[redacted]

[redacted]

[redacted]

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMSC-016

Filing Date: May 7, 2015

Docket No. 33,781

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

ADRIANA CABEZUELA,

Defendant-Appellant.

Jorge A. Alvarado, Chief Public Defender
Allison H. Jaramillo, Assistant Appellate Defender
Santa Fe, NM

for Appellant

Hector H. Balderas, Attorney General
Nicole Beder, Assistant Attorney General
Santa Fe, NM

for Appellee

OPINION

BOSSON, Justice.

{1} This Court previously issued an opinion following Defendant Adriana Cabezuela's first trial in which a jury convicted her of intentional child abuse resulting in the death of her eight-month-old daughter Mariana Barraza (Baby Mariana). *See State v. Cabezuela* (*Cabezuela I*), 2011-NMSC-041, ¶ 1, 150 N.M. 654, 265 P.3d 705 (reversing the conviction, holding that the jury was improperly instructed, and remanding for retrial) . After we reversed and remanded for a new trial, Defendant was again tried and convicted of the same offense and sentenced to life imprisonment.

{2} On direct appeal, Defendant argues that (1) the district court erred by not holding a presentencing hearing to consider mitigation evidence before imposing a life sentence, (2) the evidence was not sufficient to support her conviction, (3) a forensic pathologist's trial testimony violated Defendant's constitutional right to confrontation, (4) the district court improperly instructed the jury by giving UJI 14-610 NMRA (1993, withdrawn 2015), a definition instruction on intent, and (5) Defendant's trial counsel provided ineffective assistance. We decide in the State's favor with respect to issues (2) through (4). With respect to issue (1), however, we conclude that the district court should have heard evidence in mitigation before imposing sentence, and we remand to the district court for a new sentencing hearing. With respect to issue (5), we conclude that Defendant's ineffective assistance of counsel argument is more appropriately considered in a habeas corpus proceeding.

BACKGROUND

{3} Defendant was the mother of six children. The three youngest, including Baby Mariana, resided in the house Defendant shared with her boyfriend, Leonardo Samaniego, Jr. The

other three children lived with either their father or grandmother. Samaniego was not the father of any of Defendant's six children.

{4} At approximately 1:45 a.m. on June 14, 2007, Officer Shawn Hardison responded to a 911 call regarding an unresponsive child in Hobbs, New Mexico. Officer Hardison testified that when he arrived, he saw Defendant outside on a cell phone crying and that she asked him to "help her baby." Inside the house, Officer Hardison found Baby Mariana on the floor, wearing a diaper, and not moving. There were other people inside the house, but no one was attending to Baby Mariana. Baby Mariana was pale or blueish and did not appear to be breathing. When Officer Hardison placed his cold hand on Baby Mariana's chest, she "took a ragged breath" as the ambulance arrived. Emergency medical technicians then took over and transported Baby Mariana to Lea Regional Medical Center (LRMC) where she later died.

{5} While Officer Kathleen Rix was at LRMC for an unrelated matter, a nurse approached her and asked her to look at Baby Mariana. Officer Rix first noticed bruising all along Baby Mariana's right side, because that was the side facing her. Officer Rix testified that when she got a better look at Baby Mariana's entire body, she saw "just bruises pretty much everywhere." Defendant and Samaniego arrived at LRMC and spoke with one of the emergency room doctors while other medical staff treated Baby Mariana. They left with police officers before medical personnel pronounced Baby Mariana dead.

{6} Defendant spoke with officers at the police station. Initially, she professed not to have any idea how Baby Mariana stopped breathing or how she sustained any of the visible injuries on her body. As the interview evolved, however, Defendant made a number of highly incriminating statements which we discuss in more detail later in this opinion.

{7} A jury found Defendant guilty of intentional child abuse resulting in Baby Mariana's death, and the district court sentenced Defendant to life imprisonment. Defendant appeals her conviction directly to this Court. *See* N.M. Const. art. VI, § 2 ("Appeals from a judgment of the district court imposing a sentence of death or life imprisonment shall be taken directly to the supreme court."); *see also* Rule 12-102(A)(1) NMRA (providing for direct appeals to the Supreme Court from a life sentence).

DISCUSSION

The District Court Should Have Heard Mitigation Evidence Before Sentencing Defendant to Life Imprisonment

{8} We take the unorthodox step of proceeding directly to sentencing before discussing the issues relevant to Defendant's conviction. We do so because our legal precedent dictates clearly that Defendant was entitled to present mitigation evidence and have the district court consider reducing her life sentence by up to ten years (one-third of thirty years, the minimum before one becomes eligible for parole). *See* NMSA 1978, § 31-18-15(A)(1) (2007); NMSA 1978, § 31-18-15.1(A)(1) (2009); NMSA 1978, § 31-21-10(A) (2009).

{9} Section 31-18-15.1(A)(1) provides:

> 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[and] may alter the basic sentence . . . upon . . . a finding by the judge of any mitigating circumstances surrounding the offense or concerning the offender . . . .

At the sentencing hearing in this case, which appears to have taken no more than two minutes, the State informed the district court that Defendant was "subject to a sentence of life in prison followed by a period of five years parole, which is a minimum mandatory sentence of thirty years" without any provision for mitigation. Defense counsel agreed that "this is a situation where there is a minimum mandatory sentence, thus anything that we discuss here today does not affect that." Apparently then, both attorneys were operating under a legal misapprehension that a conviction of intentional child abuse resulting in the death of a child under twelve requires a minimum mandatory sentence of thirty years. Both were wrong, and as a result misled the sentencing court.

{10} Nearly five years ago, we addressed this same issue in *State v. Juan*, 2010-NMSC-041, ¶¶ 35-42, 148 N.M. 747, 242 P.3d 314. In *Juan*, we concluded that the Legislature gave district courts "authority to alter the basic sentence of life imprisonment for noncapital felonies," including intentional child abuse resulting in the death of a child. *Id.* ¶ 39. *See* § 31-18-15(A)(1) (describing a first degree felony resulting in the death of a child as a noncapital felony subject to a basic sentence of life imprisonment).

{11} Mandatory life sentences, with or without the possibility of parole after thirty years, are for capital felonies and are not subject to mitigation. *See Juan*, 2010-NMSC-041, ¶ 42 ("[C]apital felonies . . . carry a *mandatory sentence* of life imprisonment."). Unlike a capital felony, a *basic sentence* of life imprisonment for a noncapital felony is not a mandatory life sentence and is subject to mitigation. *See id.* ("Unlike 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." (internal quotation marks and citation omitted)).

{12} It follows that this Defendant was found guilty of a noncapital felony and, as a result, her life sentence was basic, not mandatory. Accordingly, the district court was required to consider mitigation evidence before issuing a final sentence.

{13} In *Juan*, we discussed the "proper numerical standard by which to measure the [district] court's authority to alter a basic sentence of life imprisonment," and concluded that it was at the point in time when an inmate becomes eligible for parole. *Id.* ¶ 41. In this case, that period is thirty years. *Id.* Section 31-18-15.1(G) provides that "in no case shall the alteration [of a defendant's sentence] exceed one-third of the basic sentence." Since our opinion in *Juan*, the district court has had the authority to alter Defendant's basic sentence of life imprisonment by reducing the number of years she has to serve before becoming eligible for parole by up to one-third of the minimum possible sentence, or ten years. As a result, the basic sentence of thirty years before parole eligibility could become as little as twenty years. But that decision can only be made after considering evidence in mitigation, and we remand for that purpose.

The State Presented Substantial Evidence to Support Defendant's Conviction for Intentional Child Abuse Resulting in the Death of Her Daughter

{14} Defendant challenges the sufficiency of the evidence to support her verdict, yet, ironically, much of the State's evidence came directly from her own statements to officers presented by the State at trial. "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). In her initial interview with police officers, Defendant changed her story more than once. She first offered that Baby Mariana fell off the bed the previous afternoon. When prodded about what appeared to be bite marks on Baby Mariana's body, Defendant told the officer that her eighteen-month-old child caused them. Defendant later admitted, however, that she had lost control a few times when Baby Mariana was crying and had bitten Baby Mariana on her legs and cheek.

{15} When asked if Baby Mariana's "head could have popped back" at some point, Defendant responded, "I don't recall shaking her." She insisted that she had never hit or thrown Baby Mariana. Also in the interview, Defendant stated, "I don't want to go to jail . . . . I'm giving my rights up to my kids." After the officer again asked her for an explanation for the visible bruising on Baby Mariana, Defendant admitted that she had sometimes lost her temper and had shaken her child, saying, "I can't be patient . . . . I just want them to go live with their dad 'cause I don't want to hurt them no more."

{16} When asked about a big bruise on Baby Mariana's forehead, Defendant initially said she could not remember what caused the bruise, but then stated that it happened the previous day at a storage facility. Defendant said that she shook the baby carrier with Baby Mariana in it because the baby was crying and she "lost [her] temper." Defendant then admitted "I probably hit her head; I didn't mean to hit her hard."

{17} Defendant discussed another instance when she lost her temper and threw Baby Mariana on the bed. "She could have . . . [hit her head], probably against the wall . . . . I didn't see her [hit the wall]." Defendant insisted that before the 911 call on June 14, 2007, nothing happened to Baby Mariana and that she did not remember anything happening. However, when the officer continued to question her, Defendant stated that she may have put Baby Mariana down too hard and later admitted that she had tossed Baby Mariana to the floor. Further in the interview, Defendant admitted that she jerked Baby Mariana off the floor, and at that point Baby Mariana stopped crying. After Defendant carried Baby Mariana to her bed, Samaniego noticed that something was wrong and Defendant saw that Baby Mariana did not appear to be breathing. Samaniego and Defendant drove Baby Mariana to Samaniego's father's house to call 911.

{18} In addition to these admissions, the State offered trial testimony from Dr. Michelle Barry Aurelius, the attending physician at the Office of the Medical Investigator and the supervising forensic pathologist at Baby

Mariana's autopsy.[1] Dr. Aurelius worked with Dr. Ann Bracey, a pathology fellow assigned to the autopsy. Acting in coordination, Dr. Aurelius and Dr. Bracey made various decisions regarding what tests to perform, and observed and recorded the injuries (including the head and brain injuries). Dr. Aurelius worked with Dr. Bracey to compile the autopsy report, and Dr. Aurelius signed the death certificate.

{19} Dr. Aurelius' testimony revealed numerous injuries that she had observed on Baby Mariana's face, including bruises over her forehead, a skin tear on the outside of her left eye, multiple green to black bruises on the left side of her face, skin abrasions, and bruises on her ear, nose, right eye, right cheek, and jaw line. Baby Mariana had bruising deep in the skin of her head and along the skull. There was also evidence of bleeding around her brain and inside her eyes.

{20} Testimony further revealed that Baby Mariana's torso and extremities carried a number of contusions (bruises) and abrasions. The number and age of the bruises could not be quantified because of variation in the coloration of bruises on different parts of the body. According to Dr. Aurelius, Baby Mariana died from a fatal, traumatic brain injury that could have killed her instantly or left her in a comatose state from the moment the injury occurred until she was pronounced dead.

{21} Dr. Aurelius also testified about the scope of Baby Mariana's injuries and the cause and manner of death. When asked if the external bruising could have been consistent with a "pattern of abuse," or "more than one hit, more than one strike," Dr. Aurelius replied, "it could have been." Dr. Aurelius further testified that the brain injury could be consistent with Baby Mariana being thrown to a carpeted floor.

{22} Despite the evidence against her, Defendant now argues that the State presented insufficient evidence at trial to prove that she had *intentionally* abused Baby Mariana. At trial, Defendant offered an alternative theory to explain the brain injury, that Baby Mariana fell off a van at a storage facility the afternoon before Defendant took her to the hospital. Relying on this theory, Defendant argued below and to this Court that she may have been negligent in not taking her daughter to the hospital sooner, but nothing more.

{23} Essentially, Defendant asks this Court to weigh her credibility and substitute our judgment for that of the jury. Defendant's argument is that her "account provided a plausible explanation of what had actually happened. Although the jury was not required to accept [Defendant's] version of events, her explanation should not simply be disregarded by this Court." We have previously observed in this very case that "the jury is free to reject Defendant's version of the facts." *Cabezuela I*, 2011-NMSC-041, ¶ 45 (internal quotation marks and citation omitted). We "will not invade the jury's province as fact-finder by second-guess[ing] the jury's decision concerning the credibility of witnesses, reweigh[ing] the evidence, or substitut[ing] [our] judgment for that of the jury." *State v. Garcia*, 2011-NMSC-003, ¶ 5, 149 N.M. 185, 246 P.3d 1057 (first three alterations in original) (internal quotation marks and citation omitted).

[1]Dr. Aurelius is the same person as "Dr. Michelle Barry" referred to in *Cabezuela I*. *See* 2011-NMSC-041, ¶ 48. At this trial, she identified herself as "Dr. Michelle Barry Aurelius."

{24} The jury had ample evidence before it to convict Defendant of intentional child abuse. There were Defendant's own admissions that she bit, threw, jerked, and slapped Baby Mariana. Defendant's police interview could appear to a reasonable jury as a classic change-of-story scenario. Initially, Defendant did not "remember" or did not "know" how the injuries occurred, but over the course of time gave explanations for the injuries alongside her statement that she "d[id]n't want to go to jail." And then there was Dr. Aurelius' expert testimony describing the extensive bruising as consistent with a pattern of abuse. Substantial evidence supports the verdict in this case.

Trial Testimony from the Supervising Forensic Pathologist Dr. Aurelius Did Not Violate Defendant's Constitutional Right to Confrontation

{25} We have previously summarized Dr. Aurelius' testimony at trial and how it contributed materially to the substantial evidence in support of Defendant's conviction. Importantly, Dr. Aurelius testified without objection, and therefore our review on appeal is limited to fundamental error. *See Cabezuela I*, 2011-NMSC-041, ¶ 49. ("[B]ecause [the Confrontation Clause] claim was not preserved, we review only for fundamental error."). "Fundamental error only applies in exceptional circumstances when guilt is so doubtful that it would shock the judicial conscience to allow the conviction to stand." *State v. Cunningham*, 2000-NMSC-009, ¶ 13, 128 N.M. 711, 998 P.2d 176 (internal quotation marks and citation omitted).

{26} Despite the lack of objection, Defendant argues on appeal that this testimony violated her constitutional right to confront the witnesses against her because Dr. Aurelius testified in part about work done by Dr. Bracey, a pathology fellow working under Dr. Aurelius' supervision. U.S. Const. amend. VI. ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .").

{27} We rejected this same argument in *Cabezuela I*, where Dr. Aurelius also testified about Baby Mariana's injuries and offered her opinion as to the cause and manner of death, much as in the present trial. *See* 2011-NMSC-041, ¶¶ 52, 54. Dr. Aurelius gave her expert opinion in the present trial that Baby Mariana suffered a traumatic brain injury which could have killed her instantly or induced a coma, "so that devastating injury would have occurred between the last time that she was seen acting normally and when she was declared dead." Dr. Aurelius also testified that some of Baby Mariana's injuries could have been over eighteen hours old due to the yellow color of some of the bruises but that it was difficult to estimate when all the injuries occurred because "we can bruise different ways in different colors in different parts of the body even though injuries may have all occurred at the same time, except for the yellow." She further testified that the injuries to the brain did not show any signs of healing.

{28} Dr. Aurelius supervised and worked alongside Dr. Bracey during the autopsy. While Dr. Bracey dissected the body and photographed the injuries, both pathologists examined the injuries and the organs together, both decided what tests to perform, they observed the injuries in the head and brain together, and together they compiled their opinion in the autopsy report. Dr. Aurelius signed the death certificate. Based on the foregoing, we conclude that Dr. Aurelius made independent, personal observations and had personal knowledge regarding Baby

Mariana's extensive injuries, their likely cause, and the manner of Baby Mariana's death sufficient to support her testimony and opinions. We reject Defendant's suggestion that Dr. Aurelius was simply "parroting" the conclusions of Dr. Bracey who did not testify. *See State v. Navarette*, 2013-NMSC-003, ¶ 22, 294 P.3d 435.

{29} Defendant launches a second confrontation clause challenge independent of the absence of Dr. Bracey. Prior to trial, Dr. Aurelius consulted a forensic odontologist, Dr. Pete Loomis, for his expert opinion regarding the bite marks on Baby Mariana's body. Dr. Loomis did not testify. Instead, based on Dr. Loomis's opinions, Dr. Aurelius testified that one of the injuries was "more likely than not an adult human bite mark." Another was only "slightly suggestive" of an adult human bite mark. And another was probably not a bite mark, but had a similar shape.

{30} Insofar as Dr. Aurelius was allowed to testify about Dr. Loomis' opinions, our precedent makes clear that Defendant was deprived of her constitutional right to confront Dr. Loomis about his opinions. *See Navarette*, 2013-NMSC-003, ¶¶ 22-23, 28; *see also State v. Sisneros*, 2013-NMSC-049, ¶¶ 25, 31, 314 P.3d 665. Even if Dr. Loomis' opinions were admitted in error, however, "[i]mproperly admitted evidence is not grounds for a new trial unless the error is determined to be harmful." *State v. Tollardo*, 2012-NMSC-008, ¶¶ 2, 25, 275 P.3d 110. "[H]armless error review necessarily requires a case-by-case analysis," questioning whether a guilty verdict in a particular case is attributable to a particular error. *Id.* ¶ 44.

{31} Our review of the evidence satisfies us that the error here had no such effect. Although Dr. Aurelius' testimony about the apparent bite marks related to one or two of the injuries, it was a very minor portion of her overall testimony. Importantly, her testimony about bite marks did not relate to the cause and manner of Baby Mariana's death. Baby Mariana died from blunt force trauma and traumatic brain injury, not from injuries resulting in bite marks. Furthermore, during her police interviews Defendant admitted to biting Baby Mariana, and those interviews were admitted into evidence. Accordingly, the bite mark testimony, though rising to the level of constitutional error, had little, if any, effect on the verdict. We conclude that there is no reasonable possibility that the error contributed to the verdict. *See Tollardo*, 2012-NMSC-008, ¶ 32 (holding that a constitutional error is "harmless if there is no reasonable possibility . . . that the error contributed to the defendant's conviction" (internal quotation marks omitted)).

Giving the Jury UJI 14-610 ("Child Abuse; 'Intentional'; Defined.") Did Not Amount to Fundamental Error

{32} After Defendant's first trial, she argued on appeal that the district court had improperly instructed the jury. "Specifically, Defendant argue[d] that the phrase 'failure to act' should have been omitted [from the *elements* instruction, tracking UJI 14-602 NMRA (2000, withdrawn 2015)] because such language aligns itself solely with a negligent child abuse theory." *Cabezuela I*, 2011-NMSC-041, ¶ 19. In *Cabezuela I*, the State argued that either an act or a failure to act could form the basis for committing the crime of intentional child abuse, and therefore the jury was not given a separate instruction on negligent child abuse. *Id.* ¶ 20. In reversing and remanding for a new trial, this Court agreed with Defendant. We based our reasoning partially on the lack of a separate

instruction for negligent child abuse in light of the State's theory of a failure to act. *See id.* ¶ 36.

{33} At the second trial, the State once again pursued a conviction for intentional child abuse and not negligent child abuse. This time, however, the State limited its theory to intentional child abuse based on Defendant's own actions as demonstrated by her incriminating statements of intentional abuse and did not pursue a failure-to-act theory. This time Defendant, not the State, presented an alternative theory of a negligent failure to act based on Defendant's own statements that she may have waited too long to take Baby Mariana to the hospital. Accordingly, in the second trial the jury received a separate, step-down instruction on negligent child abuse resulting in death, tracking UJI 14-603 NMRA (2000, withdrawn 2015).[2]

{34} In *Cabezuela I*, we held that it was a misstatement of the law to include the "phrase 'failure to act'" in the *elements* instruction for intentional child abuse, UJI 14-602, when the State was pursuing a conviction for intentional child abuse. *Cabezuela I*, 2011-NMSC-041, ¶¶ 20, 27, 36. At the second trial, the district court appears to have followed our instruction in *Cabezuela I* and did not include the failure-to-act language when it instructed the jury on the elements of intentional child abuse. The district court correctly instructed the jury that the State had to prove that Defendant acted intentionally and that her actions endangered Baby Mariana and ultimately caused her death. Defendant did not object to the elements instruction at the second trial.

> INSTRUCTION NO. 3
>
> For you to find Adriana Cabezuela guilty of intentional child abuse resulting in death or great bodily harm, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
>
> 1. Adriana Cabezuela caused Mariana Barraza to be placed in a situation which endangered the life or health of Mariana Barraza[;]
> 2. The defendant acted intentionally;
> 3. Adriana Cabezuela's actions resulted in the death of Mariana Barraza;
> 4. Mariana Barraza was under the age of 12;
> 5. This happened in New Mexico on or about the 14th day of June, 2007.

See UJI-14-602 ("Child abuse; intentional act or negligently 'caused'; great bodily harm; essential elements.").

{35} Correctly, Defendant does not challenge this instruction on appeal. Instead, Defendant now turns her attention to a separate instruction, not an elements instruction, that *defined* the word "intentional." That instruction reads:

[2]The district court instructed the jury in instruction no. 5 that if it had "a reasonable doubt as to whether the defendant committed the crime of Intentional [C]hild Abuse Resulting in Death [then it] must proceed to determine whether the defendant committed the included offense of Negligent Child Abuse Resulting in Death." The instruction for negligent child abuse resulting in death was given as instruction no. 6, and the instruction for intentional child abuse resulting in death was instruction no. 3. We assume that because the jury found Defendant guilty of intentional child abuse, the jurors did as they were instructed and did not go on to consider whether she was guilty of negligent child abuse.

INSTRUCTION NO. 4

> A person acts intentionally when the person purposely does an act. Whether . . . Adriana Cabezuela acted intentionally may be inferred from all of the surrounding circumstances, such as Adriana Cabezuela's actions or *failure to act*, conduct and statements.

(Emphasis added.) *See* UJI 14-610 ("Child abuse; 'intentional'; defined.").

{36} Instruction no. 4, the definition instruction for intent, tracks UJI 14-610 and includes the phrase "failure to act." *Cabezuela I*, 2011-NMSC-041, ¶18. In *Cabezuela I*, the district court gave the jury this same *definition* instruction for intentional child abuse, without objection either at trial or on appeal. *Id.* Similarly, Defendant had no objection to this same definition instruction at her second trial. In this second appeal, she now claims the definition instruction amounted to fundamental error.

{37} We review unpreserved issues regarding jury instructions for fundamental error. *Cabezuela I*, 2011-NMSC-041, ¶ 21. "The exacting standard of review for reversal for fundamental error requires the question of guilt [be] so doubtful that it would shock the conscience [of the court] to permit the verdict to stand." *State v. Swick*, 2012-NMSC-018, ¶ 46, 279 P.3d 747 (alterations in original) (internal quotation marks and citation omitted). "With regard to jury instructions, fundamental error occurs when, because an erroneous instruction was given, a court has no way of knowing whether the conviction was or was not based on the lack of the essential element." *Id.* Part of the fundamental-error analysis is "whether a reasonable juror would have been confused or misdirected by the jury instruction." *State v. Sandoval*, 2011-NMSC-022, ¶ 13, 150 N.M. 224, 258 P.3d 1016 (internal quotation marks and citation omitted).

{38} In this appeal, Defendant focuses on paragraph 37 of *Cabezuela I*, where this Court "request[ed] that the UJI Committee for Criminal Cases . . . review UJI 14-602, along with UJI 14-603 and UJI 14-610." *Cabezuela I*, 2011-NMSC-041, ¶ 37. We observed that UJI 14-610, which defines the term "intentional," includes the phrase "failure to act." *Cabezuela I*, 2011-NMSC-041, ¶37. We further observed that NMSA 1978, Section 30-6-1(D) (2009) (defining the crime of abuse of a child) "does not reference a defendant's failure to act." *Cabezuela I*, 2011-NMSC-041, ¶37. Finally, we requested that the Committee review these jury instructions in their entirety in an effort to reduce confusion. *Id.* ¶¶ 36-37.

{39} In requesting the Committee to review UJI 14-610, we did not hold that including the phrase "failure to act" in the definition of "intentional" was necessarily incorrect or legally erroneous. We simply invited the Committee to study whether there was a better, more clear way to provide jury guidance. Part of our concern was, and is, that there must be a culpable *act* that a defendant commits, not just a desire or intention that the abuse occur, in order for a defendant to be convicted of intentional child abuse. Our concern that a culpable act must be identified, however, should not preclude the jury from considering *all conduct*, including actions and failures to act, surrounding the culpable act itself, as evidence of the accused's subjective intent.

{40} In this trial, the elements instruction correctly required the jury to find that

Defendant performed an intentional act to convict her of intentional child abuse, not a failure to act. Nonetheless, Defendant argues that the jury could have been misled by the definition instruction that uses the phrase "failure to act." Defendant maintains that she could have been convicted of intentional child abuse without the jury actually finding that she acted intentionally. We are not persuaded.

{41} While the definition instruction does have the words "failure to act," it does not equate acting and failing to act as Defendant suggests. In its first sentence the instruction, UJI 14-610, provides that "[a] person acts intentionally when the person purposely does an act." The second sentence qualifies what may be used as evidence of a person's intention to act, by inferring a person's subjective intent from objective evidence. "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." UJI 14-610. Specifically, the jury may infer that a person "purposefully [performed] an act" by looking at all the circumstances that surrounded the act performed. Thus, the *surrounding circumstances* necessarily include actions, failures to act, conduct, and statements other than the culpable act that forms the basis for intentional child abuse.

{42} Nonetheless, we acknowledge the greater clarity in removing altogether any reference to "failure to act" from the definition instructions. New uniform jury instructions, effective for all cases pending or filed on or after April 3, 2015, no longer include a definition for "intentional," which is the crux of the discussion in this section. UJI 14-623 NMRA. Instead, the new instructions provide that UJI 14-141 NMRA ("General criminal intent.") be given to juries to aid them in understanding the legal concept of intent. UJI 14-141 states in relevant part that "[w]hether the defendant acted intentionally may be inferred from all of the surrounding circumstances, such as the manner in which he acts, the means used, [and] his conduct [and any statements made by him]." (alterations in original) (footnote omitted).

{43} While in *Cabezuela I* we observed that UJI 14-610 is not necessarily the model of clarity, we did not hold that the district court committed error by giving that instruction to the jury. *See* 2011-NMSC-041, ¶¶ 36, 37. In this case, where the State's theory was based entirely on evidence of what Defendant did, not on what she did not do—a theory amply supported by substantial trial evidence—we fail to find any significant risk of jury confusion, substantial injustice, or a doubtful verdict. Any concerns we may have shared in the past about how to improve UJI 14-610 do not shake our confidence in this jury verdict. We find no fundamental error in the language of jury instruction no. 4.

Defendant's Ineffective Assistance of Counsel Claim Is More Properly Brought in a Habeas Corpus Proceeding

{44} Defendant further argues that trial counsel provided ineffective assistance because counsel "[f]ailed [t]o [c]all [w]itnesses [a]nd [p]resent [t]he [d]efense [s]he [r]equested." "For a successful ineffective assistance of counsel claim, a defendant must first demonstrate error on the part of counsel, and then show that the error resulted in prejudice." *State v. Bernal*, 2006-NMSC-050, ¶ 32, 140 N.M. 644, 146 P.3d 289. "The record is frequently insufficient to establish whether an action taken by defense counsel was reasonable or if

it caused prejudice." *State v. Arrendondo*, 2012-NMSC-013, ¶ 38, 278 P.3d 517. In this case, it is more appropriate for Defendant to make this claim in a habeas corpus proceeding where she "may actually develop the record with respect to defense counsel's actions." *Id.*

CONCLUSION

{45} We affirm Defendant's conviction, but remand to the district court for resentencing following an evidentiary hearing where it considers any mitigating circumstances that may be present, consistent with this opinion.

{46} **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-017

Filing Date: May 11, 2015

Docket No. 34,447

JOSE LUIS LOYA,

Plaintiff,

v.

GLEN GUTIERREZ, Commissioned Officer of Santa Fe County,

Defendant/Third-Party Plaintiff/Appellant-Petitioner,

v.

COUNTY OF SANTA FE,

Third-Party Defendant/Appellee-Respondent.

VanAmberg, Rogers, Yepa, Abeita & Gomez, LLP
Carl Bryant Rogers
Santa Fe, NM

Ray A. Padilla, P.C.
Ray A. Padilla
Albuquerque, NM

for Petitioner

Law Offices of Michael Dickman
Michael Dickman
Santa Fe, NM

for Respondent

Robles, Rael & Anaya, P.C.
Luis E. Robles
Frank T. Apodaca

Albuquerque, NM

for Amicus Curiae New Mexico Association of Counties

OPINION

BOSSON, Justice.

{1} Given New Mexico's highways that traverse both state and tribal lands, it is not uncommon that a tribal police officer patrolling those highways may be commissioned as a deputy county sheriff to arrest non-Indians and prosecute them in state court when they commit state traffic offenses on tribal land. In light of those recurring facts, we determine a county's legal obligation when a non-Indian, arrested by a tribal officer and prosecuted in state court for state traffic offenses, sues the arresting tribal officer for federal civil rights violations. More particularly, we decide when the county has an obligation under the New Mexico Tort Claims Act, NMSA 1978, §§ 41-4-1 to -29 (1976, as amended through 2009) (NMTCA), to provide that tribal police officer with a legal defense in the federal civil rights action. The district court as well as our Court of Appeals found no such legal duty, in part because it concluded that the tribal officer was not a state public employee as defined in the NMTCA. We hold to the contrary, finding clear evidence in the text and purpose of the NMTCA requiring the county to defend the tribal officer, duly commissioned to act as a deputy county sheriff, under these circumstances endemic to the New Mexico experience.

BACKGROUND

{2} On September 5, 2009, Officer Glen Gutierrez, on duty as a full-time salaried police officer of the Pueblo of Pojoaque and also commissioned as a Santa Fe County deputy sheriff, was patrolling a portion of U.S. Highway 84/285 located within the exterior boundary of the Pojoaque Pueblo. He was driving his tribally-marked and issued police vehicle and was dressed in his full tribal uniform displaying his tribal badge. He was also carrying a deputy's commission card issued to him by the Santa Fe County sheriff.

{3} Officer Gutierrez observed Jose Luis Loya making a dangerous lane change and engaged his emergency equipment to signal Loya to pull over. Once stopped, Officer Gutierrez asked Loya to step out of his vehicle and informed Loya that he was under arrest for reckless driving in violation of NMSA 1978, Section 66-8-113 (1987), a state law. Officer Gutierrez placed Loya in the back of his patrol vehicle and transported Loya to the Pojoaque Tribal Police Department for processing. Loya, a non-Indian, was not subject to prosecution for violation of tribal law, and therefore, he was transported from the Pueblo to the Santa Fe County Adult Detention Center where he was incarcerated. Ultimately, Officer Gutierrez prosecuted Loya for reckless driving in Santa Fe County Magistrate Court.

{4} Loya felt aggrieved by what happened to him that night. Based on those events, Loya filed a civil complaint against Officer Gutierrez in the First Judicial District Court to recover damages for deprivation of his civil rights under 42 U.S.C. Section 1983 (1996) (Section 1983), claiming false arrest, malicious prosecution, and use of excessive force. Section 1983 creates a civil action for damages under federal law against any person acting under color of state law who violates the Constitution and laws of the United States. *See* 42 U.S.C. § 1983. "Native American tribes and those acting under *tribal law* do not act under color of state law within the meaning

of [Section] 1983," but Native-American actors may be subject to a Section 1983 claim if their actions are taken pursuant to state authority. *Williams v. Bd. of Cnty. Comm'rs*, 1998-NMCA-090, ¶ 20, 125 N.M. 445, 963 P.2d 522 (emphasis added). "If an individual is possessed of state authority and purports to act under that authority, his action is state action." *Id.* ¶ 21 (internal quotation marks and citation omitted).

{5} The State of New Mexico has exclusive criminal jurisdiction over non-Indians for actions committed within the exterior boundaries of a tribe or pueblo pursuant to the Indian Pueblo Land Act Amendments of 2005. *See* Pub. L. No. 109-133, 119 Stat. 2573 (2005). A tribal police officer may have jurisdictional authority to enforce tribal civil traffic ordinances against non-Indians and may eject or exclude a non-Indian engaging in criminal activity or may detain and transport the offender to proper state authorities. *See Pueblo of Pojoaque Civil Traffic Code, Tribal Council Resolution No. 1992-95* (August 20, 1992). *See also Duro v. Reina*, 495 U.S. 676, 696-97 (1990). A tribal officer may not arrest, charge, jail, or prosecute non-Indian offenders for violation of state law without some additional state authority. *Id.*

{6} According to the affidavit of Pueblo of Pojoaque Police Chief John Garcia, the limited jurisdiction of tribal police officers historically created a gap in effective law enforcement on state highways located within the exterior boundaries of a tribe or pueblo. The county sheriff did not have adequate staff to combat criminal activity by non-Indians on state highways traversing tribal lands. Likewise, the tribal officers lacked authority to prosecute non-Indian offenders. To overcome this limitation and encourage jurisdictions to work together, the Santa Fe County sheriff issued commissions to Pojoaque Pueblo police officers to act as county sheriff's deputies.

{7} In the course of that practice, on June 23, 2008, Santa Fe County Sheriff Greg Solano issued a commission to Officer Gutierrez appointing him as a Santa Fe County deputy sheriff for purposes of enforcing state traffic laws and criminal statutes against non-Indian offenders for offenses committed within the exterior boundaries of Pojoaque Pueblo. To qualify for the appointment, Sheriff Solano required Officer Gutierrez to provide documentation showing successful completion of state and/or federal law enforcement training and certification, a written copy of his background investigation, and his written application. Sheriff Solano also required Officer Gutierrez to take the oath mandated by the New Mexico Constitution to "support the Constitution of the United States, the Constitution and laws of the State of New Mexico, the laws of the County of Santa Fe and faithfully and impartially discharge the duties of said office to the best of [his] ability." *See* N.M. Const. art. XX, § 1 ("Every person elected or appointed to any office shall, before entering upon his duties, take and subscribe to an oath or affirmation that he will support the constitution of the United States and the constitution and laws of this state, and that he will faithfully and impartially discharge the duties of his office to the best of his ability.").

{8} As stated above, absent additional authority tribal police officers have no legal authority to charge non-Indian offenders for a violation of state law even if the violation is committed on tribal land. *See Duro*, 495 U.S. at 696-67. It is the commission as a county deputy sheriff that gives tribal police the

authority to make such arrests while acting under state law. In this case, the very reason Officer Gutierrez, a *tribal* police officer, is subject to a Section 1983 claim for actions taken under color of *state* law, is because he was acting under his state authority as a deputy sheriff, not tribal authority, when he charged, detained, and prosecuted Loya under state law. *See Williams*, 1998-NMCA-090, ¶¶ 20-21.

{9} Upon being sued, Officer Gutierrez tendered two requests to Santa Fe County to provide him with a legal defense and indemnification, if necessary, in accord with the defense and indemnification provisions of the NMTCA, § 41-4-4(B), (D). The County claimed it did not have any duty to provide a legal defense and indemnification, asserting that Officer Gutierrez was not a state "public employee" as defined by the NMTCA. *See* § 41-4-3(F). Following the denial of his request, Officer Gutierrez filed a third-party complaint in the Loya litigation against the County seeking a declaratory judgment that the NMTCA required the County to defend and indemnify him with respect to Loya's Section 1983 claims against him. The County answered and asserted a counterclaim for declaratory judgment in its favor.

{10} Both parties then filed motions for summary judgment, each basing its claim on an interpretation of the County's duties under the NMTCA. The district court ruled for the County, finding that Officer Gutierrez was not entitled to a defense under the NMTCA. The Court of Appeals affirmed. *Loya v. Gutierrez*, 2014-NMCA-028, ¶ 23, 319 P.3d 656. We granted certiorari to resolve a significant issue of law that potentially affects law enforcement wherever state and tribal lands border each other throughout New Mexico. *Loya v. Gutierrez*, 2014-NMCERT-002.

DISCUSSION

The New Mexico Tort Claims Act

{11} The issue before us is whether the County is obligated to defend and potentially indemnify Officer Gutierrez when he was sued for actions taken to charge, arrest, and prosecute a non-Indian offender in state court for violating state law on Indian land. The parties agree that the NMTCA guides this determination. The defense and indemnification provisions of the NMTCA, § 41-4-4(B), (D), set forth the obligation of governmental entities to protect public employees when they are sued for actions taken in the scope of their duties. Specifically, Subsection (B) states:

> [A] governmental entity shall provide a defense, including costs and attorney['s] fees, for *any public employee* when liability is sought for:
>
> (1) any tort alleged to have been committed by the public employee while acting within the scope of his duty; or
>
> (2) any violation of property rights or any rights, privileges or immunities secured by the constitution and laws of the United States or the constitution and laws of New Mexico when alleged to have been committed by the public employee while acting within the scope of his duty.

Section 41-4-4(B) (emphasis added). Likewise, if a settlement or judgment is entered against a public employee acting within the scope of his or her duties, the governmental entity is required to pay the judgment or settlement. Section 41-4-4(D).

These provisions are intended to protect "public employee[s]" from individual liability when they are acting within the scope of their duties, thus operating as a kind of statutory insurance policy. *Risk Mgmt. Div. v. McBrayer*, 2000-NMCA-104, ¶ 6, 129 N.M. 778, 14 P.3d 43. Accordingly, we focus first on whether Officer Gutierrez was acting as a "public employee" within the meaning of the NMTCA when he arrested Loya on a state highway traversing tribal lands.

Whether Officer Gutierrez Is a Public Employee Under the NMTCA

{12} Section 41-4-3(F) of the NMTCA defines "'public employee'" as "an officer, employee or servant of a governmental entity, excluding independent contractors" except for specifically defined individuals not relevant here. "'[G]overnmental entity' means the state or any local public body." Section 41-4-3(B). "'[S]tate' . . . means the state of New Mexico or any of its branches, agencies, departments, boards, instrumentalities or institutions." Section 41-4-3(H). "'[L]ocal public body' means all political subdivisions of the state and their agencies, instrumentalities and institutions." Section 41-4-3(C). Based on these definitions the County is a "governmental entity," and the Pueblo of Pojoaque is not a "governmental entity" under the NMTCA.

{13} The question then is whether Officer Gutierrez was acting as a "public employee" for the County when he arrested Loya. The "public employee" definition in turn identifies eighteen categories of persons who are deemed to be "public employees," two of which pertain to this case. Section 41-4-3(F). Section 41-4-3(F)(2) identifies "law enforcement officers" as "public employees." Section 41-4-3(F)(3) identifies "public employees" as those "persons acting on behalf or in service of a governmental entity in any official capacity, whether with or without compensation."

Whether a Tribal Police Officer Can Also Be a Public Employee Under the NMTCA Under Certain Circumstances

{14} The County makes a number of arguments as to why Officer Gutierrez cannot be a public employee under the NMTCA.[1] We consider them in the order of their presentation.

{15} The County first argues that Officer Gutierrez is not a "public employee" based on the opinion from the Court of Appeals in *Williams*, 1998-NMCA-090, ¶ 26. *Williams* involved a Navajo tribal officer who was "cross-deputized" as a San Juan County sheriff's deputy, commissioned as a Bureau of Indian Affairs special deputy police officer, and certified by the New Mexico state police. *Id.* ¶ 2. The officer in that case

[1]Following oral argument, the County submitted supplemental authority to support its position that a tribal officer cannot be a public employee under the NMTCA. *See Trujillo v. Romero*, No. 13-CV-1178 MCA-SCY, Doc. 112 (D.N.M. Mar. 3, 2015) (declining to certify question of whether the NMTCA requires a governmental entity to provide a defense and/or indemnification to a tribal officer commissioned as a deputy sheriff when, acting under color of state law, he allegedly commits torts and/or violations of Section 1983, because the question can be answered by an appellate opinion of the New Mexico Court of Appeals). In reaching the conclusion that the tribal officers in that case were not public employees under the NMTCA, the federal district court expressly relied on the Court of Appeals' decision in this case. *See generally Loya*, 2014-NMCA-028. For the reasons set forth in this opinion, we reverse the Court of Appeals and instead hold that, when enforcing state law, a tribal officer commissioned as a county sheriff's deputy is a public employee. Therefore, *Trujillo* is not persuasive.

issued a tribal speeding ticket, under Navajo law, to a non-Indian driving within the exterior boundaries of the Navajo Nation. *Id.* ¶¶ 2, 3. The person receiving the tribal speeding ticket (the plaintiff) sued the tribal officer under the NMTCA for alleged tortious behavior. *Id.* ¶¶ 5, 26. The plaintiff argued that the tribal officer, though making the arrest under tribal law, was subject nonetheless to the NMTCA because his "cross-deputization" to act under state law as a deputy sheriff made him a "public employee" under the NMTCA. *Id.* ¶ 26.The Court of Appeals affirmed dismissal of the tort claims, holding that the mere issuance of a deputy commission—without more—does not automatically transform a tribal officer into a "public employee" under the NMTCA. *Id.* The Court in *Williams* noted that the tribal officer issued a tribal traffic ticket, not a state traffic ticket, to the plaintiff and was therefore acting under Navajo law when he was sued. *Id.* ¶ 3. Importantly, the Court of Appeals left open the possibility that a tribal officer could be a "public employee" under the NMTCA if there were more evidence than just the issuance of a state commission to the tribal officer. *See Williams*, 1998-NMCA-090.

{16} This is just such a case. Unlike *Williams*, Officer Gutierrez was enforcing *state* law, not tribal law, when he arrested Loya and charged him in state court for violating state law, thereby acting as a state officer and not a tribal officer. If Officer Gutierrez had issued a tribal ticket to Loya under Pueblo authority, he would have been acting on behalf of the Pueblo and the result would be the same as in *Williams*. The additional fact that Officer Gutierrez was acting on behalf of the County, not the Pueblo, creates an important distinction between the two cases, and thus provides the additional evidence missing from *Williams*. We conclude that the Court of Appeals' analysis in *Williams* is consistent with our determination here that Officer Gutierrez is not excluded from the NMTCA definition of "public employee" on the mere basis that he is also employed as a tribal officer. We next address whether Officer Gutierrez falls within one of the two identified categories of "public employee" under the NMTCA.

{17} As set forth previously, one definition of a public employee under the NMTCA is a "law enforcement officer." Section 41-4-3(D) defines "law enforcement officer" as:

> [A] full-time salaried public employee of a governmental entity, or a certified part-time salaried police officer employed by a governmental entity, whose principal duties under law are to hold in custody any person accused of a criminal offense, to maintain public order or to make arrests for crimes.

Officer Gutierrez was not a "full-time salaried public employee" or even a "part-time salaried police officer" of the County or any other "governmental entity" recognized by the NMTCA. He was compensated by the Pueblo of Pojoaque and not by the County.

{18} This does not end the inquiry, however. In addition to the "law enforcement officer" category, the NMTCA defines a public employee as a "person[] acting on behalf or in service of a governmental entity in any official capacity, whether with or without compensation." Section 41-4-3(F)(3). The statute does not supply a definition for this category, so we look first to the text. *Key v. Chrysler Motors Corp.*, 1996-NMSC-038, ¶

13, 121 N.M. 764, 918 P.2d 350 ("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.").

Whether Officer Gutierrez Is a "Person Acting On Behalf Of Government Or In Service Of a Governmental Entity In Any Official Capacity, Whether With Or Without Compensation"

{19} To meet this category of "public employee," Officer Gutierrez had to be acting on behalf of the County with or without compensation. Section 41-4-3(F)(3). Officer Gutierrez must also have been acting in any official capacity. *Id.* At first glance it would appear that Officer Gutierrez satisfies both requirements. At the time of the Loya arrest, Officer Gutierrez was acting in an official capacity as a duly-sworn sheriff's deputy; he could not have legally arrested Loya, a non-Indian, any other way. When Officer Gutierrez made the arrest, he was acting on behalf of the County, not the Pueblo, which continued through Officer Gutierrez's prosecution of Loya in state magistrate court for the state traffic offense. In order to be certain, however, we must first understand the nature of Officer Gutierrez's commission to act as a deputy sheriff. A brief history of these commissions helps inform this understanding.

History Of Law Enforcement Commissions

{20} We start with the authority of a sheriff to commission a deputy. A sheriff's ability to commission deputies is rooted in ancient English common law under which a sheriff has inherent authority to vest his undersheriff with authority to perform every ministerial act the principal sheriff may perform. *State ex rel. Geyer v. Griffin*, 76 N.E.2d 294, 298 (Ohio Ct. App. 1947) (per curium).

> [The deputy] acts for the sheriff in his name and stead. . . . In the absence of any statutory restriction, the sheriff has full power to appoint . . . an undersheriff, and as many general or special deputies as the public service may require, who may discharge all the ordinary ministerial duties of the office, such as the return and service of process and the like. All acts of the undersheriff or of the deputies are done in the name of the sheriff, who is responsible for them.

Id. In modern jurisprudence, the common-law office of deputy sheriff remains much the same and is the presumed rule unless a change is effected by the Constitution or state statute. *Id.*

{21} In New Mexico, the power of a county sheriff to commission someone as a deputy to "preserve the public peace and to prevent and quell public disturbances," N.M. Att'y Gen. Op. 57-83 (1957), was codified as early as 1856 by the Legislative Assembly of the Territory of New Mexico. That statute states:

> Section 1. That the sheriffs in all the counties of this Territory shall have power to appoint deputies . . . .
>
> Sec. 2. Each deputy . . . shall take an oath to discharge faithfully the duties of his office, and the sheriffs shall be respons[i]ble for the acts of their deputies as such.
>
> Sec. 3. The said deputies are hereby authorized to discharge all

> the duties which belong to the office of sheriff, that may be placed under their charge by their principals, with the same effect as though they were executed by the respective sheriffs.

1855-56 N.M. Laws, ch. 2, §§ 1-3. Under that statute, the sheriff in every territorial county had the power to appoint deputies as long as they took an oath to "discharge faithfully the duties of his office" prior to entering upon the duties thereof. *Id.* § 2. In line with common-law principles, the statute mandated that "the sheriffs shall be respons[i]ble for the acts of their deputies." *Id.* In 1905, the Legislature added eligibility requirements for deputy sheriffs. NMSA 1915, § 1257 (1905). The same oath was later added to the New Mexico Constitution. *See* N.M. Const. art. XX, § 1.

{22} In 1891, the Legislative Assembly enacted an additional statute to require all appointed special deputy sheriffs, marshals, police officers, or other peace officers in New Mexico to be citizens of the Territory of New Mexico. 1891 N.M. Laws, ch. 60, § 1. The statute was amended in 2006 to require that all deputy sheriffs be United States citizens. *See* NMSA 1978, § 4-41-10 (2006). The 1891 statute also required a written appointment from the person authorized by law to appoint special deputy sheriffs before the appointed person could "assume or exercise the functions, powers, duties and privileges incident and belonging to the office of special deputy sheriff, special constable, marshal or police[officer] or other peace officer." 1891 N.M. Laws, ch. 60, § 1.

Extension Of Commissions To Tribal Officers

{23} During the 1950s, the New Mexico Attorney General issued several legal opinions advising that full-time police officers employed by New Mexico tribes and pueblos could be commissioned as special deputies as long as they met statutory qualifications under NMSA 1953, Section 15-40-10 (1905); NMSA 1953, Section 15-40-12 (1901); and NMSA 1953, Section 39-1-9 (1891). N.M. Att'y Gen. Op. 55-6305 (1955); N.M. Att'y Gen. Op. 57-83. The Attorney General characterized these specially commissioned tribal officers as "unpaid [county sheriff's] deput[ies]." N.M. Att'y Gen. Op. 66-91 (1966). Today, county sheriffs maintain that authority under New Mexico law to appoint special sheriff's deputies to preserve the public peace and to prevent and quell public disturbances, including the authority to appoint tribal police officers who satisfy statutory qualifications. *See* NMSA 1978, § 4-41-5 (1975) ("Deputy sheriffs; appointment and term; merit system"); NMSA 1978, § 4-41-8 (1905) ("Deputy sheriff; qualifications; character; revocation of commission"); *and* NMSA 1978, § 4-41-9 (1855-56) ("Deputy sheriffs; powers and duties").

Commissioning Tribal Officers By Contractual Agreement And Not Just By Appointment

{24} In addition to the authority of the county sheriff to appoint tribal police officers to act as special deputies, the Legislature authorized additional law enforcement agencies during the 1970s to issue commissions through formal agreements with tribal entities. The Mutual Aid Act, NMSA 1978, §§ 29-8-1 to -3 (1971), authorizes "[a]ny state, county or municipal agency having and maintaining peace officers [to] enter into mutual aid agreements with any public agency as defined in the Mutual Aid Act, with respect to law enforcement." Section 29-8-3. Other "public agenc[ies]" include "an

Indian tribal council, Indian pueblo council and the state or any county or municipality thereof." Section 29-8-2. To be valid, a mutual aid agreement must be in writing and approved by both the "public agency"—in this case the Pueblo of Pojoaque—and the governor of New Mexico. *See State v. Branham*, 2004-NMCA-131, ¶ 14, 136 N.M. 579, 102 P.3d 646; *see also* § 29-8-3.

{25} The other type of statutory agreement, referred to as a "cross-commission agreement," is authorized under NMSA 1978, Section 29-1-11 (2005). This provision authorizes the chief of the New Mexico state police to issue commissions as New Mexico peace officers to members of tribal police departments as long as statutory procedures are followed and the requirements and responsibilities of each entity are set forth in a formal written agreement. Section 29-1-11(B). Originally, the statute only authorized cross-commission agreements between the New Mexico state police and members of the Navajo police department. NMSA 1953, § 39-1-12 (1972). In 1979, the Legislature amended the statute to authorize state police to enter into agreements with members of any New Mexico tribe or pueblo. NMSA 1978, § 29-1-11(B) (1979). As indicated, this statute only pertains to agreements with the state police.

{26} The 1979 amendment also added several conditions to be included in a cross-commission agreement, including a training requirement for all commission applicants, proof that the tribe or pueblo entering into the agreement has adequate public liability and property damage insurance for vehicles operated by the peace officers and police professional liability insurance, and a requirement that the chief of the New Mexico state police and the tribe or pueblo meet at least quarterly to discuss the status of the agreement. *Id.* ¶ C. Importantly, in 2005 the Legislature added a subsection to the statute cautioning that these procedures in the cross-commission statute are separate from, and do not "impair[] or nullif[y]" the traditional "authority of county sheriffs to appoint . . . duly commissioned state or federally certified officers who are employees of a police or sheriff's department of an Indian nation, tribe or pueblo in New Mexico . . . as deputy sheriffs authorized to enforce New Mexico criminal and traffic law." Section 29-1-11(G).

{27} Thus, the Mutual Aid Act and the statute authorizing cross-commission agreements are not, and never have been, the exclusive source of authority for commissioning a tribal police officer to act under state law as a deputy sheriff. Sheriffs retain that traditional authority, going back to the common law and early territorial days, to appoint deputies, including tribal police officers, to assist the sheriff in the enforcement of New Mexico criminal and traffic law. These appointments may occur, pursuant to the sheriff's historic authority under Section 4-41-5, without a formal agreement between governmental entities and, more to the point, without any assurance that the tribe will indemnify the county in the event of litigation.

{28} Accordingly, Santa Fe County Sheriff Solano had the authority under state law to commission Officer Gutierrez, notwithstanding the lack of any formal agreement between the County and the Pueblo of Pojoaque. At the time of the Loya arrest, Officer Gutierrez was duly acting as an unpaid sheriff's deputy, a volunteer, no different from any volunteer deputy commissioned over the past century.

The Effect Of the Sheriff's Unanswered Letter To the Pueblo

{29} The County argues, however, that in this particular instance Sheriff Solano issued the commission subject to the provisions set forth in the January 24, 2005, letter from Sheriff Solano to Pueblo of Pojoaque Tribal Police Chief John Garcia. According to the County, that letter memorialized the scope of authority conferred upon Officer Gutierrez, provided rules for commissioned deputies to follow when acting on behalf of the County, and delineated financial responsibilities between the County and the Pueblo. In particular the letter stated that the Pueblo of Pojoaque shall be liable if a commissioned officer "is sued for actions taken while effecting an arrest or pursuing a suspect." The County argues that the letter created an agreement between the County and the Pueblo of Pojoaque and that Officer Gutierrez is commissioned pursuant to the conditions set forth in that agreement, including the Pueblo's assumption of liability.

{30} We find the County's position unpersuasive. The record is devoid of any evidence that Pojoaque Police Chief Garcia, the Pueblo Governor, or the Pueblo Council ever acknowledged the existence of that letter, much less agreed to its terms. Officer Gutierrez claimed that he was unaware of the letter at the time he took the oath of office as a commissioned deputy sheriff. The district court below issued no contrary findings. Nothing in the record indicates any efforts by Sheriff Solano to follow through with these purported (and unilateral) conditions. There is no indication of any discussions verifying that the Pueblo had accepted liability for its officers. Accordingly, we need not decide the letter's legal efficacy without any evidence of its acceptance. And we certainly could not decide the letter's legal efficacy without hearing from the Pueblo. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) ("It is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed." (internal quotation marks and citations omitted)); *Am. Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1379 (8th Cir. 1985) ("[N]othing short of an express and unequivocal waiver can defeat the sovereign immunity of an Indian nation.").

{31} As discussed earlier, the Legislature has provided for agreements between Native-American tribes and the State, but this letter does not fall within anything the Legislature has authorized. Without a written, executed agreement, it does not comply with the terms of the Mutual Aid Act. The letter does not create a valid cross-commission agreement under Section 29-1-11 because those agreements are limited to commissions issued by the New Mexico state police. In fact, the statute clearly states that the authority of county sheriffs to appoint duly commissioned deputies is not limited, impaired or nullified by the provisions of Section 29-1-11. *See* Section 29-1-11(G). The statute allows for the appointment of commissioned deputies (including tribal officers), but makes no reference to the kind of agreement envisioned here, including assumption of liability. *Id.*

{32} Accepting that Officer Gutierrez was commissioned as a volunteer sheriff's deputy and not pursuant to any formal agreement executed under New Mexico statute, we return to our initial, "working" determination that Officer Gutierrez seemed to be acting as a "public employee" under the

NMTCA when he arrested and prosecuted Loya. *See* § 41-4-3(F). As an unpaid deputy, Officer Gutierrez was acting in an "official capacity" and "on behalf or in service of" the County sheriff and Santa Fe County. *See* § 41-4-3(F)(3). Satisfaction of these two requirements necessarily makes Officer Gutierrez a "public employee" under the NMTCA; he was a "person[] acting on behalf or in service of a governmental entity [the County] in any official capacity, whether with or without compensation." *Id.* As a "public employee" under that section of the NMTCA, Officer Gutierrez was entitled to its benefits including a legal defense and indemnification.

{33} As an aside, it is of no import that the County did not compensate Officer Gutierrez for his service. The language in Section 41-4-3(F)(3) "with or without compensation" is an "express declaration of legislative intent in including volunteers acting on behalf of a governmental entity within the purview of the [NM]TCA." *Celaya v. Hall*, 2004-NMSC-005, ¶ 9, 135 N.M. 115, 85 P.3d 239. There is clear legislative intent to protect both paid employees and volunteers from personal liability for actions taken on behalf of their "governmental entity" employer with or without any agreement pertaining to indemnification and legal defense. We see no reason why Officer Gutierrez, an unpaid sheriff's deputy, should be treated any differently simply because the Legislature also intended to provide protection from personal liability for full-time "law enforcement officers" as defined under the NMTCA. The NMTCA treats volunteers the same as any other employee and "protects the public by ensuring that government will be financially accountable when volunteers working within their scope of duty" are hauled into court. *Celaya,* 2004-NMSC-005, ¶ 9.

As a Tribal Police Officer, Officer Gutierrez Is Not Limited To the "Law Enforcement Officer" Subcategory Of "Public Employee"

{34} The County further argues that even if a tribal police officer may technically fit within the definition of a "public employee" as a person "acting on behalf . . . of . . . government[] . . . in any official capacity," the operative category in this inquiry is nonetheless limited to "law enforcement officer." *See* § 41-4-3(D), (F). According to the County, because Officer Gutierrez was purporting to act specifically as a law enforcement officer and not generally as a public employee when he arrested and charged Loya, then he can only qualify under the NMTCA as a "law enforcement officer." As previously acknowledged, of course, Officer Gutierrez is not a "law enforcement officer" as defined under the NMTCA because he is not a "full-time salaried public employee" of the County. What the County is really trying to do, therefore, is to exclude Officer Gutierrez and other unpaid sheriff's deputies from the protections provided by the NMTCA because the County does not pay them a salary for their service. We first look at the policy implications of such as position.

{35} Presumably, allowing the County sheriff to commission tribal police officers as deputies has enhanced the law enforcement presence and effectiveness within the County, resulting in improved public safety at little cost to the County. *See Affidavit of Chief John Garcia Pueblo of Pojoaque Tribal Police Department* in *Loya v. Gutierrez,* First Judicial District Court No. D-101-CV-2010-3854, dated November 10, 2011. The County seeks to keep that benefit while denying any responsibility for the risks arising from its creation—namely actions taken by volunteer

deputies who are sued while acting on the County's behalf. The County's position would leave those unpaid deputies exposed to personal liability, left to pay the costs of their own defense, while simultaneously leaving members of the public like Loya without any realistic chance of financial recourse. To put the matter delicately, such a result would seem to be at odds with sound public policy. The Legislature may opt for such a course, but we would need an unambiguous expression of legislative intent, far from what we have at present.

{36} The County argues that the more specific public employee definition—law enforcement officer—should prevail over more general provisions touching on the same subject. The County's argument proceeds as follows: Officer Gutierrez was acting in a law enforcement officer capacity when he stopped and arrested Loya, the term "law enforcement officer" is a more specific subcategory of "public employee" than "persons acting on behalf of," so "law enforcement officer" should be the operative category.

{37} The proposition that specific prevails over general stems from a case where the notice requirements stated within a statute conflicted with the notice requirements set forth in a rule. *Prod. Credit Ass'n v. Williamson*, 1988-NMSC-041, 107 N.M. 212, 755 P.2d 56. This Court held that the statute addressed the specific type of proceeding at issue in the case and was therefore controlling over the rule which addressed general notice requirements, hence creating the specific over general rule of statutory interpretation. *Id.* ¶ 5.

{38} Here, we are not dealing with different parts of a statute or a conflict between a statute and a rule; we are looking at one definition. The definition of "public employee" includes 18 different categories. *See* § 41-4-3(F). "Law enforcement officer" might be more focused than "persons acting on behalf or in service of a governmental entity in any official capacity," but that does not make it more specific for purposes of statutory construction. The Legislature purposely listed multiple categories, and we must assume it did so for good reason. We cannot allow the County to limit the categories available to Officer Gutierrez without ignoring the clear intent of the Legislature. As a result, we decline to adopt the County's position that Officer Gutierrez must meet the "law enforcement officer" definition in order to be recognized as a "public employee."

The Duty To Provide a Defense In a Section 1983 Action Is Not Subject To the State's Assertion Of Sovereign Immunity

{39} The County next argues that even if Officer Gutierrez is a "public employee" under the NMTCA, there is no duty to provide a legal defense here because both the County and Officer Gutierrez are immune from liability. Under the NMTCA, the State's general policy is that "governmental entities and public employees shall only be liable within the limitations of the Tort Claims Act." Section 41-4-2(A). The County interprets this policy statement to mean that it has a duty to defend its employees only when it is or could be liable for a tort for which sovereign immunity has been waived under the NMTCA.

{40} The NMTCA asserts sovereign immunity from liability for any tort except as waived by Sections 41-4-5 to -12. *See* § 41-4-4(A). Here, the County argues it is immune from suit because none of the stated waiver exceptions apply. Specifically, Officer Gutierrez cannot be sued under Section 41-4-

12,[2] the only waiver exception otherwise applicable to this situation, because, as stated earlier in this opinion, Officer Gutierrez is not a full time salaried "law enforcement officer" for the County. If there can be no NMTCA liability, then the County has no duty to defend. With respect, the County misperceives the law in several respects.

{41} The terms "waiver" and "sovereign immunity" do not appear anywhere in the text of Section 41-4-4(B), the provision that sets forth the County's duty to provide a legal defense. In order to accept the County's argument that the defense obligation is dependent upon a statutory waiver of sovereign immunity, we would have to read words into Section 41-4-4(B), limiting the County's defense obligation to actions brought under one of the torts for which sovereign immunity has been waived. But Section 41-4-4(B) does not say that; it imposes no such limitation. The statute reads, "a governmental entity [the County] shall provide a defense . . . when liability is sought for" (1) "any tort" or (2) "any violation of . . . any rights, privileges or immunities secured by the constitution and laws of the United States [civil rights claims] . . . ." *Id.* Textually then, Section 41-4-4(B) requires a defense equally for (1) claims that *are* torts for which sovereign immunity has been waived, and (2) claims that are *not* torts (civil rights claims) for which sovereign immunity has not been waived under the NMTCA.

{42} In addition to being at odds with the statute's text, the County's position would seem to contradict settled insurance law and the expectations that normally arise with respect to an insurer's duty to defend. It is the norm that an insurer, though denying coverage and liability, must nonetheless defend its insured unless and until it receives a judicial ruling in its favor relieving it of any further obligations. *See Miller v. Triad Adoption & Counseling Servs., Inc.*, 2003-NMCA-055, ¶ 9, 133 N.M. 544, 65 P.3d 1099 ("If the allegations of the complaint or the alleged facts tend to show that an occurrence comes within the coverage of the policy, the insurer has a duty to defend regardless of the ultimate liability of the insured."); *see also Lujan v. Gonzales*, 1972-NMCA-098, ¶ 22, 84 N.M. 229, 501 P.2d 673 (an insurer's "good faith belief that there was no coverage . . . is not a defense to the breach of the duty to defend").

{43} Here, contrastingly, the County, while denying any liability to Loya for Officer Gutierrez's actions, wants to be relieved of any duty to defend Officer Gutierrez even before it obtains a ruling in its favor. The County, unlike a normal insurer, would leave Officer Gutierrez, in the position of an insured, to fight off liability on his own at his own expense. This would appear to fly in the face of Section 41-4-4(B) which equates the duties of the County with the duties of an insurer. *See* § 41-4-4(B) ("Unless an insurance carrier provides a defense, a governmental entity shall provide a defense . . . for any public employee when liability is sought for" (1) a tort or (2) civil rights violations under federal or state law.)

---

[2]Section 41-4-12, liability for law enforcement officers, waives immunity for liability from:

> personal injury, bodily injury, wrongful death or property damage resulting from assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, . . . or deprivation of any rights privileges or immunities secured by the constitution and laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties.

{44} Focusing on the specific rights and obligations set forth in the NMTCA, Section 41-4-4(A) asserts sovereign immunity from liability except as waived; however, the assertion is only for immunity from tort liability, not civil rights liability. *See* § 41-4-2(B) ("Liability for acts or omissions under the Tort Claims Act shall be based upon the traditional tort concepts of duty and . . . standard of care."); § 41-4-4(A) ("A governmental entity and any public employee . . . are granted immunity from liability for any tort except as waived by . . . Sections 41-4-5 through 41-4-12.").

{45} The NMTCA does not grant immunity from liability for federal civil rights actions, nor could it do so under the Supremacy Clause of the United States Constitution. *See* U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land."). *See also Howlett v. Rose*, 496 U.S. 356, 375-76 (1990) (noting that state laws that attempt to provide for immunities "over and above those already provided in § 1983" are preempted); *Martinez v. California*, 444 U.S. 277, 284, n. 8 (1980) (noting that "[c]onduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 . . . cannot be immunized by state law" because a "construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced" (internal quotation marks and citations omitted)). Government officials can be sued in their individual capacities for damages under Section 1983, *Hafer v. Melo*, 502 U.S. 21, 30-31 (1991); and in their official capacity for injunctive relief, *Vann v. U.S. Dep't of Interior*, 701 F.3d 927, 929 (D.C. Cir. 2012).

{46} It follows, therefore, that the listed waivers, including Section 41-4-12, are only relevant when liability is sought for the torts listed therein.[3] But here, the suit Loya brought against Officer Gutierrez alleges violations of federally protected constitutional rights under Section 1983, and does not allege tort liability. *Loya*, 2014-NMCA-028, ¶ 8. Accordingly, the waiver exceptions under Section 41-4-4(A) would seem to have no bearing on the County's obligation to provide a defense when liability is sought against its employee for violation of federal constitutional rights.

{47} The same is true for the County's duty to indemnify Officer Gutierrez in the event of a judgment against him. The County must pay that judgment under the clear language of the NMTCA. *See* § 41-4-4(D) ("A governmental entity shall pay any settlement or any final judgment entered against a public employee for" (1) any tort or (2) violation of federal constitutional rights.). An award of punitive damages, which are not even authorized under the NMTCA, Section 41-4-19(D), must also be paid by the governmental entity/insurer under the NMTCA if sustained "under the substantive law of a jurisdiction other than New Mexico, including . . . the

[3]Section 41-4-12 is essentially a restatement of the provisions of the former Peace Officers Liability Act (POLA). *See* Ruth L. Kovnat, *Torts: Sovereign and Governmental Immunity in New Mexico*, 6 N.M. L. Rev. 249, 264 (1976). POLA was enacted in 1973 "to provide a permissive method whereby the state or a local public body may elect to protect peace officers from personal liability arising out of certain acts committed during the performance of their activities . . . and to compensate the individuals wrongfully harmed by these actions." 1973 N.M. Laws, ch. 194, § 2. POLA was repealed upon the enactment of the NMTCA. *See* Kovnat, *supra*, 255-64.

United States of America." Section 41-4-4(C). Here again, there appears to be no statutory link between the County's obligation to defend and indemnify a public employee and the separate question of whether the County can be held liable for one of the torts enumerated in the NMTCA for which sovereign immunity has been waived.

{48} History supports our conclusion. The NMTCA, as originally enacted, only required a governmental entity to provide a defense when liability was alleged for torts committed by the employee. *See* 1976 N.M. Laws, ch. 58, § 3(C). Under the original statute, it is possible that the obligation of the governmental entity to provide a defense was dependent upon express waiver of liability because the statute only required the entity to provide a defense for tort actions. If the statute today read as it did in 1976, it might have been necessary for Officer Gutierrez to fit within one of the waiver exceptions in order to be provided with a defense. *See id.* ("When liability is alleged against any public employee for any torts alleged to have been committed within the scope of his duty, whether or not alleged to have been committed maliciously, fraudulently or without justifiable cause, the governmental entity shall provide a defense.")

{49} In 1977, however, the Legislature amended the statute and added a subsection to the defense provision to require a governmental entity to provide a defense when liability is sought for any violation of constitutional rights as well as for commission of the specific torts for which liability was waived in the Act. *See* 1977 N.M. Laws, ch. 386, § 3(C) ("When liability is alleged against any public employee for any torts alleged to have been committed within the scope of his duty, or for a violation of property rights or any rights, privileges or immunities secured by the constitution . . . the governmental entity shall provide a defense and pay any settlement or judgment."). Thus, the amendment expanded the duty to defend.

{50} It is clear from the added subsection, therefore, that there exists a clear right to defense against civil rights claims with no reference to assertion of waiver of immunity from those claims. *See* § 41-4-4(A). If the Legislature intended to condition the duty to provide a defense upon a finding that immunity is waived, it would not have amended the original statute to require an entity to provide a defense against civil rights violations without also asserting immunity for those same violations.

{51} All of this makes sound policy sense. If a police officer or other public employee can be sued under federal law for violation of federally-secured constitutional rights while acting within the scope of his or her duty, sound public policy supports a county not abandoning its officer, but coming to the officer's assistance with a legal defense and indemnification if necessary. Therefore, showing waiver of tort liability is not required before a governmental entity is obligated to provide its employee with a defense in a Section 1983 action where there are no tort claims asserted.

Officer Gutierrez Was Not Acting As an Independent Contractor

{52} Because we determine that Officer Gutierrez otherwise meets the "public employee" definition, we now address the County's final argument that he is excluded as an independent contractor. *See* § 41-4-3(F) ("'[P]ublic employee' means an officer, employee or servant of a governmental entity,

excluding independent contractors."). The district court determined that Officer Gutierrez failed to meet the definition of "public employee," so it did not reach this issue. The County argues that even if Officer Gutierrez is otherwise a "public employee" for purposes of the NMTCA, he was nonetheless acting as an "independent contractor" when he arrested, charged, and prosecuted Loya.

{53} We start by questioning, without deciding, whether a sheriff's deputy could ever "act" as an "independent contractor." The common law rule, undisturbed by New Mexico statute, has long established that a deputy acts on behalf of his sheriff. We are unaware of any situation in which a sheriff has lawfully commissioned an individual to serve as a deputy without also controlling, or reserving control over, the manner and means by which that deputy exercises the authority conferred upon him by the sheriff. A functional law enforcement system requires accountability and uniformity among the officers. If a sheriff no longer had the duty to oversee the actions of sworn deputies, chaos or at least a lack of critical accountability would ensue. Rightfully so, the public would question such a rogue system of law enforcement. We have grave doubts whether our Legislature would tolerate such a system.

{54} That said, the County offers *Segura v. Colombe* to support its position that a sheriff's deputy can act as an independent contractor. 895 F. Supp. 2d 1141 (D.N.M. 2012). In that case, the federal district court determined that the County did not exercise sufficient control over the deputy's activities to render the relationship one of employer and employee and thus found that the officer was acting as an independent contractor. *Id.* at 1148-49.

{55} In reaching its determination, the *Segura* court applied the test announced by this Court in *Celaya*, 2004-NMSC-005, ¶ 15. *Segura*, 895 F. Supp. 2d at 1149. In *Celaya*, this Court held that a strict application of the right-to-control test may lead to inconsistencies when analyzing whether an individual is an independent contractor for purposes of the NMTCA. We instead adopted the multi-factor analysis in Restatement (Second) of Agency, § 220(2)(a)-(j) (1958), which includes:

> 1) the type of occupation and whether it is usually performed without supervision; 2) the skill required for the occupation; 3) whether the employer supplies the instrumentalities or tools for the person doing the work; 4) the length of time the person is employed; 5) the method of payment, whether by time or job; 6) whether the work is part of the regular business of the employer; 7) whether the parties intended to create an employment relationship; and 8) whether the principal is engaged in business.

Celaya, 2004-NMSC-005, ¶ 15. The facts in *Celaya* involved a volunteer chaplain for the sheriff's department who was in an accident while driving a department vehicle. In that case, the right-to-control analysis alone could not resolve the issue of whether a volunteer chaplain was an independent contractor under the NMTCA. Thus, it was necessary to go beyond right to control to determine the relationship between the chaplain and the sheriff's department.

{56} No such further inquiry is necessary here. In the case of a sworn sheriff's deputy engaged in enforcing state law on behalf of the

county, there is a clear right to control—indeed an obligation to control—the actions of a deputy. When that right to control is so fundamentally a part of the relationship, we find it unnecessary to analyze the relationship under the additional factors announced in *Celaya*.

{57} We note from our reading of *Segura* that, unlike the present case, the parties there presented very little evidentiary support for the proposition that the deputy was not an independent contractor. Beyond that difference, however, we find the federal court's reasoning unpersuasive for the reasons stated as a matter of sound legal policy.

CONCLUSION

{58} We hold that the County must provide Officer Gutierrez with a legal defense, including costs and attorney's fees in conformity with the NMTCA. We therefore reverse the entry of summary judgment in favor of the County and remand to the district court for further proceedings consistent with this ruling.

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

RICHARD C. BOSSON, Justice

WE CONCUR:

PETRA JIMENEZ MAES, Justice

EDWARD L. CHÁVEZ, Justice

CHARLES W. DANIELS, Justice

ABIGAIL P. ARAGÓN, Judge
Sitting by Designation

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMSC-018

Filing Date: May 28, 2015

Docket No. 34,516

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

v.

AIDE ZAMORA SANCHEZ,

Defendant-Respondent.

Hector H. Balderas, Attorney General
James W. Grayson, Assistant Attorney General
Corinna Laszlo-Henry, Assistant Attorney General
Santa Fe, NM

for Petitioner

Jorge A. Alvarado, Chief Public Defender
Allison H. Jaramillo, Assistant Appellate Defender
Santa Fe, NM

for Respondent

Jones, Snead, Wertheim & Clifford, P.A.

Jerry Todd Wertheim
Albuquerque, NM

Barbara E. Bergman
Albuquerque, NM

Theresa M. Duncan
Albuquerque, NM

for Amicus Curiae New Mexico Criminal Defense Lawyers Association

OPINION

CHÁVEZ, Justice.

{1} Defendant-Respondent Aide Sanchez (Sanchez) was at the Santa Teresa, New Mexico port of entry, an international border crossing, attempting to enter the United States from Mexico, when Border Patrol agents seized marijuana from her van. In *State v. Cardenas-Alvarez*, 2001-NMSC-017, ¶ 1, 130 N.M. 386, 25 P.3d 225, we held that "the New Mexico Constitution and laws apply to evidence seized by federal agents at a border patrol checkpoint [located] sixty miles within the State of New Mexico [(an interior fixed checkpoint)] when that evidence is proffered in state court." We also held that Article II, Section 10 of the New Mexico Constitution "demands that after a Border Patrol agent has asked about a motorist's citizenship and immigration status, and has reviewed the motorist's documents, any further detention requires reasonable suspicion of criminal activity." *Cardenas-Alvarez*, 2001-NMSC-017, ¶¶ 12, 20.

{2} Sanchez successfully moved to suppress the evidence seized from her van, arguing that (1) *Cardenas-Alvarez* applies at the international border, and (2) seizure of the marijuana violated the New Mexico Constitution because the Border Patrol agents did not have a reasonable suspicion of criminal activity to continue to detain her once they had established her citizenship and immigration status. We hold that Article II, Section 10 does not afford greater protections at an international border checkpoint because unlike motorists who are stopped at interior border checkpoints, all motorists stopped at international fixed checkpoints are known to be international travelers who are not entitled to the heightened privacy expectations enjoyed by domestic travelers. We therefore reverse the district court's order suppressing the evidence in this case.

BACKGROUND

{3} On January 2, 2012, United States Customs and Border Protection Officer Erica Pedroza (Pedroza) was working as the primary officer at the Santa Teresa Port of Entry, an international border checkpoint. Primary officers are the first customs agents to speak with a motorist seeking to cross an international border. They check motorists' citizenship documentation and inspect their vehicles for contraband. Primary officers usually have, at most, 30 seconds to decide between releasing a motorist or referring the motorist to a secondary area for further inspection of the vehicle. Further inspections arise for various reasons, including documentation deficiencies such as the lack of a passport, the presence of agricultural products, and evidence that vehicles have been tampered with.

{4} Pedroza testified that while she was working, she encountered Sanchez driving a van. According to Pedroza, Sanchez claimed that she had spent the weekend in Ciudad Juárez, Mexico and was driving back to Denver, Colorado. Pedroza also stated that

Sanchez produced valid documentation of her legal status as a permanent resident. However, Pedroza was unable to inspect the van to her satisfaction because of the presence of a large dog within the van. Consequently, Pedroza referred Sanchez to a secondary area to have the vehicle inspected, even though Pedroza did not suspect any criminal activity.

{5} Customs and Border Protection Officer Monica Pantoja (Pantoja) testified that she performed a seven-point inspection of Sanchez's van, which is an inspection of the whole vehicle. As part of this inspection, a drug-sniffing canine located marijuana within Sanchez's van.

{6} Sanchez was indicted for distribution of marijuana in violation of NMSA 1978, Section 30-31-22(A)(1)(a) (2011) and conspiracy to commit distribution of marijuana in violation of NMSA 1978, Section 30-28-2 (1979). Sanchez filed a motion to suppress the evidence, arguing that under *Cardenas-Alvarez*, Pedroza lacked the reasonable suspicion of criminal activity required by the New Mexico Constitution to prolong her detention. In *Cardenas-Alvarez* we held that Article II, Section 10 applies to evidence seized at an interior fixed checkpoint "sixty miles within the State of New Mexico when that evidence is proffered in state court." 2001-NMSC-017, ¶ 1. Under *Cardenas-Alvarez*, in the context of an interior fixed checkpoint, Article II, Section 10 "demands that after a Border Patrol agent has asked about a motorist's citizenship and immigration status, and has reviewed the motorist's documents, any further detention requires reasonable suspicion of criminal activity." 2001-NMSC-017, ¶ 20. The district court granted Sanchez's motion to suppress, finding that Pedroza's referral of Sanchez for a secondary inspection of the van was not supported by reasonable suspicion of criminal activity. The district court excluded "all evidence obtained and seized from [Sanchez] and her vehicle, following the referral of [Sanchez] for a secondary inspection."

{7} The Court of Appeals affirmed the district court, holding that *Cardenas-Alvarez* applies, irrespective of the location of the checkpoint. *State v. Sanchez*, No. 32,994, mem. op. ¶¶ 1-3, 8 (N.M. Ct. App. Nov. 6, 2013) (non-precedential). The Court of Appeals then concluded that "the facts relied upon by the State neither establish that issues of residence or citizenship were unresolved when [Sanchez] was sent to the secondary inspection area nor that there was any basis for a reasonable suspicion of wrongdoing at that time." *Id.* ¶ 6.

{8} We granted the State's petition for writ of certiorari, *State v. Sanchez*, 2014-NMCERT-002, to address two issues:

> 1) Whether the protections of Article II, Section 10 of the New Mexico Constitution extend to the international border, and, if so, whether referral of [Sanchez] to a secondary area for continuation of routine questioning requires individualized suspicion[, and]
>
> 2) Whether the application of the interstitial approach in *Cardenas-Alvarez* should be revisited.

We decline to interpret Article II, Section 10 as requiring individualized reasonable suspicion of criminal activity for prolonging detentions at an international border checkpoint. We also decline to revisit the approach taken in *Cardenas-Alvarez*, because

Cardenas-Alvarez is not implicated in this case.

DISCUSSION

{9} All of the issues presented in this case are reviewed de novo. "Whether the exclusionary rule under Article II, Section 10 . . . applies to the use of evidence in a New Mexico state court proceeding when that evidence resulted from a search conducted by federal border-patrol agents is a threshold constitutional issue that is subject to de novo review." *State v. Snyder*, 1998-NMCA-166, ¶ 6, 126 N.M. 168, 967 P.2d 843. If a constitutional provision applies, claims arising under it are also reviewed de novo. *State v. Brown*, 2006-NMSC-023, ¶ 8, 139 N.M. 466, 134 P.3d 753; *see also Cardenas-Alvarez*, 2001-NMSC-017, ¶ 6 ("The constitutionality of a search or seizure is a mixed question of law and fact and demands de novo review.").

{10} In *Cardenas-Alvarez*, we held that the New Mexico Constitution applies to evidence seized by federal agents at an interior fixed checkpoint when the State seeks to introduce the evidence in state court criminal proceedings. 2001-NMSC-017, ¶ 20. The question remains whether the greater protections that exist at an interior fixed checkpoint also exist at the international border checkpoint. To answer this question, we apply the interstitial approach announced in *State v. Gomez*, 1997-NMSC-006, ¶¶ 19-22, 122 N.M. 777, 932 P.2d 1.

{11} Under the interstitial approach,

> the court asks first whether the right being asserted is protected under the federal constitution. If it is, then the state constitutional claim is not reached. If it is not, then the state constitution is examined. A state court adopting this approach may diverge from federal precedent for three reasons: a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics.

Id. ¶ 19 (citations omitted).

{12} The Fourth Amendment of the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . ." (Emphasis added.) Article II, Section 10 of the New Mexico Constitution provides that "[t]he people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures . . . ." Article II, Section 10 parallels the federal Fourth Amendment and embodies "the fundamental notion that *every person in this state* is entitled to be free from unwarranted governmental intrusions." *State v. Gutierrez*, 1993-NMSC-062, ¶ 46, 116 N.M. 431, 863 P.2d 1052 (emphasis added).

I. The United States Constitution was not violated

{13} The events in this case occurred at an international border checkpoint, not at an interior fixed checkpoint. "This is an important distinction as a citizen's Fourth Amendment rights at a checkpoint located on the border . . . are significantly less than inside the border." *United States v. Rascon-Ortiz*, 994 F.2d 749, 752 n.4 (10th Cir. 1993). The federal government's "interest in preventing the entry of unwanted persons and effects is at its zenith at the international border." *United*

States v. Flores-Montano, 541 U.S. 149, 152 (2004). Therefore, "the Fourth Amendment's *balance of reasonableness is qualitatively different* at the international border than in the interior." *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985) (emphasis added).

{14} Customs officers are afforded "great latitude in conducting a search at an international border crossing," *Klein v. United States*, 472 F.2d 847, 849 (9th Cir. 1973), and "may conduct routine searches of persons and effects crossing the border even in the absence of individualized suspicion." *United States v. Ezeiruaku*, 936 F.2d 136, 140 (3d Cir. 1991); *see also Montoya de Hernandez*, 473 U.S. at 538 ("Routine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant . . . ."). During these routine searches, "[t]he primary inspector's job is to make a preliminary determination [of] whether an entrant . . . should be allowed beyond the customs line." *United States v. Salas-Camacho*, 859 F.2d 788, 791 (9th Cir. 1988). "The secondary inspector is called upon to act when a vehicle is referred for additional inspection" and is responsible for "conduct[ing] a more searching examination." *Id.* "Referral to a secondary checkpoint . . . is considered to be routine border inspection procedure." *United States v. Ledezma-Hernandez*, 729 F.2d 310, 313 (5th Cir. 1984). Thus, suspicion of illicit activities is not required to refer a motorist from a primary to a secondary area. *See id.* Routine searches include "patdowns, frisks, luggage searches, and automobile searches." *United States v. Whitted*, 541 F.3d 480, 485 (3d Cir. 2008). These types of searches conducted at an international border checkpoint "have been considered to be 'reasonable' by the single fact that the person or item in question had entered into our country from outside." *United States v. Ramsey*, 431 U.S. 606, 619 (1977).

{15} "The border search doctrine is also applicable to stops and searches conducted at the 'functional equivalent' of the border, i.e., the first point at which an entrant may practically be detained." *United States v. Cardenas*, 9 F.3d 1139, 1147 (5th Cir. 1993); *see also Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973). Searches at the functional equivalents of borders are "those searches that, although not conducted at the actual physical border, take place after a border crossing at the first practicable detention point." *United States v. Garcia*, 672 F.2d 1349, 1365 (11th Cir. 1982). "Such searches are truly border searches because their sole justification is the fact that the border has been crossed." *Id.* For example, "a search of the passengers and cargo of an airplane arriving at a St. Louis airport after a nonstop flight from Mexico City would clearly be the functional equivalent of a border search." *Almeida-Sanchez*, 413 U.S. at 273.

{16} However, there is another federal doctrine concerning "the constitutionality of vehicle stops conducted *within* U.S. borders." *Garcia*, 672 F.2d at 1359 (emphasis added); *see United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). These cases "did not apply the functional-equivalent theory," *Garcia*, 672 F.2d at 1359, because "the distance of the Border Patrol checkpoints from the Mexican border . . . dissuaded the [United States Supreme] Court from applying the border-search rationale." *Id.* at 1360 n.14. This doctrine permits "brief warrantless stops of vehicles at permanent checkpoints absent any suspicion" of illicit activity. *Id.* at 1359. We will refer to the line of cases supporting stops

within the United States border as the federal "interior fixed-checkpoint doctrine."

{17} The interior fixed-checkpoint doctrine considers "the formidable law enforcement problems of the Border Patrol in attempting to control the flow of illegal aliens into this country, and balance[s] this governmental interest against the degree of interference with individuals' fourth amendment rights caused by the stop or search procedure at issue in each case." *Garcia*, 672 F.2d at 1359-60 (internal quotation marks and citation omitted).

{18} Under the interior fixed-checkpoint doctrine,

> [a] detention at a border checkpoint is a seizure under the Fourth Amendment. However, because the public has a substantial interest in protecting the integrity of our national borders, and the intrusion upon one's right to privacy and personal security by a routine border inspection is minimal, a border patrol agent may briefly detain and question an individual without any individualized suspicion . . . . The Fourth Amendment protects an individual's liberty at a border checkpoint by limiting the scope of the detention.

Rascon-Ortiz, 994 F.2d at 752 (footnote and citations omitted). As part of a routine interior fixed-checkpoint stop, "border patrol agents may direct motorists from the primary inspection area to secondary without individualized suspicion and have wide discretion in selecting the motorists to be diverted." *Id.* (internal quotation marks and citation omitted). "Any further detention must be based on consent or probable cause." *Martinez-Fuerte*, 428 U.S. at 567 (alterations and internal quotation marks omitted) (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 882 (1975)).

{19} Routine interior fixed-checkpoint stops generally involve "questions concerning the motorist's citizenship or immigration status, and a request for documentation." *Rascon-Ortiz*, 994 F.2d at 752. "A cursory visual inspection of the vehicle is also routine, and a few brief questions concerning such things as vehicle ownership, cargo, destination, and travel plans may be appropriate if reasonably related to the agent's duty to prevent" illegal immigration and the smuggling of contraband. *Id.* (citation omitted). However, "neither the vehicle nor its occupants" can be searched as part of a "routine inquiry," and the "visual inspection of the vehicle is limited to what can be seen without a search." *United States v. Ludlow*, 992 F.2d 260, 264 (10th Cir. 1993). Thus, the routine stops permitted under the interior fixed-checkpoint doctrine are less intrusive upon travelers' privacy than the routine searches permitted at an international border checkpoint under the border search doctrine. *Compare Whitted*, 541 F.3d at 484-85 (discussing the scope of routine searches allowed under the border search doctrine), *with Ludlow*, 992 F.2d at 263-64 (discussing the scope of routine inquiries allowed under the interior fixed-checkpoint doctrine); *see also Rascon-Ortiz*, 994 F.2d at 752 n.4 ("[A] citizen's Fourth Amendment rights at a checkpoint located on the border, or its functional equivalent, are significantly less than inside the border.").

{20} Because the search in this case occurred at an international border checkpoint, we analyze the constitutionality of the search

under the border search doctrine and conclude that Sanchez's referral to a secondary area was a permissible part of a routine border search. *See Klein*, 472 F.2d at 849. Because the canine drug-sniff was performed during the course of this routine search, the drug-sniff was also permissible under federal law. *See United States v. Kelly*, 302 F.3d 291, 294-95 (5th Cir. 2002) (holding that the use of a trained canine to sniff a pedestrian entering the United States is a permissible part of a routine border search, even without a showing of individualized suspicion of illicit activity).

{21} The parties agree that the federal constitution does not confer upon Sanchez the right to be free of prolonged detention, even if the detaining officer lacked reasonable suspicion of illicit activities. Because there was no federal constitutional violation, we proceed to the state constitutional claim. *See Gomez*, 1997-NMSC-006, ¶ 19.

II. There are no reasons to diverge from the federal border search doctrine

{22} Under New Mexico law, we "may diverge from federal precedent for three reasons: a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics"; this is also known as the interstitial approach. *See id.* We do not detect a flaw in the federal analysis concerning the border search doctrine. A rule that more robustly curbs the ability of law enforcement to conduct border searches "would frustrate the customary examinations conducted by customs officials as normal incidents of the meeting of their responsibilities." *Blefare v. United States*, 362 F.2d 870, 884 (9th Cir. 1966). The border search doctrine thus acknowledges the "exigencies present and the vital national interest demanding the regulation of who and what traverse our borders." *Blefare*, 362 F.2d at 884.

{23} As in *Cardenas-Alvarez*, we also conclude that there are no structural differences between state and federal governments so as to require a departure from federal precedent. 2001-NMSC-017, ¶ 14. Moreover, Sanchez does not argue that structural differences should warrant a departure. She contends instead that "New Mexico law provides several distinctive characteristics that require departure."

{24} Sanchez contends that New Mexico has distinctively provided heightened protections from searches and seizures "in both the automobile context and in the border context." She urges us to extend *Cardenas-Alvarez* to hold that Pedroza violated Article II, Section 10 when she referred Sanchez to a secondary area of an international border checkpoint to complete the inspection of Sanchez's van. *Cardenas-Alvarez* relied upon "the extra layer of protection that New Mexico offers its motorists" to justify heightened search and seizure protections at *interior fixed checkpoints*. *Id.* ¶¶ 1, 16. Thus, Sanchez would have us hold that the scope of travelers' rights at international border checkpoints are identical to the scope of rights at interior fixed checkpoints.

{25} *Cardenas-Alvarez* concerned stops at interior fixed checkpoints, and it accordingly analyzed the facts of the case under the *interior fixed-checkpoint doctrine*. *Id.* ¶¶ 1-2, 16. New Mexico has rejected the "notion that an individual lowers his [or her] expectation of privacy when he [or she] enters an automobile, and elected instead to provide motorists with a 'layer of protection' from unreasonable searches and seizures that is unavailable at the federal level." *Id.* ¶ 15

(citation omitted). "Therefore, in New Mexico, we . . . proscribe the prolongation of [an interior fixed-]checkpoint stop once questions regarding citizenship and immigration status have been answered, unless the officer conducting the stop reasonably suspects the defendant of criminal activity." *Id.* ¶ 16. In contrast, under the federal interior fixed-checkpoint doctrine, "questions regarding travel plans and the referral of a defendant from primary to secondary part of a routine border checkpoint stop . . . require[] no suspicion of criminal activity . . . ." *Id.*

{26} While *Cardenas-Alvarez* departed from the federal interior fixed-checkpoint doctrine, it did not analyze the federal border search doctrine. *See generally id.* "The general rule is that cases are not authority for propositions not considered." *Fernandez v. Farmers Ins. Co. of Arizona*, 1993-NMSC-035, ¶ 15, 115 N.M. 622, 857 P.2d 22 (internal quotation marks and citations omitted). Consequently, *Cardenas-Alvarez* cannot be read as modifying the federal border search doctrine, which is implicated by the facts of this case. We therefore determine whether the extra layer of protection afforded to New Mexico motorists mandates departure from the federal *border search doctrine.*

{27} Determining the permissibility of a search or seizure involves balancing governmental interests with the individual's right to privacy. *See Montoya de Hernandez*, 473 U.S. at 539-40. When individuals engage in certain courses of action, their privacy interests may be diminished within the context of a permissible search or seizure. *See Almeida-Sanchez*, 413 U.S. at 271. For example, when a gun dealer "chooses to engage in [a] pervasively regulated business and to accept a federal license, he [or she] does so with the knowledge that his [or her] business records, firearms and ammunition will be subject to effective inspection." *Id.* Likewise, an individual who presents himself or herself at an international border checkpoint for admission to the United States has a lesser expectation of privacy than he or she would have at an interior fixed checkpoint. *See Montoya de Hernandez*, 473 U.S. at 539.

{28} We conclude that the extra layer of protection for motorists that New Mexico law provides is not a distinctive state characteristic that increases the individual's expectation of privacy at an international border checkpoint. *Cardenas-Alvarez* was premised on the fact that motorists in New Mexico have a greater expectation of privacy than that which is protected by federal law at interior fixed checkpoints. 2001-NMSC-017, ¶¶ 15-16. "Since not all individuals that are required to stop at a permanent checkpoint have been outside the United States but are New Mexico motorists lawfully traveling on New Mexico's highways, New Mexico has an interest in providing some protection to individuals who are compelled to pass through a checkpoint." *Id.* ¶ 53 (Baca, J., concurring in the result); *see also Carroll v. United States*, 267 U.S. 132, 154 (1925) ("[T]hose lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise."). However, traffic passing through an international border checkpoint is international in nature, not domestic. *See United States v. Jackson*, 807 F.2d 1185, 1192 (5th Cir. 1986) (Reavley, J., specially concurring) ("[S]earches conducted at locations functionally equivalent to a border interdict the same kind of traffic stopped at

our nation's borders: international traffic."), *aff'd on reh'g*, 825 F.2d 853 (5th Cir. 1987). Thus, traffic passing through international border checkpoints do not contain domestic travelers who have heightened expectations of privacy that are idiosyncratic to the state in which they are traveling; all international travelers have a lessened expectation of privacy because they present themselves at the border for entry into the United States. *See Montoya de Hernandez*, 473 U.S. at 539-40 ("[N]ot only is the expectation of privacy less at the border than in the interior, the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is also struck much more favorably to the Government at the border." (citations omitted)). Thus, the extra layer of protection that vindicates the privacy interests of domestic travelers is not implicated at international border checkpoints. We therefore decline to depart from the federal border search doctrine.

{29} We also note that fighting illegal immigration and smuggling present significant problems for federal law enforcement. *See, e.g.*, *Montoya de Hernandez*, 473 U.S. at 538 ("These cases reflect longstanding concern for the protection of the integrity of the border. This concern is, if anything, heightened by the veritable national crisis in law enforcement caused by smuggling . . . illegal narcotics . . . ."); *Martinez-Fuerte*, 428 U.S. at 552 ("Interdicting the flow of illegal entrants . . . poses formidable law enforcement problems."). Differences between state and federal search and seizure rules create "very serious and, in some cases, seemingly insoluble problems for law enforcement officials." James W. Diehm, *New Federalism and Constitutional Criminal Procedure: Are We Repeating the Mistakes of the Past?*, 55 Md. L. Rev. 223, 263 (1996). Such problems include the generation of choice of law issues and the prospect of increasing litigation. *See id.* at 250-55. Therefore, we conclude that departing from the federal border search doctrine would exacerbate law enforcement issues at the international border.

{30} The United States Supreme Court has stated that "[t]here is no war between the [United States] Constitution and common sense." *Mapp v. Ohio*, 367 U.S. 643, 657 (1961), *limited on other grounds by United States v. Leon*, 486 U.S. 897, 906, 928 (1984). Likewise, there is no need for the New Mexico Constitution to conflict with common sense. "Federal-state cooperation in the solution of crime under constitutional standards will be promoted, if only by recognition of their . . . mutual obligation to respect the same fundamental criteria in their approaches." *Id.* at 658. Our refusal to depart from the federal border search doctrine acknowledges the significant law enforcement problems at an international border checkpoint where it is known that a motorist is entering from outside the country, thereby vindicating common sense and furthering federal-state cooperation.

CONCLUSION

{31} We reverse the decision of the Court of Appeals in *Sanchez*, Ct. App. No. 32,994, and also reverse the district court's suppression of the evidence.

{32} **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

Certiorari Denied, May 19, 2015, No. 35,195

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-058

Filing Date: February 23, 2015

Docket No. 33,517

CITIZEN ACTION NEW MEXICO,

Appellant,

v.

NEW MEXICO ENVIRONMENT DEPARTMENT and SANDIA CORPORATION,

Appellees,

APPEAL FROM THE NEW MEXICO ENVIRONMENT DEPARTMENT
Tom Blaine, Director

Robert P. McNeill
Albuquerque, NM

for Appellant

New Mexico Environment Department
William G. Grantham, Special Assistant Attorney General
John B. Verheul, Special Assistant Attorney General
Santa Fe, NM

for Appellee New Mexico Environment Department

Sandia Corporation
Amy J. Blumberg
Albuquerque, NM

Montgomery & Andrews, P.A.
Jeffrey J. Wechsler
Louis W. Rose
Lara Katz
Santa Fe, NM

for Appellee Sandia Corporation

OPINION

SUTIN, Judge.

{1} Appellant Citizen Action New Mexico appeals from a January 8, 2014, letter reflecting the New Mexico Environment Department's decision to approve the Sandia National Laboratories Long-Term Monitoring and Maintenance Plan for the Mixed Waste Landfill (the long-term plan). Pursuant to NMSA 1978, Section 74-4-14 (1992), Citizen Action appeals the Department's decision directly to this Court.

{2} Citizen Action argues that the Department's approval of the long-term plan in the January 8, 2014, letter was unlawful because the long-term plan disregarded a condition of a 2005 final order previously issued by the Secretary of the Department. That condition required Sandia to submit a report every five years, the first of which, according to Citizen Action, was due in May 2010. The purpose for the five-year report was to re-evaluate the feasibility of excavation

of the mixed-waste landfill and to analyze the continued effectiveness of a Department-ordered remedy. Citizen Action argues further that by approving the long-term plan, the Department unlawfully modified Sandia's hazardous waste permit (the permit) by changing particular aspects of the groundwater-monitoring network. The Department and Sandia filed answer briefs refuting Citizen Action's substantive arguments but also arguing that the appeal is untimely.

{3} In a letter issued and made publicly available on October 14, 2011, the Department required Sandia's first five-year report to be filed five years after the Department approved the long-term plan. Because we conclude that the October 2011 letter constituted a final agency action regarding the time-line of the five-year report, we hold that Citizen Action's appeal is untimely as to the five-year report issue, and we do not consider the merits of the appeal. Further, because it is unsupported by the record, we reject Citizen Action's argument that the long-term plan, approved in the Department's January 2014 letter, effectively modified the permit in regard to the groundwater-monitoring network. We hold that Citizen Action's appeal provides no basis for reversal, and we affirm the Department's approval of the long-term plan.

BACKGROUND

{4} In *Citizen Action v. Sandia Corporation*, this Court affirmed the final order issued in 2005 (the 2005 order) by the Secretary of the Department granting Sandia's request for a Class 3 permit modification for corrective measures for the mixed-waste landfill located at Sandia. 2008-NMCA-031, ¶¶ 1-2, 9, 143 N.M. 620, 179 P.3d 1228. In *Citizen Action*, a case involving the same parties that are involved in this case, we provided historical and factual background information related to Sandia, to the mixed-waste landfill, and to the process by which the Secretary selected the corrective measures (hereafter, the remedy) to be employed at the mixed-waste landfill and to the 2005 order. *Id.* ¶¶ 2-9. We do not reiterate that background information here. Instead, we limit our background discussion to the procedural developments that have since occurred, and we only discuss facts that were recited in *Citizen Action* when necessary for context in this appeal.

{5} The 2005 order approving a permit modification mandated that the remedy would be a vegetative soil cover with a bio-intrusion barrier. The 2005 order and the corresponding permit modification also mandated a number of substantive conditions including the following, among others. Within 180 days of the 2005 order, Sandia was required to submit a Corrective Measures Implementation Plan (CMI plan) relating to the mixed-waste landfill for the Department's approval detailing the design, construction, operation, maintenance, and performance monitoring for the remedy and a schedule for implementation including, among other things, a "comprehensive fate and transport model that studies and predicts future movement of contaminants in the landfill and whether they will eventually move further down the vadose zone and/or to groundwater[.]" Within 180 days after the remedy was implemented, Sandia was to submit a Corrective Measures Implementation Report (CMI report) for the Department's approval. And within 180 days of the Department's approval of the CMI report, Sandia was to submit its long-term plan, which was approved by the January 2014 letter from which Citizen Action appeals, for the Department's approval. The long-term

plan was to include "all necessary physical and institutional controls to be implemented in the future" and "contingency procedures that must be implemented by [Sandia] if the remedy . . . fails to be protective of human health and the environment." Before approving the CMI plan, the CMI report, or the long-term plan, the Department and Sandia were to provide a process by which interested members of the public could review and comment upon them, and the Department was required to review, consider, and respond to those comments.

{6} Additionally, the 2005 order required Sandia to "prepare a report every [five] years, re-evaluating the feasibility of excavation and analyzing the continued effectiveness of the selected remedy" (the five-year report). The five-year report was required to "include a review of the documents, monitoring reports and any other pertinent data, and anything additional required by [the Department]." In each five-year report, Sandia was also required to "update the fate and transport model for the site with current data, and re-evaluate any likelihood of contaminants reaching groundwater." Further, the five-year report was required to "detail all efforts to ensure any future releases or movement of contaminants are detected and addressed well before any effect on groundwater or increased risk to public health or the environment." Before each five-year report was approved by the Department, it and its supporting information were required to be readily available to the public, and the Department was to take public comments on the report to which it would respond in its final approval. The 2005 order did not specify when the first five-year report was due nor did it specify what action or decision would trigger the commencement of the five-year reporting period.

{7} Sandia submitted a CMI plan in November 2005, and the Department approved it in December 2008. The remedy, vegetative soil cover with bio-intrusion barrier, was installed in 2009, and in January 2010 the Department of Energy (DOE) on behalf of Sandia timely submitted a CMI report. After the requisite review and comment period, the Department approved the CMI report in its letter dated October 14, 2011. The approval letter triggered the requirement that Sandia submit its long-term plan within 180 days. In addition to notifying Sandia that it was required to submit the long-term plan within 180 days, the October 14, 2011, letter stated that: "Upon [the Department's] approval of the [long-term plan], the first five-year period for re-evaluating the feasibility of excavation and analyzing the effectiveness of the remedy, required under the [2005 order], will begin. This will allow for monitoring data to be acquired under the [long-term plan] to be available for the purpose of conducting the evaluation." The October 14, 2011, letter was posted on the Department's website and placed in Sandia's publicly accessible file.

{8} Sandia originally submitted a long-term plan on September 25, 2007, but that version was withdrawn and, within 180 days of the Department's approval of the CMI report, Sandia re-submitted its long-term plan on March 23, 2012. It is the March 23, 2012, version of the long-term plan that is at issue in this appeal.

{9} The stated purpose of the long-term plan "is to ensure that the [mixed-waste landfill], with the [remedy in place], remains protective of human health and the environment." In addition to detailing the scientific and technical means by which its purpose will be met, the long-term plan addressed the

requirement of the five-year report, stating in relevant part that:

> [t]he first five-year re[-]evaluation period will begin upon [the Department's] approval of this [mixed-waste landfill long-term plan] (Kieling October 2011). The first [five-year report] will be submitted to [the Department] five years after approval of the [long-term plan] and include monitoring results for the first four years under the [long-term plan] to allow time to prepare and submit the report.

"Kieling October 2011" within the parentheses is a reference to the October 14, 2011, letter approving the CMI report that was signed by John E. Kieling, Acting Chief of the Department's Hazardous Waste Bureau.

{10} In September 2012, the Department issued a notice of public comment period and public dialogue meeting regarding the long-term plan. In October 2012, the Department, assisted by the DOE and Sandia, held a public meeting at which it provided information on the long-term plan and answered questions. The Department also conducted a 150-day public comment period and provided responses to the public's comments. After these proceedings, the Department issued its letter approving the long-term plan on January 8, 2014.

{11} Citizen Action appeals the Department's approval of the long-term plan arguing, primarily, that the Department used the approval of the long-term plan to unlawfully "circumvent," "disregard," "delay," "ignor[e]," and modify the provision of the 2005 order that, in Citizen Action's view, "explicit[ly]" required Sandia to file the first five-year report on May 26, 2010, five years after the 2005 order. Citizen Action also raises what we construe to be a second issue, that is, that the long-term plan unlawfully modified the permit by changing the number, location, and depth of "upgradient and downgradient" wells of the groundwater-monitoring network.

{12} Because we conclude that Citizen Action failed to timely appeal from the October 2011 letter, in which the Department made the at-issue determination regarding the five-year reporting period, we decline to consider the propriety of the determination. Citizen Action's argument that the long-term plan modified the permit as it pertained to the groundwater-monitoring network is not supported by the record, and we affirm the Department's approval of the long-term plan in that regard.

DISCUSSION

The Timeliness of the Appeal and the Ambiguous Due Date of the Five-Year Report in the 2005 Order

{13} Sandia and the Department argue that the 2005 order was ambiguous as to when the first five-year report was due and that Citizen Action waived its right to raise the issue by failing to request clarification regarding the five-year report due date in the administrative proceedings related to the 2005 order or in the appeal from the 2005 order. Alternatively, they argue that because the Department's October 2011 letter reflected the Department's final determination regarding when the first five-year report was due, by failing to appeal from the October 2011 letter, Citizen Action waived its right to appeal that determination. Sandia and the Department argue that Citizen Action's appeal is untimely and should not be

considered. We review issues of waiver and timeliness de novo. *Clinesmith v Temmerman*, 2013-NMCA-024, ¶ 13, 298 P.3d 458 (stating that timeliness issues are reviewed de novo); *Concerned Residents of Santa Fe N., Inc. v. Santa Fe Estates, Inc.*, 2008-NMCA-042, ¶ 22, 143 N.M. 811, 182 P.3d 794 (stating that a waiver issue is reviewed de novo).

{14} Citizen Action argues that the 2005 order unambiguously required the first five-year report to be submitted by May 26, 2010, five years after the date of the 2005 order. The obvious implication of this argument is that because the 2005 order was unambiguous, Citizen Action would have had no reason to request clarification regarding the due date of the first five-year report during the administrative proceedings or the appeal related to the 2005 order. Further, Citizen Action argues that the Department's October 2011 letter "did not constitute adequate notice to a party that might wish to appeal an administrative decision."

{15} As noted in the background of this Opinion, the 2005 order did not specify when the first five-year report was due, nor did it identify the action that would trigger the five-year reporting period. The 2005 order's silence on the matter of when Sandia was required to submit its first five-year report led the Department to conclude that the order was ambiguous in regard to the five-year reporting period, and it led Citizen Action to conclude that the first five-year report was due within five years of the 2005 order. For the purpose of addressing the timeliness of the appeal, we assume without deciding that these disparate interpretations of the 2005 order were both reasonable and that the 2005 order was therefore ambiguous as to when the first five-year report was due. *Lawton v. Schwartz*, 2013-NMCA-086, ¶ 21, 308 P.3d 1033 (recognizing that "an ambiguity is created when provisions are reasonably and fairly susceptible [of] two constructions" (omission, internal quotation marks, and citation omitted)); *cf. Rummel v. Lexington Ins. Co.*, 1997-NMSC-041, ¶ 48, 123 N.M. 752, 945 P.2d 970 (recognizing that silence in a contract created an ambiguity).

{16} Because the 2005 order could reasonably have led Citizen Action to have understood that the first five-year report was unequivocally due in 2010, it would be unfair for this Court to hold that Citizen Action was required, in the proceedings related to the 2005 order, to request clarification of an ambiguity that it did not perceive. Accordingly, we reject the Department's and Sandia's argument that Citizen Action waived or otherwise forewent its opportunity to raise the issue of the five-year report's due date by not addressing it in the proceedings related to the 2005 order, including the appeal. Nevertheless, we conclude that because Citizen Action failed to appeal from the Department's October 2011 letter, its appeal related to the due date of the five-year report is untimely.

{17} Section 74-4-14(A) provides that "[a]ny person who is or may be affected by any final administrative action . . . may appeal to the [C]ourt of [A]ppeals for further relief within thirty days after the action." The phrase "final administrative action" is not defined. *See generally* NMSA 1978, § 74-4-3 (2010) (providing definitions of terms used in the Hazardous Waste Act, NMSA 1978, §§ 74-4-1 to -14 (1977, as amended through 2010)). Therefore, we determine finality "based on pragmatic consideration of the matters at issue and analysis of whether the administrative body has in fact finally

resolved the issues." *N.M. Indus. Energy Consumers v. N.M. Pub. Serv. Comm'n*, 1991-NMSC-018, ¶¶ 1, 24, 111 N.M. 622, 808 P.2d 592 (stating the standard used to determine finality in the context of a direct appeal to our Supreme Court from an agency decision). Our "pragmatic consideration" of the administrative agency's action includes considering, among other things, "whether certain issues will be revisited" by the agency and whether the agency will engage in "further fact finding" that "will elicit more evidence illuminating the issues[.]" *Id.* ¶¶ 24, 26.

{18} The Department's October 2011 letter does not support an inference that the Department intended to further consider any matter as to the approval of the CMI report, including the issue as to the timing of the long-term plan and the five-year report. *See id.* ¶ 26. The October 2011 letter unequivocally reflected the Department's determination that the five-year reporting period "will begin" upon the Department's approval of the long-term plan. *See id.* (stating that one factor that weighs heavily in considering whether an agency decision is final is what the agency has said it "will do"). It also provided an explanation for its decision, stating that commencing the five-year reporting period upon approval of the long-term plan would "allow for monitoring data to be acquired under the [long-term plan] to be available for the purpose of conducting the [five-year] evaluation[,]" thereby reflecting that the Department's decision was based, at least in part, on its consideration of facts relevant to the question of when the five-year report should be due. *Cf. Paule v. Santa Fe Cnty. Bd. of Cnty. Comm'rs*, 2005-NMSC-021, ¶ 9, 138 N.M. 82, 117 P.3d 240 (stating that a final order is characterized by a resolution of factual issues).

{19} In sum, the Department's October 2011 letter reflected that it had considered the relevant facts and determined that the five-year report would be due five years after the long-term plan was approved. The Department's October 2011 letter did not suggest that the matter of the due date of the first five-year report would be revisited or subject to change based upon previously unconsidered facts or evidence. As such, we conclude that it constituted the Department's "final administrative action" in that regard. Because we conclude that the Department's October 2011 letter reflected its final decision regarding when the five-year reporting period would commence, the thirty-day time frame within which Citizen Action could have appealed that decision has long expired. *See* § 74-4-14(A) (stating that a final administrative action may be appealed within thirty days after the action).

{20} Citizen Action attempts to overcome its failure to timely appeal from the October 2011 letter by reasoning that because Sandia referenced the October 2011 decision in its long-term plan, the Department's January 2014 letter approving the long-term plan constituted its "final administrative action" regarding the due date of the five-year report. We are not persuaded by Citizen Action's reasoning.

{21} Unlike the October 2011 letter approving the CMI report and also stating the Department's determination that the five-year reporting period would commence upon the Department's approval of the long-term plan, the Department's January 2014 letter contained no reference to the five-year report, nor did it reflect that the Department had undertaken any further decision-making in regard to the due date of the five-year report. To the extent that the Department's January

2014 letter implicitly approved Sandia's stated intention to submit the five-year report within the time-frame stated in the October 2011 letter, its approval was directed at Sandia's plan to implement the October 2011 action; it was not itself an appealable action on the question of the five-year report. *See Chem. Weapons Working Grp., Inc. v. United States Dep't of the Army*, 111 F.3d 1485, 1494 (10th Cir. 1997) (recognizing the distinction between a final agency action and the implementation of the decision reflected in the final agency action). We reject Citizen Action's claim that its appeal of the Department's decision to require the first five-year report five years after its approval of the long-term plan was appropriately taken from the Department's approval of the long-term plan.

{22} Further, in responding to the Department and Sandia regarding the timeliness of its appeal, Citizen Action claims that it did not have adequate notice of the October 2011 letter. Specifically, Citizen Action states that it was not aware of the Department's decision regarding the commencement of the five-year reporting period until either March 2012, when Sandia submitted the long-term plan that noted that "[t]he first five-year . . . period will begin upon [the Department's] approval of this [long-term plan,]" or May 2012, when Citizen Action obtained a copy of the Department's October 2011 letter via an Inspection of Public Records Act request. Citizen Action's lack-of-notice argument is unpersuasive in the context of this case.

{23} Pursuant to the terms of the 2005 order, the public's continued access to information and ability to participate in future decisions regarding the remedy was assured, among other ways, by requiring Sandia and the Department to "provide a convenient method for the public to review . . . major documents [including the CMI plan, the CMI report, and the long-term plan]" related to the mixed-waste landfill "including but not limited to posting the documents on a publicly accessible website." *Citizen Action*, 2008-NMCA-031, ¶ 38 (alterations, internal quotation marks, and citation omitted). The Department complied with this directive when it issued its October 2011 letter by posting the letter to its publicly available website and in Sandia's publicly accessible file. *See* http://www.nmenv.state.nm.us/HWB/snlperm.html#MWLCMIReport (last visited January 23, 2015). Citizen Action does not argue or provide authority to support the proposition that the Department was required to provide notice of its October 2011 letter by doing anything more than posting it on the publicly accessible website.

{24} We conclude that, as a result of the letter having been posted on the Department's website and in Sandia's publicly accessible file, Citizen Action was or at least should have been aware of the October 2011 approval letter at the time that it was issued. *See United States v. Bank of America*, 303 F.R.D 114, 119 (D.D.C. 2014) (holding that an appellant had actual or constructive notice of a judgment for purposes of timely appealing it where the judgment was available via the court's publicly accessible data base and via a website especially set up for the settlement). Even were we to give Citizen Action the benefit of the doubt and assume that, owing to circumstances beyond its control, Citizen Action did not learn of the Department's decision until March or May 2012, Citizen Action presents no justification for not having filed an appeal immediately thereafter. *See Clinesmith*, 2013-NMCA-024, ¶ 37 (recognizing that the appellate court may

review an untimely appeal, "but only in the most unusual circumstances beyond the control of the parties" (alteration, internal quotation marks, and citation omitted)).

{25} Having failed to timely appeal from the October 2011 letter within thirty days of its publication, or at the very least, within thirty days of having learned of the decision in March or May 2012, Citizen Action's appeal filed on February 3, 2014, is untimely. Accordingly, we decline to consider it. *See id.* ¶ 43 (declining to review an appeal that was filed over five years after the at-issue order was entered).

The Groundwater-Monitoring Issue

{26} Citizen Action claims, without citation to the record to support its assertion, that "[t]he March 2012 [long-term plan] changed the number, location[,] and depth of upgradient and downgradient wells of the groundwater monitoring network" thereby modifying the permit. *See Corona v. Corona*, 2014-NMCA-071, ¶ 28, 329 P.3d 701 (recognizing that the appellate court "has no duty to review an argument that is not adequately developed" and is unsupported by citation to the record). Sandia argues that Citizen Action's argument lacks merit because "the [p]ermit . . . does not include specific monitoring requirements such as the number, location, and depth of wells." In support of its argument, Sandia points to the relevant section of the permit, as modified according to the 2005 order. Because Citizen Action fails to respond to this argument or to provide record support for its argument in its reply, we conclude that Citizen Action concedes the point that Sandia has made. *See Delta Automatic Sys., Inc. v. Bingham*, 1999-NMCA-029, ¶ 31, 126 N.M. 717, 974 P.2d 1174 (explaining that failure to respond in a reply brief to arguments raised in an answer brief constitutes a concession of the matter). This issue provides no basis for reversal.

CONCLUSION

{27} Because Citizen Action has demonstrated no grounds for reversal, we affirm the Department's decision reflected in its January 2014 letter to approve the long-term plan.

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

JONATHAN B. SUTIN, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

CYNTHIA A. FRY, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-059

Filing Date: February 24, 2015

Docket No. 33,554

CHARLES WOOD,

Plaintiff-Appellant,

v.

THE CITY OF ALAMOGORDO and SAM TRUJILLO,

Defendants-Appellees.

John R. Hakanson, P.C.
Miguel Garcia
Alamogordo, NM

for Appellant

Brennan & Sullivan, P.A.
James P. Sullivan
Christina L.G. Brennan
Santa Fe, NM

Robyn Hoffman
Tijeras, NM

for Appellees

OPINION

KENNEDY, Judge.

{1} Plaintiff Charles Wood appeals the district court's order granting summary judgment dismissing his claims against the City of Alamogordo and Sam Trujillo (collectively, Defendants) for violation of his procedural due process rights under both the United States and New Mexico Constitutions.[1] Wood asserts that the existence of bias in pre-termination and post-termination procedures violated his right to due process. We conclude as a matter of law that an employee is not entitled to a non-biased, pre-termination decisionmaker. And, to the extent that Wood asserts post-termination bias, we conclude that he failed to establish sufficient material facts to support this claim. Accordingly, we affirm.

I. BACKGROUND

{2} Wood was employed as Captain of Operations of the Alamogordo Department of Public Safety when he became the subject of domestic abuse allegations. Before he was arrested and while the investigation was ongoing, Wood was advised by Trujillo, the Director of the Alamogordo Department of Public Safety, Wood would be terminated if arrested. Trujillo also informed Wood of the benefits of early retirement versus termination. Wood asserts that Trujillo told him that Wood "had no chance of winning this" during their discussion of the pre-termination hearing over which Trujillo would preside. Although Wood would have also been entitled to a post-termination appeal heard by the city manager, Wood alleged that Trujillo had remarked to him in the past that Trujillo had the city manager "under his thumb." Wood therefore asserts that he elected early retirement before he was either arrested or terminated because exercise of the pre- and post-termination procedures available to him would have been futile.

{3} Wood filed a complaint, under 42 U.S.C. § 1983 (2013), against Defendants, claiming they violated his procedural due process rights under the United States and New Mexico

[1]Wood does not argue that the New Mexico Constitution should be interpreted to provide greater protection than the federal due process clause provides and concedes that the analysis is the same. We have, therefore, limited our analysis accordingly. *See State v. Gomez*, 1997-NMSC-006, ¶ 23, 122 N.M. 777, 932 P.2d 1 (holding that where a state constitutional provision has not been interpreted differently than its federal analog, the party seeking different interpretation must assert in the district court that the state constitution offers greater protection and must provide reasons in support of a different interpretation).

Constitutions by failing to provide fair pre- and post-termination procedures and that Defendants violated the Peace Officer's Employer-Employee Relations Act. The parties stipulated to dismissal of the Peace Officer's Employer-Employee Relations claim. On the motion for summary judgment, the district court determined that, although Wood could conceivably establish a cause of action based on a combination of the New Mexico Constitution and 42 U.S.C. 1983's grant of remedies for a violation of constitutional rights, he failed to do so in this case. The district court granted summary judgment in favor of Defendants, ruling that Trujillo was entitled to qualified immunity because he was acting in his official capacity and because Wood failed to show that Trujillo violated clearly established law. The district court also ruled there was no genuine issue of material fact as to a violation by the City of Wood's procedural due process rights. This appeal followed.

II. DISCUSSION

{4} On appeal, Wood contends that the district court erred by (1) determining that Wood had not demonstrated a violation of clearly established law with respect to Trujillo, and (2) concluding that Wood had not presented sufficient material facts to demonstrate a violation of his procedural due process rights by the City. We begin by setting out the standards relevant to our review of Wood's claims and then turn to address these arguments.

A. Standard of Review and Applicable Law

{5} "Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Self v. United Parcel Serv., Inc.*, 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582; *see* Rule 1-056(C) NMRA. We review a district court's grant of summary judgment de novo. *Self*, 1998-NMSC-046, ¶ 6.

{6} The party moving for summary judgment has the burden to make a prima facie showing that no genuine issue of material fact exists. *Hyden v. Law Firm of McCormick, Forbes, Caraway & Tabor*, 1993-NMCA-008, ¶ 10, 115 N.M. 159, 848 P.2d 1086. "Once this prima facie showing has been made, the burden shifts to the non-movant to [show] the existence of specific evidentiary facts which would require trial on the merits." *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 10, 148 N.M. 713, 242 P.3d 280 (internal quotation marks and citation omitted). "The non-movant may not rely on allegations or speculation, but must come forward with admissible evidence demonstrating a genuine issue requiring trial and also demonstrate that facts allegedly in dispute are material to the claims at issue." *Buke, LLC, v. Cross Country Auto Sales, LLC*, 2014-NMCA-078, ¶ 21, 331 P.3d 942, *cert. denied*, 2014-NMCERT-007, 331 P.3d 923. "To determine which facts are material, the court must look to the substantive law governing the dispute[.] The inquiry's focus should be on whether, under substantive law, the fact is necessary to give rise to a claim." *Romero*, 2010-NMSC-035, ¶ 11 (internal quotation marks and citations omitted). Finally, because resolution on the merits is favored, "we view the facts in a light most favorable to the party opposing the motion and draw all reasonable inferences in support of a trial on the merits[.]" *Handmaker v. Henney*, 1999-NMSC-043, ¶ 18, 128 N.M. 328, 992 P.2d 879.

B. Qualified Immunity, Clearly Established Law, and Trujillo

{7} We begin by addressing Wood's argument that the district court erred in concluding he failed to establish that Trujillo violated clearly established law. In order to analyze this issue, we must first discuss the concept of qualified immunity.

{8} Under 42 U.S.C. § 1983, a government official performing discretionary functions is entitled to qualified immunity from suit as long as his "conduct [did] not violate clearly established [federal] statutory or constitutional rights of which a reasonable person would have known." *Cockrell v. Bd. of Regents of N.M. State Univ.*, 1999-NMCA-073, ¶ 8, 127 N.M. 478, 983 P.2d 427 (alterations in original) (internal quotation marks and citations omitted). This Court has previously stated:

> [Q]ualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." Put another way, qualified immunity is "the usual rule," such that "only in exceptional cases" will governmental actors have no immunity from § 1983 claims brought against them for money damages in their individual capacities.

Cockrell, 1999-NMCA-073, ¶ 8 (citations omitted).

{9} Once qualified immunity is raised, our courts apply a two-part test:

> First, a court must look at the undisputed facts and those facts adduced by the party opposing summary judgment to see if there is any evidentiary support for finding a possible violation of law. Second, if the law may have been violated, a court must ask if that law was clearly established at the time of the alleged violation.

Id. ¶ 9 (citations omitted). Thus, as this Court has previously recognized, "[o]n a summary judgment motion the issue is an essentially legal question whether the conduct of which the plaintiff complains violated clearly established law." *Id.* (internal quotation marks and citation omitted). Ultimately, "[a]n official is entitled to qualified immunity on a motion for summary judgment if the right allegedly violated was not so clearly established that an objectively reasonable, similarly situated official would have known that the challenged actions would violate the Constitution." *Id.*

{10} Wood relies on *Reid v. New Mexico Board of Examiners of Optometry* to argue that Trujillo violated clearly established law and is therefore not entitled to qualified immunity. 1979-NMSC-005, 92 N.M. 414, 589 P.2d 198. In *Reid*, our Supreme Court reversed a board of examiners' decision revoking an optometrist's license to practice because the board failed to disqualify one of its members on the basis of bias. *Id.* ¶¶ 1, 9. The Supreme Court held that "[w]hen government agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process." *Id.* ¶ 8. Thus, Wood argues that, "[a]t a minimum, a fair and impartial tribunal requires that the trier of fact be disinterested and free from any form of bias or predisposition regarding the outcome of the

case" and that Trujillo's predisposition violated his right to due process. *Id.* ¶ 7.

{11} While *Reid* emphasizes the importance of fairness in administrative procedures, we note that it addresses procedures in which an ultimate decisionmaker is biased. *Id.* ¶ 8. The facts presented by *Reid* did not require our Supreme Court to address the level of procedure required to satisfy due process at a pre-deprivation stage. *See Fernandez v. Farmers Ins. Co. of Ariz.*, 1993-NMSC-035, ¶ 15, 115 N.M. 622, 857 P.2d 22 ("[C]ases are not authority for propositions not considered." (internal quotation marks and citation omitted)). Thus, *Reid* is distinguishable. Because our case law does not address whether bias by the decisionmaker at the pre-termination phase violates procedural due process, we turn to federal law.

{12} Courts that have addressed this issue have held that procedural due process does not require an unbiased decisionmaker at the initial termination phase. In *McKinney v. Pate*, 20 F.3d 1550, 1562 (11th Cir. 1994), the Eleventh Circuit held that "due process is satisfied when the challenger has an opportunity to present his [or her] allegations and to demonstrate the alleged bias." According to the Eleventh Circuit, "[a] demonstration that the decisionmaker was biased, however, is not tantamount to a demonstration that there has been a denial of procedural due process." *Id.* When an employee facing termination "learns of the decisionmaker's alleged bias prior to or during the proceeding[,] . . . courts usually require that the challenger contemporaneously object to the bias." *Id.* The Eleventh Circuit explained:

> [U]nlike substantive due process violations, procedural due process violations do not become complete unless and until the state refuses to provide due process. More specifically, in the case of an employment termination case, due process [does not] require the state to provide an impartial decisionmaker at the pre-termination hearing. The state is obligated only to make available the means by which [the employee] can receive redress for the deprivations.

Id. (alterations in original) (internal quotation marks and citations omitted).

{13} The Third Circuit recognized that the initial termination decision is usually made by an employee's direct supervisor or someone working in the same organization as the employee because that person is already familiar with the employee and the situation. *McDaniels v. Flick*, 59 F.3d 446, 460 (3rd Cir. 1995). "[T]o require that the state ensure an impartial pre[-]termination hearing in every instance would as a practical matter require that termination decisions initially be made by an outside party rather than the employer as charges of bias always could be made following an in-house discharge." *Id.* The Third Circuit reasoned that, while it is not surprising that an individual responsible for the pre-termination decision would be the target for claims of bias, to require pre-termination decisions to be made by an outside party would be unduly cumbersome for the employer and may be unreasonably invasive for the employee. *Id.* Following the decision of the Eleventh Circuit in *McKinney*, as well as the decisions of the Ninth, Sixth, and Fifth Circuits, the Third Circuit concluded in *McDaniels* that "such excessive pre[-]termination precaution is [not] necessary

where the state provides a neutral tribunal at the post-termination stage that can resolve charges of improper motives." *McDaniels*, 59 F.3d at 460; *see Walker v. City of Berkeley*, 951 F.2d 182, 184 (9th Cir. 1991) ("[F]ailure to provide an impartial decisionmaker at the pre[-]termination stage, of itself, does not create liability, so long as the decisionmaker at the post-termination hearing is impartial."); *Duchesne v. Williams*, 849 F.2d 1004, 1005 (6th Cir. 1988) (holding that procedural due process in the employment termination context does not require a neutral and impartial decisionmaker at the pre-termination hearing, but only a right of reply before the official responsible for the discharge); *Schaper v. City of Huntsville*, 813 F.2d 709, 714-16 (5th Cir. 1987) (holding that, even if allegations of bias and conspiracy on the part of the decisionmaker were true, "the state cannot be expected to anticipate such unauthorized and corrupt conduct" (citing *Parratt v. Taylor*, 451 U.S. 527, 541-44 (1981)). We agree and hold that due process does not require the state to provide an employee with an impartial decisionmaker at the pre-termination level.

{14} Viewing Wood's argument in light of our holding, Trujillo was the person in the best position to know the charges against Wood and whether termination was warranted. Trujillo warned Wood that his failure to give a statement to the investigating agency would result in an arrest, which, in turn, would result in his termination. Trujillo also told Wood that, from what Trujillo knew of the case, there was no way Wood would win an appeal of his termination. Trujillo's statements appear to explain to Wood the consequences of refusing to give a statement to the investigating agency. Even assuming Wood properly objected that Trujillo was biased, and Trujillo was, in fact, biased, the law is not clearly established that Wood was entitled to an unbiased pre-termination decisionmaker and, for this reason, we affirm the district court.

{15} We note, however, that case law holding that it is not necessary to guarantee a completely disinterested pre-termination decisionmaker relies on the fact that the employee is given access to a neutral post-termination tribunal that can resolve charges of improper motive. *See, e.g.*, *McDaniels*, 59 F.3d at 460. We further note that Wood asserts that the city manager's decision would be tainted or influenced by Trujillo. Specifically, Wood testified in a deposition that Trujillo had made comments that "he had the . . . [c]ity [m]anager . . . under his thumb." Wood does not, however, indicate when these statements were made in relation to his termination and provides no other information to support his assertion that the review by the city manager would not be neutral.[2] As we discussed above, the non-movant may not rely on speculation or conclusions to overcome a movant's prima facie showing. *Buke*, 2014-NMCA-078, ¶ 21. In addition, affidavits or depositions containing hearsay are not sufficient evidence of a fact. *Seal v. Carlsbad Indep. Sch. Dist.*, 1993-NMSC-049, ¶ 14, 116 N.M. 101, 860 P.2d 743. We therefore cannot conclude that Wood established that summary judgment was improper.

C. Procedural Due Process and the City

{16} We next turn to Wood's argument that the district court erred in determining that

[2]We note that Wood argues all of his proffered facts were not accepted as true. To the extent that Wood lists proffered facts that are more akin to conclusions, neither this Court nor the district court is bound by Wood's characterization of conclusions or speculation as fact. *See Buke*, 2014-NMCA-078, ¶ 21.

his procedural due process rights were violated. We understand this portion of Wood's argument to be directed at the dismissal of his claims against the City.

{17} To prevail in a 42 U.S.C. § 1983 claim against a government entity based on conduct of a government official,

> a plaintiff must show more than just that the entity's agent violated the plaintiff's rights; the plaintiff must also demonstrate that the injury to the plaintiff resulted from the execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy.

Niederstadt v. Town of Carrizozo, 2008-NMCA-053, ¶ 11, 143 N.M. 786, 182 P.3d 769 (internal quotation marks and citation omitted). In other words, "municipal liability under 42 U.S.C. § 1983 is limited to deprivations of federally protected rights caused by action taken pursuant to official municipal policy of some nature." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 471 (1986) (internal quotation marks and citation omitted). We note, however, that "municipal liability may be imposed for a single decision by municipal policymakers . . . where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered." *Id.* at 480-81.

{18} Wood has not alleged an injury that resulted from the City's policy or custom. Moreover, even if we were to assume Trujillo is a policymaker, as we have discussed above, Wood has failed to demonstrate that Trujillo's actions were unconstitutional. We therefore conclude that Wood has not demonstrated that the district court's grant of summary judgment in favor of the City was in error.

III. CONCLUSION

{19} For the reasons stated above, we conclude that the district court's grant of summary judgment was proper. Accordingly, we affirm.

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

RODERICK T. KENNEDY, Judge

WE CONCUR:

CYNTHIA A. FRY, Judge

LINDA M. VANZI, Judge

Certiorari Denied, April 30, 2015, No. 35,207

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-060

Filing Date: March 2, 2015

Docket No. 32,338

JANEKA MAYER,

Plaintiff-Appellee,

v.

SUSAN SMITH,

Defendant,

and

MARILYN JONES, GARY JONES, ROBERT LONG, and STEPHANIE LONG,

Intervenors/Defendants-Appellants.

Alex Chisholm
Albuquerque, NM

for Appellee

Ronald T. Taylor
Albuquerque, NM

for Appellants

OPINION

KENNEDY, Judge.

{1} Janeka Mayer (Plaintiff) owns property which is burdened by an easement. She erected a fence using trees within the easement as posts and thus encroached onto the easement. Gary and Marilyn Jones (Jones) and Robert and Stephanie Long (Long) (collectively, Intervenors), owners of the dominant estate, intervened in a suit Plaintiff had filed against another neighbor, but involving the same easement. Jones and Long sought to enforce the easement and force removal of Plaintiff's fence. The district court ruled against Intervenors, restricting the scope and ownership of the easement and leaving the fence undisturbed. We reverse and remand for further proceedings.

I. BACKGROUND

{2} The physical relationships between properties are depicted in the appended illustration, which appears in the record as Intervenors' Exhibit F, provided to aid in understanding the facts presented herein.

{3} Jones bought his property, Tract 5B and 5C, in 1977. In 1979, he purchased an easement from Anne Clarke and Peggy Clarke (Clarke). Carlos Arguello bought Tract 5A, immediately north of Tract 5B and 5C from Clarke. In 2002, Plaintiff purchased land, Tract 5-1B, from Arguello. It is undisputed that land was subject to the easement Jones purchased from Clarke in 1979. The easement served Tracts 5B and 5C, which Jones has owned since 1972. In addition to a detailed description of the servient estate, the easement at issue provides the following language:

> WHEREAS, the family of . . . Jones [seeks] a non[-]exclusive [e]asement across the lands of the "grantors" for the personal use of theirselves, their families, their heirs, and their assigns, for ingress and egress over and across "grantors" property for household purposes[.]
>
> NOW, THEREFORE, for valuable consideration . . . , the undersigned hereby grant to . . . Jones, and to their families, heirs, and assigns, the non[-]exclusive right of ingress and egress, for household and non[-]commercial purposes, over and across a [t]wenty[-]foot[-]wide portion of the afore described property inside and along the [n]orthernmost and [w]esternmost boundaries thereof.

Jones cleared trees to create the path that is in the easement now and used it to access a portion of his land that was inaccessible by vehicle via any other existing roads due to a "boulder strewn and tree covered, eroded, and very steep" ridge that divided his property. Jones used the land "at least [fifty] times a year . . . for landscaping, . . . wood cutting, pinon picking, [and] picnicking[,]" and his sons learned how to drive there. The easement was occasionally used to bring in a wood chipper to dispose of unwanted brush piles, and Jones plowed the easement to remove snow. In 2009, Jones sold a portion of his land, specifically Tract 5C, which was accessible using other existing roadways, to Long. The tracts owned by Jones and Long together make up the dominant estate as Jones owned it when the easement was purchased in 1979. After the sale to Long of Tract 5C, the easement on Plaintiff's property was the only vehicular access to Tract 5B, which Jones still owns.

{4} This lawsuit began when Plaintiff brought suit against another neighbor to prevent the cutting and removal of trees within the easement. Intervenors intervened at the district court's invitation in order to enforce their rights against Plaintiff to allow them full use of the twenty-foot easement over the servient estate. As the trees grew in the easement, Plaintiff used her fence to include them in her property, resulting in a nine- to eleven-foot area becoming inaccessible to Intervenors.

{5} In the district court, Intervenors presented their case.[1] Plaintiff moved for directed verdict. The district court stated: "I'm granting in part and denying in part the motion for [d]irected [v]erdict." In its written judgment, the district court stated that "[t]he dominant estate belongs to the property of . . . Long" and "does not, as a matter of law, belong to both Intervenors." The district court held that "[t]he intended use of the easement was for household purposes, which was historically limited to occasional use as a hiking . . . [and] vehicle [trail]." Next, the district court limited Intervenors' rights to the easement by stating that they had "no authority to expand the historic use, boundaries[,] or existing cleared portion of the easement." The district court allowed for Plaintiff's fence to remain inside the easement boundaries.

{6} On appeal, neither party attacks the validity of the original twenty-foot easement. Similarly, both parties agree that the easement is appurtenant. We therefore treat the validity and terms of the appurtenant easement as fact on appeal. *Varos v. Union Oil Co. of Cal.*, 1984-NMCA-091, ¶ 2, 101 N.M. 713, 688 P.2d 31 (acknowledging facts that are not disputed become facts on appeal); *see Kikta v. Hughes*, 1988-NMCA-105, ¶ 12, 108 N.M. 61, 766 P.2d 321 (allowing characterization of easement to become a fact on appeal where both parties characterized easement at issue as an appurtenant easement).

II. DISCUSSION

A. Standard of Review

{7} Although Plaintiff presented a "legal

[1]An intervenor's burden is that which would have existed if he or she had been an original party in the suit. "If he tenders an affirmative issue which is met with a denial, he must assume the burden of proof." *Maldonado v. Haney*, 1980-NMCA-053, ¶ 18, 94 N.M. 335, 610 P.2d 222 (Lopez, J. dissenting) (internal quotation marks and citation omitted).

argument for [d]irected [v]erdict," the district court, having heard Intervenors' evidence and given its findings, acted as a trier of fact. As such, the motion was actually a motion for involuntary dismissal as provided for by Rule 1-041(B) NMRA. *Garcia v. Am. Furniture Co.*, 1984-NMCA-090, ¶ 3, 101 N.M. 785, 689 P.2d 934 (stating that, in a non-jury trial, "motion for a directed verdict was, in effect, a motion to dismiss under . . . Rule [1-041(B)]").

{8} Rule 1-041(B) provides for the dismissal of an action upon the motion of the defendant after the close of the plaintiff's case-in-chief on the ground that, "upon the facts and the law[,] the plaintiff has shown no right to relief." The district court as trier of the fact may then "render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence." *Id.* A dismissal operates as an adjudication upon the merits unless the district court specifies otherwise in its order for dismissal. *Id.* A judge, deciding an involuntary dismissal, "is not bound to give [the] plaintiff's testimony the most favorable aspect[,] but rather should give the testimony such weight as it is entitled to receive." *Carlile v. Cont'l Oil Co.*, 1970-NMCA-051, ¶ 28, 81 N.M. 484, 468 P.2d 885.

{9} Appellate courts "uphold an involuntary dismissal under Rule 1-041(B) if the dismissal is rationally based on the evidence." *Hull v. Feinstein*, 2003-NMCA-052, ¶ 14, 133 N.M. 531, 65 P.3d 266. On appeal, evidence is examined "only to the extent necessary to determine whether it gives substantial support to the [district] court's findings." *Worthey v. Sedillo Title Guar., Inc.*, 1973-NMSC-072, ¶ 7, 85 N.M. 339, 512 P.2d 667. Substantial support is that "which is acceptable to a reasonable mind as adequate support for a conclusion." *Id.* The appellate courts view evidence in the "most favorable light to support the findings, and evidence inconsistent with or unfavorable to the findings will be disregarded." *Id.*

{10} At trial, the district court stated that, in granting the directed verdict, it was "taking all the evidence in the light most favorable to the party putting on the case . . . and giving them any benefit of the doubt." We note that, under *Carlile*, this is an incorrect standard. *See* 1970-NMCA-051, ¶ 28. The parties failed to address the issue of whether the district court was applying the correct evidentiary standard during the trial and continued to ignore the issue on appeal. Thus, we do not address it. *See In re Doe*, 1982-NMSC-099, ¶ 3, 98 N.M. 540, 650 P.2d 824 (indicating that an appellate court should not reach issues that the parties have failed to raise in their briefs).

B. Scope of the Easement

1. An Unambiguous Easement Agreement Sufficiently States the Parties' Intent; Evidence of Intent Extrinsic to That Agreement Is Irrelevant

{11} The existence and scope of an express easement are "determined according to the intent of the parties." *Skeen v. Boyles*, 2009-NMCA-080, ¶ 18, 146 N.M. 627, 213 P.3d 531. The intent of the parties is derived from the language of the agreement. *Id.* "[T]he written language of an easement should be conclusive, and consideration of extrinsic evidence is generally inappropriate." *Dethlefsen v. Weddle*, 2012-NMCA-077, ¶ 12, 284 P.3d 452. Furthermore, "[w]here . . . the grant or reservation is specific in its terms, *it is . . . decisive of the limits of the easement.*" *Dyer v. Compere*, 1937-NMSC-088, ¶ 12, 41

N.M. 716, 73 P.2d 1356. (Emphasis added.) If the easement language is ambiguous, however, " 'the parties' intention must be determined from the language of the instrument as well as from the surrounding circumstances.' " *Dethlefsen*, 2012-NMCA-077, ¶ 12 (quoting *Sanders v. Lutz*, 1989-NMSC-076, ¶ 8, 109 N.M. 193, 784 P.2d 12). As such, we must determine whether the written agreement in this case is ambiguous.

a. The Easement Is Unambiguous

{12} None of the parties nor the district court ever intimated a belief that the grant of easement in this case was ambiguous. In *Dethlefsen*, this Court conducted a lengthy analysis of easement ambiguity. While concluding that the easement documents in question unambiguously reserved a fifty-foot-wide easement, we also concluded that the easement's scope was ambiguous. This conclusion was based on the omission of necessary terms: "(1) the nature and purpose of the easement, (2) an identification of each of the dominant estate holders, and (3) its duration." *Dethlefsen*, 2012-NMCA-077, ¶ 19. Similarly, we concluded that a "lack of a definite location [led] to an ambiguity." *Id.* ¶ 22. Just as the *Dethlefsen* Court determined there was an unambiguous reservation of a fifty-foot-wide easement, we determine there is an unambiguous reservation of a twenty-foot easement. As such, we next analyze the easement in the context of each of these sources of ambiguity to determine whether the scope of the easement is ambiguous.

{13} First, unlike in *Dethlefsen*, where we determined a right of ingress and egress was "not definitive as to the specific nature and purpose of the easement[,]" *id.* ¶ 19, the easement agreement's stated purpose in this case provides for ingress and egress, for personal use, and for household and non-commercial purposes. Taken together, these phrases clearly identify the nature of the use as non-commercial and personal and the purpose of the easement as a right of access. Next, the easement agreement adequately identifies "each of the dominant estate holders" as *Dethlefsen* suggested was necessary. *Id.* The agreement grants an easement "to . . . Jones, and to their families, heirs, and assigns[.]"[2] Next, *Dethlefsen* looks for information in the easement agreement disclosing the duration of the easement.

{14} An easement terminates when it expires by its terms. Where no definite term is established, the duration of an express easement is indeterminate. Restatement (Third) of Property: Servitudes § 4.3 cmt. e (2000) ("The duration of most servitudes is left indefinite because they are created to implement arrangements whose useful lives cannot be predicted when they are created. . . . When no definite term is established in the creation of the servitude, its term is indeterminate under the rule stated in this subsection. This rule applies to . . . expressly created servitudes."). As such, the duration of Jones's easement is indeterminate. Finally, the easement agreement at issue identifies a definite location: "A [t]wenty[-]foot[-]wide portion of the afore described property inside and along the [n]orthernmost and [w]esternmost boundaries thereof." *See Dethlefsen*, 2012-NMCA-077, ¶¶ 22-23 (identifying easement as "the [s]outherly twelve . . . feet of the above described property" as an example of unambiguous

[2]The easement agreement grants the easement to John and Patricia Shows as well. As they are not involved in this lawsuit in any way, that language from the agreement has been omitted.

easement language which "plainly answered" all of the legally relevant questions (internal quotation marks and citation omitted)).

{15} In this easement, the purposes are listed, the dominant estate holders clearly set out, the dimensions of the easement unequivocal, the duration unlimited, and the location clearly identified. Absent any of the ambiguity discussed above, which has been the basis for a determination of ambiguity in our previous easement cases, we conclude that the easement agreement at issue in this case is unambiguous. Because the easement agreement is unambiguous, easement law demands that the intent of the parties and, therefore, the scope of the easement be derived from the written agreement alone and that the circumstances surrounding the creation of the agreement not be considered. *See Brooks v. Tanner*, 1984-NMSC-048, ¶ 18, 101 N.M. 203, 680 P.2d 343 ("Here, we are presented with a specific, straightforward reservation of an easement. We find the intentions of the parties to be clear from the language utilized in the contract. The terms of the easement reservation . . . are specific and unambiguous. There is no need for reference to extrinsic evidence; the terms of the reservation are decisive of the limits of the easement.").

b. The District Court Misused the Extrinsic Evidence

{16} The district court used extrinsic evidence to limit the easement's scope based on what it interpreted the parties' intentions to be. Although Intervenors' counsel pointed out that a court cannot go beyond the written language of the easement when the writing clearly states the intent of the parties, the district court responded that "there is actually an opportunity to go beyond the four corners of the agreement to provide me with information about the facts surrounding the circumstances at the time this was purchased." The district court lamented that it had "almost zero testimony concerning the circumstances surrounding the purchase of the easement." In support of its conclusion that it could consider evidence extrinsic to the agreement, the district court cited to three authorities: (1) *Luevano v. Group One*, 1989-NMCA-061, 108 N.M. 774, 779 P.2d 552; (2) *Camino Sin Pasada Neighborhood Ass'n v. Rockstroh*, 1994-NMCA-164, 119 N.M. 212, 889 P.2d 247; and (3) the "current state of the law . . . with respect to contracts."

{17} These authorities do not support the district court's conclusion. *Luevano* and *Camino Sin Pasada* are inapposite in a case such as this where the easement is clearly defined in length, width, parties, location, and purpose, and where the nature of the grant is undisputed. *See Aladdin Petroleum Corp. v. Gold Crown Props., Inc.*, 561 P.2d 818, 822 (Kan. 1977) (stating that where the width, length, and location of an easement for ingress and egress have been expressly set forth in the instrument, the easement is sufficiently specific and definite that considerations of present use of the dominant estate are not controlling). In *Luevano*, this Court addressed whether the defendants had a valid easement and whether that easement was assignable absent any express reference to land owned by grantees and without language specifying whether the easement stated was appurtenant or in gross. 1989-NMCA-061, ¶¶ 1, 11. Here, neither the validity nor boundaries of the easement are questioned. And the parties agree that the easement was appurtenant. In *Camino Sin Pasada*, we addressed whether the intent to

create an easement existed where the language in the deed at issue was ambiguous and, therefore, "susceptible of clarification through the use of extrinsic evidence." 1994-NMCA-164, ¶¶ 6, 8. The ambiguities and missing terms that gave rise to a consideration of extrinsic evidence in *Luevano* and *Camino Sin Pasada* simply do not exist in this case. Neither the parties nor the district court suggested ambiguity existed, and neither party points to a single place in the record where ambiguity was asserted or argued. This Court has established a distinction between contract interpretation and easement interpretation with regard to extrinsic evidence. *See Dethlefsen*, 2012-NMCA-077, ¶ 12 ("Unlike contract construction, the written language of an easement should be conclusive, and consideration of extrinsic evidence is generally inappropriate.").

{18} We pause here to clarify that we do not fault the district court for admitting evidence extrinsic to the written agreement given that both parties offered such evidence. Rather, we find the district court's use of that evidence in determining the parties' intent impermissible in light of the unambiguity of the easement agreement.

2. The Dominant Estate Owners Must Have Access to the Easement's Full Twenty Foot Width

{19} As explained above, the written language of the easement agreement in this case lays out the width, length, location, and purpose of the easement and reflects a clear intention to create a twenty foot wide easement. The scope of an easement must conform to the intent of the parties who created it by express agreement. *See Skeen*, 2009-NMCA-080, ¶ 18.

a. The District Court's Ruling Perpetuated an Unlawful Encroachment

{20} The district court's judgment allowed for Plaintiff's fence to remain inside the twenty foot easement and prohibited the dominant estate owner from returning the easement to the width provided for by its terms. The judgment specified that the easement was limited to the "existing cleared portion" of land and had to remain as it stood before the lawsuit. The easement provides for a twenty-foot-wide easement. Plaintiff admits she placed her fence well inside the twenty-foot easement, limiting it to approximately nine- to eleven-feet wide in some places. In order for Intervenors to access all twenty feet of the easement they have been granted, Plaintiff's fence must be removed.

3. Historic Limitations Applied to the Easement and Dominant Estate Were Impermissible

{21} The determinative factor in defining the scope of an appurtenant easement is the intent of the parties. That intent is interpreted from the language of the unambiguous agreement. *See Skeen*, 2009-NMCA-080, ¶ 18. The district court erroneously relied on extrinsic evidence by considering testimony regarding use of the easement and dominant estate since the easement's creation in 1979.

{22} The testimony which the district court relied on in limiting the easement was as follows. Jones testified that he and his family used the easement a minimum of fifty times per year to access Tract 5B in order to gather stones, cut wood, pick pinons, and picnic. Jones also testified that the easement was occasionally used for bringing in a wood chipper to clear brush and that he plowed

snow from it, but Plaintiff's fence now prohibits plowing.

{23} The district court restricted the scope of the easement to household purposes and limited household purposes to the historic uses of the easement. The district court's determination, by focusing solely on the "household purposes" language of the agreement, ignores that the easement also permits any non-commercial purposes, as well as an otherwise unqualified right of ingress and egress.

{24} This Court has previously held that a right of "ingress and egress" allows for "access to the land in question plus the [c]rossing of another's land in order to obtain this access." *Martinez v. Martinez*, 1979-NMSC-104, ¶ 8, 93 N.M. 673, 604 P.2d 366 (defining "right[s] of ingress and egress" while determining whether sufficient language existed to constitute an express easement (internal quotation marks and citation)); *cf.* Restatement (Third) of Property: Servitudes § 4.10 cmt. c, illus. 1 (2000) ("[T]he owner of [an easement is] entitled to use the road [twenty-four] hours a day by any form of transportation that does not inflict unreasonable damage or unreasonably interfere with the enjoyment of [the property].").

{25} Additionally, the district court's reliance on historic use in creating an all-inclusive list of permissible uses of the easement is a misapplication of the law of appurtenant easements. Although historic use is a valid and, indeed, necessary consideration in determining the scope of a prescriptive easement, we have found, and the district court and Plaintiff's counsel directs us to, no case law that considers historic use determinative in defining the scope of an express and unambiguous appurtenant easement. *Maloney v. Wreyford*, 1990-NMCA-124, ¶ 15, 111 N.M. 221, 804 P.2d 412 ("The rule is that the extent of a *prescriptive* easement is established by its historical usage." (emphasis added)).

C. Division of the Easement's Dominant Estate

{26} Last, we conclude that the easement still serves the entire dominant estate, now comprised of Tracts 5B and 5C. "An appurtenant easement runs with the land to which it is appurtenant . . . and passes with the land to a subsequent grantee with passage of the title." *Skeen*, 2009-NMCA-080, ¶ 22 (omission in original) (internal quotation marks and citation omitted). "[A]n appurtenant easement cannot be assigned in the absence of a transfer of the dominant estate[.]" *Kikta*, 1988-NMCA-105, ¶ 11. Generally, "a right of way appurtenant to land is appurtenant to every part of it, and if the owner divides it into several lots, the grantee of each lot has an equal right over the servient land even though the subdivision does not abut upon such right of way[.]" R.W. Gascoyne, Annotation, *Property Which Does Not Abut Upon Right of Way—Easement By Necessity Over One Part of Dominant Tenement To Reach Right of Way Appurtenant To Entire Tenement*, 10 A.L.R.3d 960, § 5[b] (1966). "[B]enefits and burdens of appurtenant servitudes are not affected by the subdivision of either the benefited or burdened property." Restatement (Third) of Property: Servitudes § 5.7 cmt. a (2000). "[U]pon transfer of a part of a dominant tenement having appurtenant thereto a right of way over a servient tenement, the new owner of the transferred part of the dominant tenement acquires a right to use the right of way over the servient tenement." R.W. Gascoyne,

Annotation, *General Rule That Subsequent Owner Has Right To Use Right of Way*, 10 A.L.R.3d 960, § 3 (1966); *see* James W. Ely, Jr. & Jon W. Bruce, *The Law of Easements & Licenses in Land: Division of Easements Appurtenant* § 9:3 (2014) ("[T]he right to use an easement appurtenant extends to each subdivided portion of the dominant estate.").

{27} Jones moved to Tijeras in 1972. Jones bought Tracts 5B and 5C and built a home on what is now Tract 5C. In 1979, Jones purchased an easement to provide access to the present Tract 5B because that portion of his property was otherwise inaccessible via the existing roads. The existence of both Tracts 5B and 5C was known to Clarke at the time the easement was sold. However, at trial, the district court, in the absence of evidence to support it, summarized its finding, stating that "regardless of who owns the property, the easement was sold for the benefit of one family, not two." The district court also stated that the easement "was intended to benefit one family because only one family existed at the time." The district court cited no legal principle to support this conclusion and, in light of the foregoing stated principles and easement provision extending benefit of the easement to families, heirs, and assigns, we are aware of none that would permit it. The district court's judgment concludes that "[t]he dominant estate does not, as a matter of law, belong to both Intervenors." We disagree.

{28} The district court's reasoning that the easement was intended to benefit a single family mischaracterizes appurtenant easements. They benefit the land that comprises the dominant estate, rather than individual owners as the district court's reasoning suggests. *See* 28A C.J.S. *Easements* § 17 (2014) ("The benefit of an appurtenant easement can be used only in conjunction with the ownership or occupancy of a particular parcel of land."). Jones did not attempt to assign the right to use the easement separately from the dominant estate, but only made a valid transfer of title of a portion of the dominant estate. There is nothing in our case law to suggest the division of the dominant estate alone extinguishes the rights to the easement and, under the facts presented at trial, the easement remains appurtenant to the entire dominant estate regardless of the division of ownership. We hold that the partition of a dominant tenement alone does not extinguish an easement. We now turn to whether the district court properly determined the increased number of dominant estate owners constitutes an undue burden on the servient estate.

D. Additional Burden of Two Dominant Estates

{29} "The owner of the dominant estate cannot change the extent of the easement or subject the servient estate to an additional burden not contemplated by the grant of easement." *Kikta*, 1988-NMCA-105, ¶ 14; *Stout v. Christian*, 593 S.W.2d 146, 150 (Tex. App. 1980) (stating that the servient estate is subjected to additional burden when "use of the servient estate is curtailed, or destroyed, by the manner in which the easement is used"). Similarly, "easements created to benefit a dominant estate . . . cannot be expanded, changed, or modified without the express consent of the servient estate." *Camino Sin Pasada*, 1994-NMCA-164, ¶ 14. A right of way to divided land, as described above, exists "only if the easement can be enjoyed as to the separate parcels without any additional burden upon the servient tenement." 10 A.L.R.3d 960, § 4 (1966). An "increase in the number of persons holding the benefit of

the servitude alone does not constitute an unreasonable increase in the burden[.]" Restatement (Third) of Property: Servitudes § 5.7 cmt. c.

{30} The problem in this regard proceeds from the district court's consideration of irrelevant evidence. The district court stated: "I certainly don't have any evidence from which I can draw a conclusion that . . . [Clarke] intended to . . . benefit[] two households." Similarly, the district court declined to acknowledge both Intervenors as dominant estate owners and stated: "I don't have any evidence, zero evidence to expand the scope of the easement." Ultimately, the district court held that "[t]he dominant estate has no authority to expand the historic use, boundaries[,] or existing cleared portion of the easement" and that the dominant estate owner therefore could not cut any trees or bring heavy construction equipment on the easement. In total, the easement was to "remain as it was before the lawsuit[,]" and Plaintiff's fence could remain within the easement. Contrary to the district court's reasoning, there is no expansion of the easement's use to be considered in this case. The relevant inquiry in determining whether an additional burden exists lies not in whether the parties intended the division of, or increased burden from, the dominant estate, but whether the division created an additional burden on the servient estate.

{31} As explained above, the division of a dominant estate does not generally create an unreasonable additional burden. Rather, the relevant inquiry lies in whether any evidence existed that the scope and use of the easement had increased since the sale or division of the dominant estate. Rather than look for "evidence to expand the scope of the easement[,]" to restrict a valid easement, the district court was obligated to determine whether Intervenors were entitled to a finding of no additional burden based on the testimony given. After reviewing the testimony, we conclude that the district court's finding of an additional burden is not supported by the testimony, and the testimony does not lend the substantial support necessary for us to uphold the district court's decision.

{32} The nature of the evidence presented at trial suggests that the easement in this case is not being expanded, changed, or modified in any way by the division of the dominant estate. While the district court used Jones's testimony as evidence of "historic use" that determined intent, it seems to have been more pertinent to the issue of additional burden. For example, the majority of Jones's testimony on historic use came in response to counsel's question regarding the *frequency* of use and *type* of property being accessed. Counsel's follow-up question—whether the previously described frequency of use of the previously described property had increased—reveals that both the question asked and the answer given were more relevant to the issue of additional burden than the intent of the parties. Jones testified that there had been no change to the use of the easement since it was purchased in 1979.

{33} Long also testified regarding the use of the easement. He testified that he had never driven on the easement, and there have been no changes to his use of the property since he purchased Tract 5C. Jones testified that there had been no changes in his use of the property since he sold Tract 5C to Long in 2009. Long's property is accessible from a public road. The easement is still the same twenty feet in width that it has been since 1979 and is appurtenant to the same dominant estate as it was in 1979. The division of the dominant

estate has not changed the amount of benefited land or the size of burdened property. The easement is also not modified by the division. It is still used for ingress and egress of household and non-commercial purposes as was intended by the 1979 agreement. In light of this evidence, and absent any evidence whatsoever that the use of the easement has changed, we cannot hold that the district court's finding of an additional burden to the servient estate is rationally based on the evidence.

{34} The easement in question can be appurtenant to two dominant estates without expanding, changing, or modifying the burden on the servient estate. We therefore reverse the district court's ruling regarding the ownership of the dominant estate.

III. CONCLUSION

{35} Rather than limiting itself to the unambiguous terms of the easement as it should have done in construing the parties' intent and, thereby, the scope of the easement, the district court relied on historic use of the dominant estate to determine how the easement and dominant estate should be used. According to the unambiguous written agreement, the easement was intended to be twenty-feet wide. Plaintiff's fence currently prevents access to the full twenty feet of the easement. Plaintiff is therefore required to remove her fence from the easement, so as to effectuate the intent of the parties. The district court's judgment regarding the scope of the easement is therefore reversed.

{36} The district court also determined that the division of the dominant estate constituted an impermissible additional burden on the servient estate. Because the division of the dominant estate did not constitute an expansion, change, or modification to the easement, we reverse the district court's decision. Both Intervenors own the dominant estate and possess the right of ingress and egress for household and non-commercial purposes over the easement. We remand for proceedings consistent with this Opinion concerning the fate of the trees within the fence, and such other matters as may be required by this Opinion.

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

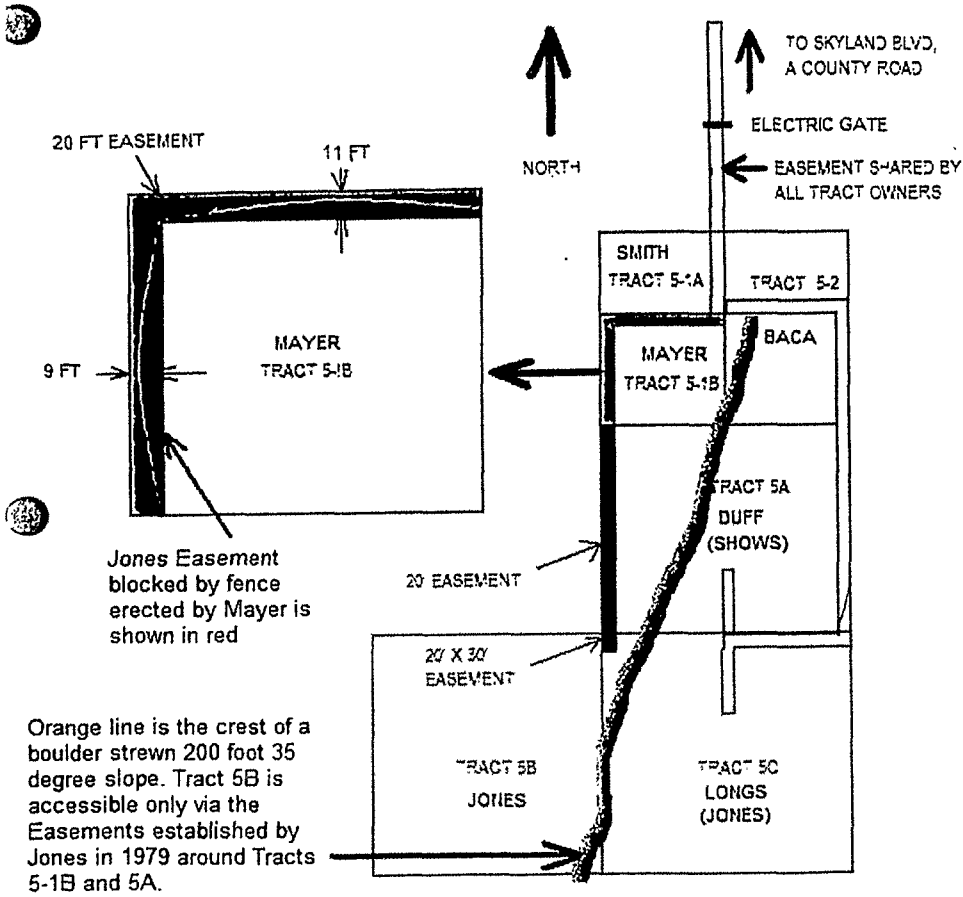
RODERICK T. KENNEDY, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

JONATHAN B. SUTIN, Judge

[redacted]



APPENDIX A

[redacted]

[redacted]

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-061

Filing Date: March 4, 2015

Docket No. 33,263

DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE OF THE RESIDENTIAL ASSET SECURITIZATION TRUST 2006-A9CB, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-I UNDER THE POOLING AND SERVICING AGREEMENT DATED JULY 1, 2006,

Plaintiff-Appellee,

v.

RICHARD MACLAURIN and KRISTIN LUNDGREN,

Defendants-Appellants.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
Sarah M. Singleton, District Judge

Johnson Law Firm, LC
Thomas L. Johnson
Andrew L. Johnson
Albuquerque, NM

for Appellee

Garner Law Firm
N. Ana Garner
Santa Fe, NM

for Appellants

OPINION

FRY, Judge.

{1} Defendants (Borrowers) appeal the district court's order granting Deutsche Bank National Trust Company's motion for summary judgment in a foreclosure action. Borrowers argue that Deutsche Bank did not validly hold their note and mortgage prior to initiating foreclosure proceedings and therefore did not have standing to foreclose on their property. Specifically, Borrowers argue that the mortgage was transferred to Deutsche Bank in violation of a pooling and servicing agreement (PSA) governing the trust and that the transfer was therefore void. Because Borrowers were neither parties to nor third-party beneficiaries of the PSA, we conclude that they cannot challenge alleged violations of the PSA, and we affirm the district court.

BACKGROUND

{2} In 2006, Borrowers executed a promissory note in the amount of $250,000. The note was secured by a mortgage covering Borrowers' property. The note was initially made payable to Plaza Home Mortgage. The note was then indorsed to IndyMac Bank F.S.B., which then indorsed the note in blank. The mortgage was assigned to Deutsche Bank on September 13, 2010. Borrowers defaulted on the note, and Deutsche Bank initiated

foreclosure proceedings on September 27, 2010. Deutsche Bank subsequently moved for summary judgment. In its statement of undisputed material facts, Deutsche Bank stated that it was the holder of the note and mortgage and was therefore the party entitled to foreclose on Borrowers' property.

{3} In response to the motion for summary judgment, Borrowers attached an affidavit by Patrick Williams, offered as an expert in the mortgage banking industry. Williams stated that based on his review of the relevant documents, the trust that the mortgage was assigned to prior to the foreclosure proceedings closed in July 2006. Because the trust closed in 2006 and the assignment of mortgage to the trust occurred in 2010, Williams concluded that the trustee—Deutsche Bank—no longer had authority to accept loan collateral and that the assignment of mortgage was therefore likely in violation of the PSA. Borrowers did not attach a copy of the PSA to their motion or otherwise make it a part of the record.[1]

{4} The district court concluded that the undisputed material facts established that Deutsche Bank was the holder of the note and had standing to foreclose. The district court further concluded that any alleged violations of the PSA were immaterial because Borrowers were precluded from challenging Deutsche Bank's compliance or lack of compliance with the PSA. Accordingly, the district court granted summary judgment. Borrowers appeal.

[1]Williams did provide a link to a pooling and servicing agreement posted on the U.S. Securities and Exchange Commission website. At the time of this Opinion, the file supposedly existing at the link provided was unavailable.

DISCUSSION

Standard of Review

{5} The appellate courts "review[ ] de novo an order granting or denying summary judgment." *United Nuclear Corp. v. Allstate Ins. Co.*, 2012-NMSC-032, ¶ 9, 285 P.3d 644. "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." *Montgomery v. Lomos Altos, Inc.*, 2007-NMSC-002, ¶ 16, 141 N.M. 21, 150 P.3d 971 (internal quotation marks and citation omitted). "On review, [the appellate courts] examine the whole record for any evidence that places a genuine issue of material fact in dispute, and we view the facts in a light most favorable to the party opposing the motion and draw all reasonable inferences in support of a trial on the merits[.]" *Handmaker v. Henney*, 1999-NMSC-043, ¶ 18, 128 N.M. 328, 992 P.2d 879 (internal quotation marks and citation omitted). "The burden rests on the party moving for summary judgment to establish that no genuine issue of material fact exists for trial and that the movant is entitled to judgment as a matter of law." *C & H Constr. & Paving Co. v. Citizens Bank*, 1979-NMCA-077, ¶ 9, 93 N.M. 150, 597 P.2d 1190.

Deutsche Bank Was the Proper Party to Foreclose

{6} Borrowers argue that Deutsche Bank did not have standing to foreclose on their property because the assignment of mortgage was dated four years after the closing date of the Deutsche Bank trust, and a transfer of assets into the trust after the closing date of the trust violated the trust's PSA. Borrowers further argue that the trust was prohibited from accepting non-performing loans, such as

Borrowers' loan at the time it was assigned to Deutsche Bank. Borrowers argue that transfers that violate the terms of the PSA are void and, therefore, under our Supreme Court's recent decision in *Bank of New York v. Romero*, 2014-NMSC-007, 320 P.3d 1, Deutsche Bank does not have standing to enforce a note and mortgage that it never validly held.

{7} As an initial matter, Borrowers' argument differs from the issue presented in *Romero*. In relevant part, the Court in *Romero* held that the bank did not have standing to foreclose because the note in the bank's possession contained two undated indorsements, one in blank and one that specifically indorsed the note to a different entity. *Id.* ¶ 26; *see also id.* ¶ 21 (stating that in the context of third-party enforcement of a note, possession of the negotiable instrument does not necessarily make that party a "holder" with rights of enforcement). The Court concluded that the specific indorsement controlled, and the bank could not rely on the blank indorsement, together with its possession of the note, to establish standing. *Id.* ¶ 26.

{8} That is not the situation in this case. It was undisputed below that Deutsche Bank was the holder, at least in terms of the issue presented in *Romero*, because it possessed the note indorsed in blank. *Id.* ¶ 26 ("[W]e agree with the [b]ank that if the Romeros' note contained only a blank indorsement from Equity One, that blank indorsement would have established the [b]ank as a holder because the [b]ank would have been in possession of bearer paper[.]"). Instead, the issue here is whether a defendant in a foreclosure action can challenge alleged violations of a PSA—an agreement it is neither a party to nor a third-party beneficiary of—in order to establish that the lending institution is not a valid holder of the loan documents and thus is not the proper party to foreclose.

{9} As the district court concluded, the great weight of authority holds that a mortgagor who is not a party to or a third-party beneficiary of the agreement governing the trust is not the proper party to challenge such alleged violations. *See In re Walker*, 466 B.R. 271, 285 (Bankr. E.D. Pa. 2012) ("[I]t appears that a judicial consensus has developed holding that a borrower lacks standing to . . . request a judicial determination that a loan assignment is invalid due to noncompliance with a pooling and servicing agreement, when the borrower is neither a party to nor a third[-]party beneficiary of the securitization agreement, *i.e.*, the PSA."); *Bank of Am. Nat'l Ass'n v. Bassman FBT, L.L.C.*, 981 N.E.2d 1, 7 (Ill. App. Ct. 2012) (collecting cases holding that "the rule that a third[-]party typically lacks standing to challenge . . . an assignment [that violates a PSA] is widely accepted"); *Reinagel v. Deutsche Bank Nat'l Trust Co.*, 735 F.3d 220, 228 (5th Cir. 2013) (holding that the plaintiffs could not challenge alleged violations of a PSA in a mortgage foreclosure action because they were not a party to the PSA and therefore had "no right to enforce its terms"); *In re Correia*, 452 B.R. 319, 324 (B.A.P. 1st Cir. 2011) (holding that mortgagors could not challenge mortgage assignment based on non-compliance with the PSA because they were not parties or third-party beneficiaries of the PSA's terms).

{10} Borrowers, however, base their argument on an exception that allows a mortgagor to challenge an assignment when the assignment is void as a matter of law, not merely voidable. *See Culhane v. Aurora Loan Servs. of Neb.*, 708 F.3d 282, 291 (1st Cir. 2013) (holding that a "mortgagor has standing to challenge a mortgage assignment as invalid,

ineffective, or void (if, say, the assignor had nothing to assign or had no authority to make an assignment to a particular assignee)" but cannot "challenge shortcomings in an assignment that render it merely voidable at the election of one party but otherwise effective to pass legal title"). Borrowers cite two cases they argue establish that assignments in contravention of a PSA are void: *Wells Fargo Bank, N.A. v. Erobobo*, No. 31648/2009, 2013 WL 1831799 (N.Y.Sup.Ct. Apr. 29, 2013) (unreported decision), and *Glaski v. Bank of Am., N.A.*, 160 Cal. Rptr. 3d 449 (Ct. App. 2013). The court in *Erobobo* held that the transfer of loan documents into a trust in violation of the trust's PSA voided the assignment and created material issues of fact as to whether the plaintiff was the proper party to foreclose. *Erobobo*, 2013 WL 1831799, at *7-9. In reaching its holding, the *Erobobo* court strictly construed a New York state statute as voiding "every sale, conveyance[,] or other act of the trustee in contravention of the trust." *Id.* at *8 (citing Est. Powers & Trusts § 7-2.4). In reliance on *Erobobo* and its interpretation of New York trust law, the court in *Glaski* similarly concluded that an assignment in violation of the trust's PSA was void and that the mortgagor therefore had standing to challenge the validity of the assignment. 160 Cal. Rptr. 3d at 463-64. The court held that because the transfer was void, the borrower had standing to challenge it regardless of whether he was a party or third-party beneficiary to any of the agreements. *Id.* at 452 ("Transfers that violate the terms of the trust instrument are void under New York trust law, and borrowers have standing to challenge void assignments of their loans even though they are not a party to, or a third[-]party beneficiary of, the assignment agreement.").

{11} However, *Erobobo* and *Glaski* appear to be anomalies in the body of case law analyzing this issue, and they have been roundly criticized for their interpretation of New York trust law. *See Rajamin v. Deutsche Bank Nat'l Trust. Co.*, 757 F.3d 79, 90 (2d Cir. 2014) ("[W]e are not aware of any New York appellate decision that has endorsed [*Erobobo*'s] interpretation of Est. Powers & Trusts § 7-2.4. And most courts in other jurisdictions discussing that section have interpreted New York law to mean that a transfer into a trust that violates the terms of a PSA is voidable rather than void[.]" (internal quotation marks and citation omitted)); *Espey v. Nationstar Mortg., LLC*, Civ. No. 13-2979 ADM/JSM, 2014 WL 2818657, at *8 (D. Minn. June 19, 2014) ("[T]he majority of courts that have examined *Erobobo* have criticized the decision and held that under New York law, an assignment of a mortgage into a trust in violation of the terms of the PSA is voidable, and not void, as the action can be ratified by the beneficiaries."); *Tran v. Bank of N.Y.*, No. 13 Civ. 580, 2014 WL 1225575, *4-5 (S.D.N.Y. Mar. 24, 2014) (stating that *Erobobo* and *Glaski* "run counter to better-reasoned cases, which apply the rule that a beneficiary can ratify a trustee's *ultra vires* act"); *Davis v. Countrywide Home Loans, Inc.*, 1 F. Supp. 3d 638, 644 (S.D. Tex. 2014) ("Although [Est. Powers & Trusts § 7-2.4] uses the term 'void', courts applying the law have treated improper transfers as subject to ratification and therefore voidable[.]"). Given these authorities, we decline to adopt *Erobobo*'s and *Glaski*'s conclusion that transfers in violation of a PSA void the transfer and give rise to permissible challenges by mortgagors.

{12} Nevertheless, Borrowers argue that because the PSA in this case was formed under New York law, the *Erobobo* decision is binding authority. We are unpersuaded for two reasons. First, the only factual support in the

record for Borrowers' argument is Borrowers' own assertion. *See Durham v. Guest*, 2009-NMSC-007, ¶ 10, 145 N.M. 694, 204 P.3d 19 (stating that "reference to facts not before the district court and not in the record is inappropriate and a violation of our Rules of Appellate Procedure"). The PSA was not made part of the record, and the internet link provided in Williams' affidavit falls short of the requirements of Rule 1-056(E) NMRA that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." Second, Borrowers' argument that *Erobobo* is controlling New York law is not accurate. *Erobobo* is an unpublished supreme court decision (equivalent, in many respects, to a New Mexico state district court). However, a recent memorandum decision by the supreme court appellate division (New York's intermediate appellate court) concluded that the mortgagors "did not have standing to assert noncompliance with the subject lender's pooling service agreement." *Bank of N.Y. Mellon v. Gales*, 982 N.Y.S.2d 911, 912 (N.Y. App. Div. 2014). *Gales* does not engage in a lengthy analysis of this issue, but it cannot be said, as Borrowers contend, that *Erobobo* represents the last word on this point in New York law.

{13} In conclusion, given the judicial consensus regarding a mortgagor's lack of authority to challenge the transfer of loan documents that allegedly violate a PSA, we hold that Borrowers failed to raise a genuine issue of material fact as to whether Deutsche Bank was the proper party to foreclose.

CONCLUSION

{14} For the foregoing reasons, we affirm the district court.

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

CYNTHIA A. FRY, Judge

WE CONCUR:

MICHAEL E. VIGIL, Chief Judge

JONATHAN B. SUTIN, Judge

Certiorari Denied, June 3, 2015, No. 35,275

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-062

Filing Date: March 5, 2015

Docket No. 32,549

ARTHUR FIRSTENBERG,

Plaintiff-Appellant/Cross-Appellee,

v.

RAPHAELA MONRIBOT,

Defendant-Appellee/Cross-Appellant

and

ROBIN LEITH,

Defendant.

Arthur Firstenberg
Santa Fe, NM

Pro Se Appellant

Graeser & McQueen, LLC
Christopher L. Graeser
Santa Fe, NM

Joseph L. Romero Trial Lawyer LLC
Joseph L. Romero
Santa Fe, NM

for Appellee

OPINION

SUTIN, Judge.

{1} Arthur Firstenberg sued his neighbor, Raphaela Monribot, and Robin Leith, the owner-lessor of Ms. Monribot's residence,[1] for injunctive relief and monetary damages under the theories of nuisance and prima facie tort. In his complaint, Mr. Firstenberg alleged that because he suffers from a condition called electromagnetic sensitivity (EMS)[2] that renders him acutely sensitive to electromagnetic radiation, his health was adversely affected by Ms. Monribot's use, within her own residence, of various electronic devices that generate electromagnetic radiation, including a cell phone, a Wi-Fi modem, dimmer switches, and a microcell. After nearly three years of litigation, having held an evidentiary hearing regarding the admissibility of expert scientific testimony, the district court determined that Mr. Firstenberg lacked admissible evidence of general causation and, therefore, granted summary judgment in favor of Ms. Monribot and Ms. Leith (Defendants). Mr. Firstenberg appeals from the court's summary judgment order. As will be discussed in this Opinion, Mr. Firstenberg raises several points of error related to the district court's summary judgment order and to various district court orders that preceded the court's summary judgment.

{2} The electric lines and meter serving Mr. Firstenberg's property were located on Defendants' property. In an effort to force Mr. Firstenberg to relocate and cease using the electric lines and meter on Defendants' property, Ms. Monribot filed counterclaims against Mr. Firstenberg, seeking declaratory and injunctive relief and trespass damages. The court, having determined that Mr. Firstenberg had an implied easement by necessity that permitted him to access the equipment, granted partial summary judgment in favor of Mr. Firstenberg as to all of Ms. Monribot's counterclaims. Ms. Monribot cross-appeals from this and other district court rulings. Ms. Leith is not a party in this appeal.

{3} As to Mr. Firstenberg's appeal, we conclude that his arguments do not demonstrate that the district court's summary judgment in favor of Ms. Monribot as to his claims of prima facie tort and nuisance was in error. We hold that Mr. Firstenberg's remaining arguments provide no basis for reversal, and we affirm the district court's summary judgment in favor of Ms. Monribot. As to Ms. Monribot's cross-appeal, we

[1]Throughout this Opinion, we refer to the house and property owned by Ms. Leith and leased by Ms. Monribot as "Defendants' property."

[2]The parties, the witnesses, and the district court variously refer to Mr. Firstenberg's condition as electromagnetic hypersensitivity, electromagnetic sensitivity, and idiopathic environmental intolerance attributed to electromagnetic fields. For ease of reference, we use the acronym EMS throughout this Opinion in reference to Mr. Firstenberg's condition.

conclude that the issues raised therein provide no basis for reversal.

BACKGROUND

{4} This case comes to us with a lengthy and complicated factual and procedural history. As background, we provide only those facts that are necessary to illuminate the appellate issues. Further facts are provided, as necessary, in the body of this Opinion.

{5} Mr. Firstenberg claims that he suffers from EMS, the numerous symptoms of which are triggered by electromagnetic radiation, such as radio waves emitted from cell phones, computers, electrical transmission lines, and similar devices. Mr. Firstenberg claims, further, that owing to "chemical" and electromagnetic sensitivities, he has been declared totally and permanently disabled by the United States Social Security Administration and that since 1992 Mr. Firstenberg has been collecting social security disability benefits on that basis.

{6} Mr. Firstenberg and Ms. Monribot met in 2008 when Ms. Monribot responded to his Craigslist ad seeking a personal cook. Mr. Firstenberg hired Ms. Monribot to cook his meals, and he ate his meals in her house; this arrangement lasted approximately one month until Ms. Monribot went to Europe for four months. While she was in Europe, Ms. Monribot sublet her house to Mr. Firstenberg, and later, Mr. Firstenberg purchased the house. Approximately one year later, Ms. Monribot returned to Santa Fe and moved into a house (owned by Ms. Leith) that was next door to Mr. Firstenberg's house. The day after Ms. Monribot moved in next door to him, Mr. Firstenberg became so ill that he thought he "could die[,]" and his symptoms recurred every time he returned to his house.

{7} Mr. Firstenberg attributed his illness to Ms. Monribot's use, within her own home, of a cell phone and a number of dimmer switches, and later, to her Wi-Fi and microcell. Ms. Monribot refused Mr. Firstenberg's requests to replace her dimmer switches with regular switches, use a land-line instead of a cell phone, to turn off her Wi-Fi, and to unplug her computer at night; she later refused Mr. Firstenberg's offer of $10,000 to comply with his requests. Mr. Firstenberg stated that because Ms. Monribot would not comply with these requests, he was unable to use his house for more than a few minutes at a time without suffering EMS symptoms that were caused by radiation from Ms. Monribot's electronic devices "entering" and "leak[ing]" into his house. Accordingly, Mr. Firstenberg filed the present lawsuit.

{8} Mr. Firstenberg's original complaint, filed on January 4, 2010, for nuisance and prima facie tort named only Ms. Monribot as a Defendant. He later filed a first amended complaint, in which Ms. Leith was added as a defendant and indispensable party, and a second and third amended complaint.[3] His complaint for prima facie tort was founded on allegations that, in summary, Ms. Monribot, who knew of Mr. Firstenberg's EMS, "bombard[ed Mr. Firstenberg's] residence with electromagnetic radiation, which she knew would injure [him]"; that she did so intentionally, with the certainty that injury would necessarily result to Mr. Firstenberg; that her use of electronic devices "rendered [Mr. Firstenberg's] home extremely difficult to inhabit and have caused him years of

[3]References to Mr. Firstenberg's "complaint" throughout this Opinion are to his third amended complaint, with references to earlier iterations delineated accordingly.

inconvenience and acute and chronic pain and suffering"; and that Ms. Monribot's conduct "had no valid purpose and was unjustifiable" because she could use a land-line, cable instead of Wi-Fi, and engage in "other simple practices that would not cause her undue expense or inconvenience." Mr. Firstenberg's claim of nuisance was based, in summary, on his allegations that Ms. Monribot's use of electronic devices interfered with his normal residential activities and his private use and enjoyment of his home and his land; Ms. Monribot's actions were intentional and unreasonable; that she knew or should have known that "bombarding [Mr. Firstenberg's] home with electromagnetic radiation interfered with [his] use and enjoyment of his land"; and that her actions caused Mr. Firstenberg "years of inconvenience and acute and chronic pain and suffering." Mr. Firstenberg's complaint sought damages totaling 1.43 million dollars and injunctive relief prohibiting Ms. Monribot from operating equipment that emits electromagnetic radiation.

{9} Ms. Monribot filed counterclaims, seeking a declaratory judgment, injunctive relief, and damages for trespass, seeking to force Mr. Firstenberg to cease using and to relocate the electric lines and meter that are on Defendants' property. Further details related to the factual bases of Ms. Monribot's counterclaims and the district court's disposition of those claims are provided later in this Opinion.

{10} Owing to the nature of Mr. Firstenberg's claims in this case, both Defendants and Mr. Firstenberg obtained experts on the issue of the cause of Mr. Firstenberg's symptoms. Mr. Firstenberg sought to prove that his EMS symptoms were caused by Ms. Monribot's use of electronic devices by relying on the expert testimony of Dr. Erica Elliott, M.D., Mr. Firstenberg's treating physician, and Dr. Raymond Singer, Ph.D, a neurotoxicologist. Defendants sought to prove, through the testimony of psychologist, Dr. Herman Staudenmayer, Ph.D, that Mr. Firstenberg's EMS symptoms were psychological, caused by an undifferentiated somatoform disorder. Each party filed motions seeking to exclude the other's expert on the ground that the proffered expert testimony was inadmissible pursuant to the standards by which the admissibility of scientific expert testimony is measured. Defendants filed an amended version of their motion to exclude the testimony of Drs. Elliott and Singer, and relying on their memorandum in support thereof, Defendants simultaneously filed a motion for summary judgment on the ground that, because Mr. Firstenberg's proffered experts as to causation were not qualified to provide expert scientific testimony, Mr. Firstenberg could not prove causation.

{11} Mr. Firstenberg appeals from the district court's order granting summary judgment in favor of Defendants as to all "allegations, counts[,] and causes of action asserted against Defendants in [Mr. Firstenberg's t]hird [a]mended [c]omplaint for [n]uisance and [p]rima [f]acie [t]ort." The basis for the district court's summary judgment order was Mr. Firstenberg's failure to demonstrate that admissible scientific evidence supported his theory of general causation, that is, that exposure to electromagnetic fields causes, or is capable of causing, the injuries that Mr. Firstenberg complains of, namely, adverse health affects from EMS. The crux of this appeal, therefore, is the propriety of the district court's summary judgment.

{12} Although Mr. Firstenberg raises numerous contentions of error related to various district court rulings and actions that preceded the summary judgment order and that, in his view, warrant reversal of particular rulings, many of Mr. Firstenberg's contentions of error were rendered moot by the district court's summary judgment order. Because we conclude that the district court did not err in granting summary judgment based on Mr. Firstenberg's failure to demonstrate that admissible evidence supported his theory of general causation, we do not consider the moot issues, including issues related to the district court's early partial summary judgment orders or its denial of Mr. Firstenberg's request for a preliminary injunction. Further, because the district court's summary judgment order was based upon Mr. Firstenberg's lack of evidence of general causation, we limit our discussion to that issue and do not consider issues related to specific causation.

DISCUSSION

I. Summary Judgment on General Causation Grounds Was Proper

{13} "A defendant seeking summary judgment bears the initial burden of negating at least one of the essential elements upon which the plaintiff['s] claims are grounded." *Snow v. Warren Power & Mach., Inc.*, 2014-NMCA-054, ¶ 5, 326 P.3d 33 (omission, internal quotation marks, and citation omitted), *cert. granted*, 2014-NMCERT-005, 326 P.3d 1112. "Once such a showing is made, the burden shifts to the plaintiff to come forward with admissible evidence to establish each required element of the claim." *Id.* (internal quotation marks and citation omitted). Where the defendant negates an essential element of the plaintiff's case, and the plaintiff fails to show that admissible evidence creates an issue of fact regarding that element, summary judgment is appropriate. *Estate of Haar v. Ulwelling*, 2007-NMCA-032, ¶ 10, 141 N.M. 252, 154 P.3d 67. We review the district court's decision to grant summary judgment de novo. *Id.*

{14} Causation is an essential element of both nuisance and prima facie tort. *See* UJI 13-1631 NMRA (stating the elements of prima facie tort, including that the defendant's act or failure to act was a cause of the plaintiff's harm); *Scott v. Jordan*, 1983-NMCA-022, ¶ 12, 99 N.M. 567, 661 P.2d 59 (stating that liability for private nuisance requires proof that the alleged nuisance is the cause of an "invasion of another's interest in the private use and enjoyment of land" (internal quotation marks and citation omitted)). In a toxic tort case, where the plaintiff seeks to establish injury as a result of exposure to a harmful substance, including radiation, the plaintiff is required to prove both general and specific causation. *See Andrews v. United States Steel Corp.*, 2011-NMCA-032, ¶ 9, 149 N.M. 461, 250 P.3d 887 ("[T]o establish cause in a toxic tort case, the evidence must show both general causation and specific causation." (internal quotation marks omitted)); *Black's Law Dictionary* 1718 (10th ed. 2014) (defining a "toxic tort" as "[a] civil wrong arising from exposure to a toxic substance, such as . . . radiation"). "General causation is whether a substance is capable of causing a particular injury or condition in the general population and specific causation is whether a substance caused a particular individual's injury." *Andrews*, 2011-NMCA-032, ¶ 9 (internal quotation marks and citation omitted).

{15} In the present case, where Mr. Firstenberg sought to establish injury, specifically, EMS symptoms, as a result of

exposure to electromagnetic radiation, he was required to prove both general and specific causation. As noted earlier, the district court granted summary judgment on the ground that Mr. Firstenberg failed to present admissible evidence of general causation. Because we affirm the district court's summary judgment order on general causation grounds, we need not and therefore do not address specific causation. *See Farris v. Intel Corp.*, 493 F. Supp. 2d 1174, 1180 (D.N.M. 2007) (stating that a "[p]laintiff must first demonstrate general causation because without general causation, there can be no specific causation" (internal quotation marks and citation omitted)); *Acosta v. Shell W. Exploration & Prod., Inc.*, 2013-NMCA-009, ¶¶ 9, 12, 26, 293 P.3d 917 (affirming the district court's grant of summary judgment owing to the plaintiff's failure to produce admissible scientific evidence showing general causation).

{16} In relevant part, in their motion to exclude Mr. Firstenberg's experts, Defendants argued that "EMS [attributed to electromagnetic radiation] has not been established," nor has it "withstood scrutiny in either the scientific or medical communities." Further, Defendants argued that Mr. Firstenberg's proffered experts on the issue of general causation were not qualified, under Rule 11-702 NMRA, to provide scientific expert testimony as to the existence of EMS.

{17} In response to Defendants' amended motion for summary judgment, Mr. Firstenberg argued, in relevant part, that because the district court had yet to rule upon Defendants' motion to exclude his proffered experts, Defendants' claim that he could not prove causation was baseless. Also pending at that time was Mr. Firstenberg's motion to exclude Dr. Staudenmayer's testimony on the ground that Dr. Staudenmayer did not meet the qualifications of an expert witness under Rule 11-702.

{18} Over the course of three days, the district court held an evidentiary hearing on the issues raised in Mr. Firstenberg's and Defendants' respective motions to exclude expert witnesses and on Defendants' amended motion for summary judgment. All three proposed experts, Drs. Staudenmayer, Elliott, and Singer, testified at the evidentiary hearing. Following the hearing, the parties filed written arguments.

{19} Having heard the testimony and considered the parties' written arguments, the district court concluded that the testimony of Drs. Elliott and Singer on the issue of general causation was inadmissible under the standard set forth in *State v. Alberico*, 1993-NMSC-047, 116 N.M. 156, 861 P.2d 192, for evaluating the admissibility of scientific expert testimony. *See id.* ¶ 51 (relying on *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), to enumerate some of the factors that courts should consider in assessing the admissibility of expert scientific testimony under Rule 11-702). Mr. Firstenberg's failure to demonstrate that admissible scientific evidence supported his theory of general causation led the court to grant summary judgment in Defendants' favor on the ground that, in the absence of admissible evidence of general causation, Mr. Firstenberg could not prevail in his claims of nuisance and prima facie tort. Additionally, in light of its summary judgment order, the district court concluded that it was "unnecessary to consider [Mr. Firstenberg's] motion to exclude Dr. Staudenmayer."

{20} Mr. Firstenberg argues on appeal that the district court made a number of errors in

regard to his and Defendants' respective proffered experts. We address Mr. Firstenberg's arguments in turn but first we discuss our standard of review and the standards by which the admissibility of expert testimony is to be determined in the district court.

{21} We review the district court's decision to admit or exclude scientific expert testimony under Rule 11-702 for an abuse of discretion. *Alberico*, 1993-NMSC-047, ¶ 58. The abuse of discretion standard allows the reviewing court to reverse a district court's discretionary decision when the decision was "obviously erroneous, arbitrary, or unwarranted" or where it was "clearly against the logic and effect of the facts and circumstances before the court." *Id.* ¶ 63. The party seeking to admit expert testimony bears the burden of showing that the expert is qualified, that the expert's testimony will assist the trier of fact, and that the expert will "testify only as to scientific, technical[,] or other specialized knowledge with a reliable basis." Rule 11-702; *State v. Anderson*, 1994-NMSC-089, ¶ 14, 118 N.M. 284, 881 P.2d 29 (internal quotation marks and citation omitted); *Parkhill v. Alderman-Cave Milling & Grain Co. of N.M.*, 2010-NMCA-110, ¶ 54, 149 N.M. 140, 245 P.3d 585 (Vigil, J., specially concurring).

{22} In determining whether scientific evidence has a reliable basis, the district court should consider:

> (1) whether a theory or technique can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known potential rate of error in using a particular scientific technique and the existence and maintenance of standards controlling the technique's operation; . . . (4) whether the theory or technique has been generally accepted in the particular scientific field[;] . . . [(5)] whether the scientific technique is based upon well-recognized scientific principle[;] and [(6)] whether it is capable of supporting opinions based upon reasonable probability rather than conjecture.

Anderson, 1994-NMSC-089, ¶ 15 (internal quotation marks and citations omitted). Because the foregoing factors were derived from the United States Supreme Court's opinion in *Daubert* and adopted by the New Mexico Supreme Court in *Alberico*, New Mexico cases often refer to them as the "*Daubert/Alberico* factors." *See Alberico*, 1993-NMSC-047, ¶ 51 (relying on *Daubert* to enumerate some of the factors that courts should consider in assessing the admissibility of scientific evidence under Rule 11-702); *see, e.g., Loper v. JMAR*, 2013-NMCA-098, ¶ 38, 311 P.3d 1184 (referencing the "*Daubert-Alberico* factors"). In this Opinion, for ease of reference, we refer simply to the "*Alberico* factors." We turn now to Mr. Firstenberg's expert witness issues.

Mr. Firstenberg's Arguments Regarding Dr. Staudenmayer

{23} On appeal, Mr. Firstenberg argues that by failing to rule on his motion to exclude Dr. Staudenmayer's testimony, which he continues to assert was inadmissible under Rule 11-702, the court failed to perform its gate-keeping function. We disagree. Insofar as the purpose of Mr. Firstenberg's motion to exclude Dr. Staudenmayer's testimony was to exclude him from testifying at trial, we agree

with the district court's ruling that its summary judgment disposition, which eliminated the possibility of this case going to trial, rendered a ruling on Mr. Firstenberg's motion unnecessary.

Mr. Firstenberg's Arguments Regarding Drs. Elliott and Singer

{24} Mr. Firstenberg also argues that the district court erred in excluding the testimony of his proffered experts on a number of grounds. Namely, he argues that the court erroneously ruled on the proffered experts' conclusions, not their methodologies, and thereby failed to apply the appropriate standard in evaluating the admissibility of the experts' testimony; the court's findings were "clearly erroneous" insofar as its order contained various typographical and semantic errors; and the court erred in excluding the testimony of his treating physician. Additionally, Mr. Firstenberg contends that the district court failed to review and to understand the ninety-three studies that his experts relied upon for their conclusions and were admitted as exhibits and that had the district court familiarized itself with these studies, it would have permitted his experts to testify regarding EMS. We address these arguments summarily.

{25} As an initial matter, we do not consider Mr. Firstenberg's arguments concerning the district court's typographical and semantic errors. To the extent that Mr. Firstenberg believed that these errors warranted further consideration, pursuant to the district court's order he could have timely filed objections to the form of the court's order. Having failed to file such objections in the district court, Mr. Firstenberg has waived the opportunity to challenge the form of the court's order.

{26} Mr. Firstenberg's remaining arguments, founded upon a litany of errors that he alleges were committed by the district court in excluding his experts, are unpersuasive. His arguments in this regard are presented without any attempt to demonstrate that applying the *Alberico* factors to the testimony provided by his experts leads to a conclusion that their testimony constituted admissible scientific testimony. We will not do for Mr. Firstenberg what he has failed to do on his own behalf—that is, search the record in an attempt to demonstrate that his experts meet the standard of reliability required of expert scientific testimony pursuant to the *Alberico* factors. *See Muse v. Muse*, 2009-NMCA-003, ¶ 72, 145 N.M. 451, 200 P.3d 104 ("We will not search the record for facts, arguments, and rulings in order to support generalized arguments.").

{27} It was Mr. Firstenberg's burden, in the district court, to show that his experts, including his treating physician, Dr. Elliott, were qualified to present scientific expert testimony as to the cause of his EMS symptoms. *See Parkhill*, 2010-NMCA-110, ¶ 20 (stating that a treating physician must be qualified pursuant to the *Alberico* factors in order to present scientific expert testimony as to the external causation of the patient's symptoms); *id.* ¶ 54 (Vigil, J., specially concurring) (recognizing that it is the proponent's burden to demonstrate the admissibility of expert scientific testimony). The district court, having reviewed the parties' briefs, authorities, exhibits, reports, expert affidavits, and testimony, concluded that Mr. Firstenberg did not meet that burden. Having reviewed the testimony of Drs. Elliott and Singer, we conclude that the record fully supports the district court's conclusion that they were not qualified to present expert scientific testimony on the issue of general

causation. Mr. Firstenberg's vague and generalized arguments to the contrary provide no basis for reversal. *See Muse*, 2009-NMCA-003, ¶ 72 (recognizing that an appellant seeking to establish that the district court abused its discretion must do so by a discussion of facts, arguments, and rulings that appear in the record).

{28} Finally, Mr. Firstenberg's repeated references to the ninety-three studies upon which his experts relied in forming their conclusions and his argument that the district court erred by failing to familiarize itself with those studies demonstrate a misunderstanding of the law. The studies and articles, standing alone, do not constitute admissible evidence; rather, they constitute inadmissible hearsay. *See* Rule 11-801(A), (C)(2) NMRA; Rule 11-802 NMRA (providing that a written statement that is offered in evidence to prove the truth of the matter asserted in the statement constitutes inadmissible hearsay). Therefore, the district court was under no obligation to independently evaluate the articles and studies upon which Mr. Firstenberg's experts relied in reaching their conclusions. *See Wilde v. Westland Dev. Co.*, 2010-NMCA-085, ¶ 28, 148 N.M. 627, 241 P.3d 628 (stating that the district court may not consider inadmissible hearsay in deciding a summary judgment motion).

{29} Rather, to the extent that Mr. Firstenberg wished to rely upon the contents of the articles and studies to demonstrate general causation, it was incumbent upon him to establish, via his experts, that the articles constituted reliable scientific authority. *See Baerwald v. Flores*, 1997-NMCA-002, ¶ 18, 122 N.M. 679, 930 P.2d 816 (recognizing that an "expert may rely on an article because it is the expert who determines, based on study and experience, whether the article is reliable"); *see also Andrews*, 2011-NMCA-032, ¶ 9 (recognizing that "general causation is established by demonstrating (usually by reference to a scientific publication) that exposure to the substance in question causes (or is capable of causing) disease" (alteration, internal quotation marks, and citation omitted)). Had Mr. Firstenberg established that his experts relied on the articles and studies in forming their opinions and that these items were reliable scientific authority, the content of the articles and studies may have been admissible pursuant to a hearsay exception. *See* Rule 11-803(18)(b) NMRA (governing the hearsay exception related to statements in learned treatises, periodicals, or pamphlets). Having failed to demonstrate through his experts that the studies and articles upon which they relied were admissible as reliable scientific authority showing causation, Mr. Firstenberg cannot argue that the district court erred by failing to consider them.

{30} In sum, we conclude that Mr. Firstenberg has not demonstrated that the district court abused its discretion in concluding that his proffered experts were not qualified to present expert scientific testimony on the issue of general causation or in failing to consider the articles and studies upon which they relied. Having concluded that Mr. Firstenberg's arguments regarding the court's expert witness rulings provide no basis for reversal, we further conclude that the court properly granted summary judgment in favor of Defendants as to Mr. Firstenberg's nuisance and prima facie tort claims. In light of this holding, we do not address his contentions of error regarding the court's denial of a preliminary injunction, its order granting partial summary judgment on prima facie tort, and its order granting summary judgment as to nuisance on grounds other than causation, all of which preceded the court's summary

judgment order. Consideration of these issues would have no effect on the outcome of this appeal. *See Stennis v. City of Santa Fe*, 2006-NMCA-125, ¶ 28, 140 N.M. 517, 143 P.3d 756 ("[A]n appellate court need not decide an issue that will have no practical effect on the current litigation[.]"), *rev'd on other grounds by* 2008-NMSC-008, 143 N.M. 320, 176 P.3d 309.

II. Mr. Firstenberg's Remaining Arguments

A. Mr. Firstenberg's Argument Regarding Federal Preemption

{31} At a hearing on a motion filed by Ms. Monribot[4] seeking to dismiss Mr. Firstenberg's complaint on federal preemption grounds, the district court concluded that to the extent that Mr. Firstenberg's claims related to Ms. Monribot's use of her cell phone, the claims were preempted by federal law. In so holding, the district court relied on *Murray v. Motorola, Inc.*, in which the District of Columbia Court of Appeals held that lawsuits based on the premise that radio frequency (RF) emissions from cell phones are harmful to human health are preempted under the doctrine of conflict preemption because "[s]uch claims conflict with the [Federal Communications Commission (FCC)] determination that wireless phones that do comply with the FCC's RF standards are safe for use by the general public[.]" 982 A.2d 764, 768-69, 777-78 (D.C. 2009) (alteration omitted); *see id.* at 772 (recognizing that conflict preemption precludes laws that "under the circumstances of a particular case, stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (omission, alteration, internal quotation marks, and citation omitted)).

{32} Mr. Firstenberg argues that the district court erred in finding federal preemption with respect to cell phones because, he claims, permitting states to entertain tort law actions premised on the harmful effects of RF emissions would not stand as an obstacle to any congressional objectives. In support of his argument, Mr. Firstenberg cites *Pinney v. Nokia, Inc.*, 402 F.3d 430, 457 (4th Cir. 2005), for the proposition that the Federal Communications Act provided no evidence of an objective "of ensuring that all equipment used in connection with wireless telecommunications be subject to exclusive national RF radiation standards that have the effect of precluding state regulation on the subject." We review this issue de novo. *Humphries v. Pay & Save, Inc.*, 2011-NMCA-035, ¶ 6, 150 N.M. 444, 261 P.3d 592 (stating the standard of review applicable to federal preemption issues).

{33} As was the district court, we are persuaded by the reasoning in *Murray*. The *Murray* court considered and rejected the reasoning in *Pinney* because, among other things, the *Pinney* court failed to consider the fact that Congress had expressly mandated that the FCC "shall prescribe and make effective rules regarding the environmental effects of [RF] emissions," a fact that the *Murray* court considered "critical" in considering whether states may permit lawsuits that are premised on the notion that cell phones cause injury. *Murray*, 982 A.2d at 778 n.19, 780-81 (omission, internal quotation marks, and citation omitted). As the *Murray* court explained, in effecting its congressional mandate, the FCC set limits on the RF

[4]Ms. Monribot filed this motion prior to Mr. Firstenberg having amended his complaint to add Robin Leith as a Defendant.

emissions for cell phones and other devices that "provide a proper balance between the need to protect the public and workers from exposure to excessive RF electromagnetic fields and the need to allow communications services to readily address growing marketplace demands." *Id.* at 776 (internal quotation marks and citation omitted). In order to prevail in a lawsuit based on an alleged injury caused by RF emissions from cell phones, a jury would have to accept the premise that FCC's regulations are inadequate to ensure the safe use of cell phones. *Id.* at 781. This would allow cell phone providers to "be held liable even though they indisputably complied with" FCC regulatory requirements, thereby imposing a legal duty that would directly conflict with federal mandates. *Id.* Such lawsuits are therefore conflict preempted. *Id.*

{34} The *Murray* court's reasoning persuasively demonstrates that conflict preemption prohibits states from establishing tort law liability for claimed injuries resulting from federally permitted cell phone RF emissions. Because the *Pinney* court failed to consider the FCC's regulatory authority or its established regulations concerning RF emissions from cell phones, Mr. Firstenberg's reliance on that case is not persuasive. *See Murray*, 982 A.2d at 778 n.19 (discussing *Pinney*). We conclude that the district court appropriately dismissed Mr. Firstenberg's claims of injury resulting from Ms. Monribot's cell phone usage.

B. Mr. Firstenberg's Argument Regarding the Americans With Disabilities Act

{35} Mr. Firstenberg argues that because the district court entered summary judgment in favor of Defendants in regard to his nuisance claim and because the district court dismissed his claims to the extent that they related to Ms. Monribot's use of her cell phone, the court violated his constitutional right to equal protection under the Fourteenth Amendment and the Americans with Disabilities Act (ADA)[5] and "adopted a new legal doctrine denying access to the courts by a class of individuals." Further, Mr. Firstenberg argues that because the court is a public entity, it is subject to the ADA. Mr. Firstenberg's argument in this regard boils down to a contention that by denying the relief requested in his complaint, the district court violated the ADA and the Fourteenth Amendment. Mr. Firstenberg's arguments in this regard are founded on a misunderstanding of the law, and they provide no basis for reversal.

{36} As an initial matter, Mr. Firstenberg's complaint, having failed to allege that Defendants' conduct amounted to a constitutionally impermissible state action, does not state an actionable claim for a deprivation of equal protection under the ADA. *See Manning v. N.M. Energy, Minerals & Natural Res. Dep't*, 2006-NMSC-027, ¶ 45, 140 N.M. 528, 144 P.3d 87 ("The ADA provides [a] remedy . . . when a state violates the Fourteenth Amendment by depriving an individual of . . . equal protection[.]"); *Foley v. Horton*, 1989-NMSC-061, ¶ 8, 108 N.M. 812, 780 P.2d 638 (stating that an equal protection claim requires the plaintiff to allege or otherwise demonstrate that the at-issue conduct constituted impermissible state action).

{37} Furthermore, the district court's mere

[5]Mr. Firstenberg alleged in his complaint that he is a "qualified individual with a disability as defined [by] the [ADA]."

adjudication of Mr. Firstenberg's lawsuit does not constitute "state action" within the meaning of the Equal Protection Clause. *See King v. King*, 174 P.3d 659, 671 (Wash. 2007) (en banc) (recognizing that a state court's "[a]djudication . . . of private rights is not sufficient state action in the sense necessary to implicate constitutional protections"). Insofar as the United States Supreme Court in *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948), stated a contrary position, the Supreme Court has since modified its position. *Compare id.* (stating that the actions of state courts and their judicial officers "is to be regarded as [an] action of the [s]tate within the meaning of the Fourteenth Amendment"), *with Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 928, 937, 939 n.21 (1982) (recognizing that "the party charged with the deprivation [of a federal right] must be a person who may fairly be said to be a state actor" and rejecting the notion "that a private party's mere invocation of state legal procedures" satisfies the state-actor requirement (internal quotation marks and citation omitted)). *See King*, 174 P.3d at 671 (recognizing that "the United States Supreme Court has . . . pulled back the reach of *Shelley*, if not overruling it sub silentio, by requiring something more than the reliance on a . . . judicial proceeding" (internal quotation marks omitted)).

{38} In sum, we reject the notion that Mr. Firstenberg's lawsuit against two private individuals was somehow transformed, by virtue of the district court's adjudication of the matter, into an equal protection lawsuit under the ADA. We will not consider this issue further.

III. Summary Regarding Mr. Firstenberg's Appeal

{39} In sum, regarding Mr. Firstenberg's appeal, we conclude that the district court did not err in granting summary judgment in Defendants' favor on the ground that Mr. Firstenberg failed to demonstrate that admissible scientific evidence supported his theory of general causation, that is, that electromagnetic fields are capable of causing the types of harm from which he suffers. Because we conclude that Mr. Firstenberg has not demonstrated reversible error on that or any other ground, we affirm the district court's summary judgment. We turn now to the issues raised by Ms. Monribot in her cross-appeal.

IV. Ms. Monribot's Cross-Appeal

{40} In her cross-appeal, Ms. Monribot raises four contentions of error, of which we address only two. Ms. Monribot argues that the district court erred in failing to dismiss Mr. Firstenberg's complaint in its entirety on the ground that federal preemption barred Mr. Firstenberg's claims of injury resulting from any of her electronic devices. She argues, further, that the district court erred in denying, in part, Defendants' amended motion for partial summary judgment on Mr. Firstenberg's prima facie tort claim. Having affirmed, on direct appeal, the district court's summary judgment as to all of Mr. Firstenberg's claims, the foregoing cross-appeal arguments are moot, and we do not address them. *See Crutchfield v. Dep't of Taxation & Revenue*, 2005-NMCA-022, ¶ 36, 137 N.M. 26, 106 P.3d 1273 ("A reviewing court generally does not decide academic or moot questions.").

{41} Additionally, Ms. Monribot argues that the district court erred in finding that Mr. Firstenberg had an implied easement by necessity to access the electrical meter on Defendants' property. Finally, she argues that the district court erred in denying Defendants'

motion to recover costs. We address each of these arguments in turn.

A. The Easement Issue

{42} The electric meter and switch that provided electricity to Mr. Firstenberg's house were located on the exterior wall of Defendants' house. In response to Ms. Monribot's counterclaims by which she sought to exclude Mr. Firstenberg from using Defendants' property to access his electric meter and switch and to force him to remove his electrical meter and switch from the property, Mr. Firstenberg filed a motion for summary judgment on the ground that, in relevant part, he had an implied easement by necessity that permitted the location of and his access to the electrical meter and switch.

{43} The district court granted Mr. Firstenberg's partial summary judgment motion. In its summary judgment order, the court stated that Mr. Firstenberg had an implied easement by necessity to access his electric meter on Defendants' property that "permits all reasonable uses, including but not necessarily limited to turning on and off the electrical switch, accessing the meter, [and] access for maintaining and repairing this switch[.]" The court further stated that Mr. Firstenberg's right of access "does not permit abusive use of the easement" for which "the Landowner" (Ms. Leith) would have "all remedies afforded by law for the over-burdening [of] the [servient] estate."

{44} Ms. Monribot contends that the court erred in determining that Mr. Firstenberg had an implied easement by necessity. "We review de novo legal questions arising from a district court's application of law to the facts involving the existence of an easement." *Los Vigiles Land Grant v. Rebar Haygood Ranch, LLC*, 2014-NMCA-017, ¶ 25, 317 P.3d 842. Likewise, we review de novo the district court's decision to grant summary judgment. *Estate of Haar*, 2007-NMCA-032, ¶ 10.

{45} In considering the nature of implied easements by necessity, New Mexico courts rely on the Restatement (Third) of Property: Servitudes § 2.15 (2000). *Kysar v. Amoco Prod. Co.*, 2004-NMSC-025, ¶ 25, 135 N.M. 767, 93 P.3d 1272 (relying on the Restatement (Third) of Property § 2.15 to discern the nature of an implied easement by necessity). According to the Restatement, an implied easement by necessity arises out of "[a] conveyance that would otherwise deprive the land conveyed to the grantee . . . of rights necessary to reasonable enjoyment of the land . . . unless the language or circumstances of the conveyance clearly indicate that the parties intended to deprive the property of those rights." Restatement (Third) of Property § 2.15. The phrase "[r]ights necessary to reasonable enjoyment of property" is not limited to access rights; it applies to "whatever is reasonably necessary for the enjoyment of property, if the conveyance would otherwise eliminate the property owner's right to do those things." *Id.* cmt. b. This includes the delivery of electricity. *Id.* cmt. d. To find an implied easement by necessity, the necessity must have arisen as a result of a severance of rights held by a single owner, for example, where a single parcel of land is divided into two parcels. *Id.* cmt. c. "The easement by necessity rests . . . heavily upon the intent of the" grantor, and unless there is "a clear indication to the contrary, the grantor is presumed to have intended to have . . . conveyed to his grantees, a means of access to the property in question, so that the land may be beneficially utilized." *Los Vigiles Land Grant*, 2014-NMCA-017, ¶ 28 (alteration,

internal quotation marks, and citations omitted).

{46} In support of his summary judgment motion, Mr. Firstenberg provided, among other things, an affidavit of Yolette Catanach, the former owner of Defendants' and Mr. Firstenberg's properties. Ms. Catanach stated that the two properties originally constituted a single lot upon which two houses (now occupied by Mr. Firstenberg and Ms. Monribot) were located. When Ms. Catanach purchased the lot, both houses were served by a single overhead power line, with the electric meters and switches for both houses attached to the house now occupied by Ms. Monribot. In 1991 Ms. Catanach and her husband split the single lot into two lots, and in so doing, they granted an express easement "as shown and for all existing utilities[.]" Ms. Catanach's affidavit attached, as an exhibit, the deed that indicated the parameters of the express easement. The express easement did not refer to or include the electric meter or switch for the house now occupied by Mr. Firstenberg; however, Ms. Catanach stated that at the time the lot was split, she and her husband intended that the location of and access to the switch and the meter would continue unchanged and unimpaired. Additionally, Mr. Firstenberg stated in an affidavit that there was no electric utility pole on his street from which he could receive electricity service.

{47} Based on the foregoing facts, we conclude that Mr. Firstenberg made a prima facie showing that he had an implied easement by necessity for the transmission of electricity and for access to the switch and meter attached to Defendants' property that entitled him to summary judgment as to Ms. Monribot's counterclaims. To counter Mr. Firstenberg's prima facie showing, Ms. Monribot was required to demonstrate that disputed issues of material fact precluded summary judgment. *See Spencer v. Health Force, Inc.*, 2005-NMSC-002, ¶ 7, 137 N.M. 64, 107 P.3d 504 (stating that once a movant for summary judgment makes a prima facie showing that summary judgment is appropriate as a matter of law, the burden shifts to the opponent to show at least a reasonable doubt as to the existence of a genuine issue of fact).

{48} In response to Mr. Firstenberg's summary judgment motion, Ms. Monribot argued, in relevant part, as admitted to by Mr. Firstenberg, that because he could have an electric utility pole installed on his street and have his electric meter and switch relocated to his own property, Mr. Firstenberg failed to establish the requisite element of "necessity" for an implied easement by necessity. Ms. Monribot reiterates this argument on appeal, claiming that the question whether it would be unreasonable for Mr. Firstenberg to access utilities through his own street was an issue of fact that should have precluded summary judgment. We disagree.

{49} Ms. Monribot's argument evokes the notion of strict, instead of reasonable, necessity. Under the strict necessity test, where "any alternative was available to an easement claimant, no easement would be found." *Martinez v. Martinez*, 1979-NMSC-104, ¶ 29, 93 N.M. 673, 604 P.2d 366. This state does not follow the strict necessity test; rather, "[t]he test of necessity in New Mexico is whether the party claiming the easement could, through the reasonable expenditure of labor or money, create an alternative [to the easement] on his own estate." *Id.*

{50} The only evidence in the record pertaining to the cost of installing a utility pole

on Mr. Firstenberg's property and relocating his meter and switch was Mr. Firstenberg's statement that the cost of doing so would not be reasonable, specifically, that it would be "in excess of $12,000." Ms. Monribot failed to provide any evidence to refute that cost, nor did she attempt to show that the cost was reasonable, for example, by providing evidence of the relative values of the properties or the effect, if any, of the easement on those values. *See Jackson v. Nash*, 866 P.2d 262, 269-70 (Nev. 1993) (stating that in determining whether the expense of creating an alternative to an easement is reasonable, the court may consider the cost of creating the alternative as compared with the values of the servient and the dominant estates and the extent to which the easement will affect their respective values).

{51} Implicit in the district court's determination that Mr. Firstenberg had an implied easement by necessity was its conclusion that the cost of creating a substitute source of electricity was not reasonable under these circumstances and that reasonable minds would not differ as to that issue. *See Beggs v. City of Portales*, 2013-NMCA-068, ¶ 11, 305 P.3d 75 (stating that summary judgment is appropriate "[w]here reasonable minds will not differ as to an issue of material fact" (internal quotation marks and citation omitted)). Ms. Monribot, having failed to present evidence that would support a contrary conclusion to Mr. Firstenberg's summary judgment motion, has therefore failed to raise an issue of material fact in that regard.

{52} Ms. Monribot further argues that the district court relied on inadmissible parol evidence in granting summary judgment. *See Amethyst Land Co. v. Terhune*, 2014-NMSC-015, ¶ 24, 326 P.3d 12 (stating that parol evidence is inadmissible to the extent that it varies "or explain[s] the terms or contradict[s] the legal effect of an unambiguous written instrument" (internal quotation marks and citation omitted)). Specifically, Ms. Monribot argues that the district court relied on Ms. Catanach's affidavit to conclude that the electrical meter and switch serving Mr. Firstenberg's property "was really part of the declared utility easement[.]" The district court's legal conclusion that Mr. Firstenberg had an implied easement by necessity is an obvious indication that the court did not conclude that the express easement encompassed the electrical meter and switch. Ms. Monribot's argument is, therefore, unavailing.

{53} For the foregoing reasons, we affirm the district court's grant of summary judgment in favor of Mr. Firstenberg on the ground of an implied easement by necessity, which permits his reasonable, non-abusive use of the easement for the purpose of accessing his electrical meter and switch.

B. The Costs Issue

{54} Pursuant to Rule 1-054(D)(1) NMRA, "costs . . . shall be allowed to the prevailing party unless the court otherwise directs[.]" Rule 1-054 vests the district court with wide discretion in determining whether to award costs. *Martinez v. Martinez*, 1997-NMCA-096, ¶ 20, 123 N.M. 816, 945 P.2d 1034. Ms. Monribot argues that because Defendants prevailed on summary judgment, they were entitled to recover their costs totaling $84,857.60 and that the district court erred in refusing to award that sum. "[W]e review the trial court's order granting or denying an award of costs for abuse of discretion." *Id.* ¶ 17.

{55} At a hearing on Defendants' motion

to recover costs, the district court ruled that a number of the costs Defendants sought to recover were not recoverable. *See* Rule 1-054(D)(2) (enumerating the costs that "generally are recoverable"). The district court denied Defendants' remaining costs on equitable grounds, including Mr. Firstenberg's inability to pay and the disparity of income between him and Ms. Leith's insurance company, which had paid for nearly all of Defendants' costs.

{56} On appeal, Ms. Monribot does not specifically identify the costs to which her claims of error are directed, nor does she persuasively demonstrate why, based on the record in this case, the court's discretionary decision to deny Defendants' costs was "contrary to logic or reason." *Marshall v. Providence Wash. Ins. Co.*, 1997-NMCA-121, ¶ 28, 124 N.M. 381, 951 P.2d 76 (stating that in order to demonstrate that the district court abused its discretion in awarding costs, the appellant must demonstrate that the "court's ruling [was] contrary to logic or reason"). Rather, Ms. Monribot's argument regarding costs is comprised of a series of quotations from various authorities with no coherent attempt to demonstrate how those authorities relate to the circumstances of this case or why reversal is warranted. We will not attempt to decipher this unclear argument. *See Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 70, 309 P.3d 53 (stating that an appellate court "will not review unclear arguments[] or guess at what a party's arguments might be" (alteration, internal quotation marks, and citation omitted)).

{57} In exercising its discretion to deny or to award costs under Rule 1-054(D), the district court is permitted to disallow costs based upon equitable grounds, including a losing party's inability to pay. *See Martinez*, 1997-NMCA-096, ¶ 20 (stating that equitable considerations are appropriate in determining whether to award costs); *Gallegos ex rel. Gallegos v. Sw. Cmty. Health Servs.*, 1994-NMCA-037, ¶ 30, 117 N.M. 481, 872 P.2d 899 ("[T]he losing party's ability to pay is a proper factor to consider in determining whether to award costs."). Further, in reviewing an issue on appeal, this Court presumes that "the district court is correct and . . . the burden is on the appellant to clearly demonstrate the district court's error." *Wilde*, 2010-NMCA-085, ¶ 30 (internal quotation marks and citation omitted). Because Ms. Monribot has failed to demonstrate error as to costs, we cannot say that the district court abused its discretion in that regard, and therefore, her argument provides no basis for reversal.

CONCLUSION

{58} We affirm the district court's summary judgment in favor of Defendants as to Mr. Firstenberg's claims of prima facie tort and nuisance. We affirm the district court's summary judgment in favor of Mr. Firstenberg as to Ms. Monribot's counterclaims. And we affirm the district court's decision to deny Defendants' motion for costs. As to the remaining issues raised by either party, we conclude that they do not require reversal.

{59} IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

CYNTHIA A. FRY, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-063

Filing Date: March 12, 2015

Docket No. 33,110

AKILAH SANDERS-REED, by and through her parents Carol and John Sanders-Reed, and WILDEARTH GUARDIANS,

Plaintiffs-Appellants,

v.

SUSANA MARTINEZ, in her official capacity as Governor of New Mexico, and STATE OF NEW MEXICO,

Defendants-Appellees.

WildEarth Guardians
Samantha Ruscavage-Barz
Santa Fe, NM

for Appellants

Keleher & McLeod, P.A.
Sean Olivas
Gary J. Van Luchene
Albuquerque, NM

Hector H. Balderas, Attorney General
Santa Fe, NM
Stephen R. Farris, Assistant Attorney General
Albuquerque, NM

for Appellees

Western Environmental Law Center
Erik Schlenker-Goodrich
Taos, NM

for Amici Curiae Law Professors Mary Christina Wood, Philip H. Knight, Denise D. Fort, Eileen Gauna, Reed Benson, Michael Blumm, John Davidson, Gerald Torres, Burns Weston, Kevin J. Lynch, Erin Ryan, Timothy P. Duane, Deepa Badrinarayana, Ryke Longest, Jacqueline P. Hand, Zygmunt Plater, Charles Wilkinson, Patrick C. McGinley, Craig Anthony Arnold, Patrick Parenteau, James R. May, Alyson C. Flournoy, David Takacs, William H. Rodgers, Jr., Karl Coplan, John Dernbach, Maxine Burkett, James Gustave Speth, and Eric T. Freyfogle

Steven C. Sugarman
Cerrillos, NM

for Amici Curiae State Representative Gail Chasey, Amigos Bravos, Sierra Club, Diné Citizens Against Ruining Our Environment, Climate Change Leadership Institute, and Chaco Alliance

OPINION

GARCIA, Judge.

{1} Plaintiffs, WildEarth Guardians, a nonprofit conservation organization, and Carol and John Sanders-Reed, on behalf of their minor daughter, Akilah Sanders-Reed, filed a civil complaint against the State of New Mexico and Susana Martinez, in her official capacity as New Mexico's governor,

(collectively, the State) seeking a judgment declaring, among other things, that the common law public trust doctrine imposes a duty on the State to regulate greenhouse gas emissions in New Mexico. The district court granted summary judgment in favor of the State. Plaintiffs appeal. We affirm.

BACKGROUND

A. The Original Complaint and the Amended Complaint

{2} This is one of several cases identified nationwide asking courts to recognize that states have a common law duty under the public trust doctrine to protect the atmosphere by regulating greenhouse gas emissions. *See, e.g.*, *Kanuk ex rel. Kanuk v. State Dep't of Natural Res.*, 335 P.3d 1088 (Alaska 2014); *Butler ex rel. Peshlakai v. Brewer*, No. 1 CA-CV 12-0347, 2013 WL 1091209 (Ariz. Ct. App. Mar. 14, 2013) (non-precedential); *Filippone ex rel. Filippone v. Iowa Dep't of Natural Res.*, 829 N.W.2d 589 (Iowa Ct. App. 2013) (utilizing a table format to address the issue); *Aronow v. State*, No. A12-0585, 2012 WL 4476642 (Minn. Ct. App. Oct. 1, 2012) (non-precedential); *Chernaik v. Kitzhaber*, 328 P.3d 799 (Or. Ct. App. 2014); *Svitak ex rel. Svitak v. State*, 178 Wash. App. 1020, No. 69710-2-I, 2013 WL 6632124 (Wash. Ct. App. Dec. 16, 2013) (non-precedential).

{3} Plaintiffs' original complaint asked the district court to declare that the State has a public trust duty to protect the atmosphere to the extent defined by "the best available science" and that the State's failure to do so constitutes a breach of its public trust duty. Plaintiffs later amended their complaint to avoid dismissal by the district court on the State's motion. In their amended complaint, Plaintiffs asked the district court to declare that the State has a public trust duty to protect the atmosphere, and that its "failure to investigate the threat posed by unlimited greenhouse gas emissions into the atmosphere, as it relates to climate change" and to devise a plan to "mitigate the effects of climate change" is a breach of the public trust duty. Their amended complaint also asked the district court to order the State to produce, by "reasonable dates certain," an assessment of greenhouse gas levels in New Mexico and the "concomitant climate change impacts based on current climate change science," and plans for redressing and preventing the impairment to the atmosphere caused by greenhouse gases, thereby mitigating the effects of climate change.

B. The Shifting Status of New Mexico's Greenhouse Gas Regulations While This Action Was Pending in the District Court

{4} At the time that Plaintiffs filed their original complaint in May 2011, the State, through the Environmental Improvement Board (the EIB)—the agency charged by the Legislature with protecting New Mexico's air and other natural resources—had promulgated regulations limiting greenhouse gas emissions. *See* NMSA 1978, § 74-2-5(A) (2007); 20.2.100 NMAC (12/27/2010) (repealed 5/7/2012); 20.2.300 to -350 (1/11/2011) (repealed 3/9/2012). Plaintiffs' original complaint acknowledged that these regulations existed, but asserted that they were insufficient to meet the State's public trust duty to protect the atmosphere.

{5} Two months later in July 2011, entities involved in New Mexico's energy industry, with the support of the New Mexico Environment Department (NMED)—the department responsible for maintaining,

developing, and enforcing New Mexico's air quality management regulations—petitioned the EIB to repeal the State's greenhouse gas regulations. *See* NMSA 1978, § 74-1-7(A)(4) (2000). After about ten months of hearings on these petitions, the EIB repealed the greenhouse gas regulations in March and May 2012. In doing so, it concluded that regulating greenhouse gas emissions in New Mexico "will have no perceptible impact on climate change or global warming."

{6} Other environmental groups began the process of initiating judicial review of the EIB's decision as provided under the Air Quality Control Act and the Rules of Appellate Procedure. *See* NMSA 1978, § 74-2-9(A) (1992) ("Any person adversely affected by an administrative action taken by the [EIB] . . . may appeal to the court of appeals. All appeals shall be upon the record made at the hearing and shall be taken to the court of appeals within thirty days following the date of the action."); Rule 12-601(B) NMRA ("Direct appeals from orders, decisions, or actions of boards, commissions, administrative agencies, or officials shall be taken by filing a notice of appeal with the appellate court clerk, . . . within thirty (30) days from the date of the order, decision, or action appealed from."). These groups later moved to dismiss the appeal.

{7} Plaintiffs did not appeal the EIB's decision to repeal the regulations pursuant to the process provided under Section 74-2-9(A) of the Air Quality Control Act or Rule 12-601(B), and they did not initiate a proposal for other regulations using the process provided under NMSA 1978, § 74-2-6(A) (1992) of the Air Quality Control Act. *See* § 74-2-6(A)-(D) (providing, among other things, that "[a]ny person may recommend or propose regulations to the environmental improvement board . . . for adoption[,]" the EIB "shall determine whether to hold a hearing[,] . . . [n]otice of the hearing shall be . . . published in a newspaper of general circulation[,]" such notice "shall also state where interested persons may secure copies of any proposed regulation or air quality standard[,]" and "[a]t the hearing, the [EIB] . . . shall allow all interested persons [a] reasonable opportunity to submit data, views[,] or arguments orally or in writing and to examine witnesses testifying at the hearing."). In response to the EIB's actions, Plaintiffs amended their complaint in this proceeding, acknowledged that the EIB repealed the greenhouse gas regulations, and continued to contend that the State had breached its public trust duties by failing to protect the atmosphere from greenhouse gas emissions.

C. Summary Judgment Disposing of the Amended Complaint

{8} The district court eventually granted summary judgment in favor of the State. In doing so, it concluded that the public trust doctrine would apply to the atmosphere if "the Legislature or the agencies charged with implementing environmental laws had ignored the atmosphere[.]" It further concluded that the public trust doctrine did not apply in this case because (1) the Legislature has established a statutory and administrative scheme for protecting the atmosphere; (2) the undisputed facts showed that the EIB did not ignore the atmosphere when it concluded that regulating greenhouse gas emissions in New Mexico would have no impact on climate change; and (3) Plaintiffs did not claim that "the [political] process was tainted" or that "the public was foreclosed from pursuing the issue."

{9} The district court further noted that

Plaintiffs and other members of the public had the opportunity to participate in the EIB proceedings that led to the repeal of the greenhouse gas regulations, and that they could propose their own greenhouse gas regulations under Section 74-2-6. It concluded that the EIB's decision whether, and to what extent, to regulate greenhouse gas emissions in response to climate change is a "political decision, not a [c]ourt decision[,]" and the remedy is to "elect people who believe that greenhouse gases are a problem, [and] man[kind] does contribute to climate change[.]"

D. Arguments on Appeal

{10} On appeal, Plaintiffs assert that the district court erred when it concluded as a matter of law that "the threshold inquiry in a public trust case is whether the [d]octrine *applies* rather than whether the State is fulfilling its . . . duty as trustee of the [atmosphere]" when it does not regulate "unlimited greenhouse gas emissions[.]" (Emphasis added.) They ask that we formally recognize that the public trust doctrine is operative in New Mexico, "that the atmosphere is a public trust resource[,]" that the State, as trustee, has a duty to "prevent substantial impairment to the atmosphere," and that we remand the case to the district court for further proceedings on its amended complaint. Although Plaintiffs do not ask us to evaluate on appeal any of the other claims for relief that they made in their amended complaint that would flow from the conclusion that the State has a public trust duty to protect the atmosphere, we consider all of the claims in the amended complaint as a whole in addressing whether summary judgment was proper in this case. *See generally 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)).

{11} We distill Plaintiffs' claims down to this: (1) that the common law public trust doctrine provides an alternative process, separate from and without regard to the process established by the Legislature under the Air Quality Control Act, by which the judicial branch of government would hold hearings, weigh evidence, and make findings and conclusions involving interwoven scientific, technical, and economic factors surrounding climate change; and (2) in the event the judiciary concludes that the public trust doctrine requires a different action than that taken by the EIB under the Air Quality Control Act, the judiciary's decision would take precedence over the EIB's decision. For the reasons discussed below, we reject Plaintiffs' claims.

DISCUSSION

A. Standard of Review

{12} A district court's decision to grant summary judgment is an issue of law that we review de novo. *Montgomery v. Lomos Altos, Inc.*, 2007-NMSC-002, ¶ 16, 141 N.M. 21, 150 P.3d 971. Summary judgment is appropriate where the parties do not genuinely dispute any material facts, 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 ("If the facts are not in dispute, and only their legal effects remain to be determined, summary judgment is proper.").

B. Public Trust Doctrine

{13} The public trust doctrine is a common law doctrine that has traditionally applied to "public navigation and fishing rights over tidal lands and in the state laws of this country." *PPL Montana, LLC v. Montana*, __ U.S. __, __, 132 S. Ct. 1215, 1234 (2012). The doctrine is "a matter of state law," and "the States retain residual power to determine the scope of the public trust[.]" *Id.* at 1235. New Mexico courts have never referred to the public trust doctrine, but they have recognized that common law public trust principles apply in the context of public waters and public trust lands. *See, e.g.*, *State ex rel. Bliss v. Dority*, 1950-NMSC-066, ¶ 11, 55 N.M. 12, 225 P.2d 1007 ("The public waters of this state are owned by the state as trustee for the people[.]"); *Forest Guardians v. Powell*, 2001-NMCA-028, ¶¶ 8-9, 13, 130 N.M. 368, 24 P.3d 803 (concluding that "the lands granted under the [Enabling] Act as well as the profits to be derived from these lands are to be held in trust for the benefit of named institutions[,]" and applying charitable trust law in holding that plaintiff school children did not have standing to sue to enforce the trust).

{14} New Mexico appellate courts have not had an opportunity to consider whether common law public trust principles apply to New Mexico's atmosphere. In looking to other jurisdictions, we note that some have declined to extend the public trust doctrine to the atmosphere. *See Filippone*, 829 N.W.2d 589, at *2-3 (declining to extend the public trust doctrine to the atmosphere because the Iowa Supreme Court had previously declined to extend the doctrine to forested areas and public alleyways); *Aronow*, No. A12-0585, 2012 WL 4476642, at *2 (declining to apply the public trust doctrine to the atmosphere because no court in Minnesota or any other jurisdiction has done so, and because it had previously held that the public trust doctrine did not apply to land). Plaintiffs have cited no cases—and we have found none—where another jurisdiction's appellate court has concluded that common law public trust principles independently apply to management of the atmosphere.

{15} Plaintiffs assert that the public trust doctrine, as applied to the atmosphere, has been adequately "expressed" in Article XX, Section 21 of the New Mexico Constitution that reads:

> The protection of the state's beautiful and healthful environment is hereby declared to be of fundamental importance to the public interest, health, safety[,] and the general welfare. The [L]egislature shall provide for control of pollution and control of despoilment of the air, water[,] and other natural resources of this state, consistent with the use and development of these resources for the maximum benefit of the people.

We agree that Article XX, Section 21 of our state constitution recognizes that a public trust duty exists for the protection of New Mexico's natural resources, including the atmosphere, for the benefit of the people of this state. However, we also conclude that New Mexico's constitutional and statutory provisions have incorporated and implemented the common law public trust doctrine with regard to the process a person must follow in asserting his or her rights to protect the atmosphere. In other words, one may raise arguments concerning the duty to protect the atmosphere, but such arguments

must be raised within the existing constitutional and statutory framework and not alternatively through a separate common law cause of action. A separate common law cause of action under the public trust doctrine would circumvent and render a nullity the process under the Air Quality Control Act that has established how competing interests are addressed and decisions are made regarding regulation of the atmosphere. We reach this conclusion for several reasons.

{16} First, although the common law has been adopted in New Mexico, *see* NMSA 1978, § 38-1-3 (1876), the common law does not apply to the extent the subject matter of the duty or right asserted is covered by constitution, statute, or rule. *See State ex rel. Atty. Gen. v. First Jud. Dist. Court of N.M.*, 1981-NMSC-053, ¶ 36, 96 N.M. 254, 629 P.2d 330, *abrogated on other grounds by Republican Party of N.M. v. N.M. Taxation & Revenue Dep't*, 2012-NMSC-026, 283 P.3d 853. Nearly a century ago, our Supreme Court explained the relationship between the common law and statutory law in *Beals v. Ares*:

> When the Legislature in 1876 adopted the common law as the rule of practice and decision, the whole body of that law . . . came into this jurisdiction. Where it found a statute counter to its provisions, it yielded to the statute, but it gave way only in so far as the statute conflicted with its principles. In so far as it was possible[,] it operated in conjunction and harmony with the statutes. If the statutes conflicted with it, it bided its time, and upon repeal of the statute became again operative. In other words, the common law, upon its adoption, came in and filled every crevice, nook, and corner in our jurisprudence where it had not been stayed or supplanted by statutory enactment, in so far as it was applicable to our conditions and circumstances.

1919-NMSC-067, ¶ 36, 25 N.M. 459, 185 P. 780. Article XX, Section 21 of our constitution recognizes the duty to protect the atmosphere and other natural resources, and it delegates the implementation of that specific duty to the Legislature. Plaintiffs do not argue that the Legislature, or its statutory delegate—the EIB—has not established appropriate regulatory procedures to comply with the constitutional mandate to protect the atmosphere. To the extent that Plaintiffs argue that the common law public trust doctrine empowers the judicial branch to independently establish the best way to implement protections for the atmosphere, apart from its judicial review function involving EIB actions, our constitutional provision has superceded that portion of the common law doctrine. *See First Jud. Dist. Court of N.M.*, 1981-NMSC-053, ¶ 36; *Beals*, 1919-NMSC-067, ¶ 36. The Legislature has enacted a statutory framework to address how protections for the atmosphere are implemented and the common law, where inconsistent with this statutory scheme, must now yield to the governing statute.

{17} Second, the Legislature has enacted the Air Quality Control Act, which charges the EIB with preventing and abating the emission of "gas" into the "outdoor atmosphere" in a way that "with reasonable probability" injures humans, plants, or animals or unreasonably interferes with the public welfare. *See* § 74-2-5(A) ("The [EIB] shall prevent or abate air pollution."); NMSA 1978, § 74-2-2(A)-(B) (2001) (defining "air pollution" as "the

emission . . . into the outdoor atmosphere of one or more air contaminants in quantities and of a duration that may with reasonable probability injure human health or animal or plant life or as may unreasonably interfere with the public welfare, visibility[,] or reasonable use of property" and defining "air contaminant" as "a substance, including . . . gas"). The Act also permits citizens to be involved in the regulatory process. *See* § 74-2-6(A)-(F). Further, in the event a citizen disagrees with an EIB decision, he or she may directly appeal that decision to this Court, at which time we must consider whether the EIB's action was "arbitrary, capricious[,] or an abuse of discretion;" "not supported by substantial evidence in the record" made during the EIB proceedings; or "otherwise not in accordance with law." *See* § 74-2-9(A)-(C). Plaintiffs neither contend that this process has been unavailable to them, nor do they argue that this process is inconsistent with public trust principles for implementing the protections set forth in Article XX, Section 21 of the Constitution.

{18} Third, our conclusion is consistent with established separation-of-powers principles. *See New Energy Econ. Inc. v. Shoobridge*, 2010-NMSC-049, ¶ 10, 149 N.M. 42, 243 P.3d 746 (recognizing that "the relationship between administrative proceedings and declaratory judgment actions [is] controlled by the doctrine of separation of powers"); *Smith v. City of Santa Fe*, 2007-NMSC-055, ¶ 15, 142 N.M. 786, 171 P.3d 300 (cautioning "against using a declaratory judgment action to challenge or review administrative actions if such an approach would foreclose any necessary fact-finding by the administrative entity, discourage reliance on any special expertise that may exist at the administrative level, disregard an exclusive statutory scheme for the review of administrative decisions, or circumvent procedural or substantive limitations that would otherwise limit review through means other than a declaratory judgment action"); *see also* Edgar Washburn & Alejandra Núñez, *Is the Public Trust a Viable Mechanism to Regulate Climate Change?*, 27 Nat. Resources & Env't 23, 27 (Fall 2012) ("[T]here are serious procedural and practical problems with seeking to utilize the judicial system and the common law public trust as a vehicle for regulating [greenhouse gases,]" including "who has standing; whether the issue is a political question not amenable to judicial resolution and other issues of separation of powers; federal and state matters of comity; and the inappropriateness of a court undertaking to regulate in a complex scientific area where it has neither the expertise nor the facilities to implement a solution."); *Svitak*, No. 69710-2-I, 2013 WL 6632124, at *2 (declining to "impose a new duty based on an unprecedented extension of the common law in a new subject area to create a new judicial cause of action" and recognizing that "[t]o create and impose this new duty, would necessarily involve resolution of complex social, economic, and environmental issues" that would "invade[] the prerogatives of the legislative branch, thereby violating the separation of powers doctrine"). Although Plaintiffs' declaratory judgment action did not explicitly challenge the EIB's decision to repeal New Mexico's greenhouse gas regulations, and it did not explicitly ask the district court to reverse the EIB's decision in that regard, the practical effect of a judgment granting Plaintiffs' requested relief would be to reverse the EIB's action, allow the courts to "foreclose" the EIB's factfinding function, "discourage reliance on" the EIB's "special expertise[,]" "disregard" the Air Quality Control Act's "exclusive statutory scheme[,]" and "circumvent procedural or substantive

limitations that would otherwise limit review" of the EIB's actions. *See Smith*, 2007-NMSC-055, ¶ 15. Separation of powers principles would be violated by adhering to Plaintiffs' request for a judicial decision that independently ignores and supplants the procedures established under the Air Quality Control Act.

CONCLUSION

{19} We conclude that the courts cannot independently intervene to impose a common law public trust duty upon the State to regulate greenhouse gases in the atmosphere. The Air Quality Control Act has established adequate procedures to address and implement any regulation of greenhouse gases in the atmosphere. Plaintiffs do not dispute that the EIB considered the effect of greenhouse gas emissions on the atmosphere, along with all of the other factors required by our constitution and the Air Quality Control Act, when it made its recent decisions regarding New Mexico's greenhouse gas regulations. Plaintiffs had an opportunity to participate in that administrative process before the EIB, they continue to have the right to propose new regulations with the EIB and to appeal any of the EIB's decisions, they have the opportunity to participate in the legislative process during New Mexico's legislative sessions, and voters have the opportunity to exercise their desire for political change regarding complex environmental issues at the ballot box during each election cycle. Therefore, where the State has a duty to protect the atmosphere under Article XX, Section 21 of the New Mexico Constitution, the courts cannot independently regulate greenhouse gas emissions in the atmosphere as Plaintiffs have proposed, based solely upon a common law duty established under the public trust doctrine as a separate cause of action. We affirm the district court's order granting summary judgment in favor of the State.

{20} IT IS SO ORDERED.

TIMOTHY L. GARCIA, Judge

WE CONCUR:

MICHAEL E. VIGIL, Chief Judge

J. MILES HANISEE, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-064

Filing Date: March 25, 2015

Docket No. 33,475

KIDSKARE, P.C.,

Plaintiff-Appellee,

v.

TYLER MANN,

Defendant-Appellant.

Jane B. Yohalem
Santa Fe, NM

for Appellee
Law Offices of Michael E. Mozes, P.C.

Michael E. Mozes
Albuquerque, NM

for Appellant

OPINION

WECHSLER, Judge.

{1} This case is an appeal by a dentist, Dr. Tyler Mann, who was found by the district court to have violated the covenant not to compete in his employment contract with his former employer, KidsKare, P.C. (KidsKare). On appeal, Dr. Mann raises four claims of error: (1) KidsKare lacked standing to enforce the covenant not to compete; (2) the covenant not to compete was unenforceable as written and was not amenable to the modification made by the district court; (3) KidsKare waived its right to enforce the covenant; and (4) prior breach of the covenant by KidsKare rendered the covenant unenforceable. We hold that, contrary to the argument of Dr. Mann, the covenant not to compete was amenable to modification by the district court because the agreement explicitly provided for amendment of any unenforceable provision and enforcement to the full extent deemed reasonable and enforceable by the reviewing court. Nor are we persuaded by Dr. Mann's other arguments. We therefore affirm the district court. Also, we award attorney fees to KidsKare for this appeal and remand to the district court for proceedings consistent with this holding.

BACKGROUND

{2} Dr. Mann was hired by KidsKare in May 2006. At that time, KidsKare was a chain of dental service providers with several offices in New Mexico. As part of the employment agreement between the parties, Dr. Mann agreed that, after termination of his association with KidsKare, (1) he was not to provide the type of dentistry that he performed for KidsKare within one hundred miles of any KidsKare office for one year, and (2) his practice could not consist of more than ten percent Medicaid or child patient services if that practice was within one hundred miles of a KidsKare office or within one hundred miles of an area that provided a substantial number of patients to a KidsKare office.[1]

{3} In January 2010, Dr. Mann submitted his notice of resignation to KidsKare. Four days after his final day at KidsKare, on April 12, 2010, Dr. Mann opened an office three miles from the KidsKare office where he had practiced. On May 10, 2010, KidsKare filed an action to enforce the covenant not to compete. In its complaint, it asserted that Dr. Mann violated the provision that precluded

---

[1]The text of the "Covenant Not to Compete" found at Section 4.1 of the employment agreement, provided, in pertinent part:

> Associate agrees that for a twelve (12) month period following the date that Associate's employment terminates for any reason, including, without limitation, termination by Employer without cause or resignation by Associate . . . , Employee shall not provide any professional dental services of any of the types of dentistry Employee provided while employed by Employer within a radius of one hundred (100) miles of any of Employer's offices; and, for a period of five (5) years following the date that Associate's employment terminates, children and/or Medicaid patient dental services shall not exceed ten percent (10%) of the total patients in their future practice of dentistry within one hundred (100) miles of any area that has KIDSKARE P.C. offices and/or within one hundred (100) miles of an area that provides substantial patients to KIDSKARE P.C. for dental services.

him from practicing the same type of dentistry within one hundred miles of a KidsKare office and within one year of resignation.

{4} The district court bifurcated the trial. The court first concluded that clause one of the covenant not to compete was reasonable as to the twelve month time period but that the one hundred mile restriction from any KidsKare office was overbroad and, therefore, unenforceable as written. As its remedy, the district court reformed the distance provision of clause one by reducing the radius to thirty miles, finding that the covenant was thus enforceable.

{5} After a trial on the merits, the district court found that Dr. Mann breached the covenant not to compete by operating an office approximately three miles from the KidsKare office within one year of leaving his employment and providing services from that office similar to those he provided at KidsKare. The district court entered a total judgment in the amount of $88,639.40 in favor of KidsKare. It awarded damages in the amount of $44,449.40, a figure based on the amount billed by Dr. Mann for services rendered within one year of leaving KidsKare to patients who had been patients of KidsKare, excluding patients who were referred to Dr. Mann by dentists, whether employed by KidsKare or not. It also awarded attorney fees in the amount of $44,140, and post-judgment interest at the rate of 8.75%.

STANDING

{6} Dr. Mann argued unpersuasively to the district court for summary judgment that KidsKare lacked standing to enforce the covenant not to compete. He now argues that the district court committed error. We review a summary judgment ruling de novo. *Self v. United Parcel Serv., Inc.*, 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582.

{7} Dr. Mann relies upon 42 U.S.C. § 1396a(a)(23) (2012), a section of the Medicaid Act that provides strict freedom of choice for Medicaid patients to choose treatment from any participating provider. *See Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962, 974 (7th Cir. 2012) ("Section 1396a(a)(23) mandates that . . . . Medicaid patients have the right to receive care from the qualified provider of their choice."). Under the pertinent part of this section, a state plan for medical assistance must:

> [P]rovide that . . . any individual eligible for medical assistance (including drugs) may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required (including an organization which provides such services, or arranges for their availability, on a prepayment basis), who undertakes to provide him such services[.]

Section 1396a(a)(23). Dr. Mann is correct that, under this section, health care providers do not have the right to enforce the freedom of choice provision intended to protect Medicaid recipients. *See RX Pharmacies Plus, Inc. v. Weil*, 883 F. Supp. 549, 554 (D. Colo. 1995) (stating that Section 1396a(a)(23) does not confer any enforceable rights on Medicaid providers). Thus, we agree with Dr. Mann that KidsKare is unable to sue under Section 1396a(a)(23).

{8} However, KidsKare has not attempted to

enforce Section 1396a(a)(23), and we do not see why it would attempt to do so under the facts of this case. Perhaps a party in Dr. Mann's position might seek to prevent the enforcement of a covenant not to compete, claiming that such a covenant violated Section 1396a(a)(23). But, as noted by both KidsKare and Dr. Mann, the only intended beneficiaries of the freedom of choice conferred by Section 1396a(a)(23) are Medicaid recipients. Thus, Dr. Mann, like KidsKare, lacks standing to enforce Section 1396a(a)(23) as neither party is a medicaid recipient. Simply stated, Section 1396a(a)(23) is not applicable to this case.

ENFORCEABILITY OF COVENANT NOT TO COMPETE

{9} Dr. Mann also contends that the district court committed error when it modified the covenant not to compete and found it thus enforceable. We review the findings of fact of the district court under a deferential, substantial evidence standard and review the application of the law to the facts de novo. *Ponder v. State Farm Mut. Auto. Ins. Co.*, 2000-NMSC-033, ¶ 7, 129 N.M. 698, 12 P.3d 960.

{10} Covenants not to compete that restrict employment present competing principles: the freedom to contract and the freedom to work. Furthermore, the public has an interest not only "in protecting the freedom of persons to contract and in enforcing contractual rights and obligations[,]" but also in "seeing that competition is not unreasonably limited or restricted[.]" *Lovelace Clinic v. Murphy*, 1966-NMSC-165, ¶ 23, 76 N.M. 645, 417 P.2d 450. Our Supreme Court has held that a covenant not to compete is "enforceable, if the restrictions thus imposed . . . are reasonable." *Id.* ¶ 18. "Whether there is a reasonable restraint depends on the facts of a particular case[.]" *Bowen v. Carlsbad Ins. & Real Estate, Inc.*, 1986-NMSC-060, ¶ 4, 104 N.M. 514, 724 P.2d 223. Covenants not to compete with reasonable restraints will be enforced when "they are not against public policy, and any detriment to the public interest in the possible loss of the services of the covenantor is more than offset by the public benefit arising out of the preservation of the freedom of contract." *Lovelace*, 1966-NMSC-165, ¶ 23 (internal quotation marks and citation omitted).

{11} Dr. Mann argues that the covenant was not amenable to modification under New Mexico law. According to Dr. Mann, New Mexico case law does not provide for reformation of terms of a covenant not to compete beyond, when possible, striking an independent clause found to be unreasonable. He also argues that, not only could the district court not alter the overly-broad distance provision in the first clause of the covenant, but, further, that because the second clause of the covenant was also overly broad and, therefore, unreasonable, the entire covenant not to compete should be "voided." Because we conclude that an alternative basis to alter the covenant not to compete allows for disposition of this case, we do not reach Defendant's argument regarding New Mexico case law.

{12} As noted by the district court, the employment agreement between the parties specifically provided for the amendment of any provision found by a court to be "overbroad or otherwise unenforceable[.]" It further provided for the enforceability of the agreement against Dr. Mann "to the maximum extent deemed reasonable and enforceable by

such court." [2] The employment agreement additionally provided that all provisions not found to be "invalid, illegal or unenforceable, in whole or in part" were to remain intact and enforceable.[3] These terms make clear that, as part of their bargain, Dr. Mann and KidsKare agreed that the covenant not to compete would not fail if provisions within it were found to be unreasonable. Instead, they specifically agreed to the type of reformation performed by the district court. Reformation of unreasonable clauses was an aspect of the bargain of the parties and consistent with their mutual intent as expressed by the employment agreement. *See Lovelace*, 1966-NMSC-165, ¶ 20 ("The purpose of the agreement was to create legally-enforceable rights and duties between the parties.")

{13} We note that Dr. Mann is a highly trained medical professional. Like the doctor in *Lovelace*, Dr. Mann accepted the benefits of the association with his employer knowing the corresponding burdens if and when his employment terminated. *See id.* ¶ 24 ("He knew that if and when he terminated his association there would likely be a burden upon him . . . . He chose to accept the burdens as well as the benefits of his contract."). Nothing in the record suggests that Dr. Mann did not enter into the employment agreement with KidsKare freely and with full knowledge of the post-employment restrictions. We do not perceive any lack of bargaining power on the part of Dr. Mann, nor has he argued that lack of bargaining power or sophistication should affect the result in this case. In fact, Dr. Mann has not argued any grounds on which Section 5.2 of the employment agreement, which explicitly provides for reformation of the agreement, should not be enforced.

{14} Thus, the covenant not to compete was amenable to reformation under the terms of the employment agreement. We therefore turn to the reasonableness of the terms of the covenant as applied by the district court, restrictions of one year and thirty miles. As to the reasonableness of the one-year restriction, evidence was presented that adult patients of KidsKare visit once per year, and Dr. Mann conceded that a restriction of one or two years is frequently found to be reasonable. The district court could thus conclude that the one-year restriction was reasonable. *See Ponder*, 2000-NMSC-033, ¶ 7 ("Substantial evidence is such relevant evidence that a reasonable mind would find adequate to support a conclusion." (internal quotation marks and citation omitted)). The one-year restriction is further supported in applicable case law. *See Lovelace*, 1966-NMSC-165, ¶¶ 24, 26, 29 (holding that a three-year restriction on a doctor was reasonable and enforceable). The thirty-mile restriction was also supported by the substantial evidence that approximately 90% of the patients of the Farmington office

---

[2] In full, Section 5.2 of the employment agreement reads:

> Employer and Associate further agree that if any provision of this agreement is held in a final judgment or determination of any court to be overbroad or otherwise unenforceable in any respect, such provision shall be- [sic] deemed to be amended, and shall be binding upon Employee to the maximum extent deemed reasonable and enforceable by such court.

[3] In full, Section 5.3 reads:

> Severability. In the event that any provision of this Agreement is held invalid, illegal or unenforceable, in whole or in part, the remaining provisions of this Agreement shall not be effected [sic] and shall continue to be valid and enforceable. (Emphasis omitted).

of KidsKare came from within a thirty-mile radius.

{15} Dr. Mann does not argue that the one-year time or thirty-mile restrictions are unreasonable or unsupported. Instead, Dr. Mann argues that the district court erred in concluding that: (1) the covenant not to compete was related to a legitimate business interest, and (2) enforcement of the covenant not to compete did not violate the public interest.

{16} Neither argument is persuasive. In *Lovelace*, a medical professional left employment with a clinic and, as a result, violated a covenant not to compete. 1966-NMSC-165. Our Supreme Court noted that an employer has a legitimate business interest in protecting the goodwill of its patients. *Id.* ¶ 22. Like the clinic in *Lovelace*, KidsKare had a legitimate interest in protecting its business from competition by Dr. Mann, who became known to KidsKare patients through his employment. Dr. Mann focuses his argument on the harm to the public from enforcement of the covenant not to compete, arguing that enforcement would deprive underserved Medicaid dental patients of an available practitioner. However, evidence was presented that a Medicaid patient could get an appointment at KidsKare in Farmington within one business day of making a request. The district court's finding that Medicaid patients who seek dental care are not underserved due to an insufficient number of providers is therefore supported by substantial evidence in the record. *See Ponder*, 2000-NMSC-033, ¶ 7 ("Substantial evidence is such relevant evidence that a reasonable mind would find adequate to support a conclusion." (internal quotation marks and citation omitted)). Because enforcement of the covenant not to compete would not cause the harm to the public asserted by Dr. Mann, we agree with the district court that the reformed covenant does not violate public policy. As reformed by the district court, the covenant not to compete was reasonable and enforceable.

WAIVER BY ESTOPPEL

{17} Dr. Mann argues that the district court erred in concluding that KidsKare did not waive its right to enforce the covenant not to compete. He contends that referrals to him from KidsKare dentists after he left employment constituted waiver by estoppel on the part of KidsKare. KidsKare contends that waiver by estoppel is inapplicable because it filed suit against Dr. Mann to enforce the covenant not to compete approximately thirty days after Dr. Mann opened his competing office.

{18} "[W]aiver by estoppel is present where a party's actions reasonably lead the other party to believe waiver has occurred and that other party is prejudiced by the belief." *Atherton v. Gopin*, 2012-NMCA-023, ¶ 13, 272 P.3d 700. The district court found that Dr. Mann could not have reasonably believed that KidsKare intended to waive its right to enforce the agreement. Substantial evidence in the record supports this finding. A number of the fourteen documented referrals on which Dr. Mann relies came from a dentist at the KidsKare office during a time period when the only dentist who could make those referrals was Dr. Connolly, a good friend and housemate of Dr. Mann. Also, KidsKare filed suit against Dr. Mann approximately thirty days after Dr. Mann left his position at KidsKare. That complaint specifically asserted that Dr. Mann violated the first clause of the covenant not to compete and sought injunctive relief, damages, and attorney fees and costs pursuant to that violation. Both the source of

at least some of the referrals relied upon by Dr. Mann and the lawsuit filed by KidsKare support the finding by the district court that Dr. Mann could not have reasonably believed that KidsKare intended to waive its rights under the covenant not to compete. Because waiver by estoppel required such a belief, Dr. Mann's argument fails.

BREACH OF CONTRACT

{19} Dr. Mann argues that the failure by KidsKare to provide adequate staff and supplies, and the referral of patients by KidsKare to Dr. Mann, constituted material breaches of the contractual employment agreement that excused Dr. Mann from further performance, including adherence to the covenant not to compete.

{20} A material breach of a contract excuses the non-breaching party from further performance under the contract. *Famiglietta v. Ivie-Miller Enters., Inc.*, 1998-NMCA-155, ¶ 14, 126 N.M. 69, 966 P.2d 777. This Court has described a material breach as the "failure to do something that is so fundamental to the contract that the failure to perform that obligation defeats an essential purpose of the contract." *Id.* ¶ 17 (internal quotation marks and citation omitted). "[T]he materiality of a breach is a specific question of fact." *Id.* ¶ 16.

{21} The employment agreement between KidsKare and Dr. Mann required KidsKare to furnish Dr. Mann with adequate equipment, supplies, and staff, as determined to be necessary and appropriate by KidsKare. The district court found that KidsKare and Dr. Mann sometimes disagreed as to the appropriate levels of equipment, staff, and supplies, but that the employment agreement left those determinations to KidsKare. The district court also found that the substantial salary and production bonuses KidsKare paid to Dr. Mann was evidence that KidsKare had fulfilled its obligation to materially support Dr. Mann's practice.

{22} Evidence in the record supports the district court's findings. Dr. Mann received a production bonus for 2009 of $110,000, equal to 55% of his base salary. His projected bonus for 2010, the year he left KidsKare, was similarly large. Testimony was presented that KidsKare spent more on supplies for Dr. Mann than any other dentist. A KidsKare dentist testified that her practice was not limited by lack of equipment or supplies. Testimony was also presented that the KidsKare office was adequately staffed.

{23} With regard to Dr. Mann's argument that referrals from KidsKare constituted a material breach of the employment agreement, Dr. Mann does not cite any provision in the contract that forbids referrals to him. This argument is more properly presented as an argument in support of waiver by KidsKare, as Dr. Mann did, and which we addressed above.

{24} The evidence supports the district court's conclusion that KidsKare did not materially breach the employment agreement and that Dr. Mann was not excused from the obligations of the covenant not to compete on that basis.

ATTORNEY FEES FOR APPEAL

{25} KidsKare requests attorney fees for this appeal, noting that the employment agreement between the parties provides for reasonable attorney fees and costs for any action to enforce its rights. We agree that this provision entitles KidsKare to attorney fees for this appeal. *See Famiglietta*, 1998-NMCA-155, ¶ 27 (awarding attorney fees for an

appeal where a contract called for attorney fees upon default by either party).

CONCLUSION

{26} We affirm the judgment of the district court. We award attorney fees for this appeal and remand to the district court for proceedings consistent with this holding, including a determination of appropriate attorney fees.

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

JAMES J. WECHSLER, Judge

WE CONCUR:

MICHAEL E. VIGIL, Chief Judge

RODERICK T. KENNEDY, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-065

Filing Date: March 31, 2015

Docket No. 33,300

SALVADOR BENAVIDEZ,

Plaintiff-Appellant,

v.

CIBOLA COUNTY SHERIFF'S DEPUTIES STEVEN SHUTIVA, GARRYL JAMES, PAT MARTINEZ, CIBOLA COUNTY UNDERSHERIFF TONY MACE, CIBOLA COUNTY SHERIFF JOHNNY VALDEZ, CIBOLA COUNTY SHERIFF'S DEPARTMENT, CIBOLA COUNTY,

Defendants-Appellees.

Law Office of Derek V. Garcia, P.C.
Derek V. Garcia
Albuquerque, NM

for Appellant

Brennan & Sullivan, P.A.
James P. Sullivan
Christina L. G. Brennan
Santa Fe, NM

Robyn Hoffman
Tijeras, NM

for Appellees

OPINION

BUSTAMANTE, Judge.

{1} After he was arrested and charged with leaving the scene of an accident, resisting arrest, assault on a peace officer, and assault, Plaintiff Salvador Benavidez sued Deputies Steven Shutiva, Garryl James, Pat Martinez, Cibola County Undersheriff Tony Mace, Cibola County Sheriff Johnny Valdez, Cibola County Sheriff's Department, and Cibola County (Defendants) alleging violations of both the United States and New Mexico Constitutions as well as common law tort claims. The district court granted Defendants'

motion for summary judgment on the ground that Defendants were entitled to qualified immunity from suit. Plaintiff appealed. We affirm in part and reverse in part.

I. Background

{2} Plaintiff was driving on Interstate 40 when his pickup truck was "lightly" rear-ended by a motor home. Plaintiff did not immediately stop and the motor home driver called 911 to report the accident. Defendant James was dispatched and stopped both vehicles. The two drivers disagreed about how exactly the accident occurred; Plaintiff maintained that he was not at fault but the motor home driver asserted that Plaintiff had caused the accident by pulling in front of the motor home and braking suddenly. Two other deputies arrived to assist James.

{3} After James approached Plaintiff's truck, Plaintiff got out and began arguing with James about the cause of the accident. Plaintiff admits that he "aggressively argued his innocence, asking . . . James why he had been stopped and insisting that he had done nothing wrong." He also walked toward the motor home, gesturing with his arms, swearing, and saying "[t]ell me to my face," among other things, to the motor home driver in a loud voice. After Plaintiff either dropped or threw his identification on the ground, and then threw his wallet on the ground, Defendant Shutiva handcuffed Plaintiff and seated him on the bumper of Plaintiff's truck. He was later placed in James's police car and transported to the Cibola County Detention Center. Throughout the encounter, Plaintiff swore at the Defendants and used "racially[]charged language."

{4} Plaintiff was charged with leaving the scene of an accident, assault on the motor home driver, resisting arrest, and assault upon a peace officer. The charges were later dismissed. Plaintiff then filed a complaint under 42 U.S.C. § 1983 (1996) alleging violations of the United States and New Mexico Constitutions and the New Mexico Tort Claims Act (NMTCA). Specifically, he alleged unreasonable seizure/arrest, selective and malicious prosecution, excessive force, retaliation for exercise of the right to freedom of speech, and false imprisonment. The district court granted Defendants' motion to dismiss based on its findings that the arrest and prosecution were supported by probable cause, the force used was reasonable, and Plaintiff's language constituted "fighting words" not protected by the First Amendment of the United States Constitution. Plaintiff appeals the dismissal of his complaint. Additional facts are provided as necessary to our discussion.

II. Discussion

Section 1983 and Qualified Immunity

{5} "A person acting under color of state law who violates the rights of a plaintiff established by the United States Constitution or federal statutes may be held personally liable for his or her action under 42 U.S.C. § 1983." *Archuleta v. Lacuesta*, 1999-NMCA-113, ¶ 7, 128 N.M. 13, 988 P.2d 883. Section 1983 claims are "limited to deprivations of federal constitutional rights and federal statutory and regulatory rights. It does not cover official conduct that violates only state law." 1 Martin A. Schwartz, *Distinguishing Federal Constitutional Violations From State Law Wrongs, Section 1983 Litigation Claims & Defenses* § 3.02 (4th ed. 2007) (footnote omitted); *accord Wells v. Valencia Cnty.*, 1982-NMSC-048, ¶ 6, 98 N.M. 3, 644 P.2d 517. Although courts often use common law

torts as analogues to claims under § 1983, such as false arrest, false imprisonment, malicious prosecution, assault, and battery, "the ultimate question is whether [a] plaintiff can prove a constitutional violation." *Pierce v. Gilchrist*, 359 F.3d 1279, 1288 (10th Cir. 2004); *see* Schwartz, *supra*, § 3.02 ("[C]ourts frequently experience difficulties in determining whether conduct that is actionable under state tort law . . . also violates some provision of the federal Constitution. Because § 1983 itself does not establish or create any rights, the answer to this question requires an interpretation of the federal Constitution itself, rather than of § 1983." (footnote omitted)). Thus, the courts may use common law torts as a "starting point," but not as the "final word" on whether a constitutional violation has occurred. *Pierce*, 359 F.3d at 1288; *accord Wells*, 1982-NMSC-048, ¶ 6. The "common law" with which courts begin their analyses is "the general common law tradition, rather than . . . the law as defined by the jurisdiction where the action originated." *Pierce*, 359 F.3d at 1289.

{6} "The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (internal quotation marks and citation omitted). To overcome the qualified immunity defense, a "plaintiff must demonstrate that (1) the defendant's alleged conduct violated a constitutional or statutory right, and (2) the right was clearly established at the time of the conduct." *Williams v. Bd. of Cnty. Comm'rs of San Juan Cnty.*, 1998-NMCA-090, ¶ 24, 125 N.M. 445, 963 P.2d 522. "[A] legal point is clearly established . . . when it has been decided by either the highest state court where the cause of action arose, by a United States court of appeals, or by the United States Supreme Court." *Sanders v. Montoya*, 1999-NMCA-079, ¶ 12, 127 N.M. 465, 982 P.2d 1064 (alteration in original) (internal quotation marks and citation omitted). "The granting of qualified immunity results in immunity from suit." *Oldfield v. Benavidez*, 1994-NMSC-006, ¶ 12, 116 N.M. 785, 867 P.2d 1167.

State Constitutional and Tort Claims

{7} Although a tort does not always rise to a constitutional violation, when it does, "the federal remedy under § 1983 for deprivation of constitutional rights is supplementary to a state remedy." *Wells*, 1982-NMSC-048, ¶ 13. Thus, "[t]he [NMTCA] does not prohibit a plaintiff from bringing an action for damages under the [NMTCA] where the plaintiff also pursues, by reason of the same occurrence, an action against the same government under 42 U.S.C. § 1983." *Id.* ¶ 16; *see* NMSA 1978, § 41-4-12 (1977) ("The immunity granted pursuant to [NMTCA] does not apply to liability for personal injury, . . . false imprisonment, false arrest, malicious prosecution, abuse of process, . . . or deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties.").

Standard of Review

{8} On appeal from a grant of summary judgment based on qualified immunity, "[w]e view the evidence presented in the light most favorable to the party opposing summary judgment" and review the district court's decision de novo. *Archuleta*, 1999-NMCA-113, ¶ 6. We "look at the undisputed facts and

those facts adduced by the party opposing summary judgment to see if there is any evidentiary support for finding a possible violation of law . . . . [I]f the law may have been violated, [we] must ask if that law was clearly established at the time of the alleged violation." *Id.* (internal quotation marks and citation omitted). But, if it is clear that the relevant legal issue was not clearly established at the time, we may not reach the first issue. *See Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (per curiam) (stating that "[c]ourts have discretion to decide the order in which to engage the[] two prongs [of the qualified immunity analysis]"). As will be seen, for the most part the parties here do not dispute that the relevant law was clearly established when Plaintiff was arrested and thus, with one exception, our focus is on the "possible violation" part of the inquiry. If there is a genuine dispute over a material fact relevant to whether qualified immunity applies, summary judgment on this basis is improper. *Id.*

Plaintiff's Claims

{9} As a preliminary matter, we note that Plaintiff made several arguments on appeal that we do not address because they were not adequately developed, not preserved, or raised for the first time in Plaintiff's reply brief. *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."); *State Farm Mut. Auto. Ins. Co. v. Barker*, 2004-NMCA-105, ¶ 20, 136 N.M. 211, 96 P.3d 336 ("We will not entertain an argument made for the first time on appeal."); *Mitchell-Carr v. McLendon*, 1999-NMSC-025, ¶ 29, 127 N.M. 282, 980 P.2d 65 (stating that "the general rule is that we do not address issues raised for the first time in a reply brief" except when the arguments are in response to issues raised in the answer brief). These arguments include (1) that Defendants targeted him because he is the former sheriff of the county; (2) that New Mexico's Constitution requires a different probable cause standard than the federal constitution because "the New Mexico Constitution has been interpreted more broadly than its federal counterpart"; and (3) that Defendants "selectively prosecuted" him when they did not charge the motor home driver for following too closely behind him.

{10} Plaintiff's claims—and his arguments on appeal—can be grouped into four broad categories. He argues that (1) Defendants arrested him without probable cause, (2) Defendants filed charges against him without probable cause, (3) Defendants used excessive force in the use of handcuffs during the arrest, and (4) Defendants retaliated against him for exercising his free speech rights during the arrest. We address each issue in turn.

A. Unreasonable Seizure—Counts I, V, and VII

{11} Plaintiff argues that Defendants violated his right to be free from unreasonable seizures when they arrested him without probable cause. He alleges that his arrest violated both the United States Constitution and the New Mexico Constitution, and constituted the tort of false imprisonment. *See* U.S. Const. amend. IV; N.M. Const. art. II, § 10. The parties agree that it is well-established that "arrest without probable cause is indeed a violation of the Fourth Amendment protection against illegal search and seizure" and that this protection was established at the time of Plaintiff's arrest. *Dickson v. City of Clovis*, 2010-NMCA-058, ¶ 7, 148 N.M. 831, 242 P.3d 398. Therefore, the only question here is

whether there are disputed material facts concerning whether Defendants violated Plaintiff's rights or committed the tort of false imprisonment by arresting him without probable cause.

{12} "A warrantless arrest is valid where the officer has probable cause to believe that a crime has been committed by the person whom he arrests." *State v. Jones*, 1981-NMSC-013, ¶ 7, 96 N.M. 14, 627 P.2d 409. "Probable cause exists when the facts and circumstances within the knowledge of the officers, based on reasonably trustworthy information, are sufficient to warrant a person of reasonable caution to believe that an offense has been or is being committed." *State v. Cohen*, 1985-NMSC-111, ¶ 36, 103 N.M. 558, 711 P.2d 3. When probable cause is present, "a person cannot be held liable for false arrest or imprisonment, since probable cause provides him with the necessary authority to carry out the arrest." *Santillo v. N.M. Dep't of Pub. Safety*, 2007-NMCA-159, ¶ 12, 143 N.M. 84, 173 P.3d 6. Probable cause to arrest for a single charge will suffice to immunize Defendants from Plaintiff's wrongful arrest claims. *See Holmes v. Vill. of Hoffman Estates*, 511 F.3d 673, 682 (7th Cir. 2007) ("An arrested individual is no more seized when he is arrested on three grounds rather than one; and so long as there is *a* reasonable basis for the arrest, the seizure is justified on that basis even if any other ground cited for the arrest was flawed." (citing *Devenpeck v. Alford,* 543 U.S. 146, 153-55 (2004)). "Whether probable cause exists is a mixed question of law and fact." *Dickson*, 2010-NMCA-058, ¶ 8 (internal quotation marks and citation omitted).

{13} We conclude that Plaintiff's arrest was supported by probable cause because it was reasonable for Shutiva to believe that Plaintiff assaulted a peace officer. Assault on a peace officer consists of "an attempt to commit a battery upon the person of a peace officer while he is in the lawful discharge of his duties" or "any unlawful act, threat or menacing conduct which causes a peace officer while he is in the lawful discharge of his duties to reasonably believe that he is in danger of receiving an immediate battery." NMSA 1978, § 30-22-21(A) (1971). On appeal, Plaintiff does not dispute that he "aggressively argued his innocence," that he threw his wallet on the ground near the officers, and that he raised his arms in the air and pointed at the officers. In his deposition, Plaintiff admitted that he was yelling "at the top of [his] lungs" at the motor home driver and that he called the officers names and swore at them. Nevertheless, Plaintiff maintains that this charge was not supported by probable cause because no officer later testified that he felt in fear of an imminent battery. But Defendants are not required to prove every element of assault. *Holmes*, 511 F.3d at 679 ("Probable cause requires more than a bare suspicion of criminal activity, but it does not require evidence sufficient to support a conviction."). The question here is simply whether Shutiva had a reasonable belief at the time he made the arrest that Plaintiff was guilty of assault.

{14} In *State v. Ford*, this Court examined whether a conviction for assault on a peace officer was supported by substantial evidence. 2007-NMCA-052, ¶ 29, 141 N.M. 512, 157 P.3d 77. There, the Court held that the evidence supported the conviction where defendant had "approached the officers coming within inches of them while shaking his fists at them." *Id.* ¶¶ 5, 29. The Court stated, "The evidence against [the d]efendant that he was verbally and physically threatening

to the officers . . . is sufficient to circumstantially support the inference that [the officer] was in fear of having his bodily integrity intruded upon." *Id.* ¶ 29. It concluded that "reasonable people under these circumstances being aggressively approached by a man, who is shouting and threatening to punch them, would fear for their personal safety. [The defendant] acted aggressively by raising his fists, shouting, and coming within a few inches of them." *Id.* Obviously, in *Ford*, the Court was examining whether the evidence supported a conviction of assault beyond a reasonable doubt, not, as here, whether an officer had a reasonable belief that an assault had occurred. In addition, the conduct here appears not to have been as threatening as that in *Ford*. Nevertheless, Plaintiff's conduct was sufficiently similar to that in *Ford* that it sufficed to establish probable cause for arrest for assault on a peace officer. The district court did not err in dismissing Plaintiff's claims based on lack of probable cause to arrest.

B. Malicious Prosecution/Malicious Abuse of Process—Counts II and VIII

{15} Counts II and VIII of the complaint allege that Defendants maliciously prosecuted him. In Count II, Plaintiff claims that his rights under the Fourth and Fourteenth Amendments to the United States Constitution were violated when Defendants filed a complaint against him. *See* U.S. Const. amends. IV, XIV, § 1. He also alleges in Count VIII that "Defendants were the actual and proximate causes of injury to Plaintiff when they caused the charging of him for crimes without probable cause." The latter claim appears to have been brought under the New Mexico Constitution and/or state tort law. We begin by discussing malicious prosecution claims under the United States Constitution.

{16} The law governing malicious prosecution under the Fourth and Fourteenth Amendments is convoluted. *See Becker v. Kroll*, 494 F.3d 904, 913 (10th Cir. 2007) (describing the law of § 1983-based malicious prosecution claims as "murky"). That being the case, we start with some historical background to such claims. "There is . . . an embarrassing diversity of judicial opinion over the composition, or even existence, of a claim for 'malicious prosecution' founded in § 1983." *Lambert v. Williams*, 223 F.3d 257, 260 (4th Cir. 2000) (internal quotation marks and citation omitted); 1 Sheldon H. Nahmod, *Civil Rights & Civil Liberties Litigation: The Law of Section 1983* § 3:64 (4th ed. 2011) ("Before the Supreme Court's 1994 decision in *Albright v. Oliver*, [510 U.S. 266 (1994)] there was considerable uncertainty in the circuits about the nature and scope of these § 1983 malicious prosecution and abuse of process actions." (footnote omitted)). In *Albright*, the Supreme Court examined whether there existed "a substantive right under the Due Process Clause of the Fourteenth Amendment to be free from criminal prosecution except upon probable cause." *Albright*, 510 U.S. at 268; *see* Steven H. Steinglass, *1 Section 1983 Litigation in State Courts* § 3:11 (1988) (stating the issue as "whether malicious prosecution, standing alone, g[ave] rise to a constitutional violation actionable under § 1983."). "[A] plurality of the Supreme Court held [in *Albright*] that the Fourth Amendment governed pretrial deprivations of liberty" and that "Fourteenth Amendment substantive due process standards have no applicability." *Taylor v. Meacham*, 82 F.3d 1556, 1560 (10th Cir. 1996) (internal quotation marks and citation omitted); *see also* Nahmod, *supra*, § 3:66. But "[b]ecause of the absence of an opinion of the Court and the conflicting views of those Justices who only concurred in the judgment, the issue of

the availability of § 1983 to pursue malicious prosecution-type claims will continue to be an area of uncertainty." Steinglass, *supra*. *Albright* left open the possibility that malicious prosecution may constitute a § 1983 claim based on a violation of another explicit constitutional right, such as those guaranteed by the Fourth Amendment or the Fourteenth Amendment's procedural due process protections. *See Albright*, 510 U.S. at 271 (stating that the plaintiff did not raise his claim under the Fourth Amendment or procedural due process and thus his "claim before [the] Court [wa]s a very limited one[]"); Nahmod, *supra*, § 3:66.

{17} Case law following *Albright* has taken a variety of paths. *See* Nahmod, *supra*, § 3.67 (stating that "the impact of *Albright* has been dramatic[,]" describing the state of the law as "complicat[ed,]" and collecting cases). But "[f]or the most part, the Courts of Appeals which have considered the issue have recognized a Fourth Amendment malicious prosecution action subsequent to *Albright*," Michael Avery, et al., *Police Misconduct: Law and Litigation* § 2:14 (3d ed. 2014), and some have recognized a malicious prosecution claim based on other constitutional provisions. *Avery*, *supra*, § 2:14, at n.5. For example, the Tenth Circuit has recognized malicious prosecution claims based on both the Fourth Amendment and the Fourteenth Amendment procedural due process. *See Myers v. Koopman*, 738 F.3d 1190, 1194 (10th Cir. 2013), *cert. denied*, 134 S. Ct. 2842 (2014) ("Unreasonable seizures imposed with legal process precipitate Fourth Amendment malicious-prosecution claims."); *Mondragon v. Thompson*, 519 F.3d 1078, 1083 (10th Cir. 2008) ("This Circuit . . . has held that the [United States] Constitution permits [procedural] due process claims for wrongful imprisonment after the wrongful institution of legal process.").

Fourteenth Amendment

{18} "The Fourteenth Amendment protects individuals against deprivations of liberty without due process of law." *Myers*, 738 F.3d at 1193. "[T]he Due Process Clause of the Fourteenth Amendment confers both substantive and procedural rights." *Albright*, 510 U.S. at 272. To the extent that Plaintiff alleges a violation of his substantive due process rights, the United States Supreme Court foreclosed that avenue in *Albright*, as discussed. To the extent that Plaintiff alleges a violation of his procedural due process rights, this argument is also unavailing. "If a state actor's harmful conduct is unauthorized and thus could not be anticipated pre-deprivation, then an adequate post-deprivation remedy—such as a state tort claim—will satisfy [procedural] due process requirements." *Myers*, 738 F.3d at 1193. Since New Mexico tort law provides a remedy for malicious abuse of process,[1] sufficient procedural due process has been provided to Plaintiff. *See id.* (stating that "[t]he existence of the state remedy flatten[ed] the Fourteenth Amendment peg on which [the plaintiff tried] to hang his § 1983 malicious[]prosecution claim" and holding that the plaintiff's Fourteenth Amendment malicious prosecution claim was properly dismissed). Hence, to the extent Plaintiff's malicious prosecution claim was based on the Fourteenth Amendment, it was properly dismissed.

---

[1]In *DeVaney v. Thriftway Mktg. Corp.*, 1998-NMSC-001, ¶ 53, 124 N.M. 512, 953 P.2d 277, *overruled on other grounds by Durham v. Guest*, 2009-NMSC-007, ¶ 29, 145 N.M. 694, 204 P.3d 19, the New Mexico Supreme Court held that "malicious prosecution and abuse of process should be restated as a single cause of action known as malicious abuse of process."

Fourth Amendment

{19} We turn next to the Fourth Amendment as a basis for a malicious prosecution claim. Because Plaintiff makes the same arguments for his Fourth Amendment and state law claims, we discuss them together. A Fourth Amendment malicious prosecution claim is distinguished from a Fourth Amendment false arrest claim by the institution of legal process. *Myers*, 738 F.3d at 1194. "[L]egal process" can be instituted by the filing of a criminal complaint. *Nieves v. McSweeney*, 241 F.3d 46, 54 (1st Cir. 2001); *Salcedo v. Town of Dudley*, 629 F. Supp. 2d 86, 98 (D. Mass. 2009). Because the constitutional right protected by the Fourth Amendment is the freedom from unreasonable seizures, a claimant must, as a foundational matter, demonstrate a "significant restriction on liberty." *Becker*, 494 F.3d at 915. Further, in the Tenth Circuit, analysis of a § 1983 malicious prosecution claim is guided by the following elements: "(1) the defendant caused the plaintiff's continued confinement or prosecution; (2) the original action terminated in favor of the plaintiff; (3) no probable cause supported the original arrest, continued confinement, or prosecution; (4) the defendant acted with malice; and (5) the plaintiff sustained damages." *Wilkins v. DeReyes*, 528 F.3d 790, 799 (10th Cir. 2008).

New Mexico Tort Claims

{20} Under New Mexico tort law, to prevail on a malicious abuse of process claim a plaintiff must demonstrate "(1) the use of process in a judicial proceeding that would be improper in the regular prosecution or defense of a claim or charge; (2) a primary motive in the use of process to accomplish an illegitimate end; and (3) damages." *Durham*, 2009-NMSC-007, ¶ 29. "An improper use of process may be shown by (1) filing a complaint without probable cause, or (2) an irregularity or impropriety suggesting extortion, delay, or harassment, or other conduct formerly actionable under the tort of abuse of process." *Id.* (alteration, internal quotation marks, and citation omitted). In this context, "probable cause [i]s the reasonable belief, founded on known facts established after a reasonable pre-filing investigation, that a claim can be established to the satisfaction of a court or jury." *DeVaney*, 1998-NMSC-001, ¶ 22 (citations and footnote omitted). The probable cause analysis focuses on what the officer knew at the time the complaint was filed. *Weststar Mortg. Corp. v. Jackson*, 2003-NMSC-002, ¶ 16, 133 N.M. 114, 61 P.3d 823 ("Probable cause . . . is to be judged by facts as they appeared at the time, not by later-discovered facts." (internal quotation marks and citation omitted)). Finally, "the tort of malicious abuse of process [is] construed narrowly [in order] to protect the right of access to the courts." *Id.* ¶ 14 (internal quotation marks and citation omitted).

{21} Plaintiff alleged in his complaint that the charges were not based on probable cause. The district court based its ruling solely on its determination to the contrary that probable cause supported the charges. The parties did not raise or argue any of the other elements associated with malicious prosecution in the district court or on appeal. Thus, we too focus only on whether the district court's grant of summary judgment on the basis of probable cause for both the constitutional and tort claims was proper.

{22} The district court found that "[o]ne or more of the charges brought against Plaintiff were based upon probable cause." Neither party addresses whether probable cause to support one charge precludes a malicious

abuse of process claim for charges not supported by probable cause. Therefore, we assume without deciding that in this context probable cause for a single charge does not preclude such a claim for unsupported charges. *See Holmes*, 511 F.3d at 682-683 ("[P]robable cause to believe an individual committed one crime—and even his conviction of that crime—does not foreclose a malicious prosecution claim for additionally prosecuting the individual on a separate charge."); *but see Fleetwood Retail Corp. of N.M. v. LeDoux*, 2007-NMSC-047, ¶ 20, 142 N.M. 150, 164 P.3d 31 ("[P]robable cause relates to the complaint as a whole, and the original plaintiff need not show favorable termination of each individual claim to establish an effective defense to a subsequent suit for malicious abuse of process.").

Leaving the Scene of an Accident

{23} We begin with the charge of leaving the scene of an accident, contrary to NMSA 1978, § 66-7-201(D) (1989), and failure to comply with the requirements set out in NMSA 1978, 66-7-203 (1978). Immediately after the accident, the motor home driver called 911 and reported that he had rear-ended a truck and that the truck's driver had not stopped. Plaintiff does not dispute that the motor home hit his truck and that he did not immediately stop. Instead of disputing these facts, Plaintiff maintains that he did not know that he had been hit and complied with Defendants' request for his identification when they stopped him and, therefore, did not violate Sections 66-7-201(C) or -203, which require drivers involved in traffic accidents to stop and provide identification and assistance to the other driver. These arguments are unavailing for two reasons. First, Plaintiff was arrested and charged for failure to comply with Section 66-7-201(D), not (C). Unlike Subsection (C), Subsection (D) does not require that a person "knowingly" fail to stop. *Compare* § 66-7-201(C) *with* § 66-7-201(D). Second, Section 66-7-203 requires a person to provide certain information, including his or her driver's license, "to the person struck or the driver or occupant of . . . any vehicle collided with." The fact that Plaintiff provided his identification to *Defendants* after they stopped him is therefore irrelevant to his compliance with Section 66-7-203. Because it was reasonable for Defendants to believe that a crime had been committed based on Plaintiff's admissions, this charge was supported by probable cause.

Resisting Arrest

{24} The criminal complaint alleges that Plaintiff "intentionally fled, resisted, obstructed, or attempted to evade or evaded [Defendant] Shutiva, . . . knowing that the officer was attempting to apprehend or arrest [him]." *See* NMSA 1978, § 30-22-1 (1981). The charge thus requires both evasive or obstructive behavior and knowledge that the officer is attempting to arrest.

{25} The evidence presented to the district court demonstrates disparate views of the facts. For instance, Plaintiff stated that it was Martinez who handcuffed him, whereas Shutiva testified that he placed Plaintiff in handcuffs. Plaintiff stated in his deposition that Shutiva told him he was under arrest for "hit and run" after he was pulled over but before he was handcuffed. But Shutiva testified that he did not tell Plaintiff that he was under arrest before Plaintiff was handcuffed and did not tell him until "later through the investigation." While Plaintiff testified that Martinez told him to turn around and put his hands on the hood of the truck, that he did not put his hands on the truck, and

that Martinez then "turned [him] around and . . . forced [him] down and . . . put the handcuffs on [him]," Shutiva testified that he "turned [Plaintiff] around to begin placing handcuffs on him[,]" that Plaintiff was "uncooperative, yelling at [him,]" and that Shutiva "remember[ed Plaintiff] pulling away a bit."

{26} Both parties cite to the dashcam video of the stop in support of their version of the facts surrounding the handcuffing. Although they recognize that the facts must be construed in Plaintiff's favor, Defendants rely on *Scott v. Harris* for the proposition that "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." 550 U.S. 372, 380 (2007); *see State v. Martinez*, 2015-NMCA-___, ¶ 16, ___ P.3d. ___ (No. 32,516, Jan. 6, 2015) (relying on a dashcam video and on a Texas case in which the Texas Criminal Court of Appeals reversed a denial of a suppression motion where the video included "indisputable visual evidence contradicting essential portions of the officer's testimony, and . . . the evidence presented on the video did not turn on an evaluation of credibility and demeanor" (internal quotation marks and citation omitted)). *Scott* and *Martinez* are distinguishable because in those cases the video was used to establish a fact that did not depend on interpretation of people's body language or demeanor. Here, while the identity of the officer doing the handcuffing might be conclusively resolved by the video, even Defendants acknowledge that some parts of the handcuffing are obscured and that it is not clear whether Plaintiff pulled the officer with him into the cab of the truck or was pushed by the officer. In addition, whether Plaintiff's movement during the handcuffing constituted resisting arrest depends on one's interpretation of that movement.

{27} *Perez v. City of Albuquerque* presents a more analogous use of a video. 2012-NMCA-040, 276 P.3d 973. In that case, this Court assessed the propriety of a denial of a motion for directed verdict where the defendant argued that "there [wa]s only one interpretation of the videotape [of the defendant's arrest] and that no reasonable factfinder could disagree that the [police o]fficers acted unreasonably after [the p]laintiff was handcuffed." *Id.* ¶ 9. The Court disagreed, stating that the plaintiff's reliance on *Scott* was misplaced because "[r]easonable jurors watching the videotape and hearing the testimony of [the] witnesses could disagree over the constitutionality of the [police o]fficers' actions." *Id.* ¶ 10. Thus, "[w]hether the actions of the [police o]fficers were unreasonable under the circumstances was a question for the jury to decide." *Id.* The question here is whether Shutiva had probable cause to charge Plaintiff with resisting arrest, which hinges on whether it was reasonable for Shutiva to believe that Plaintiff was guilty of the charge. Like in *Perez*, and unlike in *Martinez* and *Scott*, that question depends in part on interpretation of Plaintiff's demeanor. Combined with the conflicts in the deposition testimony, we conclude that the interpretation of the video gives rise to a dispute over material facts related to the existence of probable cause. The district court erred in granting summary judgment as to this claim.

Assault on Motor Home Driver

{28} Finally, we examine whether the charge of assault on the motor home driver was supported by probable cause. We begin by setting out the undisputed facts. First, after

being pulled over, Plaintiff loudly challenged the motor home driver to tell him why the motor home driver had called the police. Plaintiff admitted in deposition testimony that he was yelling "at the top of his lungs" at the motor home driver to "[c]ome over here, motherfucker[]. Tell me to my face. Don't be telling it to the cops. Tell it to my face what the fuck you're doing." Second, the parties agree that Plaintiff was raising his arms, although they differ on the precise nature of the gesture. Shutiva testified that Plaintiff was making "a challenging motion . . . . Like somebody calling you on to a fight. And waving his arms in the air. Like [a] 'bring it on' type of gesture." Plaintiff states on appeal that he "rais[ed] his hands into the air" while challenging the motor home driver and that he "pointed toward the sky in an angry manner." Third, both Plaintiff and Shutiva testified in their depositions that the motor home was approximately fifty yards from Plaintiff at the time. Fourth, the parties agree that there were three officers present at the time.

