BAR BULLETIN
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Few U.S. Supreme Court cases are better known or more often cited than *Miranda v. Arizona*. The iconic warning developed as a result of the decision has appeared in countless movies and television shows.

The 2016 Law Day theme—*Miranda*: More than Words—presents a unique public educational opportunity to use something highly familiar (the *Miranda* Warning) to delve into points that are often missed. What does protection against self-incrimination really mean?

Procedural protections are the heart of the right to due process. *Miranda* embodies the basic proposition that we need to be aware of rights in order to be in a position to exercise them. Fifty years after the *Miranda* decision, there remains a lot of work to be done to ensure that all Americans are aware of their rights and meaningfully have the opportunity to exercise them. The 2016 Law Day theme allows us to examine the issues and challenges that remain to be overcome for our nation to live up to its pledge of justice for all. It also provides us an opportunity to explore constructive ways to advocate for change.

*Law Day is celebrated each year on May 1 and the theme is determined each year by the American Bar Association. For more information about Law Day programming and this year's theme, visit www.lawday.org. Text courtesy of www.americanbar.org.*

## Inside This Issue

# CLE Planner

*Attend these programs live at the State Bar Center or via Webcast from your office or home computer.*

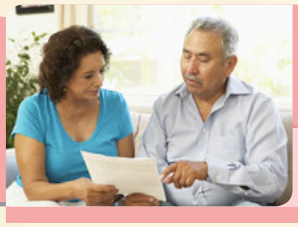
**May 6**

## Best and Worst Practices Including Ethical Dilemmas in Mediation

3.0 G | 1.0 EP

**Friday, May 6, 2016 • 8:15 a.m.–12:30 p.m.**
**State Bar Center, Albuquerque**

**May 13**



## Spring Elder Law Institute

6.2 G

**Friday, May 13, 2016 • 8:30 a.m.–4:30 p.m.**
**State Bar Center, Albuquerque**

***Summertime CLE Opportunities are here!***

*Attend these live programs offered by the Center for Legal Education at the State Bar Center. Breakfast, lunch and plenty of opportunities to network with your colleagues included.*

**June 16-17**

## Ninth Annual New Mexico Legal Service Providers Conference: Holistically Addressing Poverty and Advancing Equity for Women and Families in New Mexico

10.0 G | 2.0 EP

**Thursday and Friday, June 16–17, 2016**
**State Bar Center, Albuquerque**

**July 28**

## Reciprocity—Introduction to the Practice of Law in New Mexico

4.5 G | 2.5 EP

**Thursday, July 28, 2016 • 8:30–5 p.m.**
**University of New Mexico, Albuquerque**

On-Demand ***Take a look at these new On-Demand Programs available June 1!***

*The Center for Legal Education will file credits with New Mexico MCLE for on-demand programs at no additional cost!*

**On-Demand Programs**

- **Ethicspalozza 2015: How the Disciplinary Board Works** 1.0 EP
- **Professional Liability Insurance (2015)** 3.0 EP
- **The Future of Cross-commissioning: What Every Tribal, State and County Lawyer Should Consider post Loya v. Gutierrez** 2.5 G, 1.0 EP
- **Avoiding Retirement Pitfalls (2015 Family Law Institute)** 3.0 G
- **Legal Writing – From Fiction to Fact (Afternoon Session 2015)** 2.0 G, 1.0 EP
- **EEOC Update, Whistleblowers and Wages (2015 Employment and Labor Law Institute)** 3.2 G

*And many more! Visit the State Bar web page, click on CLE self-study to see all on-demand courses available!*

STATE BAR of NEW MEXICO
CENTER FOR LEGAL EDUCATION

Full course agendas available online. Register online at **www.nmbar.org** or call 505-797-6020.

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**28**
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### May

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

**3**
**Health Law Section BOD,** 9 a.m., teleconference

**4**
**Employment and Labor Law Section BOD,** noon, State Bar Center

**6**
**Criminal Law Section BOD,** Noon, Kelley & Boone, Albuquerque

**10**
**Appellate Practice Section BOD,** Noon, teleconference

**11**
**Animal Law Section BOD,** Noon, State Bar Center

**11**
**Children's Law Section BOD,** Noon, Juvenile Justice Center

## State Bar Workshops

### April

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

### May

**4**
**Divorce Options Workshop:** 6–8 p.m., State Bar Center, Albuquerque, 505-797-6003

**4**
**Civil Legal Clinic:** 10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

**18**
**Family Law Clinic:** 10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

**25**
**Consumer Debt/Bankruptcy Workshop:** 6–9 p.m., State Bar Center, Albuquerque, 505-797-6094

### June

**1**
**Divorce Options Workshop:** 6–8 p.m., State Bar Center, Albuquerque, 505-797-6003

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

# Notices

## Court News

### 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.

### Bernalillo County Metropolitan Court

#### Specialty Courts Education Day

Members of the legal community are invited to attend Specialty Courts Education Day at 2:30–4:30 p.m., May 20, at the Bernalillo County Metropolitan Court in the Jury Assembly Room. Learn what is new in the existing specialty courts and about two new diversion programs: Veterans Court and the Pre-Adjudication Animal Welfare (P.A.W.) Court. After the presentation, program judges and staff will be available to answer questions regarding eligibility, requirements and how these programs are making a difference in the community. Refreshments will be available. For more information, contact Camille Baca at 505-841-9897.

### Juvenile Justice Center

#### Fourth Annual Law Day at Children's Court

Roybal-Mack Law, PC, invites members of the legal community are invited to the Fourth Annual Law Day at Children's Court at 3:30 p.m., on April 29, at the John E. Brown Juvenile Justice Center. This year's theme is "Miranda: More Than Words" where students are free to express their interpretation through various forms of art including poetry, painting, drawing, music and written song. The event will feature award-winning author, television host and inaugural poet laureate, Hakim Bellamy. There will also be special guest appearance from, John "The Magician" Dodson, an Albuquerque native UFC MMA fighter. For more information, contact Antonia Roybal-Mack at 505-288-3500.

## *Professionalism Tip*

**With respect to opposing parties and their counsel:**
In depositions, negotiations and other proceedings, I will conduct myself with dignity, avoiding groundless objections and other actions that are disrupting and disrespectful.

## State Bar News

**Attorney Support Groups**

- May 2, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (the group meets the first Monday of the month.)
- May 9, 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#.
- May 16, 7:30 a.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (the group meets the third Monday of the month.)

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

### Annual Awards

#### Call for Nominations

The State Bar of New Mexico Annual Awards are presented each year to recognize those who have distinguished themselves or who have made exemplary contributions to the State Bar or legal profession in 2015 or 2016. Nominations are now being accepted for the 2016 State Bar of New Mexico Annual Awards. They will be presented Aug. 19 during the 2016 Annual Meeting—Bench and Bar Conference at the Buffalo Thunder Resort in Santa Fe. The deadline for nominations is May 20. 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. For award details and nomination requirements, visit www.nmbar.org > for Members > Annual Meeting > Annual Awards.

### Criminal Law Section

#### District Attorney Candidate Forum

The Criminal Law Section invites members of the legal community, public and the media to its Second Judicial District Attorney Candidate Forum at 5:30-7:30 p.m., May 12, at the State Bar Center. Democratic primary opponents, Raul Torrez and Ed Perea, have agreed to participate. The event will be moderated by Elaine Baumgartel, news director at KUNM and local host of NPR's Morning Edition. Seating is first-come, first-served. Proposed candidate questions will be accepted until April 29. Questions will be chosen by the Criminal Law Section Board of Directors and will be provided to the candidates prior to the event. Candidates will have 3 minutes for opening statements, 15 minutes to answer each question, 1 minute for rebuttal responses when appropriate, and 2 minutes for closing statements. To submit candidate questions (anonymously or not) or for additional information, contact Criminal Law Section Chair Julpa Davé or Joshua Boone, at NMCrimLawSection@gmail.com.

### Paralegal Division

#### Law Day CLE

The State Bar Paralegal Division invites members of the legal community to attend the Division's Law Day CLE program (3.0 G) from 9 a.m. to 12:15 p.m., April 30, at the State Bar Center. Topics include working with medicare, presented by Daniel Ulibarri, current issues in immigration presented by Christina Rosado; and recent changes to the federal rules of Civil Procedure. Remote connections for audio or video will not be available. Registration is $35 for Division members, $50 for non-member paralegals and $55 for attorneys. Send checks for registration (no credit cards or cash) to Paralegal Division, PO Box 92860, Albuquerque,

NM 87199-2860. Include printed name, State Bar member number and phone number in order to receive CLE credit. Registrations will be accepted at 8:30 a.m. the day of the program, but availability of materials will be limited. For more information, contact Carolyn Winton, 505-858-4433 or visit www.nmbar.org/About us/Divisions/Paralegal Division/CLE Programs.

## Indian Law Section

### Bar Prep Scholarship and Attorney Achievement Award Reception

To support and promote Indian law lawyers in New Mexico, the Indian Law Section has established a Bar Preparation Scholarship Fund to help alleviate the costs of preparing for the Bar Exam for third-year law students. The Section also established an achievement award for New Mexico Indian law attorneys who make outstanding contributions to the field of Indian law and work in advocating for Native American communities. The 2015-2016 scholarships will be awarded to third-year UNM School of Law students Jay C. McCray, Concetta R. Tsosie de Haro, and Brian Smith. The section has selected Michael P. Gross and C. Bryant Rogers as recipients of the 2015 Achievement Award. The Indian Law Section invites section members to attend a reception for the scholarship awardees and attorney honorees at 6 p.m., April 28, at the Indian Pueblo Cultural Center.

## Young Lawyers Division

### Apply for a Summer Fellowship

YLD is currently accepting applications for its 2016 Summer Fellowships. YLD is offering two fellowships for the summer of 2016 to law students who are interested in working in public interest law or the government sector. The fellowship awards are intended to provide the opportunity for law students to work for public interest entities or in the government sector in an unpaid position. The fellowship awards, depending on the circumstances of the position, could be up to $3,000 for the summer. Applications must be received or postmarked by April 29. For details and eligibility or to apply, contact YLD Board Member Robert Lara, robunm@gmail.com or visit http://www.nmbar.org/NmbarDocs/AboutUs/YoungLawyersDivision/2016SummerFellowships.pdf.

# UNM

## Law Library

### Hours Through May 14

*Building & Circulation*

| | |
|---|---|
| Monday–Thursday | 8 a.m.–8 p.m. |
| Friday | 8 a.m.–6 p.m. |
| Saturday | 10a.m.–6p.m. |
| Sunday | Noon–6 p.m. |

*Reference*

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

# Other Bars

## Albuquerque Bar Association

### Law Day Luncheon Features Leonard Birdsong

In spirit of Law Day which is celebrated nationally on May 1, the Albuquerque Bar Association invites members of the legal community to its annual Law Day Luncheon at 11:45 a.m., May 3, at the Embassy Suites Hotel. Leonard Birdsong, professor of law at Barry University Dwayne O. Andreas School of Law, will present "Miranda: More Than Words" because of the 50th anniversary of the landmark U.S. Supreme Court case *Miranda v. Arizona*. Individual tickets and tables of 10 can be bought for $40 or $400 (respectively). Sponsorships begin at $500. For more information about attending or sponsoring, contact Terah Beckmann at tbeckmann@abqbar.org or 505-842-1151 or visit www.abqbar.org.

## Albuquerque Lawyers Club

### May Lunch Meeting with Judge Miles Hanisee

The Albuquerque Lawyers Club invites members of the legal community to its lunch meeting at noon, May 4, at Seasons Rotisserie & Grille. Judge J. Miles Hanisee will present. The luncheon is free to members and $30 for non-members. For more information, email ydennig@Sandia.gov.

## Federalist Society, New Mexico Lawyers Chapter

### Ilya Shapiro Luncheon and Inaugural Event

The Federalist Society, New Mexico Lawyers Chapter, and the Rio Grande Foundation will host Ilya Shapiro as he discusses presents "The Scalia Legacy and the Future of the U.S. Supreme Court" at noon, May 12, at the Marriott Pyramid, 5151 San Francisco Rd. NE, Albuquerque.



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www.nmbar.org > for Members > Lawyers/Judges Assistance

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

Seating is limited and can be purchased at an early bird price of $30 until May 5. For more information and to register, visit http://www.errorsofenchantment.com/2016/04/15/ilya-shapiro-luncheon-justice-scalias-legacy-and-the-supreme-courts-future-albuquerque/.

## New Mexico Criminal Defense Lawyers Association

### 'Four Corner Forensics' CLE in Durango

The New Mexico Criminal Defense Lawyers Association will partner with the Colorado and Utah criminal defense bars to host "Four Corner Forensics" (6.2 G), a CLE on May 6 at the Fort Lewis College Student Union Building in Durango, Colo. Plan a relaxing long weekend and learn about forensics and scientific evidence while surrounded by the beautiful landscapes (and restaurants) of Durango. Topics include an update on the NAS report, mobile forensics, fundamentals of DNA and cross of forensic experts. For more information or to register, visit www.nmcdla.org or call 505-992-0050.

## New Mexico Defense Lawyers Association

### Seminars on Mediation and Medical Negligence Defense

The New Mexico Defense Lawyers Association presents two half-day seminars on April 29. The morning session, "Maximizing a Case's Settlement Posture," is chaired by Robert Sabin. The afternoon session, "Insights into Medical Negligence Defense," is chaired by Mary M. Behm. The two seminars offer up to 4.7 G, 1.0 EP and will be held at State Bar Center in Albuquerque. Registration is available at www.nmdla.org or by calling 505-797-6021.

# Other News

## Christian Legal Aid

### Training Seminar

New Mexico Christian Legal Aid invites new members to attend a volunteer refresher seminar from noon to 5 p.m., April 29th, at the State Bar Center. Join them for free lunch, free CLE credits and training as they update skills on how to provide legal aid. For more information or to register, contact Jim Roach at 505-243-4419 or Jen Meisner at 505-610-8800, or email christianlegalaid@hotmail.com.

## Southwest Women's Law Center

### Legal Issues Facing Girls in Middle and High School

The Southwest Women's Law Center invites members of the legal community and educators to its Lunch and Learn Mini Series "Legal Issues and Challenges Facing Girls in Middle and High School" (1.0 G) at noon–1 p.m., May 25, at the SWLC, 1410 Coal Avenue SW, Albuquerque. Check-in and a light lunch will begin at 11:30 a.m. The CLE will examine how lawyers can best collaborate with educators in middle and high schools to ensure that pregnant and parenting teens have equal access to education and graduation pursuant to Title IX. Register at www.swwomenslaw.org or by contacting Sarah Coffey at 505-244-0502 or info@swwomenslaw.org. Registration is $20 and registrations will be accepted at the door.

## Workers' Compensation Administration

### Notice of Destruction of Records

In accordance with NMAC 11.4.4.9 (Q)-Forms, Filing and Hearing Procedures: Return of Records, the New Mexico Workers' Compensation Administration will be destroying all exhibits and depositions filed in causes closed in 2010, excluding causes on appeal. The exhibits and depositions are stored at 2410 Centre Ave SE, Albuquerque, NM 87106 and can be picked up until May 15, 2016. For further information, contact the WCA at 505-841-6028 or 1-800-255-7965 and ask for Heather Jordan, clerk of the court. Exhibits and depositions not claimed by the specified date will be destroyed.

### 35th Annual Conference

The New Mexico Workers' Compensation Association will host its 35th Annual Conference on May 18–20 at the Albuquerque Convention Center. "The Renaissance of Work Comp: A Conference of Enlightenment" (7.0 G, 2.5 EP) will kick off with the annual fund-raising golf tournament on May 18 at Isleta Eagle Golf Course. The following two-day conference features medical, legal and "Trends in Work Comp" tracks. For more information and to register, visit www.wcaofnm.com.

## In the Supreme Court of the State of New Mexico

# Law Day Recognition

# Law Day 2016

Law Day began 58 years ago, with a proclamation from President Eisenhower. That first proclamation eloquently set forth the reasons why we, as a free people, celebrate our heritage of liberty under law.

President Eisenhower noted that it was "fitting that the people of this nation should remember with pride and vigilantly guard the great heritage of liberty, justice, and equality under law that our forefathers bequeathed to us." Further, he said that it is "our moral and civic obligation as free [people] and as Americans to preserve and strengthen that great heritage."

In celebrating Law Day this year, let us dedicate ourselves to the great values protected and preserved in our Constitution.

And, at the same time, let us recognize that democracy is not static, that we must always work to improve and perfect it. Let us seek to draw ever closer to the ideal hand carved into the woodwork above the bench of the Supreme Court of New Mexico: "Dedicated to the Administration of Equal Justice Under Law."

Let us resolve that Law Day be an opportunity for all of us, in government and the private sector, to examine our efforts to make equal justice a reality, and to work together to reach that goal.

For more than 100 years, America's charitable institutions and foundations, its lawyers and its courts, and countless others have worked to bring equal justice to as many people as possible.

Law Day 2016 is an opportune time to recognize the work of those who try to make courts accessible and justice equal:

Legal services organizations who provide legal services to those unable to afford them;

Pro Bono Publico programs under which private lawyers accept worthy cases at no fee;

Lawyer referral programs that help people find appropriate legal services;

Court programs designed to inform the public about laws and legal procedures, provide interpreters for those who need them, and generally make courts accessible.

We salute these efforts, but let us offer greater support to those who work daily to provide legal services to those who most need them. Let us dedicate ourselves to improving our courts and our justice system, so that we will truly have "justice for all."

NOW, THEREFORE, I, Charles W. Daniels, Chief Justice of the Supreme Court of New Mexico, do hereby recognize Sunday, May 1, 2016, as Law Day, and I urge the legal professionals of New Mexico to recognize and participate in the observance of this the designated day.

DONE in Santa Fe, New Mexico, this 18th day of April, 2016.

