Official Publication of the State Bar of New Mexico

BAR BULLETIN

May 24, 2017 • Volume 56, No. 21

Nature's Model, by Taylor Eidem (see page 3)

www.traynephotography.com

Inside This Issue

Annual Meeting Registration Form Inside! Flip to page 6.

STATE BAR of NEW MEXICO

2017 Annual Meeting—Bench & Bar Conference

Inn of the Mountain Gods Resort, Mescalero • July 27-29, 2017

287 Carrizo Canyon Road, Mescalero, NM 88340
Rates start at $139.99* for a standard room (per night plus tax).
**Limited rooms are available at each room rate level. Call for current availability.*
Mention your State Bar affiliation. Contact Debra Enjady, at 800-545-6040, ext. 3, or 575-464-7090.
Room reservation deadline: June 26

To find out about up-to-date sponsorships, exhibitors, networking and programing, explore the Annual Meeting at **www.nmbar.org/AnnualMeeting**.

STATE BAR of NEW MEXICO

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505-797-6000 • 800-876-6227 • Fax: 505-828-3765
email: address@nmbar.org • www.nmbar.org

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6
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7
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10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

7
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6–8 p.m., State Bar Center, Albuquerque, 505-797-6003

7
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Correction: A previous issue listed incorrect dates for some of the June workshops shown above.

About Cover Image and Artist: Taylor Eidem is an aspiring photographer in Albuquerque. She fell in love with freezing time and capturing memories and her love for photography continues to grow with each shot she gets. Although she focuses on portraits and live subjects, Eidem will occasionally take her camera on a nature stroll to capture the beauty of the world. Never one to miss a photo opportunity, she can be found laying in the rocks or water or somewhere in the mountains. For more of her photography, visit www.traynephotography.com.

Notices

Court News

New Mexico Supreme Court Board of Legal Specialization

Comments Solicited

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

Family Law
Twila Larkin
Julie Wittenberger

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.

Seventh Judicial District Court

Judicial Applicants

Six applications were received in the Judicial Selection Office as of 5 p.m., May 11 for the judicial vacancy in the Seventh Judicial District Court due to the retirement of Judge Kevin Sweazea effective May 3. The Seventh Judicial District Judicial Nominating Commission met on May 18, in Socorro to evaluate the applicants. The meeting was open to the public and those who had comments about the applicants were heard. The names of the applicants in alphabetical order are: **Gordon Bennett**, **Ricardo A. Berry**, **Anne Elizabeth Gibson**, **Shannon Murdock**, **Matthew "Mateo" S. Page** and **Roscoe A. Woods**.

Professionalism Tip

With respect to opposing parties and their counsel:

In depositions, negotiations and other proceedings, I will conduct myself with dignity, avoiding groundless objections and other actions that are disrupting and disrespectful.

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.

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.

Appellate Practice Section

Luncheon with Judge Vargas

Join the Appellate Practice Section and YLD for a brown bag lunch at noon, June 2, at the State Bar Center with guest Judge Julie J. Vargas of the New Mexico Court of Appeals. The lunch is informal and is intended to create an opportunity for appellate judges and practitioners who appear before them to exchange ideas and get to know each other better. Those attending are encouraged to bring their own "brown bag" lunch. R.S.V.P. with Zach Ives at zach@ginlawfirm.com. Space is limited.

Annual Meeting— Bench and Bar Conference

Resolutions and Motions

Resolutions and motions will be heard at 2:30 p.m., July 27, at the opening of the State Bar of New Mexico 2017 Annual Meeting at the Inn of the Mountain Gods Resort in Mescalero. To be presented for consideration, resolutions or motions must be submitted in writing by June 27 to Acting Executive Director Richard Spinello, PO Box 92860, Albuquerque, NM 87199; fax to 505-828-3765; or e-mail rspinello@nmbar.org.

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.

Unleash your passion for a cause!

State Bar standing committees:

- Help strengthen the legal profession.
- Work on legal causes of interest.
- Increase access to the legal system.

Each year the State Bar president appoints members to committees that accomplish these goals. To request an appointment email, bhenley@nmbar.org.

To learn more about committee activities, visit www.nmbar.org/committees.

STATE BAR of NEW MEXICO

New Mexico Lawyers and Judges Assistance Program

Help and support are only a phone call away.

24-Hour Helpline

Attorneys/Law Students

505-228-1948 • 800-860-4914

Judges 888-502-1289

www.nmbar.org/JLAP

Submit announcements

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

Law Library Hours

Through Aug. 20

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.

Holiday Closures

May 29: Memorial Day
July 4: Independence Day

Other Bars

Albuquerque Bar Association

June Luncheon with Bill Slease

The Albuquerque Bar Association's next membership luncheon will be June 6 at the Hyatt Regency in Albuquerque. Bill Slease will present "Disciplinary Board Update" from noon–1 p.m. (arrive at 11:30 a.m. for networking). Afterwards, there will be a malpractice panel (2.0 G) with Jack Brandt, Briggs Cheney and Jerry Dixon at 1:15 p.m. Register online at www.abqbar.org.

Requested for Feedback Regarding Law Day Luncheon

The Albuquerque Bar Association welcomed more than 300 participants to its annual Law Day luncheon on May 2. The program, "The 14th Amendment: Transforming American Democracy," was presented by the Hon. Christina Armijo, chief judge of the U.S. District Court for the District of New Mexico. Chief Judge Armijo analyzed six cases that had a defining impact on Due Process jurisprudence. The Albuquerque Bar was also honored to host Chief Justice Charles W. Daniels who delivered the annual memorial list. The program also recognized the bright young minds who won the 2017 Gene Franchini High School Mock Trial Competition, the State Bar Student Essay Contest and the Breaking Good Video Contest. Thanks to all who participated. Feedback on this and future events is encouraged. Send emails to Executive Director Terah Beckmann at TBeckmann@abqbar.org.

Other News

Christian Legal Aid

Win Disneyland Passes

Register for a chance to win four one-day Park Hopper Passes to Disneyland (expiration: Nov. 14, 2018). The price is $10 for one ticket or $30 for four tickets. There is no limit on the number of tickets bought. All proceeds go to New Nexico Christian Legal Aid. Visit http://nmchristianlegalaid.org/disney-passes-raffle/ to enter.

Southwest Women's Law Center

Understanding Proposed Changes in Healthcare

The Southwest Women's Law Center invites members of the legal community to its Healthcare CLE (1.0 G) to learn how to navigate the complexities of the healthcare law and understand proposed changes to the law. SWLC will discuss new terminology in healthcare and proposed changes to deliverables under the American Health Care Act. The CLE only costs $25. The CLE will be 4–5 p.m., June 6, in the SWLC Conference Room, 1410 Coal Avenue SW, Albuquerque, NM 87104. For more information, call 505-244-0502, or visit www.swwomenslaw.org.

STATE BAR of NEW MEXICO

2017 Annual Meeting–Bench and Bar Conference

July 27-29 • Inn of the Mountain Gods, Mescalero, NM

Name _____ SBNM Bar No. _____

Name for Badge (if different than above) _____

Firm/Organization _____

Address _____

City _____ State _____ ZIP _____

Phone _____ Fax _____ Email _____

Guest 1 _____ Guest 2 _____ Guest 3 _____

Name badge required to attend all functions.

REGISTRATION FEES	**Price**	**Qty.**	**Subtotal**

Includes CLE tuition, access to conference app, materials, MCLE filing fees, two breakfasts and lunches, breaks, Opening/President's Reception and Friday Happy Hour Mixer/*Bar Foundation Basket Extravaganza Raffle* *(Total food value $285/person; total CLE value $409/person)*

Must be postmarked by June 15

❒ Standard Fee (Thursday through Saturday)	$450	_____	_____
❒ YLD, Paralegal, Government and Legal Services Attorney Fee	$350	_____	_____
❒ Daily Fee, **Thursday and Friday, July 27-28** (includes both days)	$275	_____	_____
❒ Daily Fee, **Saturday, July 29**	$200	_____	_____
❒ **After June 15 add $50**	$50	_____	_____
❒ Guest Fee (Includes name badge, breakfasts, lunches, Opening/President's Reception and Friday Happy Hour Mixer/Raffle)	$150	_____	_____

Conference Materials: All registrants will receive a flash drive with updates on the website following the conference.

SEPARATELY TICKETED EVENTS

❒ ***Bar Foundation Basket Extravaganza Raffle****, Friday, July 28

(Advanced purchase bonus—not available at the event—2 free tickets for every 10 purchased!) **You must be present to win* $10/ticket _____ _____

Golf Outing: Inn of the Mountain Gods, (18-hole), Thursday, July 27, 11:30 a.m. (lunch not included)

❒ Individual (Handicap/Average Golf Score ____)	$95	_____	_____
❒ Foursome Players are:	$380	_____	_____

1. _____ (Handicap/Average Golf Score _____) 2. _____ (Handicap/Average Golf Score _____)

3. _____ (Handicap/Average Golf Score _____) 4. _____ (Handicap/Average Golf Score _____)

❒ **Guest Event: Spencer Theater Backstage Tour and Downtown Ruidoso**, Friday, July 28 (transportation included—shuttle departs Inn of the Mountain Gods at 8:30 a.m. and returns at approximately 1:30 p.m.)	$8	_____	_____

The Spencer Theater (Shining a New Light on the Arts), Saturday, July 29, 8 p.m.

❒ Orchestra	$59	_____	_____
❒ Spencer Theater Buffet Dinner, 6 p.m.	$20	_____	_____
❒ Roundtrip transportation from the Inn of the Mountain Gods to the Spencer Theater	$10/person	_____	_____
		TOTAL	**$**_____

PAYMENT OPTIONS

❒ Check or P.O. # _____ (Make checks payable to: New Mexico State Bar Foundation or NMSBF)

I authorize the NMSBF to charge my credit card. ❒ VISA ❒ Master Card ❒ American Express ❒ Discover

❒ Credit Card Acct. No. _____ Exp. Date _____ CVV# _____

Name (as it appears on credit card) _____

Register by mail or fax.

Mail: State Bar of New Mexico Accounting, PO Box 92860, Albuquerque, NM 87199-2860 **Email:** accounting@nmbar.org **Fax:** 866-588-9437

Cancellations and Refunds: If you find that you must cancel your registration, send a written notice of cancellation via email or fax by 5 p.m. July 17. A refund, less a $50 processing charge, will be issued. Registrants who fail to send notification by July 17 will not receive a refund.

CLE Credit Information: The Center for Legal Education of the NMSBF is an accredited CLE course provider. Complete and submit a personal attendance record provided at the reception desk.

Hotel information is available on www.nmbar.org/AnnualMeeting

Questions about registration? Call 505-797-6033.

Welcome to the Profession!

Spring 2017 Swearing-in Ceremony

Photos and story by Evann Kleinschmidt

State Bar President Scotty Holloman addresses the audience.

Almost 80 people were sworn in as attorneys at the swearing-in ceremony on April 25 at the Lensic Performing Arts Center in Santa Fe. The new attorneys attended with their families, friends, fellow classmates and colleagues to sign the historic roll of attorneys, take the Oath of Attorneys and listen to words of wisdom from bar leaders and the Supreme Court.

State Bar President Scotty A. Holloman read from the *Creed of Professionalism* of the New Mexico Bench and Bar. "In all matters: 'my word is my bond,'" said Holloman, reading from the Creed. Much of the advice given at the swearing-in ceremonies centers on the small community that is the New Mexico legal profession.

Tomas J. Garcia, chair of the Young Lawyers Division, spoke about how his involvement with the YLD has enriched his practice. He encouraged the new attorneys, who are now members of the YLD, to get involved, volunteer and attend events. Briggs Cheney, member of the JLAP Committee, cautioned the group about the dangers of addiction. He outlined how the Lawyers and Judges Assistance Program can help.

Justices of the Supreme Court listen to statements by special movants.

Members of the Board of Bar Examiners read the names of each individual who was sworn in. New admittees can choose to have a member of the legal community move on their behalf and ask the Supreme Court to admit them. The statements given by these special movants are always touching. Special movants include parents, colleagues, siblings and mentors.

Chief Clerk of the Supreme Court Joey Moya administered the Oath of Attorneys. He then turned the microphone over to members of the Supreme Court to address the newly sworn-in attorneys and their guests. Justice Judith K. Nakamura hoped that the new admittees would be able to instill more confidence in our legal system and build reputations of being fair, hard working and having high standards. Justice Barbara J. Vigil remarked that she was almost moved to tears listening to the words of praise by the special movants. She asked the new lawyers strive for a healthy balance in their life and to be diligent protectors of the truth.

Justice Edward L. Chávez mused that the justice system is the great equalizer. He advised that following the golden rule is a good way to get started on the right foot. Since she wasn't able to attend, Justice Chávez also imparted some of Justice Petra Jimenez Maes' usual advice, including "always wear comfortable shoes!"

Signing the Roll Book

Taking the Oath

Finally, Chief Justice Charles W. Daniels addressed the new lawyers saying that they've been empowered with exclusive access to the justice system. "You've been entrusted… because you've demonstrated that you're worthy," he said. Recalling his own swearing-in ceremony, the Chief Justice said that he had no idea what lay before him but that it's been a remarkable journey. Though it's unpredictable, he said, it will be a road full of opportunity and wonder.

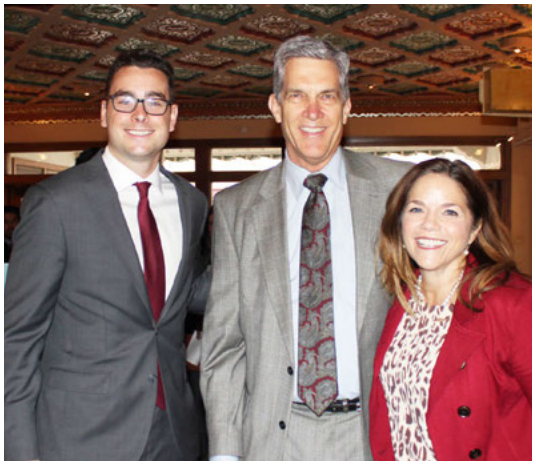




Welcome, new members!

The State Bar of New Mexico extends its heartfelt congratulations to all who were recently sworn in and to their families, friends and colleagues. For more photos, visit **www.nmbar.org/photos**.




How much do you know about the Bar Foundation?

In the last five years the Bar Foundation provided the following services to our community and members:

For Our Community

- Provided direct legal assistance to approximately **22,500** seniors statewide.
- Sponsored **250** workshops statewide on debt relief/ bankruptcy, divorce, wills, probate, long term care Medicaid and veteran's issues.
- Helped more than **10,000** New Mexicans statewide find an attorney.
- Distributed **$1.716 million** for civil legal service programs throughout New Mexico.
- Introduced more than **800** high school students to the law through the Student Essay Contest.
- Provided more than **33,000** pocket Constitutions and instruction by volunteer attorneys to New Mexico students statewide.

For Our Members

- Lawyer referral programs helped members meet new clients and accumulate pro bono hours with more than **10,000** referrals to the private bar, **1,600** prescreened by staff attorneys.
- Provided more than **100,000** credit hours of affordable continuing legal education.

The **State Bar Foundation** is the charitable arm of the State Bar of New Mexico representing the legal community's commitment to serving the people of New Mexico and the profession. The goals of the Foundation are to:

- *Enhance* access to legal services for underserved populations
- *Promote* innovation in the delivery of legal services
- *Provide* legal education to members and the public

The State Bar Foundation Relies on the *Passion* of Lawyers!

