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Speaker Biographies

Edward Ricco engages almost exclusively in appellate practice and is a fellow of the American Academy of Appellate Lawyers. As the founder of the appellate practice group at the Rodey Law Firm, Ricco has been involved in numerous appeals in a wide variety of substantive areas. He is admitted to practice in the New Mexico courts, the United States Court of Appeals for the Ninth, Tenth, and District of Columbia Circuits, and the United States Supreme Court.

David Henderson is the Appellate Defender for the Law Offices of the New Mexico Public Defender. Henderson has practiced appellate law throughout his career in both private practice and for the public defender. He has been admitted to practice before State Courts in New Mexico; the Federal District Courts of New Mexico, the Southern District of Texas, and the District of Columbia; and before the Tenth Circuit Court of Appeals. Mr. Henderson also has filed amicus briefs in the Sixth Circuit Court of Appeals and in the United States Supreme Court. Over the years he has made a number of presentations at CLE presentations and has taught appellate advocacy at training seminars conducted by NLADA and by the Administrative Offices of the U.S. Courts.

Judge David K. Thomson is a judge in the Civil Division of the First Judicial District Court in Santa Fe, New Mexico. He received his J.D. from the University of Denver College of Law. Judge Thomson clerked for United States District Judge Bruce Black and was the Director of Litigation and Deputy Attorney General with the New Mexico Attorney General's Office. He is the chair of the Uniform Civil Jury Instruction Committee, and an executive board member of the ABA Judicial Division. He has taught CLEs on a number of topics including: evidence and social media, judicial ethics and the 1st Amendment, and administrative appeals.

John L. Sullivan has been the Acting General Counsel at the New Mexico State Land Office since June of 2016 and has been an Associate Counsel since October of 2006. Sullivan is a 1989 graduate of the law school at the University of Wisconsin-Madison.

Larry J. Montaño is a Partner with the law firm of Holland & Hart LLP in its Santa Fe, NM Mexico office. Montaño provides trial and appellate counsel to clients in natural resources litigation, commercial disputes, and personal injury/wrongful death cases. He is a member and former chair of the New Mexico State Bar's Appellate Practice Section.

Prior to joining Holland & Hart LLP, Montaño served as a law clerk to The Honorable Bruce D. Black (Ret.), United States District Court Judge for the District of New Mexican and, before that, as a law clerk to The Honorable Lynn Pickard (Ret.), then Chief Judge of the New Mexico Court of Appeals.

Judge Harris Hartz has been a judge on the Tent Circuit Court of Appeals since December 2001. From 1989-99 he was on the New Mexico Court of Appeals, servings as chief judge from 1997-99. He served on the Judicial Conference Standing Committee on Rules of Practice and Procedure from 2002-2009 and was chair of the ABA Appellate Judges Conference from 2004-2005. Judge Hartz is a magna cum laude graduate of Harvard Law School, where he was case and developments editor of the Harvard Law Review. He received his AB from Harvard summa cum laude in physics. He is now on the Judicial Conference Federal-State Jurisdiction Committee, and the Scalia Law School & Economics Center's Judicial Education Advisory Board.

He is an Adviser to the ALI Principles of Government Ethics project. He is a co-author of *The Law of Judicial Precedent* and recently served on the Deans Advisory Committee at the U.C. Irvine School of Law.

Joey Moya Joey D. Moya is the current Clerk of Court who supervises a staff of seven court employees in the Clerk's Office who provide case management and administrative support to the Court and to the bench, bar, and public that it serves.

Mark Reynolds

Bonnie Stepleton grew up in Albuquerque, New N.M. She attended the University of Oregon and obtained a BS in Political Science in 1984. She graduated from the University of New Mexico School of Law in 1987. She was a law clerk in the New Mexico Supreme Court. Following her clerkship, Stepleton represented people with intellectual disabilities and then practiced law in insurance defense. She served as a mediator with the New Mexico Workers' Compensation administration for many years and has also been a volunteer mediator for the Metropolitan Court. She taught mediation and negotiation at the University of New Mexico School of Law. She became Appellate Mediator with the New Mexico Court of Appeals in January 2018.

Judge Timothy L. Garcia served over 15 years on the New Mexico bench before retiring to join the firm of Montgomery & Andrews in 2018. Judge Garcia has practiced as an attorney, trial judge and appellate judge for over 34 years. Presently, Judge Garcia primarily works in the area of alternative dispute resolution, including mediation, arbitration, case evaluation, and mock trial services.

Judge Garcia has always been known for his detailed preparation, analysis and approach to resolving difficult cases. As a trial judge, he presided over numerous high-profile cases in New Mexico. After appointment to the appellate court, he authored several important appeals before the Court of Appeals.

While Judge Garcia served on the bench with the First Judicial District Court, he primarily presided over the civil and criminal docket in Rio Arriba County, a small portion of the civil and criminal docket in Santa Fe County, and the habeas corpus docket for the entire district. In addition, the judge was often designated by the Supreme Court to preside in Taos and San Miguel counties when excusals or recusals required an out-of-district judge. During his tenure at the trial court, new assignments to Judge Garcia fluctuated between 800-1500 each year.

While serving on the Court of Appeals, Judge Garcia was one of the three judges who occupied assigned chambers at the Supreme Court Building in Santa Fe. Judge Garcia sat on more than one hundred cases assigned to the general calendar each year and hundred more assigned to the Court's summary calendar. During his tenure on the Court of Appeals, Judge Garcia was assigned to over one thousand cases.

Justin R. Kaufman joined Kelly, Durham & Pittard, LLP as a partner in 2018 and manages the firm's New Mexico practice from Santa Fe. Kaufman serves both trial and appellate counsel for people who have been harmed by corporations and individuals, and has extensive experience in complex litigation including wrongful death, catastrophic injury, toxic tort, product defect, pharmaceutical, consumer fraud, environmental and medical negligence cases. He has tried numerous cases to verdict in New Mexico and in courts throughout the country, and has successfully settled numerous cases on behalf of individual and families. Kaufman also has extensive experience with mass torts, having represented thousands of individual clients as well as state attorneys general in multi-district litigation involving defective drugs and medical devices. Since joining KDP, Kaufman's primary role is to assist some of the premier trial lawyers throughout the country in high-stakes litigation in New Mexico courts through trial and appeal.

Kaufman received his B.A. from Cornell University's College of Arts and Sciences, and his J.D., cum laude, from Temple University School of Law, where he served as editor of the Temple Law Review. Kaufman also holds an M.B.A from Temple University's Fox School of Business.

Before entering private practice, Kaufman served as a Law Clerk to the Honorable Herbert J. Hutton of the U.S. District Court for the Eastern District of Pennsylvania.

Kaufman is licensed to practice law in New Mexico, New York, and Texas.

Thomas C. Bird is a 1982 graduate of the University of New Mexico School of Law. He has practiced at Keleher & McLeod, P.A. for 36 years, principally in the area of appeals. He is listed in Best Lawyers in America in Appellate Law and is a Fellow of the American Academy of Appellate Lawyers.

Honorable Emil Kiehne was appointed to the Court of Appeals in 2017. He was raised in Valencia County, where he lives today with his wife and two children. After graduating from high school in Los Lunas, Judge Kiehne attended Harvard University, where he graduated with honors in 1995 with a degree in history. He then attended the Universidad de Navarra in Pamplona, Spain, graduating with honors in 1997 with a master's degree in political philosophy. After returning from overseas, Judge Kiehne studied law at Notre Dame Law School, graduating with honors in 2000. He then served as a prosecutor in the appellate division of the Philadelphia District Attorney's Office, where he handled about 80 appeals involving serious crimes. He also worked for one year at the Fox Rothschild law firm in Philadelphia. Judge Kiehne returned to his beloved New Mexico in 2004, where he worked and became a partner at the Modrall Sperling law firm in Albuquerque. There he handled numerous appeals in federal and state courts involving important issues of constitutional, administrative, commercial, and tort law. He also dedicated time to the community, serving on the New Mexico Supreme Court's Appellate Rules Committee, and on the boards of the New Mexico Foundation for Open Government and the Catholic Foundation of the

Archdiocese of Santa Fe. Judge Kiehne enjoys spending time with his family, hiking in the Jemez Mountains, and reading books on history.

Recent Developments in New Mexico Appellate Practice

RECENT DEVELOPMENTS IN NEW MEXICO APPELLATE PRACTICE
(Civil Appeals and Generally Applicable Principles)

Compiled by Edward Ricco
Rodey, Dickason, Sloan, Akin & Robb, P.A.

29th Appellate Practice Institute, September 2018

Cases from Bar Bulletin, Vol. 56, No. 32 through Vol. 57, No. 34
(August 9, 2017 – August 22, 2018)

Preservation of Issues/Waiver

Unified Contractor, Inc. v. Albuquerque Housing Authority, 2017-NMCA-060, ¶¶ 32-33, 400 P.3d 290.

"To preserve an alleged error for appeal, a litigant must make known to the court the action that the litigant desires the court to take or the litigant's objection to the action of the court and the grounds therefor."

Submitting requested findings of fact is not the only way to preserve issue of sufficiency of evidence in bench trial; had party filed motion for reconsideration addressing sufficiency of the evidence, motion "could have preserved a sufficiency argument on appeal."

State v. Carrillo, 2017-NMSC-023, ¶ 23, 399 P.3d 367.

General motion in limine regarding witness's testimony, taken under advisement by court before trial, that was not renewed and ruled on during trial did not preserve admissibility of testimony for appellate review. "By their very nature, motions in limine do not sufficiently preserve an issue because the rulings on them are subject to change, depending on the nature of the relevant evidence at trial."

State v. Vargas, 2017-NMSC-029, ¶¶ 14-15, 404 P.3d 416.

Court of Appeals properly considered Fourth Amendment argument based on United States Supreme Court decision issued while appeal was pending that, consequently, had not been raised in trial court. Constitutional issue was not preserved but fell within "general public interest" and "fundamental right" exceptions to preservation requirement. Responding to State's concern that it did not have opportunity to brief or develop factual record pertinent to issue, Supreme Court "agree[d] that the Court of Appeals should have asked for additional briefing . . . . Nevertheless, we remind litigants that when an appellate court fails to request supplemental briefing, filing a motion for rehearing is a valid option[.]" Supreme Court considered existing record sufficient to address issue.

Fogelson v. Wallace, 2017-NMCA-089, 406 P.3d 1012, ¶¶ 19-25, cert. granted, 2017-NMCERT-011, __ P.3d __.

First defendant raised res judicata effect of prior arbitration as defense, which district court denied. Second defendant later entered appearance but did not assert res judicata as affirmative defense. (Second defendant did raise the defense in opening statement, which was ineffective to preserve issue.) In these unique circumstances, Court of Appeals analyzed whether second defendant had waived or preserved applicability of res judicata by recognizing rule that law of the case doctrine binds all codefendants to adverse ruling made as to any one of them. Question for Court of Appeals was whether the two defendants were so situated factually that district court's ruling against first defendant also applied directly to second. Court concluded on basis of different allegations against each defendant that this was not the case. Therefore court did not review res judicata issue as to second defendant.

Kreuzer v. Aldo Leopold High School, 2018-NMCA-005, ¶ 34, 409 P.3d 930.

Although plaintiff did not respond to defense motion for summary judgment, which could be deemed failure to preserve issue, Court of Appeals would exercise discretion to address legal question of first impression concerning whether charter school is subject to protections of Tort Claims Act.

Progressive Casualty Insurance Co. v. Vigil, 2018-NMSC-014, ¶¶ 25-31, 413 P.3d 850.

District court raised and discussed with counsel during two pretrial hearings the question of admissibility of certain evidence, explaining its proposed ruling and inviting response. Although appellant never moved to admit the evidence, its challenge to exclusion of the evidence was sufficiently preserved for review because "the objectives of the preservation rule were met." The issue was before the court, the parties had an opportunity to present their views, and a record was created for appellate review.

State v. Franklin, 2018-NMSC-015, 413 P.3d 861.

Equal protection issue was not preserved where party's argument in district court only "touched on" differential treatment of two classes and court "did not address the implications of the dissimilar treatment from an equal protection standpoint." But Supreme Court would address issue of whether person convicted of first-degree murder should have same opportunity to show mitigating circumstances at sentencing as person convicted of less serious offense, despite non-preservation, as matter of "general public importance," considering uncertainty in application of law following abolition of death penalty.

Morga v. FedEx Ground Package System, Inc., 2018-NMCA-039, 420 P.3d 586, cert. granted, 2018-NMCERT-006, __ P.3d __.

Court of Appeals concludes no legal error has been established by claimed improper trial conduct or closing argument where no, or insufficient, objection was made at trial and conduct was not so aggravated as to invoke fundamental error or other exception to preservation requirement.

Valerio v. San Mateo Enterprises, Inc., 2017-NMCA-059, ¶ 12, 400 P.3d 275.

Appellant did not waive appellate review by failing to challenge ultimate disposition of case (dismissal at trial), where appellant alleged reversible error during course of proceedings: "[I]f this Court finds that reversible error occurred at any point, we will set aside the judgment."

Estate of Saenz v. Ranack Constructors, Inc., 2018-NMSC-032, 420 P.3d 576.

Plaintiff altered language of wrongful death jury instruction and, when jury returned verdict that was ambiguous with respect to its intended award, plaintiff did not seek clarification of verdict before jury was discharged. Held: plaintiff waived appellate review of challenge to district court's denial of motion for new trial based on lack of substantial evidence to support allegedly insufficient damages award. Plaintiff contributed to ambiguity of verdict and failed to obtain clarification of jury's intent.

Standards of Review

- Substantial Evidence

Phillips v. State (In re Estate of McElveny), 2017-NMSC-024, ¶ 27, 399 P.3d 919.

Where there was "no genuine dispute" as to fact, court's contrary finding was not supported by substantial evidence.

State v. Martinez, 2018-NMSC-007, 410 P.3d 186.

In case in which Court of Appeals treated police officer's dash-cam video as too ambiguous to validate traffic stop and reversed district court's suppression ruling, Court of Appeals violated substantial evidence standard of review by reweighing evidence and not giving deference to district court's determination of disputed facts. The video was not the only evidence. Police officer testified about his perception that defendant had violated traffic laws. Although video contradicted police officer's testimony in some respects, it was ambiguous in other respects, and court could have credited officer's perception that defendant committed traffic violation "even though the dash-cam video showed that the violation was not as blatant as the officer described." Viewed in the light most favorable to the district court's ruling, there was sufficient evidence to support district court's finding that officer had objectively reasonable basis to stop defendant.

- Termination of Parental Rights

State ex rel. Children, Youth & Families Dep't v. Raymond D. (In re Adrian F.), 2017-NMCA-067, ¶ 14, 404 P.3d 15.

In review of facts found by district court supporting termination of parental rights and court's determination that termination was in child's best interests, Court of Appeals "engage[s] in a two-step analysis. First, we determine whether substantial evidence supports the district court's

findings of fact. . . . Second, we determine whether that evidence supports a finding of best interests, a question of law which we review de novo."

- Abuse of Discretion

State v. Ferry, 2018-NMSC-004, ¶ 2, 409 P.3d 918.

"Discretion is the authority of a district court judge to select among multiple correct outcomes. Appellate courts analyze a district court judge's discretionary decisions by first, without deferring to the district court judge, deciding whether proper legal principles were correctly applied. If proper legal principles correctly applied only lead to one correct outcome there is no discretion for the district court judge to exercise. If the district court judge arrives at the only correct outcome, the district court judge is affirmed; otherwise the district court judge is reversed. If proper legal principles correctly applied may lead to multiple correct outcomes, deference is given to the district court judge because if reasonable minds can differ regarding the outcome, the district court judge should be affirmed."

State v. Branch, 2018-NMCA-031, ¶¶ 41-43, 417 P.3d 1141, cert. denied, 2018-NMCERT-003, __ P.3d __.

Denial by district court of criminal defendant's request for discovery of victim's military discharge records upheld. Although "compelling arguments" were presented on appeal that in camera review of the documents could have yielded material information and in camera review "would have been the best way" for district court to proceed, defendant did not request in camera review before district court. "[W]e cannot say that the district court abused its discretion in rejecting the arguments that were actually presented below."

Mootness

Tran v. Bennett, 2018-NMSC-009, ¶¶ 14-15, 411 P.3d 345.

Parenting order entered during appeal giving sole custody of child to couple on one side of dispute and visitation rights to other party mooted custody issue on appeal, but case was not moot because Court still had to determine legal status of other party who was described, in stipulated order, as one of child's three co-parents.

Extraordinary Writs

State ex rel. League of Women Voters of N.M. v. Advisory Committee to N.M. Compilation Comm'n, 2017-NMSC-025, 401 P.3d 734.

Applying "great public importance" standing in mandamus proceeding regarding efficacy of three constitutional amendments relating to voting.

Writ of Error

State ex rel. Balderas v. ITT Educational Services, Inc., 2018-NMCA-044, ¶ 7, 421 P.3d 849.

In a dispute over enforceability of subpoenas issued by the Attorney General related to enforcement activity under the Unfair Practices Act, target of investigation and litigation sought both writ of error and interlocutory appeal to review district court order enforcing subpoenas. Court of Appeals initially granted writ of error but, in its formal opinion, noted that collateral order review, implemented in New Mexico by writ of error, "is generally disfavored" and therefore "courts have limited its application." Discovery orders "are not collateral orders warranting review under a . . . writ of error." Court quashed writ of error and granted application for interlocutory appeal, under which matter was "more properly raised."

"Right for Any Reason" Doctrine

Nationstar Mortgage, LLC v. O'Malley, 2018-NMCA-029, ¶¶ 38-39, 415 P.3d 1022, cert. denied, 2018-NMCERT-003, __ P.3d __.

Appellee, seeking to uphold district court's ruling that mortgage was invalid under community property principles, argued mistake- and fraud-based grounds as alternative basis for affirmance. Court of Appeals declined to apply "right for any reason" analysis to the "unsupported possibility" that an alternative basis to invalidate mortgage might exist. Fraud and mistake theories were not developed factually or legally in district court and were barely discussed on appeal. "[W]e will not consider bare assertions that are not developed and supported . . . . There are simply too many unanswered questions based on the state of the record."

Freeman v. Fairchild, 2018-NMSC-023, 416 P.3d 264.

Court of Appeals held it was error to grant summary judgment on ground that nonmovant failed to respond to motion, but it affirmed judgment on alternative ground that unresponded-to motion made out prima facie case. Reviewing for abuse of discretion, Supreme Court held that application of "right for any reason" doctrine was improper because (1) district court had applied wrong state's substantive law to issues, (2) nonmovant's motion for extension of time to respond to summary judgment motion had been improperly denied, and (3) factual issues raised by summary judgment motion, involving voluminous record, were more appropriately resolved by district court.

Harmless Error

Valerio v. San Mateo Enterprises, Inc., 2017-NMCA-059, ¶¶ 39-43, 400 P.3d 275.

Exclusion of deposition testimony of opposing party's corporate designee was clear error, but harmless. Witness was present at trial and could have been called to testify by party proffering the deposition; nothing in record indicated that court precluded party from doing so.

Record on Appeal

Alarcon v. Albuquerque Public Schools Board of Education, 2018-NMCA-021, 413 P.3d 507, ¶ 24, cert. denied, 2018-NMCERT-001, __ P.3d __.

Party placed two pages of document in record by attaching them to a filed pleading and argued on appeal that document was supportive of its position. Document was not admitted into evidence at merits hearing, nor was it the subject of a stipulation. Court of Appeals would not consider the pages from the document "[w]ithout any information . . . such as how it came about, why it was published, or who wrote it . . . . We would otherwise be speculating on their significance on how they relate to the question . . . before us."

Decisional Process

State v. Yancey, 2017-NMCA-090, ¶ 16, 406 P.3d 1050, cert. granted, 2017-NMCERT-011, __ P.3d __.

Defendant entered into plea agreement and was sentenced without actually pleading guilty to any offense. Omission was not noted by parties but was discovered by Court of Appeals on appeal raising other issues. Court issued proposed opinion reversing conviction for lack of guilty plea and requested simultaneous briefs from parties responding to proposal. Court adhered, with dissent, to disposition as proposed.

Briefs

State v. Luna, 2018-NMCA-025, __ P.3d __, ¶ 40 n.4, cert. denied, 2018-NMCERT-003, __ P.3d __.

Court would not address issue of expert's qualifications; "passing references" in party's briefs to objections at trial and "rote recitations" of abuse of discretion standard of review were insufficiently developed argument to warrant consideration.

Precedent

State v. Salas, 2017-NMCA-057, ¶ 48, 400 P.3d 251, cert. denied, 2017-NMCERT-005, __ P.3d __.

Supreme Court dicta "has persuasive value," but not if "negated" by subsequent precedent of United States Supreme Court.

Appeals to District Court

El Castillo Retirement Residences v. Martinez, 2017-NMSC-026, 401 P.3d 751.

In district court, retirement community claimed entitlement to constitutional and statutory property tax exemptions which had been administratively denied. District court improperly

exercised original jurisdiction over both issues and determined that community qualified for exemption under constitution and statute. Assessor filed notice of appeal. Court of Appeals improperly held that it had jurisdiction only over constitutional exemption because district court had exercised appellate jurisdiction over statutory issue and assessor did not file petition for writ of certiorari. Court of Appeals determined that community did not qualify for constitutional exemption but court did not reach question of statutory exemption, leaving district court's allowance of statutory exemption in place. Sorting out jurisdictional errors that had resulted in upholding statutory tax exemption that violated constitution, Supreme Court concluded that district court should have exercised appellate jurisdiction and applied appellate standard of review to statutory issue and simultaneously exercised original jurisdiction over constitutional issue that was beyond scope of administrative body. Court of Appeals erred by considering the constitutional and statutory issues separately; they were intertwined, not independent, and had to be considered together so that statute was not applied unconstitutionally. Supreme Court held that retirement community did not qualify for exemption under constitution or statute, reversing district court.

Attorney's Fees and Costs on Appeal

Enduro Operating LLC v. Echo Production, Inc., 2018-NMSC-016, ¶ 29, 413 P.3d 866.

Court of Appeals acted prematurely in awarding statutory attorney fees and costs to prevailing party on appeal while opposing party's petition for writ of certiorari was pending in Supreme Court. Filing of petition suspended Court of Appeals judgment and mandate, eliminating underlying basis for award of costs and fees.

Sanctions

State ex rel. Children, Youth & Families Dep't v. Donna E. (In re Sarai E. and Stephen E.), 2017-NMCA-088, ¶¶ 72-73, 406 P.3d 1033.

Court of Appeals would not award costs and attorney fees as sanction for party's actions in district court in the absence of request for the same in district court. Doing so would require appellate court to make findings and exercise discretion generally reserved for district court.

Appellate Rules

Rule amendment (effective Aug. 21, 2017): 12-307.2 Electronic filing (adding Court of Appeals). Vol. 56, No. 33 SBB 17 (Aug. 16, 2017).

Rule amendments (effective Dec. 31, 2017): 12-210 (calendaring process); 12-213 (appellate mediation); 12-502 (certiorari to Court of Appeals). Vol. 56, No. 45 SBB 19 (Nov. 8, 2017).

RECENT DEVELOPMENTS IN NEW MEXICO APPELLATE PRACTICE

(Criminal Appeals)

29TH APPELLATE PRACTICE INSTITUTE

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State v. Vest, 2018-NMCA-___, ___P.3d ___, 2018 WL 3491309 (July 19, 2018).
[Statutory construction]

Held – crime of aggravated fleeing requires proof that the life of another was placed in danger during a police pursuit. Discussing statutory construction the Court wrote:

> {6} Our goal when interpreting statutes is to ascertain and effectuate legislative intent. *Baker v. Hedstrom*, 2013-NMSC-043, ¶ 11, 309 P.3d 1047. We first look to the statute's plain language, which is "the primary indicator of legislative intent." *State v. Young*, 2004-NMSC-015, ¶ 5, 135 N.M. 458, 90 P.3d 477 (internal quotation marks and citation omitted). "If the language of the statute is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation." *State v. Wilson*, 2010-NMCA-018, ¶ 9, 147 N.M. 706, 228 P.3d 490 (internal quotation marks and citation omitted). Appellate courts "will not read into a statute any words that are not there, particularly when the statute is complete and makes sense as written." *State v. Trujillo*, 2009-NMSC-012, ¶ 11, 146 N.M. 14, 206 P.3d 125. To ensure that our application of the plain meaning rule indicates the true legislative intent, we may look to the history and purpose of the statute to aid our statutory construction analysis. *See State v. Rivera*, 2004-NMSC-001, ¶ 13, 134 N.M. 768, 82 P.3d 939 ("In performing our task of statutory interpretation, not only do we look to the language of the statute at hand, we also consider the history and background of the statute."). In doing so, we examine the language in the context of the statutory scheme, legislative objectives, and other statutes in pari materia in order to determine legislative intent. *See State v. Cleve*, 1999-NMSC-017, ¶ 8, 127 N.M. 240, 980 P.2d 23. "Finally, while we would be exceeding the bounds of our role as an appellate court by second-guessing the clear policy of the Legislature, when the statute is ambiguous, we may nonetheless consider the policy implications of the various constructions of the statute." *Rivera*, 2004-NMSC-001, ¶ 14, 134 N.M. 768, 82 P.3d 939 (citation omitted).

2. *State v. Arias*, 2018-NMCA-___, ___ P.3d ___, 2018 WL 3490884 (July 19, 2018). **[Statutory construction; delegation of authority to administrative body; substantial evidence]**

Held: the state failed to present substantial evidence showing substance was a synthetic cannabinoids when it relied on testimony of a police and probation officer to identify substance seized from defendant in lieu of providing testimony regarding the chemical composition of the substance.

The Court began by observing the following regarding the relationship between substantial evidence review and statutory interpretation:

> {10} We begin by observing, as this Court did in *State v. Maldonado*, 2005-NMCA-072, ¶ 16, 137 N.M. 699, 114 P.3d 379, that "[t]he concept of substantial evidence is meaningless unless it is linked to a specific definition of a crime." The reason for this is simple: "Expand the definition of the crime and evidence that might otherwise be insufficient becomes 'substantial.' " *Id.* Thus, "[a] court cannot decide whether the [s]tate has come forward with substantial evidence of [an alleged crime] without expressly or implicitly engaging in statutory construction of the [subject] statute." *Id.*

The Court went on to reason that based on the language of the statute, the meaning of "synthetic cannabinoids" was defined not only by the illustrative list in the statute but by regulations adopted by the Board of Pharmacy under its delegated authority. 2018-NMCA-___, ¶ 19. In addition to the fifteen specific chemicals addressed by the regulations, the Board also adopted a functional test for new compounds, i.e., "'any material, compound, mixture o[r] preparation which contains any quantity of the following synthetic cannabinoids which demonstrates binding activity to the cannabinoid receptor or analogs or homologs with binding activity [.]' 16.19.20.65(C)(32) NMAC (11/27/2011)." *Id.*, ¶ 20. Thus to prove unlawful possession "for an offense involving a substance alleged to be 'synthetic cannabinoids,'" the State must prove beyond a reasonable doubt one "that the substance (1) is one of the chemical compounds enumerated in either the statute or the regulation; (2) falls into of one of the classes of chemicals listed in the regulation; *or* (3) has a high potential for

abuse, has no accepted medical use in treatment, *and* demonstrates binding activity to the cannabinoid receptor or analogs or homologs with binding activity." *Id.* ¶ 22. While the Court agreed it was not always necessary to present scientific evidence to identify a controlled substance, in this case the lay testimony of the appearance of the substance and behavior of the defendant was not enough to prove he possessed a synthetic cannabinoid. Of significant importance to this conclusion was:

> {32} Synthetic cannabinoids are a type of controlled substance innately different than substances such as marijuana, cocaine, and methamphetamine because of the nearly innumerable possible chemical formulas that may—but also may not—qualify the substance as a synthetic cannabinoid. This point bears emphasizing because the way in which New Mexico regulates synthetic cannabinoids—albeit broadly and comprehensively—stops short of criminalizing artificially-produced substances that do not either bear one of the chemical structures enumerated in the statute or regulation or demonstrate binding activity to the cannabinoid receptor.

3. *State v. Chavez*, 2018-NMCA-___, ___ P.3d ___, 2018 WL 3454848 (July 17, 2018). **[Standard of review—facial challenge for vagueness]**

Held: reasonable and prudent standard for following too closely was not unconstitutionally vague as against a facial challenge. The Court followed precedent from other jurisdictions construing similar language.

On the standard of review the Court wrote:

> {5} When a defendant contends that a statute is unconstitutionally vague, we review the claim "in light of the facts of the case and the conduct which is prohibited by the statute." *State v. Laguna*, 1999-NMCA-152, ¶ 24, 128 N.M. 345, 992 P.2d 896 (internal quotation marks and citation omitted). There is a "strong presumption of constitutionality[,]" and a defendant "has the burden of proving [that] a statute is unconstitutional beyond all reasonable doubt." *Id.* A statute is unconstitutionally vague if:

(1) it fails to provide persons of ordinary intelligence using ordinary common sense a fair opportunity to determine whether their conduct is prohibited; or

(2) it fails to create minimum guidelines for the reasonable police officer, prosecutor, judge, or jury charged with enforcement of the statute, and thereby encourages subjective and ad hoc application.

4. *State v. Cummings*, 2018-NMCA-___, ___ P.3d ___, 2018 WL 3237989 (June 28, 2018). **[Reservation of error; double jeopardy]**

Concerning the lack of reservation of a double jeopardy claim in the defendant's conditional plea, the Court held double jeopardy claims are not subject to waiver and can be raised at any time before or after entry of a judgment. 2018-NMCA-___, ¶ 5 (citing NMSA 1978, § 30-1-10 (1963)). "Moreover," it continued, "this Court has held that a guilty plea does not necessarily waive a claim of double jeopardy, although the defendant should reserve the issue in the plea agreement and must present a record capable of review for this Court to engage in a unitary conduct double jeopardy analysis." *Id.* The Court "generally appl[ies] a de novo standard of review to the constitutional question of whether there has been a double jeopardy violation." *Id.*, ¶ 6.

5. *State v. Blea*, 2018-NMCA-___, ___ P.3d ___, 2018 WL 3134016 (June 21, 2018). **[Facial challenge to statute; search and seizure; interstitial analysis]**

Held: statute that authorized collection of DNA from individuals arrested for a felony was constitutional against a facial challenge that it authorized unreasonable searches and seizures. Regarding the standard of review, the Court wrote the "Defendant has the burden to demonstrate that there is no potential set of facts to which the Act can be constitutionally applied. *See State v. Murillo*, 2015-NMCA-046, ¶ 4, 347 P.3d 284. In other words, Defendant must demonstrate that in all of its applications, the Act is unconstitutional. Moreover, because we presume the Act is valid, we will uphold it against the constitutional challenge 'unless we are satisfied beyond all reasonable doubt that the Legislature went outside the bounds fixed by the Constitution' in its enactment. *Id.* (internal quotation marks and citation omitted). 2018-NMCA-___, ¶ 17.

On the application of New Mexico's interstitial approach to State Constitutional questions the Court wrote:

> {35} We apply the interstitial approach to determine if our state provision provides broader protection than the Fourth Amendment because both provisions provide overlapping protections against unreasonable searches and seizures. *See Ketelson*, 2011-NMSC-023, ¶ 10, 150 N.M. 137, 257 P.3d 957. Under the interstitial approach, "we first consider whether the right being asserted is protected under the federal constitution." *Id.* (internal quotation marks and citation omitted). "If the right is protected by the federal constitution, then the state constitutional claim is not reached." *Id.* If the right is not protected by the federal constitution, "[the appellate courts] next consider whether the New Mexico Constitution provides broader protection, and [the appellate courts] may diverge from federal precedent for three reasons: a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics." *Id.* (internal quotation marks and citation omitted). Here, we have already concluded that the right Defendant asserts is not protected under the Fourth Amendment. We therefore proceed to consider whether Article II, Section 10 affords Defendant greater rights than the Fourth Amendment.

6. *State v. Martinez*, 2018-NMSC-081, 420 P.3d 568. **[Jurisdiction; certification from the Court of Appeals]**

Held: In light of the constitutional independence of the grand jury, a prosecutor's use of illegal subpoenas to gather evidence for presentation to a grand jury did not provide a basis to absent specific legislative provisions. On the issue of jurisdiction the Court noted:

> {9} NMSA 1978, Section 34-5-14(C) (1972), provides jurisdiction in this Court over matters certified to us by the Court of Appeals if "the matter involves: (1) a significant question of law under the constitution of New Mexico or the United States; or (2) an issue of

substantial public interest that should be determined by the supreme court."

{10} This case meets both criteria. First, the grand jury is a constitutional institution, *see* N.M. Const. art. II, § 14, and as the following discussion will show, the integrity and independence of the grand jury have been vigorously protected by both the legislative and judicial branches in statutes and case law. Consequently, a question about when grand jury indictments may be overturned is legally significant. Second, because the grand jury represents an important safeguard for individuals against unfounded criminal charges, its independence and functioning are matters of substantial public interest. A significant additional consideration is that conflicts between a statute, this Court's case law interpreting the statute, and this Court's procedural rules call for definitive resolution by this Court.

7. *State v. Ameer*, 2018-NMSC-030, ___ P.3d ___. **[Constitutional construction]**

Held: the constitution's provisions regarding denial of bail in capital cases applied only to offenses punishable by death, as this was the meaning of the term "capital offense" at the time the constitution was adopted. Even though the legislature redefined first degree murder resulting in life imprisonment as a capital offense following abolition of the death penalty, this legislative change had no effect on the meaning of article II, § 13(B). Court distinguished minority view as involving judicial abolition of the death penalty, which left the underlying legislation defining the offense as death eligible unchanged, from legislative abolition, which removed the penalty from the statute. In interpreting the Article II, Section 13, "'[O]ur primary goal is to give effect to the intent of the Legislature which proposed [the constitutional provision] and the voters of New Mexico who approved it.' *Block v. Vigil-Giron*, 2004-NMSC-003, ¶ 4, 135 N.M. 24, 84 P.3d 72. And we are guided by the principle that '[t]erms used in a [c]onstitution must be taken to mean what they meant to the minds of the voters of the state when the provision was adopted.' *Flaska v. State*, 1946-

NMSC-035, ¶ 12, 51 N.M. 13, 177 P.2d 174 (internal quotation marks and citation omitted)." 2018-NMSC-030, ¶ 17.

8. *State v. Radosevich,* 2018-NMSC-028, 419 P.3d 176. **[Stare decisis]**

The Supreme Court overruled prior case law concerning the construction of the statute prohibiting tampering with evidence. Considering stare decisis concerns the Court wrote:

> {21} Although *Jackson* did not address the constitutional issues we are called upon to address here, it did construe the tampering statute in a way that we must now reconsider, particularly in light of the possibility that our construction may result in violation of constitutional mandates. We do not overturn precedent lightly, but where our analysis "convincingly demonstrates that a past decision is wrong, the Court has not hesitated to overrule even recent precedent." *State v. Pieri*, 2009-NMSC-019, ¶ 21, 146 N.M. 155, 207 P.3d 1132 (internal quotation marks and citation omitted) (reviewing factors that may be relevant to overruling precedent). As the United States Supreme Court has recognized, the presence of a constitutional concern is particularly significant. *Payne v. Tennessee*, 501 U.S. 808, 828, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) ("Stare decisis is not an inexorable command; rather, it is a principle of policy and not a mechanical formula of adherence to the latest decision. This is particularly true in constitutional cases, because in such cases correction through legislative action is practically impossible." (internal quotation marks and citation omitted)).

9. *State v. Vanderdussen*, 2018-NMCA-041, 420 P.3d 609. **[Standard of review for de novo appeals; reconstruction of the record]**

Held: magistrate judge did not abuse discretion in declaring a mistrial for manifest necessity following excusal of several jurors after deliberations had begun. On the issue of the standard(s) of review in an appeal de novo setting, the Court wrote:

> {2} ... [The] district court was not bound by the magistrate court's decisions and was required to make an independent determination of whether manifest necessity supported the magistrate court's declaration of a mistrial. *See State v. Foster*, 2003-NMCA-099, ¶¶ 9, 19, 134 N.M. 224, 75 P.3d 824 (holding that because the magistrate court is not a court of record, appeals from there are heard de novo in district court, which required the district court to decide anew, without deference to the magistrate court, whether a mistrial was warranted). The district court, however, was bound by events that transpired in magistrate court and therefore was required to base its independent judgment on the limited record brought before it and the arguments made by counsel in district court.
>
> {3} . . .It appears that, at least in the context of a challenge in district court to a plea agreement entered into in magistrate court, the district court is permitted to take evidence to clarify the limited record from magistrate court. *See State v. Gallegos*, 2007-NMCA-112, ¶¶ 16, 18, 142 N.M. 447, 166 P.3d 1101 (explaining that the district court properly conducted an evidentiary hearing to reconstruct the magistrate proceedings to allow it to fulfill its "obligation to determine the validity of the plea in order to determine its jurisdiction over the appeal"). Our Supreme Court has also explained that it is permissible for the district court to hold a hearing to reconstruct the magistrate proceedings when asked to decide whether the magistrate court acquitted the defendant on the merits or dismissed the complaint for a procedural violation. *See State v. Baca*, 2015-NMSC-021, ¶¶ 2, 27, 352 P.3d 1151.