Charles W. Daniels, Chief Justice

## In the Supreme Court of the State of New Mexico

# *Juror Appreciation Week Recognition*

# *May 2 - 6, 2016*

WHEREAS, the right to a trial by jury is one of the core values of American citizenship;

WHEREAS, the obligation and privilege to serve as a juror are as fundamental to our democracy as the right to vote;

WHEREAS, our courts depend upon citizens to serve as jurors;

WHEREAS, service by citizens as jurors is indispensable to the judicial system;

WHEREAS, all citizens are encouraged to respond when summoned for jury service;

WHEREAS, a continuing and imperative goal for the courts, the bar, and the broader community is to ensure that jury selection and jury service are fair, effective, and not unduly burdensome on anyone; and

WHEREAS, one of the most significant actions a court system can take is to show appreciation for the jury system and for the tens of thousands of citizens who annually give their time and talents to serve on juries.

BE IT RESOLVED that the New Mexico State Courts are committed to the following goals:

- educating the public about jury duty and the importance of jury service;
- applauding the efforts of jurors who fulfill their civic duty;
- ensuring that the responsibility of jury service is shared fairly by supporting employees who are called upon to serve as jurors;
- ensuring that the responsibility of jury service is shared fairly among all citizens and that a fair cross section of the community is called for jury service including this State's non-English speaking population;
- ensuring that all jurors are treated with respect and that their service is not unduly burdensome;
- providing jurors with tools that will assist their decision making; and
- continuing to improve the jury system by encouraging productive dialogue between jurors and court officials.

NOW, THEREFORE, I, Charles W. Daniels, Chief Justice of the Supreme Court of New Mexico, do hereby recognize the week of May 2 - May 6, 2016, as Juror Appreciation Week in New Mexico and encourage all state courts in New Mexico to support the celebration of this week.

DONE in Santa Fe, New Mexico, this 18th day of April, 2016.

Charles W. Daniels, Chief Justice

# Legal Education

## April

**27** **Ten Secrets for an Ethical Trial and Appellate Practice**
1.0 EP
Live Program, Albuquerque
New Mexico Hispanic Bar Association
nmhba.net

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

**28** **13th Annual Tax Policy Conference**
9.3 G, 1.0 EP
Live Program, Albuquerque
New Mexico Tax Research Institute
www.nmtri.org

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

**29** **2016 Legislative Preview**
2.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

**29** **2015 Mock Meeting of the Ethics Advisory Committee**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

**29** **Criminal Procedure Update (2015)**
1.2 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

**29** **Lawyers' Duties of Fairness and Honesty (Fair or Foul 2016)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

**29** **Advanced Mediation Training**
9.1 G, 1.0 EP
Live Program
Magistrate Court Mediation Program
505-470-0175

**30** **Lawyers' Duties of Fairness and Honesty (Fair or Foul 2016)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

**30** **Conflicts of Interest (2015 Ethicspalooza Redux)**
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

**30** **Civility and Professionalism (2015 Ethicspalooza Redux)**
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

**30** **Law Day CLE**
3.0 G
Live Seminar, Albuquerque
State Bar of New Mexico
Paralegal Division
505-888-4357

## May

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

**4** **Annual Estate Planning Update**
6.0 G, 1.0 EP
Live Seminar
Wilcox Law Firm
www.wilcoxlawnm.com

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

**6** **Best and Worst Practices Including Ethical Dilemmas in Mediation**
3.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

**6** **Nonprofit Financing**
1.0 G
Live Seminar, Santa Fe
Center for Legal Education of NMSBF
www.nmbar.org

**6** **Four Corner Forensics**
6.2 G
Live Seminar, Durango, Colo.
New Mexico Criminal Defense Lawyers Association
www.nmcdla.org

**10** **Arbitration: An Overview of Current Issues**
1.0 G
Live Seminar
H. Vearle Payne Inns of Court
505-321-1461

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

**13** **Spring Elder Law Institute**
6.2 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

## May

**17** **Workout of Defaulted Real Estate Project**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

**18** **Trusts 101**
5.0 G, 1.0 EP
Live Seminar
NBI Inc.
www.nbi-sems.com

**19** **2016 Retaliation Claims in Employment Law Update**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

**19** **Annual WCA of NM Conference**
8.0 G, 2.5 EP
Live Program, Albuquerque
Workers Compensation Association of New Mexico
505-377-3017

**20** **The New Lawyer – Rethinking Legal Services in the 21st Century (2015)**
4.5 G, 1.5 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

**20** **Legal Writing – From Fiction to Fact: Morning Session (2015)**
2.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

**20** **Social Media and the Countdown to Your Ethical Demise (2016)**
3.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

**20** **What NASCAR, Jay-Z & the Jersey Shore Teach About Attorney Ethics (2016 Edition)**
3.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

**20** **Ethics and Virtual Law Practices**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

**25** **Legal Rights and Issues Affecting Pregnant and Parenting Teens in New Mexico**
1.0 G
Live Program, Albuquerque
Southwest Women's Law Center
swwomenslaw.org

## June

**6** **2016 Estate Planning Update**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

**7** **Conflicts of Interests (Ethicspalooza Redux—Winter 2015 Edition)**
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

**7** **Beyond Sticks and Stones (2015 Annual Meeting)**
1.5 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

**7** **The 31st Annual Bankruptcy Year in Review (2016 AM Session)**
3.5 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

**9** **Legal Issues Facing Women Seeking Healthcare**
1.0 G
Live Program, Albuquerque
Southwest Women's Law Center
swwomenslaw.org

**16** **Negotiating and Drafting Issues with Small Commercial Leases**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

**16–17** **Ninth Annual New Mexico Legal Service Providers Conference: Holistically Addressing Poverty and Advancing Equity for Women and Families in New Mexico**
10.0 G, 2.0 EP
Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

**17** **Legal Ethics in Contract Drafting**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

## July

**15** **The Ethics of Creating Attorney-Client Relationships in the Electronic Age**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

**19** **Essentials of Employment Law**
6.6 G
Live Seminar
Sterling Education Services Inc.
www.sterlingeducation.com

**21** **Drafting Sales Agents' Agreements**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

# Writs of Certiorari

As Updated by the Clerk of the New Mexico Supreme Court

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

**Effective April 1, 2016**

**Petitions for Writ of Certiorari Filed and Pending:**

| | | | Date Petition Filed |
|---|---|---|---|
| No. 35,832 | State v. Baxendale | COA 33,934 | 03/31/16 |
| No. 35,831 | State v. Martinez | COA 33,181 | 03/31/16 |
| No. 35,830 | Mesa Steel v. Dennis | COA 34,546 | 03/31/16 |
| No. 35,828 | Patscheck v. Wetzel | 12-501 | 03/29/16 |
| No. 35,825 | Bodley v. Goodman | COA 34,343 | 03/28/16 |
| No. 35,827 | Serna v. Webster | COA 34,535/34,755 | 03/24/16 |
| No. 35,824 | Earthworks Oil and Gas v. N.M. Oil & Gas Association | COA 33,451 | 03/24/16 |
| No. 35,823 | State v. Garcia | COA 32,860 | 03/24/16 |
| No. 35,822 | Chavez v. Wrigley | 12-501 | 03/24/16 |
| No. 35,820 | Martinez v. Overton | COA 34,740 | 03/24/16 |
| No. 35,821 | Pense v. Heredia | 12-501 | 03/23/16 |
| No. 35,818 | State v. Martinez | COA 35,038 | 03/22/16 |
| No. 35,817 | State v. Nathaniel L. | COA 34,864 | 03/22/16 |
| No. 35,816 | State v. McNew | COA 34,937 | 03/18/16 |
| No. 35,815 | State v. Sanchez | COA 34,170 | 03/18/16 |
| No. 35,813 | State v. Salima J. | COA 34,904 | 03/17/16 |
| No. 35,812 | State v. Tenorio | COA 34,994 | 03/17/16 |
| No. 35,814 | Campos v. Garcia | 12-501 | 03/16/16 |
| No. 35,811 | State v. Barreras | COA 33,653 | 03/16/16 |
| No. 35,810 | State v. Barela | COA 34,716 | 03/16/16 |
| No. 35,809 | State v. Taylor E. | COA 34,802 | 03/16/16 |
| No. 35,805 | Trujillo v. Los Alamos Labs | COA 34,185 | 03/16/16 |
| No. 35,804 | Jackson v. Wetzel | 12-501 | 03/14/16 |
| No. 35,803 | Dunn v. Hatch | 12-501 | 03/14/16 |
| No. 35,802 | Santillanes v. Smith | 12-501 | 03/14/16 |
| No. 35,795 | Jaramillo v. N.M. Dept. of Corrections | COA 34,528 | 03/09/16 |
| No. 35,793 | State v. Cardenas | COA 33,564 | 03/09/16 |
| No. 35,777 | N.M. State Engineer v. Santa Fe Water Resource | COA 33,704 | 02/25/16 |
| No. 35,771 | State v. Garcia | COA 33,425 | 02/24/16 |
| No. 35,758 | State v. Abeyta | COA 33,461 | 02/15/16 |
| 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. 35,747 | Sicre v. Perez | 12-501 | 02/04/16 |
| No. 35,746 | Bradford v. Hatch | 12-501 | 02/01/16 |
| No. 35,722 | James v. Smith | 12-501 | 01/25/16 |
| No. 35,711 | Foster v. Lea County | 12-501 | 01/25/16 |
| No. 35,718 | Garcia v. Franwer | 12-501 | 01/19/16 |
| No. 35,717 | Castillo v. Franco | 12-501 | 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. 35,588 | Torrez v. State | 12-501 | 11/04/15 |
| 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. 35,097 | 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. 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. 35,499 | Romero v. Ladlow Transit Services | COA 33,032 | 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 |
| No. 35,751 | State v. Begay | COA 33,588 | 03/25/16 |

**Certiorari Granted and Submitted to the Court:**

| (Submission Date = date of oral argument or briefs-only submission) | | | Submission Date |
|---|---|---|---|
| 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. 34,826 | 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 Commission | COA 33,706 | 01/11/16 |
| No. 35,255 | State v. Tufts | COA 33,419 | 01/13/16 |
| No. 35,183 | State v. Tapia | COA 32,934 | 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 & Revenue Dept. | COA 33,586 | 03/14/16 |
| No. 35,148 | El Castillo Retirement Residences v. Martinez | COA 31,701 | 03/16/16 |
| No. 35,386 | 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 |
| No. 35,456 | Haynes v. Presbyterian Healthcare Services | COA 34,489 | 04/13/16 |
| No. 34,929 | Freeman v. Love | COA 32,542 | 04/13/16 |
| No. 34,830 | State v. Le Mier | COA 33,493 | 04/25/16 |
| No. 35,438 | Rodriguez v. Brand West Dairy | COA 33,104/33,675 | 04/27/16 |
| No. 35,426 | Rodriguez v. Brand West Dairy | COA 33,675/33,104 | 04/27/16 |
| No. 35,297 | Montano v. Frezza | COA 32,403 | 08/15/16 |
| No. 35,214 | Montano v. Frezza | COA 32,403 | 08/15/16 |

**Petition for Writ of Certiorari Denied:**

| | | | Date Order Filed |
|---|---|---|---|
| No. 35,794 | State v. Brown | COA 34,905 | 04/01/16 |
| No. 35,792 | State v. Garcia-Ortega | COA 33,320 | 04/01/16 |
| No. 35,730 | State v. Humphrey | COA 34,601 | 04/01/16 |
| No. 35,593 | Quintana v. Hatch | 12-501 | 04/01/16 |
| No. 35,790 | Castillo v. Arrieta | COA 34,180 | 03/30/16 |
| No. 35,789 | State v. Cly | COA 35,016 | 03/30/16 |
| No. 35,788 | State v. Thompson | COA 34,559 | 03/30/16 |
| No. 35,786 | State v. Pacheco | COA 33,810 | 03/30/16 |
| No. 35,785 | State v. Aragon | COA 34,817 | 03/30/16 |
| No. 35,784 | State v. Diaz | COA 35,079 | 03/30/16 |
| No. 35,783 | State v. Jason R. | COA 34,562 | 03/30/16 |
| No. 35,781 | State v. Bersame | COA 34,686 | 03/30/16 |
| No. 35,739 | State v. Angulo | COA 34,714 | 03/30/16 |
| No. 35,690 | Healthsouth Rehabilitation v. Brawley | COA 33,593 | 03/30/16 |
| No. 35,581 | Salgado v. Morris | 12-501 | 03/30/16 |
| No. 35,575 | Thompson v. Frawner | 12-501 | 03/30/16 |

# 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 April 15, 2016**

## Published Opinions

| | | |
|---|---|---|
| No. 33390 | 10th Jud Dist Quay CV-08-124, I HANCOCK v R NICOLEY (reverse and remand) | 4/13/2016 |

## Unublished Opinions

| | | |
|---|---|---|
| No. 34858 | 3rd Jud Dist Dona Ana JR-15-78, STATE v JUSTIN D (affirm) | 4/11/2016 |
| No. 34944 | 12th Jud Dist Otero CR-12-424, STATE v E ALVARADO-NATERA (affirm) | 4/11/2016 |
| No. 34753 | 1st Jud Dist Santa Fe Dm-11-434, G BYRNE v R BYRNE (affirm) | 4/12/2016 |
| No. 34135 | 2nd Jud Dist Bernalillo CV-12-10590, V MAGALLANES v FARMERS INSURANCE (reverse and remand) | 4/12/2016 |
| No. 34893 | 2nd Jud Dist Bernalillo CR-14-5160, STATE v M OTERO (affirm) | 4/13/2016 |
| No. 34903 | 4th Jud Dist San Miguel JQ-14-02, CYFD v STEVEN G (affirm) | 4/13/2016 |
| No. 34491 | 2nd Jud Dist Bernalillo CR-07-1688, STATE v D MENDOZA (affirm) | 4/14/2016 |
| No. 35129 | 2nd Jud Dist Bernalillo CV-11-12550, D MCANINCH v DR LEVY (dismiss) | 4/14/2016 |
| No. 35252 | 10th Jud Dist Quay DM-14-23, R CHAVEZ v O ROBINSON (dismiss) | 4/14/2016 |

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

# 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 April 6, 2016**

## Pending Proposed Rule Changes Open for Comment:

Comment Deadline

*Please see the special summary of proposed rule amendments published in the March 9 issue of the* Bar Bulletin. *The actual text of the proposed rule amendments can be viewed on the Supreme Court's website at the address noted below. The comment deadline for those proposed rule amendments is April 6, 2016.*

## Recently Approved Rule Changes Since Release of 2015 NMRA:

### Rules of Criminal Procedure for the Magistrate Courts

| | | |
|---|---|---|
| Rule 6-506 | Time of commencement of trial | 05/24/16 |

### Rules of Criminal Procedure for the Metropolitan Courts

| | | |
|---|---|---|
| Rule 7-506 | Time of commencement of trial | 05/24/16 |

### Rules of Procedure for the Municipal Courts

| | | |
|---|---|---|
| Rule 8-506 | Time of commencement of trial | 05/24/16 |

### Second Judicial District Court Local Rules

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

*For 2015 year-end rule amendments that became effective December 31, 2015, and that will appear in the 2016 NMRA, please see the November 4, 2015, issue of the Bar Bulletin or visit the New Mexico Compilation Commission's website at http://www.nmcompcomm.us/nmrules/NMRules.aspx.*

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

From the New Mexico Court of Appeals

**Opinion Number:2016-NMCA-011**

No. 32,212 (filed August 31, 2015)

KARI T. MORRISSEY, as personal representative of the estate of FRANCES FERNANDEZ, deceased,
Plaintiff-Appellant,
v.
WILLIAM J. KRYSTOPOWICZ, SILVERSTONE HEALTHCARE, INC., and SILVERSTONE HEALTHCARE OF RATON, LLC,
Defendants-Appellees.

**APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**
BEATRICE J. BRICKHOUSE, District Judge

PAUL J. KENNEDY
ARNE R. LEONARD
PAUL KENNEDY & ASSOCIATES, P.C.
Albuquerque, New Mexico
for Appellant

RICHARD E. THOMASSON
THOMASSON LAW FIRM, LLC
Macon, Georgia
for Appellees

## Opinion

## Michael D. Bustamante, Judge

**{1}** Plaintiff Kari T. Morrissey (Plaintiff), personal representative of the estate of Frances Fernandez, deceased, appeals the dismissal of her claims after a bench trial. We consider whether the district court erred in refusing to pierce the corporate veil to hold William J. Krystopowicz (Krystopowicz) liable for a default judgment against two corporations of which he was the sole shareholder. We reverse.

**BACKGROUND**

**{2}** Although the present suit was filed after the death of Mrs. Fernandez in April 2006, the facts salient to the issues we resolve start with the formation and management of two corporate defendants, Silverstone Healthcare, Inc. and Silverstone Healthcare of Raton, LLC (collectively, the Silverstone Defendants), in 2003. Brian Davidson approached Krystopowicz about acquiring nursing homes in New Mexico. Davidson was barred from acquiring or operating nursing homes himself because of pending bankruptcy proceedings as well as other "tax issues" and "legal problems" which "precluded him from participating in the ownership or operation of licensed nursing home facilities." Krystopowicz knew that Davidson was so barred. He also knew that Davidson was engaged in self-dealing in violation of his agency relationship with another company. Despite this knowledge, Krystopowicz agreed to join with Davidson to acquire nursing homes in New Mexico and to treat Davidson as fifty percent owner of a corporation formed to do so. Thus Krystopowicz became the "front man" for the enterprise.

**{3}** Silverstone Healthcare, Inc. was incorporated in 2003 with Krystopowicz as the sole shareholder. Silverstone Healthcare, Inc. became the owner of ten limited liability companies—all created by Krystopowicz and Davidson—which in turn acquired ten nursing homes in New Mexico. Krystopowicz did not perform any debt-equity analysis for the facilities, review the operation of the facilities, determine budgetary needs or working capital needs of the facilities, or review the patient census for the facilities before they were acquired. All of the nursing home facilities were managed and operated by Peak Medical NM Management Services, Inc. (Peak) and Krystopowicz was never involved in day-to-day patient care issues at any of the facilities.