{29} The criminal complaint alleges that Plaintiff "did perform an unlawful act, threat[,] or menacing conduct which caused [the motor home driver] to reasonably believe that he was in danger of receiving an immediate battery, contrary to [NMSA 1978, Section] 30-3-1 [1963]." The uniform jury instruction associated with assault states the elements of the charge in relevant part as follows.

> 1. The defendant [description of the unlawful act, threat[,] or menacing conduct committed by the defendant];
>
> 2. The defendant's conduct caused [the victim] to believe the defendant was about to intrude on [the victim's] bodily integrity or personal safety by touching or applying force to [the victim] in a rude, insolent or angry manner;
>
> 3. A reasonable person in the same circumstances as [the victim] would have had the same belief[.]

UJI 14-302 NMRA. The phrase "touching or applying force to [the victim] in a rude, insolent or angry manner" in UJI 14-302 echoes the language of the uniform jury instruction for battery and applies to the "battery" referenced in the assault statute. *See* UJI 14-320 NMRA; § 30-3-1; NMSA 1978, § 30-3-4 (1963). Similarly, the phrase "about to" refers to the statute's requirement that the threat be "immediate." *See* § 30-3-1. "About to" is defined in the Merriam-Webster Dictionary as "on the verge of." http://www.merriam-webster.com/dictionary/about (last visited Feb. 10, 2015). Similarly, our case law has equated the phrase with "imminent." *See, e.g.*, *State v. Chavez*, 1982-NMCA-072, ¶ 13, 98 N.M. 61, 644 P.2d 1050 (holding that " '[i]mminent' means: 'about to happen'; 'ready to take place'; 'near at hand' " (citation omitted); *State v. Valdez*, 1990-NMCA-134, ¶ 14, 111 N.M. 438, 806 P.2d 578 (stating that while there was no evidence that the defendant was "about to" destroy evidence, the police could have acted without a warrant if "destruction became imminent"); *cf. Romero v. Sanchez*, 1995-NMSC-028, ¶ 12, 119 N.M. 690, 895 P.2d 212 (equating an "immediate battery" with an "imminent battery"). "Imminent" means "happening very soon" or "ready to take place." *Merriam Webster Dictionary*, http://www.merriam-webster.com/dictionary/imminent (last visited Feb. 10, 2015).

{30} With this background in mind, we

return to the question of whether the charge of assault on the motor home driver was based on a reasonable belief that the crime of assault had occurred. In other words, was it objectively reasonable for Shutiva to believe that Plaintiff had assaulted the motor home driver? This determination in turn depends on whether it would have been objectively reasonable for the motor home driver to believe that he was about to be battered. Based on the undisputed facts, we conclude that it was neither reasonable for the motor home driver to believe that a battery was imminent nor for Shutiva to believe that Plaintiff had committed assault against the motor home driver because (1) the driver was in the motor home fifty yards away from Plaintiff, and (2) there were three officers at the scene at the time. We conclude that the assault charge was not supported by probable cause, and the district court erred in granting summary judgment on this issue. *See Yucca Ford, Inc. v. Scarsella*, 1973-NMCA-042, ¶ 6, 85 N.M. 89, 509 P.2d 564 ("If the facts are sufficient to show an absence of probable cause and are not disputed, this determination disposes of the probable cause issue.")

{31} In sum, we conclude that (1) the district court properly granted summary judgment as to Plaintiff's malicious prosecution claim based on the charge of leaving the scene of an accident, (2) there are disputed issues of material fact that preclude summary judgment as to Plaintiff's malicious prosecution claim based on the resisting arrest charge, and (3) summary judgment as to Plaintiff's malicious prosecution claim based on the assault on the motor home driver was improper because there was no probable cause supporting the charge. The district court's order as to Counts II and VIII is thus affirmed in part and reversed in part.

Excessive Force—Counts III and VI

{32} Plaintiff alleged in his complaint that Defendants used excessive force in their use of handcuffs in violation of his Fourth Amendment right to be free from unreasonable seizures. He also alleged personal injuries due to excessive force under the NMTCA. The district court granted summary judgment as to this issue, stating that "[t]he force used by [Defendants] attendant to the arrest of Plaintiff was reasonable" and that " Plaintiff did not present evidence or otherwise show that the force used by [Defendants] to effectuate the arrest of Plaintiff violated clearly established law."

{33} When "officers move for qualified immunity on an excessive force claim, a plaintiff is required to show that the force used was impermissible (a constitutional violation) and that objectively reasonable officers could not have . . . thought the force constitutionally permissible (violates clearly established law)." *Cortez v. McCauley*, 478 F.3d 1108, 1128 (10th Cir. 2007) (en banc). Because "[t]he right to be free from excessive force is a clearly established right under the Fourth Amendment's prohibition against unreasonable seizures of the person[,]" we focus on whether the force used here was impermissible. *Crumley v. City of St. Paul*, 324 F.3d 1003, 1007 (8th Cir. 2003) (internal quotation marks and citation omitted). In excessive force claims, the use of handcuffs "could constitute excessive force if a plaintiff alleges: "(1) 'some actual injury that is not *de minimis*, be it physical or emotional[;]' and (2) that the officer ignored the 'plaintiff's timely complaints . . . that the handcuffs were too tight.' " *Griffin v. Penn*, 2009-NMCA-066, ¶ 18, 146 N.M. 610, 213 P.3d 514 (quoting *Cortez*, 478 F.3d at 1129 (alteration in

original))[2]. For example, in *Griffin*, the plaintiff alleged that the use of handcuffs constituted excessive force. *Id.* ¶ 17. In considering whether summary judgment had been properly granted, the *Griffin* Court accepted the plaintiff's allegation that the defendants ignored his complaints that the handcuffs were too tight, but nevertheless concluded that plaintiff's claim failed as a matter of law because he did not present evidence of an "actual injury." *Id.* ¶ 20.

{34} Here, Plaintiff testified in his deposition that the officer handcuffing him "squeezed [the handcuffs] as hard as he could," that the handcuffs were too tight, that the resultant bruising turned his hands "black" and that, although he did not seek treatment for injuries to his hands and wrists after an initial visit to the hospital, he has suffered mental and emotional distress severe enough to require medication. Plaintiff also presented a color photograph of his bruised wrists to the district court. In addition, Plaintiff testified that after he complained that the handcuffs were too tight, "[an] officer loosened [the] right one and . . . tried to loosen the left one[,] but . . . didn't." He stated that the officers "unloosened [the handcuffs] but they were still too tight." But Plaintiff also testified that he bruises easily. Additionally, although he maintained that "the bruising [was] because the handcuffs [were] too tight," he also admitted that the bruising could have been caused by his own struggling against them. Viewing the evidence in the light most favorable to Plaintiff, we conclude that this evidence establishes a question of fact as to excessive force in handcuffing sufficient to preclude summary judgment on this claim. *See Archuleta*, 1999-NMCA-113, ¶ 6.

Retaliatory Arrest—Count IV

{35} Count IV of Plaintiff's complaint alleges that he was arrested in retaliation for his speech, which is protected by the First Amendment to the United States Constitution[3]. U.S. Const. amend. I. The district court found that "Plaintiff's speech consisted of personal epithets that were 'fighting words' rather than protected speech under the First Amendment." It also stated that

> As Defendants had probable cause to arrest . . . Plaintiff [for] leaving the [3]scene of an accident pursuant to [Section] 66-7-201(D) . . . , Plaintiff could not show that his arrest was in retaliation for his speech. Regardless, as set forth above, Plaintiff's speech was not protected . . . under the First Amendment.

We first address whether Plaintiff's speech

[2]In *Griffin*, the Court addressed an excessive force claim under the Eighth Amendment, not the Fourth Amendment. It acknowledged "that excessive force claims utilize different standards under the Fourth and Eighth Amendments" and stated that "[t]he differing standards [in United States Supreme Court cases] make clear that the Fourth Amendment provides greater protection to plaintiffs on claims of excessive force than does the Eighth Amendment." 2009-NMCA-066, ¶ 20 n.1. It then applied Fourth Amendment principles in analysis of the plaintiff's claim. *Id.* Thus the holding in *Griffin* is applicable here.

[3]Plaintiff alleged both retaliatory arrest and retaliatory prosecution in his complaint. The Supreme Court of the United States has distinguished between retaliatory arrest and retaliatory prosecution. *See Reichle v. Howards*, 132 S. Ct. 2088, 2094-95 (2012) (discussing *Hartman v. Moore*, 547 U.S. 250, 265 (2006), and holding that the holding in *Hartman* pertaining to retaliatory prosecution may not extend to retaliatory arrests). Because neither Defendants' motion to dismiss nor the district court's order addressed the retaliatory prosecution claim, we also do not address it.

constituted "fighting words" unprotected by the First Amendment.

{36} In 1942, the United States Supreme Court defined " 'fighting' words [as] those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky v. N.H.*, 315 U.S. 568, 572 (1942). This definition was refined in 1971 as "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." *Cohen v. Cal.*, 403 U.S. 15, 20 (1971). But both the United States Supreme Court and New Mexico courts have recognized that police officers are not ordinary citizens. In *City of Hous., Tex. v. Hill*, 482 U.S. 451, 462 (1987), the United States Supreme Court recognized that "even the 'fighting words' exception recognized in *Chaplinsky* . . . might require a narrower application in cases involving words addressed to a police officer, because 'a properly trained officer may reasonably be expected to 'exercise a higher degree of restraint' than the average citizen, and thus be less likely to respond belligerently to 'fighting words.' " (quoting *Lewis v. City of New Orleans*, 415 U.S. 130, 135 (1974) (Powell, J., concurring) (quoting his concurrence in *Lewis v. City of New Orleans*, 408 U.S. 913 (1972)). Similarly, in *City of Alamogordo v. Ohlrich*, 1981-NMCA-028, ¶¶ 2, 5, 95 N.M. 725, 625 P.2d 1242, where the defendant called the police officer a "mother fucking son-of-a-bitch," this Court stated, "A trained police officer is not an average person." Finally, in *State v. Wade*, 1983-NMCA-084, ¶ 17, 100 N.M. 152, 667 P.2d 459, "[t]he defendant was upset at what he thought was an unwelcomed intrusion into a family argument [by police officers]. He screamed obscenities, waved his arms, and yelled at the officers to 'get the hell out of the house.' " This Court held that "[s]creaming obscenities and yelling 'get the hell out of the house' do not amount to 'fighting' words, particularly when they are addressed to police officers, who are supposed to exercise restraint." *Id.* We conclude that the district court erred in finding that Plaintiff's speech fell within the "fighting words" exception to the First Amendment.

{37} Having concluded that Plaintiff's speech was protected, we turn next to whether the district court properly dismissed this claim on the ground that the arrest was supported by probable cause. Plaintiff alleged that his arrest was based on improper motives. We have already concluded that Defendants had probable cause to arrest Plaintiff. Thus, we agree with this portion of the district court's order. Where we depart from the district court is on its conclusion that the existence of probable cause automatically precludes a claim for retaliatory arrest. We explain.

{38} In 2006, the United States Supreme Court decided *Hartman*, holding that a plaintiff must plead and prove an absence of probable cause for prosecution in order to prevail on a retaliatory prosecution claim. 547 U.S. at 265. After *Hartman*, the courts were divided on whether its holding applied to both retaliatory prosecution and retaliatory arrest claims. *Reichle*, 132 S. Ct. at 2096 (listing cases); John Koerner, *Between Healthy and Hartman: Probable Cause in Retaliatory Arrest Cases*, 109 Colum. L. Rev. 755, 775 (2009) (observing in 2009 that "[r]etaliatory arrest case law is a mess, with some courts siding entirely with *Hartman*, others rejecting *Hartman* outright, and still others having yet to take a position."). The Tenth Circuit's case law before *Hartman* had held that "a First Amendment retaliation claim[ant] in this circuit was not required to show that the

defendants lacked probable cause for their actions." *Howards v. McLaughlin,* 634 F.3d 1131, 1146 (10th Cir. 2011) (citing *DeLoach v. Bevers,* 922 F.2d 618, 620 (10th Cir. 1990), *rev'd and remanded sub nom. Reichle,* 132 S. Ct. 2088). In *Howards,* the Tenth Circuit held that because the focus in *Hartman* was on retaliatory prosecution, rather than retaliatory arrest, this holding was undisturbed. *Id.* at 1148. Consequently, it "decline[d] to extend *Hartman*'s 'no-probable-cause' requirement to [a] retaliatory arrest case" and "permit[ted] Mr. Howards to proceed with his First Amendment retaliation claim notwithstanding probable cause existed for his arrest." *Id.* at 1148-49.

{39} The United States Supreme Court granted certiorari on two questions: "whether a First Amendment retaliatory arrest claim may lie despite the presence of probable cause to support the arrest, and whether clearly established law at the time of Mr. Howards' arrest so held." *Reichle,* 132 S. Ct. at 2093. Recognizing that the defendants would be entitled to qualified immunity if it answered either question in the negative, the Court examined the state of the law on retaliatory arrest in the wake of *Hartman. Reichle,* 132 S. Ct. at 2093. The Court began by stating that "[t]o be clearly established, a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right. In other words, existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* (alteration, internal quotation marks, and citation omitted). Next, the Court clarified that the specific right at issue was "not the general right to be free from retaliation for one's speech, but the more specific right to be free from a retaliatory arrest that is otherwise supported by probable cause." *Id.* at 2094.

{40} With this framework established, the Court stated that it had "never held that there is such a right." *Id.* It also stated that, "[a]ssuming arguendo that controlling Court of Appeals' authority could be a dispositive source of clearly established law," *id.*, Tenth Circuit precedent also did not constitute clearly established law on this issue because "*Hartman* injected uncertainty into the law governing retaliatory arrests, particularly in light of *Hartman*'s rationale and the close relationship between retaliatory arrest and prosecution claims." *Id.* at 2096-97. Stating that "[a] reasonable official also could have interpreted *Hartman*'s rationale to apply to retaliatory arrests[,]" *id.* at 2095, the Court held that "when Howards was arrested it was not clearly established that an arrest supported by probable cause could give rise to a First Amendment violation." *Id.* at 2097. Since the law was not clearly established, the defendants were entitled to qualified immunity and the lower court's decision was reversed. *Id.*

{41} *Reichle* controls our analysis here. In that case, the arrest took place in 2006 and the opinion was filed in 2012. *Id.* at 2091. Here, Plaintiff was arrested in August, 2010. There is no indication that the law as to this issue was any more clear on that date than it was in 2006. Indeed, two Tenth Circuit cases addressing arrests in 2009 and 2010 have relied on *Reichle* to hold that the defendants were entitled to qualified immunity because it was still unclear at that time whether a retaliatory arrest claim could lie in the presence of probable cause. *See Wilson v. Vill. of Los Lunas,* 572 F. App'x 635, 643 (10th Cir. 2014) (unpublished) ("*Reichle* therefore compels the conclusion that the law as to First Amendment retaliatory arrest in the presence of probable cause was no more clearly established in July 2009 . . . than it was in June 2006."); *Moral v. Hagen,* 553 F. App'x

839, 840 (10th Cir. 2014) (unpublished) (addressing a 2010 arrest and stating that it "remains unsettled under current law whether an officer violates the Fourth Amendment by initiating an arrest for retaliatory reasons when the arrest itself happens to be supported, as an objective matter, by probable cause"); *Moral v. Hagen*, No. Civ.A. 10-2595-KHV, 2013 WL 1660484, at *6 (D. Kan. Apr. 17, 2013) (stating that the arrest was in January 2010), *aff'd*, 553 F. App'x 839 (10th Cir. 2014)). *But see Storey v. Taylor*, 696 F.3d 987, 997 (10th Cir. 2012).

{42} We conclude that, because it was not clear at the time that Plaintiff was arrested whether a claim for retaliatory arrest would lie when probable cause supported the arrest, Defendants are entitled to qualified immunity on this claim. We therefore affirm the district court's grant of summary judgment as to Plaintiff's First Amendment/retaliatory arrest claim, although on a different basis.

III. Conclusion

{43} We affirm the district court's order as to Counts I, IV, V, VI, VII, and parts of Counts II and VIII. We reverse the district court as to the portion of Counts II and VIII pertaining to assault on the motor home driver because, based on the undisputed facts, there was no probable cause to charge Plaintiff for assault. Because there is a genuine issue of material fact as to whether there was probable cause to charge Plaintiff with resisting arrest, we reverse the grant of summary judgment on that portion of Counts II and VIII as well. Finally, we reverse the district court's grant of summary judgment as to Plaintiff's excessive force claims in Counts III and VI.

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

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:

MICHAEL E. VIGIL, Chief Judge

J. MILES HANISEE, Judge

Certiorari Denied, June 3, 2015, No. 35,272

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-066

Filing Date: April 27, 2015

Docket No. 33,004

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

ROBERT DINAPOLI,

Defendant-Appellant.

Hector H. Balderas, Attorney General
Paula E. Ganz, Assistant Attorney General
Santa Fe, NM

for Appellee

Jorge A. Alvarado, Chief Public Defender

Kimberly Chavez Cook, Assistant Appellate Defender
Santa Fe, NM

for Appellant

OPINION

WECHSLER, Judge.

{1} Defendant Robert Dinapoli, having previously been convicted of criminal sexual penetration, signed a Sex Offender Supervision Behavioral Contract (the sex offender contract) in which he agreed that he would not possess "any sexually oriented or sexually stimulating material." The district court revoked Defendant's probation because Defendant was found to be in possession of three R-rated, theatrically released movies. Defendant argues that he did not have sufficient notice that his possession of such movies would violate the terms of his probation and that the district court erred by revoking his probation without reviewing the movies in their entirety in order to assess the nature of the movies as a whole. We hold that Defendant had sufficient notice as a result of both the sex offender contract and the circumstances of a previous probation violation. We further hold that the district court had sufficient evidence before it without reviewing the movies in their entirety. We therefore affirm the revocation of Defendant's probation. We nevertheless correct the district court's order and commitment to credit Defendant for days of probation he already served.

BACKGROUND

{2} On December 4, 1992, Defendant was indicted for numerous crimes of criminal sexual penetration taking place on June 25, 1990 after he had broken into the home of two women while armed with a firearm. In 1994, Defendant pleaded guilty to four counts of criminal sexual penetration, two counts of kidnapping, and one count of aggravated battery. All the crimes involved the use of a deadly weapon. On January 30, 1992, Defendant was also indicted for attempted criminal sexual penetration, kidnapping, and false imprisonment, among other crimes, involving another woman in an incident that took place on October 3, 1991.

{3} Defendant was sentenced for the 1991 crimes after a plea and disposition agreement to serve 364 days in custody followed by five years probation. For the 1990 crimes, he was sentenced to serve thirty years imprisonment followed by five years probation. He was additionally ordered to participate in both inpatient and outpatient treatment and sex offender counseling.

{4} Defendant was released from imprisonment on October 21, 2008 to the Sex Offender Unit at the New Mexico Behavioral Health Institute in Las Vegas, New Mexico. Two days later, Defendant was terminated from the program. Defendant's probation officer at that time reported that Defendant "informed staff members that treatment was of no value to him and [that he] wished to be returned to prison where he did not have to put up with anyone asking questions about his past behavior." The probation officer reported that Defendant told him "I don't belong out here, I raped two women and I need to go back to prison. I have food and shelter over there and [j]ust can't make it out here, I need to go back to prison." The district court revoked Defendant's probation and re-committed him to serve a term of six years imprisonment to be followed by five years probation.

{5} After his subsequent release from prison, the district court allowed Defendant to live at his mother's house because he suffers from a degenerative neurological disorder. Defendant signed the sex offender contract on December 2, 2011. Rosalind Hankins, Defendant's probation officer, reported that Defendant violated the conditions of his probation and was arrested on February 29, 2012, charging that Defendant (1) did not comply with Section 6(D) of the sex offender contract that prohibited Defendant from accessing electronic devices for sexually stimulating material, pornography, adult websites, and social networking sites; and (2) did not attend the Sex Offender Treatment Program because he was asked to leave for being disruptive (the February violation). As to the first charge, Ms. Hankins reported that Defendant stated that the websites depicted rape victims and rapists and that he "wanted to learn more about what kind of rapist he was." The State filed a motion to revoke probation, and the district court held a probation violation hearing on April 5, 2012. The district court reinstated Defendant's probation with the additional condition that Defendant not access the internet with his cell phone.

{6} On July 30, 2012, Ms. Hankins and another probation officer visited Defendant's residence on a routine probation call. While there, Ms. Hankins found three DVDs in Defendant's bedroom that she characterized in her probation violation report attached to the State's motion to revoke Defendant's probation as "extremely violent and sexually graphic in nature, and portray women being raped." The State again filed a motion to revoke probation. After a probation violation hearing held on September 19, 2012 (September hearing), the district court found that Defendant violated his probation by possessing sexually explicit materials in violation of Section 6(A) of the sex offender contract. The district court revoked Defendant's probation and committed Defendant to the Department of Corrections for a term of five years to be followed by supervised probation for a new term of five years.

NOTICE

{7} Defendant first argues that the district court improperly revoked his probation because he did not have sufficient notice that his possession of the movies would violate the terms of his probation. Specifically, Defendant contends that neither the sex offender contract nor the February violation provided him notice that his possession of "popular, mainstream, R-rated movies" would be a violation of the terms of his probation. Notice is an issue to the extent it bears upon whether it was reasonable for Defendant to have believed that he was not violating the terms of his probation. *See State v. Martinez*, 1989-NMCA-036, ¶ 4, 108 N.M. 604, 775 P.2d 1321 ("The proof necessary [to support the revocation of probation] is that which inclines a reasonable and impartial mind to the belief that a defendant has violated the terms of probation.").

{8} We review the district court's revocation of probation under an abuse of discretion standard. *Id.* ¶ 5. In exercising its discretion, the court may consider that the purpose of probation is the rehabilitation of a defendant. *State v. Lopez*, 2007-NMSC-011, ¶ 7, 141 N.M. 293, 154 P.3d 668. A court has the authority to revoke probation for a probation violation because rehabilitation is not occurring. *Id.* ¶ 8.

Evidence Before the District Court

{9} The DVDs consisted of three movies: (1) *I Spit On Your Grave* (2010); (2) *The Girl With the Dragon Tattoo* (2009, Swedish); and (3) *The Girl With the Dragon Tattoo* (2011, American). At the probation revocation hearing, the State played "about twelve scenes" from *I Spit On Your Grave* for the court. The State asked the court to review the box containing the movie, noting that the back cover stated, "A group of local lowlifes subject the star of the movie to a nightmare of degradation, rape, and violence."

{10} The State also played scenes from both versions of *The Girl With the Dragon Tattoo* at the hearing. While the DVDs were playing, Ms. Hankins testified about what was depicted. As to the Swedish version, she noted a scene in which a woman is anally raped, an oral sex scene, and a scene in which "it happens in the office." She described a rape scene in which a woman is handcuffed to a bed, has her pants pulled off, is fully nude from the back, and is being raped. She described the rape scene in the American version as "very similar" and also noted a scene with oral sex. The State drew the court's attention to the warning on the back of the DVD cover, which read, "Rated R for brutal, violent content, including rape and torture, strong sexuality, graphic nudity" and characterized the plot as "a secret history of murder and sexual abuse."

{11} Defendant testified at the September hearing that he watched the movies because of the revenge that the portrayed victims were able to impose upon their rapists. He stated that he did not derive sexual satisfaction from the movies. He assumed that the sex offender contract prohibitions only applied to pornography; he was not "cautioned not to watch any scenes in a mainstream movie." He further testified that he did not believe that the proceedings concerning the February violation indicated that the sex offender contract prohibited possession of more than pornography because the violation was based on his having a cell phone that could access prohibited sites.

Notice Under Section 6(A) of the Sex Offender Contract

{12} The district court revoked Defendant's probation for violating Section 6(A) of the sex offender contract. That provision reads:

> I will not purchase, possess or subscribe to any sexually oriented or sexually stimulating material. This includes, but is not limited to: Sexual devices, books, magazines, video/audio tapes, pictures, DVDs, CD ROMs, and Internet websites.

{13} As framed by *Martinez*, 1989-NMCA-036, ¶4, we analyze the sufficiency of the notice of this section to ascertain whether it enables a reasonable person to believe that Defendant's possession of the movies would constitute a violation of the sex offender contract. We do not believe that Defendant could have reasonably believed that his possession of the DVDs did not violate Section 6(A).

{14} Section 6(A) prohibited Defendant from possessing "any sexually oriented or sexually stimulating material." Section 6(A) does not limit the type of material that may be prohibited as sexually oriented or sexually stimulating; it specifies that such material may include DVDs. Although Defendant argues that grammatically the word "sexual" in the

listing of types of material included within the prohibition restricts the type of DVD included to a "sexual DVD," we read the word as specifying a particular kind of "device" rather than describing all of the listed items. Indeed, reading "sexual" to pertain to the items other than "devices" would be mere surplusage in that the listed items are merely examples of "material" that must be either "sexually oriented" or "sexually stimulating" to be prohibited. *See Mayfield Smithson Enters. v. Com-Quip, Inc.*, 1995-NMSC-034, ¶ 14, 120 N.M. 9, 896 P.2d 1156 ("In New Mexico it is almost axiomatic that a contract must be construed as a harmonious whole, and every word or phrase must be given meaning and significance according to its importance in the context of the whole contract." (alteration, internal quotation marks, and citation omitted)). Thus, to fall within the prohibition of Section 6(A), a DVD must be either "sexually oriented" or "sexually stimulating."

{15} In addition, for the purposes of our analysis, we need not consider whether the DVDs in question were "sexually stimulating" to Defendant. The standard of whether a reasonable person would consider Defendant's possession to be a violation is an objective one. Defendant's testimony that he was not sexually stimulated is not relevant to this inquiry. We therefore focus our discussion on whether a reasonable person would believe that the material was "sexually oriented."

{16} We have guidance with regard to this terminology in *State v. Green*, 2015-NMCA-007, 341 P.3d 10, *cert. denied*, 2014-NMCERT-012, ___ P.3d ___. In that case, the probation violation report included within its allegations that the defendant had possession of sexual images on his computer that violated a provision of the defendant's sexual offender behavior contract similar to the provision in this case. *Id.* ¶ 21. The defendant argued that the evidence did not support the revocation of his probation because the contract was overly vague in that a reasonable person would not understand that the nude images depicted would be considered pornography or prohibited by the contract. *Id.* The contract in that case also prohibited the defendant from possessing "any sexually oriented or sexually stimulating material[,]" including, but not limited to "[s]exual devices, books, magazines, video/audio tapes, DVDs, CD ROMs, and [i]nternet websites." *Id.* ¶ 23 (alterations in original). In interpreting the contractual prohibition in that case, this Court stated:

> 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, ¶ 10, 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 a 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 [the d]efendant's sex offender behavior contract.

Id. ¶ 25 (alteration and omission in original).

{17} The DVD covers were enough to raise a reasonable question concerning whether the DVDs contained "sexually oriented" material. The cover to *I Spit On Your Grave* stated that the movie involved "a nightmare of degradation, rape, and violence."

The cover to the American version of *The Girl With the Dragon Tattoo* stated that the movie involved "violent content, including rape and torture, strong sexuality, [and] graphic nudity" as well as "sexual abuse." From this language, a reasonable person would be on notice of the sexually oriented material in the DVDs. And, even if the covers were not sufficient notice, the graphic content of *The Girl With the Dragon Tattoo*, as described by Ms. Hankins, would put a reasonable person viewing the DVD on notice that the material was "sexually oriented."

{18} The fact that the movies were "mainstream movies that anybody can buy at any video store" as Defendant contended below is not of consequence. Under Section 6(A) of the sex offender contract, Defendant agreed that he would not possess any sexually oriented material, including sexually oriented DVDs. Nothing in that provision excludes sexually oriented material of general availability. Section 6(A) is a condition of Defendant's probation, which, by its language, is designed to prevent Defendant from possessing material that may lead to recurring criminal activity or hinder his rehabilitation. With this intent, it is reasonable to believe that, standing alone, the source of any sexually oriented material is not relevant.

Notice Under Section 6(A) Read in Conjunction with Other Provisions of the Sex Offender Contract

{19} Nor do we believe, as Defendant further contends, that, in the context of this case, Section 6(A) is limited to "adult" or "pornographic" material when read in conjunction with other provisions of the sex offender contract. Other provisions of the sex offender contract provide:

> I understand that any computer, camera, computer tablet, cell phone, thumb drive (USB drive), memory or any other electronic device I have access to, including the hard drive and removable drives may be examined for inappropriate content at any time. Inappropriate content includes, but is not limited to: ***Sexually stimulating material, Pornography (adult or child), adult websites, social networking sites, such as, but not limited to Facebook, Myspace and Mocospace, dating websites, and personal ads to include cell phone applications.***

Section 6(D).

> I will not patronize any establishment in which sexually oriented material or entertainment is available. Including, but not limited to: ***adult book/video stores, and topless/nude clubs.***

Section 6(F).

> I understand that I may be asked to provide my telephone, satellite television, or cable bill for examination. Prohibited charges on these bills include: ***calls to adult hotlines, and adult channels.***

Section 6(G).

{20} Section 6(D) prohibits Defendant from maintaining "inappropriate content" on any electronic device. "Inappropriate content" is not defined other than to state that it includes, but is not limited to, certain types of material. It clearly includes sexually

stimulating material, and it may be assumed that, applying the principle of *ejusdem generis*, the sex offender contract intends to embrace pornography and the other listed items in the same manner as sexually stimulating material. *See State v. Nick R.*, 2009-NMSC-050, ¶ 21, 147 N.M. 182, 218 P.3d 868 (stating that, under the statutory construction principle of *ejusdem generis*, when words with a general meaning follow words with a more specific meaning, "the general words are not construed in their widest extent but are instead construed as applying to persons or things of the same kind or class as those specifically mentioned" (internal quotation marks and citation omitted)); *State v. Strauch*, 2014-NMCA-020, ¶ 13, 317 P.3d 878 (applying the principle of *ejusdem generis* when words of specific meaning follow general words), *rev'd on other grounds*, 2015-NMSC-009, ___ P.3d. ___. While unstated, by virtue of the nature of the provision, we further believe that Section 6(D) intends for sexually oriented material to be included within the scope of "inappropriate content." Indeed, the sex offender contract treats "sexually oriented" and "sexually stimulating" material in a similar fashion.

{21} Defendant points to the statutory construction principle of *ejusdem generis* and argues that, when the provisions of the sex offender contract are considered together, Section 6(A) would be reasonably understood to prohibit only pornographic materials. According to Defendant, all the language describing prohibited materials in Sections 6(D), (F), and (G) "clarify" the terms "sexually stimulating or sexually oriented material" in Section 6(A) to relate to "adult" or pornographic material. We again note, in this regard, that Section 6(A) prohibits possession of "sexually oriented or sexually stimulating materials[,]" and Section 6(D) defines "inappropriate content" to include both "[s]exually stimulating material" and pornography, as well as "adult websites." Sections 6(F) and (G) focus their prohibitions on "adult" activities.

{22} However, Section 6(D), by defining "inappropriate content" to include both "[s]exually stimulating material" and pornography, does not use the two terms interchangeably. While there certainly may be overlap, if the intent were to equate sexually stimulating material with pornography, there would be no reason to list both items. *Pub. Serv. Co. of N.M. v. Diamond D Constr. Co.*, 2001-NMCA-082, ¶ 19, 131 N.M. 100, 33 P.3d 651 ("[W]e view the contract as a harmonious whole, give meaning to every provision, and accord each part of the contract its significance in light of other provisions."). We do not believe that it would be reasonable to assume the two terms to be fully inclusive.

Impact of the February Violation

{23} Moreover, to the extent that there is ambiguity, it was reasonably resolved with respect to Defendant because of the additional notice afforded him by the proceeding related to the February violation. That proceeding involved Section 6(D) and the allegations that Defendant accessed websites depicting rapists and rape victims on his cell phone. Defendant agreed not to access the internet using his cell phone.

{24} At the September hearing, Defendant's previous probation officer testified, over defense counsel's relevance objection, regarding the February violation. On cross-examination, Defendant later stated that he had viewed websites on his cell phone that included statements of people who were raped. He acknowledged that he violated his

probation because he viewed sexually stimulating material that did not include pornographic pictures. This acknowledgment was inconsistent with Defendant's position that he was unaware that sexually stimulating materials were not limited to pornography. In closing, the prosecutor argued that Defendant was aware that the sex offender contract was not limited to pornography as a result of the February violation. At sentencing, the district court, in finding that Defendant had violated the sex offender contract by possessing the DVDs, stated:

> There had been a prior revocation or motion revoking probation, wherein it was another scene viewed that was pretty similar to the—well, it was a scene viewed that had nuances of the same scenes that were viewed in these other tapes. It's just troubling, when you've been corrected once, that you would do the same thing again.

{25} Defendant argues on appeal that the violation underlying the current proceedings is "completely distinct" from the February violation such that the earlier proceedings were not sufficient to give a "person of ordinary intelligence" notice that possession of the DVDs at issue would violate the sex offender contract. He further argues that the district court misapprehended the substance of the earlier proceedings and erroneously relied upon them. As to the latter argument, we agree with Defendant that the district court may have misstated the facts of the February violation. It was not clear that Defendant viewed any scenes or images on his cell phone. However, we do not consider this discrepancy to be a material one because we do not agree with Defendant that the February violation was "completely distinct" from or unrelated to the current one.

{26} The two violations are related, even though they are not factually the same, because the circumstances of the February violation were sufficient to provide a reasonable person with notice that possession of sexually oriented or sexually stimulating material was forbidden by the sex offender contract even if it were not considered pornographic. The February violation involved Defendant's accessing websites on his cell phone that depicted rape victims and rapists. Regardless of whether the websites included scenic material, the State moved to revoke Defendant's probation for violating Section 6(D) of the sex offender contract. That section, as we have described, prohibits Defendant from accessing sexually stimulating material, pornography, adult websites, and social networking sites that "include cell phone applications." The State did not assert, and nothing in the record indicates, that the websites involved pornography. Indeed, Defendant testified at the September hearing that the websites pertaining to the February violation did not have pornographic pictures and that there was a probation violation because he was "viewing sexually stimulating material."

{27} A reasonable person would conclude from this information that material need not be pornographic in order to be sexually stimulating. A reasonable person would further conclude that, although the February violation was of Section 6(D), material also would not need to be pornographic in order to be considered sexually stimulating as prohibited by Section 6(A). Because the terms "sexually stimulating" and "sexually oriented" are used interchangeably in Section 6(A), a reasonable person would thus necessarily conclude that material need not be

pornographic to be prohibited as "sexually oriented" by Section 6(A). We therefore conclude that the circumstances of the February violation provided notice to Defendant that the DVDs that contained sexually oriented material would be a violation of Section 6(A) even though the material may not be considered pornographic as that term is used in the sex offender contract.

DEFENDANT'S ADDITIONAL ARGUMENTS CONCERNING THE SEX OFFENDER CONTRACT

{28} Defendant additionally argues in connection with his notice argument that the prohibitions of the sex offender contract are vague and overly broad. According to Defendant, the sex offender contract is vague and overly broad because it does not provide sufficient notice that the possession of mainstream movies was prohibited and because it therefore gives rise to the risk of arbitrary enforcement by probation officers. However, the sex offender contract couches the prohibitions of Section 6(A) in terms of "sexually oriented or sexually stimulating material." As we discussed in *Green*, the meaning of "sexually oriented" can be gleaned from case law and statute. 2015-NMCA-007, ¶ 25. Moreover, as we have discussed, Defendant had additional notice of the prohibitions of the sex offender contract by virtue of the February violation. We do not consider the sex offender contract to be impermissibly vague such as to have denied Defendant notice. We consider the sex offender contract to be necessarily broad in order to accomplish its rehabilitative purpose. *See Lopez*, 2007-NMSC-011, ¶ 7 (stating the rehabilitative intent of probation).

{29} Defendant further argues that the sex offender contract violates his First Amendment rights. However, conditions of probation are, by their very nature, restrictions on an offender's lifestyle. Probation "is not a matter of right"; it is "an act of clemency" within the court's discretion. *Id.* (internal quotation marks and citation omitted). Probation conditions are permissible if they serve the best interests of the public and the interest of the offender's rehabilitation. *See id.* ("Probation assumes that the best interests of the public and the offender will be served and also that the offender can be rehabilitated without serving the suspended jail sentence." (internal quotation marks and citation omitted)). "Probation is a criminal sanction, and the district court may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." *State v. Leon*, 2013-NMCA-011, ¶ 27, 292 P.3d 493 (internal quotation marks and citation omitted). By prohibiting Defendant from possessing sexually oriented material, the sex offender contract addresses both the need to deter Defendant from reoffending and the effort to bolster his rehabilitation. Such a prohibition is a permissible restriction of Defendant's First Amendment rights.

THE DISTRICT COURT'S EVIDENTIARY REVIEW

{30} At the probation revocation hearing, the State played scenes from each of the three DVDs for the district court's review, including twelve scenes from *I Spit On Your Grave*. The scenes from both versions of *The Girl With the Dragon Tattoo* were described by Ms. Hankins. The district court did not view other portions of the DVDs.

{31} Defendant objected to the district court's viewing only portions of the DVDs, arguing that, unless the movies were viewed in

their entirety, the court would not be viewing the complete evidence and the scenes selected by the State would not be within context. On appeal, Defendant argues that the district court abused its discretion and violated his due process rights by failing to view the movies in their entirety. Defendant acknowledges that Rule 11-106 NMRA, pertaining to a court's ability to receive evidence of parts of a writing or recorded statement that, in fairness, should be considered along with other parts of the same writing or recorded statement received in evidence, does not apply to a probation revocation hearing. *See* Rule 11-106 ("If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time."); Rule 11-1101(D)(3)(d) NMRA (stating that the rules of evidence do not apply to proceedings to revoke probation). Indeed, the district court offered to view additional parts of the DVDs identified by Defendant as demonstrating the absence of a probation violation.

{32} "We review the district court's evidentiary rulings for an abuse of discretion." *Green*, 2015-NMCA-007, ¶ 27 (internal quotation marks and citation omitted). To the extent that Defendant contends that the district court violated his due process rights, he must show prejudice. *State v. Neal*, 2007-NMCA-086, ¶ 42, 142 N.M. 487, 167 P.3d 935.

{33} Defendant argues that, although the DVDs "contain isolated scenes depicting sex[,]" the district court was required to view the DVDs in their entirety in order to determine if they "overall" constituted "sexually oriented" material. He draws a parallel to the constitutional test for obscenity, asserting that the test for "sexually oriented" is similarly dependent on a review of the material "taken as a whole." *Miller v. California*, 413 U.S. 15, 24 (1973) (setting forth the "basic guidelines" for the factual determination that material is obscene as "(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." (internal quotation marks and citation omitted)). We do not agree.

{34} The purpose of the test for obscenity is to determine whether speech is not protected by the First Amendment of the United States Constitution because it is obscene. *See id.* at 23 ("This much has been categorically settled by the [United States Supreme] Court, that obscene material is unprotected by the First Amendment."). The issue before us in this case, however, is not a matter of protected speech or First Amendment jurisprudence. It does not matter whether the material is protected by the First Amendment. Rather, the issue is whether Defendant violated the terms of his probation by possessing sexually oriented material. As we have discussed, the purposes of probation are to both prevent an offender from engaging in additional criminal activity and to rehabilitate the offender. The restrictions of the sex offender contract further these purposes by limiting Defendant's access to materials that may reasonably lead to susceptibility of other criminal acts or impede rehabilitation. *See State v. Garcia*, 2005-NMCA-065, ¶ 11, 137 N.M. 583, 113 P.3d 406 ("Conditions of probation are reasonably related to rehabilitation if they are relevant to

the offense for which probation was granted. 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 citations omitted)).

{35} For the same reasons, it does not matter whether other portions of the DVDs did not contain sexually oriented material or that the DVDs, taken as a whole, would not be considered "sexually oriented." The issue is whether the DVDs contained sexually oriented material that would undermine the purposes of Defendant's probation. The district court did not abuse its discretion or violate Defendant's due process rights in concluding that the DVDs met that standard based on the evidence before it.

CREDIT FOR TIME ON PROBATION

{36} In revoking Defendant's probation, the district court entered its October 2, 2012 order and commitment to the Department of Corrections, ordering Defendant's imprisonment for a period of five years followed by a new term of probation for five years. Defendant claims on appeal that the district court erred by neglecting to credit Defendant with 298 days that Defendant served on probation. The State does not oppose a credit but states that the proper credit is 299 days rather than 298.

{37} We agree that Defendant is entitled to credit for the time he served on probation. *See State v. Baca*, 2005-NMCA-001, ¶ 21, 136 N.M. 667, 104 P.3d 533 ("A probationer whose sentence has been suspended is entitled to credit against his or her sentence for the time served on probation."). We thus remand to the district court to modify its order and commitment to the Department of Corrections to recalculate Defendant's remaining sentence. We suggest that, when doing the recalculation, the district court expressly set out, as done in its January 6, 2009 order and commitment to the Department of Corrections, (1) the term remaining in Defendant's sentence, (2) the term of the sentence to be suspended, (3) the term of imprisonment, and (4) the time for which Defendant is given credit.

CONCLUSION

{38} We affirm the district court's revocation of Defendant's probation and remand to the district court to modify its sentence to provide credit for time served on probation.

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

JAMES J. WECHSLER, 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-067

Filing Date: April 27, 2015

Docket No. 33,605

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

Petitioner-Appellee,

v.

MELVIN C.,

Respondent-Appellant,

and

SAMANTHA M.,

Respondent,

IN THE MATTER OF DAEVON DRE C.,

Child.

Children, Youth and Families Department
Charles E. Neelley, Chief Children's Court Attorney
Kelly P. O'Neill, Children's Court Attorney
Albuquerque, NM

for Appellee

Alex Chisholm
Albuquerque, NM

for Appellant

Richard J. Austin, PC
Richard J. Austin
Farmington, NM

Guardian Ad Litem

OPINION

KENNEDY, Judge.

{1} This case resides between our Opinion in *State ex rel. Children, Youth & Families Dep't v. Christopher B.*, 2014-NMCA-016, 316 P.3d 918, and the Supreme Court's Opinion in *In re Grace H.*, 2014-NMSC-034, 335 P.3d 746. In this case, we hold that, when a parent pleads no contest to abuse and neglect and the lower court proceeds with an adjudication on that basis, the court, if it terminates parental rights, must proceed under NMSA 1978, Section 32A-4-28(B)(2) (2005). The children's court (hereinafter, the court) erred here by ignoring its earlier adjudication and changing course, absent a dispositional hearing based on its finding of neglect. It erred by allowing termination of parental rights by presumptive abandonment under NMSA 1978, Section 32A-4-22(B)(1) and (B)(3) (2005) when it had already adjudicated neglect. Father wished to make efforts toward reunification by pursuing a treatment plan as the court and the Children, Youth and Families Department (CYFD) had discussed with him at the time of the adjudication of neglect. The court was obligated to proceed under Section 32A-4-22(B)(2) to resolve Father's case. We therefore reverse the court's termination of Father's parental rights.

I. BACKGROUND

{2} Child was born in March 2013 to Melvin C. (Father) and Samantha M. (Mother) and tested positive for illegal drugs. Following a Family Centered Meeting on March 5, 2013, where Father and Mother appeared telephonically, an

amended neglect or abuse petition was filed by CYFD. The court entered an ex parte custody order on March 7, 2013, giving CYFD legal and physical custody of Child. A custody hearing was held on March 18, 2013, which Father did not attend. During that hearing, the court found that Child could not be safely returned to Father and Mother due to substance abuse and "the inability to provide safe housing." A custody hearing order filed on April 8, 2013, provided notice of a subsequent adjudicatory and dispositional hearing. On August 6, 2013, CYFD filed a motion for termination of parental rights as to both Father and Mother, alleging abandonment, abuse and neglect, and presumptive abandonment as grounds for termination. Father had no contact with Child or CYFD from March 2013 until September 2013, when he was served with the petition for neglect and abuse in a prison in Colorado to which he had been sentenced a few months earlier. The court set a hearing for October 28, 2013, on CYFD's abuse/neglect petition and its motion to terminate parental rights (TPR). The court granted a continuance of that hearing, and counsel for Father requested that the court move forward with the adjudicatory hearing, but postpone the TPR hearing that had been scheduled. Accordingly, Father filed a motion to continue the TPR hearing. The motion stated, in particular, that Father "want[ed] to participate and work a treatment plan in an attempt to reunify with [Child]." The motion requested that the court vacate the portion of the upcoming November 4, 2013, hearing "pertain[ing] to the termination of [his] parental rights" so that Father has the "opportunity to work a treatment plan" and can "move toward[] reunification with . . . [C]hild." The motion was granted, and the court subsequently filed a notice of hearing, identifying the November 4 hearing as an adjudicatory hearing as to Father only. As to Mother, however, the purpose of the November 4 hearing was to allow CYFD to pursue termination of Mother's parental rights.

{3} At the November 4 hearing that Father entered a no contest plea to an allegation of neglect under NMSA 1978, Section 32A-4-2(E)(2) (2009). The court questioned Father about the nature of his plea and explained "the possible dispositions for a finding of neglect." In doing so, the court explained what would happen if there was a stipulation to neglect in the form of a plea: "The court will hear from [CYFD] and the court will enter a finding, pursuant to your agreement, to a finding of neglect." Father pleaded no contest to neglect and abuse, and Child was so adjudicated as to Father.

{4} While CYFD pursued termination of Mother's parental rights based on abandonment during the November 4 hearing, Father's involvement was limited to the neglect and abuse adjudication. The court explained to Father that one of the consequences of its making a finding of neglect was the development of a treatment plan. Father stated that he understood the court's explanation. In the course of establishing the factual basis for the plea, CYFD made a short statement, concluding that, for a variety of reasons, Father was "unable to provide the needs of . . . Child." CYFD's only reference to abandonment by Father came in the context of the TPR hearing against Mother at that time. Despite CYFD's failure to mention abandonment as grounds for an adjudication of neglect as to Father, the court added: "I'm assuming also part of this is, you mentioned it, but also based on a failure to provide because he abandoned . . .

[C]hild," to which CYFD answered simply, "yes."

{5} Following CYFD's foundational statements, the court accepted Father's stipulation to neglect and made "a finding of neglect, pursuant to [Section 32A-4-2](E)(2)." Based on Father's stipulation and CYFD's statement, the court postponed the dispositional hearing, stating: "Let's try to set it out thirty days and, hopefully, we will have a better idea as to [Father's] position and what can be offered or what can be done."

{6} On November 21, 2013, CYFD informally notified Father that it intended to pursue termination of his parental rights at the next hearing scheduled for December 9, rather than conduct a dispositional hearing. In response, on November 25, 2013, Father filed a motion to vacate the TPR hearing. The motion was denied. The notice of hearing issued on December 4, 2013, listed the nature of the December 9, 2013, hearing as "[d]ispositional [and] TPR." Thirty-five days after the adjudicatory hearing, the court held a hearing, during which it characterized the previous adjudicatory hearing as a "little meeting."

{7} At the beginning of the December 9 hearing, which occurred after the Rule 10-344(C) NMRA thirty-day deadline for conducting dispositional hearings, Father's counsel made the argument that, under the statutory scheme, Father possessed the "opportunity to have a dispositional order entered and be permitted to work a treatment plan" and that the TPR hearing therefore should have been vacated. Counsel also pointed out that Father's November 4 stipulation to neglect was made "in part because he believed he would be able to work a disposition plan" and that the statutory scheme of Section 32A-4-22(C) "provides the court shall order [CYFD] to implement a treatment plan whenever there has been a finding of neglect or abuse." In response to CYFD's allegations of abandonment, counsel asserted that Father attempted to participate in the placement of Child and that Father did not abandon Child. These arguments were unavailing. After hearing arguments from the parties, the court ruled that it would proceed with a TPR hearing "based only on abandonment." The court acknowledged the previous finding and adjudication of neglect.

> The court [will] not use any findings made at previous hearings regarding any kinds of findings. . . . I know there was an entry of a stipulation based on some . . . representations that . . . there would be a treatment plan he would be entitled to work. The court will not consider that adjudication.

{8} CYFD then proceeded to establish the basis for termination of Father's parental rights based solely on an abandonment theory. Because CYFD intended to proceed only on the theory of abandonment, the court determined it would be appropriate to proceed. Relying on *Christopher B.*, 2014-NMCA-016, ¶ 12, the court believed it was appropriate to allow CYFD to "move forward without even a finding of neglect or abuse prior to proceeding on the theory of terminating someone's parental rights based on a theory of abandonment." The court emphasized that it was not considering a termination based on failure to follow a treatment plan because a treatment plan had not been adopted in the case, further stating that CYFD has a right, when claiming

abandonment, to proceed on that theory at any time.

{9} After hearing testimony in the case, the court found that CYFD had proven, by clear and convincing evidence, Father abandoned Child. The court stated that "abandonment is a separate analysis in this case," and "it is not necessary that [CYFD] develop a treatment plan when the allegation of abandonment is being made and pursued and proven." In its findings of fact and conclusions of law, the court acknowledged that "[a d]ispositional [h]earing was not held" in the case, and it had allowed CYFD "to proceed only on the allegations of [a]bandonment." The court concluded that "[c]lear and convincing evidence exists that Father abandoned Child pursuant to Section 32A-4-28(B)(1) of the Children's Code." In its judgment, the court also added presumptive abandonment under Section 32A-4-28(B)(3) as grounds for termination. The court accordingly terminated Father's parental rights on February 10, 2014. Father filed a timely appeal.

II. DISCUSSION

{10} "This Court reviews issues of statutory interpretation de novo." *In re Grace H.*, 2014-NMSC-034, ¶ 34. The parties dispute whether the court properly complied with the Abuse and Neglect Act, NMSA 1978, §§ 32A-4-1 to -34 (1993, as amended through 2014), whether the correct subsection of Section 32A-4-28 was applied in this case, and whether the court violated Father's due process rights.

A. Overview of New Mexico Abuse and Neglect Proceedings

{11} The procedures required by the Abuse and Neglect Act are of paramount importance in this case. Accordingly, we begin with an overview of the relevant steps the Children's Code sets out in an abuse and neglect proceeding. *See In re Esther V.*, 2011-NMSC-005, ¶ 25, 149 N.M. 315, 248 P.3d 863 (providing an "[o]verview of New Mexico [a]buse and [n]eglect [p]roceedings" (emphasis omitted)). An abuse and neglect proceeding begins when CYFD files a petition with the court alleging abuse or neglect. § 32A-4-15. The court may then issue an ex parte custody order based on probable cause awarding CYFD custody of the child until a custody hearing is held. § 32A-4-16(A); § 32A-4-18(A). The court then holds a custody hearing and, if during that custody hearing, it finds probable cause to believe the child has been abused or neglected, the court determines custody of the child pending an adjudicatory hearing on the merits of the petition. *In re Esther V.*, 2011-NMSC-005, ¶ 27; § 32A-4-18(A), (D). These steps were met in this case.

{12} An adjudicatory hearing must commence within sixty days of "service on the respondent." § 32A-4-19(A); Rule 10-343(A) NMRA (listing events from which the sixty-day time limit runs). During an adjudicatory hearing, the court determines whether the allegations made in the petition are true. *In re Esther V.*, 2011-NMSC-005, ¶ 28. Parents are entitled to due process protections during the adjudicatory hearing in an abuse or neglect case. *State ex rel. Children, Youth & Families Dep't v. Kathleen D.C.*, 2007-NMSC-018, ¶ 12, 141 N.M. 535, 157 P.3d 714. These protections include timely notice, reasonable opportunity to respond to the charges, reasonable opportunity to confront adverse witnesses and present evidence, representation by counsel when such is required by statute, and opportunity to be heard by an impartial decisionmaker. *Id.*

{13} During the adjudicatory hearing, the court may make a determination of abuse or neglect on the basis of a valid admission. § 32A-4-20(H). When it does so, the court "shall enter an order finding that the child is neglected or abused." Section 32A-4-20(H); Rule 10-342(A)(2) NMRA (stating a valid admission may be made by entering a plea of no contest to the allegations in the petition). *But see* Rule 10-342(D) ("The court shall not enter judgment upon an admission, including the entry of a no contest plea . . . without making such inquiry as shall satisfy the court that there is a factual basis for the admission . . . [and] shall obtain support for a finding that one or more of the statutory grounds alleged in the petition are true."). In this case, an adjudication of neglect was made on November 4 and acknowledged by the court. Following a finding of neglect or abuse during the adjudicatory hearing, the court may make an immediate disposition of the case. Rule 10-344(C). If the court does not make a disposition of the case immediately, a dispositional hearing must "commence within thirty . . . days after conclusion of the adjudicatory hearing." *Id.* During the dispositional stage, the court issues "factual findings relevant to a custody determination, determines custody of the child, and establishes a treatment plan." *In re Esther V.*, 2011-NMSC-005, ¶ 29; *see* § 32A-4-22. Judicial review hearings are held later to monitor parents' progress and compliance with the treatment plan. Section 32A-4-25. Permanency hearings are later held to determine the appropriate permanent placement of the child. Section 32A-4-25.1.

{14} At any point during an abuse or neglect proceeding, CYFD may file a motion to terminate parental rights. Section 32A-4-29(A). When this motion is filed, CYFD must request a hearing on the motion, and the hearing must commence at least thirty, and no more than sixty, days after service. Section 32A-4-29(D). Termination of parental rights may be based on abandonment, abuse or neglect, or presumptive abandonment. Section 32A-4-28(B), (C). Section 32A-4-28(B)(1) requires a court to terminate parental rights to a child when "there has been an abandonment of the child by his parents[.]" Similarly, Subsection (B)(3) provides for presumptive abandonment where certain criteria are met.

> (3) [T]he 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:
>
> (a) the child has lived in the home of others for an extended period of time;
>
> (b) the parent-child relationship has disintegrated;
>
> (c) a psychological parent-child relationship has developed between the substitute family and the child;
>
> (d) if the court deems the child of sufficient capacity to express a preference, the child no longer prefers to live with the natural parent;
>
> (e) the substitute family desires to adopt the child; and
>
> (f) a presumption of abandonment created by the conditions described in Subparagraphs (a) through (e) of this paragraph has not been rebutted.

Section 32A-4-28(B)(3). Abandonment cannot be supported "by simply a finding that

a parent was incarcerated during the period of alleged abandonment[.]" *Christopher B.*, 2014-NMCA-016, ¶ 12.

{15} Subsection (B)(2) governs what happens following a finding of abuse and neglect. It establishes a statutory prerequisite that CYFD put forth reasonable efforts to assist the parent and that requirement must be satisfied before parental rights can be lawfully terminated. *State ex rel. Children, Youth & Families Dep't v. Patricia H.*, 2002-NMCA-061, ¶ 21, 132 N.M. 299, 47 P.3d 859. Subsection (B)(2) requires termination where

> the child has been a neglected or abused child as defined in the Abuse and Neglect Act 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 the department or other appropriate agency to assist the parent in adjusting the conditions that render the parent unable to properly care for the child.

Section 32A-4-2(E)(2) defines "neglected child" as a child "who is without proper parental care and control or subsistence, education, medical or other care or control necessary for the child's well-being because of the faults or habits of the child's parent, . . . or refusal of the parent, . . . when able to do so, to provide them[.]" A court seeking to terminate parental rights based on abuse or neglect must find that (1) "the child was abused or neglected," (2) "causes of the abuse or neglect were unlikely to change in the foreseeable future," and (3) "CYFD made reasonable efforts to assist the parent in adjusting the conditions." *State ex rel. Children, Youth & Families Dep't v. Benjamin O.*, 2007-NMCA-070, ¶ 30, 141 N.M. 692, 160 P.3d 601 (alterations, internal quotation marks, and citation omitted).

B. The Court Was Required to Hold a Dispositional Hearing After Entering a Finding That Father Neglected Child

1. The Court Did Not Comply With the Abuse and Neglect Act's Procedures

{16} CYFD asserts that the court did not err by failing to issue a treatment plan and reasons that, under our case law, a court is not required to create a treatment plan when CYFD pursues TPR pursuant to Subsections (B)(1) and (B)(3). While this might be so if the court was proceeding solely under Subsections (B)(1) and (B)(3) as applied to the present case, this argument misses the mark. After a court makes a finding of neglect in an adjudicatory proceeding as occurred here, CYFD has a statutory duty to make reasonable efforts to assist a parent with reunification. Further, after having adjudicated neglect as occurred here, a court may not choose to ignore that ruling.

{17} Where there is a finding of neglect or abuse under Subsection (B)(2), the plain language of the statute requires a dispositional hearing and the creation of a treatment plan therein. The court issued a finding of neglect based on Father's no contest plea to having neglected Child. As a result, the court was statutorily required to hold a dispostional hearing to approve a treatment plan within thirty days of the adjudicatory hearing. Section 32A-4-22(C). It did not. Instead, the court held a TPR hearing thirty-five days after the court adjudicated Father to have neglected Child at the adjudicatory hearing on November 4. The court grounded its refusal to hold a dispositional hearing in December on

its interpretation of *Christopher B.* We shall address whether *Christopher B.* applies in this case.

{18} In *Christopher B.*, this Court affirmed a court's decision allowing CYFD to proceed with a TPR solely on an abandonment theory. 2014-NMCA-016, ¶ 12. There, the allegations of abuse or neglect in the case had already been dismissed for insufficient pleading. *Id.* ¶ 11. The facts of *Christopher B.* are dissimilar to the facts here. However, this Court did discuss Section 32A-4-28 and draw important distinctions between abandonment under Subsection (B)(1) and abuse or neglect under Subsection (B)(2). For example, we recognized that abuse or neglect and abandonment are "separate and independent grounds for the termination of parental rights" and that "[a]bandonment is a stand-alone basis for termination of parental rights." *Christopher B.*, 2014-NMCA-016, ¶¶ 9, 12. We concluded that, because abuse or neglect was a non-issue in that case by virtue of the dismissal, the father's due process rights had not been violated when CYFD proceeded on an abandonment theory. *Id.* ¶¶ 11-12. We nevertheless reiterated the holding made in *Benjamin O.* that "where the . . . court adjudicates a child as having been abused or neglected by a parent, CYFD is statutorily required to create a treatment plan." *Christopher B.*, 2014-NMCA-016, ¶ 9.

{19} The court below relied on the language regarding abandonment in *Christopher B.* without considering the context in which that decision was made when it allowed the TPR hearing to proceed solely on the theory of abandonment. *Christopher B.* specifically acknowledges the statutory requirement for a treatment plan when the court makes a finding of neglect, as it did in this case. *Id.* Therefore, while CYFD carries no duty to assist parents with reunification when it proceeds to termination of parental rights under an abandonment theory alone, an adjudication of neglect under Section 32A-4-22(C) triggers CYFD's statutory obligation to create and work a treatment plan and to follow Section 32A-4-28(B)(2). Here, the adjudication of neglect was sufficient to trigger CYFD's obligation to create a treatment plan and the court's obligation to hold a dispositional hearing. The court never acted to assess the propriety of a treatment plan, nor did it order that one be created. The adjudication was never withdrawn, just ignored when the court stated: "I know there was an entry of a stipulation based on . . . some representations that . . . there would be a treatment plan he would be entitled to work. The court will not consider that adjudication." This statement was insufficient to vacate the adjudications of neglect. It also does not serve as a dismissal of the neglect petition as was done in *Christopher B.* The district court therefore erred by failing to fulfill its statutory duties under the adjudication of neglect that it had previously entered as it was required to do by statute.

2. The Court Did Not Use the Appropriate Subsection of 32A-4-28 When It Terminated Father's Parental Rights

{20} CYFD argues that Father did not show a legitimate desire to take responsibility for Child prior to the TPR as required by *In re Grace H.*, that he was therefore not entitled to a TPR analysis under Subsection (B)(2), and that the court properly terminated Father's rights pursuant to Subsection (B)(1). The argument misstates the statutory interpretation of Section 32A-4-28 made in *In re Grace H.*

{21} In *In re Grace H.*, the Supreme Court addressed the ambiguity regarding when to terminate parental rights on a theory of abandonment under Subsection (B)(1) versus neglect by abandonment under Subsection (B)(2). *In re Grace H.*, 2014-NMSC-034, ¶¶ 35, 39. During its attempts to terminate parental rights in that case, CYFD failed to identify whether it sought termination for abandonment under Subsection (B)(1) or neglect by abandonment under Subsection (B)(2). *In re Grace H.*, 2014-NMSC-034, ¶ 21. According to the Supreme Court, the entire process was conducted as an abuse and neglect proceeding such that the termination of parental rights should have been conducted pursuant to Subsection (B)(2), but the court ultimately terminated the father's parental rights based on Subsection (B)(1) abandonment. *In re Grace H.*, 2014-NMSC-034, ¶ 40. Because CYFD had treated the matter "throughout the life of the case," the Supreme Court determined that Subsection (B)(2) was the subsection that the court should have used in considering the TPR. *In re Grace H.*, 2014-NMSC-034, ¶ 66 (internal quotation marks omitted). The Supreme Court held that Subsection (B)(1) should be used to terminate parental rights "where a parent is completely absent prior to termination," while Subsection (B)(2) should be used "where a parent is present and expresses a legitimate desire to take responsibility for a child prior to termination." *In re Grace H.*, 2014-NMSC-034, ¶¶ 43, 49. This holding stemmed from the Supreme Court's interpretation of legislative intent in which it concluded that "the Legislature intended Subsection (B)(1) to be used when there is no parent present with whom [CYFD] could work toward[] reunification prior to termination." *In re Grace H.*, 2014-NMSC-034, ¶ 41.

{22} The present case lends more support to Father's position than CYFD's position. In *In re Grace H.*, CYFD did not identify which subsection of Section 32A-4-28 it sought to use in terminating parental rights. *In re Grace H.*, 2014-NMSC-034, ¶ 21 (stating that CYFD proceeded with TPR pursuant to Section 32A-4-28). In this case, CYFD specifically stated its intention to use both Subsections (B)(1) and (B)(2) in Father's TPR. Thus, CYFD demonstrated, during the November hearing, a clear intent to pursue Father's TPR, at least to some extent, according to Subsection (B)(2). That intent, coupled with the finding of neglect and the discussion during the adjudicatory hearing regarding the development of a treatment plan, indicates that the parties were proceeding under Subsection (B)(2) until the court later decided to proceed with the TPR hearing before a treatment plan was issued.

{23} CYFD argues that, because Father had no contact with Child and made little effort to get in contact with Child, Father had no "legitimate desire" to take responsibility for Child. We disagree. CYFD interprets the phrase "legitimate desire" used in *In re Grace H.* too literally. 2014-NMSC-034, ¶ 43 ("Subsection (B)(2) is to be used where a parent is present and expresses a legitimate desire to take responsibility for a child prior to termination."). When read together with the case's legislative interpretation of Subsections (B)(1) and (B)(2), *In re Grace H.*'s "legitimate desire" language references a parent who "is present and willing to participate," even if they do so late in the game, so long as they do so prior to termination. 2014-NMSC-034, ¶ 41. Despite the approximate seven-month delay between CYFD having taken custody of Child and Father's October 2013 motion in which Father indicated his desire to reunify

with Child and his willingness to work a treatment plan, CYFD stipulated to Father's November 4 no contest plea to the neglect allegation. By failing to proceed under its adjudication of abuse and neglect, the court deprived both Father and itself of any chance to assess the "legitimacy" of Father's case. Rather than support CYFD's argument that termination under Subsection (B)(1) was appropriate in this case, *In re Grace H.*—the Supreme Court's statutory interpretation in particular—precludes Subsection (B)(1)'s applicability to this case. As discussed earlier in this Opinion, the record reflects the parties' and the court's intention to proceed in a manner consistent with a neglect adjudication. Under *In re Grace H.*, application of Subsection (B)(1) was therefore inappropriate under the circumstances of this case.

{24} CYFD argues further that Father's rights were properly terminated pursuant to a theory of "presumptive abandonment." *See* § 32A-4-28(B)(3); § 32A4-28(C) (stating that a rebuttable presumption of abandonment exists when the court finds that each rebuttable presumption of abandonment exists when the court finds that each of the six factors enumerated in Section 32A-4-28(B)(3) have been met). CYFD argues that presumptive abandonment is a stand-alone basis for termintion pursuant to which the children's court may terminate parental rights without the prerequisite opportunity for the parent to comply with a court-ordered treatment plan.

{25} Although the court cited Section 32A-4-28(B)(3) in its final judgment as one ground for its decision to terminate Father's parental rights, the court's findings of fact did not address the requisite elements of presumptive abandonment. *See* § 32A-4-28(B)(3) (enumerating the elements of presumptive abandonment). Additionally, CYFD has failed to demonstrate whether, during the hearing on its motion to terminate Father's parental rights, it presented any evidence pertaining to the elements of presumptive abandonment that might support the court's conclusion in that regard. Under these circumstances, we reject the court's factually unsupported conclusion and CYFD's unsupported assertion that presumptive abandonment was an appropriate basis upon which to terminate Father's parental rights.

III. CONCLUSION

{26} The court terminated Father's parental rights under abandonment after making a finding of neglect. Once as the court entered a finding of neglect, it was statutorily required to conduct a dispositional hearing and implement a treatment plan. Instead, the court allowed CYFD to pursue termination of Father's parental rights solely on an abandonment theory, ignoring its previous finding, which remained unaltered for subsequent proceeding. The court erred in terminating Father's rights without having fulfilled its statutorily required duties following an adjudication of neglect. We therefore reverse the court's order terminating Father's parental rights and remand the case to the court for a dispositional hearing in accordance with the Abuse and Neglect Act.

{27} IT IS SO ORDERED.

RODERICK T. KENNEDY, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

TIMOTHY L. GARCIA, Judge

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMSC-019

Filing Date: June 22, 2015

Docket No. 33,997

STATE OF NEW MEXICO,

Plaintiff-Respondent,

v.

ANTONIO T., a child,

Defendant-Petitioner,

Consolidated with:

Docket No. 33,999

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

v.

ANTONIO T., a child,

Defendant-Respondent.

Jorge A. Alvarado, Chief Public Defender
J.K. Theodosia Johnson, Assistant Appellate Defender
Santa Fe, NM

for Petitioner and Respondent Antonio T.

Gary K. King, Attorney General
Joel Jacobsen, Assistant Attorney General
Santa Fe, NM

for Respondent and Petitioner State of New Mexico

OPINION

CHÁVEZ, Justice.

{1} Having granted the State's motion for rehearing in this case, we withdraw the opinion filed October 23, 2014, and substitute the following in its place.

{2} Antonio, a seventeen-year-old high school student, was taken to Assistant Principal Vanessa Sarna's (Principal Sarna) office because he was suspected of being under the influence of alcohol. Possession of alcohol by a minor is a delinquent act under NMSA 1978, Section 32A-2-3(A)(2) (2009) of the Delinquency Act, NMSA 1978, §§ 32A-2-1 to -33 (1993, as amended through 2009). Principal Sarna questioned Antonio about his possession of alcohol in the presence of Deputy Sheriff Emerson Charley, Jr. (Deputy Charley), whom she had asked to be present, and requested that he bring a breath alcohol test to be administered to Antonio. Antonio admitted that he had brought alcohol to school, where he consumed it. At Principal Sarna's request, Deputy Charley administered the breath test to Antonio, which tested positive for alcohol. After administering the test to Antonio, Deputy Charley advised Antonio of his right to remain silent, and Antonio declined to answer Deputy Charley's questions about his possession of alcohol.

{3} Antonio was charged with the delinquent

act of possession of alcohol by a minor. He filed a motion to suppress the statements he made to Principal Sarna because his statements were elicited without a knowing, intelligent, and voluntary waiver of his right to remain silent, citing Section 32A-2-14(D). The district court denied his motion, which was affirmed by the Court of Appeals. *State v. Antonio T.*, 2013-NMCA-035, ¶ 26, 298 P.3d 484. We reverse both the district court and the Court of Appeals. Although a school official may insist that a child answer questions for purposes of school disciplinary proceedings, any statements elicited by the official in the presence of a law enforcement officer may not be used against the child in a delinquency proceeding unless the child made a knowing, intelligent, and voluntary waiver of his or her statutory right to remain silent. Section 32A-2-14(C), (D). Because the State failed to prove that Antonio effectively waived this statutory right, his statements were inadmissible in the delinquency proceeding.

I. BACKGROUND

{4} Two teachers at Kirtland Central High School (KCHS) escorted Antonio to Principal Sarna's office because they suspected he was under the influence of alcohol. Principal Sarna called the student resource officer on duty, Deputy Charley, to administer a portable breath test to Antonio. Deputy Charley is a certified law enforcement officer with the San Juan County Sheriff's Office who spent over eleven years on the police force before being assigned to KCHS as a student resource officer. Deputy Charley wears a full uniform, including his badge and duty belt with a holstered gun, to work in the school. He was wearing his uniform and his sidearm when he entered Principal Sarna's office.

{5} Deputy Charley stood about five feet away from Antonio, preparing the breath test, while Principal Sarna questioned Antonio about drinking alcohol at school. Deputy Charley's normal procedure was to question a student suspected of using alcohol prior to administering a breath alcohol test. However, in this instance, because Principal Sarna was asking questions that were identical to the ones that Deputy Charley would have asked, he merely listened attentively to Principal Sarna's questioning "in case something [did] come up . . . further on in the investigation that [he] might have to look back onto." Principal Sarna asked Antonio if he had been drinking, what he had to drink, how much he had consumed, and if anyone else was drinking with him. Principal Sarna testified that she told Antonio that he would receive a lesser term of suspension if he told her the truth. These kinds of questions and bargains were routine for Principal Sarna because her job is to enforce discipline at KCHS, where she often deals with student disciplinary cases "just one right after another." In response to Principal Sarna's questions, Antonio admitted that he had consumed two shots of alcohol, he had brought the alcohol to school in a soda or Gatorade bottle, and he had disposed of the bottle in a bathroom trash can east of the school library.

{6} After Antonio confessed to consuming alcohol, Deputy Charley advised Antonio that he would have to blow into the portable breath test machine, which Antonio did; Antonio tested positive for alcohol, which corroborated his confession. No parent or guardian was present, and Deputy Charley did not provide Antonio with any *Miranda* warnings prior to administering the breath test because at that time he "was going by what the school was requesting." While Deputy Charley was administering the breath test, Principal Sarna

searched Antonio's backpack and located a folding pocketknife.[1]

{7} Principal Sarna then asked Deputy Charley to search for the plastic bottle that Antonio claimed he threw away. Deputy Charley searched three trash cans in the vicinity of the bathroom near the library, but he could not find the bottle. After the search for evidence turned up nothing, Deputy Charley returned to Principal Sarna's office and advised Antonio of his full constitutional rights as announced in *Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966). Antonio answered Deputy Charley's questions about the knife, but he refused to answer Deputy Charley's questions regarding alcohol consumption. The statements Antonio made during Principal Sarna's questioning were documented in Deputy Charley's police report under the "investigation" heading. Deputy Charley confiscated the pocketknife that Principal Sarna found in Antonio's backpack. The State later charged Antonio only with possession of alcoholic beverages by a minor.

{8} Antonio filed a motion to suppress his statement or confession pursuant to Section 32A-2-14(C) through (E), contending that "the State cannot prove that the statement or confession offered in evidence was elicited after a knowing, intelligent and voluntary waiver of the Child's rights and must be suppressed." Antonio specifically cited Section 32A-2-14(D), which "requires that the state 'shall prove the statement or confession offered in evidence was elicited only after a knowing, intelligent and voluntary waiver of the child's constitutional rights was obtained.' " Antonio requested the district court find that he "did not knowingly, intelligently and voluntarily waive constitutional and statutory rights and suppress any statements or confession."

{9} An evidentiary hearing was held on Antonio's motion to suppress on September 1, 2010. After hearing testimony from Principal Sarna and Deputy Charley, the district court denied the motion. Antonio entered into a conditional plea and disposition agreement, reserving his right to appeal the denial of his motion to suppress. He appealed to the New Mexico Court of Appeals, which affirmed the district court's ruling. *Antonio T.*, 2013-NMCA-035, ¶ 26.

{10} The Court of Appeals analyzed the suppression as a constitutional issue, discussing the constitutional rights of children during custodial interrogation, *id.* ¶¶ 8-10, and investigatory detentions, *id.* ¶¶ 12-16. It first concluded that Antonio had been subject to an investigatory detention, not a custodial interrogation. *Id.* ¶¶ 11, 17. The Court of Appeals noted that "Section 32A-2-14 has thus far only been applied in cases where law enforcement has interrogated or detained a child, never in instances of school discipline involving only a school administrator," *Antonio T.*, 2013-NMCA-035, ¶ 18, and that "Section 32A-2-14 applies to investigations by or on behalf of law enforcement officials," *Antonio T.*, 2013-NMCA-035, ¶ 20. The

[1]Principal Sarna and Deputy Charley were the only two witnesses to testify in this case. Their stories differed as to when the knife was discovered and whether or not Deputy Charley was present when Antonio was questioned by Principal Sarna. Principal Sarna testified that she could not be sure of the sequence of events, and Deputy Charley's testimony and his police report reflect that he was present during Principal Sarna's questioning and her search of Antonio's backpack. The district court found that Deputy Charley was present. "[W]hen there is a conflict in the testimony, we defer to the trier of fact." *Buckingham v. Ryan*, 1998-NMCA-012, ¶ 10, 124 N.M. 498, 953 P.2d 33.

Court of Appeals then determined that Principal Sarna was acting within the scope of her duties as a school administrator and was not acting as an agent for law enforcement, and accordingly concluded that she was not obligated to issue *Miranda* warnings to Antonio. *Id.* ¶¶ 24, 26. The Court of Appeals did not address Antonio's statutory claim that his statement was inadmissible under the plain language of Section 32A-2-14(D), which was the original basis for Antonio's motion to suppress. Both Antonio and the State appealed to this Court.

{11} We granted certiorari on two questions raised in Antonio's appeal: (1) did the Court of Appeals err in affirming the lower court's denial of Antonio's suppression motion, and (2) was the plea invalid because there was insufficient evidence? *State v. Antonio T.*, 2013-NMCERT-003 (No. 33,997, Mar. 1, 2013). We also granted certiorari on one question raised in the State's appeal: did the Court of Appeals err in holding that Antonio was in investigatory detention? *State v. Antonio T.*, 2013-NMCERT-003 (No. 33,999, Mar. 1, 2013). We hold that Deputy Charley's mere presence during Principal Sarna's questioning of Antonio subjected Antonio to an investigatory detention that triggered the statutory protections provided by Section 32A-2-14(C) and (D). Pursuant to Section 32A-2-14(C), Deputy Charley was required to advise Antonio that he had a right to remain silent, and that if Antonio waived the right, anything he said could be used against him in criminal delinquency proceedings. Because Deputy Charley failed to advise Antonio of this statutory right before Principal Sarna questioned Antonio in his presence, Antonio's incriminating statements are inadmissible under Section 32A-2-14(D).

II. DISCUSSION

{12} This case requires us to analyze whether a statement made by a child over the age of fifteen is admissible under Section 32A-2-14, when the statement was made in response to questioning by a school principal in the presence of a law enforcement officer. Children who commit an act that would be considered a crime if they were over the age of eighteen are subject to the Delinquency Act and are granted certain basic statutory rights under Section 32A-2-14. The admissibility of Antonio's statements is dependent on our interpretation of the Delinquency Act. Because statutory interpretation is a question of law, we review it de novo. *See State v. Jade G.*, 2007-NMSC-010, ¶ 15, 141 N.M. 284, 154 P.3d 659.

A. Pursuant to Section 32A-2-14(D), Antonio's statements were inadmissible because he was questioned during an investigatory detention without being first advised of the right to remain silent as required by Section 32A-2-14(C)

{13} In *State v. Javier M.*, 2001-NMSC-030, ¶¶ 32, 42, 131 N.M. 1, 33 P.3d 1, we held that the Legislature intended Section 32A-2-14 to afford children greater statutory protection than what is constitutionally mandated. We evaluated the admissibility of a child's statements made in response to police questioning by first assessing the minimum constitutional guarantees available to the child under the United States Supreme Court's decision in *Miranda*. *Javier M.*, 2001-NMSC-030, ¶ 11 ("Only after assessing the minimum constitutional guarantees available to the Child under *Miranda* can we adequately interpret Section 32A-2-14 and determine what, if any,

additional protections are available to the Child under the statute.").

{14} We recognized that *Miranda* "imposed a prophylactic protection by requiring that suspects be advised of their rights under the Fifth Amendment [of the United States Constitution] prior to any questioning" during a custodial interrogation. *Javier M.*, 2001-NMSC-030, ¶ 14. "Custodial interrogation occurs when [a]n individual [is] swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion . . . [so that the individual feels] under compulsion to speak." *Id.* ¶ 15 (alterations in original) (internal quotation marks and citation omitted). When a suspect is subjected to a custodial interrogation, that person " 'must be warned that he [or she] has a right to remain silent, that any statement he [or she] does make may be used as evidence against him [or her], and that he [or she] has a right to the presence of an attorney, either retained or appointed.' " *Id.* (quoting *Miranda*, 384 U.S. at 444). In *Javier M.*, we held that the child was not subjected to a custodial interrogation because the "Child's detention was not overly 'police dominated,' " the child was not swept away from familiar surroundings, and the child was questioned in a public place in the presence of several other suspects. *See id.* ¶¶ 21-23. Accordingly, in *Javier M.* we held that "the officer was not required to '*Mirandize*' the Child before questioning him." *Id.* ¶ 23.

{15} Having concluded that the child was not entitled to the constitutional protections guaranteed by *Miranda*, this Court turned to the Delinquency Act to analyze whether it provided the child with any additional statutory protection. *Javier M.*, 2001-NMSC-030, ¶¶ 24-32. As a preliminary matter, we acknowledged that "it is completely within the Legislature's authority to provide greater *statutory protection* than accorded under the federal Constitution." *Id.* ¶ 24 (emphasis added). In interpreting Section 32A-2-14, we focused on three issues: (1) whether the Legislature intended to merely codify *Miranda* under the statute by requiring that children be subjected to custodial interrogations before statutory protections are triggered, (2) the circumstances under which statutory protections would be triggered if the Legislature did not intend to codify *Miranda*, and (3) the nature of the statutory protections afforded under the statute. *Javier M.*, 2001-NMSC-030, ¶ 25.

{16} After looking at its plain language, this Court rejected the notion that Section 32A-2-14 was intended to codify the advice of constitutional rights announced in *Miranda*. *Javier M.*, 2001-NMSC-030, ¶ 29. "Instead of using *Miranda* triggering terms such as 'custody' or 'custodial interrogation,' the Legislature used much broader terms, such as, 'alleged,' 'suspected,' 'interrogated,' and 'questioned.' " *Javier M.*, 2001-NMSC-030, ¶ 29 (quoting Section 32A-2-14(C)). Accordingly, we held that Section 32A-2-14 did not require a child to be subject to a custodial interrogation in order for the additional statutory protections to apply. *Javier M.*, 2001-NMSC-030, ¶ 32.

{17} After determining that a custodial interrogation was not required, we then turned to the question of what circumstances would trigger the protections of Section 32A-2-14. In *Javier M.*, we stated that " 'alleged' " pertained to the "time period after which a formal petition alleging delinquency has been filed in the Children's Court" and defined " 'suspect' " as meaning " 'to imagine (one) to be guilty or culpable.' " *Id.* ¶ 29 (quoting *Webster's Ninth New Collegiate Dictionary*

1189 (1985) (second alteration in original)). We reasoned that "an officer's suspicion will almost always cause the encounter with the child to be an investigatory detention," *Javier M.*, 2001-NMSC-030, ¶ 35, and that "by including the term 'suspected' in Section 32A-2-14(C) to describe when the statute's protections are triggered, the Legislature intended to draw the line at investigatory detentions." *Javier M.*, 2001-NMSC-030, ¶ 36. We concluded that "when an officer approaches a child to ask the child questions because the officer 'suspects' the child of delinquent behavior, the officer is performing an investigatory detention." *Id.* ¶ 37. "Given a child's possible immaturity and susceptibility to intimidation, a child who is subject to an investigatory detention may feel pressures similar to those experienced by adults during custodial interrogation." *Id.* As a result, we held that "the protections of the statute are triggered in two circumstances: (1) after formal charges have been filed against a child; and (2) when a child is seized pursuant to an investigatory detention and not free to leave." *Id.* ¶ 38.

{18} Finally, in defining the scope of the protections afforded under the statute, we held that the term " 'constitutional rights' " in Section 32A-2-14(C) does not refer to the warnings enumerated in *Miranda* where the child is subject to an investigatory detention and not a custodial interrogation. *Javier M.*, 2001-NMSC-030, ¶ 41. Instead, we held that "children who are subject to investigatory detentions [have a statutory right] *only* to be warned of their right to remain silent and that anything they say can be used against them." *Id.* ¶ 41 (emphasis added).

{19} Under the reasoning in *Javier M.*, if Antonio was subjected to an investigatory detention, the basic statutory right at issue in this case is the right to remain silent. Because children may not understand either their right to remain silent or that they are entitled to assert this statutory right, the Legislature has detailed which procedural safeguards must be satisfied before any statement made by a child is admitted as evidence in a criminal delinquency proceeding. Under Section 32A-2-14(C), a child who is suspected or alleged of having committed a delinquent act cannot be interrogated or questioned during an investigatory detention unless the child is first advised of his or her statutory right to remain silent and the child knowingly, intelligently, and voluntarily waives his or her rights. When Section 32A-2-14(C) has been violated, the legislative remedy is to preclude the admission of any statement or confession elicited from the child in court proceedings. Section 32A-2-14(D); *Javier M.*, 2001-NMSC-030, ¶¶ 1, 27.

{20} To determine whether a child's statement or confession may be introduced into evidence, the State bears the burden of proving that the child knowingly, intelligently, and voluntarily waived the child's statutory right to remain silent. Section 32A-2-14(D). In assessing the validity of an alleged waiver, Section 32A-2-14 requires the court to consider (1) the age of the child, (2) whether the child's statement was elicited or volunteered, (3) whether the child was advised of his or her statutory right to remain silent before the statement was elicited, and (4) the additional criteria listed in Section 32A-2-14(E).

{21} If the child is less than thirteen years old, under no circumstances may his or her statement be introduced against the child in court proceedings. Section 32A-2-14(F) provides that "[n]otwithstanding any other

provision to the contrary, no confessions, statements or admissions may be introduced against a child under the age of thirteen years on the allegations of the petition." In *Jade G.*, we held that Section 32A-2-14(F) erects an absolute bar to the admission of any statement made by a child under the age of thirteen—even statements that the child spontaneously volunteers to family members, friends, or others who are not in a position of authority. *See* 2007-NMSC-010, ¶ 16. For children who are thirteen or fourteen years old, the Legislature has created a rebuttable presumption that their confessions, statements, or admissions are inadmissible in court proceedings if such statements were made to a person in a position of authority. Section 32A-2-14(F).

{22} If the child is fifteen years old or older, as in this case, his or her statement is admissible if it was made spontaneously by the child without prompting—i.e., if it was not elicited. Section 32A-2-14(D), (F). "[V]olunteered statements of any kind are . . . not subject to the protections of Section 32A-2-14 since such statements are generally not in response to any 'questioning' or 'interrogation.' " *Javier M.*, 2001-NMSC-030, ¶ 40. However, if the statement or confession was elicited during an investigatory detention, the State must prove that the child was advised of his or her statutory right to remain silent and knowingly, intelligently, and voluntarily waived this right. *Id.* ¶¶ 40, 44. The question before this Court is whether Antonio was subjected to an investigatory detention triggering the protections of Section 32A-2-14 when Principal Sarna questioned him about delinquent behavior in the presence of a law enforcement officer. Unlike the Court of Appeals, we answer this question in the affirmative.

1. *When a child suspected of delinquent behavior is questioned in the presence of a law enforcement officer, that child is subjected to an investigatory detention*

{23} The Court of Appeals interpreted Section 32A-2-14(D) to preclude only statements or confessions elicited by law enforcement officers or their agents. *Antonio T.*, 2013-NMCA-035, ¶ 20 (holding that all of the basic rights of children enumerated in Section 32A-2-14 only apply "to investigations by or on behalf of law enforcement officials"). The Court of Appeals noted that "Section 32A-2-14 has thus far only been applied in cases where law enforcement has interrogated or detained a child, never in instances of school discipline involving only a school administrator." *Antonio T.*, 2013-NMCA-035, ¶ 18. Accordingly, the Court of Appeals concluded that Section 32A-2-14 only applies when a law enforcement officer interrogates or detains a child, or when the school official acts as an agent of law enforcement. *Antonio T.*, 2013-NMCA-035, ¶¶ 18-20. Because the Court of Appeals found that Deputy Charley did not interrogate or detain Antonio, the Court focused solely on whether Principal Sarna acted as an agent of law enforcement beyond the scope of her duties as a school administrator. *Id.* ¶¶ 21-24. Concluding that Principal Sarna was not acting as an agent to law enforcement, the Court of Appeals held that "although this was an investigatory detention, Antonio had no right to *Miranda* warnings from a school administrator for a school interrogation, despite the presence of a deputy." *Antonio T.*, 2013-NMCA-035, ¶ 26.

{24} We begin our analysis by first acknowledging that Principal Sarna suspected Antonio of being intoxicated while at school—a school disciplinary violation that

would also render him a delinquent child. This suspicion prompted Principal Sarna to conduct an investigation into Antonio's alcohol consumption. We agree with the Court of Appeals that Principal Sarna's suspicion alone did not trigger the protections under Section 32A-2-14(C), because Principal Sarna is neither a law enforcement officer nor was she acting as an agent of law enforcement. *See Antonio T.*, 2013-NMCA-035, ¶ 20. Questioning a child for school disciplinary matters is distinguishable from questioning a child for suspected criminal wrongdoing. *See In re Julio L.*, 3 P.3d 383, 385 (Ariz. 2000) (en banc) ("[N]ot every violation of public decorum or of school rules gives legal cause for criminal adjudication."). Because "maintaining security and order in . . . schools requires a certain degree of flexibility in school disciplinary procedures," we recognize "the value of preserving the informality of the *student-teacher relationship*." *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) (emphasis added). Accordingly, Principal Sarna was entitled to act on her suspicion and compel answers from Antonio for the purposes of school discipline. *See In re Doe*, 1975-NMCA-108, ¶ 29, 88 N.M. 347, 540 P.2d 827 (stating that in-school disciplinary matters, unlike criminal proceedings, do not require *Miranda* warnings). Absent any agency relationship between school officials and law enforcement authorities, interrogating Antonio alone in her office about school disciplinary matters would not have constituted an investigatory detention. *See State v. Santiago*, 2009-NMSC-045, ¶ 18, 147 N.M. 76, 217 P.3d 89 (providing the test to determine whether someone acts as an agent of law enforcement).

{25} However, the character of Principal Sarna's school disciplinary investigation changed once she requested Deputy Charley to be present when she questioned Antonio about his suspected delinquent behavior. While the State maintains that Deputy Charley's presence in the room was innocuous, Deputy Charley's presence in the room created a coercive and adversarial environment that does not normally exist during interactions between school officials and students. *See T.L.O.*, 469 U.S. at 349-50 (Powell, J., concurring). Unlike school officials, whose primary duties focus on "the education and training of young people[,] . . . [l]aw enforcement officers function as adversaries of criminal suspects. These officers have the responsibility to investigate criminal activity, to locate and arrest those who violate our laws, and to facilitate the charging and bringing of such persons to trial." *See id.* (Powell, J., concurring).

{26} Deputy Charley's mere presence during Principal Sarna's questioning of Antonio converted the school disciplinary interrogation into a criminal investigatory detention, and it therefore triggered the protections provided by Section 32A-2-14(C). Before encountering Antonio, Deputy Charley was already on notice that Antonio was suspected of delinquent behavior. Principal Sarna testified that she involved Deputy Charley in the school's investigation so he would know that Antonio was under the influence, and also to test Antonio's breath for alcohol. As Principal Sarna interrogated Antonio about his suspected delinquent behavior, Deputy Charley noticed that Antonio's speech was slurred and slow. During Antonio's interrogation, Deputy Charley stood about five feet away from Antonio preparing a portable breath alcohol test while wearing a full uniform, including his badge and duty belt with a holstered gun. At a minimum, Antonio was not free to leave Principal Sarna's office until Deputy Charley

administered the portable breath alcohol test to Antonio.

{27} Deputy Charley's presence in the room not only created a coercive and adversarial environment, it also granted him access to evidence necessary to prosecute criminal delinquent behavior. Apparently anticipating that Antonio's responses would have bearing on a future criminal investigation and other proceedings, Deputy Charley listened attentively to the interrogation. To this end, he testified that it is important for him to listen to whether a child admits or denies consuming alcohol before administering the portable alcohol test to confirm or deny the child's statements. Deputy Charley simply uses the portable alcohol test as a pseudo lie detector test during his criminal investigation to corroborate any elicited statements or confessions. This is important because Antonio's incriminating statements that he drank alcohol alone would support a school suspension, although the confession alone would not support a criminal conviction under the statutory corpus delicti doctrine. *See* § 32A-2-14(G).

{28} The statutory corpus delicti requirement provides that "[a]n extrajudicial admission or confession made by the child out of court is insufficient to support a finding that the child committed the delinquent acts alleged in the petition unless it is corroborated by other evidence." *See id.* As a result, the State could not have prosecuted Antonio solely on his statement or confession. *Id.* Deputy Charley's presence in Principal Sarna's office as she questioned Antonio granted the State access to both Antonio's incriminating statements and the results of the portable breath alcohol test, which corroborated Antonio's confession.

{29} We disagree with the State's characterization of Deputy Charley's involvement in Principal Sarna's questioning of Antonio. We acknowledge that Deputy Charley did not escort Antonio to Principal Sarna's office, ask Antonio any questions himself, or tell Principal Sarna which questions to ask Antonio. Nonetheless, Deputy Charley's mere presence in Principal Sarna's office as Principal Sarna questioned Antonio subjected Antonio to an investigatory detention. Pursuant to Section 32A-2-14(C), Deputy Charley was required to advise Antonio that he had a statutory right to remain silent, and if Antonio waived that right, anything he said could be used against him in criminal delinquency proceedings. Deputy Charley must have been aware that Antonio's statements would be inadmissible absent a valid waiver of his right to remain silent, as was evidenced by the fact that Deputy Charley subsequently advised Antonio of his right to remain silent prior to attempting to question him again about his consumption of alcohol.

2. *Antonio's statements were inadmissible because he did not waive his right to remain silent as required by Section 32A-2-14(D)*

{30} Section 32A-2-14(D) provides that before any incriminating statement "may be introduced at a trial or hearing when a child is alleged to be a delinquent child, the state shall prove that the statement or confession offered in evidence was elicited only after a knowing, intelligent and voluntary waiver of the child's constitutional rights was obtained." A knowing, intelligent, and voluntary waiver cannot be obtained if the child has not first been advised of his or her statutory right to remain silent. Accordingly, Section 32A-2-14(D) provides the legal remedy for violations of Section 32A-2-14(C).

{31} Antonio moved to suppress the incriminating statements he made to Principal Sarna based on the plain language mandate of Section 32A-2-14(D) that for the statements to be admissible against him in a delinquency proceeding, "the state shall prove that the statement or confession offered in evidence was elicited only after a knowing, intelligent and voluntary waiver of the child's constitutional rights was obtained." Because the language of the statute is clear, it is proper to apply it as written. *State v. Jonathan M.*, 1990-NMSC-046, ¶ 4, 109 N.M. 789, 791 P.2d 64 ("When a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation."). In this case, the district court should have granted Antonio's motion to suppress his statements because Antonio's statements were elicited by Principal Sarna before he was warned and without Antonio having knowingly, intelligently, and voluntarily waived his statutory right to remain silent. It is undisputed that Antonio refused to repeat the statements after Deputy Charley advised him of his right to remain silent. Antonio appeared to have understood that his answers to Principal Sarna's questions would affect his discipline under school rules, but once Deputy Charley questioned him, he then potentially faced criminal charges. Because the State could not prove that the statements were made after warnings and a valid waiver as required by Section 32A-2-14(D), the statements were inadmissible. As a result, the State failed to meet its burden of proof under Section 32A-2-14(D).

{32} We emphasize that our holding in this case should not be construed to require school administrators to advise a child of his or her right to remain silent in order to use incriminating statements elicited from the child against that child in school disciplinary proceedings. We emphasized in *State v. Nick R.* that "[nothing] in this opinion [is] intended to impair the existing authority of school authorities to promulgate and enforce administrative security measures." 2009-NMSC-050, ¶¶ 44-48, 147 N.M. 182, 218 P.3d 868 (affirming school policies prohibiting pocketknives on campus, but holding that a pocketknife was not a "deadly weapon" for purposes of adjudication in Children's Court (quoting with approval *State v. Doe*, 92 P.3d 521, 525 (Idaho 2004) ("[P]ublic school officials [have] an effective means of disciplining unruly or disruptive pupils in an administrative fashion." (alterations in original) (internal quotation marks and citation omitted)))); *State v. Tywayne H.*, 1997-NMCA-015, ¶ 13, 123 N.M. 42, 933 P.2d 251 ("[T]here is a sharp distinction between the purpose of a search by a school official and a search by a police officer. The nature of a . . . search by a school authority is to maintain order and discipline in the school. The nature of a search by a police officer is to obtain evidence for criminal prosecutions." (internal citation omitted)). Similarly, in this case, a plain language reading of Section 32A-2-14(D) demonstrates that it is a bar to the admissibility of children's confessions in delinquency proceedings if the confession was elicited in the presence of a law enforcement officer or a school official who was acting as an agent of law enforcement; in no way does this section prevent children's confessions from being used against them during school disciplinary proceedings.

III. CONCLUSION

{33} We hold that Section 32A-2-14(D) precluded the use of Antonio's self-incriminating statements against him in a

delinquency proceeding. Accordingly, we reverse both the district court and the Court of Appeals. We remand to the district court, where Antonio shall be permitted to withdraw his plea if he so chooses.

{34} **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: 2015-NMSC-020

Filing Date: June 25, 2015

Docket No. 34,122

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

v.

STEVEN B.,

Child-Respondent.

CONSOLIDATED WITH

Docket No. 34,142

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

v.

ERNIE BEGAYE,

Defendant-Respondent.

Hector H. Balderas, Attorney General
James W. Grayson, Assistant Attorney General
Santa Fe, NM

for Petitioner

Jorge A. Alvarado, Chief Public Defender
B. Douglas Wood, III, Assistant Appellate Defender
Santa Fe, NM

for Respondent Steven B.

Robert E. Tangora, L.L.C.
Robert E. Tangora
Santa Fe, NM

for Respondent Ernie Begaye

Damon P. Martinez, U.S. Attorney, District of New Mexico
Jonathon M. Gerson, Assistant U.S. Attorney
Albuquerque, NM

for Amicus Curiae United States

The Navajo Nation Department of Justice
Harrison Tsosie, Attorney General
Paul W. Spruhan, Assistant Attorney General
Window Rock, AZ

for Amicus Curiae The Navajo Nation

OPINION

MAES, Justice.

{1} In this consolidated appeal, Respondents Steven B. and Ernie Begaye (Respondents), are both enrolled members of the Navajo Nation who stand accused of offenses committed on Parcel Three of Fort Wingate (Parcel Three). The question presented is whether Parcel Three is a dependent Indian community—and therefore Indian country—under 18 U.S.C. § 1151(b) (2012) and *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998). If so, then the district court properly concluded that it lacked jurisdiction over Respondents. *See State v. Quintana*, 2008-NMSC-012, ¶ 4, 143 N.M. 535, 178 P.3d 820 ("In general, 'a state does not have jurisdiction over crimes committed by an Indian in Indian country.'" (quoting *State v. Frank*, 2002-NMSC-026, ¶ 12, 132 N.M. 544, 52 P.3d 404)). If not, then we must reverse the district court and permit the State to proceed against Respondents.

{2} We are not the first court to consider the Indian country status of Parcel Three. More than a decade-and-a-half ago, the Court of Appeals in *State v. Dick* held that Parcel Three is a dependent Indian community and ordered the dismissal of a DWI prosecution due to a lack of state jurisdiction. *See* 1999-NMCA-062, ¶ 28, 127 N.M. 382, 981 P.2d 796, *cert. granted*, 127 N.M. 391, 981 P.2d 1209 (1999), *cert. quashed*, 129 N.M. 208, 4 P.3d 36 (2000). Four years later, the U.S. District Court for the District of New Mexico reached the opposite conclusion in *United States v. M.C.*, holding that Parcel Three is *not* a dependent Indian community and dismissing an indictment for second-degree murder due to a lack of *federal* jurisdiction. *See* 311 F. Supp. 2d 1281, 1282, 1297 (D.N.M. 2004).

{3} Faced with these contradictory rulings, the district court determined that *Dick* was controlling and dismissed the proceedings against Respondents. The Court of Appeals affirmed, and the State now urges this Court to overrule *Dick* and to reverse. We review the controlling case law, the history, and the present circumstances of Parcel Three, and conclude that *Dick* was wrongly decided and must be overruled. Parcel Three is not a dependent Indian community, and the district court, therefore, has jurisdiction over Respondents. The district court and the Court of Appeals having concluded otherwise, we reverse.

I. FACTS AND PROCEDURAL HISTORY

{4} The facts leading to these consolidated appeals are not in dispute. Respondents are enrolled members of the Navajo Nation who were charged with offenses which, if proven, were committed on Parcel Three. Respondent Steven B., a child, is the subject of a petition alleging that he committed the delinquent act of battery against a school official at Wingate High School, contrary to NMSA 1978, Sections 30-3-9(E) (1989) and 32A-2-3(A) (2009). Respondent Begaye was charged in an unrelated proceeding with 11 counts of criminal sexual penetration of a child under 13 years of age, contrary to NMSA 1978, Section 30-9-11(D)(1) (2009), and with 14 counts of criminal sexual contact of a minor on a child

under 13 years of age, contrary to NMSA 1978, Section 30-9-13(B)(1) (2003). The criminal sexual penetration and criminal sexual contact allegedly occurred in the staff housing area of the Wingate school campus. The alleged victims in both proceedings were non-Indians.

{5} Respondents moved to dismiss the proceedings for lack of state jurisdiction, arguing that Parcel Three is a dependent Indian community and therefore Indian country as held in *Dick*. The State acknowledged that *Dick* was controlling, but argued that the courts should revisit the status of Parcel Three in light of the federal district court's contrary holding in *M.C.* The parties entered into stipulated findings of fact and conclusions of law, including the State's concession that the district court was bound by *stare decisis* to follow *Dick*, and after an evidentiary hearing, the district court granted Respondents' motions to dismiss.

{6} The State appealed both rulings, arguing that *Dick* was wrongly decided and that it should be overruled. The Court of Appeals considered the federal district court's reasoning in *M.C.* and declined to overrule *Dick*. *See State v. Steven B.*, 2013-NMCA-078, ¶¶ 14-15, 306 P.3d 509. As a result, the Court affirmed the dismissals of the proceedings against Respondents. *See id.* ¶ 16; *State v. Begaye*, No. 32,136, mem. op., ¶ 4 (N.M. Ct. App. Apr. 9, 2013) (non-precedential) ("*Steven B.* controls this appeal."). We granted certiorari in both cases and consolidated the proceedings to settle for our state courts the question of Parcel Three's status as a dependent Indian community.

II. STANDARD OF REVIEW

{7} "Questions regarding subject matter jurisdiction 'are questions of law which are subject to de novo review.'" *State v. Chavarria*, 2009-NMSC-020, ¶ 11, 146 N.M. 251, 208 P.3d 896 (quoting *State v. Montoya*, 2008-NMSC-043, ¶ 9, 144 N.M. 458, 188 P.3d 1209). This Court defers to a district court's factual determinations "if such findings are supported by substantial evidence." *Frank*, 2002-NMSC-026, ¶ 10 (internal quotation marks and citation omitted). Because the State does not contest the facts found by the district court, we review de novo whether the district court correctly applied the law to the facts, viewing the facts in the manner most favorable to Respondents as the prevailing parties. *Id.*

III. DISCUSSION

A. The issue before us is the type of "use" for which lands must be set aside by the federal government to support a finding of a dependent Indian community

{8} Though the ultimate question in this appeal is whether Parcel Three is a dependent Indian community, the parties and the district court below have narrowed the issue significantly. To frame the precise question before us, we pause to review some basic principles and to summarize the disagreement between *Dick* and *M.C.*

{9} We first explained in *Blatchford v. Gonzales* that a dependent Indian community is one of three categories of land that Congress has defined as Indian country for purposes of criminal jurisdiction. *See* 1983-NMSC-060, ¶¶ 7, 8, 100 N.M. 333, 670 P.2d 944 (citing 18 U.S.C. § 1151 (1976), which defines Indian country as Indian reservations, dependent Indian communities, and Indian allotments). The phrase dependent Indian

community originated in federal common law and was adopted as part of the statutory definition of Indian country in 1948 when Congress enacted § 1151. *See Blatchford*, 1983-NMSC-060, ¶ 9 (noting that the dependent Indian community language in § 1151(b) stemmed from *United States v. Sandoval*, 231 U.S. 28 (1913), and *United States v. McGowan*, 302 U.S. 535 (1938)).

{10} To determine if a particular tract of land is a dependent Indian community, we apply the two-prong test articulated by the U.S. Supreme Court in *Venetie*: "for the land in question to be a dependent Indian community, it must satisfy two requirements: (1) it 'must have been set aside by the Federal Government for the use of the Indians as Indian land[,]' and (2) it 'must be under federal superintendence.'" *Quintana*, 2008-NMSC-012, ¶ 4 (alteration in original) (quoting *Venetie*, 522 U.S. at 527). If the land at issue fails to meet *either* prong, it is not a dependent Indian community. *See Quintana*, 2008-NMSC-012, ¶ 8 (declining to consider whether the land in question was under federal superintendence because the Court had already concluded that it failed to meet the set-aside prong).

{11} The district court below, with the State's concession, found that Parcel Three is administered by the Bureau of Indian Affairs (BIA) and therefore meets *Venetie*'s federal superintendence prong. That conclusion is not challenged on appeal.[1] Thus, to determine whether Parcel Three is a dependent Indian community, we must answer only whether Parcel Three satisfies the first prong of the *Venetie* test, whether it was "set aside by the Federal Government for the use of the Indians as Indian land." *Venetie*, 522 U.S. at 527.

{12} But our inquiry is narrower still. In our most recent opinion to address the set-aside requirement, we explained that *Venetie* requires "some explicit action taken by Congress or the Executive to create Indian country." *Quintana*, 2008-NMSC-012, ¶ 6. Our cases have shown that failing the first part of this requirement—the need for "some explicit action taken by Congress or the Executive"—can be dispositive such that a tract is not a dependent Indian community. *See id.* ¶¶ 2, 6 (holding that State Road 16, which separates the Santo Domingo and Cochiti Pueblos and is located on land owned by the federal government and administered by the U.S. Forest Service, is not a dependent Indian community because "there is no evidence of any explicit congressional or executive action recognizing State Road 16 as Indian country"); *Frank*, 2002-NMSC-026, ¶¶ 4, 11, 23 (holding that a state road located on federally owned and administered land within a "checkerboard area" was not a dependent Indian community because there was "'no evidence . . . indicating that the area in question was set aside by the Federal Government for the exclusive use of Indians'" (alteration in original) (quoting the district court's findings of fact and conclusions of law)); *see also State v. Vandever*, 2013-NMCA-002, ¶ 16, 292 P.3d 476 (holding that land owned in fee simple by the Navajo Nation was not a dependent Indian community because "[t]here was no evidence . . . to establish either that the federal government took some explicit action to designate the land as Indian country or that the federal

[1]The United States, as amicus curiae, disputes that the BIA's oversight of Parcel Three is the type of federal superintendence necessary to meet the *Venetie* test. However, the district court explicitly concluded that Parcel Three is under federal superintendence for the purposes of *Venetie*, a conclusion that the State does not challenge on appeal. We therefore do not reach the issue.

government transferred the property to Indians for use by Indians").

{13} Parcel Three does not suffer from this shortcoming. The district court found based upon the parties' stipulated facts that Parcel Three was transferred from the Department of Defense to the Department of Interior "for use by the Bureau of Indian Affairs" in 1950 by an act of Congress. We therefore assume for the purposes of these appeals that the transfer of Parcel Three to the BIA was the type of "explicit action" that we have found lacking in previous cases to meet *Venetie*'s set-aside requirement. *See, e.g.*, *Quintana*, 2008-NMSC-012, ¶ 6.

{14} Which brings us to the heart of the matter. The precise question before us is whether the 1950 transfer of Parcel Three set the land aside "*for the use of the Indians as Indian land*." *Venetie*, 522 U.S. at 527 (emphasis added); *see also Quintana*, 2008-NMSC-012, ¶ 6 (holding that a valid set-aside under *Venetie* requires "some explicit action taken by Congress or the Executive *to create Indian country*" (emphasis added)). The parties disagree, as did the courts in *Dick* and *M.C.*, over the type of "use" that is sufficient to meet the set-aside requirement. The State argues, consistent with *M.C.*, that a dependent Indian community must be located on lands set aside for "permanent inhabitation [by] a distinct group of Indians." *See* 311 F. Supp. 2d at 1295 ("[T]here has never been a finding of a dependent Indian community unless the community at issue was located on tribal lands or land held in trust for Native Americans."). Respondents, by contrast, argue that *Dick* correctly held that inhabitation, though sufficient to meet the set-aside requirement, is not necessary and that the requirement is met when lands are set aside simply for "Indian use." *See* 1999-NMCA-062, ¶ 21 ("Although the cases relied upon by *Venetie* and *Venetie* itself address lands that were allotments, villages, reservations, or otherwise home to Indians, there is no indication that the set-aside requirement is so limited.").

{15} We first undertake our own analysis of the origin and development of the term dependent Indian community to determine the type of "use" necessary for a finding of Indian country. We then turn to the particular circumstances of Parcel Three to determine if it was set aside "for the use of the Indians as Indian land." *Venetie*, 522 U.S. at 527.

B. The cases culminating in *Venetie* limit Indian country to land set aside for "use" as a long-term settlement by an Indian community

{16} The term dependent Indian community originated in *Sandoval*, which was one of a trio of U.S. Supreme Court opinions in the early twentieth century that refined the federal definition of Indian country. *See Sandoval*, 231 U.S. 28; *see also United States v. Pelican*, 232 U.S. 442 (1914); *Donnelly v. United States*, 228 U.S. 243 (1913). Those cases, beginning with *Donnelly* and followed by *McGowan* and *Venetie*, provide critical factual and legal context for the question presented in this appeal. We therefore review the *Donnelly* line of cases before turning to our analysis of *Dick* and the status of Parcel Three.

1. The *Donnelly* line of cases informs the meaning of Indian country under 18 U.S.C. § 1151

{17} Before Congress enacted § 1151 in 1948, it had last defined Indian country in the 1834 Indian Trade and Intercourse Act as follows:

> That all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished, for purposes of this act, be taken and deemed to be the Indian country.

Act of June 30, 1834, ch. 161, § 1, 4 Stat. 729. This geographical definition soon became unworkable with the nation's rapid expansion westward following the acquisition of California and other western territories as a result of the Mexican-American War. *See* Joseph D. Matal, *A Revisionist History of Indian Country*, 14 Alaska L. Rev. 283, 294 (1997) ("The Mexican-American War of 1846-48 forced a change in thinking."). As the United States embraced its "manifest destiny" and encouraged settlement from coast to coast, the federal government began to relocate Indians onto tribal reservations within organized states and territories. *See, e.g.*, *Organized Vill. of Kake v. Egan*, 369 U.S. 60, 72 (1962) ("As the United States spread westward, it became evident that there was no place where the Indians could be forever isolated."). Having become obsolete, the 1834 definition of Indian country was effectively repealed when it was omitted from the U.S. Code in 1874. *See* 18 Stat. 1091, tit. 74 (1874) (deleting the definition of Indian country in Rev. Stat. § 5596 (1873)); *see also Clairmont v. United States*, 225 U.S. 551, 557 (1912) (explaining that the 1834 definition of Indian country "was not re-enacted in the Revised Statutes, though other parts of the statute were, and hence was repealed by § 5596 of the revision").

{18} With no statutory definition of Indian country, the courts took up the task of formulating a common law definition in light of "the changes which have taken place in our situation, with a view of determining from time to time what must be regarded as Indian country, where it is spoken of in the statutes." *Ex parte Kan-gi-shun-ca (otherwise known as Crow Dog)*, 109 U.S. 556, 561 (1883). In an early effort, the Supreme Court characterized Indian country as "all lands 'to which the Indian title has not been extinguished,' and which were either outside 'the exterior geographical limits of a state' or 'excepted from its jurisdiction . . . at the time of its admission.'" Matal, *supra*, at 301 (omission in original) (quoting *Ex parte Kan-gi-shun-ca*, 109 U.S. at 561). That definition, based on aboriginal title, would stand more-or-less undisturbed until the Court decided *Donnelly*, *Pelican*, and *Sandoval*.

{19} In *Donnelly*, the Supreme Court considered whether to reverse a federal conviction for the murder of an Indian within the boundaries of an Indian reservation in northern California. *See* 228 U.S. at 252. One of the arguments for reversal was that the reservation was not Indian country because it was located on lands that were "set apart as an Indian reservation out of the public domain, and not previously occupied by the Indians." *See id.* at 268. The Court rejected that argument, reasoning that Indian country was no longer limited to a tribe's aboriginal lands:

> "[T]he changes which have taken place in our situation" are so numerous and so material, that the term ["Indian country"] cannot now be confined to land formerly held by the Indians, and to which their title remains unextinguished. And, in our judgment, nothing can more

> appropriately be deemed "Indian country" . . . than a tract of land that, being a part of the public domain, is lawfully set apart as an Indian reservation.

Id. at 269 (quoting *Clairmont*, 225 U.S. at 557). *Donnelly*, therefore, clarified that Indian country includes land set aside as a reservation, even when the land was not "previously occupied by the Indians." *See Id.* at 268-69.

{20} In *Pelican*, the Supreme Court considered whether an 80-acre tract of land, which previously had been part of the Colville Reservation, remained Indian country after the land had been allotted to "Agnes, an Indian," and held in trust by the United States for Agnes for a period of 25 years. *See* 232 U.S. at 444-47. The lower court had concluded that the allotment was not Indian country and, therefore, had dismissed a pair of federal indictments for an alleged murder that had occurred on the allotment. *See id.* at 444-45. The Supreme Court reasoned that the allotment continued to be Indian country even after the original reservation was diminished because the lands "still retain during the trust period a distinctively Indian character, being devoted to Indian occupancy under the limitations imposed by Federal legislation." *Id.* at 449. *Pelican* thus clarified that Indian country includes, in addition to reservations, land allotted for "Indian occupancy" and held in trust by the federal government. *See id.* at 449-51 ("[M]eanwhile, [during the trust period,] the lands remained Indian lands, set apart for Indians under governmental care . . . .").

{21} In between *Donnelly* and *Pelican*, the Supreme Court in *Sandoval* considered a third category of lands, Pueblo lands, which were neither a formal reservation nor an allotment. *See Sandoval*, 231 U.S. at 38-39 (describing the lands in question as "held in communal, fee simple ownership under grants from the King of Spain, made during the Spanish sovereignty, and confirmed by Congress since the acquisition of [the New Mexico] territory by the United States."). The lower court had dismissed an indictment for "introducing intoxicating liquor into the Indian country" after concluding that a pair of statutes that defined Pueblo lands as Indian country were an invalid exercise of Congressional authority. *See id.* at 36-37. The Supreme Court first concluded that Congress not only has plenary authority over "commerce with the *Indian tribes*," but also has "the power and the duty of exercising a fostering care and protection over all *dependent Indian communities* within its borders." *Id.* at 45-46 (emphasis added). The Court then concluded that the "Pueblos of New Mexico" are such dependent communities, "entitled to [the federal government's] aid and protection, like other Indian tribes." *Id.* at 47. As a result of that "guardianship," the Court held that the lands "owned or occupied by the Pueblo Indians" were Indian country, regardless of being owned in fee simple by "the Indians of each [P]ueblo." *Id.* at 37, 48.

{22} Thus, to the extent that *Sandoval* used the term dependent Indian community to refine the common law definition of Indian country, it is more accurate to say, not that a dependent Indian community itself is Indian country, but that the *land* "owned or occupied" by a dependent Indian community is Indian country. *See United States v. Chavez*, 290 U.S. 357, 362 (1933) ("In *United States v. Sandoval*, this court, after full examination of the subject, held that the status of the Indians of the several pueblos in New Mexico is that of dependent Indian tribes under the

guardianship of the United States, and that by reason of this status they and their lands are subject to the legislation of Congress enacted for the protection of tribal Indians and their property." (citation omitted)).

{23} Some 25 years after *Sandoval*, the Supreme Court revisited its definition of Indian country in *McGowan*. The *McGowan* court considered whether the Reno Indian Colony, "composed of several hundred Indians residing on a tract of 28.38 acres of land owned by the United States," was Indian country. 302 U.S. at 537. Noting that Congress's intent in creating the colony was "to provide lands for needy Indians scattered over the State of Nevada, and to equip and supervise these Indians in establishing a permanent settlement," the Court reasoned that Congress had "afforded [Indians in the colony] the same protection by the government as that given Indians in other settlements known as 'reservations.'" *Id.* at 537-38. The Court, therefore, held that, whether designated a reservation or a colony, the tract was Indian country because the colony had been "validly set apart for the use of the Indians"; was "under the superintendence of the government"; and was located on land that was titled in the government and that the government permitted the Indians to occupy. *Id.* at 539. *McGowan* therefore signaled that lands set aside by the federal government for settlement by a dependent Indian community—regardless of the label attributed to such lands or to the community itself—are Indian country.

{24} With these cases as a backdrop, Congress in 1948 set forth the current definition of Indian country, recognizing the three categories of lands at issue in *Donnelly*, *Pelican*, *Sandoval*, and *McGowan*:

> [T]he term "Indian country," as used in this chapter, means (a) all land within the limits of any *Indian reservation* under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all *dependent Indian communities* within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all *Indian allotments*, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (1948) (emphasis added). The *Donnelly* line of cases therefore provides context for courts construing the statutory definition of Indian country, including whether land is a dependent Indian community. *See* 18 U.S.C. § 1151 Historical and Statutory Notes (explaining that the definition of Indian country "is based on [the] latest construction of the term by the United States Supreme Court in *U.S. v. McGowan*, following *U.S. v. Sandoval*" and that "Indian allotments were included in the definition on authority of the case of *U.S. v. Pelican*" (citations omitted)).

{25} And it was to these cases that the U.S. Supreme Court looked in *Venetie*, 50 years after Congress enacted § 1151, when the Court first interpreted the phrase dependent Indian community as used in the statute. In *Venetie*, the Court considered whether 1.8 million acres of land owned in fee simple by the Native Village of Venetie Tribal Government was a dependent Indian community. *See* 522 U.S. at 523-24. The land had been a reservation until Congress revoked

the reservation status of nearly all Alaskan reservations and extinguished aboriginal claims to all Alaskan lands in exchange for the transfer of nearly 1 billion dollars and 44 million acres of land to a collection of private corporations owned exclusively by Alaska Natives. *See id.* at 524 (discussing the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1601 to -1629h, 85 Stat. 688 (1971)). The Ninth Circuit had applied a six-factor balancing test and concluded that the land was a dependent Indian community under § 1151. *See Venetie*, 522 U.S. at 525-26.

{26} Reversing, the Supreme Court disapproved of the Ninth Circuit's multi-factor test and instead identified from its case law two irreducible requirements for determining whether lands are a dependent Indian community: "first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence." 522 U.S. at 527. The Court drew these requirements from the *Donnelly* line of cases, reasoning that "in enacting § 1151, Congress codified these two requirements, which previously we had held necessary for a finding of 'Indian country' generally." *Venetie*, 522 U.S. at 527. It further explained the requirements' significance as they relate to a dependent Indian community in particular:

> The federal set-aside requirement ensures that the land in question is occupied by an "Indian community"; the federal superintendence requirement guarantees that the Indian community is sufficiently "dependent" on the Federal Government that the Federal Government and the Indians involved, rather than the States, are to exercise primary jurisdiction over the land in question.

Id. at 531 (footnote omitted).

{27} The Supreme Court then applied its two-factor test to the lands owned by the Village of Venetie. With respect to the set-aside prong, the Court held that the revocation of the Venetie Reservation and subsequent transfer of the lands in fee simple to the privately owned corporations, without restraints on alienation or use restrictions, precluded a finding that the lands had been set aside as Indian lands. *See id.* at 532-33. The Court then concluded that the lands failed the superintendence prong because Congress explicitly intended to "avoid a lengthy wardship or trusteeship" and had left in place only minimal protections for the lands transferred to the Alaska Natives. *Id.* at 533 (internal quotation marks and citation omitted) (noting that "the land is exempt from adverse possession claims, real property taxes, and certain judgments as long as it has not been sold, leased, or developed"). Because the land failed both requirements, the Court held that it was not a dependent Indian community. *See id.* at 532.

{28} Thus, *Venetie* looked past the labels in § 1151 and set forth a functional definition of Indian country, including dependent Indian communities. *See also* Felix S. Cohen, *Felix S. Cohen's Handbook of Federal Indian Law 1982 Edition* 39 (Rennard Stickland et al. eds., 1982) ("Read together, 18 U.S.C. §§ 1151(a) and (b) employ a functional definition focusing on the federal purpose in recognizing or establishing a reasonably distinct location for the residence of tribal Indians under federal protection."). Whether termed a reservation, community, Pueblo, allotment, or colony, *Venetie* held that Indian country is

limited to lands that meet its two-part test, as informed by the opinions upon which *Venetie* relied. *See* 522 U.S. at 530 ("Section 1151 does not purport to alter this definition of Indian country, but merely lists the three different categories of Indian country mentioned in our prior cases . . . ."). With this context in mind, we turn to the question of the "use" necessary to support a finding of a dependent Indian community.

2. *Dick*'s interpretation of the set-aside prong is inconsistent with precedent and is overruled

{29} The Court of Appeals in *Dick* considered the *Donnelly* line of cases and concluded that, "[a]lthough the cases relied upon by *Venetie* and *Venetie* itself address lands that were allotments, villages, reservations, or otherwise home to Indians, there is no indication that the set-aside requirement is so limited." 1999-NMCA-062, ¶ 21. *Dick* also rejected the argument—similar to the State's argument in the present appeals—that *Venetie* requires the land to be "set aside for an Indian residential community or settlement." *See* 1999-NMCA-062, ¶¶ 20-21. Instead, the Court held that *Venetie* requires only that the land be "set aside for Indian use." *Dick*, 1999-NMCA-062, ¶ 21. The Court reasoned that, because *McGowan* and *Pelican* had both held that lands other than reservations were Indian country, the U.S. Supreme Court "could not have meant that land had to be set-aside as reservation-type land. Otherwise, there would have been no need for the passage of Section 1151, which separately discusses reservations, allotments, and dependent Indian communities." *Dick*, 1999-NMCA-062, ¶ 22.

{30} We view this as a misreading of *Venetie* and the cases leading to the enactment of § 1151. Based on our review, the terms reservation, dependent Indian community, and allotment were born from an era in which criminal jurisdiction over crimes committed in Indian country was being tested by defendants on technical, and even semantic, grounds. *Cf. State v. Frank*, 2001-NMCA-026, ¶ 35, 130 N.M. 306, 24 P.3d 338 (Bosson, C.J., dissenting) ("[W]e should be mindful that the provocateur of this conflict is not the tribe, but a skillful defense attorney hoping to avoid prosecution by playing off the jurisdictional aspirations of each against the other."), *rev'd*, 2002-NMSC-026, 132 N.M. 544, 52 P.3d 404. Without a then-current definition of Indian country, defendants made a series of arguments premised on the idea that the federal government lacked jurisdiction over lands that deviated from historical definitions of Indian country.

{31} In dispelling these arguments, the U.S. Supreme Court first concluded,"not surprisingly," that Indian country includes lands set aside as reservations, even when they were not the ancestral lands of a particular Tribe. *See Venetie*, 522 U.S. at 528 n.3 (citing *Donnelly*, 228 U.S. at 269). The Court then clarified that Indian country includes lands, though not formally set aside as a reservation, that are set aside for ownership and occupation by a dependent Indian community—in that case, the Santa Clara Pueblo. *See Sandoval*, 231 U.S. at 36. Next, the Court held that Indian country encompasses land that previously had been part of a reservation and that was later allotted to a particular Indian for "Indian occupancy," at least during the period that the land was held in trust by the federal government. *See Pelican*, 232 U.S. at 449-50. And finally, the Court held that an Indian "colony," regardless of its label, is Indian country because it meets the requirements of Indian country generally,

including that it was set aside for settlement by a dependent Indian community. *See McGowan*, 302 U.S. at 539.

{32} After Congress codified these three categories of Indian country in § 1151, *Venetie* clarified that they are merely variations on the functional definition of Indian country that the Court had drawn from its earlier cases:

> In each of these cases . . . we relied upon a finding of both a federal set-aside and federal superintendence in concluding that the Indian lands in question constituted Indian country and that it was permissible for the Federal Government to exercise jurisdiction over them. Section 1151 does not purport to alter this definition of Indian country, but merely lists the three different categories of Indian country mentioned in our prior cases: Indian reservations, see *Donnelly v. United States*; dependent Indian communities, see *United States v. McGowan*; *United States v. Sandoval*; and allotments, see *United States v. Pelican*.

See 522 U.S. at 530 (citations omitted).

{33} Thus, while the three categories listed in § 1151 may have different labels and particular features of ownership, we disagree with the Court of Appeals that Indian country is not limited to lands that serve as "home to Indians." *Dick*, 1999-NMCA-062, ¶ 21. To the contrary, a unifying feature of the lands from which those categories were drawn is that they were set aside for a singular "use": the long-term settlement of an Indian community. *See McGowan*, 302 U.S. at 537 (noting that Congress's intent in creating the Reno Indian colony was "to provide lands for needy Indians scattered over the State of Nevada, and to equip and supervise these Indians in establishing a *permanent settlement*" (emphasis added)); *Sandoval*, 231 U.S. at 39 (holding that Pueblo lands were Indian country when Congress had confirmed the land grants made to the Pueblo Indians by the King of Spain and that adjacent lands had been "reserved by Executive orders for the *use and occupancy* of the Indians" (emphasis added)); *see also Pelican*, 232 U.S. at 449 (holding that the allotted lands "still retain during the trust period a distinctively Indian character, being devoted to Indian *occupancy* under the limitations imposed by Federal legislation" (emphasis added)); *Donnelly*, 228 U.S. at 255 (noting that Congress had set the lands "for the purposes of Indian Reservations, which shall be of suitable extent for the accommodation of the Indians of said state" (quoting Act of April 8, 1864, § 2, 13 Stat. at L. 39, chap. 48)); *cf. Venetie*, 522 U.S. at 532-33 (holding that the lands had not been set aside for use as Indian lands when the federal government had transferred the lands to Native-owned corporations without restraints on alienation or use restrictions).

{34} In holding that *Venetie* requires that lands be set aside merely for "Indian use," the Court of Appeals in *Dick* strayed beyond the factual underpinnings that gave rise to § 1151. We decline to do the same, particularly when neither the parties nor the amici curiae in these proceedings have cited another instance of a court taking a similarly expansive view of the set-aside requirement. We therefore conclude that the "use" envisioned by Congress when it enacted § 1151(b) was the sort of occupancy associated with long-term settlement by an Indian community.

{35} We note that the outcomes in our previous cases applying *Venetie* are consistent with our conclusion. *See Quintana*, 2008-NMSC-012, ¶¶ 2, 6-7 (holding that a state road separating the Santo Domingo and Cochiti Pueblos and located on land owned by the federal government and administered by the U.S. Forest Service did not meet *Venetie*'s set-aside requirement); *State v. Romero*, 2006-NMSC-039, ¶¶ 2-3, 15, 140 N.M. 299, 142 P.3d 887 (holding that privately owned fee lands within the boundaries of the Taos and Pojoaque Pueblos were properly set aside under *Venetie* "by congressional acts recognizing pueblo land"); *Frank*, 2002-NMSC-026, ¶¶ 4, 11, 23 (holding that a state road located on federally owned and administered land within a "checkerboard area" was not a dependent Indian community because there was "'no evidence . . . indicating that the area in question was set aside by the Federal Government for the exclusive use of Indians'" (quoting the district court's findings of fact and conclusions of law)); *see also Vandever*, 2013-NMCA-002, ¶ 16 (holding that land owned in fee simple by the Navajo Nation was not a dependent Indian community because "[t]here was no evidence presented to the district court to establish either that the federal government took some explicit action to designate the land as Indian country or that the federal government transferred the property to Indians for use by Indians").

{36} Thus, *Dick* is an outlier, and we therefore overrule its conclusion that transferring land to the BIA merely for "Indian use" satisfies *Venetie*'s set-aside requirement. We also modify any previous cases that have restated or approved of *Dick*'s holding in their discussion of *Venetie*'s set-aside requirement. *See, e.g.*, *Quintana*, 2008-NMSC-012, ¶ 6 (relying on *Dick* in dicta for the premise that transferring land for Indian use or to the BIA is sufficient to meet the set-aside prong of *Venetie*). Having identified the "Indian use" contemplated by *Venetie*, we now must decide if Parcel Three was set aside for long-term settlement by an Indian community.

C. Congress set aside Parcel Three for use by the BIA, not for long-term settlement by an Indian community

{37} The parties agree that the facts related in *Dick* and in *M.C.* about Fort Wingate and Parcel Three remain largely unchanged. Although we are primarily concerned with the original purpose for which the land was set aside, we recount the land's history and present circumstances in some detail to illustrate the interests of the parties and amici curiae involved in these proceedings.

{38} Fort Wingate is located on land that was historically inhabited by the Navajo people, though not exclusively. The Treaty with the Navajo of 1868 extinguished the "Navajo tribe's" aboriginal title to certain lands (including the land that would later become Fort Wingate) and set aside land to be occupied exclusively by the Navajo. *See* Treaty with the Navajo, 1868, 15 Stat. 667 (1868). In 1870 and 1881, the federal government designated 130 square miles of the formerly Navajo lands as a military reservation, now referred to as Fort Wingate. *See Dick*, 1999-NMCA-062, ¶ 3.

{39} Today, Fort Wingate is split into four parcels, each of which is administered separately by the federal government. Parcel One, an area referred to as the Iyanbito, is held in trust by the federal government for the Navajo Nation and administered by the BIA. *See M.C.*, 311 F. Supp. 2d at 1282. Parcel

Two remains the Fort Wingate military reservation, under the control of the Department of Defense. Parcel Three, the subject of this appeal, is administered by the BIA. And Parcel Four is under the jurisdiction of the U.S. Forest Service, having been transferred to the Cibola National Forest by an Executive Order dated 1925.

{40} Congress created Parcel Three in 1950 when it enacted Public Law 567, which transferred 13,150 acres of Fort Wingate "to the Department of the Interior, for use by the Bureau of Indian Affairs." Act of June 20, 1950, Pub. L. No. 81-567, 64 Stat. 248. Public Law 567 provides,

> That the Secretary of the Army is hereby authorized and directed to transfer to the Department of the Interior, for use by the Bureau of Indian Affairs, that portion of the Fort Wingate Military Reservation, New Mexico, comprising approximately thirteen thousand one hundred and fifty acres, heretofore determined to be surplus to the requirements of the Department of the Army. Title to the land so transferred shall remain in the United States for the use of Bureau of Indian Affairs.

{41} The BIA continues to retain authority over the lands set aside in Public Law 567 with two exceptions. First, Congress transferred nearly 7,000 acres of Parcel Three to the Forest Service in 1972. *See* Act of Oct. 6, 1972, Pub. L. No. 92-465, 86 Stat. 777, 779. And second, the BIA sold 16 acres of Parcel Three in 1990 to Paul Merrill (the Merrill property), a private individual, after determining that the land exceeded its needs. The Merrill property currently is the site of a trailer park, apartments, a restaurant, a pawn shop/trading post, a convenience store, a gas station, and a post office that are used by the general public and by local Indian residents.

{42} Parcel Three is administered by the BIA for the primary purpose of educating Indian children. *See Dick*, 1999-NMCA-062, ¶14. The BIA operates two schools on Parcel Three, Wingate Elementary School and Wingate High School (the Wingate Schools). Enrollment at the Wingate Schools is not limited exclusively to Indian children; qualified non-Indian children are permitted to attend. However, at the time of the stipulated facts in the cases below, all of the students who attended the Wingate Schools were Indian, and the vast majority were Navajo.

{43} Other than the housing on the privately owned Merrill property, Parcel Three offers no living arrangements or establishments besides those provided by the BIA for student dormitories and school-employee family housing. Residence on Parcel Three is conditioned entirely upon an educational or employment relationship with the schools. Approximately 75% of the students who attend Wingate High School live on campus, and 50% of the students who attend Wingate Elementary School live on campus. Approximately 85% of the employees who live on campus are Indian.

{44} Administration and oversight of the Wingate Schools is a shared enterprise between the Navajo Nation, the BIA, and the State. The schools' Board is elected at Navajo Nation elections and determines school policies, the curriculum, and the budget; the BIA has the power to overturn the Board's decisions and employs the schools' principals; and the schools comply with all New Mexico

state education requirements, including requirements for teacher licensure.

{45} Similarly, the Navajo Nation and various levels of state, county, and city government collaborate to provide emergency and other support services to the residents of Parcel Three. Emergency telephone calls requesting police, fire, or medical services are directed to and received by McKinley County Metro Dispatch, an organization funded by McKinley County and the City of Gallup. Emergency law enforcement services are provided by the Navajo Nation, the McKinley County Sheriff's Office, and the New Mexico State Police. All utilities, including telephone services, electricity services, natural gas services, water and sewer services, and waste disposal services, are provided by non-Indian entities. Thus, Parcel Three is the subject of a cooperative approach between federal, state, local, and Navajo governments to provide for the safety and welfare of the people who are permitted by the BIA to reside at the Wingate Schools.

{46} To answer the question before us, however, our primary focus is on Public Law 567, which offers the clearest indication of Congress's intended use for Parcel Three. As previously noted, Public Law 567 transferred Parcel Three "to the Department of the Interior, for use by the Bureau of Indian Affairs." 64 Stat. 248. This language, enacted just two years after Congress adopted the definition of Indian country in § 1151, does not purport to create Indian country or refer to any of the three categories of Indian country listed in § 1151. Nor does Public Law 567 invoke any other badge of Indian country from the *Donnelly* line of cases, such as transferring title of Parcel Three to a group or community of Indians, *see Sandoval*, 231 U.S. at 39, or establishing a trust relationship with or providing for the protection of an Indian Tribe, Indian individual, or other Indian community that owns or occupies the land, *see id.*; *McGowan*, 302 U.S. at 537; *Pelican*, 232 U.S. at 447. Public Law 567 provides only that "[t]itle to the land so transferred shall remain in the United States *for use of the Bureau of Indian Affairs*." 64 Stat. 248 (emphasis added).

{47} In short, the language of Public Law 567 shows that Congress did not set aside Parcel Three for long-term settlement by an Indian community. By transferring the land simply for "use of the Bureau of Indian Affairs," Congress gave the BIA broad discretion over how to use the land. Such discretion—which apparently extends to transferring a significant portion of Parcel Three to another agency and even to selling part of it to a private individual—is antithetical to long-term settlement by an Indian community and therefore is inconsistent with an intent to create Indian country. To conclude otherwise, we would have to hold that Congress took the unprecedented step of *implicitly* delegating authority to the BIA to create and destroy Indian country on a whim, based on the use that the BIA chooses for Parcel Three at any particular time. Unlike other laws that explicitly delegate authority to create Indian country, the language of Public Law 567 does not support such a conclusion. *Compare* 64 Stat. 248, *with Donnelly*, 228 U.S. at 255-56 (noting that Congress explicitly "confer[red] a discretionary power" on the Executive to set aside lands in California for Indian reservations and to enlarge the boundaries as necessary "for the best interests of the Indians").

{48} And even assuming, arguendo, that Congress intended to give the BIA implicit

authority to create Indian country, the BIA's actual use of Parcel Three as the site of the Wingate Schools is inconsistent with long-term settlement by an Indian community. Unlike the Santa Clara Pueblo Indians in *Sandoval* and the inhabitants of the Reno Indian Colony in *McGowan*, no community of Indians, including students or staff of the Wingate Schools, has a right to dwell on or use Parcel Three as the community's homeland, and no Indian community has legal or equitable title to the land in question. Instead, any right to reside on Parcel Three is conditioned upon attendance at or employment with the Wingate Schools and terminates with the end of a student's or employee's tenure.

{49} In the end, the BIA has exercised its discretion under Public Law 567 to use Parcel Three to operate the Wingate Schools, which are federal facilities supported by federal funds that provide a specific, non-exclusive service to Indian children. The provision of such a service, discretionary or otherwise, does not show a congressional designation of federal property as Indian land. *See Venetie*, 522 U.S. at 534 ("Our Indian country precedents . . . do not suggest that the mere provision of 'desperately needed' social programs can support a finding of Indian country."); *see also Quintana*, 2008-NMSC-012, ¶ 7 ("[E]vidence of the practical use of property has never been held to be sufficient to satisfy the set-aside requirement."). *M.C.* summed up this point well:

> BIA schools exist both within and without the boundaries of Indian country. Testimony presented at the hearing established that the purpose of the [Wingate] School and its means of administration are identical to that of all BIA schools, regardless of whether they are located within or without the boundaries of Indian country. There is no evidence that, in any other instance, the presence of a BIA school alone has changed the status of the land on which it is situated. The fact that the School is a BIA school whose purpose is to provide an education to Native American children thus cannot be the defining feature to establish a dependent Indian community on Parcel Three. A holding to the contrary would be an improper expansion of both the language and the historical context of the term dependent Indian community.

311 F. Supp. 2d at 1295-96. We agree. The BIA's operation of a school—even a boarding school on federally owned land—does not by itself create a dependent Indian community. The land must have been set aside for long-term settlement by an Indian community. Because Parcel Three was not set aside for that purpose, it is not a dependent Indian community.

{50} Respondents argue that *C.M.G. v. State* supports *Dick*'s conclusion that Parcel Three is a dependent Indian community. 1979 OK CR 39, ¶ 21, 594 P.2d 798, *cert. denied*, 444 U.S. 992 (1979). In *C.M.G.*, the Oklahoma Court of Criminal Appeals held that a BIA-operated school, the Chilocco Indian School, was a dependent Indian community. *See id.* ¶¶ 15-22. Though the result in *C.M.G.* favors Respondents, we agree with the State that the reasoning in that case actually supports our conclusion that Parcel Three is not a dependent Indian community.

{51} As Respondents correctly observe, *C.M.G.* noted many features of the Chilocco

Indian School that parallel the Wingate Schools in this appeal. *See id.* ¶ 15 (noting that the land is owned by the United States, that all of the students and most of the staff are Indians, and that salaries and tuition are funded by the BIA). However, the Oklahoma Court was clear that it based its holding on language in the Executive Order setting aside the land for the Chilocco Indian School, which provided as follows:

> [T]he following-described tracts of country in the Indian Territory . . . be, and the same are hereby, *reserved and set apart for the settlement of such friendly Indians belonging within the Indian Territory as have been or who may hereafter be educated at the Chilocco Indian Industrial School in said Territory.*

Id. ¶ 5 (alteration in original) (quoting 1 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 842 (2d ed. 1904)). Based on this language, the court held that the school was a dependent Indian community because it was on "a tract of land which was *specifically reserved for the settlement of friendly Indians* at the time the Cherokee outlet was ceded to the United States." *Id.* ¶ 21 (emphasis added). This reasoning comports with our conclusion that a dependent Indian community must be located on lands set aside for the long-term settlement of an Indian community. And unlike the Executive Order in *C.M.G.*, Public Law 567 does not reserve or set aside Parcel Three for "settlement" by Indians. We therefore are not troubled by the result in *C.M.G.*

{52} We do not mean to diminish the practical reality that the Wingate Schools are indeed a close-knit community, in the commonly understood meaning of the word. As Respondents cogently argue, the Wingate Schools are home to hundreds of Indian children and school employees, and the schools serve as a focal point and gathering place for many aspects of the lives of students, staff, and their families who live on Parcel Three and in the surrounding areas. Again, however, our inquiry is limited to whether Parcel Three was set aside for long-term settlement by an Indian community—not to whether the BIA, in its discretion, has elected to use the land in a manner that incidentally fosters the development of a community of students, staff, and family members for as long as the BIA permits them to be associated with the schools.

{53} As a final matter, the United States as amicus curiae asserts that there is an "intolerable jurisdictional void" on Parcel Three for law enforcement purposes because of the conflicting rulings in *Dick* and *M.C.* The Navajo Nation, also as amicus curiae, disagrees, arguing that it retains full authority to prosecute all crimes committed by Indians, and that the State may prosecute crimes by non-Indians against other non-Indians and victimless crimes by non-Indians. The Navajo Nation also contends that it has a strong interest in the welfare of the children on the school property.

{54} Whether the United States or the Navajo Nation has jurisdiction over Parcel Three is not before us, and we therefore take no position on either issue. We note, however, that the divergent holdings in the past among the state and federal courts have created confusion and complicated the jurisdictional framework over an area in which hundreds of children, school employees, and their families live and learn. We are mindful of the delicate balance between the various sovereigns and

local governments involved, and we are hopeful that they will continue to work together to ensure that Parcel Three remains a safe and healthy environment for all who reside there. We trust that our holding will provide some much-needed clarity, at least with respect to the State's jurisdiction over offenses committed on Parcel Three.

CONCLUSION

{55} We overrule *State v. Dick* and hold that Parcel Three is not a dependent Indian community under § 1151. We therefore reverse the district court and the Court of Appeals in both of the cases before us and remand for further proceedings in the district court.

{56} **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 Denied, June 26, 2015, No. 35,230

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-068

Filing Date: March 17, 2015

Docket No. 33,303

JAMES A. TURNER and TRACY TURNER, Husband and Wife,

Plaintiffs-Appellants,

v.

FIRST NEW MEXICO BANK,

Defendant-Appellee.

Martin E. Threet and Associates
Martin E. Threet
Albuquerque, NM

for Appellants

Peifer, Hanson & Mullins, P.A.
Lauren Keefe
Albuquerque, NM

Walker & Associates, P.C.
Thomas D. Walker
Albuquerque, NM

for Appellee

OPINION

VIGIL, Judge.

{1} This case requires us to determine whether res judicata, also known as claim preclusion, bars the filing of a second lawsuit

when a virtually identical lawsuit was previously dismissed "without prejudice." The district court ruled that the second suit is barred, and we affirm.

BACKGROUND

{2} In October 2010, Plaintiffs filed a civil complaint in the Luna County district court, and the case was assigned to Judge Viramontes. In response to Defendant's motion , Judge Viramontes ordered Plaintiffs to make a more definite statement, and Plaintiffs filed an amended complaint (First Complaint). In general terms, the First Complaint alleged that Plaintiffs purchased a farm and built a dairy on the farm, financed by loans from Defendant, and that Defendant subsequently engaged in actions by which Defendant attempted to take control and management of Plaintiffs' business. Count I alleged that Defendant's course of conduct "became so egregious that it violated the standards of good faith and fair dealing that are required by [NMSA 1978,] Section 55-1-304 [(2005)] of the Uniform Commercial Code[.]" Count II alleged that Plaintiffs repaid a loan in full and Defendant failed and refused to report to credit reporting agencies that the loan had been repaid, with the consequence that the loan was reported as being past due, causing damage to Plaintiffs' credit. Count III alleged that Defendant's conduct violated the standards of good faith and fair dealing required by the Uniform Commercial Code and was sufficiently malicious, reckless and wanton, as to warrant the imposition of punitive damages. Defendant then filed a motion to dismiss the First Complaint in its entirety for failure to state a claim pursuant to Rule 1-012(B)(6) NMRA. After Plaintiffs responded, Judge Viramontes held a hearing. Following that hearing in a July 2012 order, Judge Viramontes granted Defendant's motion and dismissed each count of the First Complaint "without prejudice." Judge Viramontes reasoned that Count I alleged a breach of the "obligation of good faith" set forth in Section 55-1-304, and this section of the Uniform Commercial Code does not support an independent cause of action; that Count II alleged a violation of the federal Fair Credit Reporting Act, 15 U.S.C. § 1681 (2012), and because the claim relates to Plaintiffs' personal or consumer loan, federal law preempts the state law claim; and that Count III alleged a claim for punitive damages under the Uniform Commercial Code, which does not provide for an award of punitive damages.

{3} No appeal was taken from Judge Viramontes's order of dismissal. Instead, Plaintiffs filed a new complaint against Defendant in September 2012 (Second Complaint), and this case was assigned to Judge Robinson. The parties and Counts I and III of the Second Complaint are absolutely identical to the First Complaint. Count II is virtually identical, adding only that Defendant's conduct as it relates to Plaintiffs' personal or consumer loan impacted their "business relationships" and "commercial credit." Defendant filed a motion to dismiss the Second Complaint on grounds that Judge Viramontes's order dismissing the First Complaint was binding in the case under principles of res judicata (claim preclusion) and collateral estoppel (issue preclusion) and for the additional reason that the Second Complaint fails to state a claim upon which relief can be granted. Judge Robinson agreed with Defendant and dismissed the Second Complaint in its entirety with prejudice. Plaintiffs appeal.

{4} The dispositive issue in this case is the effect of the order dismissing the First

Complaint on the Second Complaint. Plaintiffs argue that because dismissal of the First Complaint was "without prejudice," it had no effect on their right to file the Second Complaint, and Defendant asserts that dismissal of the Second Complaint was proper under the doctrines of claim preclusion and issue preclusion. For the reasons which follow, we agree that claim preclusion was properly applied, and affirm.

STANDARD OF REVIEW

{5} The facts are undisputed; therefore, our review of whether res judicata applies presents a question of law, which we review de novo. *State ex rel. Peterson v. Aramark Corr. Servs., LLC*, 2014-NMCA-036, ¶ 23, 321 P.3d 128 (" 'When the facts are not in dispute, the preclusive effect of a prior judgment is a question of law reviewed de novo.' " (quoting *Rosette, Inc. v. United States Dep't of the Interior*, 2007-NMCA-136, ¶ 31, 142 N.M. 717, 169 P.3d 704)).

ANALYSIS

{6} "Res judicata [i.e., claim preclusion] is designed to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, prevent inconsistent decisions, and encourage reliance on adjudication." *Potter v. Pierce*, 2015-NMSC-002, ¶ 10, ___P.3d ___ (No. 34,365, Jan. 8, 2015) (alterations, omission, internal quotation marks, and citation omitted); *see also Alba v. Hayden*, 2010-NMCA-037, ¶ 6, 148 N.M. 465, 237 P.3d 767 (" 'The principles of preclusion operate to promote finality in civil disputes by relieving parties of the burdens of multiple lawsuits, conserving judicial resources, and preventing inconsistent decisions.' " (quoting *Rosette, Inc.*, 2007-NMCA-136, ¶ 32)). Claim preclusion "bars relitigation of the same claim between the same parties or their privies when the first litigation resulted in a final judgment on the merits." *Deflon v. Sawyers*, 2006-NMSC-025, ¶ 2, 139 N.M. 637, 137 P.3d 577 (internal quotation marks and citation omitted). The party asserting 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." *Potter*, 2015-NMSC-002, ¶ 10.

{7} We first address whether the order dismissing the First Complaint is a final judgment notwithstanding that the dismissal was "without prejudice." The order dismissed the First Complaint in its entirety, it fully disposed of the rights of the parties, and otherwise disposed of the matter to the fullest extent possible, without authorizing or specifying when an amended complaint could be filed. Moreover, the order decisively and fully determined that Plaintiffs failed to state a cause of action, and an immediate appeal was necessary to reverse that determination. The order dismissing the First Complaint therefore constituted a final judgment under our established precedent. *See Vill. of Los Ranchos de Albuquerque v. Shiveley*, 1989-NMCA-095, ¶¶ 10-13, 110 N.M. 15, 791 P.2d 466 (concluding that an order dismissing "without prejudice" for lack of standing constituted a final judgment because the order "terminated the suit and the proceeding was completely disposed of so far as the court had power to dispose of it"); *Bralley v. City of Albuquerque*, 1985-NMCA-043, ¶¶ 11-16, 102 N.M. 715, 699 P.2d 646 (concluding that an order of dismissal "without prejudice" for failure to exhaust administrative remedies which did not authorize or specify a definite

time to file an amended complaint was a final judgment because the order fully terminated and disposed of the case before the court). In *Sunwest Bank of Albuquerque v. Nelson*, 1998-NMSC-012, ¶¶ 7-9, 125 N.M. 170, 958 P.2d 740, our Supreme Court expressly approved *Bralley* and *Village of Los Ranchos* and concluded itself that an order of dismissal "without prejudice" for improper venue was a final order because the order "disposed of the matter to the fullest extent possible in the court in which the action was filed." *Sunwest Bank of Albuquerque*, 1998-NMSC-012, ¶ 9.

{8} We next address whether the order dismissing the First Complaint is a judgment "on the merits." Here, Defendant filed a motion to dismiss pursuant to Rule 1-012(B)(6). Plaintiffs responded in writing to the motion and then made oral arguments in opposition to the motion in a notice hearing held before Judge Viramontes. Under these circumstances, the "merits" of whether the First Complaint stated a cause of action under Rule 1-012(B)(6) was fully and fairly litigated before Judge Viramontes in accordance with the due process rights of Plaintiffs to notice and an opportunity to be heard. Accordingly, we conclude that the order dismissing the complaint constituted a judgment "on the merits" that the First Complaint failed to state a cause of action. *See Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n.3 (1981) ("The dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is a 'judgment on the merits.' "); *AVX Corp. v. Cabot Corp.*, 424 F.3d 28, 30 (1st Cir. 2005) ("Ordinarily, a dismissal for failure to state a claim is treated as a dismissal on the merits and there is abundant case law to this effect."). We therefore hold that the order dismissing the First Complaint constitutes a judgment "on the merits" that is entitled to claim preclusion effect.

{9} There is no dispute that the last two requirements for claim preclusion (that the parties in the two suits are the same, and that the cause of action is the same in both suits) are satisfied. We only add that Count II in the First Complaint was dismissed because preemption under the federal Fair Credit Reporting Act applies to personal or consumer loans. To the extent the minor changes made in the wording of Count II in the Second Complaint requires a review of the merits, the district court noted that the complaint was filed by Plaintiffs in their individual capacities and alleged that Plaintiffs borrowed the money in their individual capacities and that Defendant failed to report to credit reporting agencies that Plaintiffs had repaid the loan. We also note that the complaint alleges Plaintiffs were personally damaged. Plaintiffs cite no authority establishing that the minor changes made in the wording to Count II convert what is otherwise a personal loan into a commercial loan. Thus, regardless of the minor changes, Count II remains preempted under the Fair Credit Reporting Act.

{10} For the foregoing reasons, we hold that res judicata (claim preclusion) barred the filing of the Second Complaint.

CONCLUSION

{11} The order of the district court is affirmed.

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

MICHAEL E. VIGIL, Chief Judge

I CONCUR:

M. MONICA ZAMORA, Judge

TIMOTHY L. GARCIA, Judge (specially concurring).

GARCIA, Judge (specially concurring).

{13} I write to specially concur with the majority and disagree with the application of res judicata to dispose of the merits of Plaintiffs' appeal. Because I disagree with the majority, I would hold that the dismissal of the First Complaint "without prejudice" by Judge Viramontes precludes the application of res judicata to the Second Complaint. However, as to the merits of Plaintiff's Second Complaint, I agree with Judge Robinson's alternative position that Plaintiff's Second Complaint fails to state a claim upon which relief can be granted under Rule 1-012(B)(6). As a result, the dismissal of the Second Complaint should be affirmed on that basis.

{14} The first issue is whether Judge Viramontes's order dismissing the First Complaint without prejudice constitutes a final judgment "on the merits" for the purposes of res judicata. The majority correctly points out that certain federal courts recognize the application of res judicata to a dismissal without prejudice under a factual scenario similar to this case. Majority Opinion ¶ 8. However, our appellate courts appear to disagree with this federal position and do not apply the doctrine of res judicata when the district court, without any specific qualifications or limiting instruction, utilizes its discretion to dismiss a complaint "without prejudice." *See Sunwest Bank v. Nelson*, 1998-NMSC-012 ¶ 7, 125 N.M. 170, 958 P.2d 740 (addressing a dismissal without prejudice in the context of finality so as to permit an immediate appeal but also acknowledging that separate proceedings on the merits are appropriate and overcome the doctrine of res judicata when claims are dismissed without prejudice); *Marquez v. Juan Tafoya Land Corp.*, 1981-NMSC-080, ¶ 9, 96 N.M. 503, 632 P.2d 738 (noting that "a dismissal without prejudice contemplates the right to further proceedings"); *Watkins v. Local Sch. Bd.*, 1975-NMSC-048, ¶¶ 8, 12, 88 N.M. 276, 540 P.2d 206 (recognizing that a dismissal without prejudice along with a limited opportunity to amend the complaint within twenty days only became final and binding when no amended pleadings were filed within the time period allowed); *Bankers Trust Co. of Cal. v. Baca*, 2007-NMCA-019, ¶¶ 9-10, 141 N.M. 127, 151 P.3d 88 (denying the application of res judicata to the dismissal of a foreclosure action without prejudice that was based upon significant inactivity by the bank); *Salazar v. Yellow Freight Sys., Inc.*, 1990-NMCA-003, ¶¶ 11-13, 109 N.M. 443, 786 P.2d 57 (denying the application of res judicata to a recommended decision arising during the first of two workers' compensation administrative proceedings where the first claim was dismissed without prejudice); *Bralley*, 1985-NMCA-043, ¶ 18 (recognizing that "[t]he words 'without prejudice' when used in an order or decree generally indicate that there has been no resolution of the controversy on its merits and leaves the issues in litigation open to another suit as if no action had ever been brought"); *Chavez v. Chenoweth*, 1976-NMCA-076, ¶¶ 25-27, 89 N.M. 423, 553 P.2d 703 (denying the application of res judicata to numerous claims against third parties arising from an automobile accident that were dismissed without prejudice in various separate actions). "A dismissal 'without prejudice' gives the complainant the right to state a new and proper cause of action, if he can, and does not take away any rights of defense to the action." *Bralley*, 1985-NMCA-043, ¶ 18. Based upon this established precedent in

New Mexico, the merits of Plaintiffs' Second Complaint should be addressed anew.

{15} As the majority recognized, Plaintiffs' Second Compliant is identical to the First Complaint except for some minor additional language added to Count II. Majority Opinion ¶ 3. The modified claims were fully addressed by Judge Robinson and I agree with his analysis and the dismissal of Plaintiffs' Second Complaint under Rule 1-012(B)(6). The minor wording modification made to Count II did not establish an issue of fact regarding whether Plaintiffs' individual loan under Count II was preempted under the federal Fair Credit Reporting Act. Plaintiffs have failed to provide this Court with any authority to support their position that a personal loan impacting their business relationships and commercial credit avoids preemption under the federal Fair Credit Reporting Act. *See Jojola v. Fresenius Med. Clinic*, 2010-NMCA-101, ¶ 7, 149 N.M. 51, 243 P.3d 755 (recognizing that where a party fails to provide any authority for an argument, we will presume that none exists). As a result, the rewording of Count II was also properly dismissed pursuant to Rule 1-012(B)(6).

{16} For the reasons stated herein, I specially concur with the majority and would affirm the district court's dismissal of Plaintiffs' Second Complaint.

TIMOTHY L. GARCIA, Judge

Certiorari Granted, June 19, 2015, No. 35,297; Certiorari Granted, June 19, 2015, No. 35,214

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-069

Filing Date: March 19, 2015

Docket No. 32,403

KIMBERLY MONTAÑO,

Plaintiff-Appellee,

v.

ELDO FREZZA, M.D.,

Defendant-Appellant,

and

LOVELACE INSURANCE COMPANY, a domestic For-Profit Corporation,

Defendant.

Jones, Snead, Wertheim & Clifford, P.A.
Jerry Todd Wertheim
Roxie De Santiago
Samuel C. Wolf
Elizabeth C. Clifford
Santa Fe, NM

for Appellee

Hinkle, Hensley, Shanor & Martin, LLP
William P. Slattery
Dana S. Hardy
Zachary T. Taylor
Santa Fe, NM

for Appellant

Rodey, Dickason, Sloan, Akin & Robb PA
Nelson Franse
Brian Brack
Albuquerque, NM

for Lovelace Insurance Company

OPINION

BUSTAMANTE, Judge.

{1} This case is one of three presently before the Court of Appeals that involve the asserted medical negligence of then Texas-based physician Dr. Eldo Frezza. *See Gonzales v. Frezza*, COA No. 32,606, and *Gallegos v. Frezza*, COA No. 32,605. The issue presented in this case is whether Dr. Frezza should enjoy the immunity granted by the Texas Tort Claims Act (TTCA) when he is sued by a New Mexico resident in a New Mexico court. We conclude that under principles of comity Dr. Frezza is entitled to immunity, but only so far as that immunity is consistent with the New Mexico Tort Claims Act (NMTCA). We also conclude that the district court's order was too broadly worded. Hence, we affirm in part and vacate in part the district court's ruling and remand for further proceedings.

BACKGROUND

{2} Like the plaintiffs in the other two cases, Ms. Montaño, a New Mexico resident, traveled to Lubbock, Texas to undergo bariatric surgery by Dr. Frezza at the Texas Tech University Health Sciences Center (the Center). Ms. Montaño had been told by her insurer, Lovelace Insurance Company (Lovelace), that Dr. Frezza was the only bariatric surgeon for whom it would provide coverage. For approximately six years, Ms. Montaño traveled to Lubbock for follow-up care and treatment by Dr. Frezza for complications arising from the surgery. Eventually, testing by another doctor revealed gastrointestinal bleeding caused by an "eroding permanent suture." That doctor performed corrective surgery.

{3} At all times relevant to this case, Dr. Frezza was an employee of the Center, which is a governmental unit of the state of Texas. *See Tex. Tech Univ. Health Scis. Ctr. v. Ward*, 280 S.W.3d 345, 348 (Tex. App. 2008) (stating that the center is a governmental unit). The Center established Texas Tech Physician Associates (TTPA) to administer managed care contracts for its physicians, including the contract with Lovelace. Although not a party to the contract, Dr. Frezza was a "represented physician" subject to the terms of the contract. Additional facts are included in our discussion.

{4} Ms. Montaño filed suit against Dr. Frezza and Lovelace, alleging breach of contract and negligent referral by Lovelace, medical negligence by Dr. Frezza, violation of the New Mexico Unfair Practices Act by both Dr. Frezza and Lovelace, and lack of informed consent. Dr. Frezza filed two motions for dismissal. One motion asserted that New Mexico did not have personal jurisdiction over him. In the other he argued that as a Texas public employee he was immune from suit under the TTCA. *See* Rule 1-012(B)(2), (6) NMRA. The district court determined that New Mexico law, not the TTCA, should be applied. The district court also concluded that Dr. Frezza had sufficient contacts with New Mexico such that New Mexico courts court assert personal jurisdiction over him. The district court then denied both motions. Dr. Frezza filed a motion to reconsider the denial of his motion to dismiss based on personal

jurisdiction. The motion to reconsider is still pending below.

{5} Dr. Frezza petitioned this Court for a writ of error under the collateral order doctrine, arguing that the district court erred in concluding that New Mexico law applied. *See* Rule 12-503 NMRA. The petition, which addresses only this issue, was granted.

DISCUSSION

A. The Petition for Writ of Error was Appropriately Granted

{6} We begin by addressing whether the district court's decision to apply New Mexico law is appropriate for appellate review under the collateral order doctrine. Generally, appeal lies only from a "final judgment or decision, any interlocutory order or decision which practically disposes of the merits of the action, or any final order after entry of judgment which affects substantial rights[.]" NMSA 1978, § 39-3-2 (1966). "The principle of finality [evinced in this statute] serves a multitude of purposes, including the prevention of piecemeal appeals and the promotion of judicial economy." *Handmaker v. Henney*, 1999-NMSC-043, ¶ 7, 128 N.M. 328, 992 P.2d 879. An exception to this preference for finality is known as the collateral order doctrine, "whose reach is limited to trial court orders affecting rights that will be irretrievably lost in the absence of an immediate appeal." *Carrillo v. Rostro*, 1992-NMSC-054, ¶ 16, 114 N.M. 607, 845 P.2d 130 (internal quotation marks and citation omitted). To permit review under the doctrine, "(1) the order must finally determine the disputed question; (2) it must concern an issue that is entirely separate from the merits of the claim; and (3) there must be no effective remedy by appeal." *Handmaker*, 1999-NMSC-043, ¶ 9.

{7} Our cases have held that where an order addresses a party's immunity from suit, as opposed to immunity from liability, it satisfies the collateral order doctrine criteria. *See Campos de Suenos, Ltd. v. Cnty. of Bernalillo*, 2001-NMCA-043, ¶ 15, 130 N.M. 563, 28 P.3d 1104 (stating, "We issue writs of error to review immunity from suit cases because we consider them collateral order[s] affecting interests that would be irretrievably lost if the case proceeded to trial." (alteration in original) (internal quotation marks and citation omitted)); *accord Handmaker*, 1999-NMSC-043, ¶ 14; *Carrillo*, 1992-NMSC-054, ¶ 20; *Sugg v. Albuquerque Pub. Sch. Dist.*, 1999-NMCA-111, ¶ 8, 128 N.M. 1, 988 P.2d 311; *cf. Carmona v. Hagerman Irrigation Co.*, 1998-NMSC-007, ¶ 21, n.5, 125 N.M. 59, 957 P.2d 44 ("The [NMTCA] provides immunity from liability, not absolute immunity from suit, so the collateral order exception to the finality of judgments rule would not apply in this case.").

{8} To the extent that Ms. Montaño argues that the writ of error was improvidently granted because the collateral order doctrine criteria were not satisfied, we disagree. Ms. Montaño contends that the real question before the district court depended on the nature of TTPA's contract with Lovelace and thus the district court's order (1) did not resolve the question, and (2) was dependent on the merits of the case. But the question before the district court was a basic one: whether New Mexico or Texas law should apply. As will be seen in our discussion below, the answer to this question does not involve detailed examination of the facts related to Dr. Frezza's practice. Application of Texas law here would result in

dismissal of Ms. Montaño's suit against Dr. Frezza because the TTCA does not permit suits against government employees acting within their employment. *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.106(f) (West 2013). Because the choice of law encompasses whether Dr. Frezza is immune from suit, the decision necessarily implicates a right that would be "irretrievably lost" if not heard by this Court. *See Campos de Suenos, Ltd.*, 2001-NMCA-043, ¶ 15. We conclude that the district court's order is properly before us for review.

B. New Mexico Law Applies

{9} We turn to whether the district court properly analyzed whether New Mexico or Texas law governs Ms. Montaño's suit. In doing so, we "review the district court's decision to use a comity analysis de novo, and then review a district court's application of comity for abuse of discretion." *Sam v. Sam*, 2006-NMSC-022, ¶ 9, 139 N.M. 474, 134 P.3d 761. Dr. Frezza does not challenge the district court's decision to embark on its comity analysis. Thus, as to the comity issue, we only determine whether the district court's decision exceeded the bounds of its discretion. We begin, however, by addressing the "place-of-the-wrong" rule, and then address whether the district court properly analyzed whether Texas law should apply under principles of comity.

{10} Although some states have adopted the "most significant relationship" approach to the choice of law, the New Mexico Supreme Court has continued to endorse the "place-of-the-wrong" rule in choice of law cases. *Terrazas v. Garland & Loman, Inc.*, 2006-NMCA-111, ¶¶ 12, 14, 140 N.M. 293, 142 P.3d 374 (stating that "New Mexico courts have steadfastly applied the *lex loci delicti* rule in tort cases"); *see* Restatement (Second) of Conflict of Laws § 6 (1971); 15A C.J.S. *Conflict of Laws* § 38 (2014). Under this rule, "the substantive rights of the parties are governed by the law of the place where the wrong occurred." *Terrazas*, 2006-NMCA-111, ¶ 12. "The place of the wrong . . . is the location of the last act necessary to complete the injury." *Torres v. State*, 1995-NMSC-025, ¶ 13, 119 N.M. 609, 894 P.2d 386 (internal quotation marks and citation omitted).

{11} But the place-of-the-wrong rule may give way when policy considerations outweigh its application. *See In re Estate of Gilmore*, 1997-NMCA-103, ¶ 18, 124 N.M. 119, 946 P.2d 1130 ("[P]olicy considerations may override the place-of-the-wrong rule."). For instance, in *Torres*, the New Mexico Supreme Court held that New Mexico law should apply where the alleged negligence of the Albuquerque Police Department resulted in a death in California because "public policy dictates that New Mexico law determine the existence of duties and immunities on the part of New Mexico officials." 1995-NMSC-025, ¶ 14 (alteration, internal quotation marks, and citation omitted). Similarly, in *Sam*, the New Mexico Supreme Court reversed the Court of Appeals, which had relied on the place-of-the-wrong rule to conclude that New Mexico law should apply where the plaintiff sued an Arizona governmental unit over an accident that occurred in New Mexico. 2006-NMSC-022, ¶¶ 1, 6, 29. The general rule derived from these cases is that "we begin with a strong presumption in favor of application of the place-of-the-wrong rule, but we will not close our eyes to compelling policy arguments for departure from the general rule in specific circumstances." *In re Estate of Gilmore*, 1997-NMCA-103, ¶ 21.

{12} The district court determined that

"New Mexico is the location of the last act necessary to complete the injury because [Ms. Montaño's] injuries manifested themselves in New Mexico." Based on its decision that the injury manifested itself in New Mexico, the district court concluded that "New Mexico law applies" to the case. We perceive no error in the district court's Restatement-based place-of-the-wrong analysis.[1] *See Torres*, 1995-NMSC-025, ¶ 13; *Roberts v. Piper Aircraft Corp.*, 1983-NMCA-110, ¶ 9, 100 N.M. 363, 670 P.2d 974; *Beh v. Ostergard*, 657 F. Supp. 173, 175-76 (D.N.M. 1987).

{13} However, the outcome of the place-of-the-wrong analysis does not end the matter. The district court understood this. Recognizing that Dr. Frezza was an employee of the State of Texas and potentially immune from suit under Texas's TTCA, the district court went on to conduct an analysis of whether it should apply Texas law as a matter of comity. The presence of a defendant who can colorably assert his status as a Texas state actor entitled to the protection of Texas's sovereignty as expressed in the TTCA required the district court—and requires us—to engage in a comity analysis. In this circumstance, the comity analysis all but displaces the place-of-the-wrong analysis in resolving the issues before us. Thus, we move on to comity.

{14} The concept of comity as a tool for deciding choice-of-law issues in the United States has a long history, most of which is not necessary to recount here. *See generally* Holly Sprague, *Choice of Law: A Fond Farewell to Comity and Public Policy*, 74 Calif. L. Rev. 1447, 1449-50 (1986). We do note that comity concerns play a role in the Restatement (Second) formulation of a conflict-of-law analysis. *See* Restatement (Second) of Conflict of Laws § 6 (1971). The role of comity in actions against states or their employees in the courts of their sister states, however, was unexplained and unclear until the Supreme Court's opinion in *Nevada v. Hall*, 440 U.S. 410 (1979).

{15} In *Hall*, a California resident sued the University of Nevada in the California courts for injuries he suffered in an auto collision that occurred in California. The California courts accepted jurisdiction of the case, and after a verdict was entered, refused to honor the statutory damages limit set by Nevada law for actions against Nevada governmental entities. *Id.* at 412-13. *Hall* held, as a matter of first impression, that there was nothing in the federal constitution preventing a state from being sued in another state, assuming personal and subject matter jurisdiction was otherwise appropriate. The Court held that nothing "in Art. III authorizing the judicial power of the United States, or in the Eleventh Amendment limitation on that power, provide any basis, explicit or implicit, for this Court to impose limits on the powers of California exercised in this case." *Id.* at 421. The Court also held that the "Full Faith and Credit Clause does not

[1]The special concurrence takes issue with our discussion of and approval of the district court's application of the place-of-the-wrong rule. We disagree that it was error for the district court to begin with this analysis. In *Sam*, the Supreme Court stated that appellate courts should "review the district court's decision to use a comity analysis *de novo*" and that this review assesses "the appropriateness of a district court's decision to engage in a comity analysis." 2006-NMSC-022, ¶¶ 9, 12. This language suggests that the decision to engage in the comity analysis itself depends on a prior legal conclusion that it is necessary. If the place-of-the-wrong rule indicated that Texas law applied, there would have been no need to proceed to a comity analysis. Thus, if the question could have been resolved by relying on an established set of legal principles not requiring a detailed policy analysis, it was not error for the district court to begin with that tack.

require a [s]tate to apply another [s]tate's law in violation of its own legitimate public policy." *Id.* at 422. Finally, the Court ruled that no other provision of the Constitution—including the Commerce Clause, the Extradition Clause, and the Privileges and Immunities Clause—supported any conclusion other than that "one [s]tate's immunity from suit in the courts of another [s]tate is [nothing] other than a matter of comity." *Id.* at 425. The Supreme Court provided no guidance in *Hall* as to how the states could or should exercise this comity.

{16} The Supreme Court again visited the issue of interstate immunity in the case of *Franchise Tax Board of California v. Hyatt*, 538 U.S. 488 (2003). In *Hyatt*, a Nevada resident sued a California tax collection agency in Nevada for damages, asserting both negligent and intentional torts. The trial court denied the California agency's motion to dismiss for lack of subject matter jurisdiction. The Nevada Supreme Court reversed in part, holding that the theories sounding in negligence should have been dismissed under comity principles, but concluding that the intentional tort claims could proceed to trial. 538 U.S. at 492. The Nevada Supreme Court acknowledged that California had granted its agency complete immunity from suit. Nevertheless, noting that Nevada does not provide immunity for acts taken in bad faith or for intentional torts, the Nevada Supreme Court held that "Nevada's interest in protecting its citizens from injurious intentional torts . . . committed by sister states' government employees should be accorded greater weight than California's policy favoring complete immunity for its taxation agency." 538 U.S. at 493-94 (internal quotation marks and citation omitted).

{17} In a unanimous opinion, the Supreme Court affirmed its holding in *Hall* that the "Constitution does not confer sovereign immunity on [s]tates in the courts of sister [s]tates." *Hyatt*, 538 U.S. at 497. The Supreme Court also affirmed and strengthened its prior ruling that the Full Faith and Credit Clause does not require Nevada to honor California's statute, noting that:

> There is no principled distinction between Nevada's interests in tort claims arising out of its university employee's automobile accident, at issue in *Hall*, and California's interests in the tort claims here arising out of its tax collection agency's residency audit.

Hyatt, 538 U.S. at 498.

{18} As in *Hall*, the Supreme Court in *Hyatt* provided no guidance as to how the states should apply comity principles when resolving suits against sister states. It did observe that it saw no "policy of hostility" toward California by Nevada. *See Hyatt*, 538 U.S. at 499. Rather, it noted, Nevada had "sensitively applied principles of comity with a healthy regard for California's sovereign status, relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis." *Id.*

{19} Abstract descriptions of "comity" are as varied as the opinions applying them. In *Hyatt*, for example, the Nevada Supreme Court phrased the principle as "an accommodation policy, under which the courts of one state voluntarily give effect to the laws and judicial decisions of another state out of deference and respect, to promote harmonious interstate relations[.]" 538 U.S. at 493 (internal quotation marks and citation omitted). Closer to the case at hand, a Texas

court described it as "a principle under which the courts of one state give effect to the laws of another state or extend immunity to a sister sovereign, not as a rule of law, but rather out of deference or respect. It is a doctrine grounded in cooperation and mutuality." *State of N.M. v. Caudle*, 108 S.W.3d 319, 321 (Tex. App. 2002) (citation omitted)).

{20} Even closer to home, in *Sam*, our Supreme Court described comity as "a principle whereby a sovereign forum state recognizes and applies the laws of another state sued in the forum state's courts. The sovereign forum state has discretion whether or not to apply the laws of the other state." 2006-NMSC-022, ¶ 8. These formulations emphasize the core concerns of comity—mutual respect and harmonious relationships while protecting the forum state's own policy choices—but they provide no specific guideposts to follow as the comity decision is made.

{21} In *Sam*, our Supreme Court did provide guideposts. First, the Court set the stage by noting that comity should be extended to other states but only if doing so will not violate or undermine New Mexico's own important public policies. *Id.* ¶¶ 13, 21. *Sam* then suggested four factors our courts should take into account when "determining whether extending immunity through comity would violate [New Mexico's] public policy." *Id.* ¶ 22. In determining whether to extend immunity, courts should consider: "(1) whether the forum state would enjoy similar immunity under similar circumstances, (2) whether the state sued has or is likely to extend immunity to other states, (3) whether the forum state has a strong interest in litigating the case, and (4) whether extending immunity would prevent forum shopping[.]" *Id.* (citations omitted).

{22} Unfortunately *Sam* does not provide any indication how the four factors should be weighed as between themselves. And, more importantly, *Sam* does not provide explicit guidance as to how or when courts should fold in the comparative public policy analysis which is central to deciding whether honoring the state's immunity law improperly contravenes our own public policy choices. It is not clear whether that discussion must be had within the parameters of each factor or whether it is more appropriately conducted separately and used as a bright backdrop when assessing the impact of the four factors.

{23} Thus, we confess some confusion as to how *Sam* should be applied. We also perceive some confusion in the district court about the matter. As a drafting solution, we will deal with each factor on its terms, comparing and contrasting Texas and New Mexico law as appropriate, but we will also separately sum up the public policy implications of the factors and the differences in the two states' laws.

{24} We first examine the district court's assessment of the four *Sam* factors for an abuse of discretion. *See id.* ¶ 9. As to the first factor, the district court found that "it is unlikely the State of Texas would extend immunity to the State of New Mexico under similar circumstances[.]" This is not a correct formulation of the first factor. This factor was derived from *Head v. Platte County, Missouri*, 749 P.2d 6 (Kan. 1988), in which the Kansas Supreme Court considered whether to apply Missouri law in a suit between a Kansas resident and a Missouri county. *Id.* at 7, 10. The court concluded that application of Missouri law would afford Missouri defendants greater protections than Kansas provided to its own citizens. *Id.* at 10. It stated, "If Missouri has sovereign immunity

within our borders, a Kansas resident would be denied all recovery for injury caused by Missouri agents in this state, even though if agents of the State of Kansas had committed the same act, recovery could be permitted under our [t]ort [c]laims [a]ct." *Id.* (McFarland, J., dissenting); *accord Morrison v. Budget Rent A Car Sys.*, 230 A.D.2d 253, 268 (N.Y. App. Div. 1997). Similarly, the *Sam* court's analysis under the first factor addressed whether "a similar action brought against a New Mexico entity or government employee would be barred by the . . . [NMTCA]." 2006-NMSC-022, ¶ 23. Thus, in the context of this case, the first factor should be stated as follows: would a similar action against a New Mexico governmental entity or employee be barred by the NMTCA? The answer to this question is clearly "no" because, as we discuss in more detail below, contrary to the TTCA, the NMTCA permits suits against government employees. In addition, as we explain below, the TTCA's strict occurrence-based notice of claim provision would clearly preclude Ms. Montaño's action, whereas the NMTCA notice provision allows for discovery-based calculation of time. We view both of these provisions as important aspects of New Mexico immunity law that merit protection.

{25} Thus, although for different reasons, we agree with the district court that this factor weighs against enforcing the TTCA. *See In re Clark's Will*, 1955-NMSC-063, ¶ 7, 59 N.M. 433, 285 P.2d 795 (stating that comity does not require "the courts of this state to extend to a citizen of another state a right or privilege that would not be extended to one of our own citizens in a matter of this kind").

{26} The second factor is whether Texas has or will extend immunity to New Mexico. *Sam*, 2006-NMSC-022, ¶ 22. Dr. Frezza relies on *Caudle* in support of his argument that the second factor weighs in favor of extending immunity. The district court found that *Caudle* "has limited application in the context of this matter[.]" We agree. In *Caudle*, Texas residents employed by the State of New Mexico alleged in a Texas court that their retirement plan provided by the State of New Mexico "violate[d] the . . . Texas Constitution and . . . the Fourteenth Amendment to the United States Constitution." 108 S.W.3d at 321. The Texas Court of Appeals began by stating that "Texas should extend comity by recognizing the laws and judicial decisions of other states unless (1) the foreign state declines to extend comity to Texas or sister states under the same or similar circumstances, or (2) the foreign statute produces a result in violation of Texas'[s] own legitimate public policy." *Id.* It concluded that since New Mexico had "extended comity to its sister states[,]" it would consider New Mexico a "cooperative jurisdiction." *Id.* It then determined that since it is the responsibility of each state to determine the constitutionality of its own statutes, "[i]t is . . . good public policy for Texas to avoid scrutinizing its sister states' statutes to determine their constitutionality under either the United States Constitution or the Texas Constitution." *Id.* at 322. The court consequently ordered the matter dismissed. *Id.*

{27} *Caudle* is not dispositive of the second comity factor for two reasons. First, under Dr. Frezza's reasoning, Texas's determination to extend comity in one case would mean that it would have no reason to analyze whether to apply comity in any other contexts. In other words, the first case extending comity to New Mexico would settle the issue forever. But since the Texas courts have analyzed whether to apply comity in

cases both before and after *Caudle*, this is clearly not the course Texas has taken. *See, e.g., Robertson v. Estate of McKnight*, 609 S.W.2d 534, 537 (Tex. 1980) (applying New Mexico law on interspousal immunity); *N.M. State Univ. v. Winfrey*, No. 11-10-00213-CV, 2011 WL 3557239, at *2 (Tex. App. Aug. 11, 2011) (comparing the jurisdiction and venue provisions of the NMTCA and the TTCA and applying the NMTCA). Nor does such an approach comport with the *Sam* court's characterization of the comity analysis as "fact-intensive," indicating that the factors must be examined in the context of the circumstances of each case. 2006-NMSC-022, ¶ 12; *see City of Raton v. Ark. River Power Auth.*, 611 F. Supp. 2d 1190, 1212 (D.N.M. 2008) (discussing the *Sam* holding and concluding that a "case-by-case approach to the comity analysis" is required). Second, the policy interest served by dismissal of the *Caudle* matter—that New Mexico courts should interpret the constitutionality of New Mexico's statutes—is entirely different from the policies at play here. *See* 108 S.W.3d at 322.

{28} *Winfrey*,[2] which is not cited by either party and was not considered by the district court, provides more compelling support for Dr. Frezza's position than *Caudle*. In *Winfrey*, the Texas Court of Appeals considered whether to apply the NMTCA as a matter of comity where a Texas resident sued New Mexico State University (NMSU) for damage done to his sheep when a weather balloon owned or operated by NMSU fell on his land in Texas. 2011 WL 3557239, at *1. NMSU moved for dismissal based on a lack of jurisdiction, which the district court denied. *Id.* The court of appeals started its analysis by reiterating the two-part test for comity set out in *Caudle*, stating that "comity . . . will be applied to a cooperating state so long as the law of that state does not offend Texas public policy." *Winfrey*, 2011 WL 3557239, at *1. After determining that New Mexico was a cooperating state, the court examined the purpose of the NMTCA and TTCA and their provisions related to jurisdiction and venue. *Id.* at *1-2. It concluded, "Our comparison of the[se] similar provisions leads to the conclusion that [NMSU has] satisfied the second prong of the principle of comity: the jurisdiction and venue provisions of the [NMTCA], as applicable in this case, do not violate the public policy of Texas." *Id.* The court concluded, therefore, that it should apply the NMTCA and that since the NMTCA (1) vested exclusive jurisdiction in the New Mexico district courts and (2) required that the suit be brought in Santa Fe County, the suit should be dismissed "for lack of jurisdiction." *Id.* at *1, 2 (internal quotation marks omitted); *see* NMSA 1978, § 41-4-18(B) (1976) ("Venue for any claim against the state or its public employees, pursuant to the Tort Claims Act, shall be in the district court for the county in which a plaintiff resides, or in which the cause of action arose, or in Santa Fe county.").

{29} Although Texas applied New Mexico law on jurisdiction and venue in *Winfrey*, the *Winfrey* holding does not compel us to conclude that Texas would apply the NMTCA's other provisions under the circumstances of this case. The *Winfrey* court's analysis was based on the similarity of the two acts' venue and jurisdiction

[2] *Winfrey* is not reported in South Western Reporter 3d. According to the commentary associated with Texas Rules of Appellate Procedure 47.2 and 47.7, however, "[a]ll opinions and memorandum opinions in civil cases issued after the 2003 amendment [to the rules] have precedential value." *Id.* (notes and comments). Hence, we consider *Winfrey* as a precedential opinion of the Texas Court of Appeals.

requirements. *Cf. Univ. of Iowa Press v. Urrea*, 440 S.E.2d 203, 205 (Ga. Ct. App. 1993) (stating that where two statutes' provisions were "conceptually identical" the forum state "should recognize and give effect to the legislatively declared policy of [the other state] as a matter of comity"). The court did not consider the portions of the NMTCA and TTCA at issue in this case, which are very different. Consequently, it is not clear whether Texas would extend immunity to New Mexico under the circumstances here. *But see Hawsey v. La. Dep't of Soc. Servs.*, 934 S.W.2d 723, 727 (Tex. App. 1996) (affirming dismissal of an action under Louisiana law and stating, "Louisiana's waiver of sovereign immunity is more extensive than that of Texas, yet we cannot say it violates our public policy"); *Greenwell v. Davis*, 180 S.W.3d 287, 298 (Tex. App. 2005) ("Even though the amounts of the waivers differ, applying Arkansas' limited waiver of sovereign immunity would not be contrary to Texas public policy. The mere fact that the law of the other state differs from Texas does not render it so contrary to Texas public policy that Texas courts will refuse to enforce it." (footnote omitted)). Although neither *Caudle* nor *Winfrey* are conclusive on this issue, we will assume without deciding that Texas would extend immunity to New Mexico in a similar situation. *See Hall*, 440 U.S. at 425(stating that the Court has "presumed that the [s]tates intended to adopt policies of broad comity toward one another [based on] state policy"); *Sam*, 2006-NMSC-022, ¶ 16 (acknowledging the presumption).

{30} We turn to the third factor: "whether the forum state has a strong interest in litigating the case[.]" *Sam*, 2006-NMSC-022, ¶ 22. Although its interest is bounded by the limits of the NMTCA, *id.* ¶ 25, "New Mexico has a particular interest in providing compensation or access to the courts to residents of the state." *Id.* ¶ 26. Here, if Texas law applies, Ms. Montaño would be left without any recourse against Dr. Frezza or his employer. This fact heightens New Mexico's interest in providing a forum. *Cf. Flemma v. Halliburton Energy Servs., Inc.*, 2012-NMCA-009, ¶ 25, 269 P.3d 931 ("New Mexico courts will apply New Mexico law to automobile insurance contracts that were formed in other states if innocent accident victims would be otherwise unprotected."), *rev'd on other grounds*, 2013-NMSC-022, 303 P.3d 814; *Levert v. Univ. of Ill. at Urbana/Champaign ex rel. Bd. of Trustees*, 2002-2679, pp. 17-18 (La. App. 1 Cir. 9/26/03), 857 So. 2d 611, 622 (holding that "because [the] plaintiffs/appellants have recourse to individually seek full redress of their claims in [the sister state], [that state's] sovereign immunity law does not violate Louisiana's public or judicial policies"). On the other hand, because Dr. Frezza is an employee of the State of Texas, that state also has an interest in the case. *Cf. Zavala v. El Paso Cnty. Hosp. Dist.*, 2007-NMCA-149, ¶ 34, 143 N.M. 36, 172 P.3d 173 (stating, in the context of a personal jurisdiction analysis, that because the defendant "[h]ospital [wa]s not only located in Texas but . . . [was] also an entity of the government of the State of Texas[, i]t [was] . . . clear that Texas has a substantially stronger sovereignty interest [than New Mexico]"). Weighing these competing interests, we conclude that the district court did not abuse its discretion in determining that "the State of New Mexico has equal or greater interest in litigating this matter than does the State of Texas[.]"

{31} The final factor is whether application of Texas law will prevent forum shopping. *Sam*, 2006-NMSC-022, ¶ 22. Ms. Montaño conceded below that it would, and

the district court concluded that "forum shopping would be diminished by an application of [Texas law]." *See Newberry v. Ga. Dep't of Indus. & Trade*, 336 S.E.2d 464, 465 (S.C. 1985) (holding that refusal to apply the sued state's law would permit forum shopping). We discern no error in this conclusion by the district court.

{32} In sum, the first and third factors weigh against applying the TTCA, whereas the second and fourth factors weigh in favor of it. Again, *Sam* does not provide guidance on how these factors should be balanced against each other or whether one factor should be weighed differently from the others. Conforming to *Sam*'s approach, however, we start with the notion that New Mexico should recognize Dr. Frezza's immunity as expressed in the TTCA, unless doing so will violate substantial New Mexico policy. Put another way, whether to apply the TTCA depends on the bedrock question guiding the comity analysis: would application of Texas law in this case be contrary to New Mexico's public policies? *See Sam*, 2006-NMSC-022, ¶ 22; *City of Raton*, 611 F. Supp. 2d at 1212 ("Rather than all-or-nothing, a court must assure that, for each claim for which it applies another state's sovereign immunity rules, the application of the other state's rules does not offend the state's public policy in a substantial way.").

{33} We look to the NMTCA for an expression of our public policy as to tort claims against governmental bodies. *See Torres*, 1995-NMSC-025, ¶ 10 ("[I]t is the particular domain of the [L]egislature, as the voice of the people, to make public policy."). In a legislative declaration accompanying the NMTCA, "[t]he legislature recognize[s] the inherently unfair and inequitable results which occur in the strict application of the doctrine of sovereign immunity." NMSA 1978, § 41-4-2(A) (1976). It also recognizes that "the area within which the government has the power to act for the public good is almost without limit, and therefore government should not have the duty to do everything that might be done." *Id.* In enacting the NMTCA, therefore, "the [L]egislature expressed its intent to achieve balance between the public policy supporting compensation of those injured by public employees and the public policy militating in favor of limiting government liability." *Niederstadt v. Town of Carrizozo*, 2008-NMCA-053, ¶ 14, 143 N.M. 786, 182 P.3d 769.

{34} A comparison of the NMTCA and the TTCA reveals that the balance struck by the New Mexico Legislature is substantively different from that struck by Texas legislators. *See* NMSA 1978, §§ 41-4-1 to -30 (1976, as amended through 2013); Tex. Civ. Prac. & Rem. Code Ann. §§ 101.002 to .109 (1985, as amended through 2013). Both statutes address the extent to which each state has waived its sovereign immunity. *See* § 41-4-2(A) ("[I]t is declared to be the public policy of New Mexico that governmental entities and public employees shall only be liable within the limitations of the [NMTCA]."); § 101.021. The NMTCA and TTCA are also similar in that they provide for limits on recovery (although the limits are different), *see* § 41-4-19 and § 101.023, and waive immunity for certain injuries arising from the operation of " 'any motor vehicle, aircraft[,] or watercraft.' " Section 41-4-5; *see* § 101-021(1)(A).

{35} But there are stark differences between the statutes. For instance, the TTCA waives sovereign immunity in only three limited cases: "(1) claims arising from the operation or use of motor-driven vehicles or equipment; (2) claims caused by a condition

or use of tangible personal or real property; and (3) claims arising from premises defects." *Paz v. Weir*, 137 F. Supp. 2d 782, 820 (S.D. Tex. 2001); *see* §§ 101.021, .022. In contrast, New Mexico has waived sovereign immunity for negligent conduct in eight different categories, including medical facilities, health care providers, law enforcement, public utilities, highways/streets, and airports, and does not limit liability to incidents involving motor vehicles or personal or real property. *See* §§ 41-4-5 to -12.

{36} The NMTCA and TTCA also differ dramatically in their provisions concerning the liability of individual government employees. The TTCA does not allow actions against employees in their individual or personal capacity. Under the TTCA, a suit naming a government employee must be dismissed upon the employee's motion, unless the plaintiff files an amended complaint naming the appropriate governmental unit instead of the employee within thirty days of the employee's motion. Section 101.106(f). There is no such limitation on suits against public employees in the NMTCA. *See* § 41-4-4(A), (B) (addressing waiver of immunity for public employees); *Abalos v. Bernalillo Cnty. Dist. Attorney's Office*, 1987-NMCA-026, ¶ 18, 105 N.M. 554, 734 P.2d 794 ("Each of the eight waivers listed in Sections 41-4-5 to -12 identifies public employees; it follows that one can sue the public employee and the agency or entity for whom the public employee works.").

{37} Finally, while both statutes have a notice requirement, the requirements function very differently. In Texas, plaintiffs must file a notice within six months of "the day that the incident giving rise to the claim occurred." § 101.101(a). Failure to do so results in dismissal. *See Univ. of Tex. Health Sci. Ctr. at Houston v. McQueen*, 431 S.W.3d 750, 754 (Tex. App. 2014) ("The failure to give notice under [S]ection 101.101 requires dismissal of a suit."). This requirement functions as a statute of repose: it cuts off claims six months after the negligent conduct, regardless of whether the plaintiff's injury had been discovered. *See Putthoff v. Ancrum*, 934 S.W.2d 164, 174 (Tex. App. 1996) ("[T]he discovery rule does not apply to claims made under the [TTCA]."); *Black's Law Dictionary* 1637 (10th ed. 2014) (defining "statute of repose" as "[a] statute barring any suit that is brought after a specified time since the defendant acted . . ., even if this period ends before the plaintiff has suffered a resulting injury").

{38} In contrast, while the NMTCA requires notice "within ninety days after an occurrence giving rise to a claim for which immunity has been waived under the [NMTCA]," Section 41-4-16(A), New Mexico cases have applied the "discovery rule" to the notice requirement. Under this rule, the time period for the notice requirement to bring a medical malpractice case under the NMTCA begins to run only when "the plaintiff knows or with reasonable diligence should have known of the injury and its cause." *Maestas v. Zager*, 2007-NMSC-003, ¶ 19, 141 N.M. 154, 152 P.3d 141; *Emery v. Univ. of N.M. Med. Ctr.*, 1981-NMCA-059, ¶ 29, 96 N.M. 144, 628 P.2d 1140 (extending the discovery rule to the NMTCA's notice requirement), *abrogated on other grounds by Maestas*, 2007-NMSC-003. Thus, the NMTCA's notice requirement is much more flexible than that in the TTCA. *Cf. Timmons v. Univ. Med. Ctr.*, 331 S.W.3d 840, 846, 848 (Tex. App. 2011) (recognizing that "the operation of section 101.101 [when the plaintiff did not discover the injury until after six months had passed] appears harsh and unfair"); *Streetman v. Univ. of Tex. Health Sci. Ctr. at San*

Antonio, 952 S.W.2d 53, 56 (Tex. App. 1997) (same); *Univ. of Tex. Med. Branch at Galveston v. Greenhouse*, 889 S.W.2d 427, 430, 432 (Tex. App. 1994) (same).

{39} We conclude that applying the TTCA here would violate New Mexico public policy by (1) contravening New Mexico's broader waiver of immunity, (2) prohibiting suits against individuals, and (3) imposing a notice requirement substantially more restrictive than that in the NMTCA. *See Sam*, 2006-NMSC-022, ¶ 27 (stating that "[t]o apply [another state's shorter] statute of limitations would violate our own public policy of allowing two years to file suit [under the NMTCA]"). There may also be other ways the statutes differ substantially; we have not conducted an exhaustive comparison of the two statutes. It is sufficient to hold that, to avoid infringing on the public policy expressed in the NMTCA, the immunity extended to Dr. Frezza with regard to the three areas discussed above should be coextensive with the immunity enjoyed by New Mexico governmental agencies and employees. *See id.*

{40} This conclusion is consonant with *Sam*, in which the Court concluded that comity principles required the extension of "a limited grant of immunity to Arizona" where both states had passed similar tort claims acts but with different statutes of limitation, and held that the NMTCA's statute of limitations applied. *Id.* Similarly, in *Hyatt*, the United States Supreme Court affirmed the Nevada Supreme Court's refusal to apply California law, which provided the Franchise Tax Board with complete immunity, because Nevada law waived immunity for intentional torts. 538 U.S. at 493-94.

{41} As a general matter, it is appropriate to use the NMTCA to provide the contours—or measure—of the immunity Dr. Frezza should enjoy in New Mexico courts. Texas and its employees cannot and should not be treated as purely private litigants for the simple and obvious reason that they are not. Employees of a sister state acting within the scope of their employment do not become purely private citizens when they cross state lines or when they are subjected to the jurisdiction of the courts of another state. *See City of Red Wing v. Ellsworth Cmty. Sch. Dist.*, 617 N.W.2d 602, 607 (Minn. Ct. App. 2000) (holding that it was appropriate to apply Minnesota's municipal tort liability laws as a measure of the extent of a Wisconsin teacher's monetary liability). Using the contours of the NMTCA levels the field and assures that non-New Mexico actors are not provided greater protection than New Mexico provides its employees and governmental agencies. *See Head*, 749 P.2d at 10; *In re Clark's Will*, 1955-NMSC-063, ¶ 7. *Cf. Hansen v. Scott*, 2004 ND 179, ¶ 11, 687 N.W.2d 247, 251 ("We hold the Texas defendants are immune from suit to the same extent the State of North Dakota would grant immunity to its employees under North Dakota law. Applying the same level of immunity does not compromise the public policy of North Dakota."); and *cf.* Ann Woolhandler, *Interstate Sovereign Immunity*, 2006 Sup. Ct. Rev. 249, 291 (stating that one approach employed in comity analyses "involves ignoring defendant-state forum limitation provisions, notice and time limits, and liability and damages limitations, and applying the forum's law of state suability." (footnotes omitted)).

{42} In sum, we affirm the district court with one caveat: the district court's order seems to impose New Mexico law in toto on the proceedings. It is premature to decide that the TTCA is fully displaced. We limit our holding to the three subjects discussed in

paragraphs 34-39 of this Opinion. The applicability of other provisions of the NMTCA should be determined by the district court on remand.

CONCLUSION

{43} We affirm in part, vacate in part, and remand for proceedings consistent with this Opinion.

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

MICHAEL D. BUSTAMANTE, Judge

I CONCUR:

CYNTHIA A. FRY, Judge

JONATHAN B. SUTIN, Judge (concurring in part and dissenting in part).

SUTIN, Judge (concurring in part and dissenting in part).

{45} I concur in the majority's resolution of the comity question. I respectfully dissent in regard to the majority's approbation given to the district court's application of the place-of-the-wrong rule.

A. INTRODUCTION: Dr. Frezza's Points on Appeal

{46} Dr. Frezza's points on appeal, aside from the writ of error issue, are that (1) the place-of-the-wrong rule and public policy concerns require that Texas law apply to Ms. Montaño's claims, and (2) the doctrine of comity requires the application of Texas law. The Texas law to which Dr. Frezza refers is the TTCA.

1. The Place-of-the-Wrong Point

{47} In his motion to dismiss, Dr. Frezza asserted that the TTCA applied under the doctrine of comity because Texas was the place of the wrong. He indicates that the district court determined that he was not entitled to immunity from suit under the TTCA because, based on the place-of-the-wrong rule and on principles of comity, New Mexico law applied. Dr. Frezza erroneously conflates two distinct doctrines. Further, in arguing the place-of-the-wrong rule, Dr. Frezza relies on New Mexico conflict-of-laws cases having nothing to do with the circumstance of competing foreign state and forum state sovereign immunity laws and interests requiring a comity analysis. *See Torres*, 1995-NMSC-025; *Terrazas*, 2006-NMCA-111; *In re Estate of Gilmore*, 1997-NMCA-103.

{48} Ms. Montaño buys in to the confusing and erroneous application of the place-of-the-wrong rule. She argues that the place of the wrong is New Mexico and that the district court properly determined that the nexus of facts pled by her raised both a question of choice of law (meaning selecting, pursuant to a conflict-of-laws analysis, the law of one state over another pursuant to a place-of-the-wrong rule analysis) and comity.

{49} Although they combine the application of the place-of-the-wrong rule with the rule of *lex loci delicti* (*lex loci*), neither Dr. Frezza nor Ms. Montaño says what particular New Mexico law was to be applied under the place-of-the-wrong rule as to Dr. Frezza's immunity defense. In ruling that the place-of-the-wrong rule applied, that the place of the wrong was New Mexico, and that the law to be applied was New Mexico law, the district

court also failed to indicate what New Mexico law applied to Dr. Frezza's immunity defense.

2. The Comity Point

{50} Separately addressing comity, Dr. Frezza says that, in addition to the fact that Texas is the place of the wrong, "principles of comity require the application of Texas law[,]" namely, the immunity provided under the TTCA. He discusses solely the TTCA and the NMTCA in the bout between the immunity provisions within sovereigns' tort claims acts. Dr. Frezza analyzes the four factors in *Sam*, 2006-NMSC-022, ¶¶ 22-28. As to the state-interest factor, Dr. Frezza seems to again insert the place-of-the-wrong and *lex loci* rules into the comity analysis when he argues that "New Mexico's interest is limited by virtue of the fact that all of the alleged negligent acts occurred in Texas[,]" and thus that the TTCA applies under comity. Ms. Montaño's comity analysis, of course, ends with comity not extendable to Texas. Following a *Sam* analysis, the district court denied Dr. Frezza's motion to dismiss insofar as it was based on his comity position that the TTCA applied.

B. DISCUSSION: Misplaced Application of the Place-of-the-Wrong Rule

1. Application of the Place-of-the-Wrong Rule—What Ifs?

{51} The choice-of-law, conflict-of-laws analysis path chosen by the district court and the parties begged the unanswered question: When the determination is made that New Mexico law applies, which New Mexico law is to be applied? If New Mexico law on sovereign immunity is the law to be applied, that law would be the NMTCA. If the NMTCA were to be applied, the question necessarily becomes, can the NMTCA apply to claims against a physician for medical negligence when the physician is an employee of a Texas governmental entity and is not an employee of a New Mexico governmental entity?

{52} The answer to the foregoing question is that the NMTCA cannot be applied to that physician. In particular, because Dr. Frezza is not employed by a New Mexico governmental entity, the NMTCA cannot be applied to him. *See* § 41-4-3(B), (C), (F), (H). The upshot is that, given that the NMTCA does not apply to Dr. Frezza and barring the application of the TTCA, his existence as a medical malpractice defendant in a New Mexico lawsuit is such that he would have no New Mexico immunity from suit. Neither the parties nor the district court engaged in any such analysis.

{53} Questions arise: Were the district court to have determined that Texas law instead of New Mexico law applied as to Dr. Frezza's immunity defense and that the TTCA applied, would this then have foreclosed any comity analysis? Would *Torres* have been applicable to override on public policy grounds, the application of the TTCA? *See Torres*, 1995-NMSC-025, ¶¶ 13-14 (holding that, in a choice-of-law and conflict-of-laws, place-of-the-wrong analysis, based on New Mexico's public policy, New Mexico law would control notwithstanding that the place of the wrong was California). Would a *Torres* override on public policy grounds be a decision tantamount to a refusal to extend comity?

{54} It is noteworthy that in *Sam* our Supreme Court noted that this Court in *Sam v. Estate of Sam*, 2004-NMCA-018, ¶ 15, 135 N.M. 101, 84 P.3d 1066, *rev'd by* 2006-NMSC-022, employed a choice-of-law, place-of-the-wrong rule analysis. *See Sam*, 2006-

NMSC-022, ¶ 7. Our Supreme Court in *Sam* appears to have purposely chosen to disregard the place-of-the-wrong rule and to stick solely to comity, *see id.* ¶¶ 7-8, although one might infer that, in reversing this Court, our Supreme Court was not disregarding the place-of-the-wrong rule in the case, but was holding that the place-of-the-wrong rule was not applicable. It is also noteworthy that, in *Sam*, the Supreme Court also mentioned that this Court, in *Sam*, 2004-NMCA-018, ¶ 14, also determined that the NMTCA was inapplicable "because [the plaintiff] was not employed by New Mexico and was therefore not covered by [the NMTCA]." *Sam*, 2006-NMSC-022, ¶ 6. We have no indication whether the Supreme Court considered the significance of this Court's determination that the plaintiff in *Sam* was not employed by New Mexico and not covered under the NMTCA.

2. Misapplied Place-of-the-Wrong Rule

{55} The foregoing questions and conundrums aside, the place-of-the-wrong rule had no place in this comity case. None of the choice-of-law, conflict-of-laws, place-of-the-wrong/*lex loci* rule New Mexico cases, including in particular, *Gilmore*, *Terrazas*, and *Torres*, are comity cases. As well, and notably, neither our Supreme Court in *Sam*, nor the United States Supreme Court in *Hyatt* and *Hall*, on which *Sam* relied, engage in a place-of-the-wrong or *lex loci* analysis. *See Hyatt*, 538 U.S. 488; *Hall*, 440 U.S. 410. It was error for the district court to rely on and apply the place-of-the-wrong and lex loci rules in regard to the immunity defense issue in this case. I therefore disagree with the majority's "perceiv[ing] no error in the district court's . . . place-of-the-wrong analysis[,]" *see* Majority Op. ¶ 12, which brings me to *Sam* and comity, and also to the majority's opinion on comity in the present case.

C. DISCUSSION: *Sam*

{56} *Sam* involved the issue whether New Mexico claimants suing an Arizona government employee in New Mexico were barred by the Arizona Tort Claims Act's one-year statute of limitations, the NMTCA's two-year statute of limitations, or New Mexico's three-year general statute of limitations for tort actions. *Sam*, 2006-NMSC-022, ¶ 7; *Sam*, 2004-NMCA-018, ¶¶ 13-15 (setting out the three statutes of limitations). The action was filed just before three years had run. *Sam*, 2006-NMSC-022, ¶ 3.

{57} On appeal from the district court decision in *Sam*, this Court determined that the NMTCA did not apply to an Arizona government employee. *Sam*, 2004-NMCA-018, ¶ 13. Citing *Hyatt* and *Hall*, we held that "New Mexico, as the forum state in this case, is not required to recognize Arizona's statute of limitations attaching or the sovereign immunity granted to its public employees." *Sam*, 2004-NMCA-018, ¶ 13. We further held that the NMTCA was inapplicable because the plaintiff "was not a public employee covered under our Tort Claims Act." *Id.* ¶ 14. Declaring that sovereign immunity and public employment were irrelevant to the issues in the case, this Court turned to the place-of-the-wrong rule as applied in *Torres* and held that "because the accident resulting in [the victim's] death occurred in New Mexico, New Mexico's three-year statute of limitations [in NMSA 1978, Section 37-1-8 (1976)] applies to this suit." *Sam*, 2004-NMCA-018, ¶ 15. In a certiorari proceeding, our Supreme Court saw the case differently and reversed this Court. *Sam*, 2006-NMSC-022, ¶¶ 1, 20.

{58} The issue before our Supreme Court in *Sam* was whether the New Mexico district court should, as a matter of comity, recognize

the sovereign immunity of a sister state, Arizona. *Id.* ¶ 1. *Sam* stated at the outset that it would discuss "what factors a New Mexico court should consider to determine if comity should be extended." *Id.* ¶ 8. *Sam* analyzed *Hall* and stated that the difference between California and Nevada law as to a cap on damages "was sufficient for California to justify not extending comity." *Sam*, 2006-NMSC-022, ¶ 17. *Sam* declared that "[a]s a general rule, comity should be extended. Only if doing so would undermine New Mexico's own public policy will comity not be extended." *Id.* ¶ 21.

{59} In *Sam*, our Supreme Court at the outset indicated that the question was whether, with respect to the plaintiff's claim, the Arizona Tort Claims Act's one-year statute of limitations should be applied under comity, whether the NMTCA's two-year statute of limitations, or whether the New Mexico three-year statute of limitations on common law tort claims, should be applied. *Id.* ¶¶ 1, 3. The Court noted that Arizona and New Mexico both waived sovereign immunity with respect to the plaintiff's claim, but further noted that the waiver of sovereign immunity was "restrained by strict statutes of limitations." *Id.* ¶ 1.

{60} The Court in *Sam* addressed whether it should extend comity to Arizona for application of Arizona's one-year statute of limitations, holding that "we believe that New Mexico should extend a limited grant of immunity to Arizona because both states have done so through tort claims acts. However, we should only extend New Mexico's two-year statute of limitations instead of applying Arizona's one-year statute of limitations." *Id.* ¶ 27. The Court did not *apply* Arizona's tort claims act's one-year statute. *Id.* ¶¶ 20, 27. The Court decided to "*extend* a limited grant of immunity *to* Arizona" and also to "*extend* [the NMTCA's] two-year statute of limitations." *Id.* ¶ 27 (emphasis added). Thus, in regard to Dr. Frezza's immunity defense, in its analysis of whether to extend comity, instead of using the words "apply" or "application" with reference to law, our Supreme Court chose the word "extend"—that is, under the comity analysis, New Mexico would (1) "extend" immunity to Arizona, and (2) at the same time would "extend" the New Mexico statute of limitations "as a matter of comity" or "based on the principles of comity" or "through comity" to Arizona. *Id.* ¶¶ 13, 20, 22, 27.

{61} What I glean from *Sam* is that: (1) the Court *extended comity* to Arizona with respect to Arizona's limited sovereign immunity waiver, leaving Arizona immunity in place and applicable, but did not *extend comity* with respect to Arizona's statute of limitations; and (2) the Court, without expressly saying so, under principles of comity actually applied the NMTCA statute of limitations in place of Arizona's statute of limitations as though the NMTCA statute of limitations was Arizona law. The Court employed the notion "extending" a New Mexico law, namely, NMTCA provisions, presumably because those provisions cannot "apply" to a person who is not an employee of a New Mexico governmental entity.

{62} I am unaware of how New Mexico, by extending comity to Arizona by recognizing the sovereign immunity provision in the Arizona tort claims act, also under or based on comity or comity principles "extends" the NMTCA statute of limitations provisions "*to* Arizona" or "*to* an Arizona public employee." *Sam*, 2006-NMSC-022, ¶¶ 13, 20, 27 (emphasis added). I do not find support in either *Hyatt* or *Hall* for applying

the doctrine of comity or its principles by "extending" the NMTCA to the sister state, in effect incorporating the NMTCA into Arizona's tort claims act. I am unaware of any cases outside of *Sam* that resolves comity issues in this manner.

D. DISCUSSION: Following *Sam* Here

{63} The majority essentially follows in *Sam*'s footsteps, stating that its "conclusion is consonant with *Sam*[.]" Majority Op. ¶ 40. Like in *Sam*, which "extended" the NMTCA's two-year statute of limitations to an Arizona government employee to bar a claim filed in New Mexico against that employee—a person clearly not covered under the NMTCA—the majority "uses" the NMTCA's waiver of immunity to strip Dr. Frezza of immunity, when Dr. Frezza clearly is not covered under the NMTCA. The majority does not use the words "extend" or "extend under comity or comity principles." The majority states that "it is appropriate to *use* the NMTCA to provide the contours—or measure—of the immunity Dr. Frezza should enjoy," Majority Op. ¶ 41 (emphasis added), and further states that NMTCA's immunity-related provisions "should be *coextensive* with the immunity enjoyed by New Mexico governmental agencies and employees. Majority Op. ¶ 39 (emphasis added).

{64} In resorting to the words "extending," "coextensive," and "use," the Court in *Sam* and the majority here employ legal fictions. *Sam* and the majority have created theories or methodologies by which NMTCA provisions either become a part of or replace a provision in a sister state's tort claims act to bar a claim (as in *Sam*) or to bar a defense (as in the case here).

{65} It may well be that the legal-fiction approach necessarily must be employed to arrive at a satisfactory result in these sovereign immunity, comity circumstances. Given *Sam*, I cannot fault the majority's approach here. The majority tweaks the *Sam* analysis by discarding the notion of "extending" the NMTCA to the sister state. The majority's "use" and "coextensive" theories are, according to the majority, "consistent" with *Sam*. The majority's word selection perhaps more descriptively suggests what the Court in *Sam* was doing.

{66} I go along with the majority's resolution albeit there exists no underlying explanation as to how a Texas resident and government employee with TTCA immunity, who is recognized as such when sued in New Mexico, will in essence be treated as a New Mexico resident and New Mexico government employee, consistent with or under the NMTCA, with no immunity, when, in all probability, he will be denied any benefit under the NMTCA and may even receive no TTCA protection. With the understanding that the TTCA violates New Mexico public policy, I go along, given the apparent absence of a better resolution based on any underlying rational support and given the incomplete manner in which the case was developed and handled on Dr. Frezza's motion to dismiss.[3]

---

[3]I note that the standard of review in *Sam* for a court's analysis under comity is abuse of discretion. *See Sam*, 2006-NMSC-022, ¶ 12. I am unsure why that standard was chosen. One would think that the standard would be de novo, given (1) the claimed error was the district court's denial of a motion to dismiss under Rule 1-012(B)(6), and (2) the underlying question is whether the TTCA violates New Mexico public policy. *See Sam*, 2006-NMSC-022, ¶ 9 (stating that we generally view a denial of a motion to dismiss de novo); *Nat'l Bank of Ariz. v. Moore*, 2005-NMCA-122, ¶¶ 6-7, 138 N.M. 496, 122 P.3d 1265 (indicating that we review de novo whether New Mexico public policy is violated).

{67} Comity policy resides with each state in dealing with sovereignty issues such as those in the case before us. *See Hall*, 440 U.S. at 425-26. State courts exercise reasonable discretion through practical wisdom and general fairness in their judicial-law-making determinations and development. *See* Albert Tate, Jr., *The Law-Making Function of the Judge*, 28 La. L. Rev. 211, 214-17 (1968). This function is appropriate in our policy-driven comity circumstance. Note Judge Tate's poignant view:

> I . . . emphasize again what all lawyers know and what few laymen can deny: That the ordinary and customary operation of our judicial process requires the courts on occasion to create law-rules where needed to decide the case[] and that these law-rules operate with prospective effect to regulate the clashes of similar interests in the future, in much the same manner (although more limited in scope) as does a new statute.

Id. at 217. The import of a legal fiction into a law-rule where needed to decide the case can be appropriate, if done through practical wisdom and general fairness, as long as we recognize and make clear what we are doing and why we are doing it. Although there might be a different solution for the case before us than to employ a legal fiction,[4] I am satisfied that the methodology employed is consistent with reason and fairness and appropriate in this case. That is why I concur in the majority's solution.

JONATHAN B. SUTIN, Judge

Certiorari Granted, June 19, 2015, No. 35,248

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-070

Filing Date: March 23, 2015

Docket No. 33,706

AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, COUNCIL 18, AFL-CIO, LOCALS 1461, 2260, AND 2499,

Plaintiffs-Appellants,

v.

BOARD OF COUNTY COMMISSIONERS OF BERNALILLO COUNTY,

[4]One might offer a possible alternative comity solution by determining that there exist two strong New Mexico public policies militating against granting immunity to physicians sued in New Mexico for medical malpractice: one, lack of immunity under the NMTCA; two, lack of immunity for a non-New Mexico government physician sued for medical malpractice in New Mexico. If the TTCA violates both policies, New Mexico courts will not extend comity to Texas on immunity. The statutes and common law related to medical malpractice actions control. Under those laws, the physician has no New Mexico immunity. It is doubtful that this analysis would "fly" under *Sam*, considering that *Sam* appears to have chosen not to explore public policy underlying the three-year statute of limitations and whether the Arizona statute offended that public policy.

Defendant-Appellee.

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

for Appellants

Bernalillo County Legal Department
Randy M. Autio, County Attorney
Michael I. Garcia, Assistant County Attorney, Sr.
Albuquerque, NM

for Appellee

OPINION

FRY, Judge.

{1} Plaintiffs, the exclusive bargaining representatives for unionized public employees of Bernalillo County, appeal the district court's order denying their request for declaratory and injunctive relief against the Board of County Commissioners of Bernalillo County. Plaintiffs sought a declaration that Bernalillo County was not entitled to "grandfather" status under the Public Employee Bargaining Act (PEBA), NMSA 1978, § 10-7E-26(A) (2003), and that they were therefore not required to adjudicate labor disputes before the Bernalillo County Labor-Management Relations Board (the Labor Board) because the structure in place for dispute resolution does not provide a fair tribunal for employees. Because we conclude that the County's dispute resolution procedures do not violate Plaintiffs' due process rights to a fair and impartial tribunal, we affirm.

BACKGROUND

{2} Section 10-7E-26(A) of the PEBA is typically referred to as the "grandfather clause," which exempts public employers who qualify from the PEBA's requirements. Section 10-7E-26(A) ("A public employer other than the state that prior to October 1, 1991[,] adopted by ordinance, resolution[,] or charter amendment a system of provisions and procedures permitting employees to form, join[,] or assist a labor organization for the purpose of bargaining collectively through exclusive representatives may continue to operate under those provisions and procedures."); *see also AFSCME, Council 18 v. City of Albuquerque*, 2013-NMCA-012, ¶ 10, 293 P.3d 943 ("[T]he effect of grandfather clauses is to narrow, qualify, or otherwise restrain the scope of [a] statute or to remove from the statute's reach a class that would otherwise be encompassed by its language." (internal quotation marks and citation omitted)). Consistent with the text of the grandfather clause, our determination of whether a public employer is within the clause's purview focuses on whether "(1) . . . a public employer [has in place] a system of provisions and procedures permitting employees to form, join[,] or assist a labor organization for the purpose of bargaining collectively through exclusive representatives and (2) . . . the public employer [adopted the system of procedures before] October 1, 1991." *Id.* ¶ 8 (internal quotation marks and citation omitted).

{3} At first glance, the County appears entitled to the protections of the grandfather clause. The Bernalillo County Labor-Management Relations Ordinances (LMRO) were enacted in 1975 with the purpose to "allow county employees to organize and bargain collectively with the county government." Bernalillo County, N.M., Ordinances § 2-201 (1975). Thus, having in place a system of procedures for collective bargaining well before 1991, the County appears to be a "grandfathered" entity under the PEBA.

{4} Plaintiffs' argument centers on the LMRO's dispute resolution procedures. The contested procedures for alleged violations of the LMRO's prohibited practices are found at Bernalillo County, N.M., Ordinances § 2-210 (1975). In the event there is an allegation that the County or an employee or employee organization has committed a prohibited practice violation, the Labor Board must hold a hearing. *Id.* § 2-210(f). Upon making its determination, the Labor Board "shall request that the county commission enter an order against the party guilty of the violation." Bernalillo County, N.M., Ordinances § 2-211(a) (1975). The LMRO state that in entering the order, "[t]he county commission is not bound to accept either the majority or minority report of the [Labor Board], but shall exercise independence based on the record and arguments presented before it." *Id.*

{5} Plaintiffs petitioned the district court for declaratory and injunctive relief, arguing that these procedures were unfair to county employees. Plaintiffs sought to file employee complaints before the New Mexico Public Employee Labor Relations Board instead of the County's Labor Board. The district court denied their petition. Plaintiffs now appeal.

DISCUSSION

Standard of Review

{6} We review a district court's denial of a claim for declaratory relief for abuse of discretion. *State ex rel. Stratton v. Roswell Indep. Sch.*, 1991-NMCA-013, ¶ 49, 111 N.M. 495, 806 P.2d 1085. "An abuse of discretion occurs when the district court's ruling is clearly against logic and effect of the facts and circumstances before the court." *Id.* However, to the extent that Plaintiffs' arguments require this Court to engage in statutory construction, interpretation of a statute is a question of law that we review de novo. *See Morgan Keegan Mortg. Co. v. Candelaria*, 1998-NMCA-008, ¶ 5, 124 N.M. 405, 951 P.2d 1066. "A grandfather clause will be construed to include no case not clearly within the purpose, letter, or express terms, of the clause." *City of Albuquerque v. Montoya*, 2012-NMSC-007, ¶ 11, 274 P.3d 108 (alteration, internal quotation marks, and citation omitted). Furthermore, "[the appellate courts] review questions of constitutional law and constitutional rights, such as due process protections, de novo." *N. M. Bd. of Veterinary Med. v. Riegger*, 2007-NMSC-044, ¶ 27, 142 N.M. 248, 164 P.3d 947.

The County's Dispute Resolution Procedures Do Not Violate Plaintiffs' Due Process Rights

{7} Broadly stated, Plaintiffs' argument is that the County's dispute resolution procedures violate the employees' procedural due process rights to a fair and impartial tribunal because the county commission has a "vested interest" in the adjudication of the disputes. Plaintiffs argue that because the County does not have in place a system that facially operates to protect their collective

bargaining rights, it does not have "a system of provisions and procedures permitting employees to form, join[,] or assist any labor organization" and is not entitled to grandfather status under Section 10-7E-26(A) of the PEBA.

{8} On a more nuanced level, however, Plaintiffs' argument requires some parsing. We understand one prong of Plaintiffs' argument to be that because the county commission appoints the county manager, who serves in an advisory role to the county commission, the county commission effectively serves as both the legislative and executive branches of county government. Bernalillo County, N.M., Ordinances § 2-62 (1973, amended 2011), § 2-63 (1973); NMSA 1978, § 4-38-19(B) (1973). Therefore, according to Plaintiffs, it should be presumed that the county commission's interest in employment disputes "lie[s] in favor of managerial personnel and in conflict with the rights of employees." Second, because the county commission is not bound by any recommendations of the Labor Board in reviewing prohibited practice complaints, Plaintiffs characterize the county commission as sitting in "unrestrained final judgment" in regard to employee disputes. In considering these two contentions together, Plaintiffs argue that the system violates the employees' due process rights because it allows the county commission, with its interests aligned with management personnel, to be the final decision-maker on employee complaints.

{9} "The Fourteenth Amendment of the United States Constitution protects citizens from state action that leads to deprivations of liberty and property without due process of law." *Los Chavez Cmty. Ass'n v. Valencia Cnty.*, 2012-NMCA-044, ¶ 20, 277 P.3d 475 (internal quotation marks and citation omitted). "Procedural due process requires a fair and impartial hearing before a trier of fact who is disinterested and free from any form of bias or predisposition regarding the outcome of the case." *Riegger*, 2007-NMSC-044, ¶ 27 (internal quotation marks and citation omitted). "The inquiry is not whether the [tribunal is] actually biased or prejudiced, but whether, in the natural course of events, there is an indication of a possible temptation to an average [person] sitting as a judge to try the case with bias for or against any issue presented to him." *Reid v. N. M. Bd. of Exam'rs of Optometry*, 1979-NMSC-005, ¶ 7, 92 N.M. 414, 589 P.2d 198. "These principles are equally applicable to administrative proceedings" and are "even more relevant at the quasi-judicial level, where other trial-like rules of administrative proceedings are relaxed." *Los Chavez*, 2012-NMCA-044, ¶ 23.

{10} In considering Plaintiffs' claims of bias, we first emphasize the presumption that administrative adjudicators perform their duties with honesty and integrity. *See Jones v. N. M. State Racing Comm'n*, 1983-NMSC-089, ¶ 13, 100 N.M. 434, 671 P.2d 1145. That is to say that, in this context, we presume that the county commission's interest in reviewing the Labor Board's decision is to act fairly and with impartiality in making its determination. "The burden of overcoming the presumption of impartiality 'rests on the party making the assertion [of bias.]' " *Navistar Int'l Transp. Corp. v. United States EPA*, 941 F.2d 1339, 1360 (6th Cir. 1991) (quoting *Schweiker v. McClure*, 456 U.S. 188, 196 (1982)). Furthermore, "any alleged prejudice on the part of the decision[-]maker must be evident from the record and cannot be based on speculation or inference." *Id.*

{11} The inherent bias or partiality of a given circumstance can often be sufficient to

rebut the presumption that administrative adjudicators will properly perform their duties. For example, in *Los Chavez*, the fact that a board member of the Valencia County Commission was a first cousin to an applicant for a zoning change required the board member to recuse herself. 2012-NMCA-044, ¶ 1. Although the presumption of bias between close relatives is constitutionally recognized in regard to judges, this Court saw no reason not to extend that presumption to administrative adjudicators. *Id.* ¶ 23. Likewise, in *Riegger*, the Court held that the board's imposition of costs against a losing licensee for the hearing officer's time and the cost of the hearing room violated due process. 2007-NMSC-044, ¶ 26. The Court stated that there was a reasonable probability, even absent evidence of actual bias or partiality, that the imposition of these costs could give a hearing officer the incentive to rule against the licensee in order to be fully compensated for his services. *Id.* ¶ 30. Importantly, in both of these cases, there was some fact or circumstance that established a personal interest that could improperly influence the administrative adjudicator's ability to impartially decide the case. *See Las Cruces Prof'l Fire Fighters v. City of Las Cruces*, 1997-NMCA-031, ¶ 24, 123 N.M. 239, 938 P.2d 1384 (recognizing that "[o]ne who stands to gain or lose by a decision either way has an interest that may disqualify" (internal quotation marks and citation omitted)). In the present case, Plaintiffs have not presented any evidence suggesting the type of personal interest mentioned in *Los Chavez* and *Riegger*.

{12} Plaintiffs rely on *AFSCME v. Martinez*, 2011-NMSC-018, 150 N.M. 132, 257 P.3d 952, to support their argument that the county commission's interests favor management personnel. In *Martinez*, our Supreme Court held, in relevant part, that allowing the governor to remove board members of the Public Employee Labor-Relations Board (PELRB) "at any time and for any reason" would be a violation of due process. *Id.* ¶ 10. The Court emphasized that the PELRB directly adjudicates disputes involving the governor and her appointees and, therefore, the governor "exerts subtle coercive influence over the PELRB." *Id.* ¶¶ 10-11.Thus, because the PELRB is "empowered to make decisions that may adversely affect the executive branch," it would be a violation of due process "if [the Court] conclude[d] that the members of the PELRB serve[d] at the pleasure of the [g]overnor." *Id.* ¶ 11. Plaintiffs analogize the present case to the *Martinez* decision by arguing that the county commission's de facto exercise of executive power is similar to the governor's "undue influence" over the PELRB.

{13} We are unpersuaded by Plaintiffs' argument. Although we remain mindful that the lines between governmental bodies at the county level are not as stark as those at other levels of government, *Board of County Commissioners v. Padilla*, 1990-NMCA-125, ¶ 10, 111 N.M. 278, 804 P.2d 1097, we disagree with Plaintiffs' characterization of the county commission as effectively serving in a dual legislative/executive role such that its interest should be presumed to be in favor of management personnel. In *Montoya*, our Supreme Court rejected a similar presumption regarding the president of the Albuquerque City Council because the city's ordinances did not define the president's role as a managerial position and the ordinances referred to the city council as the "legislative body of the city." 2012-NMSC-007, ¶ 17 (internal quotaton marks and citation omitted). While the structure of Bernalillo County government differs in many respects from the City of

Albuquerque's structure noted in *Montoya*, one important area of overlap is that the county commission, like the Albuquerque City Council, does not directly administer personnel management. *See id.* ¶ 18; § 4-38-19(B); Bernalillo County, N.M., Ordinances § 2-98. Consistent with the county manager's oversight of county personnel, it is the county manager, like the mayor under Albuquerque's system, who selects the "management" member of the Labor Board. Bernalillo County, N.M., Ordinances § 2-98(a), (b)(3); § 2-214(2) (1975); *Montoya*, 2012-NMSC-007, ¶ 18. We therefore disagree with Plaintiffs that the level of oversight the county commission exercises over the county manager indicates an interest sufficient to presume that the county commission is biased in favor of management personnel.

{14} In the absence of evidence establishing the reason why the county commission would be inclined to favor management personnel over employees, Plaintiffs have not met their burden to rebut the presumption that the county commission impartially performs its duties in reviewing employee complaints. Accordingly, we conclude that the County's dispute resolution procedures do not violate Plaintiffs' due process rights to a fair and impartial tribunal.

CONCLUSION

{15} For the foregoing reasons, we affirm the district court.

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

CYNTHIA A. FRY, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

RODERICK T. KENNEDY, Judge

Certiorari Granted, June 19, 2015, No. 35,249

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-071

Filing Date: April 2, 2015

Docket No. 33,821

WILLIAM KIPNIS and MARCI KIPNIS,

Plaintiffs-Appellants,

v.

MICHAEL JUSBASCHE and REBECCA MARK-JUSBASCHE,

Defendants-Appellees.

John B. Pound, LLC
John B. Pound
Santa Fe, NM

for Appellants

The Simons Firm, L.L.P.
Thomas A. Simons, IV
Daniel H. Friedman
Santa Fe, NM

for Appellees

OPINION

BUSTAMANTE, Judge.

{1} Plaintiffs filed suit against Defendants for fraud, constructive fraud, and conversion based on Defendants' failure to tell them that Defendant Jusbasche had pled nolo contendere to a charge of theft of trade secrets nineteen years earlier. The district court dismissed the complaint on the ground that Rule 11-410(A)(2) NMRA prohibited admission of evidence of the plea and related judgment. We hold that the rule does not prohibit admission of the plea of nolo contendere and related judgment when they are not offered as proof of guilt. Consequently, we reverse that portion of the district court's order. We affirm the district court's ruling that there are questions of fact pertaining to whether Defendants had a duty to disclose information about the plea that preclude summary judgment on that issue.

BACKGROUND

{2} William and Marci Kipnis (Plaintiffs) owned a hotel in Taos Ski Valley. Together with Michael Jusbasche and Rebecca Mark-Jusbasche (Defendants) they formed a limited liability corporation with the goal of replacing the hotel with condominiums. Plaintiffs contributed the hotel's real estate and a liquor license to the corporation and Defendants contributed cash in excess of $4 million over several years, the bulk of which was considered a loan to the corporation. Defendants held a 51% interest in the corporation. In 2003 work began on a condominium complex to include thirty residential units and two commercial units. Twenty-four of the thirty residential units were sold during construction. However, the project was plagued by litigation and regulatory issues and ultimately the costs exceeded the parties' estimates. By 2005 it became apparent that the project was not going to turn a profit. Ultimately, Defendants took title to five unsold residential units and the two commercial units and the corporation was dissolved.

{3} Plaintiffs filed suit alleging fraud, constructive fraud, intentional misrepresentation, and conversion[1]. The root of Plaintiffs' suit is an alleged conversation that occurred early in the negotiations about the project. Plaintiffs alleged that in 2003 the parties had a "dinner meeting . . . to move business discussions from the abstract to the concrete." As stated in the complaint, during that conversation, William Kipnis asked Defendants "if there was anything in their personal histories he should know about before going into a business relationship with them." Defendants answered in the negative. Plaintiffs maintained that Defendants' failure to tell them in that conversation that Jusbasche had pled nolo contendere to a charge of theft of trade secrets in 1984 constituted fraud. They "contend[ed] that if [Defendants] had honestly answered the question . . . by telling them that . . . Jusbasche had pled no contest to a criminal charge of dishonesty with his business associates, they would not have gone into business with [him] . . . and would be the owners of the hotel and liquor license today."

{4} Defendants filed a motion for summary judgment, arguing in relevant part that they had no duty to disclose the plea and judgment and that Rule 11-410(A)(2) barred the

[1]Plaintiffs' complaint also alleged breach of fiduciary duty, negligent misrepresentation, and breach of the covenant of good faith and fair dealing. These counts have been either dismissed or withdrawn and are not at issue on appeal.

admission of evidence of the plea and "the surrounding circumstances of the case." Rule 11-410(A)(2) provides that "[i]n a civil, criminal, or children's court case, evidence of [a nolo contendere plea] is not admissible against the defendant who made the plea or participated in the plea discussions[.]" Plaintiffs argued in response that the question of whether Defendants had a duty to disclose the plea should be submitted to a jury and that Rule 11-410(A)(2) applies to prevent admission of evidence of a nolo contendere plea when it is offered as proof of guilt, but does not prohibit admission of such evidence for other reasons unrelated to the pleader's guilt. Here, Plaintiffs argued they were not trying to prove that Jusbasche was guilty of the charge. Rather, "[t]he fact of the plea, in and of itself, is directly relevant in the instant lawsuit. Accordingly, evidence pertaining to the plea is admissible."

{5} The district court agreed with Plaintiffs on both arguments and denied Defendants' motion (Order 1). A trial date was set. However, at a pre-trial conference the district court reconsidered its ruling sua sponte and reversed the portion related to Rule 11-410(A)(2), stating that "[o]n reconsideration, the court determines that Rule 11-410 . . . precludes introduction of evidence concerning . . . Jusbasche's plea of nolo contendere . . . as a matter of law. The court's ruling leaves Plaintiffs unable to prove a necessary element of their case." The district court granted summary judgment to Defendants, and the complaint was dismissed (Order 2).

DISCUSSION

A. Rule 11-410

{6} "The standard of review on appeal from summary judgment is de novo." *Farmers Ins. Co. of Ariz. v. Sedillo*, 2000-NMCA-094, ¶ 5, 129 N.M. 674, 11 P.3d 1236. Plaintiffs argue that the district court erred in concluding that Rule 11-410(A)(2) prohibited admission of evidence of Jusbasche's nolo contendere plea and its consequences. They reiterate the arguments made below. For support, they cite to *Olsen v. Correiro*, 189 F.3d 52 (1st Cir. 1999), and *United States v. Adedoyin*, 369 F.3d 337 (3d Cir. 2004). We therefore begin by examining those cases.

{7} As a preliminary matter, we note that, as it pertains to the exclusion of nolo contendere pleas, Rule 11-410(A)(2) is identical to Rule 410(a)(2) of the Federal Rules of Evidence, with the exception that Rule 11-410 applies in children's court cases as well as civil and criminal cases. *See* Fed. R. Evid. 410. When the state and federal evidence rules are identical, we may rely on interpretations of the federal rule as persuasive authority. *See State v. Gomez*, 2001-NMCA-080, ¶ 14, 131 N.M. 118, 33 P.3d 669 (relying on federal case law and treatises on the federal rules to construe Rule 11-613(B) NMRA); *see also State v. Torres*, 1998-NMSC-052, ¶ 13, 126 N.M. 477, 971 P.2d 1267 ("New Mexico courts have found the United States Supreme Court's interpretation of the Federal Rules of Evidence to be instructive in the interpretation of identical provisions in our Rules of Evidence."), *overruled on other grounds by State v. Alvarez-Lopez*, 2004-NMSC-030, 136 N.M. 309, 98 P.3d 699.

{8} In *Olsen*, Olsen was convicted of murder and served five years in prison. 189 F.3d at 55. After five years, his conviction was overturned based on the prosecution's failure to disclose evidence, and a new trial was ordered. *Id.* Rather than go through a new murder trial, Olsen pled nolo contendere to a

charge of manslaughter and was sentenced to time served. *Id.* Olsen then sued the city and two police officers for damages related to his incarceration for the murder charge. *Id.* The defendants "raised Olsen's manslaughter conviction resulting from the nolo plea as an affirmative defense[,]" arguing that "[Olsen was] not entitled to damages based upon the period of incarceration identified with the conviction for manslaughter." *Id.* at 55-56 (internal quotation marks omitted). Although he ultimately prevailed on the merits, Olsen appealed the amount of the damage award. *Id.*

{9} On appeal, the Court of Appeals for the First Circuit examined whether "any evidence of [Olsen's] nolo plea, conviction, or sentence" could be admitted or considered by the district court. *Id.* at 58. It first held that under Rule 410(a)(2) of the Federal Rules of Evidence, "[o]nly the nolo *plea* itself is barred by the relevant language of the rule." *Olsen*, 189 F.3d at 59. It then examined the reasons for the rule, which are (1) "a nolo plea is not a factual admission that the pleader committed a crime[,]" *id.*, and (2) "a desire to encourage compromise resolution of criminal cases." *Id.* at 60. The appellate court determined that "[t]hese reasons for excluding the nolo plea itself could well, on other facts, be applicable to the conviction and sentence that result from the nolo plea." *Id.* For example, "[i]f such convictions and sentences were offered for the purpose of demonstrating that the pleader is guilty of the crime pled to, then the nolo plea would in effect be used as an admission and the purposes of Rule 410 would be undermined." *Olsen*, 189 F.3d at 60. But where the conviction and sentence were not offered to show guilt, these purposes of the rule are not thwarted. *Id.* at 61-62. The court concluded that, in that case, "the reason for the punishment, the existence of underlying culpability, is irrelevant. It is the existence of the punishment (which, given the 'time served' sentence, cannot be proved through prison records or by any other means) that matters." *Id.* "Accordingly, there [was] no reason . . . to expand Rule 410 beyond the scope of its plain language, which in relevant part encompasses only nolo pleas" to preclude admission of evidence of Olsen's conviction. *Olsen*, 189 F.3d at 62.

{10} In *Adedoyin*, the defendant was tried for "improper entry into the United States by an alien, . . . [and] two counts of fraud and misuse of visas, permits[,] and other documents[.]" 369 F.3d at 339. Approximately twenty years earlier, the defendant had pled nolo contendere to a felony criminal charge and was convicted. *Id.* at 340. The prosecution argued that the defendant had willfully misrepresented his status by indicating on a visa application that he had no criminal convictions. *Id.* at 343. At trial, the district court admitted evidence of the conviction over the defendant's objection based on Rule 410(a)(2). *Adedoyin*, 369 F.3d at 340, 343.

{11} On appeal, the Court of Appeals for the Third Circuit relied on *Olsen* to affirm on two bases. First, it noted that there was in Rule 410 "a clear distinction between pleas of nolo contendere and convictions entered on the basis of such pleas." *Adedoyin*, 369 F.3d at 343. Second, it recognized that "a plea of nolo contendere is not an admission of guilt and thus the fact that a defendant made such a plea cannot be used to demonstrate that he was guilty of the crime in question[,]" and stated that "convictions based on pleas of nolo contendere are admissible to prove the fact of conviction." *Id.* at 344. It concluded that "it did not even matter . . . whether [the defendant] was guilty of the [earlier] crime." *Id.* Rather, "[t]he material question at trial was

whether his representation that he did not have a criminal conviction was willfully false or misleading and the conviction, though based on a plea of nolo contendere, established that his representation was false, though not necessarily willfully so. Thus, evidence of it was admissible." *Id.*

{12} We derive two propositions from these cases. One is that the reach of Rule 410 is limited to the nolo contendere plea itself, not to the resultant judgment, conviction, or sentence. The other is that the consequences of a nolo contendere plea may be admitted as evidence when not offered to prove the pleader's guilt. These propositions are found in other cases and sources as well. *See, e.g.*, *Sharif v. Picone*, 740 F.3d 263, 271 (3d Cir. 2014) ("Rule 410 does not bar the admission of a *conviction* resulting from a nolo plea, but rather prohibits only the admission of the plea itself." (citing *Adedoyin*, 369 F.3d at 344-45 and *Olsen*, 189 F.3d at 58-62)); *United States v. Drapeau*, No. CR 14-30073-RAL, 2014 WL 5089926, at *2 (D.S.D. Oct. 9, 2014) ("[Rules 410 and 803], however, do not debar admission of the fact of conviction based on a no contest plea in a case where the [g]overnment must prove a conviction exists as an element of the charged crime."); Christopher B. Mueller & Laird C. Kirkpatrick, 2 Federal Evidence § 4:65 (4th ed.) (stating that, "[d]espite the apparent breadth of Rule 410 in barring *nolo contendere* pleas, the fact is that these pleas—or more precisely the judgments entered on them—are admissible in a wide range of other contexts" and giving examples); Colin Miller, *The Best Offense Is A Good Defense: Why Criminal Defendants' Nolo Contendere Pleas Should Be Inadmissible Against Them When They Become Civil Plaintiffs*, 75 U. Cin. L. Rev. 725, 731 (2006) ("Importantly, . . . the [r]ules merely protect the defendant from the admission of his nolo contendere plea. Conversely, the resulting conviction is frequently admissible against the pleading party, typically for impeachment purposes under Federal Rule of Evidence 609 and corresponding state codes.").

{13} Other courts reject the dichotomy between pleas and convictions and instead treat nolo pleas and resultant judgments the same under the rule. Nevertheless, they endorse the second proposition from those cases: when the purpose is other than to prove guilt, evidence related to a nolo plea may be admitted. For example, the Court of Appeals for the Ninth Circuit held that

> [r]eading [Rule 410] to preclude admission of a *nolo contendere* plea but to permit admission of conviction based on that plea produces an illogical result. Rule 410's exclusion of a *nolo contendere* plea would be meaningless if all it took to prove that the defendant committed the crime charged was a certified copy of the inevitable judgment of conviction resulting from the plea. We hold that Rule 410 prohibits the admission of *nolo contendere* pleas and the convictions resulting from them *as proof that the pleader actually committed the underlying crimes charged.*

United States v. Nguyen, 465 F.3d 1128, 1131 (9th Cir. 2006) (fourth emphasis added). Interestingly, *Nguyen* relied on *Olsen* to reach this conclusion. *Nguyen*, 465 F.3d at 1131. Similarly, in *Town of Groton v. United Steelworkers of America*, the Connecticut Supreme Court held that "under our law a prior plea of nolo contendere and a conviction based thereon may not be admitted into

evidence in a subsequent civil action or administrative proceeding *to establish either an admission of guilt or the fact of criminal conduct.*" 757 A.2d 501, 511 (Conn. 2000) (emphasis added)[2]. Without making a distinction between a conviction and the nolo plea on which it was based, the Utah Supreme Court held that "[b]ecause the [s]tate did not offer [the defendant's] sexual abuse conviction to prove that she had actually committed sexual abuse, we conclude that [Utah's R]ule 410[a](2) does not bar the admissibility of her conviction." *In re W.A.*, 2002 UT 127, ¶ 34, 63 P.3d 607. Utah's Rule 410 is identical to the New Mexico rule as it pertains to nolo pleas. *See* Utah R. Evid., Rule 410 (2011).

{14} The better reasoned approach is that it is not necessary to interpret Rule 11-410(A)(2) to apply only to pleas to conclude that it does not prohibit admission of a nolo plea in this case. Indeed, such a construction is contrary to the intent of the drafters of the federal rule, "who explicitly declared that it was based on 'the inconclusive and compromise nature of *judgments* based on nolo pleas.' " Glen Weissenberger & James J. Duane, *Weissenberger's Federal Evidence*, § 410.3 (7th ed. 2011) (quoting the Advisory Committee Note to Rule 410). "Moreover, this proposed reading reduces the rule to a meaningless nullity," *id.*, because

> by that reasoning Rule 410(a)(2) could be easily and thoroughly circumvented in *every* case . . . by simply telling the jury about the criminal conviction that was entered against the defendant, without disclosing how the conviction was reached or that it was based on the plea. That arrangement would do nothing to fulfill the purposes underlying Rule 410.

Id. Finally, "this . . . argument overlooks the fact that Rule 410(a)(2) does not merely exclude the nolo plea itself, but in fact excludes 'evidence of . . . a nolo contendere plea.' " *Id.* (emphasis omitted) (omissions in original).

{15} Although we reject the idea that the rule only prohibits admission of the plea itself, we agree with the cases and the authorities holding that "Rule 410 was obviously intended to provide that pleas of nolo contendere—and convictions on the basis of such pleas—are excluded by that rule only if they are offered to prove that the defendant is guilty of the crime in question." Weissenberger, *supra* (emphasis and internal quotation marks omitted); *see also* David P. Leonard, *The New Wigmore: A Treatise on Evidence: Selected Rules of Limited Admissibility*, § 5.8.3; Barbara E. Bergman, Nancy Hollander & Theresa M. Duncan, 1 *Wharton's Criminal Evidence* § 4:44 (15th ed.) ("If a defendant pleads nolo contendere, Fed. R. Evid. 410 prohibits the use of that plea *as either an admission or proof of guilt*, in a subsequent civil or criminal proceeding, whether arising out of the same facts or not, against the defendant who made the plea." (emphasis added) (internal quotation marks and footnote omitted)). Hence, consistent with the weight of authority on this issue, we hold that Rule 11-410(A)(2) does not prohibit

[2]We note that, after this statement of the general rule in Connecticut, the court went on to affirm the admission and consideration of a nolo plea in *Town of Groton* because of the unique policy considerations attendant to the "legitimate expectations of the employer that are inherent in the employment context" that are not involved in "the ordinary civil or administrative context[.]" 757 A.2d at 511.

admission of a nolo plea or judgment based thereon for purposes other than to prove guilt.

{16} Given that this holding permits use of both nolo pleas and resultant judgments, we need not address Defendants' argument that, even if use of convictions is permissible, here, evidence of the Texas proceedings is inadmissible because there was no adjudication of guilt and no conviction per se.

{17} New Mexico case law does not require a different result. Defendants argue that in *State v. Trujillo,* the New Mexico Supreme Court held that Rule 11-410 states a broad prohibition without qualification and that our interpretation is contrary to the rule's plain language as that Court interpreted it. *See Trujillo,* 1980-NMSC-004, 93 N.M. 724, 605 P.2d 232. The *Trujillo* Court construed Rule 11-410 as a matter of first impression. *Id.* ¶ 6. There, the defendant stated during the plea discussions that he had sold heroin to an undercover agent after which he pled nolo contendere to charges of drug trafficking. *Id.* ¶ 4. But the defendant "did not fulfill his part of the [plea] agreement . . . [and] was subsequently re-arrested, pled not guilty, and stood trial" for the same charges. *Id.* ¶ 5. At trial, the defendant took the stand and testified that he did not sell heroin to the undercover agent. *Id.* The district court permitted the defendant's statement to be used to impeach him. *Id.* On appeal, the Court examined the history of Rule 11-410 and the federal rule and concluded that

> the plain import of the language of Rule 410 is to prohibit the admissibility of statements made during plea negotiations in any proceeding. The other exclusionary rules which surround Rule 410 in the Rules of Evidence contain express exceptions to the general rule of inadmissibility. *See* [Rules 11-]407, 408, 409, 411 [NMRA]. Rule 410 stands out among these rules because it contains no language which limits its exclusionary effect.

Trujillo, 1980-NMSC-004, ¶ 17. It concluded that "we interpret Rule 410 as closing the door on the admissibility of all [plea discussions] as evidence at trial for either substantive or impeachment purposes." *Id.* ¶ 19. Thus, the conviction was reversed and remanded for a new trial. *Id.* ¶ 22.

{18} Despite its broad language, *Trujillo* does not address the situation presented here, and we decline to read into it a blanket prohibition encompassing the present facts. *Cf.* Weissenberger, *supra* (stating that "it is universally agreed that this is one of those rare rules that 'can't mean what it says,' for it would lead to absurd results if read too literally, and every court and commentator agrees that there are at least some purposes for which a plea of nolo contendere should be admissible against the one who entered the plea[.]" (footnote omitted)). In addition, the *Trujillo* Court's reasoning was based in large part on policies behind nolo pleas. 1980-NMSC-004, ¶¶ 18-21. As we discuss further below, these policies are not unduly hindered by permitting admission of the pleas and related judgments for a purpose like that here.

{19} Finally, our holding is consistent with the rationales behind excluding nolo contendere pleas from evidence. The primary reason for the exclusion is the promotion of plea bargaining. The Advisory Committee Notes to Rule 410 state that "[e]xclusion of offers to plead guilty or *nolo* has as its purpose the promotion of disposition of criminal cases by compromise. . . . As with

compromise offers generally, . . . security against having an offer of compromise . . . admitted in evidence effectively encourages it." The New Mexico Supreme Court explained that "Rule 410 embodies the public interest in encouraging negotiations concerning pleas between the criminal defendant and the [s]tate [and that] candor in plea discussions aids greatly in the reaching of agreements between the defendant and the [s]tate." *Trujillo*, 1980-NMSC-004, ¶ 18.

{20} As observed by the *Olsen* court, however, this purpose may give way to other important interests: "The reach of this policy rationale has limits, of course; the plain language of the rule reflects Congress's balancing of the promotion of compromise against the admission of relevant evidence." 189 F.3d at 60. "In particular, if the conviction is being offered not to prove the truth of the facts on which it was based, but for some other purpose, the value of the evidence might outweigh the danger that admission would discourage nolo pleas." Leonard, *supra*, § 5.8.3. The *Olsen* court applied this reasoning to hold that where the fact of the defendant's punishment could not be proved another way, the necessity of admitting his conviction outweighed the need to encourage plea bargaining. 189 F.3d at 61-62. A similar analysis applies here: other than through evidence related to Jusbasche's plea, there is no way for Plaintiffs to prove that he failed to inform them of its existence.

{21} The second reason nolo contendere pleas are excluded arises from the fact that a nolo contendere plea is not an admission of guilt. "Rather, it is a statement of unwillingness to contest the government's charges and an acceptance of the punishment that would be meted out to a guilty person." *Id.* at 59. "A plea of nolo contendere is used by the accused in criminal cases to save face and avoid exacting an admission that could be used as an admission in other potential litigation, to avoid trial with its attendant expense and adverse publicity in the event of a conviction." 21 Am. Jur. 2d Criminal Law § 675 (footnote omitted). Thus, a nolo plea is less probative of guilt than a guilty plea. *See Sharif*, 740 F.3d at 268 ("[T]he use of a nolo plea as tantamount to an admission of guilt would defeat one of its primary purposes."). *But see* Leonard, *supra* § 5.4.1 (stating that "any rationale for the exclusionary rule that relies on a conclusion that the withdrawn guilty plea [or nolo contendere plea] is irrelevant as an admission of responsibility is deeply flawed"). Clearly, this rationale is inapplicable when the plea and resultant judgment is not offered as evidence of guilt.

B. Duty to Disclose

{22} Defendants argue that, even if we determine that the district court erred in its construction of Rule 11-410, they are entitled to summary judgment because they had no duty to disclose the fact that Jusbasche had entered a nolo plea in a criminal case nineteen years earlier. This argument is made pursuant to Rule 12-201(C) NMRA, that permits an appellee to "raise issues on appeal for the purpose of enabling the appellate court to affirm, or raise issues for determination only if the appellate court should reverse, in whole or in part, the judgment or order appealed from." Plaintiffs argue that whether there was a duty to disclose this information is a question of fact that should be submitted to the jury. We agree with Plaintiffs.

{23} "New Mexico case law clearly recognizes that a claim for fraud 'may be predicated on concealment where there is a duty to disclose.' " *Azar v. Prudential Ins. Co.*

of Am., 2003-NMCA-062, ¶ 60, 133 N.M. 669, 68 P.3d 909 (citation omitted). Such a duty exists here if Defendants (1) "ha[d] *actual knowledge* of . . . the undisclosed information" and (2) had actual knowledge of "the fact that [Plaintiffs were] proceeding in ignorance of facts basic to the transaction[.]" *McElhannon v. Ford*, 2003-NMCA-091, ¶ 13, 134 N.M. 124, 73 P.3d 827. "[I]t is not enough to show that the defendant should have known the information or its importance to the plaintiff." *Id.* Generally, the question of whether there was a duty to disclose is a matter of law for the district court to decide. *R.A. Peck, Inc. v. Liberty Fed. Sav. Bank*, 1988-NMCA-111, ¶ 12, 108 N.M. 84, 766 P.2d 928. "However, when the facts on which the alleged duty rests are in dispute, the existence of a duty becomes a mixed question of law and fact." *Azar*, 2003-NMCA-062, ¶ 43. In that case, "disputed issues of fact underlying the duty question must be submitted to the fact-finder for resolution." *Id.*

{24} Here, Defendants do not dispute that they had actual knowledge of the plea and that Plaintiffs were ignorant of the facts surrounding it. Instead, they frame the issue as whether they had actual knowledge that such information was important to Plaintiffs. They maintain that they could not have known that Plaintiffs wanted to know about the plea because William Kipnis's question was too vague. **[Id.]** In the context of the two-pronged formulation of the test in *McElhannon*, we understand Defendants' argument to be that the information was not "basic to the transaction" and that they could not have known that Plaintiffs would have terminated the partnership if they knew of the plea, i.e., "proceed[ed] in ignorance" of that information. 2003-NMCA-091, ¶ 13. These are classic fact questions. *See Azar*, 2003-NMCA-062, ¶ 62 (stating that where "reasonable minds could differ as to the materiality of the alleged undisclosed facts" remand for development of additional facts was appropriate "in order for the trial court to properly determine whether a duty to disclose arose"). Thus, only if the relevant facts are undisputed is summary judgment proper.

{25} Here, Defendants agreed for the purposes of the motion to dismiss that Plaintiffs asked Defendants if "there was anything in their personal histories [they] should know about before going into a business relationship with them" and that Defendants answered negatively. Thus, these basic facts are undisputed. Where the parties differ is on the effect of the question. Did Defendants understand the question to encompass a nineteen-year-old plea, as Plaintiffs argue, or, was it too vague to require a response that specific? Similarly, the parties differ on whether Defendants knew that, "because of the relationship [with Plaintiffs], the customs of the trade or other objective circumstances, [Plaintiffs] would reasonably expect a disclosure of those facts." *McElhannon*, 2003-NMCA-091, ¶ 12 (internal quotation marks and citation omitted). Because the answers to these questions depend on what inferences one draws from the basic facts and the credibility of witnesses, summary judgment on this issue would be improper. *See Fischer v. Mascarenas*, 1979-NMSC-063, ¶ 10, 93 N.M. 199, 598 P.2d 1159 ("Even where the basic facts are undisputed, if equally logical but conflicting inferences can be drawn from the facts, summary judgment should be denied.").

{26} Defendants spend a substantial portion of their briefing arguing that Plaintiffs effectively "nullified their fraud claims" and negated any duty to disclose by stating that they were not "contending . . . that . . .

Jusbasche was guilty of the crime to which he pled *nolo contendere*." Defendants interpret Plaintiffs' statement to mean that they stipulate that Jusbasche in fact was not guilty. Defendants overstate Plaintiffs' position. Just as a defendant entering a nolo plea does not accept guilt, Plaintiffs' statement that they are not seeking to prove Jusbasche's guilt in their fraud action does not equate to an acceptance of his innocence. Furthermore, Plaintiffs are not required to prove, in a fraud action, whether Jusbasche was guilty. The facts are that Jusbasche pled nolo contendere to theft of trade secrets and did not disclose the plea to Plaintiffs. That Jusbasche was not adjudicated guilty simply goes to the materiality and weight of those facts.

CONCLUSION

{27} Here, like in *Olsen* and *Adedoyin*, whether Jusbasche was actually guilty of a theft of trade secrets is immaterial to Plaintiffs' claim that he breached a duty to disclose the fact that he was accused of and sentenced for that charge. Accordingly, Plaintiffs seek to admit evidence of the plea and sentence not as evidence of guilt but as evidence of what Defendants failed to tell them. This is a permissible use under Rule 11-410(A)(2). Finally, whether Defendants had a duty to disclose information about the plea and its consequences depends on resolution of facts, a task for a jury. We therefore reverse the district court's grant of summary judgment based on Rule 11-410(A)(2) (Order 2) and affirm its denial of summary judgment as to whether Defendants had a duty to disclose the plea (Order 1).

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

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

RODERICK T. KENNEDY, Judge

Certiorari Granted, June 19, 2015, No. 35,286

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-072

Filing Date: April 7, 2015

Docket No. 32,693

JAMES FLORES,

Plaintiff-Appellant,

v.

MARY HERRERA, individually and as Secretary of State of the State of New Mexico,

Defendant-Appellee,

and

Docket No. 33,413

MANNY VILDASOL,

Plaintiff-Appellee,

v.

STATE OF NEW MEXICO,

SECRETARY OF STATE'S OFFICE and MARY HERRERA,

Defendants-Appellants.

Garcia Ives Nowara
Matthew L. Garcia
Albuquerque, NM

for Appellant Flores

Cuddy & McCarthy, LLP
M. Karen Kilgore
Evelyn A. Peyton
Santa Fe, NM

for Appellee (No. 32,693)

Law Offices of Michael E. Mozes, P.C.
Michael E. Mozes
Albuquerque, NM

for Appellee Vildasol

Hinkle Shanor LLP
Ellen S. Casey
Jaclyn M. McLean
Loren S. Foy
Santa Fe, NM

for Appellants (No. 33,413)

OPINION

SUTIN, Judge.

{1} We address two appeals that raise issues concerning the scope of the Whistleblower Protection Act (the Act), NMSA 1978, §§ 10-16C-1 to -6 (2010). During her term as Secretary of State, Defendant Mary Herrera terminated the employment of James Flores and Manny Vildasol. Separately, Mr. Flores and Mr. Vildasol sued Ms. Herrera claiming that, in relevant part, by terminating their employment, Ms. Herrera violated the Act. The two cases were decided by different district judges sitting in the First Judicial District. Ms. Herrera lost the general election in November 2010 and left office at the end of 2010. Mr. Flores filed his lawsuit December 22, 2010. Mr. Vildasol filed his lawsuit in April 2011, after Ms. Herrera had left office. In Cause No. 32,693, Mr. Flores appeals the district court's dismissal of his lawsuit. Cause No. 33,413 is an interlocutory appeal in which Ms. Herrera appeals the district court's denial of her motion to dismiss Mr. Vildasol's lawsuit against her, individually.

{2} At issue is whether Ms. Herrera may be sued pursuant to the Act in her "individual capacity." We conclude that Ms. Herrera's status as a former officer does not exclude her from the purview of the Act. We further conclude that she may be sued pursuant to the Act in her individual capacity. Accordingly, we affirm the district court's order denying Ms. Herrera's motion to dismiss Mr. Vildasol's claim under the Act, and we reverse the district court's order dismissing Mr. Flores's claim under the Act.

BACKGROUND

{3} Section 10-16C-3 provides that "[a] public employer shall not take any retaliatory action against a public employee because the public employee" engaged in specified

protected activity[1]. The Act defines a "public employee" as "a person who works for or contracts with a public employer[.]" Section 10-16C-2(B). A "public employer" includes "every office or officer" within "state government[.]" Section 10-16C-2(C)(1), (4).

{4} A public employer that violates the Act

> shall be liable to the public employee for actual damages, reinstatement with the same seniority status that the employee would have had but for the violation, two times the amount of back pay with interest on the back pay and compensation for any special damage sustained as a result of the violation. In addition, an employer shall be required to pay the litigation costs and reasonable attorney fees of the employee.

Section 10-16C-4(A).

{5} Ms. Herrera served as Secretary of State from January 2007 through December 2010. Mr. Flores worked as Ms. Herrera's public information officer from January 2007, when Ms. Herrera took office, until September 2010, when Ms. Herrera terminated his employment. Mr. Vildasol was appointed by Ms. Herrera to the position of office administrator in January 2007. Ms. Herrera terminated Mr. Vildasol's employment in September 2010. The details underlying Mr. Flores's and Mr. Vildasol's respective terminations are not relevant to this appeal, except to say that each of them claimed that their employment was terminated in retaliation for having, in good faith, reported to the FBI and, in Mr. Vildasol's case, to other authorities, what they perceived as criminal activity by Ms. Herrera and the Office of the Secretary of State.

{6} Mr. Flores filed a complaint against Ms. Herrera "individually and as Secretary of State" for having violated the Act. Mr. Vildasol filed a complaint against the Secretary of State's Office and Ms. Herrera claiming, in relevant part, that the Secretary of State's Office and Ms. Herrera had violated the Act.

{7} In each case, Ms. Herrera moved to dismiss the complaint for lack of subject matter jurisdiction, claiming that she could not be sued in her individual capacity for violating the Act, and also claiming that because she was no longer Secretary of State she could not be sued in her official capacity. The district court in Mr. Flores's case granted Ms. Herrera's motion to dismiss on the ground that it lacked subject matter jurisdiction over the complaint because Ms. Herrera was no longer Secretary of State. The court further reasoned that Mr. Flores could not recover against Ms. Herrera in her individual capacity because "such recovery is inconsistent with the statute which protects 'public' employees from the acts of their 'public' employers." As to Mr. Vildasol's complaint, the district court denied Ms. Herrera's motion to dismiss.

{8} On appeal, Mr. Flores argues that the district court erroneously differentiated between Ms. Herrera's individual and official capacities which, according to Mr. Flores, in

[1]The protected activity is set out in Section 10-16C-3 and consists of communicating "to the public employer or a third party information about an action or a failure to act that the public employee believes in good faith constitutes an unlawful or improper act"; providing information to or testifying before "a public body as part of an investigation, hearing[,] or inquiry into an unlawful or improper act"; or objecting to or refusing "to participate in an activity, policy[,] or practice that constitutes an unlawful or improper act."

the context of the Act is a meaningless distinction. Additionally, he argues that, contrary to the district court's interpretation, the Act applies to former public officials and that the district court's narrow interpretation of the Act was inconsistent with the liberal construction afforded to whistleblower statutes, generally.

{9} In her appeal from the court's denial of her motion to dismiss Mr. Vildasol's lawsuit, Ms. Herrera argues that the Act does not permit claims against former officers, generally, nor does it permit claims against them in their individual capacity. Additionally, Ms. Herrera argues that because Mr. Vildasol does not now, nor did he ever, qualify as a "public employee" who "works for or contracts with a public employer[,]" he was ineligible to bring a lawsuit pursuant to the Act.

{10} We conclude that notwithstanding the fact that Ms. Herrera is a former officer, the Act permits an individual-capacity lawsuit against her for allegedly violating the Act while she was in office. We reject Ms. Herrera's argument that Mr. Vildasol was not a public employee. We reverse the district court's dismissal of Mr. Flores's complaint, and we affirm the district court's order denying Ms. Herrera's motion to dismiss Mr. Vildasol's complaint.

DISCUSSION

Subject Matter Jurisdiction Is Not an Issue in These Appeals

{11} At the outset, before we discuss the arguments raised by the parties, we address Ms. Herrera's and, in Mr. Flores's case, the district court's invocation of subject matter jurisdiction as a basis for dismissal of these matters. Pursuant to Rule 1-012(B)(1) NMRA, a party may move to dismiss a complaint for a lack of subject matter jurisdiction. "Subject matter jurisdiction" is the "power or authority to decide the particular matter presented." *Sundance Mech. & Util. Corp. v. Atlas*, 1990-NMSC-031, ¶ 12, 109 N.M. 683, 789 P.2d 1250 (internal quotation marks and citation omitted). The district court is vested with the power and authority to decide claims arising under the Act. Section 10-16C-4(A) ("An employee may bring an action pursuant to this section in any court of competent jurisdiction."); *see also* N.M. Const. art. VI, §§ 1, 13 (vesting the district court with the judicial power of the state and stating that the district court has original jurisdiction over all matters not excepted within the Constitution).

{12} Having reviewed Ms. Herrera's motions to dismiss, we conclude that, notwithstanding her use of the phrase "subject matter jurisdiction," the issue raised in the dismissal motions was actually whether, pursuant to Rule 1-012(B)(6), Mr. Flores and Mr. Vildasol stated claims under the Act upon which relief could be granted. Similarly, although the district court's dismissal of Mr. Flores's case was ostensibly premised upon Rule 1-012(B)(1), the court's reasoning clearly invoked Rule 1-012(B)(6). A party's failure to state a claim upon which relief can be granted has no effect upon a court's subject matter jurisdiction. *See Sundance Mech. & Util. Corp.*, 1990-NMSC-031, ¶ 15. In sum, we conclude that the use of the phrase "subject matter jurisdiction" in the context of these cases was a misnomer, and Rule 1-012(B)(1) has no bearing on the issues now before us.

Standard of Review

{13} "A motion to dismiss for failure to state a claim under Rule 1-012(B)(6) . . . tests

the legal sufficiency of the complaint[.]" *Cordova v. Cline*, 2013-NMCA-083, ¶ 18, 308 P.3d 975, *cert. granted*, 2013-NMCERT-007, 308 P.3d 134. Dismissal under Rule 1-012(B)(6) "is proper only when the law does not support a claim under the facts presented." *Vigil v. State Auditor's Office*, 2005-NMCA-096, ¶ 4, 138 N.M. 63, 116 P.3d 854. We review de novo the district court's decision to grant or deny a motion to dismiss, and in so doing, we accept all well-pleaded factual allegations as true. *Id.*

{14} As well, issues of statutory construction present legal questions that we review de novo. *Bank of N.Y. v. Romero*, 2014-NMSC-007, ¶ 40, 320 P.3d 1. Finally, because the Act reflects a remedial purpose, we construe its provisions "liberally to facilitate and accomplish its purposes and intent." *Lohman v. Daimler-Chrysler Corp.*, 2007-NMCA-100, ¶ 31, 142 N.M. 437, 166 P.3d 1091 (internal quotation marks and citation omitted); *Janet v. Marshall*, 2013-NMCA-037, ¶¶ 26, 32, 296 P.3d 1253 (Fry, J., dissenting) (recognizing that the provisions of the Act are remedial), *cert. dismissed*, 2013-NMCERT-005, 302 P.3d 1163.

Ms. Herrera Is an "Officer"

{15} Ms. Herrera argues that a "former officer" is not a "public employer" as that phrase is defined in the Act. She supports this proposition by reasoning that the Act uses the present tense version of the term "officer" in Section 10-16C-2(C)(4)[2]. In addition, she argues that because she no longer possesses any "sovereign power," she does not qualify as "an officer." Finally, Ms. Herrera contends that Section 10-16C-4(A) establishes that the Legislature intended to exclude former officers from the purview of the Act. That section provides that public employers that violate the Act "shall be liable to the public employee for . . . reinstatement with the same seniority status that the employee would have had but for the violation," which, obviously, a former officer would not be capable of doing.

{16} Building on the premise that the Act does not permit lawsuits against former officers, Ms. Herrera argues that the Act only permits lawsuits against officers in their "official capacity." Relatedly, relying on the language of the Act, she contends that the Act does not allow lawsuits to be brought against former officers in their individual capacity.

{17} In Section 10-6C-6, the Legislature provided the single limitation on the time within which lawsuits may be brought pursuant to the Act, that is, within two years from the date of the alleged violation. Had the Legislature intended to further limit the scope of the Act to officials who are presently in office, it could have done so explicitly. Ms. Herrera's attempt to infer an additional time limitation from the Legislature's use of the term "officer" to define a public employer is overly narrow and technical and does not accord with our policy of construing remedial statutes liberally. It is indisputable that Ms. Herrera's alleged retaliatory action that prompted these lawsuits occurred when she was an "officer" possessed of "a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public." *Janet*, 2013-NMCA-037, ¶ 12 (internal quotation marks and citation omitted); *see* NMSA 1978, § 1-2-1(A) (2011) ("The secretary of state is the chief election officer of the state[.]").

[2]Section 10-16C-2(C)(1), (4) defines a "public employer" as "every . . . officer" within "state government[.]"

{18} Further, Ms. Herrera's argument that the Legislature intended to limit the window for filing a lawsuit under the Act because former officials lack the authority to reinstate terminated employees is also overly narrow and technical. In making this argument, Ms. Herrera overlooks the numerous other remedies that are available to a successful plaintiff pursuant to the Act and that do not require official authority, including the back pay and special damages remedies. *See* § 10-16C-4(A) ("A public employer that violates the provisions of the . . . Act shall be liable to the public employee for actual damages, . . . two times the amount of back pay with interest on the back pay[,] and compensation for any special damage sustained as a result of the violation."). Additionally, Ms. Herrera's argument assumes that the only actionable conduct under the Act is employment termination or demotion when, in fact, the Act broadly prohibits "any retaliatory action" against whistleblowers. Section 10-16C-3.

{19} In sum, construing the Act broadly, we conclude that the Act does not limit actions against officers to those who are presently in office at the time the action is filed. The only limitation on the time for filing a lawsuit under the Act is found in Section 10-6C-6, and we decline to add additional time limitations not provided for in the Act.

The Act Permits Lawsuits Against Officers in Their Individual Capacity

{20} The distinction between "official" and "individual" capacity lawsuits was explained by this Court in *Ford v. New Mexico Department of Public Safety*, 1994-NMCA-154, ¶ 18, 119 N.M. 405, 891 P.2d 546. We explained that a lawsuit "against a state official in her official capacity" is merely a way of suing "an entity of which an officer is an agent." *Id.* (internal quotation marks and citation omitted). The purpose of such a lawsuit is to remedy a wrongful deprivation caused by an "entity's policy or custom[.]" *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (internal quotation marks and citation omitted) (distinguishing personal-capacity and official-capacity claims in federal civil rights actions). Thus, when an officer who is sued in her official capacity leaves office, the official's successor in office automatically assumes her official role in the litigation. Rule 1-025(D)(1) NMRA; *Ford*, 1994-NMCA-154, ¶ 18.

{21} On the other hand, when a state official is sued for her own misconduct in office, "the defendant is the individual, not the office[,]" and when she leaves office, her successor "is not substituted as the defendant in the litigation." *Ford*, 1994-NMCA-154, ¶ 19. Generally, "an award of damages against an official in [her] personal capacity can be executed . . . against the official's personal assets[.]"[3] *Graham*, 473 U.S. at 166. Because

[3]We note that it is an open question, raised tangentially by Mr. Flores's brief in chief whether Ms. Herrera's defense of these lawsuits and any potential judgments, costs, or fees will be covered by the Office of the Secretary of State or by an insurance policy purchased through the public liability fund pursuant to the Tort Claims Act, NMSA 1978 §§ 41-4-1 to -30 (1976, as amended through 2013). *See, e.g.*, § 41-4-3(F)(1); § 41-4-4(B)(2) (providing that, unless an insurance policy that is purchased with the public liability fund provides a defense, a governmental entity must do so for any elected official when liability is sought for a violation of New Mexico law "alleged to have been committed by the [elected official] while acting within the scope of [her] duty"); § 41-4-23(B)(2); § 41-4-4(G) ("The duty to defend . . . continue[s] after employment with the governmental entity has been terminated if the occurrence for which damages are sought happened while the [elected official] was acting within the scope of duty while the [elected official] was in the employ of the governmental entity."). Because the district court's orders

Mr. Flores's and Mr. Vildasol's claims against Ms. Herrera are premised upon her alleged misconduct in office, namely, the act of terminating their employment in retaliation for their whistleblowing activities, Ms. Herrera was properly named individually as a defendant and sued in her personal capacity in their lawsuits.

{22} Ms. Herrera argues that, had the Legislature intended to allow individual capacity lawsuits, it would not have used the term "officer" to define a public employer, but instead, it would have used the term "person" or "individual" as it did in other legislation, including the New Mexico Human Rights Act and the New Mexico Tort Claims Act. *See* NMSA 1978, § 28-1-2(B) (2007) (defining an "employer" as that term is used in the Human Rights Act as "any person employing four or more persons and any person acting for an employer"); § 41-4-3(F)(3), (9) (using the terms "persons" and "individuals" in enumerating those to whom the definition of "public employee" applies in the context of the Tort Claims Act). We do not agree with Ms. Herrera's reasoning.

{23} Had the Legislature intended in the Act to preclude "individual capacity" lawsuits against officers, it could have done so by altogether omitting the term "officer" from the definition of "public employer" in Section 10-16C-2(C)(4). This would have permitted Plaintiffs to file lawsuits against the "office" while prohibiting lawsuits against officers in their individual capacity for their alleged retaliatory actions against whistleblowers. *Cf. Ford*, 1994-NMCA-154, ¶¶ 18-19 (indicating that official-capacity lawsuits "should be treated as a suit against the [s]tate[,]" whereas individual-capacity lawsuits implicate an individual's misconduct in office (internal quotation marks and citation omitted)). By expressly including every "officer" within the definition of a "public employer," however, the Legislature expressed its intention to permit individual-capacity lawsuits against such officers. *See Janet*, 2013-NMCA-037, ¶¶ 1, 11, 23 (recognizing that "[t]he language in Section 10-16C-2(C) includes entities as well as any officer of any of those entities[,]" thus, the question whether the defendants could be sued individually depended upon whether they were officers and recognizing that the Act holds "officers" liable for violations). To interpret the Act as prohibiting an individual-capacity lawsuit against an officer would be tantamount to concluding that the term "officer" in Section 10-16C-2(C)(4) was superfluous. This we will not do. *See Baker v. Hedstrom*, 2013-NMSC-043, ¶ 24, 309 P.3d 1047 (stating that an appellate court "must interpret a statute so as to avoid rendering the Legislature's language superfluous").

Mr. Vildasol Was a Public Employee

{24} We turn now to Ms. Herrera's argument that Mr. Vildasol "is not and was not a 'public employee' who 'work[ed] for or contract[ed] with' former Secretary of State Herrera within the meaning of the [Act]." As noted earlier, the Act provides that "every office or officer of any" state government office constitutes a "public employer[,]" and a "public employee" is "a person who works for . . . a public employer[.]" Section 10-16C-2(B), (C)(1), (4). Further, the Act prohibits a "public employer" from taking "any retaliatory action against a public employee"

in these cases did not decide this issue, it is not properly before this Court on appeal, and we do not address it. We encourage the parties and the district court on remand to consider the effect, if any, of the seemingly relevant provisions of the Tort Claims Act upon Ms. Herrera's financial responsibility for the litigation of these cases.

for the enumerated whistleblowing actions listed in Section 10-16C-3.

{25} In an attempt to insert ambiguity into the Act, Ms. Herrera attempts to exploit the fact that the Legislature did not define the phrase "works for" to support the assertion that she cannot be named as a defendant in Mr. Vildasol's lawsuit. To that end, she argues that Mr. Vildasol was employed and paid by the State, not by her, and the fact that she "may have acted as Mr. Vildasol's supervisor at various points during his employment at the [Secretary of State's Office], does not change the reality that Mr. Vildasol was, at all times, an employee of the State of New Mexico, and not of Ms. Herrera's."

{26} As discussed earlier, there is no question that, as the Secretary of State, Ms. Herrera was an "officer" within the meaning of the Act. Assuming, as we must, the truth of the factual allegations in Mr. Vildasol's complaint, Ms. Herrera appointed Mr. Vildasol to his position as the office administrator for the Office of the Secretary of State, she controlled his duties and the extent of his authority during his tenure in her office, and she ultimately terminated his employment. In light of these facts, it would strain common sense to conclude that Mr. Vildasol did not "work for" Ms. Herrera.

{27} In summary, we conclude that Ms. Herrera was subject to the provisions of the Act notwithstanding the fact that she was no longer the Secretary of State shortly after Mr. Flores's complaint and prior to Mr. Vildasol's complaint. And we conclude that Ms. Herrera could be sued in her individual capacity for allegedly violating the Act during her term as Secretary of State. Relating to Mr. Vildasol's claim, we reject Ms. Herrera's argument that she was not Mr. Vildasol's "public employer" or that he was not her "public employee" for purposes of the Act.

{28} Accordingly, we conclude that (1) the district court properly denied Ms. Herrera's motion to dismiss Mr. Vildasol's lawsuit under the Act, and (2) the district court erred in dismissing Mr. Flores's lawsuit under the Act.

CONCLUSION

{29} The district court's order granting Ms. Herrera's motion to dismiss Mr. Flores's case is reversed. The district court's order denying Ms. Herrera's motion to dismiss Mr. Vildasol's case is affirmed. The matters are remanded for further proceedings.

{30} IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:

RODERICK T. KENNEDY, Judge

LINDA M. VANZI, Judge

Certiorari Granted, June 19, 2015, No. 35,298

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-073

Filing Date: April 27, 2015

Docket No. 33,090

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

ANTHONY HOLT,

Defendant-Appellant.

Hector H. Balderas, Attorney General
Santa Fe, NM
Jacqueline R. Medina, Assistant Attorney General
Albuquerque, NM

for Appellee

Jorge A. Alvarado, Chief Public Defender
Karl Erich Martell, Assistant Appellate Defender
Santa Fe, NM

for Appellant

OPINION

BUSTAMANTE, Judge.

{1} Anthony Holt (Defendant) was trying to remove a window screen from Carolyn Stamper's (Stamper) home when he noticed her through the window. Although he turned and left the premises without breaching the window, he was convicted of one count of breaking and entering and now appeals on two grounds. First, he argues that the Legislature did not intend to punish as breaking and entering an intrusion into the space between the screen and the window. Second, he maintains that the evidence was insufficient for the jury to conclude that he in fact entered that space. We affirm.

BACKGROUND

{2} Stamper, a resident of Las Cruces, New Mexico, was relaxing on her sofa one December afternoon when she heard the doorbell ring and a rustling sound at the front door. She did not see anyone through the peephole in the door. She then heard a "metal on metal" sound at the window, which was approximately seven feet from the front door. The window was open approximately four inches because Stamper's "smelly old dog" was in the room with her. The curtains over the window were drawn except for a gap of about four inches. Through the gap, Stamper could see a man at the window who was working to remove the aluminum window screen. The screen was halfway removed from the window and the man was trying to get the screen free of the track at the bottom of the window frame. At trial, Stamper agreed with the State that while holding the screen, the man's "fingers were . . . in that area between the window and the screen[.]"

{3} After a few seconds, the man looked up and noticed Stamper. He said, "Oh, I'm sorry," then turned and left. As he was leaving, Stamper told him, "You better be sorry, you thief[.]" Stamper testified that the screen "was pretty well destroyed" and had to be replaced. She also testified that she was frightened by the incident and that it "was the first time [she] had been confronted with this in [her] own home."

{4} A jury convicted Defendant of one count of breaking and entering, contrary to NMSA 1978, Section 30-14-8(A) (1981). Additional

facts are provided as necessary to our discussion.

DISCUSSION

{5} Defendant makes two arguments on appeal. First, he argues that the facts of this case do not fit within a breaking and entering charge, because entering the space between a screen and a window is not the same as entering the interior of a home or structure. Second, he argues that the evidence was not sufficient to support a conclusion that Defendant entered the space between the screen and window. We address these arguments in turn.

The Breaking and Entering Statute Encompasses Entry Into the Space Between the Screen and Window

{6} Defendant argues that, even if his fingers were between the screen and the window, he cannot be convicted of breaking and entering. Defendant makes two contentions: (1) the plain language of the breaking and entering statute requires entry into the interior of a structure, i.e., entry beyond the last barrier to the structure's interior; and (2) the breaking and entering statute is ambiguous because it does not define the boundaries of a structure, and thus, under the rule of lenity, must be construed against the State. We interpret these arguments as alternatives because the rule of lenity applies only if, after examination of the plain language and other tools of statutory construction, the statute remains ambiguous. *State v. Hall*, 2013-NMSC-001, ¶ 19, 294 P.3d 1235 ("A statute is ambiguous for the purpose of the rule of lenity only if 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." (internal quotation marks and citation omitted)). After examining the statute's language and purpose, as well as cases interpreting it and similar statutes, we conclude that Defendant's conduct falls within that which the Legislature sought to punish. Based on our construction of the statute, we conclude that it is not ambiguous such that the rule of lenity applies. *Id.* Hence, we need not address Defendant's second argument.

{7} Questions of statutory interpretation are reviewed de novo. *State v. Smith*, 2004-NMSC-032, ¶ 8, 136 N.M. 372, 98 P.3d 1022. The goal of statutory interpretation is "to ascertain and give effect to the intent of the Legislature." *Id.* (internal quotation marks and citation omitted). We begin by examining the "plain language" of the statute and, if that language is clear and unambiguous, we refrain from further construction. *State v. Johnson*, 2001-NMSC-001, ¶ 6, 130 N.M. 6, 15 P.3d 1233. "The plain meaning rule, however, is only a guideline for determining the legislative intent. It is the responsibility of th[e] Court to search for and effectuate the purpose and object of the underlying statutes." *Id.* Thus, "[t]he plain meaning rule 'must yield on occasion to an intention otherwise discerned in terms of equity, legislative history, or other sources.' " *Smith*, 2004-NMSC-032, ¶ 9 (citation omitted). Finally, "statutes relating to the same general topic should be interpreted in light of each other[.]" *State v. Parvilus*, 2014-NMSC-028, ¶ 16, 332 P.3d 281. As discussed in more detail below, we rely on the burglary statute, NMSA 1978, § 30-16-3 (1971), as an aid in our interpretation because of its similarities with the breaking and entering statute.

{8} Section 30-14-8(A) defines "breaking and entering" as

> the unauthorized entry of any . . .

> dwelling or other structure, movable or immovable, where entry is obtained by fraud or deception, or by the breaking or dismantling of any part of the . . . dwelling or other structure, or by the breaking or dismantling of any device used to secure the . . . dwelling or other structure.

{9} As it relates to the facts here, UJI 14-1410 NMRA requires the jury to find that (1) "[t]he defendant entered [the structure] without permission" and (2) "[t]he entry was obtained by" breaking or dismantling a part of the structure. Unlike in some other states' statutes, neither the breaking and entering statute nor the burglary statute states what delimits a structure. *Compare* § 30-14-8(A) and § 30-16-3 *with* Ariz. Rev. Stat. Ann. § 13-1501(3) (2012) (defining "[e]ntry" as "the intrusion of any part of any instrument or any part of a person's body inside the *external boundaries* of a structure" (emphasis added)). Nor do they state that entry into any part of a structure will suffice. *Compare* § 30-14-8(A) and § 30-16-3 *with* Tex. Penal Code Ann. § 30.02(a)(1) (West 2007) (prohibiting entry of a building "or any portion of a building"). In *State v. Office of Public Defender ex rel. Muqqddin*, the Supreme Court relied on the absence of such language in the burglary statute to reject the idea that entry into a part of a structure is equivalent to entry into the structure itself, stating that "the Legislature has given no indication that it intended [such equivalency]." 2012-NMSC-029, ¶ 38, 285 P.3d 622. While the breaking and entering statute provides that a breaking may be accomplished by "breaking or dismantling any part of the . . . dwelling or other structure," the phrase "any part of" pertains only to breaking or dismantling, not to the protected spaces. Section 30-14-8(A); *see Hale v. Basin Motor Co.*, 1990-NMSC-068, ¶ 9, 110 N.M. 314, 795 P.2d 1006 ("Relative and qualifying words, phrases, and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to or including others more remote." (alterations, internal quotation marks, and citation omitted)). We conclude that the plain language of the breaking and entering statute sheds little light on the Legislature's intent as to the issue before us: whether the space between a window screen and an open window is protected space under the statute.

{10} We next examine the purposes of the breaking and entering statute to determine whether the conduct here falls within the harm the Legislature sought to prevent. Because "New Mexico's breaking-and-entering statute is itself grounded in common law burglary[,]" cases interpreting the burglary statute inform our analysis. *State v. Rubio*, 1999-NMCA-018, ¶ 13, 126 N.M. 579, 973 P.2d 256; *see* UJI 14-1410, comm. cmt. ("New Mexico's breaking and entering statute is a type of statutory burglary."). Like burglary, "the purpose of New Mexico's breaking-and-entering statute is . . . to protect possessory rights." *Rubio*, 1999-NMCA-018, ¶ 15; *Muqqddin*, 2012-NMSC-029, ¶ 40 (stating that burglary protects possessory rights). Those possessory rights, however, "go beyond the mere right to physical possession of an object" and include the right to exclude, privacy interests, and "security of habitation." *Muqqddin*, 2012-NMSC-029, ¶¶ 40-43. "It 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.

{11} "[I]n order for an area to be considered prohibited space under [the

burglary statute], it must have some sort of enclosure." *Id.* ¶ 44 (citing *State v. Foulenfont*, 1995-NMCA-028, ¶¶ 10-11, 119 N.M. 788, 895 P.2d 1329). "[I]t is this enclosed space that the Legislature intended to protect." *Id.* The burglary statute defines prohibited space as "any vehicle, watercraft, aircraft, dwelling or other structure, movable or immovable[.]" Section 30-16-3. The breaking and entering statute includes the same list. Section 30-14-8(A). In both statutes, the spaces in which possessory, privacy, and security interests are implicated are delineated by an enclosure. *See Muqqddin*, 2012-NMSC-029, ¶ 44.

{12} Our question thus becomes whether a window screen forms an enclosure such that penetration beyond the screen is sufficient for entry of a structure. "[I]n general, the roof, walls, doors, and windows constitute parts of a building's outer boundary, the penetration of which is sufficient for entry." *People v. Valencia*, 46 P.3d 920, 925 (Cal. 2002), *disapproved of by People v. Yarbrough*, 281 P.3d 68 (Cal. 2012)[1]; *see Muqqddin*, 2012-NMSC-029, ¶ 48 (stating that "[a] window, by its nature, creates an opening in an enclosure."). But other types of boundaries might also suffice because "[i]t is the nature of the enclosure that creates [prohibited space]." *Id.* ¶ 45. "'[T]he proper question is whether the nature of a structure's composition is such that a reasonable person would expect some protection from unauthorized intrusions.' " *Id.* (quoting *People v. Nible*, 247 Cal. Rptr. 396, 399 (Ct. App. 1988), *holding modified by Valencia*, 46 P.3d at 924).

[1]In *Yarbrough*, the California Supreme Court "disapprove[d] as ill-considered dictum" a statement in *Valencia* that an "unenclosed balcony" was not encompassed within the "reasonable belief test." *Yarbrough*, 281 P.3d at 71.

{13} Relying in part on this test, the *Muqqddin* Court concluded that "a vehicle's gas tank and wheel wells do not constitute protected space under [the burglary statute]." *Id.* ¶ 12. No New Mexico court since *Muqqddin* has used this test to address the legal question here. However, in *Nible*, the case from which the test was derived, the California Court of Appeals stated that "the focus of the question whether the penetration of a [partially open] window screen constitutes a burglarious entry must be on whether a reasonable person would believe a window screen provides some protection against unauthorized intrusions." 247 Cal. Rptr. at 399. It found that the answer to this question "is unequivocally in the affirmative." *Id.* It went on to state that

> the screen door [or window] is not to be considered as a mere protection against flies, but rather as a permanent part of the dwelling. The holdings [in case law] proceed, it would seem, on the grounds that the screen door [or window] is a part of the house on which the occupants rely for protection and that to open such a door [or window] is a violation of the security of the dwelling house which is the peculiar gravamen of a burglarious breaking.

Id. (second, fourth, and fifth alterations in original) (internal quotation marks and citation omitted). It concluded that "when a screen which forms the outer barrier of a protected structure is penetrated, an entry has been made for purposes of the burglary statute." *Id.* We note that the *Nible* court found this analysis "especially apposite to the [facts in that] case, where the window screen was affixed in a slot in the frame with no handle or other device to facilitate its removal from the exterior of the

apartment." *Id.* Here, Stamper testified that removal of the screen required use of a screwdriver or knife and that it was "not . . . a snap" to remove. In addition, in *Nible*, like here, the window behind the screen was partially open and the residence's occupants were inside. *See id.* at 397.

{14} Similarly, in *Valencia*, the Supreme Court of California relied on a slightly different formulation of the test[2] to conclude that "penetration into the area behind a window screen amounts to an entry of a building within the meaning of the burglary statute even when the window itself is closed and is not penetrated." *Valencia*, 46 P.3d at 927. The Court stated:

> [A] window screen is clearly part of the outer boundary of a building for purposes of burglary. A reasonable person certainly would believe that a window screen enclosed an area into which a member of the general public could not pass without authorization. . . . [W]indow screens, which announce that intrusion is unauthorized, do not limit their message to flies but extend it to burglars as well.

Id.

{15} Other courts examining similar circumstances have reached similar conclusions. For example, in *Commonwealth v. Burke*, the Massachusetts Supreme Court stated that "[it could] find no support at common law for the view . . . that . . . an entry must be accompanied by a removal of all remaining barriers (i.e., the inner window) for it to be actionable" and held that "the more common view is that outer window coverings should be treated as part of the dwelling itself, and any entry beyond them, no matter if further impeded by additional window coverings, should be punished." 467 N.E.2d 846, 849 (Mass. 1984). It concluded that, therefore, "[e]vidence that the defendant placed his hand between the broken storm window and the inner window would be sufficient to warrant a finding of an entry under [the Massachusetts burglary statute]." *Id.* The South Carolina Supreme Court held in *State v. Chappell* that a screen covering a window "was more than a mere protection against flies and mosquitoes; it was an enclosing part of the dwelling house" and that where the defendant "tor[e] away" the corner of the screen and "inserted his hand through the hole thus made and raised the window sash[, t]his was not only a breaking, but was an entry sufficient in law to constitute burglary[.]" 193 S.E. 924, 925 (S.C. 1937)[3]; *cf. State v. Kindred*, 307 P.3d 1038, 1040-41 (Ariz. Ct. App. 2013) (examining "whether the 'external boundar[y]' of the structure, as that phrase is used in [Section 13-1501(3) of Arizona's burglary statute], is the exterior of

[2]Whereas the *Nible* court stated the test as "whether a reasonable person would believe a window screen provides some protection against unauthorized intrusions[,]" 247 Cal. Rptr. at 399, the *Valencia* Court stated the test as "whether a reasonable person would believe that the element of the building in question enclosed an area into which a member of the general public could not pass without authorization." 46 P.3d at 926.

[3]The dissent argues that *Chappell* does not support our conclusion. But the facts in that case are very similar to those here: the defendant tore a screen and reached through to raise the window sash. *Id.* at 925. There is no indication in that case that any part of the defendant's body went through the window itself. *Id.* Thus, like here, the requisite entry was accomplished by entering the space between the screen and (open) window.

the door, or whether a person or instrument must penetrate past the door in order to enter the structure" and holding that "a person must penetrate whatever forms a structure's outer boundary—a door, window, or wall, for example—but need not go further to have entered the structure.")[4]; *Barrick v. State*, 119 N.E.2d 550, 553 (Ind. 1954) (stating that a "breaking" sufficient for burglary "includes the putting aside of any material part of the building *intended as a security against invasion, such as removing a window screen*" (emphasis added))[5]; *State v. Gatewood*, 221 P.2d 392, 396 (Kan. 1950) (holding that there was an entry where the defendant had broken a screen door even though he had not opened the wooden door behind it).[6]

[4]Although we agree with the dissent that *Kindred* is distinguishable because it relies on Arizona's burglary statute, which requires penetration of any "external boundary," we disagree that the *Kindred* court "found no other authority," ¶ 40, for its conclusion that "insertion of [a] pry bar into the door jamb constitutes entry as contemplated by" that statute. *Id.* at 1041. Indeed, the court cited to five cases, including *Burke*, in support of its holding. *Id.*

[5]In *Barrick*, the court analyzed only whether the rattling of the doors constituted a "breaking" sufficient for attempted burglary if such a crime existed in Indiana. *Id.* at 553 n.1. It did not analyze whether an entry occurred. It is cited here for its recognition that a window screen serves as "security against invasion." *Id.*

[6]As stated in the dissent, the facts in *Gatewood* included entry into an enclosed porch attached to the house, which the court held was an entry sufficient for burglary. 221 P.2d at 394. "The entrance door to the screen porch, however, was not the only 'outer door' the appellant broke" in that case. *Id.* at 395. The part of the opinion we rely on has to do with whether entry was accomplished where another screen door was "not only broken but a hook which fastened the door was lifted and the screen door was opened" but the wooden door behind it was not opened. *Id.* at 395-96. The court concluded that "[the defendant] did enter his hand and an arm, at least partially, when he unsuccessfully attempted to unlock the inside door with a key." *Id.* Thus, this portion of *Gatewood* supports our conclusion.