* * *

{8} As indicated above, we review the trial court's declaration of a mistrial for abuse of discretion, which in this case is the standard we apply to the district court's de novo ruling.

10. *State v. Nehemiah G.*, 2018-NMCA-034, 417 P.3d 1175. **[Adequacy of court's findings]**

The Court of Appeals reversed the children's court finding that the Child, who killed five family members, was amenable to rehabilitation by the time he reached 21. The Court found, first, that the State had right to appeal because amenability decision was contrary to law. The Court also held the children's court judge failed to make adequate findings of fact under the Children's Code:

{45} The mere recitation of testimony concerning the statutory factors and the explicit refusal to consider testimony concerning the first four factors constitutes an abuse of discretion. Summarizing the evidence is not sufficient. *Cf. Mosley v. Magnolia Petroleum Co.*, 1941-NMSC-028, ¶ 10, 45 N.M. 230, 114 P.2d 740 (canceling a finding of fact that was simply a statement regarding the testimony of witnesses); *State ex rel. Hughes v. City of Albuquerque*, 1991-NMCA-138, ¶¶ 14-16, 113 N.M. 209, 824 P.2d 349 (in light of *Mosley*, examining administrative agency's decision to determine if agency merely recited witness testimony); *Adams v. Bd. of Review of Indus. Comm'n*, 821 P.2d 1, 6 (Utah Ct. App. 1991) (determining that, while tribunal's written decision "contain[ed] an informative summary of the evidence presented, such a rehearsal of contradictory evidence does not constitute findings of fact"; findings of fact must state what "in fact occurred, not merely what the contradictory evidence indicates might have occurred"). It does not equate to making findings, *see Sosa*, 1997-NMSC-032, ¶ 8, or even to considering, i.e., weighing and balancing, the statutory factors. *See Doe*, 1979-NMCA-122, ¶ 13. Importantly, "none of those factors, standing alone, is dispositive. The [district] court *must consider each of them* ... in determining whether the child is

amenable to treatment or rehabilitation." *Jones*, 2010-NMSC-012, ¶ 41 (emphasis added).

11. *State v. Tapia*, 2018-NMSC-017, 414 P.3d 322. **[Preservation of state constitutional claims; interstitial analysis]**

Held: the exclusionary rule did not require suppression of evidence that the accused concealed his identity following an illegal traffic stop under the State or Federal Constitution because the relationship between the unlawful seizure and the challenged evidence was sufficiently weak to dissipate any taint resulting from the original illegality. Addressing the preservation of the State Constitutional claim, the Court wrote:

> {40} Because the Court of Appeals found the crimes of concealing identity and forgery should have been suppressed under the Fourth Amendment, it did not address Defendant's challenge under Article II, Section 10. Therefore, as an initial matter, we must determine whether Defendant properly preserved his argument under the New Mexico Constitution for appellate review. *See State v. Ketelson*, 2011-NMSC-023, ¶ 10, 150 N.M. 137, 257 P.3d 957. The State concedes that Defendant's state constitutional claim was adequately preserved. Nevertheless, the rule of preservation must still be met. The requirements for preservation of state constitutional claims were enunciated in *Gomez*, 1997-NMSC-006, ¶¶ 22-23, 932 P.2d 1. When, as is the case here, a state constitutional provision has previously been interpreted more expansively than its federal counterpart, trial counsel must develop the necessary factual basis and raise the applicable constitutional provision in trial court. *Id.* ¶ 22.

Finding the issue "marginally preserved," the Court proceeded to analyze the claim under New Mexico's interstitial approach to determine whether the exclusionary rule extended to the crime committed by the accused following the unlawful stop:

{ 46} While we have repeatedly expressed that Article II, Section 10 provides broader protection of individual privacy than the Fourth Amendment, the key inquiry is still one of reasonableness, which "depends on the balance between the public interest and the individual's interest in freedom from police intrusion upon personal liberty." *Ketelson*, 2011-NMSC-023, ¶ 20, 257 P.3d 957. Article II, Section 10 is "a foundation of *both* personal privacy and the integrity of the criminal justice system, as well as the ultimate regulator of police conduct." *State v. Garcia*, 2009-NMSC-046, ¶ 31, 147 N.M. 134, 217 P.3d 1032 (emphasis added). "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. Davis*, 2015-NMSC-034, ¶ 100, 360 P.3d 1161 (*Davis II*) (Chávez, J., specially concurring) (quoting *State v. Jason L.*, 2000-NMSC-018, ¶ 14, 129 N.M. 119, 2 P.3d 856).

12. *State v. Franklin,* 2018-NMSC-015, 413 P.3d 861. **[Court's exercise of discretion to reach issues on appeal.]**

The Court exercised its discretion to decide whether the lack of an opportunity to present mitigating evidence at sentencing violated the equal protection rights of a defendant convicted of first-degree murder, despite the fact that the issue had not been litigated below and was raised pursuant to *State v. Franklin*, 1967-NMSC-151, 78 N.M. 127, and *State v. Boyer*, 1985-NMCA-029, 103 N.M. 655. The Court determined the issue was one of substantial public importance to the development of New Mexico law under Rule 12-321(B)(2)(a) due to the abolition of the death penalty.

13. *State v. Sena*, 2018-NMCA-037, 419 P.3d 1240, *cert. granted.* **[Fundamental error]**

Held: failure to instruct the jury on an essential element of the crime of kidnapping was fundamental error because it did not require the jury to find

that any restraint of Victim must have been more than incidental to the sexual assault. Addressing fundamental error, the Court wrote, 2018-NMCA-037, ¶ 20:

> To prevail under a fundamental error analysis, a party "must demonstrate the existence of circumstances that shock the conscience or implicate a fundamental unfairness within the system that would undermine judicial integrity if left unchecked." *State v. Cunningham*, 2000-NMSC-009, ¶ 21, 128 N.M. 711, 998 P.2d 176 (internal quotation marks and citation omitted). Generally, "fundamental error occurs when the trial court fails to instruct the jury on an essential element." *State v. Sutphin*, 2007-NMSC-045, ¶ 16, 142 N.M. 191, 164 P.3d 72. When an essential element is omitted, courts look to "whether there was any evidence or suggestion in the facts, however slight, that could have put the omitted element in issue."

14. *State v. Luna,* 2018-NMCA-025, ___ P.3d___. **[Substantial evidence under flawed instructions]**

Held: District court fundamentally erred in instructing the jury on the charge of unlawful exhibition of motion pictures to a minor. Addressing the State's ability to retry the accused, the Court wrote:

> { 27} Whether the State may retry Defendant depends on whether there was sufficient evidence presented at trial to support a conviction under the erroneous instruction given at trial. *See State v. Dowling*, 2011-NMSC-016, ¶ 18, 150 N.M. 110, 257 P.3d 930 ("We review [a d]efendant's [sufficiency of the evidence] claim under the erroneous instruction provided to the jury at trial."). "[O]ur review of the sufficiency of the evidence is analytically independent from the issue of the defect in the jury instruction." *Rosaire*, 1996-NMCA-115, ¶ 20, 123 N.M. 250, 939 P.2d 597.

15. *State v. Groves,* 2018-NMSC-006, 410 P.3d 193. **[Bail appeals; standard of review.]**

Affirming trial court's order detaining person accused of first-degree murder pretrial, the Court interpreted the standard of review in appeals from bail orders:

> {24} Rule 12-204(D)(2)(b) NMRA, governing procedures in appeals from bail orders, provides that a district court decision shall be set aside only if it is shown that the decision (1) "is arbitrary, capricious, or reflects an abuse of discretion," (2) "is not supported by substantial evidence," or (3) "is otherwise not in accordance with law."
>
> {25} "An abuse of discretion occurs when the court exceeds the bounds of reason, all the circumstances before it being considered." *Brown*, 2014-NMSC-038, ¶ 43, 338 P.3d 1276 (internal quotation marks and citation omitted). Similarly, a decision "is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record." *N.M. Att'y Gen. v. N.M. Pub. Reg. Comm'n*, 2013-NMSC-042, ¶ 10, 309 P.3d 89 (internal quotation marks and citation omitted). "Substantial evidence is such relevant evidence that a reasonable mind would find adequate to support a conclusion." *State ex rel. King v. B&B Inv. Grp., Inc.*, 2014-NMSC-024, ¶ 12, 329 P.3d 658 (internal quotation marks and citation omitted).

16. *State ex re. Torrez v. Whitaker*, 2018-NMSC-005, 410 P.3d 201. **[Exercise of superintending control jurisdiction]**

The Court explicated the procedures for district courts to use in deciding motions for pretrial detention under the amended Article II, Section 13 of the New Mexico Constitution. In explaining its decision to issue its writ of

superintending control the Court wrote:

> {31} While a writ of superintending control should not "be used as a substitute for ... appeal," *Chappell v. Cosgrove*, 1996-NMSC-020, ¶ 6, 121 N.M. 636, 916 P.2d 836, at the time the petition was filed in this case we had not yet promulgated our July 1, 2017, rules providing expedited appeals from detention-hearing decisions. *See, e.g.*, Rule 5-405(A)(3) NMRA (providing that either party may appeal an order regarding pretrial release or detention); Rule 12-204 NMRA (providing expedited appellate procedures). Because this case presents "an issue of first impression ... without clear answers under New Mexico law," *Chappell*, 1996-NMSC-020, ¶ 6, 121 N.M. 636, 916 P.2d 836, and because it involves new constitutional provisions with serious public safety implications, we agree that this is an appropriate case in which to exercise our superintending control authority.

17. *State v. Maestas*, 2018-NMSC-010, 412 P.3d 79. **[Adequacy of record before trial court; remand for reconsideration]**

The Court's opinion contains an interesting exchange of views between the majority and Justice Chavez's partial dissent regarding whether the State adequately preserved the factual basis for its claim that the defendant forfeited his right of confrontation through his own wrongdoing. The State contended that within a fifty-six-hour recording of jail phone calls between the defendant and the alleged victim were calls showing the defendant made threats and demanded the victim come into court and lie to protect him. However, the State did not transcribe any calls and did not point the trial court to the call in which the defendant demanded that the victim lie in her testimony. The district court declined to review all fifty-six hours of recordings. On appeal, however, counsel for the State reviewed the recordings and provided the Court with specific excerpts supporting its position on appeal.

The partial dissent disagreed with the majority's recitation of "evidence that was not presented to the trial court. We should not interfere with the trial

court's decision on remand by cataloging calls never considered by the trial court or mentioned by the State in the proceedings below." 2018-NMSC-010, ¶ 48.

The majority, however, appeared concerned that notwithstanding deficiencies in the State's factual presentation below, the district court may have erred as a matter of law in requiring evidence of a specific or overt threat. 2018-NMSC-010, ¶ 30. It thus addressed the partial dissent by reasoning that "on remand the district court has discretion to decide whether to utilize all of the evidence in the record or a subset, perhaps as offered by the parties on remand." 2018-NMSC-010, ¶ 37.

18. *State v. Martinez,* 2018-NMSC-007, 410 P.3d 186. **[Standard of review for mixed documentary evidence and oral testimony; physical facts rule]**

The Court reversed the Court of Appeals opinion in *State v. Martinez*, 2015-NMCA-051, 348 P.3d 1022, *cert. granted*, 2015-NMCERT-005, 367 P.3d 441. The Supreme Court held that the Court of Appeals had improperly reweighed the evidence when it concluded the district court had rejected a police officer's testimony and then relied on ambiguous video evidence from the officer's dash cam which the Court of Appeals itself recognized did not clearly show whether the defendant committed a stop-sign violation.

The Court acknowledged that video evidence is a type of documentary evidence and an appellate court was not required to defer to the trial court in reviewing such evidence. The Court also recognized that when such documentary evidence contradicts oral testimony, the documentary evidence may be controlling under the physical facts rule. 2018-NMSC-007 ¶ 16 (citing *Ortega v. Koury*, 1951-NMSC-011, ¶ 8, 55 N.M. 142).

However, the Court concluded that because the video evidence was ambiguous and the trial court did not entirely reject the officer's oral account, the Court of Appeals reweighed the evidence in finding no traffic violation had occurred. 2018-NMSC-007, ¶ 17.

19. *State v. Ferry,* 2018-NMSC-004, 409 P.3d 918. **[Remand for clarification of ruling; bail appeals]**

In a bail appeal, the Court remanded for clarification because the district court's written order denying pretrial detention could be read as reflecting a misunderstanding of the law, while the court's oral ruling suggested the court had considered all relevant factors. 2018-NMSC-004, ¶ 9. In discussing the standard of review the Court wrote:

> {2} Discretion is the authority of a district court judge to select among multiple correct outcomes. Appellate courts analyze a district court judge's discretionary decisions by first, without deferring to the district court judge, deciding whether proper legal principles were correctly applied. If proper legal principles correctly applied only lead to one correct outcome there is no discretion for the district court judge to exercise. If the district court judge arrives at the only correct outcome, the district court judge is affirmed; otherwise the district court judge is reversed. If proper legal principles correctly applied may lead to multiple correct outcomes, deference is given to the district court judge because if reasonable minds can differ regarding the outcome, the district court judge should be affirmed. In this case the dominating issue is whether the district court judge correctly applied proper legal principles.

20. *State v. Miera,* 2018-NMCA-020, 413 P.3d 491. **[Ineffective assistance claims on direct appeal; standard of review for cumulative error]**

Held both that defendant made a prima facie showing of ineffective assistance *and* that cumulative error required reversal, thus obviating the need for an evidentiary hearing on the ineffective assistance claim.

On the first issue, the Court recited:

> {30} Whether we address a claim of ineffective assistance through direct appeal depends on the completeness of the record. *See State*

v. Trujillo, 2012-NMCA-112, ¶ 48, 289 P.3d 238. Where the facts necessary to a full determination of ineffective assistance are not part of the record, but an appellant nonetheless makes a prima facie showing of ineffective assistance of counsel, an appellate court may remand for an evidentiary hearing. *See State v. Roybal*, 2002-NMSC-027, ¶ 25, 132 N.M. 657, 54 P.3d 61; *State v. Cordova*, 2014-NMCA-081, ¶ 7, 331 P.3d 980. Because the trial court's record "may not adequately document the sort of evidence essential to a determination of trial counsel's effectiveness [,]" ineffective assistance of counsel claims are often better adjudicated through habeas corpus proceedings. *State v. Grogan*, 2007-NMSC-039, ¶ 9, 142 N.M. 107, 163 P.3d 494 (internal quotation marks and citation omitted); *Duncan v. Kerby*, 1993-NMSC-011, ¶ 4, 115 N.M. 344, 851 P.2d 466 (acknowledging that habeas corpus proceedings are the "preferred avenue for adjudicating ineffective assistance of counsel claims"). "We review claims of ineffective assistance of counsel de novo." *State v. Dylan J.*, 2009-NMCA-027, ¶ 33, 145 N.M. 719, 204 P.3d 44.

On the cumulative error issue the Court held:

{45} "Cumulative error requires reversal of a defendant's conviction when the cumulative impact of errors which occurred at trial was so prejudicial that the defendant was deprived of a fair trial." *State v. Martin*, 1984-NMSC-077, ¶ 17, 101 N.M. 595, 686 P.2d 937 ("We must reverse any conviction obtained in a proceeding in which the cumulative impact of irregularities is so prejudicial to a defendant that he is deprived of his fundamental right to a fair trial."). The doctrine is strictly applied, however, and "cannot be invoked when the record as a whole demonstrates that the defendant received a fair trial." *State v. Salas*, 2010-NMSC-028, ¶ 39, 148 N.M. 313, 236 P.3d 32 (internal quotation marks and citation omitted).

{46} Although the admission of the evaluation alone does not rise to the level of plain error, we do note that it contained information that was tantamount to an admission of guilt by Defendant. The prejudice of an erroneously admitted apparent admission of guilt by a criminal defendant is obvious, regardless of whether Defendant is given the opportunity to explain his answer. This error, coupled with the numerous errors by Defendant's counsel, including his failure to investigate the sexual molestation charges against G.M.'s stepfather, Burciaga, his failure to discover G.M.'s recantation of her allegations against Burciaga, his failure to move to strike or otherwise remedy the characterization of his client as a sexual deviant, and his failure to review and take steps to properly introduce the CYFD report containing G.M.'s admission that she has never experienced "bad touch" are so numerous and egregious that we are persuaded that Defendant was denied his right to a fair trial. . . . . Although none of the errors discussed above constitute grounds for reversal standing alone, together they deprived Defendant of a fair trial. We therefore reverse.

21. *State v. Lewis,* 2018-NMCA-019, 413 P.3d 484. **[Remand for further findings; discovery violation]**

The Court remanded to the district court for additional findings after the district court dismissed a case for discovery violations. The Court held more was required under *State v. Harper*, 2011-NMSC-044, 150 N.M. 745, 266 P.3d 25, and *State v. Le Mier*, 2017-NMSC-017, 394 P.3d 959:

{12} In this instance, the district court's assessment of the *Harper* factors is virtually nonexistent. *Le Mier* requires the district court to not only weigh the degree of culpability and extent of prejudice, but also explain its decision regarding applicability of lesser sanctions on the record. In this case, we do not have the benefit of looking at the sanction imposed through the lens of a thorough record that indicates a careful consideration of the *Harper* factors. Instead, we are left to determine whether the district court abused its discretion by arriving at the most extreme sanction available in response to an apparently unremarkable

fact pattern. Though the district court was unquestionably aware of its obligation to consider the *Harper* factors, nothing in the record reveals the district court's reasons for imposing a sanction of dismissal with prejudice or the facts on which the district court based its decision. The limited record in this case is inadequate to determine whether the district court exercised due care in making its decision to impose a severe sanction contrary to *Le Mier's* specific requirement that a district court "*must explain* [its] decision[.]" 2017-NMSC-017, ¶ 20, 394 P.3d 959 (emphasis added). As such, the district court's imposition of its sanction—dismissal with prejudice—cannot presently be evaluated or justified by this Court, and we must reverse and remand the matter to the district court for further proceedings.

22. *State v. Vargas,* 2017-NMSC-029, 404 P.3d 416. **[Retroactivity]**

The Court applied *Birchfield v. North Dakota,* --- U.S. ----, 136 S.Ct. 2160 (2016) retroactively to the defendant's DWI appeal, even though the claim had not been preserved in district court. Under *Birchfield,* "a person who is arrested for DWI may be punished for refusing to submit to a breath test under an implied consent law, but may not be punished for refusing to consent to or submit to a blood test under an implied consent law unless the officer either (a) obtains a warrant, or (b) proves probable cause to require the blood test in addition to exigent circumstances." 2017-NMSC-027 ¶ 1.

The Court reasoned:

> {11} . . . . In *Teague v. Lane,* the United States Supreme Court established the analysis that courts must follow to determine whether a new rule applies retroactively. *See* 489 U.S. 288, 299-310, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). New Mexico courts have adopted this analysis. *See Kersey v. Hatch,* 2010-NMSC-020, ¶¶ 21, 25, 148 N.M. 381, 237 P.3d 683. "An appellate court's consideration of whether a rule should be retroactively or prospectively applied is invoked only when the rule at issue is in fact a new rule." *State v. Mascareñas,* 2000-NMSC-017, ¶ 24, 129 N.M. 230, 4 P.3d 1221 (internal quotation marks omitted). The

Teague Court determined that "a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." 489 U.S. at 301, 109 S.Ct. 1060 (emphasis omitted). The new rule "applies to cases pending on direct appeal, as long as the issue was raised and preserved below ...." *Kersey*, 2010-NMSC-020, ¶ 19, 148 N.M. 381, 237 P.3d 683 (citing *State v. Nunez*, 2000-NMSC-013, ¶ 114, 129 N.M. 63, 2 P.3d 264). Vargas did not preserve her Fourth Amendment argument in the metropolitan court. . . . *Birchfield* announced an expansion of courts' previous understanding of blood tests under the Fourth Amendment. . . . *Birchfield* specifically held for the first time that police officers do not need to obtain a search warrant for a breath test from a subject because a breath test is a search incident to arrest, but officers must obtain a search warrant for a blood test unless probable cause for the blood test and exigent circumstances are present. *Id.* at ----, 136 S.Ct. at 2185. This new rule cannot apply retroactively unless "(1) it is a substantive rule that alters the range of conduct or the class of persons that the law punishes, or (2) it is a watershed rule of criminal procedure." *Kersey*, 2010-NMSC-020, ¶ 31, 148 N.M. 381, 237 P.3d 683.

{12} The rule recently announced in *Birchfield* fits squarely within the first *Teague* exception to the general principle against retroactive application because the new rule "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.' " *Teague*, 489 U.S. at 307, 109 S.Ct. 1060 (citation omitted). *Birchfield* bars criminal sanctions previously imposed upon a subject for refusing to submit to warrantless blood tests. *See* --- U.S. ----, 136 S.Ct. at 2185-86. Therefore, *Birchfield* is applicable here.

NOTES

Administrative Appeals-The District Court Conundrum

Administrative Appeals — The District Court Conundrum

29th Annual Appellate Practice Institute
September 14, 2018

The Honorable David K. Thomson, First Judicial District Court
John L. Sullivan, Esq., New Mexico State Land Office, Acting General Counsel
Edward Ricco, Esq., Rodey, Dickason, Sloan, Akin & Robb, P.A.
Larry J. Montaño, Esq., Holland & Hart LLP

I. Original Jurisdiction vs. Appellate Jurisdiction

N.M. Const. art. VI, § 1: "Judicial power" vested in the Supreme Court, Court of Appeals, District Courts, Probate Courts, Magistrate Courts and "such other courts inferior to the district courts as may be established by law from time to time in any district, county or municipality of the state."

N.M. Const. art. VI, § 13: District Courts

- Original jurisdiction over "all matters and causes not excepted" in the N.M. Constitution and "such jurisdiction of special cases and proceedings as may be conferred by law"
- Appellate jurisdiction of "all cases originating in inferior courts and tribunals in their respective districts"
- Supervisory control "over the same."
- Power to issue writs, including mandamus, injunction, certiorari, prohibition and "all other writs, remedial or otherwise in the exercise of their jurisdiction"

Appellate jurisdiction must be conferred by **statute and cannot be conferred by court rule**

Rule 1-074 NMRA: Appeals from "administrative agencies" when there is a **statutory right of review** to the district court, "whether by appeal, right to petition for a writ of certiorari, or other statutory right of review."

- "This rule does not create a right to appeal."
- "If there is no statutory right of appeal or statutory right to writ of certiorari, an aggrieved person may be entitled to a constitutional review of an administrative decision or order pursuant to Rule 1-075"
- By its terms, Rule 1-074 does not apply to:

- appeals under the Human Rights Act (governed by Rule 1-076)
- review of decisions relating to unemployment compensation claims under the Unemployment Compensation Law (governed by Rule 1-077)
- matters relating to water rights under Article XVI, Section 5 of the N.M. Constitution.

Rule 1-075 NMRA: "writs of certiorari to administrative officers and agencies pursuant to the New Mexico Constitution **when there is no statutory right to an appeal or other statutory right of review**." (Emphasis added.)

- Rule 1–075 "governs but does not itself create a right to obtain a constitutional writ of certiorari to an administrative entity when there is no statutory right to an appeal or other statutory right of review." *Moriarty Mun. Sch. v. N.M. Pub. Sch. Ins. Auth.*, 2001-NMCA-096, ¶ 34 (quoted in *Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio*, 2011-NMCA-014, ¶ 12)
- "Independent of statute, the right to seek a constitutional writ of certiorari in the district court 'will lie when it is shown that the inferior court or tribunal has exceeded its jurisdiction or has proceeded illegally,' *Regents of Univ. of N.M. v. Hughes*, [1992-NMSC-049, ¶ 16], and generally not when there exists a right to appeal. Roberson, 78 N.M. at 300, 430 P.2d at 871; see also Hughes, 114 N.M. at 310, 838 P.2d at 464 (reiterating Roberson 's statement)." Moriarty Mun. Sch., 2001-NMCA-096, ¶ 34.

For both Rule 1-074 and Rule 1-075, "Agency" means "any state or local government administrative or quasi-judicial entity."

Selected statutes creating District Court appellate jurisdiction (NM Laws 1999, ch. 265):

- Secretary of State's refusal of voter registration. NMSA 1978 § 1-4-21.
- County denial of petition for municipal incorporation and protest against municipal incorporation. NMSA 1978 §§ 3-2-5 and 3-3-9.
- Municipal governing body decision on appeal from planning commissioner order or determination. NMSA 1978 § 3-19-8.
- Zoning authority decisions and joint municipal-county zoning authority decision on appeal from extraterritorial zoning commission decision. NMSA 1978 §§ 3-21-4 and 3-21-9.
- Municipal governing body decision regarding creation of improvement district. NMSA 1978 §§ 3-33-13, 3-33-16, 3-33-22, & 3-33-35.
- Irrigation district decision regarding delivery of water. NMSA 1978 § 73-11-29.
- Administrative Procedures Act appeals, other than review of certain rules. NMSA 1978 § 12-8-16; NMSA 1978 § 12-8-8 (providing for declaratory judgment action to review validity or applicability of a rule which interferes with or impairs, or threatens to interfere with or impair, the interests, rights or privileges of the plaintiff).
- Professional or occupational license denial, revocation or suspension. NMSA 1978 § 61-1-17.
- Director of Alcohol and Gaming Division grant or denial of liquor license or liquor control officer suspension or revocation of liquor license. NMSA 1978 §§ 60-6B-2 & 60-6C-6.
- Tax & Rev. Dept. denial, cancellation or suspension of driver license. NMSA 1978 §§ 66-5-36 & 66-5-204.
- Oil Conservation Commission decision or order, other than rulemaking order. NMSA 1978 §§ 70-5-16 & 70-2-25; NMSA 1978 § 70-2-12.2 (direct appeal to Court of Appeals from OCC rulemaking order).
- Mining Commission order or decision, other than rulemaking order. NMSA 1978 §§ 69-6-2, 69–25A–30 & 69-36-16.

Selected statutes providing for appeal directly to Court of Appeals:

- Workers' compensation judge final order. NMSA 1978 § 52-5-8.
- NMED or Environmental Improvement order under the Air Quality Control Act; EIB rulemaking; Water Quality Control Commission rulemaking, permitting, certification or compliance order. NMSA 1978 §§ 74-1-9, 74-2-9.
- Tax & Rev. Dept. hearing officer decision on tax protest. NMSA 1978 § 7-1-25; *but see* NMSA 1978 § 7-1-26 (right of action district court for refund of overpayment)
- Oil Conservation Commission rulemaking. NMSA 1978 § 70-2-12.2.
- Mining Commission rulemaking. NMSA 1978 § 69-36-16.

Selected statutes providing for appeal directly to Supreme Court:

- PRC final orders. NMSA 1978 § 62-11-1

Is exhaustion of administrative remedies jurisdictional?

Potential alternative proceedings invoking the district court's original jurisdiction:

- Declaratory judgment or injunctive relief
- Mandamus

A District Court can simultaneously exercise its appellate and original jurisdiction. *El Castillo Ret. Residences v. Martinez*, 2017-NMSC-026, ¶ 23.

The District Court must consider each claim according to its appropriate standard of review and maintain the distinction appellate and original jurisdiction in rendering its decision. *Id.*

II. Venue

NMSA 1978 § 39-3-1.1(C):

- county in which the agency maintains its principal office; or
- county in which a hearing on the matter was conducted.

Workforce Solutions Dept. Secretary or board of review decision re unemployment compensation benefits: NMSA 1978 § 51-1-8 (county wherein the person seeking the review resides, with opportunity to seek more convenient forum).

Human Rights Commission: NMSA 1978 § 28-1-13 (trial de novo in the district court of the county where the discriminatory practice occurred or where the respondent does business).

State Engineer decision: NMSA 1978 § 72-7-1 (appeal to the district court of the county in which the point of desired appropriation is situated).

III. Certification to Court of Appeals

NMSA 1978, Section 39-3-1.1(F): "issue of substantial public interest"

Rule 1-074(S) and Rule 1-075(S): The District Court "shall consider, but is not limited to," whether the case involves:

(1) novel question;
(2) constitutional question;
(3) state-wide impact;
(4) imperative public importance;
(5) likely to recur and the need for uniformity is great;
(6) likelihood of further appeal making certification a more efficient means of resolution; or
(7) important local question which should receive consideration from the district court in the first instance.

Rule 12-608 NMRA: After certification, the Court of Appeals "shall issue a calendar notice and the case shall proceed in accordance with Rule 12-210 NMRA [re calendar assignments for direct appeals]."

Rejection of certification? *See Jicarilla Apache Nation v. Rodarte*, 2004-NMSC-035, ¶ 8 ("accepting" certification from District Court); *Pinghua Zhao v. Montoya*, 2012-NMCA-056, ¶ 4 (same).

IV. Who is a "party" having standing to appeal?

Rule 12-601(C) and (D) NMRA: added in 2013 in response to *New Energy Economy, Inc. v. Vanzi*, 2012-NMSC-005, 274 P.3d 53, which addresses what level of participation in an administrative proceeding is required before a participant may be considered a "party" that is entitled to notice of an appeal challenging the administrative action and is permitted, but not required, to intervene as an appellee for the purpose of defending the action.

V. Staying the administration action

Provided for in Rule 1-074(Q), Rule 1-075 (Q), and Rule 1-076(K).

VI. What constitutes the record on appeal?

Rule 1-074(H)(2) and Rule 1-075(H)(2): "all papers, pleadings, and exhibits filed in the proceedings of the agency, entered into or made a part of the proceedings of the agency, or actually presented to the agency in conjunction with the hearing."

VII. Scope and Standard of Review

NMSA 1978 § 39-3-1.1(D): may set aside, reverse or remand the final agency decision if:

(1) the agency acted fraudulently, arbitrarily or capriciously;
(2) the final decision was not supported by substantial evidence; or
(3) the agency did not act in accordance with law.

Rule 1-074(R)/Rule 1-075(R)/Rule 1-077(J):

(1) whether the agency acted fraudulently, arbitrarily, or capriciously;
(2) whether **based upon the whole record on appeal**, the decision of the agency is not supported by substantial evidence;
(3) **whether the action of the agency was outside the scope of authority of the agency**; or

(4) whether the action of the agency was otherwise not in accordance with law.

Whole record review means that the District Court must "independently review the entire record of the administrative hearing." *Smyers v. City of Albuquerque*, 2006-NMCA-095, ¶ 5.

When acting in its appellate capacity, the District Court "is limited in the same manner as any other appellate body ... and must defer to the agency's factual determinations if supported by substantial evidence." *N.M. Bd. of Psychologist Exam'rs v. Land*, 2003-NMCA-034, ¶ 5 (quoted in *El Castillo Ret. Residences v. Martinez*, 2017-NMSC-026, ¶ 21).

NMSA 1978 § 28-1-13/Rule 1-076: **de novo** appeals from NM Human Rights Commission

VIII. Explanatory Decision

Rule 1-074(T)/Rule 1-075(T):

The district court, in its appellate capacity, shall issue a written decision, which may include:

(1) remanding the case to the administrative agency with specific instructions for further proceedings and determinations; the remand may also include instructions to make the case ripe for judicial review;

(2) reversing the decision under review, with a statement of the basis for the reversal . . .; and

(3) affirming the decision under review, with a statement of the basis for affirmance.

No similar provision in Rule 1-077 (unemployment compensation appeals)

IX. Appeal of District Court Decision

NMSA 1978 § 39-3-1.1(E)/Rule 1-074(V)/Rule 1-075(V)/Rule 1-076(L)/Rule 1-077(L)/Rule 12-505:

Petition for writ of certiorari filed with the Court of Appeals, which may exercise its discretion whether to grant review. A party may seek further review by filing a petition for writ of certiorari with the Supreme Court.

Non-conforming document may be accepted as a petition for writ of certiorari **if it provides sufficient information to assess its merits as a petition**. *Wakeland v. New Mexico Dept. of Workforce Sols.*, 2012-NMCA-021, ¶¶ 5-17.

- a notice of appeal is not an adequate substitute for a petition for writ of certiorari
- untimely filing of the petition will be excused only under "unusual circumstances"

What happens in the hybrid appellate jurisdiction/original jurisdiction case? Both: *El Castillo Ret. Residences v. Martinez*, 2015-NMCA-041, ¶ 7, *aff'd but criticized*, 2017-NMSC-026.

NOTES

Keynote Address-Reflections on Judging and Advocacy

NOTES

Clerk of the Court Perspective

NOTES

Ethical Issues in Appellate Mediation

NOTES

Postjudgment Issues-Nuts and Bolts

MORGA V. FEDEX GROUND PACKAGE SYS., 2018-NMCA-039, __ P.3d __

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ALFREDO MORGA, Individually and on behalf of the Estate of YLAIRAM MORGA, Deceased; and as Next Friend of YAHIR MORGA, Minor Child,

and

RENE VENEGAS LOPEZ, Individually and as the Administrator of the Estate of MARIALY RUBY VENEGAS MORGA Deceased; and GEORGINA LETICIA VENEGAS, Individually,

Plaintiffs-Appellees,

v.

FEDEX GROUND PACKAGE SYSTEM, INC., RUBEN'S TRUCKING, LLC a/k/a RUBEN REYES a/k/a SHOOTER'S EXPRESS TRUCKING, INC., the Estate of ELIZABETH SENA QUINTANA, and M&K'S TRUCKING, INC., Defendants-Appellants.

Docket No. A-1-CA-35001
COURT OF APPEALS OF NEW MEXICO
2018-NMCA-039, __ P.3d __
February 6, 2018, Filed

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY, Francis J. Mathew, District Judge.
Certiorari Granted, June 4, 2018, No. S-1-SC-36918. Released for Publication July 3, 2018.

COUNSEL

L. Helen Bennett, P.C., L. Helen Bennett, Albuquerque, NM, for Appellee the Estate of Ylairam Morga.

Scherr & Legate, PLLC, James F. Scherr, El Paso, TX, for Appellee Alfredo Morga.

Cervantes Law Firm, P.C., K. Joseph Cervantes, Las Cruces, NM, for Appellee Yahir Morga.

Daniel Anchondo, El Paso, TX, for Appellee the Estate of Marialy Ruby Venegas Morga.

Rodey, Dickason, Sloan, Akin & Robb, P.A., Edward R. Ricco, Jocelyn Drennan, Jeff Croasdell, Brenda M. Saiz, Albuquerque, NM, for Appellants.

JUDGES

TIMOTHY L. GARCIA, Judge Pro Tem. WE CONCUR: MICHAEL E. VIGIL, Judge, M. MONICA ZAMORA, Judge.
AUTHOR: TIMOTHY L. GARCIA.

OPINION

GARCIA, Judge Pro Tem.

{1} This appeal is before us following a jury verdict for more than $165 million to Plaintiffs for wrongful death, personal injury, and loss of consortium claims that arose from a catastrophic automobile accident between a small pickup truck and a FedEx transport tractor-trailer. Defendants assert that the district court erred in denying their motion for a new trial or a remittitur of the damages awarded by the jury. Specifically, Defendants argue that (1) the verdict was not supported by substantial evidence; and (2) the jury's verdict was tainted by passion, prejudice, partiality, sympathy, undue influence, or a mistaken measure of damages. In addition, Defendants argue that the district court erred in awarding prejudgment interest. This case presents an opportunity to address important issues faced by the judicial system—how do appellate courts measure the outer limits of a jury's discretion to award compensatory damages and whether we should utilize mathematic ratios as an acceptable basis to reduce damage awards in large verdict cases. We decline to utilize mathematic ratios as the basis for establishing error by the district court. We affirm the district court's denial of Defendants' two post-trial motions, and accordingly, we affirm the jury's verdict. We also affirm the award of prejudgment interest.

