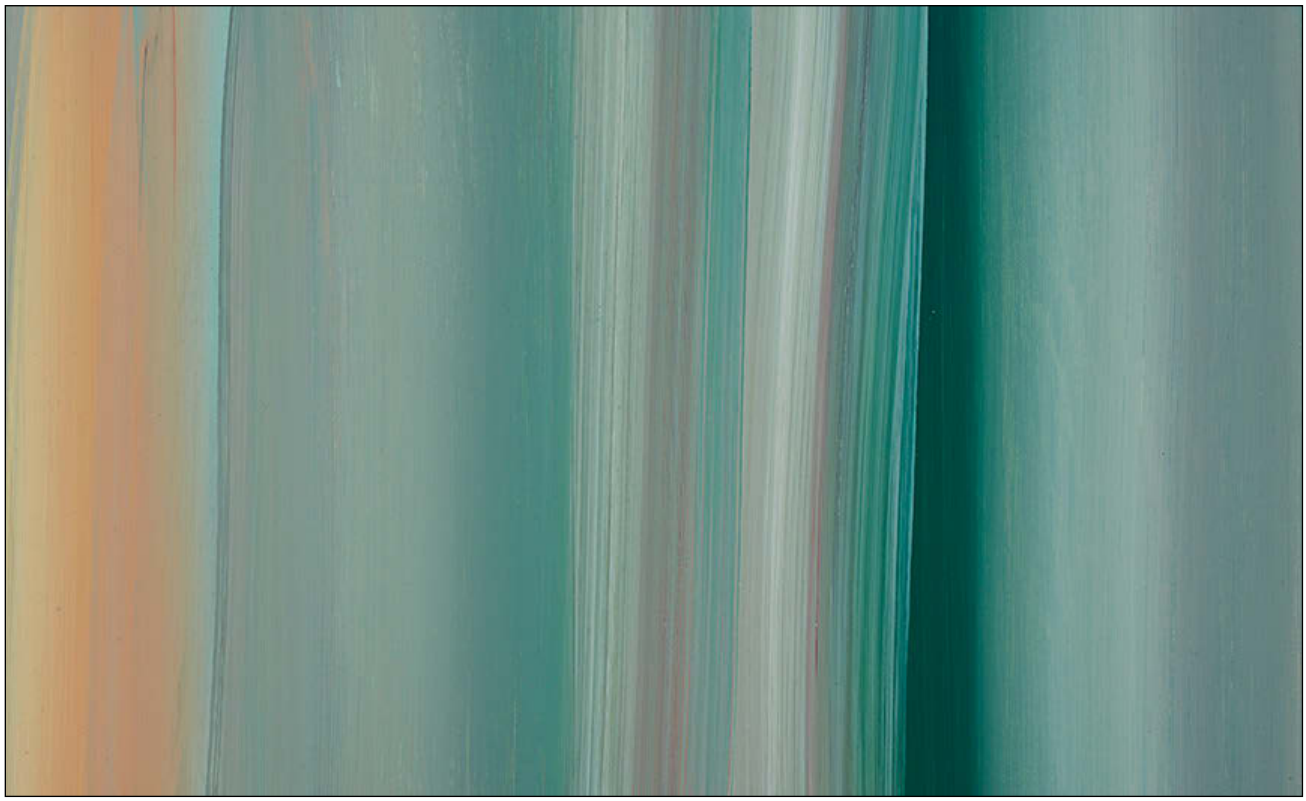
Official Publication of the State Bar of New Mexico

Bar Bulletin

January 20, 2016 • Volume 55, No. 3



Three Muses 9, by Willy Bo Richardson

Richard Levy Gallery, Albuquerque

Inside This Issue

Arturo Jaramillo Clerkship Program

History and Mission:

ARTURO JARAMILLO, the first Hispanic president of the State Bar of New Mexico, started the Summer Law Clerk Program in 1993. The program's goal was to offer law students of diverse backgrounds the opportunity to clerk in legal settings that provide a foundation for the students' law careers. Over the years, more than 200 first-year law students have participated in the program, working in the best legal environments in New Mexico. Mr. Jaramillo's vision has come to fruition as the program has seen many of its past participants go on to become some of our legal community's most influential attorneys, judges, and political leaders. The State Bar's Committee on Diversity in the Legal Profession is focused on maintaining the strength of the program and its positive influence on the diversity of the New Mexico bar.

"... I forged relationships with some of the best attorneys in their respective practice areas, received extensive feedback on assignments, and had meaningful opportunities to contribute to important cases."

Frank Davis, Associate Attorney, Freedman, Boyd, Hollander, Goldberg, Urias & Ward, P.A.

"I am grateful for the many opportunities that I had as a result of the Summer Law Clerk Program. It was far more than just a summer job. I'm thrilled that, after all these years, the Clerkship Program is still going strong."

Lisa Ortega, Partner, Rodey, Dickason, Sloan, Akin & Robb, P.A.

"This program provided me a clear understanding of what employers were seeking when hiring associate attorneys and gave me additional real life attorney work experience ..."

Mariposa Padilla-Sivage, Partner, Sutin Thayer & Browne, P.C.

How to Participate in the Arturo Jaramillo Clerkship Program:

Ensuring that this important program continues depends on the commitment of New Mexico's legal employers. If your firm or government agency is interested in participating in the program, please contact any of the individuals below.

The deadline to sign up to participate is February 1.

Mo Chavez
Chair, Arturo Jaramillo Clerkship Program
SaucedoChavez, P.C.
(505) 338-3945
mo@saucedochavez.com

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Co-Chair, State Bar of New Mexico
Committee on Diversity in the Legal Profession
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STATE BAR of NEW MEXICO

The *Bar Bulletin* (ISSN 1062-6611) is published weekly by the State Bar of New Mexico, 5121 Masthead NE, Albuquerque, NM 87109-4367. Periodicals postage paid at Albuquerque, NM. Postmaster: Send address changes to *Bar Bulletin,* PO Box 92860, Albuquerque, NM 87199-2860.

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Email: address@nmbar.org. • www.nmbar.org

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26
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28
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28
Alternative Dispute Resolution Committee,
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State Bar Workshops

January

20
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10 a.m.–1 p.m.,
Second Judicial District Court,
Albuquerque, 1-877-266-9861

27
Consumer Debt/Bankruptcy Workshop
6–9 p.m., State Bar Center, Albuquerque,
505-797-6094

February

3
Divorce Options Workshop
6–8 p.m., State Bar Center, Albuquerque,
505-797-6003

3
Civil Legal Clinic
10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

5
Civil Legal Clinic
10 a.m.–1 p.m., First Judicial District Court, Santa Fe, 1-877-266-9861

Cover Artist: Willy Bo Richardson received a Master of Fine Arts degree from Pratt Institute in 2000. He teaches painting at Santa Fe University of Art and Design and exhibits nationally. In 2011 his work was included in "70 Years of Abstract Painting" at Jason McCoy Gallery in New York, which assembled works by a selection of modern and contemporary painters, including Josef Albers, Hans Hofmann and Jackson Pollock. In 2012 he exhibited a body of watercolors at Phillips auction house in New York. His work and vision was featured on the PBS weekly arts series ¡COLORES!. He is represented by Richard Levy Gallery in Albuquerque and Turner Carroll Gallery in Santa Fe.

Notices

State Bar News

Attorney Support Groups

- Feb. 1, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (the group meets the first Monday of the month.)
- Feb. 8, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (the group meets on the second Monday of the month). To increase access, teleconference participation is now available. Dial 1-866-640-4044 and enter code 7976003#.
- March 21, 7:30 a.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (the group meets the third Monday of the month.)

For more information, contact Hilary Noskin, 505-449-7984 or Bill Stratvert, 505-242-6845.

2016 Licensing Notification

Must be Completed by Feb. 1

2016 State Bar licensing fees and certifications were due Dec. 31, 2015, and must be completed by Feb. 1 to avoid non-compliance and related late fees. Complete annual licensing requirements at www.nmbar.org. Payment by credit and debit card are available (will incur a service charge). For more information, call 505-797-6083 or email license@nmbar.org. For help logging in or other website troubleshooting, call 505-797-6086 or email aarmijo@nmbar.org. Those who have already completed their licensing requirements should disregard this notice.

Animal Law Section

Jean and Peter Ossorio Speak About the Mexican Gray Wolf

Jean and Peter Ossorio present "NEPA Days and Lobo Nights," an illustrated account of their personal involvement with the reintroduction of the Mexican gray wolf (*Canis lupus baileyi*), or, el lobo. The presentation will be noon, Jan. 22, at the State Bar Center. Jean (a retired teacher) and Peter (a retired federal prosecutor) have participated in nearly every public meeting and NEPA/ESA action since the first release of lobos in the wild in 1998. Since then they have tent-camped in New Mexico and Arizona wolf country over 350 nights and seen over 40 of these elusive, imperiled and intelligent canines. Cookies and drinks provided. R.S.V.P. to Evann Kleinschmidt at ekleinschmidt@nmbar.org.

Professionalism Tip

With respect to my clients:

I will advise my client against pursuing matters that have no merit.

Board of Bar Commissioners

Third Bar Commissioner District Vacancy

A vacancy exists in the Third Bar Commissioner District, representing Los Alamos, Rio Arriba, Sandoval and Santa Fe counties. The Board will make the appointment at its Feb. 26 meeting to fill the vacancy, with a term ending Dec. 31, 2016, until the next regular election of Commissioners. Active status members with a principal place of practice located in the Third Bar Commissioner District are eligible to apply. Applicants should plan to attend the 2016 Board meetings scheduled for May 6, July 28 (in conjunction with the State Bar of New Mexico Annual Meeting at Buffalo Thunder Resort), Sept. 30 and Dec. 14 (Santa Fe). Members interested in serving on the Board should submit a letter of interest and résumé to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 7199-2860; fax to 828-3765; or email to jconte@nmbar.org by Feb. 12.

Entrepreneurs in Community Lawyering

Now Accepting Applications from Newly Licensed Attorneys

The New Mexico State Bar Foundation announces its new legal incubator initiative, Entrepreneurs in Community Lawyering. ECL will help new attorneys to start successful and profitable, solo and small firm practices throughout New Mexico. Each year, ECL will accept three licensed attorneys with 0-3 years of practice who are passionate about starting their own solo or small firm practice. ECL is a 24 month program that will provide extensive training in both the practice of law and how to run a law practice as a successful business. ECL will provide subsidized office space, office equipment, State Bar licensing fees, CLE and mentorship fees. ECL will begin operations in October and the Bar Foundation is currently accepting applications from qualified practitioners. To view the program description, visit www.nmbar.org/nmbardocs/formembers/ECLProgramDescription.pdf. For more information, contact Stormy Ralstin at sralstin@nmbar.org.

Young Lawyers Division

Volunteers Needed for UNM Mock Interview Program

The Young Lawyers Division is seeking volunteer attorneys to serve as interviewers from 9 to 11 a.m., Jan. 30, for the annual UNM School of Law Mock Interview Program. The mock interviews and coordinated critiques of résumés assist UNM School of Law students with preparation for job interviews. Judges and attorneys from all practice areas, both public and private sectors, are needed. A brief training session will be held at 8:30 a.m. at the law school preceding the interviews. Breakfast will be provided. To volunteer, contact YLD Board Member Sean FitzPatrick, sfitzpatrickesq@gmail.com or 607-743-8500 by Jan. 22.

UNM

Law Library

Hours Through May 14

Building & Circulation	
Monday–Thursday	8 a.m.–8 p.m.
Friday	8 a.m.–6 p.m.
Saturday	10a.m.–6p.m.
Sunday	Noon–6 p.m.
Reference	
Monday–Friday	9 a.m.–6 p.m.
Saturday–Sunday	Closed

Upcoming Closures

Jan. 18 (Martin Luther King Jr. Day

Other Bars

New Mexico Defense Lawyers Association

Seeking New Members for Board of Directors

The New Mexico Defense Lawyers Association seeks interested civil defense lawyers to serve on its board of directors. Board terms are five years with quarterly meetings. Board members are expected to take an active role in the organization by chairing a committee, chairing or participating in a CLE program, contributing to *Defense News* or engaging in other duties and responsibilities as designated by the board. Those who want to be considered for a board position should send a letter of interest to NMDLA Board President,

Sean Garrett at sg@conklinfirm.com by Feb. 12.

New Mexico Chapter of the Federal Bar Association

CLE and Movie

The New Mexico Chapter of the Federal Bar Association will present its annual CLE and movie at 1 p.m., Feb. 11, at the Regal Theaters in Albuquerque. The movie will be *CitizenFour* followed by a panel discussion including Dana Gold from the Government Accountability Project and local practitioners. *CitizenFour* is the story of filmmaker Laura Poitras and journalist Glenn Greenwald's encounters with Edward Snowden as he hands over classified documents providing evidence of mass indiscriminate and illegal invasions of privacy by the National Security Agency. MCLE approval is pending. For more information, contact Kiernan Holliday at kiernanholliday@mac.com.

New Mexico Lawyers and Judges Assistance Program

Help and support are only a phone call away.

24-Hour Helpline

Attorneys/Law Students
505-228-1948 • 800-860-4914
Judges
888-502-1289
www.nmbar.org > for Members > Lawyers/Judges Asswistance

Report by Disciplinary Counsel
Disciplinary Quarterly Report

Reporting Period: October 1–December 31, 2015

Final Decisions
Final Decisions of the NM Supreme Court 1

Matter of Marcelina Y. Martinez, an unauthorized person practicing law, (Supreme Court No. S-1-SC-35210) The New Mexico Supreme Court entered an order enjoining Respondent, a non-attorney, from engaging in the unauthorized practice of law. Respondent was enjoined from preparing legal documents for other persons or entities; giving legal advice to any person or entity; acting as representative or intermediary for other persons or entities with their legal matters including, but not limited to, foreclosure matters; and using, modifying, amending, or deleting language from legal form documents for use by other persons or entities. Respondent was further ordered to pay costs to the disciplinary board.

Summary Suspensions
Total number of attorneys summarily suspended 0

Administrative Suspensions
Total number of attorneys administratively suspended 0

Disability Suspensions
Total number of attorneys placed on disability suspension 0

Charges Filed

Charges were filed against an attorney for allegations of failing to charge a reasonable fee; failing to keep proper records and failing to provide a full accounting upon request; engaging in conduct involving fraud, deceit, dishonesty, and misrepresentation; and engaging in conduct that is prejudicial to the administration of justice.

Charges were filed against an attorney for allegations of failing to provide competent representation to a client; failing to abide by the client's decision as to whether a plea would be entered; failing to represent the client diligently; and engaging in conduct prejudicial to the administration of justice.

Charges were filed against an attorney for allegations of failing to hold the property of another separately and failing to maintain complete records of all client funds.

Petitions for Reciprocal Discipline Filed
Petitions for reciprocal discipline filed 0

Petitions for Reinstatement Filed
Petitions for reinstatement filed 0

Formal Reprimands
Total number of attorneys formally reprimanded 2

Matter of John James D'Amato, Esq. (Disciplinary No. 04-2015-718) a Formal Reprimand was issued at the Disciplinary Board meeting of November 20, 2015, for the violation of Rule 16-103, failing to act with reasonable diligence and promptness in representing a client; Rule 16-115, failing to promptly disburse funds that the client was entitled to receive; and Rule 16-115(D), failing to promptly render a full accounting of client funds. The Formal Reprimand was published in the *Bar Bulletin* issued December 16, 2015.

Matter of Jason S. Montclare, Esq. (Disciplinary No. 09-2014-697) a Formal Reprimand was issued at the Disciplinary Board meeting of November 20, 2015, for the violation of Rule 16-504, sharing legal fees with a non-lawyer. The Formal Reprimand was published in the *Bar Bulletin* issued December 16, 2015.

Informal Admonitions
Total number of attorneys admonished 4

An attorney was informally admonished for entering into a business transaction with a client knowingly acquiring an ownership, possessory, security or other pecuniary interest advise to a client causing a conflict of interest in violation of Rule 16-108(A) of the Rules of Professional Conduct.

An attorney was informally admonished for failing to provide competent representation to a client and failing to act with reasonable diligence and promptness in representing a client in violation of Rules 16-101 and 16-103 of the Rules of Professional Conduct.

An attorney was informally admonished for failing to provide competent representation to a client; failing to resolve the conflict of interest between multiple clients and failing to resolve the conflict with respect to the duties to the client; and by engaging in conduct prejudicial to the administration of justice in violation of Rules 16-101, 16-107, and 16-804(D) of the rules of Professional Conduct.

An attorney was informally admonished for failing to provide competent representation to a client; failing to resolve the conflict of interest between multiple clients and failing to resolve the conflict with respect to the duties to the client; and by engaging in conduct prejudicial to the administration of justice in violation of Rules 16-101, 16-107, and 16-804(D) of the rules of Professional Conduct.

Letters of Caution
Total number of attorneys cautioned 11

Attorneys were cautioned for the following conduct: (1) harassment (two letters of caution issued); (2) general incompetence (3 letters of caution issued); (3) bank overdraft (two letters of caution issued); (4) general misrepresentation to the Court; (5) conduct prejudicial to the administration of justice; (6) overreaching/excessive fees; (7) failure to comply with Court order.

Complaints Received

Allegations	*No. of Complaints*
Trust Account Violations	3
Conflict of Interest	0
Neglect and/or Incompetence	89
Misrepresentation or Fraud	12
Relationship with Client or Court	18
Fees	4
Improper Communications	0
Criminal Activity	0
Personal Behavior	13
Other	7
Total number of complaints received	146

2015 Pro Bono Volunteer Appreciation Reception

Jeremy Faulkner, Heather Garcia and Billy Burgett

The Second Judicial District Pro Bono Committee held a volunteer appreciation reception on Oct. 15, 2015, at the Second Judicial District Court in Albuquerque. The Committee thanked the countless pro bono attorneys, judges, legal service providers, staff, law students and other volunteers who donated their time.

