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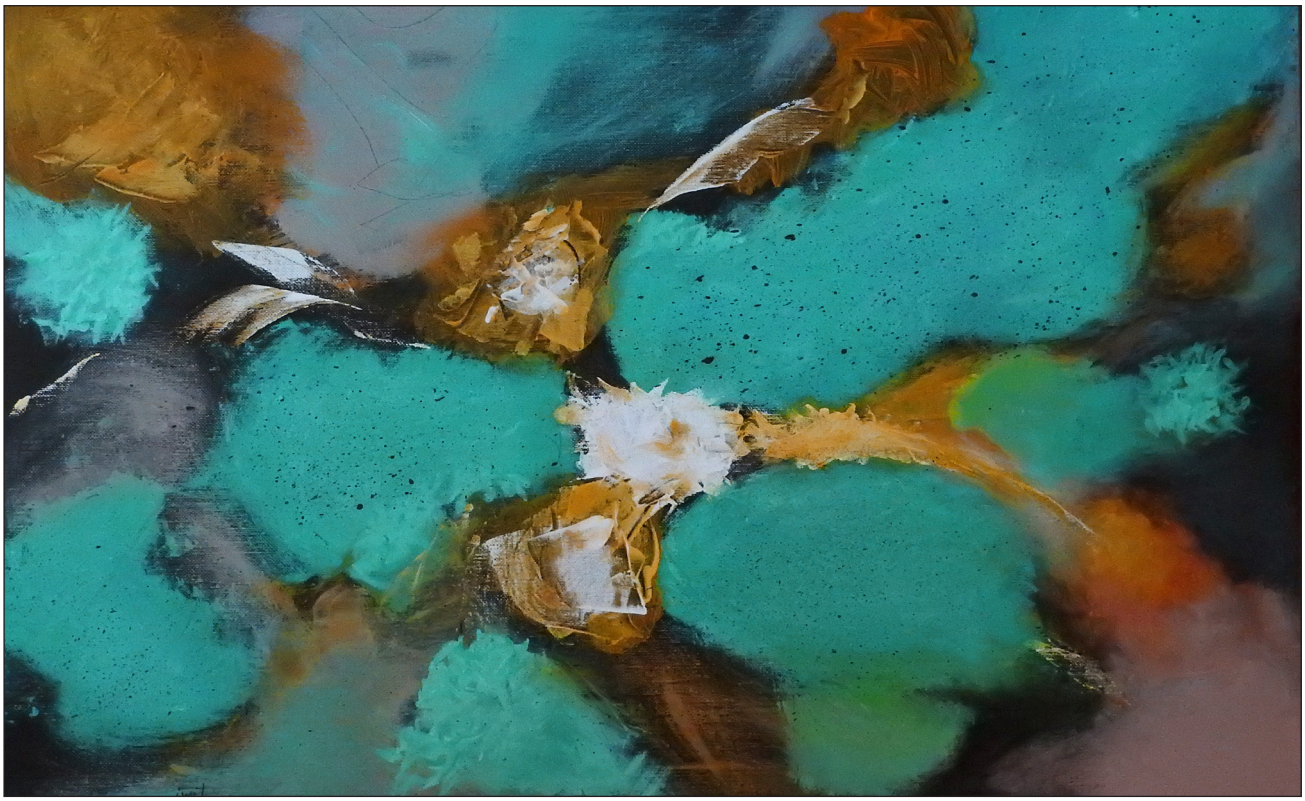

Desert Floral, by Janine Wilson

www.janinewilsonart.blogspot.com

Inside This Issue

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January 31, 2018 - Volume 57, No. 5

Table of Contents

Meetings

February

6
Health Law Section Board
9 a.m., teleconference

6
Bankruptcy Law Section Board
Noon, U.S. Bankruptcy Court, Albuquerque

7
Employment and Labor Law Section Board
Noon, State Bar Center

8
Public Law Section Board
Noon, Montgomery & Andrews, Santa Fe

8
Business Law Section Board
4 p.m., teleconference

9
Prosecutors Section Board
Noon, State Bar Center

13
Appellate Practice Section Board
Noon, teleconference

14
Tax Section Board
11 a.m., teleconference

Workshops and Legal Clinics

February

7
Divorce Options Workshop
6–8 p.m., State Bar Center, Albuquerque,
505-797-6022

16
Civil Legal Clinic
10 a.m.–1 p.m., Bernalillo County Metropolitan Court, Albuquerque,
505-841-9817

27
Common Legal Issues for Senior Citizens Workshop
Presentation 10–11:15 a.m.,
Bosque Farms Community Center,
Bosque Farms, 1-800-876-6657

28
Consumer Debt/Bankruptcy Workshop
6–9 p.m., State Bar Center, Albuquerque,
505-797-6094

March

7
Divorce Options Workshop
6–8 p.m., State Bar Center, Albuquerque,
505-797-6022

About Cover Image and Artist: Janine Wilson is attracted to repeating shapes and patterns and how they interact with each other. Strong color and design are evident in her art, whether it is acrylic, watercolor or photography. She has studied with several nationally known painters and is a member of Rainbow Artists, the Yucca Branch of the National League of American Pen Women and is a signature member of the New Mexico Watercolor Society. For more information about Wilson's art, email janineabq@gmail.com or visit www.janinewilsonart.blogspot.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.

New Mexico Court of Appeals

Gov. Susana Martinez Announces Judicial Appointments

On Jan. 19, Gov. Susana Martinez announced appointments to the New Mexico Court of Appeals. **Jennifer Attrep** of Santa Fe will fill the vacancy created by the resignation of Hon. Timothy L. Garcia and **Daniel Gallegos** of Albuquerque will fill the vacancy created by the resignation of Hon. Judge Jonathan B. Sutin.

Third Judicial District

Applicant Announcement

Five applicants were received in the Judicial Selection Office as of 5 p.m., Jan. 18, for the judicial vacancy in the Third Judicial District due to the retirement of Hon. Fernando R. Macias, effective Jan. 6. The Third Judicial District Judicial Nominating Commission will meet on Feb. 1 at the Third Judicial District Courthouse, 201 W Picacho Ave, Las Cruces, NM 88005 to evaluate the applicants for this position. The Commission meeting is open to the public. Those who want to make public comment are requested to be present at the opening of the meeting. The names of the applicants in alphabetical order are: **Richard Jacquez**, **Isabel Jerabek**, **William Kinsella Jr.**, **James McBride** and **Jeanne H. Quintero**.

Professionalism Tip

With respect to other judges:

In all written and oral communications, I will abstain from disparaging personal remarks or criticisms, or sarcastic or demeaning comments about another judge.

Bernalillo County Metropolitan Court

Destruction of Tapes

Pursuant to the judicial records retention and disposition schedules, the Second Judicial District Court will destroy tapes of proceedings associated with the following civil and criminal cases:

1. d-202-CV-1992-00001 through d-202-CV-1992-11403;
2. d-202-CV-1993-00001 through d-202-CV-1993-11714;
3. d-202-CV-1994-00001 through d-202-CV-1994-10849;
4. d-202-CV-1995-00001 through d-202-CV-1995-11431;
5. d-202-CV-1996-00001 through d-202-CV-1996-12005;
6. d-202-CV-1997-00001 through d-202-CV-1997-12024;
7. d-202-CR-1983-36058 through d-202-CR-1983-37557;
8. d-202-CR-1984-37558 through d-202-CR-1984-39151;
9. d-202-CR-1985-39152 through d-202-CR-1985-40950;
10. d-202-CR-1986-40951 through d-202-CR-1986-42576.

Attorneys who have cases with proceedings on tape and want to have duplicates made should verify tape information with the Special Services Division at 505-841-7401 from 10 a.m.-2 p.m., Monday through Friday. Aforementioned tapes will be destroyed after March 31.

State Bar News

Attorney Support Groups

- Feb. 5, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the first Monday of the month.)
- Feb. 12, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (Group meets on the second Monday of the month.) Teleconference participation is available. Dial 1-866-640-4044 and enter code 7976003#.
- **New meeting added**
  First meeting: Feb. 19, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albqerque, King Room in the Law Library (Group meets the third Monday of the month.) Teleconference participation is 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 at 505-242-6845.

2018 Licensing Notification

Late Fees Begin Feb. 2

2018 State Bar licensing fees and certifications are due. A late payment or late disclosure penalty is assessed after February 1st and delinquency certification is sent to the New Mexico Supreme Court after March 31. Complete annual licensing requirements online at www.nmbar.org/licensing or email license@nmbar.org to request a PDF copy of the license renewal form. Payment by credit card is available (payment by credit card will incur a service charge). For more information, call 505-797-6083 or email license@nmbar.org. For help logging in or other website troubleshooting, email clopez@nmbar.org. Those who have already completed their licensing requirements should disregard this notice.

Board of Bar Commissioners

Commissioner Vacancy

Third Bar Commissioner District (Los Alamos, Rio Arriba, Sandoval and Santa Fe counties)

A vacancy exists in the Third Bar Commissioner District, representing Los Alamos, Rio Arriba, Sandoval and Santa Fe counties. The Board will make the appointment at its Feb. 23 meeting to fill the vacancy until the next regular election of Commissioners, and the term will run through Dec. 31, 2018. Active status members with a principal place of practice located in the Third Bar Commissioner District are eligible to apply. The remaining 2018 Board meetings are scheduled for May 18 in Albuquerque, Aug. 9 at the Hyatt Regency Tamaya Resort in Santa Ana Pueblo in conjunction with the State Bar of New Mexico Annual Meeting, Oct. 12 in Albuquerque, and Dec. 13 in Santa Fe. Members interested in serving on the Board should submit a letter of interest and

résumé to Kris Becker at kbecker@nmbar.org or fax to 505-828-3765, by Feb. 9.

Board of Editors

Call for Articles for Criminal Law Issue of *New Mexico Lawyer*

The *New Mexico Lawyer* is published four times a year and each issue focuses on a specific area of law. The Board of Editors has chosen criminal law as the topic of the next issue of the *New Mexico Lawyer*, to be published in May. The Board seeks abstracts for articles that address criminal law issues in New Mexico. Abstracts should be at least 300 words. Abstract submissions must include the abstract, the author's full name and address and a brief biography of the author. The deadline for submissions is Feb. 23. Send submissions to Director of Communications Evann Kleinschmidt at ekleinschmidt@nmbar.org. The Board of Editors will choose the abstracts and notify authors in March. Articles for the *New Mexico Lawyer* are approximately 1,500 words. For more information about the publication or the call for abstract submissions, visit www.nmbar.org/NewMexicoLawyer or contact Evann.

Seeking Applications for Open Positions

The State Bar Board of Editors has open positions. The Board of Editors meets at least four times a year to review articles submitted to the *Bar Bulletin* and the *New Mexico Lawyer*. This volunteer board reviews submissions for suitability, edits for legal content and works with authors as needed to develop topics or address other concerns. The Board is also responsible for planning for the future of the State Bar's publications. The Board of Editors should represent a diversity of backgrounds, ages, geographic regions of the state, ethnicity, gender and areas of legal practice and preferably have some experience in journalism or legal publications. The State Bar president, with the approval of the Board of Bar Commissioners, appoints members of the Board of Editors, often on the recommendation of the current Board. Those interested in being considered for a two-year term should send a letter of interest and résumé to Director of Communications Evann Kleinschmidt at ekleinschmidt@nmbar.org. Apply by Feb. 23.

Legal Services and Programs Committee

Equal Justice Conference Attendance Financial Assistance Available

The Legal Services and Programs Committee has made available three $1,000 stipends to provide financial assistance to civil legal service providers staff and attorneys interested in attending the 2018 Equal Justice Conference on May 10-12 in San Diego. Visit www.nmbar.org/LSAP for more information and to apply. Applications must be received by 5 p.m. on Jan. 26 for consideration.

Practice Sections

Proposed Cannabis Law Section

Interested in becoming a part of history and joining a proposed brand-new State Bar Cannabis Law Section? Whether you defend or prosecute cannabis cases, whether you're a proponent or an opponent of cannabis issues, if you are in a related field or enforce our State's laws, consider signing the petition to create New Mexico's inaugural Cannabis Law Section! The Cannabis Law Section will strive to be the preeminent legal section dedicated to addressing and solving all cannabis law issues as they involve the New Mexico medical cannabis program, cannabis legislation, the interplay between the State Bar of New Mexico and the cannabis industry, litigation issues concerning cannabis and any other issue concerning current and future laws, rules and regulation relating to cannabis. If you are interested in this proposed practice section, visit https://form.jotform.com/72974569603974 or contact Carlos N. Martinez at carlos@legalsolutionsofnm.com or Breanna Henley at bhenley@nmbar.org.

Young Lawyers Division

UNMSOL Summer Fellowship Open Now

The YLD offers two $3,000 summer fellowships to UNM School of Law students who are interested in working in public interest law or the government sector. The fellowship awards are intended to provide the opportunity for law students to work for public interest entities or in the government sector in an unpaid position. To be eligible, applicants must be a current law student in good standing. Applications for the fellowship must include: 1) a letter of interest that details the student's interest in public interest law or the government sector; 2) a résumé; and 3) a written offer of employment for an unpaid legal position in public interest law or the government sector for the summer. Applications containing offers of employment that are contingent upon the successful completion of a background check will not be considered unless verification of the successful completion of the background check is also provided. Email applications to Breanna Henley at bhenley@nmbar.org by 5 p.m., March 23 for consideration.

Volunteers Needed for Rio Rancho Wills for Heroes

The YLD is seeking volunteer attorneys for its Wills fo Heroes event for Rio Rancho first-responders from 9 a.m.-noon, Feb. 24, at Loma Colorado Main Library, located at 755 Loma Colorado Blvd NE in Rio Rancho. Volunteers should arrive at 8:15 a.m. for breakfast and orientation. 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. Visit https://www.jotform.com/70925407803961 to volunteer.

UNM School of Law

Law Library Hours

Through May 12

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.

Depositions CLE with Steve Scholl

The UNM School of Law presents "Taking and Defending Depositions" with Steve Scholl and his all-star faculty on March 2-4 and March 23-24. This "learn by doing" course is approved for 31.0 G and 4.5 EP credits by MCLE. Attendees will learn how to effectively prepare witnesses; defend the deposition, deal with obstreperous counsel, get the answers within time constraints, optimize information from expert witnesses, test theories and close off avenues of escape. Whether you are new to depositions or want to refresh your skills, this class will give you the tools you need to be successful. Register by Feb. 9. For more information and online registration visit: goto.unm.edu/depositions or contact Cheryl Burbank at burbank@law.unm.edu or 505-277-0609.

Free CLE: Balancing the Scales

State Bar members and UNM law students are invited to attend a screening of the documentary "Balancing the Scales" followed by a moderated discussion with New Mexico attorney and executive coach Elizabeth Phillips from 5-7:30 p.m., March 1, at the UNM School of Law. The documentary delves into the challenges women lawyers have faced historically and still face today, including the additional hurdles faced by women lawyers of color, and illustrates how U.S. culture has accepted less than full equality for women and how few women lawyers have really broken the glass ceiling. Explore how the intersectionality of gender and race creates additional challenges and what impact we can have on the profession. View the trailer at https://vimeo.com/80957214. Dinner will be served beginning at 5 p.m. and the program begins at 5:30 p.m. This program has been approved by MCLE for 2.0 EP, sponsored by the UNM School of Law. Dinner is provided by the Committee on Women and the Legal Profession and the UNMSOL Women's Law Caucus. Special thank you to New Mexico PBS for supplying a copy of the film and permitting this special showing. R.S.V.P. to Laura Castille at lcastille@cuddymccarthy.com by Feb. 28.

Other Bars

Albuquerque Lawyers Club

February Luncheon

The Albuquerque Lawyers Club invites members of the legal community to its meeting at noon, Feb. 7, at Seasons Rotisserie & Grill in Albuquerque. Alex Bregman's father, formerly known as Sam Bregman, is the featured speaker. He will present "Defensive Specialists: the Boyd case and Alex's championship experience." The luncheon is free to members; $30 for non-members in advance; and $35 at the door. For more information, contact Yasmin Dennig at ydennig@yahoo.com or 505-844-3558.

American Bar Association Health Law Section

19th Annual Conference on Emerging Issues in Healthcare Law

The American Bar Association Health Law Section will be convening the "19th Annual Conference on Emerging Issues in Healthcare Law" on Feb. 21–24 in Scottsdale, Ariz. State Bar of New Mexico members receive a 10 percent discount. Registration is additionally discounted to $595 for first time attendees (representing a savings of $450). Attendees will have the opportunity to network with healthcare bar leaders from across the country and take home meaningful insights from 16 cutting edge CLE programs including immigrant access to healthcare, antitrust enforcement, billing disputes, human trafficking and more. Visit ambar.org/EMI2018 for more information or to register.

American Bar Association Section of Litigation

Appellate Practice Regional Meeting 2018: Colorado

The American Bar Association Section of Litigation presents "Appellate Practice Regional Meeting 2018: Colorado at the U.S. Supreme Court with Solicitor General Fed Yarger" on March 6 in Denver. Registration is $55 for section members, $120 for non-section members and $25 for government attorneys and students. Visit http://ambar.org/ltappellate for more information or to register.

New Mexico Criminal Defense Lawyers Association

Prisons, Pimps and Prejudices: Federal Practice CLE Seminar

Jeff Carson, retired operations manager for the Bureau of Prisons, returns to NMCDLA's "Prisons, Pimps & Prejudices: Federal Practice CLE" (6.0 G) on Feb. 23 in Albuquerque to give attorneys the inside scoop on everything to know about the BOP. Also on the agenda for this seminar is sex trafficking 101, the DOJ and the new war on drugs, implicit bias and a federal case law update. Visit www.nmcdla.org to register and renew membership dues for 2018 today.

New Mexico Women's Bar Association

Seeking Nominations for Support Women in the Law Award

The New Mexico Women's Bar Association seeks nominations for its Support for Women In the Law Award, which is awarded to a law firm or other organization actively engaged in promoting a culture of success for women attorneys in New Mexico. Submit nominations to Margaret (Peggy) Graham at mgraham@pbwslaw.com by Feb. 2, by providing the name of the firm or office and the reasons for the nomination.

Other News

Center for Civic Values

Manzano High School Seeks Attorney Coach

Manzano High School in Albuquerque seeks an attorney coach to help with its mock trial team. For more information, contact Kristen Leeds, director, Center for Civic Values and Gene Franchini New Mexico High School Mock Trial Program. at 505-764-9417 or kristen@Civicvalues.org.

Requesting Judges for Gene Franchini High School Mock Trial

Mock trial is an innovative, hands-on experience in the law for high school students of all ages and abilities. Every year hundreds of New Mexico teenagers and their teacher advisors and attorney coaches spend the better part of the school year researching, studying and preparing a hypothetical courtroom trial involving issues that are important and interesting to young people. Mock Trial qualifiers will be held Feb. 16–17, at the Bernalillo County Metropolitan Court in Albuquerque. CCV needs volunteers for judges (opportunities exist for sitting judges and non-judges). Learn more and register at www.civicvalues.org.

2018 STATE BAR OF NEW MEXICO Annual Awards

Nominations are being accepted for the **2018 State Bar of New Mexico Annual Awards** to recognize those who have distinguished themselves or who have made exemplary contributions to the State Bar or legal profession in 2017 or 2018. The awards will be presented during the 2018 Annual Meeting, Aug. 9-11 at the Hyatt Regency Tamaya Resort, Santa Ana Pueblo. All awards are limited to one recipient per year, whether living or deceased. Previous recipients for the past three years are listed below. To view the full list of previous recipients, visit **www.nmbar.org/Awards**.

{ Distinguished Bar Service Award–Lawyer }

Recognizes attorneys who have provided valuable service and contributions to the legal profession and the State Bar of New Mexico over a significant period of time.

Previous recipients: *Scott M. Curtis, Hannah B. Best, Jeffrey H. Albright*

{ Distinguished Bar Service Award–Nonlawyer }

Recognizes nonlawyers who have provided valuable service and contributions to the legal profession over a significant period of time.

Previous recipients: *Cathy Ansheles, Tina L. Kelbe, Kim Posich*

{ Justice Pamela B. Minzner* Professionalism Award }

Recognizes attorneys or judges who, over long and distinguished legal careers, have by their ethical and personal conduct exemplified for their fellow attorneys the epitome of professionalism.

Previous recipients: *Hon. Elizabeth E. Whitefield, Arturo L. Jaramillo, S. Thomas Overstreet*

*Known for her fervent and unyielding commitment to professionalism, Justice Minzner (1943–2007) served on the New Mexico Supreme Court from 1994–2007.

{ Outstanding Legal Organization or Program Award }

Recognizes outstanding or extraordinary law-related organizations or programs that serve the legal profession and the public.

