Official Publication of the State Bar of New Mexico

BAR BULLETIN

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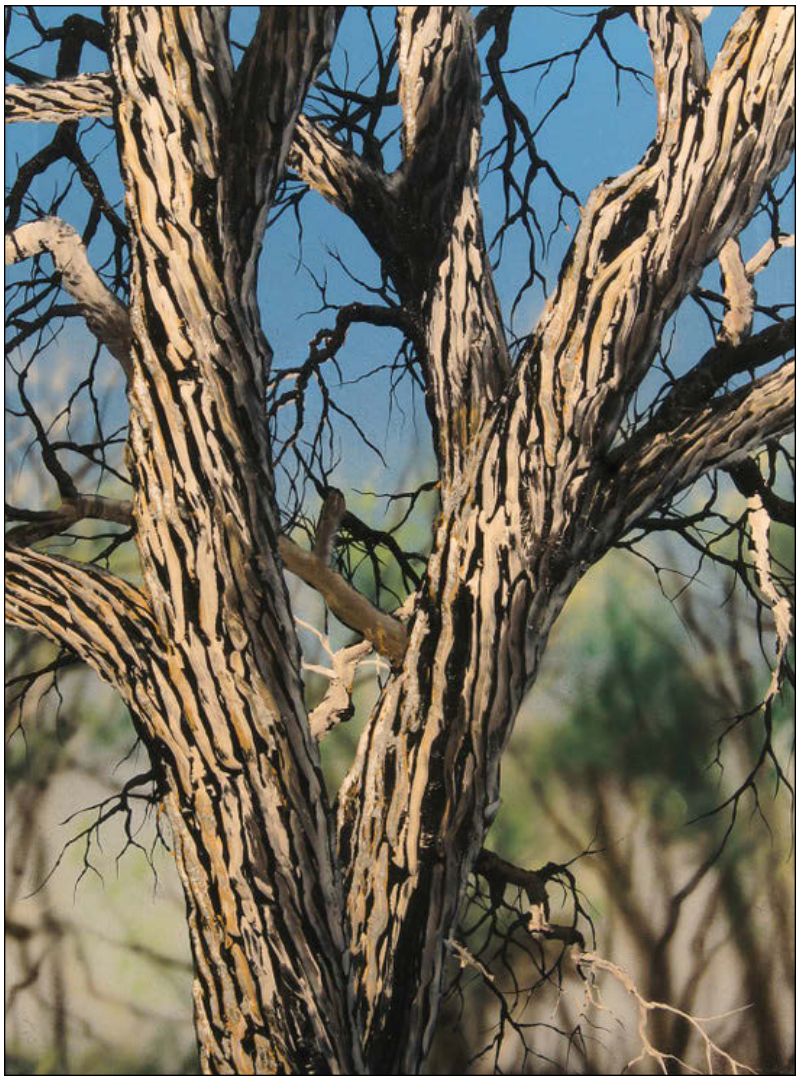

Stark, by Christopher Owen Nelson Waxlander Gallery, Santa Fe

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Join State Bar President Brent Moore for this incredible trip and enter the holiday season CLE stress free. One year's worth of CLE credits will be provided.

Seven Night Roundtrip from Fort Lauderdale

Ports of call on the Royal Caribbean Allure of the Seas:
Cozumel, Mexico • Falmouth, Jamaica • Labadee, Haiti

Prices per person based on double occupancy (including port expenses)

$679 Interior
$901 Obstructed ocean view
$939 Superior ocean view, deck 10 or 11 with balcony
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Contact Terri Nelson with Vacations To Go by April 29 to guarantee a room.
Flight reservations may be made on your own or through Terri.
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CLE course information is forthcoming.
Teach a one to two hour class and get free CLE registration ($325).
Send proposals to Christine Morganti, cmorganti@nmbar.org.

State Bar of New Mexico
Center for Legal Education

For more information go to www.nmbar.org, for Members, CLE at Sea

STATE BAR of NEW MEXICO

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Meetings

March

2
Employment and Labor Law Section BOD,
Noon, State Bar Center

4
Bankruptcy Law Section BOD,
Noon, U.S. Bankruptcy Court

4
Criminal Law Section BOD,
Noon, Kelley & Boone, Albuquerque

8
Appellate Practice Section BOD,
Noon, teleconference

9
Animal Law Section BOD,
Noon, State Bar Center

9
Children's Law Section BOD,
Noon, Juvenile Justice Center

9
Taxation Section BOD,
11 a.m., teleconference

10
Business Law Section BOD,
4 p.m., teleconference

State Bar Workshops

March

2
Divorce Options Workshop:
6–8 p.m., State Bar Center, Albuquerque, 505-797-6003

2
Civil Legal Clinic:
10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

8
Legal Clinic for Veterans:
8:30–11 a.m., New Mexico Veterans Memorial, Albuquerque, 505-265-1711, ext. 3434

16
Family Law Clinic:
10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

23
Consumer Debt/Bankruptcy Workshop:
6–9 p.m., State Bar Center, Albuquerque, 505-797-6094

April

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

Cover Artist: Christopher Owen Nelson's work has been strongly focused in the greater southwestern region. As a Colorado native, he studied fine arts at Rocky Mountain College of Art and Design. He combines elements of his skills like painting, construction and song writing to tell his story. Recently, Nelson's achievements in the arts have been featured in several national publications including: *Western Art Collector*, *Luxe Interiors and Design*, *Western Art and Architecture*, *Santa Fean* magazine and *American Art Collector*. To view more of his work, visit www.chrisnelsonfineart.com.

Notices

Court News

New Mexico Court of Appeals

Stephen French Appointed to Fill Vacancy

On Feb. 18, Gov. Susana Martinez announced the appointment of Stephen French to the New Mexico Court of Appeals, filling the vacancy created by the retirement of Judge Cynthia Fry.

Second Judicial District Court

David Williams Appointed to Fill Vacancy

On Feb. 12, Gov. Susana Martinez announced the appointment of David Williams to Division IX of the Second Judicial District Court in Bernalillo County. Williams' appointment fills the vacancy created by the appointment of Judge Judith Nakamura to the New Mexico Supreme Court.

Ninth Judicial District Court

Notice of Exhibit Destruction

The Ninth Judicial District Court, Roosevelt County, will destroy the following exhibits by order of the court if not claimed by the allotted time: 1) All unmarked exhibits, oversized poster boards/maps and diagrams; 2) Exhibits filed with the court, in criminal, civil, children's court, domestic, competency/mental health, adoption and probate cases for the years 1993–2012 may be retrieved through April 30; and 3) All cassette tapes in criminal, civil, children's court, domestic, competency/mental health, adoption and probate cases for years prior to 2007 have been exposed to hazardous toxins and extreme heat in the Roosevelt County Courthouse and are ruined and cannot be played, due to the exposures. These cassette tapes have either been destroyed for environmental health reasons or will be destroyed by April 30. For more information or to claim exhibits, contact the Court at 575-359-6920.

Santa Fe Municipal Court

Retirement Celebration for Judge Ann Yalman

Members of the legal community are invited to celebrate the retirement of Judge Ann Yalman of the Santa Fe Municipal Court. A reception will be held from 5:30–7:30 p.m., March 3, at the City of Santa Fe Convention Center, 201 West Marcy Street, Santa Fe, New Mexico 87501.

Professionalism Tip

With respect to my clients:

I will be courteous to and considerate of my client at all times.

Pueblo of Jemez Tribal Court

Tribal Judge Opening

There is an opening for a tribal judge withe the Pueblo of Jemez. The position will be responsible for direction and administration of justice for the Pueblo of Jemez' Tribal Court and judiciary functions; advises executive leadership on judicial system management and strategic planning, develops, modifies and enforces judicial safeguards. Qualifications include a law degree from an ABA accredited law school, five years of general judicial experience to include court procedures, three years of experience in specified duties and responsibilities and experience and/or practice in the field of Indian law with emphasis on federal Indian law, tribal law, tribal sovereignty, tribal government and jurisdiction. For mor information, visit the www.jemezpueblo.org or call the Human Resources Department at 575-834-7359.

State Bar News

Attorney Support Groups

- March 14, 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.)
- April 4, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (the group meets the first Monday of the month.)

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

Appellate Practice Section

Brown Bag Luncheon with Justice Judith K. Nakamura

The Appellate Practice Section and Young Lawyers Division announce the next brown bag luncheon on March 4 with Judith K. Nakamura. The event will be at noon at the State Bar Center in Albuquerque. For the past several years the Appellate Practice Section and YLD have scheduled quarterly lunches with jurists from New Mexico's appellate courts. The lunches are informal and are intended to create opportunities for appellate judges and the practitioners who appear before them to exchange ideas and to get to know each other better. Attendees are encouraged to bring their own "brown bag" lunch. Space is limited, so R.S.V.P. to Tim Atler at tja@atlerfirm.com.

Justice Nakamura graduated from the UNM School of Law in 1989. She was elected to the Bernalillo County Metropolitan Court in 1998 and served as chief judge for 11 years. She was appointed to the Second Judicial District Court in January 2013 and to the New Mexico Supreme Court in December 2015. Justice Nakamura is the first Supreme Court Justice in New Mexico to have also served on both the Metropolitan and District Court benches.

Public Law Section

Accepting Award Nominations

The Public Law Section is accepting nominations for the Public Lawyer of the Year Award, which will be presented at the state capitol on April 29. Visit www.nmbar.org > About Us > Sections > Public Lawyer Award to view previous recipients and award criteria. Nominations are due no later than 5 p.m. on March 10. Send nominations to Sean Cunniff at scunniff@nmag.gov. The selection committee will consider all nominated candidates and may nominate candidates on its own.

Solo and Small Firm Section

Legislative Update with Sen. Mike Sanchez

As part of the Solo and Small Firm Section's luncheon and presentation series, State Sen. Mike Sanchez will present a legislative update. Sen. Sanchez will discuss what was accomplished in the Roundhouse this session and what may be coming in the future. The presentation will be noon, March 15, at the State Bar Center in Albuquerque. The presentation is open to all members of the State Bar who R.S.V.P. to Evann Kleinschmidt,

ekleinschmidt@nmbar.org. Pizza and cookies will be provided.

Save the date for the April 19 presentation with David Serna, Leon Encinias and John Samore presenting "The Emerging Future of Legal Relationships with Cuba."

Young Lawyers Division
Volunteers Needed for Veterans Legal Clinic on March 8

The Young Lawyers Division and the New Mexico Veterans Affairs Health Care System are holding clinics for the Veterans Civil Justice Legal Initiative from 9 a.m.–noon, the second Tuesday of each month at the New Mexico Veterans Memorial, 1100 Louisiana Blvd. SE, Albuquerque. Breakfast and orientation for volunteers begin at 8:30 a.m. No special training or certification is required. Volunteers can give advice and counsel in their preferred practice area(s). The next clinic is Tuesday, March 8. Those who are interested in volunteering or have questions should contact Keith Mier at kcm@sutinfirm.com or 505-883-3395.

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	10 a.m.–6 p.m.
Sunday	Noon–6 p.m.

Reference

Monday–Friday	9 a.m.–6 p.m.
Saturday–Sunday	Closed

Mexican American Law Student Association
21st Annual Fighting for Justice Banquet

The Mexican American Law Student Association invites members of the legal community to the 21st Annual Fighting for Justice Banquet at 6 p.m., April 16, at Hotel Albuquerque in Old Town. Tickets and sponsorship packages can be bought at http://malsaorg.wix.com/ffj2016 or by contacting MALSA President Jazmine Ruiz at ruizja@law.unm.edu. MALSA will award Hon. Justice Cruz Reynoso of the California Supreme Court (ret.) with the 2016 Fighting for Justice Award for his remarkable work in civil rights. Justice Reynoso will be introduced by his former colleague, Emeritus Professor and former Dean of the UNM School of Law Leo Romero.

Other Bars
Albuquerque Bar Association
New Judges Reception

The Albuquerque Bar Association invites members to an event congratulating newly elected and appointed judges from 5:30–7:30 p.m., March 10, at the Pete V. Domenici U.S. Courthouse. Register for this exclusive event by calling the Albuquerque Bar at 505-842-1151 or online abqbar.org. This event is only open to Albuquerque Bar and Federal Bench and Bar members.

Albuquerque Lawyers Club
March Luncheon and Meeting

The Albuquerque Lawyers Club invites members of the legal community to its lunch meeting at noon, March 2, at Seasons Rotisserie and Grill in Albuquerque. Jeffrey Lewine, Ph.D., of the Mind Research Network, and Lyn Kiehl, director of MINDSET will present "Neuroscience: From the Laboratory to the Courtroom." The luncheon is free to members and $30 for non-members. For more information, email Yasmin Dennig at ydennig@Sandia.gov.

American Bar Association Criminal Justice Section
Spring Meeting in Albuquerque

The American Bar Association Criminal Justice Section's Spring Meeting, co-sponsored by the State Bar of New Mexico, will be "Neuroscience: Paving the Way for Criminal Justice Reform." The meeting will be held April 28-April 30 at Hotel Albuquerque at Old Town in Albuquerque. Topics include how neuroscience is paving the way to criminal justice reform, neuroscience and environmental factors, neuroscience and solitary confinement and the neuroscience of hate: the making of extremist groups. New Mexico Supreme Court Justice Charles W. Daniels will be the luncheon keynote speaker. Roberta Cooper Ramo, the first woman to become president of the American Bar Association, will provide opening remarks. State Bar of New Mexico members can register for the discounted rate of $75. For more information and to register, visit: http://ambar.org/cjs2016spring

New Mexico Criminal Defense Lawyers Association
Trial Skills College

Need to brush up on trial tactics? In the New Mexico Criminal Defense Lawyers

Featured
Member Resource

STATE BAR of NEW MEXICO
CENTER FOR LEGAL EDUCATION

A service of the New Mexico State Bar Foundation, the Center provides programming in live, online webcast, teleseminar, onsite video replay, online anytime video, and DVD formats. CLE courses fulfill the minimum requirements of 10.0 G, 2.0 EP credits per year. Call 505-797-6020 or visit www.nmbar.org.

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24-Hour Helpline

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

Submit announcements for publication in the *Bar Bulletin* to **notices@nmbar.org** by noon Monday the week prior to publication.

Association's "Trial Skills College" (15.5 G) on March 17–19 in Albuquerque, students will hear lectures and practice with each other in small focus groups on every aspect of a trial, from voir dire to closing statements. New and seasoned practitioners alike will benefit from this course. Only 30 seats are available. Register at www.nmcdla.org.

White Collar Crime CLE

Learn the latest updates and trends in charging health care cases, grand jury practice, and submitting budget requests for adequate funding at the New Mexico Criminal Defense Lawyers Association's upcoming CLE "White Collar Crime & Complex Cases" on March 11 at the Garrett's Desert Inn in Santa Fe. Hear from some of the leading practitioners in the state on these issues and more. Visit www.nmcdla.org for more information and to register.

New Mexico Women's Bar Association

Meet and Greet Event

The New Mexico Women's Bar Association, a voluntary state-wide bar association open to all New Mexico attorneys regardless of sex or gender, is hosting a meet and greet event from 5:30–7 p.m., March 18, at the Albuquerque Country Club, 601 Laguna Blvd. SW, Albuquerque. NMWBA will providing light hors d'oeuvres and an exciting door prize with a cash bar. Members who bring a guest are elligible to attend a NMWBA sponsored CLE for free. R.S.V.P. suggested but not required to barbara@frjlaw.com.

Other News

New Mexico Lawyers for the Arts

Volunteers Needed for Pro Bono Legal Clinic

New Mexico Lawyers for the Arts and WESST/Albuquerque seek attorneys to volunteer for the New Mexico Lawyers for the Arts Pro Bono Legal Clinic from 10 a.m. to 1 p.m., March 19, at the WESST Enterprise Center, 609 Broadway Blvd. NE, Albuquerque. Continental breakfast will be provided. Clients will be creative professionals, artists or creative businesses. Attorneys are needed to assist in many areas including contracts, business law, employment matters, tax law, estate planning and intellectual property law. For more information and to participate, contact Talia Kosh at tk@thebennettlawgroup.com.

Society for Human Resource Management of New Mexico

2016 Conference in Albuquerque

The Society for Human Resource Management of New Mexico has announced its 2016 conference "Picture the Future... BE the Future" on March 7–9 at the Embassy Suites Hotel and Spa in Albuquerque. The conference includes speakers and topics of interest to HR professionals, legal professionals, and business professionals of all disciplines. Keynote speakers include Louis Efron, former head of global engagement and leadership development at Tesla Motors; Ann Rhoades, president of People Ink, and former vice president of the People Department for Southwest Airlines; Dr. Richard Pimentel, senior partner with Milt Wright & Associates Inc; and Cy Wakeman, author and president and founder of Reality Based. More information and registration is available at www.shrmnm.org.

2016–2017 Bench & Bar Directory

Update Your Contact Information by March 25

To verify your current information: www.nmbar.org/FindAnAttorney

To submit changes (must be made in writing):

Online: Visit www.nmbar.org > for Members > Change of Address
Mail: Address Changes, PO Box 92860, Albuquerque, NM 87199-2860
Fax: 505-828-3765
Email: address@nmbar.org

Publication is not guaranteed for information submitted after March 25.

