BAR BULLETIN
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"Cheyenne" Pinto Mare of Sand Wash Basin, Colo., by Melody Perez (see page 3) Running Horses Studio, Las Vegas, N.M.

Inside This Issue

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Common Legal Issues for Senior Citizens Workshop:
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28
Common Legal Issues for Senior Citizens Workshop:
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Noon–1 p.m., POA AHCD clinic,
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1-800-876-6657

About the Cover Image: *"Cheyenne" Pinto Mare of Sand Wash Basin, Colo.*
Melody Perez has traveled the west extensively studying and documenting the wild Mustang in their natural habitat. She presents their spirit and wild beauty in oil and watercolors, using and the creative arts to bring awareness to the public of the importance of their preservation as a living symbol of our American western heritage. View the full fine art collection at www.runninghorses.org

Notices

Court News

Supreme Court of New Mexico

Publication for Comment of Recently Approved Amendments

The Supreme Court recently approved new and amended rules on a provisional basis, with a retroactive effective date of May 18, 2016, to coincide with the effective date of related, recently enacted statutory changes. See Rules 1-079, 1-131 (new), 5-123, 5-615 (new), 10-166, and 10-171 (new) NMRA and new Forms 4-940, 9-515, and 10-604 NMRA; see also 2016 N.M. Laws, ch. 10, § 2 (H.B. 336, 52nd Leg., 2nd Sess.). The Court seeks public comment before deciding whether to revise or approve the provisional rule changes on a non-provisional basis. To view the amendments in their entirety and instructions for submitting comments, refer to the July 6 *Bar Bulletin* (Vol. 55, No. 27) or visit the Supreme Court's website. The comment deadline is Aug. 5.

New Mexico Board of Legal Specialization

Comments Solicited

The following attorney is applying for certification as a specialist in the area of law identified. Application is made under the New Mexico Board of Legal Specialization, Rules 19-101 through 19-312 NMRA, which provide that the names of those seeking to qualify shall be released for publication. Further, attorneys and others are encouraged to comment upon any of the applicant's qualifications within 30 days after the publication of this notice. Address comments to New Mexico Board of Legal Specialization, PO Box 93070, Albuquerque, NM 87199.

Workers' Compensation Law
Veronica Dorato

Fifth Judicial District Court

Notice of Mass Reassignment

Gov. Susana Martinez has appointed Dustin K. Hunter to fill the judicial vacancy in Chaves County, Division X. Effective June 29, a mass reassignment of cases will occur pursuant to NMSC Rule 23-109. Judge Hunter will be assigned all cases previously assigned to Judge Steven L. Bell, Division X. Pursuant to Supreme Court Rule 1-088.1, parties who have not yet exercised a peremptory excusal will have 10 days from July 27 to excuse Judge Hunter.

Professionalism Tip

With respect to the courts and other tribunals:
In civil matters, I will stipulate to facts when there is no genuine dispute.

U.S. Court of Appeals for the Tenth Circuit

Notice of Bankruptcy Judge Vacancy, District of Colorado

The U.S. Court of Appeals for the Tenth Circuit seeks applications for a bankruptcy judgeship in the District of Colorado. Bankruptcy judges are appointed to 14-year terms pursuant to 28 U.S.C. §152. The position is located in Denver, Colorado and will be available January 4, 2017, pending successful completion of a background investigation. The current annual salary is $186,852. For qualification requirements and other details about the vacancy, visit www.ca10.uscourts.gov > About the Court > Employment or call 303-844-2067. To be considered, applications must be received by Aug. 15.

State Bar News

Attorney Support Groups

- Aug. 1, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (group meets the first Monday of the month.)
- Aug. 8, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (group meets on the second Monday of the month). Teleconference participation is now available. Dial 1-866-640-4044 and enter code 7976003#.
- Aug. 15, 7:30 a.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (group meets the third Monday of the month.)

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

Animal Law Section

July Animal Talk Series

From noon-1 p.m., July 22, the Animal Law Section will present "Service Animals: The People Helped, the Controversies and the Working Animals" at the State Bar Center. Individuals with disabilities can use service animals and emotional support animals for a number of reasons and this presentation will provide an overview of how major Federal civil rights govern the rights of persons requiring a service animal. The Animal Talk will also explore other social concerns and animal rights perspectives regarding the use of service animals and discuss various controversies surrounding this issue, including fraudulent use of service animal IDs on untrained animals and the potential exploitation of animals. To attend, R.S.V.P. to Breanna Henley at bhenley@nmbar.org.

Appellate Practice Section

Appellate Pro Bono Program

The Appellate Practice Section has launched an appellate pro bono program that will match volunteer attorneys with qualifying pro se litigants in appeals assigned to the Court of Appeals general calendar. The Volunteer Attorney Program of New Mexico Legal Aid will manage the process of assembling a panel of volunteer lawyers and matching lawyers with specific cases. Those interested in learning about and possibly accepting appellate pro bono opportunities should join the volunteer lawyer panel by contacting VAP Director, Dina Afek, at dinaa@nmlegalaid.org or 505-814-6719. For additional information, contact Section Chair Edward Ricco at ericco@rodey.com or 505-768-7314.

Board of Bar Commissioners

Commissioner Vacancy on the Sixth Bar Commissioner District

A vacancy was created in the Sixth Bar Commissioner District (representing Chaves, Eddy, Lea, Lincoln and Otero counties) due to Dustin K. Hunter's appointment to the bench. The Board will make the appointment at the Aug. 18 meeting to fill the vacancy until the next regular election of Commissioners. The term will run through Dec. 31, 2016. Active status members with a principal place of practice located in the Sixth Bar Commissioner District are eligible to apply. Applicants should plan to attend the 2016 Board meetings scheduled for Sept. 30 (Albuquerque) and Dec. 14 (Santa Fe). Members interested in serving on the Board should submit a letter of interest and resume to Executive Director Joe Conte at jconte@nmbar.org by Aug. 8.

Young Lawyers Division

Pro Bono Filmmakers' Clinic

New Mexico Lawyers for the Arts and City of Albuquerque Film Office seek

volunteer attorneys for the NM Lawyers for the Arts Pro Bono Filmmakers' Clinic from 10 a.m.–2 p.m. (or any portion thereof), Aug. 13. at Hotel Andaluz in Albuquerque. Continental Breakfast will be provided. Volunteer attorneys are needed for assistance in the following areas: entertainment, contracts, business law, employment matters, tax law, estate planning, IP law. For more information and to participate, contact Jose J. Garcia at josejgarcia_esq@lawyer.com. The Young Lawyers Division and Intellectual Property Law Section are co-sponsors of this clinic.

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

Other Bars

ABA Women Rainmakers

Essential Tips for Success in ADR

Join the ABA Women Rainmakers on Aug. 10 for an event as part of the Wednesday Rainmaking Webinar Series: Ten Essential Tips for Success in ADR to Build Your Practice. Attracting and keeping clients today requires that litigators and business lawyers have the expertise for effectively resolving their clients' disputes through litigation alternatives. Learn essential tips from three experienced arbitrators and mediators for drafting effective ADR clauses and positioning clients to be successful in arbitration, mediation, and hybrid forms of ADR. These tips are designed to give you an added advantage in building your book of business. To register, visit https://attendee.gotowebinar.com/register/8848355383759099906.

Federal Bar Association, New Mexico Chapter

Annual Meeting in Santa Fe

The New Mexico Chapter of the Federal Bar Association will hold its annual meeting at 9:45 a.m., Aug. 19, at the Buffalo Thunder Resort & Casino during the State Bar Annual Meeting—Bench & Bar Conference. The meeting will include election of officers for 2016–2017, a treasurer's report, changes to chapter bylaws and an outline of proposed activities for the upcoming year. All current and prospective FBA members are urged to attend.

New Mexico Criminal Defense Lawyers Association

Digital Evidence and the Fourth Amendment

Join the New Mexico Criminal Defense Lawyers Association for a CLE "I Always Feel Like Somebody's Watching Me, and I Have No Privacy: Digital Evidence and the Fourth Amendment" (6.7 G) on Aug. 26 in Las Cruces. Topics include: cell phone forensics, caselaw update on the fourth amendment and technology, child porn discovery and forensics and more. After the CLE, NMCDLA members and their friends and families are invited to the annual membership party and auction. Visit www.nmcdla.org to join NMCDLA and register for the seminar.

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.

Oliver Seth American Inn of Court

Meetings Begin in September

The Oliver Seth American Inn of Court meets on the third Wednesday of the month from September until May. Meetings address a pertinent topic and conclude with dinner. Those who reside and/or practice in Northern New Mexico and want to enhance skills and meet some good lawyers should send a letter of interest to the Honorable Paul J. Kelly Jr., U.S Court of Appeals—Tenth Circuit, PO Box 10113, Santa Fe, NM 87504-6113.

Featured

Member Benefit

Ethics Assistance

Contact the ethics helpline at 800-326-8155 for immediate assistance or for a written response to an ethics inquiry regarding one's own conduct. Send original questions to the Ethics Advisory Committee in care of rspinello@nmbar.org.

New Mexico Lawyers and Judges Assistance Program

Help and support are only a phone call away.

24-Hour Helpline

Attorneys/Law Students

505-228-1948 • 800-860-4914

Judges

888-502-1289

www.nmbar.org/JLAP

Submit announcements

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

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 July 8, 2016

Published Opinions

No. 33280	1st Jud Dist Santa Fe CR-12-2, STATE v S MAXWELL (affirm in part, reverse in part)	7/5/2016
No. 33639	5th Jud Dist Chaves CR-11-368, STATE v J MONAFO (reverse and remand)	7/5/2016
No. 33279	1st Jud Dist Santa Fe CR-12-3, STATE v M MAXWELL (affirm in part, reverse in part)	7/5/2016
No. 33875	2nd Jud Dist Bernalillo LR-12-079, STATE v C HALL (reverse and remand)	7/7/2016
No. 34908	2nd Jud Dist Bernalillo JQ-13-25, CYFD v. KEON H. (reverse)	7/7/2016

Unpublished Opinions

No. 34287	1st Jud Dist Santa Fe CV-11-3850, D OBRIEN v D MONTOYA (reverse and remand)	7/5/2016
No. 35093	2nd Jud Dist Bernalillo DM-13-2866, L POLLACK v G POLLACK (affirm)	7/6/2016
No. 35446	2nd Jud Dist Bernalillo CV-15-3239, CITY OF ALB v 1996 DODGE P/U	7/7/2016

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

Justice for Families Project
VOLUNTEER SPOTLIGHT

By Kasey Daniel, Project Coordinator, Justice for Families Project, kaseyd@nmlegalaid.org

Shona Zimmerman

Shona Zimmerman accepted a pro bono divorce case being tried in a small, rural town over 200 miles from Albuquerque. The client, let's call her Maria, is a victim of domestic violence. She filed for an order of protection, even though there was a huge power differential between the client and the DV perpetrator. I interviewed the client.

KD: *What effect has it had in your life to have a lawyer representing you in your divorce?*

MARIA: Ms. Zimmerman had an impact in our life not only as an attorney but as a great person with ethics and compassion for someone like me and my son. I was in desperate need of legal representation in an unexpected divorce case. As a consequence for filing an order of protection against my son's father, I was asked by my previous employer to resign because my son's father was associated with my employer. Then a week later, I was served with a petition for dissolution of marriage, and my Christmas and New Year holidays were the saddest season for me and my son.

Now, after seven months, I feel stronger than ever. I had the pleasure to meet Ms. Zimmerman in person for a hearing, when she traveled over 200 miles and spent two days in the town I live in. Ms. Zimmerman has not stopped fighting for my legal rights, and I am grateful and blessed to have all your assistance. I can't find words to say how fortunate and thankful I am to have Ms. Zimmerman as my attorney.

I also asked Zimmerman a couple of questions:

KD: *Tell us a little about you and your law practice.*
SZ: I've been a lawyer since 2009. I currently do defense work at Ray, McChristian and Jeans, PC. My practice includes personal injury, employment law, and uninsured motorist and bad faith work. Before attending law school, I was a licensed independent social worker. I received my MSW in 1993 from Tulane University and spent five years working for the New Mexico CYFD before attending law school at UNM.
KD: *Why do you do pro bono instead of just making a donation*?
SZ: I do pro bono work because it is important and rewarding, all individuals deserve competent legal representation, it helps our community and it is a way for me to give back to the community, and I am fortunate to work for a firm that supports its attorneys doing pro bono work. Doing pro bono work, particularly in the family law arena, also gives me valuable courtroom experience.

Volunteer Attorney Program
A Program of New Mexico Legal Aid
Justice for Families Project

LSC | America's Partner for Equal Justice
LEGAL SERVICES CORPORATION

www.nmjusticeforfamilies.org

PAW Court
Addresses Animal Abuse

By Leigh Anne Chavez

Leigh Anne Chavez wrote "Evidentiary Issues in Animal Abuse Cases" as part of the May 2016 *New Mexico Lawyer* "Red in Tooth & Claw: Issues in Animal Law." After publication, Chavez became aware of some updates to the Pre-Adjudication Animal Welfare Court and wrote this article as a follow up. To read the Evidentiary Issues article in full, visit www.nmbar.org/NewMexicoLawyer.

Albuquerque's newest specialty court receives misdemeanor animal abuse cases, but the ultimate goal is community safety.

The Pre-Adjudication Animal Welfare Court (PAW Court) launched on May 1, 2016, is in Metropolitan Court Judge Rosemary Cosgrove-Aguilar's courtroom. PAW Court is modeled after a highly successful similar effort in Tucson, and is the second of its kind in the country.

PAW Court is for those charged with animal abuse offenses, in order to address the recognized link between animal abuse and domestic violence. Defendants in PAW Court are given the option of surrendering their pets and entering counseling for the behavior instead of sitting in jail.

Attorneys Laura Castille and Amber Macias-Mayo see the results of more than two years of research that began as a law school project in Professor Marsha Baum's Animal Law Writing seminar at the UNM School of Law. In their review of the nearly 40,000 animal control complaints in Albuquerque in 2014, they discovered that many calls reported as an "aggressive dog at large" revealed dog owners with prior convictions for crimes such as assault, aggravated DWI, child abuse, and the like. Their review also revealed that all of these cases were dismissed. Castille and Macias-Mayo argued that crimes against animals can be addressed through the holistic approach of a specialty court such as Tucson's. This argument came to fruition with the creation of the PAW Court.

With the establishment of the PAW Court, animal abuse cases that are not prosecuted as felonies are referred, and the defendants can be diverted to therapy and treatment with a team approach. The goal is to create a safer community for everyone. As the PAW Court progresses, next steps include improved identification of potential cases for PAW Court, and to integrate animal abuse treatment modalities into Children's Court. Meanwhile, individuals charged with animal abuse have the chance to receive therapy, and abused animals have the chance for a better home.

Legal Education

July

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

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

26 **I Always Feel Like Somebody's Watching Me, And I Have No Privacy: Digital Evidence and the 4th Amendment**
6.7 G
Live Seminar, Las Cruces
New Mexico Criminal Defense Lawyers Association
www.nmcdla.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

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.*

September

15 **Workers' Compensation Law and Practice Seminar**
5.6 G, 1.0 EP
Live Seminar, Santa Fe
Sterling Education Services
www.sterlingeducation.com

16 **27th Annual Appellate Practice Institute**
6.4 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
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 **2016 Tax Symposium**
6.0 G, 1.0 EP
Webcast/Live Seminar, 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

October

3 **Mastering Microsoft Word in the Law Office**
7.0 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

4 **Indemnification Provisions in Contracts**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

5 **Managing Employee Leave**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

Writs of Certiorari

As Updated by the Clerk of the New Mexico Supreme Court

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

Effective 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
No. 35,661	Benjamin v. State	12-501	12/16/15
No. 35,654	Dimas v. Wrigley	12-501	12/11/15
No. 35,635	Robles v. State	12-501	12/10/15
No. 35,674	Bledsoe v. Martinez	12-501	12/09/15
No. 35,653	Pallares v. Martinez	12-501	12/09/15
No. 35,637	Lopez v. Frawner	12-501	12/07/15
No. 35,268	Saiz v. State	12-501	12/01/15
No. 35,522	Denham v. State	12-501	09/21/15
No. 35,495	Stengel v. Roark	12-501	08/21/15
No. 35,479	Johnson v. Hatch	12-501	08/17/15
No. 35,474	State v. Ross	COA 33,966	08/17/15
No. 35,466	Garcia v. Wrigley	12-501	08/06/15
No. 35,422	State v. Johnson	12-501	07/17/15
No. 35,372	Martinez v. State	12-501	06/22/15
No. 35,370	Chavez v. Hatch	12-501	06/15/15
No. 35,353	Collins v. Garrett	COA 34,368	06/12/15
No. 35,335	Chavez v. Hatch	12-501	06/03/15
No. 35,371	Pierce v. Nance	12-501	05/22/15
No. 35,266	Guy v. N.M. Dept. of Corrections	12-501	04/30/15
No. 35,261	Trujillo v. Hickson	12-501	04/23/15
No. 35,097	Marrah v. Swisstack	12-501	01/26/15
No. 35,099	Keller v. Horton	12-501	12/11/14
No. 34,937	Pittman v. N.M. Corrections Dept.	12-501	10/20/14
No. 34,932	Gonzales v. Sanchez	12-501	10/16/14
No. 34,907	Cantone v. Franco	12-501	09/11/14
No. 34,680	Wing v. Janecka	12-501	07/14/14
No. 34,775	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

Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

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

Effective July 20, 2016

Pending Proposed Rule Changes Open for Comment:

		Comment Deadline
Rule 1-079	Public inspection and sealing of court records	08/05/16
Rule 1-131	Notice of federal restriction on right to possess or receive a firearm or ammunition	08/05/16
Form 4-940	Notice of federal restriction on right to possess or receive a firearm or ammunition	08/05/16
Rule 5-123	Public inspection and sealing of court records	08/05/16
Rule 5-615	Notice of federal restriction on right to receive or possess a firearm or ammunition	08/05/16
Form 9-515	Notice of federal restriction on right to possess or receive a firearm or ammunition	08/05/16
Rule 10-166	Public inspection and sealing of court records	08/05/16
Rule 10-171	Notice of federal restriction on right to receive or possess a firearm or ammunition	08/05/16
Form 10-604	Notice of federal restriction on right to possess or receive a firearm or ammunition	08/05/16

Recently Approved Rule Changes Since Release of 2016 NMRA:

		Effective Date
Rules of Civil Procedure for the District Courts		
Rule 1-079	Public inspection and sealing of court records	05/18/16
Rule 1-131	Notice of federal restriction on right to possess or receive a firearm or ammunition	05/18/16
Civil Forms		
Form 4-940	Notice of federal restriction on right to possess or receive a firearm or ammunition	05/18/16
Rules of Criminal Procedure for the District Courts		
Rule 5-123	Public inspection and sealing of court records	05/18/16
Rule 5-615	Notice of federal restriction on right to receive or possess a firearm or ammunition	05/18/16
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
Criminal Forms		
Form 9-515	Notice of federal restriction on right to possess or receive a firearm or ammunition	05/18/16
Children's Court Rules and Forms		
Rule 10-166	Public inspection and sealing of court records	05/18/16
Rule 10-171	Notice of federal restriction on right to receive or possess a firearm or ammunition	05/18/16
Form 10-604	Notice of federal restriction on right to possess or receive a firearm or ammunition	05/18/16
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, April 14, 2016, No. S-1-SC-35777

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-035

No. 33,704 (filed December 9, 2015)

SANTA FE WATER RESOURCE ALLIANCE, LLC,
Applicant/Appellant-Appellee,
v.
JOHN D'ANTONIO, NEW MEXICO STATE ENGINEER,
Appellee/Appellant.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
FRANCIS J. MATHEW, District Judge

TANYA L. SCOTT
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Santa Fe, New Mexico
for Appellee-Appellant

Opinion

J. Miles Hanisee, Judge

{1} Applicant Santa Fe Water Resource Alliance, LLC petitioned the State Engineer (the Engineer) to change the point of diversion for a declared water right from farmland in Socorro County to a point north of the City of Santa Fe and for a change of use from agricultural to municipal. The Engineer granted the application but for much less water than Applicant argued it was entitled to under the declared right. Applicant appealed to the district court, and after extensive litigation, prevailed in all respects. Applicant moved the district court to tax its costs against the Engineer, and the district court granted Applicant's motion. The Engineer appeals the district court's order taxing costs, arguing that (1) the district court had no statutory authority to tax Applicant's costs against the Engineer; and (2) even if the district court had such authority, it abused its discretion in awarding costs in this case.