{16} Defendant points to cases using the term "interior" in their analyses of "entry" to support his contention that the breaking and entering statute requires some further penetration into the structure than occurred here. For example, in *State v. Sorrelhorse*, this Court stated that "the term 'entry' in the criminal code requires only the slightest penetration of an interior space." 2011-NMCA-095, ¶ 7, 150 N.M. 536, 263 P.3d 313. Similarly, in *State v. Reynolds*, the Court noted that "[a]ny penetration, however slight, of the interior space is sufficient [to constitute entry]." 1990-NMCA-122, ¶ 37, 111 N.M. 263, 804 P.2d 1082 (second alteration in original) (internal quotation marks and citation omitted). However, neither of these cases was using the term to address the question presented here. Rather, both *Sorrelhorse* and *Reynolds* were concerned with the extent to which the defendant penetrated the prohibited space. *See Sorrelhorse*, 2011-NMCA-095, ¶¶ 6-8; *Reynolds*, 1990-NMCA-122, ¶ 37.

{17} The question here, in contrast, has to do with what *defines* the prohibited space. "[T]he established rule [is] that cases are not authority for propositions not considered[.]" *Padilla v. State Farm Mut. Auto. Ins. Co.*, 2002-NMCA-001, ¶ 10, 131 N.M. 419, 38 P.3d 187 (internal quotation marks and citation omitted), *aff'd but criticized by*, 2003-NMSC-011, 133 N.M. 661, 68 P.3d 901. Thus, we decline to ascribe undue significance to use of the word "interior" in those cases.

{18} Similarly, the dissent cites to out-of-state cases for the proposition that an "entry" requires a crossing of a structure's threshold. *See* ¶ 41. Several of these are directly on point. For example, in *State v. Pigques*, 310 S.W.2d 942, 944 (Mo. 1958), the defendant "had entered into the space between [some] outer wooden doors and [an] inner wire-mesh

door." The court thus considered "whether his entry into that space would constitute an entry into the building within the meaning of [Missouri's burglary statute]." *Id.* Relying in part on the principle that entry requires a breach of the last barrier to the interior of the structure, the court held that the defendant had not completed a burglary but instead could be convicted only of attempted burglary. *Id.* at 945-46. In *State v. McCall*, on which *Pigques* relied, the Alabama Supreme Court considered whether there was an entry where the defendant "wrested open the window shutters, and his hands protruded beyond the line made by the shutters when shut, . . . notwithstanding the sash remained down and the glass was unbroken." 4 Ala. 643, 644 (1843) (internal quotation marks and citation omitted). The court concluded that

> [i]t cannot be, that the common security of the dwelling house is violated by breaking one of the shutters of a door or window which has several. True, it weakens the security which the mansion is supposed to afford, and renders the breach more easy; but as additional force will be necessary before an entry can be effected, there can, under such circumstances, be no burglary committed.

Id. at 646. Thus, the court held that there was no burglary because "there was nothing but a breach of the blinds, and no entry beyond the sash window [and t]he threshold of the window had not been passed[.]" *Id.*

{19} Interestingly, another case relied on by the dissent takes a different approach. In *Miller v. State*, the defendant had cut a hole in the roof of a store, climbed into the attic, and cut a hole in the ceiling, but had not entered the interior of the store itself. 187 So. 2d 51, 52 (Fla. Dist. Ct. App. 1966). The defendant "contend[ed] that breaking of the roof and the subsequent breaking of the ceiling [wa]s not enough to constitute entry." *Id.* The court stated that it "would be inclined to agree with [the defendant] if it were not for the fact that there [wa]s evidence in the record that there was an airspace between the roof and the ceiling. . . . [I]t is reasonable to conclude that it would be necessary for the [defendant] to intrude himself, or some part of himself, into the hole that he had created in the roof in order to cut a hole in the ceiling on the other side of the airspace." *Id.* 52-53. Hence, in *Miller*, entry beyond the last barrier into the store (the ceiling) was not required to effect an entry. In other words, an entry into the space between the outer barrier and inner barrier was sufficient for a breaking and entering charge. *Id.* at 53.

{20} We recognize that the *Pigques* and *McCall* courts came to a conclusion different from ours and from the conclusions reached in *Nible*, *Valencia*, *Burke*, and *Chappell*. Faced with two competing analyses, we must choose the path most consonant with the purpose of our statute and Supreme Court precedent. We believe we have done so. Based on the test stated in *Muqqddin* and the reasoning of our sister states' courts, we conclude that a reasonable person would expect the window screen here to afford some protection from unauthorized intrusions. *See Muqqddin*, 2012-NMSC-029, ¶ 45. Consequently, we conclude that if any part of Defendant entered the space between the screen and the window, he "entered" the structure for purposes of the breaking and entering statute.

{21} To the extent that Defendant argues that our holding will produce absurd results because "[t]his interpretation would convict of

[b]reaking and [e]ntering any person who opens a screen door to knock on the door itself[,]" we disagree because under the "reasonable belief test" it would be unreasonable to believe that an unlocked screen door was a barrier "a member of the general public could not pass without authorization." *Valencia*, 46 P.3d at 926.

{22} In *Muqqddin*, the Supreme Court cautioned lower courts against "expand[ing] . . . the reach of . . . statute[s] . . . without any parallel change in the statute." 2012-NMSC-029, ¶¶ 1, 49. Our conclusion does not do so. In *Muqqddin*, the gas tank and wheel well were not enclosed spaces in which "things are stored and personal items can be kept private." *Id.* ¶ 61. In contrast, a home is a structure the Legislature clearly intended to protect. *See id.* ¶ 39 (stating that the common-law purpose of burglary—security of the home—still applies). Unlike the unenclosed parts of vehicles in *Muqqddin*, the screen here was no less a component of the home's enclosure than the walls, windows, or doors. Contrary to the dissent's assertion, our analysis does not depend on the perimeter or "close" concept that was rejected in *Muqqddin. Id.* ¶ 46. In rejecting that concept, the *Muqqddin* Court was specifically rejecting the idea of an "imaginary plane created by some portion of a structure that is by its nature open to the elements." *Id.* Rather, our analysis is based on whether the window screen—a real, non-imaginary device—provided protection against intrusion and enclosed protected space. *See id.* ¶ 45. Because we conclude that it did, Defendant's placement of his hands behind the window screen was an intrusion into the structure's enclosure and infringed on Stamper's possessory rights. Such conduct is associated with the "feeling of violation and vulnerability" that the Legislature sought to prevent with the breaking and entering statute. *See id.* ¶ 43.

There is Sufficient Evidence to Support the Jury's Conclusion That Defendant "Entered" the Structure

{23} We turn next to Defendant's second argument that there was insufficient evidence that Defendant intruded into the structure at all. "In reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict." *State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711, 998 P.2d 176. After viewing the evidence in this light, we examine 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).

{24} To convict Defendant, the jury had to find that (1) "the defendant entered [Stamper's residence] without permission; the least intrusion constitutes an entry;" and (2) "the entry was obtained by the dismantling of a window screen[.]" *See* UJI 14-1410. As we have discussed, because the window screen was part of the enclosure around the home, any intrusion into the space between the screen and window constitutes an "entry" for purposes of the breaking and entering statute. *See Sorrelhorse*, 2011-NMCA-095, ¶ 7 ("[T]he term 'entry' in the criminal code requires only the slightest penetration of an interior space."). Stamper testified that "[she] saw this man, and he had the screen halfway off the window, and he had his hand on each side of the screen, and he was twisting it and turning it and looking down. . . . He was trying to get the screen off." She described

Defendant's fingers as being "over the screen." On redirect, she agreed with the State that Defendant's fingers "were then in that area between the window and the screen[.]" Viewed in the light most favorable to the verdict, this testimony is sufficient to permit the jury to conclude that Defendant had intruded into the protected space between the screen and window.

CONCLUSION

{25} For the foregoing reasons, we affirm.

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

MICHAEL D. BUSTAMANTE, Judge

I CONCUR:

JAMES J. WECHSLER, Judge

RODERICK T. KENNEDY, Judge (dissenting).

KENNEDY, Judge (dissenting).

{27} This Opinion unnecessarily expands the physical space into which "entry" must occur for breaking and entering exactly as we have recently been warned against pursuing by our Supreme Court. By defining "entry" through a solely judicial construction of the space to which it applies, the Opinion needlessly creates new definition for crimes that are already adequately defined. This Opinion for the first time establishes the outermost perimeter of a structure's space as what defines the scope of the word "entry" for breaking and entering and, presumably, for burglary as well. [Op. ¶ 18]. The Opinion, correctly, in my view, sees ambiguity in the central premise of "what delimits a structure." [Op. ¶ 9] It recognizes that the Arizona legislature has explicitly defined "entry" as an "intrusion . . . inside the external boundaries of a structure or unit of real property" and that Texas's statute prohibits entry of a building "or any portion of a building." *Id.* California accomplished expanding an intrusion within the exterior plane of a building judicially, an accomplishment the Majority now seeks to duplicate. I read *Muqqddin* as a restriction on what the Majority seeks to accomplish in this case. Accordingly, I do not believe *Muqqddin*'s citation to *Valencia* and *Nible* was intended to encourage our changing the use of the word "entry" by expanding the boundary of space to be entered in a way they took pains to criticize. *Muqqddin*, 2012-NMSC-029, ¶ 45. The Supreme Court undid our long-standing tendency to expand the spaces covered by breaking and entering and burglary; embarking again here on that path is unwise and unnecessary. With regard to *Valencia* and *Nible*, our Supreme Court specifically stated no more than that "a burglary can be committed through an open window[,]" that I see as protecting from a penetration of interior protected space, not the outermost plane of structure. *Muqqddin*, 2012-NMSC-029, ¶ 48.

{28} Statutes are strictly construed against the state, and we are to resolve doubt about their construction in favor of the rule of lenity. *State v. Bybee*, 1989-NMCA- 071, ¶ 12, 109 N.M. 44, 781 P.2d 316. Criminal statutes may not be made applicable beyond their intended scope if the legislative proscription is plain. *Id.* "We are not to enlarge or amend [a] statute by judicial fiat." *Id.* ¶ 15. "The Legislature is free to define the prohibited space of burglary to include any part of almost anything. But absent a clearer intent to do so,

we should not ourselves do that which the Legislature has declined to do. It is for the Legislature alone to define statutory criminal acts, and when it does not do so clearly, the rule of lenity compels judicial restraint." *Muqqddin*, 2012-NMSC-029, ¶ 37. In *Muqqddin*, as here, the acts in that case constituting the crime were "already punished under our statutes as other, lesser crimes." *Id.* ¶ 50 (holding that judicially expanding the legal definition of a crime to include behavior already punished as other, lesser crimes transgresses legislative intent). We recently took this conservative approach instructed by *Muqqddin* to heart, overruling the holding in *State v. Tower* to hold that entry into a commercial establishment in violation of a no trespass notice was not a predicate "entry" sufficient to fulfill the element of commercial burglary. 2002-NMCA-109, ¶ 9, 133 N.M. 32, 59 P.3d 1264, *overruled on other grounds by State v. Archuleta*, 2015-NMCA-___, ¶ 1, ___ P.3d ___ (No. 32,794, Oct. 27, 2014). We should be so restrained in this case.

Penetration of Mere Outer Perimeters as "Entry" Was Rejected in *Muqqddin*

{29} In *Muqqddin*, our Supreme Court reversed a tortured construction of "entry" by pointing out that this Court, over a period of decades, had engaged in an "unprecedented . . . expansion" of the reach of the burglary statute without there being corresponding legislative changes. 2012-NMSC-029, ¶ 1. Our holding that "[a]ny penetration of a vehicle's perimeter is . . . a penetration of the vehicle itself," *id.* ¶ 10 (internal quotation marks and citation omitted), led in the next case to our holding that the "removal of a vehicle's wheels is sufficient to constitute burglary." *State v. Dominguez-Meraz*, No. 30,832, mem. op. *1 (N.M. Ct. App. Sept. 15, 2010) (non-precedential). Relying on previous cases later criticized and overruled by our Supreme Court for expanding the nature of burglary,[7] we again held that " 'entry' in the criminal code requires only the slightest penetration of an interior space." *Sorrelhorse*, 2011-NMCA-095, ¶ 7.

{30} I disagree with the Majority's assessment of *Sorrelhorse* as not "address[ing] the question presented here" because it concerns "the extent to which the defendant penetrated the prohibited space." [Op. ¶ 16] *Sorrelhorse* specifically found "entry" into the "interior space" from the defendant's foot being forced inside the door of an apartment and then forcing its occupants even farther back inside. *Id.* By holding "entry" to be into truly interior space, *Sorrelhorse* represents the direction we should follow. Who can dispute that the defendant "entered" the prohibited space by crossing the threshold of the apartment? *Reynolds* was implicitly overruled by *Muqqddin* not on the extent of penetration, which was a hand's depth, but through questions about the validity of what constituted a prohibited structure and because the Legislature did not define a vehicle by its parts. *Muqqddin*, 2012-NMSC-029, ¶¶ 22, 37. For this reason, incorporating a boundary that resembles Texas's "any part thereof" should be avoided.

{31} The Supreme Court skeptically recognized that some states include parts of "almost anything" in burglary statutes

[7] *Reynolds*, 1990-NMCA-122, ¶ 37 (noting that any penetration of the interior space, however slight, is sufficient to constitute "entry" within the meaning of the burglary statute); *State v. Tixier*, 1976-NMCA-054, ¶ 11, 89 N.M. 297, 551 P.2d 987 (holding that evidence that an unidentified instrument penetrated one-half inch inside a building is enough to effectuate an entry under the burglary statute).

involving vehicles, but chose to "disagree with the notion that any penetration of a vehicle's perimeter constitutes a penetration of the vehicle itself." *Id.* ¶ 46. *Valencia* and *Nible*, relied upon by the Majority in this case, mirror our previous criticized cases when they "show [that] the requirement of entry is not difficult to satisfy; the slightest penetration will suffice."[8] *Magness v. Super. Ct.*, 278 P.3d 259, 263 (Cal. 2012) (construing *Valencia* and *Nible*). *Magness* specifically operates under that boundary but, in *Valencia*, the defendant damaged the window behind the screen in his attempt to open it. The California Supreme Court in *Magness* made the "observation that no burglary would have occurred in *Valencia* . . . had the defendant removed the window screen but not penetrated into the area behind it[.] *Magness*, 278 P.3d at 265. Wrapping fingers around the screen's frame alone may not be sufficient penetration under *Magness*. On the issue of what constitutes entry, *Magness* is construction of *Valencia*. "In sum, something that is *outside* must go *inside* for an entry to occur." *Id.* at 264. I am not convinced that *Valencia*'s and *Nible*'s path is persuasive.

{32} The expansion of the nature of structures that could be burgled resulted in our Court's having "gone astray" from the intent of both the common law and statutory roots of burglary according to our Supreme Court. We were thus criticized for creating a crime that enhanced "any crime committed in any type of structure or vehicle, as opposed to . . . punishment for a harmful entry." *Muqqddin*, 2012-NMSC-029, ¶ 3. We might do well to follow the Iowa Supreme Court, which restrained itself from enlarging the inclusion of curtilage, including front stoops and driveways into the definition of "occupied structure" because the legislature had not previously done so, stating: "We do not construe statutes so as to render a part of it superfluous, but presume our legislature included every part of the statute for a purpose and intended each part to be given effect." *State v. Pace*, 602 N.W.2d 764, 771 (Iowa 1999). Iowa sets a better example for us than California. The facts should fit the law. The law should not move to encompass the facts. From the progression through our vehicular burglary cases, I conclude that "entry" is not penetration of a perimeter to the slightest degree, and we should avoid expanding the protected area of a structure's interior in the absence of legislative direction.

The Fact That Defendant's Conduct Is Adequately Proscribed By Other Statutes Should Also Require Our Forebearance

{33} *Muqqddin* also cautions us against blurring the line between similar, but different, offenses with such expansions. 2012-NMSC-029, ¶ 50. It pointed out that the act of perforating a gas tank for its contents was more likely the misdemeanor of tampering with a motor vehicle. *Id.* ¶ 51.

{34} Burglary traditionally entailed a home invasion, and the crime has evolved to "protect occupants against the terror and violence that can occur as a result of such an entry." *Id.* ¶ 3. The privacy interest protected by burglary statutes is related to the terror of having an intruder inside of one's home, into which the entry is fully accomplished. This Opinion recognizes this privacy interest and that Stamper's reaction

[8]In subsequent cases in California, even this has been expanded to support a conviction in which a screen was cut from its frame without any further entry. *People v. Hedgecock*, D065977, 2015 WL 570299, at **2-3 (Cal. Ct. App. 2015) (unreported case).

to Defendant's actions is squarely within these senses of invasion, terror, and concern for possible personal violence that the burglary statute is designed to address. It is there the degree of "entry" falls short. [Op. ¶¶ 3, 10]. Certainly, Defendant *attempted* an entry. But, the California Supreme Court stated, more specifically, "[t]he laws are primarily designed, then, not to deter the trespass and the intended crime, which are prohibited by other laws, so much as to forestall the germination of a situation dangerous to personal safety." *Magness*, 278 P.3d at 261 (internal quotation marks and citation omitted). This case falls short of that standard. Breaking and entering differs from burglary because it protects a lesser interest than burglary, characterized by its inclusion in Article 14 of Chapter 30 of our statutes entitled "Trespass." *Muqqddin* counsels us to have a disinclination to expand a statute when others are adequate to the purpose at hand. 2012-NMSC-029, ¶ 40 (distinguishing burglary as protecting rights that exist beyond "other laws" intended to deter trespass and theft). Attempt is the taking an act in furtherance of an intention to commit a crime. NMSA 1978, § 30-28-1 (1963). Defendant did not complete the act of entry and, given his likely intent and location of his crime, it is attempted burglary, not breaking and entering, that accounts for what the Majority says protects a heightened interest against "invasion of privacy" and security to justify their new boundary. [Op. ¶ 10]. If the Majority follows the conservative approach given us by *Muqqddin*, then Defendant here should be criminally responsible for attempted residential burglary or, perhaps, attempted breaking and entering, criminal trespass, and criminal damage. The distinction is notable, and the existing criminal statutes are fully adequate as written.

Defining New Ambiguous Structures Damages the Plain Meaning of "Entry"

{35} The Majority concedes that the "any part of" a structure language in the breaking and entering statute applies to the "breaking" portion of the statute and not the "entry." [Op. ¶ 9]. The Opinion seems desirous of now extending "entry" to any penetration of "some sort of enclosure." [Op. ¶ 11]. To do so successfully requires steps not yet legislated: (1) "structure" (protected space) must be further defined by its outermost perimeter; and (2) entry must be found either as a breaking of a perimeter, however slight, without clear entry of protected interior space, or an actual crossing of the threshold to be present inside of the structure. In *Muqqddin*, our Supreme Court rejected judicial approach equating entry into "any portion" of a structure with entry into the structure itself. 2012-NMSC-029, ¶ 38. Thus, I urge that the Majority's holding inappropriately expands the protected area to "any portion" rather than the interior of the structure by its holding that breaking the outer perimeter and, no more, constituted "entry."

{36} *Muqqddin* also cautions us that the plain meaning rule applies to keep the word "entry" free of expansion by expanding those things that might be entered, since the Legislature's existing statutes work without doing so, and judicial restraint forecloses our meddling in such an instance. *Id.* ¶ 38. Our Supreme Court rejected law from other jurisdictions, including Texas, that allow entry to be found when "the defendant crosses some imaginary plane" and concluded that "the concept of an imaginary plane is ambiguous, creating more questions than it answers and [is] subject to prosecutorial abuse." *Id.* ¶¶ 46, 47. Our Supreme Court had no problem, however, finding that entry could be

accomplished "through an open window." *Id.* ¶ 48. The Opinion in this case consequently begs more questions than it answers. *Muqqddin* criticized including in "entry" the acts of passing a hand over a flatbed truck to break the plane of its outer edge and stealing a shutter attached to a house that required no entry, but was within the line between eaves and foundation to therefore "break[] the close." *Id.* ¶ 47. Here, the Opinion concludes that "the plain language of the breaking and entering statute sheds little light on the Legislature's intent as to the issue before us[.] . . . [W]hether the space between a window screen and an open window is protected space" under the statute. [Op. ¶ 9]. *State v. Kindred*, based on Arizona's statute that includes the plane of a building's outer perimeter, acknowledged that their statute "differs in several ways from the common law[.]" 307 P.3d 1038, 1041 (Ariz. Ct. App. 2013). The *Kindred* Court also commented that it had found "no authority . . . expressly discussing whether that threshold has any particular depth and . . . whether entry into the threshold, without more, constitutes entry into the structure." *Id.* The Arizona *legislature* made the threshold a plane and required no further entry than crossing it.

{37} Our Legislature is as apt as any in Texas and Arizona to expand what our Supreme Court counsels us should be left to them alone. In an example from *Magness* of how parsing "entry" can beggar judicial interpretation, an intruder who approached and opened an unlocked sliding glass door on a house's patio would displace air inside, but unless a part of him or something he carried "crossed the door's threshold," no burglary would occur. 278 P.3d at 264. He could be "charged with attempted burglary, but not with a completed burglary." *Id.* The case was silent about the effect if the door handle were within the outer perimeter of the door frame, or a finger was inside the outer edge of the door, but not inside the full width of the threshold. Such parsing is best not reserved by courts. 2012-NMSC-029, ¶ 47. Because Defendant did not enter Stamper's house, he is, depending on what might be proven of his intent, guilty of no more than an attempt to commit either breaking and entering or burglary, along with the other crimes he most certainly committed, involving trespass or vandalism.

The Case Law Does Not Follow *Valencia* and *Nible*

{38} I also conclude that *Muqqddin*'s citation to *Valencia* and *Nible* was for, as it stated, no more than pointing out that a structure's composition relates to an expectation of privacy. Nowhere did *Muqqddin* attempt to expand that space using these cases, and the remainder of the Supreme Court's discussion, I believe, favors my view. The Majority places reliance on *Valencia*, in which the California Supreme Court concluded that, because a window screen is part of the outer boundary of a building, the area behind the window screen is inside the premises, and entry that is just barely inside the premises is sufficient.[9] *Valencia* has been cited only three times by other states—Colorado, Hawaii, and Nevada—none of which utilize its holding expanding

[9] *Valencia* itself frequently conflated breaking with entering in its review of precedent. Many cases cited in *Valencia*, as supporting the view that penetration of a screen without entering the window behind it are not particularly apposite, since the defendants in *Bowers*, *Gatewood*, *Jenkins*, and *Conners* involved actual entry by the defendant of the inside of the structure. *Ortega* and *Woods* relied on Texas's "any portion" statute. *Crease* was on point, while *Mazer* inferred intent from cutting a screen, but entry was not mentioned.

boundaries to outside perimeters. Colorado used *Valencia* in *People v. Gonyea*,[10] where the defendant reached through the broken window to open a door. In Hawaii, where no statutory definition of "entry" existed, the Supreme Court vacated a conviction for the lack of its definition in a jury instruction. *Valencia* was mentioned only in the context of whether a stream of mace an angry father sprayed into a car over the threshold of the car's window constituted a felonious "entry."[11] In Nevada, *Valencia* was mentioned by way of evaluating probable cause for a charge based on circumstantial evidence. *Jones v. State*, 238 P.3d 827 (Nev. 2008). The older *Nible* case has been mentioned in other states for other propositions than entry past the outermost perimeter. In Colorado, mentioned above, and Ohio, where the boundary issue was mentioned, there was actual insertion of the defendant's arm through a window. *State v. McIntosh*, 549 N.E.2d 1191 (Ohio 1990). *Burke*, from Massachusetts, is squarely with *Valencia*. Other cases are not nearly as supportive.

{39} *Chappell*, cited by the Majority, involved the defendant reaching through the screen to raise the window inside. [Op. ¶ 15] *Kindred* depends on Arizona's specific statute and found no other authority for the boundary it supported. The Majority, citing two of the cases footnoted in *Valencia*, is also unavailing. *Barrick* stated that the defendant rattling doors was no entry, but that he would have been guilty of attempted burglary if Indiana had such a statute. 119 N.E.2d at 553. *Gatewood* actually held that the defendant's full entry into an enclosed porch attached to the house and the space between the screen door and the inner door were both a sufficient entry into the dwelling proper. 221 P.2d at 394.

{40} Many other states have not expanded boundaries outward. Iowa and Hawaii, mentioned above, declined to undertake a judicial expansion of their statute. Most states seem to depend on crossing a "threshold" to find entry. Charles E. Torcia, *Wharton's Criminal Law* § 322 (15th ed. 2014) ("There is an entry when any part of the defendant's person passes the line of the threshold."). Many states have determined that passing the "line of the threshold" with all or part of the body into the *interior* perimeter of the structure is entry by the defendant. *See State v. Liberty*, 280 A.2d 805, 808 (Me. 1971) (requiring "intrusion into the building of any part of the body"); *Price v. Commonwealth*, 112 S.W. 855, 855 (Ky. Ct. App. 1908) (holding that breaking without entry, however slight, is not burglary); *State v. Peterson*, 881 P.2d 965, 969 (Utah Ct. App. 1994) ("A simple passage by any part of the body over the door's threshold can amount to entry[.]"). Intrusion into the building is required in New Jersey, Missouri, Florida, Louisiana, Illinois, Alabama, and North Carolina. *See State v. O'Leary*, 107 A.2d 13, 15 (N.J. Super. Ct. 1954); *State v. Pigques*, 310 S.W.2d 942, 945 (Mo. 1958) ("Literally, 'entry' is the act of going into the place after a breach has been effected[.]"); *Miller v. State*, 187 So. 2d 51, 53 (Fla. Dist. Ct. App. 1966); *State v. Conner*, 2008-0473 (La. App. 4 Cir. 10/1/08); 996 So. 2d 564, 568 (holding that "entry" requires passing the line of the threshold and "intrud[ing], even momentarily, into the structure"); *People v. Davis*, 279 N.E.2d 179, 181 (Ill. App. Ct. 1972) (requiring "intru[sion] into the building"); *State v. McCall*, 4 Ala. 643 (Ala. 1843) (holding that reaching through shutters but not the window within

[10] 195 P.3d 1171, 1174 (Colo. App. 2008).

[11] *State v. Faria*, 60 P.3d 333, 340 (Haw. 2002).

was not "entry"); *State v. Watkins*, 720 S.E.2d 844, 850 (N.C. Ct. App. 2012) (holding that no entry inside residence when only instrument that broke window crossed threshold to be "inside the residence").

CONCLUSION

{41} I conclude that Defendant's actions did not sufficiently "enter" Stamper's house for purposes of breaking and entering. I believe that his conduct is adequately covered by other statutes and that the cause of justice would not suffer if he were convicted of the proper crime(s). Breaking and entering and attempted residential burglary are fourth-degree felonies; the legislated punishment is the same for both.[12] Attempted breaking and entering together with criminal trespass and criminal damage to the screen would be an adequate combination to accurately punish him. When facts fit snugly within existing statutes, bending another statute to fit stretches the law's reach past its legislative intent. *Muqqddin*, 2012-NMSC-029. ¶¶ 50-51.

{42} I would prefer that this Court decline to expand the extent of protected spaces. The Majority concludes early on that the language of the statute does little to help us divine legislative intent regarding whether the space between the screen and window is prohibited space. [Op. ¶ 9]. The Opinion recognizes that our statute does not state that entry into "any part of a structure will suffice." [*Id.*] There is no "plain meaning" in our statute to define the space protected from "entry" and that ambiguity requires our exercising the rule of lenity to Defendant's benefit in this case. Our previous attempts to expand the reach of protected space have been criticized. Granted, California and Massachusetts in *Valencia* and *Burke* have held in accord with where this Opinion takes us. *Kindred* is based upon the Arizona statute already distinguished from ours, but bases the crime on intruding into a boundary, as opposed to a structure, which I would regard as just the position we took in *Rodriguez* that was rejected by our Supreme Court in *Muqqddin*. Other out of state cases cited by the Majority are not so illuminating. I would prefer, in light of *Muqqddin*, to wait for it to come from somewhere else.

{43} I therefore most respectfully dissent.

RODERICK T. KENNEDY, Judge

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMSC-021

Filing Date: May 4, 2015

Docket No. 34,120

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

v.

ABRAHAM BACA,

Defendant-Respondent.

[12]Section 30-14-8(B) (stating that breaking and entering is a fourth-degree felony); § 30-16-3(A) (stating that burglary of a dwelling is a third-degree felony); § 30-28-1(C) (attempting to commit a third-degree felony is a fourth-degree felony).

Hector H. Balderas, Attorney General
Nicole Beder, Assistant Attorney General
James W. Grayson, Assistant Attorney General
Donna Bevacqua-Young, Assistant Attorney General
Santa Fe, NM

for Petitioner

Ben A. Ortega
Albuquerque, NM

for Respondent

The Law Office of Lucero & Howard, L.L.C.
Leon F. Howard III
Albuquerque, NM

Laura Louise Schauer Ives
Albuquerque, NM

for Amicus Curiae American Civil Liberties Union

OPINION

DANIELS, Justice.

{1} State and federal constitutional protections against twice being placed in jeopardy for the same criminal offense preclude a second prosecution after a defendant has been acquitted but do not necessarily preclude reprosecution after a procedural dismissal, particularly one made at the request of the accused. Even where a verbatim record is available, determining the true nature of the termination in the first proceeding is not always an easy task, requiring judicial sensitivity to both the defendant's double jeopardy protections and the public interest in one full and fair opportunity to prosecute a criminal case. In cases where there is a limited record for review, the task is even more difficult.

{2} In this case, we affirm the district court's determination that a nonrecord magistrate court's termination of a DWI trial for a filing defect, on motion of the defendant and before the State had completed presenting evidence in its case in chief, was a procedural dismissal rather than an acquittal on the merits. We therefore affirm the district court's ruling that the State was not constitutionally barred from further prosecution.

I. BACKGROUND

{3} Defendant Abraham Baca, at the time a New Mexico State Police officer, was arrested by Sergeant Martin Trujillo for aggravated DWI and driving left of center of a roadway. The State filed a criminal complaint against Defendant in Rio Arriba County Magistrate Court. The complaint alleged that after Defendant had been stopped for weaving and crossing into the oncoming traffic lane, Sergeant Trujillo observed numerous signs of intoxication, including a strong odor of alcohol, red bloodshot watery eyes, slurred speech, and failure of field sobriety tests. The complaint also alleged that Defendant refused to submit to any breath alcohol testing, either at the scene or at the sheriff's office, before he was booked and released on bond.

{4} Defendant entered a plea of not guilty and waived his right to a jury trial. When the prosecutor failed to appear at a pretrial conference, apparently because an address change resulted in the prosecutor's nonreceipt of the hearing notice, the magistrate court dismissed the case without prejudice. A day

later, the State refiled the charges in a new magistrate court criminal complaint.

{5} The State's filed witness lists indicate that it intended to call seven witnesses at trial. According to the first filed criminal complaint, two of those witnesses, Sergeant Trujillo and Deputy Jose Martinez, were officers present at the scene of arrest who had "observed Mr. Baca's driving."

{6} The case came before magistrate Judge Alex M. Naranjo for trial. As we have observed in the past, "[b]ecause the magistrate court proceedings are not recorded, what actually transpired at this setting is not of record." *State v. Montoya*, 2008-NMSC-043, ¶ 2, 144 N.M. 458, 188 P.3d 1209; *see* NMSA 1978, § 35-1-1 (1968) ("The magistrate court is not a court of record.").

{7} What does appear in the magistrate court record is that on the day of trial, the magistrate judge entered a written order (the Trial Order) dismissing the case with prejudice "upon motion made by defense attorney Ben Ortega per rule NMRA 6-506-A (C) (D)" and "per second motion that officer testimony be suppressed." The parties agree that, although the defense had not raised the matter by pretrial motion, the refiled complaint had not complied with Rule 6-506A(C) NMRA (2004, amended effective 2014).[1] Rule 6-506A(C) is a procedural rule requiring that after the dismissal of a complaint without prejudice, refiled complaints containing the same charges must be captioned "Refiled Complaint" and must contain specified information about the earlier case so that the court can be alerted to the need to treat the later case as a continuation of the first, pursuant to Rule 6-506A(D).

{8} The Trial Order was entered on a standardized court form that contained, among other options, fields for recording the magistrate's determination of guilty or not guilty, but these fields were left completely blank and instead the order recited that the cause was "dismissed with prejudice."

{9} The State filed a notice of appeal in district court pursuant to NMSA 1978, Section 35-13-1 (1968), which authorizes a party "aggrieved" by a magistrate court judgment or final order to appeal to district court within fifteen days of its issuance.

{10} Nearly two months after the notice of appeal was filed and while the case was pending before the district court, the magistrate court sua sponte entered a new signed order in its own files, titled "Amended Final Order on Criminal Complaint Numc [sic] Pro Tunc" (the Amended Order). The Amended Order stated,

> A motion was made by defense attorney Ben Ortega to suppress the testimony of Sergeant Martin Trujillo for violation of NMRA 6-506-A(C)(D). Sergeant Martin Trujillo was the arresting Officer. A second motion was made by defense attorney Ben Ortega for a directed verdict of not guilty due to insufficient evidence to proceed. Motion to suppress and directed verdict of not guilty were granted.
>
> THE DEFENDANT IS THEREFORE ACQUITTED.

[1]In this opinion, the amendment applicable to all references to Rule 6-506A NMRA is the 2004 amendment. The date parenthetical is hereafter omitted from references to this rule.

{11} After the Amended Order was filed in magistrate court, defense counsel moved the district court to dismiss the appeal on double jeopardy grounds, arguing that the magistrate court had acquitted him. Lacking the benefit of a complete record, the district court held a hearing to reconstruct the magistrate proceedings in order to determine whether the magistrate judge had dismissed the case on procedural grounds as indicated in the original Trial Order or had acquitted Defendant as indicated in the postappeal Amended Order. In support of the latter theory, the defense relied primarily on the testimony of the magistrate judge.

{12} The magistrate judge testified in district court that Sergeant Trujillo was the first and only one of the seven people listed on the State's witness list who actually testified at the nonjury trial in the magistrate court. When Sergeant Trujillo completed his testimony at that trial, the defense "challenged" the State's criminal complaint, arguing that the State's refiled criminal complaint had not included the prior-case information required by Rule 6-506A(C). Defense counsel made an oral motion that the magistrate judge should suppress Sergeant Trujillo's testimony as a sanction for that violation. After the magistrate judge granted the motion to suppress Sergeant Trujillo's testimony, the defense moved for a "directed verdict of not guilty." The magistrate judge testified that he then took a short recess to consider that motion.

{13} The magistrate judge testified that when he returned and began announcing his ruling, the State interrupted to say that it was going to voluntarily dismiss the current complaint against Defendant. The magistrate judge responded that he "didn't need to be listening to her dismissing the case, that [he] would be dismissing the case." At that point, defense counsel "reminded" the magistrate judge that he should "not dismiss the case" but instead should "find Mr. Baca not guilty." The magistrate judge testified before the district court that he responded, "So be it," and that he orally stated that Defendant would be found not guilty. However, no such ruling was contained in the official written Trial Order.

{14} When defense counsel asked the magistrate judge in district court why he granted the "directed verdict" of not guilty, the magistrate judge answered that it was for the State's violation of Rule 6-506A and because the testimony of "the only [witness] that testified," Sergeant Trujillo, whom the magistrate judge described as "the key witness for the State," had been suppressed.

{15} On the State's cross-examination in district court, the magistrate judge testified that he would not have granted a directed verdict before the State was done presenting all of its witnesses. The magistrate judge acknowledged that the State had other witnesses waiting to testify and that the State had not rested its case. He was also aware that the written Trial Order he entered did not indicate a determination of guilt or innocence despite the fact that the order was a standard court form, with fields specifically for such determinations, and that he had instead left the fields relating to guilt or innocence empty.

{16} In response to questions from the district court about the Amended Order purporting to retroactively acquit Defendant after the case had been appealed, the magistrate judge stated that he did not know who prepared it, could not remember anyone communicating with him personally about it, and could only speculate that a clerk, who had not been present during the trial, had chosen to prepare it at a later time. Whatever its source

may have been, he acknowledged that this Amended Order, not on an official court form, was the first nonstandard custom-prepared amended disposition order that he had ever entered in a case in his eleven years as a magistrate.

{17} After hearing all testimony presented by the parties for reconstruction of the magistrate court record, the district court struck the Amended Order and declined to consider it, finding that the Amended Order was not a true correction of the record and that the Trial Order more accurately reflected what had actually occurred at the aborted trial in the magistrate court. The district court found that the magistrate judge's premature termination of the case had been a dismissal to sanction the State's filing of a nonconforming criminal complaint, rather than an acquittal on the merits. Concluding that the State's appeal did not result in double jeopardy, the district court accordingly denied Defendant's motion to dismiss the appeal.

{18} Defendant appealed the district court's order denying his motion to dismiss to the Court of Appeals. The Court of Appeals reversed the district court, concluding that because "the magistrate court's dismissal constituted an acquittal and, therefore, the State was barred from appealing," it was inappropriate to address "whether . . . Judge Naranjo's ruling suppressing Sergeant Trujillo's testimony was erroneous." *See State v. Baca*, 2013-NMCA-060, ¶ 23, 303 P.3d 858. We granted certiorari to review the State's contentions that the Court of Appeals failed to give due deference to the district court's factual findings in reconstructing the events that took place in the magistrate court and to clarify the distinctions between acquittals on the merits and procedural dismissals in our double jeopardy jurisprudence.

II. DISCUSSION

{19} The propriety of the magistrate judge's Trial Order suppressing the testimony of a key State witness and terminating prosecution without hearing the testimony of the remaining six State witnesses or considering any other evidence relating to guilt or innocence, all as a sanction for the State's refiled complaint lacking identifying details required by a procedural rule, is not before us for review in this appeal. *But see State v. Harper*, 2011-NMSC-044, ¶ 21, 150 N.M. 745, 266 P.3d 25 (cautioning that the "exclusion of witnesses is a severe sanction that raises questions about the fairness of the judicial process" and holding that, "like outright dismissal of a case, the exclusion of witnesses should not be imposed except in extreme cases, and only after an adequate hearing to determine the reasons for the violation [of a rule or court order] and the prejudicial effect on the opposing party"). We therefore address only the issues presented to us regarding the constitutionality under the Double Jeopardy Clause of the State's efforts to further prosecute the DWI case against Defendant.

A. Whether the Magistrate Judge's Termination of Defendant's Case Was Appealable Depends on Whether It Was an Acquittal on the Merits for Insufficiency of Evidence or a Nonmerits Procedural Dismissal Made at the Request of the Accused

{20} We start by recognizing that the Double Jeopardy Clauses of the Fifth Amendment of the United States Constitution and Article II, Section 15 of the New Mexico

Constitution prevent the State from using its resources to wear down a defendant by "'repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.'" *County of Los Alamos v. Tapia*, 1990-NMSC-038, ¶ 16, 109 N.M. 736, 790 P.2d 1017 (quoting *Green v. United States*, 355 U.S. 184, 187-88 (1957)), *overruled on other grounds by City of Santa Fe v. Marquez*, 2012-NMSC-031, ¶ 25, 285 P.3d 637; *see* U.S. Const. amend. V ("No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb."); N.M. Const. art. II, § 15 ("[N]or shall any person be twice put in jeopardy for the same offense."). These clauses serve to protect a defendant's important right to receive a single judgment of guilt or innocence. *See United States v. Scott*, 437 U.S. 82, 99-100 (1978).

{21} This Court has emphasized that "[p]erhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that a verdict of acquittal . . . [cannot] be reviewed, on error or otherwise, without putting a defendant twice in jeopardy, and thereby violating the Constitution." *State v. Lizzol*, 2007-NMSC-024, ¶ 7, 141 N.M. 705, 160 P.3d 886 (alteration and omission in original) (internal quotation marks and citation omitted). "[T]he State is barred from appealing when a defendant is acquitted by the trial court no matter how egregiously erroneous the trial court's ruling," even where the determination of insufficiency of evidence results from an erroneous evidentiary ruling. *Id.* ¶ 15.

{22} But not all terminations of a criminal trial invoke double jeopardy protections. The United States Supreme Court has made it clear that a defendant who "obtains the termination of the proceedings against him in the trial court without any finding by a court or jury as to his guilt or innocence . . . has not been 'deprived' of his valued right to go to the first jury." *Scott*, 437 U.S. at 100. "[O]nly the public has been deprived of its valued right to 'one complete opportunity to convict those who have violated its laws.'" *Id.* (citation omitted). Consequently, "[n]o interest protected by the Double Jeopardy Clause is invaded when the Government is allowed to appeal and seek reversal of such a midtrial termination of the proceedings in a manner favorable to the defendant." *Id.*; *see also Montoya*, 2008-NMSC-043, ¶ 11 (confirming that the State is entitled to appeal a final order dismissing its case on a procedural ground).

{23} The United States Supreme Court has recently summarized the relevant constitutional distinction between merits acquittals and procedural dismissals:

> Thus an "acquittal" includes "a ruling by the court that the evidence is insufficient to convict," a factual finding [that] necessarily establish[es] the criminal defendant's lack of criminal culpability," and any other "rulin[g] which relate[s] to the ultimate question of guilt or innocence. These sorts of substantive rulings stand apart from procedural rulings that may also terminate a case midtrial, which we generally refer to as dismissals or mistrials. Procedural dismissals include rulings on questions that "are unrelated to factual guilt or innocence," but "which serve other purposes," including "a legal judgment that a

> defendant, although criminally culpable, may not be punished" because of some problem like an error with the indictment.

Evans v. Michigan, ___ U.S. ___, 133 S. Ct. 1069, 1075 (2013) (alterations in original) (citations omitted).

{24} Because "the double jeopardy consequences of each [termination] differ" and because "'[t]he law attaches particular significance to an acquittal' [such that] a merits-related ruling concludes proceedings absolutely," *id.* (citation omitted), we therefore must address whether the district court was correct in determining that the magistrate judge's termination of the first trial on Defendant's request constituted a procedural dismissal, which the State could appeal, or an acquittal, which the Double Jeopardy Clause permanently insulates from continued prosecution.

B. We Defer to the District Court's Findings of Fact If Supported by Substantial Evidence but Review Its Conclusions of Law De Novo

{25} This case involves questions of fact, particularly in determining what happened in the magistrate court, and questions of law applicable to those facts. "We generally review double jeopardy claims de novo . . . , [but] where factual issues are intertwined with the double jeopardy analysis, we review the trial court's fact determinations under a deferential substantial evidence standard of review." *See State v. Rodriguez*, 2006-NMSC-018, ¶ 3, 139 N.M. 450, 134 P.3d 737 (citation omitted). "In doing so, we will not weigh the evidence or substitute our judgment for that of the trial court, and all reasonable inferences supporting the fact findings will be accepted even if some evidence may have supported a contrary finding." *Id.* (citation omitted). It is the district court—not the magistrate court—to which we defer in this case because it was the district court that had to find the facts on which to apply the law in ruling on the motion to dismiss.

{26} The magistrate court file ordinarily should assist in determining whether there has been an acquittal. Our Rules of Criminal Procedure for the Magistrate Courts require a filed order specifying the nature of the court's disposition of each criminal complaint. *See* Rule 6-701 NMRA ("A final order shall be entered in every case. If the defendant is found guilty, a judgment of guilty shall be rendered. If the defendant has been acquitted, a judgment of not guilty shall be rendered."); *see, e.g.*, *City of Farmington v. Piñon-Garcia*, 2013-NMSC-046, ¶ 20, 311 P.3d 446 (holding that the record in a court of limited jurisdiction reflected a dismissal rather than an acquittal); *Montoya*, 2008-NMSC-043, ¶ 20 (looking to the face of a magistrate court order in determining the nature of the nonrecord proceedings). We have repeatedly emphasized the importance of "clear communication from the orders issued by all courts, including courts of limited jurisdiction," in part "because one function of final orders is as an avenue for appellate review of the issues in a case." *Id.* ¶ 21.

{27} On appeal from the magistrate court, "the record on appeal" must include "the judgment or order sought to be reviewed." Rule 1-072(G)(3) NMRA. If an appropriate order is not in the record or if the order is ambiguous, reviewing courts normally look to the facts contained in the transcript of proceedings for clarification of the order; and if a transcript of proceedings is unavailable, a substitute record may be

created. *See* Rule 1-072(H) ("If anything material . . . is omitted from the [magistrate court] record on appeal by error . . . , the district court, on proper suggestion or on its own initiative, may direct that the omission be corrected . . . ."); *State v. Schoonmaker*, 2008-NMSC-010, ¶¶ 6, 16, 143 N.M. 373, 176 P.3d 1105 (reviewing on certiorari to the Court of Appeals based on a record reconstructed in the district court), *overruled on other grounds by State v. Consaul*, 2014-NMSC-030, ¶ 38, 332 P.3d 850. One way courts recreate necessary records is to hold a reconstruction hearing and make findings of fact based on the evidence presented at that hearing, as the district court did here. *See Schoonmaker*, 2008-NMSC-010, ¶¶ 6, 16 (relying in part on findings that the district court determined in a reconstruction hearing to create a record for a prior off-the-record chambers hearing). And if necessary, a reviewing court may require the judge who presided below to testify. *See State v. Martinez*, 2002-NMSC-008, ¶ 16, 132 N.M. 32, 43 P.3d 1042 (holding that the original trial judge may testify before the judge conducting the reconstruction hearing but may not both testify and preside); *see also State v. Gallegos*, 2007-NMCA-112, ¶¶ 13, 19, 142 N.M. 447, 166 P.3d 1101 (holding that a district court had authority on appeal to supplement a magistrate court record with the assistance of the magistrate judge's testimony to determine the facts necessary to assess the legal validity of a no-contest plea).

{28} Recognizing the authority of the district court as a factfinder in reconstructing the magistrate court nonrecord proceedings, we now address whether substantial evidence supported the factual findings made by the district court.

C. Substantial Evidence Supports the District Court's Findings Concerning the Nonrecord Proceedings Before the Magistrate Judge

{29} The district court was faced with conflicting magistrate court orders, the contemporaneous Trial Order reflecting a nonmerits dismissal and the postappeal Amended Order reflecting an acquittal on the merits. It was necessary for the district court to determine which order, if either, accurately characterized the action of the magistrate judge in terminating the case before him.

{30} However the magistrate judge chose to label his own ruling in either of his conflicting orders or in his testimony before the district court, our double jeopardy precedents and those of the United States Supreme Court are in agreement that a trial court's own description of its ruling is not controlling. *See, e.g.*, *Lizzol*, 2007-NMSC-024, ¶ 15 ("[W]hether a defendant was acquitted does not depend on the trial court's characterization of its ruling."); *Martinez v. Illinois*, ___ U.S. ___, ___, 134 S. Ct. 2070, 2076 (2014) ("[W]e have emphasized that what constitutes an acquittal is not to be controlled by the form of the judge's action; it turns on whether the ruling of the judge, whatever its label, actually represents a resolution . . . of some or all of the factual elements of the offense charged. Our decision turns not on the form of the trial court's action, but rather whether it serve[s] substantive purposes or procedural ones." (alterations and omission in original) (internal quotation marks and citations omitted)). Otherwise, we risk impeding the State's ability to prosecute crimes before a court has a chance to determine innocence or guilt. *See Montoya*, 2008-NMSC-043, ¶¶ 20, 22 (holding that absent a finding that a

magistrate's disposition order was predicated on an evaluation of guilt or innocence, the State has a constitutional right to appeal an order of dismissal and seek a trial de novo in district court).

{31} According to the magistrate judge's testimony, he granted Defendant's motion for a "directed verdict" of acquittal after he granted Defendant's motion to suppress Sergeant Trujillo's testimony prior to hearing the remainder of the State's witnesses. A directed verdict, technically appropriate only in cases tried by a jury, requires a court to decide at the conclusion of the state's case "whether the direct or circumstantial evidence admitted at trial, together with all reasonable inferences to be drawn therefrom, will sustain a finding of guilt beyond a reasonable doubt." *State v. Smith*, 1979-NMSC-020, ¶ 20, 92 N.M. 533, 591 P.2d 664; *see Mayer v. Smith*, ____-NMCA-___, ¶ 7 (No. 32,338, Mar. 2, 2015), *petition for cert. filed*, 2015-NMCERT-___ (No. 35,207, Apr. 1, 2015) (noting that "in a nonjury trial, motion for a directed verdict [is], in effect, a motion to dismiss" for insufficiency of the evidence) (internal quotation marks and citation omitted); *see also* Rule 5-607(E), (K) NMRA (requiring a district court "out of the presence of the jury" and both after the state has presented its case in chief and again after the submission of all evidence to "determine the sufficiency of the evidence, whether or not a motion for directed verdict is made").

{32} New Mexico precedent gives a trial court's dismissal based on insufficient evidence to support a conviction the effect of an acquittal, whether or not characterized as a directed verdict or other resolution of guilt or innocence. In *Marquez*, the trial court suppressed the evidence in a DWI prosecution and dismissed the DWI charge after the state had rested its case. *See* 2012-NMSC-031, ¶¶ 8, 10. We held that once the state rested its case and the trial court suppressed the evidence and dismissed the case, the trial court "implicitly" concluded that the evidence was insufficient to support the DWI charge. *Id.* ¶ 18. This ruling, however characterized, had the "legal effect of an acquittal." *Id.* ¶ 28.

{33} In *Lizzol*, 2007-NMSC-024, ¶ 4, the trial court suppressed the state's breath alcohol test results on evidentiary grounds. After ensuring that the state had presented all its evidence and rested its case, the trial court orally ruled that the defendant was "not guilty at this point" and issued a written order dismissing the case. *Id.* We held that "[a]bsent the [breath test results], the judge concluded that the [s]tate lacked evidence sufficient to convict [the defendant]." *Id.* ¶ 24. This ruling, however characterized by the trial judge, had the legal effect of an acquittal. *See id.* ¶ 29.

{34} A true acquittal on the merits, even prior to the close of evidence, must result in protection from further jeopardy. *See Fong Foo v. United States*, 369 U.S. 141, 142-43 (1962) (per curiam). "[W]hen a defendant has been acquitted at trial he may not be retried on the same offense, even if the legal rulings underlying the acquittal were erroneous." *Sanabria v. United States*, 437 U.S. 54, 64 (1978). But *Fong Foo* and *Sanabria* do not preclude reprosecution after rulings that did not constitute true acquittals. *See Gonzalez v. Justices of Mun. Court of Boston*, 382 F.3d 1, 11 (1st Cir. 2004), *judgment vacated*, 544 U.S. 918 (2005), *and adhered to on remand*, 420 F.3d 5, 10 (1st Cir. 2005) (holding that retrial is allowed where the trial court did not actually acquit the defendant).

{35} The Trial Order included the two rulings made by the magistrate judge in this

case. The first, suppression of Sergeant Trujillo's testimony as a sanction for the State's noncompliant pleading, was not an evaluation of the sufficiency of the State's evidence. *See Montoya*, 2008-NMSC-043, ¶ 17 (stating that the suppression of evidence is "in no sense a decision on the quantum of proof offered by the [state], on its probative value, on the credibility of the evidence, or on any other question relating to the sufficiency of the [state's] case." (quoting *Tapia*, 1990-NMSC-038, ¶ 8)).

{36} Understanding the magistrate judge's second ruling, terminating the trial, is critical to determining whether double jeopardy protections prohibit Defendant's retrial. Was the termination based on finding the State's evidence insufficient or was it a procedural dismissal related to the noncompliant complaint or the resulting suppression of Sergeant Trujillo's testimony? As reflected in its filed witness list, the State had a number of other witnesses waiting to testify on the merits, including another officer who had observed Defendant's driving and had been present at the scene of arrest. There is no indication that the magistrate judge considered the potential testimony of the remaining witnesses or made any other determination that the State's evidence was insufficient to prove Defendant had been driving under the influence of alcohol. In fact, the magistrate testified before the district court that he would not have granted a "directed verdict" before the State finished presenting all of its witnesses. *See Montoya*, 2008-NMSC-043, ¶ 18 (noting that once some evidence is suppressed in the magistrate court, the State is entitled "to pursue its case with its remaining evidence, dismiss its case with prejudice or dismiss its case and refile it in district court").

{37} The district court considered both the Trial Order, reflecting procedural dismissal and specifically not acquittal, and the Amended Order, changing the magistrate judge's characterization of his own actions from dismissal to acquittal. Both orders recite that Defendant moved to dismiss the case based on a violation of Rule 6-506A. The district court also heard the magistrate judge's testimony that he had intended to dismiss the case on Defendant's motion prior to hearing all the evidence as a sanction for the State's violation of Rule 6-506A.

{38} Determining compliance with Rule 6-506A is a purely procedural matter because it does not require a magistrate to evaluate the sufficiency of evidence. The rule merely "prescribe[s] the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves." *See Black's Law Dictionary* 1398 (10th ed. 2014) (defining "procedural law"). The State's violation of the Rule 6-506A(C) pleading requirements was a procedural defect that did not trigger an acquittal because it was unrelated to the sufficiency of the State's evidence.

{39} The district court heard and rejected the magistrate judge's testimony that he terminated the first trial because he had determined the Defendant was not guilty, as recited in the Amended Order. Before denying and striking the Amended Order, the district court reviewed the circumstances of the termination, including facts that the magistrate never heard the testimony of most of the State's witnesses, that the termination of the magistrate court trial was the sole result of a procedural violation of pleading rules by the State, and that Sergeant Trujillo testified he heard the magistrate judge state in open court that the case was "dismissed with prejudice." And despite the theory of

defense counsel that the magistrate judge could have confused "dismissal" with "acquittal" in the contemporaneous written Trial Order, the district court found that the Trial Order was both "the best evidence" of the magistrate judge's actions and "the controlling order."

{40} Accordingly, we hold that substantial evidence supported the district court's findings, based on the reconstructed record and the magistrate's orders, that the magistrate judge's actions did not indicate that he evaluated the sufficiency of the State's evidence but that he actually dismissed the case on procedural grounds, as reflected in the original Trial Order.

D. Because the Magistrate's Order Was a Procedural Dismissal Initiated by Defendant and Not an Acquittal on the Merits, the Double Jeopardy Clause of the United States Constitution Does Not Bar Continued Prosecution

{41} A defendant "deliberately choosing to seek termination of the proceedings against him" before a determination of his guilt or innocence is voluntarily rejecting the Fifth Amendment protection against being twice placed in jeopardy for the same offense. *Scott*, 437 U.S. at 98-100. As in *Scott*, where after the close of evidence the trial court dismissed charges without evaluating the supporting evidence because the court found "sufficient proof" of prejudice from preindictment delay, "[n]o interest protected by the Double Jeopardy Clause is invaded when the Government is allowed to appeal and seek reversal of such a midtrial termination of the proceedings in a manner favorable to the defendant." *Id.* at 82, 100; *see also Tapia*, 1990-NMSC-038, ¶ 9 (stating that "a 'termination' of the trial in defendant's favor before any determination of factual guilt or innocence [should be treated] like the dismissal for preindictment delay in *Scott*, 437 U.S. at 94-95"); *State v. Vaughn*, 2005-NMCA-076, ¶ 19, 137 N.M. 674, 114 P.3d 354 (holding that a defendant cannot claim double jeopardy protection from retrial where the defendant sought the ruling that terminated the first trial). A defendant's voluntary choice to prevent a final judgment of guilt or innocence does not offend double jeopardy because such a termination does not "enhanc[e] the possibility that even though innocent he may be found guilty." *Scott*, 437 U.S. at 101 (internal quotation marks and citation omitted).

{42} The fact that defense counsel might have characterized his motion for a premature termination of the trial for procedural reasons as being instead a request for an acquittal can be of no more significance than the magistrate judge's own preferred characterization of his action in granting the motion. This case exemplifies the soundness of the principle that a judge's own characterization of his procedural dismissal as an acquittal on the merits cannot control a reviewing court's assessment of the true nature of the action. Were it otherwise, a defendant seeking a procedural dismissal unrelated to the evidence of his guilt or a judge seeking to insulate his procedural dismissal from review could simply misuse merits terminology to mask the true nature of what the defendant sought or what the court granted. We reject those attempts in this case and reaffirm that substance rather than labels will continue to control our double jeopardy analyses. As we have recently observed in another context, "in much of the . . . work courts are called on to perform, it is necessary to think thoughts and not words." *State v. Strauch*, 2015-NMSC-009, ¶ 13, 345 P.3d 317.

{43} Because Defendant successfully urged the magistrate judge to terminate Defendant's trial for procedural reasons without a true determination of guilt or innocence, no matter what words defense counsel or the magistrate judge might have used in characterizing the ruling, the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution does not bar continued prosecution of Defendant's DWI charge.

E. The Double Jeopardy Clause of the New Mexico Constitution Does Not Bar Continued Prosecution

{44} Defendant also argues that the nature of our limited jurisdiction court system requires that we interpret the Double Jeopardy Clause of Article II, Section 15 of the New Mexico Constitution more broadly than its counterpart in the Fifth Amendment of the United States Constitution. He contends that the lack of a contemporaneous record and the lack of a requirement that a magistrate judge have a law degree combine to create such confusion about proceedings in the magistrate courts that prosecutors can violate defendants' double jeopardy protections by "using lower courts to test the strength of [their] cases, only to retry defendants in district courts if they are dissatisfied with the results in the non-record courts." His suggested solution is to change our normal fact-finding processes and have the district court "consider and weigh reasonable inferences that can be drawn from the non-record court's decision and view them in the light most favorable to the termination of jeopardy." He cites no state or federal precedent or any other authority for this novel proposition, nor does he demonstrate how it would have changed the outcome in this case. *See McNeill v. Rice Eng'g & Operating, Inc.*, 2010-NMSC-015, ¶ 11, 148 N.M. 16, 229 P.3d 489 ("Where [a party has] failed to cite any contrary authority from this or any other jurisdiction, this Court will presume that no such authority exists.").

{45} Defendant also has presented nothing in the record or in his filings in this Court to indicate that the hypothetical prosecutorial abuses he poses are happening in reality. The record in this case is clear that it was Defendant who sought and obtained a premature termination of his first trial on procedural grounds unrelated to the strength of the State's evidence.

{46} The federal Double Jeopardy Clause and New Mexico law adequately protect a magistrate court defendant from prosecutorial abuse of double jeopardy protections. Constitutional jeopardy attaches in a jury trial when a jury is impaneled and sworn to hear a case and in a bench trial when the trial judge first starts hearing evidence. *State v. Nunez*, 2000-NMSC-013, ¶ 28, 129 N.M. 63, 2 P.3d 264. Accordingly, our Rules of Criminal Procedure for the Magistrate Courts limit the State's discretion in filing a voluntary dismissal of its case without prejudice "prior to the commencement of the trial." Rule 6-506A(A)(1); *see State v. Heinsen*, 2005-NMSC-035, ¶ 25, 138 N.M. 441, 121 P.3d 1040 (affirming long-established New Mexico law that "the State has wide discretion to dismiss a criminal case in magistrate court by filing a nolle prosequi and reinstating charges in district court," which has concurrent jurisdiction over the case). But once jeopardy attaches, the State does not have the discretion to dismiss the case and refile it. If the State fails to dismiss its case before jeopardy attaches, "the State is obliged to follow the course of proceedings it initiated in magistrate court." *State v. Heinsen*, 2004-NMCA-110, ¶ 24, 136 N.M. 295, 97 P.3d 627, *aff'd*, 2005-

NMSC-035, ¶¶ 23, 25, 30 (emphasizing, on appeal in this Court, the responsibilities of our district courts "to prevent the State from using the dismissal for purposes of delay or to circumvent the rules" and generally to ensure that "the defendant's due process rights are not unduly infringed"). Defendant has pointed to no example in New Mexico cases or any other data to indicate that our district courts are failing to fulfill that responsibility.

{47} Our appellate courts also continue to be sensitive to double jeopardy rights of the accused. *See, e.g.*, *State v. Gutierrez*, 2014-NMSC-031, ¶ 31, 333 P.3d 247 (barring retrial after a trial court declared a mistrial (1) for failure of an essential prosecution witness to respond to a subpoena, (2) over objection of the defendant, and (3) after the trial jury had been impaneled and sworn). And in *Marquez*, 2012-NMSC-031, ¶ 25, we emphasized "the need to clarify that our rules require suppression motions to be filed [and determined] prior to trial" in order to prevent the difficulties presented, as in this case, by delaying resolution of those issues until after jeopardy has attached for constitutional purposes. As a result of *Marquez*, our rules of criminal procedure were amended in 2013 to protect both the State's right to judicial review of adverse suppression rulings and the defendant's right not to be twice placed in jeopardy by providing that "[e]xcept for good cause shown, motions to suppress must be filed and determined prior to trial." Rule 6-304(B)(2) NMRA.

{48} We therefore decline to overrule our precedents by construing the New Mexico Double Jeopardy Clause in the manner Defendant suggests. His federal and state constitutional rights to one determination of his guilt or innocence were not violated by the district court in this case.

III. CONCLUSION

{49} We affirm the district court's denial of Defendant's motion to dismiss and reverse the Court of Appeals. We remand to the district court for further proceedings consistent with this opinion.

{50} 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 SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMSC-022

Filing Date: June 15, 2015

Docket No. 34,554

GEORGE ROBERT MILLER, BARBARA JEAN MILLER, and CHARLES RICHARD MILLER,

Plaintiffs-Petitioners,

v.

BANK OF AMERICA, N.A., as Trustee of the Qualified Terminable Interest

Marital Trust and Family Trust created under the Last Will and Testament of Rudolph C. Miller, Jr., Deceased,

Defendant-Respondent.

Tucker Law Firm, P.C.
Steven Lee Tucker
Santa Fe, NM

Catron, Catron, Pottow & Glassman, P.A.
Michael T. Pottow
Santa Fe, NM

for Petitioners

Keleher & McLeod, P.A.
Thomas C. Bird
Phil Krehbiel
Cassandra R. Malone
Albuquerque, NM

for Respondent

The Cullen Law Firm, P.C.
Christopher Cullen
Santa Fe, NM

Benjamin N. Cardozo School of Law
Melanie B. Leslie
New York, NY

for Amicus Curiae Trust Law Professors

OPINION

DANIELS, Justice.

{1} The New Mexico Uniform Trust Code provides that when a trustee breaches its duty of care and causes a loss to the trust, that lost value must be returned to the trust as restoration damages. It also provides that when a trustee breaches its duty of loyalty by self-dealing, any profit from such self-dealing must be disgorged so that the trustee cannot profit from its wrongdoing. Restoration and disgorgement are not mutually exclusive, and recovery need not be limited to the amount of a beneficiary's loss if more is required to ensure that both remedial goals are met. Because it is unclear whether the principles of disgorgement and restoration have both been satisfied in this case, we remand to the district court to determine whether the profit wrongfully earned by the trustee was included in the restoration award to the beneficiary.

I. BACKGROUND

{2} In 2007, the remainder beneficiaries (Beneficiaries) of two testamentary trusts sued the defendant Bank of America (the Bank) for its actions as trustee from 1991 through 2003. Beneficiaries alleged that the Bank had invested trust assets in an unproductive commercial building in direct violation of express trust provisions and had thereby caused the loss of trust value in breach of its duty of care. Beneficiaries also alleged that, as part of this investment, the Bank arranged loans to the trust from its own affiliates that were secured by mortgages on the building and collected loan fees and mortgage interest from the trust in breach of its duty of loyalty.

{3} At trial, Beneficiaries called Henry South to testify as an expert in accounting. South testified that the value of the trust, if the Bank had properly maintained the principal since 1991 and if that amount was adjusted for inflation to 2003 dollars, would have been approximately $894,000. Instead, the value of the trust principal by the reasonable presumed

date of distribution was effectively zero. South was unable to reconcile the records to determine where the lost principal had gone, but he testified that "the only place it could have gone was back in the building" and that it was not used to pay "trustee fees or property management fees or something like that" because "[a]ll those were paid out of the rental income and the interest and dividends that were collected." He did not testify specifically about whether money from the trust principal had been used to pay the mortgage interest and loan fees to the Bank. The Bank did not call a witness to testify concerning the calculation of damages or present other evidence concerning these calculations.

{4} The district court found the Bank liable for multiple breaches of different duties under the New Mexico Uniform Trust Code and the specific trust agreement but awarded Beneficiaries one lump sum of net damages. The court concluded that the Bank had engaged in improper self-dealing by making loans to the trust and had profited from the transactions by retaining interest and loan fees, and it ordered the disgorgement of this profit in the amount of $540,000. The court also ordered restoration of the lost trust value. It found that $894,000 was necessary to fully compensate the trust, which included an adjustment for inflation that was required to keep Beneficiaries whole. In its letter decision, the district court awarded both of these amounts and asked Beneficiaries' counsel to prepare the judgment.

{5} The Bank objected to Beneficiaries' proposed form of judgment, arguing for the first time that the award would provide "impermissible double recovery to Plaintiffs, by awarding Plaintiffs damages . . . to restore the trust and loan interest that the Trustee received." The Bank asserted that Beneficiaries' recovery must be limited to the amount of their loss and that New Mexico Uniform Trust Code provisions on damages for breach of trust, NMSA 1978, § 46A-10-1002 (2007), did not permit an award of both restoration and disgorgement, but the Bank did not discuss the actual method of calculation for the restoration award or argue that the interest had been included in those calculations. The district court accepted and signed the Bank's revised form of judgment that altered several findings and conclusions and changed the amount of the damages awarded to $171,000. The resulting district court judgment was a mix of inconsistent findings and conclusions. The final damages award deducted the amount of income the Bank had disbursed to Beneficiaries during the time period at issue from the restoration amount, unadjusted for inflation, and did not include the disgorgement award. But the final judgment did not change the conclusion that ordered disgorgement or the finding that adjustment for inflation was required to keep Beneficiaries whole. The findings stated that the award "by definition includes $540,000 in loan interest paid to the Trustee" but did not explain or support this statement.

{6} The Court of Appeals reversed the district court's decisions not to adjust for inflation and to offset income distributions against the damages award, and it awarded Beneficiaries $894,000 to restore the value of the Miller Trusts. *Miller v. Bank of America, N.A.*, 2014-NMCA-053, ¶ 47, 326 P.3d 20. The Court of Appeals held that restoration and disgorgement were alternative remedies, and it did not award an additional $540,000 on a disgorgement theory as requested by Beneficiaries because it "would amount to a double recovery and improperly impose a penalty on the Bank." *Id.* ¶¶ 44-45. Both

parties petitioned this Court for certiorari, and we granted Beneficiaries' petition.

{7} Beneficiaries assert that disgorgement of profit is not an alternate remedy but is separately required under the New Mexico Uniform Trust Code because the Code does not limit an award to the amount of a beneficiary's loss. While we agree that both restoration and disgorgement are required and reverse the Court of Appeals conclusion on that issue, we remand to the district court for the determination of damages because it is unclear whether the mortgage interest and loan fees paid to the Bank were included in the calculation of the restoration award in this case.

II. STANDARD OF REVIEW

{8} "Disgorgement is an equitable remedy whereby a [defendant] is forced to give up the benefits obtained as a result of [the defendant's] wrongdoing." *Peters Corp. v. N.M. Banquest Investors Corp.*, 2008-NMSC-039, ¶ 32, 144 N.M. 434, 188 P.3d 1185. As an application of equity, "[t]he decision whether to order a defendant to disgorge profits and the amount of profits to be disgorged rests within the sound discretion of the trial court." *Id.* ¶ 32. "'An abuse of discretion will be found when the trial court's decision is clearly untenable or contrary to logic and reason.'" *State ex rel. King v. B & B Inv. Grp., Inc.*, 2014-NMSC-024, ¶ 28, 329 P.3d 658. Such discretion . . . is a legal discretion to be exercised in conformity with the law.'" *Id.* (citation omitted). We review de novo "a discretionary decision that is premised on misapprehension of the law." *New Mexico Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶ 15, 126 N.M. 788, 975 P.2d 841.

III. DISCUSSION

{9} In 2003, New Mexico adopted the 2000 National Conference of Commissioners on Uniform State Laws (UL) Uniform Trust Code. New Mexico Uniform Trust Code, NMSA 1978, §§ 46A-1-101 to -11-1105 (2003, as amended through 2011). The UL Uniform Trust Code largely codifies the common law of trusts. Unif. Trust Code Prefatory Note, 7C U.L.A. 364, 364 (2006). Beneficiaries argue that the history and purposes of this common law, as codified in Sections 46A-8-802 and 46A-10-1003(A) of the New Mexico Uniform Trust Code, require that disgorgement be ordered in every instance of trustee self-dealing. Where New Mexico trust law requires disgorgement, its denial is an abuse of the district court's discretion. *See B & B Inv. Grp., Inc.*, 2014-NMSC-024, ¶ 28.

A. The New Mexico Uniform Trust Code Requires a Trustee to Disgorge All Personal Profit Because It Codifies the Strict Common Law Prohibition Against Self-Dealing

{10} The common law of trusts strictly prohibited self-dealing by a trustee and would not allow a trustee to retain profit gained through such transactions.

> It is a well-settled rule that a trustee can make no profit out of his trust. The rule in such cases springs from his duty to protect the interests of the estate, and not to permit his personal interest to in any wise conflict with his duty in that respect. The intention is to provide against any possible selfish interest exercising an influence which can interfere with the faithful discharge of the duty which is owing in a

> fiduciary capacity. . . . It makes no difference that the estate was not a loser in the transaction, or that the commission was no more than the services were reasonably worth.

Magruder v. Drury, 235 U.S. 106, 119-20 (1914). This no-further-inquiry rule allowed a beneficiary to void a trustee's self-dealing transactions, whether or not the beneficiary suffered any loss. *See Iriart v. Johnson*, 1965-NMSC-147, ¶ 6, 75 N.M. 745, 411 P.2d 226 ("Courts do not inquire whether a broker who has violated his fiduciary duty has gained an advantage, or whether his conduct has been fraudulent. When the fact of such violation appears, the transaction is pronounced void as against public policy."); *Bogle v. Bogle*, 1947-NMSC-073, ¶ 5, 51 N.M. 474, 188 P.2d 181 ("The very fact that defendant loaned the money to himself constitutes self-dealing, and is frowned upon by the law regardless of fair dealing or . . . no loss to the trust estate."). The no-further-inquiry rule also includes accountability for profit. In *Iriart*, the plaintiffs were awarded the profit earned by a broker when he resold their land after buying it from them himself at a lower price and without full disclosure. *See* 1965-NMSC-147, ¶¶ 6-7 ("[T]he plaintiff is not limited to rescission [of the deed from the broker] where that remedy is inadequate . . . but may recover damages for the broker's wrongful acts. . . . [T]he person so using the property is accountable for the profit . . . so made.").

{11} "The common law of trusts and principles of equity supplement the [New Mexico] Uniform Trust Code, except to the extent modified by" statute. Section 46A-1-106. Statutory construction is a matter of law, which we review de novo. *Oldham v. Oldham*, 2011-NMSC-007, ¶ 10, 149 N.M. 215, 247 P.3d 736. In construing a statute, we determine and give effect to the Legislature's intent. *Id.* We look first to the plain language of the statute and give words their ordinary meaning unless the Legislature indicates a different one was intended, and we take care to avoid adopting a construction that would render the statute's application absurd or unreasonable or lead to injustice or contradiction. *Id.*

{12} A statutory subsection may not be examined in a vacuum but must be considered in reference to the statute as a whole and to statutes dealing with the same general subject matter. *Id.* ¶ 11. "'[S]tatutes covering the same subject matter should be . . . construed together when possible in a way that facilitates . . . the achievement of their goals.'" *Id.* (alteration in original) (citation omitted). Uniform acts and the commentaries explaining those acts are often useful guidance in interpreting New Mexico law derived from a uniform code. *State ex rel. Dep't of Pub. Safety v. One 1990 Chevrolet Pickup*, 1993-NMCA-068, ¶ 15, 115 N.M. 644, 857 P.2d 44.

1. Sections 46A-8-802 and 46A-10-1003(A) of the New Mexico Uniform Trust Code Codify Common Law and Require That a Trustee Disgorge Profit

{13} The New Mexico Uniform Trust Code is consistent with the common law requirement that trustee profit be disgorged. Section 46A-8-802 concerns the duty of loyalty and codifies the common law no-further-inquiry rule.

> A trustee shall administer the trust solely in the interests of the beneficiaries. . . . [A] sale, encumbrance or other transaction involving the investment or

> management of trust property entered into by the trustee for the trustee's own personal account or that is otherwise affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary affected by the transaction . . . .

Section 46A-8-802(A)-(B).

{14} Under the plain language of this provision, a transaction involving a conflict of interest in breach of the duty of loyalty is voidable at the beneficiary's option, and voiding such a transaction will require the trustee to disgorge personal profit gained through the breach if that profit would not have been earned had the transaction never occurred. Our case law clarifies that the beneficiary is entitled to this profit, even where the transaction did not cause any loss to the trust. *Iriart*, 1965-NMSC-147, ¶ 7 ("[T]he plaintiff is not limited to rescission [of the transaction] where that remedy is inadequate . . . [and] the person so using the property is accountable for the profit . . . so made.").

{15} Section 46A-10-1003(A) further supports the requirement of mandatory disgorgement, stating, "A trustee is accountable to an affected beneficiary for any profit made by the trustee arising from the administration of the trust, even absent a breach of trust." Although entitled "Damages in absence of breach," the plain language of this section, in its use of the term "even," suggests that a trustee is always accountable for personal profit. *Id.*

{16} Our review of the UL Uniform Trust Code on which New Mexico's law is based confirms this reading. Section 46A-10-1003(A) is identical in wording to Section 1003(a) of the UL Uniform Trust Code, and comments to Section 1003 state the following:

> The principle on which a trustee's duty of loyalty is premised is that a trustee should not be allowed to use the trust as a means for personal profit other than for routine compensation earned. While most instances of personal profit involve situations where the trustee has breached the duty of loyalty, not all cases of personal profit involve a breach of trust. Subsection (a), which holds a trustee accountable for any profit made, even absent a breach of trust, is based on Restatement (Second) of Trusts Section 203 (1959).

Unif. Trust Code § 1003(a) & cmt., 7C U.L.A. 648 (2006).

{17} The Restatement (Second) of Trusts in turn provides, "The trustee is accountable for any profit made by him through or arising out of the administration of the trust, although the profit does not result from a breach of trust." Restatement (Second) of Trusts § 203 at 455 (1959). Comments to Section 203 of the Restatement (Second) of Trusts confirm that a trustee may not retain any personal profit, whether or not there has been a breach.

> If the trustee enters into a transaction in connection with the administration of the trust for the purpose of acquiring a profit for himself in violation of his duty of loyalty to the beneficiary, he commits a breach of trust . . . . Even if he enters into the transaction without intending to make a profit for himself and commits no breach of trust in so

> doing, nevertheless he is not permitted to retain the profit. Thus, if the trustee receives a commission or bonus for acts done in connection with the administration of the trust, he is accountable therefor, even if he does not commit a breach of trust in receiving the commission or bonus.

Id. cmt. a. We conclude that the plain language of Sections 46A-8-802 and 46A-10-1003(A) of the New Mexico Uniform Trust Code prohibits a trustee from retaining personal profit.

2. Section 46A-10-1002(A) of the New Mexico Uniform Trust Code Does Not Conflict with the Statutory Requirement of Disgorgement

{18} Section 46A-10-1002(A) does not contradict the common law rules codified in Sections 46A-8-802 and 46A-10-1003(A). Whenever possible, we will read statutes in harmony, to give effect to all provisions. *State v. Smith*, 2004-NMSC-032, ¶ 10, 136 N.M. 372, 98 P.3d 1022. Section 46A-10-1002(A) does provide alternative remedies:

> A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of:
>
> (1) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or
>
> (2) the profit the trustee made by reason of the breach.

Section 46A-10-1002(A) is identical in wording to Section 1002(a) of the UL Uniform Trust Code, and comments to that section state,

> If a trustee commits a breach of trust, the beneficiaries may either affirm the transaction or, if a loss has occurred, hold the trustee liable for the amount necessary to compensate fully for the consequences of the breach. This may include recovery of lost income, capital gain, or appreciation that would have resulted from proper administration. Even if a loss has not occurred, the trustee may not benefit from the improper action and is accountable for any profit the trustee made by reason of the breach.

Unif. Trust Code § 1002(a) & cmt., 7C U.L.A. 646 (2006). Section 1002(a) of the UL Uniform Trust Code "is based on [the] Restatement (Third) of Trusts: Prudent Investor Rule Section 205, at 154-55 (1992)." Unif. Trust Code § 1002 cmt. The Prudent Investor Rule provides alternative remedies, but it clarifies the alternatives as trustee accountability for "any profit accruing to the trust" and as trustee liability for "the amount required to restore the values" lost by the trust; in addition, it holds a trustee liable as needed to prevent personal benefit. Restatement (Third) of Trusts: Prudent Investor Rule § 205, at 154-55 (1992).

{19} Comments to the Prudent Investor Rule specifically state that a beneficiary may affirm a trustee's profitable breach and hold the trustee accountable for the resulting profit accruing to the trust, or if a breach instead causes a loss, may surcharge the trustee for the amount necessary to compensate the trust fully. *See id.* cmt. a, at 155. Either choice does not "preclude a court from granting other remedies available for fiduciary misconduct . . . when appropriate." *Id.* at 155-56. Although Section 46A-10-1002(A) is worded

differently than the Prudent Investor Rule, it is identical in wording to Section 1002(a) of the UL Uniform Trust Code, and so the wording difference is not indicative of any legislative intent to change the meaning of the New Mexico statute. The alternatives in Section 46A-10-1002 do not apply to a trustee's wrongful personal profit. This interpretation allows Section 46A-10-1002(A) to be read in harmony with Section 46A-8-802 and Section 46A-10-1003 and with the common law of trusts.

{20} We hold that the New Mexico Uniform Trust Code requires a trustee to disgorge all personal profit.

B. Restoration and Disgorgement Are Motivated by Separate Remedial Principles and May Be Awarded Together

{21} Loss to Beneficiaries and profit by the Bank are distinct harms that traditionally give rise to different types of damages: restoration and disgorgement. Each has its own remedial purpose, and both may be awarded if necessary to satisfy each purpose fully by compensating the trust and removing all profit from the Bank's self-dealing.

{22} Although it is an equitable remedy, the measure of disgorgement is the amount of a defendant's gain, and a beneficiary need not suffer any loss at all to be entitled to the remedy. *See* NMSA 1978, § 46A-10-1003(A) ("A trustee is accountable to an affected beneficiary for any profit made by the trustee arising from the administration of the trust, even absent a breach of trust."); *Bogle*, 1947-NMSC-073, ¶ 5 ("The very fact that defendant loaned the money to himself constitutes self-dealing, and is frowned upon by the law regardless of . . . no loss to the trust estate.").

{23} Disgorgement is not intended to compensate beneficiaries but to prevent unjust enrichment of the trustee and to deter that trustee and others from similar misconduct. *See* George Gleason Bogert & George Taylor Bogert, *The Law of Trusts and Trustees* § 543, at 235, 241 (Rev. 2d ed. 1993) ("[W]here the trustee, while engaged in a business transaction for the trust, attempts at the same time to secure a financial advantage for himself . . . [,] this is usually forbidden as self-dealing. Penalties and other remedies are provided in order to deter trustees from entering into such transactions and to take from them all benefits derived from their disloyalty." (internal quotation marks and citation omitted)); 1 Dobbs, Law of Remedies § 3.1, at 280 (2d ed. 1993) ("Restitution . . . begins with the aim of preventing unjust enrichment of the defendant."). Damages for unjust enrichment differ from compensatory damages in that "[t]he measure [and limit] 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, 17-18, 121 N.M. 840, 918 P.2d 1340; 1 Dobbs, *supra*, § 3.1, at 280 ("To measure damages, courts look at the plaintiff's loss or injury. To measure restitution, courts look at the defendant's gain or benefit."). Because it is measured by the defendant's gain, a disgorgement award cannot be limited to the amount of loss sustained by a beneficiary. We agree with Beneficiaries that under New Mexico trust law, damages need not be limited to the amount necessary to make a beneficiary whole, at least when that amount would not result in complete disgorgement.

{24} A damage award including both diminution in value attributable to breach and disgorgement of profit is not necessarily a double recovery and may be justified under

certain circumstances. *See Cmty. Hosp. of Springfield & Clark Cnty., Inc. v. Kidder, Peabody & Co.*, 81 F. Supp. 2d 863, 874-75 (S.D. Ohio 1999) (affirming an arbitrator's award of both the decline in portfolio value and the value of undisclosed markups charged by a brokerage for excess trades benefitting the broker and not the client). The court in *Kidder, Peabody & Co.* found "two distinct harms for which the client [was] entitled to separate compensation" and determined that there was no double counting involved because the portfolio decline award was based on profit the client would have earned had its funds been properly invested while the disgorgement award was based on the profits earned by the broker on the improper securities trades. *Id.* at 874. Because these improperly earned profits were not included in the calculation of the decline in portfolio value, both awards were needed to accomplish compensation and full disgorgement. *Id.* Other cases have held similarly, requiring both compensation and disgorgement when those awards are based on separate sums of money. *See, e.g., Tanzer v. Huffines*, 314 F. Supp. 189, 192, 195-96 (D. Del. 1970) (holding that it was not duplicative to force fiduciaries to disgorge personal profits earned through the wrongful use of company assets and to compensate for the company's loss of those assets); *Gerdes v. Reynolds*, 30 N.Y.S.2d 755, 760-61 (N.Y. Sup. Ct. 1941) (holding corporate directors liable for both the profits they earned by transferring control of the corporation to others and for the losses suffered by the corporation when those transferees looted its assets). The Bank must disgorge its profits. If the mortgage interest and loan fees paid to the Bank were not included in the calculation of the restoration award based on the decline in value of the trust principal, then an additional disgorgement award is required.

{25} However, disgorgement is not a punitive remedy. *Peters Corp.*, 2008-NMSC-039, ¶ 32. Beneficiaries and Amicus argue that Beneficiaries are entitled to disgorgement whether or not the Bank's interest profits were included in the restoration calculations because the Bank would still have been fully liable for lost trust value had it only managed the trust poorly. If the Bank had obtained the loans from another party and had not engaged in self-dealing where it wrongfully earned the interest itself, it would have suffered loss to its bottom line of the full restoration amount. But the Bank avoids such loss where the profits were included in the restoration calculations, and it is only required to return the interest it gained through its self-dealing. We recognize this result but emphasize that a disgorgement award must be premised on wrongful conduct that results in a benefit to the defendant and extends only to the amount of gain the defendant derived from the prohibited conduct. *Id.* ("The touchstone of a disgorgement calculation is identifying a causal link between the illegal activity and the profit sought to be disgorged. . . . The court's power to order disgorgement extends only to the amount . . . by which the defendant profited from his wrongdoing." (second alteration in original) (internal quotation marks and citations omitted)). Here, the prohibited conduct was self-dealing, and the profit to the Bank from this conduct was the $540,000 in loan fees and mortgage interest. The deterrence contemplated by the disgorgement remedy is aimed at preventing this wrongful profit and is not intended to ensure a loss, even if that loss would have occurred absent the self-dealing. *See Am. Master Lease LLC v. Idanta Partners, Ltd.*, 171 Cal. Rptr. 3d 548, 576 (Ct. App. 2014) ("[T]he profit for which the wrongdoer is liable . . . is the net increase in the assets of the wrongdoer, to the extent that this increase is

attributable to the underlying wrong." (internal quotation marks and citation omitted)). If the mortgage interest and loan fees were included in the calculation of the restoration award, that award requires the Bank to disgorge its profit with no increase in its assets remaining. The remedy of disgorgement does not require deterrence beyond the prevention of this increase.

{26} The resolution of this case depends on the calculations used to determine the decline in value of the trust principal awarded to Beneficiaries as restoration damages. If the calculations included the mortgage interest and loan fees, the Bank does not need to pay these amounts twice. However, if the losses to the trust did not include these amounts, the Bank must still disgorge its wrongful profits. In its findings of fact the district court stated that the diminution in value of the trust principal "by definition includes $540,000 in loan interest paid to the Trustee." Beneficiaries argued on appeal that "the disgorgement award is neither nullified by, nor contained in, the award for restoration damages" but did not specify how the evidence in the record failed to support a finding that the disgorgement award was, factually, contained in the award for restoration damages. A factual finding not challenged on appeal is binding on this Court. *See* Rule 12-213(A)(4) NMRA ("The argument shall set forth a specific attack on any finding, or such finding shall be deemed conclusive. A contention that a verdict, judgment or finding of fact is not supported by substantial evidence shall be deemed waived unless the argument identifies with particularity the fact or facts that are not supported by substantial evidence.").

{27} However, Beneficiaries did set forth their own proposed findings in the district court and challenged the legal conclusion that disgorgement should not be awarded. It is unclear whether the district court's statement that its award "by definition include[d]" disgorgement was based on a finding of fact or a conclusion of law. "[F]indings of fact and conclusions of law are often indistinguishable, and . . . a reviewing court is not bound by a designation as a finding." *Smith v. Maldonado*, 1985-NMSC-115, ¶ 7, 103 N.M. 570, 711 P.2d 15 (internal citations omitted). Although labeled as a finding, the phrase "by definition includes the . . . loan interest" was not explained or supported with any evidence, and the arguments of the parties concerned only the legal limits to recovery under the New Mexico Uniform Trust Code. The Bank specifically told the judge, "[T]hese are not findings. This is a matter of law." This Court is not bound by a district court's determination when it is unclear whether that decision is a finding of fact or a conclusion of law. *See Madrid v. Rodriguez* (*In re Estate of Duran*), 2003-NMSC-008, ¶ 14, 133 N.M. 553, 66 P.3d 326 ("We are not bound, however, by the trial court's legal conclusions and may independently draw our own conclusions of law on appeal." (internal quotation marks and citation omitted)); *Wine v. Neal*, 1983-NMSC-087, ¶¶ 7-11, 14, 100 N.M. 431, 671 P.2d 1142 (concluding that a judgment that a tax sale was conducted without notice was not binding on appeal despite the lack of challenge to factual notice because whether the judgment was a finding of fact or a legal conclusion was unclear).

{28} Although we are not bound to conclude that the restoration award included the mortgage interest and loan fees, the record will not allow this Court to resolve this issue on appeal. At trial, Beneficiaries' expert testified that he was unable to account for the decline in value of the trust principal and

could not determine where the money had gone but that "the only place it could have gone was back in the building" and that it did not go to "trustee fees or property management fees or something like that" because "[a]ll those were paid out of the rental income and the interest and dividends that were collected on the monies being invested." He did not specifically mention mortgage interest, and the court did not make any findings about whether that interest had been paid out of trust principal or trust income. Payments from trust principal would have contributed to its decline in value, and disgorgement would be accomplished by restoration of the amount of that decline. But if the interest was paid out of trust income, restoration of the principal would not disgorge that profit.

{29} Mortgage interest is considered an ordinary building expense like insurance or regular maintenance and should generally be charged to trust income and balanced against the rental income earned by a property, not paid out of trust principal. *See* Bogert, *supra*, § 603, at 560 ("Interest on mortgages should ordinarily be paid out of trust income."). The Bank included mortgage interest as negative entries on tax forms used to report rental income and listed interest payments on annual statements as being charged to trust income. However, the district court found that the Bank's records were "rife with error and unreliable," no testimony on this issue was presented by the parties, it was never clearly argued, and the district court did not make any specific findings as to whether the mortgage interest had actually been paid out of trust income or trust principal.

{30} "[T]his Court is not a fact-finding body." *State ex rel. King v. UU Bar Ranch Ltd. Partnership*, 2009-NMSC-010, ¶ 21, 145 N.M. 769, 205 P.3d 816. "We therefore think the fairest solution is to remand to the district court for an opportunity to clarify its findings and conclusions." *Herrington v. State of N.M. ex rel. Office of State Engineer*, 2006-NMSC-014, ¶ 36, 139 N.M. 368, 133 P.3d 258; *see also State ex rel. Human Servs. Dep't v. Coleman*, 1986-NMCA-074, ¶ 26, 104 N.M. 500, 723 P.2d 971 (stating that where ambiguity or doubt exists as to the trial court's findings of fact the appellate court can remand when the ends of justice so require), *abrogated on other grounds by State v. Alberico*, 1993-NMSC-047, ¶ 2, 116 N.M. 156, 861 P.2d 192; *Foutz v. Foutz*, 1990-NMCA-093, ¶¶ 16, 21, 110 N.M. 642, 798 P.2d 592 (vacating a judgment because the findings were insufficient for meaningful review). "[I]t is the trial court's duty to make findings of the essential or determining facts, on which its conclusions in the case w[ere] reached, specific enough to enable this court to review its decision on the same grounds as those on which it stands." *Apodaca v. Lueras*, 1929-NMSC-041, ¶ 9, 34 N.M. 121, 278 P. 197.

IV. CONCLUSION

{31} Both disgorgement of ill-gotten gains by a trustee and restoration of losses to a trust suffered as a result of a trustee's wrongdoing are required by the New Mexico Uniform Trust Code, and we reverse the Court of Appeals on this issue. Because it is not clear from the record whether the $894,000 awarded by the Court of Appeals accomplishes both restoration and disgorgement, we remand to the district court to determine whether the mortgage interest and loan fees paid to the Bank were included in the calculation of loss to the trust principal, and to enter an appropriate damages award based on this determination.

{32} **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 SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMSC-023

Filing Date: June 15, 2015

Docket No. 34,719

NEW MEXICO BUILDING AND CONSTRUCTION TRADES COUNCIL, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 611, and SHEET METAL WORKERS LOCAL 49,

Petitioners,

v.

JASON DEAN, in his capacity as Director of the LABOR RELATIONS DIVISION of the DEPARTMENT OF WORKFORCE SOLUTIONS of the STATE OF NEW MEXICO,

Respondent,

and

CELINA BUSSEY, Secretary of the DEPARTMENT OF WORKFORCE SOLUTIONS of the STATE OF NEW MEXICO,

Real Party in Interest,

and

ASSOCIATED BUILDERS AND CONTRACTORS, NEW MEXICO CHAPTER, INC., and NORTHERN NEW MEXICO INDEPENDENT ELECTRICAL CONTRACTORS, INC.,

Interveners-Real Parties in Interest.

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

for Petitioners

Law Office of Jason Lewis
Jason J. Lewis
Albuquerque, NM

New Mexico Department of Workforce Solutions
Marshall J. Ray
Albuquerque, NM

for Respondent and Real Party in Interest

Bingham, Hurst, Apodaca, & Wile, P.C.
Wayne E. Bingham

Albuquerque, NM

for Intervener-Real Parties in Interest

Hector H. Balderas, Attorney General
Scott Fuqua, Assistant Attorney General
Santa Fe, NM

for Amicus Curiae
New Mexico Attorney General

OPINION

MAES, Justice

{1} In this case, we determine whether the Director of the Labor Relations Division (the Director) of the New Mexico Department of Workforce Solutions (DWS) is in violation of the Public Works Minimum Wage Act (the Act), NMSA 1978, §§ 13-4-10 to -17 (1937, as amended through 2011), for failing to set prevailing wage rates and prevailing fringe benefit rates for public works projects in accordance with collective bargaining agreements (CBAs). We hold that under the Act the Director has a mandatory, nondiscretionary duty to set the same prevailing wage and prevailing benefit rates as those negotiated in applicable CBAs and that the Director's failure to do so violates the Act. We therefore issue a writ of mandamus ordering the Director to comply with the Act and set rates in accordance with CBAs as required under the Act within thirty days of the issuance of this opinion.

I. BACKGROUND

{2} Petitioner New Mexico Building and Construction Trades Council is an alliance of craft unions representing the interests of thousands of New Mexico employees working on public works projects throughout the State. Petitioners International Brotherhood of Electrical Workers Local 611 and Sheet Metal Workers Local 49 are affiliated members of the Council. Petitioners are hereafter collectively referred to as "the Unions." Respondent Jason Dean is currently the Director of the Labor Relations Division of DWS. Real Party in Interest Celina Bussey is the Secretary of DWS (the Secretary); Real Parties in Interest Associated Builders and Contractors, New Mexico Chapter, Inc., and the Northern New Mexico Independent Electrical Contractors, Inc., represent contractors performing work on public works projects. The Unions seek a writ of mandamus from this Court directing the Director to set prevailing wage and prevailing benefit rates for public works projects in accordance with rates specified in CBAs in or near a project's locality, as required by Section 13-4-11(B) of the Act.

{3} This is the second time the New Mexico Building and Construction Trades Council has petitioned this Court for mandamus in the matter of DWS compliance with Section 13-4-11(B). In June 2011 this Court denied a petition for writ of mandamus in order to give the Secretary "four or five months" to set prevailing wage and prevailing benefit rates under the Act as amended in 2009. Counsel for the Secretary assured this Court in oral argument that the Director at that time could have rates set within four or five months:

> I would say this could conceivably be done in four or five months, which I don't think is unreasonable, especially since the Secretary has assured me, and I'm assuring the Court, that she's intent on getting this done. I don't think it requires a writ of mandamus to get it done. But,

> whatever the Court desires, I'm confident she'll get it done.

The director in office in 2009 determined prevailing wage and prevailing benefit rates to take effect on January 1, 2010 using the pre-2009 amendment wage survey method even though the amended Act became effective on July 1, 2009. And to this date, because wages are still not determined under the amendments to the Act that became effective on July 1, 2009, the rates have been the same as those determined by the director in 2009.

{4} In March 2012 the Secretary promulgated two new regulations, *see* 11.1.2.18 & .19 NMAC, and amended most others, *see* 11.1.2.7 to .17 NMAC (3/15/2012, as amended through 1/15/2014) but has yet to set rates in accordance with the Act as amended in 2009. *See generally* Public Works Minimum Wage Act Policy Manual, 11.1.2 NMAC (7/23/1969, as amended through 1/15/2014). We acknowledge that litigation is currently pending that challenges the March 2012 changes to the regulations as "arbitrary and capricious, not supported by substantial evidence, outside the scope of authority of the Secretary, and otherwise not in accordance with law" and we express no opinion as to the merits of that proceeding. *See* No. D-202-CV-2014-05512 (indicating in the August 22, 2014, notice of appeal to the district court that the Secretary's changes to the regulations failed to adhere to DWS' own regulations as well as the Act).

II. THIS COURT'S EXERCISE OF ITS ORIGINAL JURISDICTION IN MANDAMUS IS PROPER TO ADDRESS MATTERS OF GREAT PUBLIC IMPORTANCE IMPLICATING CONSTITUTIONAL SEPARATION OF POWERS QUESTIONS BETWEEN THE LEGISLATIVE AND EXECUTIVE BRANCHES OF OUR STATE GOVERNMENT

{5} This Court has "original jurisdiction in quo warranto and mandamus against all state officers, boards and commissions." N.M. Const. art. VI, § 3. "Mandamus lies to compel the performance of a ministerial act or duty that is clear and indisputable." *New Energy Econ., Inc. v. Martinez*, 2011-NMSC-006, ¶ 10, 149 N.M. 207, 247 P.3d 286. "A ministerial act is an act which an officer performs under a given state of facts, in a prescribed manner, in obedience to a mandate of legal authority, without regard to the exercise of his own judgment upon the propriety of the act being done." *Id.* ¶ 10 (internal quotation marks and citation omitted).

> {6} This Court will exercise its original jurisdiction in mandamus when the petitioner presents a purely legal issue concerning the non-discretionary duty of a government official that (1) implicates fundamental constitutional questions of great public importance, (2) can be answered on the basis of virtually undisputed facts, and (3) calls for an expeditious resolution that cannot be obtained through other channels such as a direct appeal.

State ex rel. King v. Lyons, 2011-NMSC-004, ¶ 21, 149 N.M. 330, 248 P.3d 878 (internal quotation marks and citations omitted).

{7} The Unions present a purely legal issue concerning whether the Director has a nondiscretionary duty under the Act to set prevailing wage and prevailing benefit rates in

accordance with CBAs. Additionally, we recognize that the Director's failure to comply with a mandate of the Legislature would implicate separation of powers concerns. It is duly established that the legislative branch makes the laws, the executive branch executes the laws, and our "Constitution prohibits any branch of government from usurping the power of [an]other branch[ ]." *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 20, 125 N.M. 343, 961 P.2d 768 (citing N.M. Const. art. III, § 1). "The balance and maintenance of governmental power is of great public concern." *State ex rel. Taylor*, 1998-NMSC-015, ¶ 17. As such, the Director's undisputed five-year delay in setting rates in accordance with the Act warrants a speedy resolution by this Court. As this Court has repeatedly recognized, "when issues of sufficient public importance are presented which involve a legal and not a factual determination, we will not hesitate to accept the responsibility of rendering a just and speedy disposition." *State ex rel. Bird v. Apodaca*, 1977-NMSC-110, ¶ 5, 91 N.M. 279, 573 P.2d 213. *See also State ex rel. King*, 2011-NMSC-004, ¶ 21 (recognizing the importance of mandamus when timely relief "cannot be obtained through other channels").

III. MANDAMUS IS PROPER BECAUSE THE DIRECTOR HAS A CLEAR, INDISPUTABLE, AND NONDISCRETIONARY DUTY TO SET PREVAILING WAGE RATES AND PREVAILING FRINGE BENEFIT RATES IN ACCORDANCE WITH CBAs

{8} The Director and the Secretary argue that mandamus is not a proper remedy because the Director's duty under the Act is discretionary. *See Cook v. Smith*, 1992-NMSC-041, ¶ 5, 114 N.M. 41, 834 P.2d 418 ("Discretionary acts are beyond the reach of the writ." (citations omitted)). The Director and the Secretary cite Section 13-4-11(B)(2) and (B)(3) to argue that in addition to considering CBAs, the Director must give due regard to other data, opinions, and arguments submitted to DWS, including non-CBA wage rate data, in making prevailing wage and prevailing benefit rate determinations, even when applicable CBAs exist. We disagree. A plain reading of Section 13-4-11 and its recent amendment history provides the basis for our reasoning.

{9} The Director is required by the Act to set prevailing wage rates and prevailing fringe benefit rates for all public works projects costing more than sixty thousand dollars to which the State or any political subdivision is a party. Section 13-4-11(A), (B). Prior to 2009, the Act required the Director to obtain and compile wage rate information and give due regard to such information before making a wage rate determination:

> For the purpose of making wage determinations, the [D]irector . . . shall conduct a continuing program for the obtaining and compiling of wage-rate information and shall encourage the voluntary submission of wage-rate data by contractors, contractors' associations, labor organizations, interested persons and public officers. Before making a determination of wage rates for any project, the [D]irector shall give due regard to the information thus obtained. Whenever the [D]irector deems that the data at hand are insufficient to make a wage determination, the [D]irector may have a field survey conducted for the purpose of obtaining sufficient information upon which to make

> determination of wage rates. Any interested person shall have the right to submit to the [D]irector written data, views and arguments why the wage determination should be changed.

Section 13-4-11(B) (2005).

{10} In 2009, the Legislature dramatically and deliberately changed the process for setting wage rates. Specifically, the amended statute required the Director to set not only prevailing wage rates, but also prevailing fringe benefit rates, and the setting of those rates would now be based upon CBAs:

> The [D]irector shall determine prevailing wage rates and prevailing fringe benefit rates for respective classes of laborers and mechanics employed on public works projects at the same wage rates and fringe benefit rates used in [CBAs] between labor organizations and their signatory employers that govern predominantly similar classes or classifications of laborers and mechanics for the locality of the public works project and the crafts involved; provided that:
>
> (1) if the prevailing wage rates and prevailing fringe benefit rates cannot reasonably and fairly be determined in a locality because no [CBAs] exist, the [D]irector shall determine the prevailing wage rates and prevailing fringe benefit rates for the same or most similar class or classification of laborer or mechanic in the nearest and most similar neighboring locality in which [CBAs] exist;
>
> (2) the [D]irector shall give due regard to information obtained during the [D]irector's determination of the prevailing wage rates and the prevailing fringe benefit rates made pursuant to this subsection;
>
> (3) any interested person shall have the right to submit to the [D]irector written data, personal opinions and arguments supporting changes to the prevailing wage rate and prevailing fringe benefit rate determination; and
>
> (4) prevailing wage rates and prevailing fringe benefit rates determined pursuant to the provisions of this section shall be compiled as official records and kept on file in the [D]irector's office and the records shall be updated in accordance with the applicable rates used in subsequent [CBAs].

Section 13-4-11(B).

{11} "The primary goal in interpreting a statute is to give effect to the Legislature's intent." *State v. Hubble*, 2009-NMSC-014, ¶ 10, 146 N.M. 70, 206 P.3d 579 (internal quotation marks and citation omitted). "[W]e first look at the words chosen by the Legislature and the plain meaning of those words." *Id.* ¶ 10. "[W]hen a statute's language is 'clear and unambiguous,'" this Court "will give effect to the language and refrain from further statutory interpretation." *Id.* (citation omitted). "Legislative intent is to be determined primarily by the language of the act, and words used in a statute are to be given their ordinary and usual meaning unless a different intent is clearly indicated." *Montano v. Williams*, 1976-NMCA-017, ¶ 26, 89 N.M. 86, 547 P.2d 569 (internal quotation marks

and citations omitted). "[I]n construing particular statutory provisions to determine legislative intent, an entire act is to be read together so that each provision may be considered in its relation to every other part, and the legislative intent and purpose gleaned from a consideration of the whole act." *Id.* ¶ 26 (internal quotation marks and citation omitted).

{12} Section 13-4-11(B) mandates that the Director set rates according to CBAs. Subsections (B)(2) and (B)(3) must be read in conjunction with that statutory mandate. When considered as a whole, it is clear that these subsections do not transform the Director's mandatory, nondiscretionary duty in Section 13-4-11(B) to a discretionary one. These subsections only further clarify the mandatory duty or grant certain rights to interested persons.

{13} Subsection (B)(2) requires the Director give due regard to information obtained only when the Director is making a determination under Subsection (B)(1), when the rates cannot be determined in a particular locality because no CBAs exist. If no CBAs exist, rates are determined using the "same or most similar class or classification of laborer or mechanic in the nearest and most similar neighboring locality in which [CBAs] exist." Subsection (B)(1). Thus, in the event there are no CBAs in a locality and the Director must look to CBAs in a nearby, similar locality, or perhaps in the event there are multiple, relevant CBAs in a locality (a circumstance not expressly contemplated by the Act), any discretion conferred upon the Director is limited to the Director determining *which* CBA will be used to set the rates, not *whether* a CBA will be used.

{14} Although Subsection (B)(3) provides that any interested person may submit data, opinions, and arguments, the statute does not require the Director to give due regard to this information when making wage and benefit rate determinations when applicable CBAs are present. The Director may only consider additional data, opinions, and arguments when choosing among competing CBAs, which could arise under Subsection (B)(1), for example. While it is true that any person may provide input, that input does not change the standard the Legislature has prescribed for determining prevailing wage and prevailing benefit rates. Section 13-4-11(A) makes clear that the Director must set rates pursuant to the standard that Section 13-4-11(B) provides. *See* § 13-4-11(A) (requiring contractors to pay mechanics and laborers unconditionally the full amount of wages and fringe benefits due under Section 13-4-11(B)). That standard dictates the use of CBAs for rate determinations.

{15} Prior to the 2009 amendment, the Director was required to give due regard to all information obtained from various sources, including wage surveys and non-CBA wage rates. *See* § 13-4-11(B) (2005) ("Before making a determination of wage rates for any project the [D]irector shall give due regard to the information obtained [from these various sources].") With the amendment to the statute, the Legislature imposed a mandatory, nondiscretionary duty on the Director to set prevailing wage and prevailing benefit rates solely according to CBAs. *See* § 13-4-11(B). Furthermore, the Legislature imposed a continuing duty on the Director to update the prevailing wage and prevailing benefit rates according to "applicable rates used in subsequent [CBAs]." Section 13-4-11 (B)(4). "We operate from a working assumption that the Legislature . . . is well informed about the law and that its legislation is usually 'intended

to change the law as it previously existed.'" *State ex rel. King*, 2011-NMSC-004, ¶ 50 (citation omitted).

IV. MANDAMUS IS PROPER BECAUSE THE UNIONS HAVE NO ADEQUATE REMEDY AT LAW

{16} Mandamus will only issue if there is no "plain, speedy and adequate remedy in the ordinary course of law." NMSA 1978, § 44-2-5 (1884). The Unions represent employees whose wages have been, and continue to be, directly affected by the Director's failure to comply with the Act. Although Section 13-4-15 provides an avenue to appeal "any determination, finding or action of the [D]irector made pursuant to the [Act]," this remedy is wholly inadequate under these circumstances.

{17} It has been over five years since the Act was amended, and the Director still has not set prevailing wage and prevailing benefit rates according to CBAs. DWS has been simply setting the rates the same as those that have been in effect since 2010. The current rates are based on wage surveys as dictated by the Act prior to its amendment in 2009. The Director and the Secretary assert that the rates have not been "set" in the last few years but simply *reissued* due to a stay imposed pending the outcome of the litigation regarding the regulations issued by DWS. The Director and the Secretary further argue that because rates have not been "set," Petitioners' injury of reduced wages in the past five years is speculative. We disagree with this characterization. Public works projects have continued since 2010 with mechanics and laborers being paid wages using wage and benefit rates that are now five years old. Semantics aside, wages have been "set" for the purposes of the Act, and after five years with no increase in wage rates, these stale wages are prejudicing the right of every mechanic and laborer on a public works project to be paid a wage rate consistent with applicable CBAs.

{18} From February 2014 to April 2014, the Unions and other labor organizations submitted copies of current CBAs and formal requests for updating the rates to the Director. *See* Section 13-4-11(B)(4) ("[T]he records shall be updated in accordance with the applicable rates used in subsequent [CBAs].") The Unions' petition to this Court summarized and attached these documents. The Unions' documentation shows that the outdated prevailing wage and prevailing benefit rates are not aligned with current CBAs in effect throughout the State. The Unions report that the Director's inaction has resulted in the payment of wage and benefit rates five to thirty-five percent below what is required by the Act for most reported wage categories.

{19} In recent years a number of separate appeals have been taken from several DWS regulatory actions to district courts, but none have resulted in the setting of new rates in line with CBAs. *See* Nos. D-101-CV-2010-02705; D-101-CV-2010-02758; D-101-CV-2010-03276; D-101-CV-2011-00191, and D-202-CV-2014-05512.The Legislature issued a clear mandate, and the Director must comply. "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." *State v. Stevens*, 2014-NMSC-011, ¶ 15, 323 P.3d 901 (internal quotation marks and citation omitted). To countenance any further delay would be unacceptable and irresponsible. The Director must take immediate action to set prevailing wage and prevailing benefit rates that comply with the Act and reflect current economic realities.

V. CONCLUSION

{20} For years the prevailing wage and prevailing benefit rates for public work projects have been stagnant due to the Director's delay in issuing new rates under the amended Act. The Director's delay in setting new rates and his failure to comply with the Act is inexcusable. Unless this Court grants the requested writ without further delay, workers on state construction projects will continue to be denied their lawfully-mandated compensation as they have been for the past five years, with no alternative timely remedy to correct the Director's persistent refusal to comply with the law.

{21} We agree with the Unions that under the Act, specifically Section 13-4-11, the Director has a mandatory, nondiscretionary duty to set prevailing wage and prevailing benefit rates the same as those negotiated in applicable CBAs. Within thirty days of the issuance of this opinion, the Director shall set rates in accordance with CBAs submitted to DWS. Thereafter, the Director shall set rates in accordance with relevant CBAs. Finally, prevailing wage and prevailing benefit rates determined by the Director "shall be compiled as official records and kept on file in the [D]irector's office and . . . shall be updated in accordance with the applicable rates used in subsequent [CBAs]." Section 13-4-11(B)(4). This opinion shall serve as our writ of mandamus requiring the Director to comply with the Act as set forth above.

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

PETRA JIMENEZ MAES, Justice

WE CONCUR:

BARBARA J. VIGIL, Chief Justice

EDWARD L. CHÁVEZ, Justice

CHARLES W. DANIELS, Justice

RICHARD C. BOSSON, Justice (recused)

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMSC-024

Filing Date: June 25, 2015

Docket No. 33,775

DARA HEM,

Plaintiff,

v.

TOYOTA MOTOR CORP., et al.,

Defendants,

and

TURNER AND ASSOCIATES, P.A.,

Claimant-in-Interpleader,

v.

REGENTS OF THE UNIVERSITY OF NEW MEXICO, on behalf of THE PUBLIC OPERATION, UNIVERSITY OF NEW MEXICO HOSPITAL,

Claimant-in-Interpleader.

Tax, Estate & Business Law, Ltd.
Barry D. Williams
James T. Reist
Albuquerque, NM

Turner & Associates
C. Tab Turner
North Little Rock, AR

for Plaintiff and Turner & Associates, P.A., Claimant-in-Interpleader Turner and Associates, P.A.

Rodey, Dickason, Sloan, Akin & Robb, P.A.
Jeffrey M. Croasdell
Todd E. Rinner
Albuquerque, NM

Law Offices of Bruce S. McDonald
Tracy M. Jenks
Albuquerque, NM

Bowman and Brook, L.L.P.
Kurt Christopher Kern
Dallas, TX

for Defendants

Sutin, Thayer & Browne, P.C.
Susan H. Hapka
Andrew J. Simmons
Albuquerque, NM

for Claimant-in-Interpleader Regents of The University of New Mexico, on behalf of the public operation, University of New Mexico Hospital

OPINION

VIGIL, Chief Justice.

{1} In this case we determine whether an agreement by a state hospital to reduce the amount of a lien for medical services rendered violates Article IV, Section 32 of the New Mexico Constitution. This matter comes before the Court by way of certification from the United States District Court for the District of New Mexico pursuant to NMSA 1978, Section 39-7-4 (1997) and Rule 12-607 NMRA (2007). The questions certified to this Court arose out of an interpleader proceeding in the federal district court between Turner & Associates (Turner), attorneys for the plaintiff Dara Hem (Hem), and the University of New Mexico Hospital (UNMH), which treated Hem for injuries. UNMH argues it has priority over settlement funds pursuant to an agreement between itself and Hem's initial attorney, Clay Miller (Miller), in which Miller agreed to subrogate his statutory priority to settlement funds to UNMH. In exchange, UNMH agreed to reduce the amount of the lien imposed for Hem's outstanding medical bills. Turner argues that this agreement is unconstitutional. Therefore, Turner argues that it has a priority right to collect fees and costs out of the interpleaded settlement funds prior to the satisfaction of the hospital lien, pursuant to the Hospital Lien Act, NMSA 1978, Section 48-8-1 to -7 (1961, as amended through 1995).

{2} In order to resolve the matter, the federal district court certified two questions to this Court concerning the application of Article IV, Section 32 of the New Mexico Constitution. The first question is whether the first clause of Section 32 is a limitation applicable only to acts of the Legislature, as this Court held in *State v. State Investment*

Company, 1925-NMSC-017, ¶ 13, 30 N.M. 491, 239 P. 741, or if it applies to the State in general, as indicated in *Gutierrez v. Gutierrez*, 1983-NMSC-016, ¶ 8, 99 N.M. 333, 657 P.2d 1182. The second certified question is whether Section 32 prohibits a state hospital from compromising a debt owed by a patient-debtor, where the amount of the debt owed is not disputed, but the patient-debtor's ability to pay is doubtful and the compromise agreement is supported by consideration.

{3} In response to the first certified question, we hold that the first clause of Section 32 was correctly interpreted in *State Investment* and is strictly a limitation on the Legislature. Our answer to the second certified question is that Article IV, Section 32 of the New Mexico Constitution does not prohibit UNMH from agreeing to compromise the amount owed by a patient-debtor.

{4} In so deciding, we revisit this Court's interpretation of Article IV, Section 32 in *Gutierrez*. Because we find nothing in the Constitution to support *Gutierrez's* holding that a state hospital cannot compromise on a debt owed to it unless there is a good faith dispute as to the amount or liability for that debt, we conclude that *Gutierrez* must be overruled to the extent that it so holds. We hold that Article IV, Section 32 of the New Mexico Constitution simply requires that in order to extinguish debts or liabilities owed to the State, there must either be payment into the treasury or a proper court proceeding.

I. BACKGROUND

{5} In March 2007, Hem brought suit in a Texas federal court after he was seriously injured in an accident. Hem was traveling through northern New Mexico when his Toyota truck separated from the U-Haul trailer it was towing, causing the truck to roll over several times. After treating Hem for his injuries, UNMH recorded a hospital lien for Hem's outstanding medical bills. The lien would attach to any future judgment or settlement he might procure from a lawsuit, pursuant to the Hospital Lien Act. *See* § 48-8-1(A) ("Every hospital located within the state that furnishes emergency, medical or other service to any patient injured by reason of an accident . . . is entitled to assert a lien upon that part of the judgment, settlement or compromise going, or belonging to such patient, less the amount paid for attorneys' fees, court costs and other expenses necessary thereto in obtaining the judgment, settlement or compromise. . . ."). Although Hem did not dispute the amount owed, UNMH agreed to compromise on the lien amount and accept a lesser amount as payment in full. In exchange, one of Hem's attorneys, Miller, agreed to give up his statutory priority over settlement funds already obtained from U-Haul and some anticipated settlement funds from Toyota, so UNMH would be paid first. *See id.* (providing that a hospital lien attaches to the amount of a patient's recovery remaining after the payment of attorneys' fees). This compromise was confirmed in a letter written by Miller to UNMH (the UNMH Agreement). After sending the letter, Miller paid the U-Haul settlement funds he had already received to UNMH, per the UNMH Agreement.

{6} In September 2009, the Texas court transferred Hem's case against Toyota to New Mexico. The case went to trial in January 2011, and while the jury deliberated, the parties reached a "Contingent Confidential Settlement Agreement" (Toyota Agreement), under which Hem would recover whether or not the jury found in his favor, but the amount of recovery was dependent on the jury's verdict. The jury ultimately returned a verdict

in Toyota's favor, and in February 2011, the federal district court entered a final judgment dismissing the action. In June 2011, Hem filed a motion to enforce the Toyota Agreement. Because there was a dispute over whether the settlement funds should be paid to UNMH or to Turner, Toyota filed a motion in interpleader to allow the federal district court to determine who was entitled to the funds. The federal district court entered an order permitting Toyota to pay the amount remaining on the UNMH lien into the court registry and discharged Toyota from the lawsuit. At this time, the remaining dispute in the interpleader proceeding is between Turner and UNMH; Hem claims no interest in the settlement funds.

{7} UNMH argues that it is entitled to be paid out of the Toyota Settlement funds before Turner because of the terms of the UNMH Agreement. Turner argues that the UNMH Agreement is unenforceable in light of Article IV, Section 32 of the New Mexico Constitution, thereby entitling Hem's attorneys to the money pursuant to the Hospital Lien Act. *See* § 48-8-1(A) (providing that attorneys fees are taken out of settlement proceeds before such proceeds are used to pay a hospital lien). The disagreement over what Section 32 requires engendered the certified questions. We accepted certification.

II. DISCUSSION

{8} The certified questions require us to interpret Article IV, Section 32 of the New Mexico Constitution. "We review issues of statutory and constitutional interpretation de novo." *State v. Ordunez*, 2012-NMSC-024, ¶ 6, 283 P.3d 282 (internal quotation marks and citation omitted).

{9} The provision at issue, Article IV, Section 32 of the New Mexico Constitution, reads, in pertinent part:

> No obligation or liability of any person, association or corporation held or owned by or owing to the state, or any municipal corporation therein, shall ever be exchanged, transferred, remitted, released, postponed or in any way diminished by the legislature, nor shall any such obligation or liability be extinguished except by the payment thereof into the proper treasury, or by proper proceeding in court.

A. The First Clause of Article IV, Section 32 Is Strictly A Limitation on the Legislature and Is Therefore Not Relevant to These Proceedings

{10} When construing constitutional provisions, we keep in mind that "the rules of statutory construction apply equally to constitutional construction." *State v. Boyse*, 2013-NMSC-024, ¶ 8, 303 P.3d 830 (internal quotation marks and citation omitted). Just as if we were interpreting a statute, to determine the meaning of a constitutional provision, we begin with the language used in the provision and "the plain meaning of that language." *State v. Maestas*, 2007-NMSC-001, ¶ 9, 140 N.M. 836, 149 P.3d 933. Where the meaning of that language is "clear and unambiguous, we must give effect to that language and refrain from further . . . interpretation." *Sims v. Sims*, 1996-NMSC-078, ¶ 17, 122 N.M. 618, 930 P.2d 153 (internal quotation marks and citation omitted).

{11} The plain language of the first clause of Section 32–"No obligation or liability of any person, association or corporation held or owned by or owing to the state, or any

municipal corporation therein, shall ever be exchanged, transferred, remitted, released, postponed or in any way diminished by the legislature"–unambiguously applies solely to the Legislature. N.M. Const. art. IV, § 32. Although it mentions the state generally in the context of debts "owned by or owing *to the state*," the only potential actor referenced in this provision is the Legislature. *Id* (emphasis added). Accordingly, in *State Investment*, this Court held that the first clause of Section 32 restricts only the Legislature from diminishing obligations owed to the State, and therefore the Attorney General and district attorneys were permitted to compromise on the defendant's tax liability. *See* 1925-NMSC-017, ¶ 13. We agree with *State Investment* that the first clause of Section 32 is appropriately characterized as applying only to the Legislature.

{12} Although the meaning of the plain language is unambiguous, the first certified question arises from an apparent inconsistency between two New Mexico Supreme Court cases–*State Investment* and *Gutierrez*–that interpreted Section 32. In *Gutierrez*, the Court determined that Section 32 prohibits the State in general from compromising on "the amount owed to it unless a good faith dispute exists as to the amount of indebtedness or liability." 1983-NMSC-016, ¶ 8. However, the *Gutierrez* opinion did not include a holding specific to the first clause of Section 32. *See generally Gutierrez*, 1983-NMSC-016. Because the first clause clearly applies only to the Legislature, we conclude that *Gutierrez* was interpreting the *second* clause of Section 32 requiring a proper court proceeding, not the first clause regarding the Legislature's attempts to compromise debt. Therefore, the conflict between *State Investment* and *Gutierrez* is limited to the interpretation of the second clause of Section 32, which applies to the State in general, and has no bearing on our interpretation of the first clause. Further, as we discuss below, the remaining conflict between the two cases is hereby eliminated because we partially overrule *Gutierrez*.

{13} In answering the first certified question, we conclude that the first clause of Section 32 limits only the Legislature. Thus, it is irrelevant to the present case as no act by the Legislature is implicated here. Instead, in order to address the second question concerning whether the UNMH Agreement violates Section 32, we must consider it under the second clause of Section 32, as that clause is a limit on the State generally.

B. The UNMH Agreement Does Not Violate Article IV, Section 32 of the New Mexico Constitution

{14} The second clause of Section 32 provides, "nor shall any such obligation or liability be extinguished except by the payment thereof into the proper treasury, or by proper proceeding in court." N.M. Const. art. IV, § 32. The phrase "any such obligation" refers to the language of the first clause describing an "obligation or liability of any person, association or corporation held or owned by or owing to the state, or any municipal corporation therein." *Id.* Unlike the first clause, which provides specifically that these obligations owed to the State cannot be "in any way diminished *by the legislature*," nothing in the second clause limits its application to any specific State entity. *Id.* (emphasis added). Instead, it applies to all obligations owed to the State and provides that such obligations can only be extinguished either by a full payment to the State treasury or by a proper proceeding in court.

{15} Turner relies on this Court's previous

interpretation of Section 32 in *Gutierrez* to argue that, because there is no dispute as to the amount owed, the UNMH Agreement is unconstitutional, regardless of whether or not a proper court proceeding occurs. UNMH argues that the proper court proceeding requirement will be satisfied when the federal district court issues its order approving the UNMH Agreement.

1. *Gutierrez* Incorrectly Held that Article IV, Section 32 Requires a Good Faith Dispute as to the Amount Owed or Liability

{16} The question in *Gutierrez* was whether a court could reduce a hospital lien at the patient-debtor's request, when the hospital was unwilling to compromise. 1983-NMSC-016, ¶¶ 1-2, 4. In *Gutierrez*, the plaintiffs were injured in a car accident, and the hospital filed liens for debt incurred as a result of the plaintiffs' treatment. *Id.* ¶¶ 1, 3. When the hospital declined to compromise the lien amounts, the plaintiffs filed complaints asking the district court for an order voiding the hospital liens. *Id.* ¶ 4. The district court denied the motion, determining that it "lack[ed] equitable or discretionary power to void or reduce the amount of . . . the hospital liens." *Id.* ¶ 6. This Court affirmed, holding that the district court could not order the hospital to reduce its lien where there was no dispute as to the validity of the lien amount. *Id.* ¶ 8.

{17} The holdings announced in *Gutierrez* exceeded the scope of the dispute before the Court. The *Gutierrez* Court determined that "the New Mexico Constitution prohibits UNM Hospital from accepting a payment of less than the full amount of an undisputed legal obligation as a satisfaction," *Gutierrez*, 1983-NMSC-016, ¶ 8. The Court added, "The State cannot compromise the amount owed to it unless a good faith dispute exists as to the amount of indebtedness or liability." *Id.* Thus, although *Gutierrez* dealt with a situation in which the hospital did not agree to reduce the amount owed to it, the *Gutierrez* Court's holding would apply even where a state hospital *did* agree to compromise with patient-debtors on its own behalf. *See id.*

{18} The *Gutierrez* Court also held that in order for a state hospital to reduce a debt, there must be a good faith dispute as to the amount owed. *Id.* The Court apparently read this "good faith dispute" requirement into the definition of a proper court proceeding. *See* N.M. Const. art IV, § 32 (providing that no debts owed to the state shall "be extinguished except by the payment thereof into the proper treasury, or by proper proceeding in court"). However, Section 32 makes no reference to a good faith dispute. What Section 32 does require is either payment into the treasury or a proper proceeding in court.

{19} In support of this interpretation, the *Gutierrez* Court cited two cases from other jurisdictions–*Wade v. Clemmons*, 377 N.Y.S.2d 415 (Sup. Ct. 1975) and *Dade County v. Bodie*, 237 So.2d 553 (Fla. Dist. Ct. App. 1970). Both *Wade* and *Bodie* are out-of-state cases interpreting the hospital lien acts of their respective states, not the New Mexico Constitution. Further, neither case holds that a state hospital cannot agree to reduce a debt owed to it without a good faith dispute as to liability. In *Bodie*, the hospital did not enter into an agreement to reduce the lien, and the court held that Florida's hospital lien act gave no discretionary power to courts to reduce a hospital's lien amount. 237 So.2d at 554. The court remanded the case for a determination of the validity and appropriate amount of the lien. *Id* at 555. Under *Bodie*, a court cannot reduce a hospital lien in the absence of an

agreement unless the validity or amount of the lien is in dispute. This proposition has no application when, as here, the hospital has in fact agreed to compromise the debt owed to it.

{20} On the other hand, in *Wade*, although there was no dispute concerning the amount owed by the plaintiff to the hospital, the hospital agreed to reduce the plaintiff's lien by $1,500. 377 N.Y.S.2d at 418. The plaintiff's attorney argued for a greater reduction, in the amount of $2,433.23, to which the hospital did not agree. *Id.* Although the *Wade* court held that it "d[id] not have discretionary power to impose a reduction of the hospital lien" to the full extent requested by the plaintiff's attorney, it ultimately entered an order reducing the lien "in accordance with [the hospital's] consent." *Id.* at 418, 420. *Wade*, therefore, supports the *Gutierrez* holding that a court cannot force the hospital to reduce the lien where the amount is not in dispute. However, it does not support the determination that a hospital cannot agree to compromise an amount owed to it because the *Wade* court ultimately approved the reduction of the amount to the extent that the hospital agreed to compromise.

{21} Thus, *Bodie* is factually distinguishable from the case at hand because there the hospital did not agree to compromise the amount owed, and the conclusion in *Wade* is actually contrary to the proposition for which it was cited in *Gutierrez*. The *Gutierrez* holding that "the New Mexico Constitution prohibits UNM Hospital from accepting payment of less than the full amount of an undisputed legal obligation as a satisfaction," 1983-NMSC-016, ¶ 8, which relies upon these two cases, is therefore unsupported by precedent. The *Gutierrez* holding that a court lacks the equitable or discretionary power to void or reduce public hospital liens *without* the hospital's agreement and absent a good faith dispute is still good law. However, a public hospital *does* have the authority to compromise on its own accord. We hereby overrule *Gutierrez* to the extent that it holds that the State cannot compromise on debts owed to it unless there is a good faith dispute as to the amount owed or liability.

{22} UNMH, as a state hospital, may compromise undisputed obligations with sick or indigent patient-debtors because it is constitutionally permitted to do so. Additional authority for such action can be found in Article IX, Section 14 of the New Mexico Constitution, which provides that, although the state is generally prohibited from "mak[ing] any donation to or in aid of any person, . . . [n]othing in this section prohibits the state or any county or municipality from making provision for the care and maintenance of sick and indigent persons."

{23} "[C]onstitutional provisions should be read together and harmonized in their application if possible." *Denish v. Johnson*, 1996-NMSC-005, ¶ 32, 121 N.M. 280, 910 P.2d 914 (internal quotation marks and citation omitted). As discussed, Article IV, Section 32 allows for the extinguishment of debt owed to the State where there is a proper court proceeding. Article IX, Section 14 specially allows for the provision of aid for the care and maintenance of sick and indigent persons. When read together, Article IX, Section 14 and Article IV, Section 32 permit state government to compromise undisputed obligations with sick or indigent patient-debtors, so long as there is a proper court proceeding.

{24} Accordingly, we hold that state hospitals may compromise with patient-debtors even when no dispute as to

liability or amount owed is present, in accordance with state policies allowing aid to the sick or indigent. To prohibit state hospitals from compromising undisputed patient debts would serve only to require indigent patients seeking settlement to sue for relief rather than allowing them to negotiate with the hospital. This would result in unnecessary litigation and is contrary to state policy, as supported by Article IX, Section 14, and other state laws. *See, e.g.*, Indigent Hospital and County Health Care Act, NMSA 1978, §§ 27-5-1 to -18 (1965, as amended through 2014).

2. The Requirement of a Proper Proceeding in Court Can Be Satisfied in This Case

{25} Article IV, Section 32 requires all obligations to the state to be satisfied by payment into the treasury or proper proceeding in court. Article IV, Section 32 "is undoubtedly intended to prevent public officials from releasing debts justly owed to the state and to discourage collusion between public officials and private citizens." N.M. Att'y Gen. Op. 69-69 (1969). Absent allegations of fraud, misrepresentation, or mistake, it is to be presumed that these settlements are entered into based upon sufficient and proper facts and in the utmost good faith by counsel for the state. *State Investment*, 1925-NMSC-017, ¶ 16.

{26} A proper court proceeding is satisfied where a court reviews the agreement for issues of corruption, nepotism, etc., and issues an order approving a settlement agreement between a hospital and patient. Here, the federal district court has also reviewed the agreement for the presence of consideration in satisfaction of the pre-existing duty rule. The federal district court notes, and we agree, that it retains jurisdiction over the matter: the parties to the UNMH Agreement are before the federal district court, the federal district court has subject matter jurisdiction over the underlying dispute between Hem and the Toyota Defendants, and the disputed portion of the proceeds of the Toyota Agreement have been deposited into the registry of the federal district court. In the event that the federal district court determines that the UNMH Agreement is enforceable against the proceeds of the Toyota Agreement, the federal district court has the power to issue the judgment contemplated by the "proper proceeding in court" language of Article IV, Section 32. The fact that no court has as yet entered an order approving and enforcing the UNMH Agreement is immaterial. We therefore agree with the federal district court that the present interpleader proceeding is a proper proceeding in court by which the UNMH Agreement may be approved, UNMH's lien reduced, and Hem's debt to UNMH extinguished.

III. CONCLUSION

{27} We conclude that the UNMH agreement is not prohibited by Article IV, Section 32 of the New Mexico Constitution. We answer the questions certified to this Court as follows: (1) the first clause of Article IV, Section 32 is solely a limitation on the Legislature; and (2) the UNMH Agreement does not violate Article IV, Section 32 of the New Mexico Constitution. We overrule *Gutierrez* and hold that under Article IV, Section 32 a state hospital is permitted to compromise on a debt owed to it where there is payment into the treasury or a proper court proceeding.

{28} **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-025

Filing Date: June 25, 2015

Docket No. 34,013

STATE OF NEW MEXICO, Plaintiff, ex rel., FRANK C. FOY and SUZANNE B. FOY, *qui tam* Plaintiffs,

Plaintiffs-Petitioners and Cross-Respondents,

v.

AUSTIN CAPITAL MANAGEMENT, LTD, AUSTIN CAPITAL MANAGEMENT GP CORPORATION, CHARLES W. RILEY, BRENT A. MARTIN, DAVID E. FRIEDMAN, WILL JASON ROTTINGER, VICTORY CAPITAL MANAGEMENT, INC., KEYCORP, BEREAN CAPITAL, DUDLEY BROWN, TREMONT PARTNERS, INC., TREMONT CAPITAL MANAGEMENT, INC., TREMONT GROUP HOLDINGS, INC., OPPENHEIMER FUNDS, INC., GARY BLAND, DAVID CONTARINO, BRUCE MALOTT, MEYNERS + COMPANY, MARC CORRERA, ANTHONY CORRERA, SANDIA ASSET MANAGEMENT, ALFRED JACKSON, DAVIS HAMILTON AND JACKSON, GUY RIORDAN, JUNIPER CAPITAL, EILEEN KOTECKI, DAN HEVESI, HENRY "HANK" MORRIS, JULIO RAMIREZ, PAUL CROSS, CROSSCORE MANAGEMENT, SDN INVESTORS, PSILOS GROUP, ALBERT WAXMAN, JEFFREY KRAUSS, STEPHEN KRUPA, DAVID EICHLER, DARLENE COLLINS, WETHERLY CAPITAL GROUP, DAN WEINSTEIN, VICKY SCHIFF, QUADRANGLE GROUP, ALDUS EQUITY, SAUL MEYER, MARCELLUS TAYLOR, MATTHEW O'REILLY, RICHARD ELLMAN, DEUTSCHE BANK, DIAMOND EDGE CAPITAL, MARVIN ROSEN, CARLYLE MEZZANINE PARTNERS, CARLYLE GROUP, DB INVESTMENT MANAGERS, TOPIARY TRUST, PARK HILL GROUP, DAN PRENDERGAST, CATTERTON PARTNERS, BLACKSTONE GROUP, GOLD BRIDGE CAPITAL, DARIUS ANDERSON, KIRK ANDERSON, ARES MANAGEMENT, INROADS GROUP, CAMDEN PARTNERS, HFV, BARRETT WISSMAN, TAG, AJAX INVESTMENTS, CLAYTON DUBILIER AND RICE, INTERMEDIA, LEO HINDERY, WILLIAM R. HOWELL, CABRERA CAPITAL, MARTIN CABRERA, CRESTLINE INVESTORS, JOHN DOE #1 and JOHN DOE #3 THROUGH #50,

Defendants-Respondents and Cross-Petitioners.

Victor R. Marshall & Associates, P.C.
Victor R. Marshall
Albuquerque, NM

for Petitioners and Cross-Respondents

FallickLaw, Ltd.
Gregg Vance Fallick
Albuquerque, NM

Esquivel Law Firm, LLC
Martin R. Esquivel
Albuquerque, NM

Basham & Basham, P.C.
Katherine Ann Basham
Santa Fe, NM

for Respondent and Cross-Petitioner Bruce Malott

Rodey, Dickason, Sloan, Akin & Robb, P.A.
Andrew G. Shultz
Albuquerque, NM

Fried, Frank, Harris, Shriver & Jacobson, LLP
Peter L. Simmons
New York, NY

for Respondents and Cross-Petitioners Topiary Trust and DB Investment Managers, Inc.

Simone, Roberts & Weiss, P.A.
Norman F. Weiss
Albuquerque, NM

for Respondent and Cross-Petitioner David Contarino

Montgomery & Andrews, P.A.
Stephen S. Hamilton
Santa Fe, NM

for Respondent and Cross-Petitioner Gary Bland

The Law Offices of Erika E. Anderson
Erika Anderson
Albuquerque, NM

for Respondent and Cross-Petitioner Guy Riordan

OPINION

MAES, Justice.

{1} In this case, we address whether the retroactive application of the Fraud Against Taxpayers Act, NMSA 1978, Sections 44-9-1 to -14 (2007) ("FATA" or "the Act") violates the Ex Post Facto Clauses of the United States and New Mexico Constitutions. *See* U.S. Const. art 1, § 10, cl. 1; N.M. Const. art. 2, § 19. We hold that FATA is constitutional. The treble damages under FATA are predominantly compensatory and may be applied retroactively to conduct that occurred prior to its effective date. We decline to resolve the issue of whether the civil penalties awarded under FATA are punitive and violate ex post facto principles until there is a definitive amount awarded.

BACKGROUND

{2} This appeal concerns the second of two qui tam actions filed by former New Mexico Education Retirement Board ("ERB") Chief Investment Officer Frank Foy and his wife

Suzanne Foy ("Foys"), attacking the management of the investment portfolios of the ERB and of the New Mexico State Investment Council ("SIC"). The Foys "allege that Defendants—who include Wall Street firms and investment advisors, as well as high-ranking state officials—executed fraudulent schemes that led to the loss of hundreds of millions of dollars at the expense of the [SIC] and the [ERB]. " *State ex rel. Foy v. Austin Capital Mgmt., Ltd.*, 2013-NMCA-043, ¶ 2, 297 P.3d 357.

{3} A qui tam action is "[a]n action brought under a statute that allows a private person to sue for a penalty, part of which the government . . . will receive." *Black's Law Dictionary* 1262 (7th ed. 1999). The Foys filed their first qui tam action, *State ex rel. Foy v. Vanderbilt Capital Advisors, LLC*, D-101-CV-2008-1895 ("*Vanderbilt*"), pursuant to FATA in the First Judicial District Court on July 14, 2008. That complaint included allegations of misconduct dating back to 2003, predating the enactment of FATA in 2007. Section 44-9-12(A) of FATA allows a qui tam plaintiff to bring a civil action for conduct that occurred prior to the effective date of that Act. District Judge Stephen Pfeffer issued a sua sponte order expressing concern "that there may be *ex post facto* implications arising from the retroactive application of the Act[.]" Following briefing, the district court issued an order dismissing the Foys' claims, finding that the retroactive application of FATA, as authorized by Section 44-9-12(A), was unconstitutional. The district court specifically pointed to the award of treble damages and concluded that the Act "is punitive in purpose or effect." In order to save the statute, the district court severed the retroactive application language from Section 44-9-12(A), leaving the rest of the statute intact, including treble damages, but inapplicable to anything that occurred prior to 2007, which would exclude from this lawsuit most, if not all, of what allegedly occurred.

{4} Three months after the complaint in *Vanderbilt* was unsealed, the Foys filed a complaint under FATA against Austin Capital Management and several other defendants also in the First Judicial District Court. After a series of recusals, excusals, and administrative assignments, all of the judges of the First Judicial District were excused. This Court appointed Judge John Pope to preside over the case.

{5} The Foys raised the retroactivity issue with Judge Pope, seeking a ruling that FATA is constitutional. In response, Defendants Park Hill Group, Blackstone Group, and Prendergast provided Judge Pope with a copy of Judge Pfeffer's previous ruling that the retroactive application of FATA is unconstitutional and asked for a similar ruling. On July 8, 2011, Judge Pope ruled that the retroactive application of FATA is unconstitutional and explicitly "adopt[ed] and incorporate[d] the reasoning and analysis" contained in Judge Pfeffer's earlier decision. The Court of Appeals granted leave for the Foys to file an interlocutory appeal. The Court of Appeals affirmed "the district court's legal conclusion that retroactive application of FATA is unconstitutional and the court's decision to sever the retroactive aspects from the statute." *See Foy*, 2013-NMCA-043, ¶ 52. This appeal and cross-appeal follow.

DISCUSSION

I. The Attorney General's Prior Knowledge of Incriminating Information Does Not Bar the District Court From Proceeding in *Austin Capital*

{6} Before addressing the issue of the retroactivity of FATA, we first address the issue of subject matter jurisdiction raised by Cross-petitioner Bruce Malott. *See Wilson v. Denver*, 1998-NMSC-016, ¶ 8, 125 N.M. 308, 961 P.2d 153 ("Prior to addressing the substantive issue certified for interlocutory appeal, we raise, sua sponte, the question whether the district court had subject matter jurisdiction over these election contests."). Malott argues that the district court lacked subject matter jurisdiction over the Foys' second-filed FATA action, *Austin Capital*. Malott's most salient argument is that the district court was barred under FATA from hearing *Austin Capital*. *See* § 44-9-9(B) ("No court shall have jurisdiction over an action . . . against an elected or appointed state official . . . if the action is based on evidence or information known to . . . the attorney general when the action was filed.") The district court tentatively rejected this argument. *See Foy*, 2013-NMCA-043, ¶ 4. The Court of Appeals declined to address the issue of subject matter jurisdiction, holding that "both arguments would benefit from factual developments and legal arguments to the court below." *Id.* ¶ 5.

{7} In determining whether a court has subject matter jurisdiction, we "ask whether [the matter before the court] falls within the general scope of authority conferred upon such court by the constitution or statute." *State v. Chavarria*, 2009-NMSC-020, ¶ 11, 146 N.M. 251, 208 P.3d 896 (alteration in original, internal quotation marks and citation omitted). "The source of a district court's subject matter jurisdiction derives from the New Mexico Constitution." *Lu v. Educ. Trust Bd. of N.M.*, 2013-NMCA-010, ¶ 9, 293 P.3d 186. Under Article VI, Section 13 of the New Mexico Constitution, "[t]he district court shall have original jurisdiction in all matters and causes *not excepted in this constitution*, and such jurisdiction of special cases and proceedings as may be conferred by law . . . ." *Id.* (emphasis added). In other words, "New Mexico district courts are courts of general jurisdiction having the power to hear all matters not excepted by the constitution and those matters conferred by law." *Lyndoe v. D.R. Horton, Inc.*, 2012-NMCA-103, ¶ 12, 287 P.3d 357; *see also Daniels Ins. Agency, Inc. v. Jordan*, 1982-NMSC-148, ¶ 8, 99 N.M. 297, 657 P.2d 624 ("[T]he district courts have original jurisdiction over all cases other than those specifically excepted by the New Mexico Constitution and such jurisdiction of special cases and proceedings as may be conferred by law . . . ." (internal quotation marks and citation omitted)).

{8} *Austin Capital* falls within the general scope of authority conferred upon the district court by Article VI, Section 13 of the New Mexico Constitution because no provision in the New Mexico Constitution specifically excepts it. The district court had subject matter jurisdiction over this action. The proviso in FATA that an action may not proceed against a State official "if the action is based on evidence or information known to . . . the attorney general when the action was filed," § 44-9-9(B), is more in the nature of a mandatory precondition that the plaintiff must satisfy to proceed with a qui tam action. Therefore, the question before the Court is not really one of jurisdiction, but rather whether the Foys' pending qui tam action in *Vanderbilt* bars litigation in the second-filed qui tam action, *Austin Capital*, under FATA—based on prior knowledge of the Attorney General. We proceed to that issue.

{9} Under FATA, a qui tam plaintiff is required to disclose to the Attorney General "substantially all material evidence and

information the qui tam plaintiff possesses" at the time the complaint is filed. *See* § 44-9-5(C). The purpose of this requirement is to give the Attorney General a chance to intervene in the action. *See* § 44-9-5(D) (giving the Attorney General 60 days to notify the court if it intends to intervene). This disclosure requirement also serves as a basis for the statutory bar found in Section 44-9-9(B) that prevents suit under FATA against an elected or appointed state official "if the action is based on evidence or information known to . . . the attorney general when the action was filed." *Id.*

{10} Section 44-9-9(B) places a limitation on the district court's ability to entertain FATA actions against state officials. For an action to be barred under Section 44-9-9(B), the action must (1) be against a state official *and* (2) be "based on evidence or information known to . . . the attorney general when the action was filed." *See id.* As we will explain below, the Foys' action in *Austin Capital* meets the first requirement of the statutory bar, but fails to satisfy the second.

{11} As a preliminary matter, it is important to note that Section 44-9-9(B) does not affect the Foys' first filed qui tam action, *Vanderbilt*, a conclusion conceded by Malott. Second, Section 44-9-9(B) does not apply to any of the private party defendants in *Austin Capital*. Section 44-9-9(B) only bars actions against public officials such as "an elected or appointed state official, a member of the state legislature or a member of the judiciary." *See id.* Therefore, Section 44-9-9(B) can only bar suit against the State official defendants in *Austin Capital*. The complaints in *Vanderbilt* and *Austin Capital* name the same state official defendants, including Malott. To determine whether these State official defendants are barred from suit in *Austin Capital*, we must decide whether *Austin Capital* is "based on evidence or information known to . . . the attorney general when the action was filed." *See* § 44-9-9(B). In making such a determination it is helpful to examine the statute's historical underpinnings.

{12} Section 44-9-9(B) is patterned after an analogous section of the federal False Claims Act which similarly bars certain types of defendants and certain types of claims. *See* 31 U.S.C. § 3730(e)(2)(A) (2014) ("No court shall have jurisdiction over an action brought . . . against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought."). Section 3730(e)(2)(A) "[does] not present an absolute bar to *qui tam* suits; it simply retained the pre-1986 'government knowledge' exception with slightly different language." *See* 1 John T. Boese, *Civil False Claims and Qui Tam Actions* § 4.03(A), at 4-171 (4th ed. 2011). "It was recommended by the [U.S.] Justice Department as an exception for those suits which might be politically motivated." *Id.* at 4-172 (internal quotation marks omitted).

{13} The "government knowledge bar" was enacted in response to the U.S. Supreme Court's decision in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). *See Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 294 (2010) ("This amendment erected what came to be known as a Government knowledge bar."); *see also* 1 Boese, *supra*, § 1.02, at 1-15. In *Hess*, qui tam plaintiff Marcus alleged a collusive bidding scheme by electrical contractors working on Public Works Administration projects in Pennsylvania. *See Hess*, 317 U.S. at 539.

Marcus purportedly discovered the alleged fraud by reading a criminal indictment previously filed against the defendants. *See id.* at 545. The Justice Department argued that Marcus had not brought any new information to the government's attention. *See id.* The U.S. Supreme Court upheld Marcus's award, pointing out that the statute allowed suit to be brought "by any person" without "exception or qualification." *See id.* at 546. The U.S. Supreme Court has since referred to the qui tam action in *Hess* as a "quintessential parasitic suit." *See Graham Cnty.*, 559 U.S. at 294 (internal quotation marks and citation omitted).

{14} Following *Hess*, Congress amended the False Claims Act in 1943 to preclude qui tam actions "based upon evidence or information [already] in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought." *See Graham Cnty.*, 559 U.S. at 294 (internal quotation marks and citation omitted). Therefore, "[once] the United States learned of a false claim, only the Government could assert its rights under the [False Claims Act] against the false claimant." *See id.* (internal quotation marks and citation omitted). This amendment was designed to avoid more "parasitic" suits like *Hess*. *See* 1 Boese, *supra*, § 4.02(A), at 4-50. "The barriers set up in the 1943 Amendments led to decreased use of the *qui tam* provisions." *Id.* § 1.02, at 1-15; *see also Graham Cnty.*, 559 U.S. at 294 ("In the years that followed the 1943 amendment, the volume and efficacy of *qui tam* litigation dwindled.").

{15} In 1986, Congress replaced the government knowledge bar with the "public disclosure bar." *See id.* at 294-95. Under the public disclosure bar, "[t]he court shall dismiss an action or claim . . . if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed." *See* 31 U.S.C. § 3730(e)(4)(A). The purpose of the public disclosure bar is "to strike a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits." *Graham Cnty.*, 559 U.S. at 295. In other words, "[t]he public disclosure bar is . . . chiefly designed to separate the opportunistic relator [qui tam plaintiff] from the relator [qui tam plaintiff] who has genuine, useful information that the government lacks." *Grynberg ex rel. United States v. Exxon*, 566 F.3d 956, 961 (10th Cir. 2009). "[T]he point of the public disclosure test is to determine whether the qui tam lawsuit is a parasitic one." *United States ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1049 (10th Cir. 2004) (alteration in original, internal quotation marks and citation omitted). We determine that this overarching concern should guide our determination regarding whether *Austin Capital* is based upon information known to the Attorney General.

{16} We find the cases construing FATA's federal analogue, the False Claims Act, helpful in understanding the context and purpose of FATA. *See Akins v. United Steel Workers of Am.*, 2010-NMSC-031, ¶ 15, 148 N.M. 442, 237 P.3d 744 ("In developing a body of state common law, we may look to federal law for guidance where it is persuasive and consistent with our state laws and policies."). Although cases like *Graham County*, *Exxon*, and *Praxair* do not interpret the federal counterpart to Section 44-9-9(B), they interpret the complementary public disclosure bar, which aids in understanding the purpose and context of FATA.

{17} These cases indicate a legislative intent to prohibit "parasitic" qui tam plaintiffs while also providing an incentive for

meritorious qui tam plaintiffs to pursue their claims. This conclusion is especially true in light of the so-called "first to file" bar. *See* 31 U.S.C. § 3730(b)(5) ("When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action."); *see also* § 44-9-5(E) ("When a person brings an action pursuant to this section, no person other than the attorney general on behalf of the state may intervene or bring a related action based on the facts underlying the pending action."). This bar "functions both to eliminate parasitic plaintiffs who piggyback off the claims of a prior relator, and to encourage legitimate relators to file quickly by protecting the spoils of the first to bring a claim." *See Exxon*, 566 F.3d at 961.

{18} Applying these principles, we hold that the district court is not barred from hearing the case under FATA. The Foys' second FATA action, *Austin Capital*, is not barred under Section 44-9-9(B) because *Austin Capital* is not a "parasitic" suit like the one in *Hess* in which the "opportunistic" qui tam plaintiff simply repeated allegations made by someone else in a federal indictment. First, as alleged in the complaint, Mr. Foy as former Chief Investment Officer of the ERB may have "genuine, useful information that the government lacks." *See Exxon*, 566 F.3d at 961. He is not simply repeating someone else's allegations.

{19} Second, the statutory bar was designed to prohibit qui tam plaintiffs from piggybacking off the claims of a prior relator in an effort to unfairly recover a portion of the prior relator's damage award. Here, the Foys are the plaintiffs in both cases. It would be an absurd construction of FATA to hold that the Foys are piggybacking off their own prior claims in an effort to unfairly recover a portion of their potential damage award in *Vanderbilt*. Furthermore, barring *Austin Capital* might discourage future qui tam plaintiffs from turning up wrongdoing discovered after their case was filed. Finally, the record reflects that the Attorney General did not raise an objection to the filing of *Austin Capital* and authorized the Foys to proceed, stating that "the best interests of the State of New Mexico are served by uncovering, as soon as possible, all of the facts relating to the matters stated in the complaint." Therefore, we disagree with Malott and hold that *Austin Capital* is not barred by being "based on evidence or information known to . . . the attorney general when the action was filed." *See* § 44-9-9(B).

II. The Case is Not Barred by Claim Splitting

{20} Malott argues that in filing *Austin Capital*, the Foys are engaging in claim splitting. "It is axiomatic that piecemeal litigation is not favored by the courts." *Callaway v. Ryan*, 1960-NMSC-088, ¶ 21, 67 N.M. 283, 354 P.2d 999. The rule against claim splitting "is grounded upon public policy designed to avoid a multiplicity of suits." *United Nuclear Corp. v. Fort*, 1985-NMCA-049, ¶ 22, 102 N.M. 756, 700 P.2d 1005. "The rule against splitting a cause of action is an equitable one whose application is left to judicial discretion based on the factual circumstances of individual cases." 1A C.J.S. *Actions* § 225 (2015).

{21} In arguing against claim splitting, Malott cites primarily to New Mexico cases pertaining to res judicata, or claim preclusion. However, "[t]he rules of res judicata are applicable only when a final judgment is rendered." *See* Restatement (Second) of

Judgments § 13 (1982). Because a final judgment on the merits has not been rendered in *Vanderbilt*, res judicata does not apply to *Austin Capital*. We therefore decline to dismiss *Austin Capital* on the basis of claim splitting.

{22} Nevertheless, Malott has identified a genuine concern regarding the burden on defendants in multiple suits and the additional burden placed on the judicial system by these multiple suits. *See Concerned Residents of Santa Fe North, Inc. v. Santa Fe Estates, Inc.*, 2008-NMCA-042, ¶ 17, 143 N.M. 811, 182 P.3d 794 ("The res judicata doctrine is invoked to protect litigants from the burden of multiple litigation and to promote both judicial economy and the policy favoring reliance on final judgments by minimizing the possibility of inconsistent decisions."). We recognize that in allowing *Austin Capital* to proceed, the Foys will have two FATA actions pending at the same time in the same judicial district.

{23} To promote judicial economy and minimize the possibility of inconsistent decisions, we hold that the Foys' FATA complaints should be consolidated and heard in a single action. Therefore, pursuant to our power of superintending control, *see* N.M. Const. art. VI, § 3, we consolidate *Austin Capital* and *Vanderbilt* and will appoint a pro-tem judge to oversee the consolidated action. *See Maestas v. Hall*, 2012-NMSC-006, ¶ 9, 274 P.3d 66 (consolidating several redistricting cases and appointing a pro-tem judge to preside over the litigation). Although the Foys have identified additional cases that may be consolidated, we leave that determination to the discretion of the district court. *See* Rule 1-042(A) NMRA ("When actions involving a common question of law or fact are pending within a judicial district, the court may . . . order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.").

III. The Retroactive Application of FATA is Constitutional

{24} The central question before this Court is whether the retroactive application of FATA is unconstitutional.

A. FATA

{25} FATA prohibits knowingly presenting false or fraudulent claims for payment from the State and conspiring to defraud the State. *See* § 44-9-3(A). FATA was enacted in 2007, but includes a provision that explicitly authorizes retroactive claims. Section 44-9-12(A) states:

> A civil action pursuant to the Fraud Against Taxpayers Act may be brought for conduct that occurred prior to the effective date of that act, but not for conduct that occurred prior to July 1, 1987.

The statutory penalties for violating FATA include:

> (1) three times the amount of damages sustained by the state because of the violation;
> (2) a civil penalty of not less than five thousand dollars ($5,000) and not more than ten thousand dollars ($10,000) for each violation;
> (3) the costs of a civil action brought to recover damages or penalties; and
> (4) reasonable attorney fees, including the fees of the attorney general or state agency counsel.

See § 44-9-3(C). FATA closely tracks the longstanding federal False Claims Act. *Compare* § 44-9-3, *with* 31 U.S.C. § 3729 (2014). Like the federal Act, FATA allows the Attorney General or a qui tam plaintiff, on behalf of the State, to bring a civil action for violation of the Act. *See* §§ 44-9-4(A), 44-9-5. FATA authorizes a qui tam plaintiff to recover up to thirty percent of the damage award as well as reasonable expenses incurred in the action and reasonable attorneys' fees. *See* § 44-9-7. This award serves as an incentive to private individuals to act on behalf of the public good by bringing the suit. *See Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 769-70 (2000). The State is entitled to the remainder of the damage award (all proceeds not awarded to the qui tam plaintiff) to fully reimburse the State for the false claim paid. *See* § 44-9-7(E).

B. Retroactive Laws and the Ex Post Facto Clause

{26} The United States and New Mexico Constitutions prohibit the Legislature from enacting ex post facto laws. *See* U.S. Const. art. 1, § 10, cl. 1; N.M. Const. art. 2, § 19. "'The Ex Post Facto Clause flatly prohibits retroactive application of penal legislation.'" *State v. Ordunez*, 2012-NMSC-024, ¶ 14, 283 P.3d 282 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994)). "The prohibition does not apply to penalties that are considered remedial in nature." *Foy*, 2013-NMCA-043, ¶ 11. Defendants bear the burden of proving that FATA is unconstitutional beyond all reasonable doubt. *See State v. Druktenis*, 2004-NMCA-032, ¶ 15, 135 N.M. 223, 86 P.3d 1050. ("In regard to Ex Post Facto Clause . . . constitutional attacks, there exists a presumption of constitutionality, and the party attacking the constitutionality of the statute has the burden of proving the statute is unconstitutional beyond all reasonable doubt.").

{27} In this case, Defendants argue that the sanctions (money damages) authorized under FATA are penal in nature. And, therefore, imposing these sanctions for conduct that occurred prior to the effective date of FATA would be retroactive application of penal legislation, a direct violation of the Ex Post Facto Clauses.

C. The Legislature Intended FATA to Apply Retroactively

{28} To determine whether a sanction is punitive and thus violative of the Ex Post Facto Clause, we first look to the "government's purpose in enacting the legislation." *City of Albuquerque ex rel. Albuquerque Police Dep't v. One (1) 1984 White Chevy Ut.*, 2002-NMSC-014, ¶ 11, 132 N.M. 187, 46 P.3d 94 (internal quotation marks and citation omitted). "In assessing Legislative intent, the reviewing court looks first to the plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different one was intended." *Zhao v. Montoya*, 2014-NMSC-025, ¶ 18, 329 P.3d 676 (internal quotation marks and citation omitted). However, "we look not only to the language used in the statute, but also to the object sought to be accomplished and the wrong to be remedied." *Starko v. Presbyterian Health Plan, Inc.*, 2012-NMCA-053, ¶ 20, 276 P.3d 252 (internal quotation marks and citation omitted), *rev'd on other grounds by Starko v. N.M. Human Servs. Dep't*, 2014-NMSC-033, ¶¶ 2, 42, 333 P.3d 947.

{29} The specific legislative designation of FATA proceedings and penalties as "civil"

indicates that the Legislature intended to craft a civil statute. FATA consistently uses the term "civil action" when referring to the proceedings brought under the statute. *See* § 44-9-4(A) (allowing the Attorney General to "bring a civil action . . . pursuant to the Fraud Against Taxpayers Act"); § 44-9-4(B) (allowing the Attorney General to "delegate the authority to . . . bring a civil action to the state agency to which a false claim was made"); § 44-9-5(A) (allowing a qui tam plaintiff to "bring a civil action for a violation of Section 3 of the Fraud Against Taxpayers Act on behalf of the person and the state" (internal citation omitted)); § 44-9-12(A) ("A civil action pursuant to the Fraud Against Taxpayers Act may be brought at any time." (internal citation omitted)). Furthermore, FATA is placed within the section of the New Mexico Statutes Annotated entitled "Miscellaneous Civil Law Matters." *See* §§ 44-9-1 to -14; *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) ("Kansas' objective to create a civil proceeding is evidenced by its placement of the Act within the Kansas probate code, instead of the criminal code."). In addition, not a single section of FATA specifies or punishes criminal conduct. *See State v. Kirby*, 2003-NMCA-074, ¶ 25, 133 N.M. 782, 70 P.3d 772 (finding that the Securities Act has a remedial purpose in part because "only one section specifies criminal conduct"). Finally, the penalties imposed under FATA are designated as "civil." *See* § 44-9-3(C)(2).

{30} We recognize that "in New Mexico, the fact that the Legislature . . . chose[] to label a proceeding 'civil' or 'criminal' is not dispositive of the true nature of that proceeding," *see State v. Nuñez*, 2000-NMSC-013, ¶ 46, 129 N.M. 63, 2 P.3d 264, and cannot "be utilized to defeat the applicable protections of constitutional law." *See N.M. Taxation & Revenue Dep't v. Whitener*, 1993-NMCA-161, ¶ 12, 117 N.M. 130, 869 P.2d 829 (discussing with approval the holding of *United States v. Halper*, 490 U.S. 435, 447-48 (1989), *abrogated by Hudson v. United States*, 522 U.S. 93, 95, 100–03 (1997)).

{31} Looking beyond the "civil" label to the overall purpose of the statute, we determine that the Legislature intended FATA to be remedial in nature. Consistent with other remedial statutes, FATA compensates the State for losses incurred as a result of fraud and encourages qui tam plaintiffs to bring civil actions to root out fraud. *See* § 44-9-7(B) (entitling qui tam plaintiff to up to thirty percent of the proceeds of the action or settlement), (E) ("The state is entitled to all proceeds collected in an action or settlement not awarded to a qui tam plaintiff."); *see also Quynh Truong v. Allstate Ins. Co.*, 2010-NMSC-009, ¶ 30, 147 N.M. 583, 227 P.3d 73 (stating that the Unfair Practices Act which allows treble damages for persons damaged by unfair, deceptive, and unconscionable trade practices "constitutes remedial legislation"); *Kirby*, 2003-NMCA-074, ¶ 23 ("The Securities Act . . . has remedial purpose. . . . Its . . . provisions are aimed at protecting investors against unfair, deceptive, and fraudulent practices in the sale of securities.").

{32} It is clear that the Legislature intended FATA to be a civil, remedial statute. However, even when "the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil." *Smith v. Doe*, 538 U.S. 84, 92 (2003) (internal quotation marks

and citation omitted, internal alteration omitted).

> [T]he court must determine whether the sanction established by the legislation was sufficiently punitive in its effect that, on balance, the punitive effects outweigh the remedial effect. Although a civil penalty may cause a degree of punishment for the defendant, such a subjective effect cannot override the legislation's primarily remedial purpose.

White Chevy, 2002-NMSC-014, ¶ 11 (internal citations omitted).

D. The Civil Remedies under FATA are Predominantly Compensatory

{33} The actual sanctions imposed under FATA include liability for the costs of a civil action and reasonable attorneys' fees for both the State and the qui tam plaintiff; a civil penalty of between five thousand and ten thousand dollars per violation; and "three times the amount of damages sustained by the state." *See* § 44-9-3(C)(1). With regard to the retroactive effect of an award of the costs of bringing the qui tam action and attorneys' fees, we agree with the Court of Appeals that both "would fall under the rubric of compensating for government losses." *Foy*, 2013-NMCA-043, ¶ 28. We therefore turn to the retroactive effect of FATA's treble damages and civil penalties. We hold that treble damages under FATA are predominantly compensatory and may be applied retroactively. We hold that the nature of the civil penalties under FATA cannot be determined until after penalties are assessed.

1. Treble Damages

{34} Historically, New Mexico has followed the seven-factor test set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963), to determine whether a statute has a punitive effect. *See Druktenis*, 2004-NMCA-032, ¶ 30 ("[O]ur New Mexico Supreme Court referred to the *Mendoza-Martinez* framework as 'the test' in determining whether a statute is intended as punitive rather than remedial." (quoting *White Chevy*, 2002-NMSC-014, ¶ 11)); *see also State v. Block*, 2011-NMCA-101, ¶¶ 36-46, 150 N.M. 598, 263 P.3d 940 (analyzing civil penalty under Voter Action Act); *Kirby*, 2003-NMCA-074, ¶¶ 27-39 (analyzing civil penalty under Securities Act). These factors are:

> 1) whether the sanction involves an affirmative disability or restraint;
> 2) whether it has historically been regarded as a punishment;
> 3) whether it comes into play only on a finding of scienter;
> 4) whether its operation will promote the traditional aims of punishment—retribution and deterrence;
> 5) whether the behavior to which it applies is already a crime;
> 6) whether an alternative purpose to which it may rationally be connected is assignable to it; and
> 7) whether it appears excessive in relation to the alternative purpose assigned.

Druktenis, 2004-NMCA-032, ¶ 31. While these factors may "provide useful guideposts," *Hudson*, 522 U.S. at 99, they are "neither exhaustive nor dispositive," *Smith*, 538 U.S. at

97 (internal quotation marks and citation omitted).

{35} In regard to the nature of treble damages, recent United States Supreme Court opinions do not refer to the *Mendoza-Martinez* factors, but simply examine whether such damages are predominantly compensatory or predominantly punitive. *See, e.g. Pacificare Health Sys., Inc. v. Book*, 538 U.S. 401, 405 (2003) (acknowledging that U.S. Supreme Court cases "have placed different statutory treble damages provisions on different points along the spectrum between purely compensatory and strictly punitive awards"); *Cook Cnty. v. United States ex rel. Chandler*, 538 U.S. 119, 129-33 (2003) (acknowledging that treble damages under the FCA have compensatory and punitive traits, but concluding that, on balance, such damages are not essentially punitive). In doing so, the Court has looked largely at the purpose of the legislation and the purpose of the treble damages. *See, e.g., Agency Holding Corp. v. Malley-Duffy & Assocs., Inc.*, 483 U.S. 143, 151 (1987) (holding that RICO is "designed to remedy economic injury by providing for the recovery of treble damages, costs, and attorney's fees."); *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 575-76 (1982) (holding that an antitrust private action "was created primarily as a remedy for the victims of antitrust violations . . . " and that "treble damages serve as a means of deterring antitrust violations and of compensating victims"); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485 (1977) (holding the treble damages under the Clayton Act "is designed primarily as a remedy").

{36} Given recent U.S. Supreme Court precedent, we believe this restorative approach is more appropriate in determining the retroactive effect of FATA. Therefore, if the primary purpose of treble damages under FATA is punitive, then they should be not be applied retroactively. *Cf. Ordunez*, 2012-NMSC-024, ¶ 14 ("The Ex Post Facto Clause flatly prohibits retroactive application of penal legislation." (internal quotation marks and citation omitted)). If the primary purpose of treble damages is remedial, then they should be upheld. *Cf. Foy*, 2013-NMCA-043, ¶ 11 ("The prohibition does not apply to penalties that are considered remedial in nature.").

{37} The U.S. Supreme Court has passed upon the nature of treble damages under the analogous federal FCA, *see* 31 U.S.C. § 3729(a)(1) (holding violators liable for civil penalties "plus 3 times the amount of damages which the Government sustains because of the act of that person"), on at least two occasions. In *Vermont Agency of Natural Resources*, the Court held that a state was not a "person" for purposes of qui tam liability under the FCA. *See* 529 U.S. at 787-88. Although this case did not analyze the ex post facto implications of treble damages under the FCA, the Court was required to address whether treble damages are punitive in nature in determining whether states are subject to qui tam liability under the FCA. *See id.* at 783, 84-85 ("Several features of the current statutory scheme . . . support the conclusion that States are not subject to *qui tam* liability [including treble damages]."). The Court concluded that "the FCA imposes damages that are essentially punitive in nature, which would be inconsistent with state *qui tam* liability in light of the presumption against imposition of punitive damages on governmental entities." *Id.* at 784-85. The Court stated, "'[t]he very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of

wrongdoers.'" *See id.* at 786 (quoting *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981)). While these statements indicate that treble damages under FATA may be similarly punitive, the U.S. Supreme Court has since distinguished *Vermont Agency of Natural Resources.*

{38} In *Cook County*, a unanimous U.S. Supreme Court held that municipal corporations are "persons" for purposes of qui tam liability under the FCA. The municipal defendant argued that it was not subject to liability in part because the FCA imposes damages that are punitive in nature. *See* 538 U.S. at 129. The Court disagreed, distinguishing its earlier statements from *Vermont Agency of Natural Resources.*: "While the tipping point between payback and punishment defies general formulation, being dependent on the workings of a particular statute and the course of particular litigation, the facts about the FCA show that the damages multiplier has compensatory traits along with the punitive." *Cook County*, 538 U.S. at 130.

{39} We hold that the facts about FATA demonstrate that its treble damages feature possesses predominantly compensatory traits. Under FATA, one-third of the treble damages award is allocated to compensate the government for its loss. *See* § 44-9-7(E)(1) (requiring "proceeds in the amount of the false claim paid" to be returned to the fund from which it came). This portion of the damage award is, by definition, compensatory. *See Black's Law Dictionary* 394 (7th ed. 1999) (defining "compensatory damages" as "[d]amages sufficient in amount to indemnify the injured person for the loss suffered.").

{40} Up to another thirty percent of the damage award is allocated to reward the qui tam plaintiff for exposing fraud and corruption in state government. *See* § 44-9-7(B) (entitling qui tam plaintiff to between 25 and 30 percent of the proceeds of the action or settlement if the State does not proceed with an action brought by a qui tam plaintiff and the State prevails in the action). The importance of this potential qui tam award under FATA should not be overlooked. Both this Court and the U.S. Supreme Court have held that a qui tam award as part of a treble damages scheme is remedial in nature. In *Denison v. Tocker*, 1951-NMSC-022, ¶¶ 11, 17, 55 N.M. 184, 229 P.2d 285, we held that the federal Housing and Rent Act, 50 U.S.C. Appendix, 1895 (1947, amended 1949) "is highly remedial, and the plain purpose of . . . authorizing recovery of three times the amount of an overcharge was to enlist the help of tenants by soliciting their aid in filing suits against overcharging landlords." In *Cook County*, the U.S. Supreme Court also stressed the importance of a qui tam award within the treble damages scheme of the FCA. According to the Court:

> The most obvious indication that the treble damages ceiling has a remedial place under this statute is its *qui tam* feature with its possibility of diverting as much as 30 percent of the Government's recovery to a private relator who began the action. In *qui tam* cases the rough difference between double and triple damages may well serve not to punish, but to quicken the self-interest of some private plaintiff who can spot violations and start litigating to compensate the Government, while benefiting himself as well. The treble feature thus leaves the remaining double damages to provide elements of make-whole recovery beyond mere recoupment of the fraud.

538 U.S. at 131(citation omitted). Therefore, we hold that the qui tam provisions of FATA are compensatory.

{41} Having determined that actual damages and a potential qui tam award under FATA are compensatory, it follows that at least two-thirds of the treble damages under FATA are compensatory. *See Hess*, 317 U.S. at 551-52 (holding that "the chief purpose" of the earlier version of the FCA "was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole."). However, as *Cook County* suggests, the remaining approximately one-third of the treble damages under FATA also serve remedial purposes by encouraging more qui tam plaintiffs to root out fraud. We agree.

{42} Our conclusion is further bolstered by the allocation of the remaining damages under FATA. Under FATA, half of the remaining one-third of the damage award is allocated to fund the attorney general's anti-corruption efforts. *See* § 44-9-7(E)(3). The other half is deposited in the state's general fund. *See id.* "There is no question that some liability beyond the amount of the fraud is usually necessary to compensate the Government completely for the costs, delays, and inconveniences occasioned by fraudulent claims." *Cook County*, 538 U.S. at 130 (internal quotation marks and citations omitted). Furthermore, the government's injury includes "not merely the amount of the fraud itself, but also ancillary costs, such as the costs of detection and investigation, that routinely attend the Government's efforts to root out deceptive practices at the public purse." *Id.* at 130-131 (quoting *Halper*, 490 U.S. at 445 (internal quotation marks omitted)). Allocating a portion of the recovery to the attorney general helps to offset these costs. *See* NMSA 1978, § 44-9-7(E)(3)(a).

{43} Finally, when people or businesses commit fraud against the State, it deprives taxpayers of the use of funds for essential government services. The loss of use of money to fraudulent claims are the types of consequential damages not otherwise recoverable under FATA, which justify the conclusion that treble damages under FATA are predominantly compensatory. As noted by the U.S. Supreme Court in *Cook County*, "[t]he treble damages provision [under the FCA] was, in a way, adopted by Congress as a substitute for consequential damages." 538 U.S. at 131 n.9. In a similar fashion, allocating a portion of the treble damages award under FATA to the general fund helps address consequential damages resulting from fraud. *See* NMSA 1978, § 44-9-7(E)(3)(b).

{44} In conclusion, we hold that treble damages under FATA are predominantly compensatory. As such, treble damages do not violate the ex post facto clause and may be awarded for conduct occurring prior to the effective date of FATA.

2. Civil Penalties

{45} A person who violates FATA is liable for "a civil penalty of not less than five thousand dollars ($5,000) and not more than ten thousand dollars ($10,000) for each violation." § 44-9-3(C)(2). Civil penalties are deposited in the current school fund. *See* § 44-9-7(E)(2). In terms of the retroactive effect of civil penalties, the Court of Appeals concluded that, "in the absence of compensatory purposes, [civil penalties] exhibit the qualities of deterrence and

retribution intended to punish the offender." *Foy*, 2013-NMCA-043, ¶ 28. Because the civil penalties under FATA possess predominantly compensatory purposes, we disagree.

{46} As a general matter, "monetary assessments are traditionally a form of civil remedy." *See Kirby*, 2003-NMCA-074, ¶ 31 (internal quotation marks and citation omitted). "[N]either money penalties nor debarment has historically been viewed as punishment." *Hudson*, 522 U.S. at 104. However, the imposition of monetary penalties has a deterrent purpose. *See State ex rel. Schwartz v. Kennedy*, 1995-NMSC-069, ¶ 38, 120 N.M. 619, 904 P.2d 1044 ("[M]onetary sanctions, such as fines or forfeitures, are qualitatively different from other types of administrative sanctions because of their distinctly punitive purposes."); *see also Hudson*, 522 U.S. at 105 ("Finally, we recognize that the imposition of both money penalties and debarment sanctions will deter others from emulating petitioners' conduct, a traditional goal of criminal punishment."). Nevertheless, "[a]lthough a civil penalty may cause a degree of punishment for the defendant, such a subjective effect cannot override the legislation's primarily remedial purpose." *White Chevy*, 2002-NMSC-014, ¶ 11. In addition, "[deterrence] may be a valid objective of a regulatory statute," *Id.* ¶ 14 (internal quotation marks and citation omitted), and "the mere presence of this purpose is insufficient to render a sanction criminal, as deterrence may serve civil as well as criminal goals." *Hudson*, 522 U.S. at 105 (internal quotation marks and citation omitted); *see also Schwartz*, 1995-NMSC-069, ¶ 37 ("[T]he fact that the regulatory scheme has some incidental deterrent effect does not render the sanction punishment . . . ."). Therefore, a monetary sanction has a "deterrent or retributive purpose if it is not designed to compensate the government for its losses." *Id.* ¶ 38.

{47} The U.S. Supreme Court has found that civil penalties under an earlier version of the federal FCA are compensatory. In *Hess*, the U.S. Supreme Court held that

> "the chief purpose of the statutes here was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific [penalty] sum [$2,000 per claim] was chosen to make sure that the government would be made completely whole."

317 U.S. at 551-52. In *Vermont Agency of Natural Resources*, however, the U.S. Supreme Court stated that the earlier version of the Fraud Claims Act which imposed a civil penalty of only $2,000 per claim was remedial rather than punitive, while the current version authorizing civil penalties of up to $10,000 per claim is punitive. 529 U.S. at 784-85. The Supreme Court was not clear, however, where on the given spectrum ($2,000 to $10,000) the penalty moves from remedial in effect to punitive.

{48} The New Mexico appellate courts have found civil penalties in the amount of $5,000 to be predominantly restorative. In *Kirby*, the New Mexico Securities Division assessed $75,000 in fines against the defendant for violations of the former New Mexico Securities Act. *See* 2003-NMCA-074, ¶ 5. The former Act authorized that the director of the Securities Division to "issue an order against an applicant, licensed person or other person who

violates the act, imposing a civil penalty up to a maximum of five thousand dollars ($5,000) for each violation." § 58–13B–37(B)(4) (1993). The Court of Appeals "conclude[d] that the civil penalty imposed upon Defendant in this matter was not sufficiently punitive in its effect that, on balance, the punitive effect outweighed its remedial effect." *Kirby*, 2003-NMCA-074, ¶ 39.

{49} Turning specifically to FATA, the imposed penalty ranges from $5,000 to $10,000 per violation, leaving the exact award to the discretion of the trial judge. § 44-9-3(C)(2). It is, therefore, conceivable that the amount awarded in civil penalties could be punitive in effect, particularly if the trial judge awards the maximum $10,000 per violation. *See Vt. Agency of Natural Res.*, 529 U.S. at 785; *see also Hudson*, 522 U.S. at 103 ("The Eighth Amendment protects against excessive civil fines, including forfeitures."). It is equally conceivable that a lesser award would not be considered punitive. It is not practical to make that determination without knowing the actual amount assessed with full briefing on appeal addressed to a specific dollar figure. *See Boese*, *supra*, § 3.06(D) ("While a constitutional challenge to disproportionate damages and penalties is a legitimate issue to be raised in many FCA cases, the issue normally cannot be determined until after the trial verdict regarding actual damages."). We therefore decline to resolve the issue of whether the civil penalties awarded under FATA are punitive and violate ex post facto principles until there is a definitive amount awarded.

CONCLUSION

{50} We hold that FATA is constitutional. The judgment of the district court is affirmed in part and reversed in part. We remand the consolidated matter to the district court for further proceedings consistent with this Opinion.

{51} IT IS SO ORDERED.

PETRA JIMENEZ MAES, Justice

WE CONCUR:

RICHARD C. BOSSON, Justice

EDWARD L. CHÁVEZ, Justice

CHARLES W. DANIELS, Justice

M. MONICA ZAMORA, Judge
Sitting by designation

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMSC-026

Filing Date: August 10, 2015

Docket No. 34,501

KEN SNOW and ALLENE SNOW,

Plaintiffs-Petitioners,

v.

WARREN POWER & MACHINERY, INC., d/b/a WARREN CAT, and BRININSTOOL EQUIPMENT SALES,

Defendants-Respondents.

Sanders & Westbrook, P.C.
Maureen A. Sanders
Albuquerque, NM

Fadduol, Cluff & Hardy, P.C.
Richard L. Hardy
Eileen M. Shearin
Lubbock, TX

for Petitioners

Rodey, Dickason, Sloan, Akin & Robb, P.A.
Richard E. Hatch
Thomas A. Outler
Albuquerque, NM

for Respondent Warren Power & Machinery, Inc., d/b/a Warren Cat

Civerolo, Gralow, Hill & Curtis, P.A.
Lawrence H. Hill
Justin L. Robbs
Albuquerque, NM

for Respondent Brininstool Equipment Sales

David J. Stout
Michael B. Browde
Albuquerque, NM

for Amicus Curiae New Mexico Trial Lawyers Association

Law Offices of Bruce S. McDonald
Sean E. Garrett
Albuquerque, NM

for Amicus Curiae New Mexico Defense Lawyers Association

OPINION

BOSSON, Justice.

{1} This matter presents an unusual issue dealing with the procedure for seeking leave to amend a complaint to add parties as additional defendants. When the motion for leave is filed before the statute of limitations has run, but the order granting leave is filed after the statute has run, is the amended complaint time barred? Adopting a new rule for this situation, we hold that the subsequently filed amended complaint, post-statute of limitations, is deemed filed as of the date of the original motion for leave to file and accordingly, the statute of limitations is not a bar. Our Court of Appeals having held to the contrary, we reverse.

BACKGROUND

{2} Ken Snow worked as an operator for the Navajo Refinery. His duties as an operator included performance of a "turn-around," a "process by which the refinery is shut down and all the parts and connections are cleaned or replaced." During a turn-around on January 20, 2009, a hose assembly came loose and struck Snow, causing "serious, life-changing injuries."

{3} On August 15, 2011, Snow and his wife filed a complaint for personal injury, loss of consortium, and punitive damages, resulting from the injuries sustained during the January 2009 incident. In that complaint, the Snows named Midwest Hose & Specialty, Inc., Gandy Corporation, Repcon, Inc., and Holly

Corporation as defendants.[1] The Snows then served discovery on the named defendants in an effort to ascertain who had manufactured, provided, or installed the equipment that injured Snow. The documents submitted in response to the discovery requests revealed that Warren Power & Machinery, Inc. d/b/a Warren CAT (Warren) and Brininstool Equipment Sales (Brininstool) provided equipment used during the turn-around. In light of this finding, the Snows sought to amend their complaint to add, for the first time, Warren and Brininstool as defendants in the lawsuit.

{4} Under New Mexico law, an action for injury to a person must be brought within three years from the date of the injury, which in this case would require the complaint to be filed by January 20, 2012. *See* NMSA 1978, § 37-1-8 (1976); *N.M. Elec. Serv. Co. v. Montanez*, 1976-NMSC-028, ¶ 13, 89 N.M. 278, 551 P.2d 634. The New Mexico Rules of Civil Procedure for the District Courts allow a party to amend the complaint, but require leave of court or written consent of the adverse party to amend if more than 20 days have passed since the original complaint was served or if an answer has been filed. *See* Rule 1-015(A). The rules also require that the proposed pleading be attached to the motion to amend. *See* Rule 1-007.1(C) NMRA ("Motions to amend pleadings shall have attached the proposed pleading.").

{5} Here, the opposing parties had filed answers to the Snows' first amended complaint so the Snows needed leave of court in order to file a second amended complaint. At 4:23 p.m. on January 20, 2012, the final day before the period allowed under the statute of limitations would expire, the Snows electronically filed an unopposed motion seeking leave of court to file a second amended complaint that added Warren and Brininstool as additional defendants. The Snows attached the proposed second amended complaint as an exhibit to the motion.

{6} At 4:05 p.m. on Friday, January 27, 2012, one week after the Snows filed the motion and one week after the statute of limitations period had expired, the district court issued its order granting leave of court for the Snows to file the second amended complaint that was attached to the motion. The Snows received notification of the court's decision the following business day, Monday January 30, at 10:21 a.m.,[2] when they received electronic notice of filing.[3] Thirty-five minutes later, at 10:56 a.m. on January 30, 2012, the Snows electronically filed the second amended complaint, the exact document originally

[1]On September 8, 2011, the Snows filed an amended complaint (the first amended complaint) changing the date of injury from June 4, 2009 to January 20, 2009. The Snows filed their amended complaint before any defendant answered and did not require leave of court. *See* Rule 1-015(A) NMRA.

[2]The time and date of notification were not preserved in the record proper. We include this information only to provide an example of how electronic filing and service can cause delay that is outside the control of the filing party. Because the matter was fully settled, our decision to include this alleged fact is not prejudicial to either party.

[3]When any party, including the court, opts to electronically serve its filed document, the Electronic Filing System generates a Notice of Electronic Filing, an email verification that the court received the e-filed document and serves as official notice of filing. *See* Rule 1-005.2(C) NMRA; Electronic Filing User Guide, ¶ 6 (effective December 29, 2011), available at https://firstdistrictcourt.nmcourts.gov/images/File%20and%20Serve%20User %20Guide.pdf (last viewed July 13, 2015).

included as an exhibit to their January 20 motion.

{7} The existing defendants were electronically served through the Electronic Filing System (EFS), but Warren and Brininstool, the new defendants, required service through another authorized method.[4] The district court clerk issued summons for Brininstool and Warren on Tuesday, January 31, 2012, and the Snows served the summons and second amended complaint on Warren and Brininstool shortly thereafter.

{8} In their respective answers to the second amended complaint, Warren and Brininstool each asserted as an affirmative defense that the claims against them were barred by the three-year statute of limitations. Warren and Brininstool filed motions for summary judgment. In response, the Snows argued that the delay inherent in the rule requiring leave of court to file an amended complaint unfairly truncated the period of time prescribed by the statute of limitations to file a complaint and in this case precluded them from lawfully filing the second amended complaint until after the limitations period had passed. The Snows further argued, in order to cure this unfairness, that the second amended complaint should be "deemed" filed as a matter of law at the time the motion requesting leave of court was filed because the second amended complaint was attached to the motion. Alternatively, the Snows argued that the second amended complaint should relate back to the original filing date under Rule 1-015(C) NMRA.

{9} After full briefing and a hearing, the district court granted both summary judgment motions and dismissed Warren and Brininstool as defendants because the second amended complaint was filed after the statute of limitations had run. The Court of Appeals affirmed the district court and held that neither defense raised by the Snows, relation back under Rule 1-015(C) and the doctrine of equitable tolling, applies to save the late filing of the second amended complaint. *Snow v. Warren Power & Mach., Inc.*, 2014-NMCA-054, ¶ 1, 326 P.3d 33. The Snows filed a petition for writ of certiorari requesting this Court to review the Court of Appeals' application of the doctrine of equitable tolling. *Snow v. Warren Power & Mach., Inc.*, 2014-NMCERT-005.

{10} Shortly after submitting the petition, the parties reached a full settlement agreement. The Snows filed a notice withdrawing their petition for writ of certiorari, stating that the settlement and the subsequent dismissal of all claims against Warren and Brininstool left no active controversy.[5] In response, this Court issued an order declining to accept the notice of withdrawal and granting certiorari to review the Court of Appeals' opinion. We invited the New Mexico Trial Lawyers Association (NMTLA) and the New Mexico Defense Lawyers Association (NMDLA) to intervene as amici and submit briefs addressing the certified question. We thank both associations for their timely and thoughtful briefs which have informed our deliberations. Having settled, the named parties did not brief the issue to this Court.

[4]Our rules authorize service by electronic transmission to parties listed on the Service Contact List for the corresponding case, but require complaints or other initiating pleadings to be served by other means. *See* Rules 1-004, 1-005 and 1-005.2(C) NMRA; Electronic Fling User Guide, *supra*, ¶ 6.

[5]On April 10, 2014, the district judge entered an order of dismissal with prejudice dismissing all of the Snows' claims against Brininstool and Warren.

DISCUSSION

Mootness

{11} The settlement renders the dispute between the parties moot but does not prohibit this Court from retaining jurisdiction over the case and issuing a full opinion on the question presented for our review.

> When no actual controversy exists for which a ruling by the court will grant relief, an appeal is moot and ordinarily should be dismissed. In New Mexico, however, courts recognize two exceptions to the prohibition on deciding moot cases: cases which present issues of substantial public interest, and cases which are capable of repetition yet evade review. A case presents an issue of substantial public interest if it involves a constitutional question or affects a fundamental right such as voting. An issue is capable of repetition yet evading review if the issue is likely to arise in a future lawsuit, regardless of the identity of the parties. The Court's review of moot cases that either raise an issue of substantial public interest or are capable of repetition yet evading review is discretionary.

Republican Party of N.M. v. N.M. Taxation & Revenue Dep't, 2012-NMSC-026, ¶ 10, 283 P.3d 853 (internal quotation marks and citations omitted). The question presented in this case is "[w]hether the [Snows'] Motion for Leave to file Plaintiffs' Second Amended Complaint tolled the statute of limitations when [they] attached the [p]roposed Second Amended Complaint to the Motion." It gives rise to a question of substantial public interest likely to arise in a future lawsuit.

{12} Our pleading rules require parties to request leave of court to amend a complaint, but do not account for the time it may take a court to make a decision on the request. *See* Rule 1-015(A). Here, the motion requesting leave was filed on the last day allowed under the statute of limitations. But, a party who filed an identical motion a week or even a month before the statute of limitations expired would face the same result if the court did not grant the motion until after the statute of limitations expired. Whether the motion is filed at the last minute or well in advance, under our existing rules the timeliness of a claim is partially dependent upon the speed at which a court decides the motion and grants leave, a matter wholly outside the control of any party to a lawsuit.

{13} The advent of the EFS exacerbates the potential for delay because filing, and in most cases service, are also not in the control of the attorney seeking to amend. Unlike practice in the past, the EFS prohibits a lawyer from taking an unopposed order directly to the judge to obtain a signature, then going to the clerk's office to file the motion, the signed order, and the amended complaint. Now, all documents must be electronically filed. *See* Rule 1-005.2; LR1-312 NMRA.

{14} Under the EFS, a lawyer must first electronically file a motion and wait for electronic notification that the document has been accepted for filing. *See* Electronic Filing User Guide, *supra*, ¶ 7. Then, the lawyer must email the endorsed copy of the motion, the proposed amended complaint, and a proposed order to the judge and wait for an electronic notification that the judge has ruled on the motion and filed the order. *Id.* ¶ 8. If the

motion is granted, the lawyer may then file the amended complaint. *See* Rule 1-015(A). As a result, what was possible to complete in a single day under the old system now takes an indefinite amount of time, dependent on the judge checking the email, making a ruling, and issuing an order, and the attorney receiving notification from the EFS.

{15} The question presented for our review, therefore, directly concerns our rules for pleading and their potential interference with a party's lawful right to bring the merits of a case before a court. Both categories of discretionary appellate review are satisfied, therefore, as the question presents an issue capable of repetition that affects a substantial public interest.

{16} The NMDLA raises the concern that issuing a ruling on this question that has been resolved through a voluntary settlement will discourage settlements in other cases. We acknowledge this concern and we maintain our policy favoring settlement of cases. However, in this case we determine that the potential impact of our decision on settlements is far outweighed by the public importance of resolving this significant concern with our pleading rules. Therefore, in line with our established jurisprudence in this area, we choose to issue an opinion to provide guidance to the appropriate rules committee in our continuing effort to improve our pleading rules.

Rule 1-015(C) providing for relation back of certain amended complaints filed *after* the statute of limitations has expired does not address the issue in this case

{17} The NMDLA argues that existing New Mexico law provides adequate options to plaintiffs seeking to add a new defendant. We start with our rule that allows a party to amend a complaint to add a new defendant. Rule 1-015(A) allows a party to amend a complaint, but sets forth limitations on when a party may amend by right and when a party must seek leave of court to amend a complaint.

> A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within twenty (20) days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within ten (10) days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

Id. New Mexico has consistently maintained a policy of allowing parties freely to amend their complaints so long as it does not interfere with the administration of justice. *See Martinez v. Research Park, Inc.*, 1965-NMSC-146, ¶ 19, 75 N.M. 672, 410 P.2d 200 ("The law has long recognized the principle that amendments to pleadings are favored, and that the right thereto should be liberally permitted in the furtherance of justice."), *overruled on other grounds by Lakeview Invs., Inc. v. Alamogordo Lake Vill., Inc.*, 1974-NMSC-027, ¶ 8, 86 N.M. 151, 520 P.2d 1096.

{18} A party must, however, file the

amended complaint within the period allowed under the statute of limitations, which in this case was three years. *See* § 37-1-8. Rule 1-015(C) provides an exception by allowing an amendment to a pleading that is filed after the statute of limitations has run to relate back to the date the original complaint was filed, but only when specific conditions are met. *See Capco Acquisub, Inc. v. Greka Energy Corp.*, 2008-NMCA-153, ¶ 41, 145 N.M. 328, 198 P.3d 354 ("Rule 1-015(C) . . . applies where the proposed amendment seeks to add a party.").

{19} Rule 1-015(C) states:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment:
>
> (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits; and
>
> (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

{20} Rule 1-015(C) thus provides a remedy when a plaintiff fails to name a defendant *prior* to the expiration of time allowed under the statute of limitations. "The rationale behind allowing an amendment to relate back is that the statute of limitations should not be used mechanically to prevent adjudication of a claim where the real parties in interest were sufficiently alerted to the proceedings or were involved in them unofficially from an early stage." *Capco Acquisub*, 2008-NMCA-153, ¶ 44 (alterations omitted) (internal quotation marks and citation omitted).

{21} The Court of Appeals determined that the Rule 1-015(C) requirements were not established in order to reach their holding that relation back under Rule 1-015(C) did not apply. *Snow*, 2014-NMCA-054, ¶ 16. We are not persuaded, however, that Rule 1-015(C) addresses the situation of when a motion requesting leave of court to file an amended complaint with the amended complaint attached was filed *before* the statute of limitations expired but was not decided until after the statute of limitations expired. The Snows had no opportunity to timely file the amended complaint even though the court granted them permission to file.

{22} Here, the Snows uncovered additional actors who may bear liability, in addition to the originally-named defendants, and attempted to add them to the action pursuant to Rule 1-015(A) *before* the statute of limitations had run. But, because the rules required leave of court, they could not directly file the second amended complaint and instead had to file a motion requesting leave with the second amended complaint attached. Rules 1-007.1(C), 1-015(A). Therefore, the Snows' delay in filing the second amended complaint until after the statute of limitations had expired was due to inevitable, systemic

complications, such as the time it took for the district court to process the motion to amend as well as unforeseen effects from our new EFS. It was not because the Snows made a mistake in party identity.

{23} Thus, we are determining whether filing a motion with the attached second amended complaint before the statute of limitations expires should stand in the place, for statute of limitations purposes, of the amended complaint. It seems that Rule 1-015(C) did not contemplate this question and thus it cannot provide an answer. Finding no guidance in our existing rules, we turn to the application of non-statutory tolling.

Non-statutory tolling principles allow filing a motion to amend with the amended complaint attached to toll the statute of limitations

{24} New Mexico has characterized "equitable tolling" as a non-statutory tolling principle that provides relief in cases when circumstances beyond the plaintiff's control preclude filing suit within the statute of limitations. *See Ocana v. Am. Furniture Co.*, 2004-NMSC-018, ¶ 15, 135 N.M. 539, 91 P.3d 58. While we have applied non-statutory tolling principles to avoid the bar of the statute of limitations under our equitable tolling doctrine, we have never addressed the exact issue before us. *Snow*, 2014-NMCA-054, ¶ 18.

{25} Our Court of Appeals determined that equitable tolling could not be applied to this case because the Snows did not demonstrate extraordinary circumstances that prevented them from timely filing the amended complaint. *Snow*, 2014-NMCA-054, ¶ 23. Flatly prohibiting tolling in this instance, however, seems to defeat the purpose of providing equitable relief when circumstances beyond a party's control, such as inevitable court delay, prevent that party from timely filing.

{26} We have to assume that when enacting the statute of limitations for statutory causes of action, the Legislature determined an appropriate time period—in this case three years—after carefully contemplating the competing interests of providing 1) adequate time to injured plaintiffs to file a complaint and 2) certainty to defendants that their liability for past conduct will have a definite end. *See Butler v. Deutsche Morgan Grenfell, Inc.*, 2006-NMCA-084, ¶ 23, 140 N.M. 111, 140 P.3d 532. This Court, by imposing requirements on a party requesting leave to file an amended complaint without also accounting for the delay inherent in that request, runs the risk of truncating the period established by the Legislature to file suit. Essentially, we would be requiring parties seeking to file an amended complaint within the prescribed time to 1) anticipate how long it might take a particular judge to rule on a motion, and 2) subtract that additional time from the end date of the statute of limitations. Yet, no party can know how much that delay may be, and worse yet, that party has no means to control that delay; it is out of the party's hands.

{27} In this case, the Snows filed their motion on the eve of the expiration of the statute of limitations, not allowing much time for the district court to issue a ruling. The court took a week in this case, but the Snows could not have anticipated that. If the Snows had filed the motion a week before the statute of limitations would run and it took a month for the judge to issue its decision, the result—that the amended complaint was not timely filed—would be the same. It would be

an absurd policy for us to interpret our statutes and rules in a way that requires a plaintiff to anticipate the turnaround of a court and thereby risk truncating the limitations period set by the Legislature. Therefore, we are not persuaded by the Court of Appeals' analysis and look for guidance beyond our case law to other jurisdictions that have directly addressed this issue.

{28} Most jurisdictions apply some degree of tolling to account for the time it takes a court to rule on a motion requesting leave of court to file an amended complaint, so long as the amended complaint is attached to the motion, as was done in this case. *See Children's Store v. Cody Enters., Inc.*, 580 A.2d 1206, 1209-1210 (Vt. 1990) ("The state and federal courts that have confronted this question have held that an action against a new party, brought in through amendment to a preexisting complaint, is commenced when the motion to amend, and the new complaint, is filed even though permission to make the amendment is given at a later date."). *See also Rademaker v. E.D. Flynn Exp. Co.*, 17 F.2d 15, 17 (5th Cir. 1927) (adopting a rule that a motion for leave to amend stands in the place of an actual amendment when it is full and comprehensive in its averment of facts). As the United States Court of Appeals for the Seventh Circuit explained,

> As a party has no control over when a court renders its decision regarding the proposed amended complaint, the submission of a motion for leave to amend, properly accompanied by the proposed amended complaint that provides notice of the substance of those amendments, tolls the statute of limitations, even though technically the amended complaint will not be filed until the court rules on the motion.

Moore v. Indiana, 999 F.2d 1125, 1131 (7th Cir. 1993).

{29} There appears to be some disagreement, however, over whether 1) filing a motion requesting leave with the amended complaint attached stops the statute of limitations by "deeming" the amended complaint filed for the purposes of the statute of limitations at the time the motion with the amended complaint attached is filed, or 2) filing the motion requesting leave only tolls the statute of limitations until the court enters the order.

{30} The Massachusetts Supreme Judicial Court has observed, as have we earlier in this opinion, that because leave of court is required to amend a complaint, the plaintiff has little or no control over when the amended complaint may be filed. *See Nett v. Bellucci*, 774 N.E.2d 130, 136 (Mass. 2002). Thus, filing the motion to amend with the proposed complaint attached should be treated as the functional equivalent of filing an original complaint, subject to permission subsequently granted. *Id.* at 137. That court held that the operative date for commencement of an action is the date of filing a motion for leave to amend, so long as the motion adequately describes the contemplated amendment either through a memorandum or an attached amended complaint. *Id.* at 141. *See Totura & Co. v. Williams*, 754 So. 2d 671 (Fla. 2000) (allowing the amended complaint to relate back to the date the motion to amend was filed in order to defeat the statute of limitations defense); *Children's Store*, 580 A.2d at 1210 ("The better rule is that the action is commenced when the plaintiff files the motion to amend *and* the proposed complaint

irrespective of when the court [eventually] grants the motion to amend.").

{31} The New York Court of Appeals, on the other hand, agreed that some form of tolling was necessary but declined to adopt the "deeming" approach used in Florida, Massachusetts, and Vermont. *See Perez v. Paramount Commc'ns, Inc.*, 709 N.E.2d 83, 86 (N.Y. 1999). Instead, that court only allowed the statute of limitations to toll during the pendency of the motion, from the time the motion is filed until the court's order granting leave to file the amended complaint is filed. *See id.*

{32} If New Mexico were to adopt the more limited New York approach, the statute of limitations in this case would only toll from the time the motion was filed on January 20, 2012 at 4:23 p.m. until the court entered its order a week later on January 27, 2012 at 4:05p.m. Even if the Snows were credited with the time remaining under the statute of limitations when the motion was filed, they would only have had until the close of business on January 27, 2012, the day the order was entered—a mere one-half hour—to file the second amended complaint. As a result, they would have had to file the second amended complaint before they were even notified of the district court's decision, and before they knew they had permission to file the second amended complaint. It would be absurd for us to allow tolling, but not for a period of time long enough to make a difference.

{33} The "deeming" rule followed in Massachusetts and Florida appears to us to be the better approach. Under a similar rule in New Mexico, the Snows' second amended complaint, filed on January 30, 2012, would be "deemed" filed on the day the motion for leave to amend was filed, conditioned only on securing a court order granting leave to file. Following this rule, the second amended complaint would be "deemed" filed within the period allowed under the statute of limitations, January 20, 2012.

{34} The NMDLA argues that this rule contradicts the public policy advanced by the statute of limitations and would be unfair to potential defendants. Under the Massachusetts Rules of Civil Procedure a party is required to complete service of process within 90 days of filing the document. *See* Mass. R. Civ. P. 4(j). Therefore, even with the adoption of the "deeming" rule in Massachusetts, the certainty provided by the statute of limitations is maintained because all defendants are either notified or free from the threat of litigation within 90 days after the statute of limitations has run.

{35} By contrast, the NMDLA points out that in New Mexico we have no set period of time for service of process. *See* Rule 1-004(C)(2) ("Service of process shall be made with reasonable diligence."). Therefore, if the "deeming" rule is adopted, potential defendants would lose the certainty provided by the statute of limitations and would never be free from the threat of potential litigation. In order to cure this unfairness to defendants, NMDLA argues that our rules should be modified to require notice to the proposed new party prior to the running of the statute of limitations. In other words, the plaintiff would have to notify the potential new defendants of the intent to sue before the amended complaint is filed.

{36} We decline to impose such a requirement at this time. We do so, however, without prejudice to any future efforts by an appropriate rules committee to examine the

question further and offer suggested rule changes for consideration by this Court.

{37} Alternatively, NMDLA argues that Rule 1-004 should be amended to provide a more definite time period in which to complete service of process, similar to the Massachusetts rule. In this case, it appears that the Snows did everything within their power to file the second amended complaint and complete service of process in a timely manner. They filed the amended complaint the day they were notified that their motion requesting leave of court was granted, and they served Warren and Brininstool within a few days of filing. This clearly meets our "reasonable diligence" standard and does not provide evidence that our current standard for completion of service is unworkable. However, we leave to the appropriate rules committee the option to propose revisions to the "reasonable diligence" standard if deemed prudent.

CONCLUSION

{38} We reverse the opinion of the Court of Appeals in this matter. Because the underlying lawsuit has been settled, nothing remains to be done by way of remand. We do, however, refer this opinion to the appropriate rules committee for further consideration.

{39} **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

Certiorari Denied, June 15, 2015, No. 35,241

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-074

Filing Date: March 26, 2015

Docket Nos. 33,138 and 33,668 (consolidated)

ALFREDO RODRIGUEZ,

Plaintiff-Appellee,

v.

STEPHAN WILLIAMS,

Defendant-Appellant.

Duhigg, Cronin, Spring & Berlin, P.A.
David L. Duhigg
Albuquerque, NM

for Appellee

Ripley B. Harwood, P.C.
Ripley B. Harwood
Albuquerque, NM

for Appellant

OPINION

GARCIA, Judge.

{1} Defendant Stephan Williams appeals the judgment entered by the district court against him and in favor of Plaintiff Alfredo Rodriguez after a bench trial on a personal injury claim arising from a motor vehicle accident. We affirm.

BACKGROUND

{2} In February 2012, Defendant ran a red light and struck Plaintiff's vehicle, injuring Plaintiff. At the time of the crash, Defendant's blood-alcohol content was .11, Plaintiff's blood-alcohol content was .076, and Plaintiff was not wearing a seat belt. Plaintiff was transported by ambulance to the hospital where he underwent a "craniotomy for evacuation of [a] subdural hematoma" and spent a total of eight days in recovery. Plaintiff's medical bills totaled $111,924.63. Plaintiff sued Defendant for damages.

{3} Plaintiff, who had been earning $9.50 per hour as an auto dealership employee, was unable to work for three months after the accident and was apparently uninsured and unable to pay his medical bills. As a result, the hospital filed a lien in the event he was awarded a judgment or received insurance proceeds. In response to the lien, Plaintiff amended his complaint to include a claim against the hospital that his medical bill was unreasonable. Plaintiff and the hospital eventually entered into a settlement agreement in which the hospital agreed to accept one-third of "all monetary recovery [Plaintiff] receives arising out of or relating to the [a]ccident" in full satisfaction of his medical bill. The hospital's chief financial officer (CFO) testified at trial that Plaintiff's medical bill of $111,924.63 was reasonable and necessary for Plaintiff's care. The district court asked the CFO whether the settlement agreement would allow the hospital to recover more than what it had billed in the event one-third of Plaintiff's recovery exceeded the amount of his medical bill. The CFO replied that in her experience with this type of settlement agreement, she had never seen a case where the hospital recovered more than the billed amount, that the hospital usually receives less than what it billed, and that she believed the agreement capped the hospital's recovery at the amount of the bill. The CFO explained that the hospital typically enters into this kind of settlement agreement with an uninsured patient so that any award is evenly split between the patient, the patient's attorney, and the hospital.

{4} After a bench trial, the district court entered judgment in favor of Plaintiff. It concluded that Defendant was primarily at fault for Plaintiff's injuries and that Plaintiff was only 5% at fault due to his own alcohol impairment. The district court declined to consider the fact that Plaintiff was not wearing his seat belt in its comparative fault analysis because NMSA 1978, § 66-7-373(A) (2001) prohibits such consideration. The district court found that Plaintiff's total damages amounted to $191,864.63, which consisted of $4,940 in lost wages; $111,924.63 in medical costs; $25,000 in "[n]ature, extent and duration"; and $50,000 in pain and suffering. It subtracted 5% off of Plaintiff's total damages to account for his percentage of fault, and entered judgment against Defendant in the amount of $182,271.40.

{5} Defendant renews four arguments on appeal: (1) the unlawful acts doctrine barred Plaintiff's claims; (2) the district court should have considered the fact that Plaintiff was not

wearing a seat belt in determining Plaintiff's comparative negligence; (3) Plaintiff's seat belt non-use barred operation of the collateral source rule; and (4) Plaintiff's medical damages should have been reduced to the amount that the hospital eventually agreed to accept from Plaintiff, not what it initially billed.

DISCUSSION

A. Unlawful Acts Doctrine

{6} Defendant argues that our Supreme Court's decision in *Desmet v. Sublett* adopted a common law rule—the "unlawful acts" doctrine—that applies in this case to preclude Plaintiff from recovering damages against Defendant because Plaintiff was unlawfully driving under the influence of alcohol at the time Defendant ran a red light and struck Plaintiff's vehicle. *See* 1950-NMSC-057, 54 N.M. 355, 225 P.2d 141. We disagree with Defendant's argument for several reasons.

{7} First, although the facts of this case are distinguishable, the judgment in this case is consistent with the principles that our Supreme Court applied in *Desmet*. There, the plaintiff bought a truck from a third party. *Id.* ¶ 2. The plaintiff and the third party agreed that the third party would use the truck to haul logs for hire over the public highways. *Id.* The defendant was a mechanic who had repaired the truck during the time that the third party owned it. *Id.* The third party never paid the defendant for those repairs. *Id.* After the plaintiff bought the truck from the third party, he authorized the third party to take it to the defendant to repair it. *Id.* The defendant repaired the truck, but refused to surrender the truck until he received payment for the repairs that he made when the third party owned the truck. *Id.* The plaintiff sued the defendant for return of the truck and for damages in the amount of income the plaintiff lost from not being able to use the truck to haul logs for hire during the year in which the defendant retained it. *Id.* The district court ordered the truck be returned to the plaintiff and awarded the plaintiff damages in an amount equal to the fair rental value of the truck for each day that the defendant refused to surrender it. *Id.* ¶¶ 2-3. The district court also found that the plaintiff had not properly registered the truck and that he did not have the required permit to operate the truck for hire over the public highways. *Id.* ¶ 3. Our Supreme Court upheld the order returning the truck to the plaintiff, but it reversed the damages award based on the

> well settled rule of law that a person cannot maintain an action if, in order to establish his cause of action, he must rely, in whole or in part, on an illegal or immoral act or transaction to which he is a party, or where he must base his cause of action, in whole or in a part, on a violation by himself of the criminal or penal laws.

Id. ¶ 9. It recognized that the policy behind this rule is that "[n]o court will lend its aid to a man who [founded] his cause of action upon an immoral or illegal act." *Id.* ¶ 11 (internal quotation marks and citation omitted). The Supreme Court concluded that this rule precluded the plaintiff's monetary recovery because "the plaintiff [founded] his claim for damages on the fact that he was not allowed to operate his truck on the public highways of this state in violation of its positive law." *Id.* ¶ 12. In other words, the plaintiff could not recover damages on a claim of lost income when the activity that would have produced that income would have been done unlawfully. *Id.*

{8} Here, Plaintiff's damages claim was based on injuries he sustained when Defendant ran a red light and struck his vehicle. The district court found that a small portion of Plaintiff's injuries resulted from his own alcohol impairment, and it reduced his damages accordingly. Thus, the damages that Plaintiff actually recovered were founded solely on Defendant's negligence in running a red light and striking Plaintiff's vehicle, not on Plaintiff's unlawful act of driving impaired. In *Desmet*, one hundred percent of the income that the plaintiff claimed to have lost due to the defendant's conduct would have been earned in violation of New Mexico law, and the Supreme Court accordingly reduced his recovery by one hundred percent. *Id.* ¶ 15. Here, consistent with *Desmet*, Plaintiff's recovery was reduced by the portion of the damages attributed to his unlawful act.

{9} Second, Defendant urges this Court to follow the rule adopted by New York courts, one that precludes a plaintiff from recovering any damages for injuries sustained while committing an unlawful act, under certain circumstances. In particular, Defendant cites *Alami v. Volkswagen of Am., Inc.*, 766 N.E.2d 574, 575 (N.Y. App. 2002) (involving an intoxicated driver who crashed his Volkswagen Jetta into a utility pole and was killed). However, *Alami* does not support Defendant's argument. *Id.* at 578.

{10} In *Alami*, the driver's widow sued Volkswagen and claimed that a defect in the Jetta's design enhanced the driver's injuries. *Id.* at 575. The trial court granted summary judgment in favor of Volkswagen, dismissing the widow's damages claim because the decedent's act of driving intoxicated was a serious violation of the law that directly resulted in his injuries. *Id.* In reversing summary judgment, New York's highest court recognized that driving intoxicated was "indisputably a serious violation of the law." *Id.* However, it concluded that the rule precluding recovery based on unlawful acts did not apply because (1) "[i]f Volkswagen did defectively design the Jetta . . . it breached a duty to any driver of a Jetta involved in a crash regardless of the initial cause"; (2) the plaintiff did not "seek to profit from her husband's intoxication—she ask[ed] only that Volkswagen honor its well-recognized duty to produce a product that does not unreasonably enhance or aggravate a user's injuries"; and (3) "[t]he duty she [sought] to impose on Volkswagen originates not from her husband's act [of driving intoxicated], but from Volkswagen's obligation to design, manufacture and market a safe vehicle." *Id.* at 577. In reaching this conclusion, the New York court emphasized that the unlawful acts rule "embodies a narrow application of public policy imperatives under limited circumstances[,]" and that "[e]xtension of the rule here would abrogate legislatively mandated comparative fault analysis in a wide range of tort claims." *Id.*

{11} Other New York cases also address whether an intoxicated driver can recover in a negligence action where the driver's intoxication was a partial cause of his or her injuries. In *LaPage v. Smith*, 563 N.Y.S.2d 174, 174-75 (App. Div. 1990), a New York appellate court concluded that the plaintiff was barred from recovering against a defendant in a wrongful death action where the plaintiff's son was killed while drag racing at speeds over one hundred miles per hour and was intoxicated. There, the court distinguished the drag racing scenario from previous scenarios in two other cases involving car accidents "'occasioned' by the criminal act of a plaintiff's drunk driving." *Id.* at 175. One such previous case, *Humphrey v. State of N.Y.*, 457

N.E.2d 767, 768 (N.Y. 1983), involved a decedent motorist's estate that sued the State of New York for wrongful death. Although the decedent in *Humphrey* was driving intoxicated, the trial court found that the State of New York was 60% at fault for failing to provide adequate warning of the highway conditions. *Id.* In affirming the judgment, the appellate court concluded that "[t]he fact that decedent's ability to drive was impaired does not exonerate the State from liability[.]" *Id.* The second case was *Clark v. State of N.Y.*, 508 N.Y.S.2d 648 (App. Div. 1986), which involved a motorist that sued the state for injuries suffered when she crashed into a defective guardrail. Although the trial court found that the plaintiff hit the guardrail because she was driving intoxicated, it found the State one hundred percent liable for her injuries. *Id.* at 649. The appellate court reversed, concluding that the plaintiff's award should have been reduced—though not eliminated—by allocating part of the plaintiff's damages to her own fault in driving intoxicated. *Id.* The appellate court explained, "Without the confluence of the [s]tate's negligence and [the plaintiff's] negligence in operating her vehicle while intoxicated and failing to negotiate a curve . . . the accident and [the plaintiff's] unfortunate injuries would not have occurred. Each party's negligence was a substantial factor and, therefore, a proximate cause of the ultimate harm." *Id.*

{12} Even if this Court agreed with Defendant and adopted New York's analysis of whether an intoxicated driver can recover against another party in a negligence action, we conclude that the judgment entered by the district court would be affirmed. Like New York, New Mexico has adopted a comparative fault analysis of tort claims. *See Scott v. Rizzo*, 1981-NMSC-021, ¶ 22, 96 N.M. 682, 634 P.2d 1234 (adopting the comparative fault rule), *superseded in part by statute*, NMSA 1978, § 41-3A-1 (1987), *as recognized in Reichert v. Atler*, 1992-NMCA-134, ¶ 34, 117 N.M. 628, 875 P.2d 384. Thus, we agree with the court in *Alami* that extension of the unlawful acts rule in this case "would abrogate [judicially and] legislatively mandated comparative fault analysis in a wide range of tort claims." 766 N.E.2d at 577. Like the circumstances in *Alami*, when Defendant in this case ran a red light and crashed into a vehicle that had the right-of-way, Defendant breached an established duty, irrespective of whether the driver of the vehicle he crashed into was intoxicated. Plaintiff did not seek to profit from any impairment to his driving, but only that Defendant honor his well-recognized duty to stop at an intersection displaying a red light. *See id.* at 577 (recognizing and distinguishing the separate duties imposed upon each party that reasonably contribute to an accident). Our conclusion is also consistent with the reasoning in *Humphrey* and *Clark*. *See Humphrey*, 457 N.E.2d at 768 ("The fact that [the plaintiff's] ability to drive was impaired does not exonerate the [defendant] from liability[.]"); *Clark*, 508 N.Y.S.2d at 649 ("Without the confluence of the [defendant's] negligence and [the plaintiff's] negligence in operating h[is] vehicle while intoxicated . . . the accident and [the plaintiff's] unfortunate injuries would not have occurred. Each party's negligence was a . . . factor and, therefore, a proximate cause of the ultimate harm.").

{13} Finally, our conclusion is consistent with at least one treatise that has considered the effect of a plaintiff's unlawful act in connection with his or her negligence action:

> The plaintiff's violation of [a] statute is ordinarily relevant, of course, as showing [his or] her negligence, but not as forbidding the claim entirely.

> The fact that the plaintiff is guilty of contributory negligence per se in violating a statute shows negligence but it does not show how much, so a comparison of the plaintiff's per se fault and the defendant's negligence is still appropriate.

1 Dan B. Dobbs et al., *The Law of Torts* § 228, at 818 (2d ed. 2011). For all of these reasons, we conclude—the fact that Plaintiff's blood-alcohol content was .076 at the time Defendant ran the red light and struck the Plaintiff's vehicle does not preclude Plaintiff from recovering damages attributed to Defendant's comparative negligence.

B. Seat Belt Non-Use

1. Statutory Interpretation of Section 66-7-373(A)

{14} Defendant asserts that the district court erred when it concluded that Section 66-7-373(A) barred it from considering the fact that Plaintiff was not wearing a seat belt in determining Plaintiff's comparative negligence. Section 66-7-373(A) provides, in pertinent part, "Failure to be secured . . . by a safety belt as required by the Safety Belt Use Act shall not in any instance constitute fault or negligence and shall not limit or apportion damages." Defendant contends that Section 66-7-373(A)'s language "only forecloses parties from invoking the statute to establish negligence *per se*[,]" and that "[i]t does not foreclose the assertion that seat belt non-use constitutes comparative negligence at common law." We disagree.

{15} We review the interpretation of a statute de novo. *Chatterjee v. King*, 2012-NMSC-019, ¶ 11, 280 P.3d 283. In construing a statute, we determine the Legislature's intent by giving effect to its entire text in accordance with its objective and purpose. NMSA 1978, § 12-2A-18(A) (1997). We do not give effect to the Legislature's intent by reading a statute in a way that would render it meaningless. *City of Deming v. Deming Firefighters Local 4521*, 2007-NMCA-069, ¶ 23, 141 N.M. 686, 160 P.3d 595. "We presume that the [L]egislature is well informed as to existing statutory and common law and does not intend to enact a nullity[.]" *Inc. Cnty. of Los Alamos v. Johnson*, 1989-NMSC-045, ¶ 4, 108 N.M. 633, 776 P.2d 1252.

{16} Our Supreme Court adopted the comparative fault doctrine in 1981. *See Scott*, 1981-NMSC-021, ¶ 22. In November 1984, this Court concluded that a plaintiff's damages caused by his failure to wear a seat belt could be considered under a comparative fault analysis. *Thomas v. Henson*, 1984-NMCA-113, ¶ 24, 102 N.M. 417, 696 P.2d 1010, *rev'd in part by* 1985-NMSC-010, 102 N.M. 326, 695 P.2d 476. Our Supreme Court swiftly reversed that portion of our *Thomas* decision, holding that no common law "seat belt defense" existed in New Mexico and that the creation of such a defense was within the purview of the Legislature. 1985-NMSC-010, ¶ 4. Within weeks of the Supreme Court's decision in *Thomas*, the Legislature enacted the Safety Belt Use Act, which created a statutory duty to wear a seat belt. *See* 1985 N.M. Laws, ch. 131, §§ 1-4. However, in doing so, the Legislature could not have been clearer when it included a provision stating that breaching the statutory duty to wear a seat belt "*shall not in any instance constitute fault or negligence and shall not limit or apportion damages.*" 1985 N.M. Laws, ch. 131, § 4 (emphasis added) (now codified at § 66-7-373(A)). We presume that, at the time that it enacted this new

statutory provision, the Legislature was aware of our Supreme Court's adoption of comparative fault for tort claim lawsuits and of both this Court's and our Supreme Court's decisions in *Thomas*. *See Johnson*, 1989-NMSC-045, ¶ 4 (recognizing the presumption that the Legislature is aware of existing legal precedent). However unreasonable it may seem from the contemporary view of comparative fault, commentators recognize that numerous states have enacted statutes barring the consideration of seat belt non-use from the comparative fault analysis:

> In the light of safety factors involved, the plaintiff's failure to wear an available seat[]belt or safety harness may be quite unreasonable. Today, with pervasive seat[]belt use and statutes requiring it, failure to wear a seat[]belt certainly could count as comparative fault. However, this result is barred by many state statutes.

1 Dobbs, *supra*, § 231, at 827. If we were to conclude, as Defendant urges, that Section 66-7-373(A) does not bar consideration of an injured plaintiff's failure to wear a seat belt in a comparative fault analysis, then a plaintiff's failure to wear a seat belt would almost certainly "constitute fault or negligence" resulting in "limit[ing] or apportion[ing]" a plaintiff's damages. Section 66-7-373(A). Such an interpretation would render the relevant portion of Section 66-7-373(A) meaningless and a nullity. *See Johnson*, 1989-NMSC-045, ¶ 4; *see also Deming Firefighters Local 4521*, 2007-NMCA-069, ¶ 23. Therefore, we agree with the district court that Section 66-7-373(A) bars consideration of seat belt non-use in a comparative fault analysis of liability.

2. Constitutional Arguments

{17} Defendant asserts that if Section 66-7-373(A) bars consideration of seat belt non-use in a comparative fault analysis, we should conclude that Section 66-7-373(A) is unconstitutional because it violates the separation of powers doctrine set forth in Article IV, Section 34 of the New Mexico Constitution and it violates Defendant's due process and equal protection rights. We are not persuaded.

{18} Article IV, Section 34 of the New Mexico Constitution provides that "[n]o act of the [L]egislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case." The purpose of this provision is to "prevent legislative interference with adjudication of *pending cases*." *Brazos Land, Inc. v. Bd. of Cnty. Comm'rs*, 1993-NMCA-013, ¶ 14, 115 N.M. 168, 848 P.2d 1095 (emphasis added.) "The term 'pending case' ordinarily refers to a suit pending on some court's docket and does not include a suit filed after the statute became effective[.]" *DiMatteo v. Cnty. of Dona Ana*, 1989-NMCA-108, ¶ 13, 109 N.M. 374, 785 P.2d 285. The provision now codified at Section 66-7-373(A) was first enacted in 1985, removed by amendment in 1991, re-enacted in 1993, and has remained effective without interruption ever since. *See Mott v. Sun Country Garden Prods., Inc.*, 1995-NMCA-066, ¶¶ 8-9, 120 N.M. 261, 901 P.2d 192 (explaining the history of Section 66-7-373(A)). In this case, Plaintiff's cause of action against Defendant arose in 2012. Therefore, because Section 66-7-373(A) was effective for nearly two decades prior to 2012, Article IV, Section 34 of the New Mexico Constitution does not apply to Plaintiff's claim. *See DiMatteo*, 1989-NMCA-108, ¶ 13.

{19} As to Defendant's remaining constitutional arguments, this Court has previously considered and rejected those arguments in *Mott* and we are not persuaded to revisit this precedent. *See* 1995-NMCA-066, ¶¶ 14-21 (concluding that Section 66-7-373(A) does not violate the separation of powers doctrine or the defendant's due process or equal protection rights). Therefore, we shall proceed to address Plaintiff's remaining arguments.

C. Collateral Source Rule

{20} Generally, "plaintiffs may not collect more than the damages awarded to them, or, put another way, they may not receive compensation twice for the same injury." *Sunnyland Farms, Inc. v. Cent. N.M. Elec. Co-op*, 2013-NMSC-017, ¶ 47, 301 P.3d 387. "However, the collateral source rule is an exception to the [general] rule against double recovery." *Id.* ¶ 48. This rule states that compensation received from a collateral source, i.e., a third party, "does not operate to reduce damages recoverable from a wrongdoer." *Id.* (internal quotation marks and citation omitted). The policy behind this rule is that "the interests of society are likely to be better served if the injured person is benefitted than if the wrongdoer is benefitted." *Id.* ¶ 50 (internal quotation marks and citation omitted). One justification for this rule is that third parties will be more likely to help injured persons if they know they are likely to be reimbursed. *Id.* ¶ 49. "Charity cannot be made a substitute for such right, nor can benevolence be made a set-off against the acts of a [tortfeasor]." *Id.* (internal quotation marks and citation omitted). Where a third party who helps an injured person does not seek full reimbursement, "the collateral source rule [in New Mexico] dictates that the contribution of a collateral source must operate to benefit the plaintiff rather than the defendant." *Id.* ¶ 50.

{21} Defendant argues that the collateral source rule should not apply in this case because both Plaintiff and Defendant were wrongdoers in that they both drove impaired and Plaintiff additionally failed to wear his seat belt. Because Defendant provides no authority for the proposition that the collateral source rule does not apply where the plaintiff in a negligence action shares some degree of fault for his injuries, we decline to review this argument on appeal. *See 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. We therefore will not do this research for counsel. Issues raised in appellate briefs which are unsupported by cited authority will not be reviewed by us on appeal." (citation omitted)).

D. Medical Costs Award

{22} Defendant argues that Plaintiff's settlement agreement with the hospital "represents either a *de facto* or *de jure* medical damages cap in this case" and this Court should "remand with instructions . . . to reduce the medical damages award . . . to $37,308.21[,]" representing one-third of the hospital's $111,924.63 bill. He argues that, because Plaintiff's settlement agreement with the hospital did not result in the hospital being reimbursed for Defendant's entire $111,924.63 hospital bill in this case, the judgment awarding Plaintiff the full amount of his medical bills provides Plaintiff with a "windfall[.]" Again, Defendant does not cite any authority in support of his argument. *See id.* (explaining that the appellate courts will not research for authority supporting a

position where no cited authority is provided in the briefing). Instead, Defendant refers us to the record for a motion he filed in the district court that purportedly contains "ample support for his argument in the general case law on the subject" and a law review article that "examine[s] the general issues of medical billing in America." We decline to consider such an argument because he does not cite any authority to support it in his brief in chief. *See* Rule 12-213(A)(4) NMRA.

CONCLUSION

{23} For the foregoing reasons, we affirm the judgment entered by the district court.

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

TIMOTHY L. GARCIA, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

M. MONICA ZAMORA, Judge

Certiorari Granted, June 19, 2015, No. 35,255

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-075

Filing Date: April 7, 2015

Docket No. 33,419

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

ROBERT GEORGE TUFTS,

Defendant-Appellant.

Hector H. Balderas, Attorney General
Paula E. Ganz, Assistant Attorney General
Santa Fe, NM

for Appellee

Jorge A. Alvarado, Chief Public Defender
Kimberly Chavez Cook, Assistant Appellate Defender
Santa Fe, NM

for Appellant

OPINION

SUTIN, Judge.

{1} In this appeal, we must construe a statute proscribing the sending of forbidden "obscene images" to a child under sixteen years of age by means of an "electronic communication device." *See* NMSA 1978, § 30-37-3.3 (2007). Defendant Robert George Tufts was convicted under the statute based on his having hand-delivered such images contained on an SD (secure digital) or memory card to a fifteen-year-old. We hold that the statute was not intended to cover Defendant's act.

BACKGROUND

{2} Child met Defendant in about October or

November 2011. Defendant, in his late thirties, gave Child at least two cell phones over several months, and they texted or talked to each other daily on these cell phones. Later in their relationship, during which the two had not engaged in a physical relationship, nor had Defendant made any advances, Defendant removed the SD card from a cell phone, recorded himself nude and masturbating, and he placed the SD card back in the cell phone and handed the phone to Child. The SD card also contained photographs of an adult penis.

{3} The police were made aware that Child had received the images. After interviewing Child, the police called Defendant and asked him to come to the police station. Defendant went to the station on his own, and the police interviewed him. Police testimony at trial indicated that, in the interview, Defendant admitted his actions and consented to a search of his and Child's cell phones. Defendant stated that he was in love with Child and that his behavior was out of character but he felt compelled to do as he did because God sent this relationship to him. Also in the interview, Defendant admitted to the interviewing officer that he knew "that it was wrong." When asked by the officer why he thought that, Defendant stated that he had "looked it up[,]" and he admitted that sending photos and the video was "against the law."[1]

[1]The trial record is not clear whether Defendant's research occurred before he handed the SD card to Child or afterward. Further, Defendant contends on appeal that this interview constituted a custodial interview requiring *Miranda* admonitions and that his statements and the evidence acquired from the statements should have been suppressed. He moved to suppress before trial, and the district court denied the motion. Because we reverse on the ground that the statute under which Defendant was convicted did not cover his conduct, we do not reach the suppression issue.

{4} The law enforcement officer, who conducted a forensic evaluation of the SD card and of the at-issue cell phones, one that belonged to Child and the other that belonged to Defendant, testified that his findings were consistent with Defendant's admission that Defendant had transferred the images onto an SD card and then placed it in the phone that he gave to Child. The officer further testified that the at-issue images were not transferred through the cell phone network and confirmed that "no one hit a send button" to transmit the images electronically.

{5} Defendant was indicted on April 1, 2012, charged with one count of violating Section 30-37-3.3, a fourth degree felony, which reads, in part, as follows:

> Criminal sexual communication with a child consists of a person knowingly and intentionally communicating directly with a specific child under sixteen years of age by sending the child obscene images of the person's intimate parts by means of an electronic communication device when the perpetrator is at least four years older than the child.

{6} The term "electronic communication device" is defined in Section 30-37-3.3(C)(1) as: "a computer, video recorder, digital camera, fax machine, telephone, pager[,] or any other device that can produce an electronically generated image[.]"

{7} At the close of the State's case, Defendant moved for a directed verdict on the ground that his conduct was not covered by the statute. The district court denied Defendant's motion, and Defendant was then convicted of violating Section 30-37-3.3, followed by a

judgment and sentence of the district court. Defendant was sentenced to a term of eighteen months followed by one year parole. The court required Defendant to serve 146 days of his sentence in the custody of the Doña Ana County Detention Center as time served, but Defendant received pre-sentence confinement credit for those days; and the court suspended the remainder of the sentence (one year, thirty-six days) to be followed by probation.

DISCUSSION

{8} Defendant contends on appeal that Section 30-37-3.3(A) does not cover his conduct, because he was not "communicating" with Child "by sending" the images "by means of an electronic communication device." This case requires us to construe Section 30-37-3.3. As stated in *State v. Office of the Public Defender ex rel. Muqqddin*, 2012-NMSC-029, ¶ 13, 285 P.3d 622,

> statutory construction is a matter of law we review de novo. Our primary goal is to ascertain and give effect to the intent of the Legislature. In doing so, we 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. 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.

(Alteration, internal quotation marks, and citation omitted.)

{9} The law enforcement officer who conducted the interview of Defendant stated at trial that an SD card is a "base digital storage device" and that "[y]ou can plug it into a computer using an adapter and store files on it just like you would on a thumb drive or an external hard drive." Further, as to the meaning of the term "sending," calling on the many and varied dictionary definitions of "send" and the context of the statute, the State argues on appeal that the statute's plain language is not limited to material sent by email or text over a network. And the State argues that the plain and broad reach of the statute's references to electronic communication devices is meant to "include several devices that are not, or are not necessarily, vehicles for transmitting images (such as images of intimate parts) over a network." According to the State, by its open-ended "any other device" language "[i]n the context of a statute addressing fast-developing technologies, it can be inferred that the [L]egislature contemplated that electronic communication devices would continue to evolve and be developed[] and that the [L]egislature intended to broadly include all manner of electronic communication devices within the scope of [the statute]."

{10} From this reasoning, the State concludes and argues that the statute was intended to cover SD cards used to facilitate sending or transmitting an image even when the image is not sent over the network and that "[t]he fact that an image was in a storage device at some point in the chain between its creation and its receipt by [Child] does not negate the fact [that] it was sent to [Child] in violation of [Section] 30-37-3.3."

{11} Countering an argument by Defendant that emphasizes distance, the State argues that there is no significant difference between Defendant sitting next to Child and handing the SD card to her, and Defendant

sitting next to Child and transmitting the material via his cell phone with the SD card in it to her cell phone. And discounting Defendant's argument that the social evil at hand is anonymous-distance transmission to escape detection, the State argues that nothing in the statute indicates any exception in that regard.

{12} The State's argument goes beyond the intended coverage of the statute. The SD card stores or houses images. It was hand delivered. What it contained was not communicated to Child by "sending" the images through an electronic communication device. Section 37-30-3.3(A) is specific and plain enough in its language. The sender must *communicate* with the minor, and the communication must be made by *sending* the image *by means of* an electronic communication device, here a cell phone, used to electronically communicate the image by sending it. Nothing in the context of Section 37-30-3.3(A) and (C)(1) says that hand delivery of an image stored on an SD card which, in turn, is placed in an electronic communication device, is intended to be prohibited.

{13} The act of delivery by Defendant is pretty clearly covered under another statute. NMSA 1978, Section 30-37-2(A) (1973) outlaws delivering or providing a minor with images such as those contained on the SD card. The statute reads, in part:

> It is unlawful for a person to knowingly sell, deliver, distribute, display for sale[,] or provide to a minor . . . any picture, photograph, drawing, sculpture, motion picture film[,] or similar visual representation or image of a person or portion of the human body, or any replica, article[,] or device having the appearance of either male or female genitals which depicts nudity, sexual conduct, sexual excitement[,] or sado-masochistic abuse and which is harmful to minors[.]

A person violating Section 30-37-2(A) is guilty of a misdemeanor. NMSA 1978, § 30-37-7(A) (1985). The language of a statute should be construed together with other statutes relating to the same subject matter. *State v. Davis*, 2003-NMSC-022, ¶ 12, 134 N.M. 172, 74 P.3d 1064 (stating that "statutes in pari materia should be construed together"). Here, Section 30-37-3.3 is part of Article 37 of New Mexico's criminal statutes. Article 37 relates particularly to "sexually oriented material [that is] harmful to minors." Section 30-37-2(A), also part of Article 37, clearly covers Defendant's at-issue conduct in this case.

{14} In addition, the Legislature's use of the term "provide" in Section 30-37-2(A) when read together with the Legislature's use of the term "sending" in Section 30-37-3.3 indicates that the Legislature recognized a distinction between the verbs "to send" and "to provide" in the context of prohibiting adults from sharing depictions of intimate body parts with children. The State's attempt to blur this distinction by stretching the meaning of "sending" is problematic.

{15} The State's argument runs contrary to the principle of statutory construction that requires courts to attribute the usual and ordinary meaning to words used in a statute. *State v. Melton*, 1984-NMCA-115, ¶ 16, 102 N.M. 120, 692 P.2d 45. The Oxford Dictionaries defines "send" primarily as "[c]ause to go or be taken to a particular destination; arrange for the delivery of,

especially by mail[,]" and secondarily, as "[c]ause (a message or computer file) to be transmitted electronically[.]" Oxford Dictionaries, http://www.oxforddictionaries.com/us/ definition/american_english/send (last visited Mar. 6, 2015). The same dictionary defines "provide" primarily as "[m]ake available for use; supply[,]" and secondarily, as "[e]quip or supply someone with[.]" *Id.* http://www.oxforddictionaries.com/us/definition/american_english/provide (last visited Mar. 6, 2015). From these definitions and as a matter of common parlance, "to send" when used to describe the act of causing another person to receive a physical object evokes the notion of a third-party carrier. On the other hand, the verb "to provide" to describe the act of causing another person to receive a physical object more appropriately, although perhaps not exclusively, describes an in-person exchange.

{16} In *Muqqddin*, our Supreme Court cautioned that "[w]ords are the beginning, not the end; they serve as portals into the *thoughts* behind the words of a criminal statute." 2012-NMSC-029, ¶ 54. "Where . . . 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.*; *see also Yates v. United States*, 574 U.S. ___, 135 S. Ct. 1074, 1081 (2015) ("[T]he plainness or ambiguity of statutory language is determined not only by reference to the language itself, but as well by the specific context in which that language is used[] and the broader context of the statute as a whole." (alterations, internal quotation marks, and citation omitted)). "Ordinarily, a word's usage accords with its dictionary definition. In law as in life, however, the same words, placed in different contexts, sometimes mean different things." *Id.* at 1082.

{17} It is for the Legislature, not this Court, to broaden Section 30-37-3.3's coverage.

> It is for the Legislature, not the courts and not the district attorney, to strike the delicate balance between those grave crimes punishable as felonies and those lesser infractions punishable as only misdemeanors. That balance requires value judgments that should be made by the people's representatives, not judicial officers, under a constitutional system of separation of powers.

Muqqddin, 2012-NMSC-029, ¶ 52.

CONCLUSION

{18} We hold that Defendant was wrongly charged with violation of Section 30-37-3.3 and was wrongly convicted and sentenced under that statute. We reverse Defendant's conviction, judgment, and sentence.

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

JONATHAN B. SUTIN, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

M. MONICA ZAMORA, Judge

Certiorari Granted, July 13, 2015, No.

35,279; Certiorari Granted, July 13, 2015, No. 35,289; Certiorari Granted, July 13, 2015, No. 35,290

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-076

Filing Date: April 8, 2015

Docket No. 33,237
(consolidated with Nos. 33,238 and 33,245)

GILA RESOURCES INFORMATION PROJECT,
AMIGOS BRAVOS, TURNER RANCH PROPERTIES, L.P., STATE OF NEW MEXICO,
ex rel. Gary King, Attorney General, and WILLIAM C. OLSON,

Appellants,

v.

NEW MEXICO WATER QUALITY CONTROL COMMISSION,

Appellee,

and

FREEPORT-MCMORAN CHINO MINES COMPANY, FREEPORT-MCMORAN TYRONE,
INC., FREEPORT-MCMORAN COBRE MINING COMPANY, and NEW MEXICO ENVIRONMENT DEPARTMENT,

Intervenors-Appellees.

APPEAL FROM THE WATER QUALITY CONTROL COMMISSION

Butch Tongate, Chair

N.M. Environmental Law Center
R. Bruce Frederick
Douglas Meiklejohn
Santa Fe, NM

for Appellant Gila Resources Information Project and Turner Ranch Properties, L.P.

High Desert Energy + Environment Law Partners
Tracy Hughes
Santa Fe, NM

for Appellant Amigos Bravos

Water, Environment and Utilities Division
Office of the N.M. Attorney General
Hector H. Balderas, Attorney General
Tannis L. Fox, Assistant Attorney General
Santa Fe, NM

for Appellant State of New Mexico

High Desert Energy + Environment Law Partners
Charles F. Noble
Santa Fe, NM

for Appellant William C. Olson

Hinkle Shanor LLP
Thomas M. Hnasko
Julie A. Sakura
Santa Fe, NM

for Appellee N.M. Water Quality Control Commission

Modrall, Sperling, Roehl, Harris & Sisk, P.A.
John J. Kelly
Stuart R. Butzier
Emil J. Kiehne

Albuquerque, NM

Gallagher & Kennedy, P.A.
Dalva L. Moellenberg
Anthony (T.J.) J. Trujillo
Santa Fe, NM

for Intervenors-Appellees Freeport McMoRan Chino Mines Co., Freeport-McMoRan Tyrone, Inc., and Freeport-McMoRan Cobre Mining Co.

N.M. Environment Department
Andrew P. Knight, Assistant General Counsel
Kathryn S. Becker, Assistant General Counsel
Santa Fe, NM

for Intervenor-Appellee N.M. Environment Department

OPINION

SUTIN, Judge.

{1} The Attorney General (hereafter the State) and, separately, a group of appellants comprised of Gila Resources Information Project (GRIP), Amigos Bravos, Turner Ranch Properties, L.P., and William C. Olson (collectively Gila) appealed the Water Quality Control Commission's (the Commission) order adopting a set of regulations codified at 20.6.7 NMAC (12/1/2013) pertaining to ground water protection and supplemental permitting requirements for copper mine facilities (the Regulations). The Commission and, separately, a group of Intervenors-Appellees comprised of Freeport-McMoRan Chino Mines Co., Freeport-McMoRan Tyrone, Inc., Freeport-McMoRan Cobre Mining Co., and the New Mexico Environment Department (collectively Freeport) filed answer briefs. We consolidated three appeals and address both the State's and Gila's contentions in this Opinion.

{2} Primarily at issue in this appeal is whether the Regulations adopted by the Commission violate the Water Quality Act (the WQA), NMSA 1978, §§ 74-6-1 to -17 (1967, as amended through 2013), and whether the Commission's reasons for adopting the Regulations were supported by sufficient evidence. We hold that the Regulations do not violate the WQA. Additionally, we conclude that Appellants' various attacks on the Commission's statement of reasons in support of its adoption of the Regulations do not warrant reversal. We affirm the Commission's order adopting the Regulations.

BACKGROUND

The Significance and Effect of the 2009 Amendments to the WQA

{3} Prior to 2009, the WQA did not allow the Commission to promulgate regulations that specified the methods to prevent or abate water pollution. Accordingly, the Commission, which is required to prevent or abate water pollution, did so as part of the copper mine permitting process through its "constituent agency," the New Mexico Environment Department (NMED). *See* § 74-6-2(K)(1) (stating in an appropriate context, "constituent agency" means the department of environment); § 74-6-5(A) (stating that the Commission "may require persons to obtain from a constituent agency designated by the commission a permit for the discharge of any water contaminant"). In the permitting process, an applicant was required to propose pollution-control measures to NMED for approval and, if needed, NMED would require specific pollution-control permit conditions. Parties who were adversely affected by the permitting action were entitled to appeal

NMED's decision to the Commission. Section 74-6-5(O).

{4} In 2009 the Legislature amended the WQA to require the Commission to adopt regulations particular to the copper industry that would specify "the measures to be taken to prevent water pollution and to monitor water quality." Section 74-6-4(K). Prospective regulations were to be developed by a constituent agency, here NMED, which was charged with establishing "an advisory committee composed of persons with knowledge and expertise particular to the [copper] industry . . . and other interested stakeholders to advise [NMED] on appropriate regulations to be proposed for adoption by the [C]ommission." *Id.* Further, the Legislature mandated that, after the regulations were adopted, "permits for facilities in that industry shall be subject to conditions contained in the regulations." Section 74-6-5(D).

The 2012-2013 Regulation-Making Proceedings

{5} NMED formed two committees to advise it on appropriate regulations to propose to the Commission: a "Copper Rule Advisory Committee" (the advisory committee) and a technical committee. The advisory committee included, among others, representatives from environmental groups (including GRIP and Amigos Bravos), mine owners and operators (including Freeport), and former Ground Water Quality Bureau Chief of NMED, William C. Olson, who was hired by NMED in this instance as a contractor to assist the advisory committee. The two committees met regularly over the course of seven months to review draft language and different approaches to regulating copper mining, and in August 2012, Mr. Olson provided NMED with a draft of copper mine regulations. NMED caused the draft regulations to be edited by instructing Mr. Olson to incorporate modifications that had been suggested by Freeport, and although Mr. Olson argued that a number of Freeport's suggested modifications would violate the WQA, he eventually complied by incorporating Freeport's changes into the draft regulations. NMED submitted the edited version for public comment in September 2012. After holding two public meetings at which it took public comments on the draft regulations and after meeting with interested stakeholders, NMED prepared proposed regulations, and in October 2012, NMED petitioned the Commission to adopt its proposed regulations.

{6} GRIP, Amigos Bravos, and Turner Ranch Properties submitted a response to NMED's petition in which they argued that the Commission should reject the petition because NMED's proposed regulations violated the WQA. The Commission voted to accept the petition, assigned a hearing officer to the matter, and scheduled a hearing on the petition to be held in April 2013. Prior to the hearing, the State moved to remand NMED's proposed regulations to NMED on the ground that the proposed regulations would violate the WQA. On the same grounds, GRIP, Amigos Bravos, and Turner Ranch Properties moved to dismiss the petition. The Commission denied these respective motions.

{7} Additionally, the Commission granted, in part, a pretrial motion by the State to admit portions of the record from a 2007 adjudicatory proceeding titled "*In the Matter of Appeal of Supplemental Discharge Permit for Closure (DP 1341) for Phelps Dodge Tyrone, Inc.*" (the Permit Adjudication). Specifically, the Commission ruled that its February 4, 2009, "Decision and Order on

Remand" in the Permit Adjudication would be admitted at the hearing, while all other portions of the record from the Permit Adjudication would be excluded so as to avoid confusion and to save unnecessary expenditure of the Commission's time and resources. Although it will be discussed more thoroughly later in this Opinion, the Permit Adjudication and the 2009 Decision and Order on Remand proceeded from this Court's Opinion in 2006 in *Phelps Dodge Tyrone, Inc. v. New Mexico Water Quality Control Commission*, 2006-NMCA-115, 140 N.M. 464, 143 P.3d 502.

{8} Following further reviews by NMED staff and expert witnesses, NMED edited the proposed regulations and filed a notice of amended petition in February 2013 that included a redlined version of the proposed regulations (the amended regulations), showing all changes. Over the course of ten days in April and May 2013, the Commission held a hearing on NMED's proposed amended regulations. All of the parties to this appeal presented technical testimony during the hearing. Following the hearing, the hearing officer gave all parties the opportunity to submit written closing arguments and proposed statements of reasons for the Commission's consideration. Attached to its proposed statement of reasons, NMED proposed additional changes to the amended regulations. We will refer to this draft as the "final proposed regulations."

{9} After reviewing the record including the pleadings, the written testimony, exhibits, hearing transcript, public comments, and the hearing officer's orders, and after hearing final oral arguments from the parties during a public meeting, the Commission issued its Order and Statement of Reasons (the Order) on September 25, 2013, adopting NMED's final proposed regulations. The Order, which is the subject of this appeal, is a 214-page document that includes, among other things, the Commission's statement of 1,306 reasons supporting its decision to adopt the Regulations. NMED's final proposed regulations, to which we refer in this Opinion as "the Regulations," were codified in December 2013 at 20.6.7 NMAC.

Legal Context and Terminology

{10} The objective of the Regulations is "to supplement the general permitting requirements" of the permitting and ground water standards regulations, 20.6.2.3000 to .3114 NMAC (12/1/1995, as amended through 8/1/2014), "to control discharges of water contaminants specific to copper mine facilities and their operations to prevent water pollution." 20.6.7.6 NMAC. In the context of the WQA and the related regulations, the phrase "ground water" refers to "interstitial water which occurs in saturated earth material and which is capable of entering a well in sufficient amounts to be utilized as a water supply[.]" 20.6.2.7(Z) NMAC (8/1/2014). The term "discharge" means "spilling, leaking, pumping, pouring, emitting, or dumping of a water contaminant in a location and manner where there is a reasonable probability that the water contaminant may reach ground water." 20.6.7.7(B)(18) NMAC.

{11} Discharge is regulated through a permitting process. *See* § 74-6-5(A) (stating that the Commission may require "persons," i.e, the owner or operator of a copper mine facility, to obtain a permit for the discharge of any water contaminant (a discharge permit)). Any person, in this case, a mine owner or operator, who wishes to discharge "effluent or leachate . . . so that it may move directly or indirectly into ground water" is required to

apply to NMED for a discharge permit. 20.6.2.3104 NMAC (requiring a discharge permit). The Regulations reiterate this requirement. *See* 20.6.7.8(A) NMAC ("No person shall discharge effluent or leachate from a copper mine facility so that it may move directly or indirectly into ground water without a discharge permit approved by [NMED].").

{12} Ground water quality standards are provided by 20.6.2.3103 NMAC that specifies the pH range and the maximum concentration of various contaminants applicable to ground water for various uses, including human health, domestic water supply, and irrigation use. For ease of reference in this Opinion, we refer to the standards set forth in 20.6.2.3103 NMAC as "the 3103 standards." Pursuant to the WQA, NMED is required to deny an application for a discharge permit if, in relevant part, its approval would violate any provision of the WQA or if "the discharge would cause or contribute to water contaminant levels in excess of [the 3103 standards]" as "measured at any place of withdrawal of water for present or reasonably foreseeable future use." Section 74-6-5(E)(2), (3).

{13} "Copper mine facility" refers to "all areas within which copper mining and its related activities that may discharge water contaminants occurs and where the discharge will or does take place[.]" 20.6.7.7(B)(13) NMAC. The phrase "copper mining and its related activities" includes, among other things, open pits, waste rock piles, ore stockpiles, leaching operations, tailings impoundments, and tailings or impacted stormwater. *Id.* An "open pit" is "the area within which ore and waste rock are exposed and removed by surface mining." 20.6.7.7(B)(41) NMAC. "Waste rock" is "all material excavated from a copper mine facility that is not ore or clean top soil." 20.6.7.7(B)(65) NMAC. "Tailings" means "finely crushed and ground rock residue and associated fluids discharged from an ore milling, flotation beneficiation[,] and concentrating process"; the "final repository of tailings" is a "tailings impoundment." 20.6.7.7(B)(59), (60) NMAC. "Impacted stormwater" is "direct precipitation and runoff that comes into contact with water contaminants within a copper mine facility which causes the stormwater to exceed one or more of the . . . 3103 [standards.]" 20.6.7.7(B)(29) NMAC.

{14} "Leaching" refers to the process of "placing acidic leach solution on the tops and sides of [stockpiles]" of ore and other rock piles such that "[t]he solution percolates through the piles . . . dissolv[ing] the copper[.]" *Phelps Dodge*, 2006-NMCA-115, ¶ 5; 20.6.7.7(B)(33) NMAC (defining a "leach stockpile" as "stockpiles of ore and all other rock piles associated with mining disturbances that have been leached, are currently being leached[,] or have been placed in a pile for the purpose of being leached"). The leach solution is then collected and "pumped to a solvent extraction and electrowinning plant where the copper is removed from the solution." *Phelps Dodge*, 2006-NMCA-115, ¶ 5.

"Place of Withdrawal" and the Earlier *Phelps Dodge* Appeals

{15} The phrase "place of withdrawal" in Section 74-6-5(E)(3) is not defined by the WQA nor is it defined in any related regulation. The Legislature's intended meaning of "place of withdrawal" was the subject of this Court's discussion in *Phelps Dodge*, 2006-NMCA-115, ¶¶ 2, 7-8, 26-38, in which we considered Phelps Dodge's appeal

from the Commission's imposition of conditions on its discharge permit for its copper mine. In *Phelps Dodge*, this Court concluded that while "the [L]egislature meant to capture the concept that clean water that is currently being withdrawn for use, or clean water that is likely to be used in the reasonably foreseeable future, must be protected[,]" this standard is "difficult to apply to a [copper mine facility because] . . . it raises the question . . . as to the point at which the [L]egislature intended to measure compliance . . . . That is, should water quality be measured at the bottom of a waste rock pile, at the bottom of the mine pit, at wells located at the perimeter boundary of the mine property, or at some other point or points?" *Id.* ¶¶ 27-28. Recognizing that as a Court, and lacking the "technical expertise in hydrology, geology, or other applicable scientific topics[,]" we were ill-equipped to define "place of withdrawal" in the context of a copper mine facility, we remanded the matter to the Commission to "create some general factors or policies to guide its determination" of what constituted a "place of withdrawal." *Id.* ¶¶ 35-37. In so doing, we offered "no opinion as to whether the Commission should do so by way of rule[-]making or by simply deciding the factors as a part of [a] specific case, or both." *Id.* ¶ 35.

{16} On remand from our *Phelps Dodge* Opinion, in 2007 the Commission held a hearing, and in its February 4, 2009, Decision and Order on Remand referred to earlier in this Opinion identified several factors that NMED should consider in identifying places of withdrawal at the copper mine facility. The Commission's Decision and Order on Remand required NMED to act consistently with the order in identifying places of withdrawal and appropriate locations at which the effects of the mine's discharges on ground water were to be measured and required NMED and the facility to "negotiate" permit conditions that appropriately reduced ground water contamination at those places of withdrawal.

{17} In a second appeal, in 2009, Phelps Dodge appealed the Commission's 2009 Decision and Order on Remand to this Court. During the pendency of that second appeal, some of the parties, including NMED and Phelps Dodge, sought the Commission's permission to depart from the remand order so as to pursue regulatory solutions to determine places of withdrawal, thereby avoiding further litigation over the meaning of that phrase. The Commission granted the parties relief from the directives of the Decision and Order on Remand to allow the parties to reach a settlement through various regulatory actions and processes, and Phelps Dodge subsequently withdrew its second appeal. One such regulatory action was the proceeding to establish the Regulations that are at issue in this appeal.

The Present Consolidated Appeal

{18} In the consolidated appeal now before us, Gila and the State (Appellants) contend that the Order should be reversed. Although they each present various arguments in support of this overarching contention, the main crux of their respective appeals is that the Regulations violate the WQA by allowing copper mines to pollute ground water wherever the mines operate regardless of whether the ground water is or will be withdrawn for uses that require potable water. Additionally, Appellants challenge the sufficiency of the evidence supporting aspects of the Order. And finally, although they approach it differently, Appellants argue that by adopting the Regulations the Commission improperly circumvented the Decision and Order on Remand in the Permit Adjudication.

{19} We conclude that the Regulations do not violate the WQA, and we reject Appellants' challenges to the sufficiency of the evidence supporting the Commission's decision to adopt the Regulations. We further conclude that the Decision and Order on Remand had no bearing on the Commission's authority to adopt the Regulations. We affirm.

DISCUSSION

Standard of Review

{20} Regulations that have been enacted by an agency "are presumptively valid and will be upheld if [they are] reasonably consistent with the authorizing statutes." *N.M. Mining Ass'n v. N.M. Water Quality Control Comm'n*, 2007-NMCA-010, ¶ 11, 141 N.M. 41, 150 P.3d 991. "A party challenging [regulations] adopted by an administrative agency has the burden of establishing [their] invalidity[.]" *N.M. Mining Ass'n v. N.M. Mining Comm'n*, 1996-NMCA-098, ¶ 8, 122 N.M. 332, 924 P.2d 741.

{21} This Court will set aside the Commission's order adopting regulations only if the order is "(1) arbitrary, capricious[,] or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law." Section 74-6-7(B); *see Gila Res. Info. Project v. N.M. Water Quality Control Comm'n*, 2005-NMCA-139, ¶ 16, 138 N.M. 625, 124 P.3d 1164 (stating that an agency action is arbitrary or capricious "if it is unreasonable or without a rational basis, when viewed in light of the whole record." (internal quotation marks and citation omitted)); *Regents of the Univ. of Cal. v. N.M. Water Quality Control Comm'n*, 2004-NMCA-073, ¶ 29, 136 N.M. 45, 94 P.3d 788 (stating that an agency decision is supported by substantial evidence where "relevant evidence that a reasonable mind might accept as adequate" supports the conclusion (internal quotation marks and citation omitted)).

The Regulations Do Not Violate the WQA

{22} Appellants make a number of arguments in support of their respective claims that the Regulations violate the WQA. We address these arguments in turn, combining them where it is reasonable to do so in order to avoid duplication. We begin, however, by describing the Regulations, generally.

{23} Because the phrase "place of withdrawal" is not defined in the WQA, designating places of withdrawal is a matter left to NMED's and the Commission's expertise. *See Phelps Dodge*, 2006-NMCA-115, ¶ 37 (recognizing NMED's authority to determine the locations of places of withdrawal, subject to the Commission's review and authority to define relevant factors). As we recognized in *Phelps Dodge*, in determining places of withdrawal, two competing interests are at stake: the need to protect water sources and the need to allow mining operations, which are "a necessary and important component of our economy and our modern way of life." *Id.* ¶¶ 27, 29. Further, we recognized that because mining has inevitable environmental impacts, it would be unrealistic and overbroad to conclude that an entire mining facility is a place of withdrawal such that water quality standards must be met everywhere within the facility's boundaries. *Id.* ¶ 33.

{24} Under the Regulations, the primary method for protecting groundwater during the mine's operation is through discharge control at each mining "unit," that is, at the place of each mining-related activity, by containing

ground water that exceeds applicable standards. Although the containment strategy may allow ground water underlying certain units to exceed the 3103 standards during mining operations, pursuant to the Regulations, those areas are not available as "places of withdrawal" during mining operations. The effectiveness of the discharge control at each mining unit is determined by monitor wells that are located on the perimeter of each unit, and should a monitor well detect an exceedance of the 3103 standards, the Regulations require emergency repair, corrective action, and, if necessary, abatement measures. *See* 20.6.7.30(A) NMAC (governing the contingency requirements for copper mine facilities in the event of an exceedance of the 3103 standards).

{25} The Regulations require monitor wells to be installed "as close as practicable around the perimeter and downgradient[1] of each open pit, leach stockpile, waste rock stockpile, tailings impoundment, process water impoundment, and impacted stormwater impoundment." 20.6.7.28(B) NMAC (footnote added). Monitor wells must be located in such a manner as to "detect an exceedance[] or a trend toward exceedance[] of the [3103] standards at the earliest possible occurrence, so that investigation of the extent of contamination and actions to address the source of contamination may be implemented as soon as possible." *Id.* The prospective locations of a monitor well must be stated in an application for a discharge permit for NMED's review and must include, among other things, information pertaining to "[t]he ground water flow direction beneath the copper mine facility used to determine the monitoring well locations[], including supporting documentation used to determine ground water flow direction." 20.6.7.28(A)(2) NMAC. In the event that monitor results reflect that the 3103 standards are exceeded, the Regulations require corrective action, and if NMED determines that a monitor well "is not located downgradient of or does not adequately monitor the contamination source [that] it is intended to monitor," the Regulations require its replacement. 20.6.7.30(A), (B) NMAC. After the mine closes, the discharge permittee is required by the Regulations to take a number of steps to ensure continued ground water protection. *See generally* 20.6.7.33 NMAC (governing the closure requirements applicable to a copper mine facility); 20.6.7.35 NMAC (governing the post-closure requirements applicable to a copper mine facility).

{26} Appellants argue that, in contravention of the WQA, the Regulations create a "point of compliance system" that allows a mine facility to pollute water under the entire mine facility up to a designated point (a point of compliance) at which a monitor well is used to ensure compliance with the 3103 standards. Appellants argue, further, that the Regulations violate the WQA because they allow discharge permittees to pollute ground water underneath a mining facility without regard for places of withdrawal.

Point-of-Compliance Argument

{27} We begin by addressing Appellants' point-of-compliance arguments. In *Phelps Dodge*, we noted the phrase "point of compliance" as being "a vertical surface located at the hydraulically downgradient limit

[1]"Downgradient" means "[t]he direction that ground[]water flows[.]" Ecomii Green Dictionary a to z, http://www.ecomii.com/dictionary/downgradient (last visited Mar. 12, 2015).

of the waste management area that extends down into the uppermost aquifer underlying the regulated units[.]" 2006-NMCA-115 ¶ 36 (internal quotation marks and citation omitted). A point of compliance was one "possible factor[]" this Court suggested that the Commission might consider in establishing a set of factors that could be used to determine places of withdrawal in the Permit Adjudication or in future rule-making proceedings. *Id.* ¶¶ 35-37. In 2009 the Legislature instructed the Commission to establish regulations for the copper industry based upon scientific and statutory considerations; however, the Legislature has remained silent on the issue of whether a point-of-compliance system is appropriate for New Mexico copper mining operations. *See* § 74-6-4(E), (K).

{28} Whether Appellants' characterization of the Regulations as a point-of-compliance system is or is not proper is not significant to the outcome of this appeal. Assuming that the Regulations created a system that is properly characterized as a point-of-compliance system, nothing in the WQA prohibited the Commission from doing so. We are unpersuaded by Appellants' citations to out-of-state statutes and regulations by which they attempt to demonstrate that where legislators intended to create point-of-compliance systems, they did so expressly and/or with certain provisions that are not found in New Mexico's laws or regulations. We assume, based on our *Phelps Dodge* discussion, and based on the pervasiveness in other jurisdictions of laws and regulations pertaining to point-of-compliance systems, that our Legislature was aware of the concept of a point-of-compliance system when it vested the Commission with authority to establish copper mine regulations. *Attorney Gen. v. Pub. Regulation Comm'n*, 2011-NMSC-034, ¶ 10, 150 N.M. 174, 258 P.3d 453 (stating that appellate courts presume that the Legislature is fully aware of relevant statutory and common law). We further assume that had the Legislature intended to expressly prohibit the Commission from establishing such a system, it would have done so. Instead, our Legislature chose to leave the decision whether to establish a point-of-compliance system or an alternative to the expertise of the Commission, and Appellants' argument to the contrary, that the WQA prohibits a point-of-compliance system, is not supported by the language of the WQA. We turn now to Appellants' additional arguments that the Regulations violate various specific provisions of the WQA.

Places-of-Withdrawal Argument

{29} Section 74-6-5(E)(3) requires NMED to deny any application for a discharge permit if the discharge would cause or contribute to water contaminant levels in excess of the 3103 standards at any place of withdrawal. In turn, the Regulations expressly condition approval of a discharge permit upon the applicant's compliance with Section 74-6-5(E)(3). *See* 20.6.7.10(J)(3) NMAC (recognizing that NMED must deny a discharge permit if so required by Subsection E of Section 74-6-5(E)). Nevertheless, although they approach it differently, Appellants argue that the Regulations violate Section 74-6-5(E)(3) because they permit water pollution without regard to places of withdrawal.

{30} Appellants argue that the Regulations violate Section 74-6-5(E)(3) and disregard this Court's *Phelps Dodge* "mandate" because the Regulations do not provide any basis for identifying places of withdrawal. Rather, Gila argues, the Regulations permit "extensive ground water pollution at all copper mines so

long as 'applicable standards' are met in distant monitoring wells" and they "blindly permit[] widespread ground water pollution wherever copper mines happen to be located." The State shares Gila's view regarding the extent of ground water pollution permitted under the Regulations and argues that the Regulations allow copper mining facilities to pollute ground water underneath "its site up to a certain point, be it a monitoring well . . . or a property boundary."

{31} Appellants' argument that, pursuant to our *Phelps Dodge* Opinion, the Commission was required to include in the Regulations factors to be used in identifying places of withdrawal is premised on a misunderstanding of our holding in *Phelps Dodge*. In *Phelps Dodge*, this Court required the Commission, on remand, to create some general factors or policies to guide its determination of the location of places of withdrawal on the mine site; however, "[w]e offer[ed] no opinion as to whether the Commission should do so by way of rule[-]making or by simply deciding the factors as a part of [the Permit Adjudication]." *Phelps Dodge*, 2006-NMCA-115, ¶ 35. The Commission's Decision and Order on Remand in which the Commission identified a number of factors to be used by NMED and the mining facility to establish places of withdrawal at the mine site reflects the Commission's compliance with our *Phelps Dodge* Opinion. The Regulations that are the subject of this appeal reflect further compliance with our *Phelps Dodge* Opinion, and as we discuss next, they reflect compliance with the WQA, insofar as the Commission created a set of concrete regulations via the rule-making process that specifically protect ground water underlying mine facilities so that areas within a mine facility may become places of withdrawal.

{32} As discussed earlier in this Opinion, nearly three years after our *Phelps Dodge* Opinion was published, the Legislature amended the WQA to require the Commission to establish regulations particular to the copper mine industry. *See* § 74-6-4(K). Notably, however, the Legislature did not require the Commission to include in those regulations a list of factors or policies that must be used to determine places of withdrawal. *See id.* After the 2009 amendments to the WQA, determining the locations of places of withdrawal under Section 74-6-5(E)(3) was, as it always had been, left to the Commission's discretion. *See Phelps Dodge*, 2006-NMCA-115, ¶ 35 (recognizing that pursuant to Section 74-6-5(E)(3) the Commission must determine places of withdrawal). In sum, the Commission's decision not to include in the Regulations factors or policies to be used for determining places of withdrawal did not violate the WQA nor did it disregard a "mandate" from this Court.

The Regulations Do Not Permit Widespread Ground Water Pollution

{33} Next we consider Appellants' arguments that the Regulations allow widespread ground water pollution in excess of the 3103 standards under an entire mine facility up to "distant" monitor wells or even to the property boundary. As discussed later in this Opinion, and having reviewed the Regulations, we conclude that the notions that the Regulations allow widespread pollution or that they allow a mine facility to pollute ground water underlying the entire facility or that the monitor wells may be "distant" are unfounded or otherwise exaggerated.

{34} Pursuant to the Regulations, all areas within a mine facility except areas that fall

within the perimeter of the monitor wells must meet the 3103 standards. *See* 20.6.7.28(B) NMAC (governing the placement of monitoring wells and requiring that the 3103 standards be met at each monitoring well and outside the monitoring-well perimeter). Thus, within a mine facility, any place at or beyond the monitor-well perimeter is water that may now and may in the future be withdrawn for human uses. Accordingly, every place within a mine facility at and beyond the monitor-well perimeters is protected from ground water pollution, and therefore, may be used as a "place of withdrawal." *See Phelps Dodge*, 2006-NMCA-115, ¶ 27 (stating that the Legislature's use of the phrase "place of withdrawal" in Section 74-6-5(E)(3) captured "the concept that clean water that is currently being withdrawn for use, or clean water that is likely to be used in the reasonably foreseeable future, must be protected").

{35} Appellants' contentions that the monitor wells would be "distant" from the mining units or that the monitoring would only occur at the perimeter of the mine facility, thus allowing the entire area within the mine facility to exceed the 3103 standards are not supported by the language of the Regulations. The monitor wells must be placed as close as practicable around the perimeter and downgradient of each mining unit, and the placement of monitor wells and the number of monitor wells that are required at each unit is subject to NMED's approval. *See* 20.6.7.28 (A), (B) NMAC. In the hypothetical event that a prospective permittee intended to place monitor wells at a distance that any interested party deemed excessive, that party may raise the issue during the permitting process. *See* § 74-6-5(G) ("No ruling shall be made on any application for a permit without opportunity for a public hearing at which all interested persons shall be given a reasonable chance to submit evidence, data, views[,] or arguments orally or in writing and to examine witnesses testifying at the hearing.").

{36} We next address Appellants' arguments regarding the extent to which the Regulations allow ground water pollution. Having rejected the notion that the Regulations permit water pollution within the entire boundary of a mine facility, we focus on the State's argument that the Regulations violate the WQA because they allow copper mining facilities to pollute ground water within a unit up to the point of a monitor well. We also address the related argument, raised by Gila, that the Regulations "frustrate[] the [WQA's] basic purpose" because the Regulations permit rather than abate and prevent ground water pollution within mining units.

{37} In promulgating the Regulations, the Commission was acting pursuant to the Legislature's mandate that it formulate regulations to "prevent or abate water pollution" while simultaneously weighing, among other things, the "social and economic value of the sources of water contaminants" and the "technical practicability and economic reasonableness of reducing or eliminating" them. Section 74-6-4(E)(2), (3). Thus, the Commission was required to strike what it deemed to be an appropriate balance between the need to prevent or abate water pollution and the need to create regulations with which the mining industry could reasonably and practicably comply. To the extent that Appellants' arguments are implicitly based on the premise that the Commission was required by the WQA to establish regulations that would totally prevent mining operations from polluting ground water, we reject them. *See Phelps Dodge*, 2006-NMCA-115, ¶ 33 (recognizing that it is unrealistic to require

that all ground water underlying a mine site meet drinkable standards).

{38} Appellants cite various provisions of the Regulations pursuant to which the ground water underlying discrete mining units is not required to meet the 3103 standards to exemplify their point that the Regulations permit ground water contamination. While the Commission acknowledged that the containment strategy required by the Regulations may allow ground water underlying certain units to exceed the 3103 standards during mining operations, to say that the Regulations therefore permit ground water contamination goes too far. As noted earlier, containing ground water that exceeds the 3103 standards is the primary method of controlling discharge. Pursuant to the Regulations, each mining unit is governed by requirements that specifically identify the method by which contaminated water is controlled.

{39} For example, Appellants argue that the Regulations permit ground water pollution because, during mining operations and after closure, the 3103 standards do not apply to ground water that is located inside the " 'area of open pit hydrologic containment' and related 'open pit surface drainage area.' " *See* 20.6.7.24(D) NMAC ("During operation of an open pit, the [3103 standards] do not apply within the area of open pit hydrologic containment."). An

> "[a]rea of open pit hydrologic containment" means, for an open pit that intercepts the water table, the area where ground water drains to the open pit and is removed by evaporation or pumping, and is interior to the department approved monitoring well network installed around the perimeter of an open pit[.]"

20.6.7.7(B)(5) NMAC. An " '[o]pen pit surface drainage area' means the area in which storm water drains into an open pit and cannot feasibly be diverted by gravity outside the pit perimeter, and the underlying ground water is hydrologically contained by pumping or evaporation of water from the open pit." 20.6.7.7(B)(42) NMAC. Thus, although it is true that the 3103 standards do not apply to open pits during mining operations, Appellants fail to acknowledge the Regulations' provision for ground water protection in that area by removing the contaminated water from the open pit. *See* 20.6.7.33(D) NMAC.

{40} After closure of mining operations, Part 20.6.7.33(D) NMAC of the Regulations requires a permittee to provide a detailed closure plan for open pits that will "minimize the potential to cause an exceedance of" the 3103 standards. Under that part of the Regulations, any water within an open pit that is predicted to flow into the ground water must meet the 3103 standards. 20.6.7.33(D)(2) NMAC. An exception applies only to open pits that are determined to be "hydrologic evaporative sink[s]," meaning that evaporation of the water in the open pit will exceed the inflow and will, therefore, not flow into the ground water. 20.6.7.33(D)(1) NMAC. Thus, Appellants' assertion that the Regulations permit the water from open pits to exceed the 3103 standards perpetually after closure is inaccurate.

{41} Gila argues, further, that the Regulations violate the WQA because they permit widespread ground water pollution above the 3103 standards without requiring the permittee to apply for a variance. Section

74-6-4(H) provides that under particular circumstances, the Commission "may grant an individual variance from any regulation[.]" Nothing in the Regulations purport to alter the Commission's ability or discretion to grant a variance under Section 74-6-4(H), and having rejected Gila's premise that the Regulations "permit[] widespread ground water pollution[,]" we decline to consider this argument further.

{42} In sum, Appellants have failed to demonstrate that the Regulations violate any provision of the WQA. Although the Regulations' provisions are not perfectly protective of ground water underlying a mining facility, the WQA did not require them to be. *See* § 74-6-4(E). The Commission determined that the Regulations established "efficient measures and clear provisions to prevent and contain ground water contamination[,]" and having reviewed the various at-issue provisions, we cannot conclude that the Commission reached this conclusion in error.

Collateral Estoppel Does Not Apply to the Commission's Rule-Making Procedure

{43} Appellants each argue that collateral estoppel precluded the Commission from "re[-]litigating" or "re[-]adjudicating" facts or issues that were resolved in the Commission's Decision and Order on Remand. Yet, the State acknowledges that issues related specifically to the mine at issue in *Phelps Dodge* "were not in fact re[-]litigated in the Commission's rule[-]making" and that the purpose of rule-making proceedings that ultimately resulted in the Commission's adoption of the Regulations at issue in this appeal was "entirely different" from the purpose of the Commission's proceedings on remand from our *Phelps Dodge* Opinion. We disagree with Appellants' invocation of the doctrine of collateral estoppel in the context of this appeal.

{44} Collateral estoppel bars "the re[-]litigation of . . . facts or issues actually and necessarily determined in [a] previous litigation" where, among other things, the same issue was presented and finally adjudicated in a previous lawsuit between the same parties. *Rosette, Inc. v. United States Dep't of the Interior*, 2007-NMCA-136, ¶ 39, 142 N.M. 717, 169 P.3d 704. Unlike the Permit Adjudication that involved a dispute between Phelps Dodge Tyrone, Inc. and NMED concerning a single discharge permit, the Commission's adoption of the Regulations at issue in this case was not an adjudicatory proceeding. *Phelps Dodge*, 2006-NMCA-115, ¶ 2; *see Rauscher, Pierce, Refsnes, Inc. v. Taxation & Revenue Dep't*, 2002-NMSC-013, ¶ 42, 132 N.M. 226, 46 P.3d 687 (recognizing that rule-making and adjudication are characteristically distinct because, among other things, rule-making affects the rights of a broad class of individuals, whereas adjudication involves concrete disputes affecting specific individuals). Because the at-issue rule-making proceeding was not an adjudication, the principle of collateral estoppel has no bearing on the Commission's decision to adopt the Regulations.

{45} Setting aside the "collateral estoppel" label, it is clear that Appellants' argument is actually an attack on the Commission's decision, as stated in the Order, to allow the Phelps Dodge Tyrone mine to operate prospectively under the Regulations instead of under the directives of the Commission's Decision and Order on Remand. This argument is not persuasive.

{46} The Commission's Decision and Order on Remand preceded the

Commission's rule-making activity at issue in this appeal. Before the Commission's Decision and Order on Remand went into effect, and while it was the subject of a pending appeal, the Commission granted the parties in *Phelps Dodge* relief from the directives of the order, including any directives applicable to determining where, within the Phelps Dodge Tyrone mine facility then at issue, places of withdrawal were located. The Commission's stated purpose for relieving the parties from the directives of the Decision and Order on Remand was, in relevant part, to allow the parties to achieve a settlement by allowing the at-issue rule-making process to occur. According to legislative mandate, after the Regulations were adopted, copper mine permits were to be subject to the conditions of the Regulations. *See* § 74-6-5(D) ("After regulations have been adopted . . . permits for facilities in [the copper] industry shall be subject to conditions contained in the regulations."). Thus, contrary to the State's argument that the Commission violated the WQA by permitting the Phelps Dodge Tyrone mining site at issue in *Phelps Dodge* to operate subject to the Regulations, the Commission is, in fact complying with Section 74-6-5(D). To the extent that Appellants wish to challenge that mine's future application for a permit under the Regulations, they may do so in the relevant permit proceedings. *See* § 74-6-5(G) (requiring a public hearing before a ruling is made on a permit application).

The Order Does Not Require Reversal

{47} Appellants argue that because the Commission adopted Freeport's version of the regulations verbatim, the Order adopting the Regulations should not be afforded deference. Further, the State urges this Court to adopt an alternative version of the Regulations that was submitted jointly by Appellants to which they refer as the "Joint Proposal." Gila argues that the Order does not support its adoption of the Regulations because many of its 1,388 findings are contrary to law, arbitrary and capricious, and not supported by substantial evidence. We address these arguments in turn.

{48} Appellants' argument that the Order is not entitled to deference derives from the proposition that courts and administrative agencies acting in an adjudicatory capacity should avoid "wholesale verbatim adoption of a party's proposed findings [of fact] and conclusions" of law. *Bernier v. Bernier ex rel. Bernier*, 2013-NMCA-074, ¶ 15 n.4, 305 P.3d 978 ("The practice of full scale verbatim adoption of extensive requested findings of fact and requested conclusions of law of the prevailing party . . . can cause this Court on appeal to grant less deference to [them] than is otherwise accorded."); *Nunez v. Smith's Mgmt. Corp.*, 1988-NMCA-109, ¶¶ 1, 4, 108 N.M. 186, 769 P.2d 99 (indicating that the principle applies as well to administrative agencies acting in their adjudicatory capacity). The State does not cite any authority to show that this principle applies to an agency's statement of reasons in support of its adopted regulations which are "presumed valid and will be upheld if reasonably consistent with the statutes that they implement." *Wilcox v. N.M. Bd. of Acupuncture & Oriental Med.*, 2012-NMCA-106, ¶ 7, 288 P.3d 902 (internal quotation marks and citation omitted).

{49} Further, we summarily reject the State's suggestion that this Court "should" adopt the Joint Proposal. The authority to adopt regulations pertaining to the copper industry was granted exclusively to the Commission by the Legislature. *See* § 74-6-

4(K). This Court's authority is limited to reviewing the Regulations, and if called for, under particular circumstances, setting aside the Commission's actions. *See* § 74-6-7(B).

{50} We turn now to Gila's attack on the Order. Gila argues that a number of the Commission's reasons for adopting the Regulations should be set aside because they are based on an incorrect interpretation of the WQA. To the extent that Gila's argument in this regard reiterates contentions that were addressed earlier in this Opinion, we do not address them again.

{51} Gila attacks a portion of the Order adopting Part 20.6.7.21(B) NMAC. Part 20.6.7.21(B) NMAC governs the "[e]ngineering design requirements for new waste rock stockpiles[,]" and it enumerates the minimum requirements that must be "met in designing engineered structures for waste rock stockpiles at copper mine facilities unless the applicant or permittee can demonstrate that an alternate design will provide an equal or greater level of containment." In relevant part, the Commission stated in its reasons for adopting that provision that

> [an NMED witness] testified that, during mining operations, water use within the mine area would be controlled by the mine operator and that water produced would be used for mining purposes. Consequently, during the period of mine operation, ground water within the mine area, including the area of a waste rock stockpile, would not be available for domestic or agricultural use. [The witness] further testified that, following closure, the area around and under a waste rock stockpile could become a place of withdrawal of water for domestic or agricultural use.

{52} Gila argues that the Commission relied on the foregoing witness testimony to find that "places of withdrawal are limited to present domestic and agricultural uses of water that occur somewhere outside the copper mine facility." Gila does not demonstrate where, in the record or in the Regulations, the Commission stated that "places of withdrawal are limited to [areas] . . . outside the copper mine facility." Nor can such a finding or provision be reasonably inferred from the foregoing testimony. We do not consider this unsupported argument further. *See* Rule 12-213(A)(4) NMRA (requiring an appellant to provide record proper citations in support of each argument).

{53} Gila also argues that the witness's testimony supports a conclusion that the ground water underlying a waste rock stockpile is entitled to protection because it has a reasonably foreseeable future use. Gila's argument in this regard does not demonstrate a conflict. The Commission found that a new waste rock stockpile that is designed in accordance with Part 20.6.7.21(A) and (B) NMAC will "not typically result in ground water contamination." Thus, although, according to the witness, the mine will use the underlying ground water for its own purposes, the area underlying waste rock stockpiles could be used as a place of withdrawal after the mining operations because the requisite design of the waste rock stockpiles is expected to preserve the ground water quality. Therefore, to the extent that Gila contends that the ground water underlying a waste rock stockpile is entitled to protection, the Regulations comport with Gila's contention.

{54} Gila argues, further, that the

Commission's finding that an NMED witness "testified that requiring a variance versus approving proven technologies by rule is a distinction without a difference" was "contrary to law and not based on substantial evidence." In support of this argument, Gila claims that the witness was not competent to testify regarding rule-making or variance proceedings. Contrary to the Rules of Appellate procedure, Gila does not show whether, and if so, where in the record it raised the issue of the competence of NMED's witness to testify regarding a distinction between a variance and the Regulations. *See* Rule 12-213(A)(4). We will not search the record to determine whether the argument was raised before or resolved by the Commission, and therefore this argument presents no issue for our review.

{55} Gila also attacks the Order on substantial evidence grounds. On appeal, the party challenging the sufficiency of the evidence supporting an administrative agency's action "must set forth the substance of *all* evidence bearing upon the proposition" in the light most favorable to the agency's decision and "then demonstrate why, on balance, the evidence fails to support the finding made." *Martinez v. Sw. Landfills, Inc.*, 1993-NMCA-020, ¶¶ 8-11, 115 N.M. 181, 848 P.2d 1108; *see* Rule 12-213(A)(3). Instead of presenting its argument in the foregoing manner, Gila points to the evidence in the record that contradicts the Commission's findings and that, in Gila's view, supported adoption of an alternative version of the Regulations and repeatedly asserts that "substantial evidence contradicts" various findings of the Commission.

{56} Gila's decisions to omit citations to the evidence in the record that supported the agency's decision and to present the evidence in the light most favorable to itself leaves to this Court the task of digging through the voluminous record to determine whether, "on balance, the evidence fails to support the [Commission's] finding[s]." *Martinez*, 1993-NMCA-020, ¶ 10; *see McNeill v. Burlington Res. Oil & Gas Co.*, 2007-NMCA-024, ¶ 16, 141 N.M. 212, 153 P.3d 46 ("The question is not whether substantial evidence exists to support the opposite result, but rather whether such evidence supports the result reached." (internal quotation marks and citation omitted)), *aff'd*, 2008-NMSC-022, 143 N.M. 740, 182 P.3d 121. This we will not do. *Martinez*, 1993-NMCA-020, ¶¶ 13, 15 (stating that "it is not the responsibility of the reviewing court to search through the record to determine whether substantial evidence exists to support a finding[,]" recognizing that in a whole record review this Court "should be able to rely entirely on the appellant's brief-in-chief in canvassing all the evidence bearing on a finding or a decision," and noting that "the reviewing court should [not] have to supplement the appellant's presentation of the evidence"). Gila's substantial evidence arguments do not warrant reversal.

{57} Gila also argues that the Commission failed to review Appellants' Joint Proposal or any of Appellants' "closing submittals," and as a result, the Commission "made numerous erroneous findings in which it mischaracterize[d] . . . Appellants' . . . recommended [regulation] changes or states that they failed to submit any recommended changes." In support of this argument, Gila cites more than 100 of the Commission's allegedly erroneous findings and hundreds of pages of Appellants' supporting documentation. Apparently Gila's expectation is that as to each of the 100-plus findings, this Court will ferret out the relevant portions from the hundreds of pages of Appellants' broadly

cited documentation to determine whether the Commission's findings were erroneous. Additionally, having itself notably failed to set out the evidence bearing upon the proposition in the light most favorable to the agency's decision, Gila admonishes this Court that after we review the record, we must refrain from "supplying the reasons" supporting the Order.

{58} Again, we remind Gila that it is Appellants' burden in challenging the sufficiency of the evidence to set out all of the evidence bearing on a proposition and to specifically attack contested findings. *Martinez*, 1993-NMCA-020, ¶ 9; *see* Rule 12-213(A)(3), (4). Even when undertaking a whole-record review, it is not the duty of this Court to search through the record seeking the bases for reversal or to re-weigh the evidence. *See Martinez*, 1993-NMCA-020, ¶¶ 12-15 (explaining that in a whole-record review it is incumbent upon the appellant to present "all the evidence bearing on a finding or a decision, favorable or unfavorable" to show that the evidence supporting the decision is not substantial "when viewed in the light that the *whole record* furnishes" and "it is not the responsibility of the reviewing court to search through the record to determine whether substantial evidence exists to support a finding" (internal quotation marks and citation omitted)); *see also Regents of the Univ. of Cal. v. N.M. Water Quality Control Comm'n*, 2004-NMCA-073, ¶ 29, 136 N.M. 45, 94 P.3d 788 (stating that in reviewing an agency's decision, this Court will not re-weigh the evidence). Further, we need not search the record to supply support for the findings in the Order, in the absence of a showing to the contrary, we presume that those findings were correct. *Pickett Ranch, LLC v. Curry*, 2006-NMCA-082, ¶ 57, 140 N.M. 49, 139 P.3d 209 ("[C]ourts presume regularity and correctness on the part of administrative [agencies.]").

{59} Additionally, Gila's assertion that the Commission failed to consider Appellants' Joint Proposal and their "closing submittals" is directly contradicted by the record. To that end, we observe the Commission's transcribed deliberations in which each member of the Commission confirmed that they had reviewed each party's "written closing arguments and proposed statements of reason" and during which the contents of Appellants' Joint Proposal were reviewed and discussed.

{60} In sum, Appellants have not demonstrated that the Order provides any basis for reversal. We conclude that Appellants' attacks on the Commission's findings as unsupported by sufficient evidence or as being contrary to law do not warrant reversal.

CONCLUSION

{61} We affirm the Commission's order adopting the Regulations.

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

JONATHAN B. SUTIN, Judge

WE CONCUR:

MICHAEL E. VIGIL, Chief Judge

LINDA M. VANZI, Judge

Certiorari Denied, June 11, 2015, No. 35,283

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-077

Filing Date: April 13, 2015

Docket No. 32,664

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

MATTHEW SANCHEZ,

Defendant-Appellant.

Hector H. Balderas, Attorney General
Paula E. Ganz, Assistant Attorney General
Santa Fe, NM

for Appellee

Jorge A. Alvarado, Chief Public Defender
Will O'Connell, Assistant Appellate Defender
Santa Fe, NM

for Appellant

OPINION

HANISEE, Judge.

{1} Convicted of murder in the second degree and third-degree tampering with evidence, Defendant Matthew Sanchez asserts three points of appeal: (1) the district court committed reversible error by allowing the State to question a witness regarding a prior act of Defendant that led to an unrelated assault charge, (2) insufficient evidence existed to support his conviction for tampering with evidence, and (3) the district court's entry of conviction for third-degree tampering with evidence constituted fundamental error. We determine that Defendant's own areas of trial inquiry permitted the State, as allowed and limited by the district court, to inquire regarding the witness's awareness of the prior act. We also hold that Defendant's conviction for third-degree tampering with evidence was supported by sufficient trial evidence and was properly adjudicated. Accordingly, we affirm.

BACKGROUND

{2} On September 10, 2011, Defendant fatally stabbed his friend Tupac Amaru Leyba (Victim) in the chest and later threw the weapon from his car window as he departed the scene of the stabbing. The knife was never recovered. At trial, Defendant testified and admitted that he stabbed Victim and lied to the police when interviewed following the fatal event. However, he maintained that he acted exclusively in self-defense.

{3} During cross-examination of a State's witness (Witness), defense counsel asked if Witness remembered stating at a preliminary examination that Defendant "was a very nice guy, that he's very quiet and that he never really talked, that he was just a nice guy." When Witness indicated that she did recall making that statement, defense counsel went on to inquire of Witness whether Victim had enemies, what if any alcohol or other mood-altering substances had been consumed that night, and whether Victim habitually carried a weapon. After this exchange, the State notified the court that it intended to offer rebuttal evidence regarding Witness's opinion of Defendant's demeanor and character. Despite the State's warning, defense counsel further questioned Witness if she had ever seen

Defendant "become aggressive in any way toward [Victim.]" Witness stated that she had not.

{4} Following this testimony, the State sought to rebut what it perceived to be the presentation of character evidence by Defendant. It argued that by eliciting opinion testimony from Witness regarding her impressions of Defendant's peaceable demeanor, defense counsel had opened the door to inquiry concerning three separate incidents that bore the potential capacity to change Witness's positive opinion of Defendant. The events consisted of Defendant: (1) discharging a gun over the heads of his family members, (2) threatening to kill a man over a debt, and (3) ramming a law enforcement vehicle and fleeing from police. Defense counsel objected, arguing that his queries had not opened the door to the State's desired topics of rebuttal and that admission of such prior act evidence would unfairly prejudice Defendant.

{5} After pointing out that it was defense counsel's questioning that elicited the pertinent character trait of Defendant being a "calm and very nice guy" and recognizing the State's opportunity to "present evidence of something other than that[,]" the district court conducted an inquiry designed to determine whether the specific events of which the State proposed to question Witness were properly admissible. Although it initially ruled that admitting questions regarding the three prior incidents would cause undue delay and confusion of issues for the jury, after conducting its own research, the district court determined that Rule 11-404(A) NMRA, governing the admissibility of character evidence offered by a defendant and rebutted by the State, controlled the inquiry. Pursuant to the rule, the court permitted the State to question Witness regarding her awareness of one prior event in order to rebut the character trait placed at issue by Defendant.

{6} Although the court found each of the State's three desired topics of rebuttal inquiry to be supported by good faith, it nonetheless disallowed inquiry regarding the second and third events on the basis that both had been initially charged but were later dismissed by the State. Noting that Defendant was then separately indicted for the crime of aggravated assault with a deadly weapon, the district court announced its intention to allow the State to question Witness regarding any awareness she possessed of Defendant having discharged a firearm over the heads of his family members. It further ruled that upon any such inquiry, Defendant would be entitled to a limiting instruction regarding the jury's use of that evidence. The parties submitted proposed versions of the question to be asked of Witness regarding the shooting incident, and based again on its research the court chose to allow a "modified . . . proposal of the State[.]" The question presented to Witness, in relevant part, was as follows: "Were you aware that . . . Defendant had been accused of aggravated assault with a deadly weapon for going to the property of an individual not associated with this case and shooting a gun five to six times?" When Witness declared herself to be unaware of the incident, the State asked: "If you were aware of that . . ., would your opinion have changed?" Witness responded affirmatively.

{7} Immediately thereafter, the district court verbally provided the jury with a previously agreed to limiting instruction, stating that it had "allowed questions by the prosecution to test the opinion previously expressed by this witness to the effect that . . . Defendant . . . is a calm and very nice person" and that the

questions asked were "not in and of themselves evidence that the matters which form the basis of the questions did, in fact, occur and [the jury] must not consider these questions for any purpose other than the right of the prosecution to test an opinion of a witness as to an asserted characteristic of . . . Defendant." The instruction was repeated and twice reiterated by the court prior to closing arguments and included within the printed instructions given to the jury prior to deliberation. The jury convicted Defendant of third-degree tampering with evidence and second-degree murder, and Defendant appeals.

A. The District Court Properly Admitted Rebuttal Character Evidence

{8} Defendant contends that the district court committed reversible error in allowing the State "to ask a question which recited unproven facts of an unrelated aggravated assault case against [Defendant]." Defendant specifically argues that the State's "naked assertion" of the occurrence of a separate shooting incident was highly prejudicial. He additionally appears to challenge allowance of the question on grounds that it violated the general prohibition on prior acts evidence.

{9} Rule 11-404(A) governs both the allowance and limitation of character evidence. *See id.* It states that "[e]vidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." Rule 11-404(A)(1). However, an exception to this prohibition exists in criminal cases, permitting "a defendant to "offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it[.]" Rule 11-404(A)(2)(a). Moreover, "[o]n cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct." Rule 11-405(A) NMRA. We review the admission of evidence during trial for an abuse of discretion and will not disturb a district court's ruling "absent a clear abuse of that discretion." *State v. Stanley*, 2001-NMSC-037, ¶ 5, 131 N.M. 368, 37 P.3d 85.

{10} We first emphasize that Defendant fails to provide any analysis or discussion of Rule 11-404, or Rule 11-405, whatsoever in his briefing. Moreover, Defendant does not appear to challenge whether his questioning of Witness during cross-examination was directed toward the establishment of his peaceable nature. Instead, Defendant relies exclusively on a single case, *State v. Christopher*, 1980-NMSC-085, 94 N.M. 648, 615 P.2d 263, in which our Supreme Court considered the propriety of the state's cross-examination of character witnesses regarding their knowledge of the defendant's criminal convictions twenty-three years earlier, as well as a separate and more recent allegation of spousal assault. *Id.* ¶ 2.

{11} First addressing the prior convictions, our Supreme Court adopted the reasoning of *Michelson v. United States*, 335 U.S. 469 (1948) (upholding cross-examination inquiry of character witnesses regarding awareness of the defendant's prior conviction and the defendant's separate prior arrest), and determined that the district court erred in allowing testimony regarding the prior convictions because: (1) the district court failed to conduct an inquiry into whether the past events had occurred; (2) "none of the witnesses had known the [defendant] for more than six years"; (3) the district court did not provide the jury with a limiting instruction; (4)

"the defendant offered no evidence of specific prior acts"[;] and (5) defense counsel objected to the state's inquiry. *Christopher*, 1980-NMSC-085, ¶ 16-17. Separately, the Court considered the propriety of the state's inquiry into the alleged spousal assault and once more determined that the district court erred, in part, because the abuse claim was supported by nothing more than the wife's allegation; further, the district court neglected to separately assess the veracity of the state's desired questions. *Id.* ¶¶ 21-23. Again, the Court emphasized the district court's failure to instruct the jury as to the limited purpose of the state's questioning. *Id.* ¶ 25.