**{4}** Silverstone Healthcare of Raton, LLC, doing business as Raton Nursing and Rehabilitation Center (the Center)—where Mrs. Fernandez resided—was one of the LLCs created by Krystopowicz and owned by Silverstone Healthcare, Inc. Krystopowicz was the sole member and managing partner of Silverstone Healthcare of Raton, LLC.

**{5}** Revenue generated by the ten facilities in New Mexico, which amounted to over $47 million annually, was transferred into a single "concentration account" to which Krystopowicz and Peak had access. Although neither Davidson nor Krystopowicz performed any services for the Silverstone Defendants between August 2003 and June 2005, Krystopowicz caused a "distribution" of $400,000 to be issued from the concentration account in late June 2005. Of the $400,000 distribution, Krystopowicz received $100,000 and Davidson received $200,000. The funds were channeled through another corporation of which Krystopowicz was a shareholder in order to obscure Davidson's involvement with the Silverstone Defendants and the nursing homes.

**{6}** As the facilities became profitable, Krystopowicz secured a $4 million line of credit from GE Capital in September 2005. Although GE Capital prohibited Krystopowicz from transferring fifty percent of his shares in Silverstone Healthcare, Inc. to Davidson, Krystopowicz continued to treat Davidson as a fifty percent owner of Silverstone Healthcare, Inc. Between July 2005 and March 2006, Krystopowicz distributed at least six payments of $25,000 from the "concentration account" to himself, Davidson, and others. Davidson received fifty percent of these payments.

**{7}** In January 2006, New Mexico Medicare officials banned admissions to the Center. In addition, "[f]rom January through April 2006, the Silverstone [Defendants] were knowingly overstating their accounts receivable, and by April 2006 [the] Silverstone [Defendants] went into default on [their] line of credit from GE Capital." Earnings deteriorated because of the Center's inability to accept new Medicare patients. Krystopowicz then transferred the licenses for all ten New Mexico facilities to Cathedral Rock Corporation for no compensation. Krystopowicz entered into a personal contract with Cathedral Rock Corporation to help close the transaction. He was paid $150,000 under the contract.

**{8}** Plaintiff filed suit in March 2009. Mrs. Fernandez had lived at the Center for approximately one year before her death. Plaintiff named six corporate entities,

including the Silverstone Defendants, as well as Krystopowicz and other individuals. The complaint alleged negligence resulting in wrongful death, violation of the New Mexico Unfair Trade Practices Act, negligence per se, breach of contract, and civil conspiracy. The complaint was later amended to include a claim for loss of consortium by Mrs. Fernandez's son.

**{9}** The Silverstone Defendants failed to answer the complaint and a default judgment was entered against them. Consequently, the allegations in the complaint were considered admitted. *Chronister v. State Farm Mut. Auto. Ins. Co.*, 1963-NMSC-093, ¶ 7, 72 N.M. 159, 381 P.2d 673 (stating that "by permitting the default judgments to be entered against him, [the defendant] admitted all the allegations in said complaints"). After a two-day hearing, the district court awarded Plaintiff $4,828,300 in damages. After the other defendants were dismissed from suit, the case proceeded to a bench trial against Krystopowicz only. Krystopowicz was the only witness at the trial.

**{10}** Plaintiff argued two theories. First, she argued that the Silverstone Defendants' corporate veil should be pierced so as to hold Krystopowicz personally liable for the damages awarded against the Silverstone Defendants. Second, she argued that Krystopowicz had engaged in a civil conspiracy with the other defendants and should be held personally liable for the negligence of his co-conspirators, the Silverstone Defendants.

**{11}** The district court ruled against Plaintiff on both theories. While the district court agreed that Krystopowicz had satisfied some of the criteria for piercing the corporate veil, the district court reaffirmed an earlier ruling that the corporate veil could not be pierced to hold Krystopowicz liable for the Silverstone Defendants' conduct because "Plaintiff[] had not shown . . . that [Mrs.] Fernandez suffered any damages as a result of [Krystopowicz's] domination of Silverstone [entities] for an improper purpose." Similarly, although the district court found that the Silverstone Defendants "ha[d] admitted to participating in a civil conspiracy with . . . Krystopowicz and others[,]" it concluded that the civil conspiracy claim against Krystopowicz failed as a matter of law because there was no evidence "establishing a causal connection between . . . Krystopowicz['s conduct] and the death of [Mrs.] Fernandez." Inherent to both of these rulings is the district court's rejection of Plaintiff's argument that the allegations deemed admitted through the Silverstone Defendants' default judgment could be used against Krystopowicz. Additional facts are provided as relevant to our discussion of Plaintiff's arguments.

**DISCUSSION**

**{12}** The main issue on appeal is whether the district court erred by ruling that the corporate veil could not be pierced to hold Krystopowicz personally liable for the judgment against the Silverstone Defendants. Plaintiff makes a number of arguments related to this issue, including (1) that the admissions of the Silverstone Defendants should be imputed to Krystopowicz, (2) that the admissions are admissible against Krystopowicz as a co-conspirator, and (3) that the district court erred in not holding Krystopowicz liable for civil conspiracy. Because we conclude that the corporate veil should be pierced, we need not address Plaintiff's other arguments.

**{13}** "A basic proposition of corporate law is that a corporation will ordinarily be treated as a legal entity separate from its shareholders." *Scott v. AZL Res., Inc.*, 1988-NMSC-028, ¶ 6, 107 N.M. 118, 753 P.2d 897. Under this rule, individual shareholders cannot be held personally liable for the corporation's debt. *Id.* Under certain circumstances, however, courts may exercise their equitable power to "pierce the corporate veil," thereby requiring shareholders to answer for the corporation's liability. *Id.* ("Only under special circumstances will the courts disregard the corporate entity to pierce the corporate veil [and] hold[] individual shareholders . . . liable."); *London v. Bruskas*, 1958-NMSC-020, ¶ 18, 64 N.M. 73, 324 P.2d 424 (stating that "in a proper case equity would require the general rule [that corporations and their shareholders are separate] to be discharged"). To do so, the district court must make three findings. First, that "the subsidiary or other subservient corporation was operated not in a legitimate fashion to serve the valid goals and purposes of that corporation but . . . instead under the domination and control and for the purposes of some dominant party." *Scott*, 1988-NMSC-028, ¶ 7. This requirement is known as "instrumentality," "domination," or, in New Mexico, as the "alter ego doctrine." *Id.* Second, that there is "[s]ome form of moral culpability attributable to the [shareholder], such as use of the subsidiary to perpetrate a fraud." *Id.* ¶ 9 ("[I]n fairness to the [shareholder] and to support the policy of limited liability of a corporation, improper purpose must be established before the [shareholder] can be found liable." (alterations, internal quotation marks, and citation omitted)). Third, the court must find that "there [is] some reasonable relationship between the injury suffered by the plaintiff and the actions of the defendant." Cathy S. Krendl & James R. Krendl, *Piercing the Corporate Veil: Focusing the Inquiry*, 55 Denver L.J. 1, 27 (1978). This finding must demonstrate "some knowing or cooperative effort between the related parties which results in unjust injury to the plaintiff, even though it may not be possible to prove that the defendant's control directly caused [the] plaintiff's injury." Krendl, *supra* (footnote omitted), quoted in *Garcia v. Coffman*, 1997-NMCA-092, ¶ 24, 124 N.M. 12, 946 P.2d 216. This requirement is referred to as "proximate cause." *Garcia*, 1997-NMCA-092, ¶ 10 ("The three requirements for piercing the corporate veil are: (1) instrumentality or domination; (2) improper purpose; and (3) proximate cause."). "The burden of proof is upon the party seeking to impose individual liability on the shareholder to demonstrate that the grounds for piercing the corporate veil exist." *Nursing Home Grp. Rehab. Servs., Inc. v. Suncrest Health Care, Inc.*, 162 Ohio App. 3d 577, 581, 2005-Ohio-3945, 834 N.E.2d 382, at ¶ 12 (alteration, internal quotation marks, and citation omitted).

**{14}** Here, the district court found in a letter decision that "Plaintiff presented sufficient evidence that Krystopowicz exercised improper domination of the Silverstone [D]efendants" and that "Krystopowicz used the Silverstone [D]efendants for improper purposes." Thus, the first two requirements for piercing the corporate veil were established. The district court also found that

> there was no evidence presented to the [district c]ourt that as a result of Krystopowicz's domination of the Silverstone [D]efendants for an improper purpose . . . [Mrs.] Fernandez got less or substandard care . . ., or that the distributions taken by Krystopowicz . . . adversely affected the operations of the [Center] in any way.

**{15}** It concluded that "without any evidence to satisfy the causation prong, Plaintiff's [argument for piercing the corporate veil must] fail." The district court's conclusions as to the lack of evidence of a

link between Krystopowicz's actions and Mrs. Fernandez's injury were included in the district court's findings of fact and conclusions of law accompanying the final written judgment. Because Krystopowicz does not challenge the district court's findings and conclusions as to the first two prongs, our focus is on the narrow issue of whether there is a causal connection between Krystopowicz's misuse of the corporate form and injury to the Plaintiff.

**{16}** We do not disagree with the district court that Plaintiff failed to demonstrate a *direct* causal link between Mrs. Fernandez's death and Krystopowicz's management of the Silverstone Defendants. Although she argues that the evidence at trial was sufficient to demonstrate such a link, Plaintiff does not direct us to evidence suggesting that (1) the Center was underfunded; (2) any understaffing was the result of lack of funds; (3) Krystopowicz's distributions of funds to himself and others, or any other misuse of the corporate form, led to any underfunding, staffing shortage, or impairment of care at the Center; (4) Krystopowicz knew that the budget for the Center was inadequate; or (5) Krystopowicz denied requests for changes in the Center's budget or ignored reports of inadequate staffing or care. While Krystopowicz testified that he reviewed monthly profit and loss statements for the facilities, and that those statements included "analysis of census [and] operational issues," there was no evidence that he modified the Center's operations based on that information. Finally, there was no evidence presented related to industry standards for staffing levels, minimum capital or cash flow requirements, or the impact of "profit siphoning" on nursing homes generally. *See generally* Mark R. Kosieradzki & Joel E. Smith, *Direct Participant Liability in Causes of Action for Corporate Negligence*, 5 Litigating Tort Cases § 63:37.50 (2014) (discussing both direct and indirect liability, including corporate veil, theories). Nor did Plaintiff propose findings of fact related to these issues.

**{17}** However, a direct causal link to the tort-related acts is not required. The question is not whether there is a direct link between Krystopowicz's conduct and Mrs. Fernandez's death but rather whether Krystopowicz's abuse of the corporate form caused some injury to Plaintiff. *Garcia*, 1997-NMCA-092, ¶ 24 ("It is sufficient to show some knowing or cooperative effort between the related parties which results in unjust injury to the plaintiff, even though it may not be possible to prove that the defendant's control directly caused the plaintiff's injury." (alterations, internal quotation marks, and citation omitted)). We explain by starting with an example.

**{18}** In *Mobius Management Systems, Inc. v. West Physician Search, L.L.C.*, the Missouri Court of Appeals considered whether the district court correctly denied the plaintiff's efforts to pierce the corporate veil where a consent judgment against the defendant company had been entered. 175 S.W.3d 186, 187 (Mo. Ct. App. 2005). The case arose out of the defendant company's failure to pay rent to the plaintiff. *Id.* The plaintiff sued under a Missouri statute to recover past and future rent, attorney fees, and possession of the property. *Id.* The parties entered into a consent judgment, which was signed by the defendant company's managing member. *Id.* When the plaintiff was unsuccessful in collecting the judgment from the defendant company, it filed a motion to pierce the corporate veil to hold the managing member accountable. *Id.* The district court dismissed the motion. *Id.* at 188.

**{19}** On appeal, the appellate court reversed. *Id.* at 189. The court determined that the plaintiff had sufficiently shown that the first two requirements for piercing the corporate veil—alter ego/control and breach of a duty/improper purpose—were met. *Id.* The appellate court concluded that "[the managing member] circumvented [the defendant company's] legal obligations by operating an undercapitalized shell corporation—and therefore used his control over [the defendant company] to avoid its obligations to [the plaintiff]." *Id.*

**{20}** As to the third prong, it held that, like in New Mexico, "the plaintiff must show that the control and breach of duty proximately caused the injury or unjust loss." *Id.* It concluded, "Clearly, [the plaintiff] has suffered an injury—an unpaid $175,000 Judgment—and this injury was proximately caused by [the defendant company's] conduct. The only reason [the plaintiff] has not been paid the money it is legally owed is because [the defendant company] lacks the necessary capital to satisfy this judgment." *Id.* Thus, the managing member in *Mobius* was liable for the corporation's debts because he had intentionally manipulated the corporation so as to avoid having to pay any judgment. *See Rice v. Oriental Fireworks Co.*, 707 P.2d 1250, 1255-56 (1985) (framing the proximate cause prong as whether "the shareholder's improper conduct . . . caused [the] plaintiff's inability to obtain an adequate remedy from the corporation" and holding that "there can be no doubt that [the shareholder's] failure adequately to capitalize or obtain insurance coverage for [the defendant corporation] has caused [the] plaintiff to have an inadequate remedy against the corporation").

**{21}** We recognize that generally insolvency of a corporation alone is not a justification for piercing the corporate veil. O'Neal & Thompson's *2 Close Corporations and LLCs: Law and Practice* § 8:20 (Rev. 3d ed. 2015) (stating that "if a corporation has 'adequate' capital and if proper formalities have been observed, shareholders are not liable for the corporation's torts, even if corporate assets prove to be insufficient to pay the tort claimants"); *Scott*, 1988-NMSC-028, ¶ 10 ("Mere proof that the corporation is now insolvent is insufficient."). However, "[i]t is inequitable to allow shareholders to set up a flimsy organization just to escape personal liability." *Fontana v. TLD Builders, Inc.*, 362 Ill. App. 3d 491, 504, 840 N.E.2d 767, 779 (2005); *see Scott*, 1988-NMSC-028, ¶ 10 ("[A] party seeking to pierce the corporate veil must show that the financial setup of the corporation is a sham and causes an injustice."); *cf. Mobius*, 175 S.W.3d at 189 ("Inadequate capitalization is circumstantial evidence of an improper purpose or reckless disregard for the rights of others.").

**{22}** We conclude that, similar to *Mobius*, Krystopowicz's abuse of the corporate form resulted in a sham corporation leading to Plaintiff's inability to recover for her injury. Together with the district court's findings that Krystopowicz used the Silverstone Defendants in order to obscure Davidson's involvement with the nursing homes and to funnel funds from the "concentration account" to himself and Davidson, the district court's other findings indicate that Krystopowicz failed to manage the Silverstone Defendants in good faith to meet their legal obligations. *See Hammett v. Atcheson*, 438 S.W.3d 452, 461 (Mo. Ct. App. 2014) ("Where a corporation [or an LLC] is used for an improper purpose and to perpetuate injustice by which it avoids its legal obligations, equity will step in, pierce the corporate veil and grant appropriate relief." (internal quotation marks and citation omitted)). Krystopowicz does not challenge the following findings; consequently, they are binding on appeal. *Stueber v. Pickard*, 1991-NMSC-082, ¶ 9,

112 NM 489, 816 P.2d 1111. The district court found that the total initial capitalization of Silverstone Healthcare, Inc. and Silverstone Healthcare of Raton, LLC was $2,000 and $100, respectively. It found that the "initial working capital for Silverstone Healthcare, Inc." also included a line of credit of $1,900,000 that was "apportioned equally among [ten] underlying LLC[]s, including Silverstone Healthcare of Raton[, LLC]." It found that the ten nursing home facilities together generated over $47 million in annual revenue. In addition, it found that Krystopowicz "intentionally failed to perform any debt-equity analysis for the [nursing home] facilities, to check operations at the facilities, to determine the budgetary needs of the facilities, to determine working capital needs of the facilities, or to review the patient 'census' for the facilities." The district court found that "[a]lthough he was contractually obligated to make good faith attempts to secure insurance coverage for the Silverstone entities, . . . Krystopowicz failed to secure any such insurance and he failed to verify or even inquire as to whether or not any such insurance coverage existed." *See* Joseph E. Casson & Julia MacMillen, *Protecting Nursing Home Companies: Limiting Liability Through Corporate Restructuring*, 36 J. Health L. 577, 603 (2003) (stating that nursing home companies should "[m]aintain adequate insurance according to state-law and industry standards" in order to avoid corporate veil piercing). The district court also found that Krystopowicz caused "distributions" of approximately $550,000 to be made to him and others from the "concentration account." *Id.* (stating that nursing home companies should "[a]void even the appearance of siphoning revenues to related entities or shareholders/members" to prevent corporate veil piercing). And, when the enterprise collapsed, Krystopowicz conveyed all of Silverstone Healthcare, Inc.'s assets for no consideration to the corporation. Instead, he personally profited from the failure. Finally, it found that "[a]s of October 17, 2011, the Silverstone [D]efendants have an outstanding liability to the Internal Revenue Service for $1,000,000 in . . . taxes and penalties."

**{23}** In addition to these findings regarding Krystopowicz's management of the Silverstone Defendants, the district court made several findings as to Krystopowicz's conduct in the current suit. It found that "[a]lthough he was the sole shareholder, officer, and director of . . . Silverstone Healthcare, Inc. and the manager of . . . Silverstone Healthcare of Raton, LLC[], . . . Krystopowicz took no action to assure that the interests of these corporate entities were defended in the current litigation, and he intentionally declined to engage counsel to represent these entities in the current litigation." It further found that "Krystopowicz has intentionally failed to verify or determine if either of the two Silverstone [D]efendants maintained insurance coverage which could have provided for a defense in the current litigation."