BACKGROUND

{2} On June 22, 2011, at approximately 1:30 a.m., on the interstate between Las Cruces and Deming, New Mexico, a combination tractor-trailer vehicle (the FedEx truck) struck a small pickup truck driven by Marialy Ruby Venegas Morga (Ms. Morga). Accompanying Ms. Morga was her four-year-old daughter, Ylairam Morga (Ylairam), and nineteen-month-old son, Yahir Morga (Yahir). The FedEx truck was operated by FedEx Ground Package System, Inc. (FedEx) through independent FedEx contractors, and the actual driver for the FedEx contractors was Elizabeth Quintana (Quintana) (FedEx, the FedEx contractors, and Quintana are collectively referred to as Defendants). Ms. Morga was either stopped or barely moving on the right-hand side of her traffic lane when the FedEx truck struck her vehicle from behind at sixty-five miles per hour without slowing. The impact and its resulting injuries were severe, with multiple fatalities occurring. Ms. Morga and Ylairam died, and Yahir was seriously injured. Quintana also died as a result of the accident.

{3} Alfredo Morga, Ms. Morga's spouse, brought suit against Defendants, individually and as personal representative for his daughter, Ylairam, and as next friend for his son, Yahir. Mr. Morga also asserted claims against Defendants for personal injury and wrongful death. Ms. Morga's father, Rene Venegas Lopez, as her personal representative, brought suit against Defendants for wrongful death (Mr. Morga individually and in his representative capacity for both of his children, as well as Mr. Lopez in his capacity as personal representative for Ms. Morga are referred to in this opinion as Plaintiffs). Mr. Lopez and his wife, Georgina Leticia Venegas, also intervened in the lawsuit (Intervenors) and asserted personal claims for loss of consortium resulting from the death of their daughter Ms. Morga. Prior to trial, FedEx stipulated that it would "pay for any damages attributed to [FedEx] and the other named [D]efendants."

{4} At trial, Plaintiffs presented evidence of damages related to the wrongful death, personal injury claims by Plaintiffs and also the loss of consortium claims by Mr. Morga and Intervenors. Plaintiffs also asked the jury to award punitive damages against Defendants. The jury found all Defendants negligent and liable for Plaintiffs' claims. The jury apportioned fault for the accident as follows: FedEx (65 percent), the FedEx contractors and Quintana (10 percent each for a total of 30 percent), and Ms. Morga (5 percent). The jury awarded compensatory damages as follows:

For the wrongful death of Ylairam $61,000,000
For the wrongful death of Ms. Morga $32,000,000
For personal injury and the loss of consortium
for his mother, to Yahir $32,000,000
For emotional distress, resulting from physical
and psychological injury, and the loss of
consortium for his spouse and child,
to Mr. Morga $40,125,000
For the loss of consortium of his daughter,
to Mr. Lopez $208,000
For the loss of consortium for her daughter,
to Ms. Venegas $200,000

No punitive damages were awarded by the jury.

{5} After the verdict was entered on January 24, 2015, the district court judge presiding over the case was involved in an ex parte conversation with Plaintiffs' counsel regarding potential counsel on appeal. Recognizing that the ex parte conversation could be perceived as improper, the district court judge recused herself. The case was reassigned to Judge Mathew to preside over all the post-trial proceedings.

{6} Defendants moved for a new trial or remittitur of the damages award and argued that the verdict was excessive. The district court denied both motions. The court concluded that there was substantial evidence to support the verdict, that it was not the result of passion, prejudice, a mistaken measure of damages, or other improper factors, and that it would be inappropriate to substitute its judgment for that of the jury. Plaintiffs then proposed a form of judgment that included an award of prejudgment interest. The district court held an evidentiary hearing on the motion and subsequently ruled that, under NMSA 1978, Section 56-8-4(B) (2004), prejudgment interest was warranted at an annual rate of 5 percent. Defendants filed a timely appeal. While the appeal was pending before this Court, Intervenors settled their loss of consortium claims. As a result, we do not address any appellate arguments regarding Intervenors' damage awards and loss of consortium claims.

DISCUSSION

{7} On appeal, Defendants do not assert any issues related to the jury's determination of liability, but only contested the jury's award of compensatory damages and the district court's award of prejudgment interest.

I. Denial of Defendants' Motions for New Trial or Remittitur

A. Standard of Review

{8} We review the district court's denial of Defendants' motions for a new trial or remittitur for an abuse of discretion. *See State v. Mann*, 2002-NMSC-001, ¶ 17, 131 N.M. 459, 39 P.3d 124 ("[The appellate courts] will not overturn a trial court's denial of a motion for a new trial unless the trial court abused its discretion."); *Hanberry v. Fitzgerald*, 1963-NMSC-100, ¶ 2, 72 N.M. 383, 384 P.2d 256 (applying an abuse of discretion

standard for the review of an appellant's "claim that the verdict [was] excessive, requiring a remittitur or a new trial"); *Sandoval v. Baker Hughes Oilfield Operations, Inc. (Jose Sandoval)*, 2009-NMCA-095, ¶ 13, 146 N.M. 853, 215 P.3d 791 ("The applicable standard in reviewing the denial of a motion for a new trial or remittitur is [an] abuse of discretion."). "[The] trial court abuses its discretion when its decision is contrary to logic and reason." *N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-028, ¶ 6, 127 N.M. 654, 986 P.2d 450 (internal quotation marks and citation omitted); *see Talbott v. Roswell Hosp. Corp.*, 2008-NMCA-114, ¶¶ 29-30, 144 N.M. 753, 192 P.3d 267 (recognizing that a trial court does not abuse its discretion in denying a motion for a new trial unless its decision was "arbitrary, capricious, or beyond reason" (internal quotation marks and citation omitted)). However, 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.* ¶ 9.

{9} Our appellate courts defer to the jury in awarding damages and also to the trial court in its assessment of a motion for new trial or a motion to remit the amount of damages awarded by the jury. *See Ennis v. Kmart Corp.*, 2001-NMCA-068, ¶ 27, 131 N.M. 32, 33 P.3d 32 ("When a trial court denies a motion for a remittitur, we defer to the trial court's judgment. When the jury makes a determination and the trial court approves, the amount awarded in dollars stands in the strongest position known in the law." (internal quotation marks and citations omitted)); *see also Coates v. Wal-Mart Stores, Inc.*, 1999-NMSC-013, ¶ 49, 127 N.M. 47, 976 P.2d 999 (recognizing the appellate court's reliance on the trial court because of its unique position "to observe the witnesses and their demeanor as well as the jurors' attitude during the trial" whereas we review the record cold); *Salopek v. Friedman*, 2013-NMCA-087, ¶ 30, 308 P.3d 139 ("In determining whether a jury verdict is excessive, we do not reweigh the evidence but determine whether the verdict is excessive as a matter of law. The jury's verdict is presumed to be correct." (internal quotation marks and citation omitted)).

{10} Defendants argue that such deference to the district court should not be afforded in this particular case because Judge Mathew did not have the opportunity to observe the proceedings first hand. Defendants therefore contend that a de novo standard of review should apply. Defendants cite no authority to support their contention that a judge duly appointed to proceed with an ongoing case, pursuant to Rule 1-063 NMRA,1 is not entitled to the same discretion given to other trial judges presiding over a case. We decline to deviate from this established precedent—recognizing an abuse of discretion standard of review—for four reasons. First, this Court will not consider propositions that are unsupported by citation to authority. *See ITT Educ. Servs., Inc. v. N.M. Taxation & Revenue Dep't*, 1998-NMCA-078, ¶ 10, 125 N.M. 244, 959 P.2d 969. Second, although this standard of review argument was presented as one based on inherent logic, this Court is bound by Supreme Court precedent, including the appropriate standard of review to be applied. *See State ex rel. Martinez v. City of Las Vegas*, 2004-NMSC-009, ¶¶ 20-22, 135 N.M. 375, 89 P.3d 47 (stating that although the Court of Appeals is bound by Supreme Court precedent, we may explain "any reservations [this Court] might harbor over its application of [Supreme Court] precedent so that we will be in a more informed position to decide whether to reassess prior case law"). We can only note the potential logic of Defendants' argument regarding applying a different standard of review in the present case, but any change to the standard of review must be implemented by our Supreme Court. Third, although Judge Mathew was not in the "unique position to observe the witnesses and their demeanor as well as the jurors' attitude during the trial[,]" *Coates*, 1999-NMSC-013, ¶ 49, he does have "experience with juries in the community," which this Court stated is "an indispensable safeguard built into our American civil jury system." *Sandoval v. Chrysler Corp. (James Sandoval)*, 1998-NMCA-085, ¶ 14, 125 N.M. 292, 960 P.2d 834. Fourth, Defendants made no objection below regarding Judge Mathew's capacity or ability to fully preside over the hearing for remittitur or a new trial.

{11} In reviewing the actual evidence presented at trial, "we review the sufficiency of the evidence to support the verdict by examining whether the verdict is supported by such relevant evidence that a reasonable mind would find adequate to support a conclusion." *Jose Sandoval*, 2009-NMCA-095, ¶ 12 (internal quotation marks and citation omitted). "We review all evidence in the light most favorable to the verdict and resolve all conflicts in the light most favorable to the prevailing party." *Id.* (internal quotation marks and citation omitted).

B. Analysis of the Evidence to Support the Jury's Award

{12} "The purpose of compensatory damages is to make the injured party whole by compensating it for losses." *Cent. Sec. & Alarm Co. v. Mehler*, 1996-NMCA-060, ¶ 11, 121 N.M. 840, 918 P.2d 1340. "A jury's damages award will be upheld unless it appears that the amount awarded is so grossly out of proportion to the injury received as to shock the conscience." *Salopek*, 2013-NMCA-087, ¶ 31 (internal quotation marks and

citation omitted). This Court is required to consider two factors in making the determination of whether a jury award is excessive. First, we consider "whether the evidence, viewed in the light most favorable to the plaintiff, substantially supports the award." *Wachocki v. Bernalillo Cnty. Sheriff's Dep't.*, 2010-NMCA-021, ¶ 48, 147 N.M. 720, 228 P.3d 504 (alterations, internal quotation marks, and citation omitted), *aff'd*, 2011-NMSC-039, 150 N.M. 650, 265 P.3d 701. If any portion of the award is supported by substantial evidence, we must next consider "whether there is an indication of passion, prejudice, partiality, sympathy, undue influence or a mistaken measure of damages on the part of the fact[-]finder." *Id.* If the award does not satisfy either of these tests, then all or some portion of the award is deemed excessive. *See Jose Sandoval*, 2009-NMCA-095, ¶ 16. In the present case, Defendants argue that the evidence did not support the award of damages and that passion, prejudice, or sympathy affected the jury's determination of the amount of damages it awarded. However, even if the jury's award is higher than the court would have given, this is not sufficient to disturb a verdict. *Id.* ¶ 17. An award of damages will be disturbed only in extreme circumstances. *See Salopek*, 2013-NMCA-087, ¶ 30. "The proper approach is to examine the plaintiff's evidence related to damages and determine whether that evidence could justify the amount of the verdict, or determine whether the verdict amount was grossly out of proportion to the evidence of the plaintiff's [injury]." *Id.* ¶ 31 (alterations, internal quotation marks, and citation omitted).

{13} Although Defendants concede that the evidence at trial supported an award for compensatory damages, they argue that the amounts awarded to Plaintiffs were excessive for two reasons.[2] First, Defendants argue that the awards for wrongful death, bodily injury, and loss of consortium "far exceed any previous awards in this state" and the evidence was insufficient to support such an excessive award. Second, Defendants argue that because the awards for the economic injury make up such a small portion of the total award (between 1 and 3 percent), the damage awards are "grossly disproportionate to the injury" and constitute legal error requiring a new trial on the issue of damages. We recognize that Defendants' arguments are both primarily directed at whether the amount of the jury's award for non-economic damages "is so grossly out of proportion to the injury received as to shock the conscience" of this Court. *Id.* (internal quotation marks and citation omitted).

1. Substantial Evidence Was Presented to Support the Award of Economic and Non-Economic Damages to Plaintiffs

{14} In the present case, Defendants do not dispute that the jury was properly instructed regarding its duty to review the evidence and calculate Plaintiffs' damages. The jury was instructed as follows:

> The guide for you to follow in determining fair and just damages is the enlightened conscience of impartial jurors acting under the sanctity of your oath to compensate the beneficiaries with fairness to all parties to this action. Your verdict must be based on evidence, not on speculation, guess or conjecture. You must not permit the amount of damages to be influenced by sympathy or prejudice, or by the grief or sorrow of the family, or the loss of the deceased's society to the family.

They were further instructed to consider neither the property or wealth of the beneficiaries nor that of Defendants in arriving at a verdict. We summarize the compensatory damages evidence related to each Plaintiff separately.

a. Alfredo Morga

{15} The jury awarded Mr. Morga $40.125 million for compensatory damages. The jury was instructed that if they should decide in favor of Mr. Morga, they must "fix the amount of money which will reasonably and fairly compensate him" for injuries related to the following elements of damages: past and future medical expenses; the "nature, extent[,] and duration of the injury[;]" pain and suffering experienced as a result of the injury; loss of enjoyment of life; aggravation of a pre-existing ailment or condition; and emotional distress resulting from the death of his wife, Marialy, his daughter, Ylairam, and the injuries to his son Yahir.

{16} The evidence established that, prior to the accident, Mr. Morga suffered from epilepsy which was controlled by medication. Mr. Morga's epilepsy intensified after the accident and became more frequent. Additionally, expert testimony established that Mr. Morga suffered from posttraumatic stress disorder, major depressive disorder, and that he would need at least a year of intensive psychotherapy and psychiatric care. Dr. Angelo Romagosa, a medical doctor specializing in physical medicine and rehabilitation, testified that Mr. Morga would need $250,068 in physician care, medications, and rehabilitation services in the future due to the injuries suffered as a result of the accident.

{17} With regard to the emotional distress of Mr. Morga due to the loss of society and companionship for the injuries and death of his family members, the jury heard substantial evidence about this close young family and the irreparable personal loss that resulted from the accident. Mr. Morga testified about meeting Ms. Morga as a freshman in high school. The Morgas began dating and had their daughter, Ylairam, during their senior year. Mr. Morga testified about the details of their early lives—high school, his work at various part-time jobs to support the family—as well as Ms. Morga's background in high school, youthful activities, and eventually taking care of the home and their new baby, Ylairam. In October 2009 they had their second child, Yahir. Mr. Morga also provided numerous details about their daily lives, close relationship, buying a home, advancements at work, and plans for the future after Yahir was born. Mr. Morga then testified to his recollection of when he went to the scene on the night of the accident. He was told not to approach the vehicle where his wife and daughter were still located. He then went to the hospital in El Paso, Texas, where his son was taken following the accident and where he stayed for several days. Mr. Morga testified that he was unable to return to work for months after the accident. Mr. Morga also described how the accident severely affected him emotionally.

b. Yahir Morga

{18} The jury compensated Yahir $32 million for past and future damages for injuries he suffered as a result of the accident. The jury was instructed that should they decide in favor of Yahir, they must "fix the amount of money which will reasonably and fairly compensate [him]" for injuries related to the following elements of damages: past and future medical expenses; the "nature, extent[,] and duration of the injury"; pain and suffering experienced; loss of enjoyment of life; and emotional distress resulting from the death of his mother, Ms. Morga.

{19} At trial, the evidence showed that Yahir suffered a distal tibial metaphyseal fracture, traumatic brain injury, a liver laceration, a right pulmonary contusion, and other traumatic injuries. Yahir incurred $58,444.68 in medical treatment. Dr. Romagosa testified that Yahir would need $417,926.47 in future medical care. Additionally, Dr. King testified that Yahir would be at an "increased risk for psychological difficulties down the road due to the early loss of his mother and sister." After the accident, Yahir regressed in his use of speech and had to see a psychologist. Additionally, Mr. Morga testified that Yahir would wake up at night afraid and crying. Ms. Morga's older sister, Rebecca Brown, also testified regarding the relationship between Yahir and his mother prior to the accident.

c. Ylairam Morga

{20} The jury compensated the Estate of Ylairam $61 million for her wrongful death. The jury was instructed that if it were to find for the Plaintiffs, it "must then fix the amount of money which you deem fair and just for the life of Ylairam," for the following elements of damages: "reasonable expenses of funeral and burial[;] lost earning capacity, and the lost value of household services; [t]he value of her lost life; and the mitigating or aggravating circumstances attending the wrongful act, neglect, or default."

{21} Ylairam was only four years old at the time of the accident. At trial, Plaintiffs presented evidence regarding several aspects of Ylairam's life and her relationship with her family for the jury to consider in determining the amount of damages to be awarded for her death, including testimony by her father, Mr. Morga and various family photographs.

d. Marialy Morga

{22} The jury awarded the Estate of Ms. Morga $32 million for her wrongful death. The jury was instructed that it "must . . . fix the amount of money which you deem fair and just for [her] life," including the following the elements of damages: "[t]he reasonable expenses for the funeral and burial; [t]he lost earning capacity and the [lost] value of household services; [t]he value of [her] life apart from her earning capacity; aggravating or mitigating circumstances attending the wrongful act, neglect or default; [and t]he loss of guidance and counseling to the deceased's minor child."

{23} At trial, specific evidence was presented regarding Ms. Morga's life so that the jury could make its determination of the damages incurred as a result of Ms. Morga's death. Ms. Brown testified about Ms. Morga's early life, her family and home in El Paso, Texas, as well as her personality and interests. Ms. Brown also testified regarding the closeness of their relationship. She presented Ms. Morga as a good mother, as well as an attentive daughter and wife. Mr. Morga also testified about his relationship with his wife, buying their first home, raising their two children, and their plans to put their children through college. He also testified that

Ms. Morga had been planning to get her graduate equivalency degree, and someday obtain her cosmetology degree.

e. The Evidence Supports the Jury Award

{24} Defendants' arguments regarding the sufficiency of the evidence are, at their core, solely objections to the jury's large awards for non-economic injuries to Plaintiffs. Defendants did not target any specific component of Plaintiffs' evidence as insufficient or erroneous. Defendants do not dispute that the non-economic injuries and damages incurred by Plaintiffs are unique, intangible, and difficult to quantify in financial terms. As such, our judicial system relies on juries and trial courts, as the representatives of their local community, to best evaluate and determine the monetary value of these non-economic injuries, including pain and suffering, and the loss of life. *See James Sandoval*,1998-NMCA-085, ¶¶ 13-14 ("The amount of awards necessarily rests with the good sense and deliberate judgment of the tribunal assigned by law to ascertain what is just compensation, and, in the final analysis, each case must be decided on its own facts and circumstances. . . . In addition, the trial judge's experience with juries in the community provides an indispensable safeguard built into our American civil jury system." (internal quotation marks and citation omitted)).

{25} In this case, Defendants made a strategic decision to entrust the jury with the decision of how to determine the value of a life from the evidence presented, even going so far as to exclude Plaintiffs' economist from providing testimony regarding "specific damages for the value of a statistical life[,]" including "any numbers offering a benchmark value as to human life." Defendants' counsel specifically told the jury, " I am not going to submit to you a number, because I agree the value of life—I don't want to insult anybody about the value of life in this case. But you have to rely on you[r] own conscious[] when you're looking at [the] value of life." We agree that the damage awards in this case were very large. However, when an experienced district court judge, who is familiar with juries in his community, properly reviews the record and evaluates a motion for new trial and a motion for remittitur; the fact that Plaintiffs' awards are large does not transform Plaintiffs' undisputed evidence into something illogical or insufficient. Furthermore, although Defendants were afforded an opportunity to present evidence or testimony at trial to guide the jury in their determination of the value of life and other non-economic damages, Defendants specifically chose not to do so. Under our discretionary standard of review, Plaintiffs presented sufficient evidence to support the jury's right to perform its unique function—award all compensatory damages, including any non-economic damages for pain and suffering and loss of life that were incurred by Plaintiffs. Proper instructions were given that describe the factors a jury must consider in making its compensatory damage awards. We can only interpret Defendants' appellate argument to effectively require the appellate courts to establish a threshold or an absolute financial limit on the value of life, despite the district court and the jury's best efforts to fulfill their assigned duty to quantify something that is legally unique, intangible, and difficult to measure. We refuse to implement such a legal threshold or limit. Based upon the evidence presented at trial and the arguments presented for post-trial review, the district court did not abuse its discretion in denying Defendants' motions for a new trial or remittitur on the grounds of insufficient evidence to support the damage awards for Plaintiffs' non-economic injuries.

2. Comparison to Similar Verdicts in Other Cases Will Not be Applied to Develop Defendants' Sufficiency of the Evidence Argument

{26} Defendants' argument centers on the awards for wrongful death, pain and suffering, and emotional distress damages, all of which are non-economic and cannot be determined by any fixed standard. *See Baca v. Baca*, 1970-NMCA-090, ¶ 28, 81 N.M. 734, 472 P.2d 997 ("There is no fixed standard for measuring the value of a life, and, as in personal injury cases, wide latitude is allowed for the exercise of the judgment of the jury in fixing the amount of such an award."). Instead, a jury is given wide latitude in fixing the amount of such awards. *See id.*; *see also James Sandoval*, 1998-NMCA-085, ¶ 13 (recognizing that "there can be no standard fixed by law for measuring the value of pain and suffering" (omission, internal quotation marks, and citation omitted)).

{27} Defendants ask this Court to compare the amount of damages awarded in this case to other similar cases and cite to our Supreme Court's analysis in *Vivian v. Atchison, Topeka & Santa Fe Railway Co.*, to support their argument that such comparisons are "helpful" to determine whether a verdict is excessive. 1961-NMSC-093, ¶ 11, 69 N.M. 6, 363 P.2d 620 (emphasizing "that each case must be determined upon its own facts and circumstances[,] nevertheless, . . . a consideration of other verdicts and a comparison of the facts and circumstances is helpful"). We do not consider *Vivian* helpful toward providing guidance in the present

case. First, it is very difficult for this Court to apply the analysis in *Vivian* to the facts in this case. *Vivian* involved a workplace injury where, after a review of the evidence, our Supreme Court ultimately determined that "[i]t would serve no useful purpose to review other verdicts" in order to grant the plaintiff the option between remittitur and a new trial limited solely to the issue of damages. *Id.* ¶¶ 1-2, 25-26. Second, Defendants have failed to cite to any authority where a court conducted an actual comparison of other verdicts in order to grant a new trial or remit the jury's damage award to a lesser amount. Third, Defendants conceded at oral argument that they failed to identify in the record and did not otherwise provide the district court or this Court with any evidence of comparable jury awards that would support their argument for conducting a comparative analysis with those cases alleged to be "similar." Defendants' counsel specifically stated that they were only "obligat[ed] to come forward with an argument and a basis to argue that the verdict is excessive under common community standards, and if the court is looking for numbers, [the courts bear the obligation to] look to the court's own case law and see . . . the wrongful death damages and verdicts that have been reported [over the last ten years.]" Fourth and finally, Defendants do not dispute or attack any of Plaintiffs' evidence regarding both economic and non-economic damages.

{28} Instead, this Court has continued to emphasize that "each case must be decided on its own facts and circumstances." *James Sandoval*, 1998-NMCA-085, ¶ 13 (internal quotation marks and citation omitted). We have also questioned the usefulness of comparing non-economic damage awards in one case with the awards in other cases. *See Jose Sandoval*, 2009-NMCA-095, ¶ 18 (noting that "[w]e are skeptical about the usefulness of comparing awards for pain and suffering in other cases"); *Robinson v. Mem'l Gen. Hosp.*, 1982-NMCA-167, ¶ 20, 99 N.M. 60, 653 P.2d 891 (stating that the defendant's request that the court compare the verdict awarded to other cases was improper because "the question of excessive damages must be determined from the evidence in [each] case"); *Sweitzer v. Sanchez*, 1969-NMCA-055, ¶ 5, 80 N.M. 408, 456 P.2d 882 (stating that what this Court may have done in other cases was of "no consequence [because] the question of prejudice and . . . the measure of damages must be determined from the evidence in [each] case" (internal quotation marks, and citation omitted)). We recognize that our Supreme Court has upheld a district court's discretion in granting a substantial remittitur to a jury's damages verdict, for a claim of emotional distress, when no economic damages were offered into evidence. *See Nava v. City of Santa Fe*, 2004-NMSC-039, ¶¶ 16-20, 136 N.M. 647, 103 P.3d 571 (holding that the remittitur of the amount awarded to a plaintiff for emotional distress was upheld on a comparative basis where very specific factual findings were issued by the district court, there was a lower amount requested by the plaintiff at trial, and due to the lack of any evidence of physical harm). However, this case is very distinguishable from *Nava*, both factually and procedurally. In the present case, undisputed economic damages were presented and awarded to Plaintiffs, and this Court is now being asked to reverse, not affirm, the remittitur decision issued by the district court—a completely opposite analysis.

{29} Defendants simply argue that the damage awards for wrongful death are "tens of millions of dollars greater than any awards in similar cases and far exceed any previous award in this [S]tate for wrongful death or comparable loss" and "far outstrips any prior verdict." Yet Defendants concede that they did not bring any evidence of other non-economic damage award cases to the attention of the district court for comparison. Even if a comparative verdicts analysis would be helpful to this Court in assessing excessive damages, Defendants have elected not to offer such an analysis or to make any connection to the evidence in this case. This Court is under no obligation to go outside the record to investigate and develop Defendant's argument about greatly exceeding all prior damage awards in this State. *See Santa Fe Expl. Co. v. Oil Conservation Comm'n*, 1992-NMSC-044, ¶ 11, 114 N.M. 103, 835 P.2d 819 (stating that where a party fails to cite any portion of the record to support its factual allegations, the appellate courts need not consider its argument on appeal); *Corona v. Corona*, 2014-NMCA-071, ¶ 28, 329 P.3d 701 ("This Court has no duty to review an argument that is not adequately developed."); *see also* Rule 12-318(A)(3) NMRA (requiring briefs in chief to contain "a summary of proceedings, briefly describing the nature of the case, the course of proceedings, and the disposition in the court below, and including a summary of the facts relevant to the issues presented for review[, which] summary *shall contain citations to the record proper, transcript of proceedings, or exhibits supporting each factual representation*" (emphasis added)). Defendants have neither identified any of Plaintiffs' evidence deemed insufficient to support the jury's award of non-economic damages nor suggested the type of additional evidence that is necessary to support such an award. As a result, this Court will not undertake Defendants' offer to search the entire record and then search the existing universe of severe injury cases in an attempt to compare the substantive evidence and damage awards in other cases with Plaintiffs' substantive evidence and damage

awards in the present case. *See Kepler v. Slade*, 1995-NMSC-035, ¶ 13, 119 N.M. 802, 896 P.2d 482 ("Matters outside the record present no issue for review." (internal quotation marks and citation omitted)).

3. A Comparison of Non-Economic to Economic Damages is Unsupported by our Case Law

{30} Next, Defendants argue that because the economic damages proven at trial make up a "minuscule part" of the total amount of damages awarded, the total amounts awarded to Plaintiffs are grossly disproportionate to the measurable injuries that occurred. We begin by recognizing that this Court has specifically rejected any fixed, mathematical formula as the best way to arrive at a damage award for pain and suffering—one aspect of non-economic damages—because "there can be no standard fixed by law for measuring the value of pain and suffering." *James Sandoval*, 1998-NMCA-085, ¶ 13 (omission, internal quotation marks, and citation omitted). Instead, we have concluded time and again that, although it may be frustrating to assess non-economic damages without "a fixed, mathematical formula[,] . . . the best way to arrive at a reasonable award of damages is for the trial judge and the jury to work together, each diligently performing its respective duty to arrive at a decision that is as fair as humanly possible under the facts and circumstances of a given case." *Id.* ¶ 16.

{31} We leave any continuing concerns about the use of mathematical formulas to establish a legal basis for addressing excessive jury verdicts to the public and its ongoing debate with the legislative branch about the American judicial system and any major policy changes in New Mexico. *See id.* ¶ 17 (recognizing the public criticism and ongoing debate regarding excessive jury verdicts). Even in *James Sandoval* where "[t]he [trial] judge acknowledged that the jury verdict shocked the conscience of the court" we remanded for further consideration rather than undertake our own calculation of damages. *Id.* ¶¶ 7, 12-18. At this time, we see no support for Defendants' argument that the appellate courts should use fixed mathematical formulas to establish legal error and as the proper basis for reversing a jury's non-economic damage award.

B. The Verdict is Not the Result of Jury's Passion or Prejudice

{32} Defendants argue that we may simply "infer" that the jury was improperly influenced by passion or prejudice from the verdict itself and that it is "not necessary to point to trial error as a cause." However, we disagree that our case law allows us to infer improper passion or prejudice simply because the verdict is large and therefore "speaks for itself as to the existence of passion or prejudice." In *Vivian*, our Supreme Court stated that a verdict was "so grossly excessive as to require an inference that it resulted from passion, prejudice, partiality, [and] sympathy[.]" 1961-NMSC-093, ¶ 14. However, our Supreme Court made this statement only after having undertaken a "careful review of the evidence of pain, suffering, loss of earnings, and physical injuries" and holding that there was "no substantial evidence to support [the] verdict[.]" *Id.* Defendants have failed to present any type of evidentiary review for this Court to analyze in the present case, and we shall not undertake such a review or consider such an argument that is not developed on appeal. *See Santa Fe Expl. Co.*, 1992-NMSC-044, ¶ 11 (stating that where a party fails to cite any portion of the record to support its factual allegations, the appellate courts need not consider its argument on appeal); *Corona*, 2014-NMCA-071, ¶ 28 ("This Court has no duty to review and argument that is not adequately developed.").

{33} We also disagree with Defendants' argument that because the jury awarded sums "far greater" than requested by Plaintiffs, we may legally infer that passion and prejudice played an improper role in the jury's determination of damages. This argument mischaracterizes Plaintiffs' statements during closing argument as a request for a specific amount of monetary damages. Counsel for Ms. Morga's estate proposed to the jury that when considering damages for the loss of Ms. Morga's life, it could consider placing a value on a person's individual days of life. Counsel hypothetically stated, "[i]sn't it worth $500 a day for the enjoyment of your life, for the enjoyment of life that [Ms. Morga] has been deprived of? When you value life, I ask you to give those considerations of her life expectancy as an appropriate way for you to try and measure and place a value on something that we recognize . . . can't be valued." We perceive this hypothetical suggestion to be general guidance to the jury for developing its own method for arriving at a valuation for Ms. Morga's life. The fact that the jury chose its own method or a higher daily value for the enjoyment of life when it awarded damages different from the hypothetical example suggested by counsel, does not establish error by the jury. We reject such a hypothetical inference that the jury's damage awards were the result of passion and prejudice.

{34} We now turn to the specific incidences occurring during trial that Defendants argue provoked passion or prejudice in the jury. These incidences include Mr. Morga's trial testimony and what Defendants

characterize as "misconduct by Plaintiffs' counsel" in closing argument.

1. Mr. Morga's Testimony

{35} Defendants argue that Mr. Morga's testimony was "emotionally wrenching" when it addressed the sequence of events involving when he was informed of the accident, arrived at the scene, and observed the vehicle. Defendants concede that Mr. Morga's testimony was "an unavoidable aspect of the trial" but insist that the testimony "easily could have moved the jury" to award excess damages based on improper passion or prejudice.

{36} Mr. Morga's testimony was not objected to by Defendants. Counsel elicited testimony from Mr. Morga concerning his wife and children, as well as his description of the week leading up to the accident. Mr. Morga became visibly upset when asked how he learned about the accident and the district court ordered a recess break for the jury. Plaintiffs' counsel was then allowed to use leading questions on direct examination regarding when Mr. Morga arrived at the scene of the accident. When Mr. Morga again began crying, the district court took a second recess, and it ordered counsel to move on to another subject. Defendants' counsel commented, "[i]t's not necessary to make [Mr. Morga] cry to the jury, I'm sorry." Although the district court expressed concern with Mr. Morga's health and the impact of the testimony, there is no indication in the record that the district court believed improper prejudice had occurred from his testimony. Mr. Morga returned to the stand and completed the direct and cross-examination without any further breaks.

{37} Throughout Mr. Morga's testimony, Defendants did not ask the district court to strike any of his testimony, and Defendants never requested any kind of limiting instruction or admonition to the jury. Prior to deliberations, the jury was properly instructed that sympathy was not to play a role in the jury's determination. Without more than a witness crying during testimony that both parties expect to be visibly emotional, we cannot presume that the jury violated its oath and failed to follow the jury instructions. *See Norwest Bank N.M., N.A. v. Chrysler Corp.*, 1999-NMCA-070, ¶ 40, 127 N.M. 397, 981 P.2d 1215 (stating that the appellate courts "assume the jury followed such instructions absent evidence to the contrary"). Mr. Morga's testimony was understandably emotional, but there is no indication in the record that the testimony incited improper passion or prejudice within the jury. *See State v. Finnell*, 1984-NMSC-064, ¶ 23, 101 N.M. 732, 688 P.2d 769 (noting that the introduction of evidence that allegedly caused a witness to become very emotional and cry during her testimony was neither prejudicial nor sufficient to arouse the passion of the jury and require a mistrial); *State v. Garnenez*, 2015-NMCA-022, ¶¶ 25-26, 344 P.3d 1054 (holding that a pause in trial and the removal of a member of the courtroom gallery who became emotional and cried during upsetting testimony did not mandate a mistrial be declared or prevent the jury from rendering a fair and impartial verdict).

2. Closing Argument

{38} Next, Defendants argue that Plaintiffs' closing argument caused the jury to be infected by improper passion or prejudice. Defendants point to three incidences in Plaintiffs' closing argument: (1) a photograph admitted into evidence, but previously unused by any witness at trial, depicting the crushed vehicle in which Ms. Morga's body was partially visible; (2) what Defendants characterize as Plaintiffs arguing to the jury that FedEx was attempting to "shift responsibility for the accident to its contractors"; and (3) Plaintiffs' "justice needs to be ignited" comment related to punitive damages. Defendants argue that the above incidents during closing arguments, individually or in combination, provide the legal basis for establishing improper passion or prejudice by the jury and causing an "excessive award of damages."

{39} We begin our review by emphasizing that a defendant must make "a timely and specific objection[, one] that apprised the district court of the nature of the claimed error and that allows the district court to make an intelligent ruling thereon" in order to preserve an issue for appeal. *Jose Sandoval*, 2009-NMCA-095, ¶ 56; *see* Rule 12-321(A) NMRA (requiring that "it must appear that a ruling or decision by the trial court was fairly invoked" in order to preserve a question for review). The purpose of the preservation rule is "to specifically alert the district court to a claim of error so that any mistake can be corrected at that time, . . . to allow the opposing party a fair opportunity to respond to the claim of error and to show why the court should rule against that claim, and . . . to create a record sufficient to allow this Court to make an informed decision regarding the contested issue." *Jose Sandoval*, 2009-NMCA-095, ¶ 56. Defendants now ask us to distinguish the analysis we employed in *Jose Sandoval*.

{40} In *Jose Sandoval*, this Court declined to consider alleged instances of misconduct by the plaintiff

that were argued to be the cause of improper passion or prejudice because the defendant did not make a proper objection at trial. *Id.* ¶¶ 60-72. However, this Court noted that

> [i]n cases involving improper closing argument, as when counsel go outside the record[,] we reserve the right in a proper case to reverse the judgment and award a new trial even if objection be not made. However, this rule is to only be applied as a last resort and is not to be applied unless we are satisfied that the argument presented to the jury was so *flagrant and glaring in fault and wrongdoing as to leave the bounds of ethical conduct*, such as going outside the record.

Id. ¶ 57 (emphasis added) (internal quotation marks and citations omitted). Defendants argue that the specific instances it has cited satisfy this *Jose Sandoval* exception because they are "so flagrant and glaring in fault . . . as to leave the bounds of ethical conduct[.]" Defendants also argue that our *Jose Sandoval* decision represents an outlier in our case law that should not be perpetuated. These arguments are not compelling. A formal Court of Appeals opinion is controlling authority. *See Gulbransen v. Progressive Halcyon Ins. Co.*, 2010-NMCA-082, ¶ 13, 148 N.M. 585, 241 P.3d 183. Our reasoning in *Jose Sandoval* is in line with the well-established rule on preservation. 2009-NMCA-095, ¶ 57 (noting that "other than in Florida, no other courts in this country allow improper argument to be raised for the first time on appeal in civil cases, but noting that in *Griego v. Conwell*, 1950-NMSC-047, ¶ 17, 54 N.M. 287, 222 P.2d 606 our] Supreme Court warned that it would [reserve the right to] do so, but it has never carried out its threat" (internal quotation marks and citations omitted)); *see* Rule 12-321(A) (requiring that "it must appear that a ruling or decision by the trial court was fairly invoked" in order to preserve a question for review); *see also Berkstresser v. Voight*, 1958-NMSC-017, ¶ 10, 63 N.M. 470, 321 P.2d 1115 (per curiam) (stating that our Supreme Court has "held numerous times that to preserve a question for review[,] a litigant must invoke a ruling thereon").