Previous recipients: *Young Lawyers Division Wills for Heroes Program, Self Help Center at the Third Judicial District Court, Pegasus Legal Services for Children*

{ Outstanding Young Lawyer of the Year Award }

Awarded to attorneys who have, during the formative stages of their legal careers by their ethical and personal conduct, exemplified for their fellow attorneys the epitome of professionalism; nominee has demonstrated commitment to clients' causes and to public service, enhancing the image of the legal profession in the eyes of the public; nominee must have practiced no more than five years or must be no more than 36 years of age.

Previous recipients: *Spencer L. Edelman, Denise M. Chanez, Tania S. Silva*

{ Robert H. LaFollette* Pro Bono Award }

Presented to an attorney who has made an exemplary contribution of time and effort, without compensation, to provide legal assistance over his or her career to people who could not afford the assistance of an attorney.

Previous recipients: *Stephen. C. M. Long, Billy K. Burgett, Robert M. Bristol*

*Robert LaFollette (1900–1977), director of Legal Aid to the Poor, was a champion of the underprivileged who, through countless volunteer hours and personal generosity and sacrifice, was the consummate humanitarian and philanthropist.

{ Seth D. Montgomery* Distinguished Judicial Service Award }

Recognizes judges who have distinguished themselves through long and exemplary service on the bench and who have significantly advanced the administration of justice or improved the relations between the bench and the bar; generally given to judges who have or soon will be retiring.

Previous recipients: *Hon. Michael D. Bustamante, Justice Richard C. Bosson, Hon. Cynthia A. Fry*

*Justice Montgomery (1937–1998), a brilliant and widely respected attorney and jurist, served on the New Mexico Supreme Court from 1989–1994.

A letter of nomination for each nominee should be sent to Kris Becker, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; fax 505-828-3765; or email kbecker@nmbar.org. Please note that we will be preparing a video on the award recipients which will be presented at the awards reception, so please provide names and contact information for three or four individuals who would be willing to participate in the video project in the nomination letter.

Deadline for Nominations: June 1

For more information or questions, please contact Kris Becker at 505-797-6038.

STATE BAR of NEW MEXICO

Report by Disciplinary Counsel
Disciplinary Quarterly Report

Reporting Period: Oct. 1–Dec. 31, 2017

Final Decisions
Final Decisions of the NM Supreme Court 5

Matter of Elena Moreno Hansen, Esq., Disciplinary No. 03-2017-756. The New Mexico Supreme Court issued an Order on October 6, 2017 indefinitely suspending Respondent from the practice of law for a period of no less than three (3) years for failing to communicate, general incompetence, failing to protect the interest of a client, and failing to cooperate with the disciplinary board. Respondent was also ordered to reimburse the Client Protection Fund, submit to an audit of her IOLTA within thirty (30) days, including refunding any funds to clients that are revealed owed during the audit, provide documentation that Respondent complied with the court sanction award in *Torres v. Torres*, D-307-CV-2016-00285, and pay costs to the Disciplinary Board.

Matter of Sharon Pomeranz, Esq., Disciplinary No. 09-2017-770. The New Mexico Supreme Court issued an Order on October 10, 2017 accepting Respondents' resignation and withdrawing Respondent's membership to practice law in lieu of discipline for knowingly filing frivolous lawsuits. Respondent cannot apply for readmission or reinstatement for three (3) years and, prior to reinstatement; must reimburse the Client Protection Fund, make restitution to any clients owed money, successfully complete all continuing legal credit requirements applicable to active New Mexico attorneys' during Respondent's absence from the practice of law, and successfully pass the MPRE.

Matter of Les Sandoval, Esq., Disciplinary No. 01-2017-751. The New Mexico Supreme Court issued an Order on October 30, 2017 indefinitely suspending Respondent from the practice of law for a period of no less than one (1) year effective November 29, 2017 for general neglect, general misrepresentation, and fraud. Respondent was also ordered to reimburse client within sixty (60) days from the date of the order, submit to an audit of his IOLTA, and pay costs to the Disciplinary Board.

Matter of Matthew E. Ortiz, Esq., Disciplinary No. 10-2016-749. The New Mexico Supreme Court issued an Order on November 6, 2017 permanently disbarring Respondent from the practice law for conversion, failing to comply with court orders, and failing to cooperate with the Disciplinary Board. Respondent was also ordered to submit to an audit of his IOLTA and pay costs to the Disciplinary Board.

Matter of Christin K. Kennedy, Esq., Disciplinary No. 06-2017-760. The New Mexico Supreme Court issued an Order on December 18, 2017 accepting the conditional agreement not to contest and consent to discipline for a conflict of interest. The Court deferred the suspension of one (1) year and Respondent was order to pay costs to the Disciplinary Board.

Summary Suspensions
Total number of attorneys summarily suspended 0

Administrative Suspensions
Total number of attorneys administratively suspended.....0

Disability Inactive Status
Total number of attorneys placed on disability inactive status ...0

Charges Filed
Total number of attorneys that had charges filed against them 0

Petition for Injunctive Relief Filed
Petitions for injunctive relief filed.....2

Matter of Anthony O. Ramirez (Supreme Court No. S-1-SC-36507). A Petition for Injunctive relief was filed against a non-lawyer under the Rules Governing the Unauthorized Practice of Law. The Supreme Court entered an order effective November 13, 2017 granting a consent agreement and enjoining Respondent from preparing for, or disseminating to, others any legal documents. Respondent was further ordered to pay costs to the Disciplinary Board.

Matter of Amy Lovell (Supreme Court No. S-1-SC-36439). A Petition for Injunctive relief was filed against a non-lawyer under the Rules Governing the Unauthorized Practice of Law. The Supreme Court entered an order effective December 18, 2017 granting a consent agreement and enjoining Respondent from preparing legal documents, giving legal advice, or acting as a representative or intermediary for other persons or entities with their legal matters. Respondent was further ordered to pay costs to the Disciplinary Board.

Petitions for Reciprocal Discipline Filed
Petitions for reciprocal discipline filed 0

Reinstatement from Probation
Petitions for reinstatement filed 1

Matter of Jacqueline Bennett, Esq. (Disciplinary No. 04-2016-741) Respondent petitioned for reinstatement to the practice of law from probation. The Supreme Court granted the petition in an Order dated November 13, 2017.

Formal Reprimands
Total number of attorneys formally reprimanded 0

Informal Admonitions
Total number of attorneys admonished 1

An attorney was informally admonished for failing to provide competent representation to a client and assisting in the unauthorized practice of law in violation of Rules 16-101 and 16-505(A) of the Rules of Professional Conduct.

Letters of Caution
Total number of attorneys cautioned 5

Attorneys were cautioned for the following conduct: (1) general incompetence (2 letters of caution issued); (2) failure to protect interest of client; (3) bank overdraft; and (4) conflict of interest.

Complaints Received

Allegations	**Number of Complaints**
Trust Account Violations	5
Conflict of Interest	0
Neglect and/or Incompetence	96
Misrepresentation or Fraud	15
Relationship with Client or Court	10
Fees	3
Improper Communications	1
Criminal Activity	0
Personal Behavior	9
Other	12
Total number of complaints received	151

Legal Education

February

1 **Workplace Issues for Employers**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

2 **How to Practice Series: Adult Guardianship**
4.0 G, 2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

6 **2018 Ethics Update Part I**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

7 **Ethics Update Part II**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **Negotiating (and Renegotiating Leases) Part I**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **Regional Seminar**
20.5 G
Live Seminar, Santa Fe
Trial Lawyers College
307-432-4042

9 **Litigation and Argument Writing in the Smartphone Age (2017)**
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

12 **Negotiating (and Renogotiating) Leases, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

16 **2017 Real Property Institute**
6.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

16 **New Mexico Liquor Law for and Beyond (2017)**
3.5 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

16 **Exit Row Ethics: What Rude Airline Travel Stories Teach About Attorney Ethics (2017)**
3.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

20 **Sophisticated Choice of Entity, Part I**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

21 **Sophisticated Choice of Entity, Part II**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

23 **Drafting Waivers of Conflicts of Interests**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

23 **Where the Rubber Meets the Road: The Intersection of the Rules of Civil Procedure and the Rules of Professional Conduct (2017)**
1.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

23 **The Ethics of Lawyer Advertisements Using Social Media (2017)**
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

23 **2017 Family Law Institute Day 1**
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

March

1 **Introduction to the Practice of Law in New Mexico (Reciprocity)**
4.5 G, 2.5 EP
Live Seminar, Albuquerque
New Mexico Board of Bar Examiners
www.nmexam.org

1 **Service Level Agreements in Technology Contracting**
1.0 G
Teleseminar
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2 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
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2-4 **Taking and Defending Depositions (Part 1 of 2)**
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Live Seminar,
Albuquerque
UNM School of Law
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6 **Successor Liability in Business Transactions**
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9 **Drafting Professional and Personal Services Agreements**
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13 **Fiduciary Duties in Closely-held Companies: What Owners Owe the Business & Other Owners**
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14 **Role of LLCs in Trust and Estate Planning**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
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16 **Current Immigration Issues for the Criminal Defense Attorney (2017 Immigration Law Institute)**
5.0 G, 2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
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16 **Civility and Professionalism (2017 Ethicspalooza)**
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
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16 **New Mexico Liquor Law for 2017 and Beyond (2017)**
3.5 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
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22 **2017 Appellate Practice Institute**
6.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
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22 **Where the Rubber Meets the Road: The Intersection of the Rules of Civil Procedure and the Rules of Professional Conduct (2017)**
1.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
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22 **2017 Mock Meeting of the Ethics Advisory**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
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23-25 **Taking and Defending Depositions (Part 2 of 2)**
31.0 G, 4.5 EP
Live Seminar,
Albuquerque
UNM School of Law
goto.unm.edu/despositions

26 **Trial Know-How! (The Rush to Judgment- 2017 Trial Practice Section Annual Institute)**
4.0 G, 2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
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26 **Legal Malpractice Potpourri (2017)**
1.5 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
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26 **Conflicts of Interest (2017 Ethicspalooza)**
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
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26 **Federal and State Tax Updates (2017 Tax Symposium)**
3.5 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
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27 **Lawyer Ethics When Clients Won't Pay Fees**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

28 **Structuring For-Profit/Non-Profit Joint Ventures**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

28 **Cybersluth: Conducting Effective Internet Research (2017)**
4.0 G, 2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **The Ethics of Using Lawyer Advertisements Using Social Media (2017)**
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
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28 **Attorney vs. Judicial Discipline (2017)**
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
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Listings in the Bar Bulletin *CLE Calendar are derived from course provider submissions. All MCLE approved continuing legal education courses can be listed free of charge. Send submissions to notices@nmbar.org. Include course title, credits, location, course provider and registration instructions.*

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 January 19, 2017

PUBLISHED OPINIONS

A-1-CA-34971	J Melendez v. Salls Brothers	Affirm	01/17/2018

UNPUBLISHED OPINIONS

A-1-CA-36454	CYFD v. Francisco G.	Affirm	01/16/2018
A-1-CA-36577	State v. F Litton	Affirm/Reverse	01/16/2018
A-1-CA-36151	A Firstenberg v. R Leith	Affirm	01/17/2018
A-1-CA-36023	State v. A Baldonado	Affirm	01/18/2018

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

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 January 31, 2018

Pending Proposed Rule Changes Open for Comment:

		Comment Deadline
10-166	Public inspection and sealing of court records	02/09/2018

Recently Approved Rule Changes Since Release of 2017 NMRA:

		Effective Date
Rules of Civil Procedure for the District Courts		
1-015	Amended and supplemental pleadings	12/31/2017
1-017	Parties plaintiff and defendant; capacity	12/31/2017
1-053.1	Domestic violence special commissioners; duties	12/31/2017
1-053.2	Domestic relations hearing officers; duties	12/31/2017
1-053.3	Guardians ad litem; domestic relations appointments	12/31/2017
1-079	Public inspection and sealing of court records	03/31/2017
1-088	Designation of judge	12/31/2017
1-105	Notice to statutory beneficiaries in wrongful death cases	12/31/2017
1-121	Temporary domestic orders	12/31/2017
1-125	Domestic Relations Mediation Act programs	12/31/2017
1-129	Proceedings under the Family Violence Protection Act	12/31/2017
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		
2-105	Assignment and designation of judges	12/31/2017
2-112	Public inspection and sealing of court records	03/31/2017
2-301	Pleadings allowed; signing of pleadings, motions, and other papers; sanctions	12/31/2017
Rules of Civil Procedure for the Metropolitan Courts		
3-105	Assignment and designation of judges	12/31/2017
3-112	Public inspection and sealing of court records	03/31/2017
3-301	Pleadings allowed; signing of pleadings, motions, and other papers; sanctions	12/31/2017
Civil Forms		
4-223	Order for free process	12/31/2017
4-402	Order appointing guardian ad litem	12/31/2017
4-602	Withdrawn	12/31/2017
4-602A	Juror summons	12/31/2017
4-602B	Juror qualification	12/31/2017
4-602C	Juror questionnaire	12/31/2017
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
4-941	Motion to restore right to possess or receive a firearm or Ammunition	12/31/2017
Domestic Relations Forms		
4A-200	Domestic relations forms; instructions for stage two (2) forms	12/31/2017
4A-201	Temporary domestic order	12/31/2017
4A-209	Motion to enforce order	12/31/2017
4A-210	Withdrawn	12/31/2017
4A-321	Motion to modify final order	12/31/2017
4A-504	Order for service of process by publication in a newspaper	12/31/2017
Rules of Criminal Procedure for the District Courts		
5-105	Designation of judge	12/31/2017
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 and Indictment	07/01/2017
5-211	Search warrants	12/31/2017
5-302	Preliminary examination	12/31/2017
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
5-802	Habeas corpus	12/31/2017

Rules of Criminal Procedure for the Magistrate Courts

6-105	Assignment and designation of judges	12/31/2017
6-114	Public inspection and sealing of court records	03/31/2017
6-202	Preliminary examination	12/31/2017
6-203	Arrests without a warrant; probable cause determination	12/31/2017
6-207	Bench warrants	04/17/2017
6-207.1	Payment of fines, fees, and costs	04/17/2017
6-207.1	Payment of fines, fees, and costs	12/31/2017
6-208	Search warrants	12/31/2017
6-304	Motions	12/31/2017
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
6-506	Time of commencement of trial	12/31/2017
6-506.1	Voluntary dismissal and refiled proceedings	12/31/2017
6-703	Appeal	07/01/2017

Rules of Criminal Procedure for the Metropolitan Courts

7-105	Assignment and designation of judges	12/31/2017
7-113	Public inspection and sealing of court records	03/31/2017
7-202	Preliminary examination	12/31/2017
7-203	Probable cause determination	12/31/2017
7-207	Bench warrants	04/17/2017
7-207.1	Payment of fines, fees, and costs	04/17/2017
7-208	Search warrants	12/31/2017
7-304	Motions	12/31/2017
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
7-504	Discovery; cases within metropolitan court trial jurisdiction	12/31/2017
7-506	Time of commencement of trial	07/01/2017
7-506.1	Voluntary dismissal and refiled proceedings	12/31/2017
7-606	Subpoena	12/31/2017
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
8-202	Probable cause determination	12/31/2017
8-206	Bench warrants	04/17/2017
8-206.1	Payment of fines, fees, and costs	04/17/2017
8-207	Search warrants	12/31/2017
8-304	Motions	12/31/2017
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
8-506	Time of commencement of trial	12/31/2017
8-506.1	Voluntary dismissal and refiled proceedings	12/31/2017
8-703	Appeal	07/01/2017

Criminal Forms

9-207A	Probable cause determination	12/31/2017
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
9-513	Withdrawn	12/31/2017
9-513A	Juror summons	12/31/2017
9-513B	Juror qualification	12/31/2017
9-513C	Juror questionnaire	12/31/2017
9-515	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017
9-701	Petition for writ of habeas corpus	12/31/2017
9-702	Petition for writ of certiorari to the district court from denial of habeas corpus	12/31/2017
9-809	Order of transfer to children's court	12/31/2017
9-810	Motion to restore right to possess or receive a firearm or ammunition	12/31/2017

Children's Court Rules and Forms

10-161	Designation of children's court judge	12/31/2017
10-166	Public inspection and sealing of court records	03/31/2017
10-166	Public inspection and sealing of court records	12/31/2017
10-169	Criminal contempt	12/31/2017
10-325	Notice of child's advisement of right to attend hearing	12/31/2017
10-325.1	Guardian ad litem notice of whether child will attend hearing	12/31/2017
10-570.1	Notice of guardian ad litem regarding child's attendance at hearing	12/31/2017
10-611	Suggested questions for assessing qualifications of proposed court interpreter	12/31/2017
10-612	Request for court interpreter	12/31/2017
10-613	Cancellation of court interpreter	12/31/2017
10-614	Notice of non-availability of certified court interpreter or justice system interpreter	12/31/2017

Rules of Appellate Procedure

12-202	Appeal as of right; how taken	12/31/2017
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
12-210	Calendar assignments for direct appeals	12/31/2017
12-307.2	Electronic service and filing of papers	07/01/2017
12-307.2	Electronic service and filing of papers	08/21/2017
12-313	Mediation	12/31/2017
12-314	Public inspection and sealing of court records	03/31/2017
12-502	Certiorari from the Supreme Court to the Court of Appeals	12/31/2017

Uniform Jury Instructions – Civil

13-24 Appx 1	Part A: Sample fact pattern and jury instructions for malpractice of attorney in handling divorce case	12/31/2017
13-2401	Legal malpractice; elements	12/31/2017
13-2402	Legal malpractice; attorney-client relationship	12/31/2017
13-2403	Legal malpractice; negligence and standard of care	12/31/2017
13-2404	Legal malpractice; breach of fiduciary duty	12/31/2017
13-2405	Duty of confidentiality; definition	12/31/2017
13-2406	Duty of loyalty; definition	12/31/2017
13-2407	Legal malpractice; attorney duty to warn	12/31/2017
13-2408	Legal malpractice; duty to third-party intended - No instruction drafted	12/31/2017
13-2409	Legal malpractice; duty to intended beneficiaries; wrongful death	12/31/2017
13-2410	Legal malpractice; expert testimony	12/31/2017
13-2411	Rules of Professional Conduct	12/31/2017
13-2412	Legal malpractice; attorney error in judgment	12/31/2017
13-2413	Legal malpractice; litigation not proof of malpractice	12/31/2017
13-2414	Legal malpractice; measure of damages; general instruction	12/31/2017
13-2415	Legal malpractice; collectability – No instruction drafted	12/31/2017

Uniform Jury Instructions – Criminal

14-240	Withdrawn	12/31/2017
14-240B	Homicide by vehicle; driving under the influence; essential elements	12/31/2017
14-240C	Homicide by vehicle; reckless driving; essential elements	12/31/2017
14-240D	Great bodily injury by vehicle; essential elements	12/31/2017
14-251	Homicide; "proximate cause"; defined	12/31/2017
14-1633	Possession of burglary tools; essential elements	12/31/2017
14-2820	Aiding or abetting; accessory to crime of attempt	12/31/2017
14-2821	Aiding or abetting; accessory to felony murder	12/31/2017
14-2822	Aiding or abetting; accessory to crime other than attempt and felony murder	12/31/2017
14-4201	Money laundering; financial transaction to conceal or disguise property, OR to avoid reporting requirement; essential elements	12/31/2017

14-4202	Money laundering; financial transaction to further or commit another specified unlawful activity; essential elements	12/31/2017
14-4203	Money laundering; transporting instruments to conceal or disguise OR to avoid reporting requirement; essential elements	12/31/2017
14-4204	Money laundering; making property available to another by financial transaction OR transporting; essential elements	12/31/2017
14-4205	Money laundering; definitions	12/31/2017
14-5130	Duress; nonhomicide crimes	12/31/2017

Rules Governing Admission to the Bar

15-103	Qualifications	12/31/2017
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

16-100	Terminology	12/31/2017
16-101	Competence	12/31/2017
16-102	Scope of representation and allocation of authority between client and lawyer	08/01/2017
16-106	Confidentiality of information	12/31/2017
16-108	Conflict of interest; current clients; specific rules	12/31/2017
16-304	Fairness to opposing party and counsel	12/31/2017
16-305	Impartiality and decorum of the tribunal	12/31/2017
16-402	Communications with persons represented by counsel	12/31/2017
16-403	Communications with unrepresented persons	12/31/2017
16-701	Communications concerning a lawyer's services	12/31/2017
16-803	Reporting professional misconduct	12/31/2017

Rules Governing Discipline

17-202	Registration of attorneys	07/01/2017
17-202	Registration of attorneys	12/31/2017
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

Code of Judicial Conduct

21-004	Application	12/31/2017

Supreme Court General Rules

23-106	Supreme Court rules committees	12/31/2017
23-106.1	Supreme Court rule-making procedures	12/31/2017

Rules Governing the New Mexico Bar

24-110	"Bridge the Gap: Transitioning into the Profession" program	12/31/2017

Rules Governing Review of Judicial Standards Commission Proceedings

27-104	Filing and service	07/01/2017

Local Rules for the Second Judicial District Court

LR2-308	Case management pilot program for criminal cases	01/15/2018
LR2-308	Case management pilot program for criminal cases	01/15/2018*

*The Court approved amendments to LR2-308 on December 4, 2017, to be effective January 15, 2018, and approved additional amendments on January 9, 2018, also to be effective January 15, 2018.

