BAR BULLETIN
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New Mexico Solitude, by Richard Prather (see page 3)

InArt Gallery, Santa Fe

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STATE BAR of NEW MEXICO

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Meetings

May

17
Real Property, Trust and Estate Section: Trust and Estate Division
Noon, State Bar Center

19
Family Law Section Board
9 a.m., teleconference

19
Indian Law Section Board
9 a.m., State Bar Center

19
Criminal Law Section Board
Noon, Kelley & Boone, Albuquerque

19
Trial Practice Section Board
Noon, State Bar Center

20
Young Lawyers Division Board
10 a.m., State Bar Center

23
Intellectual Property Law Section Board
Noon, Lewis Roca Rothgerber Christie, Albuquerque

24
Natural Resources, Energy and Environmental Law Section Board
Noon, teleconference

Workshops and Legal Clinics

May

17
Family Law Clinic
10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

24
Consumer Debt/Bankruptcy Workshop
6–9 p.m., State Bar Center, Albuquerque, 505-797-6094

June

2
Civil Legal Clinic
10 a.m.–1 p.m., First Judicial District Court, Santa Fe, 1-877-266-9861

6
Common Legal Issues for Senior Citizens
Workshop Presentation 10–11:15 a.m., Cibola Senior Citizens Center, Grants, 1-800-876-6657

7
Civil Legal Clinic
10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

Correction: A previous issue of the Bar Bulletin *listed incorrect dates for some of the June workshops shown above.*

About Cover Image and Artist: *New Mexico Solitude*, oil, 12 by 16
Richard Prather creates atmospheric landscapes. The challenge to capture the subtle nuances of shadow and light drives his pursuit in painting the canyons and mountains of the Southwest. Prather is largely self-taught having started painting in the late 70s while in college. In addition to more than 30 years of studying and painting on his own, he credits the many workshops from some of the very best plein air artists working today with having the largest impact on the quality of his work. To view more of his work, visit www.richardprather.com.

Notices

Court News

Second Judicial District Court

Exhibit Destruction Notice

Pursuant to 1.21.2.617 Functional Records Retention and Disposition Schedules-Exhibits, the Second Judicial District Court will destroy exhibits filed with the Court, the Domestic (DM/DV) cases for the years of 1993 to the end of 2009 including but not limited to cases which have been consolidated. Cases on appeal are excluded. Counsel for parties are advised that exhibits may be retrieved through May 26. Those with cases with exhibits should verify exhibit information with the Special Services Division at 505-841-6717, from 10 a.m. to 2 p.m., Monday through Friday. Plaintiff's exhibits will be released to counsel of record for the plaintiff(s) and defendant's exhibits will be released to counsel of record for defendants(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

Third Judicial District Court

Judicial Vacancy Nominees

The Sixth Judicial District Court Nominating Commission convened on April 27 in Silver City and completed its evaluation of the four applicants for the vacancy on the Sixth Judicial District Court. The Commission recommends the following two applicants (in alphabetical order) to Governor Susana Martinez: **Timothy L. Aldrich** and **William Perkins**.

Bernalillo County Metropolitan Court

20th Anniversary Celebration of DWI Recovery Court

Join the Bernalillo County Metropolitan Court for the 20th Anniversary Celebration of the Bernalillo County Metropolitan Court's DWI Recovery Court at 11 a.m., May 25, in the Court's 2nd Floor Jury Room. Lunch will be provided. R.S.V.P. to Martin Burkhart at 505-841-8181.

Investiture of Hon. Renée Torres

The judges and employees of the Bernalillo County Metropolitan Court invite members of the legal community and the public to attend the investiture of the Hon. Renée Torres, Division III at 5:15 p.m., June 1, in the Bernalillo County Metropolitan Court Rotunda. Judges who want to participate in the ceremony, including Tribal Court judges, should bring their robes and report to the First Floor Viewing Room by 5 p.m. Following the ceremony, a reception will be held on the first floor of the Metro Court.

Professionalism Tip

With respect to opposing parties and their counsel:

I will refrain from excessive and abusive discovery, and I will comply with reasonable discovery requests.

U.S. Distirct Court, District of New Mexico

Open House Celebration

Judge Jim Browning of the U.S. District Court for the District of New Mexico invites everyone to his chambers for an open house to congratulate his Courtroom Deputy Clerk K'Aun Wild on her promotion to case management supervisor and to give Judge Browning their condolences after their 27-year association. Stop by at 3 p.m., May 23, at the Pete V. Domenici Courthouse, 333 Lomas Boulevard NW, Suite 660, Albuquerque. Refreshments will be served. R.S.V.P.s are appreciated in order to get an accurate head count for food, but they are not required to attend. Contact Mary Garcia at 505-348-2281.

State Bar News

Attorney Support Groups

- June 5, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the first Monday of the month.)
- June 12, 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#.
- July 19, 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

Animal Talk: Protecting Pollinators: Laws, Policies, Action

Join Julie McIntyre, pollinator coordinator for the Southwest Region 2 of U.S. Fish and Wildlife, for an Animal Law Section Animal Talk. McIntyre will discuss the importance of pollinators, along with federal, state and tribal protections for pollinators from noon-1 p.m., June 22, at the State Bar Center and by teleconference. Snacks and refreshments will be provided. Contact Breanna Henley at bhenley@nmbar.org to indicate your attendance or to obtain conference information.

Committee on Women and the Legal Profession

Golf Swing Clinic

The Committee on Women and the Legal Profession invites all lady golfers to a Golf Swing Clinic on Saturday, May 20 at Sandia Resort & Casino. The instruction will be from 10 a.m.–noon, followed by lunch. The price is $70 per person, which includes instruction, rental clubs (if needed) and lunch. Registration is not limited to attorneys—all lady golfers of all skill levels are welcome. Register at http://www.sandiagolf.com/form.php?id=e677b417d4e23c7156eb2170de6016d1. For more information, contact Jocelyn Castillo at jcastillosd@yahoo.com.

Young Lawyers Division

Volunteers Needed: Wills for Heroes in Rio Rancho

The Young Lawyers Division seeks volunteer attorneys for its Wills for Heroes event for Rio Rancho Police officers from 9 a.m.-2 p.m., June 10, at the Loma Colorado Main Library, located at 755 Loma Colorado Blvd NE in Rio Rancho. Attorneys will provide free wills, healthcare and financial powers of attorney and advanced medical directives for first responders. Paralegal and law student volunteers are also needed to serve at witnesses and notaries. Volunteers should bring a windows laptop if they are able. Contact YLD Vice Chair Sonia Russo at soniarusso09@gmail.com to volunteer and indicate if you have a laptop to bring or if you will need one.

continued to page 7

Legal Education

May

17 **Legislative Updates to the Probate Code**
1.0 G
Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

17 **Gangs, Drugs and Prosecution Conference**
10.7 G
Live Seminar, Grants
Administrative Office of the District Attorneys
www.nmdas.com

18 **Annual Estate Planning Update**
5.0 G, 1.0 EP
Live Seminar, Albuquerque
Wilcox Law Firm
www.wilcoxlawnm.com

19 **The Basics of Trust Accounting: How to Comply with Rule 17-204 NMRA**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

19 **2016 Administrative Law Institute**
4.0 G, 2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

19 **NM DWI Cases: From the Initial Stop to Sentencing; Evaluating Your Case (2016)**
2.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

19 **Human Trafficking (2016)**
3.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

19 **Ethics in Discovery Practice**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

23 **Drafting Gun Wills and Trusts—and Preventing Executor Liability**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

25 **The Basics of Trust Accounting: How to Comply with Rule 17-204 NMRA**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

26 **Living with Turmoil in the Oil Patch: What It Means to New Mexico (2016)**
5.8 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

26 **27th Annual Appellate Practice Institute (2016)**
6.4 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

31 **Ethics and Artificial Intelligence in Law Practice Software and Tools**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

June

1–3 **2017 Jackrabbit Bar Conference**
7.8 G
Live Seminar, Santa Fe
State Bar of New Mexico
www.nmbar.org/nmstatebar/JBC.aspx

2 **Drafting Employee Handbooks**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

6 **2017 Ethics in Civil Litigation Update, Part 1**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

7 **2017 Ethics in Civil Litigation Update, Part 2**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **Gender and Justice (2016 Annual Meeting)**
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

9 **The Disciplinary Process (2016 Ethicspalooza)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

9 **Tax Lightning: How to Avoid Being Stuck**
2.0 G
Live Seminar, Albuquerque
New Mexico Hispanic Bar Association
www.nmhba.net

16 **Reforming the Criminal Justice System (2017)**
6.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

16 **Avoiding Discrimination in the Form I-9 or E-Verify (2017)**
1.5 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

June

16 **Ethical Issues of Social Media and Technology in the Law (2016)**
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

16 **The Ethics of Supervising Other Lawyers**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

16 **Representing Victims of Domestic and Sexual Violence in Family Law Cases**
2.0 G
Live Seminar, Albuquerque
Volunteer Attorney Program
505-814-5038

16 **Representing Victims of Domestic and Sexual Violence in Family Law Cases**
2.0 G
Live Seminar, Albuquerque
New Mexico Legal Aid
505-814-5038

22 **Lawyer Ethics and Credit Cards**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

22 **Decanting and Otherwise Fixing Broken Trusts**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

23 **The Basics of Trust Accounting: How to Comply with Rule 17-204 NMRA**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

23 **Copy That! Copyright Topics Across Diverse Fields (2016)**
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

23 **2016 Real Property Institute**
4.5 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **DTSA: Protecting Employer Secrets After the New Defend Trade Secrets Act**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

30 **The Basics of Trust Accounting: How to Comply with Rule 17-204 NMRA**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

30 **The Rise of 3-D Technology - What Happened to IP? (2016 Annual Meeting)**
1.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

July

12 **Technical Assistance Seminar**
6.0 G
Live Seminar, Albuquerque
U.S. Equal Employment Opportunity Commission
602-640-4995

18 **Techniques to Restrict Shareholders/LLC Members: The Organizational Opportunity Doctrine, Non-Competes and More**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

20 **Default and Eviction of Commercial Real Estate Tenants**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

20 **Annual Rocky Mountain Mineral Law Institute**
13.0 G, 2.0 EP
Live Seminar, Santa Fe
Rocky Mountain Mineral Law Foundation
www.rmmlf.org

21 **Ethical Issues for Small Law Firms: Technology, Paralegals, Remote Practice and More**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

25 **Commercial Paper: Drafting Short-Term Notes to Finance Company Operations**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

27 **Evidence and Discovery Issues in Employment Law**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

27-29 **24th Annual Advanced Course: Current Developments in Employment Law**
17.5 G, 1.0 EP
Live Webcast/Live Seminar, Santa Fe
American Law Institute
www.ali-cle.org/CZ002

continued from page 4

UNM

Law Alumni/ae Association

15th Annual Law Scholarship Golf Classic

The UNM Law Alumni/ae Association invites members of the legal community to the 15th Annual Law Scholarship Golf Classic presented by US Eagle Federal Credit Union on June 9 at the UNM Championship Golf Course. Proceeds from the Golf Classic benefit the Law School's only full-tuition merit scholarships. Register and learn about visible sponsorship opportunities at goto.unm.edu/golf or contact Melissa Lobato at lobato@law.unm.edu or 505-277-1457.

Law Library Hours

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.

Other Bars

First Judicial District Bar Association

Spring Happy Hour

Join the First Judicial District Bar Association for a spring happy hour event. Admission is free for attorneys, plus a guest, and includes one drink and appetizers (while they last). The event is from 5:30–7:30 p.m., May 18, at Georgia Restaurant, 225 Johnson St., Santa Fe, NM 87501. R.S.V.P.s are not necessary. For more information, contact Mark Cox at mcox@hatcherlawgroupnm.com.

New Mexico Criminal Defense Lawyers Association

Fighting Forensics CLE

Join the New Mexico Criminal Defense Lawyers Association on June 9 in Albuquerque for the Fighting Forensics CLE (6.0 G), the annual membership meeting and the Driscoll Award Ceremony. Topics include DNA, pathology, computer, cell phone and body camera forensics. Afterwards, NMCDLA members and their families and friends are invited to the annual membership party and silent auction. Visit www.nmcdla.org to join NMCDLA and register for the seminar today.

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

From the Lawyers Professional Liability and Insurance Committee

Good Signs to Look for When Choosing a Professional Liability Insurance Company

These tips are part of a series of good signs to look for when choosing a professional liability insurance company, compiled by the Lawyers Professional Liability and Insurance Committee. Look for a new tip in the third issue of each month. Read the full list of tips and introduction (plus a guidance disclaimer) in the Oct. 19, 2016, (Vol. 55, No. 42) issue of the Bar Bulletin.

The company offers coverage for class action suits, as well as claims arising from estate planning and intellectual property matters.

Regardless of whether you or your firm are practicing in the areas of estate planning and intellectual property, it is worth noting when you purchase your policy whether the insurer offers coverage for these areas. When you apply for insurance, you will be asked to provide a list of practice areas. If you indicate that you or your firm practice in some specialized areas, such as class action practice, intellectual property and estate planning, you may be required to submit additional forms and information. If you fail to indicate that you practice in one of those areas, then you may be denied coverage later on if a claim arises related to your practice in one of those areas. But even if you do not regularly perform work in one of those specialized areas, it may be worth ensuring that your carrier offers coverage in those areas. You may be provided opportunities during your policy period to participate in work that implicates coverage in those areas. If that happens, you should immediately notify your carrier that you intend to perform that work, and inquire whether additional coverage may be necessary.

Bar Exam Attorney Coach Program

The State Bar of New Mexico Committee on Diversity in the Legal Profession would like to thank the volunteer attorneys who participated in the February 2017 Bar Exam Attorney Coach Program. The Committee implemented the program in the fall of 2016 in support of applicants sitting for the UBE in New Mexico. The program is designed to match an applicant with a committed attorney to serve as a resource for the applicant and empower them to succeed on the exam.

Thank you to the attorneys who volunteered to commit their time to support a bar exam applicant!

David Adams
Jorge Alvarado
Daniel Apodaca
Mabel Arellanes
Erin Atkins
Lee Bergen
Aja Brooks
Todd Bullion
James Burson
Rodina Cave Parnall
Natasha Cuylear
Frank Davis
Ann Delpha
Kymberleigh Dougherty
Amber Fayerberg
Ella Fenoglio
Melanie Fritzsche
Liz Garcia
Michelle Garcia
Eileen Gauna
Sonia Gipson-Rankin
Katherine Gorospe
Veronica Hill
Lelia Hood
Gabriela Ibanez Guzman
Torri Jacobus
Francine Jaramillo
Randi Johnson
Damian Lara
Robert Lucero
Vince Lujan
Maria Martinez Sanchez
Charles McElwee
Jackie McLean
Jacqueline Medina
Chris Melendrez
Josette Monette
Sarita Nair
Helen Padilla
Clara Padilla Silver
Ruth Pregenzer
Stormy Ralstin
Julio Romero
Larry Ruzow
Stephanie Salazar
Alicia Sanasac
Judge Frank Sedillo
Christina Sheehan
Justin Solimon
DeAnza Sapien
Barbara Stephenson
Kelly Stout Sanchez
Sherisse Summers
Delilah Tenorio
Joe Tenorio
Heidi Todacheene
Renee Torres
Xochitl Torres Small
Mary Valencia
Ashlee Wright
Matthew Zamora

To learn more about the Bar Exam Attorney Coach Program, visit www.nmbar.org/diversity > Bar Exam Attorney Coach Program.