The Board Governing the Recording of Judicial Proceedings
A Board of the Supreme Court of New Mexico

Expired Court Reporter Certifications

The following list includes the names and certification numbers of those court reporters whose New Mexico certifications expired as of Dec. 31, 2015.

Name	CCR CCM No.	City, State
Maria Blackwell	CCR #181	Bernalillo, N.M.
Carol Carson	CCR #28	Las Cruces, N.M.
Barbara Harris	CCR #114	Albuquerque, N.M.
Christi Macri	CCR #10	Fairport, N.Y.
Susan Moore	CCR #34	Albuquerque, N.M.
Wendy Morrison	CCR #195	Albuquerque, N.M.
Kailee Pereida	CCR #501	Lubbock, Texas
Dennis Zambataro	CCR #502	Milton, Ga.

Legal Education

March

2 **Strategies to Prosecute Sexual Assault Cases in New Mexico**
13.2 G
Live Seminar
New Mexico Coalition of Sexual Assault Programs
www.nmcsap.org

4 **31st Annual Bankruptcy Year in Review Seminar**
6.0 G, 1.0 EP
Live Seminar and Webcast
Center for Legal Education of NMSBF
www.nmbar.org

4 **How Ethics Still Apply When Lawyers Act as Non-Lawyers**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

8 **Working with Difficult Clients**
1.0 EP
Live Seminar
New Mexico Adoption and Foster Care Alliance
www.adoptfostercarealliancenm.org

9 **Foreclosure Litigation Defense**
6.0 G
Live Seminar, Albuquerque
Gleason Law Firm LLC
gleasonlawfirm@gmail.com

10 **Estate and Gift Tax Audits**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

10 **Advanced Workers Compensation**
5.6 G, 1.0 EP
Live Seminar
Sterling Education Services Inc.
www.sterlingeducation.com

11 **Navigating New Mexico Public Land Issues (2015)**
5.5 G, 1.0 EP
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org

11 **Federal Practice Tips and Advice from U.S. Magistrate Judges (2015)**
2.0 G, 1.0 EP
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org

11 **Law Practice Succession-A Little Thought Now, a Lot Less Panic Later (2015) 2.0 G**
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org

11 **The Future of Cross-commissioning: What Every Tribal, State and County Lawyer Should Consider post Loya v. Gutierrez**
2.5 G, 1.0 EP
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org

11 **White Collar Crime & Complex Cases: The Clients, the Charges, the Costs**
6.7 G
Live Seminar, Santa Fe
New Mexico Criminal Defense Lawyers Association
www.nmcdla.org

15 **Estate and Trust Planning for Short Life Expectancies**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

15 **Advocacy in Action Conference**
18.10 G
Live Seminar
New Mexico Coalition of Sexual Assault Programs
www.nmcsap.org

17 **Second Annual State Bar Symposium on Diversity and Inclusion**
5.0 G, 1.0 EP
Live Seminar and Webcast
Center for Legal Education of NMSBF
www.nmbar.org

17–19 **Trial Skills College**
15.5 G
Live Seminar, Albuquerque
New Mexico Criminal Defense Lawyers Association
www.nmcdla.org

18 **2015 Tax Symposium (2015)**
7.0 G
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org

18 **The Trial Variety: Juries, Experts and Litigation (2015)**
6.0 G
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org

18 **Ethically Managing Your Practice (Ethicspalooza Redux –Winter 2015)**
1.0 EP
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org

18 **Civility and Professionalism (Ethicspalooza Redux – Winter 2015)**
1.0 EP
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org

18 **Ethics and Keeping Your Paralegal and Yourself Out of Trouble**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

23 **Avoiding Family Feuds in Trusts**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

24 **Full Implementation Navigating the ACA Minefield**
6.6 G
Live Seminar
Sterling Education Services Inc.
www.sterlingeducation.com

March

25 **Legal Technology Academy for New Mexico Lawyers**
4.0 G, 2.0 EP
Live Seminar and Webcast
Center for Legal Education of NMSBF
www.nmbar.org

28 **Tech Tock, Tech Tock: Social Media and the Countdown to Your Ethical Demise**
3.0 EP
Live Seminar and Webcast
Center for Legal Education of NMSBF
www.nmbar.org

28 **What NASCAR, Jay-Z & the Jersey Shore Teach About Attorney Ethics—2016 Edition**
3.0 EP
Live Seminar and Webcast
Center for Legal Education of NMSBF
www.nmbar.org

29 **Drafting Demand Letters**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

31 **Fair or Foul: Lawyers' Duties of Fairness and Honesty to Clients, Parties, Courts, Counsel and Others**
2.0 EP
Live Seminar and Webcast
Center for Legal Education of NMSBF
www.nmbar.org

April

5 **Planning Due Diligence in Business Transactions**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

7 **Treatment of Trusts in Divorce**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

8 **2015 Land Use Law in New Mexico**
5.0 G, 1.0 EP
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org

8 **More Reasons to be Skeptical of Expert Witnesses Part VI (2015)**
5.0 G, 1.5 EP
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org

8 **Federal Practice Tips and Advice from U.S. Magistrate Judges**
2.0 G, 1.0 EP
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org

8 **Invasion of the Drones: IP – Privacy, Policies, Profits (2015 Annual Meeting)**
1.5 G
Live Replay
Center for Legal Education of NMSBF
www.nmbar.org

14 **Governance for Nonprofits**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

18 **Disciplinary Process Civility and Professionalism**
1.0 EP
Live Program
First Judicial District Court
505-946-2802

22 **Ethics for Estate Planners**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

26 **Employees, Secrets and Competition: Non-Competes and More**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

27 **Landlord Tenant Law Lease Agreements Defaults and Collections**
5.6 G, 1.0 EP
Live Seminar
Sterling Education Services Inc.
www.sterlingeducation.com

28 **Annual Advanced Estate Planning Strategies**
11.2 G
Live Program
Texas State Bar
www.texasbarcle.com

May

4 **Ethics and Drafting Effective Conflict of Interest Waivers**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

5 **Public Records and Open Meetings**
5.5 G, 1.0 EP
Live Seminar, Albuquerque
New Mexico Foundation for Open Government
www.nmfog.org

11 **Adding a New Member to an LLC**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

STATE BAR of NEW MEXICO

2016 Annual Meeting– Bench & Bar Conference

Call for Nominations

State Bar of New Mexico 2016 Annual Awards

Nominations are being accepted for the 2016 State Bar of New Mexico Annual Awards to recognize those who have distinguished themselves or who have made exemplary contributions to the State Bar or legal profession in 2015 or 2016. The awards will be presented August 19 during the 2016 Annual Meeting—Bench and Bar Conference at the Buffalo Thunder Resort in Santa Fe. All awards are limited to one recipient per year, whether living or deceased. *Previous recipients for the past five years are listed below.*

Distinguished Bar Service Award-Lawyer

Recognizes attorneys who have provided valuable service and contributions to the legal profession and the State Bar of New Mexico over a significant period of time.

Previous recipients: Jeffrey H. Albright, Carol Skiba, Ian Bezpalko, John D. Robb Jr., Mary T. Torres

Distinguished Bar Service Award–Nonlawyer

Recognizes nonlawyers who have provided valuable service and contributions to the legal profession over a significant period of time.

Previous recipients: Kim Posich, Rear Admiral Jon Michael Barr (ret.), Hon. Buddy J. Hall, Sandra Bauman, David Smoak

Justice Pamela B. Minzner* Professionalism Award

Recognizes attorneys or judges who, over long and distinguished legal careers, have by their ethical and personal conduct exemplified for their fellow attorneys the epitome of professionalism.

Previous recipients: S. Thomas Overstreet, Catherine T. Goldberg, Cas F. Tabor, Henry A. Kelly, Hon. Angela J. Jewell

*Known for her fervent and unyielding commitment to professionalism, Justice Minzner (1943–2007) served on the New Mexico Supreme Court from 1994–2007.

Outstanding Legal Organization or Program Award

Recognizes sections, committees, local and voluntary bars and outstanding or extraordinary law-related organizations or programs that serve the legal profession and the public.

Previous recipients: Pegasus Legal Services for Children, Corinne Wolfe Children's Law Center, Divorce Options Workshop, United South Broadway Corp. Fair Lending Center, N.M. Hispanic Bar Association

Outstanding Young Lawyer of the Year Award

Awarded to attorneys who have, during the formative stages of their legal careers by their ethical and personal conduct, exemplified for their fellow attorneys the epitome of professionalism; nominee has demonstrated commitment to clients' causes and to public service, enhancing the image of the legal profession in the eyes of the public; nominee must have practiced no more than five years or must be no more than 36 years of age.

Previous recipients: Tania S. Silva, Marshall J. Ray, Greg L. Gambill, Robert L. Jucero Jr., Keya Koul

Robert H. LaFollette* Pro Bono Award

Presented to an attorney who has made an exemplary contribution of time and effort, without compensation, to provide legal assistance to people who could not afford the assistance of an attorney.

Previous recipients: Robert M. Bristol, Erin A. Olson, Jared G. Kallunki, Alan Wainwright, Ronald E. Holmes

*Robert LaFollette (1900–1977), director of Legal Aid to the Poor, was a champion of the underprivileged who, through countless volunteer hours and personal generosity and sacrifice, was the consummate humanitarian and philanthropist.

Seth D. Montgomery* Distinguished Judicial Service Award

Recognizes judges who have distinguished themselves through long and exemplary service on the bench and who have significantly advanced the administration of justice or improved the relations between the bench and bar; generally given to judges who have or soon will be retiring.

Previous recipients: Hon. Cynthia A. Fry, Hon. Rozier E. Sanchez, Hon. Bruce D. Black, Justice Patricio M. Serna (ret.), Hon. Jerald A. Valentine

*Justice Montgomery (1937–1998), a brilliant and widely respected attorney and jurist, served on the New Mexico Supreme Court from 1989–1994.

A letter of nomination for each nominee* should be sent to Joe Conte, Executive Director, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; fax 505-828-3765; or email jconte@nmbar.org. ***Please note that we will be preparing a video on the award recipients which will be presented at the awards reception, so please provide names and contact information for three or four individuals who would be willing to participate in the video project in the nomination letter.**

Deadline for Nominations: May 20

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 February 12, 2016

Petitions for Writ of Certiorari Filed and Pending:

			Date Petition Filed
No. 35,758	State v. Abeyta	COA 33,461	02/15/16
No. 35,759	State v. Pedroza	COA 33,867	02/15/16
No. 35,760	State v. Gabaldon	COA 34,770	02/12/16
No. 35,763	State v. Marcelina R.	COA 34,683	02/12/16
No. 35,754	Valenzuela v. A.S. Horner Inc.	COA 33,521	02/12/16
No. 35,753	State v. Erwin	COA 33,561	02/12/16
No. 35,751	State v. Begay	COA 33,588	02/12/16
No. 35,750	State v. Norma M.	COA 34,768	02/11/16
No. 35,749	State v. Vargas	COA 33,247	02/11/16
No. 35,748	State v. Vargas	COA 33,247	02/11/16
No. 35,742	State v. Jackson	COA 34,852	02/05/16
No. 35,747	Sicre v. Perez	12-501	02/04/16
No. 35,743	Conger v. Jacobson	COA 34,848	02/04/16
No. 35,741	State v. Coleman	COA 34,603	02/04/16
No. 35,740	State v. Wisner	COA 34,974	02/04/16
No. 35,739	State v. Angulo	COA 34,714	02/04/16
No. 35,733	State v. Meyers	COA 34,690	02/02/16
No. 35,732	State v. Castillo	COA 34,641	02/02/16
No. 35,746	Bradford v. Hatch	12-501	02/01/16
No. 35,371	Citimortgage v. Tweed	COA 34,870	01/29/16
No. 35,730	State v. Humphrey	COA 34,601	01/29/16
No. 35,722	James v. Smith	12-501	01/25/16
No. 35,711	Foster v. Lea County	12-501	01/25/16
No. 35,713	Hernandez v. CYFD	COA 33,549	01/22/16
No. 35,718	Garcia v. Franwer	12-501	01/19/16
No. 35,717	Castillo v. Franco	12-501	01/19/16
No. 35,707	Marchand v. Marchand	COA 33,255	01/19/16
No. 35,705	State v. Farley	COA 34,010	01/19/16
No. 35,702	Steiner v. State	12-501	01/12/16
No. 35,682	Peterson v. LeMaster	12-501	01/05/16
No. 35,677	Sanchez v. Mares	12-501	01/05/16
No. 35,669	Martin v. State	12-501	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. 35,671	Riley v. Wrigley	12-501	12/21/15
No. 35,649	Miera v. Hatch	12-501	12/18/15
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	12-501	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. 35,612	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
No. 35,581	Salgado v. Morris	12-501	11/02/15
No. 35,586	Saldana v. Mercantel	12-501	10/30/15
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. 35,495	Stengel v. Roark	12-501	08/21/15
No. 35,479	Johnson v. Hatch	12-501	08/17/15
No. 35,474	State v. Ross	COA 33,966	08/17/15
No. 35,466	Garcia v. Wrigley	12-501	08/06/15
No. 35,440	Gonzales v. Franco	12-501	07/22/15
No. 35,422	State v. Johnson	12-501	07/17/15
No. 35,374	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. 35,353	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. 35,097	Marrah v. Swisstack	12-501	01/26/15
No. 35,099	Keller v. Horton	12-501	12/11/14
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. 34,775	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. Le 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. 35,121	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. 35,296	State v. Tsosie	COA 34,351	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. 35,318	State v. Dunn	COA 34,273	08/07/15
No. 35,278	Smith v. Frawner	12-501	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
No. 35,426	Rodriguez v. Brand West Dairy	COA 33,675/33,104	08/31/15
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. 35,515	Saenz v. Ranack Constructors	COA 32,373	10/23/16
No. 35,614	State v. Chavez	COA 33,084	01/19/16
No. 35,609	Castro-Montanez v. Milk-N-Atural	COA 34,772	01/19/16
No. 35,512	Phoenix Funding v. Aurora Loan Services	COA 33,211	01/19/16
No. 34,790	Venie v. Velasquez	COA 33,427	01/19/16
No. 35,680	State v. Reed	COA 33,426	02/05/16

Certiorari Granted and Submitted to the Court:

(Submission Date = date of oral argument or briefs-only submission)			Submission Date
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. 35,248	AFSCME Council 18 v. Bernalillo County Comm.	COA 33,706	01/11/16
No. 35,255	State v. Tufts	COA 33,419	01/13/16
No. 35,145	State v. Benally	COA 31,972	01/25/16
No. 35,183	State v. Tapia	COA 32,934	01/25/16
No. 35,298	State v. Holt	COA 33,090	01/25/16
No. 35,101	Dalton v. Santander	COA 33,136	02/17/16
No. 35,198	Noice v. BNSF	COA 31,935	02/17/16
No. 35,249	Kipnis v. Jusbasche	COA 33,821	02/29/16
No. 35,302	Cahn v. Berryman	COA 33,087	02/29/16
No. 35,349	Phillips v. N.M. Taxation and Revenue Dept.	COA 33,586	03/14/16
No. 35,148	El Castillo Retirement Residences v. Martinez	COA 31,701	03/16/16
No. 35,297	Montano v. Frezza	COA 32,403	03/28/16
No. 35,214	Montano v. Frezza	COA 32,403	03/28/16
No. 35,386	State v. Cordova	COA 32,820	03/28/16
No. 35,286	Flores v. Herrera	COA 32,693/33,413	03/30/16
No. 35,395	State v. Bailey	COA 32,521	03/30/16
No. 35,130	Progressive Ins. v. Vigil	COA 32,171	03/30/16

Opinion on Writ of Certiorari:

			Date Opinion Filed
No. 33,969	Safeway, Inc. v. Rooter 2000 Plumbing	COA 30,196	02/18/16

Petition for Writ of Certiorari Dismissed:

			Date Order Filed
No. 35,398	Armenta v. A.S. Homer, Inc.	COA 33,813	01/04/16

Writ of Certiorari Quashed:

			Date Order Filed
No. 35,016	State v. Baca	COA 33,626	02/18/16

Petition for Writ of Certiorari Denied:

			Date Order Filed
No. 35,728	Brannock v. Lotus Fund	COA 33,950	02/19/16
No. 35,727	State v. Calloway	COA 34,625	02/19/16
No. 35,725	State v. Ancira	COA 34,556	02/19/16
No. 35,724	State v. Donovan W.	COA 34,595	02/19/16
No. 35,723	State v. Lopez	COA 34,602	02/19/16
No. 35,714	State v. Vega	COA 32,835	02/19/16
No. 35,415	State v. McClain	12-501	02/17/16
No. 35,710	Levan v. Hayes Trucking	COA 33,858	02/15/16
No. 35,709	Dills v. N.M. Heart Institute	COA 33,725	02/15/16
No. 35,708	State v. Hobbs	COA 33,715	02/15/16
No. 35,706	State v. Jeremy C.	COA 34,482	02/15/16
No. 35,416	State v. Heredia	COA 32,937	02/15/16

Opinions

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

Mark Reynolds, Chief Clerk New Mexico Court of Appeals
PO Box 2008 • Santa Fe, NM 87504-2008 • 505-827-4925

Effective February 19, 2016

Published Opinions

No. 34185	WCA-13-648, E TRUJILLO v LANL (reverse and remand)	2/15/2016
No. 33564	8th Jud Dist Taos CR-12-108, STATE v R CARDENAS (reverse)	2/16/2016

