his observation that she appeared unconscious and in an unnatural position, did not respond to his inquiry or even give any indication that she registered the question, and that Defendant was "leaning over her." Because Officer Crayton's concern was for the passenger, it follows that his concerns for her would be alleviated by a response from her, not just from Defendant. The district court made no credibility determination regarding Officer Crayton's testimony indicating that the court found that Officer Crayton's motivation was something other than concern for the female passenger. Instead, the court concluded that Officer Crayton's concerns were not sufficient to meet the higher standard of the emergency assistance doctrine. Under the correct standard, however, Officer Crayton permissibly detained Defendant's vehicle until he could ascertain whether assistance was needed. *See Schuster*, 2012-NMSC-025, ¶ 27 (stating that "a continued investigation by an officer in his or her role as a community caretaker is reasonable as long as the officer is motivated by a desire to offer assistance and not investigate").

Finally, we note our agreement with the Montana Supreme Court that once "the officer is assured that the citizen is not in peril or is no longer in need of assistance or that the peril has been mitigated, then any actions beyond that constitute a seizure implicating . . . the protections provided by the Fourth Amendment." *State v. Lovegren*, 2002 MT 153, ¶ 25, 310 Mont. 358, 51 P.3d 471. Here, Officer Crayton stated that once the female passenger roused herself, his concerns for her safety were alleviated but that he smelled alcohol coming from the vehicle. At this point, Officer Crayton was no longer acting in a community caretaker role, and the situation transitioned into a seizure under the Fourth Amendment. No argument was presented below or on appeal that this seizure violated the Fourth Amendment and accordingly we do not address it.

CONCLUSION

For the foregoing reasons, we reverse the district court's grant of Defendant's motion to suppress.

IT IS SO ORDERED.

CYNTHIA A. FRY, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

MICHAEL E. VIGIL, Judge

Certiorari Denied, January 23, 2015, No. 35,038

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-022

Filing Date: November 19, 2014

Docket No. 32,995

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

ARLENE GARNENEZ,

Defendant-Appellant.

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for Appellant

OPINION

ZAMORA, Judge.

Arlene Garnenez (Defendant) appeals from her convictions for two counts of vehicular homicide, contrary to NMSA 1978, § 66-8-101 (2004). This case presents the issue of whether a blood draw can proceed solely pursuant to a valid search warrant, outside of the Implied Consent Act, NMSA 1978, §§ 66-8-105 to -112 (1978, as amended through 2007). We hold that it can. We also address Defendant's other contentions that (1) her blood alcohol content (BAC) results should have been suppressed as a result of false statements in the search warrant authorizing the blood draw; (2) comments made by the prosecutor during jury selection and an emotional reaction from a member of the courtroom audience prejudiced the jury and warranted a mistrial; and (3) the district court improperly admitted the BAC results and expert testimony regarding retrograde extrapolation without adequate foundation and in violation of her rights under the Confrontation Clause of the Sixth Amendment of the United States Constitution. For the following reasons, we affirm Defendant's convictions.

BACKGROUND

On July 23, 2011, between 8:00 a.m. and 8:30 a.m., Defendant was driving a pickup truck on I-40 in Gallup, New Mexico. The truck veered off the road, struck a light pole, and rolled over multiple times, resulting in the deaths of two passengers. Defendant was bleeding heavily from a head wound and her

right arm was fractured. She was taken to the hospital for treatment. Officer Andy Yearley, of the Gallup Police Department, responded to the scene and first spoke with Defendant at the hospital. Even after Defendant had been transported to the hospital, Officer Yearley still detected a slight odor of alcohol and noted that Defendant had a flushed complexion and confused speech. Officer Yearley did not arrest Defendant or read her the Implied Consent Act. Although Defendant was able to speak with him, Officer Yearley questioned her ability to give consent because she appeared to be in pain from her injuries and he was not sure if the medications in her system affected her judgment. *See generally* §§ 66-8-105 to -112. Under these circumstances, Officer Yearley decided not to arrest Defendant or presume that she was incapable of withdrawing consent pursuant to Section 66-8-108. He instead sought and obtained a search warrant to draw Defendant's blood. Defendant was not formally arrested until after the blood draw and after she was discharged from the hospital.

Following a jury trial, Defendant was convicted of two counts of vehicular homicide and one count of driving while under the influence of intoxicating liquor or drugs (DWI), impaired to the slightest degree. Defendant's DWI conviction was vacated on double jeopardy grounds. We discuss pertinent facts in more detail below as they relate to the issues.

DISCUSSION

I. Blood May Be Properly Drawn Pursuant to a Search Warrant, Without an Arrest Under the Implied Consent Act

Defendant contends that the district court should not have allowed the BAC results into evidence because she was not arrested at the time of the blood draw. Defendant argues that even though a search warrant was obtained, the statutory framework of the Implied Consent Act, by requiring an arrest prior to a blood draw, mandates the exclusion of all BAC results taken when a person was not under arrest. We disagree, and for the reasons discussed below, we hold that a constitutionally permissible search of a person's blood may arise either from an arrest pursuant to the Implied Consent Act or a valid search warrant supported by probable cause.

Fourth Amendment jurisprudence has expressed a preference for searches conducted pursuant to a warrant in the context of blood draws. *See generally Schmerber v. California*, 384 U.S. 757, 767, 770 (1966) (stating that the "compulsory administration of a blood test . . . plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment[,]" and also explaining that because "[s]earch warrants are ordinarily required for searches of dwellings, . . . absent an emergency, no less could be required where intrusions into the human body are concerned"). Consent and arrest are exceptions to the warrant requirement. *State v. Weidner*, 2007-NMCA-063, ¶ 6, 141 N.M. 582, 158 P.3d 1025 (listing the recognized exceptions to the warrant requirement as "exigent circumstances, searches incident to arrest, inventory searches, consent, hot pursuit, open field, and plain view"). The Implied Consent Act operates as one form of statutory consent, created by the Legislature, by allowing law enforcement officers to presume that all drivers, upon arrest for DWI, have agreed to take a chemical test. *In re Suazo*, 1994-NMSC-070, ¶ 7, 117 N.M. 785, 877 P.2d 1088 ("The essence of the [Implied Consent] Act is that any person who operates

a motor vehicle in New Mexico, after being arrested for driving while intoxicated, 'shall be deemed to have given consent' to a chemical test to determine the drug or alcoholic content of the motorist's blood." (quoting § 66-8-107(A)).

We acknowledge that our prior case law emphasized the importance of an arrest prior to the application of the Implied Consent Act and gave little effect to a search warrant. In *State v. Steele*, we held that where a driver refused to provide a blood sample under the Implied Consent Act, a law enforcement officer could not obtain the sample using a search warrant because the Implied Consent Act afforded the defendant greater protection than the Fourth Amendment. 1979-NMCA-113, ¶¶ 7-9, 93 N.M. 470, 601 P.2d 440; *see also State v. Chavez*, 1981-NMCA-060, ¶ 4, 96 N.M. 313, 629 P.2d 1242 (explaining that in *Steele*, "[t]his Court held that the Legislature gave the defendant more protection than was afforded by the Constitution and that, after his refusal, the result of the blood alcohol test taken by means of a valid search warrant was properly excluded"). However, the Legislature subsequently amended the Implied Consent Act to allow law enforcement officers to obtain a blood sample using a search warrant upon a defendant's refusal. *Chavez*, 1981-NMCA-060, ¶ 4.

Our subsequent case law indicates that we have construed the Legislature's amendment broadly. In *State v. House*, we held that an affidavit for a search warrant authorizing a blood draw did not need to state that a defendant was arrested and only needed to show probable cause:

> [W]e are unaware of any requirement that the affidavit for a search warrant authorizing a chemical test of a driver's blood include a statement that the driver was arrested for DWI. NMSA 1978, Section 66-8-111(A) (Repl. Pamp. 1994) (search warrant authorizing chemical tests) only requires a finding, based on the affidavit for search warrant, that there is probable cause to believe that: the person has driven a motor vehicle while under the influence of alcohol, thereby causing the death or great bodily injury of another person; or the person has committed a felony while under the influence of alcohol and that chemical tests will produce material evidence in a felony prosecution.

House, 1996-NMCA-052, ¶ 32, 121 N.M. 784, 918 P.2d 370.

Additionally, we have held that where probable cause exists, refusal under the Implied Consent Act is not required before an officer may obtain a search warrant for a blood test. *State v. Duquette*, 2000-NMCA-006, ¶ 20, 128 N.M. 530, 994 P.2d 776 ("Based on our reading of the language in Section 66-8-111(A), we do not believe that a refusal is a condition precedent to issuance of a search warrant when, as here, there exists probable cause to believe [the d]efendant committed a felony while under the influence of alcohol."). We do not, therefore, read our Implied Consent Act to prohibit an officer from obtaining a blood sample using a search warrant supported by probable cause.

The purpose of the Implied Consent Act is to assist law enforcement officers in finding and removing intoxicated drivers from the roadways. *Duquette*, 2000-NMCA-006, ¶ 20. Because Defendant had been removed from

the highway, was hospitalized, and was receiving medication for her injuries, Officer Yearley decided not to arrest Defendant or presume consent pursuant to the Implied Consent Act. He instead sought and obtained a search warrant, which, for reasons set forth in the next section, established probable cause. In light of our preference for a search warrant under the Fourth Amendment and our case law interpreting the Implied Consent Act, we conclude that the valid search warrant was a permissible alternative to proceeding under the Implied Consent Act in order to perform a blood draw.

In addition to arguing that the BAC results should have been excluded because the blood draw was not preceded by an arrest under the Implied Consent Act, Defendant also contends that "the State made no attempt to qualify Officer Yearley as a 'responsible person' who could 'authenticate' the samples[,]" as required by 7.33.2.15(A)(1) NMAC ("Blood samples shall be collected in the presence of the arresting officer or other responsible person who can authenticate the samples."). However, Defendant conceded to the district court that Officer Yearley fit the definition of a "responsible person" who could authenticate the samples. We do not address Defendant's unpreserved contentions, and Defendant does not point us to any exceptions to this rule. *See State v. Jason F.*, 1998-NMSC-010, ¶ 10, 125 N.M. 111, 957 P.2d 1145 (declining to review a party's unpreserved argument when counsel made no argument on appeal regarding the exceptions to the preservation requirement).

Finally, Defendant argues that her BAC results should have been excluded because the test was not performed within three hours of arrest, as required by 7.33.2.15(A)(2) NMAC. We note that this regulation has been superseded by statute. Section 66-8-110(E) ("If the test performed pursuant to the Implied Consent Act is administered more than three hours after the person was driving a vehicle, the test result may be introduced as evidence of the alcohol concentration in the person's blood or breath at the time of the test and the trier of fact shall determine what weight to give the test result."). Any time lapse impacts the weight of the evidence, not admissibility. *See State v. Bowden*, 2010-NMCA-070, ¶¶ 8-12, 148 N.M. 850, 242 P.3d 417 (holding that where a statute and regulation conflict, the statute generally prevails, and also explaining that Section 66-8-110(E) permits test results taken more than three hours after the person was driving to be admitted into evidence and gives the fact finder the discretion to give appropriate weight to the results).

II. Validity of the Search Warrant

Next, Defendant argues that the district court should have suppressed the BAC results because the affidavit in support of the search warrant contained a false statement that Defendant was under arrest. At the hearing on Defendant's motion to suppress, Officer Yearley testified that contrary to what was stated in the affidavit, he did not arrest Defendant. He used a standard form affidavit and did not remove the stock language that Defendant was under arrest. He also testified that he did not intend to mislead the issuing judge by the mistaken inclusion of this language.

"We review the district court's ruling on a motion to suppress to determine whether the law was correctly applied to the facts, viewing the facts in the light most favorable to the prevailing party." *State v. Cline*, 1998-NMCA-154, ¶ 6, 126 N.M. 77, 966 P.2d 785.

Findings of fact are reviewed to determine if they are supported by substantial evidence, a determination of whether the evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion[.]" *State v. Salgado*, 1999-NMSC-008, ¶ 25, 126 N.M. 691, 974 P.2d 661 (internal quotation marks and citation omitted). The application of law to fact is a legal determination, which we review de novo. *See State v. Neal*, 2007-NMSC-043, ¶ 15, 142 N.M. 176, 164 P.3d 57.

"[T]o suppress evidence based on alleged falsehoods and omissions in a search warrant affidavit, the defendant must show either 'deliberate falsehood,' or 'reckless disregard for the truth,' as to a material fact. A merely material misrepresentation or omission is insufficient." *State v. Fernandez*, 1999-NMCA-128, ¶ 34, 128 N.M. 111, 990 P.2d 224. The district court, in its written ruling on Defendant's motion to suppress, found that Officer Yearley's misstatement was negligent, but not deliberate or reckless. "[T]he district court is in the best position to resolve questions of fact and to evaluate the credibility of witnesses." *State v. Urioste*, 2002-NMSC-023, ¶ 6, 132 N.M. 592, 52 P.3d 964. Deferring to the district court's assessment of the officer's intent, we conclude that the district court properly upheld the search warrant.

With the exception of Defendant's arguments suggesting that the affidavit was tainted by the officer's false statement, Defendant does not otherwise challenge the facial validity of the affidavit to establish probable cause. We will not address arguments on appeal that were not raised in the brief in chief and have not been properly developed for review. *See State v. Garcia*, 2013-NMCA-005, ¶ 9, 294 P.3d 1256 (stating that we do not review arguments not raised in the brief in chief); *cf. Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076 (explaining that we do not review undeveloped or unclear arguments on appeal).

Finally, we note that Defendant cites to Article II, Section 10 of the New Mexico Constitution. We do not address this issue, however, because Defendant does not assert that Article II, Section 10 affords her greater protection in this context. *See State v. Hubble*, 2009-NMSC-014, ¶ 6, 146 N.M. 70, 206 P.3d 579 (addressing only the Fourth Amendment where the defendant failed to assert that the state Constitution afforded him greater protection).

III. Denial of Defendant's Motions for Mistrial Did Not Constitute an Abuse of Discretion

A. Allegations of Juror Prejudice

First, Defendant asserts that the prosecutor impermissibly tainted the venire by telling the potential jurors that "Defendant . . . and her National Guardsman friends were 'sitting around drinking until the wee hours of the morning.' " Defendant argues that telling potential jurors, prior to trial, that Defendant "[was] on trial for driving while intoxicated and has caused the death of members of that community" was sufficiently prejudicial to warrant a mistrial. The State counters, first, that the district court properly told the venire of the charges Defendant was facing, and second, that the prosecutor's question was phrased as a hypothetical and fairly inquired as to potential prejudices against drinking.

In denying Defendant's motion for a mistrial, the district court ruled that the

prejudice alleged by Defendant was purely speculative. Although some members of the venire indicated a bias against those charged with alcohol-related offenses, the district court concluded that the bias of a few potential jurors would not preclude its ability to empanel a jury comprised of members who could be fair and impartial. "We apply an abuse of discretion standard of review to the district court's determination of how voir dire should be conducted, because assuring the selection of an impartial jury may require that counsel be allowed considerable latitude in questioning prospective jury members." *State v. Johnson*, 2010-NMSC-016, ¶ 34, 148 N.M. 50, 229 P.3d 523 (alteration, internal quotation marks, and citation omitted). The district court is in the best position to evaluate counsel's questions to the venire and determine to what extent any resulting prejudice would impact the defendant's right to a fair and impartial jury. *Id.*

Pursuant to UJI 14-120 NMRA, the district court properly told the venire about the crimes that Defendant was charged with: two counts of vehicular homicide, one count of great bodily harm by vehicle, and one count of driving while under the influence of intoxicating liquor or drugs. The fact that the charges against Defendant could, potentially, create bias in a juror's mind did not give rise to the level of prejudice required for a mistrial. *See State v. Gallegos*, 2009-NMSC-017, ¶ 28, 146 N.M. 88, 206 P.3d 993 (stating that "[c]ourts rarely grant a motion for mistrial based on mere equivocal evidence of possible juror bias or prejudice, even with the potential to negatively impact a trial").

Additionally, we note that our review of the record comports with the State's recitation of the facts and indicates that the prosecutor phrased the questions in hypothetical form. The prosecutor first asked the venire: "So, if the evidence were to show that some people were sitting around drinking for a few hours and that right after they left, they had an accident, or a crash, would that affect your ability to give us a fair verdict?" The prosecutor later inquired: "If the evidence in this case were to show that all of the principals in this case had been sitting around drinking into the wee hours of the morning, would that affect your ability to give us a fair and impartial verdict?"

The State and Defendant were permitted to inquire about any potential prejudices from the jury pool against alcohol and DWI, both as a group and individually. *See* UJI 14-120, Use Note 4(c) (explaining that voir dire questioning is one source of information to be used by the district court when selecting a jury, such "questioning by the attorneys is generally used for inquiry concerning the jurors' attitudes and opinions about case-related issues (*for example, burden of proof, self defense, alcohol use, etc.*)"; *Sutherlin v. Fenenga*, 1991-NMCA-011, ¶ 36, 111 N.M. 767, 810 P.2d 353 ("The purpose of voir dire is to enable the parties to determine whether there is any bias or prejudice on the part of prospective jurors and to enable counsel to intelligently exercise challenges.").

Defendant specifically references potential jurors 7, 9, 20, 41, 43, 65, and 84 as those who expressed concerns about the facts of the case. None of these individuals were ultimately empaneled: five were excused for cause because they stated they could not be fair and impartial, one was stricken by the defense using a peremptory challenge, and one

was not selected. *See State v. Rackley*, 2000-NMCA-027, ¶ 9, 128 N.M. 761, 998 P.2d 1212 (explaining that "[t]he jury selection process, including the excusal of jurors for cause, insures that a defendant is tried before an impartial jury").

Finally, Defendant had two remaining peremptory challenges at the conclusion of jury selection and has not offered an explanation as to why she did not exercise those challenges. *See State v. Isiah*, 1989-NMSC-063, ¶ 29, 109 N.M. 21, 781 P.2d 293 (holding that where a defendant does not use all of his or her peremptory challenges, the defendant may not complain of "prejudice for failure to dismiss prospective jurors"), *overruled on other grounds by State v. Lucero*, 1993-NMSC-064, ¶ 13, 116 N.M. 450, 863 P.2d 1071.

Because Defendant has not pointed us to any specific instances of prejudice in the empaneled jurors, we conclude that the prosecutor's questioning during voir dire did not deprive Defendant of her right to a fair and impartial jury. *See Johnson*, 2010-NMSC-016, ¶ 36 (concluding that where there was no showing that the prosecutor's questions prejudiced the jury, and "[t]he district court did not abuse its discretion by permitting the use of hypotheticals during the voir dire in a way that resulted in prejudice to [the d]efendant"). The district court did not abuse its discretion in denying Defendant's motion for mistrial. *See Sutherlin*, 1991-NMCA-011, ¶ 36 (stating that the district court "is invested with broad discretion over the scope of voir dire"); *Gallegos*, 2009-NMSC-017, ¶ 22 (observing that "[a] mistrial generally should be granted only when bias is fixed in the minds of the jurors so as to preclude a fair and objective verdict" (internal quotation marks and citation omitted)).

B. Emotional Courtroom Outburst

Second, Defendant asserts that the jury was impermissibly prejudiced when a member of the courtroom audience began crying during a witness' testimony about one of the victim's injuries. The district court asked the witness to pause her testimony and requested that the audience member be escorted out of the courtroom. Defendant moved for a mistrial on the grounds that the jury was precluded from rendering an impartial verdict following the outburst. The district court denied Defendant's motion.

Defendant has failed to provide authority for the proposition that reactions within the courtroom gallery to upsetting testimony during trial warrant a mistrial because these reactions prevent the jury from being fair and impartial. *Cf. In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 ("We assume where arguments in briefs are unsupported by cited authority, counsel after diligent search, was unable to find any supporting authority."). Nonetheless, the jury was instructed that "[n]either sympathy nor prejudice should influence your verdict." *See State v. Perry*, 2009-NMCA-052, ¶ 45, 146 N.M. 208, 207 P.3d 1185 (explaining that "[t]here is a presumption that the jury follows the instructions they are given" (internal quotation marks and citation omitted)). Indulging our appellate "presumption of regularity" of the proceedings below, *State v. Pacheco*, 2007-NMSC-009, ¶ 26, 141 N.M. 340, 155 P.3d

745, we find no abuse of discretion in the district court's denial of Defendant's motion for a mistrial.

IV. Challenges to the Admission of BAC Results and Expert Testimony

We understand Defendant to make three arguments challenging the admission of her BAC results at trial: first, that the lab analyst, Hannah Nelson, testified about the BAC results before an adequate foundation was laid for the admission of the exhibits showing the results themselves; second, that Defendant was prejudiced by the fact that the jury heard the BAC results even though the district court permitted a jury instruction only on the theory of impairment to the slightest degree; and third, that expert testimony from Dr. Hwang about retrograde extrapolation improperly relied on the BAC results.

At trial, the district court permitted a jury instruction only on the "impaired to the slightest degree" theory of DWI, due to the charging language in the criminal information. Based upon the theory of the DWI charge, Defendant argues that the State should not have been allowed to present the BAC results and expert testimony about retrograde extrapolation as evidence of impairment.

We review the district court's evidentiary rulings for an abuse of discretion. *State v. McGhee*, 1985-NMSC-047, ¶ 24, 103 N.M. 100, 703 P.2d 877. "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. Thompson*, 2009-NMCA-076, ¶ 11, 146 N.M. 663, 213 P.3d 813 (internal quotation marks and citation omitted).

A. The District Court Did Not Abuse Its Discretion by Permitting Hannah Nelson to Testify Prior to Officer Yearley

First, Defendant contends that she was prejudiced because Ms. Nelson, the laboratory analyst at the Scientific Laboratory Division (SLD), testified about the BAC results before the exhibits showing the results were admitted. We disagree.

Due to logistical issues, the State called Ms. Nelson prior to calling Officer Yearley, who personally observed the blood draw. The State acknowledged that it would need to lay the proper foundation for admission of the exhibits through Officer Yearley's forthcoming testimony. "[I]t is within the [district] court's discretion to control the order of witnesses, mode of interrogating witnesses, and presentation of evidence." *State v. McDaniel*, 2004-NMCA-022, ¶ 6, 135 N.M. 84, 84 P.3d 701. Additionally, Rule 11-104(B) NMRA permits evidence to be conditionally admitted at trial, contingent upon a subsequent showing of relevancy. *See also Woolwine v. Furr's, Inc.*, 1987-NMCA-133, ¶ 19, 106 N.M. 492, 745 P.2d 717 ("When an exhibit is admitted conditionally, it is the duty of the party seeking to exclude the exhibit to renew its objection and to move to strike if its relevancy is not thereafter established.").

After Ms. Nelson's testimony, Officer Yearley testified that he personally observed two nurses perform each of the blood draws using the items in the SLD-provided kit. This testimony provided an adequate foundation. *See State v. Nez*, 2010-NMCA-092, ¶¶ 13-14, 148 N.M. 914, 242 P.3d 481 (describing testimony from a law enforcement officer about his personal

observation of a nurse performing a defendant's blood draw as providing an adequate foundation for the admission of the blood draw report). As a result, no foundational error occurred by allowing the testimony of these two witnesses to be presented out of sequence.

B. The District Court Did Not Abuse Its Discretion in Admitting Evidence of BAC Results and Expert Testimony About Retrograde Extrapolation When the Jury Was Instructed Only on an Impaired to the Slightest Degree Theory

We turn next to Defendant's assertion that she was prejudiced by the admission of the BAC results because the jury was instructed only on an impaired to the slightest degree theory. The district court did not instruct the jury on the theory of per se DWI, due to the charging language in the criminal information, but permitted into evidence the BAC results and expert testimony about retrograde extrapolation. Defendant contends that:

> [t]he prejudicial effect and confusion created by the availability of the blood results to the jury throughout the trial after Ms. Nelson's testimony makes it impossible to determine whether the jury based its guilty verdict on 'impairment to the slightest degree' or incorporated the blood results in its collective deliberations and verdict.

Defendant cites no authority in support of her contention. *See In re Adoption of Doe*, 1984-NMSC-024, ¶ 2 (addressing the lack of relevant authority in appellate briefs to indicate the absence of supporting case law). We have previously held that BAC results are relevant under the implied to the slightest degree theory to show "that [a d]efendant had alcohol in his [or her] system and, regardless of the numerical BAC, tended to show that [the d]efendant's poor driving . . . was a result of drinking liquor." *State v. Pickett*, 2009-NMCA-077, ¶ 12, 146 N.M. 655, 213 P.3d 805 (internal quotation marks omitted); *see also State v. Montoya*, 2005-NMCA-078, ¶ 21, 137 N.M. 713, 114 P.3d 393 (explaining that, where the defendant was charged with vehicular homicide, evidence of alcohol in the defendant's system four hours after the accident was relevant). The jury "was entitled to consider the BAC results insofar as they were relevant as evidence of alcohol in [the d]efendant's system that would indicate that [the d]efendant's poor driving was due to his [or her] consumption of liquor." *Pickett*, 2009-NMCA-077, ¶ 14.

Additionally, the fact that scientific retrograde extrapolation evidence was presented diminished the risk that the jury considered the BAC results in an inappropriate and prejudicial manner. *Cf. id.* ¶¶ 8-15 (holding that even though the state did not provide expert testimony about retrograde extrapolation, the district court in a bench trial was entitled to consider BAC results as evidence of the presence of alcohol in the defendant's system under an impaired to the slightest degree theory). Affording deference to the district court's evidentiary ruling, we hold that there was no abuse of discretion.

C. The District Court Did Not Abuse Its Discretion in Admitting Expert Testimony About Retrograde Extrapolation

Third, Defendant argues that Dr. Hwang's expert testimony about retrograde

extrapolation should have been excluded. Defendant asserts that Dr. Hwang's testimony improperly relied on the BAC results, and having previously determined that the BAC results were properly admitted, we conclude that such reliance went to the weight of his testimony. *See State v. Gonzales*, 2001-NMCA-025, ¶ 40, 130 N.M. 341, 24 P.3d 776 ("We recognize that the fact[ ]finder is entitled to disregard evidence presented by either party, . . . and to disregard the testimony of experts[.]"), *overruled on other grounds by State v. Rudy B.*, 2009-NMCA-104, 147 N.M. 45, 216 P.3d 810.

D. The Confrontation Clause Did Not Require Live Testimony Concerning the Blood Draw

To the extent Defendant contends that live testimony from the nurses who performed Defendant's blood draw was needed to satisfy the requirements of the Confrontation Clause, we disagree. *See Nez*, 2010-NMCA-092, ¶ 16 ("[T]he absence of the blood drawer from trial and opportunity for a defendant to cross-examine the blood drawer relating to chain of custody does not provide grounds for a confrontation objection to the admissibility of a blood[ ]alcohol report.").

CONCLUSION

For the foregoing reasons, we affirm Defendant's convictions for two counts of vehicular homicide, contrary to Section 66-8-101.

IT IS SO ORDERED.

M. MONICA ZAMORA, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

TIMOTHY L. GARCIA, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-023

Filing Date: December 2, 2014

Docket No. 32,917

CITY OF ALBUQUERQUE,

Respondent,

v.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES Local 1888, et.al.,

Petitioners.

City of Albuquerque
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Rebecca E. Wardlaw, Assistant City Attorney
Samantha M. Hults, Assistant City Attorney
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for Petitioners

OPINION

GARCIA, Judge.

We granted the American Federation of State, County, and Municipal Employees' (AFSCME) petition for writ of certiorari. AFSCME seeks review of a district court order that affirmed in part and reversed in part the administrative decision made by the Public Employee Labor Relations Board (the PELRB). The district court determined that the PELRB properly dismissed AFSCME's prohibited practice complaints against the City of Albuquerque (the City) because the PELRB did not have jurisdiction to hear those complaints. The district court also ruled that the PELRB had no authority to "remand" the dismissed prohibited practices complaints to the City's Labor Management Relations Board (the LMRB).

The critical issue involves the grandfather status of the LMRB under the Public Employee Bargaining Act (the PEBA). For approximately eighteen months, the LMRB was not functioning to resolve employee complaints because the board was missing one of its required three members. AFSCME asserted that the PELRB had jurisdiction under the PEBA to hear the prohibited practice complaints filed during the time period that the LMRB was not functioning. Alternatively, AFSCME asserts that the PELRB has jurisdiction to remand these specific prohibited practice complaints directly to the LMRB once it began to function again. Under the undisputed factual circumstances presented for review, we affirm.

BACKGROUND

The Complaints

AFSCME represents the City's employees in their collective bargaining and labor disputes with the City. Between September 2010 and June 2011, AFSCME filed several prohibited practice complaints against the City. It did not file these complaints with the LMRB, but instead filed them directly with the PELRB. It alleged in these complaints that the PELRB had jurisdiction to hear them because the LMRB had been "non-functional since December, 2009."

The PELRB's Dismissal and Remand

The City asked the PELRB to dismiss the subject complaints that were filed directly with the PELRB. It argued that the City was not subject to the PELRB's jurisdiction because it has grandfather status under the PEBA and the LMRB has exclusive jurisdiction to hear those complaints against the City that AFSCME filed with the PELRB.

The PELRB's hearing officer recommended that the complaints be dismissed. He concluded that the PELRB did not have jurisdiction over the complaints because, at the time of his recommendation, the LMRB had resumed functioning to process employee complaints against the City. In reaching this conclusion, the PELRB hearing officer suggested that the PELRB would have jurisdiction over the complaints if the LMRB was not "productive" or "functioning" at the

time of his recommendation. The hearing officer also recommended that the complaints be "remanded" to the LMRB. The PELRB then issued a final decision that adopted the hearing officer's recommendations to dismiss the complaints and remand them to the LMRB.

The City's Appeal to the District Court

The City appealed the PELRB's decision to the district court. It argued that the PELRB had no jurisdiction to hear the complaints—even if LMRB was not hearing them at the time of the PELRB decision—and thus, it had no authority to remand the complaints to the LMRB. The district court agreed with the City that the PELRB did not have jurisdiction to hear the complaints and that it also lacked authority to remand the complaints to the LMRB. It effectively rejected the argument that the PELRB could exercise any type of jurisdiction over the complaints at the time the PELRB decision was rendered.

DISCUSSION

In its brief in chief, AFSCME renews the arguments it made in front of the PELRB and the district court. It argues that the PELRB may assume jurisdiction over complaints involving a public employer entitled to grandfather status under the PEBA when that employer's labor relations board is not operating at the time, and thus, that the PELRB also had the authority to remand the complaints to the LMRB once it returned to an operating status.

I. General Principles and Standard of Review

"Administrative bodies are the creatures of statutes." *Pub. Serv. Co. of N.M. v. N.M. Envtl. Improvement Bd.*, 1976-NMCA-039, ¶ 7, 89 N.M. 223, 549 P.2d 638. They can act only on matters that are within the scope of the authority that a statute has delegated to them "either expressly or by necessary implication." *Jones v. Holiday Inn Express*, 2014-NMCA-082, ¶ 9, 331 P.3d 992 (internal quotation marks and citation omitted); *see Pub. Serv. Co. of N.M.*, 1976-NMCA-039, ¶ 7.

Whether an administrative body has acted beyond the scope of its authority is a question of statutory construction that we review de novo. *See Jones*, 2014-NMCA-082, ¶ 10; *Leonard v. Payday Prof'l/Bio-Cal Comp.*, 2008-NMCA-034, ¶ 11, 143 N.M. 637, 179 P.3d 1245. When construing a statute, we "determine and give effect to legislative intent" by looking to the plain meaning of the statute's words and reading its provisions "together to produce a harmonious whole." *Jones*, 2014-NMCA-082, ¶ 10 (internal quotation marks and citations omitted). We begin by looking to the state and local labor laws involved in this case.

II. The City's Labor-Management Relations Ordinance

In the early 1970's, Albuquerque's city council adopted an ordinance governing the "[l]abor-[m]anagement [r]elations" between the City and its employees (the LMRO). *See* Albuquerque, N.M., Ordinances ch. 3, art. II, §§ 3-2-1 to -18 (1971, as amended through 2002). Among other things, the LMRO gives City employees the right to organize for the purpose of collectively bargaining with the City. Albuquerque, N.M., Ordinances ch. 3, art. II, §§ 3-2-2(A) and 3-2-3. And the LMRO prohibits the City and its employees from engaging in certain conduct, which it calls, "prohibited practices."

Albuquerque, N.M., Ordinance ch. 3, art. II § 3-2-9.

The LMRO requires that a three-member board "be formed[] to assist in the implementation and administration of the [ordinance]." Albuquerque, N.M., Ordinance § 3-2-15. When a City employee believes that the City has engaged in a "prohibited practice," he or she must submit a complaint to the LMRB within thirty days from the date that the alleged prohibited practice occurred. Albuquerque, N.M., Ordinance § 3-2-9(D). The City has five days to answer this complaint and, within five days of the City's answer, the LMRB must schedule a hearing. *Id.* Although the LMRO provides an avenue for the City or an employee to appeal the LMRB's decision, Albuquerque, N.M., Ordinance § 3-2-10(D), it does not identify or provide a specific remedy where the LMRB fails to timely render a decision.

III. The PEBA

About twenty years after the City adopted its LMRO, the Legislature first enacted a statewide labor-management relations law for public employees (the PEBA). *See City of Albuquerque v. Montoya*, 2012-NMSC-007, ¶ 9, 274 P.3d 108. The PEBA "guarantees public employees the right to organize and bargain collectively with their employers." *Id.* (alteration, internal quotation marks, and citation omitted); *see* NMSA 1978, § 10-7E-2 (2003). And it created the statewide PELRB. NMSA 1978, § 10-7E-8(A) (2003). The PELRB "has the power to enforce provisions of the [PEBA.]" NMSA 1978, § 10-7E-9(A), (F) (2003).

The PEBA includes a grandfather clause for public employers who, like the City, had adopted their own collective bargaining systems before the PEBA was enacted. NMSA 1978, § 10-7E-26(A) (2003); *Montoya*, 2012-NMSC-007, ¶ 9. This grandfather clause allows a public employer to "continue to operate under [its own] provisions and procedures" where two conditions are met. Section 10-7E-26(A). The first condition is that the public employer must have "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." *Id.*; *see Montoya*, 2012-NMSC-007, ¶ 10. The second condition is that this system must have been adopted before October 1, 1991. Section 10-7E-26(A); *see Montoya*, 2012-NMSC-007, ¶ 10. Additionally, if a grandfathered public employer's pre-existing ordinance, resolution, or charter amendment "substantial[ly] change[s] after January 1, 2003[,]" the grandfathered public employer must comply with additional provisions enumerated in Section 10-7E-26(B) of the PEBA. Section 10-7E-26(A). Thus, as long as a public employer's system of provisions and procedures meets the two conditions for grandfather status and the written policy adopting that system has not substantially changed after January 1, 2003, the employer does not have to comply with any other provisions of the PEBA. *Id.*; *see Montoya*, 2012-NMSC-007, ¶¶ 9, 11 (stating that Section 10-7E-26(A) is a "grandfather clause" that "remove[s] from the statute's reach a class that would otherwise be encompassed by its language" (internal quotation marks and citation omitted)); *see also City of Deming v. Deming Firefighters Local 4521*, 2007-NMCA-069, ¶ 6, 141 N.M. 686, 160 P.3d 595 (recognizing that if the grandfather clause applies, "the PEBA does not apply").

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, § 10-7E-4(F) (2003) (internal quotation marks and citation omitted). The PEBA does not require grandfathered public employers, whose collective bargaining systems have not substantially changed after January 1, 2003, to have local boards that are actively adjudicating employee grievances.

IV. Analysis

AFSCME does not dispute that the City's LMRO is entitled to grandfather status under the PEBA and that the LMRO has not substantially changed since January 1, 2003. Instead, AFSCME points to the PEBA's language that allows grandfathered public employers to "continue to operate" under their pre-existing systems. *See* § 10-7E-26(A). It submits that this language implies that the PELRB could hear complaints involving grandfathered public employers if the local boards created under those systems were not in fact "operating" or "functioning" to hear complaints. We disagree.

The PELRB was created by the PEBA and its authority is limited to those matters that the PEBA has delegated to it "either expressly or by necessary implication." *Jones*, 2014-NMCA-082, ¶ 9 (internal quotation marks and citation omitted); *see Pub. Serv. Co. of N.M.*, 1976-NMCA-039, ¶ 7; *see also* § 10-7E-8(A) (creating the PELRB). The PEBA does not expressly delegate any authority to the PELRB to hear complaints involving grandfathered public employers. But, by implication, the PELRB has the power to determine in the first place whether a public employer or aspects of its labor relations system meet the conditions for grandfather status. *See Deming Firefighters Local 4521*, 2007-NMCA-069, ¶ 14 ("[T]he PELRB has the initial ability to determine its jurisdiction[.]").

Once the determination is made that a public employer and its labor relations system has grandfather status and that its collective bargaining system has not substantially changed after January 1, 2003, no other provision of the PEBA applies to that employer. *Id.* ¶ 6 (explaining that if the grandfather clause applies, "the PEBA does not apply"). And, if the public employer is not subject to the terms of the PEBA, then the PELRB has no jurisdiction to hear its complaints because the PELRB can only enforce the PEBA— it cannot enforce the LMRO. *See* § 10-7E-9(F) (noting that the PELRB "has the power to enforce provisions of the [PEBA]"); *Regents of Univ. of N.M. v. N.M. Fed'n of Teachers*, 1998-NMSC-020, ¶ 4, 125 N.M. 401, 962 P.2d 1236 (recognizing that the "PEBA created the PELRB, whose function is the administration of [the] PEBA"); *Deming Firefighters Local 4521*, 2007-NMCA-069, ¶ 6 ("[B]ecause the PEBA does not apply, the [PELRB] does not have jurisdiction.").

We therefore agree with the district court's conclusion that the PELRB did not have jurisdiction to hear AFSCME's complaints and that it did not act "in accordance with law" when it remanded the complaints to the LMRB. *See Regents*, 1998-NMSC-020, ¶ 16 (recognizing that a court may reverse the PELRB's actions where those actions are "arbitrary, capricious[,] or an abuse of discretion; . . . not supported by substantial evidence on the record taken as a whole; or . . . otherwise not in accordance with

law"). Complaints cannot be "remanded" to a tribunal if they did not originate there. *See Black's Law Dictionary* 1102 (abridged 9th ed. 2010) (defining "remand" as meaning "[t]o send (a case or claim) back to the court or tribunal from which it came for some further action"); *see also Mid-Ohio Liquid Fertilizers, Inc. v. Lowe*, 469 N.E.2d 1019, 1021 (Ohio Ct. App. 1984) ("To remand is to *send back.* Further, the term implies that what is being sent back is returned *from where it came.* 'Remand' is subject to no other construction."); *Los Alamos Cnty. v. Beery*, 1984-NMSC-050, ¶ 3, 101 N.M. 157, 679 P.2d 825 (stating that an "order of remand simply returns the jurisdiction of the cause to the lower court in which it originated"). And the PEBA does not grant the PELRB the authority, either expressly or by necessary implication, to transfer complaints against a public employer to other tribunals. *See* §10-7E-9 ("Board; powers and duties.").

We note that this decision is limited to the narrow issue of jurisdiction under the PEBA. AFSCME has not challenged whether the City's LMRO continued to be entitled to grandfather status because the LMRB was not "operating" for over eighteen months. It also did not raise any arguments involving due process, equity, or other legal principles. Thus, we do not address these issues. *See State v. Bell*, 2014-NMCA-___, ¶ 19, ___ P.3d ___ (No. 31,890, Sept. 9, 2014) ("We do not address issues or questions unraised by litigants."). AFSCME has not asked this Court to review the decision of the PELRB under a legal principle that might allow us to employ the right-for-any-reason doctrine. Under the circumstances, we will not consider any other legal principle under the theory that the PELRB decision was right for any reason. *See Meiboom v. Watson*, 2000-NMSC-004, ¶ 20,128 N.M. 536, 994 P.2d 1154 (stating that appellate courts, will not assume the role of the fact finder and delve into fact-dependent inquiries for purposes of a "right for any reason" analysis).

V. AFSCME's Lack of Any Remedy Argument

We disagree with AFSCME's final argument that the district court's decision will result in "an impossible legal vacuum" and create a "right without a remedy." NMSA 1978, Section 44-2-4 (1984) provides an example of at least one action that a union may take when a local board is not functioning: When "any inferior tribunal, corporation, *board*[,] or person" fails to perform its duties, the affected parties may apply to the district court for a writ of mandamus to compel that public body to act. *Id.* (emphasis added) (providing that the "[p]urpose" of a mandamus writ is "to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station" and that it "may require an inferior tribunal to . . . proceed to the discharge of any of its functions"). AFSCME does not discuss or argue the availability of this or any other potential remedy.

CONCLUSION

The order entered by the district court is affirmed.

IT IS SO ORDERED.

TIMOTHY L. GARCIA, Judge

WE CONCUR:

CYNTHIA A. FRY, Judge

MICHAEL E. VIGIL, Judge

Certiorari Denied, February 4, 2015, No. 35,065

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-024

Filing Date: December 3, 2014

Docket No. 32,929

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

RICHARD SCHAUBLIN,

Defendant-Appellant.

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Trace L. Rabern
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for Appellant

OPINION

SUTIN, Judge.

A jury found Defendant Richard Schaublin guilty of one count of child solicitation by electronic communication device (and appearing for a meeting with) a child between thirteen and sixteen years of age, contrary to NMSA 1978, Section 30-37-3.2(A), (C)(1) (2007). The district court entered a judgment and sentence consistent with the jury's verdict, from which Defendant now appeals. On appeal, Defendant primarily argues that he was unlawfully entrapped by a police sting operation in which an adult police officer posed as a fifteen-year-old female child on an adults-only section of the website "Craigslist[.]" He also raises a jury instruction issue and a challenge to the constitutionality of Section 30-37-3.2 on First Amendment grounds.

We hold that Defendant was not unlawfully entrapped, either as a matter of law or as a matter of fact. We do not consider Defendant's unpreserved jury instruction argument, and because Section 30-37-3.2 was held constitutional on First Amendment grounds in an Opinion issued by this Court in 2011, we do not reconsider the issue here. We affirm.

BACKGROUND

Phil Caroland, an agent of the Curry County Sheriff's Office, posted an ad on the Craigslist website under the "women seeking men" section that was titled "New in town/looking—w4m (Clovis)" and that read, "Young/cute if age doesn't matter hit me up!!!" Defendant replied to the post stating,

"Hey newbie, were[1] in the same boat. Wanna hang out?" Agent Caroland responded as "Myrna Gonzales" (Myrna) and stated, "sure asl[2]? description? im 15 f moved here from florida, very short and skinny[.]" Defendant responded by stating, "I see. What exactley are you looking for? Not sure that we could be anymore than text buddies because of your age." When Myrna responded, "thats cool . . . i like textin new ppl . . . thats how we did it in florida[,]" and after a brief e-mail discussion in which Myrna revealed that she had recently moved to New Mexico with her parents who were in the Air Force, Defendant asked for Myrna's phone number so that they could exchange text messages.

Defendant initiated a text-message conversation with Myrna later that afternoon. In the interim, "Myrna" had gone to lunch with her "mom," and Defendant asked Myrna, "what does mom think of your search for a man?" When Myrna said that her mom didn't know "or she would kill me[,]" Defendant responded "Oooh! Your being a bad little girl? Did you get many [responses]?" As their conversation continued, Myrna and Defendant both made repeated references to her age, with Myrna also making references to her parents, and with Defendant asking Myrna why she was not in school (with Myrna responding that her mom had given her "a day or to to chill").

Within their first day of texting, Defendant began including sexual innuendo in his communication with Myrna, asking her "Does your 'fun' involve things 15 yr old girls shouldn't be doing yet?"; telling her, "I can hear your dirty little mind working!"; and, asking, albeit not in response to "thoughts" shared by Myrna, "What are you going to do with all of those dirty little thoughts?" The next morning, Defendant initiated a conversation with Myrna asking, "Sleep in bad girl?" and whether she had "[s]weet dreams or did dirty thoughts keep you up?" Myrna responded that she had slept "well[.]"

In their second day of communication, in response to Defendant's request for a photograph from Myrna, Agent Caroland sent two "age regressed" photographs of an adult deputy intended to appear to be photos of a fifteen-year-old girl. Having received the photographs, Defendant sent Myrna a text stating, "WOW! Its a good think your not 21. You look older in [one of the photos,]" to which Myrna responded, "I tried too & thank u[.]" Shortly thereafter, Defendant told Myrna, "You are very pretty! Now i feel like a dirty old man!" Defendant then asked for Myrna to call him on the telephone. In response to this request, an adult, female deputy had a "short conversation" (as characterized by Defendant) with Defendant over the phone. Defendant followed the phone conversation with a text to Myrna stating, "Ok this is going to sound bad but you have THE sexiest voice! . . . Makes me want to throw my morals out the window!"

On the third day of their interaction, Defendant initiated a text communication with Myrna, in which Defendant initiated a discussion containing sexual innuendo, and Defendant eventually sent sexually explicit communications detailing what he "would" do to/with Myrna. On the fourth day of their interaction, Defendant initiated a text communication with Myrna with the greeting, "Goodmorning Lover!" and later that day he

[1]Quoted material from Craigslist postings, emails, and text messages are verbatim throughout this Opinion, with the exception of punctuation as noted.

[2]"Asl" is an acronym for "age, sex, location."

introduced the topic of meeting Myrna in person. Defendant and Myrna arranged to meet at Myrna's house when her parents were out. Defendant was arrested when he arrived at the address that Myrna had given him.

Prior to trial, Defendant moved for dismissal of the charge against him on the basis of illegal entrapment. As will be discussed in greater detail in the body of this Opinion, the district court denied the motion, in part, but allowed Defendant to present his entrapment defense to the jury. The jury rejected Defendant's entrapment defense, and as noted earlier, found him guilty of one count of child solicitation by electronic communication device.

On appeal, Defendant re-asserts his entrapment arguments, claiming that the district court erred in denying his motion to dismiss on the ground that he was subjectively entrapped as a matter of law, and also arguing that the State failed to provide sufficient evidence to support the jury's rejection of his entrapment defense as a matter of law. We disagree with both of Defendant's arguments. Defendant's additional arguments, concerning jury instructions and the constitutionality of Section 30-37-3.2 do not warrant this Court's consideration.

DISCUSSION

Overview of Entrapment Law

New Mexico recognizes two major approaches to the defense of entrapment, the subjective approach and the objective approach. *See State v. Vallejos*, 1997-NMSC-040, ¶¶ 5-6, 123 N.M. 739, 945 P.2d 957 (noting that New Mexico recognizes both subjective and objective entrapment); 2 Wayne R. LaFave et al., Criminal Procedure §§ 5.2, 5.2(a) (3d ed. 2007) (stating that the subjective and objective approaches are the two major approaches to the defense of entrapment). Both are at issue here.

"Subjective entrapment occurs when the criminal design originates with the [police], and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order" to generate a prosecution. *Vallejos*, 1997-NMSC-040, ¶ 5 (internal quotation marks and citation omitted). In the subjective approach, the focus is on the defendant's intent or predisposition to commit the crime, with the prosecution bearing the burden of proving to the fact-finder that the defendant was predisposed to commit the crime. *See id.*; *State v. Fiechter*, 1976-NMSC-006, ¶¶ 10 n.6, 11, 89 N.M. 74, 547 P.2d 557 (recognizing that it is the prosecution's burden to demonstrate, as a matter of fact to be resolved by the jury, "that the defendant was already willing to commit the crime"). Where the prosecution proves that the defendant was predisposed to commit the crime and the police merely provided an opportunity for him to do so, the subjective entrapment defense must fail. *Vallejos*, 1997-NMSC-040, ¶ 5.

Under rare circumstances, the issue of subjective entrapment may be resolved as a matter of law, in which instance, the fact-finder would not consider the defendant's predisposition. *See Fiechter*, 1976-NMSC-006, ¶ 11 ("[I]t is rare indeed when [subjective] entrapment may correctly be held to exist as a matter of law. And if entrapment in law is not present, then the jury must decide whether the defendant was predisposed to commit the crime."); *see, e.g.*, *Sherman v. United States*, 356 U.S. 369, 373 (1958) (holding, pursuant to the subjective approach, that the defendant was entrapped as a matter

of law); *Sorrells v. United States*, 287 U.S. 435, 441, 448-49 (1932) (same); *see* LaFave, *supra*, § 5.2(a) (recognizing that the subjective approach is also called the *Sherman-Sorrells* doctrine because it was adopted by a majority of the Supreme Court in those cases).

"The objective approach focuses upon the inducements used by the" police. LaFave, *supra*, § 5.2(b). A defendant may succeed in his objective entrapment defense in one of two ways, a "factual inquiry" or a "normative inquiry." *Vallejos*, 1997-NMSC-040, ¶¶ 11, 14-15. In a factual inquiry, a jury must consider whether "as a matter of fact . . . police conduct created a substantial risk that [a hypothetical] ordinary person not predisposed to commit a particular crime would have been caused to commit that crime[.]" *Id.* ¶¶ 11-12. A defendant's predisposition "plays no role whatsoever" in the factual inquiry; and the prosecution bears the burden of proving that the police did not "exceed[] the bounds of permissible law enforcement conduct." *Id.* ¶ 13; UJI 14-5161 NMRA.

In a normative inquiry, the district court may rule "as a matter of law [and policy] that police conduct exceeded the standards of proper investigation[.]" *Vallejos*, 1997-NMSC-040, ¶¶ 11, 15-16. In conducting a normative inquiry, the district court considers "whether police tactics offend our notions of fundamental fairness, or are so outrageous" that they offend principles of due process, or violate "principles of fair and honorable administration of justice[.]" *Id.* ¶¶ 16-17 (internal quotation marks and citation omitted). A defendant's predisposition may, but does not necessarily, factor into a court's normative inquiry. *See id.* ¶ 15 (stating, for example, that where police persuade a recovering drug addict to use illegal drugs, the defendant's predisposition toward drug abuse may factor into the normative inquiry because, in that circumstance, the police conduct may exceed the standards of proper investigation, notwithstanding the notion that an "ordinary person" would not be susceptible to such persuasion).

The District Court's Entrapment Ruling

The district court considered whether Defendant was entrapped pursuant to any of the foregoing standards. Through his pleadings and argument, Defendant persuaded the district court that the issue of subjective entrapment and factual-inquiry objective entrapment should be presented to and resolved by the jury. In regard to normative-inquiry objective entrapment, the district court found that the police, posing as a female, Myrna, created a profile online through which Defendant contacted Myrna who told Defendant that she was fifteen years old. Defendant and Myrna "engaged in email, text[,] and telephone conversations[,]" some of which communications "were sexual in nature." "Ultimately, . . . Defendant arrived at a residence to meet [Myrna] in person[,]" and he was arrested. The district court concluded that "the police conduct followed a well[-]established manner of investigation into these types of crimes" and "neither the methods [n]or purposes of police conduct offend . . . notions of fundamental fairness." Accordingly, the district court ruled that, pursuant to a normative inquiry, objective entrapment did not occur.

Defendant's Entrapment Argument

Defendant does not challenge the district court's ruling regarding objective entrapment, nor does he challenge the sufficiency of the State's evidence to prove

that the police "did not exceed the bounds of permissible law enforcement conduct" required to support the jury's rejection of his objective entrapment defense. *See* UJI 14-5161. Instead, Defendant's entrapment argument focuses on the "predisposition" element of subjective entrapment. In that regard, Defendant argues that, pursuant to *Sherman* and *Sorrells*, he was entrapped as a matter of law and that the State failed to present sufficient evidence that he was predisposed to sexually converse with or meet a fifteen-year-old.

Standard of Review

To the extent that Defendant challenges the district court's denial of his motion to dismiss on the basis of subjective entrapment pursuant to *Sherman* and *Sorrells* as an issue distinct from whether sufficient evidence supported the jury's rejection of his subjective entrapment defense, we consider the single issue on appeal to be whether the jury's verdict was supported by sufficient evidence. *See State v. Myers*, 2009-NMSC-016, ¶ 14, 146 N.M. 128, 207 P.3d 1105 ("[W]hen a case proceeds to trial, error resulting from an improperly denied pretrial motion is not reversible for the result becomes merged in the subsequent trial." (internal quotation marks and citation omitted)). In reviewing Defendant's argument regarding the sufficiency of the State's predisposition evidence, we view the evidence in the light most favorable to the guilty verdict to determine whether it was supported by substantial evidence. *State v. Nichols*, 2014-NMCA-040, ¶ 15, 321 P.3d 937, *cert. granted*, 2014-NMCERT-003, 324 P.3d 376. In so doing, we do not re-weigh the facts, substitute our judgment for that of the jury, or search for inferences supporting a contrary verdict. *State v. Slade*, 2014-NMCA-088, ¶ 13, 331 P.3d 930, *cert. granted*, 2014-NMCERT-008, 334 P.3d 425.

***Sherman* and *Sorrells* Are Not Supportive of Defendant's Argument**

Defendant relies on the statement in *Sherman* that "[e]ntrapment occurs only when the criminal conduct was 'the product of the creative activity' of law[]enforcement officials" for the proposition that, but for the creative activity of the police in this case, he would not have solicited a sexual relationship with a child. 356 U.S. at 372 (quoting *Sorrells*, 287 U.S. at 451). The particular creative police activity by which Defendant claims to have been induced was the officer's use of an adult-only Craigslist board to post Myrna's ad, the officer's act of directing Myrna's interaction with Defendant "toward the sexual," and the officer's act of using an adult woman's photograph and voice to accompany the "Myrna" persona. Defendant argues that the foregoing police conduct "was designed to plant a seed" in Defendant's mind that would "germinate into a plan" that, once carried out, would create an opportunity to prosecute a crime. *Cf. Sherman*, 356 U.S. at 372 (recognizing that entrapment may be indicated where "the criminal design originates with the [police], and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute" (internal quotation marks and citation omitted)).

In both *Sherman* and *Sorrells*, the United States Supreme Court recognized that police may detect criminals by means of a ruse. *See Sherman*, 356 U.S. at 372 (recognizing that "[c]riminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer");

Sorrells, 287 U.S. at 441 ("Artifice and stratagem may be employed to catch those engaged in criminal enterprises."). It is only where, acting under the cover of such ruse, the police (or government agent) persuades an otherwise law abiding citizen to engage in criminal activity through repeated and consistent appeals, that the line is crossed between setting a "trap for the unwary criminal" and impermissible entrapment of the "unwary innocent." *Sherman*, 356 U.S. at 372-74 (holding that the defendant was unlawfully entrapped by a government agent who sought to persuade the defendant to obtain narcotics by making repeated requests, first to overcome the defendant's refusal, then his evasiveness, and then his hesitancy before finally achieving capitulation); *see Sorrells*, 287 U.S. at 441 (holding that the government agent lured the defendant, otherwise not predisposed, to engage in criminal activity by "repeated and persistent solicitation in which he succeeded by taking advantage of the [defendant's] sentiment"); *see also United States v. Vasco*, 564 F.3d 12, 18 (1st Cir. 2009) (recognizing that government overreach may be demonstrated by "such conduct as intimidation, threats, dogged insistence, excessive pressure[,] or exploitation of a noncriminal motive").

Defendant's reliance on *Sherman* and *Sorrells* is unpersuasive under the circumstances of this case. Notwithstanding the fact that Myrna's ad was posted in the adults-only section of Craigslist[3], Myrna informed Defendant immediately, in her response to Defendant's initial response to her ad, that she was fifteen years old. The record of Defendant's ensuing e-mail and text exchange with Myrna is void of any indication that police attempted to persuade Defendant, through even a single request, to continue communicating with Myrna. Further, Defendant's contention that it was Myrna, instead of Defendant, who inserted sexuality into their communications is contradicted by the record, which reflects that the subject of sexuality was first broached by Defendant in the following text exchange.

> Defendant: What you be doing right now if you could?
>
> Myrna: Not sure something fun & not have to worry bout.
>
> Defendant: There you go with that fun thing again. Does your 'fun' involve things 15 yr old girls shouldn't be doing yet?
>
> Myrna: Hmmmmm I'm shy lol
>
> Defendant: What does that mean?
>
> . . . .
>
> Defendant: I've got a pretty good idea just by where you posted[.]
>
> Myrna: Hehehe is that bad?
>
> Defendant: I found you didn't i? Guess were both bad!

[3]Defendant does not appeal the district court's conclusion that the "well-established" police investigation technique of posting "Myrna's" ad to the adults-only section of Craigslist was within the bounds of fundamental fairness, thereby effectively conceding the correctness of the district court's ruling. *See* Rule 12-213(A)(4) NMRA (stating that a finding that the appellant does not attack in his brief in chief "shall be deemed conclusive").

Myrna: Hehehe guess so . . . . Now wat?

Defendant: I can hear your dirty little mind working!

See United States v. Brand, 467 F.3d 179, 195 (2d Cir. 2006) (holding that the jury could have interpreted the defendant's "use of sexual innuendo [in his online communications with an undercover agent posing as a thirteen-year-old child] as 'oblique requests' of enticement to engage in sexual activity"). Also contrary to Defendant's representation, the foregoing exchange occurred before police sent any photographs to Defendant and before Myrna phoned Defendant. Later text messages, including those that were exchanged after Defendant received the photographs and telephone call, contained increasingly graphic sexual language that was consistently introduced by Defendant, but none reflect any repeated or persistent attempt by police to persuade Defendant to communicate with Myrna, sexually or otherwise.

In sum, from the foregoing, the jury could reasonably have concluded that Defendant engaged with Myrna willingly and without having been persuaded to do so by any manner of persistent or insistent cajoling by the police. Accordingly, the circumstances here do not bear reasonable comparison to the circumstances of *Sherman* and *Sorrells*, nor do we read *Sherman* or *Sorrells* to support reversal of the jury's verdict in this case.

Evidence of Defendant's Predisposition Was Sufficient

Defendant's overarching argument regarding his predisposition is that there was "no evidence to support the conclusion that, absent the insertion of the fake persona into his life, [he] would ever [have] exchanged sexual texts with a juvenile." He argues that had he been presented with an "ordinary opportunity" to respond to an ad that was "clearly . . . for a fifteen-year-old" there was no evidence that he would have done so. And he contends that he was, in fact, responding to the "improper lure" or "special inducement" by the police that commenced with the adults-only section of the Craigslist posting and was followed by photos and telephone communication with an adult woman, all of which led him to be "suspicious that [Myrna] was an adult role-playing a minor."

Where the police offer an "ordinary opportunity" to commit a crime, that is, an opportunity that is free of police inducement and overreach and the defendant avails himself of the opportunity, an entrapment defense will not succeed. *See Jacobson v. United States*, 503 U.S. 540, 550 (1992) ("Had the agents in this case simply offered petitioner the opportunity to order child pornography through the mails, and petitioner . . . had promptly availed himself of this criminal opportunity, it is unlikely that his entrapment defense would have warranted a jury instruction."); *United States v. Gendron*, 18 F.3d 955, 961-62 (1st Cir. 1994) (stating that an "ordinary opportunity" is one that is not characterized by police inducement and overreaching). Examples of improper inducement or overreaching include: (1) the use of "intimidation and threats against a defendant's family," (2) calling every day and threatening and acting belligerent toward the defendant, (3) engaging "in forceful solicitation and dogged insistence until [the defendant] capitulated," (4) playing upon the defendant's sympathy or sentiment, (5) using "repeated suggestions which succeeded only when [the] defendant had lost his job and needed money for his family's food and rent,"

and (6) an agent presenting herself as "suicidal and in desperate need of money[.]" *Id.* (internal quotation marks and citations omitted).

In this case, the police presented an opportunity, via Myrna's Craigslist posting and her immediate representation of herself as a fifteen-year-old child, for Defendant to commit a crime. This did not constitute an improper overreach by the police. *See Gendron*, 18 F.3d at 961 ("It is proper (i.e., not an 'inducement') for the government to use a 'sting,' at least where it amounts to providing a defendant with an 'opportunity' to commit a crime."); *see also State v. Sorto-Enamorado*, 544 Fed. Appx. 298, 300 (5th Cir. 2013) (holding that the defendant was not entitled to an entrapment defense where he "pushed for a 'hook up' " with an undercover police officer who responded to the defendant's Craigslist ad and told him that she was only fifteen years old). Defendant availed himself of the opportunity presented by the police when he continued to communicate with Myrna even after having learned her age and when he introduced sexuality into the communications. The police only continued the ruse of presenting Myrna as a fifteen year old that was seeking a relationship. The record does not reflect that the police used any improper overreaching or inducement in order to persuade Defendant to engage in these activities.

Further, although Defendant argues that, based on the police's use of an adult to portray Myrna in photos and over the telephone, he believed that Myrna was an adult playing the role of a child, the jury was not persuaded by this representation, and we will not second guess its determination. *See Sorto-Enamorado*, 544 Fed. Appx. at 300 (holding that it was irrelevant to the question of the defendant's predisposition that a photograph purportedly of a fifteen-year-old child "could be thought to be an older girl" because the photo was accompanied by an age disclosure); *see also Slade*, 2014-NMCA-088, ¶ 13 (stating that we will not substitute our judgment for that of the jury). Nor are we persuaded that Defendant's testimony in that regard was "uncontradicted." To the contrary, viewing the evidence in the light most favorable to the State, the record reflects that Defendant believed that Myrna was a fifteen-year-old child, even after he saw her photo and heard her voice. For example, having seen the photo, Defendant sent an e-mail to Myrna stating, in part:

> So, as you know, I answered the [Craigslist] ad. Much to my surprise, you reply and tell me your 15! My first reaction was to slam my computer shut and throw it out the window like someone from 20/20 was filming my reaction to your age. Obviously I didn't do that because here we are now, 80 something texts and a phone call later. Now, tonight Im laying here in bed with the little angel on one shoulder and the little devil on the other. The funny thing is, the little devil is this VERY pretty, inisent looking girl . . . . She keeps telling me that these thoughts Im having are ok and thats what she wants but is too shy to say it. So now Im in this pickle and know what I should do but would REALLY, REALLY, REALLY like to do what I shouldnt!!!!!

Later on the same day that Defendant sent the foregoing e-mail, he initiated and carried out a sexually explicit text conversation with Myrna, but only after inquiring whether she

had ever experienced sex, because he "[d]idnt want to offend [her] with [his] dirty thoughts." From the foregoing, the jury could reasonably have concluded that Defendant believed that Myrna was actually a fifteen-year-old child, thereby rejecting his claim to the contrary. *See State v. Dominguez*, 2014-NMCA-064, ¶ 28, 327 P.3d 1092 (noting that "[c]ontrary evidence supporting acquittal does not provide a basis for reversal because the jury is free to reject the defendant's version of the facts" (alteration, internal quotation marks and citation omitted)), *cert. denied*, 2014-NMCERT-005, 326 P.3d 111.

In sum, Defendant's willingness to engage in sexually explicit conversations with Myrna, which was not the product of police overreach or improper inducement, was sufficient evidence of his predisposition to commit the crime of child solicitation by electronic device to support the jury's rejection of his subjective entrapment defense. Defendant's argument provides no basis for reversal.

Defendant's Remaining Arguments

Defendant argues that an instruction given to the jury in this case providing that: "[i]t is not a defense to the crime of [c]hild [s]olicitation by [e]lectronic [c]ommunication [d]evice that the intended victim of . . . [D]efendant was a peace officer posing as a child under sixteen[,]" was improper for a number of reasons. Defendant did not object to the instruction in the district court, nor, regarding that instruction or the statutory language from which it derived, did he make the arguments below that he now makes on appeal. Because Defendant's arguments in this regard were not preserved in the district court, we decline to consider them. *See* Rule 12-213(A)(4) (requiring the appellant to include a statement explaining how the issue was preserved below, including citations to the record demonstrating preservation); *State v. Lucero*, 1999-NMCA-102, ¶ 45, 127 N.M. 672, 986 P.2d 468 (declining to address an argument where the appellant failed to comply with the preservation requirement of Rule 12-213).

Finally, we do not consider Defendant's argument that Section 30-37-3.2 is unconstitutional because it criminalizes speech that is protected under the First Amendment to the United States Constitution. In contravention of Rule 12-213(A)(4), Defendant fails to demonstrate whether and, if so, how he preserved his constitutional argument in the district court. More importantly, this issue was resolved in *State v. Ebert*, a case that Defendant has failed to recognize in his briefing, and we will not reconsider it. *See* 2011-NMCA-098, ¶¶ 1, 7-14, 150 N.M. 576, 263 P.3d 918 (rejecting a challenge to Section 30-37-3.2 on the grounds of First Amendment overbreadth, among other constitutional arguments); *see also* Rule 12-213(A)(4) (requiring an appellant, in his brief in chief, to cite applicable New Mexico decisions).

CONCLUSION

We affirm the district court's judgment and sentence.

IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:

TIMOTHY L. GARCIA, Judge

M. MONICA ZAMORA, Judge

Certiorari Denied, February 12, 2015, No. 35,076

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-025

Filing Date: December 11, 2014

Docket No. 33,288

IRENE BEGAY,

Worker-Appellant,

v.

CONSUMER DIRECT PERSONAL CARE, and AMERICAN CASUALTY CO.,

Employer/Insurer-Appellee.

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Camp & Elmore, LLC
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Albuquerque, NM

for Appellees

OPINION

ZAMORA, Judge

Irene Begay (Worker) filed for workers' compensation benefits alleging that she was injured while working for Consumer Direct Personal Care (Employer). The workers' compensation judge (WCJ) found that Worker's injury was not sustained during the course and scope of her employment, and did not arise out of her employment, and denied her claim. We affirm.

BACKGROUND

Worker was employed as a personal care attendant for her son, a mentally disabled adult. In 2011, when Worker was injured, she was an employee under the Personal Care Option (PCO) as provided by 8.315.4 NMAC (7/1/2004, as amended through 12/30/2010) (repealed, 2/28/2014).[1] This option, generally paid for through Medicaid, allowed relatives already providing services to Medicaid consumers to receive compensation for some of their work, while also allowing consumers to have someone familiar with them to address their needs. 8.315.4.10 NMAC (12/30/2010).

Worker was injured on Monday, April 4, 2011. That day she left the house with her family and son around 1:00 p.m. to run errands in Gallup, New Mexico, which is approximately a one-hour drive from her home in Standing Rock, New Mexico. In Gallup, Worker purchased art supplies for her

[1]Many of the provisions of the Personal Care Option (PCO) have been replaced by Personal Care Services (PCS) which are found in 8.308.12 (NMAC) (1/01/2014).

son, took him to lunch, and then dropped him off at a movie. While her son was at the movie, Worker went to a laundromat to wash several of her son's blankets in a commercial sized washing machine. Worker also did some laundry for her mother-in-law. After finishing the laundry, Worker picked her son up from the movies. While driving home at approximately 7:00 p.m., Worker was abruptly attacked by her son, resulting in an injury to her arm.

Worker filed for workers' compensation benefits. After a trial on the merits of Worker's claim, the WCJ found that on the day of her injury, Worker's timesheet verified that she had worked her scheduled hours, from 7:00 a.m. to 2:30 p.m.; Worker knew her errands would take more time than her work schedule permitted; and, pursuant to 8.315.4.9(C) NMAC (12/30/2010), Worker was free to perform services for her son, including laundry, after her scheduled work hours, acting as a mother or a "natural support" rather than an employee.

The WCJ concluded that while doing laundry may have been a service Worker performed as an employee, on the day of her injury, Worker did not perform this task within her scheduled employment hours. The WCJ further concluded that Worker's afternoon activities—taking her son to the movies, going to lunch, doing laundry for her son and her mother-in-law—were not "specific" to her son or to "benefit" her Employer, but instead were part of a "family" outing that was not part of her employment. The WCJ decided that Worker's injury was not sustained in the course or scope of her employment, and did not arise out of her employment. Worker's complaint was dismissed and this appeal followed.

DISCUSSION

Standard of Review

We review factual findings of WCJs under a whole record standard of review. *Moya v. City of Albuquerque*, 2008-NMSC-004, ¶ 6, 143 N.M. 258, 175 P.3d 926. We give deference to the fact finder where findings are supported by substantial evidence. *Dewitt v. Rent-A-Ctr., Inc.*, 2009-NMSC-032, ¶ 12, 146 N.M. 453, 212 P.3d 341. "Substantial evidence on the record as a whole is evidence demonstrating the reasonableness of an agency's decision[.]" *Id.* We will not "reweigh the evidence [or] replace the fact finder's conclusions with our own." *Id.*

To the extent that this analysis involves interpretation of 8.315.4 NMAC (12/30/2010), our review is de novo. *See Quynh Truong v. Allstate Ins. Co.*, 2010-NMSC-009, ¶ 24, 147 N.M. 583, 227 P.3d 73 ("[I]nterpretation of an administrative regulation is a question of law that we review de novo." (internal quotation marks and citation omitted)).

Worker's Employment Under the Human Services Department Regulations

At the time Worker was injured, her employment was defined and regulated by the Human Services Department's (HSD) administrative regulations. *See* 8.315.4.1 NMAC (12/30/2010). Pursuant to these regulations, Medicaid consumers who required assistance with activities of daily living would qualify to receive PCO services. 8.315.4.9 NMAC (12/30/2010). Managed Care Organizations (MCOs) worked with PCO service providers, such as Employer, to coordinate services for eligible Medicaid consumers. *Id.* MCOs assessed consumers'

individual needs to determine the amount and type of PCO services that would be approved for payment through Medicaid. *Id.*

PCO services were meant to supplement services that consumers already received from "natural supports." 8.315.4.15 NMAC (12/30/2010). In other words, Medicaid would pay for services that a consumer needed and was not already receiving from friends, family, and other members of the consumer's community on a consistent basis. *Id.* PCO consumers could hire a personal care attendant who is a member of their household, however, Medicaid did not cover twenty-four hour a day care or services that the personal care attendant routinely provided as part of the household division of chores, unless those services were specific to the consumer. *Id.*

Based on the MCO's assessment of the consumer's needs and the natural supports in place, the PCO service provider and the consumer developed an Individual Plan of Care (IPoC). 8.315.4.20 NMAC (12/30/2010). The consumer's IPoC outlined the services approved for payment through Medicaid as well as the personal care attendant's work schedule. *Id.* Unless otherwise specified, approved PCO services should have been provided in the consumer's residence, and were to be provided during the hours specified in the IPoC. 8.315.4.15(A) NMAC (12/30/2010).

The IPoC developed for Worker's son authorized forty-five hours of services per week. The plan provided for daily assistance with meal preparation, eating, cognitive tasks, hygiene, grooming, bathing, and mobility. Three days a week, Worker's son could receive one hour of "household services" which included house cleaning, washing dishes and laundry, as well as one hour of "support services," which included assistance with shopping, errands, and transportation. Worker's scheduled hours were: Mondays, Tuesdays, and Wednesdays from 7:00 a.m. to 2:30 p.m.; Thursdays from 7:00 a.m. to 1:00 p.m.; and Saturdays and Sundays from 7:00 a.m. to 12:30 p.m. Because Worker cared for her son continuously, the IPoC's specified tasks and schedule are what distinguished the services that she provided on the clock as an employee and those she provided off the clock as a mother and natural caregiver.

The Workers' Compensation Act

Under the Workers' Compensation Act (WCA), an injured worker is entitled to workers' compensation benefits if "at the time of the accident, the employee is performing service arising out of and in the course of his employment[.]" NMSA 1978, § 52-1-9(B) (1973). "Arising out of and in the course of employment are two distinct requirements." *Schultz ex rel. Schultz v. Pojoaque Tribal Police Dep't*, 2014-NMCA-019, ¶ 8, 317 P.3d 866 (internal quotation marks and citation omitted). However, in order for a claimant to be entitled to compensation, both of the requirements for "arising out of" and "in the course of . . . employment" must be met. *Garcia v. Homestake Mining Co.*, 1992-NMCA-018, ¶ 6, 113 N.M. 508, 828 P.2d 420 (internal quotation marks and citation omitted).

In determining whether an injury arose out of the worker's employment, we look at the cause of the accident. *Id.* ¶ 7; *see Velkovitz v. Penasco Indep. Sch. Dist.*, 1981-NMSC-075, ¶ 2, 96 N.M. 577, 633 P.2d 685 ("For an injury to arise out of employment, the injury must have been caused by a risk to which the injured person was subjected in his employment."); *Flores v. McKay Oil Corp.*,

2008-NMCA-123, ¶ 10, 144 N.M. 782, 192 P.3d 777 ("The term 'arising out of' the employment denotes a risk reasonably incident to claimant's work." (citation omitted)). Injuries "arising out of" employment typically include those occurring during acts the worker was specifically instructed to perform by the employer and acts incidental to the worker's assigned duties. *Schultz*, 2014-NMCA-019, ¶ 8 (internal quotation marks and citation omitted).

The second requirement under the WCA is that the injury occurs "in the course of employment, relates to the time, place, and circumstances under which the accident takes place." *Velkovitz*, 1981-NMSC-075, ¶ 2. We consider whether the injury "takes place within the period of employment, at a place where the employee may reasonably be, and while the employee is reasonably fulfilling the duties of employment or doing something incidental to it." *Chavez v. ABF Freight Sys., Inc.*, 2001-NMCA-039, ¶ 11, 130 N.M. 524, 27 P.3d 1011 (internal quotation marks and citation omitted). "If the worker was not reasonably involved in fulfilling the duties of his employment at the time of his injury, he was not acting within the course of his employment." *Flores*, 2008-NMCA-123, ¶ 10.

Due to the unique nature of Worker's employment, including the fact that her employment duties overlapped significantly with the services she provided as a mother or natural support, most of the factors traditionally considered in the "arising out of employment" and "in the course of employment" analyses do not inform our analysis here. When Worker was providing services to her son, the tasks she performed, the places she may have reasonably been, and the risks incidental to her caregiving were much the same whether she was providing services as an employee or as a natural support. On the day she was injured, Worker provided services to her son that could have been provided in either of her two roles. As a result, Worker's schedule, as set forth in the IPoC, becomes the determinative factor as to whether the "arising out of employment" and "in the course of employment" requirements were met.

On the day of the accident, Worker was scheduled to work from 7:00 a.m. to 2:30 p.m. However, Worker stated that she was not bound by this schedule. According to Worker, she had difficulty accomplishing all of her employment tasks within her scheduled hours because her son woke up relatively late. She testified that when she reported this to her program coordinator, she was instructed to submit her timesheets, reflecting the hours approved in the IPoC, even if she actually performed her tasks outside of her scheduled hours. Worker contends that she believed she would be paid for seven-and-a-half hours a day, no matter when the actual work was done.

The WCJ considered and rejected this claim and concluded that Worker's injury did not "arise from" or occur "in the course of employment." "Because weighing evidence and making credibility determinations are uniquely within the province of the trier of fact, we will not reweigh the evidence nor substitute our judgment for that of the WCJ, unless substantial evidence does not support the findings." *Dewitt*, 2009-NMSC-032, ¶ 22.

Here, Worker's testimony about working outside her scheduled hours was directly contradicted by her program coordinator, who testified that Worker never informed her about problems with the schedule but that Worker had been advised to follow her schedule as set forth in the IPoC.

Worker also received documentation, including an Employee Handbook, which provided that she was to work only the hours approved in the IPoC and to track her actual hours worked. Moreover, we note if Worker was working outside her scheduled hours, she would have been in direct violation of 8.315.4.15(A) NMAC (12/30/2010) that requires that PCO services be within the hours specified in the IPoC. We conclude that the evidence is sufficient to support the WCJ's conclusion that Worker's injury did not "arise from" or occur "in the course of employment."

The Traveling Employee and Special Errand Exceptions Do Not Apply

Worker argues that because she began her trip to Gallup intending to perform work-related duties and while still on the clock, she was a traveling employee on a special errand for Employer. Worker's reliance on the traveling employee and special errand doctrines is misplaced.

Under the WCA, workers injured while traveling between home and work are generally not entitled to compensation. *See* NMSA 1978, § 52-1-19 (1987) (excluding from compensation "injuries to any worker occurring while on his way to assume the duties of his employment or after leaving such duties[ ]"). "In this respect, the [WCA] codifies what is commonly known in workers' compensation law as the 'going-and-coming rule.'" *Ramirez v. Dawson Prod. Partners, Inc.*, 2000-NMCA-011, ¶ 7, 128 N.M. 601, 995 P.2d 1043. "This rule arises from the recognition that, while admittedly the employment is the cause of the workman's journey between his home and [his job], it is generally taken for granted that workmen's compensation was not intended to protect him against all the perils of that journey." *Id.* (internal quotation marks and citation omitted).

We have acknowledged exceptions to the going-and-coming rule where workers' employment requires travel beyond a typical commute. *See Avila v. Pleasuretime Soda, Inc.*, 1977-NMCA-079, ¶ 16, 90 N.M. 707, 568 P.2d 233 ("The 'special errand' rule is an exception to the 'going[-]and[-]coming' rule."); *see also Ramirez*, 2000-NMCA-011, ¶ 11 (acknowledging that "[t]raveling employees . . . for whom travel is an integral part of their jobs, such as those who travel to different locations to perform their duties," are not subject to the "going-and-coming rule" (internal quotation marks and citation omitted)).

The traveling employee exception is inapplicable under the facts of this case. A traveling employee is defined as "[a]n employee who is taken away from home by his or her employment and who of necessity must eat and sleep away from home in order to further the employer's business [and who] may be considered to be in the continuous employment of the employer, day and night." *Id.* ¶ 11 (internal quotation marks and citation omitted). However, "[a] traveling employee is not simply one who must travel significant distances to and from his job[.]" *Id.* For traveling employees, "travel is an integral part of their jobs," such that they "travel to different locations to perform their duties," differentiating them from "employees who commute daily from home to a single workplace." *Id.* (internal quotation marks and citation omitted). Here, the IPoC provides that Worker may assist with transportation, however, Worker is not required to be away for days at a time as part of her employment. In fact, such work related travel would contradict both the IPoC, which allows for

occasional, incidental travel, and 8.315.4.15(A) NMAC (12/30/2010), which provides that unless otherwise specified, PCO services should be provided in the consumer's residence. Moreover, even where the traveling employee exception does apply, the employee "must still demonstrate that the injury arose out of and in the course of employment." *Ramirez*, 2000-NMCA-011, ¶ 14 (internal quotation marks and citation omitted). Worker has failed to make that showing in this case.

The special errand exception is inapplicable here. The special errand exception applies only where "the travel was required at the direction of the employer." *Avila*, 1977-NMCA-079, ¶ 16. In *Avila*, the employer required employee to make a bank deposit after business hours every day. *Id.* ¶¶ 2, 12-13. This Court held that the employee "was at work at the place where her employer's business required her to be. It was incident to the business." *Id.* ¶ 24. From the time the employee deviated from her normal route home to go to the bank until she returned to that route "beginning her trip home, [she] was acting in the scope and in the course of her employer's business." *Id.* In the present case, the IPoC outlining Worker's employment duties did not require Worker to travel in order to perform laundry services. Worker provided no evidence that her trip to Gallup was required by Employer or that it was incident to Employer's business as opposed to being incident to her natural care-taking role.

Finally, Worker argues that the HSD regulations requiring adherence to the IPoC are not binding in this case because Employer required her to go on special errands to complete laundry services, but failed to include this required errand in the IPoC. Because we find that Worker was not on a special errand when she was injured, this argument is moot and we need not address it here.

CONCLUSION

For the foregoing reasons we affirm.

IT IS SO ORDERED.

M. MONICA ZAMORA, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

J. MILES HANISEE, Judge

Certiorari Denied, March 2, 2015, No. 35,111

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-026

Filing Date: January 6, 2015

Docket No. 32,510

LEA COUNTY STATE BANK,

Plaintiff-Appellee,

v.

MARKUM RANCH PARTNERSHIP, a New Mexico General Partnership, BURRELL MARKUM and ELIZABETH

MARKUM, husband and wife, individually and as general partners to Markum Ranch and, BRANDON MARKUM, individually and as general partner to Markum Ranch, and KATHRYN YATER f/k/a KATHRYN MARKUM,

Defendants-Appellants.

Arland & Associates, LLC
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Albuquerque, NM

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OPINION

GARCIA, Judge.

This case involves three separate promissory notes between Lea County State Bank (the Bank) and the Markum Ranch Partnership (the Ranch) and its three partners, Burrell Markum (Burrell), Elizabeth Markum (Elizabeth), Brandon Markum (Brandon), as well as one non-partner guarantor, Kathryn Markum (Kathryn) (collectively, Appellants). Appellants appeal the district court's order granting summary judgment in favor of the Bank. Appellants no longer dispute the Bank's ability to enforce one of the promissory notes. They argue that the statute of limitations barred the Bank's claims against them regarding the remaining two promissory notes. The Bank argues that the statute of limitations for its claims against Appellants was revived when the Ranch sold its real property in 2006 and 2008 and paid the proceeds of those sales to the Bank. We conclude that the 2006 and 2008 payments revived the Bank's claims against the Ranch and its three partners, therefore; we affirm the summary judgment in that respect. We further conclude that the 2006 and 2008 payments did not automatically revive the Bank's claims against Kathryn; therefore we reverse the summary judgment against Kathryn regarding the two disputed promissory notes and remand this matter to the district court for further proceedings regarding Kathryn's personal guaranty.

I. BACKGROUND

The district court granted summary judgment in favor of the Bank. The actual basis for the district court's decision and ruling was not clearly stated. However, the facts relevant to the primary issue on appeal–the statute of limitations–are not disputed by the parties. In August 1999, Burrell, Elizabeth, and Brandon—but not Kathryn—agreed to be general partners in the Ranch. In September 1999, the Ranch signed a promissory note so that it could borrow $325,000 from the Bank. About a month later, the Ranch signed a second promissory note to borrow another $200,000 from the Bank. And in May 2000, the Ranch signed a third promissory note for a $650,000 line of credit

from the Bank. We refer to these three notes individually as the $325,000 note, the $200,000 note, and the $650,000 note. These three notes were secured by a mortgage on the Ranch's real property and guaranties that were signed by Burrell, Elizabeth, Brandon, and Kathryn.

The Ranch defaulted on all three notes. The parties agree that the statute of limitations started to run on the Bank's claim to enforce the $200,000 note when it matured in 2004 and Appellants had not paid it off. They agree that the statute of limitations on the Bank's claim to enforce the $650,000 note started when that note matured in 2001. Appellants now concede that the Bank's claim on the $325,000 note is not barred by the statute of limitations because that note was not scheduled to mature until 2014. Therefore, they do not appeal the summary judgment ruling as it pertains to the $325,000 note.

In October 2006, the Ranch sold part of its real property. Burrell, on behalf of the Ranch, signed a settlement statement when the sale closed. This settlement statement showed that the net proceeds of the sale—about $80,000—were to be paid to the Bank. In May 2008, the Ranch sold the rest of its real property. Burrell, Elizabeth, and Brandon signed the settlement statement on behalf of the Ranch at that sale's closing, and the net proceeds—about $382,680—were to be paid to the Bank. After both of these sales, the Bank distributed the net proceeds among all three of the debts. The Bank filed this lawsuit in 2011 to collect the remaining balance of the debts.

The following chart summarizes the timeline for these events.

Year	Event
1999	Burrell, Elizabeth, and Brandon become partners in the Ranch
1999-2000	The Ranch signs the $325,000, $200,000, and $650,000 notes, all of which are secured by a mortgage on the Ranch's real property and guaranties signed by Burrell, Elizabeth, Brandon, and Kathryn
2001	The $650,000 note matures, Appellants are in default, and the six-year statute of limitations starts to run on the Bank's right to enforce this note
2004	The $200,000 note matures, Appellants are in default, and the six-year statute of limitations starts to run on the Bank's right to enforce this note
2006	The Ranch sells some of its real property; Burrell signs the settlement statement on behalf of the Ranch showing that the net sale proceeds will be paid to the Bank and the Bank applies the proceeds to the balances on all three notes

2008	The Ranch sells the rest of its real property; Burrell, Brandon, and Elizabeth sign the settlement statement on behalf of the Ranch showing that the net sale proceeds will be paid to the Bank and the Bank applies the proceeds to the balances on all three notes
2011	The Bank files this lawsuit against the Appellants to collect the remaining balance of debts on all three notes

Both the Bank and Appellants moved for summary judgment. Appellants contended that the statute of limitations had run on the Bank's claims. During a hearing on these motions, the district court discussed the statute of limitations issue, and it asked the parties to file supplemental briefs addressing certain issues of law in this regard that were not adequately addressed in the parties' summary judgment motions. The district court eventually entered an order granting summary judgment in favor of the Bank but did not explain the basis for its decision in that order. Thereafter, the district court signed a final judgment prepared by the Bank's counsel. The district court's judgment included detailed findings regarding factual issues that had been disputed during the summary judgment proceedings, and it contained no mention of the statute of limitations issue. Unfortunately, this ruling created complications for the parties and this Court on appeal.

The pertinent issues in this appeal are: (1) whether the Ranch's partial payments to the Bank from the 2006 and 2008 sales of the Ranch's real property re-started the statute of limitations on the Bank's claims against the Ranch, and (2) whether the 2006 and 2008 payments also revived the statute of limitations on the Bank's right to enforce Kathryn's guaranty.

Appellants also raised several alternative issues on appeal. These issues include whether oral statements allegedly made by Burrell to the Bank created a disputed factual issue as to the Bank's equitable estoppel claim, whether Appellants' admissions of certain facts in discovery constituted a written acknowledgment of the debts under the revival statute, and whether a payment made by Brandon in 2009 revived the statute of limitations as to the $650,000 note. Based upon the undisputed facts, this Court can still partially affirm the summary judgment ruling in favor of the Bank. Because the 2006 and 2008 payments from the net proceeds received from the sale of the Ranch's real property revived the statute of limitations against the Ranch and its three partners, summary judgment against the Ranch and its three partners can be affirmed. As a result, it is not necessary to address the alternative issues because they would not change the outcome on appeal.

II. DISCUSSION

A. Standard of Review

We review a district court's order granting summary judgment de novo. *Juneau v. Intel Corp.*, 2006-NMSC-002, ¶ 8, 139 N.M. 12, 127 P.3d 548. "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." *Joslin v. Gregory*, 2003-NMCA-133, ¶ 6, 134 N.M. 527, 80 P.3d 464 (internal quotation marks and citation omitted). Where "the facts

underlying the application of the statute of limitations and the revival statute are undisputed, we review [a] partial payment issue as a pure question of law." *Id.* We review issues of statutory interpretation de novo. *Little v. Jacobs*, 2014-NMCA-105, ¶ 7, 336 P.3d 398. And "when determining the meaning of a statute, courts will often construe the language in light of the preexisting common law." *Sims v. Sims*, 1996-NMSC-078, ¶ 23, 122 N.M. 618, 930 P.2d 153 ("The common law fills in gaps not addressed by a statute.").

B. The Final Judgment

In their briefs, both Appellants and the Bank discuss the content of the final judgment entered by the district court. Appellants argue that the judgment's findings contain disputed facts, along with its lack of any legal conclusions about the statute of limitations or the voluntariness of the 2006 and 2008 payments, establish that the district court improperly granted summary judgment. The Bank argues that Appellants cannot challenge the content of the final judgment on appeal after they have approved it in the district court. We note that the district court directed the Bank's counsel to "prepare the form of judgment consistent with [its summary judgment] order . . . and propose it to [Appellants'] counsel . . . for approval as to form[.]" Thus, we are not persuaded by the Bank's argument that Appellants are bound by factual findings that the Bank's counsel included in the judgment that are inconsistent with the order's conclusion that "there is no genuine issue as to any material fact[.]" We agree with Appellants that it is difficult to reconcile why the district court would enter an order granting summary judgment that makes no legal conclusions, and then enter a final judgment that contains findings about disputed factual issues and omits the core issue raised during the summary judgment proceedings—whether the statute of limitations had run on the Bank's claims. However, we need not further address the content of the summary judgment order and the final judgment because we review the district court's decision to grant summary judgment de novo, and the disputed facts that Appellants point to in the judgment are not material to our resolution of the case. *See Juneau*, 2006-NMSC-002, ¶ 8; *Scott v. Murphy Corp.*, 1968-NMSC-185, ¶ 10, 79 N.M. 697, 448 P.2d 803 (stating that the reason for a trial court's decision on a matter of law—in [that] case, a directed verdict—is immaterial because "[i]t is hornbook law that the decision of a trial court will be upheld if it is right for any reason").

C. Revival of the Statute of Limitations by Partial Payment

The applicable statute of limitations on actions involving promissory notes is six years. NMSA 1978, § 37-1-3(A) (1975). One way to revive an action on a contract and extend the statute of limitations is "by the making of any partial . . . payment" on the contract. *See* NMSA 1978, § 37-1-16 (1957). When a debt is revived, the statute of limitations starts anew. *See* § 37-1-16 (stating that "[s]uch a cause of action shall be deemed to have accrued upon the date of such partial . . . payment"); *Corona v. Corona*, 2014-NMCA-071, ¶ 12, 329 P.3d 701 (recognizing that revival causes the statute of limitations clock to "run[] anew"). Although the term "revival" suggests that the thing being revived has "expired[,]" *see Black's Law Dictionary* 1515 (10th ed. 2014), our case law and other legal authorities are clear that "revival" works

to restart[1] the running of the statute of limitations before, as well as after, the statute of limitations has expired. *See Davis v. Savage*, 1946-NMSC-011, ¶ 28, 50 N.M. 30, 168 P.2d 851 ("In considering the revival of causes of action upon the indebtedness by acknowledgment that the debt is unpaid, . . . it is generally regarded as immaterial whether the acknowledgment precedes or follows the bar."); *Romero v. Hopewell*, 1922-NMSC-037, ¶ 26, 28 N.M. 259, 210 P. 231 (stating that New Mexico's revival statute "applies . . . to admissions or new promises made before the debt becomes barred as [well as] to those made afterwards"); 51 Am. Jur. 2d *Limitation of Actions* § 320 (2011) ("Except in jurisdictions in which a statute requires a part[ial] payment to be made before the cause of action is barred to toll the statute of limitations, the limitation period may be started anew by a part[ial] payment made either before or after the original obligation has become barred." (footnote omitted)). However, for a partial payment to revive an action, the partial payment must be voluntary. *Joslin*, 2003-NMCA-133, ¶ 19 ("[O]nly voluntary payments can trigger the revival statute because only voluntary payments represent the debtor's acknowledgment of the debt giving rise to a new promise.").

1. The Burden of Proof

Appellants argue that the Bank failed to meet its burden to make a prima facie showing that the statute of limitations was revived because it did not mention the statute of limitations or revival of actions in its initial motion for summary judgment. Appellants seem to argue that, because they raised the statute of limitations as an affirmative defense in their answer to the complaint, the Bank was required to address the defense in its motion for summary judgment, and, because it did not, the order granting summary judgment in favor of the Bank should be reversed. Although we agree with Appellants that the Bank should have addressed the statute of limitations defense in its motion for summary judgment, we recognize that the statute of limitations and revival issues were thoroughly addressed during the course of the summary judgment proceedings. Appellants raised the defense in their response to the Bank's motion, the Bank addressed the defense in its reply, the district court requested supplemental briefing on the issue, and the parties filed supplemental briefs on the issue before a ruling was entered. Under these circumstances, we conclude that the Bank met its burden to address all of the undisputed factual issues required for this Court to issue a de novo ruling on the Bank's summary judgment motion.

2. Voluntariness of the Payments

The Bank submitted a sworn affidavit of its president during the summary judgment proceedings, which stated that "[Appellants] requested that [the Bank] permit [Appellants] to make the deal resulting in the 2006 [and 2008] [p]ayment[s.]" Appellants did not dispute this fact during the summary judgment proceedings. Appellants submitted the settlement statements for the 2006 and 2008 sales approved by the Ranch, showing that the net proceeds from each sale were to be paid to the Bank. Appellants did not dispute that the Ranch approved these settlement statements. Appellants did not dispute that the Ranch intended and directed the proceeds from 2006

[1]Other similar terms for "revival" such as "renew," "restart," and "tolling" are utilized by the various authorities cited throughout this case. We have limited the use of these similar terms as much as possible.

and 2008 sales be paid to the Bank. Appellants did not present any evidence to create an inference that its actions regarding the payments to the Bank in 2006 and 2008 were not voluntary. Under these circumstances, we conclude that, as a matter of law, the 2006 and 2008 payments to the Bank from the proceeds of the sales of the Ranch's real property were voluntary partial payments by the Ranch.

We are not persuaded by Appellants contention that the payments made from the 2006 and 2008 sales were involuntary because they were made through "the sale of property." In support of this argument, Appellants cite a statement made by this Court in *Joslin*:

> The general requirement that a partial payment must be voluntary to revive a debt gives rise to the rule that *partial payments made on a debt through the sale of property*, execution or other legal process, or through the application of the proceeds of a sale of property after foreclosure, *are involuntary and consequently do not constitute partial payments that would restart the statute of limitations.*

2003-NMCA-133, ¶ 16 (emphasis added).

To the extent Appellants argue that *all* partial payments made on a debt after a debtor effectuates the sale of secured property must be recognized as involuntary, they misconstrue *Joslin*. *See id.* ¶¶ 16-17 (noting that the quoted statement was part of the "backdrop" that involved the sale of property *after foreclosure* and whether the resulting partial payments required after foreclosure must be recognized as voluntary); *see also State v. Erickson K.*, 2002-NMCA-058, ¶ 20, 132 N.M. 258, 46 P.3d 1258 ("It is well established that cases are not authority for propositions not considered." (internal quotation marks and citation omitted)). Further, the authority cited in *Joslin* does not support Appellants' interpretation. *See* 2003-NMCA-133, ¶ 16 (citing 51 Am. Jur. 2d *Limitation of Actions* § 349 (2003)); *see also* 51 Am. Jur. 2d *Limitation of Actions* § 328 (2011) ("A payment made on a debt by the sale of property *on* execution or other legal process . . . does not stop the running of the statute. Similarly, a payment is not voluntary and does not restart the statute of limitations if it is made through the application of the proceeds of a sale of property after the foreclosure of a trust deed or mortgage or repossession of personal property." (emphasis added)); *United States v. Lorince*, 773 F. Supp. 1082, 1086 (N.D. Ill. 1991) (dealing with collateral that was sold at auction by the *creditor*, not the debtor); *Zaks v. Elliott*, 106 F.2d 425, 426 (4th Cir. 1939) (involving collateral that was sold by the *creditor*, not the debtor). Because Appellants do not cite any authority to support their proposition that a payment made through the *debtor's* own sale of his or her collateral is deemed to be involuntary, we presume that none exists under these circumstances. *See McNeill v. Rice Eng'g & Operating, Inc.*, 2010-NMSC-015, ¶ 11, 148 N.M. 16, 229 P.3d 489 (stating that where parties fail to cite authority for their legal propositions, appellate courts "will presume that no such authority exists").

Appellants also urge us to conclude that the sale of collateral by the debtor "on his own" is just as involuntary as a forced sale or a foreclosure sale, because otherwise, "debtors would be encouraged to force the lender to go through [costly] foreclosure proceedings, . . . instead of simply selling the collateral and

allowing the proceed[s] to be applied to one or more of the loans." We cannot conclude that a partial payment made through the debtor's discretionary sale of his or her own collateral is any different than a voluntary partial payment made with any other sources of funds that are available to the debtor. *See State v. Davis*, 2003-NMSC-022, ¶ 13, 134 N.M. 172, 74 P.3d 1064 (stating that appellate courts "will not construe statutes in a manner contrary to the intent of the Legislature and in a manner that leads to absurd or unreasonable results").

3. Identification of the Debt

Appellants next argue that, even if the 2006 and 2008 payments were voluntary, they did not revive the Bank's claims on the $200,000 note and the $650,000 note because Appellants did not identify the particular debts that those payments were to be applied. They argue that, in order to revive the statute of limitations, a debtor making a partial payment must clearly identify the debt or debts that he or she intends to direct and apply the payment. The Bank counters that, without any specific instructions from the Appellants on how to apply the payments, it had the discretion to distribute them among all three of the notes. We agree with the Bank.

We begin by recognizing that, at the time that Appellants made the partial payment from the 2006 sale, all three of the debts where the Bank applied the payment were enforceable. The six-year statute of limitations had not yet run on the Bank's claims involving any of the three debts. Appellants concede that the Bank's claim on the $200,000 note matured in 2004 (payment was applied two years after it matured), the claim on the $650,000 note accrued in 2001 (payment was applied five years after it matured), and that the $325,000 note would not mature until 2014.

The general rule is that:

> A debtor owing two or more debts has the right to direct the application of his or her payment to a specific debt or debts, but in the absence of such a direction, the creditor may usually apply the payment as the creditor chooses with respect to the tolling of the statute of limitations. Thus, the creditor may apply a portion of a payment to each debt and, by such action, suspend the statute of limitations as to all[.]

54 C.J.S. *Limitations of Actions* § 383 (2010); *see also* 51 Am. Jur. 2d *Limitation of Actions* § 323 (2011) ("If a debtor fails to direct that a payment be applied to a particular debt, the creditor may make the application. If a creditor on multiple debts applies an undesignated partial payment by a debtor to a debt on which the statute of limitations has not yet run, the payment tolls the statute of limitations on that debt. If a creditor holds several distinct claims, none of which is barred by the statute, and the debtor makes a payment without any direction concerning its application, the creditor may apply it to any one or distribute it among all the claims, for this purpose." (footnotes omitted)). Where neither the debtor nor the creditor directs how the debtor's payment should be applied, the common law rule also allows the payment to be apportioned among the debts in order to prevent the statute of limitations from running on any of those debts. *See* 60 Am. Jur. 2d *Payment* § 71 (2014) ("[W]ithout specific application by either the debtor or the creditor, the law will apply payments ratably to prevent

any of several notes from being barred by the statute of limitations.").

[redacted]. The requirement for a debtor to identify the particular debt that a partial payment applies to will become a material factor when the statute of limitations on that particular debt has already run. *See Drake v. Tyner*, 914 P.2d 519, 523 (Colo. App. 1996) (holding that, "when a creditor on multiple debts applies an undesignated partial payment by the debtor to a debt on which the statute of limitations has not yet run, the payment tolls the statute of limitations on that debt"); *accord Neal v. Gideon*, 138 P.2d 419, 420 (Kan.1943); *Samuel v. Samuel's Adm'r*, 151 S.W. 676, 678 (Ky. 1912); *Anderson v. Nystrom*, 114 N.W. 742, 743 (Minn. 1908); *Anderson v. Stanley*, 753 S.W.2d 98, 100 (Mo. Ct. App. 1988); *see also* 51 Am. Jur. 2d *Limitation of Actions* 2d § 323 ("[I]f the creditor holds several separate claims, all of which are then barred by the statute, and the debtor makes a payment without directing or authorizing its application to any one of them, the bar of the statute is not removed with regard to any of the debts, because such a payment does not satisfy the requirement that the debtor recognize or acknowledge a particular debt." (footnote omitted)); 51 Am. Jur. 2d *Limitation of Actions* § 330 (2011) ("To take a debt *out of the statute of limitations* by a part payment, the evidence of the identification of the debt must be clear[.]" (emphasis added)); 28 Richard A. Lord, *Williston on Contracts* § 72:9 (4th ed. 2003) ("Where the creditor has the power to direct the application of a payment, it is allowed to make the appropriation in the way most advantageous for itself without regard to the interests of the debtor. Thus, the payment may be applied to . . . one that is unenforceable because of . . . the [s]tatute of [l]imitations. . . . [H]owever, . . . application by the creditor to a debt barred by the [s]tatute of [l]imitations will not renew the obligation unless the debtor has directed the payment or otherwise consented to the renewal of the debt.").

[redacted] Here, the 2006 payment was made before that statute of limitations ran on any of the three debts in question. Because none of the Bank's claims were barred by the statute of limitations when the Ranch made the 2006 payment, and because the Ranch did not direct how that payment should have been applied, the Bank was free to "distribute it among all the claims," 51 Am. Jur. 2d *Limitation of Actions* § 323, and thus, "suspend the statute of limitations as to all[.]" 54 C.J.S. *Limitations of Actions* § 383. Appellants do not dispute that the Bank distributed the 2006 payment among all three debts. And they do not assert or allege any facts that would show that the Ranch intended that the 2006 payment be applied differently. Thus, the statute of limitations was revived, or started "running anew[,]" on all three debts when the 2006 payment was made, and it was revived for a second time, when the 2008 payment was made. *See Corona*, 2014-NMCA-071, ¶ 12. Therefore, no genuine dispute exists regarding the material fact addressing the revival of the statute of limitations in 2006 and 2008, and, as a matter of law, the Bank's 2011 claims against the Ranch were not barred by the six-year statute of limitations. *See Joslin*, 2003-NMCA-133, ¶ 6.

4. Kathryn's Guaranty

[redacted] Appellants argue that, even if the 2006 and 2008 payments revived the Bank's claims against the Ranch, it did not automatically revive the claims against Kathryn because the Bank did not show that she consented to these payments made by the Ranch. We agree that the lack of any showing

of consent on Kathryn's part precludes summary judgment against her.

This Court recently held that "a payment by a principal obligor, without consent or ratification by the guarantor, is not a voluntary act by the guarantor and, hence, cannot bind the guarantor." *Corona*, 2014-NMCA-071, ¶ 21. The parties do not dispute that Kathryn was a guarantor to all three notes. It is also undisputed that Kathryn was not a principal obligor because she was not a partner in the Ranch. And the Bank has made no allegations and has not asserted any facts to establish that Kathryn consented to or ratified the 2006 or 2008 sales of the Ranch's real property and the subsequent payments of the net proceeds to the Bank. Thus, the statute of limitations on the Bank's right to enforce the $650,000 and $200,000 notes against Kathryn's guaranty were not automatically revived by the 2006 and 2008 payments made by the Ranch, in its capacity as the principal obligor. Under this factual scenario, summary judgment with regard to Kathryn's continued liability for the $650,000 and $200,000 notes was improperly granted. Therefore, we reverse the summary judgment ruling entered against Kathryn regarding her continuing liability on the $650,000 and $200,000 notes, and we remand for further proceedings concerning her liability on these two notes.

III. CONCLUSION

We affirm the summary judgment with respect to the Bank's claims against the Ranch, Burrell, Elizabeth, and Brandon. We affirm the summary judgment against Kathryn with respect to the $325,000 note. We reverse the summary judgment order with regard to Kathryn as it pertains to her personal guaranty of the $650,000 and $200,000 notes, and we remand this case to the district court for further proceedings as to Kathryn.

IT IS SO ORDERED.

TIMOTHY L. GARCIA, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

LINDA M. VANZI, Judge

Certiorari Denied, January 14, 2015, No. 35,043

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-027

Filing Date: November 19, 2014

Docket No. 32,600

SOPURKH KAUR KHALSA, SHAKTI PARWHA KAUR KHALSA, and EK ONG KAR KAUR KHALSA, Trustees of the Yogi Bhajan Administrative Trust,

Plaintiffs/Counter-Defendants-Appellees,

v.

INDERJIT KAUR PURI,

Defendant/Counter-Plaintiff-Appellant,

Sanders & Westbrook, P.C.
Maureen A. Sanders
Albuquerque, NM

Wray & Girard, P.C.
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OPINION

FRY, Judge.

This case involves a dispute over the division of the community estate of Harbhajan Singh Khalsa Yogiji, more commonly known as Yogi Bhajan, deceased, and his wife, Defendant Inderjit Kaur Puri, whom the parties refer to as Bibiji. Yogi Bhajan was a spiritual and religious leader of the Sikh religion in the United States. Before Yogi Bhajan's death, the spouses' assets were titled in a trust for the benefit of both spouses. When Yogi Bhajan died, Plaintiffs Sopurkh Kaur Khalsa, Shakti Parwha Kaur Khalsa, and Ek Ong Kar Kaur Khalsa[1] ultimately became trustees of two successor trusts—one for the distribution of Bibiji's half of the community estate and one for the distribution of Yogi Bhajan's half. Bibiji claimed that the trustees breached their fiduciary duties to her in a number of ways such that she was entitled to a reallocation of part of Yogi Bhajan's half of the community estate. Following years of litigation and a five-day trial, the district court rejected Bibiji's claims and concluded that the trustees had not breached any duties owed to Bibiji. For the reasons that follow, we affirm.

BACKGROUND

The Estate Plan

The present controversy springs from the estate plan developed for Yogi Bhajan and Bibiji by attorney Kate Freeland in 1979 or 1980. For this estate plan, Freeland prepared wills for each spouse and a living trust. After the tax laws changed in 1986, Freeland prepared an amendment and restatement of the initial living trust, and the spouses executed that document in 1987. We refer to this document as the Living Trust.

Under the Living Trust, Yogi Bhajan and Bibiji were the trustors, and Yogi Bhajan was the sole trustee. The Living Trust gave Yogi Bhajan broad powers as trustee, including the power, within his discretion, to invest or reinvest the properties comprising the trust estate; to make loans; to sell, lease, exchange, or make contracts concerning real or personal property; to develop real estate; to "continue

[1]Because Plaintiffs and several witnesses share the same last name, we refer to them by their first names in this Opinion.

to hold, operate, sell or liquidate any business enterprise"; and to "borrow money and to encumber or hypothecate trust property."

The Living Trust provided for a plan of distribution upon the death of either trustor. If Yogi Bhajan predeceased Bibiji, Bibiji's community property interest in cash or cash equivalents would be held in a separate trust for her benefit, which we call the Survivor's Trust. In addition, the Living Trust's interest in certain real properties would continue to be held in trust (the Property Trust) for Bibiji during her lifetime, and the Living Trust's interest in two other real properties would be distributed to Siri Singh Sahib of Sikh Dharma Brotherhood. The remaining Living Trust assets would first be used to pay taxes and the expenses associated with Yogi Bhajan's last illness and funeral and then to fund a trust to be paid to Yogi Bhajan's assistants designated in a separate written instrument.

The 2004 Amendment to the Living Trust

In 2004, at Freeland's urging, the spouses amended the Living Trust in three ways pertinent to this appeal. First, the amendment changed the disposition of real property such that, if Yogi Bhajan predeceased Bibiji, (a) the Living Trust's interest in real property in India and Los Angeles, California, would go to Bibiji's share of the trust; (b) real property in Espanola, New Mexico, had "already been donated to charity, subject to the right of [Bibiji] and Yogi Bhajan to live there for their lives"; and (c) as a result of the preceding, there would be no Property Trust. Freeland testified that the Los Angeles property was part of the community estate and that she believed the property in India was Yogi Bhajan's separate property. Thus, the amendment provided that, if Yogi Bhajan predeceased Bibiji, Bibiji would receive not only her half interest in the Los Angeles community real property but also Yogi Bhajan's half interest in that property, and she would receive Yogi Bhajan's interest in his separate real property in India.

Second, the amendment provided that "[Bibiji's] community property interest in royalties, royalty agreements, patents, licenses, and other intellectual properties" would be treated the same as cash or cash equivalents. In other words, if Yogi Bhajan predeceased Bibiji, Bibiji would receive her one-half community property interest in these intellectual properties. The previous version of the Living Trust had not made any provision for Bibiji to receive her community property interest in royalty payments, which had increased dramatically after the Living Trust was first amended.

Third, the amendment stated that Yogi Bhajan and Bibiji agreed that upon Yogi Bhajan's death, his community interest in the trust assets (apart from the real property in Los Angeles and India, which would go to Bibiji) would be distributed as he would direct in a separate written document. Yogi Bhajan and Bibiji further agreed that the successor co-trustees, upon the death of either spouse, would be Shakti, Sopurkh, and Kamaljit Kur Kohli. Shakti and Sopurkh worked as Yogi Bhajan's assistants for many years. Kamaljit is the daughter of Yogi Bhajan and Bibiji.

Several months after executing the 2004 amendment, Yogi Bhajan executed a written document entitled "Direction for Distribution of Yogi Bhajan's Share of Trust," which provided that, upon Yogi Bhajan's death, all of his interest in YB Teachings, LLC, would be donated to the non-profit Kundalini Research Institute, and that all of his remaining interest in the Living Trust's assets

(apart from the Los Angeles and India properties) would be distributed as follows: (1) to make up the difference between $125,000 and what Yogi Bhajan had already gifted to an education savings plan for a young child, Dharam Dev Kaur Khalsa; and (2) to an LLC organized for the purpose of distributing specified income percentages to fifteen named individuals, including Shakti and Sopurkh. The fifteen individuals would be members of the LLC and would be required to maintain a lifestyle consistent with Yogi Bhajan's teachings and values. Upon the death of a member, the member's share would be paid to the Legacy of Yogiji Foundation. The LLC contemplated by this document (the Staff LLC) was created in the fall of 2004. The parties refer to this trust, created to benefit Yogi Bhajan's staff, as the Administrative Trust.

Events Following Yogi Bhajan's Death

Yogi Bhajan died on October 6, 2004. Harijot Kaur Khalsa, the bookkeeper for the Living Trust since its inception, immediately closed down the bank accounts and opened two new accounts—one for the Survivor's Trust and one for the Administrative Trust. Freeland, who had been hired as legal counsel by the successor trustees, and the trustees met with members of Yogi Bhajan's family and members of the Staff LLC to discuss distribution of the Living Trust's assets. Relying on the records Harijot had kept for the previous twenty to thirty years, the trustees assembled the assets and distributed Bibiji's interest to the Survivor's Trust. Most of the assets had been distributed either to Bibiji or to the Administrative Trust by the end of 2004.

In May 2005, Bibiji's attorney wrote to Freeland and asserted that Yogi Bhajan had made charitable contributions from 1996 to 2004 without Bibiji's knowledge or consent. The letter went on to request a credit in half the amount of these contributions and asked for information regarding charitable contributions made prior to 1996 and regarding intellectual property owned by the Living Trust. In light of Bibiji's claims, Freeland and Bibiji's attorney agreed that it would be inappropriate for Bibiji's daughter, Kamaljit, to remain as a trustee of the Administrative Trust and for Shakti and Sopurkh to continue as trustees of the Survivor's Trust. Kamaljit was replaced by Ek Ong Kar Kaur as the third trustee of the Administrative Trust. Shakti and Sopurkh resigned as trustees for the Survivor's Trust. We refer to Shakti, Sopurkh, and Ek Ong Kar Kaur as the Trustees.

Initiation of Litigation

Freeland, on behalf of the Trustees, requested backup information for Bibiji's claims. In the ensuing months, the Trustees continued to request explanations for and details of Bibiji's claims, but they did not receive any. The Trustees made no further distributions of estate assets in light of Bibiji's claims. The Trustees ultimately filed the present action seeking a judgment declaring what, if anything, was owed to Bibiji beyond what had already been distributed to her. Bibiji filed a counterclaim seeking an accounting, removal of certain Trustees, and damages for breach of the trust and breach of fiduciary duties. After nearly two years of litigation, the district court dismissed the Trustees' complaint for declaratory relief due to lack of controversy. The case then proceeded to trial on Bibiji's counterclaim.

The district court heard five days of testimony and received over 500 exhibits.

Bibiji did not testify. After taking the matter under advisement, the district court found in favor of the Trustees on all claims and dismissed "all claims which have been or could have been brought by [Bibiji] in this case." It further found that "[j]ustice and equity require that [Bibiji] pay the reasonable attorney fees incurred by [the Trustees]." The amount of attorney fees was to be determined at a later time. This appeal followed.

DISCUSSION

Bibiji raises nine issues on appeal, which we consolidate into three issues. First, Bibiji maintains that the district court erred in finding that the Trustees did not breach their fiduciary duties to her as a beneficiary of the Living Trust in a variety of ways. Second, she claims that the district court made several procedural errors. Third, she contends that the district court erred in determining that the Trustees were entitled to recover their reasonable attorney fees.

1. The Trustees' Alleged Breaches of Fiduciary Duties

Bibiji argues that the Trustees breached their fiduciary duties by (a) failing to investigate and inventory the Living Trust's assets, (b) improperly managing assets and conspiring to deprive Bibiji of income from a license of trademarks, (c) ignoring conflicts of interest, and (d) failing to reallocate trust assets to account for Yogi Bhajan's alleged improper dissipation of community property. While the last two issues include discrete questions of law, the thrust of Bibiji's claims related to the Trustees' alleged breaches of duty concern whether substantial evidence supports the district court's findings that no such breaches occurred. We reject Bibiji's contention that these issues involve mixed questions of fact and law requiring de novo review.

Substantial evidence is "relevant evidence that a reasonable mind could accept as adequate to support a conclusion." *Deutsche Bank Nat'l Trust Co. v. Beneficial N.M. Inc.*, 2014-NMCA-090, ¶ 7, 335 P.3d 217 (internal quotation marks and citation omitted), *cert. granted sub nom. Deutsche Bank v. Johnston*, 2014-NMCERT-008, 334 P.3d 425. In reviewing a substantial evidence argument, "[t]he question is not whether substantial evidence exists to support the opposite result, but rather whether such evidence supports the result reached." *Las Cruces Prof'l Fire Fighters v. City of Las Cruces*, 1997-NMCA-044, ¶ 12, 123 N.M. 329, 940 P.2d 177. "[W]e will not reweigh the evidence nor substitute our judgment for that of the fact finder." *Id.* "We consider the evidence in the light most favorable to the prevailing party and disregard any inferences and evidence to the contrary." *Deutsche Bank*, 2014-NMCA-090, ¶ 7.

Before turning to Bibiji's specific claims, we clarify that the Trustees did not become trustees until Yogi Bhajan died. Until that point, all of the assets in the Living Trust were administered by Yogi Bhajan as the sole trustee. Once Yogi Bhajan died, two trusts came into existence: the Survivor's Trust, of which Bibiji was the sole beneficiary, and the Administrative Trust, of which the Staff LLC and the Legacy of Yogiji Foundation were the beneficiaries. Trustees Shakti and Sopurkh owed duties to the beneficiaries of both trusts until 2005, when they resigned as trustees of the Survivor's Trust in light of Bibiji's claims. After their resignation, they owed duties only to the beneficiaries of the Administrative Trust.

The Living Trust contained provisions guiding the actions of the Trustees in administering the Administrative Trust. The Living Trust granted the same broad powers of administration to the Trustees that Yogi Bhajan had enjoyed as the sole trustee of the Living Trust during his lifetime. These powers included the power to invest and reinvest the trust estate; to make loans; to sell, exchange, or lease property; to hold securities; to improve real estate; to employ attorneys, accountants, and other agents; and to budget the trust's estimated annual income and expenses "in such manner as to equalize, as far as practical, periodic income payments to beneficiaries."

Underlying all of Bibiji's claims against the Trustees is the undisputed legal premise that the Trustees had the obligation to administer the trusts "in good faith" and "in accordance with [their] terms and purposes and the interests of the beneficiaries." NMSA 1978, § 46A-8-801 (2003). Because the trusts had more than one beneficiary, the Trustees were required to "act impartially . . . giving due regard to the beneficiaries' respective interests." NMSA 1978, § 46A-8-803 (2003). The Trustees had the duty to "administer the trust[s] as a prudent person would, by considering the purposes, terms, distributional requirements and other circumstances of the trust[s]" and "exercise reasonable care, skill and caution." NMSA 1978, § 46A-8-804 (2003). In addition, the Trustees had the obligation to "take reasonable steps to take control of and protect the trust property." NMSA 1978, § 46A-8-809 (2003).

To clarify, upon the death of Yogi Bhajan, the then-trustees owed these fiduciary duties to Bibiji as a beneficiary of the Living Trust's assets to ensure that Bibiji received all of the assets that the Living Trust directed to be placed in the Survivor's Trust. Once these assets were transferred to the Survivor's Trust, the then-trustees' fiduciary duties to Bibiji continued because, at least initially, they were the trustees of the Survivor's Trust. However, once Shakti and Sopurkh resigned as trustees of the Survivor's Trust in August or September 2005, they no longer owed Bibiji any fiduciary duties. At that point, they were trustees of only the Administrative Trust, and their fiduciary duties were owed to the beneficiaries of that trust—the members of the Staff LLC and the Legacy of Yogiji Foundation.

With all of this in mind, we turn to Bibiji's claims.

a. Duties to Investigate and Inventory Trust Assets

Bibiji argues that the Trustees breached their duties to investigate and inventory trust assets because they admitted that they did not investigate whether the Living Trust or Yogi Bhajan had owned any assets other than those listed in the records maintained by Harijot. Bibiji claims that she identified eighteen categories of assets not reflected in Harijot's records, including real estate, jewelry, swords, minerals, books published by Yogi Bhajan, video lectures, trademarks, trade secrets, formulas, recipes, and paintings by Yogi Bhajan.

The district court made numerous findings of fact regarding Bibiji's assertions in this regard. The court found that Yogi Bhajan initially hired Harijot to prepare a general ledger for the Living Trust in 1982 and that from 1982 until Yogi Bhajan's death, "Harijot had spent decades ensuring that all of Yogi Bhajan and Bibiji's community property and separate assets were properly transferred to

and titled in the Living Trust, and inventoried on the Living Trust's general ledgers." Harijot was assisted in this endeavor by Freeland and by Shakti, who was Yogi Bhajan's executive secretary, all of whom communicated regularly over the years in order to ensure that all assets were transferred and titled in the Living Trust during Yogi Bhajan's lifetime. The district court also found that the intellectual property at issue had been properly inventoried and that Bibiji's share of this property had been appropriately distributed.

Substantial evidence through the testimony of Harijot and Freeland and through exhibits supported these findings. Both Harijot and Freeland testified that they regularly strived to ensure that all new assets were transferred to the Living Trust. As for the broad categories of assets that Bibiji argues were overlooked, Freeland testified that she was aware that "Yogi Bhajan was a prolific author, creator of recipes, trademarks, business assets and the like" and that she attempted to ensure that those assets were listed as part of the Living Trust estate. The estate tax return included detailed schedules listing the Living Trust's real estate; stocks and bonds; mortgages, notes, and cash; life insurance; miscellaneous property, which included the name and likeness of Yogi Bhajan, royalty contracts, business interests, vehicles, jewelry, furs, and personal effects; and annuities. As for weapons and paintings, Freeland testified that she understood that these were gifts to Yogi Bhajan in his capacity as head of the church, which would make them separate property, and they were placed in the church archives. The district court made a finding to this effect based on this testimony.

The Trustees' expert CPA testified that the records he reviewed reflected a professional and complete accounting of the community's assets, and that all of the assets of the Living Trust properly made their way into the Survivor's Trust and the Administrative Trust after Yogi Bhajan's death. All of this testimony supports the district court's view that, in accordance with Section 46A-8-804, the Trustees conducted the inventory and transfer of Living Trust assets as a prudent person would and in a reasonable manner. Given Harijot's careful record keeping over the years, there would be no reason for the Trustees to believe that additional assets might exist. Viewing the record in the light most favorable to the Trustees, as our standard of review requires us to do, we conclude that substantial evidence supports the district court's determination that the Trustees did not breach any fiduciary duties in their investigation of assets.

b. Management of Assets

Bibiji claims that the Trustees breached various duties in their management of the licensing of trademarks. During Yogi Bhajan's lifetime, the Living Trust had entered into a licensing agreement with Golden Temple of Oregon, Inc. (Golden Temple), for the use of trademarks for the name and likeness of Yogi Bhajan on specified cereals, teas, and body care products. Under the agreement, Golden Temple agreed to pay to the Living Trust royalties of between 0.10 percent and 3.5 percent of Golden Temple's gross sales. When Yogi Bhajan died, Harijot told Golden Temple to divide its royalty payments and pay one-half to the Survivor's Trust and one-half to the Administrative Trust because the license agreement was community property. In about 2008, Golden Temple discontinued use of Yogi Bhajan's name and likeness but

continued to use the names "Yogi" and "Yogi Tea." It stopped paying royalties.

[redacted] There was a similar licensing agreement between the Living Trust and Amalgamated Sales Corp., Ltd. for the use of Yogi Bhajan's name and likeness on teas distributed in northern Africa and Europe. Like Golden Temple, Amalgamated stopped paying royalties in about 2008. The Trustees did not sue Amalgamated because there were no funds coming into the Administrative Trust, which could not afford to take on another lawsuit in light of the present litigation. Instead of suing, the Trustees entered into a tolling agreement with Amalgamated, which provided that the Trustees would not sue during a specified period of time and that the delay would not count toward the applicable statute of limitations. The Trustees believed they were protecting the continuation of the Administrative Trust by entering into this agreement. At some point, Amalgamated transferred its assets to Golden Temple, which meant that a successor tolling agreement regarding the trademarks licensed to Amalgamated was between the Trustees and Golden Temple.

[redacted] As for the trademarks initially licensed to Golden Temple, the Trustees sent a letter of default to Golden Temple, and Golden Temple then resumed royalty payments. Bibiji, as half owner of the trademarks, pursued Golden Temple by way of an arbitration to determine ownership of the "Yogi" trademarks, and she suggested that the Trustees participate. The Trustees declined, seemingly in part because they thought that the term "Yogi" was a generic term rather than a trademark and in part because they did not feel the Administrative Trust had the funds to take on any more litigation, given the continuing litigation in the case now before us. Bibiji's arbitration was successful, and the arbitrators determined that Golden Temple had no right to the "Yogi" trademarks and that it had infringed the trademarks. They awarded Bibiji her half interest in the royalty payments that Golden Temple should have paid.

[redacted] After the arbitration award, Golden Temple sought to negotiate a new license of the trademarks. Initially, the Trustees and Bibiji took the position that they were willing to grant Golden Temple a non-perpetual, non-worldwide license. Golden Temple offered to pay a flat 3 percent royalty, with a minimum royalty payment of $2 million and a maximum of $4 million per year, an offer to which both Bibiji and the Trustees objected. Negotiations then broke down, but the Trustees alone continued to negotiate with Golden Temple.

[redacted] Ultimately, the Trustees, representing the Administrative Trust's half interest in the Yogi, Yogi Tea, and other trademarks, entered into an interim licensing agreement with Golden Temple in October 2011. The agreement provided that Golden Temple would pay back royalties to the Administrative Trust as calculated in the arbitration award to Bibiji and future royalties calculated according to the same formula applied in the arbitration award. The agreement was to remain in effect until either (a) the execution of an agreement whereby Golden Temple would purchase the Administrative Trust's interest in the trademarks or (b) the agreement was terminated by either party upon 180 days prior written notice. Under the agreement, Golden Temple was required to offer the same terms to Bibiji for her half interest in the trademarks, but Bibiji rejected the offer. The agreement further provided that Golden Temple would indemnify the Administrative Trust from any damages resulting from claims

by Bibiji arising from the Administrative Trust entering into the agreement.

Future royalties under the agreement would be paid by Golden Temple at the same rate that was payable under the 2004 license agreement, which was 3.5 percent, stepping down to 0.5 percent on sales exceeding $25 million. This was lower than the flat 3 percent rate Golden Temple offered during negotiations when Bibiji was participating. The Trustees agreed to accept the lower royalty rate because there was concern about Golden Temple having a deadline to its use of the trademark, and the Trustees were very interested in keeping the trademark viable with a company that had experience with selling Yogi Tea under the trademark. If the district court approved of a sale, the Trustees planned to sell the Administrative Trust's undivided half interest in the trademarks to Golden Temple for $9.7 million, and the sale proceeds would be distributable to the Staff LLC.

At some point prior to the execution of the interim licensing agreement, the Trustees learned that Bibiji believed she had the opportunity of licensing the trademarks for 6 percent. The Trustees asked for more information about this prospective licensee, but they never received that information from Bibiji or her attorney.

As we understand Bibiji's arguments, she claims that the Trustees mismanaged trust assets when they failed to seek advice from a trademark expert as to who owned the Yogi trademarks and when they declined to enforce the Administrative Trust's contract rights when Golden Temple and Amalgamated suspended royalty payments. Bibiji further contends that the Trustees did not have the power to enter into the new licensing agreement with Golden Temple because the trademarks were never made assets of the Living Trust.

We first observe that Bibiji's arguments regarding the trademarks apparently challenge the Trustees' compliance with their fiduciary duties even though the actions at issue occurred long after Shakti and Sopurkh resigned as trustees of the Survivor's Trust. At the time Golden Temple and Amalgamated stopped making royalty payments, the Trustees oversaw only the Administrative Trust, and their duties therefore ran to the beneficiaries of that trust, not to Bibiji. The district court appreciated this distinction. In its written decision, the district court stated that "[p]rior to the transfer to Bibiji of her one-half interest in the [intellectual property] rights, the Trustees did hold that interest in trust for Bibiji, but that interest was transferred in December 2004. Once that transfer was accomplished, the Trustees' fiduciary duties as to that interest ended."

Bibiji's arguments apparently rest on her claim that she is entitled to more than half of the trademark rights. This claim in turn springs from her assertion that she is entitled to a reallocation of Yogi Bhajan's half of the community property due to his alleged excess expenditure of community funds prior to his death. Bibiji's claim for reallocation cannot be characterized as a beneficiary's claim against the Trustees because the trustee/beneficiary relationship between the parties ended in 2005 when Shakti and Sopurkh resigned as trustees of the Survivor's Trust. Rather, Bibiji's claim to reallocation can be characterized as the claim of one spouse against the estate of the other for alleged misappropriation of community property. This is what the district court

properly concluded. *Fernandez v. Fernandez*, 1991-NMCA-001, ¶¶ 18-19, 111 N.M. 442, 806 P.2d 582 (explaining that a gift made by one spouse in breach of his or her fiduciary duty may result in the wronged spouse's recovery of his or her community share of the gift from the spouse who made the gift).

To the extent that Bibiji is arguing that the Trustees failed to accurately inventory and distribute her half interest in the trademarks, the district court found that all of "Yogi Bhajan's intellectual property interests were properly inventoried and, in accordance with the Living Trust's 2004 amendment, 50 [percent] of Yogi Bhajan's intellectual property was distributed to Bibiji." The district court further found that the intellectual property interests that were the subject of the pre-death licensing agreements with Golden Temple and Amalgamated "were inventoried on the [estate tax return] Form 706 by the contracts themselves, and are specifically listed on the contract exhibits." And the district court found that "all [intellectual property] interests to which Bibiji was entitled were properly and promptly distributed to her, most especially the [Golden Temple] and Amalgamated royalties interests intended to provide Bibiji a stable source of income." These findings were supported by the evidence summarized above and in the preceding section of this Opinion.

To the extent Bibiji is claiming that the Trustees' interim licensing agreement with Golden Temple and its tolling agreement with Amalgamated somehow negatively impacted her half interest in the Yogi trademarks, the district court viewed the relationship between the parties regarding the trademarks as co-owners. We observe that because Bibiji and the Administrative Trust each owned a one-half interest in the trademarks, this contention of negative impact on Bibiji's trademark interest is in the nature of a claim of trademark infringement by one co-owner against the other, not a claim of breach of fiduciary duty in the trust context. Since the only claims Bibiji asserted against the Trustees were claims of breach of fiduciary duty, these infringement claims seem to be misplaced. Nonetheless, because the parties litigated these claims without objection and because the district court decided them, we address them.

The district court relied on case law stating that "[a]n owner does not infringe upon his co-owner's rights in a trademark by exercising his own right of use. Likewise, he does not dilute those rights by exercising his own right of use." *Derminer v. Kramer*, 406 F. Supp. 2d 756, 759 (E.D. Mich. 2005). This is legally correct, according to a leading treatise on the subject. "When parties are co-owners of a mark, one party cannot sue the other for infringement. A co-owner cannot infringe the mark it owns." 2 *McCarthy on Trademarks & Unfair Competition* § 16.40 (4th ed. 2014).

To the extent Bibiji had any claim that the Trustees had any additional duty to her regarding the trademarks, the district court put that claim to rest when it found that "[t]he Trustees' decision to enter into the [i]nterim [l]icensing [a]greement . . . with [Golden Temple] was fiscally sound and preserved the marks' financial potential." The district court explained that if the Trustees had not entered into the agreement, "[Golden Temple] would have been forced to re-brand, which would have greatly diminished, and potentially destroyed," the potential financial value of the trademarks. These findings are supported by the evidence summarized above. Given the cost of the present litigation to the Administrative Trust, it made sense for the Trustees to preserve the value of the

trademarks through the interim licensing agreement and the tolling agreement rather than to expend additional trust funds to pursue litigation against Golden Temple and Amalgamated. We therefore reject Bibiji's claim that the district court erroneously failed to find that the Trustees mismanaged assets.

c. Alleged Conflicts of Interest

Bibiji claims that Sopurkh and Shakti had a conflict of interest as soon as Bibiji requested reallocation of the community assets because they were beneficiaries of the Administrative Trust who would benefit if Bibiji's claims failed. Sopurkh and Shakti indeed withdrew as trustees of the Survivor's Trust when Bibiji asserted her claim. But Bibiji appears to contend that they were also required to withdraw as trustees of the Administrative Trust. Again, we note that Sopurkh and Shakti's fiduciary duties to Bibiji ended when they withdrew as trustees of the Survivor's Trust. Because Bibiji was not a beneficiary of the Administrative Trust, she could not assert a claim that Sopurkh and Shakti remaining as trustees of the Administrative Trust constituted a breach of their fiduciary duties. Furthermore, Bibiji's reallocation claim was a claim of one spouse against the estate of the other spouse, not a claim asserted in the context of a trust relationship.

To the extent Bibiji is contending that Sopurkh and Shakti's status as beneficiaries by itself constituted a conflict of interest, we affirm the district court's findings to the contrary. The district court found that the Living Trust itself required that only one trustee be independent and not a beneficiary of the Administrative Trust. Ek Ong Kar Kaur is not a beneficiary of the Administrative Trust and, therefore, the Living Trust's requirements are satisfied. These findings are supported by the specific provisions of the Living Trust, which was introduced into evidence, and by other evidence at trial. In addition, the district court found that Sopurkh recused herself from participating in any decisions related to Golden Temple, of which she had once been president. This finding, too, was supported by the evidence.

d. Reallocation of Community Property

Bibiji's primary contention in the district court and on appeal is that Yogi Bhajan made gifts and charitable contributions of community property during his lifetime without Bibiji's knowledge and consent and that, as a result, Bibiji was entitled to a portion of Yogi Bhajan's half of the community estate in order to make up for these unauthorized dispositions. Bibiji relies on *Roselli v. Rio Communities Service Station, Inc.*, 1990-NMSC-018, 109 N.M. 509, 787 P.2d 428, for the proposition that if a spouse manages community property in a way that violates his or her fiduciary duty to the other spouse, "the aggrieved spouse may have recourse first against the other spouse's property, and then against the donee of the property." Thus, Bibiji claims, the Trustees had the obligation to reallocate portions of Yogi Bhajan's half of the community estate, which ended up in the Administrative Trust, to Bibiji, and the Trustees' failure to do so constituted a breach of their fiduciary duty to her.

In order to assess Bibiji's claims, we consider the sparse New Mexico case law on the issue. *Roselli* involved a husband who named his son from a prior marriage as the beneficiary of two community-purchased life insurance policies without his wife's knowledge. 1990-NMSC-018, ¶ 2. In a dispute after the husband's death, our

Supreme Court reversed summary judgment in favor of the wife on the disposition of the insurance proceeds because issues of fact remained to be resolved. *Id.* ¶ 24. In doing so, the Court established certain legal principles to guide the district court on remand. The Court first acknowledged that by statute, "either spouse alone has the power to manage, control, or dispose of the entire community personal property, unless one spouse is otherwise designated." *Id.* ¶ 18 (citing NMSA 1978, § 40-3-14 (1975)). The Court then reviewed the law in other community property states and established what it called the "best rule" as follows:

> (1) each spouse has the power to manage and dispose of the community's personal property;
>
> (2) subject to a fiduciary duty to the other spouse; and
>
> (3) absent intervening equities, a gift of substantial community property to a third person without the other spouse's consent may be revoked and set aside for the benefit of the aggrieved spouse.

Roselli, 1990-NMSC-018, ¶ 23.

A subsequent case shed additional light on the matter. In *Fernandez*, our Supreme Court suggested factors that could inform the *Roselli* rule, including whether the managing spouse's action furthered "the common benefit of both members of the community[,]" 1991-NMCA-001, ¶ 12, and whether the objectionable gift or expenditure constituted a "substantial portion of the community property." *Id.* ¶ 21.

We distill the following principles from *Roselli* and *Fernandez*. First, either spouse may dispose of community property unless the disposition violates the spouse's fiduciary duty to the other spouse. Second, the fiduciary duty in question involves the assessment of the equities of the particular circumstances. Third, in assessing the equities, a court should consider whether the disposition furthers both spouses' common benefit and whether the disposition amounted to a substantial portion of the community property.

The district court in the present case found guidance in the law of Texas, which is also a community property state, and on which our Supreme Court relied in *Roselli*. The district court noted that the applicable Texas law is summarized as follows:

> In the absence of fraud on the rights of the other spouse, a spouse has the right to control and dispose of community property subject to his sole management.... The managing spouse has the burden to show that his disposition of the property was fair.
>
> The court will consider three primary factors of 'fairness' in reviewing one spouse's claim of constructive fraud against the other. The factors to be considered are the size of the property disposed of in relation to the total size of the community estate; the adequacy of the estate remaining to support the other spouse after the disposition; and the relationship of the parties involved in the transaction or, in the case of a gift, of the donor to the donee.

Massey v. Massey, 807 S.W.2d 391, 401-02 (Tex. App. 1991) (citations omitted). These factors are similar to those we have distilled from *Roselli* and *Fernandez*.

The district court went on to analyze whether Yogi Bhajan breached his fiduciary duty to Bibiji under the framework of three questions: (1) whether the gift was a reasonable one for just cause; (2) whether the property given was excessive compared to the value of the entire community estate; and (3) whether the gift was "in discharge of a legal, moral or civic obligation." The district court derived the first question from Texas law, as stated in *Kemp v. Metropolitan Life Insurance Company*, 205 F.2d 857, 863 (5th Cir. 1953) (stating that "Texas recognizes the right of the [spouse] to make moderate gifts for just causes"). We interpret the notion of "just cause" to be a fair extension of the concept of a gift for the community's common benefit, as stated in *Fernandez*. The second question is consistent with the precepts stated in *Roselli* and *Fernandez*. We find little support in the case law for the third question, so we eliminate it from our consideration.

Because the assessment of these factors involves balancing the equities presented by a particular set of circumstances, we review the district court's determination for abuse of discretion. *See Romero v. Bank of the Sw.*, 2003-NMCA-124, ¶ 28, 135 N.M. 1, 83 P.3d 288 (explaining that "the issue of how the district court uses its equitable powers to provide an appropriate remedy is reviewed only for abuse of discretion" (internal quotation marks and citation omitted)).

Having established a framework for assessing the district court's findings on the issue of reallocation, we turn to the gifts and charitable contributions that Bibiji found objectionable. It is notable that Bibiji herself never testified at trial and, as a result, information about her objections was supplied indirectly.

Bibiji's expert accountant, David Hinton, testified about how he calculated which gifts and charitable contributions were objectionable. He prepared a report listing the amounts of charitable contributions made by the marital community annually for the years 1981 to 2004 and compared those contributions to the income reported for those years on the spouses' joint income tax returns. Hinton testified that Bibiji would have agreed to 15 percent of total income as an acceptable level of contribution. He calculated that 15 percent of total income for the twenty-three years at issue was $2,248,877 and that actual contributions totaled $5,109,554. Subtracting the former from the latter yielded the sum of $2,860,677. Hinton also provided a list of other gifts of which Bibiji apparently did not approve, totaling $576,260. Adding together Bibiji's half interest in the charitable contributions exceeding 15 percent and in the unapproved gifts yielded the sum of $1,819,950, which Bibiji claimed she was entitled to receive via a reallocation of Yogi Bhajan's half of the community estate.

The district court rejected Bibiji's claim for reallocation for a number of reasons. On the issue of gifts, the court first found that the list of challenged gifts was taken from the Living Trust's accounting entry for non-deductible disbursements, and some of those items were not actually gifts. These non-gift items included a trip that Bibiji herself took to Africa, payments to family members (including Kamaljit, the daughter of Yogi Bhajan and Bibiji), expenses incurred during visits with Indian guests, medical expenses for Yogi Bhajan and members of the Sikh

community, and payments for religious services. Harijot's testimony supported these findings of fact.

Also in connection with gifts, the court found that the Trustees were simply unable to accept the contention that Bibiji did not know about and would have objected to them. This was in part because Bibiji's list of unapproved gifts varied from year to year during the course of this litigation, in part because the list contained clearly non-objectionable gifts beneficial to the community, as detailed above, and in part because Bibiji failed to provide specifics regarding her claimed lack of knowledge or consent, despite repeated requests for such information. These findings were also supported by the evidence.

In regard to charitable contributions, the district court found that Bibiji's expert accountant "gave no credit for years in which the contributions were less than 15 percent nor any credit for contributions in excess of 15 percent that Bibiji expressly approved (such as the donation of the ranch in Espanola, to which Bibiji admitted she consented)." The court also found that the expert "failed to account for the tax benefits received by the community as a result of the charitable contributions."

The evidence supported these findings. Hinton testified that for years where charitable contributions were less than 15 percent, he simply noted a zero rather than a negative number, and he never considered the overall effect of using zero in five of the years in question. He also testified that Bibiji approved the donation of the Espanola ranch, valued at $745,000, in 1995, which was more than the total income for that year. However, he did not account for this approved donation in his straight mathematical calculation that any contribution above 15 percent of income was a non-approved contribution. The Trustees' expert accountant testified that the charitable contributions in excess of 15 percent of income resulted in a federal tax savings to the community of $1,118,892 and a state tax savings of $220,543.

In light of these findings regarding gifts and charitable contributions made during Yogi Bhajan's lifetime, the district court then applied the legal analysis of whether the gifts or contributions were reasonable and for just cause and whether the property given was excessive compared to the value of the entire community estate. With respect to gifts, the court found that many of the gifts "were small in comparison to the community estate[,]" that "[i]n the aggregate, the gifts did not violate [Bibiji's] rights[,]" and that "Yogi Bhajan did not breach his spousal fiduciary duty to Bibiji in making the gifts." Given that many of the objectionable gifts actually benefitted the community and the children of Yogi Bhajan and Bibiji, we cannot say that the district court abused its discretion in so finding.

As for the charitable contributions, the district court made several relevant findings, including:

- "Many of the donations were made to non-profit organizations that were involved in the couple's spiritual mission."
- "Bibiji gave implied, if not express, consent to the charitable contributions, particularly in view of the course of conduct of the public life of the couple."
- "The Living Trust's charitable donations, while sizeable, were reasonable in light of the marital community's life mission and for just causes; the donations . . . were not

excessive compared to the community estate; and the donations did not leave Bibiji without the means to sustain herself."

Again, these findings were supported by substantial evidence. A cursory review of the charitable contributions made over the years reveals that the vast majority were made to non-profits affiliated with the Sikh religion, including various Sikh Dharma organizations, 3HO Foundation, and the Kundalini Research Institute. Bibiji was the Bhai Sahiba for Sikh Dharma and its affiliates, which meant that she was the authority on the proper practice of the Sikh religion. She was also on the boards of Sikh Dharma Educational Institute and 3HO Foundation and "had a strong interest in promoting the mission of 3HO in the world arena." And, in the opinion of Freeland, Bibiji "has been directly involved in the charitable activities that those [charitable] contributions support. She in turn receives, directly and indirectly, tangible and intangible benefits from her association with the organizations."

The district court's finding that Bibiji impliedly consented to the majority of charitable contributions is further supported by evidence that she and Yogi Bhajan made it their life's mission to support and enhance the Sikh community they had established in the United States after they emigrated from India. Bibiji stated in a letter to the Sikh community:

> My husband and I have built the organization and given millions of dollars of contributions over the years. More than money, we have dedicated our entire lives to these organizations. My husband and I donated the Ranch in Espanola and several other properties we own to the Sikh Dharma.

In addition, Trustee Ek Ong Kar Kaur testified that she was present innumerable times from the early 1970s until Yogi Bhajan's death when donations and charitable giving were discussed in Bibiji's presence. Bibiji signed all of the income tax returns that listed charitable donations. And, because Bibiji sat on the board of many of the donee charitable organizations, including 3HO and the Sikh Dharma Educational Institute, she would have had access to information about the funding of those organizations. Bibiji and Yogi Bhajan subscribed to the tenet of Das Vandh, which is tithing at 10 percent of base income. But 10 percent was a baseline rather than a ceiling for charitable contributions. Yogi Bhajan and Bibiji "encouraged giving by their example, not only to one organization, but over and above Das Vandh, and to other organizations and to help people and other communities that needed help."

