Official Publication of the State Bar of New Mexico

Bar Bulletin

February 28, 2018 • Volume 57, No. 9

Within the Cavern, by Taylor Farinelli

www.traynephotography.com

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Center for Legal Education

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6–8 p.m., State Bar Center, Albuquerque, 505-797-6022

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13
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28
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April

4
Divorce Options Workshop
6–8 p.m., State Bar Center, Albuquerque, 505-797-6022

9
Civil Legal Clinic
10 a.m.–1 p.m., Bernalillo County Metropolitan Court, Albuquerque, 505-841-9817

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

Notices

Court News

New Mexico Supreme Court Compilation Commission

Official 2018 New Mexico Rules Annotated Now Available

The *Official 2018 New Mexico Rules Annotated* three-volume set is now available exclusively from the New Mexico Compilation Commission. The 2018 edition contains the complete library of annotated court rules governing practice in the New Mexico courts, local rules, forms and jury instructions, including the 212 new and amended rules effective through Jan. 15, 2018. Order a set now for $90, plus shipping and tax, by calling the Compilation Commission at 505-827-4821 or Conway Greene at 866-240-6550.

Judicial Standards Commission

Seeking Commentary on Proposed Amended Rules

The Commission has completed a comprehensive review and revision of its procedural rules. Commentary on the proposed amendments is requested from the bench, bar and public. To be fully considered by the Commission, comments must be received by March 16 and may be sent either by email to rules@nmjsc.org or by mail to Judicial Standards Commission, PO Box 27248, Albuquerque, NM 87125-7248. To download a copy of the proposed amended rules, visit nmjsc.org/recent-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.

Professionalism Tip

With respect to my clients:

I will be loyal and committed to my client's cause, and I will provide my client with objective and independent advice.

First Judicial District Court

Notice of Judge Assignment

Pro Tem Judge Sarah M. Singleton has been assigned to preside over criminal cases assigned to Division 5 from Feb. 26–May 25 or until a newly assigned judge takes office, whichever occurs first. This assignment is in the interest of judicial efficiency, pursuant to NMSC Rule 23-109, the chief judge rule. This reassignment is effective upon Judge Attrep vacating her position from Division 5 and is under the terms agreed to by Judge Singleton and the First Judicial District Court.

Second Judicial District 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 wish to have duplicates made should verify tape information with the Special Services Division 505-841-7401 from 10 a.m.–2 p.m., Monday through Friday. Aforementioned tapes will be destroyed after March 31.

Third Judicial District Court

Notice of Right to Excuse Judge

On Feb. 9, Gov. Susana Martinez appointed Jeanne Quintero to fill the vacant position in Division VIII of the Third Judicial District Court. Effective Feb. 26, all pending domestic relations and domestic violence cases previously assigned to Judge Conrad Perea, District Judge, Division III, shall be reassigned to Judge Jeanne Quintero. Pursuant to Supreme Court Rule 1.088.1, parties who have not yet exercised a peremptory excusal will have 10 days from March 14 to excuse Judge Quintero.

Eleventh Judicial District Court

Mass Reassignment

Effective March 5, the chief judge of the Eleventh Judicial District Court has, pursuant to her authority in Rule 23-109 NMRA, directed a mass reassignment of cases due to the appointment of Judge Sarah V. Weaver to the bench in Division III. With the exception of abuse and neglect cases which are being individually reassigned, all other cases currently assigned to Division III are reassigned to Judge Weaver. Parties who have not yet exercised a peremptory excusal under Rule 1-088.1 or Rule 10-162 NMRA in a case being reassigned in this mass reassignment will have 10 business days from March 21 to excuse Judge Sarah V. Weaver.

U.S. District Court for the District of New Mexico

Proposed Amendments to Local Rules of Criminal Procedure

Proposed amendments to the Local Rules of Criminal Procedure of the U.S. District Court for the District of New Mexico are being considered. The proposed amendments are to D.N.M.LR-Cr. 47.8, Timing and Restrictions on Responses and Replies. A redlined version (with proposed additions underlined and proposed deletions stricken out) and a clean version of these proposed amendments are posted on the Court's website at www.nmd.uscourts.gov. Members of the bar may submit comments by email to localrules@nmcourt.fed.us or by mail to U.S. District Court, Clerk's Office, Pete V.

Domenici U.S. Courthouse, 333 Lomas Blvd. NW, Suite 270, Albuquerque, NM 87102, Attn: Local Rules, no later than March 12.

U.S. Magistrate Judge Vacancy

The Judicial Conference of the U.S. has authorized the appointment of a part-time U.S. Magistrate Judge for the District of New Mexico at Roswell, N.M. This authorization is contingent upon the appointment of incumbent Magistrate Judge Joel Carson as a circuit judge to the U.S. Tenth Circuit Court of Appeals. The current annual salary of the position is $48,195 (potentially increasing to $56,607 on April 1 pending final approval by the Judicial Conference of the U.S.), commensurate with the annual caseload for this position. The term of office is four years. The U.S. Magistrate Judge application form and the full public notice with application instructions are available on the Court's website at www.nmd.uscourts.gov or by calling 575-528-1439. Applications must be submitted no later than April 3.

State Bar News

Attorney Support Groups

- March 5, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the first Monday of the month.)
- March 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#.
- March 19, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albquerque, 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.

Alternative Methods of Dispute Resolution Committee

Call for Articles for ADR Issue of *New Mexico Lawyer*

The ADR Committee seeks articles relating to the theme of the 2018 ADR Institute: "ADR Across the Spectrum" for publication in the July issue of the New Mexico Lawyer, a insert in the *Bar Bulletin* focused on a specific area of law, published four times a year. Abstracts should be at least 300 words and should be submitted to Mary Jo Lujan at maryjo.lujan@state.nm.us by March 9. The Committee will choose the abstracts and contact the authors following the submission deadline. Articles for the *New Mexico Lawyer* are approximately 1,500 words.

Animal Law Section

Animal Talk: Tethering

During the 2007 Legislative Session, the New Mexico House of Representatives issued House Memorial 19 which requested that the Department of Public Safety study the public safety and humane implications of persistently tethering dogs. Join the Animal Law Section at noon, March 2, at the State Bar Center for an Animal Talk covering an overview of a 2008 report that was produced by DPS to the Consumer and Public Affairs Committee as a result of House Memorial 19, current statutes and ordonnances in N.M. addressing tethering and a comparison of N.M. laws to other states, and efforts in community education on dog behavior, outreach and alternatives to tethering.

Appellate Practice Section

Luncheon with New Appellate Mediator

Join the Appellate Practice Section for a brown bag lunch at noon, March 16, at the State Bar Center with guest Bonnie Stepleton, appellate mediator for the New Mexico Court of Appeals. The lunch is informal and is intended to create an opportunity for appellate practitioners to learn more about the work of the Court. Those attending are encouraged to bring their own "brown bag" lunch. R.S.V.P. to Carmela Starace at cstarace@icloud.com.
Editor's Note: *This notice was previously advertised with an incorrect date. Please note the correct date of March 16.*

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.

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.

Other Bars

Albuquerque Lawyers Club

David Campbell to Speak at March Luncheon

The Albuquerque Lawyers Club invites members of the legal community to its March 7 meeting and luncheon. David Campbell, director of the Albuquerque Planning Department, is the featured speaker and will discuss "Enchanted Homecoming: A Retired Diplomat and Lawyer Looks at Albuquerque." Judge Nan Nash will introduce Campbell. The lunch meeting will be held at noon, March 7, at Seasons Restaurant, located at 2031 Mountain Road, NW, Albuquerque. The event is free to members, $30 non-members in advance and $35 at

Continued on page 8.

Legal Education

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
Center for Legal Education of NMSBF
www.nmbar.org

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

2-4 **Taking and Defending Depositions (Part 1of 2)**
31.0 G, 4.5 EP
Live Seminar,
Albuquerque
UNM School of Law
goto.unm.edu/despositions

6 **Successor Liability in Business Transactions**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

7 **Family Feuds in Trusts: How to Anticipate & Avoid**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **Drafting Professional and Personal Services Agreements**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **33rd Annual Bankruptcy Year in Review Seminar**
6.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

13 **Fiduciary Duties in Closely-held Companies: What Owners Owe the Business & Other Owners**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

14 **Role of LLCs in Trust and Estate Planning**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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
www.nmbar.org

16 **Civility and Professionalism (2017 Ethicspalooza)**
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

22 **2017 Appellate Practice Institute**
6.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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
www.nmbar.org

22 **2017 Mock Meeting of the Ethics Advisory Committe**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

23 **How to Practice Series: Probate and Non-Probate Transfers**
4.0 G, 2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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
www.nmbar.org

26 **Legal Malpractice Potpourri (2017)**
1.5 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

26 **Conflicts of Interest (2017 Ethicspalooza)**
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

26 **Federal and State Tax Updates (2017 Tax Symposium)**
3.5 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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 **Cybersleuth: 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
www.nmbar.org

28 **Attorney vs. Judicial Discipline (2017)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

28 **Everything You Need to Know About Breastfeeding Law: Rights and Accommodations**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

29 **Convincing the Jury: Trial Presentation Methods and Issue**
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

29 **Abuse and Neglect Case in Children's Court**
3.0 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

30 **What's the Dirtiest Word in Ethics?**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

April

3 **Drafting Employment Agreements, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

4 **Drafting Employment Agreements, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

6 **2017 Business Law Institute**
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

6 **2017 Health Law Symposium**
6.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

6 **Uncovering and Navigating Blind Spots Before They Become Land Mines (2017)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

6 **Deposition Practice in Federal Cases (2016)**
2.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

10 **Closely Held Stock Options, Restricted Stock, Etc.**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

12 **Domestic Self-Settled Trusts**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

17 **Protecting Client Trade Secrets & Know How from Departing Employees**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

18 **Equipment Leases: Drafting & UCC Article 2A Issues**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

20 **Ethically Managing Your Practice (2017 Ethicspalooza)**
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

Listings in the Bar Bulletin *CLE Calendar are derived from course provider submissions. All MCLE approved continuing legal education courses can be listed free of charge. Send submissions to notices@nmbar.org. Include course title, credits, location, course provider and registration instructions.*

Continued from page 5.

the door. For more information, e-mail ydennig@yahoo.com or call 505-844-3558.

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 Hispanic Bar Association

Ethical Practice CLE and Meet and Greet in Santa Fe

Join the New Mexico Hispanic Bar Association for "How to Achieve an Ethical Practice" (1.0 EP pending MCLE approval) from 4-5 p.m., March 2, at the Inn of the Governors, 101 west Alameda St., Santa Fe, NM 87501. Panelists Judge Monica Zamora of the New Mexico Court of Appeals and Justice Edward L. Chávez of the New Mexico Supreme Court will discuss best practices as noted from the bench for achieving an ethical practice. After the CLE, join NMHBA from 5-7 for a meet and greet at Del Charro Saloon. Hosted appetizers will be available. Those interested in attending the meet and greet but unable to attend the CLE are welcome. The CLE is $35 for non-members and $20 for members, government/non-profit attorneys and judicial clerks.

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

The Board Governing the Recording of Judicial Proceedings
A Board of the Supreme Court of New Mexico

Expired Court Reporter Certifications

The following list includes the names and certification numbers of those court reporters whose New Mexico certifications expired as of Dec. 31, 2017.

Name	CCR CCM No.	City, State
Castaneda, Amber	8	Chino, Calif.
Clark, Karen	277	Marana, Ariz.
Cortez, Melissa	5	Rio Rancho, N.M.
Drum, Amy	49	Albuquerque, N.M.
Farrell, Joanne M.	507	Petaluma, Calif.
Ford, Janet	25	Silver City, N.M.
Kornegay, Danna	515	Garland, Texas
Rinaudo, Kelli Ann	512	Pacific Grove, Calif.
Rose, Shannon	117	Las Vegas, Nevada
Valenzuela, Margaret	96	El Paso, Texas
Walker, Madelyn	15	Quemado, N.M.

Albuquerque Law-La-Palooza

Help us address the needs of low-income New Mexicans!

