BAR BULLETIN

Official Publication of the State Bar of New Mexico

June 29, 2016 • Volume 55, No. 26

Submergence Violet, by Angela Berkson (see page 3) EXHIBIT/208, Albuquerque

Inside This Issue

—SPECIAL INSERT—
CLE Planner

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5
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13
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13
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29
Common Legal Issues for Senior Citizens Workshop:
9:30–10:45 a.m., workshop
12:15–1:15 p.m., POA AHCD clinic,
Socorro County Senior Center, Socorro,
1-800-876-6657

July

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

6
Civil Legal Clinic:
10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

7
Common Legal Issues for Senior Citizens Workshop:
10–11:15 a.m., workshop noon–1 p.m.,
POA AHCD clinic, Las Vegas Senior Center,
Las Vegas, 1-800-876-6657

13
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10 a.m.–2 p.m., 13th Judicial District Court,
Bernalillo, 505-867-2376

About the Cover Image: *Submergence Violet*, acrylic on canvas, 30 by 24 inches
Angela Berkson is an Albuquerque based artist who works in acrylic medum and encastic (beeswax-based) medium to create a variety of abstract colorful panting. Berkson studied art in Los Angeles, New York and Texas, but returned to her hometown of Albuquerque to pursue her professional art practice. She also works part-time a s a legal assistant. Berkson's work is represented in Albuquerque by EXHIBIT/208. More of her work can be viewed at www.angelaberkson.com.

Notices

Court News

Supreme Court of New Mexico

Notice of Vacancies on Committees

The Supreme Court of New Mexico is seeking applications to fill vacancies on the following Supreme Court committees: Board of Bar Examiners (one vacancy), Joint Committee on Rules of Procedure (one vacancy), Metropolitan Courts Rules Committee (one vacancy), and Rules of Criminal Procedure (one vacancy for a district court judge). Unless otherwise noted, all licensed New Mexico attorneys are eligible to apply. Anyone interested in volunteering to serve on one or more of these committees may apply by sending a letter of interest and resume by mail to Joey D. Moya, Chief Clerk, PO Box 848, Santa Fe, New Mexico 87504-0848, by fax to 505-827-4837, or by email to nmsupremecourtclerk@nmcourts.gov. The letter of interest should describe the applicant's qualifications and should list committees in order of preference if applying to more than one committee. The deadline for applications is July 8.

State Bar News

Attorney Support Groups

- July 11, 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#.
- July 18, 7:30 a.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (the group meets the third Monday of the month.)
- Aug. 1, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (the group meets the first Monday of the month.)
  Note: the Attorney Support Group will not meet on July 4 due to the Independence Day Holiday.

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

Children's Law Section

Donate to the Annual Art Contest Fund

The Children's Law Section seeks donations for its annual art contest fund. The contest aims to help improve the lives of New Mexico's youth who are involved with the juvenile justice system. The generous donations received each year from the community help defray the cost of supplies, prizes and an award reception. Through the years, the contest has demonstrated that communicating ideas and emotions through art and writing fosters thought and discussion among youth on how to change their lives for the better. To make a tax deductible donation, make a check out to the New Mexico State Bar Foundation and write "Children's Law Section Art Contest Fund" in the memo line. Mail checks to: State Bar of New Mexico, Attn: Breanna Henley, PO Box 92860, Albuquerque, NM 87199. For more information contact Ali Pauk, alison.pauk@lopdnm.us.

Committee on Women and the Legal Profession

Professional Clothing Closet

The West Law Firm has volunteered to house the Committee on Women and the Legal Profession Clothing Closet at its offices while the Modrall Sperling Law Firm is under renovation. Those who want to look for a suit can stop by the office, located at 40 First Plaza NW, Suite 735 in Albuquerque during business hours. Call 505-243-4040 to set up an appointment. Those who want to donate to the closet are asked to drop off gently used, dry cleaned suits at the West Law Firm during business hours. Donations can also be given to Committee Co-chair Laura Castille at Cuddy & McCarthy, LLP, 7770 Jefferson NE, Suite 102, Albuquerque.

UNM

Law Library

Hours Through Aug. 21

Building & Circulation	
Monday–Thursday	8 a.m.–8 p.m.
Friday	8 a.m.–6 p.m.
Saturday	10 a.m.–6 p.m.
Sunday	noon–6 p.m.
Reference	
Monday–Friday	9 a.m.–6 p.m.
Saturday–Sunday	Closed
Holiday Closures	
Independence Day: July 4	

Professionalism Tip

With respect to the courts and other tribunals:
I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests.

Other Bars

Albuquerque Bar Association

July Membership Luncheon

Join the Albuquerque Bar Association for a membership luncheon on July 12 at the Embassy Suites Hotel. Attorney General Hector Balderas and Krisztina Ford will present "New Mexico's Future for Children" from noon–1 p.m. (arrive for networking at 11:30 a.m.). After the luncheon, Judge Shannon Bacon will present a CLE "Children's Law with Emancipation Certification" (2.0 G) from 1:15–3:15 p.m. To register, visit www.abqbar.org.

New Mexico Defense Lawyers Association

Annual Awards Nominations

The New Mexico Defense Lawyers Association is now accepting nominations for the 2016 NMDLA Outstanding Civil Defense Lawyer and the 2016 NMDLA Young Lawyer of the Year awards. Nomination forms are available on line at www.nmdla.org or by contacting NMDLA at nmdefense@nmdla.org or 505-797-6021. Deadline for nominations is Aug. 12. The awards will be presented at the NMDLA Annual Meeting Luncheon on Oct. 14 at the Hotel Andaluz in Albuquerque.

'Women in the Courtroom' CLE

The New Mexico Defense Lawyers Association will present "I'm with her! Women in the Courtroom VI: Uniting for Success" (4.5 G, 1.0 EP) Aug. 5 at the Albuquerque Jewish Community Center. This dynamic day-long CLE seminar will enhance the skills of all female attorneys. It will conclude with a wine tasting reception. Save the date; registration will open in July at www.nmdla.org. For more information call NMDLA at 505-797-6021.

New Mexico Hispanic Bar Association

CLE: Advocacy in All Venues of Government

The New Mexico Hispanic Bar Association presents a CLE "Effective Advocacy in All Venues: Judicial vs. Executive and Legislative" (3.0 G) on from 9 am.–noon, July 15, at the State Personnel Auditorium

in Santa Fe. The CLE will explore the use of forms of advocacy in deffering venues when appearing before decision makers in all three branches of government. Speakers include Tim Atler, Damian R. Lara and Clifford M. Rees. The cost is $40 for NMHBA members and $60 for non-members. To register, visit www.nmhba.net.

Correction

A reader brought attention to an error that existed in the obituary submitted for Oralia B. Franco, published in the June 1 *Bar Bulletin* (Vol. 55, No. 22). The text below should clarify the error.

In Memoriam: Upon returning to New Mexico, Oralia B. Franco decided she could best serve her community as an attorney and so she applied and was accepted to UNM School of Law in 1983, graduating in 1986. She worked for Southern New Mexico Legal Services in Silver City until she was hired with the District Attorney's Office.

New Mexico Lawyers and Judges Assistance Program

Help and support are only a phone call away.

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Judges
888-502-1289
www.nmbar.org > for Members > Lawyers/Judges Assistance

Featured
Member Benefit

STATE BAR of NEW MEXICO
BRIDGE THE GAP MENTORSHIP PROGRAM

BRIDGE THE GAP MENTORSHIP PROGRAM

This mandatory program approved by the N.M. Supreme Court offers new lawyers a highly experienced attorney member to teach real-world aspects of practice. Both earn a full year of CLE credits.

For more information, call 505-797-6003.

Entrepreneurs *in* Community Lawyering

New Mexico's Solo and Small Practice Incubator

Program Goals

- Train new attorneys to be successful solo practitioners
- Ensure that modest -income New Mexicans have access to affordable legal services
- Expand legal services in rural areas of New Mexico

Participants Receive

- Hands-on legal training
- Training in law practice management
- Help establishing alternative billing models
- Subsidized office space/equipment
- Access to client referral programs
- Networking opportunities
- Free CLE, bar dues, mentorship fees
- Free legal research tools, forms bank
- Low-cost malpractice insurance

Who can apply?

- Licensed attorneys with up to three years of practice
- Visit **www.nmbar.org/ECL** to apply, for the official Program Description and additional resources.

Deadline approaching!

STATE BAR of NEW MEXICO FOUNDATION

For more information, contact Stormy Ralstin at 505-797-6053.

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 June 17, 2016

Unublished Opinions

No. 33392	2nd Jud Dist Bernalillo CR-07-3348, STATE v C FRANCO (affirm)	6/14/2016
No. 33481	11th Jud Dist San Juan CV-09-190, WJ HOLCOMB v A RODRIGUEZ (affirm in part, reverse in part and remand)	6/16/2016

Published Opinions

No. 35329	5th Jud Dist Eddy CR-15-185, STATE v N DYESS (affirm)	6/13/2016
No. 35236	11th Jud Dist San Juan DM-14-49906, D PADGETT v Y PEREZ (affirm)	6/13/2016
No. 35502	12th Jud Dist Lincoln CR-14-135, STATE v S DELARA (dismiss)	6/13/2016
No. 33243	5th Jud Dist Lea CR-1-124, STATE v O CALVILLO (reverse and remand)	6/14/2016
No. 35587	5th Jud Dist Lea CV-13-257, R TORRES v V GOMEZ (dismiss)	6/14/2016
No. 35063	1st Jud Dist Santa Fe PQ-13-25, R PODBOY v C MAPLES (dismiss)	6/14/2016
No. 34829	5th Jud Dist Chaves LR-14-18, CITY OF ROSWELL v O FUENTES (affirm)	6/15/2016
No. 35185	2nd Jud Dist Bernalillo CR-14-242, STATE v M GALLEGOS (affirm)	6/15/2016
No. 34466	8th Jud Dist Taos CR-13-130, CR-13-129, STATE v I MARTINEZ & C CASIAS	6/16/2016

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

Rosemary Traub
Honored in the Spirit of
Justice Minzner

Story by Breanna Henley
Photos by Evann Kleinschmidt

On June 9 the Committee on Women and the Legal Profession presented Rosemary Traub, an attorney with New Mexico Legal Aid, with the 2015 Justice Pamela B. Minzner Outstanding Advocacy for Women Award. A crowd of more than 50 gathered at the Albuquerque Country Club to recognize Traub's dedication to and passion for her profession and remember the accomplishments of Justice Minzner. She was joined by Committee members and her family, friends and coworkers to celebrate.

Committee Co-chair Laura Castille introduced the award's objective of honoring an individual who distinguished themselves during the prior year by providing legal assistance to women who are underrepresented or underserved, or by advocating for causes that will ultimately benefit and/or further the rights of women. Sara Traub, niece of the awardee, thought Traub fit the bill to a T. She contacted New Mexico Legal Aid and found that Traub's boss, Shelbie Allen, was already intending to make the nomination. The two co-nominated Traub and spoke highly of her contributions to New Mexico Legal Aid. Sara, a third generation Traub attorney, presented her aunt with the award.

Committee Co-Chair Laura Castille, Richard C. Minzner, awardee Rosemary Traub and Co-chair Zoë Lees

Rosemary Traub joins members of the Committee who attended the reception. Back row: DeAnza Valencia Sapien, Abuko Estrada, Zoë Lees, Laura Castille, Jeffrey Albright, Patty Galindo, Judge Laura Fashing and Sonia Russo; front row: Jeanne Hamrick, Elizabeth Garcia, Traub, Louise Pocock and Ann Washburn

Traub spoke of being "speechless" when she received the news of being chosen for the award and found humor in then having to give a speech. She acknowledged the privilege to be honored for an award that also accredited Justice Minzner and could not think of a more respected legal professional. She dedicated the award to the women she has worked with, represented and advocated for. Though it took her a while to find hers, Traub recommends young attorneys find their passion. She advised them not to try to have a crystal ball or magic wand to predict outcomes for the client. "We can only make victims lives less ugly," Traub said of being an advocate, "We can't make them beautiful, but we can make them less ugly."

The Committee has been granted permission to permanently commemorate Traub and past recipients with an award under Justice Minzner's photograph at the New Mexico Court of Appeals. The award can be seen at the Court in the fall of 2016 and a full interview with Rosemary can be found in the May 4 issue of the *Bar Bulletin*. ■

Sara and Rosemary Traub

Rosemary Traub's family attended the event. She is pictured with her mother Alice Traub (front row), son Philip Rothfeld (blue shirt) and his fiancé Kelly McLaughlin (back row, left), Sara Traub and brother Joe Traub.

Renee Diaz, Traub and Valerie St. John

Erin Olson, Traub and Lynn Gentry-Wood

Lauren Dixon (UNM law school intern), Traub and Hadley Brown (attorney and former UNM law school intern)

For more photos of the event, visit **www.nmbar.org/Photos**.

Legal Education

July

13 **Hydrology and the Law**
6.5 G
Live Seminar, Santa Fe
Law Seminars International
www.lawseminars.com

14 **Natural Resource Damages**
10.0 G
Live Seminar, Santa Fe
Law Seminars International
www.lawseminars.com

15 **Best and Worst Practices Including Ethical Dilemmas in Mediation (2016)**
3.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

15 **Writing and Speaking to Win (2014)**
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

15 **Effective Advocacy in All Venues; Judicial vs. Executive & Legislative**
3.0 G
Live Seminar, Santa Fe
New Mexico Hispanic Bar Association
www.nmhba.net

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

28 **Reciprocity—Introduction to the Practice of Law in New Mexico**
4.5 G, 2.5 EP
Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **Talkin 'Bout My Generation: Professional Responsibility Dilemmas Among Generations (2015)**
3.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

29 **Everything Old is New Again - How the Disciplinary Board Works (Ethicspalooza Redux – Winter 2015 Edition)**
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29–30 **Joint 2016 TADC & NMDLA Seminar**
5.0 G, 1.0 EP
Live Seminar, Ruidoso
New Mexico Defense Lawyers Association
www.nmdla.org

August

2 **Due Diligence in Real Estate Acquisitions**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

5 **I'm With Her! Women in the Courtroom VI: Uniting for Success**
4.5 G, 1.0 EP
Live Seminar, Albuquerque
New Mexico Defense Lawyers Association
www.nmdla.org

9 **Charging Orders in Business Transactions**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

10 **Role of Public Benefits in Estate Planning**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

11–12 **13th Annual Comprehensive Conference on Energy in the Southwest**
13.2 G
Live Seminar, Santa Fe
Law Seminars International
www.lawseminars.com

19–20 **2016 Annual Meeting–Bench & Bar Conference**
Possible 12.5 CLE credits (including at least 5.0 EP)
Live Seminar, Santa Fe
Center for Legal Education of NMSBF
www.nmbar.org

Listings in the Bar Bulletin *CLE Calendar are derived from course provider submissions. All MCLE approved continuing legal education courses can be listed free of charge. Send submissions to notices@nmbar.org. Include course title, credits, location, course provider and registration instructions.*

August

23 **Drafting Employment Separation Agreements**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

31 **Lawyer Ethics and Disputes with Clients**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

September

9 **2015 Fiduciary Litigation Update**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **Wildlife and Endangered Species on Public and Private Lands**
6.0 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

15 **Liquidated Damages in Contracts**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

20 **2015 Mock Meeting of the Ethics Advisory Committee**
2.0 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 **Legal Writing—From Fiction to Fact (Afternoon Session 2015)**
2.0 G 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

20 **Spring Elder Law Institute (2016)**
6.2 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

20 **Estate Planning for Firearms**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

22 **EEOC Update, Whistleblowers and Wages (2015 Employment and Labor Law Institute)**
3.2 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

22 **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

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

22 **Guardianship in NM: the Kinship Guardianship Act (2016)**
5.5 G 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

23 **Ethics and Keeping Secrets or Telling Tales in Joint Representations**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

29 **Estate Planning for Liquidity**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

29 **Legal Technology Academy for New Mexico Lawyers (2016)**
4.0 G 2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

29 **The US District Court: The Next Step in Appealing Disability Denials (2015)**
3.0 G 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **Invasion of the Drones: IP-Privacy, Policies, Profits, (2015 Annual Meeting)**
1.5 G
Live Replay, Albuquerque
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 May 20, 2016

Petitions for Writ of Certiorari Filed and Pending:

			Date Petition Filed
No. 35,903	Las Cruces Medical v. Mikeska	COA 33,836	05/20/16
No. 35,900	Lovato v. Wetsel	12-501	05/18/16
No. 35,898	Rodriguez v. State	12-501	05/18/16
No. 35,897	Schueller v. Schultz	COA 34,598	05/17/16
No. 35,896	Johnston v. Martinez	12-501	05/16/16
No. 35,894	Griego v. Smith	12-501	05/13/16
No. 35,893	State v. Crutcher	COA 34,207	05/12/16
No. 35,891	State v. Flores	COA 35,070	05/11/16
No. 35,895	Caouette v. Martinez	12-501	05/06/16
No. 35,889	Ford v. Lytle	12-501	05/06/16
No. 35,886	State v. Otero	COA 34,893	05/06/16
No. 35,885	Smith v. Johnson	12-501	05/06/16
No. 35,884	State v. Torres	COA 34,894	05/06/16
No. 35,882	State v. Head	COA 34,902	05/05/16
No. 35,880	Fierro v. Smith	12-501	05/04/16
No. 35,873	State v. Justin D.	COA 34,858	05/02/16
No. 35,876	State v. Natalie W.P.	COA 34,684	04/29/16
No. 35,870	State v. Maestas	COA 33,191	04/29/16
No. 35,864	State v. Radosevich	COA 33,282	04/28/16
No. 35,866	State v. Hoffman	COA 34,414	04/27/16
No. 35,861	Morrisette v. State	12-501	04/27/16
No. 35,863	Maestas v. State	12-501	04/22/16
No. 35,857	State v. Foster	COA 34,418/34,553	04/19/16
No. 35,858	Baca v. First Judicial District Court	12-501	04/18/16
No. 35,853	State v. Sena	COA 33,889	04/15/16
No. 35,849	Blackwell v. Horton	12-501	04/08/16
No. 35,835	Pittman v. Smith	12-501	04/01/16
No. 35,828	Patscheck v. Wetzel	12-501	03/29/16
No. 35,825	Bodley v. Goodman	COA 34,343	03/28/16
No. 35,822	Chavez v. Wrigley	12-501	03/24/16
No. 35,821	Pense v. Heredia	12-501	03/23/16
No. 35,814	Campos v. Garcia	12-501	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. 35,771	State v. Garcia	COA 33,425	02/24/16
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
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No. 35,654	Dimas v. Wrigley	12-501	12/11/15
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No. 35,674	Bledsoe v. Martinez	12-501	12/09/15
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No. 35,637	Lopez v. Frawner	12-501	12/07/15
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No. 35,495	Stengel v. Roark	12-501	08/21/15
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No. 35,474	State v. Ross	COA 33,966	08/17/15
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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. 34,775	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. 34,363	Pielhau v. State Farm	COA 31,899	11/15/13
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. 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. 34,798	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 Comm.	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 and Revenue Dept.	COA 33,586	03/14/16
No. 35,148	El Castillo Retirement Residences v. Martinez	COA 31,701	03/16/16
No. 35,386	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. 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

Writ of Certiorari Quashed:

			Date Order Filed
No. 33,930	State v. Rodriguez	COA 30,938	05/03/16

Petition for Writ of Certiorari Denied:

			Date Order Filed
No. 35,869	Shah v. Devasthali	COA 34,096	05/19/16
No. 35,868	State v. Hoffman	COA 34,414	05/19/16
No. 35,865	UN.M. Board of Regents v. Garcia	COA 34,167	05/19/16
No. 35,862	Rodarte v. Presbyterian Insurance	COA 33,127	05/19/16
No. 35,860	State v. Alvarado-Natera	COA 34,944	05/16/16
No. 35,859	Faya A. v. CYFD	COA 35,101	05/16/16
No. 35,851	State v. Carmona	COA 35,851	05/11/16
No. 35,855	State v. Salazar	COA 32,906	05/09/16
No. 35,854	State v. James	COA 34,132	05/09/16
No. 35,852	State v. Cunningham	COA 33,401	05/09/16
No. 35,848	State v. Vallejos	COA 34,363	05/09/16
No. 35,634	Montano v. State	12-501	05/09/16
No. 35,612	Torrez v. Mulheron	12-501	05/09/16
No. 35,599	Tafoya v. Stewart	12-501	05/09/16
No. 35,845	Brotherton v. State	COA 35,039	05/03/16
No. 35,839	State v. Linam	COA 34,940	05/03/16
No. 35,838	State v. Nicholas G.	COA 34,838	05/03/16
No. 35,833	Daigle v. Eldorado Community	COA 34,819	05/03/16
No. 35,832	State v. Baxendale	COA 33,934	05/03/16
No. 35,831	State v. Martinez	COA 33,181	05/03/16
No. 35,830	Mesa Steel v. Dennis	COA 34,546	05/03/16
No. 35,818	State v. Martinez	COA 35,038	05/03/16
No. 35,712	State v. Nathan H.	COA 34,320	05/03/16
No. 35,638	State v. Gutierrez	COA 33,019	05/03/16
No. 34,777	State v. Dorais	COA 32,235	05/03/16

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

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Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

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Effective June 29, 2016

Pending Proposed Rule Changes Open for Comment:

Comment Deadline

There are no proposed rule changes currently open for comment.

Recently Approved Rule Changes Since Release of 2016 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

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.

Certiorari Denied, March 15, 2016, No. S-1-SC-35647

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-027

No. 33,849 (filed December 8, 2015)

HI-COUNTRY BUICK GMC, INC.,
Protestant-Appellant,
v.
TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO,
Respondent-Appellee.

APPEAL FROM THE JUNE 2, 2014 DECISION AND ORDER OF THE TAXATION AND REVENUE DEPARTMENT OF THE STATE OF NEW MEXICO
BRIAN VANDENZEN, Tax Hearing Officer

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Opinion

Cynthia A. Fry, Judge

{1} Appellant Hi-Country Buick GMC, Inc. (Hi-Country) appeals the Taxation and Revenue Department's (TRD) denial of Hi-Country's protest of the TRD's tax assessment. The TRD assessed Hi-Country as a successor in business to High Desert Automotive in the amount of $282,910.98, including penalties and interest. On appeal, Hi-Country argues that (1) the TRD's assessment was deficient; (2) Hi-Country is not a successor in business to High Desert Automotive because an intervening foreclosure of a secured interest in the stock and assets of High Desert Automotive severed Hi-Country's liability for High Desert Automotive's delinquent taxes; and (3) in the event Hi-Country is liable for the taxes, it is not liable for the interest and penalties that also accrued. We conclude that (1) even assuming the TRD's assessment was deficient, any issues with its deficiency were remedied below; (2) because Hi-Country acquired the business from an entity liable for the taxes, it was a successor in business to High Desert Automotive; and (3) successor-in-business tax liability does not include liability for interest and penalties that have accrued on the outstanding tax liability. Accordingly, we affirm in part and reverse in part.

BACKGROUND

{2} The following are the facts found by the TRD's hearing officer. High Desert Automotive, Basin Acquisition Corporation, and Basin Motor Company (collectively referred to as Desert Automotive in the remainder of this Opinion) owned a number of car dealerships, including Performance Buick and Performance Mazda (Performance dealerships) in Farmington, New Mexico. Desert Automotive was owned equally by husband and wife Jay and Susan Steigleman, and Susan's brother, Bradford Furry. In April 2008, the Steiglemans bought out Furry's interest in the businesses. To complete the sale, the Steiglemans tendered a promissory note to Furry secured, in part, by all shares of stock in Desert Automotive and the corporation's assets.

{3} The Steiglemans' operation of Desert Automotive, however, did not fare well. Of particular importance, the Steiglemans failed to pay Ally Financial, the floor plan financing company for the Performance dealerships' inventory, when they sold vehicles. Although the Steiglemans had contracted with Furry to remove him as a personal guarantor of the floor plan financing agreement when he sold his interest to them, Furry was not removed. Ally Financial therefore made a demand against Furry's personal guaranty for $16,000,000. Ally Financial also initiated an audit of the inventory at the Performance dealerships. As a result of this audit, Ally Financial sought and was granted a preliminary injunction against Desert Automotive and a writ of replevin over the Performance dealerships' inventory. This entitled Ally Financial to liquidate the assets of the Performance dealerships and effectively terminate the Performance dealerships' franchise agreements. Due in part to these failures, Furry held the Steiglemans in default under the promissory note and took possession of all corporate stock of Desert Automotive.

{4} Once Furry took over operation of Desert Automotive, he enlisted the assistance of Jeff Thomas, president of Hi-Country Chevrolet in nearby Aztec, New Mexico, to delay execution of Ally Financial's writ of replevin. As part of these efforts, Thomas entered into a management agreement with Furry to become the operator of the Performance dealerships.

{5} It is unclear from the hearing officer's findings when the TRD first contacted Performance Buick regarding its tax liability. At some point after Furry reacquired Desert Automotive, however, Performance Buick self-reported its tax liability and entered into a payment plan with the TRD. While Performance Buick ultimately failed to make the required payments, on at least one occasion while Thomas operated the Performance Buick dealership, he reported and paid the dealership's gross receipts tax.

{6} Eventually, Furry and Thomas also entered into negotiations for Thomas to purchase the Performance dealerships. As part of the agreement, Thomas assumed and paid the Performance dealerships' outstanding liabilities to Ally Financial in order to maintain the inventory. With the eventual approval of General Motors and Ally Financial, Thomas and Furry finalized an asset purchase agreement to transfer the Performance dealerships to Hi-Country.

{7} Shortly after the closing of the asset purchase agreement, the TRD determined Hi-Country to be a successor in business to Desert Automotive. Accordingly, the TRD assessed Hi-Country for Desert Automotive's back taxes, penalties, and interest in regard to the Performance Buick dealership in the amount of $282,910.98. Hi-Country protested the TRD's assessment. Following a hearing, the TRD's hearing officer denied Hi-Country's protest. Hi-Country now appeals.

DISCUSSION

Standard of Review

{8} "Administrative decisions are reviewed under an administrative standard of review." *Paule v. Santa Fe Cty. Bd. of Cty. Comm'rs*, 2005-NMSC-021, ¶ 26, 138 N.M. 82, 117 P.3d 240. "Under this standard of review, reviewing courts are limited to determining whether the administrative agency acted fraudulently, arbitrarily or capriciously; whether the agency's decision is supported by substantial evidence; or whether the agency acted in accordance with law." *Id.* To the extent the issues raised by Hi-Country necessitate statutory construction, our review is de novo. *City of Eunice v. N.M. Taxation & Revenue Dep't*, 2014-NMCA-085, ¶ 8, 331 P.3d 986.

Sufficiency of the TRD's Tax Assessment

{9} Hi-Country argues that the tax assessment was ineffective because the TRD failed to identify the nature of the taxes involved. The basis of Hi-Country's argument is that the assessment in this case, while including the amount of the tax liability and stating that it arose as a result of Hi-Country's status as a successor in business, did not state that the tax liability was for unpaid gross receipts and withholding taxes. Hi-Country contends that in the absence of this specific designation, the assessment was not effective, no tax liability arose, and therefore its tax liability must be invalidated.

{10} NMSA 1978, Section 7-1-63(A) (1997) states that if a successor has not paid the former owner's tax liability within thirty days of the business being transferred, the TRD "shall assess the successor the amount due." NMSA 1978, Section 7-1-17(B)(2) (2007) states that an assessment is effective

> when a document denominated "notice of assessment of taxes", issued in the name of the secretary, is mailed or delivered in person to the taxpayer against whom the liability for tax is asserted, stating the nature and amount of the taxes assertedly owed by the taxpayer to the state, demanding of the taxpayer the immediate payment of the taxes and briefly informing the taxpayer of the remedies available to the taxpayer[.]

The statute does not define "nature," but Hi-Country contends that it refers to the specific tax program, such as gross receipts tax.

{11} We disagree with Hi-Country. Even assuming, without deciding, that the statute requires specificity as argued by Hi-Country, the assessment at issue did specifically notify Hi-Country regarding the nature of its tax liability—successor-in-business liability from its predecessor, Performance Buick. Hi-Country also knew of the underlying gross receipts and withholding tax liability of Performance Buick. Multiple communications took place between the TRD and both Furry and Hi-Country regarding the specific nature of the underlying Performance Buick taxes being assessed against Hi-Country before it filed its protest. Furthermore, the Hi-Country assessment specifically noted the CRS number used by Thomas, while acting pursuant to a management agreement pending the sale of the Performance dealerships, to report and pay Performance Buick's gross receipts taxes on at least one occasion. Given these undisputed factual circumstances, Hi-Country was given proper notice of the nature of its successor-in-business tax liability pursuant to Section 7–1-17(B)(2) and also provided the information regarding Performance Buick's gross receipts and withholding tax liability that created this successor liability. Any failure to include the words "withholding tax" or "gross receipts tax" in the Hi-Country assessment as a successor in business neither prejudiced Hi-Country nor detracted from the nature of its specifically stated liability as a successor in business. Hi-Country went into the protest hearing fully apprised of the underlying nature and amount of Performance Buick's alleged tax liability that it would be obliged to pay as a sucessor. Accordingly, we conclude that any prejudice that potentially existed would be harmless and an inappropriate basis on which to invalidate Hi-Country's successor-in-business tax liability. *See Jewell v. Seidenberg*, 1970-NMSC-139, ¶ 9, 82 N.M. 120, 477 P.2d 296 (stating that this Court does not "correct harmless error" and that appellant "must show that substantial rights have been harmed to obtain reversible error"); *State v. Zamora*, 1978-NMCA-017, ¶ 17, 91 N.M. 470, 575 P.2d 1355 (defining "harmless error" as one that is "not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case" (internal quotation marks and citation omitted)).

Hi-Country Failed to Rebut the Presumption That It Was a Successor in Business

{12} Hi-Country argues that it is not liable for Desert Automotive's tax liability because it is not a successor in business to Desert Automotive. The basis of Hi-Country's argument is that the successor-in-business statutes and the TRD's regulations require the successor to acquire the business from the entity that is liable for the taxes. Hi-Country argues that because it purchased the business from Furry, who in turn acquired the business by declaring the Steiglemans to be in default on the promissory note, it did not purchase the business from an entity liable for the taxes. The issue then is whether Furry was liable for the taxes when he sold the business to Hi-Country. We conclude that he was. We therefore do not reach the issue of whether successor-in-business tax liability can effectively attach to an eventual successor when the successor purchases the business from an intervening entity that was not liable for the taxes pursuant to the statutes and regulations.

{13} NMSA 1978, Section 7-1-61(C) (1997) requires a person acquiring a business to set aside from the purchase price, or other sources, sufficient funds to cover any remaining tax liability from the previous owner. By its terms, the statute places this duty on a "successor" who acquires the business from the entity liable for the taxes. The statute states:

> If any person liable for any amount of tax from operating a business transfers that business to a successor the successor shall place in a trust account sufficient money from the purchase price or other source to cover such amount of tax until the secretary or secretary's delegate issues a certificate stating that no amount is due, or the successor shall pay over the amount due to the department upon proper demand for, or assessment of, that amount due by the secretary.

Section 7-1-61(C). As noted in other jurisdictions, the policy behind placing this duty on the successor "is to secure collection of taxes by imposing derivative liability on purchasers of a business who are generally in a better financial position to collect or pay the tax from the sale price than the seller quitting the business." *Bates v. Dir. of Revenue*, 691 S.W.2d 273, 276 (Mo. 1985). Apart from the successor's duty to set aside funds to cover any potential tax liability under Section 7-1-61(C), if any tax liability remains once the business is transferred, the successor has thirty days to pay the tax liability remaining from the predecessor owner. Section 7-1-63(A).

{14} The TRD has promulgated regulations defining the term "successor" and listing factors the TRD uses in determining whether a business is a successor. *See* 3.1.10.16(A) NMAC. The eight factors used by the TRD to determine whether a business is a successor are:

(1) Has a sale and purchase of a major part of the materials, supplies, equipment, merchandise or other inventory of a business enterprise occurred between a transferor and a transferee in a single or limited number of transactions?
(2) Was a transfer not in the ordinary course of the transferor's business?
(3) Was a substantial part of both equipment and inventories transferred?
(4) Was a substantial portion of the business enterprise that had been conducted by the transferor continued by the transferee?
(5) By express or implied agreement did the transferor's goodwill follow the transfer of the business properties?
(6) Were uncompleted sales, service or lease contracts of the transferor honored by the transferee?
(7) Was unpaid indebtedness to suppliers, utility companies, service contractors, landlords or employees of the transferor paid by the transferee?
(8) Was there an agreement precluding the transferor from engaging in a competing business to that which was transferred?

Id. No single factor is determinative; however, the presence of one of these factors permits the TRD to presume that the business is a successor. "If one or more of the indicia mentioned above are present, the secretary or secretary's delegate may presume that ownership of a business enterprise has transferred to a successor in business." 3.1.10.16(B) NMAC.

{15} In addition to these factors, the regulation provides a definition of successor. The regulation states that " 'successor' means any transferee of a business or property of a business, except to the extent it would be materially inconsistent with the rights of secured creditors that have perfected security interests or other perfected liens on the business or property of the business." 3.1.10.16(F)(2) NMAC. According to the definition, this "may include a business that is a mere continuation of the predecessor after those connected with the business [reacquire] at a foreclosure sale property used in the predecessor's business, a business that is acquired and run for [an] indefinite period by a creditor of the predecessor and any business that assumes the liabilities of the predecessor." *Id*. However, a successor "does not include a disinterested third party who purchases property at a commercially reasonable foreclosure sale, a bank or other financial institution or government that acquires and operates the business for a limited period of time in order to protect its collateral for eventual resale in a commercially reasonable manner or a franchisor that cancels a franchise agreement due to material default by the franchisee[.]" *Id.*

{16} In this case, the hearing officer determined that seven of the eight factors were present. The TRD therefore established the presumption that Hi-Country was a successor in business. Hi-Country does not challenge the findings supporting this conclusion on appeal. Instead, Hi-Country contends that because Furry reacquired the business by declaring the Steiglemans in default on the promissory note, he is not a successor under the exemption in the regulation for a "bank or other financial institution or government that acquires and operates a business for a limited period of time in order to protect its collateral for eventual resale in a commercially reasonable manner." 3.1.10.16(F)(2) NMAC.