Local Rules for the Thirteenth Judicial District Court

LR13-112	Courthouse security	12/31/2017

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-088

No. A-1-CA-35064 (filed July 26, 2017)

STATE OF NEW MEXICO ex rel.
CHILDREN, YOUTH AND FAMILIES
DEPARTMENT,
Petitioner-Appellee,
v.
DONNA E. and HARLEY E.,
Respondents-Appellants,
IN THE MATTER OF SARAI E. and STEPHEN E.,
Children.

APPEAL FROM THE DISTRICT COURT OF LEA COUNTY
RAYMOND L. ROMERO, District Judge

CHARLES E. NEELLEY
Chief Children's Court Attorney
REBECCA J. LIGGETT,
Children's Court Attorney
CHILDREN, YOUTH & FAMILIES
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Santa Fe, New Mexico
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MICHAEL H. STONE
OFFICE OF HOBBS CITY ATTORNEY
Hobbs, New Mexico
Guardian Ad Litem

Opinion

Jonathan B. Sutin, Judge

{1} Children, Youth and Families Department filed a motion for rehearing. This Court has considered the motion and the motion is hereby denied. The opinion filed in this case on June 8, 2017 is withdrawn and the following opinion is substituted therefor.

{2} This case involves an appeal from a ruling terminating the parental rights of Respondents Harley E. (Father) and Donna E. (Mother). Although the New Mexico Children, Youth and Families Department (CYFD) petitioned to have Respondents' parental rights terminated as to two of Respondents' children, one boy and one girl (Children, separately Son and Daughter), the district court ultimately terminated their parental rights only as to Daughter on the ground that they presumptively abandoned her, pursuant to NMSA 1978, Section 32A-4-28(B)(3) (2005). Despite only terminating Respondents' rights to Daughter and not Son, and although those rights were terminated on the basis of presumptive abandonment, the district court nevertheless entered extensive findings of fact and conclusions of law regarding abuse suffered by both Children.

{3} On appeal, Respondents argue that: (1) there was no finding and there is no evidence to support a finding that Respondents caused the disintegration of the parent-child bond with Daughter, thus rebutting the presumption of abandonment under Section 32A-4-28(B)(3); (2) upholding presumptive abandonment violates Section 32A-4-28 and due process because the deterioration of the parent-child relationship in this case was caused by CYFD that wrongfully alleged Respondents produced or consumed child pornography and relied on that allegation to justify, seek, and obtain a no-contact order that prevented Respondents from having contact with Children for years; (3) the district court based its findings that Respondents abused Son on stale and unconfronted hearsay statements; (4) there is no clear and convincing evidence that Respondents directly abused Son or participated in the sexual abuse of Son; and (5) CYFD should pay all attorney fees of Respondents as a sanction for the delay and bad faith handling of this case.

{4} We agree with Respondents that there were no findings by the court as to the cause of the disintegration of their bond with Daughter and that there is no evidence in the record to support a finding that Respondents caused the disintegration. We therefore hold that Respondents successfully rebutted the presumption of abandonment. Based upon our reversal of the abandonment determination by the district court and our remand for further proceedings, it is unnecessary for this Court to address Respondents' due process argument at this time. We therefore reverse the termination of parental rights. However, because the paramount concern in this case is the best interest of Daughter, we remand the case with instructions for additional consideration as to custody.

{5} Because the judgment from which Respondents appeal terminated their rights only as to Daughter on a theory of presumptive abandonment, we need not and do not address Respondents' evidentiary arguments about the testimony and findings and conclusions regarding Son or any abuse or neglect of Children. We also decline to order that CYFD pay Respondents' attorney fees.

BACKGROUND

{6} As noted by Respondents in their brief in chief, this case involves a "five-year odyssey." For the sake of understanding the magnitude of the delays and issues in this case, we find it necessary to provide a comprehensive procedural history and factual background.

{7} In April 2010, Son, then six years old, disclosed to his elementary school principal, Gail Bryant, that his older brother, H.J., then eighteen years old, sexually penetrated him. This disclosure came after months of Son acting out sexually at school and after Bryant had spoken to Mother about his inappropriate behavior. Bryant testified that she discussed Son's behaviors in person with Mother. Mother indicated to Bryant that she did not know how to handle Son's sexual behaviors and disclosed to Bryant that she knew that when Respondents were not at home, H.J. and Son watched pornography together. Bryant recommended putting a block on the computer or removing the computer's

keyboard in an effort to limit access, but Mother did not respond positively to either recommendation.

{8} After Son disclosed the abuse, Bryant called CYFD, and the Hobbs Police Department became involved. Bryant reported to the police that Son disclosed to her that he had told Father what H.J. had done to him. When interviewed by the police, Son disclosed that H.J. "humped [him] in the butt" and that it had happened on more than one occasion. The police interviewed H.J., and H.J. "confessed to sexual penetration of his brother on two occasions about a year and half [prior]." Father was also interviewed and denied knowing anything about the abuse. The police informed Father that H.J. could no longer have access to Son and Daughter, and Father agreed that they would find somewhere for H.J. to stay. The police also informed Mother that H.J. could no longer have access to his younger siblings, and Mother said that she would reach out to her father to see if H.J. could stay with him. H.J.'s maternal grandfather later arrived at the police station and confirmed with officers that H.J. could stay with him for as long as needed.

{9} Ten days after H.J. and Respondents were interviewed, Son was interviewed at a Safe House. During the interview, Son disclosed that he had seen H.J. "make . . . the family dog[] suck his penis." He also stated that "Bubba humped me in my butt and it started bleeding." Following the Safe House interview, the police determined that it would be appropriate to schedule an examination by a Sexual Assault Nurse Examiner (SANE). Mother accompanied Son to the examination. There were no physical findings during the examination, but during the interview, Son again disclosed that H.J. had sexually assaulted him. According to the SANE, during the examination Son began masturbating and, after telling Son to stop, Mother commented "[i]sn't he hung?" Son also stated during the interview that "[w]e have taken pictures of privates, and we print them off upstairs."

{10} As a result of Son's disclosure during the SANE examination regarding naked pictures, the Hobbs Police Department received a search warrant from the Office of the District Attorney to collect various electronic and storage devices from Respondents' home. When the police arrived at Respondents' home, H.J., who was not supposed to be in the family home, answered the door. Mother, Son, and Daughter were also in the home. A CYFD worker was called to the home, and upon entering the home, noticed that it was filthy and in an unsanitary living condition. Children were taken into custody. Daughter was two years old at the time she was taken into CYFD custody.

{11} As a result of the foregoing, an abuse or neglect petition was filed on June 15, 2010. In the petition, CYFD alleged that Son and Daughter were (1) abused children, pursuant to NMSA 1978, Section 32A-4-2(B)(1) (2009, amended 2016); (2) neglected children, pursuant to Section 32A-4-2(E)(2) (current version at Section 32A-4-2(F)(2)); and (3) neglected children, pursuant to Section 32A-4-2(E)(3) (current version at Section 32A-4-2(F)(3)). In August 2010, Respondents entered pleas of no contest with respect to all of the allegations in the petition. As part of their pleas, Respondents agreed to comply with a proposed disposition and treatment plan submitted by CYFD.

{12} The district court held its initial judicial review on September 8, 2010. In its initial judicial review hearing order, the court found that Respondents had each "made sufficient effort to comply with the treatment plan[] and . . . to maintain contact with . . . [C]hildren." However, the court also stated that it was in the best interests of Children that custody remain with CYFD.

{13} The district court held judicial review hearings in October and November 2010 and found that Respondents had made sufficient efforts to maintain contact with Children, but had made insufficient efforts to comply with the treatment plan. In its January 2011 judicial review hearing order, the court found that Respondents had each made sufficient efforts to attend services and comply with the treatment plan, but had not made significant progress. The court ordered that the parties participate in a family centered meeting.

{14} The district court held the initial permanency hearing in February 2011. During the hearing, the court found that Children would not be returned home until the FBI completed its investigation of Father's computer. It was discussed that Son required a higher level of care, but that Daughter apparently would transition home within thirty to sixty days. The court found that Respondents had made sufficient efforts to comply with the treatment plan but neither had made progress toward alleviating or mitigating the causes necessitating removal of Children. The court ordered a permanency plan of reunification but ordered that Children were not to transition home until Respondents had made sufficient progress and the court had reviewed the transition plan. The court also ordered that Son, who had previously been placed with Daughter, be placed in a residential treatment facility.

{15} Over the next three months, the district court continued to find that Respondents were not making sufficient progress. Although visits with Son were suspended in May 2011 due to Respondents' behavior during visits, the court found that "[a]s to [Daughter], . . . [CYFD] feels [Respondents] have made substantial progress toward eliminating the problem that caused [Daughter's] placement in foster care; it is likely [Daughter] will be able to safely return to [Respondents'] home within three months; and [Daughter's] return to [Respondents'] home will be in [Daughter's] best interest."

{16} In June 2011, the district court found that Respondents each made sufficient efforts to comply with and cooperate in the treatment plan, although there were no findings regarding Respondents' progress. Daughter was transitioning home, and Respondents were having unsupervised overnight weekend visits with her.

{17} On July 19, 2011, a permanency hearing was held. At the permanency hearing, a detective from the Hobbs Police Department assigned to the case informed the court that some of the images found on the computer were possibly child pornography. After hearing testimony from the detective, a program director at the treatment center providing care to Son, and Father, all contact between Respondents and Children ceased. The permanency review hearing was continued until August 16, 2011.

{18} At the August 16, 2011 permanency review hearing, the court found Respondents had made sufficient effort to participate in their treatment plan but continued to be unaware of their responsibility for the reason Children came into custody. It noted that all visits were to be cancelled on July 6, 2011, and specifically stated that there was to be no contact between Respondents and Children moving forward. The permanency plan was changed from reunification to adoption.

{19} Following the permanency plan change, Respondents' attorney withdrew, and Mother and Father retained separate counsel. Judge Gary Clingman, who had

previously presided over the case, recused himself, and the matter was reassigned to Judge William Shoobridge.

{20} CYFD filed a motion for termination of parental rights on September 27, 2011. In support of its motion, CYFD alleged that Respondents had not made sufficient progress to allow Children to be safely returned to them in the foreseeable future. The motion specifically highlighted the fact that Respondents were unable to protect Children from H.J. and refused to acknowledge their responsibility to protect Children and to take responsibility for what occurred. CYFD noted the lack of supervision and the concerns about pornography on the computer. CYFD also alleged that due to the lack of supervision, Son suffered from sexual abuse, and Son attempted to molest Daughter. Mother responded to the motion and filed a counterpetition to the motion to terminate parental rights. In her counterpetition, Mother argued that she had complied with all CYFD requirements and court orders and demanded contact, visitation, and physical access to Children "to avoid damage to the [parent-child] relationship." Father followed suit.

{21} The hearing on the motion for termination of parental rights was set to begin on January 3, 2012. However, CYFD moved to continue the hearing because the attorneys for CYFD had a scheduled training in Albuquerque, New Mexico that day. The court continued the hearing, and it was eventually reset to begin July 23, 2012.

{22} The next permanency hearing took place in March 2012. The district court ordered that the permanency plan would continue to be adoption, that CYFD's legal custody would be extended for an additional year, and that the no-contact order would remain in effect.

{23} A pretrial conference was held in June 2012. During the proceeding, counsel for the parties discussed meeting to view the images found on Respondents' computer at the Hobbs Police Department. The district court ordered that counsel be allowed to have supervised access to the computer images.

{24} Later that month, Respondents filed a motion for summary judgment. In their motion, Respondents highlighted their cooperation and compliance and the fact that visitation was suspended and had been suspended for almost one year. They argued that, after viewing the evidence, it could not be concluded by the Hobbs Police Department that the images were, "by clear and convincing evidence[,] child pornography." Because the motion for termination and the cessation of visitation were based on the notion that Respondents viewed and possessed child pornography and because there was not clear and convincing evidence that child pornography was on the computer, Respondents argued that summary judgment was appropriate.

{25} Attached to the motion for summary judgment was a report from the Hobbs Police Department documenting the meeting wherein counsel viewed the images of possible child pornography. The report indicated that the meeting took place on June 22, 2012. The report stated that there were five images that "the [Regional Computer Forensics Laboratory] identified as possible child pornography, and . . . that [the New Mexico] Center for Missing [and] Exploited Children [(NMCMEC)] reported that these images were not matches to their database, and therefore, could not be identified as child pornography." The report also noted that the images were sent to Dr. Leslie Strickler, as requested by NMCMEC.[1] The pornographic images were found in a folder titled "Harley 2," and the only webcam images tied to that folder were of H.J. The report stated that the "majority of the registry entries did not have a corresponding webcam image, so the users of these logins cannot be determined to be exclusively used by those listed[.]" The report also indicated that no criminal charges would be filed and that because there was no additional evidence to be processed, the Hobbs Police Department's involvement concluded. CYFD did not file a written response to the motion for summary judgment until thirty-three months later, in March 2015.

{26} Although the parties met on July 23, 2012, i.e., the date for which the termination hearing had been set, that hearing was not held. During the hearing, the CYFD attorney informed the district court that Dr. Parsons, a necessary expert witness, was experiencing a medical emergency and would not make it to the hearing. According to CYFD, it could not put on a case without Dr. Parsons' testimony, and the attorney requested that the court continue the hearing. The court granted the oral motion for continuance and opted instead to use the time allotted to determine whether visitation should occur. The court heard testimony from Blair Kemp, the therapist at the Guidance Center of Lea County (the Guidance Center) where Respondents were receiving treatment; Adrianna Catano, the program manager at Family Time Visitation Center, who witnessed some visits between Respondents and Daughter; Father; Ruth Macy, the therapist who had been working with Son and Daughter; and Robin Huffman and Barbara Timm, both who had worked with Son at the residential treatment facility where Son was placed. The court ultimately ruled not to change visitation. It ordered that releases be signed so that the providers could communicate and emphasized the need for providers in this case to confer before the termination of parental rights hearing. The termination hearing was reset to begin on September 13, 2012. And again, the termination hearing had to be rescheduled because Dr. Parsons was unavailable.[2]

{27} From September 2012 to February 2013, none of the parties made any movement on the case. However, a status conference was held in February 2013 at which CYFD informed the district court that the plan for CYFD was now reunification. The court entered its subsequent permanency order in March 2013. In its order, the court appointed Ted Wooldridge as the family therapist to assist with the goal of family reunification. The parties were to provide complete disclosure of therapeutic and evaluative records to Wooldridge, and Wooldridge was to "control the various aspects of the family therapy intervention including timing and duration of client contacts, parent and child visitation, contact with providers and ongoing services recommendations." The court also stated that "[g]rounds do not exist for termination of parental rights because existing evidence is insufficient to meet the burden of proof." The permanency plan was changed to reunification and legal custody of the children was extended for another year.

{28} In June 2013, Respondents filed a motion for specific instructions for reunification. Respondents argued that they had not seen Children since July 2011, and the continued delay was causing "further emotional damage" to Children and Respondents. They argued that CYFD had not made a good faith effort to reunite Children with Respondents and requested attorney fees, tax, costs, and medical expenses. They also requested an immediate hearing during which the district court could enter specific instructions to CYFD for reunification.

{29} A judicial review hearing was set for August 2013. Son's therapist, Marla

Anaya, reported that she had one family session during which she noticed that Respondents needed to work on their marriage. The hearing was continued for "approximately [sixty] days in order to allow additional time for therapists to meet with the parties." The next hearing was set for November 2013. During the November 2013 hearing, the court indicated that the plan would remain reunification and would not adopt any changes. A judicial review/subsequent permanency hearing was set for December 2013.

{30} During the December 2013 hearing, the district court found that adoption was appropriate. In changing the permanency plan, the court found that Respondents had "complied with recommendations of the treatment plan in effect, but also [found] that causes and conditions of neglect and abuse may still exist, moreover, given the amount of time . . . [C]hildren [had] remained in custody, and the testimony given at [the December 2013] hearing, a change of plan to termination of parental rights/adoption appear[ed] to be in the best interest of . . . [C]hildren." The court appointed a Rule 11-706 NMRA expert and ordered that Respondents submit to Minnesota Multiphasic Personality Inventory testing. The court ordered that Dr. Christopher J. Alexander administer the test. If Dr. Alexander was unable to serve, the court ordered that Dr. Marc A. Caplan be appointed to administer the test. However, the court also ordered that Respondents may choose to have an expert of their choice administer the test. The court discontinued joint therapy between Respondents and Son.

{31} The case was reassigned four times. A subsequent permanency hearing was set for January 15, 2015, and the termination of parental rights hearing was set for February 27, 2015.

{32} CYFD filed its amended motion for termination of parental rights on January 15, 2015. In the amended motion and as grounds for termination of the parental rights of Respondents, CYFD argued that (1) Children were abused and neglected, and the conditions and causes of the abuse or neglect were unlikely to change in the foreseeable future, despite reasonable efforts by CYFD; and (2) Daughter had been placed in the care of others and the conditions outlined in NMSA 1978, Section 32A-5-15(B)(3) (1995), existed. As with its original motion to terminate parental rights, CYFD alleged Respondents failed to protect Children and did not provide appropriate supervision. CYFD also alleged that Children's therapists indicated that Respondents' contact with Children resulted in Children acting out, that Son acted out sexually and attempted to and expressed a desire to molest Daughter, that Daughter had difficulty drawing appropriate boundaries in her interactions with others, that Respondents failed to address the issue of pornography in the home or carefully supervise and show appropriate concern for Children's well being, that prior interactions with Respondents and Children made it unlikely that Respondents could successfully parent Children, and that Respondents' failure to address sexual issues of their elder son, H.J., indicated a pattern of failing to recognize and take sexual abuse and predation seriously.

{33} Respondents filed their answer to the amended motion for termination of parental rights and filed a countermotion for reunification and reintegration of Children. In their countermotion, Respondents specifically requested an order reunifying and reintegrating Daughter, and reunifying and reintegrating Son, subject to physical custody of Son for services by CYFD until he was ready to be released to Respondents' care, custody and control. CYFD filed its response to the countermotion. In its response, CYFD resurrected the child pornography allegations against Respondents. CYFD argued that the fact the police department could not confirm the ages of the individuals in the pornographic images did not mean "that there are not pornographic images on the family computer that would self-evidently be of interest to persons with a sexual interest in very young girls who appear to be prepubescent."[3] With no factual basis set forth as to date, location, content, or person making the representation, CYFD affirmatively stated that "[t]he [Hobbs] Police Department has represented to CYFD that they can also demonstrate that [the pornographic images were] viewed on the computer by [Father]" and that because Respondents "repeatedly have denied existence of pornography in the home or ability of [Son] to access it, unless due to actions of [H.J.,] . . . sexual issues of [Respondents] have never been addressed."

{34} The termination of parental rights hearing, which had been rescheduled for February 2015, was reset for March 2015 due to a scheduling conflict of Mother's attorney. The termination hearing began on March 25, 2015, and lasted three days. Fourteen witnesses testified, including treatment providers, expert witnesses, Father, Daughter's foster mother, a detective from the Hobbs Police Department, and a CYFD social worker. None of the treatment providers or evaluators that testified (i.e., psychologists, therapists, counselors, etc.) evaluated or provided therapy to both Respondents *and* Daughter. Because the district court ultimately terminated Respondents' rights only as to Daughter, for the purposes of this appeal we focus on the testimony regarding Daughter and Respondents' progress. Testimony regarding Son, although extensive, generally does not ultimately assist this Court in evaluating whether Respondents caused the disintegration of their relationship with Daughter.

{35} We do note briefly that some of Son's treatment providers, including Dr. Marianne Westbrook, a provider to whom Son was referred in 2011, and Ruth Macy, a play therapist that met with Son in 2010, indicated that Son had disclosed to them either that he attempted to molest Daughter or expressed a desire to molest Daughter and that placing Daughter in the same home as Son would be risky. Marla Anaya, with whom Son met in 2013, similarly expressed concern that Son could be a danger to himself or others, including Daughter and Respondents, if released too soon. Son's most current therapist, Scott Gray, who had been seeing Son since 2014, stated that at the time of the hearing, Son's prognosis regarding boundaries and sexual encounters was guarded and that Son would need a lot of training and therapy.

{36} Dr. Christopher Alexander, a child psychologist, evaluated Daughter in 2014 when he was asked to provide a snapshot of how she was doing clinically, emotionally, and with overall attachment. He testified that because Daughter was removed from Respondents' home at such a young age and had not had regular contact with Respondents, the removal was not a stressor. Daughter was doing well with no major mental health diagnosis. She tested well academically and cognitively, but needed stability. Dr. Alexander opined that Daughter's primary bond was with her foster parents. Although not tasked with offering opinions on Respondents' capabilities and deficiencies, Dr. Alexander expressed concerns about the underlying allegations and whether they had been dealt with. He stated that if Respondents were accepting of Son's antisocial sexualized behavior, that represented severe

deviance. Dr. Alexander opined that if reunification were to be the plan, an investigative process about the allegations against Respondents should take place.