Hon. C. Shannon Bacon and Hon. Alan Malott presented the 2015 awards to three volunteers who have truly gone above and beyond: Pro Bono Attorney of the Year Billy Burgett, Pro Bono Volunteer of the Year Heather Garcia and Pro Bono Law Student of the Year Jeremy Faulkner.

Thank you to all the pro bono volunteers!

Volunteer Attorney Program
A Program of New Mexico Legal Aid

2015 Prosecutors Section Awards

Each year, the State Bar Prosecutors Section recognizes prosecutorial excellence through its annual awards. The 2015 awards were presented on Nov. 16 at the Hyatt Regency Tamaya Resort during the New Mexico District Attorney's Association 2015 Fall Conference.

Congratulations to the 2015 winners!

Child Abuse (Homer Campbell Award): Barbara A. Romo and Anthony Wade Long

Domestic Violence: Rebecca Duffin

Violent Crimes: Letitia Carroll Simms and Emily Maher

Drugs: Jacob Payne and Rachel Eagle

(Top row) Attorney General Hector Balderas and Prosecutors Section Board members Richard T. Wilson, Edmund E. Parea, 2015 Chair Clara Moran, 2016 Chair Ken E. Fladager and Devin Chapman and (bottom row) Awardees present Barbara A. Romo, Letitia Carroll Simms, Anthony Wade Long, Rebecca C. Duffin and Rachel Eagle

Legal Education

January

20–21 Attacking Witnesses' "I Don't Know and I Don't Remember"(two-day course)
4.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

22 Lawyer Ethics: When a Client Won't Pay Your Fees
1.0 G
National Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

27–28 Attacking the Experts' Opinion at Deposition and Trial (two-day course)
6.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

29 2015 Health Law Symposium
4.5 G, 1.0 EP
Video Replay
Center for Legal Education of NMSBF
www.nmbar.org

29 Ethicspalooza Redux—Winter 2015 Edition: Confilicts of Interest
1.0 EP
Video Replay
Center for Legal Education of NMSBF
www.nmbar.org

29 Ethicspalooza Redux—Winter 2015 Edition
Everything Old is New Again: How the Disciplinary Board Works
1.0 EP
Video Replay
Center for Legal Education of NMSBF
www.nmbar.org

29 Professionalism for the Ethical Lawyer
1.0 G
National Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

February

9 Better Not Call Saul Reprise
1.0 EP
Live Program
H. Vearle Payne Inn of Court
505-321-1461

20 Tenth Circuit Winter Meeting & Social Security Disability Practice Update
5.0 G, 1.0 EP
Live Seminar and Webcast
Center for Legal Education of NMSBF
www.nmbar.org

Writs of Certiorari

As Updated by the Clerk of the New Mexico Supreme Court

Joey D. Moya, Chief Clerk New Mexico Supreme Court
PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860

Effective January 8, 2016

Petitions for Writ of Certiorari Filed and Pending:

			Date Petition Filed
No. 35,686	State v. Romero	COA 34,264	01/07/16
No. 35,685	State v. Gipson	COA 34,552	01/07/16
No. 35,680	State v. Reed	COA 33,426	01/06/16
No. 35,682	Peterson v. LeMaster	12-501	01/05/16
No. 35,678	TPC, Inc. v. Hegarty	COA 32,165/32,492	01/05/16
No. 35,677	Sanchez v. Mares	12-501	01/05/16
No. 35,676	State v. Sears	COA 34,522	01/04/16
No. 35,675	National Roofing v. Alstate Steel	COA 34,006	01/04/16
No. 35,672	State v. Berres	COA 34,729	12/31/15
No. 35,669	Martin v. State	12-501	12/30/15
No. 35,668	State v. Marquez	COA 33,527	12/30/15
No. 35,665	Kading v. Lopez	12-501	12/29/15
No. 35,664	Martinez v. Franco	12-501	12/29/15
No. 35,657	Ira Janecka	12-501	12/28/15
No. 35,658	Bustos v. City of Clovis	COA 33,405	12/23/15
No. 35,656	Villalobos v. Villalobos	COA 32,973	12/23/15
No. 35,655	State v. Solis	COA 34,266	12/22/15
No. 35,671	Riley v. Wrigley	12-501	12/21/15
No. 35,652	Tennyson v. Santa Fe Dealership	COA 33,657	12/18/15
No. 35,650	State v. Abeyta	COA 34,705	12/18/15
No. 35,649	Miera v. Hatch	12-501	12/18/15
No. 35,645	State v. Hart-Omer	COA 33,829	12/17/15
No. 35,644	State v. Burge	COA 34,769	12/16/15
No. 35,642	Rabo Agrifinance Inc. v. Terra XXI	COA 34,757	12/16/15
No. 35,641	Garcia v. Hatch Valley Public Schools	COA 33,310	12/16/15
No. 35,661	Benjamin v. State	12-501	12/16/15
No. 35,654	Dimas v. Wrigley	COA 35,654	12/11/15
No. 35,635	Robles v. State	12-501	12/10/15
No. 35,674	Bledsoe v. Martinez	12-501	12/09/15
No. 35,653	Pallares v. Martinez	12-501	12/09/15
No. 35,637	Lopez v. Frawner	12-501	12/07/15
No. 35,268	Saiz v. State	12-501	12/01/15
No. 35,617	State v. Alanazi	COA 34,540	11/30/15
No. 35,612	Torrez v. Mulheron	12-501	11/23/15
No. 35,599	Tafoya v. Stewart	12-501	11/19/15
No. 35,593	Quintana v. Hatch	12-501	11/06/15
No. 35,588	Torrez v. State	12-501	11/04/15
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No. 35,576	Oakleaf v. Frawner	12-501	10/23/15
No. 35,575	Thompson v. Frawner	12-501	10/23/15
No. 35,555	Flores-Soto v. Wrigley	12-501	10/09/15
No. 35,554	Rivers v. Heredia	12-501	10/09/15
No. 35,540	Fausnaught v. State	12-501	10/02/15
No. 35,523	McCoy v. Horton	12-501	09/23/15
No. 35,522	Denham v. State	12-501	09/21/15
No. 35,515	Saenz v. Ranack Constructors	COA 32,373	09/17/15
No. 35,495	Stengel v. Roark	12-501	08/21/15
No. 35,480	Ramirez v. Hatch	12-501	08/20/15
No. 35,479	Johnson v. Hatch	12-501	08/17/15
No. 35,474	State v. Ross	COA 33,966	08/17/15
No. 35,422	State v. Johnson	12-501	08/10/15
No. 35,466	Garcia v. Wrigley	12-501	08/06/15
No. 35,454	Alley v. State	12-501	07/29/15
No. 35,440	Gonzales v. Franco	12-501	07/22/15
No. 35,422	State v. Johnson	12-501	07/17/15
No. 35,416	State v. Heredia	COA 32,937	07/15/15
No. 35,415	State v. McClain	12-501	07/15/15
No. 35,374	Loughborough v. Garcia	12-501	06/23/15
No. 35,372	Martinez v. State	12-501	06/22/15
No. 35,370	Chavez v. Hatch	12-501	06/15/15
No. 35,369	Serna v. State	12-501	06/15/15
No. 35,353	Collins v. Garrett	COA 34,368	06/12/15
No. 35,335	Chavez v. Hatch	12-501	06/03/15
No. 35,371	Pierce v. Nance	12-501	05/22/15
No. 35,266	Guy v. N.M. Dept. of Corrections	12-501	04/30/15
No. 35,261	Trujillo v. Hickson	12-501	04/23/15
No. 35,159	Jacobs v. Nance	12-501	03/12/15
No. 35,106	Salomon v. Franco	12-501	02/04/15
No. 35,097	Marrah v. Swisstack	12-501	01/26/15
No. 35,099	Keller v. Horton	12-501	12/11/14
No. 35,068	Jessen v. Franco	12-501	11/25/14
No. 34,937	Pittman v. N.M. Corrections Dept.	12-501	10/20/14
No. 34,932	Gonzales v. Sanchez	12-501	10/16/14
No. 34,907	Cantone v. Franco	12-501	09/11/14
No. 34,680	Wing v. Janecka	12-501	07/14/14
No. 34,777	State v. Dorais	COA 32,235	07/02/14
No. 34,790	Venie v. Velasquz	COA 33,427	06/27/14
No. 34,775	State v. Merhege	COA 32,461	06/19/14
No. 34,706	Camacho v. Sanchez	12-501	05/13/14
No. 34,563	Benavidez v. State	12-501	02/25/14
No. 34,303	Gutierrez v. State	12-501	07/30/13
No. 34,067	Gutierrez v. Williams	12-501	03/14/13
No. 33,868	Burdex v. Bravo	12-501	11/28/12
No. 33,819	Chavez v. State	12-501	10/29/12
No. 33,867	Roche v. Janecka	12-501	09/28/12
No. 33,539	Contreras v. State	12-501	07/12/12
No. 33,630	Utley v. State	12-501	06/07/12

Certiorari Granted but Not Yet Submitted to the Court:

(Parties preparing briefs)			Date Writ Issued
No. 33,725	State v. Pasillas	COA 31,513	09/14/12
No. 33,877	State v. Alvarez	COA 31,987	12/06/12
No. 33,930	State v. Rodriguez	COA 30,938	01/18/13
No. 34,363	Pielhau v. State Farm	COA 31,899	11/15/13
No. 34,274	State v. Nolen	12-501	11/20/13
No. 34,443	Aragon v. State	12-501	02/14/14
No. 34,522	Hobson v. Hatch	12-501	03/28/14
No. 34,582	State v. Sanchez	COA 32,862	04/11/14
No. 34,694	State v. Salazar	COA 33,232	06/06/14
No. 34,669	Hart v. Otero County Prison	12-501	06/06/14
No. 34,650	Scott v. Morales	COA 32,475	06/06/14
No. 34,784	Silva v. Lovelace Health Systems, Inc.	COA 31,723	08/01/14
No. 34,812	Ruiz v. Stewart	12-501	10/10/14
No. 34,830	State v. Mier	COA 33,493	10/24/14
No. 34,929	Freeman v. Love	COA 32,542	12/19/14
No. 35,063	State v. Carroll	COA 32,909	01/26/15
No. 35,016	State v. Baca	COA 33,626	01/26/15
No. 35,130	Progressive Ins. v. Vigil	COA 32,171	03/23/15
No. 35,101	Dalton v. Santander	COA 33,136	03/23/15
No. 35,148	El Castillo Retirement Residences v. Martinez	COA 31,701	04/03/15
No. 35,198	Noice v. BNSF	COA 31,935	05/11/15
No. 35,183	State v. Tapia	COA 32,934	05/11/15
No. 35,145	State v. Benally	COA 31,972	05/11/15
No. 35,121	State v. Chakerian	COA 32,872	05/11/15
No. 35,116	State v. Martinez	COA 32,516	05/11/15
No. 34,949	State v. Chacon	COA 33,748	05/11/15
No. 35,298	State v. Holt	COA 33,090	06/19/15
No. 35,297	Montano v. Frezza	COA 32,403	06/19/15
No. 35,296	State v. Tsosie	COA 34,351	06/19/15
No. 35,286	Flores v. Herrera	COA 32,693/33,413	06/19/15
No. 35,255	State v. Tufts	COA 33,419	06/19/15
No. 35,249	Kipnis v. Jusbasche	COA 33,821	06/19/15
No. 35,214	Montano v. Frezza	COA 32,403	06/19/15
No. 35,213	Hilgendorf v. Chen	COA 33056	06/19/15
No. 35,279	Gila Resource v. N.M. Water Quality Control Comm.	COA 33,238/33,237/33,245	07/13/15
No. 35,289	NMAG v. N.M. Water Quality Control Comm.	COA 33,238/33,237/33,245	07/13/15
No. 35,290	Olson v. N.M. Water Quality Control Comm.	COA 33,238/33,237/33,245	07/13/15
No. 35,349	Phillips v. N.M. Taxation and Revenue Dept.	COA 33,586	07/17/15
No. 35,302	Cahn v. Berryman	COA 33,087	07/17/15
No. 35,318	State v. Dunn	COA 34,273	08/07/15
No. 35,386	State v. Cordova	COA 32,820	08/07/15
No. 35,278	Smith v. Frawner	12-501	08/26/15
No. 35,398	Armenta v. A.S. Homer, Inc.	COA 33,813	08/26/15
No. 35,427	State v. Mercer-Smith	COA 31,941/28,294	08/26/15
No. 35,446	State Engineer v. Diamond K Bar Ranch	COA 34,103	08/26/15
No. 35,451	State v. Garcia	COA 33,249	08/26/15
No. 35,438	Rodriguez v. Brand West Dairy	COA 33,104/33,675	08/31/15
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No. 35,499	Romero v. Ladlow Transit Services	COA 33,032	09/25/15
No. 35,456	Haynes v. Presbyterian Healthcare Services	COA 34,489	09/25/15
No. 35,437	State v. Tafoya	COA 34,218	09/25/15
No. 35,395	State v. Bailey	COA 32,521	09/25/15

Certiorari Granted and Submitted to the Court:

(Submission Date = date of oral argument or briefs-only submission)			Submission Date
No. 33,969	Safeway, Inc. v. Rooter 2000 Plumbing	COA 30,196	08/28/13
No. 33,884	Acosta v. Shell Western Exploration and Production, Inc.	COA 29,502	10/28/13
No. 34,093	Cordova v. Cline	COA 30,546	01/15/14
No. 34,287	Hamaatsa v. Pueblo of San Felipe	COA 31,297	03/26/14
No. 34,613	Ramirez v. State	COA 31,820	12/17/14
No. 34,798	State v. Maestas	COA 31,666	03/25/15
No. 34,630	State v. Ochoa	COA 31,243	04/13/15
No. 34,789	Tran v. Bennett	COA 32,677	04/13/15
No. 34,997	T.H. McElvain Oil & Gas v. Benson	COA 32,666	08/24/15
No. 34,993	T.H. McElvain Oil & Gas v. Benson	COA 32,666	08/24/15
No. 34,726	Deutsche Bank v. Johnston	COA 31,503	08/24/15
No. 34,826	State v. Trammel	COA 31,097	08/26/15
No. 34,866	State v. Yazzie	COA 32,476	08/26/15
No. 35,035	State v. Stephenson	COA 31,273	10/15/15
No. 35,478	Morris v. Brandenburg	COA 33,630	10/26/15
No. 34,728	Martinez v. Bravo	12-501	12/14/15
No. 35,248	AFSCME Council 18 v. Bernalillo County Comm.	COA 33,706	01/11/16

Opinion on Writ of Certiorari:

			Date Opinion Filed
No. 34,146	Madrid v. Brinker Restaurant	COA 31,244	12/10/15
No. 35,049	State v. Surratt	COA 32,881	12/10/15

Writ of Certiorari Quashed:

			Date Order Filed
No. 34,946	State v. Kuykendall	COA 32,612	12/04/15
No. 34,945	State v. Kuykendall	COA 32,612	12/04/15

Petition for Writ of Certiorari Denied:

			Date Order Filed
No. 35,432	Castillo v. Macias	12-501	01/07/16
No. 35,399	Lopez v. State	12-501	01/07/16
No. 35,651	Bustos v. City of Clovis	COA 33,405	01/05/16
No. 35,643	State v. Orozco	COA 34,665	01/05/16
No. 35,639	State v. Kenneth	COA 33,281	01/05/16
No. 35,636	AFSCME Council 18 v. State	COA 34,144	01/05/16
No. 35,632	State v. Terrazas	COA 33,241	01/05/16
No. 35,627	State v. James	COA 34,413	01/05/16
No. 35,626	State v. Garduno	COA 34,355	01/05/16
No. 35,624	State v. Depperman	COA 33,871	01/05/16
No. 35,623	State v. James	COA 34,549	01/05/16
No. 35,622	State v. Costelon	COA 34,265	01/05/16
No. 35,621	State v. Bejarano	COA 34,439	01/05/16
No. 35,620	State v. Sandoval	COA 33,108	01/05/16
No. 35,561	State v. Scott C.	COA 33,891/34,220/34,221	01/05/16
No. 35,602	State v. Astorga	COA 32,374	12/30/15
No. 35,615	State v. Mary S.	COA 33,905	12/22/15
No. 35,613	State v. Archuleta	COA 34,699	12/22/15
No. 35,606	State v. Romero	COA 33,376	12/22/15
No. 35,605	State v. Sertuche	COA 34,579	12/22/15
No. 35,598	Fenner v. N.M. Taxation and Revenue Dept.	COA 34,365	12/22/15
No. 35,549	Centex v. Worthgroup Architects	COA 32,331	12/22/15
No. 35,375	Martinez v. State	12-501	12/22/15
No. 35,271	Cunningham v. State	12-501	12/22/15
No. 35,604	State v. Wilson	COA 34,649	12/17/15
No. 35,603	State v. County of Valencia	COA 33,903	12/17/15
No. 35,596	State v. Lucero	COA 34,360	12/07/15
No. 35,595	State v. Axtolis	COA 33,664	12/07/15
No. 35,594	State v. Hernandez	COA 33,156	12/07/15
No. 35,591	State v. Anderson	COA 32,663	12/07/15
No. 35,587	State v. Vannatter	COA 34,813	12/07/15
No. 35,585	State v. Parra	COA 34,577	12/07/15
No. 35,584	State v. Hobbs	COA 32,838	12/07/15
No. 35,582	State v. Abeyta	COA 33,485	12/07/15
No. 35,580	State v. Cuevas	COA 32,757	12/07/15
No. 35,579	State v. Harper	COA 34,697	12/07/15
No. 35,578	State v. McDaniel	COA 31,501	12/02/15
No. 35,573	Greentree Solid Waste v. County of Lincoln	COA 33,628	12/02/15
No. 35,509	Bank of New York v. Romero	COA 33,988	12/02/15