BACKGROUND

{2} In 1999, Augustine and Arlene Wagner (the Wagners) filed a declaration of ownership of a pre-1907 water right. *See* NMSA 1978, § 72-1-3 (1961) ("Any person, firm or corporation claiming to be an owner of a water right which was vested prior to the passage of Chapter 49, Laws 1907, . . . may make and file in the office of the state engineer a declaration . . . setting forth the beneficial use to which said water has been applied, the date of first application to beneficial use, the continuity thereof, the location of the source of said water and if such water has been used for irrigation purposes, the description of the land upon which such water has been so used and the name of the owner thereof."). In 2001, the Engineer issued to the Wagners a permit to draw the amount of their declared right from a supplemental well for irrigation uses.

{3} Applicant purchased the Wagners' water rights and petitioned the Engineer to change the point of diversion of the Wagners' declared right from the Wagners' land in Socorro to a point north of Santa Fe. *See* NMSA 1978, § 72-5-24 (1985) (stating that "[a]n appropriator of water may, with the approval of the state engineer, . . . change the place of diversion, storage or use in the manner and under the conditions prescribed" for applications to appropriate water); *see also* Laura Paskus, *Death by a Thousand Cuts: Will Santa Fe's Campaign to Buy Up Water Rights Kill the Rio Grande?*, Santa Fe Reporter, June 27, 2012, *available at* http://www.sfreporter.com/santafe/article-6807-death-by-a-thousand-cuts.html (last visited October 13, 2015) (discussing the potential environmental impact of Santa Fe's policy of purchasing declared water rights in the Middle Rio Grande Valley to satisfy growing municipal demand)). Applicant also sought to change the approved use of the Wagners' right from agricultural to municipal.

{4} The Engineer designated a hearing examiner, *see* NMSA 1978, § 72-2-12 (1965), who held a two-day hearing to take evidence and address various objections to Applicant's petition. The main issue at the hearing was the validity of the Wagners' claimed right. The hearing examiner rejected Applicant's contentions that the Wagners held a right to 292.005 acre-feet per annum of water, and instead found that Applicant had only demonstrated that the Wagners held a right to 61.236 acre-feet per annum. Accordingly, the hearing examiner held that Applicant was entitled to change the point of diversion for that quantity of water, and no more.

{5} Applicant appealed the Engineer's decision to the district court. *See* NMSA 1978, § 72-7-1(A) (1971) ("Any applicant or other party dissatisfied with any decision, act or refusal to act of the state engineer may appeal to the district court of the county in which the work or point of desired appropriation is situated."). The district court held a bench trial in June 2013, and afterward the court issued its own detailed findings of fact and conclusions of law reversing the hearing examiner's decision and granting Applicant's petition in whole.

{6} Afterward, Applicant submitted a bill of costs to the clerk of the district court. *See* Rule 1-054(D)(1) NMRA ("Except when express provision therefor is made either in a statute or in these rules, costs, other than attorney fees, shall be allowed to the prevailing party unless the court otherwise directs[.]"). The Engineer filed objections to Applicant's bill of costs. *See* Rule 1-054(D)(4) (setting out the procedure for the prevailing party to move to tax costs and for the non-prevailing party to object to a bill of costs). The district court overruled the Engineer's objections and taxed Applicant's costs against the Engineer. The Engineer appealed the district court's order taxing costs.

DISCUSSION

Section 72-7-1(D) Gives District Courts the Authority to Tax Costs Against the Engineer

{7} The Engineer argues that the water code does not allow district courts to tax costs against the Engineer when a party appeals a decision it makes to the district court and wins. The Engineer's argument is as follows: under Rule 1-054(D), "costs against the state, its officers and agencies shall be imposed only to the extent permitted by law." The Engineer contends that because Section 72-7-1(D), which governs the taxation of costs in appeals from the Engineer's office to the district court, makes no express provision for the taxation of costs against the Engineer, Rule 1-054(D) bars district courts from awarding costs to prevailing appellants.

{8} As an initial matter, Applicant maintains we should decline to address this argument because the Engineer failed to raise it with the district court. We agree that the issue was not preserved, meaning also that the district court did not have an opportunity to rule on it. *See* Rule 12-216(A) NMRA ("To preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked[.]")

{9} Despite the Engineer's failure to preserve the issue, we will address the Engineer's argument because it raises a question of general public importance. *See* Rule 12-216(B)(1). "[W]e have invoked the general public interest exception to the preservation rule where review of the appellate issue is likely to settle a question of law affecting the public at large or a great number of cases and litigants in the near future." *Azar v. Prudential Ins. Co. of Am.*, 2003-NMCA-062, ¶ 28, 133 N.M. 669, 68 P.3d 909 (citing cases). In this case, whether costs may be taxed against the Engineer is a pure question of law that will apply (barring legislative intervention) to every appeal of the Engineer's decisions to district court. Moreover, the issue has been raised and briefed before the district court in other pending appeals from the Engineer's office. Accordingly, we address the merits of the issue raised by the Engineer for the first time on appeal.

{10} "Our primary task in construing statutory language is to effect legislative intent." *Benny v. Moberg Welding*, 2007-NMCA-124, ¶ 5, 142 N.M. 501, 167 P.3d 949.

> We start with the language [of the statute] itself, giving effect to its plain meaning where appropriate while being careful not to be misled by simplicity of language when the other portions of a statute call its meaning into question, or the language of a section of an act conflicts with an overall legislative purpose.

Id. (internal quotation marks and citations omitted).

{11} We begin with the text of Section 72-7-1(A), (D), which states that in an appeal to a district court from a "decision, act or refusal to act of the state engineer . . . [c]osts shall be taxed in the same manner as in cases brought in the district court and bond for costs may be required upon proper application." *Id.* Section 72-7-1(D) gives district courts the ability to tax costs, but it does not allow or prohibit the taxation of costs against the state or the Engineer. Rather, it incorporates by reference the "manner" that costs are taxed in district courts generally.

{12} Our Supreme Court considered an analogous question of statutory construction in *In re Heiman's Will*, 1931-NMSC-041, 35 N.M. 522, 2 P.2d 982. In that case, a probate court sustained the appellees' claims against an estate, a ruling that the executor appealed to the district court. *Id.* ¶ 1. The district court dismissed the appeal on two grounds: "(1) [the executor's f]ailure to issue and serve citation on the claimants; [and] (2) the failure to file with the clerk of the probate court written directions as to papers and records to be transmitted to the district court, pursuant to the provisions of [C]hapter 99, Sess. Laws 1915, 1929 Comp. §§ 34-420 and 34-421." *In re Heiman's Will*, 1931-NMSC-041, ¶ 5.

{13} The appellant did not challenge the district court's conclusion that it had failed to comply with Sections 34-420 and 34-421. Instead, the appellant cited 1929 Comp. § 34-419, a section of the Kearny Code predating Sections 34-420 and 34-421, which stated that "[a]ppeals from the judgment of the probate court shall be allowed to the district court in the same manner, and subject to the same restriction as in case of appeals from the district to the [S]upreme [C]ourt." *In re Heiman's Will*, 1931-NMSC-041, ¶ 8 (internal quotation marks and citation omitted).Our Supreme Court held that the district court's dismissal of the appeal was improper because it did not follow the Supreme Court's rules of appellate procedure, to the extent that those rules did not conflict with the express terms of the statutes governing appeals from probate courts. *Id.* ¶¶ 12-15.

{14} The *Heiman's Will* Court adopted the following rule: when a statute incorporates by reference the "law generally which governs a particular subject[,]" courts must read the statute to incorporate "the law as it exists from time to time or at the time the exigency arises to which the law is to be applied" to the extent that it does not conflict with the express terms of other statutes governing the subject. *Id.* ¶¶ 9-10 (internal quotation marks and citation omitted). Since a Supreme Court rule requiring the Court to find prejudice to the moving party in order to justify granting a motion to dismiss an appeal on non-jurisdictional grounds was in effect at the time the petition for leave to appeal the probate court's order was filed, our Supreme Court held that the district court erred in granting the appellees' motion to dismiss without making any findings as to prejudice. *Id.* ¶¶ 12-13.

{15} In order to resolve the meaning of the phrase "manner as in cases brought in the district court" in Section 72-7-1(D), then, *Heiman's Will* counsels us to consult statutes and other relevant court rules that would apply to cases brought in district court at the time an appeal is made. NMSA 1978, Section 39-3-30 (1966) and Rule 1-054 govern the taxation of costs in district court. Section 39-3-30 provides in relevant part: "In all civil actions or proceedings of any kind, the party prevailing shall recover his costs against the other party unless the court orders otherwise for good cause shown." But Rule 1-054(D)(1) provides:

> Except when express provision therefor is made either in a statute or in these rules, costs, other than attorney fees, shall be allowed to the prevailing party unless the court otherwise directs; but costs against the state, its officers and agencies shall be imposed only to the extent permitted by law.

{16} In *Kirby v. New Mexico State Highway Department*, 1982-NMCA-014, 97 N.M. 692, 643 P.2d 256, the state appealed the district court's award of costs to the plaintiff, who prevailed against the state on claims arising under the Tort Claims Act, NMSA 1978, Section 41-4-1 to -30 (1976, as amended through 2015). *Kirby*, 1982-NMCA-014, ¶ 1. In *Kirby*, the state made an argument indistinguishable from the one the Engineer makes here: Since neither the Tort Claims Act nor

Section 39-3-30 made express provision for the taxation of costs against the state, Rule 1-054(D) precludes an award of costs to the party prevailing against the state in a civil action. *Kirby*, 1982-NMCA-014, ¶ 20.

{17} This Court rejected the state's argument in *Kirby* and read Section 39-3-30 to allow district courts to tax a prevailing party's costs against the State. First, we noted that Section 39-3-30

> originated in the Kearny Code of 1846 under the division entitled Costs, § 1. It was subsequently codified in C.L. 1865, ch. 45, § 1, and recodified, amended, compiled and recompiled over the intervening years until omitted by the compilers of the 1943 compilation of the New Mexico statutes because they felt it had been superseded by Supreme Court Rule 54(d) (now R.C.P. 54(d), N.M.S.A.1978). In Laws 1966, ch. 28, § 58, the section was amended and recompiled . . . . In expressly reinstating this statute and overriding the compiler's assumption that Rule 54(d) (first adopted in its present form, effective August 1, 1942, pursuant to Supreme Court order of March 20, 1942) was "deemed to supersede" the forerunners of [Section] 21-10-27, the [L]egislature gave express authority, without exception, to recovery of costs against any losing party.

Kirby, 1982-NMCA-014, ¶ 21. We went on to hold that even though the Tort Claims Act makes no express provision for the taxation of costs against the State,

> we are not impressed that the [L]egislature's silence, in that Act, is indicative of its intent to deny a successful complainant the recovery of his costs in a [t]ort [c]laims suit. In our view, the [L]egislature as easily could have expressed such a limitation, if it intended to do so, as it did in providing in the [T]ort Claims Act that no exemplary or punitive damages, or interest prior to judgment, could be included in any award. We must assume that the [L]egislature was aware of existing statutory and common law, including Rule 54(d), *supra*, and [Section] 39-3-30, when the Tort Claims Act was passed. We must also assume that the 1966 [L]egislature was familiar with the compiler's annotation to Rule 54(d) when it deliberately returned [Section] 39-3-30 (then § 21-10-27, 1953 Comp.) to the statute books. Section 39-3-30 provides the statutory basis upon which Rule 54's reference to costs against the [s]tate may be allowed. The trial court's order in that respect was not error.

Kirby, 1982-NMCA-014, ¶¶ 22-23 (citations omitted).

{18} Taken together, *Heiman's Will* and *Kirby* provide the framework for understanding the plain meaning of Section 72-7-1(D). First, under *Heiman's Will*, Section 72-7-1(D)'s incorporation of the law that generally governs cost awards in district courts requires us to apply the law governing costs in "cases brought in the district court," including Section 39-3-30. Section 72-7-1(D). Second, *Kirby* recognizes that under Rule 1-054(D) NMRA, some express provision of law must authorize the taxation of costs against the state. Because the Legislature was aware of Rule 1-054 when it passed Section 39-3-30, *Kirby* concluded that the phrase "the part[y] prevailing shall recover his costs against the other party" includes the state by its plain terms. *Kirby*, 1982-NMCA-014, ¶ 21 (internal quotation marks and citation omitted). Applying *Heiman's Will* and *Kirby* to this case, the plain meaning of Section 72-7-1(D) allows district courts to tax costs in the same way and against anyone subject to a cost award in "cases brought in the district court." Section 72-7-1(D). And since state entities are subject to cost awards in such cases under *Kirby*, Sections 72-7-1(D) and 39-3-30 allowed the district court to tax Applicant's costs against the Engineer in this case.

{19} The Engineer argues that our interpretation of the plain meaning of Section 72-7-1 cannot be squared with our Supreme Court's statement in *Lion's Gate Water v. D'Antonio*, 2009-NMSC-057, 147 N.M. 523, 226 P.3d 622 that Section 72-7-1 did not "give the judiciary de facto original jurisdiction over water rights applications." *Lion's Gate*, 2009-NMSC-057, ¶ 30. The Engineer concludes that since Section 72-7-1 does not give district courts original jurisdiction over water rights applications, an appeal from the Engineer's decision is not a "civil action[] or proceeding[] of any kind" under Section 39-3-30, but instead a special proceeding to enforce statutory rights.

{20} Even if we assume that in *Lion's Gate* our Supreme Court intended the phrase "de facto original jurisdiction" to mean "actual original jurisdiction," the Engineer's argument depends on an additional premise: that any proceeding that is not within the district court's original jurisdiction is not a "civil action[] or proceeding[] of any kind" under Section 39-3-30. *Id.* Even if we were to assume the Engineer's contention that appeals from the Engineer's decisions are not "civil actions or proceedings of any kind" and therefore not subject to Section 39-3-30, a deeper problem remains: if Section 39-3-30 does not apply to appeals of the Engineer's decisions because they are special statutory proceedings and not "civil actions or proceedings of any kind," how are we to interpret Section 72-7-1(D)'s reference to "the . . . manner [costs are taxed] in cases *brought* in the district court?" (Emphasis added.) In short, the Engineer's argument renders the text of Section 72-7-1(D) superfluous. *See Consol. Freightways, Inc. v. Subsequent Injury Fund*, 1990-NMCA-058, ¶ 15, 110 N.M. 201, 793 P.2d 1354 ("Courts assume that the [L]egislature will not enact useless statutes or amendments.").

{21} To be sure, other elements of Section 72-7-1 appear to be in tension with our reading of Section 72-7-1(D). Section 72-7-1(B) states that if an appeal is not taken, the Engineer's decision "is conclusive." And Section 72-7-1(E) refers to "[e]vidence taken in a hearing before the state engineer." Taken together, Sections 72-7-1(B) and (E) suggest that the Engineer acts in the capacity of an adjudicator in deciding an application to change the point of diversion of a water right, and our rules of procedure do not contemplate the taxation of costs against a lower court when it is reversed on appeal. The Engineer contends that it would make no sense to allow the taxation of costs against the Engineer when the water code does not allow the Engineer to appeal his own decisions; in every case, the applicant initiates the Engineer's review of a given water right and appeals the Engineer's decision to the district court if the applicant is dissatisfied with the Engineer's review.

{22} Whatever tension our reading of Section 72-7-1(D) has with other provisions of the water code stems not from our understanding of the plain meaning of Section 72-7-1(D), but from the tension between the multiple, at times conflicting, responsibilities the water code imposes on the Engineer. As our Supreme Court noted

in *Plummer v. Johnson*, 1956-NMSC-077, 61 N.M. 423, 301 P.2d 529, the Engineer is a "necessary, or at least a proper, party" to appeals from proceedings in his office, who must defend his own decision in the district court. *Id.* ¶ 8 (internal quotation marks and citation omitted). Thus, unlike an administrative adjudicator or trial court, which does not normally advocate on behalf of its judgment when it is appealed, the Legislature has tasked the Engineer with "general supervision of waters of the state[,]" NMSA 1978, § 72-2-1 (1982), and "adopt[ing] rules for priority administration to ensure that [his] authority is exercised" in a manner that does not interfere with adjudications of water rights, impair existing rights, or cause increased depletions of New Mexico's water supply. NMSA 1978, § 72-2-9.1(B)(1)-(3) (2003).

{23} Importantly, the water code does not require hearings on applications to appropriate water to be conducted by a neutral hearing examiner; instead, the hearing examiner acts as a proxy for the Engineer, and it is the Engineer who ultimately decides whether to grant an application to appropriate waters based on the hearing examiner's report. *See* § 72-2-12 ("The state engineer shall base his decision rendered in any matter heard by an examiner upon the record made by or under the supervision of the examiner in connection with such proceeding and the report and recommendation of the examiner; and his decision shall have the same force and effect as if said hearing had been conducted by the state engineer.").