STATE BAR of NEW MEXICO FOUNDATION

To support the Bar Foundation, contact Stephanie Wagner at 505-797-6007 • swagner@nmbar.org

Legal Education

May

25 **Complying with the Disciplinary Board Rule 17-204**
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

6 **Healthcare CLE**
1.0 G
Live Seminar, Albuquerque
Southwest Women's Law Center
505-244-0502

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

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

June

23 **Complying with the Disciplinary Board Rule 17-204**
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 **Complying with the Disciplinary Board Rule 17-204**
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

27–29 **2017 Annual Meeting—Bench & Bar Conference**
8.0 G, 7.0 EP (total possible)
Live Seminar, Mescalero
Center for Legal Education of NMSBF
www.nmbar.org

August

8 **Lawyers Ethics in Employment Law**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **Tricks and Traps of Tenant Improvement Money**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

29 **The Use of "Contingent Workers"—Issues for Employment Lawyers**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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 12, 2017

PUBLISHED OPINIONS

No. 35616	6th Jud Dist Luna JQ-13-6, CYFD v RAYMOND D (affirm)	5/08/2017

UNPUBLISHED OPINIONS

No. 35341	9th Jud Dist Curry CV-15-187, D NANCE v TAX AND REV (dismiss)	5/08/2017
No. 35553	2nd Jud Dist Bernalillo CR-07-3690, CR-06-3899, STATE v S LUNDVALL (affirm)	5/08/2017
No. 34139	2nd Jud Dist Bernalillo LR-12-91, STATE v D SMITH (reverse and remand)	5/11/2017
No. 34537	11th Jud Dist San Juan CR-13-1074, STATE v N YAZZIE (reverse and remand)	5/11/2017

Slip Opinions for Published Opinions may be read on the Court's website:
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Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

Joey D. Moya, Chief Clerk New Mexico Supreme Court
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Clerk's Certificate of Suspension

Effective May 9, 2017, for non-compliance with bar license fee and reporting requirements under Rules 24-102, 24-108, 24-109, 17-202, 17-203, 17-204, and 17A-003 NMRA for the year **2017**:

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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 Granted, February 14, 2017, No. S-1-SC-36197

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-023

No. 33,718 (filed October 25, 2016)

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

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
BRIANA H. ZAMORA, District Judge

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

BENNETT J. BAUR
Chief Public Defender
Santa Fe, New Mexico
VICKI W. ZELLE
Assistant Appellate Defender
Albuquerque, New Mexico
for Appellant

Opinion

M. Monica Zamora, Judge

{1} Defendant Laressa Vargas appealed her conviction in the metropolitan court (trial court) for aggravated driving while intoxicated (DWI), contrary to NMSA 1978, Section 66-8-102(D)(3) (2016), to the district court. The district court affirmed the trial court's sentencing order and filed a memorandum opinion. Defendant now appeals to this Court. Defendant challenges the sufficiency of the evidence to support her conviction. Defendant also challenges the constitutionality of the arresting officer's request for a blood test and argues that evidence of her refusal to submit to a blood test should have been excluded.

{2} We conclude that sufficient evidence supported the trial court's finding that Defendant was driving under the influence of intoxicating liquor and was impaired to the slightest degree. However, in light of the United States Supreme Court's recent holding in *Birchfield v. North Dakota*, __U.S.__, 136 S. Ct. 2160 (2016), we conclude that Defendant may not be held criminally liable for refusing to submit to a warrantless blood test based on implied consent. *Id.* at 2185-86. We affirm in part, reverse in part, and remand.

I. BACKGROUND

{3} On April 23, 2011, the Bernalillo County Sheriff's Office conducted a sobriety checkpoint. Deputy Patrick Rael of the Bernalillo County Sheriff's Office was working the checkpoint and observed Defendant's vehicle, which was stopped approximately 15 to 20 yards in advance of the checkpoint. Deputy Rael signaled to Defendant to pull forward. Defendant rolled down her window and said, "Good afternoon," which Deputy Rael found odd since it was approximately 1:00 a.m. Deputy Rael noticed the odor of alcohol coming from the vehicle and from Defendant. Deputy Rael also noticed that Defendant appeared nervous and confused, and that her eyes were bloodshot and watery. During their initial contact, Defendant denied consuming alcohol.

{4} Deputy Rael requested that Defendant perform field sobriety tests (FSTs) and Defendant agreed. With Defendant outside of the vehicle, Deputy Rael continued to smell alcohol coming from Defendant's person. Defendant performed poorly on each of the FSTs. Deputy Rael believed that Defendant could not safely operate a vehicle and Defendant was placed under arrest. Deputy Rael testified that he read the Implied Consent Act to Defendant, and requested that she submit to a breath test. Defendant then admitted to having consumed alcohol, and the breath test indicated that her blood alcohol concentration (BAC) was .04/.05.

{5} Based on Defendant's poor performance on the FSTs, Deputy Rael did not believe the BAC results were consistent with her level of impairment. Deputy Rael requested that Defendant also submit to a blood test. Defendant initially agreed to the blood test, but later refused. Defendant was charged with aggravated DWI.

{6} After a bench trial, Defendant was convicted of aggravated DWI. Defendant appealed to the district court. The district court affirmed Defendant's conviction. This appeal followed.

II. DISCUSSION

A. Sufficiency of the Evidence

{7} "[T]he test to determine the sufficiency of evidence in New Mexico . . . is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Sutphin*, 1988-NMSC-031, ¶ 21, 107 N.M. 126, 753 P.2d 1314. "In reviewing the sufficiency of the evidence, [the appellate courts] must view the evidence in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict." *State v. Cunningham,* 2000-NMSC-009, ¶ 26, 128 N.M. 711, 998 P.2d 176.

{8} In the present case, Defendant argues that because the State presented no direct evidence of impaired driving, it lacked sufficient evidence to support a verdict of aggravated DWI beyond a reasonable doubt. Section 66-8-102(D)(3) states:

> Aggravated driving under the influence of intoxicating liquor . . . consists of:
>
> . . . .
>
> (3) refusing to submit to chemical testing, as provided for in the Implied Consent Act[, NMSA 1978, §§ 66-8-105 to -112 (1978, as amended through 2015)], and in the judgment of the court, based upon evidence of intoxication presented to the court, the driver was under the influence of intoxicating liquor[.]

There is no dispute that Defendant refused to submit to the blood test. Accordingly, the sole question is whether substantial evidence supports the trial court's conclusion that Defendant was driving under the influence of intoxicating liquor.

{9} In order to convict Defendant of driving under the influence of intoxicating liquor, the trial court must find that as a result of drinking liquor Defendant was "less able, either mentally or physically or both, to exercise the clear judgment and steady hand necessary to handle [a vehicle] with safety to himself and the public." *State v. Sisneros*, 1938-NMSC-049, ¶ 18, 42 N.M. 500, 82 P.2d 274 (internal quotation marks and citation omitted); *State v. Gurule*, 2011-NMCA-042, ¶ 7, 149 N.M. 599, 252 P.3d 823 (same). "This standard is known as the impaired to the slightest degree standard." *Gurule*, 2011-NMCA-042, ¶ 7 (internal quotation marks and citation omitted).

{10} At trial, the State presented evidence that Defendant was driving the vehicle when it approached the checkpoint after having consumed alcohol. Deputy Rael testified that Defendant was in fact driving the vehicle after having consuming alcohol when she approached the checkpoint. Defendant eventually admitted to consuming alcohol and submitted to a breath test, which measured her BAC .04/.05.

{11} Deputy Rael testified that Defendant was confused, had bloodshot, watery eyes, and smelled of alcohol. According to Deputy Rael, Defendant was unable to maintain her balance and was unable to follow his instructions during the FST sequences. Deputy Rael administered four FST sequences and Defendant was not able to complete any of them successfully.

{12} We hold that this evidence supports her conviction for driving while impaired to the slightest degree. *See State v. Sparks*, 1985-NMCA-004, ¶ 6, 102 N.M. 317, 694 P.2d 1382 (defining substantial evidence as that evidence which a reasonable person would consider adequate to support a defendant's conviction); *see also State v. Neal*, 2008-NMCA-008, ¶ 29, 143 N.M. 341, 176 P.3d 330 (observing that the defendant's unsatisfactory performance on the FSTs, including his failure to follow instructions and his lack of balance, constituted signs of intoxication, which supported his conviction for driving under the influence of intoxicating liquor); *State v. Soto*, 2007-NMCA-077, ¶¶ 32, 34, 142 N.M. 32, 162 P.3d 187 (holding that there was sufficient evidence of driving under the influence pursuant to the impaired-to-the-slightest-degree standard, even though, among other factors, the officers observed no irregular driving when the defendant "had red, bloodshot, and watery eyes, as well as slurred speech and a very strong odor of alcohol on his breath[,]" the defendant admitted drinking, the officers observed several empty cans of beer where the defendant had been, and the officers testified that the defendant was definitely intoxicated), *abrogated on other grounds by State v. Tollardo*, 2012-NMSC-008, 275 P.3d 110.

B. Implied Consent to Submit to Blood Testing

{13} Defendant also argues that evidence of her refusal to take a blood test should have been suppressed because, under the circumstances of this case, a compelled blood test was constitutionally unreasonable under both the Fourth Amendment of the United States Constitution and Article II, Section 10 of the New Mexico Constitution. Defendant also challenges the constitutionality of using her refusal to submit to the blood test to aggravate her DWI charge.

1. Preservation

{14} The State asserts that Defendant failed to preserve the suppression argument she now makes on appeal. Under the New Mexico Rules of Appellate Procedure, "[t]o preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked[.]" Rule 12-216(A) NMRA. Defendant suggests that by arguing for suppression of the expanded search, she preserved the constitutional aspect of the unreasonableness of the search. Defendant further declares that the district court's denial of her request for suppression was a ruling fairly invoked from the lower court. Defendant did not directly or indirectly assert this constitutional principle in her appeal to the district court nor did she provide the necessary factual basis that would allow for the district court to rule on the issue. *See State v. Gomez*, 1997-NMSC-006, ¶ 22, 122 N.M. 777, 932 P.2d 1. The district court did not address the issue. As a result, Defendant has failed to preserve her argument for appeal.

{15} However, where a decision by the district court was not fairly invoked on a particular issue, an appellate court may still consider "jurisdictional questions, issues of general public interest, or matters involving fundamental error or fundamental rights of a party." *State v. Harrison*, 2010-NMSC-038, ¶ 10, 148 N.M. 500, 238 P.3d 869 (internal quotation marks and citation omitted); *see* Rule 12-216. Because of the unusual nature of this case where criminal liability has been imposed for refusing to submit to an unconstitutional request and the United States Supreme Court having decided and explained the applicable law on this novel issue, during the pendency of this appeal, we will exercise our discretion to consider whether compelling Defendant to submit to a blood test constitutes an illegal search under the Fourth Amendment because "freedom from illegal search and seizure is a fundamental right" that may, in particular circumstances, come within the exception to the preservation requirement. *Gomez*, 1997-NMSC-006, ¶ 31 n.4.

2. Standard of Review

{16} "The legality of a search . . . ultimately turns on the question of reasonableness." *State v. Ryon*, 2005-NMSC-005, ¶ 11, 137 N.M. 174, 108 P.3d 1032. While this "inquiry is necessarily fact-based it compels a careful balancing of constitutional values, which extends beyond fact-finding," and is therefore subject to de novo review. *State v. Rowell*, 2008-NMSC-041, ¶ 8, 144 N.M. 371, 188 P.3d 95 (internal quotation marks and citation omitted).

{17} In the present case, Defendant advances arguments under the United States and the New Mexico Constitutions, which provide overlapping protections against unreasonable searches and seizures. *Gomez*, 1997-NMSC-006, ¶¶ 19-23. In analyzing whether challenged police procedures are unlawful, we apply the interstitial approach set forth in *Gomez*, which requires that we first consider whether the United States Constitution makes the challenged procedures unlawful. *Id.* ¶ 19. "If so, the fruits usually must be suppressed as evidence. If not, we next consider whether the New Mexico Constitution makes the search unlawful." *Rowell*, 2008-NMSC-041, ¶ 12; *Gomez*, 1997-NMSC-006, ¶ 19.

3. Reasonableness of a Warrantless Blood Test

{18} Under the Fourth Amendment, the reasonableness of a search depends "on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." *State v. Williams*, 2011-NMSC-026, ¶ 10, 149 N.M. 729, 255 P.3d 307 (internal quotation marks and citation omitted). The Fourth Amendment expresses a clear preference in favor of obtaining search warrants prior to conducting a search. *State v. Williamson*, 2009-NMSC-039,

¶ 14, 146 N.M. 488, 212 P.3d 376. Our Supreme Court has stated that "[a]ny warrantless search analysis must start with the bedrock principle of both federal and state constitutional jurisprudence that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable, subject only to well-delineated exceptions." *Rowell*, 2008-NMSC-041, ¶ 10 (internal quotation marks and citation omitted).

{19} A blood alcohol test is considered "a search of 'persons' [,]" and therefore falls within the ambit of the Fourth Amendment. *State v. Richerson*, 1975-NMCA-027, ¶ 23, 87 N.M. 437, 535 P.2d 644. However, valid consent to a search is among the recognized "exceptions to the warrant requirement." *State v. Garnenez*, 2015-NMCA-022, ¶ 5, 344 P.3d 1054. New Mexico, like all states, has sought to combat the evils of drunk driving by enacting the Implied Consent Act, by which anyone who operates a motor vehicle "is deemed to have given consent to a chemical test to determine alcoholic content of his breath, blood, or urine." *In re McCain*, 1973-NMSC-023, ¶ 9, 84 N.M. 657, 506 P.2d 1204; *see* § 66-8-107.

{20} The United States Supreme Court has "referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply." *Birchfield*, ___U.S.___, 136 S. Ct. 2160, 2185; *see e.g.*, *Missouri v. McNeely*, ___ U.S. ___, 133 S. Ct. 1552, 1565-66 (2013) (plurality opinion); *South Dakota v. Neville*, 459 U.S. 553, 560 (1983). Recently, the United State Supreme Court considered whether criminalizing a driver's refusal to submit to a chemical test comports with the Fourth Amendment standard of reasonableness. *Birchfield*, ___U.S.___, 136 S. Ct. 2160, 2173. *Birchfield* was a consolidated case wherein three defendants appealed from their respective DWI convictions, one defendant argued that his submission to a blood test was involuntary, another defendant challenged his criminal prosecution for refusing to submit to a breath test, and a third defendant challenged his criminal prosecution for refusing to submit to a blood test. *Id.* at 2172.

{21} In analyzing whether a given type of search is exempt from the warrant requirement the Court assesses "on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Id.* at 2176 (internal quotation marks and citation omitted); *Riley v. California*, ___ U.S. ___, 134 S. Ct. 2473, 2484 (2014). In *Birchfield*, the Court considered the impact of breath and blood tests on individual privacy interests. *Birchfield*, ___U.S.___, 136 S. Ct. at 2176-78. The *Birchfield* court determined that blood tests impact individual privacy interests to a significantly greater degree than breath tests. *Id.* at 2178. *Birchfield* recognized that breath tests, which analyze air expelled out of the subject's lungs to determine the BAC, do not implicate significant privacy concerns. *Id.* at 2176-77. *Birchfield* noted that in contrast to breath tests, blood tests, are significantly intrusive because they "require piercing the skin and extract[ing] a part of the subject's body," and leave "in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading." *Id.* at 2178.

{22} Considering the government's and states' paramount interest in preserving the safety of public highways, the Court acknowledged the " 'carnage' and 'slaughter' caused by drunk drivers." *Id.* at 2178-79. *Birchfield* emphasized the importance of not only "neutralizing the threat posed by a drunk driver who has already gotten behind the wheel[,]" but also deterring drunk driving "so such individuals make responsible decisions and do not become a threat to others in the first place." *Id.* at 2179. *Birchfield* also noted that the states' interest in the efficient use of resources; would be hindered if a search warrant were required for every BAC test incident to a drunk driving arrest. *Id.* at 2181-82.

