BAR BULLETIN

Official Publication of the State Bar of New Mexico

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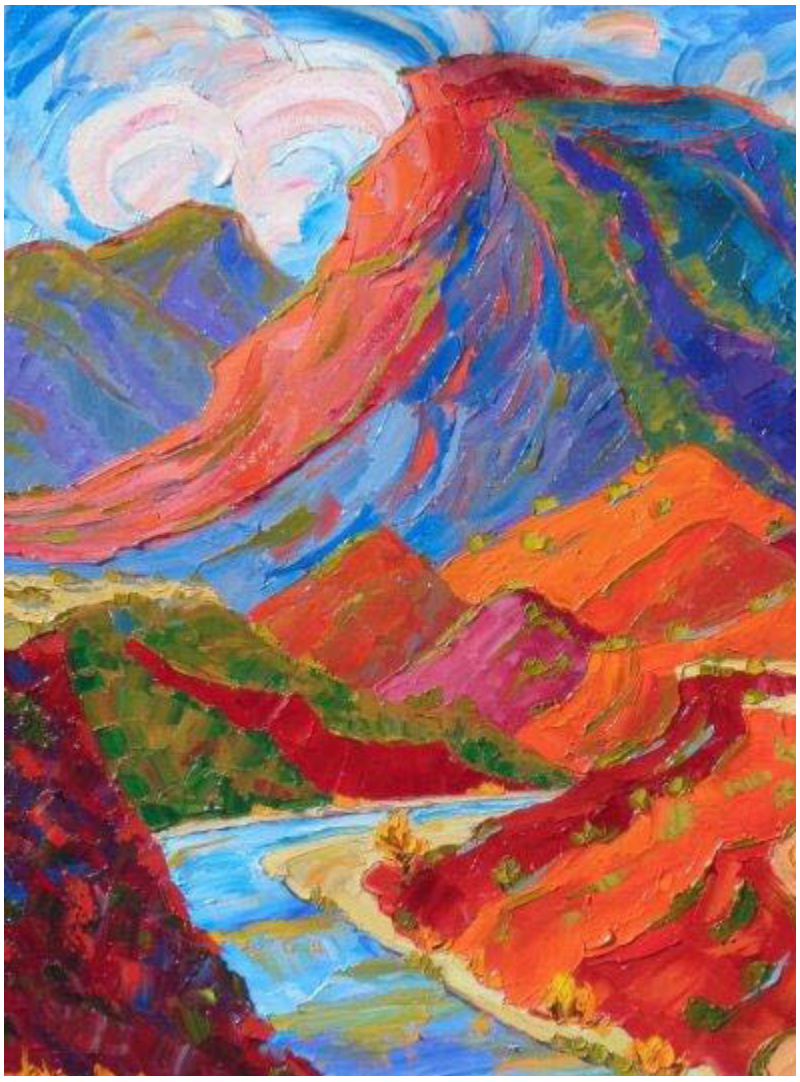

Spectral Skies Over Abiquiu (see page 3) Michelle Chrisman

Inside This Issue

A Message From State Bar President Scotty Holloman

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Coverage from the Annual Meeting!

Flip to page 8.

AHEAD OF THE CURVE

RISK MANAGEMENT FOR LAWYERS

Earn three hours of Ethics CLE credit and earn a premium discount of up to 7.5% on your CNA professional liability quote.

This **CNA seminar** covers managing the risks involved in legal outsourcing; data security and privacy exposures for lawyers; client files and document retention issues; recent cautionary malpractice case law; and client engagement agreements, including the new ethics requirements, best practices, and sample wording.

Las Cruces: Wed, Oct 18th
Hotel El Encanto de Las Cruces
705 South Telshore Blvd,. Las Cruces

Roswell: Thurs, Oct 19th
Eastern New Mexico University
48 University Blvd, Roswell

Albuquerque: Fri, Oct 20th
State Bar of New Mexico
5121 Masthead Street NE, Albq

Santa Fe: Mon, Oct 23rd
Inn and Spa at Loretto
211 Old Santa Fe Trail, Santa Fe

Register online at LawyersMalpracticeInsuranceCoverage.com and save up to $20 per registration!

Name(s): _____

_____

Please attach a list of attendees if the names do not fit above.

FIRM:_____

ADDRESS: _____

CITY: _____ STATE: _____ ZIP: _____

PHONE: _____ FAX: _____

E-MAIL: _____

LOCATIONS (please check one)

☐ La Cruces: Oct 18th, 9 am to 12:15 pm ☐ Roswell: Oct 19th, 9 am to 12:15 pm

☐ Albuquerque: Oct 20th 9 am to 12:15 pm ☐ Santa Fe: Oct 23th, 9 am to 12:15 pm

NO. OF ATTORNEYS AT $ 117: _____ NO. OF STAFF AT $67: _____

TOTAL PAYMENT ENCLOSED: $ _____

Fax or Mail orders to:

Health Agencies of the West, Inc.
500 N. State College Blvd., # 1220
Orange, CA 92868

Fax: (714) 769-3010

OR

Save $20 if you register for the newsletter and the seminar online at: www.LawyersMalpracticeInsuranceCoverage.com and pay $97 per attorney or $47 for staff.

Questions? Call: (800) 556-0800
(Make checks payable to Health Agencies.)

Full refund with at least 48 hours notice, thereafter full credit to a future CNA seminar with advance notice. No credit or refund for "no shows."

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About Cover Image and Artist: Michelle Chrisman's landscapes are painted "en plein air." She considers herself a contemporary colorist and modernist, but most of all a visual poet. She is drawn to the visual beauty of New Mexico and the West, the desert and the variety of three cultures. She paints alla prima in direct response to the landscape. Chrisman teaches annual painting workshops for Ghost Ranch in Abiquiu and for the New Mexico Art League and Harwood Art Center in Albuquerque. She can be reached via email at MichelleChrisman78@gmail.com and her website is www.MichelleChrisman.com.

Notices

Court News

Supreme Court Law Library

Hours and Information

The Supreme Court Law Library is open to any individual in the legal community or public at large seeking legal information or knowledge. The Library's staff of professional librarians is available to assist visitors. The Library provides free access to Westlaw, Lexis, NM OneSource and HeinOnline on public computers. Search the online catalog at https://n10045.eos-intl.net/N10045/OPAC/Index.aspx. Visit the Library at the Supreme Court Building, 237 Don Gaspar, Santa Fe NM 87501. Learn more at lawlibrary.nmcourts.gov or by calling 505-827-4850.

Hours of Operation

Monday–Friday 8 a.m.–5 p.m.

Reference and Circulation

Monday–Friday 8 a.m.–4:45 p.m.

Second Judicial District Court

Children's Court Abuse and Neglect Brown Bag

The Second Judicial District Court Children's Court Abuse and Neglect Brown Bag will be held at noon, Oct. 20, in the Chama Conference Room at the Juvenile Justice Center, 5100 2nd Street NW, Albuquerque. Attorneys and practitioners working with families involved in child protective custody are welcome to attend. Call 841-7644 for more information.

Eleventh Judicial District Court

Judicial Vacancy

A vacancy on the Eleventh Judicial District Court will exist as of Jan. 2, 2018 due to the retirement of Hon. Sandra Price effective Jan. 1, 2018. Inquiries regarding the details or assignment of this judicial vacancy should be directed to the administrator of the Court. Alfred Mathewson, chair of the Eleventh Judicial District Court Judicial Nominating Commission, invites applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 28 of the New Mexico Constitution. Applications may be obtained from the Judicial Selection website: http://lawschool.unm.edu/judsel/application.php. The deadline for applications is 5 p.m., Jan. 10, 2018. Applications received after that time will not be considered. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the Office of the Secretary of State. The Eleventh Judicial District Court Judicial Nominating Commission will meet beginning at 9 a.m. on Jan. 25, 2018, to interview applicants in Farmington. The Commission meeting is open to the public and anyone who wishes to be heard about any of the candidates will have an opportunity to be heard.

Professionalism Tip

With respect to the public and to other persons involved in the legal system:

I will respect and protect the image of the legal profession, and will be respectful of the content of my advertisements or other public communications.

Twelfth Judicial District Court

Notice of Reassignment of Cases

A mass reassignment of all cases previously assigned to the Hon. Jerry H. Ritter, Twelfth Judicial District Judge, Division I, were automatically reassigned to the Hon. Steven Blankinship effective Sept. 11. Pursuant to Rules 1-088.1 and 5-106, NMRA, any party who wants to exercise their right to excuse Judge Blankinship must do so by Oct. 25.

Bernalillo County Metropolitan Court

Bonding Window New Hours

Effective Sept. 30, Bernalillo County Metropolitan Court's bonding window is open from 7 a.m.–10:30 p.m. Monday through Sunday. Bonds during "graveyard" hours are no longer accepted.

Court Closure Notice

The Bernalillo County Metropolitan Court will be closed on Oct. 27 for the Court's Annual Employee Conference. Misdemeanor custody arraignments and felony first appearances will not be held that day. The conference is sponsored by the New Mexico Judicial Education Center at the University of New Mexico and paid for by fees collected by state courts.

State Bar News

Attorney Support Groups

- Oct. 16, 7:30 a.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the third Monday of the month.)
- Nov. 6, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the first Monday of the month.)
- Nov. 13, 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#.

For more information, contact Latisha Frederick at 505-948-5023 or 505-453-9030 or Bill Stratvert, 505-242-6845.

Board of Bar Commissioners

New Mexico Access to Justice Commission

The Board of Bar Commissioners will make two appointments to the New Mexico Access to Justice Commission for three-year terms. The Commission is dedicated to expanding and improving civil legal assistance by increasing pro bono and other support to indigent people in New Mexico. Active status attorneys in New Mexico wishing to serve on the Commission should send a letter of interest and brief resume by Nov. 17 to Kris Becker at kbecker@nmbar.org or fax to 505-828-3765.

Children's Law Section

15th Annual Art Contest

The Children's Law Section will host the 15th Annual Art Contest reception from 5:30-7:30 p.m., Oct. 25, at the West Mesa Community Center in Albuquerque. Members are invited to attend to view the artwork produced by youth who have come in contact with the juvenile justice system. Using materials funded by the Section's generous donors, contestants will decorate flip flips to demonstrate their idea based on the theme "How I will leave my footprint on the world." R.S.V.P.s are appreciated, contact Breanna Henley at bhenley@nmbar.org. To donate to the Art Contest, visit www.nmbar.org/ChildrensLaw and click Art Contest or make a check out to the New Mexico State Bar Foundation and note "Children's Law Section Art Contest Fund" in the memo

line and mail to: State Bar of New Mexico, Attn: Breanna Henley, PO Box 92860, Albuquerque, NM 87199.

Entrepreneurs in Community Lawyering

Fall Incubator Boot Camp Open to Solo Practitioners

The Entrepreneurs in Community Lawyering program, the State Bar's new legal incubator program, will host its third Boot Camp Oct. 17-20 at the State Bar Center. The Boot Camp is a condensed and intense introduction to the basics of setting up and managing a solo law practice. It also offers a learning opportunity for new lawyers not in ECL who are starting or considering starting a solo practice. The Boot Camp covers a wide range of business topics and practice management issues. The State Bar invites up to 10 members to join ECL's participating attorneys for the October 2017 Boot Camp, on a first-come, first-served basis. CLE credit is not offered but materials will be provided to each participant. A $150 fee will be charged for lawyers participating in the Bootcamp who are not admitted to ECL. View the curriculum at www.nmbar.org/ECL. For more information or to enroll contact Stormy Ralstin at 505-797-6053 or Ruth Pregenzer at 505-797-6077.

Indian Law Section

Call for Donations: First Annual Indian Law Section Silent Auction

The Indian Law Section seeks donations for the First Annual Silent Auction to be held in conjunction with the Section's Annual CLE, "The Duty to Consult with Tribal Governments: Law, Practice and Best Practices" and Annual Meeting on Nov. 2 at the State Bar Center. Artwork or photography, jewelry, gift certificates for a business, restaurant or spa service, and more are accepted. Donations are tax deductible as provided by law and donors will be recognized on the Section's website. The Silent Auction will benefit the Section's Bar Preparation Scholarship Fund, which assists law school graduates in their efforts to prepare for and take the New Mexico Bar Exam. To donate, contact Delilah Tenorio in Albuquerque at dmt@stetsonlaw.com or Kathryn S. Becker in Santa Fe at Kathryn.becker@state.nm.us.

Intellectual Property Law Section

The U.S. Trademark Office Comes to Albuquerque

Join the Intellectual Property Law Section from 8:45 a.m.–4:45 p.m., Oct. 18, at the Hyatt Regency Hotel in Albuquerque for "The U.S. Trademark Office Comes to Albuquerque" CLE. Lawyers and entrepreneurs alike will find this to be a highly unique opportunity. Attendees will meet and hear from patent examiners, patent trial and appeal board judges, and trademark examiners from the USPTO. Topics will include the patent examination and trademark registration processes, the administrative trial and appeal process, litigating infringement cases in federal court, and the value intellectual property protection can bring to a startup. Over lunch, the USPTO will present an update on their Dallas regional office and what resources are available to local start-ups and entrepreneurs. The day will end with a panel discussion by local businesses engaged in innovation and economic development followed by a reception. The cost is $130 for attorneys (5.0 G), $25 for non-attorneys and free to law students. Register online at www.nmbar.org/cle or call 505-797-6020. Space is limited.

Natural Resources, Energy and Environmental Law Section

Annual NREEL Section and Environmental Law Society Fall Mixer

The NREEL Section invites members to attend their annual fall mixer with the UNM School of Law Environmental Law Society from 5:30-7:30 p.m., Oct. 19, on the UNM School of Law back patio. This will be a great opportunity for Section members to catch up and to meet the new class of natural resources attorneys! R.S.V.P.s are appreciated, please contact Breanna Henley at bhenley@nmbar.org.

Nominations Open for 2017 Lawyer of the Year Award

The Natural Resources, Energy and Environmental Law Section will recognize an NREEL Lawyer of the Year during its annual meeting of membership, which will be held in conjunction with the Section's CLE on Dec. 15. The award will recognize an attorney who, within his or her practice and location, is the model of a New Mexico natural resources, energy or environmental lawyer. More detailed criteria and nomination instructions are available at www.nmbar.org/NREEL. Nominations are due by Oct. 27 to Breanna Henley, bhenley@nmbar.org.

Senior Lawyers Division

Annual Meeting of Membership

The Senior Lawyers Division invites Division members to its annual meeting of membership to be held at 4 p.m., Nov. 14, at the State Bar Center. Members of the SLD include members of the State Bar of New Mexico in good standing who are fifty-five (55) years of age or older and who have practiced law for twenty-five (25) years or more. During the annual meeting of membership, members will have the opportunity to meet with members of the SLD Board of Directors and learn more about the activities of the Division. The meeting will last an hour and attendees are welcome to stay for the Attorney Memorial Scholarship Reception following the annual meeting.

Attorney Memorial Scholarship Reception

Three UNM School of Law third-year students will be awarded a $2,500 scholarship in memory of New Mexico attorneys who have passed away over the last year. The deceased attorneys and their families will be recognized during the presentation. The reception will be held from 5:30-7:30 p.m., Nov. 14, at the State Bar Center. All State Bar members, UNM School of Law faculty, staff, and students and family and colleagues of the deceased are welcome to attend. A list of attorneys being honored can be found at www.nmbar.org/SLD under "Attorney Memorial Scholarship." Contact Breanna Henley at bhenley@nmbar.org to notify the SLD of a member's passing and to provide current contact information for surviving family members and colleagues.

Solo and Small Firm Section

Fall Speaker Series Line-up

The Solo and Small Firm Section will again sponsor monthly luncheon presentations on unique law-related subjects and the next presentation will take place on Oct. 17, featuring Gene Grant, host of New

Mexico in Focus, who will speak on the lawyer's connections to political and media developments of the 21st Century. On Nov. 21, join Eric Sirotkin, a local lawyer who has taken a new direction in the last decade and has written books on international law including North Korea (four trips there) and forgiveness commissions. And on Jan. 16, Mark Rudd, former UNM associate professor and social activist, will speak about political movements over the last fifty years and the effects (if any) on American and international law. All presentations will take place from noon-1 p.m. at the State Bar Center. Contact Breanna Henley at bhenley@nmbar.org to R.S.V.P.

Young Lawyers Division

Volunteer Needed for Taos Wills for Heroes

The YLD is seeking volunteer attorneys for its Wills for Heroes event for Taos first-responders from 9 a.m.-noon, Oct. 14, at Casa Encantada Realty, located at 7276 NM-518 in Ranchos De Taos. Volunteers should arrive at 8:15 a.m. for breakfast, orientation, and laptop set up. Attorneys will provide free wills, healthcare and financial powers of attorney and advanced medical directives for first responders. Paralegal and law student volunteers are also needed to serve at witnesses and notaries. Contact YLD Region 2 Director Kaitlyn Luck at luck.kaitlyn@gmail.com to volunteer.

UNM

Law Library Hours

Through Dec. 16

Building and 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

Nov. 24–25 (Thanksgiving)

Other Bars

New Mexico Criminal Defense Lawyers Association

The Notorious DWI Seminar

From Birchfield to field sobriety testing to use of science and experts, the New Mexico Criminal Defense Lawyers Association presents "The Notorious DWI Seminar" (6.0 G) on Oct. 27 in Albuquerque. The program will feature experienced attorneys and a segment by retired New Mexico Court of Appeals Judge Roderick Kennedy. This advanced CLE is packed with the latest information for lawyers' DWI practice. Visit nmcdla.org to join NMCDLA and register for this seminar.