{37} Ruth Macy, a licensed independent social worker and registered play therapist, who provided treatment for both Son and Daughter, was the only other treatment provider who testified about Daughter. Macy first saw Daughter after Daughter's then-foster mother had concerns about the fact Son had disclosed that he had touched Daughter "on the butt." Daughter was also referred because Respondents were concerned that Daughter might be traumatized as a result of not visiting with them. Macy testified that Daughter was "probably the . . . least traumatized child [she] had ever seen at that point." Macy indicated that Daughter never mentioned Respondents and was of the belief that her first foster mother was her biological mother. Daughter did not want to hear that Respondents were her biological parents, and Macy indicated that Daughter did not remember Respondents. Macy testified that despite experiencing some depression after her placement with her initial foster parents did not work out, Daughter was excited about living with her new foster parents and expressed that she wanted them to be her mom and dad.

{38} Caroline Winters, Daughter's current foster mother, also testified. Winters testified that Daughter had been placed with her since 2014, that Daughter was previously placed with Winters' mother-in-law, and that if Daughter became available for adoption, she intended to adopt her. Winters indicated that Daughter referred to her and her husband as her parents, and Daughter referred to her initial foster mother as her "first mom." She testified that Daughter had never referred to her biological parents and that Daughter was upset about the termination of parental rights hearing.

{39} Three treatment providers testified during the hearing as to Respondents' progress, specifically, Blair Kemp, Marla Anaya, and Dr. Marc Caplan, the 706 expert and psychologist who evaluated Respondents in 2015.

{40} Kemp testified as to Respondents' treatment at the Guidance Center dating back to 2010. In addition to being the records custodian for the Guidance Center, Kemp served as Father's therapist and Respondents' couples and parenting counselor. The main focus of Respondents' treatment was parenting skills and safety planning. During therapy, Respondents and Kemp developed safety plans for the home, community, and educational environments. Kemp testified that Respondents completed their safety plans and goals in accordance with the treatment plan. In Kemp's opinion, Respondents had met all of CYFD's requirements and were prepared to provide a safe environment with continued support.

{41} Kemp testified that Father had been seen at the Guidance Center approximately 140 times, and Mother had been seen about the same number of times. Kemp indicated that he would act as a special mediator in this case if ordered and described supervision/services that could be offered to the family if Children were returned to Respondents' home. Kemp could not attest to any danger that Son may pose to Daughter if Children were in the family home. Kemp testified that Respondents consistently showed up for appointments, actively participated in sessions, and seemed to be taking counseling seriously. However, Kemp admitted that Children's psychological conditions and issues would be factors that would affect the resolution of this case, and he could not comment on how reunification would affect Children. If Children were returned to Respondents' home, Kemp estimated that additional services would be needed for a minimum of six months. Kemp indicated that if in fact Respondents were watching pornography with Children or were aware that Son and H.J. were watching pornography together, that would be a concern that Kemp would want to address in therapy.

{42} Anaya also testified about Respondents, but her testimony focused on Respondents' progress as to Son. Anaya was providing individual therapy to Son and family therapy to Son and Respondents in 2013-2014. Anaya testified that, when Respondents came to visit Son, they would bring electronics for Son to play with but that those electronics were disruptive. Eventually, Respondents were told to leave the electronic devices in the vehicle, and they complied. Anaya also testified that Son began acting out sexually once family therapy started. She felt that Son's interactions with Respondents were genuine but that Son did not feel safe in their home. Anaya noted that Respondents minimized Sons' issues and expressed concerns that Respondents were hitting a wall.

{43} The final provider to testify about Respondents was Dr. Marc Caplan. Dr. Caplan did a parenting fitness evaluation for Respondents and generated reports regarding Mother and Father. Dr. Caplan testified that, based upon his testing, Mother had some idiosyncratic tendencies but that those tendencies did not rise to a pathological level. Dr. Caplan indicated that he was not concerned that Mother would be a danger to Children, and in terms of protecting Children, Mother had come a long way over the prior four or five years. Dr. Caplan stated that Mother was much more observant, insightful, and aware of some of the issues with Children to which she would have to attend. As far as Dr. Caplan could tell, Father seemed to have progressed as well, although he had fewer records regarding Father. Dr. Caplan expressed that Respondents were very committed to Children. Respondents knew Children had special needs, and Dr. Caplan indicated that Respondents would need help and services. Dr. Caplan stated that there were risks with terminating Respondents' parental rights and with reunification but, in his opinion, the risk was less great with reunification. Dr. Caplan indicated that if Respondents knew Son and H.J. were watching pornography together or if Respondents knew that Son was acting out sexually and took no steps to address those issues, that would be of concern and might modify the risk assessment. As with Kemp, Dr. Caplan did not evaluate Children and admitted that the likelihood of success of reunification could vary depending on the degree of trauma Children experienced in the home.

{44} Dana Becker, a CYFD employee who worked on the case, testified that even though she felt like Respondents followed the treatment plan, termination of parental rights was appropriate. As to Daughter, who at the time of the hearing was in her third foster care placement, Becker stated that she thought Daughter was bonded to her foster parents and indicated that Daughter wants a family, stability, and a home. Although Becker had no reason to disbelieve Kemp's testimony as to Respondents' progress, Becker was still concerned that Daughter could be harmed by Son and did not feel totally comfortable reunifying the family. With Daughter, Becker thought that termination was in her best interest because of the disintegration of the parent-child relationship. Becker testified that she thought CYFD was partly at fault for the disintegration because of how long everything took. Becker blamed several people, including herself, for the delay.[4] However, Becker also noted issues

with Respondents' marriage and problems with Respondents' minimizing Son's issues and their role in those problems.

{45} In April 2015, CYFD, the Guardian Ad Litem, and Respondents all filed requested or proposed findings of fact and conclusions of law. The district court entered its findings of fact and conclusions of law in July 2015.

{46} The district court concluded that Son and Daughter were abused and neglected by Respondents. In support of that conclusion, the court entered a number of findings chastising CYFD for not fully and timely informing the court of Mother's statements and actions, as well as Son's disclosures and behaviors. The court indicated that there was significant evidence that Respondents were sexual offenders, were responsible for what happened in their home, and that their actions resulted in Son's severe issues. The court found that one of the accounts on the computer contained over 1,000 photographic images of adult pornography and several photographic images of pornography depicting children under the age of eighteen. It found that Respondents were responsible for the pornographic content, both child and adult, on the computer. The court acknowledged that Respondents had participated in extensive therapy over the years, but indicated that CYFD never informed Respondents' therapists about the pornography-related disclosures and that the services offered to Respondents did not address the concerns created by the information Son disclosed. The district court attributed Respondents' lack of contact with Son to Respondents' "inability to follow very basic and straightforward visitation rules, and the deleterious effect that their visits would have on his treatment."

{47} The court outlined a number of issues Respondents failed to acknowledge and address but ultimately found that CYFD "utterly failed to properly assess the causes and conditions that led to [Respondents'] abuse of [Son]." The court further found that CYFD "never, with the directness commanded by the circumstances of this case, required [Respondents] to confront the conditions and causes of their abuse of [Children], and work to resolve them." Despite CYFD's "complete negligence[,]" the court found Respondents' "own failure, after hundreds of hours of individual, couples and parenting therapy, to perceive, and address the root of their problems[, which] has substantially contributed to a complete disintegration of the parent[-]child relationship, and makes it highly unlikely[] that they can ever have a normal parent[-]child relationship with [Son]."

{48} Because CYFD "failed [to] properly assess the conditions and causes that led to [Respondents'] abuse and neglect of [Son]," the district court concluded that CYFD's "efforts to assist [Respondents] in adjusting those conditions [were] not . . . reasonable." Additionally, "[b]ecause [CYFD did] not engage[] reasonable efforts to assist [Respondents], it is unknown at [the time of the court's order] whether the conditions and causes of the abuse are likely to change in the foreseeable future." Therefore, despite the court's conclusions that Children were abused and neglected, Respondents' parental rights as to Daughter were not terminated on the basis of abuse or neglect.

{49} The district court ultimately terminated Respondents' parental rights as to Daughter pursuant to Section 32A-5-15(B)(3), which creates, under defined circumstances, a presumption of parental abandonment. Regarding Daughter, the district court found that:

> 159. [Daughter] has been placed in the care of her current foster family since April[] 2014.
>
> 160. [Daughter] has had contact with, and been in the occasional care of her current foster family since late 2011.
>
> 161. [Daughter] has not had any contact with her parents since July[] 2011, and no longer discusses or even mentions them.
>
> 162. According to Macy, [Daughter] does not feel abandoned by [Respondents] because she has no recollection of them, and in fact denies that she has biological parents.
>
> 163. [Daughter] refers to her current foster parents as mom and dad, and has developed a strong bonded relationship with them.
>
> 164. When Macy visited with [Daughter] in her current foster home, [Daughter] became fearful because she believed that Macy was there to remove her from the home.
>
> 165. [Daughter] has expressed that she wants to be with her current foster parents and to be adopted by them.
>
> 166. [Daughter's] current foster parents desire to adopt her.

The court entered no findings as to Respondents' fault, if any, for the lack of contact with Daughter, or whether Respondents' actions or inactions contributed to or caused the disintegration of their parent-child relationship with Daughter. However, based on the aforementioned findings, the district court concluded that "[Respondents] are presumed to have abandoned [Daughter,]" and they "have not rebutted the presumption of abandonment."

{50} The court's judgment and order terminating Respondents' parental rights was entered in August 2015, more than five years after Children were taken into custody. This appeal followed.

DISCUSSION

{51} As indicated earlier in this opinion, we focus our opinion on Respondents' argument that the district court neither entered findings, nor is there any evidence, that Respondents caused the disintegration of the parent-child relationship with Daughter, which is essential to the abandonment presumption.

I. Termination Based on Presumptive Abandonment

{52} The standard of proof for termination of parental rights is clear and convincing evidence. *State ex rel. Children, Youth & Families Dep't v. Vanessa C.*, 2000-NMCA-025, ¶ 24, 128 N.M. 701, 997 P.2d 833. "Clear and convincing evidence" is defined as evidence that "instantly tilt[s] the scales in the affirmative when weighed against the evidence in opposition[.]" *In re Termination of Parental Rights of Eventyr J.*, 1995-NMCA-087, ¶ 2, 120 N.M. 463, 902 P.2d 1066 (internal quotation marks and citation omitted). "The function of the appellate court is to view the evidence in the light most favorable to the prevailing party, and to determine therefrom if the mind of the fact[-]finder could properly have reached an abiding conviction as to the truth of the fact or facts found." *State ex rel. Children, Youth & Families Dep't v. Lance K.*, 2009-NMCA-054, ¶ 16, 146 N.M. 286, 209 P.3d 778 (internal quotation marks and citation omitted).

{53} The different bases for terminating parental rights are stated in Section 32A-4-28. One such basis is presumptive abandonment, the elements of which are outlined in Section 32A-4-28(B)(3). According to the statute,

> [t]he court shall terminate parental rights with respect to a child when[]
>
> . . . .

> (3) the child has been placed in the care of others . . . and the following conditions exist:
>
> (a) the child has lived in the home of others for an extended period of time;
>
> (b) the parent-child relationship has disintegrated;
>
> (c) a psychological parent-child relationship has developed between the substitute family and the child;
>
> (d) if the court deems the child of sufficient capacity to express a preference, the child no longer prefers to live with the natural parent;
>
> (e) the substitute family desires to adopt the child; and
>
> (f) a presumption of abandonment created by the conditions described in Subparagraphs (a) through (e) of this paragraph has not been rebutted.

Id. "A finding by the court that all of the conditions set forth in Subparagraphs (a) through (f) . . . exist shall create a rebuttable presumption of abandonment." Section 32A-4-28(C). The presumption of abandonment, however, "is completely rebutted by showing that a parent lacks responsibility for the destruction of the parent-child relationship." *In re Adoption of J.J.B.*, 1995-NMSC-026, ¶ 47, 119 N.M. 638, 894 P.2d 994. Specifically, our Supreme Court in *Adoption of J.J.B.*, 1995-NMSC-026, ¶ 44, held that "two factors must both be established to prove abandonment: (1) parental conduct evidencing a conscious disregard of obligations owed to the child, and (2) this conduct must lead to the disintegration of the parent-child relationship. We emphasize that both factors must be established to prove abandonment, and that evidence of the disintegration of the parent-child relationship is of no consequence if not caused by the parent's conduct." Thus, the party seeking termination of parental rights has the burden of proving "that the objective parental conduct [is] the cause of the destruction of the parent-child relationship." *Id.* ¶ 47.

{54} Respondents argue on appeal that the district court improperly terminated their parental rights to Daughter based on presumptive abandonment because there was no finding and no evidence to support that Respondents caused the disintegration of their bond with Daughter. They argue that the reason their bond with Daughter disintegrated was because (1) the district court, at CYFD's urging, ordered that they have no contact with Daughter based on mistaken allegations about the contents of their home computer, and (2) because CYFD failed to act on the court-ordered reunification plan.

{55} After pointing out the district court's lack of findings and conclusions regarding the cause of the disintegration of the parent-child relationship, Respondents argue that they rebutted the presumption of abandonment because the disintegration was caused by actions of CYFD. Respondents highlight the delay in analyzing the computer, CYFD's improper reliance on the "floating innuendo" of Respondents' involvement in child pornography, and the months of inaction in carrying out a reunification plan. Respondents argue that while CYFD continued to make bureaucratic mistakes, Respondents continuously and zealously sought to have contact with Children but were not allowed visitation by order of the court. They argue that while CYFD dragged its proverbial feet, Respondents had addressed the issues that caused CYFD to intervene—by removing H.J., improving the condition of the home, bettering themselves with classes and counseling, and zealously seeking contact, visitation, and reunification in court. Respondents point out the district court's findings that CYFD mishandled the case and argue that Respondents were not the objective reason that Daughter was separated from Respondents for five years. Respondents also argue that because they continuously and earnestly worked for and litigated for reunification under Section 32A-4-28(B)(2), they cannot, as a matter of law, be said to have presumptively abandoned Daughter.

{56} CYFD responds by first focusing on the plain language of the presumptive abandonment statute and argues that all of the conditions for presumptive abandonment occurred. CYFD agrees that, under *Adoption of J.J.B.*, Respondents' conduct must be the cause of the disintegration of the parent-child relationship, but argues that the law does not require CYFD to affirmatively prove that Respondents' conduct caused the disintegration. CYFD then argues that Respondents did not rebut the presumption in this case for five reasons: (1) "it was the Hobbs Police Department not CYFD that seized the computer and was responsible for having it analyzed"; (2) "CYFD was interested in getting the results of the computer analysis, but had no control over the matter"; (3) CYFD based its concern about the contents of the computer on "testimony by a law enforcement officer [from 2011] that he . . . had seen images [on the computer] that he believed were child pornography" and that the forensics laboratory also suspected were child pornography; (4) it was never proved that "[the] images . . . were [not] child pornography," and in fact, the court found that the computer "contained images of child pornography"; and (5) there were over 1,000 images of adult pornography on the computer, and the record supports the court's finding that Son watched pornography with Respondents and H.J. Thus, according to CYFD, "[t]he action of the court to suspend visits with [Daughter] based in part on the fact that there was adult pornography and possible child pornography was reasonable."

{57} In support of its position, CYFD also highlights evidence about Son's behavioral issues and disclosures, and highlights the court's findings during various judicial reviews and permanency hearings that indicated that Respondents "had not made sufficient progress in alleviating the conditions and causes of abuse and neglect[.]" CYFD argues that given Son's behavioral issues, the danger posed to Daughter, the Respondents' lack of progress and impact on Son, the allegations made against Respondents, and the detective's opinion that some of the pornography appeared to involve children, "the court was understandably concerned for the well-being of [Daughter] in the care of [Respondents]." According to CYFD, "[w]hile [Respondents] made efforts to comply with the treatment plan and did express continuing desire to visit with Children, ultimately it was a combination of the level of trauma caused to [Son] while in [Respondents'] home, the pornography on the computer, including what several people, including the judge who presided over the [termination of parental rights] hearing, concluded involved children, and [Respondents'] lack of progress as of July 2011, that led to the suspension of contact between [Respondents] and [Daughter] and the consequent disintegration of the parent-child relationship."

{58} As a preliminary matter, we agree with Respondents that the district court did not enter any findings of fact or conclusions of law regarding the cause of the disintegration of the parent-child relationship between Daughter and Respondents. The only findings of fact

regarding the termination of visitation and the disintegration of a parent-child relationship relate specifically to Son. The critical question that must be analyzed and resolved is whether, despite the lack of relevant findings of fact and conclusions of law, there is clear and convincing evidence that Respondents caused the disintegration of the parent-child relationship with Daughter. Although the law does not necessarily support Respondents' position that actively participating in litigation prevents a conclusion of presumptive abandonment as a matter of law, we agree that under the particular facts of this case, there was not and cannot be a finding that Respondents caused the disintegration of their relationship with Daughter.

{59} Although we see the failures in this case as extending beyond just CYFD,[5] we agree with Respondents that there is no evidence that Respondents caused the delays that undoubtedly contributed to the disintegration of the parent-child relationship with Daughter. In this case, Children were taken into custody in June 2010. Over the course of the next year, the court held regular reviews, visits with Daughter were progressing, and Respondents had eventually progressed to unsupervised overnight weekend visits. Despite the fact that there were no documented issues with Daughter's visitation, all visitation with Daughter was suspended in July 2011 after a hearing in which a detective testified that some of the pornographic images found on Respondents' computer appeared to include individuals under the age of eighteen. At that point and even though the investigation was not complete, the permanency plan was changed to adoption.

{60} After CYFD filed its initial motion for termination of parental rights, Respondents, in September 2011, petitioned the court for visitation in order "to avoid damage to the [parent-child] relationship[.]" Despite Respondents' request, visitation was not provided. Respondents again requested visitation when they filed a motion for summary judgment in June 2012. In that motion, Respondents provided the court with a report from the Hobbs Police Department indicating that the images "could not be identified as child pornography." However, the district court continued to deny visitation with Daughter in July 2012 primarily because Daughter's therapist testified that it would be confusing for Daughter.

{61} After ordering that Respondents have no contact with Daughter for over a year and after the permanency plan was changed back to reunification, the district court appointed a mediator in early 2013 to assist on the case and to "control the various aspects of the family therapy intervention including . . . parent and child visitation[.]" The mediator completely failed to address visitation and contact with Daughter never resumed.

{62} The evidence does not support the district court's conclusion that Respondents caused the disintegration of the parent-child relationship with Daughter. There is no evidence in the record that visitation with Daughter was being withheld because Respondents acted improperly during the visits, and CYFD makes no such allegations on appeal. In fact, the only testimony about Respondents' behavior during visitation was from the program manager of Family Time Services, who testified that there were no issues during the Respondents' supervised visitation with Daughter. By all accounts, visitation in this case was initially suspended based on a questionable allegation and was then continually suspended out of fear of confusing Daughter and due to inexcusable administrative and judicial inaction.

{63} We are deeply troubled by the fact that all visitation, including supervised visitation, with Daughter was revoked based on an allegation and withheld for years while CYFD attempted to substantiate that allegation. What is even more troubling is the fact that this separation allowed Daughter to lose all memory of Respondents after years of no contact. CYFD then used the same lack of contact as the primary basis for asserting a disintegration of the parent-child relationship in order to terminate Respondents' parental rights. Respondents repeatedly petitioned the district court to allow visitation and even predicted that the lack of visitation could damage the parent-child relationship. Aside from the continual requests to the court to reconsider visitation, requests that are well documented in the record, we see no other way that Respondents could have tried to prevent the disintegration of their relationship with Daughter. Once visitation was suspended in this case, preventing the inevitable disintegration was beyond Respondents' control. *See Adoption of J.J.B.*, 1995-NMSC-026, ¶ 47 ("Proof of abandonment requires that the objective parental conduct be the cause of the destruction of the parental-child relationship.").