{23} Balancing the slight impact of breath tests on individuals' privacy, and the great need for BAC testing, *Birchfield* determined that warrantless breath tests incident to drunk driving arrests are reasonable under the Fourth Amendment. *Id.* at 2184. "Because breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests," *Birchfield* concluded that breath tests "may be administered as a search incident to a lawful arrest for drunk driving," but blood tests may not. *Id.* at 2185.

{24} *Birchfield* also rejected the idea that warrantless blood tests can be justified based on the general concept of implied consent laws. *Id.* at 2185-86. The constitutionality of states' implied consent laws was not at issue, and the Court did not address that issue. *Id.* at 2185. However, *Birchfield* did address whether a driver could be criminally liable for refusing to submit to an implied consent blood test. *Id. Birchfield* reasoned that "[t]here must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads." *Id.* Applying the Fourth Amendment reasonableness standard, *Birchfield* concluded "that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *Id.* at 2186. In other words, a driver may be deemed to have consented to a warrantless blood test under a state implied consent statute, but the driver may not be subject to a criminal penalty for refusing to submit to such a test. *Id.*

{25} In the present case, because Defendant's DWI charge by alcohol was aggravated based on her refusal of a warrantless blood test, a search which she refused, cannot be justified on the basis of implied consent. *See id.* at 2176. Neither the record nor the briefing in this case indicates that Deputy Rael's interview of Defendant, administration of the FSTs, and the breath test conducted by Deputy Rael failed to satisfy the State's interests in acquiring evidence to enforce its drunk driving laws against Defendant. And the State has not presented any information to suggest that any exception to the warrant requirement would have justified a warrantless search of Defendant's blood. *Cf. McNeely*, ___ U.S. at ___, 133 S. Ct. at 1567. Accordingly, we conclude Defendant was threatened with an unlawful search. We further conclude that Defendant's refusal to submit to the search cannot be the basis for aggravating her DWI sentence. *See Birchfield*, ___U.S.___, 136 S. Ct. at 2186 (reversing the defendant's conviction where the State presented no "case-specific information to suggest that the exigent circumstances exception would have justified a warrantless [blood test]" and where the Court was "[u]nable to see any other basis on which to justify a warrantless test of [the defendant's] blood").

CONCLUSION

{26} For the foregoing reasons, we reverse Defendant's conviction of aggravated DWI and remand to the trial court for resentencing on the charge of DWI, impaired to the slightest degree.

{27} IT IS SO ORDERED.

M. MONICA ZAMORA, Judge

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

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-024

No. 34,429 (filed November 28, 2016)

ARNOLDO CARRILLO and SANTA FE HORSE RACING BY CARRILLO'S, LLC, a domestic limited liability company,
Plaintiffs-Appellants,
v.
MY WAY HOLDINGS, LLC, a foreign limited liability company d/b/a SUNLAND PARK RACETRACK AND CASINO; SUNRAY GAMING OF NEW MEXICO, LLC, a domestic limited liability company; ZIA PARK, LLC, a foreign limited liability company; RUIDOSO DOWNS RACING, INC., a domestic corporation; RICK BAUGH; LONNIE S. BARBER, JR.; SHAUN HUBBARD,
Defendants-Appellees,
and
VINCE MARES in his official capacity as DIRECTOR OF THE NEW MEXICO RACING COMMISSION, SUNLAND PARK BOARD OF STEWARDS, ZIA PARK BOARD OF STEWARDS, SUNRAY PARK BOARD OF STEWARDS, RUIDOSO DOWNS BOARD OF STEWARDS,
Defendants.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
T. GLENN ELLINGTON, District Judge

CHRISTOPHER L. GRAESER
GRAESER & MCQUEEN, LLC
Santa Fe, New Mexico
for Appellant

DERON B. KNONER
NATHAN S. STIMSON
THOMAS C. BIRD
KELEHER & MCLEOD, P.A.
Albuquerque, New Mexico
for Appellees My Way Holdings, LLC and Rick Baugh

MEGAN DAY HILL
CIVEROLO, GRALOW, HILL & CURTIS
Albuquerque, New Mexico
for Appellees SunRay Gaming of New Mexico, LLC and Lonnie S. Barber, Jr.

JOHN K. ZIEGLER
TRACI N. OLIVAS
CONKLIN, WOODCOCK & ZIEGLER, P.C.
Albuquerque, New Mexico
for Appellees Ruidoso Downs Racing, Inc. and Shaun Hubbard

BILLY R. BLACKBURN
PAUL LINNENBURGER
Albuquerque, New Mexico
for Appellees Zia Park, LLC and Rick Baugh

Opinion

Roderick T. Kennedy, Judge

{1} Arnoldo Carrillo is a racehorse owner and trainer who, along with his business Santa Fe Horse Racing by Carrillo's, LLC (collectively Carrillo), are licensed with the New Mexico Racing Commission (the Commission). Between September 2012 and April 2013 one of Carrillo's horses died as a result of racing activities and three others suffered race-related injuries—one so severe that it had to be euthanized. As a result, four of the five privately owned, licensed racetracks in New Mexico excluded Carrillo from entering their tracks and the races held at their tracks. Carrillo filed suit against the racetracks, the managers of the racetracks, the Board of Stewards for each racetrack, and the Commission, alleging his rights as a licensee were violated by his exclusion. The racetracks filed motions for summary judgment, asserting that they had a common law right to exclude both patrons and licensees alike from their property. Carrillo did not dispute the facts set forth in the racetracks' motions. Instead, he argued that the racetracks possessed an unfettered right to exclude patrons but not licensees. On appeal, the parties make much the same argument.

{2} We conclude that racetracks in New Mexico possess a common law right to exclude any person—patron or licensee—for any reason other than those specified in the New Mexico Human Rights Act. Though we do not decide here whether these racetracks hold a monopoly over racing in New Mexico, we do hold that where the facts of the case suggest that there may be a monopoly control over the racing business, a racetrack seeking to exercise its common law right must make a showing that it has a legitimate justification for doing so; exclusion or ejection may not be done arbitrarily or without explanation. We conclude that the district court properly applied this common law right in this case and affirm its order granting summary judgment as to the racetracks.

I. BACKGROUND

{3} The facts of this case are not in dispute. Carrillo is licensed with the New Mexico Racing Commission to train and race horses. On September 9, 2012, two horses—both of which belonged to Carrillo—were injured while racing at Zia Park[1] and had to be removed by ambulance. Carrillo's horses were the only two horses injured at Zia Park on that date. On October 29, 2012, another of Carrillo's horses suffered an injury at Zia Park and had to be euthanized. That same day, Zia Park informed Carrillo that he was excluded from the premises and that he was no longer welcome to race there; Carrillo was escorted from the premises.

{4} On April 12, 2013, Carrillo's horse died immediately after winning a race at

[1]Zia Park is owned by Appellee Zia Park, LLC. Rick Baugh was the assistant general manager at Zia Park when Carrillo was excluded.

Sunland Park.[2] The next day, on April 13, 2013, Sunland Park informed Carrillo in writing that, because of the death of his horse at Sunland Park as well as his "record at New Mexico tracks," he was excluded from the property and any races held there. He was also informed that the horse's death was under investigation.[3] Likewise, on April 17, 2013, SunRay Park[4] informed Carrillo that, due to his horse's death at Sunland Park and the accompanying investigation, he was being denied entry to the property and any race held there. As a result, Carrillo's horses that were entered for subsequent races on April 19 and April 21 were scratched.

{5} Carrillo attempted to enter a horse at the Ruidoso Downs[5] on July 6, 2013. Upon speaking to management, however, Carrillo was told that he was being excluded from the track. On July 12, 2013, Carrillo received a letter stating that because of the number of "incidents" and his "record at New Mexico tracks," Carrillo was being denied entry to the Ruidoso Downs property as well as entry into any live racing at that facility.

{6} On August 5, 2013, Carrillo filed a complaint against Zia, Sunland, SunRay, and Ruidoso in the district court.[6] Carrillo's complaint brought claims for injunctive relief, declaratory judgment, interference with prospective contractual relations, prima facie tort, and negligence. Sunland, SunRay, Ruidoso, and Zia (collectively, the racetracks) filed motions for summary judgment. Carrillo filed a response to each, asserting that the reasons given for his exclusion were inadequate, that the common law right to exclude gives racetracks unfettered discretion only to exclude patrons who are not in possession of a license from the Commission, and that the regulation governing exclusion also reflects a difference between the right to exclude patrons and the right to exclude licensees.

{7} The district court held a hearing on the motions, during which Carrillo conceded that the district court would likely grant the summary judgment motions, "on the grounds that, as a matter of law, the associations retain the common law right to exclude licensees." In its order, the district court found that no genuine issues of material fact existed in the case. It reasoned that under the common law, a racetrack owner has a right to exclude any person for any lawful reason, and that right has been "affirmed by regulation at 15.2.2.8(V) NMAC and codified by statute at NMSA 1978, Section 60-1A-28.1 (2014)." As a result, the district court granted the summary judgment motions and dismissed Carrillo's claims.[7] Carrillo timely appealed.

II. DISCUSSION

{8} On appeal, Carrillo argues that Section 60-1A-28.1 controls the outcome of this case. Carrillo suggests that Section 60-1A-28.1 represents a modification to the common law rule that racetracks can exclude anyone, and instead creates a distinct set of requirements for a racetrack to satisfy in order to exclude licensees[8] from their premises. Alternatively, Carrillo argues that the common law right to exclude does not support the district court's decision to grant summary judgment. Finally, Carrillo argues that 15.2.2.8(V) NMAC is not relevant to the outcome of this appeal because it is derivative in nature and merely reflects the common law or Section 60-1A-28.1. Underlying Carrillo's argument is the suggestion that Zia, Sunland, SunRay, and Ruidoso did not afford him the due process considerations that he was entitled to before his exclusion from their tracks. Carrillo does not, however, explain why the privately owned racetracks involved in this case were obligated to comply with due process, other than suggesting that these racetracks are part of a quasi-monopoly.

A. Section 60-1A-28.1 Does Not Apply to This Case

{9} Section 60-1A-28.1 was made effective March 3, 2014. *See id.*; 2014 N.M. Laws, ch. 6, § 1. Carrillo had filed his complaint in district court on August 5, 2013. The racetracks point out that Section 60-1A-28.1 cannot be applied in this case because it was enacted after Carrillo had already been excluded from the racetracks in question and had filed his complaint. Carrillo argues that because his exclusion from the racetracks in question is ongoing, Section 60-1A-28.1 is dispositive if the racetracks "do not have a current right to exclude" under the statute. Carrillo does not, however, cite any authority to support this assertion. *See In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 ("Issues raised in appellate briefs which are unsupported by cited authority will not be reviewed by us on appeal."). Carrillo also does not explain how or why we might apply Section 60-1A-28.1 retroactively. We agree with the racetracks and conclude that Section 60-1A-28.1 is not available for the disposition of the case before us.

{10} With regard to retroactivity, Article IV, Section 34 of the New Mexico Constitution provides that "[n]o act of the [L]egislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case." We review de novo the applicability of this section of the Constitution. *See Hyden v. N.M. Human Servs. Dep't*, 2000-NMCA-002, ¶ 12, 128 N.M. 423, 993 P.2d 740. A case is considered "pending" under Article IV, Section 34 once it is filed, or where the district court retains jurisdiction, and the case is no longer pending once a final decision is entered and the court no longer has jurisdiction. *See Starko, Inc. v. Cimarron Health Plan, Inc.*, 2005-NMCA-040, ¶ 9, 137 N.M. 310, 110 P.3d 526. It is therefore

[2]Sunland Park Racetrack & Casino (Sunland Park) is owned by My Way Holdings, LLC. Rick Baugh was the general manager at Sunland Park when Carrillo was excluded.

[3]According to the results of that investigation, the horse died of a pulmonary hemorrhage. Although Zia alleged that Carrillo's horses had been treated with drugs used to mask injury, no evidence of those drugs exists in the record before the district court.

[4]SunRay Park & Casino (SunRay Park) is owned by SunRay Gaming of New Mexico, Inc. Lonnie S. Barber, Jr. was the director of racing operations at SunRay Park when Carrillo was excluded.

[5]Ruidoso Downs Race Track is owned by Ruidoso Downs Racing, Inc.

[6]Carrillo also brought claims against the Board of Stewards for each of these racetracks, as well as against the Commission. Those claims were not subject to summary judgment and are not part of this appeal.

[7]Notably, Carrillo does not make any assertion of error in the district court's decision to move forward on the summary judgment motion prior to the completion of discovery. The rule that a court generally should not grant summary judgment before discovery is complete is not absolute. *See Sun Country Sav. Bank of N.M., F.S.B. v. McDowell*, 1989-NMSC-043, ¶ 27, 108 N.M. 528, 775 P.2d 730.

[8]The term "licensees" as used throughout this opinion refers to occupational licensees, namely trainers, owners, jockeys, etc., who hold a license from the Commission to engage in racing or a regulated activity, but excludes the racetrack owners themselves.

clear that, for purposes of Article IV, Section 34, this was a "pending case" when Section 60-1A-28.1 was enacted.

{11} Article IV, Section 34 goes hand in hand with the rule that "statutes are presumed to operate prospectively only and will not be given a retroactive effect unless such intention on the part of the Legislature is clearly apparent." *Bradbury & Stamm Constr. Co. v. Bureau of Revenue*, 1962-NMSC-078, ¶ 40, 70 N.M. 226, 372 P.2d 808; *See Albuquerque Rape Crisis Ctr. v. Blackmer*, 2005-NMSC-032, ¶ 20, 138 N.M. 398, 120 P.3d 820 (explaining that a "plain reading" of Article IV, Section 34 prohibits the retroactive application of statutes). Generally, there exists a presumption against retrospective legislation: "individuals, in planning and conducting their business, should be able to rely with reasonable certainty on existing laws." *City of Albuquerque v. State ex rel. Vill. of Los Ranchos de Albuquerque*, 1991-NMCA-015, ¶ 37, 111 N.M. 608, 808 P.2d 58. Where a statute "affects vested or substantive rights," or where retroactive application of a new law "would diminish rights or increase liabilities that have already accrued," prospective application may be required by the Constitution. *Gallegos v. Pueblo of Tesuque*, 2002-NMSC-012, ¶ 33, 132 N.M. 207, 46 P.3d 668 (internal quotation marks and citation omitted).

{12} Carrillo's assertions regarding the applicability of Section 60-1A-28.1 hinge on his argument that the legality of the racetracks' ongoing exclusion of him depends on our interpretation of the statute. However, nothing in the language of the Horse Racing Act indicates a legislative intent that Section 60-1A-28.1 should apply retroactively. This case is solely concerned with whether the October 29, 2012, April 13, 2013, April 19, 2013, and July 12, 2013, exclusions of Carrillo from Zia, Sunland, SunRay, and Ruidoso, respectively, were unlawful *at that time*, and not the validity of any future exclusions that the racetracks may or may not desire to enforce. As discussed more thoroughly below, to adopt Carrillo's interpretation of Section 60-1A-28.1 and apply it to this case on appeal would be to potentially render unlawful the racetracks' actions that were permissible under the common law at the time they were taken. Nothing in the plain language of the statute suggests the Legislature intended such a result. Applying the presumption against retroactive application of statutes, we conclude that Section 60-1A-28.1 does not apply to this case. We also must not interpret Section 60-1A-28.1 as to future exclusions, as doing so would be improperly advisory. *See Sena Sch. Bus Co. v. Bd. of Educ. of Santa Fe Pub. Sch.*, 1984-NMCA-014, ¶ 16, 101 N.M. 26, 677 P.2d 639 (stating the rule that this Court does not issue advisory opinions). The district court inexplicably listed Section 60-1A-28.1 as only one of its reasons for granting the summary judgment motions; we must look to the other reasons that the district court enumerated in deciding whether the racetracks are entitled to summary judgment.