Corrections to the *2017–2018 Bench and Bar Directory*

Active Members

Finley, Charles R. 505-268-4000
Warner & Finley
4215 Lead Ave SE
Albuquerque NM 87108-2706
F 505-262-0880
finleylaw95@yahoo.com

Padilla, Arnold 505-250-2269
Law Office of Arnold Padilla
5909 Tres Vistas Ct NW
Albuquerque NM 87120-5706
aseca@comcast.net

Sutherland, Miriam 505-293 9333
Sutherland Law Firm LLC
2901 Juan Tabo Blvd NE #208
Albuquerque NM 87112-1885
F 866-235 0023
miriam@sutherlandlegal.net

Buckels, Jeffrey J.....505-363-4609
2410 Venetian Way SW
Albuquerque, NM 87105-7236
jeffbuck7@gmail.com

Corrales Municipal Court

Judge Michelle Frechette
4324 Corrales Road
Corrales, NM 87048
505-897-0503
F 505-899-6541
M/W/F 8:00-Noon and 1:00- 4:30 PM
T/TH 8:00-4:30 PM

Tenth Judicial District Court

Quay, Harding and DeBaca counties

QUAY COUNTY (#1010)
300 S 3rd Street
PO Box 1067
Tucumcari NM 88401
575-461-2764
F 575-461-4498

Note: Information for members is current as of April 5, 2017. Visit www.nmbar.org/FindAnAttorney for the most up-to-date information. To submit a correction, contact Pam Zimmer, pzimmer@nmbar.org.

Other News

Christian Legal Aid

New Volunteer Training Seminar

Christian Legal Aid of New Mexico invites new members to join them as they work together to secure justice for the poor and uphold the cause of the needy. Christian Legal Aid will be hosting a New Volunteer Training Seminar at 11 a.m.–p.m., Oct. 27, at the State Bar Center. Join them for free lunch, free CLE credits and training as they learn the basics on how to provide legal aid. For more information or to register, contact Jim Roach at 505-243-4419 or Jen Meisner at 505-610-8800. christianlegalaid@hotmail.com.

New Mexico Estate Planning Council Seminar

3.7 Hours CLE

The New Mexico Estate Planning Council is hosting a seminar from 1-5 p.m., Oct. 19, at the Albuquerque Country Club. Mike Halloran, CFP, ChFC, CLU, RICP, AEP, wealth management advisor for Northwestern Mutual in Jacksonville, Fla., with Margaret Graham will present on domestic asset protection trusts, beneficiary defective inheritor's trusts and due diligence in choosing a life insurance policy. This seminar has been approved for 3.7 hours of CLE. The seminar is free for members of the NMEPC and $125 for non-members. Registration information can be found on the NMEPC website, nmpec.com.

New Mexico Superintendent of Insurance

Healthcare Road Show

New Mexico's Superintendent of Insurance and beWellnm invite the legal community to attend an in-depth discussion of changes to the health insurance marketplace

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A MESSAGE FROM YOUR State Bar President

Scotty A. Holloman

Dear State Bar of New Mexico Members,

Thank you to all of you for your support of this year's Annual Meeting—Bench & Bar Conference at the Inn of the Mountain Gods. The comments I have received from members are very encouraging and I am pleased attendees found it both educational and enjoyable. I would like to extend my thanks again to each of our sponsors, exhibitors, donors for the raffle extravaganza, and, of course, each of you who attended. Please mark your calendars to join incoming president Wesley O. Pool for the 2018 Annual Meeting which will be held Aug. 9-11 at the Hyatt Regency Tamaya Resort and Spa near Bernalillo.

Congratulations to the officers elected to serve the State Bar next year: Wesley O. Pool, President; Jerry Dixon, President-Elect; and Tina Cruz, Secretary-Treasurer. We have a great slate of officers to serve next year.

I want to remind you of opportunities to help in the ongoing recovery efforts for the victims of the recent hurricanes. As stated before, one way to help is to provide volunteer legal services through ABA/Texas Free Legal Answers. The ABA Division for Legal Services has modified the ABA Free Legal Answers system in Texas to permit out-of-state attorneys to volunteer to answer Harvey related questions. You can learn more at https://texas.freelegalanswers.org/.

If you are in a position to help financially, the ABA Fund for Justice and Education is taking donations to support direct legal representation and resources to help hurricane victims rebuild their lives. Donate at https://donate.americanbar.org/disasterrelief.

As I was told when I began my year as President, the year you plan is not the year you will have. The Bar has undergone a significant change with the health-related retirement of longtime Executive Director Joe Conte. He has been an incredible resource for the State Bar and has provided invaluable support to presidents, commissioners and practitioners alike over his almost 20-year career here. We will miss him but wish him a very happy and restful retirement!

The search for Joe's replacement is underway. An Executive Director Search Committee has been appointed. Past State Bar President Charles J. Vigil of the Rodey Law Firm has graciously agreed to serve as chair of the committee. The Committee has announced the job posting (www.nmbar.org/CareerCenter) and will take applications through Oct. 27, 2017.

I have every confidence that the State Bar will select an excellent Executive Director. Should you have any questions about the search, I encourage you to reach out to Mr. Vigil or me.

Lastly, I would like to say special thanks to the State Bar staff. With the retirement of Joe, we have still been able to keep the State Bar running at a high and efficient level. We have a great group of people that work at the State Bar.

Sincerely,

Scotty A. Holloman
President, State Bar of New Mexico

Lessons Learned from the "Trial of the Century" Relevant to the Rule-of-Law Issues of Today with Marcia Clark

Well known prosecutor and bestselling author Marcia Clark captivated the audience during her moderated Q&A "Lessons Learned from the 'Trial of the Century' Relevant to the Rule-of-Law Issues of Today." In this session, Clark discussed her most famous criminal trial, that of O.J. Simpson, and her tips for young lawyers with local journalist Carla Aragón. Despite the fact that Simpson was not convicted in the criminal trial, Clark is pleased that the case has shown a light on domestic violence and how it often leads to homicide. Just days before the Annual Meeting, O.J. Simpson was granted parole from his civil suit. Clark signed copies of her recently re-released book *Without a Doubt* (with a new foreword). Dozens of attendees, including Judge Alan C. Torgerson (ret.) and Chief Justice Judith K. Nakamura, had the opportunity to meet Clark and pose for a picture.

Thank you to our 2017 CLE presenters!

This Annual Meeting, like many before it, was so successful in part because of the incredible caliber of our speakers and co-sponsoring sections.

Committee on Diversity Co-Chairs Denise M. Chanez and Leon Howard with Sonia Gipson Rankin (middle)

Committee on Women and the Legal Profession Co-Chairs Laura M. Castille and Quiana A. Salazar-King and Patricia M. Galindo (top) with Pamelya P. Herndon, Hon, Wendy E. York (ret.) and William D. Slease

Taxation Section Chair Bobbie Jo Collins (middle) with Edward B. Hymson and Oscar J. Ornelas

State Bar President Scotty A. Holloman with William D. Slease

Thank you to our exhibitors/sponsors!

Sponsors, exhibitors and donors also play a huge part in our Annual Meeting.
Without your support we would not be able to put on a great event for our members.

Past Presidents

Back Row: Richard F. Rowley II, Robert N. Hilgendorf, J. Brent Moore, Andrew J. Cloutier, Scotty A. Holloman, Judge Alan C. Torgerson (ret.) and Richard L. Kraft
Front Row: Dennis E. Jontz, Mary T. Torres, Erika E. Anderson, Virginia R. Dugan, Jessica A. Perez and Steven L. Hernandez

Faces of the Annual Meeting

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for the 2018 plan year. These events will feature presentations by representatives of the Superintendent of Insurance, beWellnm, and insurance carriers offering coverage on the beWellnm marketplace. Presentations will include a preview of a new plan comparison tool and provider search tool. To view the complete schedule and to R.S.V.P. go to www.bitly.com/osirsvp or call 1-833-ToBeWell today to reserve your spot.

Trojan Horse Method

Women-only Training in Albuquerque

The Trojan Horse Method training is coming to Albuquerque for its first women-only event on Nov. 2-5 at Hotel Parq Central. Trojan Horse's mission is to train, mentor and assist trial lawyers as they commit to the process of becoming winning trial lawyers. The method takes attendees outs of their comfort zone in order to aid the development of the highest level of skills required to obtain justice. Attendees will learn how to discover the emotional core of their case and transport juries into the truth—not the manufactured truth—by the insurance carriers and prosecutors. Visit https://events.bizzabo.com/thm47 for more information and to register.

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

CELEBRATE PRO BONO

www.celebrateprobono.org

OCTOBER 2017: The American Bar Association has dedicated an entire week in October to the **"National Celebration of Pro Bono."** In New Mexico, the local Judicial District Court Pro Bono Committees have extended this celebration to span the entire month of October (and parts of September and November). The committees are hosting a number of pro bono events across the state, including free legal fairs, clinics, recognition luncheons, Continuing Legal Education classes and more! To learn more about any of the events below, or to get involved with your local pro bono committee, **please contact Aja Brooks at ajab@nmlegalaid.org or (505)814-5033.** Thank you for your support of pro bono in New Mexico!

1st JUDICIAL DISTRICT:
Free Legal Fair
Oct. 21, 2017 from 10 am – 1 pm
Mary Esther Gonzales Senior Center
(1121 Alto St., Santa Fe, NM 87501)

Pro Bono Appreciation Luncheon and CLE
Oct. 23, 2017 from 11 am – 1:30 pm
Hilton of Santa Fe
(100 Sandoval St., Santa Fe, NM 87501)
CLE and luncheon details TBA

2nd JUDICIAL DISTRICT:
Law-La-Palooza Free Legal Fair
Oct. 19, 2017 from 3 – 6 pm
Westside Community Center
(1250 Isleta Blvd SW, Albuquerque, NM 87105)

3rd JUDICIAL DISTRICT:
Free Legal Fair
Oct. 27, 2017 from 10 am – 1 pm
Third Judicial District Court
(201 W. Picacho Avenue, Las Cruces, NM 88005)

5th JUDICIAL DISTRICT (LEA):
Free Legal Fair, Pro Bono Appreciation Luncheon and CLE
Nov. 3, 2017 from 11 am – 4 pm
Hobbs City Hall
(200 E. Broadway, Hobbs, NM 88240)
CLE and luncheon details TBA

6th JUDICIAL DISTRICT (LUNA):
Free Legal Fair
Nov. 3, 2017 from 10 am – 1 pm
Luna County District Court
(855 S. Platinum, Deming, NM 88030)

8th JUDICIAL DISTRICT:
Pro Bono Appreciation Luncheon and CLE
Oct. 19, 2017 from 11:30 am – 3 pm
Taos Country Club
(54 Golf Course Drive, Ranchos de Taos, NM 87557)
1-2 pm: Expanding ADR in Civil & Domestic Relations Litigation (1.0 G)
2-3 pm: Complying with the Disciplinary Board Rule 17-204 (1.0 EP; presented by the Center for Legal Education)

12th JUDICIAL DISTRICT (LINCOLN):
Free Legal Fair
Oct. 28, 2017 from 10 am – 2 pm
Ruidoso Community Center
(501 Sudderth Dr., Ruidoso, NM 88345)

Board of Bar Commissioners Election Notice 2017

Pursuant to Supreme Court Rule 24-101, the Board of Bar Commissioners is the elected governing board of the State Bar of New Mexico. Candidates must consider that voting members of the Board of Bar Commissioners are required to do the following:

Duties and Requirements for Board of Bar Commissioner Members:

- Attend all Board meetings (up to six per year), including the Annual Meeting of the State Bar.
- Represent the State Bar at local bar-related meetings and events.
- Communicate regularly with constituents regarding State Bar activities.
- Promote the programs and activities of the State Bar and the New Mexico State Bar Foundation.
- Participate on Board and Supreme Court committees.
- Evaluate the State Bar's programs and operations on a regular basis.
- Ensure financial accountability for the organization.
- Support and participate in State Bar referral programs.
- Establish and enforce bylaws and policies.
- Serve as a director of the New Mexico State Bar Foundation Board.

Notice is hereby given that the 2017 election of six commissioners for the State Bar of New Mexico will close at noon, Nov. 30. Nominations to the office of bar commissioner shall be by the written petition of any 10 or more members of the State Bar who are in good standing and whose principal place of practice is in the respective district. Members of the State Bar may nominate and sign for more than one candidate. **(See the nomination petition at www.nmbar.org/nmbardocs/aboutus/governance/BBCElectionNotice-Petition.pdf). The following terms will expire Dec. 31, and need to be filled in the upcoming election. All of the positions are three-year terms and run from Jan. 1, 2018–Dec. 31, 2020.**

First Bar Commissioner District

Bernalillo County
Two positions currently held by:
- Aja N. Brooks
- Raynard Struck

Third Bar Commissioner District

Los Alamos, Rio Arriba, Sandoval and Santa Fe counties
Two positions currently held by:
- J. Brent Moore *
- Elizabeth J. Travis

Sixth Bar Commissioner District

Chaves, Eddy, Lea, Lincoln and Otero counties
Two positions currently held by:
- Erinna M. Atkins
- Jared G. Kallunki

*Ineligible to seek re-election

Send nomination petitions to:

Interim Executive Director Richard Spinello
State Bar of New Mexico
PO Box 92860
Albuquerque, NM 87199-2860
rspinello@nmbar.org

Petitions must be received by 5 p.m., Oct. 20

Direct inquiries to 505-797-6038 or kbecker@nmbar.org.

Nomination Petition for Board of Bar Commissioners

We, the undersigned, members in good standing of the State Bar of New Mexico, nominate _____, whose principal place of practice is in the _____Bar Commissioner District, State of New Mexico, for the position of commissioner of the State Bar of New Mexico representing the _____Bar Commissioner District.

Submitted_____, 2017

(1) _____ _____
Signature

_____ _____
Type or Print Name *Address*

(2) _____ _____
Signature

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Type or Print Name *Address*

(3) _____ _____
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(4) _____ _____
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(7) _____ _____
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(8) _____ _____
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(9) _____ _____
Signature

_____ _____
Type or Print Name *Address*

(10) _____ _____
Signature

_____ _____
Type or Print Name *Address*

Legal Education

October

12 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

12 **Contempt of Court: The Case that Forever Changed the Practice of Law (2017 Annual Meeting)**
1.5 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

13–14 **Family Law Institute: Heartburn Issues—How not to Commit Malpractice in Military Divorce and in Relocation Cases**
Total Possible CLE Credits: 10.0 G, 1.0 EP (plus an optional 1.0 EP)
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

18 **U.S. Patent and Trademark Office Comes to Albuquerque**
5.0 G
Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

19 **New Mexico Estate Planning Council Seminar**
3.7 G
Live Seminar, Albuquerque
New Mexico Estate Planning Council
www.nmpec.com

19 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

19 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Live Seminar, Taos
Center for Legal Education of NMSBF
www.nmbar.org

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

19 **Practical Succession Planning for Lawyers (2017)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

20 **Rise of the Machines, Death of Expertise: Skeptical Views of Scientific Evidence**
3.5 G, 2.5 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

20 **Ethics and Client Money: Trust Funds, Setoffs and Retainers**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

20 **Annual Criminal Law Seminar**
10.0 G, 2.0 EP
Live Seminar, Ruidoso
El Paso Criminal Law Group, Inc.
915-534-6005

24 **Network of State and Federal Counsel Conference**
7.7 G, 2.0 EP
Live Seminar, Santa Fe
Davis and Henderson
800-274-7280 x2816

25 **Drafting Contract Remedies**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

26 **2016 Trial Know-How! (The Reboot)**
4.0 G, 2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

26 **2016 Real Property Institute**
4.5 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

26 **Lessons Learned from the "Trial of The Century" (2017 Annual Meeting)**
1.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

27 **Craig Othmer Memorial Procurement Code Institute**
2.5 G, 1.0 EP
Live Seminar, Santa Fe
Center for Legal Education of NMSBF
www.nmbar.org

27 **Fall Elder Law Institute—Hot Topics in Adult Guardianship Law**
4.5 G, 1.5 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

27 **The Notorious DWI Seminar**
6.0 G
Live Seminar
Albuquerque
New Mexico Criminal Defense Lawyers Association
info@nmcdla.org

31 **2017 Americans with Disabilities Act Update**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

November

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

2 **The Duty to Consult with Tribal Governments: Law, Practice and Best Practices**
2.3 G, 1.0 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

3 **2017 ADR Institute**
Is Your Dispute Resolution Safe?—Issues to Consider in Meditation and Other ADR Processes
4.0 G, 1.0 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

3 **Local Tax Court Cases with National Implications Including the Mescalero Apache U.S. Tax Court Decision**
1.0 G
Live Seminar, Las Cruces
Center for Legal Education of NMSBF
www.nmbar.org

3 **Ethics for Transactional Lawyers**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

3 **Get Smart About Open Government Laws**
6.0 G
Live Seminar, Albuquerque
New Mexico Foundation for Open Government
505-220-2820