Unublished Opinions

No. 33540	7th Jud Dist Sierra CV-06-173, L DETHLEFSEN v W WEDDLE (affirm)	2/15/2016
No. 33660	7th Jud Dist Sierra CV-06-173, L DETHLEFSEN v W WEDDLE (affirm)	2/15/2016
No. 33760	9th Jud Dist Roosevelt CR-12-24, STATE v A BAEZA (reverse and remand)	2/15/2016
No. 34526	9th Jud Dist Curry LR-13-15, STATE v L GRIMES (reverse)	2/15/2016
No. 34959	11th Jud Dist San Juan LR-14-102, CITY OF FARMINGTON v B FONTENELLE (affirm)	2/15/2016
No. 33653	2nd Jud Dist Bernalillo LR-11-40, STATE v W BARRERAS (affirm)	2/15/2016
No. 34748	2nd Jud Dist Bernalillo CV-12-5685, CITIMORTGAGE v A VARELA (affirm)	2/15/2016
No. 34512	3rd Jud Dist Dona Ana LR-14-24, STATE v A BADONI (affirm)	2/16/2016
No. 34547	8th Jud Dist Taos CR-04-30, STATE v S TOLLARDO (dismiss)	2/16/2016
No. 34904	2nd Jud Dist Bernalillo JQ-15-39, CYFD v SALIMA J (affirm)	2/16/2016
No. 35039	2nd Jud Dist Bernalillo CR-09-3256, STATE v S BROTHERTON (affirm)	2/16/2016
No. 34716	2nd Jud Dist Bernalillo YR-05-23, STATE v R BARELA (affirm)	2/16/2016
No. 34877	11th Jud Dist San Juan CR-12-523, STATE v E FROLICK (reverse and remand)	2/16/2016
No. 35191	2nd Jud Dist Bernalillo CR-14-5653, STATE v C LOPEZ (dismiss)	2/16/2016
No. 34802	3rd Jud Dist Dona Ana JR-14-266, STATE v TAYLOR E (affirm)	2/17/2016
No. 34691	4th Jud Dist Guadalupe CV-14-13, B MCMULLIN v E BRAVO (dismiss)	2/17/2016
No. 34817	2nd Jud Dist Bernalillo CR-12-5736, STATE v F ARAGON (affirm)	2/17/2016
No. 34509	13th Jud Dist Valencia DM-12-41, N BARELA v C DIAZ (dismiss)	2/18/2016
No. 34994	2nd Jud Dist Bernalillo CR-15-325, STATE v D TENORIO (affirm)	2/18/2016

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

Clerk's Certificates

From 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

Clerk's Certificate of Reinstatement to Active Status

As of February 10, 2016:
Eileen Baca-Penner
5631 Carson Road
Rio Rancho, NM 87144
505-463-0344
eileenbpe@gmail.com

In Memoriam

As of February 3, 2016:
Carla Anne Carter
555 Broadway NE, Suite 200
Albuquerque, NM 87102

As of January 18, 2016:
Jennifer L. Stone
Rodey, Dickason, Sloan, Akin & Robb, PA
PO Box 1888
Albuquerque, NM 87103

As of January 17, 2016:
Roger E. Yarbro
12231 Academy Rd. NE, Suite 301, #249
Albuquerque, NM 87111

Clerk's Certificate of Admission

On February 16, 2016:
William W. Cason
53 Soaring Hawk Trail
Santa Fe, NM 87508
575-422-7378
wcason264@gmail.com

On February 16, 2016:
Stephen E. Fogel
Xcel Energy Services, Inc.
816 Congress Avenue, Suite 1650
Austin, TX 78701
512-236-6922
512-236-6935 (fax)
stephen.e.fogel@xcelenergy.com

On February 16, 2016:
Gerald Lee Johnson
508 Mechem Drive, Suite B
Ruidoso, NM 88345
575-257-5555
575-257-5588 (fax)
glj@titleco1.com

On February 16, 2016:
Preston Randolph Mundt
Kelly Hart & Hallman
201 Main Street, Suite 2500
Fort Worth, TX 76102
817-878-9379
preston.mundt@kellyhart.com

Clerk's Certificate of Change to Inactive Status

Effective February 15, 2016:
Peter Everett IV
10911 Fourth Street NW
Albuquerque, NM 87114
505-899-4343
505-899-4812
peiv@everettlaw-nm.com

Clerk's Certificate of Withdrawal

Effective February 12, 2016:
William B. Heintz
PO Box 309
Forest Ranch, CA 95942

Effective February 12, 2016:
Mark Carl Meiering
5916 Canyon Vista Drive NE
Albuquerque, NM 87111

Effective February 12, 2016:
Lourdes M. Monserrat
909 Calle Vistoso
Santa Fe, NM 87501

Clerk's Certificate of Name Change

As of January 26, 2016:
Jessica L. Streeter f/k/a Jessica L. Candelaria
Law Offices of the Public Defender
505 Marquette Avenue NW, Suite 120
Albuquerque, NM 87102
575-642-5421
jessica.candelaria@lopdnm.us

Recent Rule-Making Activity

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 March 2, 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:

Second Judicial District Court Local Rules

LR2-400	Case management pilot program for criminal cases.	02/02/16

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 Supreme Court

No. S-1-SC-35410 (filed February 11, 2016)

INQUIRY CONCERNING A JUDGE
No. 2015-049

IN THE MATTER OF SARAH M. SINGLETON,
First Judicial District Judge

PUBLIC CENSURE

RANDALL D. ROYBAL
DEBORAH L. BORIO
Albuquerque, New Mexico
for Judicial Standards Commission

JAMES A. HALL
JAMES A. HALL, L.L.C.
Santa Fe, New Mexico
for Respondent

Order and Public Censure

{1} WHEREAS, this matter came on for consideration by the Court upon the Judicial Standards Commission's petition to accept a stipulation agreement and consent to discipline (Stipulation) entered into between the Commission and Hon. Sarah M. Singleton (respondent), who is a district court judge in the First Judicial District;

{2} WHEREAS, in the Stipulation, respondent admits to the following acts:

a. On or about January 24, 2015, in the case of *Alfredo Morga, et al. v. FedEx Ground Package System, Inc., et al.,* D-101-CV-2012-01906, respondent permitted and engaged in impermissible *ex parte* communications with plaintiff's attorney while the case was still pending before respondent;
b. On or about January 24, 2015, in the case of *Alfredo Morga, et al. v. FedEx Ground Package System, Inc., et al.,* D-101-CV-2012-01906, respondent created the appearance of impropriety by engaging in a phone conversation with plaintiff's attorney that involved substantive matters and was outside the presence of the other party or the other party's attorney;

{3} WHEREAS, in the Stipulation, respondent admits that she violated Code of Judicial Conduct Rules 21-101, 21-102, 21-209(A) and 21-210(A) NMRA;

{4} WHEREAS, in the Stipulation, respondent admits that she engaged in *ex parte* communications contrary to the Code of Judicial Conduct;

{5} WHEREAS, in the Stipulation, respondent denies that she engaged in willful misconduct and further denies any malice, corrupt purpose, or dishonesty;

{6} WHEREAS, in the Stipulation, respondent acknowledges, however, that the facts support a conclusion that she knew or should have known that her actions were beyond her lawful authority and that such conduct falls within the Supreme Court's definition of bad faith;

{7} WHEREAS, in the Stipulation, while the parties agree that violation of the Code of Judicial Conduct, by itself, does not necessarily constitute willful misconduct, respondent acknowledges and stipulates that the facts and evidence, individually and taken together, may constitute willful misconduct in office and one or more violations of the New Mexico Code of Judicial Conduct and provide sufficient basis for the New Mexico Supreme Court to impose discipline pursuant to Article VI, Section 32, of the New Mexico Constitution;

{8} WHEREAS, the Stipulation provides that, in stipulating to discipline, the following non-exclusive factors in Judicial Standards Commission Rule 30 NMRA were considered:

a. the misconduct was an isolated instance;
b. the misconduct occurred in respondent's official capacity;
c. the misconduct created a highly publicized appearance of impropriety, which reflects adversely on the judiciary;
d. respondent immediately took corrective action and disclosed the *ex parte* communication to all parties;
e. respondent showed remorse, was candid and truthful with the Commission, and fully cooperated with the Commission; and
f. respondent is a well-respected judge with an excellent reputation and has no history of discipline by the Supreme Court;

{9} WHEREAS, in the Stipulation, respondent consents to imposition of a public censure by the Supreme Court to be published in the *New Mexico Bar Bulletin;* and

{10} WHEREAS, the Court having considered the petition to accept stipulation agreement and consent to discipline and having determined that acceptance of the stipulation is in the best interests of the judiciary and the public, and the Court being otherwise sufficiently advised, Chief Justice Barbara J. Vigil, Justice Petra Jimenez Maes, Justice Edward L. Chávez, Justice Charles W. Daniels, and Justice Judith K. Nakamura concurring;

{11} NOW, THEREFORE, IT IS ORDERED that the petition is GRANTED and respondent, Hon. Sarah Singleton, shall abide by all terms of the *Stipulation Agreement and Consent to Discipline*;

{12} IT IS FURTHER ORDERED that this order shall serve as respondent's PUBLIC CENSURE and shall be published in the *Bar Bulletin;* and

{13} IT IS FURTHER ORDERED that the file is UNSEALED in accordance with Rule 27-104(B) NMRA.

{14} IT IS SO ORDERED.
BARBARA J. VIGIL, Chief Justice

PETRA JIMENEZ MAES, Justice
EDWARD L. CHÁVEZ, Justice
CHARLES W. DANIELS, Justice
JUDITH K. NAKAMURA, Justice

From the New Mexico Supreme Court

No. S-1-SC-34884

INQUIRY CONCERNING A JUDGE
No. 2014-094

IN THE MATTER OF DAVID RAMOS, SR.,
Municipal Court Judge, City of Hurley, New Mexico

PUBLIC CENSURE

RANDALL D. ROYBAL
DEBORAH BORIO
Albuquerque, New Mexico
for Judicial Standards Commission

DAVID RAMOS, SR.
Hurley, New Mexico
for Respondent

Public Censure

{1} WHEREAS, this matter came on for consideration by the Court upon the Judicial Standards Commission's petition to accept a stipulation agreement and consent to discipline (Stipulation) entered into between the Commission and Hon. David Ramos, Sr., (respondent), who is a municipal court judge in Hurley, New Mexico;

{2} WHEREAS, in the Stipulation, respondent admits that on or about June 19, 2014, respondent initiated ex parte communications with Grant County Magistrate Judge Maurine Laney – concerning a case that was pending before Judge Laney – in an attempt to personally vouch for the character of the defendant and obtain special treatment for the defendant;

{3} WHEREAS, in the Stipulation, respondent admits that he violated Code of Judicial Conduct Rules 21-101, 21-102, 21-103, 21-204(B) and (C), 21-206(A), 21-209(A), 21-210(A), and 21-303 NMRA;

{4} WHEREAS, in the Stipulation, respondent consents to imposition of a formal mentorship followed by unsupervised probation for a period of one (1) year and a public censure by the Supreme Court to be published in the New Mexico Bar Bulletin;

{5} WHEREAS, upon considering the petition to accept stipulation agreement and consent to discipline and having determined that acceptance of the stipulation is in the best interests of the judiciary and the public, the Court previously granted the petition and ordered respondent to abide by all terms of the Stipulation Agreement and Consent to Discipline;

{6} WHEREAS, respondent has successfully completed his formal mentorship and is currently serving his one (1)-year term of unsupervised probation; and

{7} WHEREAS, in light of the foregoing, and the Court having considered the stipulation agreement and consent to the imposition of a public censure and being otherwise sufficiently advised, Chief Justice Barbara J. Vigil, Justice Petra Jimenez Maes, Justice Edward L. Chávez, Justice Charles W. Daniels, and Justice Judith K. Nakamura concurring;

{8} NOW, THEREFORE, IT IS ORDERED that respondent, Hon. David Ramos, Sr., is hereby issued a PUBLIC CENSURE that shall be published in the *Bar Bulletin*.

IT IS SO ORDERED.

BARBARA J. VIGIL, Chief Justice
PETRA JIMENEZ MAES, Justice
EDWARD L. CHÁVEZ, Justice
CHARLES W. DANIELS, Justice
JUDITH K. NAKAMURA, Justice

From the New Mexico Supreme Court

Opinion Number: 2015-NMSC-035

No. S-1-SC-35160 (filed October 30, 2015)

KAREN ROBINSON, IN HER capacity as County Assessor,
Plaintiff-Appellee,
v.
BOARD OF COMMISSIONERS OF THE COUNTY OF EDDY,
ROXANNE LARA, JOHN VOLPATO, JR., GUY E. LUTMAN, LEWIS DERRICK,
AND TONY HERNANDEZ,
Defendants-Appellants.

CERTIFICATION FROM THE NEW MEXICO COURT OF APPEALS
STEVEN L. BELL, District Judge

MATTHEW T. BYERS
CARAWAY, TABOR & BYERS, L.L.P.
Carlsbad, New Mexico
for Appellants

BRIDGET ANN JACOBER
Santa Fe, New Mexico
for Appellee

Opinion

Richard C. Bosson, Justice

{1} In 1986 our Legislature established a county property valuation fund to assist county assessors in fulfilling their statutory obligations to maintain current and correct values of all property within their jurisdictions. *See* NMSA 1978, § 7-36-16(A) (2000); NMSA 1978, § 7-38-38.1(C) (2007). The County Assessor for Eddy County (County Assessor or Assessor) sought to use some of these funds to contract with a private company for technical assistance in locating and valuing oil and gas property. The County Commission for Eddy County (County Commission) refused to approve the proposed plan because it believed that a contract to pay private, independent contractors to assist the County Assessor in the performance of the Assessor's statutory duties exceeded the Commission's lawful authority.

{2} We are persuaded that the County Commission does have such authority under law, and that the contract under consideration here would not exceed that authority or be otherwise ultra vires. The district court having previously issued a declaratory judgment to that same effect, we affirm.

BACKGROUND

{3} The parties presented this case to the district court on stipulated facts. We extract from the record the most salient of these stipulations to provide background and context.

1. The current Property Tax Code ("PTC") was enacted in 1973 under Chapter 258.
2. The PTC provides for "county property valuation fund[,"] NMSA 1978, §[ ]7-38-38.1 enacted in 1986. This law is remedial legislation intended to provide assessors with resources ("the 1% fund") to meet their statutory obligation to maintain current and correct values of all property within their jurisdiction. [Section 7-36-16].
3. Expenditures from the county property valuation fund shall be made pursuant to a property valuation program presented by the county assessor and approved by a majority of the county commissioners.
4. Beginning in 2007, Karen Robinson, as Eddy County Assessor, requested approval from the commissioners to use the 1% fund to contract for technical assistance in locating and valuing oil and gas property. Exhibit 5 (Eddy County Board of Commissioners Minutes).
5. Each year, since 2008, the Eddy County Assessor submitted a property valuation program, which included an oil and gas audit. Each year a majority of the Eddy County commissioners approved the Assessor's property valuation program. *See*[] Exhibit 6 (2008 Budget Report); Exhibit 7 (2009 Budget Report); Exhibit 8 (2013 Budget Report).
6. The Eddy County commissioners, however, would not agree that the oil and gas audit could be performed with appraisal assistance procured through an independent contractor, even though monies available in the Assessor's 1% fund would pay the costs of the audit. Exhibit 5 (Minutes); Exhibit 9 (April 18, 2008 Letter from Robinson to PTD Director).
7. By constitutional provision and legislation, New Mexico counties are authorized to enter into contracts. . . .

. . . .

9. The sole prohibition on contracting by counties relates to transactions favoring persons who have been county employees within the preceding year. NMSA 1978, §[ ]4-44-24 [(1969, repealed 2011)].

. . . .

11. In 2007 and 2012, with the consent of the Eddy County Commission, the Assessor issued a Request for Proposals for an Eddy County Personal Property Audit. Exhibit 11 (Request for Proposals for Eddy County Oil and Gas Personal Property Audit Bid # B-07-20); Exhibit 12[] (Request for Proposals B-11-23 Eddy County Oil and Gas Personal Property Audit).
12. After evaluating the RFP responses in 2012, the Eddy County Assessor sought to have the Eddy County commissioners contract with the successful bidder, using the Assessor's 1% fund to pay for the contract services. Exhibit 5 (Minutes of March 14, 2012 Eddy County Commission meeting).

13. The Eddy County commissioners asserted that the Assessor did not have the legal authority to use contractual assistance to conduct an oil and gas property audit. *Id.*
14. The commissioners relied on *Fancher v. Board of Commissioners*, [1921-NMSC-039, 28 N.M. 179, 210 P.237,] in refusing to execute a contract to hire the technical assistance needed by the Assessor. Exhibit 5 (Minutes of March 14, 2012 Eddy County Commission meeting).

. . . .