B. Common Law Right to Exclude

{13} Under Carrillo's interpretation of the common law, a racetrack has a much broader discretion in excluding patrons or ticket holders than it does in excluding trainers, owners, or jockeys—those holding occupational licenses granted by the Commission. He suggests that this distinction arises from a licensee's right to due process of law where he is lawfully denied an opportunity to engage in his chosen profession. As such, Carrillo insists that because licensees are heavily regulated by the Commission, they have a right to admission to the racetrack and a racetrack's right to exclude licensees is narrower than its right to exclude patrons.

{14} The United States Supreme Court recognized a private racetrack's right to exclude in *Marrone v. Washington Jockey Club*, 227 U.S. 633, 636 (1913). Since then, many courts have continued to recognize a racetrack owner's common law right to exclude patrons. *See, e.g.*, *Nation v. Apache Greyhound Park, Inc.*, 579 P.2d 580, 582 (Ariz. Ct. App. 1978) (concluding that a racetrack may exclude a patron where no statute changed the common law right to do so). Some courts have also affirmed a racetrack owner's common law exclusion of licensees, such as owners, trainers, and jockeys. *See Calder Race Course, Inc. v. Gaitan*, 393 So. 2d 15, 16 (Fla. Dist. Ct. App. 1980) (affirming a racetrack's exclusion of a trainer, citing the common law right to exclude, and stating that private racing establishments "continue to have the right to choose those persons with whom they wish to do business"); *Greenfeld v. Md. Jockey Club*, 57 A.2d 335, 337-38 (Md. 1948) (affirming existence of common law right to exclude patrons, despite heavy regulation of racing through statute, so long as exclusion is not founded on race, creed, color, or national origin); *Catrone v. State Racing Comm'n*, 459 N.E.2d 474, 477 (Mass. App. Ct. 1984) (interpreting common law so that "a licensee racetrack at least may exclude licensed persons from participation in racing activity in the exercise of a reasonable business judgment"); *Marzocca v. Ferone*, 461 A.2d 1133, 1137 (N.J. 1983) (holding that a racetrack's common law right to exclude licensees exists "where the relationship is between the track management and persons who wish to perform their vocational activities on the track premises" (alteration, internal quotation marks, and citation omitted)); *Arone v. Sullivan Cty. Harness Racing Ass'n*, 457 N.Y.S.2d 958, 959 (N.Y. App. Div. 1982) (stating that ractrack operators' "long-recognized prerogative" of exclusion allowed a racetrack to exclude licensed trainers, drivers, and owners); *Bresnik v. Beulah Park Ltd. P'ship*, 617 N.E.2d 1096, 1097-98 (Ohio 1993) (affirming a racetrack's right to exclude "jockey agents" and characterizing the right to exclude as a long-standing "fundamental tenent of real property"). Carrillo conceded that this common law right exists during the summary judgment hearing in district court.

{15} Looking to a rule that has been stated, accepted, and followed in other jurisdictions, we conclude that a privately owned racetrack possesses a common law right to exclude individuals—both patrons and licensees alike. Of the courts and jurisdictions that have recognized a racetrack's common law right to exclude, some have limited that right based on the monopolistic nature of horse racing or on regulatory departures from the common law. We address each of these limitations in turn.

1. Limitations on Common Law Right—De Facto Monopoly

{16} Carrillo suggests that because each racetrack is required to hold a race only on dates pre-approved by the Commission and those dates are staggered throughout the year to allow for year-round racing in the state, the five racetracks in New Mexico have a monopoly over the racing industry in New Mexico. According to Carrillo, allowing racetracks to eject or exclude licensees within this monopolistic setting significantly impacts his ability to earn a living pursuing his occupation. Carrillo points to *Jacobson v. New York Racing Ass'n*, 305 N.E.2d 765 (N.Y. 1973) and *Cox v. National Jockey Club*, 323 N.E.2d 104 (Ill. App. Ct. 1974), as support for his assertion that the racetracks in this case have a monopoly and therefore possess a limited common law right to exclude licensees.

{17} In *Jacobson*, the New York appellate court sought to determine whether the New York Racing Association (NYRA) could deny a licensee stall space under the common law rule allowing exclusion, thereby functionally barring the licensee from racing in the state. 305 N.E.2d at 766. The appellate court concluded that, as NYRA owned all but one of the racetracks in the state at the time, it had a "virtual monopoly." *Id.* at 768. In light of NYRA's monopoly position, the *Jacobson* court pointed out that exclusion from NYRA's track was "tantamount to barring the [licensee] from virtually the only places in the [s]tate where he may ply his trade." *Id.* The court also pointed out that allowing NYRA's exclusion would result in the practical effect of infringing on the state's power to license horsemen. *Id.* The court likened *Jacobson* to cases in which a licensed physician is excluded from receiving staff privileges or inclusion in medical societies, reasoning that "the arbitrary action of a private association is not immune from judicial scrutiny . . . where there is a showing of 'economic necessity' for membership and 'monopoly power' over the profession." *Id.* As a result, the *Jacobson* court concluded that in order to show that his exclusion, as a licensee, was unacceptable, the plaintiff had a heavy burden in having to "prove that the denial of stall space was not a reasonable discretionary business judgment, but was actuated by motives other than those relating to the best interests of racing generally." *Id.*

{18} The Illinois appellate court reached a similar decision in *Cox*, holding that a private corporation, licensed by the state to conduct horse racing on private property, could not "arbitrarily deny a licensed jockey permission to participate in its racing meet." 323 N.E.2d at 107. The *Cox* court looked to the Illinois Horse Racing Act and determined that the legislature had intended to limit the competition between horse racing tracks by granting tracks a "quasi-monopoly" during certain specifically allotted racing dates. *Id.* at 108. The racetrack in that case was deemed to have a quasi-monopoly during its pre-allotted racing dates. *Id.* Thus, the *Cox* court held, "with the benefit of receiving a quasi-monopoly comes corresponding obligations one of which is not to arbitrarily exclude a jockey who desires to participate in a racing meet." *Id.* It qualified its holding, however, by noting that the racetrack in that case excluded the licensee without giving any reason or justification for doing so, and explaining that "[i]f a legitimate and reasonable justification for exclusion is articulated the licensee conducting the horse racing meet would certainly be within the boundaries of acceptable behavior." *Id.* at 109.

{19} The cases limiting the common law based on the existence of a monopoly do so by disallowing *arbitrary* exclusions of licensees. Both *Jacobson* and *Cox* require some showing that a monopoly exists, as well as a showing that the exclusion is arbitrary rather than a decision based on "a legitimate and reasonable justification." *Cox*, 323 N.E.2d at 108-09; *Jacobson*, 305 N.E.2d at 768. Thus, we recognize that the common law right to exclude is limited when a racetrack has a monopoly, virtual monopoly, or quasi-monopoly. In that instance, the racetrack may eject or exclude a licensee only in the exercise of a reasonable business judgment or with legitimate justification.

{20} We note here that, although Carrillo suggests we analyze this case as though the racetracks hold a monopoly over the racing industry in this State, he does not provide enough facts for us to decide that issue and provides us with virtually no analysis of the issue. He does not cite to any statutes or regulations requiring only one race occur at any given time. *In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 (1984). He does not provide any evidence that the racetracks are working together to create a monopoly. He makes no showing of economic necessity and provides no standards, rules, factors, or guidelines for this Court to implement in considering whether the racetracks possess a monopoly. Because of the inadequacy of Carrillo's argument on this issue, we decline Carrillo's invitation to characterize the racetracks in this case as a monopoly over the racing industry. This Court has no duty to review an argument that is not adequately developed. *Corona v. Corona*, 2014-NMCA-071, ¶ 28, 329 P.3d 701.

{21} Even if we were to conclude that the racetracks in this case held some sort of monopoly power over the racing industry in this State, Carrillo's argument that we must limit the racetracks' power to exclude still fails because he has not proven their actions were arbitrary, as we discuss further below. Having established the bounds of a racetrack's common law right to exclude or eject in New Mexico as well as the limitation on that right when a monopoly exists, we next determine whether the Commission has altered or amended the common law right to exclude through its promulgated regulations.

2. Limitations on Common Law Right—Regulations and Statutes

{22} Some jurisdictions have limited a private racetrack's common law right to exclude licensees because their legislature has explicitly expanded the protections afforded to licensees through rule or statute. *See, e.g.*, *Fox v. La. State Racing Comm'n*, 433 So. 2d 1123, 1126 (La. Ct. App. 1983) (holding that Louisiana statutory scheme prevents racetrack from unilaterally excluding a licensee of the state racing commission); *Burrillville Racing Ass'n v. Garabedian*, 318 A.2d 469, 471-72 (R.I. 1974) (holding that statute changed the common law to require a determination as to whether the person ejected was undesirable); *PNGI Charles Town Gaming, LLC v. Reynolds*, 727 S.E.2d 799, 806-07 (W. Va. 2011) (acknowledging that the legislature limited the common law right to exclude to licensees). Generally in New Mexico, a common law rule remains effective until the Legislature explicitly alters it through a rule or statute:

> It is not to be presumed that the [L]egislature intended to abrogate or modify a rule of the common law by the enactment of a statute upon the same subject; it is rather to be presumed that no change in the common law was intended, unless the language employed clearly indicates such an intention. . . . [S]tatutes are not presumed to make any alterations in the common law further than is expressly declared, . . . [and t]he rules of the common law are not to be changed by doubtful implication, nor overturned except by clear and unambiguous language.

Guiterrez v. Gober, 1939-NMSC-008, ¶ 14, 43 N.M. 146, 87 P.2d 437 (internal quotation marks and citation omitted). Rather than change the common law right to exclude, the Commission affirmed its existence in New Mexico by creating regulation 15.2.2.8(V) NMAC.[9] 15.2.2.8(V) NMAC provides:

[9]As stated earlier, we do not render any decision as to whether Section 60-1A-28.1 codifies this common law right to exclude or limits it.

> (1) An association shall immediately eject from the association grounds a person who is subject to such an exclusion order of the commission or stewards and notify the commission of the ejection.
>
> (2) An association may eject or exclude a person for any lawful reason. An association shall immediately notify the stewards and the commission in writing of any person ejected or excluded by the association and the reasons for the ejection or exclusion.[10]

We interpret Administrative Code regulations using the same rules applied in statutory interpretation. *Alliance Health of Santa Teresa, Inc. v. Nat'l Presto Indus.*, 2007-NMCA-157, ¶ 18, 143 N.M. 133, 173 P.3d 55. Interpretation of regulations is a legal issue, which we review de novo. *Id.* When interpreting a statute, courts strive to give effect to the Legislature's intent and look to the plain language of the statute to discern that intent. *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶ 9, 146 N.M. 24, 206 P.3d 135. Under a plain language analysis, courts give words "their ordinary meaning, unless the Legislature indicates a different one was intended." *Id.* (internal quotation marks and citation omitted). "When statutory language is clear and unambiguous, this Court must give effect to that language and refrain from further statutory interpretation." *Id.* (alteration, internal quotation marks, and citation omitted).

{23} The plain language of 15.2.2.8(V)(2) NMAC does not place any limitations on a racetrack's right to "eject or exclude." The definition of a "Person" under the Horse Racing chapter of the Code is expansive: "one or more individuals, a partnership, association, organization, corporation, joint venture, legal representative, trustee, receiver, syndicate, or any other legal entity." 15.2.1.7(P)(7) NMAC. The single qualifier in the regulation is that the exclusion be for a "lawful reason." This, like the common law rule discussed above, disallows exclusion or ejection that violates a person's civil rights. *See Greenfeld*, 57 A.2d at 338; *see also* NMSA 1978, § 28-1-7(F) (2004) (disallowing persons to make distinctions in "services, facilities, accommodations or goods . . . because of race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, spousal affiliation or physical or mental handicap"). Nothing in the plain language of the regulation suggests that it was intended to abrogate the common law right of exclusion. It is therefore unwarranted for this Court to conclude that 15.2.2.8(V) NMAC somehow altered a common law right when the two are virtually identical in language and scope. We agree with the district court's conclusion that the 15.2.2.8(V) NMAC is an affirmation, rather than a modification, of the common law right to exclude recognized in *Marrone*, 227 U.S. 633. By issuing a regulation that reiterates a racetrack proprietor's power to serve and do business with whomever it chooses, the Commission has emphasized that the common law right of racetracks to bar unwanted persons from their property remains intact, despite extensive State regulation of racing. Having established the existence of a racetrack's common law right to exclude in New Mexico, we now turn to the question of whether summary judgment was properly granted.

C. Summary Judgment Was Properly Granted

1. Standard of Review

{24} Summary judgment is proper where no genuine issues of material fact exist and the movant is entitled to judgment as a matter of law. *Roth v. Thompson*, 1992-NMSC-011, ¶ 17, 113 N.M. 331, 825 P.2d 1241; *see* Rule 1-056 NMRA. The movant has the initial burden of making a prima facie showing that he is entitled to summary judgment. *Roth*, 1992-NMSC-011, ¶ 17. A prima facie showing is "such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted." *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 10, 148 N.M. 713, 242 P.3d 280 (internal quotation marks and citation omitted). Once the movant has made a prima facie showing, the burden then shifts to the non-movant "to demonstrate the existence of specific evidentiary facts which would require trial on the merits." *Roth*, 1992-NMSC-011, ¶ 17. We note that a party "may not simply argue that such evidentiary facts might exist, nor may it rest upon the allegations of the complaint. Rather, the party opposing the summary judgment motion must adduce evidence to justify a trial on the issues." *Romero*, 2010-NMSC-035, ¶ 10 (alterations, internal quotation marks, and citations omitted). Where the facts are not disputed and only the legal effect of the facts remains to be determined, summary judgment is appropriate. *Gardner-Zemke Co. v. State*, 1990-NMSC-034, ¶ 11, 109 N.M. 729, 790 P.2d 1010.

2. Carrillo Did Not Rebut the Racetracks' Prima Facie Showing That They Were Entitled to Summary Judgment

{25} In their motions for summary judgment, the racetracks asserted that they are entitled to summary judgment as a matter of law because they had no obligation to allow Carrillo entry and they had a common law right to exclude him. In support, the racetracks proffered undisputed evidence regarding the events leading up to and including Carrillo's exclusion.

{26} It is undisputed that in September 2012 two of Carrillo's horses were injured and had to be moved by ambulance, and that later in October 2012 one of Carrillo's horses was injured so badly that it had to be euthanized. It is undisputed that all three incidents occurred at Zia Park. Zia Park put forth undisputed evidence that it was the subject of national scrutiny for incidents at its racetrack including injuries to horses and jockeys. For example, the New York Times ran stories in the Spring of 2012 that "disparaged the industry in New Mexico and raised allegations of impropriety . . . resulting in catastrophic injury and death of horses." Zia also produced evidence that it excluded Carrillo "[i]n order to protect the best interest of racing, the safety of the participants, and Zia Park's business interests[.]" Carrillo did not rebut this evidence, and instead acknowledged that "[e]nsuring the safety of race participants (including both equine athletes and human jockeys) is a legitimate concern" and "wanting to avoid negative publicity and public critique are understandable sentiments."

{27} It is also undisputed that one of Carrillo's horses died on April 12, 2013, shortly after winning a race at Sunland Park. Sunland Park presented undisputed evidence that it excluded Carrillo based on an incident involving the death of one of Carrillo's horses and Carrillo's general "record at New Mexico tracks." Sunland further explained that it believed it was "in the best interest of horse racing" to exclude Carrillo from the track. These reasons were

[10]"Association" is defined as "an individual or business entity holding a license from the commission to conduct racing with parimutuel wagering." 15.2.1.7(A)(8) NMAC.

delineated in a letter that Sunland Park sent to Carrillo, notifying him of his exclusion. Similarly, SunRay Park presented evidence that it excluded Carrillo shortly after discovering that Carrillo's horse had died at Sunland Park in April 2013. SunRay Park based its exclusion of Carrillo on "concern about the safety of the horses and the reputation of the racing industry in New Mexico[.]" SunRay Park's letter to Carrillo notifying him of the exclusion was virtually identical to Sunland Park's letter, in that it based the exclusion on the incident resulting in the death of Carrillo's horse and Carrillo's "record at new Mexico tracks." It also explained that it believed Carrillo's exclusion was "in the best interest of horse racing."