7 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Live Webcast/Live Seminar
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

8 **Litigation and Argument Writing in the Smartphone Age**
5.0 G, 1.0 EP
Live Webcast/Live Seminar
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

9 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

9 **Strategies for Well-Being and Ethical Practice**
2.0 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

9 **Thriving or Surviving? Strategies for Well-being and Ethical Practice**
2.0 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

16 **2017 Probate Institute**
6.3 G , 1.0 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

17 **2016 Ethics, Confidentiality and the Attorney-Client Privilege Update**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

17 **Sports and Entertainment Law**
5.0 G, 1.0 EP
Live Seminar, Albuquerque
New Mexico Black Lawyers Association
www.newmexicoblacklawyers association.org/

28 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Live Webcast/Live Seminar
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **New Mexico Liquor Law for 2017 and Beyond**
3.5 G
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

30 **The Basics of Family Law**
5.2 G, 1.0 EP (plus an optional 1.0 EP)
Live Webcast/Live Seminar, Albuquerque
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 September 29, 2017

PUBLISHED OPINIONS

A-1-CA-35013	State v. J Storey	Affirm/Reverse/Remand	09/28/2017

UNPUBLISHED OPINIONS

A-1-CA-34359	State v. J Mayes	Affirm	09/25/2017
A-1-CA-35426	CYFD v. Katrina A	Affirm	09/25/2017
A-1-CA-36011	Wild Horse v. NM Livestock	Affirm	09/25/2017
A-1-CA-36057	Wells Fargo Bank v. S Alverson	Affirm	09/25/2017
A-1-CA-34242	State v. F Garduno	Affirm/Vacate/Remand	09/26/2017
A-1-CA-34322	State v. M Sanchez	Affirm	09/27/2017
A-1-CA-35859	CYFD v. Sarah A	Affirm	09/27/2017
A-1-CA-35860	CYFD v. Alfonso A	Affirm	09/27/2017
A-1-CA-36173	CYFD v. Shirlee C	Affirm	09/27/2017

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

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

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

Clerk's Certificate of Change to Inactive Status

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Effective September 8, 2017:
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Bainbridge Island, WA 98110

Effective September 2, 2017:
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Clerk's Certificate of Admission

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Dated Sept. 27, 2017

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Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

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

Effective October 11, 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		
5-106	Peremptory challenge to a district judge; recusal; procedure for exercising	07/01/2017
5-123	Public inspection and sealing of court records	03/31/2017
5-204	Amendment or dismissal of complaint, information andindictment	07/01/2017
5-401	Pretrial release	07/01/2017
5-401.1	Property bond; unpaid surety	07/01/2017
5-401.2	Surety bonds; justification of compensated sureties	07/01/2017
5-402	Release; during trial, pending sentence, motion for new trial and appeal	07/01/2017
5-403	Revocation or modification of release orders	07/01/2017
5-405	Appeal from orders regarding release or detention	07/01/2017
5-406	Bonds; exoneration; forfeiture	07/01/2017
5-408	Pretrial release by designee	07/01/2017
5-409	Pretrial detention	07/01/2017
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
6-401	Pretrial release	07/01/2017
6-401.1	Property bond; unpaid surety	07/01/2017
6-401.2	Surety bonds; justification of compensated sureties	07/01/2017
6-403	Revocation or modification of release orders	07/01/2017
6-406	Bonds; exoneration; forfeiture	07/01/2017
6-408	Pretrial release by designee	07/01/2017
6-409	Pretrial detention	07/01/2017
6-506	Time of commencement of trial	07/01/2017
6-703	Appeal	07/01/2017
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
7-401	Pretrial release	07/01/2017
7-401.1	Property bond; unpaid surety	07/01/2017
7-401.2	Surety bonds; justification of compensated sureties	07/01/2017
7-403	Revocation or modification of release orders	07/01/2017
7-406	Bonds; exoneration; forfeiture	07/01/2017
7-408	Pretrial release by designee	07/01/2017
7-409	Pretrial detention	07/01/2017
7-506	Time of commencement of trial	07/01/2017
7-703	Appeal	07/01/2017

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
8-401	Pretrial release	07/01/2017
8-401.1	Property bond; unpaid surety	07/01/2017
8-401.2	Surety bonds; justification of compensated sureties	07/01/2017
8-403	Revocation or modification of release orders	07/01/2017
8-406	Bonds; exoneration; forfeiture	07/01/2017
8-408	Pretrial release by designee	07/01/2017
8-506	Time of commencement of trial	07/01/2017
8-703	Appeal	07/01/2017

Criminal Forms

9-301A	Pretrial release financial affidavit	07/01/2017
9-302	Order for release on recognizance by designee	07/01/2017
9-303	Order setting conditions of release	07/01/2017
9-303A	Withdrawn	07/01/2017
9-307	Notice of forfeiture and hearing	07/01/2017
9-308	Order setting aside bond forfeiture	07/01/2017
9-309	Judgment of default on bond	07/01/2017
9-310	Withdrawn	07/01/2017
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

12-204	Expedited appeals from orders regarding release or detention entered prior to a judgment of conviction	07/01/2017
12-205	Release pending appeal in criminal matters	07/01/2017
12-307.2	Electronic service and filing of papers	07/01/2017*
12-307.2	Electronic service and filing of papers	08/21/2017*
12-314	Public inspection and sealing of court records	03/31/2017

*The rule adopted effective July 1, 2017, implemented mandatory electronic filing for cases in the Supreme Court. The rule adopted effective August 21,2017, implements mandatory electronic filing in the Court of Appeals.

Rules Governing Admission to the Bar

15-104	Application	08/04/2017
15-105	Application fees	08/04/2017
15-301.1	Public employee limited license	08/01/2017
15-301.2	Legal services provider limited law license	08/01/2017

Rules of Professional Conduct

16-102	Scope of representation and allocation of authority between client and lawyer	08/01/2017

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 for Minimum Continuing Legal Education

18-203	Accreditation; course approval; provider reporting	09/11/2017

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.

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-060

No. 34,826 (filed April 24, 2017)

UNIFIED CONTRACTOR, INC.,
Plaintiff/Counterdefendant-Appellant,
v.
ALBUQUERQUE HOUSING AUTHORITY, a political subdivision,
Defendant/Counterclaimant-Appellee.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
VALERIE A. HULING, District Judge

SEAN R. CALVERT
CALVERT MENICUCCI, P.C.
Albuquerque, New Mexico
for Appellant

JESSICA M. HERNANDEZ
City Attorney
JOHN E. DUBOIS
Assistant City Attorney
KEVIN A. MORROW
Assistant City Attorney
CITY OF ALBUQUERQUE
Albuquerque, New Mexico
for Appellee

Opinion

James J. Wechsler, Judge

{1} This litigation and appeal result from a contractual dispute between Appellant Unified Contractor, Inc. (Unified) and Appellee Albuquerque Housing Authority (AHA). Unified appeals from the district court's ruling that both parties breached the contract (the Contract) between them and that both parties were liable for damages.

{2} In its letter decision, the district court made various factual findings and legal conclusions. It also instructed the parties to submit requested findings of fact and conclusions of law within fourteen days. Neither party timely submitted findings of fact and conclusions of law.

{3} Unified characterizes several of its appellate arguments as either questions of law or mixed questions of law and fact. As discussed in detail below, to the extent that Unified's appellate arguments simply re-purpose questions of fact as questions of law, they are not well-taken.

{4} Unified does, however, raise legal arguments related to (1) its entitlement to notice of deficient performance and the opportunity to cure such deficient performance (notice and opportunity to cure) under the Contract and general principles of contract law, (2) the district court's decision to allow AHA to raise grounds for termination of the Contract other than those articulated as the basis for termination prior to trial, (3) the district court's method of calculating damages, and (4) the district court's refusal to consider Unified's motion for reconsideration. With the exception of Unified's argument as to the district court's method of calculating damages, these arguments lack merit. As to the calculation of damages, we adopt and apply the "contract price limitation rule" to the facts of this case; a decision requiring that we reverse the district court's judgment in favor of AHA in the amount of $33,281.37 and remand to the district court for entry of a final judgment in favor of AHA in the reduced amount of $22,257.34.

{5} Finally, Unified argues that it is entitled to statutory interest pursuant to the Prompt Payment Act. NMSA 1978, §§ 57-28-1 to -11 (2001, as amended through 2007). For the reasons discussed herein, we disagree. We therefore affirm in part, reverse in part, and remand to the district court for entry of a final judgment consistent with this opinion.

BACKGROUND

The Contract

{6} Unified submitted a bid in response to AHA's invitation for bids number B13001 (IFB B13001). IFB B13001 called for various construction services at four residential properties owned by AHA. The physical addresses of the properties in Albuquerque are 514 Morris NE, 716 Morris NE, 903 Nakomis NE, and 2905 Chelwood NE.

{7} Section 2.0 of IFB B13001 outlined the scope of work and technical specifications for the project. Subsection 2.3 provided that bidders could propose to substitute for products specified in IFB B13001 so long as the substitute product was "substantially equivalent or exceeding to the product[] identified." Subsection 2.4.1.5 required the bidder to "[p]aint [the] entire exterior of [each] building with one coat of [a]crylic base primer and one coat of elastomeric coating." Subsection 2.4.6.1.2.8 defined elastomeric coating by reference to "El Rey elastomeric coating, or equal[.]" IFB B13001 did not define a "coat" of elastomeric coating.

{8} AHA accepted Unified's bid, and the parties entered the Contract on July 15, 2013. The Contract expressly incorporated Form HUD-5370 (11/2006), which outlines general conditions for the termination of a construction contract due to default by the contractor or for the convenience of the agency. The Contract also contained various clauses related to billing and payment, including (1) a prompt payment clause, which required payment for "properly completed invoice[s]" within thirty days, and (2) a disputed billings clause, which required AHA to pay any undisputed portions of billings and to formally notify Unified of any disputed billings within ten days of receipt.

{9} On August 8, 2013, Unified submitted an elastomeric coating manufactured by UltraKote Products, Inc. for use in the project. AHA did not approve this product for use. On September 3, 2013, Unified submitted an elastomeric coating manufactured by ParexUSA for use in the project. Although disputes as to which product AHA approved continued throughout the litigation, the record shows that AHA approved ParexUSA elastomeric coating for use on the project on September 9, 2013.[1] ParexUSA

[1]Significant confusion exists as to whether El Rey elastomeric coating and ParexUSA elastomeric coating are identical products. We refer to ParexUSA elastomeric coating throughout this opinion because it is the product approved by AHA for use on the project and purchased by Unified. Whether AHA intended to approve ParexUSA elastomeric coating for use on the project is unclear but immaterial to this opinion.

elastomeric coating can be applied in one or two coats by spray, brush, or roller over porous or smooth surfaces. The stucco surfaces at issue in this case were porous. Using the "one coat" method, each pail of ParexUSA elastomeric coating would cover 125-180 square feet of a porous surface. Using the "two coat" method, each pail of ParexUSA elastomeric coating would cover 250-375 square feet of a porous surface.

The Project

{10} In September 2013, Unified began work at 716 Morris NE and 903 Nakomis NE. The contract price for these properties was $278,349. Unified submitted its first itemized invoices for work at these locations on September 24, 2013. Attachments to these invoices indicate that Unified had not yet patched stucco or applied elastomeric coating at either location. AHA paid these invoices in full.

{11} On October 16, 2013, AHA's site inspections revealed deficiencies in the appearance of the finished walls at 716 Morris NE and 903 Nakomis NE. AHA sent numerous emails and a letter between October 16, 2013 and November 13, 2013 requesting confirmation that the approved elastomeric coating was being installed in accordance with the manufacturer's recommendations. Unified repeatedly responded in the affirmative.

{12} On October 24, 2013, Unified submitted a second set of itemized invoices for work at 716 Morris NE and 903 Nakomis NE. Attachments to these invoices indicate that Unified had completed eighty-eight percent of stucco patching and elastomeric coating application at each location.

{13} On November 25, 2013, Unified submitted a third set of itemized invoices for work at 716 Morris NE and 903 Nakomis NE. Attachments to these invoices indicate that Unified had completed ninety-seven percent of stucco patching and elastomeric coating application at 716 Morris NE and one hundred percent of stucco patching and elastomeric coating application at 903 Nakomis NE.

{14} On November 26, 2013, AHA sent an email notifying Unified that, with respect to the October 24, 2013 invoices, AHA would pay for certain itemized work and withhold payment for other itemized work at the respective properties.

{15} On December 9, 2013, AHA sent another email notifying Unified that AHA would pay for certain work itemized in the November 25, 2013 invoices and would withhold payment for other itemized work. This email included attachments that differentiated between invoiced items by marking certain items "OK." On the same day, AHA exercised its contractual right to audit. The audit requested invoices demonstrating that Unified purchased the approved elastomeric coating for the project.

{16} On December 17, 2013, Unified produced the invoices and a certification letter from its supplier, ProBuild. The invoices showed that, between September 10, 2013 and October 23, 2013, Unified purchased seventy-nine pails of ParexUSA elastomeric coating.

{17} On December 18, 2013, Unified filed a complaint in district court for breach of contract, unjust enrichment, and violation of the Prompt Payment Act. The complaint alleged that AHA breached the Contract by failing to provide notice of billing disputes within ten days and by failing to make prompt payment for undisputed, invoiced items.

{18} On December 29, 2013, Unified submitted itemized invoices for work at 716 Morris NE and 514 Morris NE. Attachments to these invoices indicate that Unified had completed one hundred percent of stucco patching and elastomeric coating application at 716 Morris NE and twenty percent of stucco patching and elastomeric coating application at 514 Morris NE. AHA did not pay these invoices.

{19} On January 3, 2014, AHA terminated the Contract. As grounds for termination, AHA stated that Unified materially breached the Contract by failing to (1) use contractually required construction materials, and (2) follow the manufacturer's recommended application process for the construction materials used. AHA alleged that its inspections revealed that Unified was not following the manufacturer's recommended application process. Unified amended its complaint to include a claim of wrongful termination of the Contract. AHA answered the amended complaint and filed a counterclaim for breach of contract.

The Trial

{20} The parties conducted discovery, and the district court set the matter for trial in February 2015. Unified filed a motion for partial summary judgment, which alleged that AHA breached the Contract by failing to comply with contract provisions related to bill payment and billing disputes. The district court entered a preliminary order granting the motion with respect to liability but reserving judgment on the issue of damages.

{21} Witnesses at trial included (1) Unified President Ivan Santistevan, (2) AHA Capital Improvements Projects Coordinator James Tacosa, (3) ProBuild employee Kenneth Garcia, (4) licensed stucco contractor/expert witness Danny Carrillo,[2] (5) AHA Capital Improvements Manager Patrick Strosnider, and (6) AHA Executive Director Linda Bridge. Both Santistevan and Tacosa provided overviews of the events leading up to AHA's termination of the Contract, including the approval of ParexUSA elastomeric coating for use on the project. The other witnesses testified more narrowly and only with respect to their own expertise or involvement in the project.

{22} Santistevan testified that (1) AHA approved ParexUSA elastomeric coating for use on the project, (2) Unified applied ParexUSA elastomeric coating according to the manufacturer's recommendations, (3) the ProBuild invoices indicated that Unified purchased seventy-nine pails of ParexUSA elastomeric coating, (4) seventy-nine pails of ParexUSA elastomeric coating would cover between 9,875 and 14,220 square feet of porous surface, (5) 716 Morris NE is 18,986 square feet, (6) 903 Nakomis NE is 19,592 square feet, and (7) Unified "would have" purchased additional pails of elastomeric coating to complete the project.

{23} Garcia testified that (1) the ProBuild invoices indicated that Unified purchased seventy-nine pails of ParexUSA elastomeric coating, (2) the stucco surfaces at issue were porous, (3) seventy-nine pails of ParexUSA elastomeric coating would cover between 9,875 and 13,500[3] square feet of porous surface, and (4) he did not recall Unified purchasing elastomeric coating in addition to the quantity reflected on the invoices.

[2]AHA did not expressly qualify Carrillo as an expert witness. However, when Unified raised this issue, the district court stated "I'm from that school where you don't have to offer the expert, but if the expert starts to testify and you don't believe that he's qualified, then you need to make the objection." Unified did not offer further objection to Carrillo's testimony or expertise.

[3]This calculated range appears to result from a multiplication error during Garcia's testimony. The correct range as per the manufacturer's guide, and as indicated above, is 9,875 to 14,220 square feet.

{24} Due to the discrepancy between Santistevan's testimony and Garcia's testimony with respect to the purchase of additional elastomeric coating, the district court allowed Unified to recall Garcia for the purpose of introducing additional invoices. Unified declined to recall Garcia.

{25} Tacosa testified that 716 Morris NE and 903 Nakomis NE consist of between 40,000 and 43,000 square feet of surface area that required elastomeric coating under the Contract. He further testified that he suspected that Unified was underapplying the elastomeric coating because the ProBuild invoices indicated that Unified purchased insufficient material to cover the surface area in question to the thickness required by the manufacturer.