{64} We also note that the district court's findings that CYFD "utterly failed" and that CYFD "never, with the directness commended by the circumstances of this case, required [Respondents] to confront the conditions and causes of their abuse of [Children], and work to resolve them[,]" undercuts CYFD's argument that Respondents were at fault. Even if we consider Respondents' slow progress in 2010-2011, how can suspension of all visitation and the consequent disintegration of the parent-child relationship be blamed on Respondents when CYFD was so unclear about what it required of Respondents? Because Respondents did not cause the disintegration of the parent-child bond with Daughter and consistently tried to prevent the disintegration of that relationship from occurring, we hold that Respondents rebutted the presumption of abandonment. *See id.*

II. Best Interest of Daughter

{65} Although we reverse the district court's judgment and order terminating parental rights as to Daughter, we still are tasked with the very real issue of Daughter's future. We recognize that in termination proceedings there is often a tension between "the physical, mental and emotional welfare and needs of the child," Section 32A-4-28(A), and the understanding that "parental rights are among the most basic rights of our society and go to the very heart of our social structure." *State ex rel. Children, Youth & Families Dep't v. Benjamin O.*, 2007-NMCA-070, ¶ 34, 141 N.M. 692, 160 P.3d 601 (internal quotation marks and citation omitted). We are faced with the prospect of completely disrupting the life of a young child who has lived with a family with whom she has bonded and by whom she wishes to be adopted. However, as noted in *Lance K.*, 2009-NMCA-054, ¶ 41, "we also are sympathetic to the fact that, but for the erroneous termination of [Respondents'] parental rights, [they] might not be in the position that [they are] now." (Alteration, internal quotation marks, and citation omitted.) As in *Adoption of J.J.B.*, this case "offers no truly acceptable choice. Instead, [the appellate court] must be resigned to a solution that causes the least amount of harm." 1995-NMSC-026, ¶ 65.

{66} The method for determining how to address the aforementioned tensions and conundrums is addressed in *Adoption of J.J.B.*, 1995-NMSC-026, ¶¶ 55-71, and *Lance K.*, 2009-NMCA-054, ¶¶ 41-49. As explained in *Adoption of J.J.B.*, in cases where a termination is reversed, ultimate resolution of the case lies "in deciding the best interests of the child when a biological

parent-child relationship is at issue." 1995-NMSC-026, ¶ 55. "A finding that parental rights were improperly terminated does not mechanically result in the award of custody to the biological parents. The termination of parental rights and the determination of custody are different issues and must be addressed separately." *Id.* ¶ 57. Although there is a presumption in New Mexico that custody should be awarded to the natural parent based on the premise "that it is in the child's best interests to be raised by his or her biological parents[,] . . . this presumption is never conclusive." *Id.* ¶ 58 (citations omitted). "Custody based upon the biological parent-child relationship may be at odds with the best interests of the child[,]" and "[w]hen that happens, the best interests of the child must prevail." *Id.* "A parent's right is not absolute and under extraordinary circumstances, custody of a child may be awarded to a nonparent over objections of a parent." *Id.* ¶ 59. Furthermore, any such parental right is secondary to the best interest and welfare of Daughter. *See In re Samantha D.*, 1987-NMCA-082, ¶ 11, 106 N.M. 184, 740 P.2d 1168.

{67} "It is clear that the district court is in the best position to determine the present circumstances of [Daughter] and [Respondents] and to balance the emotional interests of [Daughter] and [Respondents'] rights." *Lance K.*, 2009-NMCA-054, ¶ 41. Because "such a decision cannot be based upon the written appellate record[,]" *Adoption of J.J.B.*, 1995-NMSC-026, ¶ 66, we remand this case to the district court for a custody determination. In deciding who ought to retain custody of Daughter, the district court should consider whether there are extraordinary circumstances that warrant depriving Respondents of custody. *See Lance K.*, 2009-NMCA-054, ¶ 47. "[I]f the non-parent party (here, CYFD) establishes that extraordinary circumstances exist, the presumption favoring custody in the natural parent is rebutted." *Id.*

{68} In *Adoption of J.J.B.*, our Supreme Court outlined a number of situations that could constitute extraordinary circumstances, including: (1) a showing of "serious parental inadequacy with clear and convincing evidence[,]" including "degeneration from parental competence to parental unfitness . . . by clear and convincing evidence"; and (2) "if the child's contact with the biological parents has been so minimal that he or she has significantly bonded with the adoptive parents." 1995-NMSC-026, ¶¶ 59-61. "Once extraordinary circumstances are shown by clear and convincing evidence, the court should then make a determination based on the best interests of the child." *Id.* ¶ 62.

{69} First, in making its determination, the district court "should evaluate whether there is clear and convincing evidence of gross misconduct such as incapacity, moral delinquency, instability of character, or inability to provide [Daughter] with needed care." *Id.* ¶ 67. Second, the court "should determine whether . . . [Respondents are] capable of reestablishing a healthy parent-child bond with [Daughter]. If, despite the development of a psychological parent-child relationship between the [foster] parents and [Daughter], a psychological parent-child relationship can be restored between [Respondents] and [Daughter], then granting custody to [Respondents] is in the best interests of [Daughter]." *Id.* ¶ 68.

{70} In making its custody determination, we remind the district court that Respondents continue to have parental rights in Son, who could return home at some point in the future. The circumstances regarding H.J.'s molestation of Son and the pornography in the home did not occur in a vacuum, but both failed to be adequately addressed by CYFD in Respondents' previous treatment plan. We urge the district court to become reacquainted with the evidence presented at the termination hearing regarding the trauma suffered by Son, the behaviors learned and exhibited by Son, and Parents' role in any abuse and neglect of Children. As noted by our Supreme Court, Daughter's best interest may be served by applying more equitable principles, and the district court should consider any future temporary, as well as permanent, custody arrangements. *See id.* ¶¶ 69-70. On remand, we encourage the district court to carefully consider all these factors in making a custody determination regarding Daughter, keeping in mind that the court's primary consideration is "to provide for the care, protection and wholesome mental and physical development" of Daughter. NMSA 1978, § 32A-1-3(A) (2009).

III. Attorney Fees

{71} Respondents request that this Court order that Petitioner pay all of their attorney fees, as well as related taxes and costs, as a sanction for delays in analysis of the evidence, lack of good faith efforts to support reunification, and bad faith use of "innuendo" to achieve termination. They also request reimbursement for any and all expenses paid to Dr. Caplan.

{72} "[G]enerally speaking, an award of attorney fees is a matter for the district court's discretion." *Khalsa v. Puri*, 2015-NMCA-027, ¶ 72, 344 P.3d 1036. "Courts have the inherent power, independent of statute or rule, to award attorney fees to vindicate their judicial authority and compensate the prevailing party for expenses incurred as a result of frivolous or vexatious litigation." *Landess v. Gardner Turf Grass, Inc.*, 2008-NMCA-159, ¶ 19, 145 N.M. 372, 198 P.3d 871 (alteration, internal quotation marks, and citation omitted). Additionally, "[d]istrict courts have the inherent authority to impose a variety of sanctions on both litigants and attorneys in order to regulate their docket, promote judicial efficiency, and deter frivolous filings." *Harrison v. Bd. of Regents of Univ. of N.M.*, 2013-NMCA-105, ¶ 2, 311 P.3d 1236 (internal quotation marks and citation omitted).

{73} Although we may award costs and attorney fees related to an appeal under Rule 12-403 NMRA, Respondents have not requested appellate-related fees and costs. Respondents are requesting that this Court award costs and attorney fees incurred at the district court level. However, Respondents in their brief in chief do not specifically direct this Court to portions of the record in which they requested that the district court award attorney fees and costs, and therefore the issue has not been preserved for appellate review. *See Chan v. Montoya*, 2011-NMCA-072, ¶ 9, 150 N.M. 44, 256 P.3d 987 ("It is not our practice to rely on assertions of counsel unaccompanied by support in the record. The mere assertions and arguments of counsel are not evidence." (internal quotation marks and citation omitted)); *see also Benz v. Town Ctr. Land, LLC*, 2013-NMCA-111, ¶ 24, 314 P.3d 688 ("To preserve an issue for review on appeal, it must appear that appellant fairly invoked a ruling of the trial court on the same grounds argued in the appellate court." (internal quotation marks and citation omitted)). Insofar as Respondents are asking this Court to order Petitioner to pay Respondents' costs and attorney fees incurred during the course of litigation as a sanction despite the lack of preservation, we decline to do so. Imposing such a sanction would necessarily require this Court to make findings of fact regarding CYFD's actions before the district court and would require this Court to exercise discretion generally reserved for the district court. *See Khalsa*, 2015-NMCA-027, ¶ 72. Respondents provide no legal authority that would support such an imposition

by this Court. *See In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 (recognizing that the appellate courts "assume where arguments in briefs are unsupported by cited authority, counsel after diligent search, was unable to find any supporting authority" and stating that the appellate courts "will not do this research for counsel"). If Respondents seek such relief, that request should be made before the district court.

CONCLUSION

{74} For the reasons outlined in this opinion, we reverse the district court's judgment and order terminating Respondents' parental rights to Daughter. However, due to the lack of contact between Daughter and Respondents, we remand the matter to the district court to carefully consider the matter of custody as provided in Section II herein. Until the district court makes the final legal and physical custodial determination, CYFD shall have immediate temporary legal custody, and Daughter's foster placement may remain with the current foster parents.

{75} IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:
TIMOTHY L. GARCIA, Judge
M. MONICA ZAMORA, Judge

[1]Although the report indicates that the images were sent to Dr. Strickler and although Detective Mark Munro from the Hobbs Police Department testified during the termination of parental rights hearing that a forensic pathologist could analyze body structure of an individual in a photograph and opine as to whether or not that individual was under the age of eighteen, neither party cites to and we are unable to locate any testimony about any such analysis actually having taken place in this case.

[2]It was later represented during the termination of parental rights hearing that Dr. Parsons had passed away.

[3] By March 2015, the CYFD attorney assigned to the case had been changed from Lee Huntzinger to Harold Pope. Unlike Mr. Pope, Ms. Huntzinger represented in 2012 that CYFD concurred that it was not possible to call the material found on the computer child pornography.

[4]A number of the treatment providers working on this case indicated either that certain providers were difficult to get in contact with or that the mediator did not coordinate the providers. Becker testified that she emailed the providers so that they had each others' contact information but also stated that the mediator did not follow through in this case.

[5]CYFD's argument that it was not only to blame for the delays in this case is misguided and does not assist this Court in analyzing whether Respondents rebutted the presumption of abandonment. The consideration under Adoption of J.J.B., 1995-NMSC-026, ¶ 47, is whether "a parent lacks responsibility for the destruction of the parent-child relationship." We are not required to evaluate and assign fault to parties other than the parents to determine that the presumption is rebutted.

Certiorari Granted, November 13, 2017, No. S-1-SC-36666

From the New Mexico Court of Appeals

Opinion Number: 2017-NMCA-089

No. A-1-CA-35086 (filed July 26, 2017)

DAVID J. FOGELSON and CORINNE FOGELSON, husband and wife
Plaintiffs-Appellees/Cross-Appellants
v.
ERIC WALLACE and MARK BOZZONE,
Defendants-Appellants/Cross-Appellees
and
WALLEN DEVELOPMENT, INC;
DEVELOPMENTS BY WALLEN, LLP;
BANK OF AMERICA, NA;
RAY'S FLOORING SPECIALIST, INC.;
and ESTANCIAS AT SANTIAGO;
HOMEOWNERS' ASSOCIATION;
Defendants.

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

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Opinion

James J. Wechsler, Judge

{1} This appeal results from a dispute between parties to a contract for the construction of a new home in Bernalillo, New Mexico. Appellants/Cross-Appellees Eric Wallace and Mark Bozzone (Appellants) appeal the district court's ruling that they are jointly and severally liable for intentional torts, including prima facie tort, intentional interference with contractual relations, and civil conspiracy.[1] Appellees/Cross-Appellants David and Corinne Fogelson (Appellees) appeal the district court's dismissal of various claims, including unfair trade practices against both Appellants and conversion against Bozzone.

{2} Appellants first argue that the doctrines of res judicata or collateral estoppel barred Appellees' claims against them.[2] Bozzone did not raise res judicata at trial, but Wallace filed a motion to dismiss that ostensibly also applied to Bozzone and argued that res judicata barred Appellees' claims. As to Wallace, the requirements for res judicata are met, and Appellees' claims against him were barred. We therefore reverse the district court's judgment against Wallace. As to Bozzone, Appellees first argue that Bozzone waived res judicata by failing to raise it at trial. Even if Wallace's motion to dismiss was procedurally sufficient to raise this issue for Bozzone, Appellees made fact-specific allegations against Bozzone. These allegations negated the applicability of Wallace's res judicata argument as to Appellees' claims against Bozzone. Appellees' claims against Bozzone were not, therefore, barred by res judicata.

{3} Bozzone additionally argues that the district court erred in (1) failing to dismiss Appellees' claim of prima facie tort and (2) ruling that he was liable for intentional interference with contractual relations because no duty existed between him and Appellees. With respect to Bozzone's first argument, we agree and reverse the district court's ruling on Appellees' claim of prima facie tort.

{4} We reinterpret Bozzone's second argument to question whether substantial evidence supports the district court's ruling that he was liable for intentional interference with contractual relations. We conclude that the district court's ruling in this regard was predicated upon its finding that Bozzone was a de facto officer or director of Wallen Development, Inc. and other affiliated corporate entities. We in turn also conclude that substantial evidence does not support the district court's ruling on Appellees' claim of intentional interference with contractual relations and reverse on that claim as well.

{5} Bozzone further argues that reversal of the district court's rulings on Appellees' claims of prima facie tort and intentional interference with contractual relations necessitates that we reverse the district court's ruling on Appellees' claim of civil conspiracy as a matter of law. We agree and reverse on that claim.

{6} In their cross-appeal, Appellees first argue that the district court erred in dismissing their unfair trade practices claim. Although we take no position on the merits of the claim, we reverse the district court's dismissal as a matter of law and remand for additional proceedings on Appellees' unfair trade practices claim as to Bozzone only. Appellees additionally argue that the district court erred in dismissing their conversion claim against Bozzone. For the reasons discussed herein, we conclude that this claim lacks merit.

{7} Although for different reasons, we reverse the district court's judgment against each Appellant. We remand for additional proceedings to determine whether Bozzone engaged in unfair trade practices.

I. BACKGROUND

{8} In 2007, Appellants, through various corporate entities to be discussed herein, along with Larry Filener, purchased Wallen Development, Inc. and other affiliated corporate entities (collectively, Wallen)

from Garry and Mary Wallen. They retained Jenice Montoya as the titular president and general manager of Wallen. Wallace was Wallen's president and vice president. Filener was Wallen's registered agent, secretary, and treasurer. Montoya oversaw the day-to-day operations of the company.

{9} On May 25, 2008, Wallen entered into a purchase agreement (the Purchase Agreement) with Appellees for the construction and purchase of a residential home (the Home) in Bernalillo, New Mexico. The Purchase Agreement contained an arbitration agreement (the Arbitration Agreement), mandating that disputes between the "Seller" and the "Purchasers" be settled by binding arbitration. Wallen was defined as "Seller," and Montoya signed the Purchase Agreement on behalf of Wallen. The Purchase Agreement also contained a cash addendum that called for four incremental cash payments. Construction of the Home began, and Appellees paid $165,111 of the total due under the Purchase Agreement.

{10} After experiencing significant financial difficulties, Wallen ceased operations in late February 2009. Appellees were notified of this closure by their Wallen sales associate. They attempted to contact Montoya and Bozzone about Wallen's plan, if any, to complete and deliver the Home. They then retained counsel, who, on March 18, 2009, sent Wallen a demand letter. Appellees copied Appellants and Filener on this letter.

{11} Appellees filed a complaint in arbitration against Wallen in district court seeking to enforce the Arbitration Agreement (the First Complaint). Wallen did not appear at the ordered arbitration proceeding, and the arbitrator entered an award in favor of Appellees. The arbitrator found that Wallen (1) breached the Purchase Agreement, (2) committed fraud, and (3) violated the Unfair Practices Act, NMSA 1978, §§ 57-12-1 to -26 (1967, as amended through 2009), and awarded Appellees compensatory damages in the amount of $165,111. The arbitrator also awarded punitive damages in the amount of $165,111, as well as pre-judgment interest, costs, attorney fees plus gross receipts tax, and arbitrator fees. The district court entered a judgment confirming the arbitration award (the Arbitration Judgment). Wallen did not pay the Arbitration Judgment.

{12} Appellees then filed a complaint in the district court against Wallace, Filener, and other individuals and entities (the Second Complaint). Bozzone was not named in the Second Complaint. Appellees amended the Second Complaint (the Amended Complaint) to add Bozzone and Wallen and to remove Filener and other individuals and entities. The Amended Complaint alleged conversion, fraud, unfair trade practices, and civil conspiracy against Appellants. It also alleged intentional interference with contractual relations against Bozzone only.

{13} Wallace filed a motion to dismiss the Amended Complaint, raising res judicata as an affirmative defense. The parties litigated the motion, and it was denied by the district court. Approximately two months after this denial, Bozzone answered the Amended Complaint. He did not raise res judicata in his answer. Bozzone then filed a motion to dismiss Appellees' unfair trade practices claim, which the district court granted.[3] The district court also granted Bozzone's motion to dismiss Appellees' fraud and conversion claims following the close of Appellees' case in chief at trial.

{14} After trial, the district court ruled that (1) Wallace was liable for prima facie tort and civil conspiracy and (2) Bozzone was liable for prima facie tort, intentional interference with contractual relations, and civil conspiracy. As a basis for these rulings, it found that:

> 1. [Wallen was] purchased by [Appellants and] . . . Filener[.]
>
> . . . .
>
> 16. . . . Wallace was active at a high level in the management of the business.
>
> 17. . . . Bozzone was active at a high level of management, staffing, land purchases, [and] strategic planning for sales.
>
> . . . .
>
> 19. [Appellants] and . . . Filener knew that subcontractors could lien properties.
>
> . . . .
>
> 22. [Appellees] signed a Purchase Agreement with Wallen . . . to purchase a home to be constructed [in] . . . Bernalillo, New Mexico.
>
> . . . .
>
> 24. [Appellees] were to pay cash for the house.
>
> . . . .
>
> 30. [Appellants] and . . . Filener were aware that there was just a general operating account that all monies were put into.
>
> . . . .
>
> 44. In September of 2008, construction financing was being cut off by Wachovia [Bank.]
>
> . . . .
>
> 51. The decision to push payables and not pay vendors timely was made by [Appellants] collaboratively.
>
> . . . .
>
> 55. Construction credit with Charter [Bank] and Compass [Bank] was expiring in December of 2008.
>
> . . . .
>
> 60. [Appellants] and . . . Filener knew, or should have known, that [Appellees] had purchased property and were paying cash for it.
>
> . . . .
>
> 69. Liens were being filed because of the instructions given by [Appellants] to delay payments to vendors.
>
> 70. . . . Bozzone became directly involved in the decisions about which liens to pay and that liens on closed homes should be paid first.
>
> 71. Even though [Appellees] had paid cash, other homes were being put ahead of [Appellees'] home for payment of liens based on . . . Bozzone's instructions to pay closed homes first.
>
> 72. [Appellants] were directly responsible for the failure to pay vendors on [Appellees'] home based on their decision to not pay vendors timely and which vendors to pay.
>
> . . . .
>
> 78. . . . Bozzone instructed. . . Montoya that [Wallen] would close.
>
> 79. . . . Bozzone told . . . Montoya not to keep a skeleton staff to finish up the few homes within 30 days of completion.
>
> . . . .
>
> 81. . . . Bozzone was only interested in information regarding the three homes for which he provided construction financing.[4]

(Citations omitted.) The district court entered judgment against Appellants jointly and severally for compensatory damages in the amount of $165,111 and punitive damages in the amount of $165,111. It also awarded pre-judgment interest and costs. This appeal followed.

II. RES JUDICATA

{15} Whether the Arbitration Judgment is res judicata to Appellees' claims in the present case is a question of law that we review de novo. *See Anaya v. City of Albuquerque*, 1996-NMCA-092, ¶ 5, 122 N.M. 326, 924 P.2d 735. Although the issue has been raised on prior occasions, our appellate courts have yet to decide whether res judicata applies to arbitration proceedings. *See, e.g.*, *Guest v. Berardinelli*, 2008-NMCA-144, ¶ 29, 145 N.M. 186, 195 P.3d 353 (declining to analyze the plaintiff's undeveloped argument that the claims brought against her could have been raised at a previous arbitration proceeding); *Bank of Santa Fe v. Marcy Plaza Assocs.*, 2002-NMCA-014, ¶ 15, 131 N.M. 537, 40 P.3d 442 ("Assuming, but not deciding, that res judicata would apply to an arbitration award[.]"). It appears that the majority general rule is that an arbitration proceeding can, depending on the particular circumstances, be subject to res judicata. *See* Restatement (Second) of Judgments § 84(1), at 286 (1982) ("[A] valid and final award by arbitration has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court."); *see, e.g.*, *Behrens v. Skelly*, 173 F.2d 715, 720 (3d Cir. 1949) (holding that the arbitrator's decision "on the merits of the claim . . . bars further litigation of the controversy by the parties and their privies").