{28} It appears from the undisputed facts that in July 2013 Ruidoso Downs informed Carrillo that he had been excluded based on incidents that had occurred involving the death and injury of Carrillo's horses and Carrillo's record at other tracks. Specifically, Ruidoso Downs acknowledged the death of one of Carrillo's horses at Sunland park and the injury of two of his horses at Zia Park. Ruidoso Downs explained that it excluded Carrillo out of concern for his horses and in order to "preserve the best interests and integrity of horse racing at Ruidoso Downs."

{29} This evidence from the racetracks is adequate to establish a prima facie case of entitlement to summary judgment. The evidence creates a presumption that Carrillo was excluded in order to further a legitimate business interest of the tracks. The burden therefore shifted to Carrillo to proffer evidence to suggest a trial on the merits was necessary.

{30} Carrillo did not dispute any of the racetracks' evidence. He instead responded with legal argument and assertions. Carrillo argued that he was excluded without cause and that the justifications given for his exclusion were "illusory." He did not, however, provide evidence that his exclusion was arbitrary. He neither presented any evidence of other similar incidents where other horses were injured or euthanized, nor established that other licensees were not excluded under circumstances similar to his. He provided no evidence that the racetracks intended to specifically harm him through exclusion. *See Fikes v. Furst*, 2003-NMSC-033, ¶ 21, 134 N.M. 602, 81 P.3d 545 (establishing a motive to harm as a requirement for a claim of interference with a contract); *Kitchell v. Pub. Serv. Co. of N.M.*, 1998-NMSC-051, ¶ 15, 126 N.M. 525, 972 P.2d 344 (listing an intent to injure as an element of prima facie tort).

{31} Carrillo also asserted that he was improperly denied the process guaranteed by the Commission's regulations. Carrillo argues that he was denied the process set forth in the Administrative Code aimed at determining whether a racetrack had cause to deny entry. This argument envelopes the argument he makes on appeal that the racetracks are a de facto monopoly, infringing on the State's power to regulate horse racing. In making this argument, Carrillo cites to the rules set forth to govern procedure in stewards' hearings and commission proceedings. The conduct underlying this case, and of which Carrillo complains, is neither a stewards' hearing nor a commission proceeding. As such, the regulations do not guarantee Carrillo the "Due Process safeguards" to which he claims entitlement. *See* 15.2.1.9(A) NMAC ("This chapter contains the rules of procedure *for stewards' hearings and commission proceedings*." (emphasis added)).

{32} In light of the undisputed nature of the evidence in this case, including national scrutiny of New Mexico racetracks, concern for the safety of participants, and desire to protect business interests, we conclude that the racetracks met their burden of making a prima facie case of entitlement to judgment as a matter of law. Carrillo then failed to present any contrary evidence or demonstrate the need for a trial on the merits. The district court therefore properly concluded that Carrillo did not meet his "heavy burden" of proving that exclusion was not a reasonable discretionary business judgment and properly granted summary judgment for the racetracks. *See Jacobson*, 305 N.E.2d at 768.

III. CONCLUSION

{33} We conclude that when they decided to exclude Carrillo from their property and participation in their races, Zia Park, Sunland Park, SunRay Park, and Ruidoso Downs all possessed a common law right to exclude Carrillo, despite the fact that he possessed a license from the Commission to participate in racing. We also conclude that the undisputed evidence supported the district court's conclusion that these racetracks had an adequate justification for excluding Carrillo, and their exclusion of him was not arbitrary. As such, we affirm the district court's order granting summary judgment for Zia Park, Sunland Park, SunRay Park, and Ruidoso Downs and dismissing the claims against them. It appears from the record, however, that Carrillo's claims against the Board of Stewards for each of these racetracks and against the Commission remain. We therefore remand so that these claims may be resolved in a manner consistent with this opinion.

{34} IT IS SO ORDERED.

RODERICK T. KENNEDY, Judge

WE CONCUR:

LINDA M. VANZI, Judge

M. MONICA ZAMORA, Judge

Certiorari Denied, January 27, 2017, No. S-1-SC-36236

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-025

No. 34,465 (filed November 29, 2016)

CECILIA TAFOYA and CHARLES TAFOYA,
Plaintiffs-Appellants,
v.
PAMELA MORRISON and LEON MORRISON,
Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
RAYMOND Z. ORTIZ, District Judge

JANE B. YOHALEM
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for Appellants

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& TUTHILL, P.C.
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for Appellees

Opinion

Jonathan B. Sutin, Judge

{1} Cecilia Tafoya and Charles Tafoya (the Tafoyas) appeal the district court's grant of summary judgment against their claims to an easement along a driveway established by Cecilia's father, Alex J. Armijo (the father), for access to the father's lot when the father split his property into two lots, kept the rear lot, and transferred the lot abutting the public street to Cecilia. The district court's rulings favored Pamela and Leon Morrison (the Morrisons), who had succeeded to ownership of the rear lot.[1]

{2} A less than pleasant history of family battles in connection with the easement and the properties in general, up to at least January 2004, is contained in *Redman-Tafoya v. Armijo*, 2006-NMCA-011, 138 N.M. 836, 126 P.3d 1200. The battle continued after *Armijo*. Before us now is the rest of the story.

{3} The district court's grant of summary judgment against the Tafoyas' claims stems largely from its conclusion that most of the Tafoyas' easement claims had previously been and were finally litigated as part of an inheritance revocation case (the revocation proceeding), which will be discussed later, and thus those claims were barred. Additionally, the district court granted summary judgment in favor of the Morrisons on the Tafoyas' claim to a prescriptive easement as being without merit. Specifically on appeal, the Tafoyas argue that (1) res judicata does not bar them from claiming a driveway easement over the Morrisons' land, (2) collateral estoppel does not bar their claim for a driveway easement over the Morrisons' land, (3) they did not have a full and fair opportunity to litigate their claim to an easement in the revocation proceeding, and (4) there is no basis in the law of either res judicata or collateral estoppel to bar the Tafoyas' prescriptive easement and easement by necessity claims against the Morrisons.

{4} We hold that the Tafoyas' claims for an express easement, implied easement, and easement by necessity were properly precluded under the doctrine of res judicata. We also hold that the district court properly granted summary judgment on the Tafoyas' prescriptive easement claim.

BACKGROUND

{5} The father owned property south of a public road, Camino de Las Animas, in Santa Fe, New Mexico. On August 13, 1993, the father recorded a Family Transfer Lot Split plat (the plat) showing a split of his property into Lot 1, which he retained, and Lot 2, which he specifically designated as being for "Cecilia Armijo-Redman." Lot 2 is situated north of Lot 1 and south of Camino de Las Animas. The plat shows Lot 1 situated south of Lot 2, including a 15-foot driveway that ran west of Lot 2, connecting Lot 1 to Camino de Las Animas. In the plat, Lot 2 is shown subject to a 5-foot strip of land just east of the driveway running from Camino de Las Animas to Lot 1, making the driveway functionally 20 feet wide. In fact, the plat actually indicates the father's reservation of these two land strips as a "20' private ingress/egress and utility easement" running in part across Lot 2, all to serve his Lot 1. In connection with the plat, on August 18, 1993, the father recorded a family transfer affidavit (the affidavit), affirming his desire to "convey or have conveyed" Lot 2 to Cecilia. In 1994, after the plat and affidavit were recorded, Cecilia built her house on Lot 2. *Id.* ¶ 4. It appears that the father was highly involved in the construction of Cecilia's house, and the contractor who built the house followed the father's instructions as to where the house was to be placed. *See id.*

{6} In 1995 the father executed a will. The father's will provided that "the [p]ersonal [r]epresentative shall immediately take such action as may be necessary to sell my personal residence and the land . . . and proceeds received after payment of all expenses of sale be divided equally amongst my children." The will also provided that

> [i]t is my express desire that the equal distribution of my proceeds of my Estate shall be done without conflict amongst my children and to [e]nsure that this occurs I decree that the land upon which [Cecilia] has built her home is her sole and separate property and shall not be considered for purposes of determining her equal share of the proceeds of my estate.

Id. ¶ 5.

{7} The father passed away in 1997, upon which Cecilia's brother, Anthony I. Armijo, was appointed personal representative of the father's estate (the estate) in a Santa Fe County District Court probate proceeding titled *In the Matter of the Estate of Alex J. Armijo*, D-101-PB-97-00152. *Redman-Tafoya*, 2006-NMCA-011, ¶¶ 4, 6. In this Opinion, we refer to Anthony, in his capacity as personal representative of and acting for the estate, as "Armijo."

[1]The Morrisons also succeeded to ownership of two tracts of land, A and B, that adjoin Lot 1. For ease and clarity, we refer to all of the Morrisons' land as "Lot 1."

Armijo began attempts to sell Lot 1, and it was discovered that Cecilia's house and a stucco wall encroached into Lot 1's 5-foot easement some 8 inches. *Id.* ¶¶ 4, 8. The encroachments were not noted on the plat, and a variance was not obtained by either Cecilia or the father at the time the encroachments were constructed. As pointed out in *Redman-Tafoya*, the house and wall encroachments and a chain link fence that had been constructed at the division between the 5-foot strip and the 15-foot strip became bones of contention between Cecilia and Armijo. *Id.* ¶¶ 4, 8-16.

{8} In November 1998, through Armijo, the estate as grantor formally deeded Lot 2 to Cecilia as grantee by a recorded personal representative's deed that reserved the 20-foot easement for ingress and egress for the benefit of Lot 1. The deed, however, expressly stated that the estate does "not approve of, or acquiesce in, the encroachments by [g]rantee and her improvements onto the above-described easement, and requests that the encroachments be removed."

{9} In January and July 1999, prospective purchasers made offers to purchase Lot 1 but faced requirements by the City of Santa Fe (the City) of a 20-foot-wide driveway to Lot 1, the removal of part or all of the chain link fence for fire equipment access, and possible removal of a portion of the house and wall encroachments before issuance of any building permit for development of Lot 1. *Id.* ¶¶ 10-11. In August 1999, Armijo tendered another personal representative's deed for Lot 2 to Cecilia. *Id.* ¶ 12. This deed stated that if Cecilia did not remove the chain link fence, her property would revert to the estate. *Id.* In November 1999, Cecilia "took the position . . . that for safety reasons she would not remove the chain link fence." *Id.*

{10} After failing to resolve the encroachment and access issues, in November 1999, Armijo filed a quiet title complaint (Armijo's quiet title action) against Cecilia in regard to the easement and, in part, attempting to force the removal of Cecilia's chain link fence and the encroaching part of Cecilia's residence. *Id.* ¶ 14. Cecilia responded with claims seeking, among other relief, to disinherit her brother, Anthony, and a sister.

{11} In June 2000, a purchase contract involving the residence on Lot 1 was terminated because of an impasse between the City and Cecilia based on the chain link fence and other encroachment issues. *Id.* ¶ 15. In September 2000, the City began to relent, admitting that the fire department had discretion to permit an easement of less than 20 feet and further indicating that this could be implemented provided, among other things, that "the access through Lot 2 [was] improved to make the width wider, suggesting removal of [40] feet of the chain link fence[.]" *Id.* ¶ 16 (internal quotation marks omitted). Cecilia again declined to alter the encroachments. *Id.* After months of informal discussions, in mid to late 2001, the City eventually modified its position further and indicated that it would allow a 15-foot driveway easement. *Id.* ¶¶ 17-18. Armijo proceeded to seek a variance from the City that would allow the driveway to be only 15 feet and that would allow Cecilia to retain her residence, stucco wall, and the chain link fence as they existed. *Id.* ¶ 18. Cecilia concurred in Armijo's application for a variance, and a new offer was made to purchase the residence on Lot 1, the offer was accepted, and due diligence began. *Id.* ¶¶ 18-19. The City approved the variance in December 2001, and when Cecilia refused to sign off on the variance even though it reflected the elimination of the 5-foot easement across her property, the City nevertheless proceeded to record the variance with Armijo's signature and without Cecilia's signature. *Id.* ¶ 20. According to Cecilia, she did not sign the variance plat because "[s]he wanted the [variance] to show the easement for ingress and egress she claimed was implied from [the plat] documents and the City's imposition of a requirement for a second off-street parking space at the rear of the Tafoya lot."

{12} Afterwards, in November 2002, while Armijo's quiet title action was in its final stages of trial, "Armijo executed a quitclaim deed . . . to [Cecilia] for all of Lot 2 without any reservations or restrictions with respect to the encroachments or the [e]asement[,]" which included the 5-foot easement through Lot 2. *Id.* ¶¶ 3, 22. Armijo's quiet title action resulted in a judgment filed in January 2003 determining that issues regarding the 5-foot easement across Cecilia's property were moot by the recording of the variance plat that abandoned that easement and by Armijo's quitclaim deed to Cecilia of Lot 2. *Id.* ¶ 22. Of note is that in the midst of Armijo's quiet title action, in December 2001, Armijo sold Lot 1 and the residence on Lot 1 to the Morrisons. *See id.* ¶ 20.

{13} To exacerbate instead of calm the conflict between Cecilia and Armijo, on November 21, 2002, days before he executed the quitclaim deed as to Lot 2 to Cecilia that contained no restrictions, Armijo filed a motion in the probate proceeding to revoke Cecilia's inheritance (the revocation proceeding), grounding the motion in actions and conduct of Cecilia alleged by Armijo to be in violation of the no-contest clause in the father's will. *Id.* ¶ 23. In response, Cecilia filed a motion for summary judgment on the motion to revoke inheritance. Her motion set out undisputed facts based on her own affidavit and the affidavits of Lidia Garza Morales, a former assistant City attorney, and David Pike, the contractor who built Cecilia's home. The Pike affidavit explained in detail the circumstances surrounding the construction of Cecilia's residence, and the Morales affidavit explained in detail the circumstances surrounding the variance proceedings. Cecilia's motion concentrated on showing, in opposition to the revocation motion, that her actions were taken with probable cause and that Armijo's allegations did not show that she contested or attacked the will.

{14} A substantial part of the revocation proceeding involved Cecilia's defense against allegations that her conduct violated the no-contest provision, part of which consisted of the history of Cecilia's claimed easement need and entitlement to reach the rear of her property for access to her house and for parking. She concluded her motion and memorandum stating that she had "demonstrated on undisputed facts that she acted with probable cause throughout the dispute initiated by her brother[.]" And she added that "she had the testator's permission for any encroachment; . . . [Armijo] made absolutely no prefiling investigation; and . . . she prevailed."

{15} Among her arguments, Cecilia stated:

> All of [Armijo's] allegations boil down to one thing: Cecilia's defense of her property rights in opposition to litigation initiated by [Armijo], seeking to quiet title to five feet of a driveway easement created when the testator gave her a lot on which she built her home, which structure was sited at the testator's request and direction within the driveway easement created by the lot split plat. The apparent reason: If the testator's explicit desire that his transfer of the lot to his daughter without further dispute could be

> overridden by intimidation, then the testator's remaining adjacent property could be intensively developed, and thus generate more money for the other heirs.

(Emphasis omitted.) She further stated that "[Armijo's] contentions boil down to a complaint that he was unable to market the property for a more dense development because his sister insisted that the driveway not be widened at the expense of taking down part of her house—an unlikely judicial result in any event[.]"