17. The Eddy County commission also relies on the argument that the legislature's assignment of the "sole responsibility" and authority at the county level for property valuation maintenance, subject only to the general supervisory powers of the director (NMSA 1978, §[ ]7-36-16(A)) prohibits the Assessor from contracting for appraisal assistance.
18. In other statutes, the legislature has employed the terms "sole responsibility" and "sole authority" to allocate liability and delegate power, not to restrict an official's actions. Exhibit 4 (Fastcase search of term "sole authority").
19. At the 2013 Eddy County commission budget hearings, the commissioners stated that if there were a court order declaring that the Assessor is permitted to utilize contractual assistance, the commissioners would sign the contract with the successful bidder responding to the 2012 RFP. Exhibit 5 (Minutes of March 14, 2012 Eddy County Commission meeting).

. . . .

25. A determination of the Assessor's legal authority to utilize contractual technical assistance in assessing property will impact all thirty-three assessors in New Mexico.

{4} As noted in the stipulated facts, the Legislature created the county property valuation fund to assist county assessors to maintain "current and correct values of property" within their jurisdiction. Section 7-36-16(A). Towards that end, the Legislature provided that "[e]xpenditures from the county property valuation fund shall be made pursuant to a property valuation program presented by the county assessor and approved by the majority of the county commissioners." Section 7-38-38.1(D). The fund is created through a 1% distribution of tax revenues from the county treasurer into that fund. The Legislature created this fund to provide county assessors with essential resources necessary to meet their statutory obligations.

{5} In this instance, the County Assessor duly submitted a "property valuation program" to the County Commission that included contracting with a private company to provide expert assistance in the valuation of oil and gas property located within the county, such as equipment and machinery. In withholding its approval, the only concern expressed by the County Commission was whether it was lawful to use money from the 1% fund to hire private independent contractors, as opposed to county employees, to provide technical assistance to the County Assessor. Importantly, the County Commission has never questioned the competency of the company chosen by the Assessor, nor is there a factual debate about whether the County Assessor actually needs technical assistance as she claims.

{6} After the County Commission withheld its approval, the County Assessor filed a declaratory judgment action asking the district court to determine whether the County Assessor and the County Commission had the authority to contract with an independent contractor to assist the County Assessor in valuing property. The district court granted the declaratory judgment, concluding that "the Eddy County Board of Commissioners has legal authority to contract for technical assistance for the Assessor in performing her duties of maintaining the property tax rolls as correct and current."

{7} Dissatisfied with the district court's ruling, the County Commission appealed to our Court of Appeals. The Court of Appeals heard oral argument and then, on its own motion, certified the case to this Court pursuant to Rule 12-606 NMRA. *Robinson v. Bd. of Comm'rs*, No. 32,998, order of certification (N.M. Ct. App. Mar. 12, 2015). The Court of Appeals advised us that the appeal presents significant questions of law and issues of substantial public interest of potential state-wide impact that should be determined by this Court. *Id.* ¶¶ 3, 4. Of particular concern to the Court of Appeals was the 1921 opinion from this Court in *Fancher*, 1921-NMSC-039, that needed to be addressed by this Court before the contract could proceed. We accepted certification.

DISCUSSION

{8} This case is one of statutory construction. As such, we review the decision of the district court de novo. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶ 5, 146 N.M. 24, 206 P.3d 135.

{9} Encompassed within the stipulated facts, the parties agree that counties in New Mexico have constitutional and statutory authority to contract with outside parties. The parties further agree that "[t]he sole prohibition on contracting by counties relates to transactions favoring persons who have been county employees within the preceding year," which, of course, is not at issue in this case. *See* § 4-44-24 (1969, repealed 2011). Therefore, nothing in the statutory powers of counties stands in the way of the County Assessor's desired contract.

{10} We turn, then, to the statutory powers of county assessors. The Property Tax Code, NMSA 1978, §§ 7-35-1 to -38-93 (1973, as amended through 2012), makes a general grant to county assessors of authority over valuation of property. "The county assessor is responsible and has the authority for the valuation of all property subject to valuation for property taxation purposes in the county . . . ." Section 7-36-2(A). Section 7-36-16(A) specifically states with respect to property valuation maintenance:

> County assessors . . . shall also implement a program of updating property values so that current and correct values of property are maintained and *shall have sole responsibility and authority at the county level for property valuation maintenance*, subject only to the general supervisory powers of the director [of the state property tax department].

(Emphasis added.)

{11} Clearly, the Legislature has reposed in county assessors the responsibility for maintaining "a program of updating property values" to reflect "current and correct values of property." *See id.* Simply put, the county assessor is in charge; it is the responsibility of that office to get the job done. The statute imposes no restrictions

on how county assessors are to exercise that authority. The county commission's job is to assist the assessor. The Property Tax Code also allows a county assessor, subject to concurrence by the county commission, to request the director of the state Property Tax Division to provide technical assistance services in the valuation of major industrial or commercial properties subject to valuation by the assessor. *See* Section 7-36-19.

{12} To provide assessors with additional financial resources, the Legislature created the county property valuation fund in 1986. *See* § 7-38-38.1(C). Historical context is important. Prior to creating this fund, county assessors had the same responsibility for property valuation maintenance, but without the necessary financial resources to achieve that goal in a timely manner. This Court addressed this seeming paradox in *Appelman v. Beach*, 1980-NMSC-041, 94 N.M. 237, 608 P.2d 1119.

{13} In *Appelman*, the Bernalillo County Assessor began to reassess property values in 1974. 1980-NMSC-041, ¶ 3. By 1976, however, only 16% of property in the county had been reassessed. *Id.* This ultimately led to different tax rates for equivalent property which posed serious constitutional problems. *Id.* ¶ 9. As the *Appelman* Court described it, "[i]t is unlawful and grossly inequitable for one set of taxpayers to pay on market value and others to be charged at a much lower rate, as is indicated in this record." *Id.* ¶ 16. Bernalillo County conceded that the reappraisal program was progressing too slowly, but the record suggested that "the County did not have the manpower and money to have had all the county property reassessed" in a timely fashion. *Id.* ¶ 12.

{14} This Court, speaking in an unusually blunt manner, sharply criticized the Bernalillo County Commission for not allocating necessary resources to the Bernalillo County Assessor. *See id.* ¶ 16. Recognizing that the problem of scarce resources existed throughout the state, this Court observed: "It is common knowledge, of which we take judicial notice, that these flagrant inequities exist throughout the state. Public officials who are responsible for reappraisal programs mandated by the Legislature are to be *condemned* for permitting such manifest discrimination." *Id.* (emphasis added). This Court does not "condemn" county officials lightly. We did so in this instance because of our grave concern that county assessors were left without the necessary financial tools to do a job—of constitutional import—that the Legislature had assigned to them. Our opinion in *Appelman* was intended as a call to action.

{15} Only six years later, the Legislature enacted Section 7-38-38.1, a remedial statute seemingly in response to this Court's criticism in *Appelman*.[1] The statute created a permanent source of additional revenue and directed county assessors to use those funds to achieve fair and timely reappraisal programs, exactly what the County Assessor seeks in this instance.

{16} Section 7-38-38.1 imposed no restrictions on the use of those funds other than it be part of a "property valuation program presented by the county assessor and approved by the . . . county commission[]." Section 7-38-38.1(D). The statute makes no attempt to restrict an assessor's options or discretion, such as whom to hire or with whom to contract. And of course, the statute does not preclude an assessor from securing additional expertise, either by way of additional employees or independent contractors.

{17} We can safely assume that the Legislature understood the need for essential resources at the county level and left it to county assessors and their county commissioners to decide how those resources should be spent, including the need for specialized expertise when it came to valuing personal property of a technical nature. The statute should be given an interpretation consistent with meeting its declared purpose.

{18} "Our primary goal when interpreting statutes is to further legislative intent." *State v. Strauch*, 2015-NMSC-009, ¶ 13, 345 P.3d 317 (internal quotation marks and citation omitted). We "examine the plain language of the statute as well as the context in which it was promulgated, including the history of the statute and the object and purpose the Legislature sought to accomplish." *Id.* ¶ 14 (internal quotation marks and citation omitted). We need to "promote the [L]egislature's accomplishment of its purpose." *Id.* ¶ 17 (internal quotation marks and citation omitted). Thus, the burden in this appeal is on the County Commission to persuade us how the Legislature could have spoken in such broad terms, unadorned by any express restrictions on county assessors, yet somehow have intended that the fund could not be used to contract for the necessary expertise.

{19} In an attempt to meet this burden, the County Commission argues that the Legislature, in delegating sole responsibility for property valuation maintenance to county assessors, intended that only assessor employees, and not private contractors, could assist in the revaluation process, even for technical property like oil and gas equipment that might require specialized expertise. The County Commission relies primarily upon a nearly century-old decision from this Court, *Fancher*, 1921-NMSC-039, for the proposition that where the Legislature gives sole authority to a public entity to perform a particular function, all other persons or entities are excluded from participating in carrying out that function. *Fancher* is pivotal to the County Commission's case. If the County Commission reads *Fancher* correctly, then the County Assessor may not proceed with her contract with a private company. If the County Commission is not correct about *Fancher*, then the contract is lawful, and the County Commission's refusal to approve must give way. Accordingly, we now turn to a careful analysis of that 1921 opinion.

{20} In *Fancher*, the county commissioners for Grant County entered into a contract with Fancher Company for three purposes: 1) to make a complete record index system of all real property titles and provide it to the county clerk, 2) to furnish the county assessor with a complete and correct classification and indexing system for taxable properties located within the county including previously omitted properties, and 3) to transcribe and reproduce any records deemed necessary by the county clerk. 1921-NMSC-039, ¶ 1. Despite having satisfactorily completed the job with respect to both county offices, the county clerk and the county assessor, Fancher Company was denied payment for its services because the contract was deemed unlawful and ultra vires. *Id.* ¶¶ 3, 4.

[1]Initially, the County Commission argued that the County Assessor did not present any direct evidence that the Legislature enacted Section 7-38-38.1 in response to *Appelman*. However, during oral argument to this Court the County Commission conceded that the statute was a remedial statute in response to *Appelman*, but maintained that it still does not authorize the County Assessor to contract out her duties. The County Commission argued that the fund was only for hiring new employees.

{21} On appeal, this Court agreed that the contract was ultra vires and void because it usurped the duties of the respective county officials who were specifically assigned these same functions by express legislative direction. *See id.* ¶ 56; *see also id.* ¶ 11 ("Where authority is given to do a particular thing and the mode of doing it is prescribed, it is limited to be done in that mode; all other modes are excluded. This is a part of the so-called doctrine of *expressio unius est exclusio alterius*." (internal quotation marks and citation omitted)). This Court stated that "[t]he test is, not whether the duty is primary or secondary, but whether provision has been made by law for the accomplishment of the end, or the doing of the work, or the performance of the service, for the benefit of the public, in its organized capacity." *Id.* ¶ 54. We further stated that "[w]hether the agency created is as competent and capable as some private individual is to perform the service is not the subject of inquiry by the courts. This is a matter for legislative consideration exclusively." *Id.*

{22} We agree with our predecessors that the question at issue ultimately comes to "a matter for legislative consideration," in other words, legislative intent. *Id.* 100 years ago, in the Property Tax Code of 1915, the Legislature expressly assigned in great detail certain responsibilities to county officials and made its intent clear that those officials were to carry out those responsibilities, leaving no room for private assistance no matter how competent or helpful. *See Fancher*, 1921-NMSC-039, ¶ 55-56. It was, and still is, a matter of legislative intent. The question then arises whether the modern tax code delegates in a similarly micro-managing manner, not only of function but in its choice of agent to perform that function. We begin by examining how things were done a century ago as described in the *Fancher* opinion.

{23} We look first to county clerks, whose responsibilities under the Property Tax Code of 1915 included recording and maintaining land title records. *Fancher*, 1921-NMSC-039, ¶¶ 6-7. Anticipating the need for additional work with regard to land title records, the Legislature provided that "whenever, in the opinion of the board of county commissioners" it might be necessary "to have a complete and accurate index made of all instruments of record affecting real property," then county commissions "are hereby authorized to have such index made by the county clerk of said county." *Id.* ¶ 6 (internal quotation marks and citation omitted). In other words, when the need for an index arises, the county was told to look to the county clerk. Since the Legislature had specified not only the subject matter (land title index) but also the agent to perform that function (county clerk), then the Legislature had left no room for the county commission to contract with someone else for the same purpose. It is not clear from the opinion whether the county clerk had even agreed to the imposition of a private contractor upon its functions.

{24} The *Fancher* Court came to a similar conclusion with respect to the county assessor and the state tax commission, both directed by statute to locate properties omitted from the tax rolls and include them in the proper records. When the county commission contracted with Fancher Company for completion of this task, this Court held the contract invalid, superseded by express assignment of that same function to the proper county officials. *Fancher*, 1921-NMSC-039, ¶¶ 55-56. In *Fancher*, it appears that the contract may have been opposed by the assessor and the state tax commission or at least that they may not have been willing participants.

> Provision, which the Legislature deemed sufficient, was made for officers and agents of such tax commission, and the compensation thereof. To hold that, notwithstanding such provisions, it would be competent for the county commissioners to employ other agencies, at public expense, to do this work thus provided for, would be to subject the public revenues of the different counties to dissipation *at the whim of the county commissioners*.

Id. ¶ 55 (emphasis added).

{25} We note that during those early days of our statehood, this was not the first instance of conflict between county officials, like assessors and clerks assigned certain duties by statute, and county commissions seemingly dissatisfied with those officials who contracted with outside agents to perform those same duties. See *State ex rel. Miera v. Field*, 1918-NMSC-071, ¶ 3, 24 N.M. 168, 172 P. 1136 ("Where, by law, the duty of performing certain work is cast upon a designated county official for which compensation is provided by law, it is not competent for the board of county commissioners to employ other persons to do the work required of such county official and to pay for such services.")

{26} Today, of course, the Property Tax Code has been completely rewritten; the language from 1915 has disappeared into history. That kind of detailed control over the means of implementation has largely been replaced by general grants of authority and responsibility, leaving the details to the discretion of the county official. And most importantly, the 1986 Legislature recognized a specific problem—unacceptable delays in updating property valuations—and created a specific answer—the 1% fund—to enable assessors to finish the job without the restrictions of 100 years ago.

{27} If the legal threat to the *Fancher* Court was the county commission usurping the authority of local officials, this case presents the opposite scenario. It is the County Assessor who requests this contract to assist her in satisfying legislative intent, not undermining it. As a helpful analogy to *Fancher*, if the Legislature, in creating the property valuation fund, had directed that the fund could be used to hire additional employees to assist in valuation maintenance, then perhaps, by negative inference, the Legislature could be said to have excluded anyone else such as independent contractors. But that is not what happened here. The Legislature made no effort to instruct assessors on how to utilize this fund.

{28} We conclude, therefore, that the Legislature intended to leave it to the professional discretion of those same assessors to decide how best to achieve the statutory goal of current and correct valuation of all property within the county. This is especially the case given the exhortations of this very Court over 30 years ago in *Appelman* to get the job done. 1980-NMSC-041, ¶ 16.

{29} The County Commission points out that Section 7-36-16(A) uses language that appears to delegate *exclusive* authority to the Assessor to update property values which would preclude anyone else. *See id.* (County assessors "shall have sole responsibility and authority at the county level for property valuation maintenance."). But we see no contradiction. The County Assessor seeks to contract for technical assistance to enable her, the County Assessor, to maintain current and correct property valuations. She has "sole responsibility" over valuations. The County Assessor is not being displaced as were the officials in *Fancher*; she remains at the center of the process. Final valuations will issue from her office under her signature as the law

envisions. Additionally, the parties stipulated in this case that "[i]n other statutes, the [L]egislature has employed the terms 'sole responsibility' and 'sole authority' to allocate liability and delegate power, not to restrict an official's actions."

{30} The County Commission also directs our attention to a provision in the Property Tax Code that allows the state Property Tax Division to contract with counties and provide technical assistance to county assessors regarding the valuation process. *See* Section 7-36-19. Again relying on *Fancher*, the County Commission asserts that this option for the County Assessor precludes all others. But if we were to accept that assertion, we would be forced to turn a blind eye to what the Legislature did subsequently in 1986 when it created the property valuation fund. Obviously, the means previously available to county assessors to maintain current and correct valuations were deemed insufficient to complete the job. This Court said as much in *Appelman*. It would make little sense for the Legislature to have created a new fund to address an ongoing problem of constitutional proportions, but then to limit assessors' remedies to what had been available all along.

{31} The County Commission also points to legislative history of previous iterations of the Property Tax Code, including a time, 1933, when the Property Tax Code was changed to expressly authorize assessors to hire independent contractors, and then years later in 1969 when that authority was withdrawn in favor of better training for assessor employees. *Compare* 1933 N.M. Laws, ch. 107, § 16 *with* 1969 N.M. Laws, ch. 219, § 16 (repealing the 1933 provision) *and* 1969 N.M. Laws, ch. 269, §§ 1-3 (providing for training in property appraisal and property tax administration and increased pay for county assessors with additional training). We are not persuaded. Better training and education of assessor employees is consistent, not inconsistent, with the goal evidenced by creating the property valuation fund—namely, additional resources to enable county assessors to complete the job of periodic valuation maintenance. The assessor might not be authorized, for example, to replace employees with a staff of independent contractors, but that is not the same as allowing assessors to supplement their employees with specialized technical assistance not available from staff employees.