{24} In this role, the Engineer is more akin to a private litigant who incurs his own and causes others to similarly incur costs in order to allow the district court to decide a case. Section 72-7-1(D) by its terms applies to proceedings in the district court, where the Engineer exercises his role as administrator of New Mexico's waters and must defend his judgment against attack. Since Section 72-7-1(D) relates to the Engineer's exercise of this duty, as opposed to his other duty as an adjudicator of claims, we do not think our interpretation of Section 72-7-1(D) puts it in tension with provisions of the water code relating to the Engineer's adjudication of applications concerning water rights.

{25} As the Engineer concedes, he vigorously opposed Applicant's appeal. By tasking the Engineer with both deciding claims and defending his own decision on appeal, the Legislature must have been aware that the Engineer would cause the parties against whom it litigates to incur costs and that the Engineer would incur his own costs defending his decision in the district court. By making express provision for the taxation of costs in Section 72-7-1(D), the Legislature allows parties to recoup costs incurred in correcting an erroneous decision by the Engineer; by the same token, it provides the Engineer with a means of recovering resources expended defending the correctness of his decision on appeal.

{26} The purpose of the water code's appeals process also supports our interpretation of Section 72-7-1(D). Article XVI, Section 5 of the New Mexico Constitution, which was adopted by referendum in 1967 and codified by the Legislature in Section 72-7-1(D) in 1971, was meant to overrule our Supreme Court's holding in *Kelley v. Carlsbad Irrigation Dist.*, 1963-NMSC-049, 71 N.M. 464, 379 P.2d 763, *superseded by statute as stated in Lion's Gate*, 2009-NMSC-057, ¶ 21, that the district court's review on appeal of the Engineer's decisions is deferential and limited to the evidence considered by the Engineer below. *Lion's Gate*, 2009-NMSC-057, ¶ 34. Thus, while the water code provides a comprehensive administrative scheme that limits the scope of a district court's review in crucial respects, *id.* ¶ 36, the overall intent of Article XVI, Section 5 of the State constitution and Section 72-7-1 was to make clear that the Engineer's decision is entitled to no deference whatsoever. By making express provision for the district court to take new evidence, the Legislature intended Section 72-7-1 to place the Engineer in the same position as the appellant; the Engineer must participate in the district court proceedings, challenge the appellant's evidence and argument, and even offer his own evidence and argument in defense of his decision below. Given this purpose and the Legislature's express provision for taxation of costs in the same way costs are to be taxed in civil actions, we infer a legislative intent to deter both unsupportable decisions by the Engineer and frivolous appeals by applicants in much the same way Rule 1-054 is designed to deter the bringing of frivolous claims and the imposition of meritless defenses in civil actions. Given the overall purpose of the water code's appeal provisions and the purpose of cost-shifting in civil actions, the natural import of Section 72-7-1(D) is to assign the taxation of costs against the party who loses the appeal, regardless of the party's identity.

{27} Although ancillary to our construction of Section 72-7-1(D), its legislative history additionally supports our conclusion that the district courts may tax the prevailing party's costs against the Engineer. When the Legislature first adopted a provision allowing taxation of costs by reference to the district court rule in 1907, New Mexico district courts, as federal territorial courts, were bound by federal law. *See* Organic Act of 1850 establishing the Territory of New Mexico, Ch. 49, § 17, 9 Stat. 446 (1850). At that time, the consensus in federal courts was that absent government consent, the doctrine of sovereign immunity barred the taxation of costs against the state. *See* 10 Charles A. Wright et al., Federal Practice & Procedure § 2672.1 (3d ed. 2015). This explains a provision in New Mexico territorial law explicitly allowing the taxation of costs against the territory. *See* § 3, C.L. 1884, § 541 ("In all cases in which costs are adjudged against the Territory or any county, they shall be taxed and charged the same as in other cases and no more.").

{28} Section 541 was later repealed and replaced by a provision outlawing the taxation of costs against the territorial government unless "absolutely fixed by specific law[.]" 1889 N.M. Laws, ch. 32, § 18 (repealing C.L. 1884, § 541). The language requiring costs incurred during appeals of the Engineer's decisions to be taxed in the same fashion as costs are taxed in district courts dates to 1907, when Chapter 32, Section 18 of New Mexico Laws was still in force. *See* 1907 N.M. Laws, ch. 49, § 66 ("The costs in [appeals from the board of water commissioners are] to be taxed the same as costs in cases in the district court and at the same rates and that the same shall be paid in accordance with the judgment of the board or [the] court in each case."). Thus, at the time it was adopted, the Legislature would have understood the provision allowing for the taxation of costs in water appeals to not apply to the territory itself because laws applicable at the time would have required an explicit statement subjecting the territory to the taxation of costs.

{29} But two intervening developments changed the law in ways that are important to understanding Section 72-7-1(D)'s application in this case: first, the Legislature adopted Section 39-3-30 in 1966. As *Kirby* explains, the effect of Section 39-3-30 was to supersede Rule 1-054's prohibition of the taxation of costs against state entities absent express statutory authorization. *Kirby*,

1982-NMCA-014, ¶ 21. Then, in 1971, the Legislature substantially amended and recompiled Section 72-7-1(D). As we noted in *Kirby*, when the Legislature recompiles or amends a statute, it is presumed to be aware of other relevant statutes and court holdings at the time of the recompilation or amendment. 1982-NMCA-014, ¶¶ 20-21. By leaving intact the language allowing the taxation of costs in the same manner as costs are taxed in cases brought in district court, the Legislature was presumptively aware Section 72-7-1(D)'s incorporation of the law governing costs in cases brought in district court would incorporate Section 39-3-30.

{30} We note that the Legislature is free to revise Section 72-7-1(D) in order to exempt the Engineer from taxation of costs on appeals in district court. But given our interpretation of Section 39-3-30 in *Kirby* and Section 72-7-1(D)'s broad and unqualified incorporation of the law governing taxation of costs in civil actions, we must reject the Engineer's arguments that Section 72-7-1(D) should not be construed to apply to all parties to an appeal from the Engineer's office, including the Engineer himself.

{31} In sum, the plain meaning of Section 72-7-1(D) subjects the Engineer to the taxation of costs in the same way that state entities are subject to cost awards in civil actions. We therefore conclude that the district court did not act outside its authority in taxing Applicant's costs against the Engineer.

The District Court Did Not Abuse its Discretion in Awarding Costs in This Case

{32} We review a district court's grant or denial of a motion for an award of costs for an abuse of discretion. *Pioneer Sav. & Trust, F.A. v. Rue*, 1989-NMSC-079, ¶ 12, 109 N.M. 228, 784 P.2d 415. The Engineer argues that the district court abused its discretion by taxing costs against the Engineer because it misapprehended the legal standard that applies to motions to tax costs and it rejected the Engineer's policy arguments against an award of costs in this case.

{33} The Engineer first argues that the district court abused its discretion by applying an incorrect legal standard to Applicant's motion for costs. The Engineer points to oral statements by the district court that it "appears there is a directive" in Rule 1-054 and Section 39-3-30 that required the district court to tax Applicant's costs against the Engineer. The Engineer argues that this statement indicates that the district court granted Applicant's motion for costs because it was laboring under the mistaken belief that it had no discretion to deny the motion.

> The district court's statement was as follows:
>
> In amending [Section 72-7-1], these state engineer cases . . . could come to the court as a case that might well be litigated with new evidence and new costs . . . . When I read [Section 72-7-1] and look at Rule [1-054] concerning costs . . . I'm having a hard time with the . . . Engineer's position that costs shouldn't be awarded. It appears that there is a directive to me.

{34} We disagree with the Engineer's assertion that this statement proves that the district court was laboring under an incorrect apprehension of the law. Rather, the district court was expressing its general agreement with Applicant's argument that under Section 72-7-1(D), the prevailing party is presumptively entitled to an award of costs in all appeals of the Engineer's decisions. *See In re Stailey*, 1994-NMCA-015, ¶ 21, 117 N.M. 199, 870 P.2d 161 (noting that "a presumption exists that a prevailing party normally is entitled to costs as a matter of course and liability for costs is a normal incident of defeat"). Since we have already held that Section 72-7-1(D) imports this presumption into appeals from the Engineer's office, the district court's statement was legally sound insofar as it implied that the district court is presumptively required to award the prevailing party its costs. To the extent that the district court's statement can be characterized to suggest the court was not aware that it could deny Applicant's motion for costs as a matter of discretion, we are unwilling to infer such an unawareness based solely on the court's use of the word "directive."

{35} The Engineer next argues that because the district judge who granted Applicant's motion for an award of costs (Judge Mathew) was not the same district judge who presided over the trial and entered judgment in the case (Judge Pfeffer), "[i]t would have been difficult for Judge Mathew to exercise any discretion over some of the equitable factors raised by the State Engineer in his objections to the Cost Bill." We note first that Applicant moved to recuse Judge Mathew, and the Engineer opposed Applicant's motion. Now the Engineer takes a different position altogether: Judge Mathew should have sustained the Engineer's objections to Applicant's bill of costs because he lacked familiarity with the case as a whole.

{36} But Judge Mathew's order granting Applicant's motion for costs stated that he had "considered the briefs filed by both parties and the oral arguments of both parties" before deciding to grant the motion. To the extent that the Engineer argues that a district judge has an independent obligation to evaluate the entire record of a case (as opposed to those portions pointed out in briefing by the parties) in deciding whether to tax costs, we disagree. First, we note that a district court need only give reasons for *denying* a motion for costs; otherwise there is a rebuttable presumption that costs should be awarded to the prevailing party.

{37} Second, the text and structure of Rule 1-054(D) make clear that the judge who awards costs to the prevailing party need not be intimately familiar with the proceedings before judgment. When a court enters judgment, the prevailing party submits a bill of costs to the clerk of court, not the district judge who presided over the case. Rule 1-054(D)(4). If the losing party fails to object to the prevailing party's bill of costs, then the clerk of court "*shall* tax the claimed costs which are allowable by law." *Id.* (emphasis added). Thus, Rule 1-054 tasks the clerk of court with the responsibility of determining whether a specific cost is allowed by law and then creates a presumption that those costs are to be taxed against the losing party. A district judge only becomes involved when the losing party files objections to the prevailing party's bill of costs. *Id.* Thus, under Rule 1-054, it is the losing party's responsibility to identify aspects of the record and any other considerations that would justify disallowing costs; given the presumption in favor of awarding costs, it would make little sense to adopt the Engineer's argument that a district judge should consider the propriety of a cost award even without objections from the losing party.

{38} The Engineer next argues that the district judge's decision to tax costs against the Engineer was an abuse of discretion in light of the equities impacting this case. The Engineer argues that in opposing Applicant's claim, the Engineer was merely "act[ing] within the statutory mandate of the Water Code" by "tak[ing] reasonable and appropriate action to protect and administer the water laws of New Mexico."

The Engineer also argues that awarding costs in this case will cause the Engineer to change its standing practice of refusing to seek an award of costs when it prevails in appeals to district court.

{39} The district court did not abuse its discretion in rejecting these contentions for two reasons. First, Section 72-7-1(D) cannot permit the taxation of costs against the Engineer as a general matter but render an award of costs an abuse of discretion when the Engineer merely acts within his statutory mandate in defending the appeal; if that were so, every award of costs against the Engineer would be an abuse of discretion.

{40} Second, we are not persuaded that the Engineer's threat to seek costs when it prevails dictates a conclusion that the district court abused its discretion. We note that the Engineer's threat to seek cost awards against the "farmers with small holdings, acequia parciantes, and concerned citizens" in other cases depending on the outcome of this case, seems retaliatory.

{41} In sum, we see no abuse of discretion in the district court's decision to tax Applicant's costs against the Engineer.

CONCLUSION

{42} Section 72-7-1(D) permits the taxation of the prevailing party's costs against the Engineer. The district court did not abuse its discretion in awarding costs against the Engineer in this case.

{43} Affirmed.

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

J. MILES HANISEE, Judge

WE CONCUR:
CYNTHIA A. FRY, Judge
RODERICK T. KENNEDY, Judge

Certiorari Denied, March 23, 2016, No. S-1-SC-35775

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-036

No. 33,982 (filed December 14, 2015)

NORTHERN NEW MEXICO FEDERATION OF EDUCATIONAL EMPLOYEES,
AN AFFILIATE OF AFT NM, AFT/AFL-CIO,
Petitioner-Appellant,
v.
NORTHERN NEW MEXICO COLLEGE, and NORTHERN NEW MEXICO COLLEGE
LABOR MANAGEMENT RELATIONS BOARD,
Respondents-Appellees.

APPEAL FROM THE DISTRICT COURT OF RIO ARRIBA COUNTY
Sheri A. Raphaelson, District Judge

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Opinion

Roderick T. Kennedy, Judge

{1} This case involves a complaint filed by the Northern New Mexico Federation of Educational Employees (the Union) against Northern New Mexico Community College (the College) with the Northern New Mexico College Labor Management Relations Board (the Board). The complaint alleged that the College had terminated two employees of the College (Employees) in retaliation for their Union-related activities, which was in violation of the College's labor-management relations resolution (the Resolution) and the governing collective bargaining agreement (CBA). The College responded that it had declined to renew Employees' contracts for legitimate business reasons. In its hearing on the Union's complaint, the Board focused on provisions in the CBA and the employee handbook that were not mentioned in the complaint instead of addressing the complaint's allegations of retaliatory termination. The Board granted the College's motion to dismiss the complaint on the ground that the non-renewal of Employees' contracts was consistent with the employee handbook and not inconsistent with the CBA. Because the Board failed to address the complaint's allegations that the non-renewal was retaliatory and violated the Resolution, we reverse and remand for reinstatement of the Union's complaint. We make no determination about whether the complaint's allegations of retaliation are true and leave that undertaking to the Board on remand.

BACKGROUND

{2} Employees signed employment contracts with the College for the period from July 1, 2012 to June 30, 2013. The contracts themselves permitted cancellation by the College on several grounds, including cause, lack of funding, a reduction in personnel, or cancellation of the program in which the staff person was employed. These provisions were in accordance with the staff handbook (the Handbook). The Handbook also permitted the president of the College to "choose not to renew the contract of any regular staff employee for any reason or no reason." It is undisputed that Employees were members of the Union and that the Union and the College had entered into a CBA, which included the following provision:

> An employee may be discharged, suspended without pay or terminated only for good and just cause and in the event, shall be notified in writing of the action and reasons therefor[] and shall have the right to file a grievance as provided in Article 11.

In May 2013, the College notified Employees in writing that their contracts, due to expire on June 30, 2013, would not be renewed for the fiscal year 2013-14.

{3} The Union filed a prohibited practice complaint against the College on behalf of Employees, claiming that they were terminated by the College in violation of the Resolution and the CBA. According to the complaint, the College terminated Employees "in retaliation for [their] union activities" and then "refused to participate in the arbitration procedure" related to the grievance filed by one of the employees. The College filed an answer in which it admitted that Employees' contracts were not renewed but asserted that the non-renewal was "for legitimate business purposes."

{4} The complaint was heard by the Board, although the record on appeal does not include a transcript of the hearing or the exhibits introduced at the hearing. The Board entered its findings of fact and conclusions of law, in which it granted the College's motion to dismiss the complaint. The Board did not address the complaint's allegations of retaliation at all. Instead, it found that "the College's staff are hired on annual contracts for terms lasting from July 1st to June 30th" and that Employees "were notified in May 2013 that their contracts would not be renewed." The Board then concluded that the non-renewal of Employees' contracts was consistent with the Handbook and that non-renewal of staff contracts was a "retained management right pursuant to the CBA and the . . . Handbook." It further concluded that the CBA's provisions governing the discharge or termination of staff "applie[d] during the term of the staffs' contracts and, as such, there [was] no conflict" between the CBA and the Handbook.

{5} The Union appealed the Board's decision to the district court, which determined that the decision was not erroneous.

The district court dismissed the appeal with prejudice, and this Court granted the Union's petition for writ of certiorari under Rule 12-505 NMRA.

DISCUSSION

{6} On appeal, the parties do not directly address the allegations of retaliation asserted in the Union's complaint. Instead, the Union argues that the Board's decision was arbitrary, capricious, and contrary to law because the CBA controlled the relationship between the College and Employees and prohibited termination of Employees' employment in the absence of just cause. In response, the College contends that there is no conflict between the CBA and the Handbook on the subject of non-renewal and that, under the CBA, the College retained all rights not specifically limited by the CBA. Further and consistent with the decision reached by the Board, the College argues that non-renewal of the staff contracts was not a termination or discharge governed by the CBA.

Standard of Review

{7} "Upon a grant of a petition for writ of certiorari under Rule 12-505, this Court conducts the same review of an administrative order as the district court sitting in its appellate capacity, while at the same time determining whether the district court erred in the first appeal." *La Vida Llena v. Montoya*, 2013-NMCA-048, ¶ 9, 299 P.3d 456 (alteration, internal quotation marks, and citation omitted). "In conducting our whole record review, we review the record of the administrative hearing to determine whether the board's decision was arbitrary and capricious, not supported by substantial evidence, or otherwise not in accordance with law." *Id.* (alteration, internal quotation marks, and citation omitted).

Preliminary Matter

{8} Before undertaking our analysis of the merits, we first consider the Union's suggestion that the complaint's allegations must be deemed to be true for purposes of the College's motion to dismiss. The Union specifically contends that we must analyze its appeal in the context of its allegation that the College declined to renew Employees' contracts in retaliation for their union activities. The College responds that, because the Board considered matters outside the pleadings—i.e., the employment contracts, the Handbook, and the CBA—the motion to dismiss was converted to a motion for summary judgment and, therefore, we cannot deem true the complaint's allegations of an impermissible purpose underlying the decision not to renew Employees' contracts. *See* Rule 1-012(B) NMRA (stating that if a party files a motion to dismiss under Rule 1-012(B)(6), and if "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment").

{9} We decline to treat the motion as one for summary judgment. While the Board certainly considered "matters outside the pleadings" in deciding to dismiss the Union's complaint, those matters shed no light on the complaint's allegations that the College's non-renewal of the contracts was retaliatory. Instead, the Board relied on the Handbook and the CBA to determine that the terms of each were not in conflict and that the non-renewal complied with the Handbook's provision that the College's president could decline to renew a staff contract "for any reason or no reason." The Board made no determination as to the merits of the complaint's allegations of retaliation. *See Dunn v. McFeeley*, 1999-NMCA-084, ¶ 17, 127 N.M. 513, 984 P.2d 760 (declining to treat a motion to dismiss as a motion for summary judgment, despite the submission of matters outside the pleadings, because it would be unfair to the plaintiff).