{17} The problem in Hi-Country's argument is that under the plain language of the regulation, Furry is not a bank, financial institution, or government. Anticipating this issue, Hi-Country argues that narrowly construing this exemption unfairly denies individual creditors rights that are granted to those entities specifically listed in the regulation's definition. We are unpersuaded by Hi-Country's argument. Implicit in the regulation's definition of successor is the notion that the future intent of a transferee of a business, once it has received the business, is an important aspect of determining whether it is a successor. For instance, the exemption for banks, financial institutions, and governments states that the exemption applies to one who "acquires and operates a business *for a limited period of time* in order to protect its collateral[.]" 3.1.10.16(F)(2) NMAC (emphasis added). However, the definition also states that a successor may include "a business that is acquired and run for [an] *indefinite period* by a creditor of the predecessor." *Id.* (emphasis added). The distinguishing feature is therefore whether the entity acquiring the business intends to retain and operate the business. Thus, it is reasonable for the TRD to extend to financial and governmental institutions an exemption from successor-in-business tax liability when they acquire the business in order to protect their collateral because their lack of intent to indefinitely operate the business can be fairly presumed. Accordingly, we see no reason to extend the plain language of the regulation to cover Furry's circumstances.

{18} In reaching this conclusion, we emphasize that we do not read the regulation's definition of successor to completely foreclose successor-in-business tax liability from also attaching to banks, financial institutions, or governmental institutions. Instead, the thrust of the definition is to determine, at least on this point, whether the particular party, either as an individual creditor or a financial institution, intends to indefinitely operate the business. To the extent that it does, it is potentially liable for the predecessor's tax liability. We say "potentially" because just as important as whether or not a particular transferee fits the definition in 3.1.10.16(F)(2) NMAC, is whether any one of the eight factors is present. In this case, seven of those factors were present and created a strong presumption that Hi-Country was a successor in business. Because Hi-Country failed to rebut this presumption, we affirm the hearing officer's decision on this issue.

Successor in Business Tax Liability Does Not Include Penalties and Interest

{19} Hi-Country argues that any tax it may owe as Desert Automotive's successor in business does not include the penalties and interest incurred by Desert Automotive on that tax because the definition of "tax" under Section 7-1-61(A) does not provide for the inclusion of penalties and interest. We agree.

{20} Section 7-1-61(A) defines "tax" as "the amount of tax due imposed by [the] provisions of the taxes or tax acts set forth in Subsections A and B of [NMSA 1978,] Section 7-1-2 [(2007)], except the Income Tax Act[.]" Subsections (A) and (B) list at least thirty-five "taxes [and] tax acts as they now exist or may hereafter be amended[.]" Two of these tax acts are pertinent to this appeal: the Withholding Tax Act, NMSA 1978, §§ 7-3-1 to -13 (1961, as amended through 2010), and the Gross Receipts Tax Act, NMSA 1978, §§ 7-9-1 to -114 (1966, as amended through 2014). *See* § 7-1-2(A)(2), (4). The only penalty found within the provisions of the Withholding Tax Act is a $50 penalty for "[a]ny employer or payor required to file the quarterly withholding information return who fails to do so by the due date or to file the return in accordance with Subsection C of this section[.]" Section 7-3-13(D). The Withholding Tax Act does not contain any provision concerning interest on unpaid withholding tax. And the Gross Receipts Tax Act does not provide for penalties or interest on unpaid gross receipts tax. The penalties and interest that normally accrue on unpaid withholding and gross receipts taxes are authorized against a taxpayer under other separate provisions of New Mexico's tax code. *See, e.g.*, NMSA 1978, § 7-1-69(A) (2007) (providing for a civil penalty for the failure to pay tax); NMSA 1978, § 7-1-67(A) (2013) (providing for interest on overdue taxes). In this case, Section 7-1-61(A), which specifically deals with the narrow circumstances involving successor-in-business tax liability, limits the "tax" that can be collected from Hi-Country to "the amount of tax imposed by the provisions" of the Withholding Tax Act and the Gross Receipts Tax Act. The provisions of these two specific acts do not impose penalties or interest—except for the $50 penalty for failing to timely file quarterly withholding information. *See* § 7-3-13(D). And the Withholding Tax Act does not refer to that $50 penalty as a "tax." Therefore, Section 7-1-61(A) does not allow TRD to collect from Hi-Country the penalties and interest that accrued on High Desert Automotive's account.

{21} We reject TRD's argument that it may collect from Hi-Country the penalties and interest that accrued on Desert Automotive's account based on the following definition of "tax" found in NMSA 1978, Section 7-1-3(Y) (2015):

> the total amount of each tax imposed and required to be paid, withheld and paid or collected and paid under provision of any law made subject to administration and enforcement according to the provisions of the Tax Administration Act and, *unless the context otherwise requires, includes the amount of any interest or civil penalty relating thereto*[.]

(Emphasis added.) In enacting Section 7-1-61(A), the Legislature chose to define "tax" differently than it did in Section 7-1-3(Y). *See Luboyeski v. Hill*, 1994-NMSC-032, ¶ 10, 117 N.M. 380, 872 P.2d 353 (addressing legislative intent and recognizing that the Legislature is presumed to be aware and informed regarding existing laws at the time a statute is enacted and it would not intend to create any inconsistency within the law). Section 7-1-61(A)'s definition of "tax" is more narrow than that in Section 7-1-3(Y) as it specifically limits the "context" of the taxes that can be collected from a successor in business to those found within the specific provisions of the separately stated tax acts contained in our tax code, rather than the general administrative provisions of our tax code providing for an addition of penalties and interest. *See State ex rel. Schwartz v. Sanchez*, 1997-NMSC-021, ¶¶ 7-8, 123 N.M. 165, 936 P.2d 344 (applying the fundamental principle of statutory construction favoring the application of a more specific statutory definition over a general definition that covers the same subject matter). Therefore, we conclude that Section 7-1-3(Y)'s general definition of tax does not apply in the more specific context of defining successor-in-business tax liability under Section 7-1-61(A).

{22} Our conclusion is also consistent with sound policy considerations. *See CAVU Co. v. Martinez*, 2014-NMSC-029, ¶ 13, 332 P.3d 287 (recognizing the application of policy considerations as guidance in the analysis of taxation issues); *Waltom v. City of Portales*, 1938-NMSC-022, ¶ 6, 42 N.M. 433, 81 P.2d 58 (same); *see also Hooper v. Bernalillo Cnty. Assessor*, 1984-NMCA-027, ¶ 22, 101 N.M. 172, 679 P.2d 840, *rev'd on other grounds*, 472 U.S. 612 (1985) (recognizing that the Legislature extended a benefit to a specific class of taxpayers that was "rationally related to legitimate state interests"). First, the state's long-term interests are enhanced when a dying business is revived under new ownership with all of its previously accrued taxes paid in full and additional taxes being assessed as the new business moves forward. *See Rodey, Dickason, Sloan, Akin & Robb v. Revenue Div.*, 1988-NMSC-063, ¶ 10, 107 N.M. 399, 759 P.2d 186 (generally recognizing the state's legitimate interest in raising tax revenues for services performed in New Mexico). Second, the interest and penalties remain the liability of the previous business owner and may be collected from that predecessor. Third, the state likely would not benefit from the sale of the business's assets because it would likely stand in line behind a host of secured creditors, leaving little, if any, funds left to pay the accrued taxes. Finally, because penalties and interest are effectively punitive, it is reasonable to limit those liabilities to be paid by the previous business owner who incurred them rather than impose this punishment upon the successor who bore no responsibility for the unpaid taxes. If the Legislature intended to make a successor in business liable for penalties and interest accrued by the previous business owner, it could have easily stated so in Section 7-1-61 or alternatively identified and used Section 7-1-3(Y)'s definition of "tax" that is generally applied in other non-specific contexts under the tax code. Instead, it chose a different and more specific definition of "tax" in the context of successor-in-business liability. As a result, we reverse the hearing officer's ruling that affirmed TRD's assessment of interest and penalties against Hi-Country due to its status as a successor in business.

CONCLUSION

{23} For the foregoing reasons, we affirm the hearing officer's denial of Hi-Country's tax assessment protest as it relates to the successor-in-business gross receipts tax owed, and we reverse the denial with respect to the assessment of interest and penalties.

{24} IT IS SO ORDERED.

CYNTHIA A. FRY, Judge

WE CONCUR:
JAMES J. WECHSLER, Judge
TIMOTHY L. GARCIA, Judge

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-028

No. 33,283 (filed December 17, 2015)

PULTE HOMES OF NEW MEXICO, INC., and PULTE HOMES, INC.,
Third Party Plaintiffs-Appellants,
v.
INDIANA LUMBERMENS INSURANCE COMPANY,
Third Party Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
ALAN MALOTT, District Judge

MICHAEL J. CRADDOCK
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Opinion

Timothy L. Garcia, Judge

{1} Third-party plaintiffs Pulte Homes of New Mexico, Inc. and Pulte Homes, Inc. (collectively, Pulte), appeal the district court's grant of summary judgment in favor of third-party defendant Indiana Lumbermens Insurance Company (ILM) on the issue whether ILM had a duty to defend Pulte against claims brought by homeowners alleging construction defects in Pulte-built homes. We conclude that (1) claims of defective or defectively installed windows and doors in Pulte's two defense tenders to ILM constituted claims for "property damage" caused by an "occurrence" under the policy at issue; (2) the "your work" policy exclusion precluded coverage for this occurrence with regard to Pulte's May 2009 defense tender because no facts were alleged tending to show that the defective or defectively installed windows and doors caused damage to property other than the windows and doors themselves; (3) the "insured contract" exception to the policy's "contractual liability" exclusion did not override the separate and independent "your work" exclusion with regard to the May 2009 tender; however, (4) the "your work" exclusion did not preclude coverage after Pulte's March 2012 defense tender, because the tender contained claims tending to show that the defective or defectively installed windows and doors damaged the stucco surrounding those windows and doors. We therefore partially reverse the district court's grant of summary judgment in favor of ILM and remand the case to the district court for further proceedings.

BACKGROUND

A. The Homeowners' Initial Complaint

{2} In the mid-2000s, Pulte built 107 homes in the Seville subdivision (Seville) on the west side of Albuquerque, New Mexico. Pulte contracted with a company named Western Building Supply (WBS) to provide the windows for those homes, but a contractor other than WBS installed those windows. Pulte also contracted with WBS to provide and install the homes' sliding glass doors. In June 2007, a large group of homeowners in the subdivision sued Pulte, alleging numerous construction defects in their homes. Although the homeowners amended their complaint four times between June 2007 and September 2009 to add plaintiffs, the complaint's allegations about the construction defects remained substantially the same in these amended complaints. Pertinent here, the complaint alleged that Pulte used "substandard and inadequate windows that leak[.]" In June 2008, most of the homeowners agreed to arbitrate their disputes with Pulte.

B. Pulte's First Defense Tender and Its Third-Party Complaint Against ILM

{3} In May 2009, Pulte tendered its first demand for a defense to ILM—the insurance company that had issued a commercial general liability policy to WBS naming Pulte as an additional insured. Although Pulte did not include a copy of the homeowners' complaint with its defense tender, Pulte did provide a copy of an arbitration award involving six of the plaintiff homeowners and three of the homes at issue in this case. These homeowners were David and Kerri Scott (Scott), Michael and Stacey Leyba (Leyba), and Timothy and Vena Brown (Brown). The award described the following defects concerning the homes' windows and sliding glass doors:

> The Scotts' windows did not operate properly and have all been replaced by Pulte. The weight of the evidence demonstrated that when properly installed, the model of window used in Seville can be appropriate for homes of this type and price, but many of the windows were not properly installed. Some of the windows only had a small fraction of the fasteners that should have been used to install the windows. This resulted in inability to open and close the windows, substandard operation, and their early deterioration.
>
> . . . .
>
> The Leyba home suffered from windows and a sliding door that stick and will not close completely. Pulte has replaced one window that had a broken frame.
>
> . . . .
>
> The Browns' windows suffer from the same installation defects described above. Out of seventeen windows in the house, three are functional. The Browns['] children cannot operate the windows, and cannot open the sliding door to go out into the back yard. One large 5' x 8' window that was removed had only four nails holding it in, while testimony indicated it should have had approximately forty nails.

ILM responded to Pulte's May 2009 tender by denying coverage. By April 1, 2011, Pulte had resolved most of the homeowners' claims through arbitration or settlement, and these homeowners dismissed their claims against Pulte, including Scott, Leyba, and Brown, whose claims were the subject of the arbitration award. In May 2011, Pulte filed a third-party complaint against ILM, claiming that ILM improperly refused to indemnify and defend Pulte under the insurance policies ILM had issued to WBS.

C. The Homeowners' Fifth Amended Complaint

{4} The homeowners who remained as plaintiffs in the lawsuit amended their complaint for the fifth time in September 2011 to add plaintiffs and further allegations about the windows. The fifth amended complaint alleged that Pulte

> us[ed] substandard and inadequate windows that are approved for use in horse trailers and mobile homes and are not for use in residential construction, causing leaks, improper insulation and an inability to fasten them to the wooden frame surrounding them because they have a flange that is designed for horse trailers and mobile homes; . . . us[ed] windows that are oversized for their structural integrity, causing warping and an inability to shut and operate the windows; . . . fail[ed] to use sufficient fasteners to hold the windows in place, causing them to warp, twist and not operate; [and] us[ed] substandard and inadequate windows that leak[.]

The plaintiffs who were added in the fifth amended complaint included Catherine Macrall (Macrall), Todd and Monique Sokol (Sokol), and Jonathan and Isabella Williamson (Williamson).

D. Pulte's Second Defense Tender

{5} In March 2012, Pulte tendered its second demand for a defense to ILM, which included a copy of the fifth amended complaint and lists of alleged defects concerning the homes owned by Macrall, Sokol, and Williamson. Macrall's defect list stated that "[a]ll windows and sliding glass are hard to open and close. The sliding glass door leaks; lots of dirt all the time; wind comes through whistling" and "[t]here are cracks [in the stucco] above [the] sliding glass door" and "cracks [in the stucco] by [the] front windows." ILM continued to deny that it had any duty to defend Pulte in the lawsuit.

E. ILM's Motion for Summary Judgment

{6} In June 2013, ILM moved for summary judgment, asking the district court to rule that it had no duty to defend Pulte. The district court granted summary judgment in favor of ILM without a hearing, concluding only that "there [was] no genuine issue of material fact [and] Pulte . . . is not afforded coverage under the [ILM] policy with [WBS] regarding the windows and sliding doors provided to Pulte by WBS."

F. Pulte's Appeal

{7} Pulte appeals, asserting that its defense tenders triggered ILM's duty to defend. Specifically, Pulte first contends that ILM had a duty to defend Pulte because at the time it tendered its defenses to ILM, "potential claims existed in the underlying action that the windows caused damage to other property in the underlying plaintiffs' homes or caused the underlying plaintiffs' loss of use of their property." Second, Pulte contends that ILM had a duty to defend Pulte because Pulte stood in WBS's shoes for coverage due to WBS's agreement to defend and indemnify Pulte pursuant to the "insured contract[,]" as the ILM-WBS insurance policy defines that term.

DISCUSSION

A. Standard and Scope of Review

{8} In reviewing a grant of summary judgment, "we ordinarily review the whole record in the light most favorable to the party opposing summary judgment to determine if there is any evidence that places a genuine issue of material fact in dispute." *City of Albuquerque v. BPLW Architects & Eng'rs, Inc.*, 2009-NMCA-081, ¶ 7, 146 N.M. 717, 213 P.3d 1146. "However, if no material issues of fact are in dispute and an appeal presents only a question of law, we apply de novo review and are not required to view the appeal in the light most favorable to the party opposing summary judgment." *Id.* Pulte does not contend on appeal that there was any disputed factual issue that precluded summary judgment. Instead, Pulte asserts that "under the facts presented," the homeowners' claims against Pulte were potentially "covered under ILM's policies in accordance with New Mexico law" and that the district court "applied the wrong standard" and misinterpreted the policy language. Thus, we understand Pulte's argument to be that at the time it tendered its defenses to ILM, sufficient facts had been presented that, as a matter of law, triggered ILM's duty to defend Pulte in the lawsuit. Therefore, we need not review the record to determine if any evidence viewed in the light most favorable to Pulte places a material fact at issue. *Id.* We need only conduct a de novo review of the district court's interpretation of the policy and its application of the law to the facts presented in Pulte's defense tenders. *Id.*

{9} An insurer's obligation "is a matter of contract law and must be determined by the terms of the insurance policy." *Miller v. Triad Adoption & Counseling Servs., Inc.*, 2003-NMCA-055, ¶ 8, 133 N.M. 544, 65 P.3d 1099. We construe unambiguous policy terms "in their usual and ordinary sense" and "will not strain the words to encompass meanings they do not clearly express." *Id.* (internal quotation marks and citation omitted). Only when a policy term is ambiguous—in other words, when it is "reasonably and fairly susceptible of different constructions"—do we construe that provision "against the insurance company as the drafter of the policy." *Id.* (internal quotation marks and citation omitted). "In analyzing coverage under a commercial general liability insurance policy, courts will first examine the insuring clauses to determine whether a claim falls therein. Exclusions will only be reviewed if it [is] determined that the risk initially falls within the insuring agreements." 9A Lee R. Russ et al., *Couch on Insurance* § 129:1, at 129-7 (3d ed. 2005) (footnote omitted).