**{24}** The inability to recover for her injuries is itself a harm caused by Krystopowicz's misuse and abuse of the corporate form. There can be no question about the causal relationship between Krystopowicz's dominance and control of the Silverstone Defendants for an improper purpose and the corporations' inability to answer for their obligations.

**{25}** We hold that the corporate veil should be pierced and that Krystopowicz should be accountable for the Silverstone Defendants' default judgment. Given this disposition, we need not address Plaintiff's other arguments.

**CONCLUSION**

**{26}** We hold that the unchallenged findings and conclusions meet the requirements for piercing the corporate veil of the Silverstone Defendants such that Krystopowicz can be held liable for the default judgment against those entities. The district court's concept of injury was too narrow. The district court therefore erred in dismissing Plaintiff's claims against Krystopowicz. We reverse and remand for entry of an order consistent with this Opinion.

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

**MICHAEL D. BUSTAMANTE, Judge**

**WE CONCUR:**
**RODERICK T. KENNEDY, Judge**
**M. MONICA ZAMORA, Judge**

***Certiorari Denied, January 5, 2016, No. S-1-SC-35561***

From the New Mexico Court of Appeals

**Opinion Number:2016-NMCA-012**

No. 34,220 (filed September 3, 2015)
STATE OF NEW MEXICO ex rel. CHILDREN, YOUTH AND FAMILIES DEPARTMENT,
Petitioner-Appellant,
v.
SCOTT C.,
Respondent-Appellee,
and
DAVID H.,
Respondent,
IN THE MATTER OF BRYCE H., Child.

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

No. 34,221 (Consolidated)
STATE OF NEW MEXICO ex rel. CHILDREN, YOUTH AND FAMILIES DEPARTMENT,
Petitioner-Appellant,
v.
SCOTT C.,
Respondent-Appellee,
and
KAREN S. and SCOTT S.,
Respondents,
IN THE MATTER OF RYAN S., Child.

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

No. 33,891 (Consolidated)
TIERRA BLANCA RANCH HIGH COUNTRY YOUTH PROGRAM,
and SCOTT CHANDLER, individually,
Plaintiffs-Appellants,
v.
STATE OF NEW MEXICO CHILDREN, YOUTH AND FAMILIES DEPARTMENT,
Defendant-Appellee.
**APPEAL FROM THE DISTRICT COURT OF SIERRA COUNTY**
EDMUND H. KASE III, District Judge

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## Opinion

## Linda M. Vanzi, Judge

{1} This appeal arises from litigation related to the alleged abuse and neglect of children at the Tierra Blanca Ranch (the Ranch), a facility operated by Scott Chandler for "troubled and at-risk teenagers." In late 2013, the Children, Youth and Families Department (CYFD) investigated reports of abuse and neglect at the Ranch, ultimately initiating nine separate abuse and neglect cases against Chandler. When CYFD learned that the children were no longer in Chandler's custody, it filed notices of voluntary dismissal pursuant to Rule 10-145(A)(1)(a) NMRA, terminating proceedings without prejudice against Chandler in several of the nine cases. CYFD and Chandler then agreed on the record to amend some or all of the dismissals to read "with" as opposed to "without" prejudice. The events that followed are the subject of this consolidated appeal.

{2} On appeal from a declaratory judgment/writ action in *Tierra Blanca Ranch High Country Youth Program v. Children, Youth & Families Department*, No. D-0721-CV-2013-00107, Chandler challenges, on res judicata (claim preclusion) grounds, CYFD's authority to conduct a Child Protective Services investigation and issue "investigative decisions" against him after agreeing to dismiss him from the abuse and neglect proceedings with prejudice. On appeal from *In re Bryce H.*, No. D-0721-JQ-2013-06, and *In re Ryan S.*, No. D-0721-JQ-2013-10, CYFD challenges the underlying issue of the district court's jurisdiction to reopen and dismiss with prejudice abuse and neglect cases involving two of the nine children. For the reasons discussed in this Opinion, we affirm the district court's order in *Tierra Blanca Ranch* and reverse the court's orders in *In re Bryce H.* and *In re Ryan S.*

**BACKGROUND**

{3} On September 22, 2013, a fatal rollover involving a Ranch employee and three Ranch youth was reported to CYFD. CYFD and the state police jointly interviewed eleven children, who described prevalent physical and emotional torment at the Ranch, including shackling, forced labor, and the taunting and beating of children by other children and Ranch staff. On October 9, 2013, CYFD filed nine petitions alleging abuse and neglect of children at the Ranch and naming as respondents Chandler and the childrens' parents. Since the children were still believed to be in

Chandler's custody when the petitions were filed, CYFD also filed affidavits for ex-parte custody orders with each petition. *See* NMSA 1978, § 32A-4-16(A) (1993) ("At the time a petition is filed or any time thereafter, the . . . court may issue an ex-parte custody order upon a sworn written statement of facts showing probable cause exists to believe that the child is abused or neglected and that custody . . . is necessary."). The nine petitions, involving similar (if not identical) allegations, were inexplicably assigned to three separate judges, but all ex-parte motions were consistently granted, and legal custody of the children was temporarily awarded to CYFD pending hearings in each case. By statute, the hearings are preliminary matters, separate from the adjudication of abuse and neglect, and are designed only "to determine if the child should remain in . . . [CYFD's] custody pending adjudication." NMSA 1978, § 32A-4-18(A) (2014).

**{4}** Prior to the first custody hearing—*Charlie L.*—which was scheduled for the morning of October 15, all children were either returned to their parents or placed with CYFD. According to counsel for CYFD, the fact that the children were then "safe and away from the alleged perpetrator" prompted it to prepare notices for the clerk, voluntarily dismissing Chandler without prejudice from the abuse and neglect proceedings pursuant to Rule 10-145(A)(1)(a). Counsel for CYFD specifically believed that "Chandler no longer presented any immediate danger and there was no reason to proceed to a custody hearing or adjudicatory hearing as to him." Thus, a little over an hour before the custody hearing in *Charlie L.*, CYFD filed its notices of voluntary dismissal of Chandler in several of the nine cases, including *In re Bryce H.* and *In re Ryan S.*

**{5}** Nevertheless, counsel for Chandler attended the *Charlie L.* hearing "to oppose CYFD's actions against Chandler in all nine proceedings, including the findings in the Ex Parte Custody Orders." Since the hearing was sequestered, CYFD tried to exclude Chandler as a non-party, a discussion ensued, and the court afforded Chandler the opportunity to object to the Rule 10-145(A)(1)(a) notices dismissing him, including the notices that had already been filed with the clerk. In response to Chandler's objection, CYFD agreed on the record that it would dismiss Chandler with prejudice from *In re Charlie L.*, and from at least two other cases before the same judge. The court then ruled that the corresponding ex-parte custody orders would be dissolved as to Chandler, and Chandler's attorney left the sequestered custody hearing, which then went forth as scheduled with respect to Charlie L.'s parents, who remained as respondents. Chandler later submitted proposed orders for CYFD's approval, reflecting dismissals with prejudice in all nine cases. CYFD ultimately approved the proposed orders in seven cases, leaving only the orders in *In re Bryce H.* and *In re Ryan S.* unapproved.

**{6}** Meanwhile, by December 5, 2013, CYFD had concluded a Child Protective Services investigation, which, as will be discussed below, is an internal administrative reporting and documentation process, designed in part to "assess [the] safety of children who are the subjects of reports of alleged abuse or neglect." 8.10.3.8(A) NMAC. CYFD reached "investigative decisions" substantiating findings that Chandler abused and/or neglected all nine children. In *Tierra Blanca Ranch*, Chandler filed a motion in the district court requesting a declaration that the investigative decisions were barred by the doctrine of claim preclusion since the children's court had already dismissed "the same investigations and allegations" with prejudice pursuant to CYFD's agreement at the October 15 hearing.

**{7}** CYFD responded to Chandler's claim preclusion argument by refusing to approve the proposed orders to dismiss the cases involving Bryce H. and Ryan S. with prejudice. Since CYFD had already dismissed the *In re Bryce H.* and *In re Ryan S.* cases (without prejudice) in their entirety—meaning that the parents were no longer respondents either—Chandler moved to reopen the cases for the limited purpose of effectuating CYFD's October 15 agreement to change the dismissals to "with prejudice." CYFD opposed the court's jurisdiction to reopen the cases, arguing that the notices of dismissal immediately "terminate[d] the case without any order by the court" and divested the court of its jurisdiction to take any further action. The court ultimately found that it was "wrong for CYFD to make the aforesaid agreement and then not adhere to it." It reopened the proceedings in *In re Bryce H.* and *In re Ryan S.* and dismissed Chandler with prejudice in both cases. Although all nine cases had been ostensibly dismissed with prejudice, the court in *Tierra Blanca Ranch* declined to apply the doctrine of claim preclusion to CYFD's substantiation investigations. Appeals of all three cases followed. We consolidated the cases and now affirm in part and reverse in part.

**DISCUSSION**

**{8}** Chandler argues that claim preclusion bars CYFD from administratively substantiating and documenting allegations of abuse and neglect against him after he was dismissed with prejudice from proceedings in all nine cases in the children's court. Chandler's argument necessarily encompasses two contentions: first, that CYFD's substantiation investigations constitute "claims" that could have been brought in children's court in the first place; and second, that the underlying dismissals with prejudice in two of the cases—*In re Bryce H.* and *In re Ryan S.*—were appropriately granted over CYFD's objection. We hold that claim preclusion does not apply to any of the substantiation investigations, and we further clarify that the district court was without jurisdiction when it dismissed Chandler from *In re Bryce H.* and *In re Ryan S.* with prejudice.

**A. Claim Preclusion**

**{9}** Whether the elements of claim preclusion are satisfied is a legal question, which we review de novo. *Moffat v. Branch*, 2005-NMCA-103, ¶ 10, 138 N.M. 224, 118 P.3d 732. To the extent our analysis requires us to construe the Children's Code and its implementing regulations, we look to the statutory text as the primary indicator of legislative intent. *Bishop v. Evangelical Good Samaritan Soc'y*, 2009-NMSC-036, ¶ 11, 146 N.M. 473, 212 P.3d 361. We also interpret each section of the Children's Code "so as to correlate as faultlessly as possible with all other sections, in order that the ends sought to be accomplished by the [L]egislature shall not be thwarted." *State v. Doe*, 1980-NMCA-147, ¶ 4, 95 N.M. 88, 619 P.2d 192.

**{10}** Claim preclusion "applies equally to bar all claims arising out of the same transaction, regardless of whether they were raised at the earlier opportunity, as long as they could have been raised." *Pielhau v. State Farm Mut. Auto. Ins. Co.*, 2013-NMCA-112, ¶ 8, 314 P.3d 698 (alteration, internal quotation marks, and citation omitted), *cert. granted*, 2013-NMCERT-011, 314 P.3d 963. The doctrine "applies if three elements are met: (1) a final judgment on the merits in an earlier action, (2) identity of parties or privies in the two suits, and (3) identity of the cause of action in both suits." *Id.* (internal quotation marks and citation omitted). In determining whether a cause of action in the two suits is the same, "we consider the

relatedness of the facts, trial convenience, and the parties' expectations." *Id.* ¶ 14 (internal quotation marks and citation omitted).

**{11}** We begin by noting the novelty of analyzing this issue through the lens of claim preclusion. While numerous jurisdictions have similar child abuse substantiation and documentation schemes, we can locate no published or unpublished opinion anywhere that has ever characterized these non-adversarial internal administrative investigations as claims that can be precluded by parallel judicial proceedings. Along these lines, CYFD has argued throughout this litigation that the substantiation investigations provide no relief and embrace no remedial rights of a plaintiff and are therefore "not claims" subject to preclusion. *See* Restatement (Second) of Judgments § 24 cmt. a (1982) (defining "claim" for preclusion purposes "to embrace all the remedial rights of the plaintiff against the defendant growing out of the relevant transaction"); *cf. In re Mokiligon*, 2005-NMCA-021, ¶ 8, 137 N.M. 22, 106 P.3d 584 (stating that a petition for a name change "does not ask the court to resolve a dispute between parties" and is therefore not subject to claim preclusion). If anything, the Child Protective Services investigation determines an *issue* and is properly analyzed under the doctrine of issue preclusion. *See, e.g.*, *Grant v. Iowa Dep't of Human Servs.*, 722 N.W.2d 169, 173-78 (Iowa 2006) (determining whether issue preclusion applies to an administrative child abuse documentation scheme); *Cosby v. Dep't of Human Res.*, 42 A.3d 596, 598 (Md. 2012) (considering whether adjudication of neglect precludes the same issue in subsequent administrative child neglect reporting process); *In re P.J.*, 2009 VT 5, ¶¶ 1-3, 9, 185 Vt. 606, 969 A.2d 133 (mem.) (same).[1] But no such argument is before this Court.

**{12}** Instead, Chandler limits his argument to claim preclusion, contending that the test for identity of claims is "easily satisfied," and that "[i]t is impossible to distinguish the facts underlying the Abuse and Neglect Petitions from the facts underlying the Substantiation Notices." Although that may be true, Chandler never explains how CYFD could have pursued its purported "claim," a substantiation investigation, which is a non-adversarial administrative investigation conducted by a department worker, in an adversarial proceeding in children's court. *See Pielhau*, 2013-NMCA-112, ¶ 8 (stating that claim preclusion "applies . . . to bar all claims arising out of the same transaction . . . *as long as they could have been raised*" in the first action (emphasis added) (alteration, internal quotation marks, and citation omitted)); *State ex rel. Martinez v. Kerr-McGee Corp.*, 1995-NMCA-041, ¶ 11, 120 N.M. 118, 898 P.2d 1256 ("Claims are not precluded . . . where a plaintiff could not seek a certain relief or rely on a certain theory in the first action due to limitations on the subject matter jurisdiction of the first tribunal." (citing Restatement (Second) of Judgments § 26(1)(c) (1980))). "It is clear enough that a litigant should not be penalized for failing to seek unified disposition of matters that could not have been combined in a single proceeding." 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 4412, at 276 (2d ed. 2002). It is specifically settled that "[m]atters that can be advanced only before an administrative agency ordinarily do not form part of a single claim with matters that can be advanced only before another agency or a court." *Id.* at 279.

**{13}** These hornbook propositions are captured in statements of policy underlying the doctrine of claim preclusion that have been consistently articulated by our appellate courts. *See, e.g.*, *Potter v. Pierce*, 2015-NMSC-002, ¶ 1, 342 P.3d 54 (emphasizing that "barring a claim on res judicata grounds requires a determination that the claimant had a full and fair opportunity to litigate the claim in the earlier proceeding"); *Brooks Trucking Co. v. Bull Rogers, Inc.*, 2006-NMCA-025, ¶ 11, 139 N.M. 99, 128 P.3d 1076 ("[A] party's full and fair opportunity to litigate is the essence of res judicata."); *Apodaca v. AAA Gas Co.*, 2003-NMCA-085, ¶ 81, 134 N.M. 77, 73 P.3d 215 (observing that claim preclusion "reflects the expectation that parties who are given the capacity to present their entire controversies shall in fact do so" (internal quotation marks and citation omitted)); *Moffat v. Branch*, 2002-NMCA-067, ¶ 26, 132 N.M. 412, 49 P.3d 673 ("If a litigant is able to raise a claim in an action before the action becomes final, but does not do so, the claim is forever barred."); *Bank of Santa Fe v. Marcy Plaza Assocs.*, 2002-NMCA-014, ¶ 20, 131 N.M. 537, 40 P.3d 442 (stating that "two claims cannot be a 'convenient trial unit' when they could not both be presented" in the first tribunal); *Martinez*, 1995-NMCA-041, ¶ 11 ("Claim preclusion bars litigation of claims that were or could have been advanced in an earlier proceeding."). As a general matter, there is simply no reason to apply the doctrine to preclude a claim that could never have been brought in the first instance, and doing so would only serve to unnecessarily infringe on a plaintiff's interest in the vindication of its claims. Thus, to determine whether CYFD could have "substantiated"—as that term is defined in the department's governing regulations—abuse and neglect in the first tribunal (the children's court), we briefly examine the relevant statutes and regulations.

**{14}** Abuse and neglect investigations and petitions are governed by the Abuse and Neglect Act, NMSA 1978, §§ 32A-4-1 to -34 (1993, as amended through 2014), and by various regulations in Title 8 of the New Mexico Administrative Code. The plain text of the statutes and regulations give rise to the following scheme: When CYFD receives a report of abuse or neglect, it must "conduct an investigation to determine the best interests of the child with regard to any action to be taken[,]" § 32A-4-4(A), including whether to file an abuse or neglect petition in the children's court, § 32A-4-4(C). After it is filed, the merits of the abuse or neglect petition are adjudicated in an adversarial proceeding where CYFD must prove its case by clear and convincing evidence. Section 32A-4-20(H). A dispositional judgment is ultimately entered, and a treatment plan is ordered in cases where a child is found to be neglected or abused. Section 32A-4-22(C).

**{15}** In addition to litigating alleged abuse and neglect in children's court, CYFD also maintains a data management system to conform with state and federal reporting requirements. *See* NMSA 1978, § 9-2A-8(C) (2011) (requiring CYFD to "develop and maintain a statewide database, including client tracking of services for children, youth and families"); 8.8.2.25(B) NMAC (requiring CYFD to complete various federal reporting requirements); 42 U.S.C. § 671(a)(20)(B)(i) (2014) (conditioning

[1]Even the case cited by Chandler, *Paulo v. Holder*, 669 F.3d 911, 917 (9th Cir. 2011), involves issue preclusion. Presumably, Chandler is not arguing issue preclusion because, unlike claim preclusion, "on the merits" in an issue preclusion analysis requires that the issue must be "actually litigated." *See Pielhau*, 2013-NMCA-112, ¶¶ 11-12. In other words, Chandler would lose since "[t]he Court did not conduct a merits hearing and make a decision based on such hearing."

receipt of certain Title IV funds to a state plan requiring the state to check its child abuse and neglect registry when investigating prospective foster and adoptive parents and to comply with requests from other states); 42 U.S.C. § 16990(a) (2013) (discussing the obligation of the states to supply information to the national registry of substantiated cases of child abuse).