{12} Defendant applies the *Michelson* factors, adopted in *Christopher*, and asks us to reverse on these grounds. However, *Christopher* and its analysis of the *Michelson* factors are distinguishable. First, we note that in spite of Defendant's reliance on the *Michelson* factors, our Supreme Court adopted that reasoning specifically with regard to the prior convictions at issue in *Christopher*. 1980-NMSC-085, ¶ 11. Here, whether or not Defendant had prior convictions was not at issue, nor was the admissibility of any such evidence. Furthermore, unlike the circumstances surrounding the alleged spousal assault in *Christopher*, the district court here carefully assessed the veracity of the events upon which the State sought to question Witness and ultimately found only the shooting incident, for which Defendant's indictment by a grand jury was then pending, to be an appropriate avenue of rebuttive inquiry. In so ruling, the district court rejected two of the prior acts that the State maintained to be appropriate instances to rebut the implication of peaceableness provided to the jury during Witness's cross-examination by Defendant. Thus, the district court only allowed that which fit within the plain language of the rule and bore independent indicia of reliability pursuant to the independent charging process. Most critically, the court was repetitiously diligent in ensuring that the jury was aware of the limited purpose of the State's questioning. Not only did it provide an immediate verbal limiting instruction following Witness's responsive testimony, but it again verbally admonished the jury as to its limited ability to consider the testimony twice before closing arguments and again within the jury instruction packet. For these reasons, we conclude that *Christopher*, and its application of the *Michelson* factors, is distinguishable.

{13} Apart from *Christopher*, we reiterate that while Rule 11-404(A) prohibits the admission of evidence of a person's character trait "to prove that on a particular occasion the person acted in accordance with the character or trait[,]" it does allow a defendant to offer evidence of his or her own pertinent trait. Rule 11-404(A)(1), (A)(2)(a). Defendant, through his questioning of Witness, elicited evidence of his nice, quiet, and non-aggressive nature, going so far as to refresh Witness's recollection of her own prior testimony. Under Rule 11-404(A)(2)(a), such evidence is subject to rebuttal by the State. *See State v. Martinez*, 2008-NMSC-060, ¶ 24, 145 N.M. 220, 195 P.3d 1232 (stating that when a defendant offers evidence of his or her own good character, the defendant opens the door to the state's ability to question witnesses about "their awareness of information inconsistent with good character"). And while evidence of a person's character or character trait is typically only permitted to be proven by reputation or opinion testimony, pursuant to Rule 11-405(A) "specific instances of the person's conduct" are permitted on cross-examination of a character witness. Evidence allowed by both rules was precisely the nature

of that which was made available to the jury during Defendant's trial.

{14} Although we recognize that Witness was the State's witness, and the State was not cross-examining Witness, but redirecting, Defendant has not asserted the inapplicability of Rule 11-404(A) or Rule 11-405 on appeal, and like the district court before us, we note that this is a "parallel" situation where the State was essentially "cross-examining [Witness] on redirect and [seeking] to bring up" matters already raised by Defendant. As Defendant has cited no authority on this factual nuance, we may assume none exists. *State v. Godoy*, 2012-NMCA-084, ¶ 5, 284 P.3d 410 ("Where a party cites no authority to support an argument, we may assume no such authority exists."). Thus, based on the distinguishable characteristics of *Christopher* and our interpretation of the directly applicable provisions of Rule 11-404(A)(2)(a) and Rule 11-405(A), we conclude that the limited inquiry allowed by the district court coupled with its repeated cautionary instructions did not amount to an abuse of discretion, and we affirm Defendant's conviction for second-degree murder.

B. The Evidence was Sufficient to Support Defendant's Conviction for Tampering with Evidence

{15} Defendant challenges the sufficiency of the evidence against him for tampering with evidence pursuant to *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. Defendant argues that "a reasonable jury should have found him not guilty" due to the conflicting evidence presented at trial. Defendant maintains that "the clear weight of the evidence[] shows that he did not intend to mislead investigators when he disposed of the knife." The State responds that the evidence is for the jury to weigh, and the "jury may draw its own conclusions about Defendant's intent based upon [the] overt action of throwing the knife out the [car] window as he drove away" from the crime scene. We conclude that there was sufficient evidence presented to the jury to support Defendant's conviction for tampering with evidence.

{16} "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 review 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. Garcia*, 2011-NMSC-003, ¶ 5, 149 N.M. 185, 246 P.3d 1057 (internal quotation marks and citation omitted). In our capacity as a reviewing court, we do not share the original ability of the jury to view the evidence and witnesses firsthand; therefore, we defer to the jury's findings. *Id.* We will not "reweigh the evidence or attempt to draw alternative inferences from the evidence." *State v. Estrada*, 2001-NMCA-034, ¶ 41, 130 N.M. 358, 24 P.3d 793.

{17} Our Legislature has defined the elements of tampering with evidence to be: (1) "destroying, changing, hiding, placing or fabricating any physical evidence[,]" (2) "with intent to prevent the apprehension, prosecution or conviction of any person[,] or to throw suspicion of the commission of a crime upon another." NMSA 1978, § 30-22-5(A) (2003). Because tampering with

evidence is a specific intent crime, conviction requires that the State present sufficient evidence to allow a jury to infer both an overt act and the defendant's subjective, specific intent. *State v. Jackson*, 2010-NMSC-032, ¶ 11, 148 N.M. 452, 237 P.3d 754. However, "[w]hen there is no other evidence of the specific intent of the defendant to disrupt the police investigation, intent is often inferred from an overt act of the defendant." *Duran*, 2006-NMSC-035, ¶ 14.

{18} In this case, Defendant testified that after he stabbed Victim with a knife, he "jumped . . . in the car and . . . took off real fast" because he was scared and "just freaked out." He stated that he then "threw the knife out and . . . noticed [his phone] charger was hanging out." At this point, Defendant realized he had dropped his phone, further deduced its possible presence at the scene of the stabbing, and reversed direction to retrieve it. Upon arriving and observing that Victim remained where he had been stabbed, Defendant left. He explained to the jury that he did not want Victim to "start another conflict." When asked why he discarded the knife, Defendant stated that it "was [his] first reaction. [He] wanted to get it away" as he "just freaked out." He contended that his purpose in discarding the knife was not to avoid being implicated in the crime.

{19} Defendant's testimony describing having thrown the knife from his vehicle satisfies the first element of tampering insofar as his act removed or concealed an item of evidence. *See* § 30-22-5(A). Although Defendant contends that "the evidence suggests [] a reasonable doubt . . . that [he] was guilty of tampering with evidence and that a reasonable jury should have found him not guilty," it is the role of the jury to weigh the credibility of a witness. *State v. Santillanes*, 1974-NMCA-092, ¶ 2, 86 N.M. 627, 526 P.2d 424. "The fact finder can choose to believe the [s]tate's testimony and disbelieve [the d]efendant's version of events." *State v. Fierro*, 2014-NMCA-004, ¶ 40, 315 P.3d 319, *cert. denied*, 2013-NMCERT-012, 321 P.3d 127. There is sufficient evidence in the record to support Defendant's conviction for tampering with evidence; therefore we affirm the conviction. *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.").

C. Entry of Conviction for Third-Degree Tampering Did Not Constitute Fundamental Error

{20} Based on Defendant's act discarding the knife used to kill Victim, he was charged with third-degree tampering with evidence, which forbids tampering with evidence relating to a capital crime or of a first-or second-degree felony. Section 30-22-5(A), (B)(1). At trial, the jury was instructed that in order to find Defendant guilty of tampering with evidence, Defendant must have "hid or placed the knife" used to stab Victim in order to prevent his apprehension or prosecution. The jury was not, however, instructed that the evidence must have related to a second-degree felony. Therefore, Defendant argues that he was improperly convicted of third-degree tampering because the State's tampering instruction failed to ensure the jury's determination that Defendant intended to prevent his conviction related to a particular crime. Absent such a finding, Defendant argues that his sentence for third-degree tampering with evidence violated his Sixth Amendment constitutional rights.

{21} We typically review this

constitutional issue de novo. *State v. Alvarado*, 2012-NMCA-089, ¶ 5, ___ P.3d ___. However, as Defendant concedes that this issue was not properly preserved, we review solely for fundamental error. *State v. Herrera*, 2014-NMCA-007, ¶ 4, 315 P.3d 343. "The rule of fundamental error applies only if there has been a miscarriage of justice, if the question of guilt is so doubtful that it would shock the conscience to permit the conviction to stand, or if substantial justice has not been done." *State v. Orosco*, 1992-NMSC-006, ¶ 12, 113 N.M. 780, 833 P.2d 1146.

{22} As we have stated, tampering with evidence is, in relevant part, "destroying, changing, hiding, placing or fabricating any physical evidence with intent to prevent the apprehension, prosecution or conviction of any person[.]" Section 30-22-5(A). "Section (B) [of the statute] establishes levels of punishment depending on the degree of crime for which tampering with evidence is committed." *Jackson*, 2010-NMSC-032, ¶ 20 (internal quotation marks omitted). A person is guilty of third-degree tampering "if the highest crime for which tampering with evidence is committed is a capital or first[-]degree felony or a second[-]degree felony[.]" Section 30-22-5(B)(1). "[I]f the highest crime for which tampering with evidence is committed is indeterminate," such that no crime underlying the tampering could be identified, a person is guilty of a fourth-degree felony. Section 30-22-5(B)(4); *Jackson*, 2010-NMSC-032, ¶ 21.

{23} Defendant was charged with tampering with evidence of a second-degree felony as prohibited by Section 30-22-5(B)(1). At trial, the district court generally instructed the jury on tampering with evidence; the instruction did not require the jury to find that Defendant's act of tampering related specifically to a second-degree felony. It merely stated that in order to find Defendant guilty of tampering with evidence, the State must prove beyond a reasonable doubt that Defendant "hid or placed the knife used to stab [Victim]" and by doing so, "[D]efendant intended to prevent his apprehension, prosecution, or conviction.

{24} Defendant relies upon *Alvarado*, where we held that "when a defendant is charged with third[-]degree tampering with evidence of a capital, first, or second[-]degree felony," the State must prove, beyond a reasonable doubt, that the evidence with which the defendant tampered related to the underlying felony. 2012-NMCA-089, ¶ 16. Because the State did not provide such proof, we determined that the proper resolution was for the defendant to be sentenced under the indeterminate crime provision of the statute. *Id.* While we acknowledge the analogous nature of *Alvarado* and the case before us, we view Defendant's case to be more appropriately on point with *Herrera*, 2014-NMCA-007, where, in an identical fundamental error analysis, this Court considered the issue of whether, in the case of a conviction and sentence for third-degree tampering with evidence, the omission of a finding that the weapon was evidence of a second-degree felony violated a defendant's right to have a jury find all elements of the offense beyond a reasonable doubt. *Herrera*, 2014-NMCA-007, ¶¶ 4, 7. We determined that for the purpose of a Sixth Amendment challenge that argues for entitlement to a jury determination of guilt beyond a reasonable doubt as to every element of the charged crime, the factors contained within Subsection (B) of the tampering statute were such that they "must be interpreted as

elements of the offence, rather than mere sentencing factors." *Herrera*, 2014-NMCA-007, ¶¶ 8, 13. Although we recognized that "the failure to instruct the jury on one of the elements of the offense of third-degree tampering with evidence was error[,]" offending the defendant's rights under the Sixth Amendment, the error did not amount to fundamental error as it was clear that on review of the entire record, the evidence presented at trial established the missing element. *Id.* ¶ 17.

{25} Here, Defendant testified at trial that he stabbed Victim and "threw the knife out" of the window of his moving vehicle. In finding Defendant guilty of tampering with evidence, the jury determined that Defendant "tossed the knife" with the intent to prevent his apprehension, prosecution, or conviction. Additionally, the jury found that the act of stabbing Victim with a knife was second-degree murder. Our review of the record herein reveals that the only evidence presented at trial that related to Defendant's discard of the knife was the act of stabbing Victim. Because the jury concluded that the stabbing constituted a second-degree felony, "the facts at trial established that the tampering related to a second-degree felony." *Id.* ¶ 18. While the factors contained in Subsection (B) of Section 30-22-5 are essential elements of the crime of tampering with evidence, and "the omission of an essential element of an offense will often be found to be fundamental error," the evidence at trial clearly established the missing element, and therefore, we hold that the district court did not fundamentally err. *Herrera*, 2014-NMCA-007, ¶ 17 ("If it is clear that the missing element was established by the evidence at trial, the fact that the jury was not instructed on the element is not considered fundamental error.").

CONCLUSION

{26} For the forgoing reasons, we affirm Defendant's convictions for second-degree murder and third-degree tampering with evidence.

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

J. MILES HANISEE, Judge

WE CONCUR:

MICHAEL E. VIGIL, Chief Judge

M. MONICA ZAMORA, Judge

Certiorari Granted, July 17, 2015, No. 35,302

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-078

Filing Date: April 30, 2015

Docket No. 33,087

SARA CAHN,

Plaintiff-Appellee,

v.

JOHN D. BERRYMAN, M.D.,

Defendant-Appellant.

Law Offices of Felicia C. Weingartner, P.C.
Felicia C. Weingartner
Albuquerque, NM

Terry M. Word, P.C.
Terry M. Word
Albuquerque, NM

Law Office of Cid D. Lopez LLC
Cid D. Lopez
Albuquerque, NM

Carmela D. Starace
Albuquerque, NM

for Appellee

Hinkle, Hensley, Shanor & Martin, LLP
William P. Slattery
Dana S. Hardy
Santa Fe, NM

Butt Thornton & Baehr PC
Emily A. Franke
Albuquerque, NM

for Appellant

OPINION

VIGIL, Chief Judge.

{1} This is a medical malpractice action against a qualified healthcare provider under the Medical Malpractice Act, NMSA 1978, §§ 41-5-1 to -29 (1976, as amended through 2008). When Plaintiff learned she had a malpractice claim against Defendant, ten and one-half months remained under the Act's three-year statute of repose to sue Defendant. Section 41-5-13. The question posed is whether this was a constitutionally reasonable period of time for Plaintiff to file her lawsuit against Defendant. Because we conclude that, consistent with due process, Plaintiff had a reasonable period of time to sue Defendant, and Defendant was not named until eleven months after the statute of repose expired, Plaintiff's suit against Defendant is barred. The district court having ruled otherwise, we reverse.

BACKGROUND

{2} On May 17, 2006, Plaintiff, Sara Cahn, went to the emergency room of Lovelace Women's Hospital complaining of abdominal and pelvic pain. Plaintiff received a pelvic ultrasound on May 19, 2006, at Lovelace West Mesa Medical Center, and the ultrasound report stated that there was a complex mass on Plaintiff's left ovary and noted that "[a] malignancy need[ed] to be excluded." Plaintiff was twenty-seven years old.

{3} The one and only time Plaintiff was seen by Defendant, Dr. Berryman, was on August 8, 2006, to review the ultrasound report that Plaintiff hand carried to the appointment and gave to Defendant. Defendant did not disclose to Plaintiff the findings contained in the ultrasound report. Instead, Defendant examined Plaintiff and diagnosed her with endometriosis and prescribed approximately three months of suppressive therapy (contraceptive patches) to treat her symptoms.

{4} Plaintiff used her debit card to pay the $30 co-payment to Sandia OB/GYN, Defendant's employer, and Plaintiff's insurer, Lovelace Health Plan, mailed her an Explanation of Benefits (EOB) form dated August 23, 2006, which identified Defendant

as the doctor Plaintiff saw on August 8, 2006. The EOB form was mailed to an address where Plaintiff no longer lived, but her mail was being forwarded to where she was living.

{5} Plaintiff moved to Wyoming and saw Dr. Mary Girling on September 22, 2008, for continuing abdominal pain. Dr. Girling reviewed the May 19, 2006, ultrasound report, and told Plaintiff of the ultrasound findings. Plaintiff now knew she had a medical malpractice claim against Defendant. Further tests confirmed Plaintiff had ovarian cancer, and over the next three and one-half months, Plaintiff underwent surgery and treatment in New York and Boston, which included a total hysterectomy to remove her uterus and ovaries. Plaintiff hired counsel in December 2008 to pursue her malpractice claim against Defendant.

{6} Plaintiff did not know Defendant's name. Despite Plaintiff's efforts and those of her attorneys, which we describe in more detail below, Plaintiff first learned of his name after requesting complete copies of her insurer's EOB forms after the statute of repose expired in June or July 2010. In response to the request, an EOB form was produced on July 1, 2010, showing that Defendant, as an employee of Sandia OB/GYN, saw Plaintiff on August 8, 2006. Plaintiff's bank statements, which Plaintiff had not reviewed until the EOB form was produced, revealed the $30 transaction payable to Defendant's employer, Sandia OB/GYN, in August 2006. At all times, Plaintiff had used the checking account and had access to her online bank statements. Plaintiff also gave a deposition on June 3, 2010, after the statute of repose expired, describing where Defendant's office was located, but Plaintiff never went to that location to ascertain Defendant's name. Thus, Plaintiff had ten and one-half months from the date that she discovered she had a malpractice claim against Defendant to learn of his name. However, it was not until eleven months after the three-year statute of repose expired that Plaintiff discovered Defendant's identity. And she discovered it using information which was available to Plaintiff from the time Plaintiff first learned she had a malpractice claim against Defendant.

{7} These facts notwithstanding, Plaintiff asserts that her diligence in attempting to learn of Defendant's name "was thwarted by a confusing medical record system that prevented her from identifying a doctor that for all practical purposes appeared to be a Lovelace provider[,]" and Plaintiff admits that "her inadvertent mistake was assuming that she was looking for a Lovelace doctor." Plaintiff's confusion was understandable.

{8} At the pertinent time, Lovelace Health System, Inc. (Lovelace), which was previously called Lovelace Sandia Health System, was a licensed healthcare provider composed of several hospitals and medical centers, and Plaintiff was insured by Lovelace Health Plan. Plaintiff originally went to the emergency room at Lovelace Women's Hospital, which was part of Lovelace, and the pelvic ultrasound was performed at Lovelace West Mesa Medical Center, which was also part of Lovelace. Plaintiff's original appointment to discuss the ultrasound report was with a doctor at Lovelace Women's Hospital, but it was cancelled, and when Plaintiff called Lovelace Women's Hospital to reschedule the appointment, Lovelace Women's Hospital provided her with Defendant's name. Defendant saw Plaintiff in an office located in the Lovelace Women's Hospital Building. Defendant, however, was not a Lovelace doctor. He was employed by Sandia OB/GYN, a separate entity owned and

operated by Dr. Carl Conners, in the Lovelace Women's Hospital building.

{9} Plaintiff attempted to collect her medical records from Lovelace to identify the doctors that treated her. She undertook these efforts from September through November 2008, while undergoing treatment and recovery from the cancer. Plaintiff sent eight letters requesting her records from Lovelace Women's Health, Lovelace Westside Hospital, and Lovelace Women's Health/ABQ Health Partners. Believing she visited the doctor only one or two months after the ultrasound, Plaintiff requested Lovelace Health Plan EOB records for May, June, and July 2006, but not August 2006. None of the records reflected Plaintiff's August 8, 2006, visit or the name of the doctor that examined her.

{10} Plaintiff also called Lovelace Women's Hospital and talked to an employee about the missing record. The Lovelace employee reviewed Plaintiff's records and confirmed there was no record of the August 8, 2006, visit. Plaintiff also described Dr. Berryman, and the employee volunteered that it might be another doctor. The Lovelace employee checked that doctor's records, but there was no record of Plaintiff's visit.

{11} Plaintiff's counsel, retained in December 2008, also proceeded to collect Plaintiff's medical records from Lovelace entities. Plaintiff's counsel sent requests to Lovelace Westside OB/GYN, Lovelace Women's Hospital, Lovelace Westside Hospital, and Lovelace Sandia Health System physician billing and business office in December 2008 and January 2009. Plaintiff's counsel also contacted contractors that have records and billing information directly related to Lovelace. Plaintiff's counsel requested medical charts and itemized billings from May 17, 2006, until February 4, 2011. None of the documents received included Plaintiff's August 8, 2006, visit with Dr. Berryman.

{12} Plaintiff filed her complaint on April 10, 2009, naming Lovelace, five doctors employed by Lovelace, and "John Doe" as defendants. "John Doe" was identified as "a physician who [may have] provided care to [Plaintiff] whose identity cannot be ascertained at this time[.]" Fourteen months later in June 2010, Plaintiff subsequently filed a discovery request for all her EOB records from Lovelace Health Plan. Those records, which Plaintiff received on July 1, 2010, disclosed Defendant's name, and Plaintiff filed an amended complaint on July 9, 2010, naming Defendant and Sandia OB/GYN as Defendants. Defendant did not know of the litigation until July 16, 2010, when he was served.

{13} Defendant moved for summary judgment, arguing that the three-year statute of repose expired on August 8, 2009, barring Plaintiff's claim. The district court denied the motion, ruling that the three-year time bar "violates Plaintiff's substantive due process rights under the United States Constitution and New Mexico Constitution[.]" Following additional discovery, Defendant filed a motion to reconsider, which the district court denied.

{14} The parties then entered into a stipulated conditional directed verdict, which was approved by the district court. Therein, the parties agreed and stipulated that if the three-year statute of repose bars Plaintiff's claims against Defendant, she cannot recover, but if Plaintiff's claims are not time-barred, Defendant is liable to Plaintiff on her claims of medical malpractice. The parties further stipulated and agreed to entry of a directed

verdict against Defendant in the amount of $700,000, plus interest, subject to Defendant's right to appeal the district court order that the three-year statute of repose violates Plaintiff's right to substantive due process. The district court filed the stipulated judgment, and Defendant appeals. *See Kysar v. BP Am. Prod. Co.*, 2012-NMCA-036, ¶ 17, 273 P.3d 867 (concluding that an appeal will lie from a stipulated conditional judgment when specific conditions are satisfied).

DISCUSSION

{15} The Medical Malpractice Act aims "to promote the health and welfare of the people of New Mexico by making available professional liability insurance for health care providers in New Mexico." Section 41-5-2. One way in which the Act seeks to accomplish this goal is by establishing a "termination point" for medical malpractice claims. *Cummings v. X-Ray Assocs. of N.M., P.C.*, 1996-NMSC-035, ¶¶ 38-41, 121 N.M. 821, 918 P.2d 1321. That termination point is set forth in the Act's three-year statute of repose, which states,

> No claim for malpractice arising out of an act of malpractice which occurred subsequent to the effective date of the Medical Malpractice Act may be brought against a health care provider unless filed within three years after the date that the act of malpractice occurred[.]

Section 41-5-13. The statute is an "occurrence" based rule, meaning the time period for filing a lawsuit begins to run at the time of the malpractice without regard to when the underlying cause of action accrues and without regard to discovery of the injury or damages. *Cummings*, 1996-NMSC-035, ¶ 50; *Garcia ex rel. Garcia v. La Farge*, 1995-NMSC-019, ¶ 14, 119 N.M. 532, 893 P.2d 428. *See Chavez v. Delgado*, 2014-NMCA-014, ¶¶ 5, 11, 316 P.3d 907 (concluding that the statutory "act of malpractice" for negligently prescribing medication is the discrete act of prescribing medication to the patient, not the date of injury or the last day the medication was taken), *cert. denied*, 2013-NMCERT-012, 321 P.3d 126; *Meza v. Topalovski*, 2012-NMCA-002, ¶ 19, 268 P.3d 1284 (stating that *Cummings* has interpreted Section 41-5-13 as an occurrence-based statute of repose rather than a discovery-based statute of limitations, and that "[t]he limitations period runs from the date of the occurrence, as opposed to the date of discovery," and terminates the right of any action after the three years has elapsed even if no injury has manifested itself). Unlike a statute of limitation, which does not begin to run until the patient discovers, or reasonably should discover, the malpractice, "a statute of repose terminates the right to any action after a specific time has elapsed, even though no injury has yet manifested itself." *Cummings*, 1996-NMSC-035, ¶¶ 47, 50. The statute of repose "put[s] an end to prospective liability for wrongful acts that, after the passage of a period of time, have yet to give rise to a justiciable claim." *La Farge*, 1995-NMSC-019, ¶ 14.

{16} The Legislature may impose a statutory time deadline for commencing a cause of action as long as a reasonable time is provided for commencing suit. *La Farge*, 1995-NMSC-019, ¶ 33. However, if a plaintiff is left with an unconstitutionally short period of time to file suit within the period of the statute of repose, due process is violated. *Id.* ¶ 26. The question presented in this case is whether Plaintiff had a reasonable period of

time, consistent with due process, within which to bring her suit against Defendant.

Standard of Review

{17} Whether Plaintiff was deprived of due process presents a question which we review de novo. *See Martinez v. Pub. Emps. Ret. Ass'n*, 2012-NMCA-096, ¶ 27, 286 P.3d 613; *Los Chavez Cmty. Ass'n v. Valencia Cnty.*, 2012-NMCA-044, ¶ 12, 277 P.3d 475. In addition, we review de novo a district court order granting or denying a motion for summary judgment. *Chavez*, 2014-NMCA-014, ¶ 4.

Analysis

{18} We begin with *Terry v. New Mexico State Highway Commission*, 1982-NMSC-047, ¶ 9, 98 N.M. 119, 645 P.2d 1375, *abrogated on other grounds by Coleman v. United Engineers & Constructors, Inc.*, 1994-NMSC-074, 118 N.M. 47, 878 P.2d 996, in which the cause of action accrued three months before the applicable statute of limitations expired, and the lawsuit was filed after the statute of limitations expired. Our Supreme Court declared that it was required to decide "whether a cause of action, once accrued, may be barred by a period so short that it in effect prevents an injured party from obtaining relief." *Terry*, 1982-NMSC-047, ¶ 10. Because it was persuaded that "fundamental considerations of due process" require that the limitation period not be applied to actions occurring within, but close to the end of the limitations period, *id.* ¶ 13, the Court held that an unreasonably short limitations period denies due process. *Id.* ¶ 1. While the Court concluded that three months was unreasonable, *id.* ¶¶ 1, 9, it did not provide any express guidelines for determining what will constitute an "unreasonably short" period of time to result in a violation of due process. Nevertheless, in looking to the question that the Court said it was deciding, we conclude that to be "unreasonably short," the period of time must be "so short that it in effect prevents an injured party from obtaining relief." *Id.* ¶¶ 1, 10.

{19} *Terry* was followed and applied to the statute of repose in *La Farge*, 1995-NMSC-019, ¶ 14. Following *Terry*, our Supreme Court held that "a statute of repose that allows an unreasonably short period of time within which to bring an accrued cause of action violates the Due Process Clause of the New Mexico Constitution." *La Farge*, 1995-NMSC-019, ¶ 36. The Court concluded that, as applied to the plaintiff's claim, the statute of repose violated due process because, when the plaintiff first learned that he had a medical malpractice claim against the doctor, only eighty-five days remained before the limitations period would expire. *Id.* ¶ 37. The Court, however, did not identify what criteria it used to conclude that the eighty-five day time period was "unreasonably short."

{20} In *Cummings*, 1996-NMSC-035, ¶ 57, the plaintiff discovered the malpractice about eighteen months before the statute of repose on her claim expired, and more than two years later, she filed her lawsuit. Recognizing *La Farge* as one of the "few exceptions" to the statute of repose, *Cummings* concluded that eighteen months was not too short a period of time, and held that the plaintiff lost her malpractice claim through her own lack of diligence. *Cummings*, 1996-NMSC-035, ¶¶ 55, 57.

{21} Some guidance on how to apply the *La Farge/Cummings* due process exception to the statute of repose was subsequently

provided in *Tomlinson v. George*, 2005-NMSC-020, ¶¶ 20-27, 138 N.M. 34, 116 P.3d 105. In *Tomlinson*, when the plaintiff discovered she had a potential medical malpractice claim against the defendant, she still had two years and eight months within which to file suit. *Id.* ¶ 2. After noting its holding in *La Farge* that eighty-five days was a constitionally unreasonably short period of time, and its holding in *Cummings* that one and one-half years was a constitutionally reasonable period of time, our Supreme Court concluded in *Tomlinson* that two years and eight months was a constitutionally reasonable period of time to bring suit. *Tomlinson*, 2005-NMSC-020, ¶¶ 23-24. The Court reiterated that if a plaintiff discovers a potential medical malpractice claim within the statutory period of repose, but has an "unreasonably short period of time" within which to file her suit, she "may argue to the district court that Section 41-5-13 is unconstitutional as applied under the *La Farge/Cummings* due process analysis." *Tomlinson*, 2005-NMSC-020, ¶ 27. The Court added:

> We conclude that this flexibility provides district courts with some level of discretion to relax Section 41-5-13's strict three-year occurrence rule in unusual cases involving exceptional circumstances as a matter of fairness while upholding the legislative protection for physicians and assuring New Mexicans access to health care.

Tomlinson, 2005-NMSC-020, ¶ 27.

{22} Thus, we conclude from the decided cases that there must be "unusual cases involving exceptional circumstances" resulting in an unusually short period of time within which to file suit before the *La Farge/Cummings* due process exception to the statute of repose applies. The period of time must be so short that the plaintiff is in effect prevented from being able to file suit.

{23} In this case, when Plaintiff learned of her medical malpractice claim against Defendant, ten and one-half months remained under the statute of repose to sue Defendant. This is longer than the three months in *Terry* and the eighty-five days in *La Farge*, but shorter than the eighteen months in *Cummings* and the two years and eight months in *Tomlinson*, so we have no clear guidance based solely on the amount of time. Nevertheless, during the entire ten and one-half months period of time, the means for discovering Defendant's name were available and within Plaintiff's control. Specifically, these were the EOB forms maintained by Plaintiff's own insurer and her own online banking statements. In addition, Plaintiff knew where Defendant's office was in the Lovelace Women's Hospital building, but she never went to the office to learn his name. Although Defendant no longer worked there, Sandia OB/GYN was still operating and maintained Plaintiff's records. We acknowledge Plaintiff's initial assumption that she was seeking a Lovelace doctor, but the Lovelace records she obtained failed to include the visit to Defendant on August 8, 2006, and Plaintiff knew that as early as November 2008. Moreover, the fact that Plaintiff was initially confused about the month she saw Defendant does not excuse her asking for complete copies of her insurer's EOB forms for 2006.

{24} We cannot conclude, under the facts presented to us, that this case falls within the narrow *La Farge/Cummings* due process exception to the statute of repose. We therefore conclude that ten and one-half months was a constitutionally reasonable

amount of time for Plaintiff to bring her medical malpractice suit against Defendant, and having failed to do so, Plaintiff's claims against Defendant are barred by Section 41-5-13. The district court having concluded otherwise, we reverse.

CONCLUSION

{25} The order of the district court is reversed and the case is remanded for further proceedings consistent with this Opinion.

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

MICHAEL E. VIGIL, Chief Judge

I CONCUR:

RODERICK T. KENNEDY, Judge

M. MONICA ZAMORA, Judge (dissenting).

ZAMORA, J., dissenting.

{27} I agree with the Majority, that in New Mexico due process precludes the application of Section 41-5-13's strict three-year occurrence rule where malpractice is discovered so close to the expiration of the limitations period, as to effectively prevent the plaintiff from bringing a cause of action. *Tomlinson*, 2005-NMSC-020, ¶ 21 ("A statute of repose that allows an unreasonably short period of time within which to bring an accrued cause of action violates the Due Process Clause of the New Mexico Constitution." (alteration, internal quotation marks, and citation omitted)); *see Cummings*, 1996-NMSC-035, ¶ 55; *La Farge*, 1995-NMSC-019, ¶ 36; *Terry*, 1982-NMSC-047, ¶ 1. I also agree that due process will only preclude the application of the three-year occurrence rule in "unusual cases involving exceptional circumstances." *Tomlinson*, 2005-NMSC-020, ¶ 27. However, I do not agree that in this case Plaintiff had a constitutionally reasonable amount of time to pursue her cause of action. For that reason, I respectfully dissent.

{28} Addressing this issue, our Supreme Court has determined that eighty-five days is a constitutionally unreasonable time within which to file a claim while one and one-half years is constitutionally reasonable. *Id.* As the Majority points out, the question is open as to whether a period of time between eighty-five days and one and one-half years is constitutionally reasonable. While New Mexico precedent does not provide a specific test to determine whether a plaintiff who discovers a potential claim within the statutory period is left with a constitutionally reasonable period of time to file the claim, in my view, the Court's analyses in *Terry* and *Cummings* are instructive.

{29} In *Terry*, the court held that the application of a statute of repose where the plaintiff's cause of action accrued approximately three months before the limitations period was set to expire violated due process. *Terry*, 1982-NMSC-047, ¶ 1. In that case, the court based its determination of a constitutionally unreasonable time frame on its review of legislatively created periods of limitation. *See Id.* ¶¶ 16-17. The court noted that, for causes of action such as the one in that case, the Legislature had set the period of limitations at three years. *Id.* ¶ 17. The court also recognized that the Legislature had not specified any period of limitations that was less than one year. *Id.* The court concluded that "[t]here is no New Mexico limitations period which would give an aggrieved party less than three months to pursue a claim for

personal injury, as [the statute of repose] would do under these facts." *Id.* ¶ 16.

{30} In *Cummings*, the court acknowledged several exceptions to the strict application of the three-year occurrence rule under Section 41-5-13, including the exception that applied where late discovery of malpractice leaves an unconstitutionally short period of time to pursue a cause of action. *Cummings*, 1996-NMSC-035, ¶¶ 55-57. The court concluded that none of the exceptions applied because despite the fact that the plaintiff had eighteen months to pursue her claim, she instead "sat on her rights and did not file any claim for more than two years" after she discovered the malpractice. *Id.* ¶ 57. The court held that the plaintiff "lost her medical malpractice claim through her own lack of diligence."

{31} In the present case, Plaintiff argues that using the *Terry* approach, the ten and one-half months she had to file her claim prior to the expiration of the limitations period, was constitutionally unreasonable. Plaintiff compares the ten and one-half month time frame to New Mexico's legislatively created statutes of limitation, which all provide periods of limitation greater than one year. Defendant, on the other hand, argues that under the *Cummings* approach, Plaintiff's claim is time barred as a result of her lack of diligence. The Majority does not address either of these arguments or approaches. Instead, the Majority concludes, in hindsight, that this case does not fall within the narrow *La Farge/Cummings* due process exception to the statute, because Plaintiff should have known Defendant was not a Lovelace doctor, and Plaintiff could have found Defendant's name earlier by looking on her EOB, her bank statements, or by returning to Defendant's office.

{32} In my view, the Majority fails to consider Plaintiff's diligence in pursuing her claim, especially in light of the entirety of her circumstances. Plaintiff was living in Wyoming on September 22, 2008, when she learned that Defendant had misdiagnosed her. Less than three weeks later, On October 15, 2008, Plaintiff had been diagnosed with widespread ovarian cancer and underwent extensive surgery to remove her uterus and ovaries. Nonetheless, between October 27, 2008 and November 3, 2008, Plaintiff sent seven medical record requests to Lovelace Hospital and Lovelace contractors attempting to understand what had happened and to obtain her entire medical file, which would include the identity of Defendant. Plaintiff called and was told that there was no record of her visit with Defendant. Plaintiff retained counsel in December 2008, who also requested Plaintiff's medical records, sent several follow up requests, and wrote to Lovelace contractors attempting to obtain information related to Plaintiff's care.

{33} Reviewing Plaintiff's medical records, Plaintiff's counsel discovered that Plaintiff had been assigned three different medical record numbers. Plaintiff's counsel went to Lovelace Women's Hospital, Lovelace Women's Clinic, and Lovelace Westside Hospital, and obtained copies of Plaintiff's medical records, which were compared against the contents of Plaintiff's original chart. Lovelace claimed it had made all Plaintiff's records available; however, additional records were later discovered at another Lovelace location. Later still, records were located in the film jacket of Plaintiff's May 2006 ultrasound.

{34} The Majority asserts that Plaintiff should have known that Defendant was not a Lovelace doctor based on the fact that there

was nothing in the response to Plaintiff's initial records requests related to her visit with Defendant. In light of the disorganization of Plaintiff's Lovelace records, I do not believe this is a fair assumption. The Majority also assumes that Plaintiff could have discovered Defendant's identity by reviewing an EOB from August 2006, which the Majority insists was "in her control." However, this is not supported by the record. The EOB for the August 2006 visit was mailed to Plaintiff at an address where she no longer received mail. Even though Plaintiff had filled out a change of address form she testified that she had not received the EOB. Plaintiff requested and received EOBs from Lovelace Health Plan for May, June, and July, but not August 2006. Plaintiff did not actually have the August EOB that identified Defendant until July 2010.

{35} Additionally, the Majority assumes Plaintiff could have discovered Defendant's identity by reviewing her bank statements that showed the co-pay for her visit to Defendant's office. However, the bank statements did not reveal Defendant's name. The entry showed a payment to "Sandia OB-GYN Assoc." At that time, Lovelace used the name "Lovelace Sandia Health System." It is not necessarily fair to assume that Plaintiff would have reviewed her bank statement two years later and deduce that Sandia OB-GYN was an entirely separate entity from "Lovelace Sandia Health System."

{36} Finally, the Majority assumes that Plaintiff could have returned to the office where she had initially seen Defendant and identified him there. However, Defendant did not practice in that office after February 2007 and there is no indication in the record that Plaintiff would have been able to retrieve any records pertaining to Defendant's treatment if she had gone to the office. Moreover, Plaintiff was in New York recovering for eight months after her surgery, and, thereafter, she was traveling back and forth from Wyoming to New York as she continued her follow-up care. It is not reasonable to assume that Plaintiff could have physically gone to the office to track Defendant down.

{37} Under *La Farge* a plaintiff who discovers malpractice "during the statutory period as it runs from the occurrence of the negligent act *must* have a reasonable period of time from the discovery to file his or her claim." *Tomlinson*, 2005-NMSC-020, ¶ 23 (emphasis added). This requirement is rooted in principles of fairness, which are inherent in the Due Process Clauses of the United States and New Mexico Constitutions. *La Farge*, 1995-NMSC-019, ¶ 36.

{38} In my view, it is these principles of fairness that bring this case within the *La Farge/Cummings* exception. Plaintiff diligently pursued her claim while she faced a grave diagnosis, a serious surgery, an eight-month recovery, and years of continued treatment. While it is unfortunate that Plaintiff did not obtain the August 2006 EOB sooner, she certainly did not sit on her rights. She began investigation of her treatment history immediately after the accrual of her claim. She obtained counsel within three months of the accrual of her claim. She continued her efforts to identify Defendant after the filing of the complaint and amended her complaint three days after finally learning Defendant's name.

{39} For these reasons I believe that ten and one-half months was an unreasonably short time for Plaintiff to name Defendant in her complaint. I would affirm the district court's decision. I also believe it is worth noting that in both *Terry* and *La Farge*, where the court found that the plaintiffs had a

constitutionally unreasonable time to pursue their claims, the court applied the three-year limitation period that would have been applicable if the statute of repose had not been enacted. *See Terry*, 1982-NMSC-047, ¶ 17; *see also La Farge*, 1995-NMSC-019, ¶ 37.

M. MONICA ZAMORA, Judge

Certiorari Denied, August 4, 2015, No. 35,390

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-079

Filing Date: May 4, 2015

Docket No. 33,599

PATRICIA VIGIL,

Petitioner-Appellant,

v.

THE PUBLIC EMPLOYEES RETIREMENT BOARD,

Respondent-Appellee.

The Hemphill Firm, P.C.
Linda G. Hemphill
Santa Fe, NM

for Appellant

Robles, Rael & Anaya, P.C.
Charles Rennick
Santa Fe, NM

for Appellee

OPINION

FRY, Judge.

{1} In this case we review a decision of the Public Employees Retirement Board (the Board) denying duty-related disability retirement benefits to Petitioner-Appellant Patricia Vigil. The parties do not dispute that Ms. Vigil is disabled and that her disability was "solely and exclusively" a result of her work. The dispute concerns whether a pre-existing condition was "a significant contributing factor material to the disability." 2.80.1000.7(E) NMAC (9/30/2010). While a hearing officer recommended finding that Ms. Vigil had established by a preponderance of evidence that no pre-existing condition significantly contributed to her disability, the Board did not accept that recommended finding. Instead, without reviewing the transcript of the evidentiary hearing, the Board entered additional, contrary findings, concluded that Ms. Vigil had failed to satisfy her burden, and denied her application for benefits. On appeal, the district court affirmed. We granted Ms. Vigil's petition for a writ of certiorari and hold that the Board's decision was arbitrary and capricious. We therefore reverse.

BACKGROUND

First Application for Disability Retirement Benefits

{2} Ms. Vigil, who was employed as a recreational therapist with the New Mexico

Behavioral Health Institute in Las Vegas, New Mexico, submitted an application to the Public Employees Retirement Association (PERA) for disability retirement benefits in April 2011. In the application, she alleged that she was being treated badly at work as a result of a grievance she had filed and that she was experiencing depression and other symptoms as a consequence. She also submitted an examining physician's form statement in support of her application, which was completed by psychiatrist Jasmin Breitung, M.D. In this statement, Dr. Breitung diagnosed Ms. Vigil as having major depressive disorder, recurrent. Dr. Breitung checked "Yes" on the form in response to the question, "Do you consider this disability to have occurred as the result of causes arising, solely and exclusively out of and in the course of the claimant's employment?" Dr. Breitung then wrote, "The claimant's employment is largely responsible but not solely, since we cannot discount genetic factors. This may not have occurred if the stress at work had not."

{3} PERA's consulting psychiatrist, Dr. Douglas Puryear, reviewed Ms. Vigil's application and Dr. Brietung's statement and recommended that Ms. Vigil be awarded one year of non-duty disability. He recommended non-duty benefits because "this is a recurrent condition" and the stressors at work "[were] not the sole and exclusive cause and[,] therefore[,] this cannot be a duty-related disability." PERA's disability review committee met and agreed with Dr. Puryear's recommendation, whereupon the committee notified Ms. Vigil that it was recommending non-duty disability benefits "because [she] did not establish to the satisfaction of the [c]ommittee that [her] disability [was] the 'natural and proximate result of causes arising solely and exclusively out of and in the course of' [her] performance of [her] job duties." Because Ms. Vigil did not terminate her employment within forty-five days of the date of the committee's letter, her application file was closed.

Second Application for Disability Retirement Benefits

{4} Ms. Vigil again submitted an application for disability retirement benefits in September 2011, which was virtually the same as her prior application. Dr. Breitung filled out another examining physician's form statement, in which she again indicated that Ms. Vigil's disability was the result of her employment. Dr. Breitung further stated, "The stress at work triggered her depression and anxiety though it is not the sole cause." Ms. Vigil also submitted a letter from her therapist, Lela M. McNicol, LISW, which stated that Ms. Vigil had been treated for PTSD and depression. Once again, Dr. Puryear reviewed the application on behalf of PERA and recommended non-duty disability benefits because of Dr. Breitung's statement "that the work is not the sole cause of her psychiatric problems[.]" The disability review committee again recommended non-duty benefits, and Ms. Vigil appealed.

{5} PERA apparently allowed Ms. Vigil to supplement her application, and she submitted a letter from Dr. Breitung, which stated, "Even though [Ms. Vigil] has had a pre[-]existing prior depressive episode in 2006[,] that episode had completely resolved. This recurrent episode of [2011] is a direct result of stressors from her job. . . . As a matter of fact[,] her prior depression was also triggered by work[,] but that is not under discussion here." Dr. Breitung's letter concluded, "Any pre[-]existing condition was not a significant factor in causing her disability." Dr. Puryear reviewed this letter and changed his

recommendation to duty-related disability benefits. He stated, "Since the statute requires that pre-existing conditions were not a substantial contributor and that the problems would not have occurred without the stresses of the job, and that the job is the sole and exclusive cause of the current problems, based on the updated information from the psychiatrist[,] it appears that [Ms. Vigil] would at this time meet the requirements for a duty-related disability." Despite Dr. Puryear's change of mind, the disability review committee met again and recommended non-duty benefits.

Administrative Appeal

{6} Ms. Vigil's appeal proceeded to an evidentiary hearing before a hearing officer. Dr. Breitung testified and explained her written notations on the two examining physician forms that had been submitted with Ms. Vigil's two applications for retirement disability benefits. With respect to the first form, on which Dr. Breitung had stated that Ms. Vigil's employment "[was] largely responsible [for her disability] but not solely," Dr. Breitung explained that she meant this to be a "generic statement" because "as a psychiatrist, we generally believe that there are some genetic factors even if we can't prove it." As for her written comment that Ms. Vigil's "[p]rior history of a depressive episode put her more at risk for further depressive episodes," Dr. Breitung testified that this related to the depressive episode Ms. Vigil experienced in 2006 or 2007 and that the prior episode was also the result of work stressors. She went on to testify that the prior episode had "resolved completely" by the time Ms. Vigil came to see her in 2011.

{7} With respect to the second form prepared by Dr. Breitung and submitted with Ms. Vigil's second application, Dr. Breitung explained her statement that "[t]he stress at work triggered her depression [and] anxiety though it is not the sole cause." Again, Dr. Breitung testified that she meant that Ms. Vigil "had genetic factors." She stated that the form did not ask whether any pre-existing condition was a significant factor in Ms. Vigil's disability. Dr. Breitung further testified that she later became aware that PERA was denying Ms. Vigil duty-related disability benefits because of the forms Dr. Breitung had prepared. After being made aware of this fact and of the regulatory standards applicable to duty-related disability, Dr. Breitung wrote a letter to PERA to clarify her previous statements, in which she stated that "[a]ny pre[-] existing condition was not a significant factor in causing [Ms. Vigil's] disability." Dr. Breitung testified that she stands by the opinion stated in that letter. She opined that Ms. Vigil's work "was so substantial a factor in the disability that she would not have become disabled without it." She further testified that nothing in her treatment, diagnosis, or evaluation of Ms. Vigil led her to believe "that she had any pre[-] existing condition that was a significant factor in her disability."

{8} Dr. Breitung testified regarding several past incidents Ms. Vigil mentioned in her therapy sessions, including a panic attack Ms. Vigil had when she was in her twenties; her father's physical discipline of her when she was a child; her boyfriend's alleged affair in 2006 or 2007; the physical abuse by a former partner, who was the father of her first child; the fact that she has three freezers full of food (purportedly because of food insecurity she experienced as a child); and her brother's death in 2011. Dr. Breitung concluded that, for a variety of reasons, none of these incidents constituted a pre-existing condition

that significantly contributed to Ms. Vigil's disability.

{9} Ms. Vigil's social worker-therapist, Ms. McNicol, also testified at the hearing. Ms. McNicol treated Ms. Vigil during her first depressive episode in 2007 and opined that all of her reported problems then were work-related. During this time period, Ms. Vigil received a letter saying that her boyfriend was having an affair, but Ms. McNicol thought Ms. Vigil was more focused on who sent the letter than on the letter's allegations because her relationship with her boyfriend was going well. After a mediation at work took place, Ms. Vigil expressed uncertainty about continuing counseling, and she did not return to therapy with Ms. McNicol until early 2011.

{10} Regarding the therapy in 2011, Ms. McNicol testified that any childhood issues Ms. Vigil may have had were not a significant factor in causing her disabling depression or anxiety. Ms. Vigil viewed her upbringing as fairly normal, although she mentioned an incident where her father hit her. However, this abuse was not recurrent, and Ms. McNicol opined that Ms. Vigil had dealt with her childhood issues prior to treatment. While Ms. Vigil's brother died during her treatment with Ms. McNicol in 2011, Ms. McNicol testified that Ms. Vigil experienced normal bereavement that did not contribute to her depression. She concluded that Ms. Vigil's work was so substantial a factor in her disability that she would not have become disabled without it and that no pre-existing condition was a significant factor in her disability.

{11} The final witness at the hearing was Dr. Puryear, the psychiatrist who had reviewed Ms. Vigil's disability applications for PERA. Dr. Puryear read into the record his written report, in which he discussed his prior recommendations of non-duty disability benefits. He stated that he gave significant weight to Dr. Breitung's statements in her form reports that Ms. Vigil's depression was not solely caused by stressors at work and that she had a history of depression. He explained that he changed his recommendation to duty-related disability benefits after receiving Dr. Breitung's letter in which she stated that Ms. Vigil's job was the sole and exclusive cause of her disability and that the prior depression had completely resolved.

{12} Dr. Puryear then explained that after he recommended duty-related benefits, he reviewed "voluminous material," apparently in preparing for the appeal hearing, including the notes of Dr. Breitung and Ms. McNicol. This material caused Dr. Puryear to consider "two possible scenarios that could be supported by the evidence[.]" Those scenarios were:

> A. [Ms. Vigil] had childhood PTSD and continued to suffer from some symptoms, and this was exacerbated by her work stress, as well as somewhat by her brother's death and problems with her boyfriend. She appears to have developed a chronic adjustment disorder and exacerbation of her PTSD symptoms.
>
> B. [Ms. Vigil] was doing fine until work problems arose and caused a chronic adjustment disorder probably with features of a major depression, with probable revival of her previous PTSD symptoms.

{13} He went on to opine:

In either scenario, her problems would have resulted from:

1. her stresses, stresses largely but probably not solely from work[;]

2. a vulnerability and a predisposition to symptoms because of her childhood abuse and presumed PTSD[;]

3. her way of experiencing the work problems which was colored by childhood—feeling powerless, degraded, disregarded[;]

4. and from the interaction of her compulsive personality type with her work situation.

{14} He then concluded:

> [T]he first scenario was most supported by the evidence[,] which seemed to belie the second, but that in either scenario[,] the job was not the sole and exclusive cause of her problems. It seemed that the work situation was bad, but that absent her personality type and possible disorder, her childhood abuse and presumed PTSD, and her tendency to depression, she probably would have . . . experienced stress but not likely [to] have developed symptoms, especially of this extreme severity.

{15} Dr. Puryear elaborated on Ms. Vigil's "personality type," which he characterized as an "obsessive-compulsive" personality "style" that he would guess everyone at the appeal hearing, including himself, would "probably have." By this he meant a style that was "detail oriented, conscientious, responsible, mostly honest, scrupulous, meticulous, rigid, judgmental and critical, and particularly sensitive to issues of power and of injustice." This personality style would mean that Ms. Vigil, in a "lousy work environment[,] is going to have really severe difficulty coping with all the stuff that seemed irresponsible and immoral[.]" It would also mean that she would "have more difficulty coping with . . . stress[.]"

{16} The hearing officer prepared a recommended decision, which included recommended findings of fact and conclusions of law. He noted that Ms. Vigil and PERA agreed that Ms. Vigil is disabled and that her disability was solely and exclusively the result of her work but that they disputed whether a pre-existing condition was a significant contributing factor. The hearing officer rejected Dr. Puryear's opinion that childhood PTSD contributed to her current disability because "[t]he medical evidence in this case does not indicate that [Ms. Vigil] was diagnosed with PTSD as a result of childhood trauma or abuse." While Ms. McNicol diagnosed PTSD, she testified that "it was a result of stressors at work" and opined that "childhood trauma was not a pre[-]existing condition significant[ly] contributing to [Ms. Vigil's] work-related disability." The hearing officer found that "Dr. Breitung did not diagnose PTSD from childhood trauma" and testified that any "PTSD symptoms possibly related to childhood trauma [were] not a pre-existing condition that [were] a significant contributing factor material to the disability."

{17} The hearing officer went on to find that "Dr. Puryear appears to be discounting PTSD as a correct diagnosis while at the same time using PTSD (or at least PTSD symptoms) as a pre[-]existing condition in his analysis."

{18} He further found:

> Dr. Puryear's testimony appears to be, in certain instances, based on speculation and his own theories. Dr. Puryear's theory that [Ms. Vigil] had either PTSD or symptoms of PTSD from childhood abuse, and that this was a pre[-]existing condition significantly contributing to [Ms. Vigil's] 2011 depression and adjustment disorder, is contrary to the testimony of [Ms. Vigil's] treating physician and therapist. His testimony that [Ms. Vigil] has some obsessive-compulsive disorder, or tendencies on that spectrum, is contrary to the testimony of her treating psychiatrist, and Dr. Puryear testified it would be incorrect for him to diagnose this alleged disorder.

{19} The hearing officer also found that "[Ms. Vigil's] 2007 depressive episode was work-related. Dr. Breitung's testimony that the prior depressive episode resolved prior to 2011 is not inconsistent with the medical evidence."

{20} In summary, the hearing officer found that "greater weight is given to the testimony of the treating physician (and therapist) [than to Dr. Puryear's testimony] because her opinion is also supported by medical records and diagnosis."

{21} The hearing officer submitted recommended conclusions of law, including the following:

> A preponderance of the evidence of record supports a determination that [Ms. Vigil] is permanently and totally incapacitated for continued employment, and that the disability arose from proximate causes arising solely and exclusively from her job. A preponderance of credible evidence supports a finding that no pre[-]existing condition was a significant contributing factor material to [Ms. Vigil's] disability. . . . [Ms. Vigil] is entitled to duty disability at this time, and her [a]ppeal should be **granted**.

{22} The Board filed an order stating that it had reviewed the hearing officer's recommended decision, PERA's written exceptions to the decision, and the hearing officer's response. The order then stated:

> 5. [Ms. Vigil] received medicine and social work therapy for a 2007 depressive episode.
>
> 6. [Ms. Vigil] chose to stop taking the medicine and attending social work therapy. . . .
>
> 7. PERA's expert psychiatrist [(Dr. Puryear)] concluded that [Ms. Vigil's] 2007 depressive episode was not resolved. . . .
>
> 8. [Ms. Vigil] has failed to satisfy her burden and her appeal for "duty" disability retirement benefits is DENIED in accordance with PERA statutes and rules.

{23} Ms. Vigil appealed the Board's decision to district court, which affirmed. This Court granted certiorari.

DISCUSSION

Standard of Review

{24} We review a decision of the Board "under the same standard of review used by the district court while also determining whether the district court erred in its review." *Paule v. Santa Fe Cnty. Bd. of Cnty. Comm'rs*, 2005-NMSC-021, ¶ 26, 138 N.M. 82, 117 P.3d 240. Under this standard, we determine "whether the [Board] acted fraudulently, arbitrarily or capriciously; whether the [Board]'s decision is supported by substantial evidence; or whether the [Board] acted in accordance with the law." *Id.*; *see* NMSA 1978, § 39-3-1.1(D) (1999). In this case, we conclude that the Board's decision was arbitrary and capricious.

The Board's Decision Was Arbitrary and Capricious

{25} We begin with the legal framework applicable to Ms. Vigil's claim. Under NMSA 1978, Section 10-11-10.1 (2013), the PERA disability review committee may approve disability retirement benefits if it "finds the disability to have been the natural and proximate result of causes arising solely and exclusively out of and in the course of the member's performance of duty with an affiliated public employer." Section 10-11-10.1(B)(4)(b). Regulations define "solely and exclusively" as "[(1)] the member's work is so substantial a factor of the disability that the disability would not have occurred at the time without it and [(2)] a pre-existing condition is not a significant contributing factor material to the disability." 2.80.1000.7(E) NMAC. The parties do not dispute that Ms. Vigil established the first criterion, and the question is therefore whether a pre-existing condition significantly contributed to the disability.

{26} In considering whether an administrative decision is arbitrary or capricious, "we review the whole record to ascertain whether there has been unreasoned action without proper consideration or disregard of the facts and circumstances." *Paule*, 2005-NMSC-021, ¶ 30 (internal quotation marks and citation omitted). Put another way, a decision is arbitrary and capricious "if it provides no rational connection between the facts found and the choices made, or entirely omits consideration of relevant factors or important aspects of the problem at hand." *Atlixco Coal. v. Maggiore*, 1998-NMCA-134, ¶ 24, 125 N.M. 786, 965 P.2d 370; *see Johnson v. Pub. Emps. Ret. Bd.*, 1998-NMCA-174, ¶ 21, 126 N.M. 282, 968 P.2d 793 ("An administrative decision may be found to be arbitrary and capricious if, when viewed in the light of the whole record, it is unreasonable or does not have a rational basis."). The decision-making agency may not "select and discuss only that evidence which favors [its] ultimate conclusion or fail to consider an entire line of evidence to the contrary." *Atlixco*, 1998-NMCA-134, ¶ 24.

{27} The regulations governing the Board's consideration of disability retirement benefits serve to prevent arbitrary and capricious decision making. They provide that "[t]he [Board] shall approve, disapprove or modify the [hearing officer's] recommended decision, and shall enter a final order concerning the matter being appealed." 2.80.1500.10(D)(7) NMAC (9/30/2010). Where, as here, "the [B]oard wishes to modify the proposed findings of fact, it may do so only after review of the record before the hearing officer. The [B]oard shall provide a reasoned basis for changing the hearing officer's recommendation." *Id.*

{28} In this case, the Board's final order

recited that it had reviewed the hearing officer's recommended decision, PERA's exceptions to the decision, and the hearing officer's response to the exceptions. Notably, the order did not state that the Board reviewed the record before the hearing officer, as required by regulation. Yet, despite having failed to review the record, the Board entered new findings of fact that contradicted the hearing officer's recommended findings. It entered new findings that (1) Ms. Vigil was treated with medicine and therapy for a depressive episode in 2007; (2) she "chose to stop taking the medicine and attending the social work therapy[;]" and (3) Dr. Puryear "concluded that [Ms. Vigil's] 2007 depressive episode was not resolved." Based on these three new findings, while implicitly disapproving of all of the hearing officer's twenty-one findings, the Board concluded that Ms. Vigil "failed to satisfy her burden" and denied her claim for duty-related disability benefits.

{29} The Board's denial of benefits was arbitrary and capricious for two reasons. First, it was made in violation of the applicable regulations, which require the Board both to review the entire record before it can modify the hearing officer's recommended findings and to "provide a reasoned basis for changing the hearing officer's recommendation." 2.80.1500.10(D)(7) NMAC. The Board's order said nothing about reviewing the record, and it offered no explanation, much less a reasoned one, for why it modified the hearing officer's completely contrary findings.[1] Second, the Board's denial of benefits "entirely omit[ted] consideration of relevant factors or important aspects of the problem at hand." *Atlixco*, 1998-NMCA-134, ¶ 24.

{30} The hearing officer's findings included the following:

> [Dr. Breitung] also indicated that [Ms. Vigil's] prior depressive episode in 2007 was a result of work stressors, was a milder depression, and that it had resolved prior to the time [Ms. Vigil] came to see her in 2011.
>
> . . . .
>
> [Ms. McNicol] first saw [Ms. Vigil] June 25, 2007, . . . [when Ms. Vigil] sought treatment for excessive stress at work. . . . [Ms. Vigil] apparently went to a work mediation and then indicated she was unsure about continuing counseling. . . . Ms. McNicol had no reason to believe [Ms. Vigil] continued to suffer from depression, anxiety or PTSD after 2007 and before she returned to therapy in February 2011.
>
> . . . .
>
> Dr. Puryear questioned whether [Ms. Vigil's] 2007 depressive episode was solely caused by work, and he also questioned whether [her] 2007 depressive episode was resolved prior to 2011, although pointing to

[1]While Ms. Vigil did not raise this point in her briefing, we nonetheless address it because it is in the general public interest to ensure that the Board acts in compliance with its own regulations and bases decisions that are contrary to the recommendations of its hearing officers on the evidentiary record. Rule 12-216(B)(1) NMRA (stating that appellate court may, in its discretion, review unpreserved questions involving general public interest).

> no specific evidence concluding it was not. . . . Dr. Puryear testified it was "plausible" the depression was resolved because the records show no treatment of [Ms. Vigil] from August 2007 to early 2011.

The hearing officer's recommended findings make no mention of Ms. Vigil's choosing to stop medication and therapy in 2007, as found by the Board.

{31} Thus, the Board's finding that Ms. Vigil "chose to stop taking the medicine and attending social work therapy" is completely contrary to the hearing officer's recommended findings, and the Board offered no explanation for this contradiction other than a bare reference to an exhibit comprising sixty-eight pages of Ms. McNicol's office notes, most of which were hand-written and difficult to decipher. More important, Ms. McNicol herself contradicted this finding with her testimony that she had no reason to believe that Ms. Vigil's depression continued during the time she was not in therapy between 2007 and 2011.

{32} In making its new findings of fact, the Board "select[ed] and discuss[ed] only that evidence which favor[ed its] ultimate conclusion"—i.e., Dr. Puryear's testimony—and it "fail[ed] to consider an entire line of evidence to the contrary." *Atlixco*, 1998-NMCA-134, ¶ 24. This is, by definition, conduct that is arbitrary and capricious. *Id.*

{33} Moreover, the Board's new findings had no rational basis in light of the whole record. *See Johnson*, 1998-NMCA-174, ¶ 21 ("An administrative decision may be found to be arbitrary and capricious if, when viewed in the light of the whole record, it is unreasonable or does not have a rational basis."). Dr. Puryear himself did not rely on the 2007 depressive episode for his opinion supporting denial of benefits to Ms. Vigil. Instead, he relied on two "scenarios," the more likely of which was that Ms. Vigil suffered from "childhood PTSD . . . exacerbated by her work stress, as well as somewhat by her brother's death and problems with her boyfriend." Yet both Ms. Vigil's treating psychiatrist and her treating therapist testified that, in childhood, Ms. Vigil was disciplined by her father rather than abused and that neither her brother's death nor any alleged problems with her boyfriend constituted pre-existing conditions that significantly contributed to her disability. Dr. Breitung rejected a diagnosis of PTSD, and while therapist Ms. McNicol diagnosed PTSD, she attributed the disorder to stressors at work.

{34} Dr. Puryear also opined that, while Ms. Vigil's "work situation was bad, . . . absent her personality type, . . . presumed PTSD, and her tendency to depression," she likely would not have experienced the severe symptoms that she did. Because Dr. Breitung and Ms. McNicol testified either that Ms. Vigil did not have PTSD or that her PTSD was caused by her work, and because they agreed that her only previous depressive episode had completely resolved, the only remaining potential "pre-existing condition," according to Dr. Puryear, was Ms. Vigil's "personality type." And because Dr. Puryear described this personality type as one "probably" shared by every person in attendance at the appeal hearing, we can surmise that, in Dr. Puryear's view, no one with a college education could ever qualify for PERA duty-related disability retirement based on a mental health disorder.

{35} In summary, the Board violated its

own regulations by failing to review the record before the hearing officer and by failing to provide a reasoned basis for its new findings of fact. In addition, the Board's decision, "when viewed in the light of the whole record, . . . [was] unreasonable [and did] not have a rational basis." *Johnson*, 1998-NMCA-174, ¶ 21. The decision was therefore arbitrary and capricious and must be reversed.

CONCLUSION

{36} For the foregoing reasons, we reverse the Board's order denying duty-related disability retirement benefits to Ms. Vigil, and we reverse the district court's judgment affirming the Board's order. This matter is remanded to the Board with instructions to implement the hearing officer's proposed decision.

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

CYNTHIA A. FRY, Judge

WE CONCUR:

LINDA M. VANZI, Judge

M. MONICA ZAMORA, Judge

Certiorari Granted, July 17, 2015, No. 35,349

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-080

Filing Date: May 11, 2015

Docket No. 33,568

IN THE MATTER OF THE ESTATE OF EDWARD K. McELVENY, Deceased,

MICHAEL PHILLIPS, as Personal Representative of the Estate of Edward K. McElveny,

Petitioner-Appellee,

v.

STATE OF NEW MEXICO, ex rel. DEPARTMENT OF TAXATION AND REVENUE,

Respondent-Appellant.

Law Office of Cristy J. Carbón-Gaul
Cristy J. Carbón-Gaul
Albuquerque, NM

Starace Law
Carmela D. Starace
Albuquerque, NM

for Appellee

Hector H. Balderas, Attorney General
Peter A. Breen, Special Assistant Attorney General
Santa Fe, NM

for Appellant

OPINION

VIGIL, Chief Judge.

{1} This case presents a question of first impression: whether the district court in a formal proceeding under the Uniform Probate Code (UPC), NMSA 1978, §§ 45-1-101 to -404 (1975, as amended through 2011) has jurisdiction to order the Department of Taxation and Revenue (Department) to deliver estate assets to a personal representative when the assets are in the Department's custody pursuant to the Uniform Unclaimed Property Act (UPA), NMSA 1978, §§ 7-8A-1 to -31 (1975, as amended through 2006). We conclude that the district court has jurisdiction to do so, and affirm the order of the district court.

BACKGROUND

{2} Edward McElveny (Decedent) died intestate in 1991, and his heirs consist of seven adult grandchildren and one adult great-grandchild. In 2013, Michael Phillips, one of the adult grandsons, filed an application in the Santa Fe probate court to open an informal probate for his grandfather and to be appointed personal representative of Decedent's estate (Estate). The remaining heirs renounced their right to be appointed personal representative and nominated Michael Phillips to be appointed personal representative of the Estate. The application states that Decedent "has property which was transferred to the . . . Department as unclaimed property" and that "[a]s part of the probate administration, Applicant will claim the unclaimed property for Decedent's Estate." It is undisputed that the Department is holding property in the name of Decedent valued at "a little less than $70,000" pursuant to the UPA. The probate court issued an order appointing Mr. Phillips personal representative (PR) of the Estate and ordered the Department to "release the unclaimed property of the Decedent to Applicant as [PR] of the Estate of Decedent."

{3} The PR attached a copy of the probate court order to a blank claim form used by the Department under the UPA and submitted it to the unclaimed property office of the Department, demanding that the money be released to the PR to be administered under the UPC and distributed to the heirs. The Department rejected the claim as "incomplete" on the grounds that "[w]e do not have appropriate documentation showing that the property in question would devolve to Mr. Phillips alone under the applicable law of heirship" and that "the application should be made directly to [the] Department as unclaimed property custodian rather than probate." The Estate responded by pointing out that the demand was not made on behalf of Mr. Phillips personally, but in his capacity as PR of the Estate so the money could be distributed to the heirs. In addition, the Estate disputed that the exclusive method for acquiring estate assets in the custody of the Department under the UPA is through the Department's own administrative process rather than the UPC. The Estate therefore contended that the application was "complete" and demanded that the funds be delivered to the PR no later than ninety days after the claim was initially submitted to the Department, or the Estate would return to court and seek enforcement of the probate court order in addition to sanctions.

{4} The Department failed to respond to the Estate's demand, and the probate court thereupon transferred the probate case to the district court "for determination of all disputed issues" subject to being remanded back to the

probate court for completion after resolution of the disputed issues. *See* N.M. Const. art. VI, § 23 (stating that the probate court "shall not have jurisdiction in civil causes in which the matter in controversy shall exceed in value three thousand dollars ($3,000.00) exclusive of interest and cost[.]"). The Estate then filed a motion in the district court to enforce the probate court order and for sanctions, with notice to the Department. The Department responded by moving to dismiss on the ground that the district court had no jurisdiction to grant the relief requested. First, the Department asserted that the UPA is the "exclusive mode" for disbursing unclaimed property and that a court order issued under the UPC is ineffective. Second, the Department asserted the district court lacked jurisdiction because the Estate failed to exhaust its administrative remedies under the UPA before it obtained the order from the probate court. Finally, the Department asserted that because it was not served with process, the probate court failed to obtain jurisdiction over the Department.

{5} Following a hearing at which the Department appeared, the district court denied the Department's motion to dismiss, enforced the order of the probate court, and ordered the Department to deliver the personal property of Decedent to the PR of the Estate. The Department appeals.

DISCUSSION

{6} As a prelude to our analysis, we provide a brief overview of the UPA and how it generally operates. Property is "presumed abandoned" if it is "unclaimed" by its apparent owner for a specified period of time. Section 7-8A-2. A "holder" of property that is "presumed abandoned" is required to send written notice to the apparent owner stating that the holder is in possession of property that is subject to the UPA, make a report to the Department that it is in possession of such property and, ultimately, deliver custody of the property to the Department. Sections 7-8A-4; 7-8A-7; 7-8A-8. Upon payment or delivery of property to the Department, "the state assumes custody and responsibility for the safekeeping of the property." Section 7-8A-10(b). The Department is then required to publish a notice stating in part that "property of the owner is presumed to be abandoned and has been taken into the protective custody of the [Department.]" Section 7-8A-9(a)(3). The notice must also state that "information about the property and its return to the owner is available to a person having a legal or beneficial interest in the property, upon request to the [Department]." Section 7-8A-9(a)(4). The property does not escheat to the State. The Department is required to deposit all money and proceeds from the sale of abandoned property, minus expenses, into the tax administration suspense fund and retain it in an unclaimed property fund containing at least one hundred thousand dollars ($100,000) from which the Department "shall pay claims duly allowed." Section 7-8A-13.

{7} Against this general background, the Department contends that the order of the district court must be reversed, arguing: (1) the district court had no jurisdiction, apart from the UPA, to order the Department to release the unclaimed property to the Estate; (2) the district court order is void because the Department was not served with process; and (3) for additional reasons, which we address summarily.

Standard of Review

{8} Arguments made by the Department require us to engage in statutory interpretation,

which requires de novo review. *Oldham v. Oldham*, 2011-NMSC-007, ¶ 10, 149 N.M. 215, 247 P.3d 736. In addition, whether a district court has subject matter jurisdiction likewise presents a question of law, with de novo review. *State v. Chavarria*, 2009-NMSC-020, ¶ 11, 146 N.M. 251, 208 P.3d 896. Finally, questions relating to sufficiency of service of process are also reviewed de novo. *See Edmonds v. Martinez*, 2009-NMCA-072, ¶ 8, 146 N.M. 753, 215 P.3d 62. We now turn to the arguments made by the Department.

Subject Matter Jurisdiction

{9} We first address whether the district court had jurisdiction, independent of the UPA, to order the Department to deliver the property of Decedent to the PR of the Estate. When the probate case was opened and the PR was appointed for the Estate, the PR was automatically granted certain powers and obligations. The PR acquired "the same power over the title to property of the estate that an absolute owner would have" which could be exercised "without notice, hearing or order of the court." NMSA 1978, Section 45-3-711 (1975). In addition, the UPC directs that "every personal representative has a right to, and shall take possession or control of, the decedent's property" and the PR "may maintain an action to recover possession of property[.]" NMSA 1978, Section 45-3-709 (1975). Thus, the PR acted in accordance with his statutory obligation in seeking an order from the probate court directing the Department to deliver Decedent's property to the Estate. After the Department refused to honor the order, the case was transferred to the district court for enforcement of the probate court order. When the hearing was held in the district court with notice to the Department, it was a "formal proceeding" under the UPC. Section 45-1-201(A)(19) (defining "formal proceedings" under the UPC as "proceedings conducted before a district judge with notice to interested persons"). Section 45-1-302(B) then expressly provides:

> The district court in formal proceedings shall have jurisdiction to determine title to and value of real or personal property as between the estate and any interested person, including strangers to the estate claiming adversely thereto. The district court has full power to make orders, judgments and decrees and to take all other action necessary and proper to administer justice in matters that come before it.

On its face, Section 45-1-302(B) expressly and unambiguously grants jurisdiction to the district court to do exactly what it did here.

{10} The UPC notwithstanding, the Department asserts that the district court lacked subject matter jurisdiction because the UPA contains an express declaration that the Estate must utilize its procedure to acquire Decedent's property. The sole authority cited to us is Subsection (a) of Section 7-8A-15. This statute provides:

> A person, excluding another state, claiming property paid or delivered to the [Department] may file a claim on a form prescribed by the [Department] and verified by the claimant.

The Department argues that because an estate is included in the definition of a "person" in the UPA under Section 7-8A-1(12), the Legislature expressed its intent that an estate must follow the Department's procedures to

the exclusion of the UPC in collecting estate assets in its custody under the UPA. At oral argument the Department added that it contends the word "may" in the statute really means "shall."[1] We are not persuaded.

{11} Our task in construing a statute is to give effect to the intent of the Legislature. *Oldham*, 2011-NMSC-007, ¶ 10. To ascertain the Legislature's intent, we look first to the plain language of the statute, unless the Legislature indicates that a contrary meaning was intended. *Id.* "[W]hen a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation." *Bank of N.Y. v. Romero*, 2014-NMSC-007, ¶ 40, 320 P.3d 1 (internal quotation marks and citation omitted). Here, there is nothing to indicate that the Legislature intended the word "may" to mean anything other than what it plainly means. Plainly, the word "may" is permissive and not mandatory. *See Webster's Third New Int'l Dictionary* 1396 (unabridged ed. 2002). Moreover, the Legislature has specifically stated in the Uniform Statute and Rule Construction Act, NMSA 1978, §§ 12-2A-1 to - 20 (1997), that when "may" is used in a statute, it "confers a power, authority, privilege or right" but when "shall" or "must" are used in a statute, they "express a duty, obligation, requirement or condition precedent." Sections 12-2A-4(A) and (B).

{12} Because the words "may" and "shall" have such different meanings, "a fundamental rule of statutory construction states that in interpreting statutes, the words 'shall' and 'may' should not be used interchangeably but should be given their ordinary meaning." *Thriftway Mktg. Corp. v. State*, 1992-NMCA-092, ¶ 9, 114 N.M. 578, 844 P.2d 828. Thus, "[w]here the terms 'shall' and 'may' have been juxtaposed in the same statute, ordinarily it must be concluded that the [L]egislature was aware of and intended different meanings." *Id.* In this regard, we note that in Section 7-8A-15(b), which immediately follows Subsection (a) on which the Department relies, the Legislature used these words in just this fashion.[2] We therefore conclude that the Legislature intentionally used "may" and "shall" in Sections 7-8A-15(a) and (b) to respectively convey permissive and mandatory meanings. *See Vaughn v. United Nuclear Corp.*, 1982-NMCA-088, ¶ 23, 98 N.M. 481, 650 P.3d (stating that a statutory amendment "substituting 'may' for 'shall' manifests a clear intent to make the act referred to permissive instead of mandatory").

{13} Here, Section 7-8A-15(a) unambiguously states that a claim "may" be filed with the Department; it does not state that a claim "must" be filed with the Department. Moreover, we conclude that the UPA and the UPC can operate together and that no intent was expressed by the Legislature that the UPA supersede the UPC in the circumstances of this case. Thus, in the exercise of its duty to act "for the best

[1]The Department also repeatedly asserted at oral argument that its procedures for determining whether a person is entitled to property in its custody under the UPA are superior to a district court's. We do not comment further on this assertion, as it is not supported by reference to any facts or legal authorities.

[2]Section 7-8A-15(b) states: "Within ninety days after a claim is filed, the [Department] *shall* allow or deny the claim and give written notice of the decision to the claimant. If the claim is denied, the [Department] *shall* inform the claimant of the reasons for the denial and specify what additional evidence is required before the claim will be allowed. The claimant *may* then file a new claim with the [Department] or maintain an action under Section [7-8A-16]." (Emphasis added.)

interests of [the] successors to the estate" under Section 45-3-703(A), the PR had discretion to either file a claim with the Department under Section 7-8A-15(a) or invoke the jurisdiction of the district court under Section 45-1-302(B). We therefore reject the Department's argument and hold that the district court had jurisdiction to act as it did. *See In re Estate of Harrington*, 2000-NMCA-058, ¶ 17, 129 N.M. 266, 5 P.3d 1070 (concluding, on the basis of the language in Section 45-1-302, that "the Legislature intended to confer upon district courts general civil jurisdiction in formal probate proceedings").

Service of Process

{14} The Department contends that the order of the probate court directing it to deliver Decedent's property to the Estate and the order of the district court enforcing the order was ineffectual and void because the Department was never served with process as required by Rule 1-004 NMRA. For the following reasons, we disagree.

{15} Probate proceedings are in rem special statutory proeedings. *See In re Estate of Harrington*, 2000-NMCA-058, ¶ 14 (stating that probate proceedings are special statutory proceedings); *In re Estates of Salas*, 1987-NMCA-018, ¶ 11, 105 N.M. 472, 734 P.2d 250 ("The procedure for probating wills and testaments in New Mexico is strictly statutory and is an action in rem."), *abrogated on other grounds by In re Estate of Harrington*, 2000-NMCA-058; *In re Hickok's Will*, 1956-NMSC-035, ¶ 30, 61 N.M. 204, 297 P.2d 866 ("A probate proceeding is a special, statutory proceeding."). Here, the PR opened an informal probate for his deceased grandfather pursuant to the UPC, and the probate court properly issued an order directing the PR to collect the Estate's assets so they could be administered through probate. Property of Decedent was in the custody of the Department and, in keeping with the UPC, the Department was properly ordered to deliver the property to the PR. In this respect, the Department stands in the same shoes as any other custodian of property belonging to an estate, such as a bank. The Estate did not sue the Department, nor did it attempt to obtain personal jurisdiction over the Department for the purpose of stating a claim against the Department. Thus, the district court was not required to obtain personal jurisdiction over the Department by service of process. All that was required was that it have in rem jurisdiction over Decedent's estate property—and there is no argument that it did not. Nowhere does the UPC require service of process upon a custodian of a decedent's property in such circumstances.

{16} Under the UPC, "each proceeding before the district court or probate court is independent of any other proceeding involving the same estate" unless it is a supervised administration. Section 45-3-107. When a hearing is held, "the petitioner shall cause notice of the time and place of hearing of any petition to be given to any person having an interest in the subject of the hearing." Section 45-1-401(A). As custodian of Decedent's property, the Department had an interest in the subject of the hearing, and it was entitled to notice of the hearing and an opportunity to be heard. That is precisely what was done here. At oral argument, the Department conceded it had notice of the proceedings and that it had a full and fair opportunity to be heard in the district court. If the Department had any concerns about whether the Estate was the rightful owner of the property, it had a full and fair opportunity to present those concerns to the court. The public policy of New Mexico,

as expressed in the UPA, is to locate and restore property to its owner rather than to claim it by escheat. *See In re Estate of Tischler*, 97 Cal. Rptr. 510, 516 (Ct. App. 1971) (stating that by adopting the UPA, California's public policy is to restore property to the owner rather than claim it by escheat). By ordering the property to be delivered to the Estate, the district court acted in conformance with our public policy. And the district court properly ordered the property to be delivered to the Estate to be administered in accordance with the UPC so title could pass to Decedent's heirs. *See Clovis Nat'l Bank v. Callaway*, 1961-NMSC-129, ¶ 17, 69 N.M. 119, 364 P.2d 748 (stating that before title to personal property of a decedent passes, there must be a determination of heirship and an order of distribution in a probate case).

Remaining Arguments

{17} The Department asserts that the district court had no jurisdiction because the Estate did not exhaust its administrative remedies. The short answer to this argument is that the Estate was not required to proceed under the UPA, and exhaustion of administrative remedies is not a prerequisite for enforcing a probate court order in the district court.

{18} Finally, the Department argues that the Estate's claim to the property is insufficient to overcome the statutory presumption that the property is abandoned. We disagree. The Estate made a claim to the property pursuant to the UPC, and despite having been given the opportunity to contest the Estate's ownership of the property, the Department chose not to. Moreover, in its brief, the Department concedes that it "has roughly $70,000 of unclaimed property in its custody . . . which colorably belonged to [Decedent]." There is no factual dispute that the property belongs to the Estate, and we therefore reject the Department's argument.

CONCLUSION

{19} The order of the district court is affirmed.

{20} IT IS SO ORDERED.

MICHAEL E. VIGIL, Chief Judge

WE CONCUR:

CYNTHIA A. FRY, Judge

RODERICK T. KENNEDY, Judge

Certiorari Denied, August 4, 2015, No. 35,358

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-081

Filing Date: May 20, 2015

Docket No. 32,928

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

ROBERT J. FLORES,

Defendant-Appellant.

Hector H. Balderas, Attorney General
Santa Fe, NM
Ralph E. Trujillo, Assistant Attorney General
Albuquerque, NM

for Appellee

Caren I. Friedman
Santa Fe, NM

The Pickett Law Firm
Mark L. Pickett
Las Cruces, NM

for Appellant

OPINION

GARCIA, Judge.

{1} A jury found Defendant Robert J. Flores guilty of reckless child abuse resulting in death, in violation of NMSA 1978, § 30-6-1(D)(1), (F) (2009), and tampering with evidence, in violation of NMSA 1978, § 30-22-5(A) (2003). Defendant raises several issues on appeal involving sufficiency of the evidence, whether statements he made to the police should have been suppressed, the State's destruction of evidence, and his constitutional right to a speedy trial. Because we conclude that Defendant's constitutional right to a speedy trial was violated, we need not address the other issues Defendant raises. We reverse and remand to the district court for dismissal of the charges.

BACKGROUND

{2} This case involves the tragic suffocation death of Kalynne Flores, Defendant's four-and-one-half-month-old daughter. Defendant was entrusted with Kalynne's care one evening while the baby's mother worked the night shift. At about 10:30 p.m., Defendant wanted to leave the home to go to the store. He did not want to take Kalynne with him and he did not want to put her in the bed where she usually slept[1] because he did not want the neighbors to hear her cry while he was away. He placed Kalynne on top of clothing in a laundry basket, put the laundry basket inside of a walk-in closet inside of a bedroom, and left the home. Defendant returned home forty-five minutes later, but did not check on Kalynne until a few hours later, at which time he found her dead. The medical examiner ruled that the cause of death was asphyxia. Defendant was arrested for Kalynne's death the next day, on December 7, 2007. His trial began more than five years later on January 30, 2013.

DISCUSSION

A. Speedy Trial General Principles

{3} The Sixth Amendment of the United States Constitution guarantees 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. However, "[a] defendant has no duty to bring himself to trial[.]" *Barker v. Wingo*, 407 U.S. 514, 527 (1972). "[I]t is ultimately the [s]tate's responsibility to bring

[1]Kalynne had a crib, but the mother testified that she did not use it and that the baby generally slept in the bed with her and Defendant.

a defendant to trial in a timely manner." *State v. Stock*, 2006-NMCA-140, ¶ 17, 140 N.M. 676, 147 P.3d 885.

{4} The United States Supreme Court provided four factors to consider in *Barker*: (1) length of delay, (2) reasons for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. 407 U.S. at 530. "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 alone is sufficient to establish a violation, we analyze speedy trial claims on a case-by-case basis. *State v. Garza*, 2009-NMSC-038, ¶ 23, 146 N.M. 499, 212 P.3d 387; *State v. Palacio*, 2009-NMCA-074, ¶ 9, 146 N.M. 594, 212 P.3d 1148. In analyzing these factors, we defer to the district court's factual findings that are supported by substantial evidence, but 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. *State v. Montoya*, 2015-NMCA-___, ¶ 12, ___ P.3d ___ (No. 32,525, Feb. 25, 2015).

B. Length of Delay

{5} The length of delay serves two purposes in our analysis. First, it acts as a mechanism triggering "further inquiry into the *Barker* factors once the delay has reached a specified amount of time, depending on the difficulty of the case." *Spearman*, 2012-NMSC-023, ¶ 20 (internal quotation marks and citation omitted). A delay of trial of twelve months is presumptively prejudicial in simple cases, fifteen months in intermediate cases, and eighteen months in complex cases. *Id.* ¶ 21. Second, we consider how long the delay extends beyond this presumptively prejudicial period, because "the greater the delay the more heavily it will potentially weigh against the [s]tate." *Garza*, 2009-NMSC-038, ¶ 24. We calculate the length of delay from the time the defendant "becomes an accused, that is, by a filing of a formal indictment or information or arrest and holding to answer." *State v. Urban*, 2004-NMSC-007, ¶ 12, 135 N.M. 279, 87 P.3d 1061 (internal quotation marks and citation omitted).

{6} The district court found that this was a complex case. Defendant contends that it was a case of intermediate complexity because it involved only "two counts against a single defendant." We defer to the district court's finding that this was a complex case because it was in the best position to make that determination. *See State v. Manzanares*, 1996-NMSC-028, ¶ 9, 121 N.M. 798, 918 P.2d 714 ("The question of the complexity of a case is best answered by a trial court familiar with the factual circumstances, the contested issues and available evidence, the local judicial machinery, and reasonable expectations for the discharge of law enforcement and prosecutorial responsibilities.").

{7} Defendant was arrested on December 7, 2007. His trial began nearly five years and two months later on January 30, 2013. This nearly sixty-two month delay extends almost forty-four months beyond the presumptively prejudicial threshold of eighteen months for a complex case. Once the presumptively prejudicial threshold has been exceeded, the state must present evidence to show that a defendant's right to a speedy trial has not been violated. *See Garza*, 2009-NMSC-023, ¶ 16. This delay was considered extraordinary and weighs heavily in Defendant's favor unless sufficiently tempered by a consideration and

analysis of all four *Barker* factors. *See State v. Maddox*, 2008-NMSC-062, ¶¶ 12, 37, 145 N.M. 242, 195 P.3d 1254 (addressing a twenty-eight month delay as "extraordinary" and evaluating all four Barker factors in detail to determine whether the unique facts significantly tempered the prejudice to the defendant), *abrogated on other grounds by Garza*, 2009-NMSC-038, ¶¶ 47-48.

C. Reasons for Delay

{8} "Closely related to length of delay is the reason the government assigns to justify the delay." *Garza*, 2009-NMSC-038, ¶ 25 (internal quotation marks and citation omitted). The reasons for the delay "may either heighten or temper the prejudice to the defendant caused by the length of the delay." *Id.* (internal quotation marks and citation omitted). Generally, different reasons for delay are accorded different weight. *Id.* Bad faith or deliberate delay in order to hamper the defense or gain some impermissible advantage at trial is weighed heavily against the state. *Id.* Valid reasons for delay, such as a missing witness, reasonable time needed to oppose the defendant's pretrial motions, and a defendant "go[ing] into hiding" may be "wholly justifiable" and not weighed against the state. *Id.* ¶ 27 (internal quotation marks and citation omitted). More neutral reasons for delay, such as "negligent or administrative delay . . . caused, for example, by overcrowded courts, the reassignment of judges, or governmental negligence[,]" *State v. Steinmetz*, 2014-NMCA-070, ¶ 7, 327 P.3d 1145 (internal quotation marks and citation omitted), weighs against the state, though "less heavily." *Garza*, 2009-NMSC-038, ¶ 26.

{9} However, our tolerance of negligent or administrative delay "varies inversely with its protractedness[.]" *Id.* ¶ 26 (internal quotation marks and citation omitted). Thus, where the government's negligence and administrative burdens cause an excessively protracted delay, we weigh such delay heavily against the state. *See State v. Taylor*, 2015-NMCA-012, ¶ 25, 343 P.3d 199 (concluding that delays caused by the state's negligence and lack of diligence weigh heavily against the state where there was an "excessively long" two-year delay in a simple case); *Steinmetz*, 2014-NMCA-070, ¶ 7 ("The degree of weight we assign against the prosecution for negligent delay is closely related to the length of the delay; the longer the delay, or the greater the threat to the fairness to the defendant, the less tolerant we are of the delay." (alterations, internal quotation marks, and citation omitted)).

{10} We proceed by dividing the nearly sixty-two month delay in this case into digestible portions and discussing the reasons for each portion. We note that the district court's order denying Defendant's second speedy trial motion did not include findings specific to particular periods of delay except for the State's interlocutory appeal, which the district court found was "a valid reason" for delay. As to the remainder of the delay, the order contained only a general finding that "the majority of the delay [was] due to both parties filing numerous motions and conducting discovery" and that the delays were not "deliberate attempts to delay the trial in order to hamper the defense."

1. December 2007 to May 2008

{11} During the first six months after Defendant's arrest on December 7, 2007, and the first five months after he waived his arraignment on January 2, 2008, the record shows no activity initiated by the State to prosecute this case other than a request to review Defendant's conditions of release

because he was seen at a local basketball game. During this time, Defendant submitted three letters to the State asking for discovery because none had been provided within ten days of his arraignment waiver, contrary to Rule 5-501(A) NMRA. Although the State provided many requested materials by February 18, 2008, it did not respond to Defendant's additional requests until May and June 2008. Furthermore, the State did not file its initial witness list until May 21, 2008, and only did so after Defendant submitted a fourth letter requesting the State to disclose its witnesses so he could interview them.

{12} The State's duties under Rule 5-501(A) are not optional, nor are they triggered by Defendant's requests. *See* Rule 5-501(A) (providing that "within ten (10) days after arraignment or the date of filing of a waiver of arraignment, . . . the state *shall* disclose or make available to the defendant [an enumerated list of discoverable materials and a list of witnesses it intends to call at trial]" (emphasis added)). Accordingly, we attribute this six-month delay, during which the State did not timely fulfill its duties to Defendant and then did so only in response to Defendant's urging, as conduct that weighs against the State. *Cf. Garza*, 2009-NMSC-038, ¶ 28 (concluding that a "delay of four months in which th[e] case sat in magistrate court before the [s]tate . . . refiled in district court" was "negligent and weigh[ed] against the [s]tate").

2. May 2008 to January 2009

{13} The trial was first set for June 3, 2008. On May 22, 2008, the State filed a petition to extend the trial date by six months, up to and including January 2, 2009, because the prosecutor was scheduled for another jury trial for a different case during that time and Kalynne's autopsy report had "only recently been made available to the State and defense counsel." Although Defendant stipulated to this extension, the reasons for it were wholly attributable to the State—its prosecutor was scheduled for another trial and the State did not explain why the autopsy report was not available to the parties earlier. We therefore classify this six-month delay as administrative delay that weighs against the State. *See Steinmetz*, 2014-NMCA-070, ¶ 7 (weighing administrative delay against the state); *State v. Moreno*, 2010-NMCA-044, ¶¶ 28-29, 148 N.M. 253, 233 P.3d 782 (concluding that, even though defense counsel stipulated to continuances requested by the state due to delay caused by the state, the delay weighed against the state).

3. January 2009 to March 2009

{14} In the fall of 2008, the district court rescheduled the trial for February 3, 2009, and then rescheduled it again for March 30, 2009 because more days were needed for trial. In January 2009, the State filed the first of several petitions to our Supreme Court to extend the time in which to try Defendant based on the six-month rule that existed at that time. *See* Rule 5-604 (B)(1), (D) NMRA (2008) (requiring that criminal trials be commenced within six months after arraignment unless the Supreme Court grants an extension). The Supreme Court granted an extension until May 2, 2009.

{15} In early March 2009, about four weeks before trial, Defendant filed three pretrial motions: a motion to suppress, a motion for a supplemental juror questionnaire, and a motion to dismiss one of the charges. Defendant did not ask for a trial continuance. Three weeks later, the State moved for an extension of time to respond to Defendant's

motions, stating that "[a]dditional time is necessary for the State to research case law to adequately prepare and file a response." The district court granted the motion, extending the time for the State's response until April 15, 2009, necessitating another trial continuance. In late March 2009, Defendant filed his first speedy trial demand in which he detailed the delays that had occurred up to that time. The State filed its responses on May 4, 2009.

{16} The fact that a defendant files pretrial motions does not automatically weigh against him in a speedy trial analysis. We instead determine whether the reasons for the delay in disposing of the motions are attributable to the defendant or to the state. *See, e.g.*, *State v. Winters*, 690 N.W.2d 903, 909 (Iowa 2005) (concerning Iowa's statutory speedy trial right, stating that "the determination of whether pretrial motions . . . excuse a failure to comply with the speedy-trial rule essentially rests on the strength of the underlying reasons for the delay in disposing of the motions . . . , not the mere existence of the motions" and concluding that, in the absence of an explanation of why motions made six weeks before the trial deadline could not be heard before the deadline, "the only ground in the record to support the [trial] continuance was the filing of the motions[,]" which was "insufficient"). In this case, Defendant filed three pretrial motions four weeks before the March 30, 2009 trial setting and well within the time allocated by rule for the State to respond to the motions. *See* Rule 5-120(E) NMRA ("Unless otherwise specifically provided in these rules, a written response shall be filed within fifteen (15) days after service of the motion."). The reason cited by the State for its inability to timely respond to these motions was that it needed more time to research case law and to prepare its response. Therefore, this three-month delay is attributable to, and weighs against, the State. *See Garza*, 2009-NMSC-038, ¶ 29 (stating that delays caused by administrative burdens such as an understaffed prosecutor's office weigh against the state).

4. April 2009 to mid-July 2009

{17} The district court rescheduled trial a fourth time for July 13, 2009, in order to deal with the pending motions. On May 22, 2009, the Supreme Court granted the State's second Rule 5-604 extension, which gave the State until August 2, 2009 to commence trial. On June 18, 2009, about a month before trial, but three days before the hearing on Defendant's suppression motion, the State moved to exclude testimony from Defendant's expert. This motion had to be resolved before Defendant's March 2, 2009 suppression motion because Defendant intended to call his expert as a defense witness at the suppression hearing. Although the district court attempted to resolve the pending motions before the July 13, 2009 trial setting, it ran out of time and had to finish the motions hearing on July 15, 2009, necessitating another trial continuance. Defendant then filed his second speedy trial demand.

{18} The district court's inability to resolve the parties' motions prior to the July 13, 2009, trial setting is an administrative delay we attribute to its congested docket and the State's delay in filing a motion to exclude Defendant's expert witness report that was prepared on January 15, 2009. Therefore, we weigh this three-and-one-half-month delay against the State. *See Garza*, 2009-NMSC-038, ¶ 29 (stating that delays caused by administrative burdens such as congested dockets weigh against the state).

5. Mid-July 2009 to Late November 2009

{19} The district court rescheduled trial a fifth time for November 30, 2009. On August 18, 2009, the Supreme Court granted the State's third Rule 5-604 extension petition, over Defendant's written opposition, giving the State until January 2, 2010 to try Defendant. On September 24, 2009, Defendant filed his first motion to dismiss for violation of his speedy trial right.

{20} In October and November of 2009, Defendant moved twice for a change of venue due to the extensive coverage of the case by the local media. The district court denied the first motion, but granted the second motion in late November 2009, changing the venue to Bernalillo County and necessitating a sixth trial setting. Because the November 30, 2009 trial setting was vacated due to Defendant's meritorious venue change motion, we weigh this four-month delay neutrally. *See Garza*, 2009-NMSC-038, ¶ 27 (recognizing that delay for a valid reason may be "wholly justifiable" (internal quotation marks and citation omitted)).

6. December 2009 to September 2010

{21} On December 18, 2009, the State petitioned the district court to extend the trial date until July 2, 2010, which would have been eight months after the venue change, stating that resetting the trial "*will* require special arrangements to be made with the [c]ourt in Bernalillo County" to accommodate the five-to-seven-day trial. (Emphasis added.) The district court granted the extension. However, the record shows that no trial date was obtained in the new venue until May 2010—five months after the extension was granted—at which time, the trial was further delayed until September 2, 2010. Although we expect a venue change to cause some delay, the ten-month delay here is significant considering Defendant's trial had already been delayed for two years and he had asserted his speedy trial right three times. Nothing in the record indicates that the State attempted to secure an earlier trial date. To the contrary, the language in the State's extension petition shows that the State had not yet attempted any accommodations with the new venue before it filed the petition. Furthermore, there was an additional five-month delay in setting the September 2010 trial date with the new venue. Therefore, we attribute the six-month delay between late November 2009, when the court granted the venue change, and late May 2010, when the September 2010 trial date was finally scheduled, as negligent delay against the State. *See Garza*, 2009-NMSC-038, ¶ 29 (stating that delays caused by administrative burdens such as congested dockets weigh against the state).

7. September 2010 to March 2011

{22} On August 5, 2010, the judge that had been assigned to this case recused himself. Another judge was assigned on August 20, 2010, but she recused herself on August 24, 2010. The case was not assigned to a third judge until September 14, 2010. Accordingly, the September 2, 2010 trial setting was vacated.

{23} The district court held a status conference on September 17, 2010. The status conference order stated that Defendant intended to file two additional motions and that his pending motions were ready to be heard. It ordered that Defendant's final motions be filed by October 15, 2010, and that it would resolve those and other previously pending motions at a hearing on November 2, 2010, "if time permits[.]" The district court

delayed in setting a trial date until December 8, 2010, three months after the status conference, at which time, the trial was set for April 6, 2011.

{24} On February 16, 2011, the State moved to continue the April 6, 2011 trial setting because the prosecutor assigned to the case had been appointed to the judiciary, another prosecutor would need time to prepare for the trial, and the state's budget crisis required special appropriations from the Legislature "to cover the extraordinary expenses . . . result[ing] from the change of venue in this case." Defendant objected to the continuance.

{25} On March 10, 2011, the district court denied the State's continuance motion. Two days later, however, it partially granted Defendant's motion to exclude certain evidence, including evidence that the reason Defendant had left the home on the night of Kalynne's death was for the purpose of buying beer. The State filed a motion to reconsider the ruling, which was denied. The State then filed a notice of appeal as to that ruling, necessitating vacation of the April 6, 2011 trial setting.

{26} Although Defendant sought to file two additional pretrial motions after the September 2, 2010 trial setting was vacated, he had not asked for a continuance of the September 2, 2010 trial. This trial setting was vacated due to the recusal of judges, which is an administrative delay that weighs against the State. *See Steinmetz*, 2014-NMCA-070, ¶ 7 ("[N]egligent or administrative delay . . . caused, for example, by overcrowded courts, the reassignment of judges, or governmental negligence" is weighed against the state "because the ultimate responsibility for such circumstances rests with the government rather than with the defendant." (alterations, internal quotation marks, and citations omitted)). Adding to the delay, the district court did not obtain a new trial date for several months, until December 8, 2010, at which time, the trial was further delayed until April 6, 2011. Accordingly, we weigh the nearly seven-month delay between the September 2, 2010 trial setting and the State's notice of appeal in late March 2011 as an administrative delay against the State. *See Garza*, 2009-NMSC-038, ¶ 29 (stating that delays caused by administrative burdens such as congested dockets weigh against the state).

8. March 2011 to July 2012

{27} From the filing of the State's notice of appeal on March 23, 2011, to the Court of Appeals mandate issued on July 23, 2012, the district court was without jurisdiction to try the case. We must determine whether this sixteen-month delay weighs against the State.

{28} "The *Barker* test furnishes the flexibility to take account of the competing concerns of orderly appellate review on the one hand, and a speedy trial on the other." *Unites States v. Loud Hawk*, 474 U.S. 302, 314 (1986). "The assurance that motions to suppress evidence or to dismiss an indictment are correctly decided through orderly appellate review safeguards both the rights of defendants and the 'rights of public justice.'" *Id.* at 313. Given these important public interests, "an interlocutory appeal by the [g]overnment ordinarily is a valid reason that justifies delay." *Id.* at 315. In evaluating "the purpose and reasonableness of such an appeal," courts may consider factors including "the strength of the [g]overnment's position on the appealed issue, the importance of the issue in the posture of the case, and—in some cases—the seriousness of the crime." *Id.* The

state's appeal of a "clearly tangential or frivolous" issue would weigh heavily against the government and "the charged offense usually must be sufficiently serious to justify restraints that may be imposed on the defendant pending the outcome of the appeal." *Id.* at 315-16.

{29} Defendant asserts that the State's appeal was "weak[.]" However, he does not allege or show that the appeal was brought in "bad faith" or for a "dilatory purpose." *Id.* at 316. Although this Court ultimately affirmed the district court's order on the basis that the evidence sought to be suppressed would have been more prejudicial than probative, it concluded that the district court had erred in part when it found that the evidence was not relevant. *State v. Flores*, No. 31,205, mem. op. **3-4 (N.M. Ct. App. Apr. 26, 2012) (non-precedential). Moreover, the district court relaxed Defendant's conditions of release while the appeal was pending, despite the seriousness of the charged offenses. *See Loud Hawk*, 474 U.S. at 316. Therefore, we weigh the sixteen-month delay due to the State's interlocutory appeal neutrally.

9. July 2012 to the January 30, 2013 Trial

{30} On August 21, 2012, Defendant moved again to dismiss the charges based on violation of his speedy trial right. At the October 17, 2012 hearing during which the district court denied Defendant's speedy trial motion, it made the following comments regarding its trial scheduling for this case:

> The court will proceed at this time to identify a [trial] date. Again, the court had not done that . . . because, quite frankly, the court had gotten a little tired asking for the Second Judicial District to set aside, I believe it was a ten-day trial, and then cancelling it on them. So, at this point, I believe that we are prepared to go to trial. I don't believe that the court, based on its docket for the balance of the year, is going to be able to set this matter before January. And, again, the court does not believe that it would be appropriate to ask the Second Judicial District to vacate the trials scheduled up in that district in order to accommodate the dates for this trial. Therefore, the court will try and bring this matter to trial as expeditiously as possible, but with the understanding that it will have to rely on the Second Judicial District to identify an appropriate period of time that they can accommodate us.

The district court then obtained a trial date in Albuquerque on October 22, 2012—three months after it regained jurisdiction—at which time, the trial was set for January 30, 2013. We attribute this six-month delay to the district court's administrative decision to delay obtaining a trial date for purposes of accommodating the Second Judicial District and its own docket. We therefore weigh this delay against the State. *See Garza*, 2009-NMSC-038, ¶ 29 (stating that delays caused by administrative burdens such as congested dockets weigh against the state).

D. Assertion of the Right

{31} A defendant who fails to assert his speedy trial right does not waive that right. *Id.* ¶ 31. Instead, the strength of a defendant's assertion of his speedy trial right is considered with the other *Barker* factors. *Id.* ¶ 31. We generally assess the timing and manner in which the right was asserted in order to

determine whether the defendant was "denied needed access to [a] speedy trial over his objection or whether the issue was raised on appeal as [an] afterthought." *Id.* ¶ 32. Although we "accord weight to the 'frequency and force' of the defendant's objections to the delay[,]" the force of a defendant's assertions is mitigated where he filed motions that were "bound to slow down the proceedings," such as a motion asking for additional time, a motion to appoint new counsel, a motion to reset the trial, or other "procedural maneuvers[.]" *Id.* (internal quotation marks and citations omitted).

{32} As we have stated in our discussion of the reasons for delay, Defendant specifically asserted his right to a speedy trial at least four times within the sixty-two-month period of delay in this case. His first two assertions came in the form of detailed speedy trial demands placing the State and the district court on notice of the repeated delays in this case and Defendant's desire to timely face trial. His third and fourth assertions were made as timely motions to dismiss for violation of his speedy trial right. Although Defendant did not formally oppose the State's delays early on, he routinely opposed them as the delay increased. The pretrial motions that Defendant filed around the time he asserted his speedy trial right were not numerous, frivolous, untimely, or the kind of motions that are "bound to slow down the proceedings[.]" *Id.*(internal quotation marks and citation omitted). Therefore, we conclude that Defendant adequately asserted his right, and we weigh this factor heavily in Defendant's favor.

E. Prejudice and Balancing the Factors

{33} We analyze the prejudice factor 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. *State v. Lujan*, 2015-NMCA-___, ¶ 20, ___ P.3d ___ (No. 33,349, Feb. 18, 2015). Beside the prejudicial factor of the nearly sixty-two month delay that is deemed extraordinary in this case, we must also consider any factors that might temper the prejudice to Defendant. *See Maddox*, 2008-NMSC-062, ¶ 37 (recognizing that the factors tempering prejudice must be carefully considered). We weigh this factor in a defendant's favor only where there is a particularized showing of undue prejudice. *Garza*, 2009-NMSC-038, ¶ 35.

{34} In his second speedy trial motion, Defendant asserted that the delay prejudiced his defense because one of the State's expert witnesses—the doctor who supervised Kalynne's autopsy—testified in a deposition that he was "unable to recall what information he reviewed in arriving at his opinions" and that even after the prosecutor attempted to refresh the doctor's memory, "[he] still could not remember the evidence he reviewed." Defense counsel also included affidavits of Defendant and his mother with the motion detailing the anxiety and concern he had suffered. In his affidavit, Defendant stated that he had difficulty obtaining employment while the charges were pending and that he lost one job in early 2008 "due to harassment [his] employer received from individuals"; he and his family "experienced severe financial restraints due to this case"; the conditions of release imposed upon him earlier in the case, along with "emotional trauma, stress and anxiety" he experienced prevented him from continuing his college education, although he was able to resume his studies in August 2011; he "had a hard time finding an apartment" because he was turned away when landlords

found out about the charges against him; he experienced difficulty in school and trouble sleeping because he worried about his criminal case "most of the time"; he "had to seek medical attention" for his anxiety, including "two trips to the emergency room" and a prescription for anti-anxiety medication; extensive media attention about the case had "severely tarnished" his and his family's reputation; and he had "received threats" because of the case that "frighten[ed him] and [his] family." His mother's affidavit vouched for Defendant's anxiety, his trips to the emergency room, his anti-anxiety medication, and his difficulty concentrating on school work.

{35} The district court's order denying the speedy trial motion found that "in terms of undue prejudice to . . . [D]efendant, the [c]ourt has been very generous in terms of the leniency on the restrictions imposed during this period of [delay]"; "every defendant goes through a level of anxiety"; and Defendant "has not met the burden of showing a speedy trial violation[.]" We interpret this language to mean that the district court found that the prejudice suffered by Defendant was ameliorated by a relaxing of his conditions of release over the course of the delay, and was therefore not undue. The order did not address Defendant's assertion that the delay hampered his defense.

{36} We note that Defendant's showing of the anxiety and concern category of prejudice was vague with regard to the time frames in which he suffered it, thus making it difficult to determine whether and how much of it occurred before or after the eighteen-month presumptively prejudicial threshold. *See Spearman*, 2012-NMSC-023, ¶ 39. However, we need not determine whether Defendant sufficiently showed undue prejudice because the remaining three *Barker* factors weigh so heavily in his favor; undue prejudice is presumed under such circumstances. *See Garza*, 2009-NMSC-038, ¶ 39 ("[I]f 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."); *Taylor*, 2015-NMCA-012, ¶ 25 (holding that the defendant's speedy trial right was violated without a particularized showing of prejudice because the nearly two-year delay in a simple case was "excessively long[,]" the state was responsible for most of this delay due to neglect and lack of diligence, and the defendant adequately asserted his right); *see also United States v. Mendoza*, 530 F.3d 758, 764 (9th Cir. 2008) ("[E]xcessive delays can 'compromise[] the reliability of a trial in ways that neither party can prove or, for that matter, identify.' Due to these concerns, 'no showing of prejudice is required when the delay is great and attributable to the government.' Instead, we presume prejudice." (quoting *Doggett v. United States*, 505 U.S. 647, 655 (1992) and *United States v. Shell*, 974 F.2d 1035, 1036 (9th Cir. 1992))).

CONCLUSION

{37} The nearly sixty-two month delay in bringing this case to trial was extraordinary. It exceeded the presumptively prejudicial threshold by almost forty-four months. Because the delay in this case was extraordinary and at least thirty-six months of it was attributable to the State's negligence and administrative burdens, we weigh the length of delay and reasons for the delay factors heavily against the State. Defendant consistently and definitely expressed his objections to the State's delays and his

assertion of the right to be given a speedy trial. Because the first three *Barker* factors weigh so heavily in Defendant's favor, we presume undue prejudice and no further showing of prejudice is required. Despite this presumption, Defendant did present evidence of various particular forms of prejudice that he suffered during the long delay in this case. We therefore conclude that Defendant's speedy trial right was violated. We reverse Defendant's convictions and remand this case to the district court to dismiss the charges against him.

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

TIMOTHY L. GARCIA, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

RODERICK T. KENNEDY, Judge

Certiorari Denied, August 4, 2015, No. 35,325

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-082

Filing Date: May 26, 2015

Docket No. 32,567

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

JOHNNY M. GUTIERREZ,

Defendant-Appellant.

Hector H. Balderas, Attorney General
Santa Fe, NM
Jane A. Bernstein, Assistant Attorney General
Albuquerque, NM

for Appellee

Jorge A. Alvarado, Chief Public Defender
Nina Lalevic, Assistant Appellate Defender
Santa Fe, NM

for Appellant

OPINION

VIGIL, Judge.

{1} The district court judge in this case, on her own motion and without notice to Defendant or an opportunity to present evidence or argument on the question, reversed the prior determination of another district court judge that Defendant was not competent to stand trial, that it was unlikely he would attain competence in the future, and that he was dangerous. We reverse and remand for civil commitment proceedings to be commenced.[1]

[1]Defendant also argues that the evidence is insufficient to support the convictions on three aggravated assault counts. Our disposition is without prejudice to Defendant raising this argument again in any future proceeding, should one be commenced against him in the future. NMSA 1978, Section 30-1-10 (1963) ("The defense of double jeopardy may not be waived and may

BACKGROUND

{2} Defendant was indicted in 2005 on twenty-three charges related to an incident in Las Cruces, wherein he and two other men trapped four adults and two children in a trailer and threatened them with firearms for several hours. Specifically, Defendant was charged with six counts of attempted first-degree murder, NMSA 1978, § 30-2-1(A)(2) (1994) and NMSA 1978, § 30-28-1 (1963); one count of conspiracy to commit first-degree murder, NMSA 1978, § 30-28-2 (1979) and § 30-2-1(A)(2); six counts of kidnapping with a firearm enhancement, NMSA 1978, § 30-4-1 (2003) and NMSA 1978, § 31-18-16 (1993); four counts of aggravated assault with a firearm enhancement, NMSA 1978, § 30-3-2(A) (1963) and § 31-18-16; four counts of aggravated battery, NMSA 1978, § 30-3-5(A) and (C) (1969); and two counts of intentional child abuse, NMSA 1978, § 30-6-1(D) (2009).

{3} After over two years of continuances, including those due to repeated changes in defense counsel, Defendant's attorney informed the district court that his client was unable to understand previous plea offers. A preliminary evaluation performed by Dr. Janette Castillo found that Defendant had an intelligence quotient (IQ) of sixty-two. As a result, defense counsel requested a hearing to determine whether Defendant was competent to accept a plea or to stand trial.

{4} Defendant then underwent a second evaluation at the State's request. Judge Douglas Driggers, who was then presiding over the case, held a determination of competency hearing in accordance with NMSA 1978, § 31-9-1.1 (1993) (1.1 hearing) on September 15, 2008, to determine whether Defendant was competent to stand trial. Judge Driggers concluded that Defendant was incompetent and dangerous, and ordered him committed to the New Mexico Behavioral Health Institute (NMBHI) in Las Vegas for treatment to attain competency, in accordance with NMSA 1978, § 31-9-1.2 (1999).

{5} In February 2009, Judge Driggers held a ninety-day review in accordance with NMSA 1978, § 31-9-1.3 (1999) (1.3 hearing) to assess Defendant's progress toward attaining competency and to review the reports from the NMBHI. The purpose of the hearing was to determine whether Defendant remained incompetent, whether he continued to be a danger to himself or others, and whether he could be treated to attain competency within nine months of being found incompetent. *Id.* Dr. Marianne Holman, Defendant's treatment supervisor at the NMBHI, submitted a forensic report detailing her conclusions that Defendant was incompetent, dangerous, and unlikely to benefit from any further inpatient treatment due to the "severe and chronic" nature of his cognitive impairments. Based on her report and the hearing at which both parties stipulated to all three facts, Judge Driggers found Defendant was still incompetent, dangerous, and that he did not have a substantial probability of becoming competent. Dr. Holman had also provisionally diagnosed Defendant with mental retardation, and Judge Driggers granted Defendant's motion for a hearing to determine whether Defendant had mental retardation under NMSA 1978, § 31-9-1.6 (1999) (1.6 hearing).

{6} Defendant's case was reassigned to Judge Lisa Schultz on April 8, 2009. The State requested an independent evaluation of Defendant for mental retardation, which Judge

be raised by the accused at any stage of a criminal prosecution, either before or after judgment.").

Schultz granted in May 2009, and the hearing on whether Defendant had mental retardation occurred in November 2009. The expert testimony and argument at the hearing explicitly and exclusively centered on one issue: whether Defendant was a person with "mental retardation" as defined in Section 31-9-1.6(E).

{7} Despite the limited focus of the 1.6 hearing, Judge Schultz on her own motion, and without notice to the parties, took up the issue of competency once again and found that Defendant was competent to stand trial "beyond a reasonable doubt." Defendant moved for reconsideration, pointing out that the issue of competency had already been determined and stipulated to by the parties and that no competency evidence was presented at the hearing. Furthermore, Defendant emphasized, he had no notice or an opportunity to be heard on Defendant's competency, in violation of his right to due process. Judge Schultz denied the motion, and the case was placed on the docket for a jury trial, which occurred in May 2012. Defendant was found guilty of all twenty-three counts charged and sentenced to a prison term of 193 years.

{8} In her denial of Defendant's motion to reconsider, Judge Schultz stated that it would "shock the conscience" if she did not revisit the earlier competency ruling and limited herself to considering only whether Defendant had mental retardation. In her opinion, Defendant was "clearly competent."

DISCUSSION

{9} Both federal and New Mexico constitutional law have "long recognized that it is a violation of due process to prosecute a defendant who is incompetent to stand trial." *State v. Rotherham*, 1996-NMSC-048, ¶ 13, 122 N.M. 246, 923 P.2d 1131. To be considered competent, a defendant must (1) understand the nature and significance of the proceedings, (2) have a factual understanding of the charges, and (3) be able to assist in his own defense. *State v. Flores*, 2005-NMCA-135, ¶ 16, 138 N.M. 636, 124 P.3d 1175.

{10} Competency determinations such as this one implicate procedural due process rights: the United States Supreme Court has held specifically that a state court violates a defendant's due process rights when it fails to inquire into competency after the defendant presents enough evidence to entitle him to a hearing on the issue. *Pate v. Robinson*, 383 U.S. 375, 385 (1966). Such a hearing cannot be dispensed with based on factors like the defendant's demeanor before the court but is, rather, a procedural right. *United States v. Cornejo-Sandoval*, 564 F.3d 1225, 1233 (10th Cir. 2009); *Pate*, 383 U.S. at 385. As such, it requires adequate notice, an adversarial hearing before an independent decision-maker, and a written statement from the fact finder clarifying the evidence relied upon and reasons for the decision. *Vitek v. Jones*, 445 U.S. 480, 494-95 (1980).

{11} Under New Mexico's statutory scheme, when a defendant's competence is at issue, he must be evaluated by a qualified professional, such as a psychologist or psychiatrist, whom the district court recognizes as an expert. Section 31-9-1.1. If, following a hearing and receipt of a written report from the expert evaluator, the district court determines that a defendant is not competent but is dangerous, the court may commit the defendant to a secure facility for treatment to attain competency. Section 31-9-1.2(B). Within ninety days, the district court must conduct a review hearing to assess

whether a defendant remains incompetent and dangerous and whether he is responding to treatment. Section 31-9-1.3(A).

{12} If a defendant continues to be both incompetent and dangerous and does not respond to treatment, the district court conducts an evidentiary hearing in accordance with NMSA 1978, § 39-9-1.5 (1.5 hearing) in order to determine whether there is clear and convincing evidence that he is guilty of the accused crime. Section 31-9-1.5. If such evidence does exist, the defendant will be detained in a secure facility until either the "expiration of the period of time equal to the maximum sentence to which [he] would have been subject had [he] been convicted in a criminal proceeding" or the district court orders otherwise. Section 31-9-1.5(D)(2).

{13} At a defendant's request, the court may also conduct a 1.6 hearing to determine whether he has mental retardation. If it is determined that a defendant has mental retardation, civil commitment procedures will be initiated pursuant to NMSA 1978, § 43-1-1 (1999), and the criminal charges are dismissed. Section 31-9-1.6(D).

{14} In this case, Defendant presented sufficient evidence of incompetency to trigger his procedural due process rights, and Judge Driggers conducted an initial competency hearing on September 15, 2008. At that hearing, Defendant was required to show by a preponderance of the evidence that he was incompetent under the three-part incompetency test. *Flores*, 2005-NMCA-135, ¶ 16. Dr. Castillo performed an evaluation of Defendant on behalf of the court, and the State provided an independent evaluation from Dr. Marc Caplan. Both experts testified that Defendant was mildly mentally retarded. Dr. Caplan added that Defendant scored in the "clinically significant range of impairment" during testing.

{15} Dr. Castillo testified that, due to Defendant's low scores in verbal comprehension, he "would be unable to comprehend" any information shared with him verbally. This would make understanding in-court proceedings or documents with complicated legal language, such as a plea agreement, "very difficult." Dr. Castillo also administered tests specific to competency evaluation, the Examination for Competency to Stand Trial, Revised (ECST-R) and the Revised Competency Assessment Instrument (RCAI). She observed that Defendant did not understand his current charges or the adversarial nature of the legal process and that he was overly reliant on his attorney because he was not able to assist in the planning of his defense. Based on her evaluation of Defendant, Dr. Castillo concluded that he was not competent.

{16} Dr. Caplan also administered tests specific to determinations of competency when conducting his evaluation, including the MacArthur Competence Assessment Tool, Criminal Adjudication (MacCAT-CA). His results generally mirrored Dr. Castillo's. He found that Defendant's factual understanding of the proceedings was flawed and that Defendant struggled to identify the roles of various people in the courtroom. He also found Defendant's ability to reason "marginal at best." Besides his low scores in intelligence and comprehension, Defendant had a previous neurological injury and mentioned suffering from hallucinations, for which he received medication. Dr. Caplan ultimately concluded that Defendant "sits on the line" between competence and incompetence.

{17} In addition to the expert testimony at

the September 2008 hearing, Judge Driggers received written reports from both experts and heard testimony from two of Defendant's former lawyers. On the basis of the evidence presented, he found that Defendant was incompetent. Both parties stipulated, because of the severe nature of the charges, that Defendant was also dangerous. Therefore, in keeping with the procedure outlined in Section 31-9-1, Judge Driggers committed Defendant to the NMBHI for treatment and evaluation. Section 31-9-1.2.

{18} Generally, within ninety days of an incompetent defendant's detainment, his treatment supervisor must submit a written "progress report" detailing any advancements the defendant has made toward attaining competency, as well as whether he meets the criteria for dangerousness as defined in Section 31-9-1.2. Section 31-9-1.3. The district court then conducts a 1.3 hearing to determine whether the defendant remains incompetent and is not likely to become competent within nine months of the original finding of incompetency. Section 31-9-1.3(E).

{19} Defendant resided at the NMBHI for several months under the supervision of Dr. Holman and, in accordance with the statutory requirements, she provided a forensic report to Judge Driggers in February 2009. She included her determinations as to Defendant's competency and likelihood of becoming competent, based on several tests and the observations she and others at NMBHI had made of Defendant's behavior in the months during which he was detained there. She stated in her report: "It is my clinical opinion that, due to the severe and chronic nature of his impairment, [Defendant] will likely remain unable to attain competency to stand trial in the future." Dr. Holman also stated that "further inpatient treatment would be largely unproductive" because Defendant suffered considerable deficits in his memory, language ability, and the speed at which he processed new information. She recommended that Defendant no longer receive such inpatient psychiatric treatment, as it would not aid him in attaining competency. The State did not contest Dr. Holman's conclusions at any time, and Judge Driggers ultimately agreed.

{20} On February 23, 2009, Judge Driggers conducted a 1.3 hearing on the issue. By that time, over five months had passed since Defendant was first found incompetent. At that hearing, both parties agreed to stipulate that Defendant was not competent, was dangerous, and that he was not likely to become competent. They acknowledged the department of health's recommendation that Defendant no longer required inpatient treatment at NMBHI, and agreed to hold a 1.5/1.6 hearing as a result of that recommendation. Judge Driggers issued an order reaffirming Defendant's incompetency and stating that "[t]here is not a substantial probability that . . . Defendant will become competent to proceed within one year of the date of the original finding of incompetency." (However, the statute requires only that a defendant demonstrate that there is not a substantial probability that he will regain competency within nine months. Section 31-9-1.3(E)).

{21} Determinations that a defendant will likely not regain competency are made by a preponderance of the evidence. Section 31-9-1.6(B). At the February 23, 2009 hearing on the matter, this burden was easily met; only Dr. Holman's forensic report addressed the issue, and both parties stipulated to their agreement with its conclusions.

{22} We now proceed to our discussion

of: (1) procedural due process, (2) substantive due process, (3) proof of mental retardation, and (4) the proper remedy.

Procedural Due Process

{23} Whether Defendant was afforded procedural due process is a question subject to de novo review on appeal. *See State v. Dominguez*, 2008-NMCA-029, ¶ 5, 143 N.M. 549, 178 P.3d 834; *State ex rel. Children, Youth & Families Dep't v. Maria C.*, 2004-NMCA-083, ¶ 36, 136 N.M. 53, 94 P.3d 796.

{24} Procedural due process under both the United States Constitution and the New Mexico Constitution requires that a defendant be given reasonable notice and a fair opportunity to defend. *See State v. Baldonado*, 1998-NMCA-040, ¶ 21, 124 N.M. 745, 955 P.2d 214. *See also Rutherford v. City of Albuquerque*, 1992-NMSC-027, ¶ 7, 113 N.M. 573, 829 P.2d 652 ("The essence of procedural due process is that the parties be given notice and an opportunity for a hearing."). This includes a right to be heard in a meaningful manner, which "generally includes an opportunity to review and present evidence, confront and cross examine witnesses, and consult with counsel, either by way of an informal or formal hearing." *Maria C.*, 2004-NMCA-083, ¶ 26.

{25} In *Titus v. City of Albuquerque*, 2011-NMCA-038, ¶ 42, 149 N.M. 556, 252 P.3d 780, we stated that essential elements of the adversary process, some or all of which may be required as part of the due process afforded, include:

> (1) adequate notice of the charges or basis for government action; (2) a neutral decision-maker; (3) an opportunity to make an oral presentation to the decision-maker; (4) an opportunity to present evidence or witnesses to the decision-maker; (5) a chance to confront and cross-examine witnesses or evidence to be used against the individual; (6) the right to have an attorney present the individual's case to the decision-maker; (7) a decision based on the record with a statement of reasons for the decision.

(quoting *Bd. of Educ. v. Harrell*, 1994-NMSC-096, ¶ 25, 118 N.M. 470, 882 P.2d 511). It is clearly evident that many of these constituent elements of procedural due process are absent in this case.

{26} The hearing held before Judge Schultz on November 17, 2009, was for the narrow purpose of determining mental retardation under Section 31-9-1.6. Both parties agreed that "the issue is not competency anymore. The issue is retardation." Under Section 31-9-1.6(E), " 'mental retardation' means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior. An intelligence quotient of seventy or below on a reliably administered intelligence quotient test shall be presumptive evidence of mental retardation." *Id.*; *see State v. Trujillo*, 2009-NMSC-012, ¶ 10, 146 N.M. 14, 206 P.3d 125 ("[T]here are two prongs to the New Mexico statutory definition of mental retardation: (1) significantly subaverage general intellectual functioning and (2) deficits in adaptive behavior.").

{27} The parties also agreed that Dr. Castillo and Dr. Siegel would both be qualified as experts "for the purposes of today's hearing with respect to the specific

areas so mentioned": i.e., whether Defendant has mental retardation as defined by Section 31-9-1.6 and *Trujillo*. Neither the district court nor the parties attempted to qualify the witnesses as experts regarding competency, even though Dr. Castillo had been qualified as such in previous hearings.

{28} When it requested an evaluation for the 1.6 hearing, the State acknowledged that Defendant had already been evaluated for incompetence; then, at the NMBHI, he was evaluated for dangerousness and whether or not he was treatable; and finally the 1.6 hearing would determine whether Defendant had mental retardation or would instead require a 1.5 hearing for long-term criminal commitment. There was no testimony or argument as to any other issue at the 1.6 hearing.

{29} Following the 1.6 hearing, Judge Schultz ruled, on her own motion, without notice, and without any argument from the State, that Defendant had been proved competent "beyond a reasonable doubt." Defendant was denied his procedural right to effective and timely notice and the opportunity to present arguments and evidence before having a decision rendered against him. "[N]otice is essential to afford [a defendant] an opportunity to challenge the contemplated action and to understand the nature of what is happening to him." *Vitek*, 445 U.S. at 496.

{30} Moreover, Judge Schultz did not include—either in her original opinion or when she addressed Defendant's motion to reconsider—any findings of fact or conclusions of law that established an adequate basis for a ruling on competency. It contains no mention of any of the three factors for determining competency that a valid decision would require. Thus, in violation of Defendant's due process rights, the district court never provided Defendant with any justification for the district court's decision and the subsequent actions taken. *Wolff v. McDonnell*, 418 U.S. 539, 564 (1974).

{31} When Judge Driggers determined Defendant was incompetent following the September 2008 hearing, Defendant satisfied his burden of proving that he was incompetent. *See State v. Santillanes*, 1978-NMCA-051, ¶ 8, 91 N.M. 721, 580 P.2d 489 (stating that a defendant has the burden of proving his incompetence claim by a preponderance of the evidence). Judge Driggers reaffirmed the finding of Defendant's incompetency following the 1.3 hearing in February 2009. The burden therefore shifted to the State to prove that Defendant was competent to stand trial. *Santillanes*, 1978-NMCA-051, ¶ 10. However, Judge Schultz effectively required Defendant to re-prove his incompetence at the 1.6 hearing, without affording Defendant any opportunity to present evidence or argument. This was fundamental error. *Santillanes*, 1978-NMCA-051, ¶ 23 (stating that requiring a defendant to prove his competency a second time while the first determination of competency remains in effect constitutes fundamental error). The procedure Judge Schultz followed in ruling that Defendant was no longer incompetent violated fundamental precepts of due process and was essentially unfair. Her ruling cannot stand.

Substantive Due Process

{32} The prosecution of a defendant who is incompetent to stand trial violates due process. *Rotherham*, 1996-NMSC-048, ¶ 13. Again, under *Santillanes*, once Judge Driggers adjudicated Defendant incompetent to stand trial, the burden shifted to the State to prove

that Defendant was competent. 1978-NMCA-051, ¶ 10. As we discuss more fully below, the State never introduced evidence to overcome the presumption, and in fact stipulated that Defendant was incompetent. Moreover, the evidence at the 1.6 hearing, which Judge Schultz relied on, was insufficient to overcome the presumption. Accordingly, Defendant's convictions must be set aside.

{33} The State never offered evidence to rebut the presumptions that Defendant was incompetent, dangerous, and unlikely to attain competency in the future; on the contrary, the State consistently expressed agreement with and even stipulated to those facts. Further, the only purpose of the 1.6 hearing, as we have already stated, was to determine if Defendant had mental retardation. In fact, prior to the hearing, the State specified that "[w]here we are is at the 1.5/1.6 part of the statutes in reference to [Defendant's] condition." The experts' testimony in the 1.6 hearing was thus strictly and deliberately limited.

{34} Dr. Siegel was never qualified as an expert in competency in any proceeding on this matter. When the State requested an independent evaluation from Dr. Siegel, it was specifically and explicitly for the purposes of the 1.6 hearing, which the State described as "totally different" from competency hearings. The State argued that Dr. Siegel would be asked to evaluate Defendant based on the two-prong test set forth in *Trujillo*, an analysis specific to retardation. The State was granted an independent evaluation of Defendant from Dr. Siegel on these limited grounds, and Dr. Siegel testified at the 1.6 hearing that he believed the issue of competence had been settled prior to his involvement.

{35} At the conclusion of Dr. Siegel's testimony, Judge Schultz asked him whether he was "saying that it's [his] opinion that [D]efendant is currently competent to stand trial[.]" He responded, "I am." This was the only question at the hearing regarding Defendant's competency, and it was irrelevant to the purpose of the hearing. Moreover, Dr. Siegel, who had not been qualified as an expert in competency at any time, did not elaborate on what foundation, if any, his opinion rested upon, and he was asked no follow-up questions about it.

{36} Though Dr. Castillo had been qualified as an expert in competency at an earlier hearing, she offered no opinion and was asked no questions regarding Defendant's competency to stand trial. Instead, because the intelligence assessments showed that Defendant has an IQ below seventy, Dr. Castillo explicitly limited her testimony to whether Defendant exhibited deficits in adaptive behavior according to the Diagnostic and Statistical Manual of Mental Disorders (DSM).

{37} The standards in our case law establish a clear difference in methods and standards for determining mental retardation as compared to competency. *See, e.g., Trujillo*, 2009-NMSC-012, ¶ 10 (setting forth a two-prong test for mental retardation); *Flores*, 2005-NMCA-135, ¶ 16 (setting forth a three-prong test for determining competency). Due to the specificity of the three-prong test for competency, competency evaluations are specialized instruments. For the earlier incompetency hearings, Defendant underwent a series of tests, three of which were specific to competency: ECST-R; RCAI; and the MacCAT-CA. No testimony was offered regarding any of the above tests at the 1.6 hearing due to the focus on mental retardation, which involved Defendant's IQ

test and scores on the Vineland II assessment for adaptive behavior deficits.

{38} The State neither offered testimony nor made any argument as to Defendant's competency to stand trial at the 1.6 hearing. Judge Schultz heard no testimony regarding competency from the experts at the 1.6 hearing with the exception of a single sentence from Dr. Siegel. In addition, while she received copies of certain written reports that included competency findings, Judge Schultz made no findings of fact on any of the three prongs of competency listed in *Flores*; in fact, she made no mention of those factors either directly or indirectly. Nonetheless, Judge Schultz concluded that Defendant "is competent to stand trial beyond a reasonable doubt."

{39} We also note that at the close of the 1.6 hearing, Judge Schultz stated that, according to her interpretation of Section 31-9-1.6, she could make a determination regarding Defendant's likelihood of attaining competency in the future. The State responded that only mental retardation had been argued at the hearing because the NMBHI report from Dr. Holman stated Defendant did not have a substantial probability of becoming competent. The defense agreed and added that IQ, the basis of the presumption of Defendant's mental retardation, was unlikely to improve: "When you have people like this with this number, there is nothing you can do to that particular number."

{40} Despite this apparent opportunity to revisit the issue, the State still provided no argument that Defendant was treatable to attain competency; on the contrary, it made clear that any evidence to that effect had not been and could not be presented without serious reconsideration: "I don't know if that might be reopened, and maybe [Defendant] could be reassessed for that back at Las Vegas [NMBHI] or by another clinician." As no such "reassessments" had been obtained, the only evidence on Defendant's likelihood of attaining competency continued to be the conclusions in the forensic report from Dr. Holman, to which both parties had stipulated. Dr. Holman's forensic report unambiguously determined that Defendant did not benefit from treatment and would remain incompetent due to the severe and chronic nature of his cognitive impairment.

{41} Judge Schultz did not make a specific ruling as to whether Defendant demonstrated a substantial probability of attaining competency. She also made no finding of fact as to whether Defendant had made progress from prior incompetency. In this case, the only evaluation of treatability came from Dr. Holman, who found him unlikely to benefit from any further treatment due to chronic impairment. The State neither argued nor presented evidence to suggest that Defendant had made or could make progress toward competency, and Judge Schultz heard no testimony on the matter before disregarding the prior ruling made by Judge Driggers that it was unlikely Defendant would attain competency in the future.

{42} The only testimony that Judge Schultz relied on was the testimony from the 1.6 hearing. However, that evidence was not offered by the State, nor was it sufficient to rebut the existing presumption that Defendant was incompetent to stand trial. The result is that Defendant remained incompetent, and his trial violated due process. Consequently, Defendant's convictions must be set aside for this additional reason.

Proof of Mental Retardation

{43} Judge Schultz made no finding regarding the evidence presented on whether Defendant has mental retardation because, as we have already discussed, she ruled that Defendant was competent to stand trial. We would ordinarily remand for a determination of this issue. However, because the facts are not in dispute, and the record is sufficient to make this determination as a matter of law, a remand is not necessary. Moreover, rulings on mental retardation under Section 31-9-1.6 are reviewed de novo. *Trujillo*, 2009-NMSC-012, ¶ 9. And a determination should be made as soon as possible about the propriety of Defendant serving a prison term in the penitentiary as opposed to treatment under a civil commitment. *Id.*

{44} Section 31-9-1.6 defines what "mental retardation"means. Subsection (E) states:

> As used in this section, 'mental retardation' means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior. An intelligence quotient of seventy or below on a reliably administered intelligence quotient test shall be presumptive evidence of mental retardation.

As noted by our Supreme Court, the first sentence of the definition sets forth a two-prong test for the statutory definition of mental retardation: "(1) significantly subaverage general intellectual functioning and (2) deficits in adaptive behavior." *Trujillo*, 2009-NMSC-012, ¶ 10. However, under the explicit terms of the second sentence, a reliably administered IQ test resulting in an IQ of seventy or below "shall be presumptive evidence of mental retardation." Section 31-9-1.6(E). Therefore, an IQ test of seventy or below creates a statutory presumption that both prongs are satisfied, and the burden shifts to the State to prove by a preponderance of the evidence that a person does not have mental retardation. *See State v. Trujillo*, 2007-NMCA-056, ¶¶ 4, 21, 141 N.M. 668, 160 P.3d 577 (concluding that based on an IQ test score estimated to be in the high fifties to low sixties, there was a statutory presumption that the defendant had mental retardation, which the State failed to rebut), *aff'd*, 2009-NMSC-012, ¶13; *State v. Jones*, 1975-NMCA-078, ¶ 7, 88 N.M. 110, 537 P.2d 1006 (holding that "a true presumption shifts the burden of proof" (internal quotation marks and citation omitted)); Section 31-9-1.6(B) (stating that mental retardation must be proven by a preponderance of the evidence).

{45} The evidence on this question is undisputed and unrebutted. Defendant consistently scored below seventy on all his intelligence assessments over the course of a year and a half. One doctor found that Defendant has a full-scale IQ of sixty-two, and two others found Defendant to be in the "mild mental retardation" range with scores in the lowest percentile on verbal comprehension. Thus, we conclude that the evidence demonstrates that Defendant has mental retardation as a matter of law.

The Proper Remedy

{46} Defendant's convictions must be set aside because they were obtained in violation of his rights to procedural and substantive due process. Nevertheless, Defendant was adjudicated incompetent to stand trial; Defendant remains incompetent to stand trial and is unlikely to become competent;

Defendant is dangerous; and Defendant has mental retardation. The question remains as to the proper disposition of the case.

{47} Our Supreme Court has held that criminal commitment cannot be applied to a defendant who meets the definition of mental retardation under Section 31-9-1.6. *Trujillo*, 2009-NMSC-012, ¶ 25. Once a defendant is found to have mental retardation, the statute requires a department of health evaluation regarding whether the defendant poses a serious threat of harm to himself or others. Section 31-9-1.6(B). If the department of health finds that the defendant is dangerous, then Section 43-1-1 civil commitment proceedings must be commenced. Section 31-9-1.6(C); *Trujillo*, 2009-NMSC-012, ¶ 24 (extending the prohibition on criminal commitment to all defendants who are incompetent due to mental retardation, dangerous, and untreatable).

{48} The statutory requirements have therefore been satisfied and Section 43-1-1 civil commitment proceedings must follow. Section 31-9-1.6.

CONCLUSION

{49} For the above reasons, we reverse the district court's ruling as to competency and mental retardation and remand for further proceedings in keeping with this Opinion.

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

MICHAEL E. VIGIL, Chief Judge

WE CONCUR:

CYNTHIA A. FRY, Judge

J. MILES HANISEE, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-083

Filing Date: May 28, 2015

Docket No. 32,413

MARGARET M.M. TRACE,

Worker-Appellee,

v.

UNIVERSITY OF NEW MEXICO HOSPITAL, Self-Insured,

Employer/Insurer-Appellant.

Margaret M. McNamara Trace
Albuquerque, NM

Pro Se Appellee

Paul L. Civerolo, LLC
Paul L. Civerolo
Albuquerque, NM

for Appellant

OPINION

VIGIL, Judge.

{1} This is a workers' compensation case

which presents us with a question of first impression: whether the appointment of a case manager for ongoing coordination of health care services by a workers' compensation judge (WCJ) constitutes a "litigation expense" in connection with a proceeding before the Workers' Compensation Administration (WCA), thereby exempting the case manager's fee from the Procurement Code. We conclude that such services do not constitute a "litigation expense" and reverse the order of the WCJ to the contrary.

I. BACKGROUND

{2} Worker was a registered nurse, working the night shift at University of New Mexico Hospital when she injured her back while lifting and turning a patient on October 5, 1994. On September 1, 1995, Worker filed a claim with the WCA against University of New Mexico Hospital and its insurer, New Mexico Risk Management (collectively Employer). From the beginning the case was combative. There was disagreement regarding the compensable injuries, allegations that the employer unilaterally changed treating physicians, that Employer improperly refused payment for necessary medical services, that Employer's agent interfered with the doctor-patient relationship, that medical services were unjustifiably curtailed or terminated, and that compensation benefits were improperly curtailed.

{3} Trial was finally held on May 7-8, 1996, before WCJ Wiltgen, who entered a compensation order on June 3, 1996, concluding that as a direct and proximate result of the October 1994 accident, "Worker suffered an injury to her low back with additional effects on her shoulder, elevated blood pressure and emotional overlay." WCJ Wiltgen further found that "Worker's present condition and disability are permanent" and that Worker had "continuing need for medical care of her job-related injuries including psychological treatment."

{4} Worker asserts that after entry of the compensation order, Employer's adjuster "continued to deny various treatments and medications" and that "Worker had increasing pain; some symptoms related to the previous injuries, and other new symptoms." Worker asserts that there were disputes between Worker's attorney and Employer's adjuster and the nurse case manager, as well as a number of claims, for exacerbations or new injuries "due to the denial of care and medical bills," and complaints for a "pattern of bad faith and unfair claims processing." Consequently, there were additional mediation conferences and hearings before the WCA, with the result that on October 27, 1999, WCJ Wiltgen appointed Ms. St. Martin as "independent nurse case manager" to "coordinate future medicals and treatment and act as nurse case manager."

{5} Additional claims, responses, and motions followed, and issues remained unresolved. Following another mediation conference in December 2003, the parties agreed that Ms. St. Martin would pick a physician to conduct an independent medical examination. Following the independent medical examination and Ms. St. Martin's review, she determined that an independent medical panel should be convened. WCJ Wiltgen retired, and the case was reassigned to WCJ Griego in January 2004.

{6} Worker filed an amended complaint on April 27, 2004. Following additional hearings, discovery, and the independent medical panel review, a final hearing on the April 27, 2004 amended complaint was set. The final

compensation order, filed on February 22, 2006, determined that Worker suffered multiple injuries as a result of the 1994 accident, and that medical treatment, treatment modalities, and alternative therapies "may be necessary in the future," which "will be authorized in collaboration with the treating physician and nurse case manager." The compensation order further ordered that "Ms. . . . St. Martin shall continue to act as the court ordered nurse case manager concerning [Worker's] work related injuries[.]"

{7} In 2012, Employer moved that Ms. St. Martin be discontinued from serving as the court-appointed nurse case manager because her employer's contract with the WCA had expired, and Employer asserted, her continued appointment violated the Procurement Code. WCJ Griego denied the motion, on the basis that the Procurement Code "does not apply to Administrative/Court Ordered Decrees." Employer moved for reconsideration, and at the hearing WCJ Griego expressed his understanding that because Ms. St. Martin's appointment was court ordered, it qualified as a litigation exemption under the Procurement Code. WCJ Griego therefore denied the motion in a memorandum opinion reasoning:

> Services can be directed to be paid by Risk Management under the Workers' Compensation Act to providers who have not entered into a contract with State Risk Management under the procurement code. For example, professional services to a worker from an attorney or a physician can be ordered paid by court order. It is not necessary for those services to be provided under a contract under the procurement code.
>
> There is no question that the procurement code would be applicable if State of New Mexico were voluntarily providing services without intervention of the administration. However, the distinguishing characteristic here is that the services being provided are by direction by court order and not being voluntarily provided by Risk Management.

Employer appeals.

II. DISCUSSION

{8} Employer makes two arguments on appeal: First, the WCA has a statutorily and administratively created system of case management and a WCJ cannot unilaterally order case management by circumventing the system. Second, the WCJ's order exceeds the WCJ's authority and violates the Procurement Code because the code requires a contract for professional services.

{9} In response, Worker argues that Employer did not preserve the issues on appeal. Worker reasons that Employer has complied with Ms. St. Martin being the court-appointed case manager for fifteen years without incident, and this appeal is the first time Appellants have raised the issue. Worker also argues that the WCJ's order falls within the Procurement Code's litigation exemption.

{10} We first address Worker's preservation concerns, then we examine the WCA and the Procurement Code.

A. Preservation

{11} "To preserve a question for review it must appear that a ruling or decision by the [tribunal] was fairly invoked[.]" Rule 12-

216(A) NMRA. The principal purpose of this rule is to alert the trial judge to the claimed error, giving the trial court an opportunity to correct the matter. *Madrid v. Roybal*, 1991-NMCA-068, ¶ 7, 112 N.M. 354, 815 P.2d 650. Worker argues that Employer failed to invoke a ruling by the WCJ in order to preserve its argument on appeal. We disagree.

{12} Following the initial August 29, 2012 order, Employer made a motion to reconsider the order continuing St. Martin as the nurse case manager. In its motion, Employer asserted that the appointment of St. Martin without a contract violates the Procurement Code. WCJ Griego then held a hearing to address the controversy of St. Martin's status as the nurse case manager. All parties had the opportunity to address their concerns at the hearing. After hearing Employer's argument again that the August 29, 2012 order violates the Procurement Code, WCJ Griego disagreed and reaffirmed his ruling.

{13} We therefore conclude that Employer alerted the WCJ to the asserted error it now argues on appeal and that the issue was properly preserved for appellate review.

B. Standard of Review

{14} Our review requires us to examine the Workers' Compensation Act, NMSA 1978, §§ 52-1-1 to -70 (1929, as amended through 2013), NMSA 1978, § 52-4-3 (1990), regarding case management for health care services, and NMSA 1978, § 13-1-30 (2005) and NMSA 1978, § 13-1-98 (2013), of the Procurement Code. "We apply de novo review to interpret the meaning of a statute." *Jones v. Holiday Inn Express*, 2014-NMCA-082, ¶ 10, 331 P.3d 992. "When engaging in statutory construction, our primary concern is to determine and give effect to legislative intent." *Id.* (internal quotation marks and citation omitted). "In discerning the Legislature's intent, we are aided by classic canons of statutory construction, and 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." *Faber v. King*, 2015-NMSC-___, ¶ 9, __ P.3d ___ (Nos. 34,204 and 34,194, Mar. 12, 2015) (alteration, internal quotation marks, and citation omitted). We also consider the statute's function in the comprehensive legislative scheme. *Id.*

C. Workers Compensation Act

{15} The Act requires the WCA to establish a "case management" system providing for "the ongoing coordination of health care services provided to an injured or disabled worker[.]" Section 52-4-3(A)-(B). Thus, in providing ongoing coordination of health care services, case managers may be used for developing a treatment plan, monitoring the treatment, and the injured worker's progress, determining whether other health services are appropriate and cost-effective, and formulating a plan for the injured worker to return to work. Section 52-4-3(B).

{16} Further, the Act directs that the WCA "shall contract with an independent organization" to assist with the administration of the case management system. Section 52-4-3(C). The administrative rules of the WCA define a "contractor" as "any organization that has a legal services agreement currently in effect with the [WCA] for the provision of utilization review or case management[.]" 11.4.7.7(L) NMAC (12/31/2011). When case management is required, "The WCA will assign cases to its contractor for case management, as provided by the contract in

effect." 11.4.7.14(G)(1)(a) NMAC (01/14/2005)[1] and when the WCA refers a case to a case manager, "the WCA shall pay for the case management services pursuant to the contract." 11.4.7.14(G)(1)(e)(i) NMAC (01/14/2005).

{17} The plain language of the statute demonstrates that the Legislature intended the case manager to be a contractor with a contract in effect. The administrative rules implement this intent by creating a framework requiring case managers to be contractors who are paid as provided in the contract. In this case, the contract with Ms. St. Martin's employer expired. We now turn to whether WCJ Griego could order that Ms. St. Martin continue as Worker's case manager in the absence of a contract under the Procurement Code.

D. Procurement Code

{18} The Procurement Code applies to all expenditures by state agencies for the procurement of goods and services from private entities, unless the Procurement Code itself provides otherwise. Section 13-1-30. Here, the WCA requires a contract for case management services and the Procurement Code requires a contract for any services, unless otherwise provided. The only exception which the Worker asks us to consider, and the only exception relied on by WCJ Griego is the litigation exemption under Section 13-1-98(R). This provision of the Procurement Code exempts:

> contracts and expenditures for legal subscription and research services and litigation expenses in connection with proceedings before administrative agencies or state or federal courts, including experts, mediators, court reporters, process servers and witness fees, but not including attorney contracts[.]"

Section 13-1-98(R).

{19} We are therefore asked to conclude that the fee of a case manager, responsible for the ongoing coordination of health care services provided to an injured or disabled worker, constitutes a litigation expense in connection with a WCA proceeding because the case manager is appointed by a WCJ. We decline the invitation on the basis that the services provided by a case manager under the WCA are not incurred "in connection with" litigation. Rather, such fees are incurred following a determination that a worker is injured or disabled and entitled to benefits under the WCA, and ongoing coordination of the healthcare services is required. Stated another way, while a case manager's fee may be the consequence of litigation, such fees are not an expense of litigation.

{20} In this case, Ms. St. Martin has served as Worker's case manager since 1999, and she has acquired substantial knowledge about Worker's case, her issues, and her medical history. Continuing her services seems to be the most efficient means for coordinating Worker's future care. In addition, we note that since Ms. St. Martin became involved as Worker's case manager, the disputes between Worker, Employer, Employer's insurance adjusters, and Worker's medical providers seem to have significantly resolved. This may very well be the reason why WCJ Griego wished that her services

[1] 11.4.7.14 NMAC was amended in 2013. We apply the administrative rules that were in effect when the order was entered in 2012.

continue. These are all excellent reasons for seeking an amendment to the appropriate statutes. However, that is not our prerogative. Nor can a WCJ exceed his statutory authority. *See Jones*, 2014-NMCA-082, ¶ 9 (stating that workers' compensation courts are tribunals of limited and special jurisdiction and have only such authority as has been conferred on them by statute).

{21} For the foregoing reasons, we reverse the WCJ's order appointing Ms. St. Martin to continue as Worker's case manager.

CONCLUSION

{22} The order of the WCJ is reversed.

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

MICHAEL E. VIGIL, Chief 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-027

Filing Date: August 13, 2015

Docket No. 34,811

EMILY KANE,

Petitioner-Appellee,

v.

CITY OF ALBUQUERQUE,

Respondent-Appellant.

Office of the City Attorney
David Tourek, City Attorney
Rebecca Elizabeth Wardlaw, Assistant City Attorney
Samantha M. Hults, Assistant City Attorney
Albuquerque, NM

Conklin, Woodcock & Ziegler, P.C.
Robin A. Goble
Albuquerque, NM

for Appellant

Cadigan Law Firm, P.C.
Michael J. Cadigan
Kristina Caffrey

for Appellee

Office of the Attorney General
Hector Balderas, Attorney General
Phillip Baca, Assistant Attorney General

for Intervener

OPINION

CHÁVEZ, Justice.

{1} Since 1975, we have held that provisions precluding government employees from seeking elective office are constitutionally

permissible personnel rules regulating conflicts of interest. *See State ex rel. Gonzales v. Manzagol*, 1975-NMSC-002, ¶¶ 18-19, 87 N.M. 230, 531 P.2d 1203. These personnel rules act as conditions of employment, and therefore do not constitute added qualifications for elective public office. *See id.* ¶ 13. Appellee Emily Kane (Kane) ran for elective office while she was employed at the Albuquerque Fire Department (the AFD) as a captain. Article X, Section 3 of the Charter of the City of Albuquerque (1989) (City Charter), and the City of Albuquerque Personnel Rules and Regulations (City Personnel Rules), Section 311.3 (2001), prohibit city employees from holding elective office. Kane sought injunctive relief to allow her to hold elective office while retaining her employment with the AFD. She contends that the employment regulations of the City of Albuquerque (the City) violate (1) the First and Fourth Amendments of the United States Constitution; (2) Article VII, Section 2 of the New Mexico Constitution; and (3) Section 10-7F-9 of the Hazardous Duty Officers' Employer-Employee Relations Act, NMSA 1978, Sections 10-7F-1 to -9 (2010) (the HDOA). The district court granted Kane the relief she sought. We reverse. The City's employment regulations do not violate the First Amendment because they regulate conflicts of interest, and they are therefore rationally related to the legitimate government purpose of promoting administrative efficiency. Moreover, these regulations do not violate Article VII, Section 2 because they constitute conditions of employment that do not add additional qualifications to elective public office. Finally, the City's employment regulations are not preempted by Section 10-7F-9 because personnel rules touch upon issues of local rather than general concern, and they are therefore within the City's authority to promulgate.

I. BACKGROUND

{2} Kane is a captain in the AFD. During her employment with the AFD, she was nominated as a candidate for the New Mexico House of Representatives. Kane stated that she would neither campaign nor serve as a legislator while on duty. The City objected to Kane's candidacy.

{3} According to the stipulated facts, "[b]eginning March 26, 2011, the City advised Kane via emails of city policies prohibiting her from running for or holding office and Kane acknowledged receipt that same day." The chief of the AFD also "sent Kane a letter stating that she was not authorized under city law to be a candidate for public office." Moreover, the AFD deputy chief "issued notices of investigation and conducted a pre-discipline interview of Kane relating to her candidacy."

{4} The City asserts that Kane's candidacy was prohibited by multiple regulations. First, the City Charter provides that "employees of the city are prohibited from holding an elective office of the State of New Mexico or any of its political subdivisions. . . ." City Charter art. X, § 3. Second, the City Personnel Rules provide that "[n]o person shall . . . [b]e a candidate for or hold an elective office of the State of New Mexico or any of its political subdivisions" and that "[n]o person shall engage in political activity that diminishes the integrity, efficiency or discipline of the City service." City Personnel Rules § 311.3.

{5} Kane sought injunctive relief to enable her to seek elective office. She alleged that "[t]he City demanded that [she] either withdraw her candidacy or resign her job." She asked the district court to restrict "the City

from taking any action to require her to withdraw her candidacy." Kane argued that the City's employment regulations violate (1) the First and Fourteenth Amendments of the United States Constitution, (2) Article VII, Section 2 of the New Mexico Constitution, and (3) Section 10-7F-9.

{6} The district court granted Kane the permanent injunction she sought and awarded her attorney's fees. The City then appealed the district court's decision on the merits and the award of attorney's fees. The New Mexico Court of Appeals certified two related cases to this Court pursuant to Rule 12-606 NMRA. *Kane v. City of Albuquerque*, Nos. 32,343 & 32,683, Certification to Supreme Court (July 8, 2014), which we accepted on August 18, 2014.

II. DISCUSSION

A. Whether the City's Prohibitions Against Employers Seeking or Holding Elective Office Violate the First Amendment of the United States Constitution

{7} Kane argues that Article X, Section 3 of the City Charter and City Personnel Rules Section 311.3 violate the First Amendment of the United States Constitution. She claims that these provisions violate her right to candidacy, voters' rights, and the right of "a public employee to speak on matters of public concern." Kane asserts that her right to candidacy and voters' rights are "hybrid and overlapping" such that the constitutional analysis "varies as the restrictions [on these rights] vary." She contends that "[b]ecause the City has severely restricted candidacy rights and because those restrictions impact the fundamental rights of voters, the City's [employment regulations] can survive only if narrowly tailored to advance a compelling state interest." The City characterizes Kane's claim as concerning the right to candidacy and argues that "Kane has no fundamental [c]onstitutional right to seek or hold elective public office," and the City's employment regulations "are rationally related to legitimate governmental interests."

{8} The appropriate level of scrutiny varies with the analytical approach utilized for each of the three types of rights Kane asserts. Delineating these analytical approaches and their interrelationships is prerequisite to determining the proper level of scrutiny.

1. The right to candidacy and the right to vote

{9} The right to candidacy and the right to vote are subjected to differing levels of scrutiny. The right to candidacy is not fundamental, *see Bullock v. Carter*, 405 U.S. 134, 142-43 (1972), whereas the right to vote is fundamental. *Anderson v. Celebrezze*, 460 U.S. 780, 786 n.7 (1983). Restrictions that only impair the right to candidacy are subject to rational basis review. *See, e.g.*, *Brazil-Breashears v. Bilandic*, 53 F.3d 789, 793 (7th Cir. 1995) (subjecting a state supreme court policy prohibiting judicial branch employees from becoming candidates for public office to a rational basis review). On the other hand, restrictions on voters' rights can be subjected to heightened scrutiny. *See Wit v. Berman*, 306 F.3d 1256, 1259 (2d Cir. 2002).

{10} Although voters' rights and the right to candidacy are subject to differing levels of scrutiny, these rights are not easily separable. *See Bullock*, 405 U.S. at 142-43. Laws that narrow the field of candidates necessarily limit voter choice, and therefore "always have at

least some theoretical, correlative effect on voters." *Id.* at 143. Laws that tend to limit the field of candidates may "place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). Consequently, regulations limiting the field of candidates can, but do not automatically, compel heightened scrutiny. *Bullock*, 405 U.S. at 142-44. Although voters' rights are fundamental, "not all restrictions imposed by the States on candidates' eligibility for the ballot impose constitutionally-suspect burdens on voters' rights to associate or to choose among candidates." *Anderson*, 460 U.S. at 788; *accord Grizzle v. Kemp*, 634 F.3d 1314, 1321-22 (11th Cir. 2011) (noting that the right to vote is fundamental, and that restrictions on candidacy imposing severe burdens on First Amendment rights are subject to heightened scrutiny); *Lewis v. Guadagno*, 837 F. Supp. 2d 404, 411 (D.N.J. 2011), *aff'd*, 445 F. App'x 599 (3d Cir. 2011) ("Numerous cases . . . illustrate, either expressly or tacitly, the need for strict scrutiny of restrictions on candidacy only when those restrictions substantially and appreciably impact constitutional rights or basic political freedoms independent of the candidate's ability to run for public office."). Laws limiting the field of candidates cannot circumscribe voters' rights on the basis of "financial status, political opinion, or membership in a protected class." *Lewis*, 837 F. Supp. 2d at 412.

{11} *Bullock* is instructive about when restrictions limiting the field of candidates trigger heightened scrutiny. *See* 405 U.S. at 142-44. *Bullock* involved a Texas law that required a candidate to pay a filing fee "as a condition to having his [or her] name placed on the ballot in a primary election." *Id.* at 135. This regulation neither placed a condition on the right to vote nor quantitatively diluted the votes that were cast. *Id.* at 143. Nevertheless, the filing fees precluded individuals who lacked either personal wealth or affluent backers from seeking office, even though they may be qualified and enjoy popular support. *Id.* Consequently, voters were "substantially limited in their choice of candidates, [and] there [was] the obvious likelihood that this limitation would fall more heavily on the less affluent segment of the community, whose favorites may [have been] unable to pay the large costs required by the Texas system." *Id.* at 144. The Texas electoral system thus created a disparity in voting power based on wealth, which required the Court to review the filing fee system under heightened scrutiny. *Id.*

{12} By contrast, *Lewis* refused to apply heightened scrutiny in analyzing "New Jersey's durational residency requirement for the office of state senator." *Id.* at 413. The residency requirement only precluded those individuals who did not reside in New Jersey for at least four years from running for office. *Id.* at 412. The residency requirement therefore did not appreciably impact "voters, political parties, or persons with particularized views or minimal wealth" so as to merit heightened scrutiny. *Id.* at 412-13 (discussing *Bullock*, among other cases).

{13} Kane relies on *Anderson* to support her position that we apply heightened scrutiny. In *Anderson*, a statutory filing deadline precluded a presidential candidate from "qualify[ing] for a position on the ballot in Ohio," even though he met "the substantive requirements for having his name placed on

the ballot." 460 U.S. at 782. The issue in *Anderson* was "whether Ohio's early filing deadline placed an unconstitutional burden on the voting and associational rights of [the candidate's] supporters." *Id.* Ohio's early filing deadline required independent presidential candidates to qualify for the November general election ballot by mid-to-late March of the election year. *Id.* at 782-83, 790. By contrast, major political party candidates did not have to qualify for the general election ballot for another five months. *Id.* at 791. Thus, by comparison with supporters of the major political parties, the early filing deadline provided independent voters with less time for deciding which candidates should qualify for the ballot. *See id.* at 790-93. Moreover, the deadline shrank the pool of independent candidates that was available on the ballot. *See id.* at 790. Consequently, "the inflexibility imposed by the March filing deadline" disadvantaged independent candidates, *id.* at 791, so as to burden "an identifiable segment of Ohio's independent-minded voters." *Id.* at 792.

{14} The *Anderson* Court concluded that this burden was problematic. *See id.* at 792-94. "[T]he primary values protected by the First Amendment [include] a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Id.* at 794 (internal quotation marks and citation omitted). Regulations limiting the ability of independent voters to associate necessarily undermine their "political effectiveness as a group, [and therefore] reduce diversity and competition in the marketplace of ideas." *Id.* Therefore, laws limiting the field of candidates are unconstitutional when they burden an identifiable segment of voters— such as voters who share a particularized viewpoint, economic status, or associational preference—by limiting these voters' freedom of choice and association. *Id.* at 806 (noting that burdens "placed on the voters' freedom of choice and freedom of association, in an election of nationwide importance, unquestionably outweigh the State's minimal interest in imposing" an early filing deadline for independent candidates).

{15} *Anderson* is distinguishable from the case at bar. First, the City, by precluding City employees from holding elective office, does not impinge on voters' choice by limiting the field of potential candidates, City Charter art. X, § 3 and City Personnel Rules § 311.3, because Kane could retain her position in the AFD or hold elective office. *See Manzagol*, 1975-NMSC-002, ¶ 13 (noting that a statute precluding a state employee from holding political office did not act as a barrier to political office, but instead jeopardized his position as a public employee). No legal provision precluded Kane from making this choice. Therefore, Kane was still "free to run and the people [were] free to choose [her]." *Signorelli v. Evans*, 637 F.2d 853, 858 (2d Cir. 1980) (noting that where a law provides a prospective candidate with the choice of either running for Congress or retaining his state judgeship, there was "no obstacle between [the candidate] and the ballot" such that the candidate was free to run). By contrast, the early filing deadline in *Anderson* was not a provision that provided independent candidates with a choice; the deadline either had to be followed or the candidate was barred from the ballot. 460 U.S. at 782. This lack of choice clearly placed independent candidates, and more importantly, their followers, at a competitive disadvantage during presidential elections because major political party candidates were given a longer period of time in which to enter the presidential race. *Id.* at 790-93. Second, Kane does not allege that the

City's employment regulations impact an identifiable group of voters who share a common political affiliation, economic status, viewpoint, or membership in a protected class. Moreover, the record does not reveal any nexus between a preference for electing public employees and an identifiable political preference or any other common identifying factor. Thus, unlike the early filing deadline in *Anderson*, the City's employment regulations do not impinge on the marketplace of ideas. 460 U.S. at 793-94. Therefore, we conclude that the City's regulations do not sufficiently implicate voters' rights so as to trigger heightened scrutiny.

{16} As other courts have done in similar circumstances, we subject the City's employment regulations to rational basis review. *See, e.g.*, *Molina-Crespo v. U.S. Merit Sys. Prot. Bd.*, 547 F.3d 651, 658 (6th Cir. 2008) (applying rational basis review to a statute that "bars the candidacy of an official whose principal employment is in connection with an activity which is financed in whole or in part by the federal government" (internal quotation marks and citation omitted)); *Brazil-Breashears*, 53 F.3d at 793 (concluding that a policy prohibiting state judiciary employees from becoming candidates for public office need only survive rational basis review in part because "the right to run for office is not a fundamental right"). "It is well-established that a law that results in the termination of a public employee who runs for elective office does not need to survive heightened scrutiny to be constitutional." *Molina-Crespo*, 547 F.3d at 657.

{17} Under rational basis review, a law "need only be rationally related to a legitimate government purpose." *Leib v. Hillsborough Cty. Pub. Transp. Comm'n*, 558 F.3d 1301, 1306 (11th Cir. 2009). We first consider whether the City's employment regulations serve a legitimate government purpose. To prevail, the City need only establish "the *existence* of a conceivable rational basis" for its regulations. *Panama City Med. Diagnostic Ltd. v. Williams*, 13 F.3d 1541, 1547 (11th Cir. 1994). The City need not prove that a "basis was actually considered by [a] legislative body." *Id.* The standard of review that the district court applied to the City's employment regulations is unclear, but the district court nevertheless found that "[t]he City does not have a valid interest in preventing City employees from running for and holding non-City elected office." We disagree and hold that the City has multiple legitimate interests in promulgating its employment regulations.

{18} First, the City has an interest in minimizing, if not eliminating, conflicting demands on public employees. Forty years ago, this Court noted in *Manzagol* that the duties of political office are almost certain to impose upon state employees conflicting demands in terms of time, energy, and loyalty. 1975-NMSC-002, ¶ 18. *Manzagol* concerned a petitioner who was both "a resident and duly qualified elector of the City and County of Santa Fe and an employee of the State of New Mexico as a Water Resource Assistant in the Office of the Engineer." *Id.* ¶ 2. A statute precluded him from serving in political office. *Id.* ¶ 13. We observed in *Manzagol* that the petitioner's service as a political officer "may very well [have] place[d] him in a position of conflict with his state employment in regard to water rights claimed by the City of Santa Fe." *Id.* ¶ 18. The statute, in minimizing the risk of conflicting interests, was therefore a constitutionally "reasonable standard or restriction upon [petitioner's] employment by the State." *Id.* ¶ 19. Similarly, Kane's service in the New Mexico Legislature may place her

in a position of conflict with her City employment in regard to promulgating state laws affecting the AFD.

{19} Second, the City has a legitimate interest in limiting the perception of partisan influence among its employees. *See Molina-Crespo*, 547 F.3d at 658. For example, Kane's identification with a certain political party could conceivably put pressure, either actual or perceived, on her subordinates "to vote in a certain way or perform political chores in order to curry favor with their superiors rather than to act out their own beliefs." *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers AFL-CIO*, 413 U.S. 548, 566 (1973).

{20} Kane erroneously contends that even if the City's employment regulations further legitimate governmental purposes as they applied to her, the City's preclusion of employees from seeking both partisan and non-partisan elective offices is unconstitutionally overbroad. Under rational basis review, we do not consider situations such as the claims of candidates seeking non-partisan office that are not before the Court. *Manzagol*, 1975-NMSC-002, ¶ 16 ("Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." (internal quotation marks and citations omitted)); *accord Clements v. Fashing*, 457 U.S. 957, 960, 972 n.6 (1982) (noting that a litigant contesting a resign-to-run statute "may not challenge the provision's application to him [or her] on the grounds that the provision might be unconstitutional as applied to a class of officeholders not before the Court").

{21} Having established that the City has legitimate interests in preventing conflicting demands on its public servants and avoiding the perception of partisanship within the City administration, we turn to whether the City's employment regulations are rationally related to these interests. The regulations under attack obviously eliminate the risk that the duties of elective office would impose conflicting demands on City employees; the City's regulations are therefore a constitutional method of eliminating conflicting interests among public employees. *Manzagol*, 1975-NMSC-002, ¶¶ 18-19. The City's employment regulations also clearly preclude the possibility that employees would feel pressure to vote or campaign for superiors seeking elective office, and they are therefore rationally related to the governmental purpose of removing either "actual or apparent partisan influence." *See Molina-Crespo*, 547 F.3d at 658.

{22} We conclude that the City's employment regulations are rationally related to legitimate government purposes and hold that these provisions do not unconstitutionally circumscribe either the right to candidacy or voters' rights. We next address whether the City unconstitutionally limited Kane's right to speak on matters of public concern.

2. The right to speak on matters of public concern

{23} Kane argues that her right to engage in "pure political speech" was infringed because her right to speak on matters of public concern was harmed when the City threatened her with disciplinary action after she notified her superiors that she was seeking elective office. Our analysis therefore shifts from primarily determining the potentiality of harm

to voters and the marketplace of ideas[1] to evaluating the harm done to Kane, as a speaker. Utilizing the rationale in *Pickering v. Board of Education of Township High School District 205, Will County, Illinois*, 391 U.S. 563, 568-69 (1968), we determine the constitutionality of restrictions on the right to speak via a balancing test. We must decide "whether the speech at issue addresses a matter of public concern and if so, decid[e] the proper balance between the employee's constitutional rights and the State's interest as an employer in promoting efficient provision of public services." *Deemer v. Durell*, 110 F. Supp. 2d 1177, 1181 (S.D. Iowa 1999).

{24} Most federal circuits have concluded that candidacy for office is a matter of public concern. *See, e.g., Jantzen v. Hawkins*, 188 F.3d 1247, 1257 (10th Cir. 1999) (concluding that a candidate's "political speech—his [or her] candidacy for office—undoubtedly relates to matters of public concern"); *Click v. Copeland*, 970 F.2d 106, 112 (5th Cir. 1992) (concluding that "running for elected office[] addresse[s] matters of public concern"); *see generally* Ross Staine, *First Amendment Protection for Political Candidacy of Public Employees*, 66 SMU L. Rev. 461 (2013) (surveying cases concerning the right to speak on matters of public concern). A minority position holds that the mere fact of candidacy is not a matter of public concern. *See, e.g., Carver v. Dennis*, 104 F.3d 847, 853 (6th Cir. 1997) (holding that where an employee "was fired [solely] for announcing her intention to take her boss's office," the employee did not speak on a matter of public concern), *limitation of holding recognized by Greenwell v. Parsley*, 541 F.3d 401, 403-04 (6th Cir. 2008). For speech to be considered a matter of public concern, this minority position requires that potential candidates express their political viewpoints. *Murphy v. Cockrell*, 505 F.3d 446, 451 (6th Cir. 2007) (discussing *Carver* and distinguishing "cases in which candidates had been singled out or treated differently based on their political viewpoints or expressions, noting that [the candidate in *Carver*] was dismissed solely based on the fact of his candidacy, not his political views").

{25} Kane relies on *Murphy*, a minority position case, and argues that "the City did not threaten disciplinary action because of the mere fact of Ms. Kane's *candidacy*, but did so due to the *manner in which* Ms. Kane campaigned." We therefore determine whether under *Murphy*, Kane faced adverse employment action due to expressing her political viewpoints.

{26} In *Murphy*, a Democratic subordinate ran against a Republican supervisor for an elective office. *Id.* at 448. During the campaign, the subordinate "attacked [the supervisor's] perceived inexperience" for the office. *Id.* When the supervisor prevailed, the subordinate was discharged. *Id.* at 449. *Murphy* held that the subordinate's campaign speech was protected under the First Amendment and employed the balancing prong of the *Pickering* test. *Murphy*, 505 F.3d at 452.

{27} Kane attempts to analogize her situation to the situation in *Murphy*. She alleges that unlike previous AFD employees who sought elective office, she notified her superiors of her intention to run; she was

[1] When *Anderson* analyzed a barrier to ballot access, the United States Supreme Court began its analysis "by noting that [its] primary concern [was] not the interest of [the] candidate . . . , but rather, the interests of the voters who chose to associate together to express their support for [that candidate] and the views he espoused." 460 U.S. at 806.

threatened with potential disciplinary treatment because she chose to disregard the City's employment regulations; and other City employees were not disciplined for their candidacies because they did not notify the City of their political aspirations. Kane presumably is contending that the City's threat of discipline was unconstitutional under *Murphy* because the threat amounted to an attack on the expression of her political viewpoints, since the threat followed from Kane's notification of her candidacy.

{28} *Murphy* is distinguishable from the case at bar. The subordinate in *Murphy* was not discharged pursuant to a personnel regulation that precluded her candidacy, *see generally* 505 F.3d 446, but was terminated for campaign speech that reflected negatively on her supervisor. *Id.* at 451-52. Thus, the supervisor in *Murphy* had discretion in discharging the subordinate. Consequently, the supervisor, in choosing to discharge the subordinate on the basis of campaign speech, effectively politicized a personnel decision[2] in a manner that circumscribed political expression beyond that mandated by law. In contrast, Kane was threatened with discipline pursuant to the City Personnel Rules. This threat of discipline was therefore not an arbitrary attempt to limit political expression, but instead was an attempt to enforce existing employment regulations. Morever, unlike the subordinate in *Murphy*, Kane does not allege facts to suggest that she was attacked for expressing a political viewpoint. For example, she did not attack the credentials of a candidate for public office. She merely alleges that she was attacked for notifying her superiors of her intention to run for elective office. Kane essentially alleges that she was attacked for announcing her candidacy. However, "the mere fact of candidacy [is] not constitutionally protected, [whereas] the expression of one's political belief still [falls] under the ambit of the First Amendment." 503 F.3d at 451. Therefore, under *Murphy*, Kane's right to speak on a matter of public concern was not violated because the mere fact of candidacy is not a matter of public concern.

{29} Moreover, even if we were to decide that the mere fact of candidacy was a matter of public concern, Kane would still not prevail. Laws that preclude government employees from a wide range of political activities have been upheld as constitutional; constitutionally prohibited activities include "raising money for, publicly endorsing, or campaigning for political candidates; serving as an officer of a political club; participating as a delegate in a political convention or running for office in a political party; and writing letters on political subjects to newspapers." *Phillips v. City of Dallas*, 781 F.3d 772, 780 (5th Cir. 2015). These laws are justifiable because political activity may become a basis for the preferential treatment of employees, damage morale, and therefore impair government efficiency. *See id.*; *Briggs v. Merit Sys. Prot. Bd.*, 331 F.3d 1307, 1314-15 (Fed. Cir. 2003). Thus, even when the mere fact of candidacy is considered a matter of a public concern,

[2]We note that the politicization of personnel decisions can damage employee morale and can be harmful to government efficiency. *See Phillips v. City of Dallas*, 781 F.3d 772, 780 (5th Cir. 2015); *Briggs v. Merit Sys. Prot. Bd.*, 331 F.3d 1307, 1314-15 (Fed. Cir. 2003). By contrast, employment regulations precluding government employees from holding or seeking elective office prevent the politicization of personnel decisions. *See Phillips*, 781 F.3d at 780; *Briggs*, 331 F.3d at 1314-15. Thus, whereas *Murphy* involved the politicization of a personnel decision, 505 F.3d at 451-52, in the case at bar, the City was merely attempting to implement provisions that preclude politicization within the government workforce. Kane's reliance on *Murphy* is therefore misplaced.

employment regulations prohibiting employees from running for elective office are constitutional. *See, e.g.*, *Phillips*, 781 F.3d at 774, 783 (upholding the constitutionality of a municipal regulation that "prevented city employees from seeking office in any county overlapping the city").

{30} In conclusion, Kane's right to speak on matters of public concern was not violated. Having already held that the City's employment regulations do not violate either candidates' or voters' rights, we will not hold unconstitutional the City's attempts to apply its employment regulations by threatening non-complying employees with discipline.

B. The City's Employment Provisions Do Not Violate Article VII, Section 2 of the New Mexico Constitution Because They Are Permissible Qualifications and Standards for Holding Appointive Public Positions Under Article VII, Section 2(B)

{31} Kane next argues that the City's employment regulations add a qualification for holding elective public office—that the citizen not be a City employee—in violation of Article VII, Section 2(A). The City argues that the regulations do not impose additional eligibility requirements for elective public office in conflict with those set by the New Mexico Constitution, but rather constitute permissible qualifications and standards for employment in an appointive position with the City. *See* N.M. Const. art. VII, § 2(B). The parties differ in their interpretations of Section VII, Section 2 which provides, in relevant part:

> A. Every citizen of the United States who is a legal resident of the state and is a qualified elector therein, shall be qualified to hold any elective public office except as otherwise provided in this constitution.
>
> B. The legislature may provide by law for such qualifications and standards as may be necessary for holding an appointive position by any public officer or employee.

{32} Whose interpretation is correct necessarily turns on whether the City Charter and City Personnel Rules prohibiting city employees from simultaneously running for elective office or holding elective office are a qualification for elective office or a qualification and standard for holding an appointive public position. Article VII, Section 2(A) prohibits any qualifications for elective public office beyond those enumerated in the New Mexico Constitution, *see Cottrell v. Santillanes*, 1995-NMCA-090, ¶¶ 7-8, 120 N.M. 367, 901 P.2d 785, while Article II, Section 2(B) provides legislative authority to promulgate qualifications and standards for holding appointive positions by public officers or employees. *Manzagol*, 1975-NMSC-002, ¶ 13.

{33} The legislative history of Article VII, Section 2 indicates that there is a distinction between qualifications for elective public office and qualifications and standards for appointive positions. Prior to 1961, the 1921 version of Article VII, Section 2 broadly applied to any public office; it explicitly provided that "[e]very citizen of the United States who is a legal resident of the state and is a qualified elector therein, shall be qualified to hold any public office in the state except as otherwise provided in this constitution." N.M. Const. art. VII, § 2 (as amended September 20, 1921). In 1961 New Mexico legislators, due to the breadth of the 1921 version of

Article VII, Section 2, sought voters' adoption of an amendment to Article VII, Section 2 to assure the constitutionality of the Personnel Act, NMSA 1953, §§ 5-4-28 to -46 (1961) (now recodified as NMSA 1978, §§ 10-9-1 to -25 (1961, as amended through 2014)), which established a system of personnel administration in state government. *See* 1961 N.M. Laws, ch. 240, §§ 1-21.

{34} Article VII, Section 2 was amended to divide the section into three subsections effective September 19, 1961. Subsection A inserted "elective" before "public office" and deleted "in the state" thereafter; Subsection B inserted new material addressing "an appointive position by any public officer or employee"; and Subsection C is not relevant to this case. Thus, the 1961 amendment to Article VII, Sections 2(A) and (B) provided that:

> A. Every citizen of the United States who is a legal resident of the state and is a qualified elector therein, shall be qualified to hold any elective public office except as otherwise provided in this Constitution.
>
> B. The legislature may provide by law for such qualifications and standards as may be necessary for holding an appointive position by any public officer or employee.[3]

{35} Subsection A concerns qualifications for "elective public office," N.M. Const. art. VII, § 2(A), and Subsection B concerns "qualifications and standards . . . for holding an appointive position by any public officer or employee," N.M. Const. art. VII, § 2(B). Elective public offices are distinguishable from appointive positions, which is why they are treated differently in our case law. According to *Black's Law Dictionary* at 517-18 (6th ed. 1990), an election is defined as "[a]n expression of choice by the voters of a public body politic," whereas the term "appoint" is used "where exclusive power and authority is given to one person, officer, or body to name persons to hold certain offices," *id.* at 99. Essentially, elected public offices are chosen by voters, while appointed offices are generally designated by one person, officer, or body with the exclusive power and authority to make such a designation for a given public office. *See id.* at 99. If a position is not an elective public office, Article VII, Section 2(A) is not implicated. *Daniels v. Watson*, 1966-NMSC-011, ¶¶ 5-6, 75 N.M. 661, 410 P.2d 193 (noting that Article VII, Section 2(A) had no application to qualifications and standards for member positions on the board of a junior college district because those positions were "appointive rather than elective").

{36} The 1961 amendment indicates that qualifications for elective public office can only be promulgated through the New Mexico Constitution. N.M. Const. art VII, § 2(A). By contrast, Article VII, Section 2(B)[4] grants the Legislature authority to promulgate qualifications and standards for appointive

[3]A subsequent 1973 amendment only affected Subsection C of Article VII, Section 2 of the New Mexico Constitution. Therefore, the 1961 amendments to Article VII, Section 2 reflect Subsections A and B in their current form.

[4]The Personnel Act was passed prior to September 19, 1961, when Article VII, Section 2(B) was promulgated. *See* 1961 N.M. Laws, ch. 240, §§ 1-21. This chronology suggests that the Legislature wanted to ensure that the original form of Article VII, Section 2 did not render the Personnel Act unconstitutional.

positions such as the employment conditions promulgated in the Personnel Act. *Manzagol*, 1975-NMSC-002, ¶ 13.

{37} When the Legislature amended the Personnel Act in 1963 to conform to the 1961 amendment of Article VII, Section 2, it provided that

> [t]he purpose of the Personnel Act is to establish for New Mexico a system of personnel administration based solely on qualification and ability, which will provide greater economy and efficiency in the management of state affairs. The Personnel Act is enacted under and pursuant to the provisions of article 7, section 2 of the Constitution of New Mexico, as amended.

NMSA 1953, § 5-4-29 (1963) (citation omitted). The last sentence of Section 5-4-29 was added in 1963 to reflect that the Legislature was specifically authorized to enact the entire Personnel Act under Article VII, Section 2, as amended. The stated purpose of the Personnel Act indicates the Legislature believed that in providing qualifications and standards for appointive positions, the entire Personnel Act was in jeopardy of being declared unconstitutional under the 1921 version of Article VII, Section 2. Consequently, the Personnel Act's statement of purpose recognizes that Article VII, Section 2(B) conveys authority to create qualifications and standards for appointive public positions, which includes employee positions.

{38} The District Attorney Personnel and Compensation Act, NMSA 1978, §§ 36-1A-1 to -15 (1991, as amended through 1999), similarly concerns a system of personnel administration for district attorneys "based solely on qualification and ability [and] is enacted pursuant to the provisions of Article 7, Section 2 of the constitution of New Mexico." Section 36-1A-2. Importantly, the District Attorney Personnel and Compensation Act does not contain any provisions preventing district attorney personnel from seeking or holding elective public office. *See generally* §§ 36-1A-1 to -15. The omission of language concerning the seeking or holding of elective office constitutes additional evidence that Article VII, Section 2(B) was believed by the Legislature to be necessary to ensure the constitutionality of legislation that addresses public employee qualifications and standards. There is no indication of legislative concern over qualifications for elective public office.

{39} We must next determine whether the City Charter and employee regulations are impermissible "qualifi[cations] to hold any elective public office" within the meaning of Article VII, Section 2(A) or are permissible "qualifications and standards . . . for holding an appointive position by any public officer or employee" within the meaning of Article VII, Section 2(B). The *Manzagol* court held that NMSA 1953, Section 5-4-42(B) (Vol. 2, 2nd Repl., Part 1, 1974) of the Personnel Act—which like the City's employment regulations prohibited state employees from holding political office—was not a qualification for holding elective public office, and that Article VII, Section 2(A) was not implicated by the Personnel Act. *See* 1975-NMSC-002, ¶ 13.

> No effort is being made [by Section 5-4-42(B)] to impose any restriction upon the elective public office which Petitioner holds or upon him as the holder of that office. It is his appointive position as a "public

officer or employee" which is in danger by his persistent action in holding a "political office."

Manzagol, 1975-NMSC-002, ¶ 13.

{40} Legal precedent supports *Manzagol*'s distinction between impermissible, additional qualifications for elective public office and permissible employment regulations for appointive positions. In New Mexico, a qualified individual is one who is eligible for elective public office. *Bd. of Comm'rs of Guadalupe Cty. v. Dist. Ct. of Fourth Jud. Dist.*, 1924-NMSC-009, ¶ 29, 29 N.M. 244, 223 P. 516. Article VII, Section 2(A) only concerns the class of persons eligible to be chosen for elective public office; it does not concern the separate employment regulations this class of persons may have. Consequently, "[t]he requirement that the holder of [an appointive] public office must tender his [or her] resignation upon becoming a candidate for another office, or that his [or her] filing for another office would work a resignation ipso facto, does not prescribe additional qualifications for the [elective public] office." *Mulholland v. Ayers*, 99 P.2d 234, 239 (Mont. 1940). This is because "[a] person may possess the requisite qualifications or may be eligible [for] many different offices." *Id.* "The legal requirement, however, that he [or she] may not hold more than one [public office] at a time does not affect his [or her] eligibility to hold them all." *Id.*

{41} Under *Manzagol*, the City's employee regulations neither preclude Kane from holding elective office, City Charter art. X, § 3, nor from seeking elective office, City Personnel Rules § 311.3. As such, the City's employee regulations are not qualifications within the meaning of Article VII, Section 2(A). 1975-NMSC-002, ¶ 13. Instead, the City's employee regulations are permissible "qualifications and standards . . . for holding an appointive position" within the meaning of Article VII, Section 2(B). Kane's appointive position as a firefighter did not render her ineligible for the elective public office of a state legislator; instead, her campaign for and service as a state legislator precluded her from continuing her appointive position as a firefighter. As in *Manzagol*, we conclude that in preventing Kane from retaining her appointive position as a firefighter while campaigning for or serving in elective public office, the City's employment regulations are permissible "qualifications and standards . . . for holding an appointive position" under the meaning of Article VII, Section 2(B).

{42} Nonetheless, Kane relies on *Cottrell* to argue that the City's employment regulations are impermissible qualifications for elective public office. *Cottrell* concerned a municipal charter that required "candidates for the Albuquerque City Council not [to] have served two prior terms." 1995-NMCA-090, ¶ 16. The issue was whether this provision constituted an impermissible qualification on elective public office in contravention of Article VII, Section 2(A). *Cottrell*, 1995-NMCA-090, ¶¶ 6-8. The court in *Cottrell* read Article VII, Section 2(A) in conjunction with Article V, Section 13 of the New Mexico Constitution[5] and concluded that under the New Mexico Constitution, "any citizen who is a qualified voter can hold any municipal elected office subject only to the residency requirement." 1995-NMCA-090, ¶

[5]Article V, Section 13 of the New Mexico Constitution provides that "[a]ll district and municipal officers, county commissioners, school board members and municipal governing body members shall be residents of the political subdivision or district from which they are elected or for which they are appointed."

7. Because the term limit provision prevented qualified voters from holding elective office, the provision constituted a qualification on elective public office. *Id.* ¶¶ 7-8. This additional qualification was impermissible because "the sole means of adopting additional qualifications [for elective public office] is by constitutional amendment." *Id.* ¶ 8. Not even the Home Rule Amendment afforded municipalities the power to impose additional qualifications on elective office. *Id.* ¶ 9. *Cottrell* therefore held that Article VII, Section 2 "preempts a home rule municipality's power to adopt additional qualifications for elected office within the state beyond those set forth in [the New Mexico] Constitution." *Cottrell*, 1995-NMCA-090, ¶ 1.

{43} Kane contends that her situation is analogous to the situation in *Cottrell.* We disagree. *Cottrell* properly stands for the proposition that under Article VII, Section 2(A), only amendments to the Constitution can permissibly add qualifications to elective public office. 1995-NMCA-090, ¶ 8. However, this case is clearly distinguishable. We have already established that the City's employment provisions do not constitute qualifications for elective public office; therefore, Article VII, Section 2(A) is not implicated. Indeed, *Cottrell* recognized, albeit in dicta, that Article X, Section 3 of the City Charter merely regulates conflicts of interest concerning city employees and does not add qualifications for elective public office. 1995-NMCA-090, ¶ 15. Thus, *Cottrell*'s holding concerning unconstitutional additional qualifications to elective public office "in no way affects" the constitutionality of Article X, Section 3 of the City Charter. 1995-NMCA-090, ¶ 15.

{44} We next determine whether the City has the authority to promulgate qualifications and standards within the meaning of Article VII, Section 2(B). The *Manzagol* court recognized that under Article VII, Section 2(B), legislative authority exists to create the conditions of employment that preclude a state employee from holding an elected public office. 1975-NMSC-002, ¶ 13.

> Clearly, the Legislature had the constitutional power under art. 7, § 2, subd. B . . . to enact 5-4-42(B) . . . and to thereby provide, as a qualification or standard for his [or her] continued employment by the State in a position covered by the . . . Personnel Act, that he [or she] not hold "political office."

Manzagol, 1975-NMSC-002, ¶ 13. However, *Manzagol* does not specifically address whether municipalities may adopt regulations addressing personnel administration. We hold that under NMSA 1978, Section 3-13-4 (1965), municipalities have been delegated the legislative authority articulated in Article VII, Section 2(B) to enact qualifications and standards for appointive employee positions.

{45} In 1994, the Court of Appeals noted that Section 3-13-4 authorized municipalities to create "merit system ordinances that apply to employees." *Webb v. Vill. of Ruidoso Downs*, 1994-NMCA-026, ¶ 9, 117 N.M. 253, 871 P.2d 17. Under Section 3-13-4(A), municipalities may promulgate "reasonable restrictions or prohibitions on political activities which are deemed detrimental to" municipal merit systems. Consequently, pursuant to Section 3-13-4(A), municipalities have the legislative authority to impose restrictions on political activities that under *Manzagol* are qualifications and standards within the meaning of Article VII, Section

2(B). 1975-NMSC-002, ¶ 13. As an aside, we note that employee regulations circumscribing the political activities of public employees promote important governmental interests, such as

> (1) encouraging public officials to devote themselves exclusively to the duties of their office, (2) reducing the possibility of public subsidies for officials merely using their office as a stepping stone, (3) preventing abuse of office before and after election, and (4) protecting the expectations of the electorate voting a candidate into [public] office.

Fasi v. Cayetano, 752 F. Supp. 942, 949 (D. Haw. 1990).

{46} A municipality is defined as "any incorporated city, town or village." NMSA 1978, § 3-1-2(G) (1993). The parties do not dispute that the City is a municipal corporation. Therefore, the City has the authority under Section 3-13-4(A) to promulgate qualifications and standards for its employees, including restrictions on political activities. In this case, the parties do not dispute that Kane is an employee of the City. Consequently, the City's employment regulations prohibiting Kane from seeking or holding elective public office were permissibly promulgated under Article VII, Section 2(B) of the New Mexico Constitution and Section 3-13-4(A).

C. Whether Section 10-7F-9 Preempts the City's Prohibition Against Municipal Employees Seeking Elective Office

{47} Finally, Kane argues that Article X, Section 3 of the City Charter is not a valid exercise of the City's municipal powers because it is preempted by Section 10-7F-9 of the HDOA. Section 10-7F-9 provides that "[a] hazardous duty officer shall not be prohibited by an employer from engaging in any political activity when the officer is off duty, except as otherwise provided by law." According to Kane, although the HDOA contemplates the possibility that other laws may circumscribe a hazardous duty officer's political activities, Article X, Section 3 of the City Charter is not a valid law that limits her political activities. In determining the permissibility of Article X, Section 3 of the City Charter, we first provide an overview of city charters before applying the preemption test from *State ex rel. Haynes v. Bonem*, 1992-NMSC-062, ¶ 14, 114 N.M. 627, 845 P.2d 150.

{48} In 1970, New Mexico adopted a state constitutional amendment that "establishes the right of the citizens of a municipality to adopt a home rule charter." *Id.* ¶ 11 (citing Article X, Section 6). Municipalities that adopt home rule charters "may exercise all legislative powers and perform all functions not expressly denied by general law or charter." N.M. Const. art. X, § 6(D). "Thus, home rule municipalities do not look to the legislature for a grant of power to legislate, but only look to statutes to determine if any express limitations have been placed on that power." *Haynes*, 1992-NMSC-062, ¶ 11. By contrast, "[t]hose municipalities that choose not to adopt a home rule charter must still depend on the legislature for their power to act." *Id.* Municipal home rule was created to "enable municipalities to conduct their own business and control their own affairs, to the fullest possible extent, in their own way." *Id.* ¶ 12 (internal quotation marks and citations omitted); *see also* N.M. Const. art. X, § 6(E) (noting that the purpose of enabling home rule "is to provide for maximum local self-

government [such that a] liberal construction shall be given to the powers of municipalities").

{49} Determining whether Section 10-7F-9 preempts Article X, Section 3 of the City Charter requires a two-step analysis. We initially determine whether Section 10-7F-9 is a general law. *Haynes*, 1992-NMSC-062, ¶ 14. If we determine that Section 10-7F-9 is a general law, we then determine whether the provision expressly denies a home rule municipality the authority to prohibit its employees from seeking elective office. *See Haynes*, 1992-NMSC-062, ¶ 14.

{50} Kane argues that Article X, Section 3 of the City Charter is not a valid exercise of the City's legislative authority. Under Kane's interpretation of Section 10-7F-9, only the Legislature can deviate from Section 10-7F-9's default position of protecting firefighters' political activities. According to Kane, Section 10-7F-9 is a general law. She then contends that this general law deprives the City of the power to circumscribe hazardous duty officers' political activities because the Legislature evinced an intent to uniformly regulate employer-employee relations, at least with respect to hazardous duty officers.

1. Whether Section 10-7F-9 is a general law

{51} A general law is "a law that applies generally throughout the state *and* is of statewide concern as contrasted to 'local' or 'municipal' law." *Haynes*, 1992-NMSC-062, ¶ 17.

> In defining the term 'general law' as used in the home rule amendment, this Court . . . attempt[ed] to impart the basic notion, applied across the country, that in order for a statute to override an enactment of a home rule municipality, the statute must relate to a matter of statewide concern.

Id. For example, *City of Albuquerque v. New Mexico Public Service Commission*, 1993-NMSC-021, ¶ 24, 115 N.M. 521, 854 P.2d 348 held that utility rate-making "is a matter of statewide rather than local concern . . . because a proposed service rate for one municipality can affect rates to other municipalities in the state." By contrast, *Haynes* held that state provisions setting the number of municipal commissioners did not touch upon a matter of general concern, and allowed a municipality to "provide for a different number [of commissioners] as set out in its charter," 1992-NMSC-062, ¶ 1, because "the number of commissioners in the governing body[] is precisely the sort of matter intended to fall within the decisionmaking power of a home rule municipality." *Id.* ¶ 21. The number of commissioners a municipality has "is predominantly, if not entirely, of interest to the citizens of the" municipality for which these commissioners serve. *Id.*

{52} We hold that Section 10-7F-9 is not a general law. The regulation of government employees' activities under the First Amendment of the United States Constitution touches upon issues of local, not statewide, concern. Municipalities may provide for the convenience of their inhabitants. NMSA 1978, § 3-17-1(B) (1993) ("The governing body of a municipality may adopt ordinances or resolutions not inconsistent with the laws of New Mexico for the purpose of . . . providing for the safety, preserving the health, promoting the prosperity and improving the morals, order, comfort and convenience of the municipality and its inhabitants."). Regulating

the First Amendment activities of government employees can further the efficiency of governmental operations. *See Briggs*, 331 F.3d at 1313-15 (noting that determining the permissibility of restrictions on the First Amendment activities of government employees involves a balancing of governmental efficiency interests against employee rights and indicating that First Amendment activities may, in some circumstances, impair efficiency). "[I]ncreased efficiency of operation may reasonably be expected to promote the service, accommodation, and convenience of the public." *Lyons Transp. Co. v. Pa. Pub. Util. Comm'n*, 61 A.2d 362, 365 (Pa. Super. Ct. 1948). Thus, municipalities have an interest in promoting the convenience of their inhabitants, and regulations of municipal employees' First Amendment activities further the convenience of such inhabitants. Because Section 10-7F-9 touches upon the regulation of municipal employees' First Amendment activities, we conclude that Section 10-7F-9 is not a general law regulating a topic of statewide concern.

{53} Kane contends that the employment relationships of hazardous duty officers are matters of general concern because "[a]s the members of the public served every day by hazardous duty officers, New Mexicans . . . deserve to know that the relationship between these heroes as their employers is as respectful as possible." This argument is without merit. Under the facts in *Haynes*, it could have been said that all citizens statewide have an interest in the form of their local government. However, this does not mean that a state statute implicating local forms of government raised issues of statewide concern because the constituencies of local governments have the most interest in their respective forms of local government. *Haynes*, 1992-NMSC-062, ¶ 21. It also can be said that all citizens have an interest in how hazardous duty officers are regulated. However, employment regulations concerning hazardous duty officers touch upon the local interests of the citizens such officers serve, and not the State's broader interests. *See McGee v. Civil Serv. Bd. of City of Portland*, 154 P.3d 135, 139 (Or. Ct. App. 2007) ("[T]he administrative machinery by which the employment and discharge of city fire[fighters] is to be determined is a matter of local concern." (alteration in original) (internal quotation marks and citation omitted)).

{54} We conclude that Section 10-7F-9 does not preempt the City's employment regulations because it is not a general law. However, even if Section 10-7F-9 were a general law, it would not preempt the City's employment regulations because the restrictions do not conflict with Section 10-7F-9.

2. Whether Section 10-7F-9 expressly denies the City the power to prohibit its employees from seeking elective office

{55} If a statute is a general law, we next inquire whether the provision expressly denies a home rule municipality the right to prohibit its employees from seeking elective office. *Haynes*, 1992-NMSC-062, ¶ 14. "[A]ny New Mexico law that clearly intends to preempt a governmental area [qualifies as an express denial] without necessarily stating that affected municipalities must comply and cannot operate to the contrary." *Id.* ¶ 22 (internal quotation marks and citation omitted). Kane asserts that the City's employment regulations are preempted by Section 10-7F-9. Kane reasons that the HDOA, through enumerating various rights

that are guaranteed to hazardous duty officers, evinces an intent by the Legislature to address New Mexico municipalities' "record of abusing the[] rights of hazardous duty officers," or to at least prevent such abuse.

{56} We disagree. The HDOA contains no requirement for a uniform law concerning the proscription of hazardous duty officers' political activities. *See* §§ 10-7F-1 to -9. More importantly, although Section 10-7F-9 states that "[a] hazardous duty officer shall not be prohibited by an employer from engaging in any political activity when the officer is off duty," the provision also provides the restriction "except as otherwise provided by law." This indicates that the HDOA contemplates that regulations of hazardous duty officers' political activities will not be uniform.

{57} We conclude that the City correctly argues that "Article X, Section 3 of the City's home rule Charter falls within the HDOA's 'except as otherwise provided by law' exception" such that Section 10-7F-9 does not preempt municipal employment regulations. The phrase "except as otherwise provided by law" should be read broadly so as to include municipal laws. In *Republican Party of New Mexico v. New Mexico Taxation & Revenue Dep't*, we characterized the phrase "as otherwise provided by law" as a catch-all term that includes statutes, regulations, and constitutional provisions. *See* 2012-NMSC-026, ¶ 13, 283 P.3d 853 (internal quotation marks and citation omitted). Moreover, municipal enactments are considered law. *City of Aztec v. Gurule*, 2010-NMSC-006, ¶ 16, 147 N.M. 693, 228 P.3d 477 ("[M]unicipal ordinances are law and may be judicially noticed as such."). Finally, we have already concluded that under Section 3-13-4(A), municipalities have been delegated the legislative authority to promulgate qualifications and standards for appointed employees, including firefighters. We therefore hold that Section 10-7F-9 does not preempt the City's employment regulations as applied to hazardous duty officers.

D. Whether Kane Is Entitled to Attorney's Fees

{58} New Mexico generally follows the American rule, which provides that each party should bear its own attorney's fees unless a statute, court rule, or contractual agreement authorizes an award of attorney's fees. *See Paz v. Tijerina*, 2007-NMCA-109, ¶ 9, 142 N.M. 391, 165 P.3d 1167. The relevant statutory exception to the application of the American rule in this case is the Civil Rights Act, 42 U.S.C. § 1988(b) (2000). In any action or proceeding to enforce a provision of Sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, Title IX of Public Law 92-318, or Title VI of the Civil Rights Act of 1964, among others, the Court, in its discretion, "may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b).

{59} Pursuant to 42 U.S.C. § 1988 and NMSA 1978, Section 44-6-11 (1975), the district court awarded Kane $7,644.50 in attorney's fees and $242.70 in costs, with interest accruing on those amounts at a rate of 8.75 percent per annum from the date of entry of the order. The City argues that Kane cannot recover attorney's fees pursuant to 42 U.S.C. § 1988 if this Court reverses the district court's ruling on Kane's constitutional claims. Kane argues that the City overstates the burden of proving that one is a prevailing party by noting that the broad language in 42

U.S.C. § 1988 does not explicitly state that a party must also prevail on appeal.

{60} We disagree with Kane's position. When a case is actually litigated and a plaintiff does not win on any significant issue, that plaintiff is not a prevailing party within the meaning of 42 U.S.C. § 1988. *Pearson v. Fair*, 935 F.2d 401, 415 (1st Cir. 1991) (citing *Langton v. Johnston*, 928 F.2d 1206, 1224 (1st Cir. 1991)). A "plaintiff must be able to point to a resolution of the dispute which change[d] the legal relationship between itself and the defendant." *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989). "A plaintiff who achieves a transient victory at the threshold of an action can gain no award under [42 U.S.C. § 1988] if, at the end of the litigation, [his or] her initial success is undone and [he or] she leaves the courthouse emptyhanded." *Sole v. Wyner*, 551 U.S. 74, 78 (2007). We also note that "[a] plaintiff who prevails on one or more state claims but loses on all federal claims will not be eligible for an attorney's fee award under 42 U.S.C. § 1988." *Bogan v. Sandoval Cty. Planning & Zoning Comm'n*, 1994-NMCA-157, ¶ 44, 119 N.M. 334, 890 P.2d 395. As explained above, Kane has no federal, constitutionally-guaranteed right to maintain active City employment while simultaneously seeking or holding elective public state office. Thus, Kane is not entitled to attorney's fees pursuant to 42 U.S.C. § 1988.

III. CONCLUSION

{61} The City's employment regulations do not violate the First Amendment of the United States Constitution. Also, these restrictions do not violate Article VII, Section 2 of the New Mexico Constitution. Moreover, Section 10-7F-9 is not a general law preempting the City's employment regulations as applied to hazardous duty officers. We therefore reverse the district court's decision on the merits as well as its award of attorney's fees.

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

EDWARD L. CHÁVEZ, Justice

WE CONCUR:

PETRA JIMENEZ MAES, Justice

CHARLES W. DANIELS, Justice

SARAH C. BACKUS, Judge
Sitting by designation

RICHARD C. BOSSON, Justice, specially concurring

BOSSON, Justice (specially concurring)

{63} We say in this opinion that the City of Albuquerque is not precluding Kane from holding elective office, only from holding city employment while she does so. The City is imposing a condition on employment, not on elective office. But is that really what is going on here? Kane, a career official in the fire department, has the "freedom" to run for office; all she has to do is walk away from her career. Some choice!

{64} It seems to me that the City's employee regulations, stripped of labels and pretense, are exactly what they appear to be. They are a public policy choice by the City to keep its employees away from politics and specifically away from running for office. That policy choice is rooted in history. The Legislature created the same wall for state employees a generation ago. Section 10-9-

21(B). Around the same time, the Legislature passed Section 3-13-4 which allowed municipalities to enact a similar merit system that would include employee "restrictions on political activities." Presumably, holding elective office would constitute prohibited "political activity."

{65} I acknowledge that this very Court a generation ago characterized the State Personnel Act as a restriction on employment only, not on elected office. "No effort is being made to impose any restriction upon the elective public office which [the petitioner Jerry Manzagol] holds or upon him as the holder of that office." *Manzagol,* 1975-NMSC-002, ¶ 13. I call that statement misdirection, not reality. Jerry Manzagol, in order to keep his job with the state, was compelled to surrender his position as Santa Fe City Councilor, to which he had been duly elected by the citizens of that city. He had very little choice if he wanted to keep his job. We made a mistake with that language forty years ago; I do not know why we would repeat it today.

{66} In truth, is this not a little of both, a condition on employment *and* a prohibition on holding elective public office? We do ourselves no harm with such an acknowledgment. Back in the 1960s, to lay the groundwork for the State Personnel Act (and by extension the Albuquerque City Charter), the Legislature and the electorate combined to amend Article 7, Section 2 of the New Mexico Constitution. The Legislature passed Section 2(B) as an exception to Section 2(A), saying in effect that the Legislature may do in a merit-based personnel act for public employees what Section 2(A) would otherwise prohibit—imposing an additional qualification on holding elective public office. The result: everyone is qualified to hold "any elective public office" except as provided in Section 2(B) for public employees.

{67} The Constitution did not need amending just to pass a personnel act; it needed amending to pass a personnel act that restricted the right to hold elective public office, a restriction that would otherwise have run afoul of Section 2(A). That is exactly why the people went to all the trouble to amend Section 2. Implicitly, this Court acknowledged as much, ironically, in the same *Manzagol* opinion. "Clearly, the Legislature had the constitutional power under art. 7, § 2, subd. B, to enact 5-4-42(B), and to thereby provide, as a qualification or standard for his continued employment by the State in a position covered by the State Personnel Act, that he not hold 'political office.'" *Manzagol,* 1975-NMSC-002, ¶ 13 (internal citations omitted). In other words, but for Section B, Section A might very well have been a problem with respect to any ban on holding elective public office.

{68} And so, Albuquerque's restrictions on its employees from holding elective public office are consistent with the New Mexico Constitution. I concede the point and agree with the result reached in the Court's opinion. Having conceded the legality of the City's position toward its employee, I could stop there. The wisdom of such a policy—its prudence as a matter of sound public policy—is a matter of legislative discretion, not judicial determination.

{69} But the history of our Constitution suggests that the two cannot always be neatly separated. Our state Founders created a volunteer legislature, one that envisioned public-minded citizens from all walks of life, those who would make the personal sacrifice to come to Santa Fe each year to conduct the people's business. The Founders offered these

volunteers little help—inadequate time and no compensation. But the Founders welcomed all who would serve, including presumably public employees.

{70} True to the spirit of those Founders, we as a society need those volunteers today more than ever. We need their talent, their energy, and their vision, all attributes that can be found in both sectors of our economy, public and private. The public sector is infinitely larger now than in the days of our founding. We should be wary of eliminating whole areas of our society from the potential gene pool from which our best and brightest might be called to Santa Fe. There must be better ways, designed with greater precision, to protect civil service from the excesses of political intrigue than an across-the-board, absolute ban. The City of Albuquerque has benefitted in the past from the service of its municipal employees in the state Legislature. Representative Kiki Saavedra is but one who comes to mind. The value of their continued service should, at very least, be subject to intelligent public debate. The stakes at hand, and our continued need for quality legislative service, merit no less.

RICHARD C. BOSSON, Justice

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-084

Filing Date: May 28, 2015

Docket No. 33,587

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

MARK SANCHEZ,

Defendant-Appellant.

Hector H. Balderas, Attorney General
Santa Fe, NM
Margaret McLean, Assistant Attorney General
Olga Serafimova, Assistant Attorney General
Santa Fe, NM

for Appellee

Jorge A. Alvarado, Chief Public Defender
Steven J. Forsberg, Assistant Appellate Defender
Santa Fe, NM

Sue Anne Herrmann, Adjunct Professor of Law
Santa Fe, NM
John Campbell, Practicing Law Student
Santiago Solis, Practicing Law Student

for Appellant

OPINION

HANISEE, Judge.

{1} Defendant appeals from the district court's judgment and sentence convicting him for trafficking methamphetamine by possession with the intent to distribute, which was entered pursuant to a conditional plea

agreement. In the plea agreement, Defendant reserved the right to appeal the denial of his motion to suppress the evidence obtained from Defendant's vehicle beginning with the officer's warrantless seizure of a bag of pills that Defendant attempted to hide from the officer. We agree with Defendant that the officer lacked probable cause to seize the bag of pills. We reverse the district court's denial of the motion to suppress and remand for further proceedings.

I. BACKGROUND

{2} The following facts were established by Officer McCarty, the only witness who testified at the suppression hearing. While on routine patrol during his graveyard shift, Officer McCarty noticed a black Infiniti with Colorado license plates stopped at an intersection. The officer "ran the number of the license plate, and it came back expired." On this basis, Officer McCarty initiated and completed a traffic stop. When Officer McCarty approached the driver-side door, he asked for Defendant's driver's license, registration, and proof of insurance. Defendant leaned over toward the passenger's seat, where a passenger was seated, and appeared to be searching for his paperwork in the console or reaching for the glove box. During this time, the officer shone his flashlight around the inside of the vehicle to make sure there were "no weapons or anything." The officer observed a clear, plastic bag on the floorboard of the vehicle by Defendant's right foot with what appeared to be "a capsule or a pill of some kind in it." Later in his testimony, Officer McCarty stated that he observed two pills that were different kinds, but were similar. Defendant's foot obscured the rest of the bag from the officer's view.

{3} The officer asked Defendant what the pills were in the bag at his feet. Defendant placed his foot on top of the bag, tried to slide it underneath the driver's seat, and said, "What bag?" Officer McCarty immediately removed Defendant from the vehicle, explaining that he was afraid Defendant would "damage [the pills] or get [them] where [the officer could not] get a hold of them." Officer McCarty then reached into the vehicle and removed the bag, explaining that he did not want the passenger to take it.

{4} The officer admitted that he could not identify the two pills he saw in the bag before removing the bag from the vehicle. The officer testified that he had specific training relevant to identification of pills while he was a full-time paramedic for thirteen years prior to his employment as a law enforcement officer, and that he had maintained his license because he continued to work part-time as a paramedic for the San Juan County SWAT team. Based on this training, the officer determined that the two pills he saw in the bag prior to seizing it were prescription medications. He could not determine the type of prescription medications, however, and had not asked whether Defendant was lawfully in possession of the prescription medications before removing them from the vehicle. These are the facts that form the basis for our analysis.

{5} We note that after the officer took the bag, he could see there were several different kinds of pills in it. The officer began questioning Defendant about the pills. Defendant stated that the pills were prescribed to him by his doctor for anxiety and a back injury. Defendant stated that the prescription pill bottles were at his house. Officer McCarty's testimony does not clearly explain how he proceeded after questioning Defendant in the patrol car. It appears that he arrested Defendant, performed an inventory search,

sealed Defendant's vehicle, and obtained a search warrant. Evidence discovered in the course of the subsequent searches of the vehicle formed the basis for Defendant's conviction for trafficking methamphetamine.

{6} Argument at the suppression hearing and in motions focused entirely on the threshold seizure of the bag of pills and whether the seizure was supported by probable cause and exigency. The parties agreed that the facts were appropriately analyzed under the plain view doctrine and the need for exigency under New Mexico case law. The defense focused on the lack of probable cause under the plain view doctrine, arguing that the incriminating nature of the pills was not immediately apparent to Officer McCarty. The State, apparently drawing inferences from Officer McCarty's testimony, argued that the officer suspected the pills were contraband and, coupled with Defendant's attempt to hide the pills, Officer McCarty had the requisite probable cause. The State's arguments strongly emphasized the presence of exigency. The district court's written ruling denying the suppression of evidence agreed with the State that there were exigent circumstances and ruled that the officer's experience and observations, especially considering Defendant's furtive attempt to hide the pills, gave rise to probable cause.

II. DISCUSSION

The Parties' Arguments

{7} On appeal, Defendant argues that the officer's investigation into the pills was not founded on reasonable suspicion of criminal activity and the officer's warrantless seizure of the pills was not based on probable cause and exigency. The State argues that Defendant did not preserve a challenge to the officer's reasonable suspicion to inquire about the pills. The State contends that the district court properly concluded that the seizure of the pills was supported by probable cause and exigent circumstances and argues that Defendant's focus on the plain view doctrine on appeal renders the district court's ruling on probable cause uncontested on appeal. The State also takes issue with Defendant's reference, without citation to the record, to statistical information regarding the percentage of Americans taking prescription drugs.

{8} Initially, we clarify which matters are properly before this Court. Defendant contends that although the officer's lack of reasonable suspicion was not argued below, the inquiry is relevant and necessary to determining the reasonableness of Officer McCarty's actions because, without a reasonable suspicion that the pills were evidence of a crime, there can be no probable cause. "It is an enduring principle of constitutional jurisprudence that courts will avoid deciding constitutional questions unless required to do so." *Schieter v. Carlos*, 1989-NMSC-037, ¶ 13, 108 N.M. 507, 775 P.2d 709. The arguments before the district court were narrowly and repeatedly circumscribed to the warrantless seizure of the pills. Both the testimony elicited from the officer and the district court's ruling reflect this narrow issue. Consistent with our policy of judicial restraint and our rule requiring preservation, we decide this case on the preserved and narrowest possible grounds. *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[.]"); *Allen v. Lemaster*, 2012-NMSC-001, ¶ 28, 267 P.3d 806 (citing *Baca v. N.M. Dep't of Pub. Safety*, 2002-NMSC-017, ¶ 12, 132 N.M. 282, 47 P.3d 44 for the proposition that "courts exercise judicial restraint by deciding cases on

the narrowest possible grounds and avoid reaching unnecessary constitutional issues"). Thus, we do not decide whether the officer had reasonable suspicion to inquire about the pills before seizing them.

{9} We are not persuaded, however, by the State's attempt to characterize the district court's ruling as a rejection of the applicability of the plain view doctrine. The district court expressly found that the officer observed the bag in plain view. Nor are we persuaded by the State's attempt to distinguish the plain view analysis from the probable cause inquiry in arguing that Defendant abandoned a probable cause challenge. Below, we explain the relationship between the plain view doctrine and probable cause.

{10} Lastly, we note that we do not consider matters that are not of record, including the statistical information provided by Defendant on appeal. *State v. Maez*, 2009-NMCA-108, ¶ 8, 147 N.M. 91, 217 P.3d 104 ("This Court will not consider and counsel should not refer to matters not of record in their briefs"). We acknowledge, however, that many people are prescribed medication. *See State v. Erikson K.*, 2002-NMCA-058, ¶ 24, 132 N.M. 258, 46 P.3d 1258 ("A court may take judicial notice of adjudicative facts that are not subject to reasonable dispute. Such facts must be matters of common and general knowledge which are well established and authoritatively settled.") (alteration, internal quotation marks, and citation omitted)).

Standard of Review

{11} "The district court's denial of Defendant's motion to suppress evidence presents a mixed question of fact and law." *State v. Alamanzar*, 2014-NMSC-001, ¶ 9, 316 P.3d 183. "[W]e review any factual questions under a substantial evidence standard and . . . review the application of the law to those facts, making a de novo determination of the constitutional reasonableness of a search or seizure." *State v. Sewell*, 2009-NMSC-033, ¶ 12, 146 N.M. 428, 211 P.3d 885; *see also State v. Williamson*, 2009-NMSC-039, ¶ 28, 146 N.M. 488, 212 P.3d 376 (clarifying that in the context of warrantless searches and seizures, we review the lower court's determination de novo).

Plain View and Probable Cause

{12} "Warrantless seizures are presumed to be unreasonable and the State bears the burden of proving reasonableness." *State v. Weidner*, 2007-NMCA-063, ¶ 6, 114 N.M. 582, 158 P.3d 1025. "In order to prove that a warrantless seizure is reasonable, the State must prove that it fits into an exception to the warrant requirement." *Id.* "Among the recognized exceptions to the warrant requirement are exigent circumstances, consent, searches incident to arrest, plain view, inventory searches, open field, and hot pursuit." *State v. Leticia T.*, 2014-NMSC-020, ¶ 11, 329 P.3d 636. The relevant justifications for the warrantless seizure of the bag from Defendant's vehicle are the plain view observation and the existence of probable cause with exigent circumstances. *See id.* ¶ 12 ("A warrantless entry into a vehicle under the exigent circumstances exception requires probable cause plus exigent circumstances.").

{13} "Under the plain view exception to the warrant requirement, items may be seized without a warrant if the police officer was lawfully positioned when the evidence was observed, and the incriminating nature of the evidence was immediately apparent, such that

the officer had probable cause to believe that the article seized was evidence of a crime." *State v. Ochoa*, 2004-NMSC-023, ¶ 9, 135 N.M. 781, 93 P.3d 1286. The requirement that the incriminating nature of the evidence be "immediately apparent" does not require a more heightened level of certainty that an item is contraband or evidence of a crime than is required by probable cause. *See State v. Williams*, 1994-NMSC-050, ¶ 15, 117 N.M. 551, 874 P.2d 12, *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008, ¶ 37 n.6, 275 P.3d 110. The "immediately apparent" language "essentially requires that there be probable cause," without the need for further search or an additional invasion of privacy and possessory interests. *See Williams*, 1994-NMSC-050, ¶ 15.

{14} "Probable cause exists when the facts and circumstances warrant a belief that the accused had committed an offense, or is committing an offense." *Ochoa*, 2004-NMSC-023, ¶ 9. "There are no bright line, hard-and-fast rules for determining probable cause, but the degree of proof necessary to establish probable cause is more than a suspicion or possibility but less than a certainty of proof." *State v. Evans*, 2009-NMSC-027, ¶ 11, 146 N.M. 319, 210 P.3d 216 (internal quotation marks and citation omitted). Thus, the existence of probable cause is reviewed within the "realm of probabilities rather than in the realm of certainty." *State v. Knight*, 2000-NMCA-016, ¶ 20, 128 N.M. 591, 995 P.2d 1033. "[P]robable cause must be evaluated in relation to the circumstances as they would have appeared to a prudent, cautious and trained police officer." *Ochoa*, 2004-NMSC-023, ¶ 9 (internal quotation marks and citation omitted). An officer must acquire information establishing probable cause to believe that an item is possessed unlawfully before seizing it. *See State v. Moran*, 2008-NMCA-160, ¶¶ 12-14, 145 N.M. 297, 197 P.3d 1079 (holding that although law enforcement officers may have eventually acquired sufficient information for probable cause, they did not have adequate grounds to believe that the evidence at issue was possessed unlawfully to justify the initial entry).

Pills Not Inherently Unlawful

{15} In the instant case, we conclude that the existence of two pills contained within a small bag on the floorboard of the car was insufficient to convey evidence of criminality that would be apparent to the officer based upon mere observation. As we have acknowledged, the possession of prescription pills is commonly lawful, and our laws do not prohibit the possession of prescription pills in an aftermarket container. *Cf. Gay v. State*, 138 So.3d 1106, 1110 (Fla. Dist. Ct. App. 2014) (stating that "the mere observation of pills in an aftermarket container is equally consistent with noncriminal activity as with criminal activity"). Rather, our laws declare it unlawful to possess dangerous drugs or controlled substances unless they are obtained pursuant to a valid prescription. NMSA 1978, §§ 26-1-16(E) (2013); 30-31-23(A) (2011). Officer McCarty believed, based on his training and experience as a paramedic, that the two pills were prescription medication, but he could not identify the pills and had no information indicating whether they were prescribed to Defendant. Additionally, the two pills the officer observed did not constitute an amount that might suggest that they were possessed for an illegal purpose. *Cf. People v. Humphrey*, 836 N.E.2d 210, 213-15 (Ill. App. Ct. 2005) (holding that even where the officer observed a small, clear plastic container holding several hundred white pills partially

hidden under the passenger seat, the incriminating nature of the pills was not immediately apparent to the officer in a manner that satisfied the plain view doctrine to warrant the seizure of the container); *see People v. Carbone*, 184 A.D.2d 648, 650 (N.Y. App. Div. 1992) (stating that "the three pink and white pills could not have been seized under the plain view doctrine since it was not 'immediately apparent' to [law enforcement] that the pills were either evidence of criminality or contraband").

{16} Where, as here, an officer observes an item in plain view that is often lawfully possessed and used, the context in which the item is viewed may make it reasonably apparent to the officer that the item is being possessed or used unlawfully with a sufficient level of probability to satisfy probable cause. *See Ochoa*, 2004-NMSC-023, ¶ 13. The circumstances of the police encounter, relevant officer training and experience, and specific facts known about the suspect and the particular item observed are factors that may properly inform an officer's determination that there is probable cause to believe that the item in plain view is evidence of a crime. *See id.*

{17} Officer McCarty in the current case articulated no suspicious circumstances surrounding the encounter. The officer stopped Defendant for driving with expired registration. There is no indication from the officer's testimony that Defendant's driving or demeanor suggested that he might have been under the influence of a drug, nor did the officer testify that Defendant or his passenger displayed any suspiciously nervous or aggressive behavior before the officer observed the pills. The officer's testimony did not indicate that he stopped Defendant in an area known for drug trafficking or other criminal activity, and the officer gave no indication that he had any prior knowledge of Defendant. In fact, the officer did not expressly state in his testimony that his observation of the two pills in the bag was suspicious, nor did he state why it might give rise to any suspicions. The officer's testimony clarifies only that his training and experience led him to believe that the two pills he observed were similar and were prescription medication. We note that these items have common, noncriminal uses. *State v. Haidle*, 2012-NMSC-033, ¶ 30, 285 P.3d 668 ("Mere suspicion about ordinary, non-criminal activities, regardless of an officer's qualifications and experience, does not satisfy probable cause.")(internal quotation marks and citation omitted)). The officer indicated that he grabbed the bag of pills because Defendant was trying to hide it.

Furtive Movements and the Need for Other Specific Circumstances for Probable Cause

{18} As the officer's testimony demonstrates, the only suspicious circumstance that combined with the officer's view of the two pills on the floorboard was Defendant's reaction to the officer's question about what pills were in the bag—Defendant's attempt to slide the bag under the driver's seat with his foot, and his verbal response, "What bag?" Professor LaFave has offered his view on the role of furtive gestures in the probable cause determination:

> Observation of what reasonably appear to be furtive gestures is a factor that may properly be taken into account in determining whether probable cause exists.
>
> . . . .
>
> Thus, if the police see a person in

> possession of a highly suspicious object or *some object that is not identifiable but which because of other circumstances is reasonably suspected to be contraband, and then* observe that person make an apparent attempt to conceal the object from police view, probable cause is then present.

2 W. LaFave, *Search and Seizure: A Treatise of the Fourth Amendment* § 3.6(d), at 438 (5th ed. 2014); *see also Sibron v. New York*, 392 U.S. 40, 66-67 (1968) (stating that "deliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of mens rea, and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors to be considered in the decision to make an arrest"). LaFave's compilation of numerous cases that form the basis of his assessment of furtive gestures in the context of probable cause demonstrates that where the criminal nature of an object is not identifiable, other circumstances that indicate criminality have been required, in addition to a suspect's attempt to conceal the object from police, in order for probable cause to exist. *See* 2 W. LaFave, *supra*, § 3.6(d) at 438-39 nn.182-83. Our review of relevant caselaw generally supports this observation. *See, e.g., United States v. McGehee*, 672 F.3d 860, 863-64, 869-70 (10th Cir. 2012) (holding that where an officer observed a vehicle improperly parked in front of a house known for drug trafficking, smelled PCP in the vehicle, noticed a vanilla-extract bottle—commonly used to store PCP—in the driver-side door, and where the driver attempted to conceal a handgun underneath the seat with his foot, police had probable cause to believe the driver was involved in a narcotics-related offense); *Ex parte Kelley*, 870 So.2d 711, 715-18, 723-25 (Ala. 2003) (holding that the police had probable cause to seize a matchbox from the defendant when she made several furtive movements in attempts to conceal the matchbox from view when plainclothes, narcotics-investigation officers approached her, having reasonably suspected that the object was part of a drug deal they witnessed while investigating "numerous complaints" about drug activity, and when the officers had previous experience with drug transactions in that location).

{19} We recognize, however, that the contexts in which defendants make furtive movements vary widely, and courts view those contexts and the furtive movements themselves differently, as we illustrate below. At least two courts have concluded that there was probable cause with little more, if any, suspicious circumstances than those before us now. One such case is *Mavin v. Commonwealth*, 521 S.E.2d 784 (Va. Ct. App. 1999). There, a vehicle's passenger was slumped down in the backseat, attempting to hide his person and a prescription bottle without a label from law enforcement. *Id.* at 786. The passenger denied knowledge of the bottle, which the officer knew was often used to carry crack cocaine. *Id.* Additionally, the driver of the vehicle was very nervous and immediately exited the vehicle upon being stopped. *Id.* The Virginia court held, without much analysis or any citation to analogous authority, that the officer had probable cause to believe a crime was being committed sufficient to warrant seizure of the bottle. *Id.*; *but see Royal v. Commonwealth*, 558 S.E.2d 549, 550, 553-55 (Va. Ct. App. 2002) (requiring further suspicious circumstances beyond the defendant's "unusual behavior" – chewing and attempting to swallow a dollar bill and refusing to spit it out – to support probable cause where the defendant was in a

vehicle reported to be suspicious and where the officer knew from experience that drugs are often concealed in dollar bills and that individuals often attempt to swallow drugs).

{20} The second case determining the existence of probable cause with relatively minor suspicious circumstances, *Ball v. United States*, 803 A.2d 971, 973 (D.C. 2002), involved an officer's plain feel of a large medicine bottle during a patdown frisk for weapons resulting from a traffic stop. The officer testified that the traffic stop was becoming increasingly intense and the defendant, who was a passenger in the vehicle, was sweating, getting excited and repeatedly attempting to conceal and access something around his abdomen area despite the officer's orders to stop. *Id.* Additionally noting the officer's experience and familiarity with drugs being stored in similar packaging, the court determined that based on the circumstances, the officer had probable cause from his plain feel patdown. *Id.* at 981-982. The court detailed numerous cases that take different approaches to the immediately apparent/probable cause determination under analogous circumstances, adding to our observation that these cases turn on the smallest of facts, including a suspect's behavior, the officer's testimony regarding particularized knowledge of the items at issue, criminality, and the individuals involved in the encounter. *See id.* at 976-79, 976-77 nn.4-5.

{21} Ultimately, we are persuaded by statements made by the Massachusetts Supreme Court in *Commonwealth v. Alvarado*, explaining that circumstances similar to those before us fall short of probable cause and may, at most, give rise to reasonable suspicion:

> The view of an object which may be used for lawful as well as unlawful purposes, even a container of the type commonly used to store controlled substances, is not sufficient to provide the viewing officer with probable cause to seize that object or arrest the individual possessing that object. Nor does the observation of a furtive gesture, such as attempting to conceal an object, give rise, in and of itself, to probable cause. We are of the opinion that the combination of these two factors is more akin to a situation giving rise to a reasonable suspicion based on articulable facts justifying a threshold inquiry than to probable cause.

651 N.E.2d 824, 830 (Mass. 1995) (internal citations omitted). There, an officer stopped a vehicle based upon "the peculiar maneuverings of the automobile and the extremely slow speed at which it was traveling." *Id.* at 828. Upon stopping the vehicle, the officer shone his flashlight inside the car and observed the defendant, who was the passenger, grasping what the officer believed to be a glassine bag in his fist and placing it down the front of his pants. *Id.* The officer testified that in his training and experience, he was aware that glassine bags are commonly used to store controlled substances. *Id.* The defendant denied having put anything in his pants and gave the officer false information about where he was from. *Id.* However, the defendant later admitted that he was from a city in Colombia, which the officer knew to be a major source for cocaine in the United States. *Id.* The Massachusetts Supreme Court held that the officer did not have probable cause to arrest the defendant at that time, comparing the facts to those of other cases that included a number or combination

of additional circumstances and emphasizing the need for a case-by-case determination. *Id.* at 829-831.

{22} Consistent with the sentiment expressed by the Massachusetts Supreme Court and the observation from Professor LaFave, we are of the opinion that Defendant's attempt to conceal the bag on the floorboard containing pills that may or may not have been lawfully possessed, without any testimony from the officer indicating suspicious circumstances or specific knowledge about Defendant or the item seized, is not an act that supplied Officer McCarty with a suspicion that rose to the level of probable cause.

{23} We note that our decision is also informed by cases that examine the nature or purpose of the suspect's furtive movement and consider the item the suspect attempted to conceal in making a probable cause determination. In *Ex parte Tucker*, 667 So.2d 1339, 1342 (Ala. 1995), the circumstances at issue revolved around an officer asking the defendant to remove a large bulging item from his pocket, which the defendant revealed to be a closed, opaque film canister. After the officer asked the defendant about the contents of the canister, the defendant placed it behind his back, at which point the officer requested to see the canister. *Id.* at 1342-43. The defendant obliged, and the officer discovered drugs within the canister. *Id.* at 1343. The Alabama court analyzed the mens rea behind the defendant's action, drawing a distinction between a suspect who attempted to flee or conceal an object from police view and a suspect whose action manifested an expectation in the right to privacy in the object. *Id.* at 1347-48. With even considerably more suspicious circumstances surrounding the police encounter than were present in our case, the Alabama court concluded that because law enforcement was aware of the presence of the object and the defendant did not try to truly conceal or remove the evidence, his action was not so definitive as to suggest that the canister contained contraband, and it was more in the nature of an assertion of privacy in the personal effect. *Id.*; *see also Grantham v. City of Tuscaloosa*, 111 So.3d 174, 180-81 (Ala. Crim. App. 2012) (holding that based on the lack of the articulable suspicion in the circumstances of the traffic stop, the defendant/passenger's reach over the console and refusal to exit the vehicle was merely an assertion of the right to privacy by withholding consent rather than furtive movements that might rise to the level of probable cause); *State v. Lavender*, 762 P.2d 1027, 1028-29 (Or. Ct. App. 1988) (holding that where the defendant—who had a known history of drug offenses, appeared to be under the influence of drugs and was screaming in a public park, claiming to be upset by the death of her father—attempted to conceal the contents of her purse from police, there was no probable cause to believe the purse contained contraband and the defendant acted with intent to protect her right to privacy in the purse).

{24} Similarly, in the current case, where Officer McCarty had already seen and identified that Defendant had a bag with pills, Defendant's act of attempting to push it under the seat and asking, "What bag?" does not necessarily demonstrate an attempt to remove, destroy or truly conceal illegal contents from the officer. Defendant was cooperative in exiting the vehicle and did not attempt to flee or further hide the bag. Also, in this context, we believe it is appropriate to revisit and consider the items observed and concealed—the prescription pills. Not only are pills not inherently criminal, but their lawful

use is to treat medical conditions, which our society acknowledges in various ways to be a private matter. Thus, without other factors suggestive of illegal drug possession, Defendant's actions, at best, can be seen as equally consistent with either an assertion of the right to privacy or an intent to conceal contraband. Without more, we are not persuaded that Defendant's actions or the surrounding circumstances demonstrated with sufficient probability that Defendant possessed the pills unlawfully.

{25} Based on the foregoing, we conclude that the officer's seizure of the bag was a hasty reaction to Defendant's furtive movement that was not based on sufficient information to satisfy probable cause to believe Defendant was in possession of contraband.

Exigent Circumstances

{26} Finally, we briefly dismiss the State's argument, citing only *Leticia T.*, 2014-NMSC-020, ¶ 19, and the statutory provisions making it unlawful to possess "dangerous drugs" or a "controlled substance," without a prescription, Section 26-1-16(E) and Section 30-31-23(A), respectively, that the officer had probable cause to believe that the bag of pills was evidence of a crime. In *Leticia T.*, the Court focused on the presence of exigent circumstances in support of a full search of a vehicle when law enforcement had "reports of an armed subject pointing a 'long gun' at several people from the window" of the vehicle, but where law enforcement was initially unable to locate the weapon. 2014-NMSC-020, ¶¶ 3-4, 18-23. "A warrantless entry into a vehicle under the exigent circumstances exception requires probable cause *plus* exigent circumstances." *Id.* ¶ 12 (Emphasis added.) Because we have already determined that the officer lacked probable cause for the seizure of the bag, we need not analyze the presence of exigency or its role in the analysis of the plain view exception.

III. CONCLUSION

{27} The district court's denial of Defendant's motion to suppress is reversed. We remand for further proceedings consistent with this disposition.

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

J. MILES HANISEE, Judge

WE CONCUR:

CYNTHIA A. FRY, Judge

RODERICK T. KENNEDY, Judge

Certiorari Denied, August 14, 2015, No. 35,417

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-085

Filing Date: June 25, 2015

Docket No. 33,801

JULIAN SEGURA, CHRISTOPHER DIXON, and KEVIN J. MEYN, in their own behalf and in behalf of similarly situated persons,

Plaintiffs-Appellants,

v.

J.W. DRILLING, INC., a New Mexico corporation,

Defendant-Appellee.

Templeton & Crutchfield, P.C.
C. Barry Crutchfield
Lovington, NM

Riojas Law Firm, P.C.
Robert E. Riojas
El Paso, TX

Michael T. Milligan
El Paso, TX

for Appellants

Rodey, Dickason, Sloan, Akin & Robb, P.A.
Charles J. Vigil
Jeffrey L. Lowry
Albuquerque, NM

Hennighausen & Olsen, L.L.P.
Kenneth B. Wilson
Roswell, NM

for Appellee

OPINION

BUSTAMANTE, Judge.

{1} Julian Segura, Christopher Dixon, and Kevin J. Meyn (Workers), in their own behalf and on behalf of similarly situated persons, filed a complaint alleging that J.W. Drilling, Inc. (Employer), failed to pay them for overtime wages for the time spent traveling from their homes to Employer's job sites. Employer moved for summary judgment on the ground that such time was not compensable under New Mexico's Minimum Wage Act (MWA), NMSA 1978, §§ 50-4-19 to -30 (1955, as amended through 2013). Workers appeal the district court's grant of summary judgment in favor of Employer. We affirm.

BACKGROUND

{2} Workers are former employees of Employer, a contractor that performed oil field drilling and related work in the Permian Basin in southeastern New Mexico and west Texas. Workers were paid hourly wages as non-exempt employees. Based in Artesia, New Mexico, Employer hired employees there and "dispatch[ed] them on day trips requiring travel to and from the job sites of at least one hour per day."

{3} Workers brought suit against Employer seeking unpaid overtime compensation, liquidated damages, injunctive relief, and attorney fees for themselves and other employees similarly situated under the MWA. Workers' complaint alleged that "[Employer's] method of operation made travel a part of their employees' duties and a term of their employment relationship" and that Employer "engaged in a continuing course of conduct . . . pursuant to which they only paid employees from the arrival time to the departure time at the remote work locations, even though travel time caused the employees to work more than 40 hours per week." Workers asserted that they were " 'traveling employees' within the meaning of New Mexico common law[.]" Workers asserted that under Section 50-4-22(D) of the MWA, they "had a right to compensation at

one and one-half times their regular[] hourly rates for all hours worked in excess of 40 hours" during a seven day period. *See* Section 50-4-22(D) ("An employee shall not be required to work more than forty hours in any week of seven days, unless the employee is paid one and one-half times the employee's regular hourly rate of pay for all hours worked in excess of forty hours."). Since Employer had not paid Workers for the time spent traveling to the job sites, they asserted that Employer is "liable to them for their overtime compensation and also the mandatory liquidated damages" provided for in the MWA.

{4} Employer moved for summary judgment. *See* Rule 1-056 NMRA. For purposes of the motion, Employer accepted the basic facts set out in Workers' complaint. After a hearing, the district court granted the motion and dismissed the complaint. This appeal followed.

DISCUSSION

{5} "When a party actually admits, for purposes of the summary judgment motion, the veracity of the allegations in the complaint, a reviewing court should consider the facts pleaded as undisputed and determine if a basis is present to decide the issues as a matter of law." *GCM, Inc. v. Kentucky Cent. Life Ins. Co.*, 1997-NMSC-052, ¶ 13, 124 N.M. 186, 947 P.2d 143 (alteration, internal quotation marks, and citation omitted). Generally, "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.

{6} The parties agree that the essential legal question posed by the complaint is "whether travel time is compensable under the [MWA]." Because Workers' complaint states that the travel at issue is "travel to and from the job sites," and their briefs do not mention travel between job sites, we understand their argument to be focused on travel from their homes to one job site and back each day. Workers make two arguments. First, they argue that the district court erred in relying on case law construing a federal statute to construe the MWA. Second, they argue under the MWA their travel time to the job sites is compensable when it exceeds the "normal commute" time. We address these arguments in turn.

{7} In their first argument, Workers contrast the MWA with its federal counterpart, the Fair Labor Standards Act (FLSA). 29 U.S.C. §§ 201 to 219 (1938, as amended through 2012). They note that a portion of the FLSA, the Portal-to-Portal Act, excludes from compensable time the time spent traveling from home to the place of an employee's "principal activity." *See* 29 U.S.C § 254(a). Specifically, the Portal-to-Portal Act provides that

> Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the [FLSA] . . . on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for . . .
>
> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities[.]

Id.

{8} Workers argue that the district court erred "by engrafting onto the [MWA] the [Portal-to-Portal Act] making all travel non-compensable, even round trips nearly equal to a day of work[.]" They maintain that the MWA, passed eight years after the Portal-to-Portal Act, has no similar express exclusion, and thus the district court erred in relying on federal case law interpreting the Portal-to-Portal Act.

{9} Workers' claims are based entirely on the MWA. Although several New Mexico cases refer to federal law as persuasive authority in interpreting the MWA, in those cases the MWA and the FLSA had similar provisions. *See, e.g.*, *Garcia v. Am. Furniture Co.*, 1984-NMCA-090, ¶ 13, 101 N.M. 785, 689 P.2d 934 (stating that because the definitions in the MWA "are similar to definitions in the Fair Labor Standards Act of 1938. . . . it is appropriate to look to decisions of federal courts determining the meaning of 'employ' in the federal statute, and to consider those federal decisions as persuasive authority in deciding the meaning of 'employ' in the New Mexico statute"); *Sinclaire v. Elderhostel, Inc.*, 2012-NMCA-100, ¶ 6, 287 P.3d 978 (discussing the FLSA and the MWA provisions related to the definition of a work week). However, when the language of the MWA and the FLSA differ, we treat federal case law differently. In *New Mexico Department of Labor v. Echostar Communications Corp.*, for example, this Court declined to rely on cases interpreting the FLSA in part because the language in the MWA and FLSA differed. 2006-NMCA-047, ¶ 12, 139 N.M. 493, 134 P.3d 780. Here, the exclusions in the Portal-to-Portal Act are completely absent from the MWA. There being no analogue in the MWA, the interpretations of the Portal-to-Portal Act in case law are unhelpful. Thus, to the extent the district court relied on federal law interpreting the Portal-to-Portal Act to decide this case, we agree that it erred. Federal law does not answer the issue presented by this case.

{10} We turn to Workers' argument that their travel time is compensable under the MWA. Workers first argue that employees like them are entitled to compensation for their travel time because they are "traveling employees." The "traveling employee" concept to which Workers refer is derived from workers' compensation law. Under that body of law, employees generally are not considered within the course of their employment when they are on their way to work or returning home from work. *See* NMSA 1978, § 52-1-19 (1987). This is known as the "going and coming rule." *Ramirez v. Dawson Prod. Partners, Inc.*, 2000-NMCA-011, ¶ 7, 128 N.M. 601, 995 P.2d 1043. However, when travel is an integral part of the employee's duties and a benefit to the employer, the employee will be considered within the course of employment the entire time he or she is traveling. *Id.* ¶ 11. This is known as the "traveling employee" exception to the "going and coming rule." *Id.* Workers urged the district court and now urge this Court to import the traveling employee exception from workers' compensation law into the context of wage and hour law. They note that the rationale for the traveling employee exception is that the travel is occasioned by and solely for the benefit of the employer. They argue that their travel here is similarly for the benefit of the employer and, therefore, should be compensable.

{11} We decline to apply the traveling employee concept in this context. Workers compensation law is "sui generis" and New Mexico courts have repeatedly declined to mingle its principles with those in other areas of law. For instance, in *Lessard v. Coronado Paint & Decorating Center, Inc.*, this Court stated that although "similar principles may support [applying the going and coming rule] in [the context of workers' compensation and tort law]," the going and coming rule in workers' compensation law was inapplicable to scope of employment analyses in tort law because "the policies served by the two areas of law differ, and application of the rule in each context has produced analyses that differ from each other." 2007-NMCA-122, ¶ 9, 142 N.M. 583, 168 P.3d 155. Similarly, this Court declined to import principles related to traveling employees from workers' compensation law into vicarious liability analyses, concluding that "workers' compensation cases involving 'traveling employees' are not helpful to our analysis of common-law vicarious liability." *Ovecka v. Burlington N. Santa Fe Ry. Co.*, 2008-NMCA-140, ¶ 13, 145 N.M. 113, 194 P.3d 728; *see also Rivera v. N.M. Highway & Transp. Dep't*, 1993-NMCA-057, ¶¶ 14-15, 115 N.M. 562, 855 P.2d 136 (stating that the "rationale for allowing workers' compensation benefits for accidents arising from horseplay is unique to workers' compensation cases" and that the "rationale does not apply outside the workers' compensation context"); *Aragon v. Furr's, Inc.*, 1991-NMCA-080, ¶ 4, 112 N.M. 396, 815 P.2d 1186 (stating that statutes of limitation related to other causes of action were irrelevant because workers' compensation law is "sui generis"); *Wampler Foods, Inc. v. Workers' Comp. Div.*, 602 S.E.2d 805, 817-18 (W. Va. 2004) (stating that workers' compensation law "stands alone from all other areas of the law, causing decisions rendered in the workers' compensation realm to be almost wholly unusable in any other area of the law, and vice-versa"); *cf. Olson v. Trinity Lodge No. 282, A. F. & A. M.*, 32 N.W.2d 255, 257 (Minn. 1948) ("Compensation acts are sui generis, and care must be taken not to defeat their purpose by applying, through long judicial habit, concepts belonging to fundamentally different fields of litigation.").

{12} In a more general argument, Workers ask this Court to hold that "all employee travel beyond a normal commute [i]s compensable, regardless of who owns the vehicle." As support, Workers direct us to the Employee Commuting Flexibility Act (ECFA), a 1996 amendment to the Portal-to-Portal Act, which states that

> the use of an *employer's vehicle* for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the *normal commuting area* for the employer's business or establishment *and the use of the employer's vehicle is subject to an agreement* on the part of the employer and the employee or representative of such employee.

29 U.S.C. § 254(a) (emphasis added); Small Business Job Protection Act of 1996, Pub. L. No. 104-188, §§ 2101-2103, 110 Stat. 1755. They also cite a U.S. Department of Labor (DOL) opinion letter issued in 1999 interpreting the ECFA, in which the DOL addressed whether "time spent in driving [in the employer's vehicle] between the

[employee's] home and the job site [would] constitute hours worked." Opinion Letter Fair Labor Standards Act (FLSA), 1999 WL 1002360, at **1-2. In the letter, the DOL stated that

> where a[n employee's] commute to the first job site in the morning takes four hours, we would consider the greater portion of travel time compensable under the principles described in 29 CFR 785.37. That rule allows a portion of the total commute time to be considered non-compensable home-to-work travel. If the employer treated three of the four hours as compensable travel, we would not question such practice.

Id. at *2. Workers argue that the MWA should be interpreted consistently with the DOL's interpretation of the ECFA.

{13} The problem for us with this argument is that it is based on explicit language in the federal statute. As already discussed, there simply is no similar language in the MWA. Instead, the MWA is silent on travel time, whether within a "normal commute" or otherwise. *See, e.g.*, § 50-4-21 (not defining "travel time," "hours worked," or "work" in the definitions); Section 50-4-22 (not addressing travel time).

{14} Although Workers argue that the absence of language similar to the Portal-to-Portal Act in the MWA indicates that travel time is compensable under the MWA, Workers also appear to acknowledge the general rule that commuting time to and from a job site is not compensable absent an agreement to the contrary. Even the United States Supreme Court cases they cite in their favor distinguish between travel from home to the employer's property and travel once on the property. *See Tenn. Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 599 (1944) (stating that the travel at issue took place on the employer's property and "[bore] no relation whatever to [the employees'] needs or to the distance between their homes and the mines."), *superseded by statute as stated in Ford v. Houston Indep. Sch. Dist.*, ___ F. Supp. 3d ___, 2015 WL 1246780; *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of Am.*, 325 U.S. 161, 166 (1945) (distinguishing "[t]hose who are forced to travel in underground mines in order to earn their livelihood" from "the ordinary workman on his way to work"); *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 691 (1946) (stating that "the walking time [on the employer's property, which was at issue] differed vitally from the time spent in traveling from workers' homes to the factory"); *see also* 1 Wage & Hour Law § 6:38 (2015) ("Ordinary travel from home to work does not require compensation. This is still true even if the employer's worksite is a moving site." (footnote omitted)). Since the MWA is silent on this issue, Workers are, in essence, asking this Court to fashion out of whole cloth a new scheme, similar to the ECFA, that alters the general rule and declares some commuting time compensable.

{15} Under our rules of construction, "[i]f the Legislature is silent on an issue, we look at the overall structure and function of the statute, as well as the public policy embodied in the statute." *Delfino v. Griffo*, 2011-NMSC-015, ¶ 12, 150 N.M. 97, 257 P.3d 917. The purpose of the MWA is "to safeguard existing minimum wage and overtime compensation standards which are adequate to maintain the health, efficiency and general well-being of workers against the unfair competition of wage and hours standards which do not

provide adequate standards of living." Section 50-4-19. Holding that some portion of employees' travel time is compensable would likely further this goal. But to do what Workers ask would require us to resolve a number of policy questions as to the scope of compensable time. The effect of such an effort—in the face of legislative silence—would be to amend the current statutory language. This we are loath to do. " 'Courts must construe statutes as they find them and may not amend or change them under the guise of construction.' " *Jones v. Holiday Inn Express*, 2014-NMCA-082, ¶ 19, 331 P.3d 992 (quoting 82 C.J.S. *Statutes* § 370 (2014)); *Gonzalez v. Performance Painting, Inc.*, 2013-NMSC-021, ¶ 53, 303 P.3d 802 (Daniels, J., specially concurring) (stating that "judges are not legislators"); *Martinez v. Sedillo*, 2005-NMCA-029, ¶ 7, 137 N.M. 103, 107 P.3d 543 ("We will not rewrite a statute."); *City of Albuquerque v. Sanchez*, 1970-NMCA-023, ¶ 5, 81 N.M. 272, 466 P.2d 118 ("[T]his is a situation which calls for legislative therapy and not judicial surgery."), *overruled on other grounds by State v. Ball*, 1986-NMSC-030, ¶ 39, 104 N.M. 176, 718 P.2d 686.

CONCLUSION

{16} For the foregoing reasons, we affirm the district court's grant of summary judgment to Employer.

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

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:

MICHAEL E. VIGIL, Chief Judge

RODERICK T. KENNEDY, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-086

Filing Date: June 4, 2015

Docket No. 33,150

FLAGSTAR BANK, FSB,

Plaintiff-Appellee,

v.

JONATHAN K. LICHA, and PAMELA S. MACKENZIE-LICHA, husband and wife; et al.,

Defendants-Appellants.

Sutin, Thayer & Browne, P.C.
Michelle K. Ostrye
Justin R. Sawyer
Albuquerque, NM

for Appellee

Eric Ortiz Law
Eric N. Ortiz
Joseph C. Gonzales
Jean Y. Chu
Albuquerque, NM

for Appellants

OPINION

GARCIA, Judge.

{1} We have now considered and partially grant Defendants' motion for rehearing. As a result, we withdraw our opinion filed on February 18, 2015, and substitute the following in its place. Defendants Jonathan K. Licha and Pamela S. MacKenzie-Licha (the Lichas), appeal the district court's order granting summary judgment for foreclosure in favor of Plaintiff Flagstar Bank, FSB (Flagstar). The Lichas primarily assert on appeal that issues of fact concerning Flagstar's standing to enforce the note and mortgage precluded summary judgment. We disagree with the Lichas and affirm.

BACKGROUND

A. The Loan and the District Court Proceedings

{2} On March 4, 2009, the Lichas executed a promissory note to Lending Solutions, Inc. (Lending Solutions) to borrow $181,878. As security for the loan, the Lichas signed a mortgage contract with Mortgage Electronic Registration Systems, Inc. (MERS), as the nominee for Lending Solutions. On July 18, 2011, Flagstar filed a foreclosure complaint against the Lichas, alleging that Flagstar was the current holder of the note and the mortgage and that the Lichas were in default. The copy of the note that Flagstar attached to its complaint contained an indorsement signed by Ryan P. Tally, vice president of Lending Solutions, along with the words, "PAY TO ORDER OF: FLAGSTAR BANK, FSB WITHOUT RECOURSE." Flagstar also attached to its complaint a copy of the mortgage with MERS and a copy of a mortgage assignment from MERS to Flagstar dated April 29, 2011.

{3} The Lichas filed a pro se motion asking the district court to dismiss the complaint on the basis that the complaint had failed to state a claim upon which relief could be granted. The district court summarily denied the motion. Flagstar filed a motion for summary judgment, which it later withdrew to give the Lichas opportunity to answer the complaint. The Lichas then retained counsel, who filed an answer to the complaint on their behalf. The answer asserted, among other things, that Flagstar lacked standing to bring the complaint because it was not "the holder in due course" and because it was "not the contractual party with respect to the transaction."

{4} Flagstar renewed its summary judgment motion, asserting that it was "entitled to enforce the [n]ote and [m]ortgage" because the note and mortgage were "transferred and assigned to [Flagstar]." In support of this assertion, Flagstar referred to a copy of the MERS assignment that it had attached to its complaint and it attached an affidavit of Lisa Jones, an employee of Flagstar. In her affidavit, Ms. Jones stated that "[t]he original [n]ote is maintained in a vault at Flagstar[,]" that "Flagstar's vault document management system" indicates "that Flagstar held possession of the original [n]ote when it commenced the instant foreclosure action," that Flagstar continues to "hold[] possession of the original [n]ote[,]" and that she "reviewed the copy of the [n]ote . . . and ha[s] confirmed that it is a true and correct copy of the original [n]ote that is maintained at Flagstar." Attached to this affidavit were copies of the note containing the indorsement to Flagstar, the mortgage, and the MERS assignment, which appear to be identical to the

documents that Flagstar attached to its complaint.

{5} In response to Flagstar's renewed summary judgment motion, the Lichas made four arguments relevant to this appeal. Their first argument concerned Flagstar's standing to foreclose. They argued that there were factual disputes about whether Lending Solutions authorized MERS to assign the mortgage to Flagstar, whether Flagstar gave any consideration for the assignment of the note and mortgage, and whether Flagstar was the current owner of the mortgage. In support of their assertion that Flagstar was not the owner of the mortgage, the Lichas submitted an affidavit of Vanessa DeNiro, an attorney who performed a "loan audit" for the Lichas. Ms. DeNiro stated in her affidavit that, based on her research, Ginnie Mae was the owner of the mortgage loan. Her affidavit also contained numerous legal arguments and conclusions of law.

{6} Second, the Lichas argued that they should have been afforded an opportunity to conduct additional discovery on the issue of whether Flagstar had standing to foreclose. Third, they argued that the district court should sanction Flagstar for "bad faith discovery tactics" because it stated in its responses to the Lichas' interrogatories that the "subject loan" was "owned by Flagstar" when the "true owner is [Ginnie Mae]." Fourth, they argued that "there was a potential violation of [the] Home Loan Protection Act."

{7} In its reply, Flagstar moved to strike the DeNiro affidavit because, among other reasons, the affidavit contained statements that were "inadmissible hearsay, violate the best evidence rule[,] or are inadmissible legal conclusions." Flagstar argued that the Lichas did not have standing to challenge the consideration paid for the assignment of the mortgage to Flagstar. Flagstar also attached an affidavit and an exhibit to its reply showing an undated endorsement in blank by Flagstar on the back of the note.

{8} Without holding a hearing, the district court entered an order granting summary judgment in favor of Flagstar, in which it concluded that Flagstar was entitled to enforce the note and mortgage. In the same order, it struck the DeNiro affidavit and denied the Lichas' request for additional discovery, but it did not discuss the reasons for these decisions. It later denied the Lichas' motion to reconsider.

B. Arguments on Appeal

{9} All but one of the arguments set forth in the Lichas' brief in chief were preserved in the district court. The unpreserved argument asserts that the Jones affidavit attached to Flagstar's summary judgment motion did not show that Ms. Jones had "personal knowledge" concerning her statement that Flagstar possessed the original note on the date it filed for foreclosure because she relied on Flagstar's computer system for this information. Flagstar correctly counters that the Lichas did not raise this argument in the district court. Thus, we do not address this issue because the Lichas do not argue, and we do not find, that we should apply the public interest exception to the rule that appellate courts do not address unpreserved arguments. *See* Rule 12-216 NMRA; *O'Neel v. USAA Ins. Co.*, 2002-NMCA-028, ¶ 32, 131 N.M. 630, 41 P.3d 356 (declining to consider unpreserved arguments on appeal where there was no basis to apply the general public interest exception).

{10} The five preserved arguments that the

Lichas renew in their brief in chief are whether: (1) There were disputed issues of material fact regarding whether Flagstar was the holder of the note and the mortgage; (2) The Lichas have standing to challenge the validity of the assignment of the note and mortgage; (3) The DeNiro affidavit should not have been stricken; (4) The district court should have allowed the Lichas more time to conduct additional discovery; and (5) The district court should have held a hearing before it decided to strike the DeNiro affidavit, deny the Lichas' request for bad faith discovery sanctions against Flagstar, and grant summary judgment in favor of Flagstar.

{11} The Lichas did not renew various other issues in their brief in chief that they raised in the district court. However, because Flagstar raises two of these additional issues in its answer brief and the Lichas address them in their reply brief, we shall discuss them in this opinion. *See Brashear v. Packers*, 1994-NMSC-108, ¶ 7, 118 N.M. 581, 883 P.2d 1278 ("[I]f an appellee raises an argument not addressed by the appellant in its opening brief, the appellant may reply." (alteration, internal quotation marks, and citation omitted)). These two additional issues are whether MERS was authorized to assign the mortgage to Flagstar and whether the Lichas' contention that the original lender "may have" violated the Home Loan Protection Act precludes summary judgment in favor of Flagstar.

DISCUSSION

A. Standard of Review

{12} We review a district court's order granting summary judgment de novo. *Summers v. Ardent Health Servs., L.L.C.*, 2011-NMSC-017, ¶ 10, 150 N.M. 123, 257 P.3d 943. "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." *Montgomery v. Lomos Altos, Inc.*, 2007-NMSC-002, ¶ 16, 141 N.M. 21, 150 P.3d 971 (internal quotation marks and citation omitted). "On review, we examine the whole record for any evidence that places a genuine issue of material fact in dispute, and we view the facts in a light most favorable to the party opposing the motion and draw all reasonable inferences in support of a trial on the merits[.]" *Handmaker v. Henney*, 1999-NMSC-043, ¶ 18, 128 N.M. 328, 992 P.2d 879 (internal quotation marks and citation omitted). The party moving for summary judgment has the burden "to establish that no genuine issue of material fact exists for trial and that the movant is entitled to judgment as a matter of law." *C & H Constr. & Paving Co. v. Citizens Bank*, 1979-NMCA-077, ¶ 9, 93 N.M. 150, 597 P.2d 1190. However, "[t]he party opposing a motion for summary judgment cannot defeat the motion . . . by the bare contention that an issue of fact exists, but must show that evidence is available which would justify a trial of the issue." *Spears v. Canon de Carnue Land Grant*, 1969-NMSC-163, ¶ 12, 80 N.M. 766, 461 P.2d 415; *see Guest v. Berardinelli*, 2008-NMCA-144, ¶35, 145 N.M. 186, 195 P.3d 353 ("General assertions of the existence of a triable issue are insufficient to overcome summary judgment on appeal.").

B. Standing

{13} Standing is a jurisdictional prerequisite that "may not be waived and may be raised at any stage of the proceedings, even sua sponte by the appellate court." *Bank of N.Y. v. Romero*, 2014-NMSC-007, ¶ 15, 320 P.3d 1 (internal quotation marks and citation omitted). Plaintiffs who bring foreclosure actions must demonstrate that they had the

right to enforce the note and mortgage at the time that they filed the foreclosure suit. *Id.* ¶ 17.

1. Right to Enforce the Note

{14} To establish the right to enforce a negotiable instrument such as a note, a plaintiff must show that it is: (1) the "holder" of the instrument; (2) a "nonholder" who possesses the instrument and has the rights of a holder; or (3) a person who does not possess the instrument, but is nonetheless entitled to enforce it pursuant to certain provisions of the Uniform Commercial Code (UCC). NMSA 1978, § 55-3-301 (1992); *see Romero*, 2014-NMSC-007, ¶ 20. The UCC defines the "holder" of the instrument, in pertinent part, as "the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession[.]" NMSA 1978, § 55-1-201(b)(21)(A) (2005); *see Romero*, 2014-NMSC-007, ¶ 21. A third party who is not the payee of the instrument "must prove both physical possession *and* the right to enforcement through either a proper indorsement or a transfer by negotiation." *Romero*, 2014-NMSC-007, ¶ 21. The UCC recognizes two kinds of indorsements for the purpose of negotiating an instrument: a blank indorsement and a special indorsement. *Id.* ¶¶ 24-25. "A blank indorsement . . . does not identify a person to whom the instrument is payable[,] but instead makes it payable to anyone who holds it as bearer paper." *Id.* ¶ 24 (citing NMSA 1978, § 55-3-205(b) (1992)). "[A] special indorsement 'identifies a person to whom it makes the instrument payable.'" *Romero*, 2014-NMSC-007, ¶ 25 (quoting Section 55-3-205(a)). "When specially indorsed, an instrument becomes payable to the identified person and may be negotiated only by the indorsement of that person." *Romero*, 2014-NMSC-007, ¶ 25 (internal quotation marks and citation omitted).

{15} In this case, because the payee of the note was Lending Solutions, we must determine whether Flagstar provided sufficient evidence of how it became the holder by either an indorsement or transfer. *See id.* ¶ 21. Because the note that Flagstar attached to its complaint was specially indorsed by Lending Solutions, identifying Flagstar as the person to whom the note was payable, we conclude that Flagstar provided sufficient evidence that it was the holder of the note with the right to enforce it under the UCC. *See id.*; § 55-3-301; § 55-1-201(b)(21)(A); § 55-3-205(a).

{16} During the summary judgment proceedings, Flagstar submitted a copy of the back page of the note showing that Flagstar had indorsed the note in blank. The Lichas argue that Flagstar's blank indorsement on the back of the note was a "conflicting indorsement[]" that created an issue of fact precluding summary judgment. We disagree. Flagstar's blank indorsement is consistent with Lending Solution's special indorsement to Flagstar. Because Flagstar has shown that it is the holder of the note due to Lending Solutions' special indorsement, the effect of Flagstar's blank indorsement is to allow Flagstar to negotiate, or transfer, the note to another person. *See* NMSA 1978, § 55-3-201(a) (1992) (defining "[n]egotiation" as "a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder"); *Casarez v. Garcia*, 1983-NMCA-013, ¶ 16, 99 N.M. 508, 660 P.2d 598 (recognizing that when a note is specially indorsed to a transferee, that transferee may "further negotiate[]" the note "only by his indorsement"). The Lichas have not claimed that there is evidence that

Flagstar, after indorsing the note in blank, had transferred the note to another person. Without such evidence, Flagstar's blank indorsement on the note it continues to hold has no effect on the issues we address in this appeal.

2. Right to Foreclose the Mortgage

{17} Our Supreme Court has recently held that where a plaintiff has not established the right to enforce the note, it cannot foreclose the mortgage, even if evidence shows that the mortgage was assigned to the plaintiff. *See Romero*, 2014-NMSC-007, ¶¶ 34-35. Moreover, the Court was clear that where MERS' role was that of a "nominee for Lender and Lender's successors and assigns[,] . . . MERS could assign the mortgage but lacked any authority to assign the . . . note." *Id.* at ¶ 35. Here, like *Romero*, MERS' role as shown on the mortgage attached to the complaint was that of "nominee for Lender, as hereinafter defined, and Lender's successors and assigns." The mortgage defined "Lender" as "LENDING SOLUTIONS, INC." Therefore, "[a]s a nominee for [Lending Solutions] on the mortgage contract, MERS could assign the mortgage[,]" *id.* ¶ 35, which it did by virtue of the recorded assignment attached to Flagstar's complaint. Therefore, the Lichas' bare assertion that MERS lacked authority to assign the mortgage, without further factual development distinguishing MERS' role in this case from MERS' role in *Romero*, was not a material issue that precluded summary judgment. *See Romero v. Philip Morris, Inc.*, 2009-NMCA-022, ¶ 12, 145 N.M. 658, 203 P.3d 873 ("An issue of fact is 'material' if the existence (or non-existence) of the fact is of consequence under the substantive rules of law governing the parties' dispute."), *rev'd on other grounds by* 2010-NMSC-035, 148 N.M. 713, 242 P.3d 280. As a result, we reject the Lichas' argument that Flagstar was not entitled to summary judgment to foreclose its interest in the mortgage due to MERS role as a nominee in the assignment if the mortgage.

3. Consideration

{18} We reject the Lichas' argument that the question of whether Flagstar gave consideration for the note and mortgage was a material issue that precluded summary judgment. The Lichas cite no authority and this Court has found no authority that requires the holder of a note, as the plaintiff in a foreclosure action, to establish that it gave consideration to the original lender for the right to enforce the note and mortgage. Although New Mexico courts have not directly addressed this issue, we agree with the weight of authority that concludes that persons may not raise the defense of lack of consideration where they were not parties to the transfer because such defense is available only to the parties to the transfer. *See* 59 C.J.S. *Mortgages* § 412 (2009) ("An assignment of a mortgage must be supported by a good and valuable consideration in order to be valid *as between the parties*. However, the want of consideration is not available as a defense to one who was not a party to the assignment and hence was not thereby injured[.]" (emphasis added) (footnotes omitted)); *Reeves v. ReconTrust Co.*, 846 F. Supp. 2d 1149, 1164 (D. Or. 2012) (concluding that the defense of lack of consideration is not available to third-party debtors to void the mortgage assignment to MERS). Therefore, because the Lichas were not parties to the transfer of the note and mortgage from Lending Solutions to Flagstar, we conclude that the Lichas' lack-of-consideration argument does not raise an issue

of material fact precluding summary judgment.

C. Exclusion of the DeNiro Affidavit

{19} We review a district court's decision to strike an affidavit at the summary judgment stage of the proceedings for an abuse of discretion. *See Akins v. United Steelworkers of Am.*, 2009-NMCA-051, ¶ 40, 146 N.M. 237, 208 P.3d 457 ("We review a district court's decision to admit or exclude evidence for abuse of discretion."), *aff'd* 2010-NMSC-031, 148 N.M. 442, 237 P.3d 744; *Mitchael v. Intracorp, Inc.*, 179 F.3d 847, 854-55 (10th Cir. 1999) ("Like other evidentiary rulings, we review a district court's decision to exclude evidence at the summary judgment stage for abuse of discretion." (internal quotation marks and citation omitted)). In doing so, we "presume[] that the district court [wa]s correct" and "the burden is on the appellant to clearly demonstrate the district court's error." *Akins*, 2009-NMCA-051, ¶ 40. Affidavits supporting or opposing a summary judgment motion

> shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

Rule 1-056(E) NMRA. At the summary judgment stage, a district court "must consider evidence even if the *form* of the evidence, such as a deposition, would be inadmissible at trial," but "it cannot consider evidence if the *substance* of the evidence is inadmissible at trial." *Wilde v. Westland Dev. Co.*, 2010-NMCA-085, ¶ 28, 148 N.M. 627, 241 P.3d 628 (first emphasis added). For instance, "hearsay . . . is not generally admissible at trial, so affidavits or depositions containing hearsay are not sufficient evidence of a fact." *Id.* (internal quotation marks and citation omitted). Furthermore, opinions of witnesses concerning questions of law are inadmissible at trial. *See Beal v. S. Union Gas Co.*, 1960-NMSC-019, ¶¶ 29-30, 66 N.M. 424, 349 P.2d 337.

{20} Ms. DeNiro stated in her affidavit that she had performed a "Mortgage Securitization Analysis and Legal Chain of Title Report" based on her research and analysis of "documents[]" and "county records[,]" and her use of "internet tools and commercial and government websites." Her affidavit contained four parts: a "securitization analysis"; a "chain of title report"; a "supplementary legal analysis"; and a conclusion. In her securitization analysis, she stated that her research revealed that "[t]he [m]ortgage associated with [the subject loan] is a mortgage back [sic] security . . . guaranteed by [Ginnie Mae] (Ginnie Mae II RPB Trust/Pool 2009)." (Emphasis omitted.) She did not identify or include copies of any of the documents, county records, or website pages that she relied on in making this determination. She then stated that:

> By [Ginnie Mae] purchasing the said [m]ortgage [l]oan and selling certificates as shares of the [Ginnie Mae] RPB Pool 2009[] to investors based on the placement of the loan, [Ginnie Mae] was exercising rights of ownership over the said [m]ortgage [l]oan[, and b]y exercising such rights of ownership, [Ginnie Mae] made a claim of

ownership of the said [m]ortgage [l]oan.

In the chain of title report, Ms. DeNiro stated that she did not find the assignment of the mortgage from MERS to Flagstar in the county records. She then concluded that "[t]here is no legal evidence that Flagstar is the owner of the said [m]ortgage" or "the [n]ote" and that Flagstar was "at most, a mere servicer of the [m]ortgage." The remainder of this part of the affidavit, and the parts identified as supplementary legal analysis and conclusion do not contain facts, but rather legal arguments and legal conclusions.

{21} The Lichas contend that the district court should not have excluded the DeNiro affidavit because it established a genuine issue of material fact as to the ownership of the note and mortgage. We reject this contention.

{22} Most of the statements that Ms. DeNiro made in her affidavit concerned legal conclusions that would have been inadmissible at trial, and were thus properly excluded. *See Beal*, 1960-NMSC-019, ¶¶ 29-30 (concluding that expert testimony was properly stricken at trial because it is not the function of any witness, expert or non-expert, to state an opinion on a matter of law); *Wilde*, 2010-NMCA-085, ¶ 28 (stating that our Supreme Court has made clear that a court cannot consider evidence at the summary judgment stage "if the *substance* of the evidence is inadmissible at trial"). The only statement in her affidavit concerning a disputed *factual* issue about Flagstar's standing was that "[t]he [m]ortgage associated with [the subject loan] is a mortgage back [sic] security . . . guaranteed by [Ginnie Mae] (Ginnie Mae II RPB Trust/Pool 2009)[,]" which resulted in Ginnie Mae having "rights of ownership [over] the said [m]ortgage [l]oan." (Emphasis omitted.) This statement was properly excluded for two reasons. First, Ms. DeNiro claimed that she relied on "documents[]" and "county records[,]" and her use of "internet tools and commercial and government websites" in making her statements, but none of these sources were identified or attached to the affidavit, in violation of Rule 1-056(E). *See* Rule 1-056(E) ("Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."); *cf. State v. Lopez*, 2009-NMCA-044, ¶¶ 14, 26, 146 N.M. 98, 206 P.3d 1003 (holding that, pursuant to the best evidence rule, trial testimony relying on documents was inadmissible without submission of such documents or an explanation as to why the documents were unavailable). Second, Ms. DeNiro's statements are vague and only appear to reference the ownership of the mortgage—not the note. Because we have concluded that the right to foreclose the mortgage automatically follows the right to enforce the note, and Flagstar established that it had the right to enforce the note, Ms. DeNiro's statements about ownership of the mortgage were not material to the issue of Flagstar's right to file this foreclosure action. *See Romero*, 2009-NMCA-022, ¶ 12. Therefore, we conclude that the district court did not abuse its discretion in striking the DeNiro affidavit. *See Akins*, 2009-NMCA-051, ¶ 40; *see also Mitchael*, 179 F.3d at 854.

D. The Lichas' Request for Further Discovery

{23} The Lichas argue that the district court should have granted its request for more time to conduct discovery before it granted Flagstar's summary judgment motion. We disagree.

{24} "[W]e review a district court's

decision limiting discovery solely on the grounds of abuse of discretion." *Sanchez v. Church of Scientology*, 1993-NMSC-034, ¶ 17, 115 N.M. 660, 857 P.2d 771. Generally, "a court should not grant summary judgment before a party has completed discovery." *Sun Country Sav. Bank of N.M., F.S.B. v. McDowell*, 1989-NMSC-043, ¶ 27, 108 N.M. 528, 775 P.2d 730. In determining whether summary judgment was premature based upon discovery issues, we consider the following factors: (1) whether the nonmovant sought a continuance during the summary judgment motion stage to complete its discovery; (2) whether, between the time the summary judgment motion was filed and the grant of summary judgment, the nonmovant had sufficient time to obtain discovery; (3) whether the nonmovant submitted an affidavit in opposition to the summary judgment motion "contain[ing] a statement of the time required to complete the discovery, the particular evidence needed, where the particular evidence was located and the methods used to obtain the evidence[]"; and (4) whether the party who moved for summary judgment "gave an appropriate response to a discovery request from the nonmoving party." *Id.*

{25} Applying these factors, the record shows that the Lichas propounded interrogatories and requests for production upon Flagstar on September 7, 2012. Flagstar responded to these requests on October 31, 2012 and supplemented its responses on March 6, 2013. The record shows that during the four-month period between the time they received Flagstar's initial responses and the time that Flagstar filed its summary judgment motion, the Lichas made no formal objection to the manner in which Flagstar responded to their requests, nor did they seek additional discovery from Flagstar. Only after Flagstar moved for summary judgment did the Lichas contend in their opposition to the motion that "[f]urther discovery is needed to determine whether MERS had proper authorization to act on behalf of Lending Solutions" when it assigned the mortgage to Flagstar; that Flagstar "continuously refused to provide requested original loan documents or consideration or value given in exchange for the [a]ssignment of [m]ortgage"; that the Lichas needed time to "inspect the . . . loan application and all disclosures made or not made to them" and the "full mortgage file" so that they could "determine whether the loan is void or voidable due to fraud or misrepresentation"; and that Flagstar "has refused to provide true discovery responses" because its statement that "the loan had never been securitized" was "false." The Lichas did not submit an affidavit with their opposition detailing the time required to complete their discovery or the methods needed to obtain the evidence they sought.

{26} During the next three-month interval between the time that Flagstar moved for summary judgment and the district court's order granting it, the Lichas did not propound any further discovery requests upon Flagstar, they did not move to compel Flagstar to produce any documents they claimed that Flagstar improperly withheld, and they did not move for a stay or continuance of the summary judgment proceedings. Furthermore, the Lichas do not dispute Flagstar's claim that it provided them with an "opportunity to inspect the original note but the Lichas failed to do so." For these reasons, we conclude that the Lichas did not act reasonably in pursuing the deficiencies claimed to exist in discovery and the district court did not abuse its discretion in denying the Lichas more time to pursue discovery. *See Sanchez*, 1993-NMSC-034, ¶ 17; *Sun Country Sav. Bank of N.M., F.S.B.*, 1989-NMSC-043, ¶ 29 (affirming

summary judgment where nonmovant "did not act reasonably in discovering . . . information" because it did not file a motion to compel, did not seek a continuance of the summary judgment proceedings, did not attempt to conduct additional discovery while the summary judgment motion was pending, and did not include an affidavit elaborating on the time and methods needed to complete discovery).

E. Home Loan Protection Act

{27} Although the Lichas do not raise an issue in their brief in chief concerning the Home Loan Protection Act (HLPA), NMSA 1978, §§ 58-21A-1 to -14 (2003, as amended through 2009), Flagstar argues in its answer brief that it is not subject to the HLPA claims that were made by the Lichas during the summary judgment proceedings. The Lichas counter in their reply brief that Flagstar is subject to the HLPA, that the Lichas "presented a factual dispute as to whether [Flagstar] may have violated the HLPA[,]" and that this factual dispute precluded summary judgment. However, the Lichas do not identify or discuss the nature of the factual dispute they claim exists. Instead, they merely state that more discovery is required to determine whether there was an HLPA violation. Because the Lichas do not identify an actual factual issue with regard to the HLPA in their appellate briefs, and because we have concluded that they did not act reasonably in pursuing discovery prior to the summary judgment ruling, we need not further address the legal question of whether Flagstar violated the HLPA. *See Montgomery*, 2007-NMSC-002, ¶ 16. ("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." (internal quotation marks and citation omitted)); *Spears*, 1969-NMSC-163, ¶ 12 ("The party opposing a motion for summary judgment cannot defeat the motion . . . by the bare contention that an issue of fact exists, but must show that evidence is available[.]"); *Guest*, 2008-NMCA-144, ¶ 35 ("General assertions of the existence of a triable issue are insufficient to overcome summary judgment on appeal.").

F. Hearing

{28} Finally, the Lichas claim that the district court erred when it decided the summary judgment motion without a hearing. We reject this contention because we are aware of no authority, and the Lichas have cited none, that requires a district court to hold a hearing on a summary judgment motion. *See Curry v. Great Nw. Ins. Co.*, 2014-NMCA-031, ¶ 28, 320 P.3d 482 ("Where a party cites no authority to support an argument, we may assume no such authority exists."), *cert. denied*, 2014-NMCERT-003, 324 P.3d 375. We have previously recognized that "[i]n considering a motion for summary judgment, the [district] court . . . is not required to[] hold an oral hearing. . . . when the opposing party has had an adequate opportunity to respond to [the] movant's arguments through the briefing process." *Nat'l Excess Ins. Co. v. Bingham*, 1987-NMCA-109, ¶ 9, 106 N.M. 325, 742 P.2d 537. The Lichas filed a written response in opposition to Flagstar's summary judgment motion and have not claimed that they did not have an opportunity to respond to Flagstar's arguments during the briefing process. Therefore, we conclude that the district court did not err when it granted summary judgment without a hearing.

{29} The Lichas also argue that the district

court should have held a hearing on their request for discovery sanctions against Flagstar because: statements in the DeNiro affidavit contradicted some of Flagstar's responses to the Lichas' discovery requests; a hearing would have allowed the district court to determine whether Ms. DeNiro's statements were correct and Flagstar's statements were false; and if Flagstar's statements were false, the district court could have granted the Lichas' request for bad faith discovery sanctions. We reject this argument for three reasons. First, we have already concluded that the statements in the DeNiro affidavit were inadmissible and the district court properly struck them. Second, even if the district court had considered the DeNiro affidavit, the statements in the affidavit that contradict Flagstar's right to foreclose the mortgage fail as a matter of law because Flagstar established it had the right to enforce the note. Third, the Lichas cite no authority, and we have found none, that requires a district court to hold a hearing on an unresolved request for discovery sanctions for the separate purpose of weighing the credibility of individuals who have made conflicting statements during the discovery process. *See Curry*, 2014-NMCA-031, ¶ 28.

CONCLUSION

{30} For the reasons set forth herein, we affirm the district court's order granting summary judgment in favor of Flagstar.

{31} IT IS SO ORDERED.

TIMOTHY L. GARCIA, Judge

WE CONCUR:

MICHAEL E. VIGIL, Chief Judge

M. MONICA ZAMORA, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-087

Filing Date: June 18, 2015

Docket No. 32,958

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

Plaintiffs-Appellees,

and

STATE OF NEW MEXICO, ex rel., HECTOR H. BALDERAS, Attorney General,

Plaintiff-Appellee,

v.

MICHAEL J. GOPIN, an unlicensed New Mexico attorney d/b/a LAW OFFICES OF MICHAEL J. GOPIN,

Defendant-Appellant.

Robert N. (Tito) Meyer
Las Cruces, NM

Kenneth L. Beal
Las Cruces, NM

for Appellees

Hector H. Balderas, Attorney General
Santa Fe, NM
Tonya Noonan Herring, Special Assistant Attorney General
Rebecca C. Branch, Special Assistant Attorney General
Ismael L. Camacho, Special Assistant Attorney General
Albuquerque, NM

for Appellee Attorney General

Caren I. Friedman
Santa Fe, NM

Gorence & Oliveros, P.C.
Robert J. Gorence
Albuquerque, NM

for Appellant

OPINION

BUSTAMANTE, Judge.

{1} After a ne exeat bond is set, may a district court exercise its discretion to increase the amount of the bond? This is a matter of first impression in New Mexico. To resolve the issue, we examine the parameters of the writ of ne exeat, a little-used writ with origins dating as far back as the tenth century. Concluding that the district court did not abuse its discretion, we affirm.

BACKGROUND

{2} The present matter stems from a 2011 judgment against Michael J. Gopin (Defendant) for violations of 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 [p]laintiffs 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." *Atherton v. Gopin* (*Atherton I*), 2015-NMCA-003, ¶ 2, 340 P.3d 630, *cert. granted*, 2014-NMCERT-012, 344 P.3d 988. The details leading to the judgment are set out in this Court's Opinion in the appeal of that judgment. *Id.* ¶¶ 5-17. Because those details are not critical to the issue before us on this appeal, we do not repeat them here. It suffices to say that after entry of summary judgment in *Atherton I*, the district court issued a writ of ne exeat, the subsequent alteration of which is the only issue before us in this appeal.

{3} The Attorney General filed an application for writ of ne exeat on January 3, 2012, less than a month after entry of the judgment. The application requested the district court to enter a writ "without advance notice to Defendant," barring Defendant from leaving the State of New Mexico, removing any assets from New Mexico, and "hiding, spending, or disposing of his personal assets, or the assets of the business, pending further order of [the district c]ourt." A hearing was held on January 5, 2012. At the hearing, the district court stated that "the Attorney General has established good cause to believe that [Defendant] may be about to remove assets from the jurisdiction of the [district] court." It ordered Defendant to post a ne exeat bond in the amount of $100,000, which was based on the sale price of a building Defendant owned in New Mexico (the Solano property).

{4} Defendant moved for reconsideration of the ne exeat bond order, but failed to appear at the hearing on the motion. Following the hearing, the district court entered findings of fact. Specifically, it found that (1) "[t]he

evidence before the [c]ourt establishes that Defendant has engaged in . . . complex financial transaction[s] for the purpose of preventing collection of this judgment[;]" (2) "Defendant has dissipated assets during the pendency of this case, including the sale of [the Solano] property located in Las Cruces, New Mexico[;]" and (3) "[a]t the January 5, 2012[,] hearing, Defendant testified under oath that he would attend all future hearings in this case and would not flee the jurisdiction." It also found that "[m]ore than [thirty] days has passed since the [c]ourt ordered [D]efendant to post a bond with the [c]ourt." Based on these and other findings, the district court concluded that "a bond in the amount of $500,000, which represents approximately 25% of the total judgment entered against [D]efendant, is appropriate to prevent further dissipation of assets within the jurisdiction of the [c]ourt and to secure [D]efendant's appearance at all future proceedings."

{5} On March 20, 2012, the district court issued a temporary restraining order enjoining Defendant from, among other things, removing any assets owned by him personally or owned by the law offices of Michael J. Gopin from New Mexico. Defendant then failed to appear for a March 27, 2012, hearing and the district court issued an order to show cause why he should not be held in contempt for failure to appear. The show cause hearing was scheduled for May 16, 2012. Meanwhile, the ne exeat bond order for a bond of $500,000 was issued on April 24, 2012. Defendant failed to post the bond and failed to appear at the May 16, 2012, hearing. The district court then entered a bench warrant for his arrest and increased the bond to $1,000,000 ($500,000 for the ne exeat bond and $500,000 for failure to appear at the May 16, 2012, hearing). Defendant was arrested and put in jail. Pursuant to Defendant's emergency motion, the district court quashed the bench warrant and reduced the ne exeat bond to $250,000. Defendant paid that sum into the court registry.

{6} Defendant does not appeal any of the foregoing rulings or orders. Rather, Defendant only appeals an order increasing the amount of the ne exeat bond. This order followed a February 27, 2013, motion for increase by the Attorney General in which the Attorney General alleged that Defendant "continue[d] to dissipate his assets from New Mexico." Defendant filed responsive pleadings, and a hearing on the motion was held on April 30, 2013. The district court found that "Defendant's [r]eal [e]state [c]ontract [for sale of the Solano property] is an asset that Defendant continues to dissipate from the [S]tate of New Mexico" and ordered Defendant to post an additional $120,000 as part of the ne exeat bond.

DISCUSSION

The Writ of Ne Exeat

{7} Section 57-12-17 of the UPA permits the attorney general to move for a writ of ne exeat "[w]henever the attorney general has reasonable belief that any . . . person [violating the UPA] is about to remove himself from the [S]tate of New Mexico, or is about to remove his property or assets from the [S]tate of New Mexico." Using the writ, "the court may forbid any such person from leaving the [S]tate of New Mexico, or removing his property or assets from the [S]tate of New Mexico until a determination of the issues [alleged under the UPA] has been made." *Id.* There are no cases in New Mexico construing the ne exeat provisions in the UPA. *See* §§ 57-12-17 to -20. Thus the questions presented here are matters of first impression.

{8} Although the parties appear to agree that the district court's authority to issue the writ arises from the UPA, "the writ of ne exeat was not created, nor are its functions defined by statute." *Nixon v. Nixon*, 158 N.W.2d 919, 922 (Wis. 1968). Hence, "[a]s to the general functions of the writ and the grounds upon which it may issue, resort must be had to principles of the common law." *Id.*

{9} The writ of ne exeat has ancient origins. "The forerunner of this writ in ancient common law appears to have been a writ *de securitatem invenienda* which was designed to prevent members of the clergy in England from departing the realm to visit the Papal See. It was thus limited in use to ecclesiastics only." *Nat'l Auto. & Cas. Ins. Co. v. Queck*, 405 P.2d 905, 909 (Ariz. Ct. App. 1965). "Sometime between the reign of John (1199-1216), and Edward I (1272-1307), . . . the writ of *ne exeat regno* was first used as a high prerogative writ . . . applied to subjects and foreigners alike, to prevent them from leaving the kingdom." *Id.* By the seventeenth century, use of the writ of ne exeat had evolved to encompass enforcement of private rights. *Id.* at 910; *see also Beveridge v. Beveridge*, 507 A.2d 502, 504 (Conn. App. Ct. 1986).

{10} As used today, "[t]he writ of *ne exeat* is an equitable remedy in the nature of bail at common law. It is directed to the sheriff, commanding him to commit the party to prison until he gives security not to leave the jurisdiction without permission of the court." *The Writ of Ne Exeat*, 29 Harv. L. Rev. 206, 206 (1915) (footnotes omitted). "The purposes of the writ are to insure compliance with orders and decrees of court and to enable the court to retain jurisdiction of the party against whom it is issued." 65 C.J.S. *Ne Exeat* § 2 (2015); *Tedards v. Auty*, 557 A.2d 1030, 1034 (N.J. Super. Ct. App. Div. 1989) ("The purpose of a writ of *ne exeat* is to compel a defendant's physical appearance in court when required."). There are "two requirements for the issuance of the writ: (1) a threatened departure of the defendant [or removal of property] from the jurisdiction; and (2) a resulting defeat of the court's power to give effective in personam relief due to its loss of control over the defendant's person [or property]." *United States v. Robbins*, 235 F. Supp. 353, 356 (E.D. Ark. 1964); *see* § 57-12-17; 57 Am. Jur. 2d *Ne Exeat* § 9 (2015) ("[W]here the removal of property would defeat the purpose of a ne exeat writ, the order in the writ may detain property, as well as the person.").

{11} These requirements circumscribe the use of a writ of ne exeat: "In the absence of [a threat to abscond], the writ may not be used as a form[] of coercing payment of a debt, no matter how just, nor as a form[] of punishment, no matter how deserved." *Tedards*, 557 A.2d at 1034. Moreover, because "[t]he writ of ne exeat operates in restraint of personal liberty[, i]t is to be granted with caution [and] continued in force with caution." *Cohen v. Cohen*, 64 N.E.2d 689, 693 (Mass. 1946); *Elkay Steel Co. v. Collins*, 141 A.2d 212, 218 (Pa. 1958) (stating that "use and employment [of the writ] must be carefully circumscribed within appropriate limits and its issuance exercised with great caution and only in such instances where it clearly and unmistakably applies"). "As an adjunct to the trial court's equitable jurisdiction, the issuance, terms, and implementation of writs of ne exeat lie within the court's sound discretion." *Gredone v. Gredone*, 361 A.2d 176, 180 (D.C. 1976).

{12} Once the purpose of the writ and conditions of the bond have been fulfilled, the

writ and the bond are discharged. *May v. May*, 91 S.E. 687, 688 (Ga. 1917) (stating that when the defendant did all that he was "obligated to do in his bond; and, the bond having discharged all the offices for which it was intended, [the bond] should have been canceled as functus officio, and the sureties discharged"); 27A C.J.S. *Divorce* § 198 (2015) ("Upon the fulfillment of the purpose of the writ and the conditions of the bond, . . . the writ and the bond are functus officio." (footnotes omitted)); *Black's Law Dictionary* 787 (10th ed. 2014) (defining "*functus officio*" as "without further authority or legal competence because the duties and functions of the original commission have been fully accomplished"). On the other hand, failure to comply with the conditions of a ne exeat bond results in forfeiture of the bond. *See* 27A C.J.S. *Divorce* § 198 ("A failure to meet the conditions of a ne exeat bond forfeit[s] the entire bond."); *Queck*, 405 P.2d at 912 (stating that where the defendant failed to stay within the jurisdiction, the bond was forfeited). As with the issuance of a writ of ne exeat, "the matter of discharge . . . on a [n]e exeat bond rests in the sound discretion of the court." *Coursen v. Coursen*, 252 A.2d 738, 739 (N.J. Super. Ct. App. Div. 1969).

Defendant's Arguments

{13} Defendant makes four arguments. First, he argues that the district court lacked jurisdiction to order an increase in the ne exeat bond. Second, he maintains that the ne exeat bond violated the UPA. Third, Defendant contends that there was insufficient evidence to support increasing the bond. Finally, he argues that he was deprived of his right to due process of law when the district court ordered the ne exeat bond increased. We address these arguments in turn.

1. Jurisdiction to Increase the Bond

{14} Defendant argues first that the district court did not have jurisdiction to increase the amount of the bond because an appeal was pending in the underlying matter (*Atherton I*). We review such jurisdictional questions de novo. *Smith v. City of Santa Fe*, 2007-NMSC-055, ¶ 10, 142 N.M. 786, 171 P.3d 300. Defendant relies on the general rule "that the filing of a proper notice of appeal divests the district court of jurisdiction and transfers jurisdiction to the appellate court." *Murken v. Solv-Ex Corp.*, 2006-NMCA-064, ¶ 9, 139 N.M. 625, 136 P.3d 1035. Recognizing that "the rule is not absolute, as it does not prevent the district court from taking actions to carry out or enforce the judgment[,]" *id.* (internal quotation marks and citation omitted), Defendant argues that "increasing the amount of the ne exeat bond by $120,000 does not enable the [district] court to carry out or enforce the judgment." Rather, he argues, the increase in the bond amount was a modification of the judgment, an act not within the district court's jurisdiction once the judgment is appealed. *See Hall v. Hall*, 1992-NMCA-097, ¶ 38, 114 N.M. 378, 838 P.2d 995 ("As a general rule, while a court has jurisdiction after the judgment to enforce that judgment, it lacks jurisdiction to modify the judgment except under limited circumstances.").

{15} Defendant's argument ignores the basic nature of the writ. A ne exeat bond order "is not in itself a remedy. It is a means to effectuate a remedy by keeping a party within the jurisdiction of the court." 57 Am. Jur. 2d *Ne Exeat* § 2 (2015). The writ is not part of the judgment. *Id.* It follows that modification of a bond amount is not akin to modification of a judgment.

{16} To the extent that Defendant argues that the ne exeat bond order is not collateral to the underlying judgment because "[t]here can be no issuance of a writ of ne exeat if there is no violation of the [UPA,]" we disagree. Issuance of the writ does not depend on an actual violation of the UPA. Section 57-12-17 permits the issuance of a writ of ne exeat when the "attorney general has *reasonable belief* that any person is using or is about to use any method, act or practice which is declared by the [UPA] to be unlawful" and "*reasonable belief* that any such person is about to remove himself from the [S]tate of New Mexico, or is about to remove his property or assets from the [S]tate of New Mexico." *Id.* (emphasis added). This language indicates that the Legislature contemplated issuance of the writ even before entry of judgment on the UPA claims. The writ is thus an aid to effecting a remedy for UPA violations, but it is not itself a remedy. It is necessarily collateral to any UPA judgment that may be entered.

{17} Finally, Defendant argues that the district court lost jurisdiction to enter the writ once judgment was entered because Section 57-12-17 provides for issuance of the writ "until a determination of the issues has been made." We do not agree. Given the purposes of the writ of ne exeat, it does not make sense to construe the statute as depriving the district court of jurisdiction over this collateral matter while a judgment is on appeal. Instead, we interpret this language to permit continuation of the writ until the issues are completely determined, meaning that judgment is either paid or dismissed. *See Tafoya v. Garcia*, 1871-NMSC-003, ¶ 5, 1 N.M. 480 ("The spirit, as well as the letter of the statute, must be respected; and where the whole context of a law demonstrates a particular intent in the [L]egislature to effect a certain object, some degree of implication may be called in to aid that intent[.]" (internal quotation marks and citation omitted)). We conclude that the modification of the ne exeat bond order here was within the district court's jurisdiction to enforce its judgment in *Atherton I* notwithstanding the appeal of that judgment.