B. Duty to Defend

{10} In New Mexico, an insurer's duty to defend is triggered when it has received "actual notice" of a claim against the insured, "unless the insured affirmatively declines a defense." *Garcia v. Underwriters at Lloyd's, London*, 2008-NMSC-018, ¶ 1, 143 N.M. 732, 182 P.3d 113. The duty to defend arises and is determined "from the allegations on the face of the complaint or from the known but unpleaded factual basis of the claim that brings it *arguably* within the scope of coverage." *Am. Gen. Fire & Cas. Co. v. Progressive Cas. Co.*, 1990-NMSC-094, ¶ 11, 110 N.M. 741, 799 P.2d 1113 (emphasis added); *see Miller*, 2003-NMCA-055, ¶ 9 ("If the allegations of the complaint or the alleged facts *tend to show* that an occurrence comes within the coverage of the policy, the insurer has a duty to defend regardless of the ultimate liability of the insured." (Emphasis added.)).

{11} Furthermore, an insurance company must "conduct such an investigation into the facts and circumstances underlying the complaint against its insured as is reasonable given the factual information provided by the insured or provided by the circumstances surrounding the claim in order to determine whether it has a duty to defend." *G & G Servs., Inc. v. Agora Syndicate, Inc.*, 2000-NMCA-003, ¶ 23, 128 N.M. 434, 993 P.2d 751. "Facts that are known but unpleaded may bring a claim within the policy coverage at a later stage in the litigation." *Sw. Steel Coil, Inc. v. Redwood Fire & Cas. Ins. Co.*, 2006-NMCA-151, ¶ 14, 140 N.M. 720, 148 P.3d 806.

C. The Scope of the Claims on Appeal

{12} As an initial matter, Pulte states that it has entered into settlement agreements that limit Pulte's recovery from ILM in this case to defense and indemnity costs concerning only the claims made by Sokol, Macrall, and Williamson, which did not arise until the fifth amended complaint was filed in September 2011. Pulte asserts that we must still consider the claims contained in the May 2009 tender in order to determine whether ILM's duty to defend was triggered as early as May 2009. It makes this argument even though Sokol, Macrall, and Williamson did not appear as plaintiffs in this lawsuit until September 2011 and all of those earlier claims were ultimately resolved. ILM did not address this issue in its answer brief.

{13} Although not fully explained in Pulte's brief in chief, it appears that the reason Pulte asks us to consider whether ILM's duty to defend was triggered as early as May 2009 is because Pulte did not notify ILM of the claims specifically involving Sokol, Macrall, and Williamson until Pulte tendered its second demand for a defense to ILM in March 2012, another six months after Sokol, Macrall, and Williamson became plaintiffs in the lawsuit. It reasoned that if ILM had been defending the lawsuit from the time it received Pulte's first defense tender in May 2009, Pulte would not have needed to re-tender its defense when Sokol, Macrall, and Williamson became plaintiffs, and ILM would have had a duty to defend Pulte against the claims involving Sokol, Macrall, and Williamson as early as September 28, 2011, when the fifth amended complaint was filed. *See Guest v. Allstate Ins. Co.*, 2010-NMSC-047, ¶ 33, 149 N.M. 74, 244 P.3d 342 (recognizing that "an insurer's duty to defend . . . lasts until the conclusion of the underlying lawsuit, or until it has been shown that there is no potential for coverage"; "[w]hen multiple alternative causes of action are stated, the duty continues until every covered claim is eliminated"; "[i]n other words, the duty to defend continues through the appellate process until it can be concluded as a matter of law that there is no basis on which the insurer may be obligated to indemnify the insured" (internal quotation marks and citations omitted)). If, on the other hand, we consider only whether the March 28, 2012 defense tender triggered ILM's duty to defend Pulte, then Pulte, if successful on that issue, would not recover the defense costs involving Sokol, Macrall, and Williamson that it incurred between September 28, 2011, when the fifth amended complaint was filed, and March 28, 2012, when Pulte tendered its second demand for a defense. For these reasons, we agree that we must consider whether ILM's duty to defend was triggered at the time Pulte's first defense was tendered in May 2009.

D. Pertinent Policy Terms

{14} The following terms of the ILM-WBS insurance policy are pertinent to this appeal.

> **SECTION I - COVERAGES**
> . . . .
> 1. Insuring Agreement.
> **a.** [ILM] will pay those sums that the insured becomes legally obligated to pay as damages because of . . . "property damage" to which this insurance applies.
> . . . .
> **b.** This insurance applies to . . . "property damage" only if:
> **(1)** The . . . "property damage" is caused by an "occurrence[.]"
> . . . .
> 2. Exclusions.
> This insurance does not apply to:
> . . . .
> b. Contractual Liability
> "[P]roperty damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:
> **(1)** That the insured would have in the absence of the contract or agreement; or
> **(2)** Assumed in a contract or agreement that is an "insured contract," provided the . . . "property damage" occurs subsequent to the execution of the contract or agreement.
> . . . .
> **l. Damage to Your Work**
> "Property damage" to "your work" arising out of it or any part of it[.]
> . . . .
> **SECTION V - DEFINITIONS**
> . . . .
> **9.** "Insured contract" means:
> . . . .
> **f.** That part of any other contract or agreement pertaining to your business . . . under which you assume the tort liability of another party to pay for . . . "property damage" to a third person[.]
> . . . .
> **13.** "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.
> . . . .
> **16.** "Products-completed operations hazard":
> **a.** Includes all . . . "property damage" . . . arising out of . . . "your work" except:
> . . . .
> **(2)** Work that has not yet been completed or abandoned.
> . . . .
> **17.** "Property damage" means:
> **a.** Physical injury to tangible property[;] . . . or
> **b.** Loss of use of tangible property that is not physically injured.
> . . . .
> **22.** "Your work":
> **a.** Means:
> **(1)** Work or operations performed by you . . .; and
> **(2)** Materials . . . furnished in connection with such work or operations.

{15} The term "insured" applies to both WBS as the named insured and Pulte as an additional insured, while the terms "you" and "your" apply only to WBS. Thus, Pulte is an "insured" under the policy, but the "your work" exclusion refers only to work performed by WBS.

{16} The terms of the endorsements that define the scope of Pulte's coverage as an additional insured are also relevant. When Pulte was initially designated an additional insured, the endorsement stated that Pulte is

> **A.** an additional insured[], . . . but only with respect to "liability imputed" to [Pulte] "resulting from" the negligent acts or omissions of [WBS], *occurring during [WBS's] ongoing operations at the designated project.*

(Emphasis added.) However, effective May 25, 2005, another endorsement "amended" the scope of Pulte's coverage to insure Pulte "only to the extent that the liability for . . . 'property damage' is caused by '[WBS's] work' . . . and included in the 'products-completed operations hazard.' " As this definition specifically states, coverage includes property damage arising out of WBS's *completed* work.

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Sept. 22

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Sept. 29

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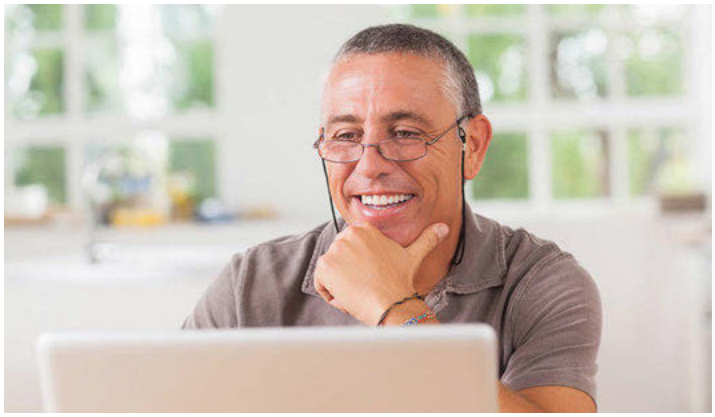

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E. The May 2009 Tender

{17} Although Pulte's May 2009 defense tender did not include a copy of the complaint, we conclude that ILM's duty to reasonably investigate the claim includes procuring a copy of the complaint. *See G & G Servs., Inc.*, 2000-NMCA-003, ¶ 23 (stating that an insurance company must "conduct such an investigation into the facts and circumstances underlying the complaint against its insured as is reasonable given the factual information provided by the insured"). Thus, we consider whether the allegations in the version of the complaint pending in May 2009, along with the facts contained in the arbitration award provided with the defense tender, triggered ILM's duty to defend Pulte. *Am. Gen. Fire & Cas. Co.*, 1990-NMSC-094, ¶ 11 ("The duty of an insurer to defend arises from the allegations on the face of the complaint *or from the known but unpleaded factual basis of the claim* that brings it arguably within the scope of coverage." (Emphasis added.)).

{18} Contrary to ILM's assertions, the arbitration award is relevant to ILM's duty to defend Pulte because the claims of Scott, Leyba, and Brown that were the subject of the arbitration award were part of the same complaint underlying this appeal, which was later amended by adding Sokol, Macrall, and Williamson as plaintiffs. As we previously recognized, if the claims of Scott, Leyba, or Brown triggered ILM's duty to defend Pulte, ILM would have had to defend Pulte until the end of the lawsuit or until all covered claims in the lawsuit were eliminated. *See Guest*, 2010-NMSC-047, ¶ 33 (recognizing that "[w]hen multiple alternative causes of action are stated, the duty [to defend] continues until every covered claim is eliminated" (internal quotation marks and citation omitted)).

{19} We begin by analyzing the pertinent terms of the insuring agreement to determine whether the facts presented in the May 2009 tender "tend[ed] to show" that the claims fell within the scope of coverage. *Miller*, 2003-NMCA-055, ¶ 9; *see Am. Gen. Fire & Cas. Co.*, 1990-NMSC-094, ¶ 11; *see also* 9A Russ et al., *supra*, § 129:1, at 129-7.

1. The Conditions Reported in the May 2009 Tender Constituted "Property Damage"

{20} The first question is whether the facts presented in the May 2009 tender alleged "[p]roperty damage[,]" as the insuring agreement defines that term. The policy defines "[p]roperty damage" as "[p]hysical injury to tangible property" or "[l]oss of use of tangible property that is not physically injured." "Tangible property can be real or personal, but it must be corporeal." 9 Steven Plitt et al., *Couch on Insurance* § 126:35, at 126-120 (3d ed. 2008). "[C]orporeal" means "[h]aving a physical, material existence[.]" *Black's Law Dictionary* 419 (10th ed. 2014). We conclude that the facts presented in the May 2009 tender constituted allegations of physical injury to tangible property under the policy for three reasons.

{21} First, the tangible property in this case included the windows and sliding glass doors because they are corporeal—in other words, they physically and materially exist. *See id*. Second, physical injury arguably occurred to the windows and sliding glass doors because the arbitration award referred to their "deterioration" and stated that they needed to be "replaced" as opposed to merely re-installed. Third, we agree with the arbitrator that the fact that some of the homeowners had to temporarily move out of their homes while their windows were replaced constituted "[l]oss of use of tangible property that is not physically injured[,]" because their homes are tangible property, "[h]aving a physical, material existence[,]" *id.*, even if no other part of the home was physically injured by the windows and doors. However, "[t]he mere fact that there is property damage does not, in and of itself, establish a duty to defend. There must also be an 'occurrence' causing that damage, and the claim must not fit within an exclusion." 14 Lee R. Russ et al., *Couch on Insurance*, § 201:9, at 201-24 (3d ed. 2005).

2. The "Property Damage" Was the Result of an "Occurrence"

{22} The next question is whether the facts presented in the May 2009 tender tended to show that the damaged windows and doors were the result of an "occurrence" as the insuring agreement defines that term. As we previously observed, the policy defines "[o]ccurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Because the policy does not define the term "accident[,]" that term "must be interpreted in its usual, ordinary and popular sense." *Vihstadt v. Travelers Ins. Co.*, 1985-NMSC-104, ¶ 6, 103 N.M. 465, 709 P.2d 187 (internal quotation marks and citation omitted). ILM argues that, because the homeowners' claims involved defective windows and doors and/or defective installation of the windows and doors, no accident occurred because faulty workmanship "does not involve the fortuity required to constitute an accident[,]" quoting 9A Russ et al., *supra*, § 129:4, at 129-13. We disagree.

{23} Fifty years ago, our Supreme Court construed the ordinary meaning of the term "accident" in the context whether an accident insurance policy provided coverage where the insured driver died in a car wreck caused by his driving over the speed limit. *See Scott v. New Empire Ins. Co.*, 1965-NMSC-034, ¶¶ 4-14, 75 N.M. 81, 400 P.2d 953. The insurance company argued that the car wreck was not an accident, and therefore not covered by the policy, "because the deceased was speeding over a relatively unknown, dangerous road at night and should have foreseen the consequences of his intentional acts." *Id.* ¶ 5. Our Supreme Court disagreed, concluding that the ordinary meaning of "accident" encompassed unintended consequences resulting from conduct that was "heedless, perhaps, but certainly not voluntarily self-inflicted[.]" *Id.* ¶ 14; *see King v. Travelers Ins.* Co., 1973-NMSC-013, ¶¶ 7-13, 84 N.M. 550, 505 P.2d 1226 (concluding that property damage resulting from "defective installation" of a water line was an "accident" under the insurance policy because it resulted from negligence); *Travelers Indem. Co. v. Miller Bldg. Corp.*, 97 Fed. Appx. 431, 436 (4th Cir. 2004) ("To adopt the narrow view that the term "accident" in liability policies of insurance . . . necessarily excludes negligence [including negligent workmanship] would mean that in most, if not all, cases the insurer would be free of coverage and the policy would be rendered meaningless." (internal quotation marks and citation omitted); *Iowa Mut. Ins. Co. v. Fred M. Simmons, Inc.*, 138 S.E.2d 512, 25 (N.C. 1964) (same).

{24} Furthermore, the most recent supplement to the same insurance law treatise relied upon by ILM has observed that some jurisdictions have recently disapproved of the view that faulty workmanship cannot constitute an accident. *See* 9A Russ et al., *supra*, § 129:3, at 32-33 (Supp. 2014). These jurisdictions have instead adopted the view that

> [a]n 'occurrence,' as the term is used in a standard commercial general liability . . . policy, does not require damage to the property or work of someone other than the insured, and thus an insured's faulty workmanship can amount to an occurrence when the only

> damage alleged is to work of the insured; standing alone, [the] word 'occurrence' is not used usually and commonly to convey information about the nature or extent of injuries worked by such a happening, much less the identity of the person whose interests are injured[.]

Id. n.7 (citing *Taylor Morrison Servs., Inc. v. HDI-Gerling Am. Ins. Co.*, 746 S.E.2d 587 (Ga. 2013));

> [t]o result in an 'occurrence' under [a] commercial general liability . . . policy providing coverage if . . . property damage was caused by an 'occurrence,' it was not necessary for [the] insured homebuilder's allegedly faulty workmanship to cause damage to real or personal property that was not part of the construction project; [the] policy defined 'occurrence' simply as 'an accident, including continuous or repeated exposure to . . . the same general harmful conditions,' and this definition did not refer to the nature or location of the property damaged.

Id. (citing *Owners Ins. Co. v. Jim Carr Homebuilder, LLC*, 157 So. 3d 148 (Ala. 2014)); and

> [s]ubcontractor's faulty workmanship could constitute an 'occurrence' within [the] meaning of contractor's commercial general liability . . . policy if the faulty work was 'unexpected' and not intended by the insured, and the property damage was not anticipated or intentional, so that neither the cause nor the harm was anticipated, intended, or expected as [the] policy did not define 'occurrence' in terms of the ownership or character of the property damaged by the act or event[.]

Id. n.10 (citing *K & L Homes, Inc. v. Am. Fam. Mut. Ins. Co.*, 829 N.W.2d 724 (ND. 2013)); *see Greystone Constr., Inc. v. Nat'l Fire & Marine Ins. Co.*, 661 F.3d 1272, 1285 (10th Cir. 2011) ("[F]ortuity is not the sole prerequisite to finding an accident under a [commercial general liability] policy.").

{25} Given our mandate to interpret the plain language of the policy without straining the language to inject meaning that is not clearly expressed, we find these recent cases cited by the treatise the more reasoned approach to construing the meaning of "occurrence" as the policy defines that term. *See Miller*, 2003-NMCA-055, ¶ 8 (recognizing that we must construe unambiguous insurance policy terms "in their usual and ordinary sense" and must not "strain the words to encompass meanings they do not clearly express." (internal quotation marks and citation omitted)). Thus, because the definition of "occurrence" in this case does not expressly state that faulty workmanship can never constitute an accident and does not limit the term's effect to a particular class of tangible property, we conclude that the alleged property damage in this case was caused by an alleged "occurrence" as the policy defines that term.[1] We now turn to the policy's exclusions to consider whether any apply to preclude coverage for the occurrences described in the May 2009 tender. *See* 9A Russ et al., *supra*, § 129:1, at 129-7.