{16} The doctrine of res judicata is "founded on principles of fairness and justice[,]" *Kirby v. Guardian Life Ins. Co. of Am.*, 2010-NMSC-014, ¶ 61, 148 N.M. 106, 231 P.3d 87, and "ensures finality, advances judicial economy, and avoids piecemeal litigation." *Bank of Santa Fe*, 2002-NMCA-014, ¶ 14. To achieve these purposes, res judicata "bars litigation of claims that were or could have been advanced in an earlier proceeding." *State ex rel. Martinez v. Kerr-McGee Corp.*, 1995-NMCA-041, ¶ 11, 120 N.M. 118, 898 P.2d 1256. We believe that the principles of res judicata apply regardless of whether the parties have previously resolved their claims through a judgment in a litigated or arbitrated proceeding, but we emphasize that each arbitration case is to be scrutinized against these principles on a case-by-case basis and that res judicata is to be applied, or not, based on the particular circumstances of the arbitration proceeding and any court confirmation of an arbitration award. *See Deflon v. Sawyers*, 2006-NMSC-025, ¶ 4, 139 N.M. 637, 137 P.3d 577 ("Determining whether parties are in privity for purposes of res judicata requires a case-by-case analysis.").

{17} "A party asserting res judicata . . . must establish that (1) there was a final judgment in an earlier action, (2) the earlier judgment was on the merits, (3) the parties in the two suits are the same, and (4) the cause of action is the same in both suits." *Potter v. Pierce*, 2015-NMSC-002, ¶ 10, 342 P.3d 54. The finality requirements are satisfied and are therefore not at issue in the present case. *See* NMSA 1978, § 44-7A-27 (2001) (conferring jurisdiction to enter judgment on an arbitration award); *First State Bank v. Muzio*, 1983-NMSC-057, ¶ 9, 100 N.M. 98, 666 P.2d 777 (holding that a prior default judgment is res judicata "on issues which were, or could have been, determined in the earlier action"), *overruled on other grounds by Huntington Nat'l Bank v. Sproul*, 1993-NMSC-051, ¶ 32, 116 N.M. 254, 861 P.2d 935.

{18} Appellants argue on appeal that the district court's entry of the Arbitration Judgment precluded Appellees from relitigating the same issues against them in the subsequently filed case. As a threshold matter, we elaborate on our previously discussed determination on the issue of waiver.

A. Waiver

{19} "[R]es judicata is an affirmative defense which must be raised or it is permanently waived." *Xorbox v. Naturita Supply Co.*, 1984-NMSC-062, ¶ 12, 101 N.M. 337, 681 P.2d 1114; *see* Rule 1-008(C) NMRA ("In pleading to a preceding pleading, a party shall set forth affirmatively . . . res judicata[.]"). The defense may be raised in either a responsive pleading or a motion to dismiss. *See Universal Life Church v. Coxon*, 1986-NMSC-086, ¶ 9, 105 N.M. 57, 728 P.2d 467; *Xorbox*, 1984-NMSC-062, ¶ 12. The purpose of the raise-or-waive requirement for res judicata is to "provid[e] the plaintiff with notice and the opportunity to demonstrate why the affirmative defense should not succeed." *Robinson v. Johnson*, 313 F.3d 128, 134-35 (3d Cir. 2002).

{20} On April 13, 2012, approximately six months before Bozzone entered his appearance in this case, Wallace filed a motion to dismiss the Amended Complaint, asserting that it "is barred by the [d]octrine . . . of [r]es [j]udicata." On May 24, 2012, the district court heard argument on this issue, among others, and denied the motion. It is clear, therefore, that Wallace raised, and by extension preserved, his res judicata argument. *Crutchfield v. N.M. Dep't of Taxation & Revenue*, 2005-NMCA-022, ¶ 14, 137 N.M. 26, 106 P.3d 1273 ("To preserve error for review, a party must fairly invoke a ruling of the district court on the same grounds argued [on appeal].").

{21} During the May 24, 2012 hearing, Wallace repeatedly invoked Bozzone, and the preclusive effect of the Arbitration Judgment as to "Defendants within privity" with Wallen, despite the fact that Bozzone had not yet entered an appearance in the case. Appellants argued, to the contrary, that Bozzone was not represented at the hearing. The district court denied the motion as a matter of law, implying that res judicata did not apply to nonsignatories of arbitration agreements.

{22} On October 10, 2012, Bozzone filed his answer to Appellees' Amended Complaint. He did not assert, in his answer or otherwise, that res judicata barred Appellees' claims. In his brief in chief, Bozzone argues that he preserved his res judicata defense in his opening statement at trial. An opening statement is not a permissible mechanism by which to raise an affirmative defense. *Cf. Proper v. Mowry*, 1977-NMCA-080, ¶ 31, 90 N.M. 710, 568 P.2d 236 ("The primary purpose of [an opening statement] is to inform the jury of the nature of the case[.]"). However, under the unique circumstances of this case, we conclude that another doctrine, law of the case, would negate Appellees' argument that Bozzone waived res judicata *if, but only if*, the allegations against Appellants were substantially the same such that a legal ruling as to Wallace would directly apply to Bozzone. *See United States v. LaHue*, 261 F.3d 993, 1010 (10th Cir. 2001) ("[W]hen a rule of law has been decided adversely to one or more codefendants, the law of the case doctrine precludes all other codefendants from relitigating the legal issue." (internal quotation marks and citation omitted)); *Alba v. Hayden*, 2010-NMCA-037, ¶ 7, 148 N.M. 465, 237 P.3d 767 ("Under the law of the case doctrine, a decision on an issue of law made at one stage of a case becomes a binding precedent in successive stages of the same litigation." (internal quotation marks and citation omitted)).

{23} We therefore review whether Wallace's res judicata argument applied equally to Bozzone such that the law of the case doctrine applies. The Amended Complaint alleged (1) when Wallen ceased operations, it had the Home and several other unfinished homes under contract; (2) of the

homes that were unfinished when Wallen ceased operations, only those for which Bozzone provided construction funding were completed; and (3) the Bozzone-funded homes were eventually sold and the construction financing was paid off. These allegations formed the basis of Appellees' intentional interference with contractual relations claim against Bozzone, which alleged that Bozzone improperly induced Wallen to breach the Purchase Agreement by deciding to complete only homes for which he provided construction financing.

{24} Although the First Complaint alleged fraud, it did not allege the specific conduct raised in Appellees' intentional interference with contractual relations claim, including the decision not to complete construction on the Home but, instead, to complete construction on other homes in which Bozzone had a personal financial interest. Appellees did not allege this conduct against Wallace. It would, therefore, stretch credulity to conclude that Wallace's motion to dismiss raised these issues such that res judicata would bar Appellees' claims against Bozzone.

{25} Because the law of the case doctrine does not apply, we review whether res judicata barred Appellees' claims as to Wallace only. Wallace argues that the identity of parties and identity of cause of action requirements were met such that res judicata precluded Appellees' claims against him. Appellees claim that (1) Wallace was not in privity with Wallen in the arbitration proceeding because he was not a signatory to the Arbitration Agreement and (2) the intentional torts alleged in the present case are not the same claims adjudicated in the arbitration proceeding.

B. Privity

{26} Res judicata's privity requirement applies to both the parties in the previous action and those with whom the parties are in privity. *See Deflon*, 2006-NMSC-025, ¶ 2 ("Res judicata prevents a party or its privies from repeatedly suing another for the same cause of action."). "Privity requires, at a minimum, a substantial identity between the issues in controversy and showing that the parties in the two actions are really and substantially in interest the same." *Boyd Estate ex rel. Boyd v. United States*, 2015-NMCA-018, ¶ 25, 344 P.3d 1013 (internal quotation marks and citation omitted). Although a "parent-subsidiary relationship does not of itself establish privity[,]" 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4460, at 634 (2d ed. 2002), the Restatement (Second) of Judgments recognizes that claim preclusion is appropriate if members of an ownership group directly control a corporate entity:

> When the corporation is closely held, . . . interests of the corporation's management and stockholders and the corporation itself generally fully coincide. By definition, the stockholders are few in number and either themselves constitute the management or have direct personal control over it. In many respects, the enterprise is a proprietorship or partnership conducted in corporate form. . . . For the purpose of affording opportunity for a day in court on issues contested in litigation, . . . there is no good reason why a closely held corporation and its owners should be ordinarily regarded as legally distinct.

Restatement (Second) of Judgments § 59 cmt. e, at 99; *see, e.g.*, *Sparks Nugget, Inc. v. Comm'r*, 458 F.2d 631, 639 (9th Cir. 1972) (" 'It would seem that the public policy underlying the doctrine of res judicata, as a bar to repetitious litigation, would support a finding of privity between a close corporation and its sole or controlling stockholder.' " (quoting 1B James Wm. Moore, *Moore's Federal Practice* ¶ 0.422[3] (2d ed. 1996))). We therefore conclude that privity may exist when the interests of a corporate entity and members of its ownership group "fully coincide." Restatement (Second) of Judgments § 59 cmt. e, at 99.

{27} The district court found that Wallen was "purchased" by Appellants and Filener. This finding of fact is supported by documentary evidence but fails to describe the series of corporate entities involved. Wallace's Exhibit R shows that, in a two-step process, Wallen was sold to Wall2 Builders. Wall2 Builders was a limited partnership, in which the general partner was Wall2 Holdings, LLC. The members of Wall2 Holdings, LLC were Wallace, Filener, and Mooresville Development, LLC (Mooresville). Bozzone was the managing member of Mooresville. The limited partners in Wall2 Builders were Filener, Mooresville, and a limited partnership named "8Fish." Wallace was the president of 8Fish. Wallace, through 8Fish, owned approximately sixty-five percent of Wall2 Builders. Filener, individually, and Bozzone, through Mooresville, owned approximately ten percent and twenty-five percent of Wall2 Builders, respectively. As such, Wallace, through corporate entities he controlled, owned a controlling interest in Wall2 Builders and, by extension, Wallen. Wallace also served as both president and vice president of Wallen.

{28} In addition to establishing Wallen's ownership and management structure, the evidence also indicated that Wallace—in concert with Bozzone and Filener—directly controlled Wallen's financial and strategic decision-making. One particularly compelling example of this control is an email message Wallace sent to Bozzone on April 29, 2008—approximately one month before Appellees signed the Purchase Agreement and approximately ten months before Wallen closed. The email message stated, in part:

> Here is the plan of attack, in summary: (1) get all the necessary data to [the banking expert], . . . (3) get [the banking expert] to review the situation and give us an opinion[,] . . . (4) take [the banking expert's] banking recommendations and act on them preliminarily which I expect to include (a) a negotiation with [the former owner] that he has to convert his loans to equity or some other workable arrangement[,] (b) a negotiation with the banks based on [the banking expert's] recommendations or make a decision on the appropriate . . . approaches that are recommended, (c) make internal changes as needed which may include (i) [Montoya's] emphasis as general manager with insistence that she make [general manager] decisions, not actions based on what [Filener], [Wallace], or [Bozzone] just dictate, (ii) internal cuts, (iii) focus on sales and marketing, (iv) reduce incentives, (v) focus only on the Alb[uquerque] and current markets until directed otherwise by us, (vi) other actions based upon the analysis. We will probably sublease the office space and turn the building back over to [the former owner], if possible, and go find cheaper space. We are not moving based on what is best for [Filener], and this was discussed with and agreed to by [Filener]. He is investigating space separate from Wallen's needs. Please have confidence that [Filener] will do whatever is best for the company

> and what we (you and I) ask him to do or not to do. Again, I need [Montoya] to act as the [general manager] and not a puppet of us.

This email message is consistent with Montoya's testimony, which strongly implied that her duties as general manager were limited to overseeing Wallen's day-to-day operations and that her input on strategic or financial decisions was limited.

{29} Although Wallen's financial circumstances were such that no money was flowing from Wallen to Wall2 Builders during the time period at issue, Wallace's control over Wallen appears satisfied under the circumstances. *See Garcia v. Coffman*, 1997-NMCA-092, ¶ 18, 124 N.M. 12, 946 P.2d 216 ("Control is not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own." (alterations, internal quotation marks, and citation omitted)). In addition to serving as both president and vice president of Wallen, Wallace—through other corporate entities—was the controlling stockholder of Wall2 Builders and Wallen. He engaged in negotiations with Wallen's lenders. He determined (1) the timing of payments to creditors and vendors and (2) that Wallen would close—the "transaction[s] attacked" in the present case. *Id.* (internal quotation marks and citation omitted). Perhaps most significantly, he characterized Wallen's general manager as a "puppet."

{30} Although Montoya and other Wallen employees controlled the day-to-day operations of Wallen, Wallace exercised the type of control contemplated in Section 59, comment e of the Restatement (Second) of Judgments, which discusses the possibility that "the enterprise is a proprietorship or partnership conducted in corporate form." Under these circumstances, Wallace's interests "fully coincide[d]" with Wallen's such that he was in privity with Wallen for purposes of res judicata. *See id.*

{31} Appellees' argument against a determination that privity existed between Wallace and Wallen relies in part on *Heye v. American Golf Corp.*, 2003-NMCA-138, ¶ 8, 134 N.M. 558, 80 P.3d 495, for the proposition that "a legally enforceable contract is a prerequisite to arbitration[,]" and in part on *Deflon* for the proposition that privity does not exist when claims are brought against corporate employees in their individual capacities. *See Deflon*, 2006-NMSC-025, ¶ 5 (citing *Morgan v. City of Rawlins*, 792 F.2d 975, 980 (10th Cir. 1986), and holding that "privity does not exist where an initial lawsuit is brought against an employer and a second lawsuit is then brought against an employee acting in his or her individual capacity").

{32} First, aside from their citation to *Heye*, Appellees develop no additional legal argument for the proposition that a nonsignatory to an arbitration agreement cannot be in privity with a signatory under the facts of this case. *See State v. Sanchez*, 2015-NMCA-077, ¶ 14, 355 P.3d 51 (explaining that when a party "has cited no authority on [a] factual nuance, we may assume none exists"). The Arbitration Agreement provided that "[i]n the event that a dispute arises between Seller and Purchasers in any way relating to or arising from the construction, including . . . the terms and provisions of th[e Purchase] Agreement, Purchasers and Seller agree to resolve the dispute exclusively th[r]ough binding arbitration." The Purchase Agreement provided for the "construction and sale of the [l]ot and completed [h]ome." When Wallen failed to deliver a completed home, a dispute related to the construction arose. In the Amended Complaint, Appellees alleged that Wallace's (1) use of funds paid by Appellees pursuant to the Purchase Agreement for alternate purposes and (2) misrepresentations related to his intent to deliver a completed home constituted conversion, fraud, unfair trade practices, civil conspiracy, and prima facie tort. Like the underlying breach of contract claim, these claims arose from "a dispute . . . relating to . . . the terms and provisions" of the Purchase Agreement. Even accepting that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit[,]" *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960), in our view, the particular circumstances in this case show that Wallace, the controlling stockholder, president, and vice president of Wallen, should have been named as a party in the arbitration proceeding to defend against alleged claims of tortious conduct on his part, including but not limited to fraud. *See* NMSA 1978, § 44-7A-7(b) (2001) ("The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate."); *see also Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 776-78 (2d Cir. 1995) (holding that five theories, based in common law and agency principles, justify binding nonsignatories to arbitration agreements: "1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel"); *Potter*, 2015-NMSC-002, ¶ 1 ("Res judicata is a judicially created doctrine designed to promote efficiency and finality by giving a litigant only one full and fair opportunity to litigate a claim and by precluding any later claim that could have, and should have, been brought as part of the earlier proceeding.").

{33} Next, in *Deflon*, which was first litigated as *Deflon v. Danka Corp.*, 1 F. App'x 807 (10th Cir. 2001), the plaintiff filed claims against her former employer in the United States District Court for the District of New Mexico for alleged violations of Title VII, the Equal Pay Act, and state law tort claims. *Deflon*, 2006-NMSC-025, ¶ 1. All of the plaintiff's claims were based on the conduct of Danka employees. *Id.* After the United States District Court granted summary judgment on all claims, the plaintiff filed claims against Danka employees in state district court for (1) intentional infliction of emotional distress, (2) intentional interference with contractual relations, (3) defamation, (4) prima facie tort, and (5) civil conspiracy. *Id.* The district court ruled that res judicata and collateral estoppel barred the plaintiff's claims. *Id.* The plaintiff appealed the district court's ruling as to intentional interference with contractual relations and civil conspiracy to this Court, which affirmed. *Id.* Our Supreme Court reversed, holding that because "[p]arties to a contract cannot bring an action for tortious interference [with contract]," the plaintiff could not have brought this claim against Danka in federal court. *Id.* ¶ 6 (internal quotation marks and citation omitted). It thereafter held that privity did not exist given the nature of the plaintiff's intentional interference and related conspiracy allegations against the defendants. *See id.* ¶ 10 ("Because we interpret [the p]laintiff's complaint as alleging that [the d]efendants acted outside the scope of their corporate authority, we do not find [the d]efendants and Danka in privity for purposes of the intentional interference with contract a claim.").

{34} Appellees did not allege intentional interference with contractual relations against Wallace. Instead, they alleged conversion, fraud, unfair trade practices, civil conspiracy, and prima facie tort. Unlike

intentional interference with contractual relations, these claims may be brought by one party to a contract against the other. *See, e.g.*, § 57-12-2(D)(17) (defining "unfair trade practices" to include "failing to deliver the quality or quantity of goods or services contracted for"); *Gasparini v. Pordomingo*, 972 So. 2d 1053, 1055 (Fla. Dist. Ct. App. 2008) (explaining that one party to a contract may bring a claim for civil theft or conversion against another if the conduct alleged "go[es] beyond . . . a failure to comply with the terms of a contract"); *Beaudry v. Farmers Ins. Exch.*, 2017-NMCA-016, ¶¶ 1-3, 388 P.3d 662 (affirming a judgment on the plaintiff's prima facie tort claim arising from an employment contract), *cert. granted* (No. 36,181, Dec. 19, 2016); *Kaveny v. MDA Enters., Inc.*, 2005-NMCA-118, ¶¶ 17-18, 138 N.M. 432, 120 P.3d 854 (holding that misrepresentations in inducing a contract constituted fraud). Therefore, inasmuch as Appellees' claims fell within the scope of the Arbitration Agreement, we see no reason why Appellees could not have brought these claims against Wallace in the arbitration proceeding.

{35} Our conclusion on the issue of privity is closely tied to the facts of this case and is bolstered by evidence indicating that Appellees were aware of Wallen's management structure prior to filing the First Complaint against Wallen alone. On March 18, 2009, Appellees sent a demand letter to Wallen, which they copied to Wallace. The act of copying Wallace on their demand letter demonstrated Appellees' awareness of Wallace as a potential party to their claims.

{36} Certainly, there are circumstances in which the absence of discovery could justify a plaintiff's failure to name potential parties in arbitration, including unknown partners, investors, or stockholders who may be liable for the conduct that gave rise to the claim or claims. Under such circumstances, res judicata should not apply as a bar to subsequent intentional tort claims. Wallace, however, was the controlling stockholder, president, and vice president of Wallen. His involvement in the management of Wallen was known to Appellees at the time they filed the First Complaint.

{37} Additionally, the circumstances of this case are not such that Appellees have been unable to secure a judgment for the full amount of their compensatory damages. *See Gandy v. Wal-Mart Stores, Inc.*, 1994-NMSC-040, ¶ 12, 117 N.M. 441, 872 P.2d 859 (stating that a "proper application of the doctrine of res judicata[] will prevent double recovery and duplicative proceedings"); *cf. Ritchie v. Landau*, 475 F.2d 151, 156 (2d Cir. 1973) (holding that a plaintiff bringing a subsequent action for fraud "must be able to show actual damages resulting from the fraud which are distinguishable from the damages which he has already recovered in a prior adjudicatory proceeding"). The arbitrator awarded Appellees the full amount of compensatory damages alleged. We do not consider the fact that the Arbitration Judgment proved partially uncollectible to be relevant to a res judicata analysis.

C. Same Cause of Action

{38} The identity of the cause of action requirement is determined using "the transactional approach," that "considers all issues arising out of a common nucleus of operative facts as a single cause of action." *Potter*, 2015-NMSC-002, ¶ 11 (internal quotation marks and citation omitted). "The facts comprising the common nucleus [are] identified pragmatically, considering (1) how they are related in time, space, or origin, (2) whether, taken together, they form a convenient trial unit, and (3) whether their treatment as a single unit conforms to the parties' expectations or business understanding or usage." *Id.* (internal quotation marks and citation omitted).

1. Relatedness of Facts

{39} The First Complaint alleged breach of contract, unfair trade practices, and fraud. After Wallen failed to appear for the arbitration proceeding, the arbitrator found that Wallen (1) breached the Purchase Agreement, (2) engaged in unfair trade practices by "failing to provide the services contracted for and failing to provide the quality of goods purchased[,]" and (3) committed fraud by "intentionally receiving payments from [Appellees], refusing to complete construction and sale of the [Home] described in the [P]urchase [A]greement, refusing to return the monies paid by [Appellees], demanding payment of additional funds from [Appellees] two weeks before going out of business, and converting the monies tendered by [Appellees] for their benefit instead of returning the funds to [Appellees]."