{26} AHA offered expert testimony from Carrillo, whom it hired to provide an independent analysis of Unified's performance. Carrillo conducted visual inspections of 716 Morris NE, 903 Nakomis NE, and 514 Morris NE and prepared a written report that presented his findings. The district court received Carrillo's report in evidence. Carrillo's inspection evaluated Unified's performance against the scope of work outlined in IFB B13001 and concluded that:

> There are numerous instances where new paint was applied directly to existing damaged wood, without adhering to the printed specifications. . . . Paint was not applied to 100% of CMU wall surfaces. In addition there were many instances of paint not being applied to the proper thickness. In order for an elastomeric paint to protect the underlying CMU the paint must be applied such that no moisture can enter below the paint, (no pin-holing). CMU walls were painted without installing cap blocks. . . . Cracks were simply patched with El Rey Premium stucco, no fiber mesh and basecoat. Large holes were left in stucco, allowing points for moisture infiltration. Some walls were painted lacking the proper paint thickness. The lack of proper thickness paint is visually evident, and will remain so for the life of the stucco system. Pin-holing is a characteristic of application, not aging.

Carrillo's testimony was consistent with his report. Carrillo also testified that there would be "no way to get the proper thickness" if the quantity of elastomeric coating purchased by Unified was applied to approximately 40,000 square feet of surface area and agreed with AHA's counsel that the incorrect application of elastomeric coating "is almost worse than not putting it on at all."

{27} Both parties offered testimony related to damages resulting from the others' breach of the Contract. Strosnider testified that he walked the project sites with a general contractor for the purpose of estimating the scope and cost of required repairs at 716 Morris NE and 903 Nakomis NE. This estimate was memorialized as Defendant's Exhibit HHH, which the district court received in evidence. The estimate indicated a cost of $125,600 for repairs at 716 Morris NE and 903 Nakomis NE, including (1) applying a second coat of elastomeric coating to the buildings and walls, and (2) sanding, patching, priming and painting the fascia.

{28} After the close of the testimony, the parties submitted closing arguments in writing. Unified's argument articulated its position that the Contract required AHA to provide Unified with notice and opportunity to cure prior to termination. On April 10, 2015, the district court issued its letter decision, stating that both parties breached the Contract and were liable for damages.

{29} AHA's breach resulted from its failure to follow the disputed billing provision of the Contract. However, the district court ruled that because Unified provided notice of a "major dispute" as of October 15, 2013, AHA was not subject to sanctions under the Prompt Payment Act. The district court awarded Unified $92,318.63 for completed, but unpaid, work at 716 Morris NE, 903 Nakomis NE and 514 Morris NE.

{30} Unified's breach resulted from its failure to apply elastomeric coating in accordance with the manufacturer's specifications and its intentional misrepresentations as to the same. The district court ruled that Unified's conduct resulted in a "material[] breach[]" of the Contract and justified termination by AHA. The district court awarded $125,600 in damages on AHA's counterclaim. It specifically tied this amount to necessary repairs at 716 Morris NE and 903 Nakomis NE. The district court did not award additional damages sought by AHA due to insufficient evidence.

{31} In its letter decision, the district court ordered the parties to submit requested findings of fact and conclusions of law within fourteen days if either party wished to appeal. Neither party did so, and the district court entered its judgment on April 24, 2015. On April 27, 2015, Unified filed a motion for reconsideration. This motion addressed (1) whether AHA's evidence of damages was sufficient as a matter of law, (2) the district court's method of calculating damages, and (3) the district court's refusal to grant interest pursuant to the Prompt Payment Act. The district court refused to consider Unified's motion. In doing so, it noted that neither party timely filed findings of fact or conclusions of law. Unified filed requested findings of fact and conclusions of law on June 3, 2015 and filed its notice of appeal on June 11, 2015. The district court did not act on the June 3, 2015 filing.

PRESERVATION

{32} To preserve an alleged error for appeal, a litigant must make known to the court the action that the litigant desires the court to take or the litigant's objection to the action of the court and the grounds therefor. Rule 1-046 NMRA. In their appellate briefing, both parties discuss the effect of Unified's failure to request findings of fact and conclusions of law on our appellate jurisdiction and standard of review. Historically, the failure to request findings of fact and conclusions of law was a bar to appellate review of the sufficiency of the evidence in a civil case. *See, e.g.*, *Duran v. Montoya*, 1952-NMSC-025, ¶ 6, 56 N.M. 198, 242 P.2d 492 ("We have . . . repeatedly held a party could not obtain a review of the evidence where he failed to make requested findings or file exceptions."). However, in *Cockrell v. Cockrell*, our Supreme Court expressly held that "a request for findings [of fact and conclusions of law] is not the only means of preserving error based upon insufficiency of the evidence to support a judgment." 1994-NMSC-026, ¶ 1, 117 N.M. 321, 871 P.2d 977. As such, a party may preserve questions as to the sufficiency of the evidence if the party timely submits findings of fact and conclusions of law or "otherwise call[s] the [district] court's attention to a problem with the sufficiency of the evidence[.]" *Id.* ¶¶ 8-9.

{33} In the current case, Unified failed to timely submit requested findings of fact and conclusions of law but did file a motion for reconsideration of the judgment. Had this motion addressed the sufficiency of the evidence, it could have preserved a sufficiency argument on appeal. However, as noted in its brief in chief, the purpose of Unified's motion for reconsideration was

not to "challenge any findings made by the [district] court in its letter decision." Instead, the motion for reconsideration "assumed that the [district] court was correct" and "challenged only the legal issues" related to the damages award.

{34} We reiterate that a party need not request findings of fact and conclusions of law to preserve certain issues for appeal. *Blea v. Sandoval*, 1988-NMCA-036, ¶ 7, 107 N.M. 554, 761 P.2d 432. However, in the absence of findings of fact and conclusions of law, or an alternate manner of calling the insufficiency of the evidence to the attention of the district court, our review is limited to "review [of] the [district] court's decision to determine whether it is legally correct, and whether it is supported by findings of fact, if any, made by the [district] court." *Id.*

BREACH OF CONTRACT BY UNIFIED

{35} The district court found that Unified materially breached the Contract and concluded that AHA properly terminated the Contract. Unified argues that the district court's finding of breach was erroneous because AHA did not give Unified notice and opportunity to cure as required by the Contract itself and general principles of contract law. AHA argues in response that notice and opportunity to cure are not required to terminate a contract if the alleged breach is "vital" to the existence of the contract or if providing notice and opportunity to cure would be "futile."

{36} Both parties assert that we should review this issue as a mixed question of fact and law. We agree but note that our review addresses two distinct questions: (1) whether the Contract required that AHA provide Unified with notice and opportunity to cure prior to termination; and (2) if not, whether Unified materially breached the Contract. The first question is one of law, which we review de novo. *See Rivera v. Am. Gen. Fin. Servs., Inc.*, 2011-NMSC-033, ¶ 27, 150 N.M. 398, 259 P.3d 803 ("Contract interpretation is a matter of law[.]"). The second question is one of fact, which we review under a substantial evidence standard. *See Collado v. City of Albuquerque*, 2002-NMCA-048, ¶ 15, 132 N.M. 133, 45 P.3d 73 ("Breach of contract is a question of fact that we review under a substantial evidence standard."); *KidsKare, P.C. v. Mann*, 2015-NMCA-064, ¶ 20, 350 P.3d 1228 ("The materiality of a breach is a specific question of fact." (alteration, internal quotation marks, and citation omitted)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Collado*, 2002-NMCA-048, ¶ 15 (internal quotation marks and citation omitted). However, a party that fails to "request or timely submit findings [of fact and conclusions of law] or otherwise call the [district] court's attention to a problem with the sufficiency of the evidence . . . waive[s the] right to appellate review." *Cockrell*, 1994-NMSC-026, ¶ 9.

Notice and Opportunity to Cure

{37} Unified's brief in chief cites various out-of-state cases for the proposition that "notice and an opportunity to cure is normally considered to be a condition precedent to termination [of a contract] by default." *See, e.g.*, *Blaine Econ. Dev. Auth. v. Royal Elec. Co.*, 520 N.W.2d 473, 476-77 (Minn. Ct. App. 1994) (holding that the contract at issue required written notice and opportunity to cure prior to termination for default). In response, AHA cites various out-of-state cases for the proposition that exceptions to such requirements apply under certain factual circumstances. *See, e.g.*, *Olin Corp. v. Cent. Indus., Inc.*, 576 F.2d 642, 646-47 (5th Cir. 1978) (holding that a breach that is "vital to the existence of the contract" excuses performance); *Giuffre Hyundai, Ltd. v. Hyundai Motor Am.*, 756 F.3d 204, 210 (2d Cir. 2014) (holding that performance is excused "when the breaching party's misfeasance is incurable and when the cure is unfeasible" (alteration, internal quotation marks, and citation omitted)).

{38} Either argument may have merit under different circumstances. At common law, "[t]he concept of cure is deeply engrained . . . as an implied condition in every contract." Philip L. Bruner & Patrick J. O'Connor, Jr., 5 *Bruner & O'Connor Construction Law* § 18:37 (2016). In the current case, however, the language of the Contract militates against drawing inferences and instead allows for a decision based upon basic rules of contract interpretation. In *Public Service Company of New Mexico v. Diamond D Construction Company*, this Court compiled and reiterated these basic rules as follows:

> [W]e view the contract as a harmonious whole, give meaning to every provision, and accord each part of the contract its significance in light of other provisions. We will not interpret a contract such that our interpretation of a particular clause or provision will annul other parts of the document, unless there is no other reasonable interpretation. Apparently conflicting provisions must be reconciled so as to give meaning to both, rather than nullifying any contractual provision, if reconciliation can be effected by any reasonable interpretation of the entire instrument in light of the surrounding circumstances.

2001-NMCA-082, ¶ 19, 131 N.M. 100, 33 P.3d 651 (internal quotation marks and citations omitted). We apply these rules to the Contract.

{39} Section 10.1 of the Contract, entitled "Remedies for Contractor Breach[,]" includes four subsections, numbered 10.1.1 through 10.1.4. The pertinent parts of Section 10.1 and Subsections 10.1.1 and 10.1.2 read:

> 10.1 . . . Pertaining to *contract-related issues*, it is the responsibility of both [AHA] and [Unified] to communicate with each in as clear and complete a manner as possible. If at any time during the term of this contract [AHA] or [Unified] is not satisfied with any issue, it is the responsibility of that party to deliver to the other party communication, in writing, fully detailing the issue and corrective action[.] . . . Further, [AHA] shall, at a minimum, employ the following steps in dealing with [Unified] as to any *performance issues*:
>
> > 10.1.1 If [Unified] is in material breach of the [C]ontract, [AHA] may promptly invoke the termination clause detailed within Form HUD-5370 (11/2006) . . . and terminate the [C]ontract for cause. . . .
> >
> > 10.1.2 Prior to termination, [AHA] *may* choose to warn [Unified] verbally or in writing, of any issue of non-compliant or unsatisfactory performance. Such written warning *may* include placing [Unified] on probation, thereby giving [Unified] a certain period of time to correct the deficiencies or potentially suffer termination.

(Emphasis added.) As a threshold matter, the Contract distinguishes between "contract-related issues" and "performance issues." While the Contract does not define these terms, AHA's notice of termination

indicates a dispute arising from Unified's performance. Statements by AHA to Unified indicating AHA's dissatisfaction with Unified's performance include, but are not limited to,

> Given your *failure to perform* in compliance with contractual requirements to use the material required for construction services as identified in the Technical Specifications . . . and your *failure to follow* the manufacturer's recommended application process for these materials in the construction services you have provided . . . you are in material breach of the . . . Contract[.]

(Emphasis added.)

{40} Viewing the Contract as a harmonious whole, performance-related issues are a subset of contract-related issues and are afforded distinct treatment with respect to notice and opportunity to cure requirements. Subsections 10.1.1 through 10.1.4 relate directly to remedies for contractor breach arising from performance-related issues. Subsection 10.1.2 articulates that AHA "may" elect to provide notice and opportunity to cure. *See Cerrillos Gravel Prods., Inc. v. Bd. of Cty. Comm'rs of Santa Fe Cty.*, 2005-NMSC-023, ¶ 12, 138 N.M. 126, 117 P.3d 932 (noting that the word "may" is permissive). This language, of course, also affords AHA the right not to provide such notice.

{41} Unified argues that language in Section 10.1 requires that AHA provide notice and opportunity to cure in the context of performance-related disputes. But such a reading would nullify the language of Subsection 10.1.2. *See Diamond D Constr. Co.*, 2001-NMCA-082, ¶ 19 ("Apparently conflicting provisions must be reconciled so as to give meaning to both, rather than nullifying any contractual provision[.]" (internal quotation marks and citation omitted)).

{42} Unified additionally argues that Form HUD-5370 requires that AHA provide notice and opportunity to cure. In support of this argument, Unified cites to Subsection 20(H) of Form HUD-5370, which provides:

If the Contractor does not promptly replace or correct rejected work, the [public housing authority] may (1) by contract or otherwise, replace or correct the work and charge the cost to the Contractor, or (2) terminate for default the Contractor's right to proceed.

{43} Subsection 20(h) of Form HUD-5370, however, merely provides an alternate justification for a public housing authority to terminate a contract for default. It in no way limits AHA's right to terminate for material breach as provided in the Contract. Subsection 10.1.1 of the Contract expressly allows AHA to "promptly invoke the termination clause detailed within Form HUD-5370 . . . and terminate the [C]ontract for cause" if Unified "is in material breach[.]" Subsection 20(h) of Form HUD-5370 is not a termination clause. *Compare* Form HUD-5370 § 20, *with* Form HUD-5370 §§ 32, 34.

{44} The United States Court of Claims has strictly construed the default clause within Form HUD-5370. *See Prof'l Servs. Supplier, Inc. v. United States*, 45 Fed. Cl. 808, 810 (Fed. Cl. 2000) (holding that federal acquisition requirement (FAR) 48 C.F.R. Section 52.249-10 "does not require that a contractor be afforded a period in which to cure defects before a contract is terminated for default");[4] Bruner & O'Connor, *supra* at § 18:37 ("[T]he absence of an express reference to 'cure notice' in the default clause . . . mean[s] that a federal construction contractor has no right to cure its defaults before termination of its contract."). We see no reason to interpret this federal regulation more broadly than our federal courts.

{45} Although deficiencies in Unified's performance undoubtedly could have been cured, neither the Contract nor the default clause contained within Form HUD-5370 requires that AHA provide notice and opportunity to cure performance-related issues prior to termination. As such, AHA was within its contractual rights to terminate the Contract if Unified's conduct resulted in a material breach. *See KidsKare, P.C.*, 2015-NMCA-064, ¶ 20 ("A material breach of a contract excuses the nonbreaching party from further performance under the contract.").

Material Breach of the Contract

{46} Because the district court did not err as a matter of law with respect to Unified's entitlement to notice and opportunity to cure, we turn to the district court's factual findings. Unified argues that the district court's finding that Unified breached the Contract is "directly contrary to all of the evidence."

{47} In its letter decision, the district court expressly found that (1) "[i]t would have been mathematically impossible for [Unified] to have properly applied the elastomeric coating[,]" and (2) Unified's failure "to prosecute the work . . . [or] acknowledge[] that [it] had not purchased enough coating to properly complete the work" resulted in a material breach of the Contract. These findings relate to the testimony of Santistevan and Garcia who addressed the quantity and coverage of elastomeric coating pursuant to the manufacturer's recommendations. Unified did not timely submit findings of fact and conclusions of law. As stated above, a party that fails to "request or timely submit findings [of fact and conclusions of law] or otherwise call the [district] court's attention to a problem with the sufficiency of the evidence . . . waive[s the] right to appellate review." *Cockrell*, 1994-NMSC-026, ¶ 9. As a result, the district court's findings and conclusions as articulated in its letter decision are binding on this Court.

Substantial Evidence of Unified's Deficient Performance

{48} Unified additionally claims that "the [district] court erred in finding that [it] failed to apply the elastomeric coating in accordance with the manufacturer's recommended thickness." Although Unified characterizes this as a separate argument on appeal, its alleged under-application of the elastomeric coating was the specific basis of the breach. Therefore, these arguments are inextricably linked.

{49} As noted immediately above, the district court expressly found that Unified did not apply the elastomeric coating in accordance with the manufacturer's recommendations. Because Unified waived its right "to object that the judgment is not supported by the evidence" the district court's factual findings as to Unified's under-application of elastomeric coating are again binding on this Court. *Id.* ¶ 8 (emphasis omitted).

GROUNDS FOR TERMINATION

{50} Unified argues that the district court erred in allowing AHA to raise grounds for termination other than those articulated as the basis for termination prior to trial. In doing so, it makes both evidentiary and legal arguments. Unified's evidentiary argument again relates to the district court's findings of fact as to the application of elastomeric coating. We decline to re-address this argument. *See id.* We review Unified's legal argument de novo. *Eker Bros. Inc. v. Rehders*, 2011-NMCA-092, ¶ 7, 150 N.M. 542, 263 P.3d 319.

[4]Prior to its recent amendment, the default clause contained within 48 C.F.R Section 52.249-10(a) was identical to that contained in Form HUD-5370. After the amendment, the clauses remain nearly identical.

{51} AHA's notice of termination cited Unified's (1) use of a non-approved elastomeric coating and (2) failure to follow the manufacturer's recommended application process. The notice of termination detailed the second justification, referring to Unified's failure to utilize a "two coat" application process. At trial, AHA expanded this justification to include the theory that Unified simply under-applied elastomeric coating, regardless of the number of coats applied.