The Second Judicial District Pro Bono Committee is hosting Law-La-Palooza, a free legal fair, on Thursday, March 15, 2018 from 3:00 pm-6:00 pm at the Barelas Community Center, 801 Barelas Rd. SW, Albuquerque, NM 87102.

first-come, first-served interpreters will be available*

We are looking for attorneys who practice in the following areas to give consults:

Divorce	Public Benefits	Immigration
Creditor/Debtor	Unemployment	SSI/SSDI
Powers of Attorney	Landlord/Tenant	Custody
Kinship/Guardianship	Contracts	Child Support
Landlord/Tenant	Bankruptcy	Personal Injury
Wills/Probate	Name Change	Visitation

If you would like to volunteer, please register at: http://bit.ly/2E5VFIy
For questions, please contact Aja Brooks at (505)814-5033 or by email at ajab@nmlegalaid.org

Opinions

As Updated by the Clerk of the New Mexico Court of Appeals

Mark Reynolds, Chief Clerk New Mexico Court of Appeals
PO Box 2008 • Santa Fe, NM 87504-2008 • 505-827-4925

Effective February 16, 2018

PUBLISHED OPINIONS

A-1-CA-34082	State v. J Gwynne	Affirm	02/14/2018
A-1-CA-34674	State v. R Sena	Affirm/Vacate/Remand	02/14/2018

UNPUBLISHED OPINIONS

A-1-CA-34242	State v. F Garduno	Affirm	02/12/2018
A-1-CA-35443	State v. D Tarango	Affirm	02/12/2018
A-1-CA-36236	State v. G Johnson Jr.	Reverse	02/12/2018

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

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

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

CLERK'S CERTIFICATE OF ADDRESS AND/OR TELEPHONE CHANGES

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jillvogel452@gmail.com

Effective January 24, 2018
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J. Douglas Foster (doug@jacksonlomanlaw.com)
Travis G. Jackson (travis@jacksonlomanlaw.com)
Barbara J. Koenig (barbara@jacksonlomanlaw.com)
R. Eric Loman (eric@jacksonlomanlaw.com)
Meghan Dimond Stanford (meghan@jacksonlomanlaw.com)
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201 Third Street, NW,
Suite 1500 (87102)
Albuquerque, NM 87103
505-767-0577
505-242-9944 (fax)

CLERK'S CERTIFICATE OF WITHDRAWAL

Effective February 8, 2018:
Bruce M. Berlin
2840 Vereda de Pueblo
Santa Fe, NM 87507

Effective February 9, 2018:
Jeffrey R. Brannen
PO Box 10166
Santa Fe, NM 87504

Effective February 9, 2018:
Rodney Fitzhugh
PO Box 848
Montrose, CO 81402

Effective February 8, 2018:
Gregory Edward McDonald
700 E. San Antonio Street,
Suite 200
El Paso, TX 79901

Effective February 9, 2018:
Hon. Jennifer Michelle Perkins
1501 W. Washington Street,
Suite 306
Phoenix, AZ 85007

Effective February 8, 2018:
Nancy Alma Taylor
730 Powers Street
Oshkosh, WI 54901

Effective February 8, 2018:
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Dated Feb. 16, 2018

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CLERK'S CERTIFICATE OF WITHDRAWAL

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On February 13, 2018
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CLERK'S CERTIFICATE OF INDEFINITE SUSPENSION FROM MEMBERSHIP IN THE STATE BAR OF NEW MEXICO

Effective February 16, 2018, the following attorney is INDEFINITELY SUSPENDED from the State Bar of New Mexico for a period of not less than two (2) years pursuant to Rule 17-206(A)(3) NMRA:
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CLERK'S CERTIFICATE OF NAME CHANGE

As of February 6, 2018:
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Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

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

Effective February 28, 2018

Pending Proposed Rule Changes Open for Comment:

Comment Deadline

There are no pending proposed rule changes currently open for comment.

Recently Approved Rule Changes Since Release of 2017 NMRA:

Effective Date

Rules of Civil Procedure for the District Courts

1-015	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
10-166	Public inspection and sealing of court records	01/15/2018*
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

**The 2018 amendment to Rule 10-166 suspends the amendments approved by the Court effective December 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

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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

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17-202	Registration of attorneys	12/31/2017
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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: 2018-NMCA-004

No. A-1-CA-34655 (filed August 2, 2017)

BLUE CANYON WELL ASSOCIATION,
Plaintiff-Appellee
v.
DENISE JEVNE,
Defendant-Appellant

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

KARL H. SOMMER
SOMMER, KARNES
& ASSOCIATES, LLP
Santa Fe, New Mexico
for Appellee

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

Opinion

Julie J. Vargas, Judge

{1} In this appeal we address whether Plaintiff Blue Canyon Well Association (Blue Canyon) was a legal entity with capacity to sue Defendant Denise Jevne. Specifically, we consider the applicability of NMSA 1978, Section 53-10-1 (1937) to Blue Canyon's claim that it was entitled to bring the suit as an unincorporated association. We hold that Blue Canyon's legal capacity to sue Jevne as an unincorporated association is dependent on its compliance with statutory requirements, and because it failed to comply with the statutory requirements, Blue Canyon lacked the capacity to sue Jevne. We reverse the judgment of the district court and remand the case for further proceedings.

I. BACKGROUND

{2} The members of Blue Canyon and Jevne are all owners of real property in Santa Fe County that claim to be parties to a well sharing and easement agreement (the Agreement). Blue Canyon was formed to maintain and manage the well pursuant to the Agreement. Some years later, a dispute arose between Jevne and the other owners regarding Jevne's unpaid water well expenses. As a result, Blue Canyon brought a claim against Jevne in magistrate court, seeking $7,651.50 for past due bills, costs associated with well use, and attorney fees and charges. The complaint was signed, "Blue Canyon Well Ass'n: Anna & Joe Durr, Frank & Billie Martinez, Lesley King, President[.]" After a trial on the merits, the magistrate court entered judgment awarding Blue Canyon $2,600.00 in damages and $6,697.02 in attorney fees. Jevne appealed that judgment to the district court.

{3} Shortly after Jevne appealed the judgment, the individuals who signed the complaint on behalf of Blue Canyon (collectively, Movants) filed a motion in district court, seeking to amend the caption of the case in order to "properly identify Plaintiffs" by substituting their names for Blue Canyon. In the motion to amend, Movants pointed out that they had each signed the complaint as individuals on behalf of Blue Canyon, but stated that "while there is a Well Agreement in the matter, there is no Blue Canyon Well Association *per se*." They therefore requested that they be identified as Plaintiffs in Blue Canyon's place. In opposing the motion, Jevne saw the motion as an improper attempt to establish the Durrs' right to use the well. Jevne claimed that the Durrs were not a part of the Agreement and were not valid users without first filing a declaratory judgment action to establish their status. Jevne recognized Blue Canyon's status as an unincorporated association and its power to sue and collect judgments, but requested that the appeal be dismissed in light of Movants' denial of Blue Canyon's existence.

{4} The district court held a hearing on Movants' motion to amend and ordered the parties to provide supplemental briefing. In Movants' supplemental brief, they again asserted that Blue Canyon was "not a legal entity properly formed under Section 53-10-1[,]" and as such, they, individually, were the proper real parties in interest in the case. Having retained new counsel, Jevne changed positions in her supplemental response, arguing that Blue Canyon was a non-existent entity. Jevne also asserted that Movants' motion was actually a motion to substitute parties without complying with Rule 1-025 NMRA and that the case must be dismissed because the judgment in favor of a non-existent entity was "uncollectible."

{5} The district court denied Movants' motion to amend the caption and rejected Movants' claim that Blue Canyon did not exist as a legal entity because it had not complied with the filing requirement of Section 53-10-1 for the creation of an unincorporated association. The district court held that the use of the word "may" in Section 53-10-1 indicated that filing statements and other documents referenced in the statute to create an unincorporated association is permissive. Following a de novo trial on the merits, the district court entered judgment in favor of Blue Canyon and entered findings of fact and conclusions of law that the Agreement was created in March 1991, that Blue Canyon was formed to carry out the requirements of the Agreement, and that Blue Canyon "is an unincorporated association with the capacity to sue and be sued."

{6} Jevne filed a motion to amend the judgment and a motion for new trial, both attacking the district court's judgment. The district court held a hearing on Jevne's post-judgment motions, denying both. Jevne appeals, challenging the district court's judgment in Blue Canyon's favor, as well as its denial of those two motions.

II. DISCUSSION

{7} On appeal, Jevne claims that the district court erred when it held that Blue Canyon was authorized to maintain this action as an unincorporated association notwithstanding that Blue Canyon had not filed the documents described in Section 53-10-1 (statutory documents) with the county clerk. Now forced to argue a position contrary to the position they took in the district court, Blue Canyon first

contends that the district court correctly held that the use of the word "may" in the statute renders the filing of any statutory documents by Blue Canyon to be permissive. Furthermore, Blue Canyon argues, because unincorporated associations are recognized by both statute and common law, it is not required to comply with the statutory requirements to be a common law unincorporated association and sue in the name of the association. We are not persuaded by either argument.

A. Section 53-10-1 Requires the Filing of Statutory Documents to Form an Unincorporated Association

{8} Statutory interpretation is an issue of law that we review de novo. *Moongate Water Co. v. City of Las Cruces*, 2013-NMSC-018, ¶ 6, 302 P.3d 405. The text of a statute is the "primary, essential source of its meaning[,]" and where a statute's language is clear and unambiguous, we are required to "give effect to that language and refrain from further statutory interpretation." NMSA 1978, § 12-2A-19 (1997); *Nat'l Educ. Ass'n of N.M. v. Santa Fe Pub. Schs.*, 2016-NMCA-009, ¶ 6, 365 P.3d 1 (internal quotation marks and citation omitted).

{9} A court's "primary goal when interpreting a statute is to give effect to the Legislature's intent[,]" which "is to be determined primarily by the language of the act, and words used in a statute are to be given their ordinary and usual meaning unless a different intent is clearly indicated." *N.M. Bldg. & Constr. Trades Council v. Dean*, 2015-NMSC-023, ¶ 11, 353 P.3d 1212 (internal quotation marks and citation omitted); *see State ex rel. Helman v. Gallegos*, 1994-NMSC-023, ¶ 23, 117 N.M. 346, 871 P.2d 1352. "Whether words of statutes are mandatory or discretionary is a matter of legislative intent to be determined by consideration of the purpose sought to be accomplished." *State ex rel. Robinson v. King*, 1974-NMSC-028, ¶ 10, 86 N.M. 231, 522 P.2d 83. We interpret statutes "to avoid rendering the Legislature's language superfluous." *Baker v. Hedstrom*, 2013-NMSC-043, ¶ 24, 309 P.3d 1047. We consider all parts of the statute together, "read[ing] the statute in its entirety and construe[ing] each part in connection with every other part to produce a harmonious whole." *Key v. Chrysler Motors Corp.*, 1996-NMSC-038, ¶ 14, 121 N.M. 764, 918 P.2d 350.

{10} Section 53-10-1, authorizing the formation of unincorporated associations provides:

> Whenever two or more persons shall desire to form an association for the promotion of their mutual pleasure or recreation . . . or an association not for the individual profit of the members thereof, and without incorporating the same as a corporation, or maintaining title of its property in trust . . .[, t]he said persons or members desiring to form such an association . . . *may file in the office of the county clerk* . . . a statement containing the name of such association, its objects and purposes, the names and residences of the persons forming such association, together with a copy of its articles of association and any rules and/or regulations governing the transactions of its objects and purposes and prescribing the terms by which its members may maintain or cease their membership therein.

(Emphasis added.) We acknowledge, and the parties are quick to point out, that generally, the words "shall" and "must" express a "duty, obligation, requirement or condition precedent" while "may" confers a "power, authority, privilege or right." NMSA 1978, § 12-2A-4(A), (B) (1997). However, in this instance, the power, authority, privilege or right signaled by the use of the word "may" in the statute is not the power, authority, privilege, or right to file documents. Instead, it is the right to form an association as opposed to a corporation, trust, or other legally viable entity. The plain language of Section 53-10-1 clearly sets out that whenever two or more persons wish to form an association for the limited purposes described therein without incorporating or maintaining title to its property in trust, then those persons may do so by filing statutory documents with the county clerk. For those intending to create an association under Section 53-10-1, the filing of statutory documents is mandatory.

{11} This interpretation is consistent with the purpose of Section 53-10-1. While avoiding some of the burdens and complexities associated with the formation of a corporation or a trust, Sections 53-10-1 to -8 (1937, as amended through 1959) (the Act), allow those involved in the limited activities described to enjoy the benefits of acting as a single unit rather than a group of individuals, and limit any recovery of a judgment against the association to its joint or common property, provided they satisfy its abbreviated requirements.

{12} Other sections of the Act confirm the mandatory nature of statutory document filing. First, unless the filing of statutory documents to create an unincorporated association is mandatory, the detailed list of information to be included in the statutory documents set out in Section 53-10-1 would be unnecessary surplusage. Even more persuasive of the mandatory nature of the statute is the language in Section 53-10-7, which provides, "[a]ny association or club formed under the provisions of [the A]ct . . . may exist for such period of time not exceeding twenty years as may be fixed *in the statement required to be filed by Section* [*53-10-1*]." (Emphasis added.) Were we to interpret the language related to the filing of statutory documents to be permissive, our interpretation would render Section 53-10-1 at odds with Section 53-10-7 describing the document filing as "required." "If statutes appear to conflict, they must be construed, if possible, to give effect to each." NMSA 1978, § 12-2A-10(A) (1997). By interpreting the statutory document filing as mandatory, we avoid a conflict and give effect to the provisions of both Section 53-10-1 and Section 53-10-7.