{41} Finally, we disagree with Defendants that the alleged incidents of misconduct by Plaintiffs, either individually or collectively, are "so flagrant and glaring in fault and wrongdoing as to leave the bounds of ethical conduct" or rise to the level of flagrant or fundamental error. *Jose Sandoval*, 2009-NMCA-095, ¶ 57; *see Estate of Gutierrez ex rel. Jaramillo v. Meteor Monument, L.L.C.*, 2012-NMSC-004, ¶¶ 32-33, 274 P.3d 97 ("The fundamental error doctrine is codified in Rule [12-321(B)(2)]. . . .This rule shall not preclude the appellate court from considering in its discretion, questions involving . . . fundamental error. . . . [T]his Court has applied the doctrine in civil cases under the most extraordinary and limited circumstances."(alterations, internal quotation marks, and citation omitted)). Despite Defendants' failure to preserve an objection to these particular closing arguments by Plaintiffs, we shall also discuss the merits of each allegation of misconduct and explain why we conclude that no legal err was established by Defendant.

a. The Photograph

{42} The district court ruled that the photograph of the crash site could be used at trial if a "yellow sticky" note was placed to cover what appeared to be a human arm in the photo. The "yellow sticky" note purportedly fell off before closing argument. However, Defendants made no objection to the error and counsel for Defendants acknowledged that he chose not to object to this error during the closing argument. After Plaintiffs rested and the jury was excused for a recess break, Defendants' counsel mentioned the absence of the "yellow sticky" note. The district court acknowledged the missing note covering the designated portion of the photo and assured the parties that the photo would not go to the jury during deliberations as a solution to the issue now being brought to the court's attention. No further objection was made to this decision by the district court to address the "yellow sticky" note issue.

{43} Defendants argue that Plaintiffs' use of the photograph is an example of "flagrantly improper conduct" that could not be cured by an instruction from the district court. However, Defendants have failed to show that Plaintiffs' use of the photograph was so glaring in fault as to leave the "bounds of ethical conduct" or that the district court's ruling to address the issue rose to the level of fundamental error. *See Grammar v. Kohlhaas Tank & Equip. Co.*, 1979-NMCA-149, ¶ 38, 93 N.M. 685, 604 P.2d 823. There is no indication in the record that: (1) Plaintiffs' use of the photograph without the "yellow sticky" note was intentional; (2) any comment was made to the jury by Plaintiffs' counsel regarding the portion of the photograph that was intended to be covered and excluded by the "yellow sticky" note; or (3) the photograph was so gruesome and inflammatory that, without the "yellow sticky" note, it inflicted flagrant and incurable prejudice upon the jury. *See Allen v. Tong*, 2003-NMCA-056, ¶¶ 35, 39, 133 N.M. 594, 66 P.3d 963 (holding that counsel's statement in closing argument, "if the jury found [the d]efendant was not negligent, then that will be the end of this trial and

your job will be over, and you will get back to your jobs and families[,]" was not "a flagrant or glaring wrongdoing that requires [this Court] to invoke fundamental error" (internal quotation marks omitted)). Furthermore, the district court addressed the issue on the record and recognized that any potential harm appeared very minor at that point, stating "I seriously doubt [the jury] recognized that as an arm. If you hadn't told me it was an arm when we first discussed it, I don't think I would've known that." Despite Defendants' assertion at oral argument that this highly prejudicial photograph is part of the record on appeal, it was not provided as part of the record for our independent review. As a result, we have no independent basis to question the district court's analysis and resolution of the issue at trial. *See Williams v. Mann*, 2017-NMCa-012, ¶ 19, 388 P.3d 295 ("Upon a doubtful or deficient record, every presumption is indulged in favor of the correctness and regularity of the trial court's decision, and the appellate court will indulge in reasonable presumptions in support of the order entered." (internal quotation marks and citation omitted)). Without any further indication of unethical conduct or fundamental error, the use of this photograph will not be recognized as causing the jury to render an improper verdict based on passion or prejudice.

b. Comments Related to Allocation of Fault

{44} Defendants argue that Plaintiffs' counsel made improper comments in closing argument related to FedEx's fault and responsibility for the damages incurred by Plaintiffs. First, Defendants argue that Plaintiffs' counsel tried to shift responsibility for the accident to its contractors, even though FedEx had agreed to pay for any damages attributed to its contractors or Quintana. Second, Defendants contend that Plaintiffs' comment—"it's happened before"—regarding other FedEx accidents defied Defendants' motion in limine to exclude all reference to other accidents involving Defendants. However, after reviewing the complete record of Plaintiffs' closing argument, we interpret Plaintiffs' comment differently. Comparative fault was a specific issue at trial and the parties disagreed about how the jury should allocate fault between the various Defendants. Plaintiffs argued that FedEx was attempting to allocate fault to their contractors and had used similar arguments in the past. Although FedEx assumed liability for all Defendants in this matter, the jury was still required to apportion fault amongst each Defendant. Defendants did not object to the jury verdict form that listed all four Defendants separately, as well as Ms. Morga, for the allocation of comparative liability. Because Defendants did not object to Plaintiffs' comments in closing or the jury instructions, we must apply a fundamental error standard of review. *See Allen*, 2003-NMCA-056, ¶¶ 33-34 (noting that a failure to properly object to issues regarding the instructions tendered to the jury will only be reversed on a basis of fundamental error). Defendants have again failed to convince this Court that Plaintiffs' comments were so glaring in fault as to leave the "bounds of ethical conduct" or that the error rose to the level of fundamental error. *Grammar*, 1979-NMCA-149, ¶ 38. Where the allocation of comparative fault was a proper function to be decided by the jury, Plaintiffs' comments would not be unethical or otherwise create any inference that the jury rendered an improper verdict.

c. Plaintiffs' Closing Argument Regarding the Need to Ignite Justice

{45} Defendants objected to one fragment of Plaintiffs' closing argument in particular, the statement that "they don't want to show the pictures to inflame the [j]ury. Well, sometimes justice needs to be ignited." Defendants argue that this type of comment encouraged the jury to follow their passion and misled the jury by implying that Defendants sought to suppress photographic evidence. Again, when read in the full context of closing argument, Plaintiffs' statements were not outside the scope of proper argument, especially where Plaintiffs asked the jury to punish Defendants for their conduct and punitive damages were an issue the jury was properly required to decide. In addition, the jury was properly instructed that all arguments made by counsel in closing were not "to be considered by you as evidence or as correct statements of the law, if contrary to the law given to you in [the jury] instructions." We conclude that if Defendants believed that Plaintiffs' closing arguments were clearly illegal, unethical, or going outside the record, they should have timely and specifically objected at trial, requested an appropriate curative instruction or admonishment, and given the district court the opportunity to correct any error. *See Jose Sandoval*, 2009-NMCA-095, ¶ 58 ("We believe that if defense counsel had timely and specifically objected and had requested and received an appropriate curative instruction and/or admonition, the issue would not now be in this Court."); *Grammar*, 1979-NMCA-149, ¶ 34 ("The objection to alleged improper argument must be specified and made known to the [trial] court so that the court may intelligently rule thereon. When that is not done, the proposition is not properly reviewable on appeal."). Without giving the district court an opportunity to evaluate Plaintiffs' "justice needs to be ignited," closing argument in the context of a potential award of punitive damages, we neither view such an argument as

being so glaring in fault as to leave the "bounds of ethical conduct" nor do we recognize it to rise to the level of fundamental error. *See Grammar*, 1979-NMCA-149, ¶ 38 (stating that this Court will only consider the narrow exception to the preservation requirement as a "last resort" and only if the plaintiff's lawyer goes outside the actual record in a flagrant and glaring manner so as to "leave the bounds of ethical conduct").

C. The Jury's Award Was Not the Result of a Mistaken Measure of Damages

{46} Finally, Defendants argue again that we may infer from the size of the jury's verdict that it applied a mistaken measure of damages. *See Hanberry*, 1963-NMSC-100, ¶ 32 (stating that after a careful review of the evidence, the award was so extremely excessive "that it is not truly supported by the evidence and therefore must indicate that the jury was mistaken in the measure of damages"). Defendants assert that "the jury mistakenly applied a punitive measure of damages in awarding compensatory damages." We disagree that such an appellate inference can be drawn exclusively from the size of a damages verdict or the evidence presented for an award of punitive damages. We emphasize that Defendants have the burden, as the appellants, to demonstrate from the record that the jury was mistaken in its award. *See Coates*, 1999-NMSC-013, ¶ 51 (stating that in appealing a denial of a remittitur, the appellant "bears the burden of showing that the record supports its contention that there was error in the verdict" or "that the verdict (i.e., damage awards) was infected with passion, prejudice, partiality, sympathy, undue influence, or some corrupt cause or motive" (internal quotation marks and citation omitted)).

{47} Plaintiffs asked the jury to award 2 percent of FedEx's $7 billion net worth as punitive damages in this case. Defendants argue that although the jury awarded no punitive damages, the amount in compensatory damages awarded—$165 plus million—is close to what was requested for punitive damages—$140 million. In the review of the special verdict form submitted to the jury, Judge Mathew specifically noted, "[t]he special verdict form indicates clearly that the jury understood that they were returning a verdict for compensatory damages." Furthermore, there are indications from the poll conducted of the jury following the actual verdict that several jurors wanted to give additional punitive damages, in addition to the amount awarded for compensatory damages. Defendants even stated on the record, "probably a couple of them wanted [to give] punitives" and the trial court agreed with Defendants' observation of the issue and comment. Based upon this clear record, Defendants' argument that the jury mistakenly applied a punitive measure of damages to award compensatory damages is not supported. *See id.* ¶ 52 (recognizing that the defendants had not "borne [their] burden of proving error"); *Baxter v. Gannaway*, 1991-NMCA-120, ¶ 18, 113 N.M. 45, 822 P.2d 1128 (recognizing that when "a jury makes an award which covers each element of damages," it is not our place to "say as a matter of law the jury verdict is founded upon a mistaken measure of damages").

II. Prejudgment Interest

{48} The district court had the discretion to award prejudgment interest. Section 56-8-4(B); *Coates*, 1999-NMSC-013, ¶ 55 ("The trial court has the discretion to award prejudgment interest."); *Smith v. McKee*, 1993-NMSC-046, ¶ 7, 116 N.M. 34, 859 P.2d 1061 (stating that when the trial court's decision to award prejudgment interest is discretionary, any award shall be reviewed for an abuse of discretion and reversed only where its decision "is contrary to logic and reason"). Section 56-8-4(B) allows the trial court, in its discretion, to award interest of up to 10 percent after considering, among other factors, the following:

(1) if [Plaintiffs were] the cause of unreasonable delay in the adjudication of [Plaintiffs'] claims; and

(2) if [Defendants] had previously made a reasonable and timely offer of settlement to [Plaintiffs].

"Prejudgment interest serves two purposes, promoting early settlements and compensating persons[.]" *Coates*, 1999-NMSC-013, ¶ 55. "Interest is awarded to make the tort victim whole, and has no bearing on the question of punishing the tortfeasor[.]" *Id.*

{49} On March 31, 2015, the district court held its hearing on the issue of prejudgment interest and specifically limited the evidentiary presentation to factors within the elements of Section 56-8-4(B). Plaintiffs presented evidence of the possibility for a significant damage award resulting from the death and injury to Plaintiffs and that Defendants made one offer for settlement during the only mediation prior to trial. Defendants offered no witnesses at the hearing but relied upon the evidence that was attached to their motion to deny prejudgment interest. Defendants' motion argued that because Plaintiffs refused to accept a provision for confidentiality as part of any settlement agreement, "there was no point to trying to negotiate a potentially mutually acceptable settlement amount." Based upon the evidence presented, the district court concluded that there was "no evidence of delay in this case by any party" but that "Defendants did not make reasonable or

timely offers of settlement." The district court's order further concluded that "the refusal on the part of . . . Plaintiff[s'] counsel to engage in settlement discussions which involved any form of confidentiality agreement was not reasonable." The district court then balanced Plaintiffs' refusal to settle on a confidential basis with what it termed as Defendants' "complete lack of appreciation or concern about the potential result of a trial," to conclude that prejudgment interest was warranted in the amount of 5 percent per annum—half the allowable rate under the statute. *See* § 56-8-4(B) (giving the district court the discretion to allow interest up to 10 percent from the date of the complaint).

{50} Defendants now assert that their "liability was not a foregone conclusion" and that "the facts were not clear-cut in Plaintiffs' favor." Defendants also argue that the trial court abused its discretion in granting prejudgment interest by ignoring "[d]ifficult legal issues" and "thorny issues of causation, comparative fault, and [damages]." *Sunnyland Farms, Inc. v. Cent. N.M. Elec. Co-op., Inc.*, 2013-NMSC-017, ¶ 62, 301 P.3d 387. We disagree. Defendants' argument that its right to dispute liability and the complexity of the case precluded its obligation to make a reasonable and timely settlement offer is not a proper reading of the statute. Although the complexity of a case may preclude reaching a settlement, Section 56-8-4(B) requires Defendants to make a reasonable and timely offer of settlement in order to avoid an award of prejudgment interest, irrespective of complexity. Furthermore, at the hearing to address prejudgment interest, Defendants conceded that they recognized the potential for a large verdict in favor of Plaintiffs.

{51} Finally, Defendants argue that Plaintiffs' refusal to make a settlement offer that included a provision for confidentiality was unreasonable and the district court's acknowledgment of Plaintiffs' unreasonableness should control the issue of prejudgment interest. In fact, Defendants argue that it was pointless for Defendants to make a reasonable settlement offer despite the district court's additional ruling that Defendants showed a "complete lack of appreciation or concern about the potential results of a trial." We disagree and emphasize that the statute does not require the parties to actually reach a settlement, it only requires that Defendants make a reasonable settlement offer. *See* § 56-8-4(B). If no reasonable settlement offer was made by Defendants, other settlement conditions imposed by Plaintiffs are just one of many discretionary matters for the district judge to consider. *Id.* The district court's discretion in awarding prejudgment interest allowed the court to evaluate both parties' actions that caused any failure by Defendants to make a reasonable settlement offer and then allocate an appropriate level of prejudgment interest accordingly. Here, the district court's conclusion that Defendants' sole settlement offer was unreasonable and their "complete lack of appreciation or concern about the potential results of a trial" is a logical conclusion that is supported by the record. Selecting an intermediate level of prejudgment interest—5 percent—is also a reasonable and logical accommodation under the circumstances where Plaintiffs refused to accept confidentiality as a settlement condition. As a result, the district court did not abuse its discretion by awarding 5 percent prejudgment interest under the circumstances presented in this case.

CONCLUSION

{52} For the foregoing reasons, we affirm the district court's denial of Defendants' motions for a new trial or remittitur. We also affirm the district court's grant of prejudgment interest.

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

TIMOTHY L. GARCIA, Judge Pro Tem

WE CONCUR:

MICHAEL E. VIGIL, Judge

M. MONICA ZAMORA, Judge

OPINION FOOTNOTES

1 Stating that "[i]f a trial or hearing has been commenced and the judge is unable to proceed, any other judge may proceed with it upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties."

2 This concession only applied to the damages claimed by, or on behalf of, Alfredo, Yahir, Ylairam and Marialy Morga. The concession did not apply to the settled loss of consortium claims by Rene and Georgina Venegas.

POST-JUDGMENT MOTIONS: INTERPLAY BETWEEN TRIAL AND APPELLATE STRATEGIES

A. Timing.

1. Judgment as a matter of law (Rule 1-050(B)).

a. If the court does not grant a motion for judgment as a matter of law made under Paragraph A of this rule, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than thirty (30) days after the entry of judgment or - if the motion addresses a jury issue not decided by a verdict - no later than thirty (30) days after the jury was discharged.

2. New trial (Rule 1-059).

B. **Time for motion.** A motion for a new trial shall be filed not later than thirty (30) days after the entry of the judgment.

E. **Motion to alter, amend, or reconsider a final judgment.** A motion to alter, amend, or reconsider a final judgment shall be filed not later than thirty (30) days after entry of the judgment.

3. Amendment of findings, conclusions and judgment (Rule 1-052(D)).

Motion to amend. Upon motion of a party filed not later than thirty (30) days after entry of judgment, the court may amend its findings or conclusions or make additional findings and conclusions and may amend the judgment accordingly.

B. Standards.

1. Rule 1-050(B).

a. *Perez v. City of Albuquerque*, 2012-NMCA-040, ¶ 11, 276 P.3d 973 (noting that a motion for judgment notwithstanding the verdict challenges the sufficiency of the evidence to support the jury's verdict, that the verdict of the jury will not be disturbed unless unsupported by substantial evidence, and that a review of the sufficiency of the evidence entails viewing the evidence in a light most favorable to the prevailing party and disregarding any inferences and evidence to the contrary). "A directed verdict is drastic measure that is generally disfavored inasmuch as it may interfere with the jury function and intrude on a litigant's right to a trial by jury." *Id.* at ¶ 7 (citations omitted).

b. *Hicks v. Eller*, 2012-NMCA-061, ¶ 16, 280 P.3d 304:

> A directed verdict may be granted if there is no legally sufficient evidentiary basis for a reasonable jury to find in favor of a party or may be granted as a matter of law against a party with respect to a claim that cannot, under controlling law, be

> maintained without a favorable ruling on the issue . . . Directed verdicts are not favored and should only be granted when the jury cannot reasonably and logically reach any other conclusion . . . In ruling upon and reviewing a motion for a directed verdict, the court must consider all of the evidence. If there are conflicts or contradictions, they must be resolved in favor or the party resisting the motion. (citations and quotation marks omitted).

c. A *de novo* standard applies in appellate review of whether sufficient evidence exists as a matter of law to justify a verdict in one party's favor. *See, e.g., McNeill v. Rice Engineering & Operating, Inc.*, 2003-NMCA-078, ¶ 31, 133 N.M. 804.

2. Rule 1-059.

a. An abuse of discretion standard applies in reviewing a district court's ruling on a motion for a new trial. *Martinez v. Ponderosa Products, Inc.*, 1988-NMCA-115, ¶¶ 5, 7, 108 N.M. 385. This review entails consideration of all the circumstances before the court, together, rather than consideration of each ground advanced for a new trial, separately. *Id.* "All must be considered together" *Id.* at ¶ 7 (citing *Acme Cigarette Servs., Inc. v. Gallegos,* 91 N.M. 577, 580, 577 P.2d 885, 888 (Ct. App. 1978)).

b. Additur.

(i) An "additur" is an "order, issued usu[ally] with the defendant's consent, that increases the jury's award of damages to avoid a new trial on grounds of inadequate damages." *Hicks v. Eller*, 2012-NMCA-061, ¶ 35, 280 P.3d 304 (quoting *Black's Law Dictionary* 44 (9th ed. 2009)).

(ii) In reviewing denial of an additur motion, the appellate court defers to the jury's resolution of conflicting evidence on damages; "it is the function of the jury to resolve the conflict and not the function of this court to resolve the conflict as a matter of law." *Id.* at ¶ 38 quoting *Gonzales v. Gen. Motors Corp.*, 1976-NMCA-065, 89 N.M. 474, 477, 553 P.2d 1281, 1284 (Ct. App. 1976)).

(iii) *Strickland v. Roosevelt Rural County Elec. Coop.*, 1982-NMCA-184, ¶¶ 17-31, 99 N.M. 335 (rejecting appellate challenge to denial of additur motion in wrongful death electrocution case, concluding that jury was free to reject uncontradicted, but equivocal, testimony from plaintiff's economist).

(iv) *Westbrook v. Lea Gen. Hosp.*, 1973-NMCA-074, ¶ 23, 85 N.M. 191 (affirming denial of additur motion in medical malpractice action, noting that the adequacy of monetary awards in a negligence action is a matter particularly within the province of the trier of facts, and its decision will not be disturbed except in extreme cases).

(v) "An [alleged] inadequate award will not be disturbed on appeal unless it appears to have resulted from passion, prejudice, partiality, undue influence or some corrupt cause or motive, where there has been palpable error or the measure of damage has been mistaken." *Id.*

(quoting *Powers v. Campbell*, 77 N.M. 302, 442 P.2d 792 (1968); *Hammond v. Blackwell*, 77 N.M. 209, 421 P.2d 124 (1966)).

c. Remittitur.

(i) *Allsup's Convenience Stores, Inc. v. N. River Ins. Co.*, 1999-NMSC-006, ¶¶ 6-19 127 N.M. 1 (holding that remittitur orders are appealable and reversing the grant of remittitur; noting that prior law did not appear to accommodate the appeal of an order alternatively granting remittitur or a new trial until after completion of second trial, concluding that requiring remittitur with such a limited right to appeal is unconstitutional because the verdict is as a practical matter the verdict of the court and not the jury; announcing new rule requiring plaintiff to elect between a remittitur or a new trial, but allowing appeal or remittitur accepted "under protest").

(ii) When ordering a remittitur, the trial judge must make specific findings clearly articulating how and why the damages are excessive, applying the longstanding "passion, prejudice, partiality [etc.]" standard. *Id.* at ¶¶ 16-18.

(iii) *Salopek v. Friedman*, 2013-NMCA-087, ¶ 30, 308 P.3d 139 ("In determining whether a jury verdict is excessive, we do not reweigh the evidence, but determine whether the verdict is excessive as a matter of law. The jury's verdict is presumed to be correct.").

(iv) *Sandoval v. Chrysler Corporation*, 1998-NMCA-085, ¶ 14, 125 N.M. 292 (noting that, in assessing possible remittitur, trial judge has a duty to act unflinchingly as the "thirteenth juror" to prevent the jury system from becoming a "capricious and intolerable tyranny," and that the trial judge's experience with juries in the community acts as an indispensable safeguard built into the civil jury system).

(v) An order granting remittitur or, in the alternative a new trial, is proper when the jury's award of damages "is so grossly out of proportion to the injury received as to shock the conscience." *Id.* at ¶ 9 (quoting *Lujan v. Reed*, 78 N.M. 556, 564, 434 P.2d 378, 386 (1967)).

(vi) Excessiveness may be established under either of two tests: whether the evidence, viewed in the light most favorable to the plaintiff, substantially supports the award, or, whether there is an indication of passion prejudice, partiality, sympathy, undue influence or a mistaken measure of damages on the part of the fact finder. *Id.* at ¶ 9.

C. Prejudgment Interest

1. 56-8-3. Interest rate; no written contract.

The rate of interest, in the absence of a written contract fixing a different rate, shall be not more than fifteen percent annually in the following cases:

A on money due by contract;

B. on money received to the use of another and retained without the owner's consent expressed or implied; and

C. on money due upon the settlement of matured accounts from the day the balance is ascertained.

2. 56-8-4. Judgments and decrees; basis of computing interest.

B. Unless the judgment is based on unpaid child support, the court in its discretion may allow interest of up to ten percent from the date the complaint is served upon the defendant after considering, among other things:

(1) if the plaintiff was the cause of unreasonable delay in the adjudication of the plaintiff's claims; and

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

N.M. Stat. Ann. §56-8-4(B).

3. *Public Service Co. of N.M. v. Diamond D Construction Co.*, 2001-NMCA-082, ¶ 52, 131 N.M. 100 (explaining that Section 56-8-3 allows prejudgment interest as a matter of right in the kinds of cases listed in the statute, for the purpose of compensating for the lost opportunity to use the money owed between the time when a claim accrued and the time of judgment. A court should take relevant equitable considerations into account when deciding on post-judgment interest issues and in setting prejudgment interest under Section 56-8-3 or 56-8-4(B). *Id.* at 61.

4. *Weidler v. Big J Enterprises*, 1998-NMCA-021, ¶ 52, 124 N.M. 591 (explaining that the purpose of allowing prejudgment interest under Section 56-8-4(B) is to give the courts a management tool to foster settlement and prevent delay in all types of litigation). Prejudgment interest discourages recalcitrance and unwarranted delays in cases which should be more speedily resolved and to insure that compensation is not eroded by dilatory tactics. *Id.*

5. Punitive damages are for the purpose of punishment and deterrence; awarding prejudgment interest on punitive damages would amplify the punishment the jury chose and improperly mix compensatory and punitive goals. *Id.* at ¶¶ 52-55.

D. Supersedeas Bond

1. *Grassie v. Roswell Hospital Corp.*, 2008-NMCA-076, 144 N.M. 241 (addressing apparent conflict between Section 39-3-22(A), which calls for a supersedeas bond "in double the amount of the judgment," with Rule 1-062(D), which specifies a bond in "such sums as will cover the whole amount of the judgment remaining unsatisfied, plus costs, interest, and damages for delay.").

2. Rule 12-207(B) allows immediate review of district court ruling on a supersedeas bond while the merits of the appeal remain pending. *Id.* at ¶ 1.

3. The rule controls over the statute, but following the statute may be an appropriate exercise of the district court's discretion, where a bond in twice the amount of the judgment satisfies the criteria set out in Rule 1-062. *Id.* at ¶¶ 15-16. The Grassie court clarified that "there may be instances when a bond in double the amount of the judgment would provide inadequate protections against the risks identified in Rule 1-062(D). In such instances, the statutory method for determining the amount of the bond must give way to what the Rule would require. Likewise, there may be instances when a bond in twice the amount of the judgment would be unnecessary to protect against the risks identified by the Rule. Again, in such instances, the statute must give way to what the Rule would otherwise require." *Id.* at ¶ 16.

E. Finality.

a. The "Age of Reason" has arrived.

(i) The Supreme Court has overridden and eliminated the 30-day "deemed denied" rule formerly imposed by statute.

(ii) Rule 12-201(D)(1) makes explicit that the time to appeal does not begin to run until an order expressly disposing of the last of any timely filed post-trial or post-judgment motions has been filed.

b. Rule 12-201(D)(3) allows parties to withdraw a timely filed post-trial or post-judgment motion by filing a notice of withdrawal in the district court. *See* Rule 1-054.1 (committee commentary for 2006 amendment).

c. Rule 12-201(D)(4) addresses cases in which a notice of appeal is filed before the express disposition or withdrawal of a timely post-trial or post-judgment motion: the notice does not become effective until ruling or withdrawal and the premature notice does not divest the district court of jurisdiction.

d. Rule 12-201(D)(4) addresses cases in which a notice of appeal is filed before the express disposition or withdrawal of a timely post-trial or post-judgment motion: the notice does not become effective until ruling or withdrawal and the premature notice does not divest the district court of jurisdiction.

e. An order granting a new trial in a civil case is not appealable.

F. Relationships With Other Rules.

1. Under Rule 1-041(B), the trial court in a bench trial is not limited to determining whether the plaintiff had produced sufficient evidence to withstand a motion for judgment as a matter of law under Rule 1-050; rather, it was entitled to weigh the evidence to determine its force as the trier of fact. *Hull v. Feinstein*, 2003-NMCA-052, ¶ 14, 133 N.M. 531. An involuntary dismissal under Rule 1-041(B) will be upheld on appeal if the dismissal is rationally based on the evidence. *Id.* (citing *Padilla v. RRA, Inc.*, 1997-NMCA-104, ¶ 17, 124 N.M. 111).

2. *Williams v. Mann*, 2017-NMCA-012, ¶¶ 24-26, 388 P.3d 295 (noting that Rule 1-050 applies only in jury trials, that it employs a standard very similar to the Rule 1-056 standard for summary judgment, that the lower court erroneously applied Rule 1-050 in a bench trial, but later corrected the error by stating that the same result would obtain through exercise of the court's power to make findings of fact and conclusions of law).

3. Findings of fact and conclusion of law are not necessary in decisions on motions under Rule 1-050. *See* Rule 1-052(A) NMRA; *U.S. Bank Nat'l Ass'n v. Hernandez*, 2017 N.M. App. Unpub. LEXIS 424, *2 (N.M. Ct. App., Nov. 28, 2017).

4. Rule 12-201(D) expressly extends the time to file a notice of appeal until the district court expressly rules on a timely filed post-trial or post-judgment motion or until the motion is withdrawn by notice from the movant.

G. Notable Examples.

1. *Morga v. Fed Ex Ground Package Sys.*, 2018-NMCA-039, 420 P.3d 586, *cert. granted*, 2018-NMCERT-___, No. S-1-SC-36918, 2018 N.M. LEXIS 49, June 4, 2018 (affirming denial of post-trial motions for new trial or remittitur challenging $165 million compensatory damage award, noting that the case presented an opportunity to address the important issue of how appellate courts measure the outer limits of a jury's discretion to award compensatory damages and whether mathematic ratios provide an acceptable basis for reducing damage awards in large verdict cases).

a. An abuse of discretion standard governs review of the district court's denial of motion for new trial or remittitur. *Id.* at ¶ 8.

b. "Our appellate courts defer to the jury in awarding damages and also to the trial court in its assessment of a motion for new trial or a motion to remit the amount of damages awarded by a jury." *Id.* at ¶ 9 (citing *Ennis v. Kmart Corp.*, 2001-NMCA-068, ¶ 27, 131 N.M. 32, 33 P.3d 32 ("When a trial court denies a motion for remittitur, we defer to the trial court's judgment. When the jury makes a determination and the trial court approves, the amount awarded in dollars stands in the strongest position known in the law." (internal quotation marks and citations omitted)).

c. "A jury's damages award will be upheld unless it appears that the amount awarded is so grossly out of proportion to the injury received as to shock the conscience." *Id.* at ¶ 12. Two factors determine whether an award is excessive: whether the evidence viewed in the light most favorable to the plaintiff substantially supports the award, and if evidentiary support exists, whether there is an indication of passion, prejudice, partiality, sympathy, under influence or a mistaken measure of damages by the fact-finder. *Id.*

d. The excessiveness of a verdict may not be demonstrated by comparison with verdicts in other similar cases. *Id.* at ¶¶ 26-29.

e. The excessiveness of a verdict may not be demonstrated by proportionally comparing non-economic to economic damages. *Id.* at ¶¶ 30-31.

f. An appellate court may not infer improper passion or prejudice simply because the verdict is large, or exceeds the amount plaintiffs sought, without identifying trial error as a cause. *Id.* at ¶¶ 32-33.

2. *Alford v. Venie*, 2018 N.M. App. Unpub. LEXIS 167 (May 2, 2018) (finding abuse of discretion in district court's permitting attorney to pursue strategy of referring repeatedly to defendant's alleged abuse of granddaughter despite earlier *in limine* ruling and admonitions from court; *Alford* does not address post-trial proceedings, but concerns attorney misconduct, and the resulting prejudice, which are sometimes presented as grounds for a new trial).

3. *Sandoval v. Chrysler Corp.*, 1998-NMCA-085, 125 N.M. 292 (reversing district Court's decision not to act on finding that $1 million verdict for pain and suffering shocked the conscience of the court, where district court denied remittitur because he believed he lacked adequate guidelines in the law to determine how much the verdict should be reduced).

H. Miscellaneous.

a. *Albuquerque Redi-Mix, Inc. v. Scottsdale Ins. Co.*, 2007-NMSC-051, ¶¶ 11-17, 142 N.M. 527 (describing 2006 and 2007 rule amendments eliminating automatic denial features for post-judgment motions).

b. *Helena Chemical Co. v. Uribe*, 2013-NMCA-017, ¶ 18, 293 P.3d 888 (noting that issues not raised until the judgment notwithstanding the verdict motion are too late to be the subject of review and that a motion for a directed verdict is a prerequisite for asking the trial judge to consider the legal sufficiency of the evidence in a motion for judgment notwithstanding the verdict).

c. *First Nat'l Bank v. Sanchez*, 1991-NMSC-065, ¶¶ 6-7, 112 N.M. 317 (reciting rule that the sufficiency of the evidence to support a jury verdict is not reviewable on appeal in the absence of a motion for directed verdict at the close of all the evidence, concluding that objection to jury instruction on the ground that no evidence had been introduced to support the instruction was sufficient to preserve the issue, despite failure to move for directed verdict).

I. Strategic Considerations.

1. Straightforward, Obvious Goals:

   a. Change or eliminate unfavorable judgment; preserve judgment your client likes.
   b. Create "breathing space."

   c. Generate settlement momentum.

2. Consider problem of redundancy, district court "fatigue."

A motion for a new trial or a Rule 1-050(B) motion may be the fifth or sixth time the district court judge has considered an issue, after motions under (i) Rule 1-012(B)(6), (ii) Rule 1-056, (iii) Rule 1-050(A) (close of plaintiff's case), (iv) Rule 1-050(A) (close of defendant's case), and

motions *in limine*. Consider fashioning each iteration to emphasize intervening developments in the record since the previous assertion of the claim or defense.

3. Goals Related to Appeal:

   a. Expand legal foundation for important positions.

   b. Anticipate favorable developments in the law, fashion arguments to capitalize on changes.

   c. Refine factual grounds for challenges to, defenses of, outcome.

   d. Consider reassembling, regrouping, shifting emphasis of facts and legal analysis.

   e. Address possible preservation problems.

1-050 . Judgment as a matter of law in jury trials; alternative motion for new trial; conditional rulings.

A. **Judgment as a matter of law.**

(1) If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may

(a) resolve the issue against the party; and

(b) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(2) A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

B. **Renewing the motion after trial; alternative motion for a new trial.** If the court does not grant a motion for judgment as a matter of law made under Paragraph A of this rule, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than thirty (30) days after the entry of judgment or - if the motion addresses a jury issue not decided by a verdict - no later than thirty (30) days after the jury was discharged. The movant may alternatively request a new trial or join a motion for a new trial under Rule 1-059 NMRA. In ruling on a renewed motion, the court may,

(1) if a verdict was returned,

(a) allow the judgment to stand;

(b) order a new trial; or

(c) direct entry of judgment as a matter of law; or

(2) if no verdict was returned,

(a) order a new trial; or

(b) direct entry of judgment as a matter of law.

C. **Granting renewed motion for judgment as a matter of law; conditional rulings; new trial motion.**

(1) If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) Any motion for a new trial under Rule 1-059 NMRA by a party against whom judgment as a matter of law is rendered shall be filed no later than thirty (30) days after entry of the judgment.

D. **Denial of motion for judgment as a matter of law.** If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

[As amended, effective September 27, 1999; as amended by Supreme Court Order No. 07-8300-001, effective March 15, 2007; as amended by Supreme Court Order No. 13-8300-032, effective in all cases pending or filed on or after December 31, 2013.]

Committee commentary. — Section 39-1-1 NMSA 1978, adopted in 1897, provides that a trial court in some cases has continuing jurisdiction over its judgments for thirty (30) days after their entry. *See, e.g., Laffoon v.Galles Motor Co.*, 80 N.M. 1, 450 P.2d 439 (Ct. App. 1969). Rather than have a ten (10) -day time requirement for filing most post-judgment motions but a thirty (30)-day time frame for filing motions under Section 39-1-1 NMSA 1978, the 2013 amendments extend the time for filing all post-trial motions, including renewed motions for judgment as a matter of law, to thirty (30) days from entry of the final judgment. The decision to extend the time to thirty (30) days rather than to limit Section 39-1-1 NMSA 1978 motions to ten (10) days was made because the prior ten (10)-day requirement often left insufficient time for parties to research, formulate, and prepare post-judgment motions. In addition, the choice of thirty (30) days makes it unnecessary to determine whether the provision in Section 39-1-1 NMSA 1978 for extended post-judgment jurisdiction of the district court is consistent with the principle of separation of powers between the legislature and the judiciary. *See* Rule 1-091 NMRA; *Ammerman v. Hubbard Broadcasting, Inc.*, 89 N.M. 307, 551 P.2d 1354 (1976). The intent and effect of the 2013 amendment to Rule 1-050(B) and (C)(2) NMRA is to expand the time for filing those motions to thirty (30) days from entry of the judgment.