{10} While we agree with the Union that the complaint's allegations of the College's retaliatory motive are central to resolution of the complaint by the Board, we need not indulge the presumption that those allegations are true because the presumption begs the question itself, which is whether the Union was entitled to a hearing on the allegations. The Board failed to address these allegations in any way by its dismissal of the complaint, effectively determining that the Union was not entitled to a hearing on whether the College's motives for non-renewal were retaliatory. We therefore turn to an analysis of whether the Board's determination was proper.

The Board Improperly Failed to Address the Allegations of the Complaint

{11} According to the Union's complaint, its claims of retaliatory discharge are specifically based on the Resolution. Consistent with the Public Employee Bargaining Act (PEBA), NMSA 1978, §§ 10-7E-10 to -11 (2003, as amended through 2005), the College adopted the Resolution creating the Board and detailing the provisions governing the College's employer-employee relations. *See* N.N.M. Coll. Labor Mgmt. Relations Resolution, http://nnmc.edu/wordpress//wp-content/uploads/2014/03/NNMC-Labor-Resolution.pdf. (Resolution).[1] Section 16(A) of the Resolution provides:

> A. A public employer or his representative shall not:
>
> 1) discriminate against an employee with regard to terms and conditions of employment because of the employee's membership in a labor organization;
>
> . . . .
>
> 5) discharge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition, grievance, or complaint or given any information or testimony under the provisions of the . . . Resolution or because an employee is forming, joining, or choosing to be represented by a labor organization[.]

Resolution, *supra*, at 18. The College's alleged violation of these provisions gave rise to the Union's claims that Employees' employment was wrongfully terminated for retaliatory reasons.

{12} Again, although the complaint focused on the College's alleged violation of the Resolution's provisions quoted above, on appeal the parties focus on the legal question of whether the non-renewal of Employees' contracts constituted a discharge or termination under the CBA. Thus, neither substantially addresses, or factually argues the allegations set forth within the complaint dismissed by the Board. We conclude that we need not decide whether non-renewal constitutes

[1]The College maintains that we should not consider the Resolution because it was not part of the record on appeal and the Union cannot show whether the Board relied on the Resolution in making its decision. In our view, the Resolution formed the basis for the Union's complaint, and it is therefore central to the question presented. The Resolution is akin to a municipal ordinance, which our Supreme Court has held is law of which a court may take judicial notice. *City of Aztec v. Gurule*, 2010-NMSC-006, ¶ 16, 147 N.M. 693, 228 P.3d 477.

a discharge or termination under the CBA because the non-renewal of the contracts—*if undertaken with the retaliatory impetus alleged by the Union*—would be in conflict with the Resolution, which is the legal document governing the CBA.

{13} We begin our discussion with a review of the law governing the circumstances before us, which is the PEBA. The PEBA was enacted "to guarantee public employees the right to organize and bargain collectively with their employers," Section 10-7E-2, and it provides that public employers and exclusive representatives (i.e., unions) "shall enter into written collective bargaining agreements covering employment relations." Section 10-7E-17(A)(2). The PEBA further states, among other things, that a public employer may "retain all rights not specifically limited by a [CBA] or by the [PEBA]." Section 10-7E-6(D). Thus, the PEBA provides the basic requirements for relations between public employers and union employees.

{14} The PEBA provides that "a public employer other than the state may, by ordinance, resolution or charter amendment, create a local board similar to the public employee labor relations board." Section 10-7E-10(A). A local board created in this fashion "shall follow all procedures and provisions of the [PEBA] unless otherwise approved by the [state public employee labor relations] board." *Id.* Among these provisions is a list of a public employer's "prohibited practices[,]" including a prohibition against "discriminat[ing] against a public employee . . . because of the employee's membership in a labor organization[.]" Section 10-7E-19(A).

{15} As previously mentioned, the College created its own local board pursuant to the Resolution. Taken together, the PEBA and the Resolution provide the legal authority for the College and the Union to bargain collectively and enter into the CBA. *See* Section 10-7E-26(B) (stating that a public employer other than the state, which adopts collective bargaining procedures after October 1, 1991, must include certain provisions and procedures in its implementing document). Importantly, the PEBA required the Resolution to include the PEBA's prohibition against discrimination on the basis of an employee's union membership. *See* Section 10-7E-26(B)(9) (requiring a public employer like the College to include in its implementing document the prohibited practices set out in the PEBA), and the Resolution does indeed include that prohibition.

{16} The issue before us concerns how the Resolution impacts Employees' contracts and the Handbook, which permits non-renewal of those contracts. The United States Supreme Court in *J.I. Case Co. v. National Labor Relations Board*, 321 U.S. 332 (1944), shed light on this interplay between employment contracts and the PEBA's federal counterpart, the National Labor Relations Act (NLRA), 29 U.S.C. Sections 151-169 (2012). The Court explained that "[c]ollective bargaining . . . results in an accord as to terms which will [g]overn hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone." *J.I.Case Co.*, 321 U.S. at 334-35. After the collective bargaining agreement is made, the employer makes hiring decisions and may enter into individual employment agreements with the persons hired. *Id.* at 335. "The employer, except as restricted by the collective agreement itself and *except that he must engage in no unfair labor practice or discrimination*, is free to select those he will employ or discharge." *Id.* (emphasis added). The Court emphasized that "[i]ndividual contracts no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the [NLRA.]" *Id.* at 337. "Wherever private contracts conflict with [the NLRA's] functions, they obviously must yield or the [NLRA] would be reduced to a futility." *Id.*

{17} The same principles apply in the circumstances of the present case. The College is free to enter into employment contracts with whomever it chooses to hire, it may discharge any employee it has hired, or it may decide not to renew an employee's contract—so long as those actions are not either restricted by the CBA or in conflict with the PEBA or the Resolution. *Cf. Las Cruces Prof'l Fire Fighters v. City of Las Cruces*, 1997-NMCA-031, ¶ 15, 123 N.M. 239, 938 P.2d 1384 (explaining that our appellate courts will generally interpret language of the PEBA the same way that similar language in the NLRA has been interpreted); *see also* Section 10-7E-19(A) (stating that "[a] public employer . . . shall not discriminate against a public employee . . . because of the employee's membership in a labor organization[.]"

{18} It follows that if the College decided not to renew Employees' contracts as a means of discriminating against them for their union activities, that decision would violate the prohibited practices section of the Resolution. This was the question presented to the Board by the Union's complaint—i.e., whether the non-renewals were motivated by discriminatory or retaliatory reasons. Instead of answering this question, however, the Board elected to dismiss the complaint on the ground that there was no conflict between the CBA's provisions requiring discharge or termination for cause and the Handbook's provisions permitting non-renewal for no reason. The Board's dismissal, being based on a ground not alleged in the Union's complaint, was arbitrary and capricious, and we therefore reverse its decision.

{19} We remand this case to the Board for reinstatement of the Union's complaint. We emphasize that we are not addressing whether the Union can prove its allegations of retaliatory motive because this is a matter for proof before the Board. Instead, we hold only that the Union is entitled to a hearing on those allegations, consistent with the Resolution, which provides that the Board "may hold hearings for the purposes of . . . adjudicating disputes and enforcing the provisions of the . . . Resolution[.]" Resolution, *supra*, at 8.

CONCLUSION

{20} For the foregoing reasons, we reverse the Board's decision dismissing the Union's complaint and remand for proceedings consistent with this Opinion.

{21} IT IS SO ORDERED.

RODERICK T. KENNEDY, Judge

WE CONCUR:
CYNTHIA A. FRY, Judge
J. MILES HANISEE, Judge

Certiorari Denied, March 30, 2016, No. S-1-SC-35690

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-037

No. 33,593 (filed December 16, 2015)

HEALTHSOUTH REHABILITATION HOSPITAL OF NEW MEXICO, LTD., d/b/a HEALTHSOUTH REHABILITATION HOSPITAL,
Plaintiff,
v.
TERRY A. BRAWLEY, individually, and TERRY A. BRAWLEY as personal representative of the Estate of JOYE BRAWLEY, deceased,
Defendants/Third-Party Plaintiffs/Appellants,
and
THE BOARD OF REGENTS OF NEW MEXICO INSTITUTE OF MINING AND TECHNOLOGY,
Third-Party Defendant/Appellee.

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

STEVEN J. VOGEL
Corrales, New Mexico

JANICE K. WOODS
Socorro, New Mexico
for Defendants/Third-Party Plaintiffs/Appellants

JOCELYN DRENNAN
EDWARD RICCO
RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.
Albuquerque, New Mexico
for Third-Party Defendant/Appellee

Opinion

Michael D. Bustamante, Judge

{1} Third-Party Plaintiff Terry A. Brawley was severely injured in an accident while riding his all-terrain vehicle. He sought coverage under a health plan provided by his wife's employer, New Mexico Institute of Mining and Technology (NM Tech). NM Tech denied Brawley's claims on the ground that Brawley's injuries were sustained while Brawley was under the influence of alcohol and hence his injuries were excluded from coverage under the terms of the health plan. After a bench trial, the district court found that NM Tech had breached its statutory duty to properly investigate the claims, but also found that Brawley's injuries were not covered by the health plan because Brawley was under the influence of alcohol at the time of the accident and that the influence of alcohol was "a cause" of the accident. Brawley appeals, arguing that the district court and NM Tech erred in relying on a certain blood alcohol content report and that his claims should be covered under the "concurrent cause" or "independent intervening cause" doctrines. We conclude that Brawley's evidentiary arguments do not present reversible error and that Brawley failed to preserve his arguments as to causation. We therefore affirm.

BACKGROUND

{2} On the evening of August 1, 2009, Brawley was drinking in the Mountain View Bar in Lemitar, New Mexico. One of the last to leave, Brawley told the bartender, "my ride is here" as he left the bar. This statement was consistent with Brawley's testimony, corroborated by other witnesses, that he customarily had friends or colleagues drive him home after he had been drinking. Later that night, Brawley was found unconscious near his all-terrain vehicle (ATV) on an unlighted road between the bar and his home. Brawley apparently had been thrown off the ATV when he encountered a "wash[]out" in the road measuring fifteen feet wide and five feet deep. He suffered extensive injuries, and after being treated for several hours at Socorro General Hospital, was airlifted to the University of New Mexico Hospital in Albuquerque, New Mexico. In total, Brawley was treated at four different hospitals over a period of approximately fourteen weeks. He incurred over $500,000 in charges for this care.

{3} Brawley was provided medical benefits through his wife's employer, Defendant NM Tech. The self-funded Health Benefit Plan (the Plan) was administered for NM Tech by a third-party, HCH Administration (HCH), although NM Tech retained the right of final determination as to any claim made under the Plan and had the power to accept or reject HCH's recommendations. The Plan was subject to the provisions of the New Mexico Insurance Code, NMSA 1978, §§ 59A-1-1 to -61-6 (1978, as amended through 2014). The Plan provides that

> no benefits are payable under [the] Plan for expenses incurred or in connection with . . . injury or sickness sustained . . . while under the influence of alcohol . . . [provided that] there is a direct relationship between [being under the influence of alcohol] and the sickness or injuries sustained.

This provision also states that "[f]or purposes of this section, a person shall be presumed to be under the influence of alcohol if his blood alcohol level equals or exceeds the limit for driving under the influence of alcohol as determined by the law of the state in which the [i]njury occurred."

{4} Based on this exclusion, called the "alcohol exclusion" by the parties, HCH denied the Brawleys' claims related to the accident. In its decision to deny the claims, HCH relied on "the police report and preliminary medical records only." Neither HCH nor NM Tech contacted Brawley or his wife (collectively, the Brawleys) or the investigating police officer or emergency medical personnel at the accident scene prior to denying the claims. No one from HCH or NM Tech went to the accident scene to investigate the accident. Finally, HCH and NM Tech did not interview the Mountain View Bar bartender or patrons of the bar, analyze the circumstances of the blood test upon which they relied to assure its reliability, talk with Brawley's medical care providers, or follow up on the issuance and later dismissal of the DWI citation issued to Brawley after the accident. The district court found that these steps would have constituted a reasonable inquiry under the circumstances.

{5} The present matter was initiated when HealthSouth Rehabilitation Hospital of New Mexico, Ltd., d/b/a HealthSouth Rehabilitation Hospital (HealthSouth), sued the Brawleys to recover the amount of their bills unpaid by NM Tech. The Brawleys filed an answer and third-party complaint naming HealthSouth and NM Tech as third-party defendants. The complaint alleged breach of contract, bad faith, violation of the Insurance Code, and violation of the Unfair Practices Act, NMSA 1978, §§ 57-12-1 to -26 (1967, as amended through 2009). The Brawleys also sought a declaratory judgment establishing that their claims are covered under the Plan.

{6} HealthSouth was dismissed from suit based on a settlement agreement and the matter proceeded to a bench trial against NM Tech. At trial, the Brawleys tendered testimony by an accident reconstructionist who opined that the washout was the sole cause of the accident and an insurance expert who testified that NM Tech failed to properly investigate the accident and, more specifically, whether Brawley's alleged intoxication had a "direct relationship" to the accident. NM Tech presented testimony by its own insurance expert who testified that HCH and NM Tech properly denied the claims based on a medical report showing Brawleys' blood alcohol level and that no further investigation was required. The parties stipulated that the amount remaining unpaid was $308,391.89.

{7} The district court entered a number of findings of fact. First, it found that "[a] blood test performed some time after the crash, and after . . . Brawley had been hospitalized, indicated that he had a blood alcohol level nearly double the New Mexico threshold for a presumption of intoxication" and that "[t]his was confirmed by the testimony of [NM Tech's witness]." As to the alcohol exclusion, the district court found that, although the phrase "direct relationship" is not defined in the Plan, "[t]he parties have uniformly and consistently represented to the [c]ourt, and to each other, that the 'direct relationship' [required by the provision] is functionally the same as causation." The district court rejected the expert testimony to the effect that the washout was the sole cause of the accident and found that "Brawley's alcohol use on the night of [the accident] was *a cause* of the ATV crash in which he was injured, and which generated the medical bills at [the] root of this litigation." As discussed above, the district court found that neither HCH nor NM Tech undertook a reasonable investigation into the Brawleys' claims. It also found that the Brawleys "did not suffer any actual damages as a result of NM Tech's . . . lack of an appropriate thorough and complete investigation into the [accident] . . . prior to the denial of medical benefits at issue." *See* § 59A-16-30 (stating that a person "who has suffered damages as a result of a violation of [the Insurance Code] by an insurer or agent is granted a right to bring an action in district court to recover actual damages"). The district court did not enter findings of fact specifically addressing the Brawleys' common law bad faith claim or request for punitive damages. The Brawleys make no argument on appeal as to the district court's failure to address their common law bad faith claim or their request for punitive damages under that claim.[1]

{8} Based on its findings, the district court concluded that NM Tech "violated [t]he Insurance Code by failing to have a licensed adjustor[,] and by failing to adopt and implement a reasonable plan for the appropriate investigation of claims in general and as to the Brawley claims in specific." Second, the court concluded that "[n]otwithstanding [NM Tech's] violation of the Insurance Code," the denial of benefits to the Brawleys was appropriate because there was sufficient evidence that the accident bore a "direct relationship" to Brawley's "ingestion of alcohol" and was otherwise supported by sufficient evidence. The court entered judgment in favor of NM Tech.

DISCUSSION

{9} On appeal, the Brawleys argue that the judgment must be reversed for two reasons. First, they argue that it was error for NM Tech and/or the district court to rely on an inadmissible document as evidence that Brawley was under the influence of alcohol and that, without this document, there was insufficient evidence that Brawley was under the influence of alcohol at the time of the accident. Second, they argue that, even if alcohol use and resultant impairment was a cause of the accident as the district court found, the district court erred in its application of the law of causation in insurance cases. We address each of the Brawleys' arguments in turn.

A. The District Court's Admission of Exhibit B is Not Reversible Error

{10} "We review the admission or exclusion of evidence for abuse of discretion." *Progressive Cas. Ins. Co. v. Vigil*, 2015-NMCA-031, ¶ 13, 345 P.3d 1096 (internal quotation marks and citation omitted), *cert. granted*, *Progressive v. Vigil*, 2015-NMCERT-003, 346 P.3d 1163. "[W]hen there is no evidence that necessary foundational requirements are met [for admission of evidence], an abuse of discretion occurs." *State v. Gardner*, 1998-NMCA-160, ¶ 5, 126 N.M. 125, 967 P.2d 465. The focus of the Brawleys' argument is a document showing Brawley's blood alcohol level (Exhibit B). Exhibit B was apparently generated by a medical care provider, not the state laboratory division. The Brawleys argue that Exhibit B should not have been admitted at trial because NM Tech failed to provide a foundation for it and to show that the blood draw and test were consistent with the Implied Consent Act. *See* NMSA 1978, §§ 66-8-105 to -112 (1978, as amended through 2015).

{11} NM Tech argues that the Brawleys' argument was not preserved either because they failed to timely object to testimony about Exhibit B or because the objections made at trial differ from the issue raised on appeal. We disagree. The Brawleys objected to admission of Exhibit B, first stating that Exhibit B was hearsay, then arguing that "there is no basis that can be established" and "[t]here is no medical doctor here that withdrew the blood [and t]here's no nurse that withdrew the blood." Furthermore, the Brawleys went on to argue that "under the Implied Consent Act, there are numerous provisions that must be followed in the extraction of blood. And so we cannot authenticate this document as to whether or not the blood was withdrawn pursuant to the Implied Consent Act." In addition to these statements at trial, the Brawleys requested a finding of fact invoking (although not naming) the Implied Consent Act and associated regulations. *See, e.g.*, § 66-8-109(A) (stating that blood samples may be taken only by authorized personnel); NMAC 7.33.2.15(A) (4/30/2010) (setting out the requirements for blood

[1]The Brawleys did not argue below nor do they argue on appeal that the exclusion at issue here is contrary to public policy. The district court noted that "[w]hile [it had]concerns about the enforceability of such broad exclusionary language, neither party has put the validity or enforceability of [the alcohol] exclusion before the [c]ourt in this matter and it is not, then, considered." Likewise, we do not consider the public policy implications of the alcohol exclusion.

sample collection). They also requested a conclusion of law stating that "[t]he blood draw evidence is excluded for failure to meet statutory, foundational[,] and authenticity requirements." We conclude that the Brawleys' arguments as to the foundational requirements for Exhibit B were adequately presented to the district court and were preserved for appeal.

{12} However, the applicability of the alcohol exclusion does not depend on a certain blood alcohol level. Rather, the provision states that benefits are not payable for injuries sustained while "under the influence of alcohol." The provision's reference to state law as to the "legal limit" for driving under the influence merely describes a condition under which the insured may be *presumed* to be under the influence of alcohol. The next sentence of the provision further states that "a person may be considered to be under the influence of alcohol . . . if objective evidence suggests such condition[.]" Here, even if the district court's finding that Brawley's blood alcohol content was "nearly double the New Mexico threshold for a presumption of intoxication" was based on improperly admitted evidence, we conclude that other evidence supports the district court's implicit finding that Brawley was under the influence of alcohol at the time of the accident. *See Stephenson v. Dale Bellamah Land Co.*, 1969-NMSC-147, ¶ 7, 80 N.M. 732, 460 P.2d 807 ("We have held, and here reiterate, that error [in the admission of evidence], if it was error, will not be considered to require reversal unless no other admissible evidence substantially supporting the court's findings is present.")