The evidence also established that Yogi Bhajan's estate was valued at $6,061,254 and that Bibiji's half of the community property totaled $3,021,632 Bibiji received an additional $706,000 from Yogi Bhajan's half of the community assets, including Yogi Bhajan's half interest in certain real properties and Yogi Bhajan's separate real property in India. Thus, there was substantial evidence that Bibiji's share of the estate, which amounted to more than half, was sufficient to sustain her. Furthermore, Bibiji's half of the objectionable charitable deductions, which were arbitrarily calculated at anything in excess of 15 percent of annual income, totaled $1,430,339 over a period of time exceeding twenty years, while the tax savings attributable to charitable deductions in

excess of 15 percent of income totaled $1,141,435.

While Bibiji presented evidence contrary to the evidence summarized above, "when 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. "The question is not whether substantial evidence exists to support the opposite result, but rather whether such evidence supports the result reached." *Las Cruces Prof'l Fire Fighters*, 1997-NMCA-044, ¶ 12. There being considerable evidence supporting the district court's decision under the *Roselli-Fernandez* framework discussed above, we cannot say that the district court abused its discretion in declining to order reallocation of Yogi Bhajan's half of the community assets.

2. Alleged Procedural Errors

Bibiji claims that the district court made several procedural errors, including: (a) entry of a collateral estoppel order, which precluded full litigation of Bibiji's claims; (b) entry of an overly broad judgment dismissing all claims that have been or could have been brought by Bibiji; and (c) allowing the Trustees to rely on advice of counsel when they failed to assert this theory as an affirmative defense. We are not persuaded.

a. Collateral Estoppel Order

This claim asserted by Bibiji is entangled with a prior opinion of this Court in related litigation, *In re Estate of Yogiji*, 2013-NMCA-104, 311 P.3d 1224, *cert. denied sub nom. Puri v. Khalsa*, 2013-NMCERT-010, 313 P.3d 250. At some point in the long history of the present litigation, more than four years after Yogi Bhajan's death, Bibiji filed a proceeding in the district court seeking probate of Yogi Bhajan's will and the appointment of a personal representative. *Id.* ¶ 2. The gist of Bibiji's claim in the probate proceeding was that she wanted a personal representative to investigate what assets Yogi Bhajan owned at the time of his death in an effort to determine whether any assets actually belonged to her. *Id.* ¶ 7. The district court probated the will, appointed a personal representative, and directed the personal representative to determine whether there were any assets other than those that had been identified and distributed by the successor trustees of the Living Trust, the Survivor's Trust, and the Administrative Trust. *Id.* ¶ 8. The district court then limited the personal representative's investigation to assets specifically identified by Bibiji as having questionable title. *Id.* ¶ 9. When the personal representative's investigation revealed no previously unidentified assets, the district court closed the probate proceeding. *Id.* ¶ 13.

The district court in the present case entered its findings of fact and conclusions of law after the district court in the probate case had closed the case before it. Consequently, the district court in the case before us entered the following conclusions of law:

> LL. Bibiji is precluded by the judgment entered in the [p]robate [c]ourt from litigating whether there were any assets belonging to Yogi Bhajan on the date of death, October 6, 2004, which were not identified and distributed by the Trustees.

. . . .

NN. Bibiji is precluded from litigating a claim that the Trustees failed to locate and identify property that was owned by Yogi Bhajan at the time of his death . . . because the [p]ersonal [r]epresentative investigated the list of alleged assets that Bibiji provided and found no evidence to support Bibiji's ownership claims regarding other assets.

Following entry of the findings and conclusions in this case, this Court filed an opinion reversing the district court's ruling in the probate case. In that opinion, we analyzed a specific section of the Probate Code and concluded that the district court had interpreted it too narrowly. We stated that "[o]n remand, the personal representative may conduct a complete investigation and inventory of assets in which [Yogi Bhajan] had an interest at the time of his death" and that the personal representative could "confirm title to any assets that are properly in the possession of a devisee, and he may inventory the assets that were properly identified as residue for transfer to the trust." *Id.* ¶31. We expressly held that Bibiji's claim for reallocation of assets was off limits in the remanded probate proceeding because that claim was the subject of the case now before us. *Id.*

Bibiji now contends that the district court's conclusions LL and NN "effectively ratified [the] Trustees' determination of what assets [Yogi Bhajan] owned at his date of death and [the] Trustees' distribution of those assets." She further maintains that this Court's reversal of the determination in the probate proceeding in *Estate of Yogiji* "has made clear that there has been no appropriate comprehensive investigation of [Yogi Bhajan]'s assets and the [d]istrict [c]ourt's . . . findings and conclusions are erroneous."

We disagree with Bibiji's arguments. If the personal representative conducts an investigation of assets, which our opinion in *Estate of Yogiji* by no means required, and if the personal representative finds assets that were overlooked by the Trustees in their inventory—a matter of sheer speculation at this point—then those assets will be distributed in accordance with the instructions in the Living Trust. Any newly discovered assets that are determined to be community property will be distributed half to Bibiji and half to the Administrative Trust. The likelihood that any new assets will be discovered seems remote because, as the Trustees note in their brief, Bibiji had approximately five years during the course of the present litigation to conduct her own investigation through the discovery process, and she was unable to produce evidence of any asset that had been overlooked in the Trustees' inventory.

b. Overly Broad Judgment

Bibiji next claims that the district court exceeded its jurisdiction in its judgment, which dismissed "all claims which have been or could have been brought by [Bibiji] in this case, including all claims related to the transactions and occurrences that are the subject matter of the claims alleged in this case." Bibiji contends that there are pending disputes between her and the Trustees in California federal court regarding "new breaches of duty in the management of trust assets and the trademarks and [intellectual

property] which were not assets of the [Living Trust]."

We do not understand Bibiji's argument. She cites no authority for the proposition that the district court lacked jurisdiction to dismiss Bibiji's claims, and we therefore assume there is no such authority. *In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 (stating that where a party cites no authority to support an argument, we may assume no such authority exists). The language Bibiji objects to does no more than describe explicitly the normal preclusive effect of any judgment entered after litigation. *Pielhau v. State Farm Mut. Auto. Ins. Co.*, 2013-NMCA 112, 314 P.3d 398. If Bibiji believes the judgment in the present case does not preclude litigation of issues or claims raised in the California court, she can present that view in that court, presumably in response to motions that may be filed by the Trustees in that court.

c. Defense of Advice of Counsel

Bibiji challenges several of the district court's findings that mention the fact that the Trustees hired Freeland to advise them as they administered the transfer of assets from the Living Trust to the two successor trusts and as they attempted to address Bibiji's claims. Bibiji contends that these findings establish that the Trustees raised an "advice of counsel" defense without having first pleaded the defense and that by allowing this to occur, the district court permitted the Trustees to "sandbag Bibiji and deprive her of the opportunity to engage in discovery and properly prepare her case for trial."

Again, we do not understand Bibiji's argument. As authority, she relies on *Gingrich v. Sandia Corp.*, for the proposition that "when the advice of counsel defense is raised, the party raising the defense must permit discovery of any and all legal advice rendered on the disputed issue." 2007-NMCA-101, ¶ 24, 142 N.M. 359, 165 P.3d 1135 (internal quotation marks and citation omitted). *Gingrich* is inapposite because it involved waiver of attorney-client privilege when the client was relying on its attorney's advice as a defense. Here, the briefs raise no issues involving attorney-client privilege. In addition, there is no suggestion that the Trustees raised advice of counsel as a defense. Instead, they consulted with an attorney to advise them in administering the trusts, as they are permitted to do under NMSA 1978, Section 46A-8-807(A)(1) (2003) (stating that "[a] trustee may delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances" providing the trustee "exercise[s] reasonable care, skill and caution in . . . selecting . . . agent[s])."

3. Attorney Fees

The Trustees asked for an award of attorney fees pursuant to NMSA 1978, Section 46A-10-1004 (2003), which provides:

> In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney fees, to any party, to be paid by another party or from the trust that is the subject of the controversy.

In its judgment, the district court stated that justice and equity supported an award to the Trustees of their reasonable attorney fees in accordance with this statute. The amount of the award would be determined after

appropriate evidence had been submitted. In this appeal, we are not concerned with the amount of fees awarded but only with the fact that an award was made.

Bibiji argues that the district court erred in determining that the Trustees were entitled to an award of attorney fees because (1) they waived such an award by failing to ask for it in their pleadings, (2) justice and equity do not require this award, and (3) the award violated Bibiji's due process rights because she did not have the opportunity to brief the issue.

While there is no New Mexico case law interpreting Section 46A-10-1004, generally speaking, an award of attorney fees is a matter for the district court's discretion. *See Lenz v. Chalamidas*, 1991-NMSC-099, ¶ 2, 113 N.M. 17, 821 P.2d 355 ("Award of attorney fees rests in the discretion of the trial court and this [C]ourt will not alter the fee award absent an abuse of discretion."); *see also Garwood v. Garwood*, 2010 WY 91, ¶ 38, 233 P.3d 977, 986 (Wyo. 2010) (stating that under the Uniform Trust Code, "[o]nce it has been determined that authority exists to award fees and costs, a trial court has extremely broad discretion to rule on the amount of such an award").

We are not persuaded by Bibiji's argument that the Trustees waived their claim for an award of attorney fees or that she was denied the opportunity to brief the issue. Bibiji has not cited any authority in support of the proposition that a request for attorney fees is waived unless it is pleaded. The Trustees asked for an award in their closing argument brief, and Bibiji could have responded to this request in her closing argument reply brief but failed to do so. Moreover, Bibiji responded in depth to the Trustees' actual motion for attorney fees, which was filed after the judgment was entered. While Bibiji claims that she "might have made different procedural choices or otherwise amended her litigation strategy" if she had known earlier about the Trustees' claim for attorney fees, she does not provide any examples of the alleged prejudice she sustained. We decline to speculate regarding what Bibiji failed to demonstrate.

On the merits, Bibiji disputes the district court's finding that justice and equity require an award of the Trustees' attorney fees. She maintains that the Trustees' claim for declaratory judgment was dismissed long before trial, thus making Bibiji the prevailing party, and that the Trustees' "successful defense against Bibiji's claims merely makes this a split result." While she cites cases in which courts have declined to award attorney fees under such circumstances, those same cases reiterate that the decision whether to award fees rests in the trial court's discretion. *See, e.g.*, *Hedicke v. Gunville*, 2003-NMCA-032, ¶ 28, 133 N.M. 335, 62 P.3d 1217 (explaining that "if each party prevails on one claim and loses on one claim, the trial court could and may conclude that neither is ultimately a prevailing party on those claims"); *In re Estate of Foster*, 1985-NMCA-038, ¶ 43, 102 N.M. 707, 699 P.2d 638 (stating that an award of attorney fees, "being equitable[,] depends on the facts of the case and the exercise of equitable power must be used with discretion"). Given the many years of litigation over issues on which Bibiji failed to present any direct evidence to support her claims and in light of the Trustees' overall success in defending these claims, we cannot say that the district court abused its discretion in determining that justice and equity required an award of the Trustees' reasonable attorney fees.

CONCLUSION

For the foregoing reasons, we affirm the district court's judgment.

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: 2015-NMSC-008

Filing Date: March 9, 2015

Docket No. 34,499

SANDRA K. PEREZ,

Petitioner-Petitioner,

v.

NEW MEXICO DEPARTMENT OF WORKFORCE SOLUTIONS and NEW MEXICO STATE PERSONNEL OFFICE,

Respondents-Respondents.

Youtz & Valdez, P.C.
Stephen Curtice
James A. Montalbano
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Albuquerque, NM

for Petitioner

Marshall J. Ray, General Counsel
Rudolph Preston Arnold, Deputy General Counsel
Albuquerque, NM

for Respondent New Mexico Department of Workforce Solutions

Law Office of Jason Lewis
Jason J. Lewis
Albuquerque, NM

for Respondent New Mexico State Personnel Office

Consolidated with:

Docket No. 34,880

DEBRA GRIEGO,

Petitioner-Appellant,

v.

NEW MEXICO DEPARTMENT OF WORKFORCE SOLUTIONS and NEW MEXICO DEPARTMENT OF FINANCE AND ADMINISTRATION,

Respondents-Appellees.

Consolidated with:

INDIA HATCH,

Petitioner-Appellee,

v.

NEW MEXICO DEPARTMENT OF WORKFORCE SOLUTIONS and NEW MEXICO RACING COMMISSION,

Respondents-Appellants.

Debra Griego
Santa Fe, NM

Pro Se Appellant

Marshall J. Ray, General Counsel
Rudolph Preston Arnold, Deputy General Counsel
Albuquerque, NM

for Appellees/Appellants New Mexico Department of Workforce Solutions and New Mexico Racing Commission

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Joseph E. Caldwell
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for Appellee India Hatch

OPINION

CHÁVEZ, Justice.

In these consolidated cases, the New Mexico Department of Workforce Solutions (Department) denied three former State of New Mexico employees (Claimants) unemployment compensation benefits, relying on NMSA 1978, Section 51-1-44(A)(5)(a) (1978). Section 51-1-44(A)(5)(a) provides that unemployment compensation benefits are not available for a state government employee who works "in a position which, under or pursuant to state law, *is designated as* . . . a major nontenured policy-making or advisory position." *Id.* (emphasis added). We interpret this language to require the Legislature to expressly designate which nontenured positions are major policy-making or advisory positions. Although not the ideal approach, the Legislature can accomplish this designation by statutorily defining the job responsibilities of a particular position to make it clear that the nontenured position is a major policy-making or advisory position. Because the Legislature has not designated any of the three positions as major nontenured policy-making or advisory positions, we hold that all three Claimants are eligible for unemployment compensation benefits.

I. BACKGROUND

These consolidated cases involve three former State of New Mexico employees. Sandra Perez (Perez) was the state personnel director of the New Mexico State Personnel Office (State Personnel Office) from August 17, 2004 through February 19, 2011. The State Personnel Board of the State Personnel Office hired Perez to the position with the approval of former Governor Bill Richardson. *See* NMSA 1978, § 10-9-10(C) (1983) (providing that the State Personnel Board shall "hire, with the approval of the governor, a director experienced in the field of personnel administration"). The State Personnel Board "is a public administrative body" with "the power to promulgate rules to carry out the provisions of the Personnel Act [NMSA 1978, §§ 10-9-1 to -25 (1961, as amended through 2009)] and to hear appeals by state employees

aggrieved by an agency's action affecting their employment." *Martinez v. N.M. State Eng'r Office*, 2000-NMCA-074, ¶22, 129 N.M. 413, 9 P.3d 657. Accordingly, the State Personnel Board has "both policy-making and quasi-judicial responsibilities." *Id.* As the state personnel director, Perez served the State of New Mexico at the pleasure of the State Personnel Board.

Dorothy Griego (Griego) was the administrative services division director and the chief financial officer of the New Mexico Department of Finance and Administration (DFA) from January 1, 2003 through December 31, 2010. "The purpose of the Department of Finance and Administration Act is to make state government more efficient and responsive . . . and to establish a single, unified department to administer laws relating to finance of state government; and to perform other duties as provided by law." NMSA 1978, § 9-6-2 (1983). The DFA cabinet secretary is the administrative and executive head of the DFA, and is a member of the executive cabinet. NMSA 1978, § 9-6-4 (1983). The DFA cabinet secretary presumably appointed Griego as the administrative services division director and chief financial officer of the DFA with the approval of former Governor Richardson. *See* NMSA 1978, § 9-1-4(A)(2) (1977) ("[T]he principal unit of a department is a 'division,' headed by a 'director,' who shall be appointed by the secretary with the approval of the governor and who shall serve at the secretary's pleasure.").

India Hatch (Hatch) was the executive director of the New Mexico Racing Commission (Racing Commission) from September 4, 2010 through September 12, 2011. The Racing Commission consists of five members "appointed by the governor and . . . confirmed by the senate." NMSA 1978, § 60-1A-3(B) (2007). The New Mexico Horse Racing Act (Horse Racing Act), NMSA 1978, §§ 60-1A-1 to -30 (2007, as amended through 2011), governs horse racing in New Mexico. The Horse Racing Act grants the Racing Commission administrative authority over the regulation of horse racing in New Mexico. *See* § 60-1A-4 (establishing the powers and duties of the Racing Commission); § 60-1A-5 (granting the Racing Commission rulemaking authority and adjudicatory authority to suspend, revoke, and deny occupational and racetrack licenses); § 60-1A-7 (granting the Racing Commission authority over horse racing licensure). The Racing Commission appointed Hatch as its executive director. *See* § 60-1A-3(H) (providing that the members of the Racing Commission "may appoint an executive director and establish the executive director's duties and compensation").

All three Claimants were terminated following Governor Susana Martinez's first election as the governor of the State of New Mexico. All three Claimants applied to the Department for unemployment compensation benefits. The Department initially awarded unemployment compensation benefits to Perez and Griego, but denied such benefits to Hatch. However, after additional review, the Department ultimately determined that all three Claimants held major nontenured policy-making or advisory positions that are ineligible for unemployment compensation benefits pursuant to Section 51-1-44(A)(5)(a). All three Claimants appealed individually to separate district courts. The district court presiding over Griego's appeal affirmed the Department's determination, while the district courts that presided over the appeals of Perez

and Hatch reversed each of the Department's determinations.

The losing party in each case appealed to the New Mexico Court of Appeals. The Court of Appeals issued a majority opinion in Perez's appeal that reversed the district court and reinstated the Department's final determination denying Perez unemployment compensation benefits. *N.M. Dep't of Workforce Solutions v. Perez*, 2014-NMCA-035, ¶ 26, 320 P.3d 1001. The Court of Appeals consolidated the appeals by Griego and Hatch, and following oral argument, each judge on the panel assigned to the consolidated appeal approached the case differently with varying results, which we will describe later in this opinion. *See Griego v. N.M. Dep't of Workforce Solutions*, No. 32,556, *consolidated with Hatch v. N.M. Dep't of Workforce Solutions*, No. 32,963, Order of Certification to the New Mexico Supreme Court (N.M. Ct. App. Sept. 3, 2014) (attaching Exhibit 1 (Vigil, J., proposed op.), Ex. Exhibit 2 (Bustamante, J., proposed op.), and Exhibit 3 (Sutin, J., proposed op.)).

Perez filed a petition for writ of certiorari and the Court of Appeals requested certification of the consolidated cases in *Griego* and *Hatch* to this Court. *Griego v. N.M. Dep't of Workforce Solutions*, No. 34,880, Order of Certification to the New Mexico Supreme Court at 4-6 (N.M. Ct. App. Sept. 3, 2014). We granted certiorari in *Perez v. N.M. Dep't of Workforce Solutions*, 2014-NMCERT-002, and accepted certification in *Griego* and *Hatch*. *Griego*, No. 34,880, Order of Certification to the New Mexico Supreme Court accepted (N.M. Sup. Ct. Sept. 29, 2014). Following oral argument, this Court consolidated all three cases.

II. DISCUSSION

The issue common to these cases on appeal stems from administrative determinations concerning whether Claimants' former positions were "designated as . . . major nontenured policy-making or advisory position[s]" pursuant to Section 51-1-44(A)(5)(a). Our review of an administrative decision applies "the same statutorily defined standard of review as the district court." *Miller v. Bd. of Cnty. Comm'rs of Santa Fe Cnty.*, 2008-NMCA-124, ¶ 16, 144 N.M. 841, 192 P.3d 1218 (internal quotation marks and citation omitted). "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.* (alteration and omission in original) (internal quotation marks and citation omitted).

Because the issue before this Court is one of statutory construction, we are asked to review whether the administrative decisions were "in accordance with the law." *Id.* (internal quotation marks and citation omitted). "If an agency decision is based upon the interpretation of a particular statute, the court will accord some deference to the agency's interpretation, especially if the legal question implicates agency expertise." *Fitzhugh v. N.M. Dep't of Labor, Emp't Sec. Div.*, 1996-NMSC-044, ¶ 22, 122 N.M. 173, 922 P.2d 555. "However, the court may always substitute its interpretation of the law for that of the agency's because it is the function of the courts to interpret the law." *Id.* (internal quotation marks and citation omitted).

A. For an employee in a state government position to be ineligible for unemployment compensation benefits, the Legislature must expressly designate that position as a major nontenured policy-making or advisory position

Pursuant to the New Mexico Unemployment Compensation Law, NMSA 1978, Sections 51-1-1 to -59 (1978, as amended through 2010), unemployment compensation benefits are not available for services performed by an individual in the employment of a government entity who is "in a position which, under or pursuant to state law, *is designated as* . . . a major nontenured policy-making or advisory position." Section 51-1-44(A)(5)(a) (emphasis added). For an employee in a state government position to be ineligible for unemployment compensation benefits, legislation must expressly (1) designate that position as a nontenured position, and (2) designate the position as *either* a major policy-making position *or* a major advisory position. *Id.* All three Claimants concede that their former positions were nontenured positions. *See* § 10-9-4(C), (D) (designating "heads of agencies appointed by boards or commissions" and "directors of department divisions" as nontenured state employees excluded from protection under the dismissal and demotion rules provided in Section 10-9-13(H) of the State Personnel Act). Accordingly, the sole issue before this Court is whether Claimants' former positions were designated by the Legislature as either major nontenured policy-making positions or major nontenured advisory positions. Section 51-1-44(A)(5)(a).

The Legislature enacted Section 51-1-3 of the Unemployment Compensation Law to serve as "a guide to the interpretation and application of" the Unemployment Compensation Law. Pursuant to Section 51-1-3, the general rule is that every employee in New Mexico is eligible for unemployment compensation benefits unless the Legislature designates a certain position ineligible for those benefits. *Compare* § 51-1-3 (stating that the public good mandates the "setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own"), *with* § 51-1-44(A)(5) (noting certain positions that are exempt from receiving unemployment benefits).

Consistent with Section 51-1-3, this Court construes the Unemployment Compensation Law liberally in favor of employees to afford them the benefits intended by law. *See Emp't Sec. Comm'n v. C. R. Davis Contracting Co.*, 1969-NMSC-174, ¶ 13, 81 N.M. 23, 462 P.2d 608 (recognizing that the Unemployment Compensation Law "is remedial legislation that calls for a liberal construction to the end that humanitarian purposes may be given effect."). Conversely, this Court narrowly construes exemptions under the Unemployment Compensation Law. *See Peisker v. Unemployment Comp. Comm'n*, 1941-NMSC-031, ¶ 7, 45 N.M. 307, 115 P.2d 62 (stating that an employer claiming an exemption from the unemployment tax carries a heavy burden because granting an exemption from the tax is strictly construed against the employer); *see also Samosa v. Lopez*, 1914-NMSC-061, ¶ 13, 19 N.M. 312, 142 P. 927 ("It is a well-established rule of construction that a statute of exemption from taxation must receive a strict construction, and no claim of exemption should be sustained, unless within the express letter or the necessary scope of the exemption clause.").

The Department argues that Section

51-1-44(A)(5)(a) requires a factual analysis of Claimants' former daily employment duties to determine whether Claimants held major nontenured policy-making or advisory positions that are ineligible for unemployment compensation benefits. We disagree. The plain language of Section 51-1-44(A)(5)(a) requires a purely legal analysis regarding whether the Legislature has "under or pursuant to state law, . . . designated" a position as "a major nontenured policy-making or advisory position." *See N.M. Indus. Energy Consumers v. N.M. Pub. Regulation Comm'n*, 2007-NMSC-053, ¶ 20, 142 N.M. 533, 168 P.3d 105 ("We look first to the plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different one was intended."). Accordingly, we interpret the plain language of Section 51-1-44(A)(5)(a) as requiring the Legislature to expressly designate which nontenured state government positions are major policy-making or advisory positions.

In these consolidated cases, the New Mexico Court of Appeals identified different approaches by which the Legislature could designate which nontenured state government positions are major policy-making or advisory positions. In *Perez*, the majority focused on the statutory duties of the personnel director as specified in Section 10-9-12, and concluded that the specification satisfies the language "designated as" in Section 51-1-44(A)(5). 2014-NMCA-035, ¶ 25. The majority also concluded that "the personnel director's broadly designated [statutory] duties to supervise and recommend along with the director's advisory responsibilities can be considered major because they are notable, conspicuous in effect and scope, important, significant, and a major part and aspect of the personnel director's full gamut of duty." *Id.*

In the consolidated appeals of Griego and Hatch, each judge on the panel offered a different approach as to how the Legislature could make the designation. Judge Vigil would require the designation to be "expressly set forth in a statute, rule, regulation, or executive order." *Griego*, No. 32,556, *consolidated with* No. 32,963, Order of Certification to the New Mexico Supreme Court, Ex. 1, ¶ 6 (Vigil, J., proposed op.). Judge Vigil would reject an approach that would require a fact-finder to examine what the employee actually did, and would also decline to consider job descriptions. *Id.* Judge Bustamante would rely on the Executive Reorganization Act, NMSA 1978, Sections 9-1-1 to -13 (1977, as amended through 1983), and would hold that all nontenured positions at or above division director are not eligible for unemployment compensation. *Griego*, No. 32,556, *consolidated with* No. 32,963, Order of Certification to the New Mexico Supreme Court, Ex. 2 (Bustamante, J., proposed op.). Judge Sutin would not consider regulations, rules, or executive orders, but would interpret statutory job descriptions to determine whether the job description evinces a legislative intent to designate a position as a major policy-making or advisory position. *Id.*, Ex. 3 (Sutin, J., proposed op.).

In addition to the suggestions from the Court of Appeals, we have reviewed how other states have designated nontenured positions as major policy-making or advisory positions, and we have identified four basic approaches. First, the Legislature could identify by title the nontenured positions it intends to be major nontenured policy-making or advisory positions. Second, the Legislature could define the terms "major," "nontenured," "policy-making," and "advisory position." Third, the Legislature could delegate to employing executive branch offices or

administrative agencies its authority to prospectively designate positions as major nontenured policy-making or advisory positions. Fourth, the Legislature could define the duties of nontenured employees to reveal which positions have major policy-making and advisory roles. We discuss each of these approaches in the following subsections.

1. ***The Legislature may enact legislation that identifies by title the positions it designates as major nontenured policy-making or advisory positions pursuant to Section 51-1-44(A)(5)(a)***

A statute identifying by title the positions that are designated major nontenured policy-making or advisory positions would provide the Department and courts with the simplest way to determine the Legislature's intent under Section 51-1-44(A)(5)(a). *See Diamond v. Diamond*, 2012-NMSC-022, ¶25, 283 P.3d 260 ("Where the language of a statute is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation." (internal quotation marks and citations omitted)). For example, the Minnesota Unemployment Insurance Law provides that eligible positions for unemployment compensation purposes do not include "employment for Minnesota that is a major policy-making or advisory position in the unclassified service," Minn. Stat. Ann. § 268.035(20)(15) (West 2010), and "employment for a political subdivision of Minnesota that is a major nontenured policy making or advisory position." Minn. Stat. Ann. § 268.035(20)(16). The Minnesota State Personnel Management Act, Minn. Stat. Ann. § 43A.001 to 43A.55 (West 1981, as amended through 2010), exhaustively specifies which positions are designated as "unclassified." Minn. Stat. Ann. § 43A.08. The relevant positions that are ineligible for unemployment compensation benefits under the Minnesota State Personnel Management Act and Unemployment Insurance Law are "*executive or administrative heads* of departments, bureaus, divisions, and institutions specifically established by law in the unclassified service," Minn. Stat. Ann. § 43A.08(2) (emphasis added), and "*executive directors* or executive secretaries appointed by and *reporting to any policy-making board or commission established by statute.*" Minn. Stat. Ann. § 43A.08(16) (emphasis added).

The Department argues that our Legislature has enacted similar legislation that designates Claimants' former positions as major policy-making or advisory positions. Specifically, the Department maintains that the Legislature has designated all nontenured positions that are exempt from coverage under the Personnel Act as major policy-making or advisory positions and therefore ineligible for unemployment compensation benefits, citing our opinion in *State ex rel. Duran v. Anaya*, 1985-NMSC-044, 102 N.M. 609, 698 P.2d 882. We disagree.

In *Duran*, former members of the State Board of Barber Examiners who had been removed from their positions by former Governor Toney Anaya argued that they had a protected property interest in their positions. *Id.* ¶¶ 2, 11. The former members maintained that they were entitled to both "notice and [a] hearing prior to the deprivation caused by the Governor's actions in removing them from the Board, prior to the expiration of their terms." *Id.* ¶ 11. This Court disagreed, noting that "the members of the State Board of Barber Examiners are policy-making persons and a policy-making public servant has no property interest in his [or her] position." *Id.* As a result, this Court concluded that by "exempting members of boards and

commissions and agency heads from the Personnel Act, . . . the Legislature acknowledges that such policy-making positions are different from other types of employment positions and that such categor[ies] of persons are not entitled to hearings before removal from their positions." *Id.*

A brief description of the provisions of the Personnel Act that were at issue in *Duran* helps explain our holding in *Duran*. The Personnel Act sets forth the procedural elements for dismissal or demotion of government employees. Section 10-9-13(H). The Personnel Act exempts certain positions from coverage under these procedures, and thereby makes the positions nontenured "with no expectation of continued employment." *Swinney v. Deming Bd. of Educ.*, 1994-NMSC-039, ¶ 7, 117 N.M. 492, 873 P.2d 238 (clarifying the status of an exempt government employee discharged under the New Mexico School Personnel Act); *see* § 10-9-4 (specifying categories of exempt government positions). Excluded from coverage under the Personnel Act and relevant to our inquiry are "B. members of boards and commissions and heads of agencies appointed by the governor; C. heads of agencies appointed by boards or commissions; [and] D. directors of department divisions." Section 10-9-4. However, these provisions simply mean that the excluded positions are nontenured positions that do not have the protections of the dismissal or demotion procedures of the Personnel Act.

Duran is inapplicable to this case because Claimants concede that their former positions were nontenured pursuant to the Personnel Act. To be ineligible for unemployment compensation benefits under Section 51-1-44(A)(5)(a), a nontenured position must *also* be expressly designated under or pursuant to state law as either (1) a major policy-making position or (2) a major advisory position. Section 51-1-44(A)(5)(a). Because Section 51-1-44(A)(5)(a) was not at issue in *Duran*, the court's observation that state employees holding certain "policy-making positions" are exempt from the Personnel Act is immaterial to our analysis. *See* 1985-NMSC-044, ¶ 11. While Claimants' former positions are excluded from coverage under the Personnel Act, the Department still has the burden of proving that Claimants' former positions were designated as either (1) major policy-making positions or (2) major advisory positions. Section 51-1-44(A)(5)(a). If the Legislature intended every position exempt from the Personnel Act to also be ineligible for unemployment compensation benefits, it could have easily and expressly done so in order to meet the requirements of Section 51-1-44(A)(5)(a).

Our Legislature has not enacted legislation that identifies by title the positions it designates as major nontenured policy-making or advisory positions. As a result, the Department's reliance on *Duran* and the example provided by the Minnesota Unemployment Insurance Law are inapplicable to these consolidated cases.

2. *The Legislature could define the terms "major," "nontenured," "policy-making," and "advisory position" as expressed under Section 51-1-44(A)(5)(a)*

The Legislature may designate which nontenured positions are major policy-making or advisory positions by enacting legislation that adequately defines the key terms in Section 51-1-44(A)(5)(a). Definitions for "major," "nontenured," "policy-making," and "advisory position" would provide much

needed context for interpreting Section 51-1-44(A)(5)(a).

For example, the Iowa Administrative Code provides definitions for the terms "major," "nontenured," "policymaker," and "advisory position." Iowa Admin. Code r. 871—23.71(96)(3) (2014).

> The word "major" in the phrase "major nontenured policymaking or advisory position" refers to high level governmental positions usually filled by appointment by the chief executive of the political entity (governor, mayor, etc.), or a council, and which involves responsibilities affecting the entire political entity, whether it be the state, county or city.

Iowa Admin. Code r. 871—23.71(96)(3)(b)(3). "The term 'nontenured' is used in its usual meaning to mean that the position is not covered by merit system or civil service law or rules with respect to duration of appointment to the service." Iowa Admin. Code r. 871—23.71(96)(3)(b)(4). " 'Policymaker' is defined as generally referring to the determination of the direction, emphasis and scope of action in the development of, and the administration of, governmental programs. Such responsibilities are confined to and inherent in jobs of the higher echelons of government." Iowa Admin. Code r. 871—23.71(96)(3)(b)(1). Finally, "[a]n 'advisory position' is one which advises established governmental agencies and officers with respect to policy, program and administration without having authority to implement the recommendations." Iowa Admin. Code r. 871—23.71(96)(3)(b)(2).

Our Legislature has not defined the terms in Section 51-1-44(A)(5)(a) of the Unemployment Compensation Law. *See* §§ 51-1-1 to -59. Our analysis in these consolidated cases would greatly benefit from legislation that defined the key terms in Section 51-1-44(A)(5)(a) in a manner analogous to the definitions provided in the Iowa Administrative Code. However, this approach is inapplicable here because our Legislature has yet to define the key terms in Section 51-1-44(A)(5)(a).

3. *The Legislature could delegate authority under Section 51-1-44(A)(5)(a) to the executive branch or administrative agencies*

The Legislature could make it clear that designations "under or pursuant to state law" also authorize the executive branch, boards, commissions, or other administrative agencies to designate which positions are major nontenured policy-making or advisory positions that are ineligible for unemployment compensation. This is the approach followed in Pennsylvania. Pennsylvania courts have interpreted that state's unemployment compensation laws to permit designations of state government positions as major policy-making or advisory positions to be by "statute, regulation, executive order or the like," provided such designations are "made by an official or entity with authority to set such terms." *Odato v. Unemployment Comp. Bd. of Review*, 805 A.2d 660, 662 (Pa. Commw. Ct. 2002) (internal quotation marks and citations omitted); *see, e.g.*, *Mandel v. Unemployment Comp. Bd. of Review*, No. 258 C.D.2012, 2013 WL 3942184, mem. op. at *2, *7 (Pa. Commw. Ct. Mar. 18, 2013) (non-precedential) (recognizing a management directive issued by the Pennsylvania Governor's Office which set forth the

positions designated by the Governor's Office as "major nontenured policymaking or advisory positions"). An important consideration is that the employee knows in advance of accepting employment as a nontenured employee that once terminated, he or she will not be eligible for unemployment compensation. *See Odato*, 805 A.2d at 663 (recognizing that the designation provides "an official signpost which informs the jobholder, upon assuming the position, of what can be expected." (internal quotation marks and citation omitted)).

We interpret "state law" in Section 51-1-44(A)(5)(a) to mean a statute enacted by the Legislature. Section 51-1-44(A)(5)(a) grants the Legislature exclusive authority to designate which nontenured positions are major policy-making or advisory positions. This authority is exclusive to the Legislature until it enacts legislation that delegates its authority under Section 51-1-44(A)(5)(a) to the executive branch, a board, commission, or administrative agency. Because the Legislature has not enacted such legislation, the Pennsylvania cases evaluating regulations and executive orders are not helpful here. We now turn to the fourth example of how the Legislature could expressly designate positions as major nontenured policy-making or advisory positions.

4. ***The Legislature could define the statutory duties of a position which could be interpreted by the Department or the courts to reflect a legislative intent to designate the position as a major nontenured policy-making or advisory position***

Although the Legislature has not followed any of the preceding approaches for designating which positions are major nontenured policy-making or advisory positions, it has on occasion enacted legislation describing the duties and responsibilities of particular positions. Because "[o]ur principal goal in interpreting statutes is to give effect to the Legislature's intent," *Griego v. Oliver*, 2014-NMSC-003, ¶ 20, 316 P.3d 865, we conclude that interpreting statutory job descriptions could evince a legislative intent to make the requisite designations under the Unemployment Compensation Law.

With respect to major policy-making positions, we have recognized that in addition to the Legislature, which as the voice of the people makes public policy, "[e]lected executive officials and executive agencies also make policy, [but] to a lesser extent, [and only] as authorized by the constitution or legislature." *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 21, 125 N.M. 343, 961 P.2d 768 (second and third alterations in original) (internal quotation marks and citation omitted). The Executive Reorganization Act creates an executive cabinet which is "headed by the governor and consist[s] of, but [is] not limited to, the lieutenant governor, and the secretaries of such departments as are hereafter created and designated as 'cabinet departments' pursuant to law." Section 9-1-3(A). Section 9-1-3(B)-(C) describes the duties of the executive cabinet.

> B. The cabinet shall:
>
> (1) *advise the governor on problems of state government*;
>
> (2) establish liaison and provide communication between the executive departments and state elected officials;

(3) *investigate problems of public policy*;

(4) study government performance and *recommend methods of interagency cooperation*;

(5) *review policy problems and recommend solutions*;

(6) strive to minimize and eliminate overlapping jurisdictions and conflicts within the executive branch; and

(7) *assist the governor in defining policies* and programs to make the government *responsive to the needs of the people.*

Id. (emphasis added). In addition, the Executive Reorganization Act requires the governor to "*seek the advice of the cabinet members.*" Section 9-1-3(C) (emphasis added).

Although Section 9-1-3 does not use the terms "major" and "policy-making or advisory," it is evident that the Legislature intended the executive cabinet members to play a major role in advising the Governor on public policy issues affecting the entire state. The executive cabinet members operate in very close organizational and functional proximity to the Governor, and because they advise the Governor regarding statewide policy issues, their roles are major ones. *Cf. Republican Party of N.M. v. N.M. Taxation & Revenue Dep't*, 2012 NMSC-026, ¶ 46, 283 P.3d 853 (limiting executive privilege "to those communications to or from individuals in very close organizational *and* functional proximity to the Governor" and government documents "authored, or solicited and received, by either the Governor or an 'immediate advisor,' with 'broad and significant responsibility' for assisting the Governor with his or her decisionmaking" (citations omitted)). Based on the statutory duties described under Section 9-1-3, it is clear that the Legislature intended to exempt executive cabinet members from eligibility for unemployment compensation benefits pursuant to Section 51-1-44(A)(5)(a) because of their major advisory role in policy making. The Executive Reorganization Act serves as one example of how the Legislature could describe statutory duties that evince its intent to designate the position as one that is a major advisory position.

Thus, to be ineligible for unemployment benefits, the statutory duties for a state position must provide equal or greater responsibilities than the statutory duties under Section 9-1-3. With this guiding principle in mind, we now analyze whether Claimants are eligible for unemployment compensation benefits by analyzing their former statutory duties against the statutory duties provided under Section 9-1-3.

B. The Legislature has not designated Claimants' former positions as either major policy-making or advisory positions

The statutory duties for Claimants' former positions are distinguishable from those of the executive cabinet under the Executive Reorganization Act. Of the former positions held by Claimants, only the position held by Perez had duties described by statute. Because the former positions held by Griego and Hatch do not have duties described by statute, we hold that the Legislature could not have designated their positions as major nontenured policy-making or advisory

positions as required by Section 51-1-44(A)(5)(a). As a result, both Griego and Hatch are eligible for unemployment compensation benefits. Our analysis now focuses solely on the statutory duties for Perez's position.

As state personnel director, Perez handled the administrative duties of the State Personnel Office and implemented the rules and policies promulgated by the State Personnel Board. Section 10-9-12. Specifically, her statutory duties were to:

> A. supervise all administrative and technical personnel activities of the state;
>
> B. act as secretary to the board;
>
> C. establish, maintain and publish annually a roster of all employees of the state, showing for each employee his [or her] division, title, pay rate and other pertinent data;
>
> D. make annual reports to the board;
>
> E. recommend to the board rules he [or she] considers necessary or desirable to effectuate the Personnel Act; and
>
> F. supervise all tests and prepare lists of persons passing them to submit to prospective employers.

Id. These statutory duties do not support the Department's conclusion that the Legislature designated Perez's former position as a major nontenured policy-making or advisory position.

Within the State Personnel Office, only the State Personnel Board has major policy-making statutory duties. The State Personnel Board has statutory authority to:

> A. *promulgate regulations* to effectuate the Personnel Act;
>
> B. hear appeals and *make recommendations to the employers*;
>
> C. hire, with the approval of the governor, a director experienced in the field of personnel administration;
>
> D. review budget requests prepared by the director for the operation of the personnel program and *make appropriate recommendations* thereon;
>
> E. make investigations, studies and audits necessary to the proper administration of the Personnel Act;
>
> F. *make an annual report to the governor* at the end of the fiscal year;
>
> G. establish and maintain liaison with the general services department; and
>
> H. represent the public interest in the improvement of personnel administration in the system.

Section 10-9-10 (emphasis added). The rules promulgated by the State Personnel Board set

statewide personnel policies for employees covered under the Personnel Act such as "classification plan[s]," "pay plan[s]," "hours of work, holiday and leave," and "dismissal or demotion procedure[s]." Section 10-9-13(A), (B), (G), (H).

While State Personnel Board members have major policy-making duties they are not employees, and therefore they are not eligible for unemployment compensation benefits pursuant to Section 51-1-44(A)(5)(a). Of the six statutory duties under Section 10-9-12 for the state personnel director, only Subsection E granted Perez authority to recommend rules to the State Personnel Board. We agree with the Court of Appeals that " '[r]ecommend' can mean 'advise or counsel.' " *Perez*, 2014-NMCA-035, ¶ 19 (quoting *Black's Law Dictionary* 1436 (Rev. 4th 1968)). However, the issue is not whether a state employee has a duty to render some advice. The majority of the statutory duties of the personnel director under Section 10-9-12 are administrative. Whether and if the personnel director will make a recommendation to amend personnel rules is but a small part of the required job duties. Personnel rule amendments may be neither required nor desirable. By contrast, the Executive Reorganization Act requires the executive cabinet to regularly and continuously advise the Governor about problems in state government, investigate public policy concerns and recommend solutions, and assist the Governor in continually defining the policies that would be responsive to the needs of the people of New Mexico. Section 9-1-3.

Comparing the job description for the personnel director under Section 10-9-12 with the job description of the executive cabinet in Section 9-1-3, we conclude that the Legislature did not intend to designate the personnel director position as one that is nontenured and a major policy-making or advisory position. As a result, we hold that Perez is also eligible for unemployment compensation. Our conclusion is also consistent with the public policy of the Unemployment Compensation Law and our obligation to liberally construe that Law in favor of awarding unemployment compensation benefits to employees. Should the Legislature believe that we have misinterpreted its intent, we have outlined different approaches by which the Legislature can make its intentions clearer.

III. CONCLUSION

The Department erred when it denied unemployment compensation benefits to Perez, Griego, and Hatch. We reverse the Court of Appeals's holding in *Perez*, 2014-NMCA-035, ¶¶ 1, 26, and reinstate the district court's order granting Perez unemployment compensation benefits. With respect to Griego, we reverse the district court's order affirming the Department's determination denying Griego unemployment compensation benefits. With respect to Hatch, we affirm the district court's order granting Hatch unemployment compensation benefits by reversing the Department's determination.

IT IS SO ORDERED.

EDWARD L. CHÁVEZ, Justice

WE CONCUR:

BARBARA J. VIGIL, Chief Justice

PETRA JIMENEZ MAES, Justice

RICHARD C. BOSSON, Justice

CHARLES W. DANIELS, Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMSC-009

Filing Date: March 9, 2015

Docket No. 34,435

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

v.

JASON STRAUCH,

Defendant-Respondent.

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OPINION

DANIELS, Justice.

The child abuse reporting requirement of the Abuse and Neglect Act in the New Mexico Children's Code mandates that

> [e]very person, including a licensed physician; a resident or an intern examining, attending or treating a child; a law enforcement officer; a judge presiding during a proceeding; a registered nurse; a visiting nurse; a schoolteacher; a school official; a social worker acting in an official capacity; or a member of the clergy who has information that is not privileged as a matter of law, who knows or has a reasonable suspicion that a child is an abused or a neglected child shall report the matter

to specified authorities. NMSA 1978, § 32A-4-3(A) (2005). In this case, we consider the scope of this statutory reporting requirement and its relationships to statutory protection of confidential communications and to the privileged-communication provisions of the New Mexico Rules of Evidence.

We conclude that both privately and publicly employed social workers are mandatory child abuse reporters, in light of the statutory history and the broadly inclusive terms of the Abuse and Neglect Act. Consequently, statements made to a social worker by an alleged child abuser in private counseling sessions are not protected from

disclosure in a court proceeding as a result of the specific exception to the physician-patient and psychotherapist-patient evidentiary privilege in Rule 11-504(D)(4) NMRA of the New Mexico Rules of Evidence, which provides, "No privilege shall apply for confidential communications concerning any material that a [social worker] is required by law to report to a public employee or public agency."

I. BACKGROUND

Defendant Jason Strauch allegedly revealed to his wife that he had been sexually abusing their minor daughter. Defendant moved out of the family home and began attending counseling sessions as a patient of Frederick Stearns, a private-practice social worker licensed by the State of New Mexico. The couple reconciled and Defendant moved back home after several months of counseling. Defendant continued to see Mr. Stearns, and Defendant's wife attended several of these counseling sessions each year over the next few years. When Defendant's daughter revealed to her mother that the sexual abuse had never stopped, his wife separated from Defendant and reported the abuse.

Defendant was charged with four counts of criminal sexual contact of a minor in the second degree, contrary to NMSA 1978, Section 30-9-13(A)-(B) (2003), which provides enhanced penalties when the victim is under the age of thirteen. After the State filed a notice of intent to call Mr. Stearns as a prosecution witness and attempted to obtain records of the counseling sessions, Defendant filed a motion in the district court for a protective order, arguing that the communications with Mr. Stearns were protected from disclosure both by statute, particularly NMSA 1978, § 61-31-24(B) (1989) (providing under the Social Work Practice Act that "[n]o licensed social worker may disclose any information he has acquired from a person consulting him in his professional capacity" unless any of four limited exceptions apply), and by evidentiary privilege, particularly Rule 11-504(A)(4), (B)-(D) (establishing under the New Mexico Rules of Evidence that a patient's confidential communications with a licensed social worker "made for the purpose of diagnosis or treatment of the patient's physical, mental, or emotional condition" are privileged from disclosure in a court proceeding unless any of four limited exceptions apply), *see* Rule 11-1101(C) NMRA ("The rules on privilege apply to all stages of a case or proceeding.").[1]

The State argued that the statutes and evidentiary rules mandated disclosure, pointing to the broadly inclusive term "[e]very person" in the Abuse and Neglect Act reporting requirement, § 32A-4-3(A); to the Social Work Practice Act confidentiality exception, § 61-31-24(C) (requiring disclosure of "information in court hearings concerning matters of adoption, child abuse, child neglect or other matters pertaining to the welfare of children as stipulated in the Children's Code"); and to the New Mexico Rules of Evidence evidentiary privilege exception, Rule 11-504(D)(4) (applying to "confidential communications concerning any material that a [social worker] or patient is required by law

[1]The New Mexico Rules of Evidence applicable in 2011 when this case was filed in district court have since been amended "effective for all cases pending or filed [as of various effective 2013 dates]." *See, e.g.*, Rule 11-504 (indicating the effective date provision of the Rules of Evidence). Because those amendments do not affect the substance of the relevant rules or the outcome of this pending case, this opinion does not distinguish between versions of the rules and quotes the current rules.

to report to a public employee or public agency").

On the issues now before this Court, the district court ruled that Mr. Stearns was not a mandatory reporter under Section 32A-4-3(A) of the Abuse and Neglect Act because his counseling sessions were conducted in his capacity as a private therapist rather than, in the words of the statute, in an "official capacity"; that Defendant's communications with Mr. Stearns were privileged under Rule 11-504; and that the Rule 11-504(D)(4) privilege exception did not apply to the communications between Defendant and Mr. Stearns because Mr. Stearns was not required by law to report what he learned in private counseling sessions.

On interlocutory appeal by the State, a majority of the Court of Appeals panel affirmed the district court's protective order. *State v. Strauch*, 2014-NMCA-020, ¶¶ 1, 32, 317 P.3d 878. The two-judge majority held that the Abuse and Neglect Act did not make Mr. Stearns a mandatory reporter because the statute does not actually require "every person" to report child abuse but only those categories of persons the statute specifically identifies after the words, "every person, including," *id.* ¶ 10, as well as "other professionals or government officials who are likely to come into contact with abused [or] neglected children during the course of their professional work," *id.* ¶ 19.

The majority held as well that Mr. Stearns was statutorily relieved of reporting child abuse because he had not been, in the words of the statute, "a social worker acting in an official capacity." *Id.* ¶ 20. The majority construed that phrase to mean that the statute imposes a reporting requirement only when the social worker counsels patients as a government employee or contractor and not in any other professional capacity. *Id.*

The majority opinion also held that the communications between Defendant and Mr. Stearns were shielded from disclosure in the district court because Section 61-31-24 of the Social Work Practice Act created an evidentiary privilege with exceptions for testimony about child abuse that applied neither in a criminal proceeding, *id.* ¶ 30, nor in any case in which a social worker had not previously reported the abuse, *id.* ¶ 31, and because the Rule 11-504 privilege exception did not apply where a social worker was not acting as a government employee or contractor and therefore was not a mandatory reporter under Section 32A-4-3(A) of the Abuse and Neglect Act, *id.* ¶ 20.

The dissent would have reversed the district court's protective order, concluding that the language requiring "'every person'" to report information of child abuse "manifests our Legislature's express intent to create an affirmative duty on all persons to report child abuse." *Id.* ¶ 39 (Hanisee, J., dissenting).

We granted the State's petition for writ of certiorari to address the important precedential issues involved. *See State v. Strauch*, 2014-NMCERT-001.

II. DISCUSSION

There are two related lines of analysis that determine the result in this case, one of them construing the scope of the mandatory out-of-court child abuse reporting provisions of a criminal statute and the other determining the applicability of in-court evidentiary privileges. Because this controversy arose through an effort to mandate in-court disclosure of arguably privileged

communications rather than through a criminal prosecution to punish a failure to report, the privilege rules ultimately are dispositive. But in order to construe and apply privilege rules that depend in part on statutory reporting requirements, it is necessary first to understand the scope of those requirements.

A. Standard of Review

This case requires us to construe both legislative enactments and court rules. We review issues of statutory interpretation de novo. *State v. Almanzar*, 2014-NMSC-001, ¶ 9, 316 P.3d 183. Our "primary goal when interpreting statutes is to further legislative intent." *Jordan v. Allstate Ins. Co.*, 2010-NMSC-051, ¶ 15, 149 N.M. 162, 245 P.3d 1214. Although the first guide to statutory interpretation is the actual wording of the statute, we have recognized that where the meaning of the facial language of a statute is in doubt, the plain language approach may not lead to a correct interpretation of true legislative intent. *See Benavides v. Eastern New Mexico Medical Center*, 2014-NMSC-037, ¶ 24, 338 P.3d 1265. In interpreting statutory language as well as in much of the other work courts are called on to perform, it is necessary to think thoughts and not words. *See State v. Office of Pub, Defender ex rel. Muqqddin*, 2012-NMSC-029, ¶ 54, 285 P.3d 622. We have repeatedly cautioned that despite the "'beguiling simplicity'" of parsing the words on the face of a statute, we must take care to avoid adoption of a construction that would render the statute's application absurd or unreasonable or lead to injustice or contradiction. *State ex rel. Children, Youth & Families Dep't v. Maurice H. (In re Grace H.)*, 2014-NMSC-034, ¶ 34, 335 P.3d 746 (citation omitted); *State v. Nick R.*, 2009-NMSC-050, ¶ 11, 147 N.M. 182, 218 P.3d 868.

We therefore must "examine the plain language of the statute as well as the context in which it was promulgated, including the history of the statute and the object and purpose the Legislature sought to accomplish." *Maes v. Audubon Indem. Ins. Grp.*, 2007-NMSC-046, ¶ 11, 142 N.M. 235, 164 P.3d 934; *see also State Bd. of Educ. v. Bd. of Educ. of Alamogordo Pub. Sch. Dist. No. 1*, 1981-NMSC-031, ¶ 14, 95 N.M. 588, 624 P.2d 530 ("In ascertaining the legislative intent, we look not only to the language used in [a] statute, but also to the object sought to be accomplished and the wrong to be remedied.").

B. Reporting Requirements of the Abuse and Neglect Act

Despite the fact that the statutory analysis in this case focuses primarily on the single sentence in Section 32A-4-3(A) describing the reporting requirements, the apparent simplicity of that sentence has proved to be deceptive. We appreciate the difficulties the parties and the courts below have had in interpreting the current facial language of the Abuse and Neglect Act because we also have not found satisfactory answers by just looking at the words in the current version of a statute that has been repeatedly amended over the course of the half century since the first version was enacted in 1965. *See* 1965 N.M. Laws, ch. 157. (For the reader's convenience, the appendix to this opinion is a chronology of all versions of the statutory reporting language from 1965 to the present.) Simply parsing words in the current version of the statute and attempting to discern legislative intent from isolated grammatical analyses

raises more difficult questions than it provides definitive answers.

For example, if the Legislature had meant to impose a reporting requirement on only the professionals specifically mentioned in the statute, why did it include the words, "[e]very person, including" immediately before identifying those professions? Conversely, if the Legislature had meant to impose a reporting requirement on every person, why did it then specifically mention some occupations and not others? Why did the Legislature amend the statute in 2003 to omit the language "but not limited to" between the words "[e]very person, including" and the listing of identified professionals that followed? *Compare* 2005 N.M. Laws, ch. 189, § 38(A), *with* 2003 N.M. Laws, ch. 189, § 1(A). Why would the Legislature have imposed a mandatory reporting requirement on a social worker providing counseling services while employed by a public school or other government agency and not on a social worker providing the same kind of counseling while employed by a private school or business or while self-employed? If the Legislature really intended "official capacity" to make such a distinction, why would it not apply the same distinction to the physicians and teachers and other occupations mentioned in the statute? More globally, what is the relationship between the reporting requirements of the statute and the evidentiary privileges in the New Mexico Rules of Evidence? And why would the judiciary's evidentiary privilege rules protect the confidentiality of counseling sessions with a privately paid social worker and not the same kind of counseling with a government-salaried social worker? In this opinion, we seek to find a principled resolution that furthers the legislative purpose while either answering those questions or putting them to rest as irrelevant.

As we have found with other unclear statutory provisions in the past, "the statutory history provides us with guidance as to the legislative intent," allowing us to "'promote the legislature's accomplishment of its purpose.'" *Ortiz v. Overland Express*, 2010-NMSC-021, ¶¶ 19, 21, 148 N.M. 405, 237 P.3d 707 (citation omitted) (interpreting a statute to achieve its apparent purpose where amendments had inadvertently led to an unintended textual interpretation). In order to fully appreciate where we are, we need to understand how we got here.

1. Statutory Origins

New Mexico did not enact its child abuse reporting statute in a vacuum. Our statute was part of a national movement that was spurred in 1962 by publication of a seminal article, *The Battered-Child Syndrome*, in the Journal of the American Medical Association. *See* Leonard G. Brown, III & Kevin Gallagher, *Mandatory Reporting of Abuse: A Historical Perspective on the Evolution of States' Current Mandatory Reporting Laws with a Review of the Laws in the Commonwealth of Pennsylvania*, 59 Vill. L. Rev. Tolle Lege 37, 37 & n.4 (2013). Prior to the article's publication, no state had enacted a child abuse reporting law, but within just the next four years, all fifty states had done so. *Id.* at 37.

Following publication of *The Battered-Child Syndrome*, which "worked to galvanize the American public to take action," Brown & Gallagher, *supra*, at 39, a number of medical and legal professionals published articles about the problem of child abuse and the need for protective statutes, particularly

including reporting laws. *See, e.g.*, Allan H. McCoid, *The Battered Child and Other Assaults Upon the Family: Part One*, 50 Minn. L. Rev. 1, 3-19 (1965). The Children's Bureau of the United States Department of Health, Education, and Welfare[2], the Council of State Governments, the American Humane Association, and the American Medical Association all drafted model statutes to "offer various alternatives to the state legislators [considering enactment of reporting legislation] on the issue of who should be required to report." Monrad G. Paulsen, *Child Abuse Reporting Laws: The Shape of the Legislation*, 67 Colum. L. Rev. 1, 2 & n.4, 3 (1967). Throughout the United States, "child abuse reporting laws were passed quickly, perhaps even hastily." Brown & Gallagher, *supra*, at 39.

The 1963 Children's Bureau proposal, initially followed by twenty-two states, would have imposed a reporting duty only on physicians, on the theory that physicians would be in the best position to learn of child abuse. Paulsen, *supra*, at 2 n.4, 3-4, 6; *see* John B. Reinhart & Elizabeth Elmer, *The Abused Child[:] Mandatory Reporting Legislation*, 188 J. Am. Med. Ass'n, Apr. 27, 1964, at 358 (discussing advantages and disadvantages of the 1963 Children's Bureau proposal for the model legislation). An advisory committee of the American Humane Association proposed in 1963 to broaden the class of reporters to include all medical practitioners and hospital personnel. Paulsen, *supra*, at 2 n.6, 4. In 1965, the Council of State Governments added registered nurses to its list of required reporters. *Id.* at 2 n.5, 5.

The "American Medical Association (AMA) objected to physicians' being singled out for a special reporting duty" and proposed adding schoolteachers and social workers to those under a duty to report, extending the reporting requirement in its 1965 proposed legislation to "'any doctor of medicine, resident or intern[,] . . . any registered nurse, any visiting nurse, any school teacher or any social worker acting in his or her official capacity.'" Paulsen, *supra*, at 3 n.7, 5 (omission in original) (quoting the 1965 AMA proposed legislation); *see* Office of the General Counsel, AMA, Editorial, *Battered Child Legislation*, 188 J. Am. Med. Ass'n, Apr. 27, 1964, at 386 (recommending that mandatory reporting of child abuse extend beyond physicians to other professions, including social workers).

In 1965, the New Mexico Legislature enacted the first predecessor to our current law, a permissive statute providing that "[a]ny licensed practitioner of the healing arts, resident, or intern, examining, attending, or treating a child under the age of 16 years, any registered nurse, any visiting nurse, any school teacher or social worker acting in his or her official capacity, or any ordained minister of an established church" was permitted, but not required, to report suspected child abuse without risk of a lawsuit. 1965 N.M. Laws, ch. 157, § 2. The "official capacity" language has been a feature of the reporting statute in every version from 1965 to the present, and to understand its significance it is important to understand its history.

[2]The United States Department of Health, Education, and Welfare became the United States Department of Health and Human Services in 1979. As of 1979, the Children's Bureau is an office within a division of the department. *See, e.g.*, organizational information available at http://www.acf.hhs.gov/about/offices.

2. The "Official Capacity" Language

In the 1965 New Mexico act, terminology identifying occupations of listed reporters tracked the language of the AMA model statute, including use of the qualifying phrase "acting in his or her official capacity" after the listed occupations; but this original New Mexico act added the language, "any ordained minister of an established church," at the end of the listing instead of inserting it at an earlier point in the listing before the phrase "acting in his or her official capacity." 1965 N.M. Laws, ch. 157, § 2.

The phrase "acting in his or her official capacity" in the original New Mexico statute was identical in wording and placement to the same phrase contained in the AMA proposed legislation. This phrase followed the entire list of AMA-suggested occupations, and there is nothing in grammar or reason to indicate that it was meant to apply only to the final occupation in the list, social workers. The other states that have adopted the "official capacity" language from the AMA proposal have variously placed the language at the beginning of the listing of occupations, at the end of the listing as in the AMA model, or in a separate paragraph applicable to all categories. *See, e.g.*, N.Y. Consol. Laws ch. 55, art. 6, § 413(1)(a) (McKinney 2015) (providing that "[t]he following persons and officials are required to report . . . when they have reasonable cause to suspect that a child coming before them in their professional or official capacity is an abused or maltreated child," followed by a lengthy listing of occupations, including mental health counselors and social workers); 325 Ill. Comp. Stat. Ann. 5/4 (West 2014) (imposing a reporting requirement on an extensive list of occupations and relationships, including social workers, and ending the list with "or any other foster parent, homemaker or child care worker having reasonable cause to believe a child known to them in their professional or official capacity may be an abused child or a neglected child"); Ohio Rev. Code Ann. § 2151.421(A)(1)(a) (West 2014) ("No person described [in the extensive listing of occupations] in division (A)(1)(b) of this section who is acting in an official or professional capacity and knows, or has reasonable cause to suspect . . . that a child [has been abused] shall fail to immediately report . . . .").

New Mexico's placement of the "official capacity" qualification before the last-listed occupation, ordained ministers, appears to be nothing more than a historical anomaly resulting from the Legislature's tacking on ordained ministers at the end of the language taken from the AMA model act. *Compare* 1965 N.M. Laws, ch. 157, § 2 (indicating at the end of the listing of permissive reporters ", any registered nurse, any visiting nurse, any school teacher or social worker acting in his or her official capacity, or any ordained minister of an established church . . ."), *with* Paulsen, *supra*, at 5 (indicating at the end of the listing of required reporters "', any registered nurse, any visiting nurse, any school teacher or any social worker acting in his or her official capacity. . . .'" (quoting the 1965 AMA proposed legislation)).

There is also no reason to find significance in the use of semicolons before and after the language referring to social workers in the current statute. The language in both the AMA model act and the original New Mexico enactment had no punctuation separating the final two occupations listed: "any school teacher or [any] social worker acting in his or her official capacity." 1965

N.M. Laws, ch. 157, § 2. It was not until thirty-eight years later that the semicolons appeared in a 2003 amendment aimed solely at clarifying the clergy's duty to report child abuse. *See* 2003 N.M. Laws, ch. 189, § 1 (amending the law in an act entitled "Relating to the Children's Code: Clarifying a Member of the Clergy's Duty to Report Child Abuse"). In the 2003 amendment process concerned with the clergy's required reporting of information not learned through confidential communications, the commas that had separated all but the last three reporter occupations were replaced with semicolons between all named occupations, changing the relevant language at the time from ", a schoolteacher or a school official or social worker acting in an official capacity" in Chapter 34, Section 2(A) of New Mexico Laws of 1997 to "; a schoolteacher; a school official; a social worker acting in an official capacity; or a member of the clergy who has information that is not privileged as a matter of law" in Chapter 189, Section 1(A) of New Mexico Laws of 2003.

We have found nothing in our research to indicate that, by using the phrase "acting in ['his or her' or 'an' or 'their'] official capacity" at the end of the list of covered occupations, either the AMA or the jurisdictions that used its suggested language meant to distinguish between health care, education, and social work professionals employed by government and those employed otherwise. In fact, the few cases to construe the language at all use "official capacity" interchangeably with "professional capacity," interpreting the language to distinguish between child abuse knowledge gained through activities in the listed occupations and knowledge gained in other capacities. The rationale underlying the use of the modifiers "official" or "professional" has been explained well by the Ohio Supreme Court:

> Because abused and neglected children lack the ability to ameliorate their own plight, [the Ohio reporting statute] imposes mandatory reporting duties on "those with special relationships with children, such as doctors and teachers." These persons, when acting in their official or professional capacity, hold unique positions in our society. They are not only the most likely and qualified persons to encounter and identify abused and neglected children, but they are often directly responsible for the care, custody, or control of these children in one form or another.

Yates v. Mansfield Bd. of Educ., 2004-Ohio-2491, ¶ 30, 808 N.E.2d 861 (citations omitted). "The duty is to report knowledge or suspicion of abuse or neglect that the designated persons encounter while doing their ordinary work. . . . What the statute requires is actually quite minimal: when teachers, or others who are required to report, encounter suspected abuse or neglect in their official capacity, they must report it." *State v. Clark*, 2013-Ohio-4731, ¶¶ 83, 85, 999 N.E.2d 592 (O'Connor, C.J., dissenting on an issue unrelated to the reporting requirement), *cert. granted*, ___ U.S. ___, 135 S. Ct. 43 (2014). Our research has found no case from any other jurisdiction that discerned a distinction between professionals receiving their compensation from the government and those receiving their compensation from private individuals or organizations.

The "official capacity" language had more significance in New Mexico's original

version of the reporting statute applicable only to the named occupations, a limitation that changed in just a few years with statutory amendments that expanded the list of reporters from certain described occupations to all persons learning of abuse and changed the reporting from discretionary to mandatory.

3. The "Every Person" Language

Following the initial adoption of child abuse legislation by New Mexico and other states, the American Humane Association in 1966 endorsed legislation proposing to place a reporting duty on all persons rather than only on identified categories, on the theory that alerting authorities to child abuse was a "'universal obligation of all responsible citizens and all community agencies.'" Paulsen, *supra*, at 5 & n.17 (quoting 1966 American Humane Association recommendations for legislation).

Initially, three states, Nebraska, Tennessee, and Utah, adopted universal reporting by either "requiring all adults to report while also enumerating certain professional groups or simply requiring all adults to report." Brown & Gallagher, *supra*, at 40 & n.25. Indiana followed suit in 1971, amending its designated reporter statute to one "that would subsequently be mimicked by fifteen other states." *Id.* at 42. The Indiana statute "enumerated certain categories of professionals that were required to report while also putting the duty on all persons in the state." *Id.*

In 1973, New Mexico became one of those states by amending its reporting statute (1) to broaden the class of reporters by substituting the language "or any other person having reason to believe [a child has been abused]" in Chapter 360, Section 2(A) of New Mexico Laws of 1973 for the language "or any ordained minister of an established church, having reason to believe [a child has been abused]" in Chapter 157, Section 2 of New Mexico Laws of 1965 after the designated occupations listing that ended with "school teacher or social worker acting in his or her official capacity," and (2) to make reporting mandatory ("shall report") instead of simply permissive ("may report").

Also in 1973, the federal government passed the Child Abuse Prevention and Treatment and Adoption Reform Act, *see* 42 U.S.C. §§ 5101-5107 (2012), which required every state to enact mandatory, rather than permissive, child abuse reporting statutes in order to be eligible for federal funding. Brown & Gallagher, *supra*, at 43 & n.41, 45. The Children's Bureau reported that as of November 2013 all states had mandatory reporting statutes, the majority limiting the duty to identified categories but eighteen states placing all persons under a duty to report. *See* United States Department of Health and Human Services, Children's Bureau, *Mandatory Reporters of Child Abuse and Neglect*, at 1-2 & n.9 (2013), available at https://library.childwelfare.gov/cwig/ws/library/docs/gateway/Record?w=NATIVE%28%27SIMPLE_SRCH+ph+is+%27%27Mandatory+Reporters+of+Child+Abuse+and+Neglect%27%27%27%29&upp=0&order=native%28%27year%2FDescend%27%29&rpp=25&r=1&m=2& (last visited March 6, 2015).

Sixteen of the eighteen states that impose reporting duties on everyone, including New Mexico, "specify certain professionals who must report but also require all persons to report suspected abuse or neglect, regardless of profession." *Id.* at 2 & n.9, 15-57 (naming New Mexico and the

fifteen other states and citing and summarizing the reporting statutes of these states). This combination of identified occupations and broadly inclusive language has been widely recognized as imposing universal reporting requirements.

> The broadest category of mandated reporters are those indicated by provisions that specify "any person, including but not limited to . . ." followed by a listing of specified professions required to report, or that begin with a listing of professions that must report, then conclude with the phrase, "or any other person . . . ."

United States Department of Health and Human Services, Children's Bureau Issue Paper, *Current Trends in Child Maltreatment Reporting Laws*, at 3 & n.9 (September 2002), available at https://library.childwelfare.gov/cwig/ws/library/docs/gateway/Record?w=NATIVE%28%27SIMPLE_SRCH+ph+is+%27%27Current+Trends+in+Child+Maltreatment+Reporting+Laws%27%27%27%29&upp=0&order=native%28%27year%2FDescend%27%29&rpp=25&r=1&m=1& (last visited March 6, 2015) (citing New Mexico as one of the eighteen states whose statutes impose a duty on "any person who suspects child abuse or neglect"); *see also* Brown & Gallagher, *supra*, at 42 & n.34 (listing New Mexico among the states that followed Indiana's lead in combining identified occupations with "any person" or "any other person" language to impose duties to report child abuse on all persons and not just those identified); Mary Harter Mitchell, *Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion*, 71 Minn. L. Rev. 723, 729 (1987) ("[M]any statutes, in addition to or instead of listing those persons required to report, simply impose the duty to report on 'any person' who suspects child abuse." (footnote omitted)).

It is helpful to consider the persuasive interpretations of similar statutory schemes by authorities in other jurisdictions. *See Sec. Ins. Co. of Hartford v. Chapman*, 1975-NMSC-052, ¶ 19, 88 N.M. 292, 540 P.2d 222 ("Of course, the decisions of other states, if any, which have statutory provisions comparable to ours, with which we are here concerned, are persuasive but not binding on us."). Florida, Idaho, Kentucky, New Hampshire, and Texas are among the sixteen states with child abuse reporting laws similar to the New Mexico law, identifying specific professionals while simultaneously requiring "any other person" or "any person" or "other person" to report. *See* Fla. Stat. Ann. § 39.201(1)(a), (d) (West 2014) ("Any person who . . . has reasonable cause to suspect[] that a child is abused . . . shall report such knowledge[,] . . . [and r]eporters in the [listed] occupation categories are required to provide their names . . . ."); Idaho Code Ann. § 16-1605(1) (West 2005) ("Any physician, . . . social worker, or other person having reason to believe that a child . . . has been abused . . . shall report . . . ."); Ky. Rev. Stat. Ann. § 620.030(1) (West 2013) ("Any person who . . . has reasonable cause to believe that a child is . . . abused shall immediately . . . report . . . ."); N.H. Rev. Stat. Ann. § 169-C:29 (West 1979) ("Any physician, . . . social worker, . . . or rabbi or any other person having reason to suspect that a child has been abused . . . shall report . . . ."); Tex. Fam. Code Ann. § 261.101(a)-(b) (West 2013) ("A person having cause to believe that a child's . . . health or welfare has been adversely affected by abuse . . . shall immediately make a report . . . and . . . [any listed] professional

shall make [the] report not later than the 48th hour after the hour the professional first suspects [the abuse]."). Idaho, Kentucky, and Texas courts and the Florida Attorney General have interpreted the scope of the duty to report under their similarly worded statutes to extend to all persons. *See Quiring v. Quiring*, 944 P.2d 695, 702 (Idaho 1997) (relying on the prior enumeration of the mandatory reporting statute, Idaho Code Ann. § 16-1619(a) (1989), to conclude that a wife was obligated to report her husband's sexual abuses of their child despite an alleged agreement between the two to refrain from reporting); *Norton Hosps., Inc. v. Peyton*, 381 S.W.3d 286, 289, 291-92 (Ky. 2012) (relying on the mandatory reporting statute, Ky. Rev. Stat. Ann. § 620.030, in holding a hospital immune from liability for mistakenly overreporting the blood alcohol content of a mother giving birth); *Rodriguez v. State*, 47 S.W.3d 86, 88-89 (Tex. Ct. App. 2001) (relying on the Texas Family Code Annotated, Section 261.101, in requiring adults to report abuse of a child by the child's mother); Fla. Att'y Gen. Op. 2004-57 (2004) (recognizing that the Florida Statutes Annotated, Section 39.201(1) (2003) "has led to confusion as to the persons actually considered mandated reporters, i.e., all persons or just the list of professions" and concluding that the Florida statute "imposes a responsibility on any person who knows of or has reasonable cause to suspect child abuse . . . to report such abuse").

Our research has found no published judicial opinion in any other state that has construed its combined specific and general statutes as imposing obligations only on the identified occupations. And we see no reason to construe New Mexico's statute in such a manner, particularly in light of its history. We have been presented with no persuasive argument that, when the Legislature followed the lead of other states in 1973 in adding "or any other person" at the end of the list of previously described reporters, it meant anything other than "any other person." Interpreted otherwise, the amendment would have been meaningless. As has been observed elsewhere, we believe that "[s]pecific mention of various professional groups, but inclusion of 'anyone,' is a feature of [a reporting statute] that tends to focus the requirement of reporting on the specific groups, while retaining the advantages of a broad reporting class." Donald Stuart, *Mandatory Reporting of Child Abuse in Nebraska*, 8 Creighton L. Rev. 791, 793-94 (1975) (footnote omitted) (discussing the Nebraska statute that was one of the first to combine specific occupational listings with a universal requirement to report child abuse).

Subsequent amendments have consistently maintained the broad scope of the 1973 expansion of the New Mexico statute. In the course of making other amendments in 1993, the Legislature placed the inclusive language at the beginning instead of the end of the listed occupations and emphasized that the list that followed was not exclusive. *Compare* 1993 N.M. Laws, ch. 77, § 97(A) ("Every person, including but not limited to a licensed physician [and other listed occupations] . . . shall report [child abuse]."), *with* 1973 N.M. Laws, ch. 360, § 2(A) ("Any licensed physician [and other listed occupations] or any other person . . . shall report [child abuse].").

The 2003 deletion of "but not limited to" following "[e]very person, including" does not change our analysis. See 2003 N.M. Laws, ch. 189, § 1(A). Chapter 189 of New Mexico Laws of 2003 was titled, "Relating to the Children's Code: Clarifying a Member of the Clergy's Duty to Report Child Abuse." Its significant effect was to add at the end of the

occupational listing the language "or a member of the clergy who has information that is not privileged as a matter of law," clarifying that clergy were not required to disclose protected communications. *See* 2003 N.M. Laws, ch. 189, § 1(A). In the process of achieving that sole objective in 2003, the 2003 act made some routine clerical cleanups, such as replacing the commas in the occupational listing with semicolons and deleting the "but not limited to" language, in accordance with the New Mexico Legislative Council Service's Legislative Drafting Manual 31 (2000, amended 2008) ("There is no need to write 'includes but is not limited to'; the word 'includes' implies an incomplete listing. Put another way, 'includes' includes the concept of 'not limited to'."). There is absolutely no indication in the legislative history that by complying with its own technical drafting manual, the Legislature intended to make an unannounced policy change from the universal reporting requirement that had existed for thirty years to a sharply limited requirement.

Accordingly, we conclude that the social worker in this case was a mandated reporter under the Abuse and Neglect Act. Because this case is not an enforcement proceeding under the act but is instead a proceeding to compel discovery and testimony in our courts, we must now address the matter of evidentiary privileges applicable in judicial proceedings.

C. Application of Evidentiary Privileges

1. Evidentiary Privileges and Separation of Powers

When analyzing in-court evidentiary privileges, as opposed to out-of-court confidentiality and reporting requirements, it is important to start with the recognition that this Court's "constitutional power . . . of superintending control over all inferior courts carries with it the inherent power to regulate all pleading, practice and procedure affecting the judicial branch of government." *State ex rel. Anaya v. McBride*, 1975-NMSC-032, ¶ 10, 88 N.M. 244, 539 P.2d 1006 (citing Article III, Section 1 and Article VI, Section 3 of the New Mexico Constitution); *see also Albuquerque Rape Crisis Ctr. v. Blackmer*, 2005-NMSC-032, ¶ 5, 138 N.M. 398, 120 P.3d 820 ("[W]e have exercised our superintending control under Article VI, Section 3, to revoke or amend a statutory provision when the statutory provision conflicts with an existing court rule."). With respect to privileges in particular, if a statutory privilege is not consistent with a rule of this Court, "the statutory privilege is not given effect and the constitutional or court rule privilege prevails." *Blackmer*, 2005-NMSC-032, ¶ 11. Accordingly, the provisions of Section 61-31-24(A) that arguably create social worker evidentiary privileges cannot prevent court-ordered disclosure of communications that would be mandated by the discovery and evidence rules of this Court.

We turn now to an analysis of those rules.

2. Social Worker Privilege in the New Mexico Rules of Evidence

Rule 11-501 NMRA of the New Mexico Rules of Evidence provides that,

> [u]nless required by the constitution, these rules, or other rules adopted by the supreme court, no person has a privilege to . . . refuse to be a witness; . . . refuse to disclose any matter; . . . refuse to produce any object or writing; or . . . prevent

> another from being a witness, disclosing any matter, or producing any object or writing.

We have been presented with no argument that a constitutional provision prohibits court-ordered disclosure of the counseling communications in this case, nor is there an argument that any nonevidentiary rule of this Court protects communications with a social worker from disclosure, such as might arise with officers of the court subject to the regulatory authority of the Supreme Court. *Cf.* Rule 16-106 NMRA (providing that no attorney may disclose protected information concerning a client, whether in or out of court, except in accordance with the rule).

The only remaining issue is whether the communications are protected from court-ordered disclosure by Rule 11-504 of the New Mexico Rules of Evidence, providing a specific privilege for a person's professional communications with physicians and mental health counselors, specifically including licensed social workers.

The basic privilege applicable to communications with physical and mental health professionals provides that "[a] patient has a privilege to refuse to disclose, or to prevent any other person from disclosing, a confidential communication made for the purpose of diagnosis or treatment of the patient's physical, mental, or emotional condition . . . ." Rule 11-504(B). The privilege generally seeks to ensure that a patient can communicate fully with a mental health professional without the risk that the information will be used against the patient in a court proceeding. *See Blackmer*, 2005-NMSC-032, ¶ 15 (recognizing as well that such uninhibited communication "serves the public interest by facilitating the administration of appropriate treatment").

Privileges often have limits, particularly where there are conflicting interests that may outweigh the interests of confidentiality. *See, e.g.*, Rule 11-503(D) NMRA (defining exceptions to the lawyer-client privilege, including where the client is obtaining counsel in "[f]urtherance of crime or fraud"); Rule 11-505(D) NMRA (defining exceptions to the spousal privilege, including when one spouse is charged with a crime against the child of either spouse). A privilege exception that was specifically added to the rule for health professionals in 1990 provided,

> No privilege shall apply for confidential communications concerning any material that a physician, psychotherapist, state or nationally licensed mental-health therapist, or patient is required by law to report to a public employee or public agency.

Rule 11-504(D)(4).

Before the 1990 amendment of Rule 11-504, there was a potential conflict between our privilege rules and a provision, now encoded in NMSA 1978, Section 32A-4-5 (2009) of the Abuse and Neglect Act, that purported to legislate an exception to any applicable "physician-patient privilege or similar privilege or rule against disclosure" relating to required child abuse reporting matters "in any proceeding." *See* § 32A-4-5(A); 1965 N.M. Laws, ch. 157, § 5 (original enactment of this provision). This statutory exception to health care worker privileges was a feature of the Children's Bureau 1963 model act for reporting child abuse and has been

adopted in most, if not all, jurisdictions. *See* Brown & Gallagher, *supra*, at 39, 67-68 & n.154; Paulsen, *supra*, at 36-37. Providing a privilege exception in the model statutes was understandable because in most states the legislative branch regulates evidentiary privileges, unlike in New Mexico and other states with similar constitutional structures where regulation of court practice and procedure is under judicial branch authority. *See, e.g.*, *State v. Sypult*, 800 S.W.2d 402, 406 (Ark. 1990) (Newbern, J., concurring) (noting that "the Supreme Court of New Mexico relied on almost identical language in the New Mexico constitution as authority for" its adoption of rules of evidence and that the "step has been taken not only in New Mexico . . . but also in Florida, in Montana, and in Wisconsin" (internal quotation marks and citation omitted)). The Arkansas Supreme Court held that a court's "deference to legislation involving rules of evidence and procedure will be given only to the extent the legislation is compatible with [that court's] established rules." *Sypult*, 800 S.W.2d at 405.

By adopting the 1990 privilege exception for our own court rules furthering the disclosure purposes underlying New Mexico's reporting statute, we ensured that our "physician-patient privilege or similar privilege," specifically Rule 11-504, the privilege rule relating to physical and mental health professionals, did not prevent mandated in-court disclosure of what otherwise would have been protected communications.

Because Mr. Stearns was a mandated reporter under the Abuse and Neglect Act, and because the social worker communications provisions in the New Mexico Rules of Evidence deny protection from in-court disclosure of matters that are required by law to be reported out of court, the communications between Defendant and Mr. Stearns are not shielded from compelled disclosure by evidentiary privilege.

III. CONCLUSION

We reverse the decisions of the courts below and remand to the district court for proceedings in accordance with this opinion.

IT IS SO ORDERED.

CHARLES W. DANIELS, Justice

WE CONCUR:

BARBARA J. VIGIL, Chief Justice

PETRA JIMENEZ MAES, Justice

RICHARD C. BOSSON, Justice

EDWARD L. CHÁVEZ, Justice

APPENDIX
STATUTORY LANGUAGE DESCRIBING CHILD ABUSE REPORTERS, 1965–2015

1965 N.M. Laws, ch. 157, § 2

Any licensed practitioner of the healing arts, resident, or intern, examining, attending, or treating a child under the age of 16 years, any registered nurse, any visiting nurse, any school teacher or social worker acting in his or her official capacity, or any ordained minister of an established church, having reason to believe that a child has had serious injury or injuries inflicted upon him or her as a result of abuse, neglect or starvation, may report the matter promptly to the appropriate district attorney.

1973 N.M. Laws, ch. 360, § 2(A)

Any licensed physician, resident or intern examining, attending, or treating a child, any law enforcement officer, registered nurse, visiting nurse, school teacher or social worker acting in his or her official capacity, or any other person having reason to believe that serious injury or injuries have been inflicted upon a child as a result of abuse, neglect or starvation, shall report the matter immediately to:

(1) the county social services office of the health and social services department in the county where the child resides; or

(2) the probation services office of the judicial district in which the child resides.

1993 N.M. Laws, ch. 77, § 97(A)

Every person, including but not limited to a licensed physician, a resident or an intern examining, attending or treating a child, a law enforcement officer, a judge presiding during any proceeding, a registered nurse, a visiting nurse, a schoolteacher, or a school official or social worker acting in an official capacity who knows or has a reasonable suspicion that a child is an abused or a neglected child shall report the matter immediately to:

(1) a local law enforcement agency;

(2) the department office in the county where the child resides; or

(3) tribal law enforcement or social services agencies for any Indian child residing in Indian country.

1997 N.M. Laws, ch. 34, § 2(A)

Every person, including but not limited to a licensed physician, a resident or an intern examining, attending or treating a child, a law enforcement officer, a judge presiding during any proceeding, a registered nurse, a visiting nurse, a schoolteacher or a school official or social worker acting in an official capacity who knows or has a reasonable suspicion that a child is an abused or a neglected child shall report the matter immediately to:

(1) a local law enforcement agency;

(2) the department office in the county where the child resides; or

(3) tribal law enforcement or social services agencies for any Indian child residing in Indian country.

2003 N.M. Laws, ch. 189, § 1(A)

Every person, including a licensed physician; a resident or an intern examining, attending or treating a child; a law enforcement officer; a judge presiding during a proceeding; a registered nurse; a visiting nurse; a schoolteacher; a school official; a social worker acting in an official capacity; or a member of the clergy who has information that is not privileged as a matter of law, who knows or has a reasonable suspicion that a child is an abused or a neglected child shall report the matter immediately to:

(1) a local law enforcement agency;

(2) the department office in the county where the child resides; or

(3) a tribal law enforcement or social services agency for any Indian child residing in Indian country.

2005 N.M. Laws, ch. 189, § 38(A)

Every person, including a licensed physician; a resident or an intern examining, attending or treating a child; a law enforcement officer; a judge presiding during a proceeding; a registered nurse; a visiting nurse; a schoolteacher; a school official; a social worker acting in an official capacity; or a member of the clergy who has information that is not privileged as a matter of law, who knows or has a reasonable suspicion that a child is an abused or a neglected child shall report the matter immediately to:

(1) a local law enforcement agency;

(2) the department; or

(3) a tribal law enforcement or social services agency for any Indian child residing in Indian country.

Certiorari Denied, December 3, 2014, No. 34,922

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-028

Filing Date: September 9, 2014

Docket No. 31,890

STATE OF NEW MEXICO,

Plaintiff-Appellant,

v.

RON BELL,

Defendant-Appellee.

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Santa Fe, NM
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Albuquerque, NM

for Appellant

Bregman & Loman, P.C.
Sam Bregman
Albuquerque, NM

for Appellee

OPINION

HANISEE, Judge.

In its appellate capacity, the district court entered an opinion and order reversing a metropolitan court conviction for speeding, failure to maintain lane, and driving while impaired (first offense), on the basis that the metropolitan court should have excluded prosecution evidence that was admitted at trial in violation of the New Mexico Constitution. The State now appeals the district court order, arguing that Defendant failed to preserve the grounds relied upon by the district court for suppressing the evidence at issue and that the challenged evidence was properly admitted during trial. Because we agree with the district court that the grounds it relied upon to reverse were sufficiently preserved in the metropolitan court and constituted reversible error, we affirm.

Standard of Review

Because this is a criminal action "involving driving while under the influence of intoxicating liquors or drugs[,]" the metropolitan court acted as the trial court of record, and the district court acted in its appellate capacity when it reviewed the conviction. NMSA 1978, § 34-8A-6(C) (1993); Rule 1-073 NMRA; *see State v. Trujillo*, 1999-NMCA-003, ¶ 4, 126 N.M. 603, 973 P.2d 855 (stating that "[f]or on-record appeals the district court acts as a typical appellate court, with the district judge simply reviewing the record of the metropolitan court trial for legal error"). In subsequent appeals such as this, we apply the

same standards of review employed by the district court. *See id.* ¶¶ 1, 5. A trial court's determination on a motion to suppress evidence involves a mixed question of law and fact, as to which our review is de novo. *State v. Garcia*, 2005-NMSC-017, ¶ 27, 138 N.M. 1, 116 P.3d 72. Our scope of review, like that of the district court, is defined by Supreme Court rules that require that in order "[t]o preserve a question for review it must appear that a ruling or decision by the metropolitan court was fairly invoked[.]" Rule 1-073(O); *cf.* Rule 12-216(A) NMRA. The preservation rule is applied to advance its three primary purposes:

> (1) to specifically alert the [trial] court to a claim of error so that any mistake can be corrected at that time, (2) to allow the opposing party a fair opportunity to respond to the claim of error and to show why the [trial] court should rule against that claim, and (3) to create a record sufficient to allow this Court to make an informed decision regarding the contested issue.

Gerke v. Romero, 2010-NMCA-060, ¶ 18, 148 N.M. 367, 237 P.3d 111 (internal quotation marks and citation omitted).

Proceedings Before the Metropolitan Court

The sole evidence relevant to the metropolitan court's ruling denying suppression was the trial testimony of Deputy Allen. The relevant portions of Deputy Allen's testimony described a sequence of events that began with Defendant's car passing Deputy Allen, who was driving northbound on Tramway Boulevard in Albuquerque, New Mexico. Deputy Allen then caught up with Defendant's car and determined, by reference to his own speedometer, that Defendant was driving at a speed of sixty miles per hour in an area with a posted speed limit of fifty miles per hour. At the intersection of Tramway and Spain Road, both cars stopped at a red light, but Defendant's car improperly stopped in the intersection crosswalk. When the light turned green, Defendant re-accelerated to sixty miles per hour, with Deputy Allen still following. The cars again stopped for a red light at the intersection of Tramway and Academy Road, and Defendant again accelerated to sixty miles per hour after the stop. Just north of Academy, Defendant crossed partially over the white line dividing the roadway from the shoulder, so that "the middle of the vehicle was over the white line," and continued to drive partially on the shoulder until Deputy Allen pulled him over just past the intersection of Tramway and San Rafael Avenue. As he pulled Defendant over, Deputy Allen used his radio to ask dispatch whether a DWI unit was available because "[j]ust on the observation of the driving[, Deputy Allen] wasn't sure if that was what [he] was looking at or not."

Deputy Allen approached Defendant, explained the basis for the stop, and asked Defendant for his driver's license, automobile registration, and proof of insurance. He noticed that Defendant's hands were shaky when he handed over those documents and that "it sounded like something wasn't correct; something didn't sound correct about his voice." Deputy Allen described Defendant as sounding as if he were speaking with a "thick tongue."

Deputy Allen asked Defendant if he was "under the influence," and Defendant said "no." Deputy Allen then had Defendant put both of his hands on the car window frame and move his head closer to the car window in order to conduct a horizontal gaze nystagmus

(HGN) test. It took four attempts by Deputy Allen to conclude that Defendant bore no sign of nystagmus, a delay Deputy Allen attributed to Defendant's non-compliance with instructions. Yet Deputy Allen agreed when cross-examined that performing an HGN test while the subject is seated in his car does not comply with standards promulgated by the National Highway Traffic Safety Administration.

Deputy Allen next asked Defendant whether "he [had] any grenades, rocket launchers in the vehicle" and whether "he had any dead bodies in the car." In response to both of those questions, Defendant said "no" while shaking his head. Deputy Allen then asked whether Defendant "had any narcotics in the vehicle, prescription or otherwise," and Defendant answered "no," but this time simultaneously nodded his head in the affirmative. Deputy Allen then asked whether there were any prescriptions in Defendant's car and Defendant again said "no" while contradictorily nodding his head affirmatively. Deputy Allen testified that he did not, in fact, believe that Defendant had any grenades, rocket launchers, or dead bodies in his car, but that he asked those questions to determine "what type of response" he would get from Defendant and to help "decide if [Defendant was] being truthful." Afterward, evidence was uncovered leading to Defendant's arrest and ultimately his conviction in the metropolitan court.

Following Deputy Allen's testimony, Defendant moved to suppress based upon "lack of reasonable suspicion to even conduct a further investigation along with the lack of reasonable suspicion based on the stop." The metropolitan court heard argument from both sides on those issues and ruled that the initial traffic stop was based upon reasonable suspicion. Defendant does not challenge that ruling on appeal. Defense counsel then asked the metropolitan court for a ruling regarding whether there was sufficient reasonable suspicion for "it to go from a [traffic] stop to conducting a DWI investigation." Following further argument, the metropolitan court denied Defendant's motion and ruled Deputy Allen's testimony to be admissible, specifically noting that Defendant was speeding, failed to maintain his traffic lane, and that Deputy Allen had to "go over [the HGN] directions on three different occasions."

Appeal on the Record to the District Court

Following a four-day bench trial in metropolitan court resulting in a conviction and the entry of a sentencing order, Defendant appealed to the district court arguing, *inter alia*, that "the metropolitan court erred in ruling independent reasonable suspicion arose outside of the scope of the initial . . . stop for traffic violations in violation of the Fourth Amendment of the United States Constitution and [Article II, Section 10] of the New Mexico Constitution[.]" The State's response asserted that Defendant relied solely upon the Fourth Amendment at trial and thus had not preserved any claim based upon the concededly broader protections afforded by Article II, Section 10 of the New Mexico Constitution, because that provision of the state constitution was never expressly referenced before the metropolitan court. The district court, *sua sponte*, ordered the parties to submit supplemental briefing on the question of "whether Defendant preserved his claim, under Article II, Section 10 of the New Mexico Constitution, as to whether or not Deputy Allen lacked reasonable suspicion to question Defendant regarding additional criminal activity thereby improperly expanding the scope of the traffic stop."

As directed, the parties submitted briefs addressing the question of whether Defendant had asserted any protection existing under the state constitution at trial. In doing so, Defendant maintained that, although his argument at trial made no specific reference to any *provision* of the state constitution, he had argued an established *principle* protected uniquely by the New Mexico Constitution. The State's disagreement notwithstanding, the district court concluded that "Defendant preserved these issues for review." If Defendant was correct in his claim before the district court, the central question raised in this appeal was preserved for review both in that court and here.

In then substantively analyzing Defendant's state constitutional argument, the district court further concluded that "Deputy Allen lacked reasonable suspicion to expand the scope of the investigation to inquire into weapons and dead bodies" and therefore that "Defendant's motion to suppress should have been granted [in the metropolitan court] as to any evidence obtained after that inquiry." The State appeals from the district court's ruling, reiterating its contentions that Defendant's state constitutional arguments were not raised and are therefore not preserved and that Article II, Section 10 was not violated by questions unrelated to the DWI investigation that did not expand the investigation's scope.

Preservation of Defendant's Claims

The question of whether a claim under Article II, Section 10 is preserved in this case depends upon what grounds or principle Defendant asserted at trial for the suppression of evidence. Specifically, we must resolve whether Defendant's challenges that Deputy Allen lacked reasonable suspicion "to even conduct a further investigation" or "to go from a [traffic] stop to conducting a DWI investigation" must be strictly understood to challenge only investigative steps undertaken with regard to DWI. If so constrained, the objections would fail to assert the broader, well established state constitutional principle that limits police inquiries of an individual suspected of having committed a vehicle infraction to questions reasonably related to the basis for the vehicle stop. If understood to challenge *any* progression of investigation beyond that needed in relation to the traffic infractions observed by Deputy Allen, the time-of-trial challenge by Defendant was sufficient to garner review of the propriety of questions about grenades, rocket launchers, and dead bodies, topics of criminality plainly afield of traffic infractions.

To this inquiry, New Mexico courts have long held that:

> [t]he purpose of an objection or motion is to invoke a ruling of the court upon a question or issue, and it is essential that the ground or grounds of the objection or motion be made with sufficient specificity to alert the mind of the trial court to the claimed error or errors, and that a ruling thereon then be invoked.

State v. Lopez, 1973-NMSC-041, ¶ 23, 84 N.M. 805, 508 P.2d 1292; *see City of Portales v. Shiplett*, 1960-NMSC-095, ¶ 6, 67 N.M. 308, 355 P.2d 126 (holding that a defendant's failure "to point out the claimed errors and to bring them to the attention of the trial court prevent his relying on them for the first time on appeal"). *But see State v. Gomez*, 1997-NMSC-006, ¶¶ 24-25, 122 N.M. 777, 932 P.2d 1 (stating that the defendant "need not have asserted . . . that Article II, Section 10 should be interpreted differently from the

Fourth Amendment" because there is "established New Mexico law interpreting Article II, Section 10 more expansively").

Most recently, our Supreme Court has clarified that the less stringent of New Mexico jurisprudence's preservation requirements applies in this very context due to the "plethora of precedent already [establishing] Article II, Section 10['s] more expansiv[e protection than that afforded by] the Fourth Amendment."[1] *State v. Leyva*, 2011-NMSC-009, ¶ 50, 149 N.M. 435, 250 P.3d 861. Having reviewed the trial proceedings and *Leyva*, we disagree with the State that the issue before us was inadequately preserved for appellate review. We conclude that not only did Defendant assert that the facts known to Deputy Allen were insufficient to justify prolonging the traffic stop for purposes of a DWI investigation, he broadly argued that there existed no "reasonable suspicion to even conduct a further investigation[.]" The principle asserted by Defendant was sufficient to question the propriety of Deputy Allen's questions about grenades, rocket launchers, and dead bodies. *See id.* ¶ 42 ("[O]nly where a state constitutional provision had never been interpreted to provide greater protection than its federal analog are parties required to alert the trial court [to the applicable constitutional provisions] and articulate reasons for departure.").[2] While we recognize that Defendant emphasized what he perceived to be the unfounded expansion of Deputy Allen's investigation into the realm of DWI, we construe *Leyva* to caution against overly technical resolutions to preservation challenges in areas of law where heightened state constitutional protections are entrenched in our jurisprudence. *See id.* ¶ 38 (upholding principles of preservation set forth in *Gomez* and noting that since its issuance "some opinions have strayed by imposing a higher standard"). One such well-rooted principle is the prohibition in New Mexico on police questioning that strays from the initial justification for a vehicle stop and that is not otherwise separately supported by reasonable suspicion. *Leyva*, 2011-NMSC-009, ¶ 55.

Because we conclude that Defendant's challenge in the metropolitan court triggered protections pursuant to Article II, Section 10 of the New Mexico Constitution, and was asserted in the metropolitan court and therefore preserved, we need not address Defendant's remaining arguments related to this issue. We turn now to whether questions asked by Deputy Allen

[1]As clear as this controlling precedent now is, we question why it is any longer necessary that the simultaneously applicable protections of the Fourth Amendment and Article II, Section 10 must be independently preserved when challenging the constitutional legality of a vehicle stop in New Mexico. To require dual assertions of such persistently overlapping protections, known well to both attorneys and the judges in whose courts these issues are most frequently raised, unnecessarily risks the waiver of important protections to motorists' liberty. It is, however, for our Supreme Court to effectuate change to its own jurisprudence, and we review the district court's ruling under *Leyva* and cases preceding it.

[2]Although unnecessary to our resolution of this issue, we note that our Supreme Court has also stated that even if the defendant "had failed to preserve the state constitutional claim, we could nevertheless consider it because freedom from illegal search and seizure is a fundamental right." *Gomez*, 1997-NMSC-006, ¶ 31 n.4. Also cited in the same footnote is *State v. Sutton*, 1991-NMCA-073, ¶ 20, 112 N.M. 449, 816 P.2d 518, which discusses search and seizure protections under the state constitution as a matter of general public interest that exists despite the defendant's failure to preserve the claim for appellate review. *See Gomez*, 1997-NMSC-006, ¶ 31 n.4.

during his investigation impermissibly expanded the scope of the traffic stop contrary to the New Mexico Constitution.

Propriety of Questions Regarding Rocket Launchers and Dead Bodies

It is well-rooted within New Mexico jurisprudence that our interstitial approach to state constitutional analysis entails review of parallel or analogous provisions of the United States Constitution to determine whether the federal protections are deficient to a degree requiring supplementation to protect the rights of New Mexico citizens. *Id.* ¶¶ 40-42. The rule is:

> "[w]here New Mexico courts have taken a different path than federal courts, our precedent governs regardless of whether a party cites specific cases in support of a constitutional principle, so long as the party asserted the principle recognized in the cases and has developed the facts adequately to give the opposing party an opportunity to respond and to give the court an opportunity to rule."

Id. ¶ 41 (quoting *Gomez*, 1997-NMSC-006, ¶ 30). *Leyva* also clarified that the "less stringent of *Gomez*'[s] preservation requirements[,]" namely the "asserti[on of] the constitutional principle" and a "showing [of] the factual basis needed for the [district] court to rule on the issue[,]" *Leyva*, 2011-NMSC-009, ¶¶ 40, 44, 50 (internal quotation marks and citation omitted), applies to issues such as that raised herein because " 'a plethora of precedent already interprets Article II, Section 10 more expansively than the Fourth Amendment.' " *Leyva*, 2011-NMSC-009, ¶ 50 (quoting *State v. Garcia*, 2009-NMSC-046, ¶ 52, 147 N.M. 134, 217 P.3d 1032 (Bosson, J., specially concurring).

Further instructive to our analysis is *Leyva*'s reaffirmation of the state constitutional principle that Defendant maintains he invoked at trial, namely that Article II, Section 10 requires "a reasonable justification for the initial stop and that *all* questions asked during the stop be reasonably related to the reason for the stop or otherwise supported by reasonable suspicion[.]" *Leyva*, 2011-NMSC-009, ¶ 55 (emphasis added); *see State v. Duran*, 2005-NMSC-034, ¶ 35, 138 N.M. 414, 120 P.3d 836 (holding that "all questions asked by police officers during a traffic stop must be analyzed to ensure they are reasonably related to the initial justification for the stop or are supported by reasonable suspicion") *overruled in part and on other grounds by Leyva*, 2011-NMSC-009, ¶ 17. *Leyva* reminds us that Article II, Section 10 bestows upon drivers "broader protection to individual privacy under the New Mexico Constitution than under the Fourth Amendment." 2011-NMSC-009, ¶ 53 (internal quotation marks and citation omitted). As a result, the propriety of police conduct during a traffic stop is measured from the perspective of the state constitution by a standard distinct from that of the Fourth Amendment. Pursuant to modern Fourth Amendment jurisprudence, a traffic stop will be held valid so long as the officer does not prolong the stop "beyond the time needed to investigate the circumstances that caused the stop, unless he develops reasonable suspicion of additional criminal activity in the meantime." *Id.* ¶ 19 (internal quotation marks and citation omitted). Thus, for Fourth Amendment purposes, the proper inquiry is "[w]hether an officer's questioning measurably extends the length of a traffic stop." *Id.* ¶ 21; *see Ariz. v. Johnson*, 555 U.S. 323, 333 (2009) (noting that "inquiries into

matters unrelated to the justification for the traffic stop . . . do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop").

For purposes of Article II, Section 10, however, our courts continue to adhere to the two-part test first articulated in *Terry v. Ohio*, that requires an officer's action be both "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place." 392 U.S. 1, 19-20 (1968). Thus, under Article II, Section 10, both the duration and scope of a stop must be reasonable under the circumstances and, unlike under the Fourth Amendment, even questions that do not prolong the encounter are improper if they are not "reasonably related to the reason for the stop or otherwise supported by reasonable suspicion[.]" *Leyva*, 2011-NMSC-009, ¶ 55. This approach "ensures that investigating officers do not engage in 'fishing expeditions' during traffic stops." *Id.*

Regarding the specific questions at issue, we note that the State has not asserted that the facts of the vehicle stop gave rise to any reasonable suspicion involving the disallowed possession of certain weapons or corpses. Had such a concern been argued by the State and determined to be valid, it would constitute a permissible expansion of the scope of the traffic stop. Contrary to such a finding, the district court determined that:

> Deputy Allen jumped from a traffic investigation to an impairment investigation to questions regarding weapons and dead bodies. . . . There were no articulable facts introduced suggesting the Deputy had reasonable suspicion to suspect Defendant was in possession of illegal weapons or corpses.
>
> . . . .
>
> Such questions, which expand the scope of the investigation, are not permitted in New Mexico, absent reasonable suspicion, irrespective of the Deputy's alleged intent to simply elicit truthful responses.

On the record before it, the district court's analysis was correct. Indeed, when given the opportunity to explain or establish an investigative foundation for his non-traffic-related inquiries in a manner that related to his immediate investigation, Deputy Allen offered only two related justifications: that he needed help generally deciding whether Defendant was "being truthful," and in "trying to determine the truthfulness of a response." On appeal, the State similarly contends that "Deputy Allen did not ask the questions about weapons and dead bodies with the intent to investigate whether Defendant had such things. Rather, he asked the questions as an interview technique designed to help him gauge the truthfulness of Defendant's responses about DWI." However, nothing in the record indicates a preexisting awareness on the part of Deputy Allen as to whether grenades, dead bodies or rocket launchers were located within Defendant's vehicle such to where Deputy Allen could ascertain the honesty or dishonesty of Defendant's responses. Furthermore, there is no basis under *Leyva* for us to assume an alternatively appropriate reason existed for asking these unrelated, and what Deputy Allen conceded to be "outrageous" questions regarding items Defendant could not have lawfully possessed. *See id.* ¶ 55; *see also Duran*, 2005-NMSC-034, ¶ 35 (stating that "all questions asked by

police officers during a traffic stop must be analyzed to ensure they are reasonably related to the initial justification . . . or are supported by reasonable suspicion" that may unfold during the investigation or traffic stop). There being no such legitimate investigative purpose asserted herein, no basis for Deputy Allen to accurately ascertain the truthfulness of the answers given by Defendant, and nothing in the record to otherwise place the questions in the context of what was properly being investigated, we hold that the district court correctly concluded that the questions were constitutionally improper under *Leyva*.

When a motorist is subjected to inquiries unsupported by reasonable suspicion during a vehicle stop, our precedent establishes that the continuing detention of that person is illegal. *State v. Portillo*, 2011-NMCA-079, ¶ 24, 150 N.M. 187, 258 P.3d 466. It is likewise settled law that evidence "discovered as a result of the exploitation of an illegal seizure must be suppressed unless it has been purged of its primary taint." *Id.* ¶ 25 (citing *Garcia*, 2009-NMSC-046, ¶¶ 14, 23, for its recitation of the "fruit of the poisonous tree doctrine" set forth in *Wong Sun v. United States*, 371 U.S. 471 (1963)). *See Leyva*, 2011-NMSC-09, ¶ 2 (stating that when an investigative officer's questions are not based upon reasonable suspicion, the proper remedy is to suppress "evidence gathered as a result of the questioning"); *see also id.* ¶ 10 (stating "[w]here evidence has been obtained as a result of questions not justified under the Fourth Amendment, suppression of that evidence is the proper remedy"). On appeal, the State's argument is limited to defending the propriety of the questions asked by Deputy Allen. The State does not argue that the evidence that led to Defendant's conviction did not result from the exploitation of his illegal detention, or maintain specifically that it derived from something other than the impermissible questions themselves. Nor did it challenge the district court's determination that Defendant's conviction must be reversed if the questions are determined to be constitutionally impermissible. We do not address issues or questions unraised by litigants. *See State v. Bent*, 2013-NMCA-108, ¶ 27, 328 P.3d 677 ([W]e disregard . . . issue[s] . . . not raised on appeal."

Here, the entirety of Deputy Allen's testimony leading to Defendant's arrest was admitted into evidence during trial, including that regarding events that transpired after the improper questions were asked and during the illegal detention. As Deputy Allen's testimony constituted the sole basis for the metropolitan court's determination of Defendant's guilt, Defendant's conviction must be reversed.

CONCLUSION

The order of the district court is affirmed.

IT IS SO ORDERED.

J. MILES HANISEE, Judge

I CONCUR:

MICHAEL E. VIGIL, Judge

JONATHAN B. SUTIN, Judge (specially concurring).

SUTIN, Judge (specially concurring).

I concur but add the following thoughts.

The Opinion's analysis of whether Defendant properly invoked the state

constitution indirectly permits a result without having to outright reject present preservation jurisprudence. It is too bad that we must resort to this indirect approach to reach a just result. I fully agree with what the Opinion states in its footnote 2. It is time to hold that in search and seizure cases our courts will automatically examine whether relief under Article II, Section 10 of the New Mexico Constitution should be available whenever it appears that relief is unavailable under the Fourth Amendment.

Insofar as the questioning about grenades, rocket launchers, and dead bodies is concerned, no one, neither Deputy Allen or Defendant, nor the metropolitan court, thought that the questioning was intended to relate to whether Defendant may have had such unlawful items in his vehicle. Furthermore, the officer testified that he had learned the questioning technique in "interviews and interrogation school" and that he had used similar types of questions in other traffic stop DWI investigations. Assuming, without deciding, that questioning to ascertain truthfulness in DWI (alcohol or drugs) investigations might under some particular circumstance be a legitimate investigatory process, the failure here was Deputy Allen's complete failure to lay an adequate foundation in that regard.

Again, assuming, without deciding whether questions related to telling the truth in a DWI investigation might be legitimate and not constitute an unlawful expansion of the investigation, it appears to me that an officer would have to show a court that the questioning was grounded in a particular skill, knowledge, experience, education, and perhaps even science, and that the questioning was likely to give an indication of truthfulness that would assist the officer in his or her investigation.

JONATHAN B. SUTIN, Judge

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMSC-010

Filing Date: March 12, 2015

Docket No. 33,967

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

NATHAN MONTOYA,

Defendant-Appellant.

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for Appellant

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for Appellee

OPINION

VIGIL, Chief Justice.

This case presents another example of the ongoing confusion created by our child abuse jury instructions. Breandra Pena (Baby Breandra), age seventeen months, died while in the care of Nathan Montoya (Defendant). Defendant was convicted of intentional child abuse resulting in the death of a child under twelve contrary to NMSA 1978, Section 30-6-1(D), (H) (2009) and sentenced to life imprisonment.

In our review of Defendant's conviction on direct appeal, we first hold that the jury instructions used in Defendant's trial accurately instructed the jury of the law and did not constitute reversible error. We determine that, when considered as a whole, the instructions used in this case are distinguishable from those used in previous cases which we have reversed based on erroneous child abuse jury instructions. We also hold that reckless child abuse may, in some cases, be a lesser included offense of intentional child abuse resulting in the death of a child under twelve, and disavow New Mexico cases suggesting otherwise. Accordingly, we determine that when a jury is correctly instructed on both reckless and intentional child abuse resulting in the death of a child under twelve, a step-down instruction is appropriate.

Next, we hold that the admission of a forensic pathologist's expert testimony was not in error and that sufficient evidence was presented to convict Defendant. Finally, we hold that it was abuse of discretion for the district court judge to refuse to consider mitigating the basic sentence of life imprisonment, based on the court's mistaken understanding that the life sentence was mandatory and could not be altered. Defendant's conviction for intentional child abuse is affirmed and the case is remanded to the district court for resentencing with consideration of potential mitigating circumstances.

I. BACKGROUND

A. Facts

Baby Breandra was born to Melissa Romero (Mother) and Andrew Pena on September 24, 2009. Mother occasionally asked her cousin, Edwardine Fernandez (Fernandez), Breandra's godmother, and Defendant to look after Baby Breandra. On March 4, 2011, when Baby Breandra was seventeen months old, Fernandez and Defendant picked up Baby Breandra from Mother's home in Albuquerque and took her to their home in Española for the weekend. When Fernandez and Defendant picked up Baby Breandra from Mother, she had no signs of bumps or bruises on her body.

On March 8, 2011, Fernandez was at work by 7:00 a.m. at St. Vincent Hospital in Santa Fe, leaving Defendant at home alone with Baby Breandra. Fernandez was in contact with Defendant regularly throughout the day, about once an hour. At about 9:00 a.m., Defendant's friend Derek Vigil (Vigil) visited Defendant at home. Vigil left around 11:30 a.m. or noon. When Vigil left, he did not see any signs that Baby Breandra was in distress.

Around 1:42 p.m., Defendant called 911 and told the operator that Baby Breandra had been teething, had not been feeling well, had been throwing up, and was not coming back. Defendant reported that Baby Breandra still had a heartbeat. He did not report that the

baby had fallen in the bathtub, or that he dropped her, as he later claimed. Paramedics were dispatched in response to a child having difficulty breathing. While en route to the scene, the paramedics received an update that the child had stopped breathing, and a second update that the child had no heartbeat.

The paramedics arrived at Defendant's home at 1:48 p.m. When they arrived, Defendant was standing in the doorway holding Baby Breandra, who was limp, nonresponsive, and pale. The paramedics noted that Baby Breandra had bruising throughout her body, including marks on her chest and belly and a scrape on her nose, and that her ears were red, bruised, and swollen. The paramedics immediately began life saving measures on Baby Breandra, but knew she was dead as soon as they got her on the gurney in the ambulance.

Randy Sanchez, one of the responding paramedics, testified as an expert witness in the field of EMT paramedics. Mr. Sanchez testified that based on her cool, pale skin, he believed Baby Breandra was deceased before Defendant placed the call to 911. In his opinion, the baby's injuries were not consistent with choking. Mr. Sanchez said it was fairly obvious that the baby had sustained traumatic injuries.

Deputy Jason Gallegos of the Rio Arriba County Sheriff's Office testified that he was dispatched to a call regarding an unresponsive baby at Defendant's home. Deputy Gallegos approached Defendant and asked him what happened. Defendant told Deputy Gallegos that he had been watching Baby Breandra and she was teething and grumpy. Defendant said he and Baby Breandra were sitting on the bed, eating cheese and crackers and watching cartoons. Baby Breandra wouldn't stop crying, so Defendant decided to give her a bath. Defendant said that after the bath, he decided to put the baby down for a nap, so he laid her on the bed and gave her a sippy cup of milk. Defendant said Baby Breandra started choking on the milk and she threw up a light brown substance. Defendant said he patted her on the back to try to dislodge whatever the baby was choking on. After speaking to Deputy Gallegos, Defendant cried and paced around the house, asking if the baby was ok.

In her statement to the police, Fernandez said that Defendant called her earlier that day and told her that Baby Breandra was fussy because she was teething. Defendant told Fernandez that he gave Baby Breandra Tylenol because she was drooling and felt feverish, and he gave her some Orajel. Defendant reported to Fernandez that he suspected the Orajel made Baby Breandra throw up, and he called 911 because she threw up and was choking. At trial, Fernandez recounted that at 12:47 p.m., Defendant had called to tell her that Baby Breandra had fallen in the bathtub and scraped her nose, but otherwise seemed fine. Fernandez said she forgot to tell the police in her statement that Defendant said Baby Breandra had fallen in the tub.

Agent Joey Gallegos interviewed Defendant at the New Mexico State Police Office in Española. Agent Gallegos testified that after he told Defendant that Baby Breandra was dead, Defendant said, "I slapped her. I got her by her ears and she didn't want to keep quiet." When Agent Gallegos showed Defendant pictures of Baby Breandra's injuries and asked if Defendant had caused them, Defendant responded, "Yeah, that one that she has, yeah. I did spank her and all of that. That's what I'm saying." Later in his statement to the police, Defendant claimed

that the baby fell in the bathtub, and that he accidentally dropped her while running to the living room.

Dr. Clarissa Krinsky, Assistant Professor of Pathology at the University of New Mexico and Medical Investigator at the Office of the Medical Investigator, testified as an expert in forensic pathology. Dr. Krinsky supervised the autopsy of Baby Breandra on March 9, 2011. Dr. Krinsky observed abrasions covering large areas of both sides of the baby's head and contusions on both ears. Dr. Krinsky opined that the injuries to Baby Breandra's ears were intentional, caused by someone grabbing and pulling them, and could not have been caused by the baby herself. Dr. Krinsky saw between forty and fifty bruises on Baby Breandra's back, chest, and abdomen. The baby also had subdural and subarachnoid hemorrhages on both sides of the brain, indicative of significant head trauma. Dr. Krinsky said these types of injuries were unlikely to be caused by a fall in a bathtub. Dr. Krinsky also found significant internal abdominal injuries, which she characterized as classic intentional injuries found in children who were punched or kicked in the stomach.

Dr. Krinsky said that Baby Breandra's death was the result of multiple blunt force injuries. Dr. Krinsky concluded that the constellation of injuries on Baby Breandra's body was a result of intentional, nonaccidental trauma, and that the manner of death was homicide, which she defined as death at the hands of another.

B. Procedure

Defendant was charged with abuse of a child resulting in the death of Baby Breandra, a child under twelve, caused by knowingly, intentionally, or recklessly,[1] and without justifiable cause, endangering, torturing, or cruelly punishing the child contrary to Sections 30-6-1(D)(1) or (2) and (H). Defendant was convicted of intentional child abuse resulting in the death of a child under twelve and sentenced to life in prison. Defendant appealed directly to this Court pursuant to Rule 12-102(A)(1) NMRA and Article VI, Section 2 of the New Mexico Constitution. Further procedural background is provided below as necessary.

II. DISCUSSION

Defendant advances numerous arguments on appeal, including: that the jury instructions used at trial were a misstatement of the law and misled the jury, that the pathologist's expert testimony about a "constellation of injuries" on the baby should not have been admitted, that the State failed to present sufficient evidence to support Defendant's conviction, that he received ineffective assistance of counsel, and that the district court's failure to consider potential

[1]While we acknowledge that "negligent child abuse" was the language in use at the time of Defendant's indictment and trial, we now refer to it as "reckless child abuse" in accordance with our holding "that what has long been called 'criminally negligent child abuse' should hereafter be labeled 'reckless child abuse' without any reference to negligence." *State v. Consaul*, 2014-NMSC-030, ¶ 37, 332 P.3d 850. While we refer in the text and record citations only to "reckless," we do not endeavor in this opinion to retrofit every quotation containing reference to "negligent" with "reckless." While *Consaul* addressed child abuse cases involving great bodily harm, rather than death, the same statute containing the now-renounced negligence language is at issue here, and thus we now expressly adopt the same rule that "'criminally negligent child abuse' should hereafter be labeled 'reckless child abuse' without any reference to negligence" for cases of child abuse resulting in death. *See id.* ¶¶ 35-37.

mitigating circumstances in sentencing Defendant was an abuse of discretion. We address each argument in turn.

A. Jury Instructions

Defendant argues that jury instruction number three erroneously combined the elements of both intentional and reckless child abuse, which Defendant asserts was a misstatement of the law, was confusing to the jury, and constitutes reversible error. We recently clarified an aspect of our Uniform Jury Instructions governing child abuse that "potentially contribute[d] to jury confusion, resulting in unjust child abuse convictions." *See Consaul*, 2014-NMSC-030, ¶ 38 (holding that the Legislature intended to require proof of recklessness to sustain a conviction for negligent child abuse and requiring juries to be instructed using the reckless disregard standard). This case presents us with a similar opportunity to clarify two other aspects of our jury instructions. We clarify when separate instructions are required to prove reckless or intentional child abuse. We also clarify that in some circumstances, like in the case at bar, reckless child abuse may be a lesser-included offense of intentional child abuse.

1. Procedural background

The confusion caused by the dissonance between our case law and our jury instructions for child abuse resulting in the death of a child under twelve is epitomized by the argument which took place in the district court below regarding the proper instructions. Just before closing arguments, the district court and the parties held an extensive discussion about the correct form of the jury instructions.

The State began the discussion by noting that "[i]n regards to the elements of the child abuse charge—well, for the record, this particular instruction should have been changed per the higher Courts back in the 90's and it never was, so it's kind of a difficult instruction to work with." The State told the district court that it did not "want to follow the [Uniform Jury Instruction] [(]UJI[)] when it comes to reckless disregard and intentional." The State recognized that "[w]hen it comes to intentional child abuse and reckless child abuse . . . the Jury has to make clear which one they find," but argued that there would be no problem with an elements instruction containing both theories as long as there was a special interrogatory. Thus, the State proposed a single jury instruction which contained elements of both intentional and reckless child abuse, along with a special interrogatory form on which the jury could indicate which type of abuse it found.

Defendant asserted that the elements of intentional and reckless should be in two separate instructions. Defendant argued that the jury would need to clearly indicate whether it found intentional or reckless child abuse, and therefore, "[t]here is a problem with having two theories in one instruction." Defendant also argued that the jury should first consider whether Defendant was guilty of intentional child abuse, and if not, consider whether he was guilty of reckless child abuse, and if not, find him not guilty. Thus, Defendant proposed two instructions, one containing the elements of intentional abuse and another for reckless abuse. Defendant also proposed a step-down-type instruction to guide the jury in considering each of the crimes in turn.

In ruling on the jury instructions, the district court observed that if ten years ago, this Court said the jury instructions should be

changed, "and the UJI Committee did not change it, it's because they didn't think it needed to be changed. They don't just ignore cases." The district court thus surmised that the Committee and the Court had discussed whether the instructions needed to be changed and decided against it. The State noted that "[t]he UJI is wrong. We don't want to follow the UJI when it comes to reckless disregard and intentional," and that "we're all in agreement that this should have been changed." The district court nonetheless concluded that "the [C]ommittee must have thought [the problem with the combined elements instruction] can [be] handled by a special interrogatory where you ask the Jury to designate on what theory." Accordingly, the district court rejected both of Defendant's proposed instructions and accepted the State's combined elements instruction and its special interrogatory form.

The disputed elements instruction submitted to the jury read as follows:

INSTRUCTION NO. 3

> For you to find the defendant guilty of child abuse resulting in death as charged in Count 1, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
> 1. The defendant caused Breandra Pena to be placed in a situation which endangered the life or health of Breandra Pena, or tortured or cruelly punished Breandra Pena;
> 2. The defendant acted intentionally or with reckless disregard and without justification. To find that the defendant acted with reckless disregard, you must find that the defendant knew or should have known the defendant's conduct created a substantial and foreseeable risk, the defendant disregarded that risk and the defendant was wholly indifferent to the consequences of the conduct and to the welfare and safety of Breandra Pena;
> 3. The defendant's actions resulted in the death of Breandra Pena;
> 4. Breandra Pena was under the age of 12;
> 5. This happened in New Mexico, on or about the 8th day of March, 2011.

Instruction number four defined "intentionally" as set out in UJI 14-610 NMRA: "A person acts intentionally when the person purposely does an act. Whether the defendant acted intentionally may be inferred from all of the surrounding circumstances, such as the defendant's actions or failure to act, conduct and statements."

Instruction number thirteen was a type of instruction"commonly referred to as a 'step-down' instruction," and directed the jury on the use of the special interrogatory forms. *See State v. Garcia*, 2005-NMCA-042, ¶ 18, 137 N.M. 315, 110 P.3d 531 (discussing the proper use of UJI 14-250 NMRA, the step-down instruction used for varying levels of homicide offenses). The instruction read as follows:

> If you find the defendant guilty of abuse of a child resulting in death, then you must determine whether the crime was committed intentionally or with reckless disregard. You must complete the special form to indicate your finding. For you to make a finding that the crime was committed intentionally, the state must prove to

> your satisfaction beyond a reasonable doubt that the crime was committed intentionally. If you decide the crime was committed intentionally, than [sic] this is the only special form you complete. If you have reasonable doubt that the crime was committed intentionally, then you must decide whether the crime was committed with reckless disregard. For you to make a finding that the crime was committed with reckless disregard, the state must prove to your satisfaction beyond a reasonable doubt that the crime was committed with reckless disregard. If you decide the crime was committed with reckless disregard, then this is the only special form youcomplete. If you have reasonable doubt that the crime was not committed with intentionally or with reckless disregard, then you must find the defendant not guilty of abuse of a child resulting in death.

The special interrogatory form read: "Do you unanimously find beyond a reasonable doubt that the crime of abuse of a child resulting in death was committed intentionally? _____ (Yes or No)." The jury foreperson wrote "yes" on the line. A second special interrogatory form asked the same question about reckless disregard. The jury did not complete this form.

During its deliberation, the jury sent a question to the district court requesting the definition of reckless disregard comparable to the definition of intent provided in instruction number four. The district court suggested, and both parties agreed, that there was no further definition the district court could provide. Accordingly, the district court told the jury that the legal definition of reckless disregard was already contained in instruction number three, paragraph two.

Defendant argues that the jury instructions misstated the law and confused or misdirected the jury. We acknowledge the inconsistencies between our case law and our jury instructions noted by the district court and the attorneys in the proceedings below. Nonetheless, we find the facts of this case distinguishable from previous cases in which we have reversed convictions of child abuse based on faulty jury instructions. We conclude that the use of our current instructions, as supplemented by the district court, was sufficient to properly instruct the jury in this case and therefore affirm Defendant's conviction.

2. Standard of review

"The standard of review we apply to jury instructions depends on whether the issue has been preserved. If the [issue] has been preserved we review the instruction for reversible error." *Cabezuela*, 2011-NMSC-041, ¶ 21, 150 N.M. 654, 265 P.3d 705 (alteration in original) (internal quotation marks and citations omitted). In this case, Defendant preserved the issue by objecting to the instruction which combined the elements of intentional and reckless abuse, and to the special interrogatory form. *See id.* ("In this case, defense counsel preserved the jury instruction claim when he objected to the inclusion of the words 'failure to act' in Instruction No. 3, and therefore, we review for reversible error."). Accordingly, this Court's review of the instruction is for reversible error. *See id.* "Reversible error arises if . . . a reasonable juror would have been confused or misdirected." *Id.* ¶ 22 (omission in original) (internal quotation marks and citation

omitted). "[Jury instructions] are to be read and considered as a whole and when so considered they are proper if they fairly and accurately state the applicable law." *Id.* ¶ 21 (alteration in original) (internal quotation marks and citation omitted).

3. The jury instructions in this case do not constitute reversible error

Defendant argues that *Cabezuela* stands for the proposition that error occurs where the elements of both intentional and reckless child abuse are contained in one instruction. Defendant misreads the holding of *Cabezuela*. In *Cabezuela*, the defendant was charged with intentional child abuse resulting in the death of a child under twelve years of age contrary to Sections 30-6-1(D)(1) and 30-6-1(H). *Cabezuela*, 2011-NMSC-041, ¶¶ 16, 27. The district court issued an elements instruction which read, in relevant part: "[The defendant] caused [the baby] to be placed in a situation which endangered the life or health of [the baby]; . . . [the] defendant acted intentionally; . . . [the defendant's] actions or failure to act resulted in the [baby's death]." *Id.* ¶ 18. The defendant was convicted of intentional child abuse resulting in death. *Id.* ¶ 15.

This Court held that the elements instruction was a misstatement of the law because it included "failure to act," which was aligned with a theory of reckless child abuse, an offense with which the defendant was not charged. *Id.* ¶¶ 33, 36. The Court concluded that the jury was misdirected by the instructions tendered because the jury could have convicted the defendant for intentional child abuse, the only crime with which she was properly charged, based on an instruction indicating a theory of reckless child abuse. *Id.* ¶ 36.

We find the error in *Cabezuela* distinguishable from the purported error in this case. The defendant in *Cabezuela* was not charged with reckless child abuse, yet the jury instructions indicated a theory of reckless child abuse. *Id.* ¶¶ 27, 34. Because the jury instructions used in *Cabezuela* suggested two distinct theories of child abuse, intentional and reckless, and no definition of reckless abuse was provided, the jury could have convicted the defendant of intentional child abuse based on a theory of recklessness. *Id.* ¶¶ 34, 36. Therefore, we held that the jury instructions constituted reversible error. *Id.* ¶ 36.

In the instant case, because the special verdict forms clearly indicated which crime Defendant was convicted of, we hold that the jury instructions do not constitute reversible error. In *Cabezuela*, the jury instructions made it impossible to discern whether the defendant was convicted of intentional child abuse, for which she was charged, or for reckless child abuse, for which she was not charged. *Id.* ¶ 36. Here, Defendant was charged with both intentional and reckless child abuse. The jury was instructed on the definitions of reckless acts, in Instruction 3, and intentional acts, in Instruction 4. The special forms provided to the jury made it very clear which crime Defendant was convicted of: intentional child abuse resulting in the death of a child under twelve years of age.

Defendant is correct in noting that in *Cabezuela*, "we suggest[ed] that there should be separate instructions for negligent and intentional child abuse." *Id.* ¶ 37. Read in the context of the *Cabezuela* opinion, this suggestion was made in order to avoid verdicts which do not clearly indicate whether the jury finds the defendant guilty of intentional or reckless child abuse. In fact, we recently noted in *Consaul*, albeit in the context

of child abuse resulting in great bodily harm, not death, that the purpose of requesting separate instructions is so that the jury's verdict is made clear. *See* 2014-NMSC-030, ¶ 23 ("When two or more different or inconsistent acts or courses of conduct are advanced by the State as alternative theories as to how a child's injuries occurred, then the jury must make an informed and unanimous decision, guided by separate instructions, as to the culpable act the defendant committed and for which he is being punished.").

We emphasize that the overriding concern in this case, as it was in *Cabezuela*, is that the jury's verdict must be clear about the crime of which the defendant was convicted. As in *Cabezuela*, the distinction in this case between reckless and intentional conduct is critical because the child abuse resulted in the death of a child under twelve. We have repeatedly explained that the Legislature, in that limited circumstance, has chosen to impose different punishments based solely on the defendant's mental state. *See Consaul*, 2014-NMSC-030, ¶¶ 21-23 (explaining that the punishments for intentional and reckless child abuse resulting in the death of a child under twelve are life in prison and 18 years in prison, respectively); *Cabezuela*, 2011-NMSC-041, ¶ 33 (same), *State v. Garcia*, 2010-NMSC-023, ¶¶ 9-13, 148 N.M. 414, 237 P.3d 716 (same).

Clear jury instructions with respect to the defendant's mental state, therefore, are necessary when the abuse results in the death of a child under twelve to properly determine the offense of which Defendant has been found guilty and to guarantee that the verdict is not the result of confusion. We held in *Cabezuela* that separate instructions are one way to achieve that result. *See* 2011-NMSC-041, ¶ 37 (suggesting that the UJI Committee for Criminal Cases draft separate instructions for intentional and reckless child abuse). We hold that the district court's approach in this case was similarly effective, which consisted of using our current jury instructions to clearly define reckless and intentional conduct and providing a step-down instruction with special interrogatories to ensure a unanimous verdict about the element separating the two offenses. We commend the district court for crafting a solution that harmonized our current jury instructions with the concerns raised in our case law.

We also reiterate that, while the distinction between reckless and intentional conduct was critical in this case, that distinction is often immaterial when the child abuse does not result in the death of a child under twelve. As we recently explained in *Consaul*, the Legislature has chosen to punish all other types of child abuse the same with respect to the defendant's mental state. *See* 2014-NMSC-030, ¶ 22 ("Here, in contrast, the punishment for child abuse resulting in *great bodily harm*, whether done knowingly, intentionally, negligently, or recklessly, is the same."); *see also* NMSA 1978, § 30-6-1(E) (providing that, whether committed knowingly, intentionally, or negligently, child abuse resulting in great bodily harm is a first-degree felony; that a conviction for a first offense of child abuse not resulting in death or great bodily harm is a third degree felony; and that all subsequent convictions are second degree felonies); § 30-6-1(F) (providing that negligent child abuse resulting in the death of a child is a first degree felony); § 30-6-1(G) (providing that intentional child abuse of a child twelve to eighteen years of age is a first degree felony). As a result, in most cases when the abuse does not result in the

death of a child under twelve, it is not necessary to specify the defendant's mental state or to provide separate jury instructions for reckless or intentional conduct; evidence that the defendant acted "knowingly, intentionally *or* [recklessly]" will suffice to support a conviction.[2] Section 30-6-1(D) (emphasis added); *cf. Consaul*, 2014-NMSC-030, ¶ 23 ("Notwithstanding this lack of difference in penalty, child abuse resulting in great bodily harm will *sometimes* also require separate jury instructions . . . ." (emphasis added)). *Accord Model Penal Code* § 2.02(5) ("When recklessness suffices to establish an element, such element also is established if a person acts purposely or knowingly.").

We conclude that the step-down instruction and special forms used in this case sufficiently clarified that the jury found Defendant guilty of intentional child abuse resulting in the death of a child under twelve years of age. Accordingly, Defendant's conviction is affirmed.

[2]We recently found error in *Consaul* when the district court failed to provide separate instructions for reckless and intentional child abuse resulting in great bodily harm because "the State's theories of how that harm occurred were different and inconsistent." 2014-NMSC-030, ¶ 26. Separate instructions were necessary because the State advanced two "different or inconsistent acts or courses of conduct . . . as alternative theories as to how [the] child's injuries occurred." *Id.* ¶ 23. The State originally argued that the defendant recklessly swaddled the child too tightly and laid him face down in his crib. *See id.* ¶ 24. After the State's own experts testified that such conduct could not have caused the child's injuries, the State sought to prove for the first time that the defendant intentionally smothered the child by placing his hand or a pillow over the child's mouth. *See id.* We held that giving a single instruction that allowed the jury to pick between the State's two inconsistent factual theories was reversible error because it made it impossible to determine which theory the jury relied on to convict the defendant. *See id.* ¶¶ 25-26.

4. Reckless child abuse resulting in the death of a child under twelve is a lesser-included offense of intentional child abuse resulting in the death of a child under twelve

Our conclusion that the district court properly instructed the jury in this case compels us to clarify another aspect of our case law related to our child abuse jury instructions: whether reckless child abuse may be a lesser-included offense of intentional child abuse. Several opinions of this Court and of the Court of Appeals have touched on this issue, though none have addressed it conclusively. We do so now to avoid confusion about our approval of the district court's use of a step-down instruction, a type of instruction typically reserved for lesser-included offenses. *See* UJI 14-250 (providing the jury procedure for various degrees of homicide); *Garcia*, 2005-NMCA-042, ¶ 18 (discussing the proper procedure under UJI 14-250); UJI 14-6002 NMRA (providing the jury procedure for considering a "necessarily included offense").

Our Court of Appeals first addressed this issue, although somewhat obliquely, in *State v. Schoonmaker*, when it had to decide the analytically opposite question for double jeopardy purposes: whether intentional child abuse is a lesser-included offense of reckless child abuse. *See* 2005-NMCA-012, ¶¶ 14-16, 136 N.M. 749, 105 P.3d 302 ("*Schoonmaker I*"), *rev'd on other grounds by State v. Schoonmaker*, 2008-NMSC-010, ¶¶ 1, 54, 143 N.M. 373, 176 P.3d 1105 ("*Schoonmaker II*"), *overruled by Consaul*, 2014-NMSC-030, ¶38. The Court rightly observed that "the statutory elements for intentional and negligent child abuse reveal[] that each offense contains an element that the other does not: the mens rea element." *Id.* ¶ 25. It further reasoned "that

these two statutes are mutually exclusive—one cannot commit an intentional act and an unintentional but substantially risky act at the same time, even though the act is voluntary as to both and the evidence may be sufficient to charge both offenses as alternative theories." *Id.* ¶ 27. The Court of Appeals therefore "[held] that the crime of intentional child abuse is not the same crime or lesser included crime of negligent child abuse," and affirmed the defendant's convictions. *Id.* ¶¶ 27, 38.

We granted certiorari and reversed the Court of Appeals on different grounds. *See Schoonmaker II*, 2008-NMSC-010, ¶ 1 (reversing the defendant's convictions and remanding for a new trial due to ineffective assistance of counsel). However, we addressed the defendant's double jeopardy argument "to avoid repetition of any similar errors on retrial." *Id.* ¶¶ 41, 46-49. In a footnote to that discussion, "[w]e agree[d] with the Court of Appeals' analysis . . . and its holding that intentional child abuse is not the same crime as, or a lesser included offense of, negligent child abuse." *Id.* ¶ 46 n.4. We also explicitly approved of the Court of Appeals' reasoning that intentional and reckless child abuse are "mutually exclusive" crimes. *Id.*

Schoonmaker I's holding that these crimes are mutually exclusive, which we endorsed in *Schoonmaker II*, became the basis for the proposition not only that *intentional* child abuse is not a lesser-included crime of *reckless* child abuse, but also that *reckless* child abuse is not a lesser-included crime of *intentional* child abuse. *See State v. Davis*, 2009-NMCA-067, ¶ 9, 146 N.M. 550, 212 P.3d 438 ("[N]egligent [now "reckless"] child abuse is not a lesser-included offense of intentional child abuse." (citing *Schoonmaker II*, 2010-NMSC-010, ¶ 46 n.4)). We continue to agree that intentional child abuse is not a lesser-included offense of reckless child abuse, but we now clarify that the Court of Appeals' conclusion that the two offenses are mutually exclusive went too far. As we explain below, the statutory elements of reckless child abuse resulting in the death of a child under twelve are a subset of the statutory elements of intentional child abuse resulting in the death of a child under twelve. We therefore hold that reckless child abuse resulting in the death of a child under twelve is a lesser-included offense of intentional child abuse resulting in the death of a child under twelve.

A lesser-included offense is "a less serious crime than the one charged, but one that an accused necessarily committed in carrying out the more serious crime." Bryan A. Garner, *Garner's Dictionary of Legal Usage*, 539, 3rd ed. 2011. In *State v. Meadors*, 1995-NMSC-073, ¶¶ 6, 12, 121 N.M. 38, 908 P.2d 731, this Court "set[] forth the test for determining whether one offense is a lesser included offense of another." *State v. Collins*, 2005-NMCA-044, ¶ 9, 137 N.M. 353, 110 P.3d 1090, *overruled on other grounds by State v. Willie*, 2009-NMSC-037, ¶ 18, 146 N.M. 481, 212 P.3d 369. "In *Meadors* we explained that New Mexico follows two distinct approaches for analyzing whether one crime constitutes a lesser-included offense of another." *State v. Campos*, 1996-NMSC-043, ¶ 20, 122 N.M. 148, 921 P.2d 1266. One is the cognate approach, which "requires that only those crimes for which the elements are sufficiently described in the charging document, and for which supporting evidence is adduced at trial, are presented to the jury as lesser-included offenses." *Id.* ¶ 21; *see also Meadors*, 1995-NMSC-073, ¶ 11 (clarifying that we refer to this "test simply as the cognate approach."). Having already concluded that, under the facts of this case, the jury was

properly instructed on both theories of child abuse, we need not analyze the cognate approach. We therefore turn to the strict elements test, under which we conclude that reckless child abuse is a lesser-included offense of intentional child abuse. Under the strict elements test, "an offense [is] a lesser-included offense of another only if the statutory elements of the lesser offense are a sub-set of the statutory elements of the greater offense such that it would be impossible ever to commit the greater offense without also committing the lesser offense." *Campos*, 1996-NMSC-043, ¶ 20.

Section 30-6-1(D) includes the crimes of both intentional and reckless child abuse:

> Abuse of a child consists of a person knowingly, intentionally or [recklessly], 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;
>
> (2) tortured, cruelly confined or cruelly punished; or
>
> (3) exposed to the inclemency of the weather.

Although this statute lists the mental states of "knowingly, intentionally, or [recklessly]" together in Section 30-6-1(D), describing various crimes of child abuse, the crimes of intentional and reckless abuse resulting in the death of a child under twelve are distinguished by their respective sentences. Reckless child abuse resulting in the death of a child under twelve years of age is a first degree felony punishable by eighteen years imprisonment. NMSA 1978, § 30-6-1(F) (2009) ("A person who commits [reckless] abuse of a child that results in the death of the child is guilty of a first degree felony."); NMSA 1978, § 31-18-15(A)(3) (2003) (stating that the basic sentence for a first degree felony is eighteen years imprisonment). Conversely, intentional child abuse resulting in the death of a child under twelve is punishable by life imprisonment. Section 30-6-1(H) ("A person who commits intentional abuse of a child less than twelve years of age that results in the death of the child is guilty of a first degree felony resulting in the death of a child."); NMSA 1978, Section 31-18-15(A)(1) (2005) (stating that the basic sentence for a first degree felony resulting in the death of a child is life imprisonment). All of the elements of these two crimes are contained in one Section: Section 30-6-1-(D). However, the sentences for these crimes are contained in separate Sections, which distinguish one crime from the other on the sole basis of the level of mens rea required. *See* §§ 30-6-1(F) (reckless) and 30-6-1(H) (intentional). Thus, we agree with *Schoonmaker I* that the only distinction between the two crimes is the level of mens rea required: either intentional or reckless. *See* 2005-NMCA-012, ¶ 25.

However, we disagree that intentional and reckless conduct are "mutually exclusive." One can commit child abuse recklessly without acting intentionally, but one cannot intentionally commit child abuse without "consciously disregard[ing] a substantial and unjustifiable risk," the definition of recklessness. *See Consaul*, 2014-NMSC-030, ¶ 37 (citing *Model Penal Code* Section 2.02(2)(c) for definition of "recklessly"); *cf. State v. Garcia*, 1992-NMSC-048, ¶ 21, 114 N.M. 269, 837 P.2d 862 ("Even though an intentional killing includes the element of knowledge of a strong probability of death or great bodily harm, the converse is not necessarily true; a killing with knowledge of the requisite probability does not necessarily

include an intentional killing."). We therefore disavow the reasoning in *Schoonmaker I* and all other precedent agreeing that intentional and reckless child abuse are mutually exclusive crimes. We clarify that reckless child abuse resulting in the death of a child under twelve is a lesser-included offense of intentional child abuse resulting in the death of a child under twelve.

We emphasize that when district courts are required to determine whether to grant a requested instruction on a lesser-included offense, *Meadors* requires analysis of both the strict elements test and the cognate approach, which "focuses upon both the charging instrument and the evidence adduced at trial." 1995-NMSC-073, ¶¶ 6, 11, 12. When a defendant is charged with intentional child abuse resulting in the death of a child under twelve, the instruction on the lesser-included offense of reckless child abuse should only be given if the evidence could support such a theory. *See State v. Ulibarri*, 1960-NMSC-102, ¶ 8, 67 N.M. 336, 355 P.2d 275 (stating that "the trial court must instruct the jury in every degree of the crime charged when there is evidence in the case tending to sustain such degree."). We further conclude that, when it is appropriate to instruct the jury on the lesser-included crime, it is also appropriate to provide a step-down instruction providing the process by which the jury should consider each charge. Because we hold that both offenses were correctly instructed in this case, we conclude that the use of a step-down instruction was appropriate.

Our holding may have important implications in the charging of future child abuse offenses. "When one offense is a lesser included offense of a crime named in a charging document, the defendant is put on notice that he [or she] must defend not only against the greater offense as charged but also against any lesser included offense." *Collins*, 2005-NMCA-044, ¶ 8; *see also Davis*, 2009-NMCA-067, ¶ 8 ("It is improper to instruct the jury as to a crime not formally charged if that crime is not a lesser[-]included offense of the crime formally charged." (alteration in original)). "The defendant's constitutional right to notice of the crime against which he must defend is a consideration that arises when . . . the State requests a jury instruction on a lesser-included offense over the defendant's objection." *Meadors*, 1995-NMSC-073, ¶ 5. Therefore, when a defendant is charged with intentional child abuse resulting in the death of a child under twelve, he or she will be on notice to defend against both intentional and reckless child abuse resulting in the death of a child under twelve when the abuse results from the same conduct or course of conduct. *Cf. Consaul*, 2014-NMSC-030, ¶ 24 (requiring separate instructions when the State advanced two "different and inconsistent theories" as to the conduct or course of conduct amounting to child abuse).