Opinions

As Updated by the Clerk of the New Mexico Court of Appeals

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Effective January 8, 2016

Published Opinions

No. 34320	11th Jud Dist San Juan JQ-12-10, CYFD v NATHAN H (affirm)	1/6/2016

Unublished Opinions

No. 34696	6th Jud Dist Hidalgo CR-13-53, STATE v E CARMONA (affirm)	1/4/2016
No. 34338	6th Jud Dist Luna CR-12-265, STATE v J OROZCO-LUJAN (affirm)	1/5/2016
No. 34552	12th Jud Dist Otero CR-06-679, STATE v R GIPSON (dismiss)	1/5/2016
No. 34394	2nd Jud Dist Bernalillo CR-08-5089, CR-09-1404, CR-07-45, STATE v A GRIEGO (affirm)	1/5/2016
No. 34714	2nd Jud Dist Bernalillo CR-13-5612, STATE v D ANGULO (reverse and remand)	1/5/2016
No. 34164	6th Jud Dist Grant CR-14-14, STATE v H DEES (affirm)	1/6/2016
No. 34603	11th Jud Dist San Juan LR-14-62, STATE v N COLEMAN (affirm)	1/6/2016
No. 34848	1st Jud Dist Santa Fe CV-15-906, K JACOBSON v C CONGER (affirm)	1/6/2015
No. 34602	11th Jud Dist San Juan CR-14-100, STATE v D LOPEZ (affirm)	1/6/2016
No. 34637	4th Jud Dist San Miguel CV-14-107, R BUSTAMANTE v LVNV LLC (dismiss)	1/6/2015
No. 34898	2nd Jud Dist Bernalillo CV-08-11-38, ROCK SCAPES v RVC (dismiss)	1/6/2015
No. 34834	2nd Jud Dist Bernalillo CV-12-877, L BENAVIDEZ v BOA (affirm)	1/7/2016
No. 34852	12th Jud Dist Otero CR-12-584, STATE v S JACKSON (dismiss)	1/7/2016

Slip Opinions for Published Opinions may be read on the Court's website:
http://coa.nmcourts.gov/documents/index.htm

Clerk's Certificates

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Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

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Effective January 20, 2016

Pending Proposed Rule Changes Open for Comment:

Comment Deadline

None to report at this time.

Recently Approved Rule Changes Since Release of 2015 NMRA:

For 2014 year-end rule amendments that became effective December 31, 2014, and which now appear in the 2015 NMRA, please see the November 5, 2014, issue of the Bar Bulletin *or visit the New Mexico Compilation Commission's website at http://www.nmcompcomm.us/nmrules/NMRuleSets.aspx.*

To view all pending proposed rule changes (comment period open or closed), visit the New Mexico Supreme Court's website at http://nmsupremecourt.nmcourts.gov. To view recently approved rule changes, visit the New Mexico Compilation Commission's website at http://www.nmcompcomm.us.

From the New Mexico Court of Appeals

Opinion Number: 2015-NMCA-101

Nos. 32,605 & 32,606, (filed March 19, 2015)

FERNANDO GALLEGOS,
Plaintiff-Appellant,
v.
ELDO FREZZA, M.D.,
Defendant-Appellee,
and
PRESBYTERIAN HEALTH PLAN, INC.,
A New Mexico Domestic For-Profit Corporation,
Defendant

Consolidated with

NELLIE GONZALES,
Plaintiff-Appellant,
v.
ELDO FREZZA, M.D.,
Defendant-Appellee,
and
PRESBYTERIAN HEALTH PLAN, INC.,
A New Mexico Domestic For-Profit Corporation,
Defendant

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
SARAH M. SINGLETON, District Judge

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Opinion

Michael D. Bustamante, Judge

{1} Plaintiffs Nellie Gonzales and Fernando Gallegos appeal the district court's dismissal of their medical malpractice suit against Dr. Eldo Frezza, a Texas resident, for lack of personal jurisdiction. On appeal, we examine whether Dr. Frezza has sufficient contacts with the State of New Mexico to permit the state courts to assert either general or specific personal jurisdiction over him. We conclude that most of the asserted contacts with this state are insufficient to establish general jurisdiction. We remand for further proceedings, however, because the record on appeal is insufficient to address whether personal jurisdiction exists based on an arrangement between New Mexico Presbyterian Health Plan and Texas Tech Physicians Associates through which Dr. Frezza was referred New Mexico residents for care.

I. BACKGROUND

{2} After undergoing bariatric surgery, New Mexico residents Nellie Gonzales and Fernando Gallegos (collectively, Plaintiffs) sued Dr. Eldo Frezza for medical malpractice and Presbyterian Health Plan (Presbyterian) for breach of contract and negligent referral. Both surgeries took place in Lubbock, Texas at the Texas Tech University Health Sciences Center (the Center). Dr. Frezza was an employee of the Center, which is a governmental unit of the State of Texas. *See Tex. Tech Univ. Health Scis. Ctr. v. Ward*, 280 S.W.3d 345, 348 (Tex. App. 2008) (stating that the Center is a governmental unit).

{3} Both Plaintiffs were employees of the State of New Mexico and covered by Presbyterian. When they sought insurance coverage for the bariatric procedure, they were directed to Dr. Frezza by Presbyterian. No other bariatric surgeons were in the Presbyterian network at that time.

{4} Dr. Frezza moved for dismissal based on the lack of personal jurisdiction and Plaintiffs' failure to state a claim. *See* Rule 1-012(B)(2), (6) NMRA. After a hearing at which it considered documentary evidence, the district court found that it did not have personal jurisdiction over Dr. Frezza and dismissed the complaint. The district court did not rule on Dr. Frezza's other motion. Plaintiffs appealed. Plaintiffs also filed a motion for reconsideration in the district court under Rule 1-060(B)(6) NMRA. Such motion "does not affect the finality of a judgment or suspend its operation." *Id.* As of the time that briefs were submitted, the district court had not ruled on the motion for reconsideration. Additional facts are provided as pertinent to our discussion.

{5} We note that these cases are two of three presently before the Court of Appeals that are based on a similar set of facts. *See Montaño v. Frezza,* COA No. 32,403. In *Montaño*, filed concurrently, we hold that the Second Judicial District Court did not err in concluding that application of Texas law would violate New Mexico public policy and denying Dr. Frezza's motion to dismiss for failure to state a claim.

II. DISCUSSION

A. The Law of Personal Jurisdiction

{6} The question before us on appeal is whether the district court properly concluded that it could not fairly exert

jurisdiction over Dr. Frezza because he did not have sufficient contacts with New Mexico. *See Zavala v. El Paso Cnty. Hosp. Dist.*, 2007-NMCA-149, ¶ 10, 143 N.M. 36, 172 P.3d 173 ("[F]or purposes of personal jurisdiction, we . . . focus on . . . whether [the defendants] had the requisite minimum contacts with New Mexico to satisfy due process."). "[T]he minimum contacts required for the state to assert personal jurisdiction over a defendant depends on whether the jurisdiction asserted is general (all-purpose) or specific (case-linked)." *Sproul v. Rob & Charlies, Inc.*, 2013-NMCA-072, ¶ 9, 304 P.3d 18. More specifically, "[a] state exercises general jurisdiction over a nonresident defendant when its affiliations with the state are so continuous and systematic as to render it essentially at home in the forum state." *Id.* ¶ 12 (alterations, internal quotation marks, and citation omitted). Specific jurisdiction may apply "if [a] defendant's contacts do not rise to the level of general jurisdiction, but the defendant nevertheless purposefully established contact with New Mexico." *Id.* ¶ 16 (internal quotation marks and citation omitted). "In contrast to general, all-purpose jurisdiction, specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011) (internal quotation marks and citation omitted). In analyzing a defendant's contacts with New Mexico, our focus is on the "defendant's activities which . . . provide the basis for personal jurisdiction, not the acts of other defendants or third parties." *Visarraga v. Gates Rubber Co.*, 1986-NMCA-021, ¶ 18, 104 N.M. 143, 717 P.2d 596.

{7} "Once it has been decided that a defendant purposefully established minimum contacts within the forum [s]tate, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (internal quotation marks and citation omitted). Thus, as part of the overall analysis of whether exercise of jurisdiction would comport with constitutional due process, we may consider "the burden on the defendant, the forum [s]tate's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several [s]tates in furthering fundamental substantive social policies." *Id.* (internal quotation marks and citation omitted).

B. Standard of Review

{8} Here, the district court concluded that it had neither general nor specific jurisdiction over Dr. Frezza. We review this conclusion de novo. *Cronin v. Sierra Med. Ctr.*, 2000-NMCA-082, ¶ 10, 129 N.M. 521, 10 P.3d 845. Our approach to review was stated succinctly in *Cronin:*

> If[] . . . a district court bases its ruling upon the parties' pleadings and affidavits, the applicable standard of review largely mirrors the standard that governs appeals from the award or denial of summary judgment. In this respect, both a district court and this appellate court must construe the pleadings and affidavits in the light most favorable to the complainant. The complainant need only make a prima facie showing that personal jurisdiction exists when a district court does not hold an evidentiary hearing.

Id. (citations omitted).

{9} Although only a prima facie showing is required, "[w]hen a party contests the existence of personal jurisdiction under Rule 1-012(B)(2) and accompanies its motion with affidavits or depositions, . . . the party resisting such motion may not stand on its pleadings and must come forward with affidavits or other proper evidence detailing specific facts" supporting jurisdiction. *Doe v. Roman Catholic Diocese of Boise, Inc.*, 1996-NMCA-057, ¶ 10, 121 N.M. 738, 918 P.2d 17; *see State ex rel. Anaya v. Columbia Research Corp.*, 1978-NMSC-073, ¶ 8, 92 N.M. 104, 583 P.2d 468 (holding that the state failed to establish personal jurisdiction over the defendant when it did not proffer proof of the jurisdictional facts alleged in its complaint after the defendant challenged them).

C. Plaintiffs' Allegations

{10} Given this standard of review, we set out Plaintiffs' allegations in some detail. Here, Plaintiffs made the following assertions:

> 2. [Dr. Frezza] is licensed to practice medicine in the State of New Mexico[;]
> . . . .
> 6. Plaintiff[s'] cause[s] of action arise[] from Dr. Frezza's and Presbyterian's transaction of business within the State of New Mexico through which Dr. Frezza and Presbyterian undertook to encourage New Mexico citizens to travel to Lubbock, Texas where they would receive bariatric surgery from Dr. Frezza[;]
> 7. Dr. Frezza used a combination of advertising in New Mexico, testimonials from former New Mexican patients, and a special relationship with Presbyterian to encourage New Mexico residents to seek treatment from him . . . [;]
> 8. Dr. Frezza encouraged his patients to use his website to provide testimonials, prominently noting their status as New Mexico residents, in order to encourage other New Mexico residents to seek treatment from him[;]
> 9. Dr. Frezza used his website to reach New Mexico residents . . . [;]
> 10. Dr. Frezza's advertising in New Mexico . . . and the special relationship he developed with Presbyterian were successful efforts undertaken by [him] to secure patients from New Mexico, which constitute[s] the transaction of business within the [s]tate[;]
> . . . .
> 12. Dr. Frezza . . . on numerous occasions traveled to Santa Fe and saw or treated patients during the trip . . . [;]
> 13. On information and belief, Dr. Frezza owns six tracts of real property in the State of New Mexico, County of Taos, and is therefore also subject to general jurisdiction in . . . New Mexico[;]
> 14. [Two] of many New Mexico citizens who learned of Dr. Frezza through his advertising and [were] told by Presbyterian that Dr. Frezza was the only "in network" bariatric surgeon from whom [they] could receive treatment [were P]laintiffs, who traveled to Lubbock, Texas for surgery by Dr. Frezza[;]
> 15. [Plaintiff[s'] causes of action arise[] directly from Dr.

Frezza's transaction of business within the State of New Mexico.

{11} Thus, Plaintiffs asserted that Dr. Frezza had four types of contact with New Mexico: (1) a website, (2) a New Mexico medical license, (3) ownership of property in New Mexico, and (4) a relationship with Presbyterian. On appeal, they also argue that a book by Dr. Frezza called *The Business of Surgery*, in which the author discusses strategies for negotiating beneficial managed care agreements and which is available in New Mexico, provides another contact with this state. In support of these allegations, Plaintiffs offered a print out of Dr. Frezza's website, selected pages from Dr. Frezza's book, and copies of the deeds to property in New Mexico owned by Dr. Frezza.

D. Dr. Frezza's Affidavits

{12} Dr. Frezza challenged Plaintiffs' jurisdictional assertions by presenting his own affidavit as well as an affidavit by Lori Velten, the Managing Director of Provider-Payor Relations at the Center. In addition to these affidavits, Dr. Frezza provided a copy of the "[s]pecialty [s]ervices [a]greement" (the agreement) between Presbyterian and Texas Tech Physicians Associates (TTPA), an organization established by the Center to handle managed care contracting.

{13} In his affidavit, Dr. Frezza stated that he was a "participating provider" with Presbyterian and that he "did not solicit patients from the State of New Mexico [but] treated several New Mexico residents who traveled to Texas by virtue of [his] status as a participating provider with . . . Presbyterian." He stated that he "ha[s] never practiced medicine in the State of New Mexico" and "never provided care or treatment to any of [his] patients in New Mexico." He stated that he "did not engage in any advertising activities that were directed at residents of New Mexico" and that "[he] was unaware of any advertising activities by [the Center] that were undertaken in New Mexico." Finally, he stated that he "did not personally seek to become credentialed with . . . Presbyterian. Rather, [TTPA] was credentialed with . . . Presbyterian. As a member of that group, [he] was required to submit a credentialing application to . . . Presbyterian."

{14} Ms. Velten stated in her affidavit that "TTPA decides what insurance will be accepted by [TTPA] physicians and health care providers" and that Dr. Frezza "did not have the authority to decide which insurance he would or would not accept." She also stated that Dr. Frezza "was subject to the [a]greement [with Presbyterian]." Finally, she stated, "As an employee of [the Center], and contracted with TTPA, Dr. Frezza was requested to submit a credentialing application to [the Center] and TTPA pursuant to the separate delegated credentialing agreement."

E. Analysis

{15} Plaintiffs argue that New Mexico has both general and specific jurisdiction over Dr. Frezza. Our next step, therefore, is to examine the alleged bases for each to see whether they establish the contacts necessary for jurisdiction. Consistent with our standard of review, we compare Plaintiffs' complaints with the evidence submitted by Dr. Frezza to see if Plaintiffs' assertions of jurisdiction were challenged. *See Plumbers Specialty Supply Co. v. Enter. Prods. Co.*, 1981-NMCA-083, ¶ 9, 96 N.M. 517, 632 P.2d 752 (examining which of the alternate bases for jurisdiction were challenged and holding that "[i]nasmuch as one ground of alleged jurisdiction was not challenged, . . . the trial court did not err in [denying the defendant's motion to dismiss and request for an evidentiary hearing]"). We address general jurisdiction first.

1. General Jurisdiction

{16} Plaintiffs argue that Dr. Frezza's website, medical license, book, property ownership, and agreement with Presbyterian are contacts sufficiently "continuous and systematic" to give New Mexico general jurisdiction over Dr. Frezza. *See Zavala*, 2007-NMCA-149, ¶ 12. We examine each assertion in turn. We conclude that none of the first four bases is sufficient to establish general jurisdiction. We also conclude that there are factual questions related to the agreement with Presbyterian and that resolution of those questions is a prerequisite to determining whether the agreement is a sufficient contact with New Mexico.

Website

{17} "Establishment of a passive website that can be viewed internationally is not sufficient to support general personal jurisdiction absent some showing that the website targeted New Mexico." *Id.* ¶ 20. Plaintiffs argue that Dr. Frezza's website targeted New Mexico residents by listing his New Mexico medical license and including testimonials by New Mexico residents, and that it was not merely passive because it "encouraged" visitors to submit testimonials through the website. We disagree.

{18} First, the inclusion of Dr. Frezza's licensure status and testimonials by New Mexico residents does not by itself indicate that the website targeted New Mexico. Dr. Frezza's website also indicated that he was licensed by Texas, Illinois, and Pennsylvania. Statement of the fact that he held those licenses does not target residents of those states because (1) all that is required for Dr. Frezza to practice in Texas is a Texas license; and (2) there is no indication in the record that the requirements for a New Mexico license differ from those for a Texas license such that a doctor with a New Mexico license would be more attractive to a New Mexico resident. *Cf. Schexnayder v. Daniels*, 187 S.W.3d 238, 249 (Tex. App. 2006) (stating that a website that included the defendant's "biography, credentials, and job description" was "informational in nature"); *Advance Petroleum Serv., Inc. v. Cucullu*, 614 So. 2d 878, 880 (La. Ct. App. 1993) (holding that listing a Louisiana law license on a Texas lawyer's letterhead is not an advertisement targeted to Louisiana clients and instead "should be considered merely a listing of professional accomplishment"). Similarly, testimonials on the website may be read by any visitor to the site and are equally persuasive regardless of the submitter's state of residence. In other words, the fact that a testimonial was written by a New Mexico resident does not necessarily make it particularly compelling to other New Mexicans. In addition, there is nothing about the site that specifically solicits testimonials by New Mexico patients. *Cf. Snowney v. Harrah's Entm't, Inc.*, 112 P.3d 28, 34 (Cal. 2005) ("By touting the proximity of their hotels to California and providing driving directions from California to their hotels, [the] defendants' [w]eb site specifically targeted residents of California.").