{40} Both the First Complaint and the Amended Complaint alleged fraud and unfair trade practices. As to Wallace, the Amended Complaint additionally alleged prima facie tort, conversion, and civil conspiracy. Although these claims expand upon those alleged in the First Complaint, in determining whether res judicata bars the subsequent suit, we examine whether "the same operative facts form the basis of both . . . complaint[s]" and whether "[t]he same alleged wrongs are sought to be redressed in both lawsuits." *Ford v. N.M. Dep't of Pub. Safety*, 1994-NMCA-154, ¶ 31, 119 N.M. 405, 891 P.2d 546; *see also Gandy*, 1994-NMSC-040, ¶ 11 (stating that a plaintiff cannot recover under both contract and tort theories for the same harm).

{41} The operative facts in the present case are similar with respect to time, space, and origin to those in the arbitration proceeding in that Appellees' claims in both arose from conduct related to the purchase and construction of the Home, including business decisions made during the same time period. As to Wallace, the Amended Complaint alleged (1) conversion resulting from the use of Appellees' money "for expenses unrelated to the construction of the [Home]"; (2) fraud resulting from the inducement of Appellees "to continue making payments . . . notwithstanding . . . that the subcontractors and suppliers were not being paid and Wallen . . . was preparing to go out of business"; (3) unfair trade practices resulting from misrepresentations that they "intended to provide construction services for the construction of [the H]ome" and "were paying [Appellants'] subcontractors [with] monies received from [Appellees] and intended to convey the [Home] to [Appellees] free and clear of any and all liens"; (4) civil conspiracy resulting from Appellants "taking [Appellees'] money, but failing to construct the [H]ome . . . and transfer it to [Appellees] free of liens"; and (5) prima facie tort resulting from Appellants "using [Appellees'] money to pay expenses for things other than the construction of the . . . Home, . . . continuing to accept [Appellees'] money after it became apparent that Wallen . . . was in serious financial difficulty and would be unable to continue . . . , and . . . completing only homes on which . . . Boz[z]one held the construction financing."

{42} These claims arose from the same conduct alleged against Wallen in the First Complaint. Beginning in March 2008, Appellees made payments pursuant to the terms of the Purchase Agreement. They made the last of these payments on February 9, 2009, just weeks before Wallen closed. The monies paid by Appellees went into a general fund rather than being dedicated to the specific purpose of con-

structing the Home. Vendors and suppliers other than those working on the Home were paid with the monies paid by Appellees. Appellees did not close on the Home prior to the date Wallen ceased operations. These are the "same operative facts" and "same alleged wrongs" that formed the basis of the First Complaint. *Ford*, 1994-NMCA-154, ¶ 31.

2. Trial Convenience

{43} "In considering whether the facts form a convenient unit for trial, we examine overlap of the witnesses and evidence relevant to the claims in the two lawsuits." *Anaya*, 1996-NMCA-092, ¶ 14. This analysis is complicated by the fact that only Appellees appeared and provided testimony in the arbitration proceeding. However, we have no reason to believe that the witnesses or evidence relevant to Appellees' claims in the arbitration proceeding and in the trial on the Amended Complaint would not substantially overlap.

{44} As discussed above, the First Complaint made allegations that are essentially the same as those in the Amended Complaint. At trial, the primary witnesses included David Fogelson, Montoya, Wallace, Bozzone, and Filener. Their testimony described the conduct of the parties and the extent to which Appellants controlled Wallen during the relevant time period. The documentary evidence included (1) email messages and other internal documents memorializing Wallen's business practices during the relevant time period and (2) additional documents establishing the connection between Wallace, Wallen, and other corporate entities. These primary witnesses and documents are the same as would have been required to prove the claims alleged in the First Complaint had Wallen appeared.

{45} In *Anaya*, this Court held that "allegations of conduct by *different persons in dissimilar situations and at distinct times* . . . suggest that the claims advanced in the two cases do not form a convenient trial unit." *Id.* ¶ 15 (emphasis added). Because none of these considerations is present in the present case, Appellees' claims against Wallace formed a convenient trial unit regardless of Appellees' decision not to bring the claims together in the arbitration proceeding.

3. Parties' Expectations

{46} Similarly, in considering whether the application of res judicata would be consistent with the parties' expectations, we review whether Wallace "had reason to expect that the additional claims raised . . . were precluded by the judgment . . . in the prior lawsuit." *Id.* ¶ 17. Generally speaking, our analysis focuses upon the expectation of the party asserting res judicata. *See Bank of Santa Fe*, 2002-NMCA-014, ¶ 21 (evaluating the reasonableness of the lessor's expectation of finality); *Anaya*, 1996-NMCA-092, ¶ 17 (evaluating the reasonableness of the defendants' expectation of finality). *But see Myers v. Olson*, 1984-NMSC-015, ¶ 14, 100 N.M. 745, 676 P.2d 822 (evaluating the reasonableness of each former spouse's expectation of finality with respect to a stipulated divorce decree). Such expectations can be based upon the procedural posture of each proceeding relative to the other. *See Anaya*, 1996-NMCA-092, ¶ 17 (noting that "[a]s of the time of the trial and judgment in [the first case], the action underlying th[e] appeal was pending in district court").

{47} In *Anaya*, the two cases proceeded simultaneously, with one reaching trial and judgment first, while the other was still in discovery. *Id.* Under those circumstances, we held that the parties had no reason to expect that the issues developed in the second case were res judicata under the first judgment. *Id.*

{48} In the present case, the initial case proceeded independently to completion, and the district court confirmed the Arbitration Judgment. Only after Wallen failed to pay the Arbitration Judgment, did Appellees file the Amended Complaint against Appellants in their individual capacities. As discussed above, Wallace's interests fully coincided with Wallen's such that privity existed, and in our view, he should have been named as a party in the arbitration proceeding to defend against alleged claims of tortious conduct. It was, therefore, not unreasonable for Wallace to expect that additional claims arising from "a common nucleus of operative facts" would be barred by res judicata. *Potter*, 2015-NMSC-002, ¶ 14.

D. Torts Committed by Appellants in Their Individual Capacities

{49} Appellees argue that the claims were not the same as those adjudicated in the arbitration proceeding because the Amended Complaint alleged intentional torts against Wallace in his individual capacity. We are not persuaded.

{50} It is well established that officers and agents of corporations can be held individually liable for their tortious acts. *See Kaveny*, 2005-NMCA-118, ¶ 20 ("Officers of corporations can be held personally liable when they commit intentional torts."); *Kreischer v. Armijo*, 1994-NMCA-118, ¶ 5, 118 N.M. 671, 884 P.2d 827 ("[A]n agent may be held individually liable for his own tortious acts, whether or not he was acting for a disclosed principal."). Appellees cite both of these cases for the proposition that, because the district court "found intentional torts were committed by [Appellants], it is clear that the subject matter of the arbitration [proceeding] and the instant case is not identical."

{51} "[T]he difference between a tort and contract action is that a breach of contract is a failure of performance of a duty arising or imposed by agreement; whereas, a tort is a violation of a duty imposed by law." *Kreischer*, 1994-NMCA-118, ¶ 6 (internal quotation marks and citation omitted). In the First Complaint, Appellees alleged breach of contract, unfair trade practices, and fraud. In the Amended Complaint, Appellees alleged unfair trade practices and various intentional torts. The Arbitration Judgment and the findings of fact and conclusions of law in the present case both outline the bases for the judgments against Wallen and Wallace in his individual capacity.

{52} These factual bases, however, have no bearing on our res judicata analysis. Res judicata bars subsequent litigation that "could have, and should have, been brought as part of the earlier proceeding." *Potter*, 2015-NMSC-002, ¶ 1. *Kaveny* and *Kreischer* speak only to the defendants' individual liability and not to claim preclusion. *See generally Kaveny*, 2005-NMCA-118, ¶ 20 (analyzing issues raised without reference to res judicata); *Kreischer*, 1994-NMCA-118, ¶ 5 (same).

{53} Appellees' answer brief, after listing various factual findings made by the district court, states that "[n]one of [the] allegations for prima facie tort [or] conspiracy . . . were part of the [First Complaint] against Wallen." We disagree and conclude that, as to Wallace, the Amended Complaint is merely a restatement of Appellees' breach of contract, unfair trade practices, and fraud claims from the First Complaint.

E. Conclusion as to Wallace

{54} The identity of party and cause of action requirements for res judicata are met with respect to Wallace. We therefore reverse the judgment against him.

III. BOZZONE'S LIABILITY FOR INTENTIONAL TORTS

{55} We next review the district court's ruling that Bozzone, in his individual

capacity, was liable for prima facie tort, intentional interference with contractual relations, and civil conspiracy. Our task is complicated by the fact that the district court's findings of fact fail to expressly define the relationship that existed between Bozzone and Wallen. However, each of the cases cited in the district court's conclusions of law discusses the imposition of individual tort liability to an officer and/or director of a corporation.[5] Given its citation to these cases, we conclude that the district court predicated its conclusions of law upon a finding that Bozzone was a de facto officer or director of Wallen.

{56} Viewing the district court's conclusions of law in this light, Bozzone's agency-based arguments on appeal are more properly characterized as a question of the sufficiency of the evidence: whether substantial evidence supports a finding of liability with respect to each element of (1) prima facie tort, (2) intentional interference with contractual relations, and (3) civil conspiracy. We address the arguments raised by Bozzone on appeal through this lens. To the extent that Appellees argue that Bozzone did not preserve such an argument at trial, Bozzone's motion to dismiss at the close of Appellees' case in chief operated as a challenge to the sufficiency of the evidence. *See Mayer v. Smith*, 2015-NMCA-060, ¶¶ 7-9, 350 P.3d 1191 (describing a motion to dismiss in a nonjury trial as a challenge to the sufficiency of the evidence).

A. Prima Facie Tort

{57} As a threshold matter, we consider whether the district court erred in denying Bozzone's motion to dismiss Appellees' claim of prima facie tort at the close of Appellees' case in chief. "We review the denial of a motion to dismiss de novo because such a motion tests the legal sufficiency of the allegations." *Padilla v. Wall Colmonoy Corp.*, 2006-NMCA-137, ¶ 7, 140 N.M. 630, 145 P.3d 110.

{58} Although Bozzone's motion to dismiss focused generally on Appellees' failure to prove the elements of prima facie tort, at trial, counsel described prima facie tort as a "catchall" claim. In *Bogle v. Summit Investment Co.*, this Court discussed the applicability of prima facie tort under similar circumstances and held that when "intentional interference with contract[ual relations] . . . was the appropriate tort action[,] . . . there was simply no need to resort to prima facie tort." 2005-NMCA-024, ¶¶ 22-24, 137 N.M. 80, 107 P.3d 520. This holding established that prima facie tort (1) "should be used to address wrongs that otherwise escaped categorization, but should not be used to evade stringent requirements of other established doctrines of law" and (2) was inapplicable regardless of the fact that the plaintiff was unable to prove its claim of intentional interference with contractual relations. *Id.* ¶¶ 22, 24 (internal quotation marks and citation omitted).

{59} Appellees acknowledge in their answer brief that recovery under both theories is not permitted. Appellees disregard *Bogle*, however, in arguing that the district court's ruling on Bozzone's motion to dismiss their prima facie tort claim was related to the outcome of their intentional interference with contractual relations claim. The existence, not the outcome, of a colorable, alternate claim in tort determines the applicability of prima facie tort. *See id.* ¶ 24 (holding that when "existing causes of action provide[] reasonable avenues to a remedy[,] . . . [p]rima facie tort has no application").

{60} Following Appellees' case in chief, the district court ruled that the evidence at trial supported a claim for intentional interference with contractual relations. The district court therefore erred in denying Bozzone's motion to dismiss Appellees' prima facie tort claim. We reverse the judgment against him as to that claim.

B. Intentional Interference With Contractual Relations

{61} "Substantial evidence is relevant legal evidence which a reasonable person would accept as adequate to support a conclusion[.]" *Durrett v. Petritsis*, 1970-NMSC-119, ¶ 10, 82 N.M. 1, 474 P.2d 487. In reviewing whether substantial evidence supports a verdict, we "indulge all reasonable inferences in support of the verdict[], disregarding all inferences or evidence to the contrary." *Id.* ¶ 9. Substantial evidence must support each element of a claim. *See Lucero v. Lucero*, 1994-NMCA-128, ¶ 21, 118 N.M. 636, 884 P.2d 527 ("[E]vidence must be adduced to support each element necessary to support a claim."), *superseded by statute on other grounds as stated in Chapman v. Varela*, 2009-NMSC-041, ¶ 21, 146 N.M. 680, 213 P.3d 1109.

{62} To establish a claim of intentional interference with contractual relations, a party must prove five elements: (1) the defendant had "knowledge of the contract between [the plaintiff] and the corporation[;] (2) performance of the contract was refused[;] (3) [the defendant] played an active and substantial part in causing [the plaintiff] to lose the benefits of his [or her] contract[;] (4) damages flowed from the breached contract[;] and (5) [the defendant] induced the breach without justification or privilege to do so." *Ettenson*, 2001-NMCA-003, ¶ 14 (internal quotation marks and citation omitted). We assume that the first four factors are met in the present case and focus our analysis on the fifth factor: whether justification or privilege excused Bozzone's inducement of the breach of the Purchase Agreement.

{63} Corporate officers may be held liable for their own intentional torts. *See Deflon*, 2006-NMSC-025, ¶ 9 ("An officer acting outside the scope of his or her employment and in his or her own private interest . . . should not be able to hide behind a corporate shield for unauthorized conduct."). However, this Court has recognized that "a corporate officer is privileged to interfere with his [or her] corporation's contracts . . . when he [or she] acts in good faith and in the best interests of the corporation[.]" *Ettenson*, 2001-NMCA-003, ¶ 17. This determination requires that district courts undertake a fact-specific inquiry that examines "the motivating forces" behind the inducement of the breach—specifically whether the breach "serve[d the defendant's] private interest with no benefit to the corporation." *Id.* ¶ 18 (internal quotation marks and citation omitted).

{64} Only an officer or director of Wallen could have directed Montoya's actions or made decisions about delaying payments to vendors and closing the company as described in the district court's findings of fact. The central question before this Court is, therefore, whether Bozzone (1) made these decisions while acting outside the scope of his duties as a de facto officer and (2) was motivated by private rather than corporate interests. The district court decided this question in the affirmative. We disagree that the evidence—even when viewed in a light most favorable to the verdict—supports such a conclusion.

{65} During 2008 and early 2009, Wallen lacked cash resources. The cash it did have, including that from Appellees' payments pursuant to the Purchase Agreement, was pooled and allocated in a manner determined by the management group, including Bozzone. One of these determinations was to use Appellees' money to pay vendors and other outstanding debts instead of prioritizing payment to subcontractors working on the Home. In February 2009, Wallen ran out of

money and ceased operations. Because the Home (1) was not complete and (2) had mechanic's liens attached, Wallen's closure resulted in a breach of the Purchase Agreement.

{66} The Amended Complaint alleged that Bozzone decided to breach the Purchase Agreement in favor of completing homes in which he had a personal financial interest by virtue of having provided construction financing. With respect to this allegation, the district court found that (1) Bozzone told Montoya not to complete construction on unfinished homes, including the Home, that were within thirty days of closing and (2) Bozzone was only interested in information regarding homes for which he had provided the construction financing. The district court applied these findings in ruling that Bozzone was liable for intentional interference with contractual relations.

{67} Our review of the evidence and trial transcript does not reveal any indication that the decision that Wallen would cease operations or the resulting breach of the Purchase Agreement served Bozzone's private interests or disregarded corporate interests. Nor does our review reveal any indication that determinations to make payment to and to withhold payment from certain vendors served Bozzone's private interests or disregarded corporate interests. The overwhelming weight of the evidence implies instead that despite efforts by Bozzone to stretch available resources, Wallen closed because it was unable to secure additional credit needed to remain open due to the overall nature of the housing industry in 2008 and 2009.

{68} The testimony and evidence cited by the district court in support of its finding of fact number eighty-one, which states that "Bozzone was only interested in information regarding the three homes for which he provided construction financing[,]" demonstrated only that Bozzone had a specific interest in three specific homes at a specific moment in time; not that he was "only interested" in those three homes overall. Even if after making the decision to cease operations Bozzone took a particular interest in certain properties, such conduct did not necessarily serve purely private interests or disregard corporate interests. *See id.* ¶ 21 (observing that an officer's interference with a contract is not—as a matter of law—contrary to the best interest of the company merely because the officer "stood to profit in tandem with the corporation").

{69} Despite the district court's conclusion that "Bozzone's actions were without justification or privilege," no finding of fact suggests the manner in which Bozzone's conduct was undertaken in bad faith or was contrary to Wallen's best interests. *See id.* ¶ 17 ("[A] corporate officer is privileged to interfere with his [or her] corporation's contracts . . . when he [or she] acts in good faith and in the best interests of the corporation[.]"). "A conclusion of law must find support in the findings of fact." *O'Shea v. Hatch*, 1982-NMCA-013, ¶ 17, 97 N.M. 409, 640 P.2d 515. Absent findings of fact that support a conclusion of law as to each element of the claim alleged, substantial evidence does not support the district court's ruling. *See Lucero*, 1994-NMCA-128, ¶ 21 ("[E]vidence must be adduced to support each element necessary to support a claim.").

{70} At least one of the district court's findings of fact refers to decisions made by Wallen, or by Bozzone in his individual capacity, as violative of Appellees' "rights." We are unclear as to the "rights" to which this finding of fact refers. Appellees had a "right," based in contract law, to receive the benefit of the Purchase Agreement. They also had a "right" to enforce the Purchase Agreement and to be compensated for damages resulting from a breach. They did not have a "right" to have the construction of the Home prioritized above other corporate interests or to be informed in real time as to the financial health of the corporation. Nor did they have a "right" to priority compensation from monies derived from steps taken to wind down the corporation. Officers of insolvent corporations have a fiduciary duty not to place their own interests above those of creditors. *See Smith v. Cox*, 1992-NMSC-029, ¶ 6, 113 N.M. 682, 831 P.2d 981 ("When a corporation becomes insolvent and can no longer continue in business, the directors and other managing officers occupy a fiduciary relation towards creditors by reason of their position and their custody of the assets." (internal quotation marks and citation omitted)). However, the evidence does not show that, with respect to the three homes for which Bozzone provided construction financing, he utilized Wallen's assets in a manner that prioritized his own interests over Appellees' interests.

{71} Although we are sympathetic to the circumstances in which Appellees found themselves in the aftermath of Wallen's closure, substantial evidence does not support a conclusion that Bozzone's conduct constituted intentional interference with contractual relations. We therefore reverse the judgment against him as to that claim.

C. Civil Conspiracy

{72} As stated by our Supreme Court in *Deflon*, "civil conspiracy is not actionable by itself and survives only if the underlying claim . . . survives[.]" 2006-NMSC-025, ¶ 16. Because we reverse the district court's ruling that Bozzone intentionally interfered with contractual relations, we also reverse the judgment against him as to Appellees' claim of civil conspiracy.

D. Conclusion as to Bozzone

{73} For the reasons discussed herein, we reverse the judgment against Bozzone as to Appellees' claims of prima facie tort, intentional interference with contractual relations, and civil conspiracy.

IV. APPLICABILITY OF THE UNFAIR PRACTICES ACT

{74} On cross-appeal, Appellees argue that the district court erred in dismissing their unfair trade practices claim against both Appellants. In support of their argument, Appellees claim that case law relied upon by the district court is inapplicable to the factual scenario in the present case and that "construction services"—such as those provided to Appellees by Wallen—fall within the scope of Section 57-12-2. This argument raises a question of statutory construction that we review de novo. *See Pub. Serv. Co. of N.M. v. Diamond D Constr. Co.*, 2001-NMCA-082, ¶ 48, 131 N.M. 100, 33 P.3d 651.

{75} "Our primary goal in interpreting statutes is to give effect to the [L]egislature's intent." *Id.* In doing so, we "look to the plain language of the statute to discern [legislative] intent." *Carrillo v. My Way Holdings, LLC*, 2017-NMCA-024, ¶ 22, 389 P.3d 1087. "When statutory language is clear and unambiguous, this Court must give effect to that language and refrain from further statutory interpretation." *Id.* (internal quotation marks and citation omitted).

{76} The Unfair Practices Act "prohibits misrepresentations made in connection with the sale of goods or services by a person in the regular course of his trade or commerce." *Lohman v. Daimler-Chrysler Corp.*, 2007-NMCA-100, ¶ 21, 142 N.M. 437, 166 P.3d 1091 (alteration, omissions, internal quotation marks, and citation omitted). The key terms for purposes of our statutory interpretation, are "trade or commerce," which is statutorily defined as the "sale . . . of any services and any property," Section 57-12-2(C); "goods,"

which this Court has previously defined as "personal estate *as distinguished from realty*"; and "services," which this Court has previously defined as "work done by one person at the request of another." *McElhannon v. Ford*, 2003-NMCA-091, ¶ 17, 134 N.M. 124, 73 P.3d 827 (internal quotation marks and citations omitted).