{32} Finally, the County Assessor has pointed out that other counties within New Mexico have contracted for years with private companies—with state approval—to assist their county assessors, in some cases providing the type of precise valuation expertise for oil and gas properties at issue in this case. The County Commission acknowledges the validity of this evidence and that a ruling in its favor might have a negative impact on these other counties. Interpreting the law as we do, to authorize the County Assessor to contract for technical assistance from private contractors, we anticipate no such negative impact.

CONCLUSION

{33} We hold that state law does not prohibit the Eddy County Commission from approving a contract with an independent contractor to assist the County Assessor, at her request, in valuing property. Accordingly, we affirm the declaratory judgment to that effect previously entered by the district court.

{34} IT IS SO ORDERED.

RICHARD C. BOSSON, Justice

WE CONCUR:

BARBARA J. VIGIL, Chief Justice

PETRA JIMENEZ MAES, Justice

EDWARD L. CHÁVEZ, Justice

CHARLES W. DANIELS, Justice

Certiorari Denied, October 23, 2015, No. 35,532

From the New Mexico Court of Appeals

Opinion Number: 2015-NMCA-111

No. 32,830, (filed July 28, 2015)

WOODY INVESTMENT, LLC and PIPKIN CORPORATION,
Plaintiffs-Appellants/Cross-Appellees,
v.
SOVEREIGN EAGLE, LLC and DAWSON GEOPHYSICAL COMPANY,
Defendants-Appellees/Cross-Appellants.

APPEAL FROM THE DISTRICT COURT OF DE BACA COUNTY
DAVID P. REEB JR., District Judge

HEIDEL, SAMBERSON, NEWELL, COX & MCMAHON
MICHAEL NEWELL
Lovington, New Mexico
for Appellants/Cross-Appellees

CAVIN & INGRAM, P.A.
STEPHEN D. INGRAM
Albuquerque, New Mexico
for Appellees/Cross-Appellants

KARIN V. FOSTER
CHATHAM PARTNERS, INC.
Albuquerque, New Mexico
for Amicus Curiae

Opinion

Michael E. Vigil, Judge

{1} This is a case that involves claims brought under the Surface Owners Protection Act (SOPA), NMSA 1978, §§ 70-12-1 to -10 (2007), and the common law as a result of geophysical seismic surveys conducted on lands owned or leased by Plaintiffs. The only claims that proceeded to trial were Plaintiffs' claims of negligence and trespass because the district court granted summary judgment on Plaintiffs' SOPA and breach of contract claims. The jury determined there was no liability for negligence and trespass, and Plaintiffs appeal from the summary judgments. We reverse. We also briefly address Plaintiffs' argument that the district court erred in not allowing their expert witness on damages to testify at the trial and Defendants' cross-appeal.

BACKGROUND

{2} Sovereign Eagle, LLC (Sovereign) is a gas and oil operator that operates wells on lands owned by Woody Investments, LLC (Woody). Sovereign contracted with Dawson Geophysical Company (Dawson) to conduct geophysical seismic surveys in what is called the Tule Field in order to evaluate potential future oil and gas operations. The surveys were to be conducted on land that Woody and Pipkin Corporation (Pipkin) either owned or leased from the State Land Office.

{3} Pursuant to SOPA, Sovereign gave notice of the planned geophysical survey to Woody and Pipkin (Plaintiffs)[1] and when the parties were not able to agree on the terms of a surface use and compensation agreement, Sovereign posted a SOPA bond to enter upon Plaintiffs' lands and conduct the geophysical survey. *See* Section 70-12-5 (setting forth procedures required under SOPA before entry upon lands to conduct oil and gas operations, including advanced notice and requirements for negotiating a proposed surface use and compensation agreement that governs operations and compensation for damages to the surface); *see* Section 70-12-6 (stating that when no surface use and compensation agreement has been made, the operator may enter the surface owner's property and conduct oil and gas operations after posting a bond). In addition, Dawson obtained a permit from the State Land Office to conduct the geophysical survey.

{4} Dawson then entered Plaintiffs' lands and conducted the geophysical survey. In order to conduct the survey, cables and seismic equipment were laid on the surface by foot, ATVs, pickup trucks, and vibroseis trucks equipped with balloon tires. Geophysical seismic surveys generate, record, and analyze soundwaves that travel through the earth and are reflected back from the different types of rock below the surface. The two main methods used to generate seismic waves are (1) the drilling of shot holes and the detonation of explosives placed in the holes, and (2) vibroseis. In this case, shot holes were not drilled and no detonating explosives were used. Where vibroseis is used, a line or grid of receivers, or geophones, is placed on the surface connected with cables for transmission of the data to a centralized vehicle. A vibroseis truck weighs 62,000 pounds and the truck's "terra tires" or balloon tires displace the weight of the vehicle to eighteen pounds per square inch. The soundwaves caused by the vibrations of the vibroseis truck bounce off geologic formations beneath the earth and return to the surface to be captured by the geophones. When the detailed images are combined with other information, geologists can map seismic geomorphology and reservoir quality. Dawson conducted a two-dimensional survey, in which seismic readings were taken from points laid down a straight line, as well as a three-dimensional survey, in which seismic readings were taken from points laid out in a grid.

{5} After the survey was completed, Plaintiffs filed a complaint against Sovereign and Dawson (Defendants) seeking damages for negligence, breach of contract, violation of SOPA, and trespass. The district court granted summary judgment on the SOPA and breach of contract claims, and trial proceeded on the negligence and trespass claims. The jury found that Defendants were not liable on these claims. Plaintiffs appeal from the summary judgments granted to Defendants on the SOPA and breach of contract claims. Plaintiffs also appeal from the order of the district court that barred Plaintiffs' expert from expressing his opinion on damages.

DISCUSSION

{6} The standard we apply in reviewing an order granting summary judgment is well

[1]Monte Best was also an original plaintiff, but he was dismissed as a party early in the litigation and did not participate in any further proceedings.

settled. "We review the district court's decision to grant summary judgment de novo. Summary judgment is appropriate where the facts are undisputed, and the movant is entitled to judgment as a matter of law. We review the facts in a light most favorable to the nonmoving party. Further, all reasonable inferences from the record should be made in favor of the nonmoving party. New Mexico courts view summary judgment with disfavor." *T.H. McElvain Oil & Gas Ltd. P'ship v. Benson-Montin-Greer Drilling Corp.*, 2015-NMCA-004, ¶ 19, 340 P.3d 1277, *cert. granted*, 2014-NMCERT-012, 344 P.3d 988 (alterations, internal quotation marks, and citations omitted). To the extent applicable, we discuss additional authorities and facts which pertain to each issue discussed.

A. The SOPA Claim

{7} The district court granted summary judgment on the SOPA claim based on its conclusion that "Defendants' geophysical survey is a non-surface disturbing activity as defined in SOPA §70-12-5(A) and not an oil and gas operation as defined in SOPA" and therefore "Plaintiffs have no claim for damages under SOPA resulting from Defendants' geophysical survey." For the following reasons, we conclude that the district court erred as a matter of law by concluding that Defendants' geophysical seismic survey is not an "oil and gas operation" covered by SOPA.

{8} "Statutory interpretation is a question of law, which we review de novo." *First Baptist Church of Roswell v. Yates Petroleum Corp.*, 2015-NMSC-004, ¶ 9, 345 P.3d 310 (internal quotation marks and citation omitted). In interpreting a statute, our primary goal is to ascertain and give effect to the Legislature's intent. *Id.* "Under the rules of statutory construction, when a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation." *Id.* (alteration, internal quotation marks, and citation omitted). We look at the statute as a whole. *Id.*

{9} The purpose of SOPA is to balance surface owners' and mineral lessees' interests. SOPA aims to minimize damage and loss of available surface for agriculture caused by oil and gas operations, Section 70-12-4, to promote a fair negotiation process between the surface owner and the mineral lessee, Section 70-12-5, and to not delay exploration and development of minerals, Section 70-12-6.

{10} Before the enactment of SOPA, surface owners could only recover damage to the land if they had a contract with oil and gas operators that had an express reclamation provision or if the oil and gas operators unreasonably, negligently, or excessively used the land. *See Amoco Prod. Co. v. Carter Farms Co.*, 1985-NMSC-071, ¶¶ 11-12, 103 N.M. 117, 703 P.2d 894, *abrogated by McNeill v. Burlington Res. Oil & Gas Co.*, 2008-NMSC-022, 143 N.M. 740, 182 P.3d 121. However, SOPA now imposes strict liability upon oil and gas operators for surface damage caused by oil and gas operations. Section 70-12-4 directs:

> A. An operator shall compensate the surface owner for damages sustained by the surface owner, as applicable, for loss of agricultural production and income, lost land value, lost use of and lost access to the surface owner's land and lost value of improvements caused by oil and gas operations. The payments contemplated by this section only cover land affected by oil and gas operations.
>
> B. An operator shall not be responsible for allocating compensation between the surface owner and any tenant, except that an operator shall compensate a tenant of the surface owner for any leasehold improvements damaged as a result of the operator's oil and gas operations if the improvements are approved and authorized by the surface owner. The compensation shall equal the cost of repairing or replacing the improvements.
>
> C. An operator shall reclaim all the surface affected by the operator's oil and gas operations.

{11} Defendants argue that geophysical seismic surveys are preliminary to actual oil and gas operations and therefore cannot be included within "oil and gas operations." Defendants' argument stems from the SOPA notice provisions that differentiate between "activities that do not disturb the surface," under Section 70-12-5(A), and "oil and gas operations" outlined under the more extensive notice provision of Section 70-12-5(B). We agree that conducting a geophysical survey only requires five days notice under Section 70-12-5(A), but we do not agree that such a survey is excluded from SOPA's definition of "oil and gas operations."

{12} The Legislature broadly defined "oil and gas operations" to include "all activities affecting the surface owner's land that are associated with *exploration*, drilling or production of oil or gas[.]" *See* § 70-12-3(A) (emphasis added). From our analysis of New Mexico and out-of-state statutes and case law, a geophysical seismic survey—whether it disturbs the surface or not—is an exploratory activity. "Exploration" is "[t]he search for oil and gas. Exploration operations include: aerial surveys, *geophysical surveys*, geological studies, core testing, and the drilling of test wells (wildcat wells)." Howard R. Williams & Charles J. Meyers, *Manual of Oil & Gas Terms* 331-32 (7th ed. 1987) (emphasis added).

{13} Other states which have surface owner protection statutes also include geophysical seismic surveys within "exploration" and "oil and gas operations." *See* Okla. Stat. Ann. tit. 52, § 318.21(B)(1) (2012) (defining "seismic exploration" as "the drilling of seismograph test holes and use of surface energy sources such as weight drop equipment, thumpers, hydropulses or vibrators, and any of the activities associated therewith"); Mont. Code. Ann. § 82-10-502(5) (2013) (defining "oil and gas operations" as "the exploration for or drilling of an oil and gas well that requires entry upon the surface estate . . . and the production operations directly related to the exploration or drilling"); Wyo. Stat. Ann. § 30-5-401(a)(iv) (2005) (defining "oil and gas operations" as "the surface disturbing activities associated with drilling, producing and transporting oil and gas, including the full range of development activity from exploration through production and reclamation of the disturbed surface").

{14} In the limited New Mexico case law dealing with geophysical seismic surveys, our courts have used the terms "geophysical" or "seismic" surveys in the context of oil and gas exploration. For example, *Dean v. Paladian Exploration Co.*, 2003-NMCA-049, 133 N.M. 491, 64 P.3d 518, deals with surface damage caused by seismic explorations similar to the explorations that Dawson—who was also a defendant in *Dean*—conducted on the Woody property here. We used "geophysical operations" interchangeably with "seismic exploration" in *Dean*: "Defendant . . . obtained the authority to conduct geophysical operations . . . pursuant to certain seismic permits . . . . Dawson commenced seismic explorations in the fall of 1994." *Id.* ¶ 3. Also in *Dean*, like the present case, Dawson conducted a 3-D seismic survey and the Court referred to the survey as "3-D seismic exploration." *Id.* ¶ 4. The surface owners in *Dean* also

experienced similar damages: "the tracks and dust created by Defendants' trucks during the seismic exploration damaged his Blue Gramma grass[.]" *Id.* ¶ 17.

{15} Our case law has long accepted that geophysical seismic surveys are part of oil and gas exploration. *See Hondo Oil & Gas Co. v. Pan Am. Petroleum Corp.*, 1963-NMSC-204, ¶ 1, 73 N.M. 241, 387 P.2d 342 (The "defendant-appellee was granted the exclusive right . . . to conduct geophysical explorations[.]"); *Pinkerton v. Moore*, 1959-NMSC-051, ¶ 13, 66 N.M. 11, 340 P.2d 844 ("[T]he United States Congress in 1958, probably in recognition of modern exploration methods, enacted certain legislation which recognizes and allows geological, geochemical and geophysical surveys to be included as labor."); *Tidewater Associated Oil Co. v. Shipp*, 1954-NMSC-129, ¶ 10, 59 N.M. 37, 278 P.2d 571 ("The doing of geophysical or seismographic work has become an inseparable part of oil and gas discovery procedure.").

{16} Other states likewise classify geophysical seismic surveys as part of oil and gas exploration. *See Enron Oil & Gas Co. v. Worth*, 1997 OK CIV APP 60, 947 P.2d 610, 612 ("This is an appeal from an order denying the plaintiff's quest for an injunction to prevent surface owners from interfering with seismic exploration for minerals."); *Anschutz Corp. v. Sanders*, 734 P.2d 1290, 1291 (Okla. 1987) ("One who is engaged merely in the process of geophysical exploration may, as a result of that exploration, determine not to drill at all."); *Roye Realty & Dev., Inc. v. S. Seismic*, 711 P.2d 946, 948 (Okla. Civ. App. 1985) ("[T]he respective rights of the lessor and lessee to conduct geological and geophysical exploration will depend on the provisions of the lease."); *Hunt Oil Co. v. Kerbaugh*, 283 N.W.2d 131, 136 (N.D. 1979) ("The [defendants], in support of their argument for denial of injunctive relief, offered affidavits and testimony indicating the damages they had sustained as the result of prior seismic exploration; that the present seismic activity was causing damage to their grain crop, pasture, and other farmland; and that they fear additional damage to property from further seismic activity."); *Ready v. Texaco, Inc.*, 410 P.2d 983 (Wyo. 1966) (referring to conducting "geophysical exploration" by the "seismographic method").

{17} Defendants argue that a classifying geophysical survey in the category of "oil and gas operations" under Sections 70-12-3(A), -4(A), and -5(B) would make no sense to the context of the activities actually occurring at the time. We disagree. Defendants confuse the purpose of the notice provision, which bifurcates non-surface disturbing and surface disturbing oil and gas activities, with SOPA's strict liability compensation provision. The notice requirements reflect the level of invasiveness of different oil and gas operations. Evaluative and exploratory activities require a lesser notice standard while activities dealing with pipelines, construction, and drilling, for example, require alerting the surface owner to the more intense operations.

{18} We hold that the geophysical seismic survey is an oil and gas operation under SOPA, which subjects Defendants to strict liability for statutory damages. We therefore reverse the district court and remand for trial of Plaintiffs' SOPA claim.

B. Breach of Contract Claims

{19} The breach of contract claims arise out of a lease from the State Land Office to Woody[2] and a permit granted to Dawson by the State Land Office. Pursuant to an agricultural lease with the State Land Office, Woody leases the surface of several tracts of land from the State Land Office, and the State Land Office reserves the right to execute leases "for the extraction of oil [and] gas" and "the right to go upon, explore for, mine, remove and sell same." The lease also provides that when such rights are granted, permittees must settle with and compensate the State Land Office surface lessees for damages specified in 19.2.17.15 NMAC that we discuss below. Dawson obtained a permit from the State Land office to conduct the geological seismic surveys on lands that included lands leased to Woody, and the permit also requires Dawson to compensate State Land Office surface lessees such as Woody for the damages specified in 19.2.17.15 NMAC.

{20} Summary judgment was granted to Defendants on the breach of contract claims related to the leased lands on the grounds that: (1) Woody is not entitled to recover surface damages, which are only owed to the State; (2) while the leases entitle Woody to recover damages to the range, Woody did not plead such damages; (3) Mr. Woody is bound by his deposition testimony that he was not seeking damages for lands he was leasing from the State; and (4) Woody is not entitled to seek damages as a third-party beneficiary to a contract between Sovereign and Dawson. We address each point in turn.

1. Surface Damages Owed to the State

{21} Plaintiffs agree that they do not seek to recover for surface damages owed to the State Land Office. On the other hand, Plaintiffs contend that as a lessee, Woody is entitled to damages to the range which it does seek. This brings us to the second basis on which the district court granted summary judgment, which we now address.

2. Damages to the Range

{22} The district court initially ruled that under the terms of its lease, Woody is entitled to recover damages to the range. We agree. Dawson's permit from the State Land Office to conduct the geophysical seismic surveys specifically provides: "The Permittee [Dawson] must settle with and compensate state land office lessees [such as Woody] for actual damage to or loss of livestock, authorized improvements, range, crops, and other valid existing rights recognized by law. (19.2.17.15(B) NMAC)." The lease between Woody and the State Land Office provided for damages which must be paid under 19.2.17.15(B) NMAC. The regulation states:

> Permittees must settle with and compensate state land office surface lessees for actual damages to or loss of livestock, authorized improvements, range, crops, and other valid existing rights recognized by law.