3. The "Your Work" Exclusion Precluded Coverage

{26} ILM asserts that, even if the May 2009 tender described an occurrence, the "your work" exclusion applies because the only property damage alleged in the May 2009 tender was to WBS's work itself—the windows and sliding glass doors—and not to other property. We agree. "[W]here all of the damage that is being claimed is damage to the work of the insured[,] . . . the "your work" exclusion will apply to preclude coverage." 9A Russ et al., *supra*, § 129:17, at 129-39.

{27} Pulte concedes this principle in its brief in chief when it states that "the 'your work' exclusion may prevent indemnity coverage for damage to the insured's work or product," but "it would not exclude damage to other property caused by the insured's work." Pulte also recognizes that "[c]ourts in several jurisdictions have found leaking windows and sliding glass doors to be an 'occurrence' *when the leaks cause other damage*." (Emphasis added). *See Travelers Indem. Co.*, 97 Fed. Appx. at 437 (noting that the "claim of *damage to guest-room carpet* caused by [the defendants'] improper installation of windows and sliding glass doors falls within the scope of the policy" (emphasis added)); *Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co.*, 137 P.3d 486, 493, 495 (Kan. 2006) (noting that faulty materials and workmanship caused the home to be continuously exposed to moisture, *which* "*in turn caused damage*" *to* "*surrounding structural components*" (emphasis added)); *Potomac Ins. of Ill. v. Huang*, 2002 WL 418008, ** 1, 15, mem. op., No. 00-4013-JPO, Mar. 1, 2002 (D. Kansas) (non-precedential) (concluding that the "your work" exclusion precluded recovery for property damage to the defective windows, but did not preclude recovery "for property damage to a third party's property—that is, the interior of the Huangs' home—arising from [the] windows[,]" where "*the water that had penetrated into the house in and around those windows had physically damaged the Huangs' home and its contents*" (emphasis added)).[2] However, Pulte does not point to any facts alleged to have existed in May 2009 that tended to show that the defective or defectively installed windows and sliding glass doors caused damage to other property, other than the fact that the windows "leak[ed]." Therefore, we conclude that the facts presented in the May 2009 tender did not trigger ILM's duty to defend because the "your work" exclusion precluded coverage under those facts.

4. The "Insured Contract" Exception to the "Contractual Liability" Exclusion Did Not Trigger ILM's Duty to Defend in May 2009

{28} Pulte asserts that, even if the "your work" exclusion precluded coverage, the "insured contract" exception to the "contractual liability" exclusion was the source of ILM's duty to defend Pulte when it tendered its first defense in May 2009. As we previously noted, the policy's exclusion for contractual liability states that "[t]his insurance does not apply to[] . . . 'property damage' for which [WBS] is obligated to pay damages by reason of the assumption of liability in a contract or agreement" *except*

[1]We note that if the term "accident" was ambiguous with respect to whether it was intended to encompass faulty workmanship, we would construe the policy in favor of providing coverage to the insured. *Miller*, 2003-NMCA-055, ¶ 8 (recognizing that we must construe ambiguous provision "against the insurance company as the drafter of the policy").

[2]Pulte also cites *Travelers Indemnity Co. of America v. Moore & Associates*, 216 S.W.3d 302, 310-11 (Tenn. 2007), but that case is inapposite here because it involved work done by the named insured's subcontractor, which rendered the "your work" exclusion inapplicable because of the policy's subcontractor exception to the "your work" exclusion.

where such "liability for damages" was "[a]ssumed in a contract or agreement that is an 'insured contract[.]' " An "[i]nsured contract" is "[t]hat part of any . . . contract . . . pertaining to [WBS's] business . . . under which [WBS] assume[s] the tort liability of another party to pay for . . . 'property damage' to a third person[.]" Pulte claims that its contract with WBS was an insured contract because it required WBS to "indemnify . . . Pulte . . . against[] all liability . . . or demands for damages to . . . property arising out of, resulting from, or relating to [WBS's] performance of the work under this [a]greement" and to "defend any and all [such c]laims which may be brought or threatened against Pulte." As a result, Pulte argues, the "contractual liability" exclusion does not apply, and ILM must assume WBS's obligation to defend Pulte, citing *Krieger v. Wilson Corp.*, 2006-NMCA-034, ¶ 45, 139 N.M. 274, 131 P.3d 661 (holding that a potential indemnitee under an insured contract may bring a direct action against the insurance company that issued the commercial general liability policy).

{29} We conclude that, even if the insured contract exception renders the contractual liability exclusion inapplicable in this case, it does not render other separate and independent policy exclusions inapplicable, such as the "your work" exclusion, which we have held applies in this case to preclude coverage with regard to the May 2009 tender. *See, e.g.*, *Fed. Ins. Co. v. Tri-State Ins. Co.*, 157 F.3d 800, 805 (10th Cir. 1998) (concluding that the contractual exclusion and its exceptions do not override another exclusion—the operations exclusion—because "the exclusions are separate and independent" and nothing in the policy indicates that one exception to one exclusion "somehow trumps" the other exclusions); *see also Federated Mut. Ins. Co. v. Ever-Ready Oil Co.*, No. 09-CV-857 JEC/RHS, 2012 WL 11945481, at * 8 (D.N.M. Mar. 9, 2012) (non-precedential) (concluding the same and citing *Fed. Ins. Co.*, 157 F.3d at 805). Pulte failed to provided any contrary authority for this Court to consider. *See In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 ("We assume where arguments in briefs are unsupported by cited authority, counsel after diligent search, was unable to find any supporting authority.").

F. The March 2012 Tender

{30} Unlike the May 2009 defense tender, the March 2012 tender contained allegations tending to show that the windows and sliding glass doors caused damage to some of the homeowners' other property in this case, namely the stucco around Macrall's windows. Macrall's defect list stated that "[a]ll windows and sliding glass are hard to open and close[, t]he sliding glass door leaks[,]" and "[t]here are cracks [in the stucco] above [the] sliding glass door" and "cracks [in the stucco] by the front windows." These allegations tend to show a claim for "property damage" caused by an "occurrence"—the home's stucco is tangible property that was arguably damaged by WBS's defective products and/or installation. And because the facts do not show, and ILM does not contend, that the stucco around the windows was also WBS's work, the "your work" exclusion does not preclude coverage.

{31} We are not persuaded by ILM's assertion that, even if the "your work" exclusion does not preclude coverage, the "products-completed operation hazard" did not apply to damages claimed to have occurred at the Macrall home because the additional insured endorsement that added that coverage was issued on May 25, 2005, *after* WBS completed its work on the Macrall home. We note that, *before* the May 25, 2005 endorsement, ILM had insured Pulte "only with respect to . . . negligent acts or omissions of [WBS], *occurring during [WBS's] ongoing operations* at the designated project." (Emphasis added.) However, *after* the May 25, 2005 endorsement, ILM insured Pulte "only to the extent that the liability for . . . 'property damage' is caused by '[WBS's] work' . . . and included in the 'products-completed operations hazard.' " The "products-completed operations hazard" included all property damage "arising out of . . . '[WBS's] work' *except*[] [w]ork that has not yet been completed[.]" (Emphasis added.) In other words, *after* May 25, 2005, the policy covered Pulte only with regard to work that WBS had already completed, and it no longer covered WBS's ongoing operations. Therefore, ILM is incorrect in its assertion that the May 25, 2005 endorsement only covered work performed by WBS after May 25, 2005, because the endorsements read together plainly contemplate that WBS had completed its work for Pulte by May 25, 2005.

{32} The operative question with regard to whether the May 25, 2005 endorsement covers Macrall's claims is whether the damage to Macrall's stucco occurred within the effective dates of the policy. *See* 9A Russ et al., *supra*, § 129:23, at 129-46. (observing that products-completed operations hazard provisions "cannot be read to provide coverage for *an injury* that occurs outside the effective dates of the policy" (emphasis added) (footnote omitted)). Although Pulte may have been removed as an additional insured under the policy on June 1, 2006, ILM does not contend, and the March 2012 tender does not indicate, that the damage to Macrall's stucco occurred after June 1, 2006.

{33} Therefore, we conclude that Macrall's claims in the March 28, 2012 tender were sufficient to allege a claim covered by the policy, thus triggering ILM's duty to defend Pulte as of the date of that tender. This duty to defend shall extend to all claims pending in this case as of March 28, 2012 and shall last until any of the following events occurs: the lawsuit ends, every potentially covered claim is eliminated from the lawsuit, or it can be concluded as a matter of law that there is no basis upon which ILM may be obligated to defend Pulte. *See Guest*, 2010-NMSC-047, ¶ 33 (recognizing that "an insurer's duty to defend . . . lasts until the conclusion of the underlying lawsuit, or until it has been shown that there is no potential for coverage"; "[w]hen multiple alternative causes of action are stated, the duty continues until every covered claim is eliminated"; "[i]n other words, the duty to defend continues through the appellate process until it can be concluded as a matter of law that there is no basis on which the insurer may be obligated to indemnify the insured" (internal quotation marks and citations omitted)).

CONCLUSION

{34} We reverse the district court's grant of summary judgment in favor of ILM and remand this case to the district court for further proceedings consistent with this opinion.

{35} IT IS SO ORDERED.

TIMOTHY L. GARCIA, Judge

WE CONCUR:
MICHAEL E. VIGIL, Chief Judge
CYNTHIA A. FRY, Judge

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-029

No. 33,990 (filed December 21, 2015)

STATE OF NEW MEXICO, ex rel.
CHILDREN, YOUTH and FAMILIES DEPARTMENT,
Petitioner-Appellee,
v.
YODELL B.,
Respondent-Appellant,
and
IN THE MATTER OF TYRELL B.,
a Child.

APPEAL FROM THE DISTRICT COURT OF CIBOLA COUNTY
JOHN F. DAVIS, District Judge

CHARLES E. NEELLEY
Chief Children's Court Attorney
KELLY P. O'NEILL
Assistant Children's Court Attorney
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for Appellee

ROBERT E. TANGORA
ROBERT E. TANGORA, L.L.C.
Santa Fe, New Mexico
for Appellant

CATHERINE A. BEGAYE
BEGAYE LAW FIRM
Albuquerque, New Mexico
Guardian Ad Litem for Child

Opinion

M. Monica Zamora, Judge

{1} Yodell B. (Father) appeals the termination of his parental rights to T.B. (Child). Father argues the evidence presented at the termination of parental rights trial (TPR) was insufficient to support the district court's finding that the Children, Youth, and Families Department (the Department) made active efforts to provide him with remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, and that those efforts were unsuccessful as is required by 25 U.S.C. § 1912(d) (2013) of the federal Indian Child Welfare Act, 25 U.S.C. §§ 1901 to 1963 (2013) (the ICWA). We hold that the evidence presented at the TPR was insufficient to show the Department complied with the active efforts requirement of 25 U.S.C. § 1912(d). Because a showing of active efforts is a mandatory predicate to the termination of parental rights under the ICWA, we reverse the district court's termination order and remand for proceedings consistent with this Opinion.

BACKGROUND

{2} On October 18, 2011, the Department filed a neglect/abuse petition against Colynn B. (Mother) and Father regarding Child, an enrolled member of the Navajo Nation. Child was taken into the Department's custody due to injuries Child sustained in Mother's care and concerns regarding Mother's mental health. At the time Child was taken into the Department's custody, Mother had been hospitalized for psychiatric treatment and Father's whereabouts were unknown to the Department.

{3} A custody hearing was held on November 1, 2011. Because Mother was not able to safely care for Child at that time and the Department was unable to locate Father as a possible placement, the district court ordered Child to remain in the Department's custody. On January 19, 2012, the adjudication was scheduled; however, Father still had not been located.

{4} Father was served with the neglect/abuse petition on February 22, 2012. The same day, Father met with the Department's permanency planning worker and together the two developed Father's treatment plan. The treatment plan required Father to be assessed for drug and alcohol abuse, parenting skills, and domestic violence. Father was also required to complete parenting and domestic violence programs. The permanency planning worker discussed with Father some service providers in or near Crownpoint, New Mexico, where Father lived. Father was responsible for setting up services and ensuring that appropriate release forms were signed so the Department could verify his receipt of services and for ensuring the service providers updated the permanency planning worker on Father's progress. Father's treatment plan also required that he participate in visitation with Child as arranged by the Department, engage in education and/or employment, maintain a safe and stable home, and keep in contact with the Department.

{5} On April 13, 2012, the second adjudication was held and Father entered a plea of no contest to the allegations of neglect in the neglect/abuse petition, pursuant to NMSA 1978, Section 32A-4-2(E)(2) (2009). Father was not present for permanency hearings held on August 15, 2012, or November 21, 2012. At the August 15, 2012 hearing, the permanency planning worker reported that Father was attempting to set up services in compliance with his treatment plan, but that he was experiencing difficulty. At the November 21, 2012 hearing, the permanency planning worker reported that Father was participating in a parenting program, but that he had not completed any of the other items on his treatment plan. She also stated that Father contacted her once to set up visitation, but that the visit could not be coordinated with the foster parents, and Father did not contact her again to set up visitation. After the hearing, the district court changed Child's permanency plan to adoption with a concurrent plan of reunification.

{6} On September 11, 2013, the Department filed a motion to terminate parental rights of Mother and Father. The TPR was held on March 7, 2014. Notice of the trial was sent to Father's attorney on October 21, 2013. At the beginning of the TPR, Father's attorney moved for a continuance because she had been unable to contact Father until two days before the hearing. The district court denied the motion. Mother voluntarily relinquished her rights, and the trial proceeded on the termination of Father's rights. At the conclusion of the trial, the district court determined that the Department's motion to terminate should

be granted and it terminated Father's parental rights in the Child. This appeal followed.

DISCUSSION

{7} On appeal, Father argues that the district court erred in denying the motion to continue the TPR. He also challenges the sufficiency of the evidence to support the termination of his parental rights. Specifically, Father claims there was insufficient evidence of neglect and abandonment and that there was insufficient evidence of the Department's active efforts to prevent the breakup of the family as required by 25 U.S.C. § 1912(d). Because our holding that the Department's failure to present sufficient evidence of active efforts at the TPR is dispositive of this appeal, we do not address Father's other arguments.

The Active Efforts Requirement

{8} Under the ICWA, a party seeking to terminate parental rights "shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." 25 U.S.C. § 1912(d). In reviewing for sufficient evidence of active efforts, our role "is to determine whether the fact[-]finder could properly conclude that the proof requirement below was met." *State ex rel. Children, Youth & Families Dep't v. Patricia H.*, 2002-NMCA-061, ¶ 22, 132 N.M. 299, 47 P.3d 859. Unlike 25 U.S.C. § 1912(e) and (f), 25 U.S.C. § 1912(d) does not specify the standard of proof applicable to the active efforts requirement. *See* 25 U.S.C. § 1912(e) ("No foster care placement may be ordered in such proceeding in the absence of a determination, supported by *clear and convincing evidence*, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." (emphasis added)); 25 U.S.C. § 1912(f) ("No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence *beyond a reasonable doubt*, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." (emphasis added)). Section 1912(d) also does not define the term "active efforts."

{9} New Mexico caselaw pertaining to the ICWA's active efforts requirement also does not resolve either of these issues. For example, in *In re Esther V.*, our Supreme Court reversed an adjudication of neglect and remanded for a new adjudicatory hearing, holding that the district court was required to make findings as to the department's compliance with 25 U.S.C. § 1912(d) and (e), at the adjudication stage of abuse and neglect proceedings. *In re Esther V.*, 2011-NMSC-005, ¶¶ 36, 46, 149 N.M. 315, 248 P.3d 863. In *State ex rel., Children, Youth & Families Department v. Casey J.*, this Court addressed whether deviation from the ICWA's placement preferences constituted a violation of the active efforts requirement. 2015-NMCA-088, ¶¶ 14-15, 355 P.3d 814. We held that "the provision of remedial services and rehabilitative programs under [25 U.S.C.] § 1912(d) supports the continued custody that is protected by [25 U.S.C. § 1912(e), (f)]. It does not apply to facilitate the placement of the child in compliance with the placement preferences listed in [25 U.S.C.] § 1915." *Casey J.*, 2015-NMCA-088, ¶ 14 (alteration, internal quotation marks, and citations omitted).

{10} *State ex rel. Children Youth & Families Department v. Arthur C.*, is the only New Mexico case in which a parent, whose parental rights were terminated, challenged the district court's finding that the active efforts requirement had been met. 2011-NMCA-022, ¶¶ 41-45, 149 N.M. 472, 251 P.3d 729. In that case, the district court found beyond a reasonable doubt that the department made active efforts to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family and such efforts were unsuccessful. *Id.* ¶ 8. Because the evidence was sufficient to establish the department's active efforts under the standard applied by the district court, and because the standard was not challenged on appeal, the question of whether the district court applied the appropriate standard was not addressed on appeal. *Id.* ¶ 45; *see Fernandez v. Farmers Ins. Co. of Ariz.*, 1993-NMSC-035, ¶ 15, 115 N.M. 622, 857 P.2d 22 ("The general rule is that cases are not authority for propositions not considered." (internal quotation marks and citation omitted)).

{11} In the present case, like in *Arthur C.*, the district court determined that the evidence established, "beyond a reasonable doubt," that the active efforts requirement was met. Although Father does not challenge the evidentiary standard applied by the district court, our review of the record indicates that the evidence of active efforts presented at the TPR is not sufficient to satisfy the heightened standard applied by the district court. In order to determine if reversal is appropriate, we must determine the standard of proof by which the evidence of active efforts is to be evaluated and consider the nature and extent of the active efforts required under 25 U.S.C. § 1912(d).