B. Admission of Expert Testimony

Defendant alleges that the district court erred by allowing the expert forensic pathologist to testify that Baby Breandra died of a "constellation of injuries" and that "it was impossible to tell which one might have been the lethal injury or in which order they may have been inflicted." He asserts that the testimony lacked specificity and allowed the jury to speculate on the cause of death. Defendant's argument is not developed beyond this bald assertion, and he makes only vague reference to Rules 11-702 to -704 NMRA to support it. Those rules establish the criteria for expert opinion testimony, but Defendant does not explain how they were

violated or otherwise support his contention. Nonetheless, we address this argument.

1. Preservation

"In order to preserve an issue for appeal, a defendant must make a timely objection that specifically apprises the trial court of the nature of the claimed error and invokes an intelligent ruling thereon." *State v. Walters*, 2007-NMSC-050, ¶ 18, 142 N.M. 644, 168 P.3d 1068 (internal quotation marks and citation omitted); 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 . . . ."). As the State points out, Defendant failed to object to this testimony and therefore failed to preserve this claim of error for appeal.

2. Standard of review

Because Defendant did not preserve this argument, we review it for plain error. "Under [Rule 11-103(D)-(E) NMRA], this Court may review evidentiary questions although not preserved if the admission of the evidence constitutes plain error." *State v. Contreras*, 1995-NMSC-056, ¶ 23, 120 N.M. 486, 903 P.2d 228. "The plain-error rule, however, applies only if the alleged error affected the substantial rights of the accused." *Id.* To find plain error, the Court "must be convinced that admission of the testimony constituted an injustice that created grave doubts concerning the validity of the verdict." *Id.* (internal quotation marks and citation omitted). Further, "[i]n determining whether there has been plain . . . error, we must examine the alleged errors in the context of the testimony as a whole." *State v. Dylan J.*, 2009-NMCA-027, ¶ 15, 145 N.M. 719, 204 P.3d 44 (omission in original) (internal quotation marks and citation omitted).

3. The admission of Dr. Krinsky's testimony was not plain error

In *State v. Lucero*, we reviewed the admission of expert testimony for plain error. 1993-NMSC-064, ¶ 13, 116 N.M. 450, 863 P.2d 1071. The expert in that case was a psychologist who interviewed a child who complained about sexual abuse by her uncle. *Id.* ¶¶ 2-3. The State asked that the expert interview the child prior to trial to determine the child's competency. *Id.* ¶ 3. The expert testified that the child suffered from post traumatic stress syndrome and that many of the child's symptoms were consistent with those found in children who have been sexually abused. *Id.* ¶ 4. The sexual abuse, the expert testified, caused the post traumatic stress syndrome. *Id.* As part of this testimony, the expert recounted several statements the child made directly to her, and commented on the demeanor and credibility of the child. *Id.* ¶¶ 6-7.

We held that the admission of this testimony was not harmless error "[b]ecause [the expert] repeated so many of the complainant's statements regarding the alleged sexual abuse by the defendant and because she commented directly and indirectly upon the complainant's truthfulness." *Id.* ¶ 22. We reasoned that the expert's "testimony in [that] case really amounted to a repetition of the complainant's statements regarding sexual abuse made to her during her evaluation" and "[i]n so many words, [the expert] testified that the complainant had in fact been molested." *Id.* ¶ 21. In addition, "[the expert] went a step further and stated that it was the defendant who abused the complainant," and "[s]he also commented that the complainant's statements were truthful." *Id.* We concluded that because the child's credibility was a central issue in the case, and because she and her uncle were the

only witnesses to the alleged abuse, it was likely that the jury was swayed by the expert's testimony. *Id.* ¶ 22. Accordingly, we expressed "grave doubts concerning the validity of the verdict and the fairness of the trial." *Id.*

In the case at bar, the record reflects that the piece of Dr. Krinsky's testimony that Defendant selectively relies on to support his argument comes from a colloquy in which Dr. Krinsky identified "multiple blunt force injuries" as the cause of Baby Breandra's death. Dr. Krinsky intimated that a brain injury could have in fact been the fatal blow, but affirmatively asserts that the cause of death was the multiple blunt force injuries. While Dr. Krinsky identified several injuries, she was specific in stating that the injuries together were the cause of death. We find it difficult to imagine how this testimony could lead to jury speculation about the cause of death. Further, Dr. Krinsky made no assertions that Defendant caused these injuries, unlike in *Lucero*, where the expert stated the child's uncle molested her. Finally, unlike *Lucero*, where the expert likely sealed the defendant's fate with her testimony alone, in this case there is ample evidence outside of Dr. Krinsky's testimony to support the jury's finding of guilt. Accordingly, we hold that the admission of Dr. Krinsky's testimony was not plain error.

C. Sufficiency of the Evidence

Defendant claims that the State failed to present sufficient evidence to prove beyond a reasonable doubt that Baby Breandra's injuries were intentional or recklessly inflicted, rather than accidental. Defendant argues that although the evidence presented established that Baby Breandra suffered a constellation of injuries, there was no evidence presented to show that Defendant caused those injuries, either intentionally or recklessly. Defendant cites no cases regarding sufficiency of evidence in support of this argument, and instead cites *State v. Franklin*, 1967-NMSC-151, 78 N.M. 127, 428 P.2d 982 and *State v. Boyer*, 1985-NMCA-029, 103 N.M. 655, 712 P.2d 1. Beyond this, Defendant's argument is undeveloped.

The State argues that the evidence presented was sufficient to support Defendant's conviction. The State asserts that the evidence that Baby Breandra was uninjured before being left alone with Defendant, that the medical experts determined that the types of injuries Baby Breandra suffered could not have been accidental, and that Defendant admitted to hitting the baby, was sufficient to support Defendant's conviction.

1. Standard of review

In reviewing the sufficiency of the evidence, "[t]he 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. Guerra*, 2012-NMSC-027, ¶ 10, 284 P.3d 1076 (second alteration in original) (internal quotation marks and citation omitted). "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." *Id.* (internal quotation marks and citation omitted). "The question before [the] reviewing [c]ourt is not whether [the court] would have had a reasonable doubt [about guilt] but whether it would have been impermissibly unreasonable for a jury to have

concluded otherwise." *Id.* (second and fourth alterations in original) (internal quotation marks and citation omitted). "In our determination of the sufficiency of the evidence, we are required to ensure that a rational jury *could* have found beyond a reasonable doubt the essential facts required for a conviction." *State v. Duran*, 2006-NMSC-035, ¶ 5, 140 N.M. 94, 140 P.3d 515 (internal quotation marks and citation omitted). "Contrary evidence supporting acquittal does not provide a basis for reversal because the jury is free to reject Defendant's version of the facts." *Id.* (internal quotation marks and citation omitted). We do "not evaluate the evidence to determine whether some hypothesis could be designed which is consistent with a finding of innocence," and we do "not weigh the evidence [or] substitute [our] judgment for that of the fact finder so long as there is sufficient evidence to support the verdict." *State v. Sutphin*, 1988-NMSC-031, ¶ 21, 107 N.M. 126, 753 P.2d 1314.

"[T]he test to determine the sufficiency of evidence in New Mexico . . . is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction." *Id.* "Substantial evidence is relevant evidence [that] a reasonable mind might accept as adequate to support a conclusion." *In re Gabriel M.*, 2002-NMCA-047, ¶ 22, 132 N.M. 124, 145 P.3d 64 (alteration in original) (internal quotation marks and citation omitted). "Just because the evidence supporting the conviction was circumstantial does not mean it was not substantial evidence." *Id.* (internal quotation marks and citation omitted). "Intent is subjective and is almost always inferred from other facts in the case, as it is rarely established by direct evidence." *State v. Sosa*, 2000-NMSC-036, ¶ 9, 129 N.M. 767, 14 P.3d 32 (internal quotation marks and citation omitted).

2. The evidence presented was sufficient to support Defendant's conviction for intentional child abuse

In order to present sufficient evidence for the jury to convict Defendant of intentional child abuse resulting in the death of a child under twelve,

> the State was required to prove beyond a reasonable doubt that (1) Defendant caused Baby [Breandra] to be placed in a situation which endangered her life or health, or tortured or cruelly confined or punished Baby [Breandra]; (2) Defendant acted intentionally; . . . (3) Defendant's actions resulted in the death of or great bodily harm to Baby [Breandra];

(4) Baby Breandra was under the age of twelve; and (5) this happened in New Mexico. *Walters*, 2007-NMSC-050, ¶ 28; *see also* UJI 14-602 NMRA; § 30-6-1(H).

The State proved the first and second elements with Defendant's own statement that "I slapped her. I got her by her ears and she didn't want to keep quiet." This statement demonstrates that Defendant endangered the baby's health, and that he acted intentionally. Further, with the forensic pathologist's testimony that the constellation of injuries on Baby Breandra's body were intentional and that the manner of death was homicide, the State showed that the injuries she suffered could not have been caused by accident. *Contra Consaul*, 2014-NMSC-014, ¶ 56

(finding insufficient evidence of child abuse resulting in great bodily harm by intentional suffocation when "expert medical testimony provided the only evidence that [the child] may have been smothered—that a crime had occurred—and that [the child] had not been injured by other, noncriminal causes."). The State proved the third element, that Defendant's actions resulted in the baby's death, with testimony from Defendant's friend Derek Vigil that he had visited Defendant at home on March 8, 2011, and when he left around 11:30 a.m. or noon, he did not see any signs that Baby Breandra was in distress. This shows that the baby was in good health before she was left alone with Defendant. In conjunction, these facts show that Defendant was the only person with the baby when she was intentionally injured, proving that Defendant's acts caused the baby's death. The State proved element four by showing that Baby Breandra's birthday was September 24, 2009, and she died on March 8, 2011. Finally, the State proved the fifth element by showing that these events occurred in Española, New Mexico.

Viewing the evidence in the light most favorable to the verdict, the evidence the State presented in support of Defendant's conviction is enough that a rational juror could have found beyond a reasonable doubt the essential facts required for conviction. We therefore hold that sufficient evidence was presented to support Defendant's conviction.

D. Ineffective Assistance of Counsel

Defendant claimed that he was denied effective assistance of counsel. Claims of ineffective assistance of counsel are reviewed de novo. *State v. Boergadine*, 2005-NMCA-028, ¶ 33, 137 N.M. 92, 107 P.3d 532. Defendant abandoned this claim, therefore we do not address it. Although we do not now comment on the merits of this claim, Defendant remains free to raise this issue in a collateral proceeding. *See State v. Baca*, 1997-NMSC-059, ¶ 25, 124 N.M. 333, 950 P.2d 776 ("A record on appeal that provides a basis for remanding to the trial court for an evidentiary hearing on ineffective assistance of counsel is rare. Ordinarily, such claims are heard on petition for writ of habeas corpus . . . ."); *State v. Telles*, 1999-NMCA-013, ¶ 25, 126 N.M. 593, 973 P.2d 845 ("Defendant's proper avenue of relief [from ineffective assistance of counsel] is a post-conviction proceeding that can develop a proper record").

E. Sentencing

Defendant argues that the district court's failure to consider mitigating circumstances during sentencing constitutes an abuse of discretion, and asks this Court to remand the case for a new sentencing hearing. The State concedes that Defendant was entitled to present mitigating circumstances prior to sentencing. While we are not bound by the State's concessions on appeal, we agree with the parties and remand to the district court for resentencing, as we discuss below. *See State v. Foster*, 1999-NMSC-007, ¶ 25, 126 N.M. 646, 974 P.2d 140 (stating that appellate courts are not bound by the State's concessions), *abrogated on other grounds by Kersey v. Hatch*, 2010-NMSC-020, ¶ 17, 148 N.M. 381, 237 P.3d 683.

1. Procedural background

Defendant argues that during sentencing, the district court misunderstood its authority to alter the basic sentence of life imprisonment based on mitigating circumstances pursuant to Section 31-18-

15.1(A)(1), and that such misunderstanding was an abuse of discretion. The State concedes this point, agreeing with Defendant that the district court misunderstood the law. The State acknowledges that Defendant was entitled to present claims of mitigating circumstances prior to sentencing, but does not agree that the district court should have altered Defendant's sentence based on the mitigating circumstances presented.

After dismissing the jury, the district court proceeded immediately to sentencing. Upon being asked for its recommendation, the State asserted that the district court had no choice but to impose a life sentence. The State presented some of Baby Breandra's family members, including her mother, father, grandmother, and uncle, who all requested the maximum sentence of life in prison. Defendant presented his mother and godmother, who spoke to Defendant's good character.

Defense counsel then requested that the district court consider mitigating circumstances under NMSA 1978, Section 31-18-15.1(A) (2009) (enhancement based on aggravating factors recognized as unconstitutional by *State v. Frawley*, 2007-NMSC-057, ¶ 29, 143 N.M. 7, 172 P.3d 144). [4 Tr. 196:5-6] Defendant argued that the mitigating circumstances included the fact that he called the ambulance, cooperated with the police, and had spent a lot of time taking care of Baby Breandra and was close with her. Defendant asked the district court to mitigate up to one-third of the basic sentence.

The district court noted that "the law has reserved the stiffest penalties that the State of New Mexico can give [for cases in which] somebody injures or hurts or kills our most vulnerable, our children." The district court then stated that it did not believe it had the authority to alter the sentence because it believed the law required a mandatory life sentence. Accordingly, the district court imposed a life sentence. The State reminded the district court that Defendant had one prior felony conviction, subjecting him to a one-year habitual offender enhancement, which the district court then added to Defendant's life sentence.

2. Standard of review

"We review the trial court's sentencing for an abuse of discretion." *State v. Sotelo*, 2013-NMCA-028, ¶ 37, 296 P.3d 1232 (internal quotation marks and citation omitted). "The district court has an obligation to consider mitigating factors in sentencing. Failure to do so, whether based on a misapprehension of the authority given by statute or a belief that a formal motion is required, is an abuse of discretion." *Id.* ¶ 45.

3. Defendant is entitled to resentencing because the district court's misunderstanding of its authority to alter the basic sentence based on mitigating circumstances was an abuse of discretion

"A person who commits intentional abuse of a child less than twelve years of age that results in the death of the child is guilty of a first degree felony resulting in the death of a child." Section 30-6-1(H). "[T]he basic sentence . . . for a first degree felony resulting in the death of a child [is] life imprisonment." Section 31-18-15(A)(1). "The appropriate basic sentence of imprisonment shall be imposed upon a person convicted and sentenced pursuant to [Section 31-18-15(A)], unless the court alters the sentence pursuant to the provisions of the Criminal Sentencing

Act." NMSA 1978, § 31-18-15(B) (2007). "The court shall hold a sentencing hearing to determine if mitigating or aggravating circumstances exist and take whatever evidence or statements it deems will aid it in reaching a decision to alter a basic sentence." Section 31-18-15.1(A). "The judge may alter the basic sentence as prescribed in Section 31-18-15 . . . upon . . . a finding by the judge of any mitigating circumstances surrounding the offense or concerning the offender." Section 31-18-15.1(A), (A)(1). The amount by which the sentence may be mitigated must be determined by the judge, but may not exceed one-third of the basic sentence. Section 31-18-15.1(G) (2009).

We recently addressed the issue of whether a district court may mitigate a life sentence for a conviction of child abuse resulting in the death of a child under twelve in *State v. Juan*, 2010-NMSC-041, 148 N.M. 747, 242 P.3d 314. The defendant in *Juan* was convicted of "child abuse resulting in the death of a child under twelve years of age." *Id.* ¶ 10. The district court declined to consider mitigating circumstances, concluding "that the Legislature intended that a life sentence be mandatory for child abuse resulting in death, reasoning that the statute provided that the alteration of a sentence could not exceed one-third of the basic sentence and one-third of a life sentence could not be calculated." *Id.* ¶ 35.

On appeal to this Court, the defendant in *Juan* claimed that the district court erred by failing to consider mitigating circumstances. *Id.* ¶ 36. We observed that "Sections 31-18-15 and 31-18-15.1 explicitly grant the trial court the authority to alter the basic sentence for all noncapital felonies, including those that carry a basic sentence of life imprisonment." *Juan*, 2010-NMSC-041, ¶ 39. We noted that "[a] statute must be construed so that no part of the statute is rendered surplusage or superfluous," and concluded that in order to conclude that district courts lacked authority to mitigate a basic life sentence for a conviction of child abuse resulting in death, we would have "to read Subsections (A)(1) and (A)(2) out of Section 31-18-15, which we cannot and will not do." *Juan*, 2010-NMSC-041,¶ 39 (internal quotation marks and citation omitted). Thus, we held that "Sections 31-18-15 and 31-18-15.1 grant the trial court the authority to alter the basic sentence of life imprisonment for noncapital felonies." *Juan*, 2010-NMSC-041, ¶ 39. Further, we held "that the thirty-year term for parole eligibility is the proper numerical standard by which to measure the trial court's authority to alter a basic sentence of life imprisonment," and district courts could therefore reduce a life sentence by up to one-third of thirty, or ten years. *Id.* ¶ 41.

In *Juan*, we also highlighted the Legislature's distinction between noncapital felonies, which carry a basic sentence of life imprisonment, and capital felonies, which carry a mandatory sentence of life imprisonment. *Id.* ¶ 42. The basic sentence of life imprisonment for a first degree felony resulting in the death of a child is set out in the noncapital felony sentencing statute, Section 31-18-15(A)(1). Accordingly, we held that "[u]nlike a mandatory sentence of life imprisonment, a basic sentence of life imprisonment is subject to alteration . . . if the trial court finds 'any mitigating circumstances surrounding the offense or concerning the offender.'" *Juan*, 2010-NMSC-041, ¶ 42 (quoting Section 31-18-15.1(A)(1)). We determined that the district court "improperly failed to consider mitigating evidence at [the d]efendant's sentencing hearing pursuant to

Sections 31-18-15 and 31-18-15.1." *Juan*, 2010-NMSC-041, ¶ 43.

Here, the district court's misunderstanding of its authority and obligation to consider mitigating circumstances, which resulted in its failure to consider altering the basic sentence, was an abuse of discretion. Therefore, we reiterate that when issuing a basic life sentence subject to alteration, district courts have the authority, and the obligation, to consider potential mitigating circumstances, and we remand to the district court for resentencing to determine whether the sentence should be altered.

III. CONCLUSION

While we acknowledge that it would have been ideal for the district court below to issue two completely separate instructions for the elements of intentional and reckless child abuse, we hold that the instructions issued, along with the special verdict forms, were sufficient as a whole to accurately instruct the jury on the law and do not constitute reversible error. In order to clarify our cases on child abuse jury instructions, we further hold that reckless child abuse resulting in the death of a child under twelve is a lesser-included offense of intentional child abuse resulting in the death of a child under twelve, and defendants should accordingly be on notice to defend against both. If a defendant is charged with intentional child abuse, and the evidence presented could support a theory of either intentional or reckless abuse, separate instructions for the elements of each theory should be given, along with a step-down instruction on the procedure for considering each theory.

Next, we find no error in the district court's admission of Dr. Krinsky's expert testimony, and we find that sufficient evidence was presented to support Defendant's conviction. Finally, we hold that the district court's refusal to consider mitigating factors when sentencing Defendant, based on its belief that the sentence could not be altered, was an abuse of discretion. Thus, finding no reversible error, we affirm Defendant's conviction for intentional child abuse resulting in the death of a child under twelve, and remand to the district court for resentencing to decide whether Defendant's sentence should be altered based on the district court's consideration of potential mitigating factors.

IT IS SO ORDERED.

BARBARA J. VIGIL, Chief Justice

WE CONCUR:

PETRA JIMENEZ MAES, Justice

RICHARD C. BOSSON, Justice

EDWARD L. CHÁVEZ, Justice

CHARLES W. DANIELS, Justice

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-029

Filing Date: December 22, 2014

Docket No. 32,161

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

ALEX TEJEIRO,

Defendant-Appellant.

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for Appellee

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Albuquerque, NM

for Appellant

OPINION

BUSTAMANTE, Judge.

Defendant Alex Tejeiro appeals from the district court's ruling on his motion to set aside his guilty plea. He argues that he received ineffective assistance from his attorney, who failed to inform him of the immigration consequences of his plea. We agree. Accordingly, we reverse.

BACKGROUND

Defendant, a Cuban immigrant, pleaded guilty to a single count of drug trafficking in November 2003. He received a conditional discharge, which he completed successfully, and the matter was dismissed with prejudice on August 13, 2007. He subsequently learned that his plea had possible immigration consequences and filed a motion to set aside his guilty plea on the grounds that his attorney had been ineffective in failing to inform him of that fact. His motion was filed in March 2011. Because the entry of the plea and the motion to withdraw it were heard by different judges, hereafter the court that accepted the guilty plea will be referred to as the "trial court," and the court that heard Defendant's motion to withdraw as the "district court."

The district court initially denied Defendant's motion, declining to apply *Paredez* retroactively to his plea agreement, which occurred the year before *Paredez* was decided. *State v. Paredez*, 2004-NMSC-036, 136 N.M. 533, 101 P.3d 799. The district court later reconsidered and set an evidentiary hearing to investigate the merits of Defendant's claim. At that hearing, the district court again denied Defendant's motion, stating that Defendant's counsel was ineffective under *Paredez* but that Defendant had not been prejudiced by his counsel's incompetence in accepting the guilty plea. Defendant appealed.

DISCUSSION

When a defendant moves to withdraw his guilty plea, the district court's denial of that motion is reviewed for abuse of discretion. *State v. Carlos*, 2006-NMCA-141, ¶ 9, 140 N.M. 688, 147 P.3d 897. An abuse of discretion occurs when a district court's ruling is clearly erroneous or "based on a misunderstanding of the law[,]" *State v. Sotelo*, 2013-NMCA-028, ¶ 37, 296 P.3d 1232, or when the court ignored "undisputed facts [that] establish[ed] that the plea was not knowingly and voluntarily given." *Paredez*, 2004-NMSC-036, ¶ 5 (internal quotation marks and citation omitted).

The voluntariness of a guilty plea depends on whether counsel performed " 'within the range of competence demanded of attorneys in criminal cases.' " *Id.* ¶ 13 (quoting *Hill v. Lockhart*, 474 U.S. 52, 56 (1985)) An otherwise valid plea can thus be undermined by ineffective assistance from counsel. *Garcia v. State*, 2010-NMSC-023, ¶ 46, 148 N.M. 414, 237 P.3d 716. Indeed, we have found that when a defendant enters a plea upon the advice of his attorney, "the voluntariness and intelligence of the defendant's plea generally *depends* on whether the attorney rendered ineffective assistance in counseling the plea." *State v. Barnett*, 1998-NMCA-105, ¶ 12, 125 N.M. 739, 965 P.2d 323 (emphasis added). As a result, we must assess a motion of this kind on the merits of its claim of ineffective assistance of counsel; such claims are mixed questions of law and fact, and are reviewed de novo. *Id.* ¶ 13.

The United States Supreme Court has established a two-prong inquiry for determining whether a defendant received ineffective assistance of counsel: (1) the trial counsel's performance fell below the objective standard of reasonability, and (2) counsel's incompetence prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see State v. Hester*, 1999-NMSC-020, ¶ 9, 127 N.M. 218, 979 P.2d 729. The defendant must demonstrate the satisfaction of both prongs to prove that his plea was not knowing and voluntary and should be set aside.

A. Defendant's Counsel Was Incompetent Under *Paredez*

Our Supreme Court has recognized the paramount importance of informing defendants of immigration consequences stemming from any guilty pleas. *Paredez*, 2004-NMSC-036. A defendant's attorney has "an affirmative duty" to determine the specific risk of deportation for his client and to inform his client of the possible impact on his immigration status if he accepts a guilty plea. *Id.* ¶ 1. If an attorney provides incorrect advice or misrepresents the consequences of a plea to his client, his performance is objectively unreasonable under *Strickland*; we require "a definite prediction as to the likelihood of deportation based on the crimes to which a defendant intends to plead and the crimes listed in federal law for which a defendant can be deported." *Carlos*, 2006-NMCA-141, ¶ 14. Additionally, the Supreme Court concluded that "an attorney's non-advice to an alien defendant on the immigration consequences of a guilty plea would also be deficient performance." *Paredez*, 2004-NMSC-036, ¶ 16. An attorney who failed to meet his affirmative burden in providing his client with information about deportation risks would thus necessarily satisfy the first prong of the *Strickland* analysis. *Paredez*, 2004-NMSC-036, ¶ 16.

The United States Supreme Court has also confirmed a defendant's right to be informed of specific immigration consequences that may stem from guilty pleas, but has not done so as broadly as New Mexico. *State v. Favela*, 2013-NMCA-102, ¶ 18, 311 P.3d 1213, *cert. granted*, 2013-NMCERT-010, 313 P.3d 251. In *Padilla v. Kentucky*, the United States Supreme Court held that the duty to inform a defendant of immigration consequences arises when "the deportation consequence is truly clear[.]" 559 U.S. 356, 369 (2010). We have established more stringent requirements for defense attorneys, requiring them to inform their clients of consequences short of deportation and to provide guidance even in cases in which

implications for immigration status are not "truly clear." *Favela*, 2013-NMCA-102, ¶ 18.

Paredez was decided in 2004, a year after Defendant pleaded guilty. We have since concluded that the standards regarding ineffective assistance of counsel outlined in *Paredez* apply retroactively. *State v. Ramirez*, 2012-NMCA-057, ¶ 5, 278 P.3d 569, *aff'd sub. nom. Ramirez v. State*, 2014-NMSC-023, 333 P.3d 240. These standards are thus applicable to Defendant's guilty plea.

Applying *Paredez*, we review the record for evidence that Defendant was given appropriate advice regarding the potential impact of a guilty plea on his immigration status. We agree with the district court that such evidence is "[c]learly absent." Defendant insisted in his own testimony that he had never been informed of the risk of deportation or other possible immigration consequences. His attorney was required to provide him with such information, even for those collateral consequences short of clear deportation risk. *Favela*, 2013-NMCA-102, ¶ 18. He failed to do so.

The record does contain the suggestion that both the trial court and defense counsel wrongly believed the conditional discharge would address deportation concerns. Contemplating the consequences to Defendant if he was "a citizen of another country," the trial court informed him that he faced possible immigration consequences in case of "*a conviction on this charge*, especially a deferred or suspended sentence[.]" (emphasis added). It then elected to release Defendant on a conditional discharge for a period of five years, and informed Defendant that if he successfully completed probation "the charge will be dismissed and you honestly can tell the world that you do not have the felony conviction[.]" The district court commented that there was a "global understanding at th[e] time" of Defendant's plea that successful completion of a conditional discharge would allow him to avoid immigration consequences. Defendant later testified that he too operated under this mistaken belief. This understanding was not correct. *See* 8 U.S.C. § 1101(a)(48)(A)(i) (2012).

The trial court's mistaken beliefs as to the immigration consequences for Defendant may account for counsel's failure to provide accurate advice—but it does not excuse it. *Carlos*, 2006-NMCA-141, ¶ 14. Defendant did indeed face possible deportation to Cuba as a result of his guilty plea, irrespective of whether he was afforded a conditional discharge, and it was incumbent on his attorney to know and inform him of that. *Paredez*, 2004-NMSC-036, ¶ 1; *see* 8 U.S.C. § 1101(a)(48)(A)(i) (incorporating guilty pleas into the definition of "conviction" for immigration purposes, even if no conviction arises under state law).

For these reasons, the district court correctly found Defendant's attorney incompetent under the first prong of *Strickland*.

B. Defendant Was Prejudiced by Ineffective Counsel

When an attorney fails to advise his client of the specific immigration consequences of his case, it satisfies the *Strickland* standard "if the defendant suffers prejudice by the attorney's omission." *Paredez*, 2004-NMSC-036, ¶ 19. In order to demonstrate such prejudice, a defendant must show that the outcome of the plea process was affected by his counsel's deficient performance. *Id.* ¶ 20. Our recent

jurisprudence adopts "a broad approach to how a defendant can demonstrate prejudice." *Favela*, 2013-NMCA-102, ¶ 20. According to the United States Supreme Court in *Padilla*, the petitioner need only show "that a decision to reject the plea bargain would have been rational under the circumstances." 559 U.S. at 372. This approach, which is in keeping with New Mexico law, contemplates not merely the possibility of success at trial, but also the opportunity for renegotiation of the plea; it thus focuses on the rationality of rejecting the plea offer rather than the State's evidence or a defendant's maximum exposure compared to the actual offer. *Favela*, 2013-NMCA-102, ¶ 21.

A defendant's testimony may comprise part of the evidence for his claim of prejudice, but generally the claim cannot rest solely on uncorroborated self-serving statements. *Patterson v. LeMaster*, 2001-NMSC-013, ¶ 29, 130 N.M. 179, 21 P.3d 1032. Corroborating evidence may include pre-conviction statements or actions that indicate the defendant's preferences or intentions. *Id.* ¶ 30. A defendant's behavior after the plea has been entered may also corroborate his statements, e.g. if he acts quickly to withdraw his acceptance of the plea agreement upon learning of immigration consequences. *Paredez*, 2004-NMSC-036, ¶ 22. Our courts have placed no limit on the types of relevant evidence a defendant may provide to demonstrate that he would have rejected the plea if given appropriate advice. *State v. Edwards*, 2007-NMCA-043, ¶ 36, 141 N.M. 491, 157 P.3d 56. This portion of the *Strickland* analysis cannot be made according to "mechanical rules," but must incorporate a variety of factors in order to determine what effect counsel's incompetent assistance may have had. *Barnett*, 1998-NMCA-105, ¶ 32.

The district court's analysis in this case focused on three factors: (1) the absence of pre-conviction statements in which Defendant "maintained his innocence" or expressed a "desire[] to fight the charges and take the case to trial[,]" (2) the benefits of the plea, and (3) the strength of the State's case against Defendant. It did not determine whether Defendant's testimony was merely self-serving or not and limited its evaluation of corroboration to particular types of pre-conviction evidence. It also placed inappropriate emphasis on the strength of the State's case and the probable similarity of result if Defendant had chosen to exercise his trial rights. Because *Favela*, in which this Court clarified how a defendant might demonstrate prejudice, was decided in 2013, the district court lacked the benefit of this clarification at the time of its decision in 2012, and thus improperly relied on these factors, particularly the strength of the State's case, in its decision. *Favela*, 2013-NMCA-102, ¶ 20.

Guided by *Padilla* and *Favela*, we review the record for a demonstration of prejudice. There are several factors in addition to Defendant's testimony that corroborate his claims and demonstrate prejudice. First, we consider the harshness of deportation and attribute proper weight to that harshness as an element of any immigrant's decision-making process. *Paredez*, 2004-NMSC-036, ¶ 18. Second, we evaluate Defendant's testimony itself, which is corroborated in the record at the time of Defendant's plea, with references both oblique and direct to Defendant's concern about his immigration status and his attachment to this country. We also recognize that Defendant's post-conviction behavior weighs in his favor, though less significantly in this case than the pre-conviction circumstances. Third, we determine that the factors considered by the

district court, when afforded their due weight under our current legal standards, were both factually and legally inadequate grounds for disposing of Defendant's claim of prejudice. Taken in conjunction with his own testimony, the totality of the factors presented firmly establishes a reasonable probability that Defendant would have rejected the plea offer if his attorney had competently advised him. Finally, we conclude that under these circumstances Defendant's plea was not made knowingly and voluntarily and that it was, therefore, error to accept it.

i. Harshness of Immigration Consequences

As the Supreme Court noted in *Paredez*, "Deportation can often be the harshest consequence of a non-citizen criminal defendant's guilty plea[.]" *Paredez*, 2004-NMSC-036, ¶ 18. The extremity—and often finality—of deportation exposure heightens the probability of prejudice because it is "a particularly severe penalty" and can be "the most important" result of a guilty plea for non-citizen defendants. *Padilla*, 559 U.S. at 364-65.

Defendant testified that he had been a political prisoner in Cuba and that he feared he would face the same fate if forced to return. He stated that the Cuban government had deprived him of all his property when he came to the United States. He described himself as "not in agreement with Fidel [Castro]," which he believed would result in cruel treatment in his native country even if he avoided imprisonment. The district court apparently agreed that conditions in Cuba are "particularly horrific."

The record indicates that the district court considered the actual probability of Defendant's deportation to Cuba, noting, "They don't deport people back to Cuba from the United States technically." The State expressed a similar opinion that "the United States and Cuba do not have an agreement to return convicted felons back to Cuba under any circumstances[.]"

The arrangements for deportation between the United States and Cuba are a political matter outside the control of either the court or Defendant and are subject to change. Moreover, the district court's statements do not accurately reflect the current status of Cuban immigrants convicted of deportable offenses. *See* 8 U.S.C. § 1231(a)(3), (6) (2012); *see also, e.g.*, *Perez v. State*, 120 So. 3d 49, 50 (Fla. Dist. Ct. App. 2013) (stating that the defendant's counsel wrongly advised that the defendant could not be deported because he was Cuban, when in fact deportation consequences were "inevitable" for his drug offenses). Defendant himself attempted to inform the district court of this fact.

Irrespective of the likelihood of actual deportation to countries such as Cuba, deportable aliens may be detained within the United States pending their removal. *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001); 8 C.F.R. § 241.4, 241.5 (2012). In this case, Defendant pleaded guilty to a charge of drug trafficking. Though he successfully completed a conditional discharge and has no criminal record in the state of New Mexico, this plea constituted a conviction of an aggravated felony for immigration purposes. 8 U.S.C. § 1101(a)(43)(B); 8 U.S.C. § 1101(a)(48)(A)(i); 18 U.S.C. § 924(c)(2) (2012). Federal law mandates his detention and attempted deportation as a result. 8 U.S.C. § 1226(c)(1)(B) (2012). He is not eligible for asylum regardless of the conditions and

consequences he may face if returned to Cuba. 8 U.S.C. § 1158(b)(2)(B)(i) (2012). Defendant has not yet been detained or removed, but immigration proceedings have been initiated. Regardless of the state of those proceedings, it is the possibility of deportation—in addition to other immigration consequences short of deportation—that we assess for purposes of determining prejudice. *Carlos*, 2006-NMCA-141, ¶ 16. We recognize that deportation is a particularly difficult and harsh result for many defendants, *Paredez*, 2004-NMSC-036, ¶ 18, and this Defendant in particular testified that he was "abused in Cuba" and imprisoned for his political views. For reasons like these, we analyze prejudice in immigration-based ineffective assistance of counsel claims differently from other types of claims. *Favela*, 2013-NMCA-102, ¶ 21. The district court failed to account for the severity of this punishment and the increased likelihood that a person faced with deportation might reconsider his decision to accept a guilty plea. *Paredez*, 2004-NMSC-036, ¶ 18.

ii. Defendant's Testimony and Corroborating Evidence

Defendant argues that he was prejudiced "by accepting a plea that made certain his deportation with the prospect of indefinite detainment to a country where he had been a political prisoner, where he had no employment, family[,] or property, [and] where he was subjected to abuse[.]" He claims that there is a reasonable probability that he would instead have elected to go to trial, which "would have provided him [the] opportunity to maintain his employment, to stay close to his family, and to live as a free resident[.]" He consistently maintained that his immigration status within this country is of utmost importance to him, and stated that he acted to set aside his guilty plea upon realizing that it carried negative consequences for that status. He also asserted that he would have rejected the plea offer at the outset if he had known of the possibility of deportation. We find corroboration for several of Defendant's claims in the record.

"Deportation can often be the harshest consequence of a non-citizen criminal defendant's guilty plea," *Paredez*, 2004-NMSC-036, ¶ 18, particularly in cases like Defendant's, where the immigrant has established roots within this country. For over a decade, Defendant has lived in the United States with his family. We consider Defendant's attachment to the United States as one of the types of evidence he may present to corroborate his current claims. *Edwards*, 2007-NMCA-043, ¶36; *see also United States v. Couto*, 311 F.3d 179, 191 (2d Cir. 2002), *abrogated on other grounds by Padilla*, 559 U.S. 356 (recognizing "[the d]efendant's overriding concern is remaining in the United States and hence she very likely would not have pleaded guilty if she had understood the deportation consequences of [her] plea"); *Sial v. State*, 862 N.E.2d 702, 706 (Ind. Ct. App. 2007) (finding a reasonable probability that the defendant would have rejected the plea if properly advised due to the "special circumstances" that he had a child and wife in the United States).

In his testimony, Defendant identified that seeing his children, who reside in the United States, was always a priority. The trial court's personal notes corroborate the assertion that Defendant expressed that sentiment prior to the court's acceptance of his guilty plea, and that he made the court aware that he had a daughter residing in Miami. It is evident from these notes and the record that all parties, including the court, realized that

Defendant's immigration status was threatened.

Defendant's attorney provided incompetent advice regarding the impact of the conditional discharge, as the district court properly concluded, and the trial court itself made statements suggesting it believed that Defendant would not have a conviction if he successfully completed the conditional discharge. The trial court coupled this explanation with references to Defendant's foreign citizenship—clearly implying that all present knew of or suspected his status and intended to provide Defendant an option that preserved it. The trial court's notes reveal that it specifically considered sentencing options in light of Defendant's immigration status and the possibility of deportation. In noting that Defendant requested the conditional discharge, the court listed only two facts: that Defendant was deportable and that he had a daughter in Miami. The record thus corroborates Defendant's claim that the threat of deportation ranked high amongst his concerns in these proceedings, and that he communicated that fact to both his attorney and the trial court.

Defendant's pre-conviction efforts to inform the trial court of his circumstances and his clear, acknowledged intent to avoid deportation and other immigration consequences at all times during the plea proceedings strongly support the conclusion that he would have rejected the plea if properly advised. *See Kovacs v. United States*, 744 F.3d 44, 53 (2d Cir. 2014) (stating that prejudice was demonstrated where defense counsel had negotiated the plea in a certain way "for the sole reason that defense counsel believed it would not impair [the defendant's] immigration status"). The district court erred in neglecting these portions of the record in its analysis.

Furthermore, Defendant is not limited to pre-conviction behavior in his demonstration of prejudice; the district court should also have considered his post-conviction behavior. *Edwards*, 2007-NMCA-043, ¶ 36. In *Paredez*, our Supreme Court held that the speed of a defendant's post-conviction reaction upon discovering the adverse immigration consequences of his guilty plea could be considered when weighing the reasonable probability that he would have acted differently with competent advice. *Paredez*, 2004-NMSC-036, ¶ 21 (stating that such an inference of prejudice is "logical" but not "conclusive[]").

In this case, Defendant claims that his goal is to obtain citizenship. He did apply for naturalization, but was determined ineligible. The letter informing him of this fact also contained reference to the possibility that he was "amenab[le] to removal," bolstering the likelihood that Defendant discovered the threat to his immigration status only upon receipt of the letter in November 2010. He testified that he researched the issue himself and then immediately obtained a lawyer. He moved to withdraw his guilty plea in early 2011. Though these actions cannot be "conclusive[,]" we consider them alongside the other corroborating evidence Defendant presented to demonstrate prejudice and recognize that they further support his claim that he would have rejected the plea offer if provided reasonable assistance. *Id.*

The district court failed to consider Defendant's post-conviction actions at all. It assessed only pre-conviction statements, and further narrowed its evaluation to two methods for Defendant to demonstrate prejudice: (1)

protestations of innocence, and (2) expressions of his desire to go to trial. Though either of these two methods could have been employed to demonstrate prejudice, Defendant may use a wide array of other evidence to show the prejudicial effect of the incompetent counsel. *Edwards*, 2007-NMCA-043, ¶ 36. The district court improperly overlooked the other undisputed corroboration within the record. It thus clearly erred in saying that the "only evidence presented in this case [was] the hearing testimony of [D]efendant."

iii. The District Court Improperly Relied on Lesser Factors

The district court placed particular emphasis on the strength of the State's case in determining whether Defendant had suffered prejudice. The State had a convincing prima facie case against Defendant; a person cooperating with the police arranged a purchase of five hundred dollars' worth of crack-cocaine, which resulted in law enforcement officers arresting Defendant as he arrived with 52 rocks worth approximately five hundred dollars.

In conjunction with the strength of the State's case, the district court considered the favorability of the plea agreement. In *Paredez*, the Court observed that the defendant received a "substantial benefit" from his plea agreement, which did not require incarceration; "It is conceivable that a non-citizen might opt to plead guilty and accept deportation to avoid serving a prison sentence, rather than face the possibility of both incarceration and deportation." 2004-NMSC-036, ¶ 22. In this case, the decision was arguably further simplified when Defendant received the conditional discharge rather than a term of imprisonment.

The district court weighed the favorability of the plea agreement against Defendant's "likely conviction" on the facts as presented at the plea colloquy, which may have exposed Defendant to immigration proceedings regardless, and determined that Defendant did not demonstrate prejudice. Its ruling also faulted Defendant for not "maintain[ing] his innocence" or expressing a desire for trial prior to conviction. We note that protestations of innocence and expressions of desire for trial are both possible examples of pre-conviction behavior that, if present, would be a valid part of the prejudice analysis. *Patterson*, 2001-NMSC-013, ¶ 30 (stating that the defendant's claims of innocence were examples of pre-conviction behavior that may indicate disposition to reject the plea, and were considered alongside other evidence). Neither, however, is required to show prejudice, nor do they constitute an exhaustive list of ways in which a defendant may demonstrate prejudice. *Edwards*, 2007-NMCA-043, ¶ 36. We also find that the district court's heavy, almost exclusive reliance on the strength of the State's case and the benefits of the plea was improper because it contradicts the standard set forth in *Favela*. 2013-NMCA-102, ¶ 21.

The strength of the State's case may be considered as part of a larger analysis of prejudice, *Carlos*, 2006-NMCA-141, ¶ 20, but "should not weigh as heavily, because the relevant initial inquiry is simply whether, given fully accurate information about the collateral consequence, it is reasonably probable that the defendant would have rejected the plea offer." *Favela*, 2013-NMCA-102, ¶ 21 (alteration, omission, internal quotation marks, and citation omitted). Even in cases in which acquittal is unlikely and the possible penalty for conviction at trial is severe, non-citizen

defendants "rationally could have been more concerned about a near-certainty of multiple decades of banishment from the United States than the possibility of [conviction]." *United States v. Orocio*, 645 F.3d 630, 645 (3d Cir. 2011), *abrogated on other grounds by Chaidez v. United States*, 133 S. Ct. 1103 (2013); *State v. Sandoval*, 249 P.3d 1015, 1022 (Wash. 2011) (en banc) (rejecting the plea even at the risk of conviction at trial would be particularly reasonable for a defendant who "had earned permanent residency and made this country his home").

The district court expressed the opinion that, based on the State's presentation, "Chances were pretty high that [the] evidence was going to be presented to a jury, that he's going to be convicted." The court stated that Defendant "got . . . the benefit of the plea" and received "everything that his attorney promised, but for this unforeseen, by everybody, consequence." It called the situation "tragic."

However, the district court also agreed that Defendant probably did not obtain a better result by his plea than he would have at trial. At the time of the plea, the trial court considered only three options: suspended sentence, deferred sentence, and conditional discharge. All parties agreed that probation was appropriate for Defendant, including the State. In addition to offering a sentence without any incarceration time, the State did not object to arguments for a conditional discharge. As the district court itself acknowledged, had a trial taken place, Defendant "probably would have gotten probation" because he "was really a mule." The risk that Defendant faced at trial was therefore a minimal one, as he was likely to attain substantially the same result but would retain the chance to avoid immigration consequences—a chance he might rationally have preferred to the then-unknown automatic consequences of his guilty plea.

During his testimony at the evidentiary hearing in 2012, Defendant asserted an affirmative defense to the trafficking charge, claiming he operated as a mule under duress. He admitted that he had not discussed with his attorney the possibility of using this defense at trial, as his attorney strongly encouraged him to accept the plea. Though the existence of an affirmative defense in this case would increase the probability that Defendant might have gone to trial rather than face immigration consequences, Defendant's lawyer never testified and so could offer no evidence regarding the possible existence of an affirmative defense. Both parties agreed that the attorney could not remember the case after the significant time lapse. Without further corroboration of the elements of this defense and its likelihood of succeeding at trial, we cannot weigh it against the strength of the State's evidence at the time of the plea proceeding. *Hill*, 474 U.S. at 59 (stating that for ineffective assistance of counsel claims involving affirmative defenses, "the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial").

Whether or not the affirmative defense had merit, the record contains clear indications that the parties identified substantial mitigation in the case, which they considered in both plea negotiations and sentencing before agreeing that Defendant merited probation. At the guilty plea hearing, Defendant's attorney referenced a meeting in chambers, reminding the court that it was "aware of how it came down" and thus asking the court for a conditional discharge. The

attorney further stated, "He was—in discussions in chambers, as you'll recall, Judge, the indication was, he was a mule[.]" The court also specifically reminded Defendant that he was not to discuss whether the cocaine belonged to him or whether he was "only helping somebody else" in his colloquy, stating only whether he had possessed it. These references are substantial enough to corroborate portions of Defendant's recent testimony and to underline that Defendant received no extreme benefit from pleading guilty as compared to his probable trial results. The district court agreed, but found that in either circumstance Defendant would have been exposed to the same possibility of deportation—and therefore he was not prejudiced by his plea. "[W]e don't have anything that could have been different," it stated.

The district court manifestly applied the wrong standard to Defendant's motion. It weighed Defendant's probable result at trial against the terms of his current plea, concluding that they were essentially the same. This conclusion ignores the possibility that an affirmative defense might have existed that could have impacted the results of the trial. Defendant is not required to demonstrate that he would have obtained a better result at trial than he received from his plea. *Edwards*, 2007-NMCA-043, ¶ 34. He need only demonstrate a reasonable probability that he would have rejected the plea as offered had he known of its immigration consequences. *Favela*, 2013-NMCA-102, ¶ 21. Had Defendant rejected the plea, he would have had the opportunity to renegotiate its terms—perhaps, e.g., agreeing to plead to an offense that would not be defined as an aggravated felony under federal immigration law—or take his case to trial, where any result may have been obtained. *Id.*

The district court's undue emphasis on the strength of the State's case and the apparent appeal of the plea offer, which resulted in a relatively favorable disposition of the conditional discharge, also fails to account for both the unique hardship of immigration consequences and the normal operation of plea bargain negotiations. *Id.* ¶ 20. Possible deportation is such a drastic result that, in cases in which a defendant is unlikely to receive much prison time, he "is usually much more concerned about immigration consequences than about the term of imprisonment." *Paredez*, 2004-NMSC-036, ¶ 18 (internal quotation marks and citation omitted). Defendant's rejection of the plea offer in this case would have been entirely rational if he had been aware that he might be deported as a result of accepting it; both the factual aspects of the record and the Defendant's own expressed eagerness to defend his immigration status suggest that there is indeed a reasonable probability that he would have behaved differently if afforded the effective counsel to which he was entitled.

All parties appear to have been acting with the conscious intent to preserve Defendant's immigration status but pursued that end operating on mistaken beliefs. Under these circumstances, a plea to a lesser charge was a distinct possibility if Defendant and his counsel had been properly informed. Certain possession charges, for example, are not aggravated felonies under federal law and would have resulted in less dramatic collateral consequences. 8 U.S.C. § 1227(a)(2)(B)(i) (2012) (stating that controlled substance offenses short of aggravated felonies do not require mandatory deportation). We therefore reject the district court's finding that there was no prejudice to Defendant.

iv. Voluntariness of Plea When Counsel Is Ineffective

The voluntariness of a guilty plea depends on whether counsel provided the effective assistance to which defendants are constitutionally entitled. *Garcia*, 2010-NMSC-023, ¶ 46; *Barnett*, 1998-NMCA-105, ¶ 12. Improper advice regarding immigration consequences can undermine the knowing and voluntary nature of a guilty plea and render it invalid. *Paredez*, 2004-NMSC-036, ¶ 19. In this case, "undisputed facts" in the record established that Defendant never received competent counsel but rather received incorrect advice regarding the immigration consequences of his plea. *Id.* ¶ 5. Defendant also established a "reasonable probability" that he would have rejected the plea if aware of those consequences, thus demonstrating prejudice. *Patterson*, 2001-NMSC-013, ¶ 18 (internal quotation marks and citation omitted). In these circumstances, Defendant's plea could not have been knowing and voluntary, and it was thus manifest error to accept it. *Barnett*, 1998-NMCA-105, ¶ 12; *Sotelo*, 2013-NMCA-028, ¶ 37.

In analogous circumstances regarding sex offender registration, we found that a defendant demonstrated prejudice when: (1) he later testified that he "would have fought" the charge if he had known it was a sex offense that would subject him to registration; (2) he presented other evidence that the State and his own attorney failed to realize the offense would require registration—and consequently did not advise him of that fact; and (3) the consequences, namely sex offender registration, were harsh. *State v. Trammell*, 2014-NMCA-107, ¶ 18, 336 P.3d 977 (internal quotation marks and citation omitted), *cert granted*, 2014-NMCERT-010, 339 P.3d 426. We concluded that, in such circumstances, sex offender registration prejudiced the defendant because "it constituted a breakdown in the fundamental fairness of the proceedings." *Id.*

In this case, Defendant testified unequivocally at the evidentiary hearing, "I would rather be in prison here, other than going back to Cuba." He claims that he would have rejected the plea outright had he known of the consequences for his immigration status. He also presented evidence, which indeed persuaded the district court, that his lawyer and the trial court both seemed unaware of the specific impacts that would stem from a guilty plea, and that no one provided him with effective, reasonable advice with which he might make an informed decision. In both of these respects, the present case closely mirrors our ruling in *Trammell*; the possible result of deportation, however, has been acknowledged a uniquely grave consequence. *Favela*, 2013-NMCA-102, ¶ 20. Therefore, the same logic applies here as in *Trammell*—the collateral consequences to which Defendant is now exposed constitute a breakdown in the fundamental fairness of the plea process and require that his guilty plea be set aside. *Trammell*, 2014-NMCA-107, ¶ 18.

CONCLUSION

The district court properly concluded that Defendant's counsel acted incompetently, but in its prejudice analysis it failed to consider the evidence that Defendant's testimony was not merely "self-serving," but could be corroborated by the record. *Patterson*, 2001-NMSC-013, ¶ 29. It also applied an improper standard for assessing the likelihood that Defendant would have rejected the plea. Noting the likelihood that Defendant would obtain a similar sentence to the one he

received under the plea agreement if he went to trial, the district court here improperly asked "[w]ould the result reasonably [have] been different than it is today?" rather than whether there was a "reasonable probability" that Defendant would have rejected the plea with competent advice. Defendant was not obligated to show that he might have obtained a "different result" at trial than he obtained with his plea; he was only required to show that rejecting the plea was a rational, reasonably likely course of action in light of his circumstances. *Favela*, 2013-NMCA-102, ¶ 20. We determine that he did so.

For this reason, and in light of the similarities to *Trammell*, we reverse the district court's denial of Defendant's motion to set aside his guilty plea and remand for further proceedings in keeping with this decision.

IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:

MICHAEL E. VIGIL, Judge

TIMOTHY L. GARCIA, Judge

Certiorari Granted, March 23, 2015, No. 35,101

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-030

Filing Date: December 30, 2014

Docket No. 33,136

EILEEN J. DALTON,

Plaintiff-Appellee,

v.

SANTANDER CONSUMER USA, INC.,

Defendant-Appellant,

and

PERFORMANCE AUTOMOTIVE GROUP, INC. d/b/a PERFORMANCE BUICK PONTIAC GMC; LAWRENCE BARELA; JASON HICKS; BDF ACQUISITIONS OF NEW MEXICO, INC. d/b/a SIERRA SANTA FE GMC BUICK; TRAVELERS CASUALTY AND SURETY COMPANY; and BRADFORD D. FURRY,

Defendants.

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OPINION

VANZI, Judge.

In this case, we determine whether an arbitration scheme in a vehicle financing contract that carves out exceptions from mandatory arbitration for self-help and small claims remedies is substantively unconscionable. We also determine whether the district court improperly shifted the burden of proof and whether, according to our Supreme Court's interpretation of federal law, a finding of unconscionability under these circumstances is preempted by the Federal Arbitration Act (FAA).

The dispute here arose when Eileen Dalton (Plaintiff) filed suit against Santander Consumer USA, Inc. (Defendant) for fraud, conversion, breach of contract, breach of warranty of title, and various violations of the Uniform Commercial Code (UCC) and the Unfair Practices Act. Defendant moved to compel arbitration of Plaintiff's claims. The district court determined that the self-help and small claims carve-out provisions were unreasonably one-sided, rendering the arbitration clause unenforceable pursuant to *Rivera v. American General Financial Services, Inc.*, 2011-NMSC-033, 150 N.M. 398, 259 P.3d 803, and its progeny. We affirm. We hold that the arbitration clause is substantively unconscionable because the practical effect of the carve-out provisions is to mandate arbitration of Plaintiff's most important and most likely claims while exempting from arbitration Defendant's most important judicial and non-judicial remedies. We further hold that the district court did not shift the burden of proof and that the FAA does not preclude the application of our generally applicable unconscionability doctrine under these circumstances.

BACKGROUND

Defendant is an Illinois-based subprime auto finance entity. Plaintiff's allegations involve a series of at least two finance contracts that were apparently sold to Defendant by a car dealership operated by Performance Automotive Group (Performance). The finance contracts contain identical arbitration clauses, which state, in relevant part:

> Any claim or dispute, whether in contract, tort, statute or otherwise . . . between you and us or our employees, agents, successors or assigns, which arises out of or relates to your credit application, purchase or condition of this vehicle, this contract or any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract) shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action.

Despite this sweeping language, a separate clause then expressly exempts certain disputes from mandatory arbitration, providing that:

> You and we retain any rights to self-

> help remedies, such as repossession. You and we retain the right to seek remedies in small claims court for disputes or claims within that court's jurisdiction, unless such action is transferred, removed or appealed to a different court. Neither you nor we waive the right to arbitrate by using self-help remedies or filing suit.

The contracts also provide that the arbitration clauses "shall be governed by the [FAA]."

Plaintiff's complaint alleged that she purchased a Cadillac from Performance, who then sold the finance contract to Defendant. Despite Plaintiff's timely payments according to the terms of her contract, the Cadillac was repossessed eight months later by another creditor because Performance had failed to pay off a prior lien on the vehicle. In response to the repossession, Performance agreed to credit Plaintiff the $4,500 she had paid on the Cadillac toward the purchase of a substitute vehicle. Plaintiff returned to Performance, selected a Pontiac G6, and signed a second purchase agreement and finance contract, now providing for a higher monthly payment. Although the facts are in dispute, the Pontiac finance contract, like the Cadillac contract before it, may have been sold to Defendant. Shortly thereafter, and for reasons that are not clear, the Pontiac was also repossessed. Plaintiff was left without a vehicle, and her $4,500 was never returned.

Plaintiff filed suit against a number of corporate entities and individuals involved in these transactions, including Defendant, alleging fraud, conversion, breach of contract, breach of warranty of title, and violations of the UCC and the Unfair Practices Act. Defendant moved to compel arbitration pursuant to the identical arbitration clauses in the Cadillac and Pontiac contracts. The district court denied Defendant's motion, reasoning that the carve-out provisions were substantially similar to the exceptions from arbitration that our Supreme Court examined in *Rivera*. The district court concluded that self-help remedies are of absolutely no use to consumers like Plaintiff and that small claims remedies are similarly one-sided, rendering the arbitration provision substantively unconscionable. Defendant timely appealed.

DISCUSSION

Standard of Review

This Court reviews de novo both the denial of a motion to compel arbitration and the issue of unconscionability of a contract. *Cordova v. World Fin. Corp. of N.M.*, 2009-NMSC-021, ¶ 11, 146 N.M. 256, 208 P.3d 901. We also apply a de novo standard of review to the interpretation of statutes, including the FAA. *Strausberg v. Laurel Healthcare Providers, LLC*, 2013-NMSC-032, ¶ 25, 304 P.3d 409.

Unfairly One-Sided Carve-Out Provisions Are Substantively Unconscionable

"[A] finding of unconscionability may be based on either procedural or substantive unconscionability, or a combination of both." *Rivera*, 2011-NMSC-033, ¶ 47. In this case, the district court's ruling and the arguments on appeal have only addressed the issue of substantive unconscionability. "Substantive unconscionability concerns the legality and fairness of the contract terms themselves, and the analysis focuses on such issues as whether the contract terms are commercially reasonable and fair, the purpose and effect of the terms, the one-sidedness of the terms, and other similar public policy concerns." *Id.* ¶ 45

(internal quotation marks and citation omitted). Thus, contract provisions that unreasonably benefit one party over another have been held to be substantively unconscionable. *Id.* ¶¶ 46, 53-54.

In *Cordova*, our Supreme Court held that a one-sided arbitration provision in a consumer loan agreement was void as unconscionable. 2009-NMSC-021, ¶ 1. The arbitration clause at issue was wholly one-sided on its face. In the event of default, it reserved the lender's option to avail itself of any and all "remedies in an action at law or in equity, including but not limited to, judicial foreclosure or repossession[,]" while simultaneously denying access to the courts to borrowers for any reason whatsoever. *Id.* ¶¶ 26-27 (internal quotation marks omitted). This "self-serving arbitration scheme" was so unreasonably one-sided that it could not be enforced. *Id.* ¶¶ 32-34.

Two years later, the Supreme Court reaffirmed this principle in *Rivera* when it corrected this Court's "overly narrow construction" of the unconscionability doctrine. 2011-NMSC-033, ¶¶ 1, 39-54. The arbitration clause in the car title loan contract addressed in *Rivera* exempted from mandatory arbitration the lender's self-help and judicial remedies, such as repossession or foreclosure, "with respect to any property that secures [the loan.]" *Id.* ¶ 3. This Court attempted to distinguish *Cordova* on the basis that the arbitration clause in *Rivera* was not completely one-sided because it still allowed borrowers to compel arbitration of any of the lender's claims that arose from disputes about the loan note itself. *See Rivera v. Am. Gen. Fin. Servs., Inc.*, 2010-NMCA-046, ¶¶ 9-10, 148 N.M. 784, 242 P.3d 351, *rev'd*, 2011-NMSC-033. We thus reasoned that the exemption only applied to disputes over the lender's interest in the collateral that secured the loan and that those actions were so heavily regulated by Article 9 of the UCC that their exemption was reasonable. *Id.* ¶¶ 12-13. In upholding the arbitration clause, we expressed concern that, "without access to these judicial and extra-judicial procedures, [the lender] would lose many of the statutory protections it enjoyed as a secured creditor." *Id.* ¶ 13.

Our Supreme Court expressly rejected our reasoning and reversed. *Rivera*, 2011-NMSC-033, ¶¶ 50-52. Notwithstanding the lender's status as a secured creditor, the Court held that the lender's ability to access the courts for its likeliest claims while forcing the plaintiff to arbitrate the claims that she may have was unreasonably one-sided. *Id.* ¶ 53. The Supreme Court explained that "[a]s a matter of law arbitrators have broad authority and are deemed capable of granting any remedy necessary to resolve a case" and that "[p]arties may effectively pursue any remedy or relief in arbitration including statutory, common law, injunctive, equitable, and all other lawful remedies and relief." *Id.* ¶¶ 51-52 (internal quotation marks and citation omitted). Thus, since "an arbitrator can be given the authority to address any claims a lender may have against a borrower[,]" including a secured creditor's Article 9 claims, the one-sided arbitration exemptions were unreasonable and void under state law. *See id.* ¶¶ 52-54.

Facially Bilateral Carve-Outs

After *Rivera*, we subsequently applied the unconscionability doctrine to invalidate a series of ostensibly bilateral arbitration clauses in admission agreements between nursing homes and their residents. *See Figueroa v. THI of N.M. at Casa Arena Blanca, LLC*, 2013-NMCA-077, ¶¶ 33-35,

306 P.3d 480 (invalidating a clause that exempted all guardianship proceedings as well as collections and eviction actions); *Ruppelt v. Laurel Healthcare Providers, LLC*, 2013-NMCA-014, ¶¶ 10-18, 293 P.3d 902 (invalidating a clause that exempted disputes pertaining to collections or discharge of residents); *cf. Bargman v. Skilled Healthcare Group, Inc.*, 2013-NMCA-006, ¶ 24, 292 P.3d 1 (examining a clause identical to that in *Ruppelt* but remanding to give the defendant an opportunity to present evidence that the one-sided clause was nonetheless reasonable).

While *Cordova* and *Rivera* dealt with arbitration clauses where one-sidedness was evident on the face of the agreement, the clauses in the nursing home cases were facially bilateral. The nursing home carve-outs excluded from arbitration various claims that either party could technically bring, but that were, as a practical matter, unlikely to be brought by a resident. *See Figueroa*, 2013-NMCA-077, ¶¶ 26, 28-30; *Ruppelt*, 2013-NMCA-014, ¶¶ 3, 15-18. In both *Figueroa* and *Ruppelt*, we determined that the "practical effect" of the ostensibly bilateral clauses was to unreasonably favor the nursing homes. *Figueroa*, 2013-NMCA-077, ¶ 29 (stating that the practical effect of the 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"); *Ruppelt*, 2013-NMCA-014, ¶ 18 (stating that "although the exemption provision may facially appear to apply evenhandedly, its practical effect unreasonably favors [the d]efendants, and the provision's bilateral appearance is inaccurate"). We thus refused to uphold the entire arbitration scheme in both cases.

Applying these principles, we agree with the district court that the carve-out provisions in this case, while purportedly bilateral, are unfairly and unreasonably one-sided in favor of Defendant and thus render the agreement to arbitrate substantively unconscionable. However, we first acknowledge the differences between the carve-outs at issue here and those in *Rivera*.

The carve-out provision in the car title loan contract in *Rivera* stated, in relevant part:

> [The plaintiff] cannot elect to arbitrate [the l]ender's self-help or judicial remedies including, without limitation, repossession or foreclosure, with respect to any property that secures any transaction . . . . In the event of a default . . . , [the l]ender can enforce its rights to [the plaintiff's] property in court or as otherwise provided by law, and [the plaintiff] cannot require that [the l]ender's actions be arbitrated.

2011-NMSC-033, ¶ 3 (internal quotation marks omitted). There are two differences between *Rivera* and the present case. First, the clause in *Rivera* facially distinguished between the rights of the lender and the borrower, expressly exempting from arbitration only the lender's "self-help or judicial remedies" with respect to the collateral. In contrast, the clause in this case is facially neutral. However, this difference is superficial. As discussed previously in this Opinion, we do not rely on ostensible neutrality; rather, we look to the practical effect of a carve-out. *See Figueroa*, 2013-NMCA-077, ¶ 29; *Ruppelt*, 2013-NMCA-014, ¶ 18.

Second, unlike *Rivera*, the clause at issue here does not exempt *judicial remedies*. Instead, it exempts all remedies in small claims court. Under the current circumstances, we conclude that this is a distinction without a meaningful difference. While we acknowledge that a fair reading of *Rivera* evinces concern about one-sided access to the courts, *see, e.g.*, 2011-NMSC-033, ¶¶ 39, 46, 48-49, 53, it is apparent that the small claims carve-out has the practical effect of preserving Defendant's most important claims as a secured creditor while severely limiting a borrower's access to judicial redress. We explain.

The Practical Effect of the Small Claims Carve-Out Renders the Arbitration Scheme Substantively Unconscionable

We conclude that the small claims carve-out renders Defendant's arbitration scheme unconscionable for two reasons. First, it preserves Defendant's access to the courts to assert its most important claims as a secured creditor. When a consumer-borrower defaults on her payments, the secured party to a used car financing contract—in this case Defendant—may repossess the car pursuant to Article 9 of the UCC. *See* NMSA 1978, § 55-9-609 (2001). If the repossession can be effected without a breach of the peace, for instance, if the borrower keeps the car in a driveway as opposed to a garage, the secured party can simply take the vehicle without judicial process. *See* § 55-9-609(b). So-called "self-help" repossession does not usually end the dispute, as the creditor, seeking to recover its loss, may then sell the vehicle in a commercially reasonable manner. *See* NMSA 1978, § 55-9-610(a) (2001). After sale, the creditor typically sues the borrower for any remaining balance owed. If the parties have signed a mutually binding arbitration agreement, the dispute over any deficiency would then be brought before an arbitrator. But in this case, Defendant has carved out a small claims exception in a financing contract for cars valued at $13,297.93 and $15,965.32, respectively. The amounts actually financed on the vehicles were $11,074.93 and $14,305.74. Thus, Defendant could safely assume that any ordinary suit for a post-reasonable-sale deficiency judgment would claim damages of less than $10,000 and would therefore be exempt from arbitration by the terms of the small claims carve-out. *See* NMSA 1978, § 35-3-3(A) (2001) (establishing the jurisdictional limits of the magistrate courts); NMSA 1978, § 34-8A-3(A)(2) (2001) (establishing jurisdictional limits of the metropolitan court). As drafted, this scheme affords Defendant the option to forego arbitration during the entire typical default process from repossession to sale to deficiency suit to garnishment of wages in the magistrate courts. *See Cordova*, 2009-NMSC-021, ¶ 26 (stating that cases of default are the most likely reason for lenders to take action against their borrowers).

In an alternative scenario, the borrower keeps the car in a garage where it cannot be repossessed without a breach of the peace or a court order. Even in these cases, however, Defendant's arbitration scheme preserves important access to judicial redress for Defendant. The small claims carve-out, which by its terms applies to any "remedies in small claims court," also reserves access to the courts for Defendant to *judicially* foreclose on either vehicle by replevying the collateral if the fair market value of the vehicle falls below $10,000. *See* NMSA 1978, § 35-11-1 (1975) (providing for the civil remedy of replevin in the magistrate courts). Depending on the values of the Cadillac or Pontiac at the time of default, these claims would not always be available to Defendant, but they would likely

be available during the greater part of the life of either loan, and they thus contribute to a determination of substantive unconscionability. *See Rivera*, 2011-NMSC-033, ¶¶ 53-54 (concluding that a creditor's carve-out for judicial repossession is unfairly one-sided); *Ruppelt*, 2013-NMCA-014, ¶ 14 (focusing on fairness rather than "complete one-sidedness").

Second, our Supreme Court has identified a borrower's typical claims against a lender to include the exact types of claims that were brought in this case: fraud and misrepresentation, "claims based on federal or state consumer protections, such as the New Mexico Unfair Practices Act, and tortious debt-collection causes of action[.]" *Cordova*, 2009-NMSC-021, ¶ 27. In contrast to Defendant's likely claims, these claims, which are protective of consumers and often provide for punitive damages, attorney fees, statutory damages, or injunctions, are unlikely to meet the jurisdictional limits of small claims court. *See generally* NMSA 1978, § 57-12-10 (2005) (setting forth the statutory remedies available for unfair trade practices); NMSA 1978, § 55-9-625 (2001) (describing the remedies available when a secured party fails to comply with Article 9 of the UCC); *Romero v. Mervyn's*, 1989-NMSC-081, ¶¶ 31-34, 109 N.M. 249, 784 P.2d 992 (holding that punitive damages may be available in contract claims when overreaching, malicious, or wanton conduct is involved). Thus, the claims that Defendant has subjected to mandatory arbitration are the same claims "a borrower is most likely to litigate in a dispute with a lender, and the very ones the lender is least likely to want to litigate." *Cordova*, 2009-NMSC-021, ¶ 27.

Given Defendant's access to judicial redress for its most likely claims, the arbitration clause's one-sided application to claims for injunctive relief is particularly concerning. This is evident in the context of a typical dispute between a secured creditor and a borrower. When a secured creditor wants to stop a borrower from using the collateral, it need not seek an injunction because it can simply repossess the collateral. Thus, Article 9 shifts the burden of initiating judicial action—or in this case, arbitration—to the borrower. *See* Edward L. Rubin, *The Code, the Consumer, & the Institutional Structure of the Common Law*, 75 Wash. U. L.Q. 11, 37 (1997). For instance, it is the aggrieved borrower who must sue to enjoin the creditor from conducting an unlawful sale. *See* § 55-9-625. However, this important borrower's remedy is uniquely subject to Defendant's arbitration clause since the small claims courts cannot issue injunctions. Section 35-3-3(C)(6).[1]

A recent decision of a federal court applying California's unconscionability doctrine to an arbitration scheme identical to that in this case is in accord with our analysis. *See Trompeter v. Ally Fin., Inc.*, 914 F. Supp. 2d 1067 (N.D. Cal. 2012). In *Trompeter*, the court noted that the defendant's carve-outs for self-help repossession and small claims remedies operated in tandem to allow the defendant the option to forego arbitration during typical disputes with its borrower. *Id.* at 1073-74. "If the consumer stops paying on the debt," the court stated, "his or her vehicle will likely be repossessed and the consumer could be held liable for any deficiency after disposition of the repossessed vehicle[.]" *Id.* at 1073. Meanwhile, the borrower's likely

[1]When an injunction is granted by the arbitrator, Defendant's arbitration clause then singles it out as an appealable award.

remedies, such as injunctions or statutory lemon law claims were all subject to the arbitration clause. *Id.* at 1073-74. This contributed to a finding of unconscionability. *Id.*

The bulk of Defendant's argument urges us to ignore the self-help carve-out. Defendant contends that "[t]he arbitration provision does not exempt from arbitration [the] right to proceed with self-help repossession. It simply notes the existence of such remedies." In other words, according to Defendant, the language exempting self-help applies to a non-judicial, non-arbitrable right is thus superfluous and therefore cannot be unconscionable.

Even assuming that self-help repossession is necessarily non-arbitrable—which in our view is not entirely clear, *see Rivera*, 2011-NMSC-033, ¶ 51 ("As a matter of law arbitrators have broad authority and are deemed capable of granting any remedy necessary to resolve a case."); *see also Buffalo Forge Co. v. United Steelworkers of Am., AFL-CIO*, 428 U.S. 397, 405-06 (1976) (stating that a court would be permitted to enjoin a self-help labor strike if the strike arose from a dispute that was subject to binding arbitration); *Greene v. Alliance Auto., Inc.*, 435 S.W.3d 646, 653 (Mo. Ct. App. 2014) (examining a clause requiring arbitration prior to exercise of a creditor's self-help repossession remedy), the fact remains that Defendant is a secured creditor that can generally act outside the judicial process to foreclose on its collateral. Including an arbitration clause in a vehicle financing contract would normally subject to mandatory arbitration Defendant's most important remaining remedies: the ability to sue for a deficiency judgment or the ability to judicially foreclose on the vehicles when self-help repossession cannot be completed without a breach of the peace. In this case, however, Defendant has carved out a small claims exception that encompasses both of these remedies. Thus, Defendant's small claims carve-out, viewed in the context of Defendant's self-help right—whether pre-existing or also carved out—renders the agreement to arbitrate unfairly one-sided.

While ostensibly bilateral on its face, the practical effect of Defendant's decision to exempt small claims remedies, much like the "collections" exceptions at issue in our nursing home cases, is to create a choice of forum for its preferred claims, while relegating a borrower's most likely claims to mandatory arbitration. *See Figueroa*, 2013-NMCA-077, ¶ 29; *Ruppelt*, 2013-NMCA-014, ¶ 18. Under these circumstances, we hold that the arbitration clauses in the Cadillac and Pontiac finance agreements are substantively unconscionable as a matter of law.

The District Court Did Not Shift the Burden of Proof to Defendant

Defendant next argues that the district court improperly allocated to it the burden to prove the absence of unconscionability. Specifically, Defendant contends that the district court raised and decided the issue of the small claims exemption "*sua sponte*" and without any evidence from Plaintiff, thereby impermissibly shifting the burden of proof. We disagree.

The parties do not dispute that the proponent of the affirmative defense of unconscionability bears the burden of proof. *Strausberg*, 2013-NMSC-032, ¶ 48. *Strausberg* was decided after the parties completed their briefing on Defendant's motion to compel arbitration but five days

before the district court held its hearing on the motion. At the hearing, Plaintiff, through her attorney, provided the court with a copy of the *Strausberg* decision and informed the court that she bore the burden of proving unconscionability. Plaintiff then analogized this case to *Rivera* in light of the nursing home cases and their recognition of the "practical effect" of arbitration provisions. The district court did not hold an evidentiary hearing to determine whether the borrower in a vehicle financing contract is less likely than the lender to file suit in small claims court. Instead, for some of the reasons discussed in this Opinion, the district court concluded that the arbitration clause at issue here is substantially similar to that in *Rivera* and is therefore unconscionable.

We note first that the district court was entitled to raise the small claims issue and request argument from counsel at the hearing on Defendant's motion to compel arbitration. We can find no authority to the effect that a court shifts the burden of proof by asking counsel a question at a hearing *sua sponte*. "The theory of pleadings is to give the parties fair notice of the claims and defenses against them, and the grounds upon which they are based." *Schmitz v. Smentowski*, 1990-NMSC-002, ¶ 9, 109 N.M. 386, 785 P.2d 726. In Plaintiff's response to the motion, she pleaded as an affirmative defense that the arbitration clause was unconscionable. Her pleading specifically stated that the small claims exemption does not diminish the impact of the self-help repossession carve-out because Defendant "still has an unlimited right to access the courts for the claims it is most likely to bring, while a consumer still is forced into arbitration for the claims that a consumer would most likely want to bring." Defendant was on sufficient notice that the court would have to consider the value to consumers of the small claims carve-out in order to make its ruling on Plaintiff's affirmative defense. Both parties argued the point at the hearing, and the court was persuaded by Plaintiff. We find no error here.

Second, the district court was not required to hold an evidentiary hearing on the small claims issue. *See State ex rel. King v. B & B Inv. Grp., Inc.*, 2014-NMSC-024, ¶ 32, 329 P.3d 658 (stating that "substantive unconscionability can be found by examining the contract terms on their face"). The court's conclusion was based on substantial similarities to exemptions deemed unconscionable by our appellate courts. While it is true that Plaintiff bore the burden of persuasion on the issue, Plaintiff argued pursuant to our precedents that it is self-evident that a small claims exception unfairly favors lenders under these circumstances. *See Figueroa*, 2013-NMCA-077, ¶ 31. Defendant failed to adequately rebut that argument. A similar situation arose in *Figueroa*, where we stated:

> In further support of its claim, [the d]efendant asserts that [the p]laintiff failed to present evidence that the arbitration agreement exempts the most likely claims [the d]efendant 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.

Id. Given the value of the collateral in this case and the ability of a secured creditor to sue for a deficiency judgment in small claims court, we conclude that the usefulness of the small claims carve-out to Defendant is similarly self-evident. Moreover, given our Supreme Court's determination that a

borrower's most likely claims against a lender include fraud and misrepresentation, "claims based on federal or state consumer protections, such as the New Mexico Unfair Practices Act, and tortious debt-collection causes of action[]," *Cordova*, 2009-NMSC-021, ¶ 27, and in light of our statutes and precedents that make available injunctions, punitive damages, or trebled damages in those types of cases, we conclude that the small claims carve-out is not similarly suitable for borrowers. Therefore, as in *Figueroa*, we reject Defendant's contention that a lack of evidence requires reversal. *See* 2013-NMCA-077, ¶ 31. If Defendant desired to factually dispute the general precedent that was established by our appellate courts, it had the right to present evidence to distinguish the exception in this particular case. *See Bargman*, 2013-NMCA-006, ¶¶ 22-24 (recognizing the right to address the issue of unconscionability by presenting evidence regarding the neutral and other legitimate reasons for an exception to mandatory arbitration). Defendant's failure to utilize its opportunity to factually rebut the apparent one-sidedness of the carve-out exception to arbitration was of its own choosing and will not be second guessed on appeal. *See id.* ¶ 17 (clarifying that there is no inflexible rule that one-sided clauses are always unreasonable and cannot be reviewed on a case-by-case basis).

Our Conclusion Is Not Preempted by the FAA

"The FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements." *AT&T Mobility LLC v. Concepcion*, ___ U.S. ___, ___, 131 S. Ct. 1740, 1745 (2011). The FAA requires courts to enforce a valid arbitration agreement unless the agreement is revocable under established principles of contract law. *See* 9 U.S.C. § 2 (2013) ("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."). This "savings clause" permits state courts to invalidate agreements to arbitrate via "generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility*, ___ U.S. at ___, 131 S. Ct. at 1746 (internal quotation marks and citation omitted).

In accordance with the FAA, our Supreme Court has consistently upheld the application of our generally applicable unconscionability doctrine to one-sided arbitration agreements. *See Strausberg*, 2013-NMSC-032, ¶¶ 49-50 (holding that a special rule that applies only to nursing home arbitration agreements is preempted by the FAA, but stating that "a court may, consistent with the FAA . . . invalidate an arbitration agreement through the application of an existing common law contract defense such as unconscionability"); *see also Flemma v. Halliburton Energy Servs., Inc.*, 2013-NMSC-022 (same), ¶ 19, 303 P.3d 814; *Rivera*, 2011-NMSC-033, ¶¶ 15-18 (same); *Cordova*, 2009-NMSC-021, ¶¶ 35-38 (same).

The parties argue the merits of a recent decision of the Tenth Circuit Court of Appeals, which determined that our state courts are applying the unconscionability doctrine based on an impermissible "perceived inferiority of arbitration to litigation as a means of vindicating one's rights." *THI of N.M. at Hobbs Ctr., LLC v. Patton*, 741 F.3d 1162, 1169 (10th Cir. 2014). We do not

address this issue. Appeals in this Court are governed by the decisions of the New Mexico Supreme Court—including decisions involving federal law, and "even when a United States Supreme Court decision seems contra." *State v. Manzanares*, 1983-NMSC-102, ¶ 3, 100 N.M. 621, 674 P.2d 511; *see State ex rel. Martinez v. City of Las Vegas*, 2004-NMSC-009, ¶ 20, 135 N.M. 375, 89 P.3d 47 (stating that this Court is bound by our Supreme Court precedent); *State v. Wilson*, 1994-NMSC-009, ¶ 5, 116 N.M. 793, 867 P.2d 1175 (same). As discussed previously in this Opinion, our Supreme Court has already expressly rejected Defendant's precise argument that applying the unconscionability doctrine to a carve-out exempting Article 9 rights is somehow inconsistent with the FAA. *Rivera*, 2011-NMSC-033, ¶¶ 50-52. We are bound by that decision.

Accordingly, we conclude that the arbitration provisions are unfairly one-sided and unenforceable. Since "the exemptions of certain claims from arbitration are so central to the agreement that they are incapable of separation from the agreement to arbitrate," the arbitration clause must be stricken from the contract in its entirety. *Figueroa*, 2013-NMCA-077, ¶ 39.

CONCLUSION

The order of the district court is affirmed.

IT IS SO ORDERED.

LINDA M. VANZI, Judge

WE CONCUR:

CYNTHIA A. FRY, Judge

TIMOTHY L. GARCIA, Judge

Certiorari Granted, March 23, 2015, No. 35,130

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-031

Filing Date: January 21, 2015

Docket No. 32,171

PROGRESSIVE CASUALTY INSURANCE COMPANY,

Plaintiff-Appellant,

v.

NANCY COLLEEN VIGIL and MARTIN VIGIL,

Defendants-Appellees.

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OPINION

GARCIA, Judge.

Plaintiff, Progressive Casualty Insurance Company (Progressive), appeals from the judgment entered in favor of Defendants, Nancy Colleen Vigil (Colleen) and her son, Martin Vigil (Martin), (collectively, the Vigils) following a jury trial. Progressive filed this declaratory judgment action against the Vigils, asking the district court to determine that the Vigils had no coverage on the day that Martin was involved in an accident, and the Vigils counterclaimed for bad faith. The jury found that the Vigils had coverage on the day of the accident and that Progressive acted in bad faith in not providing coverage. The jury awarded the Vigils $37,000 in compensatory damages and $11.7 million in punitive damages for their bad faith claim. The district court then awarded the Vigils about $1.4 million in attorney fees and $35,000 in costs under NMSA 1978, Section 39-2-1 (1977).

Because we conclude that the district court erred when it excluded certain evidence from being admitted at trial, we reverse the judgment as to the bad faith claim. We vacate the $37,000 compensatory damages award, the $11.7 million punitive damages award, the $1.4 million attorney fees award, the $35,000 costs award, and we remand to the district court for a new trial on the issue of bad faith. We affirm the verdict in favor of the Vigils regarding insurance coverage under the policy.

BACKGROUND

In the fall of 2002, Colleen and Martin were insured under a Progressive automobile insurance policy. In late September 2002, Colleen called Progressive to add a car to the policy. Believing the policy premium was due on October 3, 2002, Colleen called Progressive to pay the premium over the telephone. During this call, Progressive told Colleen that the premium was not due until October 15, 2002. She paid the premium on October 3 anyway. She received a notice in the mail from Progressive showing that the payment she made on October 3 was due on October 15. She later received another notice from Progressive stating that her policy would renew on November 3. Colleen testified that she called Progressive because "[t]he date was confusing" and the automated system told her that her next premium was due on November 15. She did not pay the premium by November 3.

On November 4, Martin got into a car accident in which one passenger was killed and another seriously injured. Colleen testified that on November 4, after the accident, she called Progressive's billing department to check on her coverage and Progressive told her that she was covered through November 15. She paid the policy premium over the telephone during that call and then she reported Martin's accident to Progressive's claims department. About two weeks later, Progressive determined that the Vigils did not have coverage on the date of the accident because the policy had lapsed on November 3. The Vigils disagreed and much of the litigation between the parties has involved this dispute.

In December 2002, Progressive filed this action in the district court seeking a

declaration that the Vigils did not have insurance coverage on the date of the accident. The Vigils filed a counterclaim against Progressive alleging bad faith, among other claims. While the action was pending, Progressive settled the personal injury and wrongful death claims that the injured passenger and the deceased passenger's family brought against the Vigils, paying $100,000 to each of them, subject to a reservation of rights. Progressive then amended its complaint to seek reimbursement from the Vigils for this $200,000 in the event that the factfinder determined that the Vigils did not have insurance coverage on the date of the accident.

After about two years of discovery between the parties and cross motions for summary judgment, the district court granted partial summary judgment in favor of Progressive on the coverage issue. It concluded as a matter of law that the Vigils did not have coverage on the date of the accident. After three more years of discovery and numerous motions and other filings by both the Vigils and Progressive, a jury trial was held on Progressive's $200,000 reimbursement claim. The jury found that Progressive was entitled to reimbursement from the Vigils, and the district court entered final judgment in favor of Progressive. The Vigils appealed. In 2009 we reversed the district court's grant of partial summary judgment because the issue of whether the Vigils had coverage involved disputed material facts. *Progressive Cas. Ins. Co. v. Vigil*, Nos. 28,023, 28,393, memo. op. at 5 (N.M. Ct. App. Aug. 18, 2009) (non-precedential). In *Progressive*, we declined to consider the Vigils' argument regarding Progressive's reimbursement claim because we noted the claim would be moot if the jury found that the Vigils had coverage. *Id.* at 6. We remanded the case to the district court for further proceedings and a new trial on the coverage and reimbursement claims. *Id.* at 13.

While the appeal was pending, the case was reassigned to a different district court judge. After we remanded the case, the Vigils moved for summary judgment on the reimbursement issue. The district court granted summary judgment, concluding as a matter of law that Progressive did not have a right to seek reimbursement for the payments it made to settle the third-party claims, even if the Vigils did not have insurance coverage on the date of the accident.

Prior to re-trial, the Vigils moved to exclude from evidence the fact that the district court had previously concluded there was no coverage. At the hearing on this motion, the district court stated that any evidence of the previous judge's ruling would be excluded because it was not relevant. The court then entered an order that prohibited Progressive "from introducing evidence, or making any reference before the jury in testimony, exhibits, voir dire[,] or argument, about what any prior [j]udge said, decided[,] or ruled about the facts, evidence or issues here or that a prior [j]udge ruled in a certain way in this case."

Separate from its decision that the district court's previous rulings would be inadmissible at trial, the district court held another pre-trial conference to address whether Progressive's actions in settling the third party claims against the Vigils would be admitted into evidence. It ruled that, "as a limine matter, . . . issues concerning the payment . . . should not go to the jury." Progressive's counsel asked the district court whether it was "saying that the jury will not be allowed to know that Progressive . . . settled those claims for $100,000 each[.]" The district court replied, "I

don't think it's relevant to the issues of whether there was coverage. No, I think that's part of the reimbursement claim [that was disposed of on summary judgment]. No." Progressive's counsel explained that given such a ruling, it could be anticipated that the Vigils were "going to say [Progressive] should have paid these claims and [Progressive] acted in bad faith and [it] left [the Vigils] hanging out there like that." The district court nonetheless entered an order prohibiting "all witnesses and attorneys . . . from mentioning . . . [that Progressive] . . . paid $200,000 to settle [the third-party] liability claims."

The second jury trial was held in 2011. During her closing argument, the Vigils' counsel emphasized, among other things, that "[t]his case ha[d] been going on for nine years" and that, during that time, Progressive "wouldn't even pay for [Martin's] truck, *let alone all the other coverages they should have provided under this policy*." (Emphasis added.)

The jury found that the Vigils had coverage on the date of the accident and Progressive acted in bad faith regarding the resulting coverage claims. In addition to the award of about $40,000 in contract damages under the policy, the jury awarded the Vigils $37,000 in compensatory damages and $11.7 million in punitive damages for their bad faith claim. The district court later awarded the Vigils about $1.4 million in attorney fees and $35,000 in costs under Section 39-2-1.

DISCUSSION

A. Evidence of the Previous Ruling

Progressive argues that the district court erred in prohibiting Progressive from admitting any evidence about the previous judge's ruling that the Vigils were not covered under the policy on the date of the accident. Progressive argues that even though this ruling was reversed on appeal because it involved a disputed factual issue, the fact of the ruling "indicate[s] that Progressive did not act in bad faith, and certainly that it should not be liable for punitive damages." We agree.

"We review the admission or exclusion of evidence for abuse of discretion." *Kilgore v. Fuji Heavy Indus. Ltd.*, 2009-NMCA-078, ¶ 39, 146 N.M. 698, 213 P.3d 1127. Generally, relevant evidence is admissible and irrelevant evidence is inadmissible. *See* Rule 11-402 NMRA. "Evidence is relevant if . . . it has any tendency to make a fact more or less probable than it would be without the evidence, and . . . the fact is of consequence in determining the action." Rule 11-401 NMRA; *see Coates v. Wal-Mart Stores, Inc.*, 1999-NMSC-013, ¶37, 127 N.M. 47, 976 P.2d 999. We will reverse a judgment based on the erroneous exclusion of evidence only if "the complaining party on appeal . . . show[s] the erroneous . . . exclusion of evidence was prejudicial." *Id.* (alteration, internal quotations marks, and citation omitted).

In New Mexico, an insurer "acts in bad faith when it refuses to pay a claim of the policyholder for reasons which are frivolous or unfounded." UJI 13-1702 NMRA; *see Am. Nat'l Prop. & Cas. Co. v. Cleveland*, 2013-NMCA-013, ¶ 11, 293 P.3d 954. An insurer "does not act in bad faith by denying a claim for reasons which are reasonable under the terms of the policy." UJI 13-1702; *see also Cleveland*, 2013-NMCA-013, ¶ 13 ("[A]n insurer has a right to refuse a claim without exposure to a bad faith claim if it has reasonable grounds to deny coverage."). "Where payment of policy proceeds depends

on an issue of law or fact that is 'fairly debatable[,]' the insurer is entitled to debate that issue." UJI 13-1702 comm. cmt. (citing *United Nuclear Corp. v. Allendale Mut. Ins. Co.*, 1985-NMSC-090, ¶ 54, 103 N.M. 480, 709 P.2d 649 (Bivins, J., specially concurring)).

We conclude that, in this case, exclusion of the evidence of the previous judge's ruling that there was no coverage was an abuse of discretion, *see Kilgore*, 2009-NMCA-078, ¶ 39, because that evidence was relevant to the factual issue of whether it was reasonable for Progressive to question the Vigils' insurance coverage. We reach this conclusion for five reasons.

First, whether Progressive acted reasonably in disputing the issue of coverage is a "fact . . . of consequence in determining the action" of bad faith. Rule 11-401(B); UJI 13-1702.

Second, the fact that the previous judge, as a matter of law, concluded that there was no coverage, albeit mistakenly, "tend[s] to make [the] fact [that Progressive acted reasonably] more . . . probable than it would be without the evidence[.]" *See* Rule 11-401(A). It makes this fact more probable because it supports the notion that the issue of coverage was "fairly debatable." *See* UJI 13-1702 comm. cmt. If the fact of coverage is fairly debatable, then there can be no bad faith because insurers are "entitled to debate" such facts. *Id.*

Third, cases from other jurisdictions demonstrate that a district court's previous rulings on coverage, even where they were later reversed, are not only relevant to the issue of whether an insurer acted reasonably in disputing coverage, but in some cases are dispositive of that issue. *See, e.g.*, *Lennar Corp. v. Transamerica Ins. Co.*, 256 P.3d 635, 641 (Ariz. Ct. App. 2011) (concluding that a trial court "may decide to admit relevant extrinsic evidence such as [separate] judicial decisions interpreting the policy language" and recognizing that such evidence "may bear on whether these insurers acted reasonably in disputing coverage[]"); *see also Karen Kane Inc. v. Reliance Ins. Co.*, 202 F.3d 1180, 1190 (9th Cir. 2000) (recognizing that the insurer's interpretation of coverage was "a reasonable one [for good faith and fair dealing purposes], noting that the district court [had previously] found in [the insurer's] favor" despite partially reversing the summary judgment interpretation of the policy on appeal and remanding back to the district court for further proceedings); *Morris v. Paul Revere Life Ins. Co.*, 135 Cal.Rptr.2d 718, 726 (Cal. Ct. App. 2003) (rejecting the insured's argument that "any court opinion issued after the insurance company made its initial decision to deny coverage could not be considered in determining whether the decision was reasonable" because "the fact that a [different] court had interpreted the law in the same manner as did the insurer, *whether before or after*, is certainly probative of the reasonableness, if not necessarily the ultimate correctness, of its position" (emphasis added)); *but see EOTT Energy Operating Ltd. P'Ship v. Certain Underwriters at Lloyd's of London*, 59 F. Supp. 2d 1072, 1078-80 (D. Mont. 1999) (granting the plaintiff's motion in limine to preclude the insurer from presenting the court's previous decision on coverage, which was later reversed, as evidence of the insurer's reasonableness because "it is clear that, in Montana, the issue whether an insurer had a reasonable basis for denying a claim may not be decided as a matter of law, no matter that the trial court found there was no coverage[,]" and because the language of

Montana's unfair trade practices statute required a showing that the insurer had a reasonable basis to deny the claim *at the time it denied the claim* — not after).[1]

Fourth, exclusion of this evidence prejudiced Progressive because it concealed an important part of the picture from the jury's view—that Progressive's decision to persist with its coverage position may have been reasonably influenced by the fact that a neutral decision maker had validated this position. *See* 14 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance*, § 204:124 (3d ed. 2005) ("The reasonable person test requires a consideration of all the circumstances of the case which have any significance or probative value in determining whether the insurer has acted properly or not. All of the circumstances of the case when considered in aggregate [can] make it clear that the insurer has not been guilty of any vexatious refusal to pay." (footnotes omitted)).

Fifth, the Vigils do not argue on appeal that any exceptions to the general rule—relevant evidence is admissible—should apply in this case. *See* Rule 11-402 (providing that relevant evidence is admissible unless "the United States or New Mexico constitution, a statute, these rules, or other rules prescribed by the Court" provide otherwise). Because the district court's ruling is relevant to the Vigils' bad faith claim against Progressive, we do not address any exceptions to the admissibility of the relevant coverage evidence. *See State v. Bent*, 2013-NMCA-108, ¶ 27, 328 P.3d 677 (noting that the appellate courts generally do not address issues that have not been raised on appeal), *cert. denied*, 2013-NMCERT-012, 321 P.3d 126.

By concluding that evidence of the previous ruling was relevant and admissible to support Progressive's position that it did not act in bad faith, we are not further concluding that the previous ruling in Progressive's favor means Progressive's conduct was reasonable as a matter of law. As with all other evidence admitted at trial, it is within the jury's purview to determine how much weight to assign that fact. *See State v. Hudson*, 1967-NMSC-164, ¶ 7, 78 N.M. 228, 430 P.2d 386 ("[T]he jury [members] are the judges of the weight and credibility of evidence."). The Vigils are free to argue that the ruling was reversed and is not dispositive of the question. *See Martinez v. N.M. Dep't of Transp.*, 2011-NMCA-082, ¶ 29, 150 N.M. 204, 258 P.3d 483 (noting that parties are "free to argue the weight of the evidence"), *rev'd on other grounds*, 2013-NMSC-005, 296 P.3d 468. We emphasize that our decision regarding the admissibility of the previous ruling is only relevant to the issue of Progressive's reasonableness under the bad faith claim and has no application to the jury's prior determination of coverage.

B. Evidence That Progressive Paid Third-Party Claims

Progressive argues that the district court erred when it concluded on summary judgment that Progressive was not entitled to be reimbursed for payments it made to the

[1]We conclude that the reasoning used in *EOTT Energy Operating Ltd. P'Ship* should not be controlling in this case for two reasons. First, the issue of whether an insurer acted reasonably in denying coverage may not be decided as a matter of law in Montana. Second, the Vigils have not pointed to any language in New Mexico statutes or case law that requires the factfinder to exclusively consider the reasonableness of the insurer's behavior at the time it first decided to file suit challenging coverage and to ignore all of the subsequent circumstances that may have influenced its decision to continue pursuing any challenge to coverage.

injured third parties in the event the jury found that there was no coverage. They raise this error because they argue that it led the district court to erroneously prohibit Progressive from introducing evidence or otherwise telling the jury that Progressive made two $100,000 payments on behalf of the Vigils to the injured passenger and the deceased passenger's family under a reservation of rights.

Before we address the evidentiary issue, we conclude that it is unnecessary to decide the issue of whether Progressive was entitled to reimbursement in the event there was no insurance coverage. The jury found that there was coverage and Progressive does not challenge this jury verdict regarding insurance coverage. Therefore, we affirm the verdict on the issue of insurance coverage. As a result, the issue of whether Progressive would be entitled to reimbursement under any reservation of rights is also moot. Progressive does not argue that any exceptions should be applied regarding our inability to address issues that are moot. *See Bernalillo Cnty. Health Care Corp. v. N.M. Pub. Regulation Comm'n*, 2014-NMSC-008, ¶ 13, 319 P.3d 1284 (noting that an appellate court "does not address moot issues that will have no practical impact on the parties before [it unless the] issues [are] of substantial public interest or . . . are capable of repetition, yet evading review").

The evidentiary relevancy of Progressive's $200,000 in settlement payments to cover third-party claims against the Vigils is a different matter. We agree with Progressive's argument that the district court abused its discretion when it excluded evidence that Progressive had settled these claims brought against the Vigils. We conclude that such evidence was relevant to the Vigils' bad faith claim.

The fact that Progressive paid a total of $200,000 to the injured passenger and the deceased passenger's family under a reservation of rights is relevant because it tends to make it less probable that Progressive acted in bad faith over the course of the coverage dispute. *See* Rule 11-401(A). In making these payments, Progressive both compensated the third-party claimants and prevented the Vigils from having to defend themselves against personal injury and wrongful death claims at the same time that they were litigating the coverage issue with Progressive. The exclusion of this evidence deprived the jury of the whole picture in determining whether Progressive acted in bad faith. *See* Russ & Segalla, *Couch on Insurance*, *supra*, § 204:124. Progressive also apprised the district court of the material nature of this defense evidence and the potential abuse that the Vigils would make of its absence. This warning came to fruition when the Vigils took advantage of this exclusionary ruling during closing arguments and gave the jury the false impression that Progressive had failed to pay anyone during the long nine-year time period that it had taken to litigate the insurance coverage issue. We conclude that it was unfair and an abuse of discretion to exclude evidence that was relevant to rebut the Vigils' claim that Progressive acted unreasonably over the long course of the coverage dispute, especially where this exclusion presented the jury with an incomplete and one-sided picture of Progressive's actions. *Cf. State v. Alberico*, 1993-NMSC-047, ¶ 37, 116 N.M. 156, 861 P.2d 192 (recognizing that it is error to exclude expert testimony where "excluding that evidence vitiates the most basic function of a jury to arbitrate the weight and credibility of evidence"); *see generally United States v. Orr*, No. 92-50235, slip. op. at 2 (9th Cir. 1992) (non-precedential) (holding that the

district court erred when it excluded evidence that was "highly relevant" to material issues in the case). On the basis of these erroneous evidentiary rulings, we reverse and remand to the district court for a new trial on the Vigils' bad faith claim.

We also vacate the award of attorney fees and costs because that statute awards reasonable attorney fees only upon a finding that the insurer acted "unreasonably" in failing to pay the claim. § 39-2-1 ("In any action where an insured prevails against an insurer who has not paid a claim on any type of first-party coverage, the insured person may be awarded reasonable attorney's fees and costs of the action upon a finding by the court that the insurer acted unreasonably in failing to pay the claim."). Because the reasonableness of Progressive's actions in addressing the insurance coverage issue and pursuing a declaratory judgment decision remains to be resolved under the bad faith claim that is now remanded for a new trial, the award of attorney fees and cost under Section 39-2-1 must also be redetermined after the bad faith proceedings are resolved.

C. Other Issues

Because we reverse the judgment and awards concerning the bad faith claim and remand for another trial on that claim, we need not address the other issues that Progressive argues should result in reversal. *See Yeager v. St. Vincent Hosp.*, 1999-NMCA-020, ¶ 6, 126 N.M. 598, 973 P.2d 850.

CONCLUSION

We affirm the judgment in favor of the Vigils as to the issue of insurance coverage and the award of compensatory damages on that issue. We reverse the judgment on the bad faith claim and the compensatory and punitive damages awarded on that claim. We also vacate the award of attorney fees and costs under Section 39-2-1. We remand this case to the district court for a new trial on the bad faith claim and any award of attorney fees and costs under Section 39-2-1.

IT IS SO ORDERED.

TIMOTHY L. GARCIA, Judge

WE CONCUR:

RODERICK T. KENNEDY, Chief Judge

J. MILES HANISEE, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-032

Filing Date: February 18, 2015

Docket No. 33,349

STATE OF NEW MEXICO,

Plaintiff-Appellant,

v.

NODEE LUJAN,

Defendant-Appellee.

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OPINION

GARCIA, Judge.

Defendant Nodee Lujan was charged with two counts of criminal sexual contact of a minor in the fourth degree. *See* NMSA 1978, § 30-9-13(A),(D)(1) (2004). The State appeals the district court's order that dismissed Defendant's charges based upon a violation of Defendant's right to a speedy trial under the United States and New Mexico Constitutions. We affirm.

BACKGROUND

On March 16, 2012, the State arrested and filed a criminal complaint against Defendant for two counts of criminal sexual contact of a minor in the fourth degree. Defendant was released on March 22, 2012, and his trial was set for October 16, 2012.

On August 16, 2012, Defendant notified the State that he took and passed a polygraph test and that he intended to use the test results at trial. On September 24, 2012, the State filed a motion to compel Defendant to take another polygraph examination, which the district court denied. On October 4, 2012, twelve days before the trial was to begin, the State notified Defendant's counsel that the victim had also taken and passed a polygraph test. Defendant objected to the State's motion to admit the results of the victim's polygraph examination on the basis of late disclosure. *See* Rule 11-707(D) NMRA ("A party who wishes to use polygraph evidence at trial must provide written notice no less than thirty (30) days before trial or within such other time as the district court may direct."). The State moved to continue the trial. The district court denied the State's continuance motion, and it scheduled a hearing to resolve the State's motion to admit the victim's polygraph results for the day of trial.

On October 15, 2012, the day before the trial was to begin, the State dismissed the charges against Defendant. It refiled identical charges eight days later. Defendant pleaded not guilty to the refiled charges at his May 2013 arraignment. Trial on the refiled charges was set for October 15, 2013, one year after his first trial had been scheduled to begin.

On July 11, 2013, five months before trial, Defendant moved to dismiss the charges against him on speedy trial grounds. After holding an evidentiary hearing on the motion on October 8, 2013, the district court granted the motion and dismissed the case.

On appeal, the State concedes that the delay presumptively prejudiced Defendant and that "the reasons for the delay should be attributed to the State." However, it argues that the district court should not have weighed the delay heavily against the State "because Defendant caused some of the delay and much of the delay was beyond the control of either party." The State also contends that Defendant did not assert his speedy trial right and that any prejudice he suffered was not "undue."

DISCUSSION

A. General Principles and Standard of Review

The Sixth Amendment of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial[.]" U.S. Const. amend. VI. The New Mexico Constitution affords a similar right: "In all criminal prosecutions, the accused shall have the right to . . . a speedy public trial." N.M. Const. art. II, § 14. "Though speed is an important attribute of the right," the right "does not preclude the rights of public justice"—"if either party is forced to trial without a fair opportunity for preparation, justice is sacrificed to speed." *State v. Garza*, 2009-NMSC-038, ¶ 11, 146 N.M. 499, 212 P.3d 387 (alteration, internal quotations marks, and citations omitted). We therefore analyze "the peculiar facts and circumstances of each case." *Id.*

In determining whether a defendant's speedy trial right was denied, our Supreme Court has adopted the balancing test that the United States Supreme Court created in *Barker v. Wingo*, 407 U.S. 514 (1972). *Garza*, 2009-NMSC-038, ¶¶ 9, 13. Under the *Barker* framework, we weigh "the conduct of both the prosecution and the defendant" under the guidance of four factors: (1) the length of the delay, (2) the reasons for the delay, (3) the timeliness and manner in which the defendant asserted his speedy trial right, and (4) the particular prejudice that the defendant actually suffered. *Garza*, 2009-NMSC-038, ¶¶ 13, 32, 35. "Each of these factors is weighed either in favor of or against the State or the defendant, and then balanced to determine if a defendant's right to a speedy trial was violated." *State v. Spearman*, 2012-NMSC-023, ¶ 17, 283 P.3d 272. Because none of these factors is "talismanic[,]" we analyze speedy trial claims on a case-by-case basis. *State v. Palacio*, 2009-NMCA-074, ¶ 9, 146 N.M. 594, 212 P.3d 1148.

Before applying the balancing test, we first assess whether the length of the delay was "presumptively prejudicial," depending on the complexity of the case. *See Spearman*, 2012-NMSC-023, ¶ 21; *see also Garza*, 2009-NMSC-038, ¶ 21 ("[A] 'presumptively prejudicial' length of delay is simply a triggering mechanism, requiring further inquiry into the *Barker* factors."). "A delay of trial of one year is presumptively prejudicial in simple cases, fifteen months in intermediate cases, and eighteen months in complex cases." *Spearman*, 2012-NMSC-023, ¶ 21. The State concedes that the length of the delay was presumptively prejudicial. We agree with the State's concession. *See State v. Urban*, 2004-NMSC-007, ¶ 13, 135 N.M. 279, 87 P.3d 1061 (agreeing with the state's concession that a sufficient lapse of time is presumptively prejudicial). We therefore proceed to inquire further into the *Barker* factors. *See Garza*, 2009-NMSC-038, ¶ 21.

Although we defer to the district court's factual findings concerning each factor, we independently review the record to determine whether a defendant was denied his speedy trial right, and we weigh and balance the *Barker* factors de novo. *Spearman*, 2012-NMSC-023, ¶ 19; *Palacio*, 2009-NMCA-074, ¶ 9; *see also State v. Collier*, 2013-NMSC-015, ¶ 41, 301 P.3d 370 (stating that the *Barker* factors are "factually based").

B. Discussion and Weighing of the Factors

1. Length of Delay

In determining what weight to give the length of any delay, we consider the extent to which the delay stretched beyond the presumptively prejudicial period. *State v. Ochoa*, 2014-NMCA-065, ¶ 6, 327 P.3d 1102, *cert. granted*, 2014-NMCERT-006, 328 P.3d 1188. "[T]he greater the delay[,] the more heavily it will potentially weigh against the [s]tate." *Garza*, 2009-NMSC-038, ¶ 24. A delay that "scarcely crosses the bare minimum needed to trigger judicial examination of the claim" will "not weigh heavily in [a d]efendant's favor." *Id.* ¶¶ 23-24 (internal quotation marks and citation omitted); *compare State v. Steinmetz*, 2014-NMCA-070, ¶ 6, 327 P.3d 1145 (concluding that a delay of twenty-eight months beyond the presumptive threshold weighed "moderately" against the State in a case of intermediate complexity), *cert. denied*, 2014-NMCERT-006, 328 P.3d 1188, *with Urban*, 2004-NMSC-007, ¶ 20, (concluding that an eighteen-month delay beyond the presumptive threshold weighed heavily against the State in a simple case); *State v. Marquez*, 2001-NMCA-062, ¶ 12, 130 N.M. 651, 29 P.3d 1052 (concluding that a nine-month delay beyond the presumptive threshold weighed heavily against the State in a simple case), *and State v. Montoya*, 2011-NMCA-074, ¶ 17, 150 N.M. 415, 259 P.3d 820 (concluding that a six-month delay beyond the presumptive threshold weighed slightly against the State in a case of intermediate complexity).

The district court found that this was a simple case, because "[t]he only contested issue . . . is the credibility of the witnesses[,]" and "the issues regarding the competing polygraph test results [would] have been resolved pretrial[.]" The State disagrees. It argues that the case was "more complicated" because it "involved minor children" and the results of Defendant's and the victim's polygraph tests "were at odds with each other." We defer to the district court's finding that this was a simple case because it was in the best position to make that determination. *See State v. Coffin*, 1999-NMSC-038, ¶ 57, 128 N.M. 192, 991 P.2d 477; *State v. Johnson*, 2007-NMCA-107, ¶ 7, 142 N.M. 377, 165 P.3d 1153.

The State and Defendant disagree on how we should calculate the length of time that Defendant's trial was delayed. Both agree that Defendant's speedy trial right accrued on March 16, 2012—the day that the State filed its first criminal complaint and arrested him. However, the State argues that the delay should be calculated at sixteen months because we should stop counting the delay on the date that Defendant filed his motion to dismiss. Defendant argues that the delay was nineteen months because we should stop counting the delay on the date that the charges were dismissed. We generally agree with Defendant. Under these circumstances, where Defendant's trial was set for October 15, 2013, the district court heard Defendant's motion to dismiss on October 8, 2013, and the order dismissing the charges was entered on October 30, 2013, we conclude that the calculation of the delay extends to either the date that the charges were dismissed or the date the trial was scheduled to begin. *See Marquez*, 2001-NMCA-062, ¶ 11 (concluding that the length of delay includes the entire time during which criminal charges were pending against the defendant); *see also Doggett v. United States*, 505 U.S. 647, 651-52 (1992) ("[T]o trigger a speedy trial

analysis, an accused must allege that the interval between accusation and *trial* has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay[.]" (Emphasis added)). We therefore conclude that the length of the delay was at least nineteen months—March 16, 2012 (the date of arrest and filing of charges) to October 15, 2013 (the trial setting).

A nineteen-month delay extends seven months beyond the twelve-month presumptive threshold for simple cases. *See Spearman*, 2012-NMSC-023, ¶ 21. This delay weighs in Defendant's favor at least slightly. *See Id.* ¶ 24 (noting that even though a one-to-four-month delay beyond the presumptive minimum does weigh against the state, it will not weigh heavily against the state); *State v. Moreno*, 2010-NMCA-044, ¶ 38, 148 N.M. 253, 233 P.3d 782 (concluding that, in a complex case, a seven-month delay beyond the presumptive threshold "weigh[ed] against the state and in [the d]efendant's favor[,]" but the Court did not say how heavily); *Marquez*, 2001-NMCA-062, ¶¶ 10, 12 (concluding that, in a simple case, a nine-month delay beyond the presumptive threshold weighed heavily against the state, and that even if the delay was seven months beyond the presumptive period as the state argued, the delay was "significantly well beyond" the threshold); *Montoya*, 2011-NMCA-074, ¶¶ 16-17 (concluding that, in a case of intermediate complexity, a six-month delay beyond the presumptive threshold weighed slightly against the state).

2. Reasons for Delay

We assign different weight to different types of delay. *See Spearman*, 2012-NMSC-023, ¶ 25. There are three types: "(1) deliberate or intentional delay; (2) negligent or administrative delay; and (3) delay for which there is a valid reason." *Ochoa*, 2014-NMCA-065, ¶ 8. "Deliberate delay is to be weighted heavily against the government." *Id.* ¶ 9 (internal quotations marks and citation omitted). Negligent or administrative delay weighs against the State, though not heavily. *Spearman*, 2012-NMSC-023, ¶ 25. "[A] valid reason, such as a missing witness, should serve to justify appropriate delay." *Id.* (internal quotation marks and citations omitted).

The district court found that

> [t]he State dismissed the case due to the rulings by the trial court to not continue the trial, to not compel . . . Defendant to take a second polygraph test[,] and the adverse position the State was in because of its late filed motions. These reasons are not valid reasons to dismiss a case. The State should have taken the case to trial in the posture it was in.

These circumstances may be viewed adversely against the State. *See Garza*, 2009-NMSC-038, ¶ 25 (stressing the point that "official bad faith in causing delay will be weighed heavily against the government" (internal quotation marks and citation omitted)). The district court also found that the other delays the State asserts were caused by Defendant and the district court were "foreseeable, if not inherent, and in any event could have been avoided had the case gone to trial as originally scheduled." The court did not enter any findings about the State's bare assertion that it needed more time for discovery in the first case due to Defendant's submission of an untimely witness list. We are unable to evaluate this claim because we do not have the record of the first case before us, and the State

does not explain why it needed more time for discovery. *See Romero v. U.S. Life Ins. Co. of Dallas*, 1986-NMCA-044, ¶ 12, 104 N.M. 241, 719 P.2d 819 (stating that, without the record of facts from a related case, part of which apparently formed the basis for the district court's decision, "no question is presented to this [C]ourt for review"); *State v. Ortiz*, 2009-NMCA-092, ¶ 32, 146 N.M. 873, 215 P.3d 811 (declining to review an undeveloped argument on appeal). Thus, we defer to the district court's factual determinations and findings, *Spearman*, 2012-NMSC-023, ¶¶ 19, 30, and conclude that the primary reason for the delay weighs heavily against the State because it was deliberate. *See Ochoa*, 2014-NMCA-065, ¶ 9.

3. Assertion of the Right

A defendant's failure to demand a speedy trial does not "forever waive[] his right[]" because this right is "fundamental in nature." *Garza*, 2009-NMSC-038, ¶¶ 31-32 (internal quotation marks and citation omitted). In determining the weight to assign to a defendant's assertion of his speedy trial right, we "assess the timing of the defendant's assertion and the manner in which the right was asserted." *Id.* ¶ 32. We consider "whether a defendant was denied needed access to speedy trial over his objection or whether the issue was raised on appeal as [an] afterthought." *Id.* The effect of a defendant's assertion of his speedy trial right may be mitigated where his actions resulted in delay. *Id.*

The district court found that Defendant had not formally asserted his speedy trial right until he filed his motion to dismiss in July 2013. It weighed this factor slightly against the State, because it found that Defendant had not acquiesced to the delay. The State, citing a Fifth Circuit Court of Appeals case, argues that Defendant's filing of a motion to dismiss should be weighed "strongly" against Defendant because it was "an assertion of the remedy" and not an assertion of the right. *See United States v. Frye*, 489 F.3d 201, 210-12 (5th Cir. 2007) (concluding that the assertion-of-the-right factor did not "weigh against the government" because the defendant's motions for dismissal amounted to an assertion of the remedy rather than an assertion of his speedy trial right and because the motions did not manifest a "desire to be tried promptly"). New Mexico courts, however, have concluded that a motion to dismiss based on speedy trial grounds is an assertion of the right that is weighed against the government, although it is generally not weighed heavily. *See, e.g.*, *Work v. State*, 1990-NMSC-085, ¶ 7, 111 N.M. 145, 803 P.2d 234 (agreeing with the Court of Appeals that the defendant timely asserted his right to a speedy trial and "weigh[ing] this factor in his favor" where the defendant filed a speedy trial motion seven months after the indictment and five weeks before trial was scheduled to begin); *State v. Johnson*, 1991-NMCA-134, ¶ 5, 113 N.M. 192, 824 P.2d 332 (concluding that the "[d]efendant asserted his right to a speedy trial by filing a motion to dismiss for delay" and that "[t]his factor . . . weighed in favor of [the] defendant, but not heavily").

Here, Defendant asserted his speedy trial right by filing his motion to dismiss about nine months after the State refiled the charges against him and about five months before he was scheduled to go to trial. He filed his motion well before trial was set to begin, not "on appeal as [an] afterthought[,]" and he did not otherwise act in a manner that caused delay. *See Garza*, 2009-NMSC-038, ¶ 32. Therefore, we conclude that his motion amounted to an appropriate assertion of the

right and the district court properly weighed the assertion factor slightly against the State. *See Work*, 1990-NMSC-085, ¶ 7; *Johnson*, 1991-NMCA-134, ¶ 5.

4. Prejudice

The "heart" of the speedy trial right "is preventing prejudice to the accused." *Garza*, 2009-NMSC-038, ¶ 12. We analyze prejudice against a defendant under three interests: (1) preventing oppressive pretrial incarceration, (2) minimizing anxiety and concern of the accused, and (3) limiting the possibility that the defense will be impaired. *Id.* ¶ 35. We are mindful that "some degree of . . . anxiety is inherent for every defendant . . . awaiting trial." *State v. Maddox*, 2008-NMSC-062, ¶ 33, 145 N.M. 242, 195 P.3d 1254 (alterations, internal quotations marks, and citation omitted), *abrogated on other grounds by Garza*, 2009-NMSC-038, ¶¶ 47-48. "Therefore, we weigh this factor in the defendant's favor only where . . . the anxiety suffered is undue." *Garza*, 2009-NMSC-038, ¶ 35. A defendant is not required to show that he experienced "greater anxiety and concern than that attending most criminal prosecutions." *Salandre v. State*, 1991-NMSC-016, ¶ 32, 111 N.M. 422, 806 P.2d 562, *holding modified on other grounds by Garza*, 2009-NMSC-038, ¶ 22. "The operative question is whether the anxiety and concern, once proved, has continued for an unacceptably long period." *Id.* "It is for the court to determine whether the emotional trauma suffered by the accused is substantial and to incorporate that factor into the balancing calculus." *Id.* The evidence must also establish that the alleged prejudice occurred as a result of the delay in trial beyond the presumptively prejudicial threshold as opposed to the earlier prejudice arising from the original indictment. *See Spearman*, 2012-NMSC-023, ¶ 39.

The district court found that Defendant suffered prejudice because he "lived under a cloud of anxiety, suspicion[,] and hostility from the beginning of the case up to the date of the hearing [on his motion to dismiss]"; "[a]fter the case was dismissed and refil[]ed, . . . Defendant's girlfriend ended her long[-]term relationship with . . . Defendant because he had become unbearable to live with[]"; and "Defendant testified [that] he became unbearable mainly due to the continued stress of the criminal proceedings against him."

Defendant testified that at the time he was arrested, he had been serving on the Gallup Fire Department for twenty years and had risen to the level of Lieutenant. As part of his duties he was a CPR instructor; taught at the fire academy and the U.S. Department of Defense; and worked with children through the Police Athletic League, the Boys and Girls Club, and in local schools teaching fire prevention. He testified that after he was arrested in March 2012, Albuquerque and Gallup newspapers published articles about the allegations against him, and his supervisor told a news reporter during a television interview that Defendant was "a black eye to the . . . department." Defendant was demoted to general "firefighter" status, resulting in a dramatic decrease in pay, and he was stripped of all of his supervisory and teaching duties. He testified that his department restricted him from having any contact with females, regardless of their age, even to the extent that he was not permitted to perform CPR on females during emergency medical calls. His supervisors began writing him up for numerous minor infractions and indirectly suggested that he retire to "save [his]

retirement" before he was fired. As a result, Defendant retired early, causing him to receive a lower pension than he would have received had he retired a few years later, as he had previously intended.

Defendant testified that he and his girlfriend of seven years and her children—his "family"—were ostracized at work and in the community and that most of his friends who had children stopped communicating with him. After the State refiled the charges against him in October 2012, Defendant's family left him and moved to Silver City. He later tried to reconcile his relationship with his family, and he moved to Silver City to be closer to them. However, he could not secure employment in Silver City due to the pending charges. His family left him a second time due to his inability to find work and the stress of "being charged again." He testified that between the time of his arrest and the time of the hearing on his motion to dismiss, his weight dropped from 280 pounds to 189 pounds and that this nearly 100-pound weight loss was due to stress and not being able to eat or sleep.

The State did not present any evidence to show that Defendant had not suffered these forms of prejudice, other than confirming that his retirement was "voluntary," that Defendant had been arrested once before in 2008 for domestic battery, and that one of the reasons that his family left him was because of his behavior in response to his stress around the pending charges.

We defer to the district court's factual findings regarding whether Defendant suffered prejudice from the delay, *see Spearman*, 2012-NMSC-023, ¶ 19, and we conclude that the prejudice was not only "actual" and "particularized[,]" but that it was "substantial[,]" "undue[,]" *see Garza*, 2009-NMSC-038, ¶¶ 13, 35, and it "continued for an unacceptably long period[,]" *see Salandre*, 1991-NMSC-016, ¶ 32. Although some of the harm occurred while the first case was pending, it continued and was unnecessarily prolonged seven to twelve months by the State's deliberate delay when it dismissed and refiled the case. Defendant suffered additional prejudice after the charges were refiled: his family left him—twice, and he was unable to secure a job. The personal hardship and anxiety-type of prejudice to be protected against is separate and distinct from the loss of liberty caused by incarceration or the possible prejudice to an accused's defense. *See Spearman*, 2012-NMSC-023, ¶ 37; *see also Salandre*, 1991-NMSC-016, ¶ 18 (stating that the speedy trial right "protects against interference with a defendant's liberty, disruption of employment, curtailment of associations, subjection to obloquy, and creation of undue anxiety"); *State v. Vigil-Giron*, 2014-NMCA-069, ¶ 56, 327 P.3d 1129 (stating that "anxiety, loss of employment, continued inability to find work, and . . . public humiliation" suffered by the defendant "are forms of prejudice that the speedy trial right is intended to curtail").

Thus, the evidence presented to the district court identified the types of serious disruptions and other severe hardships that can be weighed heavily in Defendant's favor. We will not substitute the State's view of the severity of Defendant's personal hardships and anxiety level for that of the district court. *See Spearman*, 2012-NMSC-023, ¶ 19. Taking into account the additional delay arising from the State's intentional dismissal and refiling of the charges to avoid the October 2012 trial setting, the overall anxiety and personal hardship suffered by Defendant in this case was much more severe. *See Garza*, 2009-NMSC-038, ¶ 25 ("The reasons for a

period of the delay may either heighten or temper the prejudice to the defendant caused by the length of the delay." (internal quotation marks and citation omitted)). Under these circumstances, we agree with the district court that the prejudice factor weighed heavily in Defendant's favor.

C. Balancing the Factors

The length of delay weighs at least slightly or even more heavily in Defendant's favor. The assertion of the right is weighed slightly in favor of Defendant. The reasons for the delay and the undue prejudice suffered weigh heavily in Defendant's favor. None of these *Barker* factors weigh in the State's favor. Therefore, on balance, we conclude that the *Barker* factors weigh sufficiently in Defendant's favor and the district court appropriately dismissed Defendant's charges on speedy trial grounds. *See Spearman*, 2012-NMSC-023, ¶ 17.

CONCLUSION

We affirm the district court's order dismissing this case with prejudice.

IT IS SO ORDERED.

TIMOTHY L. GARCIA, Judge

WE CONCUR:

MICHAEL E. VIGIL, Chief Judge

MICHAEL D. BUSTAMANTE, Judge

Certiorari Granted, January 26, 2015, No. 35,063

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-033

Filing Date: October 21, 2013

Docket No. 32,909

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

THADDEUS CARROLL,

Defendant-Appellant.

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OPINION

VIGIL, Judge.

Defendant Thaddeus Carroll was convicted of driving while under the influence (DWI) in violation of NMSA 1978, Section 66-8-102(D) (2007, amended 2010), following a bench trial in metropolitan court. Defendant appealed to the district court for on-record review, and the district court affirmed. Defendant then appealed to this Court. The State has filed motions urging us to dismiss Defendant's appeal and all similar appeals currently before this Court. The State contends that there is no express right to appeal or grant of jurisdiction to this Court from a district court's on-record appellate review of a metropolitan court conviction for DWI. Having conducted a de novo review of the relevant constitutional provisions and statutes governing this Court's jurisdiction and the right to appeal from cases originating in metropolitan court, we deny the State's motion to dismiss. *See State v. Montoya*, 2008-NMSC-043, ¶ 9, 144 N.M. 458, 188 P.3d 1209 ("Jurisdiction questions are questions of law which are subject to de novo review."); *State v. Heinsen*, 2004-NMCA-110, ¶ 9, 136 N.M. 295, 97 P.3d 627 ("We review the application and interpretation of constitutional provisions, statutes, and court rules de novo to determine the right to an appeal and the scope of the appeal allowed by law."), *aff'd*, 2005-NMSC-035, 138 N.M. 441, 121 P.3d 1040.

DISCUSSION

The State's challenge to this Court's authority necessitates that we consider both our jurisdiction and Defendant's right to appeal. "Jurisdiction" refers to subject matter jurisdiction and "implicates a court's power to decide the issue before it." *State v. Rudy B.*, 2010-NMSC-045, ¶ 14, 149 N.M. 22, 243 P.3d 726 (internal quotation marks and citation omitted). However, as our Supreme Court acknowledged early in our State's jurisprudence, a grant of jurisdiction does not "confer upon litigants an affirmative right to invoke such jurisdiction." *State v. Chacon*, 1914-NMSC-079, ¶ 8, 19 N.M. 456, 145 P. 125, *superseded by constitutional amendment*, N.M. Const. art. VI, § 2 (1965), *as recognized by State v. Griffin*, 1994-NMSC-061, ¶ 3 n.2, 117 N.M. 745, 877 P.2d 551.[1] Rather, based on our Supreme Court's discussion in *Chacon*, "[a] court's jurisdiction to hear an appeal [is] to be distinguished . . . from a litigant's right to invoke that jurisdiction by bringing the appeal. The court's jurisdiction thus . . . remain[s] in abeyance until given vitality by legislative authority." *See* Seth D. Montgomery & Andrew S. Montgomery, *Jurisdiction as May Be Provided by Law: Some Issues of Appellate Jurisdiction in New Mexico*, 36 N.M. L. Rev. 215, 226 (2006) (internal quotation marks and citation omitted); *cf. Rudy B.*, 2010-NMSC-045, ¶ 12 (treating the right to appeal and jurisdiction as separate concepts); *Govich v. N. Am. Sys., Inc.*, 1991-NMSC-061, ¶ 12, 112 N.M. 226, 814 P.2d 94 (same). Generally, in order for an appeal to be properly before us, this Court must have jurisdiction to hear it, and a defendant must have the right to have it heard.

Both this Court's jurisdiction and a litigant's right to appeal must derive from a

[1]Prior to being amended in 1965, Article VI, Section 2 did not contain the language that "an aggrieved party shall have an absolute right to one appeal." Rather, the antecedent to our current Article VI, Section 2 merely stated: "The appellate jurisdiction of the Supreme Court shall be co-extensive with the state, and shall extend to all final judgments and decisions of the district courts, and said court shall have such appellate jurisdiction of interlocutory orders and decisions of the district courts as may be conferred by law." *Chacon*, 1914-NMSC-079, ¶ 4. In *Chacon*, our Supreme Court determined that the pre-amendment language conferred jurisdiction, but did not confer a right to appeal. *See id.* ¶ 8.

statute or constitutional provision. *See City of Las Cruces v. Sanchez*, 2007-NMSC-042, ¶ 10, 142 N.M. 243, 164 P.3d 942 ("[I]t has long been settled that the creating of a right of appeal is a matter of substantive law and outside the province of the court's rule making power." (alteration, internal quotation marks, and citations omitted)); *State v. Smallwood*, 2007-NMSC-005, ¶ 6, 141 N.M. 178, 152 P.3d 821 ("[O]ur Constitution or Legislature must vest us with appellate jurisdiction[.]"). Our Supreme Court has recognized that it cannot create jurisdiction through its rule-making authority. *Id.* ¶ 6. Similarly, our Supreme Court has "conceded that if the [L]egislature ha[s] authorized no appeal, [it is] powerless to create the right of appeal by rule." *State v. Arnold*, 1947-NMSC-043, ¶ 11, 51 N.M. 311, 183 P.2d 845. This Court is therefore limited to relying on state constitutional and statutory provisions to support our conclusion that Defendant has the right to appeal, and this Court has the authority to consider it.

This Court is similarly limited in our interpretation of our state constitution and statutes by the plain meaning rule. *See In re Rescue Ecoversity Petition*, 2012-NMCA-008, ¶ 6, 270 P.3d 104 ("When interpreting the Constitution, we follow the plain meaning rule."); *United Rentals Nw., Inc. v. Yearout Mech., Inc.*, 2010-NMSC-030, ¶ 9, 148 N.M. 426, 237 P.3d 728 ("The first guiding principle in statutory construction dictates that we look to the wording of the statute and attempt to apply 'the plain meaning rule[.]'" (citation omitted)); *see also* NMSA 1978, § 12-2A-19 (1997) ("The text of a statute or rule is the primary, essential source of its meaning."). The plain meaning rule presumes that the words in a constitutional or statutory provision "have been used according to their plain, natural, and usual signification and import, and the courts are not at liberty to disregard the plain meaning of words . . . in order to search for some other conjectured intent." *See In re Rescue Ecoversity Petition*, 2012-NMCA-008, ¶ 6 (internal quotation marks and citation omitted); *Truong v. Allstate Ins. Co.*, 2010-NMSC-009, ¶ 37, 147 N.M. 583, 227 P.3d 73 ("[T]he plain meaning rule, recogniz[es] that when a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation." (alteration, internal quotation marks, and citation omitted)). Thus, pursuant to the plain meaning rule, we will not read into a constitutional or statutory provision "language which is not there, especially when it makes sense as it is written." *Reule Sun Corp. v. Valles*, 2010-NMSC-004, ¶ 15, 147 N.M. 512, 226 P.3d 611 (internal quotation marks and citation omitted). With these considerations in mind, we now turn to the statutory and constitutional provisions that relate to this Court's jurisdiction and Defendant's right to appeal.

Jurisdiction

The Court of Appeals' jurisdiction is governed by Article VI, Section 29 of the New Mexico Constitution and NMSA 1978, Section 34-5-8 (1983). Article VI, Section 29 provides that the Court of Appeals

> may be authorized by law to review directly decisions of administrative agencies of the state, and it may be authorized by rules of the supreme court to issue all writs necessary or appropriate in aid of its appellate jurisdiction. In all other cases, it shall exercise appellate jurisdiction as may be provided by law.

As discussed above, "[t]he phrase 'as may be provided by law' means that our Constitution or Legislature must vest us with appellate jurisdiction[.]" *See Smallwood*, 2007-NMSC-005, ¶ 6. The Legislature has defined this Court's jurisdiction in Section 34-5-8. Section 34-5-8(A)(3) vests this Court with "jurisdiction to review on appeal . . . criminal actions, except those in which a judgment of the district court imposes a sentence of death or life imprisonment." Based on the clear language of the statute, this Court has been vested with jurisdiction over appeals in all criminal actions with the limited exception of those where a sentence of death or life imprisonment is imposed. Had the Legislature intended to limit our jurisdiction to preclude review of the on-record appellate decisions of the district court, we assume it would have explicitly done so. *See, e.g., Hanson v. Turney*, 2004-NMCA-069, ¶ 12, 136 N.M. 1, 94 P.3d 1 ("It is thus clear that if the [L]egislature intended to treat permit holders the same as owners of water rights, it knew how to draft a statute which would successfully do so."); *State ex rel. Citizens for Quality Educ. v. Gallagher*, 1985-NMSC-030, ¶ 13, 102 N.M. 516, 697 P.2d 935 ("[H]ad the Legislature so desired, it would have prohibited withdrawal of signatures placed on a petition for recall. This Court will not read into the Recall Act language which is not there."). Given that the Legislature listed no other exceptions to this broad grant of jurisdiction, including no limitation on where the case originated, we conclude that Section 34-5-8(A)(3) provides this Court with jurisdiction over appeals in criminal actions originating in courts of limited jurisdiction.

Right to Appeal

Of course, a determination that this Court has jurisdiction does not end our inquiry. Instead, we must also determine whether Defendant has a right to appeal to this Court. The New Mexico Constitution provides aggrieved parties with "an absolute right to one appeal." N.M. Const. art. VI, § 2. This constitutional provision, however, has been interpreted as being limited to cases originating in district court. *See Sanchez*, 2007-NMSC-042, ¶ 9 ("Article VI, Section 2 only applies to cases originating in district court, not to cases originating in courts of limited jurisdiction, such as a municipal court."). The corollary provision for cases originating in courts of limited jurisdiction is found in Article VI, Section 27. Section 27 provides: "Appeals shall be allowed in all cases from the final judgments and decisions of the probate courts and other inferior courts to the district courts, and in all such appeals, trial shall be had de novo unless otherwise provided by law." N.M. Const. art. VI, § 27. The phrase "unless otherwise provided by law" has been interpreted to authorize the Legislature to change the form of the appeal from de novo to appellate, *see State v. Ball*, 1986-NMSC-030, ¶ 10, 104 N.M. 176, 718 P.2d 686 (internal quotation marks and citation omitted), which the Legislature has done for criminal actions originating in metropolitan court "involving driving while under the influence of intoxicating liquors or drugs." NMSA 1978, § 34-8A-6(C) (1993). Section 34-8A-6(C) provides:

> Any party aggrieved by a judgment rendered by the metropolitan court in a criminal action involving driving while under the influence of intoxicating liquors . . . may appeal to the district court of the county in which the metropolitan court is located within fifteen days after the judgment was rendered. The manner

and method of appeal shall be set forth by supreme court rule.

The State points out that these provisions do not explicitly provide for an appeal to this Court, instead, referring only to appeals to district court. The State further argues that to the extent court procedural rules indicate that defendants have a right to appeal the district court's review of a metropolitan court decision to this Court, our Supreme Court was without authority to grant a right of appeal via rule.[2] While we have acknowledged that the Supreme Court does not have authority to create or enlarge a right to appeal, the Supreme Court does have authority to promulgate procedural rules where the right to appeal has been provided by the Legislature. NMSA 1978, Section 39-3-3(A)(1) (1972) provides defendants in criminal proceedings with the right to appeal a final judgment of the district court to this Court, except in cases involving death or life imprisonment. *See* § 39-3-3(A)(1) ("In any criminal proceeding in district court an appeal may be taken by the defendant to the supreme court or court of appeals, as appellate jurisdiction may be vested by law in these courts . . .within thirty days from the entry of any final judgment[.]"); § 34-5-8(A)(3).

[2]In its motion and memorandum, the State refers to former Rule 7-703(R) NMRA (2009), which prior to being amended in 2012 stated: "[a]n aggrieved party may appeal from a judgment of the district court to the New Mexico Supreme Court or New Mexico Court of Appeals, as authorized by law, in accordance with the Rules of Appellate Procedure." In 2012, this language was removed from Rule 7-703 and included in Rule 5-827(N) NMRA ("An aggrieved party may appeal from a judgment of the district court to the New Mexico Supreme Court or New Mexico Court of Appeals, as authorized by law, in accordance with the Rules of Appellate Procedure.").

The State argues that the term "criminal proceeding" in Section 39-3-3 should not be interpreted as extending to a district court's "on-record review of a lower court judgment." The State's argument is premised on the fact that a defendant bears the burden to prosecute his or her appeal in district court, *see* Rule 5-828 NMRA; that our case law describes an appeal as "no part of the trial," *see Ammerman v. Hubbard Broadcasting, Inc.*, 1976-NMSC-031, ¶ 20, 89 N.M. 307, 551 P.2d 1354; and that the rules governing such appeals are collected under "appeals" or "special proceedings" within the Rules of Criminal Procedure for the Metropolitan Courts and District Courts, *see* Rules 7-703 and 5-827. Having considered these arguments, we conclude that the State's definition of "criminal proceeding" is much too narrow.

The State essentially asks this Court to define "proceeding" as synonymous with "trial," and conclude that because the district court proceedings are appellate in nature they do not fall within the purview of Section 39-3-3(A)(1). *Black's Law Dictionary* defines "proceeding" much more broadly than the State would have us do. According to *Black's*,

> "Proceeding" is a word much used to express the business done in courts. . . . It is more comprehensive than the word "action," but it may include in its general sense all the steps taken or measures adopted in the prosecution or defense of an action, including the pleadings and judgment. As applied to actions, the term "proceeding" may include—(1) the institution of the action; (2) the appearance of the defendant; (3) all ancillary or provisional steps, . . . (7) the trial; (8) the judgment; (9) the

execution; . . . (11) the taking of the appeal or writ of error[.]

Black's Law Dictionary 1324 (9th ed. 2009). Based on this definition of "proceeding," we conclude that Section 39-3-3(A)(1) is intended to include a defendant's right to appeal a district court's review of an on-record metropolitan court decision.

Moreover, if this Court were to construe the term "proceeding" as the State suggests, we would necessarily have to conclude that our Supreme Court did not possess the authority to promulgate Rule 5-827(N); that by promulgating Rule 5-827(N), our Supreme Court exercised legislative power; and that by doing so it violated the New Mexico Constitution. "It is, of course, a well-established principle of statutory construction that statutes should be construed, if possible, to avoid constitutional questions." *Lovelace Med. Ctr. v. Mendez*, 1991-NMSC-002, ¶ 12, 111 N.M. 336, 805 P.2d 603. Accordingly, where this Court is presented with a reasonable interpretation of a statute that does not call into question the constitutionality of the actions of our Supreme Court, that interpretation is the one this Court will adopt.

Finally, the State argues that interpreting Section 39-3-3 to provide for a right to appeal under these circumstances would give rise to claims under the Equal Protection Clause. The State argues that to provide a second appeal by right for certain petty crimes, but not for more serious crimes, is an "unreasoned distinction" that bears no "rational relationship to any legitimate state interest." While we note that our interpretation of the relevant statutes recognize a different appellate procedure depending on the type of crime, we disagree that it rises to the level of an equal protection violation. Practically speaking, however, the Legislature's decision to alter the nature of the appeal for petty offenses originating in metropolitan court from de novo to on-record, eliminated the necessity for the most populous district in this State to hold a de novo trial where the case had already been heard by a law-trained judge. *Compare* NMSA 1978, § 34-8A-4(B) (1993) (providing that a metropolitan judge must be "a member of the bar" and have "practiced in this state for a period of three years"), *and* § 34-8A-6(B), (C) (providing that the metropolitan court is a court of record for civil actions, criminal cases involving driving while under the influence, and domestic violence cases), *with* NMSA 1978, § 35-2-1 (1979, amended 2013) (providing that a magistrate judge must have "graduated from high school" or "attained the equivalent of a high school education"), *and* NMSA 1978, § 35-13-2(A) (1996) ("Appeals from the magistrate courts shall be tried de novo in the district court."). This decision also freed the State from having to retry the case, recall witnesses, or run the risk of losing evidence, and allows the district court more ease in managing its docket. Efforts aimed at improving the efficiency and economy of the operation of the most populous judicial district in this State appear to provide the rational basis for this distinction that the State argues is lacking. To the extent the State takes issue with these considerations as supporting the differences in appellate review, such policy determinations are not for this Court to make.

CONCLUSION

We conclude Section 34-5-8(A)(3) vests this Court with jurisdiction to hear appeals from a district court's on-record review of a metropolitan court decision, and that Section 39-3-3(A)(1) provides defendants

with a right to appeal to this Court and invoke that grant of jurisdiction. As a result, we deny the State's motion to dismiss. Defendant's appeal will proceed to be calendared on its merits.

IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

WE CONCUR:

M. MONICA ZAMORA, Judge

J. MILES HANISEE, Judge

Certiorari Granted, January 26, 2015, No. 35,063

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-034

Filing Date: December 1, 2014

Docket No. 32,909

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

THADDEUS CARROLL,

Defendant-Appellant.

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OPINION

WECHSLER, Judge.

Defendant Thaddeus Carroll appeals his conviction for driving under the influence of alcohol (DWI). Defendant was tried in the Bernalillo County Metropolitan Court and appealed to the district court, which affirmed. Defendant makes three arguments in favor of reversal: (1) that his conviction violated Rule 7-506 NMRA, which requires that a defendant be tried within 182 days of the latest of several triggering events; (2) that the metropolitan court improperly admitted the testimony of a prosecution witness; and (3) that the evidence was insufficient to sustain his conviction.

The crux of Defendant's argument regarding Rule 7-506 is that Defendant did not receive adequate notice of his trial. Defendant was mailed notice six days prior to the proceeding. The trial was scheduled for the very last day possible under Rule 7-506, and Defendant did not appear. Because Defendant missed the court date, the metropolitan court chose to issue a bench warrant for his arrest. The effect of the warrant was to toll the

calendar under Rule 7-506 and, upon Defendant's surrender to the jurisdiction of the court, provide an additional 182 days for trial. Defendant argues that he did not receive sufficient notice of his trial date, that the warrant was improper, and, therefore, the case should have been dismissed pursuant to Rule 7-506. We agree with Defendant that the notice provided of his trial date—six days by mail—was not sufficient and, therefore, we reverse and remand with instructions to the district court to dismiss this case with prejudice. We do not reach the other arguments.

BACKGROUND

Defendant was arrested on April 12, 2008 for aggravated DWI, first offense, and arraigned on April 14, 2008. The trial setting was continued twice because the State was not ready to proceed—first, because the arresting officer was on vacation and, second, because the officer did not appear at the proceeding. Noting that the State was twice unready to proceed and that the State did not make available witnesses for pre-trial interviews, Defendant moved to dismiss the case at the second setting. The metropolitan court granted the motion and dismissed the case without prejudice. That was on August 21, 2008.

On October 8, 2008, the State re-filed the dismissed complaint against Defendant. The metropolitan court set the trial for October 14, 2008, the last possible date to commence a trial under Rule 7-506. The metropolitan court sent both the notice of the re-filing and the new trial setting to Defendant by mail. These mailings were sent on October 8, 2008, six days prior to the trial date. Although Defendant's attorney was present at the trial, Defendant did not attend the proceeding. Again the State was not ready to proceed because the complaining officer did not appear. In consequence of Defendant's absence, the metropolitan court issued a bench warrant. Two days later, Defendant filed a motion to quash the bench warrant and dismiss the case pursuant to Rule 7-506. Defendant argued that six days notice by mail was insufficient and asserted that he only received the notice on the day of the proceeding. The metropolitan court denied Defendant's motion. Subsequently, Defendant filed a motion requesting that the bench warrant be cancelled or quashed and included an apology for his failure to appear. The metropolitan court granted this motion and cancelled the warrant.

At the trial setting on February 4, 2009, Defendant again argued that the case should be dismissed pursuant to Rule 7-506. Defendant pointed out that ten days notice is required for service of a summons, with three additional days for service by mail. The metropolitan court stated that Rule 7-205 NMRA—"the ten-day stuff"—did not apply to trials. The metropolitan court added that it could "set a trial the very next day [after notice.]" It denied Defendant's renewed motion to dismiss pursuant to Rule 7-506. Defendant was tried and found guilty of DWI, first offense. Defendant appealed to the district court, which affirmed.

STANDARD OF REVIEW

The application of Rule 7-506 to the facts of this case is a question of law that we review de novo. *State v. Maestas*, 2007-NMCA-155, ¶ 9, 143 N.M. 104, 173 P.3d 26; *see also State v. Donahoo*, 2006-NMCA-147, ¶ 2, 140 N.M. 788, 149 P.3d 104 (reviewing a district court interpretation of a metropolitan court rule de novo).

The bench warrant for Defendant was issued by the metropolitan court pursuant to Rule 7-207(A) NMRA. Rule 7-207(A) provides that a metropolitan court judge may issue a bench warrant when a person fails to appear at the time and place specified by the court. By the statutory term used for the grant of authority—"may"—the choice to issue a bench warrant is an exercise of discretion on the part of the issuing judge. As such, we review for an abuse of discretion.

RULE 7-506

Under Rule 7-506(B) and its sister rules for the municipal and magistrate courts—each frequently referred to as the six-month rule—the trial of a criminal defendant must commence within 182 days of the latest of several triggering events. *See also* Rule 8-506(B) NMRA (stating that the trial of a criminal defendant in municipal court must commence within 182 days of the latest of several triggering events); Rule 6-506(B) NMRA (same for magistrate court). Among the triggering events are arraignment and the surrender of a defendant after a failure to appear. Rule 7-506(B)(1) (arraignment); Rule 7-506(B)(5) (surrender in New Mexico); Rule 7-506(B)(6) (surrender in another state). The disposition of this case depends on whether Defendant's triggering event was his arraignment or his surrender to the court in response to the bench warrant. Whether arraignment or surrender was the triggering event pivots on whether the warrant was within the discretion of the metropolitan court.