**{16}** The regulations require a worker from CYFD's division of Child Protective Services to conduct an administrative investigation into any report of abuse or neglect that is screened in and to document into CYFD's data management system whether "credible evidence exists to support the investigation worker's conclusion that the child has been abused or neglected[.]" 8.10.3.17(A)(1) NMAC; 8.10.3.20(A) NMAC (setting forth the documentation requirements). The database of investigation decisions, which includes findings of substantiated and unsubstantiated abuse, is then used in future abuse and neglect investigations, in the screening of foster and adoptive parents and in certain licensing and hiring decisions. *See* 8.10.2.12(B) NMAC (describing use of information received from the reporting source); 8.26.4.11 NMAC (explaining foster and adoptive home licensing requirements); 8.8.2.22 NMAC (describing employee background checks); 8.26.6 NMAC (explaining requirements for licensing facilities). By rule, an aggrieved party can challenge the results of a substantiation investigation only by seeking administrative review and an administrative hearing and only while a judicial proceeding is not pending. 8.10.3.21(B) NMAC. After the administrative determination is final, the appealing party can seek judicial review. 8.8.4.13(A) NMAC.

**{17}** Thus, the regulations vest CYFD with the exclusive authority to conduct a substantiation investigation and to document substantiated and unsubstantiated abuse for reporting purposes in its centralized data management system. Only the Child Protective Services "worker" can "complete the investigation . . . and complet[e] all documentation in [the database.]" 8.10.3.17(A) NMAC. Aside from it being entirely unwieldy (i.e., not a "convenient trial unit" in the language of res judicata) to require CYFD to carry out its non-adversarial "credible evidence" investigation and documentation requirements during an adversarial proceeding in children's court, it is also contrary to law. According to the regulations, a court cannot decide whether abuse is substantiated in the first instance; its only role in the administrative process is its legislatively prescribed power of judicial review. 8.8.4.13(A) NMAC; *New Energy Econ., Inc. v. Shoobridge*, 2010-NMSC-049, ¶ 19, 149 N.M. 42, 243 P.3d 746 ("Judicial action that disrupts the administrative process before it has run its course intrudes on the power of another branch of government.").

**{18}** By expressly identifying different decision-makers, different purposes, and different standards of proof, the statutes and regulations appear to contemplate inclusion of substantiated reports in CYFD's child abuse database, even where abuse cannot be proven by clear and convincing evidence in children's court. We think it unlikely that the Legislature intended to strike from the statewide database information related to alleged abuse—documentation that is ultimately designed to be protective of children—every time a related abuse and neglect petition is dismissed pursuant to a higher burden of proof in a contested judicial proceeding, *see Anaya v. City of Albuquerque*, 1996-NMCA-092, ¶ 15, 122 N.M. 326, 924 P.2d 735 (stating that "differences in requirements of proof suggest that the claims advanced in . . . two cases do not form a convenient trial unit"), or every time a petition is dismissed with prejudice for reasons that have nothing to do with the merits of the underlying abuse allegations. For instance, if a respondent to an abuse and neglect petition has no continuing connection with the children (as in this case), CYFD has no reason to continue to pursue a treatment plan in children's court involving that respondent. That does not mean, however, that upon dismissing the petition as to the alleged abuser with prejudice, CYFD is precluded from fulfilling its responsibility to document findings of credible evidence of abuse "in every investigation." 8.10.3.18(A) NMAC. Given the purposes of the substantiation investigation and its documentation requirements, discussed above, applying the common law doctrine of claim preclusion under these circumstances would thwart the designs of the Children's Code and put children who are faced with recurring abuse or neglect at even greater risk of harm. *See In re Mahdjid B.*, 2015-NMSC-003, ¶ 13, 342 P.3d 698 ("The central purpose of the Children's Code is to protect the health and safety of children covered by its provisions while preserving the unity of the family whenever possible." (alteration, internal quotation marks, and citation omitted)).

**{19}** We conclude that, since CYFD could not have brought its purported "claim" in the first tribunal, and since the statutory/regulatory framework intends to authorize the documentation of information related to alleged abuse and neglect that is not proven by clear and convincing evidence in court, the doctrine of claim preclusion does not apply. *See Martinez*, 1995-NMCA-041, ¶ 11; Wright, et al., *supra*, § 4412, at 276 ("[A] litigant should not be penalized for failing to seek unified disposition of matters that could not have been combined in a single proceeding."). Therefore, the investigative decisions related to all nine children were not precluded by the previous dismissals in children's court, and Chandler's remedy to challenge those findings, once the judicial proceedings against him were no longer pending, was entirely contained within the procedures outlined in the New Mexico Administrative Code.

**B. *In re Bryce H.* and *In re Ryan S.***

**{20}** We also clarify that the underlying dismissals with prejudice occurred when the district court was without jurisdiction, pursuant to Rule 10-145(A)(1)(a) and *Becenti v. Becenti*, 2004-NMCA-091, ¶ 14, 136 N.M. 124, 94 P.3d 867, and we therefore reverse in *Bryce H.* and *Ryan S.* Our review of the jurisdiction of the children's court is de novo. *State ex rel. Children, Youth & Families Dep't v. Andree G.*, 2007-NMCA-156, ¶ 17, 143 N.M. 195, 174 P.3d 531. We review the children's court rules and statutes de novo, *State v. Dylan A.*, 2007-NMCA-114, ¶ 13, 142 N.M. 467, 166 P.3d 1121, construing them in light of their stated purpose to "secure simplicity in procedure, fairness in administration, elimination of unjustifiable expense and delay and to assure the recognition and enforcement of constitutional and other rights[,]" Rule 10-101(B) NMRA.

**1. The Jurisdictional Effect of Voluntary Dismissal-By-Notice**

**{21}** The children's court rules govern procedure in abuse and neglect proceedings. *See* Rule 10-101(A)(1)(d). By rule, the petitioner in "any action except a delinquency proceeding" has the right to dismiss the action without order of the court "by filing a notice of dismissal at any time before commencement of the adjudicatory hearing[.]" Rule 10-145(A)(1)(a). While the jurisdictional effect of a notice of dismissal in the children's court is an issue of first impression, the text of the rule is similar to its counterparts in the state and

federal rules of civil procedure, which have been widely interpreted. In their briefing, the parties appear to assume, with one exception that will be discussed below, that there is no basis to read the applicable children's court rules differently than their similar state and federal rules. We therefore begin by evaluating the jurisdictional effect of a voluntary dismissal under Rule 1-041(A)(1) NMRA and Federal Rule of Civil Procedure 41(a)(1)(A).

**{22}** When a case is voluntarily dismissed by notice, a court's jurisdiction is unilaterally and immediately terminated. *Becenti*, 2004-NMCA-091, ¶¶ 10, 14. In *Becenti*, the petitioner filed a pro se divorce action and then wrote a letter to the district court that was later construed as a notice of dismissal. *Id.* ¶ 2. She then filed for divorce in another state, prompting the respondent to move to reopen the New Mexico case over her objection. *Id.* ¶ 3. The district court reinstated the case under Rule 1-041(E)(2) and LR 11-110(B) NMRA, which permit reinstatement upon a showing of good cause. *Becenti*, 2004-NMCA-091, ¶¶ 3, 9. We reversed, construing our dismissal-by-notice provision in light of its federal counterpart, which "has almost universally been interpreted as a bright-line rule permitting unilateral dismissal before an answer or summary judgment motion is filed that is beyond the authority of the trial court to disturb." *Id.* ¶ 10 (internal quotation marks and citation omitted). We cited federal authorities for the proposition that "[t]here is nothing the defendant can do to fan the ashes of that action into life and the court has no role to play. This is a matter of right running to the plaintiff and may not be extinguished or circumscribed by adversary or court." *Id.* (internal quotation marks and citation omitted).

**{23}** The respondent in *Becenti* argued that the court "should not be prohibited from exercising its discretion to achieve a different result when it would be equitable to do so." *Id.* ¶ 12. We rejected that argument, reiterating that "the voluntary dismissal rule has consistently been interpreted as drawing a bright line that permits unilateral dismissal of a case by a plaintiff in the earliest stages of litigation . . . thus extinguishing the action and leaving it as though no suit had ever been brought." *Id.* We specifically held that a notice of dismissal left the district court "without power to reinstate the action under Rule1-041(E)(2)." *Becenti*, 2004-NMCA-091, ¶ 14.

**{24}** In *Becenti*, we declined to decide whether the same logic applies to a district court's power to reopen a case under Rule 1-060(B) NMRA, which authorizes a party to seek relief from "a final judgment, order, or proceeding" for a series of reasons delineated in the rule. *Becenti*, 2004-NMCA-091, ¶ 11. We opined that scenarios involving Rule 1-060(B) and Rule 1-041(E)(2) were "factually inapposite," and we noted a decision of our Supreme Court that, without addressing the jurisdictional dispute, had considered the merits of a plaintiff's Rule 1-060(B) motion to set aside a stipulated dismissal. *Becenti*, 2004-NMCA-091, ¶ 11 (discussing *Meiboom v. Watson*, 2000-NMSC-004, 128 N.M. 536, 994 P.2d 1154, and cautioning against relying on an opinion as authority for a proposition not explicitly addressed). Thus, although *Becenti* held that a plaintiff's voluntary dismissal immediately terminates the district court's jurisdiction, it explicitly left unanswered the question whether an adverse party can move for relief under Rule 1-060(B). *Becenti*, 2004-NMCA-091, ¶¶ 11, 14. That is essentially the question that is raised here, where Chandler's motions to reopen *Bryce H.* and *Ryan S.* were granted based in part on Rule 1-060's counterpart in the children's court rules. *See* Rule 10-146 NMRA. Without controlling authority, we turn to federal construction for guidance. *See Albuquerque Redi-Mix, Inc. v. Scottsdale Ins. Co.*, 2007-NMSC-051, ¶ 9, 142 N.M. 527, 168 P.3d 99 ("When our state court rules closely track the language of their federal counterparts, . . . federal construction of the federal rules is persuasive authority for the construction of New Mexico rules."); *Becenti*, 2004-NMCA-091, ¶ 10 (interpreting the state voluntary dismissal rule with reference to cases interpreting the federal rule).

**{25}** When a plaintiff files notice with the clerk under the terms stated in the voluntary dismissal rule, "[t]here is not even a perfunctory order of court closing the file. Its alpha and omega was the doing of the plaintiff alone." *See Am. Cyanamid Co. v. McGhee*, 317 F.2d 295, 297 (5th Cir. 1963). Although this would indicate that Rule 60(b), which only applies to final judgments, orders, or proceedings, cannot be used to reinstate a voluntarily dismissed action, some federal circuits permit a plaintiff to move under Rule 60 to reopen its own action on the theory that the Rule 41(a)(1)(A) filing is a "proceeding" to which Rule 60 applies. *See Yesh Music v. Lakewood Church*, 727 F.3d 356, 361-63 (5th Cir. 2013); Fed. R. Civ. P. 60(b) ("On motion and just terms, the court may relieve a party . . . from a final judgment, order, or *proceeding*." (emphasis added)). The Tenth Circuit appears to follow this approach, "embrac[ing] the proposition that a plaintiff who has dismissed his claim by filing notice [of dismissal] may move before the district court to vacate the notice on any of the grounds specified in Rule 60(b)." *Schmier v. McDonald's LLC*, 569 F.3d 1240, 1243 (10th Cir. 2009) (internal quotation marks and citation omitted).

**{26}** However, we can locate no authority that grants the same right to an adverse party over a plaintiff's objection. *See Netwig v. Ga.-Pac. Corp.*, 375 F.3d 1009, 1010-11 (10th Cir. 2004) (distinguishing the two scenarios and holding that a district court cannot reinstate an action under Rule 60(b) over the plaintiff's objection). This one-sided application of Rule 60(b) is consistent with the general understanding, expressed in *Becenti*, that voluntary dismissal by notice is "a matter of right running to the plaintiff and may not be extinguished or circumscribed by adversary or court." 2004-NMCA-091, ¶ 10 (internal quotation marks and citation omitted). Our appellate courts have never strayed from that proposition. *See id.*; *see also McCuistion v. McCuistion*, 1963-NMSC-144, ¶ 10, 73 N.M. 27, 385 P.2d 357 (applying the similar voluntary dismissal-by-stipulation provision, which similarly leaves the court "without further jurisdiction and . . . no right to render any judgment"). *Meiboom*, in which our Supreme Court applied Rule 1-060(B) to an action that had been dismissed by stipulation, is entirely consistent with this approach. *See Meiboom*, 2000-NMSC-004, ¶ 4 (stating that it was the plaintiffs who moved to reopen the case). Thus, since CYFD objected to reinstatement on several occasions, in two motions and at a hearing, neither Chandler nor the district court could have reinstated the cases over those objections.

**2. The Relevance of the State and Federal Rules of Civil Procedure**

**{27}** Chandler disputes the relevance of the civil voluntary dismissal rules to our analysis in only one respect. Seizing on the unique, definite article "the" in Rule 10-145(A)(1), he argues that the children's court rule contemplates a different meaning of the term "action" than the state and federal civil rules, both of which refer to "an action"—as opposed to "the action." *Compare* Rule 10-145(A)(1) ("In any action except a delinquency proceeding, *the*

action may be dismissed by the petitioner without order of the court[.]" (emphasis added)), *with* Rule 1-041(A)(1), *and* Fed. R. Civ. P. 41(a)(1)(A). Therefore, Chandler contends, federal cases interpreting the term "action" under the rule to permit the dismissal of fewer than all defendants named in the complaint, *see* 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2362, at 410 n.9 (listing cases that have applied this general proposition), are inapposite to our analysis, and CYFD had no ability under the children's court rule to dismiss Chandler without also dismissing the parents of Ryan S. and Bryce H. According to this logic, CYFD's notices of dismissal were legal nullities (since the parents still remained as parties) and, therefore, Chandler was still a party when CYFD later agreed to dismiss him with prejudice.

**{28}** We reject Chandler's argument for two reasons. First, we can see no meaningful difference between the use of the articles "the" and "an" in the context of the rules. The definite article "the" in the children's court rule, unlike the state and federal rules, follows a phrase that begins with the subject "any action[.]" Rule 10-145(A)(1) ("In *any action* except a delinquency proceeding, *the* action may be dismissed[.]" (emphasis added)). The use of "the" simply makes grammatical sense; it refers back to the thing (any action) previously mentioned. *See Webster's Third New Int'l Dictionary* 2368 (unabridged ed. 1986) (defining "the" as "a function word to indicate that a following noun . . . refers to someone or something previously mentioned or clearly understood from the context or the situation"). Given Rule 10-145's introductory phrase, the use of the alternative article "an" would have been nonsensical: "In any action except a delinquency proceeding, *an* action may be dismissed . . ." Thus, in this instance, the unique text of the rule is plainly stylistic; it does not appear to indicate any intention to modify the generally understood substantive meaning of the "action" that the petitioner may voluntarily dismiss.

**{29}** Second, to the extent there is any ambiguity, we construe the children's court rules, in part, to "secure simplicity in procedure[.]" Rule 10-101(B). The civil voluntary dismissal rule is "designed to permit a disengagement of the parties at the behest of the plaintiff in the early stages of a suit, before the defendant has expended time and effort in the preparation of his case." *Pedrina v. Chun*, 987 F.2d 608, 610 (9th Cir. 1993) (alteration, internal quotation marks, and citation omitted). The federal courts interpret "action" under the rule to permit the dismissal of fewer than all of the named defendants because that interpretation is consistent with the purpose of the rule. *Id.* This flexibility seems even more appropriate in the children's court, where CYFD frequently takes emergency custody of children. Upon receiving a report of child abuse or neglect, CYFD is statutorily required to "ensure that immediate steps are taken to protect the health or welfare of the alleged abused or neglected child[.]" Section 32A-4-3(C). It must initiate abuse and neglect proceedings within two days of taking a child into custody, Section 32A-4-4(D), and presumably, not always with perfect information about the proper respondents.[2] Given the necessarily expedited nature of this process, it would be misguided to interpret Rule 10-145(A)(1) in such a way that CYFD has less flexibility to name and summarily dismiss respondents in abuse and neglect proceedings than a plaintiff has in a normal civil suit. Accordingly, in the present context, we find cases interpreting the state and federal voluntary dismissal rules persuasive to our analysis. *See Albuquerque Redi-Mix, Inc.*, 2007-NMSC-051, ¶ 9.

**3. Chandler's Remaining Arguments**

**{30}** Chandler's remaining arguments in *Bryce H.* and *Ryan S.* are all geared toward escaping the effect of *Becenti*. He contends that, even if the cases could not be reopened under Rule 10-146, "a number of procedural rules empowered CYFD and the district court to rejoin Chandler as a respondent and then dismiss him with prejudice[.]" He characterizes CYFD's October 15 agreement to dismiss him with prejudice as an implied motion by CYFD to reopen the cases in accordance with the authorities discussed above. *See Schmier*, 569 F.3d at 1243 (holding that a plaintiff may move to vacate its own notice of dismissal). In the alternative, he argues that CYFD's agreement can be construed as an implied motion to rejoin Chandler under Rule 10-121(B)(2) NMRA, or that the district court impliedly rejoined Chandler under Rule 10-121(B)(4), or impliedly permitted Chandler to intervene post-dismissal under Rule 10-122(B)(2) NMRA. He finally argues that the common law doctrine of judicial estoppel and the court's inherent authority permitted it to reinstate Chandler over CYFD's objection.