{19} Plaintiffs rely on *Silver v. Brown*, 382 F. App'x 723, 730 (10th Cir. 2010), to argue that an assessment of whether the website targeted New Mexico residents hinges on "not who *could* access the site, but who is most likely to—here, patients considering surgery by [Dr. Frezza]." In that case, after a business transaction between Silver and Brown went sour, Brown created a blog called "A Special Report on David Silver and [Silver's company]" on which he warned other companies against doing business with Silver and called Silver a thief. *Id.* at 725. The court rejected the lower court's determination that the blog did not target New Mexico, stating that the district court's "analysis disregard[ed] the ubiquitous nature of search engines." *Id.* at 730. It concluded that because of "sophisticated" search engines, "it is becoming .

. . irrelevant . . . how many worldwide or nationwide internet connections there are . . . because . . . the people that are searching for information on *this* David Silver are the ones who are going to end up viewing Mr. Brown's blog." *Id.* In addition, there was evidence that Brown purposefully sought to "optimiz[e]" the site so that it would be easier for New Mexico residents to find using a search engine. *Id.* Since it was clear that Brown intended the impact of the blog to be felt in New Mexico, the court concluded that the blog targeted New Mexico. *Id.* (stating that "[a]ctions that are performed for the very purpose of having their consequences felt in the forum state are more than sufficient to support a finding" that they targeted the forum state. (internal quotation marks and citation omitted)). The court held that specific personal jurisdiction over Brown was proper. *Id.* at 731.

{20} *Silver* is inapposite. There the court was considering whether the blog was sufficient to permit specific, not general, jurisdiction. *Id.* at 728. Thus the analysis necessarily addressed whether the tortious conduct arose out of the contact with the forum state, i.e., the blog. Here, the issue is whether Dr. Frezza's contacts with New Mexico through the website are continuous and systematic. As discussed, the standards for these types of personal jurisdiction are different.

{21} In addition, the *Silver* court noted that the blog "was about a New Mexico resident and a New Mexico company [and] complained of . . . Silver's . . . actions in the failed business deal [which] occurred mainly in New Mexico." *Id.* at 729-30. It also noted that "Brown had knowledge that the brunt of the injury to . . . Silver would be felt in New Mexico." *Id.* at 730. These facts indicated that Brown "expressly aimed his blog at New Mexico." *Id.* at 729. The mere listing of a New Mexico medical license and inclusion of testimonials by New Mexico residents are simply not of the same quality and do not demonstrate that Dr. Frezza targeted this state.

{22} Second, the website is not sufficiently interactive. "[I]mplicit in 'interactive' activity is the exchange of information between parties." *Fenn v. Mleads Enters., Inc.*, 2006 UT 8, ¶ 21, 137 P.3d 706; *see Merriam-Webster Dictionary,* http://www.merriam-webster.com/dictionary/interactive (last visited Dec. 2, 2014) (defining "interactive" as "mutually or reciprocally active" or "involving the actions or input of a user"). Here, the submission of testimonials through the website was a one-way process. *Cf. Sublett v. Wallin*, 2004-NMCA-089, ¶ 30, 136 N.M. 102, 94 P.3d 845 (holding a website insufficiently interactive to establish specific jurisdiction where "[t]he only interactive feature of the website . . . was the 'Locate an inspector' feature, which requested minimal information and provided little more than additional advertising information, i.e., contact information and background information on [a local inspector]"). Because there is no indication in the record that the website passed any information back to the user based on submission of his or her testimonial and Plaintiffs do not assert that it did, Dr. Frezza's website is even less interactive than that in *Sublett*. We conclude that the website neither targets New Mexicans nor is sufficiently interactive to demonstrate that Dr. Frezza purposefully directed it toward New Mexico. *See Zavala*, 2007-NMCA-149, ¶ 20.

Medical License

{23} Plaintiffs maintain that the "[m]ost notable" contact Dr. Frezza had with New Mexico was his New Mexico medical license. Dr. Frezza held the license from January 2006 to July 2009. In July 2009, Dr. Frezza's status was changed to "inactive." Thus, Dr. Frezza did not hold an active New Mexico medical license at the time of the surgeries or at the time of the filing of Plaintiffs' complaints.

{24} We pause here to address the appropriate time frame relevant to the general jurisdiction analysis. Several New Mexico cases state that "[a]s a general rule, the existence of personal jurisdiction may not be established by events which have occurred after the acts which gave rise to [a p]laintiff's claims." *Doe*, 1996-NMCA-057, ¶ 19; *Tercero v. Roman Catholic Diocese of Norwich, Conn.*, 2002-NMSC-018, ¶ 9, 132 N.M. 312, 48 P.3d 50. Both of these cases cite *Steel v. United States*, 813 F.2d 1545, 1549 (9th Cir. 1987), in which the court stated that "courts must examine the defendant's contacts with the forum at the time of the events underlying the dispute when determining whether they have jurisdiction." But this statement was made in the context of specific jurisdiction, not general jurisdiction. *See id.* (referencing specific jurisdiction); *DVI, Inc. v. Superior Court*, 128 Cal. Rptr. 2d 683, 698 (2002) (stating that the *Steel* holding referred to specific jurisdiction). In addition, neither *Tercero* nor *Doe* distinguished between "specific jurisdiction" or "general jurisdiction," but both cases hinged on whether the cause of action arose out of the enumerated acts in New Mexico's "long-arm statute," NMSA 1978, § 38-1-16 (1971). *See Tercero*, 2002-NMSC-018, ¶ 10 (stating that jurisdiction based on the transaction of business prong of the long-arm statute is consistent with due process "only if the cause of action arises from the particular transaction of business" (internal quotation marks and citation omitted)); *Doe*, 1996-NMCA-057, ¶ 12 (stating that the appropriate test was "whether (1) the acts of the defendant are specifically set forth in this state's long-arm statute, (2) the plaintiff's cause of action arises out of and concerns such alleged acts, and (3) the defendant's acts establish minimum contacts to satisfy constitutional due process concerns"). It is not entirely clear, therefore, that the statements in those cases as to the appropriate time frame apply in the general jurisdiction context. 4 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1067.5 (3d ed. 2002) ("As a practical matter, a general jurisdiction inquiry is very different from a specific jurisdiction inquiry.").

{25} The parties did not identify any New Mexico cases explicitly addressing the time frame for a general jurisdiction analysis, nor did our own research uncover one. *See Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 569 (2d Cir. 1996) ("Few cases discuss explicitly the appropriate time period for assessing whether a defendant's contacts with the forum state are sufficiently 'continuous and systematic' for the purposes of general jurisdiction."). In addition, "[t]he [United States] Supreme Court never has spoken on the issue of determining the proper time[]frame for the defendant's contacts with the forum [in a general jurisdiction analysis]." Wright, *supra* (Supp. 2014). This issue raises two questions. "First, it must be determined whether continuous and systematic contacts need to exist at the time the claim accrues, or at the time the lawsuit is filed." *Id.* The courts appear divided on this question. *See id.* n.11.50 (collecting cases). *But see Harlow v. Children's Hosp.*, 432 F.3d 50, 64 (1st Cir. 2005) ("It is settled law that unrelated contacts which occurred after the cause of action arose, but before the suit was filed, may be considered for purposes of the general jurisdiction inquiry."). The second question is "how far back from either the accrual or filing of the claim [courts] will look[.]" Wright, *supra* (Supp. 2014). "[M]ost courts use a 'reasonable time' standard yielding time[]frames of roughly three to seven years." *Id.*; *see, e.g.*,

Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 410-11, 415-16 (1984) (examining contacts over seven-year period (1970-1977), including after the 1976 accident from which the plaintiff's claims arose, in a general jurisdiction analysis).

{26} We need not determine whether general jurisdiction in New Mexico depends on contacts extant at the time a claim accrued or at the time the complaint is filed, however, because even if we consider the medical license in our analysis, we conclude that possession of a medical license is not sufficient in and of itself to subject Dr. Frezza to general jurisdiction in New Mexico courts. The general rule gleaned from cases in sister states is that possession of a medical license in the forum state may be considered a contact for purposes of general jurisdiction but is not sufficient on its own. For instance, in *Etchebarne-Bourdin v. Radice*, the District of Columbia Court of Appeals held that where "there [was] no allegation that the doctors maintained their [District of Columbia] licenses in order to solicit patients in the District[,]" the fact "that the doctors maintained medical licenses to practice in the District cannot, without more, serve as a basis for jurisdiction under the 'transacting any business' subsection of the [D.C. long-arm] statute." 982 A.2d 752, 759 (D.C. 2009). Similarly, in *Modlin v. Superior Court*, the California Court of Appeals held that the defendant's contacts with California were "tenuous at best" and insufficient for general jurisdiction where the contacts consisted of possession of a California medical license and three trips to California in four years. 222 Cal. Rptr. 662, 665 (Ct. App. 1986); *see also Ghanem v. Kay*, 624 F. Supp. 23, 25 (D.D.C. 1984) ("A nonresident physician who arranges to be licensed in the District [of Columbia] would not by this act alone reasonably anticipate being required to defend a suit brought in the District . . . [but] where a nonresident physician is not only licensed in a jurisdiction but carries on significant activities within that jurisdiction, the due process requirement of minimum contacts between a defendant and a forum state is satisfied."); *Dean v. Johns*, 789 So. 2d 1072, 1079 (Fla. Dist. Ct. App. 2001) ("The various activities of [the Alabaman defendant], including the relationships he has developed with referring Florida physicians to treat Florida patients and his maintenance of a Florida medical license, easily pass the minimum contacts test of the Due Process Clause."); *Estate of Jones v. Phillips ex rel. Phillips*, 992 So. 2d 1131, 1141 (Miss. 2008) (considering licensure in the forum state as well as arrangements the defendant made to treat the plaintiff in the foreign state); *accord Hines v. Clendenning*, 1970 OK 28, 465 P.2d 460, 463; *cf. Eastboro Found. Charitable Trust v. Penzer*, 950 F. Supp. 2d 648, 655-56 (S.D.N.Y. 2013) (concluding that possession of a law license does not confer jurisdiction on the licensing state and collecting cases); *Katz v. Katz*, 707 A.2d 1353, 1357 (N.J. Super. Ct. App. Div. 1998) ("We are equally convinced that the defendant's license to practice law in this state does not afford a basis to exercise *in personam* jurisdiction over him in a matter totally unrelated to his professional license.").

Property

{27} Plaintiffs also point to Dr. Frezza's ownership of property in New Mexico. They argue that Dr. Frezza "purposefully availed himself of the protections and benefits of New Mexico law by purchasing land here and making some use of that land." The land was purchased after the surgeries but before Plaintiffs' complaints were filed. The timing of these land purchases thus implicates the same questions raised above. Nevertheless, we conclude that even if we consider the land purchases, they are insufficient to demonstrate that Dr. Frezza had continuous and systematic contact with New Mexico such that he could expect to be haled into court here. *See Zavala*, 2007-NMCA-149, ¶ 12 ("If a defendant has continuous and systematic contacts with New Mexico such that the defendant could reasonably foresee being haled into court in that state for any matter, New Mexico has general personal jurisdiction." (alteration, internal quotation marks, and citation omitted)). Like a medical license, Dr. Frezza's ownership of property can be considered as a contact with New Mexico but it is not sufficient on its own to establish jurisdiction over him. *Rush v. Savchuk*, 444 U.S. 320, 328 (1980) ("[T]he mere presence of property in a [s]tate does not establish a sufficient relationship between the owner of the property and the [s]tate to support the exercise of jurisdiction over an unrelated cause of action."); *cf. F.D.I.C. v. Hiatt*, 1994-NMSC-044, ¶ 10, 117 N.M. 461, 872 P.2d 879 (considering property ownership in assessment of jurisdiction).

Book

{28} To the extent Plaintiffs argue that availability of Dr. Frezza's book, *The Business of Surgery*, in New Mexico provides a contact sufficient for general jurisdiction, we are not persuaded. Even if we accept Plaintiffs' assertion that "[u]ndoubtedly, [Dr. Frezza] expects the State of New Mexico to protect his copyright . . . and has a plan for the commercial success of his book and its distribution in New Mexico[,]" the distribution of Dr. Frezza's book in New Mexico does not rise to the level of contact required by the Due Process Clause for general jurisdiction. *Cf. Sproul*, 2013-NMCA-072, ¶ 14 ("[T]he flow of a manufacturer's goods into the forum state alone does not create sufficient ties with that state to give it general jurisdiction over the manufacturer.").

{29} Plaintiffs rely on *Beh v. Ostergard* for the proposition that "a plan [for distribution in New Mexico] is sufficient for general jurisdiction to attach to [Dr. Frezza]." 657 F. Supp. 173, 178 (D.N.M 1987). The *Beh* court stated that jurisdiction would have been proper if the defendant there had "a regular distribution plan for his publications into New Mexico for which he derived commercial benefit[.]" *Id. Beh* is not persuasive for two reasons. First, the statement relied on was dicta not essential to the holding. *Id.* Second and more importantly, this statement was based on *Blount v. T D Publishing Corp.*, in which the New Mexico Supreme Court held that "placing . . . magazines in national channels of commerce . . . submits the publisher to jurisdiction in all states *where his product causes injury*." 1966-NMSC-262, ¶ 16, 77 N.M. 384, 423 P.2d 421 (emphasis added). This holding obviously applies to specific jurisdiction. Thus neither *Beh* nor *Blount* are helpful to Plaintiffs' assertions related to general jurisdiction. *See* Wright, *supra* (noting the differences in the general and specific jurisdiction analyses); *see also Sproul*, 2013-NMCA-072, ¶ 16 (indicating that the contacts necessary for general jurisdiction are more substantial than those for specific jurisdiction).

Arrangement with Presbyterian

{30} Plaintiffs argue that general jurisdiction is proper based on an "arrangement with Presbyterian . . . [which] secur[ed] for [Dr. Frezza] a virtual guarantee of New Mexico patient referrals." The parties do not dispute that (1) Dr. Frezza treated New Mexico residents, including Plaintiffs, referred to him by Presbyterian; (2) there were no bariatric surgeons in New Mexico at the time; (3) Dr. Frezza was a credentialed participating provider under the agreement between TTPA and Presbyterian; and (4) Dr. Frezza was bound by the agreement. Plaintiffs maintain that

these facts are sufficient to establish the existence of a relationship between Dr. Frezza and Presbyterian through which Dr. Frezza "reached into [New Mexico] in order to attract [a] patient's business[.]" *Cronin*, 2000-NMCA-082, ¶ 26; *cf. Zavala*, 2007-NMCA-149, ¶ 21 (concluding that although "it is not necessarily sufficient by itself to justify the exercise of general personal jurisdiction[,]" Medicaid registration "may be a factor to consider" in a general jurisdiction analysis).

{31} We note that Dr. Frezza's arguments in the district court and on appeal take several different approaches. In his pleadings below, Dr. Frezza acknowledged that his status as a participating provider in Presbyterian's network established a relationship between him and the insurer. For instance, he analogized the agreement with Presbyterian to Medicaid registration and acknowledged that such registration can be considered a contact for purposes of general jurisdiction, implicitly acknowledging that the agreement was a contact between him and New Mexico. *See Zavala*, 2007-NMCA-149, ¶ 21. Nevertheless, he argued that this contact was insufficient for general jurisdiction. *See id.* He also made several references to "[t]he contractual relationship between Dr. Frezza and Presbyterian," arguing that it would not support specific jurisdiction because Plaintiffs' claims did not arise from it. In spite of these statements in his pleadings, in the hearing before the district court Dr. Frezza relied on the fact that he was not a party to the agreement and had no authority to decide which insurance he would accept to argue that "there is no contract between Dr. Frezza and Presbyterian." Similarly, on appeal, Dr. Frezza maintains that, because he was not an employee of TTPA, was not a party to the agreement, and had no authority to select with whom he would become a participating provider, the agreement cannot be considered a contact between him and New Mexico for purposes of jurisdiction. On appeal, he argues that "Plaintiff[s'] relationship with Presbyterian[,] Presbyterian's relationship with TTPA[,] and TTPA's relationship with Dr. Frezza . . . cannot [be] combine[d] . . . to establish personal jurisdiction over Dr. Frezza."

{32} In support of his position at the hearing, Dr. Frezza submitted a copy of the agreement to the district court. The district court concluded that the fact that Dr. Frezza was not a party to the agreement was dispositive of whether Dr. Frezza had a relationship with Presbyterian. We disagree because this conclusion does not consider other facts surrounding the agreement, including, among other things, that Dr. Frezza was a participating provider bound by the agreement, that New Mexico patients were referred to him because of the agreement, and that there were no New Mexico bariatric surgery providers at that time. *See Sproul*, 2013-NMCA-072, ¶ 17 ("The question [of whether jurisdiction exists] cannot be answered by applying a mechanical formula or rule of thumb but [must be resolved] by ascertaining what is fair and reasonable under the circumstances." (alteration, internal quotation marks, and citation omitted)); *cf. Dunn v. Yager*, 58 So. 3d 1171, 1186 (Miss. 2011) (holding that Mississippi had general jurisdiction over the defendant where he "had participated in various [preferred provider organizations (PPOs)], which, *inter alia,* gave him access to more than 800,000 members of [a Mississippi PPO] as prospective clients" and recognizing that the defendant "solicited patients through the PPOs, as an approved preferred provider" and the plaintiff's claim had been approved by a Mississippi insurer).