STATE BAR of NEW MEXICO
COMMITTEE ON DIVERSITY IN THE LEGAL PROFESSION

YOUNG LAWYERS DIVISION

YLD Wills for Heroes

The YLD Wills for Heroes program is off to a great start this year. Simple wills, powers of attorney and advanced health care directives were provided to 40 first responders during an event at the Albuquerque Police Academy on Feb. 25.

The success of the Wills for Heroes program would not have been possible without volunteer assistance.

Volunteer Attorneys:

Allison Block-Chavez
James Deacon
Tara Edgmon
Sean FitzPatrick
Veronica Gonzales-Zamora
Justin Goodman
Jeff Gordon
Karin Henson
Billy Jimenez
Niva Lind
Diana Llewellyn
Kaitlyn Luck
Brooke Nowak-Neely
Michael Rueckhaus
Alicia Santos

Volunteer Witnesses and Notaries:

Karen Atkinson
Dawn Cooksey
Tony Garcia
Yolanda Hernandez
Tina Kelbe
Linda Murphy
Evonne Sanchez
Michelle Mora
Whitney Sousa
Kerryanne Devine
Vonnie Ulibarri

Volunteer for Wills for Heroes

Volunteer attorneys, witnesses and notaries are needed for a Wills for Heroes event in Rio Rancho from 9 a.m.-2 p.m., June 10, at Loma Colorado Main Library, located at 755 Loma Colorado Blvd NE in Rio Rancho. Volunteers should arrive at 8 a.m. for breakfast and orientation. Attorneys will provide free wills, healthcare and financial powers of attorney and advanced medical directives for first responders. Volunteers should bring a windows laptop if they are able to. Paralegal and law student volunteers are needed to serve as witnesses and notaries. Contact YLD Vice Chair Sonia Russo at soniarusso09@gmail.com to volunteer. Indicate if you will bring a laptop or if you will need one provided.

STATE BAR of NEW MEXICO
YOUNG LAWYERS DIVISION

WILLS FOR HEROES
NEW MEXICO

Ask-a-Lawyer
Law Day Call-in Program

The Young Lawyers Division would like to express its sincerest gratitude to the volunteer attorneys who volunteered for this year's Ask-a-Lawyer Law Day Call-in Program on April 29, many of whom have been dedicated volunteers of the program for a number of years. Without volunteer participation this program could not be a success.

Annually, the program fields roughly 250 calls from New Mexico residents eager to receive brief answers to their legal questions. 2017 was no different, with just under 200 calls taken at the Albuquerque call center and 50 calls taken at the Roswell call center. The public continues to be appreciative of the event and the YLD is proud to have KOAT Channel 7's assistance in advertising this service to throughout the state.

Thank you, Ask-a-Lawyer Call-in Program volunteers!

Dan Behles
Stephanie Beninato
Allison Block- Chavez
John Brendan Campbell
Kelly Cassels
Morris J. Chavez
Evan Cochnar
Michael Daniels
Spencer Edelman
Sean FitzPatrick
Tomas Garcia
Beth Hightower
John Hightower
Billy Jimenez
Paula Kahn
Jared Kallunki
MJ Keefe
Deborah Moore
Anna Rains-Martin
Sonia Russo
Chelsea Seaton
Elizabeth Shields
Karen Summers
Ann Washburn
Brad Zeikus

Thank you also to Sanders Law Firm and State Bar staff for their help with intake during the program!

Mari Banuelas
Tony Horvat
Vannessa Sanchez

State Bar of New Mexico
Young Lawyers Division

KOAT New Mexico

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 May 5, 2017

PUBLISHED OPINIONS

No. 34432	AD AD AD-15-2, T HAMMACK v TAX & REV (affirm)	5/1/2017

UNPUBLISHED OPINIONS

No. 33371	7th Jud Dist Soccoro CV-08-172, T ABEYTA v L LOVATO (affirm in part and remand)	5/1/2017
No. 35835	5th Jud Dist Eddy CR-15-409, STATE v M PERKINS (affirm)	5/2/2017
No. 34763	2nd Jud Dist Bernalillo LR-13-30, STATE v S MADRID (affirm)	5/2/2017
No. 35761	12th Jud Dist Otero CR-15-415, STATE v K BENTON (affirm)	5/2/2017
No. 34594	11th Jud Dist San Juan CR-14-925, STATE v D DOUGLAS (affirm)	5-3-2017
No. 35698	11th Jud Dist San Juan JQ-16-2, CYFD v MEGAN D (reverse)	5/3/2017

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

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

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

Dated May 2, 2017

Clerk's Certificate of Address and/or Telephone Changes

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Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

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Effective May 17, 2017

Pending Proposed Rule Changes Open for Comment:

There are no proposed rule changes currently open for comment.

Recently Approved Rule Changes Since Release of 2017 NMRA:

		Effective Date
Rules of Civil Procedure for the District Courts		
1-079	Public inspection and sealing of court records	03/31/2017
1-131	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017
Rules of Civil Procedure for the Magistrate Courts		
2-112	Public inspection and sealing of court records	03/31/2017
Rules of Civil Procedure for the Metropolitan Courts		
3-112	Public inspection and sealing of court records	03/31/2017
Civil Forms		
4-940	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017
4-941	Petition to restore right to possess or receive a firearm or ammunition	03/31/2017
Rules of Criminal Procedure for the District Courts		
5-123	Public inspection and sealing of court records	03/31/2017
5-615	Notice of federal restriction on right to receive or possess a firearm or ammunition	03/31/2017
Rules of Criminal Procedure for the Magistrate Courts		
6-114	Public inspection and sealing of court records	03/31/2017
6-207	Bench warrants	04/17/2017
6.207.1	Payment of fines, fees, and costs	04/17/2017
Rules of Criminal Procedure for the Metropolitan Courts		
7-113	Public inspection and sealing of court records	03/31/2017
7-207	Bench warrants	04/17/2017
7-207.1	Payment of fines, fees, and costs	04/17/2017
Rules of Procedure for the Municipal Courts		
8-112	Public inspection and sealing of court records	03/31/2017
8-206	Bench warrants	04/17/2017
8-206.1	Payment of fines, fees, and costs	04/17/2017
Criminal Forms		
9-515	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017
Children's Court Rules and Forms		
10-166	Public inspection and sealing of court records	03/31/2017
Rules of Appellate Procedure		
12-307.2	Electronic service and filing of papers	07/01/2017*
12-314	Public inspection and sealing of court records	03/31/2017

* Voluntary electronic filing and service in any new or pending case in the Supreme Court may commence on May 1, 2017.

Disciplinary Rules		
17-202	Registration of attorneys	07/01/2017
17-301	Applicability of rules; application of Rules of Civil Procedure and Rules of Appellate Procedure; service.	07/01/2017
Rules Governing Review of Judicial Standards Commission Proceedings		
27-104	Filing and service	07/01/2017

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, January 23, 2017, No. S-1-SC-36184

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-021

No. 31,162 (filed September 15, 2016)

KENNETH BADILLA,
Plaintiff-Appellant,
v.
WAL-MART STORES EAST, INC., d/b/a WAL-MART #850,
WAL-MART STORES EAST, LP, and MEL DISSASSA,
Defendants-Appellees.

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

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Opinion

Roderick T. Kennedy, Judge

{1} The Supreme Court of New Mexico has resolved the conflict between statutes of limitations in cases concerning personal injury claims arising from the sale of goods and product warranties in favor of the period set in NMSA 1978, Sections 55-2-313 to -315 (1961) of the Uniform Commercial Code (UCC), holding that Plaintiff's claims are not barred thereby. *Badilla v. Wal-Mart Stores East, Inc.* (*Badilla II*), 2015-NMSC-029, 357 P.3d 936. On remand, we return to this case to determine whether the district court's summary judgment on Plaintiff's claims under the UCC was properly rendered for Defendants. We conclude that it was, and affirm the district court.

BACKGROUND

{2} The facts in this case are aptly set out by our Supreme Court in *Badilla II*, and we will not repeat them beyond their relation to the issues presented in this opinion. In short, Plaintiff Badilla was employed as a tree trimmer and purchased work boots from Wal-Mart in October 2003. The boots' packaging described the boots as "iron tough," "rugged leather," "men's work boots," and stated that they were "designed for light to medium industrial use." Plaintiff examined the boots prior to buying them without having any conversations with store personnel about them, or whether they would be suitable for the type of work he did. He stated that he was unaware of any defect in the boots that made them unsafe at the time he purchased them.

{3} After his purchase, Plaintiff wore the boots in the course of his employment as a tree trimmer between eight and twelve hours a day, six days a week for nine months, racking up between 1871 and 2805 hours in them. He was aware that they were wearing, but maintains that the defect causing the injury was latent until he was actually injured. On July 28, 2004, Plaintiff was injured while attempting to move a log weighing about 150 pounds when the unglued sole of his boot got caught on debris, causing him to fall backwards and drop the log on top of himself. Plaintiff, represented by his present counsel in this action, initiated a worker's compensation action in March 2006 that was settled in January 2007.

{4} Plaintiff never provided notice of the boots' failure or of a claim under any warranty to Defendants prior to filing suit against them. He filed a complaint against Defendants in September 2007 more than three years after he was injured and beyond the statute of limitations for personal injury cases. *See* NMSA 1978, § 37-1-8 (1976). However, his complaint also sought damages for personal injury as a consequence of breach of warranties under New Mexico's UCC.[1] Our Supreme Court held that Defendant had adequately invoked the UCC, the provisions of which applied to this case. Specifically, the Supreme Court held that the Plaintiff's cause of action was "based in contract, and therefore the UCC's four-year statute of limitation, which governs actions for breach of warranty seeking personal injury damages, applies[,]" and specifically rejected any assertion that the case was tort-based. *Badilla II*, 2015-NMSC-029, ¶ 47. Because the portion of the summary judgment regarding Plaintiff's warranty claims under the UCC remained unresolved, the Supreme Court remanded the case to this Court for review of the district court's determination that "there is no genuine issue of material fact as to Plaintiff's inability to establish required elements of his causes of action for breach of express and implied warranty[,]" which we now address. *Id.* ¶ 50 (internal quotation marks omitted).

DISCUSSION

A. This Case Is Solely Governed By the UCC

{5} The scope of our opinion is defined by the Supreme Court's decision, deciding that Plaintiff's purchase was a contract for the present sale of goods, and his remedies are governed by the UCC. *Id.* ¶ 42. In holding that the UCC governs this case, the Court concisely stated the legal basis for Plaintiff's case:

> Plaintiff contends that Defendants made express and implied warranties about the product Plaintiff purchased. Any such warranties gave Plaintiff the right to receive goods which complied with those warranties. If the product Plaintiff purchased was not as warranted, then Defendants breached the contract, and Plaintiff has the right to recover any damages resulting from the seller's breach of that warranty if the goods do not so comply.

Id. Thus, "the nature of the right Plaintiff's claims assert is the right to receive

[1]A brief summary of the history and purposes of the UCC is found in *Badilla II*, 2015-NMSC-029, ¶¶ 13-15.

consequential damages as compensation for Defendant's alleged failure to provide Plaintiff with boots that conformed with the warranties Defendants allegedly made." *Id.* ¶ 43. This court is bound by the Supreme Court's ruling. *See Alexander v. Delgado*, 1973-NMSC-030, ¶ 9, 84 N.M. 717, 507 P.2d 778 ("[T]he Court of Appeals is to be governed by the precedents of this court."); *Varney v. Taylor*, 1968-NMSC-189, ¶ 5, 79 N.M. 652, 448 P.2d 164 ("[W]hat amounts in effect to an adjudication of the issue on a prior appeal, right or wrong, has become the law of the case, and is binding alike upon us and the litigants in all subsequent proceedings in the case."). We first address some preliminary matters unaddressed in our previous opinion.

1. "Common Law Warranties" Are Inapplicable

{6} Plaintiff attempts to expand the availability of rights and remedies that exist outside the UCC's purview to this case involving a contract for the sale of goods, arguing that there are "common law warranties" that may apply to this case. *See Camino Real Mobile Home Park P'ship v. Wolfe*, 1995-NMSC-013, 119 N.M. 436, 891 P.2d 1190, *overruled on other grounds by Sunnyland Farms, Inc. v. Cent. N.M. Elec. Coop., Inc.*, 2013-NMSC-017, ¶ 15, 301 P.3d 387. The Supreme Court held that Plaintiff, by specifically choosing to seek a remedy under the UCC, made the UCC the applicable law for this case. *See Badilla II*, 2015-NMSC-029, ¶ 44 ("Plaintiff's cause of action asserts this claim under the UCC by invoking its statutory language.")[2].The Supreme Court also held that Plaintiff's suit is circumscribed by the UCC and does not involve common law remedies. *Id.* ¶ 39. Because the Supreme Court determined in this case that "the UCC governs claims based in contract" and that tort law based in negligence has no application here, *id.* ¶ 49, there are no "common law warranties" to be considered in this case, having been entirely displaced by the applicability of the UCC to this case. We proceed in our analysis solely pursuant to the UCC.

2. Standard of Review

{7} "The standard of review on appeal from summary judgment is de novo." *Farmers Ins. Co. of Ariz. v. Sedillo*, 2000-NMCA-094, ¶ 5, 129 N.M. 674, 11 P.3d 1236. Summary judgment is appropriate where the facts are undisputed, and the movant is entitled to judgment as a matter of law. *Hydro Res. Corp. v. Gray*, 2007-NMSC-061, ¶ 14, 143 N.M. 142, 173 P.3d 749. "[W]e view the facts in a light most favorable to the party opposing the motion and draw all reasonable inferences in support of a trial on the merits[.]" *Handmaker v. Henney*, 1999-NMSC-043, ¶ 18, 128 N.M. 328, 992 P.2d 879.

{8} We are charged by the Supreme Court with reviewing the district court's summary judgment that Plaintiff was unable to establish the required elements of his causes of action for breach of express and implied warranty. Those causes of action and remedies are based in the UCC. "Interpretation of a statute is an issue of law which we review de novo." *Badilla II*, 2015-NMSC-029, ¶ 12 (alterations, internal quotation marks, and citation omitted). Our purpose in construing a statute is to determine and give effect to the Legislature's intent. *Id.* To do so, we first look to the plain language of the statute. *Id.* "When interpreting a statute, we are also informed by the history, background, and overall structure of the statute, as well as its function within a comprehensive legislative scheme." *Id.* (internal quotation marks and citation omitted). "If the [UCC] is the basis of recovery, a plaintiff will not be permitted to fulfill only certain requirements while neglecting others[.]" *Berry v. G. D. Searle & Co.*, 309 N.E.2d 550, 556 (Ill. 1974).