2. The Bond Conforms to the Statute

{18} Defendant next argues that issuance of a bond order conditioned on refraining from dissipating assets is contrary to the terms of the UPA. He distinguishes a writ of ne exeat from a ne exeat bond and argues that whereas Section 57-12-17 permits entry of a writ to prevent dissipation, Section 57-12-18 limits ne exeat bonds to those conditioned on the defendant's appearance in court. Section 57-12-18 states that "[t]he court may require any . . . person [alleged to violate the UPA] to post a ne exeat bond conditioned on such persons [person's] appearance at all hearings on the matter at issue." (Third alteration in original). Defendant's argument presents a question of statutory construction which we review de novo. *Hovet v. Allstate Ins. Co.*, 2004-NMSC-010, ¶ 10, 135 N.M. 397, 89 P.3d 69.

{19} "In construing a statute, our charge is to determine and give effect to the Legislature's intent." *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶ 9, 146 N.M. 24, 206 P.3d 135. Where a statute touches an issue in the common law, we interpret the statute's language in the context of that law. *Sims v. Sims*, 1996-NMSC-078, ¶ 23, 122 N.M. 618, 930 P.2d 153. We assume that the Legislature was "informed about the existing common law before the statute was enacted," *id.* ¶ 24, and interpret a statute "as supplanting the common law only if there is an explicit indication that the [L]egislature so intended." *Id.* ¶ 22. "This

rule of construction is a recognition that any law is passed against the background of all the law in effect at the time. If no aspect of the background of law is clearly abrogated, it is presumed to be consistent with, if not incorporated into, new legislation." *Id.* ¶ 24.

{20} As discussed above, at common law, a bond is an inherent part of a writ of ne exeat. Put another way, the writ itself contemplates—if not requires—a bond. 57 Am. Jur. 2d *Ne Exeat* § 2 ("A writ of ne exeat may be issued to secure to the plaintiff the presence of the defendant within the limits of the court's jurisdiction until the satisfaction of the plaintiff's equitable claim or *until a bond, or equitable bail, is given for that purpose.*" (emphasis added) (footnote omitted)). Defendant's distinction between a writ of ne exeat and a ne exeat bond is, therefore, specious. In addition, "[h]istorically, where the removal of property would defeat the purpose of a ne exeat writ, the order in the writ may detain property, as well as the person." 57 Am. Jur. 2d *Ne Exeat* § 9. Hence, at common law, a ne exeat writ, including a bond, may be conditioned on preservation of assets. Although Section 57-12-18 provides for an instance in which a bond may be required, it does not prohibit bonds related to assets or property. Therefore, since the statute is silent as to these bonds, the statute does not abrogate the common law. Issuance of the bond order conditioned on preservation of assets was not contrary to the UPA.

3. Sufficiency of the Evidence

{21} Next, Defendant argues that the district court's decision to increase the bond amount was not supported by sufficient evidence. He alleges three ways in which the district court's order was error. First, he argues that because the district court's first ne exeat bond order of $100,000 was based on the value of the Solano property, the subsequent increase of the bond order based on a real estate contract related to the same property was improper. Second, he contends that there was no evidence that he had an ownership interest in the Solano property. Third, he maintains that there was no evidence that he had or would dissipate assets in New Mexico. We address these arguments in turn.

{22} The fundamental premise of Defendant's first argument is that the amount of the bond order must be based on the value of the property he is allegedly dissipating and that, therefore, the same property cannot serve twice as the basis for a bond order. It appears that the parties and the district court shared this understanding of the limits on the amount of a ne exeat bond. But the parties do not cite and we have found no authority supporting this premise. Rather, some authorities state that the amount of a ne exeat bond is related to the amount of the plaintiff's interests or the judgment. *See, e.g.*, Polly J. Price, *Full Faith & Credit & the Equity Conflict*, 84 Va. L. Rev. 747, 801 (1998) ("The writ was commonly directed to a sheriff to require the defendant to post sufficient security that he would not depart the territory without leave of the court, in an amount sufficient to satisfy the plaintiff's interest, or be imprisoned."); 57 Am. Jur. 2d *Ne Exeat* § 26 (2015) ("The sum assessed must be sufficient to cover not only the existing debt but also costs and a reasonable amount of future interest having regard to the probable duration of the suit."); *McNamara v. Dwyer*, 7 Paige Ch. 239, 245 (N.Y. Ch. 1838) (holding that "[t]he amount in which the defendant is held to bail upon the [n]e exeat should therefore be reduced to $9000; as that will be sufficient to cover what will probably be found due to the complainants, with interest and costs"). Other

authorities appear to endorse a bond based on an assessment of the amount necessary to provide the defendant a material incentive to remain within the jurisdiction and/or refrain from dissipating assets without regard to the amount at issue in the underlying action. *See, e.g.*, *Elkay Steel Co.*, 141 A.2d at 214 n.3 (ordering bond of $25,000 each from two defendants where the amount in issue was $60,165); *Gredone*, 361 A.2d at 179 (ordering bond of $1,000 where trial ultimately resulted in money judgments against the defendant totaling over $13,000). Thus, to the extent that Defendant argues that the increase of the bond was improper because it was based on the same property used as a basis for the initial bond, we disagree because the amount of the bond need not necessarily be tied to the value of the property.

{23} Defendant directs us to *Siravo v. Siravo*, 670 So. 2d 983, 985 (Fla. Dist. Ct. App. 1996), in which the court stated that a writ is not "a substitute for a contempt, injunction, or other enforcement order, where its purpose is not to prevent a party from fleeing or removing assets but, rather, to force the party to post security, or produce assets, that would be used to satisfy a judgment." But in that case, the court also expressly stated that a ne exeat bond is "a valuable resource in the arsenal of remedies available to a trial court in order to secure alimony and support." *Id.* The *Siravo* court found that a ne exeat bond was improper in that case because there was no evidence of the defendant's intent to flee the jurisdiction and other remedies, such as contempt, were available to enforce the court's judgment. *Id.* We interpret the court's statements to indicate that a ne exeat bond is inappropriate where its *only* purpose is to secure assets, rather than to prevent the defendant from fleeing or dissipating assets. We decline Defendant's invitation to interpret the holding in *Siravo* as a blanket prohibition against a ne exeat bond as used in this case.

{24} In any case, the authorities agree on two points related to the bond: that the amount of the bond is within the district court's discretion and that the bond amount may not be excessive or oppressive. *Gredone*, 361 A.2d at 180 ("As an adjunct to the trial court's equitable jurisdiction, the issuance, terms, and implementation of writs of ne exeat lie within the court's sound discretion."); *State v. Browne*, 142 So. 247, 250 (Fla. 1932) ("Excessive or unreasonable bail should never be required; as the writ is a purely civil writ, it should not be allowed to be used oppressively or in unnecessary violation of the defendant's constitutional right to personal freedom to go and come as he may please."). The total bond amount including the increase was $370,000, well under the total amount of the judgment of approximately $2.5 million. Further, Defendant does not argue on appeal that the bond amount is excessive or oppressive. We discern no abuse of discretion in the bond amount.

{25} This conclusion leads us to Defendant's second and third arguments having to do with whether there was substantial evidence that he has an ownership interest in the Solano property or that he was dissipating assets from New Mexico. The district court abuses its discretion if it enters findings of fact that are not supported by substantial evidence. *Perkins v. Dep't of Human Servs.*, 1987-NMCA-148, ¶ 19, 106 N.M. 651, 748 P.2d 24 ("An abuse of discretion is established if the . . . lower court has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence."). When reviewing for

substantial evidence, we adhere to the following principles:

> If substantial evidence supports a trial court's conclusion it will not be disturbed on appeal. Substantial evidence is such relevant evidence that a reasonable mind would find adequate to support a conclusion. Evidence is substantial even if it barely tips the scales in favor of the party bearing the burden of proof.

Landavazo v. Sanchez, 1990-NMSC-114, ¶ 7, 111 N.M. 137, 802 P.2d 1283 (citations omitted).

{26} In addition, "in deciding whether the finding has substantial support, the court must view evidence in the light most favorable to support the finding[.]" *Duke City Lumber Co. v. N.M. Envtl. Improvement Bd.*, 1984-NMSC-042, ¶ 12, 101 N.M. 291, 681 P.2d 717. We do not review "any evidence unfavorable to the finding" and do "not weigh conflicting evidence or determine credibility of witnesses." *Id.*

{27} Defendant does not dispute that he owned the Solano property in December, 2011 and that he entered into a real estate contract for sale of the property and transferred his interest in the property to his wife on December 9, 2011, just days before judgment was entered in *Atherton I*. The Attorney General attached a copy of the real estate contract to its motion to increase the bond and copies of a "memorandum of real estate contract" and the transfer document were entered into evidence at the hearing on the motion to increase.

{28} As we understand it, Defendant's argument is that he could not be dissipating funds from the sale of the Solano property because he does not *currently* have an interest in it. This argument is unavailing. Based on the undisputed facts, viewed in the light most favorable to the district court's decision, we conclude that the district court could reasonably find that the sale and transfer of the property themselves constituted dissipation of that asset. Since the real estate contract indicated that payments from the sale were continuing at the time of the hearing on the motion to increase, the district court's finding that "assets are continuing to be dissipated from the jurisdiction of this [c]ourt" is also supported by the evidence.

{29} Defendant also appears to rely on the fact that the property was sold before entry of judgment in *Atherton I* as evidence that the ne exeat order and bond were improper. But under Section 57-12-17, entry of a judgment is not a prerequisite to issuance of the writ. Hence, it was not an abuse of discretion for the district court to consider the sale of the property even though it occurred before the entry of the judgment and before the application for writ of ne exeat.[1]

4. Due Process

{30} Finally, Defendant makes a brief argument that he was denied the due process of law accorded him by the New Mexico and federal constitutions because he had no opportunity to be heard before the ne exeat

[1]Defendant directs our attention to an affidavit filed with this Court, which is not part of the record proper. We do not consider evidence not reviewed in the first instance by the district court. *State v. Romero*, 1975-NMCA-017, ¶ 2, 87 N.M. 279, 532 P.2d 208 ("Matters outside the record present no issue for review."). We also decline to consider documents cited by the Attorney General that were not part of the record below. *See id.*

bond was increased. *See* U.S. Const. amend. V; N.M. Const. art. II, § 18. Defendant relies on *Jacobsen v. Jacobsen*, 126 F.2d 13, 14-15 (D.C. Cir. 1942), for the proposition that "since he had denied the allegations of the [motion for increase], he was further entitled to a full hearing [including] a full opportunity to introduce oral testimony." There, the court held that where "[the defendant] was given no such opportunity, continuing the writ [ne exeat] in force deprived him of his liberty without due process of law, in violation of the Fifth Amendment." *Id.* at 15. Due process is provided when a defendant has "timely notice . . . ; a reasonable opportunity to [be heard]; a reasonable opportunity to confront and cross-examine adverse witnesses and present evidence . . . ; representation by counsel . . . ; and a hearing before an impartial decisionmaker." *In re Pamela A.G.*, 2006-NMSC-019, ¶ 12, 139 N.M. 459, 134 P.3d 746 (internal quotation marks and citation omitted).

{31} Defendant acknowledges that this argument was not raised in the district court and, therefore, was not preserved for appeal. Generally, "[d]ue process claims will not be addressed when raised for the first time on appeal." *State v. Martinez*, 2007-NMCA-160, ¶ 4, 143 N.M. 96, 173 P.3d 18. Defendant argues that nevertheless we should review this issue because "it involves the public interest and the fundamental right[s] of Defendant." *See* Rule 12-216(B) NMRA. But, other than asserting that "a writ of ne exeat is an infringement on a party's liberty interest[,]" Defendant provides no reason why this particular due process challenge should be exempt from the general preservation rule. Similarly, although he asserts that "this case implicates the public interest because enforcement of the [UPA] is entrusted to the Attorney General on behalf of the people of New Mexico," he gives no reason why this fact distinguishes this matter from any other pursued by a state agency. Thus, we need not address this argument any further. *Cf. Doe v. State*, 1975-NMCA-108, ¶ 18, 88 N.M. 347, 540 P.2d 827 (declining to address the respondents' arguments because they did not provide "some showing on appeal of the suggested fundamental or jurisdictional nature of the error"). However, to foreclose any further argument on the issue, we will address it on its merits.

{32} Defendant's assertion that he was provided no opportunity to be heard on the motion for increase is flatly contradicted by the record, as is his contention that the Attorney General presented "nothing but innuendo" at the hearing and that the district court considered "no evidence whatsoever." Defendant filed a response in opposition to the motion in which he disputed that he was dissipating assets from New Mexico and contested the Attorney General's interpretation of the real estate contract documenting sale of the Solano property. Moreover, Defendant had notice of and was present and represented by counsel at the hearing on the motion. There is no indication in the record that Defendant was denied the opportunity to present witnesses at the hearing. Finally, the Attorney General submitted a memorandum of the real estate contract as an exhibit, and Defendant himself submitted an exhibit for the district court's review. Defendant's right to due process of law was not violated.

CONCLUSION

{33} For the foregoing reasons, we affirm the district court's order increasing the amount of the writ of ne exeat bond.

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

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:

RODERICK T. KENNEDY, Judge

LINDA M. VANZI, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-088

Filing Date: June 22, 2015

Docket No. 33,409

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

Petitioner-Appellee,

v.

CASEY J.,

Respondent-Appellant,

IN THE MATTER OF TICHELLE J., RAZIEL J., and CALEB J.,

Children.

Children, Youth & Families Department
Charles E. Neelley, Jr., Chief Children's Court Attorney
Rebecca J. Liggett, Assistant Children's Court Attorney
Santa Fe, NM

for Appellee

Casey Jim
Farmington, NM

Pro Se Appellant

W. Karen Cantrell
Placitas, NM

Guardian Ad Litem

OPINION

ZAMORA, Judge.

{1} Casey J. (Father) appeals the termination of his parental rights to T.J., R.J., and C.J. (Children) not for purposes of restoring his parental rights in the Children, but rather to require the Children, Youth and Families Department (the Department) to place Children with a specific relative, or alternatively any interested relative. Father argues that the Department failed to comply with New Mexico's Abuse and Neglect Act, NMSA 1978, §§ 32A-4-1 to -34 (1993, as amended through 2014), and the federal Indian Child Welfare Act (the ICWA), 25 U.S.C. §§ 1901 to 1963 (2013), with regard to the placement of Children. Father also argues that he was denied due process as well as a fair and impartial termination proceeding. We hold that the Department's placement of Children complied with the state and federal requirements. As to the termination proceedings, we hold that Father was afforded

due process, and was not deprived of fair and impartial proceedings. Accordingly, we affirm.

BACKGROUND

{2} The Department filed a neglect/abuse petition against Father and Andrea T. (Mother) regarding Children. The Department took Children into custody in February 2011 due to ongoing concerns related to each parent's issues with substance abuse and domestic violence. At the time Children were taken into custody, Father was incarcerated. The district court held a custody hearing on March 1, 2011. The district court found that the ICWA applied because Father, Mother, and Children are all registered members of the Navajo Nation.

{3} At the adjudicatory/dispositional hearing on April 6, 2011, both Father and Mother entered pleas of no contest to the allegations in the neglect/abuse petition, pursuant to Section 32A-4-2(E)(2). The court adopted treatment plans for both parents, designed to address the domestic violence and substance abuse issues. The treatment plans also required supervised visitation and regular communication with the Department.

{4} Father was incarcerated sporadically throughout the pendency of the case. Father attended most of the monthly meetings with the Department permanency planning worker when he was not incarcerated, but did not complete parenting training, domestic violence or substance abuse counseling, and was twice discharged for noncompliance. Father was inconsistent in his visits with Children and his last visit with Children was June 29, 2012. After the June 29, 2012 visit, Father called for a few weeks with excuses for missing visits and after that the Department permanency planning worker did not hear from Father again.

{5} On January 31, 2013, the Department filed a motion for termination of parental rights of Mother and Father, both members of the Navajo Nation. On April 24, 2013, Mother voluntarily relinquished her parental rights. The case proceeded to trial. Father was present, but did not challenge the evidence that he had failed to participate in his treatment plan and that he had abandoned Children. Father did challenge the compliance of Children's foster placements with the requirements of the ICWA. However, Father argued that the Department's failure to place Children according to the ICWA's placement preferences constituted a failure to make active efforts to prevent the breakup of the Indian family, as required by the ICWA.

{6} At the conclusion of the termination of parental rights trial, the district court announced its decision indicating it was granting the Department's motion to terminate Father's parental rights. Father filed a motion for reconsideration, which was heard on August 1, 2013. On October 29, 2013, the district court entered a judgment terminating Father's parental rights to Children. This appeal followed.

DISCUSSION

{7} Father makes a number of arguments in support of reversal for purposes of mandating a relative placement for Children and not the restoration of his parental rights. The majority of these arguments relate to the fact that Children were never placed in foster care with relatives, members of the Navajo Nation, or other Indian families. Father argues that the Department failed to make active efforts to prevent the breakup of the Indian family and

to comply with the relative placement preferences under the ICWA and the New Mexico Abuse and Neglect Act. Father also contends that in the absence of full compliance with the placement preferences, he was denied due process of law.

{8} To the extent that any of Father's claims relate to the current placement of Children, we decline to address them. Father may not challenge the placement of Children after the termination. *See* § 32A-4-29(L) ("A judgment of the court terminating parental rights divests the parent of all legal rights and privileges."). Accordingly, our analysis of Father's claims is limited to the foster care placement of Children prior to the termination of Father's parental rights.

Children's Placement Under the ICWA and the New Mexico Abuse and Neglect Act

{9} Interpretation of the ICWA and the New Mexico Abuse and Neglect Act presents questions of law that we review de novo. *State ex rel. Children, Youth & Families Dep't v. Marsalee P.*, 2013-NMCA-062, ¶ 12, 302 P.3d 761. "[The] ICWA is a remedial statute in that it was enacted to stem the alarmingly high percentage of Indian families being separated by removal of children through custody proceedings[,]" and we therefore construe it liberally in order to effectuate its purpose. *State ex rel. Children, Youth & Families Dep't v. Marlene C.*, 2011-NMSC-005, ¶ 17, 149 N.M. 315, 248 P.3d 863 (internal quotation marks and citation omitted).

{10} The ICWA was enacted to address the consequences of abusive child welfare practices that separated Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32-33 (1989). The stated purpose of the ICWA is

> to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

25 U.S.C. § 1902. The overarching concern of Congress and the proponents of the ICWA, was the maintenance of the family and tribal relationships existing in Indian homes. *Holyfield*, 490 U.S. at 37.

> One of the most serious failings of the present system is that Indian children are removed from the custody of their natural parents by nontribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and childrearing. Many of the individuals who decide the fate of our children are at best ignorant of our cultural values, and at worst contemptful of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child.

Id. at 34-35 (internal quotation marks and citation omitted). At the core of the ICWA is the tribal interest in the impact that the large

numbers of adoptions of Indian children by non-Indians have on the tribes themselves. *Id.* at 49-52. The ICWA "recognizes that the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents." *Id.* at 52 (internal quotation marks and citation omitted).

{11} The ICWA establishes federal standards for state-court child custody proceedings involving Indian children. *Id.* at 36-37. As relevant here, the ICWA conditions involuntary termination of parental rights with respect to Indian children on a showing that active efforts have been made to prevent the "breakup of the Indian family," 25 U.S.C. § 1912(d); and provides preferences for the foster care placement of Indian children with a member of the Indian child's extended family; a foster care home licensed, approved and specified by the Indian child's tribe; an Indian foster care home licensed or approved by an authorized non-Indian licensing authority; or an institution for children approved by the Indian child's tribe or operated by an Indian organization that has a program suitable to meet the Indian child's needs. 25 U.S.C. § 1915(b). The New Mexico Abuse and Neglect Act has incorporated the ICWA's placement preferences. *See* NMSA 1978, § 32A-4-9(A) (1993).

Active Efforts Designed to Prevent the Breakup of the Indian Family

{12} Father contends that the Department did not make active efforts to prevent the breakup of his family because Children were not placed with relatives and because Children were not always placed together in one foster home. We understand the basis of Father's argument to be the requirements for preservation of the Indian family as set forth in 25 U.S.C. § 1912(d).

{13} Section 1912(d) of the ICWA provides that a party seeking to terminate parental rights to an Indian child under state law "shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." *Adoptive Couple v. Baby Girl*, ___U.S. ___, ___,133 S. Ct. 2552, 2562 (2013) (emphasis, internal quotation marks and citation omitted). Efforts to provide remedial services under this section are intended to "alleviate the need to remove the Indian child from his or her parents or Indian custodians." *Id.* at 2563 (internal quotation marks and citation omitted).

{14} Section 1912(d) of the ICWA should be read in harmony with "§ 1912(e) and § 1912(f), both of which condition the outcome of proceedings on the merits of an Indian child's 'continued custody' with his parent." *Adoptive Couple*, 133 S. Ct. at 2563. Thus, 25 U.S.C. § 1912(d) requires that Indian parents be "provided with access to remedial services and rehabilitative programs . . . so that their custody might be continued in a way that avoids foster-care placement under § 1912(e) or termination of parental rights under § 1912(f)." *Adoptive Couple*, 133 S. Ct. at 2563 (internal quotation marks omitted). "[T]he provision of remedial services and rehabilitative programs under § 1912(d) supports the continued custody that is protected by § 1912(e) and § 1912(f)." *Adoptive Couple*, 133 S. Ct. at 2563 (internal quotation marks omitted). It does not apply to facilitate the placement of the child in compliance with the placement preferences listed in § 1915. *Adoptive Couple*, 133 S. Ct. at 2558.

{15} Here, Father's argument is focused

on Children's foster placements throughout the case, not on the Department's efforts to prevent a disruption in custody or parental rights as contemplated by 25 U.S.C. § 1915(d). Father does not address the Department's efforts to provide him with remedial services and rehabilitative programs prior to the removal of Children from the home, or the Department's efforts to engage him in such services and programs through his treatment plan. As a result, whether the Department made active efforts to prevent the breakup of the Indian family, as required by 25 U.S.C. § 1912(d), is not an issue in this appeal. *See In re Doe*, 1982-NMSC-099, ¶ 3, 98 N.M. 540, 650 P.2d 824 (recognizing that appellate courts should not reach issues not raised by the parties). Our relevant inquiry is whether the ICWA placement preferences were followed, and if not, whether good cause existed to deviate from them.

The ICWA Placement Preferences

{16} The ICWA and the New Mexico Abuse and Neglect Act specify that, absent good cause to the contrary, foster care placement shall be with: "[(1)] a member of the Indian child's extended family; [(2)] a foster home licensed, approved, or specified by the Indian child's tribe; [(3)] an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or [(4)] an institution for [the] children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs." *See* 25 U.S.C. § 1915(b); Section 32A-4-9(A). The party seeking to deviate from the placement preferences bears the burden of establishing the existence of good cause to do so. Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67584, 67594 (Nov. 26, 1979). In determining whether good cause exists for deviating from the placement preferences, a court is required to examine the reasons for deviation in light of "the prevailing social and cultural standards of the Indian community." 25 U.S.C. § 1915(d). The recently issued Bureau of Indian Affairs Guidelines (BIA Guidelines) recognize that any party may raise the issue of whether good cause not to follow the ICWA placement preferences exists. 80 Fed. Reg. 10150, § F(4) (February 25, 2015).

{17} In this case, the district court found that good cause to deviate from the ICWA placement preferences existed, beyond a reasonable doubt. This standard applies to termination of parental rights under the ICWA. *See* 25 U.S.C. § 1912(f) ("No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."). However, neither 25 U.S.C. § 1915(b) nor Section 32A-4-9(A) of the Abuse and Neglect Act identify a standard of proof for the good cause exception to the placement preferences identified in the statute. We are also unaware of any New Mexico case law that has established a standard as it relates to the good cause exception. We need not decide on a standard for two reasons. First, the issue is not squarely before us as neither party has raised the issue. *See In re Doe*, 1982-NMSC-099, ¶ 3 (recognizing that appellate courts should not reach issues not raised by the parties). Second, under the facts of this case, we conclude that the district court's findings of good cause to deviate from the ICWA placement preferences are appropriate whether the burden of proof

was preponderance of the evidence, clear and convincing, or beyond a reasonable doubt.

Deviation From The Placement Preferences Was Supported by Good Cause

{18} Father argues that the district court's determination that good cause existed to deviate from the ICWA placement preferences was not supported by the evidence. The ICWA does not define "good cause." However, the BIA Guidelines for state courts to use in Indian child custody proceedings provide that a determination of good cause not to follow the placement preferences should be based on one or more of the following considerations: a "request of the biological parents or the child when the child is of sufficient age"; the "extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness"; and the "unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria." Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. at 67,594.

{19} There are some courts that limit their good cause analysis to the considerations listed in the BIA Guidelines. *See In re Custody of S.E.G.*, 521 N.W.2d 357, 362 (Minn. 1994) (stating that simply applying the best interests standard is contrary to the plain language of the ICWA read as a whole, and to its legislative history); *see also In re Adoption of Riffle*, 922 P.2d 510, 514 (Mont. 1996) (deciding it is improper to apply best interest when determining good cause because the ICWA expresses presumption that it is in the Indian child's best interest to be placed in conformance with the preferences).

{20} Other courts have held that the considerations listed in the BIA Guidelines are not exhaustive. *See In re Adoption of M.*, 832 P.2d 518, 522 (Wash. Ct. App. 1992) ("Good cause is a matter of discretion, and discretion must be exercised in light of many factors. These include but are not necessarily limited to the best interests of the child, the wishes of the biological parents, the suitability of persons preferred for placement, the child's ties to the tribe, and the child's ability to make any cultural adjustments necessitated by a particular placement." (citations omitted)); *see also In re Adoption of F.H.*, 851 P.2d 1361, 1363-64 (Alaska 1993) ("Whether there is good cause to deviate in a particular case depends on many factors including, but not necessarily limited to, the best interests of the child, the wishes of the biological parents, the suitability of persons preferred for placement and the child's ties to the tribe.").

{21} NMSA 1978, § 32A-1-3(A), (B) (2009) provide, in pertinent part, that the Children's Code shall be interpreted and construed to effectuate the following legislative purposes:

> A. *[F]irst* to provide for the care, protection and wholesome mental and physical development of children coming within the provisions of the Children's Code *and then* to preserve the unity of the family whenever possible. *A child's health and safety shall be the paramount concern.* Permanent separation of a child from the child's family, however, would especially be considered when the child or another child of the parent has suffered permanent or severe injury or repeated abuse. It is the intent of the [L]egislature that, to the maximum extent possible, children in New

> Mexico shall be reared as members of a family unit;
>
> B. [T]o provide judicial and other procedures through which the provisions of the Children's Code are executed and enforced and in which *the parties are assured a fair hearing and their constitutional and other legal rights are recognized and enforced*[.]

(Emphasis added.) Thus, in determining the existence of good cause to deviate from the ICWA placement preferences, the court must give primary consideration to the children's best interests, but must ensure that the constitutional and other legal rights of all the parties are considered.

{22} We recognize that parents have a "fundamental liberty interest in the care, custody, and management of their children." *State ex rel. Children, Youth & Families Dep't v. Amanda M.*, 2006-NMCA-133, ¶ 18, 140 N.M. 578, 144 P.3d 137. Parents also have a right to pursue familial relationships with their children. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 618-20 (1984) (holding that familial associations are included in the fundamental right to freedom of association); *see also Lucero v. Salazar*, 1994-NMCA-066, ¶¶ 6-9, 117 N.M. 803, 877 P.2d 1106 (recognizing the fundamental right of familial association or right to intimate familial relationship). As discussed above, the Indian tribe has an interest in Indian children that is in parity with that of the parents. *Holyfield*, 490 U.S. at 52.

{23} However, it is well established that these rights are not absolute; rather, they must yield to the "best interests and welfare of the children." *State ex rel. Children, Youth & Families Dep't v. John R.*, 2009-NMCA-025, ¶ 27, 145 N.M. 636, 203 P.3d 167 (internal quotation marks and citation omitted). In assessing the children's best interests, it is imperative that the children are recognized as people who have fundamental interests of their own that are constitutionally protected. *See In re Gault*, 387 U.S. 1, 13, (1967) (holding that the Fourteenth Amendment and the Bill of Rights apply to children.); *see also In re Guardianship of Victoria R.*, 2009-NMCA-007, ¶ 11, 145 N.M. 500, 201 P.3d 169 (stating that a child is a person for purposes of the Fourteenth Amendment). The children have the fundamental right to be protected from abuse and neglect, and to have a permanent and stable placement. *Id.* They "are not simply chattels belonging to the parent, but have fundamental interests of their own that may diverge from the interests of the parent." *Id.* (internal quotation marks and citation omitted).

Standard of Review for Good Cause Determinations

{24} The determination of good cause to deviate from the ICWA placement preferences is a legal standard. *See Dep't of Human Servs. v. Three Affiliated Tribes of Fort Berthold Reservation*, 238 P.3d 40, 50 (Or. Ct. App. 2010). Accordingly, "we must determine whether the facts, as found by the trial court and as supported by evidence in the record, are legally sufficient to establish 'good cause' to depart from [the] ICWA's placement preferences." *Id.* "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. Jerry K.*, 2015-NMCA-047, ¶ 24, ___P.3d___. "Our overarching goal when interpreting the ICWA is to effectuate Congress's intent." *Marlene C.*, 2011-NMSC-005, ¶ 15.

The District Court's Findings of Good Cause

{25} The district court heard evidence related to Children's placement at the adjudicatory/dispositional hearing, the initial judicial review hearing, five permanency hearings, the termination of parental rights trial, and the hearing on Father's motion to reconsider. The district court consistently found that good cause existed to deviate from the ICWA' s placement preferences.

The Adjudication and the Initial Judicial Review

{26} The adjudicatory/dispositional hearing was held on April 6, 2011. The ICWA qualified expert witness (QEW) working for the Navajo Nation Children and Family Services testified that she was aware of Children's current placements and that the placements did not meet the ICWA placement preferences, but that good cause existed to deviate from the preferences. The district court found that the ICWA placement preferences had not been followed because the Department had been unable to find an ICWA approved home, and that the Department was working with the Navajo Nation to determine an appropriate relative placement.

{27} The testimony of the QEW, that good cause existed to deviate from the ICWA placement preferences, was sufficient to meet any standard. Under the ICWA, no foster care placement for an Indian child may be ordered "in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." § 1912 (e). The best interests of Indian children will often be directly linked to their tribal culture. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. at 67593. The purpose of the QEW is to provide testimony related to the Indian child's best interests from the perspective of someone with expert knowledge of tribal culture and childrearing practices. *Id.*

{28} In this case, the QEW was a social worker for the Navajo Nation Children and Family Services who had been employed with the Navajo Nation for over a year-and-a-half, and who was knowledgeable about the provisions of the ICWA. The QEW explained that she was knowledgeable about the practices and traditions of the Navajo Nation as a registered member of the tribe and as an active participant in the Navajo practices and traditions. The district court did not err in relying on her testimony that, at the time of the adjudicatory/dispositional hearing, good cause existed to deviate from the ICWA placement preferences.

{29} On June 3, 2011, the district court held an initial judicial review hearing. Information was presented that the Department was not able to find a placement for Children together. Children were placed in two separate foster homes and were visiting with each other. The Department was working with Mother, Father, and the Navajo Nation to determine an appropriate placement. The QEW testified that the Department was looking at two relatives, who did not live on the reservation, for possible placement. The Department permanency planning worker explained that three relatives had come forward: (1) a member of the Zia Pueblo, but the Zia Pueblo would not allow the Department to conduct a home study because Children were not Zia members; (2) Children's paternal uncle who withdrew for

health reasons; and (3) a paternal aunt, Bernice Strait (Aunt), for whom the Department was working on approval to go forward with the home study process.

{30} The district court encouraged the Department and the QEW to stay in touch and work out a suitable placement. The QEW did not identify any special needs of Children, and stated her approval of Children's placement. The district court found that, at that time, there was good cause not to follow the ICWA placement preferences.

{31} In light of the Department's efforts to find relative placements for Children, the unavailability of ICWA-compliant placements, and the QEW's approval and statement of good cause, we conclude that the district court did not err in determining that good cause existed to deviate from the ICWA placement preferences at the time of the initial judicial review.

The Permanency Hearings

{32} The initial permanency hearing was held on November 30, 2011. The Department reported that it was continuing to look for a placement that met the ICWA placement preferences and was working with the Navajo Nation to identify an appropriate relative. The Guardian Ad Litem (GAL) testified that Children were doing well in their respective foster homes, but that when there was visitation, there was some troublesome sibling interaction that may need to be dealt with therapeutically.

{33} The CASA volunteer, who was a member of the Navajo Nation, reported that she was helping to foster Children's cultural connections. She stated that she was able to provide Children with traditional outfits including jewelry and moccasins, and that she was helping out with T.J.'s coming of age ceremony, which was a big part of T.J's life. The Department indicated that Aunt had a good relationship with Children, and that she had been very supportive and had been visiting them. The Department also reported that Aunt had provided traditional items for Children to wear on feast days, which was very meaningful to Children.

{34} A new social worker from the Navajo Nation, also admitted as a QEW, had been assigned to the case. She requested that Mother and Father provide names of relatives on the reservation for consideration as potential placements for Children. Mother and Father were present and both indicated that they wanted Children to be placed with Aunt. The Department explained that a home study was started with Aunt, but that Aunt had withdrawn from consideration because she was caring for her mother. However, at the time of the hearing, Aunt was again expressing an interest in having Children placed with her and the Department was pursuing that placement. The court stated its support for pursuing and finalizing placement of Children with Aunt. The Navajo Nation did not object to Aunt as a possible placement.

{35} In its first permanency hearing order, the district court found that the ICWA placement preferences were not being followed because the Department had been unable to locate an ICWA approved home. However, the court also found that the Department was working with the Navajo Nation to determine an appropriate relative placement, and that the Department was working with the Navajo Nation and the family to preserve and maintain Children's cultural connection. The evidence presented at the first permanency hearing showed that the

Department was actively pursuing relative placement options for Children, and that placement in accordance with the ICWA had not yet been possible due to the unwillingness or unavailability of relative placements. The Department also showed that it was making efforts toward addressing the special needs of Children and promoting their connections with their heritage. Father's request, that Aunt be considered as a placement option, was being actively pursued by the Department. We conclude that the district court did not err in finding there was good cause to deviate from the ICWA placement preferences at the first permanency hearing.

{36} A second permanency hearing was held on February 22, 2012. Father was not present. Father's attorney could not reach Father and did not know his location. At the February 2012 hearing, it was reported that Children were doing relatively well in their current placements. R.J. and C.J. were receiving speech and language therapy. No other special needs were identified.

{37} It was also reported that Aunt had again withdrawn from the home study process and the Department had been actively trying to find other relatives. The permanency planning worker stated that she had requested names of relatives from Father, Mother, and Aunt, and had even asked Children if there were relatives that they would like to see more often. The relatives that had been considered for placement at the time of the hearing had been ineligible due to their backgrounds.

{38} When asked, the QEW indicated that she did not believe there was ever good cause to deviate from the ICWA placement preferences, but that she understood that the Department could not find Navajo or Native American foster homes for Children. The Department indicated that it would accept help from the Navajo Nation in locating potential relative or Navajo placements for Children. The district court asked the Navajo Nation to assist the Department in finding a suitable ICWA placement. The district court found that good cause existed to deviate from the ICWA placement preferences, and encouraged the Navajo Nation and the Department to work together in finding a suitable, ICWA-compliant placement for Children.

{39} The evidence presented at the second permanency hearing showed the unavailability of suitable relatives, Navajo, or other Native American placements. The absence of appropriate ICWA approved placements, along with the continued efforts by the Department and the Navajo Nation, constituted good cause to deviate from the ICWA placement preferences. Additionally, there was no indication by the GAL or the Navajo Nation that Children's needs were not being met in their placements at that time. We conclude the district court did not err in finding good cause to deviate from the placement preferences at the second permanency hearing.

{40} A third permanency hearing was held on August 20, 2012. Father was not present and his attorney was unable to contact or locate him. The Department reported that Children were all placed together in a new foster placement. The new placement was not an adoptive home for Children and the Department indicated that it wanted to get Children free for adoption so that the Department could start the adoption recruitment effort. The GAL reported that Children were doing well in the new placement where they were all together. She also stated Children were involved in therapy and with cultural activities through the Native

American Community Academy (NACA), where T.J. attended school.

{41} The Department reported that it had located some paternal relatives that were willing to be considered for placement, but they had withdrawn from the home study process because it was too invasive. The permanency planning worker then explained that several relatives had been located for possible placement but that none wanted to step forward because they were fearful of Father and Mother. She also explained that the Department had considered Aunt as a placement three times, and Father's brother had also indicated that he would be a placement option, but twice withdrew. The Department also informed the court that it had maintained contact with Aunt and that Aunt had provided the name of a third cousin that the Department could contact regarding placement. The Department had also asked Aunt to look into clan members that may provide potential placements.

{42} The Department asked for assistance from the Navajo Nation in locating potential Navajo placements. The QEW indicated that she still needed to rule out any proposed placements by their adoption unit and requested a photograph and profile of Children so that a request for certified homes to consider placement of Children could be made.

{43} The district court found that the ICWA placement preferences had not been followed; however, "good cause exist[ed] for deviating from the . . . placement preferences because no relative, no Navajo, and no Indian homes [had] been identified and approved for placement." The court further found that the "Department [was,] through its treatment plan, . . . ensuring that [C]hildren's cultural ties [were] being protected and fostered."

{44} The Department's inability to place Children in compliance with the ICWA placement preferences stemmed primarily from the unavailability of suitable families for placement. There was no testimony to indicate Children had special needs that were unmet in their current placement. We also note that there was no objection to the placement by the parents or the Navajo Nation. We conclude that the district court appropriately found that there was good cause to deviate from the placement preferences at the third permanency hearing.

{45} On February 19, 2013, a fourth permanency hearing was held. Father was not present and his attorney was unable to locate him. At that hearing, the Department reported that R.J. and C.J. had been placed in treatment foster care because they needed a higher level of care. The Department also indicated that it had been unsuccessful in finding and qualifying a suitable relative or Native American placement for Children. The GAL reported that R.J. and C.J. had experienced significant and troubling behaviors that necessitated their transition to a treatment foster care facility. She informed the court that T.J. remained placed in her original foster home and that she was doing well in that placement and at school where her cultural ties were being protected and fostered.

{46} The district court asked the QEW what the Navajo Nation's position was on the efforts of the Department and on whether good cause existed to deviate from the ICWA placement preferences. The QEW stated that the Navajo Nation supported the Department's efforts to find permanency for Children; however, the Navajo Nation was still looking

for possible relative placements on the reservation, and that a referral had been made to the Navajo Nation's adoption unit. The Navajo Nation had given approval for the Department to conduct a nationwide search for an ICWA preferred home suitable for permanent placement.

{47} The district court found that the Department had made active efforts to comply with the ICWA placement preferences, that the Department had proven beyond a reasonable doubt that good cause existed to deviate from the preferences, and that the Navajo Nation concurred with the placement under the circumstances. The Department's inability to place Children in compliance with the ICWA placement preferences stemmed primarily from the unavailability of suitable families for placement. There was no testimony to indicate Children had special needs that were unmet in their current placement. We also note that there was no objection to the placement by the parents or the Navajo Nation. We conclude that the district court appropriately found that there was good cause to deviate from the placement preferences at the fourth permanency hearing.

The Termination of Parental Rights Trial

{48} The termination of parental rights trial was held over three days: April 1, 2013, April 24, 2013, and May 17, 2013. On April 24, 2013, Mother relinquished her parental rights and the trial proceeded as to Father's rights. At the trial, the Department permanency planning worker reported that T.J. was thriving in the home where she was placed, that she was excelling in school and was involved in extracurricular activities, but that R.J. and C.J. were experiencing behavioral difficulties and had been placed in treatment foster care. The permanency planning worker also reported that Children were maintaining their cultural ties, T.J. was attending NACA and was involved in their dance club, and the treatment foster parents were reading books to R.J. and C.J. to help them learn about their culture.

{49} The permanency planning worker testified that she had maintained contact with the Navajo Nation with regard to Children's placements. She stated that the Department had continued its efforts to identify and locate suitable homes for placement, but that the relatives who had been identified as of the date of the termination hearings had been unwilling or unable to provide a suitable placement for Children. She explained that home studies had been initiated with relatives; however, the relatives had withdrawn from the process. The permanency planning worker reported that no Navajo or other Native American placements had been identified but that the Department was continuing to work with the Navajo Nation to locate other relatives or potential placements.

{50} A Department employee, who assisted Aunt during the home study process, testified about the Department's attempts to license Aunt as a foster placement for Children. In June 2011 Aunt contacted the Department to be considered as a potential placement. Aunt completed the Relative, Adoptive, Foster Parent Training (RAFT), a four day training class required for foster placement licensing. The Department requires foster parents and members of foster families over the age of seventeen to complete RAFT training as part of the home study process. The Department initiated a home study; however, Aunt's mother became very ill and Aunt

withdrew from the process in August 2011. At that time interviews with family members, which were needed to complete the home study, had not been conducted.

{51} Aunt contacted the Department again in December 2011 and the Department started the home study process again. In February 2012, Aunt's mother was hospitalized and Aunt withdrew from consideration as a placement for Children in order to care for her. In November 2012, Aunt contacted the Department and asked to be considered a third time. The Department advised Aunt that her son would be interviewed and required to participate in the RAFT training. Aunt informed the Department that her son would not cooperate.

{52} On November 26, 2012, the Department sent Aunt a letter advising that the requested interviews and RAFT training were required by policy, and requested that Aunt contact the Department by December 3, 2012, to confirm her son's participation and avoid Aunt being withdrawn from consideration a third time. Aunt called the Department and stated that her son would attend RAFT training scheduled for December 1, 2012; however, her son did not attend the training. Aunt later reported to the Department that her son would not cooperate either with an interview or with the training. The Department informed Aunt that it would have to withdraw Aunt from consideration again.

{53} The Department's home study worker explained that the purpose of the home study is to make sure that Children are placed in a safe home and that the people in the home are able to handle Children's behaviors and provide a safe and nurturing environment. She stated that the son's participation was a critical part of the home study because he would share a room with R.J. and C.J., who had been traumatized, and the son needed to know how to interact with Children efficiently and helpfully. According to the home study worker, the son had not lived with small children in the home before and the Department wanted to equip him with skills that would help him interact with Children.

{54} Aunt was present and testified at the termination trial. She stated that when she withdrew from consideration the third time, interviews with the members of her household had not yet been completed, there had not been a report from her son's school, and she had not provided the Department with copies of her income tax documents as requested. However, Aunt indicated that she was still willing to provide a home for Children and that her son was now willing to take the required classes.

{55} The QEW also testified at the termination trial. She stated that the Navajo Nation was in support of the termination of parental rights because Father had not been able to complete his service plan and had not demonstrated that he was able to parent Children without substance abuse or domestic violence, neither of which was acceptable in the Navajo culture. The QEW testified that returning Children to Father would result in serious emotional or physical harm to Children and that Children, who had been in custody for about two years, needed permanency.

{56} As to Children's placement, the QEW reported that the Department conferred with the Navajo Nation when it was changing Children's temporary placement, and that the Navajo Nation approved Children's temporary placements because the Department did not have an ICWA-compliant placement. The

QEW testified that she was aware of the Department's efforts to qualify Aunt as a relative placement for Children. It was her understanding that the last time Aunt was being considered as a relative placement, she did not want to take all three Children, only T.J. She also reported that the Navajo Nation attempted to find a family for placement, but that possible placements were too far from Father and Mother to allow them to maintain a parent-child relationship with Children.

{57} The QEW further testified that the Department had made active efforts to locate other Navajo and other Native American families for temporary placement, and that the Navajo Nation believed that there was good cause to deviate from the ICWA preferences for Children's temporary placements. She also reported that the Navajo Nation had given approval to open up a nationwide search for an ICWA preferred home suitable for permanent placement.

{58} The district court announced that it would grant the Department's motion to terminate Father's parental rights. The court pointed out that since the Navajo Nation had not yet approved a final, adoptive placement for Children, the issue of placement of Children was ongoing and Aunt was still a potential placement.

Motion for Reconsideration

{59} Father filed a motion to reconsider ruling on May 28, 2013, and the hearing on that motion was held on August 1, 2013. Father argued that it was a violation of his due process rights to allow the Department's policy that seventeen-year-olds take the foster parent classes to override the ICWA's active efforts requirement to not break up the family, which included extended family. The district court denied Father's motion based on the information and testimony in the record, including the testimony of the QEW that the Department had made active efforts to prevent the breakup of the Indian family.

{60} The court asked the Department to make efforts to help Aunt comply with the licensing requirements and to actively engage Aunt's son to participate in the classes. The Department indicated that after the May 17, 2013, hearing, the Department had been attempting to re-engage Aunt in the process and that they had been unable to reach her, but that the door was definitely open.

The Fifth Permanency Hearing

{61} On August 26, 2013, the court held a fifth permanency hearing. We consider the district court's determination of good cause to deviate from the ICWA placement preferences at this hearing because at the time, Father's parental rights had not yet been terminated. Although the district court had announced its intention to grant the Department's motion to terminate Father's parental rights at the conclusion of the termination trial in May 2013, Father was not divested of his parental rights, and thereby his interest in Children's placement, until the district court's judgment terminating Father's parental rights was filed in October 2013. *See State v. Lohberger*, 2008-NMSC-033, ¶ 20, 144 N.M. 297, 187 P.3d 162 ("Informal expressions of a court's rulings are not appealable final orders or judgments. For example, a trial court's oral announcement of a result is not final, and parties to the case should have no reasonable expectation of its finality."); *see also Bouldin v. Bruce M. Bernard, Inc.*, 1967-NMSC-155, ¶ 3, 78 N.M. 188, 429 P.2d 647 ("[A]n oral

ruling by the trial judge is not a final judgment. It is merely evidence of what the court had decided to do—a decision that the trial court can change at any time before the entry of a final judgment.").

{62} At the fifth permanency hearing, the Department reported that T.J. was doing well in her foster placement, and that R.J. and C.J. continued to require treatment foster care as well as intensive therapeutic treatment. The Department also reported that Aunt had been visiting Children, but that she had been telling Children things about their parents that were upsetting Children. The Department informed the court that it had attempted to engage Aunt in a fourth home study, that Aunt had not fully participated in the home study, and that Aunt withdrew from the process a fourth time because she did not feel like it was "fair to her son."

{63} The QEW indicated that she had not ruled out the Navajo Nation's adoption unit as to any potential placements, and that she was exploring Children's maternal relatives for possible placement options. The QEW reported that the Navajo Nation supported Children's current placement where they were receiving treatment for their special needs. The QEW also stated that T.J. has a say in her adoptive placement, and that the QEW supported T.J's decision.

{64} The district court found that the ICWA placement preferences had not been followed; however, good cause existed for deviating from the placement preferences because no relative, no Navajo, and no Indian homes had been identified and approved for placement. We conclude the district court appropriately found there was good cause to deviate from the placement preferences.

Judgment Terminating Father's Parental Rights

{65} The district court filed its judgment terminating Father's parental rights on October 29, 2013. In its judgment, the district court found that the Department had made active efforts to comply with the ICWA placement preferences, that the Department had proven that good cause existed to deviate from the preferences, and that the Navajo Nation concurred with the placement under the circumstances.

{66} We conclude that the district court's findings that good cause existed throughout this case to deviate from the ICWA placement preferences were supported by sufficient evidence. As noted earlier, the applicable standard was not before this Court, but the district court's findings would have been appropriate no matter what standard was applied. For purposes of the BIA Guidelines, we note that the Department made consistent efforts to honor Mother's and Father's request that Aunt be considered as a placement for Children; the Department and the Navajo Nation, working in conjunction, were unable to find an available ICWA preferred placement for Children; and the Department demonstrated that Children's cultural, physical, mental, and emotional needs were being addressed through Children's treatment plans, despite the unavailability of ICWA preferred placements.

{67} It is also significant that the Navajo Nation did not object to Children's placement at any point during the case. The Navajo Nation never expressed concern that Children's cultural, physical, emotional, and psychological needs were not being met by their treatment plans. It is also significant that the QEW recognized that, with regard to

Children's foster care placements, good cause existed to deviate from the ICWA preferred placements.

Relative Placement Under New Mexico Law

{68} New Mexico law expresses a preference that any child subject to the New Mexico Abuse and Neglect Act be placed with relatives, whether or not the child's case falls under the ICWA. *See* § 32A-4-25.1(D) ("[T]he court shall determine whether the [D]epartment has made reasonable efforts to identify and locate all grandparents and other relatives. The court shall also determine whether the [D]epartment has made reasonable efforts to conduct home studies on any appropriate relative expressing an interest in providing permanency for . . . [Children]. The court must ensure the consideration has been given to . . . [Children]'s familial identity and connections."); *see also* 8.10.3.16(F) NMAC (3/31/2010) (amended 2/29/2012) (the Department "shall make every effort to identify, locate[,] and notify fit and willing relatives for consideration of placement of a child in custody who requires out of home placement"); 8.10.7.17(A) NMAC (3/31/2010) ("[The] department shall exercise due diligence to identify and notify adult relatives of a child's removal within thirty . . . days of the removal. The notice shall inform relatives of their option to become a placement resource for the child.").

{69} To the extent that Father argues that the Department failed to make reasonable efforts to identify, locate, and conduct home studies on willing and appropriate relatives who could potentially serve as placement for Children, as required by Section 32A-4-25.1(D) and the related regulations, we conclude the Department's efforts to place Children with relatives, as outlined above, were sufficient to satisfy those requirements.

Due Process

{70} We note that Father does not challenge the sufficiency of the evidence to support the termination of his parental rights. Instead, Father claims that the Department's failure to place Children with relatives or non-relative Indian families violated his substantive and procedural rights to due process. Father argues that his substantive due process rights were violated when the Department failed to place Children with Aunt, in violation of the ICWA, and thus he was deprived of his right to maintain a familial relationship with his children. Father also contends that the district court denied him procedural due process by entering a judgment terminating his parental rights in the absence of full procedural compliance with the placement preferences for Indian children under New Mexico law and the ICWA.

{71} Because we have concluded that the district court's findings that good cause existed throughout this case to deviate from the ICWA placement preferences were supported by sufficient evidence, and that the Department's efforts to place Children with relatives were sufficient to satisfy the requirements of the New Mexico Abuse and Neglect Act, Father's substantive due process argument fails.

{72} Father further argues that the Department wrongly interfered with Father's pursuit of his familial relationship with Children by failing to make active efforts to place Children with Aunt. Prior to termination of parental rights Father did have a substantive due process right in a relationship with Children. *See Santosky v. Kramer*, 455 U.S.

745, 753 (1982). However, we concluded that whether the Department made active efforts to prevent the breakup of the family is not an issue in this appeal. Consequently, Father's argument fails.

{73} Once his parental rights were terminated, he no longer had that legal right to a continuing familial relationship with Children. *See* § 32A-4-29(L) (stating "termina[tion of] parental rights divests the parent of all legal rights and privileges and dispenses with both the necessity for the consent to or receipt of notice of any subsequent adoption proceeding concerning the child[ren]").

{74} Father's procedural due process claim is also based on the Department's foster care placement of Children in non-Indian homes. "[P]rocess is due when a proceeding affects or interferes with the parent-child relationship." *State ex rel. Children, Youth & Families Dep't v. Maria C.*, 2004-NMCA-083, ¶ 24, 136 N.M. 53, 94 P.3d 796. Whether a parent was afforded due process in abuse and neglect proceedings is a question we review de novo. *State ex rel. Children, Youth & Families Dep't v. Kathleen D.C.*, 2007-NMSC-018, ¶ 11, 141 N.M. 535, 157 P.3d 714. Procedural due process rights are implicated when a person has been denied "notice and an opportunity to be heard at a meaningful time and in a meaningful manner." *State ex rel. Children, Youth & Families Dep't v. Christopher B.*, 2014-NMCA-016, ¶ 6, 316 P.3d 918 (internal quotation marks and citation omitted). Because Father's claim relied on the Department's placement of Children during the pendency of the neglect proceedings, rather than his notice of and opportunity to participate in the termination proceedings, the argument fails. We hold Father's procedural due process rights were not violated.

Fair and Impartial Proceedings

{75} Father contends that he was denied fair and impartial termination proceedings because the district court judge presiding over Father's termination proceedings failed to recuse himself when Children were placed in the foster home of a judge serving within the same judicial district. Father acknowledges that this issue was not preserved. Nonetheless, Father urges this Court to address the issue, claiming that it affects Father's fundamental right to a fair and impartial hearing. *See* Rule 12-216(B)(2) NMRA ("This rule shall not preclude the appellate court from considering . . . questions involving . . . fundamental error or fundamental rights of a party.").

{76} The first step in reviewing for fundamental error is to determine whether an error occurred. *Campos v. Bravo*, 2007-NMSC-021, ¶ 8, 141 N.M. 801, 161 P.3d 846. If error has occurred, we then consider whether the error was fundamental. *Id.* Father bases his claim that he was deprived of fair and impartial proceedings, on Rule 21-211(A) NMRA, which requires that a judge "disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." *Id.* Father argues that it could appear that the judge presiding over Father's case might consider the impact on his colleague if the district court judge removed Children from the colleague's foster home to place them with Aunt. However, the district court judge typically does not determine placement when a child is in the legal custody of the Department. *See* NMSA 1978, § 32A-1-4(O) (2009) (defining "legal custody" as "a legal status created by order of the court . . . that vests in a person,

department or agency the right to determine where and with whom a child shall live" (internal quotation marks omitted)). The suggestion that the district court judge's impartiality could be reasonably questioned, based solely on the fact that he and one of Children's temporary foster parents sat concurrently as judges for the same district, is insufficient to require recusal. *See Roybal v. Morris*, 1983-NMCA-101, ¶ 7, 100 N.M. 305, 669 P.2d 1100 ("Suspicion of bias or prejudice is not enough to disqualify a judge."). We conclude that the district court judge did not err in not recusing himself.

CONCLUSION

{77} For the foregoing reasons, we affirm.

{78} IT IS SO ORDERED.

M. MONICA ZAMORA, Judge

I CONCUR:

MICHAEL D. BUSTAMANTE, Judge

JAMES J. WECHSLER, Judge (specially concurring).

WECHSLER, Judge (specially concurring).

{79} I concur in the result of the majority opinion. I write separately because I would take a different path in affirming the district court.

{80} The nature of the case on appeal is significant. Father appeals the district court's judgment terminating his parental rights to Children. In his request for relief in his brief in chief, Father specifically asks this Court to reverse the order terminating those rights, in addition to requesting an order requiring the Department to place Children with his relatives. The majority states that Father appealed, not in order to restore his parental rights, but to require the Department to place Children with Aunt or, alternatively, any interested relative. Majority Opinion ¶¶ 1, 7. The majority therefore focuses its analysis on the foster care placement of Children prior to termination of Father's parental rights. Majority Opinion ¶ 8. But regardless of Father's stated purposes that underlie his request as characterized by the majority, I consider Father's appeal to be inextricably linked to the proceeding to terminate his parental rights pursuant to the ICWA.

{81} A termination of parental rights proceeding is fundamentally different from a foster care placement proceeding under the ICWA. "Foster care placement" means "any action removing an Indian child from its parent or Indian custodian for temporary placement . . . where the parent or Indian custodian cannot have the child returned upon demand, *but where parental rights have not been terminated*[.]" 25 U.S.C. § 1903(1)(i) (emphasis added). A "termination of parental rights" means "any action resulting in the termination of the parent-child relationship[.]" 25 U.S.C. § 1903(1)(ii) (internal quotation marks omitted). By their own terms, "a foster care placement proceeding seeks to temporarily remove an Indian child from the child's parent or Indian custodian without terminating parental rights, while a termination of parental rights proceeding seeks to end the parent-child relationship." *Thompson v. Fairfax Cnty. Dep't of Family Servs.*, 747 S.E.2d 838, 853 (Va. Ct. App. 2013) (alteration, internal quotation marks, and citation omitted). Father did not seek an interlocutory appeal with regard to any foster care placement of Children. Because Father's appeal arises from a termination of parental

rights proceeding, our inquiry into Father's claims must necessarily focus on the allowable grounds upon which Father may invalidate the termination of his parental rights under the ICWA.[2]

{82} The ICWA contains a statutory provision that provides recourse to a parent whose parental rights to an Indian child have been terminated. That provision states:

> Any Indian child who is the subject of any action for foster care placement or termination of parental rights under [s]tate law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of [25 U.S.C. §§] 1911, 1912, and 1913 of this title.

25 U.S.C. § 1914. As a threshold matter, the plain language of this remedial provision only provides a cause of action for violations of three sections of the ICWA. Section 1914 does not allow a parent to challenge a termination of parental rights upon a showing that the termination violated the ICWA's placement preferences enumerated in 25 U.S.C. § 1915. Accordingly, I conclude that 25 U.S.C. § 1914 controls our review of Father's appeal, and we cannot reverse the district court's judgment only upon a showing that Children's foster care placement violated the ICWA's placement preferences. Other jurisdictions have considered this question and also have concluded that the provisions of 25 U.S.C. § 1914 do not apply to violations of Section 1915. *See Doe v. Mann*, 285 F.Supp.2d 1229, 1241 (N.D. Cal. 2003) ("[I]t seems clear from the text of [25 U.S.C. §] 1914 that Congress intended to provide a cause of action only for violations of three ICWA sections."); *see also B.R.T. v. Exec. Dir. of Soc. Serv. Bd.*, 391 N.W.2d 594, 601 (N.D. 1986) (stating that petition or motion challenging "order terminating parental rights . . . is an improper vehicle for challenging the alleged violation of the placement preferences mandated by [25 U.S.C. Section 1915]."); *In the Interest of J.W.*, 528 N.W.2d 657, 662 (Iowa Ct. App. 1995) ("The remedial provisions of [25 U.S.C. §] 1914 do not apply to violations of [25 U.S.C. §] 1915."); *State ex rel. Juvenile Dep't of Multnomah Cnty. v. Woodruff*, 816 P.2d 623, 625 (Or. Ct. App. 1991) ("Failure to comply with the foster care placement preferences in § 1915(b) is not a basis for invalidating a court order terminating parental rights."). Therefore, I disagree with the majority that we can reach the issue of Children's placement in this case.

{83} It does seem that, theoretically, Father could have raised the issue of Children's placement under 25 U.S.C. § 1914 by alleging a violation of the "active efforts" requirement outlined in 25 U.S.C. § 1912(d). In other words, Father could have posited that CYFD's failure to follow the ICWA's placement preferences impacted his ability to meet the requirements of the Department's remedial services and rehabilitative programs, thus constituting a failure by CYFD to engage in "active efforts . . . designed to prevent the

[2]Father also argues that the Department failed to comply with the Abuse and Neglect Act in its placement of Children, but Father does not raise the question of CYFD's compliance with the Abuse and Neglect Act with regard to the termination of his parental rights. Nevertheless, the Abuse and Neglect Act provides that "[t]he termination of parental rights involving a child subject to the federal [ICWA] shall comply with the requirements of that act." Section 32A-4-28(E).

breakup of the Indian family.]" 25 U.S.C § 1912(d). The district court, in its judgment terminating Father's parental rights, found "that the Department has made active efforts to comply with the preferences . . . [and] the active efforts requirement [of Section 1912(d)] does not apply to extended family[.]" Our courts have not decided whether a failure to engage in "active efforts" may serve as a basis for invalidating a termination of parental rights judgment under the ICWA, but that question is not before us here. Father does not directly attack the district court's finding or raise a specific argument that the "active efforts" requirement of 25 U.S.C. § 1912(d) applies to both his extended family and compliance with the ICWA's placement preferences pursuant to 25 U.S.C. § 1915. The majority also notes that CYFD's "active efforts" are not at issue in this appeal, albeit for slightly different reasons, because Father did not adequately raise the issue. Majority Opinion ¶ 15.

{84} Accordingly, for the foregoing reasons, I would affirm the district court's judgment due to Father's failure to state an adequate basis under the ICWA for invalidation of the termination of his parental rights.

JAMES J. WECHSLER, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-089

Filing Date: June 23, 2015

Docket No. 33,287

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

ERIC BERNARD,

Defendant-Appellant.

Hector H. Balderas, Attorney General
Santa Fe, NM
M. Anne Kelly, Assistant Attorney General
Albuquerque, NM

for Appellee

Jorge A. Alvarado, Chief Public Defender
Nicole S. Murray, Assistant Appellate Defender
Mary Barket, Assistant Appellate Defender
Santa Fe, NM

for Appellant

OPINION

WECHSLER, Judge.

{1} A jury convicted Defendant Eric Bernard of four counts of receiving or transferring stolen vehicles or motor vehicles, contrary to NMSA 1978, Section 30-16D-4(A) (2009), for his unlawful possession of a stolen enclosed trailer, a snowmobile, and two side-by-side all-terrain vehicles (ATVs). Defendant appeals his convictions on various grounds. Defendant contends that, based on his

interpretation of Section 30-16D-4(A), the jury instructions improperly omitted an essential element of the offense of possession of a stolen vehicle under the statute. Due to the omission of this essential element, Defendant also argues that the evidence presented at trial was insufficient to support his convictions. Defendant further contends that his four convictions based on a single statute violate the double jeopardy protection against multiple punishments for the same offense. Finally, Defendant raises claims of ineffective assistance of counsel. We hold that (1) the jury instructions accurately followed the language of the statute and contained all the essential elements of the offense of possession of a stolen vehicle, (2) Defendant's sufficiency of evidence argument is without merit due to his incorrect interpretation of the statute, (3) Defendant's four separate convictions do not violate his double jeopardy rights because Defendant's possession of each stolen vehicle constitutes four distinct acts, and (4) Defendant failed to make a prima facie case of ineffective assistance of counsel. Accordingly, we affirm Defendant's convictions.

BACKGROUND

{2} Defendant received four convictions for the possession of four stolen vehicles, three of which were unlawfully taken in 2012 from Tim Kelley's property located near Durango, Colorado. At the time of the theft, Kelley and his family were away from the property recovering from multiple injuries they had sustained earlier that year when their home was destroyed by a propane leak explosion. Jerry Spinnichia, who was convicted in Colorado of the theft of Kelley's vehicles, testified at Defendant's trial that he, Defendant, and another person drove onto Kelley's property and located a twenty-seven foot enclosed trailer. According to Spinnichia's testimony, the perpetrators loaded some items in the trailer, hitched the trailer to their vehicle, and towed the trailer off the property. Included among the stolen items inside the trailer were Kelley's snowmobile and Polaris Ranger side-by-side ATV. Spinnichia also testified that he and Defendant then drove the enclosed trailer containing the snowmobile and the Polaris ATV to the home of Steven Murch near Aztec, New Mexico. Police officers testified that they later recovered the stolen vehicles from Murch's property. Inside the trailer, officers also found a Honda side-by-side ATV that had previously been reported stolen from a home located in San Juan County, New Mexico.

{3} Defendant was arrested and charged with four counts of receiving or transferring stolen vehicles or motor vehicles, in violation of Section 30-16D-4(A), for his possession of the stolen enclosed trailer, the snowmobile, the Polaris ATV, and the Honda ATV. The relevant text of the statute reads:

> A. Receiving or transferring a stolen vehicle or motor vehicle consists of a person who, with intent to procure or pass title to a vehicle or motor vehicle as defined by the Motor Vehicle Code [66-1-1 NMSA 1978] that the person knows or has reason to believe has been stolen or unlawfully taken, receives or transfers possession of the vehicle or motor vehicle from or to another or *who has in the person's possession any vehicle that the person knows or has reason to believe has been stolen or unlawfully taken*[.]

Section 30-16D-4(A) (Emphasis added).

{4} After hearing the evidence at trial, the jury received instructions for the essential elements of the offense of possession of a stolen vehicle under the statute. The instructions given, which conformed with the uniform jury instructions, specified that the State must prove beyond a reasonable doubt that Defendant had possession of each stolen vehicle and "knew or had reason to know that [the] vehicle[s] had been stolen or unlawfully taken[.]" UJI 14-1652. The jury convicted Defendant on all four counts for his possession of the stolen enclosed trailer, the snowmobile, the Polaris ATV, and the Honda ATV, contrary to Section 30-16D-4(A). Defendant raises four issues on appeal that we address in turn.

JURY INSTRUCTIONS FOR POSSESSION OF A STOLEN VEHICLE, SECTION 30-16D-4(A)

{5} Although the trial court instructed the jury in accordance with the applicable uniform jury instructions in this case, Defendant first argues that the jury instructions were fundamentally flawed by failing to include an essential element of the offense of possession of a stolen vehicle. Defendant's argument hinges on his construction of Section 30-16D-4(A). Defendant claims that statutory changes passed by the Legislature in 2009 made the "intent to procure or pass title to a vehicle" an essential element of the offense of unlawful possession of a stolen vehicle under the statute. If, as Defendant asserts, the Legislature intended "intent to procure or pass title to a vehicle" to be an essential element, then the jury should have been instructed to that effect. *See* Rule 5-608(A) NMRA ("The court must instruct the jury upon all questions of law essential for a conviction of any crime submitted to the jury."). Defendant failed to object to the instructions at trial, but he argues on appeal that omission of this essential element from the jury instructions constituted fundamental error that compels reversal of his convictions. *State v. Barber*, 2004-NMSC-019, ¶ 20, 135 N.M. 621, 92 P.3d 633 ("[F]ailure to instruct the jury on an essential element, as opposed to a definition, ordinarily is fundamental error even when the defendant fails to object or offer a curative instruction."); *see also State v. Swick*, 2012-NMSC-018, ¶ 55, 279 P.3d 747 ("[W]hen the jury instructions have not informed the jury that the [s]tate had the burden to prove an essential element . . . convictions have been reversed for fundamental error.").

Standard of Review

{6} Our determination whether the "intent to procure or pass title to a vehicle" is an essential element of the offense of possession of a stolen vehicle under Section 30-16D-4(A) requires our interpretation of the statute and is a question of law that we review de novo. *State v. Tafoya*, 2010-NMSC-019, ¶ 9, 148 N.M. 391, 237 P.3d 693. "Our primary goal when interpreting statutory language is to give effect to the intent of the [L]egislature." *State v. Torres*, 2006-NMCA-106, ¶ 8, 140 N.M. 230, 141 P.3d 1284. We first examine the statute's plain language, "which is the primary indicator of legislative intent[.]" *Gonzales v. State Pub. Emps. Ret. Ass'n*, 2009-NMCA-109, ¶ 13, 147 N.M. 201, 218 P.3d 1249 (internal quotation marks and citation omitted). "In addition to looking at the statute's plain language, we will consider its history and background and how the specific statute fits within the broader statutory scheme." *Chatterjee v. King*, 2012-NMSC-019, ¶ 12, 280 P.3d 283. When interpreting a statute that has been amended, "the amended language must be read within the context of the previously existing language, and the old

and new language, taken as a whole, comprise the intent and purpose of the statute[.]" *Vigil v. Thriftway Mktg.Corp.*, 1994-NMCA-009, ¶ 15, 117 N.M. 176, 870 P.2d 138. We must also "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.

History and Plain Meaning of Section 30-16D-4

{7} Prior to 2009, the statute codifying the crime of receiving or transferring stolen vehicles or motor vehicles resided in the Motor Vehicle Code. That language read:

> Any person who, with intent to procure or pass title to a vehicle or motor vehicle which he knows or has reason to believe has been stolen or unlawfully taken, receives, or transfers possession of the same from or to another, or who has in his possession any vehicle which he knows or has reason to believe has been stolen or unlawfully taken, . . . is guilty of a fourth degree felony[.]

NMSA 1978, Section 66-3-505 (1978). In *State v. Wise*, 1973-NMCA-138, 85 N.M. 640, 515 P.2d 644, this Court settled the question of whether the statute defined one crime or two separate crimes. The defendant in *Wise* challenged his conviction under the statute for unlawful possession of a stolen vehicle by contending that the language specifically required "the vehicle [to] have been . . . possessed by the accused with the intent to procure or pass title to it[.]" *Id.* ¶ 4 (internal quotation marks omitted). We disagreed with the defendant's construction of the statute and held that the phrase "with intent to procure or pass title to a vehicle" did not apply to the act of possession of a stolen vehicle. *Id.* Accordingly, this Court explained, the "statute defines two separate crimes: (1) taking, receiving, or transferring possession of a vehicle with knowledge or reason to believe it is stolen and with intent to procure or pass title, and (2) unlawful possession of a stolen vehicle." *Id.* ¶ 3.

{8} In 2009, the Legislature amended the language of the crime of receiving or transferring stolen vehicles or motor vehicles and recompiled the statute in the Criminal Code as Section 30-16D-4. The amended text of the statute after the Legislature's action reads:

> A. Receiving or transferring a stolen vehicle or motor vehicle consists of a person who, with intent to procure or pass title to a vehicle or motor vehicle as defined by the Motor Vehicle Code [66-1-1 NMSA 1978] that the person knows or has reason to believe has been stolen or unlawfully taken, receives or transfers possession of the vehicle or motor vehicle from or to another or who has in the person's possession any vehicle that the person knows or has reason to believe has been stolen or unlawfully taken[.]

Section 30-16D-4(A) (2009).

{9} With the exception of a new subsection related to penalties, the 2009 amendments left the statute largely unchanged. *See State v. Brown*, 2010-NMCA-079, ¶ 28 n.1, 148 N.M. 888, 242 P.3d 455 (stating that Section 30-16D-4 is "essentially the same" in its recompiled and amended form when

compared to the previous version of the statute). Most notably for our purposes here, the Legislature removed the comma before the phrase "or who has in the person's possession any vehicle that the person knows or has reason to believe has been stolen or unlawfully taken[.]" *Compare* Section 30-16D-4 and Section 66-3-505. Defendant argues that the Legislature's deletion of the comma eliminated the separate and distinct offense of unlawful possession of a stolen vehicle delineated under the statute prior to 2009 and established by this Court in *Wise*. We disagree.

{10} According to Defendant's interpretation, the comma previously functioned to separate the offense of possession of a stolen vehicle from the offense of receiving or transferring a stolen vehicle or motor vehicle. Defendant claims that, by discarding the comma, the Legislature intended to graft the *mens rea* requirement of "intent to procure or pass title to a vehicle" onto the offense of possession of a stolen vehicle. Defendant concludes that this *mens rea* requirement, which previously applied only to receiving or transferring a stolen vehicle or motor vehicle, now equally applies to the *actus reus* element of possession of a stolen vehicle. Defendant therefore argues that the jury instructions given at trial were an incorrect statement of the law because they have not been updated to reflect the statutory change. We believe that Defendant overstates the significance of the Legislature's removal of the comma.

{11} Reading the statute as a whole, our review of the 2009 amendments indicates that the Legislature did not make substantive changes that materially affect the statute in the manner Defendant suggests. *See New Mexico Pharm. Ass'n v. State*, 1987-NMSC-054, ¶ 8, 106 N.M. 73, 738 P.2d 1318 ("In interpreting statutes, we should read the entire statute as a whole so that each provision may be considered in relation to every other part."). Primarily, the Legislature inserted the phrase "[r]eceiving or transferring a stolen vehicle or motor vehicle consists of" to the beginning of the statute's provisions. The Legislature further clarified that the vehicles or motor vehicles referenced in the statute are those "defined by the Motor Vehicle Code[.]" Although the Legislature also added a new subsection to the statute that increases the penalties for each offense under the statute, the amendments to Section 30-16D-4(A) demonstrate that the Legislature sought to clarify the statute's text rather than change existing law. *See Piña v. Gruy Petroleum Mgmt. Co.*, 2006-NMCA-063, ¶ 22, 139 N.M. 619, 136 P.3d 1029 ("[T]he [L]egislature can amend an existing law for clarification purposes just as effectively and certainly as for purposes of change." (alteration, internal quotation marks, and citation omitted)). We decline to adopt Defendant's interpretation that a small punctuation revision is a clear signal of legislative intent to nullify the precedent set forth in *Wise* and effect a substantial change in the *mens rea* requirement applicable to the offense of possession of a stolen vehicle. *See Citation Bingo, Ltd. v. Otten*, 1996-NMSC-003, ¶ 21, 121 N.M. 205, 910 P.2d 281 ("[When interpreting a statute] we presume that the [L]egislature was aware of existing statutory and common law and did not intend to enact a law inconsistent with existing law.").

{12} Our conclusion is reinforced by certain principles of statutory construction. First, the lack of a comma before the phrase "or who has in the person's possession any vehicle" is not dispositive because the Legislature's use of the word "or" indicates

that a person who possesses a stolen vehicle is independent from "a person who, with intent to procure or pass title to a vehicle . . . receives or transfers possession of the vehicle[.]" Section 30-16D-4(A). "As a rule of construction, the word 'or' should be given its normal disjunctive meaning unless the context of a statute demands otherwise." *Wilson v. Denver*, 1998-NMSC-016, ¶ 17, 125 N.M. 308, 961 P.2d 153 (internal quotation marks and citation omitted). Second, under the doctrine of last antecedent, we believe that the phrase "with intent to procure or pass title to a vehicle" applies to a person who receives or transfers a stolen vehicle and that the Legislature did not intend to apply the phrase to a person "who has in the person's possession any vehicle[.]" Section 30-16D-4(A); *see In re Goldsworthy's Estate*, 1941-NMSC-036, ¶ 21, 45 N.M. 406, 115 P.2d 627 ("[R]elative and qualifying words, phrases, and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to or including others more remote.").

{13} We conclude that the statute's language is plain and unambiguous. Accordingly, we disagree with Defendant's interpretation of the statute and hold that the "intent to procure or pass title to a vehicle" is not an essential element of the crime of possession of a stolen vehicle, which is a separate and distinct offense under Section 30-16D-4(A). The jury instructions accurately followed the language of the statute and contained all the essential elements of the offense. Therefore, the jury instructions were appropriate as given. *State v. Gunzelman*, 1973-NMSC-055, ¶ 26, 85 N.M. 295, 512 P.2d 55 (holding that "instructions are sufficient which substantially follow the language of the statute or use equivalent language"), *overruled on other grounds by State v. Orosco*, 1992-NMSC-006, ¶ 7, 113 N.M. 780, 833 P.2d 1146.

SUFFICIENCY OF EVIDENCE

{14} Defendant also challenges the sufficiency of the evidence underlying his convictions by employing the same statutory interpretation argument he used to attack the jury instructions. Defendant argues that because the "intent to procure or pass title to a vehicle" is an essential element of the offense of possession of a stolen vehicle under the statute, the State failed to present evidence sufficient to prove this essential element beyond a reasonable doubt. Having decided "intent to procure or pass title to a vehicle" is not an essential element of the offense of possession of a stolen vehicle under Section 30-16D-4(A), we conclude that Defendant's sufficiency of evidence argument is without merit. "The sufficiency of the evidence is assessed against the jury instructions because they become the law of the case." *State v. Quinones*, 2011-NMCA-018, ¶ 38, 149 N.M. 294, 248 P.3d 336.

DOUBLE JEOPARDY

{15} Defendant next contends that his four convictions violate the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution. The Double Jeopardy Clause protects "criminal defendant[s] against multiple punishments for the same offense." *Swick*, 2012-NMSC-018, ¶ 10 (internal quotation marks and citation omitted). A double jeopardy claim is a question of law that we review de novo. *Id.*

{16} Double jeopardy challenges implicate two general categories of multiple-punishment cases. First, cases in which a defendant's single course of conduct results in multiple

charges under different criminal statutes are classified as "double-description" cases. *Swafford v. State*, 1991-NMSC-043, ¶ 9, 112 N.M. 3, 810 P.2d 1223. Second, cases in which a defendant faces multiple charges under the same criminal statute for the same conduct are classified as "unit of prosecution" cases. *Id.* ¶ 8. Defendant advances a unit of prosecution claim by arguing that his four convictions based on a single statute violate the double jeopardy protection against multiple punishments for the same offense. He asserts that his possession of the four stolen vehicles constitutes a single course of conduct that is punishable as only one violation of the criminal statute.

{17} Unit of prosecution cases are subject to a two-step analysis that courts utilize to discern legislative intent. *Swick*, 2012-NMSC-018, ¶ 33. "The relevant inquiry in [a unit of prosecution case] is whether the [L]egislature intended punishment for the entire course of conduct or for each discrete act." *Swafford*, 1991-NMSC-043, ¶ 8. In the first step of the analysis, we look to the language of the criminal statute to determine whether the Legislature has defined the unit of prosecution. *Swick*, 2012-NMSC-018, ¶ 33. Our inquiry is complete if the unit of prosecution is spelled out in the statute. *Id.* However, if the language is ambiguous, we proceed to the second step of the analysis in which our task is to "determine whether a defendant's acts are separated by sufficient 'indicia of distinctness' to justify multiple punishments under the same statute." *State v. Bernal*, 2006-NMSC-050, ¶ 14, 140 N.M. 644, 146 P.3d 289. If there is not sufficient indicia of distinctness to separate the defendant's acts, we apply the rule of lenity to our interpretation of the statute. *Id.* The rule of lenity requires that we interpret the statute in the defendant's favor by invoking the presumption that the Legislature did not intend to create separately punishable offenses. *State v. Santillanes*, 2001-NMSC-018, ¶ 34, 130 N.M. 464, 27 P.3d 456.

Statutory Language of Section 30-16D-4(A)

{18} We now examine the statute for the crime of receiving or transferring stolen vehicles or motor vehicles. Section 30-16D-4(A) provides that "[r]eceiving or transferring a stolen vehicle or motor vehicle consists of a person . . . who has in the person's possession any vehicle that the person knows or has reason to believe has been stolen or unlawfully taken[.]" From our review of the language and history of Section 30-16D-4, it is unambiguous that the Legislature intended the meaning of "vehicle" to refer to the Motor Vehicle Code's definition of the term. *See Maestas v. Zager*, 2007-NMSC-003, ¶ 12, 141 N.M. 154, 152 P.3d 141 ("When construing a statute, we read the entire statute as a whole, considering provisions in relation to one another."). The Motor Vehicle Code's definition of "vehicle" encompasses numerous different types of vehicles and motor vehicles.[1] The statutory language, however, does not provide clear guidance as to whether the specific type of vehicle unlawfully

[1]NMSA 1978, Section 66-1-4.19 (B) (2005) defines "vehicle" as "every device in, upon or by which any person or property is or may be transported or drawn upon a highway[.]" A "motor vehicle" is defined as "every vehicle that is self-propelled and every vehicle that is propelled by electric power obtained from batteries[.]" NMSA 1978, Section 66-1-4.11(H) (2007). *State v. Richardson*, 1992-NMCA-041, ¶ 5, 113 N.M. 740, 832 P.2d 801 ("[A] 'motor vehicle' is but a subset or subgroup of the larger category 'vehicle'[.]"); *cf. State v. Natoni*, 2012-NMCA-062, ¶ 14, 282 P.3d 769 (holding that an ATV qualifies as a "vehicle" for purposes of Section 66-1-4.19(B) and the Motor Vehicle Code's DWI statute, NMSA 1978, § 66-8-102(A) (2010)).

possessed may constitute the proper unit of prosecution for multiple violations. The statute is also silent as to whether the number of vehicles unlawfully possessed by a defendant may be charged as separate offenses. We follow the reasoning expressed in recent unit of prosecution cases by this Court and our Supreme Court that have found the use of the word "any" unconvincing to resolve whether the Legislature intended to allow multiple units of prosecution under a statute. *See State v. DeGraff*, 2006-NMSC-011, ¶ 33, 139 N.M. 211, 131 P.3d 61 (discussing that the tampering with evidence statute's use of the word "any" was not persuasive in determining the Legislature's intent regarding the proper unit of prosecution); *see also State v. Olsson*, 2014-NMSC-012, ¶ 21 324 P.3d 1230 (discussing that the possession of child pornography statute's use of the word "any" was not persuasive in determining the Legislature's intent regarding proper unit of prosecution).

{19} Therefore, because ambiguity regarding the proper unit of prosecution under the statute persists, we now turn to the second step in our analysis to determine whether Defendant's acts are sufficiently distinct.

Distinctness of Defendant's Acts

{20} Defendant argues that his possession of the four stolen vehicles constituted only one violation of the statute because the snowmobile, the Polaris ATV, and the Honda ATV were contained inside the enclosed trailer and "delivered simultaneously, as one item." We note that the trial record fails to support Defendant's assertion that the snowmobile and the two ATVs were contained inside the trailer simultaneously. Nevertheless, on this premise, Defendant urges us to extend application of the "single-larceny doctrine" to the offense of possession of a stolen vehicle under Section 30-16D-4(A). The single-larceny doctrine provides that "the stealing of property from different owners at the same time and the same place constitutes only one larceny." *State v. Brown*, 1992-NMCA-028, ¶ 6, 113 N.M. 631, 830 P.2d 183. "[T]he doctrine is a canon of construction used when the Legislature's intent regarding multiple punishments is ambiguous." *State v. Alvarez-Lopez*, 2004-NMSC-030, ¶ 43, 136 N.M. 309, 98 P.3d 699.

{21} We decline to extend the single-larceny doctrine to this case. Even though our courts have recognized the validity of the single-larceny doctrine, *see Brown*, 1992-NMCA-028, ¶¶ 6, 13 (recognizing the validity of the single-larceny doctrine in New Mexico), we see no indication that the doctrine supersedes the well-established two-step legislative intent inquiry in a unit of prosecution case. Defendant's reliance on *State v. Watkins*, 2008-NMCA-060, 144 N.M. 66, 183 P.3d 951, as evidence of our application of the doctrine in a unit of prosecution case, is misplaced. In *Watkins*, we followed the holding of *Alvarez-Lopez* and held the single-larceny doctrine was inapplicable to a unit of prosecution analysis under the receiving stolen property statute. *Watkins*, 2008-NMCA-060, ¶ 11. Our courts have similarly declined to extend the single-larceny doctrine to determinations of the proper unit of prosecution for other statutory crimes. *See e.g.*, *Bernal*, 2006-NMSC-050, ¶ 30 (declining to extend the single-larceny doctrine to determine the unit of prosecution for the crime of robbery); *State v. Boergadine*, 2005-NMCA-028, ¶ 29, 137 N.M. 92, 107 P.3d 532 (declining to extend the single-larceny doctrine to determine the unit of prosecution for the crime of fraud); *State v.*

Morro, 1999-NMCA-118, ¶ 26, 127 N.M. 763, 987 P.2d 420 (declining to extend the single-larceny doctrine to determine the unit of prosecution for the crime of defacing tombs). Additionally, the single-larceny doctrine by its own definition refers to the taking of property, and application of the single-larceny doctrine is inappropriate in this case because the jury was not required to find that Defendant actually unlawfully took the vehicles.

{22} In support of his argument for extension of the single-larceny doctrine to possession of a stolen vehicle, Defendant cites *Sanchez v. State* for the proposition that "[t]he simultaneous possession of stolen items owned by different individuals is a single act constituting one offense." 1982-NMSC-012, ¶ 10, 97 N.M. 445, 640 P.2d 1325. Although we recognize *Sanchez*'s general rule regarding simultaneous possession, *Sanchez* was decided prior to *Swafford* and was not a unit of prosecution case.[2] For these reasons, we decline to depart from "the proper framework for determining legislative intent" set forth in *Swafford*. *Watkins*, 2008-NMCA-060, ¶ 18; *see State v. Travarez*, 1983-NMCA-003, ¶ 5, 99 N.M. 309, 657 P.2d 636 ("The Court of Appeals must follow applicable precedents of our Supreme Court, but in appropriate situations we may consider whether Supreme Court precedent is applicable."). Instead, we adhere to the traditional indicia of distinctness analysis, which "amounts to a canon of construction" designed to ascertain legislative intent. *Morro*, 1999-NMCA-118, ¶ 11.

{23} *Herron v. State*, 1991-NMSC-012, 111 N.M. 357, 805 P.2d 624, established the unit of prosecution indicia of distinctness "under the modern analysis." *Bernal*, 2006-NMSC-050, ¶ 15. Although *Herron*'s factors were developed in the context of a sexual assault case, our courts have generally applied *Herron*'s six factor test in a broad range of unit of prosecution cases. *See, e.g.*, *Brown*, 1992-NMCA-028, ¶¶ 6-13 (applying the *Herron* test to multiple convictions for larceny); *State v. Handa*, 1995-NMCA-042, ¶¶ 19-27, 120 N.M. 38, 897 P.2d 225 (applying the *Herron* test to multiple convictions for assault); *State v. Barr*, 1999-NMCA-081, ¶¶ 16-23, 127 N.M. 504, 984 P.2d 185 (applying the *Herron* test to multiple convictions of contributing to the delinquency of a minor); *Morro*, 1999-NMCA-118, ¶¶ 19-26 (applying the *Herron* test to multiple convictions for defacing tombs); *Boergadine*, 2005-NMCA-028, ¶¶ 21-27 (applying the *Herron* test to multiple convictions for fraud); *DeGraff*, 2006-NMSC-011, ¶¶ 35-38 (applying the *Herron* test to multiple convictions for tampering with evidence); *Bernal*, 2006-NMSC-050, ¶¶ 20-21 (applying the *Herron* test to multiple convictions for attempted robbery). The *Herron* test consists of the following six factors: "(1) temporal proximity of the acts; (2) location of the victim(s) during each act; (3) existence of an intervening event; (4) sequencing of acts; (5) defendant's intent as evidenced by his conduct and utterances; and (6) the number of victims." *Boergadine*, 2005-NMCA-028, ¶ 21 (internal quotation marks and citation omitted).

[2] *Sanchez* involved a trial court's dismissal of an indictment alleging the defendants "received, retained or disposed of 72 different items that belonged to four separate parties." 1982-NMSC-012, ¶ 2 (internal quotation marks and citation omitted).The indictment combined the charges into one count, enhancing the crime to a third degree felony. The Court held that the indictment was "extremely vague" and failed "to inform the defendants of the nature of the charge so that surprise is avoided." *Id.* ¶¶ 14-15.

{24} In considering the application of the unit of prosecution indicia of distinctness analysis to Defendant's acts, we are mindful of our Supreme Court's recent opinion in *Olsson*. *Olsson* was the first unit of prosecution case in which our courts considered application of the *Herron* factors to a possessory offense. The two defendants in *Olsson* claimed their multiple convictions for possession of child pornography violated double jeopardy. 2014-NMSC-012, ¶¶ 5, 9. Our Supreme Court was unable to discern the unit of prosecution from the language of the statute, which criminalizes the intentional possession of "any obscene visual or print medium" if the accused "knows or has reason to know that one or more of the participants [depicted in the medium] is a child under eighteen years of age." *Id.* ¶¶ 19, 23; NMSA 1978, Section 30-6A-3(A) (2007). In the second step of its analysis, the Court found "problem[s] with attempts to determine whether conduct in a child pornography possession case is distinct under *Herron*[,]" stating that cases of unlawful possession "do not so neatly fit the *Herron* mold because it is unclear when each of the factors would apply and the factors are inconclusive when they do apply." *Olsson*, 2014-NMSC-012, ¶ 39. In particular, the Court emphasized the impracticality of applying the *Herron* factors because *Herron* is "specifically tailored to a case where a defendant has direct contact with a victim." *Id.* The conduct in question included possession of computer files containing multiple images and videos, some of which were created or downloaded on separate occasions and stored on an external hard drive. *Id.* ¶ 9. Explaining that *Herron* did not apply, the Court reasoned that application of the *Herron* factors to a defendant's download or viewing of an image was uncertain. *Id.* ¶ 39. The Court noted that "[i]t is difficult to ascertain a defendant's intent at the time" the images are downloaded or viewed, that "[t]he location of the victim during a download or viewing is not relevant[,]" and that "[t]he number of victims could possibly be established, but the circumstance of multiple victims can exist from possession of a single videotape or a single computer diskette[.]" *Id.* The Court found that the analysis was further complicated because "download dates are not included in the statutory language nor alluded to in the purpose and history." *Id.* ¶ 42. As a result, in concluding that the defendants could only be charged with one count of possession of child pornography, the Court held "that the *Herron* factors are not applicable in possession cases and that the indicia of distinctness factors do not determine the unit of prosecution." *Id.*

{25} We read *Olsson* to preclude the use of the *Herron* factors in possession cases due to the "impracticability" of its application in determining the proper unit of prosecution. *Id.* However, we do not believe that *Olsson*'s abandonment of *Herron*'s fixed formula requires a wholesale departure from an indicia of distinctness analysis if the facts of a unit of prosecution case render such analysis practicable. *See Swafford*, 1991-NMSC-043, ¶ 27 ("The conduct question depends to a large degree on the elements of the charged offenses and the facts presented at trial."). Our Supreme Court in *Olsson* faced the difficult question of whether the defendants' possession of numerous separate computer files and dozens of images and videos, which were downloaded at various times and depicted multiple victims and sexual acts, constituted separate offenses. In this case, Defendant's unlawful possession of four stolen vehicles presents a significantly different factual scenario and crime from that in *Olsson*. Our task is to discern whether Defendant's acts of possession of a trailer, a

snowmobile, and two ATVs are sufficiently distinct to justify four convictions for possession of a stolen vehicle. Because the situation presented here is decidedly less complex, we next consider whether suitable indicia of distinctness may be applied to determine whether Defendant committed four distinct acts of possession punishable under the same statute.

{26} In the absence of *Herron's* factors, we look to the "guiding principles" previously set forth by our Supreme Court in *Swafford* in determining whether Defendant's acts are sufficiently distinct to justify multiple punishments under a single statute. *Swafford*, 1991-NMSC-043, ¶27. Even though *Swafford* was a double description case, the analysis in a unit of prosecution case is "substantially similar[.]" *Bernal*, 2006-NMSC-050, ¶16. "In each case, we attempt to determine, based upon the specific facts of each case, whether a defendant's activity is better characterized as one unitary act, or multiple, distinct acts, consistent with legislative intent." *Id.* *Swafford* noted that acts may be "sufficiently separated by either time or space (in the sense of physical distance between the places where the acts occurred)[.]" 1991-NMSC-043, ¶28. If a case cannot be resolved from time and space considerations, then "resort must be had to the quality and nature of the acts or to the objects and results involved." *Id.* We therefore employ these general principles in fashioning an indicia of distinctness analysis under Section 30-16D-4(A).

{27} We first examine time and space considerations to determine whether Defendant's possession of the enclosed trailer, the snowmobile, the Polaris ATV, and the Honda ATV constituted four distinct acts. The question is whether there was evidence that Defendant, knowing that the vehicles were stolen, possessed each vehicle at a separate location and time sufficient to justify multiple punishments. The jury heard evidence that Defendant and Spinnichia entered New Mexico from Colorado in possession of the stolen trailer, the snowmobile, and the Polaris ATV, which Defendant and Spinnichia took to Murch's home in Aztec, New Mexico. The jury also heard evidence that the snowmobile was removed from the trailer and that Defendant rode the Polaris ATV while at Murch's property. Although witness testimony further indicated that Defendant rode the Honda ATV at Murch's property during the same time period, there was also evidence that the Honda ATV had been stolen from a home in San Juan County, New Mexico. However, evidence of the separate theft of the Honda ATV is not probative of Defendant's distinct acts because the trial record does not clearly indicate who took the Honda ATV to Murch's property and when it was taken there. The jury could reasonably infer from Spinnichia's testimony that Defendant possessed the trailer, the snowmobile, and the Polaris ATV prior to possessing the Honda ATV, but Murch's testimony suggested that all four vehicles arrived on his property at the same time. The jury was instructed to return guilty verdicts if it found that Defendant possessed each vehicle and knew or had reason to know that the vehicle was stolen.[3] It was not instructed to consider whether Defendant possessed the vehicles at separate times and locations. Moreover, law enforcement officers testified

[3] UJI 14-1652. The jury was also instructed that "[a] person is in possession of [a vehicle] when, on the occasion in question, he knows what it is, he knows it is on his person or in his presence and he exercises control over it." UJI 14-130. This instruction also provides that "[e]ven if the object is not in his physical presence, he is in possession if he knows what it is and where it is and he exercises control over it." *Id.*

that they recovered all four vehicles from the same location, specifically finding the Honda ATV inside the enclosed trailer parked on Murch's property. Thus, based on the indicia of time and space, we conclude that the evidence fails to establish that Defendant's conduct was four distinct acts. Consequently, we must resort to *Swafford's* remaining guiding principles.

{28} We believe that the objects and results involved in this case are sufficient indicators that Defendant's possession of each stolen vehicle constitutes four distinct acts. In applying these indicia, we "may inquire as to the interests protected by the criminal statute, since the ultimate goal is to determine whether the [L]egislature intended multiple punishments." *Bernal*, 2006-NMSC-050, ¶ 14. The objects possessed by Defendant are subject to broad regulation by the State under a highly specific statutory scheme found in the Motor Vehicle Code and the Criminal Code. With limited exceptions, the Motor Vehicle Code's vehicle registration requirements mandate that "every motor vehicle, manufactured home, trailer, semitrailer and pole trailer when driven or moved upon a highway . . . is subject to the registration and certificate of title provisions of the Motor Vehicle Code[.]" NMSA 1978, § 66-3-1(A) (2013). Off-highway motor vehicles, such as snowmobiles and side-by-side ATVs, are also subject to registration requirements under the Motor Vehicle Code's provisions, including the Off-Highway Motor Vehicle Act (OHMVA), NMSA 1978, §§ 66-3-1001 to -1020 (1978, as amended through 2009).[4] Vehicle owners who fail to comply with these registration requirements may be subject to criminal penalties. § 66-3-1(C); § 66-3-1020. Protection of personal property interests in vehicles is one of the primary purposes of this statutory design.

{29} The Motor Vehicle Code requires owners to register their vehicles so they may be uniquely identified and tracked in a centralized system. Every owner of a vehicle for which registration is required must apply to the Motor Vehicle Division (MVD) of the New Mexico Taxation and Revenue Department "for the registration and issuance of a certificate of title for the vehicle[.]" NMSA 1978, § 66-3-4(A) (2007). The application must include the following detailed information:

> [A] description of the vehicle including, to the extent that the following specified data may exist with respect to a given vehicle, the make, model, type of body, number of cylinders, type of fuel used, serial number of the vehicle, odometer reading, engine or other identification number provided by the manufacturer of the vehicle, whether new or used and, if a vehicle not previously registered, date of sale by the manufacturer or dealer to the person intending to operate the vehicle[.]

Section 66-3-4(A)(2). If a vehicle has never been registered in New Mexico but was

[4] *See* § 66-3-1001.1(E) (defining an "off-highway motor vehicle"); *see also* § 66-3-1(A) (providing that "every off-highway motor vehicle is subject to the registration and certificate of title provisions of the Motor Vehicle Code" unless certain exceptions apply); *see also* § 66-3-1003 ("Unless exempted from the provisions of the [OHMVA], a person shall not operate an off-highway motor vehicle unless the off-highway motor vehicle has been registered in accordance with Chapter 66, Article 3 NMSA 1978.").

registered in another state, the vehicle must be "examined and inspected [by MVD personnel] for its identification number or engine number[.]" Section 66-3-4(B). Additionally, a registration application for a vehicle purchased from a dealer in New Mexico or another state "shall be accompanied by a manufacturer's certificate of origin duly assigned by the dealer to the purchaser." Section 66-3-4(C). Upon receipt of an application for a vehicle that has never been registered, the MVD is required to "first check the engine or other standard identification number provided by the manufacturer of the vehicle shown in the application against its own records [and] the records of the national crime information center." NMSA 1978, § 66-3-8 (2004). The MVD also "may refuse, suspend or revoke registration or issuance of a certificate of title or a transfer of registration" if "the division has a reasonable ground to believe that the vehicle is a stolen or embezzled vehicle or the granting of registration or the issuance of a certificate of title would constitute a fraud against the rightful owner or other person having valid lien upon the vehicle[.]" NMSA 1978, § 66-3-7(D) (2004). *Accord* § 66-3-1006(A) (providing that MVD may refuse registration or issuance of a certificate of title or any transfer of a registration certificate for an off-highway motor vehicle on same grounds). Evidence of registration validated by MVD "shall be exhibited upon demand of any police officer[,]" NMSA 1978, Section 66-3-13(A) (2013), a certificate of title issued by MVD is "prima facie evidence of the ownership of the vehicle[,]" NMSA 1978, § 66-3-12 (1978), and owners must display registration plates and validating stickers on their vehicles. NMSA 1978, § 66-3-14(A) (1995). The Motor Vehicle Code also contains extensive statutory provisions that delineate separate registration requirements that apply when an owner sells, transfers, or assigns title to the owner's vehicle to another person. *See* NMSA 1978, §§ 66-3-101 to -127 (1978, as amended through 2013). We are persuaded by this statutory language that the Legislature intended to prevent and combat illicit trafficking in stolen vehicles by instituting a vehicle registration system that maintains a history of individual vehicle ownership, requires distinct identifiers be assigned and affixed to vehicles, and monitors the transfer of vehicles from other states and between owners.

{30} Likewise, the Legislature crafted provisions of the Criminal Code that operate in tandem with the Motor Vehicle Code to punish criminal conduct that infringes on personal property interests in vehicles. *See* NMSA 1978, §§ 30-16D-1 to -3 (2009) (prohibiting the unlawful taking of a vehicle or motor vehicle, embezzlement of a vehicle or motor vehicle, and misappropriating a vehicle or motor vehicle by fraud); *see also* NMSA 1978, §§ 30-16D-5 to -6 (2009) (prohibiting injuring or tampering with a motor vehicle and unlawful altering or changing of vehicle engine numbers). The statute at issue in this case is part of that statutory framework and protects interests and achieves policy objectives that are different from the provisions criminalizing the retention of generic property. *Compare* § 30-16D-4 *with* NMSA 1978, § 30-16-11(C)(2) (2006) (prohibiting the retention of "any property acquired by theft, larceny, fraud, embezzlement, robbery or armed robbery."). The Legislature sought to address the harm inflicted on the public by a particularized type of criminal enterprise: vehicle theft. Because Section 30-16D-4 appears designed to protect the public from the trafficking of stolen vehicles, it follows

that the Legislature intended to allow for separate charges for each stolen vehicle separately possessed by an individual. *See Boergadine*, 2005-NMCA-028, ¶ 19 ("The unit of prosecution may be based on the *nature* of the thing taken.").

{31} Analyzing Defendant's case in light of the clear interests protected by the criminal statute, the indicia of "objects and results" sufficiently separate Defendant's acts of possession. Defendant received four convictions for possession of four separate and distinct stolen vehicles: an enclosed trailer, a snowmobile, a Polaris side-by-side ATV, and a Honda side-by-side ATV. The jury found that each vehicle had been stolen or unlawfully taken and Defendant knew or had reason to know that the vehicles had been stolen. Under these circumstances, the indicia of distinctness justify convicting Defendant of four counts under Section 30-16D-4(A).

INEFFECTIVE ASSISTANCE OF COUNSEL

{32} Finally, Defendant argues that his trial counsel failed to meet the constitutional standards of effective assistance under the Sixth Amendment of the United States Constitution. Defendant makes multiple ineffective assistance of counsel claims, specifically that trial counsel (1) failed to object to jury instructions that omitted an essential element of the crime of receiving or transferring stolen motor vehicles, (2) failed to articulate in his motion for directed verdict that the State failed to present any evidence that Defendant received the stolen vehicles with the intent to procure or pass title, (3) failed to subpoena crucial witnesses, (4) failed to consult Defendant in the preparation of his defense, and (5) failed to effectively confront the witnesses against him through cross examination, including a police officer who testified at trial about his interview of Defendant.

{33} We review claims of ineffective assistance of counsel de novo. *State v. Martinez*, 2007-NMCA-160, ¶ 19, 143 N.M. 96, 173 P.3d 18. In order to make a prima facie case of ineffective assistance of counsel, Defendant must show "(1) that counsel's performance fell below that of a reasonably competent attorney and (2) that [the d]efendant was prejudiced by the deficient performance." *Id.* "A defendant must demonstrate that counsel's errors were so serious that the result of the proceeding would have been different." *State v. Gallegos*, 2009-NMSC-017, ¶ 34, 146 N.M. 88, 206 P.3d 993.

{34} Defendant has failed to make a prima facie case for ineffective assistance of counsel. Defendant's first two attacks on trial counsel's performance are rooted in Defendant's unpersuasive interpretation of the statute codifying the crime of receiving or transferring stolen vehicles. Defendant argues that trial counsel was ineffective because he failed at trial to object to the jury instructions, which Defendant contends did not incorporate the essential element of "intent to procure or pass title to a vehicle" in the offense of possession of a stolen vehicle under Section 30-16D-4(A). Similarly, Defendant also claims that trial counsel's motion for directed verdict was deficient due to his failure to argue that the evidence was insufficient to show that Defendant intended to procure or pass title to the stolen vehicles. Because we have expressly decided in this Opinion that the offense of possession of a stolen vehicle under Section 30-16D-4(A) does not require the element of intent to procure or pass title to a vehicle, Defendant's claims of ineffective assistance of counsel on these grounds fail.

{35} Defendant also makes several general allegations related to trial counsel's conduct, including the failure to subpoena key witnesses, failure to effectively cross-examine witnesses, and failure to consult Defendant in the preparation of his defense. These types of arguments call into question matters of defense counsel's trial strategy and tactics, which "we will not second guess" on appeal. *State v. Ortega*, 2014-NMSC-017, ¶ 56, 327 P.3d 1076 (internal quotation marks and citation omitted). "We do not find ineffective assistance of counsel if there is a plausible, rational trial strategy or tactic to explain counsel's conduct." *State v. Allen*, 2014-NMCA-047, ¶ 17, 323 P.3d 925. In addition, despite the strong presumption in favor of trial counsel's competency, Defendant in his brief in chief did not provide detailed explanations or record citations to support his allegations that trial counsel's performance was deficient or prejudiced him. We decline to review or consider Defendant's ineffective assistance of counsel arguments when they are unsupported and purely speculative. *See id.* ¶ 18 (declining to review an ineffective assistance of counsel claim where "the necessary facts and arguments are not sufficiently developed [by defendant] for review or proper consideration"); *see also 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.").

{36} Although we hold that Defendant has failed to make a prima facie case of ineffective assistance of counsel on direct appeal, he is not precluded from pursuing these issues in a collateral habeas corpus proceeding. *See State v. Crocco*, 2014-NMSC-016, ¶ 24, 327 P.3d 1068 (noting that "[i]f facts beyond those in the record on appeal could establish a legitimate claim of ineffective assistance of counsel, [a d]efendant may assert it in a habeas corpus proceeding where an adequate factual record can be developed for a court to make a reasoned determination of the issues").

CONCLUSION

{37} For the foregoing reasons, we affirm Defendant's four convictions for possession of the stolen enclosed trailer, the snowmobile, the Polaris ATV, and the Honda ATV, contrary to Section 30-16D-4(A).

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

JAMES J. WECHSLER, Judge

WE CONCUR:

CYNTHIA A. FRY, Judge

J. MILES HANISEE, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-090

Filing Date: June 26, 2015

Docket No. 33,236

SANDRA LEWIS,

Worker-Appellee,

v.

AMERICAN GENERAL MEDIA and GALLAGHER BASSETT,

Employer/Insurer-Appellant.

Peter D. White
Santa Fe, NM

for Appellee

Paul L. Civerolo, L.L.C.
Paul L. Civerolo
Albuquerque, NM

for Appellant

OPINION

WECHSLER, Judge.

{1} We are again called upon to address the application of the Workers' Compensation Act, NMSA 1978, §§ 52-1-1 to -70 (1929, as amended through 2013), to a worker certified to receive treatment with medical marijuana under the Lynn and Erin Compassionate Use Act (Compassionate Use Act), NMSA 1978, §§ 26-2B-1 to -7 (2007). In *Vialpando v. Ben's Automotive Services*, we held that the Workers' Compensation Act authorizes reimbursement for medical marijuana and declined to hold that federal law required a different result. 2014-NMCA-084, ¶¶ 1, 16, 331 P.3d 975, *cert. denied*, 331 P.3d 924 (2014). In *Maez v. Riley Industrial*, we considered the sufficiency of the evidence that supported reimbursement for medical marijuana for the worker in that case. 2015-NMCA-049, 347 P.3d 732.

{2} In this case, Gallagher Bassett and its insurer American General Media (collectively, Employer) challenge the sufficiency of the evidence supporting the conclusions of the Workers' Compensation Judge (WCJ) that the use of medical marijuana by Worker Sandra Lewis constituted reasonable and necessary medical care that required reimbursement. Specifically, Employer argues that the evidence offered by Worker's authorized health care provider was insufficient and that the WCJ erred by relying on testimony from an unauthorized health care provider who had provided a certification for Worker's use of medical marijuana under the Compassionate Use Act. Employer further argues that the conflict between New Mexico and federal law concerning the use of medical marijuana precludes the validity of the amended compensation order in this case. We hold that the medical certification forms and notes of Worker's authorized health care provider were substantial evidence to support the WCJ's conclusion that Worker's use of medical marijuana constitutes reasonable and necessary medical care and that, as discussed in *Vialpando*, the conflict between New Mexico and federal law does not support failing to give recognition to the amended compensation order. We therefore affirm.

BACKGROUND

{3} Worker suffered a compensable, work-related injury to her lower back in December 1998. She underwent several surgical procedures and currently suffers from post-laminectomy syndrome in the lumbar region. She suffers chronic pain. Since her injury, Worker has taken numerous drugs as part of her pain management, including Oxycontin, oxycodone, Soma, Norflex, gabapentin, Lyrica, Percocet, fentanyl, and Zantac.

{4} The issues concerning Worker's treatment began on April 16, 2012, when

Employer filed an application requesting an independent medical examination (IME) in order to determine the scope of reasonable and necessary treatment for Worker's condition. In its application, Employer stated that Worker had been using medical marijuana and taking prescribed pain medication, which was inconsistent with Worker's belief that medical marijuana "is now the most effective medication from all of her different treatment and she is concerned by potential side effects." The WCJ appointed Dr. Carl Adams, a psychologist, "to address Worker's ongoing pain management and use of pain medications." Dr. Adams' recommendations, issued September 17, 2012, supported Worker's request to use medical marijuana to control her pain as reasonable and appropriate.

{5} Worker was originally certified to participate in the New Mexico Department of Health Medical Cannabis Program (the program) on March 22, 2010. On July 31, 2012, Dr. Carlos Esparza, Worker's authorized health care provider, provided the written certification under the Compassionate Use Act for Worker to re-enroll in the program. As required by the Compassionate Use Act, Dr. Esparza certified that Worker had "debilitating" medical conditions (painful peripheral neuropathy and severe chronic pain) and that Worker had "current unrelieved symptoms that have failed other medical therapies." Dr. Esparza stated that the "benefits of medical marijuana outweigh the risk of hyper doses of narcotic medications."

{6} On May 30, 2013, Dr. Stephen I. Rosenberg, after a medical consultation as a second doctor required for certification of Worker's re-enrollment, also signed a certification form for Worker's re-enrollment in the program, listing Worker's condition as severe chronic pain and making essentially the same certifications as Dr. Esparza. On July 31, 2013, Joel Gelinas, a physician's assistant in Dr. Esparza's office, also signed a certification form for Worker's re-enrollment in the program. He listed Worker's condition as severe chronic pain and certified that Worker's condition was debilitating and that "standard treatments have failed to bring adequate relief."

{7} After trial, conducted on August 8, 2013, the WCJ found that Worker's authorized health care provider was Dr. Esparza and physician's assistant Joel Gelinas and that "the office of Dr. Esparza" had recommended Worker "as a candidate for medical marijuana under the Compassionate Use Act." The WCJ concluded that Worker's use of medical marijuana under the program constituted reasonable and necessary medical care and required Employer to reimburse Worker for the receipts she submitted for her certified purchases. Employer filed this appeal.

REASONABLE AND NECESSARY MEDICAL CARE

{8} As its first main argument, Employer challenges the sufficiency of the evidence supporting the WCJ's conclusion that Worker's use of medical marijuana constituted reasonable and necessary medical care. Employer asserts this challenge in two ways, arguing that (1) "[t]he record does not support [the WCJ's] finding that [W]orker was recommended as a candidate for medical marijuana under the [C]ompassionate [U]se [A]ct through the office of Dr. Esparza" and (2) the WCJ "went outside" the Workers' Compensation Act and interpreting case law "to rely on testimony by an unauthorized provider" to make its finding of reasonable and necessary care.

Testimony of an Unauthorized Provider

{9} We first address Employer's argument that the WCJ improperly relied on the testimony of an unauthorized health care provider in determining that Worker's use of medical marijuana constituted reasonable and necessary medical care. In this regard, Employer contends that because Worker needed the certification of two health care professionals to be able to use medical marijuana under the Compassionate Use Act, the WCJ necessarily relied on the certification of Dr. Rosenberg in the WCJ's determination of the necessity of medical marijuana care. Thus, according to Employer, the WCJ improperly considered the certification of Dr. Rosenberg who was not qualified to present testimony under the Workers' Compensation Act because he was neither Worker's authorized health care provider nor a health care provider authorized to perform an IME. *See* § 52-1-51(C) ("Only a health care provider who has treated the worker . . . or the health care provider providing the independent medical examination . . . may offer testimony at any workers' compensation hearing concerning the particular injury in question.").

{10} Employer's argument requires us to interpret the Workers' Compensation Act in connection with the Compassionate Use Act based on the facts of this case. We thus afford it de novo review. *Vialpando*, 2014-NMCA-084, ¶ 5.

{11} Employer's argument fatally interconnects the Workers' Compensation Act and the Compassionate Use Act. In order for a worker to qualify for medical care after a compensable injury under the Workers' Compensation Act, the care must be "reasonable and necessary" care from a health care provider. Section 52-1-49(A). Typically, in the event of a dispute between a worker and an employer pertaining to the reasonableness or necessity of medical care, a worker will establish that care was reasonable and necessary through evidence provided by a health care provider. *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 Workers' Compensation Act restricts testimony in this regard to either a treating health care provider or an independent medical examiner. Section 52-1-51(C).

{12} In order to qualify for medical marijuana under the Compassionate Use Act, "a person licensed in New Mexico to prescribe and administer" controlled substances must certify to the opinion that "the patient has a debilitating medical condition" as defined in the Compassionate Use Act and "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). Regulations promulgated by the New Mexico Department of Health require two written certifications when the debilitating medical condition is, as for Worker, severe chronic pain: one from a primary health care provider and one from a "specialist with expertise in pain management or . . . expertise in the disease process that is causing the pain"). 7.34.3.8(B)(1)(b) NMAC (12/30/2010)[1].

{13} However, no statutory or regulatory provision connects these requirements under

[1]Section 7.34.3 NMAC was amended in 2015. The previous version (12/30/2010) is cited in this Opinion because it is applicable to the pending case.

the two separate statutory schemes. Practically, a worker first must be enrolled in the medical marijuana program under the Compassionate Use Act before any issue can arise under the Workers' Compensation Act as to whether medical marijuana use is reasonable and necessary care. But, otherwise, the two determinations are not dependent on each other; they are made separately, at different times, and by different administrative authorities. No express provision of the Workers' Compensation Act grants a WCJ the authority to review a Department of Health enrollment determination. *See Jones v. Holiday Inn Express*, 2014-NMCA-082, ¶ 19, 331 P.3d 992 ("Since the [Workers' Compensation Administration] is a creature of the Legislature, [the Court] cannot expand the [Workers' Compensation Administration's] jurisdiction over matters unless the Legislature expressly granted the [Workers' Compensation Administration] jurisdiction or jurisdiction can be found by necessary implication.").

{14} Thus, although the Department of Health requires that a person obtain two written certifications in order to be enrolled in the program and receive medical marijuana for severe chronic pain, the Workers' Compensation Act has no such quantitative requirements for a WCJ to determine that medical care is reasonable and necessary. Indeed, the Workers' Compensation Act contemplates that fewer, rather than more, professionals will provide input by restricting testimony to treating providers and independent medical examiners. Section 52-1-51(C). Nor does the Workers' Compensation Act require, as Employer urges, that a WCJ make a determination that a worker enrolled in the Medical Cannabis Program was properly eligible for medical marijuana use. The Compassionate Use Act and its associated regulations control the manner in which that determination is made, and the Department of Health bears the responsibility of approving applications for enrollment in the Medical Cannabis Program. *See* § 26-2B-7(G) (providing that the Department of Health shall issue registry identification cards for the Medical Cannabis Program to patients who submit applications in accordance with the Department's rules); *see also* 7.34.3.7(JJ) (12/30/2010) (defining "registry identification card" as "a document issued by the department which identifies a qualified patient authorized to engage in the use of cannabis for a debilitating medical condition" (internal quotation marks omitted)). All that is required by the Workers Compensation Act is that the WCJ determine, based on evidence from one or more authorized health care providers, whether a worker's medical treatment for a work injury is reasonable and necessary. Section 52-1-51.

{15} The facts of this case are illustrative. Dr. Esparza and Joel Gelinas were Worker's authorized health care provider. The evidence included their certifications for Worker's participation in the Medical Cannabis Program and use of medical marijuana as well as their related medical notes. Dr. Rosenberg, who was not an authorized health care provider under the Workers' Compensation Act, also submitted a written certification in support of Worker's enrollment in the program. *See* § 52-1-49 (stating the manner for selection of an authorized health care provider).

{16} Although Dr. Rosenberg's certification may have been necessary for Worker's enrollment in the program, it was unnecessary evidence to establish the reasonableness and necessity of Worker's medical care because Dr. Rosenberg was not an authorized health care provider. Thus,

Employer argues that Worker's medical marijuana treatment could not be considered medically necessary because the WCJ could not consider the certification of Dr. Rosenberg as an unauthorized health care provider in meeting the eligibility requirements of the Compassionate Use Act.[2] However, even though the administrative regulations promulgated by the Department of Health pursuant to the Compassionate Use Act may require more than one certification for the condition of severe chronic pain, nothing in the Workers' Compensation Act requires evidence from more than one health care provider in order to establish the reasonableness and necessity of medical care. Worker was enrolled in the Medical Cannabis Program; it was not the role of the WCJ to second-guess that determination, and the issue is not before us. In this regard, the only pertinent issue in this appeal is whether Worker presented substantial evidence to the WCJ for the WCJ to determine that medical marijuana use was reasonable and necessary medical care.

Sufficiency of the Evidence

{17} We thus turn to whether substantial evidence supported the WCJ's conclusion, taking into account Employer's arguments concerning the receipt in evidence of Dr. Rosenberg's certification.[3] We review for substantive evidence 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. "Whole record review contemplates a canvass by the reviewing court of all the evidence bearing on a finding or decision, favorable and unfavorable, in order to determine if there is substantial evidence to support the result." *Leonard v. Payday Prof'l*, 2007-NMCA-128, ¶ 10, 142 N.M. 605, 168 P.3d 177 (alteration, internal quotation marks, and citation omitted). Substantial evidence is evidence that demonstrates "the reasonableness of an agency's decision, and we neither reweigh the evidence nor replace the fact finder's conclusions with our own." *Dewitt*, 2009-NMSC-032, ¶ 12 (citation omitted). We give deference to the factfinder and will not disturb the WCJ's findings on appeal if they are supported by substantial evidence on the record as a whole. *Herman v. Miners' Hosp.*, 1991-NMSC-021, ¶ 6, 111 N.M. 550, 807 P.2d 734.

{18} The certification forms from both Dr. Esparza and Joel Gelinas stated that Worker suffered from severe chronic pain and that other treatment had not worked. Specifically, Dr. Esparza stated that the benefits of medical marijuana would "outweigh the risk of hyper doses of narcotic medications."

{19} Employer points to the medical notes of Dr. Esparza and Joel Gelinas and contends that they are equivocal statements and that the opinions expressed are not "of medical reasonableness and necessity." Dr. Esparza's July 17, 2012 medical notes state that Worker informed him that she had reduced her use of prescribed medications because she had been using medical marijuana. Dr. Esparza stated that "it would be reasonable for us to drop some of these narcotic medications in place of the medical marijuana if that is helping her. I

[2]Employer also intimates on appeal that Dr. Rosenberg's certification could not support Worker's enrollment in the program because he was not Worker's primary physician. Employer, however, does not indicate the manner in which such an issue was preserved before the WCJ. "To preserve a question for review it must appear that a ruling or decision" below was fairly invoked. Rule 12-216(A) NMRA.

[3]The certification forms of Dr. Esparza, Dr. Rosenberg, and Joel Gelinas were all received in evidence over Employer's objection.

would be happy to fill out her form for this." In Joel Gelinas' July 31, 2012 medical note, he observes that Worker stated that she needed a referral to her primary care doctor "so that [her use of medical marijuana] could be associated with her work injury." Worker was concerned that she was "using the marijuana to medically control her pain, which is related to her workers' compensation injury." Joel Gelinas noted that he told Worker that he would discuss the request with Dr. Esparza but that "[w]e generally do not refer patients to their primary care doctor for evaluation for a workers' compensation injury."

{20} When considered as a whole, the medical certification forms and notes of Dr. Esparza and Joel Gelinas are substantial evidence supporting the WCJ's determination. The medical certification forms certify Worker for enrollment in the program and clearly state that other treatments, that included narcotic medications, have failed. The medical certification forms are the functional equivalents of prescriptions. *Vialpando*, 2014-NMCA-084, ¶ 12. Further, Dr. Esparza expressly states in his note that "it would be reasonable" to replace some of Worker's narcotic medications if the medical marijuana was helping her and that he would be happy to complete her certification. We do not consider this language to be equivocal in view of Dr. Esparza's issuing the certification.

{21} Joel Gelinas' medical note does not detract from his certification. The practice of Dr. Esparza's office, by which Dr. Esparza and Joel Gelinas would not refer Worker to her primary physician in order to link Worker's use of medical marijuana to her work injury, does not impact the determination of whether Worker's use of medical marijuana is reasonable and necessary medical care. Dr. Esparza and Joel Gelinas were Worker's authorized health care provider who medically treated Worker; they were under no obligation to assist Worker with her legal claim. We assume that they issued their certifications in the good faith medical belief that Worker's use of medical marijuana would benefit her medical treatment. *Cf. Maez*, 2015-NMCA-049, ¶ 29 (holding that medical care was reasonable and necessary where the evidence did not support the inference that a health care provider failed to exercise medical judgment in certifying a worker for the Compassionate Use Act program). The fact that they did not refer Worker to her primary physician does not indicate that they did not have such a belief.

{22} Employer also argues that Dr. Esparza "would not have prescribed a controlled substance to [W]orker because it defies logic that a doctor holding a valid license would jeopardize himself or his patient by recommending illegal use of a controlled substance." According to Employer, Dr. Esparza's "discomfort with recommending or prescribing medical marijuana is underscored by his refusal to provide [W]orker with a referral to another doctor, even though she requested this referral." We are unpersuaded by this speculation. First, and significantly, Employer makes no reference to the record in support of his attributions to Dr. Esparza. *See* Rule 12-213(A)(4) NMRA (requiring an appellant to provide citations to the record proper in support of each argument); *see also Fenner v. Fenner*, 1987-NMCA-066, ¶ 28, 106 N.M. 36, 738 P.2d 908 (holding that the Court need not consider arguments raised on appeal that are unsupported by record citations). Second, although federal law prohibits prescribing marijuana for medical use, the Compassionate Use Act specifically contemplates the use of medical marijuana in

New Mexico as a form of medical treatment for certain conditions. 21 U.S.C. § 812 (2012); *see Gonzales v. Raich*, 545 U.S. 1, 27 (2005) (stating that "by characterizing marijuana as a Schedule I drug, Congress expressly found that the drug has no acceptable medical uses"); Sections 26-2B-2 to -7. Third, Joel Gelinas' note is much too unclear to reach a conclusion that Dr. Esparza had adopted any office policy regarding referral of patients to their primary care doctors "for evaluation of a workers' compensation injury" because of any concern about medical marijuana.

{23} We also do not believe that the testimony of Dr. Adams undercuts the WCJ's conclusion that medical marijuana constituted reasonable and necessary medical care. Dr. Adams, a psychologist, recommended in his IME report that he supported Worker's "request to begin medical cannabis use to control her pain" and that "her request seems reasonable and appropriate." In his deposition testimony, he again stated that he thought that medical marijuana was reasonable and advisable for treatment of Worker's pain. Although Dr. Adams did not state, as Employer contends, that "Worker's use of medical marijuana was a medical necessity," the absence of such testimony does not demonstrate that the WCJ's conclusion is unsupported by substantial evidence based on the evidence as a whole.

CONFLICT WITH FEDERAL LAW

{24} Employer additionally argues that the WCJ's order requiring it to reimburse Worker raises a conflict between federal and state law and that, with such conflict, the federal law preempts state law, rendering the WCJ's order without effect. This argument presents an issue of law that we review on a de novo basis. *See Largo v. Atchison, Topeka & Santa Fe Ry. Co.*, 2002-NMCA-021, ¶ 5, 131 N.M. 621, 41 P.3d 347 (stating that federal preemption is a question of law that the Court reviews de novo).

{25} We agree with Employer that the Controlled Substances Act (CSA), 21 U.S.C. §§ 801-904 (2012) conflicts with the Compassionate Use Act in that the CSA does not except marijuana used for medical purposes from its prohibition of possession or distribution of even small amounts of marijuana. 21 U.S.C. §§ 812, 822, 823(f); *Gonzales*, 545 U.S. at 27 (stating that the CSA "designates marijuana as contraband for *any* purpose"). In *Vialpando*, we recognized that "the Supremacy Clause dictates that any conflict between the Compassionate Use Act and the CSA would be resolved in favor of the CSA." *Vialpando*, 2014-NMCA-084, ¶ 15.

{26} Nonetheless, we declined to reverse the WCJ's order in *Vialpando* based on either federal law or public policy, observing that the employer had not demonstrated that the order would have required it to violate a federal statute and that federal public policy was ambiguous in contrast with New Mexico's clear public policy expressed in the Compassionate Use Act. *Id.* ¶¶ 15-16. Employer would distinguish *Vialpando* on two grounds: (1) a second memorandum issued by the United States Department of Justice (Department of Justice) subsequent to the memorandum discussed in *Vialpando* indicates that New Mexico law does not meet the standard contemplated by the Department of Justice; and (2) in contrast to *Vialpando*, Employer has identified the federal statute that would embrace Employer's activity in carrying out the WCJ's order.

{27} As to the initial memorandum, in

Vialpando we discussed the memorandum from James M. Cole, Deputy Attorney General, to All United States Attorneys, entitled Guidance Regarding Marijuana Enforcement, dated August 29, 2013. *Vialpando,* 2014-NMCA-084, ¶ 16. We noted that the memorandum was not dispositive, but included "equivocal statements about state laws allowing marijuana use for medical and even recreational purposes." *Id.* We observed that, although the memorandum affirmed that the CSA declared marijuana to be illegal and that federal prosecutors would continue to enforce the CSA, the memorandum identified eight areas of enforcement priority that did not include medical marijuana. *Id.* ¶ 16 n.1. Beyond those priorities, the memorandum indicated that the Department of Justice "would generally defer to state and local authorities." *Id.* ¶ 16.

{28} According to Employer, the New Mexico statutory and regulatory scheme is not sufficient to satisfy Department of Justice requirements that justify deference to state law. Employer points to language in the second memorandum that indicates that the Department of Justice's position "rested on the expectation that states that have enacted laws authorizing marijuana-related conduct will implement clear, strong and effective regulatory and enforcement systems in order to minimize the threat posed to federal enforcement priorities." Memorandum from James M. Cole, Deputy Attorney General, to All United States Attorneys, Guidance Regarding Marijuana Financial Related Crimes (February 14, 2014).

{29} More particularly, Employer argues that the Workers' Compensation Act and the Compassionate Use Act do not meet the standard set forth in the second memorandum. However, as we stated in *Vialpando,* the New Mexico Legislature adopted the Compassionate Use Act "to allow the beneficial use of medical cannabis in a regulated system for alleviating symptoms caused by debilitating medical conditions and their medical treatments." 2014-NMCA-084, ¶ 16 (quoting Section 26-2B-2 (internal quotation marks omitted)). It is not clear the manner in which any deficiency in this system is an issue in this case, and Employer's arguments in this regard are not specific.

{30} Employer seems to fault the WCJ for failing to provide oversight for Worker's purchase and use of medical marijuana by failing to provide a mechanism by which Worker would be responsible for demonstrating her purchases are consistent with law or that would allow Employer to investigate "the legitimacy" of Worker's purchases. But, the WCJ's amended compensation order requires Employer's reimbursement only upon Worker submitting timely receipts for medical marijuana "purchased consistent with law." Worker demonstrated that she was a certified participant in the medical marijuana program. If Employer is not satisfied that Worker is submitting "legitimate" receipts, Employer has recourse through the Workers' Compensation Act and the Workers' Compensation Administration. *See* NMSA 1978, § 52-10-1(A) (1990) (requiring that a health care provider release to an employer or employer's insurer, upon request, medical bills related to medical care service provided to a worker); *see also* NMSA 1978, § 52-5-1.3 (2013) (requiring the Workers' Compensation Administration's Enforcement Bureau to investigate fraudulent conduct concerning the payment of benefits to a worker).

{31} To the extent that Employer argues that the New Mexico laws and regulations are

not sufficient to obviate Employer's exposure to violation of federal law, its argument overlaps with the second aspect of its argument to distinguish *Vialpando*—that it has identified its continued federal exposure. According to Employer, if it were to follow the WCJ's order, and despite the Department of Justice's memoranda, it would be civilly responsible for violation of the CSA by way of conspiracy or aiding and abetting. As distinguished from *Vialpando*, Employer cites the federal statutes it believes would implicate him, 21 U.S.C. § 841A(a) (prohibiting a person from knowingly possessing a controlled substance as defined by federal law and in an amount specified by the United States Attorney General); 21 U.S.C. § 846 (prohibiting a person from attempting or conspiring to commit a violation of federal law related to controlled substances under 21 U.S.C., Chapter 13, Subchapter 1); 18 U.S.C. § 2(a) (2012) ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.").

{32} However, Employer's argument raises only speculation in view of existing Department of Justice and federal policy. Nothing in the Department of Justice's second memorandum alters its position regarding the areas of enforcement set forth in the initial memorandum. Medical marijuana is not within the list. Moreover, on December 16, 2014, the Consolidated and Further Appropriations Act of 2015 to fund the operations of the federal government was enacted. It states that "[n]one of the funds made available in this Act to the Department of Justice may be used, with respect to the [s]tates of . . . New Mexico, . . . , to prevent such States from implementing their own State laws that authorize the use, distribution, possession or cultivation of medical marijuana." We reach the same conclusion that we did in *Vialpando*. In view of the equivocal federal policy and the clear New Mexico policy as expressed in the Compassionate Use Act, we decline to reverse the WCJ's amended compensation order.

CONCLUSION

{33} We affirm the amended compensation order.

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

JAMES J. WECHSLER, Judge

WE CONCUR:

RODERICK T. KENNEDY, Judge

M. MONICA ZAMORA, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-091

Filing Date: June 30, 2015

Docket No. 32,564

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

MANUEL FERNANDEZ,

Defendant-Appellant.

Hector H. Balderas, Attorney General
Santa Fe, NM
Jane A. Bernstein, Assistant Attorney General
Albuquerque, NM

for Appellee

Jorge A. Alvarado, Chief Public Defender
J. K. Theodosia Johnson, Assistant Appellate Defender
Santa Fe, NM

for Appellant

OPINION

FRY, Judge.

{1} Defendant appeals from his conviction for criminal damage to property valued in excess of $1000 on the ground of insufficiency of the evidence. He also appeals from his sentencing as a habitual offender, arguing that the State made no *prima facie* showing of three prior usable felonies. We agree that the evidence for Defendant's felony conviction was insufficient and therefore reverse.

BACKGROUND

{2} On December 5, 2010, David Satrun, the victim, encountered a green Dodge Durango driving erratically and aggressively. The driver of the Durango, later identified as Defendant, passed Satrun more than once before getting out of his vehicle to yell at Satrun and kick Satrun's door. Satrun drove away, but Defendant followed and struck the back of Satrun's vehicle with his Durango. Defendant then pulled up alongside Satrun's door, pinning it shut. Satrun again drove away from Defendant to a gas station, where he called the police. At the time of the accident, Satrun was driving a 1998 white GMC pickup.

{3} Defendant was eventually arrested and charged with seven counts: aggravated assault with a deadly weapon (Counts 1 and 2); criminal damage to property in excess of $1000 (Count 3); driving with a suspended license (Count 4); leaving the scene of an accident (Counts 5 and 6); and concealing identity (Count 7). He was convicted on Counts 3, 5, 6, and 7, and sentenced as a habitual offender on the ground that he had three usable prior felonies. Defendant appeals on two grounds: (1) the evidence was insufficient to prove the amount of property damage to Satrun's pickup, making Count 3 unsustainable; and (2) the enhanced sentence was not legal because the State did not provide adequate proof that the out-of-state felony conviction used during sentencing was actually his.

DISCUSSION

{4} We review claims as to the sufficiency of the evidence "in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict." *State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711, 998 P.2d 176. However, we must also determine whether substantial evidence exists "and supports a verdict of guilt beyond a reasonable doubt with respect to every element essential for conviction." *State v. Kent*, 2006-NMCA 134, ¶ 10, 140 N.M. 606, 145 P.3d 86. If the evidence presented "must be buttressed by surmise and conjecture, rather than logical inference[,]" it will not be sufficient to support a conviction. *State v. Vigil*, 1975-NMSC-013, ¶ 12, 87 N.M. 345, 533 P.2d 578 (internal quotation marks and

citation omitted). In making this determination, we do not in any way "substitute [our] judgment for that of the factfinder." *State v. Mora*, 1997-NMSC-060, ¶ 27, 124 N.M. 346, 950 P.2d 789, *abrogation on other grounds recognized by Kersey v. Hatch*, 2010-NMSC-020, ¶ 17, 148 N.M. 381, 237 P.3d 683.

{5} To convict Defendant of felony criminal damage to property, the State was required to prove beyond a reasonable doubt both that Defendant intentionally damaged the property of another and that the amount of damage exceeded $1000. *See* NMSA 1978, § 30-15-1 (1963); UJI 14-1501 NMRA. In accordance with UJI 14-1510 NMRA, the "amount of damage" is defined as:

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

{6} During the trial, the State offered substantial evidence of damage to Satrun's pickup, including several photographs of the truck taken by a sheriff's deputy. Satrun testified to further explain the damage, claiming that his back bumper was "destroyed," his tailgate misaligned, and that Defendant's kick to his front door left a severe dent. He admitted that some of the damage pictured had been incurred during previous accidents. All told, Satrun testified that the cost to repair the damage Defendant inflicted was about $1500 or $1600.

{7} Defendant does not dispute that the cost of repair was over $1000, but he argues that "the mere cost of repair was insufficient—the State had to prove that the cost of replacement was not less than the cost of repair." The State did not offer testimony as to the condition of the pickup, its mileage, or its likely replacement cost, arguing that "there is no absolute requirement" that it do so.

{8} The instruction UJI 14-1510 provides two ways of determining the amount of damage: "diminution in value" and "cost of repair." *State v. Barreras*, 2007-NMCA-067, ¶¶ 5-6, 141 N.M. 653, 159 P.3d 1138. The first method, "diminution in value," is the "before[-]and[-]after value" of the property. *Id.* ¶ 5. The second method, at issue here, is the "cost of repair." In *Barreras*, the defendant used a tire iron to damage a one-year-old Cadillac Escalade that was previously in good condition. *Id.* ¶ 2. The cost to repair the damage was $5100, but the State offered no specific evidence as to replacement cost. *Id.* ¶¶ 2, 8. The defendant argued on appeal that "to prove the amount of damages under the second method, the State must present evidence of both the cost of repair and the cost of replacement so that the jury can compare them to determine if the cost of repair exceeds the replacement cost." *Id.* ¶ 8. We rejected that argument for two reasons: (1) the defendant did not "seriously place in dispute on appeal" whether the replacement cost exceeded the cost of repair; and (2) the "average juror" would be aware that the replacement cost of the Cadillac would be higher than the cost of repair. *Id.* ¶ 9. We reasoned that "if the cost of repair does not exceed the replacement cost of the property, then the cost of repair is the value used to determine the amount of damage." *Id.* ¶ 6. Because the jurors "would know that such a high-end sport utility vehicle has a

replacement cost well over $5100[,]" the cost of repair was the appropriate value to use. *Id.* ¶ 9.

{9} As we noted in *Barreras*, however, "[e]vidence of replacement cost may be necessary where the vehicle is older and/or made by a lesser-named manufacturer" than the one-year-old Cadillac at issue in that case. *Id.* ¶ 9. As our Supreme Court has recently affirmed, the amount of damage is "the cost of repair or replacement, *whichever is less*." *State v. Cobrera*, 2013-NMSC-012, ¶ 8, 300 P.3d 729 (emphasis added). In some cases, as in *Barreras*, the facts may clearly establish that the replacement cost would exceed the cost of repair and no additional evidence or testimony may be required; nonetheless, the replacement cost remains part of the State's burden. *Id.*; *Barreras*, 2007-NMCA-067, ¶ 9.

{10} In the present case, the "average juror" had no basis upon which to determine that the replacement cost of Satrun's pickup truck, which was over a decade old and had noticeable preexisting damage, would be "well over" the $1500 cost of repair. *Barreras*, 2007-NMCA-067, ¶ 9. The State observes that the jury was given "photographs of [Satrun's] stricken truck" in addition to the testimony regarding the cost of repair, but the photographs included evidence of unrelated cosmetic damage, dirt, and general wear. Without further information regarding the pickup, such as its mileage, the photographs could not provide a sufficient basis for concluding that the replacement cost would be greater than the cost of repair. Exactly as contemplated in *Barreras*, this case required the State to submit evidence as to such replacement cost so that the jury could reasonably determine whether it exceeded the cost of repair or not. 2007-NMCA-067, ¶ 9.

{11} The State suggests that Defendant waived the issue of the pickup's proper valuation when he failed to cross-examine the State's witnesses on the replacement cost. Because this is not an affirmative defense but rather a matter of the State's own burden, Defendant bore no obligation to offer or contest evidence that the State itself did not present. *State v. Munoz*, 1998-NMSC-041, ¶ 15, 126 N.M. 371, 970 P.2d 143. Furthermore, whatever his strategy in cross-examination, Defendant has "seriously place[d] in dispute on appeal" that the pickup was worth the $1,500 cost of repair, given its age, previous damage, unknown mileage, and unknown mechanical condition. *Barreras*, 2007-NMCA-067, ¶ 9.

{12} This case is therefore distinguishable from *Barreras* and, by refusing to offer evidence regarding replacement cost, the State has failed to meet its burden for felony property damage beyond a reasonable doubt.

{13} In some cases, "appellate courts have the authority to remand a case for entry of judgment on the lesser included offense and resentencing rather than retrial when the evidence does not support the offense for which the defendant was convicted but does support a lesser included offense." *State v. Haynie*, 1994-NMSC-001, ¶ 4, 116 N.M. 746, 867 P.2d 416. The "direct remand" rule does not apply, however, in cases in which the jury was not instructed on a lesser included offense. *State v. Villa*, 2004-NMSC-031, ¶¶ 9, 12, 136 N.M. 367, 98 P.3d 1017.

{14} Here, the jury was not instructed on lesser-included offenses, such as misdemeanor property damage amounting to less than $1000. When the State only instructs on the greater offense, we will not second-guess its "all-or-nothing trial strategy," *id.* ¶ 14,

because to convict Defendant of an offense with which the jury was never presented would deprive him of notice and be inconsistent with our law. *State v. Slade*, 2014-NMCA-088, ¶ 38, 331 P.3d 930. Therefore, we will not remand for resentencing Defendant for misdemeanor property damage where the evidence is insufficient to demonstrate the requisite amount of damages for a felony conviction.

CONCLUSION

{15} For the reasons stated above, we reverse Defendant's conviction as to Count 3, for criminal damage to property valued in excess of $1000. Because all the remaining counts of which Defendant was convicted are misdemeanors, the habitual sentencing enhancement is no longer at issue. *See* NMSA 1978, § 31-18-17(A) (2003) (applying to "[a] person convicted of a noncapital felony" who has one or more prior felony convictions).

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

CYNTHIA A. FRY, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

RODERICK KENNEDY, Judge

Certiorari Granted, August 26, 2015, No. 35,398

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-092

Filing Date: June 10, 2015

Docket No. 33,813

ISABEL ARMENTA, Personal Representative for ESTATE OF MANUEL ARMENTA, Deceased,

Plaintiff-Appellant,

v.

A.S. HORNER, INC., a New Mexico corporation, JOHN DOE I and JOHN DOE II,

Defendants-Appellees.

Law Office of Mel B. O'Reilly, LLC
Mel B. O'Reilly
Albuquerque, NM

for Appellant

Johnson Law Firm, L.C.
Thomas L. Johnson
Andrew L. Johnson
Albuquerque, NM

for Appellee

OPINION

BUSTAMANTE, Judge.

{1} In this appeal from the grant of summary judgment to A.S. Horner, Inc. (Defendant), we address whether there exist disputed material facts as to (1) whether the Workers' Compensation Act provides the exclusive remedy for Isabel Armenta's claim, and (2) whether Defendant negligently entrusted one of its vehicles to Manuel Armenta (Manuel), Plaintiff's husband and decedent. We reverse.

BACKGROUND

{2} Isabel Armenta, (Plaintiff), personal representative of the estate of her husband, Manuel, brought suit against Manuel's employer, Defendant, for negligent entrustment after Manuel was killed in a single-car accident while driving Defendant's vehicle. The undisputed facts leading to Manuel's death are as follows. Manuel and a number of other workers were sent to Springer, New Mexico, to work on road maintenance on I-25. Defendant arranged for motel rooms for some of its workers, including Manuel, while they were in Springer. During the last week of work in Springer, Defendant provided a Chevy Suburban vehicle to transport some of the workers from Albuquerque to Springer.

{3} Because Manuel had been convicted for driving while intoxicated in 2001, Defendant's safety director had determined that Manuel would not be permitted to drive Defendant's vehicles, and he was listed on Defendant's "do not drive" list. Nevertheless, although the parties dispute whether Manuel was issued the Suburban in Albuquerque, they agree that at some point Manuel drove the vehicle after it was picked up from Defendant's facility. They also agree that after work on the day of the accident, Manuel drove the Suburban from the motel to the grocery and liquor stores and returned with supplies for a barbecue with the other employees. The employees at the motel, including Manuel's supervisor, had pitched in money to purchase these supplies. Both Manuel's supervisor and a superintendent employed by Defendant knew that Manuel had driven the Suburban to or while in Springer. The superintendent had advised Manuel in the week before the accident that Defendant's vehicles were supposed to be parked after work hours, except that they could be used to pick up supplies needed for the night. In addition, on the evening of the accident, after eating dinner with the employees and as he was leaving for his room, Manuel's supervisor told the employees, including Manuel, "to drink moderately and to not leave [the motel]."

{4} In spite of this warning, Manuel and another employee left the motel in the Suburban headed toward Raton. Manuel was killed in an accident about five miles north of Springer on I-25. Manuel's blood alcohol concentration (BAC) was .23 at the time of his death.

DISCUSSION

{5} Defendant argued in the motion for summary judgment that Plaintiff's claims "are barred by the exclusivity provisions of the Workers' Compensation Act" or, alternatively, "Plaintiff cannot meet the requisite evidentiary standard of gross negligence and reckless disregard set forth in *Sanchez v. San Juan Concrete Co.*, 1997-NMCA-068, 123 N.M. 537, 943 P.2d 571." It is not clear from the district court's order on which basis summary judgment was granted. Defendant points to the district court's oral rulings as evidence that summary judgment was granted on the ground that the Workers' Compensation Act was Plaintiff's exclusive remedy. But "[a district] court's oral statements as to the basis for its ruling, made before judgment is entered, and not embodied therein, cannot be considered part of the judgment." *In re Adoption of John Doe*, 1982-NMCA-094, ¶ 49, 98 N.M. 340, 648 P.2d 798. We therefore consider whether summary judgment is appropriate under either theory advanced by Defendant.

A. Workers' Compensation

{6} Defendant argues that the Workers' Compensation Act (the Act) provides the exclusive remedy for Plaintiff's claim because Manuel was a traveling employee covered by the Act at the time of the accident. *See* NMSA 1978, §§ 52-1-1 to -70 (1929, as amended

through 2013). Generally, "the Act makes workers' compensation benefits the worker's exclusive remedy for all accidental injuries." *Salazar v. Torres*, 2007-NMSC-019, ¶ 11, 141 N.M. 559, 158 P.3d 449; *see* § 52-1-9; *see also* § 52-1-6(E) ("The Workers' Compensation Act provides exclusive remedies."). Section 52-1-19 precludes compensation under the Act for injuries suffered while going to work or returning home from work. This provision is known as the "going-and-coming rule." *Ramirez v. Dawson Prod. Partners, Inc.*, 2000-NMCA-011, ¶ 7, 128 N.M. 601, 995 P.2d 1043. The exception to the going-and-coming rule invoked by Defendant is known as the "traveling-employee exception." *Id.* (internal quotation marks omitted).

{7} Under the "traveling-employee exception," "[t]he general rule is that an employee whose work entails travel away from the employer's premises is, in most circumstances, under continuous workers' compensation coverage from the time he leaves home until he returns." *Id.* ¶ 11 (internal quotation marks and citation omitted). "The rationale behind the traveling[-]employee rule is that an employee who is required to travel away from home is furthering the business of his employer as he eats, sleeps, and performs other acts necessary to his health and comfort during his travels." *Id.* ¶ 12 (internal quotation marks and citation omitted). A traveling employee is one who travels to various locations as an integral part of his or her work. *Id.* ¶ 11.

{8} Since the exception applies during the entire time the employee is traveling, it necessarily encompasses injuries incurred while the employee is not actually working, such as when the employee is engaged in leisure or recreational activities. *Id.* ¶ 13. However, "one seeking compensation for an injury must still demonstrate that the injury arose out of and in the course of employment." *Id.* ¶ 14 (internal quotation marks and citation omitted); *see* § 52-1-9(B). As it pertains to leisure and recreational activities by traveling employees, this requirement is "met if the traveling employee was injured while engaging in an activity that was both reasonable and foreseeable[,]" *id.* ¶ 15, and if that activity is not "conducted in an unreasonable or unforeseeable manner." *Id.* ¶ 16. Finally, the activity "must confer some benefit on the employer; . . . it must be reasonably related or incidental to employment." *Id.* "The benefit to the employer need not be pecuniary, and may be as intangible as a well-fed and well-rested employee." *Id.* ¶ 17.

{9} A number of factors define whether a traveling employee's activity falls within the reach of the Act. These include "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). The *Chavez* Court stated the factors as "whether the activity was reasonable and foreseeable; whether the injury occurred during a distinct departure from employment for a personal errand; whether the activity was conducted in an unreasonable or unforeseeable manner; and whether the activity giving rise to the injury conferred some benefit on the employer." *Id.; see also Rodriguez v. Permian Drilling Corp.*, 2011-NMSC-032, ¶ 14, 150 N.M. 164, 258 P.3d 443 (listing additional factors). These factors "represent an attempt to draw the line between conduct reasonably related to employment and conduct that is so foreign to and removed from the employee's usual employment as to constitute an abandonment thereof." *Chavez*, 2001-NMCA-039, ¶ 12 (alteration, internal quotation marks, and citation omitted).

{10} Instead of disputing the basic facts related to the traveling-employee exception, Defendant simply argues that the exception applies and, therefore, the Act is Plaintiff's exclusive remedy. For the most part, Plaintiff does not contest that Manuel was a traveling employee. Rather, Plaintiff argues that Manuel was not in the scope and course of employment when the accident occurred. Plaintiff also argues that Manuel's conduct was unreasonable and therefore did not fall within the type of leisure activities encompassed by the Act. Although whether an employee is acting within the course of employment for purposes of the traveling-employee exception is generally a question of fact, when the relevant facts are undisputed an appellate court may resolve the issue as a matter of law. *See City of Santa Fe v. Hernandez*, 1982-NMSC-036, ¶ 6, 97 N.M. 765, 643 P.2d 851 (stating that an appellate court may determine whether an employee was in the scope of employment as a matter of law based on undisputed facts); *Flavorland Indus., Inc. v. Schumacker*, 647 P.2d 1062, 1066 (Wash. Ct. App. 1982) (stating that "[w]hether [the decedent's] intoxication constituted an abandonment of his employment was for the jury to decide"). We agree with Plaintiff that given the undisputed facts here, Manuel was not within the course of employment when he left the motel in the Suburban in an intoxicated state.

{11} First, the parties agree that Manuel was headed to Raton, that Defendant had no business interests in Raton, and that Manuel was not instructed to go to Raton and was, in fact, instructed not to leave the motel. Indeed, Defendant agrees that Manuel "took the vehicle to party in Raton." Thus, there was no reason related to his employment for Manuel to be driving the Suburban at all. Second, there is also no dispute that Manuel had been drinking alcohol before he got in the Suburban, that he was intoxicated while driving, and that an autopsy after the accident found that Manuel's BAC was .23. Even if Manuel's decision to take the vehicle for a ride could be considered foreseeable and reasonable conduct under the traveling-employee exception, doing so under the significant influence of alcohol was not reasonable. *Ramirez*, 2000-NMCA-011, ¶ 16 (agreeing with other courts holding that "injury incurred in an otherwise reasonable and foreseeable recreational activity will not be compensable if the activity was conducted in an unreasonable or unforeseeable manner"); *cf. Estate of Mitchum v. Triple S Trucking*, 1991-NMCA-118, ¶ 18, 113 N.M. 85, 823 P.2d 327 (holding that the evidence, including a BAC of .141, the employee's admission that he had been drinking the night before the accident, beer cans found in his truck, and testimony that he smelled of alcohol, was sufficient to show that the employee was intoxicated); *see* NMSA 1978, § 66-8-102(C)(1), (D)(1) (2010) (stating that it is unlawful to drive with a BAC of over .08 and that driving with a BAC of over .16 constitutes aggravated driving while intoxicated). Furthermore, no benefit can have been conferred on Defendant by Manuel's drinking excessively. *See Ramirez*, 2000-NMCA-011, ¶ 16 (stating that "the activity giving rise to the injury must confer some benefit on the employer"). We conclude that under these facts, Manuel was not within the course of his employment at the time of the accident. *Cf. Fernandez v. Lloyd McKee Motors, Inc.*, 1977-NMCA-045, ¶ 4, 90 N.M. 433, 564 P.2d 997 (holding that an employee was not in the scope of his employment where the employee was driving his employer's vehicle while intoxicated, was not pursuing the employer's business, and did not have permission to drive the vehicle at that time); *Phelps v. Positive Action Tool Co.*, 497 N.E.2d 969, 971 (Ohio 1986) (stating that "voluntary intoxication which renders an employee incapable of performing his work is a departure from the course of employment [and that] when the employee is injured in that

condition, his injury does not arise out of his employment" and holding that an employee with .21 percent BAC was "grossly intoxicated"); *Am. Safety Razor Co. v. Hunter*, 343 S.E.2d 461, 463 (Va. Ct. App. 1986) ("An employee may abandon his employment by reaching an advanced state of intoxication which renders the employee incapable of engaging in his duties.")[1]; *see generally* 3 A. Larson, Larson's Workers' Compensation Law, § 36.02 (2014). Hence, the Act does not apply to Plaintiff's claim. To the extent the district court granted summary judgment on this basis, we reverse.

B. Negligent Entrustment

{12} We turn next to whether summary judgment could properly be granted on Plaintiff's negligent entrustment claim. We begin with an overview of the law of negligent entrustment. New Mexico has adopted the general definition of negligent entrustment from the Restatement (Second) of Torts. *See Hermosillo v. Leadingham*, 2000-NMCA-096, ¶ 19, 129 N.M. 721, 13 P.3d 79. Section 308 states that

> [i]t is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.

Restatement (Second) of Torts § 308 (1965). Consistent with this definition, "the burden is upon the plaintiff to establish that [t]he motor vehicle was driven with the permission . . . of the defendant[; t]he entrustee was . . . an incompetent driver[; and t]he defendant had actual or constructive knowledge, . . . that the entrustee was incompetent." 8 Am. Jur. 2d Automobiles § 1109 (2015); *see Spencer v. Gamboa*, 1985-NMCA-033, ¶ 8, 102 N.M. 692, 699 P.2d 623 (stating that to prevail on a vehicle negligent entrustment claim, a "plaintiff must show that the defendant loaned the car to a person it either knew or should have known was an incompetent driver, and the driver's incompetence caused the injury"). Another section, Section 390, "states a specialized rule pertinent to automobiles." *Gabaldon v. Erisa Mortg. Co.*, 1997-NMCA-120, ¶ 26, 124 N.M. 296, 305, 949 P.2d 1193, *aff'd in part, rev'd in part on other grounds*, 1999-NMSC-039, 128 N.M. 84, 990 P.2d 197. Section 390 provides that

> One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

Restatement (Second) of Torts § 390 (1965). A central feature of these definitions is the act of entrustment, or permission, to use the

[1]We note that *Fernandez*, *Phelps*, and *American Safety Razor Co.* did not address the course of employment question in the context of the traveling-employee exception, and that the analysis in those cases hinged on whether the employee could carry out his or her duties despite being intoxicated. Here, Manuel was not engaged in carrying out his duties. Consequently the facts in these cases are not directly apposite. Nevertheless, we cite these cases for the general principle that severe intoxication can constitute conduct "so foreign to and removed from the employee's usual employment as to constitute an abandonment thereof." *Chavez*, 2001-NMCA-039, ¶ 12 (alteration, internal quotation marks, and citation omitted). Citation to these cases cannot be read to limit our general case law concerning the effect of intoxication on compensability under the law.

vehicle. *See* 61 C.J.S. *Motor Vehicles* § 956 (2015) (stating that "in order that the doctrine apply, it is essential that the person sought to be held legally responsible have the right of control over the vehicle. Permission, either express or implied, is thus a prerequisite to a suit for negligent entrustment of an automobile." (footnote omitted)). In *Gabaldon*, this Court observed that an important aspect of Section 308 of the Restatement (Second) of Torts "is the idea that the 'third person is entitled to possess or use the thing or engage in the activity only by the consent of the actor, and that the actor has reason to believe that by withholding consent he can prevent the third person from using the thing or engaging in the activity.' " *Gabaldon*, 1997-NMCA-120, ¶ 27 (quoting Section 308 cmt. a of the Restatement (Second) of Torts). Hence a number of negligent entrustment cases hinge on the presence or absence of such consent. *See, e.g., McManus v. Taylor*, 756 S.E.2d 709, 713 (Ga. Ct. App. 2014) ("Where the uncontroverted evidence shows that [the driver] took the [vehicle] without [the owner's] permission and knowledge, it cannot be said that [the owner] lent [the driver] the car or otherwise entrusted him with it."); *Butler v. Warren*, 582 S.E.2d 530, 532-33 (Ga. Ct. App. 2003) (holding there was no entrustment where the driver had permission to drive a truck on the owner's property but not off of it); *Evans v. Shannon*, 776 N.E.2d 1184, 1193 (Ill. 2002) (holding that where "there was no express or implied permission granted to [the driver] to use the vehicle at the time the collision occurred[,] there was no entrustment.").

{13} This principle obviously extends to preclude a negligent entrustment claim where the owner has prohibited the driver from using the vehicle. Thus, negligent entrustment does not "impose liability upon the alleged 'trustor' for the negligent operation of a vehicle which he had expressly forbidden the alleged 'trustee' to drive." *Farney v. Herr*, 358 S.W.2d 758, 761 (Tex. Civ. App. 1962); *accord Favorito v. Pannell*, 27 F.3d 716, 721 (1st Cir. 1994) ("The authorities are in substantial accord that where the alleged entrustor has prohibited the entrustee from operating the automobile or using the instrumentality in question, there is no responsibility because there has been no entrustment." (internal quotation marks and citation omitted)).

{14} Typical vehicle negligent entrustment claims involve claims against an entrustor by a person injured by a driver. It is clear that under New Mexico law such "third-party claims" are recognized. *Sanchez*, 1997-NMCA-068, ¶ 11 ("[O]ne who negligently entrusts a motor vehicle to an incompetent driver may be liable for injury to a third person caused by the driver's incompetence."). In *Sanchez*, this Court examined for the first time whether "first-party claims" would also be recognized. In other words, is an entrustor liable to the entrustee when the entrustee is injured "as a result of driving while intoxicated[?]" *Id.* ¶ 12. The Court began by noting that the holding in *Trujillo v. Trujillo*, 1986-NMCA-052, ¶ 1, 104 N.M. 379, 721 P.2d 1310, which was that "a tavernkeeper who unlawfully serves alcohol to an intoxicated patron is [not] civilly liable for injuries suffered by the patron as a result of that act[,]" was later restricted by statute. *Sanchez*, 1997-NMCA-068, ¶ 16. After passage of NMSA 1978, Section 41-11-1(B) (1986), "if the tavernkeeper acted with gross negligence and reckless disregard for the patron's safety, the tavernkeeper may be liable to the patron." *Sanchez*, 1997-NMCA-068, ¶ 16. Because it concluded that the balance of policy concerns evident in Section 41-11-1(B) justified extension of this framework to entrustors, the Court held that "one who entrusts a motor vehicle to an intoxicated person may be liable to the entrustee if the entrustor acts with gross

negligence and reckless disregard for the safety of the entrustee." *Sanchez*, 1997-NMCA-068, ¶ 20.

{15} In *Sanchez*, the entrustee stated in an affidavit that he told the entrustor, his employer, that he was "drunk, tired, hung over[,] and unfit to operate [a] cement truck." *Id.* ¶ 26. Nevertheless, the employer "refused to let [him] off work, and ordered [him] to get [his] truck, load up and begin [his] runs for the day." *Id.* Even though the entrustee told the employer again later in the day that he was drunk and unfit to drive the cement truck, the employer again refused to release him and "told [him he would] be fired if [he] did not continue to work that day." *Id.* The entrustee was injured in a single-car accident in the cement truck. *Id.* ¶ 2. The Court concluded that the fact finder could determine that the entrustee "was ordered to drive his truck despite the fact that he was visibly intoxicated, said he was intoxicated, and asked to be relieved of duty." *Id.* ¶ 28. It further concluded that "[i]f such facts were found, the fact finder could decide that the [employer] acted with gross negligence and reckless disregard for [the entrustee's] safety when he entrusted [the entrustee] with the [employer's] truck." *Id.* Consequently, summary judgment was improper. *Id.*

{16} But the *Sanchez* Court did not decide "whether an entrustor should be liable to a voluntarily intoxicated entrustee for *simple* negligence," calling this question "a more difficult issue." *Id.* ¶ 21 (emphasis added). In dicta, the Court recognized that "the language of *Trujillo* suggests that voluntary intoxication should be treated as a special species of fault" and that "some New Mexico authority treats voluntary intoxication as akin to intentional misconduct," both factors which weigh against allowing an intoxicated entrustee to recover from entrustors. *Id.* ¶ 22 (citing *California First Bank v. State*, 1990-NMSC-106, ¶ 34 n.6, 111 N.M. 64, 801 P.2d 646). It also recognized, however, that the commentary to Section 390 of the Restatement (Second) of Torts supported liability of entrustors and that this section had been relied upon by the Colorado Supreme Court to permit recovery by an intoxicated entrustee. *Sanchez*, 1997-NMCA-068, ¶ 23 (citing *Casebolt v. Cowan*, 829 P.2d 352 (Colo. 1992) (en banc)). Finally, it noted that in adopting comparative negligence principles, "New Mexico has largely eliminated distinctions between degrees of negligence and there is a strong presumption against introducing them in our tort law." *Id.* ¶ 21.

{17} In addition to Colorado, a number of states have recognized a first-party negligent entrustment cause of action for the injured entrustee that does not depend on gross negligence. The courts in these cases relied on the fact that in a pure comparative fault system, the entrustor's negligence is balanced against the intoxicated entrustee's negligence. In Missouri, for example, the Court of Appeals for the Western District followed Section 390 of the Restatement (Second) of Torts to hold that "under a pure comparative fault system (like Missouri's), a plaintiff will not be barred from recovery, even if his own negligence greatly outweighed that of the defendant." *Hays v. Royer*, 384 S.W.3d 330, 336-37 (Mo. Ct. App. 2012). Similarly, the Florida District Court of Appeal for the First District held that "an adult drunken driver who injures himself is entitled to a comparative fault trial predicated on the theory of negligent entrustment." *Gorday v. Faris*, 523 So. 2d 1215, 1218 (Fla. Dist. Ct. App. 1988) (agreeing with Section 390 of the Restatement (Second) of Torts and listing states in which a first-party negligent entrustment claim is recognized); *accord Herland v. Izatt*, 2015 UT 30, ¶ 33, 345 P.3d 661 (stating that "although there are competing social policies that favor and disfavor first-party recovery by an

intoxicated individual, nothing bars first-party recovery as a matter of law. As a result, [the plaintiff's] estate may argue for recovery, but the estate must overcome the high hurdle of comparative negligence in order to prevail, as would any plaintiff whose injury occurs while he or she is voluntarily intoxicated."); *King v. Petefish*, 541 N.E.2d 847, 852 (Ill. App. Ct. 1989) (stating that "a suit brought by an injured entrustee against his entrustor is a viable cause of action in a comparative negligence jurisdiction" and observing that "the [s]tates that have adopted comparative negligence seem to uniformly accept such a cause of action"); *Blake v. Moore*, 208 Cal. Rptr. 703, 707 (Ct. App. 1984) (stating that the injured plaintiff "is entitled to a comparative fault trial. This should result in a weighing of [the] defendant's fault in entrusting his car to [the] plaintiff with knowledge of the intoxication, and the fault of [the] plaintiff in drinking and then driving.").

{18} Other states have refused to recognize a first-party claim for an intoxicated entrustee, reasoning that where contributory or modified comparative negligence principles apply, the fault of the intoxicated driver will bar recovery. *See, e.g.*, *Lydia v. Horton*, 583 S.E.2d 750, 752 (S.C. 2003) ("We believe that this state's modified comparative negligence system also bars an intoxicated adult's recovery on a first party negligent entrustment cause of action. We cannot imagine how one could be more than fifty percent negligent in loaning his car to an intoxicated adult who subsequently injured himself."); *Bailey v. State Farm Mut. Auto. Ins. Co.*, 881 N.E.2d 996, 1003 (Ind. Ct. App. 2008) (noting that Indiana follows a modified comparative fault system and stating that "one who drives while intoxicated is generally more at fault than one who permits another to drive while intoxicated"); *Meachum v. Faw*, 436 S.E.2d 141, 145 (N.C. Ct. App. 1993) (stating that "the plaintiffs' claim is barred by decedent's contributory negligence as alleged in the complaint"). Finally, some states have held that a first-party claim is contrary to the policy of those states because "an intoxicated person should not generally be permitted to benefit from his or her own intoxication." *Shultes v. Carr*, 512 N.Y.S.2d 276, 277 (1987).

{19} Clearly the cases premised on contributory or modified comparative fault principles are inapposite to New Mexico. We also do not find the blanket prohibition against first-party claims based on policy concerns as stated in *Shultes* persuasive because some policy interests weigh in favor of permitting a first-party claim. We agree with the *Casebolt* court "that voluntary intoxication is socially undesirable conduct and that individual responsibility to refrain from such conduct should be promoted." 829 P.2d at 362.

> These considerations, however, cannot be permitted to obscure the fact that a vehicle owner who has the right and ability to control the use of the vehicle and takes no action to prevent the continued use of the vehicle by a borrower who the owner knows is likely to operate the vehicle while intoxicated is also engaged in morally reprehensible behavior that should be discouraged.

Id. But see Bailey, 881 N.E.2d at 1003 (disagreeing with the rationale in *Casebolt* and stating, "We do not believe that allowing drunk drivers to recover from those who allow them to drive drunk significantly furthers the already existing public policy against drunk driving."). Given that New Mexico adheres to pure comparative negligence principles, we agree with the court in *Casebolt* that "[c]omparative negligence provides the appropriate framework for examining any negligence on the part of the individual who drives after consuming alcoholic beverages." 829 P.2d at 362. Thus, we hold that, provided

that the elements of negligent entrustment are proven, an entrustee may state a claim for simple negligent entrustment against the entrustor when the entrustee's voluntary intoxication causes injury. Such claims need not be founded on a showing of gross negligence and reckless disregard as in *Sanchez*.

{20} We now turn back to the facts of the present matter. Plaintiff appeals the grant of summary judgment to Defendant. On appeal, "we view the facts in the light most favorable to the party opposing summary judgment, drawing all inferences in favor of that party" and examine whether "there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Gormley v. Coca-Cola Enters.*, 2005-NMSC-003, ¶ 8, 137 N.M. 192, 109 P.3d 280 (internal quotation marks and citations omitted). Our review of the latter question is de novo. *Self v. United Parcel Serv., Inc.*, 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582.

{21} To prevail on a negligent entrustment claim, Plaintiff must show that "[D]efendant [entrusted] the car to [Manuel when it] knew or should have known [Manuel] was an incompetent driver, and [Manuel's] incompetence caused the injury." *Spencer*, 1985-NMCA-033, ¶ 8. Defendant makes no argument as to whether Manuel's intoxication caused the accident. The parties' arguments focus instead on facts related to the first two elements, including Manuel's status on Defendant's "do not drive" list, the supervisor's knowledge that Manuel drove the Suburban to Springer and to pick up groceries and liquor on the night of the accident, and the supervisor's knowledge that Manuel was drinking on the night of the accident. Plaintiff argues that "[f]rom these facts, a jury could make the inference that the supervisor showed reckless disregard and utter indifference for [Manuel's] safety or the safety of others." We conclude that there is a genuine dispute over whether Defendant entrusted the Suburban to Manuel and therefore conclude that summary judgment on Plaintiff's negligent entrustment claim was inappropriate. We explain.

{22} As discussed above, permission is an integral part of an entrustment claim. Permission may be express or implied. *Bishop v. Morich*, 621 N.E.2d 43, 45 (Ill. App. Ct. 1993). "Implied permission to use a motor vehicle can be inferred from a course of conduct or relationship between the parties, or other facts and circumstances signifying the assent of the owner." *Allstate Ins. Co. v. Jensen*, 1990-NMSC-009, ¶ 8 n.3, 109 N.M. 584, 788 P.2d 340 (discussing implied consent in the context of permissive use of an insured vehicle); *see Trujillo v. Rivera*, 1953-NMSC-064, ¶ 7, 57 N.M. 451, 260 P.2d 365 (holding that the evidence supported a finding of implied consent for a minor child to use a family vehicle).

{23} Based on the undisputed facts, Defendant did not expressly permit Manuel to drive the Suburban after dinner on the evening of the accident. The superintendent told Manuel not to drive the Suburban after work hours except to buy supplies and the supervisor told all the employees at the motel not to drink too much and not to leave the motel on the night of the accident. Thus, Manuel did not have express permission to drive the Suburban after dinner that evening.

{24} Whether Manuel had implied permission to drive the Suburban that night is a closer question. Plaintiff argues that because Manuel's superiors knew that he had the keys and had been driving it throughout the week, including that night, and because the supervisor knew that Manuel had been drinking beer that night, they impliedly consented to his use of the vehicle. Plaintiff also maintains that the superintendent and supervisor should have told Manuel that he

could not drive the Suburban and, because they did not object to him driving it, their consent was implied. *See Gruger v. W. Cas. & Sur. Co.*, 1976-NMSC-068, ¶ 5, 89 N.M. 562, 555 P.2d 683 ("Implied permission is found when the insured does not expressly give his consent but consent is implied by his conduct, including lack of objection."), *overruled by United Servs. Auto. Ass'n v. Nat'l Farmers Union Prop. & Cas.*, 1995-NMSC-014, 119 N.M. 397, 891 P.2d 538.

{25} Viewing the undisputed facts in the light most favorable to Plaintiff, we conclude that "a reasonable fact[]finder could draw certain inferences and come to certain conclusions favorable to Plaintiff's claim." *Juneau v. Intel Corp.*, 2006-NMSC-002, ¶ 26, 139 N.M. 12, 127 P.3d 548. Hence, summary judgment on this issue was inappropriate. Having concluded that there are genuine issues of fact related to whether Defendant entrusted the vehicle to Manuel, we need not address whether there are questions of fact related to whether Defendant knew or should have known that Manuel was intoxicated or otherwise incompetent to drive. "Plaintiff is not required to show disputed issues of fact for every element of the claim[.]" *Id.* ¶ 25.

CONCLUSION

{26} For the foregoing reasons, we reverse the grant of summary judgment to Defendant and remand for further proceedings consistent with this Opinion.

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

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:

CYNTHIA A. FRY, Judge

M. MONICA ZAMORA, Judge

Certiorari Granted, August 26, 2015, No. 35,427

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-093

Filing Date: June 18, 2015

Docket Nos. 31,941 & 28,294 (Consolidated)

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

Petitioner-Appellant,

Concerning JANET MERCER-SMITH and JAMES MERCER-SMITH,

Respondents-Appellees.

Walz & Associates, P.C.
Jerry A. Walz
Albuquerque, NM

Narvaez Law Firm, P.A.
Henry F. Narvaez
Bryan C. Garcia
Albuquerque, NM

Rodey, Dickason, Sloan, Akin & Robb, P.A.
Denise M. Chanez
Albuquerque, NM

for Appellant

Comeau, Maldegen, Templeman & Indall, LLP
Larry D. Maldegen
William P. Templeman
Stephen J. Lauer
Santa Fe, NM

Dan Cron Law Firm, P.C.
Dan Cron
Santa Fe, NM

for Appellees

OPINION

BUSTAMANTE, Judge.

{1} In this case we assess what may be the outer edges of a court's exercise of its contempt power. At the Respondent parents' (James and Janet Mercer-Smith) urging the district court found the Children, Youth and Families Department (CYFD) in contempt of court for contravening the district court's order concerning foster placement of two of their children in its custody. The Mercer-Smiths then sought, and the district court granted, damages for loss of enjoyment of life because the possibility for reconciliation with their children had been reduced as a result of CYFD's contemptuous conduct. It awarded the Mercer-Smiths over $1.6 million in damages for loss of enjoyment of life and over $2 million in attorney fees and costs for prosecution of the contempt action. We affirm.

I. BACKGROUND

{2} The case began in 2001 and evolved to encompass four distinct phases—abuse and neglect, foster placement, contempt, and contempt damages—that we summarize in turn. More details are provided as necessary to our discussion of CYFD's arguments on appeal.

A. Abuse and Neglect Petition

{3} In February 2001 the Mercer-Smiths' three daughters, Julia, Rachel, and Allison, were removed from their home based on allegations by Julia and Rachel that they had been abused by their parents. CYFD took custody of the three girls and filed an abuse/neglect petition against the Mercer-Smiths. In August 2001 the Mercer-Smiths and CYFD entered into a stipulated disposition whereby the Mercer-Smiths stipulated that "James Mercer-Smith will enter a plea of no contest to the following allegations: . . . James Mercer-Smith touched his children Julia and Rachel in a way that made them feel uncomfortable and which they reasonably perceived as sexual." They also stipulated that "Janet Mercer-Smith will enter a plea of no contest to the following allegations: . . . Janet Mercer-Smith knew or should have known that her husband . . . touched their children Julia and Rachel in a way that made them feel uncomfortable and which they reasonably perceived as sexual." In return, CYFD agreed to "recommend to the District Attorney that the treatment plan established through the Children's Court case is the most effective way to address the problems that exist with this family rather than through a criminal prosecution."

{4} The Mercer-Smiths' pleas were accepted by the district court, which ordered that custody of the three girls would remain with CYFD and ordered compliance with a treatment plan. The goal of the treatment plan was reunification of the girls with their parents. The abuse and neglect proceedings were effectively concluded by entry of the Mercer-Smiths' pleas; neither termination of parental rights nor criminal proceedings were ever initiated against the Mercer-Smiths. Several months later, Allison was returned to the Mercer-Smiths' custody.

{5} In August 2002 the district court adopted a planned permanent living arrangement for Julia and Rachel. After this shift, reunification of Julia and Rachel with their parents was no longer a goal. While in CYFD's custody, Julia and Rachel lived for approximately eighteen and twenty-eight months, respectively, at Casa Mesita, a treatment group home.

B. Placement Hearing and Order

{6} In June 2003 CYFD proposed to remove Julia and Rachel from the group home and place Julia with the Schmierer family and Rachel with the Farley family. The Mercer-Smiths objected to this plan on the ground that Jennifer Schmierer and Gay Farley, both of whom had been employees at Casa Mesita, had a conflict of interest (or "dual relationship") based on their therapeutic relationships with Julia and Rachel at the group home. The Mercer-Smiths were also concerned that living with the Schmierers and Farleys would reduce the possibility of reconciliation with their daughters.

{7} After several days of hearings, the district court found that the proposed placements would constitute "dual relationship[s]" and "potentially exploitive relationship[s]." It concluded that "[CYFD's] proposed placement of [the girls] into the home of Jennifer and Eric Schmierer [or Dwayne and Gay Farley] constitutes an abuse of discretion." The district court's order to this effect (the Placement Order) was entered on November 3, 2003.

{8} Following the placement hearing, Rachel and Julia lived for approximately three-and-one-half months with Martin and Jeanne Ritter. After that period, CYFD changed the girls' living arrangement to "[s]emi [i]ndependent [l]iving." While living under this arrangement, the girls rented a room from Melissa Brown, Gay and Dwayne Farley's daughter, who lived a few houses from the Farleys.

C. Contempt Proceedings

{9} Approximately eight months later, the Mercer-Smiths moved to hold CYFD in contempt for violating the Placement Order.[1] The parties engaged in discovery and a contempt hearing began in November 2006. The Mercer-Smiths did not present any witnesses, relying instead on their exhibits and CYFD's responses to requests for admissions, as well as requested admissions that were deemed admitted by the district court. CYFD called two witnesses, Rebecca Liggett, CYFD counsel for the Mercer-Smiths' case, and Carmela Alcon, the county office manager for Protective Services, a CYFD division. The district court entered extensive findings of fact and concluded that "CYFD, as an agency, engaged in activity and took direct actions that were in contempt of the November 3, 2003, [district c]ourt's [f]indings of [f]act and [c]onclusions of [l]aw and [d]ecision on [p]lacement." It therefore held CYFD in contempt of court. The district court's findings are discussed in more detail below.

D. Contempt Damages

{10} A five-day bench trial on damages began in May 2011. The district court also heard additional evidence and argument on October 19, 2011. Sixteen witnesses testified. The Mercer-Smiths argued that they had suffered emotional distress and loss of enjoyment of life and requested compensatory

[1]In addition to CYFD, the motion named CYFD employees Rebecca Liggett, Lou Hoeppner, and Carmela Alcon, as well as Jennifer Schmierer, Gay Farley, Guardian ad litem Jane Wells Starke, and Julia and Rachel's counsel, Rachel Kolman. The allegations against the CYFD employees in their individual capacity, Jennifer Schmierer, Gay Farley, Jane Wells Starke, and Rachel Kolman were later dismissed.

damages for those losses as well as attorney fees and litigation costs incurred in pursuing enforcement of the Placement Order. CYFD made a number of motions to preclude or admit certain evidence and to limit damages, the denials of which are discussed in detail below. At the conclusion of the trial, the district court found that "James Mercer-Smith suffered injuries and other harms caused by CYFD's contemptuous conduct" and that such injuries included past and future emotional distress, loss of enjoyment of life, and "psychological expenses," and awarded compensatory damages of $616,000. It found that Janet Mercer-Smith suffered the same injuries and awarded compensatory damages of $1 million. Finally, the district court awarded the Mercer-Smiths compensatory attorney fees and litigation costs of $2,034,922, plus applicable gross receipts tax. CYFD appealed.

E. General Law of Contempt

{11} In order to provide context for the analysis that follows, it is useful to provide an overview of the law of contempt, including generally recognized available remedies. "The district court has inherent power to sanction for contempt." *Purpura v. Purpura*, 1993-NMCA-001, ¶ 6, 115 N.M. 80, 847 P.2d 314; *see* N.M. Const. art. VI, § 13. The contempt power is necessary to allow courts "to regulate their docket, promote judicial efficiency, and deter frivolous filings," and "[i]t has long been recognized that a court must be able to command the obedience of litigants and their attorneys if it is to perform its judicial functions." *State ex rel. N. M. State Highway & Transp. Dep't v. Baca*, 1995-NMSC-033, ¶ 11, 120 N.M. 1, 896 P.2d 1148 (internal quotation marks and citation omitted). Although this power is a broad one, our Supreme Court has cautioned that "a court should invoke its inherent powers sparingly and with circumspection." *Id.* ¶ 25.

{12} "Contempts procedurally are either civil or criminal in nature [but] the line of demarcation between the two is somewhat hazy." *State ex rel. Bliss v. Greenwood*, 1957-NMSC-071, ¶ 6, 63 N.M. 156, 315 P.2d 223. Generally, the type of contempt at issue depends on the purpose behind the contempt determination. "Where the primary purpose is to preserve the court's authority and to punish for disobedience of its orders, the contempt is criminal. Where the primary purpose is to provide a remedy for an injured suitor and to coerce compliance with an order, the contempt is civil." *Id.*; *see Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 441 (1911) ("It is not the fact of punishment, but rather its character and purpose, that often serve to distinguish between the two classes of cases."). Here, the district court awarded damages to compensate the Mercer-Smiths for damage done to their chances of reconciliation with their daughters. These compensatory damages fall within the scope of civil contempt.

{13} Compensatory damages for civil contempt are "somewhat analogous to a tort judgment for damages caused by wrongful conduct." *Parker v. United States*, 153 F.2d 66, 70 (1st Cir. 1946), *cited in El Paso Prod. Co. v. PWG P'ship*, 1993-NMSC-075, ¶ 30, 116 N.M. 583, 866 P.2d 311. As such, they serve "to make reparation to the injured party and restore the parties to the position they would have held had the [court's order] been obeyed." *Vuitton et Fils S. A. v. Carousel Handbags*, 592 F.2d 126, 130 (2d Cir. 1979); *Hutto v. Finney*, 437 U.S. 678, 691 (1978) ("Civil contempt may also be punished by a remedial fine, which compensates the party who won the injunction for the effects of his opponent's noncompliance."). Damages may include typical tort damages, including lost wages, *Meade v. Levett*, 671 N.E.2d 1172, 1181 (Ind. Ct. App. 1996); lost profits, *Eldim, Inc. v. Mullen*, 710 N.E.2d 1054, 1058 (Mass. App. Ct. 1999); emotional distress, *In re*

Reno, 299 B.R. 823, 829 (Bankr. N.D. Tex. 2003); *Sebastian v. Texas Dep't of Corr.*, 558 F. Supp. 507, 510 (S.D. Tex. 1983); and attorney fees and litigation costs. *Baca*, 1995-NMSC-033, ¶ 25 (holding that a district court may award attorney fees against the state); *Spear v. McDermott*, 1996-NMCA-048, ¶ 43, 121 N.M. 609, 916 P.2d 228. *But see McBride v. Coleman*, 955 F.2d 571, 577 (8th Cir. 1992) ("[C]ivil contempt [is not] an appropriate vehicle for awarding damages for emotional distress[.]"). The district court does not have discretion to deny compensatory damages, if established with reasonable certainty. *El Paso Prod. Co.*, 1993-NMSC-075, ¶ 31 ("[O]nce a plaintiff satisfies his burden of proving violation of a court order, proximate cause, and damages, he or she is entitled to judgment for recovery of those damages."). In apparent recognition of the weight of this authority, CYFD did not argue below and does not argue here that compensatory damages are not available as a remedy for contumacious conduct.

{14} "The elements necessary for a finding of civil contempt are: (1) knowledge of the court's order, and (2) an ability to comply." *In re Hooker*, 1980-NMSC-109, ¶ 4, 94 N.M. 798, 617 P.2d 1313. Thus, the party need not have intent to disobey the district court's order. *Seven Rivers Farm, Inc. v. Reynolds*, 1973-NMSC-039, ¶ 16, 84 N.M. 789, 508 P.2d 1276 ("[I]ntent is not an essential element of contempt."). Because knowledge of the district court's order is a prerequisite to contempt, the district court's order must not be ambiguous. *See Greer v. Johnson*, 1971-NMSC-127, ¶ 10, 83 N.M. 334, 491 P.2d 1145 (upholding a finding of contempt where the court's order was not ambiguous); *State ex rel. Patton v. Marron*, 1917-NMSC-039, ¶ 50, 22 N.M. 632, 167 P. 9 (stating that "[t]he order or decree alleged to have been violated must be definite and certain, and a respondent will not be held in contempt for alleged violation of an order wanting in these essential respects" and that "[t]he charge of contempt cannot be established for failure to comply with uncertain or indefinite orders, judgments, or mandates." (internal quotation marks and citation omitted)). That being said, the parties subject to an order have an obligation to seek clarification from the district court if they do not understand the court's order. When parties instead "undert[ake] to make their own determination of what [a] decree mean[s, t]hey act[] at their peril." *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949). Further, "[i]t does not lie in [the contemnors'] mouths to say that they have an immunity from civil contempt because the plan or scheme which they adopted was not specifically enjoined. Such a rule would give tremendous impetus to [a] program of experimentation with disobedience of the law." *Id.*

{15} "When reviewing a charge of civil contempt, the action of the trial court will not be disturbed absent an abuse of discretion." *State ex rel. Udall v. Wimberly*, 1994-NMCA-121, ¶ 15, 118 N.M. 627, 884 P.2d 518. Thus, we will reverse a contempt judgment where "the ruling is clearly against the logic and effect of the facts and circumstances of the case[, or] based on a misunderstanding of the law." *Chavez v. Lovelace Sandia Health Sys., Inc.*, 2008-NMCA-104, ¶ 25, 144 N.M. 578, 189 P.3d 711 (internal quotation marks and citation omitted). "Even when we review for an abuse of discretion, our review of the application of the law to the facts is conducted de novo." *Id.* (alteration, internal quotation marks, and citation omitted). When reviewing whether the district court's findings are supported by the evidence, we "view[] the evidence in the light most favorable to the trial court's decision, resolve[] all conflicts and indulge[] all permissible inferences to uphold the court's decision, and disregard[] all evidence and inferences to the contrary." *State v. Gonzales*, 2001-NMCA-025, ¶ 40, 130 N.M. 341, 24 P.3d 776, *overruled on other grounds by State v. Rudy B.*, 2009-NMCA-

104, 147 N.M. 45, 216 P.3d 810. In doing so, we are mindful that, as in all civil cases, "[t]he burden of proof in [civil contempt proceedings] . . . is . . . the preponderance of the evidence." *Greer*, 1971-NMSC-127, ¶ 9. In addition, "the credibility of the witnesses and the weight to be given the evidence is for the trier of the facts." *Id.*

II. DISCUSSION AND ANALYSIS

{16} CYFD makes eleven arguments on appeal that we have grouped into three major categories. First, it argues that the district court did not have jurisdiction to continue contempt proceedings after Julia and Rachel had been dismissed from the abuse and neglect proceedings because they had turned eighteen. Second, it argues that its conduct was not contemptuous. Third, it argues that, even if the district court correctly held it in contempt, the district court erred in awarding damages to the Mercer-Smiths. The third category of arguments includes CYFD's assertions that (1) CYFD's conduct did not cause any damage to the Mercer-Smiths because, under a law of the case theory, CYFD had no duty to support reconciliation of the family, (2) the district court's findings of fact on damages are not supported by the evidence, (3) the "unclean hands" doctrine prohibits compensatory damages for the Mercer-Smiths, (4) certain evidence was improperly admitted, (5) the New Mexico Tort Claims Act either precludes or limits the amount of damages that can be awarded, (6) the amount of attorney fees awarded was incorrect, and (7) the district court judge improperly refused to recuse herself from the case. We address these arguments in turn.

A. Jurisdiction

{17} CYFD first argues that the district court should have abated the contempt proceedings when Julia and Rachel turned eighteen and CYFD's legal custody of them was terminated by operation of law. *See* NMSA 1978, § 32A-4-24(F) (2009) ("When a child reaches eighteen years of age, all neglect and abuse orders affecting the child then in force automatically terminate except as provided in [NMSA 1978,] Section 32A-4-23.1 [(2009)] . . . and Subsection [C] of [NMSA 1978,] Section 32A-4-25.3 [(2009)]])."

{18} We disagree that the district court lost jurisdiction to continue contempt proceedings when the abuse and neglect proceedings were terminated. In *Gonzales v. Surgidev Corp.*, the New Mexico Supreme Court considered whether the district court had jurisdiction to enter sanctions for discovery abuses after a final judgment had been entered in the underlying matter. 1995-NMSC-047, ¶ 9, 120 N.M. 151, 899 P.2d 594. It concluded that it did, stating that "[a] court retains jurisdiction under its inherent authority to impose sanctions at any time, subject only to constitutional limitations or equitable defenses." *Id. Gonzales* is dispositive of this issue.

{19} CYFD also argues that continuing with the contempt proceedings was contrary to law because those proceedings did not further the purposes of the Children's Code. *See* NMSA 1978, §§ 32A-1-1 to -24-5 (1993, as amended through 2013). CYFD maintains that the imposition of the district court's contempt powers under the Children's Code necessarily requires that the court conduct children's court proceedings, and any contempt proceedings thereunder, "in a manner that will further the purposes and policies of [the Children's Code]." *State v. Julia S.*, 1986-NMCA-039, ¶ 19, 104 N.M. 222, 719 P.2d 449. For support, CYFD directs us to *Julia S.*, in which this Court considered whether the district court could order incarceration of a child as a sanction for a first probation violation under its contempt power. *Id.* ¶ 18. Stating that "the court is expected to conduct children's court

proceedings in a manner that will further the purposes and policies of [the Children's Code]" and that "[t]his expectation extends to the imposition of the court's contempt powers[,]" the Court held that incarceration of the child for the first probation violation was contrary to the Children's Code because the Children's Code provided that the child may be incarcerated only after three probation violations. *Id.* ¶¶ 19, 21-22. The Court also held that the district court's inherent contempt power was not unreasonably hindered by the statutory limitation in the Children's Code. *Id.* ¶ 27.

{20} *Julia S.* is inapposite for two reasons. First, the *Julia S.* court expressly limited its analysis and holding to "probation violations of [children in need of supervision]" and stated that it "express[ed] no opinion . . . as to the proper limits of the court's contempt power for an indirect contempt other than a probation violation." *Id.* ¶ 28. Second, there the contempt sanction was reversed because it was in direct contradiction to a provision in the Children's Code. *Id.* ¶ 22. Here, there is no express provision in the Children's Code prohibiting the district court's award of compensatory contempt damages to the Mercer-Smiths.

{21} As to CYFD's more general argument that the finding of contempt and award of damages exceeded the district court's authority because they did not further "the care, protection[,] and wholesome mental and physical development" of Julia and Rachel or the preservation of the Mercer-Smith family, this argument misplaces the focus of the inquiry. *See* § 32A-1-3(A). CYFD would have us focus on whether the contempt order and damages award themselves further the purposes of the Code, but the more appropriate inquiry is whether the district court's Placement Order did so. So long as the Placement Order was consistent with the Children's Code, a contempt order enforcing that order is also consistent with it. *See* § 32A-4-13(B) (stating that the Children's Court has contempt power). We conclude that the district court had jurisdiction to enter the contempt order and award compensatory damages.

B. Contumacious Conduct

{22} CYFD next argues that the district court erred in finding its conduct contumacious. It makes two contentions. The first hinges on the language of the Placement Order. CYFD contends that the Placement Order was not clear and unambiguous because the language of the order prohibited only "placement" of the girls with the Schmierers and Farleys as licensed foster parents with a contract with CYFD to care for the girls. The second argument is that, even if the Placement Order was unambiguous, the district court's findings as to contempt are not supported by the evidence. We begin with the first argument.

{23} CYFD maintains that the Placement Order prohibited only "placement" of Julia and Rachel in the Schmierer and Farley homes and CYFD designation of those families as foster parents to Julia and Rachel. CYFD asserts that "placement into foster care is derived from a signed contract between CYFD and the prospective foster family and the payment of money by CYFD to that foster family." Thus, it argues that it did not disobey the Placement Order because there was never a contract with the Schmierers and Farleys and no foster parent payments were made to them. Further, it contends, it was not clear and unambiguous that the district court intended to prohibit contact between the girls and the Schmierer and Farley families.

{24} This argument elevates form over substance. Even if we accept CYFD's argument that the Placement Order did not prohibit contact between the girls and the two

families, CYFD's position ignores the district court's findings to the effect that the *amount* of contact was tantamount to placement in those homes and thus violated the Placement Order.

{25} It is clear from the language in the Placement Order and from the district court's oral ruling that it was concerned about the nature of the relationship between the girls and people who had been their counselors. For instance, in the Placement Order the district court found that Julia was a former client of Jennifer Schmierer and that "Gay Farley . . . rendered counseling or therapy to Rachel . . . within the previous [sixty] months of the proposed placement." Based on these findings, it also found that the placement of Julia and Rachel with their former counselors created "dual relationships" that are forbidden by the code of ethics for counselors and therapists. 16.27.18.18(D) NMAC (06/15/2001). Section 16.27.18.16(B) NMAC (07/01/2004) of the code of ethics includes within "dual relationships" those involving a "financial or other potentially exploitive relationship with the client."[2] At the conclusion of the placement hearing, the district court stated that it was troubled by the proposed placement plan "because of the risk of roles in these types of cases being confused." It also referenced the "prior relationship" between the girls and their counselors and the counselors' ethical obligations. Contrary to CYFD's argument, we think it is clear from these statements and the district court's findings that it was concerned about Jennifer Schmierer and Gay Farley assuming multiple roles in the girls' lives, not only about where the girls would live and who got paid by CYFD. Given, among other things, email exchanges among CYFD case workers and CYFD counsel discussed further below, we conclude that this intent and limitation inherent in the district court's order was understood by CYFD also.

{26} We next address CYFD's contention that the district court's findings are not supported by the evidence. CYFD argues that the district court erred in deeming admitted the Mercer-Smiths' second and third requests for admission (RFAs) and that, without these admissions, there is insufficient evidence to support the district court's findings related to contempt. It also specifically challenges fifty-five findings of fact. Any unchallenged findings are binding on appeal. Rule 12-213(A)(4) NMRA ("The argument shall set forth a specific attack on any finding, or such finding shall be deemed conclusive."). We begin with a discussion of how the second and third requests for admission came to be deemed admitted and review this ruling for an abuse of discretion.

{27} After the Mercer-Smiths served their second and third RFAs, CYFD moved for a protective order and to strike the requests or for additional time to respond to the requests. After a hearing, the motion for additional time was granted "pending further hearing in this matter." A hearing was held on June 13, 2006, but CYFD's attorney was not present. Following the Mercer-Smiths' argument in response to CYFD's motion for a protective

[2]We note that the concept of a "dual relationship" appears in other parts of the Administrative Code relating to psychologists and social workers. For instance, with regard to social workers, 16.63.16.8(G)(3) NMAC (09/01/2014) prohibits social workers from engaging in dual relationships, which "occur when social workers relate to clients in more than one relationship, whether professional, social, or business. Dual or multiple relationships can occur simultaneously or consecutively." Similarly, "[a] psychologist shall not serve in varied capacities that confuse the role of the psychologist. Such confusion is most likely when the psychologist changes from one role to another and fails to make clear who is the client or patient. The psychologist is responsible for taking appropriate precautions to avoid harmful dual relationships[.]" 16.22.2.9(B)(4) NMAC (03/21/2009). 16.22.1.7(A)(16) NMAC (04/11/2012) states that a dual relationship constitutes a conflict of interest for psychologists.

order, the district court ordered the requested admissions deemed admitted. CYFD moved for reconsideration of this order.

{28} At the hearing on the motion for reconsideration, the district court heard from both CYFD and the Mercer-Smiths on whether appropriate notice of the June 13, 2006, hearing was given to CYFD. The Mercer-Smiths presented billing records and telephone call records documenting their efforts to schedule the June 13, 2006, hearing. CYFD argued that no one at CYFD had received notice of the hearing and that it had not been contacted by the Mercer-Smiths about the hearing. The district court confirmed the procedures for mailing hearing notices by its staff. Ultimately, the district court concluded that "the process and notification requirements [that] the court is obligated to fulfill in this case have been met and that [CYFD] failed to appear for the hearing." It therefore denied the motion for reconsideration and stated that "the court's ruling will stand." On appeal, the Mercer-Smiths maintain that notice was provided to CYFD and CYFD avers that it was not. We defer to the district court's resolution of factual conflicts. *Buckingham v. Ryan*, 1998-NMCA-012, ¶ 10, 124 N.M. 498, 953 P.2d 33 ("[W]hen there is a conflict in the testimony, we defer to the trier of fact."). Given its determination that CYFD received notice but failed to appear, we conclude that the district court did not err in deeming the second and third requests for admission admitted. *Morrison v. Wyrsch*, 1979-NMSC-093, ¶¶ 13, 15, 93 N.M. 556, 603 P.2d 295 (stating that district courts have discretion to determine whether counsel's failure to respond to a request for admission is excusable and, if not, to deem the requests admitted); *see* Rule 1-036 NMRA.

{29} After reviewing the admitted RFAs as well as other evidence, we conclude that the district court's findings are supported by substantial evidence. "Substantial evidence is such relevant evidence that a reasonable mind would find adequate to support a conclusion." *Miller v. Bank of Am., N.A.*, 2014-NMCA-053, ¶ 11, 326 P.3d 20 (internal quotation marks and citation omitted), *cert. granted*, 2014-NMCERT-005, 326 P.3d 1112. Under the substantial evidence standard of review,

> the question is not whether substantial evidence exists to support the opposite result, but rather whether such evidence supports the result reached. We will not reweigh the evidence nor substitute our judgment for that of the factfinder. We consider the evidence in the light most favorable to the prevailing party and disregard any inferences and evidence to the contrary.

Id. (alterations, internal quotation marks, and citations omitted).

{30} In essence, the district court found that CYFD knew that the Placement Order prohibited the two families from being caretakers of Julia and Rachel and that it nevertheless arranged for Julia and Rachel to "spend[] the majority of their waking hours either in school or with the [Schmierers and Farleys]." We examine whether the evidence supports the district court's findings as to (1) the contact between the girls and the Schmierers and Farleys, (2) CYFD's knowledge of the nature and extent of the contact, (3) the extent of the Ritters' role and CYFD's knowledge of that role, and (4) whether CYFD intentionally took direct action contrary to the Placement Order.[3]

[3]Because we have concluded that the district court retained jurisdiction over the contempt proceedings, we do not need to address CYFD's challenge to the district court's finding that it had jurisdiction to continue them.

{31} CYFD challenges findings of fact to the effect that Julia and Rachel (1) ate morning and evening meals with the Schmierers and Farleys; (2) were transported to and from school, extracurricular activities, and medical appointments by the Schmierers and Farleys; (3) were taken on vacation by Gay Farley; and (4) were provided with their own bathrooms in the Schmierer and Farley homes. They also challenge findings that Rachel attended church with Gay Farley and received clothing, presents, school supplies, and a cell phone from Gay Farley, that Rachel kept clothing at the Farley home, and that Gay Farley paid for medical expenses for Rachel, which payment was later reimbursed by CYFD, and for dance lessons. Similarly, they challenge findings that Jennifer Schmierer or the Schmierers paid for, and were reimbursed for, Julia's medical expenses and paid for her cell phone. Finally, they challenged the district court's findings that the Schmierers and Farleys were "caretakers" for the girls. Many of these findings were in fact admitted by CYFD in the first RFA. Others are supported by admissions from the RFAs that were deemed admitted by the district court. Furthermore, the district court's finding that "[during the time the Ritters were the putative foster parents], the Schmierers and the Farleys performed functions that a foster parent normally would" is unchallenged.

{32} CYFD also challenges findings related to whether CYFD knew of the type and degree of contact between Julia and Rachel and the Schmierers and Farleys. These include findings that "the only foster care services provided by the Ritters that [the CYFD social worker knew of] was 'a place to sleep[,]' " that "CYFD was aware that Gay Farley had daily contact with the Mercer-Smith girls while the Ritters were 'foster parents[,]' " and that "CYFD knew of the nature of the contact Gay Farley had with the Mercer-Smith girls while the Ritters were 'foster parents.' " Other findings were that one or both of the Schmierers and one or both of the Farleys had "attended most CYFD staffing meetings involving [Julia and Rachel] since September 9, 2003" and that "CYFD is aware that Gay Farley has taken the Mercer-Smith girls out of state." Again, some of these findings are supported by CYFD's admissions on the first RFA. Identical statements in the third RFA that were deemed admitted also support these findings. Thus, they are supported by the evidence.

{33} The district court made findings to the effect that the "placement" of the girls with the Ritters was superficial and that the Ritters were not caretakers of Julia and Rachel to the same extent the Schmierers and Farleys were. For instance, the district court found that CYFD policy requires that foster parents be licensed and that, although the Ritters had been licensed as foster parents until August 2003, they were not licensed foster parents during the time that Julia and Rachel were "placed" with them. It also found that the Ritters did not attend CYFD meetings about Julia and Rachel and that CYFD did not visit the Ritter home while Julia and Rachel were "placed" there even though its policy is to conduct home visits monthly. It found that "[t]here are no . . . contact notes for the period of time Julia and Rachel . . . were 'placed' with the Ritters." These findings are either unchallenged, admitted by CYFD, or supported by the deemed admissions. Finally, CYFD does not challenge the district court's finding that the social worker noted in the case notes that "[i]n essence, we were asking the Ritters to provide a place for [Julia and Rachel] to sleep, with minimal oversight required." Together, these findings support the district court's further finding that the Ritters "were not [f]oster [p]arents for Julia and Rachel Mercer-Smith between October 5, 2003[] and January 31, 2004[,]" and related findings.

{34} Finally, the findings as to CYFD's knowledge of the level of contact occurring between the girls and the two families and its facilitation of the Schmierers' and Farleys' (1) daily contact with the girls; (2) participation in meetings concerning the girls; (3) reimbursement for medical expenses; and (4) out-of-state vacations with the girls, among other things, support the district court's further finding that "CYFD, as an agency, engaged in activity and took direct actions that were in contempt of the [Placement Order]." As to the findings related to whether CYFD intended to contravene the Placement Order, the evidence supports these findings as well. CYFD challenges the district court's findings that "CYFD was only interested in placing Julia . . . with the Schmierers and Rachel . . . with the Farleys[,]" that "CYFD did not want to place [Julia and Rachel] with the Ritters[,]" that a CYFD social worker told the Ritters that she intended the girls to be with the Schmierers and Farleys "as much as possible" while "placed" with them, and that "[t]he designation by CYFD of the Ritters as 'foster parents' was done deliberately by CYFD for the purpose of concealing from the [c]ourt . . . that [the Schmierers and Farleys] served the function of being foster parents for [the girls]." Gay Farley testified that immediately after the placement hearing at which the district court prohibited placement of the girls with the Schmierers and Farleys, she met with several CYFD personnel, including CYFD counsel, to develop a plan for the girls' living arrangements. On cross-examination, she agreed with the Mercer-Smiths' counsel that "[the] plan that was agreed to by the participants in that meeting was that the girls would sleep at the Ritters['] and spend the rest of their time with [the Farleys] and the Schmierers[.]" Consistent with this testimony, a CYFD social worker stated in her notes that she told the Ritters that the girls "would be spending the majority of their waking hours either in school or with [the Schmierers and Farleys]. In essence, [CYFD was] asking the Ritters to provide a place for them to sleep, with minimal oversight required" and that she "t[r]ied to assure the Ritters that [CYFD was] asking them to do minimal actual parenting." CYFD's case notes indicate that when CYFD decided to implement the semi-independent living plan, CYFD personnel were aware that Rachel's and Julia's residence with the Farleys' daughter might violate the placement order. Indeed, the social worker noted that "[t]he judge may disagree with placement of the girls with the Browns [the Farleys' daughter's family] as foster care due to their relationship with the Farleys." In email exchanges discussing the semi-independent living plan and renting a room with the Browns, CYFD personnel acknowledged that this arrangement could constitute an "end run" around the Placement Order, stating, "If the question is do I think . . . [the district court] will accuse us of trying to back door [it], yes I think that is possible. If the question is whether we should do it anyway, I think the answer is also yes[.]" CYFD personnel also questioned whether it had "an obligation to inform the court of the relationship [between the Browns] and the Farley[]s who were initially denied by the court[.]" In addition to this evidence, the findings related to CYFD's intent are supported by facts deemed admitted in the third RFA.

{35} We need not address the remainder of the challenged findings, as those already discussed are sufficient to support the district court's conclusion that CYFD acted in contempt of the Placement Order. We conclude that, viewed in the light most favorable to the district court's conclusion, the evidence supports the district court's findings and therefore find no error in its conclusion that CYFD was contumacious.

C. Damages

{36} CYFD makes seven allegations of error in the district court's damages award. We address each argument in turn.

1. Law of the Case Theory

{37} CYFD first argues that the damages award to the Mercer-Smiths was contrary to the law of the case. CYFD's law of the case argument goes as follows: because "CYFD had absolutely no legal duty or obligation to seek, encourage, or support any reconciliation between the girls and their parents[,]" it could not have breached that duty and, therefore, there could not have been any damage to the Mercer-Smiths as a result of CYFD's conduct. For support, CYFD relies on the fact that the district court ruled in 2002 and 2003 that Julia and Rachel "[would] not return to their home of origin."

{38} CYFD conflates the concepts of reunification, meaning that Julia and Rachel would return to live in the Mercer-Smiths' home, and reconciliation, meaning contact and communication between the girls and their parents in the future. Although the permanency plan for Julia and Rachel was changed from reunification to a planned permanent living arrangement by agreement of the parties, and it was clear that Julia and Rachel would not return to their parents' home, it is also clear from the record that the district court, several witnesses at the placement hearing, and CYFD itself understood reunification and reconciliation to be two separate ideas. For instance, the district court indicated that reconciliation was still a goal when it ordered the girls to participate in therapy with Janet Mercer-Smith even after the planned permanent living arrangement was instituted. In addition, in questioning Dr. Charles Glass, a therapist hired by CYFD to work with the family, at the placement hearing, CYFD's counsel asked about CYFD's obligation to pursue reunification. Dr. Glass differentiated between reunification and reconciliation, stating that he understood that CYFD was not obligated to try to reunify the family. This distinction having been made, CYFD went on to ask him about reconciliation in families separated because of abuse. On redirect, the Mercer-Smiths' counsel also distinguished between reunification and reconciliation and Dr. Glass testified as to the potential impact of reconciliation on children. Similarly, CYFD asked Jennifer Schmierer how she would react "if Julia indicated that she wanted to have contact with her parents" and she testified that she would "make sure it would happen." CYFD also asked whether Ms. Schmierer had any conversations with Julia about whether she should have contact with her parents. CYFD also questioned Rachel and Julia about whether they had spoken with Ms. Schmierer or Ms. Farley about having contact with their parents. Given that reunification with the Mercer-Smiths was not a goal at the time of the hearing, these questions indicate that CYFD and these witnesses understood that reconciliation between the Mercer-Smiths and the girls was different from reunification. Thus, it was not the "law of the case" that reconciliation was not a goal for Rachel and Julia.

2. Substantial Evidence

{39} CYFD next argues that "there was no credible evidence introduced at the placement hearing or the damages trial as to [the] viability of reconciliation between the girls and the [Mercer-Smiths] as of 2003." It specifically challenges two findings of fact in the district court's order on damages. After reviewing the evidence in the light most favorable to the district court's findings and disregarding evidence to the contrary, we conclude that these findings are supported by the record. *Miller*, 2014-NMCA-053, ¶ 11.

{40} In challenged finding number six, the

district court found that "prior to the [district c]ourt's . . . 2003 . . . ruling on CYFD's proposed change in placements, there continued to be viable prospects for reconciliation between [the Mercer-Smiths] and their daughters." Dr. Glass was admitted as an expert in psychology at the placement hearing and also testified later at the damages hearing. At the damages hearing, Dr. Glass testified that as of late 2002, although "[t]here were certainly concerns about whether it was going to be possible or not, [he] believed that the potential was still there for reconciliation [between the Mercer-Smiths and their daughters]." Dr. Glass also signed a letter that was submitted to the district court before the placement hearing and later admitted at the damages hearing stating that he believed "that any possibility of future reconciliation with the girls' parents would be significantly lessened if they were to reside with [the Schmierers and the Farleys]." This statement implies that at the time of the letter there was a possibility of reconciliation between the girls and their parents. CYFD appears to argue that this evidence is insufficient because it is merely the authors' belief. But both Dr. Glass and Dr. Ned Siegel, who also signed the letter, were admitted as experts and experts are permitted to express an opinion under Rules 11-702, 703, and 704 NMRA. We conclude that this evidence is sufficient to support the district court's finding number six that there were "viable prospects for reconciliation" before the 2003 Placement Order.

{41} Challenged finding number seven states that "[d]espite th[e] written statement [referenced above], CYFD, Julia and Rachel never asserted in responsive pleadings and testimony that prospects for reconciliation . . . had already been irretrievably damaged." Because the evidence cited in support of this finding includes only the pleadings in response to the Mercer-Smiths' objection to the placement of the girls and to the testimony at the placement hearing, we interpret this finding to be focused only on what CYFD asserted in those pleadings. On appeal, CYFD points to evidence that "Julia and Rachel had repeatedly told their therapists, the expert psychologists, CYFD, and the judge that they had no desire or intention to reunify or reconcile with their parents." It maintains that "[a]ll this evidence contradicts the [district c]ourt's [f]inding of [f]act [number seven]." But CYFD does not direct us to any instance *in the specific pleadings and testimony referenced in this finding* where CYFD or the girls stated that reconciliation was no longer viable. We conclude that this finding is supported by the evidence, although we note that the finding is also very limited in scope.

{42} CYFD argues in a few sentences that its conduct was not the cause of any decrease in the possibility of reconciliation and maintains that the district court's findings and conclusions to the contrary are "erroneous." It claims that "[t]hese findings and conclusion[s] are contradicted by Julia and Rachel." But under the substantial evidence standard of review, we do not consider evidence contrary to the district court's findings. *Miller*, 2014-NMCA-053, ¶ 11. In addition, CYFD does not explain how the district court's findings are incorrect. We therefore do not consider this argument any further. *See Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076.

3. Unclean Hands[4]

{43} CYFD argues that the district court abused its discretion when it awarded damages to the Mercer-Smiths because "[t]he doctrine of unclean hands generally prevents a complainant from recovering where he or she

[4]Although CYFD references estoppel in its brief in chief, it makes no substantive argument based on estoppel and expressly stated in the proceedings below that it withdrew its estoppel argument. We therefore do not address CYFD's argument based on estoppel.

has been guilty of fraudulent, illegal or inequitable conduct in the matter with relation to which he [or she] seeks relief." *Magnolia Mountain Ltd., P'ship v. Ski Rio Partners, Ltd.*, 2006-NMCA-027, ¶ 36, 139 N.M. 288, 131 P.3d 675 (alteration in original) (internal quotation marks and citation omitted). CYFD argues that the damages award is improper because of the Mercer-Smiths' "reprehensible misconduct" that led to entry of the no-contest plea. The Mercer-Smiths argue that this argument is unavailing because "[i]n most other jurisdictions, the [unclean hands] doctrine is not a defense to a claim for damages." They cite to several out-of-state cases as support for this proposition. *See, e.g.*, *Wilson v. Prentiss*, 140 P.3d 288, 293 (Colo. App. 2006) ("The doctrine of unclean hands enables a defendant to raise an equitable defense to defeat equitable remedies, but not remedies at law.").

{44} Several New Mexico domestic relations cases state that "in the context of contempt proceedings, the court has the power to consider any valid defense," including equitable defenses. *Hopkins v. Hopkins*, 1989-NMCA-101, ¶ 18, 109 N.M. 233, 784 P.2d 420; *Mask v. Mask*, 1980-NMSC-134, ¶ 5, 95 N.M. 229, 620 P.2d 883 (stating that because that "case arose in the context of a contempt proceeding[,] . . . equitable principles [were] applicable"). In *Corliss v. Corliss*, 1976-NMSC-023, ¶ 3, 89 N.M. 235, 549 P.2d 1070, the Court appeared to distinguish between contempt actions and those for money damages when it stated that the wife in that case brought a "contempt action as opposed to seeking a money judgment for arrearages. This action invoked the equitable powers of the court in which the trial court has discretion. In a suit for a money judgment very little discretion is allowed. The court merely examines the validity of the prior judgment and enters a money judgment." *Id.* We have found no New Mexico case expressly addressing whether the unclean hands doctrine is a defense to contempt of court where compensatory money damages are sought.

{45} In *El Paso Production Co. v. PWG Partnership*, however, the New Mexico Supreme Court held that district courts do not have discretion to withhold a damages award for contempt if the plaintiff has proven a violation, causation, and damages. 1993-NMSC-075, ¶ 31, 116 N.M. 583, 866 P.2d 311 ("We hold that once a plaintiff satisfies his burden of proving violation of a court order, proximate cause, and damages, he or she is entitled to judgment for recovery of those damages."). A lack of discretion in this decision suggests that the equitable defense of unclean hands is not available. But we need not resolve this issue because even if it is, the doctrine does not apply here. "Ordinarily, the wrong which may be invoked to defeat a suit under the clean-hands maxim must have an immediate and necessary relation to the equity which the complainant seeks to enforce against the defendant." *Romero v. Bank of the Sw.*, 2003-NMCA-124, ¶ 38, 135 N.M. 1, 83 P.3d 288 (alteration, internal quotation marks, and citation omitted). "What is material is not that plaintiff's hands are dirty, but that he dirtied them in acquiring the right he now asserts[.]" *Mechem v. City of Santa Fe*, 1981-NMSC-104, ¶ 10, 96 N.M. 668, 634 P.2d 690. For instance, in *Romero*, this Court affirmed the denial of the unclean hands defense where the "unclean" conduct complained of was unrelated to the transaction for which the plaintiff sought restitution. 2003-NMCA-124, ¶ 38. Here, the Mercer-Smiths sought to have the district court's Placement Order enforced. The conduct of which CYFD complains did not occur during the placement or contempt proceedings and did not relate to the Mercer-Smiths' right to have the Placement Order followed. We conclude that the district court did not err in denying CYFD's assertion that the unclean hands doctrine precludes the contempt damages award.

4. Evidentiary Rulings

{46} CYFD argues that the district court erred in three evidentiary rulings. "We review the admission of evidence for abuse of discretion." *Couch v. Astec Indus., Inc.*, 2002-NMCA-084, ¶ 8, 132 N.M. 631, 53 P.3d 398. First, it maintains that the district court wrongly precluded admission of the stipulated judgment in which the Mercer-Smiths entered pleas of no contest. We discern no error in the district court's ruling because Rule 11-410(A)(2) NMRA prohibits the admission of a nolo contendere plea against the one who made it as proof of guilt. In an argument similar to its "unclean hands" argument, CYFD argues that it "would have utilized [the evidence of the nolo pleas] to show based on those admissions, that the Mercer-Smiths were not entitled to damages." Such use is clearly prohibited by Rule 11-410(A)(2). *See Kipnis v. Jusbasche*, 2015-NMCA- ___, ¶ 15, ___ P.3d ___ (No. 33,821, Apr. 2, 2015) (stating that the rule prohibits admission of evidence of nolo pleas when offered to prove guilt).

{47} Second, CYFD argues that the district court erred when it denied admission of the transcript of a safehouse interview with Julia. Despite CYFD's arguments that the transcript was admissible because it was either a "business record" under Rule 11-803(6) NMRA or a prior consistent statement under Rule 11-801(D)(1) NMRA, the district court ruled that the transcript was inadmissible hearsay. On appeal, CYFD argues only that the interview "was relevant and admissible as [a] prior consistent statement[]." It does not make a substantive argument as to why admission of a prior consistent statement was necessary or why the district court's ruling was incorrect. "We will not review unclear arguments, or guess at what [a party's] arguments might be." *Headley*, 2005-NMCA-045, ¶ 15.

{48} Third, CYFD argues that the district court erred in admitting and considering the testimony by economist Stan Smith and that "[his] entire testimony . . . should be stricken as it fails to meet the admissibility standards pursuant to *State v. Alberico* [, 1993-NMSC-047], 116 N.M. 156, 861 P.2d 192 . . . and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 . . . (1993)." It also argues that Smith's testimony was "not . . . sound as his opinions were based on self-reporting impairment assessments . . . by the Mercer-Smith[s], as well [as] upon blatantly false assumptions that Julia and Rachel . . . would provide household services and guidance and counseling to [the Mercer-Smiths]."

{49} Generally, "it is not improper for the trial court to permit an economist to testify regarding his or her opinion concerning the economic value of a plaintiff's loss of enjoyment of life." *Sena v. N. M. State Police*, 1995-NMCA-003, ¶ 29, 119 N.M. 471, 892 P.2d 604. As to CYFD's argument regarding the proper standard for admission of testimony by an economic expert, we note that CYFD conceded in the district court that the *Alberico/Daubert* standard did not apply to expert testimony by an economist that is based on experience and training. *See State v. Torres*, 1999-NMSC-010, ¶ 43, 127 N.M. 20, 976 P.2d 20 (concluding that "application of the *Daubert* factors is unwarranted in cases where expert testimony is based solely upon experience or training." (internal quotation marks and citation omitted)). We agree that the district court did not err in not applying the *Alberico/Daubert* standard for scientific reliability of the economist's testimony. *See Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1245-46 (10th Cir. 2000) (holding that the district court did not err in admitting testimony by Stan Smith even though it did not perform a *Daubert* analysis); *Gurule v. Ford Motor Co.*, No. 29,296, mem. op., 2011 WL 2071701, ¶ 8 (N.M. Ct. App. Feb. 17, 2011) (non-precedential) (holding that testimony by an economist on hedonic

damages was not subject to the "*Alberico* standard of scientific reliability" (internal quotation marks and citation omitted)).

{50} Instead, CYFD argued in the district court that the main question before the district court was whether "th[e] evidence [presented by Smith would] be of assistance to . . . the trier of fact." This argument rests on CYFD's contention that Smith's testimony was essentially speculative because it was based on the Mercer-Smiths' own estimates of their loss of enjoyment and assumptions about what might have happened in the relationship between the girls and their parents in the future. As the district court observed, however, the basis of Smith's opinions provided rich fodder for cross-examination. Simply because Smith's calculations were based on self-reports by the Mercer-Smiths does not render them inadmissible here.

{51} To the extent CYFD argues that Smith's testimony impermissibly intruded on the realm of the factfinder, we disagree that Smith's testimony "crosse[d] the line between the permissible and impermissible [by] attempt[ing] to define the legal parameters within which the [factfinder] *must* exercise its fact-finding function." *Smith*, 214 F.3d at 1246 (internal quotation marks and citation omitted). Smith testified in some detail about his model for calculating the value of a loss of enjoyment of life and loss of services, the assumptions he employed, the inputs he received from the Mercer-Smiths, and the studies on which the model was based. He testified that the report he provided included several calculations intended as a guide for the district court but did not offer an opinion as to the value the district court should adopt. Furthermore, the district court did not adopt any of the damages figures from Smith's report. The report provided estimates of the damages based on the Mercer-Smiths' report of their percentage of loss of enjoyment as well as estimates based on a percentage of half that amount. The district court's award was less than the lower estimate from Smith's report and did not include any damages related to loss of services by Julia and Rachel. We discern no error in admission of this testimony.

5. Tort Claims Act

{52} CYFD next argues that the Mercer-Smiths' claim for damages is akin to a tort claim and that it is "not actionable pursuant to the New Mexico Tort Claims Act [(NMTCA)] as there is no waiver of immunity." It also argues that, if this Court concludes that sovereign immunity does not preclude damages, the damages should be limited to the statutory cap in the NMTCA. Neither of these arguments is availing.

{53} The district court's contempt power derives from the judicial branch's inherent power to compel compliance with its orders. *Greenwood*, 1957-NMSC-071, ¶ 17 ("[T]he power to punish for contempt is inherent in the courts and its exercise is the exercise of the highest form of judicial power."). "The real basis of this power is to be found in the doctrine of separation of powers as provided for in the Organic Act and later in the New Mexico Constitution." *Id.* Such power is not absolute and may be circumscribed by the legislature to a limited extent. *Id.* ¶ 18. Thus, although "the [L]egislature may provide rules of procedure which are reasonable regulations of the contempt power it may not, either by enacting procedural rules or by limiting the penalty unduly, substantially impair or destroy the implied power of the court to punish for contempt." *Id.* When the legislature acts to regulate the court's contempt power, we examine "the reasonableness of the legislative regulation." *Id.* ¶ 19. Ultimately, "[t]he statutory regulation must preserve to the court sufficient power to protect itself from indignities and to enable it effectively to administer its judicial functions." *Id.*

{54} Common law sovereign immunity was abolished by the New Mexico Supreme Court in 1975. *Hicks v. State*, 1975-NMSC-056, ¶ 9, 88 N.M. 588, 544 P.2d 1153 ("Common law sovereign immunity may no longer be interposed as a defense by the [s]tate, or any of its political subdivisions, in tort actions."). Later cases clarified that the holding in *Hicks* "generally abolished the common law doctrine of sovereign immunity in all its ramifications, whether in tort or contract or otherwise." *Torrance Cnty. Mental Health Program, Inc. v. N. M. Health & Env't Dep't*, 1992-NMSC-026, ¶ 14, 113 N.M. 593, 830 P.2d 145. In response, the Legislature passed the NMTCA, which "grants all government entities and their employees general immunity from actions in tort, but [also] waives that immunity in certain specified circumstances." *Upton v. Clovis Mun. Sch. Dist.*, 2006-NMSC-040, ¶ 8, 140 N.M. 205, 141 P.3d 1259; *see* NMSA 1978, §§ 41-4-1 to -30 (1976, as amended through 2013). CYFD argues that the sovereign immunity granted to state agencies by the NMTCA immunizes it from being held in contempt of court.

{55} There are two reasons why this argument fails. First, the plain language of the NMTCA "grant[s] immunity from liability for any *tort*" and nothing in the NMTCA addresses immunity from contempt of court. Section 41-4-4(A) (emphasis added). To the extent that CYFD argues that the NMTCA applies because the damages here "are in the nature of a tort claim," we are unpersuaded. Simply because contempt compensatory damages are similar to tort damages does not mean they are governed by the NMTCA. Second, accepting CYFD's argument would mean that the Legislature effectively "destroyed" the district court's ability to find state agencies in contempt and provide a remedy therefor, a clear and improper infringement on the inherent power of the judicial branch. *See Greenwood*, 1957-NMSC-071, ¶ 18. For these reasons, we reject CYFD's assertion that it is immune from the district court's contempt power under the NMTCA. *See generally State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 62, 125 N.M. 343, 961 P.2d 768 ("It is clear this Court has authority to implement the full extent of contempt sanctions against executive branch members, including fines and imprisonment."); *Baca*, 1995-NMSC-033, ¶¶ 22-23 (commenting that attorney fee awards have a compensatory aspect and stating that a court may award attorney fees against the state for contempt).

{56} CYFD makes a cursory argument that, even if it is not immune from liability under the NMTCA, any liability "must be limited to the statutory caps for a single occurrence under the [NM]TCA." We disagree. As presently configured, the NMTCA does not govern the district court's power to hold the State in contempt in any way, including limiting the amount of damages that might be awarded.

6. Attorney Fees

{57} CYFD argues that the attorney fee award "should be substantially reduced, as the attorney fees and costs submitted by [the Mercer-Smiths] were excessive, duplicative, incomplete, not reasonable[,] and many costs were not allowable pursuant to Rule 1-054 [NMRA]." It makes several arguments on this issue. First, it argues that an award of attorney fees against the state is improper except where the litigation was "frivolous or vexatious." It cites to *Baca*, 1995-NMSC-033, ¶ 12, for this proposition. But CYFD has simply cherry-picked this favorable phrase from the *Baca* opinion. In the same sentence quoted by CYFD, the *Baca* Court stated that attorney fees are appropriate "to vindicate [the court's] judicial authority." *Id.* In addition, the *Baca* Court adopted the rationale in *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991), in

which the U.S. Supreme Court stated that courts have "the power to award attorney[] fees as a sanction for bad faith or vexatious litigation *or for defiance of a court order.*" *Baca*, 1995-NMSC-033, ¶ 12 (emphasis added). Reading these cases in their entirety, it is clear that attorney fees against the state are permissible when the state defies a court order, not just for frivolous or vexatious claims.

{58} Second, CYFD argues that the district court should have disallowed attorney fees incurred after entry of the contempt order. CYFD points to *El Paso Production Co.* for the proposition that only attorney fees related to prosecution of a contempt order may be awarded. It apparently finds this rule in the Court's statement that, after finding contempt, "[t]he court . . . may award attorney[] fees incurred in obtaining the order of contempt." 1993-NMSC-075, ¶ 31. But this reading of *El Paso Production Co.* ignores the Court's previous statement that "once a plaintiff satisfies his burden of proving violation of a court order, proximate cause, *and damages*, he or she is entitled to judgment for recovery of those damages." *Id.* (emphasis added). Thus, proving damages is part and parcel of a contempt proceeding. Furthermore, there is nothing talismanic about the entry of a contempt order that cuts off damages related to the contempt incurred after entry of the order. In *Spear*, this Court held that a compensatory award of $25,000 was not an abuse of discretion where the funds were earmarked to pay for anticipated future litigation made necessary by the contempt. 1996-NMCA-048, ¶ 44; *see In re Hooker*, 1980-NMSC-109, ¶ 1, 94 N.M. 798, 617 P.2d 1313 (affirming a compensatory contempt award for attorney fees, including fees incurred subsequent to entry of the contempt order).

{59} Third, CYFD argues that the district court erroneously awarded attorney fees and costs associated with defense of the abuse and neglect petition. As support, it directs us to an affidavit submitted by its fee expert and presented to the district court which stated that a portion of the fees requested were related to the abuse and neglect petition. But the Mercer-Smiths presented their own affidavits denying that the fee request included any fees unrelated to the contempt proceedings. "[W]hen there is a conflict in the testimony, we defer to the trier of fact." *Buckingham*, 1998-NMCA-012, ¶ 10. Given that there is evidence supporting the district court's finding that the attorney fees requested were incurred in "investigating and prosecuting the contempt proceedings," we see no abuse of discretion in this regard.

{60} Finally, CYFD makes a generalized attack on the attorney fee award by citing to its pleadings below, which it asserts alerted the district court to "example after example" of unallowable costs. Absent specific allegations and citations, we decline CYFD's invitation to search the record for errors in the district court's attorney fee award.[5] We conclude that the district court did not abuse its discretion in the award of attorney fees to the Mercer-Smiths.

7. Peremptory Excusal

{61} On January 4, 2010, the present matter was reassigned to Judge Michael Vigil as part of a mass reassignment of cases by the chief judge under Rule LR1-203(A) NMRA. On January 12, 2010, Judge Barbara Vigil, who had overseen the case since 2001, entered

[5]CYFD does specify one cost: a charge of $24,225 for a psychiatrist who did not testify at trial. Other than asserting that this charge is not allowable, it makes no argument as to why such a charge is inappropriate in an award for contempt compensatory damages. We therefore do not address this issue. *Headley*, 2005-NMCA-045, ¶ 15 ("We will not review unclear arguments, or guess at what [a party's] arguments might be.").

an order on her own motion reassigning the case back to herself. On appeal, CYFD argues that the district court erred in denying CYFD's motion to reassign the case to another judge, or for leave to file a peremptory excusal. As we understand it, CYFD's argument boils down to its assertion that the January 12, 2010, order reassigning the case to Judge Barbara Vigil was void because it was contrary to LR1-203(A) and Rule 1-088.1 NMRA, and that the order is an indication that Judge Vigil "actively sought to retain jurisdiction over the case" because she was inappropriately "embroiled" in the proceeding.

{62} We need not address these arguments, however, because the order denying CYFD's motion states that "[t]his matter was inadvertently administratively reassigned from Judge Barbara J. Vigil to Judge Michael E. Vigil as part of a mass reassignment" and that "[b]ecause the administrative reassignment was merely an administrative error, the transfer is rendered a nullity and the case shall remain assigned to Judge Barbara Vigil." The order further states that "Judge Barbara Vigil's continued assignment to the matter is not prejudicial to any party." The order was signed by Judge Barbara Vigil, Judge Michael Vigil, and Judge Stephen Pfeffer, who was the chief judge at the time. Given the concurrence of three judges that the reassignment was an administrative oversight, we perceive no error in the denial of CYFD's motion.

III. CONCLUSION

{63} For the foregoing reasons, we affirm the district court's contempt order and award of damages. Consistent with the reasoning behind the district court's award of attorney fees, we conclude that the Mercer-Smiths are entitled to attorney fees on appeal. We therefore remand to the district court for calculation of reasonable attorney fees.

{64} IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:

MICHAEL E. VIGIL, Chief Judge

M. MONICA ZAMORA, Judge

Certiorari Granted, August 26, 2015, No. 35,451

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-094

Filing Date: June 30, 2015

Docket No. 33,249

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

PATRICIA GARCIA,

Defendant-Appellant.

Hector H. Balderas, Attorney General
Paula E. Ganz, Assistant Attorney General
Santa Fe, NM

for Appellee

McGraw & Strickland, LLC
Margaret Strickland

Las Cruces, NM

for Appellant

OPINION

GARCIA, Judge.

{1} A jury found Defendant Patricia Garcia guilty of two second degree felonies, fraud, in violation of NMSA 1978, § 30-16-6(A), (F) (2006), and computer access with intent to defraud, in violation of NMSA 1978, § 30-45-3(E) (2006). On appeal, Defendant argues, among other things, that there was insufficient evidence presented to establish that the alleged victim, Page Kent, relied on her misrepresentations about her marital status. We agree that this was a critical issue regarding the fraud allegations filed by the State. The State did not ask Mr. Kent to testify about the reliance element of the fraud charge during Mr. Kent's testimony at trial. Instead, it attempted to establish the element of reliance by inferences from the other evidence presented. We hold that the other evidence was insufficient to permit an inference establishing reliance beyond a reasonable doubt. As a result, we reverse both of Defendant's convictions.

BACKGROUND

{2} The following facts relevant to the issue we address on appeal were adduced at trial. Defendant, a woman in her fifties, and Mr. Kent, a recently widowed man in his mid-eighties, first met at the post office around May 2010. At this first meeting, Defendant told Mr. Kent that she was not married and that she had been divorced several times. She asked Mr. Kent for $5,000 to "have her breast work raised[,]" and Mr. Kent wrote her a check for $5,000.

{3} After this first meeting, Defendant and Mr. Kent "became friends." Defendant took Mr. Kent to his medical appointments and helped him with his personal finances. "After a while," Defendant asked Mr. Kent if she could use his bank account to help her pay for her "children's education[,]" "everyday things, . . . cars[,]" and to "help [her children's] way of life." Defendant told Mr. Kent that she would "replace what she took." Mr. Kent agreed, and Defendant began accessing and transferring money from Mr. Kent's accounts to her own account in October 2010.

{4} On December 15, 2010, and January 4, 2011, Mr. Kent made Defendant a joint owner on his accounts. When the prosecutor asked Mr. Kent at trial "what caused" him to make Defendant a joint owner on his accounts, Mr. Kent replied that he did so because Defendant told him "it would be easier for her and her bookkeeping and also the contact with money and then she would replace it." On cross-examination, Mr. Kent also stated that he put Defendant on his accounts because he "wanted to help her out" with "her family, . . . her children, and . . . other things." A New Mexico Adult Protective Services Department caseworker who had interviewed Mr. Kent testified at trial that Mr. Kent told her that he allowed Defendant to use his accounts because "he felt sorry for [Defendant] and that he was helping her."

{5} Mr. Kent allowed Defendant to use his accounts "as she needed[,]" and although he did not tell her she could use his money "carte blanche," he did not expressly limit her spending. Mr. Kent allowed Defendant to access his accounts over the computer.

{6} On January 20, 2011—a few months after Defendant began using Mr. Kent's accounts and about one month after Mr. Kent made Defendant a joint owner on his accounts—Defendant married a man named Jerry Marquez, whom she divorced about a year later on February 12, 2012. Defendant never told Mr. Kent that she had gotten

married, that she was romantically involved with anyone prior to this marriage, or that Mr. Marquez was more than a "friend." Indeed, when Defendant arranged to have Mr. Marquez work on Mr. Kent's roof in May 2011, Defendant lied when she introduced Mr. Marquez to Mr. Kent as her "gay friend" because she was married to Mr. Marquez at that time. The prosecutor asked Mr. Kent at trial, "When you put [Defendant] on your accounts, did you know that you were putting a married woman on your bank accounts?" Mr. Kent replied, "It was impossible because I didn't know it."

{7} In May 2011, representatives from Mr. Kent's bank and a caseworker from the New Mexico Adult Protective Services Department approached Mr. Kent about their concerns with Mr. Kent's dwindling bank accounts. Mr. Kent then stopped Defendant from accessing his accounts when he discovered that his "money was going down, down, down," and he wanted to "curtail the action" on his accounts. However, after Mr. Kent and Defendant "talked about it" and Defendant agreed to "slow down on it," Mr. Kent resumed allowing Defendant to access his accounts, but he did not make her a joint owner of his accounts again. Instead, in October 2011, Mr. Kent named Defendant the beneficiary of his accounts, which meant only that the money in Mr. Kent's accounts would have gone to Defendant upon Mr. Kent's death. Although Defendant's use of Mr. Kent's accounts "quieted down a little bit[,]" it eventually "went back to the same old way." The money in Mr. Kent's accounts "went down again" and Defendant "didn't respect it[.]"

{8} Mr. Marquez testified that sometime in January 2012 he told Mr. Kent that he was married to Defendant and that Mr. Kent "was shocked." However, when the prosecutor asked Mr. Kent how he learned that Defendant was married, Mr. Kent replied, "Well, it wasn't [Mr. Marquez]." The last time that Defendant took money from Mr. Kent's accounts was on February 14, 2012. On February 18, 2012, Mr. Kent removed Defendant as the beneficiary of his accounts.

{9} The prosecutor asked Mr. Kent at trial, "What caused you to finally take [Defendant] off your accounts permanently?" Mr. Kent replied, "The bank—they kept hounding me, 'You have problems Mr. Kent,' . . . and my money in the bank . . . was down." Mr. Kent also testified that after "the sheriff's representatives came out and talked" to him is "when things started with [his] degeneration of [his] . . . contact with [Defendant]." He said that he "ended up taking her name off of everything" because he "finally woke up to see what was really happening to [his] money," and that "after a while it got so bad . . . [he] had to stop it." When defense counsel asked Mr. Kent why, other than the first time he met Defendant, he did not ask Defendant any details about her personal romantic life over the course of their friendship, Mr. Kent replied that such details were "pertinent, very pertinent now, but I didn't even think of it 'cause she said she was not [married]."

{10} On February 21, 2012, Mr. Kent filed a fraud complaint with his bank. At some point, Mr. Kent and a friend of his notified the police.

{11} At trial, the prosecutor repeatedly asked Mr. Kent to elaborate on the nature of his relationship with Defendant and how Mr. Kent viewed this relationship. Mr. Kent repeatedly replied that he and Defendant were friends, even though he admitted to having had a romantic interest in her that "meant more" than the interest that Defendant had in him:

> [PROSECUTOR:] After you met [Defendant], what type of things would you do together?

[MR. KENT:] Oh my, let's see. We became friends and she . . . said, 'From now on I will take you to all the hospitals you have to go to or doctors,' and that was kinda the starter. And she did. And we just had a pleasant relationship.

. . . .

[PROSECUTOR:] What else did you and her do? What other kind of activities?

[MR. KENT:] Not much, really.

[PROSECUTOR:] What would you talk about? What kinds of things would you and her talk about?

[MR. KENT:] [Laughs]

[PROSECUTOR:] What did you have in common? I guess that's a way of putting it. What did you and her have in common that you liked to talk about?

[MR. KENT:] I guess, cars [laughs].

[PROSECUTOR:] What was the friendship based upon? . . . What type of conversation would she have with you, Mr. Kent? What sort of subjects would she bring up and talk about with you?

[MR. KENT:] I guess, after a year or so we kind of looked a little closer to ourselves and we just liked each other.

[PROSECUTOR:] How did you come to think of [Defendant] after a time? You said you were friends, but after a while how did you come to think of her? What did you think of her in your mind as the relationship that you had with her after a while?

. . . .

[MR. KENT:] It was nice. Pleasant.

[PROSECUTOR:] Okay, but how would you describe her? What have you described her as in the past to people when you were . . . getting along with her quite well? How had you described her to other people? As your what?

[MR. KENT:] I guess, my friend. And my [pauses]—

[PROSECUTOR:] Your what?
[MR. KENT:] My friend, and uh, how will I say it—

[PROSECUTOR:] What are you trying to say?

[MR. KENT:] I'm trying to say that she meant more to me than what I thought.

[PROSECUTOR:] When you say meant more to you though, in what regard? Meant more to you in what way? 'Cause we have friends, you know, I mean, some people I might just consider a friend, like an acquaintance or someone that I might just see on the street and talk to. Is that all that it was with [Defendant] in your mind?

[MR. KENT:] No.

. . . .

[PROSECUTOR:] So, Mr. Kent,

> let me be just very blunt. Did you have a romantic interest in [Defendant] at some point?
>
> [MR. KENT:] Yes.
>
> [PROSECUTOR:] So then in some ways you told people that you regarded her as what to you?
>
> [MR. KENT:] As my close friend, and I wouldn't say quite a lover 'cause I'm eighty-six, eighty-seven years old. But it was very nice and also . . . we were both content.

Although Mr. Kent did not testify that he thought of Defendant as his romantic partner, the caseworker testified that Defendant knew that Mr. Kent thought of Defendant as his "girlfriend."

{12} The prosecutor did not ask Mr. Kent any questions about whether he relied on his impression that Defendant was not dating or married to anyone during the time that he allowed Defendant access to his bank accounts. The prosecutor did not ask Mr. Kent if he gave Defendant access to his accounts because he thought of her as his romantic partner. Furthermore, on cross-examination, when defense counsel asked Mr. Kent whether he had been "tricked" into giving Defendant access to his account, Mr. Kent replied that he had not:

> [DEFENSE COUNSEL:] You . . . granted [Defendant] access to that account, right?
>
> [MR. KENT:] Yes.
>
> [DEFENSE COUNSEL:] Nobody tricked you, nobody did anything to try and take advantage of you. . . . You did it freely and willingly, correct?
>
> [MR. KENT:] Right.

{13} In his closing argument, the prosecutor asserted:

> [I]t's hard for [Mr. Kent] to come out and say he thought that [Defendant] . . . was his girlfriend, but that's what he thought about her, that's how he thought of her, and she encouraged it. . . . by lying to Mr. Kent about who her husband was. . . . [and] she didn't think that way about him.[1]

DISCUSSION

{14} The narrow question we must answer in this appeal is whether there was sufficient evidence presented to establish beyond a reasonable doubt that Mr. Kent relied on Defendant's deception about her relationship and marriage status when he allowed Defendant to use his money and access his accounts. For reasons we explain below, we conclude that the evidence was insufficient.

A. Elements of Criminal Fraud

{15} The crime of "[f]raud consists of the intentional misappropriation or taking of anything of value that belongs to another by means of fraudulent conduct, practices or representations." Section 30-16-6(A). A misrepresentation for purposes of criminal fraud may include a deceptive silence or

[1]The prosecutor also asserted in his closing argument that Defendant's asking Mr. Kent for $5,000 for breast surgery upon their first meeting in May 2010, and then not having the surgery, was the first instance of fraud. However, the jury instructions and Defendant's resultant conviction covered conduct occurring only between the dates of October 10, 2010, and February 13, 2012. We assume this is why the State did not raise this issue in its answer brief. The State confirmed at oral argument that Defendant's May 2010 conduct should not be considered in upholding her fraud conviction.

omission. *See State v. Stettheimer*, 1980-NMCA-023, ¶¶ 9-14, 94 N.M. 149, 607 P.2d 1167. As contained within our uniform jury instructions and the jury instructions used in this trial, the state must also present evidence sufficient to prove that "[*b*]*ecause* of the . . . victim['s] reliance on [the misrepresentation], the] defendant obtained [a thing of value]." UJI 14-1640 NMRA (emphasis added).

{16} A critical inquiry in this appeal is what constitutes reliance. Although the jury in this case was not instructed about how to determine whether Mr. Kent's reliance on Defendant's misrepresentation *caused* Mr. Kent to allow Defendant to access his accounts, we find it helpful to refer to UJI 14-134 NMRA in interpreting the legal requirements under which the element of reliance must be proved in a criminal trial for fraud. Although not used in this trial, UJI 14-134 is a criminal uniform jury instruction that "*should* be used in cases [other than homicide] in which causation is an issue." UJI 14-134 n.1 (emphasis added). UJI 14-134 provides, in pertinent part:

> In addition to the other elements of the crime . . . , the state must also prove . . . beyond a reasonable doubt that[] . . . [t]he act of the defendant was a significant cause of the injury or harm. The defendant's act was a significant cause of the injury or harm if it was an act which, in a natural and continuous chain of events, uninterrupted by an outside event, resulted in the injury or harm *and without which the injury or harm would not have occurred.* (Emphasis added.)

Thus, to sustain a fraud conviction, we conclude that the State must prove beyond a reasonable doubt that *without* the defendant's misrepresentation, the defendant would not have obtained the thing of value. *Id.*; *accord State v. Young*, 1998 ME 107, ¶ 14, 711 A.2d 134, 137 (referring to the Maine Criminal Code's definition of causation in determining the nature of the causal relationship that must be proved in a theft by deception prosecution and framing the issue as whether the defendant "would not have obtained the money *but for* his deceptive act"); 3 Charles E. Torcia, *Wharton's Criminal Law* § 427 (15th ed. 1995) (stating that, in proving a defendant obtained money or property by false pretenses, it is not "necessary . . . that the false representation be the paramount cause for the victim's surrender of his property; it is sufficient merely that the false representation be a cause *without which* the victim would not have surrendered his property" (emphasis added)).

B. Standard of Review and General Principles

{17} In conducting a sufficiency-of-the-evidence analysis, we review the evidence in the light most favorable to the verdict "to determine 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 [the] conviction." *State v. Hornbeck*, 2008-NMCA-039, ¶ 33, 143 N.M. 562, 178 P.3d 847 (internal quotation marks and citation omitted). "We do not re-weigh the evidence or substitute our judgment for that of the fact-finder, so long as sufficient evidence supports the verdict." *Id.* We remain mindful, however, that "evidence that is sufficient to allow a rational juror to make a finding adverse to a defendant under a lesser preponderance-of-the-evidence standard [of proof] will not necessarily suffice to allow a rational factfinder to reach the subjective state of certitude required by the beyond-a-reasonable-doubt standard." *State v. Garcia*, 2004-NMCA-066, ¶ 9, 135 N.M. 595, 92 P.3d 41, *rev'd in part on other grounds by State v. Garcia*, 2005-NMSC-017, 138 N.M. 1, 116

P.3d 72. "[E]vidence equally consistent with two inferences does not, without more, provide a basis for adopting either one—especially beyond a reasonable doubt." *Garcia*, 2005-NMSC-017, ¶ 12 (internal quotation marks and citation omitted); *see also Baca v. Bueno Foods*, 1988-NMCA-112, ¶ 15, 108 N.M. 98, 766 P.2d 1332 ("Evidence from which a proposition can be derived only by speculation among equally plausible alternatives is not substantial evidence of the proposition.").

{18} "Although appellate courts are highly deferential to a jury's decisions, it is the independent responsibility of the courts to ensure that the jury's decisions are supportable by evidence in the record, rather than mere guess or conjecture." *State v. Slade*, 2014-NMCA-088, ¶ 14, 331 P.3d 930 (internal quotation marks and citation omitted). In *State v. Maes*, this Court found the Second Circuit's discussion in *Goldhirsh Grp., Inc. v. Alpert*, 107 F.3d 105, 108 (2d Cir. 1997) helpful in discerning the fine line that sometimes exists between permissible inference and impermissible speculation:

> The line between permissible inference and impermissible speculation is not always easy to discern. When we 'infer,' we derive a conclusion from proven facts because such considerations as experience, or history, or science have demonstrated that there is a likely correlation between those facts and the conclusion. If that correlation is sufficiently compelling, the inference is 'reasonable.' But if the correlation between the facts and the conclusion is slight, or if a different conclusion is more closely correlated with the facts than the chosen conclusion, the inference is less reasonable. At some point, the link between the facts and the conclusion becomes so tenuous that we call it 'speculation.' When that point is reached is, frankly, a matter of judgment.

State v. Maes, 2007-NMCA-089, ¶ 18, 142 N.M. 276, 164 P.3d 975 (quoting *Goldhirsh Grp., Inc.*,107 F.3d at 108).

D. Analysis

1. Timing of Defendant's Deception and Mr. Kent's Decision to Allow Her Access to His Accounts

{19} We begin our analysis by noting that at the time that Mr. Kent began allowing Defendant to access his accounts for her own purposes in October 2010 and at the time he made her a joint owner on his accounts on December 15, 2010, and January 4, 2011, Defendant was not married. The evidence shows that Defendant married Mr. Marquez on January 20, 2011. Although Mr. Marquez testified that prior to his marriage with Defendant, he and Defendant "cohabitat[ed] . . . off and on[,]" his testimony does not establish when their relationship began or whether it was exclusive or continuous prior to their marriage.[2] Thus, the evidence adduced at trial did not show that Defendant had deceived Mr. Kent in any way at the time that Mr. Kent decided to allow Defendant access to his accounts and to make her a joint owner of his

[2]Our review of the trial testimony belies the State's assertion in its answer brief that "Defendant was living at . . . [Marquez]'s house" at the time that she met Mr. Kent. To the contrary, Mr. Marquez testified that prior to their marriage, he and Defendant "cohabitat[ed] . . . off and on." After he and Defendant married in January 2011, Mr. Marquez "moved into the mobile home with her[.]" Later, Mr. Marquez bought a home and he and Defendant moved there. Mr. Marquez stated that Defendant began "developing" her relationship with Mr. Kent while she was living at [his] home. He did not testify that he and Defendant were living together when Defendant and Mr. Kent met.

accounts. Thus, the point that the State raised at trial and again raises in its answer brief—that Mr. Kent "did not know he was putting a married woman on his accounts"—is not persuasive because it is based on the assumption of a fact that was actually disproved by the evidence at trial.

{20} Defendant's deceptive behavior becomes sufficiently apparent, however, when she married and moved in with Mr. Marquez in January 2011 and not only failed to tell Mr. Kent this significant detail about her personal life during the "couple times a week" they spent together, but blatantly lied to Mr. Kent when she introduced Mr. Marquez to him as her gay friend in May 2011. Regardless of whether Defendant's deception established her intent to defraud Mr. Kent when she hid the fact that she was married to Mr. Marquez, the issue on appeal is not what Defendant intended, but rather what Mr. Kent himself relied upon when he allowed her to use his accounts.

2. Insufficient Evidence of Reliance

{21} During the State's examination of Mr. Kent at trial, the prosecutor did not ask Mr. Kent whether he would have allowed Defendant to continue to access his accounts if he knew that Defendant was involved with and had eventually married Mr. Marquez. Instead, when the prosecutor asked Mr. Kent "what caused" him to allow Defendant to access his money and make Defendant a joint owner on his accounts, he replied, "[i]t would be easier for her and her bookkeeping and also the contact with money and then she would replace it." On cross-examination, Mr. Kent also testified that he put Defendant on his accounts because he "wanted to help her out" with "her family, . . . her children, and . . . other things." He told the caseworker that he allowed Defendant to access his accounts because "he felt sorry for [Defendant] and that he was helping her." Mr. Kent testified that, beyond their first meeting, the status of Defendant's romantic affairs was not "pertinent" to him until "now." And when asked whether he felt he was "tricked" into allowing Defendant to use his bank accounts, Mr. Kent replied that he did not. This testimony is not sufficient to prove that Mr. Kent would not have given Defendant access to his accounts *but for* his impression that she was romantically available to him. *See* UJI 14-134; *Young*, 711 A.2d at 14; Torcia, *supra*, § 427.

{22} Although Mr. Kent was "shocked" when he discovered that Defendant had been married to Mr. Marquez, the evidence at trial was also insufficient to directly connect Mr. Kent's discovery of this fact with his decision to finally cut Defendant off from his accounts. The prosecutor did not ask Mr. Kent whether learning of Defendant's marriage prompted him to stop her from using his accounts. Instead, the evidence showed that Mr. Kent finally cut Defendant off from accessing his accounts for several other reasons: "[t]he bank . . . kept hounding [him]," his "money in the bank . . . was down[,]" he "finally woke up to see what was really happening to [his] money," and that "after a while it got so bad . . . [he] had to stop it." Mr. Kent testified that "[his] degeneration of [his] . . . contact with [Defendant,]" began when "the sheriff's representatives came out and talked" to him—he did not testify that learning of Defendant's marriage from Mr. Marquez caused him to take action or was the reason he ended his relationship with her. Furthermore, there was no evidence that Mr. Kent cut off Defendant's access to his accounts prior to her last transaction on February 14, 2012, which was at least two weeks after Mr. Marquez stated he told Mr. Kent about his marriage to Defendant in January 2012.

{23} Without testimony from Mr. Kent regarding what he relied upon and whether he would have continued to allow Defendant to

access his accounts had he known her true marital status, the remainder of the evidence presented at trial would, at best, be equally consistent with two hypotheses on the factual element of reliance. *See Garcia*, 2005-NMSC-017, ¶ 12; *Baca*, 1988-NMCA-112, ¶ 15. One that, irrespective of Defendant's marital status, Mr. Kent's own testimony appears to support the position that he would have allowed Defendant to access his money to assist with her children's financial needs because they were close friends, he felt sorry for her, and because she provided him with assistance and companionship. The second being that, irrespective of Defendant's assistance and companionship, Mr. Kent only allowed Defendant to access his accounts because of he thought of her as his romantic partner.

{24} Mr. Kent was the State's primary witness and testified at length in this case. Evidence of Mr. Kent's reliance on Defendant's misrepresentation of her marital status was not the type of evidence that was clandestine in nature, could only be proved by circumstantial evidence, and therefore required the jury to disregard Mr. Kent's testimony and extract contradictory inferences from other indirect testimony. *Cf. State v. Gallegos*, 2011-NMSC-027, ¶ 45, 149 N.M. 704, 254 P.3d 655 (recognizing that because conspiracies are clandestine in nature, establishing evidence of an agreement between the conspirators is seldom available, the jury may infer such an agreement from the parties' conduct and the surrounding circumstances, even though it raises the specter of a conviction by guess and speculation). The State offers no explanation for its failure to ask Mr. Kent about what he relied upon when he gave Defendant money and allowed her access to his accounts. Even if the jury could also infer that, had the victim known the truth about Defendant's marital status, he *possibly* would not have given Defendant money or access to his accounts, we conclude that, based upon the evidence presented, the jury could not reasonably make such a circumstantial inference *beyond a reasonable doubt. See Garcia*, 2004-NMCA-066, ¶¶ 9, 11; *Slade*, 2014-NMCA-088, ¶ 14; *cf. Commw. v. Imes*, 623 A.2d 859, 863 (Pa. Super. Ct. 1993) (concluding that the government failed to prove the element of reliance on a false impression where "none of the [purported victims] were called to testify at the trial[,]" and "[c]onsequently, none of them could state whether they relied on [the] false impression"). The State failed to establish such a basis of reliance when Mr. Kent competently testified at trial. Asking the jury to determine the victim's reliance from these two plausible inferences presented by the State, without asking the victim about the matter during his trial testimony, was the type of evidentiary guesswork and speculation that is insufficient for the State to meet its burden of proof. *See Slade*, 2014-NMCA-088, ¶ 14.

{25} Therefore, because the State carried the burden to prove beyond a reasonable doubt that "without" Defendant's misrepresentation about her marital status, Mr. Kent would not have allowed her to access his accounts, the other indirect and contradictory circumstantial evidence was insufficient to infer the element of reliance necessary to sustain Defendant's fraud conviction. UJI 14-134 (providing that, in criminal trials in which causation is an issue, the state must prove that "without" the defendant's act, "the injury or harm would not have occurred"); *see Young*, 711 A.2d at 14; Torcia, *supra*, § 427; *see also Hornbeck*, 2008-NMCA-039, ¶ 33 (providing that substantial evidence must support every element essential to the conviction). On the record before us in this case, we hold that "the link between the facts and the conclusion" is "so tenuous that we call it 'speculation.' " *Maes*, 2007-NMCA-089, ¶ 18 (internal quotation marks and citation omitted).

{26} We note that what makes Defendant's conduct troubling is the age and

vulnerability of Mr. Kent. He was in his mid-eighties, just lost his wife of thirty-six years, and needed someone to take him to his medical appointments and provide personal companionship. Although Defendant helped Mr. Kent in these ways, she also used his vulnerability to benefit herself in an amount that appeared somewhat disproportionate. Rather than ask Mr. Kent to testify about whether he relied upon Defendant's marital status to allow her to access his accounts, the State asked the jury to infer such reliance based upon other indirect and contradictory circumstantial evidence. We cannot speculate as to why the State presented its case in this manner. This was either a tactical trial decision by the prosecutor or an inadvertent error. Unfortunately, the other indirect circumstantial evidence was insufficient to establish the element of reliance beyond a reasonable doubt.

E. Computer Access with Intent to Defraud

{27} We also conclude that there was insufficient evidence to support Defendant's conviction of computer access with intent to defraud. Our Supreme Court has concluded that "the Computer Crimes Act was intended by the [L]egislature to deter and punish crimes committed, at least in a manner of speaking, against computers, or through the abuse of computer sophistication." *State v. Rowell*, 1995-NMSC-079, ¶ 12, 121 N.M. 111, 908 P.2d 1379. The Court noted that the Senate bill upon which the Act was based stated that "[t]he [L]egislature recognizes a dramatic increase in computer-related crimes . . . through the introduction of fraudulent data into a computer system, the unauthorized use of computer facilities, the alteration or destruction of computerized information or files[,] and the stealing of financial information, data [or] other assets." *Id.* ¶ 12 n.2. It observed that the Act was not intended to apply to the use of a computer as "a passive conduit through which the defendant's criminal activity passed." *Id.* ¶ 11.

{28} In this case, Defendant did not introduce "fraudulent data into a computer system," use "computer facilities" without "[authorization,] . . . alter[] or [destroy] . . . computerized information or files[,]" nor did she steal "financial information, data [or] other assets." *Id.* ¶ 12 n.2. Instead, Defendant used the computer as "a passive conduit" to access accounts and transfer funds, just as any banking customer would. *Id.* ¶ 11.

{29} Furthermore, because we have concluded that the evidence was insufficient to prove that the underlying transfers made via the computer were criminal, and because Mr. Kent expressly approved Defendant's use of a computer to perform these transfers, the elements of computer access with intent to defraud could not be proved beyond a reasonable doubt.

CONCLUSION

{30} Because we reverse Defendant's convictions and remand the case to the district court with instructions to vacate Defendant's convictions, we need not address the other issues that Defendant raises on appeal.

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

TIMOTHY L. GARCIA, Judge

I CONCUR:

M. MONICA ZAMORA, Judge

JONATHAN B. SUTIN, Judge (dissenting).

SUTIN, Judge (dissenting).

{32} I acknowledge that one might question whether the peculiar and particular circumstances in this case should be covered

under the criminal fraud statute. Why not leave it to civil fraud remedies? Why not, as Defendant strongly argued in her briefing and in oral argument, exclude deception in romantic relationships from criminal prosecution? Further, why not fall back on a view that the circumstances showed it only more likely than not that Mr. Kent relied on Defendant's conduct, deceitful hiding of material information, and fraudulent misrepresentations and omissions? I am unable to follow these why-not paths. Therefore, I respectfully dissent and would affirm.

{33} Looking at the totality of circumstances, particularly including Defendant's conduct, practices, and misrepresentations (including omissions), it seems apparent that the jury strongly believed that Defendant engaged in a deliberate, willful fraudulent scheme to have access to Mr. Kent's bank accounts. And the district court must have viewed the circumstances in a similar fashion, having imposed consecutive nine-year sentences for the two convictions for a total of eighteen years, ten of which were suspended, and having denied Defendant's motion for a restitution hearing and imposing restitution in the amount of $53,800.

{34} Further, viewed in the light most favorable to the verdict, as we must, the evidence presented at trial should be considered sufficient to support Defendant's convictions, including the element of reliance. *State v. Nichols*, 2014-NMCA-040, ¶ 15, 321 P.3d 937 (stating that in our review of sufficiency-of-the evidence claims, we view the evidence in the light most favorable to the guilty verdict). I would affirm.

{35} The jury was instructed, in relevant part, that to find Defendant guilty of fraud, the State was required to prove that (1) Defendant, "by any words or conduct, misrepresented a fact to [Mr.] Kent, intending to deceive or cheat" him; and (2) "[b]ecause of the misrepresentation and [Mr.] Kent's reliance on it, [D]efendant obtained over $20,000[.]" This instruction is the law of the case against which the sufficiency of the evidence supporting the jury's verdict of guilty of fraud beyond a reasonable doubt is to be measured. *See State v. Smith*, 1986-NMCA-089, ¶ 7, 104 N.M. 729, 726 P.2d 883 ("Jury instructions become the law of the case against which the sufficiency of evidence is to be measured.").

{36} Mr. Kent inquired into Defendant's marital status upon their first meeting in May 2010. Although at that time Defendant was apparently living with her boyfriend, Mr. Marquez, whom she married in January 2011, Defendant told Mr. Kent at the time only that she was not married, but that she had previously been married.

{37} Within several months following that meeting, Defendant persuaded Mr. Kent to allow her access to his bank accounts, and one month before she married Mr. Marquez, Defendant persuaded Mr. Kent to add her as a co-owner of his bank accounts and to use the accounts to help Defendant with her children's education and her "problems."

{38} Mr. Kent testified that he and Defendant started a friendship when Defendant offered to take and then began taking Mr. Kent to doctors and to hospitals. According to Mr. Kent, after a year or so, he and Defendant "liked each other." "After a while," Mr. Kent regarded Defendant as a close friend, not "quite a lover," but someone in whom he had a romantic interest; and, as Mr. Kent described it, they "were both content."

{39} Beginning in October 2010, before Mr. Kent added Defendant as a co-owner of his bank accounts in December 2010, Defendant transferred money from one of Mr.

Kent's accounts into her own accounts using the online-transfer banking feature available through Mr. Kent's bank. Defendant continued to transfer money from Mr. Kent's accounts into her own account through mid-February 2012. Mr. Kent had given Defendant permission to effect transfers and withdrawals from his accounts, and he did not specify a limit nor did he require a specific account of what the money was to be used for. Mr. Kent also gave Defendant permission to use his debit card, and she did so. At times, Defendant paid Mr. Kent back at least some of the money that she had taken from his accounts. Mr. Kent did not know how much Defendant had paid back.

{40} Defendant never told Mr. Kent that she had married Mr. Marquez; in fact, she introduced Mr. Marquez, her then-husband, to Mr. Kent in May 2011 and told Mr. Kent that Mr. Marquez was her "gay friend." In January 2012, Mr. Marquez went to Mr. Kent's home to tell him that he and Defendant were married; according to Mr. Marquez, Mr. Kent "was shocked" by that information. In February 2012, Mr. Kent permanently removed Defendant from his accounts. Three days later, Mr. Kent filed an "affidavit of online fraud" with his bank.

{41} Given that the affidavit was admitted at trial as an exhibit, this Court sua sponte obtained a copy. The subject of the affidavit of online fraud was a series of enumerated transactions achieved by "unauthorized ATM activity[,] unauthorized branch withdrawal and deposit activity[, and] unauthorized teletransfer activity" totaling several thousand dollars that occurred between September 2011 and February 2012. In handwritten responses to the questionnaire portion of the affidavit of online fraud, Mr. Kent provided the following relevant answers. In response to the question "[w]hen and how did you discover the fraud in your account?" Mr. Kent answered that "[a]round [the] 9th of February 2012, secondary acct holder's ex-husband . . . informed me of some suspicious activity." In response to the question "[d]o you know who might have committed the fraud?" Mr. Kent responded, "Yes– Patricia G. Garcia. '<u>Girlfriend</u>'[.]" And, in response to the questionnaire's request to "[e]xplain how the person that committed the fraud might have gained access to your account information[,]" Mr. Kent wrote, "manipulated, convinced me to trust her . . . [.]"

{42} These facts, among others in the record, must be viewed by us within the context of the evidence as a whole and considered within the totality of the circumstances while indulging all reasonable inferences in favor of the jury's verdict of guilt beyond a reasonable doubt. *State v. Graham*, 2005-NMSC-004, ¶ 13, 137 N.M. 197, 109 P.3d 285; *see Gallegos*, 2011-NMSC-027, ¶ 18 (rejecting a "divide-and-conquer" approach to considering the sufficiency of the evidence "whereby each piece of evidence is viewed in isolation, ignoring reasonable inferences from the totality of the circumstances that support guilt" (internal quotation marks omitted)). "When we infer, we derive a conclusion from proven facts because such considerations as experience, or history . . . have demonstrated that there is a likely correlation between those facts and the conclusion. If that correlation is sufficiently compelling, the inference is reasonable." *Maes*, 2007-NMCA-089, ¶ 18 (internal quotation marks and citation omitted).

{43} By applying the appropriate standards of review to the jury's decision, the jury could have reasonably inferred that, by asking Defendant at the outset of their relationship whether she was married, the mid-eighty-year-old victim, whose wife had recently died, intended to learn whether Defendant was available to engage in a romantic relationship. Defendant's response

that she was not married, while technically correct, could reasonably have been considered by the jury as disingenuous given that she was living with her boyfriend, Mr. Marquez, whom she married months later. The jury could also have reasonably inferred that Defendant intended to deceitfully present herself as romantically unattached. *See Stettheimer*, 1980-NMCA-023, ¶ 13 (stating that silence that is calculated to deceive may form the basis for a criminal misrepresentation). In addition, based on Defendant's almost immediate and continuing pursuit of Mr. Kent's money, the jury could have reasonably inferred that Defendant's conduct was purposeful in order to eventually gain access to Mr. Kent's money, an inference that is supported by the fact that within months of their first meeting, Defendant had direct access to Mr. Kent's bank accounts. *State v. Brenn*, 2005-NMCA-121, ¶ 24, 138 N.M. 451, 121 P.3d 1050 (recognizing that "intent is usually inferred from the facts of the case" and established by circumstantial, not direct, evidence).

{44} Further, the jury could have reasonably inferred that Defendant understood that Mr. Kent's willingness to allow her access to his accounts was grounded in Mr. Kent's impression that Defendant was his "girlfriend," and in addition, that Defendant's conduct showed an intent to continue her ruse so as to continue using Mr. Kent's money, an inference that was supported by Defendant having never informed Mr. Kent of her pre-marriage relationship with and her marriage to Mr. Marquez and by her affirmative misrepresentation when introducing Mr. Marquez as her gay friend. Finally, based on the overall circumstances and on Mr. Kent's affidavit of online fraud stating that Defendant gained access to his bank accounts by having "manipulated" and "convinced [him] to trust her[.]" This, combined with the use of the term "girlfriend," in quotation marks and underlined, allowed the jury to reasonably infer that but for Defendant's deceitful conduct intended to lead Mr. Kent to believe that she was romantically unattached, unmarried, and was his girlfriend, he would not have permitted Defendant to access his bank accounts. This inference is further supported by the fact that, although Mr. Kent always knew that Defendant was accessing his bank accounts and using his money, he stated that he did not discover the fraud on his account until Mr. Marquez informed him in February 2012 of "some suspicious activity." From Mr. Marquez's testimony, the jury could infer that the "suspicious activity" to which Mr. Kent referred included that Mr. Marquez was not Defendant's gay friend but was, instead, her husband. Viewed in the context of the evidence as a whole, the jury could reasonably have concluded that but for the knowledge that Defendant's "activity" was "suspicious" from which Mr. Kent could believe that Defendant's intent and activity was to defraud him, Mr. Kent would not have considered Defendant's use of his bank accounts to be fraud.

{45} To hold that the evidence in this case was insufficient to prove Mr. Kent's reliance on Defendant's fraudulent conduct, misrepresentations, and omissions sweeps aside reasonable inferences formed by the jury in reaching its verdict. *See Slade*, 2014-NMCA-088, ¶ 13 (noting that "the weight and effect of the evidence, including all reasonable inferences to be drawn from both the direct and circumstantial evidence is a matter reserved for determination by the [jury]" and recognizing that this Court should not substitute its judgment for that of the jury (internal quotation marks and citation omitted)). Although "[t]he line between permissible inference and impermissible speculation is not always easy to discern[,]" *see Maes*, 2007-NMCA-089, ¶ 18 (internal quotation marks and citation omitted), the jury's verdict in this case was supported by evidence and by permissible inferences drawn

from that evidence, and it should be upheld. *See Slade*, 2014-NMCA-088, ¶ 14 (recognizing that an inference is a logical deduction from proven facts).

{46} The notion that evidence of reliance was insufficient because Mr. Kent never explicitly testified that he relied upon Defendant's conduct and statements relating to her marital status or her relationships with Mr. Marquez in allowing Defendant access to and partial ownership of his accounts is a theory that originated on appeal. Having heard the prosecution's direct and re-direct examination of Mr. Kent, and having himself cross-examined Mr. Kent, Defendant's trial counsel did not once raise or argue the fact that Mr. Kent had not explicitly testified that he relied on Defendant's continuing purposeful failure to reveal her relationship with Mr. Marquez and marriage to him in allowing Defendant to access his bank accounts.

{47} This, notwithstanding the fact that after the prosecution presented its case, Defendant's counsel moved for a directed verdict on grounds having nothing to do with a failure of evidence on reliance. *See State v. Barreras*, 2007-NMCA-067, ¶ 3, 141 N.M. 653, 159 P.3d 1138 ("The question presented by a directed verdict motion is whether there was substantial evidence to support the charge." (internal quotation marks and citation omitted)). It seems safe to assume that Defendant's trial counsel inferred, as did the jury, that based under the totality of the circumstances, including in particular Defendant's conduct and material misrepresentations and omissions, and the content of Mr. Kent's affidavit of online fraud identifying Defendant's marriage to Mr. Marquez as the basis for his claim, that the element of reliance was proved.

{48} A good part of Defendant's argument on appeal dwelled on a view that the criminal fraud statute and any reasonableness standard cannot be applied to romantic, fleeting, and fickle relationships, in that persons in such relationships can be, and often are, deceitful and unreasonable. To bring these relationships under the criminal fraud statute, Defendant argues, opens a dangerous prosecution door of criminal liability not contemplated by or intended to be covered under the criminal fraud statute. The Majority Opinion does not address this policy argument. This argument might have legs in the Legislature, but it has none in this case.

{49} Because the mainstay of the Majority Opinion is that reliance was not proved because Mr. Kent did not explicitly say that he relied on Defendant's misrepresentations, I have limited this dissent to that question. I have not dissected Defendant's arguments relating to materiality, privacy, free speech, double jeopardy, and due process. Those issues need be addressed only if this case happens to return to this Court after certiorari review by our Supreme Court. In sum, the element of reliance required to prove fraud rested upon a combination of proven facts and permissible inferences, with each inference reasonably derived from evidence at trial. Accordingly, viewing the evidence and inferences in a light most favorable to the verdict, I would uphold the jury's verdict and affirm Defendant's convictions.

JONATHAN B. SUTIN, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-095

Filing Date: June 3, 2015

Docket No. 33,778

MONTE DEMICHELE,

Petitioner-Appellant,

v.

STATE OF NEW MEXICO TAXATION AND REVENUE DEPARTMENT MOTOR VEHICLE DIVISION,

Respondent-Appellee.

Joan M. Waters
Albuquerque, NM

for Appellant

Hector H. Balderas, Attorney General
Lewis J. Terr, Special Assistant Attorney General
Santa Fe, NM

for Appellee

OPINION

FRY, Judge.

{1} Petitioner Monte DeMichele appeals from the district court's order denying his petition for restoration of his driver's license. This Court, having reviewed the information presented at two evidentiary hearings held by the district court on this issue, concludes that the district court abused its discretion in determining that Petitioner failed to meet the "good cause" standard required for restoration pursuant to NMSA 1978, Section 66-5-5(D) (2011). Accordingly, we reverse the district court and remand for restoration of Petitioner's license.

BACKGROUND

{2} Between 1990 and 2007, Petitioner was convicted six times of driving while intoxicated (DWI). The last of these arrests occurred on August 17, 2005. On December 9, 2005, an interlock device was placed in Petitioner's vehicle. On August 8, 2013, Petitioner requested restoration of his driver's license in accordance with Section 66-5-5(D). Two evidentiary hearings were held in this matter, on September 25, 2013, and March 19, 2014, the details of which are discussed below. At the conclusion of the first hearing, the district court postponed making a decision until Petitioner could provide six more months of interlock records. At the conclusion of the second hearing, the district court denied the petition for restoration, notwithstanding the Motor Vehicle Division's support in favor of restoration.

{3} At the first hearing on the petition for restoration, Petitioner testified as to his sobriety, his participation in Alcoholics Anonymous (AA) for the last eight years, and the fact that he has had no violations on his interlock device. Petitioner also testified that he worked with a personal counselor, completed all programs following his arrest, and changed his associations and his way of life to avoid his "triggers." In support of his request for restoration, Petitioner submitted letters of support from a number of people, including his employer, and interlock records from December 9, 2010, until February 22, 2013.

{4} The State in its answer, and the district court at the hearing, expressed some concern over the number of refusals to retest indicated in Petitioner's interlock records. Petitioner submitted a letter from the interlock monitoring company explaining that the most

common explanations for a refusal to retest are: (1) "that the driver was warming up the car in the morning, went back into their house and didn't get to retest in time"; or (2) "that they leave their vehicle running while running in somewhere to conduct an errand or other business and not having the knowledge that the interlock was requesting a test." Petitioner testified that "sometimes [he would] leave the ignition on, depending on the customer that [he was] speaking with, because some of them walk [him] out to [his] vehicle[.]" The letter from the interlock company explained that it does "not consider a retest refusal to be suspicious, unless it is for a prolonged period of time usually exceeding [eight to ten] minutes OR that all retests from the initial test to ignition off have been ignored." The State conceded that it did not know precisely how the refusals worked and indicated that it was satisfied with Petitioner's explanation.

{5} At the conclusion of the hearing, the district court asked Petitioner if he thought "that having the interlock is a useful tool for [him] to really avoid drinking and driving[.]" Petitioner acknowledged that the interlock device had been a useful tool, "especially for the first few years" when he was "trying to build tools and things like that to keep [him] away from [his] bad decisions that [he] had made in [his] past[.]" However, he testified that he now had "different avenues and [he] trust[s] [him]self."

The district court then went on to conclude the hearing by stating:

> Well, you know, you've done a lot of good, there's no question you've made—you've worked hard[;]you have a lot of recommendations here from people who will attest to your new character and your hard work and your family life. What I'm balancing is, you've had about eight good years, I suppose, but you had about 30 pretty bad years—
>
> . . . .
>
> —you know. And I think I'd prefer to see a little more time go by to make sure the good years stay good years because I think the interlock does you some good, as you have attested to.
>
> So what I want to do is, I'm going to continue this and reschedule it again for sometime in January. Come back and we'll look at it and see where things are. If everything is the same, then I think you're going to have a good chance to get your license restored.

{6} The hearing reconvened about six months after the first hearing. At this hearing, Petitioner submitted interlock records for the period from September 9, 2013, through February 7, 2014. The district court asked the State for any relevant information from the newly submitted interlock records, and the State indicated that there were "three indications of pass greater than zero." However, the State explained that these occur when "the machine detects alcohol from some source, and it can be ambient in the air." The State went on to explain:

> So it could be anything from—I don't know what the word would be— scant background alcohol sensation or sensing alcohol from some source up to .024, because anything greater than .025, regulations require that they list that as a violation.
>
> . . . .
>
> In other words, I don't know that this particular company can do a printout,

> but I've seen details of those things where sometimes the levels are at an extremely insignificant level, like .000 something.

When asked by the district court to explain the low level readings, Petitioner stated that, based on his conversation with a person at the interlock monitoring company, it could be the result of his being an insulin-dependent diabetic and that the low level readings were .00024 and .00026. The State also pointed out to the district court that the substance abuse evaluation that had been prepared at the Court's request confirmed that Petitioner is an insulin-dependent diabetic. In addition, the State pointed out that the substance abuse evaluation[1] indicated that Petitioner was truthful and not dependent on alcohol. The district court again questioned Petitioner about the number of refusals in his interlock records.

{7} In addition, the district court again made remarks about the interlock device being a significant tool:

> I just think that in your case, like in a lot of other cases, the one significant tool that has been brought into your situation that you didn't have during those [fifteen] to [seventeen] years when you were drinking and driving was the ignition interlock device. That seems, to me, to be the one thing that has helped more than anything else. Since you did that, you haven't had any arrests for drinking and driving.
>
> . . . .
>
> So it's hard for me to understand why I would want to take away the one tool that seems to have resulted in the most success.

The district court then denied Petitioner's petition for restoration, stating:

> I'm glad you're doing well, but I'm afraid I'm going to deny your petition. There is very little room for error. You continue to have some readings of alcohol. The reason for that is all speculation. I don't know why it's in there. I recognize that they are low readings, but they're there, and with somebody with six DWI convictions, I mean, that's a lot of DWI convictions, and you're asking me to take away the one tool that I think has really helped you not get any more DWI convictions, and I just don't see, based on the record before me, that you have established good cause that would allow me to do that. So your petition is denied.

Petitioner appeals.

DISCUSSION

{8} On appeal, Petitioner contends that the district court abused its discretion in its determination that Petitioner failed to demonstrate "good cause" for restoration of his license. The State offers no opposition, agreeing that the district court abused its discretion in denying Petitioner's request. However, this Court is not bound by the State's concession. *See State v. Caldwell*, 2008-NMCA-049, ¶ 8, 143 N.M. 792, 182

[1]We note that the substance abuse evaluation ordered by the district court also provided that Defendant scored "a [l]ow [p]robability of having a current [s]ubstance [d]ependence [d]isorder . . . due to his continued eight full years of ongoing sobricty and due to his continued utilization of AA and its recovery program for life"; "a very low disposition . . . for alcohol use and driving"; and "below the threshold for indication of hazardous drinking or alcohol dependency."

P.3d 775 ("This Court . . . is not bound by the [s]tate's concession and we conduct our own analysis[.]"). We note that

> [a]lthough a confession of error by the Attorney General is entitled to great weight, it does not relieve this [C]ourt of the obligation to perform our judicial function. The public interest in criminal appeals does not permit their disposition by party stipulation. We must therefore independently review the proceedings below to insure that the error confessed is supported by the record.

State v. Maes, 1983-NMCA-073, ¶ 7, 100 N.M. 78, 665 P.2d 1169 (internal quotation marks and citation omitted), *abrogated on other grounds by State v. Armijo*, 2005-NMCA-010, ¶ 27, 136 N.M. 723, 104 P.3d 1114. While we acknowledge that this is not a criminal appeal, there is a significant public interest in alleviating drunk driving such that, where this Court is being asked to reverse the district court's denial of restoration of a driver's license to a person with six DWI convictions, it would be imprudent for this Court to rely solely on the State's stipulation and to decline to conduct our own independent review of the record prior to reversing the district court.

I. Standard of Review

{9} Given that "good cause" for restoration has never been addressed by a formal opinion of this Court or the New Mexico Supreme Court, we must first determine what standard of review this Court applies in reviewing the decision of the district court. To do so, we begin by looking to the statutory language governing restoration and inquiring what authority the Legislature bestowed on the district court to make this determination.

{10} Section 66-5-5(D) provides, in relevant part, that the Motor Vehicle Division

> shall not issue a driver's license under the Motor Vehicle Code to any person:
>
> . . . .
>
> (D) who is four or more times convicted of driving a motor vehicle while under the influence of intoxicating liquor or narcotic drug regardless of whether the convictions are under the laws or ordinances of this state or any municipality or county of this state or under the laws or ordinances of any other state, the District of Columbia or any governmental subdivision thereof, except as provided in the Ignition Interlock Licensing Act. Five years from the date of the fourth conviction and every five years thereafter, the person may apply to any district court of this state for restoration of the license, and the court, upon good cause being shown, may order restoration of the license applied for; provided that the person has not been subsequently convicted of driving a motor vehicle while under the influence of intoxicating liquor or drugs.

{11} Section 66-5-5(D) states that the district court "*may* order restoration of the license applied for." Based on the use of this discretionary language in the statute, we conclude that a district court's determination as to whether to restore a petitioner's license is discretionary in nature. *See State v. Pacheco*, 2008-NMCA-055, ¶ 25, 143 N.M. 851, 182 P.3d 834 ("The word 'may' indicates that the district court has discretion[.]"); *see also* NMSA 1978, § 12-2A-4(B) (1997) (" 'May' confers a power, authority, privilege or

right."). In recognition of this discretion, we will reverse the district court's decision only on a showing of an abuse of discretion. *See, e.g.*, *Monsanto v. Monsanto*, 1995-NMCA-048, ¶ 9, 119 N.M. 678, 894 P.2d 1034 (stating that the determination "is within the discretion of the [district] court and will be reviewed only to determine whether there has been an abuse of discretion").

{12} "A trial court abuses its discretion when a ruling is clearly against the logic and effect of the facts and circumstances, or when the ruling is contrary to the reasonable, probable, and actual deductions that may be drawn from the facts and circumstances." *State v. Soto*, 2007-NMCA-077, ¶ 10, 142 N.M. 32, 162 P.3d 187 (internal quotation marks and citation omitted). "[E]ven when we review for an abuse of discretion, our review of the application of the law to the facts is conducted de novo. Accordingly, we may characterize as an abuse of discretion a discretionary decision that is premised on a misapprehension of the law." *Harrison v. Bd. of Regents of Univ. of N.M.*, 2013-NMCA-105, ¶ 14, 311 P.3d 1236 (internal quotation marks and citations omitted). Therefore, having determined that our review is for an abuse of discretion, we now turn to the merits of Petitioner's claim of error.

II. Restoration Pursuant to Section 66-5-5(D)

A. Good Cause

{13} The statutory language quoted above provides that a district court has the discretion to order restoration of a petitioner's driver's license upon a showing of good cause. *See* § 66-5-5(D). In the present case, the district court determined that Petitioner had failed to establish good cause. In order for this Court to assess whether the district court abused its discretion in making this determination, we must first determine the meaning and scope of the term "good cause" within the context of Section 66-5-5.

{14} "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. However, this Court is limited in our interpretation of statutes by the plain meaning rule. *See Starko, Inc. v. N.M. Human Servs. Dep't*, 2014-NMSC-033, ¶ 46, 333 P.3d 947 ("New Mexico courts have long honored [the] statutory command [that the text of a statute or rule is the primary, essential source of its meaning] through application of the plain meaning rule, recognizing 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)). The plain meaning rule presumes that the words in a 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." *In re Rescue Ecoversity Petition*, 2012-NMCA-008, ¶ 6, 270 P.3d 104 (internal quotation marks and citation omitted). Thus, pursuant to the plain meaning rule, we will not read into a 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).

{15} The term "good cause" is not defined in Section 66-5-5 or elsewhere in the Motor Vehicle Code. Further, the term "good cause" has not previously been defined in this context by a published opinion of our appellate courts. We therefore look to the common meaning of the term "good cause" and draw from

interpretations in other contexts in order to ascertain the Legislature's intent.

{16} The statutes, rules, and case law of this state are replete with references to "good cause" standards. *See, e.g.*, *State v. Guthrie*, 2011-NMSC-014, ¶ 40, 150 N.M. 84, 257 P.3d 904 (holding that "good cause" for not requiring confrontation in a probation revocation proceeding exists where "the state's evidence is uncontested, corroborated by other reliable evidence, and documented by a reliable source without a motive to fabricate"); *State v. Munoz*, 2006-NMSC-005, ¶ 9, 139 N.M. 106, 129 P.3d 142 (defining good cause as "a good faith and reasonable belief" in the context of the statute setting forth the offense of custodial interference (internal quotation marks and citation omitted)); *Ortiz v. Shaw*, 2008-NMCA-136, ¶ 17, 145 N.M. 58, 193 P.3d 605 (concluding that "good cause" to set aside a default judgment existed where the defendant had demonstrated that she was not properly served with the complaint); *State v. Herrera*, 2001-NMCA-073, ¶¶ 32-34, 131 N.M. 22, 33 P.3d 22 (determining that "good cause" to order a mental examination of the defendant was not established by the mere assertion of counsel, but required an affidavit or other documentary evidence to substantiate the defendant's claims of incompetency); *Vigil v. Thriftway Mktg. Corp.*, 1994-NMCA-009, ¶¶ 14, 16, 117 N.M. 176, 870 P.2d 138 (determining that reinstatement for "good cause" after a *sua sponte* dismissal under Rule 1-041(E)(2) NMRA for failure to prosecute should occur where a party demonstrates "that he is ready, willing, and able to proceed with the prosecution of his claim and that the delay in the prosecution is not wholly without justification" (internal quotation marks and citation omitted)). While each of these cases deals with a completely different statute, rule, or principle of law, they demonstrate that what constitutes "good cause" varies, depending on the circumstances in which "good cause" is being applied. Apart from the context in which it is applied, "good cause" is simply defined as "[a] legally sufficient reason." *Black's Law Dictionary* 266 (10th ed. 2014) (also stating that "[g]ood cause is often the burden placed on a litigant . . . to show why a request should be granted or an action excused"). Thus, we must determine what is a legally sufficient basis for restoration within the context of Section 66-5-5.

{17} Our Supreme Court has previously acknowledged that license revocation serves the "purpose of protecting the public from the dangers presented by drunk drivers and helps enforce regulatory compliance with the laws governing the licensed activity of driving." *State ex rel. Schwartz v. Kennedy*, 1995-NMSC-069, ¶ 35, 120 N.M. 619, 904 P.2d 1044. Similarly, the requirement that a driver's license be conditioned on the installation and use of an ignition interlock device serves a similar purpose by "prevent[ing] the operation of a motor vehicle by an intoxicated or impaired person." *See* NMSA 1978, § 66-5-502(B) (2005, amended 2013) (defining "ignition interlock device" (internal quotation marks omitted)).

{18} This acknowledgment by our Supreme Court that license revocation is for the "purpose of protecting the public from licensees who are . . . dangerous," *Kennedy*, 1995-NMSC-069, ¶ 38, is reflected in Section 66-5-5. *See* § 66-5-5(C) (prohibiting the Motor Vehicle Division from issuing a driver's license to "[a] habitual user of narcotic drugs or alcohol"); § 66-5-5(F) (prohibiting the Motor Vehicle Division from issuing a driver's license to a person "afflicted with or who is suffering from any mental disability or disease that would render the person unable to drive a motor vehicle with safety upon the highways and who has not, at the time of application, been restored to

health"); § 66-5-5(I) (prohibiting the Motor Vehicle Division from issuing a driver's license "when the director has good cause to believe that the operation of a motor vehicle on the highways by the person would be inimical to public safety or welfare").

{19} These limitations on who can be issued a license by the Motor Vehicle Division clearly reflect a purpose and policy of protecting the public from unsafe drivers. In this vein, giving a driver's license to a person who has a habitual alcohol problem is presumed by the Legislature to pose a threat to public safety. *See* § 66-5-5(C). Similarly, a person who has four or more DWI convictions and acquires another DWI conviction while waiting the five years to apply for restoration is also presumed to pose a threat to public safety. Section 66-5-5(D). These provisions provide illumination as to what might constitute a legally sufficient justification for restoration pursuant to Section 66-5-5(D). Thus, at minimum, a petitioner would need to establish that he or she does not have a habitual alcohol problem and has not received any subsequent DWI convictions so that he was not barred from restoration under Subsections C or D. Beyond this minimal showing, in order to present evidence of a good cause, we conclude that a petitioner must also demonstrate that he or she no longer presents a threat to public safety if given an unrestricted license. This conclusion furthers the purpose of revocation by "protecting the public from licensees who are . . . dangerous." *See Kennedy*, 1995-NMSC-069, ¶ 38. Applying this definition of "good cause," we now turn to the district court's determination that Petitioner did not meet this standard.

B. Application of Good Cause

{20} We agree with the district court that the restoration of a driver's license revoked based on multiple DWI convictions is not a decision to be undertaken lightly. And we note that the Legislature has chosen to vest the district court with discretion in making this determination based on a showing of good cause. However, reviewing the decision of a lower court for an abuse of discretion does not prevent meaningful review by an appellate court. *Cf. Quintana v. Acosta*, 2014-NMCA-015, ¶ 12, 316 P.3d 912 ("An abuse of discretion standard of review, however, is not tantamount to rubber-stamping the trial judge's decision, and we are not prevented from conducting a meaningful analysis of the admission of the expert testimony to ensure that the trial judge's decision was in accordance with the Rules of Evidence and the evidence in the case." (internal quotation marks and citations omitted)). As we noted above, "[a] trial court abuses its discretion when a ruling is clearly against the logic and effect of the facts and circumstances, or when the ruling is contrary to the reasonable, probable, and actual deductions that may be drawn from the facts and circumstances." *Soto*, 2007-NMCA-077, ¶ 10 (internal quotation marks and citation omitted). Thus, we review the district court's determination that Petitioner failed to establish that he was no longer a threat to the public to determine if it was contrary to the "reasonable, probable, and actual deductions that may be drawn from the facts and circumstances" of this case. *Id.*

{21} Petitioner testified that he had been sober for eight-and-a-half years and had not had a single interlock violation during that time period. The State did not contest this testimony, nor did the district court raise any concerns with respect to actual violations. Rather, the focus of the inquiry by the district court was based on the high number of retest refusals and readings showing the presence of alcohol at above zero but below .025. With respect to the refusals, Petitioner offered the explanation of the interlock monitoring company, which also indicated that documented refusals such as Petitioner's were

not considered suspicious. With respect to the presence of alcohol above zero but below .025, Petitioner explained that this could be because he is an insulin-dependent diabetic and produces sugar alcohol in his system and that his readings were .00024 and .00026, and the State explained that often these readings will be as low as ".000 something." The district court appears to have dismissed Petitioner's explanation as "speculative." Yet, even if the district court were to disregard Petitioner's explanations, we conclude that the district court's determination that Petitioner had not established good cause for reinstatement of his license based on refusals to retest and readings showing the presence of alcohol at above zero but below .025—neither of which is considered a reportable violation—is incorrect. The uncontested evidence, including the lack of violations over an eight-and-a-half-year period, does not permit a reasonable inference that Petitioner still poses a threat to public safety. We therefore conclude that there is no reasonable view of the information presented to the district court that would permit a conclusion that Petitioner failed to establish good cause. As a result, we conclude that the district court abused its discretion. *See id.*

{22} Moreover, we note that the district court's apparent desire to retain the interlock restriction on Petitioner's license as a means of ensuring that he not commit the act of DWI in the future is contrary to Section 66-5-5(D) unless there is a basis for the district court to conclude that the need for this protective and deterrent mechanism still exists. *See* § 66-5-5(D) (allowing a person with four or more DWI convictions to apply for restoration of his or her driver's license). In other words, a district court may not require that a petitioner maintain an interlock device on his or her vehicle solely based on the number of prior DWIs held by the petitioner or simply because an interlock device can work as a deterrent to drinking and driving. Our Legislature has created a statutory scheme that allows for a party with multiple prior DWI convictions to petition for restoration of his or her driver's license. Had the Legislature intended that people receiving six DWI convictions be required to maintain an interlock device indefinitely, despite a showing of good cause, the Legislature could have drafted the statute to say so. *See State v. Greenwood*, 2012-NMCA-017, ¶ 38, 271 P.3d 753 ("The Legislature knows how to include language in a statute if it so desires."(alteration, internal quotation marks, and citation omitted)).Thus, where a petitioner makes a showing of "good cause," denying the petition for restoration because of the number of prior DWIs held by the petitioner or because interlock devices generally provide a deterrent is inconsistent with Section 66-5-5(D) and constitutes an abuse of discretion. *See State v. Favela*, 2013-NMCA-102, ¶ 16, 311 P.3d 1213 ("An abuse of discretion may also occur when the district court exercises its discretion based on a misunderstanding of the law." (internal quotation marks and citation omitted)), *aff'd*, 2015-NMSC-005, 343 P.3d 178.

CONCLUSION

{23} For the foregoing reasons, we conclude that the district court abused its discretion in determining that Petitioner failed to establish good cause for reinstatement of his license. We therefore reverse and remand for reinstatement of Petitioner's license.

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

CYNTHIA A. FRY, Judge

WE CONCUR:

M. MONICA ZAMORA, Judge

J. MILES HANISEE, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-096

Filing Date: June 9, 2015

Docket No. 33,669

CHRISTOPHER J. DOLLENS, individually and as Personal Representative of the Estate of James E. Dollens, Deceased, and SANDRA EVANS,

Plaintiffs-Appellees,

v.

WELLS FARGO BANK, N.A., Successor by merger to WELLS FARGO HOME MORTGAGE, INC.,

Defendants-Appellants,

and

THE DUHIGG LAW FIRM and STEWART BUTLER, ESQ.,

Plaintiffs-Appellees,

v.

WELLS FARGO BANK d/b/a WELLS FARGO HOME MORTGAGE d/b/a WELLS FARGO HOME MORTGAGE CPI NUMBER 708,

Defendant-Appellant.

The Duhigg Law Firm
Katy M. Duhigg
John J. Duhigg
Albuquerque, NM

Treinen Law Office, P.C.
Rob Treinen
Albuquerque, NM

for Appellees

Moses, Dunn, Farmer & Tuthill, P.C.
Alicia L. Gutierrez
Mark A. Glenn
Albuquerque, NM

Snell and Wilmer, L.L.P.
Andrew M. Jacobs
Tucson, AZ

for Appellants

OPINION

VANZI, Judge.

{1} Wells Fargo appeals from a judgment awarding substantial attorney fees and punitive damages based on a "small disputed amount" of out-of-pocket damages. On appeal from *Dollens v. Wells Fargo*, No. CV-2011-05295, Wells Fargo contends that the district court erred by finding that Wells Fargo breached its contract with James Dollens (Decedent), that it violated the covenant of good faith and fair dealing and the Unfair Practices Act, and that it engaged in "wrongful foreclosure." Wells Fargo also contends that the district court erred in awarding attorney fees and punitive damages under the present circumstances and, finally, asks us to address issues that were raised in the separate, but since-consolidated, attorney fee litigation in *Duhigg Law Firm v. Wells Fargo*, No. CV-2011-10129. We affirm in part and reverse in part. Specifically, we remand for reconsideration of the award of attorney fees

and damages as more fully explained in this Opinion.