{16} In an affidavit in support of her motion, Cecilia set out the history of the lot split and the construction of her residence on Lot 2, including a plethora of facts about the variance process, as well as the attempts by Armijo and his real estate agent, Roman Maes, to get her to sign documents regarding the 20-foot easement and the encroachments or her lot would revert to the estate. As to the quiet title action, Cecilia believed that she was defending her property rights and not attacking provisions of the will. In Cecilia's affidavit, she also discussed her ability to access the rear of her lot up until that point, her need for a second off-street parking space, and her desire for a driveway easement.

{17} At a hearing during the revocation proceeding, Armijo's counsel indicated that Armijo wanted the easement issues addressed by the court. He stated:

> Finally, Judge, there is a separate issue, and I would like to raise this issue with you because I think that it is the opening wedge for the next series of lawsuits and objections, and I would like to just deal with it right now. This lady is saying that she has an easement along this driveway to enter into her property right over here at the southwest corner of her property. And she now says that that's . . . one of her statements.
>
> Now, the problem is, the Morrisons own this property. The estate has already sold this property. There was—the Planning Commission agreed to the 15 feet. . . . She says that she has an easement. The truth is—and, frankly, Judge, what I'm asking you is this: Let's just bite this off and decide it today, because what's going to happen is she's going to sue the Morrisons. The Morrisons are going to bring us in. We're going to have to incur additional attorney[] fees from the estate, and they have an absolutely meritless claim for this easement, and I think it ought to get decided right now.

Following these comments, counsel for Armijo explained why Cecilia had no express or implied easement. He concluded with the hope that the district court would find the facts relating to Cecilia's conduct, including her conduct relating to the easement questions "to be true and that you will, once and for all, rein in this lady who has run amuck through this [e]state."

{18} In his opening remarks, Cecilia's counsel congratulated Armijo's counsel "on what is, quite possibly, the most egregiously[]overstated version of this case or any case that I've heard in recent memory" and proceeded to explain the facts related to the easement issue differently. In regard to an easement right under *Hughes v. Lippincott*, 1952-NMSC-060, 56 N.M. 473, 245 P.2d 390, Cecilia's counsel stated, "It is crystal clear, as a matter of law, that [Cecilia] has that easement." And counsel then stated, "I concur with [Armijo's counsel's] suggestion that we determine that issue here [and] now. I think we should."

{19} Later, however, during the trial, Cecilia's counsel stated:

> Your honor, both [Armijo's counsel] and myself, in our opening argument, stated our desire to have her access to that second off-street parking decided in this [c]ourt. I have to change my position on that, I don't believe this [c]ourt can decide that issue without the Morrisons here. They're necessary parties now because it affects their property now. Anything the [c]ourt decided is not going to be binding on [them].

To which Armijo's counsel replied,

> I'm going to object to that. He just elicited testimony from his witness on this very issue. And now that the testimony has come in that there clearly has been no grant of easement, he now wants to change his mind and have this tried in another forum. Our intent here is to get this issue decided, because we're afraid that this lady is going to go after the Morrisons on that issue.

To which Cecilia's counsel responded,

> I don't mind being bound by my original agreement, Your Honor, but the fact of the matter is the Morrisons cannot be. If the Morrisons cannot be bound, it serves no purpose. They're necessary parties. The purpose of this testimony is to illustrate [Cecilia's] reasons for refusing to sign the plat. She's been accused of hampering the sale of the property in every way that [Armijo] can imagine and testify to. This is the explanation for that.

{20} The district court weighed in:

> Well, I will attempt to resolve this issue. If I resolve it in a way that's going to affect the Morrisons[,] then that will be subject to their coming into court and challenging the [c]ourt's ruling. If I find they're entitled to it, they're going to then have a claim against the estate, also, because they're going to say the estate sold them that piece, but if I find that she's not entitled to it, then it doesn't affect the Morrisons at all. If I'm going to rule in your favor, I think you're correct, the Morrisons have a right to be heard on it, and it will result in the Morrisons probably having some kind of a claim against the estate. Maybe everybody gets disinherited because we use up all the money in litigation in that event.

The matter closed with Cecilia's counsel stating, "On that point, Your Honor, I'll be happy to address that in our respective closing trial briefs."

{21} In Cecilia's post-trial brief, her counsel argued that Cecilia had an access easement to her second off-street parking space. Among other arguments was this statement:

> [T]he evidence established both an existing use at the time of the severance of ownership by the family lot split plat, and a necessity for the second off[-]street parking space. The conveyance also overlapped the lot line into a 20' driveway easement as shown on that plat. The driveway, in effect, was the boundary, and the land was "bounded upon a way."

{22} In the revocation proceeding, the district court granted Armijo's motion to revoke Cecilia's inheritance. *Redman-Tafoya*, 2006-NMCA-011, ¶ 28. The district court filed a decision in January 2004 containing findings of fact and conclusions of law that reached into the historical feud regarding Cecilia's asserted easement

rights. The court's decision detailed the historical facts relating to the property issues and prior legal proceedings and concluded that the plat and affidavit "did not convey any interest in any off[-]street parking space or an easement thereto in [Cecilia]" and that the 20-foot easement "was solely for ingress, egress[,] and utility to benefit . . . Lot 1 . . . and was not for the benefit of . . . Lot 2." The district court entered a final judgment in March 2004 granting Armijo's motion to revoke Cecilia' inheritance pursuant to the no-contest clause of the father's will and denying Cecilia's motion for summary judgment. The judgment stated that "[Cecilia] does not have any interest in any off[-]street parking space or an easement over [Lot 1.]"

{23} Cecilia appealed the district court's revocation judgment, basing her arguments on court error in revoking her inheritance. *Id.* ¶¶ 1, 45-69. This Court reversed that judgment. *Id.* ¶ 70. Employing a standard of strict, narrow construction to the "relatively general no-contest clause" in the will, it was determined in *Redman-Tafoya* that none of Cecilia's conduct or actions could constitute a contest or attach under the will. *Id.* ¶¶ 64, 69. Cecilia did not appeal the district court's findings of fact or conclusions of law regarding the second off-street parking space or the denial of her claim to a driveway easement.

{24} Within a month after *Redman-Tafoya* reversed the district court's revocation of Cecilia's inheritance, in January 2006, Armijo, individually and as personal representative of the estate, Cecilia, and one of their sisters entered into a comprehensive settlement agreement and mutual release of all claims that were previously brought or that could be brought against each other. At the same time, these parties filed a stipulation of dismissal with prejudice of all claims that were brought or could have been brought in the 1999 quiet title action filed by Armijo (Cause No. D-0101-CV-99-02774), the revocation proceeding (Cause No. D-0101-PB-97-00152), and the appeal decided in *Redman-Tafoya*, 2006-NMCA-011, relating to the father's will and estate. The Morrisons, who were the grantees of Lot 1 in 2001, were not parties to any of the legal proceedings between Cecilia and Armijo, to the settlement agreement and mutual release, or to the stipulation of dismissal.

{25} In May 2011, the Tafoyas filed the lawsuit now in this Court against the Morrisons to quiet title and for injunctive and declaratory relief against the Morrisons' efforts to block the Tafoyas' access over the 15-foot driveway to reach the rear of the Tafoyas' property. The Tafoyas claimed "either an express or implied easement of access along the driveway" as evidenced by the plat and/or a notarized document from the father granting Cecilia an easement.[2] They also claimed an easement by reasonable necessity or, in the alternative, an easement by prescription. The Morrisons moved for summary judgment in February 2012 based on the doctrines of res judicata, collateral estoppel, and settlement and release. In response to the Morrisons' motion, the Tafoyas argued that neither res judicata nor collateral estoppel should apply and insisted that the settlement agreement was signed under duress. In seeking to refute the Morrisons' res judicata argument, the Tafoyas pointed out that during the revocation proceeding no "serious effort [was] made before or after the trial to brief the court on express, implied[,] or prescriptive easements and how the specific facts of the Tafoya[s'] usage applied to each theory."

{26} In an order and judgment entered in July 2012, the district court granted the Morrisons' summary judgment motion and dismissed with prejudice the Tafoyas' claims of express and implied easements, as well as their claim to an off-street parking space at the rear of Lot 2. The district court dismissed the Tafoyas' prescriptive easement claim without prejudice. The judgment recited that the claims of express and implied easements with respect to the off-street parking space, and all further attempts to again assert such claims, were "forever barred under the doctrine of res judicata." The court explained that these claims "were tried, adjudicated to a final decision on the merits, and denied" in the earlier revocation proceeding. With respect to the Tafoyas' claim of prescriptive easement, the court explained that "no [10-]year period has yet lapsed since the date on which final judgment in the [revocation proceeding] was entered."

{27} Soon after, in August 2012, the Tafoyas moved for reconsideration, asking the district court to reconsider its grant of summary judgment in the Morrisons' favor with respect to the implied and prescriptive easement claims. The court denied the motion for reconsideration in a February 2013 order that stated (1) "[the Tafoyas'] claims of implied easement and entitlement to a second off[-]street parking space at the rear of their lot were raised, tried[,] and denied in [the revocation proceeding,]" and (2) that "[b]ecause the predicate finding for an easement by necessity is that [the Tafoyas] are entitled to a second off[-]street parking space at the rear of their lot, [the Tafoyas'] claim for an easement by necessity in this action is also barred because the claim to a second off[-]street parking space was tried and denied in the [revocation proceeding]." In addition, the court amended its July 2012 summary judgment, stating that "[the Tafoyas' m]otion for [r]econsideration is denied, except that the [s]ummary [j]udgment entered July 26, 2012[,] is hereby amended to include this [c]ourt's ruling on the [m]otion for [r]econsideration that [the Tafoyas'] claim of an easement by necessity is also dismissed with prejudice."

{28} In December 2014, again basing its rulings on the revocation proceeding determinations relating to the Tafoyas' claimed easement rights, the district court granted summary judgment favoring the Morrisons on a motion for summary judgment on a counterclaim the Morrisons had filed in the action seeking a quiet title decree. During the hearing on the Morrisons' motion for summary judgment on their counterclaim, the district court considered, for the first time, the merits of the Tafoyas' prescriptive easement claim. The court held that no clear and convincing evidence was established to support the claim and that there had not been and could not be adverse use against a claim of right for 10 years. The court determined that adverse use began to run after the district court issued its decision in the revocation proceeding in March 2004 and was cut off when the Morrisons installed a fence preventing access in September 2013. In this summary judgment on the Morrisons' quiet title counterclaim, the court stated:

> 2. The Tafoyas have no easement of any kind or nature, including, but not limited to, an easement

[2] This notarized document was not offered into evidence during the revocation proceeding, despite its existence at that time. The Tafoyas argue that the notarized document was not offered into evidence because the grant was not recorded and Cecilia did not have the original, and thus she was instructed by counsel to testify that she had no writing regarding her use of the roadway.

by express grant, an easement by necessity, an implied easement or a prescriptive easement, over or across the real property owned by the Morrisons in the City and County of Santa Fe, New Mexico known as Lot 1[.] . . .

3. The Tafoyas have no right, title[,] or interest of any kind in or to the Morrison Property, and the Tafoyas, and each of them, and their successors and assigns, are forever barred and forever estopped from having or claiming any right, title[,] or interest in or to or any claim to or upon the Morrison Property, or any part thereof, adverse to the Morrisons, including, but not limited to, any claims to an easement of any kind over or across the Morrison Property.

4. The Tafoyas do not have an off-street parking space at the rear of the real property owned by the Tafoyas known as Lot 2[.] . . .

5. The Tafoyas shall not, directly or indirectly, enter upon, or cross, or attempt to enter upon or cross, the Morrison Property, and the Tafoyas shall not deposit, place, locate or affix any substance, material, object[,] or thing of any kind upon the Morrison Property.

6. The Tafoyas shall not assert, claim, argue[,] or allege in any legal or administrative proceeding of any kind, including but not limited to, any lawsuit, administrative proceeding[,] or administrative appeal, that they have or claim an easement over the Morrison Property or that they claim or are entitled to enter upon or cross the Morrison Property in order to get to an alleged second off-street parking space at the rear of the Tafoya Property. . . .

The court's summary judgment was preceded by a considerable amount of argument in opposition to and in support of summary judgment.

{29} The Tafoyas appeal the district court's July 2012 order and judgment, the February 2013 order, and the December 2014 order and judgment.

DISCUSSION

{30} The Tafoyas' points on appeal are that neither res judicata nor collateral estoppel[3] bars their express and implied easement claims and that no basis exists to bar their prescriptive easement and easement by necessity claims. The Tafoyas ask this Court to reverse the district court's summary judgments barring those claims, to vacate the district court's grant of summary judgment quieting title in favor of the Morrisons, and to remand for trial on the merits of the claims. Because we affirm the dismissal of the Tafoyas' express and implied easement claims, as well as the easement by reasonable necessity claim, based on the doctrine of res judicata, we need not address the propriety or merits of the Tafoyas' collateral estoppel or easement by necessity arguments. Additionally, because we affirm on res judicata grounds, we need not fully address the Morrisons' assertions that the Tafoyas are barred from claiming an easement based on the doctrine of law of the case or on the settlement agreement and mutual release.

I. Standards of Review

{31} "Summary judgment is appropriate in the absence of any genuine issues of material fact and where the movant is entitled to judgment as a matter of law." *Zamora v. St. Vincent Hosp.*, 2014-NMSC-035, ¶ 9, 335 P.3d 1243; *see* Rule 1-056(C) NMRA. We review orders granting summary judgment de novo. *See Potter v. Pierce*, 2015-NMSC-002, ¶ 8, 342 P.3d 54. Similarly, the standard of review for res judicata, also known as claim preclusion, is de novo. *Kirby v. Guardian Life Ins. Co. of Am.*, 2010-NMSC-014, ¶¶ 59, 61, 148 N.M. 106, 231 P.3d 87.

II. Res Judicata

{32} "Res judicata [or claim preclusion] is a judicially created doctrine designed to promote efficiency and finality by giving a litigant only one full and fair opportunity to litigate a claim and by precluding any later claim that could have, and should have, been brought as part of the earlier proceeding." *Potter*, 2015-NMSC-002, ¶ 1. "A party's full and fair opportunity to litigate is the essence of res judicata." *Id.* ¶ 15 (alteration, internal quotation marks, and citation omitted). " 'The party asserting [res judicata] must satisfy the following four requirements: (1) the parties must be the same [or in privity], (2) the cause of action must be the same, (3) there must have been a final decision in the first suit, and (4) the first decision must have been on the merits.' " *Tunis v. Country Club Estates Homeowners Ass'n*, 2014-NMCA-025, ¶ 20, 318 P.3d 713 (quoting *Kirby*, 2010-NMSC-014, ¶ 61); *see Deflon v. Sawyers*, 2006-NMSC-025, ¶ 3, 139 N.M. 637, 137 P.3d 577 (stating as the first element of res judicata that "the parties must be the same or in privity" (internal quotation marks and citation omitted)). "The purpose of our application of res judicata is to protect individuals from multiple lawsuits, to promote judicial economy, and to minimize the possibility of inconsistent judgments." *Moffat v. Branch*, 2002-NMCA-067, ¶ 14, 132 N.M. 412, 49 P.3d 673. "[N]either the type of proceeding nor the damages sought are determinative" when evaluating the fundamental question of the fairness of preclusion under the totality of circumstances in each case. *Potter*, 2015-NMSC-002, ¶ 16.

{33} The Tafoyas contend that res judicata does not bar their right of access over the Morrisons' land in the present action. Their first argument under the contention is that the Morrisons were not in privity with the estate at the time the revocation proceeding was commenced. Their second argument is that the causes of action in the present case are not the same as the causes of action in the revocation proceeding. We address each argument in turn.