Defendant contends that the metropolitan court abused its discretion when it issued a bench warrant on October 14, 2008 for failure to appear when Defendant was sent notice by mail only six days before the proceeding. Defendant points to two rules. Under Rule 7-104 NMRA, the general rule for notice of a hearing on a motion is five days with three extra days for service by mail. Under Rule 7-205, a summons to appear requires at least ten days notice with three additional days for service by mail. Defendant, arguing by analogy, contends that six days notice by mail of his trial date was inadequate because a hearing on a motion requires eight days notice by mail under our rules and a summons to appear requires thirteen days.

The State contends that the amount of notice is not relevant. The State argues that, by the plain language of Rule 7-207(A), the metropolitan court can issue a warrant if a person fails to appear at the time and place ordered by the court and, because Defendant did not appear on October 14, 2008 as ordered, the bench warrant was not improper. According to the State, upon the surrender of Defendant to the court, the 182-day countdown to commence trial under Rule 7-506 began anew.[1]

We do not agree with the State that the amount of notice given to a defendant to appear at a trial is irrelevant to whether a bench warrant for failure to appear is justified. The flaw in the State's position is highlighted by the statement of the metropolitan court that it could schedule a trial for the very day after notice was sent. Under the reasoning of the State, a defendant could be sent notice by mail to appear the next day and issued a warrant for failure to appear before the defendant even

[1]Implicit in the State's reasoning is the idea that the calendar was tolled under Rule 7-506 from the time the metropolitan court issued the bench warrant until Defendant surrendered to the court because he was a fugitive from justice from the time he did not appear. Otherwise, the 182-day period in which to commence trial would have expired after October 14, 2008.

received notice of the proceeding. An order to appear that, by design, defies compliance cannot be the basis of a legitimate warrant. This is especially true when, as here, the warrant for failure to appear is used as a lever to re-start the countdown to begin a trial under a rule intended to guarantee a defendant's right to a speedy trial.

Having determined that notice is a relevant consideration in this case, we turn to the question of whether the six-day notice by mail received by Defendant was sufficient. The State has offered no reason why Defendant should be offered less notice for his trial than the eight days by mail that would generally be required for a hearing on a motion, and we can think of none. *See* Rule 7-104(C), (D) (stating that notice of a motion hearing is not less than five days, generally, with three extra days for service by mail). Furthermore, because this case was re-filed after being dismissed, the notice sent to Defendant of his trial date is akin to a summons. *See Black's Law Dictionary* 1436 (6th ed. 1990) (recognizing that a summons to a criminal defendant commences the state's action and directs the individual to appear in court to answer the charge). A summons served by mail must be sent a minimum of thirteen days prior to the required appearance of a defendant. Rule 7-205(D). The notice provided to Defendant of his re-filed case and impending trial date—six days by mail—was not adequate. Because the notice offered to Defendant by the metropolitan court was not sufficient, the bench warrant for failure to appear was not within the discretion of the metropolitan court. Accordingly, after October 14, 2008, the time for the State to commence a trial expired under Rule 7-506(B).

Before concluding, we pause to observe the larger picture in this case. The facts cast a pall over the State's position. The State was never ready to try this case within the initial 182 days allowed under Rule 7-506(B), including on October 14, 2008, after the State re-filed the case just six days prior. At the trial setting on August 21, 2008, shortly after Defendant's motion to dismiss was granted, the State announced that it anticipated re-filing, yet chose not to re-file until October 8, 2008, a delay of about six weeks. When the State finally tried the case, about ten months after arraignment, it did so without the arresting officer whose absence ostensibly caused the delays in the first place. It is the burden of the State to bring a defendant to trial within the 182-day requirement. *State v. Granado*, 2007-NMCA-058, ¶ 14, 141 N.M. 575, 158 P.3d 1018. One purpose of the rule is to "effectuate a criminal defendant's right to a speedy trial." *State v. Savedra*, 2010-NMSC-025, ¶ 5, 148 N.M. 301, 236 P.3d 20. Although analytically distinct, the six-month rule is rooted in the right to a speedy trial articulated in the Sixth Amendment of the United States Constitution and Article II, Section 14 of the New Mexico Constitution. *Cf. State v. Garza*, 2009-NMSC-038, ¶ 43, 146 N.M. 499, 212 P.3d 387 (stating that one of the versions of our six-month rule was "implemented . . . in response to *Barker* [*v. Wingo*, 407 U.S. 514 (1972),]" in which the United States Supreme Court laid out the test for evaluating a potential speedy trial violation under the Sixth Amendment). In metropolitan court, if the State is unable to commence trial within 182 days, it can petition the court for extensions of time for up to thirty days total under Rule 7-506(C)(5). *See* Rule 7-506(C)(5) (allowing the court to grant extensions under "exceptional circumstances"). But to re-file a dismissed case just prior to the expiration of the 182-day period with the hope or intention of gaining an

additional 182 days does not comport with the spirit of the rule. *See Savedra*, 2010-NMSC-025, ¶ 5 (holding that strategic re-filing in district court "violate[d] the spirit of the six-month rule" (internal quotation marks and citation omitted)).

CONCLUSION

For the foregoing reasons, we reverse the judgment of the district court. We remand with orders to vacate the conviction of Defendant and dismiss this case with prejudice pursuant to Rule 7-506(E)(2).

IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR:

RODERICK T. KENNEDY, Chief Judge

JONATHAN B. SUTIN, Judge

Certiorari Granted, August 15, 2014, No. 34,805

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-035

Filing Date: June 9, 2014

Docket No. 31,682

STATE OF NEW MEXICO ex rel. GARY K. KING, ATTORNEY GENERAL,

Plaintiff-Appellant,

v.

BEHAVIORAL HOME CARE, INC., a New Mexico corporation,

Defendant-Appellee.

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OPINION

GARCIA, Judge.

The New Mexico Attorney General's Medicaid Fraud Control Unit brought action on behalf of the State against Behavioral Home Care, Inc. (BHC) alleging violations of the New Mexico Medicaid Fraud Act (the MFA), NMSA 1978, §§ 30-44-1 to -8 (1989, as amended through 2004), and breach of

contract. The issue before this Court involves whether the district court correctly dismissed the State's claims against BHC for failure to state a claim upon which relief can be granted. *See* Rule 1-012(B)(6) NMRA.

The State alleged that BHC's billing for Personal Care Option (PCO) services provided by certain caregivers for whom BHC had not fully complied with the Caregivers Criminal History Screening Act (CCHSA), NMSA 1978, §§ 29-17-2 to -5 (1998, as amended through 2005), constituted false, fraudulent, or excess payments under the MFA. The State further alleged that the same failure to comply with CCHSA screening requirements constituted a breach of contract by BHC. The State requested relief pursuant to Section 30-44-8 in the form of a recovery for any overpayments, civil penalties for each overpayment, civil penalties for each false representation, attorney fees, interest, and costs. In the two orders now being appealed by the State, the district court dismissed all of the State's claims.

While the MFA provides the vehicle for suit, federal Medicaid statutes and regulations define the requirements for Medicaid claims. To participate in the Medicaid program, federal law requires home healthcare providers to comply with all applicable federal, state, and local laws and regulations. *United States ex rel. Joslin v. Cmty. Home Health of Md., Inc.*, 984 F. Supp. 374, 376 (D. Md. 1997); *see* 42 U.S.C. § 1395bbb(a)(5) (2006); 42 C.F.R. § 484.12(a) (2012). It is BHC's compliance with the CCHSA that forms the primary basis for the dispute in this case. As we address in detail below, not all compliance issues translate into liability or fraud under the MFA. We hold that failure to comply with the CCHSA regulations does not support MFA liability in this case and affirm the district court's dismissal of the State's claims.

BACKGROUND

"Congress created the Medicaid program in 1965 to supplement the Social Security Act." *Starko, Inc. v. Presbyterian Health Plan, Inc.*, 2012-NMCA-053, ¶ 4, 276 P.3d 252, *cert. granted*, 2012-NMCERT-003, 293 P.3d 184. "The program provides medical assistance to persons whose income and resources are insufficient to meet the costs of necessary care and compels participating states to share the costs of administering the program with the federal government." *Id.* (internal quotation marks and citation omitted). "New Mexico is a participant state." *Id.* The New Mexico Human Services Department (HSD) is charged with administering Medicaid and maintaining a "statewide, managed care system to provide cost-efficient, preventive, primary[,] and acute care for [M]edicaid recipients." NMSA 1978, § 27-2-12.6(A) (1994); *see Starko*, 2012-NMCA-053, ¶ 28.

In order to function as a Medicaid service provider, BHC executed a contract known as an HSD Medical Assistance Division (MAD) 335 Provider Participation Agreement (PPA). The PPA is a payment related form signed by BHC and HSD that specifically states, "BY SIGNATURE, [BHC] AGREES TO ABIDE BY AND BE HELD TO ALL FEDERAL, STATE, AND LOCAL LAWS, RULES, AND REGULATIONS, INCLUDING, BUT NOT LIMITED TO THOSE PERTAINING TO MEDICAID AND THOSE STATED HEREIN." BHC also contracted with HSD as part of the Aging and Long Term Services Department Disabled and Elderly Waiver Program to provide in-home PCO caregiver services for elderly and disabled Medicaid

recipients. BHC agreed in its Medicaid contracts to provide and submit reimbursement claims for Medicaid funded services to the Medicaid eligible population in accordance with all applicable state and federal Medicaid laws and the regulations and standards of the New Mexico Medicaid Program, including, without limitation, the CCHSA. *See* §§ 29-17-2 to -5; 7.1.9.1 to .11 NMAC (01/01/2006) (screening requirements); 8.351.2.9 to .12 NMAC (07/01/2003, amended 01/01/2014) (sanctions and remedies).

The New Mexico Legislature enacted the CCHSA "to ensure to the highest degree possible the prevention of abuse, neglect[,] or financial exploitation of care recipients," including Medicaid recipients, by caregivers who provided "direct care or routine and unsupervised physical or financial access to any care recipient served by that provider[.]" Sections 29-17-3, -4(B). It provides that a care provider may not employ a caregiver unless the caregiver has first submitted to a request for a nationwide criminal history screening. Section 29-17-5(C). The screening requirement applies to caregivers who would provide services to any patient, not just Medicaid patients, irrespective of whether the patient paid out of pocket or with private insurance. Section 29-17-4(B), (D). Statutory compliance only requires submission of the caregiver's criminal history application, not receipt of screening results, prior to billing for the PCO caregiver services. Section 29-17-5(E). Should a caregiver have a disqualifying criminal conviction in his or her history, the CCHSA provides for a reconsideration procedure. Section 29-17-5(F). During the pendency of the reconsideration period, the caregiver may continue to provide caregiver services on behalf of the healthcare provider. *Id.*

The New Mexico Legislature enacted the MFA and provided both a definition for Medicaid fraud in Section 30-44-7(A) and also made the falsification of documents a fourth degree criminal offense under Section 30-44-4. Pertinent to this case, Medicaid fraud "consists of: . . . presenting or causing to be presented for allowance or payment with intent that a claim be relied upon for the expenditure of public money any false, fraudulent, excessive, multiple[,] or incomplete claim for furnishing treatment, services[,] or goods[.]" Section 30-44-7(A)(3). Falsification of documents "consists of:

> . . . knowingly making or causing to be made a misrepresentation of a material fact required to be furnished under the program or knowingly failing or causing the failure to include a material fact required to be furnished under the [Medicaid] program in any record required to be retained in connection with the program pursuant to the [MFA] or regulations issued by the department for the administration of the program, or both; or . . . knowingly submitting or causing to be submitted false or incomplete information for the purpose of receiving benefits or qualifying as a provider."

Section 30-44–4(A).

Between approximately April 2004 and July 2009, BHC electronically submitted over 1,800 PCO billing claims for services provided by certain caregivers whose criminal history screening applications had not been submitted as required by the CCHSA (the Unscreened Caregivers). BHC submitted its Medicaid reimbursement claims pursuant to an

Electronic Claim Submission Agreement (the Electronic Agreement). The Electronic Agreement required BHC to "acknowledge[] that claims will be paid from [f]ederal and [s]tate funds" and that "anyone who misrepresents or falsifies" any information relating to a claim may be subject to a fine and/or imprisonment under federal and state law. By submitting a claim electronically, BHC was also required to agree that the claim contained "true, accurate, and complete information" and that "[t]he cashing of each check attached to each Remittance Advice [was] a representation and certification that [BHC] represented the claim for services . . . and that the services were rendered . . . ." BHC was not required to expressly certify compliance with all Medicaid contractual provisions or all applicable state and federal regulations in order to submit the Electronic Agreement.

The State asserts two MFA causes of action against BHC as a result of its billing claims for the services provided by the Unscreened Caregivers. First, the State maintains that BHC's PCO claims for the Unscreened Caregivers' services constituted falsification of documents as defined in MFA Section 30-44-4(A) and/or Medicaid fraud under Section 30-44-7(A). The State specifically alleges that each claim for payment prior to the completion of the Unscreened Caregivers' criminal history screening was a false or fraudulent claim under these two statutory provisions. The State's second cause of action maintains that BHC's PCO payment claims for the Unscreened Caregivers' services were in breach of BHC's MAD 335 PPA contracts with HSD. The State argues that it was entitled to recover the 1,800 PCO claims submitted for the Unscreened Caregivers' services as overpayments and civil penalties under Section 30-44-8(A) of the MFA.

The district court dismissed both of the State's claims for failure to state a claim upon which relief can be granted. *See* Rule 1-012(B)(6). Its first order granted BHC's Rule 1-012(B)(6) motion to dismiss the State's first cause of action (statutory recovery of Medicaid overpayments under the MFA). The court held that the State may not recover the claimed MFA overpayments in addition to a claim for the recovery of civil penalties under Section 30-44-8(A)(2). The district court determined that Section 30-44-7(A)(3) was the only applicable liability provision that required BHC to comply with the CCHSA and its regulations prior to billing Medicaid for in-home caregiver services. It explained, however, that BHC's non-compliance with the CCHSA and its regulations was not actionable under the MFA because submission of criminal history screening applications for Medicaid caregivers was a "condition[] of participation in Medicaid" rather than a "condition[] of [Medicaid] payment." The district court's second order granted BHC's Rule 1-012(B)(6) motion to dismiss the State's amended cause of action (breach of contract for Medicaid overpayments). Because the Medicaid regulations were not applicable to the State's claims, the district court reviewed BHC's breach of contract claim under the common law. The court determined that the State failed to state a claim for relief under Rule 1-012(B)(6) because of its failure to allege facts that would support any recoverable damages for breach of contract.

STANDARD OF REVIEW

A Rule 1-012(B)(6) motion tests the legal sufficiency of a party's allegations, so we review de novo a district court's granting of

such a motion. *Padwa v. Hadley*, 1999-NMCA-067, ¶ 8, 127 N.M. 416, 981 P.2d 1234; *see Padilla v. Wall Colmonoy Corp.*, 2006-NMCA-137, ¶ 7, 140 N.M. 630, 145 P.3d 110 (recognizing that "a Rule1-012 B)(6) motion tests the legal sufficiency of the complaint, not the facts that support it" (internal quotation marks and citation omitted)). If a plaintiff is not entitled to recover under any theory of the facts alleged in the complaint, it is appropriate to grant a motion for dismissal under Rule 1-012(B)(6). *Padilla*, 2006-NMCA-137, ¶ 7. On appeal we accept as true all well-pleaded factual allegations and resolve all doubts in favor of the sufficiency of the complaint. *Padwa*, 1999-NMCA-067, ¶ 8.

Our analysis requires us to review the district court's interpretation of the MFA. Questions of statutory interpretation are reviewed de novo on appeal. *N.M. Indus. Energy Consumers v. N.M. Pub. Regulation Comm'n*, 2007-NMSC-053, ¶ 19, 142 N.M. 533, 168 P.3d 105. In discerning the Legislature's intent, "we are aided by classic canons of statutory construction" and "look first to the plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different one was intended." *Id.* ¶ 20. "When statutory language is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation." *Anadarko Petroleum Corp. v. Baca*, 1994-NMSC-019, ¶ 9, 117 N.M. 167, 870 P.2d 129 (internal quotation marks and citation omitted). Only if an ambiguity exists will we proceed further in our statutory construction analysis. *See State v. Maestas*, 2007-NMSC-001, ¶ 14, 140 N.M. 836, 149 P.3d 933 ("Unless ambiguity exists, [the appellate courts] must adhere to the plain meaning of the [statutory] language.").

DISCUSSION

I. MFA Overpayment and Penalty Claims

We first address the district court's rulings that the State's statutory claims for civil penalties and overpayments were not legally sufficient under the MFA. The State argues that BHC violated the MFA because of an implied certification that should be recognized under New Mexico law and an alleged violation of the terms of BHC's Medicaid contracts when it submitted the Electronic Agreement for the payment of the services provided by the Unscreened Caregivers. The State asserts that BHC knew the Unscreened Caregivers' services did not comply with New Mexico CCHSA requirements and that it was in breach of the MAD 335 PPA contracts. The legal issue raised by this allegation is whether BHC's failure as a Medicaid provider to comply with certain CCHSA screening application requirements constitutes billing and payment fraud under the MFA and exposes BHC to liability under the MFA. This legal issue arises as a matter of first impression in New Mexico.

1. Applicable Liability Provisions Under the MFA

As a preliminary matter, we first address the applicability of the State's attempt to impose MFA liability under Section 30-44-4(A) for falsification of documents and under Section 30-44-7(A) for Medicaid fraud. In the proceedings below, the district court determined that Section 30-44-7(A)(3) was the only liability provision in the MFA that was "potentially applicable" to the State's argument. Although the State summarily argues on appeal that BHC's conduct also violated Section 30-44-4(A) of the MFA, it

failed to then develop a substantive or legally articulate challenge to the district court's determination that Section 30-44-4 was inapplicable to its claims. We decline to address this inarticulate argument addressing Section 30-44-4(A). *See Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 70, 309 P.3d 53 ("It is of no benefit either to the parties or to future litigants for [the appellate courts] to promulgate case law based on our own speculation rather than the parties' carefully considered arguments."). We will therefore consider the State's argument only as it pertains to Medicaid fraud under Section 30-44-7(A)(3) of the MFA.

2. Liability for Medicaid Fraud Based on a Regulatory Violation Alone

The State alleges that BHC committed Medicaid fraud because it received payments for services that it knew were not provided in compliance with state licensing laws and regulations. To avoid dismissal of this allegation, the State must establish that BHC (1) presented false or fraudulent claims for payment to HSD, and (2) that BHC intended for HSD to rely on the false or fraudulent claims for purposes of reimbursement. *See* § 30-44-7(A)(3) (defining Medicaid fraud as "presenting or causing to be presented for allowance or payment with intent that a claim be relied upon for the expenditure of public money any false, fraudulent, excessive, multiple[,] or incomplete claim for furnishing treatment, services[,] or goods"). It is not necessary to address the intent element of the statute on appeal. The question we address is whether regulatory compliance with the CCHSA was a material condition of HSD payment for the Medicaid services, and therefore, whether alleging that BHC submitted false certifications of regulatory compliance for the purpose of receiving HSD payments states a claim for relief under Section 30-44-7(A)(3).

Although this issue is novel, we are not without guidance. With respect to the statutory language at issue in this litigation, pursuing Medicaid fraud under the MFA is substantively similar to claims pursued under the federal False Claims Act (FCA). *See* 31 U.S.C. § 3729(a)(1)(A) (2006) (creating civil liability for any person who "knowingly presents, or causes to be presented" to the government "a false or fraudulent claim for payment or approval"); *see also* Pamela Bucy et al., *States, Statutes, & Fraud: A Study of Emerging State Efforts to Combat White Collar Crime*, 31 Cardozo L. Rev. 1523, 1535 (2010) (noting that many states' false claims statutes were passed in recent years, spurred by Congress' "financial incentive for states to pass FCAs that mirror the federal FCA"). Given this analogous language, both parties have relied on federal case law interpreting the meaning of a false or fraudulent claim under the federal FCA.

To address whether the State has identified Medicaid fraud as defined by Section 30-44-7(A)(3), we shall also reference case law interpreting the meaning of a false or fraudulent claim under the FCA. New Mexico does not necessarily follow federal precedent in every instance. *See Ocana v. Am. Furniture Co.*, 2004-NMSC-018, ¶ 23, 135 N.M. 539, 91 P.3d 58 ("Our reliance on the methodology developed in the federal courts, however, should not be interpreted as an indication that we have adopted federal law as our own." (internal quotation marks and citation omitted)); *Charles v. Regents of N.M. State Univ.*, 2011-NMCA-057, ¶ 15, 150 N.M. 17, 256 P.3d 29 (noting that our appellate courts look to federal decisions for guidance but emphasizing that we have not adopted,

wholesale, federal decisions that may be helpful in deciding a particular case). The federal cases referenced by the parties in this case have provided helpful guidance.

"The FCA recognizes two types of actionable claims—factually false claims and legally false claims." *United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 543 F.3d 1211, 1217 (10th Cir. 2008). A factually false claims case is relatively straightforward, arising where the government payee has submitted reimbursement claims for unnecessary services or those that were never provided. *Id.* By contrast, a claim based on an alleged legal falsehood arises where the government payee "has certified compliance with a statute or regulation as a condition to government payment, yet knowingly failed to comply with such statute or regulation." *Id.* (emphasis, alteration, internal quotation marks, and citation omitted). In this case, the State does not assert that BHC billed for services that were not rendered or necessary—a factually false claim. Instead, the State raises a claim based on a legal falsehood. The State claims that BHC impliedly submitted a legally false claim because it attempted to collect payment from the government for services provided by the Unscreened Caregivers who it knew were not in compliance with the CCHSA screening application requirements. *See United States ex rel. Wilkins v. United Health Grp., Inc.*, 659 F.3d 295, 305 (3d Cir. 2011) (explaining that an implied false certification claim under the FCA "is premised on the notion that the act of submitting a claim for reimbursement itself implies compliance with governing federal rules that are a precondition to payment" (internal quotation marks and citation omitted)).

The State essentially argues that because BHC once certified that it complied with all state regulations to originally qualify as a Medicaid home healthcare provider and facility, BHC is continually liable under the MFA for each failure to later adhere to all the original certification requirements and regulations. BHC concedes that it "must comply with a host of regulations contained in 8.315 [NMAC], including the performance of criminal history screening on prospective caregivers" in order to participate as a provider of PCO services. However, BHC contends that violations of state qualification and licensing regulations are not actionable under the MFA, even where a healthcare provider certifies compliance with all state laws, because Medicaid reimbursement is not conditioned on compliance with all such regulations. We agree.

The success of a legally false certification claim under the FCA depends on whether it is based on "conditions of participation" in the Medicare program (which do not support an FCA claim) or on "conditions of payment" from Medicare funds (which do support FCA claims). *Wilkins*, 659 F.3d at 309; *Conner*, 543 F.3d at 1220; *United States ex rel. Mikes v. Straus*, 274 F.3d 687, 701-02 (2d Cir. 2001). The claim will fail unless compliance with the allegedly violated state law or regulation is a condition of the government's payment of the claim. *See, e.g.*, *Mikes*, 274 F.3d at 697; *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 902 (5th Cir. 1997); *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266-67 (9th Cir. 1996); *United States ex rel. Wall v. Vista Hospice Care, Inc.*, 778 F. Supp. 2d 709, 720 (N.D. Tex. 2011); *United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 459 F. Supp. 2d 1081, 1086 (D. Kan. March 4, 2006). "A violation concerns a condition

of payment if such violation might cause the government to actually refuse payment." *United States ex rel. Spay v. CVS Caremark Corp.*, 913 F. Supp. 2d 125, 147 (E.D. Pa. 2012) (alteration, internal quotation marks, and citation omitted); *see Chesbrough v. VPA, P.C.*, 655 F.3d 461, 468 (6th Cir. 2011) ("[I]t is not the violation of a regulation itself that creates a cause of action under the FCA. Rather, noncompliance constitutes actionable fraud only when compliance is a prerequisite to obtaining payment."); *see also United States ex rel. Landers v. Baptist Mem'l Health Care Corp.*, 525 F. Supp. 2d 972, 978 (W.D. Tenn. 2007) ("Conditions of [p]articipation are quality of care standards directed toward[] an entity's continued ability to participate in the Medicare program rather than a prerequisite to a particular payment.").

Though we have yet to address the viability of an implied false certification claim under the MFA, we consider the federal precedent instructive. Like the FCA, Section 30-44-7(A)(3) imposes a materiality element which requires that the false or fraudulent certification be integral to the government's payment decision. On appeal, we recognize that the State does not dispute this materiality requirement. Rather, it argues that the federal distinction between conditions of payment and conditions of participation is irrelevant in this case because BHC's certification of CCHSA compliance was both a material prerequisite for participation in the Medicaid program and a condition of Medicaid reimbursement and payment. *See Conner*, 543 F.3d at 1222 ("[S]ome regulations or statutes may be so integral to the government's payment decision as to make any divide between conditions of participation and conditions of payment a distinction without a difference." (internal quotation marks and citation omitted)).

The State cites *New York v. Amgen Inc.*, 652 F.3d 103, 115 (1st Cir. 2011), to support its assertion that CCHSA compliance should be considered a condition of Medicare payment because such compliance is a mandatory prerequisite to ever receiving payment. *Amgen* is readily distinguishable from the instant case. The *Amgen* case involved false and fraudulent claims to state Medicaid agencies that arose from alleged kickbacks to healthcare providers. *Id.* at 105. Kickbacks are specifically recognized as a form of fraud in the provider participation agreements signed by healthcare providers. *Id.* at 114 (citing NMSA 1978, § 27-11-3(B)(6), (C)(3)). In *Amgen* it was unnecessary for the federal court to distinguish between conditions of payment and conditions of participation because the contract provisions at issue explicitly identified the fraudulent kickback conduct as a condition of Medicaid payment. 652 F.3d at 115 ("[T]he New Mexico agreement requires providers to acknowledge that non-compliance with anti-kickback laws vitiates a provider's ability to get its claims paid.").

More significantly, the *Amgen* holding must also be reconciled with the well-established principle that the FCA is not a vehicle for regulatory compliance. *See, e.g.*, *Hopper*, 91 F.3d at1267; *see also United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1020 (7th Cir. 1999) ("[T]he FCA is not an appropriate vehicle for policing technical compliance with administrative regulations."). Thus, the overwhelming majority of courts have held that a violation of the underlying statute or regulation by itself does not create a false certification cause of action under the FCA. *See United States v. McNinch*, 356 U.S. 595, 599 (1958) (addressing an application for credit insurance and recognizing that the FCA "was not

designed to reach every kind of fraud practiced upon the [g]overnment"); *United States ex rel. Graves v. ITT Educ. Servs., Inc.*, 284 F. Supp. 2d 487, 501 (S.D. Tex. 2003) ("A general statement of adherence to all regulations or statutes governing participation in a program through which federal funds are received is insufficient as a basis of [FCA] liability."); *see also Wall*, 778 F. Supp. 2d. at 720 ("A sustainable FCA allegation premised on a false certification of compliance with statutory or regulatory requirements must be based upon a 'condition of payment,' not a 'condition of participation.' "). This reluctance to expand the intended scope of the FCA is particularly evident where a government payee has failed to comply with state regulations like the CCHSA screening requirement at issue here. *See United States ex rel. Swan v. Covenant Care, Inc.*, 279 F. Supp. 2d 1212, 1221 (E.D. Cal. 2002) ("The prevailing law is that regulatory violations do not give rise to a viable FCA action unless government payment is expressly conditioned on a false certification of regulatory compliance." (internal quotation marks and citation omitted)). The federal courts have repeatedly held that regulatory deficiencies that are not material to government payment do not support a false claim action. *Id.* (explaining that only two district courts "have held that submitting Medicare or Medicaid claims for services that fail to meet the relevant statutory standard of care can constitute actionable fraud under the FCA" and that "these questionable holdings have not been adopted by the Ninth Circuit or any other appellate court"); *see United States ex rel. Siewick v. Jamieson Sci. & Eng'g, Inc.*, 214 F.3d 1372, 1376 (D.C. Cir. 2000) (noting that "all courts of appeals to have addressed the matter, [hold] that a false certification of compliance with a statute or regulation cannot serve as the basis for a qui tam action under the FCA unless payment is conditioned on that certification" (emphasis omitted)); *see, e.g., United States ex rel. Willard v. Humana Health Plan of Texas Inc.*, 336 F.3d 375, 379, 382 (5th Cir. 2003); *Lamers*, 168 F.3d at 1016-17, 1020.

Public policy recognizes that the failure to strictly comply with a regulatory scheme as complicated as the MFA or the FCA does not always provide grounds for a fraudulent payment suit, especially without taking into account the nature of the noncompliance or the material aspects of the regulation. *See Conner*, 543 F.3d at 1221 ("[A]lthough the government considers substantial compliance a condition of ongoing Medicare *participation*, it does not require perfect compliance as an absolute condition to receiving Medicare *payments* for services rendered."); *Hopper*, 91 F.3d at 1267. Adoption of the State's theory of implied compliance could have a broad impact on all providers of Medicaid services. For this reason, courts addressing compliance issues under the FCA have not supported such an expansive interpretation of liability. As a result, we will not automatically conclude that every request for payment accompanied by a statement of compliance with all applicable regulations is material to the government's subsequent payment to the provider and thereby actionable as Medicaid fraud under the MFA.

An alleged violation of a state Medicaid licensing regulation does not automatically render a Medicaid provider ineligible to receive Medicaid payments. The MFA does not support such expansive liability in the absence of an underlying statute or regulation that conditions payment on compliance with the certification. Absent this requirement, the MFA could turn "into a

blunt instrument to enforce compliance with all . . . regulations [rather than] only those regulations that are a precondition to payment." *Wilkins*, 659 F.3d at 307 (omission in original) (internal quotation marks and citation omitted). The mere fact that BHC violated the statutory hiring requirements outlined by the CCHSA does not automatically create a violation of a condition of Medicaid payment that supports a Medicaid fraud cause of action under the MFA. Instead, the appropriate framework for resolving Medicaid fraud false certification issues is to examine whether the defendant's compliance with the statutes and regulations in question was a condition to receiving payment from the government. *Hopper*, 91 F.3d at 1266-68; *see also Thompson*, 125 F.3d at 902-03 (holding that the FCA is implicated where the government conditions payment upon the certification of compliance with regulations); *United States ex rel. Lamers v. City of Green Bay*, 998 F. Supp. 971, 985 (E.D. Wis. 1998) (The "key inquiry is whether the claim in question has the practical purpose and effect, and poses the attendant risk, of inducing wrongful payment." (internal quotation marks and citation omitted)). Accordingly, the success of the State's appeal depends on whether compliance with the CCHSA was a condition of HSD payment for services rendered by BHC.

3. Failure to Comply with CCHSA Screening Requirements

In the instant case, the State asserts that HSD payment was conditioned on BHC billing for services conducted by "qualified" caregivers—those who had been hired in compliance with CCHSA screening requirements. It asserts that HSD would not have paid BHC for services provided by the Unscreened Caregivers had it known that they were not "qualified" under the terms of the CCHSA. But, a disqualifying criminal history under the CCHSA does not automatically affect the caregiver's qualifications to provide caregiver services. Section 29-17-5(F) (allowing for continued employment of a disqualified caregiver and reconsideration of a disqualifying conviction during the subsequent reconsideration proceedings). The State has neither alleged any facts to support an argument that the Unscreened Caregivers provided a level of care that violated reasonable healthcare standards or requirements, nor that care from the Unscreened Caregivers resulted in the "abuse, neglect[,] or financial exploitation of care recipients." Section 29-17-3. While the State asserts that BHC had a policy of employing "unqualified" caregivers, the State could not allege that HSD would have been entitled to withhold payment solely because the Unscreened Caregivers had disqualifying criminal convictions in their histories.

Even when a care provider has expressly certified compliance with all state regulations, the New Mexico Medicaid regulations make clear that not every regulatory deficiency constitutes actionable false or fraudulent conduct under the MFA. *See* 8.351.2.11 NMAC. For example, the statutes and regulations allow, but do not require, HSD to sanction a provider for non-fraudulent misconduct, including a violation of the CCHSA. Section 29-17-5(L); 8.351.2.11 NMAC. If HSD determines that termination from the Medicaid program is the appropriate sanction for a provider's non-compliance with a condition of participation, it must allow the provider notice and an opportunity to correct the identified misconduct before termination. *See* 8.351.2.9 NMAC; 8.31.2.10(B)(1), (3) NMAC; *see also*

42 C.F.R. § 488.28 (2013) (granting a care provider a reasonable time to achieve compliance with conditions of participation); *Mikes*, 274 F.3d at 702 ("The fact that [the statute] permits sanctions for a failure to maintain an appropriate standard of care only where a dereliction occurred in 'a substantial number of cases' or a violation was especially gross and flagrant makes it evident that the section is directed at the provider's continued eligibility in the Medicare program, rather than any individual incident of noncompliance." (alterations, internal quotation marks, citation omitted)); *Hopper*, 91 F.3d at 1267 (holding that the FCA may not be used as a substitute for administrative remedies where regulatory compliance is "not a *sine qua non* [for the] receipt of state funding"). The regulations require HSD to impose the ultimate sanction of termination when a "provider has a previous suspension from [Medicaid] with failure to correct identified deficiencies[,]" or immediately when a provider is convicted of Medicare fraud. 8.351.2.11(E)(1)(a), (b) NMAC. The fact that HSD may choose to institute a plan of correction or other alternative sanctions before addressing the provider's participation in the program makes it evident that the MFA does not require perfect compliance at all times with regulatory standards such as those instituted by the CCHSA. *See Conner*, 543 F.3d at 1220-21 (recognizing that provider noncompliance with the FCA does not immediately suspend Medicare payments unless such noncompliance is a recognized condition of payment); *see also United States ex rel. N.M. v. Deming Hosp. Corp.*, ___ F. Supp. 2d. ___, 2013 WL 7046410, at *7, 9 (D.N.M. Nov. 2013) ("[A]lthough the government considers substantial compliance [with applicable regulations] a condition of ongoing Medicare participation, it does not require perfect compliance as an absolute condition of receiving Medicare payments for services rendered." (internal quotation marks and citation omitted)).

The State's position that compliance with the CCHSA requirements is an implied condition of payment is only possible by weaving together isolated phrases from several sections in a complex system of Medicaid regulation. This creative approach to implied compliance is not supported by the structure of the statutory or regulatory scheme. To the contrary, CCHSA permits providers to employ a caregiver with a disqualifying criminal history during the pendency of an administrative reconsideration and, even after reconsideration, if "the conviction does not directly bear upon the applicant's, caregiver's[,] or hospital caregiver's fitness for the employment." Section 29-17-5(F). Strict compliance cannot be reconciled with these exceptions allowed under CCHSA.

The State has correctly identified certain caregiver qualification deficiencies that are recognized as preconditions for Medicaid payment. These deficiencies include the lack of necessary caregiver certifications and inadequate training. However, nothing in the State's complaint alleges that there were any deficiencies with the certifications or training of the Unscreened Caregivers. The State merely argues that—by virtue of BHC's failure to submit criminal history screenings prior to billing—the Unscreened Caregivers were not fully qualified to perform Medicaid services.

Unlike failures to meet minimum certification and training requirements to adequately perform caregiving services, the State has presented no authority that the criminal background screenings required by CCHSA constitute an equivalent performance-

based deficiency that must be recognized as a condition of payment. *See Mikes*, 274 F.3d at 697 ("Since the [FCA] is restitutionary and aimed at retrieving ill-begotten funds, it would be anomalous to find liability when the alleged noncompliance would not have influenced the government's decision to pay."); *see also State v. Guerra*, 2012-NMSC-014, ¶ 21, 278 P.3d 1031 (emphasizing that where a party "cites no authority from any jurisdiction supporting [its] argument, [then the appellate courts] may conclude that no such authority exists"). BHC's compliance with CCHSA thus raises only one serious question—whether BHC fell below the requirements for Medicaid participation as a qualified provider. Because BHC was recognized as a qualified provider at the time it was paid for the services provided by the Unscreened Caregivers, its qualified provider status is not at issue in these proceedings. The State was not pursuing a termination of BHC's participation as a qualified provider. Accordingly, there is no evidence that Medicaid provider payments were conditioned upon compliance with CCHSA regulations. We conclude that BHC's practice of failing to comply with CCHSA was not in violation of the MFA as a condition for payment of Medicaid services. Accordingly, we affirm the district court's ruling on this issue.

4. Section 30-44-8(A) Overpayments

We now address the State's contention that the district court erred when it held that the State could not seek the remedy of reimbursement of Medicaid overpayments under Section 30-44-8(A). The State asserts that "[t]he plain language of Section 30-44-8(A) requires consideration regarding whether BHC received program payments in violation of the MFA." We have already concluded that BHC's failure to comply with CCHSA regulations was not actionable under the MFA. As such, Section 30-44-8(A) is equally inapplicable to the State's claims and does not provide a separate statutory basis for recovery of alleged overpayments. *See* § 30-44-8(A) (creating liability for payments obtained "by reason of a violation of the [MFA]"). For this reason, we need not address at this time whether the MFA provides for civil recovery of Medicaid overpayments in addition to other penalties provided by law.

II. Breach of Contract Claims

The State also appeals the district court's Rule 1-012(B)(6) dismissal of its breach of contract claims against BHC. The State alleged that BHC breached its MAD 335 PPA by filing Medicaid claims and retaining the Medicaid payments for services rendered to patients by the Unscreened Caregivers. While it is true that BHC's failure to submit the required criminal screening requests for the Unscreened Caregivers constituted a breach of its MAD 335 PPA contract, the real issue on appeal is whether the State sought any remedy for this breach that is allowed by the law. The State challenges the district court's application of UJI 13-843 NMRA to its breach of contract claim.

We have already concluded that the district court correctly found that the State failed to allege facts that would support any recoverable damages under federal and state Medicaid regulatory schemes. Thus, the only remedy available for the State's breach of contract claim is provided under the common law. *See* UJI 13-822 NMRA. But the purpose of allowing damages for a common law breach of contract is to restore to the injured party what was lost by the breach and what he or she reasonably could have expected to gain had there been no breach. UJI 13-843.

Accordingly, BHC sought dismissal by the district court, arguing that "the State has suffered no damages as a result of BHC's billing . . . for services rendered" by the Unscreened Caregivers. BHC's motion for dismissal questioned the State's ability to recover in damages "money that it paid for services it actually received." In response, the State argued that it did not waive any rights to recover damages for breach of contract under the MFA. However, it did not address BHC's argument that the State could not "support any actual damages in contract based upon BHC's conduct of billing for [the U]nscreened [C]aregivers' services."

The State in this case pursued only a reimbursement remedy under the MFA that is inapplicable under the facts of the case. Even though BHC breached its MAD 335 PPA contract, its allegedly false certifications were, under the MFA circumstances of this case, not legally material to HSD's ongoing decision to pay BHC for services provided by the Unscreened Caregivers. If the State wished to contest the accuracy of BHC's statement in its motion to dismiss, that the State suffered no recoverable damages as a result of BHC's breach of contract, then the State was required to so by identifying a basis that entitled it to relief. *See Hovet v. Lujan*, 2003-NMCA-061, ¶ 8, 133 N.M. 611, 66 P.3d 980. Although the record indicates that the State filed a brief in opposition to BHC's motion to dismiss, it did not contest BHC's statement that the State could not recover damages for services that it actually received or otherwise establish that the pleadings told "a story from which the essential elements [that are a] prerequisite to the granting of the relief sought can be found or reasonably inferred." *Derringer v. State*, 2003-NMCA-073, ¶ 5, 133 N.M. 721, 68 P.3d 961 (omissions, internal quotation marks, citation omitted). Other jurisdictions recognize that in the absence of pleading allegations sufficient to establish recoverable damages or relief that might be granted, the plaintiff may not defeat a motion to dismiss. *See Aimis Art Corp. v. N. Trust Secs., Inc.*, 641 F. Supp. 2d 314, 319 (S.D.N.Y. 2009); *see also Dloogatch v. Brincat*, 920 N.E.2d 1161, 1166 (Ill. App. Ct. 2009); *Greenwald v. Burns & Levinson, LLP*, 1 N.E.3d 294 (Mass. App. Ct. 2014) (non-precedential). Because the sole remedy sought by the State for BHC's breach of contract was based on inapplicable reimbursement provisions of the MFA, the district court did not err when it ruled in favor of BHC on the State's breach of contract claim that alleged no other damages that were recoverable.

The MFA is essential to policing the integrity of the State's dealings with those to whom it pays money. At the same time, the federal penalties afforded by the FCA are not interchangeable with remedies for ordinary breaches of contract claims. *See United States v. Southland Mgmt. Corp.*, 326 F.3d 669, 684 (5th Cir. 2003) (addressing factual issues for summary judgment but noting and distinguishing the nature of FCA claims and remedies from ordinary breach of contract claims). While we do not condone a care provider's alleged failure to adhere to CCHSA requirements, the State has failed to allege common law contract remedies or damages where it incurred no identified harm to PCO patients and enjoyed the benefit of the BHC's services that were provided. Liability cannot be imposed absent an alleged injury and a remedy. Neither the district court nor this Court have been alerted to any other non-MFA remedy sought by the State under its breach of contract claim. It was therefore not necessary for the district court to determine whether BHC could be liable to the State for a different remedy that the State is not

pursuing under its breach of contract theory in this case. As a result, we affirm the district court's ruling to dismiss the State's breach of contract claim under Rule 1-012(B)(6).

CONCLUSION

For the foregoing reasons, we affirm the district court's Rule 1-012(B)(6) dismissals of the State's complaint against BHC.

IT IS SO ORDERED.

TIMOTHY L. GARCIA, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

MICHAEL E. VIGIL, Judge

Certiorari Granted, January 26, 2015, No. 34,974

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-036

Filing Date: October 27, 2014

Docket No. 33,002

CATHY MOSES and PAUL F. WEINBAUM,

Plaintiffs-Appellants,

v.

HANNA SKANDERA, ACTING SECRETARY OF EDUCATION and NEW MEXICO PUBLIC EDUCATION DEPARTMENT,

Defendants-Appellees,

and

ALBUQUERQUE ACADEMY, et al.,

Defendants-Intervenors-Appellees.

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OPINION

WECHSLER, Judge.

Under the Instructional Material Law, NMSA 1978, §§ 22-15-1 to -14 (1967, as amended through 2011) (IML), the State of New Mexico Public Education Department (the Department) purchases and distributes instructional material to school districts, state institutions, and private schools as agents for the benefit of eligible students. Section 22-15-5, -7(B). Plaintiffs, Cathy Moses and Paul F. Weinbaum, challenge the constitutionality of the IML with respect to the purchase and distribution of instructional material to private schools. They rely upon the New Mexico Constitution Article IX, Section 14 (prohibiting the state from directly or indirectly lending or pledging "its credit or mak[ing] any donation to or in aid of any person, association or public or private corporation"); Article XII, Section 3 (prohibiting funds from use in support of sectarian, denominational, or private school); Article IV, Section 31 (prohibiting appropriation for educational purposes "to any person, corporation, association, institution or community, not under the absolute control of the state"); and Article II, Section 11 (granting the freedom to worship God according to one's own conscience and prohibiting the support of any religious sect or denomination). Plaintiffs further contend that *Zellers v. Huff*, 1951-NMSC-072, 55 N.M. 501, 236 P.2d 949, is controlling precedent in this case.

The district court rejected Plaintiffs' arguments and granted summary judgment to Defendants Hanna Skandera, Acting Secretary of Education, and New Mexico Public Education Department. We hold that *Zellers* is not controlling and that the IML does not violate the New Mexico Constitution. We therefore affirm the district court's summary judgment.

PROCEDURAL BACKGROUND

Plaintiffs filed a verified complaint seeking a declaratory judgment as to the constitutionality of the IML. After Defendants answered, Plaintiffs filed a motion for summary judgment. At a hearing on the motion for summary judgment, the district court stated that it intended to grant the motion based on *Zellers*. Intervenors, the Albuquerque Academy, Anica and Maya Benia, the New Mexico Association of Nonpublic Schools, Rehoboth Christian School, St. Francis School, Sunset Mesa School, and Hope Christian School, then filed a motion to intervene. After Plaintiffs withdrew their initial opposition to intervention, the district court granted intervention and ordered additional briefing concerning the applicability of *Zellers*. The district court held a second hearing on the motion for summary judgment, reversed its prior ruling, and denied Plaintiffs' motion for summary judgment. It entered an order granting summary judgment to Defendants.

THE IML

The IML emanates from attempts by the New Mexico Legislature over time to provide textbooks and instructional material to New Mexico students. In 1929, the Legislature enacted legislation entitled "Free Text Books" to provide free textbooks in the public schools and appropriated funds to cover purchases for first and second grade students. NMSA 1929, §§ 120-1701, 1702 (1929). In 1931, the Legislature created "a state school building, text book and rural aid fund" under the supervision of the State Board of Education and appropriated the annual balance of the

fund under the Mineral Leasing Land Act (MLLA). 1931 N.M. Laws, ch. 138, §§ 1, 2. In 1933, the Legislature expanded the Free Text Book Fund of the Free Text Books statute to include "free text books for all children in the schools in the State of New Mexico, from the first to eighth grades inclusive[.]" 1933 N.M. Laws, ch. 112, § 1. The statute was amended and recodified in 1941 and entitled "Text Books." It provided appropriation from the fund under the MLLA. NMSA 1941, §§ 55-1701 to -20 (1941 Comp.); § 55-1705. This law was amended and recodified in 1967 and entitled "School Textbook Law." NMSA 1953, §§ 77-13-1 to -14 (Vol. 8, 1967 Repl. Pocket Supp.). The School Textbook Law was amended in 1975 and labeled the "Instructional Material Law." NMSA 1953, §§ 77-13-1 to -14 (Interim Supp. 1975). The IML was, in turn, amended and recompiled in 1978. NMSA 1978, §§ 22-15-1 to -14 (2005).

The operation of the IML has historically been connected to the MLLA. Indeed, the principal, if not exclusive, funding source for the instructional material fund is the MLLA. Under the MLLA, one-half of the monies that the federal government receives from the rental of public lands is paid to the state within which the public land is located. 30 U.S.C. § 191 (2012). The New Mexico Legislature makes an annual appropriation from the MLLA to the instructional material fund. NMSA 1978, § 22-8-34(A) (2001).

As currently enacted, the IML establishes the instructional material fund, a non-reverting fund administered by the Department, to be used to purchase "instructional material," defined under the IML as "school textbooks and other educational media that are used as the basis for instruction[.]" Section 22-15-2(C); -5. Free use of instructional material is provided to students attending early childhood programs and any grade through grade twelve in a public school, a state institution, or a private school approved by the Department. Section 22-15-7(A). Under the IML, schools obtain instructional material as agents for their students. Section 22-15-7(B). The process differs for private schools. While the Department distributes funds to public schools and state institutions to acquire instructional material, it makes payment directly to an in-state depository for the instructional material for private schools. Section 22-15-9(D), (E). The school district or school is then responsible to distribute the instructional material for the students' use and to keep it safe. Section 22-15-7(B), (C).

The school districts or schools, as agents for their students, select particular instructional material from a multiple list adopted by the Department. Section 22-15-8 (A), (B). Local school boards must solicit parental involvement in the process. Section 22-15-8(B). School districts may apply for a waiver to use a maximum of fifty percent of their annual allocations for instructional material not on the multiple list, and private schools may expend "up to fifty percent of their instructional material funds for items that are not on the multiple list; provided that no funds shall be expended for religious, sectarian or nonsecular materials[.]" Section 22-15-9(C).

CONSTITUTIONAL ARGUMENTS

Standard of Review

Plaintiffs' constitutional arguments assert that the IML conflicts with four provisions of the New Mexico Constitution. In addressing these provisions, we review questions concerning constitutional interpretation as

matters of law under de novo review. *Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio*, 2012-NMSC-039, ¶ 11, 289 P.3d 1232. We must presume that statutes are valid and uphold them against constitutional challenge "unless we are satisfied beyond all reasonable doubt that the Legislature" exceeded its constitutional authority. *State ex rel. Udall v. Pub. Emps. Ret. Bd.*, 1995-NMSC-078, ¶ 7, 120 N.M. 786, 907 P.2d 190.

Article XII, Section 3 of the New Mexico Constitution

As pertinent to this case, Article XII, Section 3 provides that no "funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational or private school[.]" Our Supreme Court has stated that the purpose of this provision "is to insure exclusive control by the state over our public educational system, and to insure that none of the state's public schools ever become sectarian or denominational." *Prince v. Bd. of Educ. of Cent. Consol. Indep. Sch. Dist. No. 22*, 1975-NMSC-068, ¶ 20, 88 N.M. 548, 543 P.2d 1176. By "control," it meant "control over all of the affairs of the school[,]" including curriculum, discipline, finances, and administration. *Id.* ¶ 21.

Plaintiffs do not assert that the distribution of instructional material to private schools as agents for their students interferes with the state's control over the public educational system. Indeed, under the IML, the Department controls the distribution and content of instructional material used by all students, including those in private schools. Sections 22-15-7(B), -8(A)-(C). Plaintiffs also do not assert that the instructional material itself is sectarian or denominational because the IML specifically prohibits the use of funds for such material. Section 22-15-9(C).

Plaintiffs do argue, more generally, that the furnishing of free instructional material to private schools conflicts with Article XII, Section 3. In addition to relying upon *Zellers*, Plaintiffs rely upon cases from other states in which courts have held unconstitutional provisions that Plaintiffs state are similar to Article XII, Section 3, preventing the state's distribution of free textbooks to students in private schools. Rather than accepting the rationale of these cases, the district court determined that cases from other states that upheld free textbook distribution were more persuasive because the constitutional provisions of those states more closely tracked Article XII, Section 12.

In addressing Plaintiffs' position, we initially discuss *Zellers* because Plaintiffs argue that it controls this case and because, as we discuss, it is illustrative of the problems addressed by Article XII, Section 3. Concluding that *Zellers* is not controlling, we next discuss cases of the United States Supreme Court and the supreme courts of other states that consider the Establishment Clause of the First Amendment to the United States Constitution and state constitutions. We then analyze whether Article XII, Section 3 applies to this case.

Zellers v. Huff

The district court initially indicated its intent to hold that *Zellers* applies to the IML, but, after allowing intervention and additional briefing, and holding a second hearing, decided that *Zellers* did not control this case. Plaintiffs urge this Court on appeal to hold that *Zellers* is binding precedent.

Zellers was a class action in which the plaintiffs requested the district court to declare illegal the teaching of sectarian religion in the public schools and the expenditure of public funds in aid of Roman Catholic parochial schools, to declare members of Roman Catholic religious orders ineligible to teach in public schools, to bar certain Roman Catholic sisters and brothers from teaching in the public schools, and to enjoin the activities embraced within the district court's rulings. 1951-NMSC-072, ¶¶ 1-2. The complaint named as defendants the individual members of the State Board of Education, members of certain county, independent, and municipal boards of education, the State Educational Budget Auditor, and various members of Roman Catholic religious orders teaching in the schools included in the complaint. *Id.* ¶ 1.

The district court in *Zellers* addressed a number of issues arising from the multi-faceted interrelationship of the Roman Catholic Church, the State of New Mexico, and local schools in the operation of both public and parochial schools in various school districts in the state. *Id.* ¶¶ 1, 2, 4. The district court summarized this interrelationship by finding that "New Mexico had a Roman Catholic school system supported by public funds within its public school system." *Id.* ¶ 13.

The district court issued a broad-ranged declaratory judgment that included declaring that "the furnishing of free textbooks to schools other than tax supported schools" violates Article IX, Section 14 and Article XII, Section 3 of the New Mexico Constitution; that the furnishing of free textbooks for private, parochial, or sectarian schools was unlawful; and that public funds expended by the state in furnishing free textbooks were illegally used "in furtherance of the dissemination of Roman Catholic doctrines." *Zellers*, 1951-NMSC-072, ¶ 18. Its relevant findings concerning textbooks were that, in some school districts within New Mexico, the state furnished textbooks without charge to parochial schools, *id.* ¶ 4; Roman Catholic sisters and brothers were paid by the state to teach in public schools, free textbooks were furnished, and religious doctrines were disseminated, *id.*; and the state had adopted a complete line of textbooks for use in Catholic schools that was furnished to the Catholic schools and some public schools without charge. *Id.* The district court enjoined the individual members of the State Board of Education from certain actions with respect to textbooks that included, "furnishing sectarian indoctrinated textbooks to tax supported schools," "[f]urnishing free textbooks to schools other than tax supported schools," and "[f]urnishing sectarian and indoctrinated textbooks or textbooks for Catholic schools only to private or parochial schools at the expense of the state." *Id.* ¶ 19.

The issue before our Supreme Court in *Zellers* that is relevant to this case concerns the injunction the district court issued barring the individual board members from taking action that the district court declared to be unconstitutional. Our Supreme Court vacated the injunction because the district court lacked subject matter jurisdiction. *Id.* ¶ 77. It otherwise affirmed the district court's judgment with exceptions not applicable to this case. *Id.* ¶ 83. Making an exception to its rule of refraining from addressing issues not before it for decision, because of the "grave importance of the matters involved," the Court stated that if the district court had properly had jurisdiction, its rulings underlying its injunction were correct. *Id.* ¶ 79.

We do not believe that *Zellers* is precedent for this case for three reasons. First, both the district court and our Supreme Court lacked subject matter jurisdiction to address an injunction against the individual board members. When the lower court lacks jurisdiction to decide issues, the court on appeal also may not decide them. *State ex rel. Overton v. N.M. State Tax Comm'n*, 1969-NMSC-140, ¶ 20, 81 N.M. 28, 462 P.2d 613.

Second, our Supreme Court's expression of its opinion concerning aspects of the district court's judgment over which it did not have jurisdiction is dictum. Dictum is a statement "unnecessary to [a] decision of the issue before the Court . . . no matter how deliberately or emphatically phrased." *Ruggles v. Ruggles*, 1993-NMSC-043, ¶ 22 n.8, 116 N.M. 52, 860 P.2d 182. The Court's statement of the importance of the issue only emphasizes that it was expressing an opinion that was unnecessary to its decision. *Id.*; *see also Pincheira v. Allstate Ins. Co.*, 2007-NMCA-094, ¶ 51, 142 N.M. 283, 164 P.3d 982 ("When an appellate court makes statements that are not necessary to its decision, those statements are without the binding force of law.").

Third, the issues of *Zellers*, as included in the district court's judgment in *Zellers*, are different from the issues in this case. Although the district court in *Zellers* enjoined the state from furnishing free textbooks to private schools, it did not rule upon the constitutionality of a predecessor statute to the IML, entitled "Text Books," NMSA 1941, Sections 55-1701 to -20, that was in effect at that time. That statute, like the IML, provided for the distribution of free textbooks to the students of the state regardless of the schools they attended. *Id.* In addition, the context in which the textbooks in *Zellers* were furnished is different from the manner in which instructional material is distributed under the IML. The furnishing of textbooks in *Zellers* was merely one aspect of the unconstitutional interrelationship that was the foundation for the education system. 1951-NMSC-072, ¶ 13. ("In short, New Mexico had a Roman Catholic school system supported by public funds within its public school system."). The district court in *Zellers* found that public funds used for free textbooks "are used in furtherance of the dissemination of Roman Catholic religious doctrines to students attending" private schools and that the state had adopted a "complete line of text books . . . for use in Catholic schools" that it furnished to those schools as well as certain public schools without charge. *Id.* ¶ 4. There is no such record in this case. In contrast, the IML specifically provides that public funds cannot be used for sectarian materials. Section 22-15-9(C).

Plaintiffs contend that this Court has the obligation to follow *Zellers* because of the principle of stare decisis. *See Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶ 33, 125 N.M. 721, 965 P.2d 305 ("Stare decisis is the judicial obligation to follow precedent[.]"). However, for the principle of stare decisis to apply, the prior case must be binding precedent. As we have discussed, *Zellers* is not binding precedent for this case.

United States Supreme Court Establishment Clause Cases

The issue underlying Plaintiffs' argument is whether the furnishing of instructional material to students attending private schools provides unconstitutional support to private schools. Before discussing the cases involving constitutional provisions of other states cited by the parties, we note

that the United States Supreme Court has determined issues involving the Establishment Clause of the First Amendment to the United States Constitution that are relevant to our analysis. The Establishment Clause prevents Congress from making any law "respecting an establishment of religion[.]" U.S. Const. amend. I. Among its prohibitions is the levying of a tax "to support any religious activities or institutions[.]" *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15-16 (1947). Most states have also adopted constitutional provisions with similar protections. *Id.* at 13-14. Article XII, Section 3 of the New Mexico Constitution adopts a similar protection.

The United States Supreme Court has specifically addressed the question of whether a state statutory program providing textbooks to all students violates the Establishment Clause. In *Board of Education of Central School District No. 1 v. Allen (Allen II)*, 392 U.S. 236 (1968), the Court upheld a New York program in which local public school authorities loaned textbooks to all students in grades seven through twelve against an Establishment Clause challenge. *Id.* at 238. In its analysis, the Court looked to whether there was "a secular legislative purpose and a primary effect that neither advances nor inhibits religion." *Id.* at 243. It determined that the New York textbook law was intended to advance educational opportunities by extending the benefits of a general textbook lending program to all children and that the financial benefit was to the parents, not the schools the children attended. *Id.* at 243-44. The Court declined to hold, based on the record in the case, that the textbooks, which required approval by public school authorities and included only secular textbooks, were "instrumental in the teaching of religion" at sectarian schools. *Id.* at 247-48. The Court recognized that the textbooks in part fulfilled the state's interest in providing a secular education. *Id.* The Court noted that the problem presented to it of drawing a "line between state neutrality to religion and state support of religion" was not an easy one and was "one of degree." *Id.* at 242 (internal quotation marks and citation omitted).

The United States Supreme Court subsequently ruled upon textbook lending programs on two other occasions. In *Meek v. Pittenger*, 421 U.S. 349 (1975), *overruled by Mitchell v. Helms*, 530 U.S. 793 (2000), following *Allen II*, the Court upheld a Pennsylvania program that authorized the loan of textbooks that would be acceptable in the public schools to children attending nonpublic schools. *Meek*, 421 U.S. at 353-54, 362. As a guideline, it applied the three-part test it had developed in its recent Establishment Clause cases: (1) whether the statute has a secular purpose, (2) whether the statute has a primary effect that neither advances religion nor inhibits it, and (3) whether the statute and its administration avoids excessive government entanglement with religion. *Id.* at 358-59. The Court noted, as in *Allen II*, that the Pennsylvania program was part of a policy to lend textbooks to all schoolchildren, the financial benefit inured to the parents and children rather than the nonpublic schools, and the textbooks to be loaned were acceptable for the public schools and used only for secular purposes. *Meek*, 421 U.S. at 360-62. It reiterated that the constitutional problem "is one of degree[,]" stating that "not all legislative programs that provide indirect or incidental benefit to a religious institution are prohibited by the Constitution." *Id.* at 359 (internal quotation marks and citation omitted). The Court thought otherwise, however, about the lending of instructional material and equipment such as maps, charts,

and laboratory equipment directly to nonpublic schools rather than to the students. *Id.* at 362-63, 365. The Court found constitutional fault with the legislation because it did not take into account that the "substantial amounts of direct support authorized" would make it impossible "to separate secular educational functions from the predominantly religious role" of the schools. *Id.* at 365.

The United States Supreme Court again considered a statutory textbook program in *Wolman v. Walter*, 433 U.S. 229 (1977), *overruled by Mitchell*, 530 U.S. 793. The Court followed *Allen II* and *Meek*. *Wolman*, 433 U.S. at 238. It also determined that provisions of the Ohio statute that provided public funds for standardized tests and scoring services; speech and hearing diagnostic services; and therapeutic, guidance, and remedial services were not constitutionally inappropriate but that the lending of instructional materials and equipment to students and the funding of field trip transportation and services was. *Id.* at 239-54.

In *Wolman*, the Supreme Court specifically declined to overrule the textbook rulings of *Allen II* and *Meek*. *Wolman*, 433 U.S. at 238. In *Mitchell*, however, it did overrule *Meek* and *Wolman* with respect to its previous instructional material and equipment rulings. *Mitchell*, 530 U.S. at 808. In *Mitchell*, the Court held that a federal program under which state and local governmental agencies received funds to loan educational materials and equipment to public and private schools based on enrollment did not offend the Establishment Clause. *Id.* at 801. According to the Court, the program was neutral with respect to religion because it "makes a broad array of schools eligible for aid without regard to their religious affiliations or lack thereof" and because "[t]he aid follows the child." *Id.* at 830.

As demonstrated by *Allen II*, *Meek*, and *Wolman*, the United States Supreme Court's analysis under the Establishment Clause does not support Plaintiffs' position in this case. The Court's analysis focuses upon the neutrality of a challenged law and does not invalidate a law that applies neutrally to students of public and private schools, even if there may be a degree of benefit that inures to the private school. But this case is based on state constitutional provisions, not on the Establishment Clause. We thus turn to the cases cited by the parties and the state constitutional provisions at issue in those cases.

Cases Addressing Other State Constitutional Provisions

Plaintiffs rely on five cases that they contend involve similar issues to Article XII, Section 3 of the New Mexico Constitution. They first refer to *California Teachers Association v. Riles*, 632 P.2d 953 (Cal. 1981). That case involved a challenge to a California law authorizing the Superintendent of Public Instruction to lend to students attending nonprofit, nonpublic schools textbooks used in the public schools without charge. *Id.* at 953. Article IX, Section 8 of the California Constitution provided: "No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools[.]" *Riles*, 632 P.2d at 954 n.3 (internal quotation marks and citation omitted). Under Article XVI, Section 5 of the California Constitution:

> Neither the Legislature, nor any county, city and county, township,

> school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any city, city and county, town, or other municipal corporation for any religious creed, church, or sectarian purpose whatever[.]

Riles, 632 P.2d at 954 n.4.

The California court discussed at some length United States Supreme Court cases concerning the Establishment Clause. It independently decided that the textbook program could not survive state constitutional scrutiny. *Id.* at 964. Persuaded by Justice Brennan's dissent in *Meek*, which was critical of the characterization of the textbook program as a loan to students, it did not accept the "child benefit" theory that the program benefitted the students and not the schools or that the benefit to the schools was only incidental. *Riles*, 632 P.2d at 960-64.

Gaffney v. State Department of Education, 220 N.W.2d 550 (Neb. 1974) addressed a broad constitutional provision with similar language to Article XVI, Section 5 of the California Constitution. *Gaffney*, 220 N.W.2d at 552; *Riles*, 632 P.2d at 964. The Nebraska Supreme Court relied on the broad language of its constitutional provision to hold that the textbook loan program furnished "aid" to private sectarian schools. *Gaffney*, 220 N.W.2d at 552-54. It stated that, even assuming neutrality, the loan program "is for the purpose of augmenting the public school secular education with religious training" and was "aiding the church" in advancing religious education. *Id.* at 557. It further stated that the fact that the loan of the textbooks was to the parents and students was not determinative because the program "lends strength and support to the school and, although indirectly, lends strength and support to the sponsoring sectarian institution." *Id.*

In *Dickman v. School District No. 62C*, 366 P.2d 533 (Or. 1961) (en banc), the Supreme Court of Oregon considered a textbook loan program in the context of two constitutional provisions: one prohibited in part money to be drawn from the state treasury "for the benefit" of any religious or theological institution; and the other provided that various revenue sources "shall be exclusively applied to the support, and maintenance of common schools in each School district, and the purchase of suitable libraries, and apparatus therefor." *Id.* at 535 nn.2-3, 537. It noted that the first provision expressed "in more specific terms" the policy of the First Amendment. *Id.* at 537. Like the California Supreme Court, the Oregon court rejected the child benefit principle. *Id.* at 539, 543-44. It stated that "the aid is extended to the pupil only as a member of the school" the pupil attends and, thereby, although the pupil may share in the benefit, "such aid is an asset to" the school. *Id.* at 543.

Bloom v. School Committee of Springfield, 379 N.E.2d 578 (Mass. 1978), and *Paster v. Tussey*, 512 S.W.2d 97 (Mo. 1974), also involve particular constitutional provisions. The Massachusetts provision at issue in *Bloom* prohibited in relevant part the

"grant, appropriation or use of public money . . . for the purpose of. . . maintaining or aiding any . . . school, or charitable or religious undertaking which is not publicly owned and under the exclusive control, order and supervision of public officers . . . ." 379 N.E.2d at 581, 585 (internal quotation marks and citation omitted). As stated by the *Paster* court, the Missouri Constitution "goes even farther than those of some other states" and is more restrictive than the Establishment Clause. 512 S.W.2d at 101-02 (internal quotation marks and citation omitted).

The district court determined that the out-of-state cases cited by Defendants provided more persuasive authority than those cited by Plaintiffs. Defendants cited *Board of Education of Central School District No. 1 v. Allen* (*Allen I*), 228 N.E.2d 791 (N.Y. 1967); *Chance v. Mississippi State Textbook Rating & Purchasing Board*, 200 So. 706 (Miss. 1941) (in banc); and *Borden v. Louisiana State Board of Education*, 123 So. 655 (La. 1929). The New York Court of Appeals in *Allen I*, in rejecting the state constitutional challenge, recognized the legislative intent "to bestow a public benefit upon all school children, regardless of their school affiliations." 228 N.E.2d at 794. It considered any benefit to parochial schools to be "collateral." *Id.* In *Chance*, the Mississippi Supreme Court analyzed a constitutional provision that barred, similarly to Article XII, Section 3 of the New Mexico Constitution, the appropriation of funds "toward the support of any sectarian school[.]" *Chance*, 200 So. at 707. It too noted the duty of the state to educate the children of the state and considered the aid to the parochial schools to be only incidental. *Id.* at 712-13. It further noted the non-sectarian content of the textbooks and the continued control over them by the state. *Id.* at 713. *Borden* involved a constitutional provision like the restrictive Missouri one addressed in *Paster*. *Borden*, 123 So. at 660. Nevertheless, the Louisiana Supreme Court reached a contrary result, stating in part that the state and the children were the beneficiaries of the appropriations, not the schools, which were not "relieved of a single obligation" by the appropriations. *Id.* at 660-61. The cases cited by Defendants were decided before the United States Supreme Court addressed textbook programs in connection with the Establishment Clause.

Interpretation of Article XII, Section 3 of the New Mexico Constitution

Article XII, Section 3 prohibits the use of state funds for the support of sectarian, denominational, and private schools. It was adopted, like similar provisions of many states, in the wake of the Establishment Clause of the First Amendment. *Everson*, 330 U.S. at 13-14. In the United States Supreme Court's interpretation of the Establishment Clause, programs such as the IML are not prohibited. The states that have interpreted their constitutional provisions have reached conflicting results. In interpreting Article XII, Section 3, we are not bound by any of these strains of cases and, even though New Mexico, and the other states, have followed the concepts of the United States Constitution, we may interpret Article XII, Section 3 differently. *See N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶28, 126 N.M. 788, 975 P.2d 841 (NARAL) (stating that our Supreme Court may "undertake independent analysis of our state constitutional guarantees" (internal quotation marks and citation omitted)). We may, nevertheless, look to cases of either the United States Supreme Court or the courts of other states for guidance. Moreover, this Court has observed that because the goals of Article II, Section 11

of the New Mexico Constitution serve the same goals as the Free Exercise and Establishment Clauses of the First Amendment, New Mexico courts have cited First Amendment cases to address both the United States and state constitutions. *Elane Photography, LLC v. Willock*, 2012-NMCA-086, ¶ 33, 284 P.3d 428, *aff'd*, 2013-NMSC-040, 309 P.3d 53, *cert. denied*, 134 S.Ct. 1787 (2014). We see no reason to treat Article XII, Section 3 differently.

An essential difference between the United States Supreme Court cases and the cases cited by Plaintiffs is the approach to the public benefit of textbook programs. The principle underlying such programs is the public obligation to educate all children regardless of where they attend school. *See, e.g.*, *Allen II*, 392 U.S. at 243 (stating that the purpose of the New York textbook law was to further "the educational opportunities available to the young. . . . The law merely makes available to all children the benefits of a general program to lend school books free of charge."). In Plaintiffs' cases, the courts have held that the programs do not only benefit the children and their parents, but also the private, parochial schools. As stated in *Riles*, textbooks are "a basic educational tool." 632 P.2d at 963 (internal quotation marks and citation omitted). As discussed in *Gaffney*, and quoted in *Riles*, because "one of the main purposes of the parent sending his child to a parochial school is to insure the early inculcation of religion[,]" even if textbooks are secular, the loan of textbooks to students "is for the purpose of augmenting the public school secular training with religious training." *Gaffney*, 220 N.W.2d at 557; *Riles*, 632 P.2d at 964, n 15 (internal quotation marks and citation omitted); *see also Dickman*, 366 P.2d at 544 (noting that textbooks are an "integral part of the educational process" and that the teaching of religious precepts is an inseparable part of the educational process in the school at issue).

We are not persuaded that the cases cited by Plaintiffs should be followed in this case. We believe that the legislative intent in promoting the education of all schoolchildren in New Mexico deserves greater weight than the cases cited by Plaintiffs afford. Despite Justice Brennan's dissent in *Meek*, relied upon in *Riles*, the United States Supreme Court has repeatedly recognized the general, public nature of such programs and has declined to hold that "the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion." *Allen II*, 392 U.S. at 248; *Meek*, 421 U.S. at 360-62; *Wolman*, 433 U.S. at 257. Under the IML, the instructional material is strictly secular. Section 22-15-9(C). Plaintiffs did not present any evidence to demonstrate that the secular materials are used in a non-secular manner. *See Allen II*, 392 U.S. at 248 (noting that the record on summary judgment did not support that the textbooks were used to support religion).

As part of its analysis rejecting the "child benefit" principle, the California court in *Riles* stated that it could not harmonize the reasoning of *Allen II*, *Meek*, and *Wolman* with regard to the loan of other instructional material such as maps, globes, and charts. *Riles*, 632 P.2d at 960-61. Indeed, the United States Supreme Court has had difficulty reaching harmony in this regard. However, such a disharmony no longer exists in the United States Supreme Court jurisprudence since the Court stated in *Mitchell* that *Meek* and *Wolman* were "no longer good law" in this regard. *Mitchell*, 530 U.S. at 808.

Moreover, not only is the United States Supreme Court now clear in its analysis that textbook and instructional material programs that benefit all children regardless of the school of their attendance do not conflict with the Establishment Clause, since *Riles*, it has also upheld the constitutionality of other governmental programs that benefit all students, including those who attend private and parochial schools. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 645, 662 (2002) (concluding that a law in which the state of Ohio created a program that provided tuition assistance to parents of eligible children to attend a participating public or private school of the parent's choosing was "entirely neutral with respect to religion" and did not violate the Establishment Clause); *Mitchell*, 530 U.S. at 793 (upholding program lending educational materials and equipment to public and private schools based on enrollment); *Agostini v. Felton*, 521 U.S. 203, 209-10, 240 (1997) (holding that a federally-funded program in which public school teachers provided remedial education to disadvantaged children in parochial schools as well as public schools did not violate the Establishment Clause); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (holding that the Establishment Clause does not bar local school district from providing a publicly-employed interpreter for a deaf student in a parochial school).

The United States Supreme Court has in addition repeatedly stated that the constitutional issue involved in these types of programs is one of degree. *Allen II*, 392 U.S. at 242; *Meek*, 421 U.S. at 359. We agree. In this regard, we do not interpret Article XII, Section 3 to prohibit indirect and incidental benefit when the legislative purpose does not focus on support of parochial or private schools. We would read too much into the record of this case to conclude that the loan of instructional material to students under the IML is so inextricably intertwined that the IML instructional material is instrumental in the religious education. Our focus is therefore whether the IML provides impermissible other support of a financial nature. In contrast, the evidence in *Riles* indicated that without the loan program parochial schools purchased their own textbooks and charged the parents a rental fee. 632 P.2d at 956. There is no similar evidence in this case.

Nevertheless, even if we were to assume a similar arrangement, the focus of the IML is to provide instructional material for the benefit of students. Section 22-15-7(A). It is secular in nature. Section 22-15-9(C). Private schools do not own the instructional material, and the state controls its use and disposition. *See* Section 22-15-10(D), (E) (requiring private schools to return to the Department money collected for sale, loss, damage, or destruction of instructional material as well as any instructional material in usable condition for which there is no expected use). Although private schools maintain a possessory control, they do so as agents for their students. Section 22-15-7(B). The instructional material is, of course, used in the schools for the benefit of the students, and the schools thereby receive some benefit. But the parents of the students bear the financial burden of providing the instructional material and are the direct recipients of the program's financial support. This case is not like *Zellers* in which there was an apparent infringement of the purpose of Article XII, Section 3 "to insure exclusive control by the state over our public educational system[.]" *Prince*, 1975-NMSC-068, ¶ 20. The benefit to the schools is not of the degree that falls within Article XII, Section 3.

Article IX, Section 14 of the New Mexico Constitution

Article IX, Section 14, the Anti-Donation Clause, provides in relevant part:

> Neither the state nor any county, school district or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation . . . .

Appellants, quoting from *Village of Deming v. Hosdreg Co.*, contend that the IML violates this provision because "the lending of free textbooks and other instructional materials at public expense to private schools constitutes a 'donation to or in aid of [a] person, association or public or private corporation.'" 1956-NMSC-111, ¶ 36, 62 N.M. 18, 303 P.2d 920.

In *Village of Deming*, our Supreme Court addressed Article IX, Section 14. In that case, the Village of Deming, following a recently-enacted statute, had passed an ordinance to issue revenue bonds to finance a manufacturing project that the Village would in turn lease to a private company. *Id.* ¶¶ 4, 5, 21. The complaint alleged a violation of Article IX, Section 14 because the revenue bonds issued under the statute and the ordinance "would constitute the giving of aid to private enterprise." *Id.* ¶ 30 (internal quotation marks and citation omitted). The Court noted that the language of the complaint differed from the constitutional prohibition that, as also relevant to the case before us, forbids a "donation to or in aid of" a private corporation. *Id.* ¶ 31 (internal quotation marks and citation omitted). The Court construed a donation under Article IX, Section 14 to be "a gift, an allocation or appropriation of something of value, without consideration to a person, association or public or private corporation." *Id.* ¶ 36 (internal quotation marks omitted); *see also State ex rel. Office of State Eng'r v. Lewis*, 2007-NMCA-008, ¶ 49, 141 N.M. 1, 150 P.3d 375 (citing *Village of Deming* for the definition of a donation under Article IX, Section 14). It held that the statute authorizing the revenue bonds did not entail such a "donation." With respect to the language of the complaint, it declined to conclude that the statute provided for an unconstitutional violation even if there was "incidental aid or resultant benefit to a private corporation" that did not "take on character as a donation in substance or effect." *Vill. of Deming*, 1956-NMSC-111, ¶¶ 34, 37.

Applying *Village of Deming* to this case, we see no constitutional infirmity in the IML. There is no "donation" to a private school because there is neither a "gift" nor an "allocation or appropriation of something of value, without consideration." *Id.* ¶ 36.

As to a gift, although private schools receive possession of the instructional material, they never have an ownership interest in it. They receive possession only as agents for their students. Section 22-15-7(B). They may sell instructional material only with approval of the director of the Department's instructional material bureau and must return all proceeds from sales and monies collected for lost, damaged, and destroyed items to the Department. Section 22-15-2(B), -10(A), (D). The Department may require them to return to the Department any usable instructional material that they no longer intend to use. Section 22-15-10(E). There is thus no gift of the instructional material as contemplated by *Village of Deming*.

Nor is there an allocation or appropriation of something of value, without consideration. As we have discussed, the IML authorizes the distribution of instructional material to private schools only as agents for their students. Section 22-15-7(B). With this distribution, although the private schools may receive an "allocation," it is only as a conduit for their students, who, presumably, would otherwise need to pay for instructional material. Section 22-15-9(A).

Our Supreme Court has also stated that Article IX, Section 14 "should be construed with reference to the evils it was intended to correct." *City of Clovis v. Sw. Pub. Serv. Co.*, 1945-NMSC-030, ¶ 23, 49 N.M. 270, 161 P.2d 878. Such evils occurred when public bodies loaned their credit to, or obtained an interest in, commercial entities that ultimately required the public to assume responsibilities for their obligations to the detriment of the public fisc. *Id.* ¶¶ 23-24. No such danger exists due to the IML. The State has not loaned its credit or obtained any financial interest in any private school.

The absence of any lending of credit also distinguishes *Hutcheson v. Atherton*, 1940-NMSC-001, 44 N.M. 144, 99 P.2d 462, relied upon by Plaintiffs. Indeed, as stated by Plaintiffs, our Supreme Court in *Hutcheson* affirmed the district court's finding that a county's issuing bonds to finance an auditorium for the purposes of a private corporation violated Article IX, Section 14. *Hutcheson*, 1940-NMSC-001, ¶¶ 34-35, 37. But the county's inappropriate action in *Hutcheson* was its proposed lending of its credit through the issuance of bonds. *Id.* ¶ 1. The provision of Article IX, Section 14 at issue in this case pertains to a prohibited donation, not the lending or pledging of credit. It does not involve a prohibited donation under Article IX, Section 14.

We note that Intervenors argue that Article IX, Section 14, as well as Article XII, Section 3 and Article IV, Section 31, do not apply to the IML because the IML is funded by the New Mexico Legislature with federal MLLA funds. Because we hold that the IML does not violate these constitutional provisions, we do not address this argument.

Article IV, Section 31 of the New Mexico Constitution

Article IV, Section 31 prohibits appropriations "for charitable, educational or other benevolent purposes to any person, corporation, association, institution or community, not under the absolute control of the state[.]" Plaintiffs assert that the use of public, state funds to finance the IML is unconstitutional to the extent such funds support sectarian or denominational private schools.

Plaintiffs, however, have not demonstrated that funds used to support the IML are not within the control of the state. Under the IML, appropriations are made to the Department's instructional material fund, created by the state treasurer. Section 22-15-5(A). Disbursements from the instructional material fund are made "by warrant of the department of finance and administration upon vouchers issued by" the Department. Section 22-15-6. The Department makes payment to an in-state depository for instructional material distributed to private schools as agents for their students. Sections 22-15-7(B), -9(E). No funds are appropriated to any private school. The mere indirect or incidental benefit to the private schools does not violate Article IV, Section 31. *Cf. State ex*

rel. Interstate Stream Comm'n v. Reynolds, 1963-NMSC-023, ¶ 17, 71 N.M. 389, 378 P.2d 622 (holding that incidental benefits to a non-profit organization from appropriations made to the state engineer with absolute control of the expenditure does not violate Article IV, Section 31).

Plaintiffs rely on *Harrington v. Atteberry*, 1915-NMSC-058, 21 N.M. 50, 153 P. 1041, to contend that the IML is in "direct conflict" with Article IV, Section 31. *Harrington*, however, is not on point. In that case, our Supreme Court held that an appropriation to a private corporation for the purpose of conducting a county fair violated the New Mexico Constitution. *Id.* ¶¶ 1, 63. Although the concurring opinion would have relied on Article IV, Section 31, the opinion of the Court addressed only Article IX, Section 14. *Id.* ¶¶ 6, 66-67 (Hanna, J., concurring in result).

Article II, Section 11 of the New Mexico Constitution

Article II, Section 11 states:

> No person shall be required to attend any place of worship or support any religious sect or denomination; nor shall any preference be given by law to any religious denomination or mode of worship.

Plaintiffs argue that the IML violates Article II, Section 11.

This Court has stated that Article II, Section 11 serves the same goals as the Establishment Clause and the Free Exercise Clause of the First Amendment. *Elane Photography*, 2012-NMCA-086, ¶ 33. As a result, New Mexico courts have discussed Article II, Section 11 and the First Amendment together, citing federal case law in connection with Article II, Section 11. *Elane Photography*, 2012-NMCA-086, ¶ 33. Indeed, New Mexico courts may "diverge from federal precedent" and afford greater protections under provisions of the New Mexico Constitution. *NARAL*, 1999-NMSC-005, ¶ 28 (internal quotation marks and citation omitted). However, Plaintiffs have not argued a basis to do so. As we have discussed in connection with Article XII, Section 3 and the Establishment Clause, the United States Supreme Court does not interpret the First Amendment to prohibit programs such as those contained within the IML.

CONCLUSION

We affirm the district court's grant of summary judgment to Defendants.

IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

M. MONICA ZAMORA, Judge

Certiorari Granted, January 26, 2015, No. 35,005

IN THE COURT OF APPEALS STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-037

Filing Date: October 27, 2014

Docket No. 32,794

STATE OF NEW MEXICO,

Plaintiff-Appellant,

v.

JOSEPH ARCHULETA,

Defendant-Appellee.

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OPINION

VIGIL, Judge.

State v. Tower, 2002-NMCA-109, ¶ 9, 133 N.M. 32, 59 P.3d 1264, holds that entry into a commercial business establishment contrary to a no trespass order constitutes an "unauthorized entry" into the business under our commercial burglary statute. The question presented in this case is whether *Tower* should be overruled in light of our Supreme Court's opinion in *State v. Office of the Public Defender ex rel. Muqqddin*, 2012-NMSC-029, 285 P.3d 622. The district court concluded that *Tower* is no longer viable in light of *Muqqddin*, and dismissed the indictment charging Defendant with one count of commercial burglary in violation of NMSA 1978, Section 30-16-3(B) (1971), and the State appeals. Agreeing with the district court, we overrule *Tower* and affirm.

BACKGROUND

Defendant was charged with one count of commercial burglary on the basis that he entered a Walgreens store "without authorization or permission, with intent to commit any felony or a theft therein[.]" Defendant filed a motion to dismiss pursuant to Rule 5-601 NMRA and *State v. Foulenfont*, 1995-NMCA-028, 119 N.M. 788, 895 P.2d 1329, requesting that the district court determine "[w]hether, as a matter of law, entry into a commercial establishment during business hours with intent to commit a theft within the business, when such entry was made after a no trespass order had been served, constitutes the offense of [b]urglary[.]"

For purposes of the motion, Defendant conceded that he entered a Walgreens store through a public entrance during business hours and without ever leaving any areas openly accessible to the public, concealed a bottle of Bacardi Rum worth twelve dollars and eighty-three cents ($12.83) in his jacket and walked past all final points of sale without paying for the bottle. Defendant further conceded that he had previously been issued a warning that he was denied permission to

enter or remain on property belonging to Walgreens and that he intended to commit a theft from the Walgreens when he entered it. Defendant argued that charging him with the felony of burglary, rather than with misdemeanor criminal trespass and shoplifting or petty larceny, resulted in the overly expansive application of the burglary statute cautioned against by our Supreme Court in *Muqqddin*.

The State opposed the motion on the grounds that the issue was improperly raised as a *Foulenfont* motion,[1] that *Tower* is directly on point, and that *Muqqddin* is distinguishable. The district court determined that, while *Tower* is directly on point, *Muqqddin* directed trial courts to consider what the Legislature intended when applying the burglary statute. And, having considered the Legislature's intent, the district court determined that the Legislature did not intend for the burglary statute to be used to prosecute what are "better revealed in the lesser statutes of [t]respass . . . and [s]hoplifting[.]" The district court therefore dismissed the charge with prejudice. In reaching its determination, the district court relied on the following undisputed facts:

1. Defendant entered into a Walgreens store, which is a commercial business establishment during business hours with intent to commit theft within the business.

2. Defendant committed a theft with[in] the business.

3. The entry was made after a no trespass order had been issued and served on Defendant, and Defendant's permission to be inside the store had been explicitly revoked.

DISCUSSION

On appeal, we must decide whether to overrule a prior opinion of this Court. The decision to overrule prior precedent is not one that is undertaken lightly. We remain "mindful of the principles of stare decisis and take care to overrule established precedent only when the circumstances require it." *State v. Pieri*, 2009-NMSC-019, ¶ 21, 146 N.M. 155, 207 P.3d 1132. Thus, before overruling a prior opinion, we consider:

> 1) whether the precedent is so unworkable as to be intolerable; 2) whether parties justifiably relied on the precedent so that reversing it would create an undue hardship; 3) whether the principles of law have developed to such an extent as to leave the old rule no more than a remnant of abandoned doctrine; and 4) whether the facts have changed in the interval from the old rule to reconsideration so as to have robbed the old rule of justification.

State v. Swick, 2012-NMSC-018, ¶ 17, 279 P.3d 747 (quoting *State v. Riley*, 2010-NMSC-005, ¶ 34, 147 N.M. 557, 226 P.3d 656, *overruled on other grounds by State v.*

[1]By conceding to the material facts for the purpose of determining whether they are sufficient to support a burglary charge, Defendant properly raised a legal issue that the district court could resolve without a trial because the State did not demonstrate that the facts are in dispute. *See Foulenfont*, 1995-NMCA-028, ¶ 6 (holding that the district court has authority to resolve purely legal questions under Rule 5-601 where the facts are not disputed).

Montoya, 2013-NMSC-020, ¶ 2, 306 P.3d 426). "When one of the aforementioned circumstances convincingly demonstrates that a past decision is wrong," we should not hesitate to overrule even recent precedent. *Pieri*, 2009-NMSC-019, ¶ 21 (alteration, internal quotation marks, and citation omitted). With these principles in mind, we now turn to a consideration of *Muqqddin* and *Tower*.

Muqqddin

In *Muqqddin*, our New Mexico Supreme Court called into question forty years of this Court's burglary decisions. Our Supreme Court noted that, during that time, this Court "issued numerous opinions that, for the most part, . . . expanded significantly the reach of the burglary statute," and noted that this expansion "occurred without any parallel change in the statute." 2012-NMSC-029, ¶ 1. According to our Supreme Court,

> [a]s the crime of burglary has continued to expand, it seems at times to have transformed into an enhancement for any crime committed in any type of structure or vehicle, as opposed to a punishment for a harmful entry. In the past, the typical burglary scenario involved a home invasion, and the crime was intended to protect occupants against the terror and violence that can occur as a result of such an entry. Yet today it has become more common to add a burglary charge to other crimes where the entry itself did not create or add any potential of greater harm than the completed crime. Our Legislature has never expressed an intent that burglary be used as an enhancement, nor has it clearly authorized the steady progression of judicial expansion of burglary as seen over the past 40 years.

Id. ¶ 3 (citation omitted).

Our Supreme Court instructed that "the original common-law purpose of burglary, the protection of the security of habitation or a similar space, is still relevant when construing our modern burglary statute." *Id.* ¶ 39. The Supreme Court reminded both bench and bar that "burglary has a greater purpose than merely protecting property[,]" *id.* ¶ 39, and that "[i]t is the invasion of privacy and the victim's feeling of being personally violated that is the harm caused by the modern burglar, and the evil that our society is attempting to deter through modern burglary statutes." *Id.* ¶ 42. While our Supreme Court recognized that "[t]he privacy interest that our modern burglary statute protects is . . . broader than[] the security of habitation," it also noted that the burglary statute is still aimed at "protect[ing] against the feeling of violation and vulnerability that occurs when a burglar invades one's personal space." *Id.* ¶ 43.

Finally, the Supreme Court provided guidance to lower courts, reminding us that "[f]irst and foremost, what is being punished as a felony under Section 30-16-3 is a harmful entry[,]" *id.* ¶ 60; that such entry refers to "places where things are stored and personal items can be kept private[,]" *id.* ¶ 61; and that "burglary is a serious offense with serious consequences[,]" *id.* ¶ 60. Keeping in mind our Supreme Court's effort at guiding future applications of our burglary statute, we now turn to *Tower*.

Tower

In 2002, this Court issued its decision in

Tower. After being caught shoplifting at a Foley's department store, the defendant was given a trespass notice by Foley's, informing him that he was no longer welcome in any Foley's and, if he was ever found on Foley's property, he would be arrested for criminal trespass. 2002-NMCA-109, ¶ 2. Two years later, after the defendant was seen in Foley's shoplifting, he was indicted on charges of burglary and larceny. *Id.* ¶ 3. The district court dismissed the burglary charges on the ground that the defendant had inadequate notice "that his re-entry into Foley's [would] result in any charge more severe than trespassing." *Id.* (internal quotation marks omitted). The state appealed the district court's decision.

On appeal, we addressed whether the burglary statute was unconstitutionally vague as applied to the defendant's conduct and, therefore, whether the defendant's conduct was clearly proscribed by the burglary statute. *Id.* ¶ 4 (stating that, "[b]ecause the essence of a vagueness claim rests on a lack of notice, a party may not succeed on the claim if the statute clearly applies to the defendant's conduct" (internal quotation marks and citation omitted)). We held that the burglary statute clearly applied:

> The crime of burglary "consists of the unauthorized entry of any . . . structure, . . . with the intent to commit any felony or theft therein." Here, [the d]efendant entered the Foley's department store after his permission to enter had been revoked. Thus, he was unauthorized to enter the store. Since he was caught stealing articles from the store, it can reasonably be inferred that he entered the store with the intent to steal items from it. It appears that the burglary statute clearly applies to [the d]efendant's conduct.

Id. ¶ 5 (omissions in original) (citation omitted).

We reasoned that, although "the store was generally open to the public as a place of commerce" and "the shopping public was given authority to enter the store[,] . . . a private property owner can restrict the use of its property, either to certain persons or to those purposes for which it was dedicated[,] so long as the restrictions are not discriminatory." *Id.* ¶ 7. Thus, because Foley's gave the defendant a notice that he could no longer enter the store, we concluded that Foley's "revoked any authority that [the defendant] might otherwise have had to enter the property as a member of the public." *Id.* We therefore reversed, concluding that because "the law is clear that a burglary is an unauthorized entry into a structure with the intent to commit a felony or theft therein[, and the d]efendant knew that he was not authorized to enter Foley's[,] . . . . his entry for the purpose of committing shoplifting (a theft) was a burglary." *Id.* ¶ 9.

Absent from our analysis in *Tower* is any discussion regarding whether the entry was "harmful"—the gravamen of *Muqqddin*. Instead, our analysis in *Tower* focused exclusively on the plain language of the statute and the ability of a department store to revoke its permission to enter. And, while it is clear that such revocation of permission to enter may give rise to criminal trespass,[2] it is less

[2]NMSA 1978, Section 30-14-1(B) (1995) defines "criminal trespass" as "knowingly entering or remaining upon the unposted lands of another knowing that such

clear following our Supreme Court's decision in *Muqqddin* whether that revocation will support felony charges for burglary.

A similar issue was recently presented to this Court in *State v. Baca*, 2014-NMCA-087, 331 P.3d 971, *cert. granted*, 2014-NMCERT-008, ___ P.3d ___. *Baca* involved a defendant charged with commercial burglary where the defendant, who was not a member of Costco, shoplifted after gaining entry into Costco by using a membership card that did not belong to him. *Id.* ¶ 5. We determined that entry by a non-member during business hours, did not constitute an unauthorized entry under our burglary statute. *Id.* ¶ 6. In reaching that conclusion, we reasoned that there was "no particular security or privacy interest at stake inside Costco that justifies recognizing a departure from the general rule that we presume retail stores to be open to the public"; that "[the d]efendant's entry into th[e] shopping area d[id] not implicate 'the feeling of violation and vulnerability' we associate with the crime of burglary"; and that "[the d]efendant's entry into Costco during business hours, albeit deceptive, granted him access to an otherwise open shopping area, as opposed to an area 'where things are stored and personal items can be kept private.'" *Id.* ¶ 9 (quoting *Muqqddin*, 2012-NMSC-029, ¶¶ 43, 61). While *Baca*, ultimately, "express[ed] no opinion as to [*Tower*'s] continuing precedential value," *Baca* questioned "the continuing validity of general statements in *Tower* indicating that a retail store's notice revoking a person's permission to be on the premises is sufficient by itself to make his or her presence unauthorized under our burglary statute." *Baca*, 2014-NMCA-087, ¶ 11. We possess similar concerns here.

We have difficulty envisioning how a defendant's entry into an open public shopping area, even where the person entering the shopping area has received a notice of no trespass, can constitute the kind of harmful entry prohibited by the burglary statute. *Tower* did not address that question but merely relied on the plain language of the burglary statute—an approach for which the State also advocates. However, *Muqqddin* cautioned against relying solely on the plain language of the statute. 2012-NMSC-029, ¶ 38 ("[C]ourts must exercise caution in applying the plain meaning rule. Its beguiling simplicity may mask a host of reasons why a statute, apparently clear and unambiguous on its face, may for one reason or another give rise to legitimate (i.e., nonfrivolous) differences of opinion concerning the statute's meaning[.]" (internal quotation marks and citation omitted)). Rather, *Muqqddin* instructs prosecutors and courts alike to assess whether the conduct in question falls within the parameters of the burglary statute "construed in light of the purpose for which it was enacted." *Id.* ¶ 36 (internal quotation marks and citations omitted); *see also id.* ¶ 59 ("When deciding whether or not a burglary charge is appropriate, courts and [d]istrict [a]ttorneys *must* consider whether or not this is the type of entry the Legislature intended Section 30-16-3 to deter." (Emphasis added.)). And, according to our Supreme Court, "[f]irst and foremost" in making that determination, we must consider whether the conduct in question is "a harmful entry."[3]

consent to enter or remain is denied or withdrawn by the owner or occupant thereof."

[3] The State argues that requiring the entry to be "harmful," or one that would cause someone "to suffer a feeling of violation and vulnerability," adds an additional

Muqqddin, 2012-NMSC-029, ¶ 60. Under the circumstances presented in this case—entry into an otherwise open public shopping area after receiving a notice of no trespass—we conclude as a matter of law that a harmful entry did not occur. Accordingly, we overrule *Tower*.

The State argues that "any departure from the doctrine of *stare decisis* demands special justification[,]" that *Tower* remains a workable precedent, and that the State relied on *Tower* in making its charging decision. As we have discussed, our Supreme Court in *Muqqddin* issued a directive to reevaluate existing burglary jurisprudence to ensure that it is consistent with what our Supreme Court identified as the legislative intent behind our modern burglary statute. Pursuant to that directive, we have reevaluated *Tower* and have concluded that it is incompatible with the principles articulated in *Muqqddin*. No further justification for overruling *Tower* is necessary. Thus, the State's reliance on *Tower* in making the decision to charge Defendant with burglary is an insufficient basis for permitting *Tower* to stand in light of this Court's conclusion that *Tower* is inconsistent with the principles articulated in *Muqqddin*.

Our decision to overrule *Tower* is further supported by looking to the remaining considerations articulated in *Muqqddin* for determining when criminal conduct should be charged under the burglary statute. Our Supreme Court cautioned us to "be cognizant of the disparity in potential penalties that can stem from a burglary charge due to its unique place in our jurisprudence." 2012-NMSC-029, ¶ 62.

> The lesson from cases such as those presented here, along the outer fringes of what the Legislature may or may not consider as burglary, is that trial courts and trial counsel must consider more than just the words of a statute. Words are the beginning, not the end; they serve as portals into the thoughts behind the words of a criminal statute. Where, as here, those *thoughts* are revealed in another, lesser statute, that becomes a fairly reliable indicator of legislative intent, both as to the specific crime and, more importantly, the gravity of the offense.

Id. ¶ 54.

"As a felony, burglary is a serious offense with serious consequences. . . . [It] is no petty crime." *Id.* ¶ 60. Commercial burglary is a fourth degree felony. *See* § 30-16-3(B). Conversely, criminal trespass is a misdemeanor offense, *see* § 30-14-1(B), (E), and larceny and shoplifting under $250 are petty misdemeanors. *See* NMSA 1978, § 30-16-1(B) (2006) (larceny); NMSA 1978, § 30-16-20(B)(1) (2006) (shoplifting). By classifying the conduct at issue as a misdemeanor or petty misdemeanor, the Legislature signaled its intent that these acts not be punished as severely as burglary. As our Supreme Court noted, the burglary statute "was not designed solely to deter

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element to the burglary statute and creates a fact-based determination that cannot be resolved pretrial. We disagree. *Muqqddin* did not add an element to the Legislature's statutory definition of burglary that the State is required to prove at trial. Rather, the inquiry into whether an entry is the type that would result in a feeling of violation and vulnerability is a determination that the Supreme Court has required as part of a statutory interpretation analysis that is resolved as a matter of law.

trespass and theft, as those are prohibited by other laws." *Muqqddin*, 2012-NMSC-029, ¶ 40. Thus, given this disparity, we agree with the district court's conclusion, that the Legislature did not intend for the burglary statute to be used to prosecute conduct that, in this case, is "better revealed in the lesser statutes of [t]respass . . . and [s]hoplifting[.]" Moreover, to the extent ambiguity remains as to whether the Legislature intended for this type of conduct to be prosecuted under the burglary statute, "[t]he rule of lenity requires that ambiguity in criminal statutes [be] strictly construed against the [s]tate." *Id.* ¶ 58 (second alteration in original) (internal quotation marks and citation omitted). Thus, under the rule of lenity, any ambiguity must be resolved against the application of the burglary statute to the conduct at issue in this case.

Finally, the State challenges the district court's ruling, arguing that the district court was bound by *Tower* and that "[i]t is not the prerogative of the lower courts to overrule controlling precedent, despite the fact that subsequent cases may raise doubts about their continued vitality." While we acknowledge that lower courts are bound by controlling precedent "in order to protect the fundamental interests of fairness, certainty, uniformity, and judicial economy," *State ex rel. Martinez v. City of Las Vegas*, 2004-NMSC-009, ¶ 20, 135 N.M. 375, 89 P.3d 47, we decline to address the propriety of the district court's decision not to apply *Tower*, as it does not provide a basis for reversal. Ultimately, we have determined that *Tower* is inconsistent with the principles articulated in *Muqqddin* and must be overruled, and the district court's act of refusing to apply *Tower* does not alter that decision.

In sum, we conclude that violating an order of no trespass by entering an otherwise open public shopping area with the intent to commit a theft does not constitute the type of harmful entry required for a violation of the burglary statute in the wake of *Muqqddin*. To the extent that *Tower* holds that the burglary statute applies to such conduct, *Tower* is expressly overruled. We conclude that to hold otherwise allows the State to use the burglary statute to enhance the misdemeanor act of trespassing to a felony—an enhancement that *Muqqddin* does not permit.

CONCLUSION

For the reasons articulated above, the order of the district court is affirmed.

IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

WE CONCUR:

LINDA M. VANZI, Judge

J. MILES HANISEE, Judge

Certiorari Granted, January 26, 2015, January 26, 2015, No. 35,035

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-038

Filing Date: November 18, 2014

Docket No. 31,273

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

JENNIFER STEPHENSON,

Defendant-Appellant.

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OPINION

GARCIA, Judge.

A jury found Jennifer Stephenson (Defendant) guilty of criminal child abandonment pursuant to NMSA 1978, Section 30-6-1(B)(2009). Defendant alleges multiple errors on appeal, including a contention that there was insufficient evidence to support the verdict. Specifically, she argues that her conduct in putting her two-year-old son (Child) to bed in his bedroom and ignoring his cries during the night does not constitute "leaving" or "abandoning" Child under Section 30-6-1(B). We agree and reverse Defendant's conviction. Because we reverse Defendant's conviction, we need not address the remaining issues raised on appeal.

BACKGROUND

On the evening in question, Defendant put her Child to bed in his bedroom and locked the bedroom door. Defendant eventually went to sleep in her own bedroom in the same apartment. Sometime during the night, Child climbed from his toddler bed up onto a dresser that was standing next to his bed. The 112-pound dresser tipped over and fell onto Child, pinning his legs between the toddler bed railing and the dresser.

Defendant told a detective that she did not hear any cries coming from Child's bedroom. And Child's father, who returned to the apartment from work at 2:00 a.m. that night, also said that he did not hear any cries that night. At about 7:00 a.m., the father woke and heard "whimpering" from Child's bedroom. He unlocked Child's bedroom door with a "butter knife" and discovered that Child was pinned between the dresser and the bed railing. He removed the dresser from Child and brought him to Defendant.

Defendant, still in her pajamas, left to take Child to the hospital emergency room. On the way to the hospital, Defendant stopped at her parent's apartment to pick up her father. Defendant checked in to the emergency room by 7:58 a.m. Defendant told the emergency room doctor that a dresser had fallen on Child.

The emergency room doctor testified that Child's injuries were not consistent with being "hit" by a dresser. He said that instead of bruises, there were pressure sores on both

sides of Child's legs. Child had also developed "compartment syndrome," a condition in which the cells of the leg muscles begin to die from "pressure [to the legs] over time." The doctor confirmed that he initially thought that the pressure sores and the compartment syndrome may have been caused by Child being bound by a "belt" or a "strap." Because the nature of Child's injuries did not fit with the cause of the injury reported by Defendant, the doctor suspected child abuse and called the police. The State charged Defendant with negligent child abuse under Section 30-6-1(D). However, after further investigation, the doctors changed their conclusion regarding the cause of Child's injury. At trial, the emergency room doctor testified that his "ultimate diagnosis" was that Child had sustained "a crush injury" that was "consistent with a very large piece of furniture pinning a child down over a period of hours." Additionally, the detective assigned to the case came to "believe [that] the dresser did, in fact, fall on [Child]" and that Child "was left there."

All of the doctors who testified at trial said that Child, in order to develop pressure sores and compartment syndrome, would have been trapped between the dresser and the bed railing for hours. The emergency room doctor testified that it would take "several" hours for Child's injuries to form. The orthopedic surgeon who treated Child testified that he thought Child was trapped for at least "eight to twelve hours" and that "this type of injury usually takes [twelve] to [twenty-four] hours to develop." The pediatric intensive care doctor who treated Child testified that she thought Child was trapped for "a minimum of six to twelve hours." All of these doctors agreed that Child would have been in extreme pain and that he would have been "crying" and "screaming." And a pediatric psychologist testified that a child's cry from being "hurt" is different than his cry from being "tired" or "uncomfortable" and that "every mommy knows that."

During its closing argument, the State told the jury that this case was about whether it is "okay to leave your child confined or pinned or trapped for [six] to [twelve] hours." It told the jury that its "theory of the case" was that Child "didn't like going to bed"; that Defendant "put[] him in [his bed]room" and "locked the door"; that Child "climb[ed] up on th[e] dresser . . . and the chest f[ell]"; that Child was "in pain" and "crying"; and that "[Defendant] chose to ignore him." It said that "the crux of this case" was Defendant's "failure to act. . . . her nonaction. . . . it's about negligence."

The district court instructed the jury on the elements of the crime of negligent child abuse under Section 30-6-1(D)(1). And at defense counsel's request, the district court also instructed the jury on the elements of the crime of child abandonment. The jury acquitted Defendant of negligent child abuse, but it convicted her of child abandonment. On appeal, Defendant argues, among other things, that the evidence was insufficient to support the child abandonment conviction.

DISCUSSION

Our Supreme Court has observed that the Legislature "[r]ecogniz[ed] the wide variety of ways that a child can be harmed by abuse and neglect" and has adopted a "spectrum" of civil and criminal remedies to address child abuse. *See State v. Chavez*, 2009-NMSC-035, ¶ 12, 146 N.M. 434, 211 P.3d 891. On the "benign" end of this spectrum, the Legislature can

"ensur[e] that children receive nutritious meals[.]" *Id.* More "intrusive[ly]," children may be placed in foster care or parental rights may be terminated all together. *Id.* And "[o]n the far end of this spectrum lies the sanction for criminal child abuse, . . . punishable by . . . imprisonment" and potential loss of parental rights. *Id.* The statutory construction of various statutes within this spectrum of the criminal child abuse array is the first issue we must address in this case.

Standard of Review

Interpretation of a criminal statute is a question of law that we review de novo. *Id.* ¶ 10. Our "principal command" in construing a statute is to "effectuate the intent of the [L]egislature" by "using the plain language of the statute." *State v. Ogden*, 1994-NMSC-029, ¶ 24, 118 N.M. 234, 880 P.2d 845. When interpreting "the plain meaning of the words at issue," the appellate courts "often us[e] the dictionary for guidance." *State v. Boyse*, 2013-NMSC-024, ¶ 9, 303 P.3d 830.

We must "strictly" construe statutes that define criminal conduct. *Chavez*, 2009-NMSC-035, ¶ 10. And we will not read a criminal statute as applying to particular conduct "unless the legislative proscription is plain." *State v. Bybee*, 1989-NMCA-071, ¶ 12, 109 N.M. 44, 781 P.2d 316 (citing *United States v. Scharton*, 285 U.S. 518 (1932)).

Once an appellate court interprets the language set forth in the relevant statutes, it "appl[ies] a substantial evidence standard to review the sufficiency of the evidence at trial." *Chavez*, 2009-NMSC-035, ¶ 11. We must review the evidence "in the light most favorable to the prosecution" to determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (internal quotation marks and citation omitted). In doing so, we "indulg[e] all reasonable inferences and resolv[e] all conflicts in the evidence in favor of the verdict." *Id.* (internal quotation marks and citation omitted). We are not permitted to "weigh the evidence or substitute [our] judgment for that of the fact finder"; we determine only whether "there is sufficient evidence to support the verdict." *Id.* (internal quotation marks and citation omitted).

The Civil Child Abuse and Neglect Processes

The civil child abuse and neglect process "addresses situations in which the child has suffered or who is at risk of suffering serious harm because of the action or *inaction* of the child's parent[.]" *Id.* ¶ 13 (emphasis, internal quotation marks and citation omitted) (quoting NMSA 1978, § 32A-4-2(B)(1)).

> When parental conduct or the home environment places a child at risk, the State can use its civil powers to remove the danger to the child, either by allowing the child to remain with the parents subject to their compliance with court-ordered conditions, by removing the child from the home, or by transferring legal custody to another. Importantly, this process contemplates that parents will be afforded . . . an opportunity to comply with a treatment plan before the State proceeds to more drastic remedies[,] . . . the ultimate goal [is] to preserve and reunify the family.

Id. ¶ 14 (citation omitted).

The Criminal Child Abandonment Component

In 1973, the Legislature enacted a statute criminalizing "abandonment or abuse of a child." 1973 N.M. Laws, ch. 360, § 10; *see* § 30-6-1. Although the statute has since been amended and re-codified, its abandonment provision remains substantially the same. In pertinent part, the abandonment provision states:

> Abandonment of a child consists of the parent, guardian[,] or custodian of a child intentionally leaving or abandoning the child under circumstances whereby the child may or does suffer neglect.

Section 30-6-1(B). "Neglect" is defined to mean that:

> a child is without proper parental care and control of subsistence, education, medical[,] or other care or control necessary for the child's well-being because of the faults or habits of the child's parents, guardian[,] or custodian or their neglect or refusal, when able to do so, to provide them[.]

Section 30-6-1 (A)(2).

The child abandonment statute does not define the terms "leaving or abandoning." *See* § 30-6-1(B). We have been unable to find any New Mexico authority determining what kind of parental conduct constitutes "leaving or abandoning" a child under Section 30-6-1(B). Thus, we turn to the dictionary for guidance about the "plain meaning" of these terms. *See Boyse*, 2013-NMSC-024, ¶ 9. The word "leave" means "[t]o depart; voluntarily go away" or "[t]o depart willfully with the *intent not to return*." *Black's Law Dictionary* 767 (9th ed. 2010) (emphasis added). "Abandonment" means "1. The relinquishing of a right or interest with *the intention of never again claiming it*. . . . 3. *Family law*. The act of leaving a spouse or child willfully and *without an intent to return*." *Id.* at 1-2 (emphasis added).

These dictionary definitions are consistent with similar definitions we have found in legal encyclopedias discussing criminal child abandonment. *See* 23 Am. Jur. 2d *Dedication to Desertion and Nonsupport* § 30, at 838-39 (2013) ("To constitute abandonment or desertion of a child within the meaning of the statutes making it an offense, there ordinarily must be an actual, voluntary, or willful desertion of the child, without justification and *with an intent to sever the parental relationship entirely*." (emphasis added)); *see also* 67A C.J.S. *Pardon & Parole to Parties* § 381, at 471 (2013) ("The elements of the offense of abandonment of a child are 'desertion,' that is, the willful forsaking and desertion of the duties of parenthood, and 'dependency,' that is, leaving such a child in a dependent condition.").

A survey of other states' case law reveals that historically, the term "abandonment," as used in statutes criminalizing the abandonment of a child, has been interpreted in a manner consistent with the dictionary and legal encyclopedia definitions above. *See Gay v. State*, 31 S.E. 569, 570 (Ga. 1898) ("[T]o constitute . . . abandonment . . ., there must be an actual desertion, accompanied with an intention to entirely sever, so far as it is possible to do so, the parental relation, and throw off all obligations growing out of the same."), *superseded by statute as recognized in Bailey*

v. State, 105 S.E.2d 320 (Ga. 1958); *State v. Wilson*, 287 N.W.2d 587, 589-91 (Iowa 1980) (concluding that the Iowa general assembly used the term "abandons" in "its usual sense of permanency" and it did not "intend to encompass a temporary absence" where a mother left her eighteen-month-old child unattended in her apartment for ninety minutes while she went to a nearby gas station to talk to her boyfriend was insufficient to prove child abandonment); *City of Cincinnati v. Meade*, 259 N.E.2d 505, 506 (Ohio Ct. App. 1970) (holding that a parent cannot be convicted of child abandonment unless it is "proved beyond a reasonable doubt that there was a willful leaving of his or her child . . . with an intention of causing perpetual separation"); *State v. Laemoa*, 533 P.2d 370, 374 (Or. Ct. App. 1975) ("As applied to our child abandonment statute, abandonment means relinquishing all parental claims to a child and foregoing all parental duties to a child."); *see also State v. Davis*, 70 Mo. 467, 468 (Mo. 1879) (recognizing that abandonment is a statutory offense that "does not mean a mere temporary absence from home, or temporary neglect of parental duty" but requires "an intention of causing perpetual separation").

Some state courts have recognized that a temporary absence may be sufficient to meet the definition of abandonment. The Pennsylvania Supreme Court concluded that the criminal child abandonment statute was "designed to punish single episodes that are repugnant to our concept of an orderly society." *Commonwealth v. Skufca*, 321 A.2d 889, 892 (Pa. 1974) (explaining that "the jury was free to find that leaving these minor children of tender years and incapable of protecting themselves unattended for a sustained period, closeted in such a manner that they were denied assistance from without, by a parent who had the duty to provide for their safety and ignored that responsibility for her personal pleasure, fell within the conduct prohibited under [the criminal abandonment statute").

Under the Texas statute, "abandon" is more broadly defined to include "leav[ing] a child in any place without providing reasonable and necessary care for the child, under circumstances under which no reasonable, similarly situated adult would leave a child of that age and ability." Tex. Penal Code Ann. § 22.041(a), (b) (2007)). This definition has also been applied to circumstances that involved a temporary absence. *See Fernandez v. State*, 269 S.W.3d 63, 64 (Tex. App. 2008) (recognizing that the defendant abandoned an infant when she left the infant in a locked car at a parking lot with the windows rolled up for an hour while she was shoplifting inside of a store); *Schultz v. State*, 923 S.W.2d 1, 1-2 (Tex. App. 1996) (en banc) (affirming a conviction for child abandonment where the defendant left her two young children alone in her apartment for fifteen hours and they died in a fire). Notwithstanding the broad definition of abandonment in Texas, the term has not been construed so broadly to be applied to a circumstance where a parent remains in the same apartment with a child in distress, but ignores the child from another room.

Other state courts have upheld convictions in situations involving a parental absence that could be identified as temporary, although the question of whether these statutes encompassed temporary or permanent abandonments was not at issue or addressed in these cases. *See In re B.L.M.*, 492 S.E.2d 700, 700-01 (Ga. Ct. App. 1997) (affirming a reckless abandonment of a child conviction where a juvenile who placed her newborn

infant in a trash bag, set it out with the garbage on the porch, and went to sleep inside the house); *Jones v. State*, 701 N.E.2d 863, 869 (Ind. Ct. App. 1998) (affirming a conviction for neglect of a dependent by abandonment where a mother left her four-year-old child alone in her apartment for four days and returned to find him dead); *Davis v. State*, 476 N.E.2d 127, 140 (Ind. Ct. App. 1985) (affirming a conviction for neglect of a dependent by abandonment where a mother left her newborn infant "alone by the side of a deserted country gravel road out of the view of [any] passersby").

We have found no authority, and the State has cited none, to establish that the combined actions by a parent of locking a child in his or her bedroom and then ignoring the child's cries while remaining in the same apartment constitutes the crime of abandonment. *See State v. Ibarra*, 1993-NMCA-040, ¶ 13, 116 N.M. 486, 864 P.2d 302 ("We are entitled to assume, when arguments are unsupported by cited authority, that supporting authorities do not exist."). The State's reliance on *State v. Chavez*, 2007-NMCA-162, 143 N.M. 126, 173 P.3d 48 (*Kimberly Chavez*), is misplaced. Although this Court in *Kimberly Chavez* referenced that the defendant was convicted of one count of "abandonment or abuse of a child[,]" the statutory conviction was for negligent child abuse under Section 30-6-1(D)(1) rather than abandonment under Section 30-6-1(B). *Kimberly Chavez*, 2007-NMCA-162, ¶¶ 4, 13, 17-18, 29. In the present case, the jury found Defendant not guilty of negligent child abuse under Section 30-6-1(D)(1). As a result, it is clear that *Kimberly Chavez* addressed a conviction for negligent child abuse under Section 30-6-1(D)(1) and is not applicable to our analysis of abandonment in this case.

We are persuaded by those cases and authorities that apply the literal and plain meaning of abandonment to conclude that a parent must leave the child without an intent to return to be convicted of criminal child abandonment. This interpretation is consistent with our mandate to "effectuate the intent of the [L]egislature" by "using the plain language of the statute," *Ogden*, 1994-NMSC-029, ¶ 24; to construe criminal statutes "strictly," *Chavez*, 2009-NMSC-035, ¶ 10; and to avoid reading a criminal statute as applying to particular conduct "unless the legislative proscription is plain," *Bybee*, 1989-NMCA-071, ¶ 12. Therefore, we conclude that to convict a defendant of abandonment under Section 30-6-1(B), there must be sufficient evidence that the defendant left the child without an intent to return.

The State neither argued nor presented any evidence that Defendant intended to leave Child in his bedroom without an intent to return. By locking Child in his bedroom while Defendant remained inside the same apartment, Defendant has not met the definition of abandonment—leaving without an intent to return. As a result, there was insufficient evidence to support Defendant's child abandonment conviction under Section 30-6-1(B). We note that our holding is consistent with our recent non-binding and unpublished decision in *State v. Charley*, No. 31,911, mem. op. ¶ 24 (N.M. Ct. App. April 17, 2014) (non-precedential) (determining that a "[f]ailure to pick up a child after school does not rise to the type of abandonment contemplated by New Mexico statutory law"). Moreover, Defendant's alleged conduct was consistent with the kind of "inaction" that our Children's Code was designed to consider through other proceedings. *See* § 32A-4-2 (B)(1) (defining "abused child" to mean a child "who has

suffered . . . serious harm because of the action or *inaction* of the child's parent." (emphasis added)); *Chavez*, 2009-NMSC-035, ¶ 13.

Defendant's Jury Instruction Request

We note that Defendant requested the jury instruction on abandonment of a child pursuant to Section 30-6-1, and the State did not object to the inclusion of this instruction. The State makes reference to this procedural matter in its appellate brief but does not present any argument, cite relevant case law to assert error, or otherwise develop any issue for further review. We might speculate that this procedural factor has some relevance on appeal. The appellate courts have addressed the issue of invited error when it is properly raised on appeal. *See State v. Clark*, 1989-NMSC-010, ¶¶ 26-29, 103, 108 N.M. 288, 772 P.2d 322 (addressing a failure to object to the arguments and jury instructions in the context of invited error and fundamental error); *State v. Young*, 1994-NMCA-061, ¶¶ 3-6, 117 N.M. 688, 875 P.2d 1119 (declining to address a defendant's challenge to the evidence and the jury instruction that he requested be given). Under the circumstances, however, this Court will not address an undeveloped issue where no authority or argument has been presented on appeal. *See State v. Gutierrez*, 2012-NMCA-013, ¶ 33, 269 P.3d 905 (stating that where a party "fails to cite to any facts in the record or other authority in support of [a] contention," this Court will "decline to review Defendant's undeveloped argument on appeal.")(*rev'd on other grounds*, 2014-NMSC-031, 333 P.3d 247); *State v. Gonzales*, 2011-NMCA-007, ¶ 19, 149 N.M. 226, 247 P.3d 1111 (stating that "this Court has no duty to review an argument that is not adequately developed"); *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 on appeal that would require this Court to guess at what a party's arguments might be). As a result, we decline to consider this procedural matter further.

CONCLUSION

Defendant's conviction for the crime of child abandonment is reversed. This matter is remanded to the district court to effectuate the dismissal of Defendant's conviction and the sentence imposed upon her.

IT IS SO ORDERED.

TIMOTHY L. GARCIA, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

JONATHAN B. SUTIN, Judge

Certiorari Granted, January 27, 2015, No. 35,049

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-039

Filing Date: December 3, 2014

Docket No. 32,881

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

DANNY SURRATT,

Defendant-Appellant.

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for Appellant

OPINION

SUTIN, Judge.

This appeal raises the issue whether a person appointed as special prosecutor in a criminal case has authority to appoint another attorney to act as special prosecutor instead. In Defendant's first trial, prosecuted by a special prosecutor appointed by the district attorney of the judicial district in which the case originated, the district court ordered a new trial. Defendant's second trial was prosecuted by a second special prosecutor, this one appointed by the first special prosecutor. We hold that the district attorney of the judicial district in which the case originated was the only person with authority to appoint a special prosecutor and that the district court lacked jurisdiction over the case being retried.

BACKGROUND

Defendant Danny Surratt was a police officer and deputy sheriff in Lea County, New Mexico for approximately thirty-five years. When he was charged with four counts arising out of allegations of sexual abuse of his wife's two minor granddaughters in Lea County, Janetta Hicks, the district attorney for the Fifth Judicial District, the judicial district in which Lea County is situated and the prosecution originated, determined that a conflict of interest precluded her office from prosecuting Defendant. Accordingly, acting pursuant to NMSA 1978, Section 36-1-23.1 (1984), Ms. Hicks appointed Diana Martwick, district attorney for the Twelfth Judicial District, to prosecute Defendant in her stead. *See id.* (providing that when a district attorney "cannot prosecute a case for ethical reasons or other good cause" the district attorney may "appoint a practicing member of the bar of this state to act as special assistant district attorney").

Ms. Martwick assigned assistant district attorneys from her office in the Twelfth Judicial District to prosecute the State's case against Defendant, and they proceeded to file a criminal information against Defendant in the Fifth Judicial District Court and then to try the State's case against Defendant before a jury. Of the four charges that comprised the State's case against Defendant, the jury found Defendant guilty of a single count of criminal sexual penetration of a child between the ages of thirteen and eighteen. The district court dismissed two of the charges, and because the jury could not reach a verdict as to the fourth charge, the district court declared a mistrial as to that charge. Before Defendant was sentenced, new counsel entered the case on his behalf. Defendant, through his

new counsel, moved for a new trial on the basis of an error in the jury instructions related to the charge of which Defendant was convicted, and the district court granted the motion.

When the district court ordered a new trial, Ms. Martwick was ill and undergoing medical treatment and was therefore unable to personally prosecute the State's case against Defendant. Also, an unspecified conflict had arisen between the alleged victims and the assistant district attorney who had prosecuted Defendant in the first trial. Owing to the conflict and because, in Ms. Martwick's view, the assistant district attorney "seemed overwhelmed by the case and having to retry the whole thing all over again[,]" and lacked "the experience to deal with the re-trial[,]" Ms. Martwick "felt that it would be in the best interest of justice to re-assign the case" to another jurisdiction. Ms. Martwick then appointed Matthew Chandler, district attorney for the Ninth Judicial District, as special prosecutor in the State's case against Defendant.

Following Mr. Chandler's appointment as special prosecutor, Mr. Chandler's chief deputy district attorney entered her appearance on behalf of the State and began moving the case toward trial. Defendant successfully moved to sever the two remaining charges against him, and the State re-tried Defendant on the charge of criminal sexual penetration of a child under the age of thirteen. A jury found Defendant guilty of that charge; however, before Defendant was sentenced, his counsel learned from an anonymous telephone call that " 'the jury had and used improper information' " in reaching its verdict. Defendant moved for a new trial contingent upon confirming the truth of the anonymous caller's information. The district court issued an order authorizing Defendant's counsel to interview the jurors concerning Defendant's trial. The court also determined that, pending Defendant's investigation into the jury issue, it would delay filing a judgment and sentence pursuant to the jury's verdict.

Although the investigation into the jury issue did not, in defense counsel's estimation, "warrant further actions[,]" Defendant nevertheless moved to dismiss the complaint and set aside the sentence because, in the process of investigating the jury issue, defense counsel "became aware for the first time of defects in the appointment of" Mr. Chandler as special prosecutor. Defendant argued that Mr. Chandler lacked authority to prosecute Defendant because, among other things, Ms. Martwick, in her role as special prosecutor, lacked authority to appoint another special prosecutor to prosecute the State's case. Defendant concluded by arguing that, because Mr. Chandler lacked authority to prosecute Defendant, "no jurisdiction exists for criminal prosecution of the matter[.]" In a follow-up motion containing points and authorities in support of his lack-of-authority argument, Defendant also argued that Ms. Martwick did not have a valid or ethical reason to appoint a new special prosecutor to prosecute Defendant.

The State's response to Defendant's motion to dismiss the complaint and set aside the sentence included affidavits of Ms. Hicks, Ms. Martwick, and Mr. Chandler. In relevant part, Ms. Hicks stated in her affidavit that Ms. Martwick "would not have come back to my office for another appointment as I was already conflicted out of the proceeding. It would have been [Ms.] Martwick's responsibility to make any further [special prosecutor] appointments she deemed

appropriate."[1] Ms. Martwick stated in her affidavit that before re-assigning the case, she contacted Ms. Hicks, and they "both agreed that [Ms. Hicks] was conflicted out and that [Ms. Martwick] should be the one to" appoint a new special prosecutor. Ms. Martwick also addressed the bases of her decision to appoint another special prosecutor. Finally, Mr. Chandler stated in his affidavit that he had read, understood, and accepted the responsibilities of the oath of a special prosecutor as reflected by the filing of his acceptance of the appointment.

The district court denied Defendant's motion and proceeded to enter its judgment reflecting Defendant's conviction of criminal sexual penetration of a child under age thirteen and sentenced Defendant to eighteen years of imprisonment. The State dismissed the remaining charge of criminal sexual penetration of a child between the ages of thirteen and eighteen without prejudice in consideration of Defendant's sentence of incarceration and on the ground of "judicial efficiency[.]"

On appeal from the district court's judgment and sentence, Defendant argues that his conviction should be reversed and the matter remanded because Mr. Chandler was not lawfully appointed as special prosecutor and did not have lawful authority to prosecute the case, and because the district court lacked jurisdiction over the second trial of Defendant. We agree and reverse the district court's judgment and sentence and remand this matter to the district court for further proceedings.

[1]If Ms. Hicks and her office had a conflict that required her to appoint a special prosecutor, here Ms. Martwick, we do not understand why Ms. Hicks excused herself and her office for reasons of conflict from appointing a replacement special prosecutor.

DISCUSSION

Whether, pursuant to Section 36-1-23.1, Ms. Martwick had authority to appoint Mr. Chandler as a special prosecutor in the State's case against Defendant, and the related question whether the district court had jurisdiction over this matter, are questions of law that we review de novo. *See State v. McClaugherty*, 2008-NMSC-044, ¶ 21, 144 N.M. 483, 188 P.3d 1234 (stating that a question of jurisdiction of the district court that is answered through statutory construction is reviewed de novo).

Section 36-1-23.1, titled "[s]pecial prosecutors in conflict cases[,]" provides that

> [e]ach district attorney may, when he cannot prosecute a case for ethical reasons or other good cause, appoint a practicing member of the bar of this state to act as special assistant district attorney. Any person so appointed shall have authority to act only in the specific case or matter for which the appointment was made. An appointment and oath shall be required of special assistant district attorneys in substantially the same form as that required for assistant district attorneys[.][2]

Defendant concedes and we agree that Ms. Martwick had authority to designate an assistant district attorney

[2]Based on the title and the text of Section 36-1-23.1, it is clear that, for the purposes of and in the context of this case, the designation "special assistant district attorney[]" is synonymous with the designation of "special prosecutor[]" outside of the office of the appointing district attorney. The parties use the term "special prosecutor," as do we.

within her own office to prosecute Defendant, as she did in the first trial. *State v. Cherryhomes*, 1996-NMSC-072, ¶ 11, 122 N.M. 687, 930 P.2d 1139 (stating that where a district attorney has been appointed as special prosecutor in a particular case pursuant to Section 36-1-23.1, he or she is permitted to delegate the task of prosecution to an assistant district attorney acting under his or her supervision). Defendant contends, however, that as special prosecutor Ms. Martwick did not have the authority of a "district attorney" for the purpose of appointing a special prosecutor pursuant to Section 36-1-23.1. We agree.

As the district attorney for the Fifth Judicial District, Ms. Hicks had a statutory duty to prosecute Defendant on behalf of the State for the alleged crimes originating within Lea County. NMSA 1978, § 36-1-18(A)(1) (2001) ("Each district attorney shall . . . prosecute . . . for the state in all courts of record of the counties of his district all [criminal] cases . . . in which the state or any county in his district may be a party or may be interested[.]"). Ms. Hicks' position also vested her with the lawful authority to appoint a special prosecutor when ethical reasons or other good cause so required. Section 36-1-23.1. When Ms. Hicks appointed Ms. Martwick to act as special prosecutor in this matter, Ms. Martwick was vested with the limited authority to prosecute the State's case against Defendant. Section 36-1-23.1 ("Any person . . . appointed [to act as special prosecutor] shall have authority to act only in the specific case or matter for which the appointment was made."). Ms. Martwick's appointment as special prosecutor authorized her, in effect, to step into the shoes of the district attorney for the Fifth Judicial District solely to prosecute as prescribed by Section 36-1-18(A)(1).

Nothing in the language of Section 36-1-23.1 supports a conclusion that the Legislature intended a special prosecutor, appointed for the purpose of prosecuting a single case, to assume the authority with which the appointing district attorney was vested by virtue of having been elected to the office to appoint a special prosecutor. While a conflict may have prevented Ms. Hicks and her office from prosecuting Defendant, under Section 36-1-23.1, she nevertheless retained the statutory duty to act on behalf of the Fifth Judicial District to appoint a special prosecutor to do so, as she did with the appointment of Ms. Martwick. Having learned that Ms. Martwick could no longer prosecute the case in her stead, it was incumbent upon Ms. Hicks, as the only person with lawful authority to do so, to appoint another special prosecutor. By appointing Mr. Chandler to act as special prosecutor in Defendant's case, Ms. Martwick unlawfully assumed the exclusive authority of the district attorney for the Fifth Judicial District to appoint a special prosecutor to prosecute a matter originating within the Fifth Judicial District.

We are not persuaded by the State's attempt to explain its position that Ms. Martwick's "transfer" of the case to Mr. Chandler was lawful and did not deprive the district court of jurisdiction. With no applicable authority nor any manageable logic, the State offers several unsupported notions. The State concentrates on the fact that both Ms. Martwick and Mr. Chandler are elected district attorneys who took the required oaths in that regard and had statutory prosecutorial duties, thus curing any concerns about whether the appointment by Ms. Martwick comported with the language of Section 36-1-23.1 or created any actual prejudice to Defendant. All that occurred, according to the State, was

nothing more than a substitution by Ms. Martwick of a qualified attorney as an authorized "hybrid" between what the State characterizes as a "regular assistant district attorney[]" and a "special assistant district attorney." The *Cherryhomes* and *Hollenbeck* cases on which the State relies, *see Cherryhomes*, 1996-NMSC-072, ¶¶ 6, 11, and *State v. Hollenbeck*, 1991-NMCA-060, ¶¶ 7, 14, 15, 112 N.M. 275, 814 P.2d 143, which are the only cases remotely close to the issue here, in no way support the State's argument. And we particularly reject the State's implication, when citing to *Cherryhomes* and *Hollenbeck*, that the legislative enactments of NMSA 1978, Section 36-1-1 (1909), NMSA 1978, Section 36-1-5 (1988), NMSA 1978, Section 36-1-2 (1984), and Section 36-1-23.1 indicate both a legislative intent to allow Ms. Martwick's appointment of Mr. Chandler or, as more directly argued by the State, if the Legislature had intended to preclude such an appointment delegation responsibly it could have easily done so. It would be fruitless for us to attempt to set out in any more detail the State's eleven-plus-page discussion attempting to justify the significance of these notions and its position on appeal.

In sum, we hold that Ms. Martwick lacked lawful authority to appoint Mr. Chandler, Mr. Chandler lacked authority to prosecute the State's case against Defendant, and the district court lacked jurisdiction over Defendant's re-trial. "[I]f an individual who does not have authority to prosecute does prosecute, the [district] court will lack jurisdiction." *Hollenbeck*, 1991-NMCA-060, ¶ 10. Accordingly, we reverse the district court's judgment and sentence and remand this matter to the district court for further proceedings. *See id.* ¶¶ 14-15 (reversing the defendant's conviction where a special prosecutor's appointment did not conform to the legal requirements of Section 36-1-23.1). Because we reverse on jurisdictional grounds, we do not consider Defendant's argument regarding the validity of Ms. Martwick's reasons for appointing a special prosecutor.

CONCLUSION

We reverse the district court's judgment and sentence and remand this matter to the district court for further proceedings.

IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

MICHAEL E. VIGIL, Judge

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMSC-011

Filing Date: March 26, 2015

Docket No. 34,607

EDWARD LUCERO, JR., and ELAINE LUCERO,

Plaintiffs-Respondents,

v.

NORTHLAND INSURANCE COMPANY,

Defendant-Petitioner.

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OPINION

BOSSON, Justice.

A trucking company purchased a liability insurance policy covering each of its several tractors and trailers. The policy stipulated that liability coverage would be limited to "$1,000,000 each 'accident.'" A tractor-trailer rig insured under the policy was involved in a single accident. The question before us is whether $1,000,000 is the limit per accident for both vehicles (the tractor and the trailer) or whether each vehicle has liability coverage in the amount of $1,000,000. The district court interpreted the policy to limit its coverage to $1,000,000; our Court of Appeals disagreed and reversed. Because this dispute affects not only the parties to this lawsuit but arguably New Mexico's place among the many jurisdictions that have grappled with similar policy language, we granted certiorari and now reverse the Court of Appeals.

BACKGROUND

The facts in this case are undisputed. The Luceros were severely injured when their vehicle was hit by a tractor-trailer negligently driven by an employee of H & J Hamilton Trucking Company, insured by Defendant Northland Insurance Company. Northland defended Hamilton in the ensuing lawsuit. Eventually, Northland stipulated to liability, and the Luceros agreed to dismiss all claims against Northland and its insured in exchange for a settlement in the amount of policy limits.

The parties disagreed, however, as to the

policy limits. Before the district court, the parties filed cross-motions for summary judgment seeking to answer this question. Northland maintained that its insurance policy limits liability to $1,000,000 for each accident, an amount it tendered to the Luceros. The Luceros, on the other hand, interpreted the policy as providing $1,000,000 for each covered auto. Hamilton's tractor and trailer are both covered autos under the policy, so the Luceros sought $1,000,000 for each, or $2,000,000 for both. The district court agreed with Northland's reading of the insurance policy and granted summary judgment for $1,000,000. The Court of Appeals reversed, agreeing with the Luceros. *See Lucero v. Northland Ins. Co.*, 2014-NMCA-055, ¶¶ 1, 27, 326 P.3d 42.

DISCUSSION

Because the insurance policy before us involves liability coverage, we interpret the policy "in accordance with the same principles which govern the interpretation of all contracts." *Ponder v. State Farm Mut. Auto. Ins. Co.*, 2000-NMSC-033, ¶ 11, 129 N.M. 698, 12 P.3d 960 (internal quotation marks and citation omitted). Our primary goal is to determine "the intentions of the contracting parties . . . at the time they executed the [policy]." *Id.* "When discerning the purpose, meaning, and intent of the parties to a contract, the court's duty is confined to interpreting the contract that the parties made for themselves, and absent any ambiguity, the court may not alter or fabricate a new agreement for the parties." *CC Hous. Corp. v. Ryder Truck Rental, Inc.*, 1987-NMSC-117, ¶ 6, 106 N.M. 577, 746 P.2d 1109. "Thus, when the policy language is clear and unambiguous, we must give effect to the contract and enforce it as written." *Ponder*, 2000-NMSC-033, ¶11.

The Insurance Policy

Three sections of the policy before us are particularly relevant in resolving this case: Declarations Item Two, "Schedule of Coverages and Covered Autos," Section II(A), "Liability Coverage," and Section II(C), "Limit of Insurance." We look first to the Declarations page, Item Two, entitled "Schedule of Coverages and Covered Autos," which we insert from the original.

ITEM TWO - SCHEDULE OF COVERAGES AND COVERED AUTOS

This policy provides only those coverages where a charge is shown in the premium column below. Each of these coverages will apply only to those "autos" shown as Covered "Autos." "Autos" are shown as Covered "Autos" for a particular coverage by the entry of one or more of the Symbols listed in Section IA of the Coverage Form next to the name of the coverage.

	Covered "Autos"	COVERAGES	LIMITS OF LIABILITY	PREMIUM
LIABILITY	15	(1) BODILY INJURY - BI	$ each person $ each "accident"	$
		(2) PROPERTY DAMAGE - PD	$ each "accident"	$
		COVER NED (1) AND (2) - CSL	$ 1,000,000 each "accident"	$ 24,665 00

We note particularly the language stating: "This policy provides only those coverages where a charge is shown in the premium column below. Each of these coverages will apply only to those 'autos' shown as Covered 'Autos.'" As noted above, the Declarations page then provides, and sets forth separate premiums for, various kinds of coverages including the liability coverage for bodily injury and property damage at issue in this lawsuit. "Covered Auto" is a defined term in the policy that refers in a separate page to Hamilton's five tractors and six trailers, including both the tractor and the trailer involved in this accident. Accordingly, Northland is clearly liable for the negligence of its insured up to any limits of liability the policy declares. As is evident from the quoted portion of the Declarations page, the policy limits liability coverage to a maximum of "$1,000,000 each 'accident.'"

Moving beyond the Declarations page to the main body of the policy, the next significant provision, Section II(A) "Liability Coverage," reads as follows:

We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto".

We will also pay all sums an "insured" legally must pay as a "covered pollution cost or expense" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of covered "autos". However, we will only pay for the "covered pollution cost or expense" if there is either "bodily injury" or "property damage" to which this insurance applies that is caused by the same "accident".

We have the right and duty to defend any "insured" against a "suit" asking for such damages or a "covered pollution cost or expense". However, we have no duty to defend any "insured" against a "suit" seeking damages for "bodily injury" or "property damage" or a "covered pollution cost or expense" to which this insurance does not apply. We may investigate and settle any claim or "suit" as we consider appropriate. Our duty to defend or settle ends when the Liability Coverage Limit of Insurance has been exhausted by payment of judgments or settlements.

The third relevant policy provision, Section II(C) entitled "Limit of Insurance," then proceeds to define the limit on liability coverage:

Regardless of the number of covered "autos", "insureds", premiums paid, claims made or vehicles involved in the "accident", the most we will pay for the total of all damages and "covered pollution cost or expense" combined, resulting from any one "accident" is the Limit of Insurance for Liability Coverage shown in the Declarations.

Reading the three provisions together, we see that Northland's promise in Section II (A) to "pay all sums an 'insured' legally must pay as damages . . . caused by an 'accident' and resulting from the . . . use of a covered 'auto'," is limited by Section II(C), "the most we will pay for . . . all damages . . . resulting from any one 'accident.'" That limit is "$1,000,000 each 'accident'" as stated on the Declarations page.

The Luceros read the policy as promising something different. They argue that the policy provides $1,000,000 in liability coverage for each "covered auto" involved in any one accident. Because two "covered autos" were involved in this accident (the tractor and the trailer) and because each "covered auto" carries $1,000,000 in liability coverage, the Luceros contend that the policy limits in this case are $2,000,000, not $1,000,000. The Court of Appeals agreed with the Luceros' position. *See Lucero*, 2014-NMCA-055, ¶ 13 ("Defendant is obligated to provide $1 million in coverage for the tractor involved in the accident and $1 million in coverage for the trailer involved in the same accident, for a total of $2 million in coverage.").

As authority for their conclusion, the Luceros look first to the Declarations page Schedule of Coverages, previously quoted, which states in part that "[e]ach of these coverages will apply only to those 'autos' shown as Covered 'Autos.'" The Luceros read

this as a grant of coverage up to the policy limits of $1,000,000 for each covered auto involved in any accident, including this situation involving two covered autos in one accident. We question whether the policy really grants such expansive coverage.

First, the policy simply does not say that it grants coverage in the amount of policy limits for each covered auto, each accident. The language does not read, "each of these coverages will apply to [each of] those autos shown . . . ." The language states instead that "[e]ach of these coverages will apply *only* to those 'autos' shown . . . ." It is as if the Luceros would read the word "only" out of the sentence. Textually, the provision is phrased not as a grant but as a limitation: "only" those autos shown on the list of covered autos are eligible for $1,000,000 of liability coverage. There is a critical distinction between a *grant* of coverage and "the *amount* of such coverage." *See Vigil v. California Cas. Ins. Co.*, 1991-NMSC-050, ¶¶ 7-8, 112 N.M. 67, 811 P.2d 565 (emphasis added). Plainly, the Declarations page makes liability coverage available for each of the covered autos, but it does not grant policy limits for each covered auto.

The Declarations page then stipulates that its limit of liability is "$1,000,000 each 'accident.'" Clearly then, liability coverage is not boundless; the policy does not say "$1,000,000 *each covered auto* each accident." The limitation on the Declarations page apparently applies as an outside limit per "accident" without regard to the number of covered autos involved.

Even, however, if there were reasonable grounds for disagreement over the terms of the Declarations page, language in the body of the policy settles the matter. Section II(A) of the policy, previously quoted, states: "Our duty to defend or settle ends when the Liability Coverage Limit of Insurance has been exhausted by payment of judgments or settlements." As previously discussed, the Declarations page provides that this limit is $1,000,000 each accident. Section II(C) of the policy then says the same thing in terms of a "per accident" outside limit on what Northland will pay. It states: "Regardless of the number of covered 'autos' . . . or vehicles involved in the 'accident'," the most Northland will pay "for the total of all damages . . . resulting from any one 'accident' is the Limit of Insurance for Liability Coverage shown in the Declarations [$1,000,000 each accident]." Therefore, the argument advanced by the Luceros that the policy provides $1,000,000 in coverage for "each covered auto in each accident" simply does not find support in the language of the policy. The policy limits Northland's exposure to $1,000,000 per accident regardless of the number of covered autos involved in any one accident.

Importantly, we observe that other jurisdictions interpreting similar insurance clauses have reached a similar conclusion. *See Grinnell Select Ins. Co. v. Baker*, 362 F.3d 1005, 1006 (7th Cir. 2004) ("This is the most we will pay regardless of the number of: 1. 'Insureds'; 2. Claims made; 3. Vehicles or premiums shown in the Declarations; or 4. Vehicles involved in the auto accident."); *Auto-Owners Ins. Co. v. Munroe*, 614 F.3d 322, 324-25 (7th Cir. 2010) ("The 'Combined Limit of Liability' provision . . . provides that the per-occurrence limit—$1,000,000—is the most that Auto-Owners will pay, 'regardless of the number of automobiles shown in the Declarations . . . or automobiles involved in the occurrence.'" (second omission in original)); *Suh v. Dennis*, 614 A.2d 1367, 1370 (N.J. Super. Ct. Law Div. 1992)

("Regardless of the number of covered 'autos', 'insureds', premiums paid, claims made, or vehicles involved in the 'accident', the most we will pay for all damages resulting in any one 'accident' is the Limit of Insurance for Liability Coverage shown in the Declarations."); *United Servs. Auto. Ass'n v. Baggett*, 258 Cal. Rptr. 52, 54 (Ct. App. 1989) ("This is the most we will pay regardless of the number of: 1. Covered persons; 2. Claims made; 3. Vehicles or premiums shown in the Declarations; or 4. Vehicles involved in the auto accident." (internal alterations omitted)); *United Servs. Auto. Ass'n v. Wilkinson*, 569 A.2d 749, 751-52 (N.H. 1989) ("Regardless of the number of covered *autos, insureds,* claims made or vehicles involved in the *accident, our* limit of liability is as follows: . . . The most *we* will pay for all damages resulting from *bodily injury* to any one person caused by any one *accident* is the limit shown in this endorsement for 'each person'."); *Banner v. Raisin Valley, Inc.*, 31 F. Supp. 2d 591, 592 (N.D. Ohio 1998) ("The limitation of liability section clearly states that the limit applies regardless of the number of vehicles involved in the accident."). The Luceros offer little contrary authority.