{52} Unified argues that federal contracting law—arguably applicable here due to the Contract's incorporation of Form HUD-5370—prohibited AHA from raising the theory at trial that Unified under-applied elastomeric coating. In support of this argument, Unified cites *McDonnell Douglas Corp. v. United States*, 35 Fed. Cl. 358 (Fed. Cl. 1996), *rev'd on other grounds by McDonnell Douglas Corp. v. United States*, 182 F.3d 1319 (Fed. Cir. 1999).

{53} In *McDonnell Douglas*, the United States Court of Claims held that "[a] termination for default may be justified at trial on other grounds in some circumstances, if the Government exercised discretion in terminating the contract." 35 Fed. Cl. at 374. The court, however, limited its holding to circumstances in which "the reason used must have been a non-curable one, so that the contractor would not be prejudiced by the lack of a cure notice." *Id.* As discussed above, Unified is not entitled to notice and opportunity to cure under the Contract or Form HUD-5370. *McDonnell Douglas* is, therefore, distinguishable inasmuch as the prejudice sought to be prevented does not arise in the absence of the right to notice and opportunity to cure. In the absence of prejudice, we discern no reason to limit the grounds upon which a governmental entity, as a contract purchaser, may attempt to prove a default by a contractor. *See Coll. Point Boat Corp. v. United States*, 267 U.S. 12, 15-16 (1925) (holding that a party to a contract "may . . . justify an asserted termination, rescission, or repudiation, of a contract by proving that there was, at the time, an adequate cause, although it did not become known to him until later"); *Kelso v. Kirk Bros. Mech. Contractors, Inc.*, 16 F.3d 1173, 1175 (Fed. Cir. 1994) (holding that a default termination shall be sustained "if justified by circumstances at the time of termination, regardless of whether the Government originally removed the contractor for another reason").

{54} Our conclusion is bolstered by the nature of Unified's argument on this issue. The evidence and notice of termination provide that AHA was concerned that Unified's application of elastomeric coating did not comply with the manufacturer's requirements. Whether AHA articulated this concern by reference to a certain number of coats, or by reference to the gross quantity of elastomeric coating applied, is a distinction without a meaningful difference. Both provide an adequate basis for a finding of material breach due to the under-application of the elastomeric coating. Based upon the evidence presented, it was impossible for Unified to comply with the manufacturer's recommended application requirements and to properly coat all the porous surfaces of the two buildings. The seventy-nine pails of coating purchased were insufficient to comply with the Contract, regardless of whether Unified agreed to apply the coating in a one-step process or a two-step process for 716 Morris NE and 903 Nakomis NE. Under the circumstances of this case, the district court did not err in considering the grounds presented by AHA at trial—the misapplication of the elastomeric coating—as the basis for the termination of the Contract.

DAMAGES

{55} Unified makes two arguments related to the district court's award of damages: (1) whether "as a matter of law, the evidence provided by AHA was sufficiently certain to be the basis for an award of damages," and (2) if so, whether the district court erred by calculating damages in a manner that resulted in a double recovery to AHA.

Substantial Evidence of Damages

{56} As a general rule, the amount of damages claimed for breach of contract must be reasonably ascertainable. *Louis Lyster, Gen. Contractor, Inc. v. Town of Las Vegas*, 1965-NMSC-097, ¶ 7, 75 N.M. 427, 405 P.2d 665. "Damages which are speculative, conjectural, or remote are not to be considered for compensation." *City of Santa Fe v. Komis*, 1992-NMSC-051, ¶ 11, 114 N.M. 659, 845 P.2d 753 (internal quotation marks and citation omitted). Unified argues, essentially, that the evidence at trial is insufficient to meet these standards as a matter of law. We disagree with Unified's characterization of its evidentiary argument as a question of law and reiterate that "we review findings regarding damages to determine whether they are supported by substantial evidence." *Jones v. Auge*, 2015-NMCA-016, ¶ 48, 344 P.3d 989 (internal quotation marks and citation omitted).

{57} In *Louis Lyster*, cited by Unified on appeal, our Supreme Court reversed an award of damages because it was based upon a "rough estimate"—a circumstance that arguably occurred in the current case. 1965-NMSC-097, ¶ 8. But *Louis Lyster* was not reversed as a matter of law. It was reversed because substantial evidence did not support the award. *Id.*

{58} The district court expressly found that "[t]he site inspection did reveal defects with regard to the elastomeric coating, a hole in the soffit, failure to properly prepare the fascia for painting, and other defects[.]" Carrillo's expert testimony and Defendant's Exhibit III, which detailed deficiencies in Unified's performance, support these findings. The district court also expressly found that AHA suffered damages in the amount of $125,600. Strosnider's testimony and Defendant's Exhibit HHH, which detailed the scope and cost of required repairs, support this finding. A district court's calculation of the amount of damages "will not be disturbed unless clearly wrong." *Davis v. Campbell*, 1948-NMSC-041, ¶ 18, 52 N.M. 272, 197 P.2d 430. As discussed repeatedly in this opinion, Unified's failure to preserve its sufficiency argument results in the waiver of its right to a review of the evidence on appeal. *Cockrell*, 1994-NMSC-026, ¶¶ 8-9. Unified's argument that the evidence at trial is insufficient as a matter of law is not well-taken.

Erroneous Calculation

{59} Unified additionally argues that the district court's failure to offset AHA's damages by the value of uncompensated services Unified provided was an error that resulted in a double recovery for AHA. In support of this argument, Unified claims that even the defective work it performed added value to AHA's property. We disagree that Unified is entitled to additional payment or an offset of damages for defective work. However, "[i]t is a fundamental tenet of the law of contract remedies that, regardless of the character of the breach, an injured party should not be put in a better position than had the contract been performed." *Paiz v. State Farm Fire & Cas. Co.*, 1994-NMSC-079, ¶ 30, 118 N.M. 203, 880 P.2d 300 (internal quotation marks and citation omitted).

{60} UJI 13-850 NMRA provides that damages for defective or unfinished construction are measured by "[t]he reasonable cost of completing the construction

called for in the contract." This instruction does not, however, discount general principles of contract law, one of which requires that damages for breach of contract "must be the amount of money that will place [the injured party] in the position [it] would have been in if the contract had been performed." UJI 13-843 NMRA.

{61} The interplay between these jury instructions is captured in *Castricone v. Michaud*, in which the Illinois Court of Appeals applied the "contract price limitation rule" under similar circumstances. 583 N.E.2d 1184, 1186 (Ill. App. Ct. 1991). In *Castricone*, the defendant was a building contractor who entered a contract to build a single-family home for the plaintiffs. *Id.* at 1184. A dispute arose over the quality of workmanship, and the defendant ceased work prior to completing the project. *Id.* The contract price was $89,000, of which the plaintiffs paid $76,400 prior to the date on which the defendant ceased work. *Id.* at 1184, 1186. "[T]he plaintiffs expended $27,407.88 to finish the home, and to repair and replace defective construction." *Id.* at 1185.

{62} At trial, the district court awarded the plaintiffs $27,407.88, the entire cost incurred in completing and repairing the house. *Id.* The appellate court reversed and reduced the plaintiffs' award for breach of contract damages to $14,807.88. *Id.* at 1186. In so holding, the appellate court applied the contract price limitation rule, which provides that "the measure of damages is the difference between the total cost of completing the building less the contract price." *Id.* at 1185. *See* 24 Richard A. Lord, *Williston on Contracts* §66:17, at 462 (2002 4th ed.) ("If the defect causing the breach is remediable from a practical standpoint, recovery generally will be based on the market price of completing or correcting the performance, minus the unpaid part of the contract price.").

{63} In the current case, the district court awarded contract damages to both Unified and AHA. It based Unified's damages on the value of previously uncompensated work at three project sites: (1) $47,996.84 at 716 Morris NE; (2) $15,842.79 at 903 Nakomis NE; and (3) $28,478.99 at 514 Morris NE. It based AHA's damages on the estimate to repair and complete work at 716 Morris NE and 903 Nakomis NE: a total of $125,600. The district court then fully offset the awards, which resulted in a judgment against Unified in the amount of $33,281.37.

{64} We adopt and apply the contract price limitation rule in this case because it comports with the general principles of contract law applied in New Mexico. *See Paiz*, 1994-NMSC-079, ¶ 30 ("It is a fundamental tenet of the law of contract remedies that, regardless of the character of the breach, an injured party should not be put in a better position than had the contract been performed." (internal quotation marks and citation omitted)). Under the contract price limitation rule, the district court's judgment was error.

{65} As noted in the district court's letter decision, AHA had previously paid Unified $52,444.98 and $87,200.72 for work performed at 716 Morris NE and 903 Nakomis NE respectively. Therefore, under the district court's decision, Unified will receive, and AHA will pay, a total of $100,441.82 for work performed at 716 Morris NE and $103,043.51 for work performed at 903 Nakomis NE. These payments, totaling $203,485.33, amount to less than the contract price of $278,349 for both properties. To affirm the district court's award of damages to AHA of $125,600 with regard to the 716 Morris NE and 903 Nakomis NE properties, in light of the payments totaling $203,485.33, would place AHA in a better position than if the contract had been fully performed.

{66} Instead, AHA is entitled to "the market price of completing or correcting the performance, minus the unpaid part of the contract price." 24 Lord, *supra*, § 66:17, at 462. Therefore, the correct measure of Unified's liability for AHA's damages with respect to 716 Morris NE and 903 Nakomis NE is the difference between the $125,600 required to complete and correct the performance and the unpaid part of the contract price of $74,863.67. This calculation results in damages to AHA of $50,736.33.

{67} In order to reach the final damages amount, the $50,736.33 must be reduced by $28,478.99 to account for damages awarded to Unified for previously uncompensated work at 514 Morris NE. This reduction results in total damages to AHA of $22,257.34. We reverse the district court's judgment in favor of AHA and remand to the district court for entry of a final judgment in favor of AHA in the amount of $22,257.34. *See Miller v. Bank of Am., N.A.*, 2014-NMCA-053, ¶ 47, 326 P.3d 20 (recalculating compensatory damages and remanding to the district court for entry of a final judgment consistent with the opinion), *rev'd on other grounds by Miller v. Bank of Am., N.A.*, 2015-NMSC-022, 352 P.3d 1162.

NOTICE OF BILLING DISPUTES AND STATUTORY INTEREST

{68} Unified argues that AHA failed to provide timely and sufficient notice of billing disputes as required by the Prompt Payment Act and the Contract. Unified also argues that the district court erred in concluding that it was not entitled to statutory interest under the Prompt Payment Act.

{69} With respect to the Contract, the district court found that AHA "technically breached the [C]ontract by failing to follow the disputed billing provision of Section 9.0." While it is possible that this breach merited damages in the form of interest in accordance with the terms of the Contract, the district court did not rule upon or discuss this issue in its letter decision. *See* Rule 12-321(A) NMRA ("To preserve an issue for review, it must appear that a ruling or decision by the trial court was fairly invoked.").

{70} With respect to the Prompt Payment Act, the district court ruled that AHA's mid-October 2013 correspondence constituted sufficient notice of a billing dispute to limit statutory liability. This ruling raises questions of statutory interpretation, which we review de novo. *Diamond D*, 2001-NMCA-082, ¶ 48.

{71} The Prompt Payment Act provides, in pertinent part, that "all construction contracts shall provide that payment for amounts due shall be paid within twenty-one days after the owner receives an undisputed request for payment." Section 57-28-5(A). The statute does not define "undisputed" as used therein.

{72} "Our principal goal in interpreting statutes is to give effect to the Legislature's intent. To do so, we first look to the language used and the plain meaning of that language." *Morris v. Brandenburg*, 2015-NMCA-100, ¶ 15, 356 P.3d 564 (internal quotation marks and citation omitted), *aff'd* 2016-NMSC-027, 376 P.3d 836. Dictionary definitions provide guidance as to the plain meaning of the words at issue. *Griego v. Oliver*, 2014-NMSC-003, ¶ 21, 316 P.3d 865.

{73} Webster's International Dictionary defines the word "undisputed" as "not disputed: unchallenged, unquestioned[.]" *Webster's Third New Int'l Dictionary*, 2492 (unabridged ed. 2002). Given this definition, raising a challenge or question as to an invoiced item limits a defendant's liability for statutory interest. Nothing in the plain language of the statute applies additional requirements—for example, those

provided by contract—as a consideration in determining liability.

{74} The district court concluded that inquiries by AHA related to the application of elastomeric coating placed Unified on notice of a "major dispute" and limited AHA's liability for statutory interest under the Prompt Payment Act. Under the circumstances of this case, we agree.

{75} The correspondence considered by the district court in formulating its decision directly relates to Unified's performance under the Contract. For example, the October 16, 2013 post-inspection email messages from AHA to Unified (1) indicated dissatisfaction with the application of elastomeric coating at 716 Morris NE and 903 Nakomis NE, and (2) asked Unified to confirm that it was applying the elastomeric coating in accordance with the manufacturer's recommendations. Similar correspondence continued through mid-November.

{76} As indicated by Tacosa's trial testimony, AHA suspected, but was unaware of the extent to which, Unified's performance was deficient. Nevertheless, the mid-October 2013 correspondence from AHA put Unified on notice that a question, or dispute, existed with respect to Unified's entitlement to payment for the subsequently invoiced work—regardless of whether AHA initially indicated that certain items were payable. Such notice is sufficient to limit liability for statutory interest under the Prompt Payment Act.

MOTION TO RECONSIDER

{77} Unified finally argues that the district court erred in denying its motion for reconsideration. We review the denial of a motion for reconsideration for abuse of discretion. *Deaton v. Gutierrez*, 2004-NMCA-043, ¶ 9, 135 N.M. 423, 89 P.3d 672. This Court has held that a district court does not abuse its discretion in denying a motion for reconsideration that "was merely a restatement of the arguments [the defendants] had already advanced." *Id.* ¶ 10; *see, e.g.*, *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000) (holding that a motion for reconsideration "is not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing").

{78} Unified's motion for reconsideration raised three issues: (1) whether AHA's evidence of damages was sufficient as a matter of law, (2) the district court's refusal to grant interest pursuant to the Prompt Payment Act, and (3) the district court's method of calculating damages. Unified expressly raised the first two arguments in its written closing argument. As such, the district court did not abuse its discretion in refusing to reconsider these issues. *Deaton*, 2004-NMCA-043, ¶ 9.

{79} The third issue relates to the district court's method of calculation of damages. We do not need to address this issue. Even if, in light of our reversal, the district court abused its discretion in denying Unified's motion to reconsider on this issue, the purpose of Unified's motion to reconsider has been realized. Unified stated in its brief in chief that its motion for reconsideration challenged only "whether the [district] court had legally miscalculated its award of damages[.]" We have addressed this issue on appeal.

CONCLUSION

{80} For the foregoing reasons, we affirm in part, reverse in part, and remand to the district court for entry of a final judgment consistent with this opinion.

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

JAMES J. WECHSLER, Judge

WE CONCUR:
TIMOTHY L. GARCIA, Judge
STEPHEN G. FRENCH, Judge

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-061

No. 33,418 (filed April 25, 2017)

GARY M. ROSS,
Petitioner-Appellee,
v.
STEPHANIE NEGRON-ROSS,
Respondent-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
ALISA A. HADFIELD, District Judge

L. HELEN BENNETT
L. HELEN BENNETT, P.C.
Albuquerque, New Mexico
for Appellee

STEPHANIE NEGRON
Ocean Park, Puerto Rico
Pro Se Appellant

Opinion

Timothy L. Garcia, Judge

{1} This case arises from a question of first impression regarding whether a marital community estate is entitled to an equitable lien on a spouse's sole and separate property when community funds have contributed to the equity in the property but the property has diminished in value due to declining market conditions. We hold that the community's contributions to the sole and separate property create the right to a community lien even when the property decreased in value. We adopt the formula utilized by the Arizona Court of Appeals in *Valento v. Valento*, as the method for calculating the community lien in this case and as an extension of the principles set forth in our prior case law. *See* 240 P.3d 1239, 1243-45 (Ariz. Ct. App. 2010). As a result, we reverse the district court on this issue. On remand, we leave it to the discretion of the district court to determine the proper apportionment of this community lien. We further hold that the district court did not abuse its discretion in determining that (1) substantial evidence existed regarding Wife's breach of her fiduciary duty to Husband through the embezzlement of funds from his dental practice, and (2) the parties were required to pay their own attorney fees.

BACKGROUND

{2} This appeal comes before this Court following the dissolution of marriage and division of property owned by the parties. Gary M. Ross (Husband) and Stephanie Negron-Ross (Wife) were married on September 11, 2010. At the time they were married, both parties owned assets of significant value. Husband, age fifty-eight at the time of the marriage, was a dentist and owned a private dental practice. Husband also owned several rental properties held by a limited liability corporation, the commercial property where his practice resides, and his personal residence in Albuquerque, New Mexico (the Spring Creek residence). Husband purchased the Spring Creek residence in 2004 for $799,000. Husband paid $160,000 as a down payment on the Spring Creek residence. The Spring Creek residence subsequently depreciated in value and was appraised at $700,000 at trial. Additionally, the Spring Creek residence was subject to two mortgages totaling $559,131 at the time of trial.