Settled authority requires the damages provided for in the permit and lease to be enforced. *See Dean*, 2003-NMCA-049, ¶ 14 (concluding that a surface owner was entitled to the benefit of a statutory oil and gas lease form which held the oil and gas lessee liable for "all damages to the range, livestock, growing crops or improvements" caused by the oil and gas lessee's operation on the lands (internal quotation marks and citation omitted)); *Tidewater*, 1954-NMSC-129, ¶¶ 20-21 (making same conclusion for surface lessee).

{23} The district court ruled, however, that while Woody is entitled to damages to the range, the complaint does not plead such damages, and on this basis, granted Defendants summary judgment. The sufficiency of the pleadings to seek damages to the range presents a question of law, which we review de novo. *See Higgins v. Hermes*, 1976-

[2]The lease is actually to the Dwain F. Woody Trust. However, Woody received an assignment of rights from the Dwain F. Woody Trust to pursue this litigation. In addition, only Woody sued as a state grazing lessee, not Pipkin.

NMCA-066, ¶¶ 7-8, 89 N.M. 379, 552 P.2d 1227 (concluding as a matter of law that a complaint which alleged that the defendant's actions resulted in physical injuries to the plaintiff was sufficient to allege psychological damages and pain and suffering). For the following reasons, we disagree with the district court that the complaint fails to seek damages to the range.

{24} The complaint alleges that the permits and licenses issued to Sovereign "require compensation to the surface owner or lessee for damage done to the surface estate"; that Sovereign and Dawson are in violation of the permits and leases, and are thus in breach of contract, and that as a result of the breaches, "Plaintiffs have been damaged and are entitled to damages as necessary to compensate for the harm caused to the land." We agree with Plaintiffs that the foregoing allegations are sufficient to place Defendants on notice that they are seeking those damages provided for in the permits and leases: "actual damages to or loss of livestock, authorized improvements, range, crops, and other valid rights recognized by law." This is all that is required by our requirements for notice pleading. *See Valles v. Silverman*, 2004-NMCA-019, ¶ 18, 135 N.M. 91, 84 P.3d 1056 ("General allegations of conduct are sufficient, as long as they show that the party is entitled to relief and are sufficiently detailed to give the parties and the court a fair idea of the plaintiff's complaint and the relief requested." (alteration, internal quotation marks, and citation omitted); Rule 1-008(F) NMRA ("All pleadings shall be so construed as to do substantial justice."). Moreover, Defendants could not claim surprise, as discovery responses provided clearly stated that Plaintiffs were seeking damages to the range.

{25} Defendants assert that there is a technical difference between "surface damages" and "range damages" and that because Plaintiffs used the term "surface estate" as quoted above, they limited themselves to seeking "surface damages." The district court agreed with this argument and reasoning. However, we disagree with the broad contention that damages to the range of necessity excludes any and all surface damages. In *Tidewater*, our Supreme Court concluded that the following facts entitled a lessee to damages to the range under a lease with language identical to that before us here:

> The shot string extended for four and one-half miles and the work was in progress some eight days. Trucks ran up and down the line, according to the testimony, and as the soil was very dry, dust settled on the grass covering approximately a forty[-]acre strip of the shot string. Its use for grazing was thereby lost until it rained and there was no rain for quite a time after the work was completed.
>
> There was testimony the cattle were disturbed by the trucks being driven through them, in addition to the fact the trucks were on the ranch; that the cattle did not graze well during the period while the work was being done and that they lost weight on account thereof, to the damage of the appellee. There was also testimony the turf was damaged by the trucks driving back and forth and that the cattle had to go two miles to water because of the operations.

1954-NMSC-129, ¶¶ 23-24. Findings of fact that supported finding damages to the range included findings that in connection with the geophysical exploration work, "the plaintiff used drilling rigs, power wagons, trucks and other vehicular equipment and traveled back and forth across said lands and disturbed the defendant's livestock which were grazing thereon and damaged the [] range, livestock and improvements[.]" *Id.* ¶ 10 (internal quotation marks and citation omitted); *see also Dean*, 2003-NMCA-049, ¶¶ 17-18 (concluding there was sufficient proof of range damages where the plaintiff testified that his Blue Gamma grass was damaged by tracks and dust created by trucks during the defendant's seismic exploration).

{26} In addition, we note that besides alleging that Defendants failed to comply with their obligation to pay compensation as required by the permits and leases, the complaint alleges that Dawson was negligent in performing the geophysical seismic surveys, and as a result, "[T]he land has been damaged. The land damage is progressive and will continue to be progressive until properly repaired and remediated. The damage includes the cutting of roads, the killing of flora and the creation of areas where the vegetation was damaged to the point that it provides no barrier or prevention to erosion." These allegations are consistent with damages to the range as described in *Tidewater*, and they are then incorporated into the count alleging breach of contract. This manner of alleging damages is permissible. Rule 1-010(B) NMRA ("[A] paragraph may be referred to by number in all succeeding pleadings."). **{27}** While we do not here describe the full limits of what constitutes damages to the range, we do conclude that such damages do not exclude all damages to the surface of the land. Moreover, *Tidewater* does not allow for simply dividing damages that are due to a landlord on the one hand, and damages that are due to a tenant on the other hand, as the district court ruled. We therefore hold that the complaint gives adequate legal and factual notice in alleging damages to the range, and that such damages were improperly excluded by the summary judgment entered on this question by the district court.

3. Deposition Testimony

{28} This brings us to the third basis on which the district court granted summary judgment on the breach of contract claim. The district court disregarded Dwain Woody's affidavit that was submitted in opposition to the motion for summary judgment on grounds that "it contradicts his prior sworn testimony" and counsel's statement during the deposition to clarify the testimony was "too vague to adequately place Defendants on notice of the precise nature of the allegation being pursued." The deposition testimony at issue is the following:

> Q: Okay. All right. Now are you claiming any damage to the blue areas where you are leasing lands from the state?
>
> A: No, I'm not.

{29} During the deposition, Plaintiffs' counsel attempted to clarify the testimony, stating, " [I]f he's got a legal basis for claiming damages to lands that he leased, that's asserted in the complaint." In addition, responses to discovery requests had been provided to Defendants clearly stating that damages to the range on leased lands was being claimed pursuant to the state leases and permits. When Defendants sought summary judgment on the leased lands on the basis of Mr. Woody's deposition testimony, Plaintiffs submitted Mr. Woody's affidavit in which he explained:

> 7. To the extent it needs to be clarified Woody Investments, LLC is making claims to damage to the range on land leased from the State of New Mexico and the United States of America. It was pled in the complaint and I now understand it to be one of the claims which has been made on behalf of Woody Investments, LLC in this case.
>
> 8. I became confused in the deposition when being asked about

> the legal claims made in the case. I never intended to imply a claim would not be made for damage to the range or other necessary claims which are asserted as to state lease land.
>
> 9. To the extent I was asked to comment on a legal position I am not qualified to address that and in the deposition when my counsel indicated a claim for damage leased land had been asserted I relied upon that to clarify and accurately state our position.

{30} In the foregoing circumstances, the question before us is whether Mr. Woody's affidavit was submitted in an attempt to create a sham issue of fact. *Rivera v. Trujillo*, 1999-NMCA-129, ¶ 9, 128 N.M. 106, 990 P.2d 219. "Ultimately, the determination of whether a genuine factual dispute exists is a question of law." *Id.* ¶ 8. Thus, our task on appeal is to examine the circumstances de novo and determine if the affidavit created a material issue of fact. *See id*. ¶ 10.

{31} In *Rivera*, suit was brought when a vehicle driven by Serrano collided with a semitruck. *Id*. ¶ 2. In his deposition, Serrano repeatedly testified in response to defense counsel's questions that he had "blacked out" and could not "remember" anything immediately prior to the accident. *Id*. ¶ 10 (internal quotation marks and citation omitted). Under questioning from his own attorney, Serrano then unequivocally and repeatedly testified to his understanding of what a "blackout" is, and that he lost consciousness while driving before he hit the truck. *Id*. ¶ 10. When a motion for summary judgment was filed on the basis that Serrano admitted he lost consciousness, an affidavit was filed that contradicted his deposition testimony that he understood what a "blackout" is. *Id*. ¶ 12. We concluded that "[s]uch post-hoc efforts to nullify unambiguous admissions under oath will not create a factual dispute sufficient to evade summary judgment." *Id.*

{32} The facts before us in this case are different. When Mr. Woody was asked whether damages were claimed for lands leased from the state and he answered in the negative, counsel pointed out that if he had a legal basis for making such a claim, it was set forth in the complaint. No follow-up questions were asked, and the complaint and discovery provided to Defendants clearly put Defendants on notice that Plaintiffs were seeking damages to the leased lands. The only real issue between the parties was whether damages to the range could be recovered, and we have addressed that as well. Under these circumstances, we are unable to conclude that the affidavit was submitted to create a sham issue of fact. *See Lotspeich v. Golden Oil Co.*, 1998-NMCA-101, ¶¶ 12, 19, 125 N.M. 365, 961 P.2d 790 (concluding that it was error not to consider affidavits submitted in opposition to motion for summary judgment where "[t]he claims set forth in the affidavits are neither conclusory nor without a factual base"). We therefore conclude that the district court erred in not considering Mr. Woody's affidavit.

4. Third-Party Beneficiary

{33} This brings us to the final basis relied upon by the district court in granting summary judgment as to the breach of contract claims. Specifically, Plaintiffs contend they are entitled to recover under a "good neighbor policy" attached to a contract between Sovereign and Dawson as third-party beneficiaries, and that summary judgment on this claim should be reversed. We disagree.

{34} It is a general rule that "one who is not a party to a contract cannot maintain suit upon it." *Staley v. New*, 1952-NMSC-102, ¶ 7, 56 N.M. 756, 250 P.2d 893. An exception to the general rule is a third-party beneficiary. *Permian Basin Inv. Corp. v. Lloyd*, 1957-NMSC-048, ¶ 22, 63 N.M. 1, 312 P.2d 533. Whether a person is a third-party beneficiary depends on the intent of the parties to the contract. *Fleet Mortg. Corp. v. Schuster*, 1991-NMSC-046, ¶ 4, 112 N.M. 48, 811 P.2d 81. "Such intent must appear either from the contract itself or from some evidence that the person claiming to be a third[-]party beneficiary is an intended beneficiary." *Valdez v. Cillessen & Son, Inc.*, 1987-NMSC-015, ¶ 34, 105 N.M. 575, 734 P.2d 1258.

{35} There is no language in the contract conferring third-party beneficiary status upon Plaintiffs. Plaintiffs rely exclusively upon a statement made by Sovereign's managing member that "I guess what I would say is I think this is a benefit to everybody involved." At best this testimony rendered Plaintiffs as incidental beneficiaries. *See Fleet Mortg. Corp.*, 1991-NMSC-046, ¶ 4 (stating an incidental beneficiary is "a person who is neither the promisee of a contract nor the party to whom performance is to be rendered but who will derive a benefit from its performance.' " (quoting 2 S. Williston, *A Treatise on the Law of Contracts* § 402 (W. Jaeger 3d ed. 1959)) (alteration omitted)). As incidental beneficiaries, Plaintiffs are not entitled to recover under the contract. *Fleet Mortg. Corp.*, 1991-NMSC-046, ¶ 4.

C. Testimony of Plaintiffs' Expert Witness

{36} Plaintiffs contend that the district court committed reversible error in not allowing their expert witness to give his opinion on damages at the trial on their negligence and trespass claims. However, because the jury found no liability on the negligence and trespass claims, we do not address Plaintiffs' argument. *See Kysar v. BP Am. Prod. Co.*, 2012-NMCA-036, ¶ 21, 273 P.3d 867 ("[E]ven if a district court makes an erroneous ruling, it does not constitute reversible error unless it results in prejudice."); Rule 11-103(A) NMRA ("A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party[.]"); *W. Va. Dep't of Transp. v. Parkersburg Inn, Inc.*, 671 S.E.2d 693, 706 (W. Va. 2008) (reaffirming that where a plaintiff does not prevail on liability, any errors alleged as to damages are harmless).

D. Defendants' Cross Appeal

{37} Defendants filed a counterclaim seeking an award of attorney fees and costs pursuant to SOPA on the basis that Plaintiffs failed to exercise good faith with the provisions of SOPA. Section 70-12-7(A)(4) (providing that attorney fees and costs may be awarded to the prevailing party if "the surface owner failed to exercise good faith in complying with the provisions of [SOPA] or the terms of a surface use and compensating agreement"). At the trial on Plaintiffs' negligence and trespass claims, the district court granted Plaintiffs' motion for a directed verdict on the counterclaim, and Defendants appeal. When the district court granted the directed verdict, Defendants were "prevailing" parties under Section 70-12-7(A)(4), because summary judgment was granted to Defendants under Plaintiffs' SOPA claim. However, we have reversed that summary judgment, and Defendants can no longer be considered as "prevailing" parties. Accordingly, we do not address the cross appeal.

CONCLUSION

{38} The orders of the district court granting summary judgment on Plaintiffs' SOPA claim and breach of contract claims, except the third-party beneficiary claim, are reversed. This case is remanded to the district court for further proceedings consistent with this Opinion.

{39} IT IS SO ORDERED.

MICHAEL E. VIGIL, Chief Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

TIMOTHY L. GARCIA, Judge

From the New Mexico Court of Appeals

Opinion Number: 2015-NMCA-112

No. 32,105, (filed August 13, 2015)

ROSEMARY PAEZ and REY PAEZ,
Plaintiffs-Appellants,
v.
BURLINGTON NORTHERN SANTA FE RAILWAY, MIKE A. ORTEGA, HECTOR L. URAN, COUNTY OF SOCORRO, by and through its COMMISSIONERS, ROSALIND TRIPP, JAY SANTILLANES, LAUREL ARMIJO, CHARLES GALLEGOS, and STANLEY HERRERA,
Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF SOCORRO COUNTY
KEVIN R. SWEAZEA, District Judge

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LAW OFFICE OF TIBO CHAVEZ, JR.
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for Appellee County of Soccoro

Opinion

J. Miles Hanisee, Judge

{1} While driving her vehicle in Socorro County (the County), Rosemary Paez collided with a train owned and operated by Burlington Northern Santa Fe Railway (BNSF). Mrs. Paez and her husband, Rey Paez (Plaintiffs) filed a civil lawsuit against BNSF and the County (Defendants), among others. Defendants filed numerous motions for partial summary judgment. After multiple hearings, the district court granted summary judgment as to each motion, ultimately disposing entirely of Plaintiffs' negligence claims against Defendants. Plaintiffs appeal, arguing that disputed issues of material fact precluded summary judgment. We affirm.

BACKGROUND

{2} This case arises from a 2008 collision in Socorro County between a train, owned and operated by BNSF, and a vehicle driven by Mrs. Paez.[1] The collision occurred at a railroad crossing known as the Paizalas Road crossing (the crossing), located within walking distance of Plaintiffs' property. Mrs. Paez was badly injured in the collision, and she and her husband sued Defendants, BNSF's train operators, and others, on the basis of negligence, for personal injury and damages.[2] Plaintiffs' amended complaint asserted BNSF's negligent failure to: (1) maintain a safe railroad crossing, (2) provide adequate warning devices, and (3) eliminate visual obstructions to enable motorists' "clear and unobstructed view of the crossing and approaching trains." Additionally, Plaintiffs contended that in conjunction with its train operators, BNSF failed to sound the train horn, keep a proper lookout, and slow the train "as required to protect the traveling public."[3] Similarly but not identically, Plaintiffs alleged that the County failed to maintain the roadway itself in a safe condition, post adequate warning signs, and to undertake on-site measures to clear visual obstructions. In addition to general and punitive damages, Plaintiffs sought attorney fees and costs.

{3} BNSF answered Plaintiffs' amended complaint and subsequently filed nine motions for partial summary judgment, asserting at the outset and in relevant part for purposes of this appeal, that: (1) Mrs. Paez was negligent per se in failing to yield to the train and in failing to keep a lookout; (2) Plaintiffs' claim of failure to provide adequate warning devices was preempted by federal law; (3) Plaintiffs' claim regarding the unsafe condition of the crossing was preempted by federal law and failed for lack of causation; and (4) undisputed photographic evidence established the absence of visual obstructions. Initially, the district court denied BNSF's motion for partial summary judgment premised upon Mrs. Paez's negligence per se. It granted BNSF's preemption-based motions regarding both the crossing's upkeep and the asserted inadequacy of its warning devices. The record does not reflect an initial written order regarding BNSF's challenge to Plaintiffs' visual obstruction claim. Later during the litigation, BNSF filed a renewed motion for partial summary judgment on each basis that the district court initially rejected or withheld judgment.

{4} Along with ultimately joining BNSF's renewed motion for summary judgment, the County filed three of its own summary judgment motions, asserting that:

[1]Mrs. Paez died during the pen dency of this case. Her husband is the remaining Plaintiff in this matter. It is unclear on appeal whether the estate of Rosemary Paez has formally been substituted to represent her preexisting personal interest in the underlying litigation. In this Opinion, we refer to Plaintiffs as being either Rosemary Paez or her estate, and Rey Paez.

[2]Plaintiffs also named the Middle Rio Grande Conservancy District (MRGCD) as a defendant in the complaint; however, the district court granted a motion by MRGCD to dismiss the claims against it on the basis of improper venue. The propriety of this dismissal is not before us on appeal; we therefore omit any discussion regarding MRGCD.