{13} Blue Canyon nevertheless argues that the Act is intended to be generally permissive and that equity requires us to interpret Section 53-10-1 to authorize permissive filing. We are not persuaded. Blue Canyon's argument in this regard is largely based on an alternative reading of the plain language in Section 53-10-1. Blue Canyon argues that we should interpret Section 53-10-1 so that the "required to be filed" language is rendered functionally superfluous, reasoning that the word "required" simply "does not carry the same weight or measure of authority" as words like "shall" and "may." Because "we refrain from reading statutes in a way that renders provisions superfluous[,]" we decline to follow Blue Canyon's interpretation, particularly because an interpretation that filing statutory documents is mandatory gives meaning and effect to each term used in the Act. *State ex rel. E. N.M. Univ. Regents v. Baca*, 2008-NMSC-047, ¶ 10, 144 N.M. 530, 189 P.3d 663 (declining to interpret statute as permissive where doing so would render it superfluous).

B. Common Law Unincorporated Associations Have No Capacity to Sue

{14} Blue Canyon argues that it was the proper party to file suit against Jevne

because New Mexico law recognizes common law unincorporated associations. New Mexico law, Blue Canyon contends, permits the formation of unincorporated associations either by common law or under the Act, and Section 53-10-5, conferring a right to sue upon unincorporated associations, applies to both statutorily created and common law associations.

{15} Our Supreme Court, however, long ago resolved the legal viability of unincorporated associations that were not statutorily created. In *Flanagan v. Benvie*, 1954-NMSC-074, ¶ 7, 58 N.M. 525, 273 P.2d 381, the court unequivocally held, "unincorporated associations, clubs and societies, *unless recognized by statute*, have no legal existence[.]" (Emphasis added.) In *Flanagan*, the Court explained that the association's failure to organize in accordance with the statute precluded it from taking advantage of the right conferred by the Act to hold property in the name of the association. *Id.* ¶ 11. Similarly, in *State ex rel. Overton v. N.M. Tax Comm'n*, 1969-NMSC-140, ¶ 14, 81 N.M. 28, 462 P.2d 613, our Supreme Court found that a common law unincorporated association formed to advocate for tax equity was not a legal entity and had no right to bring an action unless its members were permitted to do so as members of a class under Rule 1-023 NMRA.

{16} The Act grants unincorporated associations formed under Section 53-10-1 a series of rights, including the right to "hold and acquire real or personal property by deed, lease or otherwise, in the name of [the] association," pursuant to Section 53-10-2; the right to mortgage or sell such property, conveying it by deed signed by an officer of the association, pursuant to Section 53-10-3; and the right to sue or be sued in the name of the association, with the collection of any money judgment against the association limited to its joint or common property, pursuant to Section 53-10-6. Implicit in both the *Flanagan* and *Overton* decisions is the fact that an association wishing to take advantage of the rights conferred upon unincorporated associations by the Legislature, including the right to bring suit in the name of the association, can only do so by complying with the requirements of Section 53-10-1.

{17} Arguing that the Act distinguishes between common law associations and statutorily created associations, Blue Canyon points out that some sections of the Act refer to an "association or club *formed under the provisions of* th[e] *act*," while Section 53-10-6, conferring associations with the right to sue in their own names, does not. *Compare* § 53-10-7, *with* § 53-10-6. Because Section 53-10-6 does not refer to associations or clubs formed under the provisions of the Act, Blue Canyon concludes that the right to sue is statutorily conferred on all unincorporated associations, whether formed at common law or by statute. Legislative silence, however, "is at best a tenuous guide to determining legislative intent." *Swink v. Fingado*, 1993-NMSC-013, ¶ 29, 115 N.M. 275, 850 P.2d 978. We see no reason to allow the absence of the language to outweigh its explicit language that filing statutory documents with the county clerk is required to create an unincorporated association. To do so would be to disregard our canons of statutory interpretation.

{18} On appeal, the parties do not dispute that neither Movants nor their predecessors in interest ever filed the statutory documents required by Section 53-10-1 to form an unincorporated association. Instead, Blue Canyon's formation was based on an unrecorded well sharing and easement agreement that did that did not satisfy the requirements of Section 53-10-1. Absent such a filing, Blue Canyon cannot avail itself of the rights conferred by the Act, including the right to sue granted by Section 53-10-5.

{19} In sum, in order to become an incorporated association entitled to exercise the right to sue, Blue Canyon was required to file the documents delineated in Section 53-10-1. Having failed to do so, we hold that Blue Canyon was not an unincorporated association under Section 53-10-1 and had no legal capacity to sue and to obtain judgment against Jevne. As Blue Canyon's lack of capacity to sue is sufficient for reversal, we need not reach Jevne's argument that Blue Canyon is not the real party in interest. The judgment in favor of Blue Canyon against Jevne was improperly entered, is of no effect, and must be vacated.

III. CONCLUSION

{20} We reverse the decision of the district court insofar as it grants relief in favor of Blue Canyon against Jevne, and we remand this matter for proceedings consistent with this opinion.

{21} IT IS SO ORDERED.
JULIE J. VARGAS, Judge

WE CONCUR:
JONATHAN B. SUTIN, Judge
J. MILES HANISEE, Judge

State Bar of New Mexico
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Thursday, March 29, 2018
9 a.m.-12:15 p.m.

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This program will cover the abuse and neglect case in Children's Court from the perspective of the Court, the respondent's attorney and the Guardian ad Litem. Allison Pieroni, Pieroni Family Law LLC; Twila Hoon, Aragon Moss Ramsey & Hoon LLC; and Hon. John Romero, Second Judicial District Court, will discuss what an abuse and neglect case is, and how the parents and the child move through the process.

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Thursday, March 29, 2018
Noon-1 p.m.
1.0 G
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Friday, March 30, 2018
Noon-1 p.m.
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$309

Civility and Professionalism (2017 Ethicspalooza)
1.0 EP
8:45-9:45 a.m.
$55

New Mexico Liquor Law for 2017 and Beyond (2017)
3.5 G
10:15 a.m.-2:15 p.m.
$185

March 22

2017 Appellate Practice Institute
6.0 G 1.0 EP
8:15 a.m.- 4:30 p.m.
$309

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
9-11 a.m.
$109

2017 Mock Meeting of the Ethics Advisory Committee
2.0 EP
1:30-3:30 p.m.
$109

March 26

Trial Know-How! (The Rush to Judgment- 2017 Trial Practice Section Annual Institute)
4.0 G 2.0 EP
9:30 a.m.-4:30 p.m.
$279

Legal Malpractice Potpourri (2017)
1.5 EP
8:30–10 a.m.
$80

Conflicts of Interest (2017 Ethicspalooza)
1.0 EP
10:30–11:30 a.m.
$55

Federal and State Tax Updates (2017 Tax Symposium)
3.5 G
Noon-3:40 p.m.
$185

March 28

2017 How to Become Your Own Cybersleuth: Conducting Effective Internet Investigative and Background Research
4.0 G 2.0 EP
9 a.m.- 4:15 p.m.
$309

The Ethics of Using Lawyer Advertisements Using Social Media (2017)
1.0 EP
9-10 a.m.
$55

Attorney vs. Judicial Discipline (2017)
2.0 EP
10:30 a.m.-12:30 p.m.
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From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-005

No. A-1-CA-35286 (filed August 7, 2017)

LORI KREUTZER and
MARCELLE CARUSO,
Plaintiffs-Appellants,
v.
ALDO LEOPOLD HIGH SCHOOL,
Defendant-Appellee,
and
NISHA MILLIGAN, BARBARA JIMENEZ,
and SAFECO INSURANCE COMPANY OF
AMERICA,
Defendants

APPEAL FROM THE DISTRICT COURT OF GRANT COUNTY
JENNIFER E. DELANEY, District Judge

HENRY F. NARVAEZ
NARVAEZ LAW FIRM, PA
Albuquerque, New Mexico
for Appellee

CHRISTOPHER D. LEE
LAW OFFICE OF CHRISTOPHER
D. LEE, LLC
Albuquerque, New Mexico
for Appellants

Opinion

Linda M. Vanzi, Chief Judge

{1} This appeal requires us to answer two questions of law. The first question, one of first impression, is whether defendant Aldo Leopold High School (ALHS), a charter school in Grant County, New Mexico, is a public school and therefore subject to the protections afforded to governmental entities by the New Mexico Tort Claims Act (the TCA), NMSA 1978, §§ 41-4-1 to -30 (1976, as amended through 2015). The second question is whether the negligence claim asserted against ALHS in this case falls within Section 41-4-6(A) of the TCA, an exception to the TCA's general rule of governmental immunity from tort liability. In the proceedings below, ALHS argued in separate motions that it is entitled to summary judgment because, as a matter of law, (1) ALHS is a public school protected by the TCA, and (2) Plaintiffs' negligence claim does not fall within the waiver of TCA immunity provided by Section 41-4-6(A). The district court granted both motions. We affirm both orders.

FACTUAL BACKGROUND

{2} At the end of the school day on March 1, 2012, Marcelle Caruso was walking to her car in the ALHS student parking lot when she was assaulted and beaten by fellow ALHS student Nisha Milligan. Nisha had been sitting in a friend's car in the school parking lot waiting for Marcelle, and when Marcelle came out of the school building, Nisha walked across the parking lot, called Marcelle's name, and began beating her. Nisha knocked Marcelle to the ground and continued to beat her, causing serious injuries, including a torn right anterior-cruciate ligament that required surgical reconstruction and painful rehabilitation.[1]

{3} Nisha later said she did this because she was angry with Marcelle for bumping her in the hall that day and for laughing at her at an earlier time she could not recall. Nisha did not report to any ALHS teacher or staff member that Marcelle had laughed at her. Marcelle testified that before March 1, 2012, she had never been threatened by anyone at ALHS, including Nisha, and was never afraid for her safety at school.

{4} ALHS Director Eric Ahner testified that Nisha told him after the incident that Marcelle "was talking badly about her" and "was giving her bad looks," but that before the incident, he had no information that Marcelle had ever bullied or harassed Nisha, and that he had seen "no indications whatsoever of any propensity of [Nisha] being violent or physical with anybody, student or staff." During the three years she attended ALHS, Nisha had no altercations with other students. Ahner stated in an affidavit that there were no student-on-student altercations in the ALHS parking lot in the seven years between the school's inception in 2005 and the March 1, 2012 assault.

{5} When the assault took place, ALHS had written policies prohibiting student behavior including belligerence, fighting, bullying, harassment, and conduct in violation of state and federal law but no written policies specifically relating to supervision of the parking lot or to prevention of student-on-student altercations. Training is conducted for staff members, and staff meetings held at the beginning of each school year devote significant time to basic safety within the school and to such safety-related matters as CPR training, fire drills, managing behavior, recognizing and de-escalating conflicts between students, handling altercations, and other aspects of student supervision. Each year, ALHS staff and students develop a set of "school norms." ALHS has also conducted formal training with students to address issues such as conflict resolution.

{6} ALHS faculty and staff are given assignments each year, including supervising the student parking lot after school. In addition to the training all staff members receive at the beginning of the school year, the individual assigned to supervise the parking lot receives training concerning traffic issues such as speed limits, keeping students away from traffic, and where students may park, as well as about applying the same principles of child safety, including handling student-on-student altercations, outside the school building as are applied inside.

{7} Judy Runnels was assigned to monitor the student parking lot in 2012. Although she was at ALHS and on monitoring duty

[1] Plaintiffs call the incident a "prolonged beating" but cites no evidence establishing the duration of the assault.

March 1, 2012, she was not in the parking lot at the time of the assault but was in the bathroom. At the end of classes that afternoon, Runnels left the classroom where she had been teaching, walked down the hall, dropped off her books in another classroom, stopped to use the bathroom, and went outside through the school's main entrance. When she arrived in the parking lot, the incident between Nisha and Marcelle was over and there was no sign that anything had happened. It was not until she went back into the building after her monitoring shift ended that Runnels heard about the fight.[2]

{8} Ahner commenced an investigation as soon as he learned of the incident. He disciplined Nisha and removed her from the general population at school by assigning her an "interim alternative educational placement." Nisha did not graduate from ALHS. Marcelle missed three months of school as a result of her injuries, stopped participating in dance, and eventually moved to New Jersey.

PROCEDURAL BACKGROUND

{9} In July 2013 Lori Kreutzer, as next friend of her minor child Marcelle (collectively, Plaintiffs), filed suit against ALHS and others. Against ALHS, Plaintiffs assert a negligence claim based on allegations that ALHS "owed a duty to Marcelle . . . to use ordinary care to keep the premises of its school safe, including the parking lot" and breached that duty "by failing to take reasonable precautions to keep the school safe" and "by failing to provide adequate security or supervision in the school parking lot[.]" The complaint does not identify a dangerous condition existing in the school parking lot, or allege that ALHS knew or should have known that the parking lot was unsafe, or that ALHS knew or should have known that Nisha had a propensity for violence or posed a threat to Marcelle.