The Luceros, focusing on the precise language and phrasing of Section II(C), put forward a different theory of that section's intent, essentially arguing that the limits of that section simply do not apply when two covered autos are involved in one accident. For ease of reference, we state the Limitation of Insurance clause once more.

> Regardless of the number of covered "autos", "insureds", premiums paid, claims made or vehicles involved in the "accident", the most we will pay for . . . any one "accident" is the Limit of Insurance for Liability Coverage shown in the Declarations [$1,000,000 each accident].

The Luceros point out that "[r]egardless of the number of covered 'autos'" as stated in Section II(C) does not say "regardless of the number of covered autos *involved in the accident.*" The Luceros argue that since the phrase is not tied to covered autos involved in the accident, then the phrase should be read as, "regardless of the number of covered autos *not involved in the accident.*"

This interpretation, according to the Luceros, makes the phrase an anti-stacking clause and not a limit on per-accident liability. Anti-stacking clauses are typically designed to prevent the insured from aggregating (stacking) policy limits that apply to covered vehicles that are *not* involved in the particular accident. *See Lucero*, 2014-NMCA-055, ¶ 19. Here, the Luceros are not trying to aggregate (or stack) policy limits for covered autos *not* involved in the accident; they seek to aggregate the limits provided for each of the covered autos that *is* involved in the accident. Therefore, the Luceros argue that the limits referred to in Section II(C) do not apply to this particular circumstance where more than one covered auto is involved in a single accident.[1]

Of course, the Limitation of Insurance clause does use the term "involved in the accident" after the word "vehicles" ("[r]egardless of the number of . . . vehicles

[1]We note that while stacking generally involves aggregating the policies of the vehicles not involved in the accident, merely saying a clause is an anti-stacking clause is not alone dispositive. A court should look to the facts of the case and the language as a whole to determine if a clause is actually an anti-stacking clause. *See Progressive Premier Ins. Co. of Ill. v. Kocher ex rel. Fleming*, 932 N.E.2d 1094, 1098 (Ill. App. Ct. 2010).

involved in the 'accident'"). The Luceros argue that the term "involved in the 'accident'" only modifies "vehicles" and not any of the antecedent terms before it—like covered autos ("[r]egardless of the number of covered 'autos'"). The Luceros note the absence of a comma between "claims made" and "or vehicles involved in the accident."[2] The Luceros point out that "covered autos" is specifically defined in the policy whereas the term "vehicles" is not, and therefore, "vehicles" is intended to refer to something other than "covered autos." Instead, the Luceros argue that "vehicles" is a generic term that refers to all autos and not "covered autos," a debatable assertion given that all "covered autos" must as well be "vehicles."

Thus, argue the Luceros, by putting the term "vehicles" instead of "covered autos" right before the phrase "involved in the accident," Northland must have intended the clause "involved in the 'accident'" to mean that the limits in the Declarations page apply regardless of the number of *other* vehicles involved or claims made against the insured. For example, the limit of liability would be the same if the insured was in an accident with one other vehicle or one hundred other vehicles. Similarly, the limit of liability would be the same whether there were one hundred claims against the insured or one.

But, according to the Luceros, this clause was not intended to modify or limit liability for multiple "covered autos" involved in the accident. In that case, there would be no limit. Northland would have to pay $2,000,000 for two covered autos in one accident, $6,000,000 for six covered autos, even $11,000,000 if all eleven covered autos were somehow involved in a single accident. At the very least, the Luceros' interpretation suggests ambiguity, and ambiguity in contracts should be interpreted in favor of the insured.

We note that "a contract is ambiguous if a *genuine* doubt appears as to its meaning, that is, if after applying established rules of interpretation, the written instrument remains *reasonably* susceptible to at least two reasonable but conflicting meanings . . . ." 11 Williston on Contracts: *Ambiguity as a prerequisite to interpretation and construction* § 30:4 (4th ed. 2014) (emphasis added) (footnotes omitted). This does not mean that every possible interpretation will lead to an ambiguity. While the Luceros' reading is not entirely implausible, it relies in part on a very technical rule of English known as the Doctrine of the Last Antecedent. *See* LeClercq, *supra*, at 201-02. Such rules may inform our analysis, but they are merely a guide to discerning legislative intent. *Hale v. Basin Motor Co.*, 1990-NMSC-068, 110 N.M. 314, 795 P.2d 1006. We believe our duty is not to impose hyper-technical rules of grammar when interpreting the true intentions of parties to a contract. If that were our duty, then most contracts would be ambiguous.

From the text of Section II(C), considered as a whole and not parsed too finely, we believe it is clear that Northland intended its "$1,000,000 each 'accident'" limitation to apply "[r]egardless of the number of covered 'autos' . . . or vehicles" that *are* "involved in the 'accident'." Regardless of

[2]According to the Doctrine of the Last Antecedent, "[e]vidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated from the antecedent by a comma." Terri LeClercq, *Doctrine of the Last Antecedent: The Mystifying Morass of Ambiguous Modifiers*, 40 Tex. J. Bus. L. 199, 210 (2004) (footnote, internal quotation marks and citation omitted).

that number, not the number of covered autos *not* involved in the accident, the policy proclaims its limit: "[T]he most we will pay for the total of all damages . . . resulting from any one 'accident'" is $1,000,000.

Reading Section II(C) as a per-accident limit of liability regardless of the number of covered autos involved in the accident appears to be consistent with the majority of jurisdictions that have addressed this issue. It is also consistent with similar cases in which the tractor and the trailer are both involved in a single accident. *See Munroe*, 614 F.3d at 325 (following the accident of a tractor trailer, the policy unambiguously limits coverage to $1,000,000); *Canal Ins. Co. v. Blankenship*, 129 F. Supp. 2d 950, 953 (S.D. W. Va. 2001) (the policy liability for the truck and trailer was properly limited to $1,000,000 and did not provide for $2,000,000 policy limits); *Carolina Cas. Ins. Co. v. Estate of Karpov*, 559 F.3d 621, 625 (7th Cir. 2009) (although the accident involved a covered tractor and trailer, "[t]he insurance policy clearly and expressly limited [the insurer's] liability to a maximum of $1,000,000 per accident").

We note three cases that are particularly helpful in deciding this issue. First, in *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29 (Fla. 2000), the Florida Supreme Court construed a limit of liability clause after a tractor-trailer rig caused an accident with a single car. *Id.* at 31-32. Although the Court found that the language of the limitation-of-liability clause in that particular policy was ambiguous, it turned to several cases from other jurisdictions as an example of what the insurer should have done to make its liability limit unambiguous. *Id.* at 33-36. The Florida Court stated:

> In contrast to the clause drafted by Auto-Owners in this case, the limiting provisions of the insurance policies set forth in the recent reported decisions include an introductory qualifying clause that clearly and unambiguously explains that liability coverage is limited to a certain amount "regardless" of the number of vehicles involved in the accident.

Id. at 36. *See also State Auto Ins. Co. v. Stinson*, 142 F.3d 436 (6th Cir.1998) (unpublished table decision); *Weimer v. Country Mut. Ins. Co.*, 575 N.W.2d 466, 469 n.6 (Wis. 1998); *Dennis*, 614 A.2d at 1370. The limiting phrase "regardless of the number of vehicles involved in the accident" is of course strikingly similar to Northland's language in this very case.

Referring to these other cases, the Florida Court then observed,

> The presence of these qualifying clauses evidences an established custom in the insurance industry as to the language used by insurers in drafting clauses where the intent is to limit liability coverage to a single amount, even though multiple insured vehicles are involved in an accident. As these out-of-state cases demonstrate, when multiple insured vehicles are involved in a single accident, a limitation of liability can be achieved by the simple use of a qualifying clause.

Anderson, 756 So. 2d at 36 (citation omitted).

We regard this reference to a "custom in the insurance industry" as

significant. Because Northland can justifiably rely on limiting phraseology accepted elsewhere to achieve its desired objective, we should proceed cautiously before creating different expectations solely for our state.

Similarly, the United States Court of Appeals for the Seventh Circuit interpreted a limit-of-liability clause after three sets of tractor-trailers, all owned by the insured, were involved in one accident. *Munroe,* 614 F.3d at 323. The policy contained a combined limit of liability of $1,000,000 per occurrence "'regardless of the number of automobiles shown in the Declarations . . . or automobiles involved in the occurrence.'" *Id.* at 325 (omission in original). The Court found no ambiguity: "While the Munroes attempt to find ambiguity, including in the terms 'automobiles' and 'combined,' these contortions merit little discussion here: applied to the facts of this case, the unambiguous terms of the policy limit the coverage to $1,000,000 for each occurrence, notwithstanding the involvement of three . . . tractor-trailers." *Id.*

Finally, the United States District Court for the Southern District of West Virginia interpreted a limit of liability clause after a tractor and trailer were involved in a deadly accident. *Blankenship*, 129 F. Supp. 2d at 952. The sole question was whether the policy limit provided $1,000,000 total liability coverage or $1,000,000 for each vehicle. *Id.* The policy contained a clause that read "[r]egardless of the number of . . . **automobiles** to which this policy applies, . . . [t]he limit of liability stated in the schedule of the policy as applicable to 'each **occurrence**' is the total limit of the company's liability . . . ." *Id.* The injured parties claimed that this language was ambiguous "because it does not limit liability to one million dollars per occurrence when more than one covered vehicle is involved in the accident." *Id.* at 953. They suggested that the insurance company should have added the language "'regardless of the number of vehicles *involved in the accident.*'" *Id.* (emphasis added). The Court held that the insurance policy was not ambiguous and provided coverage up to $1,000,000 per occurrence. *Id.* at 956. The Court noted that "[a] court should read policy provisions to avoid ambiguities and not torture the language to create them." *Id.* at 953 (internal quotation marks and citation omitted).

Thus, we are satisfied that Northland's position appears to be more in line with the "custom" within the industry and the jurisprudence construing it. While that observation is not necessarily dispositive, it does inform our deliberations. The Luceros' position, on the other hand, appears to be almost without supporting authority, at least in terms of cases interpreting similar policy language. In its briefing to this Court, Northland asserted that the Luceros' interpretation of the policy, as adopted by our Court of Appeals, "stands alone among the 50 state judicial systems." *See Grinnell,* 362 F.3d at 1007. Though perhaps somewhat hyperbolic, that statement remains largely unchallenged, and the Luceros have not done much to discredit it.[3]

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[3]The Fifth District Court of Appeals for Illinois has found policies ambiguous despite a similar limit of liability clause. *See Kocher,* 932 N.E.2d at 1096 ("'The limit of liability shown on the **Declarations Page** is the most we will pay regardless of the number of: 1. claims made; 2. **covered vehicles;** 3. **trailers** shown on the **Declarations Page;** 4. **insured persons;** 5. lawsuits brought; 6. vehicles involved in an **accident;** or 7. premiums paid.'"). However, the court found the policy ambiguous because the amount in the limit liability in the declarations page was listed more than once. The court

CONCLUSION

We hold that Northland limited its liability to $1,000,000 for each accident regardless of the number of insured vehicles involved. Accordingly, we reverse the Court of Appeals and affirm the district court's grant of summary judgment in favor of Northland.

IT IS SO ORDERED.

RICHARD C. BOSSON, Justice

WE CONCUR:

BARBARA J. VIGIL, Chief Justice

PETRA JIMENEZ MAES, Justice

EDWARD L. CHÁVEZ, Justice

JERRY H. RITTER, Judge
Sitting by Designation

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMSC-012

Filing Date: February 19, 2015

Docket No. 34,286

EMRE YEDIDAG, M.D.,

Plaintiff-Respondent,

v.

ROSWELL CLINIC CORP. and ROSWELL HOSPITAL CORP.,

Defendants-Petitioners.

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for Respondent

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specifically distinguished its case with those cases where the amount in the declarations page was listed only once. *Id.* at 1102. In our case, Northland's policy only states the limit of liability once.

OPINION

CHÁVEZ, Justice.

Respondent Dr. Emre Yedidag was an employee-physician for Roswell Clinic Corp. and Roswell Hospital Corp. (Eastern New Mexico Medical Center). During the peer review of another Eastern employee-physician, Dr. Akbar Ali, Dr. Yedidag questioned Dr. Ali because Dr. Ali was not forthcoming concerning his role in a patient's death. Members of Eastern's executive team reported the exchange to the hospital administration, which precipitated the termination of Dr. Yedidag's employment for unprofessional conduct. Dr. Yedidag then filed a complaint against Eastern for utilizing confidential peer review information to justify his termination. A jury determined that Eastern violated the New Mexico Review Organization Immunity Act (ROIA), NMSA 1978, Sections 41-9-1 to -7 (1979, as amended through 2011), and concluded that this violation proximately caused Dr. Yedidag's damages. The jury also concluded that Eastern breached its employment contract with Dr. Yedidag by terminating him for his participation in a peer review. The jury awarded both compensatory and punitive damages to Dr. Yedidag. The New Mexico Court of Appeals affirmed the verdict. *Yedidag v. Roswell Clinic Corp.*, 2013-NMCA-096, ¶¶ 2, 40, 314 P.3d 243, *cert. granted*, 2013-NMCERT-009.

On certiorari review, Eastern argues that (1) ROIA does not create a private cause of action, (2) ROIA did not create an implied promise that Dr. Yedidag would not suffer adverse consequences incident to his participation in the peer review process, and (3) the evidence was insufficient to substantiate the jury's award of punitive damages. We affirm the Court of Appeals and hold that (1) Section 41-9-5(A) creates a private cause of action for breaches of peer review confidentiality when such disclosures do not further any of the listed purposes of ROIA, (2) ROIA is the basis for an implied promise that physician-reviewers will not suffer adverse employment consequences from participation in peer reviews, *see* § 41-9-5(A), because we conclude that contractual agreements incorporate mandatory state law, and (3) the evidence was sufficient for a jury determination of punitive damages because a jury could conclude that Eastern's actions were, at minimum, wanton.

BACKGROUND

On August 14, 2006, eighty-seven-year-old Dorothy Brewington underwent surgery at Eastern to remove two known tumors from her colon. During her surgery, Dr. Ali removed only one of the tumors. This required Ms. Brewington to undergo a second operation to remove the remaining tumor. Complications resulted from both surgeries, and she ultimately died on September 13, 2006.

This incident was submitted to a peer review committee for review. Dr. Dudley, an Albuquerque private-practice colorectal surgeon and peer-review expert who reviewed the relevant hospital records, testified that the clinical summary submitted to physician reviewers during Dr. Ali's peer review of this incident provided limited information and the summary appeared "slanted" to suggest that the second surgery was necessary to remove a previously unknown third tumor. This case arises out of Dr. Ali's troubling peer review. We first provide some background on peer reviews before discussing the circumstances of Dr. Ali's peer review evaluation. Many facts in this case are contested, and we rely

extensively on testimony to frame the parties' conflicting perspectives.

DISCUSSION

I. Whether ROIA Creates a Cause of Action for Breach of the ROIA Confidentiality Provision

A. The physician peer review process in general

Peer reviews are meant to ensure that patients have received adequate care. *See* Brendan A. Sorg, Comment, *Is Meaningful Peer Review Headed Back to Florida?*, 46 Akron L. Rev. 799, 802 (2013) ("Peer review is a process in which the actions of health care providers are reviewed to determine the appropriateness of care that was provided"). During these proceedings, physicians review the actions "of individual physicians and other healthcare professionals appointed to the medical staff of a hospital or other health care organization when there are quality of care concerns with respect to the health care services provided by that individual." Susan O. Scheutzow & Sylvia Lynn Gillis, *Confidentiality and Privilege of Peer Review Information: More Imagined Than Real*, 7 J.L. & Health 169, 172 (1992-1993); *see also* Sorg, *supra*, at 802 ("Peer review is predominately performed by physicians and other health care professionals who are members of a hospital's medical staff."). In order to identify and resolve quality of care issues during a peer review, peer reviewers must have specialized medical expertise. *See id.* at 802-03 ("Functionally, peer review leads to efficient evaluation because practicing physicians have the expertise to evaluate peers' work and are best positioned to review the competence of other practicing physicians they regularly observe.").

In hospitals, "the term 'peer review' describes several distinct activities which are generally performed by a hospital medical staff committee." Katharine Van Tassel, *Hospital Peer Review Standards and Due Process: Moving from Tort Doctrine Toward Contract Principles Based on Clinical Practice Guidelines*, 36 Seton Hall L. Rev. 1179, 1190 (2006). For example, a hospital's medical staff must assemble and assess information concerning the competence and professionalism of the physicians who are seeking hospital staff privileges (such as medical, diagnostic, emergency room, or surgical privileges that allow a hospital's employee or non-employee physicians to treat the hospital's patients) for the first time or for renewal (the credentialing process). June D. Zellers & Michael R. Poulin, Symposium, *Termination of Hospital Medical Staff Privileges for Economic Reasons: An Appeal for Consistency*, 46 Me. L. Rev. 67, 67-68 (1994). Privileges enable physicians to practice medicine at a hospital. *See* Van Tassel, *supra*, at 1179, 1186-88. Physicians seek privileges when they need to access the resources that hospitals provide. *Id.* at 1187. Physicians who have privileges at a hospital are deemed to be part of the hospital's "medical staff." *See id.* at 1187-88. A peer review is also "commonly triggered by the report of an event or a series of events that raises questions about a physician's clinical competence." *Id.* at 1191. Hospitals tend to have their own unique peer review processes that are laid out in medical staff bylaws, but there are commonalities among hospitals. *Id.*

Normally, "medical staff by-laws are enforceable contracts between the hospital and the members of the medical staff." *Id.* These bylaws "designate those individuals who, or bodies which, can make a request to institute

an investigation, referred to either as a complaint or as a request for corrective action." *Id.* at 1191-92. "[B]y-laws will also identify the individuals who, or body which, can make the decision on whether to authorize an investigation." *Id.* at 1192. When "a decision is made to investigate a complaint," usually either the executive committee ("powerful members of the hospital staff") or "an appointed ad hoc committee made up of members of the general medical staff will conduct the investigation." *Id.* at 1185, 1192-93.

If such an investigation "reveals a physician who is found lacking, informal or formal punitive or restrictive measures may be imposed to bring about improvement in the subject physician's performance." *Id.* at 1190. "Informal measures include self-correction, assistance by colleagues, supervisory oversight and guidance with later re-assessment." *Id.* Formal measures could result in "a suspension of staff privileges until corrective measures are taken by the physician or further education is received by the physician"; restrictions on the scope of the physician's practice in the hospital; or termination of staff privileges altogether. *Id.* at 1190-91.

B. Barriers to peer review efficacy and the importance of confidentiality

"[E]ffective peer review requires one staff physician who becomes aware of a deficient pattern of care to come forward voluntarily and recommend that action be taken to protect the other physician's patients." Paul L. Scibetta, Note, *Restructuring Hospital-Physician Relations: Patient Care Quality Depends on the Health of Hospital Peer Review*, 51 U. Pitt. L. Rev. 1025, 1033 (1990) (footnote omitted).

> It is thus essential that the reviewing physicians on . . . peer review committees . . . not hesitate [to] act swiftly to alleviate potential injury. . . . Physicians whose poor patterns of care are discovered early could be disciplined, counselled, required to take further education, observed, or assisted in practice to assure that quality of practice is maintained. When problems remain undiscovered for long periods of time and the damage grows more serious, however, the options open to the hospital governing board will necessarily be more limited. In the worst case scenario, permanent suspension would result.

Id. Unfortunately, multiple barriers undermine peer review efficacy and threaten the objectivity and frankness of peer review evaluations. *See, e.g.*, *id.* at 1033-35.

"The most serious obstacle to effective peer review is the potential fear felt by the reviewer that participation in an adverse recommendation will lead to a lawsuit against him or her personally." *Id.* at 1033. This fear is realistic; plaintiff-physicians who have been subjected to negative reviews have brought "antitrust" suits against their reviewers. *Id.* at 1033-34. Although most of these suits have been unsuccessful, "the prospect of having to defend even a meritless claim can chill the willingness of many to recommend the action necessary to improve hospital quality." *Id.* at 1034. Thus, the threat of lawsuits significantly dampens peer reviewer candor.

Another issue is that peer reviewers may place their livelihoods at risk while conducting reviews. *See id.* at 1034-35.

Reviewers face threats to their professional livelihood from two sources: their peers and their employers. *See id.*; *see also* Maxine M. Harrington, *Revisiting Medical Error: Five Years After the IOM Report, Have Reporting Systems Made a Measurable Difference?*, 15 Health Matrix 329, 332 (2005) ("Efforts to obtain reliable information on medical error have also been hindered by the problem of underreporting, primarily due to fear of malpractice litigation and employer retaliations."). Physician-reviewers are vulnerable to retaliation from their peers because physicians are extremely interdependent on one another within hospitals; the "professional and financial success of each physician depends upon his or her colleagues." Scibetta, *supra*, at 1034. This is because "[i]ncreasing numbers of physicians practice in referral specialties: they must depend on their colleagues to send them patients." *Id.* at 1034-35. Consequently, "[p]hysicians who make important but difficult decisions [a]ffecting fellow practitioners may find that others are reluctant or unwilling to refer to them." *Id.* at 1035. This "situation is bound to chill the enthusiasm of potential peer reviewers." *Id.*

A final barrier to effective peer review is a physician's workplace friendships. Scibetta, *supra*, at 1035. Physicians develop friendships, and when they review a colleague's practice, they may have close personal ties to the colleague under review. "It is not difficult to surmise the internal conflict that must accompany the initiation of a proceeding which will be [certain] to engender animosity from a personal friend, and may well have serious implications for that friend's career." *Id.*; *see also* Sorg, *supra*, at 805 ("[P]eer review committee members are often direct colleagues or friends with the reviewed physician and understand that a disciplinary recommendation that leads to a termination of clinical privileges may have a devastating effect on the reviewed physician's career, while also ending any friendship."). This situation may be exacerbated in smaller hospitals. *See* Scheutzow, *supra*, at 174 ("Depending upon the size of the health care organization, the individuals performing peer review and the person reviewed may work together on a daily basis and may even practice in the same specialty."). Thus, relationships between physicians also inevitably dampen candor and hinder the objectivity of evaluations.

One way of overcoming these barriers is to ensure that the peer review process is kept confidential. *See* Sorg, *supra*, at 805-07 (listing the barriers to peer review efficacy and explaining that confidentiality protections are critical for addressing disincentives that prevent aggressive and meaningful peer review). "[C]onfidentiality promotes the candid, free flow of information between physicians who are part of the peer review committee." Alissa Marie Bassler, Comment, *Federal Law Should Keep Pace with States and Recognize A Medical Peer Review Privilege*, 39 Idaho L. Rev. 689, 690 (2003). This is presumably because (1) parties disgruntled by the outcome of a peer review would not know with whom they should be upset, and therefore would be less likely to retaliate, and (2) doctors would speak more candidly when their remarks were kept confidential. *See Ardisana v. Nw. Cmty. Hosp., Inc.*, 795 N.E.2d 964, 969 (Ill. App. Ct. 2003) ("Absent a confidentiality provision, physicians might be reluctant to engage in strict peer review due to a number of apprehensions: loss of referrals, respect, and friends, possible retaliations, vulnerability to tort actions, and fear of malpractice actions in which the records of the peer-review

proceedings might be used."); Bassler, *supra*, at 694 ("Physicians would not feel free to openly discuss the performance of other doctors practicing in the hospital, without assurance that their discussions in committee would be confidential" (internal quotation marks and citation omitted)).

C. Dr. Ali's peer review at Eastern

At Eastern, prior to any peer review meetings, members of the hospital's risk management team review case files to produce summaries. Physician-reviewers then evaluate the case summaries to form preliminary impressions of the cases under investigation. The reviewers then conduct a peer review meeting to discuss what, if anything, may have gone wrong, ultimately to identify methods of correcting errors to improve future treatment of patients. During peer review meetings, the physician being evaluated may be brought in for questioning when the reviewers believe that he or she may clarify points of confusion in the medical record.

According to a peer review expert, Texas general surgeon Dr. West, and consistent with Dr. Dudley's opinion, Dr. Ali's peer review was probably deficient because the clinical summary submitted to the reviewers omitted Dr. Ali's failure to remove a known tumor. This type of omission is problematic for evaluators because the summary is supposed to frame major problems for their review. Second, information concerning Dr. Ali's peer review leaked out and led to the termination of physician-reviewer Dr. Yedidag's employment. Dr. West explained that when peer review information is leaked, it discourages individuals from participating in peer reviews, and it may dim the candor of the other reviewers. This case hinges on the illegality of Eastern's actions regarding Dr. Yedidag and the statutory protections to which he was entitled as a peer reviewer. We next discuss Dr. Yedidag's tumultuous relationship with Eastern.

D. Termination of Dr. Yedidag's employment by Eastern

On September 6, 2005, Dr. Yedidag entered into a three-year surgeon's employment contract at Eastern that could only be terminated for fifteen listed reasons. Eastern hired Dr. Yedidag to build a surgical practice in Roswell to compete with other doctors and guaranteed his $375,000 salary, which meant that Eastern assumed the financial risk of Dr. Yedidag's failure to attract patients.

From Eastern's perspective, Dr. Yedidag "had [a] personality conflict right away with the other existing surgeons and doctors in his practice." Eastern claimed that Dr. Yedidag also failed to "integrate well with the primary care base and network in the community." These social conflicts caused problems for both Dr. Yedidag and Eastern because physicians rely upon referrals from other doctors to generate business, and poor relations with his peers reduced Dr. Yedidag's ability to obtain referrals. Eastern also asserts that Dr. Yedidag engaged in "several testy arguments, yelling incidents and disputes" with a colleague, despite being reprimanded for such behavior.

Dr. Yedidag argues that there was an "inevitable" clash between his "desire to observe rules and do things professionally . . . and Eastern's desire to have its employee-physicians . . . build a surgical practice for Eastern." The record indicates that Eastern's emergency room employees were undertrained

and tended to perform unnecessary and invasive[1] procedures that entail automatic admission of patients, boosting Eastern's profits. Eastern also tended to initially allocate patients, including patients of non-employee-physicians, to its own employee-physicians in a manner that artificially inflated the number of patients Eastern saw. This contravened the hospital's own regulations and created confusion and difficulties for its staff.

On November 15, 2006, Dr. Yedidag's relationship with Eastern reached its breaking point following the peer review meeting concerning Dr. Ali's treatment of Ms. Brewington. During the meeting, Dr. Yedidag questioned Dr. Ali to clarify the circumstances of Ms. Brewington's death and Dr. Ali refused to answer many of Dr. Yedidag's questions. Eastern characterizes Dr. Yedidag's questions as "verbal attacks" that were "heated" and unprecedented for peer review meetings, but failed to provide any specific details to support its characterization. Sara Williamson, who was not a member of the peer review committee but was present during the meeting in an administrative role, reported to Michael Kueker, Eastern's physician practice manager, that Dr. Yedidag had verbally attacked Dr. Ali during the peer review. However, Williamson did not recall "any word that Dr. Yedidag said," and she only had "visual memories of [Dr. Yedidag's] behavior, body language, tone of voice and the way things were being said."

However, there is evidence that Dr. Ali's peer review was neither uniquely contentious nor unprofessional. Dr. Eric Peterson, who chaired the peer review, testified that although the discussion was heated and probably did not improve relations between Dr. Yedidag and Dr. Ali, Dr. Yedidag's questions were well directed and brought information to the forefront. The peer reviewers could have asked Dr. Peterson to intervene if they thought that the discussion got out of line, but no such request was made. Dr. Petersen did not take action, even though he reportedly "doesn't tolerate unfounded accusations" and "raised voices" in peer review meetings.

Dr. Peterson's testimony is supported by the observations of Dr. Steven North, who was also present at Dr. Ali's peer review. According to Dr. North, Dr. Yedidag "was not rude in any way." Dr. North believed that while Dr. Yedidag spoke passionately, his passion was not out of the ordinary. From Dr. North's perspective, Dr. Ali's peer review was not unusually contentious.

Notwithstanding the lack of specifics, Eastern claims that Dr. Yedidag's actions during the peer review process directly contributed to his employment termination. Sara Williamson's report regarding Dr. Yedidag's questioning of Dr. Ali is what precipitated Dr. Yedidag's termination. In its brief Eastern contends that Dr. Yedidag was terminated "based on [his] repeated unprofessional behavior and repeated warnings to cease such behavior."

Despite this contention, there is evidence that Eastern's commercial interests precipitated Dr. Yedidag's employment termination following a peer review meeting where employee and non-employee physicians who compete for patients served as peer reviewers. When Dr. Yedidag tried to explain his side of the story to Mr. Kueker, Mr.

[1]For example, Dr. Yedidag alleged that Eastern employees routinely placed tubes into patients' chest walls which, even if they were not needed by the patients, was profitable for Eastern.

Kueker told Dr. Yedidag that he "[didn't] need to know" and he "[didn't] really want to know," because "in an environment where [Eastern has] a sensitive competition going between [a] group of surgeons in one camp and [Eastern's] surgeons in the other, for one of [Eastern's] surgeons to attack his [colleague] in that meeting in front of other people who are in the other camp" is problematic. Mr. Kueker also claims that he simply did not want his physicians to attack each another.

Eastern terminated Dr. Yedidag's employment pursuant to grounds 10.1(j), 10.1(k), and 10.1(m) of his employment contract. These grounds provide, respectively, that Eastern may terminate the employment of a physician (1) whose continued employment either "pose[d] an unreasonable risk of harm to patients or others" or "adversely affect[ed] the confidence of the public in the services provided by [Eastern];" (2) who "engaged in gross insubordination or gross dereliction of duty;" or (3) whose conduct was reasonably determined "to be unethical, unprofessional, fraudulent, unlawful, or adverse to the interest, reputation or business of [Eastern]."

Mr. Kueker claims that these grounds for termination were proper because (1) Dr. Yedidag reduced public confidence in Eastern's services by arguing with his peers, (2) Dr. Yedidag was insubordinate in failing to heed repeated warnings concerning his allegedly inappropriate behavior, and (3) Dr. Yedidag engaged in unprofessional behavior that was adverse to Eastern's interest. However, Mr. Kueker admitted that not all of the grounds listed in the termination clauses of the contract actually justified terminating Dr. Yedidag's employment. For example, Mr. Kueker admitted that to his knowledge, Dr. Yedidag never placed any patients in danger.

In his termination letter, Mr. Kueker did not clarify that he only relied on portions of the termination clauses to justify Dr. Yedidag's employment termination. Dr. Yedidag testified that as a result of the letter, prospective employers could have believed that he posed "an unreasonable risk of harm to patients," even though his employment was not terminated for endangering patients. The letter rendered Dr. Yedidag almost unemployable by other hospitals. He was in fact summarily rejected from many jobs after potential employers learned about the conditions under which he was terminated. Mr. Kueker was aware that this situation could arise as a result of Dr. Yedidag's termination.

After these events, Dr. Yedidag filed an amended complaint against Eastern on claims arising from his termination. A jury found that Eastern violated ROIA, which proximately caused Dr. Yedidag's damages, and that Eastern breached its employment contract with Dr. Yedidag. With respect to Eastern's breach of contract, the jury specifically found that "Eastern breached its implied promise that there would be no adverse consequences to Dr. Yedidag's employment or staff privileges as a consequence of his participation in the peer review process." The jury then awarded Dr. Yedidag compensatory and punitive damages. The New Mexico Court of Appeals affirmed the verdict. *Yedidag*, 2013-NMCA-096, ¶¶ 2, 40. We granted certiorari review and affirm the Court of Appeals. 2013-NMCERT-009.

E. The ROIA confidentiality provision creates a cause of action

This case hinges on whether Section 41-9-5(A), the ROIA confidentiality provision, creates a private cause of action, which is a question of law we review de novo.

See Sedillo v. State, Dep't of Pub. Safety, 2007-NMCA-002, ¶ 7, 140 N.M. 858, 149 P.3d 955 ("The question of whether statutes create or imply a private right of action is a question of law . . . reviewed de novo."). We first provide an overview of ROIA.

ROIA regulates hospital peer review committees, which gather and review information concerning the care and treatment of patients for eight purposes. Section 41-9-2(E). The listed purposes are:

> (1) evaluating and improving the quality of health care services rendered in the area or by a health care provider;
>
> (2) reducing morbidity or mortality;
>
> (3) obtaining and disseminating statistics and information relative to the treatment and prevention of diseases, illnesses and injuries;
>
> (4) developing and publishing guidelines showing the norms of health care services in the area or by health care providers;
>
> (5) developing and publishing guidelines designed to keep within reasonable bounds the cost of health care services;
>
> (6) reviewing the nature, quality or cost of health care services provided to enrollees of health maintenance organizations and nonprofit health care plans;
>
> (7) acting as a professional standards review organization pursuant to 42 U.S.C., Section 1320c-1, et seq.; or
>
> (8) determining whether a health care provider shall be granted authority to provide health care services using the health care provider's facilities or whether a health care provider's privileges should be limited, suspended or revoked.

Section 41-9-2(E). These purposes necessarily include gathering and evaluating treatment data, defining and enforcing professional standards, and evaluating and improving the quality of healthcare services in the area. *Id.* ROIA is meant to improve New Mexico health care. *Sw. Cmty. Health Servs. v. Smith*, 1988-NMSC-035, ¶ 7, 107 N.M. 196, 755 P.2d 40 ("ROIA establishes a medical peer review process to promote the improvement of health care in New Mexico."). However, peer reviews are only efficacious when they are conducted with objectivity and candor. *Id.* ("[ROIA] recognizes that candor and objectivity in the critical evaluation of medical professionals by medical professionals is necessary for the efficacy of the review process."). To promote objectivity and candor, ROIA grants qualified immunity to both peer reviewers and individuals who provide information to review organizations. *See* § 41-9-3 ("No person providing information to a review organization shall be subject to any action for damages or other relief . . . unless such information is false and the person providing such information knew or had reason to believe such information was false."); § 41-9-4 (providing that peer reviewers shall not be liable "for damages or other relief in any action brought by . . . persons whose activities have been or are being scrutinized or reviewed by a review organization . . . unless the performance of such duty, function or activity was done with malice toward the person affected thereby"); *Leyba v. Renger*, 1992-NMSC-061, ¶¶ 5-6, 114 N.M. 686, 845 P.2d 780 (recognizing that ROIA establishes qualified immunity).

ROIA also protects the confidentiality of peer review records. *See Sw. Cmty. Health Servs.*, 1988-NMSC-035, ¶ 10 ("Section 41-9-5 precludes any party from using for purposes of civil litigation the confidential records of peer review proceedings"). Section 41-9-5(A) protects peer review confidentiality and provides that

> [a]ll data and information acquired by a review organization in the exercise of its duties and functions shall be held in confidence and shall not be disclosed to anyone *except to the extent necessary to carry out one or more of the purposes* of the review organization or in a judicial appeal from the action of the review organization.

(Emphasis added.) Although this provision does not explicitly provide a private remedy, we must determine whether a cause of action is implied.

Our determination of whether to imply a private cause of action is influenced by three of four factors set out in *Cort v. Ash*, 422 U.S. 66, 78 (1975). *See Nat'l Trust for Historic Pres. v. City of Albuquerque*, 1994-NMCA-057, ¶¶ 7, 11, 117 N.M. 590, 874 P.2d 798 (listing the *Cort* factors and stating that the first three *Cort* factors, while not irrelevant, do not exclusively determine whether to imply a cause of action). These three factors are

> (1) Was the statute enacted for the special benefit of a class of which the plaintiff is a member? (2) Is there any indication of legislative intent, explicit or implicit, to create or deny a private remedy? [and] (3) Would a private remedy either frustrate or assist the underlying purpose of the legislative scheme?

Nat'l Trust, 1994-NMCA-057, ¶ 7 (internal quotation marks and citation omitted).

1. *Whether Dr. Yedidag is a member of the class protected by ROIA*

The first *Cort* factor favors Dr. Yedidag because he is a member of the class protected by ROIA. Eastern argues that the ROIA qualified immunity provision, which protects peer reviewers from claims brought by the physicians they evaluate, is the only ROIA protection to which Dr. Yedidag is entitled. Eastern therefore contends that Dr. Yedidag is not a member of the protected class because Dr. Ali, the person Dr. Yedidag evaluated, did not sue Dr. Yedidag. Eastern's argument is contrary to the text and policy contained in ROIA, and its argument also ignores industry realities.

Section 41-9-5(A) expressly guarantees the confidentiality of what "transpired" during peer review meetings. The plain text in ROIA provides a blanket confidentiality provision for peer review proceedings; it does not state that physician-reviewers are only protected when they are being sued by their reviewed peers. *See* §§ 41-9-3 to -7.

Retaliation against peer reviewers can arise from many different sources. *See Ardisana*, 795 N.E.2d at 969 (listing some of the apprehensions physicians may experience as a result of their participation in peer reviews). For example, physicians may lose "referrals, respect, and friends" in their community. *Id.* These concerns may undermine the rigor of physician peer reviews, and a blanket confidentiality provision that

provides protection for physician-reviewers helps ensure candid peer reviews. *See* Gregory G. Gosfield, Comment, *Medical Peer Review Protection in the Health Care Industry*, 52 Temp. L.Q. 552, 558 (1979) (noting that lawmakers seek to avert the ambivalence experienced by physicians when performing strict peer reviews "by shielding peer review deliberations from legal attacks" and describing how this ambivalence arises from numerous sources).

The instant case demonstrates that retaliation can arise from sources other than poorly reviewed physicians. Dr. Yedidag's expert, Dr. West, testified that peer review information should not be made available to members of the public, including employers, under any circumstances, and that leaked information can undermine the peer review process by provoking retaliation from parties including the reviewed doctors, their friends, and their families. *See Ardisana*, 795 N.E.2d at 969 (noting possible "loss of referrals, respect, and friends, possible retaliations, vulnerability to tort actions, and fear of malpractice actions" as sources of physicians' reluctance to participate in a peer review process). Employers also may retaliate against those who disclose information concerning medical errors and their employers' misdeeds because employers want to protect their financial interests and reputations. *See* Harrington, *supra*, at 332; *Terzano v. Wayne Cnty.*, 549 N.W.2d 606, 611 (Mich. Ct. App. 1996) (noting that employers engage in retaliatory actions when their employees reveal information about the misdeeds of other employees or of the employer that harms the employer's financial interests).

Not surprisingly, physicians who have been found responsible for providing substandard care often experience a decrease in business. *See* Alex Stein, *Toward A Theory of Medical Malpractice*, 97 Iowa L. Rev. 1201, 1242 (2012) (noting that physicians who have been found responsible for malpractice face negative peer reviews and expulsion from patient-referral networks and that these consequences often destroy such physicians' businesses); *see also Salamon v. Our Lady of Victory Hosp.*, 514 F.3d 217, 220 (2d Cir. 2008) (noting that undeserved negative performance reviews caused "serious damage" to a physician's career prospects). Employee-physicians' abilities to generate revenue for their hospital-employer depend, in part, on the number of referrals they receive. *See* Robert Kocker & Nikhil R. Sahni, *Hospitals' Race to Employ Physicians—The Logic behind a Money-Losing Proposition*, 364 New Eng. J. Med. 1790, 1791 (2011) (noting that hospitals "expect to [make] money on employed physicians when they account for the value of all care, tests, and referrals"). Eastern admits that poor reviews of a hospital's employee-physician may harm the hospital's profitability. Consequently, employee-physician reviewers who provide negative reviews of their colleagues foreseeably risk retaliation from their employers because such reviews harm their employers' financial interests.

We hold that peer reviewers are a protected class of individuals under ROIA, regardless of whether the retaliatory entity is a reviewed physician, a hospital, or any other person or entity. In this case Dr. Yedidag was a peer reviewer, and he is entitled to the protections contained in ROIA, including its confidentiality provision.

2. *Whether there was legislative intent to create or deny a remedy*

The second *Cort* factor favors Dr.

Yedidag because the Legislature intended that ROIA create a cause of action for breaches of its confidentiality provision. Eastern advances two arguments to the contrary. First, Eastern argues that because the Legislature failed to specifically provide for a civil cause of action, there is an inference that it did not intend to create one. Second, Eastern argues that whereas medical information discussed during peer reviews is confidential, the conduct of the peer reviewers is not.

Eastern's first argument is inconsistent with New Mexico case law. *National Trust* indicates that the omission of an express cause of action by a legislature does not necessarily prohibit an implied cause of action. *See* 1994-NMCA-057, ¶¶ 6, 14-15 (recognizing that "a statute may explicitly deny a private cause of action" and "it may be appropriate to deny standing when recognition of a private cause of action would undermine the effective functioning of a statutory scheme," but nevertheless enabling the plaintiffs to bring an action, although there was no "explicit statutory directive" enabling them to do so).

Eastern's second argument is inconsistent with ROIA. Section 41-9-5 does not distinguish information from conduct. The confidentiality provision precludes the disclosure of "what transpired" during the peer review meeting unless (1) disclosure would further the purposes of either peer review or judicial review of peer review actions, or (2) the medical board subpoenas individuals on what transpired during a peer review. Section 41-9-5. The term "transpire" means to "happen" or "occur." *Webster's Third New International Dictionary of the English Language Unabridged* 2430 (1971). Conduct is something that transpires at peer reviews. ROIA does not provide a basis for the distinction asserted by Eastern.

Despite Eastern's arguments, we conclude that the Legislature intended to create an implied cause of action. As a general rule, "[a] disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages . . . is *implied*." *Tex. & Pac. Ry. Co. v. Rigsby*, 241 U.S. 33, 39 (1916) (emphasis added).

3. *Whether an implied cause of action furthers or frustrates the purpose of the confidentiality provision*

We conclude that the third *Cort* factor also favors Dr. Yedidag because without a private cause of action, the minimal criminal penalty provided in Section 41-9-6 of ROIA will not adequately guarantee peer review confidentiality. Generally, when a plaintiff's interests fall "within the class that the statute was intended to protect" and when "the harm that had occurred was of the type that the statute was intended to forestall," civil actions are proper because "criminal liability [is] inadequate to ensure the full effectiveness of [a] statute." *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 202 (1967); *see also* Junping Han, Note, *The Constitutionality of Oregon's Split-Recovery Punitive Damages Statute*, 38 Willamette L. Rev. 477, 486 (2002) (noting that scarce resources for public prosecution means that private prosecutors play an important role in vindicating wrongdoings). In this case, ROIA was meant to protect Dr. Yedidag, and a jury concluded that Eastern had violated ROIA. Upholding peer review integrity under ROIA is best accomplished with an implied civil cause of action for violations of peer review

confidentiality because such violations are not necessarily prosecuted by the State.

All three *Cort* factors support our holding that ROIA creates a private cause of action for breach of the confidentiality provisions. Dr. Yedidag is a member of the protected class under ROIA. Eastern used confidential information concerning Dr. Yedidag's conduct during Dr. Ali's peer review to terminate Dr. Yedidag's employment. The acquisition and use of confidential peer review information for purposes of employee discipline is not a statutorily permissible use of peer review information, *see* § 41-9-5(A), and Dr. Yedidag's right to confidentiality was violated. We therefore conclude that Dr. Yedidag can avail himself of an implied cause of action.

Our holding limits the use of peer review information for a statutory purpose, *see* § 41-9-5(A), and only those individuals responsible for furthering the statutory purposes of ROIA can be privy to such information. *See* § 41-9-5 (noting that *no person* can utilize peer review information except to carry out the statutorily enumerated purposes of a *review organization*). Eastern contends that our holding will completely immunize physician-reviewer conduct in peer reviews, "no matter how egregious." This argument ignores the dual regulatory structure within hospitals. As will be explained, because only medical staff, not hospital administrators, are responsible for peer reviews, medical staff may utilize information concerning peer reviewer conduct to discipline reviewers.

The medical staff in a hospital is composed of both the hospital's employee-physicians and non-employee physicians who have been granted staff privileges. *See* Zellers & Poulin, *supra*, at 67 (noting that both employee-physicians and non-employee-physicians have medical staff privileges at hospitals). Both types of physicians require medical staff privileges to work at a hospital. *Id.* Physicians receive privileges to work at a hospital once the medical staff determines that the physician is professionally qualified or credentialed. Van Tassel, *supra*, at 1190. Credentialing decisions traditionally were based "solely on professional notions of medical competence" as opposed to "factors unrelated to the quality of care or physician competence." Tracy A. Powell, *The Permissibility of Conflicts Credentialing (a/k/a Economic Credentialing) by Traditional Hospitals as a Response to the Growth of Specialty Hospitals*, 20 Health Law. 17, 17 (2007). Typical credentialing requirements include the "lack of a prior adverse record by the physician, and . . . qualifications specifying licenses, insurance, [and] performance and training standards." John Hulston, et. al., *Do Hospital Medical Staff Bylaws Create a Contract?*, 51 J. Mo. B. 352, 352 (1995).

Employment regulations reflect employer interests that are separate from those covered under medical staff bylaws, the latter being designed to further quality of care. *See* Zellers, *supra*, at 70-71. For example, "a hospital may . . . control access to its equipment and staff on the basis of its own economic interests" and it may do so "not through the credentialing process but through its contracts with physicians for certain services." *Id.* at 71; *see, e.g.*, *Adler v. Montefiore Hosp. Ass'n of W. Pennsylvania*, 311 A.2d 634, 645 (Pa. 1973) (distinguishing between medical staff bylaw regulations and the conditions imposed by an employer-employee contract and holding that the cancellation of an employee-physician's

rights to perform certain procedures utilizing hospital equipment, which were granted by his or her employer-employee contract, did not implicate the privileges granted by the medical staff, and therefore did not entitle the physician to protections provided by the medical staff bylaws); Zellers, *supra*, at 73, 77-78 (discussing Adler and noting that physicians often rely on two different contracts to protect their interests within the hospital setting: "(1) the employment . . . contract between the hospital and the physician; and (2) the contract created by the medical staff bylaws").

Eastern has a dual regulatory system whereby its employee-physicians are held accountable to both medical staff bylaws and employee-physician contracts. A doctor who is employed at Eastern is not allowed to work at the hospital until its medical staff determines that the doctor is professionally qualified to fulfill the functions for which he or she is to be hired. The final decisions concerning either the grant or revocation of staff privileges rests with Eastern's credentialing committee. Furthermore, the Eastern medical staff drives the peer review process and creates the bylaws necessary to regulate that process. On the other hand, Eastern administrators in charge of employment matters have only clerical connections with medical staffing decisions, and they are not responsible for regulating peer reviewer conduct. Eastern admits that hospital administrators participating in peer reviews are not members of peer review committees and they do not possess any voting power on these committees. Hospital administrator involvement in peer reviews at Eastern is limited to collecting data and making decisions concerning "what needs to go to [the peer review] committee meeting."

In light of the aforesaid dual regulatory structure, Eastern's argument that our holding immunizes egregious conduct lacks merit because it ignores the authority of the medical staff who have their own rules concerning peer reviews. *See* Anthony W. Rodgers, Comment, *Procedural Protections During Medical Peer Review: A Reinterpretation of the Health Care Quality Improvement Act of 1986*, 111 Penn St. L. Rev. 1047, 1061 (2007) ("Hospital bylaws govern the relationship between medical practitioners and the hospital" such that "[t]hese bylaws also frequently set out the procedure for the peer review process"); Eleanor D. Kinney, *Hospital Peer Review of Physicians: Does Statutory Immunity Increase Risk of Unwarranted Professional Injury?*, 13 Mich. St. U. J. Med. & L. 57, 60-62 (2009) (noting that the accrediting body for hospitals, the Joint Commission on the Accreditation of Health Care Organizations (JCAHO), requires that "medical staff must create medical staff by-laws that describe the organizational structure of the medical staff and the rules for its self-governance" and discussing the fact that JCAHO "require[s] accredited organizations to create a code of conduct that defines acceptable and unacceptable behaviors, and to establish a formal process for managing unacceptable behavior"). Eastern's medical staff have regulations concerning disruptive conduct. The chair of an Eastern peer review committee can intervene at any time to stop inappropriate behavior. Particularly egregious behavior could trigger the termination of a physician's privileges. *See, e.g.*, Kinney, *supra*, at 58 (citing a situation where a peer review panel revoked a physician's privileges partially based on disruptive conduct). At Eastern, the loss of such privileges terminates the employment of its physician-employees. ROIA explicitly allows reviewed physicians to bring claims

against their evaluators for malicious peer review conduct. *See* § 41-9-4 (providing that immunity from claims brought by reviewed physicians only attaches when the conduct is not malicious); *Leyba*, 1992-NMSC-061, ¶ 13 (noting that immunity is qualified because "members of peer review committees are often in direct competition with those being reviewed, and the system has the potential for abuse of the person being reviewed."). Thus, unprofessional peer reviewers face multiple avenues of discipline that regulate disruptive conduct, albeit not by hospital administrators who are not privy to what transpires during peer review meetings.[2]

Minimizing the inappropriate conduct of peer reviewers improves the peer review process. Kinney, *supra*, at 79-80 ("Obviously, not every peer review of a physician is unwarranted, abusive or malicious. No doubt badly behaved physicians can pose a threat to patient safety and the smooth operation of health care facilities. And legal immunity does protect physicians participating in peer review from lawsuits by appropriately sanctioned physicians. However, the processes for regulating physician conduct should be designed to operate in a fair manner with respect to physicians while assuring protection of the public."). Thus, utilizing information concerning peer review conduct to prevent abusive review proceedings furthers the purposes of the peer review process. While inappropriate behavior during a peer review is still confidential under ROIA[3], the statute enables medical staff to utilize such information to discipline reviewers.

II. ROIA Is the Basis for an Implied Promise that Dr. Yedidag Would Not Suffer Adverse Employment Consequences Stemming from His Participation in Peer Review

Dr. Yedidag argues that ROIA provides a basis to imply, as a matter of law, that there would not be any adverse consequences to his employment resulting from his actions during the peer review process. Eastern disagrees. Whether there was an implied promise is a question of law that we review de novo. *See, e.g.*, *Taylor Equip., Inc. v. John Deere Co.*, 98 F.3d 1028, 1031 (8th Cir. 1996) (reviewing the application of an implied covenant de novo). The issue hinges on whether the ROIA confidentiality provision is either a mandatory or a default rule of law. *See* Ian Ayres, Responses, *Valuing Modern Contract Scholarship*, 112 Yale L.J. 881, 885-86 (2003) (discussing the distinction between mandatory and default contract rules).

Generally, "[t]he employer-employee relationship is a contractual [one] wherein the parties may negotiate the terms thereof and agree to any

[2]We also note that if Dr. Yedidag had actually engaged in repetitive unprofessional conduct, Eastern perhaps could have acquired information concerning Dr. Yedidag's conduct outside of the peer review to terminate his employment. Mr. Kucker claimed that Dr. Yedidag was terminated not only because of his behavior during the peer review meeting, but also because of "a long string of events where his behavior was inappropriate." Some of these alleged events were supposed to have occurred outside of the peer review context. Therefore, Eastern did not have to resort to piercing the confidentiality of a peer review meeting.

[3]Eastern argues that the jury instructions improperly left the jury "with no alternative than to find [that] Dr. Yedidag's unprofessional conduct was confidential." In light of our holding, we note that the trial court had no alternative but to issue the jury instructions as they were because the professionalism of Dr. Yedidag's behavior does not impact the confidentiality of his conduct.

terms not prohibited by law or public policy." *Whipple v. McDonald's Rest. Managers*, 2007-731, p. 3 (La. App. 3 Cir. 12/5/07); 971 So. 2d 431, 433 (internal quotation marks and citation omitted). Where a contract is silent on an issue, courts apply default rules supplied by law. *Id.* Mandatory rules of law prohibit the contracting of certain terms as violating public policy. Default rules supply terms that fill the gaps concerning issues on which parties can freely contract. Whether a statutory requirement is mandatory is a question of legislative intent. *Vaughan v. John C. Winston Co.*, 83 F.2d 370, 372 (10th Cir. 1936) ("Whether a statutory requirement is mandatory in the sense that failure to comply therewith vitiates the action taken . . . can only be determined by ascertaining the legislative intent."). "If a requirement is so essential a part of the plan that the legislative intent would be frustrated by a noncompliance, then it is mandatory." *Id.*

ROIA does not explicitly preclude employer retaliation for peer review participation. However, because Section 41-9-5 states that information concerning peer review can only be utilized for the purposes listed in the statute, ROIA precludes the usage of peer review information, *id.*, to justify adverse employment consequences. Section 41-9-5 prohibits an employer from retaliating against a physician who participates in a peer review because the unlawful acquisition and utilization of peer review information is a factual prerequisite to such retaliation. Our analysis therefore focuses on whether Section 41-9-5 is a mandatory rule of law.

By its plain language, Section 41-9-5 is a mandatory rule of law. Section 41-9-5(A) states that "[n]o person . . . *shall* disclose what transpired at a meeting of a review organization" except for the purposes listed in the statute. (Emphasis added.) "The word 'shall' is ordinarily '[t]he language of command.' And when [a law] uses . . . 'shall', the normal inference is that [it] is used in its usual sense—[that] being . . . mandatory." *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947) (citation omitted).

The ROIA regulatory scheme, which aims to promote peer review integrity by promoting candor and objectivity, also strongly suggests that Section 41-9-5 is a mandatory rule. *See Sw. Cmty. Health Servs.*, 1988-NMSC-035, ¶ 7 (ROIA "recognizes that candor and objectivity in the critical evaluation of medical professionals by medical professionals is necessary for the efficacy of the review process."). Candor and objectivity are greatly furthered when reviewers are protected by a confidentiality provision. *See* Sorg, *supra*, at 803-04. Allowing entities to contract around the confidentiality provision would undermine the entire regulatory scheme because the confidentiality of an entire group can be destroyed by one individual. The presence of one peer review participant who is not bound by the ROIA confidentiality provision could chill the candor of an entire peer review panel. We therefore hold that Section 41-9-5 is a mandatory rule of law incorporated into physician-reviewer employment contracts. A mandatory rule of law, by definition, precludes parties from contractually avoiding application of the rule. *See* Ayres, *supra*, at 881, 885-86. However, our holding does not conflict with Eastern's contractual provisions enabling termination of employment for cause. Our holding merely prevents Eastern from using confidential peer review information in making its personnel decisions.

III. The Evidence Was Sufficient for a Jury Determination of Punitive Damages Because a Jury Could Have Concluded that Eastern's Profit Motives Made Eastern's Actions, at the Very Least, Wanton

Eastern argues that "Dr. Yedidag failed to meet his burden to substantiate" a punitive damages award based on its alleged ROIA violation. We disagree. A jury could find that at the very least, Eastern acted wantonly in terminating Dr. Yedidag's employment based on his conduct during the peer review of Dr. Ali.

In New Mexico, a punitive damages award will be upheld if substantial evidence supports the jury's finding. *Aken v. Plains Elec. Generation & Transmission Co-op., Inc.*, 2002-NMSC-021, ¶ 17, 132 N.M. 401, 49 P.3d 662. In doing so, we resolve all disputed facts and indulge all reasonable inferences in favor of the judgment. *Chavarria v. Fleetwood Retail Corp.*, 2006-NMSC-046, ¶ 23, 140 N.M. 478, 486, 143 P.3d 717.

Eastern argues that punitive damages are not justified when Eastern could not have known that it violated ROIA when it terminated Dr. Yedidag's employment because (1) the issue of whether the confidentiality provision protected Dr. Yedidag's conduct was a matter of first impression for New Mexico courts, and (2) Mr. Kueker had consulted with attorneys concerning whether terminating Dr. Yedidag was permissible under the circumstances. These arguments are not persuasive.

In New Mexico, the award of punitive damages requires a culpable mental state because such damages aim to punish and deter "culpable conduct beyond that necessary to establish the underlying cause of action." *Walta v. Gallegos Law Firm, P.C.*, 2002-NMCA-015, ¶ 56, 131 N.M. 544, 40 P.3d 449. Punitive damages are awarded when a party intentionally or knowingly commits wrongs. *See* UJI 13-1827 NMRA. However, punitive damages are also imposed when a defendant is utterly indifferent to the plaintiff's rights, even if the defendant lacked actual knowledge that his or her conduct would violate those rights. *See Kennedy v. Dexter Consol. Sch.*, 2000-NMSC-025, ¶ 32, 129 N.M. 436, 10 P.3d 115. For example, reckless and wanton conduct merits punitive damages, but does not involve actual knowledge of the violations. UJI 13-1827. "Reckless conduct is the intentional doing of an act with utter indifference to the consequences." *Id.* Similarly, "[w]anton conduct is the doing of an act with utter indifference to or conscious disregard for a person's [rights]." *Id.*

There is sufficient evidence to reasonably infer that Eastern acted wantonly in violating Dr. Yedidag's right to confidentiality. A jury could have found that (1) Eastern had significant reasons to suspect that Dr. Yedidag's rights would have been violated by any potential termination of his employment based on peer review conduct, and (2) Eastern was utterly indifferent to the risk of violating those rights.

Both the plain text of ROIA and physician-reviewer norms state that Dr. Yedidag had a right to confidentiality in the context of a peer review. ROIA enhances peer review efficacy by promoting candor through its confidentiality provision. *See Sw. Cmty. Health Servs.*, 1988-NMSC-035, ¶ 7; Sorg, *supra*, at 805-07. ROIA also explicitly states that peer review information can only be utilized to

effectuate the purposes listed in the statute, which do not encompass employment discharge of peer reviewers. *See* §§ 41-9-5, 41-9-2(E). Eastern utilized peer review information to justify terminating Dr. Yedidag's employment, even though employment matters concerning peer reviewers clearly fall outside the scope of the intended purposes of ROIA. *See id.* Furthermore, the record reveals that two physicians, who were also peer reviewers during the subject peer review meeting, were somewhat bewildered when Dr. Yedidag's right of confidentiality was breached during the course of his termination. These facts indicate that Eastern should have been on notice to the possibility that its termination of Dr. Yedidag violated the ROIA confidentiality provision and were utterly indifferent to the consequences. Eastern's breach of the ROIA confidentiality provision was shocking to the physician-reviewers who recognized the potential for employer retaliation to undermine peer review candor. *See* Harrington, *supra*, at 332 (noting that fear of employment retaliation makes individuals less willing to disclose information concerning medical errors). This consequence is inconsistent with both ROIA policies and the resulting limitations on the utilization of confidential peer review information. The foreseeable consequence of disrupting peer review candor should have warned Eastern that it needed to thoroughly scrutinize the legality of its actions.

Despite the obvious risks of terminating Dr. Yedidag's employment on the basis of confidential peer review information, the evidence in the record indicates that Eastern was utterly indifferent to the risks. First, Eastern did not proffer any advice of counsel letter on which it relied in making its decision to terminate Dr. Yedidag. In fact, Eastern does not offer any documentation of reliance on counsel. A defendant who was attentive to others' rights would have obtained documentation supporting its reliance on an erroneous interpretation of law. *See Scalise v. Nat'l Util. Serv., Inc.*, 120 F.2d 938, 941-42 (5th Cir. 1941) (noting that "advice of counsel is not a defense [to recovery of punitive damages] unless it appears as a matter of fact that it was requested in good faith and upon full disclosure, and was given in good faith in regard to a course where legal questions . . . are involved"). Second, Mr. Kueker appeared to have weak factual bases for Dr. Yedidag's termination. Mr. Kueker did not seek further opinions from anyone concerning Dr. Yedidag's peer review conduct and could not recall any "specific words" that justified characterizing Dr. Yedidag's conduct during the peer review meeting as inappropriate. Mr. Kueker admitted that his recollection of the events was "fuzzy." His vagueness concerning the factual bases for Dr. Yedidag's termination suggests that Eastern lacked sufficient facts with which to support a good faith legal opinion justifying Dr. Yedidag's termination. Third, if Dr. Yedidag had continuously engaged in unprofessional behavior, Eastern should have relied on documented conduct outside of the peer review meeting to justify terminating his employment, thereby avoiding potential ROIA violations. However, the record reveals no attempt by Eastern to seek out alternative facts to justify Dr. Yedidag's termination. In light of Eastern's conduct, a jury could reasonably infer that Eastern was utterly indifferent to Dr. Yedidag's rights.

In addition to these oversights, the evidence before us is more egregious than

Eastern claims. A jury could readily find that Eastern was not forthright in asserting that it had terminated Dr. Yedidag's employment because of his unprofessional conduct. Notably Sara Williamson, who reported the incident to Mr. Kueker, was never asked to document the occurrence. However, such documentation appears to be part of Eastern's standard protocol for discharge. This suggests that Dr. Yedidag's actual peer review conduct had nothing to do with his discharge. In addition, the record does not reveal that Dr. Ali was disciplined despite his unwillingness to fully disclose his role in a patient's death. Based on testimony at the trial, a jury could find that Eastern had other reasons it did not reveal for terminating Dr. Yedidag–such as discouraging other Eastern physicians from candidly reviewing Eastern's employee physicians in front of competitors.

Unsatisfactory peer reviews can damage an employee-physician's ability to obtain referrals, and therefore harm Eastern's profits. *See* Stein, *supra*, at 1242 (discussing how findings that a physician provided inadequate care can harm that physician's business); Kocker, *supra*, at 1790 (discussing how hospitals rely on their employee-physicians to generate business so that hospitals can recoup the costs of retaining physicians). As a result, the jury could also have reasonably found that Eastern terminated Dr. Yedidag's employment in an attempt to protect its business by trying to suppress potentially candid peer reviews that would reflect poorly on its employee-physicians. *See Terzano*, 549 N.W.2d at 611 (noting that employers have been known to retaliate against employees to protect their financial interests).

This inference becomes stronger when considering that Dr. Yedidag's unprecedented[4] termination "bewildered" peer-reviewers Dr. Peterson and Dr. North. It is possible that the shock value of Dr. Yedidag's termination would discourage other doctors from providing candid peer reviews. *See* Harrington, *supra*, at 332 (noting that employees are less likely to disclose information concerning medical errors because of the threat of employer retaliation). Eastern's termination letter, which Mr. Kueker admitted was less than accurate, effectively precluded Dr. Yedidag from obtaining future employment as a surgeon, amplifying the chilling effect of Dr. Yedidag's termination. The jury could have reasonably found that apart from silencing Dr. Yedidag at Eastern's peer reviews, Eastern intentionally undermined Dr. Yedidag's career to reinforce its implied proscription of candid peer reviews. Under these circumstances, a jury could have found that Eastern's termination of Dr. Yedidag's employment was reckless or wanton, *see* UJI 13-1827, and any attempts Eastern made to deliberately undermine peer review candor could constitute intentional acts that deliberately violated ROIA rights and policies. The evidence was sufficient for the jury to find that Eastern wantonly violated ROIA, which is a finding sufficient to justify a punitive damages award.

With respect to Eastern's arguments that it should not be held liable for punitive damages because whether ROIA created a cause of action is an issue of first impression, this fact does not preclude the finding of a culpable mental state deserving of punitive damages. *See, e.g.*, *Walta*, 2002-NMCA-015, ¶¶ 30, 64 (upholding the imposition of

[4]Sara Williamson indicated that she knew of no other physician who was terminated for their participation in a peer review process.

punitive damages although the underlying violation involved an issue of first impression). We also reject Eastern's argument that its consultation with an attorney precludes the imposition of punitive damages. We have explained why a jury could reasonably reject Eastern's contention that it had consulted with an attorney. In addition, a jury could still find from other evidence that Eastern was utterly indifferent to whether it violated ROIA and that it did not properly research the legality of its actions. *See, e.g., Sheetz, Inc. v. Bowles Rice McDavid Graff & Love, PLLC*, 547 S.E.2d 256, 264-66 (W. Va. 2001) (noting that advice of counsel is not necessarily a bar to punitive damages).

We hold that there was sufficient evidence to submit the issue of punitive damages to the jury. Because Eastern only argued that it lacked a culpable mental state, and not that the damages were excessive as a matter of law, we do not analyze the jury's award for excessiveness. *See Chavez-Rey v. Miller*, 1982-NMCA-187, ¶ 9, 99 N.M. 377, 658 P.2d 452 ("Where a party prays for an award of punitive damages and the evidence is sufficient to permit the issue of punitive damages to be considered by the jury, the amount of such damages is left to the sound discretion of the jury based on the nature of the wrong, the circumstances of each case, and any aggravating or mitigating circumstances as may be shown."). We therefore uphold the award of punitive damages.

CONCLUSION

We affirm the Court of Appeals and hold that Eastern violated the ROIA confidentiality provision by utilizing confidential information concerning Dr. Yedidag's peer review conduct to terminate his employment. Because there was sufficient evidence to establish Eastern's wanton breach of the confidentiality provisions in ROIA, Dr. Yedidag is entitled to both compensatory and punitive damages. We affirm both the district court and the Court of Appeals.

IT IS SO ORDERED.

EDWARD L. CHÁVEZ, Justice

WE CONCUR:

BARBARA J. VIGIL, Chief Justice

PETRA JIMENEZ MAES, Justice

RICHARD C. BOSSON, Justice

CHARLES W. DANIELS, Justice

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-040

Filing Date: December 17, 2014

Docket No. 32,864

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

JEREMY S. LUCERO,

Defendant-Appellant.

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Paula E. Ganz, Assistant Attorney General
Santa Fe, NM

for Appellee

Law Offices of the Public Defender
Jorge A. Alvarado, Chief Public Defender
Tania Shahani, Assistant Appellate Defender
Santa Fe, NM

for Appellant

OPINION

ZAMORA, Judge.

Defendant Jeremy Lucero appeals his convictions for voluntary manslaughter, contrary to NMSA 1978, § 30-2-3(A) (1994), and aggravated battery, contrary to NMSA 1978, § 30-3-5(C) (1969). He argues that: (1) the district court erred in refusing a requested self-defense instruction as to the voluntary manslaughter and aggravated battery charges, (2) the district court erred in denying his requests for a mistrial, and (3) his convictions for aggravated battery and voluntary manslaughter arise from the same course of conduct and violate the prohibition against double jeopardy. We agree with Defendant that the self-defense jury instruction should have been given. Accordingly, we reverse and remand for a new trial. We address Defendant's remaining issues only to the extent they either have the potential of affording Defendant greater relief on appeal or they are likely to recur on retrial.

I. BACKGROUND

Jean (aka Gene) Bateman (Victim) was an eighty-seven-year-old man who lived at the Ambassador Motel (the motel) in Gallup, New Mexico. He collected and traded weapons and kept a gun and a machete in his motel room.

Defendant had been with a friend in a different room at the motel throughout the night of November 22, 2010, and on the morning of November 23, 2010. Also on that morning, he had argued loudly with his girlfriend in the parking lot and Victim observed the argument from his doorway, which was adjacent to the lot. After Defendant's girlfriend left, Victim asked Defendant about the argument and invited Defendant to his room. Defendant knew Victim socially because, at one point, Defendant, his girlfriend, and their children had also lived at the motel. The men talked near the door of Victim's room. Their interaction escalated into an argument. Defendant testified that he threatened to publicly share private details about Victim, the two exchanged words, and Victim struck Defendant in the head with his machete.

Defendant further testified that after being struck, he "saw a star" and "kind of blacked out." He remembered pushing Victim back and the machete dropping. Defendant could not recall if there was a struggle for the machete. The next thing he remembered was that Victim stood up and retrieved a gun from under his pillow and pointed it at Defendant's face.

As Victim had gone for the gun, Defendant picked up the machete from the floor. Defendant testified that when Victim pointed the gun at him, he was angry, confused, scared, and afraid for his life. Defendant did not remember swinging the machete, but testified that he remembered seeing a laceration on Victim's neck and

blood everywhere, both Victim's and his own. Defendant took Victim's gun and fled in Victim's Jeep. Defendant wrecked the Jeep and walked to his aunt's house. Defendant's aunt agreed to give him a ride back into town. As they were leaving, Defendant's girlfriend arrived. Defendant got out of the vehicle and went after his girlfriend with a gun in his hand. Defendant's aunt retrieved the gun, placed it under the seat of the vehicle, and called police. Law enforcement officers responding to the call discovered Victim's Jeep, retrieved the gun from under the seat where Defendant's aunt had put it, took Defendant into custody, and transported him to the hospital.

Meanwhile, a motel employee discovered Victim on the floor of his motel room, injured and surrounded by blood. First responders to the motel observed that there was a great deal of blood on the carpet of Victim's room. Later testimony revealed that Victim had lost between 30 percent and 40 percent of his blood volume. Victim's throat had been cut, he had cuts on his arm, and a bump on his head.

Victim was hospitalized. His injuries included lacerations on his neck, fractured ribs, lacerations on his arm, a fractured bone in his shoulder, and blunt force injuries to his head. Victim had a distinctive pattern on his forehead consistent with the pattern on the bottom of the shoes Defendant was wearing at the time of his arrest. The State's expert testified that the injury to Victim's head was consistent with Victim being stomped on with enough force to damage the blood vessels.

Victim remained hospitalized, in critical condition and on a ventilator, until February 2011. While hospitalized, Victim suffered from pressure injuries, malnutrition, and pneumonia. After several months, and several attempts by Victim's doctors to take him off of the ventilator, the decision was made not to continue to resuscitate or intubate him. The autopsy concluded that the cause of Victim's death was the multiple traumatic injuries he had sustained.

Defendant was charged with one count each of first degree murder, aggravated burglary, robbery, aggravated battery, and receiving or transferring stolen vehicles. Defendant was convicted of voluntary manslaughter, a lesser included offense of first degree murder, as well as all the other charges. This appeal followed.

II. DISCUSSION

A. The Self-Defense Instruction

At the close of evidence at Defendant's trial, Defendant requested a self-defense jury instruction in accordance with UJI 14-5181 NMRA, which the district court refused to issue. Defendant contends that the district court's refusal to issue the instruction constitutes reversible error.

"The propriety of denying a jury instruction is a mixed question of law and fact that we review de novo." *State v. Guerra*, 2012-NMSC-014, ¶ 13, 278 P.3d 1031 (internal quotation marks and citation omitted). "When considering a defendant's requested instructions, we view the evidence in the light most favorable to the giving of the requested instructions." *State v. Swick*, 2012-NMSC-018, ¶ 60, 279 P.3d 747 (alteration, internal quotation marks, and citations omitted). "For a defendant to be entitled to a self-defense instruction . . . there need be only enough evidence to raise a reasonable doubt in the mind of a juror about whether the

defendant lawfully acted in self-defense. If any reasonable minds could differ, the instruction should be given." *State v. Lucero*, 2010-NMSC-011, ¶ 11, 147 N.M. 747, 228 P.3d 1167 (omission in original) (internal quotation marks and citation omitted).

An instruction on self-defense must be justified by evidence on all three elements of self-defense, which are: "(1) the defendant was put in fear by an apparent danger of immediate death or great bodily harm, (2) the killing resulted from that fear, and (3) the defendant acted reasonably when he or she killed." *State v. Rudolfo*, 2008-NMSC-036, ¶ 17, 144 N.M. 305, 187 P.3d 170 (internal quotation marks and citation omitted). When such evidence is presented, the defendant has an "*unqualified* right" to the instruction. *State v. Ellis*, 2008-NMSC-032, ¶ 15, 144 N.M. 253, 186 P.3d 245 (internal quotation marks and citation omitted).

The first two elements, the apparent danger and the defendant's fear, are assessed subjectively, focusing "on the perception of the defendant at the time of the incident." *Rudolfo*, 2008-NMSC-036, ¶ 17 (internal quotation marks and citation omitted). The reasonableness of the defendant's response in the face of the apparent danger and fear is assessed objectively. *See id.* (stating that "the third requirement is objective in that it focuses on the hypothetical behavior of a reasonable person acting under the same circumstances as the defendant." (internal quotation marks and citation omitted)).

Evidence presented at trial did not conclusively establish the sequence of events that resulted in Victim's injuries. The forensic expert, Lawrence Renner, testified that it could not be determined to what extent the two men may have struggled against one another, what type of struggle took place, or how long the struggle may have lasted.

Defendant testified that the violence began when Victim attacked him with the machete, delivering a blow to his head that caused him to black out. Though Defendant was unable to recall exactly what happened once he had control of the machete, he did testify that when Victim pointed a gun at his face, he was afraid for his life and that he was defending himself when he injured Victim.

Several photographs admitted into evidence showed a significant gash on Defendant's forehead. Officers present when Defendant was taken into custody testified that he had a bleeding head wound and that he was transported to the hospital. Additionally, blood stains on the awning of Victim's doorway, determined to be Defendant's blood, were consistent with Defendant's testimony that he had been struck with a machete.

The State argues that Defendant's testimony that he was in danger and was in fear for his life lacks credibility. The State contends that the evidence of Victim's physical limitations and the condition of his room calls into question Defendant's testimony that Victim retrieved a gun and pointed it at him. The State also insists that at some point Victim was injured on the floor, no longer posing a threat to Defendant, so Defendant could not have been in actual fear. The State further argues that even if Defendant had perceived danger and felt actual fear, his response was not reasonable. The State relies on the theory that Defendant persisted in attacking Victim after Victim had fallen to the floor injured. This theory is based on testimony that the injuries to Victim's neck and head could have occurred while Victim was lying on the floor. However, the admitted

evidence was conflicting and did not conclusively establish the sequence of events or what position Victim was in when he sustained each of his injuries.

As a reviewing court, it is not within our purview to weigh evidence. *State v. Sutphin*, 1988-NMSC-031, ¶ 21, 107 N.M. 126, 753 P.2d 1314. That function is reserved for the trier of fact. *See State v. Johnson*, 1983-NMSC-043, ¶ 7, 99 N.M. 682, 662 P.2d 1349 (observing that conflicts in the evidence, including conflicts in testimony among witnesses, are to be resolved by the trier of fact); *see generally State v. Salas*, 1999-NMCA-099, ¶ 13, 127 N.M. 686, 986 P.2d 482 (recognizing that the appellate court defers to the fact finder when weighing the credibility of witnesses and resolving conflicts in witness testimony). The admitted evidence was sufficient to raise an issue of fact with respect to the elements of a self-defense claim and conclude that the district court erred in refusing to instruct the jury accordingly.

B. Double Jeopardy

Defendant argues that his convictions for aggravated battery and voluntary manslaughter violate the prohibition against double jeopardy because the convictions arise from the same course of conduct. "The Fifth Amendment of the United States Constitution prohibits double jeopardy and is made applicable to New Mexico by the Fourteenth Amendment." *Swick*, 2012-NMSC-018, ¶ 10. Because double jeopardy challenges are constitutional questions of law, we review them de novo. *State v. Melendrez*, 2014-NMCA-062, ¶ 5, 326 P.3d 1126, *cert. denied*, 2014-NMCERT-006, 328 P.3d 1188.

The double jeopardy clause "functions in part to protect a criminal defendant against multiple punishments for the same offense." *Swick*, 2012-NMSC-018, ¶ 10 (internal quotation marks and citation omitted). There are two classifications of double jeopardy multiple-punishment cases: double-description cases, "where the same conduct results in multiple convictions under different statutes"; and unit-of-prosecution cases, "where a defendant challenges multiple convictions under the same statute." *Id.* Here, Defendant's double jeopardy challenge raises a double-description issue because he challenges two convictions under different statutes for what he contends is the same conduct.

Double-description claims involve a two-part analysis. *Swafford v. State*, 1991-NMSC-043, ¶ 25, 112 N.M. 3, 810 P.2d 1223. We first consider whether the conduct underlying the offenses is in fact the same, or unitary. *See id.*; *Melendrez*, 2014-NMCA-062, ¶ 7; *Swick*, 2012-NMSC-018, ¶ 11. If the conduct is not unitary, there is no double jeopardy violation. *Swick*, 2012-NMSC-018, ¶ 11. If the conduct is unitary, we look to the statutes at issue "to determine whether the [L]egislature intended to create separately punishable offenses." *Swafford*, 1991-NMSC-043, ¶ 25.

When determining "whether a defendant's conduct was unitary, we consider . . . whether acts were close in time and space, their similarity, the sequence in which they occurred, whether other events intervened, and the defendant's goals for and mental state during each act." *State v. Franco*, 2005-NMSC-013, ¶ 7, 137 N.M. 447, 112 P.3d 1104. Where a defendant's acts are separated by sufficient indicia of distinctness, the conduct is not unitary. *State v. Urioste*, 2011-NMCA-121, ¶ 18, 267 P.3d 820. The proper inquiry "is whether the facts presented at trial

establish that the jury reasonably could have inferred independent factual bases for the charged offenses." *Franco*, 2005-NMSC-013, ¶ 7 (internal quotation marks and citation omitted).

On appeal, the State asserts that Victim was injured as a result of two distinct attacks; one while Victim was upright and the other after he had fallen to the floor. The State contends that the wounds on Victim's arm and shoulder were sustained while Victim was standing and are sufficient to support the aggravated battery conviction, while the injuries to Victim's neck and head were sustained as Victim lay on the floor and are sufficient to support the voluntary manslaughter conviction.

As we previously discussed, the admitted evidence did not establish the sequence or timing of Victim's injuries, nor did it conclusively establish how Victim was positioned when each of his injuries occurred. The evidence does not indicate whether there was an intervening event or a change in Defendant's intent during the course of the altercation. Moreover, the medical examiner testified that Victim's death was not specifically attributable to any of injuries, but rather to complications from multiple traumatic injuries. At trial, the State argued that the charge of aggravated battery was supported by the injuries to Victim's neck and arm and that Victim's death was attributable to all of his injuries.

Based upon what was presented at trial, the jury could not have reasonably distinguished distinct factual bases for the voluntary manslaughter charge and the aggravated battery charge. As a result, we conclude that Defendant's conduct was unitary and turn to the question of whether the Legislature intended to create separate punishments for aggravated battery and voluntary manslaughter.

In analyzing legislative intent, we look to the language of the statute. *State v. Frazier*, 2007-NMSC-032, ¶ 21, 142 N.M. 120, 164 P.3d 1. If multiple punishments are not clearly prescribed, we then apply the rule of statutory construction established in *Blockburger v. United States*, 284 U.S. 299 (1932). *Swafford*, 1991-NMSC-043, ¶ 11. Under *Blockburger*, "the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." 284 U.S. at 304.

However, our Supreme Court has clarified that "the application of *Blockburger* should not be so mechanical that it is enough for two statutes to have different elements." *Swick*, 2012-NMSC-018, ¶ 21. Instead, "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." *State v. Montoya*, 2013-NMSC-020, ¶ 49, 306 P.3d 426.

In *Swick*, the defendant "beat, stabbed, and slashed" his victims. *Swick*, 2012-NMSC-018, ¶ 26. This conduct formed the bases for both the aggravated battery and the attempted murder charges. The Court used the modified *Blockburger* approach to determine "whether the Legislature authorized multiple punishments under the statutes for attempted murder and aggravated battery with a deadly weapon for the same conduct." *Swick*, 2012-NMSC-018, ¶ 20. The Court rejected a mechanical comparison of each statutory element concluding that:

> 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. . . . Even if we accept as true that different social harms may be addressed by each statute, *Swafford* explained that '[i]f the punishment attached to an offense is enhanced to allow for kindred crimes, these related offenses may be presumed to be punished as a single offense.'

Id. ¶ 29. Considering that the state had not asserted or shown independent factual bases for the aggravated battery and the attempted murder charges the Court held that "the aggravated battery elements were subsumed within the attempted murder elements. When this occurs, the double jeopardy prohibition is violated, and punishment cannot be had for both." *Id.* ¶ 27 (internal quotation marks and citation omitted).

Swick also reaffirmed the principle that "when doubt regarding legislative intent remains, ambiguity must be resolved in favor of lenity." *Id.* ¶ 30 (internal quotation marks and citation omitted). If reasonable minds can differ as to the Legislature's intent in punishing the crimes at issue, the rule of lenity should be applied. *Montoya*, 2013-NMSC-020, ¶ 51.

Here, the State argues that the aggravated battery and voluntary manslaughter statutes are intended to be separately punishable because they proscribe different crimes with different elements. We reject this argument.

Voluntary manslaughter is the unlawful killing of a human being without malice, committed upon a sudden quarrel or in the heat of passion. *See* § 30-2-3(A). Aggravated battery involves "the unlawful touching or application of force to the person of another with intent to injure that person[.]" Section 30-3-5(A). Though these statutes do consist of different elements, here, as in *Swick*, "[b]oth statutes punish overt acts against a person's safety but take different degrees into consideration." 2012-NMSC-018, ¶ 29.

The State's attempt to characterize Defendant's actions as distinct and separately punishable on appeal is misguided. First of all, the evidence does not support the State's theory that Victim suffered two separate attacks. Second, the conduct supporting each of the charges was nearly indistinguishable. At trial, the theory of the State's case to support the aggravated battery charge was that Defendant sliced Victim's throat and arm. Its theory to support the voluntary manslaughter charge was that Defendant sliced Victim's throat and arm, and stomped on his head. The aggravated battery is subsumed within the voluntary manslaughter. Applying the double jeopardy analysis as recently clarified by our Supreme Court, along with the rule of lenity, we conclude that Defendant's convictions for both crimes violate the prohibition against double jeopardy and cannot stand.

We recognize that the evidence presented on retrial may differ from that presented at the first trial, and that the double jeopardy analysis may be affected. However, the parties and the district court should keep the above analysis in mind in addressing any double jeopardy issues that may arise upon retrial.

C. Defendant's Motions for Mistrial

Defendant contends that the court erred in denying his requests for a mistrial after several State witnesses referenced an alleged domestic violence incident, excluded by the court as prejudicial. We decline to address this issue in light of our decision to reverse Defendant's convictions and remand for a new trial. *See State v. Roman*, 1998-NMCA-132, ¶ 16, 125 N.M. 688, 964 P.2d 852 (stating that this Court will not usually "reach out to decide issues unnecessarily" (internal quotation marks and citation omitted)).

CONCLUSION

For the foregoing reasons we reverse Defendant's convictions for voluntary manslaughter and aggravated battery and remand to the district court for further proceedings consistent with this Opinion.

IT IS SO ORDERED.

M. MONICA ZAMORA, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

MICHAEL E. VIGIL, Judge

Certiorari Granted, April 3, 2015, No. 35,148

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-041

Filing Date: December 17, 2014

Docket No. 31,704

EL CASTILLO RETIREMENT RESIDENCES,

Petitioner-Appellee,

v.

DOMINGO MARTINEZ, ASSESSOR, SANTA FE COUNTY,

Respondent-Appellant.

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for Appellee

Bridget A. Jacober
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for Appellant

OPINION

ZAMORA, Judge.

Domingo Martinez, Santa Fe County Assessor (the Assessor), appeals a district court order granting El Castillo Retirement Residences (El Castillo) a charitable property tax exemption pursuant to Article VIII, Section 3 of the New Mexico Constitution and the New Mexico Property Tax Code, NMSA

1978, Section 7-36-7(B)(1)(d) (2008). As a result of the Assessor's failure to perfect his appeal as to the statutory exemption, we do not have jurisdiction to review whether El Castillo is entitled to a charitable property tax exemption under Section 7-36-7(B). We further conclude that El Castillo does not meet the constitutional requirements for a charitable property tax exemption, and therefore reverse on this issue.[1]

BACKGROUND

El Castillo, a Santa Fe continuing care retirement community, filed a claim for a charitable property tax exemption that was denied by the Assessor. El Castillo appealed that decision to the Santa Fe County Valuation Protests Board (the Protests Board), claiming a charitable property tax exemption under Section 7-36-7(B) and under Article VIII, Section 3. The Protests Board determined that El Castillo was ineligible for the exemption under Section 7-36-7(B). The Protests Board, however, declined to decide whether El Castillo qualified for the exemption under Article VIII, Section 3, citing a lack of jurisdiction.

El Castillo appealed to the district court, requesting that the Protests Board's decision to deny El Castillo's claim for a charitable property tax exemption under Section 7-36-7(B) be reversed. El Castillo also requested that the district court exercise its original jurisdiction to grant El Castillo's constitutional claim for a charitable property tax exemption. At the time, the Assessor agreed to the district court's exercise of original jurisdiction over El Castillo's constitutional property tax exemption claim.

The parties stipulated that the record made before the Protests Board would substitute for the presentation of evidence and testimony to the district court. El Castillo's appeal was briefed and argued based on evidence presented to the Protests Board. After making original findings of fact, the district court determined that El Castillo qualified for a charitable property tax exemption under both Article VIII, Section 3 and Section 7-36-7(B). The district court's judgment was entered on September 29, 2011. The Assessor filed a notice of appeal on October 25, 2011, and a docketing statement on December 28, 2011.

DISCUSSION

Due to the procedural posture of this case, we first discuss whether the Assessor properly perfected his appeal. We then turn to the Assessor's jurisdictional challenge. And finally, we consider the merits of the Assessor's constitutional claim.

I. Perfection of the Appeal

The Protests Board's decision and order addressed the statutory aspect of El Castillo's claim for a charitable property tax exemption but, based on a lack of jurisdiction, did not address the constitutional aspect of the claim. As a result, El Castillo's claim was separated into two distinct appellate procedural paths: (1) the statutory claim, reviewable by the district court in its appellate jurisdiction; and (2) the constitutional claim, reviewable by the district court in its original jurisdiction. *See* NMSA 1978, § 7-38-28(A) (1999) ("A

[1]We recognize that this opinion reaches a different result from our opinion in *La Vida Llena v. Montoya*, 2013-NMCA-048, 299 P.3d 456. *Llena*, however, proceeded only statutorily pursuant to this Court's analysis of Section 7-36-7(B). *Id.* ¶8. There was no constitutional challenge asserted by the Assessor.

property owner may appeal an order made by the director or a county valuation protests board by filing an appeal pursuant to the provisions of [NMSA Section 39-3-1.1 (1999)]."); *see also* § 39-3-1.1(A) (stating that agency decisions placed under the authority of the section by specific statutory reference, are appealable to the district court); Rule 1-074(A) NMRA (stating that "appeals from administrative agencies [may be heard by] the district courts when there is a statutory right of review to the district court"); *Victor v. N.M. Dep't of Health*, 2014-NMCA-012, ¶ 24, 316 P.3d 213 ("Constitutional challenges that exceed the scope of [an administrative agency's] review are subject to the original jurisdiction of the district court.").

"[W]hen a district court has exercised both its appellate and original jurisdiction, the appellant should pursue an appeal by filing a Rule 12-505 [NMRA] petition to address issues stemming from the exercise of the district court's appellate jurisdiction, and a direct appeal to address issues stemming from the exercise of the district court's original jurisdiction." *Victor*, 2014-NMCA-012, ¶ 18 (internal quotation marks and citation omitted). An appeal to this Court from a judgment of the district court in its original jurisdiction is perfected by filing a notice of appeal and a docketing statement. *See* Rule 12-202(A) NMRA (stating that a notice of appeal shall be filed with the district court); Rule 12-208(A) NMRA (stating that the docketing statement shall be filed in the Court of Appeals). This Court's review of an administrative decision appealed to the district court is by writ of certiorari. *Georgia O'Keefe Museum v. Cnty. of Santa Fe*, 2003-NMCA-003, ¶ 25, 133 N.M. 297, 62 P.3d 754; *see* § 39-3-1.1(E) (permitting a party to petition the Court of Appeals for a writ of certiorari to review the district court's decision in an administrative appeal); Rule 12-505(A)(1) (stating that the Court of Appeals reviews district court decisions that address administrative proceedings pursuant to Rule 1-074, Rule 1-077 NMRA, or Section 39.3.1.1); *see* Rule 12-505(B) ("A party . . . may seek review of the [district court's] order by filing a petition for writ of certiorari with the Court of Appeals.").

In this case, the Assessor filed a notice of appeal and a docketing statement which were sufficient to perfect the appeal of the constitutional issue heard by the district court in its original jurisdiction. However, the Assessor failed to file a petition for writ of certiorari to perfect his appeal as to the statutory issue first decided by the Protests Board and reviewed by the district court in its appellate jurisdiction.

In some instances, a non-conforming document may be accepted as a petition for writ of certiorari, if it provides sufficient information. *Wakeland v. N.M. Dep't of Workforce Solutions*, 2012-NMCA-021, ¶ 7, 274 P.3d 766. While a notice of appeal will not suffice, "[a] docketing statement will generally substantially comply with Rule 12-505 so as to permit this Court to review it as a substitute for a petition for writ of certiorari." *Wakeland*, 2012-NMCA-021, ¶ 16. In order to be considered as a timely non-conforming petition for writ of certiorari, the docketing statement must be filed within thirty days of the district court's judgment or order because "the time requirement for filing a petition for writ of certiorari is a mandatory precondition to the exercise of an appellate court's jurisdiction to review a petition on its merits." *Id.* ¶ 18.

In light of *Wakeland*, we construe the Assessor's docketing statement as a non-

conforming petition for writ of certiorari. However, the Assessor filed his docketing statement on December 28, 2011, which was ninety days after the district court entered its order dismissing the complaint.[2] Therefore, although we accept his docketing statement as a non-conforming petition for writ of certiorari, it was untimely under Rule 12-505(C).

When a petition for writ of certiorari is untimely, this Court will not excuse untimely filing "absent a showing of the kind of unusual circumstances that would justify an untimely petition." *Wakeland*, 2012-NMCA-021, ¶ 20. Untimely filing of a petition for writ of certiorari may be justified by unusual circumstances such as: "when (1) there is error on the part of the court[;] or (2) when the filing is not very late, and there are other unusual circumstances that were not caused by the court system but that were not within the control of the party seeking appellate review." *Mascareñas v. City of Albuquerque*, 2012-NMCA-031, ¶ 23, 274 P.3d 781 (internal quotation marks and citation omitted). The Assessor does not argue the existence of unusual circumstances that would justify an untimely petition, and we are aware of none.

Accordingly, we deny the Assessor's petition for writ of certiorari. As a result, we do not have jurisdiction to review the question of whether El Castillo is entitled to a charitable property tax exemption under Section 7-36-7(B). This appeal is therefore limited to the constitutional issue decided by the district court in the exercise of its original jurisdiction. *See Mascareñas*, 2012-NMCA-031, ¶ 24 ("This Court lacks jurisdiction to address the merits of [the] administrative appeal because the appeal was untimely and unusual circumstances do not justify the untimeliness.").

II. Assessor's Constitutional Issue

The Assessor's remaining issue is whether El Castillo meets the constitutional requirements for a charitable property tax exemption. Within that issue, the Assessor argues that the district court did not have original jurisdiction to consider the constitutional exemption and that subject matter jurisdiction is fundamentally encompassed within that determination. Initially, we note that our district courts are recognized to be courts of general jurisdiction. *Ottino v. Ottino*, 2001-NMCA-012, ¶ 6, 130 N.M. 168, 21 P.3d 37. Each has "original jurisdiction in all matters and causes not excepted in [the Constitution of the State of New Mexico], and such jurisdiction of special cases and proceedings as may be conferred by law, and appellate jurisdiction of all cases originating in inferior courts and tribunals in their respective districts." N.M. Const. art. VI, § 13. Whether a court has jurisdiction to hear a particular matter is a question of law that we review de novo. *Smith v. City of Santa Fe*, 2007-NMSC-055, ¶ 10, 142 N.M. 786, 171 P.3d 300. We review constitutional issues of law de novo. *State v. Druktenis*, 2004-NMCA-032, ¶ 14, 135 N.M. 223, 86 P.3d 1050.

A. The District Court's Original Jurisdiction

Initially, we must address the question of whether the district court had subject matter jurisdiction to hear El Castillo's constitutional claims. The Assessor had

[2]The thirty-day deadline would have run on October 29, 2011. The Assessor filed an unopposed request for an extension of time in which to file the docketing statement on November 17, 2011, which was also untimely.

consented to the district court's exercise of original jurisdiction. It was not until he appealed to this Court that the Assessor first raised the issue of whether the district court had subject matter jurisdiction over the constitutional claims. An objection to the district court's subject matter jurisdiction may be raised at any time during the proceedings and may be raised for the first time on appeal. *Chavez v. Valencia Cnty.*, 1974-NMSC-035, ¶ 15, 86 N.M. 205, 521 P.2d 1154. "Subject matter jurisdiction cannot be conferred by consent of the parties." *Id.* ¶ 14. Because a challenge to subject matter jurisdiction calls into question the power of the district court to hear and decide the case before it, it is now well-settled that a lack of subject matter jurisdiction cannot be waived or cured by the consent of the parties. *Gonzales v. Surgidev Corp.*, 1995-NMSC-036, ¶ 11, 120 N.M. 133, 899 P.2d 576. "The question of whether a court has subject matter jurisdiction is a question of law which we review de novo." *Palmer v. Palmer*, 2006-NMCA-112, ¶ 13, 140 N.M. 383, 142 P.3d 971.

"Without question, the district court has the authority to consider constitutional claims in the first instance." *Maso v. State of N.M. Taxation & Revenue Dep't, Motor Vehicle Div.*, 2004-NMCA-025, ¶ 14, 135 N.M. 152, 85 P.3d 276, *aff'd* 2004-NMSC-028, 136 N.M. 161, 96 P.3d 286. In the context of administrative appeals, this Court has held that constitutional questions outside the scope of an administrative agency's review are "subject to the original jurisdiction of the district court." *Victor*, 2014-NMCA-012, ¶ 24.

Before we can address the original jurisdiction question, our analysis at this juncture is to ascertain whether it is within or outside the scope of the Protests Board's review to decide if El Castillo qualified for the exemption under Article VIII, Section 3. Thirty-nine years ago, this Court was presented with the question of whether protests boards possess the authority to decide constitutional claims. *In re Miller*, 1975-NMCA-116, 88 N.M. 492, 542 P.2d 1182, *rev'd on other grounds by* 1976-NMSC-039, 89 N.M. 547, 555 P.2d 142. The *Miller* taxpayers argued that there were unequal assessments between their properties and comparable properties, as well as violations of the Equal Protection and Due Process clauses of the Fourteenth Amendment to the U.S. Constitution and Article II, Section 18 of the New Mexico Constitution (1953). *Miller*, 1975-NMCA-116, ¶¶ 41, 42. The protests board took the position that it did not have the statutory authority to decide constitutional questions. *Id.* ¶¶ 43, 45. At the time of the *Miller* decision, the protests board's duties were to "hear and decide protests from persons protesting valuations of property for property taxation purposes made by county assessors and protested under [NMSA 1953, S]ection 72-2-37." *Miller*, 1975-NMCA-116, ¶ 44; NMSA 1953, § 72-2-38(D) (Cum. Supp. 1973). NMSA 1953, Sections 72-2-37(A), (B) (Cum. Supp. 1973) allowed a person to protest the valuation placed upon his property by the assessor by filing a petition with the assessor and stating why they believed the valuation was incorrect, and what they believed to be the correct valuation. *See also Miller*, 1975-NMCA-116, ¶ 44. This Court found that the then existing statutory language gave the "boards the *duty* to hear a protest of valuation of a taxpayer's property on *any grounds whatsoever*[,]" including "allegedly unconstitutional discrimination." *Id.* ¶ 46 (emphasis added). In *Miller*, we reasoned that to hold otherwise would prevent a party "from arguing before the board that the valuation was incorrect because it was . . . unconstitutional." *Id.* ¶ 45.

Interestingly, ten months prior to our decision in *Miller*, our Supreme Court noted that the Constitution was the "supreme law" of the land and held that it is the judiciary's "function and duty to say what the law is and what the Constitution means." *Dillon v. King*, 1974-NMSC-096, ¶¶ 27, 28, 87 N.M. 79, 529 P.2d 745. The *Dillon* plaintiff was challenging the constitutionality of an election statute and the legislative process of its successor. We view this to indicate our Supreme Court's directive that constitutional determinations rest exclusively within the purview of the judiciary, and not entities such as protests boards. *Miller* did not discuss or address *Dillon*, and we are today left to reconcile the seeming disparity in these two outcomes. With this in mind, we turn to other cases in which administrative agencies have been presented with constitutional questions, as well as the current statutory appellate process for protests boards.

New Mexico appellate decisions which include cases where subject matter jurisdiction was not expressly provided by statute and where our Supreme Court interpreted the statute in a manner that allowed for the exercise of subject matter jurisdiction in a given tribunal or administrative proceeding do not give a clear direction in this case. *See Schuster v. State of N.M. Taxation & Revenue Dep't, Motor Vehicle Div.*, 2012-NMSC-025, ¶ 19, 283 P.3d 288 (holding that the motor vehicles division, within the course of the administrative hearing, must make a determination as to the constitutionality of the police activity leading to an arrest, as well as a determination as to the constitutionality of the arrest itself); *see also Maso*, 2004-NMCA-025, ¶ 12 (holding that the motor vehicle division, as an administrative body, did not have subject matter jurisdiction to consider the constitutional question raised, as it was a matter that exceeded the scope of the enacting statute). Other New Mexico cases in which similar analyses were undertaken reached opposite conclusions regarding subject matter jurisdiction, such as where an administrative agency was presented with questions of the constitutionality of a legislative act or the constitutionality of the process set forth by an act. *See Madrid v. St. Joseph Hosp.*, 1996-NMSC-064, ¶ 1, 122 N.M. 524, 928 P.2d 250 (noting that the Workers' Compensation Administration did not have the authority to determine the constitutionality of the Act); *Victor*, 2014-NMCA-012, ¶ 24 (holding that if applicable regulations do not expressly support the inference that a hearing officer can consider or rule upon the issue of the constitutionality of the process provided by the regulations, such an inquiry exceeded the hearing officer's scope of review). Given these divergent rulings within our own appellate case law, a clear direction is not found for the purpose of our immediate inquiry. Therefore, we closely examine the enacting legislation applicable to protests boards.

The current statutory process for appealing the county assessor's denial of a tax exemption is set forth in the Administration and Enforcement of Property Taxes. NMSA 1978, § 7-38-1 to -93 (1973, as amended through 2013). A property owner may appeal the county assessor's denial of a claim for an exemption. Section 7-38-24(A). The current statutory provision has expanded the petition requirements from just the valuation protests. It now includes protests of incorrect denials of an exemption claim and what the property owner believes should be the exemption. Section 7-38-24(B)(3). Each county valuation protests board consists of three voting members, all qualified electors of the county, with at least one of them possessing

demonstrated experience in the field of property valuation. Section 7-38-25(A). An additional member is required to be a property appraisal officer employed by the department as well as the chairman of the board. Section 7-38-25(A)(3).

Pursuant to § 7-38-25(D), the county valuation protests board's duties are to "hear and decide protests of determinations made by county assessors and protested under Section 7-38-24" ("protesting values, classifications, allocation of values and denial of exemption or limitation on increase in value determined by the county assessor"). The protest hearings before the board are not subject to the rules of evidence or the rules of civil procedure. Section 7-38-27(A). The board is required to enter an order, and that order has the same force and effect as a judgment from a court. Section 7-38-27(B), (D); *Petersen Props. v. Valencia Cnty. Valuation Protests Bd.*, 1976-NMCA-043, ¶ 18, 89 N.M. 239, 549 P.2d 1074.

As stated earlier, the question before us is whether the statutory language of Sections 7-38-24(B)(3) and 7-38-25(D) allows for constitutional interpretation by a county protests board. "Statutory interpretation is a question of law, which we review de novo." *State v. Smith*, 2009-NMCA-028, ¶ 8, 145 N.M. 757, 204 P.3d 1267 (internal quotation marks and citation omitted). "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. Parrish*, 2013-NMCA-066, ¶ 6, 304 P.3d 730, *cert. denied*, 2013-NMCERT-004, 301 P.3d 858. "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.* (internal quotation marks and citation omitted).

Based on the statutory language that identifies the responsibilities of protests boards, considered alongside the cases we have examined, we conclude that it would be inappropriate to hold that, because the protests boards have the general duty to hear and decide protests of a denial of a claim of exemption, this duty automatically includes substantive constitutional issues that have the same force and effect as a judgment of the court. To the contrary, by identifying the judiciary's function as the determinant of that which constitutes the supreme law of the land—the Constitution—the *Dillon* court guaranteed constitutional litigants that judges, and not protests board members with realty backgrounds, hear and decide constitutional issues. In those instances where the parties present constitutional issues outside of the protests board's statutory authority and topical expertise, they retain the opportunity to present their argument to the district court. We therefore agree with and adhere to the principle advanced by the *Dillon* court: it is the duty of the judiciary to interpret the Constitution, the supreme law of the land, and to set forth the law. 1974-NMSC-096, ¶ 28.

While protests boards certainly have the professional competence to make decisions as to property valuations, classifications, or statutory exemptions, they lack the professional expertise to make legal determinations involving our state Constitution, especially where we have held that the decisions of a protests board shall have the same force and effect as a court-issued judgment. *Petersen Props.*, 1976-NMCA-043, ¶ 18. We conclude that El Castillo's constitutional claims exceeded the Protests Board authority of review and that it

was appropriate for the district court to exercise its original jurisdiction over such claims. As a result, we further conclude that *Miller* is overruled. *See Trujillo*, 1998-NMSC-031, ¶ 34, 125 N.M. 721, 965 P.2d 305 (noting, in relevant part, that before overturning precedent, we must consider "whether the principles of law have developed to such an extent as to leave the old rule no more than a remnant of abandoned doctrine[ ]" and "whether the facts have changed in the interval from the old rule to reconsideration so as to have robbed the old rule of justification" (internal quotation marks and citation omitted)).

The Assessor further argued that the district court did not have jurisdiction to make original findings of fact. Relying on *Smith v. City of Santa Fe*, 2007-NMSC-055, 142 N.M. 786, 171 P.3d 300, the Assessor argues that El Castillo's request that the district court exercise its original jurisdiction to decide the constitutional issue not reached by the Protests Board was tantamount to a request for a declaratory judgment and that the district court lacked jurisdiction to make original findings of fact. We disagree. The Assessor's reliance on *Smith* in support of his argument is misplaced. In *Smith*, one set of plaintiffs filed an administrative action, the other set of plaintiffs did not. *Id.* ¶ 4. All the plaintiffs filed a declaratory judgment action in district court four months after the unfavorable administrative decision. *Id.* ¶ 5. The Supreme Court held that those plaintiffs that pursued the administrative relief were required to pursue a timely appeal under Rule 1-075 or, at a minimum, initiate a declaratory action within the same time frame. *Smith*, 2007-NMSC-055, ¶ 24. The Court further held that those plaintiffs that did not pursue administrative relief presented the district court with a pure question of law and the declaratory judgment action was therefore appropriate. *Id.* ¶ 27.

El Castillo's unopposed request that the district court exercise its original jurisdiction to decide the constitutional issue not reached by the Protests Board does not circumvent the administrative process. The issue was appealed to the district court through the appropriate administrative process and there are procedural and substantive differences between jurisdiction to address administrative claims and original jurisdiction to address constitutional claims. *See Victor*, 2014-NMCA-012, ¶ 26 (stating that a direct appeal of constitutional issues did not circumvent the procedure established by the applicable rules, instead it followed the rules).

Where a district court exercises its original jurisdiction, it, as fact finder, is within its purview to enter original findings of fact and conclusions of law. *See Moriarty Mun. Sch. v. N.M. Pub. Sch. Ins. Auth.*, 2001-NMCA-096, ¶ 29, 131 N.M. 180, 34 P.3d 124 ("Original jurisdiction here means general jurisdiction, which means those matters known to the common law and equity practice . . . . As to those matters, as well as matters in which jurisdiction is conferred by statute, district courts may take evidence, adjudicate facts, apply law, and decide the merits of a dispute in favor of one party or another." (internal quotation marks and citations omitted)).

Accordingly, we conclude here that the district court had both the authority to exercise its original jurisdiction and subject matter jurisdiction over the constitutional questions raised by El Castillo's claim for a charitable property tax exemption. Therefore the district court, acting as fact finder, did not err by making original findings of fact.

B. Requirements for Constitutional Charitable Property Tax Exemptions

We now address whether El Castillo meets the constitutional requirements for a charitable property tax exemption under our Constitution. "The most important consideration for us is that we interpret the [C]onstitution in a way that reflects the drafters' intent." *State v. Lynch*, 2003-NMSC-020, ¶ 24, 134 N.M. 139, 74 P.3d 73. The rules of statutory construction also apply to the construction of constitutional provisions. *Id.* We must, however, remember that the rules of statutory construction only assist in the determination of the drafters' intent and purpose. *Id.* When we interpret constitutional provisions, we must also be ever mindful of the intrepretation's present and future applications and make the interpretation accordingly.

Article VIII, Section 3 of the New Mexico Constitution states that "all property used for educational or charitable purposes . . . shall be exempt from taxation." "The purpose of the charitable exemption is to encourage charitable activities by providing them with tax relief, and to thereby promote the general welfare of society." *Sisters of Charity v. Cnty. of Bernalillo*, 1979-NMSC-044, ¶ 13, 93 N.M. 42, 596 P.2d 255. However, "[t]he countervailing consideration is to limit the exemption within reasonable bounds so as to minimize the shift of the tax burden to non-exempt property owners." *Id.*

The determinative factor for property tax exemptions is the use of the property; "[t]he declared objects and purposes of the owner are not determinative." *Georgia O'Keefe Museum*, 2003-NMCA-003, ¶ 40. "The fact that the purpose of an organization may be charitable . . . is not conclusive of whether the entity is entitled to an exemption from taxation." *Cottonwood Gulch Found. v. Gutierrez*, 1985-NMCA-042, ¶ 18, 102 N.M. 667, 699 P.2d 140. In evaluating the plaintiff's exemption claim, the court will consider "[t]he direct and immediate use of the property rather than the remote and consequential benefit derived from its use." *Pecos River Open Spaces, Inc. v. Cnty. of San Miguel*, 2013-NMCA-029, ¶ 10, ___ P.3d ___ (internal quotation marks and citation omitted).

To qualify for the charitable property tax exemption, the property must be "used primarily and substantially for charitable . . . purposes in a manner that benefits the public." *Id.* ¶ 9 (omission in original) (internal quotation marks and citation omitted). "Although our constitutional provision does not require property to be used exclusively for charitable purposes in order to come within the exemption, the uses for these purposes must be substantial and must be the primary uses made of the property." *Retirement Ranch, Inc. v. Curry Cnty. Valuation Protest Bd.*, 1976-NMCA-010, ¶ 7, 89 N.M. 42, 546 P.2d 1199 (internal quotation marks and citation omitted).

"The exemption granted [to] . . . charitable institutions proceeds upon the theory of the public good accomplished by them and the peculiar benefits derived by the public in general from their conduct." *Pecos River*, 2013-NMCA-029, ¶ 9 (internal quotation marks and citation omitted). "[B]ecause property which is exempt from taxation does not share in the burden of paying for the cost of government . . . in exchange for its exempt status, such property must confer a substitute substantial benefit on the public." *Id.* ¶ 10 (omission in original) (alterations, internal quotation marks, and citation omitted). "A substantial public benefit means

a benefit of real worth and importance to an indefinite class of persons who are a part of the public, which benefit comes to these persons from the use of property." *Id.* (alterations, internal quotation marks, and citation omitted).

In *Mountain View Homes, Inc. v. State Tax Commissioner*, 1967-NMSC-092, ¶ 15, 77 N.M. 649, 427 P.2d 13, our Supreme Court held that a housing development built by a non-profit corporation for moderate to low income families, was not entitled to a charitable property tax exemption. Though the development did not generate a profit, its residents were not sick or indigent and did not receive welfare. *Id.* The development was self-supporting, generating enough rental income to cover its costs. *Id.* "It is clear that rents are fixed at an amount necessary to pay the interest, amortize the principal and pay all expenses of maintaining the property." *Id.* The Court concluded that the development "was intended to be self-supporting, without any thought that gifts or charity were involved" and that property used in such an operation "would not have been considered charitable when our [C]onstitution was adopted." *Id.*

In the context of charitable property tax exemptions for nursing homes, this Court has held that a nursing home was entitled to a charitable property tax exemption because "a facility used for the purpose of caring for the aged sick and infirm would traditionally fall within the category of charitable purpose." *Retirement Ranch*, 1976-NMCA-010, ¶ 6. In that case, the nursing home claiming the charitable property tax exemption served a "sick and largely indigent" population. *Id.* Fifty-five percent of the home's residents were Medicare and Medicaid patients. *Id.* ¶ 9. The payments collected from Medicare and Medicaid "never covered the cost of the services rendered." *Id.* And, although the home's board of directors could have lessened the home's annual deficit by admitting a greater percentage of private-pay patients, it chose not to as a matter of policy "because of the large number of [M]edicare and [M]edicaid recipients in the area who needed care." *Id.* We held that these facts were sufficient to establish the home was being substantially utilized for the public to benefit from its charitable purpose and we reversed the protests board's denial of the charitable property tax exemption. *Id.* ¶ 10.

Here, El Castillo argues that through donations and subsidies to its residents, it relieves the larger community of the cost of their care, thereby conferring a benefit to the public sufficient to qualify it for a charitable property tax exemption. El Castillo purports to donate or subsidize its residents in three ways: (1) by donating its facilities for educational, religious, and cultural activities; (2) by subsidizing costs for residents who cannot afford the cost of their residency and care; and (3) by providing support for resident monthly fees from a Resident Assistance Fund. We are not persuaded that these acts qualify for the tax exempt status provided for within the Constitution.

El Castillo is structured to be a self-sustaining retirement community. It is self-contained, funded entirely by resident fees. Residents, for the most part, enter El Castillo through "independent living" which is comparable to living in an apartment. As residents age, El Castillo provides graduated levels of care, including assisted living and nursing facilities.

El Castillo exclusively serves individuals who meet certain physical, mental, and financial requirements. El Castillo's

prospective applicants must disclose health issues that create "an unacceptably high risk that [the resident] will require a degree of care that may jeopardize the financial soundness of the [c]ommunity's self-insured health program." El Castillo does not accept Medicare or Medicaid recipients; it limits admittance to individuals that have a net worth of at least $300,000, independent of any social security benefits. Once accepted for admission, El Castillo residents pay entry fees ranging from $100,000 to $300,000 in addition to monthly fees ranging from $1,800 to $3,200. In its residence agreement, El Castillo agrees to provide services and amenities to its residents, including coordinated social and recreational activities, as well as use of the dining room, resident lounge, multipurpose facilities, library, patios, fitness, laundry, and landscaped areas. Payment for these services and amenities is covered by the residents' monthly fees.

1. Facilities Donation

[redacted] El Castillo claims that use of its facilities is donated to residents because by allowing its residents to use the facilities, El Castillo is foregoing income it could generate by renting the facilities to outside groups for meetings or other types of activities. To calculate the value of the facilities donated, El Castillo contacted hotels near the El Castillo campus to determine the hourly rates for which these hotels rented their meeting rooms and facilities. Then El Castillo calculated the total number of hours its residents used its common facilities, and multiplied the number of hours by hourly rates comparable to the local hotels' rates. Using this method, El Castillo determined that in 2009, the tax year for which it seeks the exemption, it had foregone possible rental income for those facilities in the amount of $40,730. Yet we note that El Castillo residents are entitled to the use of El Castillo's facilities as part of the residence agreement. Their resident fees are used to provide amenities such as the use of facilities by the residents. It is therefore disingenuous and contrary to reason for us to contemplate that a resident's use of El Castillo's facilities is a donation. We conclude that a resident's use of El Castillo's facilities is not a donation, but rather an amenity paid for as part of their residential agreement with El Castillo.

2. Resident Subsidies

[redacted] El Castillo also claims that it charitably subsidizes the cost of residency and care for residents that can no longer afford these costs. Prior to admittance, each resident's entry fee and monthly fees are actuarially calculated based on the type of unit the resident will occupy, the level of care required, and the life expectancy of the resident. When a resident lives longer than anticipated by the actuary, the overall cost of that resident's residency and care may exceed the revenues El Castillo receives from the resident. El Castillo claims that in 2009, it donated services to 28 such residents.

[redacted] To determine the total amount of the claimed subsidy, El Castillo calculated its total operating costs per year. It then divided this figure by the number of total residents to determine the average cost per resident, per year. For 2009, that amount was $45,308. The number of long-term residents who generated less than $45,308 of amortized income for El Castillo were considered to be subsidized. For 2009, El Castillo claims it subsidized $903,922 of resident costs in this way. However, El Castillo failed to include or consider in its calculations the amount of revenue it received from residents who died

sooner than anticipated by the actuary, and whose entry fees and monthly fees paid exceeded the cost of residency and care. Because no moneys in the Resident Assistance Fund were used during the 2009 tax year to assist residents in financial need, it can only be presumed that the overall cost per resident calculation balanced out the actuary model being utilized by El Castillo. As a result, we conclude that El Castillo's claimed resident subsidy of $903,922 was neither complete nor accurate and we will not speculate as to what amount, if any, of El Castillo's subsidy calculation can be considered a charitable donation.

3. Resident Assistance Fund

El Castillo's third claimed donation to residents is financial aid for residents who are unable to pay their monthly fees. For this purpose, El Castillo has established a Resident Assistance Fund which consists of funds set aside from entrance fees and monthly fees. El Castillo claims that from 2004 to 2009, it donated $61,826 to residents from the Resident Assistance Fund. However, in 2008 and 2009, El Castillo did not assist any residents from this fund.

El Castillo is providing a limited general type of public benefit because it provides housing, health care services and other amenities to its aging sick and infirm residents. However, similar to the development in *Mountain Homes*, El Castillo is designed to be a self-supporting enterprise, with both admission and monthly fees calculated to generate enough income to cover all of its operating costs, plus additional reserves that are placed in the Resident Assistance Fund. As a result, when El Castillo provides what it describes as a subsidized benefit to a resident, it has already attempted to calculate this short-fall within the paid financial structure of its overall actuarial business model. To the extent that El Castillo argues that it benefits the public by caring for residents who would otherwise receive public assistance, we disagree. The evidence establishes that it caters instead to predominately wealthy individuals who pay substantial admission fees as well as substantial monthly fees for the time period that they are anticipated to be living at the retirement facility. No evidence was presented to show that any of its residents were qualified to receive public assistance, particularly during the tax years that it sought a property tax exemption.

El Castillo argues that by paying for those residents who can no longer pay for their housing and care, the Resident Assistance Fund will prevent the cost of care for that individual from shifting to the general public. To the contrary, if El Castillo were given the tax exemption for the years of 2008 and 2009, such an exemption would far exceed the actual charitable contribution amount paid on behalf of residents from the fund during that time period, which was zero. *See Pecos River*, 2013-NMCA-029, ¶ 10 (holding that in exchange for not sharing in the cost of government, the direct and immediate use of the property must confer a substitute substantial benefit to an indefinite class of persons of the public).

We conclude that during the tax years at issue El Castillo did not directly and immediately use its property primarily and substantially for a charitable purpose recognized under Article VIII, Section 3 of the New Mexico Constitution because it does not confer a substantial benefit of real worth and importance to an indefinite class of persons who are members of the general public.

CONCLUSION

For the foregoing reasons, we reverse the district court.

IT IS SO ORDERED.

M. MONICA ZAMORA, Judge

WE CONCUR:

TIMOTHY L. GARCIA, Judge

J. MILES HANISEE, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-042

Filing Date: January 14, 2015

Docket No. 33,446

FRANK C. DI LUZIO,

Worker-Appellee/Cross-Appellant,

v.

CITY OF SANTA FE, self-insured,

Employer-Appellant/Cross-Appellee.

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Albuquerque, NM

for Appellee/Cross-Appellant

French & Associates
Katherine E. Tourek
Albuquerque, NM

for Appellant/Cross-Appellee

OPINION

FRY, Judge.

This case is on appeal from a workers' compensation judge's (WCJ) order granting Worker, a former City of Santa Fe firefighter, total disability benefits under the New Mexico Occupational Disease Disablement Law (Occupational Disease Act), NMSA 1978, §§ 52-3-1 to -60 (1945, as amended through 2013), following his diagnosis with mantle cell non-Hodgkin's lymphoma. On appeal, Employer argues that application of Section 52-3-32.1, which creates a rebuttable presumption that certain diseases were proximately caused by firefighting, to these facts constitutes a retroactive application of the statute. Employer further argues that the Occupational Disease Act still requires firefighters to establish with medical probability that their disease was caused by firefighting and that Worker failed to do so. Finally, Employer argues that it should be allowed to rebut the causation presumption with evidence that non-Hodgkin's lymphoma is not caused by firefighting. Worker cross-appeals arguing that the WCJ erred in calculating the rate of disability benefits he is owed.

In regard to Employer's arguments, we conclude that because Worker met the statutory prerequisites to be entitled to the presumption that his disease was the result of his years of service as a firefighter, he was not

required to establish that his disease was causally connected to his employment. Further, because Employer did not present evidence that Worker's disease was the result of conduct or activities outside his employment, we conclude that Employer failed to rebut this presumption. *See* § 52-3-32.1(C). Finally, we conclude that application of Section 52-3-32.1 to these facts does not constitute a retroactive application of the statute. Accordingly, we affirm the WCJ on these bases. In regard to Worker's cross-appeal, we conclude that the WCJ erred in calculating the compensation amount due Worker by failing to take into account the date that Worker became disabled. Accordingly, we reverse and remand on this point.

BACKGROUND

Worker began working as a firefighter/paramedic for the City of Santa Fe in 1979. He remained with the fire department until 2000. During his twenty-one-year career with the fire department, Worker served in a variety of roles, including shift commander, captain of emergency services, division chief, deputy fire chief, and fire chief. Worker testified that at all times during his career with the fire department, he actively fought or attended fires approximately two times per week.

Following his career as a firefighter, Worker briefly served as the Santa Fe City Manager. After leaving employment with the City of Santa Fe, Worker worked in other occupations before becoming employed with the New Mexico Children, Youth and Families Department (CYFD). Worker was working as a supervisor for the employee relations bureau at CYFD in January 2012 when he was diagnosed with mantle cell non-Hodgkin's lymphoma. Due to his illness, Worker accepted a demotion in November 2012 from supervisor to employee relations specialist and began working increasingly reduced hours. Worker subsequently resigned from employment with CYFD in June 2013 due to his inability to continue working.

Worker timely filed his complaint for benefits in June 2012. The WCJ determined that Worker was entitled to a presumption that his disease was proximately caused by his years of service as a firefighter because, under Section 52-3-32.1, non-Hodgkin's lymphoma is an identified disease and Worker served more than fifteen years as a firefighter. *See* § 52-3-32.1(B)(5). The WCJ determined that Worker became physically unable to work in January 2012. Among other relief, the WCJ awarded Worker $480.47 per week in total disability benefits for a maximum of 700 weeks. Employer now appeals the WCJ's determination that Worker was entitled to the presumption that his service as a firefighter proximately caused his disease and Worker cross-appeals the basis of the WCJ's award of benefits.

DISCUSSION

Standard of Review

We begin with Employer's arguments regarding the WCJ's application of the firefighter occupational disease statute before considering Worker's argument regarding the calculation of disability benefits. Both parties' arguments require us to interpret the provisions of the Occupational Disease Act. Statutory interpretation is a question of law that we review de novo. *Cooper v. Chevron U.S.A., Inc.*, 2002-NMSC-020, ¶ 16, 132 N.M. 382, 49 P.3d 61.

"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.*, 1996-NMSC-038, ¶ 13, 121 N.M. 764, 918 P.2d 350. General principles guide our construction of statutes. First, the "plain language of [the] statute is the primary indicator of legislative intent." *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998-NMSC-050, ¶ 5, 126 N.M. 413, 970 P.2d 599 (internal quotation marks and citation omitted). Second, we will not read into the statute language that is not there, particularly if it makes sense as written. *Id.* And finally, if "several sections of a statute are involved, they must be read together so that all parts are given effect." *Id.*

The Firefighter Occupational Disease Statute Exempts Firefighters in Some Circumstances From Having to Establish That Firefighting Was the Proximate Cause of Their Disease

The Occupational Disease Act requires a worker to show a "direct causal connection between the conditions under which the work is performed and the occupational disease" in order to recover benefits. Section 52-3-32. Where an employer denies that the "occupational disease is the material and direct result of the conditions under which work was performed, the worker must establish that causal connection as a medical probability by medical expert testimony." *Id.*

The firefighter occupational disease statute, on the other hand, exempts firefighters in certain situations from the burden of establishing a causal connection between their disease and their duties as firefighters. Section 52-3-32.1. The statute states, "If a firefighter is diagnosed with one or more of the following diseases after the period of employment indicated, . . . the disease is presumed to be proximately caused by employment as a firefighter[.]" Section 52-3-32.1(B). In the case of a firefighter developing non-Hodgkin's lymphoma, the disease is presumed to be proximately caused by the firefighter's occupation after fifteen years of service. Section 52-3-32.1(B)(5).

Employer argues that, notwithstanding the firefighter occupational disease statute, the Occupational Disease Act still requires a firefighter to prove medical causation. Thus, Employer argues that because Worker did not establish with a reasonable degree of medical probability that his disease was caused by his years of firefighting, he should be barred from receiving disability benefits.

Employer's argument misses the mark. As noted above, the Occupational Disease Act places a burden on workers to prove that their disease was proximately caused by the hazards of their employment. Section 52-3-32. The statute requires workers to prove the causal connection between their occupation and disease "as a medical probability by medical expert testimony." *Id.* However, when the Legislature enacted 52-3-32.1 and stated that certain diseases suffered by firefighters would be "presumed to be proximately caused by employment as a firefighter," it made clear that in some circumstances a firefighter would be exempted from the requirement of establishing the causal connection between certain diseases and the hazards of firefighting, although that presumption is rebuttable. Section 52-3-32.1(B). Thus, Section 52-3-32.1 essentially reverses the usual burden of proof under the Occupational Disease Act for a narrow class of workers for public policy reasons.

These public policy reasons center around the legislative recognition of the difficulty a firefighter would have, given the various hazards and toxins firefighters are exposed to, of establishing the causal connection between firefighting and his or her disease. *City of Littleton v. Industrial Claim Appeals Office*, 2012 COA 187, ¶ 37, ___ P.3d ___, 2012 WL 5360912 (stating that a firefighter is disadvantaged in proving causation because "[t]here is no way to know which substances the firefighter encountered at which fire; and even if there were, there is no way to determine the dose, frequency, and duration of exposures"). As the WCJ found:

> In the course of fighting fires, firefighters may be exposed to harmful substances. At the fire scene, firefighters are potentially exposed to various mixtures of particulates, gases, mists, fumes of an organic and/or inorganic nature[,] and the resultant pyrolysis products.

A firefighter attempting to causally connect the number and degree of exposures to these various toxins over the course of his or her career to a specific disease would therefore be presented with a formidable barrier to recovery. *Wanstrom v. N.D. Workers Comp. Bureau*, 2001 ND 21, ¶ 7, 621 N.W.2d 864, 867 (stating that a similar statute's "purpose is to relieve firefighters of the nearly impossible burden of proving firefighting actually caused their disease").

Estate of George v. Vermont League of Cities and Towns, is instructive on this point. 2010 VT 1, 187 Vt. 229, 993 A.2d 367. In *Estate of George*, the estate of a firefighter who died of non-Hodgkin's lymphoma brought a workers' compensation action. *Id.* ¶ 3. Without the benefit of a statutory presumption similar to Section 52-3-32.1, the firefighter's claim in *Estate of George* failed because "[t]here was . . . no evidence as to the frequency of exposure or types of exposures that [the] claimant may have had." 2010 VT 1, ¶ 3, 187 Vt. 229, 993 A.2d 367. It is this type of result, which would likely repeat itself in nearly every Occupational Disease Act case brought by a firefighter, that likely led the Legislature to reverse the burden of proof for causation in favor of firefighters.

For these reasons, Employer's reliance on statements in *Castillo v. Caprock Pipe & Supply, Inc.*, indicating that the disease "must be one due wholly to causes and conditions which are normal and constantly present and characteristic of the particular occupation" is inapposite to our conclusion. 2012-NMCA-085, ¶ 5, 285 P.3d 1072 (internal quotation marks and citation omitted). These statements in *Castillo* interpret the proximate causation requirement embodied in Section 52-3-32. *See Castillo*, 2012-NMCA-085, ¶ 4. By enacting the firefighter occupational disease statute, the Legislature adopted a statutory presumption that the development of non-Hodgkin's lymphoma by a firefighter is linked to his or her service in that role under certain circumstances. Employer's reliance on *Castillo* and argument that Worker failed to show that his disease "was particular to firefighting" fails to account for this statutory presumption.

Finally, our conclusion is buttressed by the inclusion of a provision stating that when one of the presumptions does not apply, a firefighter is not precluded from "demonstrating a causal connection between employment and [the] disease or injury." Section 52-3-32.1(E). This provision would

be redundant if a firefighter was still required to prove a causal connection even where one of the presumptions applied. Thus, we conclude that when a firefighter establishes that he or she is suffering from one or more of the diseases listed in Section 52-3-32.1(B) and that the firefighter served the requisite number of years, subject to any other requirements under Section 52-3-32.1(B), the firefighter is entitled to the presumption—albeit rebuttable—that the disease was caused by his or her employment as a firefighter.

Employer Failed to Rebut the Presumption That Worker's Disease Was Causally Connected to Firefighting

Section 52-3-32.1(C) states that "[t]he presumptions created in Subsection[s] B and D of this section may be rebutted by a preponderance of evidence . . . showing that the firefighter engaged in conduct or activities outside of employment that posed a significant risk of contracting or developing a described disease." We understand Employer's argument to be that it should be allowed to rebut the presumption with evidence showing a tenuous link between firefighting and the development of non-Hodgkin's lymphoma.

Employer's argument, however, attacks the statutory presumption itself that occupational hazards relating to firefighting can cause non-Hodgkin's lymphoma instead of rebutting the presumption with evidence that Worker's non-Hodgkin's lymphoma was caused by "conduct or activities outside of employment [by Worker] that posed a significant risk of contracting or developing [the] disease." *Id.*; *see Medlin v. Cnty. of Henrico Police*, 542 S.E.2d 33, 39 (Va. Ct. App. 2001) (holding in regard to a similar statute that "evidence that merely rebuts generally the underlying premise of the statute, which establishes a causal link between stress and heart disease, is not probative evidence for purposes of overcoming the presumption"). Because the statutory presumption represents a legislative determination that there is a causal connection between firefighting and the development of non-Hodgkin's lymphoma, no amount of evidence regarding a possibly tenuous link between non-Hodgkin's lymphoma and firefighting is probative to rebut the presumption. Such a determination must come from legislative amendment, not judicial fiat. In this case, Employer did not put forth evidence of other activities or conduct by Worker outside of his employment that posed a significant risk of him contracting this disease. Accordingly, we conclude that Employer failed to rebut the presumption that Worker's disease was causally connected to his years of service as a firefighter.

Applying the Presumption to This Case Does Not Constitute a Retroactive Application of the Statute

Section 52-3-32.1(A) defines a "firefighter" as "a person who is employed as a full-time non-volunteer firefighter by the state or a local government entity and who has taken the oath prescribed for firefighters." This statute became effective in 2010. Worker, although no longer working with the fire department, became disabled in 2012 and shortly thereafter filed his claim for disability benefits. Employer argues that because Worker was not working as a firefighter at the time the firefighter occupational disease statute was enacted, his use of the statute constitutes a retroactive application of the statutory presumption. Thus, Employer argues that the statute applies only to firefighters employed at the time the statute went into effect.

We disagree with Employer that application of the presumption in this case constitutes a retroactive application of the statute. "It is well settled that a statute does not operate retroactively merely because some of the facts or conditions upon which its application depends came into existence prior to the enactment." *Hansman v. Bernalillo Cnty. Assessor*, 1980-NMCA-088, ¶ 20, 95 N.M. 697, 625 P.2d 1214 (internal quotation marks and citation omitted). The fact that Worker's employment with the fire department occurred before the enactment of Section 52-3-32.1 is not determinative of whether Worker is entitled to the statutory presumption.

We therefore disagree with Employer's argument that the Legislature's use of the word "is" in the definition of "firefighter" evidences an intention by the Legislature to limit the presumption to those firefighters working as firefighters at the time of the statute's enactment. The operative context of the definition is to distinguish between firefighters employed by a state or local government and volunteer firefighters, not to limit the statutory presumption to firefighters employed at the time of its enactment. Section 52-3-32.1(A). Furthermore, the periods of employment necessary to be entitled to the presumption indicate the Legislature's awareness of the significant latency period between exposure to harmful toxins and the development of the diseases listed. Section 52-3-32.1(B) (requiring between five to fifteen years of employment, depending on the disease contracted). Construing the statute as Employer argues would mean, in some circumstances, a similar significant delay between the statute's enactment and the "first wave," so to speak, of firefighters being able to utilize the presumption. This leads us to conclude that the Legislature intended that firefighters who became disabled due to one of the occupational diseases listed were entitled to the presumption—subject, of course, to the other statutory requirements—even if their terms of employment concluded before the statute's enactment.

This conclusion is supported by the policy underlying our presumption against retroactive application of statutes. "The presumption is premised upon policy considerations that individuals, in planning and conducting their business, should be able to rely with reasonable certainty on existing laws." *City of Albuquerque v. State ex rel. Vill. of Los Ranchos de Albuquerque*, 1991-NMCA-015, ¶ 37, 111 N.M. 608, 808 P.2d 58. This statute did not affect the underlying employment relationship between the firefighter and his or her employer. It only affects the burdens of proof between the respective parties should a firefighter file for disability benefits. As a result, because Worker filed for benefits two years after the statute's enactment, thus implicating the statute, Employer was aware at the outset of this litigation what its respective burden was. That is, it knew throughout the course of the litigation that Worker could be entitled to the statutory presumption that his disease was caused by his work as a firefighter but that it could produce evidence that Worker's disease was caused by conduct or activities outside his employment. *See* § 52-3-32.1(B), (C). Thus, the relevant inquiry for determining whether the statute was being applied retroactively or prospectively is not whether the firefighter was employed as a firefighter at the time of the statute's enactment but rather whether the statute was in existence at the time the

firefighter filed for disability benefits. Because Worker filed for disability benefits two years after the statute's enactment, application of the statute was not retroactive.

The WCJ Misapplied Section 52-3-14 in Calculating the Amount Due Worker

Worker argues that the WCJ erroneously calculated the amount of compensation he should be awarded. We agree.

Section 52-3-14(B) states that "[f]or total disablement, the employee shall receive sixty-six and two-thirds percent of his average weekly wage, not to exceed . . . a maximum of one hundred percent of the average weekly wage in the state, a week . . . during the period of such disablement." Compensation "paid or payable during [an] employee's entire period of disablement shall be based on and limited to the benefits in effect on the date of the occurrence of the disablement." *Id.* The WCJ stated, however, that "[p]ursuant to Section 52-3-14 wages utilized for determining disability benefits are to be based upon the date of the occurrence" instead of the "date of the occurrence of the disablement." The WCJ found that Worker's "last occurrence as a firefighter was in 2000" and therefore used the maximum weekly compensation rate for 2000 of $480.47.

The WCJ's calculation was incorrect given the language omitted from the statute in the WCJ's order. The WCJ determined that Worker became disabled in January 2012. Therefore, this should have also been the date that the WCJ determined was the "date of the occurrence of the disablement." Nowhere does the statute state that the date of last employment or date of last injurious exposure to the hazards of the employment is to be used in calculating the amount of the Worker's disability benefits. *Compare* § 52-3-14(B) (stating that compensation "paid or payable during [an] employee's entire period of disablement shall be based on and limited to the benefits in effect on the date of the occurrence of the disablement"), *with* § 52-3-11 ("Where compensation is payable for an occupational disease the only employer liable shall be the employer in whose employment the employee was last injuriously exposed to the hazards of employment."). By way of counterpoint, under the Workers' Compensation Act, benefits are calculated according to the "date of the accidental injury resulting in the disability or death." NMSA 1978, § 52-1-48 (1989). This difference between the two statutes may result from a legislative recognition of the latency period of occupational diseases, which may not manifest until many years after the "injurious exposure." Accordingly, the January 2012 date of disablement shall be used in determining Worker's compensation rate.

CONCLUSION

For the foregoing reasons, we affirm the order awarding Worker benefits, reverse the calculation of benefits, and remand for proceedings consistent with this Opinion.

IT IS SO ORDERED.

CYNTHIA A. FRY, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

MICHAEL E. VIGIL, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-043

Filing Date: January 28, 2015

Docket No. 32,847

MARSHALL RICHEY,

Plaintiff-Appellant,

v.

HAMMOND CONSERVANCY DISTRICT,

Defendant-Appellee.

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OPINION

ZAMORA, Judge.

The Opinion filed on October 15, 2014 is withdrawn, and the following Opinion is substituted in its place.

Plaintiff, Marshall Richey, appeals from the district court's grant of Defendant's motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 1-012(B)(6) NMRA. Plaintiff contends that the district court erred in concluding that the facts alleged in his amended complaint failed to state a claim within the exclusivity exception to the New Mexico Workers' Compensation Act (the Act), as recognized in *Delgado v. Phelps Dodge Chino, Inc.*, 2001-NMSC-034, 131 N.M. 272, 34 P.3d 1148. We hold that the allegations in the amended complaint are sufficient to satisfy Rule 1-012(B)(6). We therefore reverse and remand for further proceedings.

BACKGROUND

Plaintiff was injured while working for Hammond Conservancy District (Defendant), and filed a personal injury claim pursuant to *Delgado*. Plaintiff pleaded the following facts in his amended complaint. In 2010, Plaintiff worked for Employee Connections, Inc., as a temporary worker. On October 18, 2010, Employee Connections "loaned" Plaintiff to Hammond Conservancy District (Defendant) as a temporary worker. At Defendant's direction, Plaintiff used a small-diameter, short-nozzle, high-pressure water hose to clean culverts used for flood control. Prior to that date, several workers, including Plaintiff, had advised Defendant that the hose was very difficult to control and had reported "near misses of serious injury and death." The

workers, including Plaintiff, warned Defendant that injury from using the hose to clean out culverts was "certain to result." In spite of the workers' protests and over Plaintiff's objections, Defendant directed Plaintiff to use the hose to clean the culvert. The hose "failed to prevent the loss of control" and, as a result, water from the high-pressure hose was "injected directly into . . . Plaintiff," causing severe injuries.

Plaintiff alleged that Defendant knew the assigned task was virtually certain to cause injury or death and that compelling him to perform the task in spite of the numerous employee complaints and objections was egregious. Plaintiff also alleged that Defendant's egregious conduct was the direct, natural, and proximate cause of his injuries.

Defendant moved to dismiss pursuant to Rule 1-012(B)(6), arguing that Plaintiff's claims were barred by the exclusivity provisions of the Act and claiming governmental immunity under the Tort Claims Act, NMSA 1978, §§ 41-1-1 to -30 (1976, as amended through 2013). Plaintiff moved to stay Defendant's Rule 1-012(B)(6) motion pending discovery. The district court held a hearing on Plaintiff's motion to stay, and Plaintiff was permitted to amend his complaint. The parties completed briefing on Defendant's motion to dismiss. After conducting a hearing on the motion, the district court dismissed Plaintiff's claims with prejudice pursuant to Rule 1-012(B)(6). This appeal followed.

DISCUSSION

The fundamental question presented in this appeal is whether Plaintiff's amended complaint included facts sufficient to state a claim under *Delgado*. To resolve this question, it is necessary to first examine the evolution of New Mexico's intentional conduct exception to Worker's Compensation exclusivity.

The Intentional Conduct Exception to Worker's Compensation Exclusivity

The purpose of the Act's exclusivity provision is to achieve balance between injured workers' need for compensation and employers' need to limit liability for work-related injuries. *Coates v. Wal-Mart Stores, Inc.*, 1999-NMSC-013, ¶ 24, 127 N.M. 47, 976 P.2d 999. However, the Act's exclusivity does not preclude claims against employers that intentionally inflict injury upon workers. *Id.*

Prior to our Supreme Court's decision in *Delgado* in 2001, worker injuries were only compensable outside the Act if the injured worker could demonstrate the employer's actual intent to injure the worker. *See Coleman v. Eddy Potash, Inc.*, 1995-NMSC-063, ¶ 26, 120 N.M. 645, 905 P.2d 185, *overruled by Delgado*, 2001-NMSC-034, ¶ 23 n.3; *see also Flores v. Danfelser*, 1999-NMCA-091, ¶ 17, 127 N.M. 571, 985 P.2d 173, *overruled by Delgado*, 2001-NMSC-034, ¶ 23 n.3; *Johnson Controls World Servs., Inc. v. Barnes*, 1993-NMCA-004, ¶ 12, 115 N.M. 116, 847 P.2d 761, *overruled by Delgado*, 2001-NMSC-034, ¶ 23 n.3; *Maestas v. El Paso Natural Gas Co.*, 1990-NMCA-092, ¶ 9, 110 N.M. 609, 798 P.2d 210, *overruled by Delgado*, 2001-NMSC-034, ¶ 23 n.3; *Gallegos v. Chastain*, 1981-NMCA-014, ¶ 5, 95 N.M. 551, 624 P.2d 60, *overruled by Delgado*, 2001-NMSC-034, ¶ 23 n.3; *Sanford v. Presto Mfg. Co.*, 1979-NMCA-059, ¶ 14, 92 N.M. 746, 594 P.2d 1202, *overruled by Delgado*, 2001-NMSC-034, ¶ 23 n.3. Our courts adopted this actual intent test from

Professor Larson's treatise, 6 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 103.03 (2000). *Delgado*, 2001-NMSC-034, ¶ 16.

Delgado

In 2001, our Supreme Court decided *Delgado,* which changed the law by broadening the exclusivity exception. *Padilla v. Wall Colmonoy Corp.*, 2006-NMCA-137, ¶ 9, 140 N.M. 630, 145 P.3d 110. In *Delgado*, the worker was ordered by his supervisor to remove a fifteen-foot iron cauldron brimming over with molten slag, without shutting down a furnace or otherwise correcting an especially dangerous emergency "runaway" condition that caused additional slag to continue flowing. 2001-NMSC-034, ¶ 4. Although the worker protested the orders, and informed the supervisor that he was not qualified or competent to perform the removal because he had never operated a kress-haul (a special truck for removing the cauldron) alone under such conditions, the supervisor insisted he proceed. *Id.* ¶ 5. The worker "emerged from the smoke-filled tunnel, fully engulfed in flames," suffering third-degree burns over his entire body. *Id.* He later died of his injuries. *Id.*

The Court examined the actual intent test, and rejected it as unbalanced in favor of employers. *See id.* ¶ 23 ("Under the actual intent test, a single standard of culpability, namely willfulness, will prevent a worker from benefitting from the Act while preserving the corresponding benefits for the employer. This bias violates the explicit mandate of Section 52-5-1, which demands the equal treatment of workers and employers.") In order to address the egregious conduct of the employer in that case, and to restore balance and equality to the Act, the Supreme Court set forth a new test for determining when conduct falls outside the scope of the Act:

> [W]illfulness renders a worker's injury non-accidental, and therefore outside the scope of the Act, when: (1) the worker or employer engages in an intentional act or omission, without just cause or excuse, that is reasonably expected to result in the injury suffered by the worker; (2) the worker or employer expects the intentional act or omission to result in the injury, or has utterly disregarded the consequences; and (3) the intentional act or omission proximately causes the injury.

Delgado, 2001-NMSC-034, ¶¶ 23, 24, 26.

The first element of the *Delgado* test looks at "whether a reasonable person would expect the injury suffered by the worker to flow from the intentional act or omission." *Id.* ¶ 27. The second element "requires an examination of the subjective state of mind of the worker or employer." *Id.* ¶ 28. This element is satisfied when the worker or employer either failed to consider the consequences of the intentional act or omission, or considered the consequences and expected the injury to occur. *Id.* This element is not satisfied where "the worker or employer considered the consequences and negligently failed to expect the worker's injury to be among them." *Id.* Finally, the third element requires proximate cause. *Id.* ¶ 29.