{77} In *McElhannon*, we discussed these terms in the context of real estate transactions, concluding that "[t]o the extent goods and services are combined to create a structure that is permanently affixed to realty, . . . a sale of a completed house is not a sale of goods or services for purposes of Section 57-12-2(D)." *McElhannon*, 2003-NMCA-091, ¶ 17. We predicated our holding in *McElhannon* upon the fact that the house at issue was "completed," such that, in context, the definitions of goods and services are "combined" rather than viewed independently. *Id.* ¶¶ 3, 17.

{78} The factual scenario in the present case is distinguishable from *McElhannon* and presents a question of first impression for this Court. Rather than entering a sales agreement for a completed house, the Purchase Agreement called for Wallen to construct the Home on a designated vacant lot. Importantly, Appellees never received a "completed" house because Wallen closed before completing construction on the Home. Under such circumstances, the "combined" view of goods and services expressed in *McElhannon* does not apply. Instead, we must consider the plain meaning of the word "services" as it is used in Section 57-12-2(D).

{79} In *Keiber v. Spicer Construction Co.*, 619 N.E.2d 1105, 1106 (Ohio Ct. App. 1993), the Ohio Court of Appeals analyzed the applicability of the Ohio Consumer Sales Practices Act (OCSPA) under similar circumstances. The plaintiffs' claims arose from a sales agreement between the parties for the construction and purchase of a new house. *Id.* With the exception of breach of contract, the district court dismissed the plaintiffs' claims as barred by "extant . . . case law." *Id.* This ruling appeared to result from the district court's reading of precedential case law holding that the OCSPA was "inapplicable to pure real estate transactions." *Id.* at 1106-07 (internal quotation marks and citation omitted).

{80} At the time *Keiber* was decided, the OCSPA defined "consumer transactions as a sale . . . of an item of goods, a service, franchise, or intangible to an individual for purposes that are primarily personal, family, or household[.]" *Id.* at 1107 (omission, internal quotation marks, and citation omitted). Interpreting the statute, the Ohio Court of Appeals held that

> [a]lthough the OCSPA has been deemed not to apply to the sale of a pre-existing residence, we conclude that a contract to build a new home is distinguishable; a residential contractor, especially when engaged in the design, construction, and sales of multiple dwellings, is a supplier of consumer-oriented services for purposes of the OCSPA.

Id. It based its conclusion, at least in part, on the plain language of the statute, which provided "no express exclusion of residential construction services." *Id.*

{81} The same can be said of Section 57-12-2. The construction services provided by Wallen were undoubtedly "work done by one person at the request of another." *McElhannon*, 2003-NMCA-091, ¶ 17 (internal quotation marks and citation omitted). Section 57-12-2(C) currently defines "trade or commerce" as the "sale . . . of any services and any property." The all-encompassing nature of this definition does not render it ambiguous. *See Martinez v. Cornejo*, 2009-NMCA-011, ¶ 16, 146 N.M. 223, 208 P.3d 443 ("A statute is ambiguous when it can be understood by reasonably well-informed persons in two or more different senses." (internal quotation marks and citation omitted)). In the absence of language expressly including or excluding construction services, construction services rendered prior to the completion of a residential home are "any services" as defined in Section 57-12-2.

V. CONVERSION

{82} Appellees additionally argue that the district court erred in granting Bozzone's motion to dismiss their conversion claim pursuant to Rule 1-041(B) NMRA. This Court reviews "the involuntary dismissal of a plaintiff's case under Rule [1-0]41(B) for failure to carry a burden of proof as we review any other judgment on the merits." *Camino Real Mobile Home Park P'ship v. Wolfe*, 1995-NMSC-013, ¶ 14, 119 N.M. 436, 891 P.2d 1190, *overruled on other grounds by Sunnyland Farms, Inc. v. Cent. N.M. Elec. Coop.*, 2013-NMSC-017, ¶¶ 14-16, 301 P.3d 387. In doing so, we are "bound by the trial court's findings of fact unless they are demonstrated to be clearly erroneous or not supported by substantial evidence." *Roybal v. Morris*, 1983-NMCA-101, ¶ 30, 100 N.M. 305, 669 P.2d 1100.

{83} "Conversion is the unlawful exercise of dominion and control over personal property belonging to another in exclusion or defiance of the owner's rights, or acts constituting an unauthorized and injurious use of another's property, or a wrongful detention after demand has been made." *Muncey v. Eyeglass World, LLC*, 2012-NMCA-120, ¶ 22, 289 P.3d 1255 (internal quotation marks and citation omitted). We address each segment of this definition in turn.

A. Unlawful Exercise of Control in Exclusion or Defiance of the Owner's Rights

{84} A cognizable claim for conversion derives from a "right" related to personal property. "Rights," however, are not self-determined but must, instead, arise from either contract or law. The Purchase Agreement created a duty on the part of Wallen to construct and deliver the Home. It did not, however, convey Appellees a "right" to earmark monies paid to specific uses.

{85} In *D'Ambrosio v. Engel*, the plaintiff provided a deposit on the purchase of a sailboat pending inspections. 741 N.Y.S.2d 42, 43 (App. Div. 2002). Following the inspections, the plaintiff declined to complete the transaction and demanded return of his deposit. *Id.* The defendants refused. *Id.* The plaintiff filed a claim to recover the deposit, and the trial court entered a judgment in the amount of the deposit, plus costs. *Id.* The plaintiff later filed additional claims, including prima facie tort and conversion. The trial court dismissed these claims. *Id.* at 43-44. The appellate court affirmed, holding that the plaintiff "failed to show that there was a legal duty imposed upon the defendants independent of the contract itself, or that the defendants engaged in tortious conduct separate and apart from their failure to fulfill their contractual obligations." *Id.* at 44 (alterations, internal quotation marks, and citation omitted).

{86} We find *D'Ambrosio* persuasive as to Appellees' conversion claim. Appellees paid $165,111 pursuant to the Purchase Agreement. The Purchase Agreement expressly entitled them to remedies articulated therein. It did not, however, create an independent duty related to monies paid by Appellees pursuant to the Purchase Agreement. Because "such duty must spring from circumstances extraneous to, and not constituting elements of, the contract," substantial evidence supports dismissal. *Id.* (internal quotation

marks and citation omitted).

B. Unauthorized and Injurious Use of Another's Property

{87} Similarly, substantial evidence supports a finding that Bozzone did not participate in the "unauthorized and injurious use" of Appellees' property. *Muncey*, 2012-NMCA-120, ¶ 22 (internal quotation marks and citation omitted). The Purchase Agreement does not dictate or in any way restrict Wallen's use of monies paid by Appellees pursuant to the Purchase Agreement. The district court's findings of fact related to the use of monies paid by Appellees, while generally supported by Montoya's testimony, find no support in the Purchase Agreement. *See Littell v. Allstate Ins. Co.*, 2008-NMCA-012, ¶ 13, 143 N.M. 506, 177 P.3d 1080 ("In reviewing a sufficiency of the evidence claim, this Court views the evidence in a light most favorable to the prevailing party and disregards any inferences and evidence to the contrary." (alteration, internal quotation marks, and citation omitted)). Because neither Wallen nor Bozzone engaged in unauthorized use of Appellees' property "separate and apart from their failure to fulfill their contractual obligations," substantial evidence supports dismissal. *D'Ambrosio*, 741 N.Y.S.2d at 44 (alterations, internal quotation marks, and citation omitted).

C. Wrongful Detention After Demand

{88} Finally, no evidence supports a finding that Bozzone refused a demand to return Appellees' property. *See Nosker v. Trinity Land Co.*, 1988-NMCA-035, ¶ 20, 107 N.M. 333, 757 P.2d 803 (stating that "the demand must be made before the action for conversion is brought"). On March 18, 2009, Appellees sent a demand letter to Wallen, which was copied to Wallace, Bozzone, and Filener. However, this correspondence appears to have been directed to an incorrect email address,[6] a circumstance that calls into question whether Bozzone was aware of Appellees' demand. Furthermore, the uncontroverted evidence at trial was that Bozzone played no role in the liquidation and distribution of Wallen's assets after operations ceased. As such, even if we impute knowledge of Appellees' demand to Bozzone, substantial evidence supports dismissal because Bozzone took no part in the decision-making process to detain Appellees' money after demand was made.

VI. CONCLUSION

{89} For the reasons discussed herein, we reverse the district court's judgment as to both Appellants and remand as to Bozzone only for additional proceedings consistent with this opinion.

{90} IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR:
LINDA M. VANZI, Chief Judge
JONATHAN B. SUTIN, Judge

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[1]Appellants each retained appellate counsel and submitted separate appellate briefs. Some appellate issues are raised by both Appellants, while others are raised only by Wallace or Bozzone.

[2]Because collateral estoppel cannot apply to a default judgment, we do not analyze this argument. *See Blea v. Sandoval*, 1988-NMCA-036, ¶ 14, 107 N.M. 554, 761 P.2d 432 ("[A] default judgment has no collateral estoppel effect.").

[3]The legal rationale underlying the district court's ruling makes clear that its dismissal of Appellees' unfair trade practices claim applied to Wallace as well.

[4]The district court additionally found that Appellees "have received nothing in return for their payment of $165,111." Although this finding was accurate at the time, Appellees subsequently purchased the Home in a foreclosure sale, using $40,000 of the unpaid Arbitration Judgment.

[5]*See Deflon*, 2006-NMSC-025, ¶ 9 (holding that "[a]n officer acting outside the scope of his or her employment and in his or her own private interest has no authority to breach the corporation's contract, and that officer should not be able to hide behind a corporate shield for unauthorized conduct"); *Kaveny*, 2005-NMCA-118, ¶ 20 (holding that "[o]fficers of corporations can be held personally liable when they commit intentional torts"); *Ettenson v. Burke,* 2001-NMCA-003, ¶ 17, 130 N.M. 67, 17 P.3d 440 (holding that "a corporate officer is privileged to interfere with his corporation's contracts only when he acts in good faith and in the best interests of the corporation, as opposed to his own private interests"); *Stinson v. Berry,* 1997-NMCA-076, ¶ 17, 123 N.M. 482, 943 P.2d 129 (holding that "if an officer or director directs or actively participates in the commission of the tortious act of the corporation, he [or she] will be liable, along with the corporation").

[6]Appellees' demand letter indicated that it was copied to mbazzone@wallenbuilders.com. Based upon spelling alone, this is not an email address owned by Bozzone. Furthermore, a sampling of the admitted documents demonstrate that Bozzone's email address was mark@baydevco.net.

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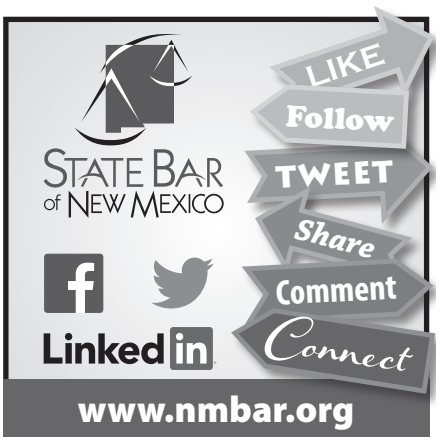

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Public School Facilities Authority, a state agency seeks an Attorney specializing in Procurement and Contracts who would apply a broad knowledge of law and programs. The candidate will draft, review, and evaluate legal documents and contracts, regulations, policies, and interpret laws and statutes. As the organization's Chief Procurement Officer for procurement issues and procedures in accordance with New Mexico Procurement Code, the candidate is the agency's expert on negotiations, extensions, terminations, and renegotiations of contracts, as appropriate. For more information, go to nmpsfa.org under job opportunities or apply to HR@nmpsfa.org.

Office Administrator Needed

Our non-profit organization, the American Indian Law Center, Inc. housed at the UNM School of Law, is currently looking for an experienced Office Administrator. This position will play an important role in providing customer service and overseeing the efficient functioning of our offices. The Office Administrator will provide administrative support to a small staff of attorneys and other professionals; greet and direct visitors, law students, tribal officials; assist with organizing and managing legal case files; and respond to calls and emails. Qualified candidates will have impeccable verbal and written communication skills, possess initiative, be a self-starter; have a strong ability to multi-task and a friendly demeanor. Qualifications and Skills: Associate Degree preferred; 3+ years' experience working in an office setting overseeing daily functions; able to complete complex administrative tasks with minimal supervision; strong knowledge of Microsoft Office, Word and Outlook software; customer-service oriented; Indian preference in hiring. We offer competitive wages and benefits. Please send cover letter and resume to: padilla@law.unm.edu.

Paralegal

Paralegal wanted for Plaintiffs civil litigation firm. Growing uptown firm seeks a full time experienced paralegal that is well organized; detail oriented, and has the ability to work independently. Candidate must have prior experience in civil litigation with an emphasis in personal injury. 3+ years experience preferred. Salary commensurate with experience. Please forward resume to: attn. Tonja, Bleus & Associates. LLC, 2633 Dakota, NE, Albuquerque, NM 87110 Paralegal2.bleuslaw@gmail.com

Legal Assistant

Kasdan LippSmith Weber Turner LLP, needs a legal assistant in its Albuquerque office. Our firm handles multi-party civil litigation with a focus on construction defect cases. We need someone to answer phones, schedule appointments and update case files and information. We require proficiency with MS Office software including Outlook, Excel and Access. Experience with E Filing, discovery and civil procedure is also required. If you have the experience and interest to contribute to serving our clients, please send your resume and cover letter to: dochoa@kasdancdlaw.com.

Full-Time Professional Bookkeeper, Paralegal, Executive Assistant

Well established civil litigation firm seeking a full-time professional bookkeeper, paralegal, executive assistant with office management skills. Candidate must have a minimum of 3-5 years' experience, including knowledge of local court rules and filing procedures. Excellent clerical, organizational, computer & word processing skills required. QuickBooks and TimeSlips highly preferred. Must be a detail oriented self-starter. Send resume, letter of interest and at least 3 personal references including a reference from a previous employer to legalresume01@gmail.com. All inquiries will be kept confidential.

Legal Assistant Positions

The Office of the New Mexico Attorney General is recruiting for two (2) Legal Assistant positions in the Consumer & Environmental Protection Division in Civil Affairs. The job postings and further details are available at www.nmag.gov/human-resources.aspx.

Full-time Administrative Assistant

Full-time Administrative Assistant needed for established law firm. Applicant is required to have strong organizational, communication and computer skills. Must be proficient in Word, Microsoft 365, Adobe and database maintenance. Applicant should be self-motivated and comfortable in a team first environment. Responsibilities include database maintenance, answering telephones, greeting clients and legal professionals, and assisting attorneys and staff with a variety of duties. Applicant is required to make daily post office runs and errands, and will need reliable transportation. Applicant may assist with Accounts Payable or other duties as assigned. Applicants with a minimum associate's degree are preferred. Please send resume with references and salary requirements to: hrlawfirm311@gmail.com.

Litigation Paralegal

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

Paralegal

Well established Santa Fe personal injury law firm is in search of a highly qualified paralegal. The ideal candidate should have at least 3 years litigation experience, preferably in civil law, be friendly, highly motivated, well organized, detail oriented, proficient with computers and possess excellent verbal and written skills. Exceptional individuals with top level skills should apply. We offer an excellent retirement plan completely funded by the firm at 15% of total wages, 100% paid health insurance, paid vacation, and sick leave. Top level salary. Please submit your cover letter and resume to santafelaw56@gmail.com

Services

Board Certified Orthopedic Surgeon

Board certified orthopedic surgeon available for case review, opinions, exams. Rates quoted per case. Owen C DeWitt, MD, odrice@icloud.com

Briefs, Research, Appeals—

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

Office Space

620 Roma N.W.

620 ROMA N.W., located within two blocks of the three downtown courts. Rent includes utilities (except phones), fax, internet, janitorial service, copy machine, etc. All of this is included in the rent of $550 per month. Up to three offices are available to choose from and you'll also have access to five conference rooms, a large waiting area, access to full library, receptionist to greet clients and take calls. Call 243-3751 for appointment to inspect.

Three Large Offices and Two Secretarial Areas

Reception area with cathedral ceiling and skylights. Refrig. air and great parking. $850.00 per month. Please call (505) 243-4541

Office for Rent

Office (16'8" x 8'9") for rent ($550/mo.), 925 Luna Circle NW - Walking distance from Court, beautiful hardwood floors, storage space, plenty of parking in front and back, includes alarm service, bi-weekly cleaning, shared mini-kitchen/break area, conference room also available upon request.Contact owner at 505-314-8884.

Nob Hill Office Building

3104 Monte Vista Blvd. NE. 1,200 sf sweet remodeled home a block off Central. Two private offices, large staff area, waiting room, full kitchen, 3/4 bath, hardwood floors, 500 sf partial finished basement, tree-shaded yard, 6 off-street parking spaces. $1,400 per month with one-year lease. Call or email Beth Mason at 505-379-3220, bethmason56@gmail.com

1121 4th Street NW Albuquerque, NM 87102

Near downtown courthouse. Up to five offices are available with access to two conference rooms, a large waiting area, and plenty of parking (short term-Trial Launch Pad or long term). Daily, weekly, and monthly rent available. Included in the rent are utilities (except phones), internet, and janitorial service. You will have access to legal research tools and a receptionist to greet clients. Call 505-288-3500.

Miscellaneous

Want To Purchase

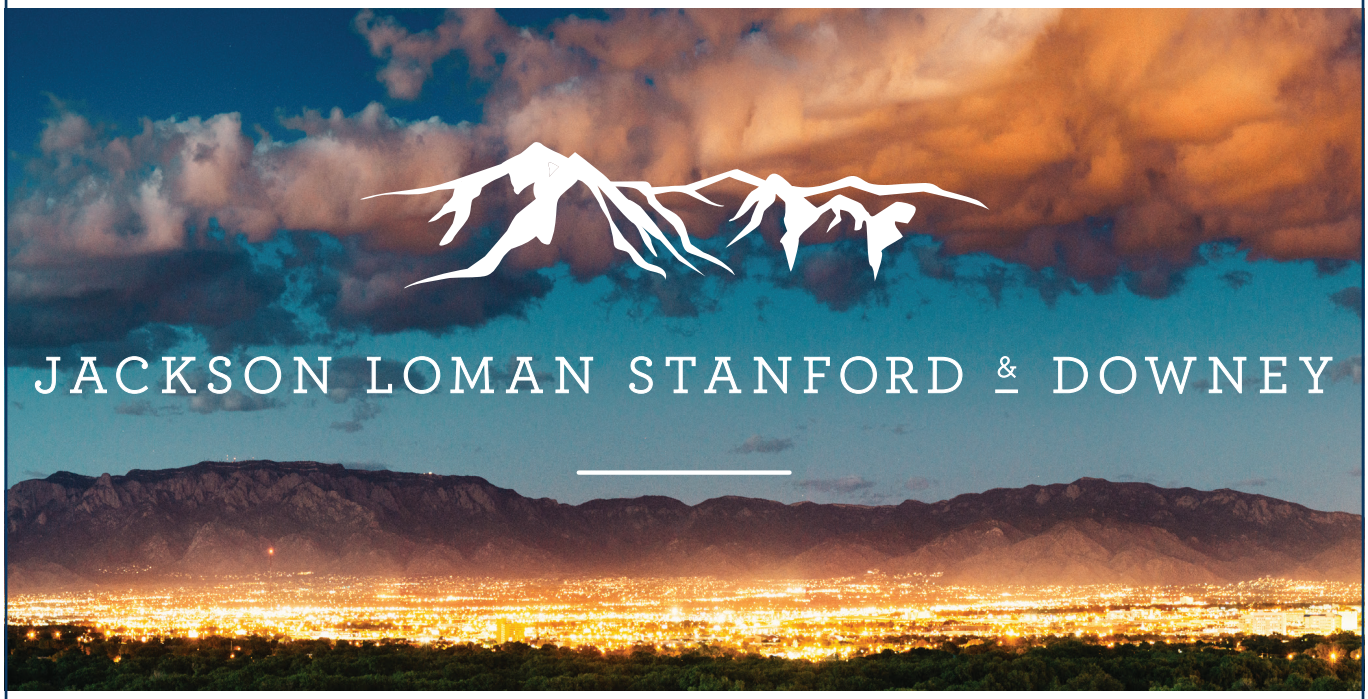
Want to purchase minerals and other oil/gas interests. Send details to: P.O. Box 13557, Denver, CO 80201

Search for Living Trust

In search for a living trust dated 2012 for Jacqueline L. Morgan and Barbara K. Anderson from Jemez Springs, NM. They are both still alive but are unable to remember who created the trust. If located, please contact Philip J. Dabney, Attorney at Law, 505-662-3911

FOSTER, RIEDER & JACKSON, P.C.

is now



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