{10} The complaint alleged that ALHS is "a privately operated charter school" and, therefore, "does not fall within the scope of" the TCA, but that the immunity afforded to government entities by the TCA is waived by Sections 41-4-4 and -6 "for [ALHS's] negligence and that of its employees in failing to properly maintain the school parking lot in a safe condition." In answering the complaint, ALHS stated that it is a charter school, as defined in the Charter Schools Act (the CSA), NMSA 1978, §§ 22-8B-1 to -17.1 (1999, as amended through 2015), and "is thus a public school . . . subject to the [TCA.]" ALHS also raised TCA-based affirmative defenses.

{11} ALHS moved to dismiss under Rule 1-012(B)(6) NMRA, arguing that (1) ALHS is a charter school under the CSA and, thus, a public school subject to suit only if the TCA waives immunity for the claim asserted against it; (2) Plaintiffs do not allege a "pattern" of dangerous behavior or a dangerous condition on the premises, but only a single instance of negligent supervision, which does not fall within the Section 41-4-6(A) immunity waiver; and (3) the TCA bars Plaintiffs' claims for punitive damages and pre-judgment interest. Plaintiffs opposed the motion, arguing that nothing in the text of the TCA or CSA indicates that "the Legislature intended privately operated schools to be immune from tort liability," as the TCA does not mention "charter schools" and the CSA does not mention "immunity," and that ALHS had not shown that it met the definition of a charter school, or that a charter school is a public school entitled to TCA immunity. Plaintiffs also maintained that their argument was not that the act of violence alleged in the complaint, by itself, rendered the ALHS parking lot unsafe, but that "a dangerous condition existed on the premises, namely the absence of adequate security, supervision, or employee oversight to prevent student fights."

{12} In its reply, ALHS countered that a charter school cannot exist unless it complies with the CSA's requirements and that charter schools are public schools subject to the TCA. As for Plaintiffs' contention that their claim falls within the Section 41-4-6(A) waiver, ALHS argued that Plaintiffs' claim is that the fight would not have occurred if there had been adequate supervision and that, as a matter of law, Section 41-4-6(A) does not waive immunity for claims of negligent supervision. The district court denied the motion to dismiss in an order that did not explain the basis for its decision.

{13} ALHS subsequently moved for summary judgment on the issue of its status as a public school subject to the TCA. The motion attached the charter agreement and documents evidencing the New Mexico Public Education Commission's renewal of ALHS's state charter, noting that the district court had advised at the hearing on the motion to dismiss that it could not determine whether ALHS was subject to the TCA without reviewing the charter agreement. Plaintiffs did not respond to this motion, and the district court granted it, ruling that ALHS "is a Public Charter School under the provisions of the [TCA.]"[3]

{14} ALHS separately moved for summary judgment on the ground that, as a matter of law, Section 41-4-6(A) did not waive TCA immunity because Plaintiffs' claim is for negligent supervision, and precedent holds that Section 41-4-6(A) does not waive immunity for such claims. ALHS cited *Encinias v. Whitener Law Firm, P.A.*, 2013-NMSC-045, 310 P.3d 611, to support its argument that Section 41-4-6(A) does not waive immunity absent a dangerous condition on the premises, and this requirement cannot be met because "a single act of student-on-student violence does not render the premises unsafe," and there is no evidence of a pattern of violence in the parking lot. Plaintiffs also cannot establish waiver under *Upton v. Clovis Municipal School District*, 2006-NMSC-040, 140 N.M. 205, 141 P.3d 1259, ALHS contended, because *Upton* requires multiple safety policy failures, and there is no such evidence here. *See id.* ¶ 21.

{15} In opposing the motion, Plaintiffs contended that their claim is not based on negligent supervision but on ALHS's failure to have an appropriate written policy for student safety in its parking lot and its failure on the day of the incident to follow an informal policy of having the parking lot monitored by a staff member. Plaintiffs emphasized that they do "not ask the [c]ourt to apply *Encinias* on its facts" and explicitly disclaimed reliance on a theory that "the high school parking lot was a 'hot zone' for violence, as in *Encinias*." Their argument relied principally on the general statement in *Encinias* that "the facts of a case will support a waiver under Section 41-4-6(A) if they would support a finding of liability against a private property owner[,]" *Encinias*, 2013-NMSC-045, ¶ 15, and the general statement in *Upton* that the waiver applies to "safety policies

[2] Plaintiffs assert that Runnels "could not account for her whereabouts" at the time of the incident; however, at her deposition, Runnels recounted where she went and what she did between the end of classes and her arrival in the parking lot.

[3] Based on this same reasoning, the district court later entered a stipulated order that punitive damages and pre-judgment interest are not available.

necessary to protect the people who use the building." *Upton*, 2006-NMSC-040, ¶ 9. They insisted that their claim is distinct from negligent supervision and is the type of claim *Upton* recognized as falling within Section 41-4-6(A), "namely, where public employees fail to have or follow safety policies that apply to those who use a public building."

{16} Plaintiffs also submitted an affidavit of C. Joshua Villines, asserting that it established that "[t]he standard of care applicable to schools is that they have appropriate written policies in place for student safety" and that "ALHS failed to meet the standard of care in multiple ways." The affidavit declares that Villines is "an expert in school safety." The opinion attached to the affidavit (Opinion) indicates that he reviewed "crisis response and safety policies and procedures for the City Schools of Decatur, Georgia" and provided training for faculty concerning "crisis planning and response, workplace and school violence, and threat assessment." But neither the Opinion nor Villines' resume show any education or training specific to public school safety, public school parking lots, or the prevention of student-on-student altercations on public school premises. And Villines does not explain how credentials such as a board certification in "Security Management" by ASIS International or designation as an "International Crime Prevention Specialist" by the International Society of Crime Prevention Practitioners, or any other education or experience he cites, make him competent to testify as an expert concerning the standard of care for New Mexico public school parking lots related to student-on-student violence.

{17} Villines also offered no explanation or authority supporting his assumption that what he cites as "industry standards" define the standard of care New Mexico public schools must meet to address student-on-student violence in school parking lots. The titles of the texts he cites and the names of the organizations to which they are attributed suggest that the "industries" he relies on bear little or no relationship to public schools.[4] The Opinion does refer to schools and "educational setting," but it contains no specific discussion of spontaneous student altercations in public schools, only general statements with citations to texts that appear to address such issues as suicide prevention and "crisis plans" and "emergency response procedures" for catastrophic emergencies such as school shootings.

{18} Villines nevertheless opined that ALHS had failed to meet the standard of care by failing to: (1) "create written policies and procedures for the supervision of the parking lot"; (2) "have a capable guardian present in the parking lot at the time of the incident"; (3) "perform and maintain a security vulnerability assessment which included the parking lot"; (4) "provide adequate supervision of the personnel assigned to the parking lot, leading to the absence of the assigned faculty member at the time of the incident"; (5) "establish a written security plan that included the parking lot"; and (6) "establish a comprehensive formal threat assessment process for the centralized archival, assessment, documentation, and tracking of threatening or potentially violent behavior." Villines does not say that any of these failures created a dangerous condition in the ALHS parking lot that threatened the safety of those who used it, or that implementation of any measure he claimed is required by his proffered standard of care would have prevented Nisha's assault on Marcelle. Plaintiffs adduced no other evidence purportedly demonstrating the existence of a dangerous condition in the ALHS parking lot, nor any evidence that ALHS knew or should have known that the parking lot was unsafe or that Nisha might attack Marcelle or anyone else.

{19} Neither Villines nor Plaintiffs discussed what, if anything, the statutes and regulations governing New Mexico public schools require for the safe operation of student parking lots, the financial limitations within which public schools must operate, or the impact on any of the foregoing on the proffered "industry" standard of care. Nor did Plaintiffs adduce any evidence that ALHS made safety-related promises to Marcelle (or to any student) or that Marcelle's parents (or any parents of students) relied on any such promises.

{20} Plaintiffs offered no reason why expert testimony was necessary, or even relevant, to resolution of the legal question presented in the summary judgment motion—whether her negligence claim against ALHS falls within the Section 41-4-6(A) waiver of immunity. They simply cited the list of ALHS failures identified by Villines as material facts barring summary judgment, stating that they had "met their burden of coming forward with proof that ALHS was negligent under the premises liability rule of *Encinias*, or at least of demonstrating that disputed issues of material fact exist and preclude summary judgment in favor of ALHS."

{21} In reply, ALHS argued that the policies public schools are required to implement are not determined by expert testimony but are prescribed by the Public School Code (the PSC), NMSA 1978, §§ 22-1-1 to -33-4 (except Article 5A) (1967, as amended through 2017), and Chapters 11 and 12 of the New Mexico Administrative Code, which do not require the measures Villines said ALHS failed to implement, and that the Legislature expressly stated in the TCA that government entities are not obligated to do everything that might be done for the benefit of the public. For these and other reasons, ALHS said, the failures cited by Villines are not material.

{22} Noting Plaintiffs' representation that they did not rely on an *Encinias* theory of a pattern of violence, ALHS argued that Runnels' absence from her assigned post was a single instance of negligent supervision for which Section 41-4-6(A) does not waive immunity, reiterating that negligence claims based on student-on-student altercations are treated as claims for negligent supervision, for which Section 41-4-6(A) does not waive immunity, and that, despite her contrary assertions, Plaintiffs' claim is that ALHS was negligent in failing to have adequate supervision in the parking lot.

{23} ALHS further argued that Plaintiffs cannot establish that their claim falls within Section 41-4-6(A) based on an *Upton* theory of failure to follow a safety policy because there was no evidence that ALHS failed to implement or follow necessary safety policies, and ALHS had safety policies for student-on-student altercations and had assigned a staff member to monitor the parking lot. Even if Runnels' absence at the time of the incident was a safety policy failure, ALHS argued that this would not establish a waiver because the decision in *Upton* was based on and requires multiple safety policy failures.

{24} The district court granted ALHS's summary judgment motion. In ruling that Section 41-4-6(A) does not waive TCA immunity for Plaintiffs' claim, the court

[4] Examples include materials that appear to address urban parking structures, crime prevention in general, workplace and "intimate partner" violence, and materials produced by the National Fire Protection Association.

concluded that there was no pattern of violence or "hot zone" in the parking lot that ALHS failed to address, as in *Encinias*; to the extent the claim is based on the absence of adequate safety policies, ALHS had an unwritten policy of staff-member supervision of the parking lot after school; and multiple safety policy failures were not shown, as *Upton* requires. The court also determined that ALHS did not breach its duty of care to its students because "New Mexico law does not require that a public high school have a written policy concerning parking lot safety."

{25} Plaintiffs appeal, arguing that the district court erred in ruling that (1) ALHS is subject to the TCA; (2) ALHS is not required to have a written policy concerning student safety in its parking lot; (3) a Section 41-4-6(A) waiver based on *Upton* requires multiple policy failures; and (4) Plaintiffs failed to demonstrate a genuine dispute of material fact barring summary judgment.

STANDARDS OF REVIEW

Summary Judgment

{26} We review summary judgment decisions de novo. *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 7, 148 N.M. 713, 242 P.3d 280. Although we ordinarily review the whole record in the light most favorable to the party opposing summary judgment, we do not do so where pure questions of law are at issue. *Rutherford v. Chaves Cty.*, 2003-NMSC-010, ¶ 8, 133 N.M. 756, 69 P.3d 1199 (stating this proposition in addressing the question whether the claim asserted in that case fell within a different TCA waiver), *abrogated on other grounds as recognized by Lujan v. N.M. Dep't of Transp.*, 2015-NMCA-005, ¶¶ 8-9, 341 P.3d 1; *Holguin v. Fulco Oil Servs. L.L.C.*, 2010-NMCA-091, ¶ 7, 149 N.M. 98, 245 P.3d 42.

{27} Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Rule 1-056(C) NMRA. If the movant establishes that there are no material fact issues and that it is entitled to judgment as a matter of law, "the burden shifts to the non-movant to demonstrate the existence of specific evidentiary facts which would require trial on the merits." *Romero*, 2010-NMSC-035, ¶ 10 (internal quotation marks and citation omitted). The non-movant cannot meet this burden with allegations or speculation but must present admissible evidence demonstrating the existence of a genuine issue of fact requiring trial. Rule 1-056(C), (E); *Romero*, 2010-NMSC-035, ¶ 10. If the non-movant fails to do so, "summary judgment, if appropriate, shall be entered against him." Rule 1-056(E).