B. Elements of the Cause of Action for Breach of Warranties Under the UCC

{9} "A breach of warranty presents an objective claim that the goods do not conform to a promise, affirmation, or description, or that they are not merchantable." *Jaramillo v. Gonzales*, 2002-NMCA-072, ¶ 13, 132 N.M. 459, 50 P.3d 554. The elements of a cause of action for a breach of warranty are "the existence of a defect caused by the seller, that the buyer notified the seller and sought repairs, and that the seller failed or refused to make repairs." *State ex rel. Concrete Sales & Equip. Rental Co. v. Kent Nowlin Constr., Inc.*, 1987-NMSC-114, ¶ 18, 106 N.M. 539, 746 P.2d 645. When a breach of warranty results in personal injury, the buyer can be entitled to "recover direct, incidental, and consequential damages." *Manouchehri v. Heim*, 1997-NMCA-052, ¶ 10, 123 N.M. 439, 941 P.2d 978; *see* NMSA 1978, § 55-2-715(2)(b) (1961) ("Consequential damages resulting from the seller's breach include . . . injury to person or property proximately resulting from any breach of warranty."). Defendants argue that notice in this case was untimely and unreasonable; Plaintiff demurs, stating that it was within the statute of limitations. We address this issue first.

1. Notice of the Breach Within a Reasonable Time After Its Discovery

{10} A buyer wishing to sue a seller for a breach of warranty must "within a reasonable time after he discovers or should have discovered any breach[,] notify the seller of breach or be barred from any remedy[.]" Section 55-2-607(3)(a). On its face, Section 55-2-607 facially operates to bar Plaintiff, as the "buyer" of the boots, from "any remedy" if he failed to abide by its provisions. The failure to allege sufficient notice may be a fatal defect in a complaint alleging breach of warranty. *Maldonado v. Creative Woodworking Concepts, Inc.*, 694 N.E.2d 1021, 1025 (Ill. App. Ct. 1998). Construction of a statute is a matter of pure law subject to de novo review. *Badilla II*, 2015-NMSC-029, ¶ 12.

{11} No New Mexico case holds that the filing or service of a complaint constitutes sufficiently timely notice of a warranty claim,[3] nor explains what criteria should be used to determine the reasonableness of any length of time between discovery of a breach and notice being given. Because the UCC is a uniform law of interstate application, we turn to out-of-state authorities. *See Badilla II*, 2015-NMSC-029, ¶ 26 (observing that where New Mexico lacks a definitive rule to apply provisions of the UCC, our courts look to its interpretation by other jurisdictions).

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[2]"Although Plaintiff did not actually cite these statutes, we find his near-verbatim recitation of their language sufficient to conclude, as the court did in *Reid* [*v. Volkswagen of Am., Inc.*, 512 F.2d 1294 (6th Cir. 1975)], that Plaintiff's claims were 'filed under' the UCC." *Badilla II*, 2015-NMSC-029, ¶ 44.

[3]In cases involving a retail consumer, courts have found that other notice is unnecessary if "the seller is found to be reasonably notified by the plaintiff's complaint alleging a breach of warranty." *Maldonado*, 694 N.E.2d at 1026 (citing *Connick*, 675 N.E.2d at 589). We regard this as stating a conceptual separation between the statute of limitations governing the filing of a complaint, and the commercial reasonableness of notice under Section 55-2-607.

{12} Defendants raise the reasonableness of the time Plaintiff took to file the complaint, but not whether the complaint itself was a proper vehicle for notice. We accordingly do not address the suitability of a complaint as providing the required notice of breach in this case, but only the reasonableness of the passage of three years and two months between the accident and Plaintiff's providing notice to Defendants of the alleged breach of warranty. The critical issue in this case therefore is whether Plaintiff's filing suit after he discovered or should have discovered the alleged breach amounts to reasonably timely notice, thereby complying with the language of Section 55-2-607.

{13} Plaintiff argues simply, and without citation to authority, that any notice within the statute of limitations is reasonable. However, the parties agree that Plaintiff's discovery of the breach of any warranty concerning his boots occurred simultaneously with his injury. He was aware that the boots were wearing prior to the incident, though the specific defect complained of was not apparent. The identity of the seller was known to Plaintiff, as was the manufacturer. There is also no dispute that the statute of limitations on product liability or tort claims had run, precluding suit on any basis outside the purview of the UCC. There are no facts to which we are directed by the Plaintiff concerning why notice was provided when it was. The record indicates that Plaintiff was represented by present counsel in a worker's compensation claim against his employer involving the injury alleged herein in March 2006—less than two years after the July 2004 incident.

a. Reasonableness Can Be Determined as a Matter of Law

{14} Both parties view our statement in *O'Shea v. Hatch*, that "[t]he sufficiency of notice and what is considered a reasonable time within which to give notice of breach of warranty are ordinarily questions of fact, based upon the circumstances of each case" to provide that the question of reasonableness is always one for the jury. 1982-NMCA-013, ¶ 29, 97 N.M. 409, 640 P.2d 515. Our statement was made in the context of a case that did not decide the issue of whether notice was adequate, and we are not obligated to follow dicta, or the parties' interpretation of it. *See generally id.*; *Pincheira v. Allstate Ins. Co.*, 2007-NMCA-094, ¶ 51, 142 N.M. 283, 164 P.2d 982 ("When an appellate court makes statements that are not necessary to its decision, those statements are without the binding force of law."). When there is no dispute of fact, and the issue is one that can be decided solely as a matter of law, which we review de novo, we "are not required to view the appeal in the light most favorable to the party opposing summary judgment." *City of Albuquerque v. BPLW Architects & Eng'rs, Inc.*, 2009-NMCA-081, ¶ 7, 146 N.M. 717, 213 P.3d 1146 (citing *Rutherford v. Chaves Cty.*, 2003-NMSC-010, ¶ 8, 133 N.M. 756, 69 P.3d 1199); *see also Hebron v. Am. Isuzu Motors, Inc.*, 60 F.3d 1095, 1098 (4th Cir. 1995) (affirming summary judgment as to unreasonable notice as a matter of law); *Wal-Mart Stores, Inc. v. Wheeler*, 586 S.E.2d 83, 85 (Ga. Ct. App. 2003) (holding summary adjudication is appropriate if the uncontroverted facts establish that notice was unreasonable as a matter of law); *Maldonado*, 694 N.E. 2d at 1026 (holding that where no inference could be drawn from the evidence but the notice was unreasonable, reasonableness can be decided as a matter of law); *Kirkpatrick v. Introspect Healthcare Corp.*, 1992-NMSC-070, ¶ 14, 114 N.M. 706, 845 P.2d 800 ("When the resolution of the issue depends upon the interpretation of documentary evidence, [an appellate court] is in as good a position as the trial court to interpret the evidence.").

b. Section 55-2-607, Comment 4: Reasonable Notice is Not Coextensive With the Statute of Limitations

{15} Defendants alleged in their motion for summary judgment that Plaintiff's delay in serving them with the lawsuit for breach of warranties constituted unreasonable notice under Section 55-2-607 that prejudiced their rights, and that Plaintiff's claim should be barred as a result. Plaintiff recognizes that notice could be unreasonable if the seller is unable to minimize damages or correct the defect, or would be subjected to a stale claim. But he does not address any of those issues, stating categorically that the reasonableness of the time period within which notice was given was sufficient to satisfy Section 55-2-607. Specifically, Plaintiff states that because returning the boots or seeking a refund for their cost was never a consideration owing to the simultaneous discovery of the breach and his being injured thereby, no more notice than that comprised by his serving the complaint in this case is required. In so arguing, Plaintiff cites Comment 4 to Section 55-2-607, which implies different notice standards for merchant and retail purchasers. We regard official comments to the UCC as persuasive, though not controlling authority. *First State Bank at Gallup v. Clark*, 1977-NMSC-088, ¶ 5, 91 N.M. 117, 570 P.2d 1144.

{16} Comment 4 to Section 55-2-607 states that " '[a] reasonable time' for notification from a retail consumer is to be judged by different standards so that in his case it will be extended, for the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy." Section 55-2-607 cmt. 4. Comment 4 to Section 55-2-607 sets no benchmark for any extension, while Comment 5 to Section 55-2-607 indicates that any person seeking damages for injuries because of a seller's breach of warranty "can be properly held to the use of good faith in notifying, once he has had time to become aware of the legal situation." We regard Comment 5 as tying a plaintiff's good faith to the requirement of giving notice promptly after he knew or should have known of a breach, as required by Section 55-2-607(3)(a). Neither comment exempts a plaintiff from providing notice within the statute of limitations if it falls within Section 55-2-607's requirement of being reasonably contemporaneous to when the breach was known or should have been known to him.

{17} We decline Plaintiff's invitation to hold that there is a categorical rule of law permitting "reasonable" giving of notice to be coextensive with the statute of limitations. First, Plaintiff provides no authority for such a proposition, allowing us to assume there is none. *Curry v. Great Nw. Ins. Co.*, 2014-NMCA-031, ¶ 28, 320 P.3d 482 ("Where a party cites no authority to support an argument, we may assume no such authority exists."). Second, even the cases Plaintiff cites in favor of two to three years being reasonable emphasize applying standards of reasonableness from the date of discovery over the terminal date provided by the statute of limitations.

{18} In *Maybank v. S.S. Kresge Co.*, 273 S.E.2d 681 (N.C. 1981), cited by Plaintiff, the court permitted a suit to proceed three years after the breach was discovered because "the applicable policies behind the notice requirement have been fulfilled," but recognized that given other facts, unreasonableness could be decided as a matter of law. *Id.* at 685. In *Goldstein v. G.D. Searle & Co.*, 378 N.E.2d 1083 (Ill. App. Ct. 1978), the other case cited by Plaintiff, the court reversed summary judgment for a drug manufacturer because of late notice, but recognized that while a delay in giving

notice might prejudice the defendants, the record indicated that the defendant's prior notice of similar complaints mitigated such concerns. *Id.* at 1089. Plaintiff's authority shows that long delays have been permitted, but provides no standards by which to assess reasonableness.

{19} Neither Section 55-2-607 nor the official comments absolve a plaintiff of providing notice within a "reasonable time after he discovers or should have discovered any breach," or exercising good faith in doing so under Comment 5. *See* § 55-2-607(3)(a). To avoid a reviewing court's deciding that notice under Section 55-2-607 was unreasonable as a matter of law, a plaintiff needs to file the action within the statute of limitations *and* show that "the applicable policies behind the notice requirement have been fulfilled[.]" *Maybank*, 273 S.E.2d at 685; *see also Golden v. Den-Mat Corp.*, 276 P.3d 773, 787-88 (Kan. Ct. App. 2012) (recognizing that reasonableness of notice can be judged as a matter of law, but viewing notice under Section 84-2-607 of the Kansas UCC must be assessed under a totality of circumstances "especially when any claimed delay compromised none of the purposes to be furthered through timely notification"). Filing a complaint within the statute of limitations under NMSA 1978, Section 55-2-725(1) (1961), cannot absolve a plaintiff of the obligation to satisfy Section 55-2-607(3)(a) requiring that the notice be provided within a reasonable time from the breach or discovery of the breach. *Wagmeister v. A. H. Robins Co.*, 382 N.E.2d 23, 25 (Ill. App. Ct. 1978). We now turn to the purposes behind Section 55-2-607 and whether Plaintiff fulfilled them.

c. Reasonableness Relates to the Purposes of Section 55-2-607

{20} It is our purpose to determine and give effect to the Legislature's intent in enacting the UCC as a "comprehensive legislative scheme." *Badilla II*, 2015-NMSC-029, ¶12 (internal quotation marks and citation omitted). We first look to the plain language of the statute. *Id.* Plaintiff agrees that reasonable notice enables the seller to correct the defect, or to minimize damages in some manner, and gives the seller some immunity against stale claims. *See O'Shea*, 1982-NMCA-013, ¶ 29 (stating the purposes of the notice requirement). The protection against stale claims, in practice, permits the seller to timely investigate the claim and conduct meaningful discovery. *See* James J. White et al., *Uniform Commercial Code* § 12:19 (6th ed. 2015) ("The second policy behind the notice requirement is to afford sellers an opportunity to arm themselves for negotiation and litigation."). In other words, a defendant who is timely notified of a claim has a better ability "to present certain defenses or at least have been able to limit the jury's speculation." *Id.* The notice requirement is also meant to encourage possible settlement through negotiation. *Kent Nowlin Constr., Inc.*, 1987-NMSC-114, ¶ 18. In the context of an action involving personal injury, timely notice also informs the seller of a need to make changes in its product to avoid future injuries. *See* 4 Anderson U.C.C. § 2-607:198 (3d ed. 2016); *Wal-Mart Stores, Inc.*, 586 S.E.2d 83 at 86 (citing 4 Anderson, *supra*, § 2-607:198); *Maldonado*, 694 N.E.2d at 1025.

{21} Factors to be considered in determining reasonableness of notice include the obviousness of the defect, the perishable nature of the goods, and possible prejudice to the seller from the delay. 18 Williston on Contracts, § 52:44 (4th ed. 2015). Prejudice to a seller has been found where the chance to fully investigate the circumstances of the accident and ascertain facts was lost by the passage of time. *Castro v. Stanley Works*, 864 F.2d 961, 964 (1st Cir. 1989). The test is not, as *Castro* urges, that formal prejudice results *only* from a loss of substance, but rather, that prejudice may result when " 'evidence which may reasonably have been developed by prompt investigation has been lost.' " *Id.* (quoting *Morales v. Nat'l Grange Mut. Ins. Co.*, 423 A.2d 325, 329 (N.J. Super. Ct. Law Div. 1980)); *see Falcon Steel Co. v. Maryland Cas. Co.*, 366 A.2d 512, 518 (Del. Super. Ct. 1976).

{22} Plaintiff's authority, *Maybank*, 273 S.E.2d at 684, reversed a directed verdict and permitted a three-year delay in giving notice. Unlike this case, *Maybank* was a products liability and negligence action filed within the tort statute of limitations. There, the North Carolina Supreme Court noted that in a case of personal injury, the purpose of the notice requirement would be defeated if "a delay operates to deprive the seller of a reasonable opportunity to discover facts which might provide a defense or which might lessen his liability[.]"*Id.* at 684. In *Maybank*, the plaintiff also had available the body of tort law that did not contain the stricter notice requirement of the UCC. The availability of tort remedies generally softens the requirements of the UCC's notice rule under Section 55-2-607. *E.g.*, Barkley Clark & Christopher Smith, 1 *The Law of Product Warranties*, § 9:6 (2015) ("[T]he availability of strict tort liability, without any duty of notification to the manufacturer, lessens the impact of the personal injury cases based on a warranty theory.").

{23} Moreover, in *Maybank*, 273 S.E.2d at 685, the North Carolina Supreme Court further stated the purpose of allowing leniency under Comment 4 for the retail customer is partly based in the assumption that under Section 25-2-607 of the North Carolina UCC, "[t]he injured consumer is seldom steeped in the business practice which justifies the rule, and at least until he has legal advice it will not occur to him to give notice to one with whom he has had no dealings." *Id.* (internal quotation marks and citation omitted). In this case, Plaintiff was represented by his present counsel as a result of the injuries presently complained of prior even to the expiration of the tort statute of limitations, and filed a worker's compensation action in March 2006. In the other case cited by Plaintiff, although absolving a subpurchaser from the late notice, the *Goldstein* court reaffirmed that "a buyer is required to give notice of breach . . . to his immediate seller." 378 N.E.2d at 1086.