[3]Plaintiffs no longer dispute that BNSF engineers in fact sounded the train's horn. Nor do Plaintiffs persist in contentions regarding the keeping of a lookout or train speed.

(1) it had no statutory duty to maintain the railroad crossing area or the railroad crossing itself; (2) federal law preempted Plaintiffs' inadequate warning device claim; (3) it had no actual or constructive notice of an alleged defect or dangerous condition associated with the crossing; and (4) Plaintiffs lacked evidence that the asserted negligence against the County was the proximate cause of any damages. The district court initially denied the County's motions with the exception of its request for summary judgment on Plaintiffs' inadequate warning device claim. Consequently, not only did the County join BNSF's motion for reconsideration, but it filed its own motion to reconsider alleging more specifically that Plaintiffs were unable to prove that the County was negligent or that the alleged negligence was a proximate cause of Mrs. Paez's injuries.

{5} The district court eventually granted the renewed motions, following lengthy proceedings and by a written order that stated there to be "no genuine issue as to any material fact." In conjunction with its rulings on these and BNSF's remaining motions for summary judgment that are not before us on appeal, the district court resolved the entirety of Plaintiffs' case against Defendants. The reasoning employed by the district court is best discerned from its statements during and at the conclusion of the two-day motion hearing it held. Addressing Plaintiffs' claims regarding both the condition of and visual obstructions alongside the crossing, and considering photographic evidence provided by the parties, the district court stated:

> The train would have been visible. When you contrast that against . . . testimony that the vegetation somehow kept one from seeing it just is not—I mean, the photographs are impossible to refute. The experts that Plaintiffs have both indicate[d] . . . that they are not giving opinions on causation, that the conditions on the road caused the accident, or that . . . [the] conditions caused the accident.

First with particular focus on the County, the district court observed that, "very honestly it looks [as though Plaintiffs] absolutely sorely lack[] . . . proof of causation." It later generally concluded that "Plaintiffs ha[d not] proven any proximate cause on any of their claims."

{6} The district court further found that "[f]ederal money was expended by [BNSF] in connection with the installation of [the] crossbucks," and therefore, Plaintiffs' claim that the crossing was extra-hazardous due to the inadequacy of warning devices was preempted by federal law. Additionally, considering Mrs. Paez's own negligence in light of the photographs it reviewed, the district court was "convinced . . . that no reasonable jury would find that [Mrs.] Paez had not violated [NMSA 1978, Section 66-7-341(A)(2) (2003),]" requiring her to stop within a prescribed distance of the railroad crossing for a visibly approaching train. Therefore, it concluded "as a matter of law, that [Mrs.] Paez was negligent pursuant to the common law duty to stop, look, and listen, and negligent per se pursuant to [Section 66-7-341]."

{7} Plaintiffs appeal, contending that the district court erred in granting summary judgment to Defendants. They argue that: (1) material facts conflict as to whether the condition of the crossing was a proximate cause of the collision; (2) material facts conflict as to whether visual obstructions alongside the crossing were a proximate cause of the collision; (3) federal law does not preempt Plaintiffs' claims regarding the adequacy of warning devices or hazardous conditions at the crossing; and (4) the district court wrongly concluded Mrs. Paez to have been negligent per se.[4]

STANDARD OF REVIEW

{8} An appeal from an order granting summary judgment presents a question of law that we review de novo. *Farmington Police Officers Ass'n v. City of Farmington*, 2006-NMCA-077, ¶ 13, 139 N.M. 750, 137 P.3d 1204. "We affirm an order granting summary judgment when there is no evidence raising a reasonable doubt about any genuine issue of material fact, and the moving party is entitled to judgment as a matter of law." *Lujan v. N.M. Dep't of Transp.*, 2015-NMCA-005, ¶ 5, 341 P.3d 001, *cert. denied*, 2014-NMCERT-011, 339 P.3d 841. The moving party bears the burden to demonstrate the absence of any genuine issue of material fact. *Brown v. Taylor*, 1995-NMSC-050, ¶ 8, 120 N.M. 302, 901 P.2d 720. "Once this prima facie showing has been made, the burden shifts to the non-movant to demonstrate the existence of specific evidentiary facts which would require trial on the merits." *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 10, 148 N.M. 713, 242 P.3d 280 (internal quotation marks and citation omitted). In New Mexico, summary judgment is disfavored, with trial on the merits being the preferred method by which litigation is concluded. *Id.* ¶ 8. As such, in conducting a de novo review of the record "we resolve all reasonable inferences in favor of the non-movant" and view the record in the light most favorable to a trial on the merits. *Lujan*, 2015-NMCA-005, ¶ 5 (alteration, internal quotation marks, and citation omitted).

DISCUSSION

{9} Plaintiffs sued Defendants on the basis that both had been negligent in their respective responsibilities attendant to the railroad crossing, the surrounding areas, and their upkeep. Plaintiffs likewise asserted BNSF's negligent operation of the train with which Mrs. Paez collided.

> It is axiomatic that a negligence action requires that there be a duty owed from the defendant to the plaintiff; that based on a standard of reasonable care under the circumstances, the defendant breached that duty; and that the breach was a cause in fact and proximate cause of the plaintiff's damages.

Romero v. Giant Stop-N-Go of N.M., Inc., 2009-NMCA-059, ¶ 5, 146 N.M. 520, 212 P.3d 408. Here, in conjunction with its general determination that material facts were not in dispute, the district court specifically concluded that "Plaintiffs [had not] proven any proximate cause [as to] any of their claims." We commence our review by examining the facts of this case in light of the element of proximate cause.

{10} Plaintiffs assert that evidence regarding the crossing's condition, its deficient warning devices, and the presence of visual obstructions that obscured Mrs. Paez's view of the approaching train establish disputed questions of material fact. In their supplemental briefing,[5] Plaintiffs reiterate their belief that "evidence submitted to the [district] court shows that the County breached its duty to provide a safe and non-hazardous roadway at the [] crossing, and that the visual obstructions at the crossing

[4]Although Plaintiffs assert that they are appealing the entirety of the district court's judgment, their brief in chief solely contains argument regarding the four issues listed above. We address only those issues specifically raised on appeal as we do not consider unsupported assertions excluded from a party's brief in chief. *See Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076.

created a dangerous condition that was a proximate cause of the collision." Regarding the crossing itself, Plaintiffs contend that its elevation was excessively disproportionate to the roadway it traversed. As well, Plaintiffs renew their contention that BNSF "failed to eliminate or remove the visual obstructions at the [] crossing, which was a proximate cause of the collision[.]"

{11} BNSF answers that Plaintiffs altogether lacked proof that its negligence in maintaining the crossing served as a legal cause of the collision. In defending itself from Plaintiffs' assertions of negligence regarding upkeep of the roadway and crossing, and the presence of visual obstructions, the County similarly answers that Plaintiffs failed to "place any causal connection between any act or omission by [the] County" and the collision. Regarding the visual obstruction claim, BNSF maintains the district court bore the authority to determine that, given clear photographic evidence to the contrary, no reasonable jury could conclude that Mrs. Paez's view of the train was obstructed from the road and direction she drove prior to the collision. BNSF relies specifically on a series of photographs taken by its expert accident reconstructionist, Brian Charles, contending that the images provide irrefutable evidence that the approaching train would have been plainly apparent such that the district court was "not required to accord weight to contradictory testimony." BNSF also points to photographs obtained from one of Plaintiffs' own experts, located at pages 2650, 2651, and 2652 of the record proper, that appear to show no visual obstruction when approaching the crossing from the roadway in the direction Mrs. Paez traveled. The County agrees that given the photographic evidence, "it simply becomes impossible to argue that [Mrs.] Paez could not have seen the approaching train[.]" As did the district court, we focus initially upon whether evidence in the record bore the capacity to establish a material factual dispute as to the element of proximate cause.

{12} We have defined the element of "proximate cause" to be "that which, in a natural or continuous sequence, produces the injury and without which the injury would not have occurred." *Lujan*, 2015-NMCA-005, ¶ 35 (internal quotation marks and citation omitted). Proximate cause encompasses "whether and to what extent the defendant's conduct foreseeably and substantially caused the specific injury that actually occurred." *Id.* (internal quotation marks and citation omitted). "An act or omission may be deemed a 'proximate cause' of an injury if it contributes to bringing about the injury, if the injury would not have occurred without it, and if it is reasonably connected as a significant link to the injury." *Talbott v. Roswell Hosp. Corp.*, 2005-NMCA-109, ¶ 34, 138 N.M. 189, 118 P.3d 194. In the majority of circumstances, proximate cause is a question of fact to be decided by the factfinder; however, proximate cause becomes an issue of law "when the facts are undisputed and the reasonable inferences from those facts are plain and consistent[.]" *Lujan*, 2015-NMCA-005, ¶ 35 (internal quotation marks and citation omitted). In order to determine that a breach of duty did not legally cause the alleged damages, the district court must conclude that no reasonable jury would find that the breach of duty by the defendant legally caused the damages suffered by the plaintiff. *Rodriguez v. Del Sol Shopping Ctr. Assocs., L.P.*, 2014-NMSC-014, ¶ 24, 326 P.3d 465; *see Lujan*, 2015-NMCA-005, ¶ 36. However, our Supreme Court has also articulated that "[c]ourts are not powerless to dismiss cases as a matter of law," and they "may still decide whether a defendant did or did not breach the duty of ordinary care as a matter of law, or that the breach of duty did not legally cause the damages alleged in the case." *Rodriguez*, 2014-NMSC-014, ¶ 24. Absent the element of proximate cause, a claim for negligence fails regardless of the presence of the remaining elements of the cause of action. *See Romero*, 2009-NMCA-059, ¶ 5 (stating that the absence of any element of a negligence claim is fatal to the claim).

Proximate Cause: Condition of the Crossing and Roadway

{13} To support the existence of a disputed issue of material fact regarding the condition of the crossing being a proximate cause of the collision, Plaintiffs first direct us to the deposition testimony of expert witness Alan Blackwell, a railway consultant with a background in track inspection. Mr. Blackwell testified that drivers are forced to decrease speed when approaching the crossing due to its "roughness[,] protruding spikes[,] and everything else[.]" He opined that BNSF failed to maintain the crossing surface in compliance with internal and industry standards such that "vehicular traffic can travel across safely and a motorist's attention is not distracted from observance of an approaching train." Additionally, Mr. Blackwell asserted that the roadway leading to and from the crossing was to be maintained by the County; the County in fact performed road work at the crossing; yet the crossing remained "extra[-]hazardous" due to its non-compliance with the appropriate standard of care, related to its elevation from the roadway. However, and despite the existence of this expert opinion that the crossing and the roadway were improperly maintained, it remains necessary for Plaintiffs to show that these failures were a cause of the collision. *See N.M. State Highway Dep't v. Van Dyke*, 1977-NMSC-027, ¶ 9, 90 N.M. 357, 563 P.2d 1150 ("Despite the failure . . . to conform to the standard[,] . . . it is still necessary for the plaintiff to show that the failure to meet those standards proximately caused the accident.").

{14} We have emphasized that in order to sustain a negligence action, along with a showing the defendant owed a duty to the plaintiff and breached that duty, the plaintiff must show that the breach was the cause in fact and proximate cause of any damages. *Romero*, 2009-NMCA-059, ¶ 5. In addition to recently addressing the topic in *Lujan*, Uniform Jury Instruction 13-305 NMRA, crafted by our Supreme Court, defines "causation (proximate cause)" to be an act, omission, or condition that contributes to bringing about an injury or harm, such that the injury would not have occurred without it. *Id.*; *Lujan*, 2015-NMCA-005, ¶ 35. We find no record citation or support for Plaintiffs' view that their experts opined that the poor or defective conditions of the crossing or roadway were causally connected to the collision. Similarly, we find no record citation or support for the position that Plaintiffs' experts opined that the collision would not have occurred absent the poor or defective conditions of the crossing or roadway. In fact, Mr. Blackwell directly stated that he was "not providing an opinion that the condition of [the] crossing caused the accident[.]" Furthermore, Plaintiffs' second expert, Mr. Burnham, a "traffic engineering and railroad safety expert," who Plaintiffs assert establishes a question of fact regarding causation, expressly stated that

[5]Supplemental briefing was ordered by this Court on April 10, 2015, due to the complexity of the underlying litigation and the nineteen-volume record proper. We appreciate the parties' effort in this regard and helpful presentations during the June 24, 2015 oral argument.

he had not "isolated a factor that would be directly attribut[able] to the County" that would have caused the collision. Nor did he maintain otherwise as to BNSF. Without a proper evidentiary showing of causation, Plaintiffs' negligence claim fails as to the condition of the crossing and the roadway leading to it. *See Lujan*, 2015-NMCA-005, ¶ 7; *Romero*, 2009-NMCA-059, ¶ 5. We hold that there is no disputed material fact as to proximate cause, and the district court did not err in granting summary judgment regarding Plaintiffs' claims that Defendants were negligent in relation to the condition of the crossing and roadway. *See Philip Morris*, 2010-NMSC-035, ¶ 20 (holding that if a material element is absent, "there can be no issue of material fact"). We affirm the district court's orders in this regard.

Proximate Cause: Visual Obstructions

{15} Plaintiffs maintain that disputed issues of material fact precluded summary judgment as to both Defendants regarding claims that the presence of visual obstructions adjacent to the crossing and railroad tracks interfered with Mrs. Paez's line of sight to the oncoming train. The County again asserts that Plaintiffs failed to show a causal connection between any act or omission by the County and the collision. BNSF maintains that summary judgment was appropriate because Plaintiffs' claim in this regard was "blatantly contradicted by the [photographic evidence], [such] that no reasonable jury could believe it[.]"

{16} In response to BNSF's fifth motion for partial summary judgment, regarding Plaintiffs' visual obstruction claim, Plaintiffs submitted six photographs taken within a month of the collision depicting the condition of the area surrounding the railroad tracks from different angles and distances. Additionally, Plaintiffs provided a report completed by Mr. Burnham detailing his findings regarding the collision. In it, but without direct reference to a particular photograph, Mr. Burnham perceived there to be a "greenery obstruction [that] is very significant to partially obscure approaching trains." He ultimately opined that from the direction Mrs. Paez traveled "[t]here was insufficient distance for a westbound motorist to observe a plainly visible train as the vehicle approached the tracks at 10 mph or more." After additional photographs were entered into evidence and Defendants filed their joint "renewed fifth motion," the district court found that "[t]he train would have been visible . . . [as] the photographs are impossible to refute."

{17} Specifically, the district court stated in reference to a motorist's position in relation to the crossing that "you can look at a picture from 50 feet out and see a train that's sitting . . . back from the crossing, and you . . . see it pretty clearly." The court noted that the photographs depicted surrounding dirt but not vegetation "of any consequence at all." It explained that "it looks like the photographs just directly contradict what [Plaintiffs'] expert is saying about . . . visibility[,]" and elaborated, stating that it did not think that the expert testimony regarding visibility "is something that any reasonable jury would even consider as factually accurate" given the photographs. The court ultimately found that "there is no way that a jury could not say that [the] train [was] readily visible." The district court granted the motion, determining there was no genuine issue of material fact as Plaintiffs had again failed to establish the element of proximate cause.

{18} Addressing causation in its supplemental briefing, Plaintiffs again point to the testimony of their two experts, and emphasize the testimony of four lay witnesses to link the failure of Defendants to remove or rectify visual obstructions at the area around the crossing and the collision. Plaintiffs cite portions of the record they contend show that the County failed to elevate the roadway in order to eliminate the disproportionate gradient that made the crossing extra-hazardous, thereby creating an obstacle that drivers must overcome when looking for a train. They also repeat that BNSF failed to remove visual obstructions at the crossing in violation of its own engineering instructions. While these contentions may relate directly to the elements of duty and/or breach, the facts on which they are based do not establish that the roadway, the crossing, or the hump on which the crossing is located, or even any visual obstructions only generally identified by Plaintiffs, caused the collision. While Plaintiffs rely on the testimony of Mr. Paez to establish that Mrs. Paez could not see down the tracks due to the crossing's elevation or the surrounding vegetation, and that of three other witnesses asserting that drivers cannot see, or encounter extreme difficulty when attempting to see, whether a train is approaching on the tracks being crossed, photographs taken by BNSF's expert accident reconstructionist, Mr. Charles, along with Plaintiffs' own photographs, illustrate circumstances wholly contrary to those described by Plaintiffs' witnesses.

{19} For clarity, Paizalas Road parallels the train tracks, then approximately 200 feet from the crossing curves 90 degrees in order for the roadway to traverse the tracks. Following the curve, and between 75 and 100 feet of the crossing, Paizalas Road becomes perpendicular to the tracks such that a motorist can look to the left and right for the presence of approaching trains. Mr. Charles took eight photographs that "show the view of the approaching train that a motorist driving east on Paizalas Road toward the crossing would have had." While he recognized that his accident reconstruction was performed a little over two years after the accident, Mr. Charles confirms that based on his "review of photographs taken on the same day or shortly after the accident, as well as satellite images, [his] opinion is that the environmental conditions and topography, including the road and track structure, are substantially similar to the conditions existing at the time of the accident." As stated previously and noted by the district court, Plaintiffs' own photographs, located at pages 2650-52 of the record proper, support this contention and are not markedly distinct from the Charles photographs that show an unobstructed view of an approaching train that a motorist would have as she or he approached the crossing. Mr. Charles's photographs, located at pages 2671, 2675 and 2677 of the record proper, show a BNSF train approaching the crossing when a motorist's vehicle would be 79 feet, 50 feet, and 15 feet from it. The photographs and accompanying visibility study demonstrate that "from 79 feet east to the crossing, a motorist's view of an oncoming train 650 feet to the south was clear and unobstructed, and the train would have been plainly visible the entire time." Our review of the photographs confirms the district court's repeated statement that a motorist's ability to see an approaching train is indisputable at distances in excess of and within 50 feet from the crossing.