The Applicable Standard of Proof

{12} State courts have applied two different standards of proof when determining whether the active efforts requirement has been met. Some courts apply the reasonable doubt standard based on the heightened burden required for termination under 25 U.S.C. § 1912(f) and to advance the Congressional purpose of protecting the Indian family. *See In re Welfare of M.S.S.*, 465 N.W.2d 412, 418 (Minn. Ct. App. 1991) ("If termination of parental rights of Indian parents to their children can be ordered only upon a factual basis shown beyond a reasonable doubt, and if termination cannot be effected without a showing of active efforts to prevent the breakup of the Indian family and a failure thereof, then the adequacy of efforts [predicating] termination, must likewise be established beyond a reasonable doubt." (citations omitted)); *see also In re G.S.*, 2002 MT 245, ¶ 33, 312 Mont. 108, 59 P.3d 1063 ("[G]iven the intent of Congress in preserving Indian families and this [s]tate's commitment to preserving Indian culture, we conclude that the proper evidentiary standard for determining 'active efforts' under [25 U.S.C.] § 1912(d) is the same standard we apply to the underlying ICWA proceeding.").

{13} Courts in other jurisdictions have rejected the reasonable doubt standard, recognizing that if Congress intended to impose a heightened burden of proof for the active efforts element in 25 U.S.C. § 1912(d), it could have done so as it did in 25 U.S.C. § 1912(e), (f). *See Valerie M. v. Ariz. Dep't of Econ. Sec.*, 198 P.3d 1203, ¶¶ 16-17 (Ariz. 2009) (en banc); *In re Michael G.*, 74 Cal. Rptr. 2d 642, 648 (Ct. App. 1998); *In re C.A.V.*, 787 N.W.2d 96, 100-01 (Iowa Ct. App. 2010); *In re JL*, 770 N.W.2d 853, 863 (Mich. 2009); *In re Interest of Walter W.*, 744 N.W.2d 55, 60-61 (Neb. 2008); *In re Adoption of R.L.A.*, 2006 OK CIV APP 138, ¶ 18, 147 P.3d 306; *In re Vaughn R.*, 2009 WI App 109, ¶ 46, 320 Wis. 2d 652, 770 N.W.2d 795.

{14} Those and many other jurisdictions have adopted the clear and convincing

standard as more appropriate for termination of parental rights under state law. *See In re C.A.V.*, 787 N.W.2d at 100 (stating that the state version of the ICWA requires that active efforts be shown by clear and convincing evidence); *In re JL*, 770 N.W.2d at 863 (applying the "default" state standard of clear and convincing evidence); *In re Annette P.*, 589 A.2d 924, 928 n.8 (Me. 1991) (applying a clear and convincing standard "[b]ecause the federal guidelines should be interpreted to change state law to the least extent possible"); *In re Vaughn R.*, 2009 WI App 109, ¶¶ 41-42, 51 (holding that Congress intended no particular standard and thus, the state standard of clear and convincing evidence applies). *But see K.N. v. State*, 856 P.2d 468, 476 (Alaska 1993) (applying the state standard of preponderance of the evidence to the active efforts requirement).

{15} We also note that "when interpreting either statutes or procedural rules, courts generally are reluctant to expand their scope or to imply requirements that have not been made explicit." *Yvonne L. v. Ariz. Dep't of Econ. Sec.*, 258 P.3d 233, ¶ 25 (Ariz. Ct. App. 2011); *see Elonis v. United States*, ___ U.S.___, ___, 135 S. Ct. 2001, 2023 (2015) ("We ordinarily resist reading words or elements into a statute that do not appear on its face[.]" (alteration, internal quotation marks, and citation omitted)); *see also High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998-NMSC-050, ¶ 5, 126 N.M. 413, 970 P.2d 599 ("[T]he court will not read into a statute or ordinance language [that] is not there, particularly if it makes sense as written." (internal quotation marks and citation omitted)).

{16} Based on the foregoing, we are persuaded by the reasoning of the majority of the courts and therefore hold that the proper standard of proof for determinations under 25 U.S.C. § 1912(d) is the clear and convincing standard, which is applicable to the underlying termination of parental rights proceedings under NMSA 1978, Section 32A-4-29(I) (2009).

Active Efforts

{17} The majority of jurisdictions that have considered the extent of active efforts required under the ICWA find it useful to draw a distinction between active and passive efforts. The Alaska Supreme Court has held:

> Passive efforts are where a plan is drawn up and the client must develop his or her own resources towards bringing it to fruition. Active efforts, the intent of the drafters of the Act, is where the state caseworker takes the client through the steps of the plan rather than requiring that the plan be performed on its own.

A.A. v. State, Dep't of Family & Youth Servs., 982 P.2d 256, 261 (Alaska 1999) (internal quotation marks and citation omitted); *see In re Welfare of Child of E.A.C.*, 812 N.W.2d 165, 174 (Minn. Ct. App. 2012) (defining active efforts as "a rigorous and concerted level of case work that uses the prevailing social and cultural values, conditions and way of life of the Indian child's tribe to preserve the child's family and to prevent placement of an Indian child" (internal quotation marks and citation omitted)); *In re A.N.*, 2005 MT 19, ¶ 23, 325 Mont. 379, 106 P.3d 556 ("The term active efforts, by definition, implies heightened responsibility compared to passive efforts. Giving the parent a treatment plan and waiting for him to complete it would constitute passive efforts."); *In re J.S.*, 2008 OK CIV APP 15, ¶ 16, 177 P.3d 590 (stating that active efforts requires more than pointing the parent in the right direction, it "requires 'leading the horse to water' ").

{18} Many jurisdictions have held that the active efforts requirement imposes a greater burden than the reasonable efforts requirement of various states. *See In re J.S.*, 2008 OK CIV APP 15, ¶ 14 (recognizing that the majority of other states' courts that have interpreted the ICWA have held that the "active efforts" standard requires more effort than the "reasonable efforts" standard in non-ICWA cases); *In re C.D.*, 2008 UT App 477, ¶ 34, 200 P.3d 194 (accord). This view is consistent with the description of active efforts included in the recently issued Bureau of Indian Affairs Guidelines (BIA Guidelines) which explain that "[a] ctive efforts are intended primarily to maintain and reunite an Indian child with his or her family or tribal community and constitute more than reasonable efforts as required by Title IV-E of the Social Security Act (42 U.S.C. 671(a)(15))." BIA Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10146-02, at 10,150 (Feb. 25, 2015).

{19} The BIA guidelines also provide several examples of active efforts including in relevant part: (1) "[i]dentifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services"; (2) "[o]ffering and employing all available and culturally appropriate family preservation strategies"; (3) "[c]ompleting a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal"; (4) "[m]aking arrangements to provide family interaction in the most natural setting that can ensure the Indian child's safety during any necessary removal"; (5) "[i]dentifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or extended family in utilizing and accessing those resources"; (6) "[m]onitoring progress and participation in services"; (7) "[p]roviding consideration of alternative ways of addressing the needs of the Indian child's parents and extended family, if services do not exist or if existing services are not available"; and (8) "[s]upporting regular visits and trial home visits of the Indian child during any period of removal, consistent with the need to ensure the safety of the child." *Id.*

{20} We find these authorities persuasive and we agree with the majority view that the term "active efforts connotes a more involved and less passive standard than that of reasonable efforts." *In re C.D.*, 2008 UT App 477, ¶ 34.

Sufficiency of the Evidence of the Department's Active Efforts

{21} In reviewing for the sufficiency of the evidence of the Department's active efforts, "[w]e will uphold the district court's judgment if, viewing the evidence in the light most favorable to the judgment, a fact[-]finder could properly determine that the clear and convincing standard was met." *State ex rel. Children, Youth & Families Dep't v. Benjamin O.*, 2009-NMSC-039, ¶ 12, 146 N.M. 60, 206 P.3d 171 (internal quotation marks and citation omitted). "For evidence to be clear and convincing, it must instantly tilt the scales in the affirmative when weighed against the evidence in opposition and the fact[-]finder's mind is left with an abiding conviction that the evidence is true." *State ex rel. Children, Youth & Families Dep't v. Hector C.*, 2008-NMCA-079, ¶ 11, 144 N.M. 222, 185 P.3d 1072 (internal quotation marks and citation omitted).

{22} At the TPR, the Department's permanency planning worker testified she met with Father twice; once when Father's treatment plan was created in February 2012 and once in November 2012 at a family centered meeting. She only discussed Father's treatment plan with him

once during their initial meeting. Father was told he would need to find a service provider to perform an alcohol severity index (ASI) assessment to determine the substance abuse services appropriate for Father, and Father would be required to follow any recommendations made after the completion of the ASI. Father was also told he needed to participate in domestic violence classes. Father and the permanency planning worker discussed one or two places in Crownpoint for Father to look into with regard to obtaining the services that were required by his treatment plan. Father was instructed to contact the service providers, arrange to receive services, provide the service providers with signed release forms, and have the providers send the permanency planning worker progress reports. According to the permanency planning worker, she never received information that Father had looked into or obtained any services as required by his treatment plan.

{23} Concerning visitation with Child, the permanency planning worker informed Father that Child would be placed in foster care with Child's maternal grandmother in Arizona. She offered to have Child transported for visitation if Father could arrange for transportation to meet Child in Grants, Gallup, or Window Rock. Because Father did not have his own means of transportation, the permanency planning worker told Father that telephonic visits with Child may also be an option. She told Father to contact her to arrange for either in person or telephonic visitation. The permanency planning worker did not hear back from Father so she did not make visitation arrangements. When the permanency planning worker attempted to call Father, she was unable to reach him using the telephone number she had been given. She attempted to obtain Father's contact information from Child's maternal grandmother and from the Navajo Nation, but she was unable to obtain a working number.

{24} Father acknowledged that he lost his phone and that he did not make subsequent efforts to stay in touch with the Department, or to contact the permanency planning worker regarding the requirements of his treatment plan. Father testified that the permanency planning worker arranged for him to take parenting classes, which he attended until the class location was changed. After that, Father did not know where the classes were being held and did not attend the remaining sessions. Father heard that there was a domestic violence program being offered at the hospital in Crownpoint. However, when Father went to the hospital he was unable to find information about the program.

{25} The Department argues the evidence that they prepared a treatment plan for Father, reviewed the treatment plan with Father, ensured Father understood the treatment plan, discussed potential service providers with Father, offered Father visits with Child, and contacted the Navajo Nation when Father failed to contact the Department is sufficient to support the district court's determination that active efforts were made to provide Father with remedial services and rehabilitative programs designed to prevent the breakup of the family under 25 U.S.C. § 1912(d). We disagree.

{26} The testimony at the TPR demonstrates that the Department took the affirmative steps of meeting with Father to create a treatment plan, and referring Father to a parenting class. It appears the Department pointed Father in the direction of service providers, but did little else to assist Father in implementing the treatment plan. Father was not offered services aside from the one parenting class. The Department took a passive role by shouldering Father with the burden of not only independently locating and obtaining services, but also ensuring the service providers were communicating with the Department about his progress.

{27} The Department argues its efforts were reasonable and active, given Father's failure to maintain contact with the Department, and to meaningfully engage in his treatment plan and establish a relationship with Child. We recognize that in some circumstances continued efforts by the Department are not likely to alleviate the need for termination, and the ICWA does not require the Department to continue making active efforts indefinitely, where to do so would be futile. *See Wilson W. v. State*, 185 P.3d 94, 101 (Alaska 2008) ("If a parent has a long history of refusing treatment and continues to refuse treatment, [Office of Children's Services] OCS is not required to keep up its active efforts once it is clear that these efforts would be futile."); *In re JL*, 770 N.W.2d at 867 ("The ICWA obviously does not require the provision of *endless* active efforts, so there comes a time when the [Department of Human Services] DHS or the tribe may justifiably pursue termination without providing additional services."); *In re C.D.*, 2008 UT App 477, ¶ 27 ("The ICWA requires active efforts to avoid the breakup of the Indian family *or* evidence that can support a finding that such efforts would be futile[.]" (emphasis added)).

{28} However, a parent's failure to engage in or complete a treatment program does not excuse an initial failure by the Department to make active efforts. *See Wilson W.*, 185 P.3d at 101 ("We will decline to find active efforts where OCS develops a case plan, but the client must develop his or her own resources towards bringing it to fruition." (internal quotation marks and citation omitted)); *In re JL*, 770 N.W.2d at 868 ("Only if active efforts have been provided to prevent the breakup of the Indian family, and it does not appear that the provision of additional services is likely to prevent the need for termination, may the DHS or the tribe pursue termination without providing additional services.").

CONCLUSION

{29} We conclude that the Department did not present clear and convincing evidence that active efforts were made to prevent the breakup of the family. We reverse the district court's order of termination and remand for proceedings consistent with this Opinion.

{30} IT IS SO ORDERED.

M. MONICA ZAMORA, Judge

WE CONCUR:
LINDA M. VANZI, Judge
J. MILES HANISEE, Judge

Certiorari Denied, February 19, 2016, No. S-1-SC-35728

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-030

No. 33,950 (filed December 29, 2015)

ANN BRANNOCK, DANIEL M. MOWERY and MARSHA J. MOWERY,
Plaintiffs-Appellees,
v.
THE LOTUS FUND, CHRISTINE HOUGH SMITH, and CHRISTOPHER SMITH,
Defendants-Appellants,
and
DOUGLAS COOMBS and COLLEEN COOMBS and EUGENE HANDS and MARIA HANDS, Voluntary Defendants.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
ALAN M. MALOTT, District Judge

RONALD T. TAYLOR
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for Appellees

MICHAEL L. DANOFF
RYAN P. DANOFF
MICHAEL L. DANOFF
& ASSOCIATES, P.C.
Albuquerque, New Mexico
for Appellants

Opinion

Michael D. Bustamante, Judge

{1} Defendants The Lotus Fund (LF), Christine Hough Smith, and Christopher Smith appeal from the district court's findings of facts and conclusions of law entering judgment[1] on behalf of Plaintiffs Ann Brannock, Daniel M. Mowery, and Marsha J. Mowery. On appeal, Defendants raise both issue and claim preclusion arguments and contend that, in any event, the district court erred in concluding that Plaintiffs proved the elements of prescriptive easement and easement by necessity. Concluding that the prior case does not have preclusive effect over the present case and that substantial evidence supports the district court's findings and conclusions that Plaintiffs proved the elements for prescriptive easement, we affirm.

I. BACKGROUND

{2} This appeal involves litigation over a disputed access to property. In order to best understand the facts and legal issues in the present case, we will first explain the legal posture that led to the present case. Prior to the present case, a separate case (the Coombs case) was initiated by Douglas M. Coombs and Colleen E. Coombs (together, the Coombses) against The Lotus Fund Limited Partnership (LFLP), an affiliate or otherwise related company to one of the present Defendants, The Lotus Fund. The Coombses and Defendants/LFLP own property adjacent to one another, which properties are separated by a twenty-five-foot dedicated easement (the dedicated easement) that is entirely on the Coombses' property. Notwithstanding this dedicated easement, the Coombses alleged that they and others used a path to access properties owned by the Coombses, Eugene and Maria Hands (the Hands), and present Plaintiffs, which path was partially on the dedicated easement on the Coombses' property and partially on Defendants'/LFLP's property. After a dispute arose between Defendants/LFLP and the Coombses regarding use of the disputed access, the Coombses filed a complaint for declaratory judgment and injunction against LFLP.

{3} In the Coombs case, Judge Brickhouse concluded that

> [a]s a matter of law there [are] no prescriptive easement rights for [the Coombses] because the required elements, which are usage by the general public continued for the length of time necessary to create a right of prescription if the use had been by an individual, provided that such usage is open, uninterrupted, peaceable, notorious, adverse, under a claim of right, and continued for a period of ten years with the knowledge, or imputed knowledge of the owner, were not proven at trial.

By this, Judge Brickhouse meant either that insufficient evidence was presented on this claim—perhaps because the Coombses instead elected to pursue an ownership argument—or that the Coombses failed to prove their prescriptive easement rights

[1]We initially note that we do not typically consider the district court's findings of fact and conclusions of law a "final order" for purposes of filing an appeal. *See Curbello v. Vaughn*, 1966-NMSC-179, ¶¶ 1-3, 76 N.M. 687, 417 P.2d 881 (stating that, when the district court had entered findings and conclusions, but had not entered an order or judgment carrying out the findings and conclusions, no final order had been entered in the case for purposes of appeal). Here, however, the district court's findings and conclusions serve as the final order or judgment because they resolve all matters to the fullest extent possible and because they contain decretal language that carries the findings and conclusions into effect. *See Floyd v. Towndrow*, 1944-NMSC-052, ¶ 4, 48 N.M. 444, 152 P.2d 391 (stating that "[t]he general rule recognized by the courts of the United States and by the courts of most, if not all, of the states, is that no judgment or decree will be regarded as final, within the meaning of the statutes in reference to appeals, unless all the issues of law and of fact necessary to be determined were determined, and the case completely disposed of, so far as the court had power to dispose of it" (internal quotation marks and citation omitted)); *see also Khalsa v. Levinson*, 1998-NMCA-110, ¶ 13, 125 N.M. 680, 964 P.2d 844 (providing that an order is final if it includes decretal language that carries the decision into effect). In satisfaction of the required decretal language, the final paragraph of the district court's subsequent findings and conclusions states that "[i]t is therefore Ordered that Judgment shall issue in favor of Plaintiffs consistent with these Findings and Conclusions." Therefore, we view the district court's findings and conclusions as the final order of the court.

or public prescriptive easement rights despite their efforts to do so. In any event, the conclusion of law, in significant part, states that there are no prescriptive easement rights *for the plaintiffs in the Coombs case*, as opposed to stating that prescriptive easement rights on the disputed access could never be proven by any other party against Defendants/LFLP.