{33} Neither does the rest of the record provide sufficient facts for us to assess whether the arrangement with Presbyterian establishes a contact between Dr. Frezza and New Mexico. Ms. Velten's claims that Dr. Frezza had no authority to select which insurance he would accept do not address the extent of Dr. Frezza's rights and obligations arising out of a contract with an insurer once it is selected by TTPA. Dr. Frezza's repeated reliance on the fact that he is not an employee of TTPA likewise raises more questions than it answers. For instance, is Dr. Frezza a member, partner, or owner of TTPA? Is he a third-party beneficiary of TTPA's contract with Presbyterian? Is there a contract with TTPA that defines Dr. Frezza's relationship with it, as Ms. Velten's affidavit suggests, and/or do the terms of his employment with the Center define his rights and obligations with respect to TTPA? The nature of Dr. Frezza's relationships with both the Center and TTPA likely will inform the analysis of any relationship with Presbyterian.

{34} Plaintiffs also alleged that Dr. Frezza "used" or "developed" "a special relationship with Presbyterian to encourage New Mexico residents to seek treatment from him[.]" *See Sher v. Johnson*, 911 F.2d 1357, 1362 (9th Cir. 1990) (" 'Purposeful availment' requires that the defendant have performed some type of affirmative conduct which allows or promotes the transaction of business within the forum state." (internal quotation marks and citation omitted)). Dr. Frezza challenged Plaintiffs' assertion through submission of the agreement and affidavits. But the agreement requires each participating provider to be "credentialed by [Presbyterian]." Ms. Velten stated in her affidavit that "Dr. Frezza was requested to submit a credentialing application to [the Center] and TTPA pursuant to the separate delegated credentialing agreement." The "separate credentialing agreement" is not in the record. Dr. Frezza stated in his affidavit that he "did not personally seek to become credentialed with . . . Presbyterian. Rather, [TTPA] was credentialed with . . . Presbyterian. As a member of that group, [he] was required to submit a credentialing application to . . . Presbyterian." The extent to which Dr. Frezza personally acted to become credentialed with Presbyterian is unclear from this record. For instance, although Dr. Frezza asserts that he did not "personally" seek to become credentialed, he also states that he submitted an application to become credentialed. At the same time that he asserts that TTPA was credentialed, he states that he submitted his own credentialing application to Presbyterian.

{35} We conclude that, even if we view Plaintiffs' assertions and Dr. Frezza's evidence in the light most favorable to jurisdiction, *Cronin*, 2000-NMCA-082, ¶ 10, the parameters of the relationship are unclear such that we cannot assess whether it is a contact sufficient for general jurisdiction. *Cf. Russell v. SNFA*, 946 N.E.2d 1076, 1080-81 (Ill. App. Ct. 2011) ("If we find that [the] plaintiff has made a *prima facie* case for jurisdiction, we must then determine if any material evidentiary conflicts exist. If a material evidentiary conflict exists, we must remand the case to the trial court for an evidentiary hearing." (citation omitted)); *Sorezza v. Scheuch*, No. 19717/07, 2008 WL 2186175, at *6 (N.Y. Sup. Ct. May 13, 2008) (denying a motion for dismissal and stating, "Absent further discovery concerning the nature of the contractual agreement or arrangement between BlueCross/Blue Shield and the defendant with respect to his 'participating provider' status, the court is constrained from determining whether such agreement or arrangement would qualify as a business transaction [under New York's long-arm statute]"). For instance, it remains unclear to what extent Dr. Frezza

was bound by or benefitted from the agreement, whether the agreement required Dr. Frezza to accept Presbyterian patients, to what extent Dr. Frezza himself sought to become credentialed with Presbyterian, and, perhaps most importantly, whether and how Dr. Frezza became the sole provider of bariatric surgery services to Presbyterian's members. *Cf. Almeida v. Radovsky*, 506 A.2d 1373, 1375 (R.I. 1986) (relying on the specific terms of the defendants' agreement with a Rhode Island insurer and the fact that the insurer did not refer Rhode Island patients to the defendants to hold that there were insufficient contacts for jurisdiction). We therefore turn to whether Plaintiffs have made a prima facie showing of specific jurisdiction.

2. Specific Jurisdiction

{36} Plaintiffs argue that New Mexico has specific personal jurisdiction over Dr. Frezza because their claims arose from surgeries performed pursuant to Dr. Frezza's relationship with Presbyterian.[1] Even if Dr. Frezza's relationship with Presbyterian is insufficient for general jurisdiction, it may nonetheless be sufficient for specific jurisdiction. *See ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 715 (4th Cir. 2002) ("[T]he threshold level of minimum contacts sufficient to confer general jurisdiction is significantly higher than for specific jurisdiction." (internal quotation marks and citation omitted)). The district court determined that Plaintiffs' claims arose from medical care provided in Texas, rejecting Plaintiffs' argument that they arose from Dr. Frezza's relationship with Presbyterian. The district court therefore concluded that it "[could not] exercise specific jurisdiction over Dr. Frezza" because Plaintiffs' claims were not connected with any contacts between Dr. Frezza and New Mexico. In doing so, the district court avoided analyzing whether there was a relationship between Dr. Frezza and Presbyterian sufficient for specific jurisdiction.

{37} The district court's rejection of Plaintiffs' contention that their claims arose from a relationship between Dr. Frezza and Presbyterian rests on an overly narrow construction of the requirement that the claims must "arise from" Dr. Frezza's contact with New Mexico. In *Goodyear Dunlop Tires*, the United States Supreme Court stated that specific jurisdiction applied when the claims "deriv[e] from, or [are] connected with" the defendant's contacts. 131 S. Ct. at 2851 (internal quotation marks and citation omitted); *accord Helicopteros Nacionales*, 466 U.S. at 414 (using the phrase "arise out of or relate to" in discussing specific jurisdiction). This language permits a more expansive construction than that applied by the district court. Similarly, our cases have held that "for New Mexico to assert specific jurisdiction over a nonresident defendant, the plaintiff's claim must 'lie in the wake' of the defendant's commercial activities in New Mexico." *Sproul*, 2013-NMCA-072, ¶ 17 (alteration omitted) (quoting *Visarraga*, 1986-NMCA-021, ¶ 15). For example, in *Kathrein v. Parkview Meadows, Inc.*, a New Mexican plaintiff sued an Arizona defendant for "emotional and psychological trauma" she suffered after attending "Family Week" at a treatment center where her husband was being treated. 1984-NMSC-117, ¶ 3, 102 N.M. 75, 691 P.2d 462. The Court held that the cause of action was "a direct outgrowth of [the] defendant's general solicitation for business in New Mexico" where the defendant had "advertised its alcoholism treatment center in the yellow pages of the Albuquerque telephone directory[,] . . . contacted the director of [a New Mexico organization] to solicit . . . referral of patients to the treatment center[,] . . . mail[ed] a brochure [to the plaintiff], inviting her to attend the treatment program's 'Family Week[,]' [and] telephoned [the] plaintiff from Arizona, to encourage her attendance." *Id.* ¶¶ 2, 4; *see Cronin*, 2000-NMCA-082, ¶ 16 (agreeing with the plaintiffs that their claims arose from the hospital's transaction of business in New Mexico because "but for [the h] ospital's solicitations, [the p]atient would not have sought treatment at [the h]ospital nor would he have endured certain health complications arising from [the doctor's] prescription and [the d]efendants' negligent failure to monitor the administration of potentially ototoxic antibiotics"); *see also Presbyterian Univ. Hosp. v. Wilson*, 654 A.2d 1324, 1331 (Md. 1995) (stating that the hospital's "voluntary efforts to register as a Maryland [Medicaid] provider and to be designated as a liver transplant referral center served in many respects to effectively solicit Maryland residents to seek treatment" at the hospital and that "[t]hese general business contacts are directly related to the [medical negligence and wrongful death] action and serve as support for the finding of specific jurisdiction").

{38} Consistent with *Kathrein* and *Cronin*, we conclude that, if the alleged relationship exists, Plaintiffs' claims here are sufficiently connected with it . The fact that Dr. Frezza may have been the only provider covered by Presbyterian and thus Plaintiffs had no option to seek treatment in New Mexico only strengthens the connection between the two. But because the district court did not address the alleged relationship in the context of specific jurisdiction, there is no factual record addressing "the precise nature of the defendant's contacts with the forum, the relationship of these contacts with the cause of action, and [] weighing . . . whether the nature and extent of contacts . . . between the forum and the defendant . . . satisfy the threshold demands of fairness." *Presbyterian Univ. Hosp.*, 654 A.2d at 1330 (second and third omissions in original) (internal quotation marks and citation omitted). The same questions about the relationship identified in our discussion of general jurisdiction apply in an analysis of specific jurisdiction. Hence we expect the district court will address them on remand in both contexts.

3. Fair Play and Substantial Justice

{39} "The United States Supreme Court has held that even if a defendant has established sufficient minimum contacts with the forum state, the Due Process Clause forbids the assertion of personal jurisdiction over that defendant under circumstances that would offend traditional notions of fair play and substantial justice." *Sproul*, 2013-NMCA-072, ¶ 35 (internal quotation marks and citation omitted). Since we have concluded that an evidentiary hearing is necessary to clarify Dr. Frezza's contacts with New Mexico and the strength of those contacts will affect the analysis of whether it is unfair to assert jurisdiction over him, we do not address this issue except to provide guidance on two points. First, Dr. Frezza argues on appeal that he would be substantially burdened by

[1]In a cursory argument, Plaintiffs contend that specific personal jurisdiction is appropriate because Dr. Frezza traveled to New Mexico and consulted with at least one patient here. However, they do not explain how their injuries arose from this contact. We therefore decline to address this argument. *Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076 ("We will not review unclear arguments, or guess at what [a party's] arguments might be.").

having to defend himself in New Mexico because (1) he is immune from suit under Texas law and (2) Texas courts are "better situated [than New Mexico courts] to deal with the issues inherent in applying Texas's Tort Claims Act." Both of these arguments assume that the Texas Tort Claims Act will apply to this case, a proposition we rejected in the companion case, *Montaño*, COA No. 32,403, ¶ 39. He also argues that Texas has "significant public policy interests in litigating th[ese] case[s]" because he is a government employee. Although we recognize that Texas has an interest in this case, we have concluded that, under the facts of these cases, New Mexico has an equal or greater interest. *See id.* ¶ 30. Finally, we reject this line of reasoning because, although there is some overlap, the personal jurisdiction and choice of law inquiries are distinct and different. The United States Supreme Court cautioned against entwining the two analyses, stating that "[t]he question of [whether the forum state's law applies] presents itself in the course of litigation only after jurisdiction over [the] respondent is established, and we do not think that such choice of law concerns should complicate or distort the jurisdictional inquiry." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 778 (1984).

{40} Second, the district court concluded that "[e]xercising personal jurisdiction over Dr. Frezza in New Mexico would violate traditional notions of fair play and substantial justice" because "many of the important fact witnesses in this case reside in Texas and . . . Dr. Frezza will be unable to compel fact witnesses in Texas, including the healthcare providers who subsequently treated Plaintiff[s] and allegedly diagnosed [their] complications, to testify in person at trial in New Mexico." At the hearing, the district court stated that it would be a "horrible trial if we have to show the jury video tapes of those people [because the jury] would be asleep." Even if we construe these findings as addressing the burden on Dr. Frezza and efficiency of the trial, there is nothing in the record indicating that the district court considered the other *Zavala* factors, such as "New Mexico's interest, the plaintiff's interest, . . . and the interest in promoting public policy." 2007-NMCA-149, ¶ 12. In addition, it is difficult to see how the concerns voiced by the district court establish the unconstitutionality of New Mexico's assertion of jurisdiction. On remand, the district court should consider all of the *Burger King* factors in relation to the strength of Dr. Frezza's contacts with New Mexico in assessing the fairness of personal jurisdiction over him. *See Burger King Corp.*, 471 U.S. at 476 (stating that if "it has been decided that a defendant purposefully established minimum contacts within the forum [s]tate, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice" (internal quotation marks and citation omitted)); *Salas v. Homestake Enters. Inc.*, 1987-NMSC-094, ¶ 6, 106 N.M. 344, 742 P.2d 1049 (citing *Burger King* and considering the defendant's contacts in assessment of the fairness of jurisdiction).

F. CONCLUSION

{41} For the foregoing reasons, we remand for further proceedings consistent with this Opinion.

{42} IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:
JONATHAN B. SUTIN, Judge
CYNTHIA A. FRY, Judge

Certiorari Granted, September 25, 2015, No. 35,395

From the New Mexico Court of Appeals

Opinion Number: 2015-NMCA-102

No. 32,521, (filed June 9, 2015)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
JASON BAILEY,
Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
DENISE BARELA-SHEPHERD, District Judge

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Opinion

James J. Wechsler, Judge

{1} Defendant Jason Bailey appeals his conviction for criminal sexual contact of a minor in the second degree pursuant to NMSA 1978, Section 30-9-13(B) (2004). Defendant argues that the district court erred when it admitted evidence of uncharged bad acts under Rule 11-404(B) NMRA and Rule 11-403 NMRA. More specifically, Defendant argues that the district court erred when, mid-trial, it reversed an earlier ruling that excluded evidence of an alleged out-of-jurisdiction sexual act by Defendant against Child. Defendant argues that this evidence was propensity evidence and was more prejudicial than probative. We do not conclude that the district court abused its discretion when it admitted this evidence. Defendant also argues that the district court committed error by allowing a qualified expert to offer an opinion beyond the scope of the expert's qualified expertise. We are not persuaded by Defendant's argument on this point. We affirm.

BACKGROUND

{2} Defendant was charged with sex crimes relating to incidents reported by his daughter (Child) that occurred when Child was between about six and nine years of age. The charges related to two separate time intervals when the family lived in Bernalillo County, New Mexico. In between the periods of time that the family lived in Bernalillo County, the family lived in Sandoval County, New Mexico.

{3} Defendant was tried twice. Defendant's first trial resulted in dismissal of five of the counts by directed verdict and a mistrial due to jury disagreement on the remaining four counts. Defendant was retried on the remaining four counts.

{4} Two incidents formed the basis of Defendant's charges at the retrial. Child reported that Defendant placed ointment on his finger and touched and rubbed Child's vagina after she got out of the shower and was wearing only a towel. Child reported that this occurred during the first time period the family lived in Bernalillo County. Child also reported that Defendant rubbed his penis on Child's back while they were both in the shower. This occurred during the second time period the family lived in Bernalillo County. On the basis of these two incidents, Defendant was charged with two counts of criminal sexual penetration of a minor in the first degree, child under thirteen years of age, and two counts of criminal sexual contact of a minor in the third degree, child under thirteen years of age.

{5} Prior to the second trial, the State filed a motion to admit evidence of a purported prior conviction for a sex crime and an uncharged act against Child that occurred while the family was living in Sandoval County. Child reported that, in Sandoval County, Defendant roused Child from sleep at night to watch her favorite movie, laid Child on top of him, placed ointment on his hand, placed his hand in her pajamas, and touched and penetrated her vagina.[1] The State argued in its motion that evidence of Defendant's uncharged conduct was admissible under Rule 11-404(B)(2) as proof of Defendant's intent. According to the State, Defendant's defense at the first trial was that the charged incidents involved normal parenting and that Defendant lacked sexual intent. The State asserted that Defendant had argued at the first trial that his actions were misperceived as sexual by Child. Defendant had argued that Child was prone to this type of misperception because Child was a victim of prior sexual abuse by her mother's boyfriend. According to the State, the Sandoval County incident was not amenable to an interpretation as normal parenting, and thus it was probative of Defendant's sexual intent and, by inference, that Child correctly perceived the incidents for which Defendant was charged. Defendant argued that evidence of the Sandoval County incident was propensity evidence and therefore inadmissable under Rule 11-404(B). Defendant also seemed to argue that the Sandoval County evidence was inadmissible under Rule 11-403 because of the prejudicial effect of the evidence. The district court denied the State's motion, finding that the evidence was "only being offered to prove the witness' understanding, and [Rule 11-404(B)] does not actually address that type of issue . . . [;] this type of evidence is highly prejudicial and it's more prejudicial than probative[.]" Consequently, Child was instructed not to discuss the Sandoval County incident at the retrial.

[1]This account is taken from Child's testimony at the retrial. The safehouse interview on which the original report was based is not in the record on appeal.

{6} During the retrial, defense counsel had the following exchange with Child on cross-examination in which he confronted Child about lying during the safehouse interview and then asked questions in which defense counsel seemed to conflate the two incidents involving ointment, one of which took place in Bernalillo County and was the basis for charges, and the other from Sandoval County, which was uncharged and excluded from evidence by the district court:

> [Defense Counsel]: Now, do you recall that you told me that when you were watching the video [of your interview at the safehouse] that you realized that you were lying and not telling the complete truth?
>
> [Child]: Well, yes, because there's some things when the [interviewer at the safehouse] would ask me a question I would say I don't know, and I really did know.
>
> [Defense Counsel]: Uh-huh. Okay. For example, let's talk about the ointment incident, okay? When you first disclosed the ointment incident you told people or you told the interviewer that [Defendant] had taken your pants off and put the ointment on you; right? Do you remember that?
>
> [Child]: I think that was a different incident. I don't know. That it wasn't—because I remember coming out of the shower.
>
> [Defense Counsel]: Okay. Well, the ointment incident, what you have described it [sic], what happened at [one of the Bernalillo County residences]; correct?
>
> [Child]: Yes.
>
> [Defense Counsel]: Okay. Do you remember that to begin with the first time that you mentioned the ointment incident you had told the interviewer that [Defendant] had actually pulled your pants down and then applied the ointment?
>
> [Child]: I don't think that happened.
>
> [Defense Counsel]: But do you remember saying that?
>
> [Child]: No.