**{31}** None of these arguments are persuasive. *Becenti*, 2004-NMCA-091, ¶ 10 ("There is *nothing* the defendant can do to fan the ashes of that action into life and the court has no role to play. This is a matter of right running to the plaintiff and may not be extinguished or circumscribed by adversary or court." (emphasis added) (internal quotation marks and citation omitted)).[3] CYFD did not impliedly move to reopen *Bryce H.* or *Ryan S.* It expressly opposed reopening the cases. The district court did not rejoin Chandler or permit Chandler to intervene; its orders were entirely grounded on Rule 10-146 and the doctrine of judicial estoppel. Pursuant to *Becenti* and the federal authorities that informed it, there is simply no role for Rule 10-146 or equitable principles in this analysis. *Becenti*, 2004-NMCA-091, ¶ 12.

**CONCLUSION**

**{32}** We affirm the district court in *Tierra Blanca Ranch High Country Youth Program v. CYFD*, No. D-0721-CV-2013-00107, and reverse and vacate the dismissals with prejudice in the matters of *In re Bryce H.*, No. D-0721-JQ-2013-06, and *In re Ryan S.*, No. D-0721-JQ-2013-10.

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

**LINDA M. VANZI, Judge**

**WE CONCUR:**
**MICHAEL D. BUSTAMANTE, Judge**
**TIMOTHY L. GARCIA, Judge**

[2]When CYFD sought emergency custody and filed its abuse and neglect petition in the matter of Bryce H., for instance, the identities of his parents were still unknown.

[3]Chandler should not even have been permitted to object to the notices of dismissal at the October 15 hearing in the first place. There should never have been any need for CYFD to come to any agreement to dismiss him with prejudice.

***Certiorari Denied, December 22, 2015, No. S-1-SC-35549***

From the New Mexico Court of Appeals

**Opinion Number:2016-NMCA-013**

No. 32,331 (filed September 10, 2015)

CENTEX/WORTHGROUP, LLC,
Plaintiff-Appellant,
v.
WORTHGROUP ARCHITECTS, L.P. and TERRACON, INC.,
Defendants-Appellees.

**APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY**
JERRY H. RITTER, District Judge

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## Opinion

## Roderick T. Kennedy, Judge

### I. INTRODUCTION

**{1}** This appeal involves a dispute between a general contractor, Centex/Worthgroup, LLC (Centex), and a subcontractor, Worthgroup Architects, L.P. (Architect). Centex and Architect entered into a contractual relationship which, among other things, governed the construction of a Mechanically Stabilized Earth (MSE) Wall. The MSE Wall ultimately failed, and Centex brought this suit against Architect and Terracon, Inc., claiming over $6,000,000 in damages for redesign and repair costs that it incurred. Centex asserted that Architect is required to cover the costs Centex incurred in redesigning and repairing the MSE Wall. Architect conversely asserted that its monetary obligations to Centex have been satisfied by the payment of proceeds of insurance coverage that it was contractually obligated to procure and maintain.

**{2}** Centex appeals a grant of summary judgment to Architect, in which the district court apparently determined that a limitation of liability clause in a prime contract flowed down to the subcontract by virtue of a flow-down clause. We reverse. We note that Centex contends genuine issues of material fact remain, but, for the reasons that follow, we decline to consider whether this is the case and remand so that the district court can consider the facts and arguments in light of the holding in this Opinion.

### II. BACKGROUND

**{3}** In February 2002, the Inn of the Mountain Gods Resort and Casino (Owner) contracted with Centex for an expansion and renovation project. These parties defined the terms of their business relationship in a second amended design/build construction contract (the prime contract). Centex then entered into a subcontract with Architect, where Architect agreed to perform design work on the project. Both the prime contract and the subcontract are relevant to our analysis in this case.[1]

**{4}** We begin with a brief overview of the prime contract and subcontract, continue with an account of the proceedings in district court, and end with a discussion of the law relevant to our holding.

#### A. The Prime Contract

**{5}** The prime contract governs the contractual relationship between Owner and Centex with regard to the project. The first section of the prime contract that the parties have termed the "limitation of liability" clause[2] is relevant to this appeal. The limitation of liability clause provides:

> In addition to all other insurance requirements set forth in this Agreement, Design/Builder shall require its design professional Subcontractor(s) to obtain and maintain professional errors and omissions coverage with respect to design services in accordance herewith. . . . [S]uch coverage shall be for each such design professional Subcontractor in an amount not less than $3,000,000. Owner agrees that it will limit Design/Builder liability to [O]wner for any errors or omissions in the design of the Project to whatever sums Owner is able to collect from the above described professional errors and omissions insurance carrier.

#### B. The Subcontract

**{6}** The subcontract, which governs the contractual relationship between Centex and Architect with regard to the project, contains an incorporation by reference clause, which requires Architect to perform the design work in strict accordance with the prime contract and incorporates the prime contract by reference. The subcontract reflects Centex's and Architect's intent that "all the terms of all documents are to be considered as complementary." Should such an interpretation be impossible, however, the parties provide the desired sequence for use of the documents, hereinafter referred to as the order of precedence clause.

> [T]he order of precedence of the documents, . . . shall be: (1) the most current approved edition of the [c]onstruction [d]ocuments; (2) modifications to [the sub-

[1]Architect also entered into an agreement with Terracon, Inc. for services to construct the MSE Wall. Terracon has since been dismissed from this case.

[2]For the sake of clarity, we will continue using this characterization.

> contract]; (3) [the subcontract], unless the [prime contract] imposes a higher standard or greater requirement on the parties, in which case the [prime contract]; (4) the [prime contract], unless the provisions of (3) apply.

**{7}** The subcontract also includes a provision—referred to by the parties as a flow-down clause[3]—which states:

> In respect of the [d]esign [w]ork, [Architect] shall, except as otherwise provided herein, have all rights toward [Centex] which [Centex] has under the [prime contract] towards the Owner and [Architect] shall, to the extent permitted by applicable laws and except as provided herein, assume all obligations, risks[,] and responsibilities toward [Centex] which [Centex] has assumed towards the Owner in the [prime contract] with respect to [the d]esign [w]ork.

The central dispute between the parties revolves around the meaning and reach of this provision.

**{8}** The subcontract also provides a general liability clause, which makes Architect responsible for "[r]edesign costs and additional construction costs of [Centex] and/or the [c]ontractor required to correct [Architect's] errors or omissions," but specifies that Architect's "responsibility shall not preclude the pursuit of available insurance proceeds on account thereof[.]"

**{9}** Finally, the subcontract assigns rights and obligations to the parties regarding insurance and liability. For instance, Architect is required to procure "insurance coverage from insurers acceptable to [Centex]" and "shall be responsible for all deductibles relating to claims under all applicable insurance policies on account of the [d]esign [w]ork, including the [p]rofessional [l]iability [i]nsurance provided by Design Builder." Architect is further required to name Centex, the [c]ontractor, and Owner as "additional insureds" on the insurance coverage and maintain the coverage "until expiration of [Architect's] obligations" under the subcontract. Another section of the subcontract requires Architect to "provide a [p]roject [p]olicy for [p]rofessional [l]iability insurance with [l]imits of [l]iability of $3,000,000 per occurrence and $3,000,000 Aggregate."

### C. Construction And Failure of the MSE Wall

**{10}** Construction of the MSE Wall began in June 2003. The MSE Wall began to fail in April 2004, causing damage to various "adjacent structures and ground-supported elements." Owner demanded that Centex remedy the defects and damage. Despite having demanded that Architect redesign the MSE Wall and repair any damage that resulted from the wall's failure, Centex spent over $6,000,000 for others to redesign and repair the MSE Wall in September 2004. Centex, as a named insured, requested payment of the available policy limits from Lexington Insurance Company (Lexington) and received payment in the amount of $3,000,000, representing the full policy limit for the claim submitted.

### D. District Court Proceedings

**{11}** Centex commenced this suit against Architect in May 2007 seeking $6,766,155.56, plus costs and expenses, on the grounds that Architect refused to adequately reimburse Centex for the damages incurred in implementing the redesign and repairs required by Owner. Centex's complaint alleges negligence, negligent misrepresentation, breach of contract, and entitlement to attorney fees. Architect, in its response to Centex's complaint, counterclaimed against Centex with three claims: declaratory judgment based on the limitation of liability clause in the prime contract and satisfaction of liability via Lexington's payment of the insurance proceeds; breach of contract based on Centex's failure to enforce the limitation of liability clause against Owner; and indemnification also based on Centex's failure to enforce the limitation of liability clause in favor of Architect. Architect later filed a motion for summary judgment, asserting that the prime contract's limitation of liability clause, which was incorporated into the subcontract through the flow-down clause, limited Centex's ability to recover damages arising from design errors or omissions. Architect also asserted in its motion that the Lexington payment satisfied and therefore extinguished Architect's liability to Centex for design errors and omissions. Architect further asserted that summary judgment was appropriate because of Centex's failure to enforce the limitation of liability clause for the benefit of Architect, as required by the subcontract.

**{12}** The district court held a hearing on the motion for summary judgment, during which the parties argued extensively over what insurable risk the Lexington payment was intended to satisfy. Centex argued that the policy was paid for construction defects while Architect argued that the Lexington policy was paid for design errors and omissions. No release was executed as a result of the Lexington payment. When the district court questioned Centex as to why, if the policy was for construction defects, Centex did not recover from the remaining policy covering design errors and omissions, Centex conceded that if the Lexington policy were indeed for construction defects, it could conceivably make another claim against a design errors and omissions policy. Centex insisted, however, that while the prime contract was set up to shield Owner from excess costs, the subcontract was not constructed to similarly shield Architect from shouldering redesign costs. After hearing arguments from the parties, the district court ordered supplemental briefing so that the parties could address what exactly the insurance payout covered. Architect included a letter from Lexington to Centex as an exhibit in its supplemental briefing, in which Lexington reminded Centex that its policy specifically excluded "any claim based upon or arising out of the cost to repair or replace any faulty . . . construction . . . performed in whole or in part by . . . the insured[.]"

**{13}** Upon completion of briefing, the district court issued an order granting Architect's motion for summary judgment. The order simply stated that, "having considered all of the pleadings and arguments of counsel, it is the finding and conclusion of the [c]ourt that there are no disputed issues of material fact and that [Architect is] entitled to judgment as a matter of law in accordance with [its] motion[]." Looking to the contract and these facts, we cannot determine on what basis the district court granted judgment as a matter of law. However, given the terms of the contracts, we hold that summary judgment was not appropriate, as a matter of law, for the reasons that follow.

## III. DISCUSSION

**{14}** Neither counsel cites, nor have we been able to find, any New Mexico authority precisely on point. The issue, which is one of first impression in New Mexico, is whether

[3]A concept closely related to incorporation by reference, "flow-down" clauses are commonly used in construction contracts to allow a subcontractor to "assume toward the general contractor all of the obligations and responsibilities the contractor assumes toward the owner in the [prime] contract." T. Bart Gary, *Incorporation by Reference and Flow-Down Clauses*, 10 Const. Law 1, 46 (1990).

the flow-down clause allows the limitation of liability clause in the prime contract to limit Architect's liability to whatever sums Centex could collect from the errors and omissions insurance policy, or whether Architect's liability is controlled by the general liability clause in the subcontract. We hold that the general liability clause in the subcontract controls Architect's liability in the context of this case.

**A. Standard of Review**

**{15}** Rule 1-056(C) NMRA allows a party to move for summary judgment when there is "no genuine issue as to any material fact" and the moving party is entitled to "a judgment as a matter of law." *E.g.*, *Self v. United Parcel Serv., Inc.*, 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582. Where the facts are not in dispute and only the legal significance of the facts is at issue, summary judgment is appropriate. *Gardner-Zemke Co. v. State*, 1990-NMSC-034, ¶ 11, 109 N.M. 729, 790 P.2d 1010. "[W]hen the [district] court's grant of summary judgment is grounded upon an error of law, [however,] the case may be remanded so that the issues may be determined under the correct principles of law." *Rummel v. Lexington Ins. Co.*, 1997-NMSC-041, ¶ 16, 123 N.M. 752, 945 P.2d 970.

**B. The Language of the Subcontract Controls**

**{16}** Although the parties disagree as to how the prime contract and the subcontract apply in this instance, the district court made no finding as to ambiguity, and the parties agree that the contracts are not ambiguous. *See Kirkpatrick v. Introspect Healthcare Corp.*, 1992-NMSC-070, ¶ 14, 114 N.M. 706, 845 P.2d 800 (stating rule that "ambiguity is not established simply because the parties differ on the contract's proper construction"). We consider the contracts to be sufficient to reach our result.

**{17}** Rather than indicate on what undisputed facts it relied when granting summary judgment, or orally recite its reasons for doing so, the district court mirrored the language of Rule 1-056(C), stating that there were "no disputed issues of material fact." *Id.*[4] (requiring a showing of "no genuine issue as to any material fact"). It appears, based on its order, that the district court applied the flow-down clause, incorporated the limitation of liability clause into the subcontract, and determined that Architect's obligation to procure insurance was satisfied by the Lexington policy. If this is the case, the Lexington payment would have released Architect from liability for Centex's claims.

**1. The Flow-Down Clause Contains "Words of Definite Limitation" That Must Be Given Effect**

**{18}** Our courts strive to give effect to a contract according to its terms. *Aktiengesellschaft Der Harlander Buamwollspinnerie Und Zwirn-Fabrik v. Lawrence Walker Cotton Co.*, 1955-NMSC-090, ¶ 33, 60 N.M. 154, 288 P.2d 691. "Parties to a contract agree to be bound by its provisions . . . . When a contract was freely entered into by parties negotiating at arm's length, the duty of the courts is ordinarily to enforce the terms of the contract which the parties made for themselves." *Nearburg v. Yates Petroleum Corp.*, 1997-NMCA-069, ¶ 31, 123 N.M. 526, 943 P.2d 560 (citation omitted); 17A C.J.S. *Contracts* § 432 (2015) ("[W]here it is not ambiguous, a construction contract is to be construed according to its terms." (footnote omitted)). As such, where a subcontract contains "words of definite limitation," those words are given effect and the incorporation of the prime contract is limited accordingly. *Perry v. United States ex rel. Newell*, 146 F.2d 398, 400 (5th Cir. 1945) (reasoning that because the subcontract contained "words of definite limitation," the work description incorporated from the prime contract "was effective only to the extent that it did not conflict with what was specifically agreed upon" in the subcontract). "Although a subcontract may incorporate by reference the terms of the prime contract, the incorporation may be limited to a special purpose." *Mountain States Constr. Co. v. Tyee Elec., Inc.*, 718 P.2d 823, 825 (Wash. Ct. App. 1986).

**{19}** Centex and Architect dispute the importance of Section 1.4.2(b) in the subcontract. Section 1.4.2(b) provides that Architect is responsible for "[r]edesign costs and additional construction costs of [Centex] required to correct [Architect's] errors or omissions." In its discussion of the flow-down clause's applicability, Centex argues that the "except as otherwise provided herein" language contained in the flow-down clause limits the flow-down clause's applicability because Section 1.4.2(b) specifically allocates the liability between Centex and Architect. Thus, Centex argues, the flow-down clause does not bring in the limitation of liability clause of the prime contract because liability was otherwise provided for in the subcontract. We agree with Centex.

**{20}** The express language of the flow-down clause limits the incorporation of the prime contract into the subcontract. By its terms, only rights, obligations, risks, or responsibilities that the prime contract set forth—and the subcontract has not allocated otherwise—can flow down to the subcontract: "[Architect] shall, *except as otherwise provided herein*, have all rights . . . obligations, risks and responsibilities toward [Centex.]" "Except as otherwise provided" are "words of definite limitation." *Cf. Holdeman v. Epperson*, 111Ohio St. 3d 551, 2006-Ohio-6209, 857 N.E.2d 583, at ¶ 19 (naming "except as otherwise provided in the operating agreement" as a "limiting word[]" (internal quotation marks and citation omitted)). Section 1.4.2(b) allocates Architect's liability to Centex, clarifying that Architect is liable for redesign and additional construction costs required to correct Architect's errors or omissions. The rights created in the limitation of liability clause, if allowed to flow down to the subcontract, "limit [Architect's] liability to [Centex] for any errors or omissions in the design of the [p]roject" to sums collected from errors and omissions insurance. Both provisions purport to allocate Architect's liability to Centex, but do so in ways that are so different that they cannot coexist. In order to give the "except as otherwise provided herein" language full effect, we therefore limit the flow-down clause's broad incorporation of the prime contract; by its express terms, the subcontract's allocation of liability governs.

**2. To The Extent That Section 1.4.2(b) and the Limitation Of Liability Clause Allocate Architect's Liability Differently, Section 1.4.2(b) Controls**

**{21}** Even without the flow-down clause's words of definite limitation, the subcon-

[4]We are aware the district court is not required to state its reasons for granting summary judgment. *Garrett v. Nissen Corp.*, 1972-NMSC-046, ¶¶ 11-12, 84 N.M. 16, 498 P.2d 1359, *overruled on other grounds by Klopp v. Wackenhut Corp.*, 1992-NMSC-008, 113 N.M. 153, 824 P.2d 293. In complicated or novel cases such as this one, however, it assists the parties in their briefing to "know upon what grounds the judgment was granted in order to properly present the controversial issue to the appellate court." *Wilson v. Albuquerque Bd. of Realtors*, 1970-NMSC-096, ¶ 12, 81 N.M. 657, 472 P.2d 371, *overruled in part by Akre v. Washburn*, 1979-NMSC-017, 92 N.M. 487, 590 P.2d 635. It is equally beneficial to appellate courts attempting to conduct competent appellate review. *See Phillips v. United Serv. Auto. Ass'n*, 1977-NMCA-137, ¶¶ 34-36, 91 N.M. 325, 573 P.2d 680 (Sutin, J., specially concurring).

tract's allocation of liability still prevails over the flow-down clause's incorporation of the prime contract. Numerous jurisdictions have implemented the rule that "if the specific provisions of the subcontract conflict with the plans and specifications, or with the general contract between the prime contractor and the owner (all of which are incorporated into the subcontract), the terms of the subcontract prevail." *McKinney Drilling Co. v. Collins Co.*, 517 F. Supp. 320, 327-28 (N.D. Ala. 1981). "[W]here the [s]ubcontract has clearly stated the parties' intentions at the time of contracting, the flow-through clause cannot be read to render those clear intentions a nullity." *Larry Snyder & Co. v. Miller*, No. 07-CV-455-PJC, 2010 WL 830616, at *6 (N.D. Okla. Mar. 2, 2010). "The general language of a standard incorporation clause cannot trump the specific language of the subcontract[.]" *Bernotas v. Super Fresh Food Mkts., Inc.*, 863 A.2d 478, 484 (Pa. 2004).