{28} To defeat summary judgment, allegedly disputed facts must be material, meaning that they are necessary to ground the claim under the governing law and will affect the outcome of the case. *Romero*, 2010-NMSC-035, ¶ 11; *see Martin v. Franklin Capital Corp.*, 2008-NMCA-152, ¶ 6, 145 N.M. 179, 195 P.3d 24 ("An issue of fact is 'material' if the existence (or non-existence) of the fact is of consequence under the substantive rules of law governing the parties' dispute."); *Farmington Police Officers Ass'n v. City of Farmington*, 2006-NMCA-077, ¶ 17, 139 N.M. 750, 137 P.3d 1204 ("In determining which issues of fact are material facts . . . we look to the substantive law governing the dispute.").

{29} "A dispute as to facts that are not material does not preclude summary judgment[,]" and summary judgment is proper although disputed factual issues remain. *Hansler v. Bass*, 1987-NMCA-106, ¶ 11, 106 N.M. 382, 743 P.2d 1031; *see N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶ 24, 126 N.M. 788, 975 P.2d 841 (explaining that disputed facts "do not preclude summary judgment without a showing that they are material"). Summary judgment is also proper "when a defendant negates an essential element of the plaintiff's case by demonstrating the absence of an issue of fact regarding that element." *Mayfield Smithson Enters. v. Com-Quip, Inc.*, 1995-NMSC-034, ¶ 22, 120 N.M. 9, 896 P.2d 1156; *see Goradia v. Hahn Co.*, 1991-NMSC-040, ¶ 18, 111 N.M. 779, 810 P.2d 798 ("A complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." (alteration, internal quotation marks, and citation omitted)).

{30} The Rule 1-056 procedure "serve[s] a worthwhile purpose in disposing of groundless claims, or claims which cannot be proved, without putting the parties and the courts through the trouble and expense of full blown trials on these claims." *Goodman v. Brock*, 1972-NMSC-043, ¶ 11, 83 N.M. 789, 498 P.2d 676; *see Schmidt v. St. Joseph's Hosp.*, 1987-NMCA-046, ¶ 4, 105 N.M. 681, 736 P.2d 135 (recognizing that Rule 1-056 "expedite[s] litigation" by providing a procedure to "determin[e] whether a party has competent evidence to support his pleadings").

Statutory Construction

{31} Statutory interpretation is a pure question of law subject to de novo review. *See Truong v. Allstate Ins. Co.*, 2010-NMSC-009, ¶ 22, 147 N.M. 583, 227 P.3d 73. This de novo standard applies to the determination of whether TCA immunity bars a tort claim. *Rutherford*, 2003-NMSC-010, ¶ 8.

{32} "In construing a statute, our charge is to determine and give effect to the Legislature's intent." *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶ 9, 146 N.M. 24, 206 P.3d 135; *see Truong*, 2010-NMSC-009, ¶ 29 ("[I]t is the high duty and responsibility of the judicial branch of government to facilitate and promote the [L]egislature's accomplishment of its purpose." (internal quotation marks and citation omitted)). In conducting this inquiry, we must consider the text of the provision(s) at issue in the context of the statute as a whole. *See State v. Rivera*, 2004-NMSC-001, ¶ 13, 134 N.M. 768, 82 P.3d 939 (stating that courts must analyze a "statute's function within a comprehensive legislative scheme" and may not consider subsections "in a vacuum").

DISCUSSION

As a Matter of Law, ALHS Is a Public School Subject to the TCA

{33} The TCA provides that "[a] governmental entity and any public employee while acting within the scope of duty are granted immunity from liability for any tort except as waived" by enumerated exceptions. Section 41-4-4(A). Plaintiffs contend that ALHS is not entitled to TCA immunity because a privately operated charter school is neither a governmental entity nor a public employee as defined in the TCA. Plaintiffs' argument appears to rest on the assertion that there is no reference to "charter schools" in the TCA and no reference to "immunity" in the CSA. For its part, ALHS cites statutory provisions defining "charter schools" as "public schools" and treating the two as having equivalent rights and responsibilities, and reasons that charter schools are protected by the TCA just as public schools are protected.

{34} We note that, although Plaintiffs filed an opposition to the motion to dismiss in which ALHS argued that (1) ALHS is a public school protected by the TCA and (2) Section 41-4-6(A) does not waive TCA immunity for Plaintiffs' claim, they did not respond to the subsequent summary judgment motion in which ALHS made a prima facie showing of entitlement to judgment as a matter of law that it is a TCA-protected public school by citing

law and attaching the charter agreement and documents evidencing the renewal of its state charter. In declining to respond, Plaintiffs abdicated the burden imposed on them by the law of summary judgment. *See* Rule 1-056(E); *Romero*, 2010-NMSC-035, ¶ 10. Plaintiffs' failure to respond to the summary judgment motion could also be deemed a failure to preserve their argument here that the district court erred in ruling, after reviewing the documents ALHS submitted in support of the motion, that ALHS "is a [p]ublic [c]harter [s]chool under the provisions of the [TCA.]" Nevertheless, we exercise our discretion under Rule 12-321(B)(2)(a) NMRA to address this legal question of first impression in the public interest.

{35} To the extent Plaintiffs contend that there is no statutory support for the proposition that a "charter school" is a "public school" under New Mexico law, they are plainly wrong. Numerous statutes include "charter schools" in the definition of "public schools" and otherwise evidence the Legislature's intent to treat charter schools as public schools, except as otherwise provided.

{36} In the PSC, the Legislature defined "public school" to "include[] a charter school." Section 22-1-2(L). The Legislature also made clear in Article 8B of Chapter 22 of the CSA that charter schools are public schools and must comply with the same requirements applicable to public schools, except as otherwise provided. *See, e.g.*, § 22-8B-2(A) (defining "charter school" as "a conversion school or start-up school authorized by the chartering authority to operate as a public school"); § 22-8B-4(J) (stating that "[a] charter school shall be a nonsectarian, nonreligious and non-home-based public school"); § 22-8B-4(Q) (requiring charter schools to "comply with all state and federal health and safety requirements applicable to public schools"); § 22-8B-4(R) (stating, *inter alia*, that "[a] charter school is a public school that may contract with a school district or other party for provision of financial management, food services, transportation, facilities, education-related services or other services"); § 22-8B-5(D) (stating that "[a] charter school shall be a public school accredited by the department and shall be accountable to the chartering authority for purposes of ensuring compliance with applicable laws, rules and charter provisions"). The ALHS charter agreement tracks some of these provisions, stating that ALHS "shall be a nonsectarian, non-religious and non-home-based public school[,]" requiring that ALHS comply with numerous statutes and regulations applicable to public schools, and obtain insurance from and comply with the rules of the Public School Insurance Authority.

{37} Other statutory provisions make clear that charter schools receive funding from the state and that receipt of public funds requires compliance with numerous requirements applicable to public schools, school boards, and school districts. *See generally* Chapter 22, Article 8 (the Public School Finance Act); *see, e.g.*, § 22-8-2(H) (defining "operating budget" as "the annual financial plan required to be submitted by a local school board or governing body of a state-chartered charter school"); § 22-8-2(L) (defining "public money" or "public funds" as "all money from public or private sources received by a school district or state-chartered charter school or officer or employee of a school district or state-chartered charter school for public use"); § 22-8-6.1 (requirements for charter school budgets); § 22-8-11(B) ("No school district or charter school . . . shall make any expenditure or incur any obligation for the expenditure of public funds unless that expenditure or obligation is made in accordance with an operating budget approved by the [public education] department.").

{38} Many provisions in the New Mexico Administrative Code addressing the administration of public schools similarly equate charter schools with public schools and make clear that charter schools are governed by the same regulations applicable to public schools. *See, e.g.*, 6.12.7.2 NMAC (stating that Chapter 12 regulations govern "[l]ocal school boards and all public schools, including charter schools"); 6.12.7.6 NMAC (stating a rule "establish[ing] requirements for local school boards and public schools, including charter schools, to address bullying of students by adopting and implementing policies and prevention programs"); 6.12.7.7(G) NMAC (defining "public school" as "a school as defined by Section 22-1-2 . . . , including charter schools").

{39} Plaintiffs do not argue that "public schools" are not "governmental entities" protected by the TCA, presumably because that would require them to reconcile that position with the fact that many New Mexico cases—including *Upton* and *Encinias*, upon which she relies—have treated public schools, school boards, and school districts as subject to the TCA. *See, e.g.*, *Pemberton v. Cordova*, 1987-NMCA-020, ¶ 4, 105 N.M. 476, 734 P.2d 254 (explaining, in a negligence case against a school board, that a claim against a government entity "must fit within one of the exceptions to the immunity granted, or it may not be maintained"). Indeed, Plaintiffs assert, "It is undisputed that Section 41-4-6(A) applies to school facilities[.]" Instead, they contend that a privately operated charter school is neither a governmental entity nor a public employee as defined in the TCA, so it is not entitled to the immunity the TCA affords to "a state-run school." We disagree.

{40} The TCA defines "governmental entity" as "the state or any local public body as defined in Subsections C and H of [the TCA's definitions] section[.]" Section 41-4-3(B). It defines "local public body" as "*all political subdivisions of the state* and their agencies, instrumentalities and institutions," Section 41-4-3(C) (emphasis added), and defines "state" or "state agency" as "the state of New Mexico or any of its branches, agencies, departments, boards, instrumentalities or institutions." Section 41-4-3(H). In addition to defining "charter schools" as "public schools," the PSC defines "school district" as "an area of land established as *a political subdivision of the state* for the administration of *public schools*," Section 22-1-2(R) (emphasis added), and defines "public school" as "*that part of a school district* that . . . is discernible as a building or group of buildings generally recognized as either an elementary, middle, junior high or high school or any combination of those and *includes a charter school*[.]" Section 22-1-2(L) (emphases added).

{41} These provisions, taken together, establish that a "charter school" is a "public school" that operates as part of a "political subdivision[] of the state" and, as such, is a "governmental entity" within the meaning of Sections 41-4-3(B) and (C). A charter school also falls within the TCA's definition of "governmental entity" as including state "instrumentalities" and "institutions." Section 41-4-3(B), (H). Numerous statutory provisions, including many not cited here, reflect the interrelationship between charter schools and public schools, school boards, and school districts, and the Legislature's intent to treat charter schools as no less governmental entities than are public schools under New Mexico law.

{42} We see no evidence that the Legislature, in defining "charter schools" as "public schools," intended that this should be so for some purposes and not others,

and Plaintiffs offer no reason that would support such an interpretation. This Court "presumes that the Legislature is aware of existing case law and acts with knowledge of it." *State v. Chavez*, 2008-NMSC-001, ¶ 21, 143 N.M. 205, 174 P.3d 988. The TCA had been in place for some twenty years when the Legislature enacted the CSA. If the Legislature had intended that charter schools and public schools be treated differently for some purposes, including under the TCA, it would have made that clear. We affirm the district court's ruling that ALHS is a public school and, as such, a governmental entity subject to suit only as permitted by an exception to the TCA's general rule of immunity.

As a Matter of Law, Section 41-4-6(A) Does Not Waive TCA Immunity for Plaintiffs' Claim Against ALHS

1. The Relevant TCA Framework

{43} The TCA provides that "[a] governmental entity and any public employee while acting within the scope of duty are granted immunity from liability for any tort except as waived" by enumerated exceptions. Section 41-4-4(A). In enacting the TCA, the Legislature reinstated the general rule of governmental immunity, abolished as a matter of the common law in *Hicks v. State*, 1975-NMSC-056, ¶ 15, 88 N.M. 588, 544 P.2d 1153, *superseded by statute as stated in Upton*, 2006-NMSC-040, ¶ 8, and declared it to be "the public policy of New Mexico that governmental entities and public employees shall only be liable within the limitations of the [TCA] and in accordance with the principles established in that act." Section 41-4-2(A). The Legislature stated its recognition of the unfairness resulting from "strict application of the doctrine of sovereign immunity" and also its intention that the "government should not have the duty to do everything that might be done" because "the area within which the government has the power to act for the public good is almost without limit[.]" *Id.* Under the TCA, "the rule is immunity; waiver is the exception." *Upton*, 2006-NMSC-040, ¶ 29 (Minzner, J., dissenting).

{44} Where TCA immunity is waived by an enumerated exception to the general rule of immunity, liability is to be determined "based upon the traditional tort concepts of duty and the reasonably prudent person's standard of care in the performance of that duty[,]" provided that "[d]etermination of the standard of care required in any particular instance should be made with the knowledge that each governmental entity has financial limitations within which it must exercise authorized power and discretion in determining the extent and nature of its activities." Section 41-4-2(B); *see also Thompson v. City of Albuquerque*, ___-NMSC-___, ¶¶ 11, 17, ___ P.3d ___ (No. 35,974, June 19, 2017) (discussing TCA waiver as an issue determined before consideration of the elements of the claim based on traditional tort concepts). The TCA "in no way imposes a strict liability for injuries upon governmental entities or public employees." Section 41-4-2(B).