Motions are no longer deemed denied if not ruled upon for thirty (30) days after submission. Rule 1-054.1 NMRA. *See* the Committee Commentary for 2006 Amendment to Rule 1-054.1 NMRA for additional information. Instead, Rule 1-054.1 NMRA directs district courts to enter an order within sixty (60) days of submission. *Id.* Normally, the party filing a post-judgment motion has to await entry of an order from the district court ruling on the motion before filing an effective notice of appeal because where a timely Rule 1-050(B) or (C) NMRA motion has been filed, the time for filing a notice of appeal runs from the date of entry of an order that expressly disposes of the motion. *See Dickens v. Laurel Healthcare, LLC*, 2009-NMCA-122, ¶ 4, 147 N.M. 303, 222 P.3d 675 (notice of appeal filed prior to ruling on pending Rule 1-059(E) NMRA motion is premature and time for filing notice of appeal does not begin to run until order is entered resolving Rule 1-059(E) NMRA motion). A party who makes a timely Rule 1-050(B) or (C) NMRA motion may thereafter prefer to forgo an express ruling on the motion and, instead, start the appellate process. Appellate Rule 12-201(D)(3) NMRA provides that a Rule 1-050(B) or (C) NMRA movant may file a notice of withdrawal of the motion, thus affecting the time for filing a notice of appeal as provided in Rule 12-201(D)(3) NMRA.

The effect of the withdrawal of a renewed motion for a judgment as a matter of law on the ability of the party to assert on appeal that the evidence was legally insufficient to support the verdict is not free from doubt. The United States Supreme Court has ruled that, in federal court, a renewed motion for a judgment as a matter of law is a necessary prerequisite to appellate review of the sufficiency of the evidence to support a verdict. *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 400-01 (2006). In dictum, the New Mexico Supreme Court has not required that there be a ruling on a motion for judgment n.o.v. (now a renewed motion for judgment as a matter of law). *See Romero v. Mervyn's*, 109 N.M. 249, 253 n.2, 784 P.2d 992, 996 n.2 (1989) (requiring "a motion for a directed verdict, objection to instructions, or a motion for j.n.o.v." (emphasis added)).

Under Rule 12-201(D)(4) NMRA, a timely filed notice of appeal does not divest the district court of jurisdiction to dispose of any timely filed motion under Rules 1-050, 1-052, or 1-059 NMRA, or a Rule 1-060 NMRA motion filed within thirty (30) days after the filing of a judgment. The notice of appeal becomes effective when the last such motion is disposed of expressly by an order of the district court, is automatically denied, or is withdrawn.

[Adopted by Supreme Court Order No. 13-8300-032, effective in all cases pending or filed on or after December 31, 2013.]

1-059 . New trials; motions directed against the judgment.

A. **Grounds.** A new trial may be granted to all or any of the parties and on all or part of the issues in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

B. **Time for motion.** A motion for a new trial shall be filed not later than thirty (30) days after the entry of the judgment.

C. **Time for serving affidavits.** When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has fifteen (15) days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding twenty (20) days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

D. **On initiative of court.** Not later than ten (10) days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

E. **Motion to alter, amend, or reconsider a final judgment.** A motion to alter, amend, or reconsider a final judgment shall be filed not later than thirty (30) days after entry of the judgment.

[As amended, effective January 1, 1987 and effective August 1, 1989; as amended by Supreme Court Order No. 06-8300-017, effective August 21, 2006; as amended by Supreme Court Order No. 13-8300-032, effective in all cases pending or filed on or after December 31, 2013.]

Committee commentary. — Motions to "reconsider" final judgments are frequent, but there was no rule providing for them. Rule 1-059(E) NMRA now authorizes such a motion, and sets a time limit for its use. Motions addressed to the validity of a judgment provide a time limit in which to bring the motion. With the exception of Rule 1-060 NMRA, the time limit had been ten (10) days. *See* Rule 1-059(B) NMRA (motion for a new trial); Rule 1-050(B) NMRA (renewed motion for judgment as a matter of law); Rule 1-052(D) NMRA (motion to amend or add findings and conclusions); Rule 1-059(E) NMRA (motion to alter or amend judgment). The trial court cannot extend the time for bringing these motions. Rule 1-006(B) NMRA.

On occasion, parties have filed a motion to reconsider after these motions were denied, requiring the court to consider the motion and then enter an additional order, thereby arguably extending the time for filing a notice of appeal until the motion to reconsider denial of the earlier motion was itself denied. The 2013 amendment to Rule 1-059 NMRA ends this practice by requiring that any motion to reconsider a judgment must be filed within thirty (30) days of entry of the judgment that is the subject of the motion. As a result, after a Rule 1-050(B) NMRA motion, a Rule 1-052(D) NMRA motion, or a Rule 1-059(A) or (E) NMRA motion is made and denied, a motion to reconsider those rulings is not available and the time for appeal cannot be extended by filing a motion to reconsider. If, however, one of those motions is granted and a new judgment is entered, a party may then make a motion to reconsider the newly entered judgment. Court rulings or orders that are not final for the purpose of appeal continue to be "subject to revision at any time before the entry of judgment adjudicating all claims." Rule 1-054(B)(1) NMRA; *see Melnick v. State Farm Mutual Automobile Ins. Co.*, 106 N.M. 726, 728, 749 P.2d 1105, 1107 (1988).

Section 39-1-1 NMSA 1978, adopted in 1897, provides that a trial court in some cases has continuing jurisdiction over its judgments for thirty (30) days after their entry. *See, e.g., Laffoon v. Galles Motor Co.,*

80 N.M. 1, 450 P.2d 439 (Ct. App. 1969). Rather than have a ten (10) day time requirement for filing most post-judgment motions but a thirty (30) day time frame for filing motions under Section 39-1-1 NMSA 1978, the 2013 amendments extend the time for filing all post-trial motions to thirty (30) days from entry of the final judgment. The decision to extend the time to thirty (30) days for all motions rather than to limit Section 39-1-1 NMSA 1978 motions to ten (10) days was made because the prior ten (10) day requirement often left insufficient time for parties to research, formulate, and prepare post-judgment motions. In addition, the choice of thirty (30) days makes it unnecessary to determine whether the provision in Section 39-1-1 NMSA 1978 for extended post-judgment jurisdiction of the district court is consistent with the principle of separation of powers between the legislature and the judiciary. *See* Rule 1-091 NMRA; *Ammerman v. Hubbard Broadcasting, Inc.*, 89 N.M. 307, 551 P.2d 1354 (1976). The intent and effect of the 2013 amendments to Rule 1-059(B) and (E) NMRA, Rule L-050(B) NMRA, and Rule 1-052(E) NMRA is to expand the time for filing all motions challenging an entered judgment to thirty (30) days from entry of judgment with the exception of motions made pursuant to Rule 1-060 NMRA, which have separate, longer time limits.

Motions are no longer deemed denied if not ruled upon for thirty (30) days after submission. Rule 1-054.1 NMRA. *See* the Committee Commentary for 2006 Amendment to Rule 1-054.1 NMRA for additional information. Instead, Rule 1-054.1 NMRA directs district courts to enter an order within sixty (60) days of submission. Id. Normally, the party filing a post-judgment motion has to await entry of an order from the district court ruling on the motion before filing an effective notice of appeal because where a timely Rule 1-059(A) or (E) NMRA motion has been filed, the time for filing a notice of appeal runs from the date of entry of an order that expressly disposes of the motion. *Dickens v. Laurel Healthcare*, LLC, 2009-NMCA-122, ¶ 4, 147 N.M. 303, 222 P.3d 675 (notice of appeal filed prior to ruling on pending Rule 1-059(E) NMRA motion is premature and time for filing notice of appeal does not begin to run until order is entered resolving Rule 1-059(E) NMRA motion). A party who makes a timely Rule 1-059 (A) or (E) NMRA motion, or a motion pursuant to Section 39-1-1 NMSA 1978, may thereafter prefer to forgo an express ruling on the motion, *see* Rule 12-216(A) NMRA ("[N]or is it necessary to file a motion for a new trial to preserve questions for review."), and, instead, start the appellate process. Appellate Rule 12-201 (D)(3) NMRA provides that a Rule 1-059 NMRA movant may file a notice of withdrawal of the motion, thus affecting the time for filing a notice of appeal as provided in Rule 12-201(D)(3) NMRA.

Under Rule 12-201 (D)(4) NMRA, a timely filed notice of appeal does not divest the district court of jurisdiction to dispose of any timely filed motion under Rules 1-050, 1-052, or 1-059 NMRA, or a Rule 1-060 NMRA motion filed within thirty (30) days after the filing of a judgment. The notice of appeal becomes effective when the last such motion is disposed of expressly by an order of the district court, is automatically denied, or is withdrawn.

Rule 1-059 NMRA formerly provided that the moving party "serve" a Rule 1-059 NMRA motion within the time provided by the rule. To make this rule consistent with Rule 1-050 NMRA, Rule 1-052 NMRA, and Section 39-1-1 NMSA 1978, Rule 1-059 NMRA now provides that the motion must be "filed" within thirty (30) days. *See* Rule 1-050 NMRA (requiring "filing" within time set by rule); Rule 1-052(D) NMRA (formerly requiring that motion be "filed" within time set by rule but now requiring that motion be "filed" by deadline); Section 39-1-1 NMSA 1978 (requiring motion to be "filed" within time period set by statute).

See the Committee Commentary for 2006 Amendment to Rule 1-054.1 NMRA for additional information.

[As amended by Supreme Court Order No. 13-8300-032, effective in all cases pending or filed on or after December 31, 2013.]

1-052. Nonjury trials; findings and conclusions.

A. **Findings and conclusions; when required.** In a case tried by the court without a jury, or by the court with an advisory jury, the court shall enter findings of fact and conclusions of law when a party makes a timely request. Findings of fact and conclusions of law are unnecessary in decisions on motions under Rules 1-012, 1-050, or 1-056 NMRA or any other motion except as provided in Paragraph B of Rule 1-041 NMRA.

B. **Request to enter findings and conclusions.** Unless otherwise ordered by the court, no later than ten (10) days after the court announces its decision, a party may request the court to enter findings of fact and conclusions of law by filing the party's requested findings of fact and conclusions of law.

C. **Amended or supplemental findings and conclusions; withdrawal of request for findings.** A party who filed requested findings of fact and conclusions of law prior to the trial, may file amended or supplemental findings and conclusions or may withdraw the request for findings and conclusions within ten (10) days after the court announces its decision.

D. **Motion to amend.** Upon motion of a party filed not later than thirty (30) days after entry of judgment, the court may amend its findings or conclusions or make additional findings and conclusions and may amend the judgment accordingly.

[As amended, effective January 1, 1987; February 1, 2001; as amended by Supreme Court Order No. 06-8300-017, effective August 21, 2006; as amended by Supreme Court Order No. 13-8300-032, effective in all cases pending or filed on or after December 31, 2013.]

Committee commentary. —

1. **In general.**

Prior to the February 1, 2001 revisions, Rule 1-052 NMRA provided procedures which were cumbersome, unnecessarily detailed and confusing. The February 1, 2001 revision simplifies the process of rendering a decision in nonjury trials while preserving the portions of the existing rule which seek to assure that the court's decision will be clear and correct.

The February 1, 2001 revision eliminates the confusing distinction between evidentiary and ultimate facts. The court is no longer required to mark as "Refused" all proposed findings that are not included in the court's decision. It requires that the court enter findings and conclusions upon request of a party. Finally, former Paragraph A of Rule 1-052 NMRA, relating to waiver of trial by jury, has been rewritten and is now found in Paragraph D of Rule 1-038 NMRA, jury trial in civil actions.

Section 39-1-1 NMSA 1978, adopted in 1897, provides that a trial court in some cases has continuing jurisdiction over its judgments for thirty (30) days after their entry. *See, e.g., Laffoon v. Galles Motor Co.*, 80 N.M. 1, 450 P.2d 439 (Ct. App. 1969). Rather than have a ten (10)-day time requirement for filing most post-judgment motions but a thirty (30)-day time frame for filing motions under Section 39-1-1 NMSA 1978, the 2013 amendments extend the time for filing all post-trial motions, including Rule 1-052 NMRA motions to amend or add findings and conclusions after entry of judgment, to thirty (30) days from entry of the final judgment. The decision to extend the time to thirty (30) days rather than to limit Section 39-1-1 NMSA 1978 motions to ten (10) days was made because the prior ten (10)-day requirement often left insufficient time for parties to research, formulate, and prepare post-judgment motions. In addition, the choice of thirty (30) days makes it unnecessary to determine whether the provision in Section 39-1-1 NMSA 1978 for extended post-judgment jurisdiction of the district court is consistent with the principle of separation of powers between the legislature and the judiciary. *See* Rule 1-091 NMRA; Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354 (1976). The intent and effect of the 2013 amendment to Rule 1-052(D) NMRA is to expand the time for filing those motions to thirty (30) days from entry of the judgment.

Motions are no longer deemed denied if not ruled upon for thirty (30) days after submission. Rule 1-054.1 NMRA. *See* the Committee Commentary for 2006 Amendment to Rule 1-054.1 NMRA for additional information. Instead, Rule 1-054.1 NMRA directs district courts to enter an order within sixty (60) days of submission. *Id.* Normally, the party filing a post-judgment motion has to await entry of an order from the district court ruling on the motion before filing an effective notice of appeal because where a timely Rule 1-052(D) NMRA motion has been filed, the time for filing a notice of appeal runs from the date of entry of an order that expressly disposes of the motion. *See Dickens v. Laurel Healthcare, LLC*, 2009-NMCA-122, ¶ 4, 147 N.M. 303, 222 P.3d 675 (notice of appeal filed prior to ruling on pending Rule 1-059(E) NMRA motion is premature and time for filing notice of appeal does not begin to run until order is entered resolving Rule 1-059(E) NMRA motion). A party who makes a timely Rule 1-052(D) NMRA motion may thereafter prefer to forgo an express ruling on the motion and, instead, start the appellate process. Appellate Rule 12-201(D)(3) NMRA provides that a Rule 1-052(D) NMRA movant may file a notice of withdrawal of the motion, thus affecting the time for filing a notice of appeal as provided in Rule 12-201(D)(3) NMRA.

Under Rule 12-201(D)(4) NMRA, a timely filed notice of appeal does not divest the district court of jurisdiction to dispose of any timely filed motion under Rules 1-050, 1-052, or 1-059 NMRA, or a Rule 1-060 NMRA motion filed within thirty (30) days after the filing of a judgment. The notice of appeal becomes effective when the last such motion is disposed of expressly by an order of the district court, is automatically denied, or is withdrawn.

2. **Findings and conclusions; when required.**

The February 1, 2001 revision requires a party to tender findings and conclusions in a timely manner in order to assure that the court will enter findings and conclusions. A party who complies with this requirement by tendering findings and conclusions at an early stage in the proceedings may subsequently waive findings and conclusions pursuant to Paragraph C of this rule.

3. **Preservation of error on appeal.**

Former Rule 1-052 NMRA lacked clarity as to the proper means for preserving error for appeal concerning the findings and conclusions. Compare former Rule 1-052(F) NMRA with former Rule 1-052 (B)(2) NMRA; *see Cockrell v. Cockrell*, 117 N.M. 321, 871 P.2d 977 (1994). The revision omits reference to "preservation of error" as this is a matter for the appellate rules. *See* Rules 12-208(E), 12-213(A)(4), and 12-216 NMRA; *cf. Martinez v. Martinez*, 101 N.M. 88, 93, 678 P.2d 1163, 1168 (1984) (dicta); *Blea v. Sandoval*, 107 N.M. 554, 556, 761 P.2d 432, 434 (Ct. App. 1988) (dicta).

[As amended by Supreme Court Order No. 13-8300-032, effective in all cases pending or filed on or after December 31, 2013.]

12-201 . Appeal as of right; when taken.

A. **Filing notice.**

(1) A notice of appeal shall be filed

(a) if the appeal is filed from a decision or order suppressing or excluding evidence or requiring the return of seized property under Section 39-3-3(B)(2) NMSA 1978, within ten (10) days after the decision or order appealed from is filed in the district court clerk's office; and

(b) for all other appeals, within thirty (30) days after the judgment or order appealed from is filed in the district court clerk's office.

(2) The three (3) day mailing period set forth in Rule 12-308(B) NMRA does not apply to the time limits set forth in Subparagraph (1) of this paragraph.

(3) A notice of appeal filed after the announcement of a decision, or return of the verdict, but before the judgment or order is filed in the district court clerk's office shall be treated as filed after that filing and on the day of the filing.

B. **Cross-appeals.**

(1) If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within fourteen (14) days after the date on which the first notice of appeal was served or within the time otherwise prescribed by this rule, whichever period last expires.

(2) If more than one party files a notice of appeal, the party to file the first notice of appeal shall be deemed the appellant, and any opposing party filing a notice of appeal shall be a cross-appellant, unless the court orders otherwise.

C. **Review without cross-appeal.** 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.

D. **Post-trial or post-judgment motions extending the time for appeal.**

(1) If any party timely files a motion that has the potential to affect the finality of the underlying judgment or sentence, the full time prescribed in this rule for the filing of the notice of appeal shall commence to run and be computed from the filing of an order expressly disposing of the last such remaining motion. Those motions may include, but are not necessarily limited to, the following:

(a) a motion under Section 39-1-1 NMSA 1978, Rule 1-050(B) NMRA, Rule 1-052 (D) NMRA, or Rule 1-059 NMRA;

(b) a motion under Rule 1-060(B) NMRA, Rule 5-614 NMRA, or Rule 5-801(A) NMRA that is filed not later than thirty (30) days after the filing of the judgment; or

(c) a motion to reconsider a ruling that is filed within the permissible time period for initiating an appeal.

(2) If any party timely files a motion under a rule or statute that provides that the motion is automatically denied if not granted within a specified period of time, the full time prescribed in this rule for the filing of the notice of appeal shall commence to run and be computed from either the filing of an order expressly disposing of the last such remaining motion or the date of any automatic denial of the last such remaining motion, whichever occurs first. But the time to appeal shall be determined under Subparagraph (1) of this paragraph if a motion listed in that subparagraph remains pending.

(3) If a party timely files a motion listed in Subparagraphs (1) or (2) of this paragraph and, before the motion is expressly disposed of by order or automatically denied, the party files in the district court a notice stating that the motion is withdrawn, the time for filing a notice of appeal shall be determined from the date the notice of withdrawal is filed in the district court, unless another motion listed in those subparagraphs remains pending.

(4) A timely notice of appeal filed before the express disposition by order, the automatic denial, or the withdrawal of any timely filed motion listed in Subparagraphs (1) or (2) of this paragraph, whether the notice is filed before or after the motion is filed, becomes effective on the day on which the time for filing a notice of appeal commences to run under Subparagraphs (1), (2), and (3) of this paragraph. Until that time, the notice does not divest the district court of jurisdiction to dispose of the motion. A notice of appeal that becomes effective under this subparagraph brings up for review any disposition by order or automatic denial of any timely filed motion listed in Subparagraphs (1) or (2) of this paragraph, without the necessity of attaching a copy of any order disposing of the motion to the notice of appeal.

(5) An order granting a motion for new trial in a civil case is not appealable and renders any prior judgment non-appealable.

(6) The three (3) day mailing period set forth in Rule 12-308(B) does not apply to any time limits under this paragraph.

E. **Motion for extension of time.**

(1) A party seeking an extension of time to file a notice of appeal shall file a motion in the district court before or not later than thirty (30) days after the expiration of the time otherwise prescribed by this rule for filing the notice of appeal. The motion for extension of time shall be served on all parties. The district court has jurisdiction to rule on the motion regardless of whether a notice of appeal has been filed.

(2) If the motion is filed before the expiration of the time otherwise prescribed by this rule for filing the notice of appeal, the motion may be granted on a showing of good cause.

(3) If the motion is filed within thirty (30) days after the expiration of the time otherwise prescribed by this rule for filing the notice of appeal, the motion may be granted on a showing of excusable neglect or circumstances beyond the control of the appellant.

(4) A motion filed more than thirty (30) days after the expiration of the time otherwise prescribed by this rule for filing the notice of appeal shall not be granted.

(5) An extension of time granted under this paragraph shall not exceed thirty (30) days after the date that the notice of appeal would have been due if the extension had not been granted. A party that has filed a motion for extension of time must file a notice of appeal within thirty (30) days after the expiration of the time otherwise prescribed by this rule for filing the notice even if the motion for extension of time remains pending. The district court may grant the motion retroactively.

F. **Grace period when notice is sent by mail or commercial courier.** A notice of appeal that is sent by mail or commercial courier service to the court in which it is to be filed shall be deemed to be timely filed on the day it is received if the notice of appeal contains a certificate of service, which in addition to the information otherwise required by Rule 12-307(E) NMRA explicitly states that the notice of appeal was sent to the court in which it is to be filed by mail or commercial courier service and was postmarked by the United States Postal Service or date-stamped by the commercial courier service at least one (1) day before the due date for the notice of appeal otherwise prescribed by this rule. The clerk's office shall file-stamp a notice of appeal

with the date on which it is actually received regardless of any postmark date set forth in the certificate of service.

[As amended, effective July 1, 1990; September 1, 1991; April 1, 1998; December 4, 1998; January 1, 2000; as amended by Supreme Court Order No. 05-8300-018, effective October 11, 2005; by Supreme Court Order No. 06-8300-036, effective February 1, 2007; as amended by Supreme Court Order No. 13-8300-032, effective for all cases pending or filed on or after December 31, 2013; as amended by Supreme Court Order No. 16-8300-014, effective for all cases pending or filed on or after December 31, 2016.]

Committee commentary. — Rule 12-201 NMRA addresses the time within which a notice of appeal from an appealable order or judgment must be filed. In 2013, the committee amended Paragraphs D and E to clarify, codify, and to a limited extent reform current practice. Prior amendments to the rules of civil procedure and appellate procedure have largely eliminated the automatic denial of post-trial or post-judgment motions that extend the time to appeal—so-called "tolling" motions. The 2013 amendments were prepared in conjunction with amendments to the rules of civil procedure that address motions for reconsideration specifically and provide for a uniform 30-day filing period for post-trial or post-judgment motions brought under a procedural rule or under NMSA 1978, Section 39-1-1. The amendments to Paragraph D, in addition to adding clarity, address the effect of a withdrawn tolling motion on the time to appeal. They also address the efficacy of a notice of appeal that is filed before all timely filed post-trial or post-judgment tolling motions have been disposed of. The amendments allow the district court to dispose of any timely filed post-trial or post-judgment motion even if a notice of appeal has been filed; the notice does not divest the district court of jurisdiction to rule on the motion.

Paragraph A determines the basic time within which to appeal, which may be affected by tolling motions (Paragraph D) or by a motion for an extension of time (Paragraph E).

Paragraph B addresses cross-appeals. The three (3)-day mailing period set forth in Rule 12-308(B) NMRA applies to the time limits for filing a notice of cross-appeal under Subparagraph (B)(1) of this rule.

Paragraph D addresses the effect of post-trial or post-judgment motions on the time to appeal. In 2016, the committee amended Paragraph D of this rule to clarify the effect in a criminal case of a timely filed motion that has the potential to affect the finality of the underlying judgment or sentence. As in civil cases, these motions render a criminal judgment or sentence non-final and toll the time to appeal until each motion is expressly disposed of, automatically denied, or withdrawn. *See, e.g., State v. Suskiewich*, 2014-NMSC-040, ¶ 17, 339 P.3d 614 ("[A] motion to reconsider filed within the permissible appeal period suspends the finality of an appealable order or judgment and tolls the time to appeal until the district court has ruled on the motion."); *State v. Romero*, 2014-NMCA-063, ¶ 13, 327 P.3d 525 (holding that the defendants' pending motions for sentence reconsideration made the underlying district court proceedings non-final and the appeals premature).

Most cases will fall under Subparagraph (D)(1), which gives effect to the common tolling motions that, if timely filed, extend the appeal time until the motion is disposed of by the district court. In addition, Subparagraph (D)(1) treats as a tolling motion a motion under Rule 1-060(B) NMRA, Rule 5-614 NMRA, or Rule 5-801(A) NMRA, if the motion is filed within thirty (30) days following the entry of the judgment.

Although most automatic denial provisions have been eliminated from the rules, *see, e.g.*, 2006 amendment to Rule 1-059(D) NMRA; 2009 amendment to Rule 5-614 NMRA, or have been rendered inoperative, *see* Rule 1-054.1 NMRA and committee commentary, some remain, *e.g.*, Rule 7-611(B) NMRA; Rule 10-252(D) NMRA. Subparagraph (D)(2) deals with cases in which a post-trial or post-judgment motion still subject to automatic denial may be filed. The last sentence of Subparagraph (D)(2) ensures that, in the event of a combination of post-trial or post-judgment motions in which some motions may be subject to automatic denial and some not, the appeal time does not begin to run until all timely filed post-trial or post-judgment motions have been disposed of either by automatic denial, where applicable, or by express written order.

Subparagraph (D)(3) recognizes a party's right to withdraw a pending post-trial or post-judgment motion and proceed directly to appeal. *See also* committee commentary to Rules 1-050, 1-052, 1-059, and 1-060 NMRA. Any tolling effect provided by the motion continues until the motion is withdrawn. The rule is intended to avoid a situation in which a party who elects to withdraw a post-trial or post-judgment

motion inadvertently misses the appeal time. *Cf. Vanderwerf v. SmithKline Beecham Corp.*, 603 F.3d 842 (10th Cir. 2010) (because motion withdrawn months after filing is treated as if it had never been made, appeal time was not tolled). Withdrawal of a tolling motion is without significance to the appeal time if other tolling motions remain pending. The rule does not address the effect that withdrawal of a post-trial or post-judgment motion may have on appellate issue preservation.

Subparagraph (D)(4) addresses when a notice of appeal that has been filed before all timely post-trial or post-judgment motions have been disposed of becomes effective. A timely motion listed in Subparagraphs (D)(1) or (D)(2) makes a final judgment non-final until the motion is expressly disposed of, automatically denied, or withdrawn, and a notice of appeal filed before that time arrives is premature. *Grygorwicz v. Trujillo*, 2009-NMSC-009, ¶ 8, 145 N.M. 650, 203 P.3d 865; *Dickens v. Laurel Healthcare, LLC*, 2009-NMCA-122, 147 N.M. 303, 222 P.3d 675. The district court retains jurisdiction to dispose of any and all timely post-trial or post-judgment motions listed in Subparagraphs (D)(1) or (D)(2), subject to any automatic denial of the motion or to withdrawal of the motion by the filing party, even after a notice of appeal has been filed. As long as the motion is timely, even if it is filed after the filing of the notice of appeal, the district court has jurisdiction to rule on it. This portion of the rule supersedes *State v. McClaugherty*, 2008-NMSC-044, ¶¶ 21-24, 144 N.M. 483, 188 P.3d 1234, which held that a district court does not have jurisdiction to rule on a post-judgment motion that is filed in the district court and directed against a final judgment when a timely notice of appeal has already been filed, transferring jurisdiction to the Court of Appeals. The change is intended to ensure that all timely post-trial and post-judgment motions are addressed by the district court before the case is transferred to an appellate court for review.

Under Subparagraph (D)(4), a notice of appeal from an underlying judgment or order that is prematurely filed before the disposition of all post-trial or post-judgment motions will eventually become effective to appeal the underlying judgment or order. *Cf.* Paragraph A (addressing filing of notice after ruling is announced but before filing of judgment or order). In these circumstances, the notice of appeal also brings up for review the disposition of any post-trial or post-judgment motion that has not been withdrawn. It is not necessary to attach any order disposing of a post-trial or post-judgment motion to a notice of appeal that was filed before the motion was disposed of in order to include the disposition of the motion within the scope of the appeal.

Paragraph E permits a party to move in the district court for an extension of the time for filing a notice of appeal by up to 30 days beyond the time prescribed by Paragraphs A and D. The motion may be made before or after the prescribed time has expired and is subject to different standards depending on when it is filed. It may be filed before or after the notice of appeal has been filed. The motion must be filed not later than 30 days after the expiration of the time prescribed by Paragraphs A and D. The notice of appeal must be filed within the maximum time allowable under Paragraph E. Therefore, a party must file a notice of appeal within 30 days after the time prescribed by Paragraphs A and D expires, even if the party's motion for extension of time remains pending and the party does not know whether the motion will be granted. The district court may grant an extension of time retroactively, but only within the limits allowed by Paragraph E.

Nothing in Paragraph F precludes any relief that might be available under Paragraph E of this rule.

[Amended by Supreme Court Order No. 13-8300-032, effective for all cases pending or filed on or after December 31, 2013; as amended by Supreme Court Order No. 16-8300-014, effective for all cases pending or filed on or after December 31, 2016.]

1-054.1 . Judgments and orders; time limit.

Notwithstanding Section 39-1-1 NMSA 1978, the court shall enter a judgment or order within sixty (60) days after submission. As used in this rule, "submission" is the time when the court takes the matter under advisement.

[Approved, effective December 15, 1999; as amended by Supreme Court Order No. 06-8300-017, effective August 21, 2006.]

Committee commentary. — The chief judge of a judicial district has the power and responsibility to monitor performance of the judges of the judicial district, including compliance with the sixty (60) day time limit for entry of judgments and orders. *See* Rule 23-109(B)(17) NMRA. A separate procedure for monitoring compliance, as found in former Rule 1-054(B), is unnecessary.

Committee commentary for 2006 amendment. — The 2006 amendment, approved by Supreme Court Order No. 06-8300-017, effective August 21, 2006, supersedes the portion of Section 39-1-1 NMSA 1978 providing that many post-judgment motions are deemed automatically denied if not granted within thirty (30) days of filing. As a result of this change, and changes made to Paragraph D of Rule 1-052 and Paragraph D of Rule 1-059, post-judgment motions are subject to the rule that the court shall enter judgments or orders within sixty (60) days of submission. Rule 1-054.1 NMRA. Because there no longer is an automatic denial of post-judgment motions, the time for filing notices of appeal will run "from the entry of an order expressly disposing of the motion". Rule 12-201(D) NMRA (time for filing of notice of appeal runs from date of entry of order expressly disposing of the motion when there is no provision of automatic denial of motion under applicable statute or rule of court).

In 1917, the Legislature provided that the trial court shall have control over its judgments for thirty (30) days after entry. Laws 1917, ch. 15. The statute also provided that if the court did not rule upon timely post-judgment motions within thirty (30) days after filing, the motions were deemed to be denied by operation of law. *Id.* That provision, now contained in Section 39-1-1 NMSA 1978, is superseded by the 2006 amendment.

The scope of Section 39-1-1 NMSA 1978 has never been clear. The statute applies only to non-jury trials, *Valley Bank of Commerce v. Hilburn*, 2005-NMCA-004, ¶ 18, 136 N.M. 741, 105 P.3d 294, and the automatic denial portion has been construed to not apply to post-judgment motions made pursuant to Rule 1-060 NMRA. *Wooley v. Wooley*, 75 N.M. 241, 245, 403 P.2d 685, 687-688 (1965). The automatic denial provision has caused confusion, *e.g.*, *Archuleta v. New Mexico State Police*, 108 N.M. 543, 775 P.2d 745 (1989) and, on occasion, possible injustice. *E.g.*, *Beneficial Finance Corp. v. Bradley*, 120 N.M. 228, 900 P.2d 977 (1995) (though Rule 1-059(E) NMRA is silent as to automatic denial while Paragraph D of Rule 1-059 NMRA explicitly provides for automatic denial, Rule 1-059(E) motions for reconsideration are automatically denied after thirty (30) days. As a result, appeal was untimely when notice of appeal was filed shortly after court's order denying motion but more than thirty days from date of automatic denial of motion).

Perhaps to alert litigants to the perils of the automatic denial statutory provision, the Supreme Court incorporated a thirty-day automatic denial provision in Rules 1-052(D) (motion to amend findings and conclusions), Paragraph D of Rule 1-059 NMRA (motion for new trial) and a former version of Rule 1-050 NMRA (motion for directed verdict), but omitted the provision in the Court's 1999 amendment to Rule 1-050. *Valley Bank of Commerce v. Hilburn*, 2005-NMCA-004, ¶ 15, 136 N.M. 741, 105 P.3d 294. The presence of the automatic denial provision in Paragraph D of Rule 1-059 but not in Paragraph C of Rule 1-050 NMRA has created an apparent anomaly in that a Rule 1-059 motion for new trial is deemed denied after thirty (30) days while the often simultaneously-filed Rule 1-050 motion for a judgment as a matter of law is not. *Id.* at ¶ 16.

The 2006 amendment to Rule 1-054.1 NMRA and the corresponding amendments to Paragraph D of Rule 1-052 and Paragraph D of Rule 1-059 NMRA eliminate the confusion by providing that the automatic denial provision in Section 39-1-1 NMSA 1978 has no application in cases to which the Rules of Civil Procedure for the District Courts apply.

The Supreme Court can supersede the automatic denial provision in Section 39-1-1 NMSA 1978 by promulgating a rule of procedure to the contrary. *Albuquerque Rape Crisis Center v. Blackmer*, 2005-

NMSC-032, ¶ 5, 138 N.M. 398, 120 P.3d 820 ("We have exercised our superintending control under Article VI, Section 3, to revoke or amend a statutory provision when the statutory provision conflicts with an existing court rule . . . or if the provision impairs the essential function of the court."). This superseding power may not extend to legislative provisions properly limiting a court's jurisdiction. *See Lovelace Medical Center v. Mendez*, 111 N.M. 336, 339, 805 P.2d 603, 606 (1991) ("If the statutory provision were *intended* by the legislature to have jurisdictional effect, then presumably we would accord it that effect -- unless we were to hold it unconstitutional...."). The automatic denial portion of Section 39-1-1 NMSA 1978, however, does not purport to affect the jurisdiction of the district court. It is similar to another statute providing for automatic denial of certain orders based on the passage of time, about which the Supreme Court declared "there are good reasons for construing it simply as the legislative adoption of a housekeeping rule to assist the courts with the management of their cases, to have effect unless and until waived by a court in a particular case or modified by a rule of this Court on the same subject." *Id.* at 339, 111 N.M. at 339. Even if Section 39-1-1 NMSA 1978 did purport to limit the jurisdiction of the district court, the statute probably would be unconstitutional. *See In re Arnall*, 94 N.M. 306, 610 P.2d 193 (1980) (constitutional provision granting district courts general jurisdiction precludes legislative attempts to limit jurisdiction of district courts).

These amendments to Rules 1-052, 1-059 and 1-054.1 affect only the Rules of Civil Procedure for the District Courts. Rules applicable to other courts that provide for automatic denial of motions by the passage of time are unaffected by this amendment. *See, e.g.*, Paragraph C of Rule 5-614 NMRA (motion for new trial, 30 days); Paragraph B of Rule 5-801 NMRA (motion to modify sentence, 90 days); Paragraph H of Rule 5-802 NMRA (habeas corpus, petition for certiorari, 30 days); Paragraph B of Rule 7-611 NMRA (motion for new trial, 20 days); Paragraph A of Rule 10-120 NMRA (relief from judgment or order, 10 or 30 days); Rule 10-230.1 NMRA (modification of judgment, 90 days); Paragraph C of Rule 12-404 NMRA (motions for rehearing, 20 days unless the court orders otherwise); Paragraph E of Rule 12-501 NMRA (petition for certiorari after habeas corpus petition, 30 days unless otherwise ordered by court). The appropriate rules committees may consider whether to review whether similar amendments should be made to these rules.

Certiorari Granted, June 4, 2018, No. S-1-SC-36918

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: 2018-NMCA-039

Filing Date: February 6, 2018

Docket No. A-1-CA-35001

ALFREDO MORGA, Individually and on behalf of the Estate of YLAIRAM MORGA, Deceased; and as Next Friend of YAHIR MORGA, Minor Child,

and

RENE VENEGAS LOPEZ, Individually and as the Administrator of the Estate of MARIALY RUBY VENEGAS MORGA Deceased; and GEORGINA LETICIA VENEGAS, Individually,

Plaintiffs-Appellees,

v.

FEDEX GROUND PACKAGE SYSTEM, INC., RUBEN'S TRUCKING, LLC a/k/a RUBEN REYES a/k/a SHOOTER'S EXPRESS TRUCKING, INC., the Estate of ELIZABETH SENA QUINTANA, and M&K'S TRUCKING, INC.,

Defendants-Appellants.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
Francis J. Mathew, District Judge

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

for Appellee the Estate of Ylairam Morga
Scherr & Legate, PLLC
James F. Scherr
El Paso, TX

for Appellee Alfredo Morga

Cervantes Law Firm, P.C.
K. Joseph Cervantes
Las Cruces, NM

for Appellee Yahir Morga

Daniel Anchondo
El Paso, TX

for Appellee the Estate of Marialy Ruby Venegas Morga

Rodey, Dickason, Sloan, Akin & Robb, P.A.
Edward R. Ricco
Jocelyn Drennan
Jeff Croasdell
Brenda M. Saiz
Albuquerque, NM

for Appellants

OPINION

GARCIA, Judge Pro Tem.