{24} Plaintiff's choice to litigate under the UCC established his procedural and substantive rights. *See Badilla II*, 2015-NMSC-029. The Supreme Court of Rhode Island noted, in dismissing a warranty claim by a bartender injured by an exploding bottle of grenadine for lack of notice under Section 6A-2-607 of the Rhode Island UCC, that "[i]f litigants seek to prevail by relying on alternate theories of recovery, they may; but in so doing, they must touch all the bases as they present each theory." *Parrillo v. Giroux Co.*, 426 A.2d 1313, 1317 (R.I. 1981). In short, Plaintiff cannot argue categorically that any notice given by a retail consumer within the UCC's statute of limitations is reasonable. Section 55-2-607 alone governs what is reasonable notice, and Plaintiff must fulfill that section's purposes to be able to claim reasonable notice was given. Clark and Smith sum it up succinctly: "The availability of strict tort as an alternative theory of recovery where personal injury is involved cuts in favor of requiring the buyer to jump through the Code notice hoop if he seeks to use a warranty theory because of a more favorable statute of limitations, or for some other reason." Clark & Smith, *supra*, § 9:6. The Supreme Judicial Court of Massachusetts

decided under a provision like Section 55-2-607 that a notice in February of injury owing to a defective shoe the preceding October was unreasonable as a matter of law when the plaintiff lived in the same city and had usual means of communication available. *Bruns v. Jordan Marsh Co.*, 26 N.E.2d 368, 374 (Mass. 1940). With this legal background, we turn to the undisputed facts.

{25} Plaintiff admitted that he was aware that his boots were showing signs of wear prior to his accident, though he maintains that the defect that injured him was not apparent until the time of his injury. Plaintiff most certainly knew about the role that his boots played in his accident for more than three years prior to giving "notice" by way of filing a suit. Although represented by counsel regarding the accident within two years of its occurrence, his claim ran afoul of the three-year tort statute of limitations despite his early knowledge of the breach and the injury it caused. Plaintiff could only avail himself of a remedy under the UCC to avail himself of the four-year statute. Plaintiff has not demonstrated the existence of any facts that would establish the reasonableness of his notice under Section 55-2-607, or his entitlement to the leniency given the retail buyer of goods based on his knowledge of the breach, or being bereft of legal advice in its regard.

{26} The effect of the delay in giving notice is manifest in this case. Plaintiff nowhere states that the warranty statements or the boots Defendants' expert bought were identical to those he purchased. Plaintiff has lost possession of the original packaging and labeling of the boots, relying on his assertion that they were "[a] substantial equivalent" of those obtained by Defendants' expert witness in a later purchase of boots. The original content of the warranties Plaintiff alleges is lost as a result. Defendants lost an opportunity to be made aware of a defect in the boots that they might have corrected for the benefit of later buyers. A chance for more definitive evidence to support early settlement slipped away. The language of those labels is the basis for the express warranties under which he has filed this action. We hold that a plaintiff has the burden to plead the adequacy of notice as a prerequisite of recovery, and has the burden of proof to prove that adequate notice of the claim was provided to a defendant. When the facts demonstrate no justification for waiting three years and two months, Plaintiff has failed to meet his burden. The commentary to Section 55-2-607 is unavailing because no good faith reason was shown for delay—Plaintiff's assertion that it was within the statute of limitations is inadequate as a matter of law.

{27} Under the undisputed facts of this case, Plaintiff failed to provide adequate or timely notice of Defendant's breach of any warranties, and his injury thereby under Section 55-2-607 as a matter of law, and his suit for damages should be dismissed.

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

RODERICK T. KENNEDY, Judge

WE CONCUR:
JAMES J. WECHSLER, Judge
J. MILES HANISEE, Judge

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-022

Nos. 32,936, 32,945 and 32,953 (Consolidated) (filed October 14, 2016)

GARY AND KIMBERLY COBB,
Plaintiffs-Appellees,
and
CLARENCE G. SIMMONS and SUSAN BEGY SIMMONS,
Third-Party Defendants-Appellees,
v.
JOSEPH GAMMON and LINDA GAMMON,
Defendants-Appellants,
and
FFFP, LLC
Third-Party Defendants-Appellants.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
GEORGE P. EICHWALD, District Judge

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Opinion

Roderick T. Kennedy, Judge

{1} Joseph and Linda Gammon, builders in search of a property to split and develop, purchased a piece of property with the help of their realtor, French & French Fine Properties, Inc. (FFFP). Neither the Gammons nor FFFP took notice of a covenant creating a minimum lot size for that property, and the Gammons created two impermissibly small lots from the property they purchased. The neighboring property owners sued the Gammons and FFFP seeking to enforce the covenant. Meanwhile, Clarence and Susan Simmons (Simmons) purchased land adjacent to the Gammons' property. FFFP filed a third-party action against the neighboring property owners, including the Simmons, seeking to bind them to the outcome of the case involving the enforceability of the covenant. The Simmons, unaware of the Gammons covenant violation during their purchase of the property and relying on FFFP's representations as to the existence of an enforceable covenant, then filed suit against FFFP for negligent misrepresentation. The district court ruled against the Gammons in the first case dealing with enforceability, and against FFFP with regard to the negligent misrepresentation claims.

{2} Only the issues presented in the Simmons' case against FFFP remain on appeal. FFFP asserts that the Simmons did not prove that FFFP made misrepresentations during the sale to the Simmons and that the Simmons also did not prove the justifiable reliance necessary for their negligent misrepresentation claim. FFFP appeals the district court's award of compensatory damages to the Simmons in the form of disgorgement of commission, attorney's fees, pecuniary loss, and transaction costs. We affirm the award of compensatory damages for the pecuniary loss. We remand the award of disgorgement of commission and transaction costs so that the district court may recalculate those damages as set forth in this opinion. We also remand the award of attorney's fees so that the district court may determine which fees were incurred while defending against FFFP's suit, and which were incurred while affirmatively pursuing the negligent misrepresentation claims. The Simmons are entitled only to those attorney's fees incurred in defending against the suit.

I. FACTUAL BACKGROUND

{3} In 1980, HMBL Venture (HMBL) owned 116 acres of property (HMBL Property) and split the property into four tracts (Tracts 1, 2, 3, and 4), imposing an identical restrictive covenant upon each tract when it was sold. The restrictive covenant attached to each of the four tracts that made up the HMBL Property, and the lots resulting from subdivision of those tracts included seven provisions, two of which are relevant to this appeal. The first reads, "[t]his land shall not be divided into parcels of less than five acres." The second provides, "[t]he covenants and restrictions shall run with and bind the land until the year 2020. They may be enforced by any person who has title to any of the property which is subject to these same restrictive covenants." Each of the four tracts within the HMBL Property were subsequently divided and sold.

A. The Gammons' Purchase of Lot 4A2

{4} In 2002, the Gammons purchased five acres within Tract 4 of the HMBL Property (Lot 4A2). The Gammons were represented by a broker from FFFP.[1] The warranty deed conveying Lot 4A2 stipulated that the tract was "SUBJECT TO: Restrictions, reservations and easements of record." The restrictive covenant for Lot 4A2 was recorded in Book 530, page

[1]We acknowledge that French & French has changed hands several times, resulting in several name changes. For the sake of clarity, however, we refer to all present and past versions of French & French Fine Properties, Inc., French & French Sotheby's, FFFP LLC, and any other variations of the name, as FFFP.

343, of the records of the Santa Fe County Clerk. Prior to closing on Lot 4A2, the Gammons received information from their title insurance company that disclosed the existence of the restrictive covenant as well as where it was recorded. Neither the Gammons nor their FFFP broker reviewed the text of the covenant, despite receiving documents containing this information from the title insurance company.

{5} After purchasing Lot 4A2, the Gammons divided their five-acre parcel into two two-and-one-half acre lots and constructed a house on one of the lots. The Gammons sold that house and lot to Lawrence Goldstein in October 2003.[2] While constructing a house on the second two-and-one-half acre lot, the Gammons discovered they were in violation of the covenant burdening Lot 4A2. FFFP assured the Gammons it would fix the problem with the restrictive covenant.

{6} FFFP discussed potential remedies to the violation with both the Gammons and Goldstein. These remedies included "condominiumizing" both of the violating lots within Lot 4A2, acquiring acreage from surrounding lots to bring each lot into compliance with the minimum size requirement, and obtaining a waiver of or amendment to the existing covenant from all HMBL Property owners. Ultimately, FFFP pursued plans to get all landowners within the HMBL Property to waive objections to or consent to amending the restrictive covenant that burdened the tracts within the HMBL Property.

{7} In August 2005, FFFP hand-delivered letters to all HMBL Property owners requesting signatures to "resolve an expiring deed restriction." The letter was accompanied by a copy of the relevant deed and restrictive covenant, a diagram specifying which tracts had acquiesced to the waiver and amendment as well as which tracts within the HMBL Property were in violation of the covenant, and copies of the proposed waiver and amendment. Because of FFFP's circulating the letter, Gary and Kimberly Cobb (the Cobbs) learned of the Gammons' covenant violation, as well as three other restrictive covenant violations within the HMBL Property. The Cobbs refused to sign the waiver and amendment. FFFP's attempts to get the waiver and amendment signed by other neighboring property owners were also unsuccessful.

B. Simmons and the Trust Property

{8} Lots 2A, 3B, 3C, 3D, 4B, 4C, and 4D within the HMBL Property belonged to a trust (Trust Property) that Cowden Henry and Thomas Craddock managed as trustees.[3] Ray Rush and Tim Van Camp, brokers for FFFP, listed the Trust Property for sale. The Simmons were searching for property in the Santa Fe area that was protected from dense development, had unobstructed views, was in a quiet setting, and had low potential for adjacent development. The Simmons were working with Neil Lyon, another FFFP broker, during their search. Lyon and Van Camp showed the trust property to the Simmons, and during the Simmons' many subsequent visits to the property, the FFFP brokers told them that some of the neighbors were interested in amending the existing covenants. On May 2, 2005, unbeknownst to the Simmons who were contemplating purchasing the Trust Property, Van Camp obtained Henry's and Craddock's signatures, as trustees for the Trust Property, on the waiver and amendment to the covenant that FFFP was circulating among the HMBL Property owners. The Simmons signed a purchase agreement on May 13, 2005, and closed on the property on June 15, 2005. Both houses on the Gammons' Lot 4A2, which was adjacent to Tract 4C of the purchased Trust Property, existed when Simmons purchased the Trust Property. In late 2008 and early 2009, FFFP approached the Simmons, requesting that they either turn over a portion of the trust property to cure Lot 4A2's violation, or sign the waiver and amendment. The Simmons refused to consent to either proposed solution. The Simmons were neither offered the reasonable value of the property in exchange for the acreage, nor provided with a copy of the waiver or amendment that the sellers had signed.

II. PROCEDURAL HISTORY

{9} After finding out about the Gammons' covenant violation through FFFP's attempts to obtain signed a waiver and amendments, the Cobbs joined with other HMBL lot owners (collectively, the Cobb Plaintiffs) and filed suit in January 2006 against the Gammons and Goldstein.[4] In the complaint, the Cobb Plaintiffs sought enforcement of the covenant through declaratory judgment and an injunction, and they requested punitive damages. The Cobb Plaintiffs later amended their complaint, adding a claim against FFFP and the Gammons for conspiracy to breach the covenant, a claim against FFFP for aiding and abetting, and requesting punitive damages against FFFP.

{10} In 2009, the Gammons, Goldstein, and FFFP filed a third-party complaint against all others who owned lots within the HMBL Property, including the Simmons, seeking judgment binding the property owners to any judgment rendered in FFFP's case against the Cobb Plaintiffs. The Simmons filed a counterclaim against the Gammons, Goldstein, and FFFP. In that counterclaim, the Simmons sought a declaratory judgment regarding the covenant violation and an injunction requiring compliance with the restrictive covenants; they also brought claims of negligent misrepresentation and constructive fraud against FFFP.

{11} The Cobb Plaintiffs' claims, the Gammons and FFFP's third-party complaint, and the Simmons' counterclaim were all tried together in a district court trial that lasted eleven days. After trial, the district court issued extensive findings of fact and conclusions of law. The district court's final judgment, entered on April 16, 2013, awarded the Cobb Plaintiffs unjust enrichment damages and punitive damages against the Gammons and FFFP.[5] It also awarded the Simmons compensatory damages against FFFP.[6] The Gammons and FFFP appealed the district court's judgment, and the appeals were consolidated. After briefing, the parties settled the Cobb Plaintiffs' claims against FFFP.

III. DISCUSSION

{12} The Cobb Plaintiffs prevailed against both the Gammons and FFFP. As a result of the settlement, the Cobb Plaintiffs' judgment and claims against FFFP are dismissed from this appeal. While this

[2]Goldstein is not a party to this appeal.

[3]Lot 4C abuts the Gammon/Goldstein property, while lots 4B and 4D each share one corner with the Gammons' property.

[4]Plaintiffs in the case included Gary and Kimberly Cobb, who owned Tracts 1-4, Carl Gilbert and Sandra Bonchin, who owned Tracts 1-1A, Perry and Barbara Jeffe, who owned Lots 1-2 and Jafet Gonzalez and Deborah Wirth, who owned Lot 1-1B.

[5]The district court also awarded pre-judgment interest on the unjust enrichment damages, taxable costs, and post-judgment interest.

[6]The district court also awarded taxable costs and post-judgment interest.

appeal was pending, the parties alerted this Court to the fact that the Gammons have undergone bankruptcy proceedings, and the bankruptcy court discharged the Gammons' debts, including the district court's judgment for the Cobb Plaintiffs.

{13} The Gammons concede that, with respect to the issues of damages, their appeal from the district court judgment is moot. An issue is moot when no actual controversy exists, and the court cannot grant actual relief. *Gunaji v. Macias*, 2001-NMSC-028, ¶ 9, 130 N.M. 734, 31 P.3d 1008. We agree with the Gammons that the issues of damages are moot in light of their bankruptcy discharge, and we do not address them. However, FFFP's appeal of the judgment in favor of the Simmons remains. We begin with a discussion of the covenant from which this litigation originates.[7]

A. The Enforceability of the Restrictive Covenant

{14} The HMBL Property was sold in four different tracts and at four different times. While Tracts 2, 3, and 4 were conveyed subject to a restrictive covenant in 1980, Tract 1 was not conveyed until 1982. The Tracts were later subdivided into lots. The Gammons' property was located in Tract 4.

{15} Though the FFFP's arguments regarding the covenant's enforceability are poorly developed and circular, they can be summarized into two broad statements: the covenant in this case does not run with the land, and the Cobb Plaintiffs, the Simmons, and other HMBL Property owners cannot enforce the covenant due to the lack of a general plan or scheme within the HMBL Property. The Gammons first suggested that the covenant in question was personal, rather than one that runs with the land. Citing *Suttle v. Bailey*, 1961-NMSC-044, ¶ 13, 68 N.M. 283, 361 P.2d 325 (holding that grantor's reservation of general power to dispense with restrictive covenants destroyed mutuality or reciprocity so necessary to create a covenant that runs with the land), in support of this theory, the Gammons reasoned that there was never an enforceable restrictive covenant governing the HMBL Property because there was no "mutuality and no reciprocity" between the restrictions imposed upon Tract 4 and Tract 1. We address each of the Gammons' arguments in turn. A determination of whether the restrictive covenant could be enforced against the Gammons required the district court to interpret the covenant; we review such a legal determination de novo. *See Heltman v. Catanach*, 2010-NMCA-016, ¶ 5, 148 N.M. 67, 229 P.3d 1239; *see also Smart v. Carpenter*, 2006-NMCA-056, ¶ 7, 139 N.M. 524, 134 P.3d 811 (stating the rule that appellate courts review the district court's conclusions of law de novo).