{13} The district court found that Brawley was drinking in the Mountain View Bar the evening before the accident and "was one of the last persons to leave the bar." This finding is supported by testimony to the effect that Brawley arrived at the bar around 9 p.m. on August 1, 2009, and consumed "maybe four shots of Crown Royal[,]" and testimony that Brawley left the bar at about 10:15 p.m. One of the emergency medical personnel who attended Brawley at the accident scene stated that he suspected alcohol was involved because he smelled alcohol on Brawley's person. The Brawleys' accident reconstructionist testified that Brawley was not "in any shape to drive the [ATV]" and that Brawley was "above the .08 limit." Dr. Alois Treybal, who was admitted as an expert "in the context of family practice as applied to traumatic brain injury[,]" reviewed a medical record dated August 2, 2009, at 5 a.m. indicating that Brawley had a blood alcohol level of .26 and testified that this level "would be an intoxicating [level]." This medical record was admitted into evidence as well.

{14} Taken together, this evidence supports a reasonable inference that Brawley was under the influence of alcohol when he left the bar on his ATV and that consequently his driving ability was impaired. *See State v. Baldwin*, 2001-NMCA-063, ¶ 16, 130 N.M. 705, 30 P.3d 394 (stating that "human experience guides us in deciding whether . . . an accused likely had the ability to drive an automobile in a prudent manner within a reasonable time before or after [he] is observed in a state of intoxication"); *Toynbee v. Mimbres Mem'l Nursing Home*, 1992-NMCA-057, ¶ 16, 114 N.M. 23, 833 P.2d 1204 ("On appeal, a reviewing court liberally construes findings of fact adopted by the fact finder in support of a judgment, and such findings are sufficient if a fair consideration of all of them taken together supports the judgment entered below.").

{15} The district court also found that "Brawley's alcohol use[2] . . . was *a cause* of the ATV crash in which he was injured[.]" This finding is a reasonable inference from the evidence as well. The accident reconstructionist agreed with NM Tech that alcohol use could "affect reaction and reflex time" and that "[p]ersons who are intoxicated have longer perception and reaction times." The accident reconstructionist also testified that any person, sober or not, would have had the accident. But the investigating officer testified that a neighbor, who knew Brawley had been drinking in the bar and who heard Brawley passing his house on the ATV, followed Brawley "to make sure that he will do all right . . . because he thought Mr. Brawley [was] intoxicated." This individual apparently did not have an accident at the washout. Finally, counsel for NM Tech and Brawleys' insurance expert had the following exchange on cross-examination:

> Q: [Y]ou concluded [on direct examination] with the statement . . . that, based on the washout alone, alcohol was not a cause of the accident.
>
> A: Well, if that's what I said, I didn't mean to. It's not the only cause of the accident.

{16} Considering this evidence in the light most favorable to the district court's decision, we conclude that it supports the district court's conclusion that "Brawley's injuries . . . bore a 'direct relationship' to his ingestion of alcohol at the Mountain View Bar prior to the ATV crash." *See Tartaglia v. Hodges*, 2000-NMCA-080, ¶ 27, 129 N.M. 497, 10 P.3d 176 (stating that, in reviewing the district court's findings after a bench trial, "we view the evidence in a light most favorable to the decision below, we resolve all conflicts in the evidence in favor of that decision and . . . disregard evidence to the contrary, we defer to the trial court in regard to the weighing of conflicting evidence, and we indulge every presumption to sustain the judgment of the trial court"). "There being substantial admissible evidence to support the court's findings, whether or not inadmissible evidence [e.g., Exhibit B] was admitted is not material[] and did not constitute reversible error." *Stephenson*, 1969-NMSC-147, ¶ 7.

B. The Brawleys' Causation Theories Were Not Preserved for Appeal

{17} "Every litigated case is tried at least three times: there is the trial the attorneys intended to conduct; there is the trial the attorneys actually conducted; and there is the trial that, after the verdict, the attorneys wished they had conducted." *Gracia v. Bittner*, 1995-NMCA-064, ¶ 1, 120 N.M. 191, 900 P.2d 351. On appeal, our review is limited to the case actually litigated below. *See In re T.B.*, 1996-NMCA-035, ¶ 13, 121 N.M. 465, 913 P.2d 272 ("[W]e review the case litigated below, not the case that is fleshed out for the first time on appeal."). This principle governs our analysis of the Brawleys' causation arguments.

{18} The district court found that the term "direct relationship" was not defined in the Plan and that the parties "represented to the [c]ourt, and to each other," that the meaning of "direct relationship" in the alcohol exclusion "is functionally the same as causation." It appears that

[2]The Brawleys argued at oral argument before this Court that the district court found only that Brawley had used alcohol and failed to find that he was "under the influence" of alcohol as the alcohol exclusion requires. Considering the findings together and in context, we conclude that the district court's findings indicate that it found that Brawley was "under the influence" of alcohol at the time of the accident.

the district court was referring to the definitions of causation in Uniform Jury Instructions 13-305 or 13-1709. UJI 13-305 NMRA states:

> An [act] [or] [omission] [or] [_____ (*condition*)] is a "cause" of [injury] [harm] [_____ (*other*)] if[, unbroken by an independent intervening cause,] it contributes to bringing about the [injury] [harm] [_____ (*other*)] [, and if injury would not have occurred without it]. *It need not be the only explanation for the [injury] [harm] [_____ (other)], nor the reason that is nearest in time or place. It is sufficient if it occurs in combination with some other cause to produce the result.* To be a "cause", the [act] [or] [omission] [or] [_____ (*condition*)], nonetheless, must be reasonably connected as a significant link to the [injury] [harm].

(Fourth emphasis added.) UJI 13-1709 NMRA, being one part of the instructions addressing both common-law and statute-based unfair practices claims in insurance cases, states that "[a] cause of a loss is a factor [that] contributes to the loss and without which the loss would not have occurred. *It need not be the only cause*." (Emphasis added.) The district court's holding that coverage was precluded because alcohol was "a cause" of the accident is consistent with these two tort-based definitions. No objections to this finding were filed in the district court. In addition, the parties did not dispute this finding in the appellate briefs or during oral argument before this Court.

{19} There are two problems with this approach. To begin with, causation principles in tort law are different from causation principles in insurance law because "the two systems examine the causation question for fundamentally different purposes. In tort, it is to assess fault for wrongdoing. In insurance, it is to determine when the operative terms of a contractual bargain come into play." Erik S. Knutsen, *Confusion About Causation in Insurance: Solutions for Catastrophic Losses*, 61 Ala. L. Rev. 957, 968 (2010); Knutsen, *supra*, at 969-70 (stating that "[i] nsurance causation therefore bears little resemblance to the policy-laden proximate cause analysis of tort law"); *see also Standard Oil Co. of N.J. v. United States*, 340 U.S. 54, 66 (1950) (Frankfurter, J., dissenting) ("[T]he subtleties and sophistries of tort liability for negligence are not to be applied in construing the covenants of [an insurance] policy."); *Allstate Ins. Co. v. Smiley*, 659 N.E.2d 1345, 1354 (Ill. App. Ct. 1995) (declining to follow a case because its holding "introduc[ed] . . . tort principles into the interpretation of an insurance policy"); Robert H. Jerry II, *Understanding Insurance Law*, 502 (2d ed. 1996) (stating that "many courts have explicitly stated that the proximate cause test is not the same in tort law and insurance law").

{20} Moreover, by relying on tort-based definitions of causation, the parties and the district court essentially construed the phrase "direct relationship" in the way most favorable to the insurer, not the insured, contrary to the general rule that "an insurance policy which may reasonably be construed in more than one way should be construed liberally in favor of the insured." *Battishill v. Farmers All. Ins. Co.*, 2006-NMSC-004, ¶ 17, 139 N.M. 24, 127 P.3d 1111 (internal quotation marks and citation omitted). Indeed, it is not clear to us what the phrase "direct relationship" actually means in the context of the alcohol exclusion. Assuming that the "relationship" required is a causal one, does the phrase encompass *any* contributing cause of the injuries as the parties appear to have agreed and the district court found? Or does the word "direct" mean that the excluded cause must be the dominant cause or the immediate cause of the injuries? There are a myriad of cases defining the word "direct" in the context of insurance policy provisions—some equating it with "proximate cause" and others stating that a "direct loss" is "more than proximate cause . . . [and] that the loss must flow immediately, either in time or space." 3 Allan D. Windt, Insurance Claims and Disputes § 11:22C n.3 (6th ed. 2015) (collecting cases).

{21} In spite of these problems with the district court's approach to causation in this context, our review does not depend on resolution of them because neither party identifies the district court's finding as error. *See State v. Joanna V.*, 2003-NMCA-100, ¶ 7, 134 N.M. 232, 75 P.3d 832 (stating that this Court's primary role is to correct trial court error, "not to arrive at a conclusion we believe would be just by deciding issues that were not raised below"). Instead, the Brawleys have accepted the district court's finding and argue only that the district court misconstrued its legal effect. Hence, we turn to that argument next.

{22} The Brawleys argue that, even if Brawley's alcohol use was "a cause" of the accident, the district court nonetheless erred in concluding that the alcohol exclusion precluded coverage. They posit two bases for this argument. First, they rely on the principle of "concurrent causation" to maintain that the claims should be covered. Generally, under the concurrent cause rule, "coverage should be permitted whenever two or more causes do appreciably contribute to the loss and at least one of the causes is a risk [that] is covered under the terms of the policy." Steven Plitt, et al., 7 *Couch on Insurance 3d*, § 101:55, at 101-104 to 101-105 (Rev. ed. 2013). Second, they argue that the washout was an independent intervening cause of the accident, i.e., "the washout was an unforeseeable force of nature that intercepted and interrupted the normal progression of causation." *See* UJI 13-306 NMRA ("An independent intervening cause interrupts and turns aside a course of events and produces that which was not foreseeable as a result of an earlier act or omission."). They maintain that since the washout was an independent intervening cause of the accident, the claims should be covered.

{23} But these arguments were not preserved for appeal. The only mention of the concurrent cause doctrine during the trial occurred in the testimony of the Brawleys' insurance expert, Professor Allen. On appeal, the Brawleys point to that testimony as evidence that the theory was raised. Assuming arguendo that an argument can be preserved solely through witness testimony, we conclude that Professor Allen's testimony was insufficient to "alert[] the district court as to which theories [the Brawleys were] relying on in support of [their] argument in order to allow the district court to make a ruling thereon." *State v. Janzen*, 2007-NMCA-134, ¶ 11, 142 N.M. 638, 168 P.3d 768; *State v. Miller*, 1997-NMCA-060, ¶ 8, 123 N.M. 507, 943 P.2d 541 (holding that an issue was not preserved where the state " 'elicited facts' supporting its theories" but did not "present[] any of [the related] legal principles or arguments to the trial court"). Indeed, Professor Allen used the phrase "concurrent causation" only twice in his entire testimony. He stated, "This case involves what we call in the insurance industry concurrent causation; that is, there's a ditch, a washout. That's a potential cause of this injury or accident. And intoxication is a

potential cause." Professor Allen went on, "So you got to figure out which one was it, or is it both, concurrent causation, and it's hard." Although Professor Allen elsewhere stated that the "direct relationship" clause in the alcohol exclusion "connotes causation" and that the alcohol use "has to make a contribution [to the accident,]" he never stated the concurrent causation rule in full. Indeed, he seemed to invoke several different causation theories when he stated, "So if you have two contributing causes, it just gets real complicated. One thing you could try to do is allocate between the two. That would be awfully hard. The other possibility is, if there are two, you could allocate it to either one, and you have to allocate it to the one that most favors the insured, because it's an exclusion, and you have to do that narrowly." *Cf.* Mark M. Bell, *A Concurrent Mess and A Call for Clarity in First-Party Property Insurance Coverage Analysis*, 18 Conn. Ins. L.J. 73, 75-76 (2012) (stating that courts have employed four different approaches to analyzing concurrent causes but "routinely refer to each approach as the 'concurrent cause doctrine' "). In addition, there were no opening or closing arguments, and the Brawleys never argued this theory to the district court. Neither did the Brawleys request a finding or conclusion based on the concurrent causation doctrine. The district court thus was never apprised of the concurrent causation doctrine nor asked to rule on it. The Brawleys' concurrent causation argument was not preserved for appeal. *See Spectron Dev. Lab. v. Am. Hollow Boring Co.*, 1997-NMCA-025, ¶ 32, 123 N.M. 170, 936 P.2d 852 (noting that general principles of preservation prohibit the raising of new theories on appeal).

{24} Finally, the Brawleys argue that their independent intervening cause argument was preserved through testimony of their two experts, who testified that the washout was the cause of the accident. We do not agree because, like their concurrent causation argument, the Brawleys never elicited a ruling from the district court on this particular theory. They did not request a finding of fact or conclusion of law citing the independent intervening cause doctrine or the UJI defining it, and the phrase "independent intervening cause" was never mentioned at trial. *See* UJI 13-306. "To preserve an issue for review on appeal, it must appear that appellant fairly invoked a ruling of the trial court on the same grounds argued in the appellate court." *Benz v. Town Ctr. Land, LLC*, 2013-NMCA-111, ¶ 24, 314 P.3d 688 (internal quotation marks and citation omitted). The Brawleys having failed to do so, we conclude that this argument also was not preserved for appeal.

CONCLUSION

{25} We conclude that even if Exhibit B was improperly admitted at trial, the district court's findings were supported by sufficient other evidence. We also conclude that the Brawleys' arguments as to concurrent causation and independent intervening cause were not preserved and decline to address them. We affirm.

{26} IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:
JONATHAN B. SUTIN, Judge
TIMOTHY L. GARCIA, Judge

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-038

No. 33,247 (filed January 12, 2016)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
MICHAEL VARGAS, SR.,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY
TEDDY L. HARTLEY, District Judge

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Opinion

Jame J. Wechsler, Judge

{1} Defendant Michael Vargas, Sr. appeals his convictions on each of twenty-four counts of intentional child abuse by torture, contrary to NMSA 1978, Section 30-6-1(D)(2) (2009). Defendant raises numerous issues on appeal, including (1) violations of his rights to due process and to be free from double jeopardy, (2) the insufficiency of the evidence to support his convictions, (3) prosecutorial misconduct, (4) improper admission of opinion testimony by a non-expert witness, (5) erroneous jury instructions, and (6) sentencing error. We are persuaded that expert testimony related to stun gun technology and the victim's injuries was improperly admitted through an unqualified lay witness. The admission of this testimony was not harmless and requires reversal of Defendant's convictions on all counts. Because of this ruling, Defendant's arguments related to erroneous jury instructions and sentencing decisions are moot.

{2} With respect to additional issues raised, our ruling affects Defendant's request for reversal due to prosecutorial misconduct. However, while prosecutorial misconduct may be so unfairly prejudicial that it bars retrial, Defendant does not request this remedy or develop such an argument on appeal. Because a finding in Defendant's favor would reduce the number of charges on retrial, we reach Defendant's sufficiency of the evidence argument and conclude that it lacks merit. Finally, we hold that the twenty-four identical counts contained in the indictment lack the required specificity and constitute a violation of Defendant's rights to due process and to be free from double jeopardy. Because the evidentiary issue requires reversal of all convictions, we remand for a new trial with instructions designed to cure the due process and double jeopardy problems.

BACKGROUND

{3} This case arose from allegations of child abuse by D.L. against Defendant, who was his foster father. The Children Youth and Families Department (CYFD) placed D.L. and his older sister L.L. with Defendant and his family in Clovis, New Mexico after the children were removed from their biological mother in Arizona. The children's biological mother was related to Defendant's wife. In late July or early August 2010, Defendant purchased a stun gun online that was delivered to the family's home.[1] In mid-October 2010, D.L. first reported to a school counselor that he was being abused at home. After consulting her supervisor and meeting with D.L. again on October 29, 2010, the counselor reported the allegations to CYFD. CYFD conducted its own investigation and removed both children from the home the same day.

{4} Accounts of the use of the stun gun on D.L. between early August and October 29, 2010 vary. Testimony by D.L. indicated that he was stunned repeatedly by Defendant and Defendant's sons Mikey and Brandon over the course of three months. When asked on direct examination specifically how many times he was stunned, D.L. did not know. He did testify, however, that (1) Defendant stunned him more than 24 times, (2) Mikey stunned him approximately fifteen times, and (3) Brandon stunned him approximately three times. D.L. then testified on cross-examination that he counted to himself each time he was stunned, but he stopped counting at twenty-four times even though he was stunned more than twenty-four times. He further testified that Defendant personally stunned him less than twenty-four times.

{5} D.L.'s testimony indicated that the incidents took place both at Defendant's home, where most of the family members resided, and at Mikey's home. D.L. testified about two specific incidents, including one when he was stunned on the arm by Mikey on the day the stun gun arrived in the mail and another when Defendant stunned D.L. while the family was visiting at Mikey's house. He testified that he asked Defendant and Mikey not to stun him and that Defendant would laugh when Mikey stunned him. D.L. also testified that most of the marks on his body during his police interview were the result of mosquito bites, although certain specific marks were from the stun gun.

{6} Testifying on behalf of the State, L.L's testimony generally corroborated the pattern of abuse against D.L. by Defendant and his sons, although there were significant inconsistencies between her direct and cross-examination testimony. L.L. initially stated that she first saw D.L. stunned by Mikey at the family's house on the day the device arrived. On cross-examination, L.L. first testified that D.L. was stunned on two different days in October: once by Mikey in the kitchen of the family's house and once by Mikey at Mikey's house when the family went over for a visit. L.L. then testified that Defendant first stunned D.L.

[1]The attorneys and witnesses in this case use the term "taser" and "stun gun" and "tased" and "stunned" interchangeably when referring to the assaults on D.L. For the purposes of continuity, we use the term "stunned" to describe the assaults and the term "stun gun" rather than "taser" to describe the device.

while sitting on the couch on the day the device arrived in the mail. After a brief recess, defense counsel again attempted to establish the sequence of events. At this point, L.L. stated simply that she could not remember all the specific incidents, that there were many incidents, and that they happened very fast. L.L consistently testified that she saw D.L. get stunned by either Defendant or his sons between ten and fifteen times.