A. Privity

{34} In arguing that the Morrisons failed to prove privity of the parties, the Tafoyas acknowledge that the general principle is that parties are in privity when they have a successive relationship to the same rights of property. However, the Tafoyas also argue that this principle applies only when the claim alleged to be subject to res judicata is commenced while the pre-

[3] The Tafoyas and the Morrisons address collateral estoppel in their appellate briefs, although the district court based its July 2012 order and judgment solely on res judicata. None of the orders and judgments from which the Tafoyas appeal expressly indicates that the dismissals or grants of summary judgment were based on the doctrine of collateral estoppel. Although the district court's December 2014 grant of summary judgment quieting title in the Morrisons stated that the Tafoyas were "forever estopped[,]" nowhere in any of the court's dispositive orders and judgments did the court enter findings of undisputed facts, conclusions, or any other type of determination showing that the elements of collateral estoppel were established. Because we affirm on res judicata grounds and because collateral estoppel was not relied upon by the court, we do not evaluate the collateral estoppel arguments.

decessor in interest, here the estate, owns the property. The Tafoyas argue that the identity of interests under that general principle is not applicable when, as here, the property is transferred to a new owner, i.e., the Morrisons, before the proceeding is commenced by the grantor, i.e., the estate. Thus, the Tafoyas conclude that once the transfer of interest in the land to the Morrisons occurred and the estate no longer held an interest in the land, the estate could not be considered to be in privity with the new owner and would not be a proper party to litigate the issues affecting the land.

{35} The Morrisons acknowledge that the Tafoyas "correctly note[] that privity of estate ends once title to the land is transferred[,]" but contend that "privity of contract remains between the grantor and grantee based on the present covenants contained in the warranty deed" transferring Lot 1 to the Morrisons. The Morrisons continue, arguing that "[t]he Morrisons and the [e]state had the same interest in seeing that those claims were defeated—the Morrisons because they bargained for a conveyance free of encumbrances and the [e]state because it warranted that Lot 1 was free of encumbrances."

{36} The Tafoyas spurn the Morrisons' privity argument made in the district court that was based on a theory that the estate was in privity because it had transferred the easement by warranty deed. According to the Tafoyas, the warranty deed created nothing more than an indemnity obligation of the estate, and an indemnitor cannot substitute itself for the later property owner. For this proposition, the Tafoyas rely on *Lopez v. Townsend*, 1933-NMSC-045, ¶¶ 31-32, 46, 37 N.M. 574, 25 P.2d 809 (Watson, C.J., on rehearing), as distinguishing between an insurance company's liability to pay a judgment, and its "liability to be sued." In the same regard, the Tafoyas argue that an indemnitor, the estate, is entitled to defend a lawsuit only "as the designated representative of the landowner[, the Morrisons], and it can attain that status only with notice to the landowner of the lawsuit and the landowner's express consent"—that is, "[w]ithout the consent of the [the Morrisons], [the estate] has no authority to assume the conduct of the defense."

{37} In support of their privity argument, the Tafoyas call upon a footnote in *Bloom v. Hendricks*, 1991-NMSC-005, ¶ 9 n.2, 111 N.M. 250, 804 P.2d 1069, as indicating that a predecessor in title is not in privity with the current landowner in the defense of a prescriptive easement claim. *Bloom* involved an indemnitee's right to sue and pursue a claim against an indemnitor for attorney fees and costs in defending claims relating to a boundary dispute which, tangentially, also involved a prescriptive easement. *Id.* ¶¶ 9-10, 20, 23-24. In the footnote relied upon by the Tafoyas, the Court in *Bloom* stated:

> *See Silva v. State*, 106 N.M. 472, 745 P.2d 380 (1987) (*res judicata*, or "claim preclusion," depends upon identity of parties or privies, *id.* at 474, 745 P.2d at 382, and offensive collateral estoppel, or "issue preclusion," requires that the defendant against whom estoppel is asserted has previously litigated an issue unsuccessfully, *id.* at 476, 745 P.2d at 384). The [defendants], as *predecessors* in title, were not in privity with the [plaintiffs] in the latter's defense of the prescriptive easement claim in *Lane v. Bloom*. 1 A.C. Freeman, *A Treatise on the Law of Judgments* § 442 (1925).

Bloom, 1991-NMSC-005, ¶ 9 n.2.

{38} In further discussion of lack of consent by the Morrisons, the Tafoyas state that the record contains no evidence establishing that the estate's resolution of the easement claims was on the Morrisons' behalf and that the estate's counsel even indicated that "the [e]state was pursuing the claims solely on its own behalf in order to avoid a subsequent indemnity claim." Further, the Tafoyas argue that the interests of the estate as indemnitor and those of the Morrisons were in conflict, in that "[i]t was in the [e]state's interest that any easement be prescriptive and therefore outside the warranty covenants." In addition, the Tafoyas argue that the estate and the Morrisons "have sued or been sued in two different legal capacities: that of owner of the property and that of indemnitor of the owner on some of the easement issues and not on others." This, according to the Tafoyas, indicates that the "capacities and the interests . . . each represent conflict in significant ways[,]" making res judicata inappropriate.

{39} The Morrisons respond that (1) the intent of the privity requirement is satisfied because Cecilia was a party to the revocation proceeding, and (2) privity was established under a theory that pursuant to the warranty deed from the estate to the Morrisons, the estate had a duty to defend easement claims against the land conveyed because "[a] grantor and its immediate grantee have privity in contract[.]" They argue that privity of contract remains between the grantor and grantee based on the present covenants contained in the warranty deed.

{40} In the Morrisons' view, "it was the identity of interests between the [e]state and [the] Morrison[s] that caused the [e]state to proceed with the adjudication of [Cecilia's] easement claims in the [revocation proceeding]." They argue that there was no conflict in the position between the Morrisons and the estate. Further, the Morrisons assert that *Bloom* is not applicable authority since *Bloom* involved a prescriptive easement, and no prescriptive easement claim was litigated in the revocation proceeding. In addition, according to the Morrisons, the grantee in *Bloom* successfully defended the easement claim and then sought reimbursement from remote grantors, the defendants, for litigation costs, and the defendants were not parties to the lawsuit in which the easement claim was defeated.

{41} Still on *Bloom*, the Morrisons reason that unlike the defendants in *Bloom*, Cecilia was a party in the revocation proceeding in which her easement claims were adjudicated, and therefore, the Tafoyas are unable to escape the effect of the outcome, simply because Lot 1 had been transferred to the Morrisons at the time the decision was rendered. The Morrisons further assert that *Bloom* is distinct from this case because summary judgment was granted against the prescriptive easement claim pursuant to the Morrisons' second motion for summary judgment to quiet title because the Tafoyas failed to raise an issue of material fact as to whether the claim could satisfy all elements of a prescriptive easement.

{42} In regard to the express and implied easement claims, the Morrisons argue that the basis for the claims arose before the transfer to the Morrisons, and if the estate failed in its defense of the claims, it stood in breach of the warranty covenant against the encumbrances. With no citation to the record, the Morrisons represent that they "deferred to the [e]state and [its] capable trial counsel to defend the easement claims." They also assert that "[p]rivity in res judicata exists if a non[-]party agrees to be bound by the determination of issues in an action between others or is adequately represented by someone with the same interests who was a party in

the earlier suit[,]" citing *N.M. Consolidated Construction LLC v. City Council of the City of Santa Fe*, 97 F. Supp. 3d 1287 (D.N.M. 2015). The Morrisons emphasize that the United States Supreme Court recognizes six exceptions to the general rule against non-party preclusion, including "when the non-party agrees to be bound by the determination of issues in an action between others" or "was adequately represented by someone with the same interests[.]" *Id.* at 1307 (internal quotation marks and citations omitted).

{43} Finally, on privity, the Morrisons argue that the Tafoyas' argument based on *Bloom* that a predecessor in title is not in privity with a successor in title, as well as the Tafoyas' argument based on *Lopez* relating to a grantor under a warranty deed being an indemnitor, were not raised in the district court or docketing statement and therefore were not preserved.

{44} The Tafoyas' argument that the estate and the Morrisons lacked privity for the sake of res judicata is not compelling. As indicated by the Morrisons, "[d]etermining whether parties are in privity for purposes of res judicata requires a case-by-case analysis." *Deflon*, 2006-NMSC-025, ¶ 4. Our Supreme Court has looked favorably on the Tenth Circuit's definition of privity in *St. Louis Baptist Temple, Inc. v. FDIC*, 605 F.2d 1169, 1174 (10th Cir. 1979), which held that "[p]rivity requires, at a minimum, a substantial identity between the issues in controversy and showing that the parties in the two actions are really and substantially in interest the same." *Deflon*, 2006-NMSC-025, ¶ 4 (internal quotation marks and citation omitted). Although admittedly parties are more clearly in privity when a landowner obtains a judgment regarding a piece of property and then the property is sold to a subsequent purchaser, i.e., when the parties have a "successive relationship to the same rights of property[,]" *id.* (internal quotation marks and citation omitted), the definition of "privity" does not necessarily need to be so rigid.

{45} Here, the Morrisons and the estate are substantially the same in interest. As indicated in the Morrisons' answer brief, the Morrisons and the estate had the same interest in seeing that Cecilia's easement claims were defeated—the Morrisons, because they bargained for a conveyance free of encumbrances as evidenced by the warranty deed, and the estate, because it warranted that Lot 1 was free of encumbrances. As indicated by the estate during the revocation proceeding, there was real concern about Cecilia suing the Morrisons and the Morrisons looking to the estate for recovery or for a defense. Thus, it was in both the estate's and the Morrisons' interest to seek a ruling from the district court in the revocation proceeding that Cecilia had no express or implied easement claims.

{46} Although the record does not show an express agreement between the Morrisons and the estate regarding the estate's request to the district court to resolve Cecilia's easement claims during the revocation proceeding, the case law cited by the Tafoyas stops short of supporting their proposition that, in New Mexico, a grantor/indemnitor "can attain [the] status [as designated representative of the landowner] only with notice to the landowner of the lawsuit and the landowner's express consent." *See Bloom*, 1991-NMSC-005, ¶¶ 14, 18 (holding that, in the context of recovering costs from a grantor under a warranty covenant for defending a title from an adverse claim, "[s]ome jurisdictions require more than mere notice of the suit and require that the grantee make a specific request upon the grantor to appear and defend" and citing *Morgan v. Haley*, 58 S.E. 564 (Va. 1907), for the proposition that "without the assent of the grantee, the grantor has no authority to assume the conduct of the defense"). The aforementioned authorities relied upon by the Tafoyas neither support the Tafoyas' broad proposition that notice and express consent are required for privity under the doctrine of res judicata nor do they apply in this case where the parties are substantially the same in interest. Where a party does not cite authority that supports an argument, we may assume no such authority exists. *See In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329. We will not consider propositions that are unsupported by citation to authority. *ITT Educ. Servs., Inc. v. N.M. Taxation & Revenue Dep't*, 1998-NMCA-078, ¶ 10, 125 N.M. 244, 959 P.2d 969.

{47} In short, because the test for determining privity is not as strict as the Tafoyas suggest and because we are convinced that the interests of the estate and the Morrisons in resolving the express and implied easement claims were substantially the same, we conclude that the parties were in privity for res judicata purposes.

B. Same Cause of Action

{48} The Tafoyas' second point against the application of res judicata is that res judicata does not bar their claims against the Morrisons because the cause of action in the present case is different from that in the revocation proceeding. The Tafoyas argue that the requirements of the single-transaction rule that was adopted in the Restatement (Second) of Judgments §§ 24-25 (Am. Law Inst. 1982), were not met. According to the Tafoyas, "[o]ur courts look to whether the facts are closely entwined and whether the claims would reasonably be brought in a single action." In this regard, the Tafoyas argue that the district court in the revocation proceeding recognized that it could not resolve the easement claims without the Morrisons in court as a party and that the sole cause of action before the court was whether Cecilia's inheritance should be revoked. Thus, the Tafoyas contend that "[Cecilia's] claim that an express . . . or an implied easement from the City justified her refusal to sign the [c]onsolidated [p]lat was a minor sub-issue at trial[,]" and further, "[t]he bulk of the evidence concerned the [5]-foot encroachment of the Tafoyas' house and fence onto the Morrison's driveway easement over the Tafoya[s'] land." In the Tafoyas' view, "[t]he easement by necessity claim was not relevant in any way and no prescriptive easement claim was even raised[,]" and "[i]t cannot be said that the motion to revoke an inheritance and the claims to an easement over land owned by someone not a party to the action is part of a single cause of action."

{49} In response, the Morrisons assert that the causes of action were the same for the purposes of res judicata because the easement claims raised during the revocation proceeding and the easement claims raised in the present case arose "out of a common nucleus of operative facts[.]" *See Potter*, 2015-NMSC-002, ¶ 11 (stating that "[t]he transactional approach considers all issues arising out of a common nucleus of operative facts as a single cause of action" (internal quotation marks and citation omitted)); *Anaya v. City of Albuquerque*, 1996-NMCA-092, ¶ 8, 122 N.M. 326, 924 P.2d 735 (stating that "[t]he transactional test requires us to go beyond any similarity in desired outcome and to examine the operative facts underlying the claims made in the two lawsuits"). The Morrisons support this approach based on the following circumstances set out in their answer brief that evidence the overlap between the claims in the revocation proceeding and those in the present case.

> [During the revocation proceeding, Cecilia] provided discovery

> on her easement claim. She filed a summary judgment motion that addressed the easement issue. She consented through counsel to have the court decide the issue. She submitted requested findings of fact, conclusions of law[,] and closing argument on the easement issue. She elicited testimony from witnesses at trial on the issue.

{50} We hold that, under the transactional approach, the easement claims in the revocation proceeding and the easement claims presented in this case constitute "a single cause of action for res judicata purposes." *Potter*, 2015-NMSC-002, ¶ 11. As indicated in *Potter*, "[t]he facts comprising the common nucleus should be identified pragmatically, considering (1) how they are related in time, space, or origin[;] (2) whether, taken together, they form a convenient trial unit[;] and (3) whether their treatment as a single unit conforms to the parties' expectations or business understanding or usage." *Id.* (internal quotation marks and citation omitted).

{51} The Tafoyas' easement claims in the present case and Cecilia's previous easement claims, which she agreed to litigate in the revocation proceeding, are "rooted in a common nucleus of operative facts." *Id.* ¶ 14. First, the facts asserted in the revocation proceeding are related to the facts regarding the easement claims in the present case. In the revocation proceeding, Cecilia consistently asserted her claim to a second off-street parking space and to an easement over the Morrisons' driveway. Although her easement claims in the revocation proceeding were vague, and we do not have the entire record from the revocation proceeding, Cecilia did assert an easement right during the course of discovery, in her post-trial brief, and in her proposed findings of fact and conclusions of law. During the revocation proceeding, she also asserted a "need" to use the driveway and argued that her father provided her with an easement as evidenced by the plat. Cecilia's arguments and the evidence she used to support her claim to an easement in the revocation proceeding were revived and expanded in the present case. In this case, the Tafoyas again asserted an easement based on the plat and affidavit, which were available and presented in the revocation proceeding. Although the Tafoyas provide additional evidence to support their easement claim, i.e., a notarized document from the father expressly granting an easement, that evidence was in Cecilia's possession during the revocation proceeding, and she decided not to present it.

{52} As in the revocation proceeding, the Tafoyas again assert the notion of necessity and reference Cecilia's claim to a second off-street parking space. Although we do not agree that an easement by necessity claim was well developed in the revocation proceeding because Cecilia simply asserted her need for the easement, as opposed to arguing the elements required to prove an easement by necessity, the Tafoyas' claim that they need the easement to access the rear of their property in times of infirmity, for deliveries, for guests, etc. is related to Cecilia's prior assertion that she needed the easement to access the rear of her property with her car. Moreover, given that the parties agreed to litigate the easement issues in the revocation proceeding and given that there have been no apparent changes regarding the claimed necessity since, Cecilia could have and should have clearly asserted her implied easement by reasonable necessity claim in the revocation proceeding. According to *Brooks Trucking Co. v. Bull Rogers, Inc.*, 2006-NMCA-025, ¶ 20, 139 N.M. 99, 128 P.3d 1076, "[i]n [New Mexico] cases that apply res judicata, when later-raised claims could have been asserted in an earlier lawsuit, the operative facts underlying the newly asserted claims existed at the time the claims in the first action were brought." *See Moffat v. Branch*, 2005-NMCA-103, ¶¶ 12-13, 138 N.M. 224, 118 P.3d 732; *Apodaca v. AAA Gas Co.*, 2003-NMCA-085, ¶ 82, 134 N.M. 77, 73 P.3d 215.