1. Requirements for Covenant Running With the Land

{16} In order to establish an enforceable covenant running with the land, the covenant must touch and concern the land, the original covenanting parties must intend the covenant to run with the land, and the successor to the burden must have notice of the covenant. *Lex Pro Corp. v. Snyder Enters., Inc.*, 1983-NMSC-073, ¶ 7, 100 N.M. 389, 671 P.2d 637. The Gammons concede they had constructive notice, which satisfies the notice requirement for restrictive covenants. *See id.*; NMSA 1978, § 14-9-2 (1886-87).

{17} In determining whether a covenant touches and concerns the land, we conduct "an objective analysis of the contents of the covenant itself." *Cypress Gardens, Ltd. v. Platt*, 1998-NMCA-007, ¶ 8, 124 N.M. 472, 952 P.2d 467. A covenant touches and concerns the land if its performance renders the burdened land less valuable while rendering the benefitted land more valuable. *See Lex Pro Corp.*, 1983-NMSC-073, ¶ 8. In more archaic terms, restrictions on the use of land are "mutual, reciprocal, equitable easements in the nature of servitudes in favor of owners of other lots within the restricted area, and constitute property rights which run with the land." *Montoya v. Barreras*, 1970-NMSC-111, ¶ 12, 81 N.M. 749, 473 P.2d 363. The express terms of the restrictive covenant in this case place a burden on the Gammons' property prohibiting the creation of lots smaller than five acres while benefitting the other HMBL Property owners' interest in their property by allowing them to enjoy a lower density of development, less traffic, and unobstructed views.[8]

{18} Where the deed does not specify that the covenant is to run with the land, we must turn to an evaluation of the parties' intent regarding the covenant. *Dunning*, 2011-NMCA-010, ¶ 18 (requiring a consideration of the circumstances surrounding the transaction and the objective of the parties making the restriction in analysis of the parties' intent). That is not necessary here, as the express language of the covenant provides that "the covenants and restrictions *shall run with and bind the land* until the year 2020." When covenant provisions are unambiguous, the district court must "enforce the expressed intentions as set forth in covenants." *Aragon v. Brown*, 2003-NMCA-126, ¶ 11, 134 N.M. 459, 78 P.3d 913. The Gammons' recorded deed specifically enumerates that Lot 4A2 is subject to recorded restrictions, and the restrictive covenant in this case is recorded. The covenant in this case therefore "touches and concerns" the land, as established by its clear language, and the Gammons had notice of the covenant's existence. We hold that the restrictive covenant in this case runs with the land.

{19} The Gammons' reliance on *Suttle* for their argument that this is a personal covenant, is unpersuasive. In *Suttle*, our Supreme Court looked at the issue of whether "a reservation by the grantor of a general power to dispense with restrictions [is] a personal covenant, or one which runs with the land[.]" 1961-NMSC-044, ¶ 4. Applying the general rule that covenants burdening land sold under a general plan of restriction could be enforced by one landowner against another within a subdivision, *id.* ¶ 5, the Court concluded that a grantor's reservation of the right to alter or annul the covenant destroyed the mutuality and reciprocity necessary to create a covenant running with the land, because no subsequent grantee had any assurance that the restrictions might not be altered without his consent. *Id.* ¶ 13. Because the grantor's reserved right to alter the covenant made the covenant personal, there existed "no right as between the individual grantees to enforce the restrictive covenants[.]" *Id.* Here, HMBL made no reservation of right to amend or annul the covenant; *Suttle* is inapposite. We next address the Gammons' assertion that no right to enforce the covenant exists because the

[7]Though primarily briefed by the Cobb Plaintiffs and the Gammons, FFFP, and the Simmons both briefed the issue of whether the covenants are enforceable. Furthermore, both parties objected to the dismissal of the Cobb Plaintiffs' appeal on the basis that the covenant issue needed to be addressed. It is relevant to our consideration of the Simmons' appeal, and we address it.

[8]There remains "no practical distinction in our case law between equitable servitudes and restrictive covenants that would necessitate the continued use of separate terms[.]" *Dunning v. Buending*, 2011-NMCA-010, ¶ 10, 149 N.M. 260, 247 P.3d 1145.

HMBL Property lacks a general plan or scheme.[9]

2. General Plan or Scheme

{20} The Gammons contend that they had no notice "that covenants affecting [Lot 4A2] potentially could be enforced by the owners of other lots within Tract 4" and that the lack of a general plan or scheme within the HMBL Property kept them from receiving notice of the restrictive covenant on Lot 4A2.[10] More specifically, they suggest that because the HMBL Property was sold piecemeal and at different times, there was no general plan in existence and the covenant does not touch and concern the entire HMBL Property. This view is incorrect.

{21} "[W]here an owner of a tract subdivides and sells under a general plan of restrictions, the restrictions may be enforced by one grantee against another." *Sharts v. Walters*, 1988-NMCA-054, ¶ 8, 107 N.M. 414, 759 P.2d 201. The "absence of an observable general plan does not negate the express language" of the restrictive covenant. *Dunning*, 2011-NMCA-010, ¶ 16. When a covenant meets the requirements for an enforceable covenant running with the land, proof of a general plan or scheme is unnecessary. *Id.* ¶ 14. The existence of a general plan or scheme is mostly used to prove three things: that covenanting parties intended a covenant to run with the land, that a purchaser had notice of the covenant, or that restrictions apply to parcels even where they have been omitted from the written deed. *Id.* ¶ 13. In this case, those things are established, and the purposes of proving a general plan or scheme are already fulfilled. Proof of a general plan or scheme is therefore unnecessary.

{22} Even if the general plan doctrine were applicable here, the Gammons' argument would fail because a general plan can be inferred from the circumstances of this case. The existence of a general plan "may be inferred from the inclusion of similar restrictions in the deeds from a common grantor[.]" Restatement (Third) of Prop.: Servitudes § 2.14 cmt. f (2000). The restrictive covenants affecting each HMBL Property tract are not merely similar or substantially similar; all four contain identical language. The district court concluded that inclusion of identical language in all of the deeds in an area demonstrates a grantor's intention to benefit all of the lots in the area. *See Rowe v. May*, 1940-NMSC-019, ¶ 32, 44 N.M. 264, 101 P.2d 391 (acknowledging that the identical language of the covenant in all deeds in the relevant area "could bear no other reasonable inference than that such deeds from the original grantor . . . gave sufficiently adequate and clear expression to its intention that the restriction was for the benefit of all the lots" (emphasis omitted)); *Lockwood v. Steiner*, 1984-NMSC-100, ¶ 9, 101 N.M. 783, 689 P.2d 932 (affirming narrow construction of restrictive covenant based on evidence that conveyances to all initial lot owners contained identical restrictive covenants that ran with the land). Though the HMBL Property may not have carried specific indicia typical to a general plan such as representations in sales brochures, advertisements, and oral statements, *see Sharts*, 1988-NMCA-054, ¶ 10, we conclude that a general plan exists within the HMBL property.

3. Covenant's Reference to "This Land"

{23} The district court found that HMBL intended that any person whose property was subject to the restrictive covenants on the HMBL Property could enforce them. The district court also found that because the same restrictive covenant was imposed on all conveyances of property within the HMBL Property, all owners of all lots within HMBL Property could enforce the covenant against the Gammons. The Gammons and FFFP suggest that the language of the restrictive covenant applies only to Lot 4A2, such that other property owners within the HMBL Property cannot seek enforcement of the covenant. The restrictive covenant provides, "[*t*]*his* land shall not be divided"; the Gammons and FFFP assert "this" refers only to the tract concerned, and because the covenants were attached to the tracts at different times and in different conveyances, the covenant on Lot 4A2 cannot be enforced by anyone in another tract within the HMBL Property.

{24} We construe the covenant as a whole rather than separate specific words and phrases from the rest of the provisions. *See* 20 Am. Jur. 2d *Covenants, Conditions and Restrictions* § 15 (2016) (stating the rule that covenants are to be construed as a whole and indicating that "[t]he intention of the parties is to be gathered from the entire context of the agreement, and not from a single clause" (footnote omitted)); 21 C.J.S. *Covenants* § 5 (2016) ("In interpreting any single provision in a covenant, the entire agreement must be viewed as a whole."). Restrictive covenants are used "to assure uniformity of development and use of a residential area to give the owners of lots within such an area some degree of environmental stability." *Cunningham v. Gross*, 1985-NMSC-050, ¶ 8, 102 N.M. 723, 699 P.2d 1075 (internal quotation marks and citation omitted).

{25} The Gammons' and FFFP's argument is flawed because it interprets the phrase "this land" in geographical isolation from the rest of the covenant language when the covenant permits enforcement "by any person who has title to any of the property which is subject to these same restrictive covenants." When considered as a whole, the provisions of the covenant reveal that the phrase "this land" is neither ambiguous, *see Cain v. Powers*, 1983-NMSC-055, ¶ 9, 100 N.M. 184, 668 P.2d 300 (stating that first step in construing covenant language is to determine whether ambiguity exists), nor does it support the interpretation suggested. While the phrase "this land" alone may refer to any portion of Tract 4, interpreting it to mean that only people who own a portion of Tract 4 may enforce the covenant is contrary to its express terms. Other provisions in the covenant reveal that any person who owns a portion of the HMBL Property and whose title is subject to a restrictive covenant identical to the one they seek to enforce may do so. This interpretation is particularly persuasive in light of the general plan, discussed above, that can be inferred from the identical restrictive language in each of the four tract conveyances.

{26} To allow the Gammons' and FFFP's interpretation of this language to prevail would promote an illogical result, *id.* (noting that restrictive covenants must be considered so that an " 'illogical, unnatural or strained construction' will not be effected"), as it would render the covenant unenforceable against any tract owned entirely by one owner. For example, if Tract 3 were owned entirely by one owner, the owner of Tract 3 could divide it into impermissibly small lots without repercussions from the owners in Tracts 1, 2, or 4, who would be unable to enforce the covenant, because

[9]To the extent that this argument is aimed toward characterizing the covenant at issue as a personal one that does not bind the covenantor's successors in interest, *Lex Pro Corp.*, 1983-NMSC-073, ¶ 12, it fails in light of the above analysis characterizing the covenant as one running with the land.

[10]Although this is the argument made, the reference to Tract 4 seems to be a typographical error. It appears the Gammons meant Tract 1, as that is the tract in which the Cobb Plaintiffs' lots are located.

their land was restricted through separate conveyances. We therefore conclude that the restrictions were clearly created to preserve the entire HMBL Property's "genuine residential character, the symmetry and beauty of the area, and for the general good of all interested, [make it] an attractive and valuable residential district." *Rowe*, 1940-NMSC-019, ¶ 32. The Gammons' and FFFP's attempts to weaken the covenant's ability to do so by limiting the ability of others to enforce it fails as well. We hold that the restrictive covenant at issue in this case is valid and can be enforced by any owner of land within the HMBL Property. With the resolution of this issue as a backdrop, we turn specifically to FFFP's appeal of the judgment in favor of the Simmons.

B. Issues on Which Simmons Prevailed

1. Negligent Misrepresentation

{27} We review the district court's findings regarding FFFP's negligent misrepresentation for substantial evidence. *See Golden Cone Concepts, Inc. v. Villa Linda Mall, Ltd.*, 1991-NMSC-097, ¶¶ 12-13, 113 N.M. 9, 820 P.2d 1323 (affirming the court's findings of negligent misrepresentation that were supported by substantial evidence). To prove negligent misrepresentation, the Simmons were required to prove that (1) FFFP made a material misrepresentation of fact to the Simmons, (2) the Simmons relied upon that representation, (3) FFFP knew the representation was false or made it recklessly, and (4) FFFP intended to induce the Simmons to rely on that representation. *See Saylor v. Valles*, 2003-NMCA-037, ¶ 17, 133 N.M. 432, 63 P.3d 1152. These elements must be established by a preponderance of the evidence. *Golden Cone Concepts, Inc.*, 1991-NMSC-097, ¶ 13. Negligent misrepresentation requires a failure to exercise ordinary care in obtaining or communicating a statement, or "an intent that the plaintiff receive and be influenced by the statement where it is reasonably foreseeable that the plaintiff would be harmed if the information conveyed was incorrect or misleading." *Eckhardt v. Charter Hosp. of Albuquerque, Inc.*, 1998-NMCA-017, ¶ 55, 124 N.M. 549, 953 P.2d 722.

{28} FFFP suggests that the Simmons could not have met their burden in proving negligent misrepresentation without proving FFFP's brokers failed to exercise reasonable care or competence through expert testimony as to the appropriate standard of care. FFFP also suggests that there is insufficient evidence of justifiable reliance and causation of damages to support negligent misrepresentation or an accompanying damages award. We disagree.

a. Expert Testimony Regarding Standard of Care

{29} Negligent misrepresentation can be established by commission or omission. *See, e.g.*, *R.A. Peck, Inc. v. Liberty Fed. Sav. Bank*, 1988-NMCA-111, ¶¶ 9, 12, 108 N.M. 84, 766 P.2d 928 (stating the rule that "a person may be held liable for damages caused by a failure to disclose material facts to the same extent that a person may be liable for damages caused by . . . negligent misrepresentation" so long as there exists a duty to disclose). While a broker may be held liable for negligent misrepresentation if he or she fails to exercise reasonable care or competence in obtaining or communicating information, the precise level of care and competence required will vary. *See Gouveia v. Citicorp Person-to-Person Fin. Ctr., Inc.*, 1984-NMCA-079, ¶ 10, 101 N.M. 572, 686 P.2d 262. FFFP asserts that in order to show that it failed to exercise reasonable care and competence in obtaining and communicating information to the Simmons, the Simmons were required to proffer expert testimony regarding whether FFFP's conduct meets the requisite standard of care. Because no expert testimony was proffered, FFFP asserts that the Simmons failed to establish the elements of negligent misrepresentation. We disagree as to both assertions.

{30} FFFP cites to *Amato v. Rathbun Realty, Inc.*, 1982-NMCA-095, ¶ 11, 98 N.M. 231, 647 P.2d 433, as support for its assertion that expert testimony is required to establish whether a broker failed to properly advise a client regarding the condition of property. *Amato* dealt with the negligence of a broker in the summary judgment context. The movants in that case presented a single affidavit that stated the sources of information that the broker relied upon and disclaimed any knowledge of the complained-of defects in the property being sold. *Id.*¶ 10. The court concluded that the showing made was insufficient to make a prima facie showing that no issue of fact existed as to whether the broker in that case was negligent. *Id.* ¶ 11 (stating that without an expert's testimony that broker "did not breach the standard of care of brokers in the community, no prima facie showing was made"). In this case, the Simmons only needed to prove at trial by a preponderance of evidence that FFFP did not exercise reasonable care or competence in communicating the disclosures relevant to the property to the Simmons.

{31} Liz Cale was a qualifying broker with FFFP when the Simmons purchased the Trust Property. She had supervised approximately 160 brokers within FFFP, had been a licensed qualifying broker since 1989, and had acted in both an associate broker and qualifying broker capacity within FFFP.