2. TCA-Specific Principles of Statutory Interpretation

{45} Our task in determining whether a TCA waiver applies is to ascertain and give effect to the Legislature's intent and purpose using the principles of statutory construction outlined above. *See Truong*, 2010-NMSC-009, ¶ 29; *Marbob Energy Corp.*, 2009-NMSC-013, ¶ 9. In doing so, we also must follow our Supreme Court's instruction that "[s]tatutory provisions purporting to waive governmental immunity are strictly construed." *Rutherford*, 2003-NMSC-010, ¶ 11.

{46} The policy statements in Section 41-4-2(A) make clear that, as Plaintiffs themselves contend, the Legislature did not intend government and private tortfeasors to receive identical treatment. *See Marrujo v. N.M. State Highway Transp. Dep't*, 1994-NMSC-116, ¶ 24, 118 N.M. 753, 887 P.2d 747 (explaining that "[g]overnmental entities are different from private parties," Section 41-4-2(A) demonstrates that "[t]he [L]egislature never intended government and private tortfeasors to receive identical treatment[,]" and "[t]he right to sue the government is a statutory right and the [L]egislature can reasonably restrict that right"); Ruth L. Kovnat, *Torts: Sovereign & Governmental Immunity in N.M.*, 6 N.M. L. Rev. 249, 261-62 (1976) (stating that "examination of the [TCA's] statutory structure compels the conclusion that the purpose of the act is to treat the State and other governmental entities differently from individuals because to do otherwise threatens the public treasuries too much").

{47} A determination that the TCA does not waive immunity for a negligence claim asserted against a governmental defendant obviates the need to address the elements of negligence. *See Armijo v. Dep't of Health & Env't*, 1989-NMCA-043, ¶ 5, 108 N.M. 616, 775 P.2d 1333 ("[W]e need not reach the issue of duty unless we determine that [the] plaintiff's cause of action is one for which immunity has been waived."); *see also Cobos v. Doña Ana Cty. Hous. Auth.*, 1998-NMSC-049, ¶ 19, 126 N.M. 418, 970 P.2d 1143 ("[I]t is not enough for the public employees to have a duty—that duty must fit within the legislative intent of the [TCA] waiver in order to state a meritorious claim for relief."); *Espinoza v. Town of Taos*, 1995-NMSC-070, ¶ 14, 120 N.M. 680, 905 P.2d 718 (stating that even if the defendant "arguably had a duty in this case, there can be no liability for any breach of that duty because immunity has not been waived"); *Pemberton*, 1987-NMCA-020, ¶¶ 2-7 (rejecting the argument that a student allegedly struck and injured by another student stated a claim for which Section 41-4-6(A) waives a school board's immunity based on a statutory obligation to supervise students and explaining that a claim against a government entity "must fit within one of the exceptions to the immunity granted, or it may not be maintained").

{48} Relatedly, a showing that the facts support a negligence claim does not necessarily establish a waiver of TCA immunity. *See Milliron v. Cty. of San Juan*, 2016-NMCA-096, ¶ 2, 384 P.3d 1089 (concluding that "[the a]ppellant's well-pleaded facts, while potentially sufficient to support a claim of negligence, are insufficient to establish a waiver of the governmental immunity granted by Section 41-4-4(A)" and that "[b]ecause [the a]ppellees are immune from suit under the facts of the case, [the a]ppellant has not stated a claim upon which relief may be granted"); *Young v. Van Duyne*, 2004-NMCA-074, ¶ 33, 135 N.M. 695, 92 P.3d 1269 (explaining that "negligence arising out of the violation of a statutory duty does not change the immunity granted under the [TCA]"); *M.D.R. v. State ex rel. Human Servs. Dep't*, 1992-NMCA-082, ¶ 3, 114 N.M. 187, 836 P.2d 106 (stating that "it does not necessarily follow" from the fact that the department employees "have a responsibility to oversee and supervise the safety and well-being of children entrusted to" it that "the [d]epartment may be held liable under the [TCA] for a breach of that duty" because the TCA "declares that governmental entities and public employees shall only be liable within the limitations of its provisions" and "[t]he right to sue and recover is therefore specifically limited to the rights, procedures, limitations, and conditions of the [TCA]" (internal quotation marks and citation omitted)).

3. As a Matter of Law, Section 41-4-6(A) Does Not Waive Immunity for Plaintiffs' Claim Against ALHS

{49} Consistent with the principles discussed above, the parties' arguments focus on the question whether Plaintiffs' claim against ALHS falls within Section 41-4-6(A), which waives sovereign immunity "for damages resulting from bodily injury . . . caused by the negligence of public employees while acting within the scope of their duties in the operation or maintenance of any building, public park, machinery, equipment or furnishings." For the reasons set forth below, we hold that it does not and affirm the district court's entry of summary judgment in favor of ALHS.

a. Plaintiffs' Claim Is for Negligent Supervision, a Single Student-on-Student Assault, for Which Section 41-4-6(A) Does Not Waive Immunity

{50} Our Supreme Court has stated that it interprets Section 41-4-6(A) broadly, an admonition that appears to have originated with cases holding that the waiver is not limited to a "physical defect" on the premises but applies " 'where due to the alleged negligence of public employees an injury arises from an unsafe, dangerous, or defective condition on property owned and operated by the government].' " *Bober v. N.M. State Fair*, 1991-NMSC-031, ¶¶ 26-27, 111 N.M. 644, 808 P.2d 614 (quoting *Castillo v. Cty. of Santa Fe*, 1988-NMSC-037, ¶ 3, 107 N.M. 204, 755 P.2d 48); *see Archibeque v. Moya*, 1993-NMSC-079, ¶ 9, 116 N.M. 616, 866 P.2d 344 ("A careful reading of *Bober* and *Castillo* reveals that both cases rejected reading Section 41-4-6 to limit waiver of immunity to those instances where injury occurred due to a physical defect in a building."); *see also Callaway v. N.M. Dep't of Corr.*, 1994-NMCA-049, ¶ 17, 117 N.M. 637, 875 P.2d 393 (citing cases rejecting a "restrictive interpretation" limiting Section 41-4-6(A) waiver to physical defects on the premises and an interpretation that would apply "more restrictively based solely on a party's status as a prison inmate").

{51} Caution is warranted given that exceptions to the TCA's general rule of immunity are strictly construed. *Rutherford*, 2003-NMSC-010, ¶ 11. Even assuming that the intended purpose of TCA waivers is remedial, judicial directives to read TCA waiver provisions broadly cannot be understood to authorize or require an interpretation that exceeds the boundaries of legislative intent. *M.D.R.*, 1992-NMCA-082, ¶¶ 12-13 (stating that courts should "read the relevant statutes in a manner that facilitates their operation and the achievement of their goals"; "we have to find the [L]egislature's goals in the words the [L]egislature chose or in the natural inferences from those words"; the TCA waiver provisions invoked by the plaintiffs did not waive immunity for the claim alleged; "it is not the function of the court of appeals to legislate"; and "[c]orrection of whatever inequity exists in such a situation" is for the Legislature (internal quotation marks and citation omitted)).

{52} In any event, *Encinias*, our Supreme Court's most recent decision addressing the issue, affirms that Section 41-4-6(A), broadly interpreted, waives immunity only where the alleged negligence creates "an unsafe, dangerous, or defective condition on property owned and operated by the government." *Encinias*, 2013-NMSC-045, ¶ 10 (quoting *Castillo*, 1988-NMSC-037, ¶ 3); *see also Upton*, 2006-NMSC-040, ¶ 8 ("For the waiver to apply, the negligent 'operation or maintenance' must create a dangerous condition that threatens the general public or a class of users of the building.").

{53} Our Supreme Court also explained in *Encinias* that it has "made it clear that there are limits to the waiver of immunity in Section 41-4-6(A)[,]" *Encinias*, 2013-NMSC-045, ¶ 12, and that these limits include the following: (1) "there is no waiver of immunity under Section 41-4-6(A) for negligent supervision"; (2) "[t]here can be no waiver under Section 41-4-6(A) without a dangerous condition on the premises, and a single act of student-on-student violence does not render the premises unsafe"; and (3) "one student's battery of another would not generally waive a school's immunity under Section 41-4-6(A)[.]" *Encinias*, 2013-NMSC-045, ¶¶ 12-14; *see also Upton*, 2006-NMSC-040, ¶ 16 (stating that, for the Section 41-4-6(A) waiver to apply, "the claim cannot be based solely on negligent supervision"); *Espinoza*, 1995-NMSC-070, ¶¶ 7, 14 (rejecting argument that absence of supervision at a town playground constitutes an "unsafe, dangerous, or defective condition" for which Section 41-4-6(A) waives immunity; holding that the inadequate supervision alleged "did not create the unsafe conditions" and that the playground itself "was a safe area for children" and "was not a condition requiring supervision"); *Leithead v. City of Santa Fe*, 1997-NMCA-041, ¶ 8, 123 N.M. 353, 940 P.2d 459 (agreeing that "a claim of negligent supervision, standing alone, is not sufficient to bring a cause of action within the waiver of immunity created by Section 41-4-6"); *Pemberton*, 1987-NMCA-020, ¶¶ 2-7 (holding that Section 41-4-6(A) does not waive immunity for a claim brought by a student allegedly struck and injured by another student against a school board based on a theory of negligent supervision).

{54} Plaintiffs contend that cases holding that Section 41-4-6(A) does not waive immunity for claims of negligent supervision do not apply because they do not allege negligent supervision. The record is to the contrary. Their complaint alleges that ALHS breached its duty "by failing to take reasonable precautions to keep the school safe" and "by failing to provide adequate security or supervision in the school parking lot." In responding to ALHS's argument below (in its Rule 1-012(B)(6) motion) that Plaintiffs' claim is for a single instance of negligent supervision, which does not fall within Section 41-4-6(A), Plaintiffs said their argument was that "a dangerous condition existed on the premises, namely the absence of adequate security, supervision, or employee oversight to prevent student fights." In responding to ALHS's similar argument on summary judgment, Plaintiffs said their claim is based on ALHS's failure to have an appropriate written policy for student safety in its parking lot and its failure on the day of the incident to follow its informal policy of having the parking lot monitored by a staff member.

{55} To the extent Plaintiffs contend that Section 41-4-6(A) waives immunity for their claim because they do not rely only on a theory of negligent supervision, but also on a failure to have or follow safety policies for parking lot users, we are not persuaded that this suffices to distinguish their claim from one for negligent supervision. Four of the six failures identified by Villines relate to "supervision" and "security" of the parking lot. On appeal, moreover, Plaintiffs rely solely on two of those purported failures—"to create written policies and procedures for the supervision of the parking lot" and "to establish a written security plan that included the parking lot at the high school[,]"—abandoning all others as a potential basis for reversal. *See Mason Family Tr. v. DeVaney*, 2009-NMCA-048, ¶ 6, 146 N.M. 199, 207 P.3d 1176 (determining that a party abandoned arguments made below but not in appellate briefs).

{56} Plaintiffs' attempt to recast their claim as one for negligent failure to have written safety policies concerning "supervision" and "security" in the parking lot is unavailing. They cite no statute, regulation, or case requiring New Mexico public schools to have such written policies. And they offered no evidence that lack of a written policy (as distinct from the unwritten policy of staff supervision of the parking lot ALHS undisputedly had) itself created a dangerous condition in the parking lot. While Plaintiffs contend that unwritten policies can be undermined by "ad hoc decisions," they offer no evidence or argument demonstrating that written policies could not similarly be undermined. Regardless, the point was not argued below, and we decline to consider it. *See, e.g.*, *Nance v. L.J. Dolloff Assocs., Inc.*, 2006-NMCA-012, ¶ 12, 138 N.M. 851, 126 P.3d 1215 ("[W]e review the case litigated below, not the case that is fleshed out for the first time on appeal." (internal quotation marks and citation omitted)); *Woolwine v. Furr's, Inc.*, 1987-NMCA-133, ¶ 20, 106 N.M. 492, 745 P.2d 717 ("To preserve an issue for review on appeal, it must appear that [the] appellant fairly invoked a ruling of the trial court on the same grounds argued in the appellate court."). Plaintiffs' assertion that Villines explained "why a written, rather than informal, policy is essential to establishing a safe school environment[,]" was not made below either. Moreover, they eidentify no specific statement but direct us to the entirety of the Villines affidavit and Opinion. "We will not search the record for facts, arguments, and rulings in order to support generalized arguments." *Muse v. Muse*, 2009-NMCA-003, ¶ 72, 145 N.M. 451, 200 P.3d 104.