BACKGROUND

{2} On April 4, 2003, Decedent borrowed $133,700 on a thirty-year note to buy a home. The note was secured by a mortgage, which was serviced by Wells Fargo for the owner/investor Freddie Mac. Wells Fargo later marketed to Decedent a mortgage accidental death insurance policy that was underwritten by the Minnesota Life Insurance Company (Minnesota Life). Decedent purchased the policy and timely paid his monthly premiums and mortgage payments directly to Wells Fargo, which was designated as the policy holder and beneficiary under the certificate of insurance. The certificate provided that the purpose of the policy was to "reduce or extinguish the insured loan" in the event Decedent was to suffer an accidental death, which was defined subject to various exclusions. In short, Minnesota Life would pay out the insurance proceeds upon receipt of proof in writing that Decedent suffered a qualifying death, which Wells Fargo would then apply to pay off or pay down the loan.

{3} Decedent died on August 18, 2010. Wells Fargo was notified of the death by August 24, 2010, by Decedent's widow and also by his son, Christopher Dollens (Dollens), who was the personal representative of the Estate. Dollens told Wells Fargo he would not be able to make payments on the mortgage and that he intended to sell his father's home to cover the Estate's debts. According to evidence later presented at trial, Wells Fargo made no mention in these communications of the existence of the accidental death insurance policy, which, in theory, could have paid off the balance of the loan. The loan became delinquent shortly thereafter, and Wells Fargo began various efforts at collection—sending form letters and notices, leaving telephone messages seeking payment, and eventually, on February 9, 2011, initiating foreclosure proceedings against the home.

{4} Meanwhile, in October and November 2010, Dollens apparently learned of the accidental death policy and submitted a claim on behalf of the Estate to Minnesota Life in the manner prescribed by the certificate of insurance. On January 10, 2011, attorneys for the Estate sent a copy of the death certificate with a letter to Wells Fargo asking it for "a suspension and . . . dismissal of the claim[ed] mortgage debt" in light of the pending claim. The death certificate described the cause of death as "[m]ultiple blunt force injuries" and the manner of death as "[u]ndetermined." A checkbox for "[a]ccident" remained unchecked. For reasons that were never adequately explained at trial, Wells Fargo did not respond to the letter.

{5} On February 3, 2011, Minnesota Life wrote to Wells Fargo, confirming that a claim was pending and requesting that it delay any adverse action on the account. Instead, Wells Fargo completed a Notice of Death form for Minnesota Life—indicating the amount due on the note at the time of Decedent's death—and moved ahead with foreclosure. Minnesota Life denied Decedent's claim in May 2011 but then reversed its denial several months later, eventually paying Wells Fargo the accidental death benefit on October 5, 2011.

{6} In the interim, between Decedent's death and Minnesota Life's payment of the insurance proceeds, delinquency and default gave rise to various costs that Wells Fargo charged to the mortgage account. These included late fees for delinquent months, foreclosure attorney fees, and charges for inspecting and preserving the property. Adding these costs to the amounts on the note, Wells Fargo determined that the insurance proceeds were now insufficient to pay off the loan, and in a highly disputed transaction, it applied the funds to pay all fees, bring the

loan current, and reduce the principal and interest on the note, reinstating the mortgage with a remaining principal balance of $4,416.45. Despite bringing the account current, Wells Fargo did not dismiss its foreclosure action for several months.

{7} The Estate did not make another monthly mortgage payment until February 13, 2012, thus accruing additional late fees and property inspection fees. The February payment brought the loan current for a second time, now with a total principal balance of $1,842.71. But the account was soon in default again, and the Estate made no further payments. Fees continued to accrue until Wells Fargo stopped servicing the loan on September 18, 2012.

{8} Dollens, Decedent's daughter (Sandra Evans), and the Estate (collectively, the Estate) filed suit against Wells Fargo and Minnesota Life, alleging numerous violations by Wells Fargo, including breach of contract, "breach of the covenant of good faith and fair dealing and wrongful foreclosure," violations of the Unfair Practices Act (UPA), violations of the Home Loan Protection Act, and for attorney fees pursuant to NMSA 1978, Section 48-7-24 (1983).[1] All claims against Minnesota Life were settled in a stipulated order dated November 19, 2012, leaving Wells Fargo as the lone defendant in *Dollens v. Wells Fargo*, No. CV-2011-05295, and in *Duhigg Law Firm v. Wells Fargo*, No. CV-2011-10129, which was a related action demanding that a portion of the accidental death benefit be paid to the Estate's attorneys as additional attorney fees on theories of unjust enrichment, the common fund doctrine, and equitable attorney's charging lien. The two cases were eventually consolidated, and the district court held a bench trial in which the plaintiffs in *Dollens* and *Duhigg* prevailed on all claims except the Home Loan Protection Act. The judgment awarded general damages of $15,633.42,[2] attorney fees of $390,654.34, costs of $48,397.10, and punitive damages of $2,728,109.16 in *Dollens* and separate attorney fees of $51,189.08 in *Duhigg*. This appeal followed.

DISCUSSION

Standard of Review

{9} The district court's factual determinations are reviewed for substantial evidence. The appellate courts "cannot substitute our judgment of the facts for that of the trial court since only the trier of facts may weigh the evidence, determine the credibility of witnesses, reconcile inconsistent or contradictory statements of witnesses, and decide where the truth lies." *Lewis v. Bloom*, 1981-NMSC-051, ¶ 4, 96 N.M. 63, 628 P.2d 308. However, "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." *Bank of N.Y. v. Romero*, 2014-NMSC-007, ¶ 18, 320 P.3d 1 (alteration, internal quotation marks, and citation omitted).

Liability for Out-of-Pocket Damages

{10} The district court's findings on liability are less than clear. It is difficult to determine which conduct justified the court's findings as to each claim. Our best

[1]Throughout this litigation, the parties and the district court have consistently treated wrongful foreclosure, which has apparently never been recognized in New Mexico, as a redundancy of the doctrine of good faith and fair dealing. We do not attempt to define the elements of this novel claim for the first time on appeal.

[2]The parties have since stipulated that the district court awarded excess out-of-pocket damages in error. The appropriate amount of disputed general damages is $4,221.73.

interpretation is that the various claims can be distilled to three theories ruled on by the district court: (1) Wells Fargo failed to implement any protection from foreclosure for home buyers, including Decedent, who purchased a mortgage accidental death insurance policy that it marketed and sold on behalf of Minnesota Life; (2) it engaged in a widespread, automated practice of charging unreasonable fees, including dubious property inspection and preservation fees; and (3) it misapplied to these spurious fees and costs the insurance proceeds that should have been applied to first pay off the mortgage.

{11} While the second and third theories relate to the substance of particular fees and the specific procedure employed in applying the insurance proceeds when they were finally received, the first theory formed the Estate's primary argument that *no fees* were valid because Wells Fargo had a duty to protect from default purchasers of the accidental death insurance policies that it markets and sells for that specific purpose. This duty, according to the Estate, would have obligated Wells Fargo to pursue the insurance proceeds, of which it was aware, and to which it would be entitled, on behalf of the mortgage account or to suspend or waive collection of payments while the insurance claim was pending. Along these lines, the Estate argued at trial that the alleged out-of-pocket damages all flowed from Wells Fargo's actions with respect to the accidental death insurance policy, whether or not Wells Fargo later misapplied funds or otherwise violated its obligations as servicer of the mortgage.

{12} We note that nothing in the mortgage or note itself bound Wells Fargo to suspend collection of payments on Decedent's account, waive any fees while a claim is pending, or otherwise assist the Estate in pursuing a claim for insurance benefits. To the contrary, Decedent, and by extension the Estate, covenanted to pay "principal and interest by making a payment every month." Despite the language in the mortgage and note, the Estate argued—and the district court agreed—that other sources of an obligation to Decedent arose from Wells Fargo's service agreement with Freddie Mac, from an "implied promise to protect [Decedent's] reasonable expectations under the [mortgage] contract," and from deceptive conduct and misrepresentations that it made to Decedent when it marketed and sold the accidental death insurance policy in violation of the UPA. Since we ultimately conclude that Wells Fargo has not met its burden on appeal to overcome the district court's finding of a UPA violation, we only address the remaining bases for liability to the extent they are relevant to attorney fees or punitive damages.

The UPA Violation

{13} In essence, the district court determined that Wells Fargo profited from its relationship with Minnesota Life by representing the insurer and acting as its "licensed agency" and by using its access to its borrowers to market and sell mortgage accidental death policies in exchange for a percentage of the premiums. Within this context, Wells Fargo made a representation to Decedent that the policy would protect his "family's financial security," though it had no system in place to "make claims or otherwise assist estates, and no intent to provide the protection promised in the sale of the policy." The district court concluded that the totality of this conduct constituted a pattern of willful conduct that caused damages to the Estate for which it is entitled to compensation.

{14} "Unfair or deceptive trade practices and unconscionable trade practices in the conduct of any trade or commerce are unlawful." NMSA 1978, § 57-12-3 (1971). There are eighteen enumerated unfair or deceptive practices in the UPA, *see Hicks v. Eller*, 2012-NMCA-061, ¶ 17, 280 P.3d 304,

some of which were specifically referenced by the district court. We have previously evaluated "this somewhat complicated statutory scheme and clarified that there are three essential elements to a UPA claim." *Id.* ¶ 18. A successful plaintiff must prove:

> (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.

Id. (internal quotation marks and citation omitted); *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."). In addition, the UPA imposes an affirmative duty "to disclose material facts reasonably necessary to prevent any statements from being misleading." *Smoot v. Physicians Life Ins. Co.*, 2004-NMCA-027, ¶ 15, 135 N.M. 265, 87 P.3d 545.

{15} On appeal, Wells Fargo does not attempt to apply or even mention any of these requirements, asserting instead that it was entitled to foreclose based on the mortgage, note, and its service agreement with Freddie Mac, and that it "lacked the authority to have committed an unfair practice in its peripheral role in relation to the [Minnesota Life] Policy." Wells Fargo misunderstands both the nature of the allegations against it and the findings below which, as we understand the district court, established that Wells Fargo treated Decedent differently from borrowers who have not purchased these deceptively marketed insurance policies. *See Corona v. Corona*, 2014-NMCA-071, ¶ 26, 329 P.3d 701 ("The appellate court presumes that the district court is correct, and the burden is on the appellant to clearly demonstrate that the district court erred."). The district court apparently determined that, by assuming a profitable function as the agent of its borrower, and as the "licensed agency" representing Minnesota Life in the sale of mortgage accidental death insurance policies for which it is a policyholder and a beneficiary, Wells Fargo knowingly created the perception that it would have some system in place or take some active role in the claims process to protect Decedent's "family's financial security" in the event of an accidental death.

{16} We question whether a vague, post-sale promise to protect financial security would tend to deceive a reasonable person into believing that Wells Fargo had any concrete obligation in relation to the policy. Wells Fargo could have cited relevant authorities and argued that the statement was not false or misleading—perhaps that it was non-actionable puffery. *See Grassie v. Roswell Hosp. Corp.*, 2011-NMCA-024, ¶ 84, 150 N.M. 283, 258 P.3d 1075. Or Wells Fargo could have challenged on substantial evidence grounds the relevant factual premises that the district court relied on, including its findings as to the purported existence of various agency relationships. *See Bozza v. Gen. Adjustment Bureau*, 1985-NMCA-068, ¶ 13, 103 N.M. 200, 704 P.2d 454 (stating that whether an agency exists is properly addressed by the trial court as a question of fact). It did not. Instead, Wells Fargo asserts only that, as a servicer of a mortgage, it can always foreclose at will upon default, subject only to the terms of the mortgage and its servicing agreement—an overbroad, unclear, and unsupported assertion that we must

reject[3]—and that its role in the insurance matter was peripheral. Such a position is inadequate to define a defense.

{17} The language of the UPA encompasses "a broad array of commercial relationships" and does not require a direct transaction between a plaintiff and a defendant. *Lohman v. Daimler-Chrysler Corp.*, 2007-NMCA-100, ¶¶ 21, 32-33, 142 N.M. 437, 166 P.3d 1091. Thus, for instance, we held in *Maese v. Garrett* that it was immaterial that the plaintiffs did not specifically compensate the defendants for financial services rendered, where the defendants received compensation from third parties for investment advice that led the plaintiffs to purchase their products. 2014-NMCA-072, ¶ 19, 329 P.3d 713, *cert. denied*, 2014-NMCERT-006, 328 P.3d 1187. For Wells Fargo's "peripheral role" argument to be successful on appeal, we would expect it to attack the district court's underlying factual findings or otherwise distinguish its relationship with Decedent and Minnesota Life from the "broad array of commercial relationships" covered by the UPA. *See* Rule 12-213(A)(4) NMRA (providing that "[a] contention that a verdict, judgment or finding of fact is not supported by substantial evidence shall be deemed waived unless the argument identifies with particularity the fact or facts that are not supported by substantial evidence"); *Armijo v. Via Dev. Corp.*, 1970-NMSC-015, ¶ 3, 81 N.M. 262, 466 P.2d 108 (stating that facts that are not challenged "become facts in the reviewing court"); *Martinez v. Sw. Landfills, Inc.*, 1993-NMCA-020, ¶ 18, 115 N.M. 181, 848 P.2d 1108 ("[A]n appellant is bound by the findings of fact made below unless the appellant properly attacks the findings, and . . . the appellant remains bound if he or she fails to properly set forth all the evidence bearing upon the findings."); *In re Estate of Heeter*, 1992-NMCA-032, ¶ 15, 113 N.M. 691, 831 P.2d 990 ("This [C]ourt will not search the record to find evidence to support an appellant's claims."). Wells Fargo has done neither.[4]

{18} We have been left to grapple with a series of findings and conclusions that, while lengthy, are unclear, and without any assistance from an appellant that instead chose to minimize the arguments against it with virtually no discussion of the applicable law or the facts contrary to the argument advanced. For example, Wells Fargo did not address the district court's finding that it ignored a request from Minnesota Life to suspend foreclosure proceedings during the pendency of the claim. While the particular details of a system to protect borrowers who purchase mortgage accidental death insurance may not be obvious, the district court could reasonably conclude that, at a minimum, Decedent purchased the insurance policy expecting that Wells Fargo would honor a request of the insurer whose policy it sold not to foreclose while a claim is pending or to otherwise credit back to the account any fees that were incurred while the insurer processed the claim.

[3]Wells Fargo specifically argues that actions it took as a servicer while the mortgage was in default cannot constitute a violation of the UPA. That seems to be a broad rule that would immunize loan servicers from all types of deceptive conduct. In support of its argument, Wells Fargo provides an unexplained citation to a specific paragraph of *Jaramillo v. Gonzales*, 2002-NMCA-072, ¶ 26, 132 N.M. 459, 50 P.3d 554. We have tried mightily to understand how that paragraph, or that case, which held that a bank's refusal to acknowledge liability to buyers under the FTC Holder Rule amounted to a UPA violation, *id.* ¶ 31, supports Wells Fargo's position. We conclude it does not.

[4]The closest thing we can find to a substantial evidence challenge on this issue is Wells Fargo's "summary of relevant facts" portion of its brief, which cites repeatedly to its own proposed findings and conclusions, without acknowledging that many of those proposed findings were expressly rejected by the district court. We caution Wells Fargo against making such misleading representations on appeal in the future.

Evidence that the two entities, Wells Fargo and Minnesota Life, were so intertwined in this process as to create a reasonable expectation that they would communicate and work together to prevent foreclosure during a pending claim has not been effectively challenged on appeal, and "[w]e will not review unclear arguments, or guess at what [those] arguments might be." *Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076. For this reason alone, we affirm the determination that Wells Fargo violated the UPA and is liable for the Estate's out-of-pocket damages.

Attorney Fees

{19} Wells Fargo next challenges several aspects of the attorney fee award. It argues first that it had no meaningful opportunity to contest the Estate's attorney fee affidavit, which was submitted in its closing argument reply brief, and second, that any award granted pursuant to Section 48-7-24 for a violation of NMSA 1978, Section 48-7-4 (1991) was error as a matter of law. Wells Fargo also challenges the district court's conclusion that attorney fees under the UPA are compensatory damages that can form the basis for a punitive damage award. We address the first two arguments and conclude that remand is necessary to allow Wells Fargo an opportunity to respond to the requested attorney fees under the UPA. We further conclude that reversal is appropriate with respect to Section 48-7-24. Since we vacate the existing award of attorney fees, we need not decide whether those fees can be considered compensatory damages in a post-trial punitive damage analysis. *See Crutchfield v. N.M. Dep't of Taxation & Revenue*, 2005-NMCA-022, ¶ 36, 137 N.M. 26, 106 P.3d 1273 ("A reviewing court generally does not decide academic or moot questions.").

{20} A party opposing a motion for attorney fees must be afforded an opportunity to respond. *See* Rule 1-054(E)(3) NMRA. However, peculiar circumstances at the close of the bench trial prevented Wells Fargo from disputing the Estate's attorney fee affidavit. Wells Fargo twice objected during trial to a proposed schedule that would have had the parties submitting simultaneous written closing arguments. The basis for the objection was, in part, that such a procedure would prevent it from meaningfully responding to any alleged attorney fees if the Estate submitted a fee affidavit for the first time during closing argument. Ultimately, the court and the parties agreed to a written closing argument schedule that would take place over the course of several months in a manner similar to motion practice: the Estate would close, arguing liability and damages; Wells Fargo could respond; and the Estate could then file a reply. Significantly, since attorney fees depended on the statutory claims, *see Dean v. Brizuela*, 2010-NMCA-076, ¶ 16, 148 N.M. 548, 238 P.3d 917 ("[I]t has long been the rule in New Mexico that a party is only entitled to those fees resulting from the cause of action for which there is authority to award attorney fees."), the court also ordered that the issue of fees would not be litigated until after entry of judgment because "[y]ou've got to get [to] liability first . . . before we would ever get to a discussion about that."

{21} As instructed, the Estate submitted its closing argument in writing. It argued that Wells Fargo's conduct justified an award of damages of $15,633.42 and a punitive damages award of "at least $5,000,000." In response, Wells Fargo asserted that the Estate's claim for damages would result in a ratio of compensatory to punitive damages of 700 to 1 in likely violation of its right to due process according to several decisions of the United States Supreme Court. *See, e.g., BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 583 (1996) (stating that a ratio of 500 to 1 "must surely raise a suspicious judicial eyebrow" (internal quotation marks and citation

omitted)). To overcome this argument, the Estate contended for the first time in its reply that the court should now award "compensatory damages of $495,012.29" based on out-of-pocket damages plus attorney fees and punitive damages of ten times that amount. The Estate then submitted an attorney fee affidavit before the court issued its judgment or concluded whether attorney fees would even be available under any or all statutory claims. In a series of motions and responses, the parties disputed whether the early fee affidavit was proper, whether it violated the court's order to reserve argument on attorney fees until after trial, and whether Wells Fargo was prejudiced by it. Wells Fargo's request for hearing on the matter was not granted.

{22} The district court then issued a letter decision, finding for the Estate on multiple claims and treating attorney fees under the UPA and Section 48-7-24 as compensatory damages for the purpose of applying the *Gore* ratio. The district court awarded substantial attorney fees of $390,654.34 and punitive damages of $2,728,109.16. It did so without indicating how it arrived at these figures or why they are less than the amounts requested by the Estate. The court concluded that Wells Fargo "waived the right to provide rebuttal argument/evidence" on the issue of attorney fees when it failed to request an unopposed surreply and when it failed to "address the reasonableness of the fees" in its various motions and objections. The court also determined that Wells Fargo did not establish prejudice as a result of the affidavit being submitted with the reply. We disagree on all points, and we remand to the district court to afford the parties an opportunity to actually litigate the issue that ultimately justified more than $3,000,000 in damages.

{23} First, Wells Fargo cannot have waived its right to respond to the attorney fee affidavit by adhering to the court's order not to litigate the reasonableness of attorney fees until after liability was established. *See State ex rel. N.M. State Highway & Transp. Dep't v. Baca*, 1995-NMSC-033, ¶ 11, 120 N.M. 1, 896 P.2d 1148 (stating that "a court must be able to command the obedience of litigants and their attorneys if it is to perform its judicial functions"). Nor can it have waived its right to respond to the affidavit by failing to request a surreply, which, even if unopposed, requires leave of the court and is only granted as a matter of discretion. *See* Rule 1-007.1 NMRA (providing only for motion, response, and reply); LR2-120(A) NMRA (requiring prior court approval for the filing of briefs and statements of supporting points and authorities for unopposed motions). Second, Wells Fargo was necessarily prejudiced. It could not have meaningfully evaluated or responded to the premature attorney fee affidavit without knowing whether the Estate prevailed on claims authorizing attorney fees, and if so, which claims. The Estate pleaded distinct violations under three separate fee-authorizing statutes—the UPA, Section 48-7-24, and the Home Loan Protection Act, together with several other claims under the common law that do not authorize attorney fees: breach of contract, wrongful foreclosure, and breach of the implied covenant of good faith and fair dealing. It is settled that "an award of attorney fees under a statutory claim which allows an award for attorney fees, which is joined with non-statutory claims, must be limited to the work done on the statutory claim." *Dean*, 2010-NMCA-076, ¶ 18; *see N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-028, ¶ 9, 127 N.M. 654, 986 P.2d 450 (stating that litigants in New Mexico are responsible for their own attorney fees absent statutory or other authority). Since, at the time the affidavit was submitted, neither party could have known which fees were actually recoverable, Wells Fargo was unable to challenge any of the non-recoverable fees, such as those related to the Home Loan Protection Act claim, which was later dismissed.

{24} Finally, we are concerned about the due process implications that arise in the unique circumstances presented here, where, after an extensive five-day bench trial with evidence of $4,221.73 in out-of-pocket damages, the court ultimately awarded punitive damages of more than $3,000,000 justified entirely, for all practical purposes, by an uncontested affidavit submitted during closing argument in violation of a prior ruling. A punitive damage award is subject to both procedural and substantive limits. *Aken v. Plains Elec. Generation & Transmission Coop., Inc.*, 2002-NMSC-021, ¶¶ 11-12, 132 N.M. 401, 49 P.3d 662. Thus, "in order to afford meaningful review of the substantive aspect of the punitive damage award in this case," we would first have to determine that "the procedures used to arrive at the award were fair." *Id.* ¶ 12. In light of the above discussion, we cannot say that Wells Fargo had a real opportunity to contest the bulk of the purported "compensatory" damages that formed the basis for the punitive damage award. Even assuming—without deciding—that attorney fees under the UPA can be treated as compensatory damages for the purpose of applying the *Gore* ratio in post-trial review, at a minimum, Wells Fargo must first have a real opportunity to challenge the reasonableness of the fees alleged, *see* Rule 1-054(E)(3), and the district court must ensure that only recoverable fees are being awarded. *See Dean*, 2010-NMCA-076, ¶ 17; *Jaramillo*, 2002-NMCA-072, ¶ 41 (stating that when a UPA claim is "the only claim for which [the p]laintiff could be awarded attorney fees, the trial court [is] obligated to separate the claims and determine the amount of time spent on each"). While work on some of the fee-authorizing and non-fee-authorizing claims may be "inextricably intertwined," the court should "attempt to distinguish between the two types of work to the extent possible." *Hinkle, Cox, Eaton, Coffield & Hensley v. Cadle Co. of Ohio*, 1993-NMSC-010, ¶ 32, 115 N.M. 152, 848 P.2d 1079.

{25} With respect to the substance of the fee affidavit, Wells Fargo argues that any fees under Section 48-7-24 were granted in error. We review an attorney fee award for abuse of discretion, but when the award is based on a misapprehension of the law, our review is de novo. *Atherton v. Gopin*, 2012-NMCA-023, ¶ 5, 272 P.3d 700. The Estate alleged at trial that Wells Fargo violated Section 48-7-4 by failing to record the satisfaction of the mortgage after it should have been paid in full by the accidental death insurance proceeds. The district court agreed and concluded that this violation justified an award of attorney fees pursuant to Section 48-7-24. We disagree. The only relationship between Section 48-7-24 and the statute that was violated is that they have since been compiled together in Chapter 48, Article 7 of the New Mexico Statutes. The attorney fee provision was enacted as part of the "due-on-sale" law, NMSA 1978, §§ 48-7-15 to -24 (1983), and provides for attorney fees for the prevailing party in "any action brought under *this act*." *See* § 48-7-24 (emphasis added). The term "this act" refers to the due-on-sale provisions that were enacted together in 1983 and only later compiled in Article 7 with the other enactments related to mortgages. In other words, Section 48-7-24 only authorizes attorney fees for Sections 48-7-15 through -23, and there was no theory presented at trial that any of those provisions were violated. It was thus error for the district court to use an inapplicable statute as a basis for awarding any attorney fees, *see Dean*, 2010-NMCA-076, ¶¶ 16-17, and all fees resulting from Wells Fargo's violation of Section 48-7-4 must be reduced accordingly on remand. *See Klinksiek v. Klinksiek*, 2005-NMCA-008, ¶ 29, 136 N.M. 693, 104 P.3d 559 (stating that the district court should reconsider an attorney fee award when a judgment is reversed in part).

Punitive Damages

A. Availability of Punitive Damages

{26} The only punitive damages provided for by the UPA are treble damages if the fact finder finds willful misconduct. NMSA 1978, § 57-12-10(B) (2005). "[T]o obtain punitive damages beyond those permitted by the statutory treble-damages provision, the plaintiff must establish a cause of action other than one under the UPA." *McLelland v. United Wis. Life Ins. Co.*, 1999-NMCA-055, ¶ 13, 127 N.M. 303, 980 P.2d 86; *see also Hale v. Basin Motor Co.*, 1990-NMSC-068, ¶¶ 20-21, 110 N.M. 314, 795 P.2d 1006 (requiring election of remedies in cases where both UPA treble damages and common law punitive damages are available). In this case, common law punitive damages are only available if Wells Fargo breached a contract with Decedent via conduct that was "malicious, fraudulent, oppressive, or committed recklessly with a wanton disregard for [his] rights" or similarly breached the implied covenant of good faith and fair dealing. *Romero v. Mervyn's*, 1989-NMSC-081, ¶¶ 23-24, 32-33, 109 N.M. 249, 784 P.2d 992. This means that Wells Fargo is liable for punitive damages if it intended to commit a wrongful breach, knowing that it was wrongful when committed (*i.e.*, conscious wrongdoing). *See id.* ¶ 35; *see also Paiz v. State Farm Fire & Cas. Co.*, 1994-NMSC-079, ¶¶ 26-28, 118 N.M. 203, 880 P.2d 300. On appeal, the Estate advances several theories justifying a punitive damage award independent of the UPA. We address each theory in turn.

1. Common Law Duty to Protect Insurance Purchasers From Foreclosure

{27} The district court concluded that Wells Fargo's failure to implement any system to protect its borrower/customer from foreclosure pursuant to the Minnesota Life insurance policy independently breached the covenant of good faith and fair dealing, justifying punitive damages. However, that doctrine is inapposite as a matter of law, as it only applies to the parties of an allegedly breached agreement, *see Azar v. Prudential Ins. Co. of Am.*, 2003-NMCA-062, ¶ 51, 133 N.M. 669, 68 P.3d 909, and Wells Fargo was not a party to the insurance policy. The Estate argued extensively below that its claim for breach of the covenant of good faith and fair dealing was based on obligations arising under Wells Fargo's service agreement with Freddie Mac, to which Decedent was a third-party beneficiary. And the district court agreed. In its findings, with respect to the covenant, the district court reasoned that Wells Fargo "failed to follow the *mandatory* Freddie Mac servicer guidelines," which, it stated, "are for the benefit of the borrower." According to the district court, "Wells Fargo was obliged to give the Estate a forbearance on the mortgage based on the Freddie Mac guidelines, and had it done so, late fees, attorney[] fees, and costs would not have been incurred, and the foreclosure would not have occurred." Thus, the court ultimately concluded that Decedent and the Estate were "third-party beneficiaries of regulations governing Wells Fargo in its servicing of the [m]ortgage[,]" and that, even if Decedent and the Estate were not third-party beneficiaries, violation of the service agreement is "evidence of . . . Wells Fargo's lack of good faith and fair dealing."

{28} Freddie Mac is a corporation chartered by Congress to purchase mortgages from approved sellers and servicers—in this case, Wells Fargo—which must in turn comply with the terms set forth in Freddie Mac's *Sellers' & Servicers' Guide* (the Guide). *See Am. Bankers Mortg. Corp. v. Fed. Home Loan Mortg. Corp.*, 75 F.3d 1401, 1404 (9th Cir. 1996). On appeal, Wells Fargo contends, among other things, that the Guide cannot be read to create contractual duties that are enforceable by borrowers. We agree.

{29} "It is a general rule of law" that, aside from third-party beneficiaries, "one who is not a party to a contract cannot maintain suit upon it." *Fleet Mortg. Corp. v. Schuster*, 1991-NMSC-046, ¶ 4, 112 N.M. 48, 811 P.2d 81. "The paramount indicator of third party beneficiary status is a showing that the parties to the contract intended to benefit the third party, either individually or as a member of a class of beneficiaries." *Valdez v. Cillessen & Son, Inc.*, 1987-NMSC-015, ¶ 34, 105 N.M. 575, 734 P.2d 1258. Incidental beneficiaries who are neither promisees of a contract nor parties to whom performance is to be rendered, but who will derive a benefit from its performance are not third-party beneficiaries. *See Fleet Mortg. Corp.*, 1991-NMSC-046, ¶ 4.

{30} While borrowers may derive benefits from some provisions of the Guide, nothing in that document indicates that they are intended beneficiaries entitled to enforce it. The plain terms of the Guide demonstrate that it exists to protect Freddie Mac's interests, incidentally benefitting borrowers when their interests align with Freddie Mac's. Thus, the contention that the Guide creates a private right of action for borrowers to exercise against mortgage servicers has been rejected by every court that has squarely considered the issue. *See McKenzie v. Wells Fargo Bank, N.A.*, 931 F. Supp. 2d 1028, 1044 (N.D. Cal. 2013) (recognizing that "the federal courts have uniformly concluded . . . that borrowers are neither parties nor third-party beneficiaries entitled to enforce [the Freddie Mac guidelines]"); *see also Deerman v. Fed. Home Loan Mortg. Corp.*, 955 F. Supp. 1393, 1404 (N.D. Ala. 1997) (stating that "no provision in the Guide indicates any intent on the part of [Freddie Mac] that third parties have a right to enforce it"), *aff'd*, 140 F.3d 1043 (11th Cir. 1998); *Kariguddaiah v. Wells Fargo Bank, N.A.*, No. C 09-5716 MHP, 2010 WL 2650492, at *4 n.4 (N.D. Cal. July 1, 2010) (same); *Wells Fargo Bank, N.A. v. Sinnott*, No. 2:07 CV 169, 2009 WL 3157380, at *11 (D. Vt. Sept. 25, 2009) ("The terms of the. . . Guide make clear that it exists not for the benefit of defaulting borrowers but rather to protect Freddie Mac's interests in its loans which are serviced by other financial institutions."); *Mitchell v. Wells Fargo Bank, N.A.*, 476 B.R. 33, 55 (Bankr. D. Mass. 2012) ("[A] Freddie Mac Contract does not bestow upon third parties the right to enforce the contract[.]"). We see no basis to depart from the reasoning in these decisions.

{31} The Estate narrows its argument on appeal. It points to decisions applying federal service agreements under the Home Affordable Modification Program (HAMP), *see Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 581-82 (7th Cir. 2012); *Hinson v. Countrywide Home Loans, Inc.*, 481 B.R. 364, 378 (Bankr. E.D.N.C. 2012), which, it contends, establish that violation of a service agreement, while not an enforceable third-party contract, can be evidence of a defendant's lack of good faith and fair dealing. However, this Court has already rejected both the notion that borrowers have a direct cause of action to enforce HAMP regulations and the general argument that a member of the public is a third-party beneficiary entitled to enforce similar contracts in the absence of terms providing for such liability. *See Charter Bank v. Francoeur*, 2012-NMCA-078, ¶¶ 13-18, 287 P.3d 333. Our Supreme Court later relied on *Charter Bank* to reject a litigant's attempt to base "good faith and fair dealing rights" on an agreement between a loan servicer and the federal government under HAMP—the exact argument that the Estate has made in this case. *See Bank of Am. NA v. Quintana*, No. 33,611, 2014 WL 809199, dec. ¶¶ 31-32 (N.M. Sup. Ct. Feb. 27, 2014) (non-precedential). Similar to the Court in *Quintana*, we conclude that the Estate's claim for breach of the covenant of good faith and fair dealing is subsumed within its

claim for breach of a duty as a third-party beneficiary to an agreement between its loan servicer and Freddie Mac. *See id.* ¶ 32. It must therefore fail as a matter of law. *Charter Bank*, 2012-NMCA-078, ¶ 18. This conclusion precludes any common law punitive damages resulting from Wells Fargo's conduct with respect to the accidental death insurance claim.

2. Unreasonable Property Inspection and Preservation Fees

{32} We affirm the district court's conclusion that Wells Fargo breached the terms of the mortgage by charging unreasonable property inspection and preservation fees, thereby justifying punitive damages. Section 7 of the mortgage provides for preservation, maintenance, inspection, and protection of the property. It specifically states that "[Wells Fargo] or its agent may make reasonable entries upon and inspections of the Property[.]" The Estate presented evidence at trial that Wells Fargo made excessive "drive-by" visits to the property, charging the mortgage account for each visit, and also charging for dubious preservation work orders, including orders for "winterization" in July, and multiple orders for "grass cuts" where photographic evidence presented at trial demonstrated that there was no grass.

{33} The Estate also presented expert testimony and cases from other jurisdictions indicating that Wells Fargo has been previously punished for similar conduct as early as 2007.[5] *See Wells Fargo Bank, N.A. v. Stewart*, 647 F.3d 553, 555 (5th Cir. 2011); *Jones v. Wells Fargo Home Mortg.*, 366 B.R. 584, 589-90 (Bankr. E.D. La. 2007). Though Wells Fargo has argued on appeal that *Jones* and *Stewart* cannot be considered for the purpose of punishing it for prior conduct in other states, *see, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421-22 (2003), evidence that Wells Fargo has been previously punished for similar conduct (recidivist evidence) is appropriate to establish the type of conscious wrongdoing and reprehensibility that justifies a punitive damage award. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 462 n.28 (1993). *Jones*, for instance, is just one case of a series that began in 2007, finding, in part, that Wells Fargo was charging for unnecessary property inspections upon default without any reason or any policy guidelines. 366 B.R. at 597-98. Based on this evidence, the district court was entitled to conclude that Wells Fargo breached Section 7 of the mortgage by unreasonably inspecting the property and that punitive damages were available to deter a pattern of continued misconduct.

3. Misapplication of Funds

{34} We also affirm the district court's finding that punitive damages are available because Wells Fargo misapplied funds to the mortgage account in breach of the mortgage and note, both when it received the insurance proceeds of $133,559.15 in October 2011, and when it later received a payment from Dollens for $3,673.89 in February 2012. According to the district court, "Wells Fargo violated the terms of the Note and Mortgage by using the insurance proceeds to pay its fees and costs before paying all interest and principal due[,]" and again by misapplying Dollens' February 2012 payment in similar fashion. This caused the note to keep a balance after funds were applied, "which resulted in the account going into default again, and Wells Fargo claiming a debt when none would have existed[.]"

[5] Wells Fargo makes a cursory assertion that the Estate's expert should not have been allowed to testify. It has done so without setting forth the standard of review or citing any authority related to the admissibility of expert testimony. We decline to review arguments that are inadequately developed on appeal. *Headley*, 2005-NMCA-045, ¶ 15.

{35} Section 2 of the mortgage, entitled "Application of Payments or Proceeds," provides:

> Except as otherwise described in this Section 2, all payments accepted and applied by [Wells Fargo] shall be applied in the following order of priority: (a) interest due under the Note; (b) principal due under the Note; (c) [escrow due]. Such payments shall be applied to each Periodic Payment in the order in which it became due. Any remaining amounts shall be applied first to late charges, second to any other amounts due under this Security Instrument, and then to reduce the principal balance of the Note.

Section 14 of the mortgage further states:

> [Wells Fargo] may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting [Wells Fargo's] interest in the Property and rights under this Security Instrument, including, but not limited to, attorney[] fees, [and] property inspection and valuation fees.

In the event of default, Section 6 of the note provides that, upon acceleration of the loan, Wells Fargo "will have the right to be paid back . . . for all of its costs and expenses in enforcing this Note," including reasonable attorney fees. Taken together, we read the plain terms of the mortgage and note to have required the following mandatory application of the insurance proceeds in this case: (1) All interest due for the months from September 2010 (the earliest payment due) until October 2011 (the latest payment due when the proceeds were received), applied in the order in which each payment became due; (2) all principal due for those same months, applied in the same order; (3) all escrow due for those same months, applied in the same order; (4) all late charges for delinquent months; (5) all inspection fees, reasonable attorney fees, and any other "costs and expenses" related to enforcement of the mortgage and note; and finally (6) the remaining principal balance on the note.

{36} The district court found that Wells Fargo received the insurance proceeds on October 5, 2011, but did not begin applying them to the mortgage account until October 11, 2011, keeping the majority of the insurance funds in a suspense account until November 21, 2011. According to the district court, Wells Fargo applied the proceeds first to interest and principal due from September 2010 through July 2011. It then paid itself late fees and property inspection fees before applying funds to the months of August, September, and October 2011. It then paid the foreclosure attorney fees that had been invoiced before using the remaining funds to reduce the principal balance on the note.

{37} For several reasons, we conclude that there was substantial evidence that Wells Fargo misapplied the insurance proceeds in bad faith. First, we have already held in our UPA analysis that no fees were valid and that all damages flowed from Wells Fargo's actions with respect to the marketing and sale of the accidental death insurance policy. Thus, any application of insurance funds to fees of any kind was a misapplication that prevented the proceeds from paying off the note, leading instead to an improper reinstatement of the mortgage and all future interest and fees.

{38} Second, the district court's conclusion that Wells Fargo independently violated the terms of the mortgage by "using the insurance proceeds to pay its fees and costs before paying all interest and principal due[,]" is supported by Wells Fargo's "Mortgage Loan History," which was

introduced at trial. We recognize that the court later admitted a visual aid, titled "Dollens Payment History," that specifies effective dates for each payment, appearing to contradict some of the dates on the "Mortgage Loan History" document. However, "only the trier of facts may weigh the evidence, determine the credibility of witnesses, reconcile inconsistent or contradictory statements of witnesses, and decide where the truth lies." *Lewis*, 1981-NMSC-051, ¶ 4. The district court in its role as fact finder was free to refer to either document and to use the demonstrative exhibit as it saw fit.

{39} Third, Wells Fargo waited over a month to reduce the principal and interest on the note, according to one exhibit, or five days, according to the other. Wells Fargo did this in spite of Section 1 of the mortgage, which provides that "[p]ayments are deemed received by [Wells Fargo] when received at the location designated in the Note." There was evidence presented at trial that this practice unnecessarily allowed interest on the loan to accrue, artificially increasing the total owed when the payment was finally processed, and permitted at least one extra inspection fee to be charged to the account after the funds purportedly "reinstated" the mortgage to bring the loan current.

{40} A similar pattern emerged with respect to the February 13, 2012 payment. According to its own exhibit, Wells Fargo applied the first periodic payment for December 2011 on February 14 then inexplicably applied an inspection fee and "corporate advance fee" on that same day before applying the periodic payments for January and February 2012 on February 15. The funds went to fees out of the order provided for in Section 2, and an extra day of interest was unnecessarily accrued before the January and February payments were processed. Wells Fargo has yet to offer any meaningful explanation for these accounting anomalies. The district court undoubtedly viewed these practices in the context of other inexplicable conduct established at trial, including the questionable billing practices related to property inspection and preservation, a series of billing statements that demanded amounts not due from the Estate, and Wells Fargo's maintenance of the foreclosure action for several months after the account was brought current. Against this backdrop, the district court heard testimony from a Wells Fargo employee that the account was handled in a "customary" manner. Thus, it was reasonable to conclude that these were not isolated errors but that Wells Fargo consistently and systematically acted in order "to increase its profits without regard for . . . Decedent or his family."

{41} For the above stated reasons, we conclude that punitive damages were available—independent of the UPA—for Wells Fargo's practices with respect to property inspection and preservation work orders and for its erroneous application of payments. Since the district court also relied on Wells Fargo's conduct related to the accidental death insurance policy as a basis for common law punitive damages, and since we have held that no common law claim affords liability for that conduct, remand is appropriate for the district court to reconsider punitive damages without reference to the accidental death insurance policy. *See Allsup's Convenience Stores, Inc. v. N. River Ins. Co.*, 1999-NMSC-006, ¶ 53, 127 N.M. 1, 976 P.2d 1 (stating that punitive damages are derivative of liability, compensatory damages, and a "culpable mental state indivisible from the conduct constituting liability" (internal quotation marks and citation omitted)).

B. Substantive Limits on the Award

{42} Since we are remanding this case for reconsideration of attorney fees and punitive damages, we need not evaluate the parties'

arguments related to the substantive, constitutional aspects of the punitive damage award that we are setting aside. We only caution on remand that "the amount of an award of punitive damages must not be so unrelated to the injury and actual damages proven as to plainly manifest passion and prejudice rather than reason or justice." *Aken*, 2002-NMSC-021, ¶ 23 (alteration, internal quotation marks, and citation omitted).

Attorney Fees in *Duhigg*

{43} In *Duhigg Law Firm v. Wells Fargo*, No. CV-2011-10129, the attorneys for the Estate were awarded $51,189.08 pursuant to the common fund doctrine for their efforts in pursuing the accidental death insurance benefits from Minnesota Life. "Under this doctrine, an attorney who creates a pool of funds for a group has the right to seek payment from the pool or seek proportional contribution from those who accept the benefits of the attorney's efforts." *Martinez v. St. Joseph Healthcare Sys.*, 1994-NMSC-030, ¶ 12, 117 N.M. 357, 871 P.2d 1363. The district court found that the attorneys' pursuit of the Minnesota Life funds resulted in the proceeds being paid to the benefit of Wells Fargo, which itself "made no attempt to appeal Minnesota Life's denial of benefits," or to contribute to the appeal in any way.

{44} Wells Fargo makes two arguments: (1) the common fund doctrine is not available in a debtor-creditor relationship, and (2) the settlement order between the Estate and Minnesota Life acknowledges that $30,000 of the settlement was already designated to reimburse the attorneys for those same fees. It appears that neither of these arguments were preserved below, and we decline to address them for the first time on appeal. *See* Rule 12-213(A)(4); *see also Glaser v. LeBus*, 2012-NMSC-012, ¶ 13, 276 P.3d 959 (stating that an appellate court may decline to address an issue when an appellant fails to comply with Rule 12-213 by demonstrating that the issue was properly preserved for review).

CONCLUSION

{45} We affirm the attorney fee award from *Duhigg Law Firm v. Wells Fargo*, No. CV-2011-10129. In *Dollens v. Wells Fargo*, No. CV-2011-05295, we remand for proceedings consistent with this Opinion. On remand, the district court should (1) reduce liability for out-of-pocket damages to $4,221.73, in accordance with the parties' stipulation; (2) allow Wells Fargo an opportunity to contest the reasonableness of the attorney fee affidavit, ensuring, to the extent possible, that only recoverable fees—that is, fees related to the UPA claim, rather than any of the common law claims, the claims under the Home Loan Protection Act, or Section 48-7-24—are actually awarded; and (3) make any necessary reevaluation of punitive damages.

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

LINDA M. VANZI, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

RODERICK T. KENNEDY, Judge

Certiorari Granted, August 31, 2015, No. 35,426; Certiorari Granted, August 31, 2015, No. 35,438

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-097

Filing Date: June 22, 2015

Docket Nos. 33,104 & 33,675 (Consolidated)

NOE RODRIGUEZ,

Worker-Appellant,

v.

BRAND WEST DAIRY, uninsured employer and UNINSURED EMPLOYER'S FUND, statutory payor,

Employer/Insurer-Appellees,

Consolidated With

MARIA ANGELICA AGUIRRE,

Worker-Appellant,

v.

M.A. & SONS CHILI PRODUCTS and FOOD INDUSTRY SELF INSURANCE FUND OF NEW MEXICO,

Employer/Insurer-Appellees.

New Mexico Center on Law & Poverty
Gail Evans
Maria Martinez Sanchez
Albuquerque, NM

for Appellants

Hector H. Balderas, Attorney General
Santa Fe, NM
Richard J. Crollett, Special Assistant Attorney General
Albuquerque, NM

for Appellee Uninsured Employers Fund

Maestas & Suggett, P.C.
Paul Maestas
Albuquerque, NM

for Appellees and Amicus Curiae New Mexico Cattle
Growers' Association, New Mexico Farm and Livestock
Bureau, Dairy Producers of New Mexico and Dairy
Farmers of New Mexico

OPINION

ZAMORA, Judge.

{1} In these consolidated appeals, Workers challenge the dismissals of their workers' compensation claims, which were based on the portion of the Workers' Compensation Act, NMSA 1978, §§ 52-1-1 to -70 (1929, as amended through 2013), excluding farm and ranch laborers from its coverage. *See* § 52-1-6(A) ("The provisions of the Workers' Compensation Act shall not apply to employers of . . . farm and ranch laborers." (the exclusion)). The question presented is whether the exclusion violates Workers' rights to equal protection under Article II, Section 18 of the New Mexico Constitution. Holding that the exclusion does violate Workers' rights to equal protection, we reverse and remand for further proceedings.

BACKGROUND

{2} Workers each suffered work-related injuries working as farm and ranch laborers. Worker Aguirre was injured picking chile for M.A. & Sons Chili Products. Worker Rodriguez was injured working for Brand West Dairy as a dairy worker and a herdsman. Workers each sought workers' compensation

benefits. Both claims were dismissed pursuant to the exclusion. Workers filed separate appeals challenging the constitutionality of the exclusion. The cases were consolidated on appeal.

DISCUSSION

{3} Workers challenge the constitutionality of the exclusion, claiming that it violates equal protection guarantees. Workers also contend that dismissal of their respective claims for compensation was precluded by a previous district court decision that declared the exclusion to be unconstitutional, *Griego v. New Mexico Workers' Compensation Administration*, Second Jud. Dist. No. CV 2009-10130, and a subsequent memorandum opinion of this Court that did not reverse that decision. *Griego v. New Mexico Workers' Compensation Administration*, No. 32,120, memo op. (N.M. Ct. App. Nov. 25, 2013) (non-precedential). M.A. & Sons Chili Products and Food Industry Self Insurance Fund of New Mexico (collectively, M.A. & Sons) argue that the exclusion does not violate equal protection guarantees, while Brand West Dairy and the State of New Mexico Uninsured Employer's Fund (collectively, Brand West) take no position on the constitutionality of the exclusion. All Employers/Insurers agree that the *Griego* decisions do not control in this case.

I. The *Griego* Decisions

{4} *Griego* involved a constitutional challenge to the exclusion. *Griego*, No. 32,120, memo op. ¶ 2. An injured worker was denied workers' compensation benefits pursuant to the exclusion. The worker attempted to challenge the constitutionality of the exclusion before a Workers' Compensation Judge (WCJ); however, WCJs do not have authority to rule on the constitutionality of statutes. *Chevron Res. ex rel. Blatnik v. N.M. Superintendent of Ins.*, 1992-NMCA-081, ¶ 19, 114 N.M. 371, 838 P.2d 988. Nonetheless, the worker requested that he be allowed to make the argument in order to make a record for the purposes of an appeal on the constitutional issue.

{5} Subsequently, the worker, joined by two individual plaintiffs and two organizational plaintiffs, brought a declaratory action against the Workers' Compensation Administration (the WCA) and its director, seeking a declaration that the exclusion violated the workers' right to equal protection. *Griego*, No. 32,120, memo op. ¶ 2. The plaintiffs also requested that the WCA be required to re-open the individual plaintiffs' claims and to stop relying on the exclusion to deny claims. *Id.* The district court concluded that the exclusion was unconstitutional and ordered the WCA to re-open the individual plaintiffs' claims. *Id.* ¶ 3.

{6} The WCA appealed to this Court, arguing that the district court lacked both jurisdiction over the individual plaintiffs' claims and the authority to order the WCA to re-open the claims. *Id.* ¶ 6. The WCA did not explicitly challenge the district court's determination regarding the constitutionality of the exclusion. *Id.* ¶ 7. We concluded that the issues on appeal were moot because the individual plaintiffs had settled their claims with the WCA. *Id.* ¶¶ 8-9. Since the WCA failed to appeal the district court's ruling as to the constitutional issue, that issue was not properly before us and, as a result, we held that the district court's declaration was final and binding on the WCA. *Id.* ¶¶ 9-10. The appeal was dismissed. *Id.* ¶ 12.

{7} Here, Workers argue that the district court's declaration in *Griego* that the exclusion is unconstitutional, coupled with the holding of our subsequent memorandum opinion, is binding on WCJs, as part of the WCA, and precludes disposition of any workers' compensation claims pursuant to the

exclusion. We need not determine whether the district court's determination in *Griego* was binding in the present cases. Any attempt at such an analysis is not necessary to our decision and would only result in an advisory opinion, which we decline to give. *See City of Las Cruces v. El Paso Elec. Co.*, 1998-NMSC-006, ¶ 18, 124 N.M. 640, 954 P,2d 72 (stating that appellate courts avoid rendering advisory opinions). The WCJs in the present cases refused to recognize the district court's determination in *Griego* in light of a 1980 decision by this Court that appeared to hold that the exclusion was constitutional. *Cueto v. Stahmann Farms, Inc.*, 1980-NMCA-036, ¶ 8, 94 N.M. 223, 608 P.2d 535 (stating, without explanation, that the exclusion did not deny the worker equal protection). We therefore take this opportunity to clarify that *Cueto* has no precedential effect and to determine conclusively that the exclusion is unconstitutional.

II. *Cueto*'s Equal Protection Holding is Dictum

{8} To the extent the WCJs concluded that the constitutionality of the exclusion was resolved by this Court in *Cueto*, we disagree. In *Cueto*, the dispositive issue on appeal was whether the worker was a farm laborer as defined by the exclusion. *Id.* ¶ 5. It is not clear from our decision that the statute's constitutionality was squarely before us in that case. *See id.* ¶ 8 ("[The worker] *seems to argue* that the exemption is unconstitutionally vague [and] *seems to argue* that the exemption denies him equal protection." (Emphasis added.)). We summarily rejected what we surmised may have been a constitutional challenge by the worker. *See id.* ("[The exclusion] does not [violate equal protection]; the exemption is not arbitrary, but has a reasonable basis."). We note that to the extent that the statute's constitutionality was not squarely before us in *Cueto*, its determination is dictum. *Fernandez v. Farmers Ins. Co.*, 1993-NMSC-035, ¶ 15, 115 N.M. 622, 857 P.2d 22 ("[C]ases are not authority for propositions not considered." (internal quotation marks and citation omitted)).

{9} We also note that *Cueto* was decided prior to our Supreme Court's "modern articulation" of the rational basis level of scrutiny, and it did not employ the same standard of review to the constitutionality of the statute as is required by our courts today. *See Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶ 14, 125 N.M. 721, 965 P.2d 305 ("To successfully challenge a statute under the rational basis test, a plaintiff is required to show that the statute's classification is not rationally related to the legislative goal.).

III. Constitutionality of the Exclusion

{10} Workers contend that the exclusion is unconstitutional because it violates their right to equal protection. We review the constitutionality of legislation de novo. *Rodriguez v. Scotts Landscaping*, 2008-NMCA-046, ¶ 8, 143 N.M. 726, 181 P.3d 718. We presume that the challenged legislation is constitutional and "will not question the wisdom, policy, or justness of legislation enacted by our Legislature." *Id.* (internal quotation marks and citation omitted).

{11} The New Mexico Constitution provides that no person shall be denied equal protection of the laws. N.M. Const. art. II, § 18. Equal protection guarantees that similarly situated individuals will be treated in an equal manner, "absent a sufficient reason to justify the disparate treatment." *Wagner v. AGW Consultants*, 2005-NMSC-016, ¶ 21, 137 N.M. 734, 114 P.3d 1050. Thus, "statutory classifications that are unreasonable, unrelated to a legitimate statutory purpose, or are not based on real differences" do not comport with equal protection guarantees. *Breen v.*

Carlsbad Mun. Schs., 2005-NMSC-028, ¶ 7, 138 N.M. 331, 120 P.3d 413 (internal quotation marks and citation omitted). "The threshold question in analyzing all equal protection challenges is whether the legislation creates a class of similarly situated individuals who are treated dissimilarly." *Id.* ¶ 10. If Workers establish that, as a result of a legislative classification, they have suffered dissimilar treatment from those who are similarly situated, we then determine what level of scrutiny to apply to the challenged legislation. *Id.* ¶ 8.

A. Disparate Treatment of Similarly Situated Individuals

{12} Workers contend that farm and ranch laborers are similarly situated to other workers within the state. More specifically, Workers contend that farm and ranch laborers, who primarily harvest crops or work with animals and are excluded from workers' compensation coverage, are similarly situated with other agricultural workers who are not excluded. M.A. & Sons claim that this Court has already determined that workers who primarily harvest crops or work with animals are not similarly situated, relying on our decisions in *Tanner v. Bosque Honey Farm, Inc.*, 1995-NMCA-053, 119 N.M. 760, 895 P.2d 282 and *Holguin v. Billy the Kid Produce, Inc.*, 1990-NMCA-073, 110 N.M. 287, 795 P.2d 92. M.A. & Sons' reliance on these decisions is misplaced.

{13} Both *Tanner* and *Holguin* involved the same sole issue of whether specific agricultural duties fall within the statutory definition of farm or ranch labor such that the farm and ranch laborers exclusion would apply. *See Tanner*, 1995-NMCA-053, ¶¶ 1, 11-12 (holding that a worker assisting in the harvesting of honey was a farm laborer under the exclusion); *Holguin*, 1990-NMCA-073, ¶¶ 1, 20-21 (holding that a worker whose primary duties were filling and stacking sacks of onions prior to shipment was not a farm laborer under the exclusion and ordering that the worker's claim be reinstated). The distinction drawn in each of these cases between farm laborers and other agricultural workers serves only to define farm labor under Section 52-1-6(A). It does not inform our analysis of whether the two groups of workers are similarly situated for equal protection purposes. *Fernandez*, 1993-NMSC-035, ¶ 15 ("[C]ases are not authority for propositions not considered." (internal quotation marks and citation omitted)).

{14} In determining whether the two classes of workers are similarly situated, "we must look beyond the classification to the purpose of the law." *Griego v. Oliver*, 2014-NMSC-003, ¶ 30, 316 P.3d 865 (internal quotation marks and citation omitted); *see Corn v. N.M. Educators Fed. Credit Union*, 1994-NMCA-161, ¶ 16, 119 N.M. 199, 889 P.2d 234, *overruled on other grounds by Trujillo*, 1998-NMSC-031.

{15} In 1929, our workers' compensation law did not expressly exclude agricultural laborers from workers' compensation coverage; however, agricultural laborers were deemed excluded because agricultural pursuits were not included in the enumerated list of extra-hazardous occupations covered by the statute. *Compare* NMSA 1929, § 156-110 (1929), *with* § 52-1-6(A). *See Koger v. A. T. Woods, Inc.*, 1934-NMSC-020, ¶¶ 7-9, 38 N.M. 241, 31 P.2d 255. In 1937, the Legislature added a provision explicitly excluding farm and ranch laborers from workers' compensation coverage. 1937 N.M. Laws, ch. 92, § 2. From 1937 until 1975, farm and ranch laborers were "excluded from compensation benefits both by the explicit exclusion and by the failure to include agricultural labor as an extra[-]hazardous occupation." *Varela v. Mounho*, 1978-NMCA-086, ¶ 6, 92 N.M. 147, 584 P.2d 194. In 1975, the extra-hazardous occupation requirement was repealed. 1975 N.M. Laws,

ch. 284, § 14. However, the explicit exclusion of farm and ranch laborers from workers' compensation coverage has remained substantively unchanged. *See* 1989 N.M. Laws, ch. 263, § 5; 1987 N.M. Laws, ch. 260, § 1; 1979 N.M. Laws, ch. 368, § 4; 1975 N.M. Laws, ch. 284, § 3; 1973 N.M. Laws, ch. 240, § 2; 1971 N.M. Laws, ch. 253, § 1; 1971 N.M. Laws, ch. 261, § 2; 1959 N.M. Laws, ch. 67, § 2; 1953 N.M. Laws, ch. 87, § 1; 1937 N.M. Laws, ch. 92, § 2; NMSA 1941, § 57-904 (1937).

{16} Our review of the history of the workers' compensation statutes back to 1929 has not revealed an articulable purpose for the exclusion. The purpose of the Workers' Compensation Act (the Act) as a whole is to provide "quick and efficient delivery of indemnity and medical benefits to injured and disabled workers at a reasonable cost to the employers who are subject to [its] provisions." NMSA 1978, § 52-5-1 (1990). "One policy factor of great concern is that *any* judicial analysis under the Act must balance equally the interests of the worker and the employer without showing bias or favoritism toward either." *Salazar v. Torres*, 2007-NMSC-019, ¶ 10, 141 N.M. 559, 158 P.3d 449 (emphasis added); *see* § 52-5-1 (stating that the Act is not to be interpreted "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"). Workers who are unable to perform work duties due to an accident arising out of and in the course of employment are eligible to receive compensation. *Breen*, 2005-NMSC-028, ¶ 10. The stated purpose of the Act is not served by creating classifications among the state's workers.

{17} Excluding farm and ranch laborers from workers' compensation coverage denies them the benefits, including but not limited to the monetary benefits, that the Act was intended to provide. It also circumvents the policy and philosophy of the Act—to balance the interests and rights of the worker and the employer. *See Salazar*, 2007-NMSC-019, ¶ 10. The exclusion tips the scale in favor of employers. Employers of farm and ranch laborers have the option to elect to be subject to the Act while that option is not available to farm and ranch laborers. Section 52-1-6(B). Employers of farm and ranch laborers avoid the cost of providing workers' compensation insurance, which results in expensive drawn out litigation being the only available option to the worker. While the exclusion exposes the employers to tort liability, the injured workers are less likely to pursue a tort claim. *See Salazar*, 2007-NMSC-019, ¶ 16 (recognizing that many injured workers "are not 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" and would benefit from workers' compensation (internal quotation marks and citation omitted)). Employers, on the other hand, may be in a better position to plan for and manage the additional cost of providing coverage.

{18} We conclude that farm and ranch laborers seeking compensation are similarly situated to other workers in the state who are likewise seeking compensation; both groups consist of workers suffering work-related injuries or disabilities who are in need of indemnity and medical benefits.

{19} The farm and ranch laborers exclusion creates classifications of workers that are not based on real differences. In the general context of farm labor, workers who perform tasks essential to the cultivation of crops are excluded from coverage, whereas workers performing tasks incidental to farming, such as processing crops, are included. *See Holguin*, 1990-NMCA-073, ¶ 13 (holding that farm labor excluded from workers compensation coverage does not

include "all things incident to farming" (internal quotation marks and citation omitted)); *Cueto*, 1980-NMCA-036, ¶ 9 (holding that farm labor includes duties essential to the cultivation of crops).

{20} The statute similarly distinguishes between workers who care for and train animals as an intrinsic part of a farm and ranch operation and other workers performing similar duties. *See* § 52-1-6.1 (stating that " 'farm and ranch laborers' shall include those persons providing care for animals in training for the purpose of competition or competitive exhibition. Employees of a veterinarian and laborers at a treating facility or a facility used solely for the boarding of animals, which is not an intrinsic part of a farm or ranch operation, are not covered by this provision"). Not only do these distinctions created by the exclusion fail to serve the stated purpose, policy, and philosophy of the Act, but these distinctions also result in dissimilar treatment of similarly situated workers. Accordingly, we must determine whether the "disparate treatment . . . is sufficiently justified such that it does not violate equal protection." *Rodriguez*, 2008-NMCA-046, ¶ 13.

B. Constitutional Standard of Review

{21} "There are three levels of equal protection review based on the New Mexico Constitution: rational basis, intermediate scrutiny[,] and strict scrutiny." *Breen*, 2005-NMSC-028, ¶ 11. The level of scrutiny applied depends on "the nature and importance of the individual interests asserted and the relationship between the statutorily created classification and the importance of the governmental interest involved." *Rodriguez*, 2008-NMCA-046, ¶ 14 (alteration, internal quotation marks, and citation omitted).

{22} Rational basis review is the "most deferential to the constitutionality of the legislation." *Breen*, 2005-NMSC-028, ¶ 11. The party challenging the legislation bears the burden of proving that it "is not rationally related to a legitimate governmental purpose." *Id.* (alteration, internal quotation marks, and citation omitted). This level of scrutiny is applied to "general social and economic legislation that does not affect a fundamental or important constitutional right or a suspect or sensitive class." *Id.* Where the challenged legislation impacts "important but not fundamental rights, or sensitive but not suspect classifications, intermediate scrutiny is warranted." *Wagner*, 2005-NMSC-016, ¶ 12. Applying intermediate scrutiny, the State must demonstrate that the statute is substantially related to an important governmental purpose. *Id.* Strict scrutiny review is applied where laws draw suspect classifications or impact fundamental rights. *Id.* Under a strict scrutiny standard, the state must show "that the provision at issue is closely tailored to a compelling government purpose." *Id.*

{23} The parties in this case do not dispute that strict scrutiny is inapplicable in this case. Workers and M.A. & Sons seem to agree that rational basis review is appropriate in this case. However, to the extent that Workers argue that intermediate scrutiny would also be applicable, we disagree. Intermediate scrutiny review is appropriate where "the challenged legislation (1) restrict[s] the ability to exercise an important right[,] or (2) treat[s] the person challenging the constitutionality of the legislation differently because they belong to a sensitive class." *Rodriguez*, 2008-NMCA-046, ¶ 15 (alteration, internal quotation marks, and citation omitted).

{24} Workers do not argue that the benefits conferred under the Act are important rights in the constitutional sense. Instead, they suggest that farm and ranch laborers are members of a sensitive class as a result of being historically mistreated by employers and having a lack of political power "which also

has a racial and ethnic overtone." This generalized argument does not provide any basis to conclude that Workers belong to a sensitive class with respect to the exception, and it is insufficient to trigger intermediate scrutiny review. *See Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076 (stating that this Court will not consider unclear or undeveloped arguments). Having no basis to conclude that Workers belong to a sensitive class, we review the constitutionality of the exclusion applying the rational basis test.

C. The Exclusion is Not Rationally Related to a Legitimate State Interest

{25} We presume that legislative acts are valid and are typically subject to rational basis review. *See Valdez v. Wal-Mart Stores, Inc.*, 1998-NMCA-030, ¶ 13, 124 N.M. 655, 954 P.2d 87. Though deferential to the constitutionality of the statute, this level of scrutiny is not a "rubber stamp for challenged legislation." *Wagner*, 2005-NMSC-016, ¶ 24 (internal quotation marks omitted). Under the rational basis test, Workers must demonstrate that the legislative classification is not rationally related to a legitimate state goal. *See id.*; *Valdez*, 1998-NMCA-030, ¶ 10.

{26} The Legislature's principal objectives in enacting the Act were: "(1) maximizing the limited recovery available to injured workers, in order to keep them and their families at least minimally financially secure; (2) minimizing costs to employers; and (3) ensuring a quick and efficient system." *Wagner*, 2005-NMSC-016, ¶ 25. M.A. & Sons argues that the exclusion serves these objectives by: (1) simplifying the administration of the workers' compensation system and (2) protecting the state's agricultural industry from additional overhead costs. Workers contend that the exclusion is arbitrary and irrational and that the relationship between the purported state interests and the statutory classification created by the exclusion does not survive rational basis scrutiny.

{27} To successfully challenge the statute under rational basis scrutiny, a worker must demonstrate that the classification created by the legislation is not supported by evidence in the record or a firm legal rationale. *Id.* ¶ 24. In these consolidated appeals, Worker did not have the opportunity to create a factual record to support their constitutional challenge of the exclusion because the WCJ "does not have the authority to determine the constitutionality of a statutory enactment." *Montez v. J & B Radiator, Inc.*, 1989-NMCA-060, ¶ 7, 108 N.M. 752, 779 P.2d 129; *see Chevron*, 1992-NMCA-081, ¶ 19 (same). Accordingly, the lack of a factual record is not fatal to Workers' constitutional argument if Workers can demonstrate that the exclusion is not supported by a firm legal rationale. *See Montez*, 1989-NMCA-060, ¶ 7 (addressing the worker's claim that a statute was facially unconstitutional despite the lack of preservation and, implicitly a factual record); *see also Chevron*, 1992-NMCA-081, ¶¶ 19, 21-24 (analyzing the worker's constitutional challenge based solely on legal rationale in the absence of a factual record).

{28} As Workers point out, the exclusion is arbitrary on its face and as applied. Legislative classifications must be based on "real differences of situation or condition" that are related to the statutory purpose. *Burch v. Foy*, 1957-NMSC-017, ¶ 10, 62 N.M. 219, 308 P.2d 199. Under the exclusion, workers whose primary duties are essential to the cultivation of crops are considered farm laborers, while workers involved primarily in the processing of the same crops are not. *See Cueto*, 1980-NMCA-036, ¶¶ 9, 10. This distinction is seemingly without purpose or reason and leads to absurd results. In some instances, employees working for the same agricultural employer may not all be covered

under the Act. For example, workers involved in irrigation, fertilization, and harvesting crops are not covered under the Act, while workers who sort, pack, and ship the very same crops are. *See Holguin*, 1990-NMCA-073, ¶ 20. We fail to see any real differences between workers who fall under the statutory definition of a farm and ranch laborer and workers who do not. We also fail to see any real differences between farm and ranch laborers and all other workers in New Mexico that would justify the exclusion.

{29} We are not persuaded by M.A. & Sons' contention, that simplifying the administration of the workers' compensation system and protecting the State's agricultural industry from additional overhead costs justify the arbitrary classification created by the exclusion. *See Plyler v. Doe*, 457 U.S. 202, 227 (1982) ("[A] concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources."); *see also Schirmer v. Homestake Min. Co.*, 1994-NMSC-095, ¶¶ 8-9, 118 N.M. 420, 882 P.2d 11 (holding that the challenged statute was "unconstitutional notwithstanding its rational relationship to the valid legislative goal of lowering employer costs" because the resulting legislative classification was arbitrary and was not "based upon some substantial or real distinction" instead of "artificial or irrelevant differences"); *Halliburton Co. v. Prop. Appraisal Dep't*, 1975-NMCA-123, ¶ 25, 88 N.M. 476, 542 P.2d 56 (holding that a tax statute based on administrative convenience alone did not survive rational basis scrutiny and violated equal protection guarantees).

{30} The classification created by the exclusion is also under-inclusive. "Discriminatory legislation is under-inclusive if the classification does not include all of those who are similarly situated with respect to the purpose of the law." *Griego*, 2014-NMSC-003, ¶ 60. As to the purported state interest in efficient administration of workers' compensation cases, the legislation is under-inclusive because the statutes do not exclude all transient or mobile workers from coverage. And as to the purported state interest in protecting the agricultural industry from the cost of providing workers' compensation coverage, the legislation is under-inclusive because it does not exclude all agricultural workers.

{31} We conclude that there is no substantial relationship between the exclusion and the purported government interests of increased workers' compensation efficiency and lower costs for the agricultural industry. There is nothing rational about a law that excludes from worker's compensation benefits employees who harvest crops from the field while providing benefits for the employees who sort and bag the very same crop. *See Madrid v. St. Joseph Hosp.*, 1996-NMSC-064, ¶ 34, 122 N.M. 524, 928 P.2d 250 (stating that equal protection guarantees "prohibit the government from creating statutory classifications that are unreasonable, unrelated to a legitimate statutory purpose, or are not based on real differences"). Moreover, excluding farm and ranch laborers from workers' compensation coverage directly controverts the purpose and evenhanded philosophy of the Act by placing farm and ranch employers at an advantage and denying workers the benefits the Act was intended to provide. Legislative classifications that are arbitrary and oppressive without any rational basis are the most objectionable. *Burch*, 1957-NMSC-017, ¶ 12.

IV. Modified Prospective Application of This Opinion

{32} Because we have declared the exclusion to be unconstitutional, we address M.A. & Sons' argument that we apply our holding prospectively. Our courts have adopted a presumption that new rules imposed

by judicial decisions in civil cases will apply retroactively. *Beavers v. Johnson Controls World Servs., Inc.*, 1994-NMSC-094, ¶ 22, 118 N.M. 391, 881 P.2d 1376. However, this presumption can be overcome where sufficient justification exists for avoiding retroactive application. *Padilla v. Wall Colmonoy Corp.*, 2006-NMCA-137, ¶ 12, 140 N.M. 630, 145 P.3d 110. To determine whether retroactive application is justified we consider: "(1) whether the case creates a new principle of law that has been relied upon[,] (2) the prior history of the rule[,] and (3) the inequity of retroactive application." *Id.* (internal quotation marks and citation omitted).

{33} "Under the first factor, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Jordan v. Allstate Ins. Co.*, 2010-NMSC-051, ¶ 27, 149 N.M. 162, 245 P.3d 1214 (internal quotation marks and citation omitted). "The extent to which the parties in a lawsuit, or others, may have relied on the state of the law before a law-changing decision has been issued can hardly be overemphasized." *Beavers*, 1994-NMSC-094, ¶ 27. "The reliance interest to be protected by a holding of nonretroactivity is strongest in commercial settings, in which rules of contract and property law may underlie the negotiations between or among parties to a transaction." *Id.* ¶ 28.

{34} Since 1937, our statutes have expressly excluded farm and ranch laborers from workers' compensation coverage. Our holding in this case sets forth a new principle of law, not clearly foreshadowed by our previous decisions. Until now, employers of farm and ranch laborers have legitimately relied on the exclusion's constitutionality. Their reliance interest weighs in favor of prospective application because, in a general sense, the workplace is a commercial setting and employment is of a contractual nature. *Padilla*, 2006-NMCA-137, ¶ 15.

{35} The second factor considers the new rule's history, purpose, and effect to determine whether retroactive application will further its operation. *Id.* ¶ 20. As we discussed earlier, the purpose of the Act is to provide quick and efficient benefits to injured and disabled workers at a reasonable cost to employers. Section 52-5-1. The application of the Act's provisions should balance the interests and rights of workers and employers. *Salazar*, 2007-NMSC-019, ¶ 10. Our decision in this case seeks to further both the purpose of the Act as well as its underlying philosophy of evenhandedness, which retroactive application may achieve to some degree.

{36} However, we must also consider the third factor, "the inequity imposed by retroactive application, for where a decision of [an appellate court] could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity." *Jordan*, 2010-NMSC-051, ¶ 29 (internal quotation marks and citation omitted). In this circumstance, retroactive application of our decision would be analogous to the enactment of a retroactive statute, which is generally disfavored in New Mexico. *See* NMSA 1978, § 12-2A-8 (1997) ("A statute or rule operates prospectively only unless the statute or rule expressly provides otherwise[,] or its context requires that it operate retrospectively."); *see also Hill v. Vanderbilt Capital Advisors, LLC*, 834 F. Supp. 2d 1228, 1262 (D.N.M. 2011) ("A retrospective law affects acts, transactions, or occurrences that happened before the law came into effect and impairs vested rights, requires new obligations, imposes new duties, or affixes new disabilities to past transactions."). Here, retroactive application would impose new obligations and duties on

employers of farm and ranch laborers and their insurers, and it would also impact the interests of the Uninsured Employers' Fund as well as the Food Industry Self Insurance Fund of New Mexico.

{37} Nevertheless, the WCA was on notice that the district court in *Griego* had declared the exclusion to be unconstitutional on March 30, 2012, and did not appeal that ruling. Therefore, acknowledging the inequity of denying benefits to workers whose claims were asserted after the date of the district court decision in *Griego*, we conclude that this Opinion's holding shall apply to workers' claims that were pending as of March 30, 2012, and that were filed thereafter.

CONCLUSION

{38} For the foregoing reasons, we reverse the dismissals of the Workers' compensation claims and remand for proceedings consistent with this Opinion.

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

M. MONICA ZAMORA, Judge

I CONCUR:

CYNTHIA A. FRY, Judge

MICHAEL E. VIGIL, Chief Judge (dissenting in part, specially concurring in part).

VIGIL, Chief J., dissenting in part, specially concurring in part.

{40} Workers' first argument on appeal is that dismissal of their claims was precluded by the declaratory judgment in *Griego*. The majority fails to address this argument. Without providing a sufficient reason for doing so, the majority simply declares, "We need not determine whether the district court's determination in *Griego* was binding in the present cases." Majority Opinion ¶ 7. I dissent from this proposition. Further, I respectfully submit that by answering Workers' fully preserved argument, we are not issuing an advisory opinion.

{41} In *Griego*, three individual plaintiffs and two organizational plaintiffs brought a declaratory judgment action against the WCA and its director (WCA) contending that the farm and ranch laborers exclusion in the Workers' Compensation Act violated their right to equal protection of the law under Article II, Section 18 of the New Mexico Constitution. *Griego*, No. 32,120, memo op. ¶ 2. (I do not cite to *Griego* for any precedential purposes, but only for the facts it discloses). The district court held that the exclusion was unconstitutional, and the WCA appealed. *Id.* ¶ 3. The WCA's appeal only challenged the district court's jurisdiction over the individual plaintiffs' claims on two grounds: (1) that they should have pursued an appeal from the WCA instead of filing a separate declaratory judgment action; and (2) that the district court did not have authority to order the WCA to re-open the individual plaintiffs' claims for consideration on their merits. *Id.* ¶¶ 6-7. The WCA did not challenge the district court's jurisdiction over the claims of the organizational plaintiffs, nor did the WCA attack the district court's determination of unconstitutionality. *Id.* ¶ 7.

{42} The WCA and individual plaintiffs settled, rendering moot the issues raised on appeal by the WCA. *Id.* ¶ 8. Nevertheless, the individual plaintiffs argued that the appeal should not be dismissed as moot, because the WCA continued to urge that it was not bound to enforce the district court judgment declaring the exclusion unconstitutional. *Id.* The WCA maintained that the district court judgment invited "chaos" because it appeared to conflict with *Cueto*, and WCJs would have to choose whether to follow the district court

judgment or *Cueto*. *Id.* ¶ 10. We rejected the WCA's assertion. We pointed out that the district court had considered *Cueto* and determined that it was inapposite and distinguishable. *Id.* Therefore, we said, "As a party to the declaratory judgment action, the WCA is bound by the district court's ruling." *Id.* We also added that if the WCA believed that the district court had ruled contrary to precedent, its remedy was to seek appellate review of that decision. *Id.* ¶ 11. Having chosen not to do so, we concluded, the WCA "cannot now escape the effect of unchallenged parts of the district court's decision." *Id.* Because the issues raised on appeal were moot, the WCA's appeal was dismissed. *Id.* ¶ 12.

{43} There can be no doubt that the district court judgment declaring the farm and ranch laborers exclusion in the Workers' Compensation Act unconstitutional is binding on the WCA. "The doctrine of issue preclusion prevents a party from re-litigating ultimate facts or issues actually and necessarily decided in a prior suit." *State ex rel. Peterson v. Aramark Corr. Servs., LLC*, 2014-NMCA-036, ¶ 34, 321 P.3d 128 (internal quotation marks and citation omitted). The four elements required to apply issue preclusion are satisfied in this case. Those elements are:

> (1) the party to be estopped was a party to the prior proceeding, (2) the cause of action in the case presently before the court is different from the cause of action in the prior adjudication, (3) the issue was actually litigated in the prior adjudication, and (4) the issue was necessarily determined in the prior litigation.

Id. The WCA fully litigated the constitutional issue in *Griego* and having lost, deliberately chose not to appeal that issue. Thus, the WCA and WCJs were legally obligated to follow and apply the declaratory judgment to these cases. The declaratory judgment does not tell WCJs of the WCA how to decide any case on its merits; it only precludes enforcement of the farm and ranch laborers exclusion. Moreover, the refusal of the WCJs to follow and apply the declaratory judgment on the basis that *Cueto* was conflicting authority was improper because the applicability of *Cueto* was resolved in the very action in which the declaratory judgment was rendered, and no appeal was taken on the constitutional question. *See State ex rel. Maloney v. Sierra*, 1970-NMSC-144, ¶¶ 8-11, 82 N.M. 125, 477 P.2d 301 (stating that the portion of a declaratory judgment on a constitutional question that was not challenged on appeal was final).

{44} The majority's failure to specifically determine that the *Griego* declaratory judgment is binding on the WCA in these cases is troubling. It encourages a litigant not to comply with a final declaratory judgment rendered against it and to relitigate the same issue in a new case. It also implies that a final judgment rendered against a party in a prior case has no effect on appeal, even if the prior judgment was against the same party and resolved the same issue. This dilutes settled principles of finality and implies that a district court declaratory judgment does not merit recognition and enforcement. I therefore dissent from the majority's statement that "We need not determine whether the district court's determination in *Griego* was binding in the present cases." Majority Opinion ¶ 7.

{45} Whether *Griego* is binding on the employers and insurers in these cases presents another question because they were not parties in the *Griego* litigation. Our Declaratory Judgment Act specifically states, that "no declaration shall prejudice the rights of persons not parties to the proceeding." NMSA 1978, Section 44-6-12 (1975); *see*

Gallegos v. Nevada Gen. Ins. Co., 2011-NMCA-004, ¶ 21, 149 N.M. 364, 248 P.3d 912 (stating that the Declaratory Judgment Act "forbids a party from being prejudiced by a declaratory action to which he was not a party"). Thus, if the WCA and WCJs had properly complied with the *Griego* declaratory judgment in these cases, and the WCJ's determined that Workers were entitled to workers' compensation benefits, the employers and insurers could have appealed from that decision and argued that the farm and ranch laborers exclusion is not unconstitutional. On this basis, I specially concur in the result, because I agree with the majority's analysis of the constitutional question and with modified prospective application set forth in parts III and IV of the majority opinion.

MICHAEL E. VIGIL, Chief Judge

Certiorari Denied, August 25, 2015, No. 35,450

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-098

Filing Date: June 24, 2015

Docket No. 33,682

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

ZACHARY DOPSLAF,

Defendant-Appellant.

Hector H. Balderas, Attorney General
Margaret McLean, Assistant Attorney General
Santa Fe, NM

for Appellee

Jorge A. Alvarado, Chief Public Defender
Santa Fe, NM
Josephine H. Ford, Assistant Public Defender
Albuquerque, NM

for Appellant

OPINION

FRY, Judge.

{1} Defendant appeals the denial of his motion to suppress evidence. Defendant was pulled over by police in downtown Albuquerque, New Mexico, after he performed a U-turn across the middle of the street. Defendant argues that the officer did not have reasonable suspicion to pull him over because the officer incorrectly believed that Defendant violated NMSA 1978, Section 66-7-319 (1978) (driving on divided highways) when he made the U-turn. We conclude that, even assuming the officer was mistaken about the application of Section 66-7-319, the officer's mistake was reasonable, and the officer had reasonable suspicion to pull Defendant over. Accordingly, we affirm.

BACKGROUND

{2} As an initial matter, we clarify that our review of the facts in this case is limited to Officer Daniel Burge's testimony because this was the only evidence presented. Therefore, we do not consider Defendant's statements at sentencing regarding the stop, nor do we

consider the diagrams Defendant incorporated in his brief on appeal.

{3} Officer Burge testified that he first observed Defendant's vehicle parked on Central Avenue in downtown Albuquerque. Officer Burge observed Defendant pull out of the parking spot and perform a U-turn across a "painted center median." 10:35:05] After performing the U-turn, Defendant sped off down Central. Officer Burge followed Defendant and pulled him over. Upon approaching the vehicle, Officer Burge testified that he smelled alcohol and that Defendant appeared to be intoxicated. Following Defendant's performance on the field sobriety tests and a subsequent chemical test, he was arrested and charged with DWI. He was also cited for violating Section 66-7-319.

{4} Officer Burge described the "painted center median" that Defendant crossed as consisting of a solid yellow line on the outside with a dotted yellow line on the inside. Given that Officer Burge testified that these markings created a median, we understand his description to include two sets of these markings offsetting an unpainted portion of the road. Officer Burge further testified that at both ends of the median were white turn bays corresponding to the intersections at the ends of the block. Defendant, however, crossed at the center portion of the median, not at either of the intersections. Officer Burge testified that there is no place in which to turn from this median, such as a side street, because the block is lined with businesses. Officer Burge further testified that law enforcement officers often use these medians to park. While Officer Burge also stated that he had never personally witnessed a delivery vehicle parked in the center median, he acknowledged that it was conceivable that one could. Finally, Officer Burge testified that, although there was no sign prohibiting U-turns on the street, he believed that Defendant's actions violated Section 66-7-319 because he crossed the solid yellow lines and the median.

{5} Defendant moved to suppress evidence at trial in metropolitan court on the basis that the stop violated the Fourth Amendment because Officer Burge did not have reasonable suspicion to believe that Defendant committed a traffic violation. The metropolitan court concluded that Officer Burge had reasonable suspicion to believe that Defendant violated Section 66-7-319 because the painted median constituted an "intervening space" or a "clearly indicated dividing section so constructed as to impede vehicular traffic" and denied the motion. Section 66-7-319. The metropolitan court subsequently convicted Defendant of DWI and violation of Section 66-7-319. Defendant then appealed to the district court. The district court affirmed. Defendant now appeals to this Court.

DISCUSSION

{6} Defendant challenged the stop under the Fourth Amendment. Our review is therefore limited to the reasonable suspicion analysis under the Fourth Amendment and not under any potential broader protections afforded by Article II, Section 10 of the New Mexico Constitution. *See State v. Hubble*, 2009-NMSC-014, ¶ 6, 146 N.M. 70, 206 P.3d 579. The basis of Defendant's challenge is that Officer Burge committed a mistake of law in believing that Defendant's U-turn constituted a violation of Section 66-7-319. Because of Officer Burge's alleged mistake, Defendant argues that reasonable suspicion did not exist to justify the stop.

Standard of Review

{7} "A review of the suppression of evidence is a mixed question of law and fact." *State v. Anaya*, 2008-NMCA-020, ¶ 5, 143 N.M. 431, 176 P.3d 1163. While we generally defer to the district court's findings of fact if the

findings are supported by substantial evidence, *id.*, as a mixed question of law and fact, we determine constitutional reasonableness de novo. *State v. Vanderberg,* 2003-NMSC-030, ¶ 19, 134 N.M. 366, 81 P.3d 19.

Mistakes of Law and Reasonable Suspicion Under the Fourth Amendment

{8} "Since an automobile stop is considered a seizure under the Fourth and Fourteenth Amendments, it must be conducted in a reasonable manner to satisfy the Fourth Amendment." *Hubble*, 2009-NMSC-014, ¶ 7 (internal quotation marks and citation omitted). Therefore, "[b]efore a police officer makes a traffic stop, he must have a reasonable suspicion of illegal activity." *Id.* (internal quotation marks and citation omitted). "A reasonable suspicion is a particularized suspicion, based on all the circumstances that a particular individual, the one detained, is breaking, or has broken, the law." *State v. Jason L.*, 2000-NMSC-018, ¶ 20, 129 N.M. 119, 2 P.3d 856. The appellate courts "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).

{9} The issue presented in this case is whether an officer's mistake of law can form the basis of the officer's reasonable suspicion to initiate the traffic stop. *See id.* ¶ 22 ("A mistake of law is a mistake about the legal effect of a known fact or situation[.]"). (internal quotation marks and citation omitted)). In *Anaya*, this Court, in line with the majority position at the time, held that while "conduct premised totally on a mistake of law cannot create the reasonable suspicion needed to make a traffic stop[,] if the facts articulated by the officer support reasonable suspicion on another basis, the stop can be upheld." 2008-NMCA-020, ¶¶ 7, 15. In *Hubble*, our Supreme Court concluded, in dicta, that the holding in *Anaya* was consistent with New Mexico's reasonable suspicion analysis. *Hubble,* 2009-NMSC-014, ¶ 27 ("In essence, the second part of the *Anaya* proposition [that reasonable suspicion on a basis other than the mistake of law can justify the stop] is our objective test for reasonable suspicion."). The Court stated that "it is not fatal in terms of reasonable suspicion if an officer makes a mistake of law when he conducts a traffic stop; courts will still look objectively to the totality of the circumstances surrounding the officer's decision to conduct the traffic stop in order to determine if he or she had reasonable suspicion." *Id.* ¶ 28.

{10} However, *Anaya*'s holding that a stop cannot be justified by an officer's reasonable mistake of law was recently rejected by the United States Supreme Court in *Heien v. North Carolina*, ___ U.S. ___, ___, 135 S. Ct. 530 (2014). In *Heien*, the Supreme Court held that an officer's reasonable mistake of law could support a finding of reasonable suspicion to conduct a lawful traffic stop under the Fourth Amendment. *Id.* at 534. The Court cautioned that "[t]he Fourth Amendment tolerates only *reasonable* mistakes, and those mistakes—whether of fact or of law—must be *objectively* reasonable." *Id.* at 539. Thus, the officer's subjective understanding of the law is immaterial, and "an officer can gain no Fourth Amendment advantage through a sloppy study of the laws he is duty-bound to enforce." *Id.* at 539-40.

{11} Because *Anaya* holds that a stop cannot be based totally on an officer's reasonable mistake of law, *Anaya*, and our Supreme Court's dicta in *Hubble* affirming that analysis, no longer represent the appropriate inquiry under the Fourth Amendment. While we acknowledge that "[a]ppeals 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[,]" *Dalton v. Santander Consumer USA, Inc.*, 2015-NMCA-030, ¶ 30, 345 P.3d 1086 (internal quotation marks and citation omitted), we conclude that, *Hubble* notwithstanding, the appropriate test to apply in this case is that found in *Heien*. *Hubble*'s discussion of *Anaya*'s holding is dicta and, as such, is not binding authority. *See Hubble,* 2009-NMSC-014, ¶ 21 (concluding that the defendant was properly stopped for a violation of the traffic code but stating that "in order to clarify the law regarding reasonable suspicion, we take this opportunity to discuss mistakes of law and mistakes of fact and how they interact with reasonable suspicion"); *State v. Johnson*, 2001-NMSC-001, ¶ 16, 130 N.M. 6, 15 P.3d 1233 (stating that although the Court of Appeals should give deference to Supreme Court dicta, it is not binding authority). Accordingly, we now turn to the facts of this case as viewed through the lens of the *Heien* decision.

{12} Perhaps owing to the inquiry under *Anaya*, Defendant's argument seems geared more toward showing that Defendant did not actually violate Section 66-7-319 rather than toward arguing that a mistake of law, assuming one was committed, was unreasonable.[1] Defendant cites numerous sections of the Manual on Uniform Traffic Control Devices (MUTCD) and the New Mexico Sign and Striping Manual in arguing that Defendant could not have violated Section 66-7-319. However, even under the stricter test utilized in *Anaya*, the determination of whether an officer had "reasonable suspicion to make the traffic stop does not hinge on whether [the d]efendant actually violated the underlying . . . statute." *Hubble*, 2009-NMSC-014, ¶ 9. In restating Defendant's arguments in light of the proper standard, we understand his main point to be that, given the "broken line" pavement markings, it was objectively unreasonable for Officer Burge to believe that crossing over the median was a violation of Section 66-7-319.

{13} Section 66-7-319 states:

> Whenever any highway has been divided into two roadways by leaving an intervening space or by a physical barrier or clearly indicated dividing section so constructed as to impede vehicular traffic, every vehicle shall be driven only upon the right-hand roadway and no vehicle shall be driven over, across or within any such dividing space, barrier[,] or section, except through an opening in such physical barrier or dividing section or space or at a crossover or intersection established by public authority.

The term "highway," as used in the statute, is synonymous with "street" and is defined as "every way or place generally open to the use of the public as a matter of right for the purpose of vehicular travel[.]" NMSA 1978, § 66-1-4.8(B) (1991). While the road at issue would clearly fall under the definition of "highway," central to this case is whether the median at issue creates a "divided highway" under Section 66-7-319. The statute delineates three general indicators that a particular street is a divided highway: where there is an "intervening space," a "physical barrier," or a "clearly indicated dividing section so constructed as to impede vehicular traffic[.]" *Id.* Based on Officer Burge's testimony and

[1]Defendant does not separately argue that his conviction under Section 66-7-319 was improper. Therefore, we limit our analysis to whether the trial court erred in denying the motion to suppress, i.e., whether Officer Burge committed a reasonable mistake of law when he stopped Defendant, not whether Defendant actually violated Section 66-7-319.

the fact that Defendant executed a U-turn, it is undisputed that no physical barrier separated the two lanes of traffic. Therefore, the issue is whether it was objectively reasonable for Officer Burge to believe that the median constituted an "intervening space" or "clearly indicated dividing section" so as to be considered a "divided highway" under Section 66-7-319.

{14} We first clarify that the fact that the median in this case was off-set by painted markings is not determinative. The statute itself is not specific on this point. However, the New Mexico Administrative Code indicates that divided highways can be created by "standard pavement markings[.]" NMAC 18.31.6.7(AD). Accordingly, it is, at the least, objectively reasonable to conclude that "standard pavement markings" are a legitimate means of creating a divided highway.

{15} Section 66-7-319 does not provide guidance as to the types of pavement markings required to establish an intervening space or divided section. Defendant therefore argues that, based on national traffic standards, the pavement markings in this case cannot be construed to create an intervening space or divided section under Section 66-7-319. Citing the MUTCD, Defendant argues that broken lines indicate a "permissive condition," whereas a "solid line discourages or prohibits crossing (depending on the specific application)," MUTCD, § 3A.06(01)(B), (C) (2009), and that, in certain contexts, the combination of a solid yellow and broken line indicates a lane that can be used by traffic in either direction. Again construing Defendant's argument in light of the proper standard, his argument is that it was unreasonable for Officer Burge to believe that crossing over these types of pavement markings constituted a violation of Section 66-7-319.

{16} Defendant's references to the MUTCD highlight the ambiguity presented by the facts in this case. The MUTCD does not specifically discuss the median described in Officer Burge's testimony. And included in the MUTCD's examples cited by Defendant are other markings that conceivably distinguish the examples from the present case. These other markings include the presence of left turn arrows within a median similar to the one described by Officer Burge, or the use of yellow lines that denote "[t]he separation of traffic traveling in opposite directions" or "[t]he left-hand edge of the roadways of divided highways." MUTCD, § 3A.05(03)(A), (B) (2009). As Justice Kagan stated in her concurrence in *Heien*, statutes that pose "a really difficult or very hard question of statutory interpretation" lend credence to the conclusion that an officer made a reasonable mistake of law. 135 S. Ct. at 541 (Kagan, J., concurring) (internal quotation marks and citation omitted). If the issue before us was whether Defendant actually violated Section 66-7-319, these ambiguities would require intensive interpretation to resolve. But, as to the question presented in this case, the multitude of MUTCD provisions and diagrams required to determine whether it was permissible to cross the median tend to support the reasonableness of Officer Burge's belief that Defendant committed a traffic violation.

{17} Therefore, even assuming, as Defendant argues, that the broken line permitted entry into the median, we conclude that it was objectively reasonable for Officer Burge to believe that the median was designed to prohibit Defendant's maneuver. That is, it is reasonable to believe that the use of a combination of solid and broken yellow lines to form a median permitted entry into the median for certain purposes—such as for use by police officers, as Officer Burge testified—but prohibited crossing completely over the median from one lane of traffic to the other. The lack of definitive guidance under Section 66-7-319 as to what constitutes an

intervening space or a clearly indicated divided section, in combination with Officer Burge's observation of Defendant crossing two solid yellow lines, is sufficient to make the stop, assuming it was a mistake of law, a reasonable one. *See Heien*, 135 S. Ct. at 541 (Kagan, J., concurring) ("If the statute is genuinely ambiguous, such that overturning the officer's judgment requires hard interpretative work, then the officer has made a reasonable mistake."). Accordingly, Officer Burge had reasonable suspicion to pull Defendant over. Because Defendant did not argue that the stop was unreasonable or pretextual under Article II, Section 10 of the New Mexico Constitution, our analysis ends with this determination.

CONCLUSION

{18} For the foregoing reasons, we affirm the denial of Defendant's motion to suppress.

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

CYNTHIA A. FRY, Judge

I CONCUR:

JONATHAN B. SUTIN, Judge

RODERICK T. KENNEDY, Judge, dissenting

KENNEDY, Judge (dissenting)

(20) I respectfully dissent. Albuquerque Municipal Code § 8-2-6-10 (1975) permits any U-turn that can "be made in safety and without interfering with any other traffic, and there is no sign prohibiting a U-turn". I do not believe the officer's mistake of law was objectively reasonable. The Metropolitan Court's stretch of construction involving "clearly driving section so constructed as to impede vehicular travel" is unhelpful.

RODERICK T. KENNEDY, Judge

Certiorari Denied, August 25, 2015, No. 35,453

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-099

Filing Date: June 29, 2015

Docket No. 33,101

MYRON G. YEPA,

Petitioner-Appellee,

v.

STATE OF NEW MEXICO TAXATION AND REVENUE DEPARTMENT, MOTOR VEHICLE DIVISION,

Respondent-Appellant.

Southwest Indian Law Clinic
Barbara Creel, Supervising Attorney
Veronica C. Gonzales, Law Student
Heidi J. Todacheene, Law Student
Albuquerque, NM

for Appellee

Hector H. Balderas, Attorney General
Taxation and Revenue Department, Legal Services Bureau
Peter A. Breen, Special Assistant Attorney

General
Santa Fe, NM

for Appellant

OPINION

WECHSLER, Judge.

{1} On appeal, we are presented with the question whether the application of the ignition interlock requirement set forth in NMSA 1978, Section 66-5-33.1 (2009), to an individual whose license was revoked prior to the effective date of the amendment, violates the prohibition against ex post facto laws. As a preliminary matter, we hold that the district court properly had jurisdiction of this case involving a constitutional challenge because it raised a purely legal issue not requiring exhaustion of administrative remedies. On the merits, because we conclude that the amendment was not penal for the purposes of ex post facto constitutional analysis, we hold that there was no constitutional violation. We therefore reverse.

BACKGROUND

{2} Petitioner Myron G. Yepa was arrested for aggravated driving under the influence of intoxicating liquor or drugs (DWI) in New Mexico on September 7, 2008. As a consequence, effective September 27, 2008, the Taxation and Revenue Department, Motor Vehicle Division (MVD) revoked his license for a period of six months pursuant to the Implied Consent Act, NMSA 1978, §§ 66-8-105 to -112 (1978, as amended through 2007). The criminal charge against Yepa was dismissed on December 10, 2008, and he became eligible for license reinstatement under the Implied Consent Act on March 28, 2009. At that time, no ignition interlock requirement existed as a prerequisite to license reinstatement. However, effective July 1, 2009, the Legislature amended the statutory license reinstatement requirements to include a minimum of six months of driving with an ignition interlock device before reinstatement of a revoked license. Section 66-5-33.1(B)(4) (the 2009 amendment). Yepa did not request reinstatement of his license until after the amendment came into effect. MVD applied the ignition interlock requirement and denied the request as a result of Yepa's failure to comply.

{3} Yepa subsequently filed the underlying action in district court, seeking a declaration that the ignition interlock requirement was improperly applied to him. The district court ultimately concluded that MVD's application of the 2009 amendment to Yepa constituted a violation of the constitutional prohibition against ex post facto laws. This appeal followed.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

{4} We initially address a jurisdictional question. MVD argues that Yepa should have challenged the denial of his request for reinstatement of his license by pursuing an administrative appeal. In light of his failure to do so, MVD contends that the underlying action should have been dismissed.

{5} According to MVD, NMSA 1978, Section 66-2-17 (1995) provides an exclusive statutory remedy for any party aggrieved by any licensing decision. That statutory section sets forth the administrative appeals process. Under Section 66-2-17(A), "any person may dispute" the denial of a license pursuant to the administrative appeals procedure outlined in subsequent portions of the statute, "[u]nless a more specific provision for review exist[s]." Section 66-2-17(I) specifies as follows:

> No court of this state has jurisdiction to entertain any proceeding by any person in which

the person calls into question the application to that person of any provision of the Motor Vehicle Code, except as a consequence of the appeal by that person to the district court from the action and order of the secretary or hearing officer as provided for in this section.

{6} We agree with MVD in its basic premise. "Under the exhaustion of administrative remedies doctrine, where relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts; and until that recourse is exhausted, suit is premature and must be dismissed." *Smith v. City of Santa Fe*, 2007-NMSC-055, ¶ 26, 142 N.M. 786, 171 P.3d 300 (alteration, internal quotation marks, and citation omitted). However, when the matter at issue is purely legal and requires no specialized agency factfinding, and there is no exclusive statutory remedy, "it is a proper matter for a declaratory judgment action and does not require exhaustion of administrative remedies." *New Energy Econ., Inc. v. Shoobridge*, 2010-NMSC-049, ¶ 12, 149 N.M. 42, 243 P.3d 746.

{7} The district court based its ruling on the constitutional prohibition against ex post facto laws. The ruling involved a purely legal issue that did not require specialized agency factfinding. The only facts found by the district court were uncontested and concerned the relevant dates underlying the constitutional challenge. As a consequence, exhaustion of administrative remedies was not required. *Smith*, 2007-NMSC-055, ¶ 27.

{8} The proposition that a purely legal ruling may be pursued in a declaratory judgment action without administrative review is particularly valid in the circumstances of this case in which the issue involved is a constitutional challenge to the Implied Consent Act. *See Schuster v. State of N.M. Taxation & Revenue Dep't*, 2012-NMSC-025, ¶¶ 19, 22, 283 P.3d 288 (holding that MVD is statutorily required to evaluate the constitutionality of arrests); *Maso v. State of N.M. Taxation & Revenue Dep't*, 2004-NMCA-025, ¶ 12, 135 N.M. 152, 85 P.3d 276 (observing that constitutional questions are generally beyond the subject matter jurisdiction of MVD), *aff'd*, 2004-NMSC-028, 136 N.M. 161, 96 P.3d 286. We are aware of no statutory provision or case law, and MVD has cited none, suggesting that MVD is vested with subject matter jurisdiction to adjudicate constitutional questions such as the ex post facto challenge presented in this case. *See Pickett Ranch, LLC v. Curry*, 2006-NMCA-082, ¶ 45, 140 N.M. 49, 139 P.3d 209 (stating that when no supporting authority for a proposition is cited, this Court may assume that no applicable or analogous authority exists). To the extent that MVD invites us to recognize such sweeping authority in the absence of statutory delegation, we deem it imprudent. *See Kilmer v. Goodwin*, 2004-NMCA-122, ¶ 24, 136 N.M. 440, 99 P.3d 690 ("[A]n administrative agency may not exercise authority beyond the powers that have been granted to it."); *Collyer v. State of N.M. Taxation & Revenue Dep't*, 1996-NMCA-029, ¶ 6, 121 N.M. 477, 913 P.2d 665 ("MVD is vested only with the power to administer and enforce the Motor Vehicle Code as provided by law.").

{9} MVD cites *Alvarez v. State of N.M. Taxation & Revenue Dep't*, 1999-NMCA-006, 126 N.M. 490, 971 P.2d 1280, in support of its position. In that case, the plaintiffs filed a complaint, seeking a declaration that they were entitled to have their driving privileges restored. *Id.* ¶ 3. However, the plaintiffs had not applied for or been denied license reinstatement. *Id.* ¶ 10. Applying Section 66-2-17, we held that the action for declaratory judgment was improper, insofar as the plaintiffs had failed to pursue "the mandated

administrative steps necessary to vest jurisdiction in the district court." *Alvarez*, 1999-NMCA-006, ¶ 10.

{10} Two significant considerations render this case distinguishable. First, unlike the *Alvarez* plaintiffs, Yepa applied for license reinstatement, and the request was denied. Accordingly, MVD has rendered a decision, such that ripeness is not a concern. *See generally U.S. West Commc'ns, Inc. v. N.M. State Corp. Comm'n*, 1998-NMSC-032, ¶ 8, 125 N.M. 798, 965 P.2d 917 (observing that the doctrine of ripeness "serves to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties" (internal quotation marks and citation omitted)); *New Energy Econ.*, 2010-NMSC-049, ¶ 17 ("One of the prerequisites of . . . a declaratory judgment action is that . . . the issue involved must be ripe for judicial determination." (second omission in original) (alteration, internal quotation marks, and citation omitted)).

{11} Second, the arguments advanced by the *Alvarez* plaintiffs do not appear to have implicated constitutional principles beyond the scope of MVD's authority. As we have discussed, this distinction is significant in view of MVD's authority to address constitutional issues.

{12} Constitutional challenges that are beyond the scope of MVD's authority are properly brought before the district courts. *See Schuster*, 2012-NMSC-025, ¶ 21 ("[A]ny constitutional challenge beyond MVD's scope of statutory review is brought for the first time in district court under its original jurisdiction."). As a result, exhaustion of administrative remedies was not required for the district court to rule on the purely legal issue of the ex post facto application of the 2009 amendment to a previous incident triggering a license revocation. *See Smith*, 2007-NMSC-055, ¶ 27 (holding that because a pure question of law was presented that would have been futile to pursue through the administrative appeals process, exhaustion was not required); *State ex rel. Norvell v. Credit Bureau of Albuquerque, Inc.*, 1973-NMSC-087, ¶ 29, 85 N.M. 521, 514 P.2d 40 ("The doctrine of exhaustion of remedies does not require the initiation of and participation in proceedings in respect to which an administrative tribunal clearly lacks jurisdiction, or which are vain and futile."). The district court had jurisdiction under the New Mexico Declaratory Judgment Act, NMSA 1978, §§ 44-6-1 to -15 (1975).

EX POST FACTO LAWS

{13} The 2009 amendment imposes a number of conditions upon the reinstatement of drivers' licenses that were suspended or revoked for DWI or for violation of the Implied Consent Act. Among these requirements is completion of "a minimum of six months of driving with an ignition interlock license with no attempts to circumvent or tamper with the ignition interlock device." Section 66-5-33.1(B)(4). As briefly described in the introductory portion of this Opinion, Yepa's driver's license was revoked in 2008 after he was arrested for aggravated DWI. The criminal charge against him was dismissed in late 2008. He became eligible for license reinstatement in March 2009, but he did not apply for reinstatement until late July 2009, after the effective date of the 2009 amendment. He successfully argued below that the application of the amendment to him constituted an impermissible ex post facto law.

{14} The constitutional prohibition against ex post facto laws is violated "when a statute

involving retroactivity is passed that makes criminal a previously innocent act, increases the punishment, or changes the proof necessary to convict the defendant." *State ex rel. Foy v. Austin Capital Mgmt., Ltd.*, 2013-NMCA-043, ¶ 10, 297 P.3d 357 (alteration, internal quotation marks, and citation omitted), *cert. granted*, 2013-NMCERT-003, 300 P.3d 1181.

{15} The first portion of our inquiry concerns retroactivity. "[C]onfusion often arises as to what retroactivity means in particular contexts." *Gadsden Fed'n of Teachers v. Bd. of Educ.*, 1996-NMCA-069, ¶ 14, 122 N.M. 98, 920 P.2d 1052. MVD contends that there is no retroactivity, in that Section 66-5-33.1(B) is not triggered until a person applies for license reinstatement. Yepa contends that application of the 2009 amendment entails retroactivity because it increases the punishment associated with conduct that preceded the effective date of the enactment.

{16} "A statute or regulation is considered retroactive if it impairs vested rights acquired under prior law or requires new obligations, imposes new duties, or affixes new disabilities to past transactions." *Howell v. Heim*, 1994-NMSC-103, ¶ 17, 118 N.M. 500, 882 P.2d 541. The impairment of vested rights does not appear to be implicated in this case. *Cf. City of Santa Fe ex rel. Santa Fe Police Dep't v. One (1) Black 2006 Jeep*, 2012-NMCA-027, ¶ 11, 286 P.3d 1223 (observing that Section 66-5-33.1 contains no provision for automatic reinstatement upon the expiration of the penalty period and, accordingly, a driver's license remains revoked and cannot be reinstated until compliance with all of the requisites is accomplished). However, the 2009 amendment does require "new obligations, imposes new duties, or affixes new disabilities" to a past transaction by increasing the burden of reinstatement upon drivers whose licenses were revoked before the 2009 amendment came into effect. *Howell*, 1994-NMSC-103, ¶ 17.

{17} MVD argues to the contrary on grounds that a statutory amendment "does not operate retroactively merely because some of the facts or conditions which are relied upon existed prior to the enactment." *Id.* (internal quotation marks and citation omitted). However, the implicit focus on the timing of the application for reinstatement, without considering the relationship between the license reinstatement process and preceding events and circumstances, is too simplistic. As our Supreme Court has more recently explained, the relevant inquiry is nuanced:

> [T]o determine whether a statutory amendment is retroactive the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates retroactively comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.

State v. Morales, 2010-NMSC-026, ¶ 9, 148 N.M. 305, 236 P.3d 24 (internal quotation marks and citation omitted). Under the 2009 amendment, there is a clear and immediate "connection between the operation of the new rule" (*i.e.*, the ignition interlock requirement) and "a relevant past event" (*i.e.*, the conduct which precipitated the prior license revocation). As a consequence, heightened burdens are imposed on drivers whose licenses were revoked as a consequence of conduct that preceded the passage of the 2009 amendment. Therefore, the 2009 amendment "attaches new legal consequences to events completed before its enactment." *Id.* (internal quotation marks and citation omitted). In light

of these considerations, retroactivity is sufficiently involved to require further analysis.[1]

{18} When considering an ex post facto challenge to the application of a statutory amendment, it is necessary to evaluate the nature of the amendment. "[T]he constitutional prohibition on ex post facto laws applies only to penal statutes which disadvantage the offender affected by them." *State v. Nunez*, 2000-NMSC-013, ¶ 112, 129 N.M. 63, 2 P.3d 264 (internal quotation marks and citation omitted). "The prohibition does not apply to penalties that are considered remedial in nature." *Foy*, 2013-NMCA-043, ¶ 11.

{19} Yepa contends that the ignition interlock requirement set forth in the 2009 amendment should be regarded as punitive, as opposed to remedial in nature, because it represents a further step in our Legislature's response to the serious problem of drunk driving, and because it imposes costs and incidental expenses. Although these are material considerations, they are not dispositive. *See State v. Kirby*, 2003-NMCA-074, ¶¶ 31, 38, 133 N.M. 782, 70 P.3d 772 (noting that "simply because the conduct to which the civil penalty applies is already a crime is insufficient, by itself, to render the sanction criminally punitive" and further observing that "monetary assessments are traditionally a form of civil remedy" (internal quotation marks and citation omitted)). Yepa also focuses heavily on the consequential impact upon him, individually. MVD counters that Yepa "cannot have it both ways," by asserting that the 2009 amendment is facially invalid on the one hand while also arguing that his "particular personal circumstances" of poverty render the 2009 amendment invalid as applied to him.

{20} Yepa's various claims pertaining to the amendment's unique individual impacts upon him are not relevant to our analysis of whether the ignition interlock requirement is punitive. "[W]hether a sanction constitutes punishment is not determined from the defendant's perspective, as even remedial sanctions carry the sting of punishment." *State ex rel. Schwartz v. Kennedy*, 1995-NMSC-069, ¶ 32, 120 N.M. 619, 904 P.2d 1044 (internal quotation marks and citation omitted). "In order to ascertain whether these sanctions are punitive[,] we must look at the purposes that the sanctions actually serve. We make this determination by evaluating the government's purpose in enacting the legislation, rather than evaluating the effect of the sanction on the defendant." *Id.* (internal citation omitted). Accordingly, we decline to consider the "actual sanctions at stake" in Yepa's "specific case[.]" *Foy*, 2013-NMCA-043, ¶ 37.

{21} The threshold question is whether the Legislature's intent was to impose punishment. *Id.*, ¶ 15. If "the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil." *Id.* (internal quotation marks and citation omitted).

[1] We note that Yepa's answer brief suggests that the ex post facto clause contained within the New Mexico Constitution affords greater protection than the United States Constitution. However, Yepa neither cites authority to support this position as a general proposition, nor attempts to demonstrate that the federal analysis is flawed, that there are structural differences between state and federal government,or that there are distinctive state characteristics. *See generally State v. Leyva*, 2011-NMSC-009, ¶ 49, 149 N.M. 435, 250 P.3d 861 (describing the interstitial approach by which arguments that the New Mexico Constitution provides greater protection than its federal counterpart may be preserved). We therefore adhere to the established ex post facto jurisprudence and leave for another day the question whether the New Mexico Constitution affords greater protections.

{22} Yepa asserts that the legislative intent was essentially punitive. He bases this assertion upon isolated comments by individuals, the fact that the requirement may be imposed in the absence of a criminal conviction, and the fact that New Mexico imposes comparatively greater sanctions for drunk driving than other states. However, we do not regard any of these reasons as reliable indicia of legislative intent.

{23} Based on an assessment of the overarching statutory scheme of the Implied Consent Act, including the procedures and penalties imposed, our Supreme Court has previously recognized, in the context of a constitutional double jeopardy analysis, that the Legislature's intent in enacting the provision for revoking and reinstating driver's licenses, including the prior version of Section 66-5-33.1, was civil and remedial. *Kennedy*, 1995-NMSC-069, ¶¶ 28-35, 42. Our Supreme Court stressed that the "state government regulates the activity of driving on the state's highways in the interest of the public's safety and general welfare." *Id.* ¶ 35. The license revocation provision of the Implied Consent Act, the Supreme Court noted, "serves the legitimate nonpunitive purpose of protecting the public from the dangers presented by drunk drivers and helps enforce regulatory compliance with the laws governing the licensed activity of driving." *Id.* It further observed that the Implied Consent Act also has a deterrent effect on drunk drivers, but noted that "[t]he deterrent effect of administrative license revocation is incidental to the government's purpose of protecting the public from licensees who are incompetent, dishonest, or otherwise dangerous." *Id.* ¶ 38.

{24} The regulatory activity in this case is not distinguishable either because the constitutional protection is different or because the statute at issue pertains to an ignition interlock requirement rather than a license revocation. Indeed, the 2009 amendment required an ignition interlock merely as a condition to reinstatement of a revoked or suspended driver's license. We perceive nothing within the 2009 amendment to suggest a departure from the legislative intent expressed in *Kennedy* that "revocation of a person's driver's license based on the conduct of either failing a blood-alcohol test or refusing to take a chemical test . . . is consistent with the government's goals in implementing the Implied Consent Act and is therefore remedial, not punitive[.]" *Id.* ¶ 42.

{25} We do note, as pointed out by the dissent, although it was not briefed by Yepa, that the statutory provision setting forth the offense of DWI includes a separate provision requiring an offender who is convicted of DWI to obtain an ignition interlock license and device. NMSA 1978, § 66-8-102(N) (2008, amended 2010). In the context of this provision, the dissent relies on dictum in *State v. Valdez*, 2013-NMCA-016, 293 P.3d 909, to assert that the Legislature intended the mandatory installation of ignition interlock devices to be punitive. The defendant in *Valdez*, however, challenged the constitutionality of the mandatory ignition interlock requirement of Section 66-8-102(N) as applied to offenders convicted of DWI "whose impairment is caused not by alcohol but by drugs[.]" *Id.* ¶ 1. In this case, Yepa was not subject to Section 66-8-102(N) because he was not convicted of aggravated DWI. Based on this dissimilar factual scenario, the statutes subject to our analysis here differ from that in *Valdez*. We therefore do not consider the language of Section 66-8-102(N) to alter the Legislature's overarching intent concerning the remedial nature of the Implied Consent Act, the statute underlying this appeal. The general statutory scheme of the Implied Consent Act focuses on the revocation and reinstatement of driver's licenses, not punishment of traffic offenses. Moreover, the bill passed by the Legislature in 2009 only amended the statutory provisions for license

revocation and reinstatement under Section 66-5-33.1 and NMSA 1978, § 66-5-503 (2013). *See* 2009 N.M. Laws, ch. 254; *Chatterjee v. King*, 2012-NMSC-019, ¶ 12, 280 P.3d 283 ("In addition to looking at the statute's plain language, we will consider its history and background and how the specific statute fits within the broader statutory scheme."). Accordingly, we view the Section 66-8-102(N) requirement as an independent means by which the Legislature intended to deter drunk drivers from endangering the public safety.

{26} We therefore proceed to the second part of the inquiry, to determine whether the 2009 amendment "is so punitive either in purpose or effect as to negate the [Legislature's] intention." *Foy*, 2013-NMCA-043, ¶ 15 (internal quotation marks and citation omitted). We apply a seven-factor test, which entails evaluating:

> (1) whether the sanction involves an affirmative disability or restraint, (2) whether it has historically been regarded as a punishment, (3) whether it comes into play only on a finding of scienter, (4) whether its operation will promote the traditional aims of punishment—retribution and deterrence, (5) whether the behavior to which it applies is already a crime, (6) whether an alternative purpose to which it may rationally be connected is assignable for it, and (7) whether it appears excessive in relation to the alternative purpose assigned.

Id. ¶ 16 (alterations, internal quotation marks, and citation omitted). We address each factor in turn.

{27} As to the first factor, we do not consider the ignition interlock requirement to be, on balance, an affirmative disability or restraint, as this factor has been interpreted and applied. Although compliance with the requirement may entail expense, and although an ignition interlock device may be inconvenient, these considerations do not approach the "infamous punishment of imprisonment." *Id.* ¶17 (internal quotation marks and citation omitted) (utilizing punishments entailing imprisonment or carrying the stigma of criminal conviction as the benchmarks for purposes of identifying sanctions that involve affirmative disability or restraint). While we do not deny that the installation of an ignition interlock device may "carry the stigma of a criminal conviction" because it is also required of offenders, we do not consider this factor to be a substantial disability or restraint because, as demonstrated by this case, an ignition interlock can be required without a criminal conviction. Moreover, and importantly, the larger ignition interlock scheme has a permissive, as opposed to disabling or constraining effect, because it allows individuals to obtain ignition interlock licenses and thereby to continue driving notwithstanding the revocation of their drivers' licenses. NMSA 1978, § 66-5-503 (2009, amended 2013). As a result, the first factor suggests that the 2009 amendment on balance is remedial rather than punitive in nature.

{28} With respect to the second factor, although in recent years an ignition interlock device has been required of DWI offenders, *see* § 66-8-102(N), we are aware of nothing to indicate that ignition interlock requirements have historically been regarded as punishment. The relative novelty of such requirements suggests no such historical sensibility.

{29} Turning to the third factor, scienter has no bearing on either the application of the ignition interlock requirement or the behavior that led to the preceding license revocation. *See State v. Orquiz*, 2012-NMCA-080, ¶ 15, 284 P.3d 418 (observing that "DWI is a strict liability crime"). This factor lends further

support to the remedial nature of the 2009 amendment.

{30} Application of the fourth factor also yields mixed results. We are aware of nothing to suggest that imposition of the ignition interlock requirement is retributional. However, as we have discussed, the requirement may have a deterrent effect. *See Kennedy*, 1995-NMSC-069, ¶¶ 36-37 (recognizing that the sanction of license revocation has a deterrent effect). Nevertheless, "the fact that the regulatory scheme has some incidental deterrent effect does not render the sanction punishment[.]" *Id.* ¶ 37. In light of the larger purpose, which is clearly to enhance public safety by keeping intoxicated drivers off of the roads, the deterrent effect of the ignition interlock requirement is relatively minor. *See id.* ¶¶ 35, 38 (holding that "[t]he deterrent effect of administrative license revocation is incidental" to the greater purpose "of protecting the public from the dangers presented by drunk drivers" and "enforc[ing] regulatory compliance with the laws governing the licensed activity of driving"). We therefore weigh this factor in favor of determining the 2009 amendment to be remedial.

{31} As to the fifth factor, insofar as ignition interlock devices are designed to prevent the driver from operating a vehicle if he or she is intoxicated or impaired, requiring the installation of such a device operates to prevent conduct that is already prohibited by law. *See* NMSA 1978, § 66-5-502(B) (2007, amended 2013) (defining "ignition interlock device" as a device "that prevents the operation of a motor vehicle by an intoxicated or impaired person"); § 66-8-102(A)-(C) (declaring driving under the influence of intoxicating liquor or drugs unlawful). This purpose suggests a punitive nature. *See Foy*, 2013-NMCA-043, ¶ 31 (observing that "when the behavior being punished is already a crime it points in favor of finding the statute to be punitive in nature"). However, "simply because the conduct to which the [sanction] applies is already a crime is insufficient, by itself, to render the sanction criminally punitive[.]" *Kirby*, 2003-NMCA-074, ¶ 38.

{32} With respect to the sixth factor, concerning alternative purposes, the ignition interlock requirement is "one of several tools of regulatory and administrative enforcement" that constitutes "an integral part of an overall remedial regulatory and administrative scheme to protect the public." *Foy*, 2013-NMCA-043, ¶ 33 (internal quotation marks and citation omitted); *see generally Kennedy*, 1995-NMSC-069, ¶¶ 29-35, 38, 42 (discussing the larger regulatory scheme that arises under the Implied Consent Act and related provisions, including Section 66-5-33.1, and noting that this scheme serves the purpose of protecting the public). This factor suggests that the 2009 amendment is remedial in nature.

{33} Finally, as to the seventh factor, we must consider whether the 2009 amendment "appears excessive in relation to the alternative purpose assigned." *Foy*, 2013-NMCA-043, ¶ 16 (internal quotation marks and citation omitted). "The question is whether the regulatory means chosen are reasonable in light of the nonpunitive objective." *Id.* ¶ 36 (internal quotation marks and citation omitted). We answer this question in the affirmative. In so doing, we note the "close and substantial relationship" between the ignition interlock requirement and the remedial purpose of protecting the public by keeping impaired drivers off of the roads. *Id.* ¶ 38; *see, e.g.*, *City of Albuquerque v. One (1) 1984 White Chevy Ut.*, 2002-NMSC-014, ¶ 16, 132 N.M. 187, 46 P.3d 94 (finding a "clear nexus between" the vehicles seized by the state and the crime of DWI); *Kennedy*, 1995-NMSC-069, ¶ 38 (finding the deterrent (*i.e.* punitive) aspects of revoking a driver's license after a conviction of DWI to be "incidental to the government's purpose of

protecting the public"). Accordingly, this factor weighs in favor of concluding the ignition interlock requirement to be remedial.

{34} In sum, our analysis reveals that the ignition interlock requirement imposed by the 2009 amendment: (1) on balance does not impose an affirmative disability or restraint; (2) has not been historically viewed as punitive; (3) does not come into play only on a finding of scienter; (4) speaks more to regulating licensed conduct than promoting the traditional aims of punishment; (5) applies to conduct that is already a crime; (6) constitutes an integral part of an overall remedial regulatory and administrative scheme to protect the public; and (7) is not excessive in relation to its remedial purpose. Insofar as six of the seven factors indicate that the 2009 amendment is remedial, on balance, the remedial effects outweigh the punitive effects. *See, e.g.*, *Kirby*, 2003-NMCA-074, ¶¶ 38-39 (arriving at the same conclusion on a similar balance of the relevant factors).

{35} In light of the foregoing, we conclude that the 2009 amendment is not penal for purposes of the constitutional prohibition against ex post facto laws. Accordingly, MVD was improperly enjoined from applying the ignition interlock requirement to Yepa on that basis.

CONCLUSION

{36} For the reasons stated, we reverse.

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

JAMES J. WECHSLER, Judge

I CONCUR:

JONATHAN B. SUTIN, Judge

MICHAEL E. VIGIL, Chief Judge (dissenting).

VIGIL, Chief J., dissenting.

{38} It might seem odd to ask whether a mandatory sentence following a criminal conviction constitutes punishment. However, I respectfully submit that is the very question which this case presents. Considered in its proper light, Yepa is being subjected to an unconstitutional ex post facto law, and contrary to the holding of the majority, I would affirm.[2]

{39} The United States Constitution prohibits both the federal and state governments from enacting ex post facto laws. U.S. Const. art. 1, § 10, cl. 3 (prohibiting Congress from passing any ex post facto law); U.S. Const. art 1, § 10, cl. 1 (prohibiting any state from passing any ex post facto law). Such laws are also prohibited by the New Mexico Constitution in its own Bill of Rights. N.M. Const. art. II, § 19. "The Latin phrase 'ex post facto' implicates in its literal meaning any law passed 'after the fact.'" *Collins v. Youngblood*, 497 U.S. 37, 41 (1990); *see Foy*, 2013-NMCA-043, ¶ 10 (citation omitted). In my view, the federal and state constitutional prohibitions were violated in Yepa's case.

{40} Criminal actions and driver's license revocations work together. Breath tests of motorists must be administered pursuant to the Implied Consent Act, NMSA 1978, Sections 66-8-105 to -112 (1978, as amended through 2007). When a breath test gives a blood alcohol concentration of .08 or higher, the arresting officer "shall" charge the driver with a violation of NMSA 1978, Section 66-8-102 (2004), and on behalf of the MVD serves notice that the driver's license will be revoked for a period of six months, unless a hearing is requested. Section 66-8-110(C)(1); 66-8-111.1. Upon receipt of a statement signed

[2]In all other respects, I concur with the majority opinion.

under perjury from the police officer that a breath test was administered and the result was a blood alcohol concentration of .08 or higher, MVD revokes the driver's license for six months. Section 66-8-111(C)(1) (2005). These statutory provisions were followed. Yepa was administered a blood alcohol test, and because the results were above .08, he was charged with DWI (aggravated) in violation of Section 66-8-102(D)(1), and MVD revoked Yepa's license for six months on the basis that the result of his breath alcohol test was above the .08 per se limit.

{41} When Yepa became eligible to have his driver's license reinstated in March 2009, there was no ignition interlock requirement for reinstatement. Section 66-5-3.1(B). However, when he did seek reinstatement in July, 2009, a law passed "after the fact" with an effective date of July 1, 2009, had an ignition interlock requirement. This new law now required "a minimum of six months of driving with an ignition interlock license" for license reinstatement. Section 66-5-33.1(B)(4) (2009). The question before us is whether requiring Yepa to comply with the new ignition interlock requirement violates the constitutional prohibition against ex post facto laws.

{42} "The *Ex Post Facto* Clause flatly prohibits retroactive application of penal legislation." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994) (quoted in *State v. Ordunez*, 2012-NMSC-024, ¶ 14, 283 P.3d 282). A statute is "penal" when it makes criminal a previously innocent act, increases the punishment, or changes the proof necessary to convict the defendant. *Ordunez*, 2012-NMSC-024, ¶ 14; *State v. Romero*, 2011-NMSC-013, ¶ 10, 150 N.M. 80, 257 P.3d 900. Moreover, the constitutional prohibition against ex post facto laws applies to all penal statutes, even those that are labeled civil. *Foy*, 2013-NMCA-043, ¶¶ 12-15.

{43} In determining whether a statute is penal, the intent of the Legislature is controlling. *Id.* ¶ 15; *Smith v. Doe*, 538 U.S. 84, 92 (2003). Unlike the majority, I conclude that the intent of our Legislature has very clearly expressed its intention that a mandatory ignition interlock is penal. In 2005, our Legislature enacted significant amendments to the sentencing requirements for DWI convictions. One requirement is that upon a conviction for DWI, the sentencing judge must order installation of an ignition interlock device in the judgment and sentence:

> Upon a conviction pursuant to this section, an offender shall be required to obtain an ignition interlock license and have an ignition interlock device installed and operating on all motor vehicles driven by the offender, pursuant to rules adopted by the [traffic safety] bureau. Unless determined by the sentencing court to be indigent, the offender shall pay all costs associated with having an ignition interlock device installed on the appropriate motor vehicles. The offender shall operate only those vehicles equipped with ignition interlock devices for:
>
> (1) a period of one year, for a first offender;
>
> (2) a period of two years, for a second conviction pursuant to this section;
>
> (3) a period of three years, for a third conviction pursuant to this section; or
>
> (4) the remainder of the offender's life, for a fourth or subsequent conviction pursuant to this section.

Section 66-8-102(N) (2005). *See* NMSA 1978, Section 66-5-503(B)(1) (2009) (stating that one of the requirements for obtaining an ignition interlock license is installation of an ignition interlock device on any vehicle driven).

{44} "The establishment of criminal penalties is a legislative function." *State v. Pendley*, 1979-NMCA-036, ¶ 23, 92 N.M. 658, 593 P.2d 755. The Legislature could not be any clearer in expressing its intent that mandatory installation of an ignition interlock device constitutes punishment for committing the criminal offense of DWI. This becomes even more evident when one considers that this mandatory sentence was added to other existing penalties for DWI. As such, only the clearest proof should suffice to override the Legislature's intent and transform what it has denominated a criminal penalty into a civil and nonpunitive regulation. *See Hudson v. United States*, 522 U.S. 93, 100 (1997) (stating that "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty[.]" (internal quotation marks and citation omitted)).

{45} When Yepa was arrested and charged with aggravated DWI in September 2008, the penalty included mandatory installation of an ignition interlock device for a period of one year, Section 66-8-102(N) (2008), and there was no such penalty for reinstatement of a driver's license. After July 1, 2009, however, a new six-month penalty was imposed for reinstatement. *See Collins*, 497 U.S. at 43 ("Legislatures may not retroactively . . . increase the punishment for criminal acts."). It belies reason to conclude that mandatory installation of an ignition interlock device following a criminal conviction is punishment but mandatory installation of an ignition interlock device for reinstatement of a driver's license is not punishment. They are the same.

{46} "If the intention of the legislature was to impose punishment, that ends the inquiry." *Smith*, 538 U.S. at 92. The majority acknowledges that the threshold question is whether the Legislature intended to impose punishment. Majority Opinion ¶ 21. We have already concluded that the Legislature intended mandatory installation of an ignition interlock device to constitute punishment. In *State v. Valdez*, 2013-NMCA-016, ¶ 12, 293 P.3d 909, we noted: "The DWI statute is part of a broad legislative scheme, including the State's separate Ignition Interlock Licensing Act, which applies to those whose "privilege or driver's license has been revoked or denied." Section 66-5-503(A)." We concluded: "The goal of the Legislature was to criminalize DWI and to penalize it with mandatory installation of ignition interlock devices[.]" *Id.* Thus, the majority fails to properly account for the fact that the Legislature imposed mandatory installation of an ignition interlock device as a penalty for DWI, and that this penalty was increased by an additional six months under the new law.

{47} The majority then assumes that the MVD requirement is part of a regulatory scheme that is civil and nonpunitive. Majority Opinion ¶¶23-25. Finally, the majority then proceeds to analyze whether that statutory scheme is so punitive in either purpose or effect so as to negate its civil, nonpunitive purpose. Majority Opinion ¶¶ 26-34. In my opinion, this analysis does not apply because the legislative intent is clearly expressed that mandatory installation of an ignition interlock device is punishment for DWI.

{48} For the foregoing reasons, I dissent from the holding that MVD was improperly enjoined from applying the interlock requirement to Yepa on the basis that the 2009 amendment is not penal under the constitutional prohibition against ex post fact laws. I would affirm.

MICHAEL E. VIGIL, Chief Judge

Certiorari Granted, August 31, 2015, No. 35,478

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-100

Filing Date: August 11, 2015

Docket No. 33,630

KATHERINE MORRIS, M.D., AROOP MANGALIK, M.D., and AJA RIGGS,

Plaintiffs-Appellees,

v.

KARI BRANDENBURG, in her official capacity as District Attorney for Bernalillo County, New Mexico, and GARY KING, in his official capacity as Attorney General of the State of New Mexico,

Defendants-Appellants.

Kennedy Kennedy & Ives, LLC
Laura Schauer Ives
Albuquerque, NM

ACLU of New Mexico Foundation
Alexandra Freedman Smith
Albuquerque, NM

Kathryn L. Tucker
Ojai, CA

for Appellees

Hector H. Balderas, Attorney General
Scott Fuqua, Assistant Attorney General
Santa Fe, NM

for Appellants

Rothstein, Donatelli, Hughes
Dahlstrom, Schoenburg & Bienvenu, LLP
Kristina Martinez
Carolyn M. "Cammie" Nichols
Santa Fe, NM

for Amicus Curiae The ALS Association New Mexico Chapter

Montgomery & Andrews, P.A.
Lara Katz
Santa Fe, NM

for Amicus Curiae Disability Rights Amici: Not Dead Yet, Adapt, American Association of People With Disabilities, Autistic Self Advocacy Network, Disability Rights Education and Defense Fund, National Council on Independent Living, and the United Spinal Association

Garcia Ives Nowara, LLC
Molly Schmidt Nowara
Albuquerque, NM

Covington & Burling, LLP
Christina G. Kuhn
Washington, DC

for Amicus Curiae American Medical Women's Association, American Medical Student Association, and New Mexico Public Health Association

Robert Schwartz
Albuquerque, NM

for Amicus Curiae New Mexico Psychological Association

Alliance Defending Freedom
Catherine Glenn Foster
Washington, DC

Modrall, Sperling, Roehl, Harris & Sisk, P.A.
Emil J. Kiehne
Albuquerque, NM

for Amicus Curiae State of New Mexico Senators William F. Burt, Mark Moores, Steven P. Neville, William E. Sharer, and Pat Woods; State of New Mexico Representatives Paul C. Bandy, Sharon Clahchischilliage, David M. Gallegos, Jason C. Harper, Yvette Herrell, and James R.J. Strickler; and Christian Medical and Dental Associations

Stelzner, Winter, Warburton, Flores, Sanchez & Dawes, P.A.
Juan L. Flores
Jaime L. Dawes
Albuquerque, NM

for Amicus Curiae Michael J. Sheehan of the Archdiocese of Santa Fe, Bishop Oscar Cantú of the Diocese of Las Cruces, and Bishop James A. Wall of the Diocese of Gallup

OPINION

GARCIA, Judge.

{1} A New Mexico statute makes "assisting suicide" a fourth degree felony and defines the proscribed conduct as "deliberately aiding another in the taking of his own life." NMSA 1978, § 30-2-4 (1963). The question presented is whether this statute may constitutionally be applied to criminalize a willing physician's act of providing a lethal dose of a prescribed medication at the request of a mentally competent, terminally ill patient who wishes a peaceful end of life (aid in dying) as an alternative to one potentially marked by suffering, pain, and/or the loss of autonomy and dignity. The district court concluded that Section 30-2-4 is invalid under two provisions of the New Mexico Constitution as applied to any physician who provides aid in dying to a patient. In reaching its conclusion, the district court determined that aid in dying is a fundamental liberty interest and that the State did not meet its burden to prove that Section 30-2-4 met a strict scrutiny standard of review. We conclude that aid in dying is not a fundamental liberty interest under the New Mexico Constitution. Accordingly, we reverse the district court's order permanently enjoining the State from enforcing Section 30-2-4. In addition, we affirm the district court's determination that, for statutory construction purposes, Section 30-2-4 prohibits aid in dying. Finally, I would also remand to the district court for further proceedings regarding the remaining aid in dying claims raised by Plaintiffs, including the entry of findings and conclusions concerning whether Section 30-2-4 meets the intermediate standard of review required for important individual liberty interests under the New Mexico Constitution and/or whether it passes a rational basis standard of review as applied to aid in dying.

BACKGROUND

{2} Plaintiffs are Dr. Katherine Morris, a surgical oncologist at the University of New Mexico (UNM); Dr. Aroop Mangalik, a UNM physician; and Aja Riggs, a patient who has been diagnosed with uterine cancer.[1] In the course of their practices, Drs. Morris and Mangalik provide medical care to mentally competent, terminally ill adults who have expressed interest in what Plaintiffs call "aid in dying," which the parties define as the "practice of a physician providing a mentally competent[,] terminally ill patient with a

[1]Although two Plaintiffs are doctors, the right at issue is asserted to belong to their patients, and doctors are typically deemed to have standing to assert the constitutional rights of their patients. *See Singleton v. Wulff*, 428 U.S. 106, 108, 117 (1976); *Doe v. Bolton*, 410 U.S. 179, 188 (1973).

prescription for [a lethal dose of] medication which the patient may choose to ingest to achieve a peaceful death and thereby avoid further suffering."

{3} Aid in dying has been legal in Oregon for nearly two decades. Or. Rev. Stat. Ann. §§ 127.800 to .897 (1997, as amended through 2013). Dr. Morris, who previously practiced in Oregon, administered aid in dying at the request of two patients in that state. The practice is also legal in Vermont, *see* Vt. Stat. Ann. tit. 18, §§ 5281 to 5292 (2013), and Washington, *see* Wash. Rev. Code Ann. §§ 70.245.10 to 70.245.904 (2009), and has been judicially recognized as a valid statutory defense to homicide in Montana, *see Baxter v. Montana*, 2009 MT 449, ¶ 1, 354 Mont. 234, 224 P.3d 1211. The practice is statutorily stated to be illegal in five other states, *see* Ark. Code Ann. § 5-10-106 (2007) (expressly prohibiting "physician-assisted suicide"); Ga. Code Ann. § 16-5-5(b), (d) (2012) (indicating application to physicians by requiring healthcare providers to notify the licensing board upon conviction); Idaho Code Ann. § 18-4017 (2011) (same); N.D. Cent. Code Ann. § 12.1-16-04 (1991) (prohibiting the issuance of prescriptions for the purpose of assisting suicide); R.I. Gen. Laws § 11-60-3 (1996) (prohibiting licensed healthcare practitioners from providing another the physical means to commit suicide), and is potentially prohibited in the majority of remaining jurisdictions by blanket manslaughter statutes similar to Section 30-2-4. *See, e.g.*, Cal. Penal Code § 401 (1905).

{4} Uncertain about the legality of aid in dying in New Mexico, Drs. Morris and Mangalik filed suit seeking a declaration that they cannot be prosecuted under Section 30-2-4. They alleged that the statute does not apply to aid in dying, and if it does, such application offends provisions of our state constitution, including Article II, Section 4's guarantee of inherent rights and Article II, Section 18's Due Process Clause. The district court held a trial on the merits at which several witnesses testified for Plaintiffs. That testimony was uncontroverted and formed the basis for the district court's findings. The testimony and findings, which remain undisputed, establish the following facts.

{5} Quality of life for terminally ill patients varies depending on the specific illness, its manifestations in the patient, and the patient's physical and psychological reserves. But progressive terminal illness, by definition, interferes with vital functions, such as eating and drinking, breathing, blood flow, and the basic functions of the brain. At any given moment, there are terminally ill patients in New Mexico "who find the suffering from their illness to be unbearable, despite efforts to relieve pain and other distressing symptoms." Some of those patients find the current options in end-of-life care to be inadequate to relieve their suffering and want the option of aid in dying. The dying process is often extremely difficult for patients with terminal illnesses. As a surgical oncologist, Dr. Morris has treated cancer patients with a variety of end-of-life symptoms, such as irremovable "obstruction[s]" that cause the inability to swallow, fluid accumulation that leads to rapid and repeated distention of the abdomen, and swelling of the skin such that it splits open. In some instances, a patient's suffering is such that doctors induce unconsciousness—the so-called "barbiturate coma"—and then withhold hydration and nutrition until death arrives. As one example, Dr. Morris recalled treating a "really strong" firefighter who was approximately six foot, five inches tall and weighed 280 pounds. His skin cancer led to metastasis of the spine, which left him "sobbing in pain." All doctors could do to ease his pain "was make him unconscious" by administering "huge doses" of narcotics, muscle relaxants, and sedatives.

{6} Dr. Morris testified that sedating people

to this level "suppresses their breathing and sometimes ends their li[ves]." The removal of life-sustaining nutrition and hydration also hastens the death of the sedated patient. Experts at trial described the "double-effect" of this practice of terminal (or palliative) sedation, as it is called: Although the physician's "primary intent"—or more accurately, motive—is to eliminate pain, the physician "inevitably know[s]" that administering such high doses of consciousness-lowering medications—at times, tens or even hundreds of times the normal dosage—will lead, in close proximity, to the patient's death. Palliative sedation is an accepted medical practice and is allowed in New Mexico. *See generally* NMSA 1978, §§ 24-2D-1 to -6 (1999, as amended through 2012). The same is true for withdrawal of life-sustaining treatment measures. *See generally* NMSA 1978, §§ 24-7A-1 to -18 (1995, as amended through 2009). But these legal options for ending life arise only after the patient potentially endures a period of degeneration.

{7} Apart from pain, there are other reasons why a terminally ill patient may choose aid in dying. In Oregon and Washington, where data on aid in dying are required to be kept by statute, *see* Or. Rev. Stat. Ann. § 127.865; Wash. Rev. Code Ann. § 70.245.150, the most commonly cited end-of-life concern among patients who choose to ingest the lethal dose of medication is "loss of autonomy."[2] Patients in both states also frequently report that their illnesses cause a loss of dignity and a loss of the ability to engage in the activities that make life enjoyable. Oregon's Death With Dignity Act Rep., *supra*, at 5; Wash. Death With Dignity Act Rep., *supra*, at 7. Dr. David Pollack, a psychiatrist practicing in Oregon for over forty years, testified at trial that patients choose to ingest the lethal dose of medication "to alleviate symptoms, to spare others from the burden of watching them dwindle away or be a shell of their former sel[ves] or to feel like they are in control, [to] have some autonomy and some control over the way that they die."

{8} Plaintiff Aja Riggs, who has been diagnosed with life-threatening uterine cancer, testified that she did not know if she "want[ed] to go all the way to the end" and naturally die if the consequences of her cancer reached the terminal stages:

> I think one of the images that I had that I didn't and I don't want to have happen is that I'm lying in bed in pain, or struggling not to be in pain, or mostly unconscious with everybody that cares about me around me and all of us just waiting for me to die.

Ms. Riggs further testified that the legal availability of aid in dying would bring her peace of mind and help her feel that she can make controlled personal choices about her experience with cancer. This sentiment was echoed by Dr. Nicholas Gideonse who specializes in end-of-life care in Oregon:

> I've had patients who've had breast cancer for [twenty years], been through rounds of fighting and succeeding and remission and then not. They know these illnesses well. And . . . if they get the chance to write that final chapter, to at least describe how the story will end on their own terms, it's a great relief to patients and their families.

[2]Or. Pub. Health Div., Oregon's Death with Dignity Act Rep. (2014) *available at* https://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Documents/Year17.pdf; Wash. State Dep't of Health, 2013 Death With Dignity Act Rep. Exec. Summary (2014) *available at* http://www.doh.wa.gov/portals/1/Documents/Pubs/422-109-DeathWithDignityAct2013.pdf

{9} The trial testimony identified the existence and substance of a standard of care for determining terminality and eligibility for aid in dying in other states, derived from the experience with the practice in Oregon, where it has been legal since 1997. In addition, it described a standard of care for determining mental competence, that physicians are trained to apply. The testimony further showed similarities among aid in dying, terminal sedation, and the removal or refusal of life-sustaining treatment, as well as the differences between aid in dying and suicide, including the distinct reasons for these acts.

{10} The experience in Oregon has been that a number of patients who have been prescribed aid-in-dying medication never ingest it. According to the trial testimony, the availability of the medication nonetheless provides patients the comfort of knowing that there is a peaceful alternative to being forced to endure unbearable suffering. Still more patients do not request the medication after discussing the option with their physicians.

The District Court's Judgment

{11} After trial, the district court found that physicians have provided and continue to provide aid in dying to qualified patients in Oregon, Washington, and Vermont (pursuant to statutory authorization); Montana (pursuant to an opinion of the Montana Supreme Court); and Hawaii (where there is no criminal prohibition). The court also found that, when aid in dying is available, "end[-]of[-]life care for all terminally ill patients improves through better pain treatment, earlier and increased referrals to hospice[,] and better dialogues between physicians and their terminally ill patients about end[-]of[-]life care and wishes."

{12} Ultimately, the district court concluded that Section 30-2-4 prohibits aid in dying but that its application to aid in dying violates the inherent-rights guarantee and substantive due process protections afforded by Article II, Section 4 and Article II, Section 18 of the New Mexico Constitution. Citing *Washington v. Glucksberg*, 521 U.S. 702, 725 (1997), the district court acknowledged that the United States Supreme Court "declined to find the right to aid in dying to be . . . protected by the federal Constitution." The court nevertheless departed from federal precedent established in *Glucksberg*, noting that New Mexico has inherent power as a separate sovereign in our federalist system to provide more liberty under the New Mexico Constitution than that afforded by the federal Constitution. It then applied the interstitial approach to constitutional analysis mandated by our Supreme Court in such circumstances. *See State v. Gomez*, 1997-NMSC-006, ¶ 19, 122 N.M. 777, 932 P.2d 1. The district court concluded that the inherent rights clause of Article II, Section 4 provides "distinct additions" to the fundamental rights afforded under the federal Constitution and a basis to diverge from federal precedent.

{13} The district court specifically held that "[a] terminally ill, mentally competent patient has a fundamental right to choose aid in dying pursuant to the New Mexico Constitution's [Article II, Section 4] guarantee to protect life, liberty, and seeking and obtaining happiness . . . and its substantive due process protections [under Article II, Section 18]." Applying strict scrutiny, the court held that the State had failed to prove that by criminalizing the actions of physicians who provide aid in dying Section 30-2-4 furthers a compelling interest. The district court also ordered that the State be permanently enjoined from prosecuting any physician who provides aid in dying to mentally competent, terminally ill patients who choose to utilize aid in dying. The State timely appealed.

ISSUES AND ARGUMENTS ON APPEAL

{14} On appeal, the parties have stipulated to the factual record developed in the district court. The State argues that (1) there is no fundamental right to the deliberate assistance of a third-party in ending one's own life through aid in dying, and (2) the district court's ruling violates the doctrine of separation of powers by legalizing conduct that is designated to be a crime by the Legislature. In addition to disputing the State's contentions, Plaintiffs argue that Section 30-2-4 does not prohibit aid in dying.

DISCUSSION

I. Statutory Construction: Section 30-2-4

{15} We begin with the text of the statute, which provides, "[A]ssisting suicide consists of deliberately aiding another in the taking of his own life. Whoever commits assisting suicide is guilty of a fourth degree felony." Section 30-2-4. "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. To do so, we first look to the language used and the plain meaning of that language. *State v. Moya*, 2007-NMSC-027, ¶ 6, 141 N.M. 817, 161 P.3d 862. "We refrain from further interpretation where the language is clear and unambiguous." *State v. Martinez*, 2006-NMCA-068, ¶ 5, 139 N.M. 741, 137 P.3d 1195 (internal quotation marks and citation omitted).

{16} Plaintiffs contend that the statute does not prohibit aid in dying. Citing Rule 12-201(C) NMRA,[3] the State protests that this argument is not properly before us because the district court ruled against Plaintiffs on this point and Plaintiffs did not file a cross appeal. It argues that the doctrine that permits affirmance for any reason supported by the record, *see Meiboom v. Watson*, 2000-NMSC-004, ¶ 20, 128 N.M. 536, 994 P.2d 1154, cannot be applied because acceptance of Plaintiffs' statutory argument would require reversing, not affirming, the district court's conclusion that Section 30-2-4 prohibits physicians from providing aid in dying. We have held that "an appellee need not cross-appeal to raise an issue that would preserve the judgment below." *Cochrell v. Mitchell*, 2003-NMCA-094, ¶ 12, 134 N.M. 180, 75 P.3d 396 (alteration, internal quotation marks, and citation omitted). In any event, we cannot address the question presented—whether Section 30-2-4 may constitutionally be applied in the circumstances presented here—without first determining what the statute proscribes. We also must interpret statutes in a manner that avoids, to the extent possible, raising constitutional concerns. *Griego*, 2014-NMSC-003, ¶ 19. Accordingly, we determine the meaning of Section 30-2-4.

{17} The central point of Plaintiffs' statutory argument is that the Legislature's use of the term "suicide" in Section 30-2-4 suggests that the statute "clearly contemplates individuals who are not already dying, and nothing suggests it reaches a competent, dying patient's decision to achieve a peaceful death." The factual basis for this argument is the uncontested expert testimony of Dr. Pollack, which establishes that "suicide is a distinctly different act than requesting aid in dying[.]" According to Dr. Pollack, suicide is a "despairing, lonely experience." He stated

---

[3]Rule 12-201(C) reads:

> An appellee may, without taking a cross-appeal or filing a docketing statement or statement of the issues, raise issues on appeal for the purpose of enabling the appellate court to affirm, or raise issues for determination only if the appellate court should reverse, in whole or in part, the judgment or order appealed from.

that it is an impulsive act—typically in reaction to psychological isolation, shame, guilt, or misunderstanding by others, and its effect on survivors is devastating. Family members tend to experience shock and disbelief or anger. In contrast, Dr. Pollack noted that those who request aid in dying do so to alleviate symptoms and to maintain relationships, connections, and a sense of self, and recognize that the problem confronting them arises from an irreversible physical calamity. They are already dying, and "[they are] focused on maintaining the quality of life that is something that they cherish." Dr. Pollack also testified that since the 1990s, increasing numbers of mental health and medical professionals have recognized that the two acts are fundamentally different, and treating physicians reject the idea that patients who have chosen aid in dying were committing suicide. He explained that if these patients could have survived their illnesses, they would have chosen to do so. The State concedes that distinctions between suicide and aid in dying identified in the fields of medicine and psychology are "compelling" but contends that they are "irrelevant from a legal standpoint."

{18} As a textual matter, the State is correct. In defining the proscribed conduct—"[a]ssisting suicide"—as "deliberately aiding another in the taking of his own life[,]" the statute necessarily also defines "suicide" as "the taking of [one's] own life." Section 30-2-4. This statutory definition of "suicide" binds us. *See Cadena v. Bernalillo Cnty. Bd. of Cnty. Comm'rs*, 2006-NMCA-036, ¶ 15, 139 N.M. 300, 131 P.3d 687 ("As a rule[,] a statutory definition which declares what a term means is binding on the court." (alteration, internal quotation marks, and citation omitted)). As noted, the parties define "aid in dying" as "the practice of a physician providing a mentally competent[,] terminally ill patient with a prescription for [a lethal dose of an authorized] medication which the patient may choose to ingest to achieve a peaceful death[.]" While not recognized as "suicide" in a growing body of medical and psychological literature, a patient's choice to "achieve a peaceful death" is still "the taking of [one's] own life" under the statute's plain terms. *See* § 30-2-4. "[A]iding," in the context of "determining whether one is criminally liable for [his or her] involvement in the suicide of another," means "providing the means to commit suicide[.]" *State v. Sexson*, 1994-NMCA-004, ¶ 15, 117 N.M. 113, 869 P.2d 301. Dr. Morris testified at trial that a prescription for aid in dying is typically for the barbiturate Seconal, written for a uniform dose calculated to have lethal effect. This conduct, by design, provides a patient the means to take his or her own life and is prohibited by the text of Section 30-2-4.

{19} Citing the Uniform Health-Care Decisions Act, §§ 24-7A-1 to -18, as evidence of "New Mexico's long, proud tradition of public policy promoting autonomy in end-of-life decision making," Plaintiffs assert that we may consider the "clear policy implications of various constructions" if a statute is ambiguous. They also cite the Supreme Court of Montana's decision in *Baxter*, 2009 MT 449, ¶¶ 26-28, for the proposition that a state's public policy valuing autonomy in medical decision making can guide courts in determining whether assisted suicide includes aid in dying. But "[s]tatutory language that is clear and unambiguous must be given effect." *V.P. Clarence Co. v. Colgate*, 1993-NMSC-022, ¶ 8, 115 N.M. 471, 853 P.2d 722. And, where the language is plain, the court's task of statutory interpretation ends. *Martinez*, 2006-NMCA-068, ¶ 5.

{20} Plaintiffs' arguments are unavailing in any event. Since enacting Section 30-2-4 in 1963, the Legislature has twice considered "assisted suicide" in the healthcare context. In both the Uniform Health-Care Decisions Act, §§ 24-7A-1 to -18, and the Mental Health

Care Treatment Decisions Act, NMSA 1978, §§ 24-7B-1 to -16 (2006, as amended through 2009), the Legislature expressly refused to "authorize . . . assisted suicide . . . to the extent prohibited by other statutes of this state." Sections 24-7A-13(C); 24-7B-15(C). We note that the "other statute[ ] of this state" must be a reference to Section 30-2-4. Furthermore, *Baxter*'s exploration of statutes and precedents for evidence of state policy on medical decision making was expressly called for by the language of a statutory affirmative defense that invalidates the consent defense when "it is against public policy to permit the conduct or the resulting harm, even though consented to." 2009 MT 449, ¶¶ 11-13 (internal quotation marks and citation omitted). Plaintiffs' statutory argument fails, and we must address the district court's ruling that aid in dying is a fundamental liberty interest that is entitled to due process protection under the New Mexico Constitution.

II. The New Mexico Constitution

{21} Plaintiffs argue that Section 30-2-4's criminalization of aid in dying violates two provisions of the New Mexico Constitution: the Due Process Clause of Article II, Section 18, which has an analogous provision in the Fourteenth Amendment of the United States Constitution, and the inherent-rights guarantee of Article II, Section 4, which has no enumerated federal constitutional analogue. Although Plaintiffs do not assert a right to aid in dying under federal law, the State's argument is that there is no such right, and the inquiry continues to be identical to and controlled by the United States Supreme Court's analysis in *Glucksberg*, 521 U.S. at 728, where it held that "the asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the [federal] Due Process Clause" and that "Washington's assisted-suicide ban [is] rationally related to legitimate government interests." Accordingly, we take cognizance of the necessity for an interstitial approach to constitutional analysis adopted by our Supreme Court in *Gomez*, 1997-NMSC-006, ¶ 19. Our review of the district court's interstitial approach is de novo. *See Bank of N.Y. v. Romero*, 2014-NMSC-007, ¶ 52, 320 P.3d 1 (stating that constitutional interpretation issues are reviewed de novo).

A. The Interstitial Approach to Interpreting the New Mexico Constitution

{22} *Gomez* made clear that "states have inherent power as separate sovereigns in our federalist system to provide *more* liberty than is mandated by the United States Constitution" and that "[w]e are not bound to give the same meaning to the New Mexico Constitution as the United States Supreme Court places upon the United States Constitution, even in construing provisions having wording that is identical, or substantially so, unless such interpretations purport to restrict the liberties guaranteed the entire citizenry under the federal charter." 1997-NMSC-006, ¶ 17 (internal quotation marks and citation omitted). While recognizing that "[f]ederal precedent in areas addressed by similar provisions in our state constitutions can be meaningful and instructive[,]" *id.* ¶ 21 (internal quotation marks and citation omitted), our Supreme Court explained that it had abandoned a "lock-step" approach to interpretation of the New Mexico Constitution and applied an "interstitial [approach], providing broader protection where we have found the federal analysis unpersuasive either because we deemed it flawed . . . or because of undeveloped federal analogs[.]" *Id.* ¶ 20 (citations omitted).

> Under the interstitial approach, the court asks first whether the right being asserted is protected under the federal [C]onstitution. If it is, then

> the state constitutional claim is not reached. If it is not, then the state constitution is examined. A state court adopting this approach may diverge from federal precedent for three reasons: a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics.

Id. ¶ 19 (citation omitted); *see State v. Garcia*, 2009-NMSC-046, ¶ 34, 147 N.M. 134, 217 P.3d 1032 (rejecting widely criticized United States Supreme Court decision weakening a right "beyond a point which may be countenanced under our state constitution"); *State v. Rowell*, 2008-NMSC-041, ¶¶ 20-23, 144 N.M. 371, 188 P.3d 95 (declining to follow United States Supreme Court decisions criticized in legal literature as "devoid of a reasoned basis in constitutional doctrine"); *N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶¶ 28-43, 126 N.M. 788, 975 P.2d 841 (concluding that distinctive characteristics of the New Mexico Constitution mandated rejection of federal constitutional analysis affording less protection); *State v. Gutierrez*, 1993-NMSC-062, ¶¶ 32, 50-56, 116 N.M. 431, 863 P.2d 1052 (discussing "a willingness to undertake independent analysis of our state constitutional guarantees when federal law begins to encroach on the sanctity of those guarantees" and rejecting a federal constitutional rule as incompatible with the guarantees of the New Mexico Constitution); *State v. Ochoa*, 2009-NMCA-002, ¶¶ 12-13, 146 N.M. 32, 206 P.3d 143 (rejecting a widely criticized United States Supreme Court decision, finding the federal analysis unpersuasive and incompatible with state constitutional standards).

{23} Thus, our analysis of rights afforded by the New Mexico Constitution is not "inextricably tied" to federal constitutional analysis. *NARAL*, 1999-NMSC-005, ¶ 37; *see Gutierrez*, 1993-NMSC-062, ¶ 16 (stating that, in interpreting state constitutional guarantees, New Mexico courts may seek guidance from decisions of federal courts without being bound by those decisions). In seeking departure from federal due process precedent, Plaintiffs carried the initial burden to establish that greater due process protections should be recognized under Article II, Section 18 of our New Mexico Constitution.[4] *See Gomez*, 1997-NMSC-006, ¶ 22-23; Rule 12-216(A) NMRA. The basis for interpreting greater protections under Article II, Section 18 of the New Mexico Constitution must first be addressed and found to exist by the district court. *Gomez*, 1997-NMSC-006, ¶ 23. In its findings of fact and conclusions of law, the district court identified the following reasons for greater protection under Article II, Section 18, which we summarize numerically:

1. Our Supreme Court has already recognized greater protections under the New Mexico Constitution in "many instances[,]" citing *Montoya v. Ulibarri*, 2007-NMSC-035, ¶ 22, 142 N.M. 89, 163 P.3d 476 (recognizing that the New Mexico Constitution provides greater rights than those provided in the federal constitution in the areas of double jeopardy, search and seizure, and equal protection).

2. Our Supreme Court has recognized that some rights of a "personal nature" are entitled to constitutional protection, such as "the right

[4]We note that interstitial review in this instance must be utilized to resolve Plaintiffs' claim that Article II, Section 18 provides New Mexicans with a due process right to aid in dying that was denied under the federal constitution. Regarding Article II, Section 4, no federal analogue exists and our analysis is initially interpretive and it potentially becomes interstitial only if substantive due process recognition is also required to establish Plaintiffs' proposed interest under Section 4.

of parents in the care, custody, and control of their children"; "the freedom of personal choice in matters of family life"; and "the right to family integrity," citing *In re Pamela A.G.*, 2006-NMSC-019, ¶ 11, 139 N.M. 459, 134 P.3d 746 (recognizing the interest of parents in the care, custody, and control of their children as a fundamental liberty interest); *Oldfield v. Benavidez*, 1994-NMSC-006, ¶ 14, 116 N.M. 785, 867 P.2d 1167 (recognizing the general right to familial integrity as a clearly established constitutional right but noting its parameters are not absolute, unqualified, or clearly established); and *Jaramillo v. Jaramillo*, 1991-NMSC-101, ¶¶ 15-21, 113 N.M. 57, 823 P.2d 299 (addressing the constitutional right to travel in the context of assigning the burden of proof between a relocating custodial parent and the non-custodial parent).

3. The protected liberty interest of a terminal patient dealing with imminent death that was identified in *Cruzan ex rel. Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 278-79 (1990), is more closely aligned with the liberty interest in this case and is entitled to protection under Article II, Section 18, despite not being protected under the Due Process Clause of the Fourteenth Amendment in *Glucksberg*.

{24} We note that as part of their interstitial argument, Plaintiffs also asserted that New Mexico has made an enhanced commitment to patient autonomy at the end of life, and Article II, Section 18 should recognize greater protections through the equal protection test articulated in *Breen v. Carlsbad Municipal Schools*, 2005-NMSC-028, ¶ 8, 138 N.M. 331, 120 P.3d 413. This equal protection assertion was not recognized by the district court and was not included in its findings.

{25} Prior to any hearings held by the district court, the State moved to dismiss Plaintiffs' complaint based upon substantially the same governmental interests determined to exist by the United States Supreme Court in *Glucksberg*. *See* 521 U.S. at 703-04. While the State does not fully concede application of the interstitial approach suggested by Plaintiffs, the district court's findings nonetheless identified a basis for establishing greater protections in New Mexico by application of the interstitial approach. First, it held that the distinctive individual interests embodied under Article II, Section 4 are not enumerated as protections within the federal Constitution and these enumerated New Mexico interests have been recognized to support the existence of other inherent rights by our Supreme Court. *See Griego*, 2014-NMSC-003, ¶ 1 (relying upon Article II, Section 4 to identify the inherent rights "enjoyed by all New Mexicans" that must then be legally measured because "it is the responsibility of the courts to interpret and apply the protections of the Constitution"). Second, its findings concerning the experiences in other states where aid in dying is legal support the notion that the federal analysis in *Glucksberg* may be flawed and thus may not constitute an authoritative bar to protection under Article II, Section 18 of the New Mexico Constitution. As a result, current due process analysis could result in a different factual and legal outcome than that of *Glucksberg*. Having identified Article II, Section 18 as the basis for application of the interstitial approach under the New Mexico Constitution, the district court rejected *Glucksberg*'s analysis and concluded that greater constitutional protections are provided under the New Mexico Constitution. We review the interstitial analysis employed by the district court as to both constitutional provisions to address whether aid in dying constitutes a liberty interest under either of these two sections of the New Mexico Constitution.

B. Aid in Dying as Defined and Applied by the Parties

{26} Plaintiffs contend that aid in dying is "fundamental or, at the very least, important under the New Mexico Constitution." On appeal, Plaintiffs identify the fundamental rights implicated in aid in dying as (1) the "right to autonomous medical decision making" and (2) the right to "a dignified, peaceful death." The district court agreed that aid in dying is a fundamental liberty interest protected by the New Mexico Constitution. Constitutional interpretation is an issue of law we review de novo. *State v. Boyse*, 2013-NMSC-024, ¶ 8, 303 P.3d 830. In doing so, we must consider the claimed constitutional interest in the context in which the allegedly protected conduct takes place. Additionally, we emphasize at the outset that the interest asserted here applies only to a narrowly defined class of New Mexico citizens.

{27} Plaintiffs do not argue that there is a broad, categorical constitutional right to commit suicide that includes a right to third-party assistance in doing so. Rather, Plaintiffs precisely and narrowly define their claimed liberty interest as one that does not apply to any large classification of citizens. We understand Plaintiffs' assertion to be that this narrowly defined interest is only fundamental where: (1) a mentally competent patient is capable of giving consent, (2) the patient is diagnosed as terminally ill, (3) the patient requests a prescription for medication that may be ingested to bring about an immediate end to his/her life, and (4) a willing physician applying the proper standard of care determines that it would be appropriate to provide and prescribes the terminal dose of medication for the patient to ingest and end the patient's life.

{28} The State concedes that citizens have a right to make their own end-of-life decisions and to bring about their own deaths without the aid or assistance of another person. There is also no dispute that a physician may lawfully act pursuant to statute to support a patient's desire to shorten the dying process by removing life-sustaining nutrition, hydration, or mechanical life support, and by administering palliative sedation (high doses of consciousness-lowering medications). *See generally* §§ 24-2D-1 to -6; 24-7A-1 to -18. At oral argument, the State even suggested that patients may bring about the end of their own lives by stockpiling morphine lawfully prescribed by a physician and ultimately ingesting a lethal dosage. According to the State, this act does not involve the statutorily defined aid or assistance of another person under Section 30-2-4, even though it involves a physician's act of prescribing the medication used by the patient to cause his/her own death. The State also "readily concede[d]" that, except for the acts of aiding or assisting a person in taking his or her own life, it had no interest in causing mentally competent, terminally ill patients to suffer during the final days of their lives.

C. Aid in Dying Is Not a Fundamental Liberty Interest Protected by the Due Process Clause of the New Mexico Constitution

{29} The Due Process Clause of the New Mexico Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law[.]" N.M. Const. art. II, § 18. The federal Due Process Clause similarly provides that no state "shall . . . deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV, § 1. Because the State's due process argument relies primarily on *Glucksberg*, the principal federal case interpreting the liberty interest described here as aid in dying, we shall address its application to our decision even though it does not bind our interpretation under Article II, Section 18, or curtail the potential for broader

protections under the New Mexico Constitution. *See Gomez*, 1997-NMSC-006, ¶ 19. We also address the narrow scope of Plaintiffs' proposed liberty interest and its relationship to the interests of life, liberty, and happiness that are enumerated protections within Article II, Section 4.

1. The Federal Analysis of Due Process and *Glucksberg*

{30} In *Glucksberg*, the United States Supreme Court confirmed that the substantive component of the Due Process Clause under the Fourteenth Amendment protects certain aspects of personal autonomy as fundamental rights notwithstanding that they are not mentioned in the text of the Bill of Rights. *Glucksberg*, 521 U.S. at 720-21; *see Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847 (1992) (explaining that the United States Supreme Court has never accepted the view that "liberty encompasses no more than those rights already guaranteed to the individual against [governmental] interference by the express provisions of the first eight [a]mendments to the Constitution"). The Court stated that the government may not interfere with certain liberty interests unless the government meets its burden under a strict scrutiny standard—proving that the infringing statute is narrowly tailored to serve a compelling governmental interest. *Glucksberg*, 521 U.S. at 721. In *Glucksberg*, four physicians, three terminally ill patients, and one nonprofit organization filed suit against the State of Washington, seeking a declaration that the state's ban on assisting suicide was unconstitutional. 521 U.S. at 707-08. Under the Due Process Clause of the Fourteenth Amendment, the plaintiffs asserted a liberty interest to allow a mentally competent, terminally ill adult the right to choose physician-assisted suicide as a method to end life. *Id.* The United States Supreme Court unanimously determined that "the asserted 'right' " to physician-assisted suicide is not a liberty interest entitled to any type of protection under the Due Process Clause of the Fourteenth Amendment. *Id.* at 728, 735 (precluding its recognition as a constitutionally protected due process liberty interest because of society's nearly universal efforts to prevent suicide and assisted suicide and due to the importance of the state's interest in regulating both the real and potentially adverse consequences of assisted suicide).

{31} Fundamental constitutional rights are enumerated and "specific freedoms protected by the Bill of Rights," *id.* at 720, or those later identified by process of the United States Supreme Court's enforcement of equality and liberty guaranteed by the Fifth and Fourteenth Amendments. *See Lawrence v. Texas*, 539 U.S. 558, 575 (2003) ("Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects[.]"). While constitutional interpretation must address "new dimensions of freedom" over time, *see Obergefell v. Hodges*, __ U.S. __, 135 S. Ct. 2584, 2596 (2015), the sum of such rights remains principally static because, in the words of the fourth Chief Justice of the United States Supreme Court, John Marshall, "we must never forget, that it is a *constitution* we are expounding." *M'Culloch v. Maryland*, 17 U.S. 316, 407 (1819). Constitutions, including our New Mexico Constitution, are sacred because they were written to apply in perpetuity. *See Republican Party of N.M. v. N.M. Taxation & Revenue Dep't*, 2012-NMSC-026, ¶ 52, 283 P.3d 853 ("The constitution is the heart, the soul, the genius of our system of government, and its safeguarding is [our New Mexico Supreme] Court's highest duty and most sacred function." (internal quotation marks and citation omitted)). "The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in [the] field [of substantive

due process.]" *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992); *see also Log Cabin Republicans v. United States*, 658 F.3d 1162, 1170 (9th Cir. 2011) ("[W]hen confronted with assertions of new fundamental rights, rather than invite innovation the [c]ourt has counseled caution."). Plaintiffs' assertion of a new form of constitutional right, one that protects a terminally ill patient's interest in death and the process of dying, is the type of new dimension that warrants such a careful exercise of judicial caution.

{32} The constitutional question here—whether aid in dying is a constitutional right, fundamental or otherwise—has only been directly answered by one case, *Glucksberg*. Nearly twenty years have passed since *Glucksberg* concluded that a physician's "assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause" of the Fourteenth Amendment. 521 U.S. at 728. Despite its share of criticism over the years, *see* Dissenting Op. ¶¶ 98-99, no court, federal or state, has held that the concept of death, including a method of a more dignified premature death with the assistance of another person, is rooted within the protections of bodily integrity under the constitution.

{33} *Glucksberg* both recognized and relied upon "over 700 years [of] Anglo-American common-law tradition [that] has punished or otherwise disapproved of both suicide and assisting suicide." 521 U.S. at 711. *Glucksberg*'s determination that there exists no precipitate constitutional alleyway to the permanent nationwide legality of physician-assisted suicide also stated its awareness of "serious, thoughtful examinations" regarding aid in dying in various states. *Id.* at 719. It concluded by permitting "earnest and profound debate about the morality, legality, and practicality of [aid in dying] . . . to continue, as it should in a democratic society." *Id.* at 735; *see id.* at 737 (O'Connor, J. concurring) ("There is no reason to think the democratic process will not strike the proper balance between the interests of terminally ill, mentally competent individuals . . . and the [s]tate's interests in protecting those who might seek to end life mistakenly or under pressure."); *id.* at 789 (Souter, J., concurring) (cautioning against "displace[ment of] the legislative ordering of things"). Confirming that it meant what it held in *Glucksberg*, eight years later, the Supreme Court rejected executive action undertaken by the United States Department of Justice to apply the Controlled Substances Act to disallow physicians from prescribing fatal narcotics as authorized by Oregon's Death With Dignity Act.[5] *See Gonzales v. Oregon*, 546 U.S. 243 (2006). *Obergefell* also recently mentioned the *Glucksberg* decision that has allowed the states to undertake nearly twenty years of independent experimentation to properly balance the varying interests of the terminally ill. *Obergefell*, __ U.S. at __, 135 S. Ct. at 2596.

{34} Before addressing Plaintiffs' due process claim under Article II, Section 18, we are compelled to address the methodologies applied when litigants pursue due process interests they believe to be implied by the words chosen by the founders of our nation and its states. Prior opinions have expressed the legally analytic, yet structurally ideologic,

[5]*See* Or. Rev. Stat. Ann. §§ 127.800 to .897. Despite the Supreme Court's invitation to utilize the democratic process to allow aid in dying in 1997, only three states have presently enacted such enabling legislation. Significantly, at least thirteen other states—Alaska, California, Colorado, Connecticut, Delaware, Maine, Maryland, Massachusetts, Missouri, Nevada, Utah, Wisconsin, and Wyoming—have rejected aid in dying by referendum or have failed to pass aid in dying legislation through each state's legislative process. *See* Patients Rights Council, *available at* http://www.patientsrightscouncil.org/site/assisted-suicide-the-continuing-debate/ (last visited July 10, 2015) (tracking ballot initiatives and legislation regarding aid in dying).

tug-of-war that exists within courthouses across the nation, including the United States Supreme Court itself. *Compare Glucksberg*, 521 U.S. at 720-21 (weighing the constitutional stature of an asserted right by direct review of "this Nation's history and tradition" (internal quotation marks and citation omitted)), *with Lawrence*, 539 U.S. at 572 ("History and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." (alteration, internal quotation marks, and citation omitted)), *and Obergefell*, __ U.S. at __, 135 S. Ct. at 2598 ("History and tradition guide and discipline this inquiry but do not set its outer boundaries. That method respects our history and learns from it without allowing the past alone to rule the present."(citation omitted)). Yet in this instance, any philosophical attempt to resolve that bigger constitutional picture serves only to distract our focus from the real issues to be considered. The fact that *Glucksberg*'s analytic methodology has been questioned by some legal scholars does not mean the opposite of its holding must be true. More critically for our purposes, *Glucksberg* provided a substantive due process answer to a factually identical scenario that has never been rejected by any state appellate court. The issue before us is not whether *Glucksberg* is one of several available constitutionally interpretive "guideposts for responsible decision[]making," *Collins*, 503 U.S. at 125; rather, it remains the only existing precedent regarding the nearly identical constitutional question that is posed in this case. In order to justify a departure from *Glucksberg*, Plaintiffs must have shown precisely why greater fundamental due process protections exist under Article II, Section 4.

{35} *Obergefell* suggests that the assisted suicide analysis in *Glucksberg* remains unchanged. *See Obergefell*, __ U.S. at __, 135 S. Ct. at 2602. The *Obergefell* majority briefly addressed aid in dying and distinguished that asserted right of physician assisted suicide from the asserted interest in marriage that was before it. *Id.* In *Obergefell*, every member of the United States Supreme Court, including those justices that the Dissenting Opinion identifies to embrace a more evolving due process concept of constitutional analysis and the developed interests in autonomy of self, passed upon an opportunity to question the majority's reference to the outcome in *Glucksberg* or cast aspersion upon the analysis of aid in dying that was utilized in *Glucksberg*. *Obergefell*, __ U.S. at __, 135 S. Ct. at 2602. *See* Dissenting Op. at ¶¶ 96 & 100. Specifically, while *Obergefell* recognized the re-ordering of evaluative constitutional criteria in similar due process cases, it provided a specific reference of approval and a brief defense of *Glucksberg* by stating that the "central reference to historical . . . practices . . . may have been appropriate for . . . (physician-assisted suicide), [yet not for] other fundamental rights, including marriage and intimacy." *Obergefell*, __ U.S. at __, 135 S. Ct. at 2602. Although the United States Supreme Court appears engaged in an effort to integrate its constitutional jurisprudence, including *Glucksberg*, *see Obergefell*, __ U.S. at __, 135 S. Ct. at 2602, it is our view that we should continue to be very careful when considering new constitutional interests and remain reluctant to deviate from United States Supreme Court determinations of what are, and what are not, fundamental constitutional rights.

{36} Irrespective of the new interpretive dimensions applied by the United States Supreme Court to address differing applications of due process, the substantive fundamental rights that are recognized to exist under the Due Process Clause of the Fourteenth Amendment have always originated from classic personal interactions or embedded principles in our democratic society. These protections include the longstanding interests in marriage, *see Loving*

v. Virginia, 388 U.S. 1 (1967); sexual relationships, *see Lawrence*, 539 U.S. 558; family integrity, *see Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); child rearing, *see Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); education of one's children, *see Meyers v. Nebraska*, 262 U.S. 390 (1923); and bodily integrity, *see Rochin v. California*, 342 U.S. 165 (1952). Plaintiffs have failed to provide any authority to support the position that "death" or "aid in dying" in New Mexico have either been recognized as embedded principles within our democratic society or as a modern interpretation of certain fundamental interests that have been applied to some members of society but historically denied to others. *See 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."); *see also* John B. Mitchell, *My Father, John Locke, &Assisted Suicide: The Real Constitutional Right*, 3 Ind. Health L. Rev. 45, 59 (2006) (evaluating the various attempts at articulating the fundamental right at issue in *Glucksberg* and illustrating the difficulty in identifying the right's contours, while further suggesting that "it would probably be fairer to the proponents of [physician-assisted suicide] in the Glucksberg [c]ourt to equate the phrase dying with dignity with a [substitute phrase,] rejection of bad death"). For example, *Cruzan* has been offered by Plaintiffs to identify an equivalent liberty interest to aid in dying. 497 U.S. 261. But the constitutionally protected right assumed to exist in *Cruzan*, 497 U.S. at 279—the right to refuse medical treatment, including lifesaving hydration and nutrition—was clearly distinguished and specifically rejected as an equivalent interest to aid in dying. *Glucksberg*, 521 U.S. at 722-23, 730-31. In addition, the modern concerns associated with aid in dying—regarding issues of pain, suffering, dignity, and autonomy during the final days of a person's life—are medical circumstances that have only garnered growing consideration in modern society due to the longevity, pain management, and life-sustaining advancements that have been made more recently by the medical profession. *See Cruzan*, 497 U.S. at 270. As discussed in more detail below, we are also troubled that Plaintiffs and their witnesses have narrowed the focus of an autonomous and dignified death to one that favors only a very narrow segment of the population—only those New Mexicans who are competent, terminally ill, and under the care of a physician.

{37} Aid in dying, the medical concept of dying with autonomy and dignity, is a relatively recent human phenomena and deserves appropriate public evaluation and consideration. However, as a new legal consideration, it must also be carefully weighed against longstanding societal principles such as preventing a person from taking the life of another; preventing suicide; preventing assisted suicide; promoting the integrity, healing, and life preserving principles of the medical profession; protecting vulnerable groups from unwanted pressure to considering aid in dying as the best alternative to other medical options; and promoting human life where aid in dying is not the appropriate medical option despite a patient's request for its use. *See Glucksberg*, 521 U.S. at 703-04; *see also Cruzan*, 497 U.S. at 270-71. The recent advances in life-prolonging medical care and the public acceptance of aid in dying in some states has not diminished the other longstanding societal principles and concerns regarding intentional killing, the dying process, the preservation of life, and the basic life saving principles embedded in the medical profession. *Cruzan*, 497 U.S. at 280 ("As a general matter, the [s]tates—indeed, all civilized nations—demonstrate their commitment to life by treating homicide as a serious crime. Moreover, the majority of [s]tates in this country have laws imposing criminal penalties

on one who assists another to commit suicide."). Plaintiffs' witnesses established that certain benefits have been clinically shown to exist and that several of society's concerns have not materialized when careful regulations and safeguards are imposed upon aid in dying by the medical profession and state legislatures. Yet, even where statutory approval has been achieved, improper application of the statutory protections that allow aid in dying will still expose an offending physician or other responsible parties to criminal liability if they fail to comply with the statutes' narrow parameters. *See* Or. Rev. Stat. Ann. § 127.890; Vt. Stat. Ann. tit. 18, § 5283(b); Wash. Rev. Code Ann. § 70.254.200. As a result, aid in dying is still in the process of being tested by society and the various states where it has been sanctioned. Presently, aid in dying is best described as a legal and societal work in progress. To assert that it has now risen to the level of a fundamental due process right, requiring strict constitutional protection from society's longstanding interest in the protection of life through its final stages, has not been established by this record or by other jurisprudence.

{38} Lastly, regarding the constitutional stature of aid in dying, the ultimate arbiter of the meaning of the New Mexico Constitution is our New Mexico Supreme Court. *See State v. ex rel. Serna v. Hodges*, 89 N.M. 351, 356, 552 P.2d 787, 792 (1976), overruled on other grounds by *State v. Rondeau*, 89 N.M. 408, 412, 553 P.2d 688, 692 (1976) (recognizing that "as the ultimate arbiters of the law of New Mexico[,] [our Supreme Court is] not bound to give the same meaning to the New Mexico Constitution as the United States Supreme Court places upon the United States Constitution"). We have previously recognized that under circumstances where it appears "that an uncertain state of law should not exist and because avoidance of the same involves an issue of substantial public interest, the matters raised on appeal should be resolved by the Supreme Court." *Archibeque v. Homrich*, 1975-NMCA-023, ¶ 5, 87 N.M. 265, 531 P.2d 1238 (per curiam). Such a constitutional shift from the United States Supreme Court decision in *Glucksberg*, one that was recently referenced anew in *Obergefell*, should be addressed by our state's highest court. *See Archibeque*, 1975-NMCA-023, ¶ 5; *see also Quill v. Vacco*, 80 F.3d 716, 725 (2d Cir. 1996) ("We . . . decline the plaintiffs' invitation to identify a new fundamental right [to physician-assisted suicide], in the absence of a clear direction from the Court whose precedents we are bound to follow. The limited room for expansion of substantive due process rights and the reasons therefor have been clearly stated[.] . . . Our position in the judicial hierarchy constrains us to be even more reluctant than the [United States Supreme] Court to undertake an expansive approach in this unchartered area." (internal quotation marks and citation omitted)), *rev'd on other grounds*, *Vacco v. Quill*, 521 U.S. 793 (1997) (internal quotation marks and citation omitted)). Similar to our New Mexico Supreme Court, we are not heedless to changes occurring over time but are careful to expand constitutional interpretations of the law to satisfy our own concepts of right or wrong. *See State v. Pace*, 1969-NMSC-055, ¶ 23, 80 N.M. 364, 456 P.2d 197 ("We are not heedless of the plea that this is a more enlightened day than were those of years gone by, and that views of what is and what is not right have changed with the passage of time. However, we perceive our responsibility as being confined to interpreting the law as we understand it, not to making of new law to satisfy our conceptions of right or wrong."). From the perspective of constitutional interpretation, *Glucksberg*'s holding still provides this Court with principled authority. Given our analysis, and consistent with *Glucksberg*, we conclude that there is no fundamental right to aid in dying under Article

II, Section 18 of the New Mexico Constitution. Therefore, interstitial departure to declare such a right would be inappropriate. *See Gomez*, 1997-NMSC-006, ¶ 19 (allowing interstitial identification of a right when existing federal precedent is flawed).

2. Inherent Rights Under Article II, Section 4

{39} Article II, Section 4 specifically identifies three broad categories of individual interests that are entitled to constitutional protection in New Mexico—life, liberty, and happiness. However, Article II, Section 4 has been sparsely interpreted. *See Reed v. State ex rel. Ortiz*, 1997-NMSC-055, ¶ 105, 124 N.M. 129, 947 P.2d 86 (recognizing that "[o]ur courts have not fully defined the scope of this constitutional provision"), *rev'd sub nom. on other grounds by N.M. ex rel. Ortiz v. Reed*, 524 U.S. 151 (1998). The Oxford English Dictionary defines "life" as "[t]he condition or attribute of living or being alive; animate existence. Opposed to *death*." 8 *Oxford English Dictionary* 910 (2d ed. 1989, reprinted with corrections 1991). Plaintiffs ask us to interpret Article II, Section 4's express protections of liberty and happiness as encompassing an implied inherent right to oppose the protected principle of life by constitutionally allowing third-party physicians to intentionally hasten another person's death. We decline to recognize Article II, Section 4 as protecting a fundamental interest in hastening another person's death because such an interest is diametrically "[o]pposed" to the express interest in protecting life. 8 *Oxford English Dictionary*, *supra*, at 910.

{40} At its core, aid in dying challenges the longstanding and historic interest in the protection of life until its natural end as well as the equally longstanding prohibition against assisting another in hastening that process. *See Glucksberg*, 521 U.S. at 710-16 (observing that our nation's historical approach has been to disallow assisting another person in the taking of his/ her own life regardless of the circumstances). This treasured right to life is not only considered sacred under the common law but is also recognized as an inalienable right, even for those condemned to death. *See id.* at 714-15 (citing *Martin v. Commw.*, 37 S.E.2d 43, at 47 (Va.1946) ("'The right to life and to personal security is not only sacred in the estimation of the common law, but it is inalienable.'") and *Blackburn v. State*, 23 Ohio St. 146, 163 (1872) ("'[E]ven the lives of criminals condemned to death, [are] under the protection of the law[.]'"), *overruled in part on other grounds by State v. Staten*, 247 N.E.2d 293 (Ohio 1969)). Assisting a condemned criminal in taking his/her own life has also been subjected to punishment. *Commw. v. Bowen*, 13 Mass. 356 (1816). The inalienable right that defends life is also a prioritized constitutional interest in New Mexico. *See Reed*, 1997-NMSC-055, ¶ 103 ("When a person's life is jeopardized by the actions of the state without due process, *no constitutional interest is of greater consequence*. . . . The transgression is not only against a single human being but also the most basic principles upon which our system of government was founded." (emphasis added) (citation omitted)); *Trujillo v. Prince*, 1938-NMSC-024, ¶ 15, 42 N.M. 337, 78 P.2d 145 (1938) ("The [c]onstitution and statute, allowing compensation for life lost through negligence of another, adopt a policy touching the most important subject of all government, in which it is recognized that human life should be protected as well from negligence as from crime. . . . It could scarcely be said that a man has any greater right in his own life now than he had before the adoption of the constitutional provision and statutes of a kindred nature. His right originally was *above all others*, save where it is forfeited for crime." (emphasis added) (internal quotation marks and citation omitted)). Although the dissent concedes, in general terms, that the

government has a compelling and substantial constitutional interest in preserving life, it then concludes that this expressly prioritized constitutional interest in life was not adequately articulated by the State to address the needs of New Mexicans dying from terminal illness and, as a result, effectively disappears upon a medical determination of terminal illness. *See* Dissent ¶¶ 112-114, 117, 121 & 127.

{41} We understand Plaintiffs to assert that the process of dying during the final stages of life, defined as a terminally ill patient with six months or less to live, is now an accepted constitutional priority that falls within an intimate zone of privacy and that contemporary generations view aid in dying as a fundamental constitutional interest that deserves strict protection from governmental intrusion. However, death and the process of dying are not rights expressly enumerated within Article II, Section 4 and can only qualify as inferences that might exist within the categories of liberty or happiness. Plaintiffs cite no American case law that interprets the interests of constitutional liberty and happiness as extending protection to a third-party that assists another with intentionally taking his or her own life. *See In re Adoption of Doe*, 1984-NMSC-024, ¶ 2 ("We assume where arguments in briefs are unsupported by cited authority, counsel after diligent search, was unable to find any supporting authority."). The leap from a general societal concern about pain, suffering, and/or loss of autonomy and dignity during the final months of a terminally ill person's life into the creation of an Article II, Section 4 fundamental constitutional right to protect physicians who practice aid in dying is unprecedented. *See Pace*, 1969-NMSC-055, ¶ 23 (recognizing the need for judicial restraint when society may have changed over time and adhering to the preference for deferring to the legislative process for legal changes to keep "our existing laws in step with current thinking"). The Dissenting Opinion's analysis of how this Court should achieve the creation of this new fundamental interest under the New Mexico Constitution is also vague. *See* Dissent ¶¶ 110-114.

{42} The Dissenting Opinion appears to argue that a new constitutionally recognized event now occurs upon the diagnosis of terminal illness. *Id.* First, a patient's right to privacy automatically creates an inferred end-of-life liberty interest under Article II, Section 4 in the event of terminal illness. *Id.* Next, this new liberty interest ascends to constitutional priority over life itself. *Id.* Ultimately, the Dissenting Opinion harshly criticizes the majority for failing to agree with this new constitutional result. *Id.* at ¶ 114. It then extends this criticism by asserting that the majority is cavalier about the needs of the terminally ill, to the point it asserts that the majority is shockingly disrespectful to both physicians and the terminally ill. *Id.* References of ignorance, disrespect, or miscreance leveled at one's colleagues by the Dissenting Opinion are improper and unnecessarily harmful to our judicial process. *See id.*

{43} We are not persuaded by Plaintiffs' position that a modern desire to hasten death under the rubric of medical privacy can be inferred to take priority over the express fundamental interest in life set forth in Article II, Section 4. Medical privacy has never been constitutionally extended to such a high constitutional level, especially when "[i]t cannot be disputed that the Due Process Clause protects an interest in life." *Cruzan*, 497 U.S. at 281. Any development of the importance that society may eventually attribute to dying with autonomy and dignity remains inferential and secondary to life under the enumerated language set forth in Article II, Section 4 as well as our New Mexico precedent. *See Reed*, 1997-NMSC-055, ¶ 103; *Trujillo*, 1938-NMSC-024, ¶ 15. Again, there

is no basis under the *Gomez* factors to permit the creation of an interstitial constitutional right under Article II, Section 4 of the New Mexico Constitution. *See Gomez*, 1997-NMSC-006, ¶ 19.

3. The Exclusionary Defects in Plaintiffs' Proposed Right to Aid in Dying

{44} Article II, Section 4 declares that "*All* persons . . . have certain natural, inherent and inalienable rights" entitled to protection. N.M. Const. art. II, § 4 (Emphasis added). In arguing that the genesis of aid in dying is rooted in Article II, Section 4, Plaintiffs identify two categories of bodily integrity as the basis for fundamental constitutional protection: (1) the "right to autonomous medical decision making" and (2) the right to "a dignified, peaceful death." But the fundamental constitutional protection being sought by Plaintiffs is not a right of autonomy or dignity shared or uniformly applied to all New Mexico citizens; it is a narrow interest only favoring certain patients who meet very specific criteria during their final days of life—competence, terminal illness, physical ability to take and swallow a pill, and who are under the current care and supervision of a physician who prescribes the lethal dosage of medication. Aid in dying also provides a very narrow benefit from prosecution that exclusively favors physicians. Despite repeatedly referring to aid in dying as the liberty interest of "all New Mexicans," the Dissenting Opinion ultimately concedes that it is a narrowly defined right and its narrowly tailored application is the "question at the heart of this case." *See* Dissenting Opinion ¶¶ 73, 133, 135 & 148.

{45} Plaintiffs' experts testified that in Oregon and Washington, patients who have ingested the medication are overwhelmingly white, married, college-educated, insured, receiving hospice services, and dying of cancer or ALS. *See* Or. Pub. Health Div., Oregon's Death with Dignity Act Rep., at 4; Wash. State Dep't of Health, 2013 Death With Dignity Act Rep., at 1(2014). Plaintiffs do not assert that the same fundamental right exists for the remainder of New Mexicans who cannot meet the narrow definition for aid in dying. In addition, they do not claim that these excluded New Mexicans do not equally suffer from the same symptoms during the final six months of their lives—extreme pain, loss of autonomy, and loss of dignity, despite an absence of terminal illness. Under Plaintiffs' theory of substantive due process, the remainder of our citizens enduring the similar excruciating and unbearable symptoms are not entitled to equal constitutional protection. This theory would exclude the availability of aid in dying for all terminal patients suffering from a variety of disorders affecting their mental competence such as mental illness, dementia, or Alzheimer's disease. It would also exclude all patients suffering from non-terminal diseases or other medical conditions that are also causing extreme pain, indignity, and loss of autonomy during the final six months of their lives, such as multiple sclerosis and Parkinson's disease. *See* Mitchell, *supra*, at 60-61 (recognizing that a fundamental right to aid in dying may not be exercised by "people who are incapable of picking up . . . and/or swallowing the pills [by] themselves[,]" or by those "patients suffering as the result of massive injuries or those inflicted with a wasting disease[,]" and noting that such patients "[may] be in a far worse position than those with terminal illness, e.g. six months or a year to live" because "[t]he suffering of non-terminal patients can go on and on, while, for the terminally ill, the end is in sight").

{46} Furthermore, Plaintiffs' narrowly defined asserted right to aid in dying would provide constitutional immunity from criminal prosecution to only physicians and no one else. For example, the asserted right would not protect a non-physician from criminal prosecution under Section 30-2-4 under a

circumstance in which a patient who qualifies for aid in dying seeks assistance from a loved one in addition to or instead of a physician in achieving a peaceful and dignified death. This exclusionary benefit applying only to physicians further exposes the constitutional inadequacy of Plaintiffs' asserted right. Just as a fundamental right is one that exists for all citizens, any immunity from prosecution of third parties that springs from such a right, under properly applied principles of equal protection, must exist for *all* citizens who assist in carrying out a patient's constitutional right to hasten death. *See* N.M. Const. art. II, § 4; *see also Gentry v. Shug*, 2012-NMCA-019, ¶ 8, 270 P.3d 1286 ("An equal protection claim arises when a state actor treats similarly situated groups or persons differently."). We decline to conclude that a fundamental right exists where it would protect only one class of citizens from criminal prosecution to the exclusion of all others.

{47} Under Article II, Section 4, we decline to recognize an inferred fundamental right benefitting only a select few New Mexicans. Fundamental constitutional rights that protect life, liberty, or happiness are "enjoyed by *all* New Mexicans[.]" *Griego*, 2014-NMSC-003, ¶ 1 (emphasis added); *see also Obergefell*, __ U.S. at __, 135 S. Ct. at 2599 (recognizing that marriage is a fundamental right "for *all* persons, whatever their sexual orientation" (emphasis added)). The selective discrimination embodied within Plaintiffs' concept of aid in dying is constitutionally unsound for recognition as a fundamental right embodied within Article II, Section 4 and does not protect all New Mexicans who have equal interests in dying with autonomy and dignity.

D. Whether Aid in Dying Is Protected by the New Mexico Constitution Under Plaintiffs' Other Theories

{48} Plaintiffs challenged Section 30-2-4 in the district court under five independent claims. They claimed that Section 30-2-4 (1) does not prohibit aid in dying, (2) is unconstitutionally vague, (3) violates Article II, Section 18's equal protection guarantee, (4) violates Article II, Section 18's due process guarantee, and (5) violates Article II, Section 4's inherent rights guarantee. In addition to asserting that aid in dying is a fundamental right requiring strict protection under our constitution's equal protection, due process, and inherent rights clauses, Plaintiffs asserted that Section 30-2-4's prohibition on aid in dying "is not substantially related to an important governmental interest[, or] . . . is not rationally related to firm legal rationale." Plaintiffs submitted proposed findings of fact and conclusions of law pertaining to all of these theories. In its decision, the district court did not address the second and third theories listed above. Further, the district court did not fully address Plaintiffs' fourth and fifth theories, whether Section 30-2-4 would pass an intermediate or a rational basis review in the event aid in dying was ultimately determined not to qualify as a fundamental right. It recognized in its final judgment that it did not need to address these other theories because it had concluded that aid in dying was a fundamental right and that Section 30-2-4 was subject to strict scrutiny review.

{49} In applying its due process analysis under Article II, Section 18, the district court did not address whether aid in dying qualifies as the type of important individual interest entitled to heightened protection under intermediate scrutiny. *See Mieras v. Dyncorp*, 1996-NMCA-095, ¶ 26, 122 N.M. 401, 925 P.2d 518 (noting that important individual interests, although not fundamental, are entitled to a intermediate standard of constitutional review to test the application of the impinging legislation); *Wagner v. AGW Consultants*, 2005-NMSC-016, ¶ 12 n.3, 137 N.M. 734, 114 P.3d 1050 (emphasizing that the intermediate scrutiny standard applies to

"*either* an important right *or* a sensitive class, contrary to what we may have suggested in dicta in [previous cases]"); *see also Richardson v. Carnegie Library Rest., Inc.*, 1988-NMSC-084, ¶¶ 35-37, 107 N.M. 688, 763 P.2d 1153 (noting that heightened intermediate scrutiny allows a method of genuine judicial inquiry of important individual interests rather than the all-or-nothing choice between minimum rationality and strict scrutiny), *overruled on other grounds by Trujillo v. City of Albuquerque*, 1998-NMSC-031, 125 N.M. 721, 965 P.2d 305. "This level of evaluation is more sensitive to the risks of injustice than the rational basis standard and yet less blind to the needs of governmental flexibility than strict scrutiny." *Marrujo v. N.M. State Highway Transp. Dep't*, 1994-NMSC-116, ¶ 11, 118 N.M. 753, 887 P.2d 747 (internal quotation marks and citations omitted).

{50} Although the initial burden still rests upon a plaintiff to establish that the legislation at issue infringes upon an important individual interest, the state's burden of proof under an intermediate scrutiny analysis is different from the burden required under a strict scrutiny analysis. *Compare Breen*, 2005-NMSC-028, ¶ 13 (recognizing that the government bears the burden of proof under intermediate scrutiny to "prove that the classification or discrimination caused by the legislation is substantially related to an important government interest" (internal quotation marks and citation omitted)), *with City of Albuquerque v. Pangaea Cinema, LLC*, 2012-NMCA-075, ¶ 29, 284 P.3d 1090 (recognizing that the government bears the burden of proof under strict scrutiny "to show that it has a compelling interest in the challenged scheme and that it has accomplished its goals by employing the least restrictive means"), *rev'd on other grounds*, 2013-NMSC-044, 310 P.3d 60; *see also Griego*, 2014-NMSC-003, ¶ 56 (applying intermediate scrutiny in an equal protection context and considering "whether the legislation is over- or under-inclusive in its application" and "whether the legislation is the least restrictive alternative for protecting the important governmental interest"); *Breen*, 2005-NMSC-028, ¶ 32 ("While the least restrictive alternative need not be selected if it poses serious practical difficulties in implementation, the existence of less restrictive alternatives is material to the determination of whether the [restriction] substantially furthers an important governmental interest." (alteration, internal quotation marks, and citation omitted)). The standard of proof differs even further when the district court applies rational basis testing. *See id.* ¶ 11 (recognizing that the party challenging the legislation bears the burden to prove that the statute is not rationally related to a legitimate governmental purpose). The alternative standards of proof that were included in Plaintiffs' proposed findings and conclusions were not addressed by the district court in its original ruling and the corresponding findings that it entered. *See State ex rel. King v. UU Bar Ranch Ltd.*, 2009-NMSC-010, ¶ 44, 145 N.M. 769, 205 P.3d 816 ("When a trial court rejects proposed findings of facts or conclusions of law, we assume that said facts were not supported by sufficient evidence.").

{51} We have discretion under certain circumstances to resolve any issue raised on appeal, regardless of whether the district court had an opportunity to resolve that issue. *See* Rule 12-216(A) (limiting appellate scope of review to issues where it "appear[s] that a ruling or decision by the district court was fairly invoked," but granting appellate courts the discretion to consider unpreserved questions involving jurisdiction, general public interest, fundamental error, or fundamental rights of a party). However, we also have the discretion to remand a case to the district court to address alternative claims or theories raised by the parties that it declined to address at the trial level. *See Pruyn v. Lam*,

2009-NMCA-103, ¶ 17, 147 N.M. 39, 216 P.3d 804 (declining to address on appeal an alternative theory raised in the district court because the district court did not address the alternative theory and remanding the case to the district court to address that theory); *State ex rel. Children, Youth & Families Dep't v. Frank G.*, 2005-NMCA-026, ¶ 40, 137 N.M. 137, 108 P.3d 543 ("The general rule in New Mexico for determining the finality of a judgment is whether all issues of law and fact have been determined and the case disposed of by the [district] court to the fullest extent possible." (internal quotation marks and citation omitted)).

{52} To the extent that aid in dying may be an important interest on par with other important interests recognized by our courts, such as the right to access the courts and the right to an appeal, *see Wagner*, 2005-NMSC-016, ¶ 14, and the right to run for elected office, *see Alvarez v. Chavez*, 1994-NMCA-133, ¶ 21, 118 N.M. 732, 886 P.2d 461, *overruled on other grounds by Trujillo v. City of Albuquerque*, 1998-NMSC-031, the district court should have analyzed Section 30-2-4 under intermediate scrutiny and determined whether the State has satisfied its lower burden of persuasion. Furthermore, it should have determined whether Section 30-2-4 passes a rational basis test as applied to aid in dying and have rendered a decision on Plaintiffs' remaining constitutional claims so as to avoid potential piecemeal appeals in this case.

{53} Although these and Plaintiffs' other alternative claims involve matters of profound public interest, *see* Rule 12-216, it is more appropriate in this case to require the district court to render its decision on these claims and explain the grounds for those decisions prior to our review. The district court, as the sole fact finder in this case, was present for all of the testimony and arguments presented at trial. In considering the claims that it thought unnecessary to consider in the first instance, it will have an opportunity to make any additional factual findings that are more specific to the unaddressed issues and to require further hearings and/or briefing on these issues. Our Court is not in the position to make factual findings relevant to issues left unaddressed by the district court. *See generally Maloof v. San Juan Cnty. Valuation Protests Bd.*, 1992-NMCA-127, ¶ 17, 114 N.M. 755, 845 P.2d 849 ("The findings of fact adopted below, if supported by substantial evidence, are controlling on appeal."). Therefore, I would remand this case to the district court for further proceedings it deems necessary to result in the entry of findings of fact and conclusions of law concerning Plaintiffs' remaining claims.

CONCLUSION

{54} We reverse the district court's ruling that aid in dying is a fundamental liberty interest under the New Mexico Constitution. Accordingly, we reverse the district court's order permanently enjoining the State from enforcing Section 30-2-4. We affirm the district court's determination that, for statutory construction purposes, Section 30-2-4 prohibits aid in dying. Separate from the Concurring Opinion, I would also remand this case to the district court to make any further findings it deems necessary, to conduct both an intermediate scrutiny and rational basis review of Section 30-2-4, as well as dispose of Plaintiffs' remaining claims.

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

TIMOTHY L. GARCIA, Judge

J. MILES HANISEE, Judge (concurring in part)

LINDA M. VANZI, Judge (dissenting)

HANISEE, Judge (concurring in part).

{56} I view the New Mexico Constitution to incorporate no *right*—fundamental or otherwise—to lethal narcotics medically prescribed for the sole purpose of causing the immediate death of a patient. I therefore concur in reversing the judgment of the district court, and join the majority conclusion that neither Article II, Sections 4 nor 18 constitutionalize aid in dying as a fundamental right in New Mexico. *See* Majority Op. ¶¶ 39, 43. I further agree that NMSA 1978, Section 30-2-4 prohibits aid in dying in New Mexico. *See* Majority Op. ¶ 20. I respectfully decline to join the perspectives of either of my colleagues that there is or may be some non-fundamental but otherwise constitutionally "important right" to aid in dying.[6] Accordingly, remand for further district court proceedings is unwarranted, *see also* Dissenting Op. ¶ 142, and I diverge from the Majority Opinion in this regard also. *See* Majority Op. ¶ 53. As well, I write separately to address my belief that a different branch of the tripartite structure that characterizes our governmental system is vastly better suited to consider and resolve the lawfulness of aid in dying in New Mexico than is the judiciary.

{57} In proposing to affirm the district court, the Dissenting Opinion would adjudicate New Mexico to be just the fourth state to legalize aid in dying, yet the *only* one to do so extra-statutorily and in a manner broadly circumventive of democratic processes.[7] Such a ruling would stand troublingly alone nationally, and would simultaneously contravene: (1) the United States Supreme Court's unanimous declaration that there is no such constitutional right; (2) the New Mexico Legislature's longtime prohibition of suicide assistance and far more recent establishment of end-of-life standards of medical care that expressly disallow aid in dying; and (3) principles of judicial reasoning that rarely compel, and even more rarely permit, the unilateral and permanent imposition of robed will upon coequal branches of government and society at large. The institution tasked with ensuring legal order ought to be measurably cautious before strong-arming into existence instant, precipitous, and profound social change.

Aid in Dying Is Not A Fundamental Right

{58} I agree with the Majority Opinion's analysis holding there to be no Article II-derived fundamental right to aid in dying in New Mexico. First, Article II, Section 18 safeguards our right to due process of law by language meaningfully indistinguishable from the federal Due Process Clause that was held by the United States Supreme Court *not* to provide a right to aid in dying. *See Glucksberg*, 521 U.S. at 728 ("[T]he asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause."). In order to conclude contrary to *Glucksberg*, we are first required to adhere to the narrow interstitial parameters our New Mexico Supreme Court applies when it is asked to depart from federal constitutional precedent. *See Gomez*, 1997-NMSC-006, ¶ 19 (permitting recognition of a right rejected for federal protection by "flawed federal analysis," or if arising from "structural differences between state and federal government" or New Mexico's "distinctive state characteristics"). Yet neither our nor some select legal critics' disagreement with established federal precedent, *see* Dissenting Op. ¶¶ 98-99 (citing scholarly opposition to *Glucksberg*), are the sort of determinants of

[6]The Dissenting Opinion would hold there to be a "fundamental, or at least important, liberty right to aid in dying." Dissenting Op. ¶ 104. The Majority author leaves open only the possibility that the lesser of such rights might be guaranteed by the New Mexico Constitution. Majority Op. ¶¶ 52-53.

[7]While not affirmatively legalizing aid in dying, the Supreme Court of Montana held that "a terminally ill patient's consent to . . . aid in dying constitutes a statutory defense to a charge of homicide." *Baxter*, 2009 MT 449, ¶ 50.

legal "flaw" that I can embrace under *Gomez*.[8] The Majority Opinion's exclusion of aid in dying from those constitutional rights identified by process of interstitial analysis is correct, *see* Majority Op. ¶ 38, particularly given the United States Supreme Court's concise but timely supportive reference to *Glucksberg* in *Obergefell*. ___ U.S. at ___, 135 S. Ct. at 2602 (noting that *Glucksberg*'s "central reference to specific historic practices . . . may have been appropriate for the asserted right there involved (physician-assisted suicide)[, but] it is inconsistent with the approach [the United States Supreme Court] has used in discussing other fundamental rights, including marriage and intimacy"). It would be a mistake to disregard as dicta the Court's own recognition that not all interests asserted to be of constitutional dimension require identical analyses. *See Obergefell*, ___ U.S. at ___, 135 S. Ct. at 2602 (prohibiting the unequal disallowance of a recognized class of Americans from exercising a 48-year-long established fundamental constitutional right); *see also Loving*, 388 U.S. at 12 (declaring marriage to be "one of the vital personal rights essential to the orderly pursuit of happiness").

{59} Secondly, among other inherent rights, Article II, Section 4 guarantees those of "enjoying and defending life and liberty[.]" *See Griego*, 2014-NMSC-003, ¶ 1. But our New Mexico Supreme Court has yet to hold this constitutional provision to be a fountain for as-yet-undiscovered rights, the implied geneses of which more typically spring from federal and/or state due process and equal protection clauses, such as those within Article II, Section 18. *See Obergefell*, ___ U.S. at ___, 135 S. Ct. at 2602-03 ("The Due Process Clause and the Equal Protection Clause [interrelate] in a profound way [to] . . . further[] our understanding of what freedom is and must become."). This distinction is uniquely apropos to aid in dying, an asserted right that is functionally at odds with the enjoyment and defense of life, two of the very few stated interests Article II, Section 4 directly protects. *See* Majority Op. ¶¶ 40-43. In any event, even *Griego* mentions Article II, Section 4 in an introductory way, like our Constitution, then proceeds to conduct its constitutional inquiry pursuant to better established interpretive methodology. *Griego*, 2014-NMSC-003, ¶¶ 1, 25-27, 68.

Aid in Dying Is Not An Important Right To Which Intermediate Scrutiny Applies

{60} It seems innately sensible that a constitutional right of any sort, even one that is non-fundamental but "important," must be meaningfully rooted within some specific protection afforded by the document being interpreted, or elsewhere by law. Yet the theoretical constitutional origin of an important such right does not automatically emerge from an otherwise flawed constitutional assertion. As noted above, the interest that is aid in dying is not merely one unmentioned by the New Mexico Constitution, but one that contradicts its very language and a first principle for which it stands. *See* N.M. Const. art. II, § 4 (declaring the enjoyment and defense of life to be "natural, inherent and inalienable rights[.]"). Moreover, constitutionally "important right[s]" are those "certainly . . . more important and sensitive than rights restricted by primarily social . . . legislation." *State v. Druktenis*, 2004-NMCA-032, ¶ 98, 135 N.M. 223, 86 P.3d 1050. While it would be a mistake to coldly or cavalierly disregard the wishes of some who suffer from terminal illnesses, and for whom the enjoyment of life has been lost, the aid in dying interest presented by Plaintiffs to be a uniquely New Mexican constitutional

[8]Regarding the latter two *Gomez*-available bases for interstitial departure, nothing in the record of this case or the arguments of Plaintiffs illustrates structural governmental differences or distinctive state characteristics that lend support to a constitutional right to aid in dying in New Mexico.

right is neither absolute nor unqualified; that is, it is conditionally available to certain citizens but not to others. *See Lucero v. Salazar*, 1994-NMCA-066, ¶ 6, 117 N.M. 803, 877 P.2d 1106 (citing *Oldfield*, 1994-NMSC-005, ¶ 15, to advance the proposition that Article II, Section 4 is interpreted in a manner consistent with absolute and unqualified rights derived from the Fourteenth Amendment to the United States Constitution). To establish or leave open the possibility that this narrowest of interests is one of constitutional dimension disregards its predominant unavailability as well as its absence from and irresolvable squabble with our Constitution's language that instead expresses and emphasizes a diametrically opposite and equally available fundamental right: life's preservation.

{61} Furthermore, even were aid in dying suited for a determination of constitutional importance, it would squarely conflict with the State's own important and legitimate contrary interests. *See Marrujo*, 1994-NMSC-116, ¶ 11 (holding that an "important—rather than fundamental—individual interest" yields to legislation that "substantially relate[s] to an important governmental interest")(internal quotation marks and citation omitted). Those include:

> preventing a person from taking the life of another; preventing suicide; preventing assisted suicide; promoting the integrity, healing, and life preserving principles of the medical profession; protecting vulnerable groups from unwanted pressure to considering aid in dying as the best alternative to other medical options; and promoting human life where aid in dying is not the appropriate medical option despite a patient's request for its use.

Majority Op. ¶ 37. It is difficult to envision legislation designed to foster indisputably legitimate state interests such as these to give way to a limited interest that is, as the Majority Opinion points out, societally undeveloped and within its legal infancy in state courts. *Id.* Of yet greater concern would be the dearth of any regulatory framework enforceable by the State to ensure the safety and efficacy of aid in dying were this judicial body to pronounce its legality. Unlike the three states that have *legislatively* permitted aid in dying, its practice in New Mexico would occur in a void only minimally filled by externally written and questionably enforceable "professional standards of practice" or some alternately nebulous "established standard of care." Dissenting Op. ¶¶ 126, 127. In fact, the best examples of why the more capably informed legislative process is the superior means by which aid in dying might achieve legality are the three statutory enactments existing nationally. *See* Or. Rev. Stat. Ann. §§ 127.800 to .897; Vt. Stat. Ann. tit. 18, §§ 5281 to 5292; Wash. Rev. Code Ann. §§ 70.245.10 to .904. Each not only provides a framework to actuate aid in dying, but also defines physician responsibilities, reporting requirements, and procedural processes. *Id.* Importantly, each state imposes criminal liability on individuals who engage in varying degrees of malfeasance with regard to aid in dying. *See* Wash. Rev. Code Ann. § 70.245.200; Or. Rev. Stat. Ann. § 127.890 § 4.02; Vt. Stat. Ann. tit. 18, § 5283(b). Such a patient-safety-driven framework, codifying a deterrent threat of criminal liability should lives be prematurely, wrongly, or improperly ended in violation of statutorily pre-defined safeguards, is altogether absent in New Mexico. And it is not the judiciary's place to assume the legislative role necessary to enact some regulatory substitute for that which should accompany and govern any such fundamental transformation in medical caregiving. I consider a New Mexico courthouse to be perhaps the least suitable venue to determine whether the foundational

healing tenet of medical care—the Hippocratic Oath—is to be abruptly disregarded, even in the laudable context of attempting to alleviate the suffering of dying patients.

{62} Notably also, aid in dying negates not one but *three* contrary expressions of law passed by our citizen legislature, the constitutional branch of government elected by New Mexicans to represent their perspectives as lawmakers. *See* § 30-2-4; §§ 24-7A-1 to -18 (Uniform Health Care Decisions Act); §§ 24-7B-1 to -16 (Mental Health Care Treatment Decisions Act). *See also Glucksberg*, 521 U.S. at 720 ("By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action."). To substitute our judgment for that underpinning laws written by the New Mexico Legislature and enacted by a governor's signature would serve to disrupt the considered order by which society is governed. *See Baxter*, 2009 MT 449, ¶ 117 (Rice, J., dissenting) ("Controlling their own destiny, Montanans may decide to change the [s]tate's public policy. . . . This [c]ourt should allow [its citizens] . . . to control their own destiny on [aid in dying]."). Such is particularly true when the newfound right arises from inexact, directly contrary, ethereal, or otherwise indefinite language. Our Constitution was not meant to be molded and stretched to exclusively afford a right of any sort to so few of the many protected by the same enduring and all-encompassing document. *See Griego*, 2014-NMSC-003, ¶¶ 53, 68-69 (declaring unconstitutional statutes that preclude a "discrete group" of New Mexico citizens from engaging in an activity afforded to another group).

{63} Regarding intermediate scrutiny, *Griego* is our New Mexico Supreme Court's most recent topical jurisprudence. Prior to *Obergefell*'s ruling that same-sex marriage is protected by the United States Constitution, *Griego* applied intermediate scrutiny to hold that same-gender couples in New Mexico cannot be denied the "rights, protections and responsibilities of civil marriage solely because of their sexual orientation." *Griego*, 2014-NMSC-003, ¶ 6. But three circumstances distinguish *Griego* from the issue before us. First, *Griego* made clear that "none of [the] New Mexico[] marriage statutes specifically prohibit same-gender marriages"; however, each "reflect[ed] a legislative intent" to do so. 2014-NMSC-003, ¶¶ 4, 23. Here, Section 30-2-4 expressly criminalizes "deliberately aiding another in the taking of his [or her] own life[,]" a prohibition twice reiterated in ensuing legislation regarding end of life medical care. *See also* §§ 24-7A-13(C); 24-7B-15(C) (each expressly refusing to "authorize . . . assisted suicide . . . to the extent prohibited by other statutes of this state"). Second, unlike the situation before us where the United States Supreme Court has held there to be no fundamental liberty interest in "assistance in committing suicide[,]" *Glucksberg*, 521 U.S. at 728, our New Mexico Supreme Court in *Griego* recognized that the question before it was one that had at the time "not been answered by the United States Supreme Court" and declined to address fundamentality. *Griego*, 2014-NMSC-003, ¶ 54. Third and most importantly, the result in *Griego* was based upon application of the New Mexico Human Rights Act (NMHRA), NMSA 1978, §§ 28-1-1 to -15 (1969, as amended through 2007) (recognizing "sexual orientation as a class of persons protected from discriminatory treatment") in conjunction with the "equality demanded by the Equal Protection Clause of the New Mexico Constitution." *Griego*, 2014-NMSC-003, ¶¶ 42, 68 (internal quotation marks and citation omitted). Almost needless to say, the NMHRA is silent on "terminally ill" as a protected class.

{64} With no sensitive class or equal protection consideration like was present in

Griego, application of intermediate scrutiny in this instance can only be premised upon the identification of aid in dying as a freshly minted constitutionally important right. *See Wagner*, 2005-NMSC-016, ¶ 12 n.3 (application of intermediate scrutiny "requires *either* an important right *or* a sensitive class") (emphasis in original). If found to be such, aid in dying would immediately violate the very equality of application demanded of rights guaranteed by the New Mexico Constitution. One class of citizens—terminally ill, mentally competent adults—would possess a right that would be denied to other similarly but not identically situated New Mexicans at the end of their lives.[9] New Mexico courts should be particularly wary of constitutionalizing interests that would be unavailable to inexactly situated members of the broader public at the end of their lives. *See Quill*, 521 U.S. at 799 (rejecting equal protection challenge to New York's statutes banning aid in dying that apply to "*all* New Yorkers alike [and do not] . . . infringe fundamental rights [or] suspect classifications." (emphasis added)). Likewise, the constitutional infirmity of protecting some New Mexicans (physicians) but not others (family members of terminally ill patients) from Section 30-2-4's reach is to me starkly apparent. *See also* Majority Op. ¶ 44.

[9]A right to aid in dying available only to a minute sector of the population would seem markedly in conflict with bedrock constitutional principles that guarantee equality of rights. Yet to apply principles of equal protection to any future right to aid in dying, as courts will inevitably be asked to do, seems as well fraught with peril. *See* Rachel Aviv, *Letter From Belgium, The Death Treatment: When should people with a non-terminal illness be helped to die?*, The New Yorker, (June 22, 2015), *available at* http://www.newyorker.com/magazine/2015/06/22/the-death-treatment (questioning the practice of aid in dying generally and specifically its expansion to the contexts of mental illness and dementia in Belgium).

Section 30-2-4 Is Reasonably Related To A Legitimate Government Purpose

{65} A constitutional challenge to governmental interference with an asserted right bestirs a process of review both federally and in New Mexico whereupon courts "decide what interest is involved or to whom the interest belongs[,]" *Marrujo*, 1994-NMSC-116, ¶ 9, ascertain state interest in prohibiting or curtailing the asserted right, *Griego*, 2014-NMSC-003, ¶¶ 56-62 (identifying and rejecting the state's interest in denying same gender couples the right to marry), and apply whichever of three ensuing standards of legal scrutiny is warranted to fairly balance the interests of the proponent with those of the State: strict, intermediate, or "rational basis." *Marrujo*, 1994-NMSC-116, ¶¶ 9-12 (explaining each standard of review and stating that in New Mexico "the same standards of review are used in analyzing both due process and equal protection guarantees"). The rational basis test is "triggered by . . . interests . . . that are not fundamental rights, suspect classifications, important individual interests, [or] sensitive classifications." *Id.* ¶ 12. "The burden is on the opponent of the legislation to show that the law lacks a reasonable relationship to a legitimate governmental purpose." *Id.* (internal citation omitted). The test applies in circumstances of "personal activities that are not fundamental rights." *Id.* Aid in dying is such an activity, and is subject to rational basis review.

{66} To justify its ban on aid in dying, the State relies on many of the same "unquestionably important and legitimate" governmental interests identified to be valid by *Glucksberg*: (1) preserving life; (2) "protecting the integrity and ethics of the medical profession"; (3) "ensuring adequate regulation of the practice"; and (4) preventing suicide and treating its causes. 521 U.S. at 703, 729-35. Without "weigh[ing] exactingly

the relative strengths of these various interests," *Glucksberg* concluded Washington's prohibition of "assisting another in the commission of self-murder[,]" to be "at least reasonably related to their promotion and protection." *Id.* at 707, 735 (internal quotation marks omitted). Therefore, pursuant to rational basis review, the Washington statute did not violate the Fourteenth Amendment. *Id.* at 735; *see also Marrujo*, 1994-NMSC-116, ¶ 12 ("The opponent's burden is difficult because they must demonstrate that the challenged legislation is clearly arbitrary and unreasonable, not just possibly so. The court will uphold the statute if any state of facts can be discerned that will reasonably sustain the challenged [legislation.]" (internal quotation marks and citation omitted)). Here, Section 30-2-4 prohibits "deliberately aiding another in the taking of his [or her] own life" in a manner nearly identical to the State of Washington, and New Mexico's own recognized governmental interests align with those determined to be valid by *Glucksberg*. Accordingly, I would conclude that Section 30-2-4 is rationally related to a legitimate government purpose. Both it and the ensuing statutory enactments that define the parameters of medical decision-making reiterate the disallowance of aid in dying in New Mexico, and warrant the "traditional deference accorded by courts to the legislature's sense of the general good" emphasized by *Marrujo* in its discussion of rational basis review. 1994-NMSC-116, ¶ 12 (internal quotation marks and citation omitted). The determination that Section 30-2-4 withstands rational basis review as a matter of law should be part of our holding today.

{67} Lastly, I note that the rational basis test reflects the deference owed by our third branch of government when legislative and executive processes combine to produce laws that govern society. Our uneven decision today amply illustrates why those processes provide better answers to societal questions such as the legality or illegality of aid in dying. Pursuant to them, the New Mexico Legislature may, upon consultation with constituents and citizens, study and propose any bill it deems to be in the best interest of New Mexicans. If such legislation withstands the rigors of bicameral scrutiny, it is next subjected to executive review, after which a governor may sign or veto it. By this exacting process, the people of our state speak to declare their wishes. If an ensuing enactment is legally challenged, courts are then far better positioned to exercise their constitutional role in a properly judicial context.

CONCLUSION

{68} It can be difficult to repress—as judges sometimes must—the innately human inclination to act when invited to provide a decisional option in circumstances where options are sadly few. By declining such an invitation today, I mean not to assail aid in dying or to thwart what Plaintiffs hope to accomplish for gravely ill New Mexicans. The role of the judiciary is not always to determine a victor between competing extremes, particularly when answers to questions of law are attainable on narrower grounds. *See Allen v. LeMaster*, 2012-NMSC-001, ¶ 28, 267 P.3d 806 (citing *Baca v. N.M. Dep't of Pub. Safety*, 2002-NMSC-017, ¶ 12, 132 N.M. 282, 47 P.3d 441, for the proposition that "courts exercise judicial restraint by deciding cases on the narrowest possible grounds and avoid reaching unnecessary constitutional issues"). Those that may be disappointed or pleased by today's decision should also know that three judges can no more disavow aid in dying as a movement gathering public momentum than we should today stifle the deeply held beliefs and countervailing efforts of those that exercise their right to oppose it.

{69} The question before this panel is not whether aid in dying *should* be legal, nor whether it *can* be legalized in a manner

consistent with the New Mexico Constitution; we must simply answer whether the legality of aid in dying is constitutionally *compulsory*. It is not. The correct answer does not spring from our own individual or collective "policy preferences [as m]embers of this Court," *Glucksberg*, 521 U.S. at 720, but from our informed fidelity to constitutional precedent, institutionally advisable notions of restraint, required respect for the roles of co-equal branches of government, and awareness of the often arduous, and yet enduring, people-driven process by which societies evolve within our nation's immortality-minded experiment in democracy. *See Schuette v. BAMN*, ___ U.S. ___, 134 S. Ct. 1623, 1636-37 (2014) (noting by plurality the "right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times"). Inevitably, the value of rights chosen by citizens will exceed that of rights prematurely directed by judges. To spare aid in dying that which is normally required to effectuate significant change to New Mexico law would deprive it of both the legitimacy of public inclusion and the opportunity for consensus invaluable to the determinative process. *See Obergefell*, ___ U.S. at ___, 135 S. Ct. at 2605 (noting with approval the "referenda, legislative debates, and grassroots campaigns, as well as countless studies, papers, books, and other popular and scholarly writings [alongside] extensive litigation in state and federal courts" regarding same-sex marriage). Such would also wrongly short-change citizens across our state who wish to voice their opinion prior to being told the outcome of matters about which they care. Our preference today simply does not belong alongside historic, hard won, and transcendent rights that warrant constitutional guarantee to the exclusion of countervailing governmental interests.

{70} Based on my agreement that the New Mexico Constitution provides no fundamental right to aid in dying, I concur in the Majority Opinion's reversal of the district court's final declaratory judgment and order of permanent injunction. I would extend our ruling to additionally conclude that aid in dying is not a constitutionally protected important right or interest. Lastly, I would uphold Section 30-2-4 pursuant to the rational basis standard of review.

J. MILES HANISEE, Judge

VANZI, Judge (dissenting).

{71} The question presented is whether NMSA 1978, Section 30-2-4 (1963) may constitutionally be applied to criminalize a willing physician's act of providing "aid in dying" at the request of a mentally competent, terminally ill patient who wishes a peaceful end of life as an alternative to being forced to endure an unbearable dying process marked by suffering, including extreme pain and/or the loss of autonomy and dignity. I would hold that it may not and would therefore affirm the district court's order permanently enjoining the State from prosecuting under Section 30-2-4 any physician who provides aid in dying in accordance with the parties' agreed definition. I present my analysis in full, save for my recitation of the factual record and statutory interpretation, regardless of any repetition with portions of the majority opinion.[10]

I. BACKGROUND

{72} Plaintiffs contend that the right to aid in dying is "fundamental or, at the very least, important under the New Mexico Constitution." I understand the parties' agreed definition of "aid in dying" to limit the right such that it is implicated only where: (1) a

[10]A certain amount of redundancy is unavoidable because the majority opinion tracks some of my analysis and presentation of the relevant law.

mentally competent adult who is capable of giving consent, and (2) who is terminally ill with a grievous and irremediable medical condition, (3) chooses to request a prescription for medication that may be ingested to bring about a painless, peaceful, and dignified end of life, and (4) a willing physician applying the established standard of care for aid in dying determines that it would be appropriate to provide such medication so that the requesting patient need not be forced to endure an intolerable dying process marked by suffering, including extreme pain and/or loss of autonomy and dignity. All references to "aid in dying" herein assume and encompass the full scope of the foregoing definition.

{73} I pause to address the majority and concurring opinions' attempt to use these limitations in support of the argument that there is no fundamental right to aid in dying, suggesting that recognizing the right would somehow be an act of "selective discrimination" because only "a select few" would have it and because it "also provides a very narrow benefit from prosecution that exclusively favors physicians." *See* Majority Op. ¶¶ 44-47 (referring to the limitations as "exclusionary defects"); *see also* Concurring Op. ¶¶ 62, 64. The contention is untenable. The right to aid in dying, which I would hold is protected under our Constitution, belongs to *all* New Mexicans. The fact that it may be invoked only by some people who find themselves in certain circumstances is also true of other constitutional rights. The parental autonomy rights recognized by the Constitution (discussed below) apply to all citizens, even though not all citizens will exercise them. So too, the reproductive autonomy rights to use contraception and to terminate a pregnancy belong to every citizen, notwithstanding that every citizen might not be in a situation that would bring about their exercise. The right to terminate a pregnancy, moreover, cannot be exercised beyond a certain point in the pregnancy. Viability marks "the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions"; before then, "the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 835, 846 (1992). Those who are on life support have the constitutional right to have their lives ended, although not everyone will be on life support. *See Cruzan ex rel. Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 279, 287, 302, 344 (1990) (majority opinion assumed that "a competent person [has] a constitutionally protected right to refuse lifesaving hydration and nutrition"; five Justices concluded that there is a due process right to refuse medical treatment). And there is a fundamental right to marry, even though not everyone will claim it. All asserted rights must be considered in the context in which the allegedly protected conduct takes place. The right to aid in dying is no different in this respect. The fact that the right is exercised in a specific context, during a limited time period, does not defeat its existence. Nor is the recognition of the right precluded because it would protect physicians who provide aid in dying from prosecution but not non-physicians. For one thing, Plaintiffs do not assert a right to the assistance of anyone but a physician in providing aid in dying. For another, the protection of physicians from criminal liability in this context is required for the same reasons it is required in any context in which the assistance of a physician is necessary (under the medical standard of care or otherwise) to effectuate the constitutional right of the patient. As discussed below, the patient's choice and the assistance of the physician to actualize it are both protected. This does not vitiate the right asserted here any more than it does the right to terminate a pregnancy, or to administer terminal sedation,

or withdraw life sustaining medication and equipment.

{74} Plaintiffs invoke two provisions of the New Mexico Constitution: the due process clause of Article II, Section 18, which has an analogous provision in the United States Constitution, and the inherent rights guarantee of Article II, Section 4, which has no federal constitutional analogue. The State made no attempt below to justify Section 30-2-4 as necessary to serve a compelling governmental interest (as it must if the right is "fundamental") or a substantial governmental interest (which it must if the right is "important"). Instead, relying on a single federal decision, *Washington v. Glucksberg*, 521 U.S. 702 (1997), it argued that the statute is constitutional as applied to aid in dying because it is rationally related to a legitimate governmental interest.

{75} The district court concluded that Section 30-2-4, as applied to aid in dying, violates Article II, Section 4 and Article II, Section 18 of the New Mexico Constitution. Citing *Glucksberg*, 521 U.S. at 725, the court acknowledged that the United States Supreme Court had previously "declined to find the right to aid in dying to be . . . protected by the federal Constitution." The court nevertheless departed from federal precedent. Noting that New Mexico has inherent power as a separate sovereign in our federalist system to provide more liberty than that afforded by the federal Constitution and applying the interstitial approach to constitutional analysis, *see State v. Gomez*, 1997-NMSC-006, ¶ 19, 122 N.M. 777, 932 P.2d 1, the district court concluded that Article II, Section 4 provides "distinct additions" to the rights afforded by the federal Constitution and a basis to diverge from federal precedent.

{76} The district court held that "[a] terminally ill, mentally competent patient has a fundamental right to choose aid in dying pursuant to the New Mexico Constitution's guarantee to protect life, liberty, and seeking and obtaining happiness, N.M. Const. art. II, § 4, and its substantive due process protections, N.M. Const. art. II, § 18." Applying strict scrutiny, the court held that the State had failed to prove that Section 30-2-4 furthers a compelling interest by criminalizing physician aid in dying and ordered that the State is permanently enjoined from prosecuting any physician who provides aid in dying to mentally competent, terminally ill patients.

{77} On appeal, the State argues that: (1) there is no fundamental constitutional right to the deliberate assistance of a third party in ending one's own life; and (2) the district court's ruling violates the doctrine of separation of powers by legalizing conduct that was designated as a crime by the Legislature. Here, as in the district court, the State makes no attempt to justify Section 30-2-4's proscription against aid in dying as necessary to serve a compelling or substantial state interest; relying on *Glucksberg*, it asserts it does not have to. Our review is de novo. *Bank of N.Y. v. Romero*, 2014-NMSC-007, ¶ 52, 320 P.3d 1.

II. DUE PROCESS

{78} The due process clause of the New Mexico Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law[.]" N.M. Const. art. II, § 18. The federal due process clause similarly provides that no state "shall . . . deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV, § 1. Plaintiffs do not claim a right to aid in dying under federal law, but the State's argument that there is no such right assumes that the result in this case is dictated by *Glucksberg*, 521 U.S. at 728, which held that "the asserted 'right' to assistance in committing suicide is not a

fundamental liberty interest protected by the [federal] Due Process Clause" and that "Washington's assisted-suicide ban [is] rationally related to legitimate government interests." The majority and concurring opinions also assume that *Glucksberg* is dispositive here. I begin with a review of the key United States Supreme Court decisions interpreting the liberty interest protected by the federal due process clause.

A. Federal Due Process Precedents

{79} Long before it decided *Glucksberg*, the United States Supreme Court interpreted the substantive component of the due process clause to protect aspects of personal autonomy as "fundamental rights," notwithstanding that they are not mentioned in the text of the Bill of Rights, with which the government may not interfere unless it meets its burden under the strict scrutiny standard to prove that the infringing statute is narrowly tailored to serve a compelling governmental interest. *See Casey*, 505 U.S. at 847 (explaining that the United States Supreme Court has never accepted the view that "liberty encompasses no more than those rights already guaranteed to the individual against [governmental] interference by the express provisions of the first eight Amendments to the Constitution").

{80} These previously recognized fundamental rights include the right to marry, *see Loving v. Virginia*, 388 U.S. 1, 2 (1967), and aspects of parental autonomy, *see, e.g.*, *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (recognizing the rights to the companionship, care, custody, and management of one's children); *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972) (preserving the right to conceive, raise, and retain custody of one's children); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (decided on equal protection grounds, emphasizing the "fundamental" nature of individual choice about procreation and the corresponding standard of "strict scrutiny"); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925) (recognizing the right to raise one's children); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (discussing the parental right to control children's education). The Court has also recognized a fundamental due process right to bodily integrity. *See Casey*, 505 U.S. at 849 (citing *Washington v. Harper*, 494 U.S. 210, 221-22 (1990); *Winston v. Lee*, 470 U.S. 753 (1985); *Rochin v. California*, 342 U.S. 165 (1952)).

{81} The Court has held that there is a fundamental due process right to reproductive autonomy, which includes the right to purchase and use contraceptives, *see Griswold v. Connecticut*, 381 U.S. 479, 499 (1965) (recognizing a married couple's privacy right in their intimate relationship); *Eisenstadt v. Baird*, 405 U.S. 438, 443-44 (1972) (extending *Griswold*, under the Equal Protection Clause, to invalidate a state law against distributing contraceptives to unmarried persons), and the right to terminate a pregnancy, *see Roe v. Wade*, 410 U.S. 113, 165-66 (1973); *Casey*, 505 U.S. at 833. In *Roe* and its progeny, the Court recognized and then affirmed the right of a woman to choose whether or not to terminate her pregnancy, reasoning primarily from the personal nature of the decision and its consequences, which are best left to "the woman and her responsible physician." 410 U.S. at 153; *see Casey*, 505 U.S. at 846 (affirming *Roe*'s central holding).

{82} Writing separately in *Roe* and its companion case, *Bolton*, Justice Douglas broadly described, among other liberties, a "freedom to care for one's health and person[.]" *Doe v. Bolton*, 410 U.S. 179, 213 (1973) (Douglas, J., concurring). These cases establish that individuals have an "interest in independence in making certain kinds of important decisions[,]" *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (footnote omitted);

see Carey v. Population Servs. Int'l, 431 U.S. 678, 684-85 (1977), and that "[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter[,]" *Casey*, 505 U.S. at 847. This interest in self-definition, which is "the heart of liberty," is no less than "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Id.* at 851. *Casey* described *Roe* "not only as an exemplar of *Griswold* liberty but as a rule . . . of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection." *Casey*, 505 U.S. at 857.

{83} Substantive due process decisions pre-dating *Glucksberg* also clearly recognized, as part of the protected liberty interest, the right to the necessary assistance of a physician. In *Carey*, 431 U.S. at 684-90, the Court emphasized, in holding that restrictions on the distribution of contraceptives must satisfy strict scrutiny because they clearly burden the fundamental right to make decisions concerning reproduction, that strict scrutiny also applies to state regulations that burden the fundamental right to make such decisions "by substantially limiting access to the means of effectuating that decision." And the decisions in *Roe* and *Casey* held that the right encompasses the assistance of a physician necessary to exercise it, "vindicat[ing] the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention." *Roe*, 410 U.S. at 165-66. "If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available." *Id.* at 166.

{84} *Casey* further clarified that, although "[i]t is . . . tempting . . . to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified . . . such a view would be inconsistent with our law." 505 U.S. at 847; *see also Rochin*, 342 U.S. at 171 ("To believe that this judicial exercise of judgment could be avoided by freezing 'due process of law' at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges[.]").

{85} In *Cruzan*, 497 U.S. at 278, the Court stated that "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions" and "assume[d] that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition." *Id.* at 279; *see id.* at 281 ("[T]he Due Process Clause protects . . . an interest in refusing life-sustaining medical treatment."). As Justice O'Connor explained in her concurring opinion, "The State's imposition of medical treatment on an unwilling competent adult necessarily involves some form of restraint and intrusion. A seriously ill or dying patient whose wishes are not honored may feel a captive of the machinery required for life-sustaining measures or other medical interventions. Such forced treatment may burden that individual's liberty interests as much as any state coercion. The State's artificial provision of nutrition and hydration implicates identical concerns." *Id.* at 288 (O'Connor, J., concurring) (citations omitted). "Requiring a competent adult to endure such procedures against her will burdens the patient's liberty, dignity, and freedom to determine the course of her own treatment. Accordingly, the liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual's deeply personal

decision to reject medical treatment, including the artificial delivery of food and water." *Id.* at 289 (O'Connor, J., concurring).

{86} In *Bowers v. Hardwick*, 478 U.S. 186, 190-91 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003), the Court did an about-face, rejecting the substantive due process analysis it had previously applied in addressing fundamental rights. Recasting the respondent's claim as an asserted "fundamental right to engage in homosexual sodomy," *id.* at 191, the Court dismissed the right as "at best, facetious," because homosexual sodomy was not "deeply rooted in this Nation's history and tradition." *Id.* at 192, 194 (internal quotation marks and citation omitted). In *Glucksberg*, the Court applied the same tactics, redefining the right asserted and rejecting it for lack of a "deeply rooted" historical antecedent. Before examining *Glucksberg*, I consider the Court's most recent substantive due process decisions, which make plain that the *Bowers/Glucksberg* analysis does not control substantive due process analysis as a matter of federal constitutional law.

{87} In *Lawrence*, the Court overruled *Bowers*, emphatically rejecting its narrow characterization of the right at issue and its rigid adherence to, and exclusive focus on, an historical analysis in deciding substantive due process claims. *Lawrence*, 539 U.S. at 567, 577-78. The *Lawrence* Court adopted Justice Stevens' dissent in *Bowers*, which recognized that "the fact that the governing majority in a [s]tate has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice[.]" *Lawrence*, 539 U.S. at 577-78 (internal quotation marks and citation omitted). Stating that "[t]he issue is whether the majority may use the power of the [s]tate to enforce these views on the whole society through operation of the criminal law[,]" the *Lawrence* Court embraced *Casey*, quoting its statement that the Court's " 'obligation is to define the liberty of all, not to mandate our own moral code[,]' " and its formulation of the due process liberty interest as protecting "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Lawrence*, 539 U.S. at 571, 574 (quoting *Casey*, 505 U.S. at 850-51).

{88} *Bowers*, the *Lawrence* Court held, "was not correct when it was decided, and it is not correct today." *Lawrence*, 539 U.S. at 578. Reiterating *Casey*'s pronouncement that " '[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter[,]' " *Lawrence*, 539 U.S. at 578 (quoting *Casey*, 505 U.S. at 847), *Lawrence* concluded,

> Had those who drew and ratified the Due Process Clauses . . . known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

Id. at 578-79.

{89} The Court cemented its rejection of a rigid historical analysis as dispositive of substantive due process rights in *Obergefell v. Hodges*, ___ U.S. ___, 135 S. Ct. 2584 (2015), in which the Court held that the federal due process clause protects a liberty interest in marrying a person of the same sex and requires states to license and recognize such marriages. *See id.* at 2604-05, 2608. The Court explained that the liberty interests

protected by the federal due process clause "extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs[,]" *id.* at 2597 (citing *Eisenstadt*, 405 U.S. at 453; *Griswold*, 381 U.S. at 484-86), and that "[t]he identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution[,]" *id.* at 2598. The Court emphasized that the task of fulfilling that judicial responsibility "has not been reduced to any formula," but rather "requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect." *Id.* (internal quotation marks and citation omitted). "History and tradition guide and discipline this inquiry but do not set its outer boundaries." *Id.* (citing *Lawrence*, 539 U.S. at 572). The proper method of analysis "respects our history and learns from it without allowing the past alone to rule the present." *Id.* The Court reasoned:

> The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a chapter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Id.

B. *Washington v. Glucksberg*

{90} In *Glucksberg*, which was decided after *Bowers* but before *Lawrence* and *Obergefell*, an alliance of physicians and terminally ill patients sought a declaration that a Washington statute criminalizing "promoting a suicide attempt," defined as "knowingly caus[ing] or aid[ing] another person to attempt suicide," violated the federal due process clause. *Glucksberg*, 521 U.S. at 707-08 (internal quotation marks and citation omitted). The plaintiffs had asserted "a liberty interest protected by the Fourteenth Amendment which extends to a personal choice by a mentally competent, terminally ill adult to commit physician-assisted suicide." *Id.* at 708 (internal quotation marks and citation omitted). The Supreme Court recast the issue as "whether the 'liberty' specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so[,]" *id.* at 723, and restricted its inquiry to whether that right had previously been recognized in the course of "our Nation's history, legal traditions, and practices," *id.* at 710, 721. The Court concluded that a " 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause" because "[t]he history of the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it." *Id.* at 728. Having declined to recognize a fundamental right, the Court went on to hold the State's asserted interests to be sufficient to withstand the immediate challenge under rational basis review. *Id.*

{91} The Court distinguished *Cruzan* on the ground that the right the Court assumed existed in that case was rooted in "the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment," and thus "was entirely consistent with this Nation's history and constitutional traditions," while "[t]he decision to commit suicide with the assistance of another . . . has never enjoyed similar legal

protection." *Glucksberg*, 521 U.S. at 725. The Court characterized the broad, rights-protective language of *Casey* as a general description of personal activities that had previously been identified as "so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty, that they are protected by the Fourteenth Amendment[,]" concluding without analysis that the fact that "many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected[.]" *Glucksberg*, 521 U.S. at 727-28.

{92} Five Justices wrote separately, reserving the possibility that the Court might recognize a constitutional right to "physician-assisted suicide" in certain circumstances, while relying on different grounds and different reasoning. Justice Stevens concurred in the result, explaining that all of the patient plaintiffs had died during the litigation and that the majority opinion held that "Washington's statute prohibiting assisted suicide is not invalid 'on its face[.]' " *Id.* at 739 (Stevens, J., concurring). Justice O'Connor joined the majority opinion "because [she] agree[d] that there is no generalized right to 'commit suicide[,]' " stating that there was no need to reach "the narrower question whether a mentally competent person who is experiencing great suffering has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death" in the context of what she characterized as the facial challenges presented in *Glucksberg* and the related case, *Vacco v. Quill*, 521 U.S. 793 (1997).[11] *Glucksberg*, 521 U.S. at 736 (O'Connor, J., concurring). Justice Ginsburg concurred "substantially for the reasons stated by Justice O'Connor." *Id.* at 789 (Ginsburg, J., concurring). Justice Breyer also joined Justice O'Connor's opinion, "except insofar as it joins the majority[,]" writing separately to say that our legal tradition might protect a "right to die with dignity," at the core of which "would lie personal control over the manner of death, professional medical assistance, and the avoidance of unnecessary and severe physical suffering—combined[,]" and to emphasize that terminally ill patients experiencing "severe physical pain" might have a constitutionally protected interest. *Id.* at 789-91 (Breyer, J., concurring) (internal quotation marks omitted). Taking a completely different approach, Justice Souter stated that "the importance of the individual interest here, as within that class of 'certain interests' demanding careful scrutiny of the State's contrary claim, cannot be gainsaid[,]" but did not reach the question whether "that interest might in some circumstances, or at some time, be seen as 'fundamental' to the degree entitled to prevail" because he was "satisfied that the State's interests . . . [we]re sufficiently serious to defeat the present claim that its law is arbitrary or purposeless." *Id.* at 782 (Souter, J., concurring) (citation omitted).

{93} Thus, Justices O'Connor and Stevens, and Justices Ginsburg and Breyer (to the extent they joined Justice O'Connor's concurrence) viewed the majority opinion as having rejected a *facial* challenge. The majority opinion, moreover, agreed that its holding "would not 'foreclose the possibility that an individual plaintiff seeking to hasten her death, or a doctor whose assistance was

[11] In *Quill*, the Supreme Court held that New York's similar ban did not deprive a similarly defined class of persons of equal protection, despite the state's recognition and protection of the right of each patient in the class to refuse lifesaving medical treatment. 521 U.S. at 796-97.

sought, could prevail in a more particularized challenge[.]' " *Id.* at 735 n.24 (quoting *id.* at 750 (Stevens, J., concurring)).[12]

{94} I need not discuss *Glucksberg* in exegetical detail. Given that *Lawrence* and *Obergefell* emphatically rejected an analysis of unenumerated due process liberty interests upon which *Glucksberg*, like *Bowers*, relied (an analysis focusing solely on the historical roots of the asserted right) and just as emphatically embraced analytical principles that *Glucksberg* rejected (the liberty rights analysis of *Casey* and other decisions addressing due process liberty interests), it is impossible to conclude that the due process analysis applied in *Glucksberg* is dispositive of the issue today, even as a matter of federal law.

{95} The assumption that a fundamental right exists only if there is a history and tradition of protecting it, shared by *Bowers* and *Glucksberg*, does not comport with the Supreme Court's analysis of due process liberty rights in decisions issued before and afterward. As one noted constitutional scholar has pointed out, "laws prohibiting interracial marriage were far more 'deeply rooted in this Nation's history and tradition' than the right to interracial marriage, but in *Loving v. Virginia*, the Court held that such a right is protected by the Due Process Clause. And there was no deeply rooted tradition of protecting a right to abortion before *Roe v. Wade*. In fact, abortion was illegal in forty-six states when *Roe* was decided." Erwin Chemerinsky, *Washington v. Glucksberg Was Tragically Wrong*, 106 Mich. L. Rev. 1501, 1505 (2008) (footnotes omitted). Furthermore, "the fact that laws have long existed does not answer the question as to whether the interest the laws regulate is so integral to personhood as to be worthy of being deemed a fundamental right." *Id.*

{96} The opinion of the Court in *Obergefell* briefly addressed *Glucksberg*, in rejecting respondents' argument that petitioners' assertion of "a new and nonexistent" right was inappropriate in light of *Glucksberg*. *See Obergefell*, ___ U.S. at ___, 135 S. Ct. at 2602. The Court said that, although *Glucksberg*'s requirement that liberty "must be defined in a most circumscribed manner, with central reference to specific historical practices . . . may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights[.]" *Id.* The majority and concurring opinions in this case seize on this statement as supporting their contention that *Glucksberg*'s analysis still applies to aid in dying. *See* Majority Op. ¶ 35; Concurring Op. ¶ 58. Stating that "[i]n *Obergefell*, every member of the United States Supreme Court . . . passed upon an opportunity to question the majority's reference to the outcome in *Glucksberg* or cast aspersion upon the analysis of aid in dying that was utilized in *Glucksberg*[,]" the majority opinion represents *Obergefell* as providing "a specific reference of approval and a brief defense of *Glucksberg*." Majority Op. ¶ 35; *see also* Concurring Op. ¶ 58. This characterization of *Obergefell* as an endorsement of *Glucksberg* is specious. It ignores that there was no occasion for the *Obergefell* Justices to question or disparage *Glucksberg*'s analysis of aid in dying, as the issue was not before the Court. And it is exceedingly difficult to imagine how *Obergefell* could be so understood given what the Court said next: "If rights were defined by

[12]As Laurence Tribe has observed, "*Quill*, like *Glucksberg*, splintered the Court in a way that required the majority opinion to acknowledge that the Court's holding left open 'the possibility that some applications of the state statute may impose an intolerable intrusion on the patient's freedom.' " Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 Harv. L. Rev. 1893, 1918 n.89 (2004) (quoting *Quill*, 521 U.S. at 809 n.13) (alteration omitted).

who exercised them in the past," the Court explained, "then received practices could serve as their own continued justification and new groups could not invoke rights once denied." *Obergefell*, ___ U.S. at ___, 135 S. Ct. at 2602. "[R]ights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era." *Id.* This view of substantive due process rights could not be more contrary to *Glucksberg*, and the application of this principle cannot be understood to be limited to the identity of the right at issue.

{97} If the *Obergefell* Court had applied a *Glucksberg* analysis, it could not have identified a history and tradition protecting the right to marry another of the same sex, just as it could not identify a history and tradition protecting the right to engage in same-sex sodomy when it applied that restrictive analysis in *Bowers*. I can think of no principled reason why there should be two tests for substantive due process rights; one for aid in dying, and one for everything else. Although the opinion of the Court in *Obergefell* left *Glucksberg* untouched (again it had no reason to reach out to overrule it), the dissent correctly acknowledged that the majority's position "require[d] it to effectively overrule *Glucksberg*." *Obergefell*, ___ U.S. at ___, 135 S. Ct. at 2621 (Roberts, J., dissenting). It remains to be seen, of course, what the outcome would be if the Court were to address aid in dying again, but the conclusion is inescapable that the United States Supreme Court itself has disclaimed the substantive due process analysis upon which *Glucksberg*'s holding rests.

{98} Reams of critical analysis by numerous commentators, preeminent constitutional scholars among them, also belie the State's conclusory contention that *Glucksberg* is not "flawed," and so should be followed under our interstitial approach to analysis of rights afforded by provisions of our Constitution that have federal analogues (more on that later). *See, e.g.*, Chemerinsky, *supra*, at 1506 ("The methodology of *Lawrence* . . . cannot be reconciled with Chief Justice Rehnquist's restrictive view of rights under the Due Process Clause [in *Glucksberg*]."); Yale Kamisar, *Foreward: Can Glucksberg Survive Lawrence? Another Look at the End of Life & Personal Autonomy*, 106 Mich. L. Rev. 1453, 1455-56 (2008) (noting commentary that, although the *Lawrence* majority did not cite *Glucksberg*, "the aspersions *Lawrence* cast on *Bowers* inevitably fell with equal force on *Glucksberg*—especially the narrow view of substantive due process *Glucksberg* shared with *Bowers*" (footnote, internal quotation marks, and citation omitted)); Tribe, *supra*, at 1923 (stating that *Lawrence* demonstrates that "[n]othing in *Glucksberg* can fairly be understood to have cemented the *Bowers* transmutation into our constitutional law").

{99} Commentators have noted, for example, the majority's recharacterization of the right asserted by the plaintiffs. *See, e.g.*, Ruth C. Stern & J. Herbie Difonzo, *Stopping for Death: Re-Framing Our Perspective on the End of Life*, 20 U. Fla. J.L. & Pub. Pol'y 387, 418 (2009) ("In neither the majority nor in the five concurring opinions did the justices correctly or coherently define the questions presented."). Even scholars who have questioned whether *Lawrence* necessarily means that the United States Supreme Court will recognize a right to aid in dying have described *Glucksberg*'s "fragility" in light of the obvious lack of agreement among the justices, even as to the precise question answered. *See* Kamisar, *supra*, at 1459-60 (noting, *inter alia*, that Justice O'Connor really did not join the majority; that the five concurring opinions "make for frustrating reading and a shaky ruling"; and that *Glucksberg* "may be the most confusing and

the most fragile 9-0 decision in Supreme Court history"). As Kamisar has observed, "although Rehnquist's opinion is called 'the opinion of the Court,' it does not seem to deserve that designation." Kamisar, *supra*, at 1462. For example, "[a]lthough formally Justice O'Connor provided the much-needed fifth vote, it is highly doubtful that she really did[,]" *id.* at 1462, and Justice Stevens' concurring opinion "is primarily a dissent." *Id.* at 1464.

{100} The State does not address the fractured nature of *Glucksberg*'s concurring opinions. Indeed, counsel for the State said at oral argument that he was not "properly equipped to discuss . . . some of the nuanced views" stated in those opinions. And, although *Obergefell* was not decided until after oral argument, *Lawrence* had been decided, yet the State did not acknowledge that *Lawrence* unequivocally rejected the rigid historical analysis upon which *Bowers* and *Glucksberg* relied exclusively, and instead embraced a concept of liberty that protects "an autonomy of self," which *Glucksberg* disavowed.

{101} The majority and concurring opinions in this case also say nothing about the impact of *Glucksberg*'s fractures and fragility on its authoritative value; like the State, they essentially say that we should give the decision dispositive effect because it exists and has not been overruled. *See* Majority Op. ¶ 34; Concurring Op. ¶ 58. These opinions also do not address the critical commentary, offering only that "[t]he fact that *Glucksberg*'s analytic methodology has been questioned by some legal scholars does not mean the opposite of its holding must be true." Majority Op. ¶ 34.

{102} But even accepting the State's conclusory assertion that *Glucksberg* is not "flawed," neither the State nor the majority or concurring opinions offer any reason why it should be treated as persuasive, given the United States Supreme Court's current analysis of due process liberty interests and over seventeen years of experience (and evidence) with aid in dying, which the *Glucksberg* Court did not have before it. Whatever the status of *Glucksberg* in the federal courts, the bottom line is that it does not bind us here, and our analysis of rights afforded by the New Mexico Constitution—the only source of rights invoked by Plaintiffs—is not "inextricably tied" to it. *See, e.g.*, *N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶ 37, 126 N.M. 788, 975 P.2d 841; *State v. Gutierrez*, 1993-NMSC-062, ¶ 16, 50-56, 116 N.M. 431, 863 P.2d 1052.

C. Article II, Section 18 and Our Interstitial Approach

{103} Our Supreme Court has previously interpreted the New Mexico due process clause more expansively than the United States Supreme Court has interpreted the federal due process clause, holding in *Montoya v. Ulibarri*, 2007-NMSC-035, ¶ 23, 142 N.M. 89, 163 P.3d 476, that New Mexico's due process clause requires that habeas petitioners must be permitted to assert freestanding claims of actual innocence. *See also State v. Vallejos*, 1997-NMSC-040, ¶ 32, 123 N.M. 739, 945 P.2d 957 (holding that all forms of entrapment violate New Mexico's due process clause; rejecting widely criticized U.S. Supreme Court precedent to the contrary as to the federal counterpart).[13] And nothing in

[13]Our Supreme Court has rejected federal constitutional precedent and analysis affording less protection than our own Constitution under other provisions as well. *See, e.g.*, *State v. Leyva*, 2011-NMSC-009, ¶ 51, 149 N.M. 435, 250 P.3d 861 (departing from Fourth Amendment analysis when construing analogous Article II, Section 10); *State v. Garcia*, 2009-NMSC-046, ¶ 34, 147 N.M. 134, 217 P.3d 1032 (rejecting widely criticized United States Supreme Court decision weakening a right "beyond a point which may be countenanced under our state constitution"); *State v.*

our Supreme Court's most recent interpretation of Article II, Section 18 remotely suggests that analysis of liberty interests under New Mexico's due process clause requires the rigid adherence to historical analysis that *Glucksberg*, like *Bowers*, elevated to the exclusion of all else. *See Griego*, 2014-NMSC-003, ¶ 2 ("Interracial marriages were once prohibited by laws in many states until the United States Supreme Court declared such laws unconstitutional and ordered an end to the discriminatory treatment."); *id.* ¶ 58 ("Articulating the governmental interest as maintaining the tradition of excluding same-gender marriages because the historic and cultural understanding of marriage has been between a man and a woman—cannot in itself provide a sufficient basis for the challenged exclusion. To say that the discrimination is traditional is to say only that the discrimination has existed for a long time." (alteration, internal quotation marks, and citation omitted)). Indeed, *Griego* acknowledged both *Lawrence*, *see Griego*, 2014-NMSC-003, ¶ 58, and the privacy right recognized in *Eisenstadt*, 405 U.S. at 453, *see Griego*, 2014-NMSC-003, ¶ 60 n.10.

{104} Thus, to the extent it is appropriate to be guided by federal law in determining whether New Mexico's due process clause protects aid in dying, the sound and persuasive analysis is that which embraces the view of liberty, autonomy, and privacy elucidated in the *Casey/Lawrence/Obergefell* line of cases and rejects the analysis of *Bowers* and *Glucksberg*. Even if *Glucksberg* remains good law, as a matter of federaldue process analysis, I would reject it as unpersuasive, flawed, and inadequate to protect the rights of New Mexicans. *Garcia*, 2009-NMSC-046, ¶ 57 (Bosson, J., specially concurring) ("In a government of dual sovereigns, it is imperative that our state Constitution develop to its full potential and protect the rights of our citizens where we deem federal law lacking."). The State has conceded that citizens have a fundamental right to make their own end-of-life decisions and stated at oral argument before this Court that citizens have a fundamental right to bring about their own deaths, even by stockpiling morphine prescribed by a physician and ingesting a lethal dosage. The State further conceded at oral argument that it had no interest in preventing suffering, mentally competent, terminally ill patients from obtaining aid in dying. *See* Oral Argument, No. 33,360 at 4:19:15-4:19:30 (Jan. 26, 2015) ("The State interest does not lie in prolonging the suffering of people who are in fact terminally ill, and have made an informed, competent decision to request this sort of medication. *I will readily concede that the State has no interest in preventing that person from obtaining this sort of assistance.*" (emphasis added)); *supra*, at 4:18:40-4:19:00 ("I don't think there would be a compelling state interest in preventing a person at the very end of their life who is, in fact, terminally ill and mentally competent from obtaining this sort of assistance. I don't think the statute would survive strict scrutiny analysis. I don't think the statute would survive an intermediate scrutiny analysis, either, for largely the same reasons."). According to the State, the only conduct proscribed by Section 30-2-4 in this context is a physician's act of prescribing a lethal dosage of medication. Yet it provides no reason, other than its citation to *Glucksberg*, why that conceded fundamental right does not include the only means available to effectuate the right in a peaceful and dignified

---

Rowell, 2008-NMSC-041, ¶¶ 20-23, 144 N.M. 371, 188 P.3d 95 (declining to follow United States Supreme Court decisions criticized in legal literature as "devoid of a reasoned basis in constitutional doctrine"); *Gutierrez*, 1993-NMSC-062, ¶¶ 32, 50-56 (discussing "a willingness to undertake independent analysis of our state constitutional guarantees when federal law begins to encroach on the sanctity of those guarantees" and rejecting federal constitutional rule as incompatible with the guarantees of the New Mexico Constitution).

manner—a lethal dosage of medication prescribed by a willing physician acting in accordance with the established standard of care for aid in dying.[14] Nor does it explain or even attempt to justify why a physician's affirmative acts of administering terminal sedation and removing life-sustaining nutrition, hydration, or mechanical life support—undertaken with knowledge that these acts will hasten death—should be legal, while a physician's affirmative act of writing a prescription that will bring about the same result should be criminalized.[15] I would hold that Article II, Section 18 affords New Mexico citizens a fundamental, or at least important, liberty right to aid in dying from a willing physician.

{105} The majority opinion asserts that "[i]n order to justify a departure from *Glucksberg*, Plaintiffs must have shown precisely why greater fundamental due process protections exist under Article II, Section 4." Majority Op. ¶ 34. It asserts that "we should continue to be very careful when considering new constitutional interests and remain reluctant to deviate from United States Supreme Court determinations of what are, and what are not, fundamental constitutional rights." *Id.* ¶ 35. It assigns Plaintiffs the burden to cite authority for the proposition that " 'death' or 'aid in dying' in New Mexico have either been recognized as embedded principles within our democratic society or as a modern interpretation of certain fundamental interests that have been applied to some members of society but historically denied to others." *Id.* ¶ 36. No authority is cited for any of these propositions. I am aware of none. These and other statements in the majority and concurring opinions reflect a profound misunderstanding of our interstitial approach to state constitutional analysis.

{106} For example, the majority opinion asserts that "there is no basis under the *Gomez*

[14]As Justice Souter reasoned in *Glucksberg*:

> There is . . . [another] reason for claiming that a physician's assistance here would fall within the accepted tradition of medical care in our society, and the abortion cases are only the most obvious illustration . . . . While the Court has held that the performance of abortion procedures can be restricted to physicians, the Court's opinion in *Roe* recognized the doctors' role in yet another way. For, in the course of holding that the decision to perform an abortion called for a physician's assistance, the Court recognized that the good physician is not just a mechanic of the human body whose services have no bearing on a person's moral choices, but one who does more than treat symptoms, one who ministers to the patient. This idea of the physician as serving the whole person is a source of the high value traditionally placed on the medical relationship. Its value is surely as apparent here as in the abortion cases, for just as the decision about abortion is not directed to correcting some pathology, so the decision in which a dying patient seeks help is not so limited. The patients here sought not only an end to pain (which they might have had, although perhaps at the price of stupor) but an end to their short remaining lives with a dignity that they believed would be denied them by powerful pain medication, as well as by their consciousness of dependency and helplessness as they approached death. In that period when the end is imminent, they said, the decision to end life is closest to decisions that are generally accepted as proper instances of exercising autonomy over one's own body, instances recognized under the Constitution and the State's own law, instances in which the help of physicians is accepted as falling within the traditional norm.

Glucksberg, 521 U.S. at 779 (citations omitted).

[15]*See Chemerinsky, supra*, at 1508 ("Turning off a respirator, removing a feeding tube, stopping medication that keeps a person's blood pressure at a level to sustain life; all are affirmative acts. Both are intended to end a person's life—and both will have that effect. The [*Glucksberg*] argument invokes a familiar distinction between omission and commission, but this distinction is inapposite here because ending treatment and administering substances to end life are both acts of commission with the same purpose and effect.").

factors to permit the creation of an interstitial constitutional right under Article II, Section 4 of the New Mexico Constitution." Majority Op. ¶ 43. But we use interstitial analysis to determine whether we should follow federal precedent in interpreting provisions of our Constitution that have federal analogues. *See, e.g.*, *Gomez*, 1997-NMSC-006, ¶¶ 16, 21-23. Section 18's due process clause has a federal counterpart; Section 4 does not. I agree with the district court that Section 4 is a distinctive characteristic of our Constitution that provides a basis to depart from federal precedent in determining the due process rights protected by Section 18. *See NARAL*, 1999-NMSC-005, ¶¶ 28-43 (concluding that distinctive characteristics of the New Mexico Constitution—the Equal Rights Amendment—required rejection of federal equal protection analysis affording less protection). I reject any suggestion that our interstitial analysis requires that we must give federal due process precedents dispositive effect in determining the inherent rights afforded by Section 4.

{107} I also reject the concurring opinion's characterization of our interstitial approach as "narrow" and as permitting departure from federal precedent based only on a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics. *See* Concurring Op. ¶ 58. These grounds were stated in *Gomez*, of course, 1997-NMSC-006, ¶ 19, and have been frequently cited since then. But our Supreme Court has subsequently described these grounds as merely examples of reasons warranting departure from federal precedent. *See Leyva*, 2011-NMSC-009, ¶ 40 n.6 (describing these three grounds as "examples of reason for departure"); *id.* ¶ 49.

{108} The majority opinion appears to confuse the requirements for preserving a claim predicated on a provision of our Constitution that has a federal counterpart with the parameters that inform our decision whether to follow federal precedent in determining whether the state constitutional provision protects the right asserted. *See* Majority Op. ¶¶ 23, 34. There is no preservation issue here. Plaintiffs have not brought a claim under the federal Constitution. They have identified the provisions of our Constitution that they believe protect the right they assert. They have explained why they believe that each provision protects the right. They have stated reasons why we should not follow *Glucksberg* and why they believe that our Constitution provides broader protection than the federal Constitution. Our interstitial approach requires no more; in fact, it requires less. *See Leyva*, 2011-NMSC-009, ¶ 49 (noting that citation to the state constitutional provision invoked is sufficient).

{109} Our interstitial approach does not require (or even permit) us to treat *Glucksberg* as dispositive of this case simply because it exists. *See Gomez*, 1997-NMSC-006, ¶ 17; *see also Arizona v. Evans*, 514 U.S. 1, 8 (1995) ("[S]tate courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution."). It obligates us to consider whether the federal analysis articulated in *Glucksberg* is persuasive because its underlying reasoning "is better calibrated to protect the rights of individuals" in this state from unwarranted government intrusion. *Leyva*, 2011-NMSC-009, ¶ 53. It is not.

D. Article II, Section 4 of the New Mexico Constitution

{110} Plaintiffs also assert a right to aid in dying under the New Mexico Constitution's inherent rights guarantee, which provides, "All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and

protecting property, and of seeking and obtaining safety and happiness." N.M. Const. art. II, § 4. Section 4 has been sparsely interpreted. *See Reed v. State ex rel. Ortiz*, 1997-NMSC-055, ¶ 105, 124 N.M. 129, 947 P.2d 86 (recognizing that "[o]ur courts have not fully defined the scope of this constitutional provision"), *rev'd sub nom. on other grounds by New Mexico ex rel. Ortiz v. Reed*, 524 U.S. 151 (1998). But that surely does not mean that its text may simply be read out of the Constitution. *See Hannett v. Jones*, 1986-NMSC-047, ¶ 13, 104 N.M. 392, 722 P.2d 643 (noting that the Constitution must be "construed so that no part is rendered surplusage or superfluous"); *cf. Johnson v. Craft*, 87 So. 375, 386 (Ala. 1921) ("The Constitution contains no idle assertions, no meaningless language, [and] no ephemeral purpose[.]").

{111} Nor does it mean that its scope is defined by and limited to the circumstances in which it has previously been invoked, as the State appears to suggest. The State cites *Lucero v. Salazar*, 1994-NMCA-066, ¶ 7,117 N.M. 803, 877 P.2d 1106, for the proposition that "mere references to the right to enjoy life and to seek and obtain safety and happiness are not sufficient to serve as a basis for a waiver of immunity under [the New Mexico Tort Claims Act]." *Lucero* relied on *Blea v. City of Espanola*, 1994-NMCA-008, ¶ 20, 117 N.M. 217, 870 P.2d 755, which stated that "vague references to safety or happiness in [A]rticle II, Section 4 . . . are not sufficient to state a claim under [the New Mexico Tort Claims Act]." *Blea* made clear, however, that the issue in that case was "not what our [C]onstitution protects or does not protect[,]" but "the scope of the acts for which the [L]egislature has waived immunity." *Id.* These cases have no bearing on the question presented here, which quite obviously requires us to determine what our Constitution protects in this context.

{112} Equally clear is that this case involves a great deal more than a vague reference to "safety and happiness." Far more significant, and relevant here, is that the framers of our Constitution saw fit to include in their enumeration of rights guaranteed as "inherent" the right—and agency to effectuate the right—to "enjoy[] and defend[]" their own "li[ves] and liberty" against unjustified intrusions by the government. N.M. Const. art. II, § 4. Section 4 is no mere "ornament," as one amicus declares. To the contrary, *Griego* begins by quoting its text in full, emphasizing the primacy of the inherent rights provision in any consideration of the liberty rights of our citizens. *See* 2014-NMSC-003, ¶ 1. And *Griego* instructs that "[w]hen government is alleged to have threatened any of these rights, it is the responsibility of the courts to interpret and apply the protections of the Constitution." *Id.*

{113} I think it is plain that Section 4 supplements and expands the liberty rights afforded by Section 18's due process clause to ensure maximum protection for the lives and liberty of New Mexicans. The express textual rights to "enjoy[] and defend[]" these interests can mean nothing less. I would hold that, whether construed on its own terms as a constitutional provision with no federal analogue, or deemed a "distinctive characteristic" of the New Mexico Constitution mandating rejection of a federal constitutional analysis affording less protection, *see, e.g.*, *NARAL*, 1999-NMSC-005, ¶¶ 28-43, Section 4 affords New Mexico citizens the right and agency to defend their lives and liberty by availing themselves of aid in dying, as that term is defined herein.

{114} Relying on a dictionary definition of "life," the majority opinion recasts the liberty interest asserted by Plaintiffs as "an implied fundamental interest in hastening another person's death" and then declines to

recognize it "because such an interest is diametrically opposed to . . . life." Majority Op. ¶ 39 (alteration, internal quotation marks, and citation omitted); *see also* Concurring Op. ¶ 59. Despite the contrary stipulated record, the opinion seems to equate the dying and suffering patient who seeks aid in dying with a person who wishes to commit suicide, and her doctor with any miscreant who counsels another to commit suicide against her will. *See* Majority Op. ¶ 40 (citing, *inter alia*, *Commonwealth v. Bowen*, 13 Mass. 356 (1816)). This re-characterization ignores the distinctions between suicide and aid in dying established by the trial testimony and reflects a shocking disrespect for the individuals whose circumstances would bring them to seek aid in dying, individuals who would live if they could, but whose terminal illnesses will not allow them to do so. For these individuals, "death" is imminent, and "life" means being forced to endure unbearable suffering until it ends. The majority's characterization of aid in dying as contrary to the interest in "life" protected by the inherent rights guarantee, *see also* Concurring Op. ¶ 59, also misapprehends the nature of the liberty interest asserted by Plaintiffs, and ignores that Article II, Section 4 protects the right to "liberty" as well as to life, and the right to defend that liberty against unjustified government intrusion. Having declared what amounts to lock-step adherence to federal due process precedent, the majority and concurring judges ought to consider that under federal law, "a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims." *Casey*, 505 U.S. at 857 (citing, *inter alia*, *Cruzan*, 497 U.S. at 278). They should also consider the record in this case, which establishes that the State has articulated no basis, and concedes none exists, for intruding into the liberty interests of mentally competent, terminally ill New Mexicans to seek aid in dying, as discussed further below.

III. THE ASSERTED STATE INTERESTS

{115} The determination that our Constitution affords New Mexicans a right to aid in dying does not end the matter. The next question is whether the State has carried its burden to prove that Section 30-2-4's infringement of that right is constitutionally justified. *See Wagner v. AGW Consultants*, 2005-NMSC-016, ¶ 12, 137 N.M. 734, 114 P.3d 1050. We apply strict scrutiny when the interest at issue is a "fundamental personal right or civil liberty" guaranteed by the Constitution. *Marrujo v. N.M. State Highway Transp. Dep't*, 1994-NMSC-116, ¶ 10, 118 N.M. 753, 887 P.2d 747. Strict scrutiny requires the government to prove that the infringing statute is narrowly tailored to serve a compelling governmental interest. *Id.* ¶¶ 10-11. Intermediate scrutiny, which applies when legislation infringes on important but not fundamental rights, requires the government to prove that the infringing statute is substantially related to an important governmental interest. *Id.* Relying on *Glucksberg*, the State presumes, as does the concurring opinion, that the less stringent rational basis standard applies here. That standard requires the party asserting the right to show that the statute is not rationally related to a legitimate governmental interest. *See Marrujo*, 1994-NMSC-116, ¶¶ 10-12 (describing the three levels of scrutiny applicable to review of equal protection and substantive due process claims). On this record, I would conclude that Section 30-2-4, as applied to aid in dying, does not survive scrutiny under any standard.

{116} Throughout this litigation, the State has relied exclusively on the governmental interests asserted by the State of Washington in *Glucksberg*: (1) preserving life; (2) "protecting the integrity and ethics of the medical profession"; (3) "ensuring adequate regulation of the practice"; and, for the first time on appeal, (4) preventing suicide and

treating its causes. Beyond simply reciting these interests, the State has made virtually no effort to explain how any of them justify applying Section 30-2-4 to aid in dying in New Mexico.[16] As noted, the State stipulated to the entirety of the evidence presented in the district court. It did not challenge any of the evidence as flawed or unsupported, nor did it call any witnesses or provide any evidence of its own. The State further conceded at oral argument that other than an interest in preventing the "hypothetical potential for abuse," it had no interest—compelling or substantial or otherwise—in preventing suffering, mentally competent, terminally ill patients from obtaining aid in dying. Nor could it cite a single instance of abuse in any United States jurisdiction where aid in dying is legal—including in Montana, which has no legislatively enacted regulatory framework and is governed entirely by the medical profession's standard of care. The State merely incants *Glucksberg*, as if it held talismanic significance. But the State may not claim substantial or compelling interests without providing *any* such evidence; on that basis alone, Section 30-2-4's prohibition on aid in dying fails under heightened scrutiny. *See Griego*, 2014-NMSC-003, ¶ 57 ("[T]he party with the burden of proof in a constitutional challenge must support his or her argument with a 'firm legal rationale' or evidence in the record."). And even under the rational basis standard, the State must do more than cite to interests asserted by another state more than seventeen years ago—at least in this case, in which it has stipulated to a record that demonstrates that the concerns raised in *Glucksberg* have not materialized in states that allow aid in dying. Below, I address the State's broadly asserted interests, as well as those raised by amici for the State, in light of Plaintiffs' uncontradicted evidence and the State's concessions.

A. Interests in Life and Preventing Suicide

{117} No one doubts, as a general abstract matter, that the government has a compelling interest in preserving human life. The specific question presented in this case, however, is whether the State has a compelling—or substantial—interest in prolonging the lives of mentally competent, terminally ill patients, the quality of whose lives can no longer be meaningfully improved by treatment, and whose dying process is so intolerable that they wish to end their lives. The State is unable to articulate an interest in prolonging life in this narrow circumstance and concedes that it has no interest in preventing the terminally ill from hastening their deaths and avoiding painful, undignified, and inhumane endings to their lives. And the State does not dispute that when a patient is close to the end of life and suffering intractable, unrelenting pain, it is legal and ethical for her physician to sedate her and maintain her in a state of deep, continuous unconsciousness to the time of death, with or without providing artificial hydration or nutrition, thereby hastening death.

{118} Nor does the law treat the safeguarding of human life as a governmental interest that is absolute, subject to no exceptions. For example, under current New Mexico law and United

[16]Like the State, the majority and concurring opinions rely only on the broadly stated governmental interests set forth in *Glucksberg*, and like the State, they provide no analysis explaining how those interests justify denying the right to aid in dying. *See* Majority Op. ¶ 37; Concurring Op. ¶ 61. Nor do the opinions reconcile their position with the State's stipulation to the entire factual record and the State's concession that it has no interest in "prolonging the suffering of people who are terminally ill." To the extent that the majority and concurring opinions discuss aid in dying as "a matter of relatively recent human phenomena," Majority Op. ¶ 37; Concurring Op. ¶ 62, it is unclear why this itself poses an obstacle. If the concern is lack of information, there is now almost twenty years of data that the *Glucksberg* Court did not have.

States Supreme Court precedent, *any* patient may refuse or withdraw life-sustaining treatment, may voluntarily stop eating and drinking, and may obtain from a qualified physician medication that will deeply sedate her—and thereby hasten death—to alleviate suffering. *See generally* §§ 24-7A-1 to -18 (expanding the right to withdraw or withhold life-sustaining treatment to *all* medical decisions and *all* patients); *Glucksberg*, 521 U.S. at 736-37 (O'Connor, J., concurring) ("[A] patient who is suffering from a terminal illness and who is experiencing great pain has no legal barriers to obtaining medication, from qualified physicians, to alleviate that suffering, even to the point of causing unconsciousness and hastening death."); *Cruzan*, 497 U.S. at 279 (assuming a constitutionally protected right for those who are on life support to have it ended). Thus, some decisions to end one's life intentionally through termination or refusal of treatment are clearly regarded as worthy of protection, and this is so even where the assistance of a physician is required. These settled constitutional and statutory rights *necessarily* acknowledge a diminished governmental interest in the protection of life under certain circumstances.[17] *See Compassion in Dying v. Washington*, 79 F.3d 790, 820 (9th Cir. 1996) (en banc) ("When patients are no longer able to pursue liberty or happiness and do not wish to pursue life, the state's interest in forcing them to remain alive is clearly less compelling."), *rev'd on other grounds by Glucksberg*, 521 U.S. at 709. I would hold that the State's mere assertion of a general interest in the preservation of life cannot outweigh the constitutionally protected liberty interest of a mentally competent, terminally ill patient to aid in dying. *See Casey*, 505 U.S. at 857 ("[A] State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims." (citing *inter alia Cruzan*, 497 U.S. at 278)).

{119} The State's asserted interest in "preventing suicide and treating its causes," raised for the first time on appeal, is unquestionably significant but irrelevant in this case. Unrebutted expert testimony at trial established that the practice of aid in dying bears almost no medical or psychological overlap with suicide, as the two phenomena are fundamentally distinct mental and physical processes. Patients who request aid in dying do so because they are suffering from a terminal and incurable physical condition, rather than from a temporary, treatable mental pathology, as is typical of suicide. In addition, the collaboration between a physician and terminally ill patient over time reflects a deliberative, rational process intended to preserve the patient's sense of self and coherent self-image; the antithesis of the impulse-driven, self-destructive behavior of the mentally unstable person who commits suicide. *See, e.g.*, Roy F. Baumeister, *Suicide as Escape from Self*, Psychological Review, Vol. 97, No. 1 at 90 (1990). Unlike the suicidal person whose psychiatric disorder is amenable to treatment, the terminally ill patient wants to live but cannot because incurable disease makes near-term death inescapable. The State itself admits that individuals seeking aid in dying "are patients who, if the option were available to them, would continue to live a full and rewarding life." Furthermore, the families of terminally ill patients requesting aid in dying tend to be more prepared for,

[17]The United States Supreme Court has identified similarly shifting state interests at the other end of the spectrum of life. *See Roe*, 410 U.S. at 155; *Casey* 505 U.S. at 860, 869-73 (affirming the central holding of *Roe*). Thus, as the government's interest in life increases during the course of a pregnancy, *see Casey*, 505 U.S. at 869-73, so it diminishes when a suffering patient faces near and imminent death.

and at peace with, the deaths of their loved ones, and they are often gathered to say farewell; this is in contrast to the feelings of shock, blame, guilt, anger, and/or shame that often accompany death by suicide.

{120} This unchallenged expert testimony is supported by amici New Mexico Psychological Association and the American Medical Women's Association, American Medical Students Association, and New Mexico Public Health Association, who agree that the reasoning on which a mentally competent, terminally ill person bases a decision to end his or her life is distinct from the reasoning a clinically depressed person uses to justify suicide. As Justice James C. Nelson eloquently summarized in *Baxter v. Montana*,

> "Suicide" is a pejorative term in our society. . . . The term denigrates the complex individual circumstances that drive persons generally—and, in particular, those who are incurably ill and face prolonged illness and agonizing death—to [seek aid in dying]. The term is used to generate antipathy, and it does. [The patients seeking aid in dying] do not seek to commit "suicide." Rather, they acknowledge that death within a relatively short time is inescapable because of their illness or disease. And with that fact in mind, they seek the ability to self-administer, at a time and place of their choosing, a physician-prescribed medication that will assist them in preserving their own human dignity during the inevitable process of dying. Having come to grips with the inexorability of their death, they simply ask the government not to force them to suffer and die in an agonizing, degrading, humiliating, and undignified manner. They seek nothing more nor less[.]

2009 MT 449, ¶ 71, 354 Mont. 234, 224 P.3d 1211 (Nelson, J., specially concurring).

{121} I conclude that, although the State's interests in preserving life and preventing suicide may be compelling or substantial in the abstract, these broadly stated general interests are insufficient to justify infringing the right to aid in dying. Given the State's stipulations and concessions in this case, there is no basis for a contrary conclusion.

B. The Integrity of the Medical Profession and Adequate Regulation

{122} The State makes three arguments concerning its interest in the integrity of the medical profession and the necessity for regulations: (1) *Glucksberg* recognized the interest; (2) there are no preexisting legislative definitions of "mentally competent" and "terminally ill"; and (3) there is no regulation of the manner in which a patient makes the request. The stipulated factual record undercuts these arguments, and the State's unsupported conclusions are insufficient to justify Section 30-2-4's prohibition against aid in dying.

{123} The State's reliance on *Glucksberg*'s stated concerns about protecting the integrity and ethics of the medical profession is unavailing. First, to the extent that the *Glucksberg* Court generally accepted that "the American Medical Association, like many other medical and physicians' groups, has concluded that physician-assisted suicide is fundamentally incompatible with the physician's role as healer[,]" 521 U.S. at 731 (alteration, internal quotation marks, and citation omitted), that view began to shift significantly within the medical community soon after *Glucksberg* was decided. In fact, by 2005, two national surveys revealed that a majority of polled rank-and-file physicians

believed it to be ethical for a doctor to assist a competent, dying patient hasten death.[18] Two months ago, the California Medical Association, representing more than 40,000 physicians in that state, removed its historic opposition to a bill that would allow doctors to prescribe lethal doses of medication to terminally ill patients. California Medical Association Removes Opposition to Physician Aid in Dying Bill (May 20, 2015), *available at* http://www.cmanet.org/news/press-detail/?article=california-medical-association-removes. Regardless, a ruling holding that the New Mexico Constitution protects the right to aid in dying would not compel any physician to provide aid in dying.

{124} Second, the stipulated record in this case includes evidence of the experience with aid in dying in Oregon, Washington, Montana, and Vermont;[19] uncontroverted opinion evidence of medical ethicists and practitioners informed by the experience in United States jurisdictions with legalized aid in dying; and specific evidence concerning current palliative care and palliative/terminal sedation practices. And this evidence (almost two decades worth) proves that the medical profession has not become corrupted or compromised in any respect in jurisdictions where aid in dying is allowed. *Cf. Casey*, 505 U.S. at 863-64 (explaining that the decisions in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), and *Brown v. Board of Education*, 347 U.S. 483 (1954), "each rested on facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions[,]" and that "[i]n constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court's constitutional duty").

{125} Third, the State ignores the fact that, for all practical purposes, physicians already participate in helping terminal patients to end their lives. Some doctors do this by ending medical care necessary to sustain life. And, as explained above, when doctors terminally sedate patients, they know that they are "hastening that moment at which that death will occur."[20] The State has not cited any

---

[18] *See* The Jewish Theological Seminary, *Physician-Assisted Suicide Survey*, *available at* http://www.jtsa.edu/x5533.xml (finding that 57% of 1,088 physicians polled believed aid in dying ethical); *News & Innovations*, 20 J. Pain and Palliative Care Pharmacotherapy 83, 92 (2006) (finding that a majority of 677 physicians and 1,057 members of the public polled believed that physicians should be permitted to practice aid in dying). Most recently, in a survey of 17,000 American physicians representing 28 medical specialties, a majority stated the belief that patients with an "incurable and terminal" disease should have the option to choose aid in dying. Medscape Ethics Report 2014, Part 1: Life, Death, and Pain, at 2 (December 16, 2014), *available at* http://www.medscape.com/features/slideshow/public/ ethics2014-part1#1.

[19] For example, the Oregon Health Authority recently produced its 2014 annual "Death with Dignity Act - 2014" report, which identifies the number of prescriptions written, number of deaths, patient characteristics, physician characteristics, type of medications, complications, data analysis, and end-of-life concerns, along with historical, legal and statutory challenges, from the time of the law's enactment in 1998 through February 2, 2015, and includes supporting documents. Oregon Public Health Division, Oregon's Death With Dignity Act - 2014, *available at* https://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Pages/index.aspx. The Washington Department of Health similarly issued its fifth annual report containing much of the same information. Washington State Department of Health 2013 Death With Dignity Act Report, Executive Summary, *available at* http://www.doh.wa.gov/portals/1/Documents/Pubs/422-109-DeathWithDignityAct 2013.pdf.

[20] *See also* Roger S. Magnusson, *"Underground Euthanasia" & the Harm Minimization Debate*, 32 J.L. Med. & Ethics 486, 486 (2004) ("A national survey of 1092 American physicians found that 3.3 percent had written at least one 'lethal prescription,' while 4.7 percent had provided at least one lethal injection. A survey of American oncologists found that 3.7 percent had

example where the integrity and/or ethics of the medical profession have been called into question in jurisdictions in which aid in dying is practiced; the unspecified concern it adverts to here is speculative and bereft of evidentiary support.

{126} The State's asserted interest in adequate regulation rests on the flawed premise that such legislation is required. As a legal matter, the existence of regulations is surely not a prerequisite to the recognition of a constitutional right. As a factual matter, medical care is typically governed by professional standards of practice, not by statutes or court decisions that either prohibit or provide affirmative authorization for specific types of care. *See* 61 Am. Jur. 2d *Physicians, Surgeons, & Other Healers* § 187 (2015); *see also Pharmaseal Labs. Inc. v. Goffe*, 1977-NMSC-071, ¶ 14, 90 N.M. 753, 568 P.2d 589 (discussing a physician's obligation to adhere to recognized standards of medical practice in the community); *Gonzales v. Oregon*, 546 U.S. 243, 271 (2006) (noting that the development of best practices in medicine—also referred to as the standard of care—is left to physicians and regulated by the states).

{127} Dr. Kress, who practices aid in dying in Montana, which has no regulatory framework, testified at length about how doctors in that state would be liable for malpractice were they to prescribe the medication without "tapping into" the existing standard of care for aid in dying that has developed over seventeen years of clinical experience in Oregon. Today, that established standard of care, which the State does not dispute exists and to which physicians in New Mexico would be held, includes the requirements that an eligible patient for aid in dying must be a terminally ill, mentally competent adult who has made repeated requests over multiple visits, and who is able to self-administer the medication. Mental competence means that the patient does not have any gross cognitive or psychological impairment and that she understands the nature of the illness and the proposed treatments, including any alternatives such as hospice care and pain control, and the potential risks and probable results of taking the medication that will result in her death. Thus, for example, a patient with Alzheimer's disease or a brain cancer that affects cognition is not eligible for aid in dying. In addition, the standard of care for providing aid in dying directs, in part, that a patient is terminally ill when she has less than six months to live; that to establish terminality, two physicians must agree to the diagnosis; and that the patient must be able to understand the information presented to her and to make a reasoned decision. I also view as significant the trial testimony about a doctor's relationship with her patient and the often lengthy process of caring for someone who has a terminal illness.

{128} In addition to civil liability for failing to comply with the standard of care, as Dr. Kress described, all doctors in New Mexico are subject to regulation by the state medical board, which has been tasked by the Legislature with protecting the public from "the improper, unprofessional, incompetent and unlawful practice of medicine," and which supervises the profession by licensing competent physicians and by disciplining those whose performance falls below its requirements. NMSA 1978, § 61-6-1 (2003). Discipline for gross negligence includes the revocation or suspension of a license to practice medicine in New Mexico. NMSA 1978, § 61-6-15(A), (D)(12) (2008).

{129} The State's attempt to justify the blanket prohibition of a liberty interest that it concedes is "important and fundamental,"

performed euthanasia, while 10.8 percent had [provided aid in dying]." (footnote omitted)).

solely on the basis that the Legislature has not enacted legislation to ward off dangers that have not before materialized, is without merit. Such an approach would obliterate constitutional recognition and protection of virtually any liberty interest requiring the intervention of the medical profession, including the right found in *Roe*, 410 U.S. at 155, and affirmed in *Casey*, 505 U.S. at 846. Although I conclude that the need for regulation of aid in dying is not necessary given the existing standard-of-care framework, the Legislature is free to enact appropriate guidelines to ensure that only the terminally ill who make a voluntary and informed decision may receive aid in dying. What it may not do is intrude upon the doctor-patient relationship[21] as it relates to the constitutional right to aid in dying by criminalizing the provision of aid in dying by a willing physician at the request of a mentally competent, terminally ill patient.

C. Abuse of Vulnerable Populations and Slippery Slope

{130} At oral argument, the State acknowledged that preservation of life was "a pretty weak interest" when applied to terminally ill patients but said that the interest in life extended to potential areas of abuse. Although the State admitted that this was a "phantom concern" and that "the sky has not fallen," the State's amici cite interests in protecting vulnerable individuals, including the elderly and disabled, from exploitation and abuse, and in avoiding a slippery slope to "non-voluntary euthanasia."[22]

{131} Abuse of any sort is, of course, a legitimate governmental concern in general, but this "interest" is far too abstract to justify infringement of the constitutional right to aid in dying. First, the detailed protocols and established standard of care—requiring, among other things, the mental competence and informed consent of the patient, ability of the patient to self-administer the medication, a diagnosis of terminal illness by two physicians, and repeated requests with waiting periods in between—undeniably guard against the speculative dangers that amici raise. Moreover, amici fail to explain how the circumscribed right to aid in dying would increase the frequency of elder abuse and disproportionately affect the poor and disabled.

{132} And again, as previously noted, the State and amici have not provided a single example of abuse in any United States jurisdiction where aid in dying is legal. The record contains no such evidence, and almost two decades of substantial data from Oregon and elsewhere are to the contrary. *See* Or. Pub. Health Div., Oregon's Death with Dignity Act Rep. (2014); Wash. State Dept. of Health, 2013 Death with Dignity Act Rep., Exec. Summary (2014). According to the data and evidence described above, issues of coercion, insidious bias, and societal indifference have not occurred and have not threatened the safety of people who are poor,

[21]Here, as in the context of reproductive autonomy, "[w]hatever constitutional status the doctor-patient relation may have as a general matter, in the present context it is derivative of the [patient]'s position" and "is entitled to the same solicitude it receives in other contexts." *Casey*, 505 U.S. at 884.

[22]Non-voluntary euthanasia is defined as causing or hastening the death of "an incompetent, and therefore nonconsenting, person; euthanasia that occurs when the person killed is incapable of either making or refusing to make a request to be killed." *Black's Law Dictionary* (10th ed. 2014). Non-voluntary euthanasia has nothing to do with the practice of aid in dying.

elderly, uninsured, or disabled.[23] *See* Oregon's Death with Dignity Act Rep., *supra*, at 1-6; Wash. State Dept. of Health 2013 Death with Dignity Act Rep., *supra*, at 1-12; *see also* Margaret P. Battin, et al., *Legal Physician-Assisted Dying in Oregon and the Netherlands: Evidence Concerning the Impact on Patients in "Vulnerable" Groups*, 33 J. Med. Ethics 591, at 591 (2007) (finding no evidence of "heightened risk" to patients with non-terminal physical disabilities or mental disabilities or other vulnerable groups). Rather, patients who have ingested the medication are overwhelmingly white, married, college-educated, insured, receiving hospice services, and dying of cancer or ALS (commonly referred to as Lou Gehrig's disease). *See* Oregon's Death with Dignity Act Rep., *supra*, at 4-5; Wash. State Dept. of Health 2013 Death with Dignity Act Rep., *supra*, at 1. Nearly all patients pass away at home, and complications are rare, occurring in less than three percent of all cases. *See* Oregon's Death with Dignity Act Rep., *supra*, at 2, 5; Wash. State Dept. of Health 2013 Death with Dignity Act Rep., *supra*, at 1, 9.

{133} Trial experts testified that the potential for mistaken diagnoses are low. Physicians have established referral pathways to learn about safe ways to prescribe the medication, including methods for ensuring terminality and competency—medical diagnoses and determinations they are historically and routinely called upon to make outside the context of aid in dying. For instance, physicians frequently assess competency in order to obtain informed consent for surgical and other medical procedures. Doctors are typically capable of differentiating between clinical depression and a sincere, informed decision to seek aid in dying, and they are required by the standard of care to take a patient-centered approach to the issue, ensuring that all options have been meaningfully discussed by first exploring a patient's needs and fears related to death from terminal illness. Physicians also have experience diagnosing terminality before changing a patient's model of care from curative to hospice and before terminally sedating any patient. Some amici assert that doctors "often get terminality wrong in determining eligibility for hospice care." But they offer no supporting evidence, and the statement ignores the fact that we entrust doctors to make these judgments every day in accordance with the relevant standards of care in the medical profession. That some people may defy the odds and that doctors may be wrong from time to time are not reasons to deny to all New Mexicans a constitutional right to aid in dying. No diagnosis is fool proof. But the law does not require 100% certainty. The United States Supreme Court in *Casey* drew a line based on estimated time of fetal viability. Estimates of end-of-life are functionally no different.