{7} The State then asked to approach the bench. There, defense counsel claimed that in the above exchange he was exposing inconsistencies between Child's earlier account of the Bernalillo County ointment incident for which Defendant was on trial and Child's account of that incident offered in court. The State argued that defense counsel made Child seem confused by importing a detail—pants—from the uncharged Sandoval County incident, that Child was instructed not to discuss, into questions ostensibly about one of the charged incidents from Bernalillo County. Common to both incidents was the use of ointment, among other factors, but Child was wearing pants only during the Sandoval County incident. The State argued to the court that defense counsel had opened the door to testimony about the uncharged Sandoval County incident because defense counsel used elements of the Sandoval County incident in his questions to Child, thereby creating an impression that Child was confused about the incident for which Defendant was charged. The State also argued that the uncharged incident was relevant to proving the sexual intent of Defendant during the two charged incidents, and, further, that the "crux" of the defense was that there was "no [sexual] intent" on the part of Defendant. Defense counsel conceded that intent was at issue in this case, stating that:

> [I]ntent is always an issue in every single case. So just because intent is an issue in this case doesn't mean that [Rule 11-]404(b) opens the doors to propensity evidence and bad character evidence to allow the State to get a conviction. Intent is always an issue. It's an issue here.

{8} After hearing argument, the court took a lunch recess and advised counsel to perform legal research to present case law to the court. After the recess, the court heard additional argument and required a lengthy voir dire examination of Child, both direct and cross, to enable the court to hear content of the testimony. The court ruled, based on Rule 11-404(B), that the State was allowed to present evidence of "only the alleged act of incident [sic] that occurred in Sandoval County that included the ointment." The court found that "[i]ntent . . . [was] relevant to the material issue—or to a material issue" in the case. It did not rely on the State's "opening the door" argument.

{9} Child testified and was cross-examined about the Sandoval County incident. The jury was instructed that the evidence admitted about the Sandoval County incident should be considered "only for the purpose of determining[] the existence of the intent which is a necessary element of the crimes charged in this case."

{10} We will include additional facts as necessary in our discussion below.

ADMISSION OF EVIDENCE OF THE UNCHARGED ACTS

{11} Defendant argues that the district court committed error by admitting Child's testimony relating to the incident from Sandoval County of uncharged abuse by Defendant. Defendant argues that the evidence was not admissible under Rule 11-404(B) and, even if admissible under Rule 11-404(B), the evidence should have been disallowed under Rule 11-403. We review both arguments for an abuse of discretion. *See State v. Otto*, 2007-NMSC-012, ¶ 9, 141 N.M. 443, 157 P.3d 8 (stating that we review the decision of a trial court to admit evidence under Rule 11-404(B) for an abuse of discretion); *id.* ¶ 14 (same under Rule 11-403). Only when a ruling of the trial court is clearly untenable, not justified by reason, or clearly against the logic and effect of the facts and circumstances of the case, will we hold that the trial court abused its discretion in admitting or excluding evidence. *Id.* ¶ 9. We examine the arguments of Defendant in turn.

Rule 11-404(B)

{12} Rule 11-404(B) establishes boundaries for the admission of evidence of other crimes, wrongs, or acts. Rule 11-404(B) prohibits the use of "[e]vidence of a crime, wrong, or other act . . . to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." In other words, evidence of other misconduct may not be admitted into evidence to demonstrate that "because the defendant committed those acts in the past, he is more likely to have committed them at the time of the charged offense." David A. Sonenshein, *The Misuse of Rule 404(B) on the Issue of Intent in the Federal Courts*, 45 Creighton L. Rev. 215, 220 (2011). However, Rule 11-404(B) allows evidence of other misconduct to be admitted, if legally relevant, for numerous other purposes, including to prove the intent of the defendant. *See* Rule 11-404(B)(2) ("This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."); Rule 11-402 NMRA (stating that relevant evidence is generally admissible except as subject to contrary constitutional, statutory, or

rule provisions, but "[i]rrelevant evidence is not admissible"). "Before admitting evidence of other crimes, wrongs or acts, the trial court must find that the evidence is relevant to a material issue other than the defendant's character or propensity to commit a crime[.]" *Otto*, 2007-NMSC-012, ¶ 10 (internal quotation marks and citation omitted). Rule 11-404(B) does not require that "evidence admitted under [the] rule be offered only to rebut evidence presented by the defense." *See id.* ¶ 11.

{13} In this case, Defendant's intent was an element of the charges. The jury was instructed that an aspect of the State's burden was to prove that Defendant touched Child in a manner that was "unlawful." Defendant acted unlawfully only if he acted with "the intent to arouse or gratify sexual desire or to intrude upon the bodily integrity or personal safety of [Child.]" "[T]ouching or penetration for purposes of reasonable medical treatment or nonabusive parental care" would not be considered unlawful. Defendant did not dispute that he touched Child in a manner fundamentally consistent with Child's allegations, but, instead, argued that Defendant touched Child without sexual intent.

{14} Defendant contends that evidence of the Sandoval County incident was inadmissible propensity evidence under Rule 11-404(B). Defendant mainly relies on three cases in support of this contention, citing them for the proposition that "[a] number of prior New Mexico cases have held 'bad acts' evidence inadmissible." [2] All three were joinder cases, in which multiple charges against a single defendant were tried in a single proceeding. *See Lovett*, 2012-NMSC-036, ¶¶ 7, 55 (reviewing the joinder of two first degree murder charges and related charges from two separate instances); *Gallegos*, 2007-NMSC-007, ¶¶ 4-5 (reviewing the joinder of multiple sexual charges against two different females); *Ruiz*, 2001-NMCA-097, ¶ 12 (reviewing the joinder of sexual charges relating to three girls). In each case, there was an issue as to whether the joinder permitted the jury to consider evidence that was not cross-admissible under Rule 11-404(B). *Lovett*, 2012-NMSC-036, ¶¶ 9, 11, 30-31; *Gallegos*, 2007-NMSC-007, ¶¶ 19-21; *Ruiz*, 2001-NMCA-097, ¶ 12.

{15} Intent was not an issue in any of the three cases cited by Defendant. And in each case, the court did not find an alternative exception under Rule 11-404(B) that would allow cross-admissibility. In *Lovett, Gallegos*, and *Ruiz*, the reviewing court held that evidence of each of the joined charges *vis-à-vis* the other charges was not relevant for any purpose other than propensity and disallowed the joint trial. *Lovett*, 2012-NMSC-036, ¶ 48; *Gallegos*, 2007-NMSC-007, ¶¶ 23, 36; *Ruiz*, 2001-NMCA-097, ¶¶ 16, 18, 23. The disputed evidence in these cases concerned whether the acts alleged to have been committed by the defendants happened in fact, not the mental state of the defendants in committing those acts. Because intent was not at issue in these cases, and the evidence of the acts admitted through joinder was probative only as propensity evidence, the three cases cited by Defendant are not persuasive in the context of this case.

{16} The Rule 11-404(B) analysis in this case is akin to that of *Otto*, 2007-NMSC-012. In *Otto*, the defendant was charged with criminal sexual penetration of his step-daughter, a minor. *Id.* ¶¶ 1-2. A detective testified in *Otto* that the defendant made a statement to police in which he indicated that he did not think he penetrated his step-daughter, but that he was "ready" to do so and then woke up. *Id.* ¶ 6. The State sought to introduce alleged, uncharged acts by the defendant against the same victim, committed subsequent to the charged incident in another state. *Id.* ¶¶ 2-3. The defendant argued that the evidence should have been excluded because his defense was not that he "mistakenly or without knowledge committed sexual acts" but, instead, that the sexual contact was committed without penetration. *Id.* ¶ 11. The Court noted that the defendant's statement might have suggested to the jury that the defendant was admitting to penetrating his step-daughter, but "unconsciously[.]" *Id.* It held that the prosecution "had the right to introduce evidence to show that [the d]efendant's actions were intentional and not committed accidentally or by mistake." *Id.* In the case before us, Defendant conceded that his intent was at issue under his argument and, as in *Otto*, the disputed evidence was offered to prove that Defendant acted with the requisite intent.

{17} Simply stated, under Rule 11-404(B) and our case law, the issue before the district court was whether the uncharged incident from Sandoval County was, in fact, relevant to the material legal issue of Defendant's intent. We agree with the district court that it was. Defendant's argument focused on lack of sexual intent. Evidence of the Sandoval County incident, that alleged non-parental touching, was relevant to whether Defendant touched Child with unlawful intent.

{18} We note an argument made by Defendant that even an analysis that focuses on Defendant's intent relies on a propensity inference, and, therefore, the Sandoval County incident was improperly admitted under Rule 11-404(B). The inferential chain suggested by Defendant's argument might be as follows: Defendant touched Child with sexual intent in Sandoval County; therefore, he is the sort of person who touches children with sexual intent; because he is that sort of person, he is more likely to have had sexual intent during the charged acts. Thus, according to Defendant, the evidence is inadmissible. Under Rule 11-404(B), however, the admissibility of evidence of other acts does not depend on whether the evidence is potentially illegitimate evidence of character, but, instead, on whether there is a permissible purpose. *See Old Chief v. United States*, 519 U.S. 172, 184 (1997) (stating that when certain evidence "has the dual nature of legitimate evidence of an element [of a charge] and illegitimate evidence of character" the evidence satisfies federal Rule 404(B) and admissibility is determined under federal Rule 403); *Gallegos*, 2007-NMSC-007, ¶ 22 (stating that evidence is inadmissible under Rule 11-404(B) if "its sole purpose or effect is to prove criminal propensity").

{19} As a result, the district court did not abuse its discretion by allowing evidence of the uncharged Sandoval County incident past the threshold of Rule 11-404(B). We cannot disagree that evidence was relevant to the material issue of Defendant's intent with regard to the charged acts alleged by Child. We now examine the admission of this evidence under Rule 11-403. *See Lovett*, 2012-NMSC-036, ¶ 32 ("If the evidence is probative of something other than propensity, then we balance the prejudicial effect of the evidence against its probative value [when applying Rule 11-403]." (internal quotation marks and citation omitted)).

[2]Defendant cites *State v. Lovett*, 2012-NMSC-036, 286 P.3d 265; *State v. Gallegos*, 2007-NMSC-007, 141 N.M. 185, 152 P.3d 828; and *State v. Ruiz*, 2001-NMCA-097, 131 N.M. 241, 34 P.3d 630.

Rule 11-403

{20} Rule 11-403 provides that "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." At issue in this case is the balance between probative value and unfair prejudice. Unfair prejudice, in the context of Rule 11-403, "means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *State v. Stanley*, 2001-NMSC-037, ¶ 17, 131 N.M. 368, 37 P.3d 85 (internal quotation marks and citation omitted). Evidence is unfairly prejudicial "if it is best characterized as sensational or shocking, provoking anger, inflaming passions, or arousing overwhelmingly sympathetic reactions, or provoking hostility or revulsion or punitive impulses, or appealing entirely to emotion against reason." *Id*. (internal quotation marks and citation omitted). The determination of unfair prejudice is "fact sensitive," and, accordingly, "much leeway is given trial judges who must fairly weigh probative value against probable dangers." *Otto*, 2007-NMSC-012, ¶ 14 (internal quotation marks and citation omitted). However, we will "not . . . simply rubber stamp the trial court's determination." *State v. Torrez*, 2009-NMSC-029, ¶ 9, 146 N.M. 331, 210 P.3d 228 (internal quotation marks and citation omitted). As stated above, we review a trial court's weighing of probative value against unfair prejudice for an abuse of discretion. *Otto*, 2007-NMSC-012, ¶ 14.

{21} Defendant argues that evidence of prior crimes in general and, in particular, evidence of prior child molestation, is highly prejudicial. He also argues that the Sandoval County incident was of "*de minimis* probative value" because that incident was dissimilar to the charged incidents, "took place after [one of] the charged event[s]," and Child's account was uncorroborated and changed over time. In addition, Defendant argues that a note submitted by a juror indicated that the jury was "focus[ed] on what really happened in that uncharged incident" and, therefore, was unfairly prejudiced such that a mistrial was necessary. This note asked whether the condition of Child's hymen as noted during her medical examination was consistent with Child's Sandoval County allegations. Lastly, Defendant argues that the mid-trial ruling by the court allowing evidence of the Sandoval County incident "unfairly surprised" Defendant.

{22} We conclude that the district court did not abuse its discretion in deciding that the Sandoval County incident, which involved allegations of the same type of incident against the same alleged victim during a time period between the two charged incidents, was neither too dissimilar nor too remote in time to be of significant probative value. Defendant presented evidence that Child's prior sexual abuse may have affected her capacity to discern whether behavior was or was not sexual and argued vigorously that his actions toward Child were normal parental care and that he did not have sexual intent. Evidence of unlawful intent was a required element of the charges against Defendant. Evidence that Defendant touched Child in a sexual manner that was not amenable to an interpretation as normal parental care could reasonably be deemed of probative value, especially considering that evidence of Defendant's intent was otherwise scarce.

{23} In addition, under the circumstances of this case, the district court's mid-trial decision to admit evidence of the Sandoval County incident did not unfairly surprise or unfairly prejudice Defendant. *See id.* ¶ 16 ("The purpose of Rule 11-403 is not to guard against any prejudice whatsoever, but only against the danger of unfair prejudice." (alterations, internal quotation marks, and citation omitted)). By the retrial, after defending against two motions in limine that sought to admit evidence of the Sandoval County incident, defense counsel was well-aware of this evidence. Nor are we convinced that we should overrule the district court's decision to admit the evidence based on a single question by a juror.

{24} Defendant further states that child molestation provokes "strong visceral reactions of repugnance" in jurors and that there is a "culturally prevalent belief that a 'child molester' has a propensity to molest children." Against this background, Defendant argues that the admission of evidence of the alleged Sandoval County incident constituted unfair prejudice. Hearing and evaluating evidence of terrible events and acts without allowing emotion to gain the upper hand over reason is, naturally, challenging. Yet, we sometimes ask this task of jurors. This case involved alleged sexual misconduct against Child by her father. We cannot find a basis to conclude that the district court abused its discretion in deciding that the Sandoval County incident was similar enough to allow its admission or an abuse of discretion in the district court's decision that would indicate that the evidence was unfairly prejudicial.

{25} Lastly, Defendant argues that the limiting instruction to the jury exacerbated the unfair prejudice because "telling a jury to consider the evidence as evidence of intent merely re-inforces [sic] the 'common sense' use of the evidence as showing propensity." However, Defendant did not object to the instructions or offer an alternative one. With such lack of preservation, we will reverse only for fundamental error, and Defendant has not asserted fundamental error on appeal. *See State v. Sandoval*, 2011-NMSC-022, ¶¶ 14-15, 150 N.M. 224, 258 P.3d 1016 (reviewing for fundamental error when parties do not object to tendered jury instructions).

{26} In sum, the district court did not abuse its discretion in finding that the probative value of Child's testimony about the Sandoval County incident was not substantially outweighed by any unfair prejudice caused by admission of this evidence. *See* Rule 11-403; *Otto*, 2007-NMSC-012, ¶ 14 (stating that under Rule 11-403 we review the decision of a trial court to admit evidence for an abuse of discretion). The district court did not commit reversible error under Rule 11-404(B) or 11-403 by admitting evidence of the Sandoval County incident.

TESTIMONY OF DR. RENEE ORNELAS

{27} Defendant contends that the district court committed error by failing to grant a mistrial during the testimony of Dr. Renee Ornelas. Dr. Ornelas was qualified as an expert in child sexual abuse. She testified for the State. The following exchange took place during her direct examination:

> State:
> Would a physician ever prescribe not putting any kind of ointment on or near the genital area when someone has a U[rinary] T[ract] I[nfection] or give instructions on avoiding that area?
> Dr. Ornelas:
> Well, you wouldn't put ointment on a child's genitalia for a urinary tract infection. And typically—and in this age group a nine year old, we would show them how to put it on themselves. It's not typical for a parent of a child of this age to do that kind of intimate care. Certainly that kind of intimate care another person,

> a caretaker, you know, applying something, that would be appropriate for a baby or toddler.

But just like a nine year old doesn't need somebody to clean their genital area—

{28} Defense counsel objected, approached the bench, and requested either a mistrial or an instruction to the jury to disregard this testimony as the "personal opinion [of Dr. Ornelas] about a nine year old." The district court granted neither, stating that the testimony was "in line with the line of questioning that [defense counsel] asked [Dr. Ornelas] concerning what a parent would do on a child." On appeal, Defendant argues that a mistrial was necessary because Dr. Ornelas' testimony was beyond the scope of her expertise and, as such, inadmissible.

{29} We review a trial court's decision to grant or refuse a mistrial for an abuse of discretion. *State v. Torres*, 2012-NMSC-016, ¶ 7, 279 P.3d 740. "The trial court abuses its discretion in ruling on a motion for mistrial if in doing so it acted in an obviously erroneous, arbitrary, or unwarranted manner." *Id.* (internal quotation marks and citation omitted). Even if the admission of the evidence was error, the State argues that the error was harmless, and therefore not reversible. *See State v. Tollardo*, 2012-NMSC-008, ¶ 25, 275 P.3d 110 ("Improperly admitted evidence is not grounds for a new trial unless the error is determined to be harmful."). When evaluating whether a violation of evidentiary rules was harmless, "we ask whether there [was] a reasonable probability that the error affected the jury's verdict." *Lovett*, 2012-NMSC-036, ¶ 52.