{57} We conclude that Plaintiffs' claim is for negligent supervision—a single student-on-student altercation—which does not fall within Section 41-4-6(A), as broadly construed by our Supreme Court. *See Encinias*, 2013-NMSC-045, ¶ 12 ("[T]here is no waiver of immunity under Section 41-4-6(A) for negligent supervision."). Even assuming the claim is not solely one for negligent supervision, it still does not fall within the waiver, as we explain below.

b. *Encinias* Does Not Require the Conclusion That Section 41-4-6(A) Waives TCA Immunity for Plaintiffs' Claim

{58} In *Encinias*, the plaintiff contended that Section 41-4-6(A) waived immunity for his negligence claim against a high school and school district arising from injuries he sustained when another student attacked him in an area where students patronized food vendors, which an assistant principal described in an affidavit as a "hot zone" for student violence. *Encinias*, 2013-NMSC-045, ¶¶ 2, 13. Our Supreme Court held that the government can be liable for the violent acts of a third party under a premises liability theory "if the government reasonably should have discovered and could have prevented the incident" and that the plaintiff had established a genuine issue of material fact as to the existence of a dangerous condition on school premises based on the assistant principal's "hot zone" statement. *Id.* ¶¶ 17-18.

{59} In reaching its decision in *Encinias*, the Court re-affirmed its longstanding interpretation of Section 41-4-6(A) that "[t]here can be no waiver under Section 41-4-6(A) without a dangerous condition on the premises, and a single act of student-on-student violence does not render the premises unsafe." *Encinias*, 2013-NMSC-045, ¶ 13. The Court distinguished *Pemberton*, in which the plaintiff claimed to have been struck and injured by another student, noting that "[t]he plaintiff in *Pemberton* specifically alleged negligent supervision but did not allege that the school was negligent in failing to exercise reasonable care to discover and prevent dangerous conditions caused by people on its premises" and did not allege "a broader pattern of violence at the school, or any facts to suggest that the school, in the exercise of ordinary care, could have discovered that the violence was about to occur and that the school could have protected the student from injury." *Encinias*, 2013-NMSC-045, ¶ 13 (citing *Pemberton*, 1987-NMCA-020, ¶ 2). "While one student's battery of another would not generally waive a school's immunity under Section 41-4-6(A), a school's failure to address a pattern of student violence in a particular area might create an unsafe condition on the premises." *Encinias*, 2013-NMSC-045, ¶ 14.

{60} *Encinias* thus distinguished a negligent supervision case, as in a single student-on-student altercation, from a case in which there is evidence of a prior history of violence that the defendant, in the exercise of ordinary care, reasonably could have discovered and acted upon to prevent injury to the plaintiff. *See id.* ¶¶ 16-18 (citing cases for "the operative principle" that businesses and government "must exercise reasonable care to discover and prevent dangerous conditions caused by people on their premises"; holding that the "hot zone" affidavit sufficed to "raise questions about the degree of student violence and the school's efforts to discover and prevent student violence in that area" and to establish a genuine issue of material fact "as to whether there was a dangerous condition on the premises of the high school").

{61} There is no evidence in this case (or even an allegation) that the ALHS parking lot was a "hot zone." Plaintiffs, moreover, explicitly disclaimed reliance on a theory that "the high school parking lot was a 'hot zone' for violence," citing *Encinias* only for its general statement that "the facts of a case will support a waiver under Section 41-4-6(A) if they would support a finding of liability against a private property owner." *Encinias*, 2013-NMSC-045, ¶ 15. On appeal, Plaintiffs make no specific argument based on *Encinias*, merely reciting that same general statement and the equally general statement that "Section 41-4-6(A) incorporates the concepts of premises liability found in our case law." The lack of developed argument is reason enough for us to decline to consider whether *Encinias* requires reversal. *See Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076 (refusing to consider a cursory argument that included no explanation and no facts permitting evaluation of the claim).

{62} Regardless, Plaintiffs cannot establish a waiver simply by reciting these general statements, while disregarding the legal and factual context grounding the *Encinias* Court's actual holding that the assistant principal's affidavit demonstrated a genuine issue of material fact as to whether there was a dangerous condition that the school might reasonably have discovered and mitigated in the exercise of ordinary care. *See* 2013-NMSC-045, ¶ 18. Plaintiffs did not adduce competent evidence of the existence of a dangerous condition in the school parking lot or that ALHS knew or should have known that the parking lot was unsafe, or that ALHS knew or should have known that Nisha had a propensity for violence or posed a threat to Marcelle (or to anyone at the school). Plaintiffs did not allege any of these things. *See, e.g.*, *Castillo*, 1988-NMSC-037, ¶ 10 (stating that the defendant's liability depended on what it "knew or should have known about loose-running dogs in the common area, whether such loose-running dogs should have been foreseen as a threat to the

safety of the residents and invitees, and the means at the disposal of the [defendant] to control the presence of loose-running dogs"; holding that the complaint alleging "knowledge on the part of the defendant of the unsafe condition represented by dogs running loose within the project" stated a claim within Section 41-4-6(A)); *Callaway*, 1994-NMCA-049, ¶ 19 ("[The p]laintiff has stated a claim sufficient to waive immunity under Section 41-4-6 because [the d]efendants knew or should have known that roaming gang members with a known propensity for violence had access to potential weapons in the recreation area, that such gang members created a dangerous condition on the premises of the penitentiary, and that the danger to other inmates was foreseeable."); *see also Saiz v. Belen Sch. Dist.*, 1992-NMSC-018, ¶¶ 43-44, 113 N.M. 387, 827 P.2d 102 (stating that liability under the TCA "is based solely" on a breach of the "reasonably prudent person's standard of care," which requires evidence of "the foreseeability, *to one who has or should have knowledge*, that his or her act or failure to act will result in an unreasonable risk of injury" (internal quotation marks and citation omitted)).

{63} Plaintiffs claim that "[a]s a general proposition, parking lots can be dangerous[,]" quoting a statement by Villines referencing "[t]he nature of heavy foot and vehicle traffic at certain times of the day" and "the combination of ease of access and lack of natural surveillance in many parking lots[.]" But they did not argue this point below, and they offer no connection between this "general proposition" and the condition of the ALHS parking lot at the time of the incident. In fact, Plaintiffs offered no evidence that any of the purported failures identified by Villines made the parking lot unsafe or that implementation of any of the measures he discussed would have prevented the assault. While Villines characterized the failures he cited as breaches of his proffered "industry" standard of care, he did not say that the parking lot was in a dangerous condition, and to the extent Plaintiffs argue that it was, they have characterized that condition only as a lack of supervision.

{64} Furthermore, the issue presented in this case is the legal question whether Section 41-4-6(A) waives immunity for the claim alleged, and Plaintiffs do not explain how their expert's opinions as to what constitutes the standard of care and the ways in which ALHS breached that standard are material under the governing law, or even relevant, to our determination of that question. *See, e.g.*, *Espinoza*, 1995-NMSC-070, ¶ 14 (stating that even if the defendant "arguably had a duty . . . , there can be no liability for any breach of that duty because immunity has not been waived"); *Martin*, 2008-NMCA-152, ¶ 6 ("An issue of fact is 'material' if the existence (or non-existence) of the fact is of consequence under the substantive rules of law governing the parties' dispute."); *Young*, 2004-NMCA-074, ¶ 33 (explaining that "negligence arising out of the violation of a statutory duty does not change the immunity granted under the [TCA]"); *M.D.R.*, 1992-NMCA-082, ¶ 3 (stating that "it does not necessarily follow" from the fact that the department employees "have a responsibility to oversee and supervise the safety and well-being of children entrusted to" it that "the [d]epartment may be held liable under the [TCA] for a breach of that duty" because the TCA "declares that governmental entities and public employees shall only be liable within the limitations of its provisions" (internal quotation marks and citation omitted)).

}65{ Plaintiffs seem to assume that all they need do to demonstrate that their claim falls within Section 41-4-6(A) is allege negligence under a "premises liability" theory. This is incorrect. While claims determined to fall within Section 41-4-6(A) are analyzed as premises liability cases, a negligence claim is not actionable against a government defendant unless it falls within the waiver. *See, e.g.*, *Thompson v. City of Albuquerque*, ___-NMSC-___, ¶¶ 11, 17 (discussing TCA waiver as an issue determined before consideration of the elements of the claim based on traditional tort concepts). As a matter of law, Plaintiffs have not established that Section 41-4-6(A) waives immunity for their claim against ALHS based on *Encinias*.

c. *Upton* Does Not Require the Conclusion That Section 41-4-6(A) Waives TCA Immunity for Plaintiffs' Claim

{66} Plaintiffs argue, citing *Upton*, that their claim is "a type of claim" that our Supreme Court recognized as distinct from negligent supervision and within Section 41-4-6(A)—"namely, where public employees fail to have or follow safety policies that apply to those who use a public building." According to Plaintiffs, "this is the ultimate distinction that makes a difference in the present case." We disagree. The district court's conclusion that "New Mexico law does not require that a public high school have a written policy concerning parking lot safety" is not contrary to *Upton*, as Plaintiffs contend; nor did the court err in reading *Upton*'s holding as premised on multiple policy failures.

{67} In *Upton*, the parents of a student who died from an asthma attack after a substitute physical education teacher required her to participate in strenuous exercise sued a school district for negligence, arguing that Section 41-4-6(A) waived immunity. *Upton*, 2006-NMSC-040, ¶ 1. The claim was based on allegations of a course of negligent conduct by school personnel over two time periods that created an unreasonable risk of harm to their daughter, Sarah, and other students with medical conditions. *Id.* ¶ 10.

{68} The plaintiffs alleged that they had advised Sarah's physical education teacher and the school of Sarah's condition, verbally and in writing; the teacher agreed that Sarah could limit her participation if she felt that exercise was triggering an asthma attack; and Sarah's condition and the special services she would need were documented in an individualized education plan (IEP) with the school. *Id.* ¶¶ 2, 10. The plaintiffs had instructed that school personnel could immediately contact medical personnel directly in the event of an attack and had received assurances that Sarah's special needs would be met. *Id.* The attack occurred, they claimed, because the school negligently failed to inform the substitute teacher of Sarah's special needs, creating a dangerous condition for Sarah, and the teacher made Sarah perform strenuous exercise, even though Sarah told the teacher of her distress. *Id.* The plaintiffs further alleged that the school negligently failed to respond to the attack, resulting in Sarah's death, by waiting fifteen minutes after Sarah's distress was noticed to call 911 and by failing to administer CPR, although it was clear from the onset of the attack that Sarah was not breathing well and turning blue. *Id.* ¶ 11.

{69} In reversing the district court's entry of summary judgment for the school district, our Supreme Court affirmed the longstanding holding that Section 41-4-6(A) does not waive immunity for claims "based solely on negligent supervision[,]" *Upton*, 2006-NMSC-040, ¶ 16, and that "[f]or the waiver to apply, the negligent 'operation or maintenance' must create a dangerous condition that threatens the general public or a class of users of the building." *Id.* ¶ 8. The Court concluded, however, that the waiver applies to "safety policies necessary to protect the people

who use the building" and that the school district created a dangerous condition by failing "to follow procedures established for at-risk students," which "students have been promised, and upon which parents have relied." *Id.* ¶¶ 9, 13. The Court rejected the argument that "the [plaintiffs'] complaint amounts to nothing more than a claim of negligent supervision of one student during a physical education class," stating that the plaintiffs "challenge far more than a single failure of oversight by one overworked teacher." *Id.* ¶¶ 15, 18. The Court explained:

> [T]he [plaintiffs] challenge the [s]chool [d]istrict's general failure to implement promised safety policies for at-risk students. The [plaintiffs] claim the [s]chool [d]istrict negligently put in motion a chain of events that both preceded and followed the specific decisions of the hapless substitute teacher. The school failed to implement Sarah's IEP, to respond appropriately to the specific information it was given about Sarah's condition, and to implement the specific assurances given to the [plaintiffs] about the care the school was to provide in light of Sarah's special needs. The substitute teacher, a school employee, forced Sarah to continue her exercise despite tangible evidence of her distress. Then, the school failed to properly implement its emergency procedures. Faced with Sarah's acute distress, the school never administered CPR, no one called 911 in a timely manner, Sarah was simply wheeled outside to await emergency personnel.

Id. ¶ 18.

{70} The Court reasoned that, if the only negligence alleged was the substitute teacher's failure to watch Sarah during physical exercise, the claim would be "much closer to the single administrative decision in *Archibeque* [and] practically identical to the single claim of negligent supervision we found inadequate in *Espinoza*[,]" but that the conduct alleged went "beyond these limits." *Upton*, 2006-NMSC-040, ¶ 21. Our Supreme Court further stated:

> First the school ignored the information it was given by the [plaintiffs]. This led to the school actively participating in causing the asthma attack by forcing Sarah to do more exercise than she was supposed to do. Actively forcing students, who are known to have health problems, creates a foreseeable risk that such a health emergency will occur. Then the school failed to follow through with proper emergency procedures, negligent omissions that exacerbated the problem caused by its previous negligent actions. These actions and omissions combined to create the dangerous condition, placing Sarah in a far worse position than the reasonable and expected risks of school life.

Id. (alteration and internal quotation marks omitted).