{4} Plaintiffs in the present case, who own/have owned property to the south of the Coombses (non-adjacent) and the Hands (adjacent), thereafter brought a case against present Defendants for prescriptive easement, easement by necessity, and permanent restraining order, seeking court verification of their easement over the same disputed roadway that was litigated in the Coombs case. The Coombses and the Hands were additionally named as "voluntary defendants" in the present case. Both parties filed motions for summary judgment, and the district court denied both motions. In the order denying summary judgment, the district court took judicial notice of the Coombs case; noted that the plaintiffs in the Coombs case are not the same as Plaintiffs in the present case or in privity with them; and found that the Coombs case determined legal ownership of land, whereas the present case deals with the right to use that land. The case therefore proceeded to trial.

{5} After a trial on the merits, the district court filed findings of fact and conclusions of law, granting judgment in favor of Plaintiffs. The district court reiterated that the ownership rights determined in the Coombs case did not have preclusive effect on the usage rights as asserted by Plaintiffs in the present matter and concluded that Plaintiffs had proved the elements of prescriptive easement and easement by necessity. Defendants appeal.

II. DISCUSSION

{6} On appeal, Defendants raise both issue and claim preclusion arguments and additionally contend that, in any event, the district court erred in concluding that Plaintiffs proved the elements of prescriptive easement and easement by necessity. We first address Defendants' preclusion arguments and, concluding that the present case is not precluded by the Coombs case, then proceed to the merits of the easement issues.

A. Collateral Estoppel

{7} Defendants argue that "the disputed easement access" issue is precluded from litigation in the present case based on the doctrine of collateral estoppel. We review a decision by the district court to apply or not apply the doctrine of collateral estoppel for an abuse of discretion. *See Shovelin v. Cent. N.M. Elec. Coop., Inc.*, 1993-NMSC-015, ¶ 10, 115 N.M. 293, 850 P.2d 996. "The doctrine of collateral estoppel fosters judicial economy by preventing the relitigation of ultimate facts or issues actually and necessarily decided in a prior suit." *Id.* (internal quotation marks and citation omitted). The party invoking the doctrine

> must demonstrate that (1) the party to be estopped was a party to the prior proceeding, (2) the cause of action in the case presently before the court is different from the cause of action in the prior adjudication, (3) the issue was actually litigated in the prior adjudication, and (4) the issue was necessarily determined in the prior litigation.

Id. "If the movant introduces sufficient evidence to meet *all elements* of this test, the trial court must then determine whether the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the prior litigation." *Id.* (emphasis added). In this case, Defendants have failed to satisfy several of the requirements.

{8} With regard to the first element, the plaintiffs in the prior litigation were the Coombses. In the present case, Plaintiffs are Ann Brannock, Daniel M. Mowery, and Marsha J. Mowery. Although the Coombses and the Lotus Fund (or an affiliate thereof) are defendants in both cases, *Plaintiffs* in the present case are the parties Defendants are seeking to estop and are thus the parties to whom the doctrine would apply. *See id.* (identifying the first element as "*the party to be estopped* was a party to the prior proceeding" (emphasis added)). Plaintiffs were not parties to the prior litigation. As the movant must introduce *all elements* of the test in order for the district court to even consider "whether the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the prior litigation[,]" *see id.*, Defendants have failed to show that the district court abused its discretion in determining that Plaintiffs were not estopped from proceeding with their claims of easement by prescription and by necessity.

{9} Defendants nevertheless argue that Plaintiffs were "in privity with" the plaintiffs in the prior action because there was a "substantial identity between the issues in controversy and . . . the parties in the two actions are really and substantially in interest the same." *Deflon v. Sawyers*, 2006-NMSC-025, ¶ 4, 139 N.M. 637, 137 P.3d 577; *see also City of Sunland Park v. Macias*, 2003-NMCA-098, ¶ 10, 134 N.M. 216, 75 P.3d 816 (stating that the doctrine of collateral estoppel requires, *inter alia*, that "the parties in the current action were the same or in privity with the parties in the prior action"). Specifically, Defendants contend that the two sets of plaintiffs are in privity with one another because Plaintiffs were aware of the prior case; many of the witnesses were the same, including Mr. Mowery himself testifying in the prior case; counsel for plaintiffs was the same in both cases; Judge Brickhouse already determined there was not a prescriptive easement on the contested roadway; the experts were the same in both cases and they dealt with the same evidence; and there was/is a concurrent relationship by the two sets of plaintiffs to the same property involving the disputed access. Defendants' argument is unavailing.

{10} As our Supreme Court explained in *Deflon*,

> [t]here is no definition of "privity" which can be automatically applied in all cases involving the doctrines of res judicata and collateral estoppel. Thus, each case must be carefully examined to determine whether the circumstances require its application. . . . Privity requires, at a minimum, a substantial identity between the issues in controversy and showing that the parties in the two actions are really and substantially in interest the same.

2006-NMSC-025, ¶ 4 (internal quotation marks and citation omitted). "[P]arties have been found in privity where they represent the same legal right or where they have a mutual or successive relationship to the same rights of property." *Id.* (internal quotation marks and citation omitted).

{11} In the present case, Defendants contend that "there was evidence of the concurrent relationships to the same property involving the disputed access, thus privity was established." Defendants appear to be arguing that, because the Coombses, the Hands, and present Plaintiffs are all neighbors on the west side of the disputed access road and have all used the disputed access road to access their individual properties and each others' properties, they collectively share a single opportunity to claim a right to prescriptive easement over the disputed access. Defendants provide no authority for this contention, other than

citation to *Deflon*'s explanation that "[p]rivity has been held to exist in the following relationships: concurrent relationship to the same property right (i.e. trustee and beneficiary); successive relationship to the same property or right (i.e. seller or buyer); or representation of the interests of the same person." *Id.* (internal quotation marks and citation omitted). However, Defendants' implication that the Coombses and Plaintiffs are in legal privity with one another because they both dispute their right to access their separate properties with the same Defendants (or affiliates thereof), simply because the access road is the same, is unsupported.

{12} Indeed, the fact that the Coombses, the Hands, and present Plaintiffs are all neighbors who all use the disputed access road does not mean that they have a concurrent relationship to the same property right, *see id.*, because they all own separate properties, require individual access to their separate properties, and each have individual rights with regard to access to their own separate properties. *See Hill v. State Highway Comm'n*, 1973-NMSC-114, ¶ 5, 85 N.M. 689, 516 P.2d 199 ("This Court has recognized that the right of access is a property right[.]"); *State ex rel. State Highway Comm'n v. Chavez*, 1966-NMSC-222, ¶ 5, 77 N.M. 104, 419 P.2d 759 ("There can be no question that the right to access is a property right[.]"). Likewise, the fact that the Coombses, the Hands, and present Plaintiffs are all neighbors who all use the disputed access road does not mean that they represent the interests of the same person, *see Deflon*, 2006-NMSC-025, ¶ 4; indeed, they are all separate persons with their own separate properties in different locations with different access points.

{13} Further, Defendants have presented no evidence that would indicate that the Coombses' right to access their own property via the disputed roadway is somehow the same as Plaintiffs' right to access their non-adjacent property farther south via the disputed access, such that the parties' rights to access their separate properties can be said to be a concurrent relationship to the same property right or a representation of the interests of the same person. *See id.* Similarly, Defendants have presented no argument or evidence regarding any successive relationship to the property or right between the Coombses, the Hands, and present Plaintiffs, aside from the fact that the Mowerys have sold their property to Ms. Brannock, and the Mowerys and Ms. Brannock are all presently seeking the same right in the present lawsuit, so there is no support for a contention that there is legal privity between the Coombses and Plaintiffs based on a successive relationship to the same property or right. *See id.*

{14} Additionally, as Defendants have presented no authority to support a contention that neighbors who use the same disputed property or access road to access or exit their separate properties are in legal privity with one another, and as we are aware of no such authority, we assume no such authority exists. *See Curry v. Great Nw. Ins. Co.*, 2014-NMCA-031, ¶ 28, 320 P.3d 482 ("Where a party cites no authority to support an argument, we may assume no such authority exists."). In fact, such a conclusion would be contrary to the rights of property owners to access their own property. *See Hill*, 1973-NMSC-114, ¶ 5 ("This Court has recognized that the right of access is a property right[.]"); *Chavez*, 1966-NMSC-222, ¶ 5 ("There can be no question that the right to access is a property right[.]"). We therefore conclude, as a matter of law, that the Coombses and Plaintiffs—non-adjacent neighbors who use the same roadway to access and exit their separate properties—are not in legal privity with one another simply because they use the same roadway and have sought to enforce their right to do so against the same Defendants.

{15} Moreover, Defendants have presented no authority that states that witnesses in one case cannot maintain their own legal action against the defendants of the first action, that such witnesses cannot secure the same attorney as was used in the first action, or that such witnesses cannot introduce the same testimony or experts as in the first case to prove their own case, and after diligent search we have not uncovered any such authority. Similarly, we are aware of no law and Defendants have not presented us with any law that indicates that such witnesses would be in legal privity with the plaintiffs of the first action as a result of such witnesses' knowledge of and participation in the first action. Additionally, given that the Coombs case dealt with whether the *Coombses* had a prescriptive right to the disputed access road, and the present case deals with whether *Plaintiffs* have a prescriptive right to the disputed access road, as indicated above, there is no reason to conclude that the parties have a concurrent relationship to the same property right or a representation of the interests of the same person or are otherwise in legal privity with one another. *See Deflon*, 2006-NMSC-025, ¶ 4.

{16} We therefore conclude that Plaintiffs are not in legal privity with the Coombses by virtue of Plaintiffs' knowledge of or participation in the Coombs case dealing with the *Coombses' interest* in the disputed access road; by virtue of Plaintiffs' hiring of the Coombses' lawyer; or by virtue of the same evidence, witnesses, or experts being used in Plaintiffs' case to establish *Plaintiffs' interests* in the disputed access road. Accordingly, Defendants have failed to establish the first requirement needed to apply the doctrine of collateral estoppel—the party to be estopped was the same as or in privity with a party in the prior litigation. *See Shovelin*, 1993-NMSC-015, ¶ 10; *City of Sunland Park*, 2003-NMCA-098, ¶ 10.

{17} Furthermore, Defendants have failed to satisfy the third and fourth requirements needed to apply collateral estoppel—that "the issue was actually litigated in the prior adjudication" and that the issue was "necessarily determined in the prior litigation." *Shovelin*, 1993-NMSC-015, ¶ 10. As discussed above, the issues in the Coombs case dealt with whether the *Coombses* had established a prescriptive easement over the disputed access road; the issues in the present case deal with whether *Plaintiffs* have established a prescriptive easement over the disputed access road. Additionally, in the Coombs case, Judge Brickhouse specifically concluded that "[a]s a matter of law there [are] no prescriptive easement rights *for Plaintiffs*"—i.e., the Coombses. (Emphasis added.) She did not, however, conclude that there are no prescriptive easement rights for any of the witnesses in the Coombs case or for other neighbors in the vicinity who use the disputed access. As such, the present issues were neither "actually litigated" in the Coombs case, nor "necessarily determined in the prior litigation." *See id.* Therefore, Defendants have failed to satisfy at least three of the four elements required for collateral estoppel with regard to Plaintiffs' prescriptive easement claim.

{18} Finally, Defendants argue that, because the district court in the Coombs case ruled that there was a dedicated easement and the district court in the present case likewise ruled that there is a dedicated easement, "that would trump any claim for an easement by necessity or prescriptive easement." In other words, Defendants appear to be arguing that, because both courts have found a dedicated easement, present Plaintiffs' easement by necessity

claim is somehow collaterally estopped. Given that Defendants have presented no argument or evidence that any of the issues involving Plaintiffs' easement by necessity claim were raised, considered, argued, or determined in the Coombs case, we will not consider this aspect of Defendants' argument. *See Muse v. Muse*, 2009-NMCA-003, ¶ 72, 145 N.M. 451, 200 P.3d 104 ("We will not search the record for facts, arguments, and rulings in order to support generalized arguments."); *see also Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076 (declining to entertain a cursory argument that included no explanation of the party's argument and no facts that would allow the Court to evaluate the claim). Indeed, even if the district court in the Coombs case "adjudicated the issue and held that there was a [dedicated] easement and it was located entirely on the [Coombses'] property," such a ruling does not address the issue of whether Plaintiffs' use of the disputed access road is reasonably necessary, which is a required element of an easement by necessity claim, as discussed more fully below. *See Los Vigiles Land Grant v. Rebar Haygood Ranch, LLC*, 2014-NMCA-017, ¶ 28, 317 P.3d 842 (stating that an easement by necessity claim requires, *inter alia*, "that a reasonable necessity existed for such right of way" (internal quotation marks and citation omitted)).

{19} Accordingly, we conclude that the district court did not abuse its discretion in determining that Plaintiffs are not collaterally estopped from proceeding with the issues related to their claims of easement by prescription and by necessity. *See Shovelin*, 1993-NMSC-015, ¶ 10 (setting forth the requirements for establishing collateral estoppel).

B. Res Judicata

{20} Similar to their collateral estoppel argument, Defendants argue that the relief sought by Plaintiffs with regard to Plaintiffs' claim for easement by prescription/necessity is precluded from relitigation by *res judicata*, or claim preclusion. We review a district court's determination concerning a res judicata claim de novo. *Roybal v. Lujan de la Fuente*, 2009-NMCA-114, ¶ 23, 147 N.M. 193, 218 P.3d 879.

{21} "Claim preclusion, or res judicata, precludes a subsequent action involving the same claim or cause of action." *Id.* (internal quotation marks and citation omitted).

> In order to bar a lawsuit under the doctrine of res judicata, four elements must be met: (1) identity of parties or privies, (2) identity of capacity or character of persons for or against whom the claim is made, (3) the same cause of action, and (4) the same subject matter.

Id. (alterations, internal quotation marks, and citation omitted). "The party seeking to bar the claim has the burden of establishing res judicata[.]" *Id.* (internal quotation marks and citation omitted). In this case, Defendants have failed to meet several elements.

{22} For the same reasons discussed at length above, the identity of the parties or privies in the Coombs case is not the same as in the present case. *See id.* Likewise, for the same reasons discussed at length above, the cause of action in the Coombs case—regarding the *Coombses*' right to prescriptive easement over the disputed access road—is different from the cause of action in the present case—regarding *Plaintiffs*' right to prescriptive easement over the disputed access road. Further, to the extent Defendants intend to raise the same argument regarding Plaintiffs' easement by necessity claim with regard to *res judicata* as they do for collateral estoppel, our responses remain the same.

{23} Accordingly, we conclude that the district court did not err in determining that the doctrine of res judicata does not apply and that Plaintiffs are not barred from proceeding with their claims of easement by prescription and by necessity. *See id.* We therefore turn to the merits of Defendants' easement arguments.

C. Prescriptive Easement

{24} Defendants argue that the district court erred in finding a prescriptive easement and that Plaintiffs failed to prove all of the elements required for prescriptive easement. We initially note that the district court appears to have been confused about the distinction between easement by prescription and easement by necessity. Although they are both easements, they are different types of easements with different elements of proof. *See, e.g.*, *Los Vigiles Land Grant*, 2014-NMCA-017, ¶¶ 4-5 (affirming the district court's finding that the plaintiffs had an easement by implication and necessity, but reversing the district court's grant of easement by prescription). Nevertheless, as discussed below, the district court did not err in finding that both types of easement existed under the facts of the present case.

{25} "On appeal, we decide whether substantial evidence supports the district court's findings and whether these findings support the conclusions that [each of] the elements required to establish [an] . . . easement by prescription were not proved by clear and convincing evidence." *Algermissen v. Sutin*, 2003-NMSC-001, ¶ 9, 133 N.M. 50, 61 P.3d 176. "For evidence to be clear and convincing, it must instantly tilt the scales in the affirmative when weighed against the evidence in opposition and the fact finder's mind is left with the abiding conviction that the evidence is true." *Varbel v. Sandia Auto Elec.*, 1999-NMCA-112, ¶ 18, 128 N.M. 7, 988 P.2d 317 (internal quotation marks and citation omitted). "The function of the appellate court is to view the evidence in the light most favorable to the prevailing party, and to determine therefrom if the mind of the fact[ ]finder could properly have reached an abiding conviction as to the truth of the facts found." *Ledbetter v. Webb*, 1985-NMSC-112, ¶ 21, 103 N.M. 597, 711 P.2d 874 (emphasis, alteration, internal quotation marks, and citation omitted); *see Tartaglia v. Hodges*, 2000-NMCA-080, ¶ 57, 129 N.M. 497, 10 P.3d 176 ("Even where the standard of proof is clear and convincing evidence, it is for the fact[ ]finder and not the appellate courts to weigh conflicting evidence and arrive at the truth." (internal quotation marks and citation omitted)). "We defer to the trial court, not because it is convenient, but because the trial court is in a better position than we are to make findings of fact and also because that is one of the responsibilities given to trial courts rather than appellate courts. Our responsibility is to review for reversible error." *In re R.W.*, 1989-NMCA-008, ¶ 7, 108 N.M. 332, 772 P.2d 366.