Morales

In *Morales v. Reynolds*, 2004-NMCA-098, 136 N.M. 280, 97 P.3d 612, this Court consolidated and decided the first two cases involving *Delgado* claims reaching us

after the *Delgado* decision. *Morales*, 2004-NMCA-093, ¶¶ 1,10. The *Morales* case was an appeal from a district court's grant of summary judgment in favor of the employer. *Id.* ¶ 3. The *Fernandez* case appealed a district court's dismissal for failure to state a claim. *Id.* ¶ 5.

Our focus in *Morales* was on "the procedural and evidentiary requirements a plaintiff must meet in order to overcome a motion to dismiss or for summary judgment." *Dominguez v. Perovich Props., Inc.*, 2005-NMCA-050, ¶ 16, 137 N.M. 401, 111 P.3d 721. To determine whether the workers' claims met the *Delgado* requirements as a matter of law, we considered the type of employer conduct *Delgado* sought to deter. *Morales*, 2004-NMCA-098, ¶ 10.

Because the *Delgado* Court did not elaborate on the type of employer conduct that would render a worker's injury compensable under the new test, we looked to the facts of that case for guidance. *Morales*, 2004-NMCA-098, ¶ 9. We determined that the *Delgado* decision stemmed from "a combination of deadly conditions, profit-motivated disregard for easily implemented safety measures, complete lack of worker training or preparation, and outright denial of assistance to a worker in a terrifying situation." *Morales*, 2004-NMCA-098, ¶ 10.

We concluded *Delgado* plaintiffs "must plead or present evidence that the employer met each of the three *Delgado* elements through actions that exemplify a comparable degree of egregiousness as the employer in *Delgado* in order to survive a pre-trial dispositive motion." *Morales*, 2004-NMCA-098, ¶ 14. We compared this threshold determination of egregiousness to the requirement in intentional infliction of emotional distress (IIED) cases, where "we require the court to determine as a matter of law whether conduct reasonably may be regarded as so extreme and outrageous that it will permit recovery[.]" *Id.* ¶ 15 (internal quotation marks and citation omitted).

The purpose for a threshold determination of egregiousness in *Delgado* cases was to "preserve the bargain of the Act in a meaningful way." *Morales*, 2004-NMCA-098, ¶ 16. Our concern was that "[e]xposing employers to the costs of litigating a full trial on the merits of every case in which a worker alleges some wilful conduct or claims that safety was ignored due to profit motive would deprive employers of their benefit from the Act's bargain." *Id.* Even unsuccessful claims, we reasoned, "would be a significant drain on an employer's financial resources if all questions of employer intent, no matter how slight, were sent to a jury." *Id.*

Holding that both the *Morales* and the *Fernandez* plaintiffs failed to satisfy the threshold determination of egregious employer conduct, as well as the requirements of *Delgado*, we affirmed the district courts' decisions in both cases. *Morales*, 2004-NMCA-098, ¶ 1.

Salazar I* and *Salazar II

In 2005, this Court addressed the question of whether the receipt of Worker's Compensation benefits precludes an injured worker from filing a *Delgado* claim. *Salazar v. Torres*, 2005-NMCA-127, ¶ 1, 138 N.M. 510, 122 P.3d 1279 (*Salazar I*), *rev'd in part*, 2007-NMSC-019, 141 N.M. 559, 158 P.3d 449 (*Salazar II*). In *Salazar I*, the employer instructed the worker to start a truck by pouring gasoline into the truck's carburetor.

2005-NMCA-127, ¶ 2. While the worker was still pouring the gasoline, the employer instructed the worker's son to start the truck's ignition. *Id.* The engine ignited the gasoline and the worker was severely burned. *Id.*

The worker received Worker's Compensation benefits, and entered into a settlement which included a lump-sum payment for permanent partial disability as well as future medical benefits. *Id.* ¶¶ 3, 31 (Pickard, J., specially concurring in part and dissenting in part). The worker subsequently filed a claim for damages, pursuant to *Delgado*. *Salazar I*, 2005-NMCA-127, ¶ 3. The employer moved for summary judgment and the worker responded. *Id.* Then, "for the first time in its reply to the response, [the employer] contended that [the w]orker's version of the facts, even if true, would not rise to the level of egregiousness sufficient to support a *Delgado* claim." *Salazar I*, 2005-NMCA-127, ¶ 3. Summary judgment was granted without an explanation of the district court's reasoning. *Id.*

A divided panel reversed the district court's grant of summary judgment. *Id.* ¶¶ 1, 30. The majority noted that in many cases, injured workers, faced with medical bills and an inability to work, will not be "in a financial position to wait out a lengthy, expensive and risky court proceeding to be compensated for the injury, due to the problems of pressing medical bills, and often the inability to work." *Id.* ¶ 11 (internal quotation marks and citation omitted). As a result, the majority concluded that "to consider the receipt of benefits a forfeiture of [a worker's] right to pursue the employer in the courts would not only be harsh and unjust, it would also frustrate the laudable purposes of the Act." *Id.* (alteration, internal quotation marks, and citation omitted).

Addressing the employer's argument that the worker's allegations, even if true, would not satisfy the required elements of a *Delgado* claim, the majority held that:

> Worker's complaint tracks the language of *Delgado* verbatim in so far as alleging the mental state on [the *e]mployer's* part, and [the e]mployer never submitted an affidavit in contesting these allegations. Our law simply requires *notice pleading*, and without any motion for summary judgment supported by [the e]mployer's own affidavit regarding willfulness, we hold that [the w]orker's allegations tracking the language of *Delgado* were sufficient to withstand what was tantamount to a motion to dismiss for failure to state a claim.

Salazar I, 2005-NMCA-127, ¶ 27 (emphasis added) (citation omitted).

A special concurrence and dissent took issue with the majority's holdings related to both the pleading standard and receipt of benefits for *Delgado* claims. *Salazar I*, 2005-NMCA-127, ¶¶ 36, 37 (Pickard, J., specially concurring in part and dissenting in part). As to the issue of benefits, the dissent expressed concern that by allowing employees to sue in tort after accepting compensation, the majority was disrupting the Act's balance of interests. *See id.* ¶ 34 (Pickard, J., dissenting) ("[T]he Act represents a bargain between employers and workers pursuant to which each gives up rights and obligations in return for some other benefit. The Act balances a worker's need for expeditious payment of benefits and an employer's need to limit liability. In [the dissenting Judge's] view, the majority tips this

balance entirely to the side of the worker[.]" (citation omitted)). .

The special concurrence advocated for a more stringent pleading standard in cases involving *Delgado* claims, stating:

> Our most recent cases of *Dominguez* and *Morales* have required a level of egregiousness of employer behavior comparable to that found in *Delgado*.
>
> . . . .
>
> So as not to require employers to litigate in circumstances where a worker cannot establish the requisite *Delgado* willfulness at the time of the filing of the complaint, I would adopt a pleading requirement in *Delgado* cases that requires workers to plead sufficient facts demonstrating that the standard is met or be subject to dismissal for failure to state a claim upon which relief can be granted.

Salazar I, 2005-NMCA-127, ¶ 38 (Pickard, J., specially concurring).

Our Supreme Court granted certiorari to resolve the question of "whether and when a worker can receive benefits under the Act without compromising a potential intentional tort action under *Delgado*." *Salazar II*, 2007-NMSC-019, ¶ 4. "Based on the clear intent of the Act," the Court held that when a worker suffers a work-related injury, and "questions whether the injury was intentionally inflicted by the employer," the worker may collect benefits under the Act, "while pursuing an intentional tort action under *Delgado*." *Salazar II*, 2007-NMSC-019, ¶ 1. However, the Court also concluded that when a worker enters into a final settlement of the claim in exchange for a lump-sum payment of indemnity benefits, the worker is then precluded from pursuing a *Delgado* claim. *Salazar II*, 2007-NMSC-019, ¶ 1. Because the worker in that case had received a lump-sum payment, representing full settlement of his claim, the Court reversed *Salazar I*. *Salazar II*, 2007-NMSC-019, ¶ 1. Notably, *Salazar II* did not reverse the majority's holding in *Salazar I* as to the pleading standard for *Delgado* claims. *Salazar II*, 2007-NMSC-019, ¶¶ 4, 30.

The Present Case

Standard of Review

We review motions to dismiss a complaint for failure to state a claim under Rule 1-012(B)(6) de novo. *Healthsource, Inc. v. X-Ray Assocs. of N.M.*, 2005-NMCA-097, ¶ 16, 138 N.M. 70, 116 P.3d 861. In considering a motion to dismiss, we test "the legal sufficiency of the complaint, not the factual allegations of the pleadings which, for purposes of ruling on the motion, the court must accept as true." *Herrera v. Quality Pontiac*, 2003-NMSC-018, ¶ 2, 134 N.M. 43, 73 P.3d 181 (internal quotation marks and citation omitted). Accepting all well-pleaded factual allegations in the complaint as true, we "resolve all doubts in favor of sufficiency of the complaint." *Delfino v. Griffo*, 2011-NMSC-015, ¶ 9, 150 N.M. 97, 257 P.3d 917 (internal quotation marks and citation omitted). Dismissal under Rule 1-012(B)(6) is appropriate only where the non-moving party is "not entitled to recover under any theory of the facts alleged in their complaint." *Delfino*, 2011-NMSC-015, ¶ 12 (internal quotation marks and citation omitted).

Defendant argues that Plaintiff's amended complaint is legally insufficient to state a *Delgado* claim because Plaintiff failed to allege Defendant's subjective intent, and because Plaintiff's allegations do not satisfy the threshold determination of egregiousness required for *Delgado* claims. Defendant also argues that an employer's failure to take safety measures does not meet the *Delgado* standard.

Defendant correctly states that the absence of safety measures generally will not give rise to a *Delgado* claim. *See May v. DCP Midstream, L.P.*, 2010-NMCA-087, ¶ 13, 148 N.M. 595, 241 P.3d 193 ("The absence of safety measures by itself demonstrates neither intent nor an inherent probability of injury, and we believe the Supreme Court in *Delgado* intended more than the disregard of preventative safety devices when contemplating an exception to the Workers' Compensation Act."); *see also Dominguez*, 2005-NMCA-050, ¶ 22 (holding that an employer's appalling disregard for safety requirements designed to help prevent injury and death on the job does not equate to an employer "specifically and wilfully caus[ing] the [worker] to enter harm's way, facing virtually certain serious injury or death, as contemplated under *Delgado*"). However, we are not convinced that Plaintiff is alleging a general failure by Defendant to provide safe equipment or take safety precautions.

Plaintiff's allegations are that Defendant was notified that the specific equipment Plaintiff was required to use was dangerous and had nearly caused serious injuries to several employees; that Defendant required Plaintiff to use the equipment in spite of this knowledge and over his objections; and that as a result, Plaintiff was severely injured using the equipment. Under *Morales*, the "critical measure" for *Delgado* claims is "whether the employer has, in a specific dangerous circumstance, required the [worker] to perform a task where the employer is or should clearly be aware that there is a substantial likelihood the [worker] will suffer injury or death by performing the task." *Dominguez*, 2005-NMCA-050, ¶ 22; *see May*, 2010-NMCA-087, ¶ 13.

Taking the allegations in Plaintiff's amended complaint as true, and construing them in a light most favorable to the complaint's sufficiency, we conclude that Plaintiff's allegations were sufficient to state a claim under *Delgado*. *See Salazar I*, 2005-NMCA-127, ¶ 27 (holding that "[the w]orker's allegations tracking the language of *Delgado* were sufficient to withstand what was tantamount to a motion to dismiss for failure to state a claim").

To the extent that Defendant argues that under *Morales* the Rule 12(B)(6) analysis for *Delgado* claims is different than the analysis typically applied to Rule (12)(B)(6) motions, we are not persuaded. As *Salazar I* recognized, New Mexico is a notice pleading state. *Madrid v. Vill. of Chama*, 2012-NMCA-071, ¶ 17, 283 P.3d 871. We do not require "[district] courts to consider the merits of a plaintiff's allegations when deciding a motion to dismiss[.]" *Id.* Rather, we require "only that the plaintiff allege facts sufficient to put the defendant on notice of his claims." *Id.*; *see Zamora v. St. Vincent Hosp.*, 2014-NMSC-035, ¶¶ 1, 10, 335 P.3d 243 (reaffirming "New Mexico's longstanding commitment to the nontechnical fair notice requirements"); *see also* Rule 1-008(A)(2) (stating that a claim for relief shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief").

In *Salazar I*, 2005-NMCA-127, ¶ 27,

we held that the notice pleading standard is applicable in cases involving *Delgado* claims, and our holding as to that issue was not reversed by *Salazar II*, 2007-NMSC-019, ¶ 4. We also note that the special concurrence in *Salazar I* proposed adopting a heightened pleading standard for *Delgado* claims, indicating that *Morales* had not already done so. *Salazar I*, 2005-NMCA-127, ¶ 38.[1] Moreover, applying the notice pleading standard to *Delgado* claims is consistent with the policy and philosophy of the Act as discussed in *Salazar II*:

> *Delgado* established a high threshold of culpability that should eliminate many claims before trial. In light of this high threshold, injured workers must be afforded a reasonable time to investigate, including pre-trial discovery, whether they have a sustainable *Delgado* claim. It may not be until the summary judgment stage, or even trial, that a worker has the answer.

Salazar II, 2007-NMSC-019, ¶ 14 (citations omitted).

Salazar II also addressed the concern expressed in *Salazar I's* dissent, that employers may be required to litigate in circumstances where the requisite *Delgado* willfulness is not established in the complaint:

> We acknowledge that under our holding here, employers who pay compensation benefits may, in some cases, also have to pay legal fees to defend an intentional tort action under *Delgado*. Even if the worker's *Delgado* claim is ultimately dismissed, the employer will never recover the cost of those legal fees. However, the Act does not insulate employers from such contingencies. As noted above, the [L]egislature intended to protect employers from negligence actions for accidental injury, not actions for intentional tort. Accordingly, an employer is protected from having to defend negligence lawsuits, but not against the expense of lawsuits grounded in intentional or willful behavior. We observe that in some instances, perhaps most, prudent employers have the ability to anticipate and plan for the possibility of paying future attorney fees to defend against *Delgado* claims. [The w]orkers, on the other hand, can rarely plan for injuries inflicted by the willful misconduct of their employers.

Salazar II, 2007-NMSC-019, ¶ 22 (citation omitted).

Defendant's Governmental Immunity Defense

In its motion to dismiss, Defendant claims that because it is a statutorily created conservancy district, it is an arm of the State and enjoys immunity under the Tort Claims Act. Plaintiff argues that immunity was waived pursuant to NMSA 1978, § 41-4-6 (2007). The district court found that Defendant's Rule 1-012(B)(6) motion to dismiss was well taken, and ordered that Plaintiff's complaint be dismissed with prejudice pursuant to Rule 1-012(B)(6). Because the district court did not reach the

[1] Judge Pickard authored *Morales* and also wrote the dissenting opinion in *Salazar I*.

issue of governmental immunity, we leave it for determination on remand.

CONCLUSION

For the foregoing reasons, we reverse and remand for further proceedings.

IT IS SO ORDERED.

M. MONICA ZAMORA, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

RODERICK T. KENNEDY, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-044

Filing Date: January 29, 2015

Docket No. 33,484

STATE OF NEW MEXICO ex rel. THE HONORABLE SHERYL WILLIAMS STAPLETON, THE HONORABLE HOWIE MORALES, THE HONORABLE LINDA M. LOPEZ, AMERICAN FEDERATION OF TEACHERS-NEW MEXICO, ELLEN BERNSTEIN, and RYAN ROSS,

Petitioners-Appellants,

v.

HANNA SKANDERA, Secretary-Designate of the PUBLIC EDUCATION DEPARTMENT OF THE STATE OF NEW MEXICO,

Respondent-Appellee.

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for Respondent-Appellee

OPINION

BUSTAMANTE, Judge.

Petitioners appeal the district court's denial of their petition for a writ of mandamus ordering the Secretary-Designate (the Secretary) of the Public Education Department (the Department) to desist from implementing new regulations governing the evaluation of teachers in public schools. Like the district court, we conclude that the Secretary acted within the discretion authorized by statute and, therefore, cannot be compelled by a writ of mandamus to suspend the new regulations. We affirm.

BACKGROUND

In January 2012 the Teacher and School Leader Effectiveness Act (the Act) was introduced in the New Mexico Legislature. Although it passed in the House of Representatives, ultimately the Legislature failed to pass the Act. Later that year, the Secretary published regulations governing evaluation of teachers in public schools, which were codified at Title 6, Chapter 69, Part 8 of the New Mexico Administrative Code. *See* 6.69.8 NMAC (08/30/2012). We will refer to these regulations collectively as "Part 8." Part 8 is titled "Teacher and School Leader Effectiveness." *Id.*

The purpose of Part 8 is stated in the regulations.

> This rule establishes uniform procedures for conducting annual evaluations of licensed school employees, for setting the standards for each effectiveness level, for measuring and implementing student achievement growth, and for monitoring each school district's implementation of its teacher and school leader effectiveness evaluation system. This rule also seeks to change the dynamic of placing emphasis on teacher effectiveness and provide the opportunity to acknowledge excellence, thereby replacing the binary system that emphasizes years of experience and credentials.

6.69.8.6 NMAC (08/30/2012). Part 8 supersedes the teacher evaluation regulations promulgated in 2003 as 6.69.4 NMAC (09/30/2003, as amended through 06/15/2009). *See* 6.69.8.8 NMAC (09/30/2013). Additional facts are provided in our discussion of Petitioners' arguments.

DISCUSSION

A. Standard of Review

"[M]andamus lies to compel the performance of an affirmative act by another where the duty to perform the act is clearly enjoined by law and where there is no other plain, speedy[,] and adequate remedy in the ordinary course of law." *Lovato v. City of Albuquerque*, 1987-NMSC-086, ¶ 6, 106 N.M. 287, 742 P.2d 499; *see* NMSA 1978, §§ 44-2-4, -5 (1884). "Mandamus is a drastic remedy to be invoked only in extraordinary circumstances." *Brantley Farms v. Carlsbad Irrigation Dist.*, 1998-NMCA-023, ¶ 12, 124 N.M. 698, 954 P.2d 763. Mandamus does not apply "to compel an executive officer acting within his discretion." *State ex rel. King v. Lyons*, 2011-NMSC-004, ¶ 28, 149 N.M. 330, 248 P.3d 878. In other words, "[w]hen the legal duty in question is based on a statute, mandamus is appropriate only when that duty is clear and indisputable." *Johnson v. Vigil-Giron*, 2006-NMSC-051, ¶ 22, 140 N.M. 667, 146 P.3d 312 (internal quotation marks and citation omitted).

Generally, the grant or denial of a petition for writ of mandamus is reviewed for an abuse of discretion. *FastBucks of Roswell, N.M., LLC v. King*, 2013-NMCA-008, ¶ 7, 294 P.3d 1287. Within the abuse of discretion standard we consider whether the district court's ruling rested on its determination that the Secretary acted within her statutory authority and exercised her discretion under statute. That issue presented requires the interpretation of statutes. Thus, our review is de novo. *Id.* ¶ 6; *OS Farms, Inc. v. N.M. Am. Water Co.*, 2009-

NMCA-113, ¶ 19, 147 N.M. 221, 218 P.3d 1269. The scope of our review is limited to whether the Secretary's actions fall within her authority; we do not examine the prudence of the regulations themselves. *See Am. Fed'n of State, Cnty. & Mun. Emps. v. Martinez*, 2011-NMSC-018, ¶ 4, 150 N.M. 132, 257 P.3d 952 ("In considering whether to issue a prohibitory mandamus, we do not assess the wisdom of the public official's act[.]").

Petitioners make two broad arguments. First, they argue that the Secretary "[o]verstepped" the authority granted her by statute and "[u]surp[ed]" the authority of the Legislature to set public policy. Second, they maintain that two provisions in Part 8 expressly violate the Public School Code. NMSA 1978, §§ 22-1-1 to 22-33-4 (except Article 5A) (1967, as amended through 2014). We address these arguments in turn.

B. The Secretary Did Not Exceed Her Authority

Petitioners maintain that Part 8 constitutes a "radical[] alter[ation of the] teacher evaluation standards" found in the Department's governing statutes. More specifically, Petitioners object to the inclusion of student performance as a measure of teacher competency and to the replacement of the "binary system" of evaluation (competent or incompetent) with one in which teachers are assessed according to five levels of competency (exemplary, highly effective, effective, minimally effective, and ineffective). 6.69.8.8(D)(6) NMAC. They maintain that these aspects of the regulations constitute a "fundamental shift in public policy" and therefore usurp the Legislature's policy-making function. We disagree that the Secretary has acted outside of her statutorily defined authority.

"Agencies are created by statute, and limited to the power and authority expressly granted or necessarily implied by those statutes." *Qwest Corp. v. N.M. Pub. Regulation Comm'n*, 2006-NMSC-042, ¶ 20, 140 N.M. 440, 143 P.3d 478. "Generally, the Legislature, not the administrative agency, declares the policy and establishes primary standards to which the agency must conform." *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 22, 125 N.M. 343, 961 P.2d 768. Through enabling statutes, the Legislature may "delegate both adjudicative and rule-making power to administrative agencies." *New Energy Econ., Inc. v. Shoobridge*, 2010-NMSC-049, ¶ 14, 149 N.M. 42, 243 P.3d 746. Thus, although courts have recognized the primacy of the Legislature's role, our Supreme Court "has acknowledged that elected executive officials and executive agencies also make policy, to a lesser extent, as authorized by the constitution or the [L]egislature[.]" *State ex rel. Sandel v. N.M. Pub. Util. Comm'n*, 1999-NMSC-019, ¶ 12, 127 N.M. 272, 980 P.2d 55 (alteration, internal quotation marks, and citation omitted). However, "[t]he administrative agency's discretion may not justify altering, modifying[,] or extending the reach of a law created by the Legislature." *Taylor*, 1998-NMSC-015, ¶ 22.

When reviewing agency action, we presume that "[r]ules and regulations enacted by an agency are . . . valid" and we will uphold them if they are "reasonably consistent with the statutes that they implement." *Tenneco Oil Co. v. N.M. Water Quality Control Comm'n*, 1987-NMCA-153, ¶ 14, 107 N.M. 469, 760 P.2d 161, *superseded by statute as stated in N.M. Mining Ass'n v. N.M. Water Quality Control Comm'n*, 2007-NMCA-010, 141 N.M. 41, 150 P.3d 991. Given this presumption, Petitioners bear the

burden "of establishing the invalidity of [Part 8]." *N.M. Mining Ass'n v. N.M. Mining Comm'n*, 1996-NMCA-098, ¶ 8, 122 N.M. 332, 924 P.2d 741.

The Secretary's duties and authority are addressed by several different statutes. The Public Education Department Act provides that "[t]he secretary may make and adopt such reasonable and procedural rules as may be necessary to carry out the duties of the [D]epartment and its divisions." NMSA 1978, § 9-24-8(D) (2004). The Public School Code also contains several provisions addressing the authority of the Secretary and the Department. Section 22-2-1 states that "[t]he [S]ecretary is the governing authority and shall have control, management and direction of all public schools, except as otherwise provided by law" and that "[t]he [D]epartment may . . . adopt, promulgate[,] and enforce rules to exercise its authority and the authority of the [S]ecretary[.]" Section 22-2-2(B) and (C) state that "[t]he [D]epartment shall . . . determine policy for the operation of all public schools and vocational education programs in the state, . . . [and] supervise all schools and school officials coming under its jurisdiction[.]" In addition, Section 22-10A-19(A) requires the Department to "adopt criteria and minimum highly objective uniform statewide standards of evaluation for the annual performance evaluation of licensed school employees." Through these provisions, the Legislature has delegated broad authority to the Secretary to define how teachers will be evaluated, so long as evaluations are "highly objective" and "uniform statewide." *Id.* Thus, unless the Secretary has abused her discretion, mandamus is improper. *See Brantley Farms*, 1998-NMCA-023, ¶ 22 ("[T]he exercise of discretionary power or the performance of a discretionary duty cannot be controlled by mandamus.").

Petitioners argue that inclusion of student achievement as a performance measure for teachers represents a shift in public policy that can only be made by the Legislature. They appear to contend that the 2003 evaluation regulations, which focused on teachers' "skills, training[,] and knowledge" and did not include the assessment of student achievement to the same degree as the new regulations, properly implemented the Legislature's intent. *See, e.g.*, 6.69.4.10 NMAC (providing for implementation of a high objective uniform standard of evaluation); 6.69.4.9(D)(4)(b) NMAC (discussing student achievement as a measure of a teacher's competency); 6.69.4.11(E)(1)(a) NMAC (same).

But there is nothing in the Legislature's directive that teacher evaluations should be "highly objective" and "uniform statewide" that addresses exactly how teacher effectiveness should be measured. Indeed, even the 2003 regulations, with which Petitioners agree, were based on the Department's discretionary selection of assessment criteria. We conclude that the statute leaves the particulars of a teacher evaluation program to the Secretary.

A similar analysis applies to Petitioners' argument that the Secretary fundamentally altered the public policy of the state by "replacing the binary system" of teacher evaluation with a more nuanced system. The statute requires only that the teacher evaluation program be objective and uniform. *See* § 22-10A-19(A). As long as these broad criteria are met, it is within the Secretary's discretion to devise a structure for evaluations as she sees fit.

Finally, to the extent that Petitioners argue that Part 8 is invalid because it was

promulgated only after the Legislature failed to pass a bill mandating its provisions, we are unpersuaded. Petitioners argue that the present matter is "virtually indistinguishable" from the facts in *Taylor*, in which an administrative agency implemented regulations after a bill to the same effect failed to pass in the Legislature. 1998-NMSC-015, ¶ 10. On appeal, the Court invalidated the regulations. *Id.* ¶ 25. Its reasoning, however, was based on its determination that the regulations "implement[ed] the type of substantive policy changes reserved to the Legislature[,]" and therefore were beyond the agency's authority, not on the fact that the Legislature had rejected similar legislation. *Id.* Similarly, the failure of the Legislature to pass the Teacher and School Leader Effectiveness Act has no bearing on our analysis of whether the Secretary's actions were within her discretion under the current statutes. *See id.* Since we have concluded that the Secretary did not exceed her authority, *Taylor* does not support Petitioners' position.

C. Part 8 Does Not Violate the Public School Code

In their second major argument, Petitioners contend that two provisions in Part 8 are in direct violation of the Public School Code. They argue that whereas the statute requires principals to observe each teacher in the classroom, Part 8 permits assistant principals to observe teachers. Similarly, they argue that whereas the statute requires that any evaluation system be "uniform statewide," Part 8 exempts charter schools from its regulations. These arguments are unavailing.

Petitioners first contend that 6.69.8.8(H) NMAC conflicts with Section 22-10A-19(C). The former states that "[s]chool leaders shall observe instructional practice of teachers using common research-based observational protocol approved by the [D]epartment that correlates observations to improved student achievement." 6.69.8.8(H) NMAC. The term "school leader[s]" includes both principals and assistant principals. 6.69.8.7(N) NMAC. Section 22-10A-19(C) states, "[a]s part of the highly objective uniform statewide standard of evaluation for teachers, the school principal shall observe each teacher's classroom practice to determine the teacher's ability to demonstrate state-adopted competencies." We agree with the district court that the regulation does not necessarily conflict with the statute because the statute "mandates the participation of school principals [but] does not limit the persons who *may* [also] observe [teachers]." (Emphasis added.) Neither does the fact that 6.69.8.8(H) NMAC allows either principals or assistant principals to observe teachers in classrooms relieve principals of their duty to do so under the statute. Even if we acknowledge that, as Petitioners argue, the regulation may be applied in such a way as to conflict with the statute, Petitioners provide no evidence that the Secretary has interpreted the regulation that way. "If the [Department] may interpret the regulation in a manner that is in compliance with the [Public School Code], we must affirm the regulation, leaving to a future time any challenge to the regulation as applied." *Old Abe Co. v. N.M. Mining Comm'n*, 1995-NMCA-134, ¶ 22, 121 N.M. 83, 908 P.2d 776. "Meanwhile, for purposes of this appeal, we will presume that the rule will not be interpreted in a manner contrary to the [Public School Code]." *Id.*

Next, Petitioners argue that, because charter schools are exempt from Part 8, the evaluation program does not comply with the statute's requirement that any evaluation program be uniformly applied to all schools.

See 6.69.8.7(L) NMAC (defining "[s]chool district" and stating that "[d]istrict-authorized charter schools are excluded from being considered a school district for purposes of this rule"); § 22-10A-19(A) ("The department shall adopt . . . uniform statewide standards of evaluation for the annual performance evaluation of licensed school employees."). But the Legislature expressly exempted charter schools from the Public School Code's provisions related to teacher evaluations. Section 22-8B-5(C), which is part of the Charter Schools Act within the Public School Code, requires the Department to "waive requirements or rules and provisions of the Public School Code . . . pertaining to . . . evaluation standards for school personnel[.]" Thus Part 8's provision exempting charter schools does not contravene the uniformity requirement in the Public School Code.

Petitioners make a cursory argument that the requirement in Section 22-10A-19(A) that evaluation programs be uniform throughout the state "could be seen as taking precedence [over the exemption in the Charter Schools Act]." They do not cite to any authority in support of this proposition. In addition, Petitioners do not state how this specific argument was preserved, we do not find it in the pleadings, and the district court did not address it in its order. We therefore do not address this argument because it was not preserved below and is undeveloped on appeal. *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."); *Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076 (declining to review an undeveloped argument).

CONCLUSION

Having concluded that the Secretary's promulgation of Part 8 was within the discretionary authority granted her by statute, we affirm the district court's denial of Petitioners' petition for a writ of mandamus.

IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

RODERICK T. KENNEDY, Judge

Certiorari Denied, March 18, 2015, No. 35,131

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-045

Filing Date: February 2, 2015

Docket No. 33,362

LEE EINER,

Petitioner-Appellant,

v.

MELANIE Y. RIVERA,
in her official capacity as

Clerk of San Miguel County,

Respondent-Appellee.

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for Appellant

Jesus L. Lopez, San Miguel County Attorney
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for Appellee

OPINION

WECHSLER, Judge.

We consider in this appeal whether San Miguel County is subject to the home rule charter process of the Home Rule Amendment, Article X, Section 6 of the New Mexico Constitution, and the Municipal Charter Act, NMSA 1978, §§ 3-15-1 to -16 (1965, as amended through 1990). We hold that it is not, concluding that San Miguel County is not a "municipality" within the Municipal Charter Act or the Home Rule Amendment. We further conclude that our holding does not violate the constitutional equal protection rights of Petitioner Lee Einer. We affirm the district court's denial of a petition for mandamus.

BACKGROUND

The attorneys for Petitioner, a resident of San Miguel County, submitted a form petition to Respondent Melanie Y. Rivera, the County Clerk, requesting that Respondent approve the form of the petition for circulation to qualified electors. The petition requested the San Miguel County Commission to appoint a charter commission providing for the "home rule" government of the county. NMSA 1978, Section 3-1-5 (2007) provides the procedure for approval of the form of a municipal home rule petition that includes approval by a county clerk if the form meets specified statutory requirements. Section 3-1-5(C).

The San Miguel County attorney responded to the request, advising that Respondent declined to act on the petition because the petition seeking incorporation of the county and adoption of a charter was not authorized by law. After an additional exchange of letters between counsel, Petitioner filed a writ of mandamus, requesting that the district court issue (1) a declaratory judgment that San Miguel County is a "municipality" under the Municipal Charter Act and that the form of petition met the requirements of Section 3-1-5(C); and (2) a peremptory or alternative writ of mandamus, compelling Respondent to approve the petition.

The parties filed stipulated findings of fact and proposed conclusions of law and cross-motions for summary judgment. The district court denied Petitioner's motion, granted Respondent's motion, and denied the petition for a writ. It stated that San Miguel County was "not a municipality as contemplated in the Municipal Code and Municipal Charter Act."

On appeal, Petitioner argues, as he did in the district court, that (1) San Miguel County is a municipality with authority to adopt a home rule charter under the Municipal Charter Act; (2) San Miguel County is a municipality

with authority to adopt a home rule charter under the Home Rule Amendment; and (3) if San Miguel County is not recognized as a municipality under the Municipal Charter Act and the Home Rule Amendment, his right to local self-government would be infringed in violation of the Equal Protection Clause of the Fourth Amendment of the United States Constitution and Article II, Section 18 of the New Mexico Constitution.

MUNICIPAL CHARTER ACT

The Home Rule Amendment was adopted in 1970. It permits the qualified electors of a municipality to adopt "in the manner provided by law" a charter for the exercise of legislative powers. N.M. Const. art. X, § 6(C), (D). The Legislature adopted the Municipal Charter Act the following year, providing the manner by which the Home Rule Amendment was to be carried out. *See, e.g.*, § 3-15-2 ("The qualified electors of a municipality who wish to be governed pursuant to Article 10, Section 6 of the constitution of New Mexico may adopt, amend or repeal a charter pursuant to the Municipal Charter Act.").

The Municipal Charter Act permits the qualified electors of a municipality to petition for the adoption of a home rule charter. Section 3-15-4. It defines a "municipality" to mean "any incorporated city, town, village or county, whether incorporated under general act, special act or constitutional provision." Section 3-15-3. Petitioner's argument that the Municipal Charter Act provides San Miguel County with the authority to adopt a home rule charter hinges on this definition. Specifically, in order for Petitioner to be entitled to petition for a home rule charter, San Miguel County must be an incorporated county, "incorporated under general act, special act or constitutional provision." *Id.* As a matter of statutory interpretation, we address Petitioner's argument on appeal under de novo review. *State v. Almanzar*, 2014-NMSC-001, ¶ 15, 316 P.3d 183. We interpret the Municipal Charter Act in order to fulfill its legislative intent. *Griego v. Oliver*, 2014-NMSC-003, ¶ 20, 316 P.3d 865. In doing so, we first look to the language of the relevant statutes. *Id.* ¶ 21.

Petitioner asserts that San Miguel County is an incorporated county by virtue of both a special act, Chapter 142, Section 1 of New Mexico Laws of 1923, codified at NMSA 1978, Section 4-25-1 (1923), and a general act, Chapter 1, Section 3 of New Mexico Laws of 1876, codified at NMSA 1978, Section 4-38-1 (1876). Section 4-25-1 created the county presently named San Miguel County and established its geographic boundaries. *See* NMSA 1978, § 4-25-7 (1923) (changing the name of Jefferson County to San Miguel County in 1923). A county is a subdivision of the state. *El Dorado at Santa Fe, Inc. v. Bd. of Cnty. Comm'rs of Santa Fe Cnty.*, 1976-NMSC-029, ¶ 6, 89 N.M. 313, 551 P.2d 1360. It "possesses only such powers as are expressly granted to it by the Legislature, together with those necessarily implied to implement those express powers." *Id.* Nothing in Section 4-25-1 incorporated San Miguel County.

Section 4-38-1 states: "The powers of a county as a body politic and corporate shall be exercised by a board of county commissioners." Petitioner reads this statute as establishing that a county in New Mexico is necessarily an incorporated county. But, a body "corporate" and an "incorporated" body are not the same for the purposes of defining a municipality under the Municipal Charter Act.

The Municipal Charter Act

specifically defines a "municipality" to include an "incorporated . . . county" as well as incorporated cities, towns, or villages. Section 3-15-3. It specifies that a municipality may be incorporated under a "general act, special act or constitutional provision." *Id.* Significantly, when the Legislature passed the Municipal Charter Act, the Municipal Code contained provisions for the incorporation of municipalities both generally and under special act. NMSA 1978, §§ 3-2-1 to -9 (1965, as amended through 2013); NMSA 1978, §§ 3-3-1 to -4 (1965, as amended through 1985). Both such procedures required petitions and elections. Section 3-2-1, -5(E); Section 3-3-2, -3. In addition, at the time the Municipal Charter Act was enacted, the New Mexico Constitution provided for the incorporation of counties that are "less than one hundred forty-four square miles in area and ha[ve] a population of ten thousand or more." N.M. Const., art. X, § 5 (adopted in 1964). The procedure for the incorporation of a county requires an election on a draft charter. *Id.* Article X, Section 5 of the New Mexico Constitution grants a county incorporated under its provisions the same powers constitutionally and statutorily granted to municipalities. *Id.*

Other than Article X, Section 5, there is no New Mexico constitutional or statutory provision that "incorporates" a county. The Home Rule Amendment permits a "municipality" to adopt a charter and to exercise certain legislative powers. N.M. Const. art. X, § 6(D). The Municipal Charter Act treats an "incorporated" county as a municipality. But, the constitutional and statutory backdrop at the time the Legislature enacted the Municipal Charter Act indicates that the legislative intent in defining "municipality" to include an "incorporated" county was to embrace within the Home Rule Amendment a county that incorporated under Article X, Section 5 and, thereby, acquired the same powers constitutionally and statutorily granted to municipalities.

Section 4-38-1 states that a board of county commissioners has the authority to exercise the powers of the county "as a body politic and corporate." It was adopted, along with the establishment of organized counties as bodies corporate and politic in 1876. 1876 N.M. Laws, ch. 1, §§ 1, 3. These statutes were enacted because, at that time, there was "no general law for the incorporation of cities or towns, in which powers of local administration are usually vested[,]" and the Territorial Legislature did not want communities to "be without municipal government of some kind[.]" *Agua Pura Co. v. Mayor of Las Vegas*, 1900-NMSC-002, ¶ 13, 10 N.M. 6, 60 P. 208. These statutes recognize the counties as subdivisions of the territory, and later the state, and, with that status as distinct entities, they may exercise powers necessary for their operation. In Section 4-38-1, the Territorial Legislature described a county's powers as "corporate," and, indeed, these powers resemble those of a corporation. *See* 3 *The Oxford English Dictionary* 955 (2d ed. 1991 reprint) (defining "corporate county" as "a city or town with its liberties, which has been constituted a county of itself, independent of the jurisdiction of the historical county or shire in which it is situated"); *The American Heritage Dictionary of the English Language* 41 (5th ed. 2011) (defining "corporate" in relevant part as "[o]f or relating to a corporative government or political system"). But neither Section 4-38-1 nor Section 4-25-1 is an incorporation provision or indicates an intent of the Legislature to incorporate counties. They do not provide any procedure for a county to incorporate or even to acquire any powers. We consider incorporation to be

a specific process that requires specific legislative authority. *See* §§ 3-2-1 to -9; §§ 3-3-1 to -4 (specifying the process for a municipality to incorporate); *see also* NMSA 1978, §§ 53-12-1 to -4 (1967, as amended through 2003) (specifying the process to form a business corporation); NMSA 1978, §§ 53-8-30 to -33 (1975, as amended through 2003) (specifying the process to form a nonprofit corporation). Section 4-38-1 is not an indirect incorporation process.

Although we have appellate cases that have discussed Section 4-38-1 or its predecessor statute, they do not affect our analysis of the Municipal Charter Act. For example, in *Board of Commissioners of Rio Arriba County v. Greacen*, 2000-NMSC-016, ¶ 5, 129 N.M. 177, 3 P.3d 672, in considering whether a county had the authority to enact local traffic ordinances and retain collected penalty assessments, our Supreme Court noted Section 4-38-1 and recognized that the county was organized and exercised powers "as a body politic and corporate." Nothing in *Greacen* addresses the incorporation of the county. Similarly, *State ex rel. Dow v. Graham*, 1928-NMSC-022, ¶ 6, 33 N.M. 504, 270 P. 897, involving a challenge to a legislative effort to abolish Catron County, merely recites that Catron County is a "body politic and corporate"; it does not consider any issue regarding incorporation.

Our Supreme Court has also referred to counties as "municipal corporations." In *Agua Pura*, the issues involved a statute that limited actions questioning a franchise granted by a municipal corporation to six years from the grant of the franchise and deemed such franchises valid after the six-year period. 1900-NMSC-002, ¶ 14. The plaintiff had entered a contract with the board of county commissioners in 1880 that included supplying water within the county and to the "town and city of Las Vegas." *Id.* ¶¶ 10, 15. The Las Vegas city council sought to regulate the plaintiff's rates under an 1897 law that granted a city or town such authority provided that existing contracts were not affected. *Id.* ¶ 9. The plaintiff sought an injunction against the city. *Id.* ¶ 4. The Court's holdings included that the contract was not subject to question and "valid in all respects" because the plaintiff did not bring suit within the required time period. *Id.* ¶ 15. The Court treated the county as a "municipal corporation." *Id.* ¶ 13.

Mountain States Telephone & Telegraph Co. v. Town of Belen, 1952-NMSC-053, 56 N.M. 415, 244 P.2d 1112, involved a similar issue. The county commissioners of Valencia County had granted a franchise to the defendant to provide telephone service within the county in 1905. *Id.* ¶ 5. In 1949, the town of Belen, which was incorporated in 1918, sought to require the defendant to accept a franchise to operate within its corporate limits. *Id.* ¶¶ 1, 5. Our Supreme Court discussed its *Agua Pura* opinion at length, in particular, its conclusions that the county commissioners in *Agua Pura* had the power to grant a franchise to a public utility as a "municipal corporation" and that the six-year limitation period for challenging actions by a "municipal corporation" with respect to its grant of a franchise applied. *Mountain States*, 1952-NMSC-053, ¶¶ 8-10.

In *Mountain States*, our Supreme Court described counties as "bodies corporate and politic" and stated their powers to be both "corporate" and "administrative." *Id.* ¶ 6 (internal quotation marks and citation omitted). The Court, however, noted that the *Agua Pura* Court did not examine, but merely assumed, that the Territorial Legislature intended a county to be included as a

"municipal corporation" allowed in the 1893 statute to grant a utility franchise. *Mountain States*, 1952-NMSC-053, ¶ 8. And, it questioned the correctness of its prior conclusion in *Agua Pura* that a county was such a municipal corporation, stating:

> While the term "municipal corporation" is sometimes used, in its broader meaning, to include such public bodies as the state and each of the governmental subdivisions of the state,—such as counties, parishes, townships, hundreds, etc.,—it ordinarily applies only to cities, villages, and towns which are organized as full-fledged public corporations.
>
> A county in a sense is a municipal corporation and sometimes is classed as such; but strictly speaking a county is distinguishable from, and is not, a municipal corporation.

Mountain States, 1952-NMSC-053, ¶ 8 (internal quotation marks and citations omitted). The Court further noted that if the *Agua Pura* Court had examined the meaning of the use of "municipal corporation" in the statute, "it might have reached a different conclusion." *Mountain States*, 1952-NMSC-053, ¶ 9. It nevertheless followed *Agua Pura* because it had been "stare decisis in this [s]tate for more than half a century." *Mountain States*, 1952-NMSC-053, ¶ 10.

As we have discussed, the issue before us in this case is not whether San Miguel is a body corporate or a municipal corporation under Section 4-38-1, but rather whether it is an incorporated county under the Municipal Charter Act. Although the Territorial Legislature designed counties to have corporate powers, and such powers have been used to broadly consider counties as "municipal corporations," the Municipal Charter Act is specific in its use of the term "incorporated county." Section 3-15-3. With this specificity, the Legislature did not intend to use the broader sense of corporate power discussed in *Mountain States*; it intended to include as "incorporated" counties only counties "organized as full-fledged corporations." *Mountain States*, 1952-NMSC-053, ¶ 8 (internal quotation marks and citation omitted).

Any other interpretation of the Municipal Charter Act would not make sense. *See Baker v. Hedstrom*, 2012-NMCA-073, ¶ 12, 284 P.3d 400 ("It is fundamental that statutes will be construed so that their application will be neither absurd nor unreasonable." (internal quotation marks and citation omitted)). Article X, Section 5 of the New Mexico Constitution provides the procedure for a county to become incorporated, as well as the authority of an incorporated county, and restricts it to a county with less than one hundred forty-four square miles in area and a minimum population of ten thousand. Why would the Legislature pass such a constitutional amendment for voter approval to permit incorporation of such a limited class of counties of the state if it intended all counties of the state to be incorporated by their statutory creation?

It is apparent that the Legislature took no such action. Its intent in passing the constitutional amendment to the voters was to limit incorporated counties to Los Alamos County. Petitioner does not dispute that Los Alamos County is the only county in the state that falls within the restrictions set forth in

Article X, Section 5. This provision, adopted in 1964, was not the first to single out Los Alamos County from other counties. In 1955, the Legislature established the classification of H class counties, defined as "[a]ny county which covers an area of not more that 200 square miles." NMSA 1978, § 4-44-3 (1985). (The record indicates that Los Alamos County has a total area of 109 square miles and San Miguel County a total area of 4736 square miles.) In 1965, with the adoption of the Municipal Code, Los Alamos County was treated as a municipality. *See* NMSA 1978, § 3-1-2(G) (1993) (including "incorporated counties" and "H class counties" within the definition of "municipality"). The Municipal Code permitted municipalities to incorporate as a municipality. Sections 3-2-1 to -9. Los Alamos County did so in 1968. Thus, in 1971, when adopting the Municipal Charter Act and defining a "municipality" to include "incorporated counties," the Legislature was merely continuing its precedent distinguishing Los Alamos County from other counties.

San Miguel County has no such history. It is not an "incorporated county" under the Municipal Charter Act. Absent that status, it does not fall within the definition of "municipality" and is not entitled to a home rule charter under the Municipal Charter Act.

HOME RULE AMENDMENT

Petitioner makes the alternative argument that "San Miguel County is a municipality with authority to adopt a home rule charter under the Home Rule Amendment." He contends that the Home Rule Amendment is self-executing in that it provides that "[i]n the absence of law, the governing body of a municipality may appoint a charter commission upon its own initiative or shall appoint a charter commission upon the filing of a petition" of registered qualified electors. N.M. Const. art. X, § 6(C).

According to Petitioner, if the Municipal Charter Act does not apply, there is an "absence of law" that triggers the self-executing aspect of the Home Rule Amendment. Petitioner thus proposes that the meaning of "municipality" in the Home Rule Amendment, which is not specifically defined, can be defined independently of the Municipal Charter Act to include San Miguel County based on the plain meaning of "municipality." We do not agree with Petitioner's arguments.

First, we do not believe that it is appropriate to read the Home Rule Amendment independently of the Municipal Charter Act. The Home Rule Amendment specifically states that "registered qualified electors of a municipality may adopt . . . a charter in the manner provided by law." N.M. Const. art. X, § 6(C). The Municipal Charter Act is the law enacted to implement the Home Rule Amendment. In this manner, the interpretation of the Home Rule Amendment is dependent on, not independent of, the Municipal Charter Act. There is no "absence of law."

Second, even if the "municipality" in the Home Rule Amendment could be given a different interpretation from "municipality" as defined in the Municipal Charter Act, the plain meaning of "municipality" would not include a county. Petitioner points to the definition of "municipality" in *Black's Law Dictionary* as embracing the plain meaning of the term. *Black's Law Dictionary* defines "municipality" and "municipal corporation" as:

> A city, town, or other local political entity formed by charter from the

> state and having the autonomous authority to administer the state's local affairs; esp., a public corporation created for political purposes and endowed with political powers to be exercised for the public good in the administration of local civil government.

Black's Law Dictionary 1113 (9th ed. 2009). Although certain aspects of this definition may apply to a New Mexico county, the only county in the state that is either formed by charter or is a corporation is Los Alamos County.

Petitioner additionally argues that the plain meaning of "municipality" as used in the Home Rule Amendment includes counties because of the stated purpose of the amendment "to provide for maximum local self-government[,]" Article X, Section 6(E) of the New Mexico Constitution, and because it would be irrational to exclude counties other than Los Alamos. However, the purpose of the Home Rule Amendment is to provide maximum local self-government for "municipalities." As we have discussed, except for Los Alamos, the counties of the state are not municipalities. While it may be an appropriate goal to have "maximum local self-government" at the county level, such intent was not encompassed within the Home Rule Amendment.

Moreover, the difference between counties and municipalities is more than mere geography, as Petitioner suggests. "Historically, [a] county was solely the subdivision of the state, constituted to administer state power and authority." 1 Eugene McQuillin, *The Law of Municipal Corporations* § 1:27, at 32 (3d ed. 2010). "[C]ounties have been deliberately laid out, . . . [they] are artificial divisions created to share in state government." *Id.* § 1:25, at 26. Counties are formed by legislative act, *see* NMSA 1978, §§ 4-1 to -32 (1876, as amended through 1981) (establishing the boundaries of the counties in New Mexico), and are subdivisions of the state. 1 McQuillin § 1:27, at 32; *El Dorado at Santa Fe, Inc.*, 1976-NMSC-029, ¶ 9. Municipal corporations are "designed to promote the common interests of [their] inhabitants . . . [are] representative of [their] citizens and taxpayers . . . [and are] established for the advantage of . . . the public at large." 1 McQuillin § 1:59, at 100. Municipalities are self-governing. *See* 1 McQuillin § 1:36, at 50 ("Generally, municipal corporations are self-governing[.]"). Unlike counties, they are formed by incorporation or charter. *See* § 3-1-2(G) ("'[M]unicipality' means any incorporated city, town or village, whether incorporated under general act, special act or special charter[.]"). Municipalities are governed by the Municipal Code, *see* NMSA 1978, §§ 3-1-1 to -66-11 (1965, as amended through 2014) (entitled, "Municipalities"), which is generally not applicable to counties. *See* NMSA 1978, §§ 4-1-1 to -62-10 (1876, as amended through 2013) (entitled, "Counties"). Although there may be certain overlap or parallel governing principles with respect to municipalities and counties, and our courts have at times referred to municipalities and counties in a common way, the two are not the same. *See, e.g.*, *City of Albuquerque v. New Mexico Pub. Regulation Comm'n*, 2003-NMSC-028, ¶ 3, 134 N.M. 472, 79 P.3d 297 (stating that a municipality "is an auxiliary of the state government" and a county "is but a political subdivision" of the state) (internal quotation marks and citation omitted), *see also* 1 McQuillin § 2:54, at 283, 286 ("[Municipal Corporations] and counties have been declared to be separate and distinct legal

entities . . . . [T]he county is not, strictly speaking, a municipal corporation[.]"); *id.* at 283 ("Counties are often distinguished from municipal corporations in that counties are created without the consent of the inhabitants, whereas the existence of municipal corporations ordinarily depends on the consent of the inhabitants."). We conclude that San Miguel County is not a municipality for the purpose of the Home Rule Amendment.

EQUAL PROTECTION

Petitioner argues that "[f]ailure to include San Miguel County in the term 'municipality' under the Home Rule Amendment and the Municipal Charter Act would infringe [Petitioner's] right to local self-government in a manner that violates the federal and state Equal Protection Clauses." U.S. Const. amend XIV, § 1; N.M. Const. art. II, § 18. In other words, Petitioner argues that an interpretation of the Home Rule Amendment and the Municipal Charter Act that fails to include all New Mexico counties within the definition of "municipality" violates federal and New Mexico equal protection guarantees because the residents of all counties except Los Alamos are denied the possibility of a vote on whether to adopt county-based home rule.

The right to equal protection under the law, both state and federal, affords a guarantee that the government will treat similarly-situated individuals in an equal manner. *Breen v. Carlsbad Mun. Schs.*, 2005-NMSC-028, ¶ 7, 138 N.M. 331, 120 P.3d 413. Under equal protection analysis, the threshold inquiry is whether the challenged legislation creates a class of similarly-situated persons who are treated dissimilarly. *Id.* ¶ 10. Petitioner argues that, when read in combination, Sections 3-1-2(G), 3-15-3, 3-15-4, and Article X, § 5 of the New Mexico Constitution, allow citizens residing in incorporated cities, towns, villages, and Los Alamos County the potential for home rule but deny that potential to all others. For the purpose of this analysis, we assume without deciding that the combined effect of the statutes is to create a class of similarly-situated persons who are treated differently.

The next step in an equal protection analysis is to determine the level of scrutiny that applies to the challenged legislation. *Breen*, 2005-NMSC-028, ¶ 11. Strict scrutiny, the standard of review least deferential to the Legislature, requires a party defending a statute to "prove that the legislation furthers a compelling state interest." *Griego*, 2014-NMSC-003, ¶ 39. Strict scrutiny applies when statutes treat a suspect class differently, or, generally, when statutes burden the exercise of fundamental rights. *Id.* Fundamental rights include voting and interstate travel, among others, and suspect classes include race and ancestry, among others. *Marrujo v. N.M. State Highway Transp. Dep't*, 1994-NMSC-116, ¶ 10, 118 N.M. 753, 887 P.2d 747. Rational basis review is most deferential to the legislation. Under rational basis review, the burden is on the party challenging the legislation in question to prove that the legislation is not rationally related to a legitimate governmental purpose. *Id.* Rational basis review applies to general social or economic legislation. *Breen*, 2005-NMSC-028, ¶ 11. In between lies intermediate scrutiny. Intermediate scrutiny generally applies to statutes that affect a sensitive class of individuals, such as the mentally disabled. *Griego*, 2014-NMSC-003, ¶ 39. Intermediate scrutiny requires that the party defending the legislation prove a substantial relationship

between the legislation and an important government interest. *Id.*

Petitioner contends that we should apply strict scrutiny to the challenged legislation because the burdened right is fundamental. Petitioner argues that there is a fundamental right to local self-governance and, further, that the fundamental right is to the "utmost" local self-governance. Petitioner argues that this fundamental right is burdened by the inability to vote for home rule, stating that only home rule municipalities "have autonomy from state interference in matters of local concern, power to control their own affairs, and the utmost ability to take policymaking initiative." Petitioner asserts that it is an equal protection violation for New Mexico to "give the people of cities, towns, villages, and the county of Los Alamos the utmost local autonomy, control, and policymaking initiative while depriving the people of the other counties of the same local power."

In support of his argument, Petitioner cites the Declaration of Independence para. 2 (U.S. 1776) ("Governments . . . deriv[e] their just powers from the consent of the governed."); the Ninth and Tenth Amendments of the United States Constitution ("The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people" and "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," respectively); the Enabling Act for New Mexico of 1910 (stating that the New Mexico Constitution "shall not be repugnant to . . . the principles of the declaration of independence"); Article II, Section 2 of the New Mexico Constitution ("All political power is vested in and derived from the people: all government of right originates with the people, is founded upon their will and is instituted solely for their good."); and Article II, Section 3 of the New Mexico Constitution ("The people of the state have the sole and exclusive right to govern themselves as a free, sovereign and independent state."). These authorities seem to establish a broad right to political power and self-government, but, even assuming that there is a local dimension to that right, we do not recognize in these authorities a fundamental right to the utmost local control and autonomy as asserted by Petitioner.

Petitioner also cites a number of cases in support of his contention that the right burdened is fundamental and so demands strict scrutiny under equal protection analysis. These cases are unpersuasive in this context. Petitioner cites *Griffin v. County School Board of Prince Edward County*, noting that the United States Supreme Court did not allow a county in Virginia to de-fund and keep closed its public schools for the ultimate purpose of maintaining segregated education. 377 U.S. 218, 222-23, 225 (1964). *Griffin* was grounded in federal equal protection analysis, holding that:

> A [s]tate, of course, has wide discretion in deciding whether laws shall operate statewide or shall operate only in certain counties, the legislature having in mind the needs and desires of each. . . . [But w]hatever nonracial grounds might support a [s]tate's allowing a county to abandon public schools, . . . grounds of race and opposition to desegregation do not qualify as constitutional.

Id. at 231 (internal quotation marks and

citation omitted). This language suggests an equal protection analysis not based on a fundamental right, as Petitioner contends, but, instead, on race as a suspect class. Because Petitioner does not argue that there is an issue in this case that relates to race or any other suspect class, and because *Griffin* does not address fundamental rights, *Griffin* is not persuasive.

The other cases cited by Petitioner are similarly off-point. [2] Mere reference to cases in which a court applied strict scrutiny to an infringement of a fundamental right, such as the right to vote, that is unrelated to the right Petitioner would have us recognize, fails to persuade us that we should apply strict scrutiny in this case. Nor are we persuaded by cases cited by Petitioner that invalidate statutes or constitutional provisions as violations of equal protection without reference to a standard of review or reference to whether the right in question was fundamental.[3]

We conclude that rational basis review is appropriate in this case. There is no fundamental right that is violated by a statutory and constitutional scheme that allows the residents of Los Alamos County to engage in county-based home rule while residents of other counties cannot. As the United States Supreme Court noted in *Griffin*, 377 U.S. at 231, "there are reasons why one county ought not to be treated like another," and the nature of the legislative function is to draw lines that "leave[] some out that might well have been included." *Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶ 28, 125 N.M. 721, 965 P.2d 305 (quoting *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974)). Under rational basis scrutiny, the burden falls on Petitioner "to prove that the legislation is not rationally related to a legitimate governmental purpose." *See Griego*, 2014-NMSC-003, ¶ 39 (stating that under rational basis scrutiny the burden is on the party challenging the legislation to prove that statute is not rationally related to a legitimate governmental purpose). Petitioner has not constructed such an argument, instead relying solely on the argument that strict scrutiny is appropriate. We note that San Miguel County is more than forty times as large as Los Alamos County. It is a rational policy choice for the Legislature and the people of New Mexico to treat Los Alamos County differently from other counties on the basis of its size and its unique history and characteristics. Under rational basis review, the legislative scheme challenged by Petitioner does not violate equal protection guarantees under the United States or New Mexico Constitutions.

CONCLUSION

For the foregoing reasons, we affirm the district court's denial of a petition for mandamus.

IT IS SO ORDERED.

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[2] Petitioner cites to, for example, *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 622, 628 (1969) (evaluating a statute that limited the right to vote in certain New York school districts under "exacting judicial scrutiny") and *Brown v. Entertainment Merchants Ass'n*, 131 S.Ct. 2729, 2738 (2011) (evaluating a statute that restricted the content of protected speech under strict scrutiny).

[3] For example, *Board of Education of the Village of Cimarron v. Maloney*, 1970-NMSC-146, ¶¶ 5, 8, 82 N.M. 167, 477 P.2d 605 (invalidating a provision of the New Mexico Constitution requiring ownership of real property as a prerequisite to voting on the creation of bond debt but without reference to a standard of scrutiny or fundamental rights) and *Nixon v. Condon*, 286 U.S. 73, 81, 89 (1932) (invalidating as a violation of the equal protection clause a law preventing non-whites from voting in primary elections in Texas).

JAMES J. WECHSLER, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

RODERICK T. KENNEDY, Judge

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMSC-013

Filing Date: April 6, 2015

Docket No. 34,182

TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.,

Appellant,

v.

NEW MEXICO PUBLIC REGULATION COMMISSION and KIT CARSON ELECTRIC COOPERATIVE, INC.,

Appellees.

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OPINION

DANIELS, Justice.

In this precedential case of first impression, we address a number of issues related to the New Mexico Public Regulation Commission's authority and procedures in regulating utility rates of a generation and transmission cooperative, which statutorily differ from the Commission's powers over the

rates charged by public utilities. We vacate the order of the Commission related to its suspension of a cooperative's proposed rates and provide guidance for similar situations that may arise in the future.

I. BACKGROUND

As a generation and transmission cooperative (G&T Coop) owned by forty-four distribution cooperatives that are each members of its board, Tri-State Generation and Transmission Association, Inc., sells electric power exclusively to its members in four states. To cover its costs, Tri-State charges rates in accordance with a revenue requirement and a rate design approved by the Tri-State board. In 2012, the Tri-State board approved a new revenue requirement and a new rate design to meet that revenue requirement for 2013 (the 2013 rate design) and to replace the rate design and revenue requirement in effect at that time (the old rate design).

As required by NMSA 1978, Section 62-6-4(D) (2003), Tri-State filed Advice Notice 15 (AN 15) informing the Commission of the 2013 rate design. For the first time since the 2000 enactment of Subsection (D) of Section 62-6-4, three of the twelve Tri-State New Mexico members (the Kit Carson, Continental Divide, and Springer Electric Cooperatives) protested the 2013 rate design, and the Commission opened Case No. 12-00375-UT (the 2013 rate case). The Commission found that the three protesting members had just cause under Section 62-6-4(D) for the Commission to suspend the 2013 rate design, and it set a hearing to consider whether the 2013 rate design was reasonable. One of the commissioners suggested that Tri-State could file a proposal for interim rates if it wished.

With the 2013 rate design suspended, the Tri-State board agreed to address its revenue requirement on an interim basis by billing the protesting members under the old rate design and the nonprotesting members under the 2013 rate design. Pursuant to Section 62-6-4(D), Tri-State filed Advice Notices 16, 17, and 18 (ANs 16, 17, and 18) with the Commission. According to the letter Tri-State attached to its advice notices, AN 16 applied the 2013 rate design contained in AN 15 to the nine nonprotesting members so that the nonprotesting members could take advantage of the 2013 rate design as soon as possible. Apparently, many of the nonprotesting members had already taken steps to implement the 2013 rate design. AN 17 sought to recover the portion of the 2013 revenue requirement attributable to the three protesting New Mexico members using the old rate design. AN 18 was an alternative to AN 17 that would allow two additional months, compared to AN 17, to recover the revenue required under AN 17 from the protesting members in case any of the three elected to waive the contractual ninety-day notice requirement Tri-State incurred by replacing the 2013 rate design with the old rate design.

When the same members that protested AN 15 filed protests against ANs 16, 17, and 18, the Commission opened Case No. 13-00037-UT (the interim rate case) and issued an order on March 13, 2013, rejecting ANs 16, 17, and 18 (the Order). The Order rejected a public hearing of AN 16, concluding that "the rates in question are already before a Hearing Examiner" because AN 16 applied rates "identical" to the rates pending in the 2013 rate case. The Order rejected ANs 17 and 18, stating that they "would result in what would be perceived as punishing the protestors." On "separate and independent grounds," the Order rejected ANs 16, 17, and

18 for the failure of Tri-State to satisfy the interim rate pleading burden imposed by a Commission regulation, 1.2.2.27 NMAC (Rule 27).

Several months after the Commission issued the Order, Tri-State filed a notice of withdrawal from the 2013 rate case in order to file Advice Notice 19 (AN 19) informing the Commission of a rate increase to take effect as of January 1, 2014. The Commission stayed discovery and vacated the procedural schedule on the 2013 rate case, pending responses by the parties to Tri-State's notice of withdrawal. Tri-State appealed to this Court from the Order, arguing that the Commission exceeded its statutory authority and that the Order was arbitrary or contrary to law. This Court reviews appeals from the final orders of the Commission. *See* NMSA 1978, § 62-11-1 (1993). Appellee Kit Carson Electric Cooperative filed a motion to dismiss this appeal on two grounds: that the Order was not final and that the appeal was moot, issues we address in this opinion.

II. DISCUSSION

Tri-State has the burden on appeal of showing that the Order is "unreasonable" or "unlawful." NMSA 1978, § 62-11-4 (1965). This Court considers only the evidence on the record before the Commission, *see* NMSA 1978, § 62-11-3 (1982), and reviews in favor of the Order to determine whether it was supported by substantial evidence, was neither arbitrary nor capricious, and was within the Commission's scope of authority. *See Plains Electric Generation & Transmission Coop. v. N.M. Pub. Util. Comm'n*, 1998-NMSC-038, ¶ 7, 126 N.M. 152, 967 P.2d 827. This Court can either affirm or annul and vacate the Order but cannot modify it. *See* NMSA 1978, § 62-11-5 (1982).

Section 62-6-4(D) of the Public Utility Act (PUA)[1] is the only statutory provision that grants the Commission jurisdiction over G&T Coops like Tri-State. Section 62-6-4(D) requires that a G&T Coop file its proposed New Mexico rates with the Commission in the form of an advice notice and serve its member utilities. *See id.* If at least three New Mexico member utilities file protests with "just cause," the Commission "shall suspend the rates, conduct a hearing concerning reasonableness of the proposed rates and establish reasonable rates." *Id.* Section 62-6-4(D) further defines the requirements of a protest. *Id.*

Once the Commission's jurisdiction and rate-making powers are invoked under Section 62-6-4(D), as in this case, the Commission has plenary authority to set the utility's rates. *City of Albuquerque v. N.M. Pub. Regulation Comm'n*, 2003-NMSC-028, ¶ 8, 134 N.M. 472, 79 P.3d 297. And this Court defers to the "relatively broad policy-making authority" that the Legislature delegates to the Commission unless the Commission's interpretation of its statutory authority is "unreasonable." *Doña Ana Mut. Domestic Water Consumers Ass'n v. N.M. Pub. Regulation Comm'n*, 2006-NMSC-032, ¶ 17, 140 N.M. 6, 139 P.3d 166.

[1]The entire PUA is set forth in NMSA 1978, §§ 62-1-1 to -7 (1909, as amended through 1993), 62-2-1 to -22 (1884, as amended through 2013), 62-3-1 to -5 (1967, as amended through 2009), 62-4-1 (1998), 62-6-4 to -28 (1941, as amended through 2009), 62-8-1 to -11 (1941, as amended through 2011), 62-9-1 to -7 (1941, as amended through 2005), 62-10-1 to -16 (1941, as amended through 1998), 62-11-1 to -6 (1941, as amended through 1993), 62-12-1 to -7 (1941, as amended through 1993), and 62-13-1 to -15 (1941, as amended through 2010); *see* § 62-13-1 (specifying the range of articles in Chapter 62 that comprised the PUA in 1993).

"When reviewing statutes this [C]ourt will read all relevant provisions together in order to determine legislative intent." *Otero Cnty. Electric Coop. v. N.M. Pub. Serv. Comm'n*, 1989-NMSC-033, ¶ 9, 108 N.M. 462, 774 P.2d 1050. "In reviewing utility regulations as applied to rate cases, this [C]ourt has interpreted the statutory language broadly" consistent with the considerable discretion with which the Commission is vested to determine whether rates are just and reasonable. *Id.*

A. Advice Notices 17 and 18 Did Not Unlawfully Discriminate Among Tri-State Member Cooperatives

The Order rejected ANs 17 and 18 because approving them "would result in what would be perceived as punishing the protestors." The Commission concluded that ANs 17 and 18 were discriminatory as a matter of law because, as it argues on appeal, "[t]he Legislature has prohibited discriminatory treatment of ratepayers [in] Section 62-8-6." The Commission asks us to affirm its Order denying Tri-State's interim rates because Tri-State cited no decision from this Court or the Commission supporting Tri-State's method of treating protestors and nonprotestors differently.

The language of Section 62-8-6, however, expressly applies only to public utilities and makes no reference at all to G&T Coops.

> No public utility shall, as to rates or services, make or grant any unreasonable preference or advantage to any corporation or person within any classification or subject any corporation or person within any classification to any unreasonable prejudice or disadvantage.

Id. The PUA is explicit in tailoring the Commission's authority over the rates of different kinds of utilities depending on whether a utility is, for example, a "public utility," *see* § 62-6-4(A) (defining the power and jurisdiction of the Commission over the rates of public utilities), a "rural electric cooperative," *see* § 62-8-7(G) (same for rural electric cooperatives), or a "generation and transmission cooperative," *see* § 62-6-4(D) (same for G&T Coops). We find no support for the proposition that Section 62-8-6 is the source of Commission authority to disapprove the rates of a G&T Coop. Instead, Section 62-6-4(D) gives the Commission the authority to determine the reasonableness of the rates of a G&T Coop after at least three of its members file protests that the Commission determines have just cause.

There are strong indications throughout the PUA that the Legislature intended the Commission's powers over a G&T Coop to be more limited than its powers over a public utility. A public utility sells power to the general public, but a G&T Coop sells power exclusively to other cooperatives that are its members. *Compare* § 62-6-4(E) ("'[G]eneration and transmission cooperative' means a person with generation or transmission facilities either organized as a rural electric cooperative . . . or organized in another state and providing sales of electric power to *member cooperatives* in this state." (emphasis added)), *with* § 62-3-3(G)(1) ("'[P]ublic utility' or 'utility' means every person not engaged solely in interstate business . . . that may own, operate, lease or control . . . any . . . facility for the generation, transmission or distribution, sale or furnishing *to or for the public* of electricity . . . ."

(emphasis added)). The ownership and organization of a rural electric cooperative or a G&T Coop differs from that of a public utility. *Compare* NMSA 1978, § 62-15-2 (1998) (stating that rural electric cooperatives are organized on a nonprofit or cooperative basis under NMSA 1978, Sections 62-15-1 to -37 (1939, as amended through 2014), "for the primary purpose of supplying electric power [to] . . . and extending the use of electricity in rural areas"), *and* § 62-6-4(E) (stating that a G&T Coop may be organized as a rural electric cooperative), *with* § 62-3-2(A)(3) (describing public utilities as "investor-owned" and "profit motivated"). *See also* Richard P. Keck, *Reevaluating the Rural Electrification Administration: A New Deal for the Taxpayer*, 16 Envtl. L. 39, 45-47 (1985) (describing the history of the federal Rural Electrification Act and electric cooperatives and explaining how rural electric cooperatives and generation and transmission cooperatives were born in the late 1930s as a result of that congressional enactment to incentivize the electrification of rural America by authorizing low-interest loans for generation and transmission facilities as well as for distribution facilities).

The PUA limits the Commission's power and jurisdiction over cooperatives as compared to public utilities. The Commission has "general and exclusive power and jurisdiction to regulate and supervise every public utility in respect to its rates and service regulations . . . ." Section 62-6-4(A). A public utility cannot change its rates without first obtaining the Commission's approval. *See* § 62-8-7(A)-(F). When a public utility requests a rate change, the Commission "may" conduct a hearing concerning the reasonableness of the rates; and the proposed rates are suspended until the Commission determines reasonable rates. *See* § 62-8-7(C). At any hearing involving an increase in rates, the public utility carries the burden of proving that the increase "is just and reasonable." Section 62-8-7(A).

In contrast, the Commission's jurisdiction over a rural electric cooperative or a G&T Coop is not general and exclusive but instead must be triggered by protests filed by a prescribed number of members before the Commission has any power over proposed rates. *See* § 62-6-4(A) (excluding the rates of G&T Coops from the general and exclusive power of the Commission to regulate the rates of public utilities); § 62-6-4(D) (setting forth the requirements of the protests that could cause the Commission to review the rates submitted by a G&T Coop). The rates of a rural electric cooperative become effective "as proposed" except "[u]pon the filing with the [C]ommission of a protest setting forth grounds for review of the proposed rates" by the prescribed portion of customers with just cause. Section 62-8-7(G). Although Section 62-6-4(D) does not expressly state that the rates of a G&T Coop are effective as proposed, it specifically allows the Commission to suspend the rates submitted by a G&T Coop only when the specified number of protests with just cause have been filed. *See id.* ("If three or more New Mexico member utilities file protests [with just cause], the [C]ommission shall suspend the rates . . . .").

The Legislature directed that rural electric cooperatives are to be regulated in a "limited" manner because they are "substantially different" from public utilities. Section 62-3-2(A)(3). Consumers have no control over the rates of investor-owned public utilities, *id.*, and accordingly the PUA seeks a balanced regulation that addresses "the public interest, the interest of consumers and

the interest of investors." Section 62-3-1(B). In contrast, the interests of the purchasers of electric power from a G&T Coop, who own the G&T Coop, are already addressed democratically through the owner-membership of the G&T Coop board. *See* § 62-3-2(A)(2)-(3) (stating that members of cooperatives have "direct control over the cooperative's rates through an elected board of trustees"); *see also Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm'n*, 1995-NMSC-062, ¶ 20, 120 N.M. 579, 904 P.2d 28 ("The PUA attempts to distinguish on the one hand utilities that are required to serve any and all members of the public who request [utility] service and on the other hand utilities that operate more like a private coalition or club that chooses to limit its services only to its own select members.").

The Legislature expressly recognized that there is no rational basis for treating rural electric cooperatives and public utilities the same as to their rates because a rural electric cooperative is not investor-owned. Section 62-3-2(A)(3) ("Experience has shown that a rational basis exists to provide procedures for setting rates of rural electric cooperatives different from and more limited than those for setting rates of investor-owned utilities."). The Legislature's language in Section 62-3-2(A)(3) echoes this Court's holding that there is not a rational basis for treating rural electric cooperatives and public utilities the same under the PUA—a rationale which also applies to G&T Coops. *See Cmty. Pub. Serv. Co. v. N.M. Pub. Serv. Comm'n*, 1966-NMSC-053, ¶¶ 1, 11, 14, 76 N.M. 314, 414 P.2d 675 (holding that a 1961 amendment to include rural electric cooperatives as public utilities under the PUA denied equal protection to public utilities because there was no rational basis for giving rural electric cooperatives PUA advantages without subjecting them to full PUA regulation and the requirement to render service to the general public as prescribed for other electric utilities under the PUA); *see also Edington v. N.M. Pub. Serv. Comm'n*, 1964-NMSC-248, ¶ 6, 74 N.M. 647, 397 P.2d 300 (discussing history leading to the 1961 inclusion of rural electric cooperatives as public utilities under the PUA).

The language of Section 62-8-6 restricting its application to a public utility is significant because a G&T Coop is not investor-owned; the Legislature expressly limited the Commission's powers over utilities that are not investor-owned; and the Commission's only authority over G&T Coops comes from Section 62-6-4, Subsection (D), which the Legislature enacted in its 2000 amendment of Section 62-6-4 without altering the language that restricts application of Section 62-8-6 to public utilities.

Although Section 62-8-6 makes no textual reference to a G&T Coop, its prohibition against "unreasonable differences as to rates" established by a public utility is a prohibition that applies to G&T Coops as well because Section 62-6-4(D) explicitly authorizes the Commission to "conduct a hearing concerning reasonableness of the [G&T Coop] proposed rates and establish reasonable rates." Obviously, rates incorporating unreasonable differences or discriminations, the focus of Section 62-8-6, would be unreasonable rates under Section 62-6-4(D).

Neither statute prohibits reasonable variations in rates. *See* § 62-8-6 (stating that a public utility shall not grant an "unreasonable preference" or cause an "unreasonable prejudice" in its rate-making); *Albuquerque Bernalillo Cnty. Water Util. Auth. v. N.M.*

Pub. Regulation Comm'n, 2010-NMSC-013, ¶ 61, 148 N.M. 21, 229 P.3d 494 ("[Section 62-8-6] does not prohibit variations in rates, nor does it require 'equal service.' Rather, it prohibits 'unreasonable differences' in rates of service between localities. Section 62-8-6 thus forbids arbitrary variations in rates, while permitting variations due to differing costs of service to different areas." (internal quotation marks and citation omitted)).

Although no prior appellate decision has construed Section 62-6-4(D), there is absolutely nothing in the statute or its legislative history to indicate that the Legislature intended to impose a flat ban on reasonable variations in rates. While it is possible that a majority of board members of a cooperative could engage in unreasonable discrimination against minority members and thus engage in unreasonable rate-making, there is no evidence in this record to support a conclusion that Tri-State's board unreasonably discriminated against its minority members.

Section 62-6-4(D) compels the Commission to look at the additional facts surrounding the reasonableness of Tri-State's interim rates, which is the purpose of the required hearing: to give a voice to the nonprotesting members so that the Commission can be fully informed of all members' interests and concerns. As Tri-State points out on appeal, "Because Tri-State is obligated to recover its revenue requirement from its Members, [the Commission's suspension of the 2013 rate design] left an estimated shortfall of over $14 million for New Mexico which would necessarily have to be borne in some fashion by all Members." Tri-State's interim rates were designed to be fair to all of its members because "the Protestors would pay under the old rate design (which they asked for), and the non-Protestors would pay under the new rate design (which they did not protest)."

We conclude that the Order's rejection of ANs 17 and 18 was improper because as a matter of law the interim rates they prescribe are not unreasonably discriminatory and because there is no evidence otherwise of unreasonable discrimination.

B. Rejecting the Advice Notices Without a Hearing Violated Section 62-6-4(D)

Although the Commission's regulations allow it great latitude in managing its own proceedings, the Commission cannot apply its regulations contrary to Section 62-6-4. *See, e.g.*, *Jones v. Emp't Servs. Div. of Human Servs. Dep't*, 1980-NMSC-120, ¶ 3, 95 N.M. 97, 619 P.2d 542 ("If there is a conflict or inconsistency between statutes and regulations promulgated by an agency, the language of the statutes shall prevail. An agency by regulation cannot overrule a specific statute.").

When the Commission determines just cause in at least three protests of any G&T Coop advice notice, Section 62-6-4(D) requires a Commission hearing on the reasonableness of the protested rates without distinguishing between interim and permanent rates and referring only to "rates" generally. The PUA defines "rate" broadly, stating that a "'rate' means every rate, tariff, charge or other compensation for utility service rendered or to be rendered by a utility." Section 62-3-3(H). Absent further legislative clarification, we take this to mean that the "rate" referred to in Section 62-6-4(D) includes both interim and permanent rates because, as we will discuss, a G&T Coop does not request interim rate relief—it only needs to file new rates with the

Commission pursuant to Section 62-6-4(D). We address the Order's two grounds of rejection separately.

1. Rejection of Advice Notice 16 Without a Hearing Based on a Prior Suspension of the Same Rates Violated Section 62-6-4(D)

The Order concluded that the AN 16 rate prescription for nonprotesting members was "identical" to the suspended AN 15 rate prescription. The Order rejected AN 16 pursuant to the regulation that requires a utility to comply with Commission orders, *see* 17.1.210.11(H) NMAC (stating that the Commission may reject rates, rules, or forms that "are not in substantial compliance with Commission . . . orders"), "because when the Commission suspended the rates [filed under AN 15], it did not limit the suspension to only those rates to be charged to the protesting [members]." On appeal, the Commission states, "Ordinarily, a rate either goes into effect or it is suspended—not in part, but in whole, so that the entirety of the rate and its effects on various customer classes can be evaluated before it is made permanent."

We recognize that AN 16 tests the Commission's power to enforce its prior order suspending AN 15 in the 2013 rate case. *See* NMSA 1978, § 8-8-4(B)(5) (1998) ("The [C]ommission may . . . take administrative action by issuing orders not inconsistent with law to assure implementation of and compliance with the provisions of law for which the [C]ommission is responsible and to enforce those orders by appropriate administrative action and court proceedings."). Kit Carson describes Tri-State's request for interim rates as an attempt by Tri-State to charge rates on a temporary basis that were previously suspended in the 2013 rate case. We must assume that the 2013 rate case is still pending because Tri-State filed a withdrawal in the 2013 rate case and there is no indication in the record that such a withdrawal has been granted. *See* 17.1.210.11(E) NMAC ("[A] filing which has been made with the Commission may not be withdrawn or changed in any manner without the Commission's approval. Such approval may be granted by the Commission in its discretion."). The Order did not indicate that the Commission intended to consolidate a hearing of the AN 16 interim rate with the hearing of the permanent rate in the 2013 rate case or that AN 16 would be heard at a later time. Because Section 62-6-4(D) applies to both permanent and interim rates, we conclude that this section requires the Commission to grant a hearing of AN 16. The Order was contrary to Section 62-6-4(D) in its rejection of AN 16 without a hearing.

2. Rejection of Advice Notices 16, 17, and 18 Without a Hearing Based on Alleged Rule 27 Noncompliance Violated Section 62-6-4(D)

The Order rejected ANs 16, 17, and 18 and, having concluded that the advice notices lacked the evidentiary support required by the Commission's regulation establishing that a utility has the burden of supporting its interim rate relief request with evidence, declined to hear them pursuant to Rule 27(A)-(D). Rule 27(A) requires that pleadings for interim relief "must allege such extraordinary facts of immediate and irreparable injury as would justify the [C]ommission's exercise of discretion by granting interim relief prior to a final decision," Rule 27(B) prescribes that the pleading "be accompanied by affidavit or testimony in support of the request," and Rule 27(C) specifies notice requirements. Rule 27(D) authorizes the Commission to forego a

public hearing on "requests for interim relief other than interim rate relief." Tri-State referred to interim rates in its letter to the Commission describing ANs 16, 17, and 18, and on appeal Tri-State describes these advice notices as the "rates . . . that would apply only from March to December 2013" pursuant to Section 62-6-4(D) and not Rule 27.

We recognize that the Commission's rules of procedure, of which Rule 27 is a part, apply "to all utility division . . . proceedings other than rulemaking[]." 1.2.2.2 NMAC. The Commission's rate-making authority over public utilities "carries with it the incidental and implied power to grant interim rate relief, if the facts warrant" such relief. *U.S. West Commc'ns v. N.M. State Corp. Comm'n*, 1999-NMSC-016, ¶ 16, 127 N.M. 254, 980 P.2d 37 (internal quotation marks and citation omitted). If the Commission suspends the proposed rate change of a public utility for a period of time before the Commission determines the rate, interim rate relief prevents, effectively, the Commission's taking of the property of the public utility without just compensation. *See Mountain States Tel. & Tel. Co. v. N.M. State Corp. Comm'n*, 1977-NMSC-032, ¶¶ 38, 41, 50, 90 N.M. 325, 563 P.2d 588 (explaining that the Commission may approve interim rate relief that applies until it decides the permanent rates to prevent an unconstitutional confiscation of property without due process of law).

The Commission suggests that the Legislature was aware of the Commission's powers over the interim rates of utilities and must have intended Rule 27 to "fill[] that gap" in Section 62-6-4(D) as to interim rates. The Rule 27 predecessor governing interim rate relief, 17.1.2.30 NMAC (12/31/1998), was in existence before 2000 when Subsection (D) of Section 62-6-4 was enacted. *See* 9 N.M. Reg. 1414 (Dec. 31, 1998). Caselaw imposing the interim rate relief burden existed even earlier than the Rule 27 predecessor. *See, e.g., In re Gas Co. of N.M.*, 28 P.U.R 4th 20, 41 (1978) ("A utility seeking the exercise of this discretion has a heavy burden to bear. . . . The company must demonstrate that the granting of interim rate relief prior to a rate design determination will not unduly burden its customers and if not granted will result in an extreme hardship to the company.").

The Commission overlooks the fact that interim rate relief is a form of relief from the rate-making powers the Commission exercises over public utilities and not cooperatives. *See, e.g., id.* at 40-41 (stating that the legal basis of interim rate relief comes from the constitutional duty of the Commission to fix interim rates that would minimize the confiscation of the public utility's property but that the Commission has the discretion to consider whether the interim rate relief proposal is appropriate in the case at hand and to impose the burden on the public utility to show that the rate proposal is appropriate); *Mountain States Tel. & Tel. Co. v. N.M. State Corp. Comm'n*, 1985-NMSC-024, ¶¶ 6, 9-10, 102 N.M. 409, 696 P.2d 1002 (stating that the United States Supreme Court set the standard for determining when a confiscation of a public utility company's property has occurred and affirming the Commission's denial of a public utility request for interim rate relief because the record did not adequately support the public utility's confiscation claim).

Interim rate relief is a concept unique to public utilities because the only way a public utility can change its rates is by Commission approval. *See* § 62-6-4(A); § 62-8-7(A)-(F). A public utility subject to confiscation of its property without due

process may be justified in seeking the Commission's approval of its request for interim rate relief. In contrast, a G&T Coop does not need to seek the Commission's approval for interim rates because a G&T Coop board can agree to a new rate and file that new rate pursuant to Section 62-6-4(D) without requesting interim rate relief under Rule 27. The Legislature would not have necessarily considered confiscation implications of the interim rate relief pleading burden as part of the Commission's authority over G&T Coops because a G&T Coop does not seek such interim rate relief but instead notifies the Commission of new rates as Section 62-6-4(D) prescribes.

Our determination here that the Legislature did not intend for the Commission to have rate-making powers over the rates of G&T Coops independent of Section 62-6-4(D) delineates the roles of the statute and Rule 27 in proposals for interim rates and requests for interim rate relief. Section 62-6-4(D) is the only PUA source of the Commission's authority over the rates of a G&T Coop, and the broad references to "rates" in Section 62-6-4(D) do not distinguish between interim and permanent rates. Rule 27(A)-(C) imposes a pleading burden on a utility requesting interim rate relief while G&T Coops under Section 62-6-4(D) do not seek administrative action to set rates in the first place. Unlike public utilities under Section 62-8-7 that must first propose a rate and then obtain the Commission's approval before the rate is effective, the rates of G&T Coops, like rural electric cooperatives, are effective immediately unless suspended under Section 62-6-4(D). If the Commission suspends a G&T rate, interim or not, then the Commission under Section 62-6-4(D) must "conduct a hearing concerning the reasonableness" of the rate; while Rule 27(D) allows the Commission to "act[] upon [a request for interim relief] with or without public hearing." Rule 27(A)-(C) imposes the pleading burden on the utility seeking interim rate relief, *see also* § 62-8-7(A) (imposing a pleading burden on a public utility that seeks the Commission's approval of its rate), while Section 62-6-4(D) does not require a G&T Coop to carry any burden of proof or pleading in order to set its rates.

To the extent that Rule 27 requires a utility to file a request for interim relief as a "complaint, petition, application, or other pleading" with the Commission, Rule 27 is applicable generally; and ANs 16, 17, and 18 are Tri-State's pleadings for interim rates. But Section 62-6-4(D) alone, and not Rule 27, dictates the Commission's authority and its obligations in reviewing any G&T Coop rate "filed in the form of an advice notice," including ANs 16, 17, and 18. Section 62-6-4(D) authorizes the Commission's review of the "reasonableness" of a rate—interim or otherwise—only when the Commission determines, as the Order asserts it did in this case, that at least three G&T Coop members have protested the rate in a showing of "just cause . . . for review." Tri-State incurred no pleading burden because Section 62-6-4(D) imposes a burden on each protesting member to state grounds for its allegation that "the proposed rates are unreasonable," specify the relief it requests, describe its efforts to exhaust remedies for resolution of its dispute of the democratically determined rate, and provide an authorization of the member's protest from the G&T Coop board.

Having determined the required showing of "just cause," the Commission was obligated by Section 64-6-4(D) to "conduct a hearing concerning reasonableness" of the rates specified in ANs 16, 17, and 18. The

Order was contrary to Section 62-6-4(D) when it rejected ANs 16, 17, and 18 without a hearing.

C. We Reject Kit Carson's Mootness Claim and Deny Its Motion to Dismiss the Order

Kit Carson moved to dismiss Tri-State's appeal of the Order on grounds that the Order was not final and the issues were moot. We write to clarify for future cases the reasons why we did not dismiss this appeal. We recognize that the interim rates are to some extent "identical" to a rate that was already before the Commission and that this bears on whether the Order is final for appeal. And if issues of the rates in ANs 16, 17, or 18 are pending in another proceeding before the Commission, review by this Court would not be appropriate. *See* § 62-11-1 (stating that only "final" orders of the Commission can be appealed to this Court); *B.L. Goldberg & Assocs., Inc. v. Uptown, Inc.*, 1985-NMSC-084, ¶ 3, 103 N.M. 277, 705 P.2d 683 ("For purposes of appeal, an order or judgment is not considered final unless all issues of law and fact have been determined and the case disposed of . . . to the fullest extent possible."). However, we deny the motion to dismiss because the Commission rejected Tri-State's interim rate application and bypassed the hearing requirements of Section 62-6-4(D) when it determined that ANs 16, 17, and 18 failed to meet the Commission's Rule 27 pleading burden for interim rates. The Commission later denied Tri-State's motion for a rehearing of the interim rate case, stating that "[t]his Docket is closed." The Commission, by its own words, made a final determination that the case for Tri-State's interim rates would not be heard because Tri-State's advice notices did not satisfy the burden imposed by the Commission's regulations.

It is also the repetitive nature of issues such as those in this case that compels us to deny the motion to dismiss this appeal based on mootness. *See Cobb v. State Canvassing Bd.*, 2006-NMSC-034, ¶¶ 23, 29-31, 140 N.M. 77, 140 P.3d 498 (holding that we may review moot cases that either (1) present issues of substantial public interest or (2) are capable of repetition yet evade review); *Howell v. Heim*, 1994-NMSC-103, ¶ 7, 118 N.M. 500, 882 P.2d 541 (affirming a state agency's authority to promulgate a regulation during a finite-term budgetary crisis—even after the crisis in question had passed—because the appearance of similar issues in such time-limited circumstances is subject to repetition); *State ex rel. N.M. Press Ass'n v. Kaufman*, 1982-NMSC-060, ¶ 23, 98 N.M. 261, 648 P.2d 300 (addressing moot issues regarding the right of the media to cover a trial, which concluded before the appellate review of the denial of media access, because similar media access questions would likely rise again in future trials). Tri-State's briefing in this Court represents that it attempted to withdraw the rate design in the 2013 rate case in order to revise rates for 2014, pursuant to AN 19, because it was clear to Tri-State that the Commission "would not permit the 2013 rates to be effective in New Mexico before Tri-State would need to file a new rate to be effective in 2014." Tri-State reported in an October 11, 2013, pleading filed for this appeal that four Tri-State New Mexico members had already filed protests concerning AN 19. This gives us reason to believe that this dispute is repetitive and requires resolution for future guidance in similar situations. The suspension of rates in this case forced Tri-State to set other rates even before a resolution in the suspended-rate

case. The Commission could repeatedly characterize Tri-State's subsequent advice notices as requests for interim rate relief and reject them for failure to meet the pleading burden for interim rate relief requests in Rule 27(A)-(C) until this Court clarifies the Commission's authority over the rates of G&T Coops. Accordingly, we conclude that the issues in this case are not moot, and we deny Kit Carson's motion to dismiss.

III. CONCLUSION

We vacate the Commission's March 13, 2013, Order in Case No. 13-00037-UT and remand for any proceedings that may be necessary in order to comply with this opinion.

IT IS SO ORDERED.

CHARLES W. DANIELS, Justice

WE CONCUR:

BARBARA J. VIGIL, Chief Justice

PETRA JIMENEZ MAES, Justice

RICHARD C. BOSSON, Justice

EDWARD L. CHÁVEZ, Justice

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-046

Filing Date: January 21, 2015

Docket No. 32,708

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

GUADALUPE MURILLO,

Defendant-Appellant.

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OPINION

WECHSLER, Judge.

Defendant Guadalupe Murillo appeals his convictions of two counts of aggravated battery with a deadly weapon, contrary to NMSA 1978, Section 30-3-5(C) (1969), and unlawfully possessing a switchblade knife pursuant to NMSA 1978, Section 30-7-8 (1963). Defendant raises five issues on appeal. Three of Defendant's issues stem from his contention that the switchblade

statute is unconstitutional on its face. In this regard, Defendant argues that the switchblade statute (1) violates the right to bear arms guaranteed under Article II, Section 6 of the New Mexico Constitution; (2) violates federal and state substantive due process guarantees; and (3) violates federal and state equal protection guarantees. Defendant also contends that the jury instructions violated his procedural due process rights and that the district court improperly precluded him from presenting evidence in support of his self-defense theory during his opening statement. We uphold Section 30-7-8 as constitutional and affirm the district court.

BACKGROUND

Defendant used a switchblade knife to stab two customers at the Wal-Mart in Clovis, New Mexico, where he worked in the tire and lube department. The two victims, Carlos Lopez and Celestino Owen (Owen), were part of a group of shoppers that included Anna Owen, who was Carlos Lopez's sister and Owen's wife, Owen's twelve year-old brother, and the three Owen children, ages six years, two years, and eight months. Conflicting testimony was presented as to whether the victims and their family members went to the store to purchase supplies for an outing or with the specific intention to attack Defendant or his brother-in-law and co-worker, Daniel Lopez. In any case, there was prior animosity between the parties, and the encounter led to an altercation between Defendant and Carlos Lopez in the grocery aisle. Conflicting testimony was presented as to who initiated the fight. Defendant used a switchblade knife to stab Carlos Lopez multiple times, while Carlos Lopez fought without a weapon. Owen, also weaponless, was stabbed in the neck by Defendant while trying to break up the fight.

CONSTITUTIONALITY OF SECTION 30-7-8

Defendant did not raise his three facial challenges to Section 30-7-8 in the district court. Although these issues were not preserved, we exercise our discretion to review Defendant's arguments because these arguments implicate the general public interest. *See* Rule 12-216(B)(1) NMRA (stating that an appellate court may review unpreserved questions of general public interest); *see also Azar v. Prudential Ins. Co. of Am.*, 2003-NMCA-062, ¶ 28, 133 N.M. 669, 68 P.3d 909 (stating that we have invoked the general public interest exception to the preservation rule when review is likely to settle a question of law that affects the public at large).

In evaluating a facial challenge to the constitutionality of a statute, we examine whether there is any potential set of facts to which the statute can be constitutionally applied. *Bounds v. State ex rel. D'Antonio*, 2011-NMCA-011, ¶ 34, 149 N.M. 484, 252 P.3d 708, *aff'd* 2013-NMSC-037, 306 P.3d 457. Put another way, "we consider only the text of the statute itself, not its application[.]" *Bounds*, 2013-NMSC-037, ¶ 14 (alteration, internal quotation marks, and citation omitted). We do not question the wisdom, policy, or justness of an act of the Legislature. *Id.* ¶ 11. Instead, we presume statutes are valid and, therefore, we uphold them against constitutional challenge "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.* (internal quotation marks and citation omitted).

Article II, Section 6 Challenge

Defendant argues that Section 30-7-8, under which possession of a switchblade knife is a petty misdemeanor, violates Article II, Section 6 of the New Mexico Constitution, which guarantees the right to bear arms.

Article II, Section 6 reads:

> No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons. No municipality or county shall regulate, in any way, an incident of the right to keep and bear arms.

The ban on possession of switchblade knives pursuant to Section 30-7-8 implicates Article II, Section 6 only if switchblade knives qualify as "arms." For the purpose of our analysis, we assume without deciding that switchblade knives are among the arms protected by Article II, Section 6.

Defendant does not argue for a particular level of scrutiny that should apply to the challenged legislation in his argument on this issue. Our cases that have addressed a challenge to a statute under Article II, Section 6 have scrutinized whether the statute was "reasonably related to the public health, safety, and welfare." *State v. Lake*, 1996-NMCA-055, ¶¶ 7, 9, 11, 121 N.M. 794, 918 P.2d 380; *see also State v. Rivera*, 1993-NMCA-011, ¶¶ 5, 7, 115 N.M. 424, 853 P.2d 126 ("An act is within the state's police power if it is reasonably related to the public health, welfare, and safety." (internal quotation marks and citation omitted)); *State v. Dees*, 1983-NMCA-105, ¶ 11, 100 N.M. 252, 669 P.2d 261 (upholding statute against an Article II, Section 6 challenge because the statute was "a reasonable regulation . . . [that] serve[d] a legitimate goal"). This formulation approximates rational basis scrutiny. *Compare Griego v. Oliver*, 2014-NMSC-003, ¶ 39, 316 P.3d 865 (stating that under rational basis review, "the burden is on the party challenging statutes to prove that the legislation is not rationally related to a legitimate governmental purpose"), *with Dees*, 1983-NMCA-105, ¶ 11 (upholding a firearm control statute because it was "a reasonable regulation . . . [that] serve[d] a legitimate goal"). Rational basis scrutiny is the most deferential standard of review. *Griego*, 2014-NMSC-003, ¶ 39. The least deferential standard of review, strict scrutiny, requires the party defending the statute to "prove that the legislation furthers a compelling state interest." *Id.* In between lies intermediate scrutiny, which requires proof "that the legislation is substantially related to an important governmental interest." *Id.*

The United States Supreme Court has declared that the right to keep and bear arms for self-defense is a fundamental right but abstained from specifying standards of scrutiny that apply to challenges under that right. *McDonald v. City of Chicago*, 561 U.S. 742, 790-91 (2010). That said, the Court has rejected rational basis review as an overly deferential standard. *District of Columbia v. Heller (Heller I)*, 554 U.S. 570, 628 n.27 (2008); *see also United States v. Reese*, 627 F.3d 792, 801 (10th Cir. 2010) ("[T]he [Supreme] Court indicated . . . that the rational basis test is not appropriate for assessing Second Amendment challenges to federal laws."); *Heller v. District of Columbia* (*Heller*

II), 670 F.3d 1244, 1256 (D.C. Cir. 2011) ("*Heller* [*I*] clearly does reject any kind of 'rational basis' or reasonableness test[.]"). The Court also has identified certain longstanding regulatory measures as "presumptively lawful[,]" offering an explicitly non-exhaustive list. *Heller I*, 554 U.S. at 626-627, 627 n.26. The lack of specific guidance from the Court as to the appropriate analytical framework for a right to bear arms challenge left a void, or, as the Seventh Circuit has put it, a "quagmire." *United States v. Skoien*, 614 F.3d 638, 642 (7th Cir. 2010) (en banc).

Given only general direction by the Supreme Court, federal circuits have developed a consensus to the extent that some form of intermediate scrutiny is appropriate. *See, e.g.*, *Reese*, 627 F.3d at 798, 802 (applying intermediate scrutiny to analyze a Second Amendment challenge to a federal statute that prohibited possession of a firearm while subject to a domestic protection order); *Heller II*, 670 F.3d at 1247, 1256-58, 1262 (applying intermediate scrutiny to District of Columbia laws requiring registration of firearms, prohibiting assault weapons, and prohibiting magazines that hold more than ten rounds); *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010) (applying intermediate scrutiny to the prohibition of unmarked firearms); *Skoien*, 614 F.3d at 639, 641-42 (applying intermediate scrutiny to federal statute prohibiting firearm possession by persons convicted of domestic violence); *see also* Allen Rostron, *Justice Breyer's Triumph in the Third Battle Over the Second Amendment*, 80 Geo. Wash. L. Rev. 703, 752 (2012) (noting consensus "emerging from the confusion and uncertainty" that intermediate scrutiny is the correct standard of review for Second Amendment claims). We have found only one court reviewing a right to bear arms challenge that has based its holding on a strict scrutiny analysis.[1] *See* Rostron, *supra*, at 753 (writing prior to the Sixth Circuit decision in 2014 that applied strict scrutiny under a right to bear arms challenge, one commentator wrote that "courts . . . have been remarkably unanimous in rejecting the strict scrutiny standard of review.").

We are not persuaded that we should depart from the post-*Heller I* consensus for intermediate scrutiny to evaluate the statute in question. Viewed from any approach, the switchblade statute is a modest infringement. Because Section 30-7-8 bans only a small subset of knives, which are themselves a peripheral subset of arms typically used for self-defense or security, the statute effects an unsubstantial burden on the right to keep and bear arms. *Cf. Heller I*, 554 U.S. at 629 ("[T]he American people have considered the handgun to be the quintessential self-defense weapon. . . . [H]andguns are the most popular weapon chosen by Americans for self-defense in the home[.]"). And switchblades are designed for uses that are remote from the core of the right to keep and bear arms. *Cf. id.* at 635 ("[The Second Amendment] elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."). Switchblades are specifically "designed for quick use in a knife fight." *State v. Nick R.*, 2009-NMSC-050, ¶ 23, 147 N.M 182, 218 P.3d 868. "[T]hey are more readily concealable [than

[1]The Sixth Circuit court in *Tyler v. Hillsdale County Sheriff's Department*, ___ F.3d ___, 2014 WL 7181334, at *17 (6th Cir. Dec. 18, 2014), applied strict scrutiny under a Second Amendment challenge to a federal statute that prohibits possession of firearms by a person who has been "adjudicated as a mental defective or who has been committed to a mental institution[.]" 18 U.S.C. § 922(g)(4) (2012).

regular knives] and hence more suitable for criminal use." *Crowley Cutlery Co. v. United States*, 849 F.2d 273, 278 (7th Cir.1988). Congress passed a statute in 1958, still in effect, that prohibits the transportation or distribution of switchblade knives in interstate commerce and possession within territories of the United States. 15 U.S.C. §§ 1241-1242 (2013). The need for this law was "[t]he problem of the use of switchblade and other quick-opening knives for criminal purposes[.]" S. Rep. No. 85-1980, at 3436 (1958), *reprinted in* 1958 U.S.C.C.A.N 3435. In sum, Section 30-7-8 does not warrant departure from the application of intermediate scrutiny preferred under federal law.

Defendant argues that the New Mexico Constitution affords more protection under Article II, Section 6 than does the Second Amendment of the United States Constitution. We agree that our Constitution, unlike its federal counterpart, specifically protects the right to keep and bear arms for "lawful hunting and recreational use[.]" *Compare* N.M. Const. art. II, § 6, *with* U.S. Const. amend. II. But Defendant does not argue that our constitutional protection of arms used for hunting and recreation is violated by the prohibition on switchblades. With regard to the standard of scrutiny applied by our courts to challenges under the right to keep and bear arms, New Mexico has not offered greater protections than federal courts under the federal Constitution, at least since *Heller I*. In fact, we observe that our pre-*Heller I* standard for evaluating claims under the right to keep and bear arms, which approximates rational basis review, does not comport with *Heller I*'s statement that "[rational basis scrutiny] could not be used to evaluate the extent to which a legislature may regulate . . . the right to keep and bear arms." *Heller I*, 554 U.S. at 628 n.27. And under *McDonald*, it must. *See McDonald*, 561 U.S. at 791 (holding that the Second Amendment right to bear arms is incorporated against the States and, therefore, applies "equally to the Federal Government and the States."). Accordingly, we can no longer apply rational basis scrutiny to challenges under the right to bear arms. Returning to Defendant's argument, we are not persuaded that our prior cases have afforded even as much scrutiny to challenges to the right to bear arms under our state constitution as is now necessary under the Second Amendment to the United States Constitution, much less offered more protection.

Defendant argues that we should follow the reasoning of the Oregon Supreme Court, that, in *State v. Delgado*, invalidated an Oregon statute that prohibited possession of switchblade knives on the basis that the statute violated the right to bear arms guaranteed by the Oregon Constitution. 692 P.2d 610, 614 (Or. 1984) (en banc). We do not agree and decline to follow the reasoning of the *Delgado* court. *Delgado* focused most of its analysis on whether knives are "arms," concluding that they are, in fact, protected under the Oregon Constitution. *Id.* at 611-14. Having determined that switchblade knives are "arms," the *Delgado* court held, with minimal further analysis and without reference to a level of scrutiny, that the Oregon statute was unconstitutional. *See id.* at 614. ("[T]his decision does not mean that individuals have an unfettered right to possess or use constitutionally protected arms in any way they please. . . . [T]he problem here is that [the challenged statute] absolutely proscribes the mere possession or carrying of such arms. This the constitution does not permit."). Because our courts apply a standard of scrutiny when

analyzing constitutional claims, which the Oregon court did not in *Delgado*, we are not persuaded by its decision.

We turn now to an analysis of Section 30-7-8 through the lens of intermediate scrutiny. To survive a challenge under intermediate scrutiny, the government must show that the statute is substantially related to an important government purpose. *Griego*, 2014-NMSC-003, ¶ 39.[2] The State argues that the purpose of the statute is to protect the public from the danger of potentially-lethal surprise attacks posed by switchblade knives. As the State points out, our Supreme Court has stated that the switchblade is "designed for quick use in a knife fight." *Nick R.*, 2009-NMSC-050, ¶ 23. It is, "by design and use, almost exclusively the weapon of the thug and the delinquent." *Precise Imp. Corp. v. Kelly*, 378 F.2d 1014, 1017 (2d Cir. 1967). The purpose of the legislation—protection of the public from the surprise use of a dangerous weapon utilized in large part for unlawful activity—is an important governmental purpose. Prohibiting the possession of this weapon is, of course, substantially related to this narrow, but important, purpose.

Defendant points out that Section 30-7-8 does not provide exceptions for places where a switchblade might be carried or for the length of the blade. Defendant argues, in essence, that although regulation of switchblades might be permissible, the categorical ban instituted by Section 30-7-8 is unconstitutional. We do not agree. While the statute might be characterized as prohibiting an entire class of arms (switchblades), it might equally be characterized as a ban on a mere subset of a type of arms (knives) that is itself peripheral to self-defense or home security. Ultimately, Defendant's point is semantic and beside the point. The real issues are: (1) the degree of the burden placed on the right to keep and bear arms, which, in this case, is unsubstantial and (2) the distance from the core of the right, which, in this case, is remote. The fact that the statute effects a categorical ban is not, of itself, decisive. *See Skoien*, 614 F.3d at 641 ("Categorical limits on the possession of firearms would not be a constitutional anomaly.").

Defendant also argues that the Legislature acted impermissibly because, in enacting Section 30-7-8, it banned switchblades while leaving unregulated other equally dangerous or more dangerous knives. Whether other knives also warrant regulation is a question for the Legislature. The question we face under intermediate scrutiny is whether the prohibition on switchblade knives serves an important purpose. For reasons we have already stated, we think it does. Additionally, although our legal analysis of Defendant's facial challenge is not fact-dependent, the facts of this case nevertheless evince the purpose of the prohibition of switchblades. Here, what might have been a minor confrontation escalated into significant bloodshed in the grocery aisle at the Clovis Wal-Mart. The important harm-reducing purpose of the switchblade statute is not undermined by the fact that banning similar weapons would also reduce harm. Defendant is asking us to question the policy of the Legislature, which we decline to do. *See Bounds*, 2013-NMSC-037, ¶ 11.

[2]This analysis typically requires an evidentiary basis developed at trial, but in this case Defendant did not raise his facial challenges below, leaving this Court without the benefit of the typical evidentiary record. Other cases have addressed the issue, and, rather than remanding this case to district court, we can address Defendant's arguments based on case law.

We are not satisfied beyond a reasonable doubt that the Legislature violated Article II, Section 6 of the New Mexico Constitution in enacting Section 30-7-8 and, therefore, we uphold the legislation against Defendant's challenge.

Equal Protection

Defendant also contends that Section 30-7-8 violates both state and federal equal protection guarantees. The right to equal protection under the law, both state and federal, affords a guarantee that the government will treat similarly situated individuals in an equal manner. *Breen v. Carlsbad Mun. Sch.*, 2005-NMSC-028, ¶ 7, 138 N.M. 331, 120 P.3d 413. A threshold to any equal protection claim is membership in a group that is similarly situated to another group but treated differently by the government because of a legislative classification. *Id.* ¶ 8. Defendant has not addressed this requirement or developed the other aspects of an equal protection argument. We will not construct Defendant's argument on his behalf. *Elane Photography v. Willock, LLC*, 2013-NMSC-040, ¶ 70, 309 P.3d 53 ("We will not review unclear arguments, or guess at what a party's arguments might be." (alterations, internal quotation marks, and citation omitted)), *cert. denied*, ___ U.S. ___, 134 S.Ct. 1787 (2014). To do so would not only "create[ ] a strain on judicial resources and a substantial risk of error[,]" *id.*, but would also be unfair to the opposing party—in this case, the State—that is not afforded an opportunity to fully develop an opposing argument. For these reasons, we do not consider Defendant's equal protection argument.

Substantive Due Process

Both the United States and New Mexico Constitutions guarantee that when a state deprives any person of "life, liberty, or property," due process is required. U.S. Const. amend XIV, § 1; N.M. Const. art. II, § 18. "'[S]ubstantive due process' prevents the government from engaging in conduct that 'shocks the conscience' or interferes with rights 'implicit in the concept of ordered liberty[.]'" *United States v. Salerno*, 481 U.S. 739, 746 (1987) (citations omitted); *see also Bounds*, 2013-NMSC-037, ¶ 50 ("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." (internal quotation marks and citation omitted)). Defendant contends that Section 30-7-8 interferes with his right to keep and bear arms, which is fundamental. At the outset of his briefing on this issue, Defendant asserts that Section 30-7-8 violates both the United States and New Mexico Constitutions. But as his brief continues, Defendant refrains from constructing an argument under the New Mexico Constitution, instead explicitly resting only on his conclusion that his federal right to due process has been violated. Therefore, we address only Defendant's argument under federal due process requirements.

The Second Amendment is enforceable against the States. *See McDonald*, 561 U.S. at 791 (stating that the Second Amendment is "fundamental from an American perspective" and is therefore incorporated under the Due Process Clause of the Fourteenth Amendment). Substantive due process analysis requires that we determine the appropriate level of scrutiny to apply to the challenged statute. *Wagner v. AGW Consultants*, 2005-NMSC-016, ¶ 12, 137 N.M. 734, 114 P.3d 1050. The appropriate

level of scrutiny "depends on the nature and importance of the individual interests asserted and the classifications created by the statute." *Id.* Defendant argues that Section 30-7-8 impinges on his right to bear arms guaranteed under the Second Amendment. We observe that Defendant's substantive due process challenge is the federal counterpart to his direct challenge to Section 30-7-8 under Article II, Section 6 of the New Mexico Constitution. Above, we held that intermediate scrutiny is the appropriate standard of review for this statute, citing federal consensus for the application of intermediate scrutiny to challenges under the Second Amendment. Applying intermediate scrutiny to Section 30-7-8, we further held that the statute is not repugnant to the right to bear arms under a federal standard. Accordingly, Defendant's federal substantive due process challenge fails.

JURY INSTRUCTIONS

Defendant contends that he was denied due process because he was convicted without the jury having found all elements necessary to constitute aggravated battery with a deadly weapon. He argues that the jury should have been instructed that "[a] knife is a deadly weapon only if you find that a knife, when used as a weapon, could cause death or great bodily harm." Defendant further argues that he requested this instruction and that it conforms with the appropriate instruction for aggravated battery with a deadly weapon. *See* UJI 14-322 NMRA. We review Defendant's argument de novo. *State v. Lucero*, 2010-NMSC-011, ¶ 11, 147 N.M. 747, 228 P.3d 1167 (stating that we review the propriety of jury instructions de novo as a mixed question of law and fact).

Defendant's requested instruction is, indeed, part of UJI 14-322. However, the specific instruction in question is only appropriate if the object used for the alleged battery is not among the objects defined by statute as deadly weapons. UJI 14-322, n.5 ("This alternative is given only if the object used is not specifically listed in [NMSA 1978, Section 30-1-12(B) (1963)]."). A switchblade knife is, by definition, a "deadly weapon." Section 30-1-12(B). Because Defendant's switchblade was per se a deadly weapon, the jury was not required to find that the switchblade could cause death or bodily harm. Accordingly, Defendant was not entitled to his requested instruction.

OPENING STATEMENT

Defendant argues that his trial was unfair and his convictions should be overturned because he was prevented from making any reference to self-defense in his opening statement. We review the decision of the district court for abuse of discretion. *See State v. Reynolds*, 1990-NMCA-122, ¶ 11, 111 N.M. 263, 804 P.2d 1082 (stating that the latitude of counsel at opening argument is subject to the discretion of the district court and appellate courts review for abuse of that discretion). A district court abuses its discretion when a ruling is "clearly untenable or not justified by reason." *State v. Flores*, 2010-NMSC-002, ¶ 25, 147 N.M. 542, 226 P.3d 641 (internal quotation marks and citation omitted).

Defendant has not provided any citation to the record, and we found no reference to a ruling by the district court, that Defendant was prevented from making any reference to self-defense in his opening statement. Therefore, we do not agree with Defendant's main premise that he was

prevented from any reference to self-defense in his opening statement.

Although Defendant's assertion that the court prevented all reference to self-defense is too broad, the court did prevent Defendant from referring in his opening statement to an incident that supposedly occurred between one of the victims, Carlos Lopez, and one of the defense witnesses, Daniel Lopez, and to photographs that purportedly showed injuries to Daniel Lopez caused by Carlos Lopez. Defendant wanted to introduce the photographs to show that he was fearful of Carlos Lopez and acted in self-defense when he stabbed Carlos Lopez. Defendant has not made any argument or cited to any authority that the ruling of the district court that prevented mention of this incident or using the photographs in his opening statement was an abuse of discretion. In fact, Defendant did not even mention this ruling in particular in his briefing to this Court. We will not construct Defendant's argument for him. *See Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076 (stating that we will not develop an unclear argument on behalf of a party). The district court did not abuse its discretion in so limiting Defendant's opening argument.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court and uphold Section 30-7-8 against challenge under the Second Amendment of the United States Constitution and Article II, Section 6 of the New Mexico Constitution.

IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR:

MICHAEL E. VIGIL, Chief Judge

LINDA M. VANZI, Judge

Certiorari Denied, April 15, 2015, No. 35,150

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-047

Filing Date: January 12, 2015

Docket No. 33,341

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

Petitioner-Appellee,

v.

JERRY K.,

Respondent-Appellant,

and

IN THE MATTER OF CLAUDIA K. and MADELINE K.,

Children.

Children, Youth & Families Department
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Rebecca J. Liggett, Children's Court Attorney
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Clovis, NM

Guardian Ad Litem

OPINION

SUTIN, Judge.

Jerry K. (Father) appeals the termination of his parental rights as to his two daughters (Children). The Children, Youth and Families Department (the Department) gained legal custody of Children who were held to be "neglected" by virtue of Father's incarceration for crimes unrelated to Children. Father's parental rights were terminated after he was sentenced to thirty-five years in prison.

Father argues that his fundamental right to parent Children was violated by the Department's refusal to place Children according to his expressed preference of an adoptive home. He also argues that the district court improperly terminated his parental rights after erroneously excluding evidence of his efforts to effectuate his desired placement for Children and of the Department's failure to place Children according to his wishes. In Father's view, had the excluded evidence been admitted, it would have established that Father was able to remedy the causes and conditions of neglect but that the Department did not make reasonable efforts to assist him in doing so. Underlying Father's argument is his desire to have his parental rights restored and to regain legal custody so that he may consent to Children's adoption by a couple that Father considers to be akin to his and Children's family.

We hold the record does not support Father's argument that the district court's order to terminate his parental rights was affected by the allegedly erroneous evidentiary ruling. We conclude that, under the circumstances of this case, the Department's decision to not place Children according to Father's recommendation does not warrant reversal of the district court's judgment terminating his parental rights. We affirm.

BACKGROUND

Father had sole custody of Children; Children's mother was, at all times relevant to this appeal, not involved in Children's lives (with the exception of having sent Children one letter), and she is not a party in this appeal. On April 8, 2009, Father was arrested in Clovis, New Mexico, pursuant to a warrant issued by the State of Missouri for having allegedly perpetrated a number of sex crimes against his ex-girlfriend's fourteen-year-old daughter. According to a St. Louis, Missouri police detective with whom Donald Graves, a Department social worker, spoke to on the phone, Father had fled Missouri, thereby evading investigation. Because law enforcement in Clovis who arrested Father learned from Steven Schultze that Children had "no family members in the local area" that

could care for Children, they placed Children in the Department's custody.

At the time of Father's arrest, Father and Children lived in the home of Mr. Schultze, who was working in a temporary job as an Administrator/Director for the Clovis Christian School. Mr. Schultze and his wife, Lois (who did not live in Clovis while her husband was temporarily employed there), had a long-standing relationship with Father, and although they were not biologically related, the Schultzes considered themselves Father's "family," and Father described the Schultzes as his former legal guardians. While Father and Children lived with Mr. Schultze in Clovis, Father's ex-girlfriend contacted Mr. Schultze via e-mail regarding Father's alleged criminal sexual activity perpetrated against her daughter; however, Mr. Schultze did not believe that Father had committed the crimes. Despite a criminal investigation and a temporary suspension from his job in connection with having allowed Father to stay at his house in Clovis while he was a "fugitive," Mr. Schultze was not criminally charged, nor was his employment terminated as a result of having allowed Father to live with him during that time.

On the day of Father's arrest, Mr. Graves interviewed Father regarding placement options for Children. Father told Mr. Graves that Mr. Schultze, whom Children knew and called "uncle," had a letter written by Father that granted Mr. Schultze guardianship of Children in the event that something happened to Father or he was unable to care for Children; however, this letter was never found, and later, Mr. Schultze claimed to have no knowledge of it. Father also provided Mr. Graves with information about Father's brother and sister-in-law in Colorado with whom Children could stay while Father returned to Missouri to "clear up the situation" of the then-pending criminal charges. Additionally, Father provided the name of another couple, Dean and Dezra Turvaville, as possible caretakers for Children.

After his interview with Father, Mr. Graves contacted Father's brother and sister-in-law who explained that Father's "plan when he was staying with them" was that they would "get . . . [C]hildren as long as [Father] gives . . . permission." Regarding the other possible caretakers for Children, namely Mr. Schultze and the Turvavilles, Mr. Graves stated in his affidavit for an ex parte custody order that the Department could not place Children in their homes without "more information." Mr. Graves also stated in his affidavit that he explained to Father that Children "were placed in custody because there were no family members in the local area and Mr. Schultze is not a [blood] relative[.]"

On November 3, 2009, the district court concluded its adjudicatory hearing. Father pleaded no contest to neglect pursuant to NMSA 1978, Section 32A-4-2(E)(4) (1999, amended 2009), which defines a "neglected child" as one whose parent "is unable to discharge that person's responsibilities to and for the child because of incarceration[.]" At the adjudicatory hearing, the district court adopted the Department's treatment plan that included, in relevant part, the following information. The Department had located Children's mother and was awaiting the results of an assessment to determine whether she could care for Children. Until that assessment was done, Children would remain with their Department-chosen foster home instead of with Father's brother and sister-in-law, who wished to "gain custody" of Children and who had been approved as "a viable placement option[.]" The Department's treatment plan

also noted that Father had been trying to assist the Department in finding permanence for Children while he was incarcerated and that Father "seem[ed] to have a strong concern and care for . . . [C]hildren."

Children's mother sent one letter to Children, in August 2009, upon the Department's request, but beyond that she failed to respond to the Department's attempt to assess the viability of placing Children with her; ultimately the Department was unable to locate her, and her rights were later terminated. In December 2009, Children were placed with Father's brother and sister-in-law in Colorado. In September 2010, Father was sentenced to thirty-five years in a Missouri prison. After Father was sentenced, Father's brother and sister-in-law advised the Department that they did not intend to serve as a permanent placement option for Children and that they would only keep Children until the Department was able to find a new placement.

In October 2010, the district court held a permanency review hearing. Among other things, the Department permanency worker testified that the Department was looking into long-term placement options and that once such a placement had been found, Children would be brought back from Colorado to New Mexico. The Department also requested that Children's permanency plan be changed from reunification with Father to termination of Father's parental rights and adoption because Father would not be available to parent Children through their adolescence.

Father, who testified via telephone at the October 2010 hearing, stated that he was not aware until the hearing that Children would be removed from his brother and sister-in-law's home. Having learned that Children would be moved, Father testified that he would like the Department to consider placing Children with Steve and Lois Schultze. At the time of the October 2010 hearing, the Schultzes lived in California.

Following the October 2010 hearing, the district court entered an order changing Children's permanency from reunification to adoption and reflecting, among other things, that Father had complied with his treatment plan by writing letters to Children and by advising the Department of his brother in Colorado as a placement for Children. On the same day that the court's permanency review order was entered, the Department filed a motion for termination of parental rights.

In its motion to terminate Father's parental rights, the Department stated that efforts to reunify Father with Children would be futile owing to the length of Father's incarceration. The Department also stated that Father's brother and sister-in-law did not want to adopt Children and recommended "the Department" as the sole agency or person that "should be considered by the court to take custody" of Children. In November 2010, the Department moved Children into a non-relative, foster care placement with a family that wished to adopt Children.

On March 8, 2011, the district court, Judge Orlik, held a hearing on the Department's motion to terminate Father's parental rights. In his opening statement, Father's counsel represented that Father would be willing to "relinquish his parental rights" to Children provided that Children would be placed with the Schultzes. Father's counsel further argued that since Children's return from Colorado, the Department had ruled the Schultzes out as a potential placement for

Children without having investigated the viability of placing Children with them.

The district court admonished the Department for having placed Children with potentially adoptive foster parents without having first investigated placing Children with the Schultzes, with whom Children had some relationship and who may be considered Children's "fictive kin[1]." Rather than proceed with the March 8, 2011, termination of parental rights hearing, the district court reset the matter for forty-five days hence[2]. The court ordered that during the forty-five-day delay, the Department would "facilitate and conduct an expedited investigation and background check of" the Schultzes, and concurrent with that investigation, conduct an "ICPC"[3] investigation into the viability of placing Children with the Schultzes.

The Department requested an ICPC home study regarding the Schultzes from California, and while it awaited the results, it conducted its own investigation into the propriety of placing Children with the Schultzes. Based on information gathered from the Clovis Police Department and the Curry County Sheriff's Office about Mr. Schultze, the Department submitted a written report to the district court in May 2011 stating, among other things, that it had "grave concerns that Mr. Schultze was allowing [Father] to reside in his home" despite having been contacted by the mother of the victim of Father's alleged crimes who had detailed "the sex acts that [Father] forced the teenage victim to endure[,]" and "Mr. Schultze [ignored] the e-mails from the victim's mother and failed to confront [Father] about their authenticity." In September 2011, California's Monterey County Department of Social and Employment Services provided the Department with a home study approving placement of Children with the Schultzes who, among other things, had indicated their willingness to care for Children and had completed foster parent training in anticipation of Children's placement with them. The report, having evaluated many factors, was highly favorable to and recommended placement with the Schultzes. Citing confidentiality issues, the Department refused to disclose the results of the Schultzes' ICPC home study to Father, forcing Father to file a motion to compel discovery.

On April 3, 2012, the district court, Judge Mowrer, held a permanency hearing.[4] Among other things, a Department permanency worker testified that the Department had determined that the Schultzes were not Children's "fictive kin." Also during the hearing, the district court ordered the Department to disclose the results of the Schultzes' ICPC home study to Father and to the district court. By the time of the April 3, 2012, hearing, Children had been with their

[1]According to Department-issued regulations, the term "fictive kin" refers to "a person not related by birth or marriage who has an emotionally significant relationship with the child." 8.26.4.7(P) NMAC (8/15/2011).

[2]As a result of various factors, the termination hearing was not held forty-five days later; rather, it was ultimately conducted in March and June 2013.

[3]"ICPC is an acronym for "Interstate Compact on the Placement of Children." 8.26.5.15(A)(8) NMAC (8/15/2011). The ICPC allows states to cooperate with each other in the interstate placement of children by, among other things, allowing authorities in the state of a prospective out-of-state placement to "ascertain the circumstances of the proposed placement[.]" NMSA 1978, § 32A-11-1(B) (1993).

[4]Judge Orlik, who had previously presided over the case, passed away in May 2011.

foster parents, who were willing to adopt them, for nearly two years, and according to the Department, had an "extremely strong psychological bond" with them; nevertheless, the court stated that it had not "ruled out" Children's placement with the Schultzes.

In accord with the district court's order to do so, the Department provided a copy of the Schultzes' ICPC home study results to Father, and Father provided a copy to the district court. Approximately seven months had passed between the Department's receipt of the ICPC home study and Father's receipt of a copy. Based on the results of the ICPC home study, Father filed a motion requesting the district court place Children with the Schultzes; however, the district court denied the motion on the ground that it "did not have authority to order a specific placement with Mr. [and] Mrs. Schultze."

In June 2012, the Department filed a "First Amended and Superseding Motion for Termination of Parental Rights." In anticipation of a hearing on its motion to terminate Father's parental rights, the Department had already filed a motion in limine to exclude "placement issues" from the hearing on the ground that placement issues, meaning particularly, the Department's decision to not place Children with the Schultzes, were irrelevant and inadmissible on the issue of whether Father's parental rights should be terminated. Father responded to the Department's motion in limine by requesting that the court deny it.

In July 2012, following a hearing on the Department's motion in limine, the district court ordered the exclusion of "issues concerning [the Department's] placement decisions[,]" which was defined by the court as evidence pertaining to the Department's determination of "where and with whom [C]hildren . . . are to live[,]" from the termination of parental rights hearing. As a caveat to its order excluding evidence of placement issues, however, the district court ordered that Father could "provide evidence that he has given placement alternatives and information to the Department." The district court's ruling in that regard was intended to allow Father to respond, during the termination hearing, to the Department's allegation in its motion to terminate Father's parental rights that "[Father had] not shown himself to be able to designate a suitable and appropriate caregiver for . . . [C]hildren."

On March 7, 2013, and June 18, 2013, the district court held a trial on the issue of terminating Father's parental rights. Following the hearing, the district court concluded, in relevant part, that clear and convincing evidence established that Children were neglected because Father was unable to discharge his responsibilities to and for Children owing to his incarceration, that the conditions and causes of the neglect were unlikely to change in the foreseeable future despite the Department's reasonable efforts to facilitate a treatment plan, and that it was in Children's best interest to be adopted and not reunified with Father. Accordingly, the district court terminated Father's parental rights to Children. Further details of the district court's ruling will be discussed as needed in the body of this Opinion.

In his appeal from the district court's termination of parental rights order, Father primarily argues that the district court erred in excluding evidence of Father's efforts to arrange for Children to be adopted by the Schultzes. In Father's view, his efforts regarding the Schultzes demonstrated that he was acting to remedy his inability to parent

Children despite his incarceration. Relatedly, Father argues that the district court erred in excluding evidence of the Department's failures regarding the Schultzes as a potential placement for Children because that evidence was relevant to the question whether the Department made reasonable efforts to assist Father in remedying the causes and conditions of neglect. Father asserts that the district court's erroneous exclusion of relevant evidence led the court to terminate his parental rights without a valid statutory basis.

We conclude that there is no legal basis for reversing the district court's judgment terminating Father's parental rights. Accordingly, we affirm.

DISCUSSION

Pursuant to NMSA 1978, Section 32A-4-28(B)(2) (2005), the court shall terminate parental rights with respect to a neglected child when the court finds by clear and convincing evidence that "the conditions and causes of the neglect . . . 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." *See State ex rel. Children, Youth & Families Dep't v. Lance K.*, 2009-NMCA-054, ¶ 16, 146 N.M. 286, 209 P.3d 778 ("The standard of proof for termination of parental rights is clear and convincing evidence."). On appeal, this Court does not re-weigh the evidence, rather, we view the evidence in the light most favorable to the prevailing party. *State ex rel. Children, Youth & Families Dep't v. Amanda H.*, 2007-NMCA-029, ¶ 19, 141 N.M. 299, 154 P.3d 674. We review the admission or exclusion of evidence under the abuse of discretion standard. *See In re Esperanza M.*, 1998-NMCA-039, ¶ 7, 124 N.M. 735, 955 P.2d 204.

Father concedes that Children were neglected pursuant to Section 32A-4-2(E)(4) in that he was "unable to discharge [his] responsibilities to and for [Children] because of incarceration[.]"[5] Father argues, however, that by helping to arrange for Children's placement with his brother and sister-in-law, by identifying the Schultzes as a potential foster placement, and by offering to consent to the Schultzes' adoption of Children, he effectively "remedied his inability to parent Children because of his incarceration[.]" He argues further that by excluding evidence of his efforts to arrange Children's adoption by the Schultzes and of the Department's failure to comply with his desire to effect Children's adoption by the Schultzes, the district court excluded evidence that was directly relevant on the issue of termination, namely, whether the conditions and causes of Father's neglect were likely to change despite reasonable efforts by the Department. *See* § 32A-4-28(B)(2) (requiring the district court to terminate parental rights if, despite reasonable efforts by the Department, "the conditions and causes of the neglect . . . are unlikely to change in the foreseeable future").

[5]To the extent that Father argues that his right to due process was violated by the district court's finding that Children were neglected on grounds other than his incarceration, Father has failed to demonstrate that in the absence of the alleged error, it is reasonably probable that the outcome of this case would have been different. *See In re Pamela A.G.*, 2006-NMSC-019, ¶ 14, 139 N.M. 459, 134 P.3d 746 (stating the standard required to procure reversal pursuant to a claimed deprivation of due process). In light of his concession that Children were neglected pursuant to Section 32A-4-2(E)(4), and he was otherwise unable to discharge his parental duties in light of his extended incarceration, we do not consider the issue whether Children were otherwise neglected.

Father's argument is contradicted by the record and it is, therefore, unpersuasive. Father's argument is founded on a misconstruction of the district court's evidentiary order. The district court's order on the Department's motion in limine to exclude placement issues from the termination of parental rights hearing was specific and limited in its exclusion of "any evidence or argument concerning placement of . . . [C]hildren ('placement' meaning a determination of where and with whom [C]hildren in [the Department's] custody are to live)[.]" The order was intended to prevent Father from raising the Department's decision to not place Children with the Schultzes as an issue in the termination of parental rights hearing. The order expressly permitted Father to provide evidence that he had "given placement alternatives and information to the Department." And, contrary to Father's argument, the district court's order did not preclude Father or the Department from presenting evidence of the time-line of the Department's activities that, if presented, would illustrate any delays in the Department's actions that bore on the question whether the Department made reasonable efforts to assist Father.

Further, testimony from the termination of parental rights hearing and the district court's findings of fact and conclusions of law demonstrate that the court permitted and considered evidence of Father's efforts to have Children placed with and adopted by the Schultzes. We particularly note that Father testified, in response to a question by the Department's counsel, that "the moment" he learned that Children could not stay with his brother and sister-in-law, he stated his desire for Children to "go to" the Schultzes. Further, in its findings of fact and conclusions of law, the district court recognized Father's effort regarding the Schultzes when it observed that Father "directed [the Department] toward persons he felt were fictive kin, Mr. [and] Mrs. Schultze[,]" and he "attempted to have the [c]ourt force [the Department] to place [Children] with Mr. [and] Mrs. Schultze."

Additionally, in regard to evidence of the Department's "delays" in investigating the Schultzes, we observe that the district court found: (1) that the Department learned, in August 2010, that Father's brother and sister-in-law would not permanently provide placement for Children; and (2) that not until after Judge Orlik's March 28, 2011, order to do so did the Department complete an ICPC home study on Mr. and Mrs. Schultze, after which the Department ultimately determined that it would not place Children with the Schultzes. Additionally, we observe that during the termination hearing, a representative of the Department testified that in an October 19, 2010, letter she advised Father that the Department would look for placement alternatives and asked him to provide input regarding potential placement, but that by the October 26, 2010, permanency hearing, Father had yet to receive that letter.

To the extent that Father wished to present additional evidence of his efforts to remedy the conditions and causes of neglect or of the Department's failure to make reasonable efforts to assist him in doing so, Father does not state, with specificity, what that evidence was, and we will not attempt to guess what it may have been. *See Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 70, 309 P.3d 53 (stating that an appellate court will not attempt to "guess at what a party's arguments might be" (alteration, internal quotation marks, and citation omitted)), *cert. denied*, __ U.S. __,

134 S. Ct. 1787 (2014). Based on the record before us, we conclude that the district court had before it the evidence that Father complains was excluded and that the court's judgment reflects that the court considered the at-issue evidence in making its determination. Therefore, Father has not demonstrated that the district court's evidentiary ruling constituted an abuse of discretion. *See Esperanza M.*, 1998-NMCA-039, ¶ 7 (stating that we review evidentiary issues under an abuse of discretion standard).

The subtext of Father's argument regarding the Department's efforts and the apparent crux of his appeal is Father's view that his fundamental right to parent Children entitled Father to decide that Children should be placed with, and ultimately adopted by, the Schultzes and that the district court erred by terminating his parental rights notwithstanding his efforts to effect Children's placement with or his offer to relinquish his parental rights to the Schultzes. Well-intentioned though he may be, Father's desire to dictate the Department's placement of Children at this point in the proceedings is not supported by the law.

When Father pleaded no contest to the allegation that Children were neglected as a result of Father's inability "to discharge [his] responsibilities to and for [them] because of incarceration[,]" the district court ordered Children into the legal custody of the Department. Absent an abuse of its discretion, the Department's "legal custody" of Children permitted it, alone, to determine where and with whom Children would be placed. *See* NMSA 1978, § 32A-1-4(O) (2005, amended 2009) (stating that " 'legal custody' means a legal status created by order of the court . . . that vests in a . . . department . . . the right to determine where and with whom a child shall live"); *State ex rel. Children, Youth & Families Dep't v. Senaida C.*, 2008-NMCA-007, ¶ 11, 143 N.M. 335, 176 P.3d 324 (stating that the Department "has the discretion to place children within the foster system, and the district court [may] only overrule a [Department] decision if the court determines that [the Department] has . . . abused its discretion in the placement or proposed placement of the child" (omission in original) (alteration, internal quotation marks, and citation omitted)). Accordingly, while Father could and did express his preferences in regard to Children's placement, once Children were legal custodians of the Department, Father was not in a position to decide where or with whom Children would be placed.

As we understand Father's argument, Father wishes to have his parental rights restored so that he may relinquish his parental rights to Children in favor of the Schultzes, who are willing to adopt them. In Father's view, this arrangement would serve the best interests of Children and also serve Father's interest to the extent that, were Children adopted by the Schultzes, Father could maintain a relationship with Children, which the Schultzes are willing to facilitate. While Father's arguments may be theoretically compelling, as a matter of practicality, they are unacceptable.

Father has failed to provide any authority for the proposition that, under the circumstances of this case, he could lawfully relinquish his rights to Children on the condition of their adoption by the Schultzes. We assume no such authority exists. *See State ex rel. Children, Youth & Families Dep't v. Arthur C.*, 2011-NMCA-022, ¶ 46, 149 N.M. 472, 251 P.3d 729 ("We assume where arguments in briefs are unsupported

by cited authority, counsel after a diligent search, was unable to find any supporting authority." (internal quotation marks and citation omitted)). Nor has Father cited any authority for the proposition that were we to reverse the district court's judgment terminating his parental rights, Father could successfully direct the Department to place Children with the Schultzes. *See id.*; *State ex rel. Children, Youth & Families Dep't v. Patricia H.*, 2002-NMCA-061, ¶ 27, 132 N.M. 299, 47 P.3d 859 (recognizing that the Department is not required to make "efforts subject to conditions unilaterally imposed by the parent").

The district court concluded that Children's best interests would be served by being adopted. Father refused to relinquish his parental rights to allow Children's present foster parents to adopt them, and the Department concluded that it would not place Children with the Schultzes as a potential adoptive home. Because Children cannot be adopted unless Father relinquishes his parental rights or consents to their adoption or, alternatively, unless Father's parental rights are terminated, reversing the district court's judgment would subject Children to a sustained period of legal limbo in which they would remain legal custodians of the Department, ineligible for adoption, yet, owing to Father's lengthy incarceration, would also be ineligible for reunification. *See* NMSA 1978, § 32A-5-17(A)(5) (2005); NMSA 1978, § 32A-5-19(A) (2001) (stating that consent to adoption or relinquishment of parental rights is a prerequisite to a child's adoption except in a circumstance in which the parent's parental rights to the child have been terminated). Thus, even were we persuaded that the Department's failure to comply with Father's attempt to dictate Children's foster placement with and adoption by the Schultzes was grounds for reversal, reversing the district court's judgment in this case would effectively place Father's impracticable desire to dictate Children's placement over Children's best interests. This we will not do. *See State ex rel. Children, Youth & Families Dep't v. Maurice H.*, 2014-NMSC-034, ¶ 47, 335 P.3d 746 (recognizing that, although parental rights are fundamental, they yield to the best interests and welfare of the children at issue); *State ex rel. Children, Youth & Families Dep't v. William M.*, 2007-NMCA-055, ¶ 66, 141 N.M. 765, 161 P.3d 262 ("When balancing the interests of parents and children, the court is not required to place the children indefinitely in a legal holding pattern, when doing so would be detrimental to the children's interests." (internal quotation marks and citation omitted)).

CONCLUSION

We affirm the district court's judgment terminating Father's parental rights to Children.

IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:

LINDA M. VANZI, Judge

M. MONICA ZAMORA, Judge

Certiorari Denied, April 20, 2015, No. 35,182;
Certiorari Denied, April 10, 2015, No. 35,190

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-048

Filing Date: February 17, 2015

Docket No. 32,277

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

AUGUSTINE TAPIA,

Defendant-Appellant.

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OPINION

HANISEE, Judge.

Defendant appeals his conviction for five counts of criminal sexual penetration of a minor (CSPM), five counts of criminal sexual contact of a minor (CSCM), and four counts of kidnapping. He asserts: (1) there was insufficient evidence presented at trial to support all but one of his convictions for CSPM and CSCM; (2) the State failed to prove two counts of CSPM were separate and distinct from one another; (3) the conduct charged as kidnapping was incidental to sexual assault and not a separate crime; (4) the jury instructions were contradictory, resulting in fundamental error; and (5) the district court erred by allowing a non-expert witness to testify that her findings were consistent with sexual abuse. We affirm in part, reverse in part, and remand for resentencing in accordance with this Opinion.

BACKGROUND

Defendant's convictions are a product of multiple instances of sexual assault perpetrated against his eight-year-old daughter, H.T., and his four-year-old step-daughter, L.T. Both victims testified at trial, as did the physician's assistant (the PA) who examined the girls following the sexual assaults. Due to the numerous counts of conviction and the many issues on appeal, we reserve further discussion of the underlying facts for the accompanying analysis.

CSPM CONVICTIONS

A jury convicted Defendant of five instances of CSPM: Counts 2, 8, 11, 12, and 13.[1] Counts 2 and 13 charged Defendant with digitally penetrating the vaginas of L.T. and

[1]Following the district court's dismissal of some counts prior to submission to the jury, the remaining seventeen counts were renumbered consecutively. Within this opinion, we numerically refer to the counts as each was renumbered.

H.T., respectively. Count 8 charged Defendant with engaging in anal intercourse with H.T. Counts 5, 7, 11, and 12 arose from Defendant engaging in what constitutes the statutory definition of "sexual intercourse" with L.T. and H.T.

Defendant appeals his CSPM convictions on Counts 2, 8, 11, and 13, asserting that there was insufficient evidence presented at trial to support digital vaginal penetration, anal penetration, or "sexual intercourse."[2] Our sufficiency of the evidence review is a two-step process: we first view the evidence in the light most favorable to the verdict, and then we legally determine "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*, 1994-NMSC-121, ¶ 6, 118 N.M. 762, 887 P.2d 756 (internal quotation marks and citation omitted). We do not reweigh the evidence, nor will we substitute our judgment for that of the fact finder so long as the record contains sufficient evidence to support the verdict. *State v. Sutphin*, 1988-NMSC-031, ¶ 21, 107 N.M. 126, 753 P.2d 1314. "Where . . . a jury verdict in a criminal case is supported by substantial evidence, the verdict will not be disturbed on appeal." *Id.*

"Criminal sexual penetration" as defined by NMSA 1978, Section 30-9-11(A) (2009), in relevant part, is "the unlawful and intentional causing of a person to engage in sexual intercourse . . . or the causing of penetration, to any extent and with any object, of the genital or anal openings of another[.]" UJI 14-982 NMRA defines "sexual intercourse" as "the penetration of the vulva or vagina, the female sex organ, by the penis . . . to any extent." The "vulva" is defined as "the external parts of the female organ of sexual intercourse[,] . . . composed of the major and minor lips, the clitoris and the opening of the vagina[,]" and the "vagina" is "the canal or passage for sexual intercourse in the female, extending from the vulva to the neck of the uterus." UJI 14-981 NMRA.

A. Counts 2 and 13: Digital Vaginal Penetration

The State alleged in Counts 2 and 13 that Defendant penetrated the vaginas of L.T. and H.T., respectively, with his finger. At trial, L.T. testified that one night when she was alone in the living room with Defendant, he "rubbed" her "privates" with his hand. L.T. did not provide any additional details about specifically how or where Defendant touched her. The PA who examined L.T. for evidence of sexual abuse, later that same day, testified that she observed redness on L.T.'s labia majora and minora, including a small scratch to the right labia minora. The PA indicated that her observations could be the result of sexual abuse, L.T.'s underwear being too tight, scratching herself, "or something like that." Similarly, as to Count 13, H.T. testified that Defendant would "slide his fingers up and down on [her] private part." H.T. elaborated that Defendant would not move his fingers "in and out" but "up and down." When the PA examined H.T. several days later, she did not observe any injuries.

As to each count, the jury was instructed that in order to find Defendant guilty of

[2]Although Count 12 is identically worded to Count 11 in that it alleges that Defendant engaged in "sexual intercourse" with H.T., we note that Defendant does not appeal this conviction. Therefore, we will not address it in our analysis. *See City of Santa Fe v. Komis*, 1992-NMSC-051, ¶ 22, 114 N.M. 659, 845 P.2d 753 ("Issues not briefed will not be reviewed by this Court.").

CSPM, it must find that the State proved that Defendant "caused the insertion, to any extent, of a finger into the vagina" of L.T. and H.T. Although it was instructed as to the statutory definitions of both "vagina" and "vulva," the jury was not told that penetration of the latter was sufficient to find Defendant guilty of either or both counts. Defendant contends that this exclusion is fatal to the convictions. The State answers that use of the term "vagina" in the jury instructions for Counts 2 and 13 was sufficient to support convictions for CSPM premised upon the testimony of L.T. and H.T. because "vagina" as contained in the jury instruction "was meant to convey not just the vaginal canal but rather the area of the vulva or genital openings of the female." The State relies on this Court's clarification in *State v. Tafoya* that the definition of sexual intercourse, as contained within the jury instruction for CSPM, includes not only penetration of the vagina but of the vulva as well. 2010-NMCA-010, ¶ 52, 147 N.M. 602, 227 P.3d 92.