{134} In my view, the potential for abuse is far more likely in other circumstances not proscribed by law. For example, the State suggested at oral argument that patients could legally stockpile their medication and ingest it to end their lives. And, as discussed, doctors already help patients end their lives by withholding essential medical care and by practicing terminal sedation, neither of which are subject to statutory regulation or to any reporting or recording requirements. Further, experts presented uncontested testimony that patients are sometimes sedated to death according to the instructions of physicians or surrogate decision makers, without the

[23] Amici's related argument concerning the increase in the number of physician-assisted deaths in the Netherlands and Belgium is inapplicable to the issue before us for a host of reasons including, most notably, the fact that those countries practice euthanasia and do so under an entirely different set of laws and standards. For the same reason, the concurring opinion's citation to a *New Yorker* article concerning euthanasia in Belgium, *see* Concurring Op. ¶ 64 n.9, is also inapt.

patient's explicit consent and without anyone "knowing what the patient would exactly want because the illness itself or the treatment has rendered them past [the] point of competency." It is hard to imagine that aid in dying makes the potential for abuse any more likely than do these practices; indeed, these practices could well create a greater risk of abuse. As noted constitutional scholar Erwin Chemerinsky put it, bluntly:

> Indeed, the same concern [about abuse] can be raised about the right to refuse medical care. A person could choose to terminate treatment because of pressure from family members or to reduce their emotional or financial burdens. Notwithstanding this concern, the [United States Supreme] Court recognized a right to refuse medical care in *Cruzan*. There is no reason why the concern is weightier or more powerful in the context of [aid in dying].
>
> Besides, if the concern is pressure, the solution should be to lessen the risk of pressure, not to prohibit [aid in] dying. And if the government is concerned that individuals might feel pressure to save their families from large expenses, then the government should ensure that the costs of medical care are adequately covered.

Chemerinsky, *supra*, at 1512.

{135} The unsupported assertions of the State and its amici about potential abuses are questionable, at best. The speculative possibility that vulnerable individuals might be induced or coerced to hasten their deaths cannot justify denying to all New Mexicans the constitutional right to aid in dying.

{136} Finally, amici raise a host of slippery slope arguments, including that aid in dying will assuredly lead to such horrors as euthanasia (voluntary and non-voluntary) of adults and children, that it will be administered by non-physician third parties, and that courts will soon be asked to extend the constitutional right to aid in dying to any competent person, regardless of whether or not the person is terminally ill. These cataclysmic predictions provide no basis to deny a constitutionally protected right to aid in dying. As the United States Supreme Court observed in *Cruzan*, "it is the better part of wisdom not to attempt, by any general statement, to cover every possible phase of the subject." 497 U.S. at 278 (alteration, internal quotation marks, and citation omitted); *see also Marozsan v. United States*, 852 F.2d 1469, 1498 (7th Cir.1988) (Easterbrook, J., dissenting) (stating that "[t]he terror of extreme hypotheticals produces much bad law"). The State has had "ample opportunity to articulate a constitutionally adequate justification" for prohibiting aid in dying. *Griego*, 2014-NMSC-003, ¶ 68. It has not done so.

{137} It is possible that, in another case, presenting different facts, the State might assert interests that a court might view differently. In this case, I end where I began, asking what possible interest the State could have in denying to a mentally competent, terminally ill patient whose medical condition is irreversible and irremediable, who has but a short time to live, and who is experiencing intractable suffering, the right to die peacefully, with dignity, at a time of her own choosing. The State has not advanced a sufficiently persuasive justification for denying aid in dying as that term is defined herein. Indeed, the State has acknowledged the profoundly diminished value of its asserted interests, to the extent it has not conceded that the interests do not exist at all. The factual record in this case, to which the State stipulated in its entirety—including the expert

testimony, the comprehensive body of data that has been amassed since *Glucksberg*, and the current state of medical practice and the standard of care—taken together with the State's significant concessions, compel the conclusion that the State's asserted interests do not, and cannot, withstand scrutiny under any standard of review; strict, intermediate, or rational basis. I would hold that Section 30-2-4 is unconstitutional as applied to a willing physician's act of providing aid in dying at the request of a mentally competent, terminally ill patient who wishes a peaceful end of life as an alternative to being forced to endure an unbearable dying process marked by suffering, including extreme pain and/or the loss of autonomy and dignity.

IV. THE REMAND PROPOSAL

{138} The author of the majority opinion, having concluded that the right asserted by Plaintiffs is not a fundamental right, would remand for the district court to (1) determine whether the State has met its burden to justify Section 30-2-4's proscription against aid in dying under intermediate scrutiny; (2) determine whether Section 30-2-4 is constitutional under rational basis review; (3) decide the merits of other constitutional theories that Plaintiffs raised below but did not cross appeal; and (4) make any additional "factual findings relevant to issues left unaddressed by the district court." Majority Op. ¶¶ 48-53. This proposal is completely at odds with the majority opinion's suggestion that it would be inappropriate for this Court to recognize a fundamental right because our Supreme Court is "the ultimate arbiter of the meaning of" our Constitution. Majority Op. ¶ 38. It goes without saying that our Supreme Court will have the final word. But it does not follow that this Court must remain mute until it does. (The cases cited by the majority do not stand for that proposition.) Regardless, it is impossible to reconcile this reasoning with a proposal to remand. And remand cannot be squared with true and settled legal principles as applied to this case.

{139} First, the question whether a constitutional right exists is a pure question of law, as is the standard to be applied in determining whether a governmental infringement of that right is constitutionally justified, *i.e.*, the level of scrutiny to be applied to the challenged statute. *State v. Lucero*, 2007-NMSC-041, ¶ 8, 142 N.M. 102, 163 P.3d 489 ("[The appellate courts] review issues of statutory and constitutional interpretation de novo."); *Breen v. Carlsbad Mun. Sch.*, 2005-NMSC-028, ¶ 15, 138 N.M. 331, 120 P.3d 413 ("The determination of which level of scrutiny is applicable under the Constitution is a purely legal question, and is reviewed de novo."); *Hyden v. N.M. Human Servs. Dep't*, 2000-NMCA-002, ¶ 12, 128 N.M. 423, 993 P.2d 740 (stating that interpretation of the state constitution is reviewed de novo). This means that we consider the legal question whether our Constitution protects the right asserted without any deference to the district court's conclusions on the issue. *In re Estate of Duran*, 2003-NMSC-008, ¶ 14, 133 N.M. 553, 66 P.3d 326 (explaining that the appellate court is not bound by district court's legal conclusions and "may independently draw [its] own conclusions of law on appeal" (internal quotation marks and citation omitted)); *Romero Excavation & Trucking, Inc. v. Bradley Constr., Inc.*, 1996-NMSC-010, ¶ 5, 121 N.M. 471, 913 P.2d 659 (stating that the appellate court does not defer to district court's legal conclusions but "determine[s] whether the [district] court correctly applied the law to the facts of the case"). And that means that a remand would be utterly pointless; all the more so here because the district court's conclusion that the asserted right is protected by our Constitution as a fundamental right necessarily includes the conclusion that the right is at least important, and the State has conceded that it cannot meet

its burden under intermediate scrutiny to demonstrate a substantial governmental interest sufficient to justify Section 30-2-4's intrusion on the right. As Justice Bosson stated in emphasizing that appellate courts should consider state constitutional issues, even if the district court did not, if the party asserting the right cited a state constitutional provision below:

> [E]ven if the court is not alerted, of what real import is that to the resolution of a pure question of law? The factual record here is not subject to any material dispute. This Court can decide the . . . issue whether or not the trial court addressed it. While in a perfect world the trial court should address each issue first, that aspiration should not be determinative. The statewide interest in development of our state Constitution tips the balance in favor of proceeding, and we should not hesitate to do so.

Garcia, 2009-NMSC-046, ¶ 63 (Bosson, J., concurring). Although Justice Bosson's comments were made in the context of discussing the requirements for preserving a state constitutional issue for appeal (an issue not presented here, where Plaintiffs' claims are based solely on the New Mexico Constitution), the point pertains.

{140} To the extent the author of the majority opinion believes that the district court should make further "findings," the factual record is undisputed, and our review is de novo on this aspect of the case as well. *See City of Albuquerque v. One 1984 White Chevy Ut.*, 2002-NMSC-014, ¶ 5, 132 N.M. 187, 46 P.3d 94 (explaining that the appellate courts review issues under de novo standard when there are no disputed material facts); *State v. Esparza*, 2003-NMCA-075, ¶ 13, 133 N.M. 772, 70 P.3d 762 ("Because the underlying facts . . . are not in dispute, we review the legal issues presented de novo."). The majority opinion's concern with factual findings in a case in which the facts are entirely undisputed is baffling in itself. But even assuming a legitimate concern, the author of the majority opinion does not identify a single fact purportedly necessary to resolve the legal issues presented in this case that is not already contained in the stipulated record; the opinion, in fact, does not address the factual record at all. Nor does the State argue that the record is incomplete, or that it lacked the opportunity to present its case in the district court. To the contrary, the State's counsel said below that "the issues are not fact disputes but legal disputes" and that he thought he "would be willing to stipulate to any facts that Plaintiffs wanted to prove."

{141} The contention that remand is necessary so that the district court can rule on other constitutional theories raised by Plaintiffs that the court saw no need to reach in light of its ruling is contrary to elementary legal principles. Appellate courts routinely affirm district court rulings on purely legal issues where the record allows, even when the district court relied on different reasoning, and when the court did not consider the issue at all. *State v. Vargas*, 2008-NMSC-019, ¶ 8, 143 N.M. 692, 181 P.3d 684 ("[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." (internal quotation marks and citation omitted)); *State v. Snyder*, 1998-NMCA-166, ¶ 8, 126 N.M. 168, 967 P.2d 843 (considering a state constitutional issue that was not considered or ruled upon in the district court); *State v. Beachum*, 1972-NMCA-023, ¶ 8, 83 N.M. 526, 494 P.2d 188 ("A decision of the trial court will be upheld if it is right for any reason."). No one argues that the district court erred by failing to determine whether the right to aid in dying is "important"

even if it is not "fundamental," as the district court held it was. Nor does anyone claim that the district court erred by failing to rule on Plaintiffs' other constitutional theories. Appellate courts treat claims made in the district court but not pressed on appeal as abandoned. *English v. English*, 1994-NMCA-090, ¶ 14, 118 N.M. 170, 879 P.2d 802. And the law requires that courts avoid reaching constitutional questions that need not be decided. *Minero v. Dominguez*, 1985-NMCA-100, ¶ 5, 103 N.M. 551, 710 P.2d 745 ("As a general principle, courts do not reach constitutional questions unless absolutely required to do so in order to resolve an issue presented."). The notion that a remand is necessary to decide abandoned constitutional issues so that "potential piecemeal appeals" may be avoided, *see* Majority Op. ¶ 52, makes no sense.

{142} The law does not require "the doing of useless things." *State ex rel. Peters v. McIntosh*, 1969-NMSC-103, ¶ 9, 80 N.M. 496, 458 P.2d 222. The facts and principles necessary to a correct holding are known. A remand would be pointless and would needlessly consume the resources of the parties and the courts while delaying final disposition by our Supreme Court.

V. SEPARATION OF POWERS

{143} The State contends that New Mexico courts may not consider whether the Legislature's criminalization of aid in dying is unconstitutional because doing so violates "separation of powers."[24] First, it argues that decisions about aid in dying are best left to the Legislature because that branch of government is directly accountable to the people, and the fact that Section 30-2-4 has been on the books for forty-two years without amendment demonstrates that the law reflects the values and social mores of New Mexico citizens. Second, the State argues that the "legal landscape surrounding physician[-]assisted suicide is unclear and filled with the kind of uncertainty the resolution of which demands legislative action." I address the State's arguments in reverse order.

{144} The State's argument based on the lack of existing regulations specifically governing the conduct of physicians who provide aid in dying has no merit. As a threshold matter, this argument has nothing to do with the separation of powers; rather, it concerns the type and scope of procedural safeguards the State says are necessary to govern the practice of aid in dying. The State's argument, moreover, is internally inconsistent, relying on contradictory contentions. The State first contends that the district court erred by failing to implement procedural safeguards for aid in dying such as those set forth in Oregon's Death With Dignity Act. It then argues that the court "lacks the constitutional power to put these safeguards in place" because these are exclusively legislative determinations. The State is correct that it is not the role of the court to legislate. But a ruling that the New Mexico Constitution protects the right to aid in dying in no way usurps the Legislature's power to regulate aid in dying in a manner that comports with that ruling. To the extent the Legislature deems regulations appropriate or necessary, nothing would prevent it from

[24]The separation of powers clause states:

> The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except [where constitutionally excepted].

N.M. Const. art. III, § 1.

enacting constitutionally permissible measures.

{145} The State's argument that the district court impermissibly intruded upon the exclusive province of the Legislature evinces a fundamental misunderstanding of the role of judicial review. Indeed, a decision holding Section 30-2-4 unconstitutional as applied to aid in dying necessarily would vitiate the State's argument that the district court violated the provisions in our Constitution requiring separation of powers. *See NARAL*, 1999-NMSC-005, ¶ 59 ("It is a function of the judiciary when its jurisdiction is properly invoked to measure the acts of the executive and the legislative branch solely by the yardstick of the [C]onstitution." (internal quotation marks and citation omitted)); *see also Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *Dillon v. King*, 1974-NMSC-096, ¶¶ 27-28, 87 N.M. 79, 529 P.2d 745 (holding that the Constitution is the supreme law of the land and that it is the judiciary's "function and duty to say what the law is and what the Constitution means"). When a constitutionally protected interest is at stake, preference for the legislative process cannot constrain this Court, no matter how long the law at issue has been in effect. *See Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 678 (1970) ("[N]o one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it."); *Loving*, 388 U.S. at 6-8 (noting that the state cannot rely on a history of exclusion to narrow the scope of the right); *Brown*, 347 U.S. at 492-93 (same); Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897) ("It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."). The State urges us to abdicate our constitutional responsibility to decide this matter. This I cannot and will not do.

{146} Just over a year ago, our Supreme Court struck down a statutory scheme dating back almost a century that effectively precluded same-sex couples from marrying. At the time, many argued that the policy debate over same-sex marriage, like the current debate over aid in dying, was best left to the legislative process and that judicial review would violate the separation of powers. Our Supreme Court did not retreat from its constitutional responsibility in favor of leaving the matter to civic discourse and legislative action. In *Griego*, 2014-NMSC-003, ¶ 1, Justice Chávez began by underscoring the duty of courts to interpret and apply the protections of the Constitution when the government is alleged to have threatened individual rights. The Court rejected at the outset the premise of the argument the State makes here:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Id. (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)). The Court went on to recognize for the first time a right to same-sex marriage and held that our marriage laws were unconstitutional insofar as they applied only to opposite-sex couples. *Id.* ¶ 69; *see also*

Obergefell, ___ U.S. at ___, 135 S. Ct. at 2605 ("The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act."); *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) ("It is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause[.]"); *Chambers v. State of Florida*, 309 U.S. 227, 241 (1940) ("Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement.").

{147} While I recognize that Section 30-2-4 was enacted over four decades ago, I disagree with the contention of the State and the concurring opinion, *see* Concurring Op. ¶ 62, that this fact immunizes the statute from judicial review of its constitutionality. The argument is little more than a bald assertion that the Legislature may constitutionally criminalize conduct simply because 'twas ever thus. The law is to the contrary. A ruling that Section 30-2-4 is unconstitutional as applied to aid in dying reflects neither ignorance nor disregard of a quintessential legislative function. It would not violate the separation of powers. It would simply be an exercise of judicial authority and responsibility that is a founding principle of our system of government. This is what courts do.

* * * *

{148} The question at the heart of this case is who has the right to decide when and how a mentally competent, terminally ill New Mexican will end her life after the options for meaningful improvement of her terminal condition have been exhausted, such that "life" means being forced to endure unbearable suffering until death arrives.[25] I recognize that citizens may disagree about the profound implications of a terminally ill individual's decision to end her suffering by ending her life, but our judicial obligation is to give effect to the liberty interests of all New Mexicans in accordance with the guarantees of our Constitution. Other choices and decisions central to personal autonomy and dignity have long enjoyed the status of constitutionally protected liberty interests. I would hold that the New Mexico Constitution protects aid in dying as a liberty interest subject to heightened scrutiny. While it is impossible for me to conclude that governmental infringement of the right to aid in dying could be justified by any lesser interest than that required for constitutional rights previously recognized as "fundamental," the required level of scrutiny need not be determined in this case. For the State concedes that mentally competent, terminally ill citizens have a fundamental right to decide for themselves when and how to end their lives, and it provides no acceptable justification for denying them the only means available to effectuate that right in a peaceful and dignified manner—a lethal dosage of medication prescribed by a willing physician acting in accordance with the established standard of care for aid in dying. It is beyond dispute that the suffering of these citizens "is too intimate

[25]"There are times when even the most accommodating sufferers can endure no more pain, no further losses of function, and no additional insults to their bodily and personal integrity. Despite receiving good palliative care, and regardless of prognosis, these patients arrive at a point where they are ready to end the struggle with their illness." Stern & Difonzo, *supra*, at 400 (footnote and internal quotation marks omitted).

and personal for the State to insist, without more, upon its own vision . . . , however dominant that vision has been in the course of our history and our culture." *Casey*, 505 U.S. at 852.

LINDA M. VANZI, Judge

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMSC-028

Filing Date: August 20, 2015

Docket No. 34,985

STATE OF NEW MEXICO, EX REL., GARY K. KING, NEW MEXICO ATTORNEY GENERAL,

Petitioner,

v.

HON. SHERI RAPHAELSON, First Judicial District Court Judge,

Respondent.

Hector H. Balderas, Attorney General
Scott Fuqua, Assistant Attorney General
Santa Fe, NM

for Petitioner

The Perrin Law Firm
Doug Perrin
Santa Fe, NM

for Respondent

OPINION

BOSSON, Justice.

{1} Under Article VI, Section 33 of the New Mexico Constitution, a district judge elected to that position in a partisan election is thereafter "subject to retention or rejection in like manner at the general election every sixth year." Section 33 does not specify when this six-year term begins, particularly when the elected judge succeeds a predecessor who has not completed his or her full term in office. In that case, does the successor judge's election mark the beginning of a new six-year term, or does the successor judge assume the six-year term of the predecessor judge? The answer determines when the successor judge must stand for nonpartisan retention election. For the reasons that follow, we hold that under the New Mexico Constitution a judge elected in a partisan election is subject to retention in the sixth year of the predecessor judge's term. Our holding is consistent with the intent and purpose of our New Mexico Constitution.

BACKGROUND

{2} In 2009, Governor Bill Richardson appointed District Judge Sheri Raphaelson to fill a vacancy in Division V of the First Judicial District Court created when then-District Judge Timothy L. Garcia was appointed to the New Mexico Court of Appeals, leaving an unexpired term of office. A year later, as required by Article VI, Section 35 of the New Mexico Constitution (providing that the appointee "shall serve until the next general election" and that at the election a judge "shall be chosen . . . and shall hold the office until the expiration of the original term"), Judge Raphaelson successfully ran in a partisan election to remain in office as Judge Garcia's successor. Thereafter, Judge Raphaelson had only to run for retention, but in what year?

{3} On March 11, 2014, Judge Raphaelson filed a declaration of candidacy to place her name on the ballot for retention in the 2014 general election in accordance with Article VI, Section 34 of the New Mexico Constitution and NMSA 1978, Section 1-8-26 (2013). In the general election, only 55.87 percent of the votes cast were in favor of Judge Raphaelson's retention, falling short of the 57 percent necessary to retain the office as stipulated by Article VI, Section 33(A) of the New Mexico Constitution.[1]

{4} Days after the 2014 general election, despite her unsuccessful retention election, Judge Raphaelson publically declared her intent to remain on the bench until January 1, 2017, not January 1, 2015. Judge Raphaelson contended for the first time that her six-year term of office had begun on January 1, 2011, after her successful partisan election, and that she had mistakenly stood for retention prematurely.

{5} On November 21, 2014, the State of New Mexico, through the Office of the Attorney General, filed a petition for writ of quo warranto with this Court seeking to remove Judge Raphaelson from the bench due to her unsuccessful retention election. After hearing oral arguments, we issued the writ requested by the Attorney General removing Judge Raphaelson from judicial office effective January 1, 2015. We issue this opinion to explain our reasoning.

DISCUSSION

{6} Beginning at statehood, New Mexico judges were elected and reelected at periodic partisan elections. That changed in 1988 when the electorate amended the New Mexico Constitution.

{7} "In 1988, the Constitution was amended to institute a merit selection system, in which the governor now fills judicial vacancies by appointment from a list of applicants who are evaluated on a variety of merit-based factors and recommended by a judicial nominating commission." *State ex rel. Richardson v. Fifth Judicial Dist. Nominating Comm'n*, 2007-NMSC-023, ¶ 16, 141 N.M. 657, 160 P.3d 566 (internal footnote omitted); *see also* N.M. Const. art. VI, §§ 35-37. Of particular significance to this case, "[t]he appointed judge is then subject to one partisan election in the next general election, after which he or she is subject to nonpartisan retention election, requiring a fifty-seven percent supermajority to be retained in office." *State ex rel. Richardson*, 2007-NMSC-023, ¶ 16; *see also* N.M. Const. art. VI, §§ 33, 35-37. "The 1988 amendment to the New Mexico Constitution adopting the new judicial selection system was the culmination of over fifty years of efforts to reform the method of selecting judges." Leo M. Romero, *Judicial Selection in New Mexico: A Hybrid of Commission Nomination and Partisan Election*, 30 N.M. L. Rev. 177, 181 (2000).

{8} Judge Raphaelson argues that Article VI, Section 33, which implements the retention requirement, controls her term in office. Paragraph C of Section 33 states that "[e]ach district judge shall be subject to retention or rejection in like manner at the general election every sixth year." Judge Raphaelson interprets this provision to mean that her six-year term began after her partisan election to succeed Judge Garcia in 2010. Therefore, under Judge Raphaelson's interpretation, her term in office would not expire until December 31, 2016. Notwithstanding the unfavorable results of the 2014 retention election, Judge Raphaelson maintains that she should be allowed to remain on the bench through that date. The 2014

[1] *See* New Mexico Secretary of State Official Election Results, *available at* http://electionresults.sos.state.nm.us/resultsSW.aspx?type=JDX&map=CTY (last viewed on July 21, 2015).

retention election was, therefore, a "nullity because Judge Raphaelson's term was not up and had not expired and she was not subject to retention" until 2016.

{9} The Attorney General disagrees, arguing that Judge Raphaelson has misconstrued the 1988 amendments to the Constitution. According to the Attorney General, Judge Raphaelson was properly up for retention in the 2014 general election pursuant to Article VI, Sections 33, 35, and 36 of the New Mexico Constitution. Having not garnered 57 percent of the votes cast on her retention, Judge Raphaelson was required to vacate her position by January 1, 2015. *See* N.M. Const. art. VI, § 34 (stating that the office of district judge "becomes vacant on January 1 immediately following the general election at which the . . . judge is rejected by more than forty-three percent of those voting on the question of retention or rejection").

{10} We analyze these competing positions and conclude that the Attorney General's interpretation is more reasonable considering both the text and the purpose of the 1988 constitutional amendments. We explain our reasoning.

In 2010 Judge Raphaelson was elected to complete Judge Garcia's six-year term in office, not to begin a new six-year term

{11} "In construing the New Mexico Constitution, this Court must ascertain the intent and objectives of the framers." *See In re Generic Investigation into Cable Television Servs.*, 1985-NMSC-087, ¶ 10, 103 N.M. 345, 707 P.2d 1155. In doing so, "[t]he provisions of the Constitution should not be considered in isolation, but rather should be construed as a whole." *See id.* ¶ 13; *see also Block v. Vigil-Giron*, 2004-NMSC-003, ¶ 9, 135 N.M. 24, 84 P.3d 72 ("In general, we interpret constitutional provisions as a harmonious whole . . . .").

{12} Judge Raphaelson's argument relies on interpreting Section 33 of the Constitution in isolation when it prescribes that a district judge shall be subject to retention "at the general election every sixth year." But Section 33 does not prescribe when a judge's six-year term begins, so we cannot confine our analysis to that one paragraph. As the Attorney General rightly points out, Sections 35 and 36 expressly define the term of a judge, like Judge Raphaelson, who is elected to the bench following the interim appointment process. Therefore, in determining when Judge Raphaelson's term begins and ends, we must construe Section 33 in conjunction with Sections 35 and 36. *See Generic Investigation*, 1985-NMSC-087, ¶ 13.

{13} Although Section 35 addresses the appointment and election of *appellate* judges, that section, with some exceptions pertaining to the makeup of the judicial nominating committee, is made applicable to district judges as well by Section 36. *See* N.M. Const. art. VI, § 36 ("Each and every provision of Section 35 of Article 6 of this constitution shall apply to the district judges nominating committee . . . .") (internal quotation marks omitted). Thus, we look to Section 35 for guidance. After describing the manner in which the nominating committee operates and the governor's appointment power, Section 35 provides: "Any person appointed shall serve until the next general election. That person's successor shall be chosen at such election and shall hold the office until the expiration of *the original term*." (Emphasis added.)

{14} The inclusion of the phrase "original term" in Section 35 is important. The successor judge—whether appointed or elected—holds the office for the remainder of the "original term." Therefore, in calculating the time at which the successor judge will first be subject to a retention election, we look to the date that the "original term" expires. At the very least, the text of Section 35 implies

that we focus on the "original term" to calculate the time of future retention elections, particularly in the absence of any other language in the 1988 amendments indicating a contrary result.

{15} Here, the "original term" was the term for which Judge Raphaelson's predecessor, Judge Garcia, was retained. In 2008, the people retained Judge Garcia for a new six-year term beginning January 1, 2009.[2] Had Judge Garcia remained on the district court, his term would have ended six years after his retention, on December 31, 2014, and he would have been subject to another retention vote in the 2014 general election. *See* N.M. Const. art. VI, § 33(C) ("Each district judge shall be subject to retention or rejection in like manner at the general election every sixth year.").

{16} However, on November 12, 2008, days after Judge Garcia's successful retention election, Governor Richardson appointed Judge Garcia to the Court of Appeals, leaving his district court seat vacant.[3] After the constitutional nomination process was complete, Governor Richardson appointed Judge Raphaelson early in 2009 to fill that vacancy "until the next general election," which took place in November 2010. *See* N.M. Const. art. VI, § 35 ("Any person appointed shall serve until the next general election."). At that partisan election, the voters chose Judge Raphaelson to succeed Judge Garcia and "hold the office until the expiration of the *original term*." *See id.* (emphasis added). Because the "original term" was that of Judge Garcia, Judge Raphaelson was subject to a retention vote at the same time Judge Garcia would have been—the 2014 general election. During that election, she did not receive 57 percent of the vote in her favor, and therefore her seat became vacant on January 1, 2015. *See* N.M. Const. art. VI, § 34 ("The office of any justice or judge subject to the provisions of Article 6, Section 33 of this constitution becomes vacant on January 1 immediately following the general election at which the justice or judge is rejected by more than forty-three percent of those voting on the question of retention or rejection.").

New Mexico's judicial selection system was designed so that all district judges are up for retention at the same time

{17} As previously stated, Section 35 stipulates that "[a]ny person appointed shall serve until the next general election. *That person's successor* shall be chosen at such election and shall hold the office until the expiration of the original term." (Emphasis added.)

{18} Judge Raphaelson argues that the phrase "original term" in Section 35 must be read in context with the phrase "that person's successor." According to Judge Raphaelson, "that person's successor" is the judge elected to succeed the appointed judge at the first partisan election. If the winner of the partisan election is someone other than the appointed judge, then he or she becomes the "successor" to the appointed judge and serves the remainder of the "original term."

{19} When, however, the appointed judge is herself successful at the partisan election, Judge Raphaelson maintains that she is not a "successor" judge, as contemplated by Section 35, but is merely one continuing in office. According to Judge Raphaelson, therefore, the phrase "[t]hat person's successor . . . shall hold the office until the expiration of the original term" does not apply because she is not a "successor" to herself. Thus, she would

[2] *See* http://www.nmjpec.org/en/judge-evaluation?election_id=119&year=2008 (last viewed on July 21, 2015).

[3] *See* https://coa.nmcourts.gov/bios/garcia.php (last viewed on July 22, 2015).

have this Court create a new term of office for appointed judges who succeed at the partisan election, one that would cast aside the "original term" and begin anew with a six-year term upon election.

{20} We concede that Judge Raphaelson's position is not inherently unreasonable, particularly if it were supported by some affirmative language in the 1988 amendments. But the text of the Constitution yields no such support. Judge Raphaelson's argument attempts to add a substantive distinction between an appointed judge who wins a subsequent partisan election and an appointed judge who loses a subsequent partisan election. Whatever the policy arguments might be in support of such a distinction, the text of Section 35 ignores them.

{21} Of equal importance, we would have to consider the question without regard to context and the history of both the 1988 amendments and the constitutional language that preceded it. Such an examination reaffirms our initial conclusion that the phrase "original term" applies in all situations, regardless of whether the winner at the partisan general election is the appointed judge or a new judge. In a word, New Mexico has consistently followed a practice of uniformity going back many years, one that requires all judges statewide to stand for retention at the same time, a practice modeled on years of history that preceded even the 1988 amendments. We now turn to those lessons of history.

{22} "The historical purposes of the constitutional provision are instructive in determining the obvious spirit . . . utilized in [its drafting]." *State v. Boyse*, 2013-NMSC-024, ¶ 16, 303 P.3d 830 (internal quotation marks and citation omitted, alterations in original). The U.S. Supreme Court has observed that "[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions." *See N.L.R.B. v. Noel Canning*, ___ U.S. ___, 134 S.Ct. 2550, 2559 (2014) (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929) (alterations in original)). Similarly, this Court has noted the relevancy of past practice in interpreting constitutional and statutory issues. *See Jones v. Murdoch*, 2009-NMSC-002, ¶ 28, 145 N.M. 473, 200 P.3d 523 ("[I]n light of past practice, it would be unreasonable to conclude that the Legislature decided to explicitly give the target the right to alert the grand jury to the existence of exculpatory evidence while nevertheless allowing the prosecutor to reject such offers without a check."); *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 32, 125 N.M. 343, 961 P.2d 768 (holding that "the past practices of the New Mexico Legislature and Executive are instructive" in determining whether the executive branch had exceeded its constitutional powers in enacting and implementing certain welfare regulations).

{23} Prior to the adoption of the 1988 amendments, "our Constitution required partisan election of the entire judiciary, with the governor filling judicial vacancies by appointment." *State ex rel. Richardson*, 2007-NMSC-023, ¶ 16 (internal citations omitted). This Court held under the previous system, that the terms for all district court judges were designed to be on the same schedule, beginning and ending at the same time every six years regardless of when or whether the seat became vacant or newly occupied. *See State ex rel. Swope v. Mechem*, 1954-NMSC-011, ¶ 22, 58 N.M. 1, 265 P.2d 336 ("[U]nder all equations of vacancy in these offices, excepting only a vacancy occurring by the creation of a new judge . . . the terms of district judges . . . will begin and end at the same time.").

{24} *Swope* involved three district judges who were appointed by former Governor Edwin Mechem, two in 1949 and one in 1951.

See id. ¶ 1. Each of the three district judges ran and were elected in the first general election following their appointments, Judges Swope and Harris in 1950 and Judge Bonem in 1952. *See id.* ¶ 2. All three judges then intended to run again in 1954 when "the terms of all other district judges [would] expire." *See id.* Governor Mechem, however, notified the three judges that he would not include their offices in the 1954 election proclamation along with all other district judges. The governor contended, as Judge Raphaelson does here, that each judge held his respective office for six years from the date of that judge's election. *See id.* This Court concluded, based on former Article XX, Section 4 of the New Mexico Constitution, that the terms of office for all district judges began and ended at the same time: the 1954 general election. *See Swope*, 1954-NMSC-011, ¶¶ 20-22.

{25} The language of former Article XX, Section 4 is substantially similar to the language of current Article VI, Section 35. *Compare* N.M. Const. art. XX, § 4 (1912) ("[T]he governor shall fill such vacancy by appointment, and such appointee shall hold such office until the next general election. His successor shall be chosen at such election and shall hold his office until the expiration of the original term.") *with* N.M. Const. art. VI, § 35 ("Any person appointed shall serve until the next general election. That person's successor shall be chosen at such election and shall hold the office until the expiration of the original term.").

{26} This Court held that Governor Mechem's interpretation of the last sentence of Article XX would render the word "expiration" as well as the whole sentence meaningless. *See Swope*, 1954-NMSC-011, ¶ 21 ("If it be said that 'original term,' as applied to these two offices, means any four or six years respectively between two general elections, then the word 'expiration,' in fact, the whole sentence becomes surplusage and meaningless."). This Court concluded, therefore, that under Article XX, Section 4, "there can be no doubt that the appointee or his successor elected at the general election following his appointment serves only until the termination date of the term of the original incumbent." *Swope*, 1954-NMSC-011 ¶ 21. "This means that, under all equations of vacancy in these offices, excepting only a vacancy occurring by the creation of a new judge . . . , the terms of district judges . . . will begin and end at the same time." *Id.* ¶ 22.[4] The Court concluded, as we have in this opinion, that if the drafters of the Constitution "desired to make an exception of this one isolated case, it is hard to believe that it would not have been spelled out with particularity." *Id.* Concluding that the drafters had a valid interest in preserving concurrent terms for all district judges, this Court entered its writ of mandamus compelling the governor to place the three judicial positions on the 1954 ballot. *Id.*

{27} The *Swope* opinion encapsulates the common understanding and interpretation of terms of office for district judges, not only at the time, but up to the successful amendment of the Constitution in 1988. In light of this Court's clear holding in *Swope,* the framers of the 1988 amendments had a choice. They could have altered the definition of a term of office, much as the Attorney General argued unsuccessfully in 1954 and Judge Raphaelson does here. But they did not do so. Far from a change in direction, the 1988 amendments enshrine the same understanding and interpretation as *Swope.* Under paragraph E of Article VI, Section 33:

> Every . . . district judge . . . holding office on January 1 next following the date of the election at which this

[4]Our holding in the present case also does not address the question of newly created judgeships.

> amendment is adopted shall be deemed to have fulfilled the requirements of Subsection A of this section [regarding partisan election] and the . . . judge shall be eligible for retention or rejection by the electorate at the general election next preceding the end of the term of which the . . . judge was last elected prior to the adoption of this amendment.

{28} In other words, any district judge holding office on January 1, 1989, was deemed to have been elected in a partisan election and eligible for retention "at the general election next preceding the end of the term of which the . . . judge was last elected." Because, as confirmed in *Swope*, all district judges were elected at the same time every six years prior to the adoption of Article VI, Section 33, paragraph E ensured that all district judges would stand for retention at the same time every six years under the new system.

{29} The history of the Division V seat on the First Judicial District Court, which Judge Raphaelson held, illustrates this point. Division V of the First Judicial District was created in 1980. *See* 1980 N.M. Laws, ch. 141. Governor Bruce King appointed J. Michael Francke to fill the new position on May 6, 1980. Judge Francke held that office until 1983, when it was filled by the appointment of Arthur Encinias. Judge Encinias held the position at the time the 1988 constitutional amendments were adopted. Accordingly, Judge Encinias successfully ran for retention in 1990, the first year retention elections were held for all district judges across the state.[5] *See* N.M. Const. art. VI, § 33(E); *see also* Romero, *supra*, at 182 ("All judges sitting in 1988 would be considered to have met the competitive election requirement and would face only retention elections."). Six years later, Judge Encinias was retained a second time. He retired in advance of the 2002 election, and Judge Garcia was chosen in the partisan election of that same year. Thereafter, Judge Garcia was retained in 2008 simultaneously with all other sitting judges. As discussed above, Judge Raphaelson then filled Judge Garcia's unexpired term which ended in 2014.

{30} Uniformity of judicial terms serves a legitimate public purpose. Admittedly, it is not the only way to devise a judicial system. The constitutional framers, both in the distant past and more recently, could have selected a system not unlike the one for which Judge Raphaelson advocates, but clearly they did not. That choice is not unreasonable. It fosters consistency and uniformity thereby avoiding confusion in the electorate. Both judges and the people who will sit in judgment of their performance know exactly when that opportunity arises—and when to focus on that performance—every six years across the state. *See Swope*, 1954-NMSC-011, ¶ 22 (in retaining concurrent terms, the framers of the Constitution were preserving uniformity). Under a contrary interpretation, district judges would have informally staggered terms based capriciously upon when the individual judge was elected, regardless of whose term the judge was filling. Such an interpretation might lead to confusion by creating an uneven and ad-hoc system with judges being elected at differing times. Some years, many judges might stand for retention; other years only a few. The framers and the people who adopted the 1988 amendments should be supported for selecting reason over disorder. *See* Romero, *supra*, at 224-25 (stating that "the

[5] *See* Secretary of State Statewide Results for 1990 General Election http://www.sos.state.nm.us/uploads/files/Election%20Results/CanvassGeneral1990.pdf (last viewed on July 22, 2015).

nomination-appointment aspect and the electoral aspect have played significant roles in the selection of New Mexico judges" and "[t]wo in-depth examinations of the compromise system concluded that the current system should not be jettisoned").

CONCLUSION

{31} We appropriately granted the State's petition for a writ of quo warranto. Judge Raphaelson was properly up for retention in the 2014 general election pursuant to Article VI, Sections 33, 35, and 36 of the New Mexico Constitution. Judge Raphaelson's failure to earn 57 percent of the votes in favor of retention in the 2014 general election resulted in her loss of the seat. Any effort to remain in office beyond December 31, 2014 contravened the Constitution, justifying our writ of quo warranto.

{32} **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 COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-101

Filing Date: March 19, 2015

Docket Nos. 32,605 & 32,606

(Consolidated)

FERNANDO GALLEGOS,

Plaintiff-Appellant,

v.

ELDO FREZZA, M.D.,

Defendant-Appellee,

and

PRESBYTERIAN HEALTH PLAN, INC., A New Mexico Domestic For-Profit Corporation,

Defendant.

Consolidated With

NELLIE GONZALES,

Plaintiff-Appellant,

v.

ELDO FREZZA, M.D.,

Defendant-Appellee,

and

PRESBYTERIAN HEALTH PLAN, INC., A New Mexico Domestic For-Profit Corporation,

Defendant.

Jones, Snead, Wertheim & Clifford, P.A.
Jerry Todd Wertheim

Roxie P. Rawls-De Santiago
Samuel C. Wolf
Elizabeth C. Clifford
Santa Fe, NM

for Appellants

Hinkle, Hensley, Shanor & Martin, LLP
William P. Slattery
Dana S. Hardy
Zachary T. Taylor
Santa Fe, NM

for Appellee

Brown & Gay, P.C.
Remo E. Gay
Melissa A. Brown
Albuquerque, NM

for Defendant Presbyterian Health Plan, Inc.

OPINION

BUSTAMANTE, Judge.

{1} Plaintiffs Nellie Gonzales and Fernando Gallegos appeal the district court's dismissal of their medical malpractice suit against Dr. Eldo Frezza, a Texas resident, for lack of personal jurisdiction. On appeal, we examine whether Dr. Frezza has sufficient contacts with the State of New Mexico to permit the state courts to assert either general or specific personal jurisdiction over him. We conclude that most of the asserted contacts with this state are insufficient to establish general jurisdiction. We remand for further proceedings, however, because the record on appeal is insufficient to address whether personal jurisdiction exists based on an arrangement between New Mexico Presbyterian Health Plan and Texas Tech Physicians Associates through which Dr. Frezza was referred New Mexico residents for care.

I. BACKGROUND

{2} After undergoing bariatric surgery, New Mexico residents Nellie Gonzales and Fernando Gallegos (collectively, Plaintiffs) sued Dr. Eldo Frezza for medical malpractice and Presbyterian Health Plan (Presbyterian) for breach of contract and negligent referral. Both surgeries took place in Lubbock, Texas at the Texas Tech University Health Sciences Center (the Center). Dr. Frezza was an employee of the Center, which is a governmental unit of the State of Texas. *See Tex. Tech Univ. Health Scis. Ctr. v. Ward*, 280 S.W.3d 345, 348 (Tex. App. 2008) (stating that the Center is a governmental unit).

{3} Both Plaintiffs were employees of the State of New Mexico and covered by Presbyterian. When they sought insurance coverage for the bariatric procedure, they were directed to Dr. Frezza by Presbyterian. No other bariatric surgeons were in the Presbyterian network at that time.

{4} Dr. Frezza moved for dismissal based on the lack of personal jurisdiction and Plaintiffs' failure to state a claim. *See* Rule 1-012(B)(2), (6) NMRA. After a hearing at which it considered documentary evidence, the district court found that it did not have personal jurisdiction over Dr. Frezza and dismissed the complaint. The district court did not rule on Dr. Frezza's other motion. Plaintiffs appealed. Plaintiffs also filed a motion for reconsideration in the district court under Rule 1-060(B)(6) NMRA. Such motion "does not affect the finality of a judgment or suspend its operation." *Id.* As of the time that briefs were submitted, the district court had not ruled on the motion for reconsideration. Additional facts are provided as pertinent to our discussion.

{5} We note that these cases are two of three presently before the Court of Appeals that are based on a similar set of facts. *See Montaño*

v. Frezza, COA No. 32,403. In *Montaño,* filed concurrently, we hold that the Second Judicial District Court did not err in concluding that application of Texas law would violate New Mexico public policy and denying Dr. Frezza's motion to dismiss for failure to state a claim.

II. DISCUSSION

A. The Law of Personal Jurisdiction

{6} The question before us on appeal is whether the district court properly concluded that it could not fairly exert jurisdiction over Dr. Frezza because he did not have sufficient contacts with New Mexico. *See Zavala v. El Paso Cnty. Hosp. Dist.*, 2007-NMCA-149, ¶ 10, 143 N.M. 36, 172 P.3d 173 ("[F]or purposes of personal jurisdiction, we . . . focus on . . . whether [the defendants] had the requisite minimum contacts with New Mexico to satisfy due process."). "[T]he minimum contacts required for the state to assert personal jurisdiction over a defendant depends on whether the jurisdiction asserted is general (all-purpose) or specific (case-linked)." *Sproul v. Rob & Charlies, Inc.*, 2013-NMCA-072, ¶ 9, 304 P.3d 18. More specifically, "[a] state exercises general jurisdiction over a nonresident defendant when its affiliations with the state are so continuous and systematic as to render it essentially at home in the forum state." *Id.* ¶ 12 (alterations, internal quotation marks, and citation omitted). Specific jurisdiction may apply "if [a] defendant's contacts do not rise to the level of general jurisdiction, but the defendant nevertheless purposefully established contact with New Mexico." *Id.* ¶ 16 (internal quotation marks and citation omitted). "In contrast to general, all-purpose jurisdiction, specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011) (internal quotation marks and citation omitted). In analyzing a defendant's contacts with New Mexico, our focus is on the "defendant's activities which . . . provide the basis for personal jurisdiction, not the acts of other defendants or third parties." *Visarraga v. Gates Rubber Co.*, 1986-NMCA-021, ¶ 18, 104 N.M. 143, 717 P.2d 596.

{7} "Once it has been decided that a defendant purposefully established minimum contacts within the forum [s]tate, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (internal quotation marks and citation omitted). Thus, as part of the overall analysis of whether exercise of jurisdiction would comport with constitutional due process, we may consider "the burden on the defendant, the forum [s]tate's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several [s]tates in furthering fundamental substantive social policies." *Id.* (internal quotation marks and citation omitted).

B. Standard of Review

{8} Here, the district court concluded that it had neither general nor specific jurisdiction over Dr. Frezza. We review this conclusion de novo. *Cronin v. Sierra Med. Ctr.*, 2000-NMCA-082, ¶ 10, 129 N.M. 521, 10 P.3d 845. Our approach to review was stated succinctly in *Cronin:*

> If[] . . . a district court bases its ruling upon the parties' pleadings and affidavits, the applicable standard of review largely mirrors the standard that governs appeals

> from the award or denial of summary judgment. In this respect, both a district court and this appellate court must construe the pleadings and affidavits in the light most favorable to the complainant. The complainant need only make a prima facie showing that personal jurisdiction exists when a district court does not hold an evidentiary hearing.

Id. (citations omitted).

{9} Although only a prima facie showing is required, "[w]hen a party contests the existence of personal jurisdiction under Rule 1-012(B)(2) and accompanies its motion with affidavits or depositions, . . . the party resisting such motion may not stand on its pleadings and must come forward with affidavits or other proper evidence detailing specific facts" supporting jurisdiction. *Doe v. Roman Catholic Diocese of Boise, Inc.*, 1996-NMCA-057, ¶ 10, 121 N.M. 738, 918 P.2d 17; *see State ex rel. Anaya v. Columbia Research Corp.*, 1978-NMSC-073, ¶ 8, 92 N.M. 104, 583 P.2d 468 (holding that the state failed to establish personal jurisdiction over the defendant when it did not proffer proof of the jurisdictional facts alleged in its complaint after the defendant challenged them).

C. Plaintiffs' Allegations

{10} Given this standard of review, we set out Plaintiffs' allegations in some detail. Here, Plaintiffs made the following assertions:

> 2. [Dr. Frezza] is licensed to practice medicine in the State of New Mexico[;]
>
> . . . .
>
> 6. Plaintiff[s'] cause[s] of action arise[] from Dr. Frezza's and Presbyterian's transaction of business within the State of New Mexico through which Dr. Frezza and Presbyterian undertook to encourage New Mexico citizens to travel to Lubbock, Texas where they would receive bariatric surgery from Dr. Frezza[;]
>
> 7. Dr. Frezza used a combination of advertising in New Mexico, testimonials from former New Mexican patients, and a special relationship with Presbyterian to encourage New Mexico residents to seek treatment from him . . . [;]
>
> 8. Dr. Frezza encouraged his patients to use his website to provide testimonials, prominently noting their status as New Mexico residents, in order to encourage other New Mexico residents to seek treatment from him[;]
>
> 9. Dr. Frezza used his website to reach New Mexico residents . . . [;]
>
> 10. Dr. Frezza's advertising in New Mexico . . . and the special relationship he developed with Presbyterian were successful efforts undertaken by [him] to secure patients from New Mexico, which constitute[s] the transaction of business within the [s]tate[;]
>
> . . . .
>
> 12. Dr. Frezza . . . on numerous occasions traveled to Santa Fe and saw or treated patients during the trip . . . [;]

13. On information and belief, Dr. Frezza owns six tracts of real property in the State of New Mexico, County of Taos, and is therefore also subject to general jurisdiction in . . . New Mexico[;]

14. [Two] of many New Mexico citizens who learned of Dr. Frezza through his advertising and [were] told by Presbyterian that Dr. Frezza was the only "in network" bariatric surgeon from whom [they] could receive treatment [were P]laintiffs, who traveled to Lubbock, Texas for surgery by Dr. Frezza[;]

15. [Plaintiff[s']] causes of action arise[] directly from Dr. Frezza's transaction of business within the State of New Mexico.

{11} Thus, Plaintiffs asserted that Dr. Frezza had four types of contact with New Mexico: (1) a website, (2) a New Mexico medical license, (3) ownership of property in New Mexico, and (4) a relationship with Presbyterian. On appeal, they also argue that a book by Dr. Frezza called *The Business of Surgery*, in which the author discusses strategies for negotiating beneficial managed care agreements and which is available in New Mexico, provides another contact with this state. In support of these allegations, Plaintiffs offered a print out of Dr. Frezza's website, selected pages from Dr. Frezza's book, and copies of the deeds to property in New Mexico owned by Dr. Frezza.

D. Dr. Frezza's Affidavits

{12} Dr. Frezza challenged Plaintiffs' jurisdictional assertions by presenting his own affidavit as well as an affidavit by Lori Velten, the Managing Director of Provider-Payor Relations at the Center. In addition to these affidavits, Dr. Frezza provided a copy of the "[s]pecialty [s]ervices [a]greement" (the agreement) between Presbyterian and Texas Tech Physicians Associates (TTPA), an organization established by the Center to handle managed care contracting.

{13} In his affidavit, Dr. Frezza stated that he was a "participating provider" with Presbyterian and that he "did not solicit patients from the State of New Mexico [but] treated several New Mexico residents who traveled to Texas by virtue of [his] status as a participating provider with . . . Presbyterian." He stated that he "ha[s] never practiced medicine in the State of New Mexico" and "never provided care or treatment to any of [his] patients in New Mexico." He stated that he "did not engage in any advertising activities that were directed at residents of New Mexico" and that "[he] was unaware of any advertising activities by [the Center] that were undertaken in New Mexico." Finally, he stated that he "did not personally seek to become credentialed with . . . Presbyterian. Rather, [TTPA] was credentialed with . . . Presbyterian. As a member of that group, [he] was required to submit a credentialing application to . . . Presbyterian."

{14} Ms. Velten stated in her affidavit that "TTPA decides what insurance will be accepted by [TTPA] physicians and health care providers" and that Dr. Frezza "did not have the authority to decide which insurance he would or would not accept." She also stated that Dr. Frezza "was subject to the [a]greement [with Presbyterian]." Finally, she stated, "As an employee of [the Center], and contracted with TTPA, Dr. Frezza was requested to submit a credentialing application to [the Center] and TTPA pursuant to the separate delegated credentialing agreement."

E. Analysis

{15} Plaintiffs argue that New Mexico has both general and specific jurisdiction over Dr. Frezza. Our next step, therefore, is to examine the alleged bases for each to see whether they establish the contacts necessary for jurisdiction. Consistent with our standard of review, we compare Plaintiffs' complaints with the evidence submitted by Dr. Frezza to see if Plaintiffs' assertions of jurisdiction were challenged. *See Plumbers Specialty Supply Co. v. Enter. Prods. Co.*, 1981-NMCA-083, ¶ 9, 96 N.M. 517, 632 P.2d 752 (examining which of the alternate bases for jurisdiction were challenged and holding that "[i]nasmuch as one ground of alleged jurisdiction was not challenged, . . . the trial court did not err in [denying the defendant's motion to dismiss and request for an evidentiary hearing]"). We address general jurisdiction first.

1. General Jurisdiction

{16} Plaintiffs argue that Dr. Frezza's website, medical license, book, property ownership, and agreement with Presbyterian are contacts sufficiently "continuous and systematic" to give New Mexico general jurisdiction over Dr. Frezza. *See Zavala*, 2007-NMCA-149, ¶ 12. We examine each assertion in turn. We conclude that none of the first four bases is sufficient to establish general jurisdiction. We also conclude that there are factual questions related to the agreement with Presbyterian and that resolution of those questions is a prerequisite to determining whether the agreement is a sufficient contact with New Mexico.

Website

{17} "Establishment of a passive website that can be viewed internationally is not sufficient to support general personal jurisdiction absent some showing that the website targeted New Mexico." *Id.* ¶ 20. Plaintiffs argue that Dr. Frezza's website targeted New Mexico residents by listing his New Mexico medical license and including testimonials by New Mexico residents, and that it was not merely passive because it "encouraged" visitors to submit testimonials through the website. We disagree.

{18} First, the inclusion of Dr. Frezza's licensure status and testimonials by New Mexico residents does not by itself indicate that the website targeted New Mexico. Dr. Frezza's website also indicated that he was licensed by Texas, Illinois, and Pennsylvania. Statement of the fact that he held those licenses does not target residents of those states because (1) all that is required for Dr. Frezza to practice in Texas is a Texas license; and (2) there is no indication in the record that the requirements for a New Mexico license differ from those for a Texas license such that a doctor with a New Mexico license would be more attractive to a New Mexico resident. *Cf. Schexnayder v. Daniels*, 187 S.W.3d 238, 249 (Tex. App. 2006) (stating that a website that included the defendant's "biography, credentials, and job description" was "informational in nature"); *Advance Petroleum Serv., Inc. v. Cucullu*, 614 So. 2d 878, 880 (La. Ct. App. 1993) (holding that listing a Louisiana law license on a Texas lawyer's letterhead is not an advertisement targeted to Louisiana clients and instead "should be considered merely a listing of professional accomplishment"). Similarly, testimonials on the website may be read by any visitor to the site and are equally persuasive regardless of the submitter's state of residence. In other words, the fact that a testimonial was written by a New Mexico resident does not necessarily make it particularly compelling to other New Mexicans. In addition, there is nothing about the site that specifically solicits testimonials by New Mexico patients. *Cf. Snowney v. Harrah's Entm't, Inc.*, 112 P.3d 28, 34 (Cal. 2005) ("By touting the proximity of their

hotels to California and providing driving directions from California to their hotels, [the] defendants' [w]eb site specifically targeted residents of California.").

{19} Plaintiffs rely on *Silver v. Brown*, 382 F. App'x 723, 730 (10th Cir. 2010), to argue that an assessment of whether the website targeted New Mexico residents hinges on "not who *could* access the site, but who is most likely to—here, patients considering surgery by [Dr. Frezza]." In that case, after a business transaction between Silver and Brown went sour, Brown created a blog called "A Special Report on David Silver and [Silver's company]" on which he warned other companies against doing business with Silver and called Silver a thief. *Id.* at 725. The court rejected the lower court's determination that the blog did not target New Mexico, stating that the district court's "analysis disregard[ed] the ubiquitous nature of search engines." *Id.* at 730. It concluded that because of "sophisticated" search engines, "it is becoming . . . irrelevant . . . how many worldwide or nationwide internet connections there are . . . because . . . the people that are searching for information on *this* David Silver are the ones who are going to end up viewing Mr. Brown's blog." *Id.* In addition, there was evidence that Brown purposefully sought to "optimiz[e]" the site so that it would be easier for New Mexico residents to find using a search engine. *Id.* Since it was clear that Brown intended the impact of the blog to be felt in New Mexico, the court concluded that the blog targeted New Mexico. *Id.* (stating that "[a]ctions that are performed for the very purpose of having their consequences felt in the forum state are more than sufficient to support a finding" that they targeted the forum state. (internal quotation marks and citation omitted)). The court held that specific personal jurisdiction over Brown was proper. *Id.* at 731.

{20} *Silver* is inapposite. There the court was considering whether the blog was sufficient to permit specific, not general, jurisdiction. *Id.* at 728. Thus the analysis necessarily addressed whether the tortious conduct arose out of the contact with the forum state, i.e., the blog. Here, the issue is whether Dr. Frezza's contacts with New Mexico through the website are continuous and systematic. As discussed, the standards for these types of personal jurisdiction are different.

{21} In addition, the *Silver* court noted that the blog "was about a New Mexico resident and a New Mexico company [and] complained of . . . Silver's . . . actions in the failed business deal [which] occurred mainly in New Mexico." *Id.* at 729-30. It also noted that "Brown had knowledge that the brunt of the injury to . . . Silver would be felt in New Mexico." *Id.* at 730. These facts indicated that Brown "expressly aimed his blog at New Mexico." *Id.* at 729. The mere listing of a New Mexico medical license and inclusion of testimonials by New Mexico residents are simply not of the same quality and do not demonstrate that Dr. Frezza targeted this state.

{22} Second, the website is not sufficiently interactive. "[I]mplicit in 'interactive' activity is the exchange of information between parties." *Fenn v. Mleads Enters., Inc.*, 2006 UT 8, ¶ 21, 137 P.3d 706; *see Merriam-Webster Dictionary*, http://www.merriam-webster.com/dictionary/interactive (last visited Dec. 2, 2014) (defining "interactive" as "mutually or reciprocally active" or "involving the actions or input of a user"). Here, the submission of testimonials through the website was a one-way process. *Cf. Sublett v. Wallin*, 2004-NMCA-089, ¶ 30, 136 N.M. 102, 94 P.3d 845 (holding a website insufficiently interactive to establish specific jurisdiction where "[t]he only interactive feature of the website . . . was the 'Locate an inspector' feature, which requested minimal information and provided

little more than additional advertising information, i.e., contact information and background information on [a local inspector]"). Because there is no indication in the record that the website passed any information back to the user based on submission of his or her testimonial and Plaintiffs do not assert that it did, Dr. Frezza's website is even less interactive than that in *Sublett*. We conclude that the website neither targets New Mexicans nor is sufficiently interactive to demonstrate that Dr. Frezza purposefully directed it toward New Mexico. *See Zavala*, 2007-NMCA-149, ¶ 20.

Medical License

{23} Plaintiffs maintain that the "[m]ost notable" contact Dr. Frezza had with New Mexico was his New Mexico medical license. Dr. Frezza held the license from January 2006 to July 2009. In July 2009, Dr. Frezza's status was changed to "inactive." Thus, Dr. Frezza did not hold an active New Mexico medical license at the time of the surgeries or at the time of the filing of Plaintiffs' complaints.

{24} We pause here to address the appropriate time frame relevant to the general jurisdiction analysis. Several New Mexico cases state that "[a]s a general rule, the existence of personal jurisdiction may not be established by events which have occurred after the acts which gave rise to [a p]laintiff's claims." *Doe*, 1996-NMCA-057, ¶ 19; *Tercero v. Roman Catholic Diocese of Norwich, Conn.*, 2002-NMSC-018, ¶ 9, 132 N.M. 312, 48 P.3d 50. Both of these cases cite *Steel v. United States*, 813 F.2d 1545, 1549 (9th Cir. 1987), in which the court stated that "courts must examine the defendant's contacts with the forum at the time of the events underlying the dispute when determining whether they have jurisdiction." But this statement was made in the context of specific jurisdiction, not general jurisdiction. *See id.* (referencing specific jurisdiction); *DVI, Inc. v. Superior Court*, 128 Cal. Rptr. 2d 683, 698 (2002) (stating that the *Steel* holding referred to specific jurisdiction). In addition, neither *Tercero* nor *Doe* distinguished between "specific jurisdiction" or "general jurisdiction," but both cases hinged on whether the cause of action arose out of the enumerated acts in New Mexico's "long-arm statute," NMSA 1978, § 38-1-16 (1971). *See Tercero*, 2002-NMSC-018, ¶ 10 (stating that jurisdiction based on the transaction of business prong of the long-arm statute is consistent with due process "only if the cause of action arises from the particular transaction of business" (internal quotation marks and citation omitted)); *Doe*, 1996-NMCA-057, ¶ 12 (stating that the appropriate test was "whether (1) the acts of the defendant are specifically set forth in this state's long-arm statute, (2) the plaintiff's cause of action arises out of and concerns such alleged acts, and (3) the defendant's acts establish minimum contacts to satisfy constitutional due process concerns"). It is not entirely clear, therefore, that the statements in those cases as to the appropriate time frame apply in the general jurisdiction context. 4 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1067.5 (3d ed. 2002) ("As a practical matter, a general jurisdiction inquiry is very different from a specific jurisdiction inquiry.").

{25} The parties did not identify any New Mexico cases explicitly addressing the time frame for a general jurisdiction analysis, nor did our own research uncover one. *See Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 569 (2d Cir. 1996) ("Few cases discuss explicitly the appropriate time period for assessing whether a defendant's contacts with the forum state are sufficiently 'continuous and systematic' for the purposes of general jurisdiction."). In addition, "[t]he [United States] Supreme Court never has spoken on the issue of determining the proper time[]frame for the defendant's contacts with

the forum [in a general jurisdiction analysis]." Wright, *supra* (Supp. 2014). This issue raises two questions. "First, it must be determined whether continuous and systematic contacts need to exist at the time the claim accrues, or at the time the lawsuit is filed." *Id.* The courts appear divided on this question. *See id.* n.11.50 (collecting cases). *But see Harlow v. Children's Hosp.*, 432 F.3d 50, 64 (1st Cir. 2005) ("It is settled law that unrelated contacts which occurred after the cause of action arose, but before the suit was filed, may be considered for purposes of the general jurisdiction inquiry."). The second question is "how far back from either the accrual or filing of the claim [courts] will look[.]" Wright, *supra* (Supp. 2014). "[M]ost courts use a 'reasonable time' standard yielding time[]frames of roughly three to seven years." *Id.*; *see, e.g., Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 410-11, 415-16 (1984) (examining contacts over seven-year period (1970-1977), including after the 1976 accident from which the plaintiff's claims arose, in a general jurisdiction analysis).

{26} We need not determine whether general jurisdiction in New Mexico depends on contacts extant at the time a claim accrued or at the time the complaint is filed, however, because even if we consider the medical license in our analysis, we conclude that possession of a medical license is not sufficient in and of itself to subject Dr. Frezza to general jurisdiction in New Mexico courts. The general rule gleaned from cases in sister states is that possession of a medical license in the forum state may be considered a contact for purposes of general jurisdiction but is not sufficient on its own. For instance, in *Etchebarne-Bourdin v. Radice*, the District of Columbia Court of Appeals held that where "there [was] no allegation that the doctors maintained their [District of Columbia] licenses in order to solicit patients in the District[,]" the fact "that the doctors maintained medical licenses to practice in the District cannot, without more, serve as a basis for jurisdiction under the 'transacting any business' subsection of the [D.C. long-arm] statute." 982 A.2d 752, 759 (D.C. 2009). Similarly, in *Modlin v. Superior Court*, the California Court of Appeals held that the defendant's contacts with California were "tenuous at best" and insufficient for general jurisdiction where the contacts consisted of possession of a California medical license and three trips to California in four years. 222 Cal. Rptr. 662, 665 (Ct. App. 1986); *see also Ghanem v. Kay*, 624 F. Supp. 23, 25 (D.D.C. 1984) ("A nonresident physician who arranges to be licensed in the District [of Columbia] would not by this act alone reasonably anticipate being required to defend a suit brought in the District . . . [but] where a nonresident physician is not only licensed in a jurisdiction but carries on significant activities within that jurisdiction, the due process requirement of minimum contacts between a defendant and a forum state is satisfied."); *Dean v. Johns*, 789 So. 2d 1072, 1079 (Fla. Dist. Ct. App. 2001) ("The various activities of [the Alabaman defendant], including the relationships he has developed with referring Florida physicians to treat Florida patients and his maintenance of a Florida medical license, easily pass the minimum contacts test of the Due Process Clause."); *Estate of Jones v. Phillips ex rel. Phillips*, 992 So. 2d 1131, 1141 (Miss. 2008) (considering licensure in the forum state as well as arrangements the defendant made to treat the plaintiff in the foreign state); *accord Hines v. Clendenning*, 1970 OK 28, 465 P.2d 460, 463; *cf. Eastboro Found. Charitable Trust v. Penzer*, 950 F. Supp. 2d 648, 655-56 (S.D.N.Y. 2013) (concluding that possession of a law license does not confer jurisdiction on the licensing state and collecting cases); *Katz v. Katz*, 707 A.2d 1353, 1357 (N.J. Super. Ct. App. Div. 1998) ("We are equally convinced that the defendant's license to practice law in this state does not afford a basis to exercise *in*

personam jurisdiction over him in a matter totally unrelated to his professional license.").

Property

{27} Plaintiffs also point to Dr. Frezza's ownership of property in New Mexico. They argue that Dr. Frezza "purposefully availed himself of the protections and benefits of New Mexico law by purchasing land here and making some use of that land." The land was purchased after the surgeries but before Plaintiffs' complaints were filed. The timing of these land purchases thus implicates the same questions raised above. Nevertheless, we conclude that even if we consider the land purchases, they are insufficient to demonstrate that Dr. Frezza had continuous and systematic contact with New Mexico such that he could expect to be haled into court here. *See Zavala*, 2007-NMCA-149, ¶ 12 ("If a defendant has continuous and systematic contacts with New Mexico such that the defendant could reasonably foresee being haled into court in that state for any matter, New Mexico has general personal jurisdiction." (alteration, internal quotation marks, and citation omitted)). Like a medical license, Dr. Frezza's ownership of property can be considered as a contact with New Mexico but it is not sufficient on its own to establish jurisdiction over him. *Rush v. Savchuk*, 444 U.S. 320, 328 (1980) ("[T]he mere presence of property in a [s]tate does not establish a sufficient relationship between the owner of the property and the [s]tate to support the exercise of jurisdiction over an unrelated cause of action."); *cf. F.D.I.C. v. Hiatt*, 1994-NMSC-044, ¶ 10, 117 N.M. 461, 872 P.2d 879 (considering property ownership in assessment of jurisdiction).

Book

{28} To the extent Plaintiffs argue that availability of Dr. Frezza's book, *The Business of Surgery*, in New Mexico provides a contact sufficient for general jurisdiction, we are not persuaded. Even if we accept Plaintiffs' assertion that "[u]ndoubtedly, [Dr. Frezza] expects the State of New Mexico to protect his copyright . . . and has a plan for the commercial success of his book and its distribution in New Mexico[,]" the distribution of Dr. Frezza's book in New Mexico does not rise to the level of contact required by the Due Process Clause for general jurisdiction. *Cf. Sproul*, 2013-NMCA-072, ¶ 14 ("[T]he flow of a manufacturer's goods into the forum state alone does not create sufficient ties with that state to give it general jurisdiction over the manufacturer.").

{29} Plaintiffs rely on *Beh v. Ostergard* for the proposition that "a plan [for distribution in New Mexico] is sufficient for general jurisdiction to attach to [Dr. Frezza]." 657 F. Supp. 173, 178 (D.N.M 1987). The *Beh* court stated that jurisdiction would have been proper if the defendant there had "a regular distribution plan for his publications into New Mexico for which he derived commercial benefit[.]" *Id.* *Beh* is not persuasive for two reasons. First, the statement relied on was dicta not essential to the holding. *Id.* Second and more importantly, this statement was based on *Blount v. T D Publishing Corp.*, in which the New Mexico Supreme Court held that "placing . . . magazines in national channels of commerce . . . submits the publisher to jurisdiction in all states *where his product causes injury*." 1966-NMSC-262, ¶ 16, 77 N.M. 384, 423 P.2d 421 (emphasis added). This holding obviously applies to specific jurisdiction. Thus neither *Beh* nor *Blount* are helpful to Plaintiffs' assertions related to general jurisdiction. *See* Wright, *supra* (noting the differences in the general and specific jurisdiction analyses); *see also Sproul*, 2013-NMCA-072, ¶ 16 (indicating that the contacts necessary for general

jurisdiction are more substantial than those for specific jurisdiction).

Arrangement with Presbyterian

{30} Plaintiffs argue that general jurisdiction is proper based on an "arrangement with Presbyterian . . . [which] secur[ed] for [Dr. Frezza] a virtual guarantee of New Mexico patient referrals." The parties do not dispute that (1) Dr. Frezza treated New Mexico residents, including Plaintiffs, referred to him by Presbyterian; (2) there were no bariatric surgeons in New Mexico at the time; (3) Dr. Frezza was a credentialed participating provider under the agreement between TTPA and Presbyterian; and (4) Dr. Frezza was bound by the agreement. Plaintiffs maintain that these facts are sufficient to establish the existence of a relationship between Dr. Frezza and Presbyterian through which Dr. Frezza "reached into [New Mexico] in order to attract [a] patient's business[.]" *Cronin*, 2000-NMCA-082, ¶ 26; *cf. Zavala*, 2007-NMCA-149, ¶ 21 (concluding that although "it is not necessarily sufficient by itself to justify the exercise of general personal jurisdiction[,]" Medicaid registration "may be a factor to consider" in a general jurisdiction analysis).

{31} We note that Dr. Frezza's arguments in the district court and on appeal take several different approaches. In his pleadings below, Dr. Frezza acknowledged that his status as a participating provider in Presbyterian's network established a relationship between him and the insurer. For instance, he analogized the agreement with Presbyterian to Medicaid registration and acknowledged that such registration can be considered a contact for purposes of general jurisdiction, implicitly acknowledging that the agreement was a contact between him and New Mexico. *See Zavala*, 2007-NMCA-149, ¶ 21. Nevertheless, he argued that this contact was insufficient for general jurisdiction. *See id.* He also made several references to "[t]he contractual relationship between Dr. Frezza and Presbyterian," arguing that it would not support specific jurisdiction because Plaintiffs' claims did not arise from it. In spite of these statements in his pleadings, in the hearing before the district court Dr. Frezza relied on the fact that he was not a party to the agreement and had no authority to decide which insurance he would accept to argue that "there is no contract between Dr. Frezza and Presbyterian." Similarly, on appeal, Dr. Frezza maintains that, because he was not an employee of TTPA, was not a party to the agreement, and had no authority to select with whom he would become a participating provider, the agreement cannot be considered a contact between him and New Mexico for purposes of jurisdiction. On appeal, he argues that "Plaintiff[s'] relationship with Presbyterian[,] Presbyterian's relationship with TTPA[,] and TTPA's relationship with Dr. Frezza . . . cannot [be] combine[d] . . . to establish personal jurisdiction over Dr. Frezza."

{32} In support of his position at the hearing, Dr. Frezza submitted a copy of the agreement to the district court. The district court concluded that the fact that Dr. Frezza was not a party to the agreement was dispositive of whether Dr. Frezza had a relationship with Presbyterian. We disagree because this conclusion does not consider other facts surrounding the agreement, including, among other things, that Dr. Frezza was a participating provider bound by the agreement, that New Mexico patients were referred to him because of the agreement, and that there were no New Mexico bariatric surgery providers at that time. *See Sproul*, 2013-NMCA-072, ¶ 17 ("The question [of whether jurisdiction exists] cannot be answered by applying a mechanical formula or rule of thumb but [must be resolved] by ascertaining what is fair and reasonable under the circumstances." (alteration, internal quotation marks, and citation omitted)); *cf.*

Dunn v. Yager, 58 So. 3d 1171, 1186 (Miss. 2011) (holding that Mississippi had general jurisdiction over the defendant where he "had participated in various [preferred provider organizations (PPOs)], which, *inter alia,* gave him access to more than 800,000 members of [a Mississippi PPO] as prospective clients" and recognizing that the defendant "solicited patients through the PPOs, as an approved preferred provider" and the plaintiff's claim had been approved by a Mississippi insurer).

{33} Neither does the rest of the record provide sufficient facts for us to assess whether the arrangement with Presbyterian establishes a contact between Dr. Frezza and New Mexico. Ms. Velten's claims that Dr. Frezza had no authority to select which insurance he would accept do not address the extent of Dr. Frezza's rights and obligations arising out of a contract with an insurer once it is selected by TTPA. Dr. Frezza's repeated reliance on the fact that he is not an employee of TTPA likewise raises more questions than it answers. For instance, is Dr. Frezza a member, partner, or owner of TTPA? Is he a third-party beneficiary of TTPA's contract with Presbyterian? Is there a contract with TTPA that defines Dr. Frezza's relationship with it, as Ms. Velten's affidavit suggests, and/or do the terms of his employment with the Center define his rights and obligations with respect to TTPA? The nature of Dr. Frezza's relationships with both the Center and TTPA likely will inform the analysis of any relationship with Presbyterian.

{34} Plaintiffs also alleged that Dr. Frezza "used" or "developed" "a special relationship with Presbyterian to encourage New Mexico residents to seek treatment from him[.]" *See Sher v. Johnson,* 911 F.2d 1357, 1362 (9th Cir. 1990) (" 'Purposeful availment' requires that the defendant have performed some type of affirmative conduct which allows or promotes the transaction of business within the forum state." (internal quotation marks and citation omitted)). Dr. Frezza challenged Plaintiffs' assertion through submission of the agreement and affidavits. But the agreement requires each participating provider to be "credentialed by [Presbyterian]." Ms. Velten stated in her affidavit that "Dr. Frezza was requested to submit a credentialing application to [the Center] and TTPA pursuant to the separate delegated credentialing agreement." The "separate credentialing agreement" is not in the record. Dr. Frezza stated in his affidavit that he "did not personally seek to become credentialed with . . . Presbyterian. Rather, [TTPA] was credentialed with . . . Presbyterian. As a member of that group, [he] was required to submit a credentialing application to . . . Presbyterian." The extent to which Dr. Frezza personally acted to become credentialed with Presbyterian is unclear from this record. For instance, although Dr. Frezza asserts that he did not "personally" seek to become credentialed, he also states that he submitted an application to become credentialed. At the same time that he asserts that TTPA was credentialed, he states that he submitted his own credentialing application to Presbyterian.

{35} We conclude that, even if we view Plaintiffs' assertions and Dr. Frezza's evidence in the light most favorable to jurisdiction, *Cronin*, 2000-NMCA-082, ¶ 10, the parameters of the relationship are unclear such that we cannot assess whether it is a contact sufficient for general jurisdiction. *Cf. Russell v. SNFA*, 946 N.E.2d 1076, 1080-81 (Ill. App. Ct. 2011) ("If we find that [the] plaintiff has made a *prima facie* case for jurisdiction, we must then determine if any material evidentiary conflicts exist. If a material evidentiary conflict exists, we must remand the case to the trial court for an evidentiary hearing." (citation omitted)); *Sorezza v. Scheuch*, No. 19717/07, 2008 WL 2186175, at *6 (N.Y. Sup. Ct. May 13, 2008) (denying a motion for dismissal and stating, "Absent further discovery concerning the

nature of the contractual agreement or arrangement between BlueCross/Blue Shield and the defendant with respect to his 'participating provider' status, the court is constrained from determining whether such agreement or arrangement would qualify as a business transaction [under New York's long-arm statute]"). For instance, it remains unclear to what extent Dr. Frezza was bound by or benefitted from the agreement, whether the agreement required Dr. Frezza to accept Presbyterian patients, to what extent Dr. Frezza himself sought to become credentialed with Presbyterian, and, perhaps most importantly, whether and how Dr. Frezza became the sole provider of bariatric surgery services to Presbyterian's members. *Cf. Almeida v. Radovsky*, 506 A.2d 1373, 1375 (R.I. 1986) (relying on the specific terms of the defendants' agreement with a Rhode Island insurer and the fact that the insurer did not refer Rhode Island patients to the defendants to hold that there were insufficient contacts for jurisdiction). We therefore turn to whether Plaintiffs have made a prima facie showing of specific jurisdiction.

2. Specific Jurisdiction

{36} Plaintiffs argue that New Mexico has specific personal jurisdiction over Dr. Frezza because their claims arose from surgeries performed pursuant to Dr. Frezza's relationship with Presbyterian.[1] Even if Dr. Frezza's relationship with Presbyterian is insufficient for general jurisdiction, it may nonetheless be sufficient for specific jurisdiction. *See ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 715 (4th Cir. 2002) ("[T]he threshold level of minimum contacts sufficient to confer general jurisdiction is significantly higher than for specific jurisdiction." (internal quotation marks and citation omitted)). The district court determined that Plaintiffs' claims arose from medical care provided in Texas, rejecting Plaintiffs' argument that they arose from Dr. Frezza's relationship with Presbyterian. The district court therefore concluded that it "[could not] exercise specific jurisdiction over Dr. Frezza" because Plaintiffs' claims were not connected with any contacts between Dr. Frezza and New Mexico. In doing so, the district court avoided analyzing whether there was a relationship between Dr. Frezza and Presbyterian sufficient for specific jurisdiction.

{37} The district court's rejection of Plaintiffs' contention that their claims arose from a relationship between Dr. Frezza and Presbyterian rests on an overly narrow construction of the requirement that the claims must "arise from" Dr. Frezza's contact with New Mexico. In *Goodyear Dunlop Tires*, the United States Supreme Court stated that specific jurisdiction applied when the claims "deriv[e] from, or [are] connected with" the defendant's contacts. 131 S. Ct. at 2851 (internal quotation marks and citation omitted); *accord Helicopteros Nacionales*, 466 U.S. at 414 (using the phrase "arise out of or relate to" in discussing specific jurisdiction). This language permits a more expansive construction than that applied by the district court. Similarly, our cases have held that "for New Mexico to assert specific jurisdiction over a nonresident defendant, the plaintiff's claim must 'lie in the wake' of the defendant's commercial activities in New Mexico." *Sproul*, 2013-NMCA-072, ¶ 17 (alteration omitted) (quoting *Visarraga*, 1986-NMCA-021, ¶ 15). For example, in *Kathrein v. Parkview Meadows, Inc.*, a New Mexican

[1]In a cursory argument, Plaintiffs contend that specific personal jurisdiction is appropriate because Dr. Frezza traveled to New Mexico and consulted with at least one patient here. However, they do not explain how their injuries arose from this contact. We therefore decline to address this argument. *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.").

plaintiff sued an Arizona defendant for "emotional and psychological trauma" she suffered after attending "Family Week" at a treatment center where her husband was being treated. 1984-NMSC-117, ¶ 3, 102 N.M. 75, 691 P.2d 462. The Court held that the cause of action was "a direct outgrowth of [the] defendant's general solicitation for business in New Mexico" where the defendant had "advertised its alcoholism treatment center in the yellow pages of the Albuquerque telephone directory[,] . . . contacted the director of [a New Mexico organization] to solicit . . . referral of patients to the treatment center[,] . . . mail[ed] a brochure [to the plaintiff], inviting her to attend the treatment program's 'Family Week[,]' [and] telephoned [the] plaintiff from Arizona, to encourage her attendance." *Id.* ¶¶ 2, 4; *see Cronin*, 2000-NMCA-082, ¶ 16 (agreeing with the plaintiffs that their claims arose from the hospital's transaction of business in New Mexico because "but for [the h]ospital's solicitations, [the p]atient would not have sought treatment at [the h]ospital nor would he have endured certain health complications arising from [the doctor's] prescription and [the d]efendants' negligent failure to monitor the administration of potentially ototoxic antibiotics"); *see also Presbyterian Univ. Hosp. v. Wilson*, 654 A.2d 1324, 1331 (Md. 1995) (stating that the hospital's "voluntary efforts to register as a Maryland [Medicaid] provider and to be designated as a liver transplant referral center served in many respects to effectively solicit Maryland residents to seek treatment" at the hospital and that "[t]hese general business contacts are directly related to the [medical negligence and wrongful death] action and serve as support for the finding of specific jurisdiction").

{38} Consistent with *Kathrein* and *Cronin*, we conclude that, if the alleged relationship exists, Plaintiffs' claims here are sufficiently connected with it . The fact that Dr. Frezza may have been the only provider covered by Presbyterian and thus Plaintiffs had no option to seek treatment in New Mexico only strengthens the connection between the two. But because the district court did not address the alleged relationship in the context of specific jurisdiction, there is no factual record addressing "the precise nature of the defendant's contacts with the forum, the relationship of these contacts with the cause of action, and [] weighing . . . whether the nature and extent of contacts . . . between the forum and the defendant . . . satisfy the threshold demands of fairness." *Presbyterian Univ. Hosp.*, 654 A.2d at 1330 (second and third omissions in original) (internal quotation marks and citation omitted). The same questions about the relationship identified in our discussion of general jurisdiction apply in an analysis of specific jurisdiction. Hence we expect the district court will address them on remand in both contexts.

3. Fair Play and Substantial Justice

{39} "The United States Supreme Court has held that even if a defendant has established sufficient minimum contacts with the forum state, the Due Process Clause forbids the assertion of personal jurisdiction over that defendant under circumstances that would offend traditional notions of fair play and substantial justice." *Sproul*, 2013-NMCA-072, ¶ 35 (internal quotation marks and citation omitted). Since we have concluded that an evidentiary hearing is necessary to clarify Dr. Frezza's contacts with New Mexico and the strength of those contacts will affect the analysis of whether it is unfair to assert jurisdiction over him, we do not address this issue except to provide guidance on two points. First, Dr. Frezza argues on appeal that he would be substantially burdened by having to defend himself in New Mexico because (1) he is immune from suit under Texas law and (2) Texas courts are "better situated [than New Mexico courts] to deal with the issues inherent

in applying Texas's Tort Claims Act." Both of these arguments assume that the Texas Tort Claims Act will apply to this case, a proposition we rejected in the companion case, *Montaño*, COA No. 32,403, ¶ 39. He also argues that Texas has "significant public policy interests in litigating th[ese] case[s]" because he is a government employee. Although we recognize that Texas has an interest in this case, we have concluded that, under the facts of these cases, New Mexico has an equal or greater interest. *See id.* ¶ 30. Finally, we reject this line of reasoning because, although there is some overlap, the personal jurisdiction and choice of law inquiries are distinct and different. The United States Supreme Court cautioned against entwining the two analyses, stating that "[t]he question of [whether the forum state's law applies] presents itself in the course of litigation only after jurisdiction over [the] respondent is established, and we do not think that such choice of law concerns should complicate or distort the jurisdictional inquiry." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 778 (1984).

{40} Second, the district court concluded that "[e]xercising personal jurisdiction over Dr. Frezza in New Mexico would violate traditional notions of fair play and substantial justice" because "many of the important fact witnesses in this case reside in Texas and . . . Dr. Frezza will be unable to compel fact witnesses in Texas, including the healthcare providers who subsequently treated Plaintiff[s] and allegedly diagnosed [their] complications, to testify in person at trial in New Mexico." At the hearing, the district court stated that it would be a "horrible trial if we have to show the jury video tapes of those people [because the jury] would be asleep." Even if we construe these findings as addressing the burden on Dr. Frezza and efficiency of the trial, there is nothing in the record indicating that the district court considered the other *Zavala* factors, such as "New Mexico's interest, the plaintiff's interest, . . . and the interest in promoting public policy." 2007-NMCA-149, ¶ 12. In addition, it is difficult to see how the concerns voiced by the district court establish the unconstitutionality of New Mexico's assertion of jurisdiction. On remand, the district court should consider all of the *Burger King* factors in relation to the strength of Dr. Frezza's contacts with New Mexico in assessing the fairness of personal jurisdiction over him. *See Burger King Corp.*, 471 U.S. at 476 (stating that if "it has been decided that a defendant purposefully established minimum contacts within the forum [s]tate, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice" (internal quotation marks and citation omitted)); *Salas v. Homestake Enters. Inc.*, 1987-NMSC-094, ¶ 6, 106 N.M. 344, 742 P.2d 1049 (citing *Burger King* and considering the defendant's contacts in assessment of the fairness of jurisdiction).

F. CONCLUSION

{41} For the foregoing reasons, we remand for further proceedings consistent with this Opinion.

{42} IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

CYNTHIA A. FRY, Judge

Certiorari Granted, September 25, 2015, No. 35,395

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-102

Filing Date: June 9, 2015

Docket No. 32,521

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

JASON BAILEY,

Defendant-Appellant.

Hector H. Balderas, Attorney General
Paula E. Ganz, Assistant Attorney General
Santa Fe, NM

for Appellee

Jorge A. Alvarado, Chief Public Defender
Sergio Viscoli, Appellate Defender
David Henderson, Assistant Appellate Defender
Santa Fe, NM

for Appellant

OPINION

WECHSLER, Judge.

{1} Defendant Jason Bailey appeals his conviction for criminal sexual contact of a minor in the second degree pursuant to NMSA 1978, Section 30-9-13(B) (2004). Defendant argues that the district court erred when it admitted evidence of uncharged bad acts under Rule 11-404(B) NMRA and Rule 11-403 NMRA. More specifically, Defendant argues that the district court erred when, mid-trial, it reversed an earlier ruling that excluded evidence of an alleged out-of-jurisdiction sexual act by Defendant against Child. Defendant argues that this evidence was propensity evidence and was more prejudicial than probative. We do not conclude that the district court abused its discretion when it admitted this evidence. Defendant also argues that the district court committed error by allowing a qualified expert to offer an opinion beyond the scope of the expert's qualified expertise. We are not persuaded by Defendant's argument on this point. We affirm.

BACKGROUND

{2} Defendant was charged with sex crimes relating to incidents reported by his daughter (Child) that occurred when Child was between about six and nine years of age. The charges related to two separate time intervals when the family lived in Bernalillo County, New Mexico. In between the periods of time that the family lived in Bernalillo County, the family lived in Sandoval County, New Mexico.

{3} Defendant was tried twice. Defendant's first trial resulted in dismissal of five of the counts by directed verdict and a mistrial due to jury disagreement on the remaining four counts. Defendant was retried on the remaining four counts.

{4} Two incidents formed the basis of Defendant's charges at the retrial. Child reported that Defendant placed ointment on his finger and touched and rubbed Child's vagina after she got out of the shower and was wearing only a towel. Child reported that this occurred during the first time period the family lived in Bernalillo County. Child also reported that Defendant rubbed his penis on

Child's back while they were both in the shower. This occurred during the second time period the family lived in Bernalillo County. On the basis of these two incidents, Defendant was charged with two counts of criminal sexual penetration of a minor in the first degree, child under thirteen years of age, and two counts of criminal sexual contact of a minor in the third degree, child under thirteen years of age.

{5} Prior to the second trial, the State filed a motion to admit evidence of a purported prior conviction for a sex crime and an uncharged act against Child that occurred while the family was living in Sandoval County. Child reported that, in Sandoval County, Defendant roused Child from sleep at night to watch her favorite movie, laid Child on top of him, placed ointment on his hand, placed his hand in her pajamas, and touched and penetrated her vagina.[1] The State argued in its motion that evidence of Defendant's uncharged conduct was admissible under Rule 11-404(B)(2) as proof of Defendant's intent. According to the State, Defendant's defense at the first trial was that the charged incidents involved normal parenting and that Defendant lacked sexual intent. The State asserted that Defendant had argued at the first trial that his actions were misperceived as sexual by Child. Defendant had argued that Child was prone to this type of misperception because Child was a victim of prior sexual abuse by her mother's boyfriend. According to the State, the Sandoval County incident was not amenable to an interpretation as normal parenting, and thus it was probative of Defendant's sexual intent and, by inference, that Child correctly perceived the incidents for which Defendant was charged. Defendant argued that evidence of the Sandoval County incident was propensity evidence and therefore inadmissable under Rule 11-404(B). Defendant also seemed to argue that the Sandoval County evidence was inadmissible under Rule 11-403 because of the prejudicial effect of the evidence. The district court denied the State's motion, finding that the evidence was "only being offered to prove the witness' understanding, and [Rule 11-404(B)] does not actually address that type of issue . . . [;] this type of evidence is highly prejudicial and it's more prejudicial than probative[.]" Consequently, Child was instructed not to discuss the Sandoval County incident at the retrial.

{6} During the retrial, defense counsel had the following exchange with Child on cross-examination in which he confronted Child about lying during the safehouse interview and then asked questions in which defense counsel seemed to conflate the two incidents involving ointment, one of which took place in Bernalillo County and was the basis for charges, and the other from Sandoval County, which was uncharged and excluded from evidence by the district court:

> [Defense Counsel]: Now, do you recall that you told me that when you were watching the video [of your interview at the safehouse] that you realized that you were lying and not telling the complete truth?
>
> [Child]: Well, yes, because there's some things when the [interviewer at the safehouse] would ask me a question I would say I don't know, and I really did know.
>
> [Defense Counsel]: Uh-huh. Okay. For example, let's talk about the ointment incident, okay? When you first disclosed the ointment incident you told people or you told the interviewer that [Defendant] had

[1]This account is taken from Child's testimony at the retrial. The safehouse interview on which the original report was based is not in the record on appeal.

taken your pants off and put the ointment on you; right? Do you remember that?

[Child]: I think that was a different incident. I don't know. That it wasn't—because I remember coming out of the shower.

[Defense Counsel]: Okay. Well, the ointment incident, what you have described it [sic], what happened at [one of the Bernalillo County residences]; correct?

[Child]: Yes.

[Defense Counsel]: Okay. Do you remember that to begin with the first time that you mentioned the ointment incident you had told the interviewer that [Defendant] had actually pulled your pants down and then applied the ointment?

[Child]: I don't think that happened.

[Defense Counsel]: But do you remember saying that?

[Child]: No.

{7} The State then asked to approach the bench. There, defense counsel claimed that in the above exchange he was exposing inconsistencies between Child's earlier account of the Bernalillo County ointment incident for which Defendant was on trial and Child's account of that incident offered in court. The State argued that defense counsel made Child seem confused by importing a detail—pants—from the uncharged Sandoval County incident, that Child was instructed not to discuss, into questions ostensibly about one of the charged incidents from Bernalillo County. Common to both incidents was the use of ointment, among other factors, but Child was wearing pants only during the Sandoval County incident. The State argued to the court that defense counsel had opened the door to testimony about the uncharged Sandoval County incident because defense counsel used elements of the Sandoval County incident in his questions to Child, thereby creating an impression that Child was confused about the incident for which Defendant was charged. The State also argued that the uncharged incident was relevant to proving the sexual intent of Defendant during the two charged incidents, and, further, that the "crux" of the defense was that there was "no [sexual] intent" on the part of Defendant. Defense counsel conceded that intent was at issue in this case, stating that:

> [I]ntent is always an issue in every single case. So just because intent is an issue in this case doesn't mean that [Rule 11-]404(b) opens the doors to propensity evidence and bad character evidence to allow the State to get a conviction. Intent is always an issue. It's an issue here.

{8} After hearing argument, the court took a lunch recess and advised counsel to perform legal research to present case law to the court. After the recess, the court heard additional argument and required a lengthy voir dire examination of Child, both direct and cross, to enable the court to hear content of the testimony. The court ruled, based on Rule 11-404(B), that the State was allowed to present evidence of "only the alleged act of incident [sic] that occurred in Sandoval County that included the ointment." The court found that "[i]ntent . . . [was] relevant to the material issue—or to a material issue" in the case. It did not rely on the State's "opening the door" argument.

{9} Child testified and was cross-examined about the Sandoval County incident. The jury was instructed that the evidence admitted

about the Sandoval County incident should be considered "only for the purpose of determining[] the existence of the intent which is a necessary element of the crimes charged in this case."

{10} We will include additional facts as necessary in our discussion below.

ADMISSION OF EVIDENCE OF THE UNCHARGED ACTS

{11} Defendant argues that the district court committed error by admitting Child's testimony relating to the incident from Sandoval County of uncharged abuse by Defendant. Defendant argues that the evidence was not admissible under Rule 11-404(B) and, even if admissible under Rule 11-404(B), the evidence should have been disallowed under Rule 11-403. We review both arguments for an abuse of discretion. *See State v. Otto*, 2007-NMSC-012, ¶ 9, 141 N.M. 443, 157 P.3d 8 (stating that we review the decision of a trial court to admit evidence under Rule 11-404(B) for an abuse of discretion); *id.* ¶ 14 (same under Rule 11-403). Only when a ruling of the trial court is clearly untenable, not justified by reason, or clearly against the logic and effect of the facts and circumstances of the case, will we hold that the trial court abused its discretion in admitting or excluding evidence. *Id.* ¶ 9. We examine the arguments of Defendant in turn.

Rule 11-404(B)

{12} Rule 11-404(B) establishes boundaries for the admission of evidence of other crimes, wrongs, or acts. Rule 11-404(B) prohibits the use of "[e]vidence of a crime, wrong, or other act . . . to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." In other words, evidence of other misconduct may not be admitted into evidence to demonstrate that "because the defendant committed those acts in the past, he is more likely to have committed them at the time of the charged offense." David A. Sonenshein, *The Misuse of Rule 404(B) on the Issue of Intent in the Federal Courts*, 45 Creighton L. Rev. 215, 220 (2011). However, Rule 11-404(B) allows evidence of other misconduct to be admitted, if legally relevant, for numerous other purposes, including to prove the intent of the defendant. *See* Rule 11-404(B)(2) ("This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."); Rule 11-402 NMRA (stating that relevant evidence is generally admissible except as subject to contrary constitutional, statutory, or rule provisions, but "[i]rrelevant evidence is not admissible"). "Before admitting evidence of other crimes, wrongs or acts, the trial court must find that the evidence is relevant to a material issue other than the defendant's character or propensity to commit a crime[.]" *Otto*, 2007-NMSC-012, ¶ 10 (internal quotation marks and citation omitted). Rule 11-404(B) does not require that "evidence admitted under [the] rule be offered only to rebut evidence presented by the defense." *See id.* ¶ 11.

{13} In this case, Defendant's intent was an element of the charges. The jury was instructed that an aspect of the State's burden was to prove that Defendant touched Child in a manner that was "unlawful." Defendant acted unlawfully only if he acted with "the intent to arouse or gratify sexual desire or to intrude upon the bodily integrity or personal safety of [Child.]" "[T]ouching or penetration for purposes of reasonable medical treatment or nonabusive parental care" would not be considered unlawful. Defendant did not dispute that he touched Child in a manner fundamentally consistent with Child's allegations, but, instead, argued that Defendant touched Child without sexual intent.

{14} Defendant contends that evidence of the Sandoval County incident was inadmissible propensity evidence under Rule 11-404(B). Defendant mainly relies on three cases in support of this contention, citing them for the proposition that "[a] number of prior New Mexico cases have held 'bad acts' evidence inadmissible." [2] All three were joinder cases, in which multiple charges against a single defendant were tried in a single proceeding. *See Lovett*, 2012-NMSC-036, ¶¶ 7, 55 (reviewing the joinder of two first degree murder charges and related charges from two separate instances); *Gallegos*, 2007-NMSC-007, ¶¶ 4-5 (reviewing the joinder of multiple sexual charges against two different females); *Ruiz*, 2001-NMCA-097, ¶ 12 (reviewing the joinder of sexual charges relating to three girls). In each case, there was an issue as to whether the joinder permitted the jury to consider evidence that was not cross-admissible under Rule 11-404(B). *Lovett*, 2012-NMSC-036, ¶¶ 9, 11, 30-31; *Gallegos*, 2007-NMSC-007, ¶¶ 19-21; *Ruiz*, 2001-NMCA-097, ¶ 12.

{15} Intent was not an issue in any of the three cases cited by Defendant. And in each case, the court did not find an alternative exception under Rule 11-404(B) that would allow cross-admissibility. In *Lovett, Gallegos*, and *Ruiz*, the reviewing court held that evidence of each of the joined charges *vis-à-vis* the other charges was not relevant for any purpose other than propensity and disallowed the joint trial. *Lovett*, 2012-NMSC-036, ¶ 48; *Gallegos*, 2007-NMSC-007, ¶¶ 23, 36; *Ruiz*, 2001-NMCA-097, ¶¶ 16, 18, 23. The disputed evidence in these cases concerned whether the acts alleged to have been committed by the defendants happened in fact, not the mental state of the defendants in committing those acts. Because intent was not at issue in these cases, and the evidence of the acts admitted through joinder was probative only as propensity evidence, the three cases cited by Defendant are not persuasive in the context of this case.

{16} The Rule 11-404(B) analysis in this case is akin to that of *Otto*, 2007-NMSC-012. In *Otto*, the defendant was charged with criminal sexual penetration of his step-daughter, a minor. *Id.* ¶¶ 1-2. A detective testified in *Otto* that the defendant made a statement to police in which he indicated that he did not think he penetrated his step-daughter, but that he was "ready" to do so and then woke up. *Id.* ¶ 6. The State sought to introduce alleged, uncharged acts by the defendant against the same victim, committed subsequent to the charged incident in another state. *Id.* ¶¶ 2-3. The defendant argued that the evidence should have been excluded because his defense was not that he "mistakenly or without knowledge committed sexual acts" but, instead, that the sexual contact was committed without penetration. *Id.* ¶ 11. The Court noted that the defendant's statement might have suggested to the jury that the defendant was admitting to penetrating his step-daughter, but "unconsciously[.]" *Id.* It held that the prosecution "had the right to introduce evidence to show that [the d]efendant's actions were intentional and not committed accidentally or by mistake." *Id.* In the case before us, Defendant conceded that his intent was at issue under his argument and, as in *Otto*, the disputed evidence was offered to prove that Defendant acted with the requisite intent.

{17} Simply stated, under Rule 11-404(B) and our case law, the issue before the district court was whether the uncharged incident from Sandoval County was, in fact, relevant to the material legal issue of Defendant's intent. We agree with the district court that it was.

[2] Defendant cites *State v. Lovett*, 2012-NMSC-036, 286 P.3d 265; *State v. Gallegos*, 2007-NMSC-007, 141 N.M. 185, 152 P.3d 828; and *State v. Ruiz*, 2001-NMCA-097, 131 N.M. 241, 34 P.3d 630.

Defendant's argument focused on lack of sexual intent. Evidence of the Sandoval County incident, that alleged non-parental touching, was relevant to whether Defendant touched Child with unlawful intent.

{18} We note an argument made by Defendant that even an analysis that focuses on Defendant's intent relies on a propensity inference, and, therefore, the Sandoval County incident was improperly admitted under Rule 11-404(B). The inferential chain suggested by Defendant's argument might be as follows: Defendant touched Child with sexual intent in Sandoval County; therefore, he is the sort of person who touches children with sexual intent; because he is that sort of person, he is more likely to have had sexual intent during the charged acts. Thus, according to Defendant, the evidence is inadmissible. Under Rule 11-404(B), however, the admissibility of evidence of other acts does not depend on whether the evidence is potentially illegitimate evidence of character, but, instead, on whether there is a permissible purpose. *See Old Chief v. United States*, 519 U.S. 172, 184 (1997) (stating that when certain evidence "has the dual nature of legitimate evidence of an element [of a charge] and illegitimate evidence of character" the evidence satisfies federal Rule 404(B) and admissibility is determined under federal Rule 403); *Gallegos*, 2007-NMSC-007, ¶ 22 (stating that evidence is inadmissible under Rule 11-404(B) if "its sole purpose or effect is to prove criminal propensity").

{19} As a result, the district court did not abuse its discretion by allowing evidence of the uncharged Sandoval County incident past the threshold of Rule 11-404(B). We cannot disagree that evidence was relevant to the material issue of Defendant's intent with regard to the charged acts alleged by Child. We now examine the admission of this evidence under Rule 11-403. *See Lovett*, 2012-NMSC-036, ¶ 32 ("If the evidence is probative of something other than propensity, then we balance the prejudicial effect of the evidence against its probative value [when applying Rule 11-403]." (internal quotation marks and citation omitted)).

Rule 11-403

{20} Rule 11-403 provides that "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." At issue in this case is the balance between probative value and unfair prejudice. Unfair prejudice, in the context of Rule 11-403, "means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *State v. Stanley*, 2001-NMSC-037, ¶ 17, 131 N.M. 368, 37 P.3d 85 (internal quotation marks and citation omitted). Evidence is unfairly prejudicial "if it is best characterized as sensational or shocking, provoking anger, inflaming passions, or arousing overwhelmingly sympathetic reactions, or provoking hostility or revulsion or punitive impulses, or appealing entirely to emotion against reason." *Id.* (internal quotation marks and citation omitted). The determination of unfair prejudice is "fact sensitive," and, accordingly, "much leeway is given trial judges who must fairly weigh probative value against probable dangers." *Otto*, 2007-NMSC-012, ¶ 14 (internal quotation marks and citation omitted). However, we will "not . . . simply rubber stamp the trial court's determination." *State v. Torrez*, 2009-NMSC-029, ¶ 9, 146 N.M. 331, 210 P.3d 228 (internal quotation marks and citation omitted). As stated above, we review a trial court's weighing of probative value against unfair prejudice for an abuse of discretion. *Otto*, 2007-NMSC-012, ¶ 14.

{21} Defendant argues that evidence of prior crimes in general and, in particular, evidence of prior child molestation, is highly prejudicial. He also argues that the Sandoval County incident was of "*de minimis* probative value" because that incident was dissimilar to the charged incidents, "took place after [one of] the charged event[s]," and Child's account was uncorroborated and changed over time. In addition, Defendant argues that a note submitted by a juror indicated that the jury was "focus[ed] on what really happened in that uncharged incident" and, therefore, was unfairly prejudiced such that a mistrial was necessary. This note asked whether the condition of Child's hymen as noted during her medical examination was consistent with Child's Sandoval County allegations. Lastly, Defendant argues that the mid-trial ruling by the court allowing evidence of the Sandoval County incident "unfairly surprised" Defendant.

{22} We conclude that the district court did not abuse its discretion in deciding that the Sandoval County incident, which involved allegations of the same type of incident against the same alleged victim during a time period between the two charged incidents, was neither too dissimilar nor too remote in time to be of significant probative value. Defendant presented evidence that Child's prior sexual abuse may have affected her capacity to discern whether behavior was or was not sexual and argued vigorously that his actions toward Child were normal parental care and that he did not have sexual intent. Evidence of unlawful intent was a required element of the charges against Defendant. Evidence that Defendant touched Child in a sexual manner that was not amenable to an interpretation as normal parental care could reasonably be deemed of probative value, especially considering that evidence of Defendant's intent was otherwise scarce.

{23} In addition, under the circumstances of this case, the district court's mid-trial decision to admit evidence of the Sandoval County incident did not unfairly surprise or unfairly prejudice Defendant. *See id.* ¶ 16 ("The purpose of Rule 11-403 is not to guard against any prejudice whatsoever, but only against the danger of unfair prejudice." (alterations, internal quotation marks, and citation omitted)). By the retrial, after defending against two motions in limine that sought to admit evidence of the Sandoval County incident, defense counsel was well-aware of this evidence. Nor are we convinced that we should overrule the district court's decision to admit the evidence based on a single question by a juror.

{24} Defendant further states that child molestation provokes "strong visceral reactions of repugnance" in jurors and that there is a "culturally prevalent belief that a 'child molester' has a propensity to molest children." Against this background, Defendant argues that the admission of evidence of the alleged Sandoval County incident constituted unfair prejudice. Hearing and evaluating evidence of terrible events and acts without allowing emotion to gain the upper hand over reason is, naturally, challenging. Yet, we sometimes ask this task of jurors. This case involved alleged sexual misconduct against Child by her father. We cannot find a basis to conclude that the district court abused its discretion in deciding that the Sandoval County incident was similar enough to allow its admission or an abuse of discretion in the district court's decision that would indicate that the evidence was unfairly prejudicial.

{25} Lastly, Defendant argues that the limiting instruction to the jury exacerbated the unfair prejudice because "telling a jury to consider the evidence as evidence of intent merely re-inforces [sic] the 'common sense' use of the evidence as showing propensity." However, Defendant did not object to the instructions or offer an alternative one. With

such lack of preservation, we will reverse only for fundamental error, and Defendant has not asserted fundamental error on appeal. *See State v. Sandoval*, 2011-NMSC-022, ¶¶ 14-15, 150 N.M. 224, 258 P.3d 1016 (reviewing for fundamental error when parties do not object to tendered jury instructions).

{26} In sum, the district court did not abuse its discretion in finding that the probative value of Child's testimony about the Sandoval County incident was not substantially outweighed by any unfair prejudice caused by admission of this evidence. *See* Rule 11-403; *Otto*, 2007-NMSC-012, ¶ 14 (stating that under Rule 11-403 we review the decision of a trial court to admit evidence for an abuse of discretion). The district court did not commit reversible error under Rule 11-404(B) or 11-403 by admitting evidence of the Sandoval County incident.

TESTIMONY OF DR. RENEE ORNELAS

{27} Defendant contends that the district court committed error by failing to grant a mistrial during the testimony of Dr. Renee Ornelas. Dr. Ornelas was qualified as an expert in child sexual abuse. She testified for the State. The following exchange took place during her direct examination:

> State: Would a physician ever prescribe not putting any kind of ointment on or near the genital area when someone has a U[rinary] T[ract] I[nfection] or give instructions on avoiding that area?
>
> Dr. Ornelas: Well, you wouldn't put ointment on a child's genitalia for a urinary tract infection. And typically—and in this age group a nine year old, we would show them how to put it on themselves. It's not typical for a parent of a child of this age to do that kind of intimate care. Certainly that kind of intimate care another person, a caretaker, you know, applying something, that would be appropriate for a baby or toddler.
>
> But just like a nine year old doesn't need somebody to clean their genital area—

{28} Defense counsel objected, approached the bench, and requested either a mistrial or an instruction to the jury to disregard this testimony as the "personal opinion [of Dr. Ornelas] about a nine year old." The district court granted neither, stating that the testimony was "in line with the line of questioning that [defense counsel] asked [Dr. Ornelas] concerning what a parent would do on a child." On appeal, Defendant argues that a mistrial was necessary because Dr. Ornelas' testimony was beyond the scope of her expertise and, as such, inadmissible.

{29} We review a trial court's decision to grant or refuse a mistrial for an abuse of discretion. *State v. Torres*, 2012-NMSC-016, ¶ 7, 279 P.3d 740. "The trial court abuses its discretion in ruling on a motion for mistrial if in doing so it acted in an obviously erroneous, arbitrary, or unwarranted manner." *Id.* (internal quotation marks and citation omitted). Even if the admission of the evidence was error, the State argues that the error was harmless, and therefore not reversible. *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."). When evaluating whether a violation of evidentiary rules was harmless, "we ask whether there [was] a reasonable probability that the error affected the jury's verdict." *Lovett*, 2012-NMSC-036, ¶ 52.

{30} The jury did not convict Defendant of any charge that related to the contested testimony of Dr. Ornelas. Defendant was only convicted of a charge based on the incident that took place in the shower during the second time period the family lived in Bernalillo County. This incident did not involve ointment or the propriety of applying ointment to Child. The testimony to which defense counsel objected did not relate to this incident. Thus, even if the testimony complained of was improperly admitted, there is not a reasonable probability that the error affected the verdict of the jury. As a result, any error in the admission of this testimony was harmless and, accordingly, Defendant is not entitled to a new trial on this basis. *See id.* (stating that harmless error review entails an inquiry into whether there was a reasonable probability that the jury's verdict was affected by the error).

CONCLUSION

{31} For the foregoing reasons, we affirm Defendant's conviction.

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

JAMES J. WECHSLER, Judge

I CONCUR:

MICHAEL D. BUSTAMANTE, Judge

TIMOTHY L. GARCIA, Judge (dissenting).

GARCIA, Judge (dissenting).

{33} I respectfully dissent from the majority opinion for two reasons.

{34} First, the irregular way in which the district court eventually admitted the Sandoval County evidence prejudiced the defense. In denying the State's motion to admit the Sandoval County evidence prior to the second trial, the district court concluded that the purpose of the Sandoval County evidence was: (1) to "bolster the testimony of the alleged victim . . . to show that . . . she's not misinterpreting [Defendant's actions,]" and (2) that the evidence was "only being offered to prove the witness'[s] understanding" and not the Defendant's intent. It further concluded that the Sandoval County evidence was "extremely prejudicial to the defense" and "more prejudicial than probative [under a Rule 11-403 analysis.]" This ruling encouraged Defendant to proceed at trial with his theory that Child may have misinterpreted Defendant's intentions, with the understanding that raising this theory would not trigger a Rule 11-404(B)(2) exception to the rule's prohibition against using other bad acts evidence. Accordingly, defense counsel asserted in his opening statement that expert testimony would show that Child "may be misinterpreting what may be normal contact between a parent and a child." The majority affirms the conviction on the basis that Defendant opened the door to the Sandoval County evidence when he asserted this theory of defense. Maj. Op. ¶¶ 16-17. I submit that it is unfair to Defendant to conclude that he opened the door to the Sandoval County evidence when he did so in reliance on the district court's specific pretrial ruling that his theory of defense concerning Child's potential for misinterpretation would in fact *not* open the door to the Sandoval County evidence. Under these circumstances, I would reverse the conviction on the basis that the district court's actions in this case created a situation that "appears . . . inconsistent with substantial justice." Rule 5-113 NMRA ("Error in either the admission or exclusion of evidence and error or defect in any ruling . . . is not grounds for granting a new trial . . . unless

refusal to take . . . such action appears to the court inconsistent with substantial justice.").[3]

{35} Second, the majority extends Rule 11-404(B)(2)'s "intent" exception beyond the circumstances previously identified by our Supreme Court. At the time that the district court decided to admit the Sandoval County evidence, no evidence had yet been presented by either party calling Defendant's intent into question, and defense counsel had not yet presented its evidence concerning Child's potential for misinterpretation. Although defense counsel raised the misinterpretation issue in his opening statement, opening statements are not evidence. *See* UJI 14-101 NMRA ("Statements of the lawyers . . . are not themselves evidence."). Our Supreme Court has held that other acts evidence involving the same victim generally may be admitted in child sexual abuse cases to counter evidence that has been admitted showing that the defendant did not have the requisite sexual intent. *See State v. Sena*, 2008-NMSC-053, ¶ 14, 144 N.M. 821, 192 P.3d 1198 (affirming admission of other acts evidence where Defendant told witnesses that he had touched the victim's vagina while putting ointment on her rash and that he had not done so sexually); *State v. Kerby*, 2007-NMSC-014, ¶ 26, 141 N.M. 413, 156 P.3d 704 (affirming admission of other acts evidence where the defendant "injected the issue of intent by calling his mother to testify that [the d]efendant told her the touch was merely a fatherly pat on the bottom"); *Otto*, 2007-NMSC-012, ¶ 11 (affirming admission of other acts evidence where evidence had been presented that Defendant told detectives he may have sexually touched the victim unconsciously while he was half-asleep). However, we have not encountered any case from our Supreme Court concluding that other acts evidence may be admitted *before* any evidence was presented calling the defendant's intent into question but merely because the defendant's intent is an element of the crime and is at issue in every child sexual assault case. Because a defendant's intent is normally an element of every criminal charge, allowing the state to use other bad acts evidence to establish its initial burden of proof regarding the element of criminal intent, before any evidence is admitted placing Defendant's intent into question, effectively eviscerates the well-recognized protections provided under Rule 11-404(B)(1).

{36} It has been a longstanding fear that criminal propensity or other bad acts evidence is extremely prejudicial and may be misapplied to obtain a conviction. *See Gallegos*, 2007-NMSC-007, ¶ 21 ("The nearly universal view is that other-acts evidence, although logically relevant to show that the defendant committed the crime by acting consistently with his or her past conduct, is inadmissible because the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect." (internal quotation marks and citation omitted)); *State v. Lamure*, 1992-NMCA-137, ¶ 47, 115 N.M. 61, 846 P.2d 1070 (Hartz, J., specially concurring) ("One cannot ignore the long tradition of courts and commentators expressing fear that jurors are too likely to give undue weight to evidence of a defendant's prior misconduct and perhaps

[3] It is also worth noting that when the district court eventually allowed the State to present the Sandoval County evidence, it explained only that the evidence was "relevant" to "[i]ntent," which was "a material issue in this case." The district court did not re-evaluate its pretrial determination that the Sandoval County evidence was "extremely prejudicial" and "more prejudicial than probative" under Rule 11-403. Without more in the record, it is impossible to determine why the district court reversed its previous ruling and determined that the highly prejudicial Sandoval County incident became admissible under Rule 11-403. No explanation other than relevance was identified by the district court.

even to convict the defendant solely because of a belief that the defendant is a bad person."); *see also Old Chief*, 519 U.S. at 181 (recognizing that although other acts evidence is relevant, "the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect"); *People v. Smallwood*, 722 P.2d 197, 205 (Cal. 1986) (recognizing that other acts evidence "is the most prejudicial evidence imaginable against an accused"), *disagreed with on other grounds by People v. Bean*, 760 P.2d 996, 1008 n. 8 (Cal. 1988); Edward J. Imwinkelried, *Undertaking the Task of Reforming the American Character Evidence Prohibition: The Importance of Getting the Experiment Off on the Right Foot*, 22 Fordham Urb. L.J. 285, 288 (1995) ("The contemporary abhorrence of sexual misconduct and offenses against children is as intense as it is widespread. Repulsed by evidence of such uncharged crimes by an accused, a juror might be tempted to look past weaknesses in the prosecution's proof of the accused's guilt of the uncharged crime."). I would urge our Supreme Court to reconsider and clarify the bounds of the application of Rule 11-404(B)(2) during the state's case-in-chief, especially under the circumstances presented in this case.

TIMOTHY L. GARCIA, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-103

Filing Date: July 6, 2015

Docket No. 32,648

VILLAGE OF LOGAN,

Plaintiff-Appellant,

v.

EASTERN NEW MEXICO WATER UTILITY AUTHORITY,

Defendant-Appellee.

Hinkle, Hensley, Shanor & Martin, L.L.P.
Thomas M. Hnasko
Dulcinea Z. Hanuschak
Dayan M. Hochman
Santa Fe, NM

for Appellant

Montgomery & Andrews, P.A.
Louis W. Rose
Jeffrey J. Wechsler
Carolyn A. Wolf
Galen M. Buller
Santa Fe, NM

Grieg & Richards, P.A.
David F. Richards
Clovis, NM

for Appellee

OPINION

HANISEE, Judge.

{1} This single-issue appeal requires clarification of the legal methodology that applies to resolve a zoning and land use

conflict between a municipality and a water utility authority, both of which are political subdivisions of the state established by legislative processes. The district court employed the statutory guidance test, which it found to be most consistent with New Mexico law. We affirm.

BACKGROUND

{2} Plaintiff-Appellant, the Village of Logan (the Village), is located within Quay County, near Tucumcari and on the shores of the Ute Lake Reservoir. As a New Mexico municipality, the Village has the authority to adopt and enforce laws and zoning regulations "[f]or the purpose of promoting health, safety, morals or the general welfare" of its residents. NMSA 1978, § 3-21-1(A) (2007). When the Village first enacted its zoning ordinances in 1965, it created six zones, one of which was designated "R-1," denoting single-family residential use unless otherwise specified. Under the Village's current ordinances, any landowner wishing to utilize property in a manner contrary to its zoning designation must apply to the Village for a special use permit.

{3} Defendant-Appellee, Eastern New Mexico Water Utility Authority (ENMWUA), is a state entity created by the Legislature pursuant to NMSA 1978, Section 73-27-4 (2010). The Eastern New Mexico Water Utility Authority Act (the Act), *see* NMSA 1978, §§ 73-27-1 to -19 (2010), was enacted to create a "water utility authority to develop and construct a water delivery system [to] local governments within the boundaries of the authority." Section 73-27-2(B)(1), (2). Within the Act, the Legislature posited the need for an "organized structure to work with state, local and federal agencies to complete a water delivery system from the Ute Reservoir to local governments" in the neighboring eastern New Mexico counties of Curry and Roosevelt. Section 73-27-2(A)(3); § 73-27-4. To facilitate its mission, ENMWUA was granted the power of eminent domain to acquire property for "rights of way and easements and for the use and placement of facilities and infrastructure elements, including pipelines, structures, pump stations and related appurtenances." Section 73-27-7(G).

{4} Once established, ENMWUA acquired Lot 11 in the Village's South Shore development. It sought and obtained a special use permit for an initially planned water intake structure that would be contained within the boundaries of Lot 11. ENMWUA later decided to enlarge the planned structure, and to include an access road and holding pond. To accommodate the larger facilities, ENMWUA used its power of eminent domain to acquire Lot 12, adjacent to Lot 11. The Village asserted that without a newly specific special use permit, the project would violate the Village's R-1 zoning regulations on Lot 12. At that juncture, ENMWUA ceased to acknowledge the Village's authority to enforce its zoning regulations against it and refused to again seek a special use permit.

{5} The impasse led the Village to district court, where its complaint sought injunctive relief and a declaratory determination that its zoning regulations were indeed applicable to ENMWUA, such that a special use permit would be required in order for the proposed construction to proceed. ENMWUA filed a motion to dismiss pursuant to Rule 1-012(B)(6) NMRA, arguing that as a state agency it was immune from the Village's zoning laws. In support, ENMWUA cited *City of Santa Fe v. Armijo*, 1981-NMSC-102, ¶ 3, 96 N.M. 663, 634 P.2d 685 ("Municipalities have only those powers expressly delegated by state statute."). Concluding, however, that the parties were political subdivisions of equal dignity insofar as each had been "created by or pursuant to statute," the district court found that *Armijo* "does not control the situation

presented in this case," and sought legal guidance elsewhere.

{6} The district court and the parties collectively identified five stand-alone tests used in varying jurisdictions to resolve disputes of this nature: (1) the statutory guidance test, (2) the balancing of interests test, (3) the eminent domain test, (4) the superior sovereign test, and (5) the governmental propriety test. *See Macon Ass'n for Retarded Citizens v. Macon-Bibb Cnty. Planning & Zoning Comm'n*, 314 S.E.2d 218, 222 (Ga. 1984) (discussing and citing authority for each test); *Rutgers v. Piluso*, 286 A.2d 697, 702-03 (N.J. 1972) (discussing and applying the balancing of interests test). ENMWUA sought application of either the statutory guidance or eminent domain tests, while the Village maintained that the balancing of interests test should be adopted in circumstances of sovereign equality. Having distinguished *Armijo*, the district court nonetheless agreed with ENMWUA that the statutory guidance test was most consistent with New Mexico law, granted ENMWUA's motion, and dismissed the Village's complaint.

{7} The Village appeals, arguing that the district court erred in resolving the case by application of the statutory guidance test. The Village contends that we should adopt the balancing of interests test as the more equitable approach to resolving zoning and land use conflicts between equally situated political subdivisions of the state. The Village seeks remand in order for an evidentiary hearing to be conducted so that the interests of the two entities can be balanced in district court, which it asserts would produce a more informed result. ENMWUA maintains on appeal that the statutory guidance test is the proper test to be applied, and that its adoption in this circumstance would be most consistent with our Supreme Court's rejection of unexpressed municipal power in *Armijo*.

STANDARD OF REVIEW

{8} "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. We accept as truthful well-pleaded factual allegations and resolve all doubts in favor of the complainant. *Id.* "A Rule [1-0]12(B)(6) motion is only proper when it appears that [a] plaintiff can neither recover nor obtain relief under any state of facts provable under the claim." *Valdez*, 2002-NMSC-028, ¶ 4 (emphasis, internal quotation marks, and citation omitted). The facts in this case are not in dispute; thus, we review only the district court's application of the statutory guidance test de novo.

DISCUSSION

{9} Although this Court squarely addressed zoning and land use conflicts between the State and a lesser authority in *County of Santa Fe v. Milagro Wireless, LLC*, 2001-NMCA-070, 130 N.M. 771, 32 P.3d 214, as had our Supreme Court previously in *Armijo*, 1981-NMSC-102, neither has had occasion to speak regarding whether a wholly separate analysis is needed to resolve zoning and land use disputes between co-equal political subdivisions of the state concerning activities on non-state-owned land. Regarding this distinction, the Village contends that *Armijo* and *Milagro*, are not useful to this issue of "first impression," and that the statutory guidance test amounts to little more than an "obsolete approach that should be eschewed in favor of the more enlightened [b]alancing of [i]nterests [t]est." ENMWUA agrees on appeal with the district court's selection of the statutory guidance test, and the resulting dismissal of the Village's complaint.

{10} We take a moment to summarize the balancing of interests test advocated by the Village and first introduced in *Rutgers*. The

test owes its genesis to the New Jersey Supreme Court's belief that "[legislative] intent, rarely specifically expressed, is to be divined from a consideration of many factors[.]" *Rutgers,* 286 A.2d at 702. The summarized factors considered essential in *Rutgers* include statutory language itself, but also considerations such as the identification of alternative locations for land uses that divide one political subdivision from another, the scope of each litigant's political authority, input from any higher state authority, the degree to which the proposed facility is essential versus considerations of detriment to surrounding property, and whether any effort was made to comply with the disputed zoning procedures. *Id.* at 698. The Village also points out that the balancing of interests test has been embraced in New Mexico, albeit by the New Mexico Attorney General in an advisory opinion issued in 2005. *See* N.M. Att'y Gen. Op. 05-03 (2005) (relying on a *Rutgers* analysis to conclude that the Los Alamos Public School District is not automatically immune from local zoning regulations). The Village contends that this modern, more "holistic alternative approach," best balances the interests of the parties and considers the overarching public interest in a comprehensive plan. *See Rutgers,* 286 A.2d at 701, 703; *Hayward v. Gaston,* 542 A.2d 760, 764 (Del. 1988); *Alaska R.R. Corp. v. Native Vill. of Eklutna,* 142 P.3d 1192, 1196 (Alaska 2006) (all adopting the balancing of the interests test).

{11} We begin our analysis, however, by determining the degree to which *Armijo* and *Milagro,* are instructive. In *Armijo,* our Supreme Court announced specific limitations on the power of a municipality to enact and enforce local zoning regulations or restrictions. 1981-NMSC-102, ¶ 3. At issue was whether the City of Santa Fe could utilize its zoning authority to forbid the Commissioner of Public Lands from maintaining an oil field pumping rig on the premises of the State Land Office Building, an activity that would require a permit in order not to violate Santa Fe's historical district zoning ordinances. *Id.* ¶ 1. In reversing the district court's determination that Santa Fe's ordinances apply to state agencies, institutions, and officials, the Court held that "[a] state governmental body is not subject to local zoning regulations or restrictions." *Id.* ¶ 3. It added that "[s]tatutes granting power to cities are strictly construed, and any fair or reasonable doubt concerning the existence of an asserted power is resolved against the city." *Id.* The Court went on to state that "[m]unicipalities have only those powers expressly delegated by state statute" and that such authority does not arise by "inference or implication from a statute." *Id.* The Court examined the language of state statutes regarding "Zoning Regulations" under NMSA 1953, §§ 14-28-9 to -11 (repealed in 1965) (current version at NMSA 1978, §§ 3-21-1 to -2 (1965, as amended through 2007)), then authorizing Santa Fe to zone property within its municipal boundaries in the first place. *Armijo,* ¶ 4. Finding no direct allowance within the statute permitting municipal zoning requirements to apply to state land, our Supreme Court reversed the district court's conclusion that Santa Fe could prevent placement of an oil pumping rig on state property. *Id.* ¶¶ 12-13.

{12} *Milagro* assessed the enforceability of county zoning ordinances to the actions of a private, commercial entity on a state-owned right of way. 2001-NMCA-070, ¶¶ 2, 4-5, 7. Applying *Armijo* in this slightly different context, this Court upheld the district court's dismissal of a challenge to the erection of a cell phone tower—approved of but not undertaken directly by the New Mexico Highway Department—adjacent to I-25. *Milagro,* 2001-NMCA-070, ¶¶ 2, 9. From an analytic perspective, *Milagro,* as did *Armijo,* examined the statutory authority upon which the power to enforce county zoning ordinances

was premised and concluded that the power granted lacked an "express grant of authority to zone on state land." *Milagro*, 2001-NMCA-070, ¶ 7.

{13} Although notably distinct from this case insofar as both *Armijo* and *Milagro*, address activities that otherwise violated zoning restrictions on state owned land, both utilized principles of statutory construction to determine that municipal ordinances lack force on state land when contrary authority is not plainly provided by enabling legislation. *Armijo*, 1981-NMSC-102, ¶¶ 12-13; *Milagro*, 2001-NMCA-070, ¶ 7. Here, the district court correctly identified the statutory guidance test as that most consistent with our jurisprudence. Pursuant to it, courts review the statutory powers assigned to each entity to ascertain whether the Legislature intended that one entity's local zoning ordinances apply to the other entity's activities. *Macon Ass'n*, 314 S.E.2d at 222; *see Village of Swansea v. Cnty. of St. Clair*, 359 N.E.2d 866, 867 (Ill. App. Ct. 1977) (utilizing statutory guidance test to conclude that to allow application of municipal zoning regulations to prevent construction of dog pound would frustrate the intent of the Illinois legislature and the statutory mandate of the animal control act it enacted); *State ex rel. St. Louis Union Trust Co. v. Ferriss*, 304 S.W.2d 896, 901-03 (Mo. 1957) (en banc) (applying statutory guidance test in holding school district's legally authorized construction activities to be superior to a municipality's zoning ordinance). We note also that the approach taken by *Armijo*, *Milagro*, and by jurisdictions that employ the statutory guidance test in instances such as this where political subdivisions conflict, is consistent with our historic preference to identify legislative intent when actions are undertaken pursuant to statutory authority. *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 ("When construing statutes, our guiding principle is to determine and give effect to legislative intent . . . aided by classic canons of statutory construction . . . giving the words their ordinary meaning, [absent indication that] a different one was intended."); *Griego v. Oliver*, 2014-NMSC-003, ¶ 20, 316 P.3d 865 ("Our principal goal in interpreting statutes is to give effect to the Legislature's intent."). We adopt the statutory guidance test as that which applies to determine whether a land use proposed by one political subdivision of the state may be prohibited by the zoning regulation of another. While we note the availability of additional possible tests to guide district courts in such instances, neither party seeks application of the tests not evaluated in this Opinion.

{14} We lastly turn to whether the statutory guidance test supports the district court's dismissal of the Village's complaint, and conclude that it does. We first note that the Village does not argue on appeal that if the statutory guidance test were correctly selected by the district court, it was nonetheless incorrectly applied. Accordingly, ENMWUA did not address application of the test in its answer brief. Yet the district court as well did not provide insight as to the basis on which it determined ENMWUA was entitled to dismissal of the Village's complaint pursuant to the statutory guidance test. We therefore elect to briefly explain why, as a matter of law and pursuant to the statutory guidance test, the district court's dismissal of the Village's complaint was proper. The Act established, directed, and ultimately empowered ENMWUA in a manner greater than that allowed to municipalities such as the Village regarding land use regulation. Specifically, the Act identified the need for and created a water utility authority spanning multiple counties in eastern New Mexico. *See* §§ 73-27-1 to -4. It was designed to benefit local governments in that quadrant of the state by sharing water from the Canadian River stored in the Ute Reservoir. Section 73-27-2(A)(3). The power

to condemn land by eminent domain is not an insignificant one[1], yet it was provided to ENMWUA to directly acquire and utilize property in Quay County, where the Village exists. *See* § 73-27-7(G). Ultimately, ENMWUA was directed to "provide an organized structure to work with state, local and federal agencies," Section 73-27-2(A)(3), not simply any local entity. *See* § 73-27-7(G).

{15} Comparatively, Section 3-21-1(A) allows local restriction of land use "[f]or the purpose of promoting health, safety, morals or the general welfare," among other local powers vested in municipalities such as the Village by the zoning authority. Yet, no municipal ordinance can be "inconsistent with the laws of New Mexico." NMSA 1978, § 3-17-1 (1993). In this instance, the legislative purpose behind its creation of ENMWUA would be frustrated by requiring that it adhere to municipal zoning ordinances. We conclude that the statutory guidance test applies to immunize ENMWUA from the Village's zoning ordinances, and thus from its special use permit process in this instance. *See Armijo*, 1981-NMSC-102, ¶ 3 ("Statutes granting power to cities are strictly construed, and any fair or reasonable doubt concerning the existence of an asserted power is resolved against the city.").

{16} For the foregoing reasons, we affirm the district court's application of the statutory guidance test, and its dismissal of the Village's complaint.

[1]In jurisdictions that employ the eminent domain test, ENMWUA's power to take and use land would alone establish its superiority over the Village in the current dispute. *See Macon Ass'n*, 314 S.E.2d at 222 ("[T]he [p]ower of [e]minent [d]omain [t]est take[s] the position that when a political unit is authorized to condemn, it is automatically immune from local zoning regulation when it acts in furtherance of its designated public function."). For the purposes of statutory guidance, it is a factor that at minimum constitutes a significant expression of legislative intent.

{17} IT IS SO ORDERED.

J. MILES HANISEE, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

CYNTHIA A. FRY, Judge

Certiorari Denied, September 16, 2015, No. 35,489

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-104

Filing Date: July 21, 2015

Docket No. 33,187

CYNTHIA R. HERALD, M.D.,

Plaintiff-Appellant/Cross-Appellee,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF NEW MEXICO, a body corporate of the STATE OF NEW MEXICO, for itself and its public operations including BOARD OF DIRECTORS OF THE UNIVERSITY OF NEW MEXICO HEALTH SCIENCES CENTER, UNIVERSITY OF NEW MEXICO HEALTH SCIENCES CENTER and its components the UNIVERSITY OF NEW MEXICO HOSPITAL and UNIVERSITY OF NEW MEXICO SCHOOL OF MEDICINE,

Defendant-Appellee/Cross-Appellant.

Curtis & Lucero
Lisa K. Curtis
Amalia S. Lucero
Albuquerque, NM

Law Offices of E. Justin Pennington
E. Justin Pennington
Albuquerque, NM

L. Helen Bennett
Albuquerque, NM

for Appellant

Wiggins, Williams & Wiggins, P.C.
Patricia G. Williams
Albuquerque, NM

for Appellee

OPINION

SUTIN, Judge.

{1} Plaintiff Cynthia Herald, M.D., sued the Board of Regents of the University of New Mexico (Defendant) after she was discharged from the residency program at the University of New Mexico School of Medicine. She claimed that her termination was driven by discrimination and retaliation in violation of the New Mexico Human Rights Act (the HRA), NMSA 1978, §§ 28-1-1 to -15 (1969, as amended through 2007), and the Whistleblower Protection Act (the WPA), NMSA 1978, §§ 10-16C-1 to -6 (2010). She also stated claims under the New Mexico Tort Claims Act (the TCA), NMSA 1978, §§ 41-4-1 to -30 (1976, as amended through 2015), and for breach of contract. Underlying these claims was Plaintiff's theory that Defendant's alleged discriminatory and retaliatory actions toward her, including her termination, stemmed from and were related to Plaintiff's allegation that she had been raped by a fellow participant in the residency program.

{2} The district court dismissed Plaintiff's TCA and WPA claims, and the court granted summary judgment in favor of Defendant as to Plaintiff's breach of contract claim. The district court construed Plaintiff's complaint as stating three claims under the HRA, namely, disparate treatment, sex discrimination, and retaliation. As to disparate treatment, the district court granted summary judgment in favor of Defendant. Plaintiff's claims of sex discrimination and retaliation pursuant to the HRA were tried before a jury; the jury found in favor of Defendant on both claims.

{3} On appeal, Plaintiff challenges the district court's WPA and TCA dismissal orders and its order granting summary judgment as to her breach of contract claim. She also argues that the court erred in its instructions to the jury on her HRA claim. We reverse the district court's dismissal of Plaintiff's WPA claims on statutory construction grounds. As to Plaintiff's remaining arguments, we affirm the district court.

{4} Defendant cross appeals, claiming that the district court erred in denying its requested costs and attorney fees. We reverse the district court's denial of costs associated with Defendant's electronic filing fees because we hold that it was premised on a misapplication of the relevant law. We affirm on the remaining issues.

BACKGROUND

{5} After graduating from medical school, Plaintiff enrolled in the University of New Mexico School of Medicine (the School) as a post-doctoral fellow and resident physician in anesthesiology (the residency program) in June 2008. As a participant in the residency

program, Plaintiff was both an employee and a student at the University of New Mexico (UNM), with responsibilities as a "house staff physician for patients" at UNM Hospital, as well as having a responsibility to participate in educational activities. Plaintiff's involvement with the residency program was formalized in a "Graduate Medical Education Agreement" between Defendant and Plaintiff; this agreement served as Plaintiff's employment contract.

{6} In June 2009, Plaintiff visited the home of a man who was "senior to Plaintiff" in the residency program (the senior resident), and who, by virtue of his greater experience, education, and training, supervised Plaintiff's work. Plaintiff claimed that while she was in his home, the senior resident raped her. In September 2009, Plaintiff reported the alleged rape to the Associate Dean for Graduate Medical Education, Dr. David Sklar; Residency Program Director, Dr. James Harding; and Chairman of the Department of Anesthesiology, Dr. John Wills (collectively, the residency administrators). Plaintiff never reported the alleged rape to a law enforcement agency, and the senior resident was never charged with or convicted of any crime as a result of Plaintiff's allegation that he raped her.

{7} In June 2010, Plaintiff was terminated from the residency program. A "notice of final action" letter to Plaintiff, signed by Doctors Wills and Sklar, detailed the School's decision to terminate Plaintiff from the residency program on "administrative misconduct" grounds. The letter enumerated several findings that led to the School's conclusion that Plaintiff had committed various forms of administrative misconduct. Those findings included that Plaintiff was impaired and incompetent while on duty at UNM Hospital as a result of ingesting Schedule IV narcotics; that an investigation revealed that Plaintiff's hospital-issued narcotic pack was missing Schedule II and IV controlled substances and that Plaintiff had altered a document pertaining to the content of the narcotic pack so as to hide the discrepancy; and that, in contravention of the School's policy, Plaintiff had repeatedly filled prescriptions issued to her by other participants in the residency program, many of which may have been falsified by Plaintiff in an unlawful use of the other residents' institutional DEA numbers. As well, the letter stated that Plaintiff had refused to attend meetings, refused to discuss her impairment and related issues, deliberately lied to the School so as to obstruct the investigation, and had attempted to convince an attending physician to take the blame for the discrepancy in her narcotic pack.

{8} Following her termination from the residency program, Plaintiff filed a complaint with the New Mexico Department of Workforce Solutions, Human Rights Bureau alleging that she had suffered sex discrimination and retaliation culminating in her termination from the residency program. She received an order of non-determination from the Labor Relations Division of the Human Rights Bureau allowing her to pursue her HRA claim in district court. *See* § 28-1-10(D) (stating that "[a] person who has filed a complaint with the human rights division may request and shall receive an order of non[-]determination from the director"); § 28-1-13(A) (stating that the order of non-determination may be appealed to the district court where the complainant may obtain a trial de novo).

{9} Plaintiff filed a "notice of appeal [from the order of non-determination] and complaint for negligent supervision [under the TCA], wrongful discharge[,] and violation of civil rights" against Defendant in district court. In her complaint, Plaintiff alleged the following. After she reported to the residency administrators that the senior resident had raped her, they discouraged her from reporting

the alleged rape to law enforcement so as to avoid damaging the reputation of the School and UNM Hospital. Defendant failed to investigate the rape allegation and failed to "provide appropriate assistance" to her. And, although her "documented performance continued to be satisfactory through December 2009," after she reported the alleged rape, she was subjected to "heightened scrutiny and increased criticisms" by Defendant's agents.

{10} Plaintiff further alleged that, on an unspecified date, she requested but was denied a medical leave of absence so that she could seek and participate in medical treatment for the alleged rape. She also alleged that her physical, psychological, and emotional condition deteriorated after she reported the alleged rape to the residency administrators and that on January 14, 2010, Dr. Harding requested that she resign from the residency program based on "performance deficiencies and unspecified 'global problems.' " She then repeated her request for a medical leave of absence, and the request was granted. When she returned to work, she was advised that, owing to deficient clinical performance, she would be subject to a three-month period of formal remediation during which her clinical performance would be assessed regularly.

{11} Plaintiff alleged that, after she returned to work, she was not periodically assessed, but to the extent that she was assessed, her performance was deemed satisfactory, and without a final assessment, the remediation period concluded in April 2010. Finally, Plaintiff's complaint stated facts that have already been addressed in this Opinion, pertaining to her alleged impairment on duty on May 4, 2010, and her termination from the residency program.

{12} Based on the foregoing factual allegations, Plaintiff stated four overarching claims: negligent supervision under the TCA, wrongful discharge for a breach of an employment contract, wrongful discharge by retaliation contrary to the WPA, and retaliation and sex discrimination contrary to the HRA.

{13} Before answering Plaintiff's complaint, Defendant filed two motions to dismiss, one seeking dismissal of Plaintiff's WPA claims and another seeking dismissal of Plaintiff's negligent supervision and breach of contract claims. For reasons that are discussed later in this Opinion, the district court granted Defendant's motion to dismiss Plaintiff's WPA claims and TCA claims, and the court denied Defendant's motion to dismiss Plaintiff's breach of contract claim.

{14} Notwithstanding the court's orders of dismissal, Plaintiff filed a first amended notice of appeal and first amended complaint for failure to properly operate a hospital, wrongful discharge, and violation of civil rights (the amended complaint) that re-stated all of the claims in the original complaint. According to Plaintiff, the substantive differences between the original complaint and the amended complaint were that the amended complaint made it clear that the WPA claims were "in the alternative and/or in addition to the relief and remedies of the other causes of action"; and that, unlike the original complaint, the amended complaint specified that Plaintiff's tort claim was based on an alleged "failure to properly operate a hospital[.]" With the exception of the previously dismissed WPA and TCA claims, which the court ruled remained dismissed, the district court permitted Plaintiff to proceed on the amended complaint.

{15} After Defendant answered Plaintiff's amended complaint, Defendant filed two motions for summary judgment, one pertaining to Plaintiff's breach of contract claim and another pertaining to her HRA claims. Plaintiff filed responses in opposition to both motions for summary judgment. The

details of the parties' arguments will be discussed as necessary in the body of this Opinion.

{16} Based on the parties' written arguments and the arguments made at a hearing on the motions for summary judgment, the district court granted summary judgment in favor of Defendant as to Plaintiff's breach of contract claim. As to Plaintiff's HRA claims, the district court ruled that, to the extent that Plaintiff raised a claim of sex discrimination on the theory of disparate treatment, summary judgment should be granted in Defendant's favor. To the extent that Plaintiff's HRA claims for sex discrimination were based on a theory of hostile work environment and of retaliation based on the theory of opposition to unlawful discrimination, the court denied summary judgment and allowed the claims to be tried before a jury.

{17} A jury determined that Plaintiff failed to prove that Defendant unlawfully retaliated or unlawfully discriminated against her. The district court entered a judgment on the verdict ordering that "Plaintiff take nothing[.]" Thereafter, Defendant sought costs pursuant to Rule 1-054(D) NMRA and, on the ground that it had made two offers of settlement, both of which had been rejected by Plaintiff, it sought costs pursuant to Rule 1-068 NMRA. Defendant also sought attorney fees. The district court awarded Defendant its partial costs but denied its request for attorney fees.

{18} On appeal, Plaintiff argues that the district court dismissed her WPA claims based on its erroneous determination that the WPA and the HRA are irreconcilable and on its related conclusion that Plaintiff could therefore only proceed under the HRA. Plaintiff also argues that erroneous legal determinations led the district court to grant summary judgment in favor of Defendant on Plaintiff's breach of contract claim. Additionally, Plaintiff argues that the district court's decision to dismiss her tort claims was based on its misconstruction of the TCA. And finally, Plaintiff argues that because the jury instructions did not accurately reflect the relevant law, the instructions confused and misled the jury. On these bases, Plaintiff seeks reversal. In a cross-appeal, Defendant argues that the district court erred in not awarding attorney fees and in not awarding its full costs or, alternatively, double costs.

{19} We conclude that the district court erred in dismissing Plaintiff's WPA claims on the ground that the WPA and the HRA are irreconcilably conflicting. Accordingly, we reverse the court's dismissal of Plaintiff's WPA claims and remand for further proceedings as to that claim. Plaintiff's remaining arguments provide no grounds for reversal.

{20} We conclude that the district court's denial of Defendant's electronic filing fees on the ground that they are not recoverable under the applicable rule was based on a misinterpretation of the law and remand for further consideration of that issue. Defendant's remaining arguments pertaining to costs and attorney fees do not demonstrate grounds for reversal.

DISCUSSION

A. Plaintiff's Arguments

{21} Plaintiff's arguments present issues of law that are reviewed de novo. *See Baker v. Hedstrom*, 2013-NMSC-043, ¶ 10, 309 P.3d 1047 (stating that statutory construction is a question of law that an appellate court reviews de novo); *Benavidez v. City of Gallup*, 2007-NMSC-026, ¶ 19, 141 N.M. 808, 161 P.3d 853 (stating that the appellate court reviews "jury instructions de novo to determine whether they correctly state the law" (internal quotation marks and citation omitted)); *Lopez v. Las Cruces Police Dep't*, 2006-NMCA-

074, ¶ 10, 139 N.M. 730, 137 P.3d 670 (stating that orders pertaining to summary judgment and motions to dismiss are reviewed de novo).

1. Plaintiff's Argument That the District Court Erred in Dismissing Her WPA Claims

{22} Plaintiff's respective HRA and WPA claims arose out of her claim that because she reported the alleged rape to the residency administrators, Defendant took various retaliatory actions against her that ultimately culminated in terminating her from the residency program. In its motion to dismiss Plaintiff's WPA claims, Defendant argued that the HRA provides the exclusive remedy for Plaintiff's retaliation claim. The district court agreed and dismissed Plaintiff's WPA claims. We begin by reviewing the relevant provisions of the HRA and the WPA.

i. The HRA

{23} The HRA provides that it is an unlawful discriminatory practice for an employer to discharge or discriminate based on an employee's sex when that employee is otherwise qualified, in matters of terms, conditions, or privileges of employment. Section 28-1-7(A). It is also an unlawful discriminatory practice for any employer to "aid, abet, incite, compel[,] or coerce the doing of any unlawful discriminatory practice or to attempt to do so" or to "engage in any form of . . . reprisal or discrimination against any person who has opposed any unlawful discriminatory practice[.]" Section 28-1-7(I)(1), (2). A person claiming to be aggrieved by an unlawful discriminatory practice may file a written complaint with the Human Rights Division, thus prompting a series of administrative processes, or she may request an order of non-determination. *See generally* § 28-1-10. An aggrieved employee may obtain a trial de novo in the district court either from an order of the commission following the administrative process or from an order of non-determination. Section 28-1-10(D); § 28-1-13(A).

ii. The WPA

{24} The WPA applies exclusively to public employers and public employees. Section 10-16C-3. Among other things, the WPA prohibits a public employer from taking any retaliatory action against a public employee because the public employee: "communicates to the public employer . . . information about an action or a failure to act that the public employee believes in good faith constitutes an unlawful or improper act" or "objects to or refuses to participate in an activity, policy[,] or practice that constitutes an unlawful or improper act." Section 10-16C-3(A), (C). A "retaliatory action" is defined in the WPA as "any discriminatory or adverse employment action against a public employee in the terms and conditions of public employment[.]" Section 10-16C-2(D). The WPA enumerates the remedies that are available to a public employee who prevails in a lawsuit and provides that those remedies "are not exclusive and shall be in addition to any other remedies provided for in any other law[.]" Section 10-16C-4(A), (C).

iii. Plaintiff Was Entitled to State Claims Under the HRA and the WPA

{25} Statutory interpretation is driven primarily by the language in a statute, and the language of remedial statutes, including the HRA and the WPA, must be liberally construed. *See Whitely v. State Pers. Bd.*, 1993-NMSC-019, ¶ 5, 115 N.M. 308, 850 P.2d 1011 (stating that the language used by Legislature in a statute is the primary indicator of legislative intent); *Las Campanas Ltd. P'ship v. Pribble*, 1997-NMCA-055, ¶ 15, 123

N.M. 520, 943 P.2d 554 (stating that remedial statutes must be liberally construed). With these principles in mind, we observe that the WPA expressly provides that its remedies "shall be in addition to any other remedies provided for in any other law[.]" Section 10-16C-4(C). Further, we observe that, although the HRA is silent on the issue of exclusivity, our Supreme Court has interpreted this silence to mean that the Legislature did not intend the HRA's remedies to be exclusive. *See Gandy v. Wal-Mart Stores, Inc.*, 1994-NMSC-040, ¶ 8, 117 N.M. 441, 872 P.2d 859 (stating that the language of the HRA "is permissive [insofar as it] contains no declaration that the remedies [that] it provides are exclusive" and holding, therefore, that the Legislature "did not intend the [HRA's] remedies to be exclusive").

{26} In light of our Supreme Court's discussion of the HRA in *Gandy*, and based upon the language in Section 10-16C-4(C) of the WPA, we conclude that the Legislature did not intend the HRA to provide Plaintiff's exclusive remedy in this case. Our conclusion, supported by the Legislature's language, also comports with a liberal construction of the two statutes. The district court's reasons for reaching the opposite conclusion are not persuasive.

{27} "Statutes are not to be read in a manner that would make portions of them superfluous." *State Dep't of Labor v. Echostar Commc'ns Corp.*, 2006-NMCA-047, ¶ 6, 139 N.M. 493, 134 P.3d 780. In construing legislative intent to reach its conclusion that the HRA provided Plaintiff's exclusive remedy, the district court omitted any discussion of the express provision in Section 10-16C-4(C) that the remedies in the WPA "shall be in addition to any other remedies provided for in any other law[.]" Having omitted consideration of that language, which ostensibly allows a plaintiff to state a WPA claim alongside a claim under any other law, including the HRA, the district court concluded that there was a conflict between the WPA and the HRA that rendered them irreconcilable.

{28} In the context of statutory construction, a determination that two legislatively enacted provisions irreconcilably conflict is not favored. *See Luboyeski v. Hill*, 1994-NMSC-032, ¶ 10, 117 N.M. 380, 872 P.2d 353 ("Whenever possible, [the appellate courts] must read different legislative enactments as harmonious instead of as contradicting one another."); *see also* NMSA 1978, § 12-2A-10(A) (1997) (stating that "[i]f statutes appear to conflict, they must be construed, if possible, to give effect to each"). This is because there is a presumption that the Legislature is aware of existing laws and would not intend to enact new legislation that irreconcilably conflicts with existing laws. *See Luboyeski*, 1994-NMSC-032, ¶ 10 (stating that the Legislature is presumed not to have intended to enact a law that is inconsistent with existing laws). Thus, the district court's conclusion that the HRA and the WPA are irreconcilably conflicting is out of step with general principles of statutory construction, particularly in light of the language in Section 10-16C-4(C).

{29} In support of its conclusion that there was an irreconcilable conflict between the HRA and the WPA, the district court stated that: (1) unlike the WPA, the HRA "provides a comprehensive administrative process . . . which must be exhausted as a prerequisite to suit"; (2) the two acts have different statutes of limitations; and (3) the two acts differ in terms of the recovery available to a successful claimant. Defendant urges this Court to rely on these distinctions to affirm the district court's decision. We decline to do so.

{30} We begin with the different statutes of limitations and the different recoveries available to a successful claimant. Here, the district court did not explain why these

differences necessarily placed the HRA and the WPA in irreconcilable conflict. And, on appeal, Defendant has failed to as well. We see no reason to conclude that these distinctions create an irreconcilable conflict between the two acts.

{31} The HRA and the WPA may be read harmoniously, giving effect to each, notwithstanding the different statutes of limitations and the different remedies available to a successful claimant. We assume that any plaintiff who wished to file claims pursuant to the HRA and the WPA would understand the need to do so within the earlier statute of limitations of the HRA to avoid dismissal of the HRA claim on timeliness grounds. *See* § 28-1-10(A) (providing a three-hundred-day statute of limitations for filing claims under the HRA); § 10-16C-6 (providing a two-year statute of limitations for filing claims under the WPA). In the present case, Plaintiff's HRA and WPA claims were timely brought within the same complaint.

{32} Additionally, that the HRA and the WPA provide different remedies for a successful claimant does not create an irreconcilable conflict. *See* § 28-1-13(D) (providing that, pursuant to the district court's discretion, a successful claimant under the HRA may receive "actual damages and reasonable attorney fees"); § 10-16C-4(A) (stating that a public employer that violates the WPA "shall be liable to the public employee for actual damages, reinstatement with the same seniority status that the employee would have had but for the violation, two times the amount of back pay with interest on the back pay and compensation for any special damage sustained as a result of the violation . . . . [and the] employer shall be required to pay the litigation costs and reasonable attorney fees of the employee"). To the extent that a plaintiff is successful under both theories and to the extent that the remedies overlap, it is incumbent on the district court to prevent impermissible double recovery. *Hood v. Fulkerson*, 1985-NMSC-048, ¶ 12, 102 N.M. 677, 699 P.2d 608 (stating that "[d]uplication of damages or double recovery for injuries received is not permissible" and "[w]here there are different theories of recovery and liability is found on each, but the relief requested was the same . . ., the injured party is entitled to [recover a particular type of damages] award [only once]"); *see Gandy*, 1994-NMSC-040, ¶ 12 ("We are confident that an appropriate exercise of discretion by the district courts . . . will prevent double recovery[.]").

{33} In regard to its conclusion that the HRA "provides a comprehensive administrative process . . . which must be exhausted as a prerequisite to suit," the district court reasoned that allowing a public employee to frame retaliation-based disputes as WPA claims instead of HRA claims would frustrate the Legislature's intent, reflected in the HRA, to require aggrieved employees to pursue administrative remedies. But here, Plaintiff satisfied the grievance procedure of the HRA by requesting and receiving an order of non-determination and then appealing that order in the district court. *See Mitchell-Carr v. McLendon*, 1999-NMSC-025, ¶ 16, 127 N.M. 282, 980 P.2d 65 (explaining that the process of requesting and receiving an order of non-determination signals that the claimant has complied with the HRA grievance procedures and may proceed to court). The order of non-determination allowed Plaintiff to bring her HRA and non-HRA claims, including her WPA claim, before the district court in a single lawsuit.

{34} That the Legislature provided a procedure in the HRA by which a claimant may proceed to court on her claim after requesting and receiving an order of non-determination precludes the conclusion that the Legislature intended to require a

claimant, in every instance, to proceed through a comprehensive administrative process before the Human Rights Commission before bringing her claim to court. *See, e.g.*, § 28-1-10(B), (C), (F) (describing an administrative process that includes, in part, an investigation by the director of the Human Rights Division, potentially followed by an attempt of persuasion or conciliation, possibly followed by a hearing before the Human Rights Commission). Rather, as demonstrated in this case, a claimant may essentially circumvent the more extensive administrative processes contemplated by the HRA by requesting and receiving, without delay, an order of non-determination that may then be appealed in a trial de novo in the district court. *See* § 28-1-10(D) ("A person who has filed a complaint with the [H]uman [R]ights [D]ivision may request and shall receive an order of non[-]determination from the director without delay[.]"); § 28-1-13(A) (stating that the order of non-determination may then be appealed to the district court where the complainant may obtain a trial de novo).

{35} In sum, we reverse the district court's order dismissing Plaintiff's WPA claims on the ground that the HRA and WPA are in irreconcilable conflict and that, therefore, the HRA is the exclusive remedy for Plaintiff's retaliation claim.

iv. Defendant's Arguments in Opposition to Remanding Plaintiff's WPA Claims for Trial

{36} Defendant argues that even if this Court reverses the dismissal of Plaintiff's WPA claims, Plaintiff is not entitled to a trial on that issue. According to Defendant, when the jury found that Plaintiff did not prove Defendant unlawfully retaliated against her under the HRA, it necessarily resolved her claim for retaliation under the WPA as well. We disagree.

{37} Plaintiff's claims under the HRA and under the WPA were premised on distinct theories of what caused Defendant's alleged retaliation against her. In regard to the HRA claims, the jury was instructed, in relevant part, that to prove retaliation, Plaintiff was required to show that she suffered an adverse employment action because she opposed an "unlawful discriminatory practice." The phrase "unlawful discriminatory practice" was defined for the jury as follows: (1) "to create a hostile work environment, discharge an employee[,] or to otherwise discriminate on the basis of sex"; or (2) "to discriminate against any person who reports an unlawful discriminatory practice."

{38} Thus, as to Plaintiff's HRA claims, the jury was instructed that an employer engages in an unlawful retaliation if the employee claiming retaliation (1) opposed the creation of a hostile work environment or the discharge of an employee or other discrimination on the basis of sex; or (2) reported the creation of a hostile work environment, the discharge of an employee, or other discrimination on the basis of sex. Plaintiff argues that the jury's determination that Plaintiff did not suffer retaliation on any of the foregoing bases did not answer the question that was raised by her WPA claims, that is, whether Defendant retaliated against her based on her report of the alleged rape to the residency administrators.

{39} The issue whether Defendant's alleged retaliatory behavior was triggered by Plaintiff's report of the alleged rape alone is distinct from the issue whether Defendant's alleged retaliatory behavior was triggered by Plaintiff's opposition to or report of an "unlawful discriminatory practice" as that phrase was defined for the jury. Accordingly, we hold that the jury's determination of no retaliation under the HRA did not preclude a determination that Defendant retaliated against Plaintiff in violation of the WPA, and we

remand this matter to the district court for further proceedings related to Plaintiff's WPA claims.

{40} Recognizing that we might hold that the WPA claims were viable, Defendant argues that we should affirm the district court's dismissal of Plaintiff's WPA claims on the basis that the WPA is unconstitutional. Defendant argues that the WPA is void for vagueness because it "sets no discernable standard for compliance" and fails to define crucial terms such as "information" and "about." The district court, having dismissed Plaintiff's WPA claims on another ground, expressly declined to consider the issue whether the WPA is unconstitutional. Accordingly, this issue is not properly before this Court and will not be considered. *See Lewis v. City of Santa Fe*, 2005-NMCA-032, ¶ 19, 137 N.M. 152, 108 P.3d 558 (declining to consider an issue upon which the district court had not passed).

2. Plaintiff's Breach of Contract Arguments

{41} In the amended complaint, Plaintiff stated a claim for wrongful discharge premised on the theory that, by terminating her from the residency program without just cause, Defendant had breached the Graduate Medical Education Agreement (the employment contract). Defendant filed a motion for summary judgment on the ground that Plaintiff's contract claim was precluded as a matter of law, which the district court granted. On appeal, Plaintiff argues that disputed issues of fact existed that rendered summary judgment on this issue improper.

{42} In summary judgment proceedings, the moving party has the initial burden of making a prima facie showing that it is entitled to summary judgment. *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 10, 148 N.M. 713, 242 P.3d 280. The moving party may meet this burden by showing "such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question[.]" *Id.* (internal quotation marks and citation omitted). "Once this prima facie showing has been made, the burden shifts to the non-movant to demonstrate the existence of specific evidentiary facts [that] would require trial on the merits." *Id.* (internal quotation marks and citation omitted). In order to meet its burden, the non-movant must provide the court with evidence that justifies a trial on the issues; merely arguing that such evidence exists is insufficient. *Id.*

{43} Defendant set forth the following undisputed facts in support of its motion: (1) "[t]he terms of Plaintiff's employment contract, including applicable policies and procedures, required her to adjudicate her contract dispute through a formal three-step grievance [procedure]"; (2) "[w]hile Plaintiff initiated that process, she did not complete the third step—final and binding arbitration"; and (3) "Plaintiff, having failed to comply with the exclusive dispute resolution provisions of her own contract, including applicable policies and procedures, is precluded as a matter of law from asserting claims against [Defendant] for breach of contract[.]" Attached to Defendant's motion were several exhibits that supported the foregoing statements, including the employment contract and copies of "grievance forms" indicating that Plaintiff had completed only two steps of the three-step grievance procedure.

{44} The district court relied on Defendant's undisputed material facts as the basis for its summary judgment order. Implicit in the court's summary judgment was a determination that Plaintiff failed to meet her burden, under *Romero*, of demonstrating the existence of evidence that would require a trial on the merits. *See id.* On appeal, Plaintiff argues that two issues of fact precluded the court's summary judgment.

{45} First, Plaintiff argues that there exists a factual issue regarding the basis for her termination from the residency program. In support of her argument, Plaintiff points out that, although the notice of final action by which Defendant terminated Plaintiff from the residency program states that the various forms of conduct for which Plaintiff was terminated constituted "administrative misconduct," the notice of final action "clearly articulate[d] academic and professional objections[.]" Therefore, Plaintiff argues, she was actually terminated for "alleged non-administrative misconduct[.]" Plaintiff argues that since she was not terminated for administrative misconduct, she was not required to follow the three-step grievance procedure upon which the district court's summary judgment order was based. Rather, Plaintiff argues, she was required to and did follow a "bifurcated two-step grievance process" that is applicable to termination based on academic or professional misconduct. Based on the foregoing, Plaintiff argues that the district court erred in concluding as a matter of law that she failed to comply with the three-step grievance procedure required in the employment contract.

{46} Plaintiff does not supply any evidentiary or legal support for her assertion that, contrary to what was stated in the notice of final action, the actions that led to her termination constituted non-administrative misconduct. We note as well that in Plaintiff's grievance forms, attached to Defendant's motion for summary judgment, Plaintiff referred to the grievance procedure applicable to disciplinary action for administrative misconduct. Accordingly, we are not persuaded that the district court erred in granting Defendant's summary judgment motion. *See id.* (stating that in response to the movant's showing of entitlement to summary judgment, the non-movant must show, rather than merely argue, the existence of evidence that warrants a trial on the merits); *V.P. Clarence Co. v. Colgate*, 1993-NMSC-022, ¶ 2, 115 N.M. 471, 853 P.2d 722 ("[A]rguments of counsel are not evidence upon which a trial court can rely in a summary judgment proceeding.").

{47} Plaintiff nevertheless argues that even if the grievance procedure applicable to termination on administrative misconduct grounds applied to her, she could not have submitted her dispute to binding arbitration because only the union that negotiated the terms of the employment contract on behalf of all medical residents was permitted to do so. And, according to Plaintiff, the union "did not elect to proceed to the third step—binding arbitration[.]" In Plaintiff's view, she "exhausted her remedies within the UNM system" by completing the only two steps of the grievance procedure that she, personally, could do. From our review of the record, we conclude that Plaintiff failed in the district court to provide any evidence in support of this argument. Specifically, Plaintiff does not point to any evidence demonstrating that she attempted but the union refused to submit her grievance to arbitration, thus leaving her unable to complete the grievance procedure. Plaintiff's arguments on appeal are unsupported by citations to the record on appeal and fail to demonstrate grounds for reversing the district court's summary judgment order. *See id.*; *Muse v. Muse*, 2009-NMCA-003, ¶ 51, 145 N.M. 451, 200 P.3d 104 (stating that, on appeal, this Court will not rely on the arguments and assertions of counsel that are unsupported by citations to the record).

3. Plaintiff's TCA Arguments

{48} The district court granted Defendant's motion to dismiss Plaintiff's tort claims because Plaintiff failed to comply with the TCA's notice requirement. Plaintiff argues

that the court erred in concluding that she failed to meet the TCA's notice requirements. She also argues that the merits of her tort claims precluded dismissal. Because we affirm the district court's dismissal on the notice issue, we do not consider Plaintiff's remaining TCA arguments.

{49} Under the TCA, a person who claims damages against a public entity is required to provide the administrative head of the public entity with written notice stating the "time, place[,] and circumstances of the loss or injury" that gave rise to the claim. Section 41-4-16(A). Unless the public entity has been given notice as required in Section 41-4-16(A) or unless the public entity had "actual notice of the occurrence[,]" a court is jurisdictionally barred from considering the matter. Section 41-4-16(B). Plaintiff claims that dismissal of her tort claims was improper because, by reporting the alleged rape, Plaintiff provided Defendant with "actual notice" of the occurrence; thus, Plaintiff contends, she satisfied the notice requirement of Section 41-4-16(B). Under the clear constraint of precedent, we disagree.

{50} The purpose of the notice requirement in Section 41-4-16(B) is "to ensure that the agency allegedly at fault is notified that *it may be subject to a lawsuit.*" *City of Las Cruces v. Garcia*, 1984-NMSC-106, ¶ 5, 102 N.M. 25, 690 P.2d 1019 (internal quotation marks and citation omitted); *Dutton v. McKinley Cnty. Bd. of Comm'rs*, 1991-NMCA-130, ¶ 9, 113 N.M. 51, 822 P.2d 1134 (stating that it is "firmly established that the notice required is not simply actual notice of the occurrence of the accident or injury but rather, actual notice that there exists a likelihood that litigation may ensue" (internal quotation marks and citation omitted)). Requiring a potential claimant to provide notice that litigation is likely to ensue is intended to "reasonably alert [the agency] to the necessity of investigating the merits of a potential claim against it." *Smith v. State ex rel. State Dep't of Parks & Recreation*, 1987-NMCA-111, ¶ 12, 106 N.M. 368, 743 P.2d 124; *see also Ferguson v. State Highway Comm'n*, 1982-NMCA-180, ¶ 12, 99 N.M. 194, 656 P.2d 244 (stating that the purpose of the notice requirement under the TCA is to enable an investigation "while the facts are accessible[,]" "to question witnesses[,]" "to protect against simulated or aggravated claims[,]" and "to consider whether to pay the claim or to refuse it").

{51} Plaintiff does not argue on appeal, nor did she allege in the district court, that her report of the alleged rape created or was sufficient to notify Defendant of a likelihood that litigation may ensue. Without such notice, the fact that Plaintiff notified Defendant of the alleged rape does not satisfy Section 41-4-16(B). *Dutton*, 1991-NMCA-130, ¶ 9 (stating that actual knowledge of a plaintiff's alleged injury is insufficient to comply with Section 41-4-16). The district court properly dismissed Plaintiff's TCA claims.

4. Plaintiff's Jury Instructions Arguments

{52} In regard to the instructions given to the jury, Plaintiff argues that the district court erred in two ways. Plaintiff's first argument pertains to the instruction that stated the elements of a "hostile work environment" claim. In relevant part, the jury was instructed that to prove her hostile work environment theory, Plaintiff was required to establish that Defendant's "alleged conduct, after it learned of Plaintiff['s] allegations of rape, was based on her sex and was severe and pervasive." Plaintiff argues that because the given instruction included the phrase "severe and pervasive" instead of the phrase "severe or pervasive[,]" as stated in Plaintiff's proffered instruction on this issue, the jury was provided with a misstatement of the law.

{53} Plaintiff's argument regarding the hostile work environment instruction is premised on our Supreme Court's recognition, in *Nava v. City of Santa Fe*, that "generally" a hostile work environment claim requires showing that "the harassment was sufficiently severe or pervasive to create an abusive work environment[.]" 2004-NMSC-039, ¶ 6, 136 N.M. 647, 103 P.3d 571 (quoting Lawrence Solotoff & Henry S. Kramer, *Sex Discrimination and Sexual Harassment in the Work Place* § 3.04[2], at 3-31 (2004)) (internal quotation marks omitted). The *Nava* Court also observed, however, that in New Mexico the HRA has been interpreted to require conduct that is "so severe and pervasive that . . . the workplace is transformed into a hostile and abusive environment for the employee." *Nava*, 2004-NMSC-039, ¶ 5 (quoting *Ocana v. Am. Furniture Co.*, 2004-NMSC-018, ¶ 24, 135 N.M. 539, 91 P.3d 58) (internal quotation marks omitted). The phrase "severe and pervasive" used in *Ocana* and recognized in *Nava* continued, after *Nava*, to be employed by our Supreme Court in the context of hostile work environment claims. *See, eg., Ulibarri v. State*, 2006-NMSC-009, ¶ 13, 139 N.M. 193, 131 P.3d 43 ("The alleged harassment . . . was not sufficiently severe and pervasive to support [the p]laintiff's claim.").

{54} The issue in the present case, whether harassment must be "severe and pervasive" or "severe or pervasive" was not considered by the *Nava* Court, and therefore, *Nava* is not authority for Plaintiff's argument. *Ramirez v. Dawson Prod. Partners, Inc.*, 2000-NMCA-011, ¶ 10, 128 N.M. 601, 995 P.2d 1043 ("[C]ases are not authority for propositions they do not consider."). Further, we are not persuaded that, by its mere recognition of a general rule cited in a treatise, the *Nava* Court intended to announce a new standard applicable to hostile work environment claims in New Mexico. Accordingly, we conclude that the district court's instructions to the jury on this issue accurately stated the law.

{55} Plaintiff's second argument in regard to the jury instructions is a generalized complaint that the district court failed to give the jury Plaintiff's proffered instructions pertaining to three issues: Defendant's failure to conduct an adequate and fair investigation into the alleged rape, its failure to prepare a written report on the alleged rape, and its failure "to respond" to Plaintiff's reports that she felt "traumatized, terrified, intimidated[,] and unable to work or learn" when she was required to interact with the senior resident. Insofar as we can tell from Plaintiff's briefing, Plaintiff's argument regarding Defendant's failure to prepare a written report is raised for the first time on appeal. Therefore, this issue will not be considered. *See Wolfley v. Real Estate Comm'n*, 1983-NMSC-064, ¶ 5, 100 N.M. 187, 668 P.2d 303 (stating that the appellate courts will not consider theories that are raised for the first time on appeal).

{56} As to Plaintiff's contention that the district court erred in failing to instruct the jury in regard to Defendant's failure to conduct an investigation into the alleged rape and its failure "to respond" to Plaintiff in a particular manner, Plaintiff fails to demonstrate where, in the record, facts to support these instructions were argued before the district court, argued at trial, or supported by evidence that was presented to the jury. *See* Rule 12-213(A)(4) NMRA (requiring the appellant to include in the brief in chief citations to the record proper, transcript of proceedings, or exhibits relied upon in support of each argument). We will not search the record on Plaintiff's behalf; accordingly, Plaintiff's argument provides no grounds for reversal. *See Muse*, 2009-NMCA-003, ¶ 72 (stating that this Court "will not search the record for facts, arguments, and rulings in order to support generalized arguments").

5. Conclusion of Issues in Plaintiff's Appeal

{57} In summary, we reverse the district court's order dismissing Plaintiff's WPA claim. As to all other issues raised by Plaintiff, we affirm. We turn now to Defendant's cross-appeal.

B. Defendant's Cross-Appeal

{58} Defendant's cross-appeal pertains to the district court's decisions regarding its requested costs and attorney fees. As to the costs issue, Defendant relies upon both Rule 1-068 and Rule 1-054. Since the jury did not enter a judgment in favor of Plaintiff, Rule 1-068 does not apply under the circumstances of this case. *See* Rule 1-068(A) ("If an offer of settlement made by a defending party is not accepted and the judgment finally obtained by the claimant is not more favorable than the offer, the claimant must pay the costs . . . incurred by the defending party after the making of the offer[.]"); *Apodaca v. AAA Gas Co.*, 2003-NMCA-085, ¶ 100, 134 N.M. 77, 73 P.3d 215 ("Rule 1-068 . . . does not apply where the judgment is entered against [a] plaintiff-offeree and in favor of a defendant-offeror."). Accordingly, we limit our review of the costs issue to Defendant's arguments under Rule 1-054.

{59} Pursuant to Rule 1-054(D)(1), "costs . . . shall be allowed to the prevailing party unless the court otherwise directs[.]" Attorney fees awards are governed by the American rule, which provides that "absent statutory or other authority, . . . each party should bear its own attorney fees"; an exception to the American rule is the court's power "to sanction the bad faith conduct of litigants and attorneys[.]" *Clark v. Sims*, 2009-NMCA-118, ¶ 21, 147 N.M. 252, 219 P.3d 20 (internal quotation marks and citation omitted). The district court's decisions regarding costs and attorney fees are reviewed for an abuse of discretion. *Robertson v. Carmel Builders Real Estate*, 2004-NMCA-056, ¶¶ 47, 53, 135 N.M. 641, 92 P.3d 653.

{60} Defendant filed motions seeking to recover attorney fees in an amount not specified in the record, and costs, totaling $39,442.05. The district court found that, at trial, Plaintiff testified that she had "earned almost no money. However, Plaintiff has a medical degree and it was established at trial that Plaintiff had done little, to nothing, to seek employment from the time of her termination to the time of trial." The court determined that, although the foregoing facts did not support an "outright denial of Defendant's cost bill[,]" they did warrant reducing certain costs that Defendant sought to recover. The district court ultimately awarded Defendant costs totaling $16,661.16. The district court denied Defendant's request for attorney fees, reasoning that the HRA does not allow attorney fees for a prevailing Defendant and that Plaintiff's case was not brought in bad faith, nor was it unreasonable, frivolous, or lacking a foundation.

{61} Defendant argues that it was error for the district court to deny its costs for certain depositions on the ground that they were not used at trial or in support of summary judgment, as well as its electronic filing fees, its charges for obtaining Plaintiff's medical records, witness fees that it paid to Plaintiff's psychiatrist who was not qualified as an expert, and transcript fees that were not requested or approved by the court. Additionally, Defendant argues that the court erred in reducing its jury consultant fees from the total sum of $18,298.31 to the awarded sum of $2000. With the exception of the court's denial of Defendant's electronic filing fees, which was based on a misconstruction of Rule 1-054(D)(2)(a), we conclude that the district court properly exercised its discretion in its decision regarding costs.

{62} Pursuant to the Rules of the District Court of the Second Judicial District, Defendant was required to file all of its court documents electronically. *See* LR2-303 NMRA (stating that in the Second Judicial District Court, in civil, domestic relations, and probate actions, "[t]he electronic filing of documents . . . is mandatory for parties represented by attorneys"). Having prevailed against Plaintiff in this lawsuit, Defendant sought to recover its electronic filing fee costs of $330. The district court refused to award Defendant's filing fees on the ground that "Rule 1-054 does not allow for the recovery of e-filing charges."

{63} Rule 1-054(D)(2)(a) provides that "filing fees" are generally recoverable. Rule 1-005(F) NMRA, governing the service and filing of pleadings and other papers with the court, provides that " '[f]iling' shall include . . . filing an electronic copy[.]" Nothing in these rules suggests that the cost of electronically filing court documents is excluded from Rule 1-054(D)(2)(a)'s provision that filing fees are generally recoverable. Further, to conclude that electronic filing fees comprise an exception to Rule 1-054(D)(2)(a) would absurdly render that rule inapplicable to attorney-represented litigants in a civil, domestic relations, or probate action in the Second Judicial District Court who are required to file documents electronically. LR2-303. To avoid this absurd result, and in accord with the language of the rule, we conclude that "filing fees" as that term is used in Rule 1-054(D)(2) includes electronic filing fees.

{64} Because the district court's denial of Defendant's costs was expressly based upon its misconstruction of Rule 1-054(D)(2)(a), we conclude that the court abused its discretion in that regard. *See Bhandari v. Artesia Gen. Hosp.*, 2014-NMCA-018, ¶ 9, 317 P.3d 856 (stating that the district court abuses its discretion when its discretionary decision rests upon a misapprehension of the law), *cert. denied*, 2014-NMCERT-001, 321 P.3d 935. On remand, the district court shall reconsider whether to award Defendant its electronic filing fee costs of $330.

{65} Having reviewed Defendant's arguments and the district court's order, we conclude that the court's remaining costs decisions were supported by various provisions of Rule 1-054, and we will not second guess the equitable consideration by the district court of Plaintiff's inability to pay the costs. *See Martinez v. Martinez*, 1997-NMCA-096, ¶ 20, 123 N.M. 816, 945 P.2d 1034 (stating that equitable considerations are appropriate in determining whether to award costs); *Gallegos ex rel. Gallegos v. Sw. Cmty. Health Servs.*, 1994-NMCA-037, ¶ 30, 117 N.M. 481, 872 P.2d 899 ("[T]he losing party's ability to pay is a proper factor to consider in determining whether to award costs."); *see also* Rule 1-054(D)(1) (granting the court discretion to determine whether to award costs); Rule 1-054(D)(2)(d) (stating that transcript fees are generally recoverable "when requested or approved by the court"); Rule 1-054(D)(2)(e)(i), (ii) (stating, in relevant part, that the cost of a deposition is generally recoverable only when it is used at trial or used in support of a motion for summary judgment); Rule 1-054(D)(2)(g) (providing only that "expert" witness fees are generally recoverable). Accordingly, we are not persuaded that the district court's denial or reduction of Defendant's remaining costs constituted an abuse of discretion.

{66} In regard to attorney fees, Defendant, citing *Sorbo v. United Parcel Service*, 432 F.3d 1169, 1181 (10th Cir. 2005), argues that "[i]n federal employment discrimination actions, the court has discretion to award fees to a prevailing defendant when the plaintiff's claim 'was brought in bad faith, or was frivolous, unreasonable, or without foundation.' " Defendant urges this Court to

interpret the HRA to comport with the principle that it has derived from *Sorbo.* Building on the foregoing, Defendant argues further that because "Plaintiff's claims in this litigation were, in fact, unreasonable and without foundation[,]" the district court erred in denying its request for attorney fees under the HRA.

{67} It is unnecessary in this case to determine whether the HRA should be read to comport with the principle that Defendant has derived from *Sorbo*. Had the district court determined that Plaintiff's lawsuit was unreasonable or without foundation, it was free to exercise its discretion to award attorney fees to Defendant. *See Clark*, 2009-NMCA-118, ¶ 21 (stating that, pursuant to the American Rule, a district court may award a prevailing party its attorney fees on the ground that the losing party acted in bad faith). The district court expressly found that Plaintiff's lawsuit was not unreasonable and was not brought "without foundation[.]" Defendant does not attack the district court's determination in that regard, and it is conclusive. *See* Rule 12-213(A)(4) (stating that where a party does not specifically attack a finding, the finding shall be deemed conclusive). Accordingly, Defendant's assertion that Plaintiff's lawsuit was "in fact, unreasonable and without foundation" is contradicted by the district court's conclusive finding to the contrary. Defendant's attorney fees argument provides no grounds for reversal.

{68} In sum, as to Defendant's cross-appeal, we reverse the district court's decision to deny the cost of Defendant's electronic filing fees. On remand, the district court shall consider whether those costs should be awarded to Defendant. As to the court's remaining decisions regarding costs and attorney fees, we affirm.

CONCLUSION

{69} We reverse the district court's dismissal of Plaintiff's WPA claim. We also reverse the district court's denial of Defendant's request to recover the cost of its electronic filing fees. We remand for further proceedings as to these issues. As to all remaining issues raised in Plaintiff's appeal and Defendant's cross-appeal, we affirm.

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

JONATHAN B. SUTIN, Judge

WE CONCUR:

CYNTHIA A. FRY, Judge

LINDA M. VANZI, Judge

Certiorari Denied, September 16, 2015, No. 35,486

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-105

Filing Date: July 21, 2015

Docket No. 33,465

JOHN WILLS, M.D.,

Plaintiff-Appellant,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF NEW MEXICO and UNIVERSITY OF NEW MEXICO

HEALTH SCIENCES CENTER,

Defendants-Appellees.

Valdez and White Law Firm, LLC
Timothy L. White
Albuquerque, NM

for Appellant

Sheehan & Sheehan, P.A.
Quentin Smith
Leah M. Stevens-Block
Albuquerque, NM

for Appellees

OPINION

KENNEDY, Judge.

{1} Plaintiff John Wills, M.D. sued the Board of Regents of the University of New Mexico and the University of New Mexico Health Sciences Center (Defendants) for breach of contract and, relatedly, breach of the covenant of good faith and fair dealing. He later amended his complaint to include claims of a violation of due process and a violation of the New Mexico Whistleblower Protection Act (the WPA), NMSA 1978, §§ 10-16C-1 to -6 (2010), on the ground that Defendants terminated his employment in retaliation for his initiation of this lawsuit. On Defendants' motion, the district court dismissed Plaintiff's contract-related claims and his WPA claim. The court later granted Defendants' motion for a judgment on the pleadings as to Plaintiff's due process claim.

{2} On appeal, Plaintiff argues that the district court erred in dismissing his breach of contract[1] and WPA claims and in entering judgment on the pleadings as to his due process claim. We conclude that the district court did not err, and we affirm.

BACKGROUND

{3} Plaintiff was hired to the position of Chair of the Department of Anesthesiology and Critical Care Medicine at the University of New Mexico Health Sciences Center in September 2002. Pursuant to a two-year employment contract, Defendants agreed to pay Plaintiff a base salary plus a supplemental salary. After the two-year term of the contract expired, Defendants continued to pay Plaintiff's salary in an amount consistent with the payment-related terms of the original contract until 2009. After 2009 Defendants stopped paying Plaintiff pursuant to those original contract payment-related terms.

{4} In June 2011, Plaintiff filed a complaint for breach of contract and breach of the covenant of good faith and fair dealing (the initial complaint) by which he sought to recover "past due salaries" that were unpaid since 2009. Plaintiff alleged that the terms of the expired contract had been "continued by the acts of the parties and the subsequent payment of salary to [P]laintiff per the terms of the [original] contract" and, by failing to pay him in accord with those terms, Defendants were in breach of their contractual obligation. Approximately four days after Defendants were served with Plaintiff's initial complaint, Defendants terminated his employment.

{5} After Defendants terminated his employment, Plaintiff amended his complaint, adding a claim for retaliatory violation of due

[1]Plaintiff does not raise any issue on appeal regarding his claim of a breach of the covenant of good faith and fair dealing.

process. In support of his due process claim, Plaintiff alleged that by terminating his employment in retaliation for filing the initial complaint, Defendants violated Plaintiff's constitutional right of access to the courts. Later, in a third amended complaint, Plaintiff added a new claim in which he alleged that, by retaliating against him for filing the initial complaint, Defendants abused their authority in violation of the WPA.

{6} Defendants moved to dismiss Plaintiff's third amended complaint pursuant to Rule 1-012(B)(6) NMRA on the ground that it failed to state any claim upon which relief could be granted. For reasons that are discussed later in this Opinion, the district court granted Defendants' motion to dismiss Plaintiff's claims related to breach of contract and breach of the covenant of good faith and fair dealing, as well as his WPA claim. As to Plaintiff's due process claim, the district court denied Defendants' motion to dismiss on the ground that "a public employer may not take adverse employment action against a public employee for that employee filing a lawsuit[.]"

{7} Defendants again sought dismissal of Plaintiff's due process claim in a motion for a judgment on the pleadings pursuant to Rule 1-012(C). *See Glaser v. LeBus*, 2012-NMSC-012, ¶ 8, 276 P.3d 959 ("A judgment on the pleadings is treated as a motion to dismiss when the district court considers matters contained solely within the pleadings."). In the motion for a judgment on the pleadings, Defendants argued that, insofar as Plaintiff sought to recover damages from Defendants for an alleged violation of his constitutional right of access to the courts, his claim was barred by the New Mexico Tort Claims Act (the TCA), NMSA 1978, §§ 41-4-1 to -30 (1976, as amended through 2015). In support of their argument, Defendants cited New Mexico case law for the proposition that "absent a waiver of immunity under the [TCA], a person may not sue the state for damages for violation of a state constitutional right." *Valdez v. State*, 2002-NMSC-028, ¶ 12, 132 N.M. 667, 54 P.3d 71 (internal quotation marks and citation omitted). Plaintiff conceded that this was a correct statement of the law; he argued in response, however, that Defendants' motion for a judgment on the pleadings should be denied because the TCA's "failure to permit a remedy for a violation of a public employee's fundamental and constitutional right of access to the courts makes the [TCA] unconstitutional as applied" in this case.

{8} In support of his argument that the TCA was unconstitutional as applied in this case, Plaintiff argued that access to the courts is a fundamental right and that by depriving him of access to the courts and, concomitantly, a remedy in this case, the TCA violated his right to equal protection. Plaintiff also argued that he had a fundamental right to "a means to a remedy," and to the extent that the TCA barred his ability to exercise the right to seek a remedy in this instance, its application violated his substantive and procedural due process rights.

{9} The district court was not persuaded by Plaintiff's constitutional arguments. Having considered Defendants' motion for a judgment on the pleadings and Plaintiff's response, the district court granted the motion for a judgment on the pleadings, thereby dismissing Plaintiff's due process claim.

{10} On appeal, Plaintiff argues that the factual allegations in his complaint satisfied the plain language of the WPA and that the district court's dismissal of his WPA claim was founded on an erroneous interpretation of the law. He also argues that because he had an implied employment contract, he was legally entitled to sue Defendants for breach of contract and that the district court erred in concluding otherwise. And, finally, reiterating the argument that he made in response to

Defendants' motion for a judgment on the pleadings, he argues that the district court erred in dismissing his due process claim.

{11} We conclude that because Defendants' breach of contract claim was not founded upon a valid written contract, the district court properly dismissed his claim. We further conclude that the allegations in Plaintiff's complaint did not state a claim under the WPA. And, finally, we conclude that Plaintiff's constitutional attack on the TCA is not supported by the relevant law, and we affirm the district court's judgment on the pleadings as to Plaintiff's due process claim.

Standard of Review

{12} We review de novo a district court's decision to dismiss a case for failure to state a claim under Rule 1-012(B)(6). *Delfino v. Griffo*, 2011-NMSC-015, ¶ 9, 150 N.M. 97, 257 P.3d 917. "Dismissals under Rule 1-012(B)(6) are proper when the claim asserted is legally deficient." *Id.* "In reviewing a district court's decision to dismiss for failure to state a claim, we accept all well-pleaded factual allegations in the complaint as true and resolve all doubts in favor of sufficiency of the complaint." *Id.* (internal quotation marks and citation omitted). The foregoing standard of review also applies to a district court's entry of judgment on the pleadings pursuant to Rule 1-012(C). *Vill. of Angel Fire v. Bd. of Cnty. Comm'rs of Colfax Cnty.*, 2010-NMCA-038, ¶ 5, 148 N.M. 804, 242 P.3d 371.

Plaintiff's WPA Claim

{13} Plaintiff's WPA claim was based on the allegation that Defendants retaliated against him for filing the initial complaint by terminating his employment and that this retaliatory act constituted "an abuse of authority" as that term is used in the WPA. *See* § 10-16C-2(E)(3). The district court dismissed Plaintiff's WPA claim on the ground that Plaintiff's allegations did not show that Plaintiff engaged in any activity that is protected by the WPA. On appeal, Plaintiff argues that the district court erred in dismissing his claim because the allegations in his third amended complaint satisfied the "plain language" of the WPA.

{14} The WPA provides that it is unlawful for a public employer to "take any retaliatory action against a public employee because the public employee . . . communicates to the public employer or a third party information about an action or a failure to act that the public employee believes in good faith constitutes an unlawful or improper act[.]" Section 10-16C-3(A). In relevant part, the WPA defines an "unlawful or improper act" as an "action or failure to act on the part of a public employer that . . . constitutes . . . an abuse of authority[.]" Section 10-16C-2(E)(3). Thus, in order to state a legally viable claim under the WPA, Plaintiff was required to allege that because Plaintiff communicated with Defendants or a third party about Defendants' abuse of authority, Defendants retaliated against him.

{15} In his complaint, Plaintiff failed to allege that Defendants retaliated against him because he communicated with a third party or with Defendants about Defendants' abuse of authority. Rather, Plaintiff alleged only that the act of retaliation, that is, the termination of his employment, constituted an abuse of authority. Because the WPA exclusively protects an employee's communications, by failing to allege that Defendants retaliated against him because he communicated about "an unlawful or improper act" as that term is defined in the WPA, Plaintiff omitted the element of communication that was essential to his WPA claim. *Am. Fed'n of State Cnty. And Mun. Emps. Council 18 v. State*, 2013-NMCA-106, ¶ 6, 314 P.3d 674 (recognizing that to withstand dismissal for failure to state a claim, the facts pleaded must meet the

essential elements of the claim). Plaintiff's argument on appeal that Defendants violated the WPA when they abused their authority by retaliating against him is not supported by any facts or by any language of the WPA and is, therefore, unpersuasive.

{16} On appeal, Plaintiff expands his WPA theory. He now argues that by filing the initial complaint, "he was communicating to both his public employer and to a third party via the public record" that Defendants were abusing their authority by withholding his "contractually agreed-upon pay." Although Plaintiff did not clearly articulate this theory below, it may reasonably have been inferred from his complaint and, therefore, we will consider it on appeal. *Id.* (stating dismissal is improper where the essential elements of the claim may reasonably be inferred from the alleged facts); *Delfino*, 2011-NMSC-015, ¶ 9 (stating that the appellate courts must resolve all doubts in favor of the sufficiency of the complaint).

{17} Defendants argue that whistleblower protection laws, including the WPA, do not protect an employee's "communications" about a personal employment grievance. Rather, Defendants argue, the purpose of whistleblower protection laws generally and the WPA specifically is to protect employees who risk their own job security for the good of the public by disclosing the unlawful and improper activities of public officials. Because Plaintiff's at-issue lawsuit "communication" pertained only to whether Defendants were required to pay Plaintiff according to the terms of the original contract, Defendants contend that the communication was not one that was protected by the WPA.

{18} Plaintiff has conceded that the breach of contract allegations that he communicated in his initial complaint did not pertain to "a matter of public concern." He argues, however, that this Court should not read into the statute something that is not there, namely, a requirement that to qualify for the protections of the WPA, the employee's at-issue communication must pertain to a matter of public concern. In Plaintiff's view, the "plain meaning" of the text of the WPA reveals the Legislature's intent to permit a WPA claim under the circumstances of this case.

{19} The issue whether Plaintiff was entitled to whistleblower protection arising out of his lawsuit communication regarding Defendants' failure to pay him according to the terms of the original employment contract is a matter of first impression in New Mexico. "When New Mexico cases do not directly answer the question presented, we look for guidance in analogous law in other states or the federal system." *CIT Grp./Equip. Fin., Inc. v. Horizon Potash Corp.*, 1994-NMCA-116, ¶ 6, 118 N.M. 665, 884 P.2d 821. The WPA was modeled after its federal counterpart. *See* 5 U.S.C. § 2302(b)(8) (2013) (prohibited personnel practices). Accordingly, cases interpreting the federal whistleblower law have persuasive value in considering the legislative intent behind the WPA. *See Trujillo v. N. Rio Arriba Elec. Coop, Inc.*, 2002-NMSC-004, ¶ 8, 131 N.M. 607, 41 P.3d 333 (recognizing that, when New Mexico statutes are similar to their federal counterparts, appellate courts may rely on federal jurisprudence in construing legislative intent).

{20} Like the WPA, the federal whistleblower protection law does not explicitly limit whistleblower protection to communications that benefit the public or pertain to matters of public concern. Nevertheless, as Defendants demonstrate in their answer brief, federal courts interpreting the federal whisteblower protection law have distinguished "whistleblowing" that benefits the public by exposing unlawful and improper actions by government employees

from communications regarding personal personnel grievances that primarily benefit the individual employee. *See Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1368 (Fed. Cir. 2012) (stating that the federal whistleblower protection law "makes clear that whistleblowing provides an important public benefit"); *Winfield v. Dep't of Veterans Affairs*, 348 F. App'x. 577, 580 (Fed. Cir. 2009) (per curiam) ("Whistleblower protection does not extend to an employee's personal grievances about his job."); *Riley v. Dep't of Homeland Sec.*, 315 F. App'x. 267, 270 (Fed. Cir. 2009) (stating that "personal disagreements with legitimate managerial decisions" do not demonstrate abuse of authority or "any other kind of activity that could be considered a whistleblowing disclosure"); *Willis v. Dep't of Agric.*, 141 F.3d 1139, 1143 (Fed. Cir. 1998) (stating that the federal whistleblower protection laws are "designed to protect employees who risk their own personal job security for the benefit of the public"). Only the former is protected by whistleblower protection laws. *See Montgomery v. E. Corr. Inst.*, 835 A.2d 169, 180 (Md. 2003) (discussing the legislative intent of the federal whistleblower protection laws and stating that the term "whistleblowing," which generally evokes the type of public disclosure that "serve[s] the public interest by assisting in the elimination of fraud, waste, abuse, and unnecessary government expenditures[,]" does not include an individual's communications regarding a supervisor's maltreatment of him personally (emphasis, internal quotation marks, and citation omitted)).

{21} Plaintiff argues that the foregoing authorities are not binding on this Court and should not bear on our analysis of the WPA. However, aside from citing the bare text of the WPA, he provides no authority to support the proposition that, by communicating about his dispute with Defendants over whether Defendants were required to pay him according to the terms of his expired employment contract, he engaged in an activity that was protected by the WPA. We will therefore assume that no such authority exists. *See In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 (stating that, if no authority is cited in support of a proposition the appellate courts will assume that no such authority exists). Further, the object of statutory interpretation is to construe its terms according to their "obvious spirit or reason," not to interpret its terms in a way that would lead to an absurd or unintended result. *State ex rel. Helman v. Gallegos*, 1994-NMSC-023, ¶ 3, 117 N.M. 346, 871 P.2d 1352 (internal quotation marks and citation omitted). Nothing in the language of the WPA, when read in its entirety and against the backdrop of the earlier discussed federal authorities, leads us to believe that Plaintiff's initial complaint constituted a protected whistleblowing activity. Since the district court reached the same conclusion, we affirm its order dismissing Plaintiff's WPA claim.

Plaintiff's Contract Claim

{22} The district court dismissed Plaintiff's breach of contract claim on the ground that Plaintiff's employment contract expired by its own terms after two years and, in the absence of a valid written employment contract, Plaintiff's claim was barred by NMSA 1978, Section 37-1-23(A) (1976). Plaintiff argues that he had an implied contract that satisfied Section 37-1-23(A). Therefore, Plaintiff argues, the district court erred in dismissing his claim.

{23} Section 37-1-23(A) provides that "[g]overnmental entities are granted immunity from actions based on contract, except actions based on a valid written contract." Accordingly, "a government[] entity's contractual liability can only be based on a

valid written contract." *Garcia v. Middle Rio Grande Conservancy Dist.*, 1996-NMSC-029, ¶ 8, 121 N.M. 728, 918 P.2d 7.

{24} In the present case, the two-year employment contract between Plaintiff and Defendants expired in September 2004. Plaintiff alleged, however, that, "[t]he terms of the original contract . . . [were] continued by the acts of the parties" and by Defendants' subsequent payment of Plaintiff's salary in an amount consistent with the terms of the original contract. Relying on the principle that "an implied employment contract . . . may be found . . . in the conduct of the parties," Plaintiff argues that the continued acts of the parties under the circumstances of this case gave rise to an implied contract. *Id.* ¶ 10 (internal quotation marks and citation omitted).

{25} Even assuming that the parties' conduct gave rise to an implied employment contract, without a showing that the terms of the implied contract were written, Section 37-1-23(A) bars Plaintiff's claim. Plaintiff's reliance on *Garcia* is misplaced. In *Garcia*, the implied employment contract that included *written* terms in a personnel policy constituted a "valid written" employment contract as contemplated in Section 37-1-23(A). *Garcia*, 1996-NMSC-029, ¶¶ 14-15, 19. *Garcia* does not support Plaintiff's argument that an employment contract that is implied only from the actions of the parties satisfies Section 37-1-23(A). Rather, *Garcia* stands for the proposition that where an employment contract may be implied from "written terms" it may be considered a "valid written contract" for the purpose of satisfying Section 37-1-23(A). *See Garcia*, 1996-NMSC-029, ¶¶ 10, 18 (recognizing that although an implied employment contract may be found from written representations, oral representations, from the parties' conduct, or in a combination of conduct and representations, an oral promise is not a "valid written contract" such that it could satisfy Section 37-1-23(A)). Because Plaintiff failed to demonstrate the existence of a valid written employment contract, we affirm the district court's dismissal of his claim.

Plaintiff's Due Process Claim

{26} In his third amended complaint, Plaintiff alleged that Defendants violated his due process right of access to the courts by terminating his employment in retaliation for filing his initial complaint. Plaintiff conceded that insofar as his claim for damages did not fit within one of the enumerated exceptions to governmental immunity under the TCA, his claim was barred. *See Valdez*, 2002-NMSC-028, ¶ 12 (recognizing that "absent a waiver of immunity under the [TCA], a person may not sue the state for damages for violation of a state constitutional right" (internal quotation marks and citation omitted)). Plaintiff argued, however, that as applied to his claim, the TCA was unconstitutional in that it violated his "fundamental right" of access to the courts. The district court rejected Plaintiff's constitutional attack on the TCA and granted Defendants' motion for a judgment on the pleadings. On appeal, Plaintiff re-asserts his as-applied challenge to the constitutionality of the TCA on equal protection and due process grounds.

{27} We do not discern any substantive distinction between Plaintiff's equal protection and due process arguments. In his equal protection argument, Plaintiff argues that the TCA violates his fundamental right of access to the courts by barring his claim for monetary damages against Defendants. And in his due process argument, Plaintiff argues that the TCA is unconstitutional because it acts as a "complete ban" upon his fundamental right of access to the courts to seek a monetary remedy in this case. Thus, Plaintiff's sole argument is that the TCA is unconstitutional because it does not permit him to exercise what he

asserts is a fundamental right, that is, the right to sue Defendants for monetary damages.

{28} Plaintiff's constitutional attack on the TCA is unavailing because it improperly conflates the constitutionally guaranteed right of access to the courts with the notion of entitlement to recover monetary damages. The right of access to the courts is an implicit guarantee derived from Article II, Section 18 of the New Mexico Constitution. *See Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶ 20, 125 N.M. 721, 965 P.2d 305 (recognizing that the constitutional provision that "[n]o person shall be deprived of life, liberty[,] or property without due process of law; nor shall any person be denied equal protection of the laws" contains an implicit right of access to the courts (internal quotation marks and citation omitted)). However, the right of "access to the courts does not create a right to unlimited governmental tort liability[,]" and it does not guarantee the existence of a remedy. *Id.* ¶¶ 20-21. Thus, "the fact that a plaintiff is denied an adequate remedy when suing the state does not constitute a violation of one's right to court access." *Id.* ¶ 21.

{29} Plaintiff's constitutional argument is also unpersuasive because it is based on the erroneous assumption that he had a fundamental right to sue Defendants for damages. The right to sue the government for tort damages is not a fundamental right; it is a statutory right. *See Marrujo v. State Highway Transp. Dep't*, 1994-NMSC-116, ¶¶ 18, 24, 118 N.M. 753, 887 P.2d 747 (stating that there is no fundamental right to sue the government for tort damages; rather, "[t]he right to sue the government is a statutory right"). As such, the Legislature may reasonably restrict that right, as it has done in the TCA. *See id.* ¶ 24 (stating that the Legislature may reasonably restrict the right to sue the government for tort damages); *Garcia v. Albuquerque Pub. Sch. Bd. of Educ.*, 1980-NMCA-081, ¶ 9, 95 N.M. 391, 622 P.2d 699 (recognizing that creating exceptions to sovereign immunity via the TCA is a function of the Legislature, not of the courts).

{30} In sum, Plaintiff has failed to demonstrate that the absence of a TCA exception that would permit him to seek monetary damages from Defendants under the circumstances of this case renders the TCA unconstitutional. Nor has Plaintiff demonstrated any legal basis upon which he was entitled to seek damages for Defendants' alleged violation of his constitutional right of access to the courts. Accordingly, we affirm the district court's order granting Defendants' motion for a judgment on the pleadings.

CONCLUSION

{31} We affirm.

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

RODERICK T. KENNEDY, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

CYNTHIA A. FRY, Judge

Certiorari Denied, September 15, 2015, No. 35,496

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-106

Filing Date: July 28, 2015

Docket No. 33,041

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

LUIS MADRIGAL,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
Fernando R. Macias, District Judge

Hector H. Balderas, Attorney General
Santa Fe, NM

M. Anne Kelly, Assistant Attorney General
Albuquerque, NM

for Appellee

Jorge A. Alvarado, Chief Public Defender
Allison H. Jaramillo, Assistant Appellate Defender
Santa Fe, NM

for Appellant

OPINION[1]

BUSTAMANTE, Judge.

{1} Defendant Luis Madrigal (Defendant) appeals his conviction for trafficking, conspiracy to commit trafficking, and possession of drug paraphernalia. Because we conclude that Defendant was twice put in jeopardy for the same crime when the State both forfeited his property and subjected him to a criminal trial, we further conclude that Defendant's convictions must be vacated. *See* N.M. Const. art. II, § 15; NMSA 1978, § 30-1-10 (1963).

BACKGROUND

{2} Defendant was stopped while driving away from an apartment that was under surveillance by officers investigating drug trafficking. Cocaine was found in his pocket. He was indicted on July 16, 2009, for trafficking (possession with intent to distribute), conspiracy to commit trafficking, and possession of drug paraphernalia. A forfeiture complaint for the cash found in Defendant's pocket during the stop was filed fourteen days later on July 30, 2009, pursuant to the Forfeiture Act and the Controlled Substances Act, NMSA 1978, §§ 30-31-1 to -41 (1972, as amended through 2015). The forfeiture complaint had the same case number as the criminal case and was assigned to the same judge. A summons for the forfeiture complaint was issued the same day. The parties differ as to whether the summons was properly served. Defendant argues that the summons was served at Defendant's address in El Paso, Texas, although he was still in custody in New Mexico at the time and "could not possibly have been personally served at that address." The State maintains that the "return on th[e] summons indicated that Defendant was personally served with it on

[1]The present matter is decided under the Forfeiture Act enacted in 2002. *See* NMSA 1978, §§ 31-27-1 to -8 (2002, as amended through 2015). All references to the Forfeiture Act herein are to the statute as it existed before the 2015 amendments. In the 2015 session, the New Mexico Legislature substantially amended the Forfeiture Act. *See* 2015 N.M. Laws, ch. 152, §§ 1 to 10. Among other changes, the 2015 amendments provide that the Forfeiture Act "ensure[s] that only criminal forfeiture is allowed in this state[,]" and that "[t]he forfeiture proceeding shall begin after the conclusion of the trial for the related criminal matter in an ancillary proceeding . . . before the same judge and jury, if applicable[.]" Section 31-27-2(A)(6); § 31-27-6(C). They also state that "[d]iscovery conducted in an ancillary forfeiture proceeding is subject to the rules of criminal procedure." Section 31-27-6(D). These amendments took effect on July 1, 2015. 2015 N.M. Laws, ch. 152, § 21. Thus the precise scenario presented in this case is unlikely to be repeated.

August 4, 2009." In any case, the parties agree that Defendant was not present for the forfeiture hearing on November 9, 2009. Because he failed to appear or answer the forfeiture complaint, the district court, Judge Bridgforth, entered a default judgment against him. Although the criminal case was initially assigned to Judge Bridgforth, it was reassigned several times and ultimately was tried in October 2012—roughly three years after entry of the default judgment—before Judge Macias. Defendant was convicted by a jury of all charges and sentenced to eighteen years imprisonment.

DISCUSSION

{3} Defendant argues that (1) his right to be free of double jeopardy was violated, (2) his counsel at trial was ineffective, and (3) there was insufficient evidence to support his convictions. Because we agree with Defendant's first argument, we need not reach the other two.

{4} We begin with the State's concession that the forfeiture of Defendant's money was fatally flawed under the Forfeiture Act. Section 31-27-6(E)(2) of the Forfeiture Act provides that "[t]he court shall enter a judgment of forfeiture and the property shall be forfeited to the state if the state proves by clear and convincing evidence that . . . the criminal prosecution of the owner has resulted in a conviction[.]" In addition, the State must prove by clear and convincing evidence that the property is subject to forfeiture and certain facts about the value of the property. Section 31-27-6(E)(1), (3). The State concedes that default judgment in the forfeiture matter was improper because Defendant had not yet been convicted, and the State did not demonstrate that the other elements were met. Because "compliance with the Forfeiture Act is mandatory[,]" we agree that the forfeiture judgment is invalid. *Albin v. Bakas*, 2007-NMCA-076, ¶ 1, 141 N.M. 742, 160 P.3d 923. We therefore vacate that judgment.

{5} The State argues that "[i]f the forfeiture is vacated, then the double jeopardy issue is mooted" and that once the forfeiture is vacated, "there [i]s only one proceeding" and, thus, no double jeopardy violation. We disagree. Jeopardy attached on entry of the default judgment. *State v. Esparza*, 2003-NMCA-075, ¶ 17, 133 N.M. 772, 70 P.3d 762 ("[I]t is now settled that jeopardy attaches upon a court's entry of default judgment."). The State's concession that the default judgment was obtained in error does not negate the fact that the default proceedings occurred or that jeopardy attached. *See State v. Nunez*, 2000-NMSC-013, ¶ 167, 129 N.M. 63, 2 P.3d 264 (Serna, J., dissenting) ("[U]nder a true successive prosecution inquiry, . . . it would be a violation of double jeopardy to subject a defendant to multiple prosecutions regardless of whether an earlier prosecution resulted in acquittal, and therefore no punishment, or conviction, and therefore punishment. The harm the defendant suffers is the proceeding itself, regardless of the outcome."). *Cf. Blake v. State*, 65 A.3d 557, 564 (Del. 2013) ("Because the second prosecution for the greater offense subjected [the defendant] to double jeopardy, the [s]tate cannot avoid the protection the Double Jeopardy Clause provides by offering to vacate the lesser-included offense as consolation.").

{6} We therefore go on to examine whether Defendant's right to be free from double jeopardy under the New Mexico Constitution, Article II, Section 15, was violated when he was subjected to trial on the criminal charges. In *Nunez*, the Supreme Court of New Mexico held that forfeitures under the Controlled Substances Act "are decidedly punitive for double[]jeopardy purposes." 2000-NMSC-013, ¶ 94. The *Nunez* Court then made clear that, to avoid double jeopardy concerns, "all

forfeiture complaints and criminal charges for violations of the Controlled Substances Act may both be brought only in a single, bifurcated proceeding." *Id.* ¶ 104. The crux of the matter now before us is whether the State pursued the forfeiture and criminal actions in a single proceeding or whether the proceedings were sufficiently distinct as to constitute separate proceedings.

{7} This Court addressed single versus separate proceedings in *Esparza*. There, the Court considered three consolidated cases (*Esparza*, *Booth*, and *Reed*) involving both criminal charges and forfeitures and focused specifically on whether the proceedings were separate such that double jeopardy principles precluded successive trials on both. *Esparza*, 2003-NMCA-075, ¶¶ 1, 19. The *Booth* case involved facts similar to those here, i.e., a default forfeiture judgment and subsequent criminal prosecution. *Id.* ¶¶ 6-8. In considering whether the forfeiture and criminal proceedings were separate, the Court noted that the forfeiture motion was filed three days after the indictment, had the same cause number as the indictment, and was directed to the same judge as the indictment. *Id.* ¶ 27. The Court also concluded that "[d]efendant Booth was on notice of the dual penalties facing him before either of the proceedings was resolved and . . . had no expectation of finality upon the resolution of the forfeiture motion." *Id.* ¶ 28. It also observed that "the State was not afforded multiple opportunities to rehearse its trial strategy, and [d]efendant Booth was not repeatedly subjected to the expense, embarrassment[,] and ordeal of repeated trials." *Id.* (internal quotation marks and citation omitted). Finally, the Court stated that "the State . . . endeavored, in good faith, to comply with the requirement of a single proceeding." *Id.* ¶ 33. It concluded that, "given the circumstances" of that case, "the unity of the two proceedings is apparent[.]" *Id.* It further concluded that Booth's right to be free of double jeopardy was not violated. *Id.* ¶ 46.

{8} Such unity is not apparent here. First, while it is true that the indictment and forfeiture complaint referenced the same case number, "the mere act of assignment of a docket number is insufficient, of itself, to demonstrate that the penalties were sought in a single, bifurcated proceeding." *Id.* ¶ 27. Second, although the two matters were initially assigned to the same judge, ultimately the two matters were decided before different judges. *See id.* ¶¶ 27, 32 (relying in part on the fact that the proceedings were overseen by the same judge to hold that forfeiture and criminal proceedings were not separate). Third, the parties dispute whether Defendant had notice of the forfeiture action at all. Fourth, the criminal trial occurred nearly three years after the conclusion of the forfeiture action. Neither *Nunez* nor *Esparza* require that forfeiture and criminal proceedings result in a single judgment or that they proceed in lock step. *See Nunez*, 2000-NMSC-013, ¶ 31; *Esparza*, 2003-NMCA-075, ¶¶ 20-22. In *Booth*, the criminal proceeding concluded with a plea nine months after the default judgment was entered. *Esparza*, 2003-NMCA-075, ¶ 8. *Contra Oakes v. United States*, 872 F. Supp. 817, 824-25 (E.D. Wash. 1994) (noting that "the civil decree of forfeiture was not entered until nearly ten months after the [p]etitioner's criminal conviction" in its holding that the forfeiture and criminal proceedings were separate), *rev'd on other grounds*, *United States v. Oakes*, 92 F.3d 1195 (9th Cir. 1996) (non-precedential). Nevertheless, the length of time between the default judgment and criminal convictions here stretches the bounds of what can be reasonably considered a single proceeding. Finally, we cannot ascribe good faith to the State when it sought a default forfeiture judgment in disregard of statutory requirements that had been in effect for seven

years. *See* § 31-27-6. Considering these circumstances as a whole, we conclude that the forfeiture and criminal actions were pursued in separate proceedings.

{9} Because subjecting Defendant to two separate proceedings resulting in two penalties based on the same conduct is contrary to double jeopardy principles as stated in *Nunez*, we further conclude that Defendant's double jeopardy rights were violated. 2000-NMSC-013, ¶ 104 ("The only feasible way to avoid double jeopardy is to bring both civil and criminal suits in one combined proceeding." (alteration, internal quotation marks, and citation omitted)). Hence, Defendant's criminal convictions must be vacated. *Id.* ¶ 30 ("The New Mexico Constitution bars whichever action placed the defendant in jeopardy a second time for the same offense.").

CONCLUSION

{10} For the foregoing reasons, we remand to the district court with instructions to vacate the forfeiture judgment and Defendant's convictions.

{11} IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

TIMOTHY L. GARCIA, Judge

Certiorari Granted, September 25, 2015, No. 35,499

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-107

Filing Date: July 31, 2015

Docket No. 33,032

HENRY ROMERO,

Worker-Appellant,

v.

LAIDLAW TRANSIT SERVICES, INC. d/b/a SAFERIDE SERVICES, INC. and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,

Employer/Insurer-Appellees.

Gerald A. Hanrahan
Albuquerque, NM

for Appellant

Timothy S. Hale
Paulette J. Dixon
Albuquerque, NM

for Appellees

OPINION

ZAMORA, Judge.

{1} In this workers' compensation case, Henry Romero (Worker) appeals from an order awarding him permanent partial disability (PPD) benefits, partial attorney fees, and imposing bad faith sanctions against

Laidlaw Transit Services, Inc. d/b/a Saferide Services, Inc. (Employer), and the Insurance Company of the State of Pennsylvania (Insurer). Worker maintains that the bad faith sanctions imposed against Employer/Insurer were inadequate and that he should not have been required to pay half of his attorney fees. We affirm.

BACKGROUND

{2} Worker was employed as a patient transporter and driver for Employer. Worker was injured in two separate accidents, which both occurred within the scope of his employment. On April 13, 2006, a compensation order was entered finding that Worker had sustained compensable injuries as a result of the accidents. Worker was awarded temporary total disability (TTD) benefits. An interim order was entered March 9, 2012, reflecting a stipulation by the parties to reduce Worker's TTD benefits to PPD benefits at 80 percent.

{3} In August 2012, the parties reached a settlement agreement. Worker agreed to accept a lump sum payment in lieu of additional workers' compensation benefits, and Insurer agreed to continue paying Worker PPD benefits until the order approving settlement was filed. The agreement was presented to and approved by the Workers' Compensation Judge (WCJ) on August 10, 2012, and the order approving settlement was filed on August 30, 2012. However, Insurer had discontinued payment of PPD benefits on August 10, 2012, the day the WCJ approved the settlement rather than August 30, 2012, the day the order was filed.

{4} Worker sent letters requesting payment of PPD benefits for the period from August 10, 2012, to August 30, 2012, and received no response from Insurer. Worker requested that the WCJ enter an order directing payment of the PPD benefits along with post-judgment interest, a benefit penalty, and attorney fees. On March 7, 2013, the WCJ entered an order directing payment of the PPD benefits. The WCJ found that, contrary to the order approving settlement and despite Worker's requests for payment, Insurer failed or refused to issue the missed PPD payments. The WCJ ordered Insurer to issue payment of the PPD benefits and post-judgment interest, which together totaled $864.76. The WCJ set a hearing to address Worker's request for a benefit penalty and attorney fees.

{5} The hearing was held on March 20, 2013. The WCJ found that Insurer: failed to timely issue payment of the lump sum settlement funds pursuant to the order approving settlement; failed to pay PPD benefits in compliance with the order approving settlement; took no action in response to Worker's requests for payment; failed to respond to Worker's application to the WCJ requesting the order directing payment; failed to timely comply with the WCJ's order requiring payment of the PPD benefits; and offered no excuse or justification for its failure to comply with the WCJ's orders.

{6} The WCJ found that Insurer had willfully disregarded Worker's rights and violated the WCJ's orders and that Insurer knew that there was no reasonable basis for its conduct. The WCJ determined that Insurer's conduct constituted bad faith and/or unfair claim processing. The WCJ ordered Insurer to pay Worker $864.76 in PPD benefits, plus a benefit penalty of $216.19, for a total award of $1,080.95. The WCJ also awarded $2,500 in attorney fees to be shared equally between Insurer and Worker. Worker was responsible for $1,250 in attorney fees, resulting in a $169.05 net loss to Worker. Worker appealed.

DISCUSSION

{7} On appeal, Worker argues that the Workers' Compensation Act (the Act), NMSA

1978, §§ 52-1-1 to -70 (1929, as amended through 2015), provides an inadequate remedy for unfair claim-processing practices and bad faith claims. Worker also challenges the WCJ's decision concerning attorney fees.

Standard of Review

{8} We review the WCJ's factual findings 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 WCJ as fact finder where findings are supported by substantial evidence. *See DeWitt v. Rent-A-Ctr., Inc.*, 2009-NMSC-032, ¶ 12, 146 N.M. 453, 212 P.3d 341. The WCJ's application of the law to the facts is reviewed de novo. *Ruiz v. Los Lunas Pub. Sch.*, 2013-NMCA-085, ¶ 5, 308 P.3d 983. We also apply a de novo standard of review to the extent that our analysis involves the interpretation of workers' compensation statutes. *See Ramirez v. IBP Prepared Foods*, 2001-NMCA-036, ¶ 10, 130 N.M. 559, 28 P.3d 1100 (stating that interpretation of a workers' compensation statute is a question of law to be reviewed de novo), *superseded by statute on other grounds as stated in Baca v. Los Lunas Cmty. Programs*, 2011-NMCA-008, 149 N.M. 198, 246 P.3d 1070. The WCJ's award of attorney fees is reviewed for abuse of discretion. *Cordova v. Taos Ski Valley, Inc.*, 1996-NMCA-009, ¶ 15, 121 N.M. 258, 910 P.2d 334.

Unfair Claim-Processing Practices and Bad Faith

{9} Section 52-1-28.1(B) provides that when an employer/insurer engages in unfair claim processing or bad faith, the worker shall be awarded "any benefits due and owing" and "a benefit penalty not to exceed twenty-five percent of the benefit amount ordered to be paid." In this case, the WCJ awarded a benefit penalty of $216.19, an amount equal to twenty-five percent of the benefit amount ordered to be paid. This is the maximum benefit penalty allowable under the statute.

{10} Worker argues that the benefit penalty allowed by Section 52-1-28.1 is insufficient to deter bad faith and unfair claim processing by employers/insurers and that workers are deterred from pursuing bad faith and unfair claim-processing claims because the cost of successfully pursuing such claims exceeds the available benefit penalty. Worker also argues against Section 52-1-28.1 as an exclusive remedy for workers' bad faith claims.

{11} Section 52-1-28.1 was enacted in response to *Russell v. Protective Insurance Co.*, 1988-NMSC-025, ¶¶ 8-9, 107 N.M. 9, 751 P.2d 693, *abrogated by Cruz v. Liberty Mutual Insurance Co.*, 1995-NMSC-006, 119 N.M. 301, 889 P.2d 1223. *See Meyers v. W. Auto*, 2002-NMCA-089, ¶ 16, 132 N.M. 675, 54 P.3d 79. In *Russell*, the New Mexico Supreme Court held that, because the Act did not address bad faith claims in a workers' compensation context, such claims could be brought in the district court. 1988-NMSC-025, ¶¶ 8-9. Subsequently, the Legislature enacted Section 52-1-28.1 that provided workers with a remedy for bad faith and unfair claim-processing practices.

{12} In *Cruz*, the New Mexico Supreme Court addressed the question of whether the statute provides an adequate and exclusive remedy for workers' bad faith claims. 1995-NMSC-006, ¶¶ 2, 4. In *Cruz*, an injured worker filed a complaint in district court alleging "fraud, bad faith, breach of contract, breach of the insurance code, civil conspiracy, invasion of privacy, negligent misrepresentation, and racketeering" after the employer/insurer refused to pay for the worker's treatment as set forth in the parties' settlement agreement. *Id.* The district court dismissed the worker's complaint, finding it lacked jurisdiction due to the Act's exclusivity

provision. *Id.* ¶ 6. The worker appealed, arguing that Section 52-1-28.1 was not an exclusive or adequate remedy for bad faith and unfair claim-processing claims. *Cruz*, 1995-NMSC-006, ¶¶ 7, 13.

{13} Our Supreme Court discussed the effect of Section 52-1-28.1 on workers' bad faith claims. *Cruz*, 1995-NMSC-006, ¶¶ 7-14. As to the statute's exclusivity, the Court explained that prior to the enactment of Section 52-1-28.1, workers were not afforded a remedy for bad faith and unfair claim processing under the Act. *Cruz*, 1995-NMSC-006, ¶ 9. The Court determined that the Legislature, by enacting Section 52-1-28.1 and providing a remedy for bad faith under the Act, brought all workers' bad faith claims under the Act's exclusivity provision and abrogated workers' rights to file bad faith actions in district court. *Cruz*, 1995-NMSC-006, ¶¶ 9, 11.

{14} As to the adequacy of the remedy, the Court stated that "[t]he purpose of the bad[]faith action in the Act is to secure benefits for the employee and penalize the employer or insurer." *Id.* ¶ 14. The Court noted that under Section 52-1-28.1, the worker receives all benefits due and owing as well as the extra benefit penalty of up to twenty-five percent of the claim. *Cruz*, 1995-NMSC-006, ¶ 14. The Court recognized that the benefit penalty would not be large in cases involving small claims. *Id.* Nonetheless, the Court concluded that the penalty amount was adequate and provided "sufficient deterrence to prevent an insurer from denying benefits in bad faith and enforces the public policy against the bad[]faith handling of workers' compensation claims." *Id.*

{15} Worker urges this Court to re-examine and overturn the holding of *Cruz* concerning the adequacy and exclusivity of the remedies provided in Section 52-1-28.1. We decline to do so. Our Supreme Court's decision in *Cruz* is binding, and we do not have the authority to overrule it. *See Alexander v. Delgado*, 1973-NMSC-030, ¶ 9, 84 N.M. 717, 507 P.2d 778 (stating that "the Court of Appeals is to be governed by the precedents of [the Supreme C]ourt"); *Meyers*, 2002-NMCA-089, ¶ 21 ("Worker challenges the holding of *Cruz* with respect to exclusivity and the adequacy of remedies available under Section 52-1-28.1. However, this Court does not have authority to overrule *Cruz*.").

Worker's Other Arguments Related to the Act's Exclusivity

{16} Worker argues that NMSA 1978, Section 59A-16-30 (1990), which provides a private right of action for bad faith under the Insurance Code and which specifically excludes actions by workers subject to the Act's exclusivity, violates the Equal Protection Clause of the New Mexico Constitution. Worker also argues that the district court should be granted concurrent jurisdiction with WCJs to assess penalty benefits for workers' bad faith claims. With regard to both of these arguments, Worker does not cite any supporting authority or develop factual bases on which we can evaluate his claims. As such, we will not review these arguments on appeal. *See Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076 (stating that this Court will not review unclear or undeveloped arguments or guess at what parties' arguments might be); *ITT Educ. Servs., Inc. v. Taxation & Revenue Dep't*, 1998-NMCA-078, ¶ 10, 125 N.M. 244, 959 P.2d 969 (explaining that appellate courts will not consider propositions that are unsupported by citation to authority).

Attorney Fees

{17} The WCJ determined and allocated Worker's attorney fees pursuant to NMSA 1978, § 52-1-54(I), (J) (2003, amended 2013),

which provided in pertinent part:

> I. . . . The workers' compensation judge may . . . award[] a reasonable attorney fee if [he] finds that a claimant, an insurer or an employer acted in bad faith with regard to handling the injured worker's claim and the injured worker or employer has suffered economic loss as a result. However, in no case shall this additional amount exceed two thousand five hundred dollars ($2,500). . . .
>
> J. . . . [T]he payment of a claimant's attorney fees determined under this section shall be shared equally by the worker and the employer.

{18} Worker argues that the WCJ abused his discretion in assessing fifty percent of the awarded attorney fees to him. Worker relies on 11.4.4.13(B), (D)(1) NMAC (6/13/2003, amended 12/31/2012 and 10/1/2014), which provide that a WCJ may assess reasonable attorney fees to a party upon a finding of bad faith or unfair claim processing.[1] Worker contends that, under the circumstances of this case, it was reasonable to assess 100 percent of Worker's attorney fees to Insurer pursuant to the regulations. Worker's reading of the regulation puts it in direct contravention to Section 52-1-54(J). Worker's argument fails for two reasons.

{19} First, "[a]n administrative agency has no power to create a rule or regulation that is not in harmony with its statutory authority." *Wilcox v. N.M. Bd. of Acupuncture & Oriental Med.*, 2012-NMCA-106, ¶ 7, 288 P.3d 902 (internal quotation marks and citation omitted). "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." *Jones v. Emp't Servs. Div. of Human Servs. Dep't*, 1980-NMSC-120, ¶ 3, 95 N.M. 97, 619 P.2d 542.

{20} Second, we will not adopt a construction of an administrative code provision that is inconsistent with a related statute if consistent construction is possible. In interpreting sections of the administrative code, we employ the same rules as used in statutory construction. *AMREP Sw. Inc. v. Sandoval Cnty. Assessor*, 2012-NMCA-082, ¶ 9, 284 P.3d 1118. The primary goal "is to give effect to the intent of the [L]egislature." *Archer v. Roadrunner Trucking, Inc.*, 1997-NMSC-003, ¶ 7, 122 N.M. 703, 930 P.2d 1155. Administrative regulations should be construed in harmony with related statutory provisions if possible. *See Fowler v. Vista Care*, 2014-NMSC-019, ¶ 7, 329 P.3d 630 ("[The appellate courts] will not read the plain language of the statute in a way that is absurd, unreasonable, or contrary to the spirit of the statute, and will not read any provision of the statute in a way that would render another provision of the statute null or superfluous[.]" (internal quotation marks and citations omitted)); *DeWitt*, 2009-NMSC-032, ¶ 14 (stating that related provisions should be read together "to produce a harmonious whole"); *AMREP*, 2012-NMCA-082, ¶ 14 (reading pertinent statutory and administrative code provisions "together so as to give effect to their meaning"); *Howell v. Marto Elec.*, 2006-NMCA-154, ¶ 16, 140 N.M. 737, 148 P.3d 823 ("[I]t is the function of [the] courts to interpret [statutes and regulations] in a manner consistent with the legislative intent."). We conclude that 11.4.4.13(B), (D) NMAC (6/13/2003) cannot be read in a manner consistent with Section 52-1-54.

[1]This regulation was amended in 2014, and the current version does not contain the provisions Worker relies on.

Accordingly, we reject Worker's argument that the WCJ abused his discretion by failing to assess attorney fees entirely to Insurer under the regulation.

{21} We note that Section 52-1-54(I) and (J) were amended effective June 14, 2013. The current version of the statute provides that a "party found to have acted in bad faith *shall pay [100] percent* of the additional fees awarded for representation of the prevailing party in a bad faith action." Section 52-1-54(I) (emphasis added). However, because Worker's claim with regard to the benefit penalty and attorney fees was pending at the time the statute was amended, Article IV, Section 34 of the New Mexico Constitution precludes the application of the current version of the statute to this case. *See* N.M. Const. art. IV, § 34 ("No act of the [L]egislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case.").

CONCLUSION

{22} For the foregoing reasons, we affirm the WCJ's order.

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

M. MONICA ZAMORA, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

CYNTHIA A. FRY, Judge

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMSC-029

Filing Date: September 10, 2015

Docket No. 34,085

KENNETH BADILLA,

Plaintiff-Petitioner,

v.

WAL-MART STORES EAST INC., d/b/a WAL-MART #850, et al.,

Defendant-Respondent.

Narciso Garcia, Jr.
Albuquerque, NM

for Petitioner

Rodey, Dickason, Sloan, Akin & Robb, P.A.
Jeffrey M. Croasdell
Patrick M. Shay
Thomas A. Outler
Albuquerque, NM

for Respondent

OPINION

VIGIL, Chief Justice.

{1} We are called upon to decide whether a complaint for breach of warranty seeking damages for personal injury under the Uniform Commercial Code (UCC) is governed by the four-year statute of limitations for suits based on the sale of

goods, or whether the three-year statute of limitations for tort applies.

{2} Kenneth Badilla (Plaintiff) bought a pair of work boots at Wal-Mart. He claims the soles of the boots came unglued, causing him to trip and injure his back. More than three years later, on September 20, 2007, he sued Wal-Mart and its store manager (Defendants) for breach of express and implied warranties. In his complaint Plaintiff seeks damages for personal injuries he claims were caused by the boots' alleged failure to conform to their warranties. Defendants moved for summary judgment, which the district court granted on two grounds: first, that Plaintiff's complaint was time-barred by the application of the three-year statute of limitation for causes of action for torts in NMSA 1978, Section 37-1-8 (1976) rather than the four-year statute of limitation period in the UCC under NMSA 1978, Section 55-2-725(1) (1961); and second, that there were no genuine issues of material fact to rebut Plaintiff's inability to establish the elements for breach of express and implied warranty.

{3} Plaintiff appealed the district court's grant of summary judgment in Defendants' favor to the Court of Appeals. *Badilla v. Wal-Mart Stores E., Inc.*, 2013-NMCA-058, 302 P.3d 747. The Court of Appeals affirmed the district court's grant of summary judgment on the statute of limitations issue, and because its determination on that issue was dispositive, it abstained from addressing the second basis upon which the district court granted summary judgment. *Id.* ¶ 16.

{4} Plaintiff sought review of the Court of Appeals' decision by petition for writ of certiorari, asking this Court to determine whether his claims for personal injury damages resulting from breach of warranties were subject to the four-year limitation period set out in Section 55-2-725 or the three-year limitation period for tort actions found in Section 37-1-8.[1] *Badilla v. Wal-Mart Stores E., Inc., cert. granted*, 2013-NMSA-005. We granted Plaintiff's petition and reverse the Court of Appeals. We hold that the UCC's four-year statute of limitation governs breach of warranty claims, including those seeking damages for personal injuries resulting from the breach.

I. BACKGROUND

{5} Plaintiff, a tree trimmer, purchased a pair of Brahma brand men's work boots from Wal-Mart on October 19, 2003. The boots' packaging described the boots as "iron tough," "rugged leather . . . men's work boots." The label also stated that the boots "me[t] or exceed[ed] ASTM F2413-05 standards," which "outlin[e] what footwear employers must ensure employees use under the Occupational Safety and Health Administration, which requires protection against falling or rolling objects, objects piercing the sole, and when an employee's feet are exposed to electrical wires." *Badilla*, 2013-NMCA-058, ¶ 2 & 2 n.1 (citing 29 C.F.R. § 1910.136 (2009)). Plaintiff wore the boots eight to twelve hours per day, six days a week, for about nine months. He claims that as the sole of "the boots wear down[,] the yellow rubber piece tends to unglue itself and roll up as you are walking, making it very dangerous when working." Plaintiff states that this unglued piece of the sole of the boots caused him to trip, fall over, and injure his back.

{6} On July 28, 2004, Plaintiff was wearing

[1]While we acknowledge that Section 37-1-8 refers to actions for personal injuries without explicit reference to tort claims, this statute governs general tort claims. Therefore, this opinion refers to it as the "tort statute of limitation" for ease of reference. *See Sam v. Sam*, 2006-NMSC-022, ¶ 3, 139 N.M. 474, 134 P.3d 761 (noting that Section 37-1-8 provides the "statute of limitation[] for general tort actions").

the boots while at work cutting down dead tree limbs and removing the logs. When he began to move a log weighing about 150 pounds, the unglued sole of his boot got caught on debris, causing him to fall backwards and drop the log on top of himself. He immediately felt a sharp pain in his back. The next morning, he was unable to get out of bed due to his back pain, and was driven to the emergency room. He had x-rays and an MRI, which showed that he had two ruptured or bulging discs. Following five or six months of physical therapy, Plaintiff eventually underwent back surgery.

{7} Plaintiff filed his complaint against Defendants alleging breach of warranties on September 20, 2007, about three years and two months after the accident. In his complaint, Plaintiff seeks damages for personal injuries caused by the allegedly defective boots based upon (1) breach of express warranty, (2) breach of implied warranty of merchantability, and (3) breach of implied warranty of fitness for a particular purpose. These claims are brought pursuant to the UCC as set forth in NMSA 1978, Sections 55-2-313 to -315 (1961), respectively. Defendants answered the complaint and raised affirmative defenses, including the assertion that Plaintiff's damages were barred by the statute of limitations.

{8} Defendants filed a second motion for summary judgment, arguing that Plaintiff's complaint was time-barred by the three-year tort statute of limitations under Section 37-1-8. Defendants also argued that, while Plaintiff had "establishe[d] the existence of an express warranty based on the product description printed on the packaging," he had failed to assert that Defendants engaged in "any specific acts [that would] constitute a breach of that warranty," and failed to show how the boots failed to conform with any implied warranties. Defendants argued that there were no genuine issues of material fact at issue on either basis, and that they were entitled to summary judgment. The district court agreed with Defendants on both grounds, and granted summary judgment in their favor under Rule 1-056 NMRA.

{9} Plaintiff appealed the district court's grant of summary judgment to the Court of Appeals. *Badilla*, 2013-NMCA-058, ¶ 4. The Court of Appeals addressed only the first issue and affirmed the district court's grant of summary judgment, holding that "when a personal injury is the basis for a breach of warranty suit, the essence of the injury should govern which statute of limitation applies." *Id.* ¶ 12. Thus, the Court of Appeals concluded that because Plaintiff's claims were "undisputedly for personal injury, rather than loss based on the commercial value of the boots, [they] must remain subject to the three-year . . . statute of limitation" for torts. *Id.* The Court of Appeals found that its determination of the statute of limitations issue was dispositive, and for this reason it did not address the second basis upon which it granted certiorari to the district court—whether there was indeed no genuine issue of material fact as to Plaintiff's inability to establish the elements necessary to prove breach of warranty. *Id.* ¶ 16.

{10} Plaintiff petitioned this Court for a writ of certiorari, which we granted in order to review whether the "essence of the injury should govern which statute of limitation applies" in a breach of warranty suit seeking damages for personal injury caused by the breach. *Id.* ¶ 12. We hold that it does not.

II. DISCUSSION

{11} The central issue is whether the four-year statute of limitation period applies to claims under the UCC seeking damages for personal injury sustained from a breach of warranty, or whether the three-year statute of limitation period for claims based in tort applies. In deciding this issue, we first examine the development of the UCC, and

then proceed to review the language of the statute, to discern the Legislature's intent behind its adoption of the UCC statute of limitation. In doing so, we conclude that the UCC statute of limitation applies to actions for breach of warranty where a party seeks to recover damages for personal injuries. Further, we acknowledge that other jurisdictions join one of two main approaches in addressing this issue, and conclude that the majority approach is most consistent with the law in New Mexico. Finally, we conclude that Plaintiff asserts breach of warranty claims seeking personal injury damages. Therefore the UCC statute of limitation governs his claims. Accordingly, we reverse and remand to the Court of Appeals for consideration of whether there was a genuine issue of material fact precluding summary judgment on the merits of Plaintiff's claims, which the Court of Appeals did not reach in its initial opinion on this case.

A. Standard of Review

{12} Our determination of the applicable statute of limitations requires us to interpret the statutory scheme of our UCC. "Interpretation of a statute is an issue of law . . . [which w]e review . . . de novo." *Pub. Serv. Co. of N.M. v. N.M. Pub. Util. Comm'n*, 1999-NMSC-040, ¶ 14, 128 N.M. 309, 992 P.2d 860 (internal quotation marks and citation omitted). "When this Court construes statutes, our charge is to determine and give effect to the Legislature's intent." *Moongate Water Co. v. City of Las Cruces*, 2013-NMSC-018, ¶ 6, 302 P.3d 405 (internal quotation marks and citation omitted). "To discern the Legislature's intent, the Court look[s] first to the plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different one was intended." *State v. Almanzar*, 2014-NMSC-001, ¶ 14, 316 P.3d 183 (alteration in original) (internal quotation marks and citation omitted). "Where the language of a statute is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation." *Id.* (internal quotation marks and citation omitted). "When interpreting a statute, we are also informed by the history, background, and overall structure of the statute, as well as its function within a comprehensive legislative scheme." *Id.* ¶ 15 (internal quotation marks and citation omitted). We apply these principles in interpreting the UCC statutory scheme in order to decipher whether the Legislature indeed intended to allow for the recovery of damages for personal injuries resulting from a breach of warranty. We begin by reviewing the history and purpose of the UCC.

B. History and Purpose of the UCC

{13} The UCC was developed by the joint efforts of the National Conference of Commissioners on Uniform State Laws and the American Law Institute beginning in the 1940s. 1 William D. Hawkland & Frederick H. Miller, *Uniform Commercial Code Series* § 1-101:1 [Rev.] (2012). The first official text of the Code was published in 1952 and first adopted by Pennsylvania in 1953. *Id.* The Code was revised in 1957 based in part on lessons gleaned from Pennsylvania's experience, and other states gradually began adopting the Code. *Id.* "The UCC, and the subsequent revisions of it, [were] presented to the various state legislatures for adoption, but only bec[a]me the law of a respective state when adopted by that state's legislature." Henry D. Gabriel, *The Revisions of the Uniform Commercial Code—Process and Politics*, 19 J.L. & Com. 125, 130 (1999). "[B]ecause the individual states have the power to adopt whatever version or modifications the state pleases, there is a substantial amount of non-uniformity among the states." *Id.*

{14} New Mexico adopted the UCC in 1961. NMSA 1978, §§ 55-1-101 to 55-12-111

(1961, as amended through 2013). As the UCC has been revised and updated over the years, New Mexico has adopted these revisions. *See, e.g.*, 2005 N.M. Laws, ch. 144 ("amending, repealing and enacting certain sections of the NMSA 1978 to accomplish the additions to, deletions from and clarifications of the [UCC]"); 2005 N.M. Laws, ch. 144 § 1 (amending NMSA 1978, § 55-1-101 (2005)).

{15} The purposes of the UCC are: "(1) to simplify, clarify and modernize the law governing commercial transactions; (2) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties; and (3) to make uniform the law among the various jurisdictions." NMSA 1978, § 55-1-103(a) (2005). The Legislature indicated that the UCC "must be liberally construed and applied to promote [these] underlying purposes and policies." *Id.* Further, "[t]he remedies provided by the [UCC] must be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed." NMSA 1978, § 55-1-305(a) (2005).

{16} The statute of limitation which governs causes of actions under the UCC is established by Section 55-2-725. The Legislature explained that the purpose of Section 55-2-725 is "[t]o introduce a uniform statute of limitations for sales contracts, thus eliminating the jurisdictional variations and providing needed relief for concerns doing business on a nationwide scale whose contracts have heretofore been governed by several different periods of limitation depending upon the state in which the transaction occurred." *Id.* cmt. However, the scope of the causes of action governed by this section of the UCC has not been universally agreed upon. *See* 63B Am. Jur. 2d *Products Liability* § 1448 (2015) ("[W]hether a plaintiff is required to bring an action for personal injury . . . that is based upon breach of an implied warranty within the limitations period specified in the [UCC] or within the limitations period specified in a statute relating to torts, is a problem that has received considerable judicial attention and has resulted in a split of authority among the various jurisdictions that have addressed the problem."). This is the central issue we are called upon to decide in this case: which, if any, approach is consistent with New Mexico law.

{17} The Court of Appeals aptly observed that, "[a]lthough other jurisdictions have addressed the issue of whether personal injury or UCC time limits apply to such cases with disparate results, New Mexico lacks a definitive rule." *Badilla*, 2013-NMCA-058, ¶ 9. We agree, and with this opinion fill that chasm in New Mexico law. Having framed this issue in the context of the history and purpose of the UCC, we proceed to interpret New Mexico's UCC statute to determine to what claims the Legislature intended that it apply.

C. There Are Two Main Approaches to Determining Whether a Particular Claim Asserts a Cause of Action Governed by the UCC's Statute of Limitations

{18} "Courts in other jurisdictions have reached varying conclusions as to when an action is governed by the limitations period of the UCC." *Wieser v. Firestone Tire & Rubber Co.*, 596 F. Supp. 1473, 1475 (D. Colo. 1984). These varying conclusions have created two main approaches to the issue: the majority approach and the minority approach.[2] *Id.*

---

[2]An additional approach to determining which statute of limitation applies in cases such as this holds that the UCC period governs all actions for breach of warranty, regardless of the remedy sought, so long as there is privity between the parties. *See Wieser*, 569 F. Supp at 1475; *Davidson Lumber Sales, Inc. v. Bonneville*

{19} To start with, "[t]he majority [approach holds] that the UCC limitations period applies to all actions for breach of warranties, regardless of whether the plaintiff seeks personal injury damages or economic and contractual damages." *Id.* This approach essentially looks to the nature of the right asserted; if the right is based in contract, it is subject to the UCC. The minority approach "holds that the type of damages sought in an action determines whether the statute of limitations in [UCC] § 2-725 applies," thus, "[a]ctions for personal injury damages or tortious injury to personal property are governed by general, non-[UCC] limitations periods, while actions for economic or breach of contract damages are governed by § 2-725." *Davidson Lumber Sales, Inc. v. Bonneville Inv., Inc.*, 794 P.2d 11, 16 (Utah 1990). The minority approach focuses upon the remedy sought: if the remedy sought is economic damages, the claim is subject to the UCC; if the remedy sought is personal injury damages, the claim is not subject to the UCC. We turn to the specific language used in our statute to decipher whether the Legislature intended to adopt one approach or the other.

D. The Plain Language of New Mexico's UCC Statute Denotes the Legislature's Intent That the UCC Statute of Limitation Governs Breach of Warranty Claims Which Seek Damages for Personal Injuries

{20} This case requires us to interpret New Mexico's UCC statute. "Our primary goal when interpreting a statute is to determine and give effect to the Legislature's intent." *Cook v. Anding*, 2008-NMSC-035, ¶ 7, 144 N.M. 400, 188 P.3d 1151. "We do so by first looking to the statute's plain language and giving effect to the plain meaning of the words therein." *Id.* We now turn to the relevant UCC statutory provisions.

{21} Article 2 of the UCC applies to sales of goods and is codified at Sections 55-2-101 to -725; *see* § 55-2-102 ("[T]his article applies to transactions in goods."). "A 'sale' consists in the passing of title from the seller to the buyer for a price." Section 55-2-106(1). " 'Goods' means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid . . . ." Section 55-2-105(1). "The law of warranty for sales of goods is codified at NMSA 1978, Sections 55-2-312 to -318. . . ." *Camino Real Mobile Home Park P'ship v. Wolfe*, 1995-NMSC-013, ¶ 15, 119 N.M. 436, 891 P.2d 1190, *overruled on other grounds by Sunnyland Farms, Inc. v. Cent. N.M. Elec. Coop., Inc.*, 2013-NMSC-017, ¶¶ 14, 16, 301 P.3d 387.

{22} Article 2 also sets out the various warranties that apply to sales of goods. These include express warranties and implied warranties of merchantability and fitness for a particular purpose, among others. Sections 55-2-313 to -315 establish the methods by which express and implied warranties are created. *See* § 55-2-313(1) ("Express warranties by the seller are created as follows

---

Inv., Inc., 794 P.2d 11, 16 (Utah 1990). The New Mexico Legislature has effectively eliminated the need for analysis of privity in the context of express or implied warranties under the UCC. *See* § 55-2-318 ("A seller's warranty whether express or implied extends to any natural person who is in the family or household of his [or her] buyer or who is a guest in his [or her] home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty."); *id.* cmt. 2 ("The purpose of this section is to give certain beneficiaries the benefit of the same warranty which the buyer received in the contract of sale, thereby freeing any such beneficiaries from any technical rules as to 'privity.' "). The Legislature has indicated its intent not to rely on privity to determine the persons entitled to bring an action asserting those warranties. Therefore we find it unnecessary to consider this approach.

. . . ."); § 55-2-314(1) ("Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." (citation omitted)); § 55-2-315 ("Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.").

{23} If the goods provided are not as warranted, the goods are in breach of warranty. "A breach of warranty presents an objective claim that the goods do not conform to a promise, affirmation, or description, or that they are not merchantable." *Jaramillo v. Gonzales*, 2002-NMCA-072, ¶ 13, 132 N.M. 459, 50 P.3d 554. "A breach of warranty occurs when tender of delivery is made . . . ." Section 55-2-725(2). "A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach." *Id.*

{24} The UCC also establishes the remedies available under a cause of action for breach of warranty. "For breach of warranty the buyer may recover direct, incidental, and consequential damages." *Manouchehri v. Heim*, 1997-NMCA-052, ¶ 10, 123 N.M. 439, 941 P.2d 978; *see also* § 55-2-714 ("[B]uyer [who] has accepted goods and given notification . . . may recover as damages . . . the loss resulting in the ordinary course of events from the seller's breach . . . . The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted . . ." and "[i]n a proper case any incidental and consequential damages under [Section 55-2-715] may also be recovered." (citation omitted)). Section 55-2-715(2) provides:

> Consequential damages resulting from the seller's breach include:
>
> (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
>
> (b) injury to person or property proximately resulting from any breach of warranty.

Section 55-2-725 sets forth the statute of limitation for such causes of action. It provides, in pertinent part:

> (1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.
>
> (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance, the cause of action accrues when the breach is or should have been discovered.

{25} The Legislature has thus clearly established that: (1) a seller's breach of express or implied warranties creates in the buyer a cause of action; (2) consequential

damages, *including those for personal injuries*, are available pursuant to such cause of action; and (3) the statute of limitation applicable to that cause of action is four years. The four-year deadline for filing suit under the UCC for breach of warranty of goods sold in New Mexico is clearly and unambiguously set forth in the statute. *See State v. Bernal*, 2006-NMSC-050, ¶ 14, 140 N.M. 644, 146 P.3d 289 (stating that when statutory language is unambiguous, "we follow the language, and . . . [our] inquiry is complete"). Accordingly, we apply the statute as it is written. *See Aeda v. Aeda*, 2013-NMCA-095, ¶ 11, 310 P.3d 646 ("[I]t is . . . the responsibility of the judiciary to apply the statute as written." (omission in original) (internal quotation marks and citation omitted)). We hold that by expressly including the cause of action, as well as the remedy, in Section 55-2-725, which creates the limitation period for claims brought pursuant to the UCC, the Legislature intended to establish a four-year statute of limitation period for all breach of warranty claims, including those seeking damages for personal injury caused by the breach. We conclude that the New Mexico Legislature had in mind that the four-year statute of limitations period in Section 55-2-725 would apply to the very cause of action Section 55-2-725 recognizes.

{26} In deciding this issue, other courts have likewise concluded that the cause of action for breach of warranty established by Section 55-2-725 should be subject to the limitation period provided in that same section. *See Needle v. Lasco Indus., Inc.*, 89 Cal. Rptr. 593, 594 (Cal. Ct. App. 1970) ("Since one of the purposes of the Commercial Code is to make uniform the law among the various jurisdictions . . . cases [from other states] are compelling authority which we accept." (internal quotation marks and citation omitted)). We find that the reasoning provided in the following cases is helpful in informing our analysis of this issue under New Mexico law. *See, e.g., Johnson v. Hockessin Tractor, Inc.*, 420 A.2d 154, 158 (Del. 1980) (holding that "it [is] completely logical that a statutory remedy have its period of limitation governed by the limitation provision of the [s]tatute that created the remedy"); *Di Prospero v. R. Brown & Sons, Inc.*, 494 N.Y.S.2d 181, 182 (N.Y. App. Div. 1985) (holding that "UCC 2-715(2) specifically states that [c]onsequential damages resulting from the seller's breach include . . . injury to person or property proximately resulting from any breach of warranty. Thus, it is clear that consequential damages under the UCC include personal injury to a buyer proximately resulting from a seller's breach of warranty." (alteration in original) (internal quotation marks omitted)); *Garcia v. Tex. Instruments, Inc.*, 610 S.W.2d 456, 462 (Tex. 1980), quoting *Berry v. G. D. Searle & Co.*, 309 N.E.2d 550, 553 (Ill. 1974) (adopting Illinois' holding that UCC Sections 2-314, -715, -719, and -725 "clearly demonstrate the legislative intent to create a statutory cause of action for breach of implied warranty to afford consumer protection to those who sustain personal injuries resulting from product deficiencies. This remedy is distinct and in addition to that existing in strict tort liability."). We find such reasoning to be persuasive and see no reason to depart from it in New Mexico.

E. Our Interpretation of New Mexico's UCC Statute is Consistent with the Majority of Other States, Which Furthers the Goal of Uniformity Under the UCC

{27} While the plain language of the UCC compels this Court to conclude that the Legislature intended that the four-year limitation period set forth in the UCC governs a breach of warranty claim, including those claims which seek damages for personal injuries in furtherance of the UCC's important goal of uniformity, we also consider the two

main approaches taken by other states in deciding this issue. Upon doing so, we adopt the approach taken by a majority of other states, which informs our analysis and is consistent with New Mexico law.

{28} The Sixth Circuit addressed this issue under Michigan's UCC statute in *Reid v. Volkswagen of America, Inc.*, 512 F.2d 1294 (6th Cir. 1975). Having reached the same conclusion as we do regarding the Legislative intent behind Michigan's UCC statute, the Sixth Circuit explained why the majority approach is consistent with the statute's purposes. *Id.* at 1296. We find this case highly informative, given that both the facts and the law are quite similar to those in the case before us.

{29} In *Reid*, the plaintiff sued the manufacturer and distributor of the car she was driving when she was involved in a wreck, arguing that the car was defective because "on impact, the left front seat of the Volkswagen broke loose from the floor of the car, causing plaintiff to be thrown about the car," and "claiming that her injuries resulted from defendant's breach of express and implied warranties of fitness of the automobile." *Id.* at 1295. The plaintiff filed suit "more than three years and less than four years after the . . . accident." *Id.* The Michigan statute establishing a three-year statute of limitations on actions "for injuries to persons and property" had last been "reenacted in 1961, to be effective in 1963 . . . ." *Id.* at 1295-96. The Sixth Circuit acknowledged that jurisdictions are split among two main approaches to this issue, as we recognized above, and considered the history of Michigan's UCC as well as the language of the Michigan statute for guidance. *Id.* at 1295-97. Michigan adopted the UCC in 1962, to take effect in 1964. *See id.* at 1296. Therefore, the three-year personal injury statute was adopted, but not yet in effect, when the UCC was adopted. *Id.* The Sixth Circuit noted that the UCC "contained no general repealer section and made no reference to the three-year personal injury limitation in the earlier general limitation statute." *Id.* Then, based on the language of the statute, the Sixth Circuit held that the UCC applies the plaintiff's claims and permitted recovery of personal injury damages, thereby adopting the majority approach. *Id.* at 1297. The *Reid* court gave six reasons to support its holding. *Id.* at 1297-98.

{30} First, the plaintiff's "complaint [wa]s filed under and in specific reference to Michigan's [UCC]." *Id.* at 1297. Second, "[t]he plain language of Michigan's [UCC] limitation section encompasses plaintiff's case." *Id.* Third, "[th]e Michigan [UCC]'s limitation section was adopted to be effective January 1, 1964, subsequent to the general limitation section which was adopted effective January 1, 1963, and hence, should be regarded as having amended it (by implication) as it pertains to warranty actions." *Id.* Fourth, "[t]he Michigan [UCC] limitation is specific as opposed to the general limitation statute, and hence, should be given effect. *Id.* Fifth, "[g]enerally the courts (absent a showing of prejudice on the part of defendant) tend to favor the longer of two limitation statutes." *Id.* Finally, "[a]lthough nationwide the courts are divided on whether a state tort limitation statute or the [UCC] limitation statute prevails, we believe the [UCC] statute is the only uniform statute possible and that adopti[ng] its limitation [period] will favor uniformity amongst the states in an important area of commercial law," which the Michigan Legislature specifically stated as one of the purposes of adopting the UCC. *Id.*

{31} The analysis taken by the *Reid* court presents a logical and persuasive approach to determining the central issue in the instant case. It also furthers the fundamental policy of uniformity embraced by the Legislature

through its enactment of the UCC in New Mexico. Accordingly, we apply its six-part rationale in addressing the issue before us. We address *Reid*'s second, fifth, and sixth reasons for its holding here, and the remaining reasons in discrete sections of this opinion.

{32} *Reid* reasoned that the plain language of Michigan's UCC indicated that the UCC governed the plaintiff's claim, and we have reached the same holding in this case. *Id.* at 1297. *Reid* also reasoned that "[g]enerally the courts (absent a showing of prejudice on the part of defendant) tend to favor the longer of two limitation statutes." *Id.* at 1297. New Mexico law also favors statutes of limitation which permit, rather than bar, causes of action. *See First Nat'l Bank in Albuquerque v. Chase*, 1994-NMSC-127, ¶ 17, 118 N.M. 783, 887 P.2d 1250 (Franchini, J., dissenting) (noting that New Mexico has long held that "law favors the right of action over a limitation"). *Reid* further reasoned that its holding aligned with the majority of courts that have addressed this issue, which furthered the UCC's goal to "make uniform the law among the various jurisdictions." 512 F.2d at 1297-98 (internal quotation marks and citation omitted). Our holding achieves the same goal, and is consistent with the Legislature's mandate that the UCC "be liberally construed and applied to promote its underlying purposes and policies," and its remedies liberally administered. Section 55-1-103(a); *see also* § 55-1-305(a) ("The remedies provided by the [UCC] must be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed . . . ."). We find the majority approach taken by other states, particularly as illustrated in *Reid*, to be persuasive in that it not only embraces the plain language in the statute, which reveals the Legislative intent to apply the UCC limitation period to breach of warranty claims seeking damages for personal injuries, but also furthers the important public policies embodied in the UCC.

F. We Reject the Minority Approach

{33} In deciding this issue, the Court of Appeals aligned New Mexico with the minority approach. *Badilla*, 2013-NMCA-058, ¶¶ 9-12. The minority approach looks to the remedy sought, not the right asserted, to determine the applicable statute of limitations; this is contrary to New Mexico law.

{34} The Court of Appeals concluded that Plaintiff's "injuries were personal, rather than related to any failure of the purchase of the boots," implying that a claim must seek recovery of economic damages in order to fall under the UCC. *Id.* ¶ 8. The Court of Appeals held that "when a personal injury is the basis for a breach of warranty suit, the essence of the injury should govern which statute of limitation applies." *Id.* ¶ 12. The Court of Appeals therefore concluded that because the essence of Plaintiff's injury was personal, the tort statute of limitations applied because it governs "injury to the person," and foreclosed application of the UCC because it "applies to cases involving the sale of goods." *Id.* ¶¶ 7, 12 (internal quotation marks and citation omitted).

{35} Defendants implore this Court to do as the Court of Appeals did—align New Mexico with the minority approach and regard the remedy of damages for personal injuries as paramount to the determination of the nature of the right sued upon, and thus determinative of which statute of limitations period should apply. *See id.* ¶ 10. This approach "holds that the type of damages sought in an action determines whether the statute of limitations in [UCC] § 2-725 applies," thus, "[a]ctions for personal injury damages or tortious injury to personal property are governed by general, non-[UCC] limitations periods, while actions for economic or breach of contract damages are governed by § 2-725." *Davidson*, 794 P.2d

at 16. Courts adopting this approach reason that "[w]here the injury is personal, the statute relating to personal injury actions applies." *Kinney v. Goodyear Tire & Rubber Co.*, 367 A.2d 677, 680 (Vt. 1976).

{36} We decline Defendants' invitation to adopt the minority approach and shape the nature of the claim to conform to the relief requested. We conclude that the minority approach is inconsistent with our Legislature's intent in adopting the UCC. We find the rationale taken by the Kansas Court of Appeals in rejecting the minority approach to be informative and persuasive. *See Golden v. Den-Mat Corp.*, 276 P.3d 773, 787 (Kan. Ct. App. 2012). It provides an excellent illustration of the aberrational outcomes that may result from allowing a plaintiff's requested damages to dictate the cause of action asserted. *Id.*

{37} In *Golden*, a patient who hoped to have extremely white teeth purchased porcelain veneers from a dentist, who marketed the veneers, sold them to the patient, and put the veneers in place. *Id.* at 780-81. The patient alleged that after 15 months of wear, "the veneers became discolored and stained despite representations" by the dentist and the manufacturer (the defendants) "that [the veneers] would retain their appearance." *Id.* at 781, 782. The veneers were covered by a written five-year limited warranty. *Id.* at 782. The patient sued the defendants, "alleging breach of express warranties regarding the veneers and breach of implied warranties of merchantability and fitness for a particular purpose," among other claims. *Id.* at 783. The defendants argued that the patient was "asserting a tort-based products liability claim" because she sought damages for pain and suffering, along with other remedies. *See id.* at 785. The Kansas Court of Appeals said "the notion that a plaintiff's requested monetary damages define the cause of action rather than the stated cause of action defining the appropriate monetary remedies borders on the nonsensical." *Id.* at 786. It then illustrated the absurdity of this proposition: if the remedy requested defined the cause of action asserted, then if the patient had sought treble damages as a remedy, her warranty claims could be treated as "alleged violations of federal antitrust laws, 15 U.S.C. § 15 (2006), or the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c) (2006), since they permit such a recovery," even though the complaint "did not state claims under either of those federal statutory schemes." *Golden*, 276 P.3d at 786.

{38} The Kansas Court concluded that "the district court would have had no more business dismissing the suit on [the basis of the remedy requested] than it did in declaring the claims to be torts filed past the limitations deadline because [the plaintiff] asked for pain and suffering damages." *Id.* It held that "the monetary damages [should be conformed] to the claims, not the other way around," explaining that "[t]he proper approach is to [determine the nature of the claim and] disallow [any] damages inconsistent with [that] claim." *Id.* We adhere to the proposition that the nature of the claim determines the available remedies. Thus, in determining which statute of limitations governs a claim, we first identify the nature of the claim asserted, which then establishes the available remedy, not the other way around. Such an approach is consistent with the legislative mandate that we construe statutes so as to avoid absurd results. NMSA 1978, § 12-2A-18 (1997). Therefore, we conclude that the minority approach is inapposite to both the policies upon which the UCC is based, as well as the manner in which claims are addressed—which must focus upon the nature of the right asserted, rather than the remedy sought.

G. Pre-UCC Cases Do Not Govern Which Statute of Limitations Applies to Causes of Action Which Accrued After the UCC Took Effect

{39} Defendants contend that the minority approach is consistent with New Mexico law, because "[i]t has long been preceden[t] that when the essence of a plaintiff's claim is for personal injury, the three-year personal injury statute of limitations applies, even though the cause of action is framed as an action in contract." Defendants therefore argue that if this Court adopts the majority approach, we will be "legislat[ing] judicially by providing that the UCC limitations period applie[s] to personal injury claims in simple product liability cases," because the Legislature had the opportunity to do so but chose not to. Defendants argue that *Chavez v. Kitsch*, 1962-NMSC-122, 70 N.M. 439, 374 P.2d 497, governs the analysis of which statute of limitation applies in this case and mandates our adoption of the minority approach.

{40} *Chavez* is distinguishable from the case at bar because it dealt with a cause of action that accrued before the UCC took effect. The UCC first took effect in New Mexico at midnight on December 31, 1961, and "applie[d] to transactions entered into and events occurring after that date." 1961 N.M. Laws, ch. 96, § 10-101. In *Chavez*, the alleged breach of warranty occurred on February 5, 1956, when the plaintiffs bought a house that was unfit for habitation. 1962-NMSC-122, ¶ 1. Thus the provisions of the UCC did not apply to an action which accrued in February 1956. While we agree with the Court of Appeals that "New Mexico has *historically* distinguished claims for personal injuries from contractual claims," we conclude that our Legislature nullified the arbitrary distinction of claims based solely on the remedy sought when it adopted the UCC. *Badilla*, 2013-NMCA-058, ¶ 11 (emphasis added). By adopting the UCC, the Legislature intended to circumscribe the scope of claims that the tort statute of limitation in Section 37-1-8 governs, in order to usher claims for breach of warranty based in contract, which seek damages for personal injuries, into the realm of the UCC.

H. Plaintiff's Claims Are Governed by the UCC

{41} We next determine the nature of Plaintiff's claims, and whether Plaintiff asserts those claims under the UCC. In doing so, "[w]e look to the nature of the right sued upon, and not the form of action or relief demanded, to determine the applicability of the statute of limitations to a cause of action." *Martinez v. Cornejo*, 2009-NMCA-011, ¶ 29, 146 N.M. 223, 208 P.3d 443 (alterations in original omitted) (internal quotation marks and citation omitted). The UCC governs contracts for sales, including the present sale of goods. Section 55-2-106(1). A " '[c]ontract for sale' includes . . . a present sale of goods," which "means a sale which is accomplished by the making of the contract." *Id.* "A 'sale' consists in the passing of title from the seller to the buyer for a price." *Id.* (citation omitted). A contract for sale encompasses "the total legal obligation that results from the parties' agreement as determined by the [UCC] as supplemented by any other applicable laws." Section 55-1-201(b)(12). Under the UCC, "[g]oods . . . conform to the contract when they are in accordance with the obligations under the contract." Section 55-2-106(2). If one of the parties to the contract fails to meet their obligation to ensure that the goods conform, this "constitutes a breach of the contract, giving rise to a remedy, typically damages." UJI 13-822 NMRA Committee Commentary. These legal obligations include any warranties made about the goods. *See id.* (stating that the legal obligations of a contract "may be either expressed in the contract or implied, such as any obligation of good faith or implied warranties").

{42} Plaintiff's purchase of the boots from Wal-Mart was a contract for the present sale of goods. Such contracts are governed by the UCC. *See Sinka v. N. Commercial Co.*, 491 P.2d 116, 118 (Alaska 1971) (holding that because "the transaction was a typical sale of goods . . . the sale necessarily was subject to the [UCC]" (footnote omitted)); § 55-2-102 ("Unless the context otherwise requires, this article applies to transactions in goods . . . ."). In his first amended complaint for damages, Plaintiff contends that Defendants made express and implied warranties about the product Plaintiff purchased. Any such warranties gave Plaintiff the right to receive goods which complied with those warranties. If the product Plaintiff purchased was not as warranted, then Defendants breached the contract, and Plaintiff has the right to recover any damages resulting from the seller's breach of that warranty if the goods do not so comply.

{43} We hold that the nature of the right Plaintiff's claims assert is the right to receive consequential damages as compensation for Defendant's alleged failure to provide Plaintiff with boots that conformed with the warranties Defendants allegedly made. This is a contract-based right. Accordingly, we consider the nature of Plaintiff's claims to lie in contract rather than in tort, and therefore Plaintiff's cause of action is governed by Section 55-2-725 of the UCC. Under this cause of action, incidental and consequential damages, including those for personal injuries, may be recovered pursuant to Section 55-2-714(3). Plaintiff alleged that the boots' failure to conform to their warranties caused him to "suffer damages, including severe, painful and permanent mental and physical injury, loss of earnings and medical expenses," and sought relief "in a reasonable amount to be decided by the trier of fact." Plaintiff therefore seeks damages which are eligible for recovery under Section 55-2-714. This is congruent with our holding that the nature of the claim asserted dictates the remedies available.

{44} Plaintiff's cause of action asserts this claim under the UCC by invoking its statutory language. Again, we find the Sixth Circuit's analysis of whether a claim for breach of warranty was properly brought under the UCC helpful. *See Reid*, 512 F.2d at 1296. While Plaintiff here did not specifically cite the UCC in his complaint, as the plaintiff did in *Reid*, he repeats almost verbatim the language of the UCC statutes which apply to each of his claims, respectively. For example, under his claim for breach of express warranty, Plaintiff asserts: "Defendants made representations, affirmations of fact, promises and descriptions which related to the boots and became part of the basis of the bargain." Compare this to Section 55-2-313(1)(a), stating: "any affirmation of fact, . . . promise[, or description] made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise." Although Plaintiff did not actually cite these statutes, we find his near-verbatim recitation of their language sufficient to conclude, as the court did in *Reid*, that Plaintiff's claims were "filed under" the UCC. *See* 512 F.2d at 1297.

{45} Defendants argue that, under the majority approach which looks to the nature of the right asserted, Plaintiff's claims are governed by the tort limitation period. Defendants artfully assert that, looking to the nature of the right Plaintiff asserts, "the gravamen of Plaintiff's complaint is a claim for personal injury and nothing more." Therefore, the three-year statute of limitation for tort under Section 37-1-8 should apply. Defendants imply that Plaintiff's claims are governed by the tort limitation period because they are truly "simple product liability" claims. As a threshold matter, this argument assumes that Plaintiff's claim could only be a

products liability claim, a proposition with which we disagree. Products liability claims and warranty claims are not mutually exclusive. The fact that products liability in tort is a theory available to plaintiffs does not mean it is the *only* theory plaintiffs may pursue when the case is based on an allegedly defective product. *See Perfetti v. McGhan Med.*, 1983-NMCA-032, ¶¶ 45-47, 99 N.M. 645, 662 P.2d 646 (acknowledging that New Mexico law explicitly provides that both products liability and breach of warranty causes of action are available to plaintiffs). Even if Plaintiff was asserting a claim for products liability, that would not necessarily foreclose his option to assert a warranty claim as well. *See Di Prospero*, 494 N.Y.S.2d at 183 ("[I]t does not follow that merely because a cause of action exists under strict product liability in tort, a separate cause of action under the warranty provisions of the UCC is precluded."); *see also* Introduction to UJI ch. 14 NMRA, Products Liability (noting that the UCC and the doctrine of strict liability in tort "create parallel but independent bodies of product liability law," and "[p]laintiffs may proceed under both theories"; "[n]o election is required").

{46} Further, Defendants' contention that Plaintiff's claims are tort-based ignores the very nature of tort-based products liability claims, which rely on a theory of negligence. *See Fernandez v. Char-Li-Jon, Inc.*, 1994-NMCA-130, ¶ 4, 119 N.M. 25, 888 P.2d 471 (recognizing "[a]n action seeking recovery for personal injury as a result of a defendant's alleged negligence"), *abrogated on other grounds by Romero v. Bachicha*, 2001-NMCA-048, ¶ 16, 130 N.M. 610, 28 P.3d 1151. Defendants overlook the fact that Plaintiff makes no claim for damages based on Defendants' negligence. Defendants point to only one fact which they contend reveals that Plaintiff's claims are truly tort claims: the fact that Plaintiff seeks damages for personal injuries. As we have previously discussed, we will not permit the remedy requested to dictate the nature of the claim. Thus, the outcome Defendants suggest represents the inverse of the rule that we look to the right asserted, not the remedy requested, to determine the nature of a claim: it would require us to look to the remedy requested in order to determine the right sued upon.

{47} While we agree with Defendants' contention that we must determine the true nature of a claim in order to prevent parties from avoiding the shorter tort limitation period by couching their claims in terms of breach of warranty when they are actually tort-based, we do not find this to be true in the case at bar. *See B & B Paint Corp. v. Shrock Mfg., Inc.*, 568 N.E.2d 1017, 1019 (Ind. Ct. App. 1991) (acknowledging that "[i]f a cause of action is actually one for negligence or strict liability, but has been couched in terms of breach of warranty under the UCC solely to avoid the shorter statute of limitations [for products liability actions], the statute of limitations for [p]roduct [l]iability [actions] will apply"). We hold that the nature of the right Plaintiff asserts is based in contract, and therefore the UCC's four-year statute of limitation, which governs actions for breach of warranty seeking personal injury damages, applies.

I. The Tort and UCC Statutes Do Not Conflict; Therefore Analysis of Which Statute Is More Specific Is Unwarranted

{48} The parties suggest that a principle of statutory interpretation, sometimes called the "general/specific rule," also supports each of their respective positions. This rule dictates "that when one statute deals with a subject in general terms and another deals with a part of the same subject more specifically, the more specific statute will be considered an exception to the general statute, and will apply." *Prod. Credit Ass'n of S. N.M. v.*

Williamson, 1988-NMSC-041, ¶ 5, 107 N.M. 212, 755 P.2d 56. In light of this opinion's foregoing holdings, we find it unnecessary to address this issue.

{49} As we held above, the tort statute and the UCC statute address distinct causes of action, foreclosing any requirement to apply the general/specific rule of statutory interpretation. It is well established in New Mexico that our tort and UCC bodies of law are parallel, but independent: the UCC governs claims based in contract; the tort limitation governs claims based in negligence. *See Fernandez*, 1994-NMCA-130, ¶ 4 (Section 37-1-8 governs an "action seeking recovery for personal injury as a result of a defendant's alleged negligence"). Because these two bodies of law govern different types of claims, they do not conflict; therefore, we need not decide which one is more specific. *See State ex rel. Madrid v. UU Bar Ranch Ltd. P'ship*, 2005-NMCA-079, ¶ 20, 137 N.M. 719, 114 P.3d 399 ("[T]he general/specific rule of statutory construction applies only when the statutory provisions are conflicting.") (internal quotation marks and citation omitted). Thus, the two statutes are harmonized so that each is given effect. *See Citizens for Incorporation, Inc. v. Bd. of Cty. Comm'rs of Cnty. of Bernalillo*, 1993-NMCA-069, ¶ 20, 115 N.M. 710, 858 P.2d 86 ("If the statutes can be harmonized so that each can be given effect, this Court should do so.").

{50} Lastly, we turn to the parties' final argument. Defendants argue that Plaintiff's claims are barred on the second ground upon which the district court granted summary judgment in their favor, namely, that "there is no genuine issue of material fact as to Plaintiff's inability to establish required elements of his causes of action for breach of express and implied warranty." Because this issue was not included in the grounds upon which this Court granted Plaintiff's petition for writ of certiorari, we decline to address it. *See* Rule 12-502(C)(2)(d) NMRA (stating parenthetically that "the Court will consider only the questions set forth in the petition"); *State v. Morales*, 2010-NMSC-026, ¶ 19, 148 N.M. 305, 236 P.3d 24 ("Under the appellate rules, it is improper for this Court to consider any questions except those set forth in the petition for certiorari." (internal quotation marks and citations omitted)). The case is remanded to the Court of Appeals to consider the second basis upon which the district court granted summary judgment to Defendants. *See Badilla*, 2013-NMCA-058, ¶ 16.

III. CONCLUSION

{51} We hold that the UCC four-year statute of limitations for breach of warranty claims governs Plaintiff's claims, rather than the three-year statute for tort claims. We therefore reverse and remand the case to the Court of Appeals for further proceedings consistent with this opinion.

{52} 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-030

Filing Date: September 10, 2015

Docket No. 34,411

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

DONOVAN KING,

Defendant-Appellant.

Jorge A. Alvarado, Chief Public Defender
J.K. Theodosia Johnson, Assistant Appellate Defender
Santa Fe, NM

for Appellant

Hector H. Balderas, Attorney General
Kenneth H. Stalter, Assistant Attorney General
Santa Fe, NM

for Appellee

OPINION

BOSSON, Justice.

{1} Relying on *Santobello v. New York*, 404 U.S. 257 (1971), this Court has previously held that a plea-bargained sentence must be fulfilled by the prosecution, and if not, will be enforced by the courts. *See State v. Miller*, 2013-NMSC-048, ¶¶ 29, 31, 314 P.3d 655. In this first-degree murder appeal, we apply that principle of law to a prosecutorial promise to dismiss a tampering-with-evidence charge if the accused would locate and produce the murder weapon. Here, Defendant Donovan King produced the weapon, but the prosecutor did not drop the charge as promised and Defendant was convicted of tampering with evidence. Accordingly, we reverse the tampering conviction. Affirming all remaining convictions, including first-degree murder, we remand for resentencing.

BACKGROUND

{2} Defendant and Justin Mark arrived at Kevin Lossiah's apartment the morning of May 29, 2011. Initially, Lossiah's neighbors saw Defendant and Mark outside Lossiah's apartment. Neighbor Wesley Gray talked to Defendant briefly before returning to his apartment. Moments later Gray and his wife Nicole Beyale heard banging coming from Lossiah's apartment and someone yelling "Please stop! Shut up!" Beyale immediately called the police, who were dispatched to the apartment and found Lossiah severely beaten but still breathing. Officers called for paramedics and Lossiah was rushed to the hospital.

{3} Farmington police officers, having the descriptions of both Defendant and Mark, began canvassing the area. Shortly after the incident, Detective Paul Martinez and Officer Frank Dart came into contact with Mark and Defendant. Detective Martinez testified that Mark was shirtless and had fresh scratches on his back, and that the clothing on both men was wet and muddy. Detective Martinez also testified that both individuals looked like they had been involved in a struggle. DNA testing later revealed Lossiah's blood on their clothing. While being questioned by Officer Dart, Defendant stated that Lossiah "came at him with a sword." Both Mark and Defendant were arrested and taken to the Farmington Police Department. Lossiah died later that night.

{4} Ultimately, Defendant was charged with and convicted of first-degree murder,

conspiracy to commit first-degree murder, armed robbery, conspiracy to commit armed robbery, and tampering with evidence. The district court sentenced Defendant to life imprisonment plus 18 years. Recently this Court upheld Mark's conviction for first-degree murder for his participation in Lossiah's murder. *See State v. Mark*, No. 34,025, dec., ¶¶ 1, 48 (N.M. Sup. Ct. Apr. 13, 2015) (non-precedential). Defendant appeals directly to this Court. *See* Rule12-102(A)(1) NMRA.

DISCUSSION

{5} On direct appeal to this Court, Defendant raises five issues. The principal issue is whether the prosecutor made a promise to Defendant to dismiss one of the charges if Defendant would locate and turn over the murder weapon. If such a promise was made, we must decide the appropriate remedy, if any. To establish necessary context, we begin with Defendant's custodial interrogations.

{6} Officers questioned Defendant on May 29, 2011, the day of the arrest, and again on May 30, 2011. This Court previously upheld the district court's determination that Defendant's interrogation on May 29, 2011, violated Defendant's constitutional rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), making Defendant's incriminating statements from that interview inadmissible at trial. *State v. King*, 2013-NMSC-014, ¶¶ 1-2, 13, 300 P.3d 732. When Detective Martinez questioned Defendant the next day, he properly advised Defendant of his *Miranda* rights and Defendant signed a waiver, consenting to questioning without an attorney.

{7} After being advised of his *Miranda* rights, Defendant asked the detective for his paperwork. Defendant indicated that he did not want to talk about the events of the previous day because he wanted to speak to his family first.[1] Detective Martinez asked Defendant if there was anything he did want to talk about, to which Defendant replied "[t]hat's why I asked [you] to bring the papers." Defendant then indicated that he would like to see some charges dropped. The following exchange took place:

> **Detective Martinez:** Well, what would you like to see dropped and why?
>
> **Donovan King**: The tampering with evidence.
>
> **Detective Martinez:** And how would you like that one to get dropped?
>
> **Donovan King**: If I show you personally what I did with what I had?
>
> **Detective Martinez:** Look, I can't make that promise, but if you . . . tell me now where you [put it] I can talk to the [district attorney] but I cannot make you a promise. But I can tell you that if you cooperate and tell me where everything you guys did and where it went well, yeah, that's going to help in the tampering because then it would no longer have, . . . I'm sure the [district attorney] would be willing to work with us.

[1]Defendant sought to suppress the statements and any physical evidence that resulted from the second interview. The district court found that the second interview did not include a valid waiver of Defendant's right against self-incrimination because of Defendant's stated reluctance to speak with the detective before talking with his family. The court, however, also found that the statements were voluntarily given. Consistent with the *U.S. v. Patane*, 542 U.S. 630 (2004) standard, the district court held that the physical fruits of those statements—in this case the murder weapon—could be admitted at trial.

{8} During the discussion, Defendant admitted that he and Mark had taken a wooden branch into Lossiah's apartment and that Defendant later hid it. This branch is what Defendant was referring to when he offered to show the detective "what I did with what I had" if the tampering charge was dropped. The tampering charge was based on Defendant having hidden the branch.

{9} Because Detective Martinez did not have the authority to drop the charge, he called his supervisor. After the supervisor returned Detective Martinez's telephone call, the detective had this exchange with Defendant:

> **Detective Martinez**: Here is what I was told word for word. We just talked with the district attorney that is actually charging you. The district attorney is willing to talk dismissal of the charge of tampering if we go today and actually find the weapon where you hid it. Is that what you want to do?
>
> **Donovan King**: Yeah.
>
> **Detective Martinez:** Okay, let me make arrangements and I got somebody meeting us and we will go right now.

Defendant then went with the officers to the location of the wooden branch Defendant had hidden. At trial the prosecution used the branch as evidence of a murder weapon.

{10} The exchange between Defendant and Detective Martinez is significant because the assistant district attorney, speaking through Detective Martinez, appears to have promised to dismiss the tampering charge in exchange for Defendant locating the murder weapon. Yet, Defendant was in fact charged with and convicted of that same tampering charge pertaining to that same branch. Based on this exchange, we requested supplemental briefing to address the voluntariness of Defendant's statements and subsequent production of the branch in reliance on a promise of leniency—dismissal of the tampering charge.

{11} Normally, we would analyze custodial statements made to a police officer in reliance on a promise of leniency in terms of whether the individual's "'will has been overborne and his capacity for self-determination critically impaired.'" *State v. Munoz*, 1998-NMSC-048, ¶ 20, 126 N.M. 535, 972 P.2d 847 (quoting *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961)). The analysis differs, however, when examining a plea agreement entered into with a prosecutor. *See Miller*, 2013-NMSC-048, ¶ 9. ("Upon review, appellate courts construe the terms of the plea agreement according to what Defendant reasonably understood when he entered the plea." (internal alteration omitted) (internal quotation marks and citation omitted)). The distinction exists in part because "[t]he police have no authority to make prosecutorial decisions." *State v. Reed*, 879 P.2d 1000, 1002 (Wash. Ct. App. 1994). The district attorney obviously does have such authority.

{12} Notably, this appeal presents a kind of hybrid of custodial statements made to a police officer and a plea agreement negotiated with a prosecutor. Defendant only talked with Detective Martinez. However, the level of participation by the prosecutor is significant and cannot be overlooked. In the initial discussion with Defendant, Detective Martinez was very careful not to promise dismissal because he had no authority to make such an offer ("Look, I can't make that promise, but . . . ."). But the prosecutor did have the authority, which appears to be exactly why the detective then conferred with the one person who could "make that promise": "the district attorney that is actually charging you."

{13} After talking directly with the prosecutor, Detective Martinez, acting as a kind of proxy, relayed the prosecutor's offer—not the detective's offer—that the prosecutor would dismiss the tampering charge if Defendant showed the police where the tampered-with evidence—the hidden murder weapon—was located. Importantly, there is no claim here that the detective misunderstood or misrepresented the prosecutor's offer. At the suppression hearing, the same prosecutor who made the offer played the audio interview between Detective Martinez and Defendant without any contradiction, objection, or claim of inaccuracy.

{14} The fundamental problem is not the officer's willingness to participate in the discussion Defendant initiated, but the prosecutor's failure to follow through on his offer. Had the prosecutor dismissed the tampering charge, Defendant would be in no position to complain about having given the statement or produced the murder weapon; he would have received the benefit of his bargain. Thus, it is the level of participation by the prosecutor that places this case into the realm of a plea agreement. As such, "[w]e examine the language in the plea agreement to evaluate the reasonableness of *Defendant's understanding*." *Miller*, 2013-NMSC-048, ¶ 16 (emphasis added).

{15} A literal, finely-parsed reading of the exchange might suggest that the prosecutor promised only to "talk dismissal" of the tampering charge, but not necessarily to dismiss the charge. The State makes such a claim on appeal. A fair reading of this exchange, however, leads ineluctably to a different conclusion. If Defendant showed the branch to Detective Martinez, then the tampering charge really would be dismissed; they would not just "talk" about it. Clearly, that is what Defendant believed and reasonably so. Why else would he locate the branch for Detective Martinez if not in reliance on such an agreement? Defendant performed on his promise; the prosecutor did not. Accordingly, we must consider the appropriate remedy for the prosecutor's unfulfilled promise.

Specific performance is the appropriate remedy for an unfulfilled promise made by the prosecutor in the context of this case

{16} *Santobello*, 404 U.S. 257, provides a helpful framework for this issue. In *Santobello*, the prosecutor permitted the accused to plead guilty to a lesser-included offense and agreed not to recommend any sentence to the court. *Id.* at 258. After a series of delays, a new prosecutor who took over the case failed to adhere to the original plea agreement and recommended the maximum sentence, which the defendant received. *Id.* at 259. The U.S. Supreme Court reversed, saying that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.* at 262. Declining to decide categorically how that promise should be enforced, the Court remanded, stating "[t]he ultimate relief to which petitioner is entitled we leave to the discretion of the state court" because the state court is in a better position to choose the remedy. *Id.* at 263. The Court did suggest specific performance of the original plea agreement as one alternative. *Id.*

{17} Citing *Santobello*, this Court granted specific performance in *Miller*, 2013-NMSC-048, ¶¶ 30-31, as a proper remedy for a broken plea agreement. In *Miller*, the defendant and the prosecutor had agreed that the defendant would receive a maximum sentence of forty years. *Id.* ¶ 3. The district court then proceeded to sentence the defendant to forty-two years and suspended nine years of the sentence. *Id.* ¶ 4. This Court held "that the forty-two-year sentence

violate[d] the plea agreement." *Id.* ¶ 8. We remanded the case to the district court "to sentence [the defendant] according to his reasonable understanding of the plea agreement, requiring that his sentence contain a total period of incarceration between ten and forty years." *Id.*

{18} In the present case, Defendant voluntarily presented a potential plea agreement to the State, saying essentially: "If you dismiss the tampering charge, I will find the branch." While the deal may not have been in Defendant's best interest, it is the deal he freely proposed; it was not coerced or extracted unfairly. The prosecutor's response, through Detective Martinez and his conduct thereafter, led Defendant reasonably to understand that they had an agreement. There was no apparent reason for the prosecutor not to keep his end of the bargain. We strongly favor the language from *Santobello* quoted earlier that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello*, 404 U.S. at 262. *See State v. Unga*, 196 P.3d 645, 651 (Wash. 2008) (en banc) (charge dismissed when confession was based on a promise not to prosecute for that crime; other charges were upheld).

{19} In the interest of fundamental fairness, we conclude that Defendant is entitled to specific performance of the agreement he made with the prosecutor. As a result, we vacate Defendant's tampering with evidence conviction and remand for resentencing. We continue with the remaining issues Defendant raises on appeal.

Defendant was on notice that he could be convicted as an accessory even though he was only charged as a principal

{20} Defendant failed to preserve his challenge to the jury instruction on accessory liability, which we now review for fundamental error. *See* Rule 12-216(B)(2) NMRA (providing that an appellate court may review, "in its discretion, [unpreserved] questions involving . . . fundamental error"). Fundamental error "'must go to the foundation of the case or take from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive.'" *State v. Barber*, 2004-NMSC-019, ¶ 8, 135 N.M. 621, 92 P.3d 633 (quoting *State v. Garcia*, 1942-NMSC-030, ¶ 25, 46 N.M. 302, 128 P.2d 459). "The exacting standard of review for reversal for fundamental error requires the question of guilt be so doubtful that it would shock the conscience of the court to permit the verdict to stand." *State v. Samora*, 2013-NMSC-038, ¶ 17, 307 P.3d 328 (internal alterations omitted) (internal quotation marks and citation omitted). Defendant claims for the first time that "[i]nstructing the jury on accessory liability when the State failed to charge [Defendant] at any point with accessory liability deprived [Defendant] of his fundamental rights to notice of the charges against him and the opportunity to prepare a defense." We are not persuaded.

{21} Defendant is correct that the State did not initially charge Defendant with accessory liability. However, New Mexico long ago abolished the distinction between accessory and principal liability. *See State v. Wall*, 1980-NMSC-034, ¶ 10, 94 N.M. 169, 608 P.2d 145 ("The Legislature and our courts have abolished the distinction between a principal and an accessory."), *overruled on other grounds by State v. Lucero*, 1993-NMSC-064, ¶ 13, 116 N.M. 450, 863 P.2d 1071. *See also State v. Nance*, 1966-NMSC-207, ¶ 18, 77 N.M. 39, 419 P.2d 242 ("The purpose of the [L]egislature to authorize charging and convicting an accessory as a principal is made evident when we consider that no different penalty is provided by law for one who aids

and abets."), *abrogated on other grounds by State v. Wilson*, 2011-NMSC-001, ¶¶ 14-15, 149 N.M. 273, 248 P.3d 315; *Tapia v. Tansy*, 926 F.2d 1554, 1561 (10th Cir. 1991) ("New Mexico, like many other states, long ago abolished the distinction between conviction as a principal and an accessory, so that the charge as principal includes a corresponding accessory charge."). The charge against Defendant as a principal included "a corresponding accessory charge," assuming the evidence at trial supported the charge. Accordingly, Defendant "was on notice that he could be charged as a principal and convicted as an accessory or vice-a-versa." *See Wall*, 1980-NMSC-034, ¶ 10. After Defendant was charged as a principal, the district court correctly instructed the jury on accessory liability.

Defendant's statements were hearsay not falling within any recognized exception

{22} Defendant, in reliance on his Fifth Amendment privilege against compelled self-incrimination, declined to testify at trial. Defense counsel, trying to lay an evidentiary foundation for Defendant's claim of self-defense, sought to question Officer Dart about certain statements Defendant had made to him. The State made a hearsay objection. Defense counsel called Officer Dart outside the presence of the jury to make a proffer of evidence. During the proffer, Officer Dart acknowledged being told by Defendant that "Lossiah came at him with a sword." The court granted the State's hearsay objection.

{23} Defendant maintains on appeal that his statement to Officer Dart was admissible either as a nonhearsay statement or, in the alternative, as a statement that satisfied one or more exceptions to the hearsay rule. "We review the admission of hearsay evidence for an abuse of discretion." *State v. Sisneros*, 2013-NMSC-049, ¶ 18, 314 P.3d 665. We begin by asking whether Defendant's statement to Officer Dart was hearsay.

{24} "Hearsay is an out-of-court statement offered to prove the truth of the matter asserted." *Id.*; *see also* Rule 11–801(C) NMRA. Defendant argues that his statement to Officer Dart was not hearsay because it was not offered to prove the truth of the matter asserted—that Lossiah actually threatened Defendant with a sword—but only to show how Defendant felt as a result, his fearful state of mind. Defendant argues that excluding this statement effectively denied him a defense, that he believed he was threatened with a sword and reacted accordingly.

{25} This Court has stated: "The purpose of recognizing self-defense as a complete justification to homicide is the *reasonable belief* in the necessity for the use of deadly force to repel an attack in order to save oneself or another from death or great bodily harm." *State v. Coffin*, 1999-NMSC-038, ¶ 12, 128 N.M. 192, 991 P.2d 477 (emphasis added). We agree with the State's analysis that "[Defendant's] statement only shows a reasonable belief of imminent danger if the statement is true. If the statement is false, then it shows no such thing." Defendant cannot use this statement to demonstrate a *reasonable belief* in the necessity of his use of force for self-defense unless he stated truthfully to Officer Dart that the victim came at him with a sword. Accordingly, the statement in fact was being offered for the truth of the matter stated, and the district court correctly denied its admission.

{26} Defendant also argues for various recognized exceptions to the hearsay rule. He first proposes that his statement was admissible under Rule 11-803(3) NMRA as a then-existing mental, emotional or physical condition. This exception to the hearsay rule applies to "[a] statement of the declarant's then-existing state of mind (such as motive,

intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed." *Id.* "The exception is limited to statements showing the mental state, *not its cause*." *State v. Leyba*, 2012-NMSC-037, ¶ 13, 289 P.3d 1215 (emphasis added).

{27} Defendant's statement that "Lossiah came at him with a sword" does not show Defendant's mental state, only its cause. This Court has held that "the rule does not permit evidence explaining why the declarant held a particular state of mind." *State v. Baca*, 1995-NMSC-045, ¶ 19, 120 N.M. 383, 902 P.2d 65. Even if Defendant had told the officer that he was afraid because of Lossiah's conduct, that would not have been his state of mind at the time he made the out-of-court statement, only his previous state of mind at the time of the alleged incident. Therefore, the district court did not abuse its discretion by rejecting Defendant's statement under Rule 11-803(3).

{28} Defendant next argues for the first time on appeal that this was an exception to hearsay as a statement against interest under Rule 11-804(B)(3) NMRA. We review for plain error. *See Lucero*, 1993-NMSC-064, ¶ 13 ("To establish plain error, the error complained of must have affected substantial rights although the plain errors were not brought to the attention of the judge." (internal alterations omitted) (internal quotation marks and citation omitted)). Defendant first must show he is unavailable to testify to meet any exception under Rule 11-804. Rule 11-804(A)(1) states that a declarant is unavailable if he "is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies." Here, Defendant chose to exercise his Fifth Amendment privilege against compulsory self-incrimination. By doing so, he made himself unavailable to the State, but he remained free to change his mind and testify. *See United States v. Peterson*, 100 F.3d 7, 13 (2d Cir. 1996) ("When the defendant invokes his Fifth Amendment privilege, he has made himself unavailable to any other party, but he is not unavailable to himself."). *See also United States v. Kimball*, 15 F.3d 54, 56 (5th Cir. 1994) (holding that a declarant cannot cause his own unavailability by invoking his Fifth Amendment privilege against self-incrimination); *United States v. Hughes*, 535 F.3d 880, 882 (8th Cir. 2008).

{29} Defendant was not unavailable as contemplated by Rule 11-804(A)(1). Even if Defendant were unavailable, however, his claim still fails under Rule 11-804(B)(3). A statement against interest is defined as a "statement . . . so far contrary to the declarant's penal interest that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." *State v. Torres*, 1998-NMSC-052, ¶ 14, 126 N.M. 477, 971 P.2d 1267 (internal quotation marks and citation omitted), *overruled by State v. Alvarez-Lopez*, 2004-NMSC-030, ¶¶ 17, 23, 136 N.M. 309, 98 P.3d 699 (overruling *Torres* "to the extent [that *Torres*] held custodial confessions implicating the accused fall with a firmly rooted hearsay exception and do not violate the federal Confrontation Clause"). The advisory committee's note to Fed. R. Evid. 804(b)(3) states that "a statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest." Fed. R. Evid. 804(b)(3) advisory committee's note to 1972 amendment.

{30} Defendant argues that since his statement ("Lossiah came at [me] with a sword") exposed him to criminal liability, it was "an inculpatory statement with an aspect of self-defense." We disagree. Defendant gave the statement to Officer Dart when he was

covered in Lossiah's blood and had Lossiah's possessions on his person. While this statement did not implicate another person, it could well have been "motivated by a desire to curry favor" with Officer Dart and explain his actions. The statement was not "so far contrary" to Defendant's penal interest. It actually was in Defendant's interest to make the statement. The district court correctly rejected Defendant's argument under Rule 11-804(B)(3).

{31} Defendant also argues for the first time on appeal that the statement should fall under Rule 11-807 NMRA. Again we review for plain error. This hearsay exception is available if

> (1) the statement has equivalent circumstantial guarantees of trustworthiness; (2) it is offered as evidence of a material fact; (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and (4) admitting it will best serve the purposes of these rules and the interests of justice.

Rule 11-807(A). This Court has observed that "[t]his exception is to be used sparingly, however, especially in criminal cases." *Leyba*, 2012-NMSC-037, ¶ 20. "The test under the catch-all rules is whether the out-of-court statement—not the witness's testimony—has circumstantial guarantees of trustworthiness." *State v. Trujillo*, 2002-NMSC-005, ¶ 17, 131 N.M. 709, 42 P.3d 814.

{32} Defendant made no effort at trial to demonstrate that his statement shows "indicia of trustworthiness equivalent to those other specific exceptions." *Leyba*, 2012-NMSC-037, ¶ 20 (internal quotation marks and citation omitted). Defendant made the statement two hours after the incident took place while he had Lossiah's blood on his clothes. He was offering the officer self-serving testimony to mitigate or explain his actions. Moreover, Defendant failed to comply with Rule 11-807(B) that "[t]he statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars . . . so that the party has a fair opportunity to meet it." Therefore, we hold that it was not plain error for the district court to deny admission of Defendant's statements under Rule 11-807.

Ineffective assistance of counsel

{33} Defendant argues that he received ineffective assistance of counsel. This Court has repeatedly stated that ineffective assistance of counsel claims are best served through habeas corpus proceedings so that an evidentiary hearing can take place on the record. *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."). *See also State v. Telles*, 1999-NMCA-013, ¶ 25, 126 N.M. 593, 973 P.2d 845 ("[The] proper avenue of relief [from ineffective assistance of counsel] is a post-conviction proceeding that can develop a proper record."). Generally, only an evidentiary hearing can provide a court with sufficient information to make an informed determination about the effectiveness of counsel. Accordingly, we reject Defendant's ineffective assistance of counsel claim on appeal without prejudice to his ability to bring such a claim by way of habeas corpus.