{26} In order to be successful in their claim that an easement by prescription exists, Plaintiffs had to satisfy the requirements for prescriptive easement. *See Algermissen*, 2003-NMSC-001, ¶ 9. Specifically, "an easement by prescription is created by an adverse use of land, that is open *or* notorious, and continued without effective interruption for the prescriptive period (of ten years)." *Id.* ¶ 10 (emphasis added). In the present case, the district court found that Plaintiffs established the elements of easement by prescription, including that Plaintiffs utilized the access road at issue "continuously in an open, notorious, and adverse fashion without permission since they purchased their land . . . in 1979." The district court also found that there

was testimony that, since 1979, Plaintiffs "witnessed others using the access road continuously, in an open, notorious, and adverse fashion without permission."

1. Adverse Use

{27} We must first determine whether Plaintiffs established by clear and convincing evidence that their use of the disputed access road was adverse. *See id.* ¶ 12. Defendants allege, *inter alia*, that "there was no evidence or testimony at trial from [Plaintiffs] to show that any use was adverse." In *Algermissen*, the Court explained that "[a]dversity is a general concept that simply means a person holds an interest opposed or contrary to that of someone else." *Id.* ¶ 11 (internal quotation marks and citation omitted). "An adverse use is a use made without the consent of the landowner." *Id.* Because in many circumstances adversity can be difficult to prove, "a series of presumptions are used." *Id.*

> For example, a use that has its inception in permission will be presumed to continue to be permissive, until a distinct and positive assertion of a right hostile to the owner is brought home to him by words or acts. Similarly, if all of the other elements of a prescriptive easement claim are satisfied, the use is presumed to be adverse in the absence of proof of express permission.

Id. (internal quotation marks and citation omitted).

{28} At trial, Mr. Mowery testified that he never sought permission to use the disputed access road and that he did not believe such permission was required. Mr. Mowery likewise testified that the Gonnsens—owners of the Coombs property prior to the Coombs—never indicated that they needed permission to use the disputed access road. Similarly, Mrs. Mowery testified that she never had to obtain permission from anyone to use the disputed access road. Ms. Brannock, who currently resides at the end of the disputed access road, testified that the Smiths did not mention her use of the access road when she spoke with them about construction concerns and that she never asked anyone permission to use the access road. In other words, Plaintiffs all testified that they believed that permission to use the disputed access was not necessary and that they never sought such permission.

{29} Moreover, Mr. Smith testified that when the Smiths moved into the property, he was aware of no road and/or the road was not in existence; that he was puzzled about the testimony claiming that the road has been in existence since the 1960s because the aerial photographs show brush on the disputed access; and that his understanding was that the road had not been used when he purchased the property in 1998—in other words, Mr. Smith indicated by his testimony that he never gave permission to the Mowerys or Ms. Brannock or any other party to use the disputed access road. In fact, Mr. Smith even testified that he "was not concerned with people trespassing on my property," indicating his view that the Mowerys' and Ms. Brannock's use was trespass, and not permissive. Additionally, the only communication Defendants had with either the Mowerys or Ms. Brannock regarding their use of the disputed access was when Mr. Smith conversed with Ms. Brannock, informing her of the Coombs litigation, and advising her that it would be beneficial to wait and see how it all works out in court, followed by a letter from Mr. Smith's attorney to Ms. Brannock, stating that the Smiths objected to Ms. Brannock using the access in any way. Thus, substantial evidence exists to support the district court's finding by clear and convincing evidence that the use was adverse—i.e., "made without the consent of the landowner." *Algermissen*, 2003-NMSC-001, ¶ 11; *see also id.* ¶ 12 ("the fact finder should presume adversity if all of the other elements of the claim are satisfied, and there is no evidence of express permission"). Although there may have been evidence presented to the contrary, "we will not reweigh the evidence nor substitute our judgment for that of the fact finder." *Las Cruces Prof'l Fire Fighters & Int'l Ass'n of Fire Fighters v. City of Las Cruces*, 1997-NMCA-044, ¶ 12, 123 N.M. 329, 940 P.2d 177; *see also In re R.W.*, 1989-NMCA-008, ¶ 7 ("Even in a case involving issues that must be established by clear and convincing evidence, it is for the finder of fact, and not for reviewing courts, to weigh conflicting evidence and decide where the truth lies.").

2. Open or Notorious Use

{30} We must next determine whether Plaintiffs established by clear and convincing evidence that their use of the access road was open *or* notorious. *See Algermissen*, 2003-NMSC-001, ¶ 9. Defendants allege, *inter alia*, that the use was not open or notorious because the use was infrequent, the road was not obvious or visible to a reasonable person based on aerial photographs and Mr. Smith's testimony, and there was no reason to use the disputed access until after Ms. Brannock built her home in 2010. Our Supreme Court clarified that the requirement that the prescriptive use be open or notorious is the same as the elements previously "labeled as knowledge and imputed knowledge." *Id.* ¶ 18. Indeed, "[o]pen or notorious use is the only way that knowledge can be imputed to the landowner." *Id.* "Imputed knowledge is synonymous with constructive notice, a phrase that means that the use of the property must have been so obvious that the landowners should have known about it, had they been reasonably diligent." *Id.*

> The use must simply be *either* open *or* notorious. To be open, the use must be visible or apparent. This has long been the law of this State. To be notorious, the claimant's use of the property must be either actually known to the owner or widely known in the neighborhood. This, also, is consistent with our cases.

Id. ¶ 19 (emphasis added) (internal quotation marks and citations omitted). Defendants argue that there was no way to establish open or notorious use because the access was covered in trees and brush until 2010 and because the access was "pretty rough" as there was some washout. Defendants further contend that Mr. Smith never saw the Mowerys or Ms. Brannock use the access in dispute; the access was not a road because there was no street and no grading; and the county does not recognize the access as a road in any way, so there was no evidence that the use was open or notorious. However, contrary to Defendants' allegations, there was substantial evidence that Plaintiffs' use was both open and notorious.

{31} Mr. Mowery testified that he used the disputed access road "a lot" since 1979 when he purchased acreage at the end of the road and, during the thirty-one years from 1979 until 2010 when he sold the property to Ms. Brannock, he used the road as the access to the property and for hiking, driving, walking, or riding a motorcycle at least once a month. Mr. Mowery further testified that many people used the disputed road to access their properties, including he and his wife, the Gonnsens, the Coombses, and the Hands, as well as other people—firewood people, pinecone pickers, construction workers, girl scout troops—for various reasons including for visual inspections, firewood, pinecones, picnics, etc. Similarly, Mrs. Mowery testified that she frequently

walked on the disputed access road for over thirty years, mostly to take walks alone and with her children. Mrs. Mowery also testified that, after they moved away, she still occasionally—once or twice a month—went back and used the access road to check on the house or to simply walk the road. Ms. Brannock likewise testified that, since she purchased the property in 2009-2010, she has been using the road, as it currently exists, by driving and walking down the road. Ms. Brannock further testified that she uses the access road quite often—several times a week, up to many times a day, depending on whether she was in the area or felt like going there.

{32} Additionally, specifically regarding whether the use of the road was visible or apparent, various individuals testified that the disputed access road was clearly visible from Sangre de Cristo, Woodbriar, and Defendants'/LFLP's property. Mr. Mowery testified that the road and vehicles on the road are visible from the main street, Sangre de Cristo, all the way to the corner at Woodbriar, where the Smiths live. Mr. Mowery testified that there are trees, but that the road is visible anyway. Mrs. Mowery likewise testified that you could see the Smith property from the disputed access road, that she saw people using the access road, assuming it was neighbors, and that she could see Defendants' property from the disputed access road when she walked on it. Mrs. Mowery also testified that she could see the road and vehicles on the road from Sangre de Cristo. Even Mr. Smith testified that he could see the surveyor and various vehicles on the road from Defendants' property/house. In fact, Mr. Smith even admitted that footpaths can be seen on the access road in an un-admitted aerial photograph from 2008; that he had seen people walk on the access road; and that even the Smiths used the access road, including with logging trucks, from 1998 when they bought the property through 2003.

{33} Moreover, the district court asserted that its "review of the photographs . . . does not support Defendants' position. In each of the photos, taken as early as 1996, the access road as utilized is visible and easily discerned." Thus, substantial evidence exists to support the district court's finding by clear and convincing evidence that the use was open or notorious—i.e., "visible or apparent . . . [*or*] either actually known to the owner or widely known in the neighborhood." *Id.* ¶¶ 9, 19. Again, although there may have been evidence presented to the contrary, "we will not reweigh the evidence nor substitute our judgment for that of the fact finder." *Las Cruces Prof'l Fire Fighters*, 1997-NMCA-044, ¶ 12; *see In re R.W.*, 1989-NMCA-008, ¶ 7 ("Even in a case involving issues that must be established by clear and convincing evidence, it is for the finder of fact, and not for reviewing courts, to weigh conflicting evidence and decide where the truth lies.").

3. Continuous and Uninterrupted Use For the Prescriptive Period

{34} Finally, we must determine whether Plaintiffs established by clear and convincing evidence that their use "continued without effective interruption for the prescriptive period (of ten years)." *Algermissen*, 2003-NMSC-001, ¶ 10. Defendants allege, *inter alia*, that Plaintiffs did not show continuous use because the only evidence of use was occasional, limited, and rare. In order to prevail in their claim, Plaintiffs must prove that their use was continuous and uninterrupted. *Id.* ¶ 23.

> Although not synonymous, these two terms are interrelated parts of the same requirement. For the use to be continuous, it must take place with the same consistency that a normal owner of the claimed servitude would make, so long as that use is reasonably frequent. The requirement that the use be uninterrupted, however, refers to the actions of the prospective servient owner. If the owner takes any action that stops the claimants' use of the property, this will defeat the claim.

Id. (citations omitted).

{35} Defendants make no argument that Plaintiffs did not use the disputed access road with the same consistency that a normal owner would make or that Defendants took any action that interrupted Plaintiffs' use of the disputed access road. To the extent Defendants' reiteration of certain testimony from trial that Plaintiffs "only used the access" a limited frequency of times during various periods since 1979 is meant to be an argument regarding continuous use, Defendants fail to explain how such use is not as consistent as the use a normal owner would make, *id.* ¶ 23; and, in fact, as Plaintiffs *are* "normal owners" of the property at the end of the disputed access, such arguments would likely be unavailing. *See Corona v. Corona*, 2014-NMCA-071, ¶ 28, 329 P.3d 701 ("This Court has no duty to review an argument that is not adequately developed.").

{36} Nonetheless, with regard to the element regarding Plaintiffs' continuous and uninterrupted use for the prescriptive period, Defendants argue that "[t]here was no road prior to 2010 and thus there was no open and notorious use of the access prior to 2010"; and that the road was not usable for portions of the time due to the facts that the access was at times covered by brush, that there was no gravel road until 2010, and that Ms. Brannock did not begin building her home until 2010, so "there was no reason or way to access the property." Along those lines, Mr. Smith testified that an *aerial* photograph from 2006 shows that "it's pretty rough" on the access road in question. However, as set forth above, notwithstanding how the road may have appeared in aerial photographs from 2006 or Defendants' belief about whether the road had any use to Plaintiffs prior to Ms. Brannock's home being built in 2010, Plaintiffs variously testified that they did use the disputed access road for walking, hiking, driving, and other activities continuously for over forty years.

{37} Again, as set forth above, Mr. Mowery testified that he used the disputed access road "a lot" since 1979 when he purchased acreage at the end of the road and, during the thirty-one years from 1979 until 2010 when he sold the property to Ms. Brannock, he used the road as the access to the property and for hiking, driving, walking, or riding a motorcycle at least once a month. Similarly, Mrs. Mowery testified that she frequently walked on the disputed access road for over thirty years, mostly to take walks alone and with her children, and that, even after they moved, she continued to use the road once or twice a month to check on the house or simply walk the road. Ms. Brannock likewise testified that, since she purchased the property in 2009-2010, she has been using the road regularly, as it currently exists, by driving and walking down the road.

{38} Thus, substantial evidence exists to support the district court's finding by clear and convincing evidence that the use was "continued without effective interruption for the prescriptive period (of ten years)." *Algermissen*, 2003-NMSC-001, ¶¶ 10, 23. Again, although there may have been evidence presented to the contrary, "we will not reweigh the evidence nor substitute our judgment for that of the fact finder." *Las Cruces Prof'l Fire Fighters*, 1997-NMCA-044, ¶ 12; *see In re R.W.*, 1989-NMCA-008, ¶ 7 ("Even in a case involving issues that must be established

by clear and convincing evidence, it is for the finder of fact, and not for reviewing courts, to weigh conflicting evidence and decide where the truth lies.").

{39} As we have concluded that there was substantial evidence presented at trial to support the district court's findings by clear and convincing evidence that Plaintiffs established each of the required elements for prescriptive easement, we likewise conclude that the district court did not err in concluding that Plaintiffs established a prescriptive easement over the disputed access road.

D. Plaintiffs' Request for Attorney Fees

{40} Finally, we address Plaintiffs' request in their answer brief for attorney fees "incurred in this cause for having misstated the evidence and trial testimony to stop [this] Court's Proposed Summary Disposition." We initially note that Plaintiffs present no legal authority in support of their request for attorney fees. *See Curry*, 2014-NMCA-031, ¶ 28 ("Where a party cites no authority to support an argument, we may assume no such authority exists."). Nevertheless, our Supreme Court has clarified that "New Mexico adheres to the so-called American rule that, absent statutory or other authority, litigants are responsible for their own attorney's fees." *N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-028, ¶ 9, 127 N.M. 654, 986 P.2d 450 (internal quotation marks and citation omitted); *see also* Rule 12-403(B)(3) NMRA (allowing "reasonable attorney fees for services rendered on appeal in causes where the award of attorney fees is permitted by law"). However, "[c]ourts have the inherent power, independent of statute or rule, to award attorney fees to vindicate their judicial authority and compensate the prevailing party for expenses incurred as a result of frivolous or vexatious litigation." *Landess v. Gardner Turf Grass, Inc.*, 2008-NMCA-159, ¶ 19, 145 N.M. 372, 198 P.3d 871 (alteration, internal quotation marks, and citation omitted).

{41} In their answer brief, Plaintiffs present various instances in which Defendants have made certain representations to this Court with the purported knowledge that such representations were not accurate. However, although we ultimately agree with Plaintiffs that the district court did not err in deciding that Plaintiffs established an easement by prescription, we do not find Defendants' position to be solely a result of "frivolous or vexatious litigation." *Id.*; *cf. Perez v. Gallegos*, 1974-NMSC-102, ¶ 8, 87 N.M. 161, 530 P.2d 1155 (noting that just because the appeal lacked merit did not necessarily mean that appeal was taken or pursued in bad faith solely for purposes of delay and harassment entitling the plaintiff to attorney fees). We therefore decline to award Plaintiffs attorney fees resulting from this appeal.

III. CONCLUSION

{42} Concluding that the present case is not precluded by collateral estoppel or res judicata, we affirm the district court's judgment in favor of Plaintiffs and against Defendants.

{43} IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:
LINDA M. VANZI, Judge
TIMOTHY L. GARCIA, Judge

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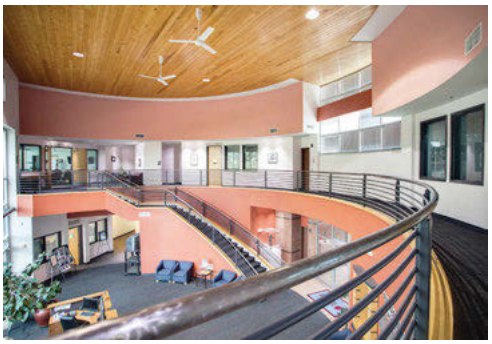

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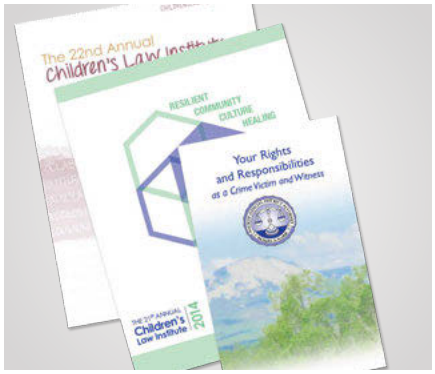

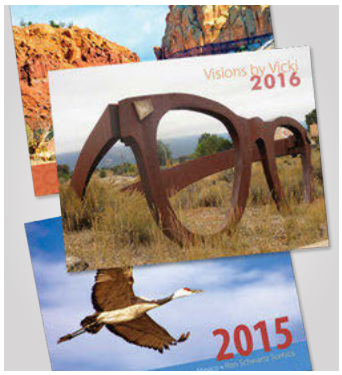

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