{71} Contrary to Plaintiffs' arguments, *Upton* does not require the conclusion that Section 41-4-6(A) waives immunity for her claim against ALHS. First, nothing in *Upton* can be read as a general rule requiring that public schools must have written policies concerning supervision of school parking lots. Second, Plaintiffs are wrong in asserting (quoting *Upton*, 2006-NMSC-040, ¶ 13) that "a policy concerning student safety in the school parking lot is precisely the type of 'safety service[] that students have been promised, and upon which parents have relied.' " They have neither alleged nor submitted any evidence that any promises were made to Marcelle (or to anyone) concerning the parking lot or that any parent relied on any such promise. Plaintiffs are also wrong to the extent they contend that their claim is actionable under *Upton* based on a theory that Runnels' absence from the parking lot at the time of the incident is a failure to follow the ALHS policy requiring monitoring of the parking lot after school.

{72} As the foregoing discussion makes clear, *Upton*'s holding was expressly predicated on facts not even alleged here: a student with special medical needs; parents who previously advised the school and the student's teacher of those needs and of the procedures required to address them, which were documented in the student's IEP; assurances from the school and the teacher that the student's needs would be addressed; and a course of conduct over a period of time involving multiple acts of alleged negligence, including failure to respond to the medical emergency that developed after the onset of the student's asthma attack. *See* 2006-NMSC-040, ¶¶ 2, 10, 18. *Upton*'s holding that Section 41-4-6(A) waived immunity for the claim in that case was based on numerous facts and circumstances not present in this case.

{73} Plaintiffs' citation to two cases involving swimming pools (which they characterizes as "the *Upton* line of cases") does not alter our conclusion that their safety policy theory fails to demonstrate a waiver.

{74} In *Seal v. Carlsbad Independent School District*, 1993-NMSC-049, 116 N.M. 101, 860 P.2d 743, the plaintiff's decedent, a physically and mentally disabled eighteen-year-old who could not swim, drowned in a pool owned and operated by the school district while he participated in an aquatic camp planned, provided, and supervised by the Boy Scouts. *Id.* ¶ 2. Our Supreme Court reversed summary judgment for the defendant, in part, because of its concern that the district court did not consider allegations of the school district's "primary negligence" for "failing to ensure that a properly trained lifeguard was present *and acting as such* and by failing to provide necessary safety equipment," both required by regulations. *Id.* ¶¶ 9-10, 17. *Seal* does not even mention Section 41-4-6(A).

{75} In *Espinoza*, our Supreme Court explained that, in contrast to *Seal*, where "the unsafe condition of the premises was a swimming pool without the superintending lifeguard protection required by statute[,]" the town playground in *Espinoza* "was a safe area for children" and "not a condition requiring supervision" and the alleged negligent supervision of children at the playground did not create an unsafe condition. 1995-NMSC-070, ¶ 14. Noting that "[t]he Legislature has expressly stated that because of the broad range of the government's activities, it 'should not have the duty to do everything that might be done' for the benefit of the public[,]" the Court held that "[e]ven if the [defendant] arguably had a duty in this case, there can be no liability for any breach of that duty because immunity has not been waived." *Id.* (quoting Section 41-4-2(A)).

{76} *Leithead* involved a negligence claim brought on behalf of Amanda Leithead, who nearly drowned in a city swimming pool when she was six years old. 1997-NMCA-041, ¶¶ 1-4. Amanda and other children enrolled in a YMCA program were allowed into the pool without any inquiry concerning the ages or heights of the children, despite pool regulations

requiring adult supervision for children younger than seven and under forty-eight inches in height. *Id.* ¶ 2. *Leithead* affirmed that "a claim of negligent supervision, standing alone, is not sufficient to bring a cause of action within the waiver of immunity created by Section 41-4-6],]" but held that the allegations and evidence presented brought the claim within the waiver. *Leithead*, 1997-NMCA-041, ¶ 8. This Court reasoned as follows:

> A swimming pool without an adequate number of trained lifeguards creates a dangerous condition on the physical premises which affects the swimming public at large. In fact, lifeguard services are so essential to the safety of a swimming pool that they seem akin to other kinds of safety equipment, such as lifelines and ladders, that are fundamental in making the premises reasonably safe for the swimming public. Failure to provide those services in reasonable quantity and quality (lifeguards "present and acting as such") makes the premises unsafe.

Id. ¶ 15. In contrast, "negligent supervision of a child in the [defendant's] care did not create an unsafe condition," and "[t]he [defendant's] fault [in *Espinoza*] lay in negligently administering a summer day camp which . . . is not a category for which sovereign immunity has been waived under the [TCA]." *Leithead*, 1997-NMCA-041, ¶ 9.

{77} The unsupervised public school parking lot in this case bears no similarity to a public swimming pool without the lifeguards and safety equipment required by regulations. As *Upton* acknowledged, "a school building is not as inherently dangerous as a swimming pool[.]" 2006-NMSC-040, ¶ 19. In *Upton* our Supreme Court distinguished the plaintiffs' claim from a claim of negligent supervision based on numerous facts. *Id.* ¶ 21. The allegations and evidence Plaintiffs present do not require or permit us to draw the same distinction here and do not support the conclusion that either the absence of a written policy concerning supervision of the ALHS parking lot or the absence of a supervisor in the parking lot at the time of the incident brings Plaintiffs' claim within Section 41-4-6(A).

No Genuine Issue of Material Fact Precludes Entry of Summary Judgment for ALHS

{78} Plaintiffs contend that they proffered "numerous disputed issues of material fact, each of which were sufficient to preclude judgment in ALHS'[s] favor." Plaintiffs do not identify a single one. Instead, they recite the list of failures identified by Villines, asserting that they demonstrate that ALHS "breached the standard of care that requires schools to have appropriate written policies in place for student safety."

{79} As discussed above, Plaintiffs rely solely on the failures of ALHS to have written policies for supervision and security in the parking lot, while providing no basis for distinguishing them from a claim of negligent supervision. As also discussed, Plaintiffs do not explain how the opinions of their expert concerning the standard of care and the ways in which ALHS breached it[5] are material under the governing law to our determination of the legal question of whether Section 41-4-6(A) waives immunity for their claim. Nor have they identified any other genuine dispute of fact material to the waiver determination. In short, Plaintiffs have failed to demonstrate that there are any material issues of fact on the question of whether the ALHS parking lot had any condition that rendered it unsafe, dangerous, or defective that caused the incident between Nisha and Marcelle to take place. Having concluded as a matter of law that there is no waiver, we have no need or reason to consider evidence concerning the elements of negligence. *See, e.g.*, *Espinoza*, 1995-NMSC-070, ¶ 14; *Armijo*, 1989-NMCA-043, ¶ 5. Even if the facts did support a negligence claim, this would not suffice to establish a waiver. *See Milliron*, 2016-NMCA-096, ¶ 2; *Young*, 2004-NMCA-074, ¶ 33; *M.D.R.*, 1992-NMCA-082, ¶ 3.

CONCLUSION

{80} For the foregoing reasons, we affirm the district court's rulings that ALHS is a public school protected by the TCA, that Plaintiffs' negligence claim against ALHS does not fall within the waiver of immunity provided by Section 41-4-6(A), and its entry of summary judgment in favor of ALHS, dismissing Plaintiffs' claim against ALHS with prejudice.

{81} IT IS SO ORDERED.

LINDA M. VANZI, Chief Judge

I CONCUR:

MICHAEL E. VIGIL, Judge

GARCIA, Judge (specially concurring).

{82} I write to specially concur with the majority in this case. Plaintiffs filed a docketing statement that was forty-nine days late. *See* Rule 12-208(B) NMRA ("Within *thirty (30) days* after filing the notice of appeal . . . the appellant *shall file* a docketing statement[.]" (emphasis added)). Plaintiffs also failed to provide any reasonable justification for this delay or otherwise request an extension of time to allow for the late filing of their docketing statement. *See* Rule 12-312(A) NMRA ("If an appellant fails to file a docketing statement in the Court of Appeals . . . *as provided by these rules*, such failure may be deemed sufficient grounds for dismissal of the appeal by the appellate court." (emphasis added)); *see also Johnson v. Sch. Bd. of Albuquerque Pub. Sch. Sys.*, 1991-NMCA-062, ¶ 6, 113 N.M. 117, 823 P.2d 917 (recognizing the appellate court's discretion to grant an extension for filing a docketing statement that is only "a few days late").

{83} Although our calendaring system allows for the late filing of the docketing statement and subsequent briefing by the parties, any accommodation within the appellate process does not prevent this Court from addressing the merits of the untimely docketing statement once the

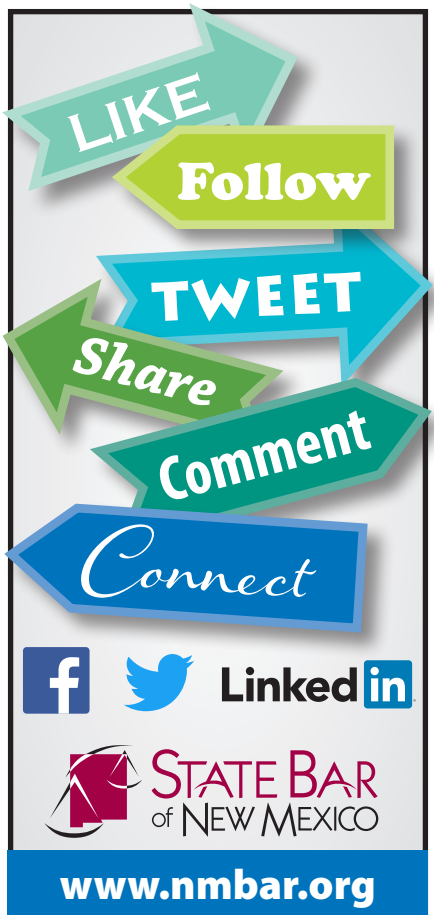
[5] We note that it is not clear from the materials submitted by Villines that he is competent, based on education, training, experience, and personal knowledge, to testify as an expert on the standard of care applicable to New Mexico public school parking lots, as the rules require. See Rule 1-056(E) (requiring that "affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein"); Rule 11-702 NMRA (permitting opinion testimony by a "witness who is qualified as an expert by knowledge, skill, experience, training, or education . . . if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue"). It is also not clear that expert testimony would be required in this case, even if the claim did fall within the waiver. See *Mott v. Sun Country Garden Prods., Inc.,* 1995-NMCA-066, ¶ 34, 120 N.M. 261, 901 P.2d 192 ("[I]f the fact in issue is within the ken of the average lay juror, expert opinion testimony is not necessary."). ALHS does not raise these issues and, in light of our disposition of the waiver issue, we need not reach them.

district court record has been received and the case is assigned to the general calendar. *See Johnson*, 1991-NMCA-062, ¶ 3 (noting that "until a docketing statement has been filed in this [C]ourt, we cannot consider the merits of the appeal because we rely on the docketing statement under our calendaring system to provide us with the facts and issues sought to be raised"). We also note that the "refusal to consider the offending party's contentions" is one of less severe actions that the appellate court may consider as an appropriate sanction for the late filing of an appellant's docketing statement. Rule 12-312(D). *But see State v. Lope*, 2015-NMCA-011, ¶ 8, 343 P.3d 186 (recognizing that in criminal appeals, we are obligated to accept a defendant's appeal that is filed late based upon "a conclusive presumption of ineffective assistance [of counsel]" in those circumstances).

{84} Plaintiffs provided no justification for the late filing of their docketing statement and it was substantially more than a few days late. Under the circumstances, Rule 12-312(D) permits this Court to refuse to consider Plaintiffs' issue of first impression—whether the lack of parking lot policy at ALHS qualifies as an exception under Section 41-4-6(A) of the TCA. I choose to exercise this Court's discretion under Rule 12-312(D) to refuse to address Plaintiffs' TCA issue for two reasons. First, forty-nine days late is not justified without a well-articulated reason and valid justification for filing the docketing statement late. Secondly, the application of paragraph fifteen in *Encinias* was not well-developed by Plaintiffs' briefs to this Court, and the issue of a broader TCA exception—being one of first impression—is rather perplexing. *See* 2013-NMSC-045, ¶ 15. Although this Court might certify both issues to our Supreme Court for clarification under Rule 12-606 NMRA, I would simply choose to affirm based upon Rule 12-312. Having sat by designation on *Encinias*, I remain confused by our Supreme Court's recognition of the "dangerous condition" element of TCA liability and the added dicta for TCA liability in paragraph fifteen—if the facts "would support a finding of liability against a private property owner." 2013-NMSC-045, ¶¶ 13-15. These statements are not mutually compatible, and our Supreme Court gave no guidance to assist the lower courts with this dilemma. I respect my colleagues' efforts to address the issue in this case but prefer to specially concur due to Plaintiffs' defectively late docketing statement.

{85} For the reasons stated herein, I specially concur with the majority and would affirm the district court's two orders.

TIMOTHY L. GARCIA, Judge



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