**{22}** The allocation of liability in the prime contract cannot coexist with Section 1.4.2(b). Architect's liability under one is not equivalent to its liability under the other. While the prime contract limits Centex's recovery from Architect to "whatever sums" it can collect from the errors and omissions insurance carrier, the subcontract allows, without limit, recovery for redesign costs and additional construction costs, and does not preclude "pursuit of available insurance proceeds." Pursuant to the legal principles outlined above, the express allocation of liability in the subcontract prevails over the limitation of liability clause in the prime contract; Section 1.4.2.(b) governs Architect's liability to Centex. Architect must therefore shoulder full responsibility for the consequences of its errors and omissions, if any.

**3. Our Interpretation Is In Accordance With the Order of Precedence Clause**

**{23}** The parties are divided on whether our interpretation of the contracts is in accord with the order of precedence clause. We conclude that it is. *See APAC–Tenn., Inc. v. J.M. Humphries Constr. Co.*, 732 S.W.2d 601, 604 (Tenn. Ct. App. 1986) (holding that the clear language of the order of precedence clause required that the subcontract govern in the event that the prime contract's provisions were inconsistent with the subcontract). In the order of precedence clause, the parties required that all terms and all documents be considered as complementary and laid out an order of precedence "in the event that such an interpretation is not possible[.]" The parties agreed that, in the event that the terms of the contracts somehow conflict, the subcontract governs unless the prime contract "imposes a higher standard or greater requirement on the parties," in which case the prime contract governs. Each party argues that its own interpretation of the flow-down clause's applicability is in accord with the application of the "higher standard." For example, Centex argues that the prime contract does not impose any higher standard, so the subcontract should govern. Conversely, Architect argues that the prime contract actually imposes a higher standard than the subcontract, so the prime contract should govern.

**{24}** To the extent that the flow-down clause causes any conflict between the two agreements' allocation of liability, we agree with Centex; the subcontract imposes a higher standard. Section 1.4.2(b) represents a more severe undertaking for Architect than the limitation of liability clause in terms of monetary responsibility for its own errors and omissions. The limitation of liability clause imposes the requirement that Architect obtain and maintain a $3,000,000 insurance policy, which then covers its liability, while Section 1.4.2(b) allows Architect to potentially be liable for any construction or redesign costs incurred as a result of its errors and omissions. Architect is therefore liable for a much higher amount of money for its errors and omissions under Section 1.4.2(b) than under the limitation of liability clause. As such, the subcontract takes precedence, and our determination that the terms of the subcontract govern over conflicting terms incorporated from the prime contract is therefore in accordance with the order of precedence clause.

**{25}** Although the flow-down clause does not incorporate the limitation of liability clause into the subcontract under our holding here, the flow-down clause is not rendered superfluous. It still applies to incorporate other clauses from the prime contract into the subcontract, so long as such an incorporation does not run afoul of its own words of definite limitation. It is only when the subcontract provides rights, obligations, risks, and responsibilities that differ from those set forth in the prime contract that the subcontract governs regardless of the flow-down clause application.

**IV. CONCLUSION**

**{26}** We conclude that the district court based its grant of summary judgment on a mistaken interpretation of the law. Applying rules governing the applicability of the flow-down clause that are widely accepted among other jurisdictions, we determine that the subcontract's terms regarding liability govern for any one of three reasons: (1) the flow-down clause's words of definite limitation must be given effect; (2) the well-recognized rule that when specific provisions in the subcontract conflict with provisions in the prime contract, the subcontract controls; and (3) the order or precedence clause explicitly requires that the subcontract govern when clauses cannot be read as complementary. We hold that the flow-down clause does not incorporate the limitation of liability clause from the prime contract in the subcontract, and Section 1.4.2(b) governs Architect's liability to Centex. We reverse.

**{27} IT IS SO ORDERED.**
**RODERICK T. KENNEDY, Judge**

**WE CONCUR:**
**MICHAEL D. BUSTAMANTE, Judge**
**JONATHAN B. SUTIN, Judge**

From the New Mexico Court of Appeals

**Opinion Number:2016-NMCA-014**

No. 33,649 (filed September 16, 2015)

THOMAS M. COUCH,
Plaintiff-Appellee,
v.
CHRISTIAN WILLIAMS, GEORGINA WILLIAMS, and
NEW MEXICO DEVELOPMENT & CONSULTING, LLC,
Defendants-Appellants.

**APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**
C. SHANNON BACON, District Judge

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for Appellants

## Opinion

## Michael D. Bustamante, Judge

**{1}** Christian and Georgina Williams (Defendants) appeal the district court's order forfeiting their interest in New Mexico Development and Consulting, LLC, (NMDC) to their co-owner, Thomas M. Couch (Plaintiff). The forfeiture order was imposed by the district court after it entered a default judgment against Defendants as a sanction for discovery abuses. Defendants argue that the district court erred in not holding an evidentiary hearing on the amount of Plaintiff's damages before ordering forfeiture of their interest. Agreeing, we reverse the damages award and remand for a hearing on Plaintiff's damages.

**BACKGROUND**

**{2}** The present matter arises from a partnership gone bad. Plaintiff and Defendants were partners in NMDC, which owned a commercial office building in Albuquerque. Plaintiff and Defendants each owned fifty percent of NMDC. In March 2012 Plaintiff filed a petition for an accounting, alleging that Defendant Christian Williams had "appropriated [NMDC] funds for his own use and benefit," and "refused to provide copies of leases to [Plaintiff], . . . refused access to [NMDC's] bank account[,] and refused to provide any accounting as to [NMDC's] operations." Plaintiff made other allegations to the effect that Defendants were mismanaging the commercial property and stated that "[i]t is not reasonably practicable to carry on the business of [NMDC] in conformity with [NMDC's] [a]rticles of [o]rganization and [o]perating [a]greement." Plaintiff prayed for an order "requiring Defendants to provide an accounting, for an award of damages as shown by the accounting[,] and for an award of punitive damages as proved at trial, for his costs and attorney[] fees[,] and for such other relief which the [c]ourt deems appropriate."

**{3}** When Defendants did not timely answer the petition, Plaintiff moved for default judgment. Plaintiff also filed a motion for a preliminary injunction and appointment of receiver, accompanied by an affidavit supporting the motions. In the motion and affidavit, Plaintiff alleged that Defendants had incurred approximately $9146 in inappropriate costs to NMDC and tax penalties, as well as "numerous" overdraft and late charges on bank accounts and loans. Plaintiff also alleged that Defendants' mismanagement of the property led to tenant dissatisfaction. Defendants did not respond to these motions. At the hearing on the motions, the district court warned Defendants that it would "not entertain any further late filings in this matter[.]" The district court denied all of Plaintiff's motions and orally ordered the parties to engage in discovery. The district court also told the parties that "[u]ntimeliness will not be tolerated" in discovery.

**{4}** When Defendants did not respond to Plaintiff's first and second interrogatories and requests for production, Plaintiff filed two motions to compel. After a hearing, the district court granted the motions to compel and ordered Defendants to pay $1070 in attorney fees as a sanction. *See* Rule 1-037(D) NMRA. The district court noted at the hearing that "I have given Mr. Williams ample opportunity to rectify his course in this case [and] he [is] clearly thumbing his nose at those opportunities, and he [is] thumbing his nose at the court process." The district court's order warned, "Failure of . . . Defendants to comply with this [o]rder will be met with severe sanctions, including an [o]rder of [d]efault [j]udgment."

**{5}** In spite of this order, Defendants failed to provide any discovery to Plaintiff or to pay Plaintiff $1070. Plaintiff moved for sanctions and requested an order requiring Defendants "to turn over . . . all documents and records associated with [NMDC];" holding Defendants in contempt of court; and awarding attorney fees and costs. He also requested "such other sanctions as [are] appropriate." Meanwhile, Defendants' counsel moved to withdraw because he "ha[d] not been able to get ahold of Mr. Williams" and Mr. Williams was avoiding him. The district court then scheduled a hearing and included in the notice of the hearing that "Christian and Georgina Williams are to appear in person for this hearing."

**{6}** Defendants appeared at the hearing by telephone. Although he did not request it in the motions for sanctions, at the hearing Plaintiff argued for default judgment and forfeiture of Defendants' "membership interest in [NMDC]." Defendants' counsel conceded that sanctions were appropriate and argued "for a sanction that is reasonable in the [district c]ourt's opinion." He argued that default judgment was unreasonable because there was no "verification" of the figures presented by Plaintiff and "there [was] no noticing it." At the conclusion of the hearing, the district court observed that its previous orders had been "[t]otally ignored" and that there had been a "complete and absolute violation of [its] discovery order[.]" The district court ordered Defendants to provide all documents requested by Plaintiff within a week and to pay $5000 to Plaintiff for contempt of court. It stated, "Absent [compliance with its order, it would] take [Plaintiff]

up on his proposal, which is a forfeiture of [Defendants'] interest in [NMDC]."

**{7}** Defendants provided Plaintiff with a password-protected QuickBooks file but did not provide the password and did not provide any other documents. Plaintiff then moved for a default judgment declaring Defendants' interest in NMDC forfeited, which was granted. Plaintiff concedes that "there was no evidence in the record at the time of the entry of [d]efault [j]udgment concerning the value of [NMDC]."

**{8}** Defendants then filed a motion for reconsideration, citing NMSA 1978, Section 39-1-1 (1917), and including an affidavit by Mr. Williams in which he averred that his "equitable interest in [NMDC] is approximately $500,000 to $600,000." Defendants made several arguments for why the default judgment was improper, including that the district court failed to hold a hearing on damages. Plaintiff's response to the motion disputed Mr. Williams's valuation of NMDC, arguing that each party's equity interest in NMDC was approximately $122,000. Plaintiff also argued that, in addition to the amounts allegedly embezzled by Defendants, he suffered a loss of $24,000 in income as a result of Defendants' mismanagement of NMDC. The district court declined to consider Defendants' evidence of the value of NMDC because it was not "newly discovered evidence" under Rule 1-060(B)(2) NMRA, and denied the motion for reconsideration. Defendants appealed.

**DISCUSSION**

**1. Scope of Appellate Review**

**{9}** We first define the scope of our review. Plaintiff argues that "the original [d]efault [j]udgment cannot be the subject of th[is] appeal[] because the [n]otice of [a]ppeal was filed more than [thirty] days after entry of the [d]efault [j]udgment." He argues that the only issue before this Court is the district court's denial of Defendants' motion for reconsideration. We disagree because Plaintiff's premise conflicts with the rules of appellate procedure. Rule 12-201(D)(1) NMRA states that

> [i]f any party timely files a motion under Section 39-1-1 . . ., or files a motion under Rule 1-060(B) . . . that is filed not later than thirty . . . days after the filing of the judgment, the full time prescribed in this rule for the filing of the notice of appeal shall commence to run and be computed from the filing of an order expressly disposing of the last such remaining motion.

**{10}** Defendants' motion for reconsideration was filed within thirty days of the filing of the judgment. *See* § 39-1-1; Rule 12-201(D)(1). Consistent with Rule 12-201(D)(1), the period for filing of the appeal commenced upon the district court's denial of that motion. In other words, the filing of the motion for reconsideration tolled the period in which the appeal could be filed. *State v. Romero*, 2014-NMCA-063, ¶ 6, 327 P.3d 525 ("[T]he pendency of a timely-filed motion for reconsideration generally has the effect of suspending the finality of the preceding judgment."); *see Grygorwicz v. Trujillo*, 2009-NMSC-009, ¶ 8, 145 N.M. 650, 203 P.3d 865 ("Rule 12-201(D) provides that if a party makes a post-judgment motion directed at the final judgment pursuant to Section 39-1-1, the time for filing an appeal does not begin to run until the district court enters an express disposition on that motion."). Since the appeal was filed within thirty days of the district court's entry of an order denying the motion for reconsideration, it is also timely.

**{11}** Plaintiff also argues that because the motion for reconsideration was filed "too late to be considered under Rule 1-059 [NMRA], . . . it must have been filed pursuant to Rule 1-060."[1] He appears to argue further that the appeal should be dismissed because Defendants have failed to address whether their motion met the requirements for relief from the judgment under Rule 1-060(B). This too is incorrect.

**{12}** Plaintiff's argument rests on a false dilemma: Plaintiff maintains that because motions filed within ten days of the judgment are deemed to be motions pursuant to Rule 1-059(E), any motion filed beyond that period must perforce be pursuant to Rule 1-060. But the cases cited in support of this position state only what happens when a motion is filed *within* ten days, not what happens when they are filed after that. For example, in *Albuquerque Redi-Mix, Inc. v. Scottsdale Insurance Co.*, the Supreme Court held that "a motion challenging a judgment, filed within ten days of the judgment, should be considered a Rule 1-059(E) motion to alter or amend a judgment." 2007-NMSC-051, ¶ 10, 142 N.M. 527, 168 P.3d 99. In *In re Estate of Keeney*, this Court examined the federal rules of civil procedure and noted that under those rules "a motion is treated as either a motion to alter or amend the judgment under Rule [1-059(E)] or a motion for relief from judgment under Rule [1-060(B)]." 1995-NMCA-102, ¶ 11, 121 N.M. 58, 908 P.2d 751 (alteration, internal quotation marks, and citation omitted). In that case, because the motion was filed within ten days, it was considered under Rule 1-059(E). *In re Estate of Keeney*, 1995-NMCA-102, ¶ 11. The Court did not address, however, whether New Mexico adopted the federal practice rule for when a motion is filed beyond the ten-day window or the impact of Section 39-1-1 on its analysis. *In re Estate of Keeney*, 1995-NMCA-102, ¶ 11; *see Sangre de Cristo Dev. Corp. v. City of Santa Fe*, 1972-NMSC-076, ¶ 23, 84 N.M. 343, 503 P.2d 323 ("The general rule is that cases are not authority for propositions not considered.").

**{13}** Indeed, several more recent cases have held that Section 39-1-1 provides a third avenue for challenging a judgment. In *Rosales v. State Taxation & Revenue Department, Motor Vehicle Division*, 2012-NMCA-098, 287 P.3d 353, this Court concluded that a motion for reconsideration that cited only Section 39-1-1 and that was filed more than ten days after the judgment "f[ell] within the purview of Section 39-1-1 only." *Rosales*, 2012-NMCA-098, ¶ 7. Similarly, in *Chapel v. Nevitt*, 2009-NMCA-017, 145 N.M. 674, 203 P.3d 889, we held that "[b]ecause a motion for reconsideration filed within ten days of the final judgment is deemed to be a Rule 1-059(E) motion, a motion filed outside of the ten-day period should logically be deemed to have been filed under Section 39-1-1[.]" *Chapel*, 2009-NMCA-017, ¶ 18; *cf. Century Bank v. Hymans*, 1995-NMCA-095, ¶ 10 n.1, 120 N.M. 684, 905 P.2d 722 (stating that "when a post-judgment motion is timely under both Section 39-1-1 and Rule 1-060[,] . . . the time for appeal from the judgment should be determined by treating the motion as one pursuant to Section 39-1-1"). We conclude that the district court erred in construing the motion under Rule 1-060(B). Hence, to the extent the district court relied on Rule 1-060(B) when it declined to consider Defendants'

[1]At the relevant time, Rule 1-059(E) (2012) required motions to alter or amend a judgment to be filed within ten days after entry of the judgment. *See* Rule 1-059(E) (2012). The rule was modified in 2013 to allow thirty days for filing a motion to alter, amend, or reconsider judgment. Supreme Court Order No. 13-8300-032. The amended rule is effective for all cases pending or filed on or after December 31, 2013. *See* Rule 1-059(2013). Because Plaintiff's petition was filed in March 2012 our discussion of this argument is based on the rule as it existed before the 2013 amendments.

evidence related to the value of NMDC, we conclude that such reliance was error.

**2. A Hearing on Damages Is Required**

**{14}** As a preliminary matter, we emphasize that the question before this Court is a narrow one. First, Defendants do not challenge the propriety of the district court's discovery orders, the imposition of sanctions, or even the entry of default judgment against them. Instead, Defendants challenge only the amount of damages awarded. Second, the parties do not appear to dispute the basic parameters of the rules at issue here or their essential functions. Instead, they dispute whether the guidelines for default judgments found in Rule 1-055(B) NMRA apply to default judgments entered as a sanction under Rule 1-037. Plaintiff argues that the district court correctly held that they do not. Defendants argue the opposite and that the matter must be remanded for a hearing on damages consistent with Rule 1-055(B). We agree with Defendants.

**{15}** Generally, "[t]he choice of sanctions for abuse of the discovery process falls within the sound discretion of the trial court and will be reversed only for abuse of discretion." *Gonzales v. N.M. Dep't of Health*, 2000-NMSC-029, ¶ 15, 129 N.M. 586, 11 P.3d 550. The district court "abuses its discretion when it exercises its discretion based on a misunderstanding of the law." *Trinosky v. Johnstone*, 2011-NMCA-045, ¶ 23, 149 N.M. 605, 252 P.3d 829 (internal quotation marks and citation omitted). We review the district court's construction of the rules of procedure de novo. *Id.*

**{16}** We begin with the rules themselves. Rule 1-037(B)(2)(c) provides that "[i]f a party . . . fails to obey an order to provide or permit discovery, . . . the court in which the action is pending may make such orders in regard to the failure as are just, [including] . . . rendering a judgment by default against the disobedient party[.]" "Dismissal is a severe sanction, but the district court is justified in imposing the sanction and does not abuse its discretion when a party demonstrates flagrant bad faith and callous disregard for its discovery responsibilities." *Reed v. Furr's Supermarkets, Inc.*, 2000-NMCA-091, ¶ 10, 129 N.M. 639, 11 P.3d 603 (alteration, internal quotation marks, and citation omitted). "Furthermore, despite the severity of dismissal as a sanction, the district court is not required to impose lesser sanctions before it imposes the sanction of dismissal." *Id.* (internal quotation marks and citation omitted).