{3} Prior to the marriage, Wife, age fifty-four at the time of the marriage, worked in marketing for seventeen years and owned her own business for twelve years. Wife testified that she donated real property in Puerto Rico to her daughters in September 2009. However, she continued to make mortgage payments and receive rent from the property. The district court characterized the donation as "alleged" and found that Wife's testimony was not credible. During the marriage, Wife worked at Husband's dental practice earning a gross monthly income of $5,000. The district court found that during the marriage, "Wife breached her fiduciary duty and embezzled money and stole property from Husband's dental practice [in] the sum of $48,341." Husband was subsequently reimbursed through insurance for those losses.

{4} The parties separated on September 9, 2012, after less than two years of marriage, and Husband filed for a petition for dissolution of marriage on October 26, 2012. A minute order, filed on February 22, 2013, set an interim division of income and expenses. At the time the interim order was entered, Husband's monthly income was found to be $9,026 and Wife's monthly income was found to be $2,860. The district court entered a partial divorce decree dissolving the parties' marriage on June 21, 2013. Following several days of trial, the district court entered a final decree and judgment (final judgment) on October 4, 2013.

{5} The district court's final judgment included factual findings and rulings regarding the distribution of the parties' property including the real estate, bank accounts, and other assets. We only address those findings and rulings that are relevant to this appeal. With regard to the Spring Creek residence, the district court found that "[a]fter deducting the mortgage debt and Husband's sole and separate down payment the Spring Creek residence has a negative value" and that "the expenditures on the Spring Creek residence during the marriage" did not increase its value. Husband was awarded the Spring Creek residence as his sole and separate property, and the district court found "no community lien" to have been created against this residential property. Based upon several enumerated factors, the district court also ruled that "[e]ach party shall pay their own attorney fees[.]"

{6} On appeal, Wife contests three of the district court's findings of fact or legal rulings: (1) that the Spring Creek residence was not subject to a community lien, (2) that Wife breached her fiduciary duty to Husband by embezzling a significant amount of money from his dental practice, and (3) that each party pay their own attorney fees.

DISCUSSION

I. The Community is Entitled to a Lien on Separate Property That Depreciates in Value When Community Funds Were Used to Pay the Mortgage That Benefitted the Separate Property

{7} Wife argues that the district court erred in declaring that no community property lien was created against Husband's separate

property assets. Whether the district court erred in finding no community lien on the Spring Creek residence is a question of law that we review de novo. *See* NMSA 1978, § 40-3-8(A), (B) (1990) (defining separate and community property); *Styka v. Styka*, 1999-NMCA-002, ¶ 8, 126 N.M. 515, 972 P.2d 16 ("[W]e review questions of law de novo.").

{8} "In New Mexico, property takes its status as community or separate property at the time and by the manner of its acquisition." *Zemke v. Zemke*, 1993-NMCA-067, ¶ 18, 116 N.M. 114, 860 P.2d 756 (internal quotation marks and citation omitted). "[A]ll property brought to . . . marriage by either spouse or acquired during marriage by gift, bequest, devise or descent, together with its rents, issues and profits[,]" is separate property. *Portillo v. Shappie*, 1981-NMSC-119, ¶ 12, 97 N.M. 59, 636 P.2d 878. All property "acquired by either or both spouses during marriage, which is not separate property," as well as its rents, issues, and profits, is community property. *Id.* However, "[a]pportionment is appropriate when separate property is enhanced through community efforts [(funds),] or when an asset is acquired with both separate and community funds." *Trego v. Scott*, 1998-NMCA-080, ¶ 5, 125 N.M. 323, 961 P.2d 168. "The [district] court must apportion the value enhanced by community funds between the separate and community estates." *Id.* ¶ 13. The community is, therefore, entitled to a lien against the separate property of a spouse for the contributions made by the community that enhanced the value of the property during the marriage. *See Jurado v. Jurado*, 1995-NMCA-014, ¶ 10, 119 N.M. 522, 892 P.2d 969.

{9} Previously, this Court has stated that it is the "increase in the value of the [separate property] asset that is apportioned among separate and community interests." *Id.* As such, this Court has adopted different formulas to calculate the apportionment, all of which assume an appreciation in the property's value, and incorporate varying factors depending on the pertinent facts. *See id.* ¶ 11 ("Any increase in the value of separate property is presumed to be separate unless it is rebutted by direct and positive evidence that the increase was due to community funds or labor."). However, our prior case law fails to adequately address the community's interest, if any, in separate property that has depreciated in value due to market conditions that are present during the marriage.

{10} In *Valento*, the Arizona court addressed a residential mortgage payment issue that is substantially similar to the one being disputed by the parties in the present case. 240 P.3d at 1242-45.The Arizona court reasoned that when a separate property residence depreciates but positive equity remains in the asset, the court should recognize a community lien in an amount "equal to the reduction [of the] principal indebtedness attributable to the community contribution." *Id.* at 1244. By making community contributions toward principal that does create an increase in equity, "the presence of [any] positive equity means that the owner-spouse can actually realize the benefit conferred by the community." *Id.* "If the community contributions were not recognized in the form of a lien, the owner-spouse would receive a windfall from the community." *Id.* However, in the event that the property has negative equity, "[i]t would be illogical . . . to hold that the community should receive the full benefit of its contributions to principal when a portion of the equity it created can no longer be realized." *Id.* The Arizona court therefore applied the following formula when the value of a separate property asset has decreased during the marriage but positive equity remains in the property and the community has paid contributions toward the principal indebtedness against that property:

> C-[C/B x D]; where D = depreciation in value of the property during the marriage, B = value on the date of the marriage, and C = community contributions to principal or market value.

Id. The application of this Arizona formula is a logical extension of New Mexico case law to calculate a community lien when community funds are used to enhance the equity in an owner-spouse's separate property even where other factors have caused the value of the property to decrease during the term of the marriage.

{11} In the present case, the community—through its contribution to pay the principal mortgage against the Spring Creek residence—is entitled to a lien against Husband's remaining equity in the Spring Creek residence even though the residence declined in value during the marriage. It is undisputed by the parties that Husband purchased the Spring Creek residence prior to his marriage to Wife, the residence is his sole and separate property, and the residence declined in value during the parties' marriage. Additionally, Husband does not dispute that community funds contributed to the payment of the mortgage. Applying principles and the formula now adopted from *Valento*, the district court must determine the value of the community lien that exists against the Spring Creek residence.

{12} Husband argues that the district court's finding of no community lien on the Spring Creek residence remains equitable under the circumstances of this case. He contends that the district court could have balanced other factors against Wife's community property claims, including its findings that "the community substantially depleted Husband's separate property investment accounts" and that "Wife breached [her] fiduciary duty." However, our holding and adoption of the principles from *Valento* is exclusively an issue of law, and we will not intervene to address how the district court should apply its continuing equitable discretion to apportion the community lien that was created. *See Gomez v. Gomez*, 1995-NMCA-049, ¶¶ 2, 5, 119 N.M. 755, 895 P.2d 277 (recognizing that legal error is addressed first, especially where its resolution would be determinative on the district court's remaining decisions), *superseded by statute on other grounds as stated in Erickson v. Erickson*, 1999-NMCA-056, ¶ 25, 127 N.M. 140, 978 P.2d 347. On remand, the district court must still address how to apportion the community lien that was created in order to achieve substantial justice. *See Dorbin v. Dorbin*, 1986-NMCA-114, ¶ 15, 105 N.M. 263, 731 P.2d 959 ("At divorce, the asset is apportioned between separate and community interests in a manner which achieves substantial justice."). The district court is given broad discretion to consider all relevant factors when making this equitable division of community property. *See Scott*, 1998-NMCA-080, ¶ 22 (noting that the district court has broad discretion when it exercises its power to divide community property equally between the parties). We therefore remand this matter to the district court to calculate the community lien against the Spring Creek residence and to make a proper apportionment of this lien as it deems appropriate.

II. The District Court's Remaining Findings and Conclusions Were Supported by Substantial Evidence and Were Not an Abuse of Discretion

{13} Wife makes two additional arguments on appeal. First, she argues that "[t]he district court erred in finding that

[she] breach[ed] her fiduciary duty to [H]usband and embezzled a significant amount of funds from [H]usband's dental practice." Second, Wife contends that the district court erred in not requiring Husband to pay her attorney fees. The district court made several consecutive findings relating to these arguments:

83. Husband earns significantly more income than Wife[;]
84. Both parties have assets with significant value[;]
85. Husband prevailed at trial[;]
86. Wife breached her fiduciary duty to Husband and embezzled a significant amount of funds from Husband's dental practice[; and]
87. Balancing the competing factors enumerated in paragraphs 83 to 86, each party shall pay their own attorney fees.

A. The District Court's Determination That Wife Breached Her Fiduciary Duty and Embezzled Money From Husband's Dental Practice Was Supported by Substantial Evidence and Was Not an Abuse of Discretion

{14} Wife argues that the district court's finding eighty-six— that she "breached her fiduciary duty to Husband and embezzled a significant amount of funds from Husband's dental practice"—was an abuse of discretion, not in accordance with the law and not supported by substantial evidence. However, Wife does not address the numerous findings and conclusions entered by the district court that were also related to its determination regarding the issues of embezzlement and breach of fiduciary duty, specifically, findings sixty-seven, sixty-eight, and eighty, as well as conclusions of law. *See Rhoades v. Rhoades*, 2004-NMCA-020, ¶ 5, 135 N.M. 122, 85 P.3d 246 ("Unchallenged findings of fact are conclusive on appeal."). Furthermore, Wife has failed to indicate what remedy or result she is seeking if we only reverse finding eighty-six. *See Morris v. Merchant*, 1967-NMSC-026, ¶ 24, 77 N.M. 411, 423 P.2d 606 (recognizing that our appellate courts "will not correct errors which, even if corrected, will not change the result"). Because Wife does not develop any of her other arguments and only directs this Court to finding eighty-six, we are left with just one remaining argument—that finding eighty-six was not supported by substantial evidence. *See Clayton v. Trotter*, 1990-NMCA-078, ¶¶ 16-17, 110 N.M. 369, 796 P.2d 262 (stating that the appellate court will review the arguments of self-represented litigants to the best of its ability, but cannot respond to unintelligible arguments); *see also Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076 (stating that an appellate court need not review an undeveloped argument). We, therefore, limit our review to the issue of whether the district court's finding eighty-six, that Wife breached her fiduciary duty to Husband and embezzled a significant amount of funds from Husband's dental practice, was supported by substantial evidence.

{15} In our review of the challenged finding, we view the evidence "in the light most favorable to the findings and judgment entered [by the district court]." *Jurado*,1995-NMCA-014, ¶ 8. "If substantial evidence exists, then the conclusion of law must be upheld absent an abuse of discretion. This Court indulges in all reasonable inferences that can be drawn from the evidence in support of the judgment." *Id.* (citations omitted).

{16} Substantial evidence was presented by Husband regarding monies taken from his dental practice, including exhibits and expert testimony. Although Wife challenged the truthfulness and credibility of this evidence, she does not otherwise substantively dispute its content or the inferences and conclusions that it supported. *See id.* ("This Court indulges in all reasonable inferences that can be drawn from the evidence in support of the judgment."). The district court also accepted the credibility of Husband's testimony and evidence but did not find Wife's testimony to be credible. As a result, we determine that substantial evidence was presented to support the district court's finding eighty-six. We affirm the district court's ruling on this issue.

B. The District Court's Determination That Each Party Pay His or Her Own Attorney Fees Was Not an Abuse of Discretion

{17} "We review a [district] court's decision whether to award attorney fees in a marital dissolution and property division case for abuse of discretion." *Muse v. Muse*, 2009-NMCA-003, ¶ 71, 145 N.M. 451, 200 P.3d 104. When reasons both supporting and detracting from a decision exist, there is no abuse of discretion. *Talley v. Talley*, 1993-NMCA-003, ¶ 12, 115 N.M. 89, 847 P.2d 323.

{18} Rule 1-127 NMRA governs the award of attorney fees in domestic relations cases. In such cases, "the district court is to consider a number of factors including disparity of the parties' resources, prior settlement offers, the total amount of fees and costs expended by each party, and the success on the merits." *Weddington v. Weddington*, 2004-NMCA-034, ¶ 27, 135 N.M. 198, 86 P.3d 623. No single factor is dispositive. *See id.* ¶ 28 (holding that "disparity is only one factor to be considered and disparity cannot support reversal where the other factors weigh in favor of the award of attorney fees"). Wife's breach of fiduciary duty and embezzlement of monies, a separate issue that Husband prevailed upon in the district court, is only modestly relevant to the above factors. As such, even though we affirm that finding eighty-six was supported by substantial evidence, it is not a significant consideration in determining whether Wife was entitled to an award of attorney fees. We, therefore, focus primarily on the district court's other three findings in determining whether the court erred when it ruled that each party should pay their own attorney fees.

{19} The remaining three findings by the district court are set forth in paragraphs eighty-three through eighty-five. We recognize that the district court did not enter any findings regarding prior settlement offers or the total amount of fees and costs expended by either party. The district court instead looked to the disparity of the parties' resources and each party's success on the merits. The finding by the district court that Husband earns significantly more than Wife is a finding in her favor for an award of attorney fees, but the court's finding that Husband prevailed at trial weighs against her. The district court's finding that both parties have assets of significant value also factors into any determination regarding the disparity of the parties' resources and further supports the determination that each party has the financial ability to pay his or her own attorney fees. *See Allen v. Allen*, 1982-NMSC-118, ¶¶ 16-18, 98 N.M. 652, 651 P.2d 1296 (noting that when neither party is economically oppressed, the district court acts within its discretion to require each party to pay its own attorney fees). As these factors can be balanced out neutrally and support the district court's decision to require each party to pay their

own attorney fees, we conclude that the district court did not abuse its discretion. *See Talley*, 1993-NMCA-003, ¶ 12.

CONCLUSION

{20} We reverse the district court's failure to recognize the existence of a community lien and to calculate the community lien against the Spring Creek residence. We remand this matter to the district court for further proceedings in order to address the community lien against the Spring Creek residence and to make a proper apportionment of this lien as it deems appropriate. We uphold the district court's remaining rulings, including the requirement that each party pay his or her own attorney fees.

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

TIMOTHY L. GARCIA, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

M. MONICA ZAMORA, Judge

Certiorari Denied, June 22, 2017, No. S-1-SC-36492

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-062

No. 34,783 (filed April 27, 2017)

STATE OF NEW MEXICO,
Plaintiff-Appellant,
v.
JOHNNY ORTIZ,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
JACQUELINE D. FLORES, District Judge

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Santa Fe, New Mexico
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JENNIFER J. WERNERSBACH
LAW OFFICES OF
JENNIFER J. WERNERSBACH, P.C.
Albuquerque, New Mexico
for Appellee

Opinion

J. Miles Hanisee, Judge

{1} The State appeals the district court's order suppressing evidence seized from Defendant Johnny Ortiz's vehicle. The district court suppressed the evidence because it concluded that what began as an investigatory detention of Defendant impermissibly ripened into a de facto arrest in violation of the Fourth Amendment right to be free from unreasonable seizure. We agree with the district court and affirm.

BACKGROUND

{2} On the morning of June 1, 2012, Sandia Resort & Casino (the casino) security personnel came into possession of a found wallet. Upon searching its contents for identifying information, a security dispatcher found Defendant's name and an unidentified female's name whose contact information was in the wallet. The dispatcher contacted the female, who reported that her wallet had been stolen at the casino. Shortly thereafter, Defendant inquired with security about the wallet, at which point the dispatcher searched the casino's private security database to see if Defendant had any prior infractions at the casino. The dispatcher discovered a person with Defendant's name who had been banned from the casino in 2007.

{3} The dispatcher then contacted the Pueblo of Sandia Police Department (PSPD) to report a possible criminal trespass in progress. PSPD Detective James Chavez and Officer Stephen Garcia responded to the dispatch. Detective Chavez arrived at the casino first and proceeded to the security office, planning to confirm Defendant's ban with security personnel. Before he could do so, however, security informed him that surveillance video showed Defendant walking out the main doors of the casino.

{4} Detective Chavez, electing to attempt to intercept Defendant before Defendant could leave the premises, left the security office before he was able to confirm Defendant's ban. As Detective Chavez ran through the casino, security personnel relayed information about Defendant's location to him over the phone. Detective Chavez, in turn, communicated that information to Officer Garcia via radio so that Officer Garcia could pursue Defendant in his patrol car. Security personnel observed Defendant walk toward the parking lot, enter a white vehicle, and proceed eastbound through the parking lot. Officer Garcia located the vehicle, initiated his emergency equipment, and effectuated a stop in the casino parking lot.

{5} Detective Chavez, who witnessed the stop, arrived on foot and made contact with Defendant. Detective Chavez patted down Defendant, handcuffed him, and placed him in the back of Officer Garcia's car in what Detective Chavez described as "just detention, investigative detention" so that he could confirm Defendant's ban with security personnel in order to determine if there was probable cause to arrest Defendant for criminal trespass. It took approximately ten minutes for Detective Chavez to receive confirmation of Defendant's ban. Detective Chavez testified that after the ban was confirmed, he placed Defendant under arrest, called for a tow truck, and commenced an inventory search of Defendant's vehicle. The search produced, among other things, syringes, a scale, and a bank bag containing baggies of a crystal-like substance, later confirmed to be methamphetamine.