{20} We take a moment to speak with greater specificity as to the photographs on which the district court primarily relied. Of Mr. Charles's, the first, located at page 2671 of the record proper, was taken 79 feet from the crossing and depicted a clearly visible train approaching from the southerly direction as had the train that collided with Mrs. Paez's vehicle. The second, located at page 2675 of the record proper, was taken 50 feet from the crossing, and was noteworthy to the district court because that is the distance at which Mrs. Paez was required to stop pursuant to Section 66-7-341(A)

(2)(b) (requiring that a "person driving a vehicle approaching a railroad-highway grade crossing shall . . . stop not more than [50] feet and not less than [15] feet from the nearest rail of a crossing if . . . a train is plainly visible and approaching the crossing within hazardous proximity to the crossing"). That photograph shows not only the approaching train engine to be clearly visible, but also its three illuminated headlights and many of its accompanying train cars. Lastly, page number 2677 of the record proper is a photograph that depicts a plainly visible train 15 feet from the crossing, the point by which Mrs. Paez was required to stop for a plainly visible train pursuant to the statute. Not relying exclusively on Mr. Charles's photographs, the district court was also presented with three photographs, located at pages 2650-52 of the record proper, taken by counsel for Plaintiffs within a few weeks of the collision. At oral argument, Plaintiffs did not dispute that these photographs were taken approximately 20 feet away from the crossing. Each depicted a scene free from obstructions that might obscure a driver's view of a train approaching the crossing. Based on these six photographs, namely the three taken by Mr. Charles and the three taken by Plaintiffs' counsel, the district court concluded that no visible obstruction impaired Mrs. Paez's view of the oncoming train.

{21} When asked at oral argument to identify the photograph that best depicted visual obstructions adjacent to the railroad tracks, Plaintiffs' counsel identified an altogether different photograph, located at page 1205 of the record proper. But that photograph, which counsel conceded to have been taken "a long way away" from the crossing—in excess of 50 feet—is little different from the six photographs the district court primarily relied upon, and fails to undermine its conclusion regarding the absence of visual obstructions.[6] Despite the photographic evidence, Plaintiffs reference a vague, stand-alone assertion by Mr. Burnham that expressed his "confiden[ce] that if [Mrs. Paez] was traveling 10 [mph] or more, she would not have seen [the train] until she got into a[] nonrecovery position[,]" such that she would have been unable to stop even had she seen the train. However, this same expert agreed that Mrs. Paez would have had a plain view of the train 35 feet from the track had she looked.

{22} BNSF asserts that the photographic evidence presented to the district court mandated the determination that summary judgment was proper, as the images irrefutably proved that Mrs. Paez's view was unobstructed prior to the collision. *See Scott v. Harris*, 550 U.S. 372, 380 (2007) ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." (internal quotation marks and citation omitted)). Relying as well upon *Perez v. City of Albuquerque*, 2012-NMCA-040, ¶ 9, 276 P.3d 973, which discusses *Scott*, BNSF contends that as a matter of law, the district court is not required to accord weight to testimony presented when it is blatantly at odds with the extensive and irrefutable photographic evidence. By way of supplemental authority, BNSF additionally notifies us of *Brown v. Illinois Central Railroad Co.*, 705 F.3d 531, 538-39 (5th Cir. 2013), which affirmed summary judgment in favor of a railroad where photographs showed that the motorist had a clear view of an oncoming train.

{23} Regarding *Scott*, we first note that this Court has twice determined it to be inapplicable when relied upon by a party in an effort to resolve a factual conflict on grounds of dispositive imagery. Yet *Perez*, 2012-NMCA-040, ¶ 10, and *Benavidez v. Shutiva*, 2015-NMCA-065, ¶ 26, 350 P.3d 1234, are both meaningfully dissimilar to *Scott* and are therefore distinguishable. Moreover, neither repudiates the proposition set forth in *Scott*. At issue in both *Perez* and *Benavidez* was videotape evidence that depicted an occurrence, but which required a jury's separate subjective interpretation of the actors' body language or movements. *Perez*, 2012-NMCA-040, ¶ 8; *Benavidez*, 2015-NMCA-065, ¶ 26. In *Perez*, a civil rights claim in which a plaintiff had sought a directed verdict based on a video and in reliance on *Scott*, we noted that the circumstance was different insofar as the video evidence portrayed only a sequence of events and did not provide a "determinative or a definitive account of the full circumstances." *Perez*, 2012-NMCA-040, ¶¶ 3, 10. At issue was whether the actions of law enforcement officers were unreasonable under the total circumstances. *Id.* ¶ 10. The plaintiff argued that there was only one interpretation of the videotape at issue, but we concluded the question of reasonableness to be one of fact for the jury and did not disturb the district court's denial of a directed verdict. *Id.* ¶ 10.

{24} *Benavidez* also addressed a claimed violation of a plaintiff's constitutional rights as well as tort claims, where the district court granted summary judgment in favor of the defendants. *Benavidez*, 2015-NMCA-065, ¶¶ 1, 21. The parties referred to a dashcam video of a vehicle stop to support their versions of facts concerning the handcuffing of the plaintiff; the defendants additionally relied upon *Scott*. *Benavidez*, 2015-NMCA-065, ¶ 26. We distinguished *Scott*, explaining that "the video [in *Scott*] was used to establish a fact that did not depend on interpretation of people's body language or demeanor[,]" unlike the situation presented where the actions of the parties were unclear from the videotape and were subject to multiple interpretations. *Benavidez*, 2015-NMCA-065, ¶ 26. We ultimately determined that the identity of the officer who handcuffed the plaintiff might be conclusive, but whether the plaintiff was resisting arrest depended on one's interpretation of various movements of the plaintiff and the police officer. Therefore, we held that the district court erred in granting summary judgment. *Id.* ¶ 27.

{25} Here, photographs depicting the southerly view Mrs. Paez would have had when approaching the crossing require no subjective interpretation. They establish that an approaching motorist's capacity to see an oncoming train from that direction is plain and irrefutable. This case therefore squarely aligns with *Scott*, *see* 550 U.S. at 380, and the district court properly relied on indisputably decisive photographic evidence to determine that no reasonable jury could conclude that contrary testimony created a genuine issue of material fact as to Defendants' negligence. As well, no reasonable jury could conclude that any obstruction obscured the oncoming train from Mrs. Paez's view at some point between 50 and 15 feet before the crossing, the distances between which she was statutorily required to stop. *Id.*; *see* § 66-7-341(A)(2)(b). Despite Plaintiffs' effort to establish a factual dispute regarding this issue, "[m]ere argument or contention of [the] existence of [a] material issue of fact . . . does not make it so." *Spears v. Canon de Carnue Land Grant*, 1969-NMSC-163, ¶ 12, 80 N.M. 766, 461 P.2d 415.

[6]The six photographs primarily relied on by the district court, and the seventh identified by Plaintiffs' counsel during oral argument, are appended to this Opinion.

{26} The instrument of summary judgment, when sparingly and properly utilized, is appropriate to resolve cases that do not present issues upon which reasonable jurors would disagree. When proper, such conclusions of law do not impermissibly intrude into the realm of the fact-finder, but serve the appropriate purpose of dispensing with claims that are premised upon insufficient factual showings. "The purpose of summary judgment is to pierce the boilerplate of the pleadings and assay the parties' proof in order to determine whether trial is actually required." *Sovie v. Town of N. Andover*, 742 F. Supp. 2d 167, 171 (D. Mass. 2010) (internal quotation marks and citation omitted). We view this circumstance to be the rare such occurrence that justifies the district court's use of its summary judgment authority regarding the element of proximate cause. We affirm the district court's grant of summary judgment in this case because we agree that no reasonable jury could find that vegetation near or around the crossing created a visual obstruction that was the proximate cause of the collision. *See Scott*, 550 U.S. at 380; *Brown*, 705 F.3d at 538 ("[W]here photographs and undisputed measurements establish that a driver approaching the crossing would have had an unobstructed view of an oncoming train, . . . trial courts [are instructed] to grant judgment as a matter of law."); *Rodriguez*, 2014-NMSC-014, ¶ 24 (holding that a "judge can enter judgment as a matter of law only if the judge concludes that no reasonable jury could decide the . . . legal cause question[] except one way").

Preemption

{27} Plaintiffs additionally assert that the district court erred in granting BNSF's third and seventh motions for partial summary judgment, along with the County's first such motion, on the basis that Plaintiffs' claims regarding inadequate warning devices and the hazardous condition of the crossing were preempted by federal law. Plaintiffs claim that this ruling constitutes error as both Defendants "failed to submit any evidence that federal monies were spent on [these] warning devices" or to make any improvements to the crossing itself. (Emphasis omitted.) We note at the outset that Plaintiffs' preemption argument is, at best, muddled. Plaintiffs appear to abandon or otherwise decline to develop their argument regarding the inadequate warning devices on appeal, specifically notifying us that they "do not claim that the warning devices at the crossing (i.e., the lights and crossbucks) were inadequate[.]" However, Plaintiffs seem to argue that if their claim regarding the dangerous condition of the crossing could be construed to be one of inadequate warning devices, federal preemption would not be triggered as neither BNSF nor the County submitted evidence that federal funds were used to erect warning devices.

{28} We need not resolve this issue as federal preemption is an affirmative defense. *See Azar v. Prudential Ins. Co. of Am.*, 2003-NMCA-062, ¶ 24, 133 N.M. 669, 68 P.3d 909. We have already determined that Plaintiffs failed to establish a prima facie case as to their negligence claim regarding the condition of the crossing, and therefore the availability of a preemption defense as to those claims cannot alter the outcome of the district court's ruling. *See Lujan*, 2015-NMCA-005, ¶ 7 (stating that the absence of any element of negligence is fatal to a plaintiff's claim).

Negligence Per Se

{29} Lastly, Plaintiffs assert that the district court erred in granting partial summary judgment premised upon its determination that Mrs. Paez was negligent per se. Plaintiffs maintain this ruling is contrary to the evidence that was presented to the district court and is based on an impermissible factual determination of fault. Plaintiffs contend that a genuine issue of material fact exists as to the presence or absence of negligence on the part of Mrs. Paez and that the district court improperly adopted the role of fact-finder in lieu of allowing the matter to proceed to a jury. BNSF contends that summary judgment was proper as it is undisputed that all of the elements of negligence per se were satisfied. The County does not directly address the negligence per se claim; however, it maintains that Mrs. Paez could see the train, failed to perceive it in time, and, therefore, proximately caused the collision herself. The County generally reminds us that in order to recover damages, Plaintiffs must prove that an act or omission by the County was a proximate cause.

{30} In order to determine whether a party was negligent per se, New Mexico courts employ the following four-part test: (1) a statute "prescribes certain actions or defines a standard of conduct, either explicitly or implicitly," (2) the plaintiff "violate[d] the statute," (3) the plaintiff is "in the class of persons sought to be protected by the statute," and (4) the plaintiff's "harm or injury . . . must generally be of the type the [L]egislature through the statute sought to prevent." *Apodaca v. AAA Gas Co.*, 2003-NMCA-085, ¶ 43, 134 N.M. 77, 73 P.3d 215 (alteration, internal quotation marks, and citation omitted). BNSF contends that Mrs. Paez violated Section 66-7-341(A)(2)(b), requiring her to stop between 50 and 15 feet before the crossing, that she is within the class of persons to be protected under this statute, and suffered the type of harm sought to be prevented through promulgation of the statute.

{31} Section 66-7-341(A)(2)(b) requires that motorists "approaching a railroad-highway grade crossing [to] stop not more than [50] feet and not less that [15] feet from the nearest rail of a crossing if . . . a train is plainly visible and approaching the crossing with hazardous proximity to the crossing[.]" Additionally, Section 66-7-341(A)(3) permits a motorist to "proceed through the railroad-highway grade crossing *only* if it is safe to completely pass through the entire" crossing without stopping. (Emphasis added.)

{32} Because we have affirmed the district court's conclusion that photographic evidence established the plain visibility of the approaching train had Mrs. Paez looked for it, we can determine that she violated Section 66-7-341(A)(3) when she drove into its path. Whom the Legislature sought to protect is not explicitly stated in the statute; however, it is reasonable to construe that it is drivers, their passengers, and railroad operation personnel. The harm sought to be prevented was ostensibly collisions between motorists and traversing trains. It appears that the collision between Mrs. Paez and the train is just that which the Legislature sought to prevent in enacting this statute. *See Archibeque v. Homrich*, 1975-NMSC-066, ¶ 16, 88 N.M. 527, 543 P.2d 820 (providing a negligence per se analysis). Given that all elements of the negligence per se test have been satisfied, we hold that the district court properly granted the summary judgment motion regarding negligence per se, and we affirm it. *See Hernandez v. Brooks*, 1980-NMCA-056, ¶ 5, 95 N.M. 670, 625 P.2d 1187 ("In New Mexico, one who violates a statute . . . is guilty of negligence per se, if the statute . . . was enacted for the benefit of the class of persons to which the injured person belongs.").

CONCLUSION

{33} For the foregoing reasons, we affirm the summary judgment rulings of the district court.

{34} IT IS SO ORDERED.

J. MILES HANISEE, Judge

WE CONCUR:
JONATHAN B. SUTIN, Judge
M. MONICA ZAMORA, Judge

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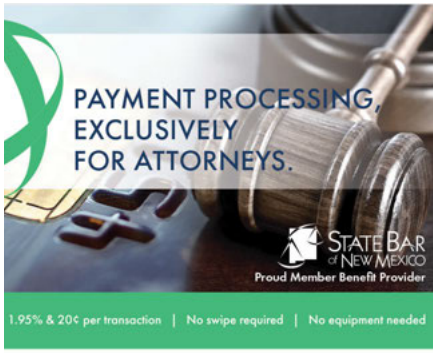

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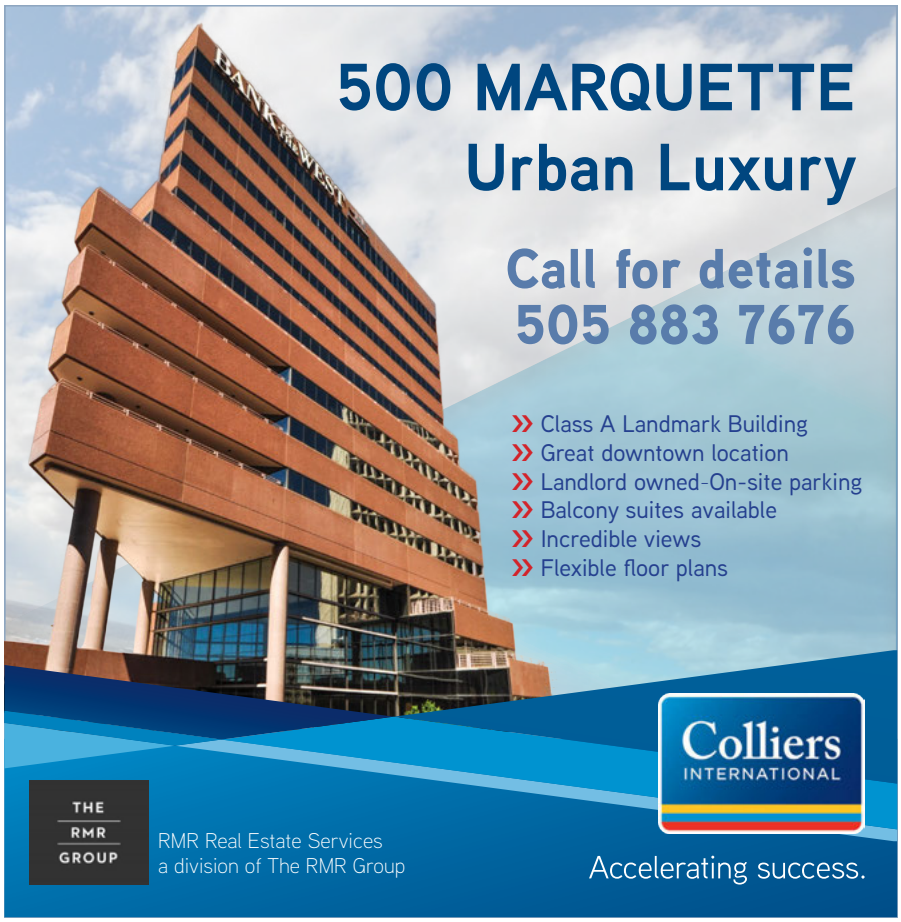

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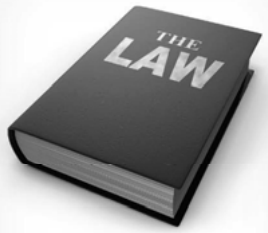

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