**{17}** Rule 1-055(B) provides:

> If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties entitled thereto.

Although this provision gives the district court discretion to conduct a hearing to determine the amount of damages, "where the claim for damages is unliquidated, it would be an abuse of discretion not to have a hearing and to put [the] plaintiff to the test of presenting evidence to support the claim for damages." *Armijo v. Armijo*, 1982-NMCA-124, ¶ 15, 98 N.M. 518, 650 P.2d 40; *see Rodriguez v. Conant*, 1987-NMSC-040, ¶ 15, 105 N.M. 746, 737 P.2d 527 ("[The Supreme] Court often has held that the district court must conduct an evidentiary hearing pursuant to its Rule 1-055(B) authority when the plaintiff seeks an award of an unliquidated amount of damages."); *see Black's Law Dictionary* 473 (10th ed. 2014) (defining "liquidated damages" as "[a]n amount contractually stipulated as a reasonable estimation of actual damages to be recovered by one party if the other party breaches" and stating that "[i]f the parties to a contract have properly agreed on liquidated damages, the sum fixed is the measure of damages for a breach, whether it exceeds or falls short of the actual damages"). In *Gallegos v. Franklin*, this Court explained that a hearing is necessary because "[t]he entry of a default judgment against a defendant is not considered an admission by [the] defendant of the amount of unliquidated damages claimed by [the] plaintiff." 1976-NMCA-019, ¶ 40, 89 N.M. 118, 547 P.2d 1160 (internal quotation marks and citation omitted). In the hearing, the defaulting defendant has a "right to cross-examine [the] plaintiff's witnesses and to introduce affirmative testimony on his own behalf in mitigation of damages." *Id.* ¶ 41.

**{18}** There is no explicit language in the rules stating that Rule 1-055(B) applies to Rule 1-037 sanctions. On the other hand, there is no indication that the term "default judgment" listed as a possible sanction in Rule 1-037(B) should be interpreted differently than the same term used in other rules. Similarly, nothing in Rule 1-055(B) indicates that its provisions do not apply when a default judgment is entered as a sanction.

**{19}** When construing Supreme Court rules, we apply the same principles of construction as are applied to statutes. *Walker v. Walton*, 2003-NMSC-014, ¶ 11, 133 N.M. 766, 70 P.3d 756 ("We apply the same rules to the construction of rules of procedure adopted by our supreme court as are applied to statutes.") (internal quotation marks and citation omitted). These principles require us to strive to "read the rules as a whole." *H-B-S P'ship v. Aircoa Hospitality Servs., Inc.*, 2008-NMCA-013, ¶ 10, 143 N.M. 404, 176 P.3d 1136. "The court's duty is to, so far as practicable, reconcile different provisions so as to make them consistent, harmonious and sensible." *State ex rel. Clinton Realty Co. v. Scarborough*, 1967-NMSC-152, ¶ 9, 78 N.M. 132, 429 P.2d 330. In addition, "a normal rule of statutory construction [is] to interpret identical words used in different parts of the same act as having the same meaning." *State v. Jade G.*, 2007-NMSC-010, ¶ 28, 141 N.M. 284, 154 P.3d 659 (alteration, internal quotation marks, and citation omitted). Interpreting the language of Rules 1-037 and 1-055 according to these principles, we conclude that there is no distinction between default judgments under Rules 1-037 and 1-055(B) and that the Supreme Court intended a default judgment entered as a sanction under Rule 1-037(B) to be subject to Rule 1-055(B).

**{20}** Our case law reflects this intent. In *Gallegos*, this Court invoked both Rule 1-037 and Rule 1-055(B) in its analysis of the district court's award of default judgment damages. *Gallegos*, 1976-NMCA-019, ¶ 32. The Court noted that while counsel for the defendants entered an appearance, the defendants never answered the complaint, thus seeming to invoke Rule 1-055(A)'s provision for default for failure to answer. *Gallegos*, 1976-NMCA-019, ¶ 4. In addition, however, it noted that the district court entered a finding that "[the d]efendants [were] in default in their willful failure to make discovery as set by the Rules of Civil Procedure and that judgment should be entered against them for their default." *Id.* ¶ 17. Citing both Rule 1-037(D) and Rule 1-055(A), it affirmed the district court's entry of default, stating, "[for] a period of ten months, the defendants failed to comply with the Rules of Civil Procedure. A default judgment may be entered." *Gallegos*, 1976-NMCA-019, ¶ 32. It went on to analyze the dam-

ages award under Rule 1-055(B). *Gallegos*, 1976-NMCA-019, ¶¶ 40, 42. Ultimately, it remanded for "a hearing in which evidence may be presented by the plaintiff as to damages to be awarded [the] plaintiff, compensatory and punitive, with the right granted to [the] defendants to contest this issue." *Id.* ¶ 50.

**{21}** Here, the district court held that *Gallegos* was distinguishable from the present matter because in that case "default judgment was entered under Rule [1-055(B)]." We do not agree. Although it is not entirely clear whether the default judgment in that case was based on the defendants' failure to answer or to comply with the discovery rules, because both Rule 1-037 and Rule 1-055 are cited, the clear implication of *Gallegos* is that Rule 1-055(B) applies to default judgments entered as a discovery sanction.

**{22}** To the extent the district court relied on the *United Nuclear Corp. v. General Atomic Co.* Court's statement that "[t]here is no requirement under Rule [1-037(B)] that an evidentiary hearing be held before sanctions are imposed" to reject Defendants' argument that "the [district c]ourt [was] required to hold a hearing on damages," we disagree that *United Nuclear* can be applied to categorically preclude a damages hearing in the present matter. 1980-NMSC-094, ¶ 375, 96 N.M. 155, 629 P.2d 231. We do not read *United Nuclear* as broadly as the district court did because (1) the Court made clear that its analysis of the necessity of a hearing was highly contextual; and (2) the Court was addressing the propriety of the sanction itself, not the measure of damages.

**{23}** First, after stating that evidentiary hearings are not required by Rule 1-037(B), the *United Nuclear* Court stated that "[u]nder our rules, a court may decide motions on the basis of affidavits, oral testimony or depositions." 1980-NMSC-094, ¶ 375 (citing current Rule 1-043(C) NMRA). Its analysis of the need for a hearing focused on the fact that "[the defendant's] failures to make good faith discovery are mirrored in the record." *Id.* ¶ 377 (internal quotation marks and citation omitted). That being the case, "[n]o amount of oral testimony could alter those aspects of the history of this litigation." *Id.* Moreover, the defendant's own affidavits "did not demonstrate any need for such a hearing." *Id.* ¶ 378. The Court therefore concluded that no hearing was necessary because the evidence in the record, including affidavits submitted by both sides, was sufficient to support the district court's findings of bad faith in discovery. *Id.* ¶ 383.

**{24}** The Court took pains to explain that the need for an evidentiary hearing is evaluated in the context of the record. *See id.* ¶ 375 ("Evidentiary hearings in cases involving the imposition of discovery sanctions have been required under some, but not all circumstances."). It stated that "[t]he requirements of due process are not technical, and no particular form of procedure is necessary for protecting substantial rights. The circumstances of the case dictate the requirements. The integrity of the fact-finding process and the basic fairness of the decision are the princi[pal] considerations." *Id.* ¶ 376 (internal quotation marks and citation omitted). *United Nuclear*, therefore, stands for the proposition that where the evidence in the record is sufficient to support imposition of sanctions, no hearing is required. But where that is not true, an evidentiary hearing may be necessary.

**{25}** Second, and most significantly, the statement in *United Nuclear* pertained to whether the district court erred in imposing discovery sanctions without a hearing—it did not pertain to the award of damages as a result of a sanction. *Id.* ¶ 375. The distinction between these two issues is clear in our case law. *See, e.g.*, *Armijo*, 1982-NMCA-124, ¶ 14 ("New Mexico decisions recognize that liability and damages are different and separate concepts."); *Herrera v. Springer Corp.*, 1973-NMCA-041, ¶ 42, 85 N.M. 6, 508 P.2d 1303, *aff'd in part, rev'd in part*, 1973-NMSC-057, 85 N.M. 201, 510 P.2d 1072. Indeed, the *United Nuclear* Court stated that "[a]fter entry of the sanctions order and default judgment, the [district] court conducted a trial on damages[,]" 1980-NMSC-094, ¶ 431, and that such a trial was required under *Gallegos*. *United Nuclear*, 1980-NMSC-094, ¶ 431 n.165 (noting that "the prevailing parties must prove the damages to which they are entitled"). The district court erred in relying on *United Nuclear* for the proposition that a hearing on damages after default judgment is not required.

**{26}** Finally, Plaintiff argues that this Court should affirm the default judgment and damages award in its entirety as a vindication of the district court's authority and to protect the integrity of the judicial process. He maintains that a reversal would permit "future defendants anywhere . . . [to] withhold evidence with impunity" because without such evidence a plaintiff will be unable to prove damages. We are unpersuaded. A default judgment is a drastic sanction, regardless of the amount of damages awarded. *Marshall v. Providence Wash. Ins. Co.*, 1997-NMCA-121, ¶ 29, 124 N.M. 381, 951 P.2d 76 (describing dismissal as a "severe" sanction to be used in "extreme" circumstances). Because of the default judgment, Defendants here may no longer contest liability. *Gallegos*, 1976-NMCA-019, ¶ 40 ("A default judgment entered on well-pleaded allegations in a complaint establishes [the] defendant's liability."). Moreover, our holding today does not diminish the district court's power to sanction recalcitrant parties through default judgment or its contempt power. But "[d]iscovery sanctions cannot be imposed to . . . bestow an unwarranted 'windfall' on the adversary." *In re Marriage of Economou*, 274 Cal. Rptr. 473, 478 (Ct. App. 1990). Here, Plaintiff concedes that there was no evidence in the record of the value of NMDC or the parties' equity in it at the time the district court concluded that Defendants had forfeited their interest in NMDC. Thus, the district court's finding in the order for default judgment that "[t]he damages suffered by Plaintiff equal or exceed the equity in [NMDC]" is not supported by the evidence. Furthermore, although the parties attempted to provide evidence as to the value of NMDC and their equity in it as part of their pleadings related to Defendants' motion for reconsideration, the district court declined to consider this evidence because it was not "newly discovered evidence" under Rule 1-060(B)(2). The record is therefore devoid of supported findings as to the value of NMDC and the parties' equity in the company. Consequently, it is not clear whether forfeiture of Defendants' share of NMDC is commensurate with Plaintiff's damages or not. In the absence of evidence to support it, the damages award cannot stand. *See Armijo*, 1982-NMCA-124, ¶ 15 (stating that the plaintiff must provide evidence to support a damages award).

**CONCLUSION**

**{27}** We conclude that Plaintiff was required to prove his damages after entry of the default judgment and that Defendants were entitled to contest such damages or submit mitigating evidence. The district court erred in ruling to the contrary. We reverse the damages award and remand to the district court for a hearing on Plaintiff's damages.

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

**MICHAEL D. BUSTAMANTE, Judge**

**WE CONCUR:**

**MICHAEL E. VIGIL, Chief Judge**

**J. MILES HANISEE, Judge**

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Dynamic legal assistant immediately needed for Sutin, Thayer and Browne. Should have 3-5 years' legal experience, including in civil litigation, and be organized, efficient, accurate and flexible. ProLaw experience preferred. Top benefits package in place; salary to be discussed. Email application to GLW@sutinfirm.com.

### Paralegal
Robles, Rael & Anaya, P.C. is seeking a paralegal for its civil defense practice. Firm primarily represents governmental entities. Practice involves general civil representation, civil rights defense, and complex litigation. Three years' experience or Paralegal Certificate preferred. Competitive salary and benefits. Please submit resumes to jr@roblesrael.com

## Positions Wanted

### Legal Assistant/Paralegal Seeks FT Employment
8 yrs. exp., P/I, Ins. Def., W/C, Gen./Civil Litigation, Transcription, Type 60 wpm, Draft Corres./Basic Pldgs., Proofrdg./Formatting,Odyssey-CM/ECF-WCA, Cust. Svc., Client Interaction/Communication, Prepare/Answer Discovery, Med. Rcrd/Bill Requests, Notary. Word-Excel-Outlook-Email, Calendar/File Maintenance, A/R, A/P. Passionate, Hard-Working, Attn./Detail, Punctual, Quick Study, Multi-Tasker, Profssnl. Able to start in 2 weeks. For Resume, Salary Expectations and References, please contact LegalAssistant0425@yahoo.com.

## Services

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

### Briefs, Research, Appeals—
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## Office Space

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

### Office Building For Lease
Office building for lease adjacent to State Capitol Complex and Supreme Court by owner. 3 offices, conference room, waiting and support staff area. 505 988 2970

### Offices For Rent
Offices for rent, one block from courthouses, all amenities: copier, fax, telephone system, conference room, internet, phone service, receptionist. Call Ramona at 243-7170.

### 823 Gold Ave SW
Charming Victorian house, beautifully restored. Ideal location near courthouses. Plenty of free parking. Has served as law offices since 1990's. 2075 sq ft, plus storage basement and detached garage. New hickory hardwood flooring. For sale: $279,000. Liska Maddox, 505-764-0400

## Miscellaneous

### Will Search
Looking for a will for Helen Villaneuva Montoya a/k/a Helen Villanueva Cordova born 6/1/1923, died 12/5/2012. Lived in Albuquerque most of her life. If you have any information, please contact Michael Hughes, Silva & Associates, PC, at 505-246-8300.

We need attorneys to volunteer with an exciting new project using technology to span the great expanse of our state.

Can you help?

# Volunteer Attorney Program

*A Program of New Mexico Legal Aid*

# *Justice for Families Project*

**Did you know that 83% of practicing New Mexico lawyers live in the Albuquerque metro area, Santa Fe and Las Cruces?*** New Mexico Legal Aid's new Justice for Families Project was created to help address the problem of lack of access to civil legal assistance in New Mexico's 10 poorest counties. The Justice for Families Project uses pro bono attorneys from the three urban centers to assist low income families primarily in the 10 most poverty-stricken counties in New Mexico – which are mostly rural counties. The project uses technology such as Skype and a secure web portal to respond to cases regardless of any geographic distance separating the client and the pro bono attorney. The Justice for Families Project is very excited to partner with the Southwest Women's Law Center's "One Woman, One Case, Once a Year" campaign and the Women's Bar Association to recruit volunteer attorneys.

We are looking for volunteer attorneys to assist clients in a variety of ways including reviewing documents, giving legal advice, or limited representation for a specific issue or motion. How about expanding your pro bono practice to include serving very low-income clients living in rural New Mexico? We can help you figure out how to make that work.

**Volunteer. A few hours of your time can make a huge impact on a family's well-being and stability.**

For more information or to sign up, please contact
**Kasey Daniel, Justice for Families Project Coordinator**,
at kaseyd@nmlegalaid.org or 505-545-8543.
www.nmjusticeforfamilies.org

NMWBA

southwest women's law center

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*http://www.nmbar.org/NmbarDocs/AboutUs/SBNMDemographics.pdf

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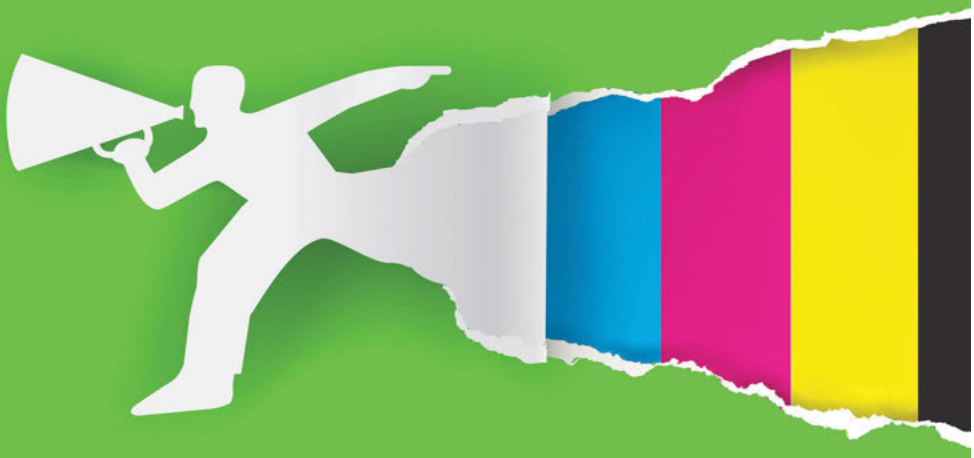


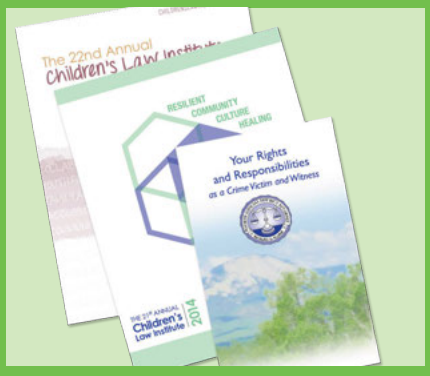



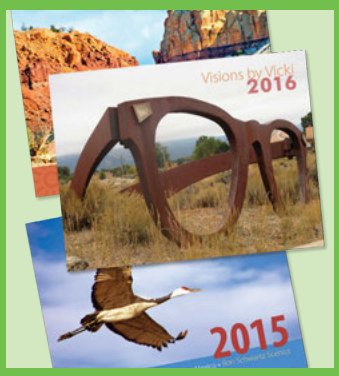



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