{53} That Cecilia changed her implied easement claim from implied by law or implied by necessity, due to the City's requirement for a second off-street parking spot, to implied by necessity due to the Tafoyas' need to access their home without having to climb stairs does not alter our analysis because the facts upon which the Tafoyas rely have not changed. *See Anaya*, 1996-NMCA-092, ¶ 8 (requiring consideration of "the operative facts underlying the claims"). The Tafoyas offer no explanation as to why they were able to assert certain easement claims in the revocation proceeding but were unable to assert the implied easement by necessity claim they now make. In short, because the facts underlying Cecilia's easement claims in the revocation proceeding and the Tafoyas' easement claims here were related, the first prong under *Potter* is met. *See* 2015-NMSC-002, ¶ 11.

{54} We also hold that the second and third *Potter* prongs are met because the validity of the easement claims were evaluated as part of the estate's claim that Cecilia's inheritance should be revoked, and thus it was convenient for the court to consider the merits of the easement claims during the revocation proceeding. *See id.* And it would have been convenient for the court in the revocation proceeding to consider the modified claims that were made by the Tafoyas in the present action. Further, Cecilia initially agreed on the record that the court should consider the easement claims during the revocation proceeding, thus making it nearly impossible for the Tafoyas to argue that the fact the court issued a decision on the easement claims during the revocation proceeding did not conform to the parties' expectations. *See id.*

{55} The Tafoyas' argument that Cecilia's claim for an express or implied easement in the revocation proceeding was a "minor sub-issue" and thus their current claims are different from the prior claims is unavailing because, as previously stated, the parties agreed to address the easement claims in the revocation proceeding head on. The parties litigated Cecilia's easement claims during the revocation proceeding. We hold that, under the transactional test, the causes of action were the same, and it was proper for the district court to apply res judicata. *See id.*

III. Full and Fair Opportunity

{56} Although related to res judicata , the Tafoyas separately argue that they did not have a full and fair opportunity to litigate their claim to an easement in the revocation proceeding. Whether the parties had a full and fair opportunity to litigate their issues is an overarching concern in evaluating res judicata. *See Armijo v. City of Española*, 2016-NMCA-086, ¶ 13, __ P.3d __)"The essence of claim preclusion is the parties' full and fair opportunity to litigate the issues."(. Although the Tafoyas argue that their alleged lack of a full and fair opportunity to litigate their claim implicates both res judicata and collateral estoppel, because we affirm on the grounds of res judicata, we focus on the Tafoyas' arguments specific to res judicata.

{57} In support of their argument, the Tafoyas point to the district court's musing as to its authority to grant Cecilia an easement in the revocation proceeding when the Morrisons were not parties to that action and further highlight the court's position that it could only decide

the easement issues if it ruled against Cecilia. The Tafoyas argue that they did not have a full and fair opportunity to litigate their easement claims because the estate raised those claims at the commencement of the evidentiary hearing without prior notice that it intended to litigate those issues. They also argue that "the interest in providing an opportunity for a considered determination . . . outweighs the interest in avoiding the burden of relitigation],[" quoting the Restatement)Second(of Judgments § 27 cmt. h)Am. Law Inst. 1982(.

{58} We disagree with the Tafoyas that they did not have a full and fair opportunity to litigate their easement claims. During the revocation proceeding, the parties engaged in discovery as to the easement claim, and Cecilia presented evidence and argument regarding her claim to an easement. Cecilia's counsel agreed that evaluating and ruling on those claims would be beneficial. Her counsel's attempt to back pedal occurred only after evidence had been offered. That Cecilia was ultimately unsuccessful in her easement claims does not mean that the Tafoyas did not have a full and fair opportunity to present their claims. *See, e.g.*, *Armijo*, 2016-NMCA-086, ¶¶ 9, 13-15 (highlighting the requirement that the parties have a full and fair opportunity to litigate the issues and holding that the plaintiff did have an opportunity to assert his contract claims in the first action and was thus precluded from subsequently asserting those claims). Because Cecilia was afforded an opportunity for a considered determination in the revocation proceeding, the application of res judicata is appropriate here.

IV. Prescriptive Easement

{59} The Tafoyas contend that, even if this Court were to conclude that res judicata applies to some claims, there exists no basis for precluding the Tafoyas from litigating their prescriptive easement and easement by necessity claims against the Morrisons. Because we have already addressed the Tafoyas' easement by necessity claim, we focus on their prescriptive easement claim. As to the prescriptive easement claim, the Tafoyas argue that res judicata does not apply because warranty covenants do not run as to an open and obvious prescriptive easement, and thus, any claim of privity between the estate and the Morrisons by way of the warranty deed does not apply to a prescriptive easement.

{60} "[A]n easement by prescription is created by adverse use of land, that is open or notorious, and continued without effective interruption for the prescriptive period []of ten years[]." *Algermissen v. Sutin*, 2003-NMSC-001, ¶ 10, 133 N.M. 50, 61 P.3d 176. "An adverse use is a use made without the consent of the landowner[,]" *id.* ¶ 11, and when "a use has its inception in permission, express or implied, it is stamped with such permissive character and will continue as such until a distinct and positive assertion of a right hostile to the owner is brought home to him by words or acts." *Id.* ¶ 12 (emphasis, internal quotation marks, and citation omitted).

{61} According to the Tafoyas, the district court erroneously granted summary judgment on their prescriptive easement claim on the basis that the prescriptive period started against the Morrisons when the judgment in the revocation proceeding was entered. As previously indicated, the court determined that the prescriptive period began to run after the district court issued its decision in the revocation proceeding in March 2004 and ended when the Morrisons installed a fence preventing access in September 2013. The Tafoyas state that the basis for the district court's ruling as to when the 10-year statute of limitations was restarted was that the Morrisons were in privity with the estate in the revocation proceeding and therefore the revocation proceeding served as a quiet title action against the Morrisons. The Tafoyas assert, of course, that the Morrisons were not in privity with the estate, they were not a party to the settlement that followed, and the Morrisons' title could not be quieted in the revocation proceeding. Thus, according to the Tafoyas, the date of the judgment in the revocation proceeding was irrelevant to the running of the prescriptive period. And, further, the prescriptive easement claim was properly brought in the present case and the proper date for the start of the prescriptive period must await trial, on remand, as to when the use became adverse.

{62} The Morrisons agree that the revocation proceeding has no preclusive effect on the Tafoyas' prescriptive easement claim, which was not asserted or evaluated in the revocation proceeding. However, the Morrisons argue that the Tafoyas' claim fails because (1) it is barred by the terms of the settlement agreement, or (2) the Tafoyas rightfully lost on that claim before the district court. We begin by addressing the Morrisons' argument that even if preclusion did not apply, the prescriptive easement claim is barred by the settlement agreement.

{63} The Morrisons contend that the Tafoyas' claim for a prescriptive driveway easement is barred because Cecilia settled and released her easement claims in the parties' settlement agreement and mutual release that followed the *Redman-Tafoya* remand. The Morrisons point particularly to a paragraph in the release providing that the settlement agreement and release was binding upon successors and assigns of the parties, and they assert that they were successors to the estate by virtue of the estate's warranty deed to Lot 1. The Morrisons therefore argue that they are entitled to the benefit of the release because it "not only encompassed the express and implied easement claims, but also 'all . . . future claims . . . which may later develop . . . .[,]' " including the Tafoyas' prescriptive easement claim. The Morrisons provide no authority in support of this contention and argument that they are successors or assigns under the contract. They fail to explain how their succession in ownership through the estate's warranty deed and the language of the settlement agreement and release between Cecilia and the estate entitled them, a non-party to the settlement agreement, to invoke the settlement agreement and release to bar the Tafoyas' claims in the present case.

{64} The Tafoyas answer the Morrisons' points with two arguments: (1) that the Morrisons were not parties or successors to the settlement agreement and mutual release, and (2) that the Tafoyas' claims to a prescriptive easement were neither actually litigated nor could have been litigated in the revocation proceeding. They assert that had the estate intended the Morrisons to benefit from the settlement agreement and mutual release, the estate would have brought them in as a party to the agreement or at least mentioned them by name. The Tafoyas, like the Morrisons, provide no authority in this particular section of their reply brief that responds to the Morrisons' arguments.

{65} Because the Morrisons fail to develop their arguments regarding the applicability of the settlement agreement and mutual release with relevant case law, authority, or citations to the record, we reject the Morrisons' argument that the Tafoyas are barred from asserting their prescriptive easement claim based on the settlement agreement and mutual release. Although the Morrisons may have been able to persuasively argue that they were "successors" or "assigns" as contemplated by the settlement agreement and mutual

release, the Morrisons offer no legal support or citation to the record that would support their assertion. *See Chan v. Montoya*, 2011-NMCA-072, ¶ 9, 150 N.M. 44, 256 P.3d 987 ("It is not our practice to rely on assertions of counsel unaccompanied by support in the record. The mere assertions and arguments of counsel are not evidence." (internal quotation marks and citation omitted)); *ITT Educ. Servs., Inc.*, 1998-NMCA-078, ¶ 10 (stating that this Court will not consider propositions that are unsupported by citation to authority.). Additionally, as indicated by the Tafoyas, the parties were aware that the Morrisons could get involved, and yet the estate chose not to specifically name them in the settlement agreement and mutual release.

{66} We next address the Morrisons' argument that the Tafoyas' prescriptive easement claim was without merit. When initially considering the Tafoyas' prescriptive easement claim in 2012, the district court held that the claim was not ripe for review and dismissed the claim without prejudice. However, in December 2014, when considering the Morrisons' summary judgment motion on their quiet title counterclaim, the district court held that the Tafoyas had no prescriptive easement and that the Tafoyas had no right, title, or interest of any kind in or to the Morrisons' property or adverse to the Morrisons, including "any claims to an easement of any kind over or across the Morrison[s' p]roperty." Although the factual basis for the district court's judgment against the Tafoyas' prescriptive easement claim is not stated in the court's order, the court stated during the hearing that no clear and convincing evidence was established to support a prescriptive easement claim and that there had not been and could not be adverse use against a claim of right for 10 years, which began to run after the district court issued its decision in the revocation proceeding in March 2004 and which was cut off when the Morrisons installed a fence preventing access in September 2013.

{67} In this case, we agree with the district court that the Tafoyas failed to establish a prescriptive easement claim because they did not show adverse use of the driveway for the required 10-year period. Throughout the course of the revocation proceeding, Cecilia asserted that she had permission to use the driveway. And in fact even in the present proceeding, the Tafoyas continued to assert permissive use, and Charles Tafoya asserted that they had permission to use the driveway and that permission was not contested until 2005, which was well after the ruling in the revocation proceeding. Although the Tafoyas now claim that there are genuine issues of material fact regarding the date wherein use of the easement became adverse, they do not adequately support that assertion. Conversely, the Morrisons cite specifically to statements by the Tafoyas that their use was permissive at least until the district court, in the revocation proceeding, entered judgment against Cecilia in 2004. *See Dow v. Chilili Coop. Ass'n*, 1986-NMSC-084, ¶ 13, 105 N.M. 52, 728 P.2d 462 (holding that a party opposing summary judgment "may not simply argue that [evidentiary] facts [requiring a trial on the merits] might exist, nor may [the party] rest upon the allegations of the complaint"); *see also Cates v. Regents of N.M. Inst. of Mining & Tech.*, 1998-NMSC-002, ¶ 9, 124 N.M. 633, 954 P.2d 65 ("If there is no evidence that creates a reasonable doubt as to the existence of a genuine issue, summary judgment is appropriate."). Because the district court issued its decision in the revocation proceeding wherein Cecilia argued permissive use up to and as late as 2004, adverse use, if any, and at the earliest, began in 2004. As noted earlier, the Morrisons erected a fence in September 2013, such that, even if there had been uninterrupted adverse use, the 10-year period required by law for a prescriptive easement had not passed as of the date that the Morrisons installed their fence. Because the Tafoyas failed to offer any genuine issues of material fact as to continued adverse use of land without effective interruption for the prescriptive period, we hold that the district court was correct in granting summary judgment against the Tafoyas on their prescriptive easement claim.

CONCLUSION

{68} We affirm the district court's grant of summary judgment against the Tafoyas as to the express, implied, and by-necessity easement claims on the basis of res judicata. We also affirm the district court's grant of summary judgment as to the Tafoyas' prescriptive easement claim.

{69} IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:
RODERICK T. KENNEDY, Judge
STEPHEN G. FRENCH, Judge

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Positions

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.

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.

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.

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.

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.

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

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

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

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

City of Las Cruces–
Deputy City Attorney

Closing date: May 29, 2017. Salary: $78,142.05 -- $117,213.07 annually. Fulltime regular, exempt position that plans, coordinates, and manages operations, functions, activities, staff and legal issues in the City Attorney's Office to ensure compliance with all applicable laws, policies, and procedures. Minimum requirements: Juris Doctor Degree AND seven (7) years of experience in a civil and criminal legal practice; at least one (1) year of experience in municipal finance, land use, and public labor law is preferred. Member of the New Mexico State Bar Association, licensed to practice law in the state of New Mexico; active with all New Mexico Bar annual requirements. Valid driver's license may be required or preferred. Visit website http://agency.governmentjobs.com/lascruces/default.cfm for further information, job posting, requirements and online application process.

Business Lawyer

Busy Albuquerque Uptown law firm seeks business lawyer with 0-3 years' experience in commercial and transactional work. Tax or accounting skills a plus. Must have a strong work ethic, self-starting nature, and excellent research and writing skills. Should be licensed to practice law in New Mexico. Salary commensurate with experience; attractive benefits package in place. Send cover letter, resume and writing sample to GLW@sutinfirm.com by June 16, 2017. Applications will be kept confidential.

Associate Attorney

Property rights focused law firm seeking full time attorney with several years of experience for practice located in Cheyenne, Wyoming. Applicants should have excellent legal research and writing skills and some experience appearing in court. General public speaking skills are a plus. Firm practice areas include natural resources and environmental litigation, advocacy for private property rights, land use planning, complex right-of-way and easement transactions representing property owners and administrative law. Prefer to hire in top 1/4 of law school class. Salary commensurate with experience. Please send resume, law school transcript, writing sample, and references to Budd-Falen Law Offices L.L.C., P.O. Box 346, Cheyenne, WY 82003, phone (307) 632-5105, fax (307) 637-3891, e-mail main@buddfalen.com. Questions can be directed to Karen Budd-Falen.

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Allen, Shepherd, Lewis & Syra, P.A. is seeking a New Mexico licensed attorney with 2-5 years of litigation experience. Experience in construction defects, professional malpractice or personal injury preferred. Candidates considered for a position must have excellent oral and written communication skills. Available position is considered regular and full time. Please send resume with cover letter, unofficial transcript, and writing sample to HR@allenlawnm.org or Allen, Shepherd, Lewis & Syra, P.A. Attn: Human Resources, PO Box 94750, Albuquerque, NM 87199-4750. All replies will be kept confidential. EEO.

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

Paralegal
Albuquerque firm is looking for experienced paralegal. Experience in complex civil, large document management and criminal cases a plus. Send resume to Joseph at jmeserve@rothsteinlaw.com

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

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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.

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