{6} Defendant was indicted on one count of trafficking by possession with intent to distribute methamphetamine, contrary to NMSA 1978, Section 30-31-20 (2006), one count of criminal trespass, contrary to NMSA 1978, Section 30-14-1 (1995), and one count of possession of drug paraphernalia, contrary to NMSA 1978, Section 30-31-25.1(A) (2001). Defendant moved to suppress the evidence seized from his car, arguing that it was "obtained pursuant to an illegal arrest and subsequent inventory search . . . in violation of the Fourth and Fourteenth Amendments of the United States Constitution[.]"

{7} At the conclusion of the hearing on Defendant's motion to suppress, the district court granted the motion, finding that PSPD's investigatory detention of Defendant had ripened into a de facto arrest lacking probable cause, violating Defendant's right to be free from unreasonable seizure. This appeal resulted. *See* NMSA 1978, § 39-3-3(B)(2) (1972) (providing that the State may immediately appeal an order suppressing evidence if the district attorney certifies to the district court that "the appeal is not taken for the purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding").

DISCUSSION

{8} Defendant concedes—and we agree—that PSPD had reasonable suspicion to stop Defendant and place him in an investigatory detention. The only issue before us, then, is whether the character of PSPD's investigatory detention ripened into a de facto arrest, which, absent probable cause, constituted a violation of Defendant's Fourth Amendment rights.

I. Standard of Review

{9} "Appellate review of a motion to suppress presents a mixed question of law and fact." *State v. Paananen*, 2015-NMSC-031, ¶ 10, 357 P.3d 958 (internal quotation marks and citation omitted). "We review the trial court's ruling on [a d]efendant's motion to suppress to determine whether the law was correctly applied to the facts, viewing them in the manner most favorable to the prevailing party." *State v. Leyba*, 1997-NMCA-023, ¶ 8, 123 N.M. 159, 935 P.2d 1171 (internal quotation marks and citation omitted). "While we afford de novo review of the trial court's legal conclusions, we will not disturb the trial court's factual findings if they are supported by substantial evidence." *Id.*

II. The Test for Determining the Reasonableness of an Investigatory Detention

{10} "It is well established that stopping an automobile and detaining its occupants constitute a seizure under the Fourth and Fourteenth Amendments." *State v. Skippings*, 2014-NMCA-117, ¶ 9, 338 P.3d 128 (internal quotation marks and citation omitted). The Fourth Amendment to the United States Constitution prohibits only seizures that are unreasonable. *See* U.S. Const. amend. IV. "Consistent with the reasonableness requirement of the Fourth Amendment, police officers may stop a person for investigative purposes where, considering the totality of the circumstances, the officers have a reasonable and objective basis for suspecting that particular person is engaged in criminal activity." *State v. Sewell*, 2009-NMSC-033, ¶ 13, 146 N.M. 428, 211 P.3d 885 (internal quotation marks and citation omitted). The reasonableness of an officer's actions during an investigatory detention "is determined by objectively evaluating the particular facts of the stop within the context of all the attendant circumstances." *Id.* ¶ 16.

{11} "There is no bright-line test for evaluating when an investigatory detention becomes invasive enough to become a de facto arrest." *Skippings*, 2014-NMCA-117, ¶ 14. The reasonableness of a detention "rests on the balancing of competing interests: the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *State v. Cohen*, 1985-NMSC-111, ¶ 19, 103 N.M. 558, 711 P.2d 3 (alteration, internal quotation marks, and citation omitted). Where the government's justification for the intrusion outweighs the nature and quality of the intrusion upon a defendant's right to privacy, the detention is more likely to be considered reasonable. *See State v. Robbs*, 2006-NMCA-061, ¶ 20, 139 N.M. 569, 136 P.3d 570 ("If the nature and extent of the detention minimally intrude on an individual's Fourth Amendment interests, opposing law enforcement interests can support a seizure based on less than probable cause." (internal quotation marks and citation omitted)). Conversely, where the intrusion is significant and the government's justification is not, the detention is considered a de facto arrest and, thus, an unreasonable seizure. *See State v. Werner*, 1994-NMSC-025, ¶¶ 16-21, 117 N.M. 315, 871 P.2d 971 (describing the character of the defendant's detention as "a significant intrusion" and holding that the detention was a de facto arrest because the government's purported justification for restricting the defendant to the degree it did failed to outweigh the intrusion).

{12} Regarding characterization of the government's interest—i.e., the government's justification for the intrusion—courts typically focus on one or both of two considerations: (1) the nature of the criminal activity suspected or afoot, *see, e.g.*, *Skippings*, 2014-NMCA-117, ¶ 17 (explaining that "[t]he government has a significant interest in preventing the use and distribution of drugs like cocaine"); *see also State v. Lovato*, 1991-NMCA-083, ¶¶ 23-27, 112 N.M. 517, 817 P.2d 251 (holding, as a matter of law, that the intrusiveness of a stop by officers investigating a drive-by shooting was reasonable "in view of the level of danger the officers reasonably could assume to exist" given the nature of the crime being investigated); *cf. State v. Contreras*, 2003-NMCA-129, ¶ 14, 134 N.M. 503, 79 P.3d 1111 (holding that "the gravity of the public concern and the public interest served by the seizure" of a suspected drunk driver "weigh heavily in the [reasonableness] balancing test"); and/or (2) the specific reasons supporting particular intrusive actions taken by an officer during a detention. *See, e.g.*, *Werner*, 1994-NMSC-025, ¶ 17 (rejecting the claimed reasonableness of placing a suspect in a police vehicle—purportedly to prevent the suspect's flight and minimize risk of harm to the officer—when the officer knew where the suspect lived and there was no indication the officer, who had already removed a knife from the suspect, feared for his safety); *Skippings*, 2014-NMCA-117, ¶ 20 (concluding that officers did not act unreasonably by patting down and handcuffing the suspect, who had a history of violence, out of concern for officer safety); *State v. Flores*, 1996-NMCA-059, ¶ 17, 122 N.M. 84, 920 P.2d 1038 (explaining that "[t]he nature of the crime being investigated may also justify a patdown search").

{13} In analyzing the defendant's privacy interest—specifically, the nature and quality of the intrusion thereon—courts consider and weigh numerous factors, including but not limited to: (1) the extent to which the suspect's freedom of movement is restricted, such as placement in the back of a police vehicle, *see Werner*, 1994-NMSC-025, ¶ 15, or being detained at gunpoint or through the use of handcuffs, *see Lovato*, 1991-NMCA-083, ¶¶ 4, 27-32; (2) the overall length of the detention and, relatedly, the officer's diligence in investigating in order to be able to confirm or dispel his suspicion, *see Werner*, 1994-NMSC-025, ¶¶ 13, 16; and (3) other fact-dependent factors, such as giving a defendant his *Miranda* rights, *see Skippings*, 2014-NMCA-117, ¶ 23, using a drug-sniffing dog, *see Robbs*, 2006-NMCA-061, ¶ 29, or relocating the defendant during the course of an investigation, *see Flores*, 1996-NMCA-059, ¶ 15 (holding that moving a suspect from the location of the initial traffic stop to a police warehouse in order to continue the investigation constituted a de facto arrest). No single factor is dispositive. *See Sewell*, 2009-NMSC-033, ¶ 18 (explaining that "[t]emporal duration is neither the controlling nor the only factor to be considered in assessing the reasonableness of the extent of an investigatory detention"); *Werner*, 1994-NMSC-025, ¶ 14 (explaining that "[a]lthough the back of a patrol car is not an ideal location for the purposes of an investigatory detention, detention in a patrol car does not constitute an arrest per se" (internal quotation marks and citations omitted)); *Skippings*, 2014-NMCA-117, ¶¶ 20, 22-23 (explaining that "while we consider the fact that [the d]efendant was handcuffed, it is not determinative" and collecting cases supporting the proposition as well as explaining that giving a defendant *Miranda* rights does not automatically convert an investigatory detention into an arrest). We emphasize that the above-listed factors should be understood as illustrative, not an exhaustive list of possible considerations. *See Skippings*, 2014-NMCA-117, ¶ 14 (explaining that courts "are also guided by the circumstances in

other cases in which investigative detentions have been held to be de facto arrests or impermissibly invasive").

{14} On a defendant's motion to suppress evidence obtained without a warrant, the State bears the burden of establishing the reasonableness of the officer's conduct. *See State v. Rowell*, 2008-NMSC-041, ¶ 10, 144 N.M. 371, 188 P.3d 95 ("Warrantless seizures are presumed to be unreasonable and the [s]tate bears the burden of proving reasonableness." (internal quotation marks and citation omitted)). If the State fails to "present testimony or other evidence showing that the arrest or search met constitutional muster[,]" the defendant's motion should be granted. *State v. Ponce*, 2004-NMCA-137, ¶ 7, 136 N.M. 614, 103 P.3d 54.

III. Whether PSPD's Investigatory Detention of Defendant Ripened Into a De Facto Arrest

{15} We turn, now, to an application of this balancing test to the facts of this case. We first consider and characterize the government's interest because doing so sharpens the lens through which we analyze the reasonableness of the officers' particular actions and the overall nature and quality of the detention. Once we determine the weight of the government's interest, we determine whether the intrusiveness of PSPD's actions was justified by or outweighed the government's interest. *See Skippings*, 2014-NMCA-117, ¶¶ 17-18.

A. The Government's Justification for the Intrusion

{16} PSPD's only basis for stopping and detaining Defendant was the yet-to-be-confirmed report from casino dispatch that Defendant was banned and therefore suspected of committing a criminal trespass, a misdemeanor offense. *See* § 30-14-1(E) ("Whoever commits criminal trespass is guilty of a misdemeanor."). Tellingly, the State argues that PSPD has "a significant interest in preventing criminal trespass on property under [its] jurisdiction" and that such interest "is even stronger under the circumstances of this case [based on the officers'] reasonable suspicion that Defendant was permanently banned from [the c]asino specifically for narcotics." Yet the State ignores the uncontradicted evidence that at the time Defendant was detained, neither Detective Chavez nor Officer Garcia acted upon knowledge that Defendant's original ban was "for narcotics." While the State relies on the district court's finding that Detective Chavez "had received information through the dispatcher that [the c]asino Security had observed a male subject on casino property who they believe to have previously been banned from casino property for narcotics[,]" the evidence in the record, in fact, does not support this finding. When asked if he "remember[ed] exactly what dispatch said when they asked you to come to Sandia" and, specifically, if he remembered "that dispatch told you to come up for a banned subject who's banned for narcotics[,]" Detective Chavez responded, "I don't remember the ban for narcotics." The State's reliance on Defendant's assertion in his motion to suppress that "Sandia police officers were dispatched with the knowledge that . . . Defendant had possibly been previously banned from the casino for narcotic use or possession" is equally unavailing. *See Chan v. Montoya*, 2011-NMCA-072, ¶ 9, 150 N.M. 44, 256 P.3d 987 ("The mere assertions and arguments of counsel are not evidence." (internal quotation marks and citation omitted)). And the State failed to present any testimony or evidence establishing that even if the officers knew that Defendant's ban was related to narcotics, they had reasonable suspicion that Defendant was engaged in drug-related criminal activity on June 1, 2012, which may have heightened PSPD's justification for intruding on Defendant's privacy interest. *See Pacheco*, 2008-NMCA-131, ¶ 20, 145 N.M. 40, 193 P.3d 587 ("Insofar as [the officer] had a reasonable, articulable suspicion that drug-related criminality was afoot, the justification for the intrusion was substantial.").

{17} It is true that our cases have consistently characterized the government's interest in "preventing the use and distribution of drugs" as "significant," thereby presumptively justifying a higher level of intrusion during an investigatory detention. *Skippings*, 2014-NMCA-117, ¶ 17. *See State v. Pacheco*, 2008-NMCA-131, ¶ 20; *Robbs*, 2006-NMCA-061, ¶ 22. However, the fact that the case ended as a narcotics investigation does not mean it began as one. More importantly, the record does not support an inference that Detective Chavez was concerned about narcotics when he detained Defendant. And the State has not pointed to any authority suggesting that the government has a similar interest in the prevention of misdemeanor criminal trespass alone. As such, we assume no such authority exists. *See In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329. Consequently, we are left only with the State's lesser, but certainly not non-existent, interest in enforcing misdemeanor trespass violations.

{18} Additionally, the State failed to present any evidence that the circumstances evolved over the course of PSPD's response in a way that would have justified a graduated response based on a more substantial government interest. *Cf. State v. Funderburg*, 2008-NMSC-026, ¶ 16, 144 N.M. 37, 183 P.3d 922 ("An officer's continued detention of a suspect may be reasonable if the detention represents a graduated response to the evolving circumstances of the situation."). While the State attempted to portray Defendant as fleeing at the time he was stopped, the district court expressly found that "[t]he State did not present any evidence that Defendant was fleeing from apprehension, disruptive or not obeying commands by casino security or [PSPD]." This finding is substantially supported by Detective Chavez's testimony that (1) casino security reported seeing Defendant walking, not running, out of the casino, (2) Defendant appeared to simply be "proceeding along through the parking lot" just prior to being stopped by Officer Garcia, (3) Defendant's tires were not squealing while he was driving through the parking lot, and (4) Defendant stopped once Officer Garcia activated his emergency equipment and while still in the casino parking lot. Further, the State failed to call any witness to testify as to what Defendant had been told by casino security prior to PSPD's arrival—i.e., whether he was informed that security suspected him of committing criminal trespass and was told not to leave the premises. There is no evidence that Defendant was even aware that he was being investigated for—or that PSPD had been called regarding—a possible criminal trespass. All that Detective Chavez could establish was that Defendant had been in contact with casino security regarding the found wallet.

{19} We are unpersuaded by the State's argument that the facts developed before the district court support a conclusion that the government's interest at the time it detained Defendant was "significant" and that the "law enforcement justification in this case was substantial." While we hold, here, that the government's interest in stopping a possible criminal trespass was less than "significant," our decision should not be read as establishing a categorical rule. Because the test of reasonableness is one based on the totality of the circumstances, *see Werner*, 1994-NMSC-025,

¶ 16, we leave open the possibility that under a different set of facts, the government's interest in preventing criminal trespass may be deemed "significant," thereby potentially justifying a more intrusive detention. *Cf. State v. McCormack*, 1984-NMCA-042, ¶¶ 16-20, 27, 101 N.M. 349, 682 P.2d 742 (affirming a journalist's conviction for criminal trespass of the Waste Isolation Pilot Plant and rejecting a First Amendment challenge to government-imposed access restrictions, which were based on the need to protect the property and people working thereon). As the next part of our discussion elucidates, we need not assign a specific descriptor—such as "minimal" or "important"—to the nature of the government's interest here.

B. The Nature and Quality of the Intrusion

{20} The State argues that "the intrusion on Defendant's liberty during the investigatory detention was slight or minimal" and reasons that "[a]lthough the detention occurred in a police vehicle and included handcuffing Defendant, these intrusions are ameliorated by the brevity of the detention[.]" Based on our case law, we disagree.

{21} The focus of our inquiry, here, is whether the particular activities—i.e., intrusions—during the investigatory detention were "reasonably related to the circumstances that initially justified the stop" and whether there was "some reasonable justification" to support the intrusions. *Werner*, 1994-NMSC-025, ¶¶ 13, 15 (internal quotation marks and citation omitted). We also consider the length of Defendant's detention and the officers' diligence in confirming or dispelling their suspicion, which factors inform—but do not control—our characterization of the nature and quality of the detention and, ultimately, our determination of whether it was reasonable.

1. Restraint on Defendant's Freedom of Movement

{22} Detective Chavez testified that Defendant was patted down, handcuffed, and put in the back of Officer Garcia's patrol car immediately upon exiting his vehicle. But there is no evidence that the officers knew that Defendant had a history of violence or feared for their safety, *see Skippings*, 2014-NMCA-117, ¶ 20; that Defendant attempted to leave the scene upon exiting his car, *see State v. Wilson*, 2007-NMCA-111, ¶¶ 3, 19, 142 N.M. 737, 169 P.3d 1184; or that Defendant was unstable, swaying back and forth, or unable to safely stand on his own, *see id.* ¶ 3—all of which *may* be reasonable justifications for the officers' actions. We do not mean to suggest that these are the only reasons that could have justified the actions taken in this case. Rather, these examples provide guidance regarding what may establish the reasonableness of such intrusions. The key in this case is the complete absence of any evidence whatsoever suggesting there were mitigating circumstances that may have justified PSPD's intrusive actions upon Defendant.[1] And absent a reasonable justification for restricting a person's freedom of movement—particularly in as highly restrictive a way as occurred in this case—such intrusion is considered "significant." *See Werner*, 1994-NMSC-025, ¶ 16.