{7} The State's final witness was Detective Rick Smith. Detective Smith stated that he had been a police officer for twenty-nine years, including as an investigator specializing in sexual assault and child abuse cases with the Clovis Police Department since 2007. Detective Smith also testified as to his experience with stun guns similar to the one described by D.L. and L.L. Detective Smith was not offered or qualified as an expert witness on the topic of stun guns or the injurious effects of stun guns to humans. Detective Smith offered substantial testimony related to the operation of stun guns, the types of injuries they create, and the manner in which those injuries heal.[2]

{8} Defendant testified that he purchased the stun gun online, gave it to his son Mikey, and never saw it again. Defendant also testified that he never stunned D.L. and was unaware if, or that, his sons were doing so.

{9} Following a jury trial, Defendant was convicted of twenty-four counts of child abuse by torture.

IMPROPER EXPERT TESTIMONY

Standard of Review

{10} Defendant claims that the district court improperly admitted expert opinions offered by Detective Smith as lay witness testimony under Rule 11-701 NMRA. Appellate courts review the admission of evidence for an abuse of discretion. *State v. Flores*, 2010-NMSC-002, ¶ 25, 147 N.M. 542, 226 P.3d 641. A court abuses its discretion when its evidentiary rulings indicate a misapprehension of the law. *State v. Elinski*, 1997-NMCA-117, ¶ 8, 124 N.M. 261, 948 P.2d 1209, *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008, 275 P.3d 110. If Detective Smith's testimony was improperly admitted under Rule 11-701, that admission would indicate a misapprehension of our law and constitute an abuse of discretion by the district court.

Preservation

{11} To preserve evidentiary objections, a defendant must make a timely objection that specifically apprises the trial court of the nature of the claimed error and invokes an intelligent ruling thereon. *State v. Varela*, 1999-NMSC-045, ¶ 25, 128 N.M. 454, 993 P.2d 1280. Defendant objected to Detective Smith being allowed to testify in an expert capacity without qualification. Defendant's objection specifically stated that Detective Smith lacked medical training necessary to opine as to the cause of D.L.'s injuries. This objection was sufficient to put the district court on notice as to Defendant's assertion that Detective Smith was offering opinions that exceeded the scope of lay testimony.

Admission of Detective Smith's Testimony as Lay Witness Opinion Testimony

{12} Our rules of evidence create a distinction between opinion testimony offered by an observer and expert witness testimony offered based upon expertise in the relevant subject matter area. *Compare* Rule 11-701, *with* Rule 11-702 NMRA. Rule 701 states:

> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is
> A. rationally based on the witness's perception,
> B. helpful to clearly understanding the witness's testimony or to determining a fact in issue, and
> C. not based on scientific, technical, or other specialized knowledge within the scope of Rule 11-702 NMRA.

In contrast, Rule 702 states:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

{13} In federal courts, Federal Rule of Evidence 701 (Rule 701) governs lay opinion testimony and was amended in the year 2000 in order to "eliminate the risk that the reliability requirements set forth in [Fed. R. Evid.] 702 [(Rule 702)] will be evaded through the simple expedient of proffering an expert in lay witness clothing." Rule 701 advisory comm. notes, 2000 amends. The rule "does not distinguish between expert and lay *witnesses*, but rather between expert and lay *testimony*." *Id.* Under Rule 701, it "is possible for the same witness to provide both lay and expert testimony in a single case," but "any part of a witness's testimony that is based upon scientific, technical, or other specialized knowledge . . . is governed by the standards of [Rule] 702." *Id.*

{14} New Mexico's Rule 11-701 is modeled upon Rule 701 and was amended in 2006 to guarantee application consistent with the federal rule. *See* Rule 11-701 Comm. Commentary ("The addition of Paragraph C in 2006 brought this rule into alignment with federal rule 701. This amendment was made to the federal rule in 2000 to avoid the misuse of the lay witness opinion rule as a guise for offering testimony that in reality is based on some form of claimed expertise of the witness. . . . If the witness testifies [as to] scientific, technical or other specialized knowledge, then the admissibility of such testimony must be analyzed under Rule 11-702 NMRA for expert testimony."). Since the language and intent of our Rule 11-701 mirrors that of Rule 701, we do not hesitate to look to federal court analysis of proper and improper lay opinion testimony. *Kipnis v. Jusbasche*, 2015-NMCA-071, ¶ 7, 352 P.3d 687, *cert. granted*, 2015-NMCERT-___ (No. 35,249, June 19, 2015) ("When the state and federal evidence rules are identical, we may rely on interpretations of the federal rule as persuasive authority.").

{15} Whether lay opinion testimony is admissible requires a two-step analysis. First, the court must find that the opinion is based on personal perception or personal observation by the witness. *Hansen v. Skate Ranch, Inc.*, 1982-NMCA-026, ¶ 22, 97 N.M. 486, 641 P.2d 517. Second, the opinion must be rationally based on the witness's own perception or observation. *Sanchez v. Wiley*, 1997-NMCA-105, ¶ 17, 124 N.M. 47, 946 P.2d 650. The content of such testimony "is generally confined to matters which are within the common knowledge and experience of an average person." *State v. Winters*, 2015-NMCA-050, ¶ 11, 349 P.3d 524 (internal quotation marks and citation omitted).[3]

[2]We expand upon this testimony below because it forms the basis of one of Defendant's issues on appeal.

[3]Our appellate cases provide non-exhaustive lists of subject matter areas in which lay opinion testimony is properly admitted. *See Bunton v. Hull*, 1947-NMSC-005, ¶ 27, 51 N.M. 5, 177 P.2d 168 (listing "identity of persons or things; the age, health, physical condition, and appearance of a person; the lapse of time; the dimensions and quantities of things" as areas where lay opinion testimony is appropriate); *State v. Alberico*, 1993-NMSC-047, ¶ 45, 116 N.M. 156, 861 P.2d 192 (listing "circumstances involving value, voice and handwriting identification, sanity, or speed" as areas where lay opinion testimony is appropriate).

{16} The testimony of law enforcement officers presents a particular challenge to courts given that an officer's personal perception of events is often informed by technical or other specialized knowledge obtained through the officer's professional experience. The training and daily interactions undertaken by law enforcement officers are not part of the "common knowledge and experience of an average person." *Id.* ¶ 11 (internal quotation marks and citation omitted). However, law enforcement officers regularly make observations in the course of their professional duties, such as the speed of an automobile, that are proper lay opinion testimony from either an officer or a casual observer.

{17} Our district courts perform the function of gatekeepers in order to ensure that properly admitted lay opinion testimony is not contaminated by improper expert testimony. *See, e.g.*, *State v. Downey*, 2008-NMSC-061, ¶ 25, 145 N.M. 232, 195 P.3d 1244 (describing trial judges as gatekeepers with respect to relevance and reliability of evidence). This Court has frequently determined the admissibility of non-expert opinion testimony by law enforcement officers. *See, e.g.*, *State v. Wildgrube*, 2003-NMCA-108, ¶¶ 12-15, 134 N.M. 262, 75 P.3d 862 (holding that officer's personal observation of the debris field from an automobile accident allowed testimony as to the nature of the accident); *Hansen*, 1982-NMCA-026, ¶¶ 21, 24 (holding that officer's personal observations made at a roller rink allowed testimony as to the absence of safety protocol); *State v. Gerald B.*, 2006-NMCA-022, ¶ 23, 139 N.M. 113, 129 P.3d 149 (holding that expert testimony is not required to identify marijuana); *cf. State v. Duran*, 2015-NMCA-015, ¶ 15, 343 P.3d 207 (holding that a forensic examiner's personal observations of child sexual assault victims did not allow lay testimony as to the behavior of victims generally). We reiterate that the content of lay opinion testimony is properly limited to "matters which are within the common knowledge and experience of an average person." *Winters*, 2015-NMCA-050, ¶ 11 (internal quotation marks and citation omitted). When the line between lay and expert opinion is blurred during the course of a single witness's testimony, it is the proper function of the district court, as gatekeeper, to correct the error when raised.

{18} *United States v. Jones*, 739 F.3d 364 (7th Cir. 2014), provides a comprehensive discussion of this principle. In that case, the defendant was charged with bank robbery. *Id.* at 366. The prosecution argued that the defendant participated in the robbery, that he placed bait money containing a dye pack in his pocket, and that the dye pack exploded causing a grapefruit-sized burn on the defendant's thigh. *Id.* at 367. On appeal of his conviction, the defendant argued that the trial court allowed improper expert testimony by the investigating detective under the guise of lay testimony. *Id.* at 366-67. The testimony in question related to the technical functions of dye packs and physical injuries caused by dye packs. *Id.* at 367. The prosecution did not offer or qualify the detective as an expert. *Id.* at 368. The detective testified that (1) a dye pack is designed to detonate between ten and thirty seconds after leaving a bank; (2) the purpose of this delay is to create witnesses outside the bank; (3) a dye pack instantly burns at approximately 400 degrees, releases smoke, tear gas, and red dye; (4) he had seen burns caused by dye packs three to five times during his career; and (5) a dye pack can cause severe burns if it ignites in close proximity to the body. *Id.* at 367-68.

{19} The Seventh Circuit held that the witness's testimony was comprised of both lay and expert opinions. In arriving at this conclusion, the court noted that

> [l]ay testimony is based upon one's own observations, with the classic example being testimony as to one's sensory observations. . . . In contrast, testimony moves from lay to expert if an officer is asked to bring her law enforcement experience to bear on her personal observations and make connections for the jury based on that specialized knowledge.

Id. at 369 (citation omitted).

{20} The court distinguished the testimony in the following way. The detective's testimony about the specific functions of the dye packs—that is, the manufacturer, the workings of the timer, the purpose to create more witnesses, the temperature at which the pack burned—was "based on technical, specialized knowledge obtained in the course of his position, and was not based on personal observations accessible to ordinary persons." *Id.* In contrast, the detective's testimony about the aftermath of a dye pack exploding near a person's skin was simply a recollection of the detective's own sensory observations, which was proper lay testimony. *Id.* at 370. To emphasize the contrast, the court explained the manner in which the burn testimony would have crossed the line from lay to expert opinion, stating that

> [t]he government could have ventured into the territory of expert testimony here if it had gone one step further and solicited an opinion as to the nature of Brown's scars on his leg. If the government had show[n] the picture of the leg and asked [the witness] if based on his observations of past dye pack incidents, those scars were of the type that would be caused by a dye pack exploding, then that would have been the type of testimony dependent on specialized knowledge and experience that falls within expert testimony.

Id. Application of *Jones*'s distinction to Detective Smith's testimony indicates that Detective Smith's testimony crossed the line between lay and expert opinion testimony.

{21} Detective Smith's testimony consisted of various details about stun guns and his opinion as to the cause of D.L.'s bodily injuries. The following exchanges took place on direct examination:

> D.A.: [W]ere you able to determine or figure out what type of device these kids were talking about? You said they called it a taser.
>
> Detective Smith: They called it a taser throughout everything up to that point. What it looks like is it's an electronic stun gun.
>
> . . . .
>
> D.A.: How do you know so much about stun guns and tasers?
>
> Detective Smith: As part of my career I worked in the Santa Fe Police Department. I was assigned to the administrative division, and we did actually do some research on stun guns themselves to determine whether or not we wanted to utilize them as an alternate means of control.
>
> D.A.: You've actually looked into these as part of your job?
>
> Detective Smith: To some extent, yes ma'am.
>
> D.A.: OK, and the stun gun, versus the taser, again, describe what a stun gun looks like.
>
> Detective Smith: The stun gun is a contact weapon. In other words, you have to have it in your hand

and actually make contact with the individual to utilize it.

. . . .

D.A.: You heard [D.L.] describe if he moved one prong would hit him. Does that seem accurate to you in your training and experience?

Detective Smith: Yes, the way it worked is that the nodules themselves, or the prongs, are live when the button is pressed and you can hold it up and discharge it and there's an electrical charge that will go back and forth between the prongs, but if you touch someone with it, one or both prongs can deliver the shock.

. . . .

D.A.: Have you ever seen what type of marks are left from a stun gun?

Detective Smith: The marks that I've seen on [D.L.] are extremely similar to the ones I've seen on individuals that have suffered stun guns.

. . . .

D.A.: So we've been talking about mosquito bites, does [the injury] look similar to a mosquito bite?

Detective Smith: I could see someone that wasn't familiar with them would think so, but they really didn't appear to be a mosquito bite because they didn't have the raised irritation that you would see from a mosquito bite, and then the angry red ring around it that would show on a mosquito bite. There's a round area that's very round. Mosquito bites, they come in a variety of shapes and sizes.[4]

. . . .

D.A.: I want to talk specifically about the difference in what your experience is as a law enforcement [officer] in a stun gun injury.

Detective Smith: The stun gun injuries, they're all consistently—when they hit in pairs, are the same distance apart. . . . The prongs of a stun gun are about . . . two-and-a-half inches apart. . . . And when they both hit they will make marks that are that distance apart. . . . But if you just hit a lone stud, or a lone prong at one point, it can leave a single mark on its own.

. . . .

D.A.: [B]ased on your experience in knowing what a stun gun does, how many pairs were you able to locate on his body?

Detective Smith: I counted up twenty-four pairs that appeared to be stun gun injuries.

{22} As an initial matter, Detective Smith's testimony indicates that his experience with stun guns is based upon his law enforcement training and experience, rather than from life experience outside the law enforcement context. Therefore, any commentary by Detective Smith about the technical properties of stun guns, the nature of stun gun injuries and the manner in which they heal, similarities and dissimilarities between stun gun injuries and mosquito bites, and the distance between stun gun prongs, are not "matters which are within the common knowledge and experience of an average person." *Winters*, 2015-NMCA-050, ¶ 11 (internal quotation marks and citation omitted). Furthermore, Detective Smith's testimony crossed the line drawn in *Jones* in that he did not simply state that he had seen stun gun injuries, describe them, and allow the jury to draw its own conclusion. Instead, Detective Smith several times stated that the marks on D.L.'s body were the type that would be caused by a stun gun. Thus, Detective Smith's testimony was not simply commentary on observations he witnessed during the investigation, but instead he applied his law enforcement training and experience to "make connections for the jury" as to the cause of the marks on D.L.'s body. *Jones,* 739 F.3d at 369.

{23} We do not dispute the State's contention that Detective Smith's testimony was based upon his personal perceptions. However, we cannot agree that his characterization of these marks as stun gun injuries is one that a "normal person would form on the basis of observed facts," *State v. Luna*, 1979-NMCA-048, ¶ 19, 92 N.M. 680, 594 P.2d 340, particularly when D.L. himself testified that many of the marks on his body were mosquito bites. As such, Detective Smith's testimony constituted expert opinion testimony and should not have been admitted under Rule 11-701.[5]

Harmless Error

{24} The State alternatively argues that if Detective Smith's testimony was improper, its admission constitutes harmless error. Violations of the rules of evidence by a district court are non-constitutional errors. *State v. Marquez*, 2009-NMSC-055, ¶ 20, 147 N.M. 386, 223 P.3d 931, *overruled on other grounds by Tollardo*, 2012-NMSC-008. Non-constitutional errors are harmless unless there is a reasonable probability that the error impacted the verdict. *Tollardo*, 2012-NMSC-008, ¶ 36. To determine the likely effect of the error, courts must evaluate all of the circumstances. *Id.* ¶ 43. These circumstances include other evidence of the defendant's guilt, the importance of the erroneously admitted evidence to the prosecution's case, and the cumulative nature of the error. *Id.*

{25} Defendant was charged and convicted of twenty-four counts of child abuse. Detective Smith testified that he observed twenty-four pairs of stun gun injuries on D.L.'s body. This evidence was the most authoritative causal connection between Defendant and the injuries observed on D.L.'s body. No other witness, including D.L. himself, testified to that exact number of marks being caused by a stun gun.[6] The primary witnesses against Defendant were young children when the assaults occurred. Their testimony contained numerous inconsistencies and was subject to change under cross-examination. These inconsistencies dramatically increased the importance of Detective Smith's testimony to the State's case. *See id.* Under the circumstances, a reasonable probability exists that Detective Smith's testimony impacted the jury's verdict by authoritatively declaring that (1) the cause of D.L.'s injuries was

[4]Defendant's objection to Detective Smith's lack of qualification as an expert was raised at this point in the testimony.

[5]We observe an interaction that took place during cross-examination of D.L. During an exchange about the marks appearing on D.L.'s body, defense counsel asked D.L "[i]f there are two prongs on the taser you should have more than forty-eight marks on your body. Does that sound right?" to which the prosecution objected and asked whether the question "is [counsel's] expert opinion." In response to the objection, the court stated that the question was "too specific."

[6]D.L. testified on direct examination that most of the marks present on his body during the police interview were the result of mosquito bites.

a stun gun, and (2) the number of assaults was at least twenty-four. As such, the admission of Detective Smith's testimony did not constitute harmless error and requires reversal of Defendant's convictions on all counts.

SUFFICIENCY OF THE EVIDENCE

{26} Defendant argues that there was not sufficient evidence to support his convictions on twenty-four counts of child abuse by torture. We address this issue independently from our analysis of the evidentiary issue to avoid double jeopardy implications on retrial. *See State v. Mascareñas*, 2000-NMSC-017, ¶ 31, 129 N.M. 230, 4 P.3d 1221 ("By addressing [the defendant's] claim of insufficient evidence and determining that retrial is permissible, we ensure that no double jeopardy concerns are implicated.").

{27} Sufficient evidence exists to support a conviction when "substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Duran*, 2006-NMSC-035, ¶ 5, 140 N.M. 94, 140 P.3d 515 (internal quotation marks and citation omitted). "In reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict." *State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711, 998 P.2d 176. It is the exclusive province of the jury to resolve inconsistencies or ambiguities in a witness's testimony, *State v. Sena*, 2008-NMSC-053, ¶ 11, 144 N.M. 821, 192 P.3d 1198, and "New Mexico appellate courts will not invade the jury's province as fact-finder by second-guessing the jury's decision concerning the credibility of witnesses, reweighing the evidence, or substituting its judgment for that of the jury." *State v. Garcia*, 2011-NMSC-003, ¶ 5, 149 N.M. 185, 246 P.3d 1057 (alterations, internal quotation marks, and citation omitted). Instead, we determine only whether "a rational jury *could* have found beyond a reasonable doubt the essential facts required for a conviction." *Duran*, 2006-NMSC-035, ¶ 5 (internal quotation marks and citation omitted). We measure the sufficiency of the evidence against the instructions given to the jury. *State v. Smith*, 1986-NMCA-089, ¶ 7, 104 N.M. 729, 726 P.2d 883.

{28} Defendant argues at length that the State failed to present sufficient evidence to prove beyond a reasonable doubt that (1) Defendant directly assaulted D.L. twenty-four times, or (2) Defendant was culpable under the language of our accessory statute. We address these arguments in turn.