{32} Cale testified as to what FFFP's brokers should have disclosed to the Simmons as well as the ways in which those disclosures could have occurred. Cale testified that the existence and circulation of the waiver and amendment should have been disclosed to the Simmons. Similarly, she testified that the fact that the sellers of the property had signed the waiver and amendment prior to the Simmons' purchase should have been disclosed to the Simmons. She also acknowledged that the FFFP brokers were aware of the Gammons' covenant violation, and could have disclosed to the Simmons that an adjoining property was in violation of the covenant. Cale stated that disclosure of this information could have been made in the purchase agreement or any of the subsequent negotiations, through a modified disclosure document, through a separate disclosure from the seller to the buyer, or verbally. Despite these opportunities for disclosure, nothing in the seller's disclosure statement mentioned the waiver, amendment, or known covenant violation present on the adjacent property. In fact, Cale acknowledged that no documentation from the sale could demonstrate that the Simmons or any similarly situated buyer was notified that the waiver and amendment existed or had been signed by the seller. This evidence demonstrated both a standard of care for the realtors, and the facts of non-disclosure.

{33} Section 16.61.19 NMAC sets out the duties of brokers and defines the disclosures that brokers are required to make when working with consumers, requiring the "disclosure of any adverse material facts actually known by the [broker] about the property or the transaction[.]" 16.61.19.8(H) NMAC (1/1/2004). FFFP uses this same language in its purchase agreement to define the duties of its brokers. This is mirrored in FFFP's statement in its own purchase agreement that it assumes the duty of "disclosure of any adverse material fact actually known," and the evidence also supports a conclusion that FFFP breached the duty it imposed on itself in the purchase agreement.

{34} It is undisputed that Neil Lyon was working for FFFP during the Simmons'

purchase of the Trust Property. In fact, throughout his career at FFFP, he worked in several different capacities, including vice president, managing broker, and selling and listing agent. When questioned regarding the nature of his relationship with the Simmons during the purchase of the Trust Property, Lyon obtusely responded by stating "I think it's clearly defined by the basic licensee duties." The district court could reasonably infer that the "basic licensee duties" that Lyon references are those contained in the purchase agreement, which also match the standards set out in 16.61.19.8 NMAC.

{35} It is also beyond dispute that the FFFP brokers involved in the Simmons' purchase—Van Camp, Rush, and Lyon—knew of the covenant, the covenant violation, and FFFP's ongoing efforts to remedy the violation through the waiver and amendment. It is undisputed that Van Camp and Rush represented the sellers of the Trust Property, and as such, Van Camp knew that the sellers had signed the waiver and amendment at their behest prior to the Simmons submitting their first purchase agreement. Van Camp and Lyon both testified that the Simmons were aware of the covenant, the violation, and the efforts to enact a waiver and amendment to the covenant. The Simmons, however, testified that they were unaware of the existence of a covenant violation or waiver and amendment. This discrepancy is a matter for the fact-finder to resolve, and not a legal impediment to establishing the elements of a cause of action such as negligent misrepresentation. *See, e.g.*, *New Mexicans for Free Enter. v. City of Santa Fe*, 2006-NMCA-007, ¶ 71, 138 N.M. 785, 126 P.3d 1149 (stating that " 'where there is conflicting evidence, the [district] court, as fact[-]finder, resolves all disparities in the testimony and determines the weight and credibility to be accorded to the witnesses' " (alteration omitted) (quoting *Tres Ladrones, Inc. v. Fitch*, 1999-NMCA-076, ¶ 16, 127 N.M. 437, 982 P.2d 488)).

{36} According to his testimony, Mr. Simmons was unaware at any time prior to closing on the property, that the waiver and amendment existed and that the sellers had signed them. Mr. Simmons testified that had he and his wife known of the covenant violation and the waiver and amendment before purchasing the house, they would not have purchased the house. In fact, and known to Lyon, prior to viewing the property in question, the Simmons had abandoned interest in another home upon discovering it was embroiled in pending litigation and was affected by dust from a neighbor's construction.

{37} FFFP's brokers insisted that they achieved the result of making the relevant disclosures to the Simmons, but could proffer few or no details regarding the manner or method in which those disclosures were made. According to Van Camp's testimony regarding disclosure of the covenant violation, waiver, and amendment, he indicated to the Simmons that there was a possibility the waiver and amendment could be signed by HMBL Property owners in the future, rather than disclosing that the sellers had already signed the waiver and amendment. Although Van Camp testified that he told the Simmons that the waiver and amendment was signed, he could not recall when, where, or how many times he revealed that information. Van Camp also testified that he gave the Simmons a copy of the waiver and amendment, but the copy he provided was not the one previously signed by the sellers. Lyon's testimony was similar, as he had no recollection of where he had seen the waiver and amendment, whether a copy had been given to the Simmons, or whether the copy he saw bore the sellers' signatures. From these vague facts, a fact-finder could conclude disclosure was not made at all.

{38} The district court determined that the FFFP brokers neither informed the Simmons that the sellers had executed the waiver and amendment, nor provided the Simmons with a copy of the waiver and amendment. It also found that, based on Cale's testimony, the FFFP brokers should have disclosed that information to the Simmons. The district court found that the sole disclosure made—that some neighbors were interested in altering the covenants at some point in the future—was a factual misrepresentation in light of FFFP's possession of a waiver and amendment signed by sellers. The district court concluded that Van Camp and Lyon's testimony—that they told the Simmons that the waiver and amendment had been signed and gave the Simmons copies of those documents—was not credible. This determination was based on the lack of evidence of such disclosure in this case's lengthy record, as well as FFFP's subsequent unsuccessful attempts to obtain another waiver and amendment from the Simmons in 2008-2009.

{39} The district court, acting as the fact-finder in this case, is entitled to assess the credibility of the witnesses and assign weight to their testimony accordingly. *See, e.g.*, *New Mexicans for Free Enter.*, 2006-NMCA-007, ¶ 71 (stating that "[i]t is well established that where there is conflicting evidence, the trial court, as fact[-]finder, resolves all disparities in the testimony and determines the weight and credibility to be accorded to the witnesses" (alteration, internal quotation marks, and citation omitted)); *Mares v. Valencia Cty. Sheriff's Dep't*, 1988-NMCA-003, ¶ 8, 106 N.M. 744, 749 P.2d 1123 (acknowledging that appellate courts do not second-guess a fact-finder's determination where it is supported by substantial evidence).The district court concluded that FFFP's actions violated the obligations set forth under 16.61.19.8(A) NMAC and the Simmons' purchase agreement to act with honesty and to disclose any adverse material facts. Reviewing the evidence in favor of the party that prevailed below, we conclude that a reasonable mind could accept the evidence presented as adequate to support a conclusion that FFFP breached its duty to exercise reasonable care or competence in communicating information regarding the Trust Property to the Simmons prior to their purchase of the property. *See Smith v. FDC Corp.*, 1990-NMSC-020, ¶ 13, 109 N.M. 514, 787 P.2d 433 (setting forth substantial evidence standard). Because they were supported by substantial evidence, the district court's findings were appropriate in this instance, as FFFP, through its brokers, knew that potential involvement in litigation was an adverse material fact to the Simmons, based on their abandoning interest in another home for just that reason.

b. Justifiable Reliance

{40} FFFP also asserts that the written purchase agreement precludes the Simmons from justifiably relying on representation regarding the possibility of future development surrounding the property.[11] The Simmons assert that they would not have bought the property had they known of the existence of the covenant violation and waiver and amendment. They assert that they relied on Lyon and Van Camp's misrepresentations as to the existence of the covenant and their right to enforce it, absent any waiver or amendment, to protect their expectations regarding development density, traffic, and dust.

[11]The language of the purchase agreement provides, "Buyer understands and acknowledges that Broker cannot and does not warrant or guarantee the condition of the Property . . ., nor does Broker guarantee that all defects have been disclosed... *(cont. on next page)*

{41} FFFP's assertion that the sales agreement precludes a claim of negligent misrepresentation is loosely based on a concept originating in *Rio Grande Jewelers Supply, Inc. v. Data General Corp.*, 1984-NMSC-094, ¶¶ 6, 8, 101 N.M. 798, 689 P.2d 1269. In *Rio Grande Jewelers Supply*, our Supreme Court addressed a very specific issue: whether, in a sale of goods context governed by the New Mexico Uniform Commercial Code, a commercial purchaser may maintain an action in tort against the seller for pre-contract negligent misrepresentations where the subsequently executed written sales contract contains an effective provision disclaiming all prior representations and all warranties not contained in the contract. *Id.* ¶ 1. The Court's analysis blended a consideration of the parol evidence rule with an acknowledgment of our State's freedom of contract policy. *Id.* ¶ 3. Reasoning that the representations alleged in the negligent misrepresentation count were the same as those alleged for breach of warranties, the Court concluded that the claim for negligent misrepresentation was "nothing more than an attempt to circumvent the operation of the Commercial Code" and an attempt "to allow the contract to be rewritten under the guise of an alleged action in tort." *Id.* ¶ 6.

{42} This case is distinguishable from *Rio Grande Jewelers Supply*, as it deals with a real estate contract rather than a contract governed by the New Mexico Commercial Code. In addition, the purchase agreement's limitation of liability does not limit FFFP's tort liability for its conduct in this case. The purchase agreement does not alleviate FFFP's duty to disclose material facts regarding valuable property rights; rather it imposes a duty to do so. The only thing that the purchase agreement disclaims is reliance on representations regarding possible future occurrences. The Simmons' reliance was on FFFP's representations as to the present status of the property, particularly the covenant and the existence of a waiver and amendment, as it existed at the time of the sale. The Simmons thus relied on representations regarding a valuable property right rather than any representations regarding future adjacent development. While it is true that "freedom of contract and notions of contractually assumed duties and liabilities can act to limit general tort liability in certain circumstances when limited liability is expressly bargained for[,]" this case does not present such a circumstance. *State ex rel. Udall v. Colonial Penn Ins. Co.*, 1991-NMSC-048, ¶ 37, 112 N.M. 123, 812 P.2d 777. This is particularly true in light of FFFP's knowledge of the covenant violation, their role in actively promoting waivers among the HMBL Property owners, and their specific assertions that they informed the Simmons of the status of these issues. We therefore conclude that FFFP's assertion that the Simmons' reliance was not justified is without merit.

2. Negligence Per Se

{43} FFFP suggests that Simmons failed to prove that FFFP did not exercise the reasonable care or competence required of brokers. In doing so, FFFP challenges the district court's findings regarding negligence per se. FFFP reasons that the duties enumerated in 16.61.19.8 NMAC (1/1/2004) do not have the specificity required to satisfy a claim of negligence per se. Negligence per se consists of four elements:

> (1) There must be a statute [or regulation] which prescribes certain actions or defines a standard of conduct, either explicitly or implicitly, (2) the defendant must violate the statute [or regulation], (3) the plaintiff must be in the class of persons sought to be protected by the statute, and (4) the harm or injury to the plaintiff must generally be of the type the Legislature through the statute sought to prevent.

Thompson v. Potter, 2012-NMCA-014, ¶ 32, 268 P.3d 57 (alteration, internal quotation marks, and citation omitted). FFFP challenges the district court's conclusion only as to the first and second elements. Negligence per se exists only where a statutory or regulatory provision imposes an absolute duty to comply with a specific requirement. *See Heath v. LaMariana Apartments*, 2008-NMSC-017, ¶¶ 8-9, 143 N.M. 657, 180 P.3d 664. The statute or regulation at issue "must specify a duty that is distinguishable from the ordinary standard of care." *Thompson*, 2012-NMCA-014, ¶ 32. It is the court's task "to determine whether the statutory *or regulatory provisions* at issue define with specificity what is 'reasonable' in a particular circumstance, such that the [fact-finder] does not have to undertake that inquiry." *Heath*, 2008-NMSC-017, ¶ 9 (emphasis added).

{44} FFFP's argument that the duties enumerated in 16.61.19.8 NMAC are not sufficiently specific to satisfy a claim of negligence per se overlooks the very specific provision of 16.61.19.8(H) NMAC (1/1/2004), which requires brokers to disclose in writing "any adverse material facts actually known by the associate broker or qualifying broker about the property or transaction[.]" This is a clear standard of conduct that FFFP was required to comply with, and in our discussion of negligence we have set forth the evidence supporting the district court conclusion that FFFP failed to comply with this standard. FFFP failed to make the disclosures required by this regulation, and as customers, the Simmons are people that the regulation is aimed at protecting. The expenses the Simmons incurred in relying on FFFP's representations and purchasing the Trust Property are the type of harm that the regulation is intended to prevent. We therefore reject FFFP's argument that the first and second elements of negligence per se were not proven here.

3. Damages

i. Actual Damages for Negligence Per Se and Negligent Misrepresentation

{45} The district court concluded that the Simmons suffered actual damages as

[3] *(cont. from previous page)* ...by Seller." "Both Parties acknowledge that Broker did not and cannot examine the status of . . . future development plans[.]" Furthermore, the agreement states that "Buyer acknowledges that Buyer has not received or relied upon any representations by either Broker or Seller with respect to the condition of the Property other than those contained in th[e] Agreement, or in the Property Disclosure Statement[.]" In fact, it specifies that "[a]ny disclosure Buyer obtains should not be deemed by Buyer as a substitute for due diligence by Buyer, such as inspections by qualified professionals." Most importantly, the purchase agreement addresses future development:

> Buyer is aware that the Property may be affected by future development of property in the neighborhood or surrounding areas, including, without limitation, view, noise, traffic, local services, safety and water restrictions. . . . Buyer agrees that Seller and Broker make no representation as to the preservation of present/future views, and that present/future views may be affected by future development/construction/alteration of neighboring property or other impairments.

a consequence of FFFP's negligent misrepresentation and negligence per se. As a result, it awarded the Simmons $123,000 for overpayments in the purchase of three of the lots within the Trust Property. The district court arrived at this value by concluding that the Gammons' covenant violations diminished the value of three lots within the Trust Property by $41,000, or 17%, per lot. The diminishment in value was due to the increased development, density, and degradation of view caused by the covenant violation, and resulted in an actual value of $199,000 for each of those lots despite the Simmons having purchased them for $240,000.

{46} FFFP asserts that there is insufficient evidence to establish damages for diminution in value of the Trust Property. *See, e.g.*, *Weststar Mortg. Corp. v. Jackson*, 2003-NMSC-002, ¶ 8, 133 N.M. 114, 61 P.3d 823 ("If the verdict below is supported by substantial evidence, which we have defined as 'such relevant evidence that a reasonable mind would find adequate to support a conclusion,' we will affirm the result." (quoting *Landavazo v. Sanchez*, 1990-NMSC-114, ¶ 7, 111 N.M. 137, 802 P.2d 1283)). While diminution of value is relevant as a measure of damages for injury to real property, *McNeill v. Burlington Resources Oil & Gas Co.*, 2008-NMSC-022, ¶ 27, 143 N.M. 740, 182 P.3d 121, the measure of damages for a negligent misrepresentation is that which is necessary to compensate for pecuniary loss caused by the misrepresentation. Restatement (Second) of Torts § 552B(1) (1977) (stating that such damages include "the difference between the value of what he has received in the transaction and its purchase price or other value given" and pecuniary loss suffered as a consequence of reliance upon the misrepresentation); *see First Interstate Bank of Gallup v. Foutz*, 1988-NMSC-087, ¶ 8, 107 N.M. 749, 764 P.2d 1307. FFFP is therefore advocating the use of the incorrect measure of damages. *See Varga v. Ferrell*, 2014-NMCA-005, ¶¶ 49-50, 362 P.3d 96.