{34} Because we have vacated Defendant's conviction of tampering while concluding that three other issues he raises are without merit, the fifth issue in which Defendant claims cumulative error is moot.

CONCLUSION

{35} We vacate Defendant's tampering with evidence conviction and remand for resentencing. We affirm Defendant's remaining convictions.

{36} **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-031

Filing Date: September 10, 2015

Docket No. 34,526

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

v.

ERNEST PAANANEN,

Defendant-Respondent.

Hector H. Balderas, Attorney General
Nicole Beder, Assistant Attorney General
Jacqueline Rose Medina, Assistant Attorney General
Santa Fe, NM

for Petitioner

Jorge A. Alvarado, Chief Public Defender
B. Douglas Wood, III, Assistant Appellate Defender
Santa Fe, NM

for Respondent

OPINION

BOSSON, Justice.

{1} Over two decades ago, in *Campos v. State*, 1994-NMSC-012, ¶ 1, 117 N.M. 155, 870 P.2d 117, this Court held that under our New Mexico Constitution a felony arrest must be preceded by an arrest warrant, even when supported by probable cause, unless exigent circumstances made securing a warrant impractical. Our opinion in *Campos* addressed a situation in which the authorities had ample time to obtain an arrest warrant and provided no good reason for failing to do so. In the present case, by contrast, police officers made their arrest at the scene of the crime, shoplifting, without any prior opportunity to secure a warrant. In the course of our analysis, we explain our reasons for differing from the decision reached by the Court of Appeals, and reverse the opinion upholding the suppression of evidence below. We remand for further proceedings.

BACKROUND

{2} Surveillance cameras at Sportsman's Warehouse in Albuquerque caught Defendant Ernest Paananen placing two flashlights under his jacket and then leaving the store without

paying. Moments later, the store's loss prevention team apprehended Defendant and returned him to the store. The loss prevention team placed Defendant in a back room, frisked him, and called the police. During the frisk, a loss prevention employee placed Defendant's possessions on the table, along with the stolen flashlights. The employee did not go through Defendant's backpack.

{3} Albuquerque Police Department Officers Cole Knight and Andrew Hsu arrived at the store, and Officer Knight immediately handcuffed Defendant. Officer Hsu searched Defendant's backpack and found hypodermic needles. When questioned about the needles, Defendant admitted that he had tried to use drugs the day before but said he did not currently possess any drugs.

{4} While waiting for a copy of the surveillance video, Officer Knight searched through Defendant's possessions on the table and found a cigarette pack. Officer Knight looked in the cigarette pack and found a substance he believed to be heroin, a hunch later confirmed by a field kit test. Along with shoplifting, the State charged Defendant with possession of a controlled substance and possession of drug paraphernalia.

{5} Subsequently, Defendant sought to suppress all evidence seized at the store, arguing that the officers had conducted an unreasonable, warrantless search in violation of both the Fourth Amendment to the United States Constitution and Article II, Section 10 of the New Mexico Constitution. In response, the State emphasized that the officers had specific statutory authority in shoplifting cases to arrest Defendant without a warrant. *See* NMSA 1978, Section 30-16-23 (1965) ("Any law enforcement officer may arrest *without warrant* any person [the officer] has probable cause for believing has committed the crime of shoplifting. . . ." (emphasis added)). The State then argued that because the arrest was valid, the officers conducted a lawful search of Defendant in the course of that arrest.

{6} At the suppression hearing, the State argued that the search 1) was incident to a valid arrest for shoplifting, and 2) was the result of inevitable discovery pursuant to that arrest. Unpersuaded, the district court suppressed all evidence seized, concluding that "the State ha[d] failed to establish that the search was conducted pursuant to any exception to the warrant requirement . . . ." The State appealed the suppression order to the Court of Appeals. *See* NMSA 1978, § 39-3-3(B)(2) (1972) ("In any criminal proceeding in district court an appeal may be taken by the state to the . . . court of appeals . . . within ten days from a[n] . . . order . . . suppressing or excluding evidence. . . .").

Court of Appeals opinion

{7} The Court of Appeals affirmed the suppression, holding "that the [warrantless] arrest of Defendant was not lawful under Article II, Section 10 of the New Mexico Constitution." *State v. Paananen*, 2014-NMCA-041, ¶ 2, 321 P.3d 945, *cert. granted*, 2014-NMCERT-003 (No. 34,526, Mar. 28, 2014). The Court acknowledged that a warrantless search may be conducted incident to a lawful arrest. *Id.* ¶ 17. The validity of the search, therefore, depended on the lawfulness of the arrest, and in this case Defendant was apprehended without an arrest warrant. To determine the validity of the warrantless arrest, the Court of Appeals focused heavily on *Campos*, 1994-NMSC-012, one of this Court's first opinions interpreting Article II, Section 10 of the New Mexico Constitution distinctly from its federal counterpart, the Fourth Amendment to the United States Constitution.

{8} In *Campos*, this Court held that an arrest without a warrant was valid only if both supported by probable cause and made under

sufficient exigent circumstances. 1994-NMSC-012, ¶ 1. After determining that "Defendant presented no imminent threat to escape or destroy evidence," and that "the State made no showing of exigent circumstances," the Court of Appeals held that the arresting officers first needed a warrant to arrest Defendant. *Paananen*, 2014-NMCA-041, ¶ 35-36. Only then could they justify searching Defendant incident to a lawful arrest, despite the undisputed presence of probable cause. *See id.* Accordingly, because the officers arrested Defendant without an arrest warrant, the Court of Appeals held that the arrest and subsequent search were unconstitutional and suppression of the evidence was appropriate. *Id.*

{9} In resolving the case at bar, we consider both federal and state constitutional precedent, especially our opinion in *Campos*, because the lawfulness of Defendant's warrantless arrest at Sportsman's Warehouse—and the search incident thereto—hangs in the balance.

DISCUSSION

{10} "Appellate review of a motion to suppress presents a mixed question of law and fact. We review factual determinations for substantial evidence and legal determinations de novo." *State v. Ketelson*, 2011-NMSC-023, ¶ 9, 150 N.M. 137, 257 P.3d 957.

The State properly preserved the issue of a search incident to an arrest

{11} Initially, we uphold the Court of Appeals' decision that the State properly preserved its theory of a search incident to an arrest. While the State initially argued only that the search of Defendant was the result of an inevitable discovery, the State clarified during the suppression hearing that it was also relying on an alternative theory of search incident to arrest. We agree with the Court of Appeals that the State sufficiently asserted the issue and adduced the evidence necessary to support the legal principle. Defendant, moreover, had an opportunity to respond below. Thus, we are satisfied that the issue was preserved for review on appeal. *See Paananen*, 2014-NMCA-041, ¶ 15.

Reasonableness of a warrantless arrest under the Fourth Amendment

{12} To determine the constitutionality of Defendant's arrest, under our interstitial approach to constitutional analysis, before looking to our New Mexico Constitution we first decide whether the arrest was lawful under the U.S. Constitution. *State v. Gomez*, 1997-NMSC-006, ¶ 19, 122 N.M. 777, 932 P.2d 1. Only if the federal constitution would not provide protection from the law enforcement activity under consideration, do we then turn to the civil liberties protected under Article II, Section 10 of the New Mexico Constitution. *Gomez*, 1997-NMSC-006, ¶ 19.

{13} The Fourth Amendment guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable searches and seizures*, shall not be violated . . . ." U.S. Const. amend. IV (emphasis added). "To determine the constitutionality of a seizure we must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (internal quotation marks, citation, and brackets omitted).

{14} Almost 40 years ago, in *United States v. Watson*, 423 U.S. 411 (1976), the U.S. Supreme Court squarely applied these principles to determine the constitutionality of a warrantless arrest supported by probable cause and explicit statutory authority, similar

to the statutory authority to arrest in cases of shoplifting in New Mexico. *See* Section 30-16-23 ("Any law enforcement officer may arrest *without warrant* any person [the officer] has probable cause for believing has committed the crime of shoplifting. . . ." (emphasis added)). In *Watson*, a statute authorized postal service officers to "make arrests without warrant for felonies cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such a felony." *Id.* at 415. Watson was suspected of possessing stolen credit cards. *Id.* at 412. An informant notified the postal inspector, and the inspector subsequently set up a sting operation to catch Watson in possession of the stolen credit cards. *Id.* at 412-13. The informant notified the postal inspector six days before the sting operation. *Id.* at 426 (Powell, J., concurring). Once Watson arrived at the intended meeting, officers arrested him. *Id.* at 413. After receiving permission to search Watson's vehicle, officers discovered two stolen credit cards. *Id.*

{15} The main issue on appeal was whether the warrantless arrest violated the Fourth Amendment. *Watson*, 423 U.S. at 412-14. The U.S. Court of Appeals for the Ninth Circuit held that the arrest was not constitutional, despite the presence of probable cause, because no exigent circumstances justified the absence of an arrest warrant. *Id.* at 414. Notably, the postal inspector had probable cause for Watson's arrest six days before the sting operation. *Id.* at 413-14. "The Government made no effort to show that circumstances precluded the obtaining of a warrant, relying instead for the validity of the arrest solely upon the showing of probable cause to believe that respondent had committed a felony." *Id.* at 426 (Powell, J., concurring). Thus, according to the Ninth Circuit the postal inspector should have obtained an arrest warrant as he "concededly had time to do so." *Id.* at 414.

{16} The U.S. Supreme Court disagreed, determining that probable cause alone was a sufficient basis for a warrantless felony arrest. In reaching that determination, the Court considered the import of the statute that authorized the arrests and noted that "there is a strong presumption of constitutionality due to an Act of Congress, especially when it turns on what is reasonable." *Id.* at 416 (internal quotation marks and citation omitted). Additionally, the Court surveyed several prior cases in which it had upheld the validity of warrantless arrests based solely on a determination that such arrests were supported by probable cause. *See, e.g., id.* at 417 (concluding in its discussion of *Henry v. United States*, 361 U.S. 98 (1959), that "[t]he necessary inquiry, therefore, was not whether there was a warrant or whether there was time to get one, but whether there was probable cause for the arrest."). The Court concluded that the statute and case law supported the constitutionality of a warrantless felony arrest as long as it was supported by probable cause. *Watson*, 423 U.S. at 416-24.

{17} In addition to statutory authority for a warrantless arrest, the U.S. Supreme Court looked to the common law standard "that a peace officer [is] permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable ground [probable cause] for making the arrest." *Id.* at 418. *See also* 3 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 5.1(b), at 15 (5th ed. 2012) (citing *Draper v. United States*, 358 U.S. 307 (1959), for the proposition that the "'reasonable grounds' test . . . and the 'probable cause' requirement of the Fourth Amendment 'are substantial equivalents.'"). Moreover, " '[t]he rule of the common law, that a peace officer or a private

citizen may arrest a felon without a warrant, has been generally held by the courts of the several [s]tates to be in force in cases of felony punishable by the civil tribunals.' " *Id.* at 419, quoting *Kurtz v. Moffitt*, 115 U.S. 487 (1885). Continuing, the Court observed that although it would be "wise" for law enforcement officers to obtain an arrest warrant when it is "practicable to do so," *Watson*, 423 U.S. at 423, the Court declined to read that prudential consideration into the Fourth Amendment.

> [W]e decline to transform this judicial preference into a constitutional rule when the judgment of the Nation and Congress has for so long been to authorize warrantless public arrests on probable cause rather than to encumber criminal prosecutions with endless litigation with respect to the existence of exigent circumstances, whether it was practicable to get a warrant, whether the suspect was about to flee, and the like.

Watson, 423 U.S. at 423-24.

{18} *Watson* remains good law today. Accordingly, there is no doubt that the warrantless arrest of Defendant did not violate his rights under the United States Constitution. That, in turn, would make the subsequent search incident to that arrest lawful as well, at least under the Fourth Amendment. *See Chimel v. California*, 395 U.S. 752, 762-63 (1969) (recognizing that "[w]hen an arrest is made, it is reasonable for the arresting officer to search the person arrested"). Under our interstitial analysis we now proceed to examine this case under Article II, Section 10 of the New Mexico Constitution, and *Campos* in particular, to determine whether our New Mexico Constitution would require a warrant where the federal constitution does not. *See Gomez*, 1997-NMSC-006, ¶ 19.

Reasonableness of a warrantless arrest under Article II, Section 10 of the New Mexico Constitution

{19} In *Campos*, this Court held "that for a warrantless arrest to be reasonable the arresting officer must show that the officer had probable cause to believe that the person arrested had committed or was about to commit a felony and some exigency existed that precluded the officer from securing a warrant." *Campos*, 1995-NMSC-012, ¶ 14. Tellingly, our opinion in *Campos* was directed squarely at *Watson* and expressly disavowed the *Watson* holding that a warrant was not required, even when officers had sufficient time and opportunity to obtain one.

{20} Similar to *Watson*, a state statute in *Campos* authorized officers to make a warrantless arrest of any individual based solely on probable cause that a suspect was violating the Controlled Substances Act. *Campos*, 1994-NMSC-012, ¶ 4. The officer received information from a confidential informant that Campos would be conducting a drug transaction the next morning. *Id.* ¶ 2. "The informant told Officer Lara that Campos would be driving either a silver and black pickup truck or a small blue car down one of two routes to a location on East Deming Street in Roswell at about 8:00 a.m." *Id.* This information was corroborated by evidence that "Officer Lara had been investigating Campos for approximately one year, knew that Campos used vehicles like those described by the informant, and believed that Campos engaged in illegal drug activity." *Id.* The informant had proven to be reliable and accurate on previous occasions.

{21} In response, the officers set up a surveillance team. *Id.* ¶ 2. Officer Lara explained that he did not first secure an arrest warrant from a magistrate because he wanted to corroborate the information from the informant. The information provided to the

officers proved to be accurate. When the defendant arrived at the transaction scene, he was arrested without a warrant. *Id.* ¶ 3. After a search of the defendant and his car, officers discovered heroin. *Id.*

{22} On certiorari review, this Court acknowledged the *Watson* rule that "a warrantless public arrest of a felon based on *probable cause* will be upheld regardless of whether the officer could have secured an arrest warrant." *Campos*, 1994-NMSC-012, ¶ 9 (emphasis added). This Court then recognized that since New Mexico strongly favors warrants, Article II, Section 10 of the New Mexico Constitution provides greater protection than the Fourth Amendment. *Campos*, 1994-NMSC-012, ¶ 10. Accordingly, this Court "[did] not assume that warrantless public arrests of felons are constitutionally reasonable." *Id.*

{23} In its analysis of the constitutionality of the warrantless arrest, the *Campos* Court pointed out, the crucial "inquiry in reviewing warrantless arrests [is] whether it was reasonable for the officer not to procure an arrest warrant." *Id.* ¶ 15. The Court appears to have been strongly influenced by the factor of time. Given the early presence of probable cause and adequate opportunity to obtain a warrant prior to the arrest, the officers had no good reason not to get the warrant. Thus, because "Officer Lara had probable cause to obtain a warrant on December 7 for the arrest of Campos on December 8," there were no "sufficient exigent circumstances to make the warrantless arrest of Campos reasonable." *Id.* ¶¶ 16-17.

{24} In contrast, in the case at bar, time was not on the officers' side. After they arrived at the arrest scene, the officers clearly developed probable cause to arrest Defendant based on their review of the video tape and the evidence of shoplifting displayed on the table before them. Unlike either *Campos* or *Watson*, however, the officers did not have this information or time to act on it prior to arriving on scene, and thus could not have gotten an arrest warrant before responding to the call.

{25} Given that it was not reasonably practical for the officers to obtain an arrest warrant before responding to the scene, they faced three alternatives after arriving on scene and gathering information amounting to probable cause. First, the officers could arrest Defendant on scene, as they did. Second, the officers could have continued to detain Defendant at the store while going to court to obtain the warrant, an effort likely to have taken significant time, during which Defendant would have remained under a de facto warrantless arrest at the store. *See, e.g.*, *State v. Werner*, 1994-NMSC-025, ¶ 16, 117 N.M. 315, 871 P.2d 971 (holding, after consideration of the "combination of the length of time of detention, the place of detention, and the restriction on Werner's freedom of movement," that a forty-five minute detention in a police car amounted to a de facto arrest). Finally, the officers could have released Defendant while they went to secure the warrant in the hope they could relocate and arrest him later, an expenditure of resources seemingly disproportionate to the crime of shoplifting and a risk our Legislature has declared unacceptable. *See* § 30-16-23 (authorizing warrantless arrests of shoplifting with probable cause). In our view, the officers chose the only reasonable approach, and the facts of this case provide a prime example of an "exigency . . . that precluded the officer[s] from securing a warrant." *See Campos*, 1994-NMSC-012, ¶ 14.

{26} The phrase "exigent circumstances" has been described in our jurisprudence as including "an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or

destruction of evidence." *Campos*, 1994-NMSC-012, ¶ 11 (quoting *State v. Copeland*, 1986-NMCA-083, ¶ 14, 105 N.M. 27, 727 P.2d 1342). The Court of Appeals appears to have relied upon this language in finding a lack of exigency when it reviewed this case below. *See Paananen*, 2014-NMCA-041, ¶¶ 32-36. The quoted language, however, is not an exclusive list. As *Campos* provides—and we now hold—there are other situations in which an exigency not necessarily amounting to an imminent threat of danger, escape, or lost evidence will be sufficient to render reasonable a warrantless public arrest supported by probable cause under the totality of the circumstances. *See Campos*, 1994-NMSC-012, ¶ 14 (declaring that "exigency will be presumed" where an officer observes the commission of a felony, without reference to imminent danger, escape, or destruction of evidence). An on-the-scene arrest supported by probable cause will usually supply the requisite exigency.

{27} We reiterate our holding in *Campos* that the overarching "inquiry in reviewing warrantless arrests [is] whether it was reasonable for the officer not to procure an arrest warrant," and that a warrantless arrest supported by probable cause is reasonable if "some exigency existed that precluded the officer from securing a warrant." *Id.* ¶ 14-15. Accordingly, when the police have ample time to obtain a warrant before making an arrest, as was the case in *Campos*, our New Mexico Constitution compels them to do so. *See id.* ¶ 15 ("We will not hesitate . . . to find a warrantless arrest unreasonable if no exigencies existed to excuse the officer's failure to obtain a warrant."). However, where as here sufficient exigent circumstances make it not reasonably practicable to get a warrant, one is not required.

{28} That this was a misdemeanor arrest does not materially alter the analysis. We have previously held that exigent circumstances can justify a warrantless arrest for misdemeanor driving while intoxicated. *See City of Santa Fe v. Martinez*, 2010-NMSC-033, ¶¶ 14, 17, 148 N.M. 708, 242 P.3d 275 (evanescent nature of alcohol in the body presents sufficient exigent circumstances to justify warrantless arrest). More recently, we upheld a warrantless arrest for misdemeanor domestic battery as long as the officer apprehended the suspect reasonably close to the scene of the crime. *See State v. Almanzar*, 2014-NMSC-001, ¶ 2, 316 P.3d 183; NMSA 1978, § 31-1-7(A) (1979, amended 1995) ("[A] peace officer may arrest a person and take that person into custody without a warrant when the officer is at the scene of a domestic disturbance and has probable cause."). The same principle of probable cause plus exigent circumstances justifies an arrest for misdemeanor shoplifting made at the scene of the crime.

The search was reasonable because it was incident to a valid arrest

{29} In New Mexico, a warrantless search is presumed unreasonable unless the search fits within a judicially recognized exception to the warrant requirement. *State v. Rowell*, 2008-NMSC-041, ¶ 10, 144 N.M. 371, 188 P.3d 95. "One of the most firmly established exceptions to the warrant requirement is the right on the part of the government, always recognized under English and American law, to search the person of the accused when legally arrested." *Id.* ¶ 13 (internal quotation marks and citations omitted). "Given the exigencies always inherent in taking an arrestee into custody, a search incident to arrest is a reasonable preventative measure to eliminate any possibility of the arrestee's accessing weapons or evidence, without any requirement of a showing that an actual threat exists in a particular case." *Id.* ¶ 25, n.1.

{30} Officer Knight testified at the suppression hearing that it is standard procedure to search a suspect incident to an

arrest to "make sure they don't take contraband to jail . . . ." Officer Knight explained that searches are performed thoroughly because "[i]t's been my experience that they can have little razor blades and such in their property. We're pretty thorough to make sure there's no weapons first off." Finally, counsel for the State asked Officer Knight if opening up small containers was part of the procedure to protect against small razor blades, to which Officer Knight answered, "[a]bsolutely."

{31} Once Officer Knight placed Defendant in handcuffs, Defendant was deemed under arrest. Pursuant to protocol, Officer Knight opened the cigarette package that was sitting on the table and discovered heroin. This search, while performed without a warrant, was conducted incident to a valid arrest. Hence, the search fits within a judicially recognized exception to the warrant requirement and was reasonable.

CONCLUSION

{32} Defendant's arrest, though without a warrant, was reasonable under the New Mexico Constitution. The subsequent warrantless search of Defendant fits a judicially recognized exception to the warrant requirement and was therefore also constitutionally reasonable. Accordingly, we reverse the Court of Appeals and remand for further proceedings.

{33} **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-032

Filing Date: September 28, 2015

Docket No. S-1-SC-34768

NEW MEXICO ATTORNEY GENERAL,

Appellant,

v.

NEW MEXICO PUBLIC REGULATION COMMISSION,

Appellee,

and

SOUTHWESTERN PUBLIC SERVICE COMPANY, OCCIDENTAL PERMIAN LTD., and COALITION FOR CLEAN AFFORDABLE ENERGY,

Intervenors-Appellees.

Hector H. Balderas, Attorney General
P. Cholla Khoury, Assistant Attorney General
Santa Fe, NM

for Appellant

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

for Appellee

Hinkle Shanor, LLP
Jeffrey L. Fornaciari
Dana S. Hardy
Santa Fe, NM

Xcel Energy Services, Inc.
Stephen Fogel
Austin, TX

for Intervenor Southwestern Public Service Company

Gallagher & Kennedy, P.A.
Anthony J. Trujillo
Germaine R. Chappelle
Santa Fe, NM

Thompson & Knight, LLP
Phillip G. Oldham
Austin, TX

for Intervenor Occidental Permian, Ltd.

Charles F. Noble
Santa Fe, NM

for Intervenor Coalition for Clean Affordable Energy

Cuddy & McCarthy, LLP
Rebecca Dempsey
Santa Fe, NM

PNM Resources, Inc.
Benjamin Phillips
Albuquerque, NM

for Amicus Curiae Public Service Company of New Mexico

OPINION

CHÁVEZ, Justice.

{1} The Public Regulation Commission (PRC) granted Southwestern Public Service Company's (SPS) application to (1) include a prepaid pension asset in its rate base in order for SPS to earn a return on this asset, and (2) obtain a renewable energy cost rider to recover approximately $22 million of renewable energy procurement costs from those customers who do not have a legislatively imposed limit on their renewable energy costs (non-capped customers). The Attorney General appeals the PRC's final order granting SPS's application, arguing that the approved rates are unjust and unreasonable because the inclusion of the entire prepaid asset in the rate base is not supported by substantial evidence, and the PRC acted contrary to law in allowing SPS to recover the aforementioned renewable energy costs from non-capped customers. We affirm the PRC because (1) SPS is entitled to earn a reasonable rate of return on the investor-funded prepaid pension asset, and (2) SPS may recover its renewable energy costs in excess of the large customer cap from non-capped customers because such a recovery mechanism is the only viable method of cost recovery that is consistent with the purposes of the Renewable Energy Act, NMSA 1978, §§ 62-16-1 to -10 (2004, as amended through 2011).

I. THE INCLUSION OF SPS'S PREPAID PENSION ASSET IN THE RATE BASE

{2} SPS applied to the PRC to include a prepaid pension asset in its rate base to allow its shareholders, who funded the asset, to receive a corresponding return on their investment. By including this prepaid pension asset in the rate base, the asset is treated as a capital investment, allowing SPS to recover

the asset as an expense, thereby increasing SPS's revenue requirement. *See* Joseph P. Tomain, Symposium Article, *"Steel in the Ground": Greening the Grid with the iUtility*, 39 Envtl. L. 931, 945-46 (2009) (providing and discussing the rate making formula, which sets the amount of money utilities may receive for their investments and expenses). Importantly, inclusion of an investment asset in the rate base does not enable investors to recover the value of their investment, but instead only allows investors to earn a return on the asset. *See id.* (noting that utilities generally recover the value of an investment by treating the depreciation of the asset as an operating expense).

{3} The parties agree that a prepaid pension asset is the amount by which investor contributions to a pension trust and earnings on these contributions exceed pension expenses. *S. Co. Servs., Inc.*, 122 FERC ¶ 61,218, at *62235, 2008 WL 630079, slip copy at 5 (FERC 2008) (order on tariff filing), *order clarified by* 128 FERC ¶ 61,276, 2009 WL 3043950 (slip copy) (FERC 2009); *In re Delmarva Power & Light Co.*, 2014 WL 3964914, slip copy at 18, 315 P.U.R. 4th 10 (Del. P.S.C. 2014) ("A prepaid pension asset occurs when the accumulated contributions and growth in the pension plan exceed the accumulated expenses associated with the pension obligations."). For example, SPS's expert stated that if the annual pension contribution over a five-year period is $100 and the annual pension expense over the same period is only $90, at the end of the five-year period, the prepaid pension asset would be $50 ($100 x 5 - $90 x 5), plus any return on the $50 prepaid pension asset. "Conversely, when [accrued expenses] exceed[] contributions to [a] fund, a prepaid pension liability accrues." *See In re Sw. Pub. Serv. Co.*, 2008 WL 4226018 n.256, slip copy at 114 (NMPRC) (final order partially adopting recommended decision), *order clarifying final order sub nom.* 2008 WL 9888273 (slip copy) (NMPRC 2008). The SPS expert also stated that the prepaid pension asset is an artifact of timing; over a long period, pension contributions and pension expenses may even out, but over short and intermediate periods there will surely be differences, which are recorded as either prepaid pension assets or pension liabilities.

{4} SPS's expert testified that pension contributions and expenses differ because the federal Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (2011), and the Internal Revenue Code, 26 U.S.C. §§ 1-59 (2012), dictate how much the utility must contribute to its employee pension program, whereas the Financial Accounting Standards Board promulgates codified accounting standards[1] that govern how pension expenses are determined. The expert continued by testifying that as a result of these differing federal and industry standards, pension contribution and expense calculations utilize different assumptions, attribution methods, and periods of time over which the costs are required to be recognized. SPS's expert stated that these dissimilarities often result in differing annual contribution and expense amounts. When mandated contributions and income earned on the contributions exceed expenses, a prepaid pension asset accrues. *See S. Co. Servs., Inc.*, 122 FERC ¶ 61,218, at *62235, 2008 WL 630079, slip copy at 5; *see also In re Delmarva Power & Light Co.*, 2014 WL 3964914, slip copy at 18.

{5} The expert witness also testified that utilities cannot legally withdraw any funds from pension trusts except to pay pension benefits and expenses. *See S. Co. Servs., Inc.*, 122 FERC ¶ 61,218, at *62235, 2008 WL 630079, slip copy at 5. However, SPS

[1]Companies must follow Financial Accounting Standards Board codified accounting standards to comply with generally accepted accounting principles.

customers benefit from a prepaid pension asset because the earnings on this asset are deemed to be income for SPS, which reduces the amount of revenue it must collect from its customers. *See Ind. Office of Util. Consumer Counselor v. Ind. Mich. Power Co.*, 7 N.E.3d 1025, 2014 WL 934350, at *12 (Ind. Ct. App. 2014) (memorandum decision) (non-precedential). The following hypothetical offered by SPS's testifying expert illustrates the indirect benefit SPS customers receive.

> [S]uppose that in a given year the utility had a revenue requirement of $300, and that it expected to earn a 6% return on the pension fund. The $3.00 return on [a hypothetical] $50 prepaid pension asset (0.06 x $50) . . . would be credited against the revenue requirement, so that the utility could only collect $297 from its customers through [the] rates. Thus, the revenue requirement is reduced by $3.00 as a result of the prepaid pension asset.

SPS customers therefore would benefit from rate reductions generated by the prepaid pension asset, but SPS would not earn a return on the prepaid pension asset if the asset is not included in SPS's rate base.

{6} In this case, the New Mexico jurisdictional share[2] of SPS's prepaid pension asset is approximately $36.9 million. According to SPS, this asset resulted in $1.7 million in earnings that effectively reduced SPS's pension expense by $1.7 million, which reduced SPS's revenue requirement by the same amount. SPS sought "to include the net amount of its prepaid pension asset of approximately $22 million" in the rate base to earn a return on its $22 million (the $36.9 million asset minus a $14.9 million tax deferred asset).

{7} In a recommended decision, the PRC hearing examiner concluded that because the prepaid pension asset reduced the pension expense by $1.7 million, that $1.7 million should be included in the rate base for recovery. The PRC hearing examiner did not recommend that the $22 million net prepaid pension asset amount be included in the rate base. SPS disagreed with this recommendation, contending that the examiner's proposal would enable "SPS [to] earn a return only on the amount of the reduction in the cost of service rather than on the amount of the asset that resulted in the reduction."

{8} The PRC also disagreed with the hearing examiner. In its final order, the PRC authorized the inclusion of the net amount of the prepaid asset in SPS's rate base because doing so "recognizes that ratepayers benefit from the prepaid pension asset and that the utility should earn a return on the prepaid pension asset in order for the utility to recover its full cost of service." The Attorney General appeals, arguing that substantial evidence does not support the inclusion of the entire prepaid pension asset within the rate base.

A. Standard of Review

{9} In determining whether a PRC final order is supported by substantial evidence, we review the whole record, "view[ing] the evidence in the light most favorable to the decision made by the [PRC]." *PNM Gas Servs. v. N.M. Pub. Util. Comm'n* (*In re PNM Gas Servs.*), 2000-NMSC-012, ¶ 4, 129 N.M. 1, 1 P.3d 383 (internal quotation marks and citation omitted). " 'Substantial evidence' [is] such relevant evidence as a reasonable mind might accept as adequate to support a

[2]SPS operates in other states besides New Mexico. For the relevant time period, SPS's total prepaid pension asset, on a total company basis, was approximately $179.7 million. The amount of this asset attributable to New Mexico is approximately $36.9 million.

conclusion." *Rinker v. State Corp. Comm'n*, 1973-NMSC-021, ¶ 5, 84 N.M. 626, 506 P.2d 783. "The supreme court shall have no power to modify the action or order appealed from [(in this case, a PRC final order)], but shall either affirm or annul and vacate the same." NMSA 1978, § 62-11-5 (1982). "The [PRC] is vested with considerable discretion in determining whether a rate to be received and charged is just and reasonable." *Hobbs Gas Co. v. N.M. Pub. Serv. Comm'n*, 1980-NMSC-005, ¶ 4, 94 N.M. 731, 616 P.2d 1116. A party challenging a PRC final order has the burden of establishing that the order is "arbitrary and capricious, not supported by substantial evidence, outside the scope of the agency's authority, or otherwise inconsistent with law." *N.M. Indus. Energy Consumers v. N.M. Pub. Regulation Comm'n*, 2007-NMSC-053, ¶ 13, 142 N.M. 533, 168 P.3d 105 (internal quotation marks and citation omitted).

B. The Prepaid Pension Asset

{10} The Attorney General contends that only the earnings generated by the prepaid pension asset should be included in the rate base because this is the amount by which the ratepayers have benefitted, or the amount by which the utility's revenue requirement is reduced. The Attorney General argues that only $1.7 million should be included in the rate base, whereas the PRC's final order enables SPS to include $22 million in the rate base, which is the net amount of its prepaid pension asset. In resolving this issue, we explain the rationale for electric utility regulation.

{11} Electric utilities are regulated because their industry has natural monopoly characteristics. Joseph P. Tomain, *The Persistence of Natural Monopoly*, 16 Nat. Resources & Env't. 242, 242 (2002). In natural monopoly settings, both the benefits and the possibility of competition are limited. *Omega Satellite Prods. Co. v. City of Indianapolis*, 694 F.2d 119, 126 (7th Cir. 1982). If the electric industry was a competitive free-for-all, different companies would attempt to build separate electric grids and sign up customers as quickly as possible to reduce their average costs of business more rapidly than their rivals. *See id.* This competitive process would last until a single company was left standing "because until a company serves the whole market it will have an incentive to keep expanding in order to lower its average costs." *Id.* Thus, until a single company wins, competition within the electric industry would produce wasteful duplicate grids that would needlessly raise average costs for consumers. *See id.*; Tomain, *The Persistence of Natural Monopoly*, *supra*, at 242 ("A specific service area needs only one set of electric . . . wires—the investment in any other set of wires is wasteful."). To avoid wasteful duplication, a government may choose to give one firm a monopoly within a service area "in exchange [for] a commitment to provide reasonable service at reasonable rates." *Omega Satellite Prods. Co.*, 694 F.2d at 126.

{12} Electric utility regulation consequently reflects a compact between utilities and the public. *See Jersey Cent. Power & Light Co. v. Federal Energy Regulatory Comm'n (FERC)*, 810 F.2d 1168, 1189 (D.C. Cir. 1987) (Starr, J., concurring). A utility is given a monopoly over a service area, and in exchange accepts government regulation of its business, including price regulation. *Id.* Under this arrangement, utility investors obtain a stability in earnings that would likely be unattainable in less regulated industries, while "ratepayers are afforded universal, non-discriminatory service and protection from monopolistic profits." *Id.*

{13} Regulators attempt to set prices that mimic market conditions and ensure that utilities are "profitable enough to attract

capital investment." Tomain, *"Steel in the Ground," supra*, at 945. The following rate making formula traditionally determines utility revenues to be received from ratepayers: $R = O + (V - d)r$, where

> *R* represents the utility's revenue requirement—that is, the amount of money the utility needs to stay in business. *O* represents the utility's prudently incurred expenses. In short, ratepayers reimburse the utility for its expenditures dollar for dollar. The utility's rate base is represented by *(V - d)*, which stands for the *value* of a utility's capital investment minus *depreciation*, which is returned to the utility as expenses. Finally, *r* represents the rate of return on the rate base.

Id. at 945-46.

{14} The utility's rate base—the total amount of investment made by a utility to provide its service—is determined by adding the utility's investment in physical properties to its working capital. *Cent. La. Elec. Co. v. La. Pub. Serv. Comm'n*, 373 So. 2d 123, 129 (La. 1979). Thus, a utility can include physical properties such as a power plant, *see, e.g., Hobbs Gas Co.*, 1980-NMSC-005, ¶ 6, and working capital—operating funds essential to pay for current obligations—in its rate base. *Gov't of Guam v. Fed. Mar. Comm'n*, 329 F.2d 251, 256 (D.C. Cir. 1964); *Ariz. Pub. Serv. Co.*, 5 FERC ¶ 63,038, at *65179, 1978 WL 16416, slip copy at 2 (FERC 1978) (defining working capital as "the money which a utility puts up to finance the services provided until it is compensated by customers").

{15} In the context of utility regulation, working capital

> does not include the total liquid funds with which the business is conducted. It is not the property which the business has; that is, it is not the excess of current assets over current liabilities. Working capital, rather, is an allowance for the sum which the company needs to supply from its own funds for the purpose of enabling it to meet its current obligations as they arise and to operate economically and efficiently.

Gov't of Guam, 329 F.2d at 256 (internal quotation marks and citation omitted). As a result, only utility contributions, not ratepayer contributions, can be properly included in the rate base as working capital. For example, if a utility were to prepay for natural gas with investor funds, the utility should expect to receive a reasonable return on its investment. *Zia Nat. Gas Co. v. N.M. Pub. Util. Comm'n* (*In re Zia Nat. Gas Co.*), 2000-NMSC-011, ¶ 22, 128 N.M. 728, 998 P.2d 564. Conversely, if ratepayers have paid in advance for the natural gas, the utility would have no expectation of a return because its capital was not used to buy the natural gas. *Id.*

{16} A utility can include prepayments for pension expenses in its rate base "because the utility is out-of-pocket for such costs until they are recovered from ratepayers and is therefore entitled to recover its cost of financing such prepaid expenses." *S. Co. Servs., Inc.*, 122 FERC ¶ 61,218, at *62235, 2008 WL 630079, slip copy at 5. For example, in the context of prepaid pension assets, income earned on the pension fund is reported under generally accepted accounting principles as a reduction to the utility's pension expense. *Id.* "If that reduction in pension expense is used in determining a utility's rates, there will be a corresponding reduction in the amounts collected from ratepayers." *Id.* Under these circumstances, the utility must finance the reduction because it cannot use the income from the pension trust to pay other current

obligations; as a result, the utility is allowed to recover the costs of financing the reduction by including the pension income in the rate base. *See id.* The Attorney General's position is that the utility can only recover the costs of financing the reduction of the utility's revenue requirement, i.e., the utility can only earn a return from the pension income generated by the prepaid pension asset.

{17} However, a utility may not only be out-of-pocket for reductions in its revenue requirement resulting from pension fund earnings. A utility may also be out-of-pocket for investor-funded contributions that are in excess of pension expenses. Basically, when a utility supplies working capital to fund contributions in excess of pension expenses to create an income-producing prepaid pension asset, the utility finances the cost of the entire prepaid pension asset. *See, e.g., In re Rocky Mountain Power*, 2014 WL 7526282, at *14 ¶¶ 52, 53, *36 (Wyo. P.S.C. 2014) (noting that a "prepaid pension asset represents [a utility's] contributions to its pension . . . plans in excess of what is expensed to that time" and the utility "finances the asset with a combination of debt and equity financing").

{18} Other jurisdictions have allowed utilities to recover the financing costs of the net prepaid pension asset by including the asset in the rate base as a component of working capital. *See, e.g., Ind. Office of Util. Consumer Counselor*, 7 N.E.3d 1025, 2014 WL 934350, at *12 (upholding a regulatory determination that a prepaid pension asset be included in the rate base because the "asset amounted to working capital that benefited the ratepayers by reducing the total pension costs needed in [the utility's] revenue requirement"); *In re Rocky Mountain Power*, 2014 WL 7526282, at *14, *36 (finding persuasive a utility's argument that it should recover the financing costs of its prepaid pension asset by including the asset in the rate base to enable the utility to earn a return on that asset). *But see In re Pub. Util. Comm'n of Or.*, 2015 WL 4710466, at *7 (Or. P.U.C. 2015) (affirming a "long-standing policy of allowing a utility to recover its pension contributions [only as an] expense and reject[ing] the . . . Utilities' proposal to include their current prepaid pension assets in rate base").

{19} On appeal, the Attorney General does not argue as a matter of law that the prepaid pension asset cannot be included in the rate base. The Attorney General's only evidentiary challenge is that inclusion of the net prepaid pension asset will result in ratepayers paying more to SPS than the benefit ratepayers have enjoyed from the pension fund earnings. We interpret the Attorney General's argument to be that SPS did not prove how much of the net prepaid pension asset resulted in consumers paying $1.7 million less to SPS. We disagree. We hold that some or all of a prepaid pension asset should be included in the rate base to the extent that the evidence evinces that the asset was investor-funded, as opposed to ratepayer-funded.[3] *See In re Potomac Elec. Power Co.*, 2008 WL 516553, slip copy at 29, 263 P.U.R.

[3]Because utilities may only include in the rate base investor-funded, prepaid pension assets, we emphasize that "shareholder contributions do not solely drive prepaid pension asset balances." *In re Pub. Util. Comm'n of Or.*, 2015 WL 4710466, at *8 (Or. P.U.C. 2015) . For example, during "periods of high economic growth, a prepaid pension asset balance will increase even with no shareholder contributions," *id.*, presumably because, among other reasons, existing funds within a pension trust can earn unexpectedly high returns. *See, e.g., In re Cent. Tel. Co. of Tex.*, 19 Tex. P.U.C. Bull. 929, 1993 WL 595464, slip copy at 13 (Tex. P.U.C. 1993) (noting that because a utility failed to "accurately predict that its pension fund would experience favorable investment results and that there would be reductions in benefit levels, the [utility's] pension fund was subsequently overfunded" through rates collected earlier from ratepayers). In short, simply placing a prepaid pension asset in the rate base allows utilities to earn returns on amounts that are not shareholder contributions. *See In re Pub. Util. Comm'n of Or.*, 2015 WL 4710466, at *8.

4th 1 (D.C. P.S.C.) (finding that "investor-supplied cash contributions have resulted in an asset from which [utility] customers receive a tangible benefit in the form of reduced pension expenses" and including the prepaid pension asset in the rate base), *adhered to on denial of reconsideration sub nom.* 2008 WL 4831456 (slip copy) (D.C. P.S.C. 2008); *In re N. Ill. Gas Co.*, 2005 WL 2445944, slip copy at 23 (Ill. C.C. 2005) (noting that a prepaid pension asset "was created by ratepayer-supplied funds, not by shareholder-supplied funds," and finding that the "prepaid pension asset should be eliminated from rate base"); *In re Zia Nat. Gas Co.*, 2000-NMSC-011, ¶ 22 (noting that only investor-supplied working capital may be included in the rate base); *In re Cent. Tel. Co. of Tex.*, 19 Tex. P.U.C. Bull. 929, 1993 WL 595464, slip copy at 13 (Tex. P.U.C. 1993) (concluding that conversely, when ratepayer-supplied money overfunds a pension plan, investors are not entitled to "earn a return on the prepaid pension asset because [this] . . . would have the effect of charging ratepayers again for amounts they have already paid"). Similarly, while a prepaid pension asset may be included in the rate base, prepaid pension liability must be subtracted from the rate base. *See, e.g.*, *In re Ky.-Am. Water Co.*, 1997 WL 34863470, slip copy at 10 (Ky. P.S.C. 1997) (noting that although pension liabilities can be utilized to reduce the rate base, if "a pension asset is created, then the asset should be included as a rate base addition"), *opinion modified on denial of reh'g sub nom. In re Adjustment of the Rates of Ky.-Am. Water Co.*, 1997 WL 34863471 (slip copy) (Ky. P.S.C. 1997).

{20} The evidence indicates that SPS has a net prepaid pension asset of approximately $22 million. The evidence also indicates that including $22 million of the net prepaid pension asset in the rate base would generate approximately $2.5 million in revenue for SPS, which exceeds the $1.7 million by which SPS asserts the pension expense was reduced. SPS maintains that its actual annual pension expense is $5.36 million, but the $1.7 million return on the prepaid pension asset reduced the pension expense to $3.66 million.

{21} Although the Attorney General is correct to make an evidentiary contention, the premise of its argument is incorrect. Utilities are able to recover the costs of financing their business operations through the inclusion of investor-supplied working capital in the rate base. *See In re Zia Nat. Gas Co.*, 2000-NMSC-011, ¶ 22. In his written testimony, Gene H. Wickes stated that "[t]he portion of the prepaid pension asset due to these contributions has therefore come exclusively from shareholder capital and should be included in rate base." It is uncontested that SPS investors made contributions to the pension fund that are required by law. These contributions exceeded expenses and generated earnings that effectively reduced SPS's—and consequently the ratepayers'—pension expense. Had the ratepayers advanced the contributions to the pension fund, their contributions would not have been included in the rate base. *See In re N. Ill. Gas Co.*, 2005 WL 2445944, slip copy at 14. However, because the ratepayers did not make the contributions, the investors, not the ratepayers, absorbed the cost of funding the pension program, and therefore the net prepaid pension asset was properly included in the rate base. *See, e.g.*, *In re Pub. Serv. Co. of Colo.*, 1993 WL 494141, slip copy at 17, 148 P.U.R. 4th 1 (Colo. P.U.C. 1993) ("In order to compensate investors for the additional funds they supply to meet the higher contribution levels, the resulting prepaid assets are an appropriate addition to rate base."); *In re Potomac Elec. Power Co.*, 2008 WL 4831456, slip copy at 3 (concluding that inclusion of an investor-supplied prepaid pension asset in the rate base is supported by substantial evidence because "the earnings on

the prepaid pension asset will reduce the annual [utility] expense, thus benefiting customers by reducing the revenue requirement"); *Ind. Office of Util. Consumer Counselor*, 7 N.E.3d 1025, 2014 WL 934350, at *12 (upholding a regulatory determination that a prepaid pension asset amounted to working capital that should be included in the rate base).

{22} We note, however, that contributions to pension funds should be scrutinized to ensure that utility investments are "used and useful" so as to inure to the benefit of consumers. *See N.M. Indus. Energy Consumers v. N.M. Pub. Serv. Comm'n*, 1986-NMSC-059, ¶ 29, 104 N.M. 565, 725 P.2d 244 (internal quotation marks omitted) (noting that the " 'used and useful' concept is but one factor among many to be considered by the [PRC] in its rate base analysis"). Utilities should not voluntarily overfund their pension funds simply to earn a favored rate of return. *In re Appalachian Power Co.*, 2011 WL 2150661, slip op. at 27, 288 P.U.R. 4th 185 (W. Va. P.S.C. 2011) ("Prepayments should be subject to the same review as any other investment or expense of a utility. Inclusion of prepayments in rate base should not be used for a utility to find a convenient place to deposit funds and then expect to earn a return on those funds."). On the other hand, mandatory contributions to pension funds are useful. Such contributions may benefit customers by generating an income-earning prepaid pension asset to reduce pension expenses, *see, e.g.*, *In re Potomac Elec. Power Co.*, 2008 WL 516553, slip copy at 29, and also fund the pension programs that make it possible for the utility to attract and retain highly-skilled workers. *See, e.g.*, *In re Advice Letter No. 830 - Gas of Pub. Serv. Co. of Colo.*, 2013 WL 5799983, at *46-47 (Colo. P.U.C.).

{23} We conclude that the Attorney General has failed to meet its burden of showing that the PRC's inclusion of the entire prepaid pension asset was unreasonable or unlawful for lack of substantial evidence. *See In re PNM Gas Servs.*, 2000-NMSC-012, ¶ 4.

II. THE LAWFULNESS OF THE RENEWABLE PORTFOLIO STANDARDS RIDER

A. SPS's Recovery of Renewable Energy Procurement Costs from Non-Capped Customers

{24} The Attorney General also contends that the PRC acted contrary to law when it approved SPS's renewable energy cost rider because the rider sought to recover renewable energy costs from non-capped customers, customers who are not subject to a legislatively imposed limit on their renewable energy costs. We review issues of law de novo. *N.M. Attorney Gen. v. N.M. Pub. Regulation Comm'n*, 2013-NMSC-042, ¶ 10, 309 P.3d 89. However, "[w]hen an agency that is governed by a particular statute construes or applies that statute, [we] will [accord] some deference to the agency's interpretation." *Id.* ¶ 12 (internal quotation marks and citations omitted). We will reverse the agency's interpretation of a statute if it is unreasonable or unlawful. *Id.*

{25} The resolution of this issue necessitates a discussion of the Renewable Energy Act, §§ 62-16-1 to -10. As a preface to our discussion of this issue, some background on renewable energy promotion is warranted.

{26} Under the traditional rate formula, utilities receive a reasonable rate of return for capital project investments such as power plants. *See* Tomain, *"Steel in the Ground," supra*, at 946. Utilities consequently have an incentive to invest in capital projects, *see id.*, and "prefer low-risk, conventional technologies that can be built quickly instead

of long-term, innovative technologies that would be riskier." Virginia R. Hildreth, Comment, *Renewable Energy Subsidies and the GATT*, 14 Chi. J. Int'l L. 702, 707 (2014). As a result, "government assistance is often key to encourage investment in industries like renewable energy." *Id.* Such encouragement is desirable because there are numerous benefits to renewable energy such as "lessened dependence on foreign fossil fuel supplies, heightened national security, overall cleaner air, and local and rural job creation." Shelley Welton, *From the States Up: Building a National Renewable Energy Policy*, 17 N.Y.U. Envtl. L.J. 987, 995 (2008); *see also* Brent M. Haddad & Paul Jefferiss, *Forging Consensus on National Renewables Policy: The Renewables Portfolio Standard and the National Public Benefits Trust Fund*, 12 The Elec. J. 68, 69 (Mar. 1999) (listing benefits of renewable energy).

{27} Renewable portfolio standards are among the most popular methods of encouraging renewable energy development. *See* Lincoln L. Davies, *State Renewable Portfolio Standards: Is There A "Race" and Is It "To the Top"?*, 3 San Diego J. Climate & Energy L. 3, 10 (2011-2012). These standards mandate that utilities incorporate renewable energy sources into their electric generation portfolios, *id.* at 13, and frequently enable utilities to purchase renewable energy credits[4] to satisfy the mandates of renewable portfolio standards. *Id.* at 11. A renewable portfolio standard therefore combines "both a potentially inflexible regulatory directive and the malleable tool of economic trading," *id.* at 10, to "inject an element of economic efficiency into [renewable portfolio standard] schemes." *Id.* at 11.

[4]Renewable energy credits "typically represent the production of one megawatt hour ('MWh') of renewables-fueled electricity." Davies, *supra*, at 11.

{28} Under the Renewable Energy Act, New Mexico has a renewable portfolio standard that both mandates the incorporation of renewable energy sources into electric generation portfolios and allows for the purchase of renewable energy certificates (credits) to satisfy the mandates. Sections 62-16-4 to -5. Pursuant to this renewable portfolio standard, before the proceedings in this case, the evidence indicates that SPS received PRC approval to (1) purchase the outputs of two New Mexico wind farms, (2) pay incentives encouraging customers to install solar and biomass generation systems, (3) obtain renewable energy credits from various sources, and (4) purchase solar photovoltaic systems.

{29} The controversy over the permissibility of SPS's proposed rider arises from a disagreement as to how renewable energy costs are allocated between different rate classes. In utility regulation, customers are often divided into different classes that are charged different rates. II Leonard Saul Goodman, *The Process of Ratemaking* 964-65 (1998). The creation of rate classes involves the consideration of various factors such as alternate fuel capability and types of customer, which can be classified as residential, commercial, or industrial. *Id.* at 965. Differential rates can be utilized to implement various policies. Tomain, *"Steel in the Ground," supra*, at 946-47.

{30} In this case, cost allocation has been utilized to address a problem that is incidental to the promotion of renewable energy generation. The use of renewable energy tends to raise energy costs relative to the consumption of fossil fuels. *See* Hildreth, *supra*, at 716 ("The technology needed for renewable energy tends to be more expensive than traditional fuel sources."); Trevor D. Stiles, *Renewable Resources and the Dormant Commerce Clause*, 4 Envtl. & Energy L. & Pol'y J. 34, 43-44, 45 (2009) (numerically

illustrating how there is a "vast price discrepancy between renewable energy sources and fossil fuel sources for energy generation"). The prospect of "overly high renewable implementation costs" has prompted concern that commercial and large industrial customers may leave the utility system or exit states that implement prohibitively expensive renewable energy promotion plans. *California Commissioner Seeks Consideration of Shale Gas*, 4054 PUR Util. Reg. News 1, 1 (Jan. 20, 2012). These large customers may have the capacity to self-generate their energy needs or simply close their plants in areas where energy costs are high. *See* Charles G. Stalon & Reinier H.J.H. Lock, *State-Federal Relations in the Economic Regulation of Energy*, 7 Yale J. on Reg. 427, 449 (1990). When these large customers are driven from the utility system, utility rates have to be raised even further for remaining customers, which exacerbates the potential for other customer exits. *See id.* In light of the potential for large customers to exit the grid, the Legislature enacted Section 62-16-4(A)(2), which limits the annual amount large customers can be charged for renewable energy procurement. The PRC calls this limit the "large customer cap." Accordingly, costs that exceed the large customer cap may be called "large customer cap costs."

{31} In earlier proceedings, the evidence indicates that the PRC had already approved SPS's "requested procurements without any reduction to SPS's overall [renewable portfolio standards] to account for large customer cap costs." When the PRC learned that SPS's costs exceeded the large customer cap, the PRC specifically approved treatment of that amount as a deferred cost. "A 'deferred cost' is one that has been paid by the [utility] but is postponed for inclusion in rates until a future period." I Leonard Saul Goodman, *The Process of Ratemaking* 321 (1998). This may occur, for example, when a utility "has a major future liability, and before collecting anything through rates, its management decides that the books should reflect the liability." *Id.* Under these circumstances, a utility "may apply for [regulator] approval to fund an account, and to reflect on its books a deferred debit or 'regulatory asset,' . . . which later can be charged to ratepayers and amortized over a future period." *Id.* Regulatory assets are often created to spread out the recovery of nonrecurring costs over a period of years so as to avoid substantial rate increases, which may occur if full recovery was allowed as soon as the utility made an expenditure. *City of Corpus Christi v. Pub. Util. Comm'n of Tex.*, 51 S.W.3d 231, 244-45 (Tex. 2001).

{32} SPS filed an application seeking to obtain a rider to recover approximately $22 million of renewable energy procurement costs. Riders are surcharges applied to directly recover specific costs. *See Chesapeake Utils. Corp. v. Del. Pub. Serv. Comm'n*, 705 A.2d 1059, 1063 (Del. Super. Ct. 1997) (referring to a rider as a surcharge); *Citizens Util. Bd. v. Ill. Commerce Comm'n*, 651 N.E.2d 1089, 1102 (Ill. 1995) ("[A] rider mechanism . . . facilitates direct recovery of a particular cost."). These surcharges give regulators more flexibility in spreading out costs charged to ratepayers over a period of time. *See Chesapeake Utils. Corp.*, 705 A.2d at 1063 n.3.

{33} Section 62-16-4(A)(1)(a)-(d) mandates that a certain percentage of a "public utility's total retail sales to New Mexico customers" be comprised of renewable energy. The required percentage escalates over time. *See id.* However, under the large customer cap provision of Section 62-16-4(A)(2), the renewable portfolio standards mandated in Section 62-16-4(A)(1)

> shall be reduced, as necessary, to provide for the following specific procurement requirements for

> nongovernmental customers at a single location or facility, regardless of the number of meters at that location or facility, with consumption exceeding ten million kilowatt-hours per year [(capped customers)]. On and after January 1, 2006, the kilowatt-hours of renewable energy procured for these customers shall be limited so that the additional cost of the renewable portfolio standard to each customer does not exceed the lower of one percent of that customer's annual electric charges or forty-nine thousand dollars ($49,000) [(large customer cap)].

Section 62-16-4(A)(2). The large customer cap in Section 62-16-4(A)(2) also escalates over time such that capped customers can continue to be charged increasing amounts for renewable energy.

{34} The evidence indicates that SPS sought to recover the renewable energy procurement costs that exceeded the large customer cap from non-capped customers. The Attorney General opposed SPS's application, arguing that SPS could only recover its costs from large customers. The Attorney General argues that recovery of large customer cap costs from non-capped customers is contrary to both Section 62-16-4(A)(2) and 17.9.572.15 NMAC, a regulation concerning renewable energy cost recovery. The Attorney General contends that Section 62-16-4(A)(2) mandates the reduction of renewable energy procurements if such procurements would generate costs in excess of the large customer cap. Under the Attorney General's reasoning, because large customer cap costs should not have arisen as a matter of law, they cannot be allocated to non-capped customers.

{35} In a supplemental recommended decision, the hearing examiner recommended that SPS be allowed to recover large customer cap costs from non-capped customers because given the cost limits on large customers, SPS's ability to collect excess costs from large customers in the future would be speculative and uncertain. In a final order partially adopting the recommended decision (the final order), the PRC agreed with the hearing examiner. We affirm the PRC on this issue because its actions are consistent with Section 62-16-4(A)(2) and the Renewable Energy Act as a whole.

B. Discretion to Reduce Renewable Energy Procurements

{36} Section 62-16-4(A)(2) states that the New Mexico renewable portfolio standards mandate "shall be reduced, as necessary" to accommodate the large customer cap. According to the Attorney General, the word "shall" indicates that renewable energy procurement reductions are mandated whenever renewable energy procurement costs would otherwise exceed the large customer cap. One opposing interpretation of Section 62-16-4(A)(2) is that the phrase "as necessary" modifies the phrase "shall be reduced" to indicate that the PRC has discretion to reduce renewable energy procurements, even if large customer cap costs would result from such procurements. The Attorney General argues that when large customer cap costs arise, the PRC has discretion regarding the amount by which renewable energy procurement should be reduced, but not whether the renewable portfolio standards should be reduced. We hold that (1) Section 62-16-4(A)(2) does not mandate a reduction in renewable energy procurement whenever large customer cap costs arise, and (2) the PRC has discretion to reduce renewable energy procurement when large customer cap costs arise.

{37} Our analysis begins with the plain text of the statute. *Garcia v. Gutierrez*,

2009-NMSC-044, ¶ 53, 147 N.M. 105, 217 P.3d 591. In analyzing the phrase "shall be reduced, as necessary," we knowledge that "shall" is a word of mandate. *See Black's Law Dictionary* 1375 (6th ed. 1990). However, the phrase "as necessary" indicates discretion. *Norris v. Emanuel Cty.*, 561 S.E.2d 240, 244 (Ga. Ct. App. 2002). Because "as necessary" modifies the word "shall" in Section 62-16-4(A)(2) (internal quotation marks omitted), the statute's plain text indicates that when large customer cap costs arise, the PRC has discretion to determine whether renewable energy procurement reductions are necessary.

{38} The next sentence in Section 62-16-4(A)(2) provides that "the kilowatt-hours of renewable energy procured for these customers shall be limited so that the additional cost of the renewable portfolio standard to each customer does not exceed" the large customer cap. The word "shall" in this sentence is not modified by any words of discretion. The Attorney General apparently relies upon this lack of discretionary language to argue that Section 62-16-4(A)(2) mandates renewable energy procurement reductions whenever large customer cap costs arise. We disagree. This sentence merely precludes capped customers from being charged costs in excess of the statutory cap. Logically, should large customer cap costs arise, the PRC can ensure compliance with the statutory cap in two ways: the PRC can either reduce renewable energy procurement or adjust what is actually charged to capped customers. In adjusting what is actually charged to capped customers, the PRC "may authorize deferred recovery of the costs of complying with the renewable portfolio standard." Section 62-16-4(A)(2). In other words, the PRC can choose not to reduce procurements, even when large customer cap costs arise, by deferring the excess costs for later recovery, so as not to charge capped customers with statutorily prohibited costs. *See id.*

{39} A plain reading of Section 62-16-4(A)(2) indicates that the PRC has the authority not to reduce renewable energy procurements, even when large customer cap costs increase. This interpretation is strongly supported by a reading of the Renewable Energy Act in its entirety, and it should therefore be adopted. *See Arnold v. State*, 1980-NMSC-030, ¶ 10, 94 N.M. 381, 610 P.2d 1210 ("Legislative intent is to be determined primarily from the language used in the Act or statute as a whole."). Moreover, this reading acknowledges the difficulty of avoiding large customer cap costs.

{40} First, the renewable portfolio standard promulgated by the Renewable Energy Act provides a minimum standard. *See* § 62-16-4(A)(1) ("[R]enewable energy shall comprise *no less than* [a given] percent of each public utility's total retail sales to New Mexico customers." (emphasis added)). The Attorney General's reading of Section 62-16-4(A)(2) would have us treat the large customer cap as providing a maximum standard. This is problematic because mandating renewable energy procurement reductions whenever large customer cap costs arise would be inconsistent with Section 62-16-2(A)(5), which plainly states that "a public utility should have incentives to go beyond the minimum requirements of the renewable portfolio standard."

{41} Second, Section 62-16-4(A) clearly evinces a legislative intent to systematically increase renewable energy use in New Mexico. Section 62-16-4(A)(1) escalates renewable energy procurement requirements over time, while Section 62-16-4(A)(2) increases the large customer cap over time. Mandating renewable energy procurement reductions whenever large customer cap costs arise would undermine New Mexico's ability to systematically increase renewable energy usage.

{42} Third, the Attorney General's argument is erroneously premised on the idea that Section 62-16-4(A)(2) was meant to protect non-capped customers from high renewable energy costs by banning costs in excess of the large customer cap to prevent large customer cap costs from being allocated to non-capped customers. We need not adopt the Attorney General's interpretation of Section 62-16-4(A)(2) to protect non-capped customers from high renewable energy costs because another statutory provision already performs this function: Section 62-16-4(B) mandates setting an overall reasonable cost threshold for renewable energy procurement.

{43} Fourth, the Attorney General's argument appears to assume that large customer cap costs can be forecast on an accurate and consistent basis so that in approving renewable energy procurements, the PRC can systematically avoid large customer cap costs. The record proper indicates otherwise. PRC approvals of renewable energy procurement are "based on the best information available at the time the resources were being reviewed." SPS notes that how much large customer cap costs will increase depends on future occurrences such as the fluctuation of natural gas prices. Accordingly, the evidence indicates that we cannot reasonably expect that large customer cap costs can be predictably eliminated.

{44} Reading the language of the Renewable Energy Act as a whole, we conclude that the PRC has discretion to decline to reduce renewable energy procurement, even when large customer cap costs arise. This authority is congruent with the statutory policy of increasing renewable energy use in New Mexico. Moreover, we cannot reasonably expect that either the PRC or utilities will be able to avoid large customer cap costs. Thus, adopting the Attorney General's position that large customer cap costs have to be avoided as a matter of law also would be contrary to practical experience.

C. Section 62-16-4(A)(2) Does Not Preclude the Recovery of Large Customer Cap Costs from Non-Capped Customers

{45} The PRC exercised its discretion not to reduce renewable energy procurement when large customer cap costs arose, which is consistent with our interpretation of Section 62-16-4(A)(2). It then authorized the deferral of large customer cap costs for future recovery. The PRC's final order provides for the collection of large customer cap costs from non-capped customers. We therefore determine the permissibility of collecting large customer cap costs from non-capped customers.

{46} The Attorney General does not oppose SPS's ability to recover deferred large customer cap costs. It merely contends that such costs should not be recovered from non-capped customers, asserting that (1) enabling recovery of large customer cap costs from non-capped customers "violate[s] the basic ratemaking principle of cost[ ] causation," and (2) Section 62-16-4(A)(2) protects non-capped customers from paying for large customer cap costs. We reject the Attorney General's position as contrary to law and hold that large customer cap costs can be allocated to non-capped customers.

{47} The Attorney General's contention that allocating large customer cap costs to non-capped customers violates the principle of cost causation is without merit. The plain language of Section 62-16-4(A)(2) does not mandate that renewable energy procurement costs be recovered only against those customers who caused large customer cap costs. Moreover, renewable energy procurement costs arise as a result of statutory mandate, *see* § 62-16-4(A)(1), such that

neither capped nor non-capped customers can be said to cause any specific procurement costs.

{48} Similarly, the Attorney General's assertion that Section 62-16-4(A)(2) protects non-capped customers from large customer cap costs is unsupported by law. Its argument assumes that Section 62-16-4(A)(2) mandates reductions in renewable energy procurement whenever large customer cap costs arise to protect both capped and non-capped customers from high renewable energy costs. Under the Attorney General's reasoning, rates for non-capped customers cannot be increased by large customer cap costs because such increases would deprive non-capped customers of the protections provided by Section 62-16-4(A)(2). We reject this reasoning because Section 62-16-4(A)(2) does not evince a legislative intent to protect non-capped customers. We have already held that Section 62-16-4(A)(2) does not mandate renewable energy procurement reductions when large customer cap costs arise. The Attorney General's contention that Section 62-16-4(A)(2) precludes large customer cap costs to protect non-capped customers is also incorrect because nothing in Section 62-16-4(A)(2) addresses the interests of non-capped customers. *See State v. Diamond*, 1921-NMSC-099, ¶ 5, 27 N.M. 477, 202 P. 988 (We will not insert words that are absent in a statute.). We conclude that Section 62-16-4(A)(2) does not preclude the allocation of large customer cap costs to non-capped customers.

{49} The PRC had previously approved of SPS's procurement plans. Under Section 62-16-6(A), "[c]osts that are consistent with commission approval of procurement plans . . . shall be deemed to be reasonable." Thus, the renewable procurement costs in this case are reasonable as a matter of law. Because these procurement costs are reasonable, SPS is entitled under Section 62-16-6(A) to recover large customer cap costs. *Id.* ("A public utility that procures or generates renewable energy shall recover, through the rate-making process, the reasonable costs of complying with the renewable portfolio standard."). The evidence indicates that if large customer cap costs only can be collected from capped customers, 20 years or more could elapse "before SPS even has the opportunity to collect" these procurement costs. Thus, as the PRC determined, the Attorney General's proposed cost recovery mechanism "is speculative and uncertain, and would not provide a reasonable opportunity for SPS to recover [large customer cap] costs." Forcing SPS to collect large customer cap costs only from capped customers would effectively disallow recovery of these procurement costs, contrary to the Renewable Energy Act's guarantee that utilities can recover the reasonable costs of renewable energy procurement. Sections 62-16-4(A)(2) & -6(A).[5]

D. 17.9.572.15 NMAC Does Not Preclude the Recovery of Large Customer Cap Costs from Non-Capped Customers

{50} The Attorney General contends that the "plain language" of 17.9.572.15 NMAC "make[s] clear that costs associated with large [capped] customers should be borne by large customers alone." 17.9.572.15 NMAC is a regulatory provision concerning renewable energy cost recovery that references Section 62-16-4(A)(2). Our interpretation of Section 62-16-4(A)(2) therefore informs our

[5]We also note that although the Attorney General relies on Section 62-16-4(A)(2) to argue for a cost recovery mechanism which SPS argues would effectively disallow its ability to recover large customer cap costs, such a mechanism would be contrary to the plain language of Section 62-16-4(A)(2), which provides that "[n]othing contained in this paragraph [concerning the large customer cap] shall be construed as affecting a public utility's right to recover all reasonable costs of complying with the renewable portfolio standard."

construction of 17.9.572.15 NMAC. We have previously held in this opinion that Section 62-16-4(A)(2) provides the PRC with discretion, not a mandate, to reduce renewable energy procurement when large customer cap costs arise, and does not bar the allocation of large customer cap costs to non-capped customers. Consistent with our interpretation of Section 62-16-4(A)(2), we hold that 17.9.572.15 NMAC also does not bar the allocation of large customer cap costs to non-capped customers.

{51} 17.9.572.15 NMAC provides that:

> A. A public utility shall recover the reasonable costs of complying with this rule through the rate making process, including its reasonable interconnection and transmission costs and other costs attributable to acquisition and delivery of renewable energy to retail New Mexico customers.
>
> B. Costs that are consistent with commission-approved annual Renewable Energy Act plans are deemed to be reasonable.
>
> C. A public utility that is permitted to defer the recovery of renewable energy costs pursuant to commission order may, through the ratemaking process, recover from customers that are not subject to the rate impact limitations of Sections 62-16-4A(2) and 62-16-4A(3) NMSA 1978 the cumulative sum of those deferred amounts, plus a carrying charge on those amounts.
>
> D. For customers that are subject to the rate impact limitations of Section 62-16-4A(2) NMSA 1978, a public utility may, through the ratemaking process, recover from those customers the cumulative sum of those Section 62-16-4A(2) NMSA 1978 limited deferred amounts, plus carrying charges on those amounts.
>
> E. Any renewable energy procurement costs recovered through the utility's fuel clause shall be separately identified in its monthly and annual fuel and purchased power clause adjustment filings and its continuation filings.

{52} The Attorney General's argument relies on 17.9.572.15(D) NMAC to support its contention that large customer cap costs can only be recovered from large customers. The Attorney General seems to share our understanding that large customer cap costs, which arise pursuant to Section 62-16-4A(2), may be deferred. Based on this understanding, the Attorney General assumes that the term "Section 62-16-4A(2) NMSA 1978 limited deferred amounts" in Subsection D is a synonym for deferred large customer cap costs. Armed with this assumption, the Attorney General contends that because Subsection D concerns recovery of costs from capped customers and only Subsection D expressly refers to recovery of "Section 62-16-4A(2) NMSA 1978 limited deferred amounts," large customer cap costs can only be recovered from capped customers.

{53} We reject the Attorney General's contention. 17.9.572.15(C) NMAC states that whenever "[a] public utility . . . is permitted to defer the recovery of renewable energy costs pursuant to commission order," the utility may recover the deferred amounts from non-capped customers. Subsection C therefore authorizes public utilities to recover deferred costs, in general, from non-capped customers. By contrast, 17.9.572.15(D) NMAC explicitly authorizes only the recovery of "Section 62-16-4A(2) NMSA 1978 limited deferred amounts" from capped customers. Thus,

although 17.9.572.15(D) NMAC arguably provides that only "Section 62-16-4A(2) NMSA 1978 limited deferred amounts" may be recovered from capped customers, 17.9.572.15(C) NMAC provides that any deferred amounts may be recovered from non-capped customers.

{54} We conclude that a plain reading of 17.9.572.15 NMAC indicates that deferred costs arising from Section 62-16-4A(2) can be recovered from both capped and non-capped customers. There is simply no language explicitly banning the collection of deferred large customer cap costs from non-capped customers. The Attorney General errs in conflating the issue of whether capped customers may be charged only for Section 62-16-4A(2) deferred amounts with whether only capped customers may be charged the aforesaid deferred amounts.

III. CONCLUSION

{55} We affirm the PRC's final order. We will not disturb the PRC's finding that SPS's entire prepaid pension asset was properly included in the rate base. We also hold that the PRC properly allocated large customer cap costs to non-capped customers to enable SPS to recover its reasonable renewable energy procurement costs.

{56} IT IS SO ORDERED.

EDWARD L. CHÁVEZ, Justice

WE CONCUR:

BARBARA J. VIGIL, Chief Justice

PETRA JIMENEZ MAES, Justice

CHARLES W. DANIELS, Justice

TIMOTHY L. GARCIA, Judge
Sitting by designation

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-108

Filing Date: June 30, 2015

Docket No. 32,762

SHARON HOYT,

Plaintiff-Appellee,

v.

STATE OF NEW MEXICO, NEW MEXICO OFFICE OF THE MEDICAL INVESTIGATOR, ROSS E. ZUMWALT, M.D., CHIEF MEDICAL INVESTIGATOR,

Defendants-Appellants.

Wallin, Huss & Mendez, LLC
Brandon Huss
Dennis K. Wallin
Moriarty, NM

for Appellee

Office of University Counsel
Kimberly N. Bell
Albuquerque, NM

for Appellants

OPINION

KENNEDY, Judge.

{1} This is a mandamus case which scarcely resembles the statutory process imagined by the legislative and common law foundations of the writ. The Office of the Medical Investigator and Medical Investigator, Ross Zumwalt, (collectively, OMI) filed an answer to a petition for an alternative writ, and participated in a hearing on the merits. This renders the resulting writ a final peremptory writ from which an appeal must have been taken. It is undisputed that OMI did not file an appeal within thirty days of the writ being filed and issued. OMI's attempt to circumvent finality of the writ by filing a second answer to the peremptory writ instead of its notice of appeal fails.

{2} The case was final when the time for appeal had run from the date of the writ's issuance and filing, and the district court's attempt to make its later order the final order for purposes of appeal is ineffective. *See* NMSA 1987 § 44-2-14 (1887) ("[I]n all cases of proceedings by mandamus in any district court of this state, the final judgment of the court thereon shall be reviewable by appeal or writ of error in the same manner as now provided by law in other civil cases.") NMSA 1978, § 39-3-2 (1966) (requiring appeals to be filed within thirty days after the judgment or order appealed from is filed in the district court); NMSA 1978, § 39-1-1 (1917) (stating that absent motions directed against the final judgment, judgments remain under the control of district courts for thirty days); Rule 12-201(D)(1) NMRA (stating that Section 39-1-1 may be tolled if motion directed at the judgment under Rule 1-050(B) NMRA or Rule 1-060(B) NMRA is pending).

{3} We take no position on the merits of the writ the district court issued. OMI's failure to file a timely notice of appeal deprives us of jurisdiction to entertain this case, and we dismiss the appeal.

I. BACKGROUND AND PROCEDURAL HISTORY

{4} Sharon Hoyt's husband died in 2000. Hoyt was dissatisfied with various aspects of what was listed on her husband's death certificate, such as the time and cause of death, and its statement that no autopsy had been performed. She sought to have the death certificate amended by the hospital where he died and which had performed an autopsy. Hoyt was unsuccessful in securing the change she sought through the hospital and made a request to OMI to amend the certificate; OMI declined. Approximately eight years after her husband's death, Hoyt filed a petition for writ of mandamus in the Seventh Judicial District Court against OMI and the Chief Medical Investigator, Ross Zumwalt. The petition requested that the district court compel OMI to file a corrected death certificate containing more accurate information based on a theory that OMI's interest in accuracy in the recording of death certificates created a mandatory duty to amend faulty certificates even if it did not attend the death or perform the autopsy.

{5} The petition stated a factual basis for the writ and asserted reasons the district court should compel OMI to act. Hoyt concluded her petition by asking for a writ of mandamus to issue, ordering OMI to amend the death certificate to include language she desired, "or in the alternative file a response hereto with this court stating why [OMI] should not be compelled to do so." Hoyt did not submit a form of writ, and none was filed. Instead, a summons issued, directing OMI to file a responsive pleading within thirty days of service. OMI filed its response to the petition on October 23, 2008, alleging various reasons for the district court to decline to issue the writ, including that because the hospital, and

not OMI, had attended her husband's death and performed the autopsy, OMI had no jurisdiction over Hoyt's husband's death, and Hoyt had not exhausted all of her remedies with the hospital. OMI further alleged that it had no legal authority or duty to amend the death certificate, that it was an improper party for a writ of mandamus, and the petition failed to state a claim for mandamus for which the petition should be denied. OMI filed no further pleadings.

{6} After a host of procedural delays and recusals, Judge George Eichwald of the Thirteenth Judicial District Court was designated by the Supreme Court to preside over this case on April 30, 2010. At a telephonic pretrial conference on August 19, 2010, the parties proposed a half-day trial, which the district court indicated would occur toward the end of the year.

{7} The court held a hearing on the merits of the petition on November 16, 2010, during which the district court heard testimony from Hoyt, took exhibits, and heard legal arguments from both parties. The death certificate in question and the autopsy report were both admitted without objection. OMI offered no evidence, but argued that it had no legal obligation to amend the death certificate and that Hoyt had an adequate remedy at law against the hospital.

{8} The district court granted the writ at the conclusion of the hearing and ordered that OMI make various amendments to the death certificate. The district court instructed Hoyt's attorney to "prepare the appropriate order, and get it to [OMI's counsel] signature, and then obviously . . . OMI has an absolute right to appeal." At the end of the hearing, counsel for OMI clarified with the court that the result of the hearing was "not an order, it would be a writ." The district court stated that OMI had "every right to appeal my decision" and asked Hoyt to submit the writ quickly, so OMI "can make [a] decision[] as to whether or not [OMI] want[s] to appeal this matter."

{9} The writ of mandamus was not filed until March 15, 2011. Although OMI was notified of the presentment of the writ before the court on that date, it informed Hoyt's counsel that it would not attend, nor would it take any action to approve the writ as to form, as it believed that it had no legal ability to affect the writ or its language. As filed, the writ is entitled "Writ of Mandamus" and does not include the word "peremptory." The writ directs OMI to issue "an amended, corrected death certificate" within "30 days from the date this Writ is entered by the Court" and further required that in "the event that [OMI is,] for any reason[,] unable to effectuate the ordered changes, [OMI] shall take all available measures to cooperate with [Hoyt] to make such changes."

{10} Thirty days later on April 16, 2012, OMI filed what it styled as an answer to an alternative writ of mandamus, operating under an assumption that the writ issued by the district court was an alternative writ. This pleading laid out OMI's belief that the writ was alternative for allegedly failing to include language required by the statutes governing peremptory writs and, therefore, permitted a response under NMSA 1978, § 44-2-8 (1884). In this "answer," OMI asserted essentially the same grounds that it argued in its first response to the petition and during the hearing on the writ. Hoyt moved to strike OMI's answer. In a hearing on January 22, 2013, the district court granted the motion to strike and elaborated in its order granting the motion that, although "[t]he [w]rit issued by the [c]ourt was the final resolution of all matters pertaining to [the] case[,]" the order was the "final action . . . from which appellate review [could] be taken." OMI filed a notice of appeal from this order on February 19, 2013.

II. DISCUSSION

{11} The parties' briefs focus on whether mandamus was proper in this case. We will not address the merits in this case, however, because of the conclusive effect of OMI filing a second answer in the case rather than a notice of appeal.

{12} Owing to OMI's filing an answer to what it deemed an "alternative writ," we must turn to whether OMI's eventual notice of appeal was timely. Hoyt asserts that the writ's language indicated it was peremptory as, indeed, the district court stated in its order of January 2013. OMI insists the writ was alternative, justifying its belief that it could properly file a response to the writ and that no appeal was proper at that time. *See* NMSA 1978, § 44-2-9 (1884) (providing that a defendant may show cause by answer to an alternative writ). If we hold that the writ is an alternative writ, the result would compel the district court's consideration of OMI's response, a new date of finality, and OMI's timely appeal from that order.

{13} For reasons stated below, we conclude that the writ issued by the district court was a final peremptory writ of mandamus at the time it was entered. We operate under Section 44-2-14, *Id.*, (providing that writs be reviewed by appeal or writ of error as other civil cases) and Rule 12-201(A)(2) (requiring appeals to be filed "within thirty . . . days after the judgment or order appealed from is filed in the district court clerk's office"), and hold that the writ of mandamus that the district court issued triggered the need to file a notice of appeal within thirty days of its filing. No notice of appeal or motion directed against the judgment was filed within that time. Upon the expiration of thirty days, OMI's appeal was no longer timely.

B. Writs of Mandamus—Statutory Requirements

{14} Mandamus is a creature of statute, and its regulating statutes can be found at NMSA 1978, Sections 44-2-1 to -14 (1953). Section 44-2-1 (stating that a writ of mandamus is regulated only by Chapter 44, Article 2). We concern ourselves here with only the procedural aspects of the proceedings before us.

{15} Mandamus has been a part of New Mexico's statutory remedies since 1884. Following the statutes and case law, an action for mandamus commences when a petition for a writ is filed. *Brantley Farms v. Carlsbad Irrigation Dist.*, 1998-NMCA-023, ¶ 12, 124 N.M. 698, 954 P.2d 763. After the filing of an application or petition, the district court may, having read the petition and considered its merits, issue either a peremptory or an alternative writ pursuant to the statutory requirements. Section 44-2-6. All writs must contain a statement of fact showing the obligation to act, as well as the order to perform it, and are issued with a date by which compliance must be completed. Section 44-2-6. This is known as the "return day." Section 44-2-8. Both alternative and peremptory writs require responses by the return day, either certifying that the duty to be performed has been completed for a peremptory writ or, in the case of an alternative writ, giving the respondent's reason for non-performance. Section 44-2-6. At the point the writ is issued, the petition or application disappears and is replaced by the writ itself. *Brantley Farms*, 1998-NMCA-023, ¶ 12; *see State ex rel. Burg v. City of Albuquerque*, 1926-NMSC-031, ¶ 5, 31 N.M. 576, 249 P. 242 ("Upon granting of the alternative writ, the application is functus officio, and the alternative writ becomes the initial pleading in the case."). Legal sufficiency of the writ is based on the district court's consideration of the allegations in the

writ and the answer alone. *Brantley Farms*, 1998-NMCA-023, ¶¶ 12-13.

{16} The Mandamus Act contemplates that peremptory writs—those issued based on an apparently incontrovertible duty and sufficient factual basis—would be rarely issued: "When the right to require the performance of the act is clear, and it is apparent that no valid excuse can be given for not performing it, a peremptory mandamus may be allowed in the first instance; in all other cases[,] the alternative writ shall be first issued." Section 44-2-7. Because peremptory writs may issue without notice to the opposing party or an opportunity to be heard, alternative writs are the norm. Charles T. Dumars & Michael B. Browde, *Mandamus in New Mexico*, 4 N.M. L. Rev. 155, 161 (1974). This portion of the statute was specifically enacted to permit an ex parte writ, in reaction to *Armijo v. Territory of N.M.*, 1874-NMSC-002, 1 N.M. 580, which held a peremptory writ of mandamus void for lack of notice and an opportunity to be heard. Because under the Act, a peremptory writ is entered without notice and an opportunity to be heard, it constitutes a final judgment, against which the remedy for any error is by appeal. *Bd. of Comm'rs of Guadalupe Cnty. v. Dist. Ct. of Fourth Jud. Dist.*, 1924-NMSC-009, ¶ 14, 29 N.M. 244, 223 P. 516. At the same time, *Board of Commissioners* recognizes that a respondent may file a motion directed at the legal propriety of the peremptory writ, which operates as a general appearance, giving the court jurisdiction over the respondents and placing them in the same position as if it had been served with notice prior to the issuance of the writ and defaulted. *Id.* ¶ 24. Once having joined in the dispute, by filing a motion to be allowed to appear and defend against the writ, OMI is unable to "urge want of notice and opportunity to be heard before the issuance of the writ." *Id.*

{17} The other side of mandamus is the alternative writ, which "is in the nature of an order to show cause[.]" Dumars & Browde, *supra* at 159-60. Section 44-2-6 specifically lists the contents that an alternative writ must have:

> The alternative writ shall state concisely the facts showing the obligation of the defendant to perform the act, and his omission to perform it, and command him, that . . . he do the act required to be performed, or show cause before the court out of which the writ issued, at a specified time and place, why he has not done so[,] and that he then and there return the writ with his certificate of having done as he is commanded.

{18} While alternative writs permit the defendant to show a "valid excuse . . . for not performing" the required duty by the expiration of the return date, peremptory writs omit the words requiring the defendant to show cause why he has not done as commanded. Section 44-2-7. Alternative, not peremptory, writs allow for the defendant to file an answer. Section 44-2-9 ("On the return day of the alternative writ, . . . the party on whom the writ is served may show cause by answer, made in the same manner as an answer to a complaint in [a] civil action."). In this way, an alternative writ "serves the same function as a complaint in a civil action and the answer to the writ serves as the answer." *Salopek*, 2006-NMCA-093, ¶ 14. In an answer to an alternative writ, the public official answers the factual allegations contained in the writ and proffers whatever legal defenses he has to the action. *Id.* Upon the filing of an answer, "the issues thereby joined shall be tried and further proceedings had in the same manner as a civil action." Section 44-2-11. If the defendant makes no answer following the

issuance of an alternative writ, "a peremptory mandamus shall be allowed against the defendant[.]" Section 44-2-10. A peremptory writ is the end product of the alternative writ proceeding. *See Chance v. Temple*, 1 Iowa 179, 181 (1855) ("The proper order, on the hearing of the application for a peremptory writ, after an alternative is, let the writ be peremptory,' or 'peremptory writ refused.' "). If judgment for the plaintiff is given, issuance of a peremptory writ is the final step in all mandamus proceedings, Section 44-2-12, and the final order that must be appealed to a higher court.

C. Hoyt's Petition Was for an Alternative Writ And OMI's Answer Operates to Join the Issues for Adjudication of the Case

{19} The petition in this case was for an alternative writ for mandamus, despite the word "alternative" being left out of its title. The petition requested that OMI should be required to file an amended death certificate with certain inclusions "or in the alternative file a response hereto with this court stating why [OMI] should not be compelled to do so." Leaving the word "alternative" out of the title is of no consequence, so long as the purpose is clear. *See Salopek*, 2006-NMCA-093, ¶ 16 (reasoning that the writ issued, although entitled "Peremptory Writ of Mandamus[,]" was not peremptory because, in accordance with the statutory requirements for alternative writs, it directed the defendant to prepare and file a response to the writ within thirty days). No writ was issued in this case. Instead, a summons to OMI was issued, demanding a response within thirty days of service. Following the receipt of the summons in this case, OMI filed a timely response to the petition for writ of mandamus, refuting the allegations of the petition on the merits and asserting separate defenses. Under *Board of Commissioners*, OMI cannot complain that it was not aware of the petition, the issues involved, and its obligation to respond. OMI did not pursue their theory that the relief Hoyt sought was not available as a matter of law by motion to dismiss or otherwise prior to the hearing on the merits.

{20} Once an answer to a petition is filed, Section 44-2-11 directs that the issues joined through the answer "shall be tried and further proceedings had in the same manner as in a civil action." We acknowledge that "[t]he procedure for filing a mandamus action is rather convoluted[,]" Dumars & Browde, *supra* at 158, and that this case has been inordinately so. The concept that a petition in proper form gives rise to a court order "directing the court clerk to issue the writ[,]" *supra* at 159, is provably awry here. However, we do not believe that the lack of an initial writ is of great import under these circumstances.

{21} Our courts have chosen function over form when considering writs of mandamus. For example, *Laumbach v. Board of County Commissioners of San Miguel County*, gave effect to a civil complaint for equitable relief by converting it to a petition for mandamus. 1955-NMSC-096, ¶ 15, 60 N.M. 226, 290 P.2d 1067 ("It matters not what the pleading initiating the proceeding may be denominated. If in truth it discloses by its allegations and the relief sought that it is an action in mandamus, it will be so treated."). Additionally, our Supreme Court has considered a petition as though it were a writ where the respondent answers the allegations made in the petition as it would those made in a writ. *Burg*, 1926-NMSC-031, ¶¶ 11-13. *Burg* held that the defects in the issuance of a writ "can be waived if the parties, by their acts or agreement, treat the application as a writ." *Id.* ¶ 12. It also held that when a respondent answers factual allegations in the application as a writ, the writ itself can be waived under Section 44-2-11's predecessor, supporting

further proceedings.[1] Our Supreme Court has even gone so far as to consider a motion to dismiss, which is inappropriate in a mandamus case, as an answer to a writ where it raised legal questions, admitted facts stated in the writ, and invoked the court's application of the law on an issue, just as an answer to a writ would properly do. *State ex rel. Fitzhugh v. City Council of City of Hot Springs*, 1952-NMSC-022, ¶ 8, 56 N.M. 118, 241 P.2d 100.

{22} From these cases, we conclude that OMI's answer waived the issuance of a writ to begin the case and agreed that the case would be presented based on the pleadings before the court. "The only allegations of fact against which this answer can be directed are those contained in the application; and they are treated by the respondents as though they were contained in the writ." *Burg*, 1926-NMSC-031, ¶ 13. As such, the case was to proceed as in any civil action. Section 44-2-11. OMI's answer to the petition was functionally the same as an answer to an alternative writ, and under our Supreme Court's precedent set forth in *Burg*, 1926-NMSC-031, ¶¶ 11-13, we will treat the case in that manner. Accordingly, after its hearing on the merits, at which OMI was represented and actively defended its position, the district court gave judgment for Hoyt and issued its final peremptory writ as directed by Section 44-2-12. The writ adjudicated all issues pending before the court and disposed of the case to the fullest extent possible. Last, the district court's conversation with OMI's counsel about the issuance of the writ after the hearing indicates that OMI was twice advised that the next step available to it after the writ was filed would be an appeal. Section 42-2-14; *Bd. of Trustees of Vill. of Los Ranchos de Albuquerque v. Sanchez*, 2004-NMCA-128, ¶ 11, 136 NM 528, 101 P.3d 339 (holding that where the case has been disposed of to the fullest extent, the judgment is final and an appeal can be taken). OMI clearly ascertained that it had been ordered to amend the Hoyt death certificate, that it was the district court's intent to issue a writ and not "an order," and twice that an appeal was contemplated by the district court as the next step should OMI have so desired.

{23} Despite OMI's assertion that it could not initially file a motion to dismiss the petition, our Supreme Court in *Fitzhugh*, 1952-NMSC-022, ¶ 8, held that, a motion to dismiss in a mandamus case could be treated as an answer to an alternative writ that admits the facts, but invokes an application of the law to decide the case. OMI's answer to the petition does not contest the essential facts, and contains a response to each and every paragraph of the petition, alleges specific defenses, and requests dismissal on jurisdictional and other grounds. The answer filed after the writ follows the same format and makes virtually the same arguments as the answer filed after the petition. The difference is that the second answer begins with the assertion that the March 2012 writ is an alternative, not a peremptory, writ due to asserted statutory deficiencies in its language.

{24} OMI maintains that its second answer, filed thirty days after the final writ of mandamus was issued and not its original answer to the petition, should be viewed as the "answer" to a writ that is contemplated by statute. Counsel does not point to, and we are not aware of, any provision in the statutes or rules that would permit a second answer, which is substantively indistinguishable from the first, to be filed in a case after the district

[1] We followed *Burg* in subsequent cases determining the validity of writs. *See Salopek*, 2006-NMCA-093, ¶ 15 (stating rule that defects in writ can be waived where respondent answers allegations in the petition as if they were set forth in the writ); *City of Sunland Park v. N.M. Pub. Regulation Comm'n*, 2004-NMCA-024, ¶ 8, 135 N.M. 143, 85 P.3d 267 ("[D]efects in the pleadings can be waived, and the allegations in the application may be considered, where the respondent answers the allegations as if they were set forth in the writ.").

court has held a hearing on the merits, and informed counsel that it could appeal its ruling if it desired and told a party that an appeal would be the next step. The failure to cite to authority in support of a proposition of law allows us to decline to do the research on the party's behalf. *In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 ("We have long held that to present an issue on appeal for review, an appellant must submit argument *and authority* as required by rule."). OMI's assertions that the writ is defective for failing to include items OMI now asserts to be mandatory components of a peremptory writ, and assertions that the district court's conclusions of law are wrong with regard to OMI's ability to affect Hoyt's husband's death certificate, would all be issues properly addressed by a timely appeal.

{25} We are satisfied that OMI's first answer to the petition, prior to the issuance of any writ, was sufficient to waive OMI's objections to procedural failings—i.e., the district court's failure to issue an alternative writ immediately upon receiving the petition—and allowed the district court to consider the merits of the allegations made in the petition as though made in an alternative writ. OMI's answer, having treated the petition as though it were a writ, functionally transformed the petition to an alternative writ. *Burg*, 1926-NMSC-031, ¶¶ 11-13. Thus, the alternative writ procedures having been completed by the petition, an answer, and a hearing on the merits at which OMI appeared and participated, the writ issued in March 2011 was peremptory.

D. The Writ Issued Was Peremptory

{26} OMI asserts that the writ did not contain the necessary language, either as to the necessity of compelling action or establishing a clear legal duty to act to establish it as a peremptory writ under Section 44-2-7 and, thus, its second answer was appropriately filed. OMI misreads the statute. Section 44-2-7 governs the content of writs initially issued after a petition is filed, not as the end product of a proceeding on an alternative writ as we have in this case where, after hearing on the merits, the plaintiff has prevailed. Section 44-2-12 is clear that, upon judgment being "given for the plaintiff" as here, "*a peremptory* mandamus shall be awarded without delay." (Emphasis added.) The fact that the consequence of judgment for Hoyt in this mandamus action could not be anything *but* a peremptory writ is inescapable. The district court's issuance of a writ that complies with the statutory requirements for a peremptory writ reflects its stated conclusion that Hoyt had a clear right to compel OMI to amend the death certificate. Rather than rely on its own determination that there was no clear right to require performance while it calculated its options, OMI should have looked to the entire mandamus statute to determine whether the district court's writ qualified as alternative or peremptory.

{27} Because the writ issued after a petition and answer were filed, an evidentiary hearing was held, and judgment was announced for Hoyt, all procedures available for an alternative writ had been exhausted. Section 44-2-12 and the function of the writ as the final resolution of the case is conclusive regardless of omission of the word "peremptory." We therefore reject OMI's contention that the final writ was an alternative writ and hold that the writ was peremptory. OMI should have appealed by the date it filed its second answer.

E. OMI Demonstrates No Excuse for Its Untimely Appeal

{28} Despite joining and participating in a full determination of the case on its merits, being familiar with the mandamus statutes, and twice acknowledging the district court's statement that, upon filing the writ, OMI could

appeal, OMI now asserts that regarding the writ as a peremptory writ and, therefore, the final appealable order, would be unfairly prejudicial and an error of law. We disagree.

{29} Supporting our view of Section 44-2-12, our cases also hold that once "all issues of law and of fact necessary to be determined have been determined, and the case has been completely disposed of to the extent the court has power to dispose of it[,]" the resulting order is final. *In re Estate of Duran*, 2007-NMCA-068, ¶ 10, 141 N.M. 793, 161 P.3d 290 (internal quotation marks and citation omitted). The writ issued on March 15, 2012, completely disposed of the case on the merits as a result of judgment in Hoyt's favor. OMI therefore had thirty days to file a notice of appeal with this court. Rule 12-201(A)(2) (requiring appeals to be filed "within thirty . . . days after the judgment or order appealed from is filed in the district court clerk's office"). OMI did not file a pleading attacking the district court's judgment so as to toll the thirty-day rule for filing a notice of appeal, nor did it file an appeal on the merits. Instead, it chose to file another answer based on its misguided assertion that the final writ was actually an alternative writ that kicked off the process anew.

{30} OMI's argument that naming the writ as peremptory at this time would cause it prejudice because it relied on the language in the district court's order in the motion to strike also fails. The writ was peremptory because the Legislature made it so. OMI's view is blind to the facts preceding the writ being filed. During that hearing and prior to the filing of the writ, the district court twice notified OMI's counsel of not only its ability, but also its right to appeal, which OMI's counsel acknowledged. OMI refused to participate in the presentment of the writ, or review it prior to that hearing, believing, apparently, that it was a "writ," not an "order" that could be further clarified or modified if OMI had an objection to any part. In order to file its second answer, it had to invent its forced interpretation that the writ based on the *judgment* of the court after a full progression of the case through a hearing on the merits, was an alternative writ, intended to allow further proceedings. This ignores the course of proceedings in the district court. The proper route was to file an appeal on the merits.

{31} We note that at argument, OMI's counsel spoke to a process by which it decided to assert its position here on appeal. From clarifying at the end of the merits hearing that the court would be issuing a writ, not an order, counsel stated that based on the belief that a "writ" is not an "order," counsel refused to review the writ, attend the presentment hearing, or approve the writ as to form. In doing so, OMI forfeited an opportunity to seek or offer clarity or correction to the muddled proceedings and what it now asserts is defective language in the writ. OMI concedes that the district court issued its writ following consideration of the petition and answer thereto.

{32} It is undisputed that a peremptory writ is a final, appealable judgment. *See Bd. of Comm'rs*, 1924-NMSC-009, ¶ 13 (declaring a peremptory writ is a final judgment). We therefore have two conclusions from which to choose. First, we could plausibly conclude that OMI knew the writ was peremptory based on the procedural posture of the case and chose to use the procedural confusion to get another chance to address the merits. Second, we could also plausibly conclude that OMI should have known that the writ was peremptory, but did not adequately research the law on the issue. Under neither conclusion may OMI prevail. The fastest and the proper way to prove the writ was erroneous was through a direct appeal. *See id.* (supporting the idea that defects in the writ are to be addressed by an

appeal). Instead, OMI's second, procedurally unnecessary, answer improperly attempted to draw out the already unnecessarily lengthy proceedings.

{33} Last, district courts, unless a post-judgment motion is pending, lose their power over the judgment within thirty days. Section 39-1-1 (stating that the district court loses control over its final judgments unless motions are pending directed against the judgment). Rule 1-052(D) NMRA similarly puts a thirty-day time limit for requests to amend or change findings or conclusions in a non-jury case. We are unable to find, and OMI does not point us to, any action by them or authority that would toll this deadline owing to OMI filing a second answer to the district court's peremptory writ of mandamus. As such, it would be an unsound practice for this Court to exercise jurisdiction over this appeal; the timeliness of OMI's appeal rests on an improperly filed second answer to a peremptory and final writ issued after a hearing on the merits has been completed.

{34} The dissent suggests that OMI should be entitled to an untimely appeal based on an erroneous reading of *Trujillo v. Serrano*, 1994 -NMSC- 024, 871 P.2d 369. In that case, a party did not receive a copy of the judment in a magistrate court case until more than a month after it was filed. *Id.* ¶ 3. Here, the district court was quite clear at the end of the merits hearing that it was issuing a writ, from which OMI's next step would properly be an appeal, and OMI received the writ in March 2012, with a full thirty days to file its appeal, choosing to file a second answer instead. We do not regard this as either judicial error in the issuance of the writ, or a situation requiring clarification of the district court's position that had to wait until 2013. OMI had all of the information it needed, including facts and applicable law, from which to discern a proper path to appellate review of the merits of their case. They asserted in their first answer all of the arguments the dissent now suggests, and their position was litigated in a hearing on the merits. *Trujillo* also points out that allowing a late appeal is a discretionary matter with the reviewing court. *Id.* ¶ 9. Again, the proper way to challenge a final peremptory writ's content is through direct appeal. *See Bd. of Comm'rs*, 1924-NMSC-009.

{35} We recognize that "unusual circumstances beyond the control of the parties" are a ground upon which a court can base its decision to excuse a late notice of appeal. *Schultz ex rel. Schultz v. Pojoaque Tribal Police Dep't*, 2010-NMSC-034, ¶ 23, 148 N.M. 692, 242 P.3d 259 (internal quotation marks and citation omitted). In *Schultz*, we recognized things like error on the part of the court and mail delays as examples of "unusual circumstances beyond the control of the parties[.]" *Id.* (internal quotation marks and citation omitted). We cannot conclude that the untimely filing of the notice of appeal here was beyond OMI's control where OMI's counsel was on notice of its right to appeal, but seems to have made a calculated choice to file an answer rather than a notice of appeal. While we might agree with the district court's decision to strike the answer, that decision was made after the district court had lost its ability to act. OMI intentionally did not file a timely notice of appeal to the district court's peremptory, final writ. A second answer cannot substitute for a timely notice of appeal. Absent a timely notice of appeal, we must dismiss.

III. CONCLUSION

{36} The petition filed in this case was for an alternative writ. Despite no initial writ being issued by the district court, OMI filed a timely answer to that petition, and the case was heard on the merits. The district court issued judgment for Hoyt, compelling the filing of a peremptory writ that would end the case. The district court's statements during

the first hearing, and OMI's counsel's acknowledgement, clearly establish that OMI was on notice as to the final nature of the writ that would issue. By law, such a final writ is peremptory. As such, we cannot agree with OMI that its notice of appeal was timely in this case. OMI was required to file a notice of appeal within thirty days of the district court's issuance of a peremptory writ. *Bd. of Comm'rs*, 1924-NMSC-009, ¶ 13 (declaring a peremptory writ is a final judgment); Rule 12-201(A)(2) (requiring appeals to be filed "within thirty . . . days after the judgment or order appealed from is filed in the district court clerk's office"). Instead, it elected to improperly file an answer to the writ. *See* § 44-2-9 (stating that the defendant to an alternative writ "may show cause by answer"). OMI's filing of a notice of appeal 341 days after a peremptory writ was filed is untimely and deprives this Court of jurisdiction. We therefore dismiss the appeal.

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

RODERICK T. KENNEDY, Judge

I CONCUR:

MICHAEL E. VIGIL, Chief Judge

TIMOTHY L. GARCIA, (dissenting).

GARCIA, Judge (dissenting).

{38} I respectfully dissent from the majority opinion for two related reasons. First, I view this case as containing "unusual circumstances which would warrant permitting an untimely appeal" because "the delay was the result of judicial error." *Trujillo v. Serrano*, 1994-NMSC-024, ¶ 16, 117 N.M. 273, 871 P.2d 369. Initially, we must recognize that the rule regarding the time to file an appeal is "a mandatory precondition rather than an absolute jurisdictional requirement." *See id.* ¶ 15. Until the district court clarified that its March 15, 2012 writ was intended to be peremptory and operate as a final judgment, OMI was not reasonably required to interpret this March 2012 writ as a peremptory writ. It appears that the district court recognized its previous error when it attempted to remedy the situation by providing that its January 2013 order clarifying the intended effect of the writ would be "[the] final action in this case from which appellate review may be taken[,] if elected." Although the district court may have acted outside of its jurisdiction in extending the time for filing a notice of appeal, we would not be acting outside our jurisdiction by accepting an untimely notice of appeal. *See id.* ¶¶ 15-16. This is especially true in this case where the mandamus writ at issue appears to require OMI to act outside of its statutory and regulatory authority. *See Mimbres Valley Irrigation Co. v. Salopek*, 2006-NMCA-093, ¶ 19, 140 N.M. 168, 140 P.3d 1117 ("[M]andamus is only appropriate to compel an official to perform a duty if the duty is clear and indisputable."); *see also* 55 C.J.S. *Mandamus* § 17 at 34 (2009) ("A writ of mandamus by its nature confers no new authority upon the party against whom it may be issued.").

{39} The second reason for this dissent involves Hoyt's failure to follow the appropriate statutory procedures for obtaining an alternative peremptory writ of mandamus. *See* §§ 44-2-6 to -11. The fact that OMI responded to Hoyt's defective and inappropriate petition that initiated this procedural mess in 2008, should not be determinative or controlling. I cannot conclude that OMI was required to do nothing in 2008 and simply wait for the outcome of the district court's review of Hoyt's inappropriate 2008 petition. OMI alerted the district court and Hoyt to this dilemma throughout the early proceedings in 2008 and again in 2011. OMI's first opportunity to properly answer the actual written form of the writ proposed by

Hoyt only occurred after the writ was filed on March 15, 2012. As noted above, even the district court was confused about the final nature of the writ that was presented after the November 2011 hearing. This confusion was not cleared up until the January 2013 order. Any procedural or finality defects that may have occurred in this case prior to January 2013, were entirely Hoyt's creation and should not now be used to deny OMI the right to appeal the merits of this peremptory writ.

TIMOTHY L. GARCIA, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-109

Filing Date: July 29, 2015

Docket No. 32,379

JACOB M. WILLIAMS,

Plaintiff-Appellee,

v.

BNSF RAILWAY COMPANY,

Defendant-Appellant.

Caren I. Friedman
Santa Fe, NM

Heard Robins Cloud LLP
Bill Robins III
Justin R. Kaufman
Santa Fe, NM

Jones, Granger, Tramuto & Halstead
Robert M. Tramuto
Houston, TX

for Appellee

Modrall, Sperling, Roehl, Harris & Sisk, P.A.
Tim L. Fields
Jeremy K. Harrison
Albuquerque, NM

BNSF Railway Company
Wayne L. Robbins, Jr.
Fort Worth, TX

for Appellant

OPINION

ZAMORA, Judge.

{1} BNSF Railway Company (BNSF) appeals from a district court judgment in favor of Jacob Williams (Plaintiff) on Plaintiff's claims brought under the Federal Employers' Liability Act (the Act), 45 U.S.C. §§ 51-60 (2013). BNSF claims that the district court committed reversible error in admitting evidence of subsequent remedial measures and in admitting evidence concerning injuries to other railway employees. We conclude that the district court did not err in its evidentiary rulings. We affirm.

BACKGROUND

{2} Plaintiff worked for BNSF as a locomotive engineer. On July 30, 2009, Plaintiff was working at a mechanical facility for locomotive railcars in Belen. One of Plaintiff's duties was to secure the locomotives by tying or setting handbrakes on each locomotive. A handbrake is a component of a locomotive railcar that is operated manually and that helps to secure a stopped

train. Setting the handbrakes involves cranking a wheel on the catwalk of each locomotive. The wheel pulls a chain, which is attached to the brake. When the wheel is turned, the brake is pulled up against the wheels of the locomotive.

{3} As Plaintiff tied a handbrake on July 30, 2009, he felt a "pop and a stretch" in his left shoulder. Plaintiff finished his shift. Over the next two days Plaintiff experienced increased pain and decreased range of motion in his shoulder. Plaintiff reported the injury on August 1, 2009. The injury was designated as an overexertion injury. Plaintiff underwent physical therapy and eventually needed surgery on his shoulder.

{4} Plaintiff filed a personal injury complaint against BNSF alleging that he injured his shoulder as a result of BNSF's negligent training and unsafe equipment relating to handbrake use. Plaintiff claimed to have suffered a permanent disability and sought recovery for medical expenses, lost wages, and pain and suffering. A jury returned a special verdict, finding damages in the amount of $80,000, and apportioning fault at seventy-five percent to BNSF and twenty-five percent to Plaintiff. This appeal followed.

DISCUSSION

{5} On appeal BNSF argues that the district court erred in admitting evidence concerning a specialized "handbrake trailer" used in safety training after Plaintiff's injury. BNSF also challenges the admissibility of injury reports made by other BNSF employees after unrelated events.

Standard of Review

{6} "We review the admission or exclusion of evidence for abuse of discretion." *Progressive Cas. Ins. Co. v. Vigil*, 2015-NMCA-031, ¶ 13, 345 P.3d 1096 (internal quotation marks and citation omitted), *cert. granted, Progressive v. Vigil*, 2015-NMCERT-003, 346 P.3d 1163. "To the extent our analysis requires interpretation of applicable rules of evidence, our review is de novo." *State v. Garcia*, 2013-NMCA-064, ¶ 11, 302 P.3d 111; *Kysar v. BP Am. Prod. Co.*, 2012-NMCA-036, ¶ 20, 273 P.3d 867 ("Ordinarily, we review an evidentiary ruling of the district court admitting or excluding evidence for an abuse of discretion, while reviewing any interpretation of law underlying the ruling de novo.").

Evidence of the Handbrake Trailer

{7} Prior to trial, BNSF filed a motion in limine seeking to exclude evidence that after Plaintiff's injury, BNSF began using a handbrake trailer in safety training programs in its Southwest Division, including the Belen yard, where Plaintiff was injured. The handbrake trailer is a small portable trailer, with simulations of different types of handbrakes. Each handbrake on the trailer is equipped with a pressure gauge. As employees tighten the simulated handbrakes on the trailer, the gauges show the pressure being applied to the brake in pounds per square inch. A red line on the gauge indicates the pressure at which sufficient tension has been placed on the brake. This helps employees to get a sense for the amount of force needed to properly set each handbrake.

{8} BNSF sought to exclude evidence related to the trailer, claiming that its use in the Southwest Division was a subsequent remedial measure. However, the district court denied the motion, finding that the handbrake trailer evidence was admissible to show the feasibility of precautionary measures. BNSF contends that the district court erred in admitting the evidence under Rule 11-407 NMRA's feasibility exception. We conclude that the evidence was admissible because it

did not involve a subsequent remedial measure.

{9} Rule 11-407 provides in pertinent part: "When measures are taken by a defendant that would have made an *earlier* injury or harm less likely to occur, evidence of the *subsequent* measures is not admissible to prove . . . negligence[.] But the court may admit this evidence for another purpose, such as . . . the feasibility of precautionary measures." *Id.* (emphasis added). By its language, the rule applies to actions taken after the injury or harm has occurred. We also note that the rule concerns *remedial* measures, meaning measures taken to address the occurrence of an accident or injury to make it less likely to occur in the future. *See Black's Law Dictionary* 1484 (10th ed. 2014) (defining "remedial" as "[a]ffording or providing a remedy; providing the means of obtaining redress" or "[i]ntended to correct, remove, or lessen a wrong, fault, or defect").

{10} One basic purpose of Rule 11-407 is to encourage a party to make repairs or modifications after an accident by removing the threat of legal liability for doing so. *See Yardman v. San Juan Downs, Inc.*, 1995-NMCA-106, ¶ 22, 120 N.M. 751, 906 P.2d 742. The rule protects a defendant that is first alerted to the possibility of danger after an accident and is induced by the accident to take steps to prevent further injury. *See Boggs ex rel. Boggs v. Lay*, 164 S.W.3d 4, 21 (Mo. Ct. App. 2005). "A defendant who is aware of the problem and has proposed measures for remediation prior to the accident is not entitled to the same protection." *Id.* (internal quotation marks and citation omitted).

{11} A review of the record in this case reveals that BNSF developed the handbrake trailer prior to Plaintiff's injury in July 2009. Julia Stoll, who became BNSF's safety manager for the Southwest Division between 2009 and 2011 testified that the trailer was developed and first used by BNSF's Montana Division. Stoll further testified that she was aware of the trailer's existence and use in handbrake safety training before she was transferred to the Southwest Division in April 2009. Because the handbrake trailer was developed and used for safety training prior to Plaintiff's injury, we conclude that it was not a subsequent remedial measure as contemplated by Rule 11-407.

{12} BNSF also argues that the district court abused its discretion by concluding that the trailer evidence was admissible under Rule 11-401 NMRA, which provides that relevant evidence is generally admissible. This argument is unavailing. During the hearing on BNSF's motion in limine to exclude the trailer evidence, the district court found that the evidence was relevant because Plaintiff had directly put his training in issue. Relevant evidence is evidence having "any tendency to make a fact more or less probable than it would be without the evidence." Rule 11-401. "Whatever naturally and logically tends to establish a fact in issue is relevant." *McNeill v. Burlington Res. Oil & Gas Co.*, 2008-NMSC-022, ¶ 14, 143 N.M. 740, 182 P.3d 121 (alteration, internal quotation marks, and citation omitted). Here, Plaintiff's claim was based in part on his allegation that BNSF was negligent in training him. Evidence related to BNSF's training and safety tools would have a tendency to make more or less probable Plaintiff's claim that his handbrake injury resulted from negligent training.

{13} BNSF further argues that the district court abused its discretion when it concluded that the trailer evidence was admissible under the Rule 11-403 NMRA balancing test because the probative value was not substantially outweighed by any prejudice to Defendant. However, BNSF does not develop this argument by discussing how the trailer evidence was prejudicial and how any prejudice would have outweighed its probative

value. Accordingly, we decline to address this argument. *See Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076 (stating that we will not review undeveloped or unclear arguments that require us to guess at what a party's arguments might be).

{14} Because evidence concerning the handbrake trailer is relevant to Plaintiff's claim, and because use of the trailer was not a subsequent remedial measure, we affirm the district court's admission of the evidence without considering Rule 11-407's feasibility exception on which the district court based its decision. *Sanders-Reed ex rel. Sanders-Reed v. Martinez*, 2015-NMCA-063, ¶ 12, ___P.3d___ ("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)). We also conclude that BNSF's argument regarding the jury instruction limiting consideration of the trailer evidence to the issue of feasibility is moot. *See Crutchfield v. N.M. Dep't of Taxation & Revenue*, 2005-NMCA-022, ¶ 36, 137 N.M. 26, 106 P.3d 1273 ("A reviewing court generally does not decide . . . moot questions.").

Evidence of Other Injuries

{15} BNSF makes a number of arguments challenging the admissibility of injury reports filed by other BNSF employees. BNSF's primary argument is that Plaintiff failed to show, and the district court failed to consider, whether the incidents reported were substantially similar to the incident from which Plaintiff's injury arose. BNSF's arguments are unavailing.

{16} In *Ohlson v. Kent Nowlin Construction Co.*, 1983-NMCA-008, ¶ 34, 99 N.M. 539, 660 P.2d 1021, we relied on *McCormick's Handbook of the Law of Evidence*, § 200, at 475 (Edward W. Cleary ed., 2d ed. 1972), for the general rule regarding the admissibility of prior accidents or injuries in negligence cases. *Ohlson*, 1983-NMCA-008, ¶ 34 (citing *McCormick's, supra*, § 200, at 475). Then, as now, the rule is that evidence of prior accidents or injuries is not relevant to prove a specific act of negligence, but may be relevant to show either the existence of a danger or hazard or a defendant's knowledge of the danger. 1 George E. Dix, *McCormick on Evidence*, § 200, at 1106-07, 1112-13 (Kenneth S. Broun ed., 7th ed. 2013). Evidence of prior accidents or injuries is relevant where the circumstances surrounding the prior incidents are substantially similar to the circumstances surrounding the incident at issue. *Id.* at 1107. The burden of demonstrating substantial similarity lies with the proponent of the evidence. *Id.* at 1107-08. The degree of similarity required will depend on the nature of the allegedly dangerous condition in each case. *Id.* at 1111-14. When evidence of previous accidents or injuries is offered to show a defendant's knowledge or notice of a danger, a lesser degree of similarity may establish relevance because all that is required "is that the previous injury or injuries be such as to call [the] defendant's attention to the dangerous situation that resulted in the litigated accident." *Id.* at 1114.

{17} This is consistent with the general rule in the Tenth Circuit. In *Ponder v. Warren Tool Corp.*, 834 F.2d 1553, 1560 (10th Cir. 1987) the court noted:

> Generally, . . . admission of evidence regarding prior accidents or complaints is predicated upon a showing that the circumstances surrounding them were substantially similar to those involved in the present case[,] . . . how substantial

> the similarity must be is in part a function of the proponent's theory of proof. . . . If the accident is offered to prove notice, a lack of exact similarity of conditions will not cause exclusion provided the accident was of a kind which should have served to warn the defendant. When evidence of other accidents is used to prove notice or awareness of a dangerous condition, the rule requiring substantial similarity of those accidents to the one at issue should be relaxed. Once a court has determined that accidents are substantially similar, any differences in the circumstances surrounding those occurrences go merely to the weight to be given the evidence.

(alterations, internal quotation marks, and citations omitted).

{18} This is consistent with the general rule in other jurisdictions as well. *See, e.g., Surles ex rel. Johnson v. Greyhound Lines, Inc.*, 474 F.3d 288, 297-98 (6th Cir. 2007) ("Only prior incidents that are substantially similar to the one at issue will be admissible in evidence. This is so in large part because all evidence deemed admissible by the district court must meet the minimal standards of relevancy articulated in Federal Rules of Evidence 401 and 403 . . . if a prior occurrence is offered to prove notice, . . . a lesser degree of similarity is required provided the accident would have tended to warn the defendant." (footnote, internal quotation marks, and citations omitted)); *Borden, Inc. v. Fla. E. Coast Ry. Co.*, 772 F.2d 750, 754-55 (11th Cir. 1985) (stating that "[e]vidence of similar occurrences may be offered to show a defendant's notice of a particular defect or danger [or] the magnitude of the defect or danger involved," and recognizing that the relevance of similar occurrences "depends upon whether the conditions operating to produce the [similar occurrences] were substantially similar to the occurrence in question" (internal quotation marks and citation omitted)); *Gardner v. S. Ry. Sys.*, 675 F.2d 949, 952 (7th Cir. 1982) ("Evidence of prior accidents which occurred at that crossing under similar conditions may be admitted to show that the railroad had prior knowledge that a dangerous and hazardous condition existed. Moreover, as the Third Circuit and other circuits suggest, it is appropriate to relax the requirement of similar conditions when the offer of proof is to show notice . . . rather than [the] defendant's negligence. (footnote and citations omitted)); *Lohmann ex rel. Lohmann v. Norfolk & W. Ry. Co.*, 948 S.W.2d 659, 668 (Mo. Ct. App. 1997) (holding that "[w]hen evidence of prior accidents is presented to show notice of danger, the similarity of the circumstances surrounding the accidents does not have to be completely symmetrical"); *see Hyatt v. Metro-N. Commuter R.R.*, 792 N.Y.S.2d 391, 393 (App. Div. 2005) (holding that reports and testimony relating to prior accidents should not have been admitted where a railroad employee failed to show that the conditions of prior accidents were substantially the same as the conditions present when his accident occurred).

{19} In the present case, BNSF filed a motion in limine seeking to exclude evidence concerning other BNSF employees on the basis that such evidence was irrelevant to BNSF's negligence, and that its probative value was substantially outweighed by the danger of unfair prejudice to BNSF and confusion of the issues. Plaintiff argued that the injury reports would show that BNSF was on notice that its employees were sustaining injuries while handling handbrakes, which was relevant to the issue of adequate training. At a hearing on BNSF's motion, the parties explained that they were still conducting discovery on the issue. The district court deferred ruling on the motion until discovery was complete.

{20} After hearing arguments on the motion, the district court entered an order limiting the admissibility of the injury reports. The district court ruled that evidence of accident reports or injury information produced by BNSF would be admissible to the extent that it related to injuries sustained while applying handbrakes, the setting and releasing of handbrakes, and exertion or pressure during the use of handbrakes, within the ten years prior to Plaintiff's injury. It is unclear from the record whether the court reviewed the individual injury reports prior to issuing the order.

{21} However, the district court did review the injury reports prior to trial. Addressing preliminary matters prior to jury selection, the district court heard from the parties regarding their objections to the trial exhibits. Plaintiff's exhibits included injury reports of other BNSF employees. The reports contained the date of each incident, the physical act and event which led to the injury, a description of the injury, and a short narrative explaining how the injury occurred. BNSF acknowledged that the injury reports were being offered only to demonstrate BNSF's notice of handbrake injuries, and did not object to the reports on the basis that they were irrelevant to its negligence. Instead, BNSF objected to one report because it was a duplicate, one report based on the relevant time period, and five reports based on an alleged lack of similarity between the reported incidents and Plaintiff's. The district court individually considered each of the reports to which BNSF objected. The duplicate reports and the report outside the relevant time frame were excluded. As to BNSF's objection to the other five reports, the district court concluded that because the injuries or incidents involved overexertion or repetitive motion in the handling of handbrakes, they were substantially similar to Plaintiff's injury and the reports were admitted.

{22} BNSF argues that (1) the injury reports are irrelevant to Plaintiff's negligence claim; (2) the district court erred in admitting the reports without considering evidence of substantial similarity; (3) the reports lacked sufficient detail to establish substantial similarity; and (4) the reports were unfairly prejudicial to BNSF's defense. We disagree.

{23} BNSF's first three assertions are simply not supported by the record. First, Plaintiff offered the injury reports to show that BNSF had notice of a pattern of exertion injuries related to the operation of handbrakes, not to prove negligence, a fact that BNSF acknowledged prior to trial. Thus, whether the reports were relevant to prove negligence has never been an issue in this case. Second, the district court reviewed each injury report with the parties before jury selection and made specific rulings as to each report. And third, the reports detailed when each injury occurred, what task the employee was performing when each injury occurred, what equipment was involved in the injury, descriptions of each injury, and narratives explaining how each injury occurred. The district court correctly determined that the reports contained sufficient detail to establish substantial similarity.

{24} BNSF argues that admitting the injury reports was unfairly prejudicial because it permitted the jury to infer that BNSF knew its employees were being injured operating handbrakes. According to BNSF, the prejudice was compounded by the fact that BNSF was not permitted to question Julia Stoll, its safety manager for the Southwest Division between 2009 and 2011 about the specific nature of the injuries listed in the reports. This allowed the jury to infer that the injuries in the reports were actually caused by handbrakes.

{25} Under Rule 11-403, the district court may exclude relevant evidence if its probative

value is substantially outweighed by a danger of unfair prejudice. "Our courts have repeatedly recognized that the trial court is in the best position to evaluate the effect of trial proceedings on the jury." *Norwest Bank N.M., N.A. v. Chrysler Corp.*, 1999-NMCA-070, ¶ 39, 127 N.M. 397, 981 P.2d 1215. Accordingly, "the trial court is vested with broad discretion to determine under Rule 11-403 whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." *Norwest Bank N.M., N.A.*, 1999-NMCA-070, ¶ 39.

{26} "The purpose of Rule 11-403 is not to guard against any prejudice whatsoever, but only against the danger of *unfair* prejudice." *State v. Otto*, 2007-NMSC-012, ¶ 16, 141 N.M. 443, 157 P.3d 8 (alteration, internal quotation marks, and citation omitted). In the present case, evidence that other BNSF employees were injured operating handbrakes is relevant to whether BNSF had notice of a pattern of handbrake injuries, and the district court properly admitted the injury reports because they were substantially similar to the Plaintiff's claim. *See Surles*, 474 F.3d 288, 297 (noting that "[a] showing of substantial similarity insures that the evidence meets the . . . requirements of Rule [403]"). BNSF does not explain how Ms. Stoll's testimony would have reduced any prejudicial effect the injury reports had at trial. Nor does BNSF present any argument as to how this probative value of the injury reports was substantially outweighed by any prejudicial effect the evidence may have had. We conclude that the injury reports were not unfairly prejudicial to BNSF to the extent that they outweighed their probative value and that the district court did not abuse its discretion in admitting the reports as evidence.

CONCLUSION

{27} For the foregoing reasons, we affirm.

{28} **IT IS SO ORDERED**

M. MONICA ZAMORA, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

RODERICK T. KENNEDY, Judge

Certiorari Denied, October 13, 2015, No. 35,513

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMCA-110

Filing Date: August 13, 2015

Docket No. 33,297

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

WYATT B.,

Child-Appellant.

Hector H. Balderas, Attorney General
Santa Fe, NM
M. Victoria Wilson, Assistant Attorney General
Albuquerque, NM

for Appellee

Jorge A. Alvarado, Chief Public Defender
Tania Shahani, Assistant Appellate Defender
Santa Fe, NM

for Child-Appellant

OPINION

WECHSLER, Judge.

{1} Child, Wyatt B., appeals his adjudication for driving while under the influence of intoxicating liquor or drugs (DWI), contrary to NMSA 1978, Section 66-8-102(A), (B) (2010). DWI is a delinquent act under NMSA 1978, Section 32A-2-3(A)(1)(a) (2009). Child primarily raises violations of the Children's Code, NMSA 1978, §§ 32A-1-1 to -21 (1993, as amended through 2009), and issues of evidentiary error in connection with the district court's admission of incriminating statements Child made to police officers while subject to an investigatory detention and arrest for DWI. Under the Children's Code, police cannot question or interrogate a child suspected of having committed a delinquent act without first advising the child of his or her right to remain silent and securing the child's knowing, intelligent, and voluntary waiver of that right. Section 32A-2-14(C); *State v. Javier M.*, 2001-NMSC-030, ¶ 48, 131 N.M. 1, 33 P.3d 1. If a child's statements are elicited in violation of this requirement, Section 32A-2-14(D) prohibits the admission of the child's statements at a subsequent court proceeding.

{2} Child first argues that the district court erred in admitting his statements because the State failed to prove that Child knowingly, intelligently, and voluntarily waived his statutory right to remain silent, in violation of Section 32A-2-14(D). Child further argues that the State intentionally elicited inadmissible testimony regarding incriminating statements Child made before he was advised of his statutory right. Child contends that the inadmissible testimony similarly violated Section 32A-2-14(D), unfairly prejudiced Child, and could not be remedied by the district court's subsequent curative instruction to disregard Child's statements. Finally, Child argues that the district court erred in refusing to provide the jury with his requested instruction on duress.

{3} We hold that Child's waiver of his statutory right to remain silent was made knowingly, intelligently, and voluntarily. We also hold that the testimony pertaining to the statements Child made before he was advised of his statutory right to remain silent was inadmissible, but that the improper admission of this evidence was harmless error. We further uphold the district court's denial of Child's request for a jury instruction on duress. Accordingly, we affirm Child's conviction.

BACKGROUND

{4} Late in the evening of September 23, 2012, San Juan County Sheriff's Deputies Michael Carey and Ricky Stevens responded to a dispatch report of a suspicious vehicle parked outside a convenience store located near the western border of San Juan County, New Mexico. After arriving at the store and identifying the vehicle, Deputy Carey made contact with Child, who was in the driver's seat. Deputy Stevens approached the opposite side of the vehicle and made contact with Hensley George, who was in the passenger's seat. Deputy Carey observed signs of Child's intoxication and initiated a DWI investigation, which was video-recorded by the dashboard camera in Deputy Carey's patrol car. Before advising Child of his right to remain silent, Deputy Carey asked Child a series of questions pertaining to Child's age and identity and whether Child had been drinking. Child, who was sixteen years old at that time, made incriminating statements in response to Deputy Carey's questions. Deputy Carey then

turned over the DWI investigation to Deputy Stevens, who administered field sobriety tests and ultimately arrested Child for DWI. Child made additional incriminating statements to Deputy Stevens and was later found to have a breath alcohol concentration of 0.14 percent and 0.15 percent.

{5} Child was tried pursuant to a criminal complaint charging him with DWI and possession of drug paraphernalia. Because the jury acquitted him of possession of drug paraphernalia, only the DWI conviction is at issue in this appeal. With regard to that charge, the State's evidence at trial consisted of the testimony of Deputies Carey and Stevens, the video recording that captured Deputy Carey's investigatory detention of Child, and the results of the breath alcohol tests.

{6} On the morning of Child's trial, after selection of the jury but before opening statements, Child made an oral motion to exclude his statements to police officers. Child's counsel specifically cited Section 32A-2-14(D), which provides that before the State may introduce at trial any statements made by a child who is alleged to be delinquent, "the state shall prove that the statement or confession offered in evidence was elicited only after a knowing, intelligent, and voluntary waiver of the child's constitutional rights was obtained." Child's counsel further argued that Child had not received any notice from the State that it intended to use Child's statements or offer them as evidence at Child's trial. The State argued that, as part of the discovery process, it had provided Child's counsel with a copy of Deputy Carey's dashboard camera video and had viewed the video together with Child's counsel. The district court addressed Child's motion as a suppression motion, and the court expressed its concern that attempts to suppress statements are the types of issues that are usually raised "well in advance" of trial and that Child's motion "should never have been made during trial." The district court nonetheless decided to proceed in addressing Child's motion by questioning Deputy Carey outside the presence of the jury on matters pertaining to the factors the district court must consider to determine whether Child's waiver was valid.

{7} In response to the district court's questions, Deputy Carey testified that he advised Child of his rights under *Miranda v. Arizona*, 384 U.S. 436, 467-68 (1966), (*Miranda*) after he discovered Child was a juvenile. He also testified that Child seemed to understand his questions and was not reluctant to answer them. However, in response to Child's counsel's questions, Deputy Carey testified that he could not remember what preliminary investigative questions he asked Child before advising Child of his *Miranda* rights. He further testified that it was possible that prior to his advisement to Child, he had asked Child whether he had been drinking. Following Deputy Carey's testimony, the district court denied a request by Child's counsel to call Deputy Stevens to the witness stand. Instead, the district court announced its ruling that, based on the testimony of Deputy Carey and after consideration of the factors outlined in Section 32A-2-14(E), Child's waiver was knowing, intelligent, and voluntary.

{8} After a brief recess, Child renewed his motion to exclude his statements, arguing that the district court should excise from Deputy Carey's dashboard camera video any statements made by Child that were elicited prior to Deputy Carey's advisement. Child's counsel again cited Section 32A-2-14(D) as support for his motion. Noting first that it had not seen Deputy Carey's video and that Child had not filed a motion to exclude or excise it, the district court asked Child's counsel if he had reviewed the video to determine the portions that he believed should be excised.

Child's counsel responded that defense counsel "has had difficulty getting the video to operate properly." The court again voiced its concern over the timing of Child's request, remarking that "the attorneys should have done this prior to sitting in trial with a jury in the hallway." The court then inquired whether the prosecutor knew the content of the video recording regarding statements Child made before Child was advised of his *Miranda* rights. The prosecutor informed the court that the questions were "introductory questions" that any police officer would make during a DWI investigation, including "what are you doing" and "have you been drinking." Child's counsel argued that if police asked Child if he had been drinking, that type of question would lead to an incriminating response under the Children's Code. The court noted that it may have to strike Child's statements if their introduction at trial was improper but decided to proceed with Child's trial without watching the video. The State informed the court that it planned to play only approximately seven minutes of the video.

{9} Prior to playing Deputy Carey's video for the jury, the State asked Deputy Carey on direct examination whether he had asked Child any questions prior to turning the DWI investigation over to Deputy Stevens. Deputy Carey answered that he asked Child if he had been drinking but that he could not recall what other questions he asked Child. The State followed up with the questions, "Did [Child] give you any indication to what he'd been drinking?" and "Did [Child] give you any indication as to when the last time he had a drink was?" Deputy Carey responded to both questions that he could not recall Child's answers, and the State asked if Deputy Carey's report would refresh his recollection. Deputy Carey testified that he did not write a report but that "everything should be on [the] video."

{10} When the State moved to introduce Deputy Carey's dashboard camera video, Child objected to the admission of any statements Child made prior to being advised of his *Miranda* rights. The court stated that it would continue its ruling as previously given and permitted the State to play the video. The video revealed that after Deputy Carey learned Child's age, but before he advised Child of his right to remain silent, Deputy Carey asked Child two questions regarding how much alcohol he had to drink and when he drank it. Child gave two statements in response to Deputy Carey's questions, specifically answering that he had consumed "three cans" approximately "fifteen [to] thirty minutes ago." Deputy Carey then advised Child of his *Miranda* rights, which Child stated he understood. This portion of the video drew an objection from Child. After the video was played, the district court noted that Deputy Carey had asked Child two questions after learning Child's age but before Deputy Carey's advisement. The district court immediately instructed the jury to disregard Child's statements in response to those questions, explaining that they must not consider those statements as evidence in the case.

{11} The prosecutor then continued her direct examination of Deputy Carey, during which the following exchange occurred:

State: After reviewing that video, did you ask [Child] how much he had to drink that night?

Carey: Yes.

State: Okay. After he was *Mirandized*?

Carey: I think it was before I *Mirandized* him.

State: Okay. Did you ask him after he was *Mirandized*

how much he had been drinking?

Child's objection to that question was overruled, and the court allowed the State's questioning to continue:

State: So, after you *Mirandized* [Child], did he ever make any statements as to how much he had been drinking?

Carey: I believe so, yes.

State: Okay. And do you recall after watching the video, what did he tell you?

Carey: Just the three beers.

State: Okay. And do you recall after watching the video how long ago he stated he had been drinking?

Carey: Thirty minutes prior to us contacting him.

{12} After Deputy Carey's testimony and outside the presence of the jury, Child moved for a mistrial on the grounds that (1) Deputy Carey asked Child questions that elicited incriminating statements "without first advising [Child] of [his] constitutional rights and securing a knowing, intelligent, and voluntary waiver" as required by Section 32A-2-14(C); and (2) the State introduced the evidence of Child's statements at trial in violation of Section 32A-2-14(D). The district court denied Child's motion and stated it would issue a curative instruction to the jury if Child requested it.

{13} Before reconvening the jury and proceeding with the trial, the court offered to hear testimony from Deputy Stevens for the purpose of revisiting the issue of whether Child's waiver was knowing, intelligent, and voluntary. After hearing Deputy Stevens' testimony, the district court stood by its previous ruling that Child's waiver was valid.

{14} Prior to closing statements, the district court reminded the jury that it had instructed the jury to disregard a statement by Child on Deputy Carey's video recording. The court then read a curative instruction regarding that issue, stating that the jury must "disregard any and all statements made by [Child] to the police after the officers learned his age, but prior . . . to them *Mirandizing* him or reading him the juvenile constitutional rights. These statements are not to be considered by you for any purpose." The jury convicted Child of DWI, but it acquitted him of possession of drug paraphernalia. Child raises three issues on appeal that we address in turn.

CHILD'S WAIVER OF HIS STATUTORY RIGHT TO REMAIN SILENT

{15} Child first challenges the admissibility of inculpatory statements that he made after he was advised of his right to remain silent. Child argues that the district court's admission of this evidence violated Section 32A-2-14(D) because the State failed to demonstrate that Child knowingly, intelligently, and voluntarily waived his right. Child primarily claims that his impaired physical and mental condition, caused by his intoxication, inhibited his ability to validly waive his right. He also advances several other grounds in support of his argument, namely that (1) he was detained by police officers and not free to leave; (2) Deputy Carey hurried through his advisement to Child and did not slow down to confirm that Child understood his right; (3) Deputy Carey asked Child questions that he knew were likely to elicit incriminating responses; (4) Deputy Carey refused Child's request to call his parents; and

(5) the district court's determination that Child validly waived his right was based, in part, on the court's mistaken belief that Child lied about his age to Deputy Carey.

Standard of Review

{16} Illegally obtained evidence is subject to a suppression motion to exclude the evidence from trial. *Cf. City of Santa Fe v. Marquez*, 2012-NMSC-031, ¶ 27, 285 P.3d 637 ("A motion to suppress presupposes that the evidence was illegally obtained." (emphasis, alteration, quotation marks, and citation omitted)); *see, e.g.*, *State v. Antonio T.*, 2015-NMSC-019, ¶ 31, ___ P.3d ___ (holding that the child's motion to suppress his incriminating statements should have been granted because the statements were obtained in violation of Section 32A-2-14(C) and the state failed to prove the child's waiver was valid pursuant to Section 32A-2-14(D)). An appeal of a district court's denial of a motion to suppress inculpatory statements involves mixed questions of fact and law. *State v. Gerald B.*, 2006-NMCA-022, ¶ 13, 139 N.M. 113, 129 P.3d 149. As an appellate court, we do not intrude on the district court's role as the trier of fact. *State v. Urioste*, 2002-NMSC-023, ¶ 6, 132 N.M. 592, 52 P.3d 964. "We view the facts in the manner most favorable to the prevailing party and defer to the district court's findings of fact if substantial evidence exists to support those findings." *Id.* "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Jean-Paul*, 2013-NMCA-032, ¶ 4, 295 P.3d 1072 (internal quotation marks and citation omitted). The district court's application of the law to the facts is a question of law that we review de novo. *State v. Randy J.*, 2011-NMCA-105, ¶ 10, 150 N.M. 683, 265 P.3d 734.

Protections Under the Children's Code

{17} The Fifth Amendment to the United States Constitution "serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." *Miranda*, 384 U.S. at 467. In New Mexico, children who are subject to police questioning are statutorily entitled to greater rights under Section 32A-2-14 than those guaranteed by *Miranda*. *See Javier M.*, 2001-NMSC-030, ¶ 1 (concluding that Section 32A-2-14 demonstrates the Legislature's intent to afford broader rights to children than those provided in *Miranda* jurisprudence). Section 32A-2-14(C) prohibits police questioning of a child suspected of a delinquent act "without first advising the child of the child's constitutional rights and securing a knowing, intelligent and voluntary waiver." More significantly, before the State may introduce any statements made by a child at trial, the State "shall prove that the statement or confession offered in evidence was elicited only after a knowing, intelligent and voluntary waiver of the child's constitutional rights was obtained." Section 32A-2-14(D).

{18} Our Supreme Court held in *Javier M.* that "a child need not be under custodial interrogation" by police for the statute's protections to apply. 2001-NMSC-030, ¶ 1. "Custodial interrogation occurs when an individual is swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion so that the individual feels under compulsion to speak." *Id.* ¶ 15 (alterations, internal quotation marks, and citation omitted). Rather, our Supreme Court concluded that the protections of Section 32A-2-14 also extend to a child who is "seized pursuant to an investigatory detention and not free to leave." *Javier M.*, 2001-NMSC-030, ¶ 38. "[W]hen an officer approaches a child to

ask the child questions because the officer 'suspects' the child of delinquent behavior, the officer is performing an investigatory detention." *Id.* ¶ 37. The Court held that the statute's use of the term "constitutional rights" is not a reference to the "required warnings enumerated in *Miranda*." *Id.* ¶ 41. Instead, the Court held that Section 32A-2-14 requires that the child who is subject to an investigatory detention "be advised of his or her right to remain silent and that if the child waives that right, anything said can be used against [the child]." *Javier M.*, 2001-NMSC-030, ¶ 48.

{19} Although Section 32A-2-14 institutes these heightened statutory protections for children, the applicable test for reviewing whether a child waived his or her statutory right is the same as that of an adult. *State v. Lasner*, 2000-NMSC-038, ¶ 6, 129 N.M. 806, 14 P.3d 1282. We examine the totality of the circumstances to determine whether the State has carried its "burden of demonstrating by a preponderance of the evidence that the defendant knowingly, intelligently, and voluntarily waived the constitutional right against self-incrimination." *State v. Martinez*, 1999-NMSC-018, ¶ 14, 127 N.M. 207, 979 P.2d 718. With respect to children over the age of fourteen, Section 32A-2-14(E) codifies the totality of the circumstances test and requires that courts consider "some of the circumstances that may be particularly relevant for a juvenile" when determining whether a child's statements are admissible. *Martinez*, 1999-NMSC-018, ¶ 18. That section provides:

> In determining whether the child knowingly, intelligently and voluntarily waived the child's rights, the court shall consider the following factors:
>
> (1) the age and education of the respondent;
>
> (2) whether the respondent is in custody;
>
> (3) the manner in which the respondent was advised of the respondent's rights;
>
> (4) the length of questioning and circumstances under which the respondent was questioned;
>
> (5) the condition of the quarters where the respondent was being kept at the time of being questioned;
>
> (6) the time of day and the treatment of the respondent at the time of being questioned;
>
> (7) the mental and physical condition of the respondent at the time of being questioned; and
>
> (8) whether the respondent had the counsel of an attorney, friends or relatives at the time of being questioned.

Section 32A-2-14(E).

{20} Child was approached and questioned by Deputy Carey because he suspected Child of DWI, a delinquent act under the Children's Code. Accordingly, Child was subject to an investigatory detention that triggered the statutory protections of Section 32A-2-14. We therefore analyze the totality of the circumstances surrounding Child's questioning to evaluate whether Child knowingly, intelligently, and voluntarily waived his statutory right to remain silent. "In determining a knowing and intelligent waiver of rights, we ascertain whether [Child] was fully aware of the nature of the right he was waiving and the consequences of abandoning the right." *Martinez*, 1999-NMSC-018, ¶ 21.

Validity of Child's Waiver

{21} Applying the factors enumerated in Section 32A-2-14(E) as part of the totality of circumstances analysis, we conclude that Child knowingly, intelligently, and voluntarily waived his statutory right to remain silent. Child was sixteen years old at the time of questioning. Although the trial record does not indicate Child's educational level, our Supreme Court has held that "a child over age fifteen is unlikely to make an involuntary statement . . . after receiving *Miranda* warnings." *State v. Jonathan M.*, 1990-NMSC-046, ¶ 8, 109 N.M. 789, 791 P.2d 64. Child does not dispute that he was subject to an investigatory detention, but Child suggests that his waiver was invalid because Deputy Carey testified Child was not free to leave during questioning. We do not believe this restriction indicates Child's waiver was invalid but only indicates that the statutory protections of Section 32A-2-14 apply to Child's situation. *See Javier M.*, 2001-NMSC-030, ¶ 38 ("[T]he protections of [Section 32A-2-14] are triggered . . . when a child is seized pursuant to an investigatory detention and not free to leave."). Officers conducted the DWI investigation in the public parking lot of a convenience store in plain view of store employees, traffic, and other members of the public entering and exiting the store. Further, the length of time between Child's initial contact with police and his arrest for DWI lasted only approximately twelve minutes. Even though the time of day was approximately 11:00 p.m., Deputy Stevens testified that the parking lot was well-lit by the store's lights and the lights of the police patrol cars. In addition, Deputy Carey testified that his demeanor toward Child was professional and courteous and that there was no indication that Child felt in fear of the interaction. Deputy Carey informed Child of his right to remain silent, that anything Child said could be used against him, and that Child could exercise his right to not make any statements or answer any questions. Deputy Carey asked Child if he understood the advisement, and Child answered that he did. Child argues that Deputy Carey "ran through" the advisement, failed to slow down to confirm whether Child understood his rights, and asked Child questions that he knew were likely to elicit incriminating responses. Child does not fully develop these arguments or cite any authority on these points. *See State v. Flores*, 2015-NMCA-002, ¶ 17, 340 P.3d 622 ("[This] 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."), *cert. granted*, 2014-NMCERT-012, 344 P.3d 988. However, to the extent Child suggests that he was "tricked[] or cajoled into a waiver[,]" evidence in the trial record fails to support such a claim. *Miranda*, 384 U.S. at 476.

{22} We are also not persuaded by Child's argument that his intoxication level during the time of questioning impaired his ability to validly waive his statutory right. Child points to this Court's prior holding that evidence of extreme intoxication is inconsistent with a knowing, intelligent, and voluntary waiver of rights. *See State v. Bramlett*, 1980-NMCA-042, ¶¶ 22-23, 94 N.M. 263, 609 P.2d 345 (holding that the defendant's statements were inadmissible because evidence of the defendant's extreme intoxication was not consistent with a valid waiver of *Miranda* rights), *overruled on other grounds by Armijo v. State ex rel. Transp. Dep't*, 1987-NMCA-052, ¶ 8, 105 N.M. 771, 737 P.2d 552; *see also State v. Young*, 1994-NMCA-061, ¶ 14, 117 N.M. 688, 875 P.2d 1119 (holding that the trial court must consider evidence of intoxication when the defendant's extreme intoxication was not consistent with a valid waiver of *Miranda* rights). In support of his argument, Child first cites testimony from Deputy Carey that Child had difficulty opening the door of his vehicle. Child also

relies on testimony from Deputy Stevens that Child spoke in incomplete sentences due to his intoxication, stated that he was "pretty buzzed," and performed poorly on the field sobriety tests. In addition, Child claims that the results of his breath alcohol concentrations of 0.14 and 0.15 exhibited an intoxication level that detrimentally impacted his ability to validly waive his right to remain silent.

{23} We agree that the evidence of Child's intoxication demonstrates he could not drive safely, and we are mindful that "voluntary intoxication is relevant to determining whether a waiver was knowing and intelligent." *Young*, 1994-NMCA-061, ¶ 14. However, we disagree that the evidence in this case compels a determination that Child was extremely intoxicated and lacked the capability to understand and waive his statutory right. In *Bramlett*, the defendant's breath alcohol concentration level was 0.23, he had difficulty walking, and police officers prolonged their detention of the defendant "for his own protection" because he was "too intoxicated to be released[.]" 1980-NMCA-042, ¶¶ 20-21 (internal quotation marks omitted). Similarly, in *Young*, the defendant's blood alcohol level was nearly four times the level necessary to establish impairment for purposes of DWI. 1994-NMCA-061, ¶ 14. Evidence of Child's intoxication stands in stark contrast to the evidence of extreme intoxication present in *Bramlett* and *Young*. When asked about Child's level of intoxication, Deputy Carey described Child as having "a little bit of slurred speech" and blood shot and watery eyes, but he testified that Child seemed to understand his questions and was not disheveled, out of control, or mentally unbalanced. Child was unable to successfully complete the field sobriety tests, but no evidence in the trial record supports a conclusion that Child was unable to walk or could not care for his own safety. Moreover, Child's breath alcohol concentration level was markedly below the levels of the defendants in *Bramlett* and *Young*. We believe that this evidence is consistent with a determination that Child knowingly, intelligently, and voluntarily waived his right to remain silent.

{24} Deputy Carey denied Child's request to allow him to call his parents while he was being questioned, and Child further argues that Deputy Carey's denial runs contrary to Section 32A-2-14(E)(8) and weighs against the district court's finding of a valid waiver. Specifically, Child claims that the Legislature included Section 32A-2-14(E)(8) for the specific purpose of protecting children from pressures intrinsic to the interrogation atmosphere. Even though we consider this factor in reviewing the totality of the circumstances, Child misconstrues our well-established application of the test. The statutory factors set forth in Section 32A-2-14(E) "emphasiz[e] some of the circumstances that may be particularly relevant for a juvenile," but "presence or absence of an attorney, friend, or relative at the questioning . . . is merely one of the factors relevant in determining the validity of a waiver of rights[.]" *Martinez*, 1999-NMSC-018, ¶¶ 18, 20. We are not convinced that the inability of Child to have his parents present during his investigatory detention overcomes other factors that suggest Child's waiver was knowing, intelligent, and voluntary.

{25} Finally, Child argues that the district court based its ruling of a valid waiver on the court's incorrect belief that Child lied about his age at the time of questioning. After viewing Deputy Carey's video, the district court, in its second ruling on the validity of Child's waiver, stated that Child "fabricated his age" by initially telling Deputy Carey he was fifteen rather than sixteen during questioning. Child contends that the trial record fails to support the district court's finding because the court mistakenly equated Child's ability to lie with his ability to waive his right to remain silent. However, the court

did not ground its determination on the validity of Child's waiver solely in its conclusion that Child was deceptive about his age. Regardless of the district court's finding regarding Child's deception, the trial record nonetheless adequately establishes that Child understood his statutory right and the consequences of waiving that right. We are therefore convinced by the totality of the circumstances that Child's waiver was knowing, intelligent, and voluntary and that the district court properly denied Child's suppression motion.

ADMISSION OF DEPUTY CAREY'S TESTIMONY

{26} Child next argues that Deputy Carey's testimony that Child stated he drank "three beers . . . thirty minutes prior to [police] contacting him" was inadmissible under Section 32A-2-14(D) and prejudiced Child. Child contends that the State intentionally elicited the improper testimony only moments after the district court viewed Deputy Carey's video and admonished the jury to disregard the statements Child made after Deputy Carey learned Child's age but before Child was advised of his right to remain silent. Child argues that the error could not be remedied by the district court's subsequent curative instruction given at the end of Child's trial to disregard Child's statements.

{27} According to Child, the State's improper motive in eliciting Deputy Carey's inadmissible testimony requires our departure from the general rule that "a prompt admonition from the court to the jury to disregard and not consider inadmissible evidence sufficiently cures any prejudicial effect which might otherwise result." *State v. Newman*, 1989-NMCA-086, ¶ 19, 109 N.M. 263, 784 P.2d 1006. It is true that our courts apply a different analysis to cases in which the prosecution intentionally elicits inadmissible evidence. *State v. Armijo*, 2014-NMCA-013, ¶ 9, 316 P.3d 902. In those types of cases, "regardless of whether a [district] court admonishes the jury not to consider the testimony, [we] must determine whether there is a reasonable probability that the improperly admitted evidence could have induced the jury's verdict." *Id.* (internal quotation marks and citation omitted). The trial record in this case, however, fails to support Child's assertion that the district court issued a curative instruction related to Deputy Carey's testimony regarding Child's statements. The district court, at the close of Child's trial, instead issued a curative instruction related to Child's statements as recorded by Deputy Carey's video. On appeal, Child does not raise an issue of evidentiary error with regard to the district court's admission of the video. Therefore, in the absence of a curative instruction or prompt admonition from the district court to cure any error caused by Deputy Carey's testimony, the question of whether the State intentionally elicited the testimony is not relevant for purposes of our analysis. Rather, we must determine whether Deputy Carey's testimony was inadmissible and, if so, whether the inadmissible testimony was prejudicial or harmless to Child. *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.").

{28} Child is correct that Deputy Carey's testimony that highlighted statements Child made prior to being advised of his statutory right to remain silent was inadmissible. After the jury viewed Deputy Carey's video, the district court promptly excluded Child's statements that he drank three beers approximately fifteen to thirty minutes prior to his encounter with police officers. Over Child's objection, the district court then allowed the prosecutor to elicit testimony from Deputy Carey regarding those same statements, specifically that Child stated he had consumed "three beers . . . thirty minutes

prior to [police] contacting him." Child's statements were elicited before he was advised of his statutory right to remain silent, and the improper admission of this testimony violated Section 32A-2-14(D). Therefore, we turn to whether Deputy Carey's inadmissible testimony was prejudicial or harmless to Child.

{29} For purposes of harmless error review, we apply a non-constitutional harmless error analysis when the error implicates a violation of statutory law. "[A] non-constitutional error is harmless when there is no reasonable probability the error affected the verdict." *Tollardo*, 2012-NMSC-008, ¶ 36 (emphasis, internal quotation marks, and citation omitted). We conduct our harmless error analysis on a case-by-case basis and "evaluate all of the circumstances surrounding the error." *Id.* ¶¶ 43-44. These circumstances necessarily encompass "an examination of the error itself, which depending upon the facts of the particular case could include an examination of the source of the error and the emphasis placed upon the error." *Id.* ¶ 43. We may also consider properly admitted evidence of a defendant's guilt "since it will provide context for understanding how the error arose and what role it may have played in the trial proceedings[.]" *Id.* The circumstances of a particular case will also dictate our examination of the error in the context of "the importance of the erroneously admitted evidence in the prosecution's case, as well as whether the error was cumulative or instead introduced new facts." *Id.* (alterations, internal quotation marks, and citation omitted).

{30} Child concedes on appeal that the evidence at his trial was generally sufficient to support his conviction for DWI. However, our inquiry for purposes of harmless error review "is not to determine whether the evidence was sufficient to support a conviction." *Armijo*, 2014-NMCA-013, ¶ 16. We instead determine whether there is a reasonable probability that Deputy Carey's inadmissible testimony affected the jury's verdict. *See Tollardo*, 2012-NMSC-008, ¶ 57 ("In the final analysis, determining whether an error was harmless requires reviewing the error itself and its role in the trial proceedings, and in light of those facts, making an educated inference about how that error was received by the jury."). The jury was instructed at trial that to return a guilty verdict it must find that Child "operated a motor vehicle" and "[w]ithin three (3) hours of driving, [Child] had an alcohol concentration of eight one-hundredths (.08) grams or more[.]" UJI 14-4503 NMRA. The State's properly admitted evidence pertaining to these findings consisted of Child's breath alcohol test results and the deputies' testimony regarding signs of Child's intoxication, his performance on the field sobriety tests, and incriminating statements Child made after he waived his right to remain silent.

{31} Deputy Carey testified that, upon approaching Child's vehicle, he detected the odor of alcohol and Child appeared to be intoxicated. Deputy Stevens also testified that he smelled alcohol on Child's breath as he spoke, that Child's eyes were bloodshot and watery, and that Child slurred his speech. Child also performed poorly on the field sobriety tests, particularly with regard to the tests that gauge physical balance, and Deputy Stevens testified that Child's performance was the result of his intoxication. Further, Child told Deputy Stevens that he was "pretty buzzed," that George had given him alcohol and forced Child to drive, and that Child and George drove to the convenience store "to do a beer run." Finally, the results of Child's breath alcohol tests established Child's alcohol concentration level of 0.14 and 0.15, which exceeds the limit of .08 specified in Section 66-8-102 and the jury instruction. In light of this evidence, there is no reasonable probability that the admission of Deputy Carey's testimony regarding the statements

Child made prior to being advised of his right to remain silent affected the verdict. Accordingly, the district court's error in admitting Deputy Carey's inadmissible testimony regarding statements Child made before he was advised of his statutory right to remain silent was harmless.

{32} We make one final observation in connection with the course of the proceedings below. In evaluating all the circumstances surrounding the error, we note that the genesis of the error was the district court's admission of Deputy Carey's dashboard camera video without previously determining whether Child made inadmissible statements. With regard to the video, the trial record reflects the district court's frustration with the timing of Child's suppression motion as well as the inability of both Child and the State to pinpoint any statements that should be suppressed. Although the error before us in this appeal was ultimately harmless, the situation underscores the importance of both (1) the requirement that defense counsel make timely pretrial suppression motions; and (2) the State's duty to ensure compliance with Section 32A-2-14(D) before introducing evidence at trial that is inadmissible under the Children's Code.

REQUEST FOR JURY INSTRUCTION ON DURESS

{33} Lastly, Child argues that the district court erred in refusing to provide the jury with his requested instruction on duress, UJI 14-5130 NMRA. Child's proffered instruction was based on the theory that Child drove to the store under threat of harm from George, who testified that he "forced" Child to drive him. Child reiterates this same line of reasoning on appeal, contending that George's testimony constituted sufficient evidence that warranted the instruction. "The propriety of jury instructions given or denied is a mixed question of law and fact" that we review de novo. *State v. Lucero*, 2010-NMSC-011, ¶ 11, 147 N.M. 747, 228 P.3d 1167 (internal quotation marks and citation omitted). "When considering a defendant's requested instructions, we view the evidence in the light most favorable to the giving of the requested instruction." *State v. Romero*, 2005-NMCA-060, ¶ 8, 137 N.M. 456, 112 P.3d 1113. The district court's refusal of a defendant's requested jury instruction that is supported by the evidence at trial is reversible error. *State v. Brown*, 1996-NMSC-073, ¶ 34, 122 N.M. 724, 931 P.2d 69.

{34} Duress is a valid defense that is available to defendants in DWI cases. *State v. Rios*, 1999-NMCA-069, ¶¶ 1, 28, 127 N.M. 334, 980 P.2d 1068. Defendants who raise the defense of duress are "*not* attempting to disprove a requisite mental state" but "are instead attempting to show that they ought to be excused from criminal liability because of the circumstances surrounding their intentional act." *Id.* ¶ 12. The duress defense excuses or justifies a defendant's conduct based on the principle that the defendant committed the crime "in order to avoid a harm of greater magnitude." *State v. Gurule*, 2011-NMCA-042, ¶ 19, 149 N.M. 599, 252 P.3d 823 (alteration, internal quotation marks, and citation omitted). When applying the duress defense to the strict liability crime of DWI, our courts have adopted a "narrowed articulation" of the defense "so as not to vitiate the protectionary purpose of the strict liability statute." *Rios*, 1999-NMCA-069, ¶¶ 16-17 (alteration, internal quotation marks, and citation omitted). Consequently, to be entitled to a jury instruction on the defense of duress, a defendant must present sufficient evidence that "(1) [he or she] acted under unlawful and imminent threat of death or serious bodily injury, (2) he [or she] did not find himself [or herself] in a position that compelled him [or her] to violate the law due to his [or her] own recklessness, (3) he [or she] had no reasonable legal alternative, and (4) his [or her] illegal conduct was directly

caused by the threat of harm." *Id.* ¶ 25 "The keystone of the analysis is that the defendant must have no alternative—either before or during the event—to avoid violating the law." *Rios*, 1999-NMCA-069, ¶ 17 (alteration, internal quotation marks, and citation omitted).

{35} In this case, the district court denied Defendant's request for the instruction on the ground that Child did not present evidence that would support that he "feared immediate great bodily harm."[1] Although the district court used the terms of the uniform jury instruction rather than the four-factor test articulated in *Rios*, its determination clearly correlates with the first factor, and it ultimately reached the correct result. George testified that he "forced" Child to drive him to the store that night to buy more alcohol. He further testified that he raised his voice and told Child to "hurry" before Child's parents returned home. George admitted that he "pressured" Child, but he also testified that he never made physical contact with Child or threatened Child with physical force or a weapon. We are not persuaded that this testimony supports Child's argument that Child acted under unlawful and imminent threat of death or serious bodily injury.

{36} Child does not provide any other arguments, record citations, or legal authority in his brief in chief that address the remaining factors necessary to make a prima facie showing that he was entitled to a jury instruction on the defense of duress. *See Rios*, 1999-NMCA-069, ¶ 22 ("Defendant [is] required to present evidence regarding each element of the prima facie case [for a duress instruction]."); *see also Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076 (declining to review undeveloped arguments with no citations to the record or legal authority). Accordingly, we hold the district court properly denied Child's request for a jury instruction on duress.

CONCLUSION

{37} For the foregoing reasons, we affirm Child's conviction for DWI.

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

JAMES J. WECHSLER, Judge

WE CONCUR:

CYNTHIA A. FRY, Judge

LINDA M. VANZI, Judge

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMSC-033

Filing Date: October 15, 2015

Docket No. S-1-SC-34995

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

v.

DeANGELO M.,

Child-Respondent.

[1]The uniform jury instruction for the defense of duress provides that "[i]f the defendant feared immediate great bodily harm to himself or another person if he did not commit the crime and if a reasonable person would have acted in the same way under the circumstances, [the jury] must find the defendant not guilty." UJI 14-5130.

Hector H. Balderas, Attorney General
Kenneth H. Stalter, Assistant Attorney General
Santa Fe, NM

for Petitioner

Robert E. Tangora, L.L.C.
Robert E. Tangora
Santa Fe, NM

for Respondent

OPINION

CHÁVEZ, Justice.

{1} DeAngelo M. (Child) was thirteen years and eight days old when during a custodial interrogation by three law enforcement officers, he made inculpatory statements regarding a burglary, which connected Child to a murder. Had Child made his statements nine days earlier, his statements would not have been admissible against him in any delinquency proceedings. NMSA 1978, § 32A-2-14(F) (2009). Had Child been fifteen years old at the time of his statement, his statement would be admissible if the prosecution proved by a preponderance of the evidence that Child's statement was elicited after his knowing, intelligent and voluntary waiver of his constitutional and statutory rights. Section 32A-2-14(D), (E); *State v. Martinez*, 1999-NMSC-018, ¶ 14, 127 N.M. 207, 979 P.2d 718. However, because Child was thirteen years old and his statement was given to a person in a position of authority, there is a rebuttable presumption that his statement is inadmissable in any delinquency proceedings. Section 32A-2-14(F).

{2} How does the prosecution rebut this presumption? The Court of Appeals held that the prosecution must prove by clear and convincing evidence, through expert testimony, that "Child had the maturity and intelligence of an average fifteen-year-old child to understand his situation and the rights he possessed." *State v. DeAngelo M.*, 2015-NMCA-019, ¶¶ 21, 23-24, 344 P.3d 1019. The Court of Appeals reversed the district court's denial of the motion to suppress because the prosecution did not meet this burden and remanded for a new trial. *See id.* ¶¶ 23, 24. We granted the State's petition for certiorari, *State v. DeAngelo M.*, 2015-NMCERT-002, to consider the following issues: (1) whether the Court of Appeals erred by holding that the State can only rebut the presumption of inadmissibility by showing that the thirteen- or fourteen-year-old child has the intellectual capacity of an average fifteen-year-old; (2) whether the Court of Appeals erred by holding that the State must rebut the presumption of inadmissibility by clear and convincing evidence rather than by a preponderance of the evidence; and (3) whether the Court of Appeals erred by holding that the State can only rebut the presumption of inadmissibility through expert testimony.

{3} We hold that Section 32A-2-14(F) requires the State to prove by clear and convincing evidence that at the time a thirteen- or fourteen-year-old child makes a statement, confession, or admission to a person in a position of authority, the child (1) was warned of his constitutional and statutory rights, and (2) knowingly, intelligently, and voluntarily waived each right. To prove the second element, the recording of the custodial interrogation which resulted in the statement, confession, or admission must prove clearly and convincingly that the child's answer to open-ended questions demonstrated that the thirteen- or fourteen-year-old child has the maturity to understand each of his or her constitutional and statutory rights and the force of will to insist on exercising those rights. Expert testimony may assist the fact-finder in understanding the evidence or

determining the facts necessary to satisfy this requirement, but it is not essential. We conclude that the evidence in this case does not prove that Child knowingly, intelligently, and voluntarily waived each right. Therefore, his statement should be suppressed.

I. Section 32A-2-14(F) requires the State to rebut the presumption of inadmissibility by clear and convincing evidence

{4} The Fifth Amendment to the United States Constitution provides individuals a constitutional right against self-incrimination by providing that an individual shall not "be compelled in any criminal case to be a witness against himself [or herself]." U.S. Const. amend. V. In *Miranda v. Arizona*, the United States Supreme Court articulated warnings that law enforcement must give to a suspect before the suspect can be subjected to a custodial interrogation without compromising his or her privilege against self-incrimination. 384 U.S. 436, 479 (1966). The Court explained that:

> Prior to any questioning, the person must be warned that he [or she] has a right to remain silent, that any statement he [or she] does make may be used as evidence against him [or her], and that he [or she] has a right to the presence of an attorney, either retained or appointed.

Id. at 444. "After such warnings have been given, and such opportunity afforded him [or her], the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement." *Id.* at 479. "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he [or she] wishes to remain silent, the interrogation must cease." *Id.* at 473-74.

{5} "[W]hile the federal constitution provides a minimum level of protection below which the states may not descend, states remain free to provide greater protection." *State v. Javier M.*, 2001-NMSC-030, ¶ 24, 131 N.M. 1, 33 P.3d 1 (alteration in original) (internal quotation marks and citation omitted). "Hence, it is completely within the Legislature's authority to provide greater statutory protection than accorded under the federal Constitution." *Id.* The New Mexico Legislature did just that by its enactment of the Delinquency Act, NMSA 1978, §§ 32A-2-1 to -33(1993, as amended through 2009).

{6} The Delinquency Act provides children with "greater protections than those constitutionally afforded [to] adults with regard to the admissibility of a child's statements or confessions." *State v. Adam J.*, 2003-NMCA-080, ¶ 3, 133 N.M. 815, 70 P.3d 805 (citing § 32A-2-14(C)-(G)). Relevant to our inquiry in this case, Section 32A-2-14(F) provides:

> Notwithstanding any other provision to the contrary, no confessions, statements or admissions may be introduced against a child under the age of thirteen years on the allegations of the petition. There is a rebuttable presumption that any confessions, statements or admissions made by a child thirteen or fourteen years old to a person in a position of authority are inadmissible.

{7} What is not clear from the text is how the prosecution is expected to rebut the presumption. What is the prosecution's burden of proof? What evidence will overcome the presumption? This case requires us to construe Section 32A-2-14(F). "Statutory interpretation is a question of law, which we review de novo." *State ex rel. Children, Youth & Families*

Dep't v. Djamila B. (*In re Mahdjid B.*), 2015-NMSC-003, ¶ 12, 342 P.3d 698, 702 (internal quotation marks and citation omitted). "We look first to the plain language of the statute." *N.M. Indus. Energy Consumers v. N.M. Pub. Regulation Comm'n*, 2007-NMSC-053, ¶ 20, 142 N.M. 533, 168 P.3d 105. "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." *Djamila B.*, 2015-NMSC-003, ¶ 25 (internal quotation marks and citation omitted). "In doing so, we 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." *State v. Office of the Pub. Def. ex rel. Muqqddin*, 2012-NMSC-029, ¶ 13, 285 P.3d 622 (internal quotation marks and citation omitted).

{8} One of the express purposes of the Delinquency Act is "to remove from children committing delinquent acts the adult consequences of criminal behavior, but to still hold children committing delinquent acts accountable for their actions to the extent of the child's age, education, mental and physical condition, background and all other relevant factors." Section 32A-2-2(A). This express purpose is consistent with the overarching legislative goals of the Children's Code, NMSA 1978, §§ 32A-1-1 to -24-5 (1993, as amended through 2009), which ensures that children's constitutional and statutory rights are recognized and enforced:

> The Children's Code shall be interpreted and construed to effectuate the following legislative purposes:
>
> A. first to provide for the care, protection and wholesome mental and physical development of children coming within the provisions of the Children's Code . . . ; [and]
>
> B. to provide judicial and other procedures through which the provisions of the Children's Code are executed and enforced and in which the parties are assured a fair hearing and their constitutional and other legal rights are recognized and enforced . . . .

Section 32A-1-3(A)-(B).

{9} Prior to 1993 no confession, statements or admissions made by a child under the age of fifteen could be introduced against the child. NMSA 1978, § 32-1-27(F) (1992). The legislative rationale for categorically excluding such statements was because

> [c]hildren of tender years lack the maturity to understand constitutional rights and the force of will to assert those constitutional rights. Children are encouraged to respect and obey adults and should not be expected to assert their constitutional rights even under the most perfunctory questioning by any adult, particularly an adult of authority. By prohibiting the admission of statements made by children under age fifteen, Section 32-1-27(F) encourages children to freely converse with adults without fear that their statements will be used against them at a later date. In contrast, an adult or a child over age fifteen is unlikely to make an involuntary statement in a noncustodial, noncoercive atmosphere or after receiving *Miranda* warnings. The additional protection that Section 32-1-27(F) grants children under age fifteen

helps to balance these differences in sophistication.

State v. Jonathan M., 1990-NMSC-046, ¶ 8, 109 N.M. 789, 791 P.2d 64.

{10} However, in 1993 the Legislature revised the Children's Code, and along with it replaced Section 32-1-27 with Section 32A-2-14(F). Rather than excluding from evidence all statements made by children under fifteen, the Legislature decided to exclude from evidence only statements made by children younger than thirteen years old. *See* § 32A-2-14(F). The Legislature chose to treat thirteen- and fourteen-year-old children differently than children older than fourteen or younger than thirteen. *See* NMSA 1978, § 32A-2-14(F) (1993); *State v. Jade G.*, 2007-NMSC-010, ¶ 16, 141 N.M. 284, 154 P.3d 659 ("The fact that the Legislature drew a distinction between children [of different ages] demonstrates its clear intent to treat the . . . groups differently, and the plain language of this statute explains the nature of that difference.").

{11} By categorizing children into different age groups, the Legislature distinguished between the different age groups' intellectual and developmental capacities to knowingly, intelligently, and voluntarily waive their *Miranda* and statutory rights. *See Adam J.*, 2003-NMCA-080, ¶ 20 (Alarid, J., specially concurring). For example, although Section 32A-2-14 provides greater protections for all children than does *Miranda*, the Legislature treats children fifteen and older as having the intellectual and developmental capacity of adults to waive their constitutional and statutory rights. *See Jonathan M.*, 1990-NMSC-046, ¶ 8 (explaining that like adults, children over fifteen are unlikely to make involuntary statements after *Miranda* warnings due to their higher level of sophistication).

{12} On the opposite end of the age groups are children younger than thirteen. Unlike children fifteen and older, the Legislature precludes the introduction of confessions, statements, or admissions against a child under the age of thirteen on the allegations of a delinquency petition, regardless of the context in which or to whom the statements were made. Section 32A-2-14(F); *see Jade G.*, 2007-NMSC-010, ¶ 16. The Legislature has made the policy decision that children younger than thirteen lack the maturity to understand their constitutional and statutory rights and the force of will to assert those rights. Accordingly, Section 32A-2-14(F) provides no exceptions permitting "the admission of statements made by children under thirteen." *Jade G.*, 2007-NMSC-010, ¶ 16.

{13} By creating fundamentally distinct protections for children fifteen and older and for children younger than thirteen, the Legislature intended to " 'draw [a] line between children who are too young to waive their rights and those who are not.' " *Adam J.*, 2003-NMCA-080, ¶ 8 (citations omitted). The Legislature chose not to treat thirteen- and fourteen-year-old children categorically as belonging at one end or the other of this childhood developmental spectrum. Some may lack the maturity to understand their constitutional and statutory rights and the force of will to assert those rights, and some may not.

{14} To address this uncertainty, under Section 32A-2-14(F) any statement, admission, or confession of a child thirteen or fourteen years old is presumed to be inadmissible unless the State rebuts the presumption. The State's burden of proof is not defined in the statute; therefore, it is our responsibility to make that determination. *State v. Valdez* (*In re Valdez*), 1975-NMSC-050, ¶ 12, 88 N.M. 338, 540 P.2d 818 (citing *Woodby v. Immigration Serv.*, 385 U.S. 276, 284 (1966)). The State argues

that it should only have to prove "by a preponderance of the evidence, that [Child] was advised of [his] rights and knowingly, intelligently, and voluntarily waived those rights." The State maintains that it can rebut the presumption of inadmissibility when "the district court determines that the child made a knowing, intelligent, and voluntary waiver of rights" by utilizing the totality of circumstances factors listed under Section 32A-2-14(E). If we were to agree with the State's argument, we would in essence be treating thirteen- and fourteen-year-old children the same as fifteen-year-old children. We conclude that the Legislature did not intend this result. The purpose of a burden of proof is to " 'instruct the factfinder concerning the degree of confidence our society thinks he [or she] should have in the correctness of factual conclusions for a particular type of adjudication.' " *Addington v. Texas*, 441 U.S. 418, 423 (1979) (quoting *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)). The legislative history of Section 32A-2-14(F) and the importance of protecting children younger than fifteen years of age from unknowing or involuntary waivers of their rights leads us to conclude that clear and convincing evidence is the proper burden of proof for rebutting the presumption of inadmissibility under Section 32A-2-14(F). *DeAngelo M.*, 2015-NMCA-019, ¶¶ 14-16.

II. To overcome the presumption, the State must prove by clear and convincing evidence that the thirteen- or fourteen-year-old child had the maturity to understand his or her constitutional and statutory rights and the force of will to invoke such rights

{15} We next address what clear and convincing evidence must be introduced by the State to rebut the presumption of inadmissibility under Section 32A-2-14(F). The State maintains that evidence relating to the Section 32A-2-14(E) factors should suffice. Section 32A-2-14(E) provides:

> In determining whether the child knowingly, intelligently and voluntarily waived the child's rights, the court shall consider the following factors:
>
> (1) the age and education of the respondent;
>
> (2) whether the respondent is in custody;
>
> (3) the manner in which the respondent was advised of the respondent's rights;
>
> (4) the length of questioning and circumstances under which the respondent was questioned;
>
> (5) the condition of the quarters where the respondent was being kept at the time of being questioned;
>
> (6) the time of day and the treatment of the respondent at the time of being questioned;
>
> (7) the mental and physical condition of the respondent at the time of being questioned; and
>
> (8) whether the respondent had the counsel of an attorney, friends or relatives at the time of being questioned.

{16} The Court of Appeals held generally that "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." *DeAngelo M.*, 2015-NMCA-019, ¶ 13. The Court of Appeals determined that lay witnesses lack the expertise to determine whether a thirteen- or fourteen-year-old child has the intellectual characteristics that would render him or her the equal of an average fifteen-year-old in understanding and appreciating the significance of a *Miranda* waiver. *See id.* Consequently, the Court of Appeals would require expert testimony, although it did not identify the type of expertise required. *Id.* ¶¶ 13-15.

{17} Although we do not agree entirely with the Court of Appeals, we conclude that the Legislature intended a different analysis by drawing a distinction between fifteen-year-old children and thirteen- and fourteen-year-old children, although the Subsection E factors are also relevant. We hold that the State must first prove by clear and convincing evidence that at the time the thirteen- or fourteen-year-old child made his or her statement to a person in a position of authority, the child had the maturity to understand his or her constitutional and statutory rights and the force of will to assert those rights. It is not necessary to prove that the child had the maturity and intellectual capacity of an average fifteen-year-old child. How such a determination could be made is not evident from the Court of Appeals' opinion.

{18} The Court of Appeals stated that expert testimony would be required. However, Child did not introduce evidence to the trial court to establish what kind of expert might be able to derive an opinion about children's capacity to waive their *Miranda* and statutory warnings. In his brief in chief Child cited Thomas Grisso, *Adolescents' Decision Making: A Developmental Perspective on Constitutional Provisions in Delinquency Cases*, 32 New Eng. J. on Crim. & Civ. Confinement 3, 12 (2006) as an example of potentially useful expert testimony.[1] However, without a record that establishes the validity and reliability of the expert's methodology, we are unable to make an informed decision about the utility of such expert testimony. The undeveloped record before this Court prevents us from categorically affirming the Court of Appeals' broad holding, which would require expert testimony and evaluations of the child, most likely by mental health professionals, in all cases involving statements made by thirteen- or fourteen-year-old children to persons in a position of authority.

{19} Absent an evaluation by an expert, interrogators in a position of authority can preserve the evidence needed by the State to rebut the presumption of inadmissibility for thirteen- and fourteen-year-old children under Section 32A-2-14(F). NMSA 1978, Section 29-1-16 (2006) requires law enforcement officers, with limited exceptions, to electronically video and audio record their custodial interrogations. *See, e.g.*, *State v. Spriggs-Gore*, 2003-NMCA-046, ¶¶ 14-15, 133 N.M. 479, 64 P.3d 506 (noting that the interrogating law enforcement officer recorded and transcribed "approximately five and one-half hours of conversation with Defendant"). In order to obtain the clear and convincing evidence needed to rebut the presumption of inadmissibility, the interrogator who is in a position of authority must first adequately

[1] *See also* Thomas Grisso, *Instruments for Assessing Understanding & Appreciation of Miranda Rights* (1998); Thomas Grisso, *Juveniles' Capacities to Waive* Miranda *Rights: An Empirical Analysis*, 68 Cal. L. Rev. 1134 (1980); I. Bruce Frumkin, et. al., *The Grisso Tests for Assessing Understanding and Appreciation of* Miranda *Warnings with a Forensic Sample*, 30 Behav. Sci. L. 673 (2012). In 2012, Dr. Thomas Grisso published *The Miranda Rights Comprehension Instruments (MRCI)*, which provides instruments that have been updated since the publication of his original *Instruments for Assessing Understanding & Appreciation of Miranda Rights*.

advise the thirteen- or fourteen-year-old child of his or her *Miranda* and statutory rights and then invite the child to explain, on the record, his or her actual comprehension and appreciation of each *Miranda* warning. This could be done by having the child explain in his or her own words—without suggestions by the interrogator—what each of the rights means to the child. An effective inquiry into a thirteen- or fourteen-year-old child's actual comprehension and appreciation of each right under *Miranda* requires more than simple "yes" answers or a signed *Miranda* notification and consent form on the child's part, when the child may or may not be able to fully process a formal recitation of the four warnings. It is through the child's articulation of his or her understanding that a fact-finder could assess whether the child appreciated the function and significance of each right in the context of not only police questioning, but in future court proceedings. A court deciding a motion to suppress pursuant to Section 32A-2-14(F) would be able to assess the child's actual understanding of the *Miranda* rights and whether the child made a rational choice based on the child's appreciation of the consequences of his or her decision from evidence developed at the time of his or her interrogation. Ultimately, a district court judge should suppress any statement made by a thirteen- or fourteen-year-old child unless the judge finds that the child clearly and convincingly demonstrated his or her maturity to understand his or her constitutional and statutory rights and possessed the force of will to assert those rights.

III. The agents failed to produce sufficient evidence to rebut the presumption

{20} Child was born on July 15, 1997. On July 26, 2010, the State charged Child with one count of residential burglary contrary to NMSA 1978, Sections 30-16-3(A) (1963) and 32A-2-3(A) (2009); one count of tampering with evidence contrary to NMSA 1978, Sections 30-22-5 (2003) and 32A-2-3(A); and one count of larceny of over $250 (but not more than $500) contrary to NMSA 1978, Sections 30-16-1(C) (2006) and 32A-2-3(A). Around noon on July 23, 2010, eight days after Child's thirteenth birthday, Agent Daniel Blair transported Child and Child's mother to the Roosevelt County Law Enforcement Complex to interrogate Child. Child's mother was present during the entire interrogation.

{21} Agents Dan Aguilar and Daniel Blair, who are investigators with the District Attorney's office, and Detective John Mondragon, who is a detective with the Portales Police Department, interrogated Child. When Agent Blair began advising Child of his *Miranda* rights, Agent Blair appeared to agree with the Legislature's presumption that a thirteen-year-old child does not have the maturity to understand his or her *Miranda* rights when he stated "[y]ou have to be advised of your rights pursuant to rule 32A-2-14 of the Children's Code Rules of Procedure and the constitution. You probably don't understand that because I don't understand part of that but it's a rule that we gotta do. Okay?"

{22} The following exchange occurred between Agent Blair and Child as Agent Blair attempted to read and explain to Child the right to remain silent:

> Agent Blair: It tells us—you have the right to remain silent. You don't have anything—if you . . . you do not have to say anything if you do not want to. I've been up for a little while so I'm not reading properly. Like I'm reading at a second grade level—just tell me. You can probably read better. Do you understand that?
>
> Child: Kind of. Yeah.

Agent Blair: What do you think that means?

Child: Don't talk on your own behalf.

Agent Blair: Or you don't have to talk to us if you don't want to and your mom will explain that.

Agent Blair initially and correctly invited Child to explain in his own words what Child understood the right to remain silent means rather than accept Child's unclear response of "Kind of. Yeah." Apparently dissatisfied with Child's explanation of his right to remain silent, Agent Blair simply corrected Child without inviting Child to further explain his actual comprehension and appreciation of the right for a second time. It is not clear from this exchange whether Child fully comprehended his right to remain silent. Agent Blair also erroneously suggested to Child that his mother could counsel Child as an equivalent substitute to an attorney. In any event, during the entire exchange regarding Child's right to remain silent, it was never developed whether Child was able to use the information provided by the warning, grasp the significance of his right to remain silent, and weigh his options and the consequences of his decisions.

{23} Agents Blair and Aguilar hurriedly and equivocally warned Child of his remaining rights.

Agent Blair: Anything you say can be used against you in court. Okay on TV when they read these—they read them to adults and that means that they've arrested them but that's not happening here okay? That's, that's why I didn't want to—uh—do you understand what that means? Okay, you can talk to your parents, your guardian, and an attorney. You got your parent/guardian right here with you um. [Y]ou have the right to have you [sic] parent/guardian parent present during any questioning. If you can not afford a lawyer, one may be appointed for you before any questioning. These are the ones on TV. Um, if you decide to answer questions um, without an attorney, you can—you still have the right to stop answering questions anytime. You have the right to stop answering questions any time till you talk to an attorney. Now you understand what I just said?

Child: Not really.

Agent Blair: You didn't understand those? Which ones?

Child: —I think I understand that you can talk to the Judge—no, you can talk without an attorney. And then you can stop if it's just like—too getting out of hand. You can stop.

Agent Blair: —You're right on the—

Child: —answering questions. Until you get an attorney.

Agent Blair: You're absolutely right.

Agent Aguilar: —Correct.

Child: Okay.

This exchange failed to capture Child's actual comprehension and appreciation of his remaining rights. Agent Blair's description of these rights can only be characterized as confusing. Persons in a position of authority must advise thirteen- and fourteen-year-old children of their constitutional and statutory rights in a clear and intelligible manner if they

want to rebut the presumption under Section 32A-2-14(F). The manner in which a child is informed of his or her constitutional and statutory rights is relevant to whether the child knowingly waived his or her rights. In this case, it is impossible to ascertain Child's comprehension and appreciation of his rights without a clear and intelligible advisement of such rights. First, the manner in which Agent Blair advised Child of the three remaining *Miranda* warnings, which included mentioning rights read on television, suggesting that the rights only apply when people are arrested, and explaining that Child was not under arrest, was at best confusing and at worst clearly erroneous. Thirteen- or fourteen-year-old children possess these constitutional and statutory rights whether or not they are under arrest. It is not surprising that Child responded that he did "[n]ot really" understand his rights as they were presented by Agent Blair.

{24} Second, Agent Blair asked Child to identify which warnings Child did not understand. In response, the interrogation transcript appears to indicate that Child confused the right to remain silent with the right to an attorney. Child explained that he thought he understood that he had a right to talk without an attorney, but that Child could then stop the interrogation only if Child thought the interrogation was "getting out of hand" and not answer the questions until he obtained an attorney. Agents Blair and Aguilar simply told Child that he was absolutely correct and moved on. Given this exchange, we are left without any clear indication of whether Child actually comprehended and appreciated each of the *Miranda* warnings.

{25} As he read Child his *Miranda* rights, Agent Blair also presented Child with a notification and waiver form listing those rights, and Child wrote his initials next to each right listed on the form. Both Child and his mother signed the notification and waiver form.

{26} Child's lack of understanding of his rights and his inability to invoke his rights was also demonstrated by what occurred during the interrogation after the forms were signed. Child initially admitted that he broke into the victim's home and stole personal items identified by Agent Blair that belonged to the victim. However, Child denied taking a gun or any ammunition from the victim's home, and also denied involvement in the victim's shooting. When Agent Blair told Child that he believed Child had shot and killed the victim, Child denied killing the victim, became very upset, and started to cry. Child eventually told Agent Blair "I don't want to talk anymore." Agents Blair and Aguilar acknowledged and confirmed Child's invocation of his right to remain silent. Agent Blair specifically responded, "You don't want to talk anymore? Okay," while Agent Aguilar stated, "We're done. Then." The interrogation stopped while Agents Blair and Aguilar collected a saliva swab sample from Child and Child used the restroom.

{27} Following the break, Agents Blair and Aguilar reinitiated the interrogation, reminding Child that he could ask to stop any further questions if he did not want to talk.

> Agent Aguilar: DeAngelo we want to—we just, I just want to ask you a few questions okay? You admitted that you went into the house and took some things and stuff like that—that's all we want to talk to you about okay? We don't want to talk to you about a gun or we don't want to talk to you about any of that other stuff. Okay? Is that alright?
>
> Child: (inaudible response)
>
> Agent Aguilar: Okay, um, with that

> in mind—you just keep in mind this, you can do exactly what you did the last time, okay? When you've had enough and you don't want to talk to us anymore, you just tell us you don't want to talk anymore. Okay? Is that alright? (inaudible response) Okay, now, when, when you into uh . . . their house on Sunday—you remember? Yes? Sunday or whatever day—over the weekend. While they were gone. And the things that you took, where did you hide them till you got rid of them? Or did you get rid of everything?

In response, Child provided more details about the specific circumstances of how he stole certain items from the victim's home. Resuming the interrogation of Child after Child said he did not want to talk does not scrupulously honor the invocation of an individual's right to remain silent that the law requires. *State v. King*, 2013-NMSC-014, ¶ 8, 300 P.3d 732. "The moment that the unambiguous statement is made, the interrogator must 'scrupulously honor' the suspect's or person's right by ceasing the interrogation." *Id.* When Child continued to answer questions after stating that he did not want to talk, this provided additional evidence that Child did not possess either the maturity to understand his rights or the force of will to assert those rights.

{28} Following this interview, Child's charges were amended to (1) one count of first degree murder contrary to NMSA 1978, Sections 30-2-1(A)(1) (1994) and 32A-2-3; (2) one count of aggravated burglary contrary to NMSA 1978, Sections 30-16-4(B) (1963) and 32A-2-3; (3) two counts of tampering with evidence contrary to Sections 30-22-5 and 32A-2-3; and (4) one count of larceny over $250 (but not more than $500) contrary to Sections 30-16-1 and 32A-2-3. Prior to trial, Child timely filed a motion to suppress the inculpatory statements he made during the July 23, 2010 interview, arguing that the State failed to adequately rebut the presumption that his statements were inadmissible pursuant to Section 32A-2-14(F).

{29} During the suppression hearing, the State presented testimony from Agents Blair and Aguilar and Child's teacher at the detention center where Child was held. The district court found their testimony persuasive, noting in its decision letter that Agents Blair and Aguilar both testified that "based on their experience in interviewing children of similar age, [Child] was articulate, inquisitive and fully aware of his constitutional rights, and [Child] appeared to be more mature and intelligent than children of his age." The district court noted that Child's teacher testified that Child was "well-read, inquisitive and readily corrects the grammar and vocabulary of other juveniles detained in the Curry County Juvenile Detention Center, and in his opinion, [Child] is more intelligent than the average juvenile detainees in his age group." The district court denied Child's motion and determined that Child "knowingly, voluntarily and intelligently waived his constitutional rights prior to speaking with law enforcement, and, as a result, the State has overcome the rebuttable presumption that the statements of [Child] are inadmissible."

{30} On this record, we conclude that the State failed to meet the burden of proof necessary to overcome the statutory presumption against admitting Child's statements. The testimony of the interrogating officers is not the type of evidence that could overcome this presumption. What must be considered is the evidence from the recorded interview, not the officers' characterization of Child's maturity to understand and invoke his constitutional and statutory rights. The

State's evidence concerning whether Child reads books, converses with adults, corrects other children's vocabulary and grammar, and seems more intelligent and mature than other children is only indirectly related to whether Child actually comprehended and appreciated each *Miranda* warning that he was given. While such evidence is relevant, the court must first determine whether at the time of the interrogation the child exhibited the maturity to understand each of his or her constitutional and statutory rights and possessed the force of will to invoke such rights. Absent clear and convincing evidence which proves that Child understood each right, Child's school performance is not material evidence. In this case, the transcript of the interrogation falls far short of establishing any of the required showings. Accordingly, the district court erred in denying Child's motion to suppress because the State did not meet its burden of rebutting the presumption of inadmissibility under Section 32A-2-14(F) by clear and convincing evidence.

IV. Conclusion

{31} For the foregoing reasons, we affirm the Court of Appeals on different grounds and reverse the district court's denial of Child's motion to suppress. We remand for further proceedings in accordance with this opinion.

{32} **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-034

Filing Date: October 19, 2015

Docket No. S-1-SC-34548

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

v.

NORMAN DAVIS,

Defendant-Respondent.

Hector H. Balderas, Attorney General
Martha Anne Kelly, Assistant Attorney General
Santa Fe, NM

for Petitioner

Jorge A. Alvarado, Chief Public Defender
Allison H. Jaramillo, Assistant Appellate Defender
Santa Fe, NM

for Respondent

Jones, Snead, Wertheim & Clifford, P.A.
Jerry Todd Wertheim
Santa Fe, NM

Marc Rotenberg
Alan J. Butler
Jeramie Scott

Washington, D.C.

for Amicus Curiae Electronic Privacy Information Center

OPINION

BOSSON, Justice.

{1} Defendant Norman Davis was convicted of possession of marijuana after New Mexico State Police officers consensually searched his greenhouse and seized 14 marijuana plants. That search was the result of "Operation Yerba Buena 2006," a comprehensive aerial surveillance of Davis' property and the surrounding area conducted by a coordinated law enforcement effort that allegedly discovered marijuana plants growing on Davis' property. We decide whether that aerial surveillance, and the manner in which it was conducted, amounted to a warrantless search of Davis' property contrary to rights secured to him under the Fourth Amendment to the U.S. Constitution. Concluding that his federal constitutional rights were violated in this instance, we reverse the opinion of the Court of Appeals to the contrary as well as Davis' conviction below.

BACKGROUND

{2} Over a period of time during 2005 and 2006, the New Mexico State Police received several reports that residents were growing marijuana plants throughout rural areas of Taos County, New Mexico. The informants, however, were unable or unwilling to provide the police with specific locations where marijuana was growing due to the remoteness of the area and fear of retaliation. In investigating the reports, the New Mexico State Police, Region Three narcotic agents, and the New Mexico National Guard organized Operation Yerba Buena, described as "a collaborative effort in the identification of marijuana plantations in Taos County with the use of two Army National Guard OH 58 Jet Ranger helicopters."

{3} Prior to the execution of Operation Yerba Buena, the State Police developed an operation plan to provide a common working framework for everyone participating in the operation and to ensure that all participating agencies followed State Police policies and procedures. The plan divided the search areas of Carson Estates and Twin Peaks—vast rural tracts in Taos County—between two separate search teams. Each team consisted of an Army National Guard helicopter with an observer and a ground team comprised of individuals from various law enforcement agencies. All ground team officers were required to carry standard issue State Police tape recorders to be used during any "*interviews/arrests, [and] during [any] contacts from which there are reasons to believe a complaint could result in an arrest.*" (Emphasis in original.)

{4} During the operation, the helicopter observers were instructed to fly over the assigned portions of the search area to look for potential "marijuana plantations." Once an observer spotted marijuana plants, he was instructed to contact the corresponding ground team staged at a pre-identified area and guide the team to the location of the plants. The ground team would then approach and make contact with the particular house to confirm or deny the existence of marijuana. The helicopter was to remain in the vicinity to provide cover and safety to its ground team.

{5} On August 23, 2006, at approximately 9:00 a.m., the helicopters departed the Taos Regional Airport. The total operation lasted approximately ten hours. During that time, the helicopter observers identified possible marijuana plantations at eight properties and directed the ground teams accordingly.

The Davis residence

{6} Observer Travis Skinner, upon identifying a potential marijuana plantation, directed his ground team—five vehicles containing at least six armed law enforcement officers—to the Davis residence. Davis' property was enclosed from ground level view by fences that ran along the property line, several large trees and bushes, and a "shade screen." However, when looking down on Davis' property from the helicopter, Sergeant Skinner was able to see and relay to the ground team the presence of a greenhouse as well as what appeared to be marijuana plants located at the back of Davis' property near the house. Sergeant Skinner also informed the team that there were dogs on the property.

{7} Davis stated he was "in bed and not feeling very well when [he] heard a helicopter hovering very low, right on top of [his] house." He stated that the helicopter was making "a considerable racket" and that when the sound did not go away, he went outside to see "what . . . was going on." He observed the helicopter hovering approximately 50 feet above his head "kicking up dust and debris that was swirling all around."

{8} Sergeant Bill Merrell of the New Mexico State Police confronted Davis near Davis' front door. Other officers were present on either side of his driveway. Sergeant Merrell, as heard on the tape recording, approached Davis, identified himself, and said "it appears that the helicopter . . . [was] looking for marijuana plants and they believe they've located some at your residence." Sergeant Merrell asked Davis for permission to search the residence for the marijuana plants seen by the observer. The noise from the helicopter was audible in the background of Sergeant Merrell's recording.

{9} In response to Sergeant Merrell's accusation, Davis admitted that he was growing marijuana in his greenhouse and allowed the officers to search his property. Davis signed a written consent authorizing a complete search of his greenhouse and residence. This Court previously upheld the validity of Davis' consent. *See State v. Davis*, 2013-NMSC-028, ¶ 35, 304 P.3d 10 (*Davis II*). The officers seized 14 marijuana plants from Davis' greenhouse. Neither the flyover of Davis' property nor the resulting search was accompanied by a search warrant.

{10} Several nearby residents characterized the helicopter flyovers during Operation Yerba Buena as terrifying and highly disruptive. Kelly Rayburn watched a helicopter fly around his house about "half a dozen times." Rayburn said the helicopter flew so close to his roof that the downdraft lifted off a solar panel and scattered trash all over his property. Victoria Lindsay observed a helicopter sweeping back and forth over her property, sending debris and personal property all over the yard. Lindsay also observed the helicopter hovering very close to the ground at a neighbor's greenhouse. Merilee Lighty observed a helicopter flying over her property for about 15 minutes. She said it was so close that the downdraft affected her trees and her bushes.

{11} William Hecox did not notice any real dust flying at the time of the flyover, but after the helicopter left he noticed that one of his four-by-four beams was broken at the ground and another one was broken three feet up from the ground. Hecox specifically stated that the beams were not broken prior to the helicopter flying over. He also stated that the noise and effect from the helicopter upset his turkey and fowl and caused them to "squawk[] and run[] around."

Suppression hearing

{12} A grand jury indicted Davis on possession of marijuana contrary to NMSA 1978, Section 30-31-23(A) and (B)(3) (2005), and possession of drug paraphernalia contrary to NMSA 1978, Section 30-31-25(A) (2001), based on the items found during Operation Yerba Buena. Davis filed two suppression motions, arguing that 1) the helicopter surveillance violated his constitutional right to be free from unreasonable searches, and 2) his consent for the subsequent search of his property was involuntary.

{13} Davis requested that the suppression hearing be consolidated with a suppression hearing in a separate case involving Steve Hodges, another Carson resident also charged with possession of marijuana seized from his property as part of Operation Yerba Buena. Although each defendant made additional arguments for suppression (invalid warrant by Hodges and invalid consent by Davis), both presented a similar challenge to the constitutionality of the helicopter surveillance of their property. The district court granted Davis' consolidation request and held an evidentiary hearing on the motions to suppress.

{14} Several Carson residents testified during the hearing, as previously discussed in this opinion. Some residents testified that the surveillance felt like an invasion with the helicopter hovering so close to the ground that the rotor wash and ground effects kicked up dust and blew debris around their property. Others focused their testimony specifically on the noise disruption from the helicopter, stating that they were unable to go outside and work or have a conversation. Still others alleged that the helicopter physically damaged their property, and recounted the damage to the solar panel and the broken support beams discussed above.

{15} Some of the participating officers also testified during the hearing. Sergeant Matthew Vigil, the officer in command of Operation Yerba Buena, testified that the helicopters were flown at a reasonable height above the residents' properties and stated that the pilots "were real strict on guidelines as far as altitude." When asked generally whether a helicopter ever spent "like five minutes or ten minutes over a property in an altitude of less than a hundred feet," Sergeant Vigil responded in the negative. Sergeant Vigil stated that he was unaware of and did not observe any of the damage or disturbance created by the helicopter's rotor wash alleged by the individual residents.

{16} Sergeant Adrian Vigil, one of the ground officers, testified that the helicopter probably came down to "a couple hundred feet" to confirm its original observations and provide the ground team with cover. He also testified that the helicopter did not go so low that it would cause interference, and said he could not feel any wash from the helicopter. Sergeant Merrell, the ground team officer in charge of the investigation at Davis' residence, gave testimony describing his encounter with Davis, and his audio recording of the encounter, including the audible noise from the hovering helicopter, was submitted into evidence.

{17} After considering all testimony, exhibits, and arguments, the district court denied Davis' suppression motion and issued findings and conclusions in support of its decision. The court analyzed the facts of this case under what it characterized as the *Riley/Ciraolo* rule, a list of factors used by the United States Supreme Court to assess the constitutionality of aerial surveillance.[1] *See*

[1]The factors the district court considered were "[e]fforts of the [resident] to protect from aerial intrusions, presence in navigable airspace, the extent of

Florida v. Riley, 488 U.S. 445 (1989); *California v. Ciraolo*, 476 U.S. 207 (1986).

{18} According to the district court's findings, the helicopter circled over certain locations and then swooped in for closer looks. The court concluded that "[a] greater degree of intrusion is permissible if aerial surveillance is used to confirm facts, rather than flying around generally in an effort to spot greenhouses, then swooping in lower to see what could possibly be seen." But the district court was "troubled by the testimonial descriptions of rotor wash and flying debris." Although the court believed that some of the testimony was "overly dramatic and anti-police state rhetoric," it found merit to the claim that "the police swooped in as if they were in a state of war . . . [which] can be terrifying and intimidating to most normal persons."

{19} Because surveillance was in response to general vague complaints, however, the district court found that "[i]t was not confirmatory activity" and "[t]he claims of dust and destruction [were] negligible, in comparison." In totality, the court concluded as a matter of law that the helicopter surveillance "just barely" made it over the threshold of validity. The district court then found that Davis' subsequent consent to the search was valid and not given under duress or coercion. The court denied both of Davis' motions to suppress.

{20} Following the hearing, Davis entered a conditional plea of guilty reserving his right to appeal the district court's pretrial denial of his motion to suppress. On Davis' first appeal, our Court of Appeals reversed the district court on the consent finding, concluding that the State failed to establish that Davis' consent was voluntary. *State v. Davis*, 2011-NMCA-102, ¶ 1, 150 N.M. 611, 263 P.3d 953 (*Davis I*). We granted certiorari and reversed, concluding that substantial evidence supported the district court's finding that Davis voluntarily consented to the search of his residence. *Davis II*, 2013-NMSC-028, ¶¶ 2, 34. We remanded the case to the Court of Appeals to address remaining issues. *Id.* ¶ 35.

{21} On remand, the Court of Appeals considered the validity of the aerial surveillance under both the U.S. and the New Mexico Constitutions. *State v. Davis*, 2014-NMCA-042, ¶ 4, 321 P.3d 955 (*Davis III*). The Court of Appeals found the surveillance permissible under the Fourth Amendment to the U.S. Constitution, but impermissible under Article II, Section 10 of the New Mexico Constitution. *Davis III*, 2014-NMCA-042, ¶¶ 1, 11, 27. As justification for its holding, the Court of Appeals stated: "The privacy interest protected by Article II, Section 10 is not limited to one's interest in a quiet and dust-free environment. It also includes an interest in freedom from visual intrusion from targeted, warrantless police aerial surveillance, no matter how quietly or cleanly the intrusion is performed." *Id.* ¶ 19.

{22} Having determined that the aerial surveillance was unconstitutional, the Court of Appeals then concluded that there was insufficient attenuation to purge Davis' consent from the illegal search. *Id.* ¶¶ 28-31. Reversing the district court, the Court of Appeals suppressed all evidence obtained from the Davis search. *Id.* ¶¶ 1, 32.

{23} We again granted the State's petition for certiorari review, *State v. Davis*, 2014-NMCERT-003, this time to determine 1) whether aerial surveillance is a violation of Article II, Section 10 of the New Mexico Constitution and, if so, 2) whether Davis'

---

physical intrusion, location of the property, [and] altitude and frequency and circumstances around the means of surveillance."

subsequent consent to search his property was sufficiently attenuated from the illegal search.

DISCUSSION

Under our interstitial analysis, we must first consider whether the claimed right is protected under the U.S. Constitution before considering whether the New Mexico Constitution offers broader protection

{24} When interpreting independent provisions of our New Mexico Constitution for which there are analogous provisions in the U.S. Constitution, New Mexico utilizes the interstitial approach. *State v. Gomez*, 1997-NMSC-006, ¶ 21, 122 N.M. 777, 932 P.2d 1. Under that approach, before reaching the state constitutional claim, we must first determine whether the right being asserted is protected under the Federal Constitution. *Id.* ¶ 19. If the right is protected under the Federal Constitution, our courts do not reach the state constitutional claim. *Id.* In this case, therefore, we must first determine whether the aerial surveillance conducted during Operation Yerba Buena violated the Fourth Amendment. If so, we do not address Davis' state constitutional claim.

{25} "The touchstone of Fourth Amendment analysis is whether a person has a constitutionally protected reasonable expectation of privacy [in the area searched]," in this case the curtilage of a private home. *Ciraolo*, 476 U.S. at 211 (internal quotation marks and citation omitted). This inquiry normally embraces two discrete questions: "whether the individual, by his conduct, has exhibited an actual (subjective) expectation of privacy, . . . [and] whether the individual's subjective expectation of privacy is [objectively] one that society is prepared to recognize as reasonable." *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (internal quotation marks and citations omitted). The determination is based on the totality of circumstances in each particular case. *Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980).

Whether Davis had a reasonable expectation of privacy from a helicopter conducting aerial observation over the curtilage of his home

{26} The curtilage of a house is considered an extension of the home for Fourth Amendment purposes. *State v. Sutton*, 1991-NMCA-073, ¶ 8, 112 N.M. 449, 816 P.2d 518, *modified on other grounds by Gomez*, 1997-NMSC-006, ¶ 32. As such, the curtilage has "long been given protection as a place where the occupants have a reasonable and legitimate expectation of privacy that society is prepared to accept." *Dow Chem. Co. v. United States*, 476 U.S. 227, 235 (1986). *See also State v. Bryant*, 2008 VT 39, ¶ 13, 950 A.2d 467 ("A home's curtilage—the 'area outside the physical confines of a house into which the 'privacies of life' may extend'—merits 'the same constitutional protection from unreasonable searches and seizures as the home itself.'" (first quoting *State v. Rogers*, 638 A.2d 569, 572 (Vt. 1993); then quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984))).

{27} Falling within the curtilage of a home, however, does not automatically warrant protection from all observation under the Fourth Amendment. The U.S. Supreme Court has consistently maintained that the Fourth Amendment offers no protection—even within the home or curtilage—if the observed area is knowingly exposed to public view. *Kyllo v. United States*, 533 U.S. 27, 32 (2001). *See also Katz v. United States*, 389 U.S. 347, 351 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."); *Dow Chem. Co.*, 476 U.S. at 234-35 (visual observation is no

search at all). In order to claim protection under the Fourth Amendment, therefore, an individual must take affirmative steps to exhibit an expectation of privacy.

{28} In this case, Davis did take affirmative steps to exhibit an expectation of privacy from ground level surveillance. He fully enclosed his property with ground level "fencing," using a combination of vegetation and artificial devices. But, exhibiting a reasonable expectation of privacy from ground level surveillance may not always be enough to protect from public or official observation from the air under the Fourth Amendment. *Riley*, 488 U.S. at 450-51.

{29} In two cases remarkably similar to the case at bar, the U.S. Supreme Court addressed the constitutionality of warrantless aerial observation of the curtilage of a home that, like Davis', was blocked from ground-level observation but left open to observation from the air. In the first case, *California v. Ciraolo*, the police attempted to observe the backyard of a private residence where marijuana was allegedly being grown. *Ciraolo*, 476 U.S. at 213. High double fences completely enclosed the yard, prohibiting all ground level observation, so officers secured a private plane and flew over the house. *Id.* at 209. From the air, the officers identified marijuana plants and photographed the plants with a standard 35 mm camera. *Id.*

{30} The U.S. Supreme Court granted certiorari to determine whether officers violated the Fourth Amendment when they observed the fenced-in backyard within the curtilage of a home from a fixed-wing aircraft at an altitude of *1,000* feet. *Id.* The Court determined there was no reasonable expectation of privacy when the observations "took place within public navigable airspace, in a physically nonintrusive manner." *Ciraolo*, 476 U.S. at 213 (internal citation omitted).

{31} In support of its holding, the Court stated "[t]he test of legitimacy is not whether the individual chooses to conceal assertedly 'private activity,' but instead whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." *Id.* at 212 (alteration in original) (internal quotation marks and citation omitted).

> That the area is within the curtilage does not itself bar all police observation. The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.

Ciraolo, 476 U.S. at 213 (internal quotation marks and citations omitted).

{32} Three years later in *Florida v. Riley*, the U.S. Supreme Court again addressed aerial observation under the Fourth Amendment. 488 U.S. at 447-48. In that case, the officer utilized a helicopter to observe a targeted area. *Id.* at 448 The Court granted certiorari to determine whether warrantless surveillance of a partially covered greenhouse in a residential backyard from a helicopter *400* feet above the greenhouse constituted a search under the Fourth Amendment. *Id.* at 448.

{33} The opinion in *Riley* was badly fractured, but a majority of the Court agreed that the observation was not a search under the

Fourth Amendment. *Id.* at 447, 452 (O'Connor, J., concurring). Justice White wrote an opinion for a plurality of four justices. *Id.* at 447. Following the reasoning advanced in *Ciraolo,* the plurality reiterated that:

> [T]he home and its curtilage are not necessarily protected from inspection that involves no physical invasion. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. As a general proposition, the police may see what may be seen from a public vantage point where they have a right to be. Thus the police, like the public, would have been free to inspect the backyard garden from the street if their view had been unobstructed. They were likewise free to inspect the yard from the vantage point of an aircraft flying in the navigable airspace.

Riley, 488 U.S. at 449-50 (internal alterations omitted) (internal quotation marks and citations omitted). The plurality determined that the helicopter, like the airplane in *Ciraolo*, was hovering within the prescribed navigable airspace. *Riley*, 488 U.S. at 451. In making that determination, the plurality relied on Federal Aviation Administration regulations that permit helicopters to operate at less than the minimum altitude for fixed-wing aircraft, as long as the "operation is conducted without hazard to persons or property on the surface." *Id.* at 451 n.3 (internal quotation marks and citation omitted).

{34} Significantly for our case, the plurality emphasized that the helicopter was not violating the law, and there was no indication in the record that "the helicopter interfered with respondent's normal use of the greenhouse or of other parts of the curtilage," or caused undue noise, wind, dust, or threat of injury. *Id.* at 451-52. The plurality thus found that the police did no more than any member of the public could do flying in navigable airspace, and the Court held that the surveillance did not violate the Fourth Amendment. *Id.* at 451. Justice White cautioned, however, that not every inspection of the curtilage of a house from an aircraft will "pass muster under the Fourth Amendment simply because the plane is within the navigable airspace specified by law." *Id.*

{35} Although we avoid the temptation to draw too much settled legal principle from either of these two opinions, we believe certain inferences are appropriate. First, it appears after *Ciraolo* and *Riley* that the Fourth Amendment affords citizens no reasonable expectation of privacy from aerial surveillance conducted in a disciplined manner—mere observation from navigable airspace of an area left open to public view with minimal impact on the ground. It also seems, however, that warrantless surveillance can go beyond benign observation in a number of different ways, one of those being when surveillance creates a "hazard"—a physical disturbance on the ground or unreasonable interference with a resident's use of his property. In that case, surveillance more closely resembles a physical invasion of privacy which has always been a violation of the Fourth Amendment. *See Riley*, 488 U.S. at 449-52. *See also United States v. Jones*, __ U.S. __, __, 132 S. Ct. 945, 955 (2012) ("[A] search within the meaning of the Fourth Amendment occurs, at a minimum, '[w]here . . . the Government obtains information by physically intruding on a constitutionally protected area.'" (Sotomayor, J., concurring, quoting 132 S. Ct. at 950 n.3.) (second alteration in original)). For reasons that follow, this distinction, referenced in both *Ciraolo* and *Riley*, informs our

constitutional analysis of what occurred on Davis' property.

{36} We do not consider this question in a vacuum. Many state courts base their determination of whether a particular aerial surveillance violates the Fourth Amendment on the degree of physical intrusion on the ground below. In assessing intrusion, courts look at the legality of the flight, the altitude of the aircraft, the frequency and duration of the flight, and the nature of the area observed—factors similar to *Ciraolo* and *Riley* and factors employed by the district court in this very case. *See United States v. Bassford*, 601 F. Supp. 1324, 1330 (D. Me. 1985) ("[C]ourts have taken a case-by-case approach to the [F]ourth [A]mendment problems implicated by aerial surveillance [considering factors such as] the height of the aircraft, the size of the objects, the nature of the area observed, . . . the frequency of flights over the area, and the frequency and duration of the aerial surveillance." (internal citations omitted)). *See also Bryant*, 2008 VT 39, ¶¶ 23-26 ("Since the rulings in . . . *Ciraolo* and *Riley*, . . . some state courts have relied solely on the legality of a helicopter's position in public airspace to determine whether the aerial surveillance at issue was a search. . . . Some courts . . . consider the legality and intrusiveness of the surveillance flight. . . . Still other state courts attempt to give effect to all of the *Riley* opinions by evaluating legality, intrusiveness, and the frequency of flight at the altitude at which the surveillance took place. . . . A remaining group of state courts rely on a multitude of factors of their own articulation." (internal citations omitted)).

{37} Consistent with the general trend of focusing on the degree of intrusiveness, our Court of Appeals over 30 years ago found no Fourth Amendment violation based partly on the district court's finding that the aerial observation was accomplished "without disturbing defendant's premises." *State v. Rogers*, 1983-NMCA-115, ¶¶ 3, 5, 100 N.M. 517, 673 P.2d 142 (internal quotation marks omitted). Although decided three years before the first of the U.S. Supreme Court opinions on aerial surveillance, the Court of Appeals' opinion in *Rogers* presaged the analysis eventually undertaken by that Court.

{38} Much as with this case, *Rogers* involved aerial observation of a greenhouse within the curtilage of a home from a helicopter looking for marijuana plants. *Id.* ¶ 2. Rogers and his neighbors testified that the helicopter hovered as low as 30 feet and that the noise of the helicopter awakened them and kicked up dust. *Id.* ¶¶ 5, 12. The helicopter pilot testified, however, that the total surveillance lasted for only 15 to 30 seconds and the helicopter stayed above 100 feet, hovering over an adjacent field several hundred feet from the residence. *Id.* ¶ 12. As finder of fact, the district court found the State's witnesses persuasive. *Id.* ¶ 5. Our Court of Appeals concluded that "[w]hile the facts of this case teeter dangerously close to exceeding the limitations implicit in the Fourth Amendment, we do not believe that defendant may claim constitutional protection under these circumstances. . . . [T]he surveillance methods used by the police were not unreasonable." *Id.* ¶ 13. Substantial evidence supported the district court's finding of no disturbance to the defendant's property, and the Court of Appeals affirmed. *Id.* ¶¶ 5, 14.

{39} As in *Rogers*, in most cases courts find that the aerial observation was not sufficiently intrusive as to invade a reasonable expectation of privacy, and sustain the warrantless aerial surveillance. *See, e.g.*, *People v. McKim*, 263 Cal. Rptr. 21, 25 (Ct. App. 1989) (upholding a helicopter surveillance where there was no evidence the helicopter interfered with the defendant's use of his property or "created any undue noise, wind, dust, or threat of injury"); *Henderson v.*

People, 879 P.2d 383, 389-90 (Colo. 1994) (en banc) (upholding helicopter surveillance where there was little evidence of wind, dust, threat of injury, or interference and there was no indication the neighbors felt compelled to go outside and observe the commotion); *State v. Rodal*, 985 P.2d 863, 867 (Or. Ct. App. 1999) (upholding surveillance where the helicopter was operated in a lawful and unintrusive manner).

{40} There are instances, however, where "the means of surveillance [were] sufficiently intrusive so as to give rise to a constitutional violation." *See* 1 Joseph G. Cook, *Constitutional Rights of the Accused* § 4:5 n.6 (3d ed. 2015). We have found two state court cases from other jurisdictions concluding that the degree of physical invasiveness from warrantless aerial surveillance amounted to an unconstitutional search under the Fourth Amendment.

{41} In *Commonwealth v. Oglialoro*, the Supreme Court of Pennsylvania held that aerial surveillance of a barn violated the Fourth Amendment due to the risk of harm to the resident and her property during the search. 579 A.2d 1288, 1294 (Pa. 1990). In that case, the police hovered over a barn located within the curtilage of a home at an altitude of 50 feet for "approximately 15 seconds and made a total of three or more passes over the . . . property, lasting approximately five minutes." *Id.* at 1290. The wife of the defendant testified that she was "present in the home at the time [and] experienced various sensations caused by the helicopter['s] proximity, such as loud noise, and vibration of the house and windows." *Id.* The Court stated:

> While the police had a right to fly above [defendant's] property and he had no reasonable expectation of privacy that they would not peer into his barn, it remains to be decided whether the conduct of the police in flying at 50 feet above the barn was hazardous to persons or property on the surface. If so, the search would be unreasonable . . . . When weighing the issue of whether or not a helicopter surveillance is intrusive to the point of being hazardous, or non-intrusive, a trial court should ask whether or not a risk of harm or danger exists in regards to the person(s) present or property being observed, whether or not a danger, or threat of injury exists, in regards to persons present within the area being searched.

Id. at 1293. There was no testimony from the police to refute the wife's testimony. *Id.* at 1294.

{42} The Pennsylvania Supreme Court determined under the evidence presented that the "helicopter's presence at 50 feet above the barn represented a hazard to persons and property on the ground and that the conduct of the police in flying at this level was unreasonable." *Id.* at 1294. The Court concluded that the surveillance was intrusive and that flying at that low level created a risk of harm, and noted that the police did not produce any evidence rebutting the wife's testimony or explaining why it was necessary to conduct observation from such a dangerously low altitude. *Id.*

{43} The Colorado Court of Appeals, also finding a violation of the Fourth Amendment, held that aerial surveillance of a backyard went beyond mere observation when a helicopter 1) "descended to 200 feet," 2) "hovered in the area for several minutes," and 3) created "enough noise that numerous people ran out" to see what was happening. *People v. Pollock*, 796 P.2d 63 (Colo. Ct. App. 1990). The defendant and several neighbors testified that the helicopter was

extremely noisy and that one child asked if the army was invading. *Id.* at 65.

{44} The Colorado Court of Appeals characterized *Pollock* as a close case but determined that two critical factors in the record distinguished *Pollock* from *Ciraolo* and *Riley*: 1) infrequency of helicopter flights at that altitude, and 2) excessive noise from the helicopter. *Pollock*, 796 P.2d at 64. The Court held that, "on this record, with unrefuted evidence, the type of which was notedly absent in both *California v. Ciraolo* and *Florida v. Riley*, . . . defendant had a reasonable expectation of privacy that no such surveillance would occur." *Id.* at 65.

The aerial surveillance during Operation Yerba Buena in light of these Fourth Amendment cases

{45} Our review of these and other cases involving aerial observation of marijuana plants, both pre- and post-*Ciraolo* and *Riley*, leads us to certain conclusions. First, unobtrusive aerial observations of space open to the public are generally permitted under the Fourth Amendment. Even a minor degree of annoyance or irritation on the ground will not change that result. If that were all that occurred in the surveillance of the Davis property, this would likely not constitute an unreasonable search under the Fourth Amendment.

{46} Our second conclusion, however, is that when low-flying aerial activity leads to more than just observation and actually causes an unreasonable intrusion on the ground—most commonly from an unreasonable amount of wind, dust, broken objects, noise, and sheer panic—then at some point courts are compelled to step in and require a warrant before law enforcement engages in such activity. The Fourth Amendment and its prohibition against unreasonable searches and seizures demands no less. Obviously, the line drawn between activity permitted with or without a warrant is fact-dependent; any further definition is elusive. For that reason, we must return to the evidentiary hearing conducted in this case and the resulting observations of the district court.

{47} Although the district court concluded as a matter of law that Operation Yerba Buena did not amount to an unconstitutional search, many of its findings and much of the evidence suggest that the police went beyond mere observation as that term has been defined by Fourth Amendment jurisprudence. The district court's findings make multiple references to the degree of noise and disturbance on the ground and suggest that the helicopter swooped down low enough to cause panic among the residents.

{48} In addition to the district court's findings, evidence from Davis and the other residents suggests that the officers in the helicopter did more than merely observe. There were multiple allegations regarding other properties that the helicopter caused property damage—the broken beams and the damaged solar panel—and produced excessive noise and kicked up dust and debris. The noise allegations in particular are supported by Sergeant Merrell's audio recording where the helicopter is clearly heard hovering over Davis' home. And it is clear from all testimony that the helicopters were there to do more than just observe; they were also there to provide aerial cover and protection for the officers on the ground—in other words, to participate actively in the investigation. In so doing, the police increased the risk of actual physical intrusion as occurred in this case.

{49} We acknowledge testimony to the contrary, primarily from law enforcement officers who were there on the ground. For example, police officers testified that the helicopter was operating at a lawful altitude and emphasized that the pilots strictly adhered

to altitude guidelines. However, as the U.S. Supreme Court said in *Riley*, an observation will not always be lawful under the Fourth Amendment simply because the plane is operating within navigable airspace. *Riley*, 488 U.S. at 451. Like in *Pollock* and *Oglialoro*, the police here failed to provide testimony rebutting the specific claims of damage and disruption as described by Davis and the other residents at the suppression hearing.

{50} For example, Sergeant M. Vigil stated that he was *unaware* of any damage to any resident's property, and Sergeant A. Vigil stated that he did not *feel* any wash from the helicopter. Both of these accounts imply that the officers either may not have recalled or were not particularly focused on whether there was damage or wash. These vague recollections are not the type of conclusive evidence that can effectively rebut the specific allegations made by the residents. Further, and perhaps more importantly, neither Sergeant M. Vigil nor Sergeant A. Vigil was present for the surveillance of Davis' property. They were assigned to searches of properties located elsewhere in the search area.

{51} Regrettably for the State, Sergeant Skinner, the observer for the team that did fly over Davis' property, did not testify at the suppression hearing. Sergeant Merrell, who was also present at Davis' property, testified but did not address or refute Davis' allegations of disturbance, excessive noise, and dust. Perhaps most importantly, the district court, having personally witnessed all testimony and other evidence elicited at the suppression hearing, did not disregard the residents' testimony as not credible, did not find that the dust and disturbance never happened, and did not find that the police officers' testimony was exclusively reliable.

{52} Based on the evidence, therefore, we conclude that the official conduct in this case went beyond a brief flyover to gather information. The prolonged hovering close enough to the ground to cause interference with Davis' property transformed this surveillance from a lawful observation of an area left open to public view to an unconstitutional intrusion into Davis' expectation of privacy. We think what happened in this case to Davis and other persons on the ground is precisely what *did not* occur in either *Ciraolo* or *Riley* and what *did* occur in both *Oglialoro* and *Pollock*. Accordingly, we hold that the aerial surveillance over Davis' property was an unwarranted search in violation of the Fourth Amendment.

The New Mexico Constitution

{53} Under our interstitial approach to the New Mexico Constitution as explained previously, because we find the asserted right to be protected under the Federal Constitution we do not reach the same claim under our New Mexico Constitution. In resolving this dispute on federal grounds, two consequences for the Court of Appeals' opinion become clear. First, we reverse the Court of Appeals' holding with respect to the Fourth Amendment because we find an unreasonable, unconstitutional search under the U.S. Constitution. Second, it is now unnecessary to reach the same question posed under the New Mexico Constitution, which renders the Court of Appeals' discussion of that subject moot though informative. In the end, however, we uphold the result achieved by the Court of Appeals, which is to suppress all evidence obtained from the search of Davis' property and to reverse his conviction.

{54} As an aside, we note that the Court of Appeals, when reviewing the district court's order in this case, suggested that when considering privacy interests under our State Constitution we move away from an intrusion analysis in anticipation of future surveillance

conducted by "ultra-quiet drones" and other high-tech devices. *Davis III*, 2014-NMCA-042, ¶ 19. Because this case only involves surveillance by helicopters, technology that has been with us for nearly 80 years, we find it unnecessary to speculate about problems—and futuristic technology—that may or may not arise in the future. Instead, we reserve judgment and await a proper case with a developed record.

Davis' consent was not sufficiently attenuated from the unconstitutional search

{55} As this Court decided in *Davis II*, Davis validly consented to the search of his home and greenhouse after Sergeant Merrell informed him that a helicopter spotter had identified marijuana plants growing on his property. 2013-NMSC-028, ¶¶ 19-20, 35. However, having now determined that the helicopter flyover was an illegal search, we are left to decide whether Sergeant Merrell obtained Davis' consent by means "sufficiently distinguishable to be purged of the primary taint of the illegal helicopter surveillance." *Davis III*, 2014-NMCA-042, ¶ 30 (internal quotation marks and citation omitted).

{56} "The fruit of the poisonous tree doctrine bar[s] the admission of legally obtained evidence derived from past police illegalities." *State v. Monteleone*, 2005-NMCA-129, ¶ 16, 138 N.M. 544, 123 P.3d 777 (alteration in original) (internal quotation marks and citation omitted). "In order for evidence obtained after an illegality, but with the voluntary consent of the defendant, to be admissible, there must be a break in the causal chain from the [illegality] to the search[.]" *State v. Taylor*, 1999-NMCA-022, ¶ 28, 126 N.M. 569, 973 P.2d 246 (alterations in original) (internal quotation marks and citation omitted), *overruled on other grounds by State v. Leyva*, 2011-NMSC-009, ¶ 17 n.1, 149 N.M. 435, 250 P.3d 861. "In deciding whether the consent is sufficiently attenuated from the Fourth Amendment violation, we consider the temporal proximity of the illegal act and the consent, the presence or absence of intervening circumstances, and the purpose and flagrancy of the official misconduct." *Taylor*, 1999-NMCA-022, ¶ 28.

{57} In this case, Sergeant Merrell's contact with Davis and his subsequent request to search Davis' greenhouse were made in direct response to, and simultaneously with, the information provided by the helicopter spotter, information obtained as a result of the illegal helicopter search. Sergeant Merrell told Davis that "the helicopter . . . [was] looking for marijuana plants and they believe they've located some at your residence." Sergeant Merrell then asked Davis for permission to search his property.

{58} Further, the helicopter was present and was continuing to provide information to Sergeant Merrell as Sergeant Merrell approached Davis. The helicopter is clearly audible on Sergeant Merrell's belt tape during his discussion with Davis and remained over the house until Davis gave verbal consent to search his property.

{59} We affirm the Court of Appeals' determination that Sergeant Merrell entered "[Davis'] property solely as a result of information obtained in the helicopter search," and there were no "intervening circumstances between the aerial search and [Davis'] consent." *Davis III*, 2014-NMCA-042, ¶ 31. As a result we hold that there was insufficient attenuation to purge Davis' consent of the taint resulting from the warrantless aerial search.

CONCLUSION

{60} For the foregoing reasons we hold that this aerial surveillance amounted to an

unconstitutional search under the Fourth Amendment and reverse the Court of Appeals' determination to the contrary. We affirm the ultimate determination of the Court of Appeals to suppress all evidence seized as a result and reverse the conviction in this case.

{61} IT IS SO ORDERED.

RICHARD C. BOSSON, Justice

WE CONCUR:

BARBARA J. VIGIL, Chief Justice

PETRA JIMENEZ MAES, Justice

EDWARD L. CHÁVEZ, Justice, specially concurring

CHARLES W. DANIELS, Justice

CHÁVEZ, Justice, specially concurring.

{62} I concur in the result of the majority opinion which suppresses the evidence in this case, but I respectfully disagree with the analysis employed by the majority. In this case, law enforcement officers conducted an indiscriminate aerial surveillance over large areas in Taos County based on outdated, vague reports from anonymous sources whose reliability is unknown, that some undisclosed people were growing marijuana in unspecified locations. Utilizing helicopters for aerial surveillance, the law enforcement officers swooped down on house after house, including Defendant's house, as if the occupants did not have an expectation of privacy in and around their homes. The district court believed "that the police swooped in as if they were in a state of war, searching for weapons or terrorist activity," which "can be terrifying and intimidating to most normal persons." The majority concludes that people would not have a reasonable expectation of privacy in their homes and curtilage[2] from aerial surveillance as long as during the surveillance law enforcement is disciplined enough not to be too noisy, kick up too much dust, cause too much wind, or otherwise unduly interfere with the owners' or occupants' use of the property. Majority op. ¶¶ 35, 36, 45, 46. In this case the majority concludes that the law enforcement officers were not disciplined enough, and they therefore violated Defendant's Fourth Amendment rights, requiring suppression of the evidence.

{63} Unlike the majority, I doubt that Defendant has a protected privacy interest under the Fourth Amendment of the United States Constitution, and I therefore would analyze this case under Article II, Section 10 of the New Mexico Constitution. I would hold that an individual's subjective expectation of privacy in his or her home from ground-level surveillance is coextensive with his or her subjective expectation of privacy from aerial surveillance. If an individual has taken steps to ward off inspection from the ground, the individual has also manifested an expectation to ward off inspection from the air.

{64} I would decline to follow the flawed analysis of the federal courts. Whether an individual has a reasonable expectation of privacy in his or her home and curtilage should not turn on whether the government's invasion is too noisy or kicked up too much dust. Equally unilluminating criteria such as whether the altitude of the aircraft is in compliance with Federal Aviation Administration (FAA) regulations or the regularity of flights over an individual's home should also be rejected. FAA regulations

[2]"Generally, the curtilage is the enclosed space of the grounds and buildings immediately surrounding a dwelling house." *State v. Hamilton*, 2012-NMCA-115, ¶ 16, 290 P.3d 271 (internal quotation marks and citation omitted).

address safety concerns, not privacy concerns. In addition, to suggest that in New Mexico privately owned helicopters or other aircraft regularly fly at the altitudes that the helicopters in this case were flown strains credulity. In any event, members of the public utilize airspace for travel, not to intently scrutinize other peoples' residential yards; at most, such travelers only gain a fleeting glimpse of a property owner's backyard. The New Mexico Constitution should not be interpreted to give the government the authority to conduct an aerial surveillance over a property owner's home and curtilage when the owner has taken steps to exhibit an expectation of privacy in those areas, unless the government complies with the warrant requirement—a requirement that we have carefully guarded for at least the last quarter of a century.

{65} New Mexico covers a large geographic area, almost 122,000 square miles, and much of it is rural. People living in rural communities enjoy the absence of noise and light pollution. To be clear, they have a heightened expectation of privacy. Our courts have acknowledged as much since at least 1991. *See State v. Sutton*, 1991-NMCA-073, ¶ 24, 112 N.M. 449, 816 P.2d 518 (concluding that the prevalence of large rural lots and plentiful land has given rise to uniquely heightened expectations of privacy in the homes and curtilages of our citizens), *holding modified on other grounds by State v. Gomez*, 1997-NMSC-006, 122 N.M. 777, 932 P.2d 1.

{66} I would hold that in New Mexico, when a property owner takes steps to exhibit a subjective expectation of privacy from ground-level observations into the curtilage of his or her property, society would recognize the owner's subjective expectation of privacy from aerial observations as reasonable. Under such circumstances, pursuant to Article II, Section 10 of the New Mexico Constitution, before law enforcement officers may conduct an aerial surveillance, they must obtain a search warrant or have some recognized exception to the warrant requirement. The interest protected by Article II, Section 10 is the privacy interest of all citizens, including law-abiding citizens, and a citizen's privacy interest is not diminished if a search uncovers evidence of a crime.[3]

A. Article II, Section 10 of the New Mexico Constitution provides greater privacy protections than the Fourth Amendment of the United States Constitution against the government-initiated aerial surveillance of Defendant's property

{67} The Fourth Amendment of the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Similarly, Article II, Section 10 of the New Mexico Constitution guarantees that "[t]he people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures."

{68} "Because both the United States and the New Mexico Constitutions provide overlapping protections against unreasonable searches and seizures, we apply our interstitial approach." *State v. Ketelson*, 2011-NMSC-023, ¶ 10, 150 N.M. 137, 257 P.3d 957 (internal quotation marks and citations omitted). Under our interstitial approach, "we first consider whether the right being asserted is protected under the federal constitution." *Id.* (internal quotation marks and citation

[3] *See, e.g., State v. Cardenas-Alvarez*, 2001-NMSC-017, ¶ 18, 130 N.M. 386, 25 P.3d 225 (noting that Article II, Section 10 embodies "the fundamental notion that *every* person in this state is entitled to be free from unwarranted governmental intrusion" (emphasis added) (internal quotation marks and citations omitted)).

omitted). "If the right is protected by the federal constitution, then the state constitutional claim is not reached." *Id.*; *see also State v. Jean-Paul*, 2013-NMCA-032, ¶ 5, 295 P.3d 1072 ("Under New Mexico's interstitial approach to state constitutional interpretation, this Court should only reach the state constitutional question if the federal constitution does not provide the protection sought by the party raising the issue."). If the right is not protected by the federal constitution, "we next consider whether the New Mexico Constitution provides broader protection, and we may diverge from federal precedent for three reasons: a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics." *Ketelson*, 2011-NMSC-023, ¶ 10 (internal quotation marks and citation omitted). For the reasons that follow, I cannot agree with the majority that the Fourth Amendment protects Defendant's reasonable expectation of privacy from government aerial surveillance.

1. *Defendant's expectation of privacy against aerial surveillance is likely not protected by the Fourth Amendment*

{69} "In determining whether a particular form of government-initiated . . . surveillance is a 'search' within the meaning of the Fourth Amendment," *Smith v. Maryland*, 442 U.S. 735, 739 (1979), the United States Supreme Court adopted a two-prong test that was first articulated in Justice Harlan's concurrence in *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring), *limitation of holding recognized by United States v. Oliver*, 686 F.2d 356, 359-60 (6th Cir. 1982). *Smith*, 442 U.S. at 740 (quoting *Katz*, 389 U.S. at 361 (Harlan, J., concurring)). Under this two-prong test, courts must first determine "whether the individual, by his [or her] conduct, has 'exhibited an actual (subjective) expectation of privacy.' " *Id.* (quoting *Katz*, 389 U.S. at 361 (Harlan, J., concurring)). If the individual exhibited a subjective expectation of privacy, courts next determine "whether the individual's subjective expectation of privacy is 'one that society is prepared to recognize as reasonable.' " *Id.* (quoting *Katz*, 389 U.S. at 361 (Harlan, J., concurring) (internal quotation marks omitted)).

{70} United States Supreme Court precedent establishes that a defendant does not have a reasonable expectation of privacy under the Fourth Amendment if the aerial surveillance of a home and its curtilage is conducted within navigable airspace, in a non-intrusive manner, using commercially available technology, and the aerial surveillance reveals something that the defendant has not protected from aerial scrutiny. The Court first analyzed the constitutionality of aerial surveillance in *Dow Chemical Co. v. United States*, 476 U.S. 227, 229 (1986), where the Environmental Protection Agency, without Dow's consent, contracted with a commercial aerial photographer to provide images of a 2,000-acre Dow manufacturing facility from altitudes of 1,200 feet, 3,000 feet, and 12,000 feet.

{71} The Court first noted that "Dow plainly ha[d] a reasonable, legitimate, and objective expectation of privacy within the interior of its covered buildings, and it is equally clear that expectation is one society is prepared to observe." *Id.* at 236. However, the Court reasoned that the "intimate activities associated with family privacy and the home and its curtilage simply do not reach the outdoor areas or spaces between structures and buildings of a manufacturing plant." *Id.* The Court reasoned that the open areas in the 2,000-acre industrial facility were more akin to an open field than to the curtilage of a home, *id.* at 235-36, and as a result, were "open to the view and observation of persons in aircraft lawfully in the public airspace immediately above or sufficiently near the

area for the reach of cameras." *Id.* at 239. Accordingly, the Court held that "the taking of aerial photographs of an industrial plant complex from navigable airspace is not a search prohibited by the Fourth Amendment." *Id.*

{72} In a second opinion filed on the same day the Court decided *Dow*, the United States Supreme Court also decided *California v. Ciraolo*, a case where police conducted an aerial surveillance operation after they received a tip regarding backyard marijuana cultivation on the defendant's property. 476 U.S. 207, 209 (1986). After finding that the high fencing surrounding the defendant's yard obstructed their view from the street, the police obtained a small airplane and flew over the residence at an altitude of 1,000 feet. *Id.* The police officers in the airplane observed and photographed what they concluded to be marijuana plants growing in the defendant's backyard. *Id.* This evidence was used to obtain a search warrant to seize the marijuana plants. *Id.* at 209-10.

{73} The Court reasoned that although the presence of a ten-foot fence clearly conveyed a "desire to maintain privacy," and indeed, it successfully did so "as far as the normal sidewalk traffic was concerned," the marijuana plants might well have been visible from "the top of a truck or a two-level bus." *Id.* at 211. Under the second prong of the *Katz* test, the Court reasoned that "[t]he Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares." *Id.* at 213. As a result, the Court concluded that "the mere fact that an individual has taken measures to restrict some views of his [or her] activities [does not] preclude an officer's observations from a public vantage point where he [or she] has a right to be and which renders the activities clearly visible." *Id.* Because the observations were made from "public navigable airspace in a physically nonintrusive manner," *id.* (citation omitted), the Court held that the defendant's expectation of privacy from such aerial observations was not one "that society is prepared to honor," *id.* at 213-14 ("Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed.").

{74} The dissent written by Justice Powell took issue with the majority's sole reliance "on the fact that members of the public fly in planes and may look down at homes as they fly over them." *Id.* at 223 (Powell, J., dissenting). Justice Powell observed that this reasoning was flawed because "the actual risk to privacy from commercial or pleasure aircraft is virtually nonexistent. Travelers on commercial flights, as well as private planes used for business or personal reasons, normally obtain at most a fleeting, anonymous, and nondiscriminating glimpse of the landscape and buildings over which they pass." *Id.*

{75} Nearly three years after *Ciraolo*, the Court again addressed the constitutionality of government-initiated aerial surveillance operations in *Florida v. Riley*, 488 U.S. 445 (1989). *Riley* arose from a tip to police involving marijuana cultivation in a greenhouse located behind the defendant's house where the plants could not be seen from the street. *Id.* at 447-48. The aerial observations were made from a helicopter at an altitude of 400 feet, which allowed the police officers to see marijuana plants through openings in the roof and sides of the greenhouse. *Id.* at 448. In a fractured opinion, the majority of the justices in *Riley* concluded that these observations were constitutional. *Id.* at 452.

{76} Writing for the plurality, Justice White acknowledged that the defendant had a subjective expectation of privacy because "the

precautions he took protected against ground-level observation." *Id.* at 450. However, Justice White concluded that the defendant's subjective expectation of privacy was not reasonable because "the sides and roof of his greenhouse were left partially open," and "what was growing in the greenhouse was subject to viewing from the air." *Id.* Justice White reasoned that the defendant "could not reasonably have expected that his greenhouse was protected from public or official observation from a helicopter had it been flying within the navigable airspace for fixed-wing aircraft." *Id.* at 450-51. Justice White noted that the Court "would have a different case if flying at that altitude had been contrary to law or regulation." *Id.* at 451. Justice White also concluded that it was important that "no intimate details connected with the use of the home or curtilage were observed, and there was no undue noise, and no wind, dust, or threat of injury." *Id.* at 452.

{77} Justice O'Connor's concurrence raised concerns about relying only upon compliance with FAA regulations as a litmus test for an individual's privacy interest against government-initiated aerial surveillance. *Id.* at 452-53 (O'Connor, J., concurring). Justice O'Connor instead reasoned that "consistent with *Katz*, we must ask whether the helicopter was in the public airways at an altitude at which members of the public travel with sufficient regularity that [the defendant's] expectation of privacy from aerial observation was not 'one that society is prepared to recognize as reasonable.' " *Id.* at 454 (O'Connor, J., concurring) (quoting *Katz*, 389 U.S. at 361 (Harlan, J., concurring) (internal quotation marks omitted)). Justice O'Connor concluded that because there is "considerable public use of airspace at altitudes of 400 feet and above," the defendant did not have a reasonable expectation of privacy from "naked-eye aerial observation from that altitude." *Id.* at 455 (O'Connor, J., concurring). However, Justice O'Connor also cautioned that "public use of altitudes lower than that—particularly public observations from helicopters circling over the curtilage of a home—may be sufficiently rare that police surveillance from such altitudes would violate reasonable expectations of privacy, despite compliance with FAA air safety regulations." *Id.* (O'Connor, J., concurring).

{78} Justice Brennan's dissent similarly took issue with tying an individual's privacy interest to FAA flight safety regulations, stating that "[i]t is a curious notion that the reach of the Fourth Amendment can be so largely defined by administrative regulations issued for purposes of flight safety." *Id.* at 458 (Brennan, J., dissenting). To Justice Brennan, the question was not whether the flights were in compliance with the FAA regulations, "but whether public observation of [the defendant]'s curtilage was so commonplace that [the defendant]'s expectation of privacy in his backyard could not be considered reasonable." *Id.* at 460 (Brennan, J., dissenting). In answering this question, Justice Brennan departed from Justice O'Connor's conclusion, and he noted that while privately-owned helicopters occasionally fly over populated areas at 400 feet, "such flights are a rarity." *Id.* at 465 (Brennan, J., dissenting). Justice Brennan attributed this observation in part on the fact that the police officer's "ability to see over [the defendant]'s fence depended on his [or her] use of a very expensive and sophisticated piece of machinery to which few ordinary citizens have access." *Id.* at 460 (Brennan, J., dissenting). Justice Blackmun's dissent also cited the rarity of helicopter overflights at 400 feet, and he therefore reasoned that the prosecution should have the burden of proving that the defendant lacked a reasonable expectation of privacy "for any helicopter surveillance case in which the

flight occurred below 1,000 feet." *Id.* at 468 (Blackmun, J., dissenting).

{79} Under the leading federal precedent, it is questionable whether Defendant in this case has a protected privacy interest under the Fourth Amendment. Although I agree with the majority that Defendant exhibited a subjective expectation of privacy under the first prong of the two-prong test in *Katz*, majority op. ¶ 28, it is questionable whether Defendant's "subjective expectation of privacy is 'one that society is prepared to recognize as reasonable.' " *Smith*, 442 U.S. at 740 (quoting *Katz*, 389 U.S. at 361 (internal quotation marks omitted)).

{80} Concerning Defendant's subjective expectation of privacy, I first note that Defendant's property is located in a remote area of Carson Estates in Taos County which, as the district court found, "is accessed by poorly maintained dirt roads with few directional signs." The evidence introduced during the hearing on Defendant's motion to suppress indicates that Defendant constructed the greenhouse in question at a distance from the single dirt road into his property, which runs parallel to his southern property line. The evidence also indicates that Defendant posted three signs at the only entrance into his property that read "Caveman Way Private Road," "No trespassing," and "Beware of Dog," and he erected two fences that extended 12 feet to the east and west of the driveway along his southern property line. In addition to the two fences and several large trees and bushes obstructing the view of Defendant's greenhouse from the dirt road, the evidence presented at the suppression hearing indicated that he constructed a garden with a shade screen along the southern wall of the greenhouse, and he covered the north wall of the greenhouse with black plastic. Unlike *Ciraolo*, where the marijuana plants might well have been visible from "the top of a truck or a two-level bus," 476 U.S. at 211, the evidence presented at Defendant's suppression hearing substantially supports the district court's finding that "[t]he overwhelming volume of testimony is that one could not see into the greenhouse[] from the ground."

{81} In addition, the district court was not convinced that the State Police officers were able to definitively see into the greenhouse from the helicopter. This finding is attributed to the fact that Defendant covered the roof of his greenhouse with opaque plastic, which the district court found "is described at best as translucent, though light and dark may be distinguished, but only as a pattern of shadows and light." Unlike *Riley*, there is no evidence of openings in the opaque plastic covering the ceiling of Defendant's greenhouse. Because no photographs of the greenhouse were taken from the helicopter, the State presented testimony suggesting that the spotter in the helicopter could easily see marijuana plants inside Defendant's greenhouse because the plants pressed up against the ceiling and filled the entire greenhouse. However, although the spotter reported seeing plants growing in back of the greenhouse (which actually were corn, sunflowers, and echinacea plants) and a greenhouse with vegetation, the spotter never confirmed any marijuana sightings. In addition, photographs taken by Sergeant Merrell of the interior of Defendant's greenhouse during the State Police search do not support the State's assertion that marijuana plants were pressed up against the ceiling of the greenhouse. In fact, when presented with these photographs during the suppression hearing, Sergeant Merrell conceded that none of them shows marijuana plants pressing up against the ceiling and filling Defendant's entire greenhouse.

{82} This evidence supports the district court's findings that "[w]ith the unaided eye it is not likely that anything other than a belief that it was marijuana was possible" and that "the visibility of 'suspected marijuana' plants

inside the greenhouse[] is improbable." Accordingly, I conclude that Defendant took steps that exhibited a subjective expectation of privacy under the Fourth Amendment.

{83} However, under the second prong in the *Katz* test, it is questionable whether the United States Supreme Court would conclude that Defendant's "subjective expectation of privacy is 'one that society is prepared to recognize as reasonable' " under the Fourth Amendment. *Smith*, 422 U.S. at 740 (quoting *Katz*, 389 U.S. at 361 (internal quotation marks omitted)). First, although the district court found suspect "[t]he testimony that naked eye examination from 500 feet revealed marijuana plants" and the spotter in the helicopter "probably had to get closer to try to see what he was seeing from afar," the district court ultimately concluded that "[t]his factor does not weigh against the police surveillance, standing alone." The district court found "no competent evidence that the police were violating flight laws" because "[t]he FAA permits much lower flight by helicopter than by fixed wing" aircraft. *See* 14 C.F.R. § 91.119(d)(1) (1996) ("If the operation is conducted without hazard to persons or property on the surface . . . [a] helicopter may be operated at less than the minimums prescribed in paragraph (b) or (c) of this section . . . .").

{84} Second, the district court was "troubled by the testimonial descriptions of rotor wash and flying debris" relevant to the intrusiveness of the operation. Defendant's neighbors testified that the helicopter "frightened and annoyed" them and the downdraft created by the helicopter lifted a solar panel off a roof and blew trash all over neighboring front yards. However, Sergeant Adrian Vigil, who was in charge of supervising portions of the operation, testified that the helicopter team is trained to hover at a high enough altitude to avoid picking up rotor wash and flying debris that would create a dangerous situation for the ground teams. The district court found that some of the testimony by Defendant's neighbors was "overly dramatic and anti-police state rhetoric," but the court also "believe[d] that there is merit to the claim that the police swooped in as if they were in a state of war, searching for weapons or terrorist activity." The district court ultimately concluded that "[t]he claims of dust and destruction [were] negligible, in comparison" to the heightened degree of intrusion created by aerial surveillance "in response to general vague complaints." Nevertheless, apart from "negligible" claims of dust and destruction, the district court found that the aerial surveillance did not interfere with Defendant's use of his greenhouse. *Cf. Riley*, 488 U.S. at 452 (determining that a surveillance helicopter did not interfere with using a greenhouse to grow marijuana in ultimately holding that aerial surveillance was not a search under the Fourth Amendment).

{85} Finally, the district court found that the spotter in the helicopter "was not using optical enhancements like binoculars." Although the operation's procedures required helicopter spotters to "utilize optic devices in the course of locating marijuana plantations," the helicopter that provided aerial surveillance on Defendant's property did not have such devices installed. Because the State Police spotter made a naked-eye observation of Defendant's property, the district court's finding on this factor favors the State, although I note that the helicopter spotter's sightings of allegedly suspicious plants growing outside the greenhouse and allegedly suspicious vegetation growing inside the greenhouse were either incorrect or improbable.

{86} Although the aerial surveillance sightings over Defendant's property were incorrect or improbable, the district court found that the surveillance was conducted

within navigable airspace and in a negligibly intrusive manner, which makes it questionable whether Defendant has a protected privacy interest under the Fourth Amendment. Because "there is serious uncertainty regarding whether the United State Supreme Court would suppress the evidence in this case under the Fourth Amendment's protections against unreasonable searches and seizures," *State v. Garcia*, 2009-NMSC-046, ¶ 25, 147 N.M. 134, 217 P.3d 1032, "we turn to Article II, Section 10 to resolve this issue." *State v. Paul T.*, 1999-NMSC-037, ¶ 12, 128 N.M. 360, 993 P.2d 74 ("Because of this gap in Fourth Amendment jurisprudence, together with the possibility that the Fourth Amendment does not protect [the defendant] in the circumstances of this case, we turn to Article II, Section 10 to resolve the issue . . . .").

2. *Defendant has a protected privacy interest against aerial surveillance under Article II, Section 10*

{87} "When interpreting Article II, Section 10, the New Mexico Supreme Court has emphasized its strong belief in the protection of individual privacy . . . ." *State v. Granville*, 2006-NMCA-098, ¶ 19, 140 N.M. 345, 142 P.3d 933. "Accordingly, New Mexico courts have long held that Article II, Section 10 provides greater protection of individual privacy than the Fourth Amendment." *State v. Crane*, 2014-NMSC-026, ¶ 16, 329 P.3d 689; *State v. Leyva*, 2011-NMSC-009, ¶ 51, 149 N.M. 435, 250 P.3d 861 ("It is well-established that Article II, Section 10 provides more protection against unreasonable searches and seizures than the Fourth Amendment.").

{88} In light of the New Mexico Constitution's strong belief in the protection of individual privacy, "[t]he foremost distinct state characteristic upon which this Court has elaborated New Mexico's search and seizure jurisprudence under Article II, Section 10 is 'a strong preference for warrants.' " *Crane*, 2014-NMSC-026, ¶ 16 (quoting *Gomez*, 1997-NMSC-006, ¶ 36). This Court "has emphasized New Mexico's strong preference for warrants in order to preserve the values of privacy and sanctity of the home that are embodied by" Article II, Section 10. *Granville*, 2006-NMCA-098, ¶ 24. Because an individual's " 'curtilage is the area to which extends the intimate activity associated with the sanctity of a . . . home and the privacies of life,' " it enjoys the same privacy protections of the home. *State v. Hamilton*, 2012-NMCA-115, ¶ 16, 290 P.3d 271 (citations omitted).

{89} We premise our strong preference for warrants on the basic principle that a "judicial warrant has a significant role to play in that it provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime." *Gomez*, 1997-NMSC-006, ¶ 36 (internal quotation marks and citations omitted). Based on our strong preference for warrants, I would depart from federal jurisprudence and hold that Article II, Section 10 of the New Mexico Constitution provides greater protection than the Fourth Amendment of the United States Constitution against government-initiated aerial surveillance over an individual's home and curtilage.

{90} To begin the analysis, a court must apply the two-prong test set out in *Katz* to the facts of this case. First, did Defendant exhibit an actual subjective expectation of privacy, and second, was Defendant's subjective expectation of privacy " 'one that society is prepared to recognize as reasonable.' " *Crane*, 2014-NMSC-026, ¶ 18 (quoting *Katz*, 389 U.S. at 361 (Harlan, J., concurring)). Under the first prong, courts address which steps an individual

must take to manifest a subjective expectation of privacy from aerial surveillance. *Id.* I would hold that an individual's subjective expectation of privacy from *ground-level* surveillance is *coextensive* with his or her subjective expectation of privacy from *aerial* surveillance. If an individual has taken steps to ward off inspection *from the ground*, the individual has also manifested an expectation that the visibility of his or her property that he or she sought to block off from the ground *should also be private when seen from the air*. This is because members of the general public generally do not intently scrutinize other peoples' curtilages, even when they do fly over private property. *Riley*, 488 U.S. at 460 (Brennan, J., dissenting) (noting that an officer "positioned 400 feet above [the defendant's] backyard" enjoyed a vantage point that "was not one any citizen could readily share"); *see also Ciraolo*, 476 U.S. at 223-24 (Powell, J., dissenting) ("[T]he actual risk to privacy from commercial or pleasure aircraft is virtually nonexistent. Travelers on commercial flights, as well as private planes used for business or personal reasons, normally obtain at most a fleeting, anonymous, and nondiscriminating glimpse of the landscape and buildings over which they pass. The risk that a passenger on such a plane might observe private activities, and might connect those activities with particular people, is simply too trivial to protect against. It is no accident that, as a matter of common experience, many people build fences around their residential areas, but few build roofs over their backyards." (footnote omitted)). Instead, aerial surveillance is usually conducted with "expensive" equipment by police officers. *See Riley*, 488 U.S. at 460 (Brennan, J., dissenting). Thus, in most situations, an individual who desires complete privacy on his or her property can usually establish such privacy by *merely* taking steps to ward off *ground-level surveillance* because aerial surveillance usually is conducted only by law enforcement personnel, and not by the general public.

{91} This holding acknowledges that "even individuals who have taken effective precautions to ensure against ground-level observations cannot block off all conceivable aerial views of their outdoor patios and yards *without entirely giving up their enjoyment of those areas*." *Riley*, 488 U.S. at 454 (O'Connor, J., concurring) (emphasis added). I would refuse to require individuals to give up enjoyment of their curtilage areas so as to manifest a subjective expectation of privacy from aerial surveillance "that society is prepared to recognize as reasonable." *Katz*, 389 U.S. at 361 (Harlan, J., concurring) (internal quotation marks omitted). A contrary holding would require individuals to roof their backyards and "encourage the transformation of our open society into a garrison state, [where] each individual [is] obsessed with shielding private activities in presumptively private areas from all possible observation." *People v. Cook*, 710 P.2d 299, 305 (Cal. 1985). Moreover, measures to block off curtilages from aerial view would generate "intangible cost[s] of shutting out the sunlight and fresh air which gives such . . . space[s their] precious character." *Id.*

{92} Applying the first *Katz* prong to the facts in this case, I conclude that the evidence presented during the motion to suppress hearing establishes that Defendant held a subjective expectation of privacy from aerial surveillance because of the steps he took to ward off ground-level surveillance. Defendant chose to live in a remote area of Carson Estates in Taos County, an area difficult to access due to "poorly maintained dirt roads with few directional signs or markings." Moreover, the evidence presented at the motion to suppress hearing indicates that Defendant posted signs and erected fencing at the single entrance into his property which

notified any passersby of his expectations of privacy. The evidence also indicates that Defendant constructed a garden with a shade screen along the southern wall of his greenhouse and covered the north wall of his greenhouse with black plastic. This evidence substantially supports the district court's finding that "[t]he overwhelming volume of testimony is that one could not see into the greenhouse[] *from the ground*." Based on this evidence, we hold that the Defendant took sufficient steps to exhibit a subjective expectation of privacy from ground-level observation, and therefore from aerial surveillance as well.

{93} The second prong of the *Katz* test requires a court to determine whether Defendant's subjective expectation of privacy is one that society is prepared to recognize as reasonable. Only two New Mexico cases have evaluated the second prong to determine the constitutionality of government-initiated aerial surveillance. *See generally State v. Rogers*, 1983-NMCA-115, 100 N.M. 517, 673 P.2d 142; *State v. Bigler*, 1983-NMCA-114, 100 N.M. 515, 673 P.2d 140. As *State v. Davis* (*Davis III*) recognized, both of these cases were decided before we began interpreting Article II, Section 10 more broadly than the Fourth Amendment. 2014-NMCA-042, ¶ 16, 321 P.3d 955. *Rogers* and *Bigler* appeared to anticipate the multi-factored analysis taken in *Dow*, *Ciraolo*, and *Riley* and focused on the aircraft's altitude, what aspects of the curtilage were openly visible to the public from the air, and the regularity of public flights over the defendant's property. *See Rogers*, 1983-NMCA-115, ¶¶ 7, 9 (holding that the "defendant did not have a justifiable expectation of privacy with respect to marijuana plants protruding through holes in his greenhouse roof to the extent of their visibility from the air" by focusing on the "altitude of the aircraft, use of equipment to enhance the observation, frequency of other flights and intensity of the surveillance"); *Bigler*, 1983-NMCA-114, ¶¶ 8-9 (holding that the defendant had no reasonable expectation of privacy in his marijuana crop to the extent it was visible from the air because, among other considerations, the "defendant's property [lay] within two or three miles of a municipal airport and the fact that crop dusters [flew] in the area at will").

{94} These factors are not helpful in determining whether an individual's subjective expectation of privacy from aerial surveillance is recognized as reasonable under Article II, Section 10. First, the altitude at which an aircraft may be operated is governed by the FAA's flight regulations under 14 C.F.R. Section 91.119. In an aspect that is relevant to this case, helicopters may operate at lower altitudes than the minimums prescribed in Section 91.119(b)-(c) "[i]f the operation is conducted without hazard to persons or property on the surface." 14 C.F.R. § 91.119(d)(1). The plain language of these flight regulations concerns physical safety, not whether an individual has a reasonable expectation of privacy in his or her home and curtilage. *See id.*; *cf. Riley*, 488 U.S. at 453 (O'Connor, J., concurring) ("[T]here is no reason to assume that compliance with FAA regulations alone determines whether the government's intrusion infringes upon the person and societal values protected by the Fourth Amendment." (internal quotation marks and citations omitted)).

{95} Individuals "likely expect that law enforcement personnel as well as other air travelers will abide by safety rules and other applicable laws and regulations when flying over their homes," but simply abiding by these regulations is not "an adequate test of whether government surveillance from that same spot is constitutional." *State v. Bryant*, 2008 VT 39, ¶ 28, 950 A.2d 467; *see also Crane*, 2014-NMSC-026, ¶¶ 26-27 (refusing to guide its constitutional analysis by conflicting public ordinances that regulate the manner in which

household trash is collected and disposed of in New Mexico).

> Because FAA regulations allow helicopters to fly at any altitude "if the operation is conducted *without hazard to person or property on the surface*," 14 C.F.R. § 91.119, the inevitable result of this reasoning—in the absence of more restrictive state aviation laws—is that the *dangerousness* of police surveillance may become the yardstick by which constitutional privacy protection is measured.

Bryant, 2008 VT 39, ¶ 23 (first emphasis added). As a result, I decline to utilize an aircraft's altitude to evaluate the constitutionality of government-initiated aerial surveillance.

{96} The factor analyzing what is openly visible in a curtilage from the air is similarly not helpful, regardless of whether the aircraft was flying within navigable airspace or whether its occupants were utilizing optical equipment. If courts were to analyze what was openly visible from the air, individuals may be induced to "completely cover and enclose their curtilage." *Riley*, 488 U.S. at 454 (O'Connor, J., concurring). These "precautions" would exceed the measures "customarily taken by those seeking privacy." *Id.* (O'Connor, J., concurring) (internal quotation marks and citation omitted). Article II, Section 10 does not require the residents of this state to employ extraordinary means to maintain their constitutional privacy rights. *See* N.M. Const. art. II, § 10; *cf.* 1 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 2.6(c), at 898-99 (5th ed. 2012) ("It would be a perversion of *Katz* to interpret it as extending protection only to those who resort to extraordinary means to keep information regarding their personal lives out of the hands of the police."). We also note that the measures required to cut off aerial views would entail "considerable monetary expense." *Cook*, 710 P.2d at 305. Thus, a criterion that focuses on what is openly visible would imply that individuals who have greater financial resources would possess a greater expectation of privacy than others who do not; the protections of the New Mexico Constitution should not vary with an individual's financial resources. *See Crane*, 2014-NMSC-026, ¶ 28.

{97} I also would decline to utilize the regularity of flights over an individual's home or its proximity to an airport to inform our constitutional analysis under Article II, Section 10. Neither *Rogers* nor *Bigler* addressed the difference between government-initiated overflights and those made by members of the general public. *See Rogers*, 1983-NMCA-115, ¶ 6 ("[A]ir traffic is not uncommon in the area, although the town apparently does not lie below any prescribed air corridor. Defendant and one of his neighbors on occasion had seen aircraft, including helicopters, in the area."); *Bigler*, 1983-NMCA-114, ¶ 8 ("The fact that defendant's property lies within two or three miles of a municipal airport and the fact that crop dusters fly in the area at will also support the trial court's finding that he had no reasonable expectation of privacy in his field to the extent of [its] visibility from the air."). There is a "qualitative difference between police surveillance and other uses made of the airspace. Members of the public use the airspace for travel, business, or pleasure, not for the purpose of observing activities taking place within residential yards." *Ciraolo*, 476 U.S. at 224 (Powell, J., dissenting). As Justice Brennan observed in *Riley*, the ability of the State Police to see on to a defendant's property "depended on [their] use of a very expensive and sophisticated piece of machinery to which few ordinary citizens have access." 488 U.S. at 460 (Brennan, J., dissenting). The factors of flight regularity

and airport proximity fail to comport with our recognition that "Article II, Section 10, protects citizens from governmental intrusions, not intrusions from members of the general public." *Granville*, 2006-NMCA-098, ¶ 29.

{98} Furthermore, I agree with Justice Powell's dissent in *Ciraolo* and also conclude that any actual risk to privacy from commercial or private aircraft is tenuous at best. *See* 476 U.S. at 223 (Powell, J., dissenting). "[T]he actual risk to privacy from commercial or pleasure aircraft is virtually nonexistent. Travelers on commercial flights, as well as private planes used for business or personal reasons, normally obtain at most a fleeting, anonymous, and nondiscriminating glimpse of the landscape and buildings over which they pass." *Id.* (footnote omitted). "One's yard may unavoidably be exposed to casual glances from passing aircraft, but he [or she] may still reasonably assume that it will not be intently examined by government agents who are flying over it for that specific purpose." *Cook*, 710 P.2d at 304 (footnote omitted). Accordingly, I also reject using the regularity of overflights and a property's proximity to an airport to inform our constitutional analysis.

{99} The Court of Appeals also rejected these factors. *See Davis III*, 2014-NMCA-042, ¶¶ 18-20. The Court of Appeals was understandably concerned with the likelihood that "ultra-quiet drones will soon be used commercially and, possibly, for domestic surveillance," *id.* ¶ 19, and that "[s]uch advances in technology demonstrate the increasingly diminished relevance of intrusiveness factors, as courts have regarded them in the past, in the analysis of what constitutes a search." *Id.* As a result, the Court of Appeals adopted the following test to determine whether aerial surveillance constitutes a search under Article II, Section10:

> [I]f law enforcement personnel, via targeted aerial surveillance, have the *purpose to intrude and attempt to obtain information* from a protected area, such as the home or its curtilage, that could not otherwise be obtained without physical intrusion into that area, that aerial surveillance constitutes a search for purposes of Article II, Section 10.

Davis III, 2014-NMCA-042, ¶ 20 (emphasis added).

{100} I would decline to perpetuate a multi-factored analysis to inform constitutional privacy protections. This Court has long interpreted the protections of Article II, Section 10 by acknowledging the need to balance governmental interests against individual privacy interests. *See State v. Attaway*, 1994-NMSC-011, ¶ 24, 117 N.M. 141, 870 P.2d 103 ("Article II, Section 10 embodies the disparate values of privacy, sanctity of the home, occupant safety, and police expedience and safety."), *holding modified on other grounds by State v. Lopez*, 2005-NMSC-018, ¶¶ 18-19, 138 N.M. 9, 116 P.3d 80. To evaluate whether a search and seizure violates the protections of the New Mexico Constitution, courts judge "the facts of each case by balancing the degree of intrusion into an individual's privacy against the interest of the government in promoting crime prevention and detection." *State v. Jason L.*, 2000-NMSC-018, ¶ 14, 129 N.M. 119, 2 P.3d 856 (internal quotation marks and citation omitted).

{101} I would hold that under the second prong in the *Katz* test, an individual's reasonable expectation of privacy from aerial surveillance is coextensive with the scope of his or her reasonable expectation of privacy from ground surveillance. Therefore, the reasonableness of an individual's expectation of privacy from aerial surveillance is

determined by the steps he or she took to ward off ground surveillance. My analysis is guided by the long-held notion that society recognizes that an individual's curtilage enjoys the same privacy protections as his or her home. *Hamilton*, 2012-NMCA-115, ¶ 16. In addition, Article II, Section 10 does not require that extraordinary steps be taken to protect against ground-level observation for an individual to assert a reasonable expectation of privacy against government-initiated aerial surveillance. *See* N.M. Const. art. II, § 10; 1 LaFave, *supra*, § 2.6(c), at 898-99. "[T]he fact that government officials or the civilian public might be expected, for one reason or another, to enter a place or see or hear the activities within, does not necessarily preclude reasonable claims of privacy from intensive spying by police officers looking for evidence of crime." *Cook*, 710 P.2d at 304. Ultimately, "while an inhabitant of the modern world is deemed to *expect . . . the expectable*, the Constitution still shields him [or her] from governmental intrusions he [or she] has legitimate grounds not to expect." *Id.* (omission in original) (emphasis added) (internal quotation marks and citation omitted).

{102} For example, although an individual may expect the government to electronically eavesdrop on a private telephone conversation, an individual still exhibits an expectation of privacy that society recognizes as reasonable by secluding himself or herself when placing such a phone call. *Katz*, 389 U.S. at 353. Similarly, although an individual may expect the government to rummage through the contents of garbage bags placed in a communal dumpster, an individual still exhibits an expectation of privacy that society recognizes as reasonable by concealing his or her trash in an opaque garbage bag. *Crane*, 2014-NMSC-026, ¶ 27. Finally, hotel guests may also expect that housekeeping staff may enter their room or that police officers may open their unlocked hotel room door, but hotel guests still exhibit an expectation of privacy that society recognizes as reasonable by simply closing the hotel room door. *See, e.g.*, *Stoner v. California*, 376 U.S. 483, 489-90 (1964).

{103} Using the same reasoning, the citizens of New Mexico may expect any passerby to glance at the intimate details of their curtilage, but our citizens also exhibit an expectation of privacy that society recognizes as reasonable if the individuals took reasonable steps to prevent ground-level observation. In this case, Defendant not only obstructed the view into his greenhouse by constructing it some distance away from his southern property line behind trees and a screened garden, but he also covered the exterior walls with black plastic. These steps were not only reasonable in protecting against ground-level observation, but they were ultimately effective in preventing anyone from seeing "into the greenhouse[] from the ground." Based on these actions alone, society would recognize that Defendant's expectation of privacy was reasonable. I would therefore conclude that this reasonable expectation of privacy precludes aerial surveillance without a warrant. It is also significant that by constructing the greenhouse close to his home and completely enclosing it, Defendant's greenhouse more closely resembled an enclosed structure similar to a residential garage than an open backyard. Society clearly would find it reasonable for Defendant to have an expectation of privacy in the contents of a fully enclosed greenhouse located on his curtilage. *See Taylor v. United States*, 286 U.S. 1, 5-6 (1932) (holding that a garage was protected from a warrantless search because the garage was adjacent to the defendant's home); *United States v. Mullin*, 329 F.2d 295, 298 (4th Cir. 1964) (holding that an outdoor smokehouse was protected from a warrantless search because the smokehouse was 75 feet from the defendant's residence and there was no intervening barrier

between the two buildings to remove it from the curtilage); *but cf. United States v. Dunn*, 480 U.S. 294, 302 (1987) (holding that the defendant did not have a reasonable privacy interest in a barn located 60 yards from his home because the barn lay outside the fence enclosing the home, and thus it was not part of the curtilage).

{104} I would conclude that Defendant's subjective expectation of privacy from aerial surveillance is reasonable because of the steps he took to prevent ground-level surveillance. The State Police were required to obtain a warrant prior to conducting an aerial or ground search of the contents of Defendant's greenhouse during the operation. I accordingly would hold that the aerial surveillance of Defendant's property was unconstitutional.

B. The evidence seized from Defendant's greenhouse was not sufficiently attenuated from the warrantless aerial search

{105} I am in complete agreement with the majority that the evidence seized by the State Police was not sufficiently attenuated to purge it of the unconstitutional warrantless search. Majority op. ¶ 59. To preface this discussion, I would emphasize that I am not foreclosing the ability of law enforcement personnel to use constitutional investigative efforts in similar cases. The operation in this case was conducted as a result of anonymous tips reporting that marijuana was being grown in rural areas of Taos County. The anonymous tips did not provide either any names or the specific residences of the people who were allegedly growing marijuana. Based on these anonymous tips, the State Police narrowed its search to the Carson Estates and Twin Peaks areas of Taos County. As this Court recognized in *State v. Urioste*, " '[a]n anonymous tip may justify an investigatory stop if the information is sufficiently corroborated by subsequent investigation to establish reliability.' " 2002-NMSC-023, ¶ 16, 132 N.M. 592, 52 P.3d 964 (quoting *State v. Flores*, 1996-NMCA-059, ¶ 8, 122 N.M. 84, 920 P.2d 1038). However, " 'if a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable.' " *Id.* ¶ 17 (quoting *Alabama v. White*, 496 U.S. 325, 330 (1990)).

{106} The uncertain reliability of the anonymous tips in this case, coupled with "[t]he overwhelming volume of testimony . . . that one could not see into the greenhouse[] from the ground," required State Police personnel to investigate further using constitutional methods. *Id.* In the absence of reasonable suspicion, we have encouraged police officers to either (1) utilize a confidential informant or an undercover officer to observe suspicious activity; (2) "*attempt to gain consent to search the residence or perform a 'knock and talk' to try and gain information*"; or (3) speak with neighbors about whether they had observed any suspicious activities. *State v. Nyce*, 2006-NMSC-026, ¶ 23, 139 N.M. 647, 137 P.3d 587 (emphasis added), *holding limited on other grounds by State v. Williamson*, 2009-NMSC-039, 146 N.M. 488, 212 P.3d 376. In this case, the State Police officers relied on non-specific tips that they received over two years to conduct indiscriminate aerial surveillance of all private property in a vast area of Taos County. The New Mexico Constitution requires law enforcement officers to employ constitutional methods to develop probable cause to believe that a specific property contains evidence of a crime. I would make it clear that aerial surveillance is not a constitutional method.

{107} Even where consent is voluntary, consent is not constitutionally free of illegal taint where the police misconduct was

"directly related to the ensuing event of . . . giving consent." *Davis v. Commonwealth*, 559 S.E.2d 374, 380 (Va. Ct. App. 2002). Because Defendant took reasonable steps to protect his privacy that exhibited a reasonable expectation of privacy, the State Police should have attempted to corroborate their anonymous tips by employing one of the three listed constitutional methods. The State Police then likely would have established probable cause to support a search warrant. However, the subsequent utilization by the State Police of the constitutional "knock and talk" investigative tactic cannot purge Defendant's consent from the original taint of the unconstitutional warrantless aerial search. Accordingly, I agree that all evidence seized from Defendant's property must be suppressed.

{108} For the foregoing reasons, I respectfully concur with the result reached by the majority.

EDWARD L. CHÁVEZ, Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2015-NMSC-035

Filing Date: October 30, 2015

Docket No. S-1-SC-35160

KAREN ROBINSON, IN HER capacity as County Assessor,

Plaintiff-Appellee,

v.

BOARD OF COMMISSIONERS OF THE COUNTY OF EDDY, ROXANNE LARA, JOHN VOLPATO, JR., GUY E. LUTMAN, LEWIS DERRICK, AND TONY HERNANDEZ,

Defendants-Appellants.

Caraway, Tabor & Byers, L.L.P.
Matthew T. Byers
Carlsbad, NM

for Appellants

Bridget Ann Jacober
Santa Fe, NM

for Appellee

OPINION

BOSSON, Justice.

{1} In 1986 our Legislature established a county property valuation fund to assist county assessors in fulfilling their statutory obligations to maintain current and correct values of all property within their jurisdictions. *See* NMSA 1978, § 7-36-16(A) (2000); NMSA 1978, § 7-38-38.1(C) (2007). The County Assessor for Eddy County (County Assessor or Assessor) sought to use some of these funds to contract with a private company for technical assistance in locating and valuing oil and gas property. The County Commission for Eddy County (County Commission) refused to approve the proposed plan because it believed that a contract to pay private, independent contractors to assist the County Assessor in the performance of the Assessor's statutory duties exceeded the Commission's lawful authority.

{2} We are persuaded that the County Commission does have such authority under law, and that the contract under consideration here would not exceed that authority or be otherwise ultra vires. The district court having previously issued a declaratory judgment to that same effect, we affirm.

BACKGROUND

{3} The parties presented this case to the district court on stipulated facts. We extract from the record the most salient of these stipulations to provide background and context.

1. The current Property Tax Code ("PTC") was enacted in 1973 under Chapter 258.

2. The PTC provides for "county property valuation fund[,"] NMSA 1978, §[ ]7-38-38.1 enacted in 1986. This law is remedial legislation intended to provide assessors with resources ("the 1% fund") to meet their statutory obligation to maintain current and correct values of all property within their jurisdiction. [Section 7-36-16].

3. Expenditures from the county property valuation fund shall be made pursuant to a property valuation program presented by the county assessor and approved by a majority of the county commissioners.

4. Beginning in 2007, Karen Robinson, as Eddy County Assessor, requested approval from the commissioners to use the 1% fund to contract for technical assistance in locating and valuing oil and gas property. Exhibit 5 (Eddy County Board of Commissioners Minutes).

5. Each year, since 2008, the Eddy County Assessor submitted a property valuation program, which included an oil and gas audit. Each year a majority of the Eddy County commissioners approved the Assessor's property valuation program. *See*[] Exhibit 6 (2008 Budget Report); Exhibit 7 (2009 Budget Report); Exhibit 8 (2013 Budget Report).

6. The Eddy County commissioners, however, would not agree that the oil and gas audit could be performed with appraisal assistance procured through an independent contractor, even though monies available in the Assessor's 1% fund would pay the costs of the audit. Exhibit 5 (Minutes); Exhibit 9 (April 18, 2008 Letter from Robinson to PTD Director).

7. By constitutional provision and legislation, New Mexico counties are authorized to enter into contracts. . . .

. . . .

9. The sole prohibition on contracting by counties relates to transactions favoring persons who have been county employees within the preceding year. NMSA 1978, §[ ]4-44-24 [(1969, repealed 2011)].

. . . .

11. In 2007 and 2012, with the consent of the Eddy County Commission, the Assessor issued a Request for Proposals for an Eddy County Personal Property Audit. Exhibit 11 (Request for Proposals for Eddy County Oil and Gas Personal Property Audit Bid # B-07-20); Exhibit 12[] (Request for Proposals B-11-23 Eddy County Oil and Gas Personal Property Audit).

12. After evaluating the RFP responses in 2012, the Eddy County Assessor sought to have the Eddy County commissioners contract with the successful bidder, using the Assessor's 1% fund to pay for the contract services. Exhibit 5 (Minutes of March 14, 2012 Eddy County Commission meeting).

13. The Eddy County commissioners asserted that the Assessor did not have the legal authority to use contractual assistance to conduct an oil and gas property audit. *Id.*

14. The commissioners relied on *Fancher v. Board of Commissioners*, [1921-NMSC-039, 28 N.M. 179, 210 P.237,] in refusing to execute a contract to hire the technical assistance needed by the Assessor. Exhibit 5 (Minutes of March 14, 2012 Eddy County Commission meeting).

. . . .

17. The Eddy County commission also relies on the argument that the legislature's assignment of the "sole responsibility" and authority at the county level for property valuation maintenance, subject only to the general supervisory powers of the director (NMSA 1978, §[ ]7-36-16(A)) prohibits the Assessor from contracting for appraisal assistance.

18. In other statutes, the legislature has employed the terms "sole responsibility" and "sole authority" to allocate liability and delegate power, not to restrict an official's actions. Exhibit 4 (Fastcase search of term "sole authority").

19. At the 2013 Eddy County commission budget hearings, the commissioners stated that if there were a court order declaring that the Assessor is permitted to utilize contractual assistance, the commissioners would sign the contract with the successful bidder responding to the 2012 RFP. Exhibit 5 (Minutes of March 14, 2012 Eddy County Commission meeting).

. . . .

25. A determination of the Assessor's legal authority to utilize contractual technical assistance in assessing property will impact all thirty-three assessors in New Mexico.

{4} As noted in the stipulated facts, the Legislature created the county property valuation fund to assist county assessors to maintain "current and correct values of

property" within their jurisdiction. Section 7-36-16(A). Towards that end, the Legislature provided that "[e]xpenditures from the county property valuation fund shall be made pursuant to a property valuation program presented by the county assessor and approved by the majority of the county commissioners." Section 7-38-38.1(D). The fund is created through a 1% distribution of tax revenues from the county treasurer into that fund. The Legislature created this fund to provide county assessors with essential resources necessary to meet their statutory obligations.

{5} In this instance, the County Assessor duly submitted a "property valuation program" to the County Commission that included contracting with a private company to provide expert assistance in the valuation of oil and gas property located within the county, such as equipment and machinery. In withholding its approval, the only concern expressed by the County Commission was whether it was lawful to use money from the 1% fund to hire private independent contractors, as opposed to county employees, to provide technical assistance to the County Assessor. Importantly, the County Commission has never questioned the competency of the company chosen by the Assessor, nor is there a factual debate about whether the County Assessor actually needs technical assistance as she claims.

{6} After the County Commission withheld its approval, the County Assessor filed a declaratory judgment action asking the district court to determine whether the County Assessor and the County Commission had the authority to contract with an independent contractor to assist the County Assessor in valuing property. The district court granted the declaratory judgment, concluding that "the Eddy County Board of Commissioners has legal authority to contract for technical assistance for the Assessor in performing her duties of maintaining the property tax rolls as correct and current."

{7} Dissatisfied with the district court's ruling, the County Commission appealed to our Court of Appeals. The Court of Appeals heard oral argument and then, on its own motion, certified the case to this Court pursuant to Rule 12-606 NMRA. *Robinson v. Bd. of Comm'rs*, No. 32,998, order of certification (N.M. Ct. App. Mar. 12, 2015). The Court of Appeals advised us that the appeal presents significant questions of law and issues of substantial public interest of potential state-wide impact that should be determined by this Court. *Id.* ¶¶ 3, 4. Of particular concern to the Court of Appeals was the 1921 opinion from this Court in *Fancher*, 1921-NMSC-039, that needed to be addressed by this Court before the contract could proceed. We accepted certification.

DISCUSSION

{8} This case is one of statutory construction. As such, we review the decision of the district court de novo. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶ 5, 146 N.M. 24, 206 P.3d 135.

{9} Encompassed within the stipulated facts, the parties agree that counties in New Mexico have constitutional and statutory authority to contract with outside parties. The parties further agree that "[t]he sole prohibition on contracting by counties relates to transactions favoring persons who have been county employees within the preceding year," which, of course, is not at issue in this case. *See* § 4-44-24 (1969, repealed 2011). Therefore, nothing in the statutory powers of counties stands in the way of the County Assessor's desired contract.

{10} We turn, then, to the statutory powers of county assessors. The Property Tax Code, NMSA 1978, §§ 7-35-1 to -38-93 (1973, as amended through 2012), makes a general grant to county assessors of authority over valuation of property. "The county assessor is

responsible and has the authority for the valuation of all property subject to valuation for property taxation purposes in the county . . . ." Section 7-36-2(A). Section 7-36-16(A) specifically states with respect to property valuation maintenance:

> County assessors . . . shall also implement a program of updating property values so that current and correct values of property are maintained and *shall have sole responsibility and authority at the county level for property valuation maintenance*, subject only to the general supervisory powers of the director [of the state property tax department].

(Emphasis added.)

{11} Clearly, the Legislature has reposed in county assessors the responsibility for maintaining "a program of updating property values" to reflect "current and correct values of property." *See id.* Simply put, the county assessor is in charge; it is the responsibility of that office to get the job done. The statute imposes no restrictions on how county assessors are to exercise that authority. The county commission's job is to assist the assessor. The Property Tax Code also allows a county assessor, subject to concurrence by the county commission, to request the director of the state Property Tax Division to provide technical assistance services in the valuation of major industrial or commercial properties subject to valuation by the assessor. *See* Section 7-36-19.

{12} To provide assessors with additional financial resources, the Legislature created the county property valuation fund in 1986. *See* § 7-38-38.1(C). Historical context is important. Prior to creating this fund, county assessors had the same responsibility for property valuation maintenance, but without the necessary financial resources to achieve that goal in a timely manner. This Court addressed this seeming paradox in *Appelman v. Beach*, 1980-NMSC-041, 94 N.M. 237, 608 P.2d 1119.

{13} In *Appelman*, the Bernalillo County Assessor began to reassess property values in 1974. 1980-NMSC-041, ¶ 3. By 1976, however, only 16% of property in the county had been reassessed. *Id.* This ultimately led to different tax rates for equivalent property which posed serious constitutional problems. *Id.* ¶ 9. As the *Appelman* Court described it, "[i]t is unlawful and grossly inequitable for one set of taxpayers to pay on market value and others to be charged at a much lower rate, as is indicated in this record." *Id.* ¶ 16. Bernalillo County conceded that the reappraisal program was progressing too slowly, but the record suggested that "the County did not have the manpower and money to have had all the county property reassessed" in a timely fashion. *Id.* ¶ 12.

{14} This Court, speaking in an unusually blunt manner, sharply criticized the Bernalillo County Commission for not allocating necessary resources to the Bernalillo County Assessor. *See id.* ¶ 16. Recognizing that the problem of scarce resources existed throughout the state, this Court observed: "It is common knowledge, of which we take judicial notice, that these flagrant inequities exist throughout the state. Public officials who are responsible for reappraisal programs mandated by the Legislature are to be *condemned* for permitting such manifest discrimination." *Id.* (emphasis added). This Court does not "condemn" county officials lightly. We did so in this instance because of our grave concern that county assessors were left without the necessary financial tools to do a job—of constitutional import—that the Legislature had assigned to them. Our opinion in *Appelman* was intended as a call to action.

{15} Only six years later, the Legislature enacted Section 7-38-38.1, a remedial statute seemingly in response to this Court's criticism in *Appelman*.[1] The statute created a permanent source of additional revenue and directed county assessors to use those funds to achieve fair and timely reappraisal programs, exactly what the County Assessor seeks in this instance.

{16} Section 7-38-38.1 imposed no restrictions on the use of those funds other than it be part of a "property valuation program presented by the county assessor and approved by the . . . county commission[]." Section 7-38-38.1(D). The statute makes no attempt to restrict an assessor's options or discretion, such as whom to hire or with whom to contract. And of course, the statute does not preclude an assessor from securing additional expertise, either by way of additional employees or independent contractors.

{17} We can safely assume that the Legislature understood the need for essential resources at the county level and left it to county assessors and their county commissioners to decide how those resources should be spent, including the need for specialized expertise when it came to valuing personal property of a technical nature. The statute should be given an interpretation consistent with meeting its declared purpose.

{18} "Our primary goal when interpreting statutes is to further legislative intent." *State v. Strauch*, 2015-NMSC-009, ¶ 13, 345 P.3d 317 (internal quotation marks and citation omitted). We "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." *Id.* ¶ 14 (internal quotation marks and citation omitted). We need to "promote the [L]egislature's accomplishment of its purpose." *Id.* ¶ 17 (internal quotation marks and citation omitted). Thus, the burden in this appeal is on the County Commission to persuade us how the Legislature could have spoken in such broad terms, unadorned by any express restrictions on county assessors, yet somehow have intended that the fund could not be used to contract for the necessary expertise.

{19} In an attempt to meet this burden, the County Commission argues that the Legislature, in delegating sole responsibility for property valuation maintenance to county assessors, intended that only assessor employees, and not private contractors, could assist in the revaluation process, even for technical property like oil and gas equipment that might require specialized expertise. The County Commission relies primarily upon a nearly century-old decision from this Court, *Fancher*, 1921-NMSC-039, for the proposition that where the Legislature gives sole authority to a public entity to perform a particular function, all other persons or entities are excluded from participating in carrying out that function. *Fancher* is pivotal to the County Commission's case. If the County Commission reads *Fancher* correctly, then the County Assessor may not proceed with her contract with a private company. If the County Commission is not correct about *Fancher*, then the contract is lawful, and the County Commission's refusal to approve must give way. Accordingly, we now turn to a careful analysis of that 1921 opinion.

{20} In *Fancher*, the county

[1]Initially, the County Commission argued that the County Assessor did not present any direct evidence that the Legislature enacted Section 7-38-38.1 in response to *Appelman*. However, during oral argument to this Court the County Commission conceded that the statute was a remedial statute in response to *Appelman*, but maintained that it still does not authorize the County Assessor to contract out her duties. The County Commission argued that the fund was only for hiring new employees.

commissioners for Grant County entered into a contract with Fancher Company for three purposes: 1) to make a complete record index system of all real property titles and provide it to the county clerk, 2) to furnish the county assessor with a complete and correct classification and indexing system for taxable properties located within the county including previously omitted properties, and 3) to transcribe and reproduce any records deemed necessary by the county clerk. 1921-NMSC-039, ¶ 1. Despite having satisfactorily completed the job with respect to both county offices, the county clerk and the county assessor, Fancher Company was denied payment for its services because the contract was deemed unlawful and ultra vires. *Id.* ¶¶ 3, 4.

{21} On appeal, this Court agreed that the contract was ultra vires and void because it usurped the duties of the respective county officials who were specifically assigned these same functions by express legislative direction. *See id.* ¶ 56; *see also id.* ¶ 11 ("Where authority is given to do a particular thing and the mode of doing it is prescribed, it is limited to be done in that mode; all other modes are excluded. This is a part of the so-called doctrine of *expressio unius est exclusio alterius*." (internal quotation marks and citation omitted)). This Court stated that "[t]he test is, not whether the duty is primary or secondary, but whether provision has been made by law for the accomplishment of the end, or the doing of the work, or the performance of the service, for the benefit of the public, in its organized capacity." *Id.* ¶ 54. We further stated that "[w]hether the agency created is as competent and capable as some private individual is to perform the service is not the subject of inquiry by the courts. This is a matter for legislative consideration exclusively." *Id.*

{22} We agree with our predecessors that the question at issue ultimately comes to "a matter for legislative consideration," in other words, legislative intent. *Id.* 100 years ago, in the Property Tax Code of 1915, the Legislature expressly assigned in great detail certain responsibilities to county officials and made its intent clear that those officials were to carry out those responsibilities, leaving no room for private assistance no matter how competent or helpful. *See Fancher*, 1921-NMSC-039, ¶ 55-56. It was, and still is, a matter of legislative intent. The question then arises whether the modern tax code delegates in a similarly micro-managing manner, not only of function but in its choice of agent to perform that function. We begin by examining how things were done a century ago as described in the *Fancher* opinion.

{23} We look first to county clerks, whose responsibilities under the Property Tax Code of 1915 included recording and maintaining land title records. *Fancher*, 1921-NMSC-039, ¶¶ 6-7. Anticipating the need for additional work with regard to land title records, the Legislature provided that "whenever, in the opinion of the board of county commissioners" it might be necessary "to have a complete and accurate index made of all instruments of record affecting real property," then county commissions "are hereby authorized to have such index made by the county clerk of said county." *Id.* ¶ 6 (internal quotation marks and citation omitted). In other words, when the need for an index arises, the county was told to look to the county clerk. Since the Legislature had specified not only the subject matter (land title index) but also the agent to perform that function (county clerk), then the Legislature had left no room for the county commission to contract with someone else for the same purpose. It is not clear from the opinion whether the county clerk had even agreed to the imposition of a private contractor upon its functions.

{24} The *Fancher* Court came to a similar conclusion with respect to the county assessor

and the state tax commission, both directed by statute to locate properties omitted from the tax rolls and include them in the proper records. When the county commission contracted with Fancher Company for completion of this task, this Court held the contract invalid, superseded by express assignment of that same function to the proper county officials. *Fancher*, 1921-NMSC-039, ¶¶ 55-56. In *Fancher*, it appears that the contract may have been opposed by the assessor and the state tax commission or at least that they may not have been willing participants.

> Provision, which the Legislature deemed sufficient, was made for officers and agents of such tax commission, and the compensation thereof. To hold that, notwithstanding such provisions, it would be competent for the county commissioners to employ other agencies, at public expense, to do this work thus provided for, would be to subject the public revenues of the different counties to dissipation *at the whim of the county commissioners.*

Id. ¶ 55 (emphasis added).

{25} We note that during those early days of our statehood, this was not the first instance of conflict between county officials, like assessors and clerks assigned certain duties by statute, and county commissions seemingly dissatisfied with those officials who contracted with outside agents to perform those same duties. See *State ex rel. Miera v. Field*, 1918-NMSC-071, ¶ 3, 24 N.M. 168, 172 P. 1136 ("Where, by law, the duty of performing certain work is cast upon a designated county official for which compensation is provided by law, it is not competent for the board of county commissioners to employ other persons to do the work required of such county official and to pay for such services.")

{26} Today, of course, the Property Tax Code has been completely rewritten; the language from 1915 has disappeared into history. That kind of detailed control over the means of implementation has largely been replaced by general grants of authority and responsibility, leaving the details to the discretion of the county official. And most importantly, the 1986 Legislature recognized a specific problem—unacceptable delays in updating property valuations—and created a specific answer—the 1% fund—to enable assessors to finish the job without the restrictions of 100 years ago.

{27} If the legal threat to the *Fancher* Court was the county commission usurping the authority of local officials, this case presents the opposite scenario. It is the County Assessor who requests this contract to assist her in satisfying legislative intent, not undermining it. As a helpful analogy to *Fancher*, if the Legislature, in creating the property valuation fund, had directed that the fund could be used to hire additional employees to assist in valuation maintenance, then perhaps, by negative inference, the Legislature could be said to have excluded anyone else such as independent contractors. But that is not what happened here. The Legislature made no effort to instruct assessors on how to utilize this fund.

{28} We conclude, therefore, that the Legislature intended to leave it to the professional discretion of those same assessors to decide how best to achieve the statutory goal of current and correct valuation of all property within the county. This is especially the case given the exhortations of this very Court over 30 years ago in *Appelman* to get the job done. 1980-NMSC-041, ¶ 16.

{29} The County Commission points out that Section 7-36-16(A) uses language that

appears to delegate *exclusive* authority to the Assessor to update property values which would preclude anyone else. *See id.* (County assessors "shall have sole responsibility and authority at the county level for property valuation maintenance."). But we see no contradiction. The County Assessor seeks to contract for technical assistance to enable her, the County Assessor, to maintain current and correct property valuations. She has "sole responsibility" over valuations. The County Assessor is not being displaced as were the officials in *Fancher*; she remains at the center of the process. Final valuations will issue from her office under her signature as the law envisions. Additionally, the parties stipulated in this case that "[i]n other statutes, the [L]egislature has employed the terms 'sole responsibility' and 'sole authority' to allocate liability and delegate power, not to restrict an official's actions."

{30} The County Commission also directs our attention to a provision in the Property Tax Code that allows the state Property Tax Division to contract with counties and provide technical assistance to county assessors regarding the valuation process. *See* Section 7-36-19. Again relying on *Fancher*, the County Commission asserts that this option for the County Assessor precludes all others. But if we were to accept that assertion, we would be forced to turn a blind eye to what the Legislature did subsequently in 1986 when it created the property valuation fund. Obviously, the means previously available to county assessors to maintain current and correct valuations were deemed insufficient to complete the job. This Court said as much in *Appelman*. It would make little sense for the Legislature to have created a new fund to address an ongoing problem of constitutional proportions, but then to limit assessors' remedies to what had been available all along.

{31} The County Commission also points to legislative history of previous iterations of the Property Tax Code, including a time, 1933, when the Property Tax Code was changed to expressly authorize assessors to hire independent contractors, and then years later in 1969 when that authority was withdrawn in favor of better training for assessor employees. *Compare* 1933 N.M. Laws, ch. 107, § 16 *with* 1969 N.M. Laws, ch. 219, § 16 (repealing the 1933 provision) *and* 1969 N.M. Laws, ch. 269, §§ 1-3 (providing for training in property appraisal and property tax administration and increased pay for county assessors with additional training). We are not persuaded. Better training and education of assessor employees is consistent, not inconsistent, with the goal evidenced by creating the property valuation fund—namely, additional resources to enable county assessors to complete the job of periodic valuation maintenance. The assessor might not be authorized, for example, to replace employees with a staff of independent contractors, but that is not the same as allowing assessors to supplement their employees with specialized technical assistance not available from staff employees.

{32} Finally, the County Assessor has pointed out that other counties within New Mexico have contracted for years with private companies—with state approval—to assist their county assessors, in some cases providing the type of precise valuation expertise for oil and gas properties at issue in this case. The County Commission acknowledges the validity of this evidence and that a ruling in its favor might have a negative impact on these other counties. Interpreting the law as we do, to authorize the County Assessor to contract for technical assistance from private contractors, we anticipate no such negative impact.

CONCLUSION

{33} We hold that state law does not prohibit the Eddy County Commission from

approving a contract with an independent contractor to assist the County Assessor, at her request, in valuing property. Accordingly, we affirm the declaratory judgment to that effect previously entered by the district court.

{34} **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