2. Duration and Diligence

{23} In an attempt to "ameliorate" these intrusions on Defendant's liberty in order to allow the balance to tip back in favor of the government's interest, the State relies on the brevity of the investigatory detention and Detective Chavez's diligence in confirming Defendant's ban from the casino. As to brevity, the State contends that "our Supreme Court has strongly suggested that a ten-minute detention will not rise to an arrest under any set of facts." To support this position, the State cites our Supreme Court's observation in *Sewell* that it had "found no reported case in which a New Mexico court has ever held that a ten[-]minute detention was impermissibly long in any set of circumstances where there was reasonable suspicion to make a roadside drug stop." 2009-NMSC-033, ¶ 17. The State also relies on this Court's recent observation in *Skippings* that all New Mexico cases that have held that a de facto arrest occurred involve "circumstances in which the defendant was detained for at least an hour." 2014-NMCA-117, ¶ 18. The State places heavy emphasis on the brevity of Defendant's detention and asks us to "give great weight" to this factor as well. We decline to do so because while the length of a detention is generally an important factor in determining whether it is reasonable, it is but one of a myriad factors that is neither controlling nor dispositive on the ultimate question of reasonableness. *See Sewell*, 2009-NMSC-033, ¶ 18; *Skippings*, 2014-NMCA-117, ¶¶ 18, 24. We also observe that *Sewell* and *Skippings* are factually distinguishable from the instant case in two key respects. First, neither involved the defendant being patted down, handcuffed, *and* placed in the back of a patrol car while handcuffed for any amount of time—i.e., the nature and quality of the intrusions in those cases were palpably less significant. *See Sewell*, 2009-NMSC-033, ¶¶ 6-7; *Skippings*, 2014-NMCA-117, ¶ 18. Second, both involved drug-related offenses, which, as we have already discussed, elevated the government's interest to "significant," thereby justifying a higher level of intrusiveness and making the detentions reasonable. *See Sewell*, 2009-NMSC-033, ¶ 20; *Skippings*, 2014-NMCA-117, ¶ 17.

{24} As to diligence, the State relies on *Werner*'s pronouncement that "[d]iligence in the investigation is key[.]" 1994-NMSC-025, ¶ 20. While we agree that the evidence indicates that Detective Chavez acted diligently to confirm Defendant's ban with casino security and that there is no evidence suggesting that Detective Chavez intentionally delayed confirmation in order to fish for evidence of other crimes, that alone is not enough to offset the significant intrusions upon Defendant's liberty or establish the reasonableness of the detention. *See id.* (explaining that "[i]f authorities, acting without probable cause, can seize a person, hold him in a locked police car . . ., and keep him available for arrest in case probable cause is later developed, the requirement for probable cause for arrest has been turned upside down"). And while we observe that all of our prior cases holding that there was no de facto arrest also found that the officer had acted diligently, none

[1]The State effectively concedes this point, acknowledging that "the testimony may have been thin regarding the specific reasons that the officers placed Defendant in the back of a patrol car, patted Defendant down, and handcuffed Defendant," but attempts to justify this by pointing out that the district court granted Defendant's motion to suppress on a legal principle (de facto arrest) other than the one initially argued by Defendant (lack of exigent circumstances). **[RB 13 n.7]** We observe, however, that the State made no attempt to reopen testimony, continue the hearing, move the district court to reconsider its order, or take any other steps prior to appealing the suppression order to remedy the claimed "unfairness" the State says resulted. Additionally, the State has neither raised this as an issue on appeal—other than in a footnote in its reply brief—nor cited any authority suggesting that the district court acted improperly or that our review of the suppression order is somehow affected by this unusual circumstance. We therefore address this matter no further.

of those cases involved the unique facts and circumstances present in this case. *See Skippings*, 2014-NMCA-117, ¶ 24; *Pacheco*, 2008-NMCA-131, ¶¶ 23-25; *Robbs*, 2006-NMCA-061, ¶ 29. As this case proves, an officer's diligence and ability to confirm or dispel his suspicions in a short amount of time may be insufficient to overcome the intrusions upon a defendant's privacy interest where such intrusions result in a highly-restrictive detention and are not supported by reasonable justification.

CONCLUSION

{25} Viewing the evidence in the light most favorable to Defendant, the government's interest in investigating and stopping criminal trespass was far outweighed by the significant intrusion on Defendant's Fourth Amendment interests. We hold that PSPD's investigatory detention of Defendant ripened into an unconstitutional de facto arrest. The district court's order of suppression is affirmed.

{26} IT IS SO ORDERED.

J. MILES HANISEE, Judge

WE CONCUR:
JAMES J. WECHSLER, Judge
JULIE J. VARGAS, Judge

Classified

Positions

Senior Trial Attorney
Senior Trial Attorney wanted for immediate employment with the Seventh Judicial District Attorney's Office, which includes Catron, Sierra, Socorro and Torrance counties. Employment will be based primarily in Socorro County (Socorro). Must be admitted to the New Mexico State Bar and be willing to relocate within 6 months of hire. Salary range: $59,802 - $74,753. Salary will be based on the NM District Attorneys' Personnel & Compensation Plan and commensurate with experience and budget availability. Send resume to: Seventh District Attorney's Office, Attention: J.B. Mauldin, P.O. Box 1099, 302 Park Street, Socorro, New Mexico 87801.

Associate Attorney
The Sanders Law Firm in Roswell, NM is seeking a New Mexico licensed associate attorney interested in practicing in the areas of general civil litigation and family law with an emphasis in family law in our Roswell, NM office. Please send your cover letter, resume, law school transcript, writing sample and references to amh@sbcw.com. All inquiries will be kept confidential.

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Established ABQ plaintiff personal injury firm has immediate opening for associate with 2+ yrs. litigation experience. Must have excellent communication, organizational, and customer services skills. Good pay, benefits and profit sharing. Send confidential response to POB 92860, ABQ, NM 87199. Attention Box A

Associate Attorney
The Associate Attorney will review pleadings, assist with task and workflow management, work with pleadings and accompanying paperwork and provide professional legal assistance, advice and counsel with respect to collections and creditor's rights. Moreover, the position may require research and analysis of legal questions. The position will also entail court appearances, often on a daily basis. The position has a high level of responsibility within established guidelines, but is encouraged to exercise initiative. The position is part of a growing team of attorneys across several states, and is located in Albuquerque, New Mexico. Please email your resume directly to Tonia Martinez at tonia.martinez@mjfirm.com

Attorney IV Position

NM Department of Public Safety seeks full time licensed attorney with minimum of five years' experience to work in the Office of General Counsel at DPS headquarters in Santa Fe. This attorney will represent the Department in administrative and district court hearings, mediations, and arbitrations; provide legal opinions and recommendations to DPS personnel based on legal research and analysis; and may participate in the NM legislative session. The attorney will review, draft, and edit agency policies, rules, and conduct rulemakings. Employment and litigation experience is preferred. Must be a mature, hardworking team player. The State of New Mexico hires without regard to race, color, religion, national origin, sex, sexual orientation, gender identity or expression, age, disability or state or local law. Reasonable accommodations provided to known disabilities of individuals in compliance with the Americans with Disabilities Act. Salary range $50,898-$88,525 DOE. Further information and application requirements online at www.spo.state.nm.us, position #48406.

Staff Attorney-Public Benefits

New Mexico Center on Law and Poverty (www.nmpovertylaw.org) seeks full-time staff attorney for our Public Benefits Team to enhance our work with low income New Mexicans to address hunger and secure fundamental fairness in the administration of the public safety net. Required: Law degree and license; minimum three years of civil litigation experience; excellent research, writing, and legal advocacy skills; 'no-stone-unturned' thoroughness and persistence; leadership; ability to be articulate and forceful in the face of powerful opposition; commitment to economic and racial justice in alignment with the mission of the NM Center on Law & Poverty. Preferred: experience with advocacy seeking systemic fairness in the administration of government benefit programs or in related institutional contexts; experience working with diverse community groups and other allies; familiarity with poverty law; Spanish fluency. Varied, challenging, rewarding work. Good non-profit salary. Excellent benefits. Balanced work schedule. Apply in confidence by emailing a resume and a cover letter describing your interests in social justice to veronica@nmpovertylaw.org. Please put your name in the subject line. EEOE. People with disabilities, people of color, former recipients of public assistance, or people who have grown up in poverty are especially encouraged to apply.

Assistant Attorney General III

The Office of the New Mexico Attorney General is recruiting for an Assistant Attorney General III position and a Traffic Safety Resource Prosecutor in the Special Prosecutions Division in Criminal Affairs. The job postings and further details are available at www.nmag.gov/human-resources.aspx.

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. Email resume, cover letter, and references to: Steve North, snorth@da.state.nm.us.

Administrative Office of the Courts

The Sixth Judicial District Court is recruiting for a full-time Unclassified Law Clerk position in Deming, NM #00054577. Target pay rate is $29.532 hourly. Opening Date: 08-24-17 – Close Date (Extended): 10-20-17 at 4:00 P.M. A full description of the position and submission of Application for Employment or a Resume and a Resume Supplemental Form is located on: https://humanresources.nmcourts.gov/career-opportunities.aspx. Proof of education is required. EQUAL OPPORTUNITY EMPLOYER

Procurement Director/Counsel

The Procurement Director/Counsel is an attorney licensed to practice law in the state of New Mexico who has significant experience in business practices, procurement strategies, commercial litigation and contract law, drafting and negotiation. This position provides a multitude of services to the company, including: legal research in a variety of legal matters, providing legal advice, project management, contract negotiations, settlements and litigation, as well as overseeing the procurement process. Please visit www.lagunadevcorp.com Careers section for full job description, requirements and to apply. Contact HR at (505)352-7900 with any questions.

Attorney Associate

The Third Judicial District Court in Las Cruces is accepting applications for a permanent full-time, Attorney Associate. Requirements include admission to the NM Sate Bar plus a minimum of three years experience in the practice of applicable law, or as a law clerk. Under general direction, as assigned by a judge or supervising attorney, review cases, analyze legal issues, perform legal research and writing, and make recommendations concerning the work of the Court. For a detailed job description, requirements and application/resume procedure please refer to https://www.nmcourts.gov/careers.aspx or contact Briggett Becerra, HR Administrator Senior at 575-528-8310. Deadline for submission is: October 20, 2017.

Hearing Officer or Judge *Pro Tempore* Services

The Thirteenth Judicial District Court is requesting proposals (RFP) #2018-0002-1 for Hearing Officer or Judge *Pro Tempore* Services in Cibola County. This is the first amendment to RFP 2018-0002. The full RFP can be found at: https://thirteenth-districtcourt.nmcourts.gov This RFP was initially issued on August 25, 2017, and the amendment issued on September 20, 2017. The deadline for submissions is October 25, 2017 at noon (12:00 pm) MST. Offerors who submitted proposals under RFP 2018-0002 need not resubmit to be considered under this amendment. All questions should be directed to Karl Reifsteck at berdkwr@nmcourts.gov or by calling 505-865-2404.

Associate Attorney

Holt Mynatt Martínez, P.C., an AV-rated law firm in Las Cruces, New Mexico is seeking two associate attorneys with 1-5 years of experience to join our team. Duties would include providing legal analysis and advice, preparing court pleadings and filings, performing legal research, conducting pretrial discovery, preparing for and attending administrative and judicial hearings, civil jury trials and appeals. The firm's practice areas include insurance defense, civil rights defense, commercial litigation, real property, contracts, and governmental law. Successful candidates will have strong organizational and writing skills, exceptional communication skills, and the ability to interact and develop collaborative relationships. Prefer attorney licensed in New Mexico and Texas but will consider applicants only licensed in Texas. Salary commensurate with experience, and benefits. Please send your cover letter, resume, law school transcript, writing sample, and references to bb@hmm-law.com.

Attorney Associate

The Bernalillo County Metropolitan Court is accepting applications for a full-time Associate Attorney position in the Office of General Counsel. Education/Experience: Must be a graduate of a law school meeting the standards of accreditation of the American Bar Association; possess and maintain a license to practice law in the state of New Mexico; and have at least three years' experience in the practice of law. Salary: $28.128 to $35.160 hourly DOE plus State of NM benefits package. A complete copy of the job description is available at https://metro.nmcourts.gov or may be obtained in the Human Resource office of the Metropolitan Court. Apply at or send application/resume with a legal writing sample to the Bernalillo County Metropolitan Court, H. R. Division, P.O. Box 133, Albuquerque, NM 87103. Applications/Resume must be submitted by October 27, 2017.

Associate Attorney
Maynes, Bradford, Shipps and Sheftel, LLP seeks an associate attorney with 2-5 years of experience to join our Durango, CO office's Indian law practice. We offer an interesting and diverse practice, a competitive salary, and a collegial working environment. Candidates with a Navajo bar license strongly preferred. Please send resume and writing sample to: ssingley@mbssllp.com

Paralegal
The Rodey Law Firm is accepting resumes for a business department paralegal position in its Albuquerque Office. Must have a minimum of five years hands-on transactional paralegal work experience. Applicants must possess the ability to manage a transaction, including forming entities, maintaining a transaction calendar, preparation of publications, notices and other requested transaction documents and conducting closings. Requires attention to detail and ability to manage multiple deadlines. Needs to be a self-starter, willing to take initiative and work as a member of a team. Firm offers congenial work environment, competitive compensation and excellent benefit package. Please send resume to hr@rodey.com or mail to Human Resources Manager, PO Box 1888, Albuquerque, NM 87103.

Communications Assistant
The State Bar of New Mexico seeks a FT Communications Assistant to assist with writing and design tasks. Successful applicants will have excellent writing skills as demonstrated in application materials and experience with Adobe InDesign or a proven history of learning new software and programs. Proficiency with Microsoft Word, Excel, and Outlook is required. Ideal candidates will have strong copyediting skills, experience with uniform writing styles (AP), and familiarity with Adobe InDesign. Email cover letter, resume, and 2 writing samples to hr@nmbar.org. Full description at www.nmbar.org/Nmstatebar/About_Us/Career_Center.aspx. EOE.

Office Manager
Take responsibility for the smooth running of our small, dynamic law office where your professionalism, initiative and office skills will be welcomed. You will have plenty of room to be creative and management is always open to new ideas. This is an autonomous role and you need to be comfortable being independent and making decisions. This position will suit you if you have good interpersonal and presentation skills, and office management experience. You need to be self-directed and have organizational and problem-solving skills. Salary DOE between $38,000 -$45,000 w benefits and quarterly bonus opportunities To apply, Email cover letter, resumé and references in PDF to glenn@onitlaw.com

New Mexico State University College of Business Department of Finance College Full Professor in Entrepreneurship with Endowed Chair (Non-tenure Track)
Applications are invited to fill a (non-tenure track) College Full Professor position with the Bill and Sharon Sheriff Endowed Chair in Entrepreneurship. The applicant for the Endowed Chair must have a Masters or Doctorate degree in business or a related field from an accredited school (AACSB accreditation preferred) or a Juris Doctorate. Chair holder will have a demonstrated track record of expertise in any area of entrepreneurship that will allow for him or her to teach courses related to entrepreneurship and provide strong leadership and expertise toward the goal of cultivating a spirit of entrepreneurship among New Mexicans. Online application must be submitted by December 20, 2017. For complete job description, qualifications and application process visit: http://jobs.nmsu.edu/postings/29291.

Legal Secretary and a Receptionist/ Document Clerk
The law firm of Gallagher & Kennedy is seeking both an experienced Legal Secretary and a Receptionist/Document Clerk to join their Santa Fe office. Candidates should possess excellent written and verbal communication skills, be organized and flourish in a team environment. Law firm experience a plus. Please email resumes, indicating position applying for to patti.marshall@gknet.com.

Paralegal/Legal Assistant
Small solo firm seeks motivated individual for a position in Ruidoso or Alamogordo. Certificate in paralegal studies preferred. To apply, please submit a resume to: team@truittlegalgroup.com

Accounts Payable
Law firm seeks experienced accounts payable person with experience with TABS. Send resume to: jmeserve@rothsteinlaw.com

Positions Wanted

Legal Assistant for Hire
Would like to work for a PI Atty., or Ins. Def. in ABQ or RR only. CV Litigation exp., WC exp., Odyssey-CM/ECF, Prepare/Answer Discovery, Med. Rec. Reqts/ Follow up/ Organization, MS Office exp., Calendaring exp. Hard-Working, Loyal, Dedicated. Strong work ethic. Empathetic. Enjoys continuous learning. Please email me for resume & references, at 'legalassistantforhire2017@gmail.com.'

Services

Briefs, Research, Appeals—
Leave the writing to me. Experienced, effective, reasonable. cindi.pearlman@gmail.com (505) 281 6797

Office Space

Uptown Shared Office Space Available
Rental space includes large window office and interior office for assistant, phones, fax, internet, copy machine, janitorial service, etc. Access to 2 conference rooms, large waiting area, kitchenette and garage parking. Class A space. Contact Nina at 505-889-8240 for details.

A Peaceful Oasis to Work In
Excellent office space for lease. Southwest style. Huge professional office (20'x 16'), part of private law office suite. Complete with: conference room, waiting area, break room, and restrooms. Ample parking for clients. Quick freeway access. Close to courthouses. Quiet setting with Courtyard entrance and mature landscaping. Viga ceilings and adobe walls. Two huge windows. $1,100/month (includes rent, utilities, and grounds maintenance). Contact Carol or Nina at (505) 246-1669.

Miscellaneous

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

Navajo Law CLE on Dec. 1
Sutin, Thayer & Browne law firm will host its annual Navajo Law CLE on December 1 at Sheraton Albuquerque Uptown. The nonprofit CLE offers 8 credits (including 2 ethics credits) applicable to the Navajo Nation Bar and the State Bar of New Mexico. Details at sutinfirm.com/news.

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For more information, contact Marcia Ulibarri at
505-797-6058 or mulibarri@nmbar.org.

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