{47} At trial, the district court heard the testimony of Barry Hunnicutt, a real estate appraiser. Hunnicutt conducted an appraisal of the Trust Property in 2011, and conducted a retrospective appraisal to determine the value of the Trust Property in June 2005. Hunnicutt's appraisal can be separated into two parts: the appraisal of Lot 4C within the Trust Property, and the appraisal of the rest of the lots of the Trust Property. As to Lot 4C, Hunnicutt concluded that the construction of the Gammons' house on Lot 4A2 impacted the view corridor in such a way that the lot suffered a 17% diminution in value. Hunnicutt's conclusion in this respect took only the Gammons' house—not the Goldstein house—into account because it was the only one on Lot 4A2 that was in Lot 4C's sight line. Hunnicutt acknowledged that he was aware that the Gammons' house's impact on Lot 4C's view already existed as of June 2005. Nonetheless, Hunnicutt concluded that Lot 4C had suffered a 17% diminution, resulting in a value of $199,000.

{48} For the rest of the lots within the Trust Property, Hunnicutt applied a hypothetical condition to evaluate the value of the land. That hypothetical was that each lot of five or more acres that was contiguous to the Trust Property could be split into two lots and any vacant lot less than five acres could be built on. Applying that hypothetical to Lots 4D and 4B, Hunnicutt similarly concluded that there was a 17% diminution in value as to those lots and as such they were worth only $199,000. Hunnicutt's conclusions as to both Lot 4C and the remaining lots were based on adversely impacted views, which were downgraded from "very good" to "good." FFFP did not submit any evidence regarding the value of the Trust Property.

{49} A reasonable mind would find this evidence adequate to support the district court's award of $41,000 for each of the three lots within the Trust Property. The Simmons had the burden of providing evidence of pecuniary loss, and they did so by proffering evidence regarding the difference between the value of the Trust Property and the purchase price that they paid in reliance upon FFFP's misrepresentations. FFFP's argument that the district court improperly awarded future damages that were not "reasonably certain to occur" is unpersuasive. *Cf. Frank Bond & Son, Inc. v Reserve Minerals Corp.*, 1959-NMSC-016, ¶ 4, 65 N.M. 257, 335 P.2d 858 (stating that "damages may be awarded where there is no uncertainty as to whether the rights of the plaintiff were invaded, even though there may be some uncertainty respecting the amount of damages sustained" (quoting *Stern v. Dunlap Co.*, 228 F.2d 939, 943 (10th Cir. 1955)).

ii. Actual Damages for FFFP's Commission

{50} The district court awarded the Simmons actual damages in the amount of $452,287.95. Of that amount, $123,000 was for the difference between the purchase price and value of the Trust Property, and $202,725 was for commissions and gross receipts taxes paid to FFFP that "would not have been paid but for [FFFP's] negligent misrepresentations." FFFP asserts that by awarding actual damages for both the property value and for the commission paid, the district court awarded impermissibly duplicative damages. FFFP also asserts that the Simmons never proved that they paid the commission, and could not do so because the commission was paid by seller out of the sales proceeds. The Simmons assert that seller received the money to pay FFFP's commission from them at closing.

{51} While we agree with FFFP's assertion that the Simmons elected to pursue damages for the negligent misrepresentation claim alone, we disagree with FFFP's conclusion that the district court could not award damages based on FFFP's commission because doing so would be duplicative. *Cf. Miller v. Bank of Am., N.A.*, 2015-NMSC-022, ¶ 24, 352 P.3d 1162 ("A damage award including both diminution in value attributable to breach and disgorgement of profit is not necessarily a double recovery."). The relevant rule on this issue is that "[w]here there are different theories of recovery and liability is found on each, but the relief requested was the same, namely compensatory damages, the injured party is entitled to only one compensatory damage award." *Hood v. Fulkerson*, 1985-NMSC-048, ¶ 12, 102 N.M. 677, 699 P.2d 608.

{52} This is not a case where the Simmons pursued multiple theories of recovery, prevailed, and were required to make an election among awards.[12] *See Cent. Sec. & Alarm Co. v. Mehler*, 1996-NMCA-060, ¶ 12, 121 N.M. 840, 918 P.2d 1340 (requiring an election of remedies

[12]FFFP presents an unclear argument on this point, suggesting that the Simmons pursued an equity claim, and that the commission was awarded as an element of damages in equity. Thus, FFFP argues, the district court could not award actual damages of diminished value and carry costs plus "additional equitable damages." This argument is unclear and undeveloped, and we do not address it. *See Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076 ("We will not review unclear arguments, or guess at what [a party's] arguments might be.").

if the plaintiff pursues several theories of recovery and liability is found on each). Instead, the Simmons pursued a single theory of recovery in asserting negligent misrepresentation, prevailed, and are entitled to a single award of compensatory damages ($452,287.95), which happens to be comprised of multiple components; loss of property value, commissions, and transaction costs respectively ($123,000, $202,725, and 125,562.95). As acknowledged by FFFP, the Simmons pursued only the negligent misrepresentation claim. The district court awarded compensatory damages for only that claim. FFFP points to no case law to support its suggestion that a court errs in considering multiple sources of pecuniary loss when calculating the appropriate compensatory damages award in a negligent misrepresentation claim. FFFP therefore cannot prevail on this point. *See In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 (stating that "[w]e assume where arguments in briefs are unsupported by cited authority, counsel after diligent search, was unable to find any supporting authority. We therefore will not do this research for counsel[,]" and employing the rule that issues raised in briefs but unsupported by authority are not reviewed on appeal).

{53} We next address FFFP's argument that the Simmons cannot recover compensatory damages for commissions that they did not pay. The Simmons suggest that the evidence proffered at trial demonstrated that their mortgage included FFFP's sales commission, and that the seller's payment of the commission was financed by money provided by the Simmons at closing. Both parties point to the title company's settlement statement as the only evidence pertinent to this issue. That document lays out the sales price of the Trust Property. The document states that $190,800 in commission was to be "Paid From Seller's Funds at Settlement" and includes $11,925, also to be paid from seller's funds, for gross receipts tax on FFFP's commission. FFFP's commission was added to other fees and was included in a "reduction in amounts due to Seller." Thus, we conclude that substantial evidence supports the Simmons' assertion that FFFP's commission was paid out of money that the Simmons paid to purchase the Trust Property.

{54} Disgorgement is a remedy that requires a wrongdoer to give up the benefits obtained as a result of his wrongdoing. *See Peters Corp. v. N.M. Banquest Inv'rs Corp.*, 2008-NMSC-039, ¶ 32, 144 N.M. 434, 188 P.2d 1185. "The decision whether to order a defendant to disgorge profits and the amount of profits to be disgorged rests within the sound discretion of the [district] court." *Id.* The remedy of disgorgement may not be used punitively, and a causal connection must exist between the breach and the benefit sought to be disgorged. *Id.* The evidence supports the conclusion that the Simmons paid $123,000 more than the value of the Trust Property because of misrepresentations made by FFFP. *See Jacobs v. Phillippi*, 1985-NMSC-029, ¶ 5, 102 N.M. 449, 697 P.2d 132 (reviewing an appeal of damages award for substantial evidence). Thus, FFFP's misrepresentations and its commission are only causally connected by the portion of the commission that arose from the $123,000 overpayment that the Simmons made. FFFP is therefore properly required to disgorge the portion of its commission that was paid as a result of its misrepresentations. We conclude that FFFP is entitled to keep its commission from the sale of the Trust Property except for the portion stemming from the $123,000 that the Simmons overpaid. We remand so that the district court may adjust the amount of commission to reflect the $123,000 diminution in the Trust Property's value.

iii. Carry-Cost Damages

{55} The district court awarded the Simmons $202,725 for FFFP's commission and gross receipts taxes that would not have been paid but for FFFP's actions, and $126,562.95 in mortgage principal and interest, which also would not have been paid but for FFFP's actions. The parties have labeled these "carry-cost" damages—a characterization that we will continue using throughout the remainder of this opinion. FFFP asserts that the district court's award of carry-cost damages was improper because it violates due process principles and because there is insufficient evidence to support the award. Due process has been provided where a party is afforded timely notice, a reasonable opportunity to be heard, a reasonable opportunity to confront and cross-examine adverse witnesses and present evidence, representation by counsel, and a hearing before an impartial decision maker. *In re Pamela A.G.*, 2006-NMSC-019, ¶ 12, 139 N.M. 459, 134 P.3d 746. FFFP's due process argument hinges on its assertion that, because the chart was only used as a demonstrative aid during closing arguments, FFFP never had the chance to cross-examine any witness as to the calculations of the carry costs listed in the chart.

{56} During closing arguments, the Simmons presented the district court with a demonstrative aid, which laid out the calculations behind their request for carry-cost damages. In that chart, the Simmons added the monthly mortgage cost and real estate tax for the portion of the Trust Property that had, according to Hunnicutt, diminished in value, namely, Lots 4B, 4C, and 4D, as well as the real estate commission paid to FFFP. Those costs were then multiplied by seventy-three—the number of months between Simmons' purchase and the trial. Adding together those calculations, the chart suggests a carry-cost damage award in the amount of $126,561.95. The district court awarded Simmons $126,562.95 in carry-cost damages.[13]

{57} The record reveals, however, that during his testimony, Mr. Simmons set forth the basic formula that is used in the chart. Mr. Simmons testified that he had a 5.5% annual interest on his mortgage and that he had owned the property for seventy-three months. Mr. Simmons also testified as to what he believed the real estate tax rate was in 2010, and stated that it should be considered in the calculation of damages. FFFP had the opportunity to cross-examine Mr. Simmons, and availed itself of that opportunity.

{58} FFFP's assertion that there is insufficient evidence to support the carry-cost damages award is also without merit. Not only was there testimony from Hunnicutt regarding the diminution of value of the Trust Property lots and testimony from Mr. Simmons regarding the monthly mortgage rate, but there was also a title insurance settlement statement entered into evidence. That exhibit listed the amount of the Simmons' mortgage principal, county taxes, and the daily rate of interest. This evidence, considered together, is substantial enough to support the district court's findings as to the amount of damages. *Landavazo*, 1990-NMSC-114, ¶ 7 (defining substantial evidence and acknowledging that "[e]vidence is substantial even if it barely tips the scales in favor of the party

[13]The slight discrepancy in amounts is due to a miscalculation in the chart's total. When the values listed in the chart are added and multiplied correctly, the total carry-cost amount is $126,562.95.

bearing the burden of proof"). As such, the district court's assessment of carry-cost damages against FFFP will stand.

{59} The district court's calculation of carry-cost damages included FFFP's entire commission for the sale of the Trust Property. Because the value of Lots 4B, 4C, and 4D within the Trust Property is 17% less than the original purchase price, the commission used for purposes of calculating carry-cost damages must be recalculated in light of that lower value. We therefore remand for the district court to recalculate the amount of FFFP's commission, and the carry-cost damages associated therewith, pursuant to this opinion.

iv. Attorney's Fees as Compensatory Damages

{60} Damages allowable for negligent misrepresentation are "those proximately caused by the misrepresentation." *Charter Servs., Inc. v. Principal Mut. Life Ins. Co.*, 1994-NMCA-007, ¶ 10, 117 N.M. 82, 868 P.2d 1307. We must therefore determine whether FFFP's misrepresentations regarding the covenant violations, waiver, and amendment caused the Simmons' expense of attorney's fees associated with involvement in this lawsuit. *See id.* (defining proximate cause as "that which in a natural and continuous sequence unbroken by any new independent causes produces the injury and without which the injury would not have occurred" (internal quotation marks and citation omitted)). We review an award of attorney's fees for abuse of discretion. *N.M. Right to Choose/ NARAL v. Johnson*, 1999-NMSC-028, ¶ 6, 127 N.M. 654, 986 P.2d 450. "The district court abuses its discretion if it enters findings of fact that are not supported by substantial evidence." *Atherton v. Gopin*, 2015-NMCA-087, ¶ 25, 355 P.3d 804. If substantial evidence exists to support the district court's conclusion, we will not disturb that conclusion on appeal. *Landavazo*, 1990-NMSC-114, ¶ 7.

{61} The district court awarded "compensatory damages in the form of reasonable attorney's fees" in the amount of $152,552.36. This award was based on the court's finding that "[a]s a consequence of the lack of required disclosure, . . . [t]he Simmons closed on the purchase of the . . . Trust Property and purchased property they would not have purchased had [FFFP] acted with honesty and reasonable care." Thus, the district court found that "[t]he Simmons have been required to retain counsel in order to protect their interests as a direct consequence of the original non-disclosures and misrepresentations by [FFFP]. The Simmons['] costs and fees arising from being sued by [FFFP] constitute additional damages arising from the wrongful conduct of [FFFP]." The court further concluded that FFFP "hoped to leverage the Simmons into executing the Amendment by subjecting them to the costs of suit and attorneys' fees by suing the Simmons" and that "[t]he costs and attorneys' fees incurred by the Simmons are a direct consequence of the series of misrepresentations and regulation violations" of FFFP. As such, the district court concluded that the Simmons are entitled to recover those costs and fees in accordance with *Charter Services, Inc.*, 1994-NMCA-007.

{62} In *Charter Services, Inc.*, an employer purchased an insurance policy, relying on an insurance agent's assurance that no additional workers' compensation policy would be necessary if the employer chose one particular policy. *Id.* ¶ 2. The employer relied on that representation and purchased the policy. *Id.* Subsequently, an employee was injured, and sued the employer for workers' compensation. The employee asserted that she was fired in retaliation for her workers' compensation case, and she also filed a wrongful discharge claim. *Id.* ¶ 3. The employer incurred thousands of dollars in attorney's fees in defending the suit that the employee brought. *Id.* ¶ 5. Employer later filed suit against its insurance company for negligent misrepresentation regarding the coverage of the group insurance policy, *id.* ¶ 1, and it was awarded the total amount of attorney's fees for defending against both of the employee's claims. *Id.* ¶ 5. The insurance company appealed, arguing that only the fees for the workers' compensation claim should have been awarded against it. *Id.* ¶ 8.

{63} We disagreed and affirmed the district court's determination that the employer was entitled to recover all of its legal costs incurred during the suit against its employee. *Id.* ¶ 11. This Court pointed out that the appropriate damages in a negligent misrepresentation case are "those proximately caused by the misrepresentation." *Id.* ¶ 10. This Court also reasoned that because all of the employer's costs in defending against the employee's lawsuit flowed directly from the insurance agent's misrepresentations concerning the policy, the employer was entitled to recover attorney's fees. *Id.* ¶ 11.