It is true that in *Tafoya*, we held that the definition of "sexual intercourse" includes penetration not just of the vagina, but also of the vulva; thus, we concluded that the CSPM statute was meant to be inclusive of the "broader sense of the female genitalia as opposed to just the vaginal canal." *Id.* Indeed, the statutory definition of vagina is inclusive of the vulva. *See* UJI 14-981 (stating that the "vagina" is "the canal or passage for sexual intercourse in the female, extending from the vulva to the neck of the uterus"). Our holding in *Tafoya* in no way altered the anatomical definition of "vulva" and "vagina" as defined by our Supreme Court, *see* UJI 14-981, when it amended UJI 14-982 (2010), nor do we view *Tafoya* as requiring anatomical specificity in every case in which the sexual organs of a child have been penetrated to the slightest degree. *Compare* UJI 14-982 (2009) with UJI 14-982 (2010) (modifying the definition of sexual intercourse to include penetration of the vagina as well as the vulva). To the contrary, the statutory language clearly instructs that CSPM occurs if the Defendant engaged in an act of "penetration[] to any extent." Section 30-9-11(A). Although there may be circumstances of a given case that warrant scrutiny of particular parts of the genitalia, pursuant to the sufficiency of the evidence standard of review, we review the evidence in the light most favorable to the verdict this jury rendered. *See Sutphin*, 1988-NMSC-031, ¶ 21 (stating that under a sufficiency of the evidence standard of review, we "must view the evidence in the light most favorable to the state, resolving all conflicts therein and indulging all permissible inferences therefrom in favor of the verdict").

Moreover, at trial Defendant elected not to challenge the CSPM charges against him based upon any absence of definitional distinctions, but rather upon the victims' lack of credibility and the factual impossibility of the occurrences of the charged crimes. Defendant's closing argument was premised upon the difficulty of defending this case, stating "how does one . . . explain [that] a child isn't being truthful[?] We all want to believe that a child wouldn't lie about something like this[.]" Yet Defendant now argues that the evidence and the inferences from the evidence do not support the jury verdict, not from the standpoint of non-occurrence, but from the asserted failure of the State to present evidence of precisely which portion of the victims' genitalia were penetrated by his fingers. When reviewing the presence or absence of substantial evidence on appeal, however, we need not be so

anatomically exacting. Here, the nature of the acts testified to by both victims involved physical interaction that was skin to skin, and during which Defendant rubbed or repetitiously slid his fingers upon both child's unclothed genital openings. Moreover, given that L.T. and H.T. were seven and eleven years old at the time they testified, respectively, it would be unwise for us to establish within our caselaw any requirement that the trial record reflect comprehension of anatomic specifics or the technical nuances of what constitutes penetration under the applicable jury instruction. Applying the definitions of vagina and vulva in light of the requirement that penetration minimally occur to any extent, the testimony given by both victims, and the PA as to L.T., was sufficient to allow a jury to utilize its fact finding autonomy to find that the State satisfied its evidentiary burden as to the penetrative element of CSPM within Counts 2 and 13. On the basis of this record as to these Counts, we affirm.

B. Count 8: Anal Penetration

Count 8 alleged that Defendant engaged in anal intercourse with H.T. At trial, H.T. testified that Defendant "got his private part and put it up where I go poop." On cross-examination when defense counsel sought to determine whether Defendant "put his private on [her] butt . . . or in [her] butt[,]" H.T. clarified that it actually went "in." The jury was instructed that in order to find Defendant guilty of CSPM as to Count 8, the State must prove that Defendant "caused [H.T.] to engage in anal intercourse[.]" It was also instructed that "anal intercourse" is "the penetration of the anus by the penis to any extent" and that the " 'anus' is the opening to the rectum." The jury found Defendant guilty on Count 8.

On appeal, Defendant contends that CSPM requires penetration of the anal opening, and because H.T. was never "asked whether she understood the difference between penetrating the cheeks of the buttocks and penetrating the anus itself[,]" there was no evidence of physical penetration. Defendant maintains that H.T.'s testimony was "too vague and conclusory to allow the jury to infer beyond a reasonable doubt that [Defendant] penetrated her anus, as opposed to touching her buttocks with his unclothed penis." Defendant relies on *Herron v. State* for the proposition that "[e]vidence equally consistent with two hypotheses tends to prove neither." 1991-NMSC-012, ¶ 18, 111 N.M. 357, 805 P.2d 624.

It is well established that in "prosecutions for [CSP], the testimony of the victim need not be corroborated and lack of corroboration has no bearing on weight to be given to the testimony." *State v. Nichols*, 2006-NMCA-017, ¶ 10, 139 N.M. 72, 128 P.3d 500 (alterations, internal quotation marks, and citation omitted). Furthermore, "[t]he determination of the weight and effect of evidence, including all reasonable inferences to be drawn from both direct and circumstantial evidence, is reserved for determination by the trier of facts, which in this case is the jury." *State v. Luna*, 1979-NMCA-048, ¶ 15, 92 N.M. 680, 594 P.2d 340. This Court will not weigh the evidence presented during the trial. *Id.* H.T.'s testimony made very clear that Defendant put his penis both "in [her] butt" and "up where [she goes] poop." By its guilty verdict, the jury determined that Defendant penetrated H.T.'s anus. *See State v. Smith*, 2001-NMSC-004, ¶ 40, 130 N.M. 117, 19 P.3d 254 ("Juries are presumed to have followed the written instructions."). We will not substitute our judgment for that of the jury. *Sutphin*, 1988-

NMSC-031, ¶ 21. Because evidence within the record is sufficient to support Defendant's conviction for CSPM in Count 8, we affirm.

C. Counts 5, 7, and 11: "Sexual Intercourse"

Counts 5, 7, and 11 respectively alleged that Defendant committed CSPM by engaging in "sexual intercourse" with H.T. and L.T. The State maintained that Defendant penetrated the labia of both victims with his penis, an act that it termed "labial coitus." For each count, the jury was provided with the CSPM instruction; however, as to Count 5, the jury was alternatively instructed as to CSCM. The jury ultimately found Defendant guilty of CSPM as to H.T. in Count 11 and guilty of CSCM as to L.T. in Count 5. Defendant was acquitted of Count 7.

Defendant appeals all three counts, arguing that the State failed to prove its theory of labial coitus as neither victim testified that any penetration occurred. Because Defendant was acquitted of Count 7, there is no basis on which to review Defendant's argument. As to Count 5, Defendant was convicted of CSCM, which contains no penetrative element. We therefore need only review Defendant's argument as it pertains to his CSPM conviction in Count 11.

Regarding Count 11, the jury was instructed that in order to find Defendant guilty, the State must have proven that Defendant "caused [H.T.] to engage in sexual intercourse[.]" The jury was definitionally instructed that "[s]exual intercourse means the penetration of the vulva or vagina . . . by the penis" and that the "vulva" is "the external parts of the female [sex] organ . . . composed of the major and minor lips, the clitoris and the opening of the vagina." Accordingly, to any extent that Defendant's penis penetrated beyond or within H.T.'s labia majora, the outermost lips of the vulva, such would constitute "sexual intercourse" for purposes of CSPM. UJI 14-981; *see* § 30-9-11(A).

As to Count 11, H.T. testified that she was made to remove her clothing and await Defendant on her mother's bed prior to the first time he sexually assaulted her. Once Defendant had removed his own clothing, he "put his private part on [her private part]" and started moving "up and down." H.T. additionally explained that "every time after he abused [her], he would get up and . . . shake his private part and white stuff would come out." As we have stated, we allow a jury all reasonable inferences in support of a verdict, and we view the evidence in the light most favorable to that verdict. *State v. Haar*, 1990-NMCA-076, ¶ 14, 110 N.M. 517, 797 P.2d 306. Under this standard, we conclude there is sufficient evidence for the jury to determine that Defendant's repeated movement of his penis against H.T.'s unclothed genitalia, prior to the emission she witnessed, penetrated the labia majora to the slightest extent or beyond, and thereby met the penetrative element of the "sexual intercourse" CSPM jury instruction. Considered cumulatively, the act described by H.T. was evidence upon which a jury could conclude that penetration "to any extent" took place. Section 30-9-11(A). We will not second guess or substitute our judgment for such a jury's determination of fact, nor require a child victim to utilize specific and exacting terminology in the context of a sexual assault to establish the threshold of abuse a jury must consider given the aggregate testimony provided by such a witness. We affirm Defendant's conviction on Count 11.

CSCM CONVICTIONS

A. Counts 3 and 4

Defendant was charged with two counts of CSCM based on the State's assertion that Defendant twice forced L.T. to place her hand upon his penis. The jury convicted Defendant on both counts. Defendant appeals these convictions, arguing that there was insufficient evidence presented at trial to prove two separate and distinct counts of CSCM. Despite L.T.'s testimony, Defendant maintains that there was insufficient evidence to support the convictions because H.T.'s testimony, that she was present during and perceived the nature of this abuse of L.T., was both self-contradictory and incompetent due to her indirect personal knowledge of the relevant facts.

At the outset, we note that the language within and the jury instructions for both Counts 3 and 4 are identical, requiring conviction only upon the jury's determination beyond a reasonable doubt that Defendant "caused [L.T.] to touch [his] penis . . . [and] [t]his happened in New Mexico on or between the 26th day of July, 2008 and the 12th day of November, 2009." Despite their seeming indistinguishability, L.T. and H.T. provided testimony in support of separate acts of CSCM. *See State v. Dominguez*, 2008-NMCA-029, ¶ 10, 143 N.M. 549, 178 P.3d 834 (sanctioning identically worded counts "[w]hen a child cannot remember specific dates, . . . if the child or other witnesses are able to provide facts sufficient to identify distinct incidents of abuse"). L.T. specifically testified that Defendant "touched [her] privates and then he made [her] touch his." She elaborated, stating that "I touched [his penis] with my hand and then . . . he . . . got my hand and he made [me] touch it and then I pulled my hand off and he kept pulling it back." Similarly, H.T. testified to two incidents where she and L.T. were both in the same room with Defendant. H.T. stated that during both incidents Defendant "made us put . . . our hand on his private part." When asked whether she directly observed L.T."do that to him[,]" however, H.T. responded that she had not.

L.T.'s testimony alone is sufficient to establish one count of CSCM. *See Sutphin*, 1988-NMSC-031, ¶ 21. Additionally, H.T.'s testimony served to not only circumstantially corroborate L.T.'s testimony regarding the act Defendant made L.T. perform, but also to establish its occurrence on two occasions. As to the nature of the specific abuse, H.T. testified that Defendant made both her and L.T. touch his penis, but conceded that she did not directly see L.T.'s hand when it touched Defendant's penis. Defendant maintains that if H.T. "subjectively believed but did not actually see [L.T.] being abused, her belief was not competent testimony" under Rule 11-602 NMRA.

Defendant is correct that our Supreme Court recognizes "[b]elief or opinion testimony alone, no matter how sincere[, not to be] equivalent to personal knowledge" and therefore not admissible evidence. *Martinez v. Metzgar*, 1981-NMSC-126, ¶ 9, 97 N.M. 173, 637 P.2d 1228. But Defendant's argument in this regard is misplaced. H.T. did not testify that she believed, thought, or assumed that L.T. touched Defendant's penis. She stated that on two occasions Defendant "made us put . . . our hand on his private part." The circumstances under which she and L.T. found themselves, which included the individual actions Defendant required of H.T., were described to the jury not as belief or opinion, but as an event of which H.T. possessed

personal knowledge, however imperfect. As to one participant in the events she described, H.T.'s testimony directly corroborated L.T.'s testimony, leaving the jury with both direct and circumstantial evidence upon which it could resolve the separate and distinct questions of fact associated with Counts 3 and 4. *See State v. Sena*, 2008-NMSC-053, ¶ 11, 144 N.M. 821, 192 P.3d 1198 ("When parts of a witness's testimony are conflicting and ambiguous, it is the exclusive province of the jury to resolve the factual inconsistencies in that testimony." (alterations, internal quotation marks, and citation omitted)). Because it is the jury's role to resolve any conflict in witness testimony, and H.T.'s testimony regarding two incidents of contact could justify a finding by a rational trier of fact that Defendant "caused [L.T.] to touch [his] penis" on two separate occasions, we affirm Defendant's convictions of Counts 3 and 4. *See id.*

JURY INSTRUCTIONS

Defendant next requests that we reverse each CSCM and CSPM conviction and remand for a new trial on the basis that the jury instructions defining "sexual intercourse" and "criminal sexual contact" "hopelessly confus[ed]" the jury. Defendant's argument again arises from the alteration in the jury instruction for "sexual intercourse" that followed this Court's decision in *Tafoya*. Prior to *Tafoya*, UJI 14-982 defined "sexual intercourse" as "the penetration of the vagina . . . by the penis . . . to any extent." UJI 14-982 (2009). However, in response to our suggestion that the instruction be modified, our Supreme Court altered it specifically to include "penetration of the vulva or vagina[.]" UJI 14-982 (2010). Defendant asserts that because the CSCM instruction still includes "vagina" as one of the applicable alternative points of contact, it is impossible for a jury to distinguish between CSCM and "sexual intercourse" for the purposes of CSPM because it is impossible to contact the vagina without first penetrating the vulva. UJI 14-909 NMRA.

Defendant maintains that this instructional error fundamentally undermined his CSPM and CSCM convictions.[3] "The doctrine of fundamental error applies only under exceptional circumstances and only to prevent a miscarriage of justice." *State v. Barber*, 2004-NMSC-019, ¶ 8, 135 N.M. 621, 92 P.3d 633. Fundamental error review serves to safeguard a defendant's substantive rights under two circumstances: (1) "where a defendant has been convicted of a crime despite undisputable innocence" and (2) "when a mistake in process makes a conviction fundamentally unfair notwithstanding the apparent guilt of the accused." *State v. Nevarez*, 2010-NMCA-049, ¶ 24, 148 N.M. 820, 242 P.3d 387 (internal quotation marks and citation omitted).

The first component in a fundamental error analysis requires that we "determine whether a reasonable juror would have been confused or misdirected by the jury instruction." *Barber*, 2004-NMSC-019, ¶ 19. If we determine that there was an instructional error, we then "review the entire record,

[3]We assume Defendant requests fundamental error review on the basis that this asserted objection was not preserved in the district court. *See State v. Castillo*, 2011-NMCA-046, ¶ 29, 149 N.M. 536, 252 P.3d 760 (stating that when a defendant fails to preserve an argument in district court, this Court can only review for fundamental error). Defendant fails to provide a citation to the record where he objected to the instructions now challenged, and this Court will not search the record to ascertain whether an issue was properly preserved absent a transcript reference by the challenging party. *State v. Rojo*, 1999-NMSC-001, ¶ 44, 126 N.M. 438, 971 P.2d 829.

placing the jury instructions in the context of the individual facts and circumstances of the case, to determine whether the defendant's conviction was the result of a plain miscarriage of justice." *Nevarez*, 2010-NMCA-049 ¶25 (alteration, internal quotation marks, and citation omitted). We have held that "[t]here is no miscarriage of justice where, despite any misunderstanding by the jury, the circumstances of the case demonstrate that all the necessary elements of the offense were satisfied beyond a reasonable doubt." *Id.* ¶ 26.

Defendant asserts that the district court fundamentally erred in instructing the jury on all counts of CSPM and CSCM. Defendant was convicted of CSCM on Counts 3, 4, 5, 9, and 14, and of CSPM on Counts 2, 11, 12, and 13.[4] We note that the only count on which the jury received both an instruction for CSPM and CSCM was Count 5. As to each remaining count, the jury was solely instructed on either CSPM or CSCM, and therefore, there was no possible risk of confusion between the requisite elements of each offense. As such, we will solely address Count 5 in our fundamental error analysis and reject Defendant's overly broad contention that somehow the distinction in verbiage within the sexual intercourse instruction and the CSCM instruction theoretically bore aspects of overlapping error that rendered infirm the convictions as to either crime.

Initially, we do not disagree that following the change in the definition of "sexual intercourse" to include "penetration of the vulva," there ultimately can be no contact with the vagina without a penetration of the vulva occurring. *See* UJI 14-981 (indicating that the opening of the vagina is encompassed within the vulva). We acknowledge that the overlap in the language of the CSCM instruction and the sexual intercourse instruction could have resulted in some juror confusion. However, we do not conclude that incongruencies in the jury instructions were fatal to the jury's comprehension of the definitions within or the elements of the crimes of which it chose to convict Defendant or that any such discrepancy amounted to fundamental error.

As to Count 5, the jury was instructed that in the event that it had a reasonable doubt as to whether Defendant committed CSPM, it must proceed to determine whether Defendant committed the lesser included offense of CSCM. To find Defendant guilty of CSCM, the jury was first instructed that he must have "touched or applied force to the vagina and/or groin area of [L.T.] with his penis[.]" The jury did not find Defendant guilty of CSPM on Count 5, but did find him guilty of CSCM. Similarly, the jury acquitted Defendant of Count 7, which reflects its reasoned belief that the State failed to prove Defendant engaged in "sexual intercourse" with H.T. and neither penetrated her vulva or vagina as set forth in Count 7. Our review of the record regarding Count 5, however, indicates that L.T. provided specific testimony describing how Defendant unzipped her pajamas, pulled down her underwear, and lay on top of her with his unclothed "private" touching her unclothed "private," skin to skin. It is clear that the jury determined that this incident did not amount to CSPM as it convicted Defendant of the lesser-included CSCM, which instructed that Defendant could be found guilty if he

[4]Defendant was also convicted of CSPM as to Count 8. However, because Count 8 concerned anal penetration, we do not address it herein and consider only those convictions containing an element of genital contact or penetration.

"touched or applied force to the vagina and/or groin[.]"

Based on L.T.'s testimony, the jury could have reasonably determined that Defendant touched her unclothed groin area with his penis, amounting to CSCM, and it is not our role to disturb this finding on appeal. *See Sutphin*, 1988-NMSC-031, ¶ 21. Accordingly, "no distinct possibility exists from the evidence that the jury convicted Defendant without finding all the elements beyond a reasonable doubt." *Barber*, 2004-NMSC-019, ¶ 26. We conclude that the CSCM jury instruction, even though arguably flawed from the standpoint of anatomical definitional accuracy, did not create such confusion in the jury that it would undermine the judicial process. However, as a result of any ambiguity or contradiction that may arise out of the change in the definition of "sexual intercourse" under UJI 14-982, we believe that "vagina" should be removed from the list of anatomy that can be included within the jury instructions for any criminal sexual contact. *See Tafoya*, 2010-NMCA-010, ¶ 52 (calling into question the wording of UJI 14-982 and making a suggestion for appropriate modification).

KIDNAPPING

The jury convicted Defendant of four kidapping charges: Counts 6, 10, 15, and 16. Kidnapping in New Mexico is defined as the "unlawful taking, restraining, transporting or confining of a person, by force, intimidation or deception, with intent . . . to inflict . . . a sexual offense on the victim." NMSA 1978, § 30-4-1(A)(4) (2004). These charges arose from conduct attendant to the multiple sexual assaults Defendant perpetrated against H.T. and L.T. Defendant challenges these convictions, arguing that the Legislature did not intend to punish related incidental movement and restraints occurring prior to and during sexual assaults as the separate crime of kidnapping. Defendant further maintains that the evidence supporting his kidnapping convictions was insufficient as it failed to establish conduct beyond actions that were contemporaneous with and incidental to the sexual assaults.

We agree. Our review of these four convictions commences with a query of whether, in the light most favorable to the verdict, *see State v. Gipson*, 2009-NMCA-053, ¶ 4, 146 N.M. 202, 207 P.3d 1179, the restraints and movements to which the victims testified are sufficient, as a matter of law, to support convictions for kidnapping. *State v. Trujillo*, 2012-NMCA-112,¶ 6, 289 P.3d 238, *cert. granted*, 2012-NMCERT-011, 297 P.3d 1227. This Court has already held that "the Legislature did not intend to punish as kidnapping restraint or movement[s] that [are] merely incidental to another crime." *Id.* ¶ 1. In *Trujillo*, we analyzed whether the "momentary restraint of [a v]ictim in the course of a fight" was meant to be punished as kidnapping. 2012-NMCA-112, ¶ 22. After examining and interpreting our kidnapping statute, as well as those of other states, we determined that New Mexico follows the majority position that "kidnapping statutes do not apply to unlawful confinements or movements incidental to the commission of other felonies." *Id.* ¶ 31 (internal quotation marks and citation omitted). We additionally examined the three major tests employed by other courts to determine whether a restraint or movement is incidental to another crime, concluding that the overarching question of these three tests is "whether the restraint or movement increases the culpability of the defendant over and above his culpability for the other crime." *Id.*

¶¶ 31-38. While we found the tests instructive to determining what conduct qualifies as incidental to another crime, we declined to explicitly adopt any of the tests on the basis that the facts of that case so clearly evidenced incidental conduct. *Id.* ¶ 39. Thus, we were able to make the determination as a matter of law. *Id.* ¶ 42. However, we did make it clear that the determination of incidental conduct was fact dependent based on the totality of the circumstances and stated our preference that more complicated factual situations are better resolved by a jury. *Id.* ¶¶ 42-43.

In this case, our review of the record reflects that L.T. testified to Count 6, and H.T. testified to Counts 15, 16, and 10, respectively referred to as the "first time," a "different time," and the "last time[.]" As to Count 6, L.T. testified that before Defendant sexually assaulted her, she, H.T., and Defendant were "in [her] mom's room." H.T. left the room, and L.T. remained in the bedroom with Defendant. L.T. stated that Defendant then lay on top of her on the bed and sexually assaulted her; no other evidence of restraint on her movement exists within the record. Similarly, H.T. testified that the "first time" Defendant sexually assaulted her, he "made [her] go to [her] mom's room." She later described the same incident, explaining that Defendant "took [her] to [her] mom's room." With regard to the "different time[,]" H.T. explained that after Defendant "made" her remove her clothing, they "went to [another] room[,]" where the sexual assault occurred. The "last time" Defendant sexually assaulted H.T., she testified that she and Defendant were "in [her] mom's room[,] . . . [h]e made [her] take off [her] clothes[,]" and Defendant and H.T. "got on [her] mom's bed and . . . [Defendant] moved up and down and he made [her] put [her] mouth on top of his private."

The State acknowledges that the sole supporting evidence of kidnapping in Count 6 is that Defendant restrained L.T. by lying on top of her during the sexual assault. It further agrees that based on this Court's determination in *Trujillo*, lying on top of a victim during a sexual assault is insufficient to support a kidnapping conviction. "Although the [s]tate concedes this issue, we are not bound to accept the [s]tate's concession." *State v. Palmer*, 1998-NMCA-052, ¶ 12, 125 N.M. 86, 957 P.2d 71. However, in employing the *Trujillo* analysis, we determine that the nature of Defendant's incidental restraint did not increase his culpability beyond that already inherent to any sexual assault. L.T.'s testimony does not assert that the restraint was any longer or greater than that necessary to commit sexual assault. *See Trujillo*, 2012-NMCA-112, ¶¶ 34, 39 (citing one test for determining whether a restraint is incidental to another crime as "whether a defendant intended to prevent the victim's liberation for a longer period of time or to a greater degree than that which is necessary to commit the other crime" (alteration, internal quotation marks, and citation omitted)). Furthermore, L.T.'s testimony does not establish that the restraint imposed increased her risk of harm or the severity of the assault beyond that inherent to the underlying crime. *See id.* ¶¶ 36, 39 (citing a second test for determining incidental conduct, inquiring into whether the movements of the victim "substantially increase[d] the risk of harm over and above that necessarily present" in the accompanying crime (internal quotation marks and citation omitted)). Lastly, the restraint herein did not serve to decrease Defendant's risk of detection or the difficulty of the commission of the crime. *See id.* ¶ 37 (citing this third test for determining conduct incidental to a crime). Under any criterion we have favored or applied, the restraint L.T. described was

incidental to the sexual assault perpetrated upon her and did not establish conduct that the Legislature intended to support a kidnapping conviction.

As to Count 10, H.T. did not explicitly testify that Defendant took, restrained, transported, or confined her. She stated that when she and Defendant were in her mom's room, he made her take off her clothes, and the two "got on [the] bed" where he sexually assaulted her. Notwithstanding, the State maintains that "[a] jury could reasonably infer from [the] testimony that [D]efendant exerted an independent amount of force or restraint on [H.T.] when he made her [remove her clothes] prior to exerting force or restraint during the sexual assault." Again employing the *Trujillo* analysis, any incidental restraint Defendant used in "making" H.T. remove her clothing is not the type of separate conduct that the Legislature intended to punish as kidnapping. This conduct did not increase Defendant's culpability beyond that inherent to the assault; the restraint was not longer or greater than necessary to complete the assault, *see id.* ¶¶ 34, 39; it did not increase the risk of harm to H.T. or the severity of the assault, *see id.* ¶¶ 36, 39; and the restraint used to compel the removal of H.T.'s clothes in this situation is inherent to the sexual assault and was not done to make the commission of the crime easier or less detectable. *See id.* ¶ 37. We conclude that any restraint that was utilized to compel H.T. to remove her clothing was incidental to the sexual assault.

As to Counts 15 and 16, we recognize that instead of examining whether a *restraint* was incidental to a sexual assault, we are called upon to examine whether a *movement* was incidental to a sexual assault. Although *Trujillo* primarily reviewed whether an instance of restraint was incidental to a crime, one of the major tests this Court employed in our analysis was the test detailed by the Supreme Court of California in *People v. Daniels*, 459 P.2d 225 (Cal. 1969) (in bank). The *Daniels* court specifically examined whether the movement of a victim from room to room in order to commit robbery and rape constituted kidnapping. *Id.* at 227-28. The California court, having already recognized that a movement in the course of a kidnapping must be one that is not merely incidental to the commission of another crime, employed a two-prong test to determine whether the movements were incidental to the commission of another crime. *Id.* at 231, 238; *see People v. Rayford*, 884 P.2d 1369, 323-24 (Cal. 1994) (summarizing the *Daniels* test).

The first prong analyzed the scope and nature of the movement in the context of the environment in which the movement occurred, and the second prong examined whether the movement subjected the victim to a substantial increase in risk of harm beyond that inherent in the accompanying crime. *Id.* The Court determined that when in the course of committing a crime, "a defendant does no more than move [the] victim around inside the premises" in which the victim is already found, the movement generally will not be determined to constitute kidnapping. *Daniels*, 459 P.2d at 238. Although the Court refrained from a detailed analysis into each prong of the test, it concluded that the conduct at issue constituted "brief movements" that were compelled in furtherance of the robbery that did not subject the victims to a substantial increase in a risk of harm above and beyond the type of movement inherent in a robbery and, therefore, were incidental. *Id.*

As we did in *Trujillo*, in the context of the restraint of a victim, we apply the *Daniels* analysis in the context of a movement

of a victim. *Trujillo*, 2012-NMCA-112, ¶ 39. Here, H.T. testified that as to Count 15, Defendant "made" her go or "took" her into another room, and as to Count 16, she and Defendant "went" into another room. In both instances, the movement was from one room to another in the family residence where they were both already located. Furthermore, this movement did not subject H.T. to a substantial increase in risk of harm above and beyond that inherent in a sexual assault. *See Daniels*, 459 P.2d at 238. Applying the *Daniels* test to the facts before us, we conclude these brief movements from one room to another, in furtherance of a sexual assault, were incidental to those crimes and cannot support separate kidnapping convictions.

Accordingly, as to Counts 6, 10, 15, and 16, we reverse Defendant's convictions as a matter of law, and conclude that the restraints and movements described in the testimony were incidental to the sexual assaults, did not exceed the conduct inherent to a sexual assault, and did not evidence the type of conduct that the Legislature intended to be used to support separate kidnapping convictions. However, we note that the factual circumstances herein enable us to make this determination as a matter of law based upon the lack of complexity in the movements and restraints described. *Trujillo*, 2012-NCMA-112, ¶ 42.

THE PHYSICIAN ASSISTANT'S TESTIMONY

Defendant argues that the district court erred in permitting the PA, whom the district court declined to qualify as an expert witness, to testify that her physical findings were consistent with sexual abuse. The State contends that the issue was not properly preserved. We agree.

At trial, the State called the PA who examined the victims after the sexual assaults to testify. She explained that at the time she met the victims, she was a physician assistant at Para Los Niños, an agency or department at "[the University of New Mexico that takes] care of children who have disclosed that they have been sexually abused or there is a concern about sexual abuse." The PA stated that during the sixteen months she worked at Para Los Niños, she saw 310 sexual abuse cases. She further indicated that she had previously been qualified as an expert in approximately five to seven child sexual abuse cases. The State moved to tender the PA as an expert, but the defense objected on the basis that she did not have sufficient specialized training. The district court decided that it would not qualify the PA as an expert witness as she had not performed individual research and had not been peer reviewed; however, it ruled that "[s]he can talk about what she observed. She can talk about what her observations may be consistent with. She just can't come to any conclusions." The court then asked if both the State and Defendant agreed with this ruling, and both parties responded affirmatively.

The PA testified in a manner consistent with the ruling agreed to by the parties, stating that at the time she examined L.T., she observed erythema or redness "on the labia majora and minora on the right and on the clitoris." The State then asked her what the possible reasons could be for the redness, and she responded that "[i]t could be sexual abuse . . . [or i]t also could be scratching or something like that." The defense never objected to the question or the answer. The PA later testified that L.T. had a "little scratch" on the right labia minora. Again, the State asked if this injury "could be consistent with sexual abuse[.]" The PA responded

affirmatively. At this point, the defense objected on the basis that the PA is not an expert in sexual abuse and it was inappropriate for her to make such a conclusion. Outside of the jury's presence, the State argued that everyone previously agreed that it was allowable for the PA to discuss whether an observation is consistent with sexual abuse but not make a definitive diagnosis. The court found that the PA could testify whether the injuries were consistent with sexual abuse, but it was up to the jury to decide whether or not the injuries were definitively a result of sexual abuse. Back in the presence of the jury, the PA provided additional examples of what could have caused the injuries, including L.T. scratching herself, wearing tight underwear, or having urine or fecal matter in her underwear.

Rule 11-103(A)(1)(a) NMRA requires that in order to preserve a claim of error, a party must make a timely objection. "Generally, evidentiary objections must be made at the time the evidence is offered." *State v. Neswood*, 2002-NMCA-081, ¶ 18, 132 N.M. 505, 51 P.3d 1159. Prior to Defendant objecting, he had already agreed that it was appropriate for the PA to testify regarding her findings and what they might be consistent with. When Defendant finally did object during the PA's subsequent testimony, the PA had already previously testified, without objection, that the injuries could be consistent with sexual abuse or with L.T. scratching herself. It was not until the PA again testified about the possibility of sexual abuse that Defendant ultimately objected. As this Court has previously determined, under evidentiary circumstances such as these, "the horse was already out of the barn when Defendant tried to shut the door; the jury had already heard [of various possible causes of the injuries] before the objection was made." *Id.* Defendant should have objected immediately to the district court's inquiry into whether the party's were comfortable with the PA "talk[ing] about what her observations may be consistent with." Accordingly, we decline to review this argument any further because Defendant's objection was untimely and therefore not preserved.

CONCLUSION

For the foregoing reasons, we affirm Defendant's conviction as to Counts 2, 3, 4, 5, 8, 11, and 13. We reverse as to Counts 6, 10, 15, and 16. We remand for resentencing in accordance with this opinion.

IT IS SO ORDERED.

J. MILES HANISEE, Judge

I CONCUR:

CYNTHIA A. FRY, Judge

TIMOTHY L. GARCIA, Judge, (concurring in part, dissenting in part).

GARCIA, Judge (concurring in part and dissenting in part)

Respectfully, I disagree with one aspect of the majority decision and would reverse Defendant's conviction of CSPM alleged in Count 13 and remand for the entry of an amended judgment and resentencing on the lesser included offense of CSCM for Count 13.

The majority determined that sufficient evidence exists from the testimony to support a conviction of CSPM under Count 13 because "it would be unwise for us to establish within our caselaw any requirement that the trial record reflect comprehension of

anatomic specifics or the technical nuances of what constitutes penetration under the applicable jury instruction." Majority Opinion ¶ 9. In effect, the majority explained that evidence need not be so anatomically exacting in situations such as this one, involving skin to skin contact where Defendant "would slide his fingers *up and down on* [H.T.'s] private part." Majority Opinion ¶¶ 6, 9 (Emphasis added.) However, when specifically asked to clarify this testimony, defense counsel asked H.T., "[Y]ou testified today that when [Defendant] put his hand on your private, he would move it in and out. Is that how you worded it?" H.T.'s response was "*No*, like . . . he would move *up and down*." (Emphasis added.) The answer was confirmed a second time. "Up and down?" Answer: "Yes." The only other evidence or testimony regarding the factual allegations for Count 13 came from the PA who examined H.T. several days later and testified that "she did not observe any injuries" on H.T. but did observe redness and small scratch injuries on her sister, L.T. Majority Opinion ¶ 6.

The factual issue in this case is not about H.T.'s comprehension of anatomical specifics or technical nuances. H.T.'s reference to her vagina as "my private part" is not at issue in this case. Defendant does not argue that his conviction should be overturned because H.T. failed to sufficiently describe Defendant's fingers sliding up and down on her vagina. The only issue is whether the evidence established the insertion, to any extent, of Defendant's finger(s) into the vagina of H.T. *See* UJI 14-957 NMRA (requiring insertion into the body part of a child as one of the elements for CSPM of a child under the age of thirteen); § 30-9-11(A). When asked this specific question regarding whether Defendant put his hand in her private part, H.T. answered "No." The State does not challenge the veracity or truthfulness of H.T.'s answer to the only question that was asked regarding the potential penetration of her vagina.

Sufficient evidence exists to affirm a conviction where substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to each essential element of a crime charged. *Apodaca*, 1994-NMSC-121, ¶ 3. In reviewing an insufficiency claim, we must view the evidence in the light most favorable to the state and indulge all reasonable inferences in favor of the verdict. *State v. Phillips*, 2000-NMCA-028, ¶ 7, 128 N.M. 777, 999 P.2d 421. The only evidence offered regarding whether Defendant inserted his finger, to any extent, into the vagina of the victim was specifically answered by H.T.—"No." The record is void of any other evidence of penetration of H.T.'s vagina. Any other logical inference or conclusion of penetration that might be drawn from H.T.'s answer is nothing more than pure speculation, conjecture, or guesswork. Our appellate courts do not permit the jury to determine guilt based upon speculation, guess, or conjecture. *State v. Rojo*, 1999-NMSC-001, ¶ 31, 126 N.M. 438, 971 P.2d 829; *State v. Slade*, 2014-NMCA-088, ¶ 14, 331 P.3d 930, *cert. granted* 2014-NMCERT-008, 334 P.3d 425; *see* UJI 14-6006 NMRA (instructing the jury not to base their verdict on speculation, guess or conjecture). The jury was asked to utilize speculation and conjecture to contradict H.T.'s direct testimony and then impermissibly infer that other evidence established penetration *into* her private part.

As a result, I respectfully dissent regarding Defendant's conviction of CSPM under Count 13. Because the lesser included offense of CSCM was also presented to the

jury regarding Count 13 and because sufficient evidence exists for a reasonable jury to convict Defendant of CSCM regarding Count 13, this Court should have remanded for the entry of judgment and resentencing for CSCM on Count 13. *See Slade*, 2014-NMCA-088, ¶ 38 (Generally, "appellate courts have the authority to remand a case for entry of judgment on the lesser included offense and resentencing rather than retrial when the evidence does not support the offense for which the defendant was convicted but does support a lesser included offense." (internal quotation marks and citations omitted)); *State v. Haynie*, 1994-NMSC-001, ¶¶ 3-4, 116 N.M. 746, 867 P.2d 416 (reversing the defendant's first degree murder conviction due to insufficient evidence and remanding to the district court for entry of judgment on the lesser included charge of second degree murder where the jury had been instructed on that charge, substantial evidence supported conviction on that charge, and the interests of justice would not be better served by a new trial). For the reasons stated herein, I would reverse the district court's determination of guilt for CSPM under Count 13 and would remand Count 13 for entry of judgment and resentencing for the lesser included charge of CSCM. I concur in the majority decision in all other respects.

TIMOTHY L. GARCIA, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-049

Filing Date: January 13, 2015

Docket No. 33,154

MIGUEL MAEZ,

Worker-Appellant,

v.

RILEY INDUSTRIAL and CHARTIS,

Employer/Insurer-Appellees.

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OPINION

WECHSLER, Judge.

In *Vialpando v. Ben's Automotive Services*, 2014-NMCA-084, ¶ 1, 331 P.3d 975, *cert. denied*, 331 P.3d 924 (2014), this Court held that the Workers' Compensation Act, NMSA 1978, §§ 52-1-1 to -70 (1929, as amended through 2013), authorizes reimbursement for medical marijuana used pursuant to the Lynn and Erin Compassionate Use Act (Compassionate Use Act), NMSA 1978, §§ 26-2B-1 to -7 (2007). The workers' compensation judge in *Vialpando* had found

that the worker was qualified to participate in the Department of Health Medical Cannabis Program authorized by the Compassionate Use Act and that such treatment would be reasonable and necessary medical care. 2014-NMCA-084, ¶ 1.

In this appeal, the workers' compensation judge (WCJ) found that the worker's authorized treating health care provider (HCP) did not prescribe medical marijuana and concluded that medical marijuana was not reasonable and necessary medical care. Worker Miguel Maez argues that the WCJ erred in this conclusion because Worker had proven that medical marijuana was reasonable and necessary medical care, particularly based on the evidence that the HCP's treatment plan for Worker included medical marijuana, and the HCP and another doctor had certified Worker's use of medical marijuana as required by the Compassionate Use Act.

Because there is not substantial evidence supporting the WCJ's conclusion that medical marijuana was not reasonable and necessary medical care for Worker, we reverse the WCJ's compensation order.

I. BACKGROUND

Worker suffered two compensable injuries to his lumbar spine in the course and scope of his employment with Riley Industrial on February 14, 2011 and March 4, 2011. Riley Industrial was insured by Chartis (both referred to as Employer herein). Worker was entitled to payment of temporary disability until the date of maximum medical improvement and permanent partial disability thereafter based on a seven percent whole body impairment for the balance of the 500-week benefit period. He was also entitled to ongoing reasonable and necessary medical care. His authorized HCP was Dr. Anthony Reeve.

The WCJ found that "Dr. Reeve did not prescribe medical marijuana to Worker" and concluded that "[m]edical marijuana is not reasonable and necessary medical care from an authorized HCP" that would require payment by Employer. Worker appeals from the WCJ's compensation order to the extent that the WCJ did not award medical benefits for Worker's use of medical marijuana for pain management.

II. REASONABLE AND NECESSARY MEDICAL CARE

A. Issue on Appeal

On appeal, Worker initially makes arguments concerning the interrelationship of the Workers' Compensation Act and the Compassionate Use Act that are similar to those we decided in *Vialpando*. In *Vialpando*, filed after Worker filed his brief-in-chief in this case, we determined that medical marijuana treatment approved under the Compassionate Use Act that the WCJ found to be reasonable and necessary medical care qualifies for reimbursement under the Workers' Compensation Act. *Vialpando*, 2014-NMCA-084, ¶ 1.

The WCJ in this case did not find Worker's medical marijuana treatment to be reasonable and necessary medical care. To the contrary, the WCJ specifically concluded that "[m]edical marijuana is not reasonable and necessary medical care from an authorized HCP." Worker argues that the WCJ erred in reaching this conclusion because the evidence indicated that medical marijuana is reasonable care for Worker's chronic low back pain and because the WCJ incorrectly found that

medical marijuana was not "prescribed" by Dr. Reeve.

The Workers' Compensation Act requires an employer to provide a worker "reasonable and necessary health care services from a health care provider." Section 52-1-49(A). Conversely, an employer need not provide a worker with health care that is not reasonable and necessary. *See Vargas v. City of Albuquerque*, 1993-NMCA-136, ¶ 8, 116 N.M. 664, 866 P.2d 392 ("[T]he employer's obligation is limited by Section 52-1-49(A) to paying for 'reasonable and necessary' health care services"). Thus, the pivotal question in Worker's appeal is whether the evidence supports the WCJ's conclusion that medical marijuana was not reasonable and necessary medical care.

B. Standard of Review

We address this question under a whole record standard of review by determining whether substantial evidence in the record as a whole supports the WCJ's conclusion. *Dewitt v. Rent-A-Center, Inc.*, 2009-NMSC-032, ¶ 12, 146 N.M. 453, 212 P.3d 341. Substantial evidence is credible evidence in light of the whole record "that is sufficient for a reasonable mind to accept as adequate to support the conclusion[.]" *Id.* (internal quotation marks and citation omitted). We give deference to the WCJ as factfinder and view the evidence in the light most favorable to the decision without disregarding contravening evidence. *Id.*

While we generally may not weigh the evidence, even under whole record review, such review "allows the reviewing court greater latitude to determine whether a finding of fact was reasonable based on the evidence[.]" *Herman v. Miners' Hosp.*, 1991-NMSC-021, ¶ 10, 111 N.M. 550, 807 P.2d 734. Moreover, our review has even greater latitude when reviewing an issue for which the evidence is documentary in nature. As in this case, when "all or substantially all of the evidence on a material issue is documentary or by deposition," an appellate court may "examine and weigh it[.]" *United Nuclear Corp. v. Gen. Atomic Co.*, 1979-NMSC-036, ¶ 62, 93 N.M. 105, 597 P.2d 290 (internal quotation marks and citation omitted). In review for substantial evidence of such a record from a district court proceeding, the appellate court must then give "some weight to the findings of the trial judge on such issue" and not disturb such findings based on conflicting evidence "unless such findings are manifestly wrong or clearly opposed to the evidence." *Id.* (internal quotation marks and citation omitted). In this case, in which we are applying whole record review, we must similarly give weight to the WCJ's findings and consider contravening evidence. *Dewitt*, 2009-NMSC-032, ¶ 12. Following *United Nuclear*, we will not disturb the WCJ's findings unless they are manifestly wrong or clearly opposed to the evidence. 1979-NMSC-036. ¶ 69.

We apply a de novo standard to the WCJ's application of law to the facts. *Vialpando*, 2014-NMCA-084, ¶ 5.

C. Review of the Evidence

Dr. Reeve provided the evidence concerning the issue of whether medical marijuana constituted reasonable and necessary medical care. He testified by deposition. He made detailed medical reports of each of Worker's visits, and the reports were included as exhibits to his deposition.

Dr. Reeve began treating Worker on

June 13, 2011. He testified that his diagnosis of Worker included chronic back pain and that he treated Worker with medication for pain management. Over the course of Worker's treatment, Dr. Reeve had injected Worker with Toradol and had prescribed Soma, Ultram, Sprix, Percocet, Lortab (oxycodone), and hydrocodone for Worker's pain. Dr. Reeve also referred Worker to another doctor for spinal injections. During one test required for pain management patients, Worker tested positive for marijuana. Dr. Reeve informed Worker that if Worker was going to take marijuana, he needed to have a license for Dr. Reeve to continue administering other narcotics, and further, even if Worker had a license, he would probably consider only additional nonnarcotic pain medication.

On February 28, 2012, Dr. Reeve first saw Worker for a medical marijuana evaluation. In his medical report, Dr. Reeve states that Worker has had spinal injections and chronic pain management and that Worker "has failed traditional pain management and is a candidate for the cannabis program." At that time, Dr. Reeve was treating Worker with hydrocodone. His report concludes with the following:

> **IMPRESSION**
>
> 1. Lumbar radiculopathy.
> 2. Chronic low back pain.
> 3. Failed traditional management.
>
> **REHABILITATION MANAGEMENT AND SUGGESTIONS**
>
> I have reviewed the records and examined the patient. The history, radiographic and physical findings are consistent at this time. I will recommend authorization of medical marijuana as a trial. Authorization is good for one year and the patient will need to show symptomatic progress upon reauthorization.
>
> **TREATMENT PLAN**
>
> Authorization for medical marijuana for one year.

Dr. Reeve re-authorized Worker for the medical marijuana program after an evaluation on April 3, 2013. Similarly, Dr. Reeve again stated in his report that Worker had "failed traditional pain management and is a candidate for the cannabis program." He stated the same "IMPRESSION" and "REHABILITATION MANAGEMENT AND SUGGESTIONS" as he had on February 28, 2012. His "TREATMENT PLAN" stated "Reauthorization for medical marijuana for one year."

The Compassionate Use Act requires for enrollment that "a person licensed in New Mexico to prescribe and administer drugs that are subject to the Controlled Substances Act" provide a "written certification" that "the patient has a debilitating medical condition" and that the person certifying "believes that the potential health benefits of the medical use of cannabis would likely outweigh the health risks for the patient." Section 26-2B-3(E), (H). Dr. Reeve signed the certification for Worker to qualify for the Compassionate Use Act medical marijuana program. The original certification is not part of the record on appeal. Dr. Reeve also signed the certification re-enrolling Worker in the program. In that certification, in addition to the statutory requirements stated above, Dr. Reeve further certified that Worker "has current unrelieved

symptoms that have failed other medical therapies."

At his deposition, Dr. Reeve was asked: "And because you signed for [medical marijuana], do you believe that it is an appropriate medical treatment for [Worker's] herniated disk?" Dr. Reeve responded:

> Well, I think I need to be really clear on this issue. What happens is patients are going to use the cannabis [marijuana] either one way or the other. He already tested positive for it. And so I explain to patients, "If you're going to use cannabis, you should probably have a license for it because people will suspect you of using it ultimately, and you can always pass a preemployment screen or other tests if you have a license for it." And if patients request that I sign it, I will sign for them, but I'm not recommending or distributing or in any way advocating for the use of medical cannabis.

1. Necessity of a Prescription

Worker contends that the WCJ erred in his conclusion that medical marijuana does not constitute reasonable and necessary medical care because Dr. Reeve did not "prescribe" medical marijuana for Worker. The WCJ found that Dr. Reeve did not prescribe medical marijuana to Worker and further found that "Employer is not liable for the purchase of medical marijuana based on the fact that the medical marijuana is not being prescribed by the authorized HCP, Dr. Reeve." The Workers' Compensation Administration regulations adopted pursuant to NMSA 1978, Section 52-4-5 (1993) and NMSA 1978, Section 52-5-4 (2003) applicable at the time Worker filed his application defined "prescription drug" as a drug requiring "a written order from an authorized HCP for dispensing by a licensed pharmacist or authorized HCP." 11.4.7.7(OO) NMAC (12/31/2011). But, as we stated in *Vialpando*, medical marijuana is not a prescription drug. 2014-NMCA-084, ¶ 11. Moreover, as we further stated in *Vialpando*, the certification required under the Compassionate Use Act by a person licensed in New Mexico to prescribe and administer controlled substances is the functional equivalent of a prescription. *Id.* ¶ 12; see § 26-2B-3(E), (H). We thus agree with Worker that the fact that Dr. Reeve did not provide Worker a prescription as defined in the regulations does not support the WCJ's conclusion that medical marijuana was not reasonable and necessary medical care for Worker.

2. Conclusion Regarding Reasonable Medical Care

As we have stated, to the extent that the WCJ based his conclusion that medical marijuana was not reasonable and necessary medical care on his finding that Dr. Reeve did not prescribe medical marijuana for Worker, the WCJ's conclusion is based on a faulty premise. Employer argues that the evidence in the record nevertheless supports the WCJ's conclusion. We therefore turn to the other evidence to determine whether it supports the conclusion that medical marijuana was not reasonable and necessary medical care for Worker.

We discuss the two aspects of the WCJ's conclusion separately. With regard to whether medical marijuana was reasonable medical care for Worker, we have little difficulty concluding that the evidence as a

whole does not support the WCJ's conclusion. Regardless of whether Worker requested treatment with medical marijuana, Dr. Reeve had treated Worker with traditional pain management that had failed. He adopted a treatment plan based on medical marijuana. He would not have done so if it were an unreasonable medical treatment. The evidence does not support a conclusion that Dr. Reeve did not believe medical marijuana to be a reasonable treatment for Worker.

3. Conclusion Regarding Necessary Medical Care

The aspect concerning necessary medical care is more difficult. Dr. Reeve did not testify that the medical marijuana treatment was necessary for Worker's care. Rather, when asked in his deposition whether he believed it was appropriate medical treatment because he had signed for it, Dr. Reeve stated that Worker was using marijuana, that such patients need a license for such use, and that he will sign for them if he is requested. He specified that in doing so he was not recommending marijuana use. He also considered the medical marijuana program to be a patient's decision "as it's private and voluntary and it's not overseen by a physician."

The WCJ decided from this evidence that medical marijuana was not necessary medical care for Worker. The question before us is whether there was substantial evidence for the WCJ to reach this conclusion. Under our standard of review, we must defer to the finder of fact and view the evidence in the most favorable light to the decision without disregarding contravening evidence.

Worker had the burden to establish that medical marijuana was a necessary medical treatment. *See DiMatteo v. Doña Ana Cnty.*, 1985-NMCA-099, ¶ 26, 104 N.M. 599, 725 P.2d 575 (stating under previous version of Workers' Compensation Act that the worker had the burden of proving that his medical expenses were reasonably necessary). The evidence indicates that Dr. Reeve considered traditional pain management to have failed and planned to treat Worker with medical marijuana. Dr. Reeve also testified, however, that medical marijuana treatment is a patient's decision and that he will adopt it on a patient's request. The question before us distills to whether, considering all the evidence, the WCJ could reasonably have concluded that medical marijuana was not necessary medical care because Dr. Reeve merely acceded to Worker's choice and adopted medical marijuana as his treatment plan because Worker had begun to use it on his own.

We begin with the contravening evidence. Dr. Reeve's medical reports clearly state that he had treated Worker with traditional pain management and that such treatment had failed. The medical reports further state that Dr. Reeve was adopting medical marijuana as his treatment plan and would recommend its use for Worker. Dr. Reeve did so, certifying in Worker's re-enrollment form that Worker had "unrelieved symptoms that have failed other medical therapies." We consider this evidence to clearly establish that medical marijuana was necessary for Worker's treatment because (1) traditional pain management had failed and (2) it would not be possible for Dr. Reeve to institute or carry out his treatment plan without medical marijuana.

To support the WCJ's conclusion and to consider the evidence in the light most

favorable to the WCJ's conclusion, we must be able to infer from Dr. Reeve's deposition testimony, as argued by Employer, that medical marijuana treatment was entirely Worker's choice and that Dr. Reeve certified Worker for the medical marijuana program only because Worker intended to use it regardless and asked Dr. Reeve for the certification. In this regard, Dr. Reeve testified that Worker had tested positive for marijuana, that patients use marijuana "either one way or the other[,]" and that he will sign for patients if requested. He further stated that he was "not recommending or distributing or in any way advocating for the use of medical cannabis."

But, even reading this evidence in the light most favorable to the WCJ's decision, we do not consider this testimony to be inconsistent with Dr. Reeve's medical records. There is no conflict in the evidence that Dr. Reeve addressed medical marijuana as a treatment for Worker because Worker had used marijuana and tested positive for it. Nor do we question that Dr. Reeve pursued medical marijuana as a treatment plan because Worker requested it. Dr. Reeve's testimony also indicates that, in adopting his treatment plan, he did not recommend medical marijuana to Worker or advocate its use. Dr. Reeve did not distribute medical marijuana to Worker. *See* Section 26-2B-4(E) (stating that a practitioner may not be subject to arrest, prosecution, or penalty for distributing medical marijuana under the Compassionate Use Act).

We must focus on the question at issue—whether medical marijuana was necessary medical care for Worker. The facts that Dr. Reeve did not initiate or recommend to Worker such care are not dispositive. Regardless of whether he took such action or was merely "passive," as Employer contends, Dr. Reeve adopted a treatment plan that called for medical marijuana. By the very nature of such treatment, medical marijuana was a necessary component. Dr. Reeve then recommended Worker for receipt of medical marijuana by his certification. He did so, even though at Worker's request, because traditional pain management was not successful for Worker.

Perhaps most significantly, we cannot accept the contention, albeit implied, that Dr. Reeve would certify Worker for medical marijuana use solely on Worker's request regardless of whether it was appropriate for Worker's medical care. Marijuana is a controlled substance. The Compassionate Use Act makes an exception to the contraband use of marijuana only when necessary for medical treatment. *See* § 26-2B-2 ("The purpose of the [Compassionate Use Act] is to allow the beneficial use of medical cannabis in a regulated system for alleviating symptoms caused by debilitating medical conditions and their medical treatments."). Of course, a patient must wish to participate in the Compassionate Use Act program, but that law does not contemplate that individuals who wish to receive marijuana may do so merely upon request; it requires the certification by a professional. Nor does it contemplate that this professional certification will be issued in an irresponsible fashion. Dr. Reeve was familiar with the Compassionate Use Act program and testified that he was "one of only two doctors that I know of in the state that will sign for the medical cannabis[.]" We cannot infer from Dr. Reeve's testimony that he would certify Worker for the Compassionate Use Act program without exercising his medical judgment. Indeed, to

the contrary, his medical records describe in detail the basis for his exercise of his medical judgment.

We additionally note that Dr. Reeve re-examined Worker on April 3, 2013 and re-authorized Worker for the Compassionate Use Act program. Dr. Reeve certified at that time that Worker continued to meet the eligibility requirements for the program and that Worker "has current unrelieved symptoms that have failed other medical therapies." This certification underscores Worker's need for medical marijuana therapy.

We thus read the evidence in the record as a whole as failing to support and as clearly opposed to the WCJ's conclusion that medical marijuana was not reasonable and necessary medical care.

III. WORKER'S REFUSAL OF REASONABLE AND NECESSARY MEDICAL CARE

Employer also argues that, if medical marijuana is reasonable and necessary medical care, Employer should not be responsible to reimburse it because Worker refused the reasonable and necessary medical care that Dr. Reeve was providing to him. We address this argument because, if Employer is correct, we could affirm the WCJ's compensation order because it is right for a reason that it does not address. *See Davis v. Los Alamos Nat'l Lab.*, 1989-NMCA-023, ¶ 18, 108 N.M. 587, 775 P.2d 1304 (stating that we will affirm the decision of a workers' compensation order if it is right for any reason).

However, we do not agree with Employer. Employer's argument is premised on its position that:

> It was Worker's own choice, and not Dr. Reeve's professional judgment of what constituted reasonable and necessary care, that first motivated the medical use of marijuana. Dr. Reeve's rationale for signing for the medical cannabis was not that he wasn't providing reasonable and necessary care, but rather that Worker was going to use marijuana regardless of whether Worker was taking narcotic pain medication.

As we have discussed, however, the substantial evidence in the record as a whole does not support the proposition that Dr. Reeve certified Worker for medical marijuana treatment merely because Worker had made that choice. The record, which includes Dr. Reeve's medical reports, does not support a conclusion that traditional pain medication was the sole reasonable and necessary treatment, precluding any other.

IV. CONCLUSION

Substantial evidence in the record as a whole does not support the WCJ's conclusion that medical marijuana was not reasonable and necessary medical care. We therefore reverse the WCJ's compensation order.

IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR:

CYNTHIA A. FRY, Judge

MICHAEL E. VIGIL, Judge

Certiorari Denied, April 14, 2015, No. 35,181

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-050

Filing Date: March 12, 2015

Docket No. 32,669

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

JACKIE WINTERS,

Defendant-Appellant.

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OPINION

FRY, Judge.

Defendant's motion for rehearing is granted. The Opinion filed on February 18, 2015 is withdrawn, and this Opinion is substituted therefor.

Defendant appeals his convictions for larceny and criminal damage to property. The convictions arose out of the same incident, although the charges were not joined for trial. In his larceny trial, Defendant unsuccessfully challenged testimony by a sheriff's deputy that shoe prints found at the scene were similar to shoe prints found outside Defendant's residence. He was subsequently found guilty. Following his conviction for larceny, Defendant conditionally pleaded no contest to the charge of criminal damage to property (CDP), reserving an unstated issue for appeal. On appeal from both convictions, Defendant argues that Deputy Jason Daugherty's shoe print testimony was improper lay witness testimony. We conclude that because Deputy Daugherty did not provide a foundation for his opinion that the shoe prints at issue were similar, the district court abused its discretion in allowing him to give this opinion. We therefore reverse his conviction for larceny. Defendant further argues that reversal of his larceny conviction requires reversal of his conditional plea in the CDP case. However, because Defendant neither reserved nor preserved an issue for appeal during his no contest plea in the CDP case, we uphold the plea.

BACKGROUND

Late one evening, the foreman of an oil extraction company operating in Lea County, New Mexico, received an alert that one of the

company's pumps had stopped running. Upon arriving at the scene, a company employee discovered that the "fluid end" of an injection pump had been removed and was in the bed of a pick-up truck on site. The pick-up truck did not belong to any of the employees of the company. In addition to the theft of the fluid end, the instrument panel of a company backhoe nearby was damaged.

The company reported the theft, and Deputy Daugherty of the Lea County Sheriff's Department arrived to investigate. Although the keys to the truck were in the ignition, the truck was inoperable. Deputy Daugherty ran the license plate number of the truck and determined that it belonged to Defendant. Deputy Daugherty also took photos of different sets of shoe prints at the scene that he believed were potentially associated with suspects of the crime. He believed they were associated with the suspects because he eliminated shoe prints he believed matched other employees and law enforcement officials at the crime scene and because the shoe prints were in close proximity to the truck.

Deputy Daugherty then drove to Defendant's residence to secure the area pending the issuance of a search warrant. While at the residence, Deputy Daugherty observed shoe prints outside the residence that he believed were similar to the shoe prints he photographed at the crime scene. Deputy Daugherty did not take photos of the shoe prints at the residence, but other investigators on site did. Defendant was subsequently arrested and charged with one count of larceny and one count of CDP.

Procedural History

For unknown reasons, Defendant's charges were separated into two cases before two different judges in district court. The larceny case went to trial first. Before trial, Defendant argued that Deputy Daugherty should be precluded from testifying as to the similarity between the shoe prints at the crime scene and those he observed at Defendant's residence because the evidence was irrelevant without expert testimony establishing any alleged similarities between the prints. The district court denied the motion. Defendant also objected to the testimony at trial because there was no foundation for Deputy Daugherty's testimony that the shoe prints were "substantially the same." The jury convicted Defendant on the larceny charge.

A few days after his conviction in the larceny case, Defendant pleaded no contest to the charge of CDP. During the plea hearing, Defendant indicated that he wished to enter into a conditional no contest plea to reserve an issue for appeal. When asked what particular issue he was reserving, Defendant stated that while he believed that there was an appealable issue, he did not want to single out one particular issue until he reviewed the record. Defendant further indicated that he wished to join the larceny and CDP cases on appeal. The prosecution did not object to Defendant's conditional plea. The district court accepted Defendant's no contest plea, noting that the plea was "conditioned upon successful prosecution of an appeal reversing an unstated issue." Defendant now appeals.

DISCUSSION

Deputy Daugherty's Opinion Testimony was Improper

Defendant argues that Deputy Daugherty's testimony regarding the similarity between shoe prints found at the scene of the theft and shoe prints found outside

Defendant's residence was improper lay witness opinion testimony. We review this issue for abuse of discretion. *See State v. Luna*, 1979-NMCA-048, ¶ 18, 92 N.M. 680, 594 P.2d 340. We conclude that because no foundation was laid for Deputy Daugherty's opinion that shoe prints found at the scene were substantially the same to shoe prints found near Defendant's residence, his opinion constituted improper lay witness opinion testimony.

Rule 11-701 NMRA governs the admission of opinion testimony by lay witnesses. The Rule states,

> If a witness is not testifying as an expert, testimony in the form of opinion is limited to one that is
>
> A. rationally based on the witness's perception,
>
> B. helpful to clearly understanding the witness's testimony or to determining a fact in issue, and
>
> C. not based on scientific, technical or other specialized knowledge within the scope of Rule 11-702 NMRA.

Generally speaking, our Supreme Court has recognized that in some circumstances shoe print comparison is within the purview of permissible lay witness opinion testimony. *See State v. Rondeau*, 1976-NMSC-044, ¶¶ 42-43, 89 N.M. 408, 553 P.2d 688 (holding that a detective could provide non-expert opinion testimony regarding similarities between shoe prints found at the scene and shoes seized from the defendant); *State v. Martinez*, 1932-NMSC-051, ¶¶ 7-9, 36 N.M. 360, 15 P.2d 685 (holding that lay witness testimony comparing tracks found at the crime scene with the defendant's shoes was admissible); *State v. Ancheta*, 1915-NMSC-003, ¶ 10, 20 N.M. 19, 145 P. 1086 (holding that testimony by lay witness regarding his observations of tracks at the crime scene with tracks known to be the defendant's was proper lay witness opinion testimony). While these cases engage in a somewhat cursory analysis of the issue, we glean from them that, at least, the lay witness's opinion regarding the similarities between the prints or shoes at issue must derive from personal observation or examination of the similarities of the tracks believed to be the suspect's and a shoe or print known to be the defendant's. *See Rondeau*, 1976-NMSC-044, ¶ 43 ("[A] witness who has made measurements of the tracks, and the foot or shoe of the defendant, or who has made some such comparison between the tracks and the shoes of the defendant, [such] as placing the shoe in the tracks, or who has detailed peculiarities in the tracks on the ground which correspond with the shoes, or with the proven or admitted tracks of the defendant, that in either of these cases . . . the witness may give his opinion as to the similarity of the tracks." (internal quotation marks and citation omitted)); *Martinez*, 1932-NMSC-051, ¶ 9 ("[A] witness who has measured the tracks and compared his measurement with the shoes of the accused may testify to the results and that a correspondence exists in size and shape." (internal quotation marks and citation omitted)).

This principle appears rooted in the concept that "opinion testimony of lay witnesses is generally confined to matters which are within the common knowledge and experience of an average person." *Garcia v. Borden, Inc.*, 1993-NMCA-047, ¶10, 115

N.M. 486, 853 P.2d 737. That is, certain similarities between shoe prints, including tread features and size, can be considered, in some instances, distinctive enough to be readily apparent to an average observer. *See Luna*, 1979-NMCA-048, ¶ 19 (stating that for a lay witness's opinion to be based on the witness's perception, the opinion must be one a "normal person would form on the basis of the observed facts"); *People v. Maglaya*, 6 Cal. Rptr. 3d 155, 158 (Ct. App. 2003) (stating that when "shoeprints are so large and the points of similarity so obvious, the comparison is a matter of nonexpert rather than of expert testimony." (emphasis, alteration, internal quotation marks, and citation omitted)). However, because this will not always be the case, we agree with jurisdictions that require a foundation to be laid before a lay witness may testify to the purported similarities between prints. In such a case, a "lay witness may be permitted to express his or her opinion as to the similarity of footprints if it can be shown that his or her conclusions are based on measurements or peculiarities in the prints that are readily recognizable and within the capabilities of a lay witness to observe." *State v. Jells*, 559 N.E.2d 464, 471 (Ohio 1990). As the court in *Jells* explained, "This means that the print pattern is sufficiently large and distinct so that no detailed measurements, subtle analysis or scientific determination is needed." *Id.* Without such a foundation, the lay witness's opinion testimony is outside the bounds of Rule 11-701.

[redacted] In this case, Defendant objects to Deputy Daugherty's opinion that shoe prints photographed at the scene were substantially similar to shoe prints photographed outside Defendant's residence. At trial, Deputy Daugherty testified that he observed shoe prints at the scene and at Defendant's residence and, based on his observations, the shoe prints were "substantially the same." No other foundation for the admission of this opinion was given. The State later moved to admit photographs of three different shoe prints taken by Deputy Daugherty at the scene but not photographs taken at the residence.

[redacted] The foundation laid for Deputy Daugherty's opinion regarding the similarities between the shoe prints was insufficient. Deputy Daugherty did not testify to the observations he made regarding the similarities in the prints or any other peculiarities. He merely testified that he observed shoe prints in both places and that they were "substantially the same." Indeed, not only did Deputy Daugherty fail to state the observations that supported his opinion, his testimony failed to specify which of the three shoe prints—photographs of which were later published to the jury—he believed matched shoe prints later observed outside Defendant's residence. This is problematic because it does not establish that his opinion was "rationally based on [his] perception[s]" or "helpful to clearly understanding [his] testimony[.]" Rule 11-701(A), (B).

[redacted] Furthermore, Deputy Daugherty's testimony failed to establish a foundation linking the shoe prints he observed outside Defendant's residence with Defendant. In *People v. Zismer*, the court stated that "[t]here is a sound policy for requiring foundational evidence that the footprint matches [the] defendant's shoes." 80 Cal. Rptr. 184, 190 (1969). While the court noted that such a link may not always be required when there is "independent evidence linking [the] defendant with the tracks. . . where the fact that [the] defendant made the tracks can only be established by a comparison of the tracks with [the] defendant's shoes . . . [s]ufficient

foundational evidence should be required to support a logical inference of identity from the common distinctive features of the footprint and the [defendant's] shoes." *Id.* Although this specific issue has not been analyzed by a New Mexico appellate court, this requirement has been generally acknowledged in our Supreme Court's decisions on this issue. *See Rondeau*, 1976-NMSC-044, ¶ 43 (stating that a witness may testify to similarities between tracks found and the shoes or shoe prints of the defendant); *Martinez*, 1932-NMSC-051, ¶ 9 (stating that "a witness who has measured the tracks and compared his measurement *with the shoes of [the] accused* may testify to the results and that a correspondence exists in size and shape" (emphasis added) (internal quotation marks and citation omitted)). In this case, aside from the fact that shoe prints were found near Defendant's residence, there was no other testimony or independent evidence linking the shoe prints found outside Defendant's home with Defendant. Therefore, Deputy Daugherty's testimony failed to provide a sufficient foundation for his opinion.

In sum, Deputy Daugherty's testimony, when considered as a whole, amounts to a cursory opinion that three different shoe prints found at the scene were substantially like some unknown shoe prints he observed outside Defendant's residence, without any specification regarding their similarities, much less which shoe prints he was actually comparing. Accordingly, his testimony failed to lay a foundation under Rule 11-701 and was impermissible lay witness opinion testimony.

Defendant Did Not Properly Enter Into a Conditional Plea

Because we conclude that Deputy Daugherty's opinion testimony was improper, we also address Defendant's argument that he properly preserved the issue challenging the testimony in his conditional no contest plea in the CDP case. Defendant argues that if he had, in fact, proceeded to trial on this charge, it is likely that Deputy Daugherty's opinion regarding the shoe prints would have been admitted at this trial. Therefore, he claims that reversal on this point in the larceny case requires a reversal of his conviction for CDP. We disagree.

"[A] voluntary guilty plea ordinarily constitutes a waiver of the defendant's right to appeal his [or her] conviction on other than jurisdictional grounds." *State v. Hodge*, 1994-NMSC-087, ¶ 14, 118 N.M. 410, 882 P.2d 1. A conditional plea, however, is a procedure that "enable[s] a defendant to reserve a significant pretrial issue for appeal in a case in which conviction seems certain unless the defendant prevails on the pretrial issue." *State v. Celusniak*, 2004-NMCA-070, ¶ 7, 135 N.M. 728, 93 P.3d 10. Rule 5-304(A)(2) NMRA governs conditional pleas. The Rule states, "With the approval of the court and the consent of the state, a defendant may enter a conditional plea of guilty or no contest, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pre-trial motion." *Id.* Thus, a "defendant enters a valid conditional plea by (1) preserving the error through a pretrial motion, (2) obtaining consent of the prosecution, and (3) obtaining approval of the court." *Celusniak*, 2004-NMCA-070, ¶ 7.

Apart from the consent requirements, the rule embodies two other principles: preservation and reservation. First, the rule requires that there be an "adverse determination of any specified pre-trial motion." Rule 5-304(A)(2). Therefore, a

defendant must have *preserved* the issue for appellate review. Second, the defendant must specify the specific issue or issues that he or she is *reserving* for appellate review. That is, the defendant must "express an intention to reserve a particular pretrial issue for appeal." *State v. Handa*, 1995-NMCA-042, ¶ 12, 120 N.M. 38, 897 P.2d 225 (internal quotation marks and citation omitted).

In this case, Defendant did neither. Defendant did not file any motion challenging Deputy Daugherty's testimony in the CDP case. Without such an adverse determination ruling the testimony admissible, there is no alleged error on which to base appellate review. Furthermore, Defendant did not *reserve* an issue for appellate review. Defendant did not specify an issue when entering his conditional plea, and, in fact, declined to do so. Such failures are not inconsequential. Without preserving an issue for review or indicating what issue the defendant is reserving, neither the prosecutor nor the district court can properly grant their respective consent or approval of the conditional plea. *See Hodge*, 1994-NMSC-087, ¶ 20 (stating that both the prosecutor and the court should ensure that issues reserved in conditional pleas are case-dispositive). Accordingly, we conclude that Defendant did not enter a valid conditional plea reserving his right to appeal the admissibility of Deputy Daugherty's testimony in his CDP case.

Sufficient Evidence Supported Defendant's Larceny Conviction

Defendant argues that his larceny conviction is not supported by sufficient evidence. Specifically, Defendant argues that there was no evidence that he was at the scene or that he personally took the fluid end of the pump. He argues instead that there was evidence only that his truck was at the scene, while other evidence established that he was elsewhere when the theft occurred.

Review of a sufficiency of the evidence challenge involves a two-step process. *State v. Apodaca*, 1994-NMSC-121, ¶ 6, 118 N.M. 762, 887 P.2d 756. Initially, the evidence is viewed in the light most favorable to the verdict. *Id.* Then the appellate court must make a legal determination of "whether the evidence viewed in this manner could justify a finding by any rational trier of fact that each element of the crime charged has been established beyond a reasonable doubt." *Id.* (internal quotation marks and citation omitted). The question is whether the district court's "decision is supported by substantial evidence, not whether the court could have reached a different conclusion." *In re Ernesto M., Jr.*, 1996-NMCA-039, ¶ 15, 121 N.M. 562, 915 P.2d 318.

In order to convict Defendant of larceny, the jury was required to find beyond a reasonable doubt that (1) Defendant took and carried away a fluid end off of a pump, belonging to another, which had a market value over $2500 but less than $20,000; (2) at the time he took this property, Defendant intended to permanently deprive the owner of it; and (3) this happened in New Mexico on the 24th day of October, 2011. Defendant does not dispute the value of the property or the date of the offense. He only challenges whether he was the one who committed the theft.

We conclude that there was sufficient evidence supporting Defendant's conviction. Regardless of our conclusion

above in regard to Deputy Daugherty's testimony, when reviewing whether sufficient evidence exists to support retrial, we include in our review the erroneously admitted evidence. *See State v. Post*, 1989-NMCA-090, ¶¶ 22-24, 109 N.M. 177, 783 P.2d 487 ("If all the evidence, including the wrongfully admitted evidence, is sufficient, then retrial following appeal is not barred."). In this case, evidence that Defendant's truck was found at the scene with the stolen property in the bed combined with Deputy Daugherty's opinion that shoe prints found at the scene matched shoe prints found at Defendant's residence was sufficient to permit the jury to reasonably infer that Defendant was at the scene and committed the theft. The fact that Defendant put forth evidence that he was elsewhere at the time is immaterial. "Contrary evidence supporting acquittal does not provide a basis for reversal because the jury is free to reject Defendant's version of the facts." *State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829. Accordingly, because there was sufficient evidence to support conviction, Defendant is subject to retrial on remand. *See Post*, 1989-NMCA-090, ¶ 22.

CONCLUSION

For the foregoing reasons, we reverse Defendant's conviction for larceny and affirm his plea of no contest to the CDP charge.

IT IS SO ORDERED.

CYNTHIA A. FRY, Judge

WE CONCUR:

MICHAEL E. VIGIL, Chief Judge

J. MILES HANISEE, Judge

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMSC-014

Filing Date: April 16, 2015

Docket No. 34,295

RODRIGO DOMINGUEZ,

Petitioner,

v.

STATE OF NEW MEXICO,

Respondent.

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for Petitioner

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for Respondent

OPINION

CHÁVEZ, Justice.

In *State v. Montoya*, 2013-NMSC-020, ¶¶

2, 22-27, 54, 306 P.3d 426,[1] this Court held that the Double Jeopardy Clause of the United States Constitution, U.S. Const. amend. V, precludes a defendant from being cumulatively punished for both voluntary manslaughter and shooting at or from a motor vehicle resulting in great bodily harm in a situation where both convictions are based on the same shooting of the same victim. The double jeopardy analysis in *Montoya* has been applied in other cases by the Court of Appeals to preclude a defendant from being punished cumulatively for both aggravated battery and shooting at or from a motor vehicle resulting in great bodily harm. *See State v. Munoz*, 2014 WL 4292963, No. 30,837, mem. op. ¶¶ 2-3, 5 (N.M. Ct. App. June 23, 2014) (non-precedential), *cert. denied*, 2014-NMCERT-008; *State v. Rudy B.*, 2014 WL 3039618, No. 27,589, mem. op. ¶¶ 2, 4 (N.M. Ct. App. May 8, 2014) (non-precedential), *cert. denied*, 2014-NMCERT-007.

These are the exact arguments that Petitioner Rodrigo Dominguez made in 2005 on certiorari review to this Court of his convictions for voluntary manslaughter and shooting at or from a motor vehicle resulting in the death of one person, and aggravated battery and shooting at or from a motor vehicle resulting in great bodily injury to a second person. *See State v. Dominguez* (*Dominguez I*), 2005-NMSC-001, ¶¶ 5, 17, 22, 137 N.M. 1, 106 P.3d 563, *overruled by Montoya*, 2013-NMSC-020, ¶¶ 2, 54. A majority of this Court ultimately rejected Dominguez's double jeopardy arguments, concluding that *State v. Gonzales*, 1992-NMSC-003, ¶¶ 4-12, 113 N.M. 221, 824 P.2d 1023, *overruled by Montoya*, 2013-NMSC-020, ¶¶ 2, 54, controlled. *Dominguez I*, 2005-NMSC-001, ¶ 8. Dominguez has now filed a habeas petition pursuant to Rule 5-802 NMRA seeking to retroactively apply *Montoya* to support the same double jeopardy claims he earlier raised on certiorari review. We again decline to accept Dominguez's double jeopardy claims because *Montoya* announced a new procedural rule that cannot be applied retroactively under *Kersey v. Hatch*, 2010-NMSC-020, ¶ 25, 148 N.M. 381, 237 P.3d 683.

BACKGROUND

The following facts from this Court's opinion in *Dominguez I* are not in dispute and are relevant only to understand the double jeopardy issues raised by Dominguez. Dominguez and several of his friends went to a convenience store to fight another group of individuals. *Dominguez I*, 2005-NMSC-001, ¶ 4. Dominguez supplied each member of his group with guns. *Id.* Both groups arrived in cars, and Dominguez was the driver for his group. *Id.* Dominguez's group opened fire after one of their adversaries exited the other group's vehicle carrying a baseball bat. *Id.* One member of Dominguez's group fired multiple times into the opposing group's car and killed Ricky Solisz, the driver. *Id.* Another one of Dominguez's associates shot at and wounded Vince Martinez, an individual who had exited the other group's car. *Id.*

In 2002, Dominguez was convicted of one count of voluntary manslaughter, contrary to NMSA 1978, Section 30-2-3(A) (1994); one count of aggravated battery, contrary to NMSA 1978, Section 30-3-5 (1969); two counts of shooting at or from a motor vehicle, contrary to NMSA 1978, Section 30-3-8(B) (1993); and one count of conspiracy to

[1] *Overruling recognized by State v. Servantez*, 2014 WL 4292919, No. 30,414, mem. op. (N.M. Ct. App. Jul. 30, 2014) (non-precedential).

commit tampering with evidence, contrary to NMSA 1978, Section 30-22-5 (1963, amended 2003) and NMSA 1978, Section 30-28-2 (1979).

The Court of Appeals unanimously affirmed Dominguez's convictions. *See State v. Dominguez*, No. 23,286, mem. op. ¶¶ 5, 14 (N.M. Ct. App. May 20, 2003) (non-precedential). Dominguez petitioned for certiorari review, *State v. Dominguez, cert. granted*, 134 N.M. 320, 76 P.3d 638 (2003), and raised two multiple-punishment double jeopardy issues under the United States Constitution that are relevant to this appeal. First, he claimed that his convictions of voluntary manslaughter and shooting at or from a motor vehicle resulting in Solisz's death violated the protection against double jeopardy. *Dominguez I*, 2005-NMSC-001, ¶ 5. Second, he claimed that his convictions of aggravated battery and shooting at or from a motor vehicle resulting in Martinez's injuries violated the protection against double jeopardy. *Id.* ¶ 17. On appeal, the parties did not dispute that these convictions were "based on the unitary conduct of [Dominguez] aiding and abetting" the shooting of Solisz and Martinez by another member of Dominguez's group. *Id.* ¶ 6. Because shooting at or from a vehicle and voluntary manslaughter or aggravated battery involve unitary acts underlying separate charged offenses, *id.* ¶¶ 6, 7, the Court focused on ascertaining whether the Legislature intended multiple punishments, *id.* ¶¶ 6, 18.

A divided Supreme Court rejected Dominguez's claims and affirmed the Court of Appeals. *Id.* ¶ 26. Applying the *Blockburger* test and concluding that *Gonzales* was controlling precedent, *Dominguez I* refused to find a double jeopardy violation if a defendant was convicted of separately punishable offenses. 2005-NMSC-001, ¶¶ 8, 16, 21. Because the crimes of shooting at or from a motor vehicle and voluntary manslaughter each involved elements that were absent in the other crime, *Dominguez I* held that the offenses were separate, and therefore there was no double jeopardy violation if a defendant was convicted of both crimes. *Id.* ¶ 16. Similarly, *Dominguez I* held that the crimes of shooting at or from a motor vehicle and aggravated battery each involved elements that were absent in the other crime; consequently, convicting Dominguez of both crimes also did not violate double jeopardy. *Id.* ¶ 18.

This Court overruled *Dominguez I* in *Montoya*, 2013-NMSC-020, ¶¶ 2, 54. *Montoya* acknowledged that *Gonzales*, 1992-NMSC-003, and the cases that followed it, including *Dominguez I*, 2005-NMSC-001, had enabled cumulative punishment for the "theoretically separate offenses of causing great bodily harm to a person by shooting at [or from] a motor vehicle and the homicide resulting from the penetration of the same bullet into the same person." *Montoya*, 2013-NMSC-020, ¶ 2. *Montoya* held that "current New Mexico jurisprudence precludes cumulative punishment for both crimes." *Id.* *Montoya* did not answer the question of whether the analysis for finding a double jeopardy violation for manslaughter and shooting at or from a motor vehicle also applied to convictions for aggravated battery and shooting at or from a motor vehicle, *see id.* ¶ 54, although the Court of Appeals has affirmatively answered the question in two unpublished memorandum opinions, *see generally Munoz*, 2014 WL 4292963, No. 30,837; *Rudy B.*, 2014 WL 3039618, No. 27,589.

Dominguez filed a petition for writ of habeas corpus pursuant to Rule 5-802, seeking to retroactively apply *Montoya* to support the same double jeopardy claims he had raised in *Dominguez I*. The petition was summarily dismissed by the trial court for raising previously litigated issues. We then granted Dominguez's petition for writ of certiorari, which was filed pursuant to Rule 12-501 NMRA. *Dominguez v. State*, 2013-NMCERT-010.

DISCUSSION

When reviewing the "propriety of a lower court's grant or denial of a writ of habeas corpus," the trial court's findings of fact "concerning the habeas petition are reviewed to determine if substantial evidence supports the [trial] court's findings." *Duncan v. Kerby*, 1993-NMSC-011, ¶ 7, 115 N.M. 344, 851 P.2d 466. "Questions of law or questions of mixed fact and law . . . are reviewed de novo." *Id.* This "approach provides logical deference to the trial court fact-finder as first-hand observer, while assuring that higher courts perform their sanctioned role as arbiter[s] of the law." *Id.*

In this case, Dominguez presented facts "*only* for purposes of analyzing the double jeopardy issues presented on appeal." The State does not dispute these facts. Thus, there are only questions of law to be reviewed de novo. Dominguez argues that (1) this case does not concern *Montoya*'s retroactive application because "habeas petitioners *relitigating claims already disposed of on direct appeal* should benefit from a new rule adopting their prior arguments"; (2) our retroactivity jurisprudence "must be revisited" if it precludes retroactive application of *Montoya*; and (3) "because [*Dominguez I*] expressly advocated the position adopted in *Montoya*, this Court may retroactively apply [*Montoya*] to [*Dominguez I*] *only*."

I. Dominguez Can Relitigate Previously Raised Claims

The trial court dismissed Dominguez's petition as a matter of law because the petition presented issues that had been previously litigated. We review de novo the propriety of this determination. *Duncan*, 1993-NMSC-011, ¶ 7. In *Clark v. Tansy*, 1994-NMSC-098, ¶ 14, 118 N.M. 486, 882 P.2d 527, this Court held that "when a habeas petitioner can show that there has been an intervening change of law or fact, or that the ends of justice would otherwise be served, principles of finality do not bar relitigation of an issue adversely decided on [certiorari review]." *Montoya* acted as an intervening change in the law because it announced a new rule. 2013-NMSC-020, ¶¶ 52-54. "[A] court establishes a new rule when its decision is flatly inconsistent with the prior governing precedent and is an explicit overruling of an earlier holding." *Kersey*, 2010-NMSC-020, ¶ 16 (internal quotation marks and citations omitted). In this case, *Montoya* explicitly overruled both *Dominguez I* and *Gonzales*, holding that current New Mexico double jeopardy jurisprudence precludes cumulative punishment for shooting at or from a vehicle and "the homicide resulting from the penetration of the same bullet into the same person." *Montoya*, 2013-NMSC-020, ¶¶ 2, 54. *Montoya* reasoned that when both the shooting and the homicide charges stem from the same action and concern the same victim, the offenses are substantively the same. *See id.* ¶¶ 52-54. *Montoya* concluded that current New Mexico jurisprudence prevents overcharging and vindicates legislative intent. *See id.* ¶ 46. *Montoya* thus reflected

a movement in New Mexico's double jeopardy jurisprudence "toward a substantive sameness analysis." 2013-NMSC-020, ¶¶ 46-54 (summarizing the evolution of double jeopardy case law in New Mexico). Under this approach, if a defendant's charges substantively involve the same crime, there is a double jeopardy violation. *See id.* ¶ 54. Determining whether different charges involve the same crime "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." *Id.* ¶ 49 (citing *State v. Swick*, 2012-NMSC-018, ¶¶ 21, 26, 279 P.3d 747). Because *Montoya* announced a new rule, Dominguez has the right to relitigate his double jeopardy claims that are similar to the double jeopardy claims raised in *Montoya*.[1]

The first set of convictions concerns Solisz's death. These two convictions present facts that are similar to those in *Montoya*. *Compare Dominguez I*, 2005-NMSC-001, ¶¶ 1, 4, *with Montoya*, 2013-NMSC-020, ¶¶ 4-7, 11. As in *Montoya*, Dominguez was charged under separate statutes for voluntary manslaughter and shooting at or from a motor vehicle. *Compare Dominguez I*, 2005-NMSC-001, ¶ 1, *with Montoya*, 2013-NMSC-020, ¶ 11. As in *Montoya*, these charges stemmed from the same act and involved the same victim. *Compare Dominguez I*, 2005-NMSC-001, ¶ 6, *with Montoya*, 2013-NMSC-020, ¶¶ 30, 54. Under *Montoya*, Dominguez can relitigate the convictions of voluntary manslaughter and shooting at or from a motor vehicle.

The second set of convictions concerns the shooting of Martinez. Dominguez was charged under different statutes for aggravated battery and shooting at or from a motor vehicle; the charges stemmed from one act and involved the same victim. *Dominguez I*, 2005-NMSC-001, ¶ 4. Under *Montoya*, the aggravated battery and the shooting are also substantively the same crime. *See Munoz*, 2014 WL 4292963, No. 30,837, mem. op. ¶ 4 (concluding that "*Montoya*'s reasoning also invalidates *Dominguez*'s holding that unitary conduct resulting in convictions for both aggravated battery and shooting at or from a motor vehicle does not violate double jeopardy"); *Rudy B.*, 2014 WL 3039618, No. 27,589, mem. op. ¶ 2 (same). Consequently, pursuant to *Montoya*, Dominguez can also relitigate the convictions of aggravated battery and shooting at or from a motor vehicle.

Dominguez urges us to go further and to hold that *Clark* requires that *Montoya* automatically be applied to his claims because he previously made the very arguments made by Montoya. However, Dominguez recognizes that this argument is problematic in light of *Kersey*, which requires courts to conduct an independent analysis as to whether a new rule should apply retroactively. 2010-NMSC-020, ¶ 15. Dominguez nonetheless claims that his interpretation of *Clark* can be reconciled with *Kersey* because *Kersey* did not consider *Clark*, and therefore it cannot be deemed to have impliedly overruled *Clark*. In the alternative, to the extent that *Clark* is irreconcilable with *Kersey*, Dominguez argues that *Clark* and *Kersey* approach the retroactivity issue differently and that this Court should adopt the approach

[1]Dominguez also claims that his two convictions for shooting at or from a motor vehicle violated the protection against double jeopardy. However, because Dominguez cites to no intervening change of law concerning unit of prosecution claims, he cannot relitigate these convictions.

taken in *Clark*. Dominguez misreads our opinions in *Clark* and *Kersey*; we therefore reject his arguments on this issue.

Clark involved a habeas petition which relied upon case law that was "announced after [the petitioner's] conviction and sentence became final." *See* 1994-NMSC-098, ¶¶ 1-2. *Clark* applied a new rule announced by the United States Supreme Court after the petitioner's conviction and sentence became final without addressing the issue of retroactivity. *Id.* ¶¶ 15, 19. Dominguez's inference is understandable but erroneous, because although Clark received the benefit of the new rule, this Court never addressed retroactivity. *See id.* ¶ 15. The most likely explanation for the absence of retroactivity analysis in *Clark* is that the State never argued the issue; retroactivity is not mentioned in the State's reply brief. *See generally* Defendant-Appellant's Reply Brief, 1999 WL 33996276 (No. 23,832), *State v. Clark*, 1999-NMSC-035, 128 N.M. 119, 990 P.2d 793. Because courts will not insert arguments on a party's behalf, the issue of retroactivity was probably not argued, and therefore it was not discussed in the opinion. *See Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076 (noting that New Mexico courts "will not review unclear arguments, or guess at what [litigants'] arguments might be").

Because "[t]he general rule is that cases are not authority for propositions not considered," *Clark* cannot be read to support the idea that litigants may automatically avail themselves of a new rule, irrespective of any retroactivity doctrine, if they have argued in favor of that rule on appeal. *Fernandez v. Farmers Ins. Co. of Ariz.*, 1993-NMSC-035, ¶ 15, 115 N.M. 622, 857 P.2d 22 (internal quotation marks and citations omitted). Unlike *Clark*, *Kersey* focused solely on whether the doctrine of retroactivity permitted the petitioner to benefit from a new rule. *See Kersey*, 2010-NMSC-020, ¶¶ 15-31.

Clark and *Kersey* addressed separate issues. *Clark* addressed whether a habeas petitioner can relitigate claims disposed of on appeal, while *Kersey* addressed whether new laws, if there are any, retroactively apply in analyzing those relitigated claims. *See Kersey*, 2010-NMSC-020, ¶¶ 21-31; *Clark*, 1994-NMSC-098, ¶ 14. Because *Kersey* and *Clark* concern different issues, *Kersey* did not have to overrule *Clark*. *See Kersey*, 2010-NMSC-020, ¶ 25; *Clark*, 1994-NMSC-098, ¶ 14. Consequently, both *Kersey* and *Clark* can, and should be, followed in this case. We next apply the analysis we announced in *Kersey* to determine whether *Montoya* should be applied retroactively.

II. *Montoya* Does Not Apply Retroactively

As we indicated in paragraph 11, *supra*, *Montoya* announces a new rule because *Montoya* explicitly overruled *Dominguez I*. *See Montoya*, 2013-NMSC-020, ¶¶ 2, 54; *Kersey*, 2010-NMSC-020, ¶ 16 (noting that "a court establishes a new rule when its decision is flatly inconsistent with the prior governing precedent and is an explicit overruling of an earlier holding" (internal quotation marks and citations omitted)). Dominguez argues that *Montoya* does not announce a new rule because his argument in *Dominguez I* paralleled the reasoning in *Montoya*. This rationale contravenes *Kersey*'s standard for determining the existence of a new rule. *See* 2010-NMSC-020, ¶ 16. We look to precedent to determine whether a rule is new. *See id.* Thus, the single question is whether the double jeopardy analysis in *Montoya* should be applied retroactively.

Kersey adopted the federal standard of retroactivity in *Teague v. Lane*, 489 U.S. 288, 301 (1989), *holding limited on other grounds*, *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993), to determine whether a new rule applies retroactively. *Kersey*, 2010-NMSC-020, ¶¶ 25-26. This Court adopted the *Teague* standard because it "appropriately balances both the purpose of the writ [of habeas corpus] and the government's interest in finality by applying the law prevailing at the time a conviction became final and refusing, except in limited circumstances, to dispose of [habeas] cases on the basis of intervening changes in constitutional interpretation." *Kersey*, 2010-NMSC-020, ¶ 26 (second alteration in original) (internal quotation marks and citation omitted).

Pursuant to *Teague*, *Kersey* mandates a two-pronged test to determine retroactivity. 2010-NMSC-020, ¶ 25. "[N]ew rules generally should not be afforded retroactive effect unless (1) the rule is substantive in nature, in that it alters the range of conduct or the class of persons that the law punishes, or (2) although procedural in nature, the rule announces a watershed rule of criminal procedure." *Id.* (internal quotation marks and citations omitted). A substantive change must therefore "place[] an entire category of primary conduct beyond the reach of the criminal law, or . . . prohibit[] imposition of a certain type of punishment for a class of defendants because of their status or offense." *Kersey*, 2010-NMSC-020, ¶ 28 (ellipsis in original) (internal quotation marks and citation omitted). Watershed rules are those that are necessary to the fundamental fairness or accuracy of a criminal proceeding. *Id.* ¶¶ 28, 30 (citations omitted). Only the rule establishing a universal right to counsel in criminal proceedings has been upheld as a retroactively applied watershed rule.[2] *See Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963); Jennifer H. Berman, Padilla v. Kentucky: *Overcoming* Teague*'s "Watershed" Exception to Non-Retroactivity*, 15 U. Pa. J. Const. L. 667, 685 (2012) ("Indeed, in the years following *Teague*, the [United States Supreme] Court has yet to find a new rule that falls under the second *Teague* exception. Since *Teague* was decided in 1989, the Supreme Court has considered fourteen cases where the petitioner argued that a new rule is 'watershed' in nature and in every case the Court has refused to find the rule as such." (footnotes omitted) (internal quotation marks and citations omitted)). The paucity of case law upholding watershed rules reflects the belief that new rules concerning basic due process are unlikely to emerge. *See Teague*, 489 U.S. at 311-13 ("[W]e believe it unlikely that many such components of basic due process have yet to emerge.").

In *Kersey*, we concluded that a new procedural rule of law was announced in *State v. Frazier*, 2007-NMSC-032, ¶ 1, 142 N.M. 120, 164 P.3d 1, which held that "the predicate felony is always subsumed into a felony murder conviction, and no defendant can be convicted of both." *Kersey*, 2010-NMSC-020, ¶ 1 (internal quotation marks and citation omitted). *Kersey* concluded that our opinion in *Frazier* adopted "a new methodology for the review of double jeopardy claims involving multiple separate convictions for felony murder and the

[2]The right to counsel applied retroactively because the absence of criminal defense attorneys produces a high risk of unreliable convictions. *See Whorton v. Bockting*, 549 U.S. 406, 416, 419 (2007).

underlying predicate felony." *Id.* ¶ 30. *Kersey* held that this rule is not a substantive change in the law, but instead, it is a formulation of a new rule of criminal procedure. *Id. Kersey* noted that the new rule did not decriminalize any formerly criminal activities, and therefore it "did not alter the range of [punishable] conduct or the class of persons" punished. *Id.* Moreover, the rule left undisturbed the requirements for conviction such that both before and after *Frazier*, "the State [was and] is required to prove the essential elements of felony murder, as well as the essential elements of the underlying predicate felony, in order to secure a conviction." *Kersey*, 2010-NMSC-020, ¶ 30. Consequently, the *Kersey* court concluded that *Frazier* "formulated a new rule of criminal procedure, which does not implicate the fundamental fairness or accuracy of the criminal proceeding and, as such, is not available for retroactive application in habeas corpus proceedings." *Kersey*, 2010-NMSC-020, ¶ 30. Thus, *Kersey* held that the new rule in *Frazier* was not subject to retroactive application under either of the two exceptions established in *Teague*. *Kersey*, 2010-NMSC-020, ¶ 31.

Our analysis of *Montoya* in this opinion should parallel the analysis of *Frazier* in *Kersey*. Aggravated battery, voluntary manslaughter, and shooting at or from a motor vehicle were crimes prior to *Montoya* and they remain crimes since *Montoya* was filed. *See* §§ 30-2-3(A), 30-3-5, & 30-3-8(B). Moreover, the requirements for conviction of those crimes were not altered by this Court's opinion in *Montoya*. *See generally* §§ 30-2-3(A), 30-3-5, & 30-3-8(B); *Montoya*, 2013-NMSC-020. Under *Kersey*, 2010-NMSC-020, ¶ 30, *Montoya* announces a procedural rule, not a substantive one. Therefore, *Kersey* precludes the retroactive application of *Montoya* under the first *Teague* exception. *See Kersey*, 2010-NMSC-020, ¶ 30.

Montoya also does not qualify for the watershed exception under *Teague*. "In order to qualify as watershed, a new rule must meet two requirements. First, the rule must be necessary to prevent an impermissibly large risk of an inaccurate conviction. Second, the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Whorton v. Bockting*, 549 U.S. 406, 418 (2007) (internal quotation marks and citations omitted).

Montoya concerns double jeopardy jurisprudence. *See* 2013-NMSC-020, ¶ 11. Double jeopardy analysis is "applied at the conclusion of a case." *Id.* ¶ 53 (internal quotation marks and citation omitted). A new rule concerning double jeopardy cannot possibly impact the accuracy of criminal convictions. Consequently, *Montoya* fails *Teague*'s second exception, precluding Dominguez from applying *Montoya* retroactively as a watershed rule.

Using the *Kersey* analysis, 2010-NMSC-020, ¶ 30, *Montoya* announces a new rule that cannot be retroactively applied. This is because *Montoya*'s new rule, which concerns a new methodology for reviewing double jeopardy claims, is neither a substantive change in the law nor a watershed rule. Consequently, Dominguez cannot avail himself of *Montoya*.

III. *Kersey* Cannot Be Overruled Because of Stare Decisis

Dominguez argues that *Kersey* should be overruled if it precludes the retroactive application of *Montoya* to his

convictions. He maintains that *Kersey*'s characterization of the new double jeopardy analysis as procedural is improper, or in the alternative, that *Kersey*'s adoption of *Teague* was improper. We are not persuaded by either argument.

New Mexico utilizes a four-factor test to determine whether to overturn precedent:

> 1) whether the precedent is so unworkable as to be intolerable; 2) whether parties justifiably relied on the precedent so that reversing it would create an undue hardship; 3) whether the principles of law have developed to such an extent as to leave the old rule no more than a remnant of abandoned doctrine; and 4) whether the facts have changed in the interval from the old rule to reconsideration so as to have robbed the old rule of justification.

State v. Pieri, 2009-NMSC-019, ¶ 21, 146 N.M. 155, 207 P.3d 1132 (internal quotation marks and citations omitted). These factors must convincingly demonstrate that a precedent is wrong. *Id.*

Kersey recognized that the United States Supreme Court adopted the approach taken in *Teague* so that retroactivity jurisprudence can generate more consistent results because the earlier approach to determining retroactivity involved a multi-factor balancing test that proved unworkable. *See Kersey*, 2010-NMSC-020, ¶¶ 22-25. In addition, we recently applied *Kersey* to another case, proving that it is not an abandoned doctrine. *See, e.g.*, *Ramirez v. State*, 2014-NMSC-023, ¶ 11, 333 P.3d 240. As a result, we see no compelling reason to overturn *Kersey*.

IV. *State v. Forbes* Does Not Hold That Litigating a Claim on Appeal Automatically Entitles the Litigant to Retroactive Application of New Rules

Finally, Dominguez argues that under *State v. Forbes*, 2005-NMSC-027, 138 N.M. 264, 119 P.3d 144, this Court may retroactively apply *Montoya* only to the case at bar because he "expressly advocated the position adopted in *Montoya*." *Forbes* does not stand for this proposition.

Forbes involved a habeas petitioner who challenged his conviction on Confrontation Clause grounds. U.S. Const. amend. VI; N.M. Const. art. II, § 14; *Forbes*, 2005-NMSC-027, ¶¶ 1-2. Prior to his habeas petition, the petitioner initially appealed his conviction to the New Mexico Supreme Court on the same Confrontation Clause grounds and had obtained a reversal of his convictions. *Id.* ¶ 1. The United States Supreme Court vacated the reversal and remanded the case to the New Mexico Supreme Court, instructing this Court to apply the reliability analysis presented in *Lee v. Illinois*, 476 U.S. 530 (1986), *limited by Idaho v. Wright*, 497 U.S. 805, 817 (1990). On remand, the New Mexico Supreme Court affirmed the petitioner's conviction. *Forbes*, 2005-NMSC-027, ¶ 1. However, *Crawford v. Washington*, 541 U.S. 36, 68 (2004) validated the rationale used by this Court in its original reversal of the petitioner's conviction. *Forbes*, 2005-NMSC-027, ¶¶ 1, 6. The New Mexico Supreme Court granted the petitioner habeas relief and ordered a new trial. *Id.* ¶ 13.

During the habeas proceedings, the *Forbes* court had to determine whether the

petitioner should benefit from the holding in *Crawford*, which was a case that was announced almost 20 years after the petitioner's conviction. *Forbes*, 2005-NMSC-027, ¶ 7. This issue "initially turn[ed] on whether *Crawford* announce[d] a new constitutional procedural rule" because *Forbes* noted that the United States Supreme Court did not expressly state whether *Crawford* announced a new rule. *Forbes*, 2005-NMSC-027, ¶ 7. *Forbes* concluded that *Crawford* did not announce a new rule because the result was dictated by United States Supreme Court precedent existing at the time of the petitioner's conviction and the petitioner could rely on *Crawford*. *Forbes*, 2005-NMSC-027, ¶¶ 8-10. Thus, under *Forbes*, a petitioner may rely upon case law post-dating the petitioner's conviction if the case law vindicates previously overruled precedent. *See id.* ¶ 13.

In summary, when we granted habeas relief in *Forbes*, we did so on the basis of well-established existing precedent, not a new rule. *See id.* ¶¶ 13-14. The viability of the previous law may have been confirmed by a more recent case, but the precedent had already been established. *See id.* ¶ 13. *Forbes* enables a habeas petitioner to rely upon *existing precedent* to relitigate a claim on the basis that a court failed to apply law that was *available at the time of conviction*. *Id.* ¶¶ 7-9. In addition, the decision in *Forbes* was "limited to the very special facts of this case," *id.* ¶ 13, and it is also limited to situations where the petitioner is relitigating claims based upon existing precedent.

Dominguez cannot rely upon *Forbes* because he does not rely upon existing precedent to support his position. Dominguez relies upon *Montoya*, a case decided many years after his conviction was final. Instead of being dictated by previous precedent, *Montoya* expressly departs from established law to create a new rule. *Compare Montoya*, 2013-NMSC-020, ¶ 2 (overruling *Gonzales*, 1992-NMSC-003, *Dominguez*, 2005-NMSC-001, *and State v. Riley*, 2010-NMSC-005, 147 N.M. 557, 226 P.3d 65), *with Forbes*, 2005-NMSC-027, ¶ 13 ("Our decision is . . . highlighted by the fact that the very law this Court applied to [the petitioner's] case twenty years ago has now been vindicated, which entitled him now to the same new trial he should have received back then."). At the time of Dominguez's appeal in *Dominguez I*, a majority of this Court relied on existing precedent to affirm his convictions. *See generally Dominguez I*, 2005-NMSC-001 (citing *Gonzales*, 1992-NMSC-003). Unlike *Crawford* or *Forbes*, *Montoya* does not reaffirm previously ambiguous case law. *Compare Crawford*, 541 U.S. at 57 (citing *Douglas v. Alabama*, 380 U.S. 415, 418-20 (1965), *and Forbes*, 2005-NMSC-027, ¶ 8 (acknowledging the United States Supreme Court's reliance on *Douglas*, 280 U.S. 415, in *Crawford*, 541 U.S. 36, was contrary to *New Mexico v. Earnest*, 477 U.S. 648 (1986)), *with Montoya*, 2013-NMSC-020, ¶ 2 (overruling, rather than vindicating, prior double jeopardy jurisprudence). Consequently, Dominguez must request the retroactive application of *Montoya* under *Kersey* to prevail. In fact, *Forbes* merely followed the *Teague* approach in first determining whether *Crawford* announced a new rule as a possible prelude to retroactivity analysis. *See Forbes*, 2005-NMSC-027, ¶¶ 7-8 (citing *Teague*, 489 U.S. 288). Moreover, Dominguez cannot try to extend *Forbes* beyond its narrow holding. *Forbes* is limited to a situation where the petitioner had relitigated claims based upon a previous rule that was subsequently vindicated by the Court's later holding. *See id.* ¶ 13.

Dominguez nevertheless contends

that *Forbes* vindicated the rights of the petitioner on appeal "because this Court had relied on then-existing precedent when it initially reversed the conviction," and thus the petitioner preserved his identical argument on appeal. However, such an extension misses a critical policy distinction between *Forbes* and the position Dominguez urges us to adopt. By limiting its holding to case law available at the time of the petitioner's conviction, *Forbes* promotes the finality of convictions by reaffirming existing precedent. *See Kersey*, 2010-NMSC-020, ¶ 26 (noting that applying the prevailing law at the time that a conviction becomes final acknowledges the government's interest in the finality of the convictions). This limited holding "is consistent with our responsibility to do justice to each litigant on the merits of *his* [*or her*] *own case*." *Forbes*, 2005-NMSC-027, ¶ 13 (emphasis added) (internal quotation marks and citation omitted). In contrast, Dominguez's position undermines the finality of convictions by making it easier to retroactively apply new laws that were unavailable at the time of the petitioner's conviction. Dominguez's position would allow criminal petitioners to relitigate their convictions any time a new law is announced, regardless of whether the new law was available at the time of their convictions. We are not persuaded by Dominguez's reliance on *Forbes*.

CONCLUSION

Dominguez has the right to relitigate his double jeopardy claims in the habeas petition before us. *See Clark*, 1994-NMSC-098, ¶¶ 11, 14. However, *Kersey* precludes the retroactive application of *Montoya* during this relitigation, and Dominguez is not entitled to relief on any of his double jeopardy claims. We therefore affirm the trial court's dismissal of Dominguez's writ of habeas corpus.

IT IS SO ORDERED.

EDWARD L. CHÁVEZ, Justice

WE CONCUR:

BARBARA J. VIGIL, Chief Justice

PETRA JIMENEZ MAES, Justice

RICHARD C. BOSSON, Justice

CHARLES W. DANIELS, Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMSC-015

Filing Date: March 12, 2015

Docket No. 34,204

DANIEL M. FABER,

Plaintiff-Petitioner,

v.

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

Defendant-Respondent.

CONSOLIDATED WITH:

Docket No. 34,194

GARY K. KING, Attorney

General of the State of New Mexico,

Defendant-Petitioner,

v.

DANIEL M. FABER,

Plaintiff-Respondent.

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OPINION

MAES, Justice.

State agencies are supposed to make their documents available to the public under the New Mexico Inspection of Public Records Act (IPRA), NMSA 1978, Sections 14-2-1 to -12 (1947, as amended through 2009). *See* § 14-2-1(A) ("Every person has a right to inspect public records of this state . . . ."). Therefore, when an agency wrongfully denies a request for documents, Section 14-2-12(D) of IPRA states that "[t]he court shall award damages, costs and reasonable attorneys' fees to any person whose written request has been denied and is successful in a court action to enforce the provisions of [IPRA]." The parties do not dispute that the Attorney General wrongfully denied the IPRA request. Instead, the issue in these consolidated cases is what type of damages were authorized by the Legislature in Section 14-2-12(D). We hold that Section 14-2-12(D) permits compensatory or actual damages because the plain language, purpose, and history of IPRA indicate that neither punitive nor statutory damages were intended by the Legislature. We also hold that Faber is not eligible for nominal damages.

I. FACTS AND PROCEDURAL HISTORY

Attorney Daniel Faber (Faber) filed a federal lawsuit on behalf of three assistant attorneys general alleging gender discrimination in connection with their salaries. The Attorney General filed a motion to stay litigation pending resolution of his motion to dismiss the complaint based on an immunity defense. On May 28, 2010, the federal district court entered a memorandum opinion and order granting the Attorney General's motion to stay all proceedings, including discovery; the federal district court later lifted the stay on January 14, 2011.

On August 23, 2010, Faber filed an IPRA request in his own name seeking employment data for every attorney who had been employed by the Attorney General's Office since January 1987. On August 26, 2010, the records custodian of the Attorney General's Office denied the IPRA request, stating that "[o]n August 25, 2010[,] I received your request to inspect certain records. This request is being denied as these records involve a current lawsuit and appear to circumvent the discovery process and the current Order Staying Discovery (attached)."

Faber filed a complaint for damages and a petition for writ of mandamus in the state district court against the Attorney General on September 7, 2010, alleging that his IPRA request had been wrongfully denied. The state district court found that the stay of discovery entered by the federal court did not preempt the statutory rights granted to New Mexico citizens by IPRA, and that the Attorney General violated IPRA by denying Faber's August 23, 2010, request. The court also issued a writ of mandamus ordering the Attorney General to comply and ruled that damages would be considered at a later date.

Faber subsequently moved for an award of "damages of $100 per day from the day the noncompliance began (August 26, 2010) until the day Defendant complies . . . ." As support, Faber noted that courts may award damages of $100 per day for failure to timely respond to an IPRA request under Section 14-2-11(C). Faber submitted that the same per diem damages should apply for wrongful denial of requests under Section 14-2-12(D). The state district court awarded damages of $10 per day from the date of the wrongful denial to the date the stay was lifted and thereafter "damages of $100 per day until the records are provided," and $257.19 in costs to Faber. The Attorney General appealed the state district court's award of damages. The determination of the IPRA violation was not at issue on appeal. *See generally Faber v. King*, 2013-NMCA-080, 306 P.3d 519.

The New Mexico Court of Appeals did not directly address the type of damages that are appropriate under Section 14-2-12(D). Nonetheless, the Court of Appeals held that "damages for enforcement of a denied [IPRA] request are governed by Section 14-2-12(D), not Section 14-2-11(C)," and that 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*, 2013-NMCA-080, ¶ 15. Therefore, the Court determined that "[t]he only question we must answer is whether the nature and amount of the award was supported." *Id.* ¶ 9. The Court of Appeals also noted that the " term 'damages' under IPRA has not been construed or limited by our courts." *Id.* ¶ 11. The Court of Appeals held that Faber cannot receive Section 14-2-11(C) per diem damages under Section 14-2-12(D) and that a district court must specify and measure the nature of the damages. *Faber*, 2013-NMCA-080, ¶ 15. Since the nature of the damages was unclear from the record, the Court of Appeals remanded the case to the state district court to "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." *Id.* ¶ 17.

Faber and the Attorney General appealed separately to this Court to clarify what type of damages a court is permitted to award under Section 14-2-12(D). We granted both petitions for certiorari and consolidated the cases. "*Faber v. King*," 2013-NMCERT-007.

II. STANDARD OF REVIEW

Our review requires us to interpret provisions of IPRA. Interpretation of the language of a statute is a question of law that we review de novo. *Cooper v. Chevron U.S.A., Inc.*, 2002-NMSC-020, ¶ 16, 132 N.M. 382, 49 P.3d 61. We construe IPRA in light of its purpose and interpret it "to mean what the Legislature intended it to mean, and to accomplish the ends sought to be accomplished by it." *San Juan Agric. Water Users Ass'n v. KNME-TV* (*San Juan*), 2011-

NMSC-011, ¶ 14, 150 N.M. 64, 257 P.3d 884 (internal quotation marks and citation omitted).

"In discerning the Legislature's intent, we are aided by classic canons of statutory construction, and [w]e look first to the plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different one was intended." *City of Albuquerque v. Montoya*, 2012-NMSC-007, ¶ 12, 274 P.3d 108 (alteration in original) (internal quotation marks and citation omitted). In addition to looking at the statutory language, "consider the history and background of the statute." *State v. Rivera*, 2004-NMSC-001, ¶ 13, 134 N.M. 768, 82 P.3d 939. We examine the overall structure of the statute and its function in the comprehensive legislative scheme. *See id.*

To the extent that the Attorney General argues the district court awarded an erroneous amount of damages, we review an award of damages for substantial evidence. *See Moody v. Stribling*, 1999-NMCA-094, ¶¶ 37, 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.").

III. DISCUSSION

A. Section 14-2-12 does not authorize the award of statutory damages

We look first to the plain meaning of the statute to determine what damages are allowed when a party wrongfully denies a request for documents. When a state agency receives a written IPRA request, IPRA requires the agency's custodian of records to timely respond and IPRA also forbids the agency from wrongfully denying the request. *See* §§ 14-2-8 to -12. IPRA then obligates state agencies in two primary ways. First, it requires an agency's custodian of records to either (1) "permit the inspection immediately or as soon as practicable under the circumstances, but not later than fifteen days after receiving [the] written request," Section 14-2-8(D), or (2) deny the written request, but "the custodian shall provide the requester with a written explanation of the denial . . . within fifteen days after the request for inspection was received," Section 14-2-11(B)(3). Second, IPRA allows a claimant to file an action to enforce the procedures of IPRA when a records request has been wrongfully denied through separate mechanisms: Section 14-2-11, entitled "Procedure for denied requests," and Section 14-2-12, entitled "Enforcement."

Sections 14-2-11 and 14-2-12 create separate remedies depending on the stage of the IPRA request. Section 14-2-11 only concerns the procedures a public entity shall employ when the public entity denies an IPRA request. Section 14-2-11 requires a public entity to respond to a records request within fifteen days unless the "request has been determined to be excessively burdensome or broad." Section 14-2-11(A). If the request is denied, "the custodian shall provide the requester with a written explanation of the denial." Section 14-2-11(B). Section 14-2-11 also addresses the damages available if the public entity does not adhere to the denial procedures. Specifically, Section 14-2-11(C) provides that:

> C. A custodian who does not deliver or mail a written explanation of denial within fifteen days after receipt of a written request for inspection is subject to an action to enforce the provisions of the

Inspection of Public Records Act . . . and the requester may be awarded damages. Damages shall:

(1) be awarded if the failure to provide a timely explanation of denial is determined to be unreasonable;

(2) not exceed one hundred dollars ($100) per day;

(3) accrue from the day the public body is in noncompliance until a written denial is issued; and

(4) be payable from the funds of the public body.

Section 14-2-12(A), (B), (D) provides that:

A. An action to enforce the Inspection of Public Records Act . . . may be brought by:

(1) the attorney general or the district attorney in the county of jurisdiction; or

(2) a person whose written request has been denied.

B. A district court may issue a writ of mandamus or order an injunction or other appropriate remedy to enforce the provisions of the Inspection of Public Records Act.

. . . .

D. The court shall award damages, costs and reasonable attorney's fees to any person whose written request has been denied and is successful in a court action to enforce the provisions of the Inspection of Public Records Act.

Faber claims that statutory per diem damages are permissible under Section 14-2-12 as a penalty because otherwise the legislative purpose behind IPRA would be frustrated. Faber asserts that the broad language in Section 14-2-12 includes the authority for courts to award per diem damages comparable to those authorized under Section 14-2-11. Under this analysis, Faber contends that neither one of the comparable statutory damage provisions in Sections 14-2-11 or 14-2-12 requires proof of actual damages. The Attorney General contends that the Legislature did not clearly provide for an award of statutory damages under Section 14-2-12. The Attorney General also maintains that had "the legislature intended to make the same provision in wrongful withholding cases (*i.e.*, those cases enforced under Section 14-2-12), it could and would have done so." The Attorney General asserts that Faber's position that Section 14-2-12 is "broader" is unfounded, especially since the legislature expressly provided for per diem damages in the immediately preceding section.

Statutory damages are those available to a litigant without proof of actual injury because both the existence and the amount of the damages are established by statute. *See Marauder Corp. v. Beall*, 301 S.W.3d 817, 822 (Tex. App. 2009) (noting that "proof of actual damages is not a prerequisite to recovery of the damages" authorized by statute). Section 14-2-11 authorizes statutory damages of up to $100 per day. Section 14-2-11(C)(2); *see Edenburn v. N.M. Dep't of Health*, 2013-NMCA-045, ¶ 5, 299 P.3d 424.

The Legislature also has provided statutory damages in several contexts. In the Unfair Practices Act, for example, the Legislature provided that a person who has suffered from conduct in violation of the Act "may bring an action to recover actual damages or the sum of one hundred dollars ($100), whichever is greater." NMSA 1978, § 57-12-10(B) (2005); *see also Jones v. Gen. Motors Corp.*, 1998-NMCA-020, ¶ 23, 124 N.M. 606, 953 P.2d 1104 (recognizing that Section 57-12-10(B) authorizes the recovery of "statutory damages one hundred dollars" if such a recovery would be greater than the actual damages). Statutory damages are also common among environmental enforcement statutes. *See* NMSA 1978, § 72-5A-12(A) (1999) (providing damages for violating the Ground Water Storage and Recovery Act, NMSA 1978, §§ 72-5A-1 to -17 (1999, as amended through 2003), of up to "(1) one hundred dollars ($100) per day [for] violation[s] not directly related to the illegal recovery or use of stored water; or (2) ten thousand dollars ($10,000) per day [for] violation[s] directly related to the illegal recovery or use of stored water"); NMSA 1978, § 74-6-10(C) (1993) (providing for damages for violating the Water Quality Act, NMSA 1978, §§ 74-6-1 to -17 (1993, as amended through 2009), of up to (1) "fifteen thousand dollars ($15,000) per day of noncompliance with the provisions in Section 74-6-5 . . .; or (2) ten thousand dollars ($10,000) per day of each violation of a provision of the Water Quality Act other than the provisions in Section 74-6-5 . . . or of a regulation or water quality standard adopted pursuant to the Water Quality Act).

Faber does not explain why statutory damages are appropriate under Section 14-2-12, particularly in light of the fact that in the immediately preceding section, Section 14-2-11, the Legislature expressly provided for statutory damages. Had the Legislature intended to make the same damages available in wrongful denial cases enforceable under Section 14-2-12, it could have easily done so. Faber's reading embeds language from Section 14-2-11 into Section 14-2-12, which violates our long-established rule of construction prohibiting courts from reading language into a statute which is not there, particularly when it makes sense as it is written. *See Reule Sun Corp. v. Valles*, 2010-NMSC-004, ¶ 15, 147 N.M. 512, 226 P.3d 611 ("Under the plain meaning rule, when a statute's language is clear and unambiguous, we will give effect to the language and refrain from further statutory interpretation. We will not read into a statute language which is not there, especially when it makes sense as it is written." (internal quotation marks and citation omitted)).

Section 14-2-11 and Section 14-2-12 create separate remedies depending on the stage of the IPRA request. Section 14-2-11 requires a public entity to respond to a records request within fifteen days unless the "request has been determined to be excessively burdensome or broad." Section 14-2-11(A). If the request is denied, "the custodian shall provide the requester with a written explanation of the denial." Section 14-2-11(B). It is when the custodian fails to respond to a request or deliver a written explanation of the denial that the public entity is subject to Section 14-2-11 damages. In that case, the court shall award the injured party damages not to exceed $100 per day that "accrue from the day the public body is in noncompliance until a written denial is issued" and are "payable from the funds of the public body." Section 14-2-11(C)(2)-(4).

In this case, the Attorney General's Office received the IPRA request on August

25, 2010, and denied the request the next day, August 26, 2010. Section 14-2-11 damages are not applicable in this case because the Attorney General's Office timely answered the request with a denial by following the denial procedures set out in Section 14-2-11. However, because this action is for the post-denial enforcement of Faber's IPRA request, the enforcement and damages provisions under Section 14-2-12 apply. Section14-2-12(D) ("The court shall award damages, costs and reasonable attorneys' fees to any person whose written request has been denied and is successful in a court action to enforce the provisions of [IPRA]."). We must now determine what type of damages the Legislature authorized for a successful Section 14-2-12 claimant.

B. Discussion of typical types of damages allowed

Unlike Section 14-2-11, Section 14-2-12 only provides that a "court shall award damages" and does not specify the nature of damages to be awarded. Section 14-2-12(D). As a result, we cannot look to the plain language of the statute to determine its meaning. Furthermore, the term "damages" has not been interpreted by our courts. *See* Office of New Mexico Attorney General, Inspection of Public Records Act Compliance Guide 45 (5th ed. 2008) ("Damages also could potentially include amounts necessary to compensate the requester for any losses related to the improper denial. However, in the absence of judicial interpretation of the Act's damages provisions, we do not have a precise picture of what damages are allowed under the Act at this time."). Thus, we look to our precedent and the purpose, history, and legislative scheme of IPRA for further guidance. *See Rivera*, 2004-NMSC-001, ¶ 13.

Typically three kinds of damages are available to a prevailing party: (1) damages designed to remedy an injury, *i.e.*, compensatory or actual damages; (2) damages designed to punish a wrongdoer, *i.e.*, punitive damages; and (3) damages available to a litigant without having to prove either the existence or the extent of an injury. This last category includes both nominal and statutory damages.

Compensatory, or actual, damages are "the measure of a loss" and are awarded to place the plaintiff in a position that he or she would have been in had he or she not suffered the wrong complained of. *Sanchez v. Clayton*, 1994-NMSC-064, ¶ 11, 117 N.M. 761, 877 P.2d 567 (internal quotation marks omitted); Restatement (Second) of Torts § 903 cmt. a (1979). Punitive damages are awarded not to compensate a plaintiff for injury or loss suffered but to penalize a defendant for particularly egregious, wrongful conduct. *See* Restatement (Second) of Torts § 908. "Nominal damages are a trivial sum of money awarded to a litigant who has established a cause of action *but has not established that he is entitled to compensatory damages*." *Sanchez*, 1994-NMSC-064, ¶ 13 (emphasis in the original) (internal quotation marks and citation omitted).

We first determine whether punitive damages apply under IPRA. Then we discuss actual or compensatory damages, and finally address Faber's nominal damages argument.

1. Section 14-2-12 does not authorize the award of punitive damages

The Attorney General argues that the term "damages" in Section 14-2-12 can only mean actual or nominal damages because punitive damages against the State are

unavailable absent an express declaration to the contrary, and Section 14-2-12 does not make such a declaration. Faber argues that IPRA is not silent concerning punitive damages; it expressly uses the word "penalty" in reference to the remedies in Section 14-2-8(A): "failure to respond to an oral request shall not subject the custodian to any penalty." The implication being "that the failure to respond to a *written* request *shall* subject the custodian to a penalty as provided in Section [14-2-]11." We disagree with Faber's conclusion.

In *Torrance Cnty. Mental Health Program v. N.M. Health & Env't Dep't,* 1992-NMSC-026, ¶ 1, 113 N.M. 593, 830 P.2d 145, this Court considered whether a litigant could recover punitive damages against the state in a breach of contract action. We considered this issue in light of the fact that the Tort Claims Act expressly prohibits punitive damages, whereas a comparable contract claims statute was silent on the subject. *Torrance*, 1992-NMSC-026, ¶ 2. Because the Court was unable to discern any legislative intent "one way or the other on the subject of punitive damages in contract actions," *id.* ¶ 19, the Court balanced the policy interests favoring punitive damages against those favoring immunity. *Id.* ¶ 27. *Torrance* held that "the state's policy of not permitting assessment of punitive damages in tort cases, as reflected in our Tort Claims Act, applies also, despite legislative silence on the issue, to breach-of-contract cases." *Id.* ¶ 2.

In reaching that conclusion, *Torrance* cited to both *Brown v. Village of Deming*, 1952-NMSC-042, 56 N.M. 302, 243 P.2d 609, and *Rascoe v. Town of Farmington*, 1956-NMSC-115, 62 N.M. 51, 304 P.2d 575. The *Brown* court stated that it is "the general rule, supported by the great weight of authority, that absent a statute so providing, exemplary or punitive damages may not be awarded against a municipality" because, among other things, punitive damages are intended to punish, and taking them from the municipality "would be to penalize the taxpayers who had no part in the commission of the tort." 1952-NMSC-042, ¶ 32. *Rascoe* affirmed *Brown* four years later, holding that "[e]xemplary damages ordinarily are not allowable against a municipality in the absence of a statute so authorizing and we have none." 1956-NMSC-115, ¶ 14.

With that in mind, *Torrance* recognized that government liability for punitive damages would deter the abuse of governmental power and promote accountability among government officials. 1992-NMSC-026, ¶ 25. It nevertheless found that "the countervailing policies we believe must prevail are the necessity to protect public revenues unless their diversion is specifically authorized by statute, coupled with the function of punitive damages to visit *punishment* on one against whom they are assessed." *Id.* ¶ 27. The Court found those considerations "especially compelling" because of the prohibition on punitive damages found in the Tort Claims Act. *Id.*

Like NMSA 1978, Section 37-1-23 (1976), in *Torrance*, Section 14-2-12 is silent concerning punitive damages. Accordingly, the countervailing policies that must prevail are the necessity to protect public revenues unless their diversion is specifically authorized by statute. Further, because awarding such damages against a state entity would result in the expenditure of public, taxpayer dollars, it makes no sense to bar punitive damages in the tort and contract contexts but not in the IPRA enforcement context when the considerations supporting

punitive damages—malicious or egregious conduct—are very similar in all three instances. Thus we hold that Section 14-2-12 does not authorize punitive damages.

2. Section 14-2-12 authorizes the award of compensatory damages, costs, and attorneys' fees

Faber argues that if a court does not have authority to award statutory or punitive damages, IPRA is "rendered meaningless" because there are no consequences for a public entity to wrongfully withhold documents. The Attorney General counters that the fundamental purpose of IPRA is to provide access to the public of documents that memorialize the operations of our State government; IPRA "is not about recovering damages."

The purpose behind IPRA is clearly set forth in Section 14-2-5:

> Recognizing that a representative government is dependent upon an informed electorate, the intent of the legislature in enacting the Inspection of Public Records Act . . . is to ensure, and it is declared to be the public policy of this state, that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees.

Section 14-2-5. In recognition of this stated public policy, we have long held that the public's right to inspect documents is paramount. *See San Juan*, 2011-NMSC-011, ¶¶ 15-16 ("IPRA's stated policy reflects the fact that people in our democratic society have 'a fundamental right' to inspect public records. . . . In order for government to truly be of the people and by the people, and not just for the people, our citizens must be able to know what their own public servants are doing in their name."). The damage provisions contained in IPRA are designed to promote compliance and accountability from New Mexico's public servants. *See San Juan*, 2011-NMSC-011, ¶¶ 13, 16 ("IPRA's damage provisions are intended to encourage public entities' prompt compliance with records requests. . . . IPRA is intended to ensure that the public servants of New Mexico remain accountable to the people they serve."). Additionally, "IPRA's provisions create private attorneys general for more effective and efficient enforcement of IPRA than would be possible if only the attorney general or district attorney could enforce the statute." *Id.* ¶ 12 (internal quotation marks and citation omitted).

In 1993, the Legislature enacted two separate damages provisions through Sections 14-2-11 and 14-2-12. *See* 1993 N.M. Laws, ch. 258, § 8 (§ 14-2-11); 1993 N.M. Laws, ch. 258, § 9 (§ 14-2-12). By enacting these separate provisions in the same year, the Legislature intended that the separate damages provisions in Sections 14-2-11 and 14-2-12 address separate issues concerning the overarching public policy behind IPRA. *See State v. Smith*, 2004-NMSC-032, ¶ 10, 136 N.M. 372, 98 P.3d 1022 ("Whenever possible, we must read different legislative enactments as harmonious instead of contradicting one another." (internal quotation marks and citation omitted)). Considering the structure of IPRA, its history, and its purpose, we conclude that the goal of prompt compliance is met by the damage provisions laid out in Section 14-2-11 while Section 14-2-12 ensures that IPRA requests are not wrongfully

denied. Section 14-2-11 and Section 14-2-8(D) promote prompt compliance by requiring the custodian of records to promptly respond to it in writing within fifteen days so that the requester is apprised of his or her request. Therefore, we hold that the Legislature intended for Section 14-2-12 to only authorize the recovery of compensatory damages, costs, and attorneys' fees associated with the litigation to enforce a wrongfully denied IPRA request.

It is true that IPRA aims to open access to the public of government records, however, there are certain restrictions and exceptions that may justify a public entity's denial. Section 14-2-1(A)(1)-(8) limits a person's right to inspect public records for a host of reasons, including, among other things, legal and medical confidentiality, trade secrets, and work products. Right or wrong, the Attorney General's Office was entitled to present its reasons for nonproduction to the district court for a decision under Section 14-2-12; up to the time of decision, the Attorney General was in compliance with IPRA. Otherwise, an agency would be subject to penalties simply for asserting a good faith reason for nonproduction as IPRA entitles it to do. With the district court's finding that the Attorney General wrongfully withheld the documents, the goal of accountability was ultimately satisfied.

A successful litigant suing under Section 14-2-12 is adequately compensated by obtaining the documents he or she sought in the first place. If the litigant is not made whole by the furnishment of the documents, he or she can seek actual damages, costs, and attorneys' fees. These damages ensure that the entire process is virtually costless to a successful litigant. Such a regime neither chills IPRA enforcement litigation nor subverts the incentives IPRA provides to government agencies to comply with its dictates, especially where under Section 14-2-12 a state agency has a good-faith basis for denying the request, even if the denial is later deemed unlawful. In contrast, Section 14-2-11 ensures prompt compliance by allowing for statutory damages of up to $100 per day if a public body fails to timely respond to a records request. The built-in damages contained in Section 14-2-11 and 14-2-12 of IPRA create a complete and sensible mechanism that properly satisfies the objective of a transparent and accountable state government.

Moreover, the damages expressly provided for in Section 14-2-12 promote compliance and accountability in other ways. Section 14-2-12 allows for a writ of mandamus, an injunction, actual damages, costs, and attorneys' fees. We find costs and attorneys' fees particularly important. In *State ex rel. N.M. State Hwy. and Transp. Dep't v. Baca*, 1995-NMSC-033, ¶¶ 21-22, 25, 120 N.M. 1, 896 P.2d 1148, this Court concluded that awarding attorneys' fees, which are punitive *and* compensatory, did not conflict with *Torrance* because a court's inherent authority to "control the parties and the litigation before it" outweighed the possible depletion of public revenues. In *Rio Grande Sun v. Jemez Mountains Pub. Sch. Dist.*, 2012-NMCA-091, ¶ 19, 287 P.3d 318, the Court of Appeals held that, "[a]s with other fee-shifting statutory schemes, IPRA's fee requirement encourages individuals to enforce IPRA on behalf of the public." *See, e.g., Lucero v. Aladdin Beauty Colls., Inc.*, 1994-NMSC-022, ¶ 4, 117 N.M. 269, 871 P.2d 365 (noting that "one of the policies embodied in the [Human Rights] Act is to encourage lawyers to take cases involving alleged violations of the Act" by providing for the award of attorney fees). We hold that

attorneys' fees, along with costs and actual damages, are sufficient incentives for New Mexico public officials to "remain accountable to the people they serve." *San Juan*, 2011-NMSC-011, ¶ 16.

This case is a prime example of how the express, built-in remedies of Section 14-2-12 achieve the overall purposes of IPRA without punishing the taxpayers. On March 15, 2011, Faber was successful in his state court action to enforce the provisions of IPRA, and the state district court issued a writ of mandamus ordering the Attorney General to comply with the request. In response to a motion filed by Faber, the district court subsequently awarded Faber "costs of $257.19; damages of $10 per day from the date of the wrongful denial [August 26, 2010] to the date the federal court stay was lifted [January 14, 2011]; thereafter, damages of $100 per day until the records are provided." The state district court did not award Faber attorneys' fees because Faber "waived an award of attorneys' fees by representing himself in this matter."

While the exact date of compliance cannot be known because the litigation is ongoing, we can be certain that on the day of this writing over 1,000 days have passed, thus tipping Faber's damages over the $100,000 mark. However, we recognize that much more time has passed in this case than the typical IPRA enforcement case. Still, we cannot conceive that the Legislature intended the taxpayers to burden such a cost where a public office wrongfully denies public records. *See State v. Herrera*, 1974-NMSC-037, ¶ 6, 86 N.M. 224, 522 P.2d 76 ("We will not construe statutes to achieve an absurd result or to defeat the intended object of the legislature."). Further, with the resolution of this case, Faber will receive the requested records and can recover his actual costs, thereby maintaining the goals of providing access to public records and enforcing accountability. Faber is not entitled to attorneys' fees because he is an attorney and he litigated this matter pro se. *See Faber*, 2013-NMCA-080, ¶ 11 ("Here, Faber waived his claim to attorney fees and argued for damages, thus removing from our consideration one possible remedy for successful litigants."); *see also Guttman v. Silverberg*, 374 F.Supp. 2d 991, 993 (D.N.M. 2005) (recognizing that "[t]here is authority in many types of cases for the position that a pro se litigant who is also an attorney should not be awarded attorney's fees." (providing string citation to supporting authority)).

Thus, Faber's damages under Section 14-2-12 are limited to compensatory damages designed to compensate him for any loss or injury suffered as a proximate result of the delayed production of the requested records. The Attorney General points out to this Court that Faber never produced any evidence of actual, compensatory damages, and the record contains none, an assertion that Faber has not challenged anywhere in his briefing to this Court, preferring instead to argue for statutory and punitive damages. Therefore, any claim to actual damages in this particular case has been waived.

C. Faber is not entitled to nominal damages

Faber makes the final argument that an award of per diem damages could be upheld as nominal damages. Faber relies on *Ruiz v. Varan*, 1990-NMSC-081, ¶ 18, 110 N.M. 478, 797 P.2d 267, where this Court upheld the award of $5,000 as nominal damages because the party liable for the award did not complain of the amount and the amount is a matter of discretion for the trial

court. Faber contends that the same is true here; that the Attorney General did not complain about the amount or argue that the trial court abused its discretion.

The Attorney General asserts that he did complain about the state district court's discretion by advancing the argument that it lacked the authorization to award per diem damages. The Attorney General also argues that Faber's requested amount of damages of approximately $20,000 cannot be described as a "'trivial sum.'" *Id.* Lastly, the Attorney General claims that Faber is reversing his "courses midstream" because Faber never requested nominal damages. The Court of Appeals did not address this issue.

In *Ruiz*, this Court considered whether the district court abused its discretion by awarding $5,000 as nominal damages. *See* 1990-NMSC-081, ¶ 17. *Ruiz* defined "nominal damages" as,

> damages awarded for the infraction of a legal right, where the extent of the loss is not shown, or the right is not dependent upon loss or damage, as in the case of rights . . . to have one's material property undisturbed by direct invasion. The award of nominal damages is made as a judicial declaration that the plaintiff's right has been violated.

Id. (omission in original) (quoting C. McCormick, Handbook on the Law of Damages § 20 (1935)). The *Ruiz* court stated that "nominal damages should be of a 'trivial sum.'" 1990-NMSC-081, ¶ 18 (citation omitted). *Ruiz* then noted that, "[a]ccording to McCormick, [Handbook on the Law of Damages,] some courts would not consider an award of $5,000 'nominal,' even as compared to the amount of the claim involved." *Id.* Yet *Ruiz* upheld that amount without expressly holding that $5,000 was not nominal because the party did not complain of the amount and the award and the amount of nominal damages is "a matter of discretion for the trial court." *Id. Ruiz* affirmed the judgment because the plaintiff succeeded in proving harm to the trial court and because the plaintiff "did not prove anything else in connection with its damages." *Id.* ¶ 19.

Ruiz is inapposite to this case. In this case, we cannot review the district court's award of nominal damages for an abuse of discretion because the district court never specifically classified the damages as nominal. Instead, it awarded per diem damages under Section 14-2-12, which were requested by Faber. Further, both parties' argument that $5,000 is or is not nominal is unfounded. The *Ruiz* court explicitly refused to "hold that $5,000 is a trivial sum as a matter of law . . . ." 1990-NMSC-081, ¶ 18. Additionally, unlike the defendant in *Ruiz*, the Attorney General contested the amount by disputing the court's authority to award damages in the first place.

More importantly, our jury instructions expressly provide that "[n]ominal damages are a trivial sum of money, usually one cent or one dollar, awarded to a party who has established a right to recover but has not established that [he] [she] [it] is entitled to compensatory damages." UJI 13-1832 NMRA. The Use Note to UJI 13-1832 further states that "[t]his instruction should not be used when the cause of action requires proof of actual damages." Because Faber is entitled to the compensatory damages clearly provided for in Section 14-2-12, we hold that Faber is not eligible for nominal damages.

IV. CONCLUSION

Section 14-2-12 does not permit punitive or statutory damages. Section 14-2-12 only allows for a writ of mandamus, an injunction, actual damages, costs, and attorneys' fees. For the foregoing reasons, we reverse both the Court of Appeals and the district court and remand to the district court for further proceedings consistent with this opinion.

IT IS SO ORDERED.

PETRA JIMENEZ MAES, Justice

WE CONCUR:

BARBARA J. VIGIL, Chief Justice

RICHARD C. BOSSON, Justice

EDWARD L. CHÁVEZ, Justice

CHARLES W. DANIELS, Justice

Certiorari Granted, May 11, 2015, No. 35,116

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-051

Filing Date: January 6, 2015

Docket No. 32,516

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

JENNIFER MARTINEZ,

Defendant-Appellant.

Hector H. Balderas, Attorney General
Santa Fe, NM
Ralph E. Trujillo, Assistant Attorney General
Albuquerque, NM

for Appellee

Jorge A. Alvarado, Chief Public Defender
David Henderson, Assistant Appellate Defender
Santa Fe, NM

for Appellant

OPINION

VIGIL, Judge.

This case presents a new wrinkle on reasonable suspicion. The arresting officer testified that Defendant ran a stop sign and came to a stop in the middle of the intersection, blocking his lane of travel. However, the dashboard camera in the officer's police car demonstrated that this was not the case. The district court found that the officer exaggerated, at least, and gave no credence to the officer's testimony. Nevertheless, relying on the dashboard camera video, the district court found that the officer had reasonable suspicion to stop Defendant and denied Defendant's motion to suppress. On review, we find the video evidence to be ambiguous. Because the district court found

that the officer was not credible, and we do not agree with the district court that the video evidence alone supports a finding of reasonable suspicion, we reverse.

I. BACKGROUND

Defendant was charged in the magistrate court with driving under the influence of intoxicating liquor (DWI), having an open container in the vehicle, and failure to stop at a stop sign. Defendant's motion to suppress on the basis that the officer had no reasonable suspicion to stop her vehicle was denied, and Defendant entered into a plea and disposition agreement, reserving her right to appeal the denial of her motion to suppress. In Defendant's de novo appeal to the district court, an evidentiary hearing was held on Defendant's motion to suppress. Concluding that reasonable suspicion supported the stop of Defendant's vehicle, the district court denied the motion and remanded the case to the magistrate court. Additional proceedings took place in the magistrate court and district court, which we discuss in more detail below, and Defendant appeals.

II. DISCUSSION

A. Timely Appeal

We first address the State's assertion that the appeal is not properly before us because Defendant is appealing from the order denying her motion to suppress, and the notice of appeal from that order was not filed on time. "The timely filing of a notice of appeal is a mandatory precondition to this Court's exercise of jurisdiction." *State v. Vigil*, 2014-NMCA-096, ¶ 7, 336 P.3d 380, *cert. granted*, 2014-NMCERT-009, 337 P.3d 095. The State's argument arises in the following context.

The district court order denying Defendant's motion to suppress and remanding the case to the magistrate court was filed on July 22, 2010. Over two months later on October 12, 2010, Defendant attempted to fax file a notice of appeal in the magistrate court, appealing the district court order to this Court, but the notice of appeal does not seem to have been filed. In any event, the attempted filing was not timely, and the notice should have been filed with the district court, not the magistrate court. *See* Rule 12-201(A)(2) NMRA (directing that a notice of appeal from the district court is to be filed with the clerk of the district court within thirty days from the date the order or judgment is filed). Defendant was then sentenced in the magistrate court, and Defendant again appealed to the district court, creating a new district court cause number. Defendant then filed a motion to incorporate the original district court appeal with the new case on grounds that the failure to perfect the original appeal was the fault of defense counsel. The district court denied the motion and dismissed the case. Defendant appeals.

In *State v. Duran*, 1986-NMCA-125, ¶ 1, 105 N.M. 231, 731 P.2d 374, we held that there is a conclusive presumption of ineffective assistance of counsel where a notice of appeal is not filed within the time limit required. In such cases, we will entertain a criminal appeal on the merits. *State v. Lope*, 2014-NMCA-____, ¶ 8, ___P.3d___ (No. 32,511, July 24, 2014). We have recently applied the presumption in several contexts. *See State v. Dorais*, 2014-NMCA-___, ¶¶ 4-5, 7, ___P.3d___ (No. 32,235, May 21, 2014) (concluding that the *Duran* presumption applies where the notice of appeal was not filed for four years following a de novo trial in the district court in an appeal from the magistrate court); *Vigil*, 2014-NMCA-096, ¶

16 (applying the *Duran* presumption when "an untimely notice of appeal is filed following the district court's on-record review of a metropolitan court decision"); *State v. Eger*, 2007-NMCA-039, ¶ 5, 141 N.M. 379, 155 P.3d 784 (holding that the *Duran* presumption of ineffectiveness of counsel applies to a defendant's right to appeal a conditional plea agreement to the district court). *Cf. State v. Lope*, 2014-NMCA-____, ¶ 9 (applying the *Duran* presumption where the notice of appeal was timely filed, but the inaction of counsel resulted in the appeal being dismissed); *Olguin v. State*, 1977-NMSC-034, ¶¶ 1, 7, 90 N.M. 303, 563 P.2d 97 (concluding that dismissal of the appeal was not warranted where counsel filed a timely notice of appeal but did not perfect the appeal because the docketing statement was not filed on time).

Here, defense counsel unsuccessfully attempted to fax file a notice of appeal from the district court order denying Defendant's motion to suppress in the wrong court, and it was untimely. Not applying the *Duran* presumption in this case will result in denying Defendant her constitutional right to appeal because of counsel's failure to comply with the requirements for perfecting the appeal. Because there is no material distinction between the case now before us and our existing precedent in this regard, we conclude the presumption applies and proceed to decide the merits.

B. Motion to Suppress

The sole issue on appeal is whether Sergeant Rascon had a reasonable suspicion that Defendant failed to stop at a stop sign. In the context of a non-pretextual traffic stop, "a police officer must have reasonable suspicion of criminal activity or probable cause that the traffic code has been violated." *State v. Hicks*, 2013-NMCA-056, ¶ 14, 300 P.3d 1183 (internal quotation marks and citation omitted), *cert. denied*, 2014-NMCERT-004, 301 P.3d 858. Thus, "the State has the burden to establish reasonable suspicion to stop the motorist. If the State fails in its burden, the stop is unconstitutional." *State v. Gonzales*, 2011-NMSC-012, ¶ 12, 150 N.M. 74, 257 P.3d 894 (citing *State v. Ochoa*, 2009-NMCA-002, ¶ 40, 146 N.M. 32, 206 P.3d 143). "As usual, the State has the burden of proof to justify the stop under an exception to the warrant requirement." *Ochoa*, 2009-NMCA-002, ¶ 40.