{30} The jury did not convict Defendant of any charge that related to the contested testimony of Dr. Ornelas. Defendant was only convicted of a charge based on the incident that took place in the shower during the second time period the family lived in Bernalillo County. This incident did not involve ointment or the propriety of applying ointment to Child. The testimony to which defense counsel objected did not relate to this incident. Thus, even if the testimony complained of was improperly admitted, there is not a reasonable probability that the error affected the verdict of the jury. As a result, any error in the admission of this testimony was harmless and, accordingly, Defendant is not entitled to a new trial on this basis. *See id.* (stating that harmless error review entails an inquiry into whether there was a reasonable probability that the jury's verdict was affected by the error).

CONCLUSION

{31} For the foregoing reasons, we affirm Defendant's conviction.

{32} IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

I CONCUR:
MICHAEL D. BUSTAMANTE, Judge
TIMOTHY L. GARCIA, Judge (dissenting).

GARCIA, Judge (dissenting).

{33} I respectfully dissent from the majority opinion for two reasons.

{34} First, the irregular way in which the district court eventually admitted the Sandoval County evidence prejudiced the defense. In denying the State's motion to admit the Sandoval County evidence prior to the second trial, the district court concluded that the purpose of the Sandoval County evidence was: (1) to "bolster the testimony of the alleged victim . . . to show that . . . she's not misinterpreting [Defendant's actions,]" and (2) that the evidence was "only being offered to prove the witness'[s] understanding" and not the Defendant's intent. It further concluded that the Sandoval County evidence was "extremely prejudicial to the defense" and "more prejudicial than probative [under a Rule 11-403 analysis.]" This ruling encouraged Defendant to proceed at trial with his theory that Child may have misinterpreted Defendant's intentions, with the understanding that raising this theory would not trigger a Rule 11-404(B)(2) exception to the rule's prohibition against using other bad acts evidence. Accordingly, defense counsel asserted in his opening statement that expert testimony would show that Child "may be misinterpreting what may be normal contact between a parent and a child." The majority affirms the conviction on the basis that Defendant opened the door to the Sandoval County evidence when he asserted this theory of defense. Maj. Op. ¶¶ 16-17. I submit that it is unfair to Defendant to conclude that he opened the door to the Sandoval County evidence when he did so in reliance on the district court's specific pretrial ruling that his theory of defense concerning Child's potential for misinterpretation would in fact *not* open the door to the Sandoval County evidence. Under these circumstances, I would reverse the conviction on the basis that the district court's actions in this case created a situation that "appears . . . inconsistent with substantial justice." Rule 5-113 NMRA ("Error in either the admission or exclusion of evidence and error or defect in any ruling . . . is not grounds for granting a new trial . . . unless refusal to take . . . such action appears to the court inconsistent with substantial justice.").[3]

{35} Second, the majority extends Rule 11-404(B)(2)'s "intent" exception beyond the circumstances previously identified by our Supreme Court. At the time that the district court decided to admit the Sandoval County evidence, no evidence had yet been presented by either party calling Defendant's intent into question, and defense counsel had not yet presented its evidence concerning Child's potential for misinterpretation. Although defense counsel raised the misinterpretation issue in his opening statement, opening statements are not evidence. *See* UJI 14-101 NMRA ("Statements of the lawyers . . . are not themselves evidence."). Our Supreme Court has held that other acts evidence involving the same victim generally may be admitted in child sexual abuse cases to counter evidence that has been admitted showing that the defendant did not have the requisite sexual intent. *See State v. Sena*, 2008-NMSC-053, ¶ 14, 144 N.M. 821, 192 P.3d 1198 (affirming admission of other acts evidence where Defendant told witnesses that he had touched the victim's vagina while putting ointment on her rash and that he had not done so sexually); *State v. Kerby*, 2007-NMSC-014, ¶ 26, 141 N.M. 413, 156 P.3d 704 (affirming admission of other acts evidence where the defendant "injected the issue of intent by calling his mother to testify that [the d]efendant told her the touch was merely a fatherly

[3]It is also worth noting that when the district court eventually allowed the State to present the Sandoval County evidence, it explained only that the evidence was "relevant" to "[i]ntent," which was "a material issue in this case." The district court did not re-evaluate its pretrial determination that the Sandoval County evidence was "extremely prejudicial" and "more prejudicial than probative" under Rule 11-403. Without more in the record, it is impossible to determine why the district court reversed its previous ruling and determined that the highly prejudicial Sandoval County incident became admissible under Rule 11-403. No explanation other than relevance was identified by the district court.

pat on the bottom"); *Otto*, 2007-NMSC-012, ¶ 11 (affirming admission of other acts evidence where evidence had been presented that Defendant told detectives he may have sexually touched the victim unconsciously while he was half-asleep). However, we have not encountered any case from our Supreme Court concluding that other acts evidence may be admitted *before* any evidence was presented calling the defendant's intent into question but merely because the defendant's intent is an element of the crime and is at issue in every child sexual assault case. Because a defendant's intent is normally an element of every criminal charge, allowing the state to use other bad acts evidence to establish its initial burden of proof regarding the element of criminal intent, before any evidence is admitted placing Defendant's intent into question, effectively eviscerates the well-recognized protections provided under Rule 11-404(B)(1).

{36} It has been a longstanding fear that criminal propensity or other bad acts evidence is extremely prejudicial and may be misapplied to obtain a conviction. *See Gallegos*, 2007-NMSC-007, ¶ 21 ("The nearly universal view is that other-acts evidence, although logically relevant to show that the defendant committed the crime by acting consistently with his or her past conduct, is inadmissible because the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect." (internal quotation marks and citation omitted)); *State v. Lamure*,1992-NMCA-137, ¶ 47, 115 N.M. 61, 846 P.2d 1070 (Hartz, J., specially concurring) ("One cannot ignore the long tradition of courts and commentators expressing fear that jurors are too likely to give undue weight to evidence of a defendant's prior misconduct and perhaps even to convict the defendant solely because of a belief that the defendant is a bad person."); *see also Old Chief*, 519 U.S. at 181 (recognizing that although other acts evidence is relevant, "the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect"); *People v. Smallwood*, 722 P.2d 197, 205 (Cal. 1986) (recognizing that other acts evidence "is the most prejudicial evidence imaginable against an accused"), *disagreed with on other grounds by People v. Bean*, 760 P.2d 996, 1008 n. 8 (Cal. 1988); Edward J. Imwinkelried, *Undertaking the Task of Reforming the American Character Evidence Prohibition: The Importance of Getting the Experiment Off on the Right Foot*, 22 Fordham Urb. L.J. 285, 288 (1995) ("The contemporary abhorrence of sexual misconduct and offenses against children is as intense as it is widespread. Repulsed by evidence of such uncharged crimes by an accused, a juror might be tempted to look past weaknesses in the prosecution's proof of the accused's guilt of the uncharged crime."). I would urge our Supreme Court to reconsider and clarify the bounds of the application of Rule 11-404(B)(2) during the state's case-in-chief, especially under the circumstances presented in this case.

TIMOTHY L. GARCIA, Judge

From the New Mexico Court of Appeals

Opinion Number: 2015-NMCA-103

No. 32,648, (filed July 6, 2015)

VILLAGE OF LOGAN,
Plaintiff-Appellant,
v.
EASTERN NEW MEXICO WATER UTILITY AUTHORITY,
Defendant-Appellee

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
SARAH M. SINGLETON, District Judge

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Opinion

J. Miles Hanisee, Judge

{1} This single-issue appeal requires clarification of the legal methodology that applies to resolve a zoning and land use conflict between a municipality and a water utility authority, both of which are political subdivisions of the state established by legislative processes. The district court employed the statutory guidance test, which it found to be most consistent with New Mexico law. We affirm.

BACKGROUND

{2} Plaintiff-Appellant, the Village of Logan (the Village), is located within Quay County, near Tucumcari and on the shores of the Ute Lake Reservoir. As a New Mexico municipality, the Village has the authority to adopt and enforce laws and zoning regulations "[f]or the purpose of promoting health, safety, morals or the general welfare" of its residents. NMSA 1978, § 3-21-1(A) (2007). When the Village first enacted its zoning ordinances in 1965, it created six zones, one of which was designated "R-1," denoting single-family residential use unless otherwise specified. Under the Village's current ordinances, any landowner wishing to utilize property in a manner contrary to its zoning designation must apply to the Village for a special use permit.

{3} Defendant-Appellee, Eastern New Mexico Water Utility Authority (ENMWUA), is a state entity created by the Legislature pursuant to NMSA 1978, Section 73-27-4 (2010). The Eastern New Mexico Water Utility Authority Act (the Act), *see* NMSA 1978, §§ 73-27-1 to -19 (2010), was enacted to create a "water utility authority to develop and construct a water delivery system [to] local governments within the boundaries of the authority." Section 73-27-2(B)(1), (2). Within the Act, the Legislature posited the need for an "organized structure to work with state, local and federal agencies to complete a water delivery system from the Ute Reservoir to local governments" in the neighboring eastern New Mexico counties of Curry and Roosevelt. Section 73-27-2(A)(3); § 73-27-4. To facilitate its mission, ENMWUA was granted the power of eminent domain to acquire property for "rights of way and easements and for the use and placement of facilities and infrastructure elements, including pipelines, structures, pump stations and related appurtenances." Section 73-27-7(G).

{4} Once established, ENMWUA acquired Lot 11 in the Village's South Shore development. It sought and obtained a special use permit for an initially planned water intake structure that would be contained within the boundaries of Lot 11. ENMWUA later decided to enlarge the planned structure, and to include an access road and holding pond. To accommodate the larger facilities, ENMWUA used its power of eminent domain to acquire Lot 12, adjacent to Lot 11. The Village asserted that without a newly specific special use permit, the project would violate the Village's R-1 zoning regulations on Lot 12. At that juncture, ENMWUA ceased to acknowledge the Village's authority to enforce its zoning regulations against it and refused to again seek a special use permit.

{5} The impasse led the Village to district court, where its complaint sought injunctive relief and a declaratory determination that its zoning regulations were indeed applicable to ENMWUA, such that a special use permit would be required in order for the proposed construction to proceed. ENMWUA filed a motion to dismiss pursuant to Rule 1-012(B)(6) NMRA, arguing that as a state agency it was immune from the Village's zoning laws. In support, ENMWUA cited *City of Santa Fe v. Armijo*, 1981-NMSC-102, ¶ 3, 96 N.M. 663, 634 P.2d 685 ("Municipalities have only those powers expressly delegated by state statute."). Concluding, however, that the parties were political subdivisions of equal dignity insofar as each had been "created by or pursuant to statute," the district court found that *Armijo* "does not control the situation presented in this case," and sought legal guidance elsewhere.

{6} The district court and the parties collectively identified five stand-alone tests used in varying jurisdictions to resolve disputes of this nature: (1) the statutory guidance test, (2) the balancing of interests test, (3) the eminent domain test, (4) the superior sovereign test, and (5) the governmental propriety test. *See Macon Ass'n for Retarded Citizens v. Macon-Bibb Cnty. Planning & Zoning Comm'n*, 314 S.E.2d 218, 222 (Ga. 1984) (discussing and citing authority for each test); *Rutgers v. Piluso,* 286 A.2d 697, 702-03 (N.J. 1972) (discussing and applying the balancing of interests test). ENMWUA sought application of either the statutory guidance or eminent domain tests, while the Village maintained that the balancing of interests test should be adopted in circumstances of sovereign equality. Having distinguished *Armijo*,

the district court nonetheless agreed with ENMWUA that the statutory guidance test was most consistent with New Mexico law, granted ENMWUA's motion, and dismissed the Village's complaint.

{7} The Village appeals, arguing that the district court erred in resolving the case by application of the statutory guidance test. The Village contends that we should adopt the balancing of interests test as the more equitable approach to resolving zoning and land use conflicts between equally situated political subdivisions of the state. The Village seeks remand in order for an evidentiary hearing to be conducted so that the interests of the two entities can be balanced in district court, which it asserts would produce a more informed result. ENMWUA maintains on appeal that the statutory guidance test is the proper test to be applied, and that its adoption in this circumstance would be most consistent with our Supreme Court's rejection of unexpressed municipal power in *Armijo*.

STANDARD OF REVIEW

{8} "A district court's decision to dismiss a case for failure to state a claim under Rule 1-012(B)(6) is reviewed de novo." *Valdez v. State*, 2002-NMSC-028, ¶ 4, 132 N.M. 667, 54 P.3d 71. We accept as truthful well-pleaded factual allegations and resolve all doubts in favor of the complainant. *Id*. "A Rule [1-0]12(B)(6) motion is only proper when it appears that [a] plaintiff can neither recover nor obtain relief under any state of facts provable under the claim." *Valdez,* 2002-NMSC-028, ¶ 4 (emphasis, internal quotation marks, and citation omitted). The facts in this case are not in dispute; thus, we review only the district court's application of the statutory guidance test de novo.

DISCUSSION

{9} Although this Court squarely addressed zoning and land use conflicts between the State and a lesser authority in *County of Santa Fe v. Milagro Wireless, LLC*, 2001-NMCA-070, 130 N.M. 771, 32 P.3d 214, as had our Supreme Court previously in *Armijo*, 1981-NMSC-102, neither has had occasion to speak regarding whether a wholly separate analysis is needed to resolve zoning and land use disputes between co-equal political subdivisions of the state concerning activities on non-state-owned land. Regarding this distinction, the Village contends that *Armijo* and *Milagro*, are not useful to this issue of "first impression," and that the statutory guidance test amounts to little more than an "obsolete approach that should be eschewed in favor of the more enlightened [b]alancing of [i]nterests [t]est." ENMWUA agrees on appeal with the district court's selection of the statutory guidance test, and the resulting dismissal of the Village's complaint.

{10} We take a moment to summarize the balancing of interests test advocated by the Village and first introduced in *Rutgers*. The test owes its genesis to the New Jersey Supreme Court's belief that "[legislative] intent, rarely specifically expressed, is to be divined from a consideration of many factors[.]" *Rutgers,* 286 A.2d at 702. The summarized factors considered essential in *Rutgers* include statutory language itself, but also considerations such as the identification of alternative locations for land uses that divide one political subdivision from another, the scope of each litigant's political authority, input from any higher state authority, the degree to which the proposed facility is essential versus considerations of detriment to surrounding property, and whether any effort was made to comply with the disputed zoning procedures. *Id.* at 698. The Village also points out that the balancing of interests test has been embraced in New Mexico, albeit by the New Mexico Attorney General in an advisory opinion issued in 2005. *See* N.M. Att'y Gen. Op. 05-03 (2005) (relying on a *Rutgers* analysis to conclude that the Los Alamos Public School District is not automatically immune from local zoning regulations). The Village contends that this modern, more "holistic alternative approach," best balances the interests of the parties and considers the overarching public interest in a comprehensive plan. *See Rutgers*, 286 A.2d at 701, 703; *Hayward v. Gaston,* 542 A.2d 760, 764 (Del. 1988); *Alaska R.R. Corp. v. Native Vill. of Eklutna,* 142 P.3d 1192, 1196 (Alaska 2006) (all adopting the balancing of the interests test).

{11} We begin our analysis, however, by determining the degree to which *Armijo* and *Milagro*, are instructive. In *Armijo*, our Supreme Court announced specific limitations on the power of a municipality to enact and enforce local zoning regulations or restrictions. 1981-NMSC-102, ¶ 3. At issue was whether the City of Santa Fe could utilize its zoning authority to forbid the Commissioner of Public Lands from maintaining an oil field pumping rig on the premises of the State Land Office Building, an activity that would require a permit in order not to violate Santa Fe's historical district zoning ordinances. *Id.* ¶ 1. In reversing the district court's determination that Santa Fe's ordinances apply to state agencies, institutions, and officials, the Court held that "[a] state governmental body is not subject to local zoning regulations or restrictions." *Id.* ¶ 3. It added that "[s]tatutes granting power to cities are strictly construed, and any fair or reasonable doubt concerning the existence of an asserted power is resolved against the city." *Id*. The Court went on to state that "[m]unicipalities have only those powers expressly delegated by state statute" and that such authority does not arise by "inference or implication from a statute." *Id*. The Court examined the language of state statutes regarding "Zoning Regulations" under NMSA 1953, §§ 14-28-9 to -11 (repealed in 1965) (current version at NMSA 1978, §§ 3-21-1 to -2 (1965, as amended through 2007)), then authorizing Santa Fe to zone property within its municipal boundaries in the first place. *Armijo,* ¶ 4. Finding no direct allowance within the statute permitting municipal zoning requirements to apply to state land, our Supreme Court reversed the district court's conclusion that Santa Fe could prevent placement of an oil pumping rig on state property. *Id.* ¶¶ 12-13.

{12} *Milagro* assessed the enforceability of county zoning ordinances to the actions of a private, commercial entity on a state-owned right of way. 2001-NMCA-070, ¶¶ 2, 4-5, 7. Applying *Armijo* in this slightly different context, this Court upheld the district court's dismissal of a challenge to the erection of a cell phone tower—approved of but not undertaken directly by the New Mexico Highway Department—adjacent to I-25. *Milagro*, 2001-NMCA-070, ¶¶ 2, 9. From an analytic perspective, *Milagro*, as did *Armijo*, examined the statutory authority upon which the power to enforce county zoning ordinances was premised and concluded that the power granted lacked an "express grant of authority to zone on state land." *Milagro*, 2001-NMCA-070, ¶ 7.