{64} Though not cited by either party, we also find *First National Bank of Clovis v. Diane, Inc.*, 1985-NMCA-025, 102 N.M. 548, 698 P.2d 5, to be instructive. The bank sued the corporation on promissory notes evidencing a loan, and the corporation filed a third-party claim against the broker, who had negotiated the loan on the corporation's behalf. *Id.* ¶ 3. The corporation prevailed against the broker. *Id.* ¶ 4. The broker then filed a cross-claim against his attorney, alleging malpractice on the basis that he had sought the attorney's advice regarding the legality of the brokerage fee he had charged, and for which the corporation had ultimately recovered damages. *Id.* ¶¶ 4-5. In the cross-claim, the district court awarded the broker $25,000 in attorney's fees incurred "as a proximate result of the advice given to [the broker]" by the attorney. *Id.* ¶ 31. The attorney appealed.

{65} We acknowledged the general rule that attorney's fees are not allowable absent a statute or agreement authorizing them, and agreed with the attorney that the broker could not recover attorney's fees for the malpractice action he brought against the attorney. *Id.* This Court did, however, allow the broker to recover the attorney's fees incurred while defending the suit against the corporation: "where, as here, a client is required to engage counsel *to defend a separate action* proximately resulting from his attorney's negligence, reasonable fees incurred may be awarded[.]" *Id.* ¶¶ 33, 35 (emphasis added). In total, the award of $25,000 in attorney's fees was remanded so that the district court could recalculate the award, allowing only the attorney's fees incurred in defending against the corporation's third-party claim.

{66} These cases reveal that a party can recover attorney's fees incurred to defend against litigation where it is involved in the litigation by a third party, resulting from reliance on the representations of another. *First National Bank of Clovis*, demonstrates that attorney's fees are recoverable in a procedural posture such as this one, where attorney's fees incurred as a result of one action are recoverable in another action. This case is analogous to *First National Bank of Clovis* because both cases question whether a party acting as both a plaintiff and a defendant may be awarded attorney's fees. In *First National Bank of Clovis*, the broker acted as a defendant when he was brought into the primary action through a third-party action, just as the Simmons acted as defendants when they were brought into this litigation through FFFP's third-party complaint in the Cobb Plaintiffs' litigation over the validity of

the covenants. *See id.* ¶ 3. The broker then acted as a plaintiff by filing a cross-claim against his attorney, whose representations proximately caused his involvement in the third-party action, just as the Simmons acted as plaintiffs by filing a countersuit against FFFP, whose actions also proximately caused the Simmons' involvement in the third-party action. *See id* ¶ 4. We see no reason for FFFP's role as both the plaintiff in the third-party action and the defendant in the counter-suit to alter our analysis under *First National Bank of Clovis*, particularly in light of the various roles it played in the sale and resale of the HMBL Property.[14]

{67} Following the precedent set forth in *Charter Services, Inc.*, and *First National Bank of Clovis*, we conclude that the Simmons are entitled to recover attorney's fees spent in defending against FFFP's third-party action against them. The Simmons are not, however, entitled to attorney's fees incurred while litigating their counter-claim; to allow such a recovery would violate the American Rule. *See N.M. Right to Choose/NARAL*, 1999-NMSC-028, ¶ 9 (stating that generally, the American Rule provides that "absent statutory or other authority, litigants are responsible for their own attorney's fees"). We therefore reverse, so the district court may award only those attorney's fees incurred in defending against FFFP's third-party action. *See Charter Services, Inc.*, 1994-NMCA-007, ¶ 8 ("[W]hen an attorney's services are rendered in pursuit of multiple objectives, some of which permit a fee and some of which do not, the trial court must apportion the fees and award only those that are compensable.").

IV. CONCLUSION

{68} The restrictive covenant in this case is enforceable by anyone owning a lot within the HMBL Property. FFFP negligently misrepresented the status of the covenant's waiver and amendment to the Simmons during the sale of the Trust Property. As a result, the Simmons are entitled to actual damages. The Simmons provided sufficient evidence that they overpaid $123,000 for Lots 4B, 4C, and 4D and that award is affirmed. We remand the remaining portion of the Simmons' award so that the district court may recalculate the appropriate amount consistent with this opinion. This recalculation includes a reduction in FFFP's commission proportionate to the $123,000 overpayment, a corresponding reduction in the amount of commission used to calculate carry-cost damages, and a differentiation between attorney's fees incurred in defending the third-party action (recoverable) and in pursuing the negligent misrepresentation claim (not recoverable).

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

WE CONCUR:
MICHAEL E. VIGIL, Chief Judge
MICHAEL D. BUSTAMANTE, Judge

[14]FFFP represented the Gammons in their purchase of Lot 4A2, the sellers during their sale of the Trust Property, and the Simmons during their purchase of the Trust Property. As FFFP is willing to play fast and loose with its roles in representing these parties, it must face the consequences of doing so.

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The Eighth Judicial District Attorney's Office is accepting applications for a Senior Trial Attorney or Deputy District Attorney in the Ratin Office. The position will be responsible for a felony caseload and must have at least two (2) to four (4) years as a practicing attorney in criminal law. This is a mid-level to an advanced level position. Salary will be based upon experience and the District Attorney Personnel and Compensation Plan. Please send interest letter/resume to Suzanne Valerio, District Office Manager, 105 Albright Street, Suite L, Taos, New Mexico 87571 or svalerio@da.state.nm.us. Deadline for the submission of resumes: Open until position is filled.

Trial Attorney

Trial Attorney wanted for immediate employment with the Ninth Judicial District Attorney's Office, which includes Curry and Roosevelt counties. Employment will be based primarily in Curry County (Clovis). Must be admitted to the New Mexico State Bar. Salary will be based on the NM District Attorneys' Personnel & Compensation Plan and commensurate with experience and budget availability. Send resume to: Ninth District Attorney's Office, Attention: Steve North, 417 Gidding St. Suite 200, Clovis, New Mexico 88101.

Associate Attorney

Chapman and Charlebois, P.C., an AV rated defense firm, seeks an associate attorney to assist with increasing litigation case load. Candidates should have 1 to 5 years civil defense experience and good research and writing skills, as well as excellent oral speaking ability, and the ability to be a self-starter. Send resume, references, writing sample and salary requirements to Tonnie@cclawnm.com.

Real Estate Attorney

Rodey, Dickason, Sloan, Akin & Robb, P.A. is accepting resumes for an attorney with 5-8 years experience in real estate matters for our Albuquerque office. Experience in land use, natural resources, water law, environmental law and/or other real estate related practice areas a plus. Prefer New Mexico practitioner with strong academic credentials and broad real estate background. Firm offers excellent benefit package. Salary commensurate with experience. Please send indication of interest and resume to Cathy Lopez, P.O. Box 1888, Albuquerque, NM 87103 or via e-mail to hr@rodey.com. All inquiries kept confidential.

Associate Attorney

Associate Attorney will receive outstanding compensation and benefits, in a busy, growing plaintiffs personal injury law firm. Work smart and hard to earn in the low- to mid-six figure range, in salary plus clear and instant bonuses. Mission: To provide clients with intelligent, compassionate and determined advocacy, with the goal of maximizing compensation for the harms caused by wrongful actions of others. To give clients the attention needed to help bring resolution as effectively and quickly as possible. To make sure that, at the end of the case, the client is satisfied and knows Parnall Law has stood up for, fought for, and given voice and value to his or her harm. Success: Litigation experience (on plaintiff's side) preferred. Strong negotiation skills. Ability to thrive in a productive and fast-paced work environment. Organized. Detail-oriented. Team player. Willing to tackle challenges with enthusiasm. Frequent contact with your clients, team, opposing counsel and insurance adjusters is of paramount importance in this role. Integrate the 5 values of our team: Teamwork, Talent, Tenacity, Truth, Triumph. Compelled to do outstanding work. Strong work ethic. Interested in results, but also work-life balance. Barriers to success: Lack of fulfillment in role. Not enjoying people. Lack of empathy. Not being time-effective. Unwillingness to adapt and train. Arrogance. If you are interested in this position, and you have all the qualifications necessary, please submit your resume detailing your experience, a cover letter explaining why you want to work here, and transcripts of grades. Send documents to Bert@ParnallLaw.com, and type "Mango" in the subject line.

Associate Attorney

Albuquerque based plaintiff construction defect law firm, is currently seeking an Associate Attorney (must be admitted to NM bar). The ideal candidate should have at least 3 - 5 years litigation experience and superior academic credentials. This position is not open to attorneys with less than 3 years of experience. Construction defect and construction related experience greatly preferred as well as deposition and trial experience. We are looking for a motivated and aggressive individual with strong analytical and judgment skills who is able to work in teams and individually on case assignments, take depositions, coordinate with experts, as well as conduct case evaluation. Please send resume, salary demands and writing sample demonstrating legal reasoning ability to Denise Ochoa at dochoa@kasdancdlaw.com.

Pueblo of Laguna – Attorney

The Pueblo of Laguna is seeking applicants for a full time Attorney. Under general direction of Government Affairs Director, serves as an in-house legal advisor, representative, and counselor. Ensures the adherence to applicable laws to protect and enhance tribal sovereignty, to avoid or prevent expensive legal disputes and litigation, and to protect the legal interests of the Pueblo government. Consistently applies the Pueblo's Core Values in support of Workforce Excellence. Maintains confidentiality of all privileged information. For more specific information, including application instructions, go to www.lagunapueblo-nsn.gov and click on Employment Opportunities.

Senior Trial Attorney/Deputy Trial Taos County

The Eighth Judicial District Attorney's Office is accepting applications for a Senior Trial Attorney and Deputy District Attorney in the Taos Office. Attorneys in these positions will be responsible for felony and some misdemeanor cases and must have at least two (2) to four (4) years as a practicing attorney in criminal law. These are mid-level to advanced level positions. Salary will be based upon experience and the District Attorney Personnel and Compensation Plan. Please send interest letter/resume to Suzanne Valerio, District Office Manager, 105 Albright Street, Suite L, Taos, New Mexico 87571 or svalerio@da.state.nm.us. Deadline for the submission of resumes: Open until positions are filled.

Attorney

The Albuquerque office of Lewis, Brisbois, Bisgaard & Smith LLP is seeking a high energy attorney with a minimum of five years of litigation experience to join our General Liability Practice Group. Applicants must have exceptional writing skills and experience analyzing files, researching and briefing, and taking and defending depositions. In addition to five years of litigation defense experience, successful candidates must have credentials from an ABA approved law school, and must currently be licensed to practice in NM. This is a great opportunity to work in a collegial local office of a national firm. Please submit a cover letter, resume with salary history, and two writing samples via email to stephanie.reinhard@lewisbrisbois.com.

Full-time Law Clerk

United States District Court, District of New Mexico, Albuquerque, Full-time Law Clerk, assigned to the Honorable James O. Browning. $60,367 to $72,356 DOQ. See full announcement and application instructions at www.nmd.uscourts.gov/employment. Successful applicants subject to FBI & fingerprint checks. EEO employer.

Attorney
Atkinson, Baker & Rodriguez, P.C. seeks attorney with strong academic credentials and 3-8 years civil litigation experience for successful, established complex commercial and tort litigation practice. Excellent benefits. Tremendous opportunity for professional development. Salary D.O.E. All inquiries kept confidential. Send resume and writing sample to Atkinson, Baker & Rodriguez, P.C., Attorney Recruiting, 201 Third Street NW, Suite 1850, Albuquerque, NM 87102.

Bilingual Associate Attorney
Rebecca Kitson Law in Uptown Albuquerque is seeking a full time, bilingual associate attorney. Candidate must have passion and commitment to advocate for immigrants in all areas of relief. Duties to include but not limited to: drafting appeals/motions, legal research, consultations, case opening, hearings/USCIS interviews, case work. We are an inclusive, supportive office culture that welcomes all to apply. Position available immediately. Must be fluent in Spanish. NM Law License preferred. Experience preferred. Salary DOE, full benefits and fun perks offered. E-mail letter of interest, resume, and writing sample to Rebecca Kitson at rk@rkitsonlaw.com.

City Attorney- City of Gallup
The City of Gallup is seeking individual with graduation from accredited law school with a possession of a Juris Doctorate degree, Ten (10) years legal experience in a broad range of legal issues including, purchase of goods and services, contracting, labor & employee relations, land use, utilities, and prosecution of criminal offenses. Ability to draft legal documents including ordinances, resolutions, contracts, joint powers agreements. Salary Negotiable ($90-110K) Valid DL. Contact: adavis@gallupnm.gov. Open Until Filled. Phone: (505) 863-1215. FAX: 505-726-2053, www.gallupnm.gov/jobs online application

Part and Full Time Attorneys
Part and Full Time Attorneys, licensed and in good standing in NM. Minimum of 3-5 years of experience, preferably in Family Law and Civil Litigation, and must possess strong court room, client relations, and computer skills. Excellent compensation and a comfortable, team-oriented working environment with flexible hours. Priority is to fill position at the Santa Fe location, but openings available in Albuquerque. Support staff manages client acquisitions and administration, leaving our attorneys to do what they do best. Please send resume and cover letter to ac@lightninglegal.biz. All inquiries are maintained as confidential.

Administrative Prosecutor New Mexico Medical Board
The New Mexico Medical Board is accepting applications to fill the position of Prosecutor. This is an exempt, full-time position which is charged with prosecuting physicians and other licensees for violation of the Medical Practices Act. For more information regarding qualification and the application process please visit the New Mexico Medical Board website: http://www.nmmb.state.nm.us

Legal Assistant
Downtown law firm seeks experienced Legal Assistant. Excellent salary and benefits. Must have experience in insurance defense or personal injury. Knowledge of billing software a plus. Requires calendaring, scheduling, independent work and client contact. People skills are a must and to be able to effectively work with our team. Send resume and references to resume01@gmail.com

Legal Assistant
Small law firm needs legal assistant with at least 5 years insurance defense litigation experience for position opening mid-May/early June. Must be comfortable working in a fast-paced environment and managing a large volume of documents. Ability to handle multiple tasks for busy senior partner and at least one other attorney. Send resume and salary requirements to jjenkins@gcmlegal.com.

Legal Assistant
Legal Assistant for busy NM non-profit children's legal services agency. Heavy client contact; requires experience with Microsoft Office, self motivation & a strong work ethic, previous legal assistant experience required; excellent communication & organizational skills. Must have a sense of humor; be flexible and able to multitask. Must be a team player; Bilingual Spanish/English strongly preferred. Benefits. Please email resume to info@pegasuslaw.org.

Family Law Paralegal
Full-time paralegal needed for small Uptown firm exclusively dedicated to family law practice. 3+ yrs. experience preferred. Requirements: excellent organizational & communication skills, experience in self-directed drafting of letters & pleadings, and preparing trial notebooks, and solid knowledge of Word, Excel and Outlook. Health insurance & Simple IRA offered. Salary depending on experience. Email cover letter & resume to info@nmdivorcecustody.com.

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Want to purchase minerals and other oil/gas interests. Send details to: P.O. Box 13557, Denver, CO 80201

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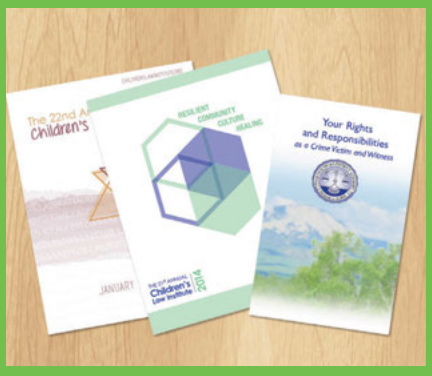

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