{1} This appeal is before us following a jury verdict for more than $165 million to Plaintiffs for wrongful death, personal injury, and loss of consortium claims that arose from a catastrophic automobile accident between a small pickup truck and a FedEx transport tractor-trailer. Defendants assert that the district court erred in denying their motion for a new trial or a remittitur of the damages awarded by the jury. Specifically, Defendants argue that (1) the verdict was not supported by substantial evidence; and (2) the jury's verdict was tainted by passion, prejudice, partiality, sympathy, undue influence, or a mistaken measure of damages. In addition, Defendants argue that the district court erred in awarding prejudgment interest. This case presents an opportunity to address important issues faced by the judicial system—how do appellate courts measure the outer limits of a jury's discretion to award compensatory damages and whether we should utilize mathematic ratios as an acceptable basis to reduce damage awards in large verdict cases. We decline to utilize mathematic ratios as the basis for establishing error by the district court. We affirm the district court's denial of Defendants' two post-trial motions, and accordingly, we affirm the jury's verdict. We also affirm the award of prejudgment interest.

BACKGROUND

{2} On June 22, 2011, at approximately 1:30 a.m., on the interstate between Las Cruces and Deming, New Mexico, a combination tractor-trailer vehicle (the FedEx truck) struck a

small pickup truck driven by Marialy Ruby Venegas Morga (Ms. Morga). Accompanying Ms. Morga was her four-year-old daughter, Ylairam Morga (Ylairam), and nineteen-month-old son, Yahir Morga (Yahir). The FedEx truck was operated by FedEx Ground Package System, Inc. (FedEx) through independent FedEx contractors, and the actual driver for the FedEx contractors was Elizabeth Quintana (Quintana) (FedEx, the FedEx contractors, and Quintana are collectively referred to as Defendants). Ms. Morga was either stopped or barely moving on the right-hand side of her traffic lane when the FedEx truck struck her vehicle from behind at sixty-five miles per hour without slowing. The impact and its resulting injuries were severe, with multiple fatalities occurring. Ms. Morga and Ylairam died, and Yahir was seriously injured. Quintana also died as a result of the accident.

{3} Alfredo Morga, Ms. Morga's spouse, brought suit against Defendants, individually and as personal representative for his daughter, Ylairam, and as next friend for his son, Yahir. Mr. Morga also asserted claims against Defendants for personal injury and wrongful death. Ms. Morga's father, Rene Venegas Lopez, as her personal representative, brought suit against Defendants for wrongful death (Mr. Morga individually and in his representative capacity for both of his children, as well as Mr. Lopez in his capacity as personal representative for Ms. Morga are referred to in this opinion as Plaintiffs). Mr. Lopez and his wife, Georgina Leticia Venegas, also intervened in the lawsuit (Intervenors) and asserted personal claims for loss of consortium resulting from the death of their daughter Ms. Morga. Prior to trial, FedEx stipulated that it would "pay for any damages attributed to [FedEx] and the other named [D]efendants."

{4} At trial, Plaintiffs presented evidence of damages related to the wrongful death, personal injury claims by Plaintiffs and also the loss of consortium claims by Mr. Morga and Intervenors. Plaintiffs also asked the jury to award punitive damages against Defendants. The jury found all Defendants negligent and liable for Plaintiffs' claims. The jury apportioned fault for the accident as follows: FedEx (65 percent), the FedEx contractors and Quintana (10 percent each for a total of 30 percent), and Ms. Morga (5 percent). The jury awarded compensatory damages as follows:

For the wrongful death of Ylairam	$61,000,000
For the wrongful death of Ms. Morga	$32,000,000
For personal injury and the loss of consortium for his mother, to Yahir	$32,000,000
For emotional distress, resulting from physical and psychological injury, and the loss of consortium for his spouse and child, to Mr. Morga	$40,125,000
For the loss of consortium of his daughter, to Mr. Lopez	$208,000
For the loss of consortium for her daughter, to Ms. Venegas	$200,000

No punitive damages were awarded by the jury.

{5} After the verdict was entered on January 24, 2015, the district court judge presiding over the case was involved in an ex parte conversation with Plaintiffs' counsel regarding potential counsel on appeal. Recognizing that the ex parte conversation could be perceived as improper, the district court judge recused herself. The case was reassigned to Judge Mathew to preside over all the post-trial proceedings.

{6} Defendants moved for a new trial or remittitur of the damages award and argued that the verdict was excessive. The district court denied both motions. The court concluded that there was substantial evidence to support the verdict, that it was not the result of passion, prejudice, a mistaken measure of damages, or other improper factors, and that it would be inappropriate to substitute its judgment for that of the jury. Plaintiffs then proposed a form of judgment that included an award of prejudgment interest. The district court held an evidentiary hearing on the motion and subsequently ruled that, under NMSA 1978, Section 56-8-4(B) (2004), prejudgment interest was warranted at an annual rate of 5 percent. Defendants filed a timely appeal. While the appeal was pending before this Court, Intervenors settled their loss of consortium claims. As a result, we do not address any appellate arguments regarding Intervenors' damage awards and loss of consortium claims.

DISCUSSION

{7} On appeal, Defendants do not assert any issues related to the jury's determination of liability, but only contested the jury's award of compensatory damages and the district court's award of prejudgment interest.

I. Denial of Defendants' Motions for New Trial or Remittitur

A. Standard of Review

{8} We review the district court's denial of Defendants' motions for a new trial or remittitur for an abuse of discretion. *See State v. Mann*, 2002-NMSC-001, ¶ 17, 131 N.M. 459, 39 P.3d 124 ("[The appellate courts] will not overturn a trial court's denial of a motion for a new trial unless the trial court abused its discretion."); *Hanberry v. Fitzgerald*, 1963-NMSC-100, ¶ 2, 72 N.M. 383, 384 P.2d 256 (applying an abuse of discretion standard for the review of an appellant's "claim that the verdict [was] excessive, requiring a remittitur or a new trial"); *Sandoval v. Baker Hughes Oilfield Operations, Inc. (Jose Sandoval)*, 2009-NMCA-095, ¶ 13, 146 N.M. 853, 215 P.3d 791 ("The applicable standard in reviewing the denial of a motion for a new trial or remittitur is [an] abuse of discretion."). "[The] trial court abuses its discretion when its decision is contrary to logic and reason." *N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-028, ¶ 6, 127 N.M. 654, 986 P.2d 450 (internal quotation marks and citation omitted); *see Talbott v. Roswell Hosp. Corp.*, 2008-NMCA-114, ¶¶ 29-30, 144 N.M. 753, 192 P.3d 267 (recognizing that a trial court does not abuse its discretion in denying a motion for a new trial unless its decision was "arbitrary, capricious,

or beyond reason" (internal quotation marks and citation omitted)). However, 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.* ¶ 9.

{9} Our appellate courts defer to the jury in awarding damages and also to the trial court in its assessment of a motion for new trial or a motion to remit the amount of damages awarded by the jury. *See Ennis v. Kmart Corp.*, 2001-NMCA-068, ¶ 27, 131 N.M. 32, 33 P.3d 32 ("When a trial court denies a motion for a remittitur, we defer to the trial court's judgment. When the jury makes a determination and the trial court approves, the amount awarded in dollars stands in the strongest position known in the law." (internal quotation marks and citations omitted)); *see also Coates v. Wal-Mart Stores, Inc.*, 1999-NMSC-013, ¶ 49, 127 N.M. 47, 976 P.2d 999 (recognizing the appellate court's reliance on the trial court because of its unique position "to observe the witnesses and their demeanor as well as the jurors' attitude during the trial" whereas we review the record cold); *Salopek v. Friedman*, 2013-NMCA-087, ¶ 30, 308 P.3d 139 ("In determining whether a jury verdict is excessive, we do not reweigh the evidence but determine whether the verdict is excessive as a matter of law. The jury's verdict is presumed to be correct." (internal quotation marks and citation omitted)).

{10} Defendants argue that such deference to the district court should not be afforded in this particular case because Judge Mathew did not have the opportunity to observe the proceedings first hand. Defendants therefore contend that a de novo standard of review should apply. Defendants cite no authority to support their contention that a judge duly appointed to proceed with an ongoing case, pursuant to Rule 1-063 NMRA,[1] is not entitled to the same discretion given to other trial judges presiding over a case. We decline to deviate from this established precedent—recognizing an abuse of discretion standard of review—for four reasons. First, this Court will not consider propositions that are unsupported by citation to authority. *See ITT Educ. Servs., Inc. v. N.M. Taxation & Revenue Dep't*, 1998-NMCA-078, ¶ 10, 125 N.M. 244, 959 P.2d 969. Second, although this standard of review argument was presented as one based on inherent logic, this Court is bound by Supreme Court precedent, including the appropriate standard of review to be applied. *See State ex rel. Martinez v. City of Las Vegas*, 2004-NMSC-009, ¶¶ 20-22, 135 N.M. 375, 89 P.3d 47 (stating that although the Court of Appeals is bound by Supreme Court precedent, we may explain "any reservations [this Court] might harbor over its application of [Supreme Court] precedent so that we will be in a more informed position to decide whether to reassess prior case law"). We can only note the potential logic of Defendants' argument regarding applying a different standard of review in the present case, but any change to the standard of review must be implemented by our Supreme Court. Third, although Judge Mathew was

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[1]Stating that "[i]f a trial or hearing has been commenced and the judge is unable to proceed, any other judge may proceed with it upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties."

not in the "unique position to observe the witnesses and their demeanor as well as the jurors' attitude during the trial[,]" *Coates*, 1999-NMSC-013, ¶ 49, he does have "experience with juries in the community," which this Court stated is "an indispensable safeguard built into our American civil jury system." *Sandoval v. Chrysler Corp. (James Sandoval)*, 1998-NMCA-085, ¶ 14, 125 N.M. 292, 960 P.2d 834. Fourth, Defendants made no objection below regarding Judge Mathew's capacity or ability to fully preside over the hearing for remittitur or a new trial.

{11} In reviewing the actual evidence presented at trial, "we review the sufficiency of the evidence to support the verdict by examining whether the verdict is supported by such relevant evidence that a reasonable mind would find adequate to support a conclusion." *Jose Sandoval*, 2009-NMCA-095, ¶ 12 (internal quotation marks and citation omitted). "We review all evidence in the light most favorable to the verdict and resolve all conflicts in the light most favorable to the prevailing party." *Id.* (internal quotation marks and citation omitted).

B. Analysis of the Evidence to Support the Jury's Award

{12} "The purpose of compensatory damages is to make the injured party whole by compensating it for losses." *Cent. Sec. & Alarm Co. v. Mehler*, 1996-NMCA-060, ¶ 11, 121 N.M. 840, 918 P.2d 1340. "A jury's damages award will be upheld unless it appears that the amount awarded is so grossly out of proportion to the injury received as to shock the conscience." *Salopek*, 2013-NMCA-087, ¶ 31 (internal quotation marks and citation omitted). This Court is required to consider two factors in making the determination of whether a jury award is excessive. First, we consider "whether the evidence, viewed in the light most favorable to the plaintiff, substantially supports the award." *Wachocki v. Bernalillo Cnty. Sheriff's Dep't.*, 2010-NMCA-021, ¶ 48, 147 N.M. 720, 228 P.3d 504 (alterations, internal quotation marks, and citation omitted), *aff'd*, 2011-NMSC-039, 150 N.M. 650, 265 P.3d 701. If any portion of the award is supported by substantial evidence, we must next consider "whether there is an indication of passion, prejudice, partiality, sympathy, undue influence or a mistaken measure of damages on the part of the fact[-]finder." *Id.* If the award does not satisfy either of these tests, then all or some portion of the award is deemed excessive. *See Jose Sandoval*, 2009-NMCA-095, ¶ 16. In the present case, Defendants argue that the evidence did not support the award of damages and that passion, prejudice, or sympathy affected the jury's determination of the amount of damages it awarded. However, even if the jury's award is higher than the court would have given, this is not sufficient to disturb a verdict. *Id.* ¶ 17. An award of damages will be disturbed only in extreme circumstances. *See Salopek*, 2013-NMCA-087, ¶ 30. "The proper approach is to examine the plaintiff's evidence related to damages and determine whether that evidence could justify the amount of the verdict, or determine whether the verdict amount was grossly out of proportion to the evidence of the plaintiff's [injury]." *Id.* ¶ 31 (alterations, internal quotation marks, and citation omitted).

{13} Although Defendants concede that the evidence at trial supported an award for

compensatory damages, they argue that the amounts awarded to Plaintiffs were excessive for two reasons.[2] First, Defendants argue that the awards for wrongful death, bodily injury, and loss of consortium "far exceed any previous awards in this state" and the evidence was insufficient to support such an excessive award. Second, Defendants argue that because the awards for the economic injury make up such a small portion of the total award (between 1 and 3 percent), the damage awards are "grossly disproportionate to the injury" and constitute legal error requiring a new trial on the issue of damages. We recognize that Defendants' arguments are both primarily directed at whether the amount of the jury's award for non-economic damages "is so grossly out of proportion to the injury received as to shock the conscience" of this Court. *Id.* (internal quotation marks and citation omitted).

1. Substantial Evidence Was Presented to Support the Award of Economic and Non-Economic Damages to Plaintiffs

{14} In the present case, Defendants do not dispute that the jury was properly instructed regarding its duty to review the evidence and calculate Plaintiffs' damages. The jury was instructed as follows:

> The guide for you to follow in determining fair and just damages is the enlightened conscience of impartial jurors acting under the sanctity of your oath to compensate the beneficiaries with fairness to all parties to this action. Your verdict must be based on evidence, not on speculation, guess or conjecture. You must not permit the amount of damages to be influenced by sympathy or prejudice, or by the grief or sorrow of the family, or the loss of the deceased's society to the family.

They were further instructed to consider neither the property or wealth of the beneficiaries nor that of Defendants in arriving at a verdict. We summarize the compensatory damages evidence related to each Plaintiff separately.

a. Alfredo Morga

{15} The jury awarded Mr. Morga $40.125 million for compensatory damages. The jury was instructed that if they should decide in favor of Mr. Morga, they must "fix the amount of money which will reasonably and fairly compensate him" for injuries related to the following elements of damages: past and future medical expenses; the "nature, extent[,] and duration of the injury[;]" pain and suffering experienced as a result of the injury; loss of enjoyment of life; aggravation of a pre-existing ailment or condition; and emotional distress resulting from the death of his wife, Marialy, his daughter, Ylairam, and the injuries to his

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[2]This concession only applied to the damages claimed by, or on behalf of, Alfredo, Yahir, Ylairam and Marialy Morga. The concession did not apply to the settled loss of consortium claims by Rene and Georgina Venegas.

son Yahir.

{16} The evidence established that, prior to the accident, Mr. Morga suffered from epilepsy which was controlled by medication. Mr. Morga's epilepsy intensified after the accident and became more frequent. Additionally, expert testimony established that Mr. Morga suffered from posttraumatic stress disorder, major depressive disorder, and that he would need at least a year of intensive psychotherapy and psychiatric care. Dr. Angelo Romagosa, a medical doctor specializing in physical medicine and rehabilitation, testified that Mr. Morga would need $250,068 in physician care, medications, and rehabilitation services in the future due to the injuries suffered as a result of the accident.

{17} With regard to the emotional distress of Mr. Morga due to the loss of society and companionship for the injuries and death of his family members, the jury heard substantial evidence about this close young family and the irreparable personal loss that resulted from the accident. Mr. Morga testified about meeting Ms. Morga as a freshman in high school. The Morgas began dating and had their daughter, Ylairam, during their senior year. Mr. Morga testified about the details of their early lives—high school, his work at various part-time jobs to support the family—as well as Ms. Morga's background in high school, youthful activities, and eventually taking care of the home and their new baby, Ylairam. In October 2009 they had their second child, Yahir. Mr. Morga also provided numerous details about their daily lives, close relationship, buying a home, advancements at work, and plans for the future after Yahir was born. Mr. Morga then testified to his recollection of when he went to the scene on the night of the accident. He was told not to approach the vehicle where his wife and daughter were still located. He then went to the hospital in El Paso, Texas, where his son was taken following the accident and where he stayed for several days. Mr. Morga testified that he was unable to return to work for months after the accident. Mr. Morga also described how the accident severely affected him emotionally.

b. Yahir Morga

{18} The jury compensated Yahir $32 million for past and future damages for injuries he suffered as a result of the accident. The jury was instructed that should they decide in favor of Yahir, they must "fix the amount of money which will reasonably and fairly compensate [him]" for injuries related to the following elements of damages: past and future medical expenses; the "nature, extent[,] and duration of the injury"; pain and suffering experienced; loss of enjoyment of life; and emotional distress resulting from the death of his mother, Ms. Morga.

{19} At trial, the evidence showed that Yahir suffered a distal tibial metaphyseal fracture, traumatic brain injury, a liver laceration, a right pulmonary contusion, and other traumatic injuries. Yahir incurred $58,444.68 in medical treatment. Dr. Romagosa testified that Yahir would need $417,926.47 in future medical care. Additionally, Dr. King testified that Yahir would be at an "increased risk for psychological difficulties down the road due to the early loss of his mother and sister." After the accident, Yahir regressed in his use of speech and

had to see a psychologist. Additionally, Mr. Morga testified that Yahir would wake up at night afraid and crying. Ms. Morga's older sister, Rebecca Brown, also testified regarding the relationship between Yahir and his mother prior to the accident.

c. Ylairam Morga

{20} The jury compensated the Estate of Ylairam $61 million for her wrongful death. The jury was instructed that if it were to find for the Plaintiffs, it "must then fix the amount of money which you deem fair and just for the life of Ylairam," for the following elements of damages: "reasonable expenses of funeral and burial[;] lost earning capacity, and the lost value of household services; [t]he value of her lost life; and the mitigating or aggravating circumstances attending the wrongful act, neglect, or default."

{21} Ylairam was only four years old at the time of the accident. At trial, Plaintiffs presented evidence regarding several aspects of Ylairam's life and her relationship with her family for the jury to consider in determining the amount of damages to be awarded for her death, including testimony by her father, Mr. Morga and various family photographs.

d. Marialy Morga

{22} The jury awarded the Estate of Ms. Morga $32 million for her wrongful death. The jury was instructed that it "must . . . fix the amount of money which you deem fair and just for [her] life," including the following the elements of damages: "[t]he reasonable expenses for the funeral and burial; [t]he lost earning capacity and the [lost] value of household services; [t]he value of [her] life apart from her earning capacity; aggravating or mitigating circumstances attending the wrongful act, neglect or default; [and t]he loss of guidance and counseling to the deceased's minor child."

{23} At trial, specific evidence was presented regarding Ms. Morga's life so that the jury could make its determination of the damages incurred as a result of Ms. Morga's death. Ms. Brown testified about Ms. Morga's early life, her family and home in El Paso, Texas, as well as her personality and interests. Ms. Brown also testified regarding the closeness of their relationship. She presented Ms. Morga as a good mother, as well as an attentive daughter and wife. Mr. Morga also testified about his relationship with his wife, buying their first home, raising their two children, and their plans to put their children through college. He also testified that Ms. Morga had been planning to get her graduate equivalency degree, and someday obtain her cosmetology degree.

e. The Evidence Supports the Jury Award

{24} Defendants' arguments regarding the sufficiency of the evidence are, at their core, solely objections to the jury's large awards for non-economic injuries to Plaintiffs. Defendants did not target any specific component of Plaintiffs' evidence as insufficient or erroneous. Defendants do not dispute that the non-economic injuries and damages incurred

by Plaintiffs are unique, intangible, and difficult to quantify in financial terms. As such, our judicial system relies on juries and trial courts, as the representatives of their local community, to best evaluate and determine the monetary value of these non-economic injuries, including pain and suffering, and the loss of life. *See James Sandoval*,1998-NMCA-085, ¶¶ 13-14 ("The amount of awards necessarily rests with the good sense and deliberate judgment of the tribunal assigned by law to ascertain what is just compensation, and, in the final analysis, each case must be decided on its own facts and circumstances. . . . In addition, the trial judge's experience with juries in the community provides an indispensable safeguard built into our American civil jury system." (internal quotation marks and citation omitted)).

{25} In this case, Defendants made a strategic decision to entrust the jury with the decision of how to determine the value of a life from the evidence presented, even going so far as to exclude Plaintiffs' economist from providing testimony regarding "specific damages for the value of a statistical life[,]" including "any numbers offering a benchmark value as to human life." Defendants' counsel specifically told the jury, " I am not going to submit to you a number, because I agree the value of life—I don't want to insult anybody about the value of life in this case. But you have to rely on you[r] own conscious[] when you're looking at [the] value of life." We agree that the damage awards in this case were very large. However, when an experienced district court judge, who is familiar with juries in his community, properly reviews the record and evaluates a motion for new trial and a motion for remittitur; the fact that Plaintiffs' awards are large does not transform Plaintiffs' undisputed evidence into something illogical or insufficient. Furthermore, although Defendants were afforded an opportunity to present evidence or testimony at trial to guide the jury in their determination of the value of life and other non-economic damages, Defendants specifically chose not to do so. Under our discretionary standard of review, Plaintiffs presented sufficient evidence to support the jury's right to perform its unique function—award all compensatory damages, including any non-economic damages for pain and suffering and loss of life that were incurred by Plaintiffs. Proper instructions were given that describe the factors a jury must consider in making its compensatory damage awards. We can only interpret Defendants' appellate argument to effectively require the appellate courts to establish a threshold or an absolute financial limit on the value of life, despite the district court and the jury's best efforts to fulfill their assigned duty to quantify something that is legally unique, intangible, and difficult to measure. We refuse to implement such a legal threshold or limit. Based upon the evidence presented at trial and the arguments presented for post-trial review, the district court did not abuse its discretion in denying Defendants' motions for a new trial or remittitur on the grounds of insufficient evidence to support the damage awards for Plaintiffs' non-economic injuries.

2. Comparison to Similar Verdicts in Other Cases Will Not be Applied to Develop Defendants' Sufficiency of the Evidence Argument

{26} Defendants' argument centers on the awards for wrongful death, pain and suffering, and emotional distress damages, all of which are non-economic and cannot be determined

by any fixed standard. *See Baca v. Baca*, 1970-NMCA-090, ¶ 28, 81 N.M. 734, 472 P.2d 997 ("There is no fixed standard for measuring the value of a life, and, as in personal injury cases, wide latitude is allowed for the exercise of the judgment of the jury in fixing the amount of such an award."). Instead, a jury is given wide latitude in fixing the amount of such awards. *See id.*; *see also James Sandoval*, 1998-NMCA-085, ¶ 13 (recognizing that "there can be no standard fixed by law for measuring the value of pain and suffering" (omission, internal quotation marks, and citation omitted)).

{27} Defendants ask this Court to compare the amount of damages awarded in this case to other similar cases and cite to our Supreme Court's analysis in *Vivian v. Atchison, Topeka & Santa Fe Railway Co.*, to support their argument that such comparisons are "helpful" to determine whether a verdict is excessive. 1961-NMSC-093, ¶ 11, 69 N.M. 6, 363 P.2d 620 (emphasizing "that each case must be determined upon its own facts and circumstances[,] nevertheless, . . . a consideration of other verdicts and a comparison of the facts and circumstances is helpful"). We do not consider *Vivian* helpful toward providing guidance in the present case. First, it is very difficult for this Court to apply the analysis in *Vivian* to the facts in this case. *Vivian* involved a workplace injury where, after a review of the evidence, our Supreme Court ultimately determined that "[i]t would serve no useful purpose to review other verdicts" in order to grant the plaintiff the option between remittitur and a new trial limited solely to the issue of damages. *Id.* ¶¶ 1-2, 25-26. Second, Defendants have failed to cite to any authority where a court conducted an actual comparison of other verdicts in order to grant a new trial or remit the jury's damage award to a lesser amount. Third, Defendants conceded at oral argument that they failed to identify in the record and did not otherwise provide the district court or this Court with any evidence of comparable jury awards that would support their argument for conducting a comparative analysis with those cases alleged to be "similar." Defendants' counsel specifically stated that they were only "obligat[ed] to come forward with an argument and a basis to argue that the verdict is excessive under common community standards, and if the court is looking for numbers, [the courts bear the obligation to] look to the court's own case law and see . . . the wrongful death damages and verdicts that have been reported [over the last ten years.]" Fourth and finally, Defendants do not dispute or attack any of Plaintiffs' evidence regarding both economic and non-economic damages.

{28} Instead, this Court has continued to emphasize that "each case must be decided on its own facts and circumstances." *James Sandoval*, 1998-NMCA-085, ¶ 13 (internal quotation marks and citation omitted). We have also questioned the usefulness of comparing non-economic damage awards in one case with the awards in other cases. *See Jose Sandoval*, 2009-NMCA-095, ¶ 18 (noting that "[w]e are skeptical about the usefulness of comparing awards for pain and suffering in other cases"); *Robinson v. Mem'l Gen. Hosp.*, 1982-NMCA-167, ¶ 20, 99 N.M. 60, 653 P.2d 891 (stating that the defendant's request that the court compare the verdict awarded to other cases was improper because "the question of excessive damages must be determined from the evidence in [each] case"); *Sweitzer v. Sanchez*, 1969-NMCA-055, ¶ 5, 80 N.M. 408, 456 P.2d 882 (stating that what this Court may have done in other cases was of "no consequence [because] the question of prejudice

and . . . the measure of damages must be determined from the evidence in [each] case" (internal quotation marks, and citation omitted)). We recognize that our Supreme Court has upheld a district court's discretion in granting a substantial remittitur to a jury's damages verdict, for a claim of emotional distress, when no economic damages were offered into evidence. *See Nava v. City of Santa Fe*, 2004-NMSC-039, ¶¶ 16-20, 136 N.M. 647, 103 P.3d 571 (holding that the remittitur of the amount awarded to a plaintiff for emotional distress was upheld on a comparative basis where very specific factual findings were issued by the district court, there was a lower amount requested by the plaintiff at trial, and due to the lack of any evidence of physical harm). However, this case is very distinguishable from *Nava*, both factually and procedurally. In the present case, undisputed economic damages were presented and awarded to Plaintiffs, and this Court is now being asked to reverse, not affirm, the remittitur decision issued by the district court—a completely opposite analysis.

{29} Defendants simply argue that the damage awards for wrongful death are "tens of millions of dollars greater than any awards in similar cases and far exceed any previous award in this [S]tate for wrongful death or comparable loss" and "far outstrips any prior verdict." Yet Defendants concede that they did not bring any evidence of other non-economic damage award cases to the attention of the district court for comparison. Even if a comparative verdicts analysis would be helpful to this Court in assessing excessive damages, Defendants have elected not to offer such an analysis or to make any connection to the evidence in this case. This Court is under no obligation to go outside the record to investigate and develop Defendant's argument about greatly exceeding all prior damage awards in this State. *See Santa Fe Expl. Co. v. Oil Conservation Comm'n*, 1992-NMSC-044, ¶ 11, 114 N.M. 103, 835 P.2d 819 (stating that where a party fails to cite any portion of the record to support its factual allegations, the appellate courts need not consider its argument on appeal); *Corona v. Corona*, 2014-NMCA-071, ¶ 28, 329 P.3d 701 ("This Court has no duty to review an argument that is not adequately developed."); *see also* Rule 12-318(A)(3) NMRA (requiring briefs in chief to contain "a summary of proceedings, briefly describing the nature of the case, the course of proceedings, and the disposition in the court below, and including a summary of the facts relevant to the issues presented for review[, which] summary *shall contain citations to the record proper, transcript of proceedings, or exhibits supporting each factual representation*" (emphasis added)). Defendants have neither identified any of Plaintiffs' evidence deemed insufficient to support the jury's award of non-economic damages nor suggested the type of additional evidence that is necessary to support such an award. As a result, this Court will not undertake Defendants' offer to search the entire record and then search the existing universe of severe injury cases in an attempt to compare the substantive evidence and damage awards in other cases with Plaintiffs' substantive evidence and damage awards in the present case. *See Kepler v. Slade*, 1995-NMSC-035, ¶ 13, 119 N.M. 802, 896 P.2d 482 ("Matters outside the record present no issue for review." (internal quotation marks and citation omitted)).

3. A Comparison of Non-Economic to Economic Damages is Unsupported by our Case Law

{30} Next, Defendants argue that because the economic damages proven at trial make up a "minuscule part" of the total amount of damages awarded, the total amounts awarded to Plaintiffs are grossly disproportionate to the measurable injuries that occurred. We begin by recognizing that this Court has specifically rejected any fixed, mathematical formula as the best way to arrive at a damage award for pain and suffering—one aspect of non-economic damages—because "there can be no standard fixed by law for measuring the value of pain and suffering." *James Sandoval*, 1998-NMCA-085, ¶ 13 (omission, internal quotation marks, and citation omitted). Instead, we have concluded time and again that, although it may be frustrating to assess non-economic damages without "a fixed, mathematical formula[,] . . . the best way to arrive at a reasonable award of damages is for the trial judge and the jury to work together, each diligently performing its respective duty to arrive at a decision that is as fair as humanly possible under the facts and circumstances of a given case." *Id.* ¶ 16.

{31} We leave any continuing concerns about the use of mathematical formulas to establish a legal basis for addressing excessive jury verdicts to the public and its ongoing debate with the legislative branch about the American judicial system and any major policy changes in New Mexico. *See id.* ¶ 17 (recognizing the public criticism and ongoing debate regarding excessive jury verdicts). Even in *James Sandoval* where "[t]he [trial] judge acknowledged that the jury verdict shocked the conscience of the court" we remanded for further consideration rather than undertake our own calculation of damages. *Id.* ¶¶ 7, 12-18. At this time, we see no support for Defendants' argument that the appellate courts should use fixed mathematical formulas to establish legal error and as the proper basis for reversing a jury's non-economic damage award.

B. The Verdict is Not the Result of Jury's Passion or Prejudice

{32} Defendants argue that we may simply "infer" that the jury was improperly influenced by passion or prejudice from the verdict itself and that it is "not necessary to point to trial error as a cause." However, we disagree that our case law allows us to infer improper passion or prejudice simply because the verdict is large and therefore "speaks for itself as to the existence of passion or prejudice." In *Vivian*, our Supreme Court stated that a verdict was "so grossly excessive as to require an inference that it resulted from passion, prejudice, partiality, [and] sympathy[.]" 1961-NMSC-093, ¶ 14. However, our Supreme Court made this statement only after having undertaken a "careful review of the evidence of pain, suffering, loss of earnings, and physical injuries" and holding that there was "no substantial evidence to support [the] verdict[.]" *Id.* Defendants have failed to present any type of evidentiary review for this Court to analyze in the present case, and we shall not undertake such a review or consider such an argument that is not developed on appeal. *See Santa Fe Expl. Co.*, 1992-NMSC-044, ¶ 11 (stating that where a party fails to cite any portion of the record to support its factual allegations, the appellate courts need not consider its argument on appeal); *Corona*, 2014-NMCA-071, ¶ 28 ("This Court has no duty to review and argument that is not adequately developed.").

{33} We also disagree with Defendants' argument that because the jury awarded sums "far

greater" than requested by Plaintiffs, we may legally infer that passion and prejudice played an improper role in the jury's determination of damages. This argument mischaracterizes Plaintiffs' statements during closing argument as a request for a specific amount of monetary damages. Counsel for Ms. Morga's estate proposed to the jury that when considering damages for the loss of Ms. Morga's life, it could consider placing a value on a person's individual days of life. Counsel hypothetically stated, "[i]sn't it worth $500 a day for the enjoyment of your life, for the enjoyment of life that [Ms. Morga] has been deprived of? When you value life, I ask you to give those considerations of her life expectancy as an appropriate way for you to try and measure and place a value on something that we recognize . . . can't be valued." We perceive this hypothetical suggestion to be general guidance to the jury for developing its own method for arriving at a valuation for Ms. Morga's life. The fact that the jury chose its own method or a higher daily value for the enjoyment of life when it awarded damages different from the hypothetical example suggested by counsel, does not establish error by the jury. We reject such a hypothetical inference that the jury's damage awards were the result of passion and prejudice.

{34} We now turn to the specific incidences occurring during trial that Defendants argue provoked passion or prejudice in the jury. These incidences include Mr. Morga's trial testimony and what Defendants characterize as "misconduct by Plaintiffs' counsel" in closing argument.

1. Mr. Morga's Testimony

{35} Defendants argue that Mr. Morga's testimony was "emotionally wrenching" when it addressed the sequence of events involving when he was informed of the accident, arrived at the scene, and observed the vehicle. Defendants concede that Mr. Morga's testimony was "an unavoidable aspect of the trial" but insist that the testimony "easily could have moved the jury" to award excess damages based on improper passion or prejudice.

{36} Mr. Morga's testimony was not objected to by Defendants. Counsel elicited testimony from Mr. Morga concerning his wife and children, as well as his description of the week leading up to the accident. Mr. Morga became visibly upset when asked how he learned about the accident and the district court ordered a recess break for the jury. Plaintiffs' counsel was then allowed to use leading questions on direct examination regarding when Mr. Morga arrived at the scene of the accident. When Mr. Morga again began crying, the district court took a second recess, and it ordered counsel to move on to another subject. Defendants' counsel commented, "[i]t's not necessary to make [Mr. Morga] cry to the jury, I'm sorry." Although the district court expressed concern with Mr. Morga's health and the impact of the testimony, there is no indication in the record that the district court believed improper prejudice had occurred from his testimony. Mr. Morga returned to the stand and completed the direct and cross-examination without any further breaks.

{37} Throughout Mr. Morga's testimony, Defendants did not ask the district court to strike any of his testimony, and Defendants never requested any kind of limiting instruction or

admonition to the jury. Prior to deliberations, the jury was properly instructed that sympathy was not to play a role in the jury's determination. Without more than a witness crying during testimony that both parties expect to be visibly emotional, we cannot presume that the jury violated its oath and failed to follow the jury instructions. *See Norwest Bank N.M., N.A. v. Chrysler Corp.*, 1999-NMCA-070, ¶ 40, 127 N.M. 397, 981 P.2d 1215 (stating that the appellate courts "assume the jury followed such instructions absent evidence to the contrary"). Mr. Morga's testimony was understandably emotional, but there is no indication in the record that the testimony incited improper passion or prejudice within the jury. *See State v. Finnell*, 1984-NMSC-064, ¶ 23, 101 N.M. 732, 688 P.2d 769 (noting that the introduction of evidence that allegedly caused a witness to become very emotional and cry during her testimony was neither prejudicial nor sufficient to arouse the passion of the jury and require a mistrial); *State v. Garnenez*, 2015-NMCA-022, ¶¶ 25-26, 344 P.3d 1054 (holding that a pause in trial and the removal of a member of the courtroom gallery who became emotional and cried during upsetting testimony did not mandate a mistrial be declared or prevent the jury from rendering a fair and impartial verdict).

2. Closing Argument

{38} Next, Defendants argue that Plaintiffs' closing argument caused the jury to be infected by improper passion or prejudice. Defendants point to three incidences in Plaintiffs' closing argument: (1) a photograph admitted into evidence, but previously unused by any witness at trial, depicting the crushed vehicle in which Ms. Morga's body was partially visible; (2) what Defendants characterize as Plaintiffs arguing to the jury that FedEx was attempting to "shift responsibility for the accident to its contractors"; and (3) Plaintiffs' "justice needs to be ignited" comment related to punitive damages. Defendants argue that the above incidents during closing arguments, individually or in combination, provide the legal basis for establishing improper passion or prejudice by the jury and causing an "excessive award of damages."

{39} We begin our review by emphasizing that a defendant must make "a timely and specific objection[, one] that apprised the district court of the nature of the claimed error and that allows the district court to make an intelligent ruling thereon" in order to preserve an issue for appeal. *Jose Sandoval*, 2009-NMCA-095, ¶ 56; *see* Rule 12-321(A) NMRA (requiring that "it must appear that a ruling or decision by the trial court was fairly invoked" in order to preserve a question for review). The purpose of the preservation rule is "to specifically alert the district court to a claim of error so that any mistake can be corrected at that time, . . . to allow the opposing party a fair opportunity to respond to the claim of error and to show why the court should rule against that claim, and . . . to create a record sufficient to allow this Court to make an informed decision regarding the contested issue." *Jose Sandoval*, 2009-NMCA-095, ¶ 56. Defendants now ask us to distinguish the analysis we employed in *Jose Sandoval*.