Sufficiency of the Evidence to Convict Defendant as D.L.'s Principal Abuser

{29} Child abuse occurs when "a person knowingly, intentionally or negligently, and without justifiable cause, caus[es] or permit[s] a child to be: (1) placed in a situation that may endanger the child's life or health; (2) tortured, cruelly confined or cruelly punished; or (3) exposed to the inclemency of the weather." Section 30-6-1(D). The twenty-four count indictment against Defendant was consistent with the statutory language.

{30} At trial, the district court gave a jury instruction requiring that, to convict Defendant of child abuse by torture, the jury must find that Defendant (1) caused D.L. to be tortured; (2) intentionally and without justification; (3) while D.L. was under the age of eighteen; and (4) in the state of New Mexico between August 1, 2010 and October 29, 2010. This instruction is consistent with the uniform jury instruction on child abuse. *See* UJI 14-604 NMRA (1999) (withdrawn 2015). The language of the jury instruction, which only included the word "caused," implies that the Defendant must be found to be the principal abuser to support a conviction under this instruction. To affirm Defendant's convictions as D.L.'s principal abuser, this Court must conclude that any rational jury, based upon the evidence presented, could have found Defendant guilty beyond a reasonable doubt. *Duran*, 2006-NMSC-035, ¶ 5.

{31} D.L. testified that Defendant stunned him more than twenty-four times. While D.L.'s testimony was not unequivocal on this topic, it was presented to the jury for consideration. The jury also saw pictures of D.L.'s injuries and heard corroborating testimony from L.L. and Detective Smith. On this evidence, a rational jury could have found Defendant guilty beyond a reasonable doubt as D.L.'s principal abuser on twenty-four counts of child abuse by torture.

Sufficiency of the Evidence to Convict Defendant as an Accessory to Abuse Committed by Another

{32} Additionally, the district court gave a jury instruction requiring that, to convict Defendant as an accessory to child abuse by torture, the jury must find (1) Defendant intended that the crime be committed; (2) the crime was committed; and (3) Defendant helped, encouraged, or caused the crime to be committed. This instruction is consistent with the uniform jury instruction on accessory liability. *See* UJI 14-2822 NMRA.

{33} Our accessory liability statute provides, in pertinent part, that "[a] person may be charged with and convicted of the crime as an accessory if he procures, counsels, aids or abets in its commission and although he did not directly commit the crime." NMSA 1978, § 30-1-13 (1972). Being an accessory is not a distinct offense, but it is instead linked to the actions of the principal. *State v. Carrasco*, 1997-NMSC-047, ¶ 6, 124 N.M. 64, 946 P.2d 1075. A person charged as an accessory is equally as culpable as the primary offender and is subject to the same punishment. *Id.* An accessory must share the criminal intent of the principal, and this intent may be inferred "from behavior which encourages the act or which informs the confederates that the person approves of the crime after the crime has been committed." *Id.* ¶ 7. Generally, mere presence during the commission of the charged offense, even presence accompanied by mental approbation, is insufficient to infer the criminal intent required by the statute. *Luna*, 1979-NMCA-048, ¶ 11. However, this generality does not apply in the same manner to those "entrusted with the care and safekeeping of a child[.]" *State v. Orosco*, 1991-NMCA-084, ¶ 25, 113 N.M. 789, 833 P.2d 1155, *aff'd*, 1992-NMSC-006, 113 N.M. 780, 833 P.2d 1146.

{34} In *Orosco*, the defendant lived with his girlfriend and her six-year-old son, the victim. *Id.* ¶ 2. While providing child care, the defendant and a friend took the victim to a bar where the friend sexually assaulted the victim. *Id.* After the assault, the victim consistently stated that he was forced to perform sexual acts on the friend, but he gave inconsistent statements about the defendant's role in the assault. *Id.* In one statement, the victim alleged that the friend assaulted him in the bar bathroom and that the defendant laughed at him when the assault was over. *Id.* ¶ 4. In later statements, the victim alleged that both the defendant and the friend were in the bathroom and that the defendant held his head while the friend attempted to have oral sex with him. *Id.* ¶¶ 5-6. The defendant was charged with criminal sexual contact with a minor as an accessory. *See id.* ¶ 1. At trial, both the state and the defendant took the position that, in order to convict, the jury must

find that the defendant took an active role in the assault. *See id.* ¶ 22 ("Thus, both the state and [the] defendant seem to concede that [the] defendant's mere presence during the molestations would not suffice to convict him as an accessory, even though [the] defendant had charge of the care of the minor and took no steps to protect him."). While expressly upholding the defendant's convictions based upon testimony indicating approval or encouragement in the assault, this Court, sua sponte, held that a parent, or a person "charged with the care and welfare of [a] child," is culpable as an accessory for the failure, when present, to take reasonable steps to protect a child from an assault by another. *Id.* ¶¶ 20, 26-27.

{35} Based on *Orosco*, as D.L.'s foster parent, Defendant had an affirmative duty to protect D.L. from assaults occurring during Defendant's presence. He thus was subject to conviction under our accessory liability statute on this basis.

{36} At trial, D.L. testified that (1) Defendant purchased the stun gun and gave it to his son Mikey; (2) he was stunned by Mikey approximately fifteen times; (3) he was stunned by Brandon approximately three times; and (4) Defendant was present during assaults by Mikey and Defendant would laugh in response. L.L. testified that she saw D.L. get stunned by various individuals between ten and fifteen times. On this evidence, a rational jury could have found Defendant guilty beyond a reasonable doubt as an accessory to child abuse inflicted by another, even though the maximum number of convictions supported by the evidence is eighteen.

{37} When, as in this case, a district court uses general rather than specific verdict forms, the appellate courts are often unable to determine the jury's rationale for conviction. In this case, the jury might have found that Defendant was guilty of all twenty-four counts of child abuse as the principal abuser. The jury also might have found that Defendant was guilty in part as the principal abuser and in part as an accessory. Regardless of the basis for the jury's conclusion, the evidence was sufficient because the convictions can be sustained under just one of the theories—that is, that Defendant was guilty beyond a reasonable doubt as the principal abuser on all twenty-four counts.

DUE PROCESS AND DOUBLE JEOPARDY

{38} Defendant's final argument relates to the charging scheme employed by the State at trial. Defendant argues that the State's indictment violated his right to due process inasmuch as he was denied notice of the particular charges against him and potentially subjected him to double jeopardy under a course of conduct theory of prosecution. "We review questions of constitutional law and constitutional rights, such as due process protections, de novo." *N.M. Bd. of Veterinary Med. v. Riegger*, 2007-NMSC-044, ¶ 27, 142 N.M. 248, 164 P.3d 947.

{39} The United States Constitution provides procedural due process protections to criminal defendants, including the right to have "reasonable notice of charges against [them] and a fair opportunity to defend[.]" *State v. Baldonado*, 1998-NMCA-040, ¶ 21, 124 N.M. 745, 995 P.2d 214. "Procedural due process also requires that criminal charges provide criminal defendants with the ability to protect themselves from double jeopardy." *State v. Dominguez*, 2008-NMCA-029, ¶ 5, 143 N.M. 549, 178 P.3d 834 (internal quotation marks and citation omitted). The right to these protections is regularly asserted in cases in which, as here, the allegations of child victims lack specificity as to the date, location, or details of an incident. *See generally id.*; *Baldonado*, 1998-NMCA-040; *State v. Tafoya*, 2010-NMCA-010, 147 N.M. 602, 227 P.3d 92.

{40} The rights of defendants are balanced against the state's compelling interest in protecting child victims of abuse and prosecuting perpetrators of violence against children. *See Baldonado*, 1998-NMCA-040, ¶ 20 ("[T]here exists a profound tension between the defendant's constitutional rights to notice of the charges against him and to present a defense, and the state's interest in protecting those victims who need the most protection." (internal quotation marks and citation omitted)). Given this compelling interest, our courts recognize the limitations of child victims and are "less vigorous in requiring specificity as to time and place when young children are involved than would usually be the case where an adult is involved." *Id.* ¶ 21 (internal quotation marks and citation omitted).

{41} Application of our relevant case law to the facts of this case demonstrates that Defendant's argument must prevail. Defendant was charged with twenty-four counts of child abuse by torture; a number that appears to be derived by combining Detective Smith's claim that twenty-four matched injuries were located on D.L.'s body, and D.L.'s testimony that he stopped counting how many times he was stunned at twenty-four. The criminal indictment does not differentiate between any of the incidents, but instead it presents twenty-four identical counts. Each count states:

> Child Abuse, in that on or between June 01, 2010, and October 29, 2010, in Curry County, New Mexico, the above-named defendant did intentionally and without justification, cause or permit D.L., a child under the age of eighteen years, to be placed in a situation that may endanger his life or health, OR tortured, cruelly confined or cruelly punished D.L., contrary to NMSA 1978, Section 30-6-1(D), a third degree felony.

The charging period was later amended to August 1, 2010 to October 29, 2010.

{42} As a threshold matter, this case does not present a question of the permissibility of the charging period. It is undisputed that any stunning that did occur happened between the date the stun gun arrived in the mail, sometime in early August 2010, and October 29, 2010, when D.L. and L.L. were removed from the house. As a result, this case does not require application of the *Baldonado* test for permissibility of the charging period. *See id.* ¶ 27 (outlining test for a permissible charging period when the allegations of a child victim lack specificity with respect to timing of the assault(s)). While this Court recognizes the merits of the public policy rationale outlined in *Baldonado*, a determination as to the presence of a due process violation in the present case does not turn on questions related to "whether an indictment is reasonably particular with respect to the time of the offense." *Id.* ¶ 26.

{43} Instead, our inquiry relates to the lack of specificity of the incidents alleged against Defendant, making *Dominguez* the controlling precedent. 2008-NMCA-029. In *Dominguez*, the defendant was charged with ten counts of criminal sexual contact of a minor under the age of thirteen over a period of approximately ten weeks. *Id.* ¶ 2. All ten counts of the indictment were identical and "[n]othing in the indictment provided any information that would distinguish one count from any other count." *Id.* After the state filed a bill of particulars, the district court concluded that "the [s]tate had provided [the d]efendant with notice of the facts and circumstances as to five alleged incidents," and it dismissed

the five remaining undifferentiated counts. *Id.* ¶ 4. On appeal, this Court reviewed the dismissal of the five undifferentiated counts and held that the dismissal was appropriate for the "five counts that could not be linked to a particular incident of abuse." *Id.* ¶ 10. We noted:

> [a]lthough we have allowed some leeway in the charging period where child victims are unable to recall dates with specificity, we have never held that the [s]tate may move forward with a prosecution of supposedly distinct offenses based on no distinguishing facts or circumstances at all, simply because the victim is a child.

Id. Additionally, we stated that our holding was necessitated by the "very real possibility that the defendant would be subject to double jeopardy in his initial trial by being punished multiple times for what may have been the same offense." *Id.* ¶ 9 (alterations, internal quotation marks, and citation omitted).

{44} We followed the *Dominguez* rationale in *Tafoya*, 2010-NMCA-010, ¶¶ 22, 24. In *Tafoya*, the defendant was charged with four counts of criminal sexual penetration of a minor under the age of thirteen, among other charges. *Id.* ¶ 1. Two of the counts were for vaginal penetration and two of the counts were for anal penetration. *Id.* ¶ 2. The defendant was convicted of the four charges. *Id.* ¶ 6. On appeal, the defendant argued that a lack of factual specificity in the indictment and the evidence at trial required reversal. *Id.* ¶ 20. Relying on *Dominguez*, we held that a lack of differentiation with respect to the counts of vaginal and anal penetration necessitated reversal of one count of each. *Tafoya*, 2010-NMCA-010, ¶¶ 22, 24.

{45} The State charged Defendant with twenty-four individual counts of child abuse based upon D.L.'s allegations that Defendant and his sons assaulted him with a stun gun numerous times between August and October 2010. The indictment did not provide notice as to any specific instance in which Defendant was alleged to be the principal abuser. Nor did it provide notice as to any specific instance in which Defendant was alleged to be an accomplice to abuse inflicted by others. We view this case as directly analogous to *Dominguez*, in that the indictment and trial placed Defendant in a situation in which it was "impossible for the jury to conclude that [he] was guilty of some of the offenses, but not others" and "[t]he jury could have found him not guilty of some of the counts only if they reached the conclusion that the child victim had overestimated the number of abusive acts." 2008-NMCA-029, ¶ 8 (internal quotation marks and citation omitted).

{46} Because Defendant's due process rights were violated by the district court proceedings, and retrial is not barred, we must craft an appropriate remedy. *State v. Slade*, 2014-NMCA-088, ¶ 40, 331 P.3d 930 ("Where a defendant successfully challenges his or her conviction on some basis other than insufficiency of the evidence, double jeopardy does not apply." (internal quotation marks and citation omitted)).

{47} In similar circumstances, our double jeopardy jurisprudence allows for the state to proceed with a single count of child abuse by torture under a course of conduct theory. *See Dominguez*, 2008-NMCA-029, ¶ 10 ("[I]f the [s]tate can only support its indictment with a child's statements regarding a defendant's course of conduct and does not have enough specific information to charge distinct incidents of abuse, the [s]tate is still able to go forward with the prosecution since this Court has held that evidence of a course of conduct will support a single count of abuse."); *State v. Altgilbers*, 1989-NMCA-106, ¶¶ 38-39, 109 N.M. 453, 786 P.2d 680 (explaining that the state may charge a single count for multiple acts under a course of conduct theory). That said, the State is not required to employ a course of conduct theory on retrial. If the State elects to retry Defendant on multiple counts of child abuse by torture, it shall file a bill of particulars supporting its indictment. The district court may then conduct a hearing to determine whether each count charged meets the due process requirements under *Dominguez*. If the result of that hearing is a ruling that certain counts must be dismissed, Defendant's new trial shall be on the remaining counts only.

CONCLUSION

{48} For the foregoing reasons, we reverse Defendant's convictions on all counts and remand to the district court for retrial consistent with procedures outlined in this opinion.

{49} IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR:

MICHAEL E. VIGIL, Chief Judge

MICHAEL D. BUSTAMANTE, Judge

Certiorari Granted, March 25, 2016, No. S-1-SC-35751

From the New Mexico Court of Appeals

Opinion Number: 2016-NMCA-039

No. 33,588 (filed January 13, 2016)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
TREVOR BEGAY,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY
JOHN A. DEAN JR. District Judge

HECTOR H. BALDERAS
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Santa Fe, New Mexico
JACQUELINE R. MEDINA
Assistant Attorney General
Albuquerque, New Mexico
for Appellee

JORGE A. ALVARADO
Chief Public Defender
SERGIO VISCOLI
Assistant Appellate Defender
DAVID HENDERSON
Assistant Appellate Defender
Santa Fe, New Mexico
for Appellant

Opinion

Timothy L. Garcia, Judge

{1} A criminal sentencing statute requires magistrate, metropolitan, and district courts to place a convicted defendant on probation whenever those courts defer or suspend that defendant's sentence of imprisonment. *See* NMSA 1978, § 31-20-5 (1985, amended 2003). Once the period of the defendant's suspended sentence expires, that defendant is generally "relieved of any obligations imposed on him . . . and has satisfied his criminal liability for the crime." NMSA 1978, § 31-20-8 (1963, amended 1977). The Probation and Parole Act contains an exception to this rule. *See* NMSA 1978, §§ 31-21-3 to -19 (1955, as amended through 2013). Section 31-21-15(C) allows a court to effectively toll the running of a defendant's suspended sentence where he has violated the terms of his probation and cannot be immediately located to answer for this violation (hereinafter, the tolling provision). However, the statutory language used by the Legislature limited the tolling provision to cases in which the defendant's underlying conviction occurred in the district court. *See* § 31-21-5 (A), (F). As a result, when a defendant is convicted of a crime in magistrate court, placed on probation in lieu of serving a prison sentence, violates the terms of his probation, and cannot be located to answer for this violation until the period of his suspended sentence has expired, tolling does not apply, and the defendant is relieved of his obligations without any apparent consequence. The magistrate court and the district court in this case concluded that the tolling provision applied to the defendant, even though the defendant's underlying conviction was imposed by the magistrate court, and not the district court. For reasons we explain below, we conclude that the plain language of the Probation and Parole Act does not permit the tolling provision to apply to persons convicted in magistrate court and that the Legislature intended this result when it enacted the Probation and Parole Act. Accordingly, we reverse the district court's order.

BACKGROUND

{2} Defendant Trevor Begay was convicted of battery in the San Juan County Magistrate Court and sentenced to 182 days of imprisonment with credit for eleven days of time served. The magistrate court suspended his sentence and ordered that Defendant serve 171 days of supervised probation. Defendant violated the terms of his probation and could not be located to answer for this violation until after the period of his suspended sentence expired. When he was finally brought back before the magistrate court, the court determined that Section 31-21-15(C) permitted it to toll the running of Defendant's sentence. As a result, the magistrate court revoked Defendant's probation and ordered him to serve the remainder of his sentence in prison. Defendant appealed to the district court, which reached the same conclusion and affirmed the magistrate court. Defendant now appeals to this Court, asserting that the tolling provision cannot be applied to Defendant because his conviction was obtained in the magistrate court.

DISCUSSION

Statutory Interpretation Principles

{3} We review statutory interpretation issues de novo. *State v. Nozie*, 2009-NMSC-018, ¶ 28, 146 N.M. 142, 207 P.3d 1119. Our "primary goal" in interpreting a statute "is to ascertain and give effect to the intent of the Legislature." *State v. Morales*, 2010-NMSC-026, ¶ 6, 148 N.M. 305, 236 P.3d 24 (internal quotation marks and citation omitted).

> In doing so, we examine the plain language of the statute as well as the context in which it was promulgated, including the history of the statute and the object and purpose the Legislature sought to accomplish. We must take care to avoid adoption of a construction that would render the statute's application absurd or unreasonable or lead to injustice or contradiction.

Id. (internal quotation marks and citation omitted).

Historical Context of the Probation and Parole Act and the Magistrate Court

{4} Our Legislature originally enacted "The Parole Act of 1955" to provide for "the release to the community of an inmate of a [s]tate correctional institution [prior to the expiration of his term], by the decision of a parole board . . ., [and] subject to conditions imposed by the board and to its supervision." 1955 N.M. Laws, ch. 232, §§ 1, 3. The Legislature amended this act in 1963 to include probation, changing its title to the "Probation and Parole Act." 1963 N.M. Laws, ch. 301, § 1. This amendment defined the term "probation" as "the procedure under which an *adult* defendant, found guilty of a crime upon verdict or plea, is released by the court without imprisonment under a suspended or deferred sentence and subject to conditions[.]" *Id.* § 3 (emphasis added); *see* § 31-21-5(A). The amendment defined "adult" as "any person convicted of a crime by a *district court*." 1963 N.M. Laws, ch. 301, § 3 (emphasis added); *see* § 31-21-5(F). These definitions have remained unchanged since the 1963

amendment was enacted. *See* § 31-21-5(A), (F). Furthermore, the 1963 amendment created the tolling provision at issue in this case, which has also remained unchanged.