{13} Although notably distinct from this case insofar as both *Armijo* and *Milagro*, address activities that otherwise violated zoning restrictions on state owned land, both utilized principles of statutory construction to determine that municipal ordinances lack force on state land when contrary authority is not plainly provided by enabling legislation. *Armijo*, 1981-NMSC-102, ¶¶ 12-13; *Milagro,* 2001-NMCA-070, ¶ 7. Here, the district court correctly identified the statutory guidance test as that most consistent with our jurisprudence. Pursuant to it, courts

review the statutory powers assigned to each entity to ascertain whether the Legislature intended that one entity's local zoning ordinances apply to the other entity's activities. *Macon Ass'n*, 314 S.E.2d at 222; *see Village of Swansea v. Cnty. of St. Clair*, 359 N.E.2d 866, 867 (Ill. App. Ct. 1977) (utilizing statutory guidance test to conclude that to allow application of municipal zoning regulations to prevent construction of dog pound would frustrate the intent of the Illinois legislature and the statutory mandate of the animal control act it enacted); *State ex rel. St. Louis Union Trust Co. v. Ferriss*, 304 S.W.2d 896, 901-03 (Mo. 1957) (en banc) (applying statutory guidance test in holding school district's legally authorized construction activities to be superior to a municipality's zoning ordinance). We note also that the approach taken by *Armijo*, *Milagro*, and by jurisdictions that employ the statutory guidance test in instances such as this where political subdivisions conflict, is consistent with our historic preference to identify legislative intent when actions are undertaken pursuant to statutory authority. *See N.M. Indus. Energy Consumers v. N.M. Pub. Regulation Comm'n,* 2007-NMSC-053, ¶ 20, 142 N.M. 533, 168 P.3d 105 ("When construing statutes, our guiding principle is to determine and give effect to legislative intent . . . aided by classic canons of statutory construction . . . giving the words their ordinary meaning, [absent indication that] a different one was intended."); *Griego v. Oliver*, 2014-NMSC-003, ¶ 20, 316 P.3d 865 ("Our principal goal in interpreting statutes is to give effect to the Legislature's intent."). We adopt the statutory guidance test as that which applies to determine whether a land use proposed by one political subdivision of the state may be prohibited by the zoning regulation of another. While we note the availability of additional possible tests to guide district courts in such instances, neither party seeks application of the tests not evaluated in this Opinion.

{14} We lastly turn to whether the statutory guidance test supports the district court's dismissal of the Village's complaint, and conclude that it does. We first note that the Village does not argue on appeal that if the statutory guidance test were correctly selected by the district court, it was nonetheless incorrectly applied. Accordingly, ENMWUA did not address application of the test in its answer brief. Yet the district court as well did not provide insight as to the basis on which it determined ENMWUA was entitled to dismissal of the Village's complaint pursuant to the statutory guidance test. We therefore elect to briefly explain why, as a matter of law and pursuant to the statutory guidance test, the district court's dismissal of the Village's complaint was proper. The Act established, directed, and ultimately empowered ENMWUA in a manner greater than that allowed to municipalities such as the Village regarding land use regulation. Specifically, the Act identified the need for and created a water utility authority spanning multiple counties in eastern New Mexico. *See* §§ 73-27-1 to -4. It was designed to benefit local governments in that quadrant of the state by sharing water from the Canadian River stored in the Ute Reservoir. Section 73-27-2(A)(3). The power to condemn land by eminent domain is not an insignificant one[1], yet it was provided to ENMWUA to directly acquire and utilize property in Quay County, where the Village exists. *See* § 73-27-7(G). Ultimately, ENMWUA was directed to "provide an organized structure to work with state, local and federal agencies," Section 73-27-2(A)(3), not simply any local entity. *See* § 73-27-7(G).

{15} Comparatively, Section 3-21-1(A) allows local restriction of land use "[f]or the purpose of promoting health, safety, morals or the general welfare," among other local powers vested in municipalities such as the Village by the zoning authority. Yet, no municipal ordinance can be "inconsistent with the laws of New Mexico." NMSA 1978, § 3-17-1 (1993). In this instance, the legislative purpose behind its creation of ENMWUA would be frustrated by requiring that it adhere to municipal zoning ordinances. We conclude that the statutory guidance test applies to immunize ENMWUA from the Village's zoning ordinances, and thus from its special use permit process in this instance. *See Armijo*, 1981-NMSC-102, ¶ 3 ("Statutes granting power to cities are strictly construed, and any fair or reasonable doubt concerning the existence of an asserted power is resolved against the city.").

{16} For the foregoing reasons, we affirm the district court's application of the statutory guidance test, and its dismissal of the Village's complaint.

{17} IT IS SO ORDERED.

J. MILES HANISEE, Judge

WE CONCUR
MICHAEL D. BUSTAMANTE, Judge
CYNTHIA A. FRY, Judge

[1]In jurisdictions that employ the eminent domain test, ENMWUA's power to take and use land would alone establish its superiority over the Village in the current dispute. *See Macon Ass'n,* 314 S.E.2d at 222 ("[T]he [p]ower of [e]minent [d]omain [t]est take[s] the position that when a political unit is authorized to condemn, it is automatically immune from local zoning regulation when it acts in furtherance of its designated public function."). For the purposes of statutory guidance, it is a factor that at minimum constitutes a significant expression of legislative intent.

Classified

Positions

Attorney Positions - 1st Judicial District Attorney

The First Judicial District Attorney's Office has immediate openings available for attorneys to prosecute DWI and/or domestic violence cases in Magistrate Court. This is an entry level attorney position, 0 to 2 years of experience. Salary is based on the District Attorney Personnel and Compensation Plan. Please send resume and letter of interest to: "Attorney Employment", PO Box 2041, Santa Fe, NM 87504, or via e-mail to 1stDA@da.state.nm.us.

United States District Court, District of New Mexico, Las Cruces - Term Law Clerks

Two full-time Term Law Clerk positions available, $59,246-$109,781 DOQ. See full announcement and application instructions at www.nmd.uscourts.gov Successful applicants subject to FBI & fingerprint checks. EEO employer.

Request For Proposal LOPD RFP 2016-002

In accordance with the appropriate sections of the New Mexico Procurement Code (Chapters 13-1-28 through 13-1-199 NMSA 1978 amended), the New Mexico Public Defender Department also known as The Law Offices of the Defender (LOPD) is requesting proposals from licensed New Mexico attorneys to furnish professional criminal defense legal services for indigent clients in Lea and Eddy Counties. TO OBTAIN PROPOSAL DOCUMENTS, GO TO THIS WEBSITE: www.lopdnm.us

Associate Attorney

The Santa Fe office of Hinkle Shanor LLP seeks an associate attorney for its medical malpractice defense group. Candidates should have a strong academic background, excellent research and writing skills, the ability to work independently, and a strong interest in working in an active civil trial practice. Please send resume, law school transcript, and writing sample to Hiring Partner, P.O. Box 2068, Santa Fe, New Mexico 87504-2068

9th Judicial District Attorney- Senior Trial Attorney, Assistant Trial Attorney, Associate Trial Attorney

The Ninth Judicial District Attorney is accepting resumes and applications for an attorney to fill one of the following positions depending on experience. All positions require admission to the New Mexico State Bar. Senior Trial Attorney- This position requires substantial knowledge and experience in criminal prosecution, rules of criminal procedure and rules of evidence, as well as the ability to handle a full-time complex felony caseload. A minimum of five years as a practicing attorney are also required. Assistant Trial Attorney – This is an entry to mid-level attorney. This position requires misdemeanor and felony caseload experience. Associate Trial Attorney – an entry level position which requires misdemeanor, juvenile and possible felony cases. Salary for each position is commensurate with experience. Send resumes to Dan Blair, District Office Manager, 417 Gidding, Suite 200, Clovis, NM 88101 or email to: Dblair@da.state.nm.us.

Programs Division Director Pretrial Services (FT-PERM)

The Second Judicial District Court is seeking a dynamic, enthusiastic, innovative, and experienced Pretrial Services Director for New Mexico's largest Pretrial Services Program. Qualifications: Bachelors' degree in Criminal Justice, Public or Business Administration, Social Work or a related field from an accredited college or university. Eight years of program management experience which must include two years of contract oversight and three years of supervisory experience. Relevant experience may include: public or business administration, budget, finance, social services, social work, social sciences, mediation, grant writing, guidance and counseling, law, probation, program management, adult education, training, volunteer programs or closely related field. Additional relevant education may substitute for experience at a rate of thirty semester credit hours equals one year of experience. Education may not substitute for supervisory experience. SALARY: $28.128 to $35.16 hourly, plus benefits. Send application or resume supplemental form with proof of education to the Second Judicial District Court, Human Resource Office, P.O. Box 488 (400 Lomas Blvd. NW), Albuquerque, NM, 87102. Applications without copies of information requested on the employment application will be rejected. Application and resume supplemental form may be obtained on the Judicial Branch web page at www.nmcourts.gov. Resumes will not be accepted in lieu of application. CLOSES: January 29, 2016 at 5:00 p.m.

Las Cruces Attorney

Holt Mynatt Martínez, P.C., an AV-rated law firm in Las Cruces, New Mexico is seeking an associate attorney with 3-5 years of experience to join our team. Duties would include providing legal analysis and advice, preparing court pleadings and filings, performing legal research, conducting pretrial discovery, preparing for and attending administrative and judicial hearings, civil jury trials and appeals. The firm's practice areas include insurance defense, civil rights defense, commercial litigation, real property, contracts, and governmental law. Successful candidates will have strong organizational and writing skills, exceptional communication skills, and the ability to interact and develop collaborative relationships. Salary commensurate with experience, and benefits. Please send your cover letter, resume, law school transcript, writing sample, and references to bb@hmm-law.com.

Request for Applications City of Albuquerque Assistant City Attorney Position

Assistant City Attorney: Assistant City Attorney position available within the Safe City Strike Force Division, with primary duties to serve as a special prosecutor in the Metropolitan Court, Traffic Arraignments. Secondary duties are representing APD in DWI Vehicle Seizure and Forfeiture cases, which include weekly administrative hearings and district court proceedings. Applicant must be admitted to the practice of law by the New Mexico Supreme Court and be an active member of the Bar in good standing. One (1) year of attorney experience, including knowledge of civil and/or criminal practice and procedures in the district and Metropolitan courts, is preferred, but not required. Spanish language skills are preferred, but not required. A successful candidate will have strong communication skills and be able to work within a diverse legal team and interact daily with the public. Salary will be based upon experience and the City of Albuquerque Attorney's Personnel and Compensation Plan with a City of Albuquerque Benefits package. Please submit resume to attention of "Litigation Attorney Application"; c/o Ramona Zamir-Gonzalez; Executive Assistant; P.O. Box 2248, Albuquerque, NM 87103 or rzamir-gonzalez@cabq.gov. Application deadline is January 29, 2016.

Attorney

The civil litigation firm of Atkinson, Thal & Baker, P.C. seeks an attorney with strong academic credentials and 2-10 years experience for a successful, established complex commercial and tort litigation practice. Excellent benefits. Tremendous opportunity for professional development. Salary D.O.E. All inquiries kept confidential. Send resume and writing sample to Atkinson, Thal & Baker, P.C., Attorney Recruiting, 201 Third Street NW, Suite 1850, Albuquerque, NM 87102.

Request for Applications City of Albuquerque Assistant City Attorney Position

Assistant City Attorney: Assistant City Attorney position available with the Litigation Division with desired experience in civil litigation in handling pretrial discovery, motion practice, trial preparation and trial. We are seeking attorneys who have an interest in defending civil rights, personal injury, and premises liability cases within a positive team environment. Salary will be based upon experience and the City of Albuquerque Attorney's Personnel and Compensation Plan with a City of Albuquerque Benefits package. Please submit resume to attention of "Litigation Attorney Application"; c/o Ramona Zamir-Gonzalez; Executive Assistant; P.O. Box 2248, Albuquerque, NM 87103 or rzamir-gonzalez@cabq.gov. Application deadline is January 29, 2016.

Experienced Santa Fe Paralegal $45k

Santa Fe Law Firm has an immediate opening for a 10 yr+ EXPERIENCED SANTA FE PARALEGAL — bright, conscientious, hardworking, self-starter, mature, meticulous, professional to join our team. Excellent attention to detail, written and oral communication skills and multitasking. Our firm is computer intensive, informal, non-smoking and a fun place to work. Very Competitive Compensation package $45,000+ pa (plus fully paid health insurance and a Monthly Performance Bonus), paid parking, paid holidays + sick and personal leave. All responses will be kept strictly confidential. Please send us your resume and a cover letter in PDF format by eMail to sfelegalsecretary@gmail.com

Full-Time Court Services Specialist Position

The NM Supreme Court is accepting applications for a full-time Court Services Specialist position in Santa Fe, New Mexico. Target pay rate is $17.122-$19.025 per hour. SUMMARY: Under supervision perform a variety of administrative and clerical duties, provide technical and courtroom assistance, and work with inventory and equipment. This is a full performance level job classification. To apply, please go to: www.nmcourts.gov/jobs/jobselectpage.php

Paralegal

Experienced paralegal with background in criminal or civil litigation. Familiarity with document management systems a plus. This is an opportunity for a highly motivated professional to work for the Rothstein Law Firm in Santa Fe. Excellent benefits. Email resume to info@rothsteinlaw.com.

Request for Applications City of Albuquerque Various Paralegal Positions

Two Paralegal positions are available within the Safe City Strike Force (Traffic Arraignment Section) and Real Estate Land Use Divisions of the Legal Department of the City of Albuquerque. Position Summary: Paralegal with a civil litigation background who has the skills, knowledge, and ability to assist attorneys in civil litigation practice, and/or administrative hearings, including from the inception of a civil lawsuit through trial. Minimum education and experience requirements: Associates Degree in Paralegal Studies, plus three (3) years' experience as a paralegal; may substitute two (2) years of additional paralegal experience for the Associates Degree in Paralegal Studies or a Certificate in Paralegal Studies, plus five (5) years' experience as a legal Secretary/Assistant. Pro-Law system experience is desirable. To Apply: All applicants must submit, by January 29th, a City Application. Resumes will not be accepted in lieu of the application. An On-Line Application Process can be accessed at the web site: http://www.cabq.gov/jobs. Copies of required certifications, registrations, and/or licenses, if not attached on-line, must be provided at the time of interview.

Legal Assistant Wanted

Approx. ½ time with very hours flexible. Filing and billing experience an absolute requirement. Virtual office set up 2-5 short visits to the office to check mail, file and pick up documents for editing, etc. No set office hours. Pleadings filing, mail and bill generation may take place from your home. Computer literacy also a must. Must know filing rules in federal and district court plus TimeSlips and electronic submissions for billing insurance companies. Uptown Albuquerque Office of busy sole practitioner. Must confirm experience level but will not contact present employer if so stated on application. Salary, experience summary, and attorney references in first reply. Reply in confidence to POB 92860, ABQ., NM, 87199. Attention Box C.

Paralegal

Paralegal for Plaintiff's Injury Firm. Minimum 3 years' experience in Plaintiff's injury law. Litigation experience necessary. Fast-paced environment with a high case load. We work as a team, and are the best team in Albuquerque. Outstanding pay, perks, and benefits. Come join us. To see the position description and apply, please type into your browser: ParnallLawJobs.com

Positions Wanted

Are You Looking for a FT Legal Assistant/Secretary?
7-8 years experience, Want to work in Personal Injury or Insurance Defense area ONLY. Gen./Civil Litigation. Professional. Transcription, Proofreading/Formatting, Organized, Attn. to Detail, E-filing in Odyssey-CM/ECF, Cust. Svc. Exp., Basic Pleadings, Discovery Prep., Calendaring, File Maintenance, MSWord, MS Outlook, Excel. Please contact LegalAssistant0425@yahoo.com for Resume, Salary Expectations and References.

Services

Briefs, Research, Appeals—
Leave the writing to me. Experienced, effective, reasonable. cindi.pearlman@gmail.com (505) 281 6797

Contract Paralegal
Paralegal with 25+ years of experience available for work in all aspects of civil litigation on a freelance basis. Excellent references. civilparanm@gmail.com.

Full-Charge Bookkeeper
Full-Charge Bookkeeper, profitminder@gmail.com

Office Space

Need Office Space?
Plaza500 located in the Albuquerque Plaza Office building at 201 3rd Street NW offers all-inclusive office packages with terms as long or as short as you need the space. Office package includes covered parking, VoIP phone with phone line, high-speed internet, free WiFi, meeting rooms, professional reception service, mail handling, and copy and fax machine. Contact Sandee at 505-999-1726 or sgalietti@allegiancesw.com.

423 Mountain Rd. NW – For Sale or Lease
Excellent location. Northeast corner of 5th and Mountain Rd. Attractive and efficient office space. Convenient two blocks from courthouses. Conference room, two offices, kitchen space, reception area and plenty of room for staff. 1,100 sf. Floors wood and carpet. Security system. Onsite and free street parking. Storage. Rent $1,200 per month. Please call (505) 247-3335 for more information.

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620 ROMA N.W., located within two blocks of the three downtown courts. Rent includes utilities (except phones), fax, internet, janitorial service, copy machine, etc. All of this is included in the rent of $550 per month. Up to three offices are available to choose from and you'll also have access to five conference rooms, a large waiting area, access to full library, receptionist to greet clients and take calls. Call 243-3751 for appointment to inspect.

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