{40} In *Jose Sandoval*, this Court declined to consider alleged instances of misconduct by the plaintiff that were argued to be the cause of improper passion or prejudice because the

defendant did not make a proper objection at trial. *Id.* ¶¶ 60-72. However, this Court noted that

> [i]n cases involving improper closing argument, as when counsel go outside the record[,] we reserve the right in a proper case to reverse the judgment and award a new trial even if objection be not made. However, this rule is to only be applied as a last resort and is not to be applied unless we are satisfied that the argument presented to the jury was so *flagrant and glaring in fault and wrongdoing as to leave the bounds of ethical conduct*, such as going outside the record.

Id. ¶ 57 (emphasis added) (internal quotation marks and citations omitted). Defendants argue that the specific instances it has cited satisfy this *Jose Sandoval* exception because they are "so flagrant and glaring in fault . . . as to leave the bounds of ethical conduct[.]" Defendants also argue that our *Jose Sandoval* decision represents an outlier in our case law that should not be perpetuated. These arguments are not compelling. A formal Court of Appeals opinion is controlling authority. *See Gulbransen v. Progressive Halcyon Ins. Co.*, 2010-NMCA-082, ¶ 13, 148 N.M. 585, 241 P.3d 183. Our reasoning in *Jose Sandoval* is in line with the well-established rule on preservation. 2009-NMCA-095, ¶ 57 (noting that "other than in Florida, no other courts in this country allow improper argument to be raised for the first time on appeal in civil cases, but noting that in *Griego v. Conwell*, 1950-NMSC-047, ¶ 17, 54 N.M. 287, 222 P.2d 606 our] Supreme Court warned that it would [reserve the right to] do so, but it has never carried out its threat" (internal quotation marks and citations omitted)); *see* Rule 12-321(A) (requiring that "it must appear that a ruling or decision by the trial court was fairly invoked" in order to preserve a question for review); *see also Berkstresser v. Voight*, 1958-NMSC-017, ¶ 10, 63 N.M. 470, 321 P.2d 1115 (per curiam) (stating that our Supreme Court has "held numerous times that to preserve a question for review[,] a litigant must invoke a ruling thereon").

{41} Finally, we disagree with Defendants that the alleged incidents of misconduct by Plaintiffs, either individually or collectively, are "so flagrant and glaring in fault and wrongdoing as to leave the bounds of ethical conduct" or rise to the level of flagrant or fundamental error. *Jose Sandoval*, 2009-NMCA-095, ¶ 57; *see Estate of Gutierrez ex rel. Jaramillo v. Meteor Monument, L.L.C.*, 2012-NMSC-004, ¶¶ 32-33, 274 P.3d 97 ("The fundamental error doctrine is codified in Rule [12-321(B)(2)]. . . .This rule shall not preclude the appellate court from considering in its discretion, questions involving . . . fundamental error. . . . [T]his Court has applied the doctrine in civil cases under the most extraordinary and limited circumstances."(alterations, internal quotation marks, and citation omitted)). Despite Defendants' failure to preserve an objection to these particular closing arguments by Plaintiffs, we shall also discuss the merits of each allegation of misconduct and explain why we conclude that no legal err was established by Defendant.

a. The Photograph

{42} The district court ruled that the photograph of the crash site could be used at trial if a "yellow sticky" note was placed to cover what appeared to be a human arm in the photo. The "yellow sticky" note purportedly fell off before closing argument. However, Defendants made no objection to the error and counsel for Defendants acknowledged that he chose not to object to this error during the closing argument. After Plaintiffs rested and the jury was excused for a recess break, Defendants' counsel mentioned the absence of the "yellow sticky" note. The district court acknowledged the missing note covering the designated portion of the photo and assured the parties that the photo would not go to the jury during deliberations as a solution to the issue now being brought to the court's attention. No further objection was made to this decision by the district court to address the "yellow sticky" note issue.

{43} Defendants argue that Plaintiffs' use of the photograph is an example of "flagrantly improper conduct" that could not be cured by an instruction from the district court. However, Defendants have failed to show that Plaintiffs' use of the photograph was so glaring in fault as to leave the "bounds of ethical conduct" or that the district court's ruling to address the issue rose to the level of fundamental error. *See Grammar v. Kohlhaas Tank & Equip. Co.*, 1979-NMCA-149, ¶ 38, 93 N.M. 685, 604 P.2d 823. There is no indication in the record that: (1) Plaintiffs' use of the photograph without the "yellow sticky" note was intentional; (2) any comment was made to the jury by Plaintiffs' counsel regarding the portion of the photograph that was intended to be covered and excluded by the "yellow sticky" note; or (3) the photograph was so gruesome and inflammatory that, without the "yellow sticky" note, it inflicted flagrant and incurable prejudice upon the jury. *See Allen v. Tong*, 2003-NMCA-056, ¶¶ 35, 39, 133 N.M. 594, 66 P.3d 963 (holding that counsel's statement in closing argument, "if the jury found [the d]efendant was not negligent, then that will be the end of this trial and your job will be over, and you will get back to your jobs and families[,]" was not "a flagrant or glaring wrongdoing that requires [this Court] to invoke fundamental error" (internal quotation marks omitted)). Furthermore, the district court addressed the issue on the record and recognized that any potential harm appeared very minor at that point, stating "I seriously doubt [the jury] recognized that as an arm. If you hadn't told me it was an arm when we first discussed it, I don't think I would've known that." Despite Defendants' assertion at oral argument that this highly prejudicial photograph is part of the record on appeal, it was not provided as part of the record for our independent review. As a result, we have no independent basis to question the district court's analysis and resolution of the issue at trial. *See Williams v. Mann*, 2017-NMCa-012, ¶ 19, 388 P.3d 295 ("Upon a doubtful or deficient record, every presumption is indulged in favor of the correctness and regularity of the trial court's decision, and the appellate court will indulge in reasonable presumptions in support of the order entered." (internal quotation marks and citation omitted)). Without any further indication of unethical conduct or fundamental error, the use of this photograph will not be recognized as causing the jury to render an improper verdict based on passion or prejudice.

b. Comments Related to Allocation of Fault

{44} Defendants argue that Plaintiffs' counsel made improper comments in closing

argument related to FedEx's fault and responsibility for the damages incurred by Plaintiffs. First, Defendants argue that Plaintiffs' counsel tried to shift responsibility for the accident to its contractors, even though FedEx had agreed to pay for any damages attributed to its contractors or Quintana. Second, Defendants contend that Plaintiffs' comment—"it's happened before"—regarding other FedEx accidents defied Defendants' motion in limine to exclude all reference to other accidents involving Defendants. However, after reviewing the complete record of Plaintiffs' closing argument, we interpret Plaintiffs' comment differently. Comparative fault was a specific issue at trial and the parties disagreed about how the jury should allocate fault between the various Defendants. Plaintiffs argued that FedEx was attempting to allocate fault to their contractors and had used similar arguments in the past. Although FedEx assumed liability for all Defendants in this matter, the jury was still required to apportion fault amongst each Defendant. Defendants did not object to the jury verdict form that listed all four Defendants separately, as well as Ms. Morga, for the allocation of comparative liability. Because Defendants did not object to Plaintiffs' comments in closing or the jury instructions, we must apply a fundamental error standard of review. *See Allen,* 2003-NMCA-056, ¶¶ 33-34 (noting that a failure to properly object to issues regarding the instructions tendered to the jury will only be reversed on a basis of fundamental error). Defendants have again failed to convince this Court that Plaintiffs' comments were so glaring in fault as to leave the "bounds of ethical conduct" or that the error rose to the level of fundamental error. *Grammar*, 1979-NMCA-149, ¶ 38. Where the allocation of comparative fault was a proper function to be decided by the jury, Plaintiffs' comments would not be unethical or otherwise create any inference that the jury rendered an improper verdict.

c. Plaintiffs' Closing Argument Regarding the Need to Ignite Justice

{45} Defendants objected to one fragment of Plaintiffs' closing argument in particular, the statement that "they don't want to show the pictures to inflame the [j]jury. Well, sometimes justice needs to be ignited." Defendants argue that this type of comment encouraged the jury to follow their passion and misled the jury by implying that Defendants sought to suppress photographic evidence. Again, when read in the full context of closing argument, Plaintiffs' statements were not outside the scope of proper argument, especially where Plaintiffs asked the jury to punish Defendants for their conduct and punitive damages were an issue the jury was properly required to decide. In addition, the jury was properly instructed that all arguments made by counsel in closing were not "to be considered by you as evidence or as correct statements of the law, if contrary to the law given to you in [the jury] instructions." We conclude that if Defendants believed that Plaintiffs' closing arguments were clearly illegal, unethical, or going outside the record, they should have timely and specifically objected at trial, requested an appropriate curative instruction or admonishment, and given the district court the opportunity to correct any error. *See Jose Sandoval*, 2009-NMCA-095, ¶ 58 ("We believe that if defense counsel had timely and specifically objected and had requested and received an appropriate curative instruction and/or admonition, the issue would not now be in this Court."); *Grammar*, 1979-NMCA-149, ¶ 34 ("The objection to alleged improper argument must be specified and made known to the [trial] court so that the

court may intelligently rule thereon. When that is not done, the proposition is not properly reviewable on appeal."). Without giving the district court an opportunity to evaluate Plaintiffs' "justice needs to be ignited," closing argument in the context of a potential award of punitive damages, we neither view such an argument as being so glaring in fault as to leave the "bounds of ethical conduct" nor do we recognize it to rise to the level of fundamental error. *See Grammar*, 1979-NMCA-149, ¶ 38 (stating that this Court will only consider the narrow exception to the preservation requirement as a "last resort" and only if the plaintiff's lawyer goes outside the actual record in a flagrant and glaring manner so as to "leave the bounds of ethical conduct").

C. The Jury's Award Was Not the Result of a Mistaken Measure of Damages

{46} Finally, Defendants argue again that we may infer from the size of the jury's verdict that it applied a mistaken measure of damages. *See Hanberry*, 1963-NMSC-100, ¶ 32 (stating that after a careful review of the evidence, the award was so extremely excessive "that it is not truly supported by the evidence and therefore must indicate that the jury was mistaken in the measure of damages"). Defendants assert that "the jury mistakenly applied a punitive measure of damages in awarding compensatory damages." We disagree that such an appellate inference can be drawn exclusively from the size of a damages verdict or the evidence presented for an award of punitive damages. We emphasize that Defendants have the burden, as the appellants, to demonstrate from the record that the jury was mistaken in its award. *See Coates*, 1999-NMSC-013, ¶ 51 (stating that in appealing a denial of a remittitur, the appellant "bears the burden of showing that the record supports its contention that there was error in the verdict" or "that the verdict (i.e., damage awards) was infected with passion, prejudice, partiality, sympathy, undue influence, or some corrupt cause or motive" (internal quotation marks and citation omitted)).

{47} Plaintiffs asked the jury to award 2 percent of FedEx's $7 billion net worth as punitive damages in this case. Defendants argue that although the jury awarded no punitive damages, the amount in compensatory damages awarded—$165 plus million—is close to what was requested for punitive damages—$140 million. In the review of the special verdict form submitted to the jury, Judge Mathew specifically noted, "[t]he special verdict form indicates clearly that the jury understood that they were returning a verdict for compensatory damages." Furthermore, there are indications from the poll conducted of the jury following the actual verdict that several jurors wanted to give additional punitive damages, in addition to the amount awarded for compensatory damages. Defendants even stated on the record, "probably a couple of them wanted [to give] punitives" and the trial court agreed with Defendants' observation of the issue and comment. Based upon this clear record, Defendants' argument that the jury mistakenly applied a punitive measure of damages to award compensatory damages is not supported. *See id.* ¶ 52 (recognizing that the defendants had not "borne [their] burden of proving error"); *Baxter v. Gannaway*, 1991-NMCA-120, ¶ 18, 113 N.M. 45, 822 P.2d 1128 (recognizing that when "a jury makes an award which covers each element of damages," it is not our place to "say as a matter of law the jury verdict is founded upon a mistaken measure of damages").

II. Prejudgment Interest

{48} The district court had the discretion to award prejudgment interest. Section 56-8-4(B); *Coates*, 1999-NMSC-013, ¶ 55 ("The trial court has the discretion to award prejudgment interest."); *Smith v. McKee*, 1993-NMSC-046, ¶ 7, 116 N.M. 34, 859 P.2d 1061 (stating that when the trial court's decision to award prejudgment interest is discretionary, any award shall be reviewed for an abuse of discretion and reversed only where its decision "is contrary to logic and reason"). Section 56-8-4(B) allows the trial court, in its discretion, to award interest of up to 10 percent after considering, among other factors, the following:

> (1) if [Plaintiffs were] the cause of unreasonable delay in the adjudication of [Plaintiffs'] claims; and
>
> (2) if [Defendants] had previously made a reasonable and timely offer of settlement to [Plaintiffs].

"Prejudgment interest serves two purposes, promoting early settlements and compensating persons[.]" *Coates*, 1999-NMSC-013, ¶ 55. "Interest is awarded to make the tort victim whole, and has no bearing on the question of punishing the tortfeasor[.]" *Id.*

{49} On March 31, 2015, the district court held its hearing on the issue of prejudgment interest and specifically limited the evidentiary presentation to factors within the elements of Section 56-8-4(B). Plaintiffs presented evidence of the possibility for a significant damage award resulting from the death and injury to Plaintiffs and that Defendants made one offer for settlement during the only mediation prior to trial. Defendants offered no witnesses at the hearing but relied upon the evidence that was attached to their motion to deny prejudgment interest. Defendants' motion argued that because Plaintiffs refused to accept a provision for confidentiality as part of any settlement agreement, "there was no point to trying to negotiate a potentially mutually acceptable settlement amount." Based upon the evidence presented, the district court concluded that there was "no evidence of delay in this case by any party" but that "Defendants did not make reasonable or timely offers of settlement." The district court's order further concluded that "the refusal on the part of . . . Plaintiff[s'] counsel to engage in settlement discussions which involved any form of confidentiality agreement was not reasonable." The district court then balanced Plaintiffs' refusal to settle on a confidential basis with what it termed as Defendants' "complete lack of appreciation or concern about the potential result of a trial," to conclude that prejudgment interest was warranted in the amount of 5 percent per annum—half the allowable rate under the statute. *See* § 56-8-4(B) (giving the district court the discretion to allow interest up to 10 percent from the date of the complaint).

{50} Defendants now assert that their "liability was not a foregone conclusion" and that "the facts were not clear-cut in Plaintiffs' favor." Defendants also argue that the trial court abused its discretion in granting prejudgment interest by ignoring "[d]ifficult legal issues" and "thorny issues of causation, comparative fault, and [damages]." *Sunnyland Farms, Inc.*

v. Cent. N.M. Elec. Co-op., Inc., 2013-NMSC-017, ¶ 62, 301 P.3d 387. We disagree. Defendants' argument that its right to dispute liability and the complexity of the case precluded its obligation to make a reasonable and timely settlement offer is not a proper reading of the statute. Although the complexity of a case may preclude reaching a settlement, Section 56-8-4(B) requires Defendants to make a reasonable and timely offer of settlement in order to avoid an award of prejudgment interest, irrespective of complexity. Furthermore, at the hearing to address prejudgment interest, Defendants conceded that they recognized the potential for a large verdict in favor of Plaintiffs.

{51} Finally, Defendants argue that Plaintiffs' refusal to make a settlement offer that included a provision for confidentiality was unreasonable and the district court's acknowledgment of Plaintiffs' unreasonableness should control the issue of prejudgment interest. In fact, Defendants argue that it was pointless for Defendants to make a reasonable settlement offer despite the district court's additional ruling that Defendants showed a "complete lack of appreciation or concern about the potential results of a trial." We disagree and emphasize that the statute does not require the parties to actually reach a settlement, it only requires that Defendants make a reasonable settlement offer. *See* § 56-8-4(B). If no reasonable settlement offer was made by Defendants, other settlement conditions imposed by Plaintiffs are just one of many discretionary matters for the district judge to consider. *Id.* The district court's discretion in awarding prejudgment interest allowed the court to evaluate both parties' actions that caused any failure by Defendants to make a reasonable settlement offer and then allocate an appropriate level of prejudgment interest accordingly. Here, the district court's conclusion that Defendants' sole settlement offer was unreasonable and their "complete lack of appreciation or concern about the potential results of a trial" is a logical conclusion that is supported by the record. Selecting an intermediate level of prejudgment interest—5 percent—is also a reasonable and logical accommodation under the circumstances where Plaintiffs refused to accept confidentiality as a settlement condition. As a result, the district court did not abuse its discretion by awarding 5 percent prejudgment interest under the circumstances presented in this case.

CONCLUSION

{52} For the foregoing reasons, we affirm the district court's denial of Defendants' motions for a new trial or remittitur. We also affirm the district court's grant of prejudgment interest.

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

TIMOTHY L. GARCIA, Judge Pro Tem

WE CONCUR:

MICHAEL E. VIGIL, Judge

M. MONICA ZAMORA, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

LEON ALFORD and SANDRA ALFORD,

Petitioners-Appellants,

v. **NO. A-1-CA-35652**

D. CHIPMAN VENIE d/b/a FREEDOM LAW CENTER,

Respondent-Appellee.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Carl J. Butkus, District Judge

Grayson Law Office, LLC
Brian G. Grayson
Albuquerque, NM

for Appellants

D. Chipman Venie
Rio Rancho, NM

Pro Se Appellee

MEMORANDUM OPINION

FRENCH, Judge.

{1} This appeal, a fee dispute between D. Chipman Venie and Leon and Sandra Alford (Mr. and Mrs. Alford, collectively, the Alfords), stems from a contract for legal services rendered by Venie who was representing Mr. Alford in a criminal

matter. The jury returned a verdict in favor of Venie. On appeal, the Alfords argue that the district court abused its discretion by admitting testimony concerning the nature of the criminal charges, Mr. Alford's purported commission and admission to them, and Mrs. Alford's fraudulent complicity in the alleged crimes. We address the Alfords' evidentiary claim and reverse.

BACKGROUND

{2} In response to the Alfords' petition for accounting of money, services, property, and other assets, Venie filed an answer and counterclaim for breach of contract and quantum meruit, all related to his legal representation of Mr. Alford in the criminal cases. Venie described the case as a "garden-variety fee dispute." Subsequent to the Alfords' filing of their petition and withdrawal of their counsel, the Alfords proceeded pro se. Prior to trial on the fee dispute, the district court dismissed the Alfords' petition but allowed Venie's counterclaim to proceed to trial.

{3} Before commencement of the jury trial on the contract dispute, the Alfords filed a motion in limine seeking to prevent Venie from revealing "the nature of the criminal charges against [Mr.] Alford that . . . Venie defended [Mr. Alford] on." The motion further stated:

> 1. [Mr. Alford] was acquitted by a jury of all wrong-doing;

2. That the nature of the charges against [Mr. Alford], from which he was completely exonerated, are such that they would prejudice the jury against him;

3. The issues in this case are simply that . . . Venie has been paid in full pursuant to a [f]ee [a]greement and that he is entitled to no additional money from [the Alfords];

4. The charges which . . . Venie defended [Mr.] Alford on are not an issue in this case[;]

5. The [Alfords] have made no claim that . . . Venie did not perform his job as defense counsel.

WHEREFORE [the Alfords] would respectfully request that . . . Venie be instructed by the Court not to mention the nature of the charges to the jury, including in all aspects of the trial such as voir dire, opening, testimony or closing.

{4} The district court orally ruled on the motion in limine prior to voir dire. In granting the motion, the district court addressed Venie's assertion that the nature of the crimes and Mr. Alford's culpable admissions to him were admissible in the fee dispute: "I'm still not convinced that it's relevant, and plus I've got concerns on the prejudice aspect." The district court further stated, "I've made a ruling that [Venie's] not going to go into it, and he isn't going to go into it anyway in the voir dire. I mean, I don't want [the criminal allegations] argued on the merits. . . . [I]f we get to the point where . . . Venie wants to let it in—because, I mean, even if he wants to let it in, I want to hear the foundation testimony before we get there."

{5} During opening statements Venie stated, "That's [Mr.] Alford, child molester, sex predator. That's his wife, [Mrs. Alford, who] covered up for him for 50 years." Venie further stated that Mr. Alford's daughter believed him to be a "child molester" and listed the crimes that Mr. Alford had been charged with. "[T]hey hired me to defend [Mr.] Alford in an incest case, . . . [for] having sex with [his] own granddaughter[.]" Venie stated that Mr. Alford "tried to kill witnesses" and that he "choked" Mrs. Alford when she "brought up his sexual predations" for "what he had done to her granddaughter." Venie also stated that he represented Mr. Alford for "forcible rape, forcible sodomy on children, [and] kidnapping[.]" Concerned that Venie had placed an "awful lot of emphasis on guilt[,]" the district court cautioned Venie that he did not "want to declare a mistrial in [the] case."

{6} Prior to Venie calling his first witness, Mrs. Alford, the district court again cautioned Venie that he had not changed his prior ruling and that he would not allow him to go into details "related to the admission [of Mr. Alford to Venie of his guilt] at this point." Venie inquired of Mrs. Alford if there were "[t]hree counts of having sex with your granddaughter," and "[i]ncest with your granddaughter[?]" Despite the district court's warning relative to Mr. Alford's attorney-client statement to Venie, he asked the following question: "To your knowledge, did [Mr.] Alford ever tell me that he had raped your granddaughter? Because that's the truth. So to your

knowledge, did [Mr.] Alford ever tell me . . . that he raped your granddaughter?" At the immediate bench conference that followed, the district court stated, "This is asking for me to declare a mistrial. . . . [Y]ou are still getting it out—was there . . . an admission to . . . committing a crime or crimes[?] . . . I think that coming in . . . is very prejudicial[.]" The district court then cautioned Venie that this was a contract case.

{7} Prior to Venie calling Mr. Alford as a witness, the district court cautioned: "[H]ere's what we're going to do: I have made the orders, and I don't want . . . a bunch of questioning that does refer to them as child molester[s.] . . . Because we are talking about breach of contract . . . and I want to stay focused on the contract[.] . . . I don't want references to child molester . . . and I don't want it done in an inferential manner either[.]" Further, the district court cautioned, "I don't want this to degenerate into name calling and . . . going beyond the pale on this whole issue of molestation, because it really doesn't have much to do with the issues we've got in front of us which is, was there a contract . . . or not[.]" In emphasis, the district court stated: "And from the other side, . . . Venie, please stay away, you know, from being a child molester and all that sort of thing."

{8} On direct examination of his former client, Mr. Alford, Venie asked the following question: "So did you admit your crimes to me or deny them?" To which Mr. Alford responded, "I admitted them to you." The district court held an immediate

bench conference. The colloquy from the district court—directed to Venie—began with, "What are we doing?" Responding to Venie's argument that he did not refer to the crimes by name, again the district court admonished: "I think I stated . . . a number of times on the record so far that I think going into that has a potential—I have some questions about relevance for one thing, but beyond that, going into that has the potential to be unduly prejudicial. . . . I really don't think that is part of this case, which is essentially a breach of contract case." After stating its concern—"that . . . the horse is out of the barn"—and finding that the question and answer were unduly prejudicial under Rule 11-403 NMRA, the district court directed the jury to "disregard the last question and answer[.]"

{9} Venie called himself to testify. After discussing many of the contract terms and documents, Venie again revealed that he had represented Mr. Alford on the "types of crimes" that are "the worst thing you can be accused of." After excusing the jury, the district court again cautioned Venie to stay away from testimony that inferred that Mr. Alford committed the crimes for which he had been charged: "[I]t's unduly prejudicial[.] . . . I don't want to put that in there because, frankly, I think it would be almost reversible error to let it come in." Continuing his testimony, Venie commented to the jury on the propriety of his revealing client confidences: "When you're an attorney, you're not really supposed to reveal their confidences and that sort of

thing." In stopping the testimony, the district court stated that this "area" is not to be argued before the jury. However, on Venie's cross-examination by Mrs. Alford, Venie again responded that he had represented Mr. Alford on "three incest counts."

{10} In closing argument Venie emphasized that he had represented Mr. Alford for three years on two separate cases covering "dozens of felonies, and we heard what they are." Venie characterized Mr. Alford's testimony as "lies out of a criminal's mouth" and "[a] lying criminal sits over there and asks you to help them." Venie also stated that Mr. Alford had "sued his granddaughter, the victim[,]" and that Mrs. Alford "had covered up for 50 years for him," and Mrs. Alford "didn't cry when she found out what happened to the granddaughter[.]"

DISCUSSION

{11} On appeal, we must determine whether the district court abused its discretion under Rule 11-403 by allowing Plaintiff to repeatedly discuss the subject matter that it previously excluded when it granted the Alfords' motion in limine. We review the district court's decision to admit or exclude testimony for an abuse of discretion. *See Behrmann v. Phototron Corp.*, 1990-NMSC-073, ¶ 17, 110 N.M. 323, 795 P.2d 1015 (explaining that the district court has "a great deal of discretion in admitting or excluding evidence, and we will reverse the [district] court only when it is clear that the court has abused its discretion"). "An abuse of discretion occurs when the ruling

is clearly against the logic and effect of the facts and circumstances of the case." *Coates v. Wal-Mart Stores, Inc.*, 1999-NMSC-013, ¶ 36, 127 N.M. 47, 976 P.2d 999 (internal quotation marks and citation omitted). In balancing the probative value and the unfair prejudice of the evidence, an abuse of discretion occurs where the district court's decision "is contrary to logic and reason." *Davila v. Bodelson*, 1985-NMCA-072, ¶ 12, 103 N.M. 243, 704 P.2d 1119. Based on the record before us, we conclude that the probative value of the evidence was substantially outweighed by a danger of unfair prejudice, and it should have been excluded.

{12} 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." *State v. Stanley*, 2001-NMSC-037, ¶ 17, 131 N.M. 368, 37 P.3d 85 (internal quotation marks and citation omitted). To be excluded under Rule 11-403, the evidence must not only be prejudicial, it must be unfairly so, which means that it has a "tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Stanley*, 2001-NMSC-037, ¶ 17 (internal quotation marks and citation omitted).

{13} The district court admonished Venie multiple times regarding the subject matter and effect of the introduction of such inflammatory evidence. In granting the

Alfords' motion in limine, the district court properly executed its role as a gatekeeper and balanced the relevance of the inflammatory evidence against its probative value in a contract dispute. *See State v. Pickett*, 2009-NMCA-077, ¶ 13, 146 N.M. 655, 213 P.3d 805 (discussing the role of the district court to act as "a gatekeeper to insulate the jury from prejudice and confusion"). Nonetheless, Venie persisted with his virulent statements regarding the sexual content of the prior criminal charges against Mr. Alford, his purported guilt, and Mrs. Alford's alleged coverup. Despite the district court's ruling on the motion in limine, Venie continued his attack, to which the district cautioned against the "emphasis on guilt," stated that it did not "want to declare a mistrial," and noted that the evidence was irrelevant and unduly prejudicial—"the horse is out of the barn" and that "it would be . . . reversible error to let it come in." Undeterred by the district court's admonishments Venie continued his improper trial strategy throughout trial and closing argument.

{14} Our review of the record reveals the district court's concerns that the multiple references to the improper evidence was highly prejudicial, and we agree. "Evidence should be excluded if it is calculated to arouse the prejudices and passions of the jury and is not reasonably relevant to the issues of the case." *State v. Chamberlain*, 1991-NMSC-094, ¶ 9, 112 N.M. 723, 819 P.2d 673 (alteration, internal quotation marks, and citation omitted). The key part of Venie's trial strategy in this breach of contract

case was to portray Mr. Alford, his former client, as a child molester and sexual predator and that Mrs. Alford covered up these facts for 50 years. Venie executed this strategy in his opening statement, cross examination, and closing statement. In alerting the jury that Mr. Alford had hired Venie to represent him in criminal matters involving sex with his own granddaughter, forcible rape, forcible sodomy on children, and kidnapping, on cross examination, Venie secured a confidential attorney-client statement from Mr. Alford that he had admitted these crimes for which he had been acquitted. We conclude that this evidence was unfairly prejudicial. *See Stanley*, 2001-NMSC-037, ¶ 17 (explaining that the district court should exclude evidence deemed "so extraordinarily inflammatory to the jury that the evidence substantially outweighed its probative value").

{15} The district court acknowledged that the prejudicial evidence violated Rule 11-403. The dispute concerned a breach of contract; thus, we also agree with the district court's conclusion that the probative value of the evidence was minimal. Despite directing Venie to stay focused on the contract issues, and to stay away from the nature of the criminal charges and inferences of guilt, nonetheless the jury heard the inflammatory evidence repeatedly. Concerned about the prejudicial effect on the jury, the district court stated that the evidence had gone "beyond the pale on this whole issue of molestation[.]" Yet again, in closing argument the jury heard that Mr. Alford

was a criminal, molested his granddaughter, and Mrs. Alford was ostensibly a co-conspirator. Venie's repeated refusal to heed the district court's admonitions and the court's single instruction to the jury to disregard Mr. Alford's admission of "crimes" necessarily resulted in unfair prejudice to Mr. Alford.

{16} Finally, we note that our Supreme Court permanently disbarred Venie for revealing these client confidences and statements of his client's guilt in the case before us. *See In re Venie*, 2017-NMSC-018, ¶¶ 23-27, 41, 395 P.3d 516. Although we decline the Alfords' offer to give preclusive effect to the Supreme Court's ruling, and instead review for an abuse of discretion, our conclusion regarding unfair prejudice is bolstered by our Supreme Court's holdings.

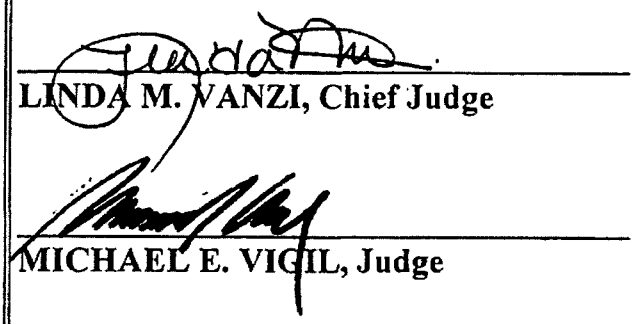
CONCLUSION

{17} We conclude that the district court abused its discretion in admitting the testimony at issue and therefore reverse.

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

STEPHEN G. FRENCH, Judge

WE CONCUR:



LINDA M. VANZI, Chief Judge

MICHAEL E. VIGIL, Judge

SANDOVAL V. CHRYSLER CORP., 1998-NMCA-085, 125 N.M. 292, 960 P.2d 834

JAMES E. SANDOVAL, Plaintiff-Appellee,
vs.
CHRYSLER CORPORATION, a Delaware Corporation,
Defendant-Appellant.

Docket No. 18,198
COURT OF APPEALS OF NEW MEXICO
1998-NMCA-085, 125 N.M. 292, 960 P.2d 834
May 20, 1998, Filed
APPEAL FROM THE DISTRICT COURT OF SAN MIGUEL COUNTY. Jay G. Harris, District Judge.

Released for Publication June 23, 1998.

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JUDGES

RICHARD C. BOSSON, Judge. WE CONCUR: A. JOSEPH ALARID, Judge, JAMES J. WECHSLER, Judge.

AUTHOR: RICHARD C. BOSSON

OPINION

*{*293}*

BOSSON, Judge.

{1} We are called upon to examine the duty of the trial judge who finds that a jury's award of compensatory damages shocks the conscience of the court, but who nevertheless denies a motion for remittitur or, in the alternative, a new trial. We hold in this case that the court abused its discretion in failing to act upon its findings regarding an excessive verdict, and we reverse and remand for the court to do so. We also address the difficulty facing trial judges in evaluating the amount of damages awarded by a jury for pain and suffering, and we reconfirm our conviction that trial judges can properly perform their vital review function without the artificial aid of a fixed mathematical formula for pain and suffering.

BACKGROUND

{2} A catastrophic automobile accident occurred during the early morning hours of October 15, 1993, near Las Vegas, New Mexico. The driver, James Sandoval (Plaintiff) and his three

passengers, Brian Archuleta, Angela Archuleta, and Gail Martinez, were traveling in a 1984 two-door Plymouth Laser, manufactured by Chrysler Corporation (Chrysler). As they rounded a curve in the road, Plaintiff swerved to avoid an oncoming vehicle that was traveling near the center line. His car skidded out of control, struck several objects, and became airborne before coming to rest on its top. There was evidence that Plaintiff was intoxicated and speeding at the time of the accident.

{3} As Plaintiff and his front seat passenger, Brian, worked their way out of the vehicle, it caught fire. Angela and Gail, the passengers in the back, were unable to escape from the burning car, and they died at the accident. By all accounts, the scene of the accident was horrific with the two passengers essentially being burned alive.

{4} By contrast, Plaintiff appears to have been relatively fortunate. Although he suffered second and third degree burns on his arms and face, they were not severe enough to require hospitalization and were treated with pain medication and creams. Apparently, Plaintiff did not suffer any perceptible scarring or disfigurement from the burns, although the skin on his face now burns more easily in the sun. Plaintiff also suffered emotional and psychological injury from the accident. He was unable to return to work for five weeks after the accident. He received psychological counseling, and he continues to participate in weekly group counseling and monthly individual counseling. Plaintiff has been diagnosed with post-traumatic stress disorder as a result of the accident.

{5} Plaintiff, Brian, and Angela's estate brought this lawsuit against Chrysler, alleging that the car caught fire due to a defective design in the Plymouth Laser. The jury returned a verdict in favor of all three plaintiffs and awarded Plaintiff $ 1,000,000 in compensatory damages. The jury also found that Plaintiff was 25% responsible for the accident, that Brian was 2% at fault, and that the driver of the unknown vehicle was 3% at fault. Therefore, Plaintiff's verdict against *{*294}* Chrysler was reduced by 30% under New Mexico's comparative fault principles to a judgment for $ 700,000. The jury also awarded Brian $ 3,500,000 and Angela's estate $ 7,000,000 in damages against Chrysler. Those other plaintiffs settled with Chrysler after trial, and they are not parties to this appeal.

{6} Chrysler subsequently moved for a remittitur or a new trial with respect to Plaintiff, contending that the jury verdict of $ 1,000,000 was excessive as a matter of law. Chrysler emphasized evidence that Plaintiff had only incurred approximately $ 5000 in actual economic damages, which included all past and future medical bills, psychological counseling, and lost income. The rest of the award was apparently based on pain and suffering. Chrysler argued that the jury's $ 1,000,000 verdict was so grossly out of proportion to Plaintiff's injuries that it shocked the conscience and should be reduced.

{7} The trial judge agreed with Chrysler's characterization of the verdict. The judge acknowledged that the jury verdict shocked the conscience of the court, but the judge nevertheless denied Chrysler's motion, believing that he lacked adequate guidance in the law to determine what a fair verdict would be with regard to pain and suffering and to ascertain how

much the verdict should be reduced by way of remittitur. In an attempt to accurately describe the unusual nature of his decision, the trial judge directed that the order denying Chrysler's motion contain a verbatim portion of his oral ruling from the bench. Portions of that order follow:

> I'm going to let Chrysler put in its order that the conscience of the Court is shocked because there was no evidence, at least in my opinion, there was insufficient evidence to justify a million dollars. But the problem that there is, is that there was evidence to justify some kind of compensatory damages, but when we talked [sic] about pain and suffering and emotional distress, the Supreme Court has not put any guidelines on that. There are no caps on damages that can be awarded, so this jury could very possibly have said this guy is having nightmares, he's got Post-Traumatic Stress Syndrome and in our opinion that's worth $ 975,000.00. And I don't think this Court is in a position to where I can say I can go ahead and substitute my feelings-my verdict for that of the jury.
>
> . . . .
>
> I think they should give me some kind of guidelines as to how I should reduce this. They should say, okay for pain and suffering we've got a limit. I don't even know if the Supreme Court can do this. Maybe the legislature is going to have to come along and say we're going to have to put some kind of caps in some kinds of cases. I don't know.
>
> But to me this is jury [sic] not-Mr. Sandoval did not deserve a million dollars for killing two girls with the limited damages that he suffered. But I think because of the way the system is set up right now with the jury instructions with the pain and suffering. [sic] I think they're pretty much free to do whatever they want to do.
>
> . . . .
>
> But in this area where we're talking about less than a million dollars, possibly, for pain and suffering and that type of thing, I'm going to have to go ahead-I'm not going to set it aside. I'm going to let the Appellate Court know that this is a case where this Court's conscience is shocked by that amount of money, and the Appellate Court may disagree and say we're sorry. That's why you didn't decide the case. That's why we had a jury. I don't know, but if they agree, then I think maybe they should come out with some kind of guidelines. Maybe that's a decision they can made [sic] because they can review the evidence just as well as I can or might send it back for a new trial. I don't have the

slightest idea.

I'm going to deny Chrysler's Motion, but I do want-Chrysler may go ahead and put in the Order that the Court's conscience was shocked by the amount of damages that was awarded, to Mr. Sandoval in this case, evidently for pain and suffering because I don't think there was sufficient evidence to justify that amount of damage, actually.

{8} *{*295}* Chrysler appeals from the denial of its motion for a remittitur or a new trial, arguing that the trial court abused its discretion after finding that the verdict was so excessive under the circumstances that it shocked the conscience of the court.

DISCUSSION

{9} An order granting a remittitur or, in the alternative a new trial, is appropriate when the jury's award of damages "'is so grossly out of proportion to the injury received as to shock the conscience[.]'" **See Lujan v. Reed**, 78 N.M. 556, 564, 434 P.2d 378, 386 (1967) (quoting **Mathis v. Atchison, Topeka & Santa Fe Ry. Co.**, 61 N.M. 330, 336, 300 P.2d 482, 487 (1956)). New Mexico case law provides two tests for determining whether an award is so excessive that it shocks the conscience: "'(1) whether the evidence, viewed in the light most favorable to plaintiff, substantially supports the award and (2) whether there is an indication of passion, prejudice, partiality, sympathy, undue influence or a mistaken measure of damages on the part of the fact finder.'" **Sweitzer v. Sanchez**, 80 N.M. 408, 409, 456 P.2d 882, 883 (quoting **Chavez v. Atchison, Topeka & Santa Fe Ry. Co.**, 77 N.M. 346, 351, 423 P.2d 34, 37 (1967)); **accord Richardson v. Rutherford**, 109 N.M. 495, 503, 787 P.2d 414, 422 (1990); **Baxter v. Gannaway**, 113 N.M. 45, 48, 822 P.2d 1128, 1131 (Ct. App. 1991); **Martinez v. Teague**, 96 N.M. 446, 452, 631 P.2d 1314, 1320 (Ct. App. 1981); **Gonzales v. General Motors Corp.**, 89 N.M. 474, 480, 553 P.2d 1281, 1287 (Ct. App. 1976). The award is excessive if either test is met. **See Gonzales**, 89 N.M. at 480, 553 P.2d at 1287. However, the options available to the trial court may vary depending on which test is met.

{10} For example, if "passion or prejudice existed such as would vitiate the verdict on the question of liability," a new trial would be in order. **Richardson**, 109 N.M. at 503, 787 P.2d at 422. But if the evidence viewed in the light most favorable to the verdict simply "does not support the amount of damages awarded by the jury," and there are no indications of passion or prejudice, the "court in its discretion may order remittitur as an alternative to a new trial." **Id.** Of course, the trial court still must give the plaintiff the option of choosing between the remittitur or a new trial. **See Chavez-Rey v. Miller**, 99 N.M. 377, 379, 658 P.2d 452, 454 . "Otherwise, a remittitur would invade the province of the jury and violate the constitutional right to trial by jury." **Id.** But if the plaintiff declines to accept the remittitur and opts for a new trial, the new trial may be limited to the issue of damages. **See Gonzales**, 89 N.M. at 480-81, 553 P.2d at

1287-88.

{11} In this case, the trial judge repeatedly stated that the jury's award of damages shocked the conscience of the court. The judge also specifically found that there was insufficient evidence to support the amount of damages awarded by the jury. Ordinarily, such findings would lead to the grant of a remittitur or a new trial. However, the trial judge denied Chrysler's motion, not because the judge was satisfied with the verdict, but because the judge believed he needed more specificity in the law regarding what would be an appropriate amount of damages for pain and suffering. Consequently, the judge chose to ask this Court to formulate specific guidelines and determine whether the jury's verdict should be reduced. We decline to do so for a number of reasons.

{12} We can only review the trial judge's decision for an abuse of discretion. **See Chavez-Rey**, 99 N.M. at 379, 658 P.2d at 454. However, in this instance the judge refused to exercise his discretion, despite the predicate findings and the court's conviction that the award should be reduced. The failure of the trial judge to exercise his discretion is, in itself, reversible error. **See State v. Conn**, 115 N.M. 101, 105, 847 P.2d 746, 750 . Beyond the trial judge's failure to exercise his discretion, his decision is reversible for two additional reasons: 1) the decision asks this Court to assume a role that should be fulfilled by the trial judge in the first instance, and 2) the decision denying Chrysler's motion on the basis of the lack of specific guidelines defining pain and suffering is erroneous as a matter of law.

{13} "It is not the duty of the appellate court to evaluate the value of pain and suffering." *{*296}* **Baxter**, 113 N.M. at 49, 822 P.2d at 1132. Without a doubt, the valuation of pain and suffering is a difficult, inexact undertaking at best. "No one can measure another's pain and suffering; only the person suffering knows how much he or she is suffering, and even this person cannot accurately say what would be reasonable compensation for it." **Grammer v. Kohlhaas Tank & Equip. Co.**, 93 N.M. 685, 695, 604 P.2d 823, 833 . Because of this basic truth, our courts have repeatedly recognized that there can be "no standard fixed by law for measuring the value of . . . pain and suffering." **Mathis**, 61 N.M. at 337, 300 P.2d at 487; **accord Lujan**, 78 N.M. at 564, 434 P.2d at 386; **Baxter**, 113 N.M. at 49, 822 P.2d at 1132; **Sheraden v. Black**, 107 N.M. 76, 81, 752 P.2d 791, 796 (Ct. App. 1988). "The amount of awards necessarily rests with the good sense and deliberate judgment of the tribunal assigned by law to ascertain what is just compensation, and, in the final analysis, each case must be decided on its own facts and circumstances." **Powers v. Campbell**, 79 N.M. 302, 304, 442 P.2d 792, 794 (1968).

{14} We recognize that in determining whether an award is excessive, the trial judge may not weigh the evidence but must determine excessiveness as a matter of law. **See Chavez-Rey**, 99 N.M. at 379, 658 P.2d at 454. Thus, in some ways, the trial judge must make the same legal determination that this Court must make on appeal. However, the trial judge is in a unique position to perform the critical first check on the jury's judgment. As this Court noted in **Grammer**, both the trial judge and the jury are crucial to an accurate, just assessment of pain and suffering:

> This evaluation is for the jury to determine and for the trial court to approve or disapprove. When the jury makes a determination and the trial court approves, the amount awarded in dollars stands in the strongest position known in the law. The trial court sees the various witnesses, observes their demeanor during direct and cross-examination, as well as the attitude of the jurors during the progress of the trial, and the conduct of lawyers. We read the cold record.

93 N.M. at 695, 604 P.2d at 833; **see also Crookston v. Fire Ins. Exch.**, 817 P.2d 789, 804 (Utah 1991) (trial judge should determine whether jury verdict is excessive in first instance because judge was present for entire trial). In addition, the trial judge's experience with juries in the community provides an indispensable safeguard built into our American civil jury system. **See id.** at 802 n.15 (trial judge has duty to act unflinchingly as thirteenth juror to prevent jury system from becoming "a capricious and intolerable tyranny").

{15} From the standpoint of judicial economy, it also makes more sense for the trial judge to present the plaintiff with the option of choosing between remittitur and a new trial. Depending on the amount set by the trial judge to be remitted, the plaintiff may elect to accept remittitur instead of a new trial, particularly because an order granting remittitur or a new trial is not immediately appealable. **See Chavez-Rey**, 99 N.M. at 379, 658 P.2d at 454. Thus, although the trial judge may be reluctant to set a dollar amount to be remitted, that decision may actually eliminate the need for a new trial or appeal. **See Crookston**, 817 P.2d at 803 (trial court's decision to order remittitur or new trial "may encourage the parties to come to some mutually agreeable solution rather than incur the time and expense of a new trial"). It is uniquely the job of the trial judge to make this decision in the first instance.

{16} We can understand the trial judge's frustration at the difficulty of assessing the value of pain and suffering, and we appreciate the judge's lament for a fixed, mathematical formula. But time and again our appellate courts have come to the conclusion that the best way to arrive at a reasonable award of damages is for the trial judge and the jury to work together, each diligently performing its respective duty to arrive at a decision that is as fair as humanly possible under the facts and circumstances of a given case. If the lack of mathematical precision were to cause the trial court to refrain from performing its role as the first check on the jury's verdict, then the parties would suffer the injustice of an excessive verdict being allowed to stand. *{*297}* **See Best v. Taylor Mach. Works**, 179 Ill. 2d 367, 689 N.E.2d 1057, 1080, 228 Ill. Dec. 636 (Ill. 1997) (inherent power of the trial judge to act as a check on excessive verdicts "is essential to the judicial management of trials"). Equally important, such failure to act would weaken the public confidence on which our judicial system depends for its survival.

{17} Concern about excessive jury verdicts is part of the public debate currently focused on the American jury system. The trial judge is an equal partner in that system, which depends on the review and oversight function of the trial judge to correct the occasional aberrant verdict,

either too high or too low, by using the tools at hand. These tools do not include a specific formula for pain and suffering, and any such formula risks being arbitrary at the margins, thereby substituting one problem for another. If our courts fail to use these tools, no matter how imprecise, we merely fuel this debate and invite the justifiable criticism of the public. The courts have a duty to act.

CONCLUSION

{18} In short, the trial judge still has important work to do in **this case. The judge's knowledge of the trial proceedings is critical to a thorough evaluation of the jury verdict using the broad, equitable standard of judicial review that has evolved over time. We reverse and remand for that purpose. By remanding this case to the trial judge for further consideration, we are not suggesting that we necessarily agree or disagree with the trial judge's initial determination that the jury verdict shocked the conscience. Before we can review that matter, the trial judge must first decide whether to order a remittitur and, if so, in what amount, through the exercise of the enlightened conscience of the trial court.**

{19} IT IS SO ORDERED.

RICHARD C. BOSSON, Judge

WE CONCUR:

A. JOSEPH ALARID, Judge

JAMES J. WECHSLER, Judge

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

SANTA FE TRUST, INC., As Personal Representative for the ESTATE OF KEVIN UDY, Deceased; SUSAN UDY; SCOTT UDY; SARAH UDY; DEVON UDY; LANDON UDY; EMILY UDY; LEO UDY; and RHEA UDY,	§	No. D-101-CV-2011-00751
Plaintiffs,	§	
vs.	§	
STANDARD E&S, LLC; ZIA TRANSPORT INCORPORATED, INC.; BERGSTEIN ENTERPRISES, LTD.; and MONTE LYONS,	§	
Defendants.	§	

MOTION FOR PREJUDGMENT INTEREST

Plaintiffs Santa Fe Trust, Inc., as Personal Representative for the Estate of Kevin Udy, Deceased, Susan Udy, Scott Udy, Sarah Udy, Devin Udy, Landon Udy, Emily Udy, Leo Udy, and Rhea Udy (hereinafter "the Plaintiffs"), submit this Motion for Prejudgment Interest seeking an order granting prejudgment interest on the compensatory damage portion of the judgment entered in this case at the rate of 10% per year pursuant to NMSA § 56-8-4(B).

INTRODUCTION

This case was tried to a twelve person jury from March 11, 2013 through March 20, 2013. On March 20, 2013, the jury returned a verdict in open court in favor of Plaintiffs. The jury awarded $11.5 million in compensatory damages and $47 million in punitive damages. *See*

Special Verdict Form, attached hereto as Exhibit "A". Pursuant to the jury's verdict, Plaintiffs have submitted a proposed Judgment on Jury Verdict for this Court's review and approval.

Pursuant to NMSA § 56-8-4(B), because Plaintiffs were not the cause of unreasonable delay in the adjudication of Plaintiffs' claims, and because Defendants failed to make a reasonable and timely offer of settlement to Plaintiffs, Plaintiffs now request that this Court award pre-judgment interest at the maximum statutory rate of 10% per year on the compensatory portion of the jury's verdict.

STATEMENT OF FACTS

1. This lawsuit was filed in 2011 against Defendants Standard E&S, LLC, Zia Transport, Inc., Bergstein Enterprises, Ltd., and Monte Lyons. Defendants Standard E&S, LLC and Lyons were properly served on September 23, 2011; Defendant Bergstein Enterprises, Ltd. was properly served on September 29, 2011. On October 11, 2011, defense counsel, Randal Roberts, appeared and filed an answer on behalf of Defendants Standard E&S, LLC, Bergstein Enterprises, Ltd., and Monte Lyons. Defendant Zia Transport, Inc. was properly served on November 7, 2011 and on November 14, 2011 the same defense counsel entered his appearance and filed his answer on behalf of Zia Transport, Inc.

2. On November 30, 2012, Plaintiffs served Defendants with a Rule 1-068 Offer of Settlement. *See* Exhibit "B" (Plaintiffs' Rule 1-068 Offer of Settlement). As set forth in the Offer of Settlement, Plaintiffs proposed to settle all of their pending claims against Defendants Standard E&S, LLC, Zia Transport, Inc., Bergstein Enterprises, Ltd., and Monte Lyons for the sum of $4,993,459.00, which Plaintiffs understood was the remaining amount of the relevant insurance policy limits of Fireman's Fund Insurance and First Mercury Insurance disclosed

during the course of discovery.[1]

3. Defendants did not respond within the ten day time limit set forth under Rule 1-068 and in Plaintiffs' accompanying correspondence.

4. On December 19, 2012, First Mercury's claims adjuster sent a letter to Plaintiffs' counsel confirming receipt of the November 30, 2012 Offer of Settlement and stating that "our prior offer of $2,750,000, made during mediation, remains open, should you wish to discuss it." *See* Exhibit "C" (Letter from E. Weiss to G. Waddoups dated December 19, 2012).

5. On March 4, 2013, upon the Court's direction, the parties engaged in mediation with David K. Thomson. During this mediation, Defendants offered to settle for the sum of $2,775,000.00, which was rejected by Plaintiffs.

6. On the eve of trial, in one last effort to settle this case before trial with all Defendants, Plaintiffs offered to settle with all Defendants for $4,900,000. The Defendants did not accept Plaintiffs' final pre-trial settlement demand. The jury panel was selected on March 11, 2013 and was sworn in on the morning of March 12, 2013. Once the jury was sworn in, Plaintiffs placed Defendants on notice that all prior settlement offers were revoked. *See* Exhibit "D" (Email from B. DeBry to E. Weiss and R. Roberts dated March 12, 2013).

7. On March 20, 2013, the jury awarded Plaintiffs $11.5 million in compensatory damages and $47 million in punitive damages.

[1] After the verdict was returned in this case, Plaintiffs have learned that additional insurance policies were in effect during the relevant time periods of this case. The production of all such insurance policies, and Plaintiffs' request for sanctions for Defendants' failure to disclose such insurance policies, are set forth more fully in Plaintiffs' Motion to Compel Insurance Information and for Sanctions pending before the Court.

PLAINTIFFS ARE ENTITLED TO PREJUDGMENT INTEREST AT A RATE OF 10% PER YEAR.

NMSA § 56-8-4(B) states as follows:

> Unless the judgment is based on unpaid child support, the court in its discretion may allow interest of up to ten percent from the date the complaint is served upon the defendant after considering among other things:
>
> (1) if the plaintiff was the cause of unreasonable delay in the adjudication of the plaintiff's claims; and
>
> (2) if the defendant had previously made a reasonable and timely offer of settlement to the plaintiff.

The purpose of Section 56-8-4(B) is to foster settlement and to prevent delay. *See Lucero v. Aladdin Beauty Colleges, Inc.*, 871 P.2d 365, 368 (N.M. 1994). The statute plainly gives the trial court discretion to award prejudgment interest up to ten percent (10%) after considering two specific factors: whether the plaintiff was the cause of unreasonable delay and whether the defendant previously made a timely and reasonable settlement offer. NMSA § 56–8–4(B). It is indisputable that the Plaintiffs were not a cause of unreasonable delay. Therefore, the only issue for the Court is whether the Defendants in this case made a timely and reasonable settlement offer.

In *Lucero,* the Defendant offered $1500 before trial, and the jury awarded $69,100 in compensatory damages. Given the final outcome in the case, the Supreme Court concluded that the trial court did not abuse its discretion by awarding Plaintiff prejudgment interest at ten percent (10%). *Lucero,* 871 P.2d at 368. As was the case in *Lucero,* Defendants' timely settlement offers were grossly unreasonable in comparison to the final outcome in the case.

Although the Defendants did not admit to liability prior to trial, given the facts of the collision, the Defendants and their insurance carriers surely knew that a finding of liability was certain. Indeed, the Defendants essentially admitted to liability during trial. In addition, given that Mr. Udy was only 46 years old at the time of his death, was a substantial wage earner, and married and a father of five (5) children, the Defendants and their insurance carriers were well aware of the fact that it was highly likely that a jury verdict for the wrongful death claim alone would be well in excess of the Defendants' final pre-trial settlement offer of $2,775,000. The Defendants and their insurance carriers were also well aware that there was a substantial risk that the jury would likely consider some or all of the Plaintiffs' claims for loss of consortium. In addition, given the egregious nature of the corporate Defendants' conduct, the Defendants and their insurance carriers knew that there was a substantial risk that the corporate defendants would be found liable for punitive damages. Nonetheless, the Defendants and their insurance carriers instead chose to proceed to trial, and the jury awarded $11.5 million in compensatory damages and $47 million in punitive damages, which is over **twenty one times** the amount of the Defendants' last pre-trial settlement offer. Indeed, the compensatory damage alone is over **four times** the amount of the Defendants' last pre-trial settlement offer. *Cf. Southhard v. Fox,* 113 N.M. 774 (Ct. App. 1992 (affirming trial court's award of prejudgment interest at eight percent (8%) when Defendant's last pre-trial offer was $56,000 and jury verdict for compensatory damages was $130,000). Under these circumstances, as in *Lucero,* the Court should award Plaintiffs' prejudgment interest on the compensatory damages award at the maximum rate of ten percent (10%). *See Weidler v. Big J. Enterprises,* 124 N.M. 591 (Ct. App. 1997) (holding that prejudgment interest is not recoverable on punitive damages).

WHEREFORE, Plaintiffs respectfully request that this Court enter an order granting prejudgment interest on the total $11.5 million in compensatory damages awarded by the jury at the rate of 10% per year from the respective date of service for each defendant.

Respectfully Submitted,

HEARD, ROBINS, CLOUD, & BLACK, L.L.P.

Bill Robins III
Justin R. Kaufman
300 Paseo De Peralta, Suite 200
Santa Fe, NM 87501

ROBERT J. DEBRY & ASSOCIATES,
George T. Waddoups
J. Bradford Debry
Michael L. Banks
4252 South 700 East
Salt Lake City, Utah 84107

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I certify that I caused a copy of this document to be served on the following persons or entities by U.S. mail on this 8th day of April, 2013.

RANDAL W. ROBERTS
SIMONE ROBERTS & WEISS P.A.
11200 Lomas Boulevard NE, Suite 210
Albuquerque, New Mexico 87112
Telephone: (505) 298-9400
Facsimile: (505) 298-7070

ATTORNEYS FOR DEFENDANTS

Bill Robins III

FIRST JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF SANTA FE

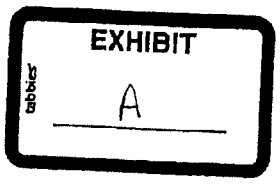
Case No.: D-0101-CV-2011-00751

SANTA FE TRUST, INC., As Personal Representative for the ESTATE OF KEVIN UDY, Deceased; SUSAN UDY; SCOTT UDY; SARAH UDY; DEVON UDY; LANDON UDY; JOLYNN UDY; EMILY UDY; LEO UDY; and RHEA UDY ,
Plaintiffs,

vs.

STANDARD E&S, LLC; ZIA TRANSPORT INCORPORATED, INC.; BERGSTEIN ENTERPRISES, LTD.; And MONTE LYONS,
Defendants.

SPECIAL VERDICT FORM



SPECIAL VERDICT

On the questions submitted, the jury finds as follows:

Question No. 1: Were any of the defendants listed below negligent?

Answer:

	YES	NO
Monte Lyons	✓	
Standard E&S, L.L.C.	✓	
Zia Transport, Inc.	✓	
Bergstein Enterprises, Ltd.	✓	

If the answer to Question No. 1 is "No" for each person and company listed above, you are not to answer further questions. Your foreperson must sign this special verdict, which will be your verdict for the Defendants and against the Plaintiffs, and you will all return to open court.

If the answer to Question No. 1 is "Yes" as to at least one of the persons or companies listed above, you are to answer Question No. 2.

Question No. 2: For each person or company you found negligent in response to Question No. 1, was the negligence of that person or company a cause of Plaintiffs' injuries and damages? For each person or company you found not negligent in answer to Question No. 1, check answer "Not Applicable."

Answer:

	YES	NO	NOT APPLICABLE
Monte Lyons	✓		
Standard E&S, L.L.C.	✓		
Zia Transport, Inc.	✓		
Bergstein Enterprises, Ltd.	✓		

If the answer to Question No. 2 is "No" or "Not Applicable" as to each person and company listed, you are not to answer further questions. Your foreperson must sign this special verdict, which will be your verdict for the Defendants and against the Plaintiffs, and you will all return to open court

If the answer to Question No. 2 is "Yes" as to one or more of the parties listed, then you are to answer the remaining questions on this special verdict form. When as many as ten of you have agreed upon each of your answers below, your foreperson must sign this special verdict, and you will all return to open court.

Question No. 3:

a. In accordance with the damage instruction given by the court, we find the total amount of damages suffered by the Plaintiff Santa Fe Trust, Inc., on behalf of the surviving beneficiaries Susan Udy, Scott Udy, Sarah Udy, Devon Udy, Landon Udy, and Emily Udy, to be:

AMOUNT $ 8,000,000

b. In accordance with the damage instruction given by the court, we find the total amount of damages suffered by Plaintiff Susan Udy for the emotional distress caused by the loss of society, guidance, companionship, and sexual relations to be:

AMOUNT $ 2,000,000

c. In accordance with the damage instruction given by the court, we find the total amount of damages suffered by Plaintiff Landon Udy for the emotional distress caused by the loss of society, guidance, and companionship to be:

AMOUNT $ 500,000

d. In accordance with the damage instruction given by the court, we find the total amount of damages suffered by Plaintiff Devon Udy for the emotional distress caused by the loss of society, guidance, and companionship to be:

AMOUNT $ 500,000

e. In accordance with the damage instruction given by the court, we find the total amount of damages suffered by Plaintiff Emily Udy for the emotional distress caused by the loss of society, guidance, counseling, and companionship to be:

AMOUNT $ 500,000

Question No. 4: Compare the negligence of the following persons and find a percentage for each. The total of the percentages must equal 100%, but the percentage for any one or more of the persons named may be zero if you find that such person was not negligent or that any negligence on the part of such person was not a cause of damage.

Monte Lyons	1 %
Standard E&S, L.L.C.	20 %
Zia Transport, Inc.	9 %
Bergstein Enterprises, Ltd.	70 %

100% TOTAL

The court will multiply the percentage of each Defendant times the Plaintiffs' total damages as found by the jury under Question No. 3. The court will then enter judgment for Plaintiffs against each defendant in the proportion of damages found as to that defendant. If the percentage found by the jury for any one defendant is zero, then the court will enter judgment for that defendant and against the Plaintiffs as to that defendant.

Question #5: Were the acts or omissions of Defendant Standard E&S, L.L.C. malicious, willful, reckless, or wanton?

Answer: YES (YES or NO)

If YES, enter the amount of punitive damages against Defendant Standard E&S, L.L.C.:

AMOUNT $ 28,000,000

Question #6: Were the acts or omissions of Defendant Zia Transport, Inc. malicious, willful, reckless, or wanton?

Answer: YES (YES or NO)

If YES, enter the amount of punitive damages against Defendant Zia Transport, Inc.:

AMOUNT $ 5,000,000

Question #7: Were the acts or omissions of Defendant Bergstein Enterprises, Ltd. malicious, willful, reckless, or wanton?

Answer: YES (YES or NO)

If YES, enter the amount of punitive damages against Defendant Bergstein Enterprises, Ltd.:

AMOUNT $ 14,000,000

Foreperson

3/20/2013

Date

HEARD ROBINS

HEARD ROBINS CLOUD & BLACK LLP

JUSTIN R. KAUFMAN

E-MAIL: jkaufman@heardrobins.com

November 30, 2012

Randal W. Roberts
Simone Roberts & Weiss P.A.
11200 Lomas Blvd NE, Suite 210
Albuquerque, NM 87112

Via E-mail & Regular Mail

Re: *Santa Fe Trust, et al. v. Standard Energy, et al.* (D-101-CV-2011-00751)
First Judicial District Court, Santa Fe County

Dear Counsel:

Thank you for participating in the mediation held before Judge Lang on November 27, 2012. It is unfortunate that we were unable to resolve this matter at that time.

The purpose of this letter is to provide your clients with a settlement demand in a final attempt to resolve this matter before trial, and to avoid the exposure to your insureds to a judgment in excess of their available insurance policy limits. To that end, please find enclosed one copy of *Plaintiffs' Rule 1-068 NMRA Offer of Settlement.*

I know that you are fully apprised of the facts of this case. Our understanding is that the total remaining policy limits are four million nine hundred ninety three thousand four hundred and fifty nine dollars ($4,993,459.00). If this is correct, then there is substantial risk to your insureds that, if this case is not resolved, that they will be exposed to a judgment well in excess of their insurance limits. Under these circumstances, a reasonable insurer would tender the insurance limits of $4,993,459.00 in order to avoid this exposure to the insureds.

Pursuant to NMRA Rule 1-068, this offer to settle will remain open for ten days.

Thank you for your cooperation in this matter.

Sincerely,

Justin R. Kaufman

EXHIBIT
B

JRK/cm

Enclosures

cc George Waddoups, Esq., w/Encl.

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

SANTA FE TRUST, INC., As Personal Representative for the ESTATE OF KEVIN UDY, Deceased; SUSAN UDY; SCOTT UDY; SARAH UDY; DEVON UDY; LANDON UDY; JOLYNN UDY; EMILY UDY; LEO UDY; and RHEA UDY,	§	No. D-101-CV-2011-00751
Plaintiffs,	§	
vs.	§	
STANDARD E&S, LLC; ZIA TRANSPORT INCORPORATED, INC.; BERGSTEIN ENTERPRISES, LTD.; and MONTE LYONS,	§	
Defendants.	§	

RULE 1-068 NMRA OFFER OF SETTLEMENT

Plaintiffs, by and through their attorneys of record, make the following Offer of Settlement to Defendants pursuant to Rule 1-068 NMRA:

Plaintiffs offer to settle their claims against Defendants Standard E&S, LLC, Zia Transport Incorporated, Inc., Bergstein Enterprises, Ltd., and Monte Lyons for the sum of $4,993,459.00. This is an offer to settle this claim in the amount of the relevant insurance policy limits of Fireman's Fund Insurance and First Mercury. This offer is made for the purposes specified in Rule 1-068 NMRA. Should Defendants choose not to accept this offer within 10 days and the jury returns a verdict in excess of this offer, it will be liable to Plaintiffs for the full amount of the jury's verdict, plus double the costs that Plaintiffs incurred from the date of this offer through the end of trial.

DATED: **November 30, 2012**

Respectfully Submitted,

HEARD, ROBINS, CLOUD & BLACK L.L.P.

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brad@robertdebry.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing has been forwarded to all counsel of record on the **30th day of November, 2012** as follows:

RANDAL W. ROBERTS
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Attorneys for Defendants

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Crum & Forster
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Eric Weiss
Claims Specialist
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Morristown, NJ 07960
Phone: (973) 490-6072
Fax: (877) 622-6534
Eric_Weiss@cfins.com

Certified Return Receipt Requested

December 19, 2012

George Waddoups, Esq.
Robert J. DeBry & Associates
4252 S. 700 E
Salt Lake City, UT 84107

Re:	**Your Clients:**	**Estate of Michael Udy**
	Policyholder:	**Standard Energy Services**
	D/L:	**03/03/2010**
	Our File No.:	**21668-1**

Dear Mr. Waddoups:

On behalf of The First Mercury Insurance Company ("First Mercury"), receipt is acknowledged of your November 30, 2012 demand to settle this claim.

At this time, First Mercury is continuing to investigate and evaluate this matter. However, our prior offer of $2,750,000, made during mediation, remains open, should you wish to discuss it.

Very truly yours,

Eric Weiss

EXHIBIT
tabbies
C

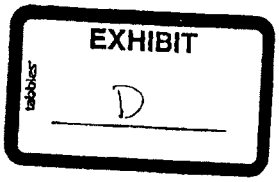
Justin Kaufman

From: Brad DeBry <BradD@RobertDebry.com>
Sent: Monday, April 01, 2013 5:25 PM
To: Justin Kaufman; Bill Robins
Cc: George Waddoups
Subject: FW: Udy v Standard - Withdrawal of all offers - Sent the moment the jury was sworn

-----Original Message-----
From: Brad DeBry
Sent: Tuesday, March 12, 2013 9:03 AM
To: Randal Roberts; Eric Weiss; Grady
Subject: Udy v Standard - Withdrawal of all offers

As we have now sworn a jury, the plaintiffs withdraw all prior settlement offers and negotiations.

Sent from my iPhone



FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

SANTA FE TRUST, INC., As Personal Representative for the ESTATE OF KEVIN UDY, Deceased; SUSAN UDY; SCOTT UDY; SARAH UDY; DEVON UDY; LANDON UDY; EMILY UDY; LEO UDY; and RHEA UDY,	§	No. D-101-CV-2011-00751
Plaintiffs,	§	
vs.	§	
STANDARD E&S, LLC; ZIA TRANSPORT INCORPORATED, INC.; BERGSTEIN ENTERPRISES, LTD.; and MONTE LYONS,	§	
Defendants.	§	

PLAINTIFFS' MOTION TO REQUIRE SUPERSEDEAS BOND

Pursuant to NMSA 1978, § 39-3-22, Plaintiffs Santa Fe Trust, Inc., as Personal Representative for the Estate of Kevin Udy, Deceased, Susan Udy, Devin Udy, Landon Udy, and Emily Udy (hereinafter "Plaintiffs") respectfully move this Court for an order requiring Defendants Standard E&S, LLC, Zia Transport, Inc., Bergstein Enterprises, Ltd., and Monte Lyons (hereinafter "Defendants") to post a Supersedeas Bond in double the amount of the outstanding Judgment. In support, Plaintiffs state as follows:

1. On April 9, 2013, this Court entered its Judgment on Jury Verdict ("the Judgment") in this case against Defendants and in favor of Plaintiffs Santa Fe Trust, Inc., as Personal Representative for the Estate of Kevin Udy, Deceased, Susan Udy, Devin Udy, Landon

Udy, and Emily Udy, in the total amount of $58,500,000.00. The Court further ordered that the judgment amount would bear interest pursuant to NMSA § 56-8-4(A) at the rate of fifteen percent (15%) per year beginning on the date the judgment was entered.

2. Currently pending before this Court are the following pleadings:

(a) Plaintiffs' Bill of Costs in the amount of $101,296.33; and

(b) Plaintiffs' Motion for Pre-Judgment Interest seeking an order granting Plaintiffs prejudgment interest on the $11,500,000.00 compensatory damage portion of the judgment entered in the case at the rate of 10% per year pursuant to NMSA § 56-8-4(B).

3. The Defendants have announced publicly and have also advised Plaintiffs' counsel that some or all of the Defendants intend to appeal this case, and such appeal will undoubtedly include an appeal of the Judgment, as well as appeal of any award by the Court of pre-judgment interest and costs.

4. Under NMSA § 39-3-22, there can be no stay of execution "unless the appellant within 60 days from entry of judgment executes a bond to the adverse party **in double the amount of the judgment complained of**, with sufficient sureties, and approved by the clerk of the district court in case of appeals." NMSA § 39-3-22 (emphasis supplied). Under this statute, the district court, for good cause shown, can allow the appellant up to 30 additional days to file the bond. There is no good cause to allow the Defendants any extension on the 60 day requirement of NMSA § 39-3-22.

5. Plaintiffs anticipate that the Defendants may seek an order under NMRA Rule 1-062, and request that the Court set the bond for some amount less than double the amount of the

Judgment. Under NMRA Rule 1-062, an appellant can obtain a stay of the execution of a judgment by giving a bond approved by the district court. "When the judgment is for the recovery of money, **the amount of the bond shall be such sum as will cover the whole amount of the judgment remaining unsatisfied, plus costs, interest and damages for delay**." NMRA Rule 1-062 (emphasis supplied).

6. In the *Grassie* case, the defendant sought a letter of credit in lieu of a bond in order to stay execution pending appeal of the $22 million judgment. *See Grassie v. Roswell Hosp. Corp.*, 144 N.M. 241 (N.M. Ct. App. 2008). The district court granted stay of the execution, denied the request for a line of credit in lieu of the bond, and, pursuant to NMSA § 39-3-22, required the defendant to post a bond in twice the amount of the judgment entered plus twice the attorneys' fees awarded. On appeal, the defendant argued that the district court erred in setting the amount of the bond at double the judgment and contended that the court should have set a lower bond amount pursuant to NMRA Rule 1-062. The Court of Appeals held that the trial court did not abuse its discretion in relying upon the mechanism in NMSA § 39-3-22 to set the bond. *Grassie*, 144 N.M. at 245. In so holding, the Court of Appeals explained that the purpose of NMSA § 39-3-22 and NMRA Rule 1-062 were consistent in that both "provide[] a means to ensure the status quo of the case pending appeal – protecting the appellee from the risk of a later uncollectible judgment and compensating the appellee for any loss resulting from the stay, while at the same time allowing the appellant to exercise the right to be free from execution for the judgment following appeal." *Id.* at 244. The Court rejected the defendant's argument that a $30 million dollar bond was adequate because the defendant's advocated amount made no accommodation for "additional damages for delay," as required by NMRA Rule 1-062(D)

beyond interest. In light of this last factor, together with the large amount of money at stake, the Court found that the district court did not abuse its discretion by setting the amount of bond to cover more than the just the amount of judgment and loss of interest. *Id.* at 245.

7. The Judgment in this case totals $58.5 million. Without an award of pre-judgment interest, the Judgment will total $84.825 million after three years of post-judgment interest at the Court-ordered rate of fifteen percent (15%). This amount is conservative because there is no certainty that any appeals of this matter will be resolved within three (3) years. Moreover, as the *Grassie* Court recognized, adequate security for accruing interest is not the only consideration. The setting of the bond amount must also take into consideration any damages that may be caused by a stay of execution, which are not always apparent at the time the stay is granted. Until such damages are actually incurred, the actual amount of damages caused by a stay pending appeal, if any, are unknown and need not be established with mathematical certainty until, and if, a surety is required to pay on the bond. Viewed in the context of an unpredictable future, NMRA Rule 1-062(D) is intended to ensure that the amount of the bond is sufficient to maintain the status quo while the case is pending on appeal. *Grassie* at 245. Given this rationale, and particularly given the substantial amount of the Judgment in this case, as in *Grassie,* this Court should find that any bond should be calculated at double the amount of the Judgment, which would total $117 million. Unless and until a bond in that amount is entered, Plaintiffs should have the right to execute on the Judgment to the extent of the outstanding balance of the Judgment, the interest thereon and costs as may be awarded.

8. Due to the nature of this motion, Plaintiffs state that this motion is presumed to be OPPOSED by Defendants.

WHEREFORE the Plaintiffs pray the Court to order the Defendants to post a properly executed Supersedeas Bond in double the amount of the Judgment, with sufficient sureties, said Supersedeas Bond conditioned on payment for the amounts finally adjudged against Defendants on the dismissal of the appeal or when the Judgment is affirmed, including payment of the full amount of the Judgment, any prejudgment interest, post-judgment interest, and all costs, including costs for the appeal, together with all additional damages for delay as may be incurred by Plaintiffs.

Respectfully Submitted,

HEARD, ROBINS, CLOUD, & BLACK, L.L.P.

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CERTIFICATE OF SERVICE

I certify that I caused a copy of this document to be served on the following persons or entities by U.S. mail on this 24th day of April, 2013.

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Oral Argument-From Both Sides Now

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