> At any time during *probation*[,] . . . the court may issue a warrant for the arrest of a probationer for violation of any of the conditions of release. . . .
>
> . . .
>
> If it is found that a warrant for the return of a probationer cannot be served, the probationer is a fugitive from justice. After hearing upon return, if it appears that he has violated the provisions of his release, the court shall determine whether the time from the date of violation to the date of his arrest, or any part of it, shall be counted as time served on probation.

1963 N.M. Laws, ch. 301, § 13 (emphasis added); *see* § 31-21-15(A), (C). Thus, when the Legislature enacted these 1963 provisions, it expressly limited the application of the tolling provision to "adult" persons convicted of crimes in the district court.

{5} In 1963, like today, the district court also had original jurisdiction over all misdemeanors. *See* N.M. Const. art. VI, § 13. But some misdemeanors could instead be tried by "magistrates[,]" also known as "justices of the peace[,]" NMSA 1953, §§ 36-2-1, -5 (1961) (providing magistrates/justices of the peace jurisdiction over misdemeanors punishable by a maximum fine of $100 or six months imprisonment), or by a "municipal magistrate court[,]" NMSA 1953, §§ 37-1-1 to -2 (1961) (providing a municipal magistrate court jurisdiction over offenses under municipal ordinances). The Legislature did not create the present day "magistrate court" system until 1968, five years after it created the tolling provision. *See* 1968 N.M. Laws, ch. 62, §§ 3, 49 (establishing the " 'magistrate court' as a court of limited original jurisdiction within the judicial department of the state government" and limiting its criminal jurisdiction to misdemeanors punishable by a maximum fine of $100 or up to six months imprisonment); *see also* N.M. Const. art. VI, § 26 (authorizing and directing the Legislature in 1966 to "establish a magistrate court to exercise limited original jurisdiction as may be provided by law"). In creating the current magistrate court system in 1968, the Legislature "abolished" the office of justice of the peace and transferred its jurisdiction, powers, and duties to the magistrate court. 1968 N.M. Laws, ch. 62, § 40. Finally, although the Legislature later amended Section 31-20-5 in 1984 to require the magistrate court to order probation when it defers or suspends a sentence, 1984 N.M. Laws, ch. 106, § 2, it did not amend the Probation and Parole Act to extend the tolling provision to magistrate court convictions.

{6} Viewing the plain language of the Probation and Parole Act and considering the totality of the historical considerations, we conclude that the Legislature intended to limit the tolling provision to "adult" persons who were convicted in the district court, as opposed to persons convicted by magistrates, even though the magistrate court had concurrent jurisdiction over crimes punishable by a maximum fine of $100 and six months imprisonment. *Compare* NMSA 1953, §§ 36-2-1, -5, *with* 1968 N.M. Laws, ch. 62, §§ 3, 49. The Legislature's decision in this regard does not appear unreasonable or to have created an absurd or unjust result, at least at the time the tolling provision was created. As Defendant suggests, the Legislature may have chosen to limit the tolling provision in this manner because (1) convictions obtained by magistrates (and, later, the magistrate court) only involved minor crimes with less severe punishment implications than the more serious convictions addressed by the district court; and (2) the burden of injecting an additional administrative process and additional inmates into our magistrate court system arising from probation violations involving only minor offenses may well outweigh the public benefits achieved through these courts of limited criminal jurisdiction. Whatever the reasons, such policy decisions are primarily within the domain of the Legislature. *See Hartford Ins. Co. v. Cline*, 2006-NMSC-033, ¶ 8, 140 N.M. 16, 139 P.3d 176 ("It is the particular domain of the [L]egislature, as the voice of the people, to make public policy. Elected executive officials and executive agencies also make policy, to a lesser extent, as authorized by the [C]onstitution or the [L]egislature. The judiciary, however, is not as directly and politically responsible to the people as are the legislative and executive branches of government." (alteration, internal quotation marks, and citation omitted)). Although it seems that the Legislature's decision in 1984 to require the magistrate court to order probation when deferring or suspending a sentence would have been logically followed by an amendment to the Probation and Parole Act to provide that the term "probation" under the Act also applies to persons convicted in magistrate court, we cannot judicially amend the Probation and Parole Act to reach this result. *See id.*; *see also Eskew v. Nat'l Farmers Union Ins. Co.*, 2000-NMCA-093, ¶ 17, 129 N.M. 667, 11 P.3d 1229 ("A court cannot judicially amend a statute[.]" (internal quotation marks and citation omitted)).

{7} In support of the State's position that the Probation and Parole Act's tolling provision applies to persons convicted in magistrate court, it notes that Section 31-21-9(A) of the Probation and Parole Act recognizes that the magistrate court, as well as the district court, may order a presentence report from the director of the field services division of the corrections department. We are not convinced that this 1972 amendment shows that the Legislature also meant to allow the tolling provision to apply to magistrate court convictions, because the Legislature did not require the magistrate court to order probation until 1984. *See* 1984 N.M. Laws, ch. 106, § 2. Also, the State's argument concerning the statement contained in Section 31-21-18 that the provisions of the Probation and Parole Act "apply to all persons who, at the effective date, are on probation" ignores the Act's definitions of "probation" and "adult" as limited to persons convicted in the district court. Section 31-21-5(A), (F). Finally, we are not persuaded by the State's reliance on this Court's statement in *State v. Candelaria* that "allowance of . . . a variation in penalty based on the pure happenstance of where a case is tried would be an unreasonable result, which we must avoid in interpreting our statutes." 1991-NMCA-107, ¶ 8, 113 N.M. 288, 825 P.2d 221. In *Candelaria*, this Court determined that the statute at issue had two potential interpretations and declined to adopt the interpretation that would create such a variation in penalty. *Id.* ¶¶ 6, 8. Here, the Probation and Parole Act's language is not open to varying interpretations; the tolling provision plainly applies only to "adult" persons convicted in the district court.

CONCLUSION

{8} We reverse the district court's order and remand the case to the district court for an order requiring the magistrate court to withdraw its amended judgment and sentence and for the further entry of an order certifying that Defendant is relieved of "any obligations imposed on him . . . and has satisfied his criminal liability for the crime" as required under Section 31-20-8.

{9} IT IS SO ORDERED.

TIMOTHY L. GARCIA, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

JONATHAN B. SUTIN, Judge

Classified

Positions

Law Clerk
United States District Court, District of New Mexico, Albuquerque, Full-time Law Clerk, assigned to Judge Browning, $59,256 to $71,025 DOQ. See full announcement and application instructions at www.nmd.uscourts.gov. Successful applicants subject to FBI & fingerprint checks. EEO employer.

Associate Attorney
The Santa Fe law firm of Katz Ahern Herdman & MacGillivray PC is seeking a full-time associate with three to five years of experience to assist in all areas of our practice, including real estate, zoning, business, employment, construction and related litigation. Please send resumes to fth@santafelawgroup.com. Please state "Associate Attorney Position" in email subject line.

Law Clerk Position
Busy litigation Firm looking for Law Clerk with a desire to work in tort and insurance litigation. Please send resume and recent writing sample to: Guebert Bruckner P.C., P.O. Box 93880, Albuquerque, NM 87199-3880. All replies are kept confidential. No telephone calls please.

Attorney

Egolf + Ferlic + Harwood, LLC is looking for a hardworking lawyer to join our fast-paced and growing practice. The ideal candidate will have clerkship and private sector litigation experience. She or he will be eager to work hard on cases that will advance the law in New Mexico and produce meaningful results for our clients and our communities. We look forward to welcoming a lawyer who possesses impeccable writing and research skills and who can manage important cases from start to finish. Please be in touch if you think you will be a good candidate for this position, want to enjoy a collegial workplace, seek unparalleled opportunities for professional advancement, and understand the importance of the Oxford comma. You may send your letter of interest, resume and writing sample to our firm administrator, Manya Snyder, at Manya@EgolfLaw.com. We look forward to you joining our team!

Assistant Attorney General III, Albuquerque

[Full time] Job Reference # 00001089. The New Mexico Office of the Attorney General, Consumer and Environmental Protection Division an Equal Employment Opportunity (EEO) employer is seeking applicants for an "At Will" (not classified) Assistant Attorney General III position. An "At Will" position means any state office job or position of employment which is exempt from the service and the Personnel Act," Section 10- 9-4 NNMSA 1978, the employee serves at the pleasure of the New Mexico Attorney General. The Assistant Attorney General will be responsible for bringing litigation on behalf of the State on consumer protection issues. Responsibilities will include representing the State of New Mexico in front of State and Federal Courts as well as in front of administrative and regulatory entities, as needed. Applicants should have a minimum of 7 years of litigation experience. Applicant must be licensed to practice law in New Mexico. Experience with plaintiffs actions and consumer law preferred. Salary is commensurate with experience. Resume, writing sample and three professional references must be received at the Office of the Attorney General. This job advertisement will remain open until filled. Applicants selected for an interview must notify the Attorney General's Office of the need for a reasonable accommodation due to a Disability. Please send resumes to: The Office of the Attorney General, Attn: Cholla Khoury, E-mail: ckhoury@nmag.gov – (505) 827-6000, P.O. Drawer 1508, Santa Fe, NM 87504-1508.

Assistant Attorney General I, Santa Fe

[Full time] Job Reference # 00023914. The New Mexico Office of the Attorney General, Consumer and Environmental Protection Division an Equal Employment Opportunity (EEO) employer is seeking applicants for an "At Will" (not classified) Assistant Attorney General I position. An "At Will" position means any state office job or position of employment which is exempt from the service and the Personnel Act," Section 10- 9-4 NNMSA 1978, the employee serves at the pleasure of the New Mexico Attorney General. The Assistant Attorney General will be responsible for representing the interests of the State of New Mexico and residential and small commercial utility rate payers in utility related matters. Responsibilities will practice in front of administrative and regulatory entities and in state court, as needed. Applicant must be licensed to practice law in New Mexico. Experience with complex litigation, utility matters or financial transactions preferred. Salary is commensurate with experience. Resume, writing sample and three professional references must be received at the Office of the Attorney General. This job advertisement will remain open until filled. Applicants selected for an interview must notify the Attorney General's Office of the need for a reasonable accommodation due to a Disability. Please send resumes to: The Office of the Attorney General, Attn: Cholla Khoury, E-mail: ckhoury@nmag.gov – (505) 827-6000 , P.O. Drawer 1508, Santa Fe, NM 87504-1508.

County Attorney

The Los Alamos County is looking for County Attorney with 10 years' of experience in the practice of law across all years of experience which must include two years of providing legal representation to public sector executive policymakers. Three years' management and supervisory experience, across all years of job related experience. Licensed to practice law in the State of New Mexico or attain the license within 12 years months of employment. Excellent Benefits included. A Los Alamos County job application is required. Applications and full position information can be found at www.losalamosnm.us or by calling 505-662-8040. Completed applications should be mailed or delivered to: Los Alamos County Human Resources 1000 Central Avenue, Suite 230 Los Alamos, NM 87544. Applications may also be faxed to 505-662-8000 or emailed to jobs@lacnm.us

Position Announcement: Chief Judge Mescalero Apache Tribal Court

SUMMARY: The Chief Judge is responsible for fairly and impartially hearing and deciding judicial matters within the jurisdiction of the Mescalero Apache Tribal Court and supervising Associate Judges. DUTIES AND RESPONSIBILITIES: Adhere to the Tribal Code; Hear and determine all types of cases filed in the Tribal Court, including but not limited to: criminal, traffic, civil (e.g. domestic relations, probate, repossession, breach of contract, personal injury), juvenile, and child welfare cases (e.g. neglect, dependency, delinquency, truancy); In a timely manner, conduct legal research and issue orders; Preside over jury trials; Issue search and seizure warrants, arrest warrants, and orders of protection where appropriate; andAssist the Court Administrator in the development of a Court budget and maintenance of the case docket. MINIMUM QUALIFICATIONS: Pursuant to Article XXVI, Section 4 of the Revised Constitution of the Mescalero Apache Tribe, the successful candidate for the position of Chief Judge must: A) Possess at least a one-quarter degree of Indian blood and is a member of a federally recognized Indian tribe, nation, band or is an Eskimo, Aleut or other Alaska Native; B) Be not less than thirty-five (35) years of age, nor more than seventy (70) years of age; and C) Never have been convicted of a felony nor a misdemeanor within the past year; and Possess a high school education or its equivalent KNOWLEDGE/SKILLS/ABILITIES: Demonstrate oral and written communication skills as well as ability to perform legal research and possess analytical skills commensurate with the position of Chief Judge; Demonstrate knowledge of general legal principles in all areas listed in "Duties and Responsibilities;" Demonstrate knowledge in federal grant applications and management and "638" contracting; Demonstrate knowledge of and expertise in Federal Indian Law; Understand, appreciate and promote the ideas of tribal self-determination and tribal sovereignty; Possess and demonstrate a judicial temperament; and Possess a working knowledge of computers and software. SALARY: Salary is negotiable, and is dependent upon qualifications and budgetary concerns. CLOSING DATE: This position is open until filled. SUBMIT RESUME WITH COPY OF CERTIFICATE OF INDIAN BLOOD TO: Mr. Duane Duffy, Chief of Staff, Mescalero Apache Tribe via: 1) first class mail to P.O. Box 227, Mescalero, NM 88340; 2) facsimile to (575) 464-9191; or 3) email to dduffy@mescaleroapachetribe.com.

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Attorney Contracted Ethics Official

The City of Rio Rancho, Department of Financial Services, will receive sealed proposals for the a Contracted Ethics Official, no later than Thursday, August 11, 2016, at 10:00 a.m. local time. Sealed proposals shall be delivered to the City Clerk's Office, located at 3200 Civic Center Circle, Suite 150, Rio Rancho, New Mexico 87144. The City of Rio Rancho is soliciting formal proposals from a licensed attorney or law firm to perform independent reviews of complaints, conduct investigations, gather information, draft reports and make recommendations in accordance with City Ordinance No. 22, Enactment No. 16-19 adopted June 8, 2016. A copy of the ordinance may be accessed via the City's website: www.rrnm.gov/ethics. RFP packages may be obtained through the contact information listed below or on the City's website at: www.rrnm.gov/bids. Question regarding the RFP can be directed to the City of Rio Rancho, Department of Financial Services (505) 891-5044.

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Hinkle Law Firm in Santa Fe seeking litigation paralegal. Experience (2-3 years) required in general civil practice, including labor and employment. Candidates must have experience in trial preparation, including discovery, document production, scheduling and client contact. Degree or paralegal certificate preferred, but will consider experience in lieu of. Competitive salary and benefits. All inquires kept confidential. Santa Fe resident preferred. E-mail resume to: gromero@hinklelawfirm.com

Mgr. Employer Outreach

The School of Law seeks a motivated individual for a full-time Manager, Employer Outreach position. Duties: Manages the promotion and execution of employer outreach services in the legal community and other employment markets, including employer liaison, on/off-campus recruitment, career fairs, and other initiatives; advises students and graduates regarding employment options. Requires: ability to create/deliver presentations on legal career/employer development topics; knowledge of legal career outreach methods, programs, services, resources. Must be able to interact professionally with diverse constituencies. Occasional evening/weekend work required. Applicants possessing J.D. degree from ABA accredited law school strongly preferred. To apply: http://unmjobs.unm.edu

Admissions Administrator

The New Mexico Board of Bar Examiners seeks an Admissions Administrator to work under the immediate supervision of the Executive Director and at the direction of the Board in administering bar admissions for New Mexico. The qualified candidate will have strong written and verbal communication skills, attention to detail, and ability to work well with diverse individuals. The duties of the Admissions Administrator include dissemination of information to applicants seeking licensure as New Mexico attorneys, receiving and assisting in evaluating applications for admission, maintaining applicant files, participating in bar exam organization and administration, and other duties as required by the Board and its Executive Director. For the complete job description, visit http://nmexam.org/about-2/hiring-admissions-administrator/.

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Exceptional compensation and benefits for a manager who will improve the firm's operation and success, and achieve across the board efficiencies in the delivery of world class legal and client service. Smart, with strong written and verbal communication skills. Positive interpersonal and leadership skills to deal with individuals at all levels in a professional and respectful manner. Ability to review systems, identify efficiencies, create new systems, analyze facts and data to form objective conclusions, make sound recommendations and exercise good judgment. Organized. Computer skills a must. Ability to multitask and meet deadlines in a fast-paced environment. Detail oriented yet able to see the big picture. MBA or advanced degree preferable. Minimum 5 years COO / management experience, preferably in a law firm setting. Send cover letter and resume to Bert@ParnallLaw.com. Inquiries kept confidential.

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The School of Law seeks an experienced professional for the position of Law School Registrar. Best Consideration 7/25/2016. Duties: Oversees registrar operations and compliance with ABA standards; advises law students regarding graduation requirements and course-load selection; oversees mid-term/final examination processes; manages recording of student grades and honors listings; advises regarding student retention, suspension, and readmission; creates/distributes class schedules; manages pre-registration and course enrollment activities. Requires occasional weekend work during final exams. Preferred Qualifications: Knowledge of ABA requirements; Law School or graduate level setting experience; demonstrated ability to work effectively with a wide range of constituencies in a diverse community. To apply: http://unmjobs.unm.edu

Secretary/Legal Assistant

F/T or P/T secretary/legal assistant for litigation and business matters. Applicants should have a minimum of 3 years of experience. Must be detail oriented, organized, self-motivated & able to undertake a variety of tasks in a fast-paced environment. Salary DOE. Please email your resume to lori@srklawnm.com.

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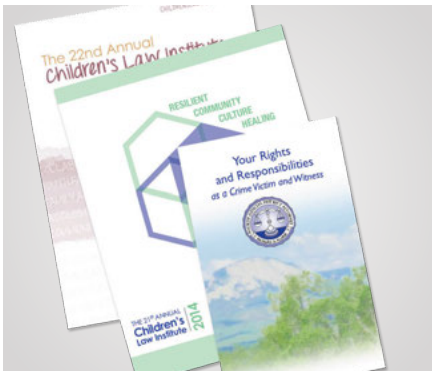

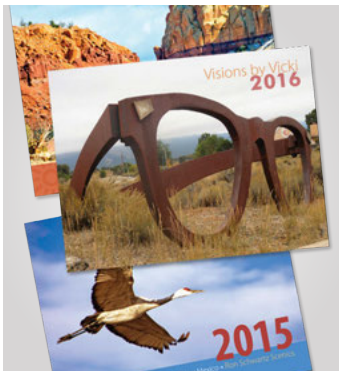

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