A reasonable suspicion is "a particularized suspicion, based on all the circumstances that a particular individual, the one detained, is breaking, or has broken, the law." *State v. Neal*, 2007-NMSC-043, ¶ 21, 142 N.M. 176, 164 P.3d 57 (emphasis, internal quotation marks, and citation omitted). On appeal, we determine whether the facts found by the district court are supported by substantial evidence, and we review the application of the law to the facts under a de novo standard of review. *State v. Alderete*, 2011-NMCA-055, ¶ 9, 149 N.M. 799, 255 P.3d 377. Therefore, "[q]uestions of reasonable suspicion are reviewed de novo by looking at the totality of the circumstances to determine whether the detention was justified." *State v. Hubble*, 2009-NMSC-014, ¶ 5, 146 N.M. 70, 206 P.3d 579 (internal quotation marks and citation omitted); *see Alderete*, 2011-NMCA-055, ¶¶ 13-14 (stating that with respect to a district court's determination of reasonable suspicion, our review is de novo); *State v. Candelaria*, 2011-NMCA-001, ¶ 8, 149 N.M. 125, 245 P.3d 69 ("[W]e consider de novo whether the disputed police activity was reasonable given the totality of the circumstances."). "We will find

reasonable suspicion if the officer is aware of specific articulable facts, together with rational inferences from those facts, that, when judged objectively, would lead a reasonable person to believe criminal activity occurred or was occurring." *Hubble*, 2009-NMSC-014, ¶ 8 (internal quotation marks and citation omitted). In making this determination, "it is the evidence known to the officer that counts[.]" *Id.* Finally, we must determine that "the officer's action was justified at its inception." *Terry v. Ohio*, 392 U.S. 1, 19-20 (1968).

At the evidentiary hearing in the district court Sergeant Rascon testified that at approximately 10:00 p.m., he was on patrol traveling south on a two-lane road when he observed Defendant approaching an intersection with a four-way stop sign at a high rate of speed. "And at the four-way stop sign the vehicle just went past the stop sign completely into the lane of traffic, southbound lane of traffic. She stepped on her brakes completely and she made a complete stop, but it was in the middle, in the lane of traffic." Sergeant Rascon said that Defendant then made a wide left turn and proceeded north. On cross examination, Sergeant Rascon clarified that Defendant was traveling east and traveled past the stop sign so far, that when she stopped, she was in the middle of the southbound traffic lane, blocking his lane of travel. Sergeant Rascon did not cite Defendant for speeding (he did not know how fast Defendant was driving), or for making a wide turn. The only traffic infraction he cited Defendant with was failure to stop at a stop sign.

The stop was recorded by Sergeant Rascon's dashboard camera, and the video was admitted into evidence. After viewing the video, the district court said:

> Alright, well you know after hearing Sergeant Rascon's testimony I was certainly confused as to why the Defendant would file the motion to suppress because he made it sound very clear why, why he stopped and that there was reasonable suspicion, but I think it just goes to show you really need to review the video in every case. And in this case after reviewing the video, I truly find the truth somewhere in between both positions. I certainly didn't see Sergeant Rascon's testimony that there was, she stopped in the middle of the intersection, I don't think that was the case. However I do think she, she seemed to be going quickly, she seemed to have slammed on her brakes, and she seems to have slammed on her brakes further into the intersection than I think is allowable, creating the reasonable suspicion for Sergeant Rascon to . . . stop [Defendant]. So therefore I will deny Defendant's motion to suppress although I will grant that it was certainly a closer call than I thought it was going to be at first. But I still think Sergeant Rascon did have reasonable suspicion to stop her.

To assess whether the evidence supports the district court's conclusion that the stop was supported by a reasonable suspicion, we begin with the applicable statute. In pertinent part, NMSA 1978, Section 66-7-345(C) (2003) directs that "every driver of a vehicle approaching a stop intersection indicated by a stop sign shall stop before entering the crosswalk on the near side of the intersection or, in the event there is no crosswalk, shall stop at a clearly marked stop line, but if none, then at the point nearest the

intersecting roadway before entering the intersection." In this case, there is no crosswalk or stop line; thus the question is whether the evidence supports a conclusion that Sergeant Rascon had a reasonable suspicion that Defendant's vehicle failed to stop "at the point nearest the intersecting roadway before entering the intersection." *Id.*

The district court made an express finding after viewing the video that Defendant did not stop in the middle of the intersection, which was directly contrary to Sergeant Rascon's testimony. Also, the district court did not give any indication that it inferred reasonable suspicion from the officer's testimony. The district court could, perhaps, have stripped away the officer's exaggeration while giving credence to the officer's perception that Defendant came to rest in the intersection. But it did not. Instead, the district court found that the officer was not credible. Again, a finding of reasonable suspicion must be based on specific articulable facts that are based on the officer's observations, and it is the evidence that is known to the officer at the time of the stop that counts. Thus, the district court was left with no facts other than the video on which to conclude that the stop was supported by a reasonable suspicion.

We also conclude that the video fails to support a finding of a reasonable suspicion for the stop. The video shows the vehicle as Sergeant Rascon approaches an intersection with a four-way stop sign. To the right, Defendant's car approached the same intersection with its left turn signal on, signaling that Defendant's turn would take her across Sergeant Rascon's lane of traffic, turning onto the same road as Sergeant Rascon, headed the opposite direction. Defendant's vehicle came to a complete stop. Then Sergeant Rascon's car stopped before he engaged his emergency lights, executed a U-turn, and got behind Defendant to initiate the traffic stop. The video shows there is no crosswalk or line painted on the road to indicate where Defendant's car must be behind in order to be in compliance with Section 66-7-345(C).

What the video does not show is whether Defendant's vehicle stopped "at the point nearest the intersecting roadway before entering the intersection" as required by Section 66-7-345(C). Because of the angle on which the video is taken, it is impossible to determine whether Defendant's vehicle is just barely in the intersection (a violation) or just barely behind the intersection (no violation) when it came to a stop. Because the district court did not give any credence to Sergeant Rascon's testimony that Defendant stopped in the middle of the intersection, we must decide whether an ambiguous video by itself can provide a police officer with a reasonable suspicion. We conclude that it cannot. The burden to establish reasonable suspicion falls on the State. *Gonzales*, 2011-NMSC-012, ¶ 12. Without more, an ambiguous video does not meet that burden. *See City of E. Peoria v. Palmer*, 980 N.E.2d 774, 782-83 (Ill. App. Ct. 2012) (agreeing with the circuit court that the officer lacked reasonable, articulable suspicion because the circuit court found the officer to be "not credible" and the dashboard camera video did not provide "conclusive proof" of a violation).

We acknowledge that the district court also looked at the video, and that it came to a different conclusion regarding reasonable suspicion. However, its findings are expressed in speculative terms: "[Defendant] seemed to have slammed on her brakes, and she seems to have slammed on her brakes

further into the intersection than I think is allowable[.]" The constitutionality of a stop premised upon reasonable suspicion cannot be based upon speculation or conjecture. *See State v. Houghton*, 384 S.W.3d 441, 448-50 (Tex. Ct. App. 2012) (concluding that reasonable suspicion could not be based solely on a video which did not "indisputably" show a traffic violation). Moreover, reviewing a video by itself is like reviewing any other documentary evidence, and we are in as good a position as the district court to view the video and interpret what it shows. *See Kirkpatrick v. Introspect Healthcare Corp.*, 1992-NMSC-070, ¶ 14, 114 N.M. 706, 845 P.2d 800 ("When the resolution of the issue depends upon the interpretation of documentary evidence, this Court is in as good a position as the trial court to interpret the evidence."); *City of Raton v. Vermejo Conservancy Dist.*, 1984-NMSC-037, ¶ 27, 101 N.M. 95, 678 P.2d 1170 ("[W]hen the issue to be determined rests upon the 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[.]").

In *Carmouche v. State* , 10 S.W.3d 323 (Tex. Crim. App. 2000), a police officer testified that the defendant consented to a search of his person, and on this basis, the defendant's motion to suppress was denied, which the intermediate court affirmed. *Id.* at 326; 331. However, the Court of Criminal Appeals of Texas reversed both lower courts because a video of the incident presented "indisputable visual evidence contradicting essential portions" of the officer's testimony, and the nature of the evidence presented on the video did not turn on an evaluation of credibility and demeanor. *Id.* at 332. We find such reasoning persuasive in this case. *See also State v. Collins*, 45,979, p.3 (La. App. 2 Cir. 12/22/10) 87 So. 3d 857, 859 (concluding that there was no unlawful driving on the basis of a video, notwithstanding the testimony of an officer that there was).

For the foregoing reasons, in our de novo review, we conclude that the evidence fails to support a finding that a reasonable suspicion justified the stop of Defendant's car for failing to stop at a stop sign.

III. CONCLUSION

The order of the district court denying Defendant's motion to suppress is reversed, and the case is remanded to the district court for further proceedings consistent with this opinion.

IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

M. MONICA ZAMORA, Judge

Certiorari Granted, May 11, 2015, No. 35,121

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-052

Filing Date: January 14, 2015

Docket No. 32,872

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

STEFAN CHAKERIAN,

Defendant-Appellant.

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for Appellee

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for Appellant

OPINION

VIGIL, Judge.

The question presented in this case is whether a defendant who was provided with a telephone book and access to a telephone for a period of twenty to thirty minutes in the early hours of the morning, was given a reasonable opportunity to arrange for an independent chemical test pursuant to the Implied Consent Act (the Act), NMSA 1978, §§ 66-8-105 to -112 (1978, as amended through 2007). We conclude that Defendant was not afforded his statutory right under the Act. We therefore reverse the judgment of the district court and remand to the metropolitan court for further proceedings.

BACKGROUND

At the bench trial in the metropolitan court before Judge Benavidez (trial court), the following facts were established. Albuquerque Police Officer Mark Aragon initiated a traffic stop of Defendant's vehicle after his dash-mounted radar indicated Defendant was traveling forty-seven miles per hour in a thirty-five mile-per-hour zone. Upon coming into contact with Defendant, Officer Aragon observed that Defendant had bloodshot, watery eyes and emitted an odor of alcohol. He asked Defendant if he had been drinking, and Defendant responded "not much." After administering field sobriety tests, Officer Aragon concluded that Defendant was driving while under the influence of alcohol (DWI) and arrested him.

Officer Aragon transported Defendant to a police substation to administer a breath alcohol (BAC) test. Before beginning the test, Officer Aragon advised Defendant of his rights and obligations under the Act. This included Defendant's right to be given an opportunity to arrange for a qualified person of his own choosing to perform a chemical test of his blood for alcohol content. *See* § 66-8-109(B) (directing that the law enforcement officer shall advise the person of his right to be given an opportunity to arrange for a qualified person "of his own choosing" to perform a chemical test of his blood). Because the machine at the substation delivered an error message when Officer Aragon attempted to obtain a breath sample from Defendant, he transported Defendant to the Prisoner Transport Center to administer a breath test. The BAC test measured two samples of Defendant's breath alcohol content at .12 and .11 at 3:37 and 3:40 a.m., respectively.

At the Prisoner Transport Center, Officer Aragon again advised Defendant of his right to arrange for an independent test of his blood, and Defendant requested that he be afforded that right. Officer Aragon thereupon took Defendant to a table with a telephone and Yellow Pages phonebook. Defendant testified, "I don't actually know what to look up to get a blood test taken. There was nothing under phlebotomists . . . I had the phone and a phonebook and I couldn't find any numbers that could actually—I mean, I didn't know what to look up." Defendant wrote phone numbers down but he did not use any of them because, although he wanted a blood test, he felt too much time had already passed. Officer Aragon believed they were at the table for twenty to thirty minutes before the medical screening officer arrived, and Defendant was then booked into custody.

Defendant objected to the admission of the BAC test results, arguing that he was not given a reasonable opportunity to arrange for an independent chemical test of his blood for alcohol as required by the Act. The objection was overruled, and the BAC test results were admitted into evidence. However, the trial court expressed its reservation in having admitted the test results. Before announcing the verdict, the trial court said:

> One of the most troubling things with respect to this case is whether or not Defendant had an opportunity to take another breath, another blood test at his request. From what's been presented to me today, I mean, I just don't see, the way things happened, that he was really afforded an opportunity to have a blood test given to him.

Based on the test results admitted into evidence, the trial court found Defendant guilty of per se DWI and speeding. *See* § 66-8-102(C)(1) (providing that it is per se unlawful to drive a vehicle if the person has an alcohol concentration of .08 or more in the person's blood or breath within three hours of driving the vehicle). The verdict notwithstanding, the trial court added:

> I have really, some really big issues with the fact that I don't know that he was actually allowed to take another test that was going to be meaningful or not. I mean, I'm just not seeing it, given what was presented to me. That may be an issue that defense might want to pursue, you know, on appeal. He testified that he was just given a book and a phone. I don't know if that is meaningful or not. His actions, and he testified also, you know, 'I didn't object strenuously,' like I had stated earlier. I think he really did want to get the test done. I don't know that he had a real opportunity to get it done.

Defendant appealed the DWI and speeding convictions to the district court. The district court affirmed the DWI conviction on a basis not raised in the trial court or argued by either party in the appeal. In its memorandum opinion, the district court asserted that even if Defendant had obtained an independent BAC test of his blood, the test results "would have had to register nearly a third lower" than the breath test results of .12 and .11 obtained by Officer Aragon. Further, said the district court, because Defendant presented no evidence that an independent test "would have demonstrated an error of such magnitude[,]" it concluded that Defendant "failed to establish prejudice and, regardless

of whether the officer afforded [Defendant] a reasonable opportunity to obtain an independent test, suppression was not required." Defendant appeals from the decision of the district court, and for the reasons stated below, we reverse.

DISCUSSION

Defendant raises two issues on appeal. First, Defendant contends he was not given a reasonable opportunity to arrange for an independent test of his blood as required by Section 66-8-109(B) of the Act. Second, Defendant asserts that the district court erred in basing its decision on an issue that was not considered by the trial court or raised on appeal. In response, the State argues that no error was committed in the trial court or on appeal. In addition, the State contends that Defendant's appeal to us from the district court—his second appeal—is not an appeal as a matter of right over which we must exercise jurisdiction. Since briefing concluded in this case, we issued our opinion in *State v. Carroll*, 2013-NMCA-__, __ P.3d __ (No. 32,909, Oct. 21, 2013), rejecting the State's jurisdictional challenge. We therefore do not address this matter further and proceed to address Defendant's arguments.

The Right to Arrange for an Independent Chemical Test

The first issue we address is the right of a motorist arrested for DWI to arrange for an independent chemical test of his blood for alcohol under Section 66-8-109(B), and whether, under the circumstances, Defendant was afforded that right.

Standard of Review

Prior to analyzing whether Defendant was afforded his statutory right under Section 66-8-109(B), we clarify our standard of review. Defendant asserts that the trial court's statement quoted above before admitting the breath test results into evidence ("I just don't see, the way this happened, that he was really afforded an opportunity to have a blood test given to him.") constitutes a finding of fact. Therefore, Defendant argues that our review is limited to whether this "finding" is supported by substantial evidence. On the other hand, the State contends that because the breath test results were admitted into evidence, we are limited to reviewing whether the trial court abused its discretion in admitting the test results. We reject both assertions.

Historical facts, as found by the fact finder, are reviewed under the substantial evidence standard, whereas interpreting or applying the law to the facts is reviewed de novo. *See State v. King*, 2012-NMCA-119, ¶ 13, 291 P.3d 160 (stating that statutory review of the Act is under a de novo standard); *State v. Vaughn*, 2005-NMCA-076, ¶ 33, 137 N.M. 674, 114 P.3d 354 (interpreting provisions of the Act). Here, the historical facts set forth above are not disputed, and we construe the comments of the trial court as questioning whether, under the facts, the statute was complied with by Officer Aragon. We therefore proceed to determine de novo whether, under those facts, Defendant was deprived of his statutory right.

Analysis

State v. Jones, 1998-NMCA-076, ¶ 24, 125 N.M. 556, 964 P.2d 117, is the only case examining the meaning of Section 66-8-109(B). Therein, we held that the statute "entitles arrestees to a reasonable opportunity to contact a qualified person of their choosing who may be able to perform the test." *Jones*,

1998-NMCA-076, ¶ 24. We further concluded that the statute entitles "those arrested on charges of DWI to choose who will perform the independent chemical test upon them by drawing the blood, as well as to choose who analyzes the blood sample." *Id.* ¶ 23.

In *Jones*, the arresting officer read the defendant the Act advisory and administered two breath tests. *Id.* ¶ 4. Once the tests were completed, the defendant requested an independent blood test, and specified that he wanted his own doctor, not a blood technician on contract with the police department, to draw his blood. *Id.* ¶ 5. However, the officer did not allow the defendant to use a telephone, nor did the officer make any calls on the defendant's behalf. *Id.* Under these circumstances, we concluded it was clear that the defendant was denied a reasonable opportunity to contact his doctor. *Id.* ¶ 25. Because the statutory violation was so clear in *Jones*, it was not necessary for us to decide whether anything more than access to a telephone was required to afford a DWI arrestee "a reasonable opportunity to contact someone of his choosing to perform the blood test upon him." *Id.*

Unlike *Jones*, this case requires us to address whether providing access to a telephone and Yellow Pages phonebook provided Defendant "a reasonable opportunity to contact someone of his own choosing to perform the blood test upon him." To guide our resolution of this question, we first examine the structure of the Act and the rights and duties imposed by the Legislature in the Act.

The purpose of the Act is to deter DWI and to aid in discovering and removing an intoxicated driver from the highway. *See McKay v. Davis*, 1982-NMSC-122, ¶ 4, 99 N.M. 29, 653 P.2d 860. To this end, the Act declares that any person who operates a motor vehicle "shall be deemed to have given consent" to a chemical test of his breath or blood "for the purpose of determining the drug or alcohol content of his blood" if the person is arrested for DWI. Section 66-8-107(A). The test "shall be administered at the direction of a law enforcement officer" who has reasonable grounds to believe the person is DWI. Section 66-8-107(B). While the driver may refuse to submit to a test, his driver's license may be revoked and he subjects himself to an enhanced charge of aggravated DWI for refusing to submit to the test. Sections 66-8-111 (A), (B); 66-8-112; and 66-8-102(D)(3). When the test shows that the breath or blood of the driver contains an alcohol concentration of eight one hundredths or more (or four one hundredths or more if the person is driving a commercial motor vehicle), "[t]he arresting officer shall charge the person tested" with DWI. Section 66-8-110(C). The test results are admissible in evidence in any civil or criminal action arising out of the acts alleged to have been committed by the person while driving a motor vehicle under the influence of intoxicating liquor or drugs. Section 66-8-110(A). Finally, on the basis of the test results, the Act creates presumptions about whether the driver is DWI. Section 66-8-110(B).

The alcohol content of the driver's blood is the critical evidence in DWI prosecutions such as the one before us here. A driver has a right to challenge the reliability and results of a test for alcohol at trial. *King*, 2012-NMCA-119, ¶ 16; *State v. Chavez*, 2009-NMCA-089, ¶ 9, 146 N.M. 729, 214 P.3d 794; *State v. Martinez*, 2007-NMSC-025, ¶ 24, 141 N.M. 713, 160 P.3d 894. However,

if the driver's blood is not preserved for testing, critical evidence to make such a challenge is irretrievably lost, and a question arises as to whether due process was violated. *See Montoya v. Metro. Court*, 1982-NMSC-092, ¶¶ 2-7, 98 N.M. 616, 651 P.2d 1260 (addressing whether the State is constitutionally required to preserve what remains of a breath alcohol sample for independent testing by persons charged with DWI), *abrogated on other grounds by State v. Alberico*, 1993-NMSC-047, ¶ 40, 116 N.M. 156, 861 P.2d 192. In addition, this critical evidence is subject to constant changes over time. As the expert in *State v. Christmas*, 2002-NMCA-020, ¶ 26, 131 N.M. 591, 40 P.3d 1035 explained:

> [W]hen alcohol is ingested, it travels first to the stomach, and is eventually absorbed into the bloodstream. During this first stage, or 'absorption stage,' an individual's BAC continues to rise. However, absorption rates can vary tremendously, based on any number of anatomical, physiological, and situational factors. At some point, the alcohol level in a person's blood or breath reaches a second stage, or 'peak level.' After the BAC reaches a peak, an individual enters the so-called 'elimination phase,' as alcohol is metabolized by the body and the BAC level begins to decline. . . . [T]hese three phases can overlap, because the body begins the process of elimination even as it may still be absorbing alcohol . . . . [T]his phenomena [can be described] as an 'alcohol time response curve,' that can vary greatly with the individual and the situation. . . . [I]t is not always possible to tell whether an individual's BAC was on the rise, at its peak, or on the decline at some earlier point in time, like the time of driving[.]

In response to these concerns, at least one state has concluded that the constitutional due process right to obtain exculpatory evidence includes a right to obtain an alcohol test independent of the test administered by the arresting officer and that this includes being informed of that constitutional right at the time of the arrest. *State v. Minkoff*, 2002 MT 29, ¶¶ 9-10, 308 Mont. 248, 42 P.3d 223; *State v. Strand*, 951 P.2d 552, 554-55 (Mont. 1997), *overruled on other grounds by Minkoff*, 2002 MT 29, ¶ 23; *State v. Swanson*, 722 P.2d 1155, 1157-58 (Mont. 1986).

It is within this factual and legal context that the Legislature adopted Section 66-8-109(B). The statute directs:

> The person tested shall be advised by the law enforcement officer of the person's right to be given an opportunity to arrange for a physician, licensed professional or practical nurse or laboratory technician or technologist who is employed by a hospital or physician of his own choosing to perform a chemical test in addition to any test performed at the direction of a law enforcement officer.

Thus, by enacting Section 66-8-109(B), our Legislature has crafted a careful balance. On the one hand, the Legislature has provided the State with strong tools for deterring and prosecuting DWI offenses, and on the other hand, the Legislature has protected the rights of citizens by requiring the State to provide an arrestee with a

meaningful opportunity to reasonably preserve and test the critical and potentially exonerating evidence. As explained in *Fugere v. Taxation & Revenue Dep't*, 1995-NMCA-040, ¶ 21, 120 N.M. 29, 897 P.2d 216, a person accused of DWI who takes the test ordered by the arresting officer then has a right to "take an additional test of his own choosing, and to thereafter challenge any disparate results." *Id.* Section 66-8-109(B) affords fundamental fairness and at the same time, constitutional due process. In fact the Legislature has determined that the right is so fundamental and important, that when it is exercised, "the cost of that test shall be paid by the law enforcement agency[.]" Section 66-8-109(E). We now proceed to determine whether Defendant was afforded his statutory right.

The statute grants arrestees a protected right in the form of an "opportunity" to arrange for an independent blood test in order to challenge the critical BAC evidence. The word "opportunity" means in part "a combination of circumstances, time, and place suitable or favorable for a particular activity or action." Webster's Third New Int'l Dictionary 1583 (unabridged ed. 2002). Thus, an opportunity "indicates a combination of circumstances facilitating a certain action or inviting a certain decision." Webster's Third New Int'l Dictionary, *supra*, at 1583. In *Jones*, we added that the statute requires "that the arrestee will be given a *reasonable opportunity* to arrange for an additional test." 1998-NMCA-076, ¶ 24 (emphasis added). We therefore conclude that the plain meaning of the statue imposes a duty upon the State, a duty that requires law enforcement to meaningfully cooperate with an arrestee's express desire to arrange for an independent blood test. The level of meaningful cooperation required by law enforcement will depend upon the facts and circumstances in each particular case.

Doing nothing more than providing access to a Yellow Pages telephone book and telephone in the early morning hours fails to rise to the level of meaningful cooperation required by Section 66-8-109(B). A telephone book is simply a list of names and telephone numbers of telephone subscribers who allow their number to be published. In this regard, a telephone book is over-inclusive in that most—if not all—of the numbers listed do not relate to a person who conducts chemical tests of blood for alcohol. Further, while a Yellow Pages telephone book has categories of goods and services under which names and telephone numbers are listed, one will search in vain for the categories of a "physician, licensed professional or practical nurse or laboratory technician or technologist who is employed by a hospital or physician" who is authorized to draw blood or test blood for alcoholic content. In this sense, a telephone book is under-inclusive.

The State failed to present any evidence or argument demonstrating that providing Defendant with the Yellow Pages telephone book and telephone was reasonably likely to result in Defendant being able to arrange for an independent chemical test. The only evidence we have is Defendant's testimony that he tried to find someone listed in the phone book who could take a sample of his blood, but he was not able to do so—"I didn't know what to look up." The fact that some percentage of citizens arrested for DWI might be able to successfully arrange for an independent blood test in the early morning hours by using the Yellow Pages and a telephone is not determinative. The critical issue is whether an ordinary person under arrest for being impaired can reasonably

arrange for an independent blood test in the early morning hours by simply using the Yellow Pages and a telephone. The "reasonable person standard" is employed in many other contexts, and we see no reason why it should not apply in this case as well. *See Cochrell v. Mitchell*, 2003-NMCA-094, ¶ 21, 134 N.M. 180, 75 P.3d 396 (interpreting statutory notice requirement under a reasonable person standard); *Bogan v. Sandoval Cnty. Planning & Zoning Comm'n*, 1994-NMCA-157, ¶ 24, 119 N.M. 334, 890 P.2d 395 (concluding that compliance with an ordinance requiring notice is measured by what the average citizen reading the notice would understand).

Under the circumstances, Officer Aragon only provided Defendant with a mere possibility of being able to arrange for an independent test, and more than that is required by the plain language of the statute—the opportunity provided must be meaningful. The State's duty to participate and cooperate with an arrestee's opportunity to obtain an independent blood test cannot be so minimal that it reduces an ordinary citizen's protected right to the level of being illusory. *See City of Deming v. Deming Firefighters Local 4521*, 2007-NMCA-069, ¶ 23, 141 N.M. 686, 160 P.3d 595 ("We . . . do not give effect to legislative intent by reading a statute in a way that would render it meaningless."); *Gray v. Sanchez*, 1974-NMSC-011, 86 N.M. 146, 520 P.2d 1091 (Montoya, J., specially concurring) (observing that the manner in which a statute is executed cannot result in rendering the statutory right illusory). Objectively, Officer Aragon's actions in this case were not sufficient to provide an ordinary person with the means to reasonably obtain an independent test of his or her blood to determine its alcohol content as required by Section 66-8-109(B). *State v. Herrera*, 1974-NMSC-037, ¶ 6, 86 N.M. 224, 522 P.2d 76 ("We will not construe statues to achieve an absurd result or to defeat the intended object of the legislature.").

We therefore hold that Defendant was not afforded his statutory right of a reasonable opportunity to arrange for an independent chemical blood test of his own choosing. We acknowledge that other states have come to a different conclusion in interpreting their own statute. *See Schulz v. Comm'r of Pub. Safety*, 760 N.W.2d 331, 334 (Minn. Ct. App. 2009) ("Other than providing a telephone, an officer has no obligation to assist a driver to obtain an additional test."); *State v. Dake*, 529 N.W.2d 46, 49 (Neb. 1995) (finding that while "the police cannot hamper a motorist's efforts to obtain independent testing, they are under no duty to assist in obtaining such testing beyond allowing telephone calls to secure the test"). However, we are not persuaded by their reasoning in light of how our Legislature has chosen to balance the interests at stake while maintaining fundamental fairness and affording due process.

Prejudice From the Statutory Violation and Sanctions

We now address Defendant's second argument, that the district court erred in affirming the DWI conviction on grounds that Defendant failed to demonstrate prejudice, a basis not raised in the trial court or argued by either party on appeal to the district court. In an on-the-record appeal from the metropolitan court the district court is the equivalent of an appellate court. *See State v. Trujillo*, 1999-NMCA-003, ¶ 4, 126 N.M. 603, 973 P.2d 855 ("For on-record appeals the district court acts as a typical appellate court, with the district judge simply reviewing the record of the

metropolitan court trial for legal error."). Thus, Defendant asserts, the district court improperly decided Defendant was not prejudiced, because it was not an issue raised by either party in the trial court or on appeal to the district court. We agree with Defendant. *See State v. Jade G.*, 2007-NMSC-010, ¶ 24, 141 N.M. 284, 154 P.3d 659 (acknowledging that as a general rule, propositions of law not raised in the trial court cannot be considered sua sponte by an appellate court).

This case illustrates one of the reasons why, as a general rule, issues not raised at trial should not be considered sua sponte on appeal. The trial court found Defendant guilty of per se DWI under Section 66-8-102(C)(1) (providing that it is per se unlawful to drive a vehicle if the person has an alcohol concentration of .08 or more in the person's blood or breath within three hours of driving the vehicle). In affirming the conviction on appeal, the district court noted that Defendant's BAC test results were .12 and .11. Therefore, reasoned the district court, to avoid a per se conviction, Defendant's independent tests "would have had to register nearly a third lower[,]" and Defendant "presented no evidence an independent test would have demonstrated an error of such magnitude." The district court therefore concluded that Defendant failed to establish prejudice and regardless of whether Defendant was afforded his right to an independent test, suppression was not required. However, there was no basis in the record to support the premise on which these conclusions were reached. In effect, the district court made findings of fact and conclusions of law without any evidentiary support while sitting in its capacity as an appellate court. This was improper and itself a basis for reversal. *See Cadena v. Bernalillo Cnty. Bd. of Comm'rs*, 2006-NMCA-036, ¶¶ 3, 18, 139 N.M. 300, 131 P.3d 687 (concluding that the district court improperly acted outside its capacity as an appellate court by engaging in fact finding).

Moreover, the district court erred in the analysis that it did employ. In coming to its conclusions, the district court relied on *Jones*, 1998-NMCA-076. However, that reliance was misplaced. In *Jones*, the defendant was arrested for DWI and submitted to a BAC test of his breath for alcohol. *Id.* ¶ 4. After being informed of his right to arrange for an independent test of his blood, he stated he wanted to call his doctor to perform the test. *Id.* ¶¶ 4-5. The arresting officer told the defendant that the police department had a blood technician on contract to perform blood tests at the jail, and did not allow the defendant to use a telephone, nor did he make any calls on the defendant's behalf. *Id.* ¶¶ 5-6. Based on the BAC breath test results of .17 and. 17, the defendant was charged with aggravated DWI. *Id.* ¶¶ 4, 7. *See* § 66-8-102(D)(1) (providing that aggravated DWI consists of driving a motor vehicle with an alcohol concentration of sixteen one hundredths or more in the driver's breath or blood). At the defendant's trial for DWI in the metropolitan court, the court dismissed the aggravated portion of the DWI charge as a sanction because the State failed to afford the defendant an opportunity to have a person of his choosing draw his blood, *Jones*, 1998-NMCA-076, ¶ 7, but refused to suppress the breath alcohol test results. *Id.* ¶ 11. The defendant was found guilty of DWI, first offense, which was affirmed in his on the record appeal to the district court. *Id.* ¶ 7.

The defendant in *Jones* then appealed to this court, arguing in part that he was entitled to suppression of the BAC test results because he was not afforded his statutory right

to arrange for an independent test under Section 66-8-109(B). *Jones*, 1998-NMCA-076, ¶ 11. We stated it was "unlikely" that a blood alcohol test of the defendant's own choosing would have shown he was not driving while intoxicated, *id.* ¶ 30, and that the defendant's own test "would have had to have shown an error of 100% in the State's test." *Id.* ¶ 31. While *Jones* does not inform us on what basis these statements were made, it is well settled that such questions are matters of scientific expertise, and constitute adjudicative facts not subject to judicial notice. *See State v. Day*, 2008-NMSC-007, ¶ 31, 143 N.M. 359, 176 P.3d 1091 (discussing the necessity of use of scientific retrograde extrapolation evidence to determine BAC at an earlier time); *State v. Baldwin*, 2001-NMCA-063, ¶ 17, 130 N.M. 705, 30 P.3d 394 ("But a BAC reading from a laboratory test is just a sterile number; by itself it tells us nothing about a driver's condition hours earlier. Extrapolating backward in time can be a difficult task even for experts."). With the foregoing statements as a backdrop, *Jones* held that any possible prejudice suffered by the defendant was cured by the dismissal of the aggravated portion of the DWI charge, and he was not entitled to any further relief. 1998-NMCA-076, ¶¶ 31-32.

In this case, on the other hand, there is no evidence in the record on which the district court could make the findings it did to conclude that Defendant was not prejudiced. First of all, the issue was raised by the district court on its own motion for the first time on appeal, and Defendant never had an opportunity to argue to the district court why or how he was prejudiced. Secondly, no blood sample was taken or preserved to enable Defendant to prove prejudice, and the district court opinion fails to explain how Defendant could possibly prove what the results of a test would be on a blood sample which does not exist. Finally, unlike *Jones*, in which the trial court imposed sanctions for the statutory violation, no sanction was imposed in this case. For the foregoing reasons, we conclude that the district court improperly relied on *Jones* in concluding that Defendant was not prejudiced when the State failed to afford Defendant his right under Section 66-8-109(B).

Since we have concluded that Defendant's right to an independent test under Section 66-8-109(B) was violated, we now address the matter of sanctions. While the statute is silent on this question, we are confident that the Legislature intended for consequences to result when the State does not afford a driver the protections of Section 66-8-109(B). A right with no remedy for its violation is an empty right. Because our Legislature has established a procedure, consistent with due process, for preserving material evidence for independent testing in Section 66-8-109(B), we look to cases construing the right to access evidence material to guilt, innocence, or punishment for guidance on the question of sanctions.

We begin with *State v. Lovato*, 1980-NMCA-126, 94 N.M. 780, 617 P.2d 169, where the defendant was convicted of homicide by vehicle while DWI on the basis of a test performed on a sample of his blood by a chemist of the police department. *Id.* ¶ 2. The test showed a blood alcohol content of .10 percent, the minimum at that time for presuming intoxication. *Id.* Because the State made no effort to preserve the blood taken from the defendant, and the blood kit was immediately destroyed after the blood analysis was completed, we concluded the defendant's right to due process was violated and we reversed and remanded for a new trial without

the blood test results. *Id.* ¶¶ 1, 3, 5, 6, 10. We said, "In effect, our holding is that if the State is going to use as evidence the results of a blood alcohol test, it must make provisions for its preservation so that if a timely request is made for retesting by the defendant, the sample taken is available." *Id.* ¶ 10.

In *Lovato*, we concluded that because the defendant's right to due process was violated, he was entitled to suppression of the blood test results. Suppression of the blood test results may be the most appropriate remedy in most cases when Section 66-8-109(B) is violated. However, we do not hold that suppression is automatic. *Cf. State v. Chouinard*, 1981-NMSC-096, ¶¶ 23-26, 96 N.M. 658, 634 P.2d 680 (stating that the remedy for a due process violation—suppression or admission of the evidence with full disclosure of the loss and its relevance and import—lies in the discretion of the trial court). Our Supreme Court specifically stated that the trial court has discretion to craft a remedy when material evidence is lost in *Scoggins v. State*, 1990-NMSC-103, ¶¶ 10-11, 111 N.M. 122, 802 P.2d 631. This was a drug case where the only credible evidence against a defendant (latent fingerprints of the defendant) was negligently destroyed by the police, and our Supreme Court held that the trial court did not abuse its discretion in dismissing the criminal charges. *Id.* ¶¶ 10-11. Pertinent to the issue before us here, our Supreme Court said, "We defer to the trial court's discretion in deciding that testimony on the missing fingerprints should be suppressed because it may have been impeached by lost evidence." *Id.* ¶ 10.

We adopt the reasoning of *Lovato, Chouinard,* and *Scoggins* and hold that the remedy for a violation of a driver's right under Section 66-8-109(B) lies in the discretion of the trial court, subject to review on appeal for an abuse of discretion. In deciding what is an appropriate remedy, trial courts may consider all the facts of the case, including whether trial is before a jury or the bench, the materiality of the blood test results, and prejudice. In their consideration of prejudice, we caution trial courts to be mindful of the fact that a defendant cannot prove what the test result of a blood sample that does not exist would be. Because a sample was not preserved in violation of the defendant's statutory right, this should not weigh against the defendant. In *Scoggins* our Supreme Court did not require the defendant to prove what the results of a test of the destroyed latent fingerprints would have been, and the case before us is not materially different. Finally, in determining whether a statutory violation has occurred, and what sanctions are appropriate, we encourage trial courts to enter findings of fact and conclusions of law to facilitate appellate review.

CONCLUSION

The judgment of the district court affirming the judgment of the metropolitan court is reversed, and the case is remanded to the trial court for further proceedings consistent with this opinion.

IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

I CONCUR:

TIMOTHY L. GARCIA, Judge

M. MONICA ZAMORA, Judge (dissenting).

ZAMORA, J., dissenting.

I agree that Section 66-8-109(B), as written, does not provide a defendant with a *meaningful* opportunity to arrange for and effectuate the timely performance of an independent chemical test. However, it is a function of our Legislature to make it so and revise the statute accordingly. For these reasons, I respectfully dissent.

The issue before this Court is whether providing Defendant with the Yellow Pages phone book and access to a telephone for a period of twenty to thirty minutes in the early hours of the morning meant that Defendant was given a *reasonable*, as opposed to *meaningful*, opportunity to arrange for an independent chemical test. *Jones* did not provide any guidance about how to undertake the analysis of whether an opportunity was reasonable. 1998-NMCA-076. We also noted that "the purpose of this subsection of the statute is to inform the person arrested of his or her right to arrange to have an independent chemical test performed by a person of his or her own choosing." *Id.* ¶ 19.

The Majority places an affirmative responsibility on law enforcement by concluding that not only must they advise an arrestee that the arrestee has the right to be given an opportunity to arrange for an independent test in addition to any test performed at the direction of a law enforcement officer, but that they also have a duty to assist an arrestee in arranging and effectuating an independent test. Perhaps the uncertainty expressed by the metropolitan court as to whether Defendant's opportunity to arrange for independent testing was "meaningful," was the means to this end.

To discern the Legislature's intent, we rely on the classic canons of statutory interpretation and "look first to the plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different one was intended." *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶9, 146 N.M. 24, 206 P.3d 135 (internal quotation marks and citation omitted). When we interpret a statute, we must "read the statute in its entirety and construe each part in connection with every other part to produce a harmonious whole." *Key v. Chrysler Motors Corp.*, 1996-NMSC-038, ¶14, 121 N.M. 764, 918 P.2d 350; *see also Miller v. New Mexico Dep't of Transp.*, 1987-NMSC-081, ¶ 8, 106 N.M. 253, 741 P.2d 1374 ("Statutes are to be read in a way that facilitates their operation and the achievement of their goals."). We must also take care not to "read into a statute . . . language which is not there, particularly if it makes sense as written." *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998-NMSC-050, ¶ 5, 126 N.M. 413, 970 P.2d 599 (internal quotation marks and citation omitted).

The plain language of the statute mandates that an arrestee be provided *an opportunity to make arrangements* for an additional test. Section 66-8-109(B) does not mandate that a law enforcement officer assist a person accused of DWI in arranging such a test, beyond providing the means with which to arrange for an independent chemical test. We have also concluded in *Jones* that "reading the entire statute . . . does not guarantee the arrestee an additional test will be performed, but only that the arrestee will be given a *reasonable* opportunity to arrange for an additional test." 1998-NMCA-076, ¶ 24 (emphasis added). This also acomplishes the purpose of the subsection. *Id.* ¶ 19.

The Majority's interpretation of "reasonable opportunity" to import the word

"meaningful" into the statute is a substantive change to the law that is best left to the legislative branch. Article III, Section 1 of the New Mexico Constitution divides the state government into "three distinct departments, the legislative, executive and judicial[.] . . . The Legislature makes, the executive executes, and the judiciary construes the laws." *State v. Fifth Jud. Dist. Ct.*, 1932-NMSC-023, ¶¶ 8-9, 36 N.M. 151, 9 P.2d 691. Our Supreme Court has said that "the legislative branch is constitutionally established to create substantive law." *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 21, 125 N.M. 343, 961 P.2d 768. "A determination of what is reasonably necessary for the preservation of the public health, safety and welfare of the general public is [also] a legislative function and should not be interfered with, save in a clear case of abuse." *State v. Collins*, 1956-NMSC-046, ¶ 8, 61 N.M. 184, 297 P.2d 325. It is not within our authority to expand Section 66-8-109(B) and doing so may create unintended consequences.

The application of the plain language of Section 66-8-109(B) is consistent with the approach taken in other jurisdictions. *See Grizzle v. State*, 265 S.E.2d 324, 325 (Ga. Ct. App. 1980) ("[I]t is the duty of a police officer not to prevent a defendant from exercising his right to an independent test, but not his duty to insure the performance of such test[.]"); *Commw. v. O'Brien*, 750 N.E.2d 1000, 1003-04 (Mass. 2001) ("Once the police inform a defendant of his right to an independent medical examination . . . the police have no obligation to help him in exercising that right." (internal quotation marks and citation omitted)); *Commw. v. Alano*, 448 N.E.2d 1122, 1128 (Mass. 1983) (stating that police had a statutory duty to inform accused of the right to a test, but no statutory duty to tell accused how to obtain a test once one was requested); *Cosky v. Comm'r of Pub. Safety*, 602 N.W.2d 892, 894 (Minn. Ct. App. 1999) ("An officer is not required to assist a driver by furnishing supplies or transportation to facilitate an additional test. An officer is not required to instruct a driver on how to obtain an additional test."); *Provo City v. Werner*, 810 P.2d 469, 474 (Utah Ct. App. 1991) (stating that police have a "duty . . . to not frustrate or thwart reasonable attempts to obtain an independent test"); *Cf. Luebke v. N. Dakota Dep't of Transp.*, 1998 ND 110, ¶ 13, 579 N.W.2d 189 (holding that officers may be required to do more than allow telephone access, where a driver shows that he has "made arrangements [for a test] with a qualified person of his own choosing, that the test would be made if he came to the hospital, that he so informed the personnel at the jail where he was under arrest" (alteration in original) (internal quotation marks and citation omitted)).

There are several jurisdictions where providing DWI arrestees with telephone access has been deemed statutorily sufficient. *See State v. Hedges*, 154 P.3d 1074, 1078 (Idaho Ct. App. 2007) ("[P]olice . . . have a duty not to interfere with or affirmatively deny a defendant access to a telephone once a request has been made to make telephonic arrangements for an independent BAC test."); *Cosky*, 602 N.W.2d at 895 ("[The defendant's] right to obtain an additional chemical test . . . was vindicated when he was allowed to use a telephone to make the calls he wished to make[.]"); *Dake*, 529 N.W.2d at 49 ("[W]hile . . . the police cannot hamper a motorist's efforts to obtain independent testing, they are under no duty to assist in obtaining such testing beyond allowing telephone calls to secure the test."); *Luebke*, 1998 ND 110, ¶ 11 ("Generally, law officers . . . need only allow an accused access to a

telephone." (internal quotation marks and citation omitted)). Defendant was given access to a telephone and a telephone book, and his ability to arrange independent testing was not hindered by police, therefore he was afforded a reasonable opportunity to arrange for an independent chemical test.

Furthermore, under *Jones*, a defendant is only entitled to the remedy of suppression of his BAT test results in violation of the statute when he proves that: (1) he was deprived of a reasonable opportunity to arrange for independent testing in violation of Section 66-8-109(B), and (2) the statutory violation resulted in prejudice. *Jones*, 1998-NMCA-076, ¶ 29. A failure to prove either element is dispositive. *Id.* ¶ 31. Accordingly, the district court properly based its decision on whether Defendant demonstrated prejudice. Defendant's BAT results were .12 and .11. Defendant did not present any evidence to show an independent chemical test would have demonstrated error in his BAT results such that it would bring him below the per se limit of .08. Additionally, a review of the record reveals that Defendant did have an opportunity to argue the issue of harmless error.

The constitutional due process right to obtain possibly exculpatory evidence includes a right to obtain an alcohol test independent of the test administered by the arresting officer. The Defendant has the right to be free of police interference when obtaining this test. The way our statutory provision is currently written means being informed of this statutory right, being given a reasonable opportunity to arrange for the independent testing, and nothing more.

I respectfully dissent from the Opinion of the Court and would hold that Defendant was given a reasonable opportunity to arrange for an independent chemical test as requred by the Implied Consent Act, and affirm the district court.

M. MONICA ZAMORA, Judge

Certiorari Granted, May 11, 2015, No. 35,145

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-053

Filing Date: January 29, 2015

Docket No. 31,972

STATE OF NEW MEXICO,

Plaintiff-Appellant,

v.

NORMAN BENALLY,

Defendant-Appellee.

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Law Offices of the Public Defender

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for Appellee

OPINION

BUSTAMANTE, Judge.

The State appeals the district court's dismissal of a forfeiture action on the ground that the State failed to file a complaint within the period designated by statute. The State makes several policy-based arguments in support of its position that the thirty-day period specified in the Forfeiture Act should begin on the date the property subject to forfeiture was discovered rather than on the date the State took custody of the property. We conclude that the State's position is contrary to the plain language of the statute and thus do not reach the State's policy arguments. We affirm.

BACKGROUND

The essential facts are simple and undisputed. On June 23, 2011, officers stopped Norman Benally (Defendant) for driving with a headlight out. In the course of the stop, the officers impounded the vehicle. The vehicle was held in the Gallup impound lot where it was secured.

Five days later, on June 28, 2011, a search warrant for the vehicle was issued and officers searched the vehicle the next day, June 29, 2011. The search uncovered $1295, among other items. On July 27, 2011, thirty-four days after the vehicle was impounded, the State filed a complaint for forfeiture of the money.

The district court granted Defendant's motion for dismissal of the forfeiture complaint on the ground that it was not timely filed under NMSA 1978, Section 31-27-5(A) (2002) of the Forfeiture Act, which states that "[w]ithin thirty days of making a seizure, the state shall file a complaint of forfeiture or return the property to the person from whom it was seized." The State appealed.

DISCUSSION

The issue presented is whether the statutory thirty-day period was triggered on the date the State took possession of the vehicle and its contents or on the date the State executed the search warrant and discovered the money. We address this statutory construction question as one of first impression. Our review is de novo. *State v. Herrera*, 2001-NMCA-007, ¶ 6, 130 N.M. 85, 18 P.3d 326.

The goal of statutory construction is to give effect to the Legislature's intent. *Albuquerque Bernalillo Cnty. Water Util. Auth. v. N.M. Pub. Regulation Comm'n*, 2010-NMSC-013, ¶ 52, 148 N.M. 21, 229 P.3d 494. "[O]ur first step is to look at the language used by the Legislature and the plain meaning of that language." *Martinez v. Cornejo*, 2009-NMCA-011, ¶ 11, 146 N.M. 223, 208 P.3d 443; *see* NMSA 1978, § 12-2A-19 (1997) ("The text of a statute or rule is the primary, essential source of its meaning."). "Statutory language that is clear and unambiguous must be given effect [and o]nly if an ambiguity exists will we proceed further in our statutory construction analysis." *Albuquerque Bernalillo Cnty. Water Util. Auth.*, 2010-NMSC-013, ¶ 52 (internal quotation marks and citations omitted).

Under this "plain meaning rule" we are

guided by the "ordinary meaning" of the words chosen by the Legislature. *Herrera*, 2001-NMCA-007, ¶ 6; *see Martinez*, 2009-NMCA-011, ¶ 11 ("[A] statute should be read according to its natural and most obvious import of language without resorting to subtle and forced constructions for the purpose of either limiting or extending its operation." (internal quotation marks and citation omitted). Similarly, "[w]e will not read language into the statute that is not there, especially when the statute makes sense as written." *State v. Brennan*, 1998-NMCA-176, ¶ 5, 126 N.M. 389, 970 P.2d 161. Finally, "[f]orfeitures are not favored at law and statutes are to be construed strictly against forfeiture." *State v. Ozarek*, 1978-NMSC-001, ¶ 4, 91 N.M. 275, 573 P.2d 209.

Applying these principles, we conclude that the language of Section 31-27-5(A) clearly and unambiguously indicates that the Legislature intended forfeiture complaints to be filed within thirty days of the date the State took possession of the subject property. We begin with the definition of the word "seizure." Black's Law Dictionary defines "seizure" as "[t]he act or an instance of taking possession of a person or property by legal right or process[.]" *Black's Law Dictionary* 1564 (10th ed. 2010). Similarly, Merriam-Webster Dictionary states that "seizure" is "the taking possession of person or property by legal process." *Merriam-Webster Dictionary*, http://www.merriam-webster.com/dictionary/seizure (last visited on Dec. 11, 2014). This definition is not only a legal term of art but also has a common meaning and understanding that is applied by the public. Garner's Dictionary of Legal Usage describes the term as "a nontechnical lay word meaning . . . to take possession of (a thing) by legal right." Bryan A. Garner, *Garner's Dictionary of Legal Usage*, 803 (3d ed. 2011) (internal quotation marks omitted). Even Wiktionary[1] defines "seizure" as "[t]he act of taking possession, as by force or right of law." http://en.wiktionary.org/wiki/seizure (last visited Dec. 11, 2014).[2]

This definition of "seizure" is reflected in case law. The U.S. Supreme Court explained that "[a] 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *Soldal v. Cook Cnty., Ill.*, 506 U.S. 56, 61 (1992) (internal quotation marks and citation omitted). Similarly, in *State v. Sanchez*, this Court noted that the seizure clauses of the Fourth Amendment of the U.S.

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[1]"Wiktionary, a sister project of Wikipedia, is an open-content dictionary that individuals with access can collaboratively edit to reflect a popular understanding of words. Some courts have turned to Wiktionary to determine a popular understanding of the English language rather than a traditional dictionary definition." *Wallace H. Campbell & Co. v. Md. Comm'n on Human Relations*, 33 A.3d 1042, 1052 n.7 (Md. Ct. Spec. App. 2011) (collecting cases).

[2]Similarly, the definition of "seizure" with the most "up" votes in Urban Dictionary includes the definition "when the police come and take stuff from your house," which, like the other definitions, incorporates the concepts of taking and possessory interests. http://www.urbandictionary.com/define.php?term=seizure (last visited Jan. 22, 2015). Urban Dictionary is "a crowdsourced collection of definitions for slang words that is available on the Internet." James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 Wm. & Mary L. Rev. 483, n.73 (2013). Because Urban Dictionary lacks the quality control measures employed by some other consensus-based websites, we cite it here only to demonstrate the common understanding of the term. *See id.*; Jason C. Miller & Hannah B. Murray, *Wikipedia in Court: When and How Citing Wikipedia and Other Consensus Websites Is Appropriate*, 84 St. John's L. Rev. 633, 635 (2010) ("When a court seeks to determine the common meaning of a term or expression, a website that anyone can edit is likely to produce a viable consensus answer.").

Constitution and Article II, Section 10 of the New Mexico Constitution "protect[] notions of possession, at least insofar as [they] appl[y] to objects." 2005-NMCA-081, ¶ 17, 137 N.M. 759, 114 P.3d 1075. In *State v. Ketelson*, the New Mexico Supreme Court considered the reasonableness of an officer's actions where the officer removed the defendant's gun from his vehicle. 2011-NMSC-023, ¶ 19, 150 N.M. 137, 257 P.3d 957. The Court's analysis rested on its recognition that "even a temporary moving of the firearm constituted, to some degree, an interference with [the d]efendant's possessory interest." *Id.* ¶ 23. It recognized that the officer's possession of the gun, however temporary, "may technically be called [a] 'seizure[],' " *id.* ¶ 26, although ultimately the Court determined that the officer's actions were reasonable given the public and officer safety concerns present in that case. *Id.* ¶ 27; *cf. State v. Bomboy*, 2008-NMSC-029, ¶ 10, 144 N.M. 151, 184 P.3d 1045 (concluding that an officer's taking of methamphetamine from the defendant's car did not infringe on the defendant's possessory interest because the defendant did not have a lawful right to possess methamphetamine). Because it "meaningful[ly] interfere[s] with an individual's possessory interests," impoundment of a vehicle is a seizure of the vehicle. *Soldal*, 506 U.S. at 61, 63; *see State v. Reynoso*, 702 P.2d 1222, 1224 (Wash. Ct. App. 1985) ("An impoundment, because it involves the governmental taking of a vehicle into exclusive custody, is a 'seizure' in the literal sense of that term."). By the same logic, the contents of the vehicle were also seized by virtue of being in the impounded car.

Having concluded that the ordinary meaning of "seizure" incorporates the concept of an interference with possession, we next examine that term in the context of the remainder of the statute. In contrast to the statutes of some other states, the remaining language of the Forfeiture Act does not suggest a trigger other than the physical seizure of property. For example, one section of an Arizona statute defines a "'[s]eizure for forfeiture' [as] seizure of property by a peace officer *coupled with an assertion by the seizing agency . . . that the property is subject to forfeiture.*" Ariz. Rev. Stat. Ann. § 13-4301(9) (1999) (emphasis added). Another section requires the state to file forfeiture complaints within "sixty days after [the property's] seizure for forfeiture." Ariz. Rev. Stat. Ann. § 13-4308(B) (1988). The Arizona Court of Appeals relied on the definition of "seizure for forfeiture" to hold that the state's complaint for forfeiture was timely even though it was filed approximately seven months after the state impounded the money found in the defendant's car. *In re Approximately $50,000.00 In U.S. Currency*, 2 P.3d 1271, 1275 (Ariz. Ct. App. 2000). There, the state had impounded money found in the defendant's car as part of its investigation into money laundering and other charges. *Id.* at 1273. The court found that the definition of "seizure for forfeiture" "clearly states that, in order to constitute a seizure for forfeiture, the state must affirmatively assert that the seized property is subject to forfeiture." *Id.* at 1275. Consequently, it held that, even though the state had possession of the money for months before it filed a forfeiture complaint, it was not until the state asserted its intention to forfeit it that the sixty-day period began. *Id.* The court stated, "because the state initiated forfeiture proceedings at the same time it declared seizure of the currency for forfeiture, it clearly did not violate the statute's requirement that it initiate such proceedings within sixty days." *Id.*

Commonwealth v. Brunson presents a variation on the facts in this case. 448 S.E.2d 393 (Va. 1994). There, the Supreme Court of Virginia considered whether the triggering event for the ninety-day period in Virginia's forfeiture statute began when the Commonwealth took physical custody of the property or when it "declared its decision to seek forfeiture of the property." *Id.* at 396. The relevant statute stated that "[w]hen property has been seized under [Virginia's forfeiture laws] . . . prior to filing an information, then an information against that property shall be filed within 90 days of the date of seizure or the property shall be released to the owner or lien holder." Va. Code Ann. § 19.2-386.3(A) (West 2012). The Commonwealth relied on the phrase "under [Virginia's forfeiture laws]" to argue that "although physically seized substantially before the informations were filed, [the property] was not 'seized for forfeiture' until shortly before filing the necessary informations, well within the limitations period." *Brunson*, 448 S.E.2d at 396. The Virginia Supreme Court rejected this construction of the statute, stating that:

> The Commonwealth's theory transforms the seizure from an event occurring at a readily determined and objective point in time into an event, subjective in nature, whose occurrence is known only to the Commonwealth. Furthermore, the timing of this subjective event is within the absolute discretion of the Commonwealth. Only the Commonwealth knows when the seizure changed from 'evidentiary' to 'forfeiture.' This theory of seizure can effectively defeat any allegation that the information was not filed within the [ninety]-day limitation period and renders meaningless the apparent protection afforded property owners-releasing property if no information is filed within 90 days of seizure.

Id. (footnote omitted).

Unlike Arizona's statute, Section 31-27-5(A) does not include a specific definition of "seizure," *see* Section 31-27-3, and includes even less qualifying language than the Virginia statute addressed in *Brunson*. There being no language suggesting that the word "seizure" has a meaning other than the common one, we conclude that the Legislature intended the word "seizure" to have its ordinary meaning. That meaning is clear and unambiguous; hence, no further construction of Section 31-27-5(A) is necessary. *Martinez*, 2009-NMCA-011, ¶ 11 ("This plain meaning rule requires us to give effect to the statute's language and refrain from further interpretation when the language is clear and unambiguous."). Thus, the clock started when the officers impounded Defendant's car and its contents on June 23, 2011. Since the State failed to file a complaint for forfeiture within thirty days of that date, the district court properly dismissed the forfeiture action.

CONCLUSION

For the foregoing reasons, we affirm.

IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:

TIMOTHY L. GARCIA, Judge

M. MONICA ZAMORA, Judge

Certiorari Granted, May 11, 2015, No. 35,198

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-054

Filing Date: February 10, 2015

Docket No. 31,935

LENARD NOICE II, as Personal Representative for LENARD E. NOICE, Decedent,

Plaintiff-Appellant,

v.

BNSF RAILWAY COMPANY, a Delaware corporation,

Defendant-Appellee.

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OPINION

KENNEDY, Judge.

When a railroad employee's negligence claim against his employer railroad under the Federal Employers Liability Act (FELA) is based solely on allegations of excessive speed, we conclude that claim is not precluded under the Federal Railroad Safety Act (FRSA). A locomotive engineer disappeared from a train while the conductor was speeding up, but the train was still within the speed regulations prescribed under FRSA. He was later found dead beside the track. His representative sued his employer railroad for negligence under FELA. We are persuaded by other jurisdictions that have considered the issue that FRSA speed regulations cannot preclude a speed-based negligence claim under FELA. We reverse the district court's grant of summary judgment to the railroad.

I. BACKGROUND

Lenard Noice (Decedent) worked as a locomotive engineer for BNSF Railway Company (BNSF). Decedent was operating locomotives on a trip to Belen, New Mexico, along with the conductor, John Royal. The train was traveling between fifteen and twenty miles per hour when Decedent told Royal to take control of the train. Decedent told Royal to "start pulling on it," and Royal began gradually increasing the train's speed. Decedent exited the locomotive and walked along the outside of the train to the next locomotives. The train's speed reached fifty-five miles per hour. Royal became aware at some point that he could not see Decedent. After repeated attempts to contact Decedent by ringing a bell, Royal slowed and stopped the train to search for him. Decedent was later

discovered by another train near the tracks. He had apparently fallen off the train and perished from his injuries. A video revealed that Decedent had disappeared from the second locomotive walkway.

Decedent's son, Lenard Noice II, sued BNSF for negligence in violation of FELA, as well as for strict liability and spoliation of evidence. BNSF moved for partial summary judgment on the FELA negligence count, which is the basis for this appeal. BNSF argued that Noice had failed to prove a breach of duty or causation of Decedent's injuries and that Decedent was negligent. Noice responded. Before filing its reply brief, BNSF filed a motion in limine, asking the district court, among other matters, to prohibit Noice from asserting that the train was traveling at an excessive speed, as such an excessive speed claim was precluded by FRSA. The motion in limine was denied and, in BNSF's reply to its summary judgment motion, it reasserted that Noice's claim could not be based on the speed of the train due to preclusion by FRSA.

The district court held a hearing on the motion for summary judgment, which focused on the issue of causation. There was some discussion as to whether Noice's claims were based solely on speed. The district court granted summary judgment, having determined that the only premise for the FELA claim was excessive speed, which was precluded by FRSA. Noice appealed.

II. DISCUSSION

"An appeal from the grant or denial of a motion for summary judgment presents a question of law. We therefore review de novo the [district] court's denial of summary judgment." *Bartlett v. Mirabal*, 2000-NMCA-036, ¶ 4, 128 N.M. 830, 999 P.2d 1062. "Summary judgment is proper if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Roth v. Thompson*, 1992-NMSC-011, ¶ 17, 113 N.M. 331, 825 P.2d 1241. The movant must make a prima facie showing of entitlement to summary judgment. *Id.* Then, the "burden shifts to the party opposing the motion to demonstrate the existence of specific evidentiary facts which would require trial on the merits." *Id.* "If the facts are not in dispute, and only their legal effects remain to be determined, summary judgment is proper." *Id.*

A. The Preclusion Argument Was Briefed Before the District Court

Noice first argues that the district court impermissibly based its order on the issues of speed and preclusion because FRSA had not been discussed at the partial summary judgment hearing. Although Noice claims that the grant of summary judgment on the ground of preclusion "violates basic notions of due process[,]" he fails to include facts or legal authority to support his position. Where a party cites no authority to support an argument, we may assume no such authority exists. *In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329.

However, potential preclusion under FRSA was briefed and discussed several times in the record. Noice raised the issue of the train's speed in his response to BNSF's motion for summary judgment, although he did not then discuss FRSA. BNSF first raised potential preclusion of a claim based on excessive speed under FRSA in September 2011. BNSF included a brief argument regarding FRSA preclusion in its reply in support of its motion for summary judgment. In its attempt to keep evidence of speed from

the facts being considered for summary judgment, BNSF fully briefed the preclusion issue in its motion in limine to exclude certain evidence. Noice briefed the legal issue of speed-based claims being precluded under FRSA in his response to that motion. The facts and legal arguments regarding preclusion were therefore presented to the district court. Additionally, despite Noice's argument to the contrary, speed was mentioned as an issue in the negligence case at the hearing.

B. FRSA Does Not Preclude Plaintiff's Speed-Based FELA Claim

The district court granted BNSF's motion for summary judgment. The district court determined that Noice's negligence claim was supported by three distinct theories to support his negligence claim: (1) defective equipment threw Decedent from the train; (2) Decedent's coworker, Royal, should have conducted a safety briefing before Decedent left the locomotive; and (3) Royal increased the train's speed to fifty-five miles per hour while Decedent was walking to a different locomotive. After determining that no facts supported either of the first two theories, the district court analyzed the remaining speed-based theory of negligence and concluded that such an argument was preempted by FRSA when the train was within the speed limit. On appeal, Noice challenges the district court's rejection of each theory of negligence. Regarding preemption of his speed-based claim, Noice argues that his FELA claim remains viable despite FRSA because the cases relied on by the district court stretched a decision about state laws being preempted by FRSA to include FELA preclusion. We agree.

"In 1908, Congress enacted . . . [FELA], 45 U.S.C. § 51, . . . to provide a remedy to railroad employees injured as a result of their employers' negligence." *Waymire v. Norfolk & W. Ry. Co.*, 218 F.3d 773, 775 (7th Cir. 2000). "FELA imposes on railroads 'a general duty to provide a safe workplace[.]' " *Id.* (quoting *Kossman v. Ne. Ill. Reg'l Commuter R.R. Corp.*, 211 F.3d 1031, 1035 (7th Cir. 2000). FELA is a general negligence statute and "neither prohibits nor requires specific conduct by a railroad." *Waymire*, 218 F.3d at 775. The legislative intent behind FELA was reduction of injuries and deaths from interstate railroad accidents. *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 542 (1994). "Recognizing the physical dangers inherent in the operation of a railroad, Congress 'crafted a federal remedy that shifted part of the 'human overhead' of doing business from employees to their employers.' " *Grimes v. Norfolk S. Ry. Co.*, 116 F. Supp. 2d 995, 999 (N.D. Ind. 2000) (quoting *Gottshall*, 512 U.S. at 542). "FELA is a broad remedial statute[,] which the United States Supreme Court construes liberally in order to effectuate its purposes." *Id.*

"Congress passed [FRSA], 49 U.S.C. § 20101 . . . for the purpose of promoting rail safety and making laws, regulations[,] and orders related to railroad safety nationally uniform to the extent possible." *Grimes*, 116 F. Supp. 2d at 999 (internal quotation marks and citation omitted). FRSA is more specific than the general negligence statute, FELA, and "proscribes railroad conduct by empowering the Secretary of Transportation to implement comprehensive and detailed railroad safety regulations." *Waymire*, 218 F.3d at 775.

The United States Supreme Court has determined that FRSA preempts state tort claims to the extent that they are based on an allegation of excessive speed. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 676 (1993).

In *Easterwood*, a widow sued a railroad company after one of their trains struck and killed her husband at a crossing. *Id.* at 661. Among other claims, she alleged that the train was operated at an excessive speed. The Supreme Court held that, because the regulations in FRSA covered the subject matter of speed fully, her state law claim was precluded. *Id.* 674-75. The Supreme Court concluded that the regulations do more than set maximum speed limits, rather, "in the context of the overall structure of the regulations, the speed limits must be read as not only establishing a ceiling, but also precluding additional state regulation." *Id.* at 674. However, *Easterwood* did not answer the question of any extent to which FRSA would affect a claim under FELA.

Since *Easterwood*, courts have considered the issue of FRSA preclusion for excessive speed claims and other regulated matters when the claim is brought under FELA, rather than state tort law. Some courts have refused to follow *Easterwood*'s reasoning. Noice relies on *Earwood v. Norfolk Southern Railway Co.*, 845 F. Supp. 880, 891 (N.D. Ga. 1993), a federal district court opinion that concluded that a FRSA regulation does not preclude a FELA claim based on unsafe speed. In *Earwood*, the plaintiff was a railroad employee who was injured when the train he was on collided with a truck at an intersection. *Id.* at 883. One of his claims for negligence under FELA was for excessive speed. *Id.* The *Earwood* court held that FRSA did not preclude FELA claims because "[t]he two statutes do not purport to cover the same areas." *Id.* at 885. The court stated that, because FRSA does not address the standard of care required of employer railroads, FELA claims could still be based on allegations of unsafe speed. *Id.* The *Earwood* court concluded that "[FRSA speed] regulations were not directed at the issue of employee safety." *Id.* at 891. Although safety may be a consequence of the regulation, the court stated that it is not the primary objective. Thus, the FELA claim is not precluded. This district court opinion has since been rejected by two circuits.

The Seventh Circuit specifically rejected the district court's opinion in *Earwood* and stated that "we are instead faced with the interaction of two federal statutes." *Waymire*, 218 F.3d at 775. "But, we find the opinion of the [United States] Supreme Court on the subject of the preemption of unsafe train speed claims to be instructive and so we discuss it here." *Id.* In *Waymire*, the Seventh Circuit held that, in order to be consistent with *Easterwood* and "to uphold FRSA's goal of uniformity," the plaintiff's claim of negligence under FELA was "superseded by FRSA and the [speed] regulations." *Waymire*, 218 F.3d at 777. Part of the court's reasoning was that it would be absurd if a train traveling under the speed limit would not be subject to liability under state law because FRSA precluded all speed-related claims and put them beyond the reach of state courts. *Id.* A preemption analysis does not apply when considering the interaction of two federal statutes. *See Randolph v. IMBS, Inc.*, 368 F.3d 726, 730 (7th Cir. 2004) ("One federal statute does not preempt another.") Although the *Waymire* court recognized that a preemption analysis did not apply, it nonetheless based its conclusion in part on *Easterwood*'s assessment of whether FRSA "covered" the subject at issue. *See Waymire*, 218 F.3d at 775-76.

The Fifth Circuit, in *Lane v. R.A. Sims, Jr., Inc.*, 241 F.3d 439 (5th Cir. 2001), found *Waymire*'s application of *Easterwood* to be persuasive. The court in *Lane* emphasized

that FRSA regulations should preempt excessive speed claims under FELA based on the importance of uniform liability no matter the class of the plaintiffs in a case.

> [U]niformity can be achieved only if the regulations covering train speed are applied similarly to a FELA plaintiff's negligence claim and a non-railroad-employee plaintiff's state law negligence claim. Otherwise, a railroad employee could assert a FELA excessive-speed claim, but a non-employee motorist involved in the same collision would be precluded from doing so. Dissimilar treatment of the claims would have the untenable result of making the railroad safety regulations established under . . . FRSA virtually meaningless[.]

241 F.3d at 443.

"When two federal statutes address the same subject in different ways, the right question is whether one implicitly repeals the other [through an] irreconcilable conflict between the statutes or a clearly expressed legislative decision that one replace the other." *Randolph*, 368 F.3d at 730. When two federal statutes may be interpreted harmoniously, "a court must interpret them in a manner which gives . . . operation and effect to both, in the absence of clear and unambiguous expression of Congressional intent to the contrary." *United States v. Kenaan*, 557 F.2d 912, 917 (1st Cir. 1977). Thus, "repeal by implication is a rare bird indeed." *Randolph*, 368 F.3d at 730.

Here, there is no "clear and unambiguous" indication in FRSA that Congress intended it to eliminate workers' remedies under FELA. *See Grimes,* 116 F. Supp. 2d at 1003 ("There is also nothing in the language or legislative history of any enactment, including FRSA, that indicates the serious purpose of undermining the basic core of FELA and its essential purposes."). The obligation of the courts is therefore to construe FRSA in such a way as to render it harmonious with FELA. The *Earwood* court met this obligation when it analyzed the two statutes and concluded that FELA and FRSA have different purposes. *Earwood,* 845 F. Supp. at 885. In contrast, the *Waymire* and *Lane* line of cases effectively hold that FRSA and its associated regulations impliedly repeal FELA and fail to address the effect of repeal on railroad workers. We do not believe Congress could have intended FRSA to have such a dramatic effect without making its purpose clear. *See Cowden v. BNSF Ry. Co.*, 690 F.3d 884, 892 (8th Cir. 2012) (stating that "the Supreme Court has cautioned that the FELA should not be cut down by inference or implication." (internal quotation marks and citation omitted)); *Myers v. Ill. Cent. R.R. Co.*, 753 N.E.2d 560, 565 (Ill. App. Ct. 2001) ("If Congress had intended FRSA to abolish FELA remedies for railroad employees, we believe Congress would have said so explicitly.").

This view of the interplay between federal statutes was recently addressed by the United States Supreme Court in *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228 (2014), and, in our view, resolves the FRSA/FELA preclusion question in favor of Noice. As we noted above, both FELA and FRSA can be viewed as complementary, each with its own scope and purpose. In *POM Wonderful*, the question was whether suit for misleading descriptions of products by business competitors under the Lanham Act, 15 U.S.C. § 1125, was precluded by the Federal Food, Drug, and Cosmetic Act

(FDCA), 21 U.S.C. §§ 331, 343, that places enforcement of misbranding of food and drink in the hands of the Food and Drug Administration (FDA). *POM Wonderful*, 134 S. Ct. at 2233. The Ninth Circuit had ruled that the FDCA precluded Lanham Act suits. *Id.* Specifically, it held that the Lanham Act protected competitors as a specific class of entities, as opposed to members of the public at large whom the FDCA was designed to protect, but whose rights are almost exclusively enforced by the federal government in the form of the FDA. *Id.* at 2234-35. The United States Supreme Court rejected the lower court's reliance on the FDCA's regulating juice labeling, as representing Congress's choice to give authority over the matter to the FDA, precluding a court "to act [in a Lanham case] when the FDA has not[.]" *Id.* at 2236.

In reversing its decision, the United States Supreme Court pointed out the lack of clear congressional intent to limit the Lanham Act by enacting the FDCA, specifically ruling that Lanham Act suits are not precluded. *Id.* at 2237. The United States Supreme Court determined that "Congress did not intend [the] FDA oversight to be the exclusive means of ensuring proper food and beverage labeling." *Id.* at 2231 (internal quotation marks and citation omitted). Rather, it found the statutes to be complementary in nature and held that each imposed "different requirements and protections" and therefore allowed a competitor's suit under the Lanham Act as protective of a specific interest group. *Id.* at 2238 (internal quotation marks and citation omitted).

Although not directly on point, we find *POM Wonderful* to be instructive. As we noted, FELA was enacted as a safe workplace legislation in 1908 to protect the safety of railroad workers by allowing negligence suits against their employers. The FRSA was enacted to provide national uniformity in railroad safety regulations. Although both laws are intended to have an impact on railroad safety, FELA's thrust in protecting workers can easily exist apart from FRSA-enacted regulation of industry safety standards. We conclude that as *Easterwood* dealt only with FRSA preclusion of state law suits, *POM Wonderful* speaks more clearly to whether FRSA would preclude a negligence suit under FELA by railroad employees who benefit from the provisions permitting negligent actions. Similarly, any confusion in the federal circuits spawned by *Waymire*, we now regard as resolved. We hold that Noice's FELA count is not precluded by FSRA.

C. Plaintiff's Other Arguments Are Not Supported

Noice also argues that, because he brought his negligence claim pursuant to FELA, it should be adjudicated pursuant to federal law. However, as Noice correctly points out, FELA actions in state courts follow state procedural rules, including rules for summary judgment. *Rivera v. Atchison, Topeka & Santa Fe Ry. Co.*, 1956-NMSC-072, ¶ 10, 61 N.M. 314, 299 P.2d 1090 ("[I]n cases arising in [s]tate [c]ourts under . . . [FELA], 45 U.S.C.A. § 51 . . . , all procedural matters, including review of verdicts for excessiveness, are governed by the law of the forum and not by the Federal Decisional Law."). This motion, therefore, is correctly governed by Rule 1-056 NMRA.

Noice argues that his claims should have gone to the jury to consider evidence that (1) "there was excessive motion on the second locomotive"; (2) Royal "should have inquired whether he needed to conduct a safety

meeting, [or] that he should have conducted a safety meeting"; and (3) Royal "should have contacted [Decedent] earlier . . . [and] stopped the train" more quickly. Noice insists that these were factual issues, but fails to point to evidence in the record that creates an issue of disputed fact regarding excessive motion, the relevance of safety meetings, or Royal's behavior after Decedent left as causal factors. Where a party fails to cite any portion of the record to support its factual allegations, the Court need not consider its argument on appeal. *See Santa Fe Exploration Co. v. Oil Conservation Comm'n*, 1992-NMSC-044, ¶ 11, 114 N.M. 103, 835 P.2d 819. We agree with the district court that Noice failed to point to evidence that a safety meeting was required in his response to the motion for summary judgment. The district court could thus conclude that Noice failed to create an issue of genuine material fact under the standard for summary judgment. Without these facts in dispute, we need not consider whether such issues may have caused or contributed to Decedent's fall. "It is well settled that an appellate court will not decide abstract, hypothetical, or moot questions, disconnected from the granting of actual relief, or from the determination of which no practical relief can follow." *Valencia Water Co. v. Neilson*, 1920-NMSC-076, ¶ 3, 27 N.M. 29, 192 P. 510.

The district court stated in its order for summary judgment that, regarding Royal's increase of the train's speed, "[w]hether [Royal] was complying with [Decedent's] orders or creating an unsafe working condition is a disputed issue of fact." We do not need to consider whether the speed caused Decedent's fall.

Noice also argues that the district court incorrectly examined each individual basis for his negligence claim, rather than look at it as a whole. However, he fails to point to any evidence that would create a genuine issue of fact when looked at holistically. Again, the Court need not consider his argument on appeal. *See Santa Fe Exploration*, 1992-NMSC-044, ¶ 11. However, as his claim based on the train's speed survives, we reverse the district court's grant of summary judgment.

III. CONCLUSION

In light of *POM Wonderful* (distinguishing between preemption and preclusion), we conclude that Noice's FELA suit was not precluded by FSRA and that summary judgment for BNSF should be reversed.

IT IS SO ORDERED.

RODERICK T. KENNEDY, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

J. MILES HANISEE, Judge

Certiorari Granted, May 11, 2015, No. 35,183

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-055

Filing Date: February 16, 2015

Docket No. 32,934

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

EDWARD JAMES TAPIA SR.,

Defendant-Appellant.

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for Appellant

OPINION

VIGIL, Chief Judge.

Defendant was a backseat passenger in a vehicle which a police officer stopped without reasonable suspicion. Observing a seat belt violation, the police officer asked Defendant for identification, and Defendant thereupon allegedly concealed his identity by giving the officer a false name and committed forgery by signing the citation issued by the officer in the false name Defendant had given to the officer. The question presented in this case is whether the exclusionary rule applies to the "new" crimes of concealing identity and forgery, which were allegedly committed after the unconstitutional stop in the presence of the police officer. The district court held that the stop was unconstitutional and ordered suppression of the seat belt violation but denied suppression of the evidence of the "new" crimes. Because suppression of the evidence of these "new crimes" is consistent with the purpose of the exclusionary rule under federal law—the deterrence of unlawful police conduct—we reverse.

BACKGROUND

A vehicle, which had small rims that made it look like a "low rider," was stopped at a gas station. Officer Benally was parked in the median across from the gas station and watched the vehicle leave the gas station. Shortly after it left the gas station, Officer Benally engaged her emergency lights and stopped the vehicle because the vehicle was driving forty miles per hour in a speed limit zone marked fifty-five miles per hour. This made her "suspicious" since the road was dry and mostly flat. She also testified that she stopped the vehicle because she could not read the license plate.

Upon approaching the vehicle, she could see that Defendant, who was sitting in the backseat, was not wearing his seat belt. She asked Defendant for his identification and he responded that he had none. She asked him to write down his name, date of birth, and social security number. He wrote, "Robert Tapia DOB 3/22/1968" and said he did not know his social security number. Officer Benally called the information into dispatch and asked for a description of Robert Tapia, which did not match Defendant's description. Another passenger told Officer Benally that Defendant's real name was Edward Tapia, not

Robert Tapia. Officer Benally issued Defendant a no seat belt citation in the name of Robert Tapia, and Defendant signed the citation.

Defendant was arrested and charged with one count of forgery contrary to NMSA 1978, Section 30-16-10(A) (2006); one count of concealing his identity contrary to NMSA 1978, Section 30-22-3 (1963); and one count of seat belt violation contrary to NMSA 1978, Section 66-7-372 (2001). Defendant filed a motion to suppress evidence, arguing that Officer Benally lacked reasonable suspicion to initiate the traffic stop and therefore all evidence seized after the stop should be suppressed. At the hearing, Officer Benally testified regarding the vehicle's slow speed and unreadable license plate. However, she failed to articulate why the slow speed made her "suspicious,"could not recall whether the vehicle was impeding traffic, and admitted there was no minimum posted speed. She also failed to articulate what about the illuminated license plate made it unreadable, considering she was able to read it once the vehicle was stopped.

The district court ruled the stop was unsupported by reasonable suspicion and granted the motion to suppress with respect to the evidence of the seat belt violation. However, the district court denied the motion with respect to evidence of the forgery and concealing identity. The ruling was based on the conclusion of law that: "The crimes of concealing identity and forgery, however, had not yet been committed at the time of the stop. Evidence of those crimes did not exist at the time of the stop. Further, an unlawful stop does not justify the commission of new crimes." Defendant then entered into a plea agreement, pleading guilty to one count of forgery and reserving the right to appeal the suppression issue as to both forgery and concealing identity. This appeal followed.

DISCUSSION

The district court ruled that Officer Benally lacked reasonable suspicion and therefore suppressed evidence of the seat belt violation. *See State v. Hubble*, 2009-NMSC-014, ¶ 7, 146 N.M. 70, 206 P.3d 579 ("Before a police officer makes a traffic stop, he must have a reasonable suspicion of illegal activity." (internal quotation marks and citation omitted)); *see also State v. Leyva*, 2011-NMSC-009, ¶ 23, 149 N.M. 435, 250 P.3d 861 ("Reasonable suspicion must consist of more than an officer's hunch that something is amiss; it requires objectively reasonable indications of criminal activity."). The State does not challenge the ruling that the stop was unsupported by reasonable suspicion. Thus, the only issue before us is whether evidence of the additional crimes of forgery and concealing identity should also have been suppressed.

Defendant argues that suppression of this evidence was required under both the Fourth Amendment to the United States Constitution and Article II, Section 10 of the New Mexico Constitution. Under our interstitial approach to claims made under analogous provisions of the United States and New Mexico Constitutions, we first review Defendant's federal claim under the Fourth Amendment. *See State v. Gomez*, 1997-NMSC-006, ¶ 19, 122 N.M. 777, 932 P.2d 1 (stating that under the interstitial approach, we first examine whether the right being asserted is protected under the federal constitution).

A. Standard of Review

The issue before us concerns the scope of

the exclusionary rule, a legal question we review de novo. *State v. Lowe*, 2004-NMCA-054, ¶ 10, 135 N.M. 520, 90 P.3d 539 (stating that the district court's application of law to the facts is reviewed de novo); *State v. Marquart*, 1997-NMCA-090, ¶ 7, 123 N.M. 809, 945 P.2d 1027 (stating that constitutional questions are reviewed de novo). To the extent that our review entails a review of facts, we give deference to the district court's findings of fact that are supported by substantial evidence. *State v. Attaway*, 1994-NMSC-011, ¶ 5, 117 N.M. 141, 870 P.2d 103, *modified on other grounds by State v. Lopez*, 2005-NMSC-018, 138 N.M. 9, 116 P.3d 80.

B. The Exclusionary Rule and the New Crime Exception Under Federal Law

Defendant argues that, because the stop of the automobile was unconstitutional, evidence of his "identity related crimes" should be suppressed pursuant to the Fourth Amendment, under the fruit of the poisonous tree doctrine. Although Defendant concedes that there is an exception to the exclusionary rule for some new crimes committed under certain circumstances after an unconstitutional search or seizure, Defendant contends that the "new crimes" exception is not sufficiently broad to include his crimes.

We begin by examining the exclusionary rule under federal law. The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" *Herring v. United States*, 555 U.S. 135, 139 (2009) (alteration, internal quotation marks, and citation omitted). It is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). The exclusionary rule, when applicable, forbids the use at trial of improperly obtained evidence. *Herring*, 555 U.S. at 139. After prolonged doctrinal development, *see* Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Colum. L. Rev. 1365, 1372-80, (1983), the federal exclusionary rule is now understood to be a judicially-created doctrine that safeguards rights guaranteed under the Fourth Amendment through its deterrent effect on state misconduct. *Herring*, 555 U.S. at 139-41; *see also Elkins v. United States*, 364 U.S. 206, 217 (1960) ("The [exclusionary] rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."). The focus of the federal exclusionary rule analysis is whether the exclusion of evidence obtained illegally would deter Fourth Amendment violations in the future; that is, whether "the benefits of deterrence . . . outweigh the [societal] costs" of excluding the evidence. *Herring*, 555 U.S. at 141; *see also State v. Gutierrez*, 1993-NMSC-062, ¶ 31, 116 N.M. 431, 863 P.2d 1052.

In this case, the district court ruled that the crimes of concealing identity and forgery had not yet been committed at the time of the unconstitutional stop and that "an unlawful stop does not justify the commission of new crimes." Thus, the district court applied what we refer to herein as the "new crime exception" to the exclusionary rule (called by some courts as the "distinct crime exception"). *See, e.g.*, *State v. Brocuglio*, 826 A.2d 145, 151-52 (Conn. 2003) (collecting cases that have considered and adopted a "new crime exception" to the exclusionary rule where a new crime was committed following

police conduct that violated the Fourth Amendment); *People v. Brown*, 802 N.E.2d 356, 359 (Ill. App. Ct. 2003) (recognizing the existence of a "distinct-crime" exception to the exclusionary rule). The "new crime exception" provides that, under certain circumstances, evidence of a new crime committed after an illegal search or seizure does not warrant suppression and may be used in court. *See* 6 Wayne R. La Fave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 11.4(j), at 483-91 (5th ed. 2012) (discussing the applicability of exclusion to evidence of crimes committed after violations of the Fourth Amendment).

Our jurisprudence has heretofore only addressed the new crime exception in situations involving violence or threats against police officer safety. *See, e.g.*, *State v. Travison B.*, 2006-NMCA-146, ¶ 9, 140 N.M. 783, 149 P.3d 99 (concluding that even if police officers entered an apartment unlawfully, evidence that the officers were attacked was admissible because the attack was "new criminal activity that is not subject to the exclusionary rule"); *State v. Jones*, 1992-NMCA-064, ¶¶ 5, 16, 18, 114 N.M. 147, 835 P.2d 863 (concluding that notwithstanding that the initial stop of the defendant was illegal, evidence that the defendant struggled with the police officer, hit him, broke from his grasp, and bolted, only to be caught by another police officer was admissible); *State v. Chamberlain*, 1989-NMCA-082, ¶¶ 2-4, 109 N.M. 173, 783 P.2d 483 (assuming that even if two police officers unlawfully remained in the defendant's home, evidence that the defendant shot at the police officers, killing one of them, was admissible); *State v. Doe*, 1978-NMSC-072, ¶¶ 10-11, 92 N.M. 100, 583 P.3d 464 (holding that "a private citizen may not use force to resist a search by an authorized police officer engaged in the performance of his duties whether or not the arrest is illegal" because such self-help measures "can lead to violence and serious physical injury" and "[t]he societal interest in the orderly settlement of disputes between citizens and their government outweighs any individual interest in resisting a questionable search"). This jurisprudence is supported by case law across the country. *See Brown v. City of Danville*, 606 S.E.2d 523, 530 (Va. Ct. App. 2004) ("[F]ederal and state courts alike have uniformly rejected the argument that trial courts should suppress evidence relating to the defendant's violence or threatened violence toward police officers subsequent to an unlawful search or seizure or a warrantless entry." (alteration, internal quotation marks, and citation omitted)); *State v. Aydelotte*, 665 P.2d 443, 447 (Wash. Ct. App. 1983) ("All courts . . . agree that evidence of post-entry assaults on police officers are outside the scope of the exclusionary rule.").

C. Analysis

The issue in this case is the scope of the new crime exception to the exclusionary rule. Arguing to affirm the district court, the State maintains that under federal law, the new crime exception applies to any new crime committed, violent or not. On the other hand, Defendant asserts that the new crime exception does not automatically apply to a non-violent, identity-related offense. Which position applies under federal law in New Mexico is an issue of first impression.

{14} The only case cited by the State in support of its position in which the new crime did not involve violence or threats against police officer safety is *United States v. Pryor*, 32 F.3d 1192 (7th Cir. 1994). In *Pryor*, the defendant drove a woman and her children to a social security office where the woman was

arrested for making false statements to obtain a social security number and card. *Id.* at 1193. The agents asked the defendant, who was in the parking lot with the children, to come inside to determine if he would care for the children. *Id.* The defendant produced a driver's license and social security card falsely showing that he was "Michael Recob." *Id.* at 1194. "Michael Recob" was deceased, and the defendant had obtained the social security card by deceit, and then used it to get a driver's license because his own driver's license was suspended. *Id.* When an agent discovered that "Michael Recob" was deceased, an investigation followed, and the defendant was subsequently convicted of using a social security number which was obtained on the basis of false information. *Id.* The court rejected the defendant's argument that it was error to deny his motion to suppress the evidence that he misrepresented his identity. *Id.* at 1195-96. The court reasoned that because the exclusionary rule was devised "to reduce incentives to violate the Constitution by preventing the prosecutors from using evidence the police turn up," and "[p]olice do not detain people hoping that they will commit new crimes in their presence[,]" applying the exclusionary rule to the case before it would not advance the policy underlying the exclusionary rule. *Id.* at 1196.

Defendant asks us to consider two cases in which it was held that the new crime exception did not apply because the new crime did not involve violence or threats against the police. The first case is *Brown*, which commenced when a police officer saw the defendant standing alone in the parking lot of a building, which was a small strip mall with a grocery store, a restaurant, and two or three other small businesses. 802 N.E.2d at 357. The defendant was standing about five or ten feet from the door of the grocery store, which was closed, and between fifteen and twenty feet from the door of the restaurant next door, which was open. *Id.* The officer "thought it was odd" for the defendant to be standing where he was, so he confronted the defendant. *Id.* (internal quotation marks omitted). The officer asked the defendant for identification, and the defendant lied by responding that he had none. *Id.* at 358. He also told the officer that his name was "Tony B. Brown" when it was actually "Antonio B. Brown." *Id.* The defendant was then arrested when the officer learned there was an outstanding warrant for his arrest, and he was subsequently charged with one count of obstructing justice, one count for falsely stating he was not carrying identification, and one count for providing a false name. *Id.* The trial court found that there was no justification for stopping the defendant and ordered the defendant's answers to the police officer's questions suppressed. *Id.* On appeal, the court first reaffirmed that, in order to protect police officers from people who physically resist unconstitutional searches and seizures, evidence of a physical confrontation with a police officer is admissible notwithstanding an unconstitutional search by the police officers. *Id.* at 359-60. However, because giving false information to a police officer does not raise the same policy concerns as assaulting a police officer, the court affirmed the trial court order suppressing the evidence "as the fruit of the unconstitutional seizure." *Id.* at 360.

In addition, Defendant urges us to consider *State v. Badessa*, 885 A.2d 430 (N.J. 2005) in which the New Jersey Supreme Court reversed the holding of the appellate division affirming the defendant's conviction for refusing to take a breath test (a crime under New Jersey law), notwithstanding the unconstitutional stop of the defendant's car. *Id.* at 434. The appellate division reasoned

that refusing to take a breath test is comparable to a defendant resisting arrest or eluding the police, and the exclusionary rule does not apply to resisting or eluding the police following an illegal search or detention. *Id.* at 434, 437. The New Jersey Supreme Court also stated that when a defendant committed an entirely new crime that placed police officers in physical danger following his improper detention, "the need to protect the troopers' safety outweighed whatever marginal deterrent to police misconduct might be provided by immunizing [the] defendant's actions from criminal liability." *Id.* at 437 (quoting *State v. Casimono*, 593 A.2d 827, 833 (N.J. Super. Ct. App. Div. 1991). The New Jersey Supreme Court reasoned that the commission of a new crime which endangers the safety of a police officer or endangers public safety is an "intervening act" marking the point at which the detrimental consequences of an unconstitutional seizure become so attenuated that the exclusionary rule loses its value. *Badessa*, 885 A.2d at 437; *see State v. Seymour*, 672 A.2d 1273,1277 (N.J. Super. Ct. App. Div. 1996) (involving eluding police at high speeds following an unconstitutional stop). On the other hand, the New Jersey Supreme Court concluded that refusing to take a breath test is not comparable to a case involving the commission of a new crime that directly threatens public safety, such as resisting arrest or eluding police. *Badessa*, 885 A.2d at 437. The Court further concluded that public policy does not warrant making an exception to the exclusionary rule for the crime of refusing to take a breath test and reversed the appellate division. *Id.* at 438.

The authorities cited by Defendant are the most persuasive. Specifically, the policy reasons for recognizing a new crime exception to the exclusionary rule simply do not exist when a non-violent, identity-related offense is committed in response to unconstitutional police conduct. On the other hand, applying the exclusionary rule in such circumstances advances its purpose of deterring unlawful police conduct. *See State v. Garcia*, 2009-NMSC-046, ¶ 24, 147 N.M. 134, 217 P.3d 1032 ("[T]he exclusionary rule is designed to deter unlawful police conduct[.]"); *see also Elkins*, 364 U.S. at 217 ("The [exclusionary] rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."). In this case, the identity crime was directly connected to the seat belt infraction, and the seat belt infraction was only unearthed because of the unconstitutional police conduct. Under these facts, applying the exclusionary rule serves to deter the initial unconstitutional conduct. *See Keylon v. City of Albuquerque*, 535 F.3d 1210, 1216 (10th Cir. 2008) ("[T]o arrest for concealing identity, there must be reasonable suspicion of some predicate, underlying crime."). Furthermore, the societal cost for excluding evidence that a non-violent offense was committed to avoid a seat belt infraction appears to be minor. Because the deterrent effect outweighs the societal costs, suppression of the evidence of Defendant's new crimes is appropriate. *See Herring*, 555 U.S. at 141 (suppression is an appropriate remedy for a Fourth Amendment violation when the benefits of deterrence outweigh the costs). We hold that the commission of a non-violent, identity-related offense in response to unconstitutional police conduct does not automatically purge the taint of the unlawful police conduct under federal law.

D. Attenuation Analysis

Having concluded that the taint of

Officer Benally's unconstitutional stop of the vehicle was not automatically purged by the new offenses, we must still determine whether the exclusionary rule otherwise applies. To answer this question, we employ the traditional attenuation analysis. Although the exclusionary rule "prohibits the introduction of derivative evidence, both tangible and testimonial, that is the product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search," *Murray v. United States*, 487 U.S. 533, 536-37 (1988), it does not apply when the connection between the unconstitutional police action and the evidence becomes "so attenuated as to dissipate the taint" from the unlawful conduct. *Nardone v. United States*, 308 U.S. 338, 341 (1939); *see State v. Portillo*, 2011-NMCA-079, ¶ 25, 150 N.M. 187, 258 P.3d 466 ("It is established law that evidence discovered as a result of the exploitation of an illegal seizure must be suppressed unless it has been purged of its primary taint."); *State v. Soto*, 2008-NMCA-032, ¶ 25, 143 N.M. 631, 179 P.3d 1239 (noting that because the purpose of the exclusionary rule is to deter unlawful police conduct, if the acquisition of evidence is sufficiently removed from the unlawful police conduct, "the deterrent value of excluding it is diminished." (quoting *People v. Mitchell*, 824 N.E.2d 642, 649 (Ill. App. Ct. 2005)).

The United States Supreme Court has articulated three factors for assessing attenuation between the unconstitutional police conduct and the evidence offered by the State: "(1) the amount of time that elapsed between the illegality and the acquisition of evidence; (2) any intervening circumstances; and (3) the purpose and the flagrancy of the police misconduct." *Soto*, 2008-NMCA-032, ¶ 25 (internal quotation marks and citation omitted). "This last factor is especially important, because the aim of the exclusionary rule is to deter police misconduct by removing the incentive to disregard constitutional guarantees." *State v. Bale*, 267 N.W.2d 730, 733 (Minn. 1978). We conclude that the discovery of the evidence of concealing identity and forgery was not sufficiently removed from the taint of the illegal stop to justify admitting the evidence notwithstanding the exclusionary rule. "It is well established that the initiation of a traffic stop constitutes a seizure of the vehicle's occupants." *Portillo*, 2011-NMCA-079, ¶ 12. Evidence of the new crimes flowed directly from observing an alleged seat belt violation during the unlawful seizure, and Defendant concealed his identity and signed the citation issued in his brother's name directly in response to questions about not wearing his seat belt during the seizure. Finally, the fact that evidence of Defendant's seat belt violation was suppressed further reinforces the connection between the unlawful stop and the evidence of the new crimes. Stated another way, there was a clear link between the unconstitutional seizure and the questions that led to the concealing identity and forgery charges. We conclude that these facts favor suppression in deterring stops of vehicles where there is no reasonable suspicion to do so.

D. Defendant's State Constitution Challenge

Having concluded that the crimes of concealing identity and forgery should have been suppressed under the Fourth Amendment, we do not address Defendant's challenge under Article II, Section 10 of the New Mexico Constitution. *See Gomez*, 1997-NMSC-006, ¶ 19 (stating that under the interstitial approach, if the right being asserted is protected under the federal constitution, the state constitutional claim is not reached).

CONCLUSION

The order of the district court denying Defendant's motion to suppress is reversed, and the case is remanded to the district court for further proceedings consistent with this Opinion.

IT IS SO ORDERED.

MICHAEL E. VIGIL, Chief Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

M. MONICA ZAMORA, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-056

Filing Date: February 25, 2015

Docket No. 32,525

STATE OF NEW MEXICO,

Plaintiff-Appellant,

v.

NIKOLOS MONTOYA, a/k/a NIKOLOS SOILES, a/k/a NIKOLOS SOLLES,

Defendant-Appellee.

Hector H. Balderas, Attorney General
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for Appellant

Jorge A. Alvarado, Chief Public Defender
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for Appellee

OPINION

GARCIA, Judge.

A grand jury indicted Defendant Nikolos Montoya on multiple counts of criminal sexual penetration of a minor (CSPM) and related felonies. The State appeals the district court's order dismissing Defendant's charges based upon a violation of his right to a speedy trial under the United States and New Mexico Constitutions. We affirm.

BACKGROUND

On May 13, 2010, a grand jury indicted Defendant on multiple counts of CSPM, sexual exploitation of a child, criminal sexual communication with a child, kidnapping, aggravated battery, and bribery of a witness, stemming from Defendant's alleged relationship with two teenaged girls. He was arrested three weeks after the indictment, on June 2, 2010. At his June 14, 2010 arraignment, he pleaded not guilty to the charges and his bond was set at $100,000. On June 23, 2010, Defendant's counsel entered an appearance on his behalf, requested

disclosures from the State, and asserted Defendant's right to a speedy trial.

On August 9, 2010, the State provided Defendant with its initial disclosures. On October 25, 2010, Defendant moved for a statement of facts, asserting that the indictment lacked details as to where and when the alleged crimes occurred, what specific acts allegedly took place, and on what evidence the State intended to rely in proving each count. At the hearing on this motion, defense counsel stated that he "reviewed all of the discovery[,]" the discovery referred to "images" in the State's possession, and he asked that the State specify which images related to which counts. He also asked that the State be "explicit as to what activity or what averment applie[d] to which count." The district court granted the motion. In doing so, it recognized that the prosecutor had not yet familiarized herself with the evidence and that providing a statement of facts to Defendant, although not required by the rules, would help "things start to make sense." Two months later, the State provided a detailed statement of facts.

On December 3, 2010, after spending about six months in jail, Defendant was released on bond. Other than notices concerning two pre-trial conferences that were to take place in April 2011 and June 2011, the record shows no further activity in this case until June 2011, at which time the district court filed a notice setting the trial for November 7, 2011.

On October 25, 2011, about two weeks before the trial was scheduled to begin, Defendant moved to dismiss the case on the ground that the State had failed to respond to his requests to conduct pre-trial interviews with the victims. On November 2, 2011, five days before trial, the State moved to continue the trial because the attorney who had been prosecuting the case left the district attorney's office, and the new prosecuting attorney needed more time to either consider a plea offer or schedule pre-trial interviews with the victims. Defendant amended his motion to dismiss to include copies of email communications between defense counsel and the previous prosecutor. These emails showed that:

- Defense counsel first wrote the prosecutor on October 1, 2010, over a year before he filed his motion to dismiss, asking for documents that appeared to be missing from discovery, whether any safe house interviews had been conducted, whether he could have access to any records concerning the victims' counseling, and expressing his intention to schedule pre-trial interviews with the victims once he had all of the State's discovery. The prosecutor responded the same day, reminding defense counsel, "that once [pre-trial interviews] of [Victims] are done" the policy is "that there is no plea[.]"

- Defense counsel emailed the prosecutor two a half months later on December 14, 2010, telling her that he wanted to set the pre-trial interviews "at [her] earliest convenience[,]" such as "the week after [Christmas]" or "the first week in [January 2011]." The prosecutor responded that she would not be able to set them until mid-to-late January 2011.

- On January 6, 2011, defense counsel emailed the prosecutor again telling her that he was "ready to schedule the [pre-trial interviews]" and to "let [him] know the time frame [she]'d like to schedule

them[.]" The prosecutor responded, only to remind defense counsel again that "[i]f we schedule [the pre-trial interviews with the alleged victims]—there is no plea. You do know that is the policy here, correct? Is that what your intent is? Otherwise, I'd suggest we start with other witnesses and work our way to the [alleged victims]." Defense counsel replied that he did not intend to interview anyone other than the alleged victims and suggested that the prosecutor "make a plea offer first (and soon)" and "[i]f that is rejected, then we can schedule the [pre-trial interviews]."

- Six months later, on June 21, 2011, defense counsel emailed the prosecutor again. He asked if she "plan[ned] to make a plea offer[.]" and if so, when he could expect it. He also told her that they "should put this [case] on the trial calendar." The prosecutor apparently did not respond.

- Two months later, on August 26, 2011, defense counsel emailed the prosecutor telling her that he was "still waiting for [her] to get back to [him] on the [pre-trial interviews]" and to "give [him] dates when the two [alleged victims] are available to be interviewed any time [during] the first half of September." The prosecutor apparently did not respond.

- A few weeks later, on September 13, 2011, defense counsel emailed the prosecutor again, noting that she had not responded to his last email and asking for possible dates on which to set the pre-trial interviews "between now and October 10 so that we can complete the [pre-trial interviews] of the two [alleged victims] in time to have them transcribed before trial which is set for November 7." The prosecutor responded that she could set pre-trial interviews with witnesses *other than the victims* during the "last week of September." (Emphasis added.) Defense counsel reminded her that he wanted to interview the alleged victims and asked again when they could schedule those interviews. The prosecutor responded once again to remind defense counsel, "You know that means, according to [the State's CACU] policy, that there will be no plea offer[]?"

At a hearing on December 7, 2011, the district court denied Defendant's motion to dismiss and granted the State's motion to continue the trial. In doing so, it ordered the State to either make a plea offer or set up pre-trial interviews with the victims by the end of December 2011, so that there would be "[n]o more messing around on the State's part."

The record shows no further activity in this case for seven more months, until July 9, 2012, when the district court entered a notice rescheduling the trial for September 10, 2012. This new trial date was about ten months after the trial was originally scheduled and about twenty-seven months after Defendant was arrested.

On July 23, 2012, seven weeks before trial, Defendant filed several pre-trial motions, including a motion to dismiss for violation of his speedy trial right. About a week later, on July 31, 2012, the State and defense counsel filed a stipulated motion and order requiring mental health providers to release one of the victim's counseling records. During a status conference on August 21, 2012, requested by the State, the prosecutor told the court that he could not attend the hearing on Defendant's pre-trial motions because another case that he

was prosecuting had been rescheduled for trial on that date. Because the court could not reschedule the motions hearing to another date before the September 10, 2012, trial, it rescheduled trial for September 24, 2012, and rescheduled the motions hearing for September 13, 2012. After the hearing on the speedy trial motion, the district court granted it and dismissed the indictment. The State appeals.

DISCUSSION

A. General Principles and Standard of Review

The Sixth Amendment of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial[.]" U.S. Const. amend. VI. The New Mexico Constitution affords a similar right: "In all criminal prosecutions, the accused shall have the right to . . . a speedy public trial." N.M. Const. art. II, § 14. "Though speed is an important attribute of the right," the right "does not preclude the rights of public justice"—"if either party is forced to trial without a fair opportunity for preparation, justice is sacrificed to speed." *State v. Garza*, 2009-NMSC-038, ¶ 11, 146 N.M. 499, 212 P.3d 387 (alteration, internal quotation marks, and citations omitted). We therefore analyze "the peculiar facts and circumstances of each case." *Id.*

In determining whether a defendant's speedy trial right was denied, our Supreme Court has adopted the balancing test that the United States Supreme Court created in *Barker v. Wingo*, 407 U.S. 514 (1972). *Garza*, 2009-NMSC-038, ¶¶ 9, 13. Under the *Barker* framework, we weigh "the conduct of both the prosecution and the defendant" under the guidance of four factors: (1) the length of the delay, (2) the reasons for the delay, (3) the timeliness and manner in which the defendant asserted his speedy trial right, and (4) the particular prejudice that the defendant actually suffered. *Garza*, 2009-NMSC-038, ¶¶ 13, 32, 35 (internal quotation marks and citation omitted). "Each of these factors is weighed either in favor of or against the [s]tate or the defendant, and then balanced to determine if a defendant's right to a speedy trial was violated." *State v. Spearman*, 2012-NMSC-023, ¶ 17, 283 P.3d 272. Because none of these factors is talismanic, we analyze speedy trial claims on a case-by-case basis. *State v. Palacio*, 2009-NMCA-074, ¶ 9, 146 N.M. 594, 212 P.3d 1148

.

Before applying this balancing test, we first assess whether the length of the delay was "presumptively prejudicial," depending on the complexity of the case. *Spearman*, 2012-NMSC-023, ¶ 21; *Garza*, 2009-NMSC-038, ¶ 21 ("[A] 'presumptively prejudicial' length of delay is simply a triggering mechanism, requiring further inquiry into the *Barker* factors."). "A delay of trial of one year is presumptively prejudicial in simple cases, fifteen months in intermediate cases, and eighteen months in complex cases." *Spearman*, 2012-NMSC-023, ¶ 21. Because the State concedes that the length of the delay was presumptively prejudicial regardless of the level of complexity assigned to the case, we proceed to inquire into the *Barker* factors. *See Garza*, 2009-NMSC-038, ¶ 21.

In analyzing these factors, we defer to the district court's factual findings concerning each factor as long as they are supported by substantial evidence, we independently review the record to determine whether a defendant was denied his speedy trial right, and we weigh and balance the

Barker factors de novo. *Spearman*, 2012-NMSC-023, ¶19; *Palacio*, 2009-NMCA-074, ¶ 9; *see State v. Collier*, 2013-NMSC-015, ¶ 41, 301 P.3d 370 (recognizing that the *Barker* factors themselves are "factually based"); *cf. State v. Bloom*, 1977-NMSC-016, ¶ 7, 90 N.M. 192, 561 P.2d 465 (stating that, in reviewing a district court's factual findings related to a motion to suppress, the appellate court determines "only whether the evidence, viewed in the light most favorable to the finding and considering the degree of proof required, substantially supports the finding" (internal quotation marks and citation omitted)).

B. Discussion and Weighing of the Factors

1. Length of Delay

In determining what weight to give to the length of delay, we consider the extent to which the delay stretched beyond the presumptively prejudicial period. *State v. Ochoa*, 2014-NMCA-065, ¶ 6, 327 P.3d 1102, *cert. granted*, 2014-NMCERT-006, 328 P.3d 1188. "[T]he greater the delay[,] the more heavily it will potentially weigh against the State." *Garza*, 2009-NMSC-038, ¶ 24. A delay that "scarcely crosses the bare minimum needed to trigger judicial examination of the claim" will "not weigh heavily in [a d]efendant's favor." *Id.* ¶¶ 23-24 (internal quotation marks and citation omitted); *compare State v. Steinmetz*, 2014-NMCA-070, ¶ 6, 327 P.3d 1145 (concluding that a delay of twenty-eight months beyond the presumptive threshold weighed "moderately" against the State in a case of intermediate complexity), *cert. denied* 2014-NMCERT-006, 328 P.3d 118, *with State v. Urban*, 2004-NMSC-007, ¶ 20, 135 N.M. 279, 87 P.3d 1061 (concluding that an eighteen-month delay beyond the presumptive threshold weighed heavily against the State in a simple case), *State v. Marquez*, 2001-NMCA-062, ¶ 12, 130 N.M. 651, 29 P.3d 1052 (concluding that a nine-month delay beyond the presumptive threshold weighed heavily against the State in a simple case), *and State v. Montoya*, 2011-NMCA-074, ¶ 17, 150 N.M. 415, 259 P.3d 820 (concluding that a six-month delay beyond the presumptive threshold weighed slightly against the State in a case of intermediate complexity).

The district court found that this was a case of intermediate complexity. In making this finding, it considered the fact that the victims were teenagers, as opposed to young children, thereby "diminish[ing] the difficulty of the case[.]" On appeal, the State argues that substantial evidence does not support the district court's finding that this was an intermediately complex case because the court "had very little familiarity with the facts of the . . . case and relied solely on the victims' ages, rather than the overall complexity of the case[.]" It also noted that during previous hearings on other matters, the district court had characterized the case as "serious" and "tangled." We conclude that, viewed in the light most favorable to the district court's finding, substantial evidence supports the finding that the case was of intermediate complexity. *See Bloom*, 1977-NMSC-016, ¶ 7. At the hearing in the district court, the State's sole argument in support of its position that this was a complex case was that the case involved "two alleged victims, [and] delayed disclosure [by] both of them." It also stated that "intermediate . . . [was] the absolute floor for any case involving these types of charges." The fact that the district court had previously commented at other hearings that this case was "serious" and "tangled" does not detract from its ultimate finding that the case was of

intermediate complexity. Nothing in the record explains why the delayed disclosure by the two teenagers complicated this case and, if it did, to what degree and why. Thus, we defer to the district court's finding that the case was one of intermediate complexity, because it was in the best position to make that determination. *See Spearman*, 2012-NMSC-023, ¶ 19; *State v. Coffin*, 1999-NMSC-038, ¶ 57, 128 N.M. 192, 991 P.2d 477; *State v. Johnson*, 2007-NMCA-107, ¶ 7, 142 N.M. 377, 165 P.3d 1153.

The parties and the district court agreed that the length of delay was twenty-seven months. This delay extends twelve months beyond the fifteen-month presumptive threshold for intermediate cases. *See Spearman*, 2012-NMSC-023, ¶ 21. We conclude that this delay is significant and that it weighs more than slightly in favor of Defendant. *See Urban*, 2004-NMSC-007, ¶ 20; *Steinmetz*, 2014-NMCA-070, ¶ 6; *Montoya*, 2011-NMCA-074, ¶ 17; *Marquez*, 2001-NMCA-062, ¶ 12. Accordingly, we weigh this factor moderately to heavily in Defendant's favor.

2. Reasons for Delay

We assign different weight to different types of delay. *See Spearman*, 2012-NMSC-023, ¶ 25. There are three types: "(1) deliberate or intentional delay[,] (2) negligent or administrative delay[,] and (3) delay for which there is a valid reason." *Ochoa*, 2014-NMCA-065, ¶ 8. "Deliberate delay is to be weighted heavily against the government." *Id.* ¶ 9 (internal quotation marks and citation omitted). Negligent or administrative delay weighs against the state, though not heavily. *Spearman*, 2012-NMSC-023, ¶ 25. The government's failure to make witnesses available to the defense upon request constitutes "bureaucratic indifference" that "weighs against the [s]tate." *State v. Moreno*, 2010-NMCA-044, ¶ 29, 148 N.M. 253, 233 P.3d 782 (alterations, internal quotation marks, and citation omitted); *see also Johnson*, 2007-NMCA-107, ¶¶ 12-15 (weighing the entire first twelve months of delay against the state where "the [s]tate failed to make its witnesses available for pretrial interviews so that [the d]efendant could prepare for trial"); *State v. Talamante*, 2003-NMCA-135, ¶¶ 12-13, 134 N.M. 539, 80 P.3d 476 (weighing the reasons for the delay against the state because "[t]he [s]tate's delay in producing its witnesses for defense interviews was unreasonable and cannot be condoned"). Furthermore, delay that results from lack of diligence on the part of the state weighs more heavily than do " '[i]nstitutional delays' that are inherent in the criminal justice system." *State v. MacGregor*, 2013 MT 297, ¶ 33, 372 Mont. 142, 311 P.3d 428 (weighing delays attributable to the state's lack of diligence "significantly against the [s]tate").

The district court found that the State was "responsible for the entire delay although there was no bad faith on its part[,]" and it weighed this factor in Defendant's favor. The State argues on appeal that the reasons for the delay should not be weighed against the State because much of the delay was "customary," Defendant delayed the proceedings when he unnecessarily moved for a statement of facts, the State was not obligated to make a plea offer or to make witnesses available without a court order, and Defendant further delayed trial in his efforts to obtain the victims' counseling records. We are not persuaded by the State's argument for several reasons.

First, a twenty-seven-month delay in the prosecution of an intermediately complex case is not customary; to the contrary, any

delay beyond fifteen months in such a case is presumptively prejudicial. *See Spearman*, 2012-NMSC-023, ¶ 21.

Second, the district court granted the motion for a statement of facts in order to move the case forward—it recognized that seven months after the indictment the prosecutor had not yet familiarized herself with the evidence and that preparing a statement of facts would help "things start to make sense."

Third, the State—not Defendant—moved to continue the trial from its original November 2011 setting because it had not yet made the victims available for pre-trial interviews despite Defendant's numerous requests to interview the victims over the course of fourteen months. It is clear from the emails between the prosecutor and defense counsel that Defendant intended to move the case forward for trial and the prosecutor resisted—the prosecutor repeatedly tried to dissuade defense counsel from conducting witness interviews by insinuating that a plea offer would be forthcoming and that conducting interviews would eliminate the chance of that plea offer under its "CACU policy." The district court's order continuing the trial and ordering the State to make witnesses available to the defense by the end of December 2011 was another effort on the court's part to move the case forward in specific response to the State's failure to do so. We are not persuaded by the State's assertion that our Supreme Court's decision in *State v. Harper* precludes us from considering the State's failure to make witnesses available for defense interviews in a speedy trial analysis. *See* 2011-NMSC-044, ¶ 21, 150 N.M. 745, 266 P.3d 25 (reversing the district court's "severe sanction" of excluding the State's primary witnesses because the State did not make them available for defense interviews by the deadline imposed by the district court).

Fourth, the record does not support the State's explanation on appeal of why trial was delayed an additional nine months after the pre-trial interviews were finished. The State argues that, because it was helping Defendant obtain the victims' counseling records, requesting a trial setting before getting these records would have been "futile[.]" In support of this argument, the State cites to a comment that the district court made during a previous hearing that "the trial setting is somewhat contingent on [defense counsel's] ability to . . . defend [his] client." Although the parties' joint efforts to obtain the victims' counseling records could have been a cause for some delay, we do not know whether any of this delay can be attributed to Defendant because the State made no record of it. Therefore, we reject the factual basis for this argument as it is purely speculative. *See State v. Ortega*, 2014-NMSC-017, ¶¶ 57, 59, 327 P.3d 1076 (declining to address arguments that are speculative and unsupported by the record). "[I]t is ultimately the State's responsibility to bring a defendant to trial in a timely manner." *State v. Stock*, 2006-NMCA-140, ¶ 17, 140 N.M. 676, 147 P.3d 885. "A defendant has no duty to bring himself to trial[.]" *Barker*, 407 U.S. at 527. Thus, we defer to the district court's finding that the State was entirely responsible for the delay in this case. *See Spearman*, 2012-NMSC-023, ¶ 19. We further conclude that the State's failure to timely schedule witness interviews despite defense counsel's persistent efforts to otherwise move the case forward on its own accord without judicial intervention constitutes "unacceptable . . . indifference" to its duty to bring Defendant to trial in a timely manner. *Moreno*, 2010-NMCA-044, ¶ 29; *see*

MacGregor, 2013 MT 297, ¶ 33 (recognizing that delays arising from the state's lack of diligence are weighed significantly against the state). The assertion of a "CACU policy" regarding witness interviews being delayed because the State had not yet considered making a plea offer to a defendant is not good cause for delaying trial and shall be held against the State in weighing the reasons for delaying a trial in a speedy trial analysis. *See generally Myers v. State*, 145 So. 3d 1143, ¶¶ 22-23 (Miss. 2014) (recognizing that where the length of delay is presumptively prejudicial the state "bears the burden of proving good cause for a speedy trial delay, and thus bears the risk of non-persuasion" (internal quotation marks and citation omitted)). Therefore, we also weigh this factor moderately to heavily against the State.

3. Assertion of the Right

In determining the weight to assign a defendant's assertion of his speedy trial right, we "assess the timing of the defendant's assertion and the manner in which the right was asserted." *Garza*, 2009-NMSC-038, ¶ 32. We consider "whether a defendant was denied needed access to speedy trial over his objection or whether the issue was raised on appeal as [an] afterthought." *Id.* The effect of a defendant's assertion of his speedy trial right may be diluted where his own actions caused the delay. *Id.*

The district court found that Defendant asserted his speedy trial right three times: first, at the same time that his counsel entered an appearance on his behalf; second, when he filed his first motion to dismiss on the grounds that the State failed to schedule pre-trial interviews; and third, when he filed his specific speedy trial motion. The State argues that these assertions "weigh only slightly in Defendant's favor" because the first was "simply pro forma language in an entry of appearance less than a month after Defendant's arrest"; the second was not an explicit assertion of his speedy trial right, but rather a motion to dismiss for discovery violations; and the third—his motion to dismiss for violation of his speedy trial right—was made less than two months before trial was set to begin.

Mindful of Justice Daniels' special concurrence in *Spearman*, we agree with the State that these three combined assertions should weigh less heavily in Defendant's favor. *See* 2012-NMSC-023, ¶ 46 (Daniels, J., specially concurring) (suggesting that cases should not be dismissed on speedy trial grounds without putting the State on notice that it "had to put up or suffer the consequences"). However, we are also mindful that Defendant was in custody facing a $100,000 bond and serious charges that carried the potential penalty of decades in prison and the permanent stigma of sex offender registration. Although our Supreme Court has stated that a defendant's assertion of his speedy trial right that "[comes] as part of the pro forma pre[-]trial motions [the d]efendant's counsel file[s] upon entering his appearance [is] generally afforded relatively little weight[,]" *See Urban*, 2004-NMSC-007, ¶ 16, we do not consider Defendant's initial request for a speedy trial to be insignificant in light of the overall circumstances in this case. We also consider Defendant's persistence over the course of fourteen months to proceed to trial by seeking to ensure that the State had made all required disclosures and his attempts to obtain pre-trial interviews with the victims in time for the original trial setting. This behavior on Defendant's part was consistent with his first request to move the case to a timely trial and enhanced his original

assertions for a speedy trial, unlike other cases in which a defendant's dilatory behavior negates the effect of his verbal or other early assertions. *See Garza*, 2009-NMSC-038, ¶ 32 (considering actions taken by the defendant in pursuing or delaying trial in addition to his verbal assertions of his speedy trial right); *see also State v. Charlie*, 2010 MT 195, ¶ 54, 357 Mont. 355, 239 P.3d 934 (considering the defendant's "responses to the delay[,]" including "timeliness, persistence[,] and sincerity of any objection to the delay," in recognizing that "[c]onduct evidencing a desire to be brought to trial promptly weighs in the defendant's favor" (alteration, internal quotation marks, and citations omitted)). Given Defendant's assertions, his persistent efforts to prepare his defense for a timely trial, and the district court's several admonishments to the State regarding its failure to move the case forward, we conclude that the State was on clear notice of the need to timely fulfill its obligations to the defense, including providing access to witnesses and timely proceeding to trial in this case. Accordingly, we weigh the assertion factor slightly to moderately in Defendant's favor.

4. Prejudice

The "heart" of the speedy trial right "is preventing prejudice to the accused." *Garza*, 2009-NMSC-038, ¶ 12. We analyze prejudice under three interests: (1) preventing oppressive pre-trial incarceration, (2) minimizing anxiety and concern of the accused, and (3) limiting the possibility that the defense will be impaired. *Id.* ¶ 35. We are mindful that "some degree of . . . anxiety is inherent for every defendant . . . awaiting trial." *State v. Maddox*, 2008-NMSC-062, ¶ 33, 145 N.M. 242, 195 P.3d 1254 (alterations, internal quotation marks, and citation omitted), *abrogated on other grounds by Garza*, 2009-NMSC-038, ¶¶ 47-48. "Therefore, we weigh this factor in the defendant's favor only where . . . the anxiety suffered is undue." *Garza*, 2009-NMSC-038, ¶ 35. A defendant is not required to show that he experienced "greater anxiety and concern than that attending most criminal prosecutions." *Salandre v. State*, 1991-NMSC-016, ¶ 32, 111 N.M. 422, 806 P.2d 562, *holding modified on other grounds by Garza*, 2009-NMSC-038. "The operative question is whether the anxiety and concern, once proved, has continued for an unacceptably long period." *Id.* "It is for the court to determine whether the emotional trauma suffered by the accused is substantial and to incorporate that factor into the balancing calculus." *Id.* The evidence must also establish that the alleged prejudice occurred as a result of the delay in trial beyond the presumptively prejudicial threshold as opposed to the earlier prejudice arising from the original indictment. *Spearman*, 2012-NMSC-023, ¶ 39. Because the presumption of prejudice intensifies the longer that the delay extends beyond the presumptive threshold, less proof of prejudice is required from Defendant, and more proof of lack of prejudice is required from the State where the delay is significant. *See Doggett v. United States*, 505 U.S. 647, 652 (2012) ("[T]he presumption that pre[-]trial delay has prejudiced the accused intensifies over time."); *State v. Redlich*, 2014 MT 55, ¶ 52, 347 Mont. 135, 321 P.3d 82 (noting that, because a delay of 285 days beyond the presumptive threshold was significant, the court "require[d] less proof of prejudice from the defendant, and a greater showing of lack of prejudice from the State").

At the hearing on the speedy trial motion, Defendant's mother testified that

during the time that the charges were pending, Defendant was "paranoid[,]" "extremely depressed[,] . . . lost almost 30 pounds[,]" had not "been able to go to church every Sunday, like he used to," had become "constantly confused[,]" and had become "distanced" from his daughter and his son. Defendant testified on direct examination that after spending six months in jail and being released, he had problems finding employment as a plumber because he "lost all [his] equipment, all [his] tools," he was "kicked out" of the union because he "couldn't pay [his] dues" while he was in jail, and that other independent plumbing companies would not hire him because he had previously been in the union. He testified that before he was arrested, he was "extremely close" with his daughter. After the arrest, his daughter moved out of his home and he only had limited contact with her. He said that since the charges had been pending, he isolated himself because he was "very paranoid" that others would "misconstrue" his words and bring "false accusations" upon him; he had become depressed and began receiving treatment and taking medications for his depression; he stopped being affectionate toward his daughter; and he had not seen his son in over two years.

On cross-examination, Defendant admitted that he would be reinstated into the union if he paid his back dues. When the prosecutor asked him if he had sought other types of employment, Defendant testified that he "was a tattoo artist at one time," but that "nobody [was] hiring" because of "all this on [his] record[.]" He said that he "did have a job" with a landscaping company for a few months about a year before the hearing. On redirect, Defendant testified that the police "confiscated" all of his tattoo equipment prior to his arrest, and he had not gotten it back.

The district court found that Defendant "was prejudiced by the delay" in that he "suffered from depression as a result of these charges pending against him"; "[t]he depression [had] caused Defendant to be prejudiced within the meaning of *Barker* and *Spearman*"; and he was unable "to be licensed as a tattoo artist while this case was pending." It also found that "this prejudice was originally caused by the charges pending against . . . Defendant, [but] that the prejudice was [exacerbated] by excessive pre[-]trial delay."

We agree with the State that the record does not support the district court's finding that Defendant was unable to be licensed as a tattoo artist while the case was pending. Defendant testified that he "was a tattoo artist at one time," but he also testified that at the time of his arrest he had been a union plumber with the intention of taking over the family plumbing business. The record shows that he gave permission to the police to confiscate his tattoo equipment before he was arrested, but it does not show that he expressed any desire to have that equipment returned until he filed a motion to recover it *after* the district court dismissed the case on speedy trial grounds. He testified at the hearing on the speedy trial motion that his tattoo equipment had not been returned, but nothing in the hearing transcript or the record indicates that he was unable to be licensed as a tattoo artist because of the pending charges or was otherwise prejudiced by the fact that the police had confiscated his tattoo equipment.

Additionally, the district court did not make any findings about Defendant's inability to work as a plumber while the indictment was pending. Our independent review of the record, *see Palacio*, 2009-

NMCA-074, ¶ 9, reveals that the prejudice Defendant suffered with respect to employment occurred during the first six months after his indictment and while he was in jail when his union membership was revoked for failure to pay dues. The subsequent delay in trial had no effect on his union status because Defendant's membership in the union was dependent on repaying his dues, not on being tried or acquitted of the charges. Further, because Defendant did not say how he lost his plumbing tools and equipment, we cannot determine whether they were lost as a result of the pending charges. Although Defendant was unable to obtain employment as a plumber during the twenty-seven months after his indictment, we do not weight that hardship as a significant factor in our analysis.

[redacted] However, we defer to the district court's findings that Defendant suffered other types of prejudice from the delay and conclude that these findings are supported by substantial evidence in the record. *See Spearman*, 2012-NMSC-023, ¶ 19; *cf. Bloom*, 1977-NMSC-016, ¶ 7 (reserving the resolution of conflicts in the evidence to the district court). We further conclude that this prejudice was "actual," "particularized," and that it may be considered "undue" because it "continued for an unacceptably long period." *Garza*, 2009-NMSC-038, ¶¶ 13, 35; *Salandre*, 1991-NMSC-016, ¶ 32. Defendant and his mother testified that Defendant had become depressed, paranoid, and isolated; that his participation in his church and his relationship with his children deteriorated; that he lost about thirty pounds due to the anxiety of the pending charges. The State did not present evidence, nor did it demonstrate during cross-examination of Defendant and his mother, that Defendant did not suffer these types of prejudice.

[redacted] We recognize that various aspects of the harm Defendant suffered initially resulted from having been indicted on these charges in the first place. However, we conclude that this initial harm was unnecessarily prolonged by the State's failure over the course of fourteen months to make its witnesses available to the defense and to otherwise move this case forward to a timely trial. The personal hardship and anxiety type of prejudice to be protected against is separate and distinct from the loss of liberty caused by incarceration or the possible prejudice to an accused's defense. *See Spearman*, 2012-NMSC-023, ¶ 37; *see also Salandre*, 1991-NMSC-016, ¶ 18 (stating that the speedy trial right "protects against interference with a defendant's liberty, disruption of employment, curtailment of associations, subjection to obloquy, and creation of undue anxiety"); *State v. Vigil-Giron*, 2014-NMCA-069, ¶ 56, 327 P.3d 1129 (stating that "anxiety, loss of employment, continued inability to find work, and . . . public humiliation" suffered by the defendant "are forms of prejudice that the speedy trial right is intended to curtail"), *cert. denied*, 2014-NMCERT-006, 328 P.3d 1188. We also consider how Defendant's incarceration for the first six months after being indicted intensified the overall hardship and anxiety he suffered due to the subsequent delay in moving forward to a timely trial. Defendant testified that his incarceration "was the worst experience in [his] life" and that while he was in jail he "entertain[ed] . . . suicidal thoughts . . . [a]lmost every day." Defendant faced the possibility of being incarcerated for decades more over the next twenty-one months during which this case was pending, and during which the State was indifferent to and lacked diligence in bringing the case to trial. Thus, the evidence presented to the district court identified the types of disruptions and hardships that can be weighed in Defendant's

favor. The district court was in the best position to assess the credibility of the witnesses and determine the severity of the hardships and anxiety suffered by Defendant during the additional twelve-month period after the speedy trial threshold had passed. *See Spearman*, 2012-NMSC-023, ¶ 19. Based upon the sufficiency of the evidence presented to show that Defendant suffered undue prejudice and the lack of evidence presented by the State showing that Defendant was not unduly prejudiced, we will not substitute the State's view of the severity of Defendant's personal hardships and anxiety level for that of the district court. *See id.* (recognizing the deference given to factual findings by the district court). Under these circumstances, we agree with the district court that the prejudice factor weighed in Defendant's favor, and we further conclude that it should be weighed slightly to moderately in his favor.

C. Balancing the Factors

We weigh the length of delay and the reasons for the delay moderately to heavily in Defendant's favor. We weigh the assertion factor and the prejudice suffered slightly to moderately in Defendant's favor. None of the factors weigh in the State's favor. Therefore, we conclude that, on balance, the *Barker* factors weigh in Defendant's favor, and the district court appropriately dismissed Defendant's charges on speedy trial grounds. *See Spearman*, 2012-NMSC-023, ¶ 17.

CONCLUSION

We affirm the district court's order dismissing this case with 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: 2015-NMCA-057

Filing Date: March 9, 2015

Docket No. 33,057

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

DAVID HANSON,

Defendant-Appellant.

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OPINION

VANZI, Judge.

Defendant appeals from his conviction for violation of a no-contact provision of a protective order. The central issue on appeal is whether the trial court erred in admitting secondary evidence to prove the contents of a series of text messages that Defendant allegedly sent in violation of the order. We conclude that the State failed to meet its burden to establish that the originals were lost or destroyed without bad faith before invoking an exception to the best evidence rule. The error was not harmless. Since we remand for a new trial on this ground, we need not reach Defendant's alternative argument that a new trial should be granted based on prosecutorial misconduct.

BACKGROUND

In February 2009, Defendant was restrained from having any contact with Sarah Myers for a period of six months. Myers contacted police on March 7, 2009, to report that Defendant violated the order of protection by sending her a series of text messages over the previous three days. Officer Mark Maycumber responded to the call. At trial, Maycumber testified that he reviewed Myers' cell phone and located a total of eight messages from an unknown number, including two that came in while Maycumber was meeting with Myers. Maycumber further testified that he attempted to call the originating number without success and that officers were dispatched to locate Defendant at his last known address, also without success. For reasons that are not entirely clear, Maycumber instructed Myers to transcribe a copy of the messages by hand. The handwritten transcript consisted of a purportedly verbatim entry for each message, including its contents, a time and date stamp, and the originating phone number. Although Myers did not recognize the phone number and noted that it did not match Defendant's known number, the contents of the messages appeared to contain facts concerning their past relationship, including facts referencing the order of protection.

Trial was set to occur in metropolitan court when counsel for Defendant learned that the State sought to introduce the handwritten transcript into evidence in order to establish Defendant's identity as the sender. The parties agreed that this implicated the best evidence rule, *see* Rules 11-1001 to -1008 NMRA, but disputed whether an exception was applicable that would permit the admission of "other evidence of the content of a writing . . . if . . . all the originals are lost or destroyed, and not by the proponent acting in bad faith[.]" Rule 11-1004(A). The parties briefed and then argued the issue at a motion hearing and again on the day of trial. The trial court ultimately concluded that the messages on the phone were lost or destroyed without bad faith, permitted Myers to read the transcript to the jury, and then admitted the handwritten transcript into evidence. The jury found Defendant guilty of violating the order of protection, the district court affirmed the conviction, and Defendant timely appealed.[1]

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[1]The State argues that this Court lacks jurisdiction to review the district court's disposition of an appeal from the metropolitan court. We recently rejected the State's position in *State v. Carroll*, ___-NMCA-___, ___ P.3d ___, 2014 WL 6765814 (No. 32,909, Oct. 21, 2013). To the extent that the State asks us to overrule

DISCUSSION

Defendant has contended, below and on appeal, that the best evidence rule and *State v. Chouinard*, 1981-NMSC-096, ¶ 23, 96 N.M. 658, 634 P.2d 680, require a new trial without the improperly admitted transcript. *Chouinard* sets out a three-part test for due process when the State fails to preserve evidence. *Id.* ¶ 16. Since we ultimately agree with Defendant that the text messages should not have been admitted into evidence according to the best evidence rule, we do not address the constitutional standards discussed in *Chouinard*.

The best evidence rule states that "[a]n original writing . . . is required in order to prove its content" unless a statute or rule provides otherwise. Rule 11-1002. We review the trial court's decision to exclude or admit evidence for an abuse of discretion. *State v. Lopez*, 2009-NMCA-044, ¶ 12, 146 N.M. 98, 206 P.3d 1003. "An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case." *Id.* (internal quotation marks and citation omitted).

The text messages at issue in this case are "writings" for purposes of the rule. *See* Rule 11-1001(A) (defining a writing to consist "of letters, words, numbers, or their equivalent set down in any form"). As a practical matter, the best evidence rule infrequently applies, since a witness can typically testify based on independent firsthand knowledge of an event, even though a writing recording facts related to the event may also be available. *See* 2 Kenneth S. Broun, *McCormick on Evidence* § 234, at 135 (7th ed. 2013). In this case, however, the State had no evidence that Defendant sent the text messages, other than the content of the messages, which apparently referenced facts related to Defendant's relationship with Myers. The State's theory at trial relied on the contents of the writings themselves, which were introduced as substantive evidence through Myers' handwritten transcript. Thus an original writing was required unless otherwise provided by statute or rule. Rule 11-1002; *see also* 3 Barbara E. Bergman et al., *Wharton's Criminal Evidence* § 15:4, at 785 (15th ed. 2014) ("[T]he test is whether the party seeking to prove a fact is trying to prove what a particular writing . . . says or shows.").

The Handwritten Transcript Was Secondary Evidence

Since only secondary evidence is subject to exclusion under the best evidence rule, we first pause to clarify that the handwritten transcript was neither an original nor an admissible duplicate. An "original" is defined as "the writing . . . itself or any counterpart intended to have the same effect by the person who executed or issued it." Rule 11-1001(D). In the specific context of electronically stored information, " 'original' means any printout—or other output readable by sight—if it accurately reflects the information." *Id.* A "duplicate" is "a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original." Rule 11-1001(E). A duplicate is typically admissible to the same extent as an original. Rule 11-1003.

The New Mexico Rules of Evidence, promulgated in 1973, were patterned after the draft of proposed federal rules that had been recently submitted for congressional approval.

Carroll, we decline to do so.

State v. Martinez, 2008-NMSC-060, ¶ 25, 145 N.M. 220, 195 P.3d 1232. Thus, our rules "generally follow the federal rules of evidence[.]" *Estate of Romero ex rel. Romero v. City of Santa Fe*, 2006-NMSC-028, ¶ 8, 139 N.M. 671, 137 P.3d 611. The text of New Mexico's best evidence rule was and remains virtually identical to its federal counterpart, which was designed to codify the common law's recognition that the written word occupies a "central position" in the law. *See* 2 Broun, *supra*, § 232, at 128. History's earliest articulations of the requirement prohibited the admission of legal documents copied by scriveners of the "Bob Cratchit sort," who transcribed by hand, and "not always under the best of conditions." *Id.* § 236, at 145. Thus, from its inception, the rule has protected against the fraudulent or negligent omissions and inaccuracies that inhere in subsequently made, handwritten copies. *See, e.g.*, *Seiler v. Lucasfilm, Ltd.*, 808 F.2d 1316, 1318-19 (9th Cir. 1986) (holding that after-the-fact reconstructions of drawings constituted secondary evidence).

While modern copying methods, which are typically mechanical or photographic, have led to the recognition that reliable duplicates are admissible to the same extent as originals, *see* Fed. R. Evid. 1003, the federal rules have retained the "Bob Cratchit" rationale and have never permitted subsequently transcribed, manual copies to pass as duplicates. *See* Fed. R. Evid. 1001(e) advisory committee's note (stating that subsequent, manual copies, "whether handwritten or typed, are not within the definition"); 2 Broun, *supra*, § 236, at 145. We find no basis to diverge in our application of New Mexico's rule. The requirement of an original writing continues to serve its purpose by setting a clear, minimal threshold to ensure accuracy, prevent fraud, and guard against intentional or unintentional misrepresentation through the introduction of selected portions of a comprehensive set of writings to which the opponent has no access. *See generally* 2 Broun, *supra*, § 232, at 128-29; *Seiler*, 808 F.2d at 1319 (discussing the modern justifications for the rule). Accordingly, we conclude that Myers' hand drafted transcripts of the text messages are secondary evidence. An exception to the best evidence rule was therefore required for their admission.

The State Did Not Prove the Originals Were Destroyed Without Bad Faith

Rule 11-1004(A) provides an exception when "all the originals are lost or destroyed, and not by the proponent acting in bad faith." The State correctly acknowledges that it bore the burden to establish that (1) the originals were lost or destroyed, and (2) their loss or destruction was not the result of bad faith. *See Lopez*, 2009-NMCA-044, ¶ 14 (requiring the proponent "to either produce the original writings or explain why they were unavailable"); *Di Palma v. Weinman*, 1911-NMSC-036, ¶ 10, 16 N.M. 302, 121 P. 38 (stating that the proponent must establish destruction and also "remove[], to the satisfaction of the judge, any reasonable suspicion of fraud" (internal quotation marks and citation omitted)), *aff'd*, *Weinman v. De Palma*, 232 U.S. 571 (1914); *Palatine Ins. Co. v. Santa Fe Mercantile Co.*, 1905-NMSC-026, ¶ 6, 13 N.M. 241, 82 P. 363 (concluding that secondary evidence was improper when the proponent failed to show "why an original of the same could not be produced"); *Kirchner v. Laughlin*, 1892-NMSC-001, ¶ 6, 6 N.M. 300, 28 P. 505 (rejecting the notion that contents of a writing "may be shown by parol, in the absence of proof that proper efforts had been made to produce it").

Our cases have not previously

articulated any special requirements for proving that original documents have been lost or destroyed. Like its federal counterpart, New Mexico's best evidence rule specifically allocates to the court the responsibility of determining "whether the proponent has fulfilled the factual conditions for admitting [secondary] evidence[.]" Fed. R. Evid. 1008; Rule 11-1008. In the federal system, the trial court makes this determination in accordance with the requirements for deciding preliminary questions of fact. *See* Fed. R. Evid. 1008 advisory committee's note (stating that most preliminary questions of fact, including the question whether the loss of originals has been established, are for the judge "under the general principles announced in [Fed. R. Evid.] 104"). Thus, the issues of loss or destruction and absence of bad faith are foundational questions for the trial court to determine in accordance with Rule 104 before admitting secondary evidence to the jury. *See* Fed. R. Evid. 1008; 31 Charles Alan Wright & Victor James Gold, *Federal Practice & Procedure* §§ 8014, at 448-49, 8064, at 580-81 (1st ed. 2014).

As we see no reason to deviate from the general standards for establishing admissibility here, we apply the same burden of proof that governs other foundational issues. *See* Rule 11-104(A) NMRA. Thus, as in the federal courts, the "lost or destroyed" exception requires the proponent of secondary evidence in New Mexico to establish preliminary facts by a preponderance of the evidence. *State v. Martinez*, 2007-NMSC-025, ¶ 19, 141 N.M. 713, 160 P.3d 894 (stating that the burden to establish admissibility under Rule 11-104(A) requires that "the trial court need only be satisfied by a preponderance of the evidence that the foundational requirement has been met"); 31 Wright & Gold, *supra*, § 8014, at 449 (stating that the standard is "preponderance of the evidence" and "the burden is not sustained where the proponent merely casts doubt as to the existence of the original").

The required foundation may be established by introducing circumstantial evidence that a diligent effort was made to obtain the originals or by eliciting direct testimony from a witness who caused their loss or destruction. 2 Broun, *supra*, § 237, at 150-51; *see Sylvania Elec. Prods., Inc. v. Flanagan*, 352 F.2d 1005, 1008 (1st Cir. 1965) (finding secondary evidence inadmissible where the plaintiff introduced "little if any evidence" related to the extent of the search for the missing originals); *United States v. Bennett*, 363 F.3d 947, 954 (9th Cir. 2004) (concluding that secondary evidence of GPS data was impermissible where the government failed to offer "any record evidence that it would have been impossible or even difficult to download or print out the data" from the device); *Cross v. United States*, 149 F.3d 1190, 1998 WL 255054, at *4-5 (10th Cir. 1998) (non-precedential) (finding that sworn testimony that IRS agents undertook a diligent search for a missing form was sufficient to establish that the original was lost or destroyed); *United States v. McGaughey*, 977 F.2d 1067, 1071-72 (7th Cir. 1992) (en banc) (permitting the affidavit of an investigator to establish that continued search would be futile); *United States v. Cambindo Valencia*, 609 F.2d 603, 633 (2d Cir. 1979) (admitting secondary evidence where a witness testified that the original document was either given to the opponent or lost); *United States v. Standing Soldier*, 538 F.2d 196, 203 (8th Cir. 1976) (concluding that sworn testimony that an investigator attempted to locate a missing original by contacting the FBI was

sufficient to establish that the original was lost or destroyed).

Considering Rules 11-1004(A) and 11-1008 along with these analogous cases interpreting and applying its federal counterpart, we find one aspect of this case to be both curious and dispositive. The State did not introduce any evidence that the messages were erased from the phone. When Defendant first objected to the admission of the transcript on August 26, 2009, counsel for the State contended that she did not bring "the actual phone with the text message[s]" because she was "unable to get a printout" of the messages. Although counsel's statement is insufficient to establish the necessary foundation for secondary evidence, it is also factually incomplete insofar as it appears to raise the possibility that the messages were still on Myers' phone at the time but were in some manner unsuitable to whatever printing technology was available to the State. Myers then testified at the August 26 hearing and again at trial, but the State did not attempt to ask any questions or inquire regarding the existence or destruction of the messages.

On appeal, the State asserts, without any citation to the record, that " Myers and Officer Maycumber both testified that . . . Myers deleted the original text messages from her phone." While we agree with the State that "testimony from a witness who destroyed the document" is sufficient to support a finding that loss or destruction has occurred, *see* 2 Broun, *supra*, § 237, at 150-51, we have scoured the record without locating any such testimony. Since "[t]he mere assertions and arguments of counsel are not evidence," *Muse v. Muse*, 2009-NMCA-003, ¶ 51, 145 N.M. 451, 200 P.3d 104, we cannot speculate or conclude that the State met its burden to establish by a preponderance of the evidence that the messages on the phone were destroyed without bad faith. *See State v. Gardner*, 1998-NMCA-160, ¶ 5, 126 N.M. 125, 967 P.2d 465 ("We review rulings upon the admission or exclusion of evidence under an abuse of discretion standard, but when there is no evidence that necessary foundational requirements are met, an abuse of discretion occurs." (citation omitted)).

The district court did not hold the State to account for failing to meet its fundamental evidentiary burden under Rules 11-1004 and 11-1008. Defendant has, however, argued that the messages were erased in bad faith. Neither the trial court, the district court, nor this Court can meaningfully consider that claim in the absence of evidence establishing whether the messages were erased, and if so, who erased them and why. In light of the standards discussed in this Opinion, it was error to admit the handwritten transcript under the "lost or destroyed" exception to the best evidence rule under these circumstances. Because the State's case relied entirely on the content of the inadmissible transcript to link Defendant to the violation of the protective order, the error was not harmless. *See State v. Tollardo*, 2012-NMSC-008, ¶ 36, 275 P.3d 110 (stating that "a non-constitutional error is harmless when there is no reasonable probability the error affected the verdict" (emphasis, internal quotation marks, and citation omitted)). The trial court erred in admitting the handwritten transcript into evidence to prove the contents of the text messages that Myers received.

CONCLUSION

We reverse the district court's order affirming Defendant's conviction for violation of the protective order and remand to the metropolitan court for a new trial.

[redacted]

[redacted] **IT IS SO ORDERED.**

M. MONICA ZAMORA, Judge

LINDA M. VANZI, Judge

J. MILES HANISEE, Judge

WE CONCUR: