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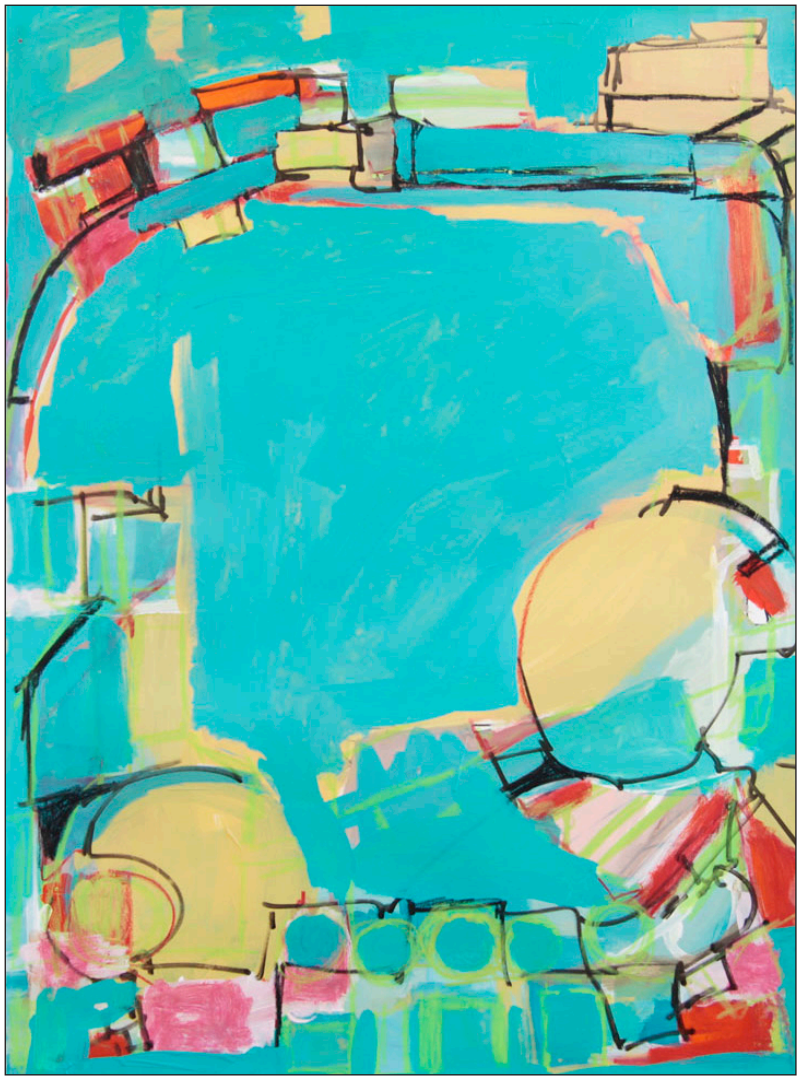
Bar Bulletin

August 29, 2018 • Volume 57, No. 35



Almost Blue by Norma Alonzo www.artworkinternational.com

Inside This Issue

CLE Planner

Upcoming programming from the

Center for Legal Education

Regarding

New Mexico Minimum Continuing Legal Education

By New Mexico Supreme Court order

Minimum Continuing Legal Education will transition to State Bar of New Mexico Administration by September 2018.

Through MCLE, the State Bar is committed to

- ✓ Providing exceptional customer service for members and course providers
- ✓ Certifying courses on relevant legal topics and emerging areas of law practice management
- ✓ Investing in new technology to assist members with reporting and tracking CLE credits
- ✓ Encouraging modern training delivery methods

Stay tuned for details!

Check your email and the *Bar Bulletin* for updates about the MCLE transition and please contact us with any questions at:

505-821-1980 • mcle@nmmcle.org
www.nmbar.org/mcle

STATE BAR of NEW MEXICO
MINIMUM CONTINUING LEGAL EDUCATION

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

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6
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10–11:15 a.m., Munson Senior Center, Las Cruces, 1-800-876-6657

About Cover Image and Artist: Norma Alonzo has always taken her painting life seriously, albeit privately. An extraordinarily accomplished artist, she has been painting for over 25 years. Beginning as a landscape painter, she quickly transitioned to an immersion in all genres to experiment and learn. Through her paintings, Alonzo examines our place, metaphysically and functionally, in the midst of today's fast-paced world. Her work has most recently been featured in the International Museum of Art, Arts International 2017 in El Paso, Texas. Learn more about Alonzo and view her work at www.artworkinternational.com.

Notices

Court News

New Mexico Commission on Access to Justice

The next meeting of the Commission On Access to Justice is from Noon-4 p.m. on Sept. 7, at the State Bar of New Mexico. Commission goals include expanding resources for civil legal assistance to New Mexicans living in poverty, increasing public awareness and encouraging and supporting pro bono work by attorneys. Interested parties from the private bar and the public are welcome to attend. More information about the Commission is available at www.accesstojustice.nmcourts.gov.

Second Judicial District Court

Destruction of Tapes

In accordance with 1.17.230.502 NMAC, taped proceedings on domestic matters cases in the range of cases filed in 1971-1999 will be destroyed. To review a comprehensive list of case numbers and party names or attorneys who have cases with proceedings on tape and wish to have duplicates made should verify tape information with the Special Services Division at 505-841-6717 from 8 a.m.-5 p.m,. Mon.-Fri. The aforementioned tapes will be destroyed after Oct. 13.

Governor Susana Martinez Appoints William Perkins to Sixth Judicial District Court

Aug. 17, Gov. Susana Martinez appointed William Perkins of Silver City to Division I of the Sixth Judicial District Court. Perkins fills the vacancy created by the retirement of Judge Timothy Aldrich.

Twelfth Judicial District Court

Announcements

The Twelfth Judicial District Court would like to extend an invitation to anyone who would like to electronically receive Court announcements and newsletters. To be added to the email distribution list, submit a request to aladref@nmcourts.gov.

Professionalism Tip

With respect to the courts and other tribunals:

I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests.

State Bar News

Appellate Practice Section

Court of Appeals Candidate Forum

The Appellate Practice Section will host a Candidate Forum for the eight candidates running for the New Mexico Court of Appeals this Nov. Save the date for 4-6 p.m., Oct. 18, at the State Bar Center in Albuquerque. The event will be live streamed at www.nmbar.org/AppellatePractice for those who cannot attend in person. Thank you to the New Mexico Trial Lawyers Association, New Mexico Defense Lawyers Association and Albuquerque Bar Association for their co-sponsorship of the event.

Committee on Women and the Legal Profession

Aaron Wolf Honored with Justice Pamela B. Minzner Outstanding Advocacy for Women Award

Join the Committee on Women and the Legal Profession for the presentation of the 2017 Justice Pamela B. Minzner Outstanding Advocacy for Women Award to Aaron Wolf for his work providing legal assistance to women who are underrepresented or under served and for his egalitarian approach towards working with women colleagues. The award reception will be held from 5:30–7:30 p.m., Aug. 30, at the Albuquerque Country Club. Hors d'oeuvres will be provided and a cash bar will be available. R.S.V.P.s are appreciated. Contact Committee Co-chair Quiana Salazar-King at salazar-king@law.unm.edu. Read more about Wolf on page 7.

New Mexico Judges and Lawyers Assistance Program

Attorney Support Groups

- Sept. 10, 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#.
- Sept 17, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, 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#.
- Oct. 1, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (The group normally meets the first Monday of the month but will skip September due to the Labor Day holiday.)

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

UNM School of Law

Law Library

Fall 2018 Hours

Mon. Aug. 20,– Sat., Dec. 15

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.
Saturday & Sunday	No reference

Other Bars

Albuquerque Bar Association

Albuquerque Bar Association Luncheon

The Albuquerque Bar Association is pleased to announce gubernatorial candidate Representative Steve Pearce. Pearce will be speaking at the ABA's monthly luncheon on Sept. 11, from noon-1 p.m. at the Hyatt in downtown Albuquerque. The ABA will also observe a moment of silence at the luncheon out of respect for those who lost their lives on Sept. 11, 2001, and for those who dedicate themselves to protect our country's safety, freedom and democracy. The lunch is $30 for members of the ABA and $40 for non-members. There is a $5 charge for walk-ups and day-of registration. To register contact the ABA's interim executive director Deborah Chavez at dchavez@vancechavez.com or 505-842-6626.

Other News

Workers' Compensation Administration

Judicial Reappointment

The director of the Workers' Compensation Administration, Darin A. Childers, is considering the reappointment of Judge Reginald "Reg" Woodard to a five-year term pursuant to NMSA 1978, Section 52-5-2 (2004). Judge Woodard's term expires on Nov. 24. Anyone who wants to submit written comments concerning Judge Woodard's performance may do so until 5 p.m. on Aug. 31. All written comments submitted per this notice shall remain confidential. Comments may be addressed to WCA Director Darin A. Childers, PO Box 27198, Albuquerque, New Mexico 87125-7198 or faxed to 505-841-6813.

Enivironmental Law Institute

27th Annual Eastern Boot Camp on Environmental Law

Join ELI for a stimulating three-day immersion in environmental law at Eastern Boot Camp. Designed for both new and seasoned professionals, this intensive course explores the substance and practice of environmental law. The faculty members are highly respected practitioners who bring environmental law, practice, and emerging issues to life through concrete examples, cases and practice concerns in this three-day intensive course for ELI members. The Boot Camp is a great deal, offering up to 20 hours of CLE credit for $1,100 or less, with special discounts provided to government, academic, public interest employees and students. Designed originally for attorneys, the course is highly useful for environmental professionals such as consultants, environmental managers, policy and advocacy experts, paralegals and technicians seeking deeper knowledge of environmental law. The registration deadline is Oct. 19. Visit https://www.eli.org/boot-camp/eastern-bootcamp-environmental-law for more details.

Albuquerque Lawyers' Club

announces the start of its 2018-2019 season

Albuquerque Lawyers' Club, the oldest lawyers' group in Albuquerque, announces the start of its 2018-19 season. Membership dues for the year are $250. Nine lunch meetings will be held at Seasons Restaurant on the first Wednesday of each month, at noon, Sept.-May. We also welcome attendance from non-members at a cost of $30 in advance, or $35 on the day of. The first meeting will be held Wed. Sept 5, noon at Seasons Restaurant, located at 2031 Mountain Rd., NW, Albuquerque. The lunch meeting will feature Franz Joachim, general manager & CEO of NM PBS. The title of Joachim's presentation is "PBS, Not Just Downton Abbey!" The meeting will also feature Victoria Garcia, Program Manager for NM DoIT. For more information, contact Yasmin Dennig at ydennig@Sandia.gov

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 August 17, 2018

PUBLISHED OPINIONS

A-1-CA-35732	J Crespin v. Safeco	Affirm	08/14/2018

UNPUBLISHED OPINIONS

A-1-CA-36897	F Nava v. Wells Fargo	Affirm	08/13/2018
A-1-CA-35529	State v. J Faggion	Affirm/Reverse/Remand	08/14/2018
A-1-CA-35787	State v. J McDowell	Affirm	08/14/2018
A-1-CA-35451	L Ballard v. GEO Group	Affirm	08/15/2018
A-1-CA-34766	State v. T Howell	Affirm	08/16/2018
A-1-CA-36499	State v. M Lucero	Reverse/Remand	08/16/2018
A-1-CA-37040	K Trevor v. L Trevor-Belton	Affirm	08/16/2018
A-1-CA-37209	CYFD v. Nina C	Affirm	08/16/2018

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

Aaron Wolf Honored with 2017 Justice Pamela B. Minzner Outstanding Advocacy for Women Award

by Zoë E. Lees

The Committee on Women and the Legal Profession is proud to announce this year's Pamela B. Minzner Award recipient, Aaron Wolf. A family law attorney with Cuddy & McCarthy LLP, Wolf was nominated because of his dedication to *pro bono* representation of women in need of legal services in New Mexico. Judge Sarah Singleton wrote, "During my time on the bench, I observed Mr. Wolf represent many women in domestic relations and domestic violence matters. . . Regardless of his clients' ability to pay, Mr. Wolf always provided the highest quality of service in advocating for these women." Wolf's colleague, Julie Rivers, observed, "While working with Mr. Wolf. . . I have seen [him] quietly go about consistently representing women in family-law and civil matters who are in need of fierce representation but do not really have[] the funds to afford the value of his exceptional services."

Jennifer Landau, executive director of the New Mexico Immigrant Law Center and past Pamela B. Minzner Award recipient (2009), nominated Wolf because he had "taken on more *pro bono* cases for the family law portion of Special Immigrant Juvenile Status cases than any other *pro bono* attorney"—often representing mothers of immigrant children whose father had abandoned the family. In addition to offering his *pro bono* services, he volunteers his time training new *pro bono* attorneys for the Center.

When asked about his *pro bono* work, Wolf stated that he was initially inspired by two women to make *pro bono* work part of his regular practice: Judges Singleton and Sylvia LaMar, who have spearheaded the Resolution Day Program in the First Judicial District. In speaking of his representation of underserved women in the community, Wolf stated, "It's evident that, in general, women do more of the work and earn less of the money than men in our society, and often their life experiences and conditions have discouraged many of them from standing up for themselves. I've always seen the purpose of my practice of law to be driven by what seems to be most needed, as much as what particular field of law interests me, so initially, indigent criminal defendants and now, people who suffer from fracturing of families and who shoulder the burden of supporting themselves and raising children, have received the most attention from me."

Wolf has also been dedicated to the mentorship of female attorneys starting their legal careers. Rivers wrote, "Mr. Wolf is also a man who reflects a deep integrity in his professional and personal relationships. . . Mr. Wolf actually walks the walk when it comes towards respect and regard toward his fellow women lawyers and staff daily—and year in and year out—supporting and dialoguing with each colleague (whether partner, associate or staff) as an equal." Wolf views mentorship as an important part of his practice, stating "Mentoring shows a level of respect for the profession, gives the benefit of practical experience to younger lawyers, and has a salutary effect on the mentor, because you can't help but reflect on your own choices when you share your stories, methods, and strategies about cases with someone who is at an earlier stage in her work life."

Aaron's wife, Carolyn Wolf, introduced him to Justice Pamela B. Minzner years ago. Remembering Justice Minzner, Wolf stated, "I was struck most of all by how easy it was to talk to her, how funny she was and how instantly she made people around her feel comfortable, and then enjoying her fierce intellect on display when she was in a more formal setting."

The Committee is excited to award this year's Pamela B. Minzner Award to Mr. Wolf, who like Justice Minzner has integrity, is strongly principled, and deeply compassionate. Please help the Committee honor Aaron Wolf on Aug. 30, 2018 at 5:30 p.m. at the Albuquerque Country Club, hors d'oeuvres will be provided and a cash bar is available. R.S.V.P.s are appreciated. Contact Committee Co-chair Quiana Salazar King at Salazar-king@law.unm.edu.

STATE BAR of NEW MEXICO
COMMITTEE ON WOMEN AND THE LEGAL PROFESSION

Elizabeth Whitefield-Thorne
Obituary

The Honorable Elizabeth E. Whitefield died peacefully in her home on August 11, 2018 after a courageous eleven year battle with cancer. She died as she lived, graciously and generously. Her loving husband and devoted caretaker Paul Thorne and her dear friends Mary Torres and John Chavez were at her side.

Elizabeth was born at a Marine Base in Cherry Point, NC on May 9, 1947 to a family of Irish/Swiss immigrants. She came to New Mexico with her first husband Jan Whitefield. She received her Bachelor of Arts, *Magna cum Laude*, from the University of New Mexico in 1974, becoming the first member of her family to graduate college. Elizabeth attended UNM Law School, graduating with her Juris Doctorate in 1977. Elizabeth, by then Judge Whitefield, was awarded the UNM School of Law Distinguished Achievement Award in 2015.

Elizabeth practiced law for almost thirty years, first with the late Willard F. ("Bill") Kitts and then with the law firm of Keleher & McLeod, where she became the first female shareholder and first female member of the Executive Committee. As a young lawyer, Elizabeth immediately became involved in the local legal community and began giving back. She was a member of the New Mexico Trial Lawyers Association where she served as Assistant Editor of the Trial Lawyers Journal. She was a State Bar of New Mexico Bar Commissioner for twelve years. Together with her good friend and fellow Commissioner Mary Torres, Elizabeth supported and implemented a policy of inclusion in the State Bar, actively promoting diversity through action. For her efforts and service, Elizabeth was awarded the State Bar President's Award in 2012.

One of Elizabeth's greatest contributions to the New Mexico legal community was her founding of the New Mexico Women's Bar Association, together with Carol Conner and her lifelong friend Margaret Moses Branch, in 1991. The NMWBA was created to address the deficit of women judges, women seminar speakers, women in major law firm positions, and women as lead counsel. The work of Elizabeth and her cofounders is evidenced today by

the number of women in the New Mexico Judiciary, the New Mexico Bar, and in significant leadership positions throughout the State. Elizabeth is a recipient of the coveted Henrietta Pettijohn Award, named for the first woman attorney in New Mexico and the NMWBA Founder's Award.

Judge Whitefield was appointed to the Second Judicial District Court in 2007 by Gov. Bill Richardson. She served as the presiding Family Court Judge from 2007 through her retirement in 2016. As presiding judge, she was instrumental in establishing the Peter H. Johnstone Day, where attorneys and mental health professionals provide free assistance to low income families to resolve divorce, child custody and other family law issues. She was always looking for a way to help people through the system in a more dignified and compassionate manner. She was a highly respected judge, revered for her work ethic, her fairness and insight, her extensive legal knowledge and experience until her retirement in 2016. After she retired, she continued to volunteer her time to the Court as a *pro tem* judge.

In 2016, the Albuquerque Chamber of Commerce awarded Judge Whitefield with the Spirit of New Mexico Award for her extraordinary service to the community. She received the 2017 Justice Pamela B. Minzner Professionalism Award from the State Bar of New Mexico, and the Albuquerque Bar Association Outstanding Judge of the Year Award for 2016. Like her numerous other awards, these awards honored Judge Whitefield's years of mentoring, leadership and service.

Elizabeth performed one of her greatest acts of service when she testified in support of the End of Life Options Act during the 2018 New Mexico Legislative Session. The Act would have allowed terminally ill patients to choose to end their life and suffering with medical assistance. In support of the Act she told the legislators "[c]ancer has stolen everything from me; my ability to work, my ability to eat, my ability to drink. Don't let me die without dignity. I implore you to give me the choice that is right for me."

Though she was a dedicated and revered lawyer and public servant, Elizabeth was first and foremost a treasured friend. She loved entertaining her numerous friends with a glass of wine, golfing with her golf buddies, and shopping with an energy few could match! She was known for her fabulous sense of style and fashion, and after she retired, she gifted numerous pieces of her wardrobe to young women trial attorneys.

She married her great love Paul Thorne in 1986, escorted down the aisle by her dear friend Mike Danoff. Paul was her best friend, her advisor, her mentor, her confidante, and her devoted caregiver. Quite simply, Paul was her everything, and Elizabeth was Paul's everything. In fact, Elizabeth's last words were "Paul, Paul, Paul."

Elizabeth is survived by her loving husband Paul Thorne, her sister Mary Ratchford, her sister in law Steph Medoff (Mark), her brother in law Steve Thorne (Randi), her devoted dogs Sophie and Leo, her first husband Jan Whitefield (Karin), her lifelong friend, Bev Davies, and her sisters of choice, Nan Nash, Deb "shotgun" Ramirez, Mary "meritorious" Torres, and Deborah Walker.

A Memorial Service for Elizabeth will be on Friday, August 31, 2018 at 2:00 p.m. at Albuquerque Country Club, 601 Laguna Blvd SW, Albuquerque, NM 87104. A reception will follow. In lieu of flowers, please consider donating in Elizabeth's name to Animal Humane New Mexico, 615 Virginia Street SE Albuquerque NM 87108 or to the New Mexico State Bar Foundation, PO Box 92860, Albuquerque, NM 87199. Contributions may be made online to the New Mexico State Bar Foundation using this link: https://form.jotform.com/sbnm/JudgeElizabethWhitefieldDonation.

"What we once enjoyed and deeply loved we can never lose, for all that we love deeply becomes part of us." —*Helen Keller.*

Elizabeth you are part of all of us and we will love you forever.

Legal Education

August

31 **The Ethical Issues Representing a Band-Using the Beatles**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

September

5 **Choice of Entity for Nonprofits & Obtaining Tax Exempt Status, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

6 **Choice of Entity for Nonprofits & Obtaining Tax Exempt Status, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

6 **Attorney Orientation and the Ethics of Pro Bono**
2.0 EP
Live Seminar, Albuquerque
New Mexico Legal Aid
505-814-6719

6 **Microsoft Word's Styles: A Guide for Lawyers**
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

7 **2018 Family Law Institute: Hot Topics in Family Law (Friday)**
5.0 G, 1.5 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

7-8 **2018 Family Law Institute: Hot Topics in Family Law (Both Days)**
11.0 G, 1.5 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

8 **2018 Family Law Institute: Hot Topics in Family (Law Saturday)**
6.0 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

11 **Planning with Single Member, LLCs, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

11 **Ethics Issues of Moving Your Practice Into the Cloud**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

12 **Planning with Single Member, LLCs, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

12 **Boundary Issues and Easement Law**
5.0 G, 1.0 EP
Live Seminar, Albuquerque
NBI, Inc.
www.nbi-sems.com

13 **How to Practice Series: Civil Litigation, Pt II – Taking and Defending Depositions**
4.5 G, 2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

14 **29th Annual Appellate Practice Institute (Full Day)**
5.5 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

18 **How to Comply with Disciplinary Board Rule 17-204: Basics of Trust Accounting**
1.0 EP
Webcast/Live Seminar, Albuquerque
New Mexico Legal Aid
505-814-6719

19 **Income and Fiduciary Tax Issues for Estate Planners, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

20 **Income and Fiduciary Tax Issues for Estate Planners, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

20 **Military Retired Pay Primer**
2.0 G, 1.0 EP
Live Seminar, Albuquerque
FAMlaw LLC
www.famlawseminars.com

20 **The Lifecycle of a Trial, from a Technology Perspective (2017)**
4.3 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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 August 29, 2018

Pending Proposed Rule Changes Open for Comment:

Comment Deadline

Please see the summary of proposed rule amendments published in the August 8, 2018, issue of the Bar Bulletin. The actual text of the proposed rule amendments can be viewed on the Supreme Court's website at the address noted below. The comment deadline for those proposed rule amendments is September 7, 2018.

Recently Approved Rule Changes Since Release of 2018 NMRA:

Effective Date

Rules of Civil Procedure for the District Courts

1-003.2	Commencement of action; guardianship and conservatorship information sheet	07/01/2018
1-079	Public inspection and sealing of court records	07/01/2018
1-079.1	Public inspection and sealing of court records; guardianship and conservatorship proceedings	07/01/2018
1-088.1	Peremptory excusal of a district judge; recusal; procedure for exercising	03/01/2018
1-104	Courtroom closure	07/01/2018
1-140	Guardianship and conservatorship proceedings; mandatory use forms	07/01/2018
1-141	Guardianship and conservatorship proceedings; determination of persons entitled to notice of proceedings or access to court records	07/01/2018

Civil Forms

4-992	Guardianship and conservatorship information sheet; petition	07/01/2018
4-993	Order identifying persons entitled to notice and access to court records	07/01/2018
4-994	Order to secure or waive bond	07/01/2018
4-995	Conservator's notice of bonding	07/01/2018
4-995.1	Corporate surety statement	07/01/2018
4-996	Guardian's report	07/01/2018
4-997	Conservator's inventory	07/01/2018
4-998	Conservator's report	07/01/2018

Rules of Criminal Procedure for the District Courts

5-302A	Grand jury proceedings	04/23/2018

To view all pending proposed rule changes (comment period open or closed), visit the New Mexico Supreme Court's website at http://nmsupremecourt.nmcourts.gov. To view recently approved rule changes, visit the New Mexico Compilation Commission's website at http://www.nmcompcomm.us.

Certiorari Granted, July 24, 2018, No. S-1-SC-37021

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-047

No. A-1-CA-35275 (filed March 29, 2018)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
ROY MONTANO,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY
Fred T. Van Soelen, District Judge

HECTOR H. BALDERAS,
Attorney General
Santa Fe, New Mexico
JOHN J. WOYKOVSKY,
Assistant Attorney General
Albuquerque, New Mexico
for Appellee

ERIC D. DIXON
ATTORNEY & COUNSELOR AT LAW, P.A.
Portales, New Mexico
for Appellant

Opinion

Henry M. Bohnhoff, Judge

{1} Roy Montano (Defendant) was convicted of aggravated fleeing from a law enforcement officer in violation of NMSA 1978, Section 30-22-1.1(A) (2003). Defendant contends on appeal, as he argued below, that the Curry County Sheriff's Office deputy whose signals to stop Defendant refused to obey was neither "uniformed" nor in "an appropriately marked law enforcement vehicle" as required by the statute. *See id.* We conclude that, while the deputy's vehicle complied with the statutory requirement, the clothes that he was wearing did not constitute a uniform. We therefore reverse Defendant's conviction.

BACKGROUND

{2} On September 4, 2013, Deputy Glenn Russ with the Curry County Sheriff's Office was working as an "investigator." He was wearing the clothes that investigators were required to wear: "a dress shirt with tie, dress slacks, and dress shoes." His badge was displayed on the breast pocket of his shirt. He was driving a Ford Expedition that had no decals, striping, insignia, or lettering on the front, back, or sides of the vehicle. However, the vehicle had a government license plate, wigwag headlights, red and blue flashing lights mounted on the front grill and the top of the rear window, flashing brake lights, and a siren.

{3} Around noon that day, while Deputy Russ was driving within the Clovis, New Mexico city limits, he observed Defendant enter a vehicle and begin driving. Russ initially thought Defendant was someone else whom Russ believed had an outstanding warrant. Russ approached Defendant's vehicle from behind and checked the license plate. Russ determined that the vehicle was registered to Defendant, not the other person, but that the registration for Defendant's vehicle had expired. At that point Russ attempted to stop Defendant for the registration infraction by "utilizing the [red and blue flashing] lights" on his vehicle. Defendant then made a few turns and ran a stop sign, at which point Russ activated his vehicle's siren. Defendant continued driving through a residential neighborhood at speeds that exceeded the posted speed limits and failed to stop at additional stop signs and intersections. Defendant came to a stop after his vehicle jumped a curb and drove onto an adjacent easement after he attempted to turn by braking and sliding through an intersection. Russ then approached the vehicle, removed Defendant, placed him on the ground, and handcuffed him. The pursuit lasted "a couple of minutes" in total. Undersheriff Michael Reeves, also of the Curry County Sheriff's Office, arrived at the scene after Defendant was already in custody.

{4} Defendant was charged with aggravated fleeing, contrary to Section 30-22-1.1(A). Deputy Russ and Undersheriff Reeves both testified at Defendant's bench trial. During the trial, the district court took judicial notice that the vehicle Russ drove "was not a marked vehicle." The court denied Defendant's motion for directed verdict based on his uniform and "appropriately marked vehicle" arguments. The court determined that displaying a badge was enough to be in uniform; the vehicle was appropriately marked because motorists know they have to pull over and stop when they see emergency lights flash. The court found Defendant guilty of aggravated fleeing and imposed the maximum sentence of eighteen months imprisonment.

DISCUSSION

{5} In 2003, the Legislature enacted the Law Enforcement Safe Pursuit Act (LESPA), 2003 N.M. Laws, ch. 260, §§ 1-4. LESPA, which is codified at NMSA 1978, Sections 29-20-1 to -4 (2003), mandates the development and implementation of law enforcement agency policies and training to reduce the risk that uninvolved motorists and bystanders will be killed or injured by vehicles involved in high-speed pursuits conducted by law enforcement personnel. However, along with LESPA's establishment of standards for the conduct of high-speed pursuits, Section 5(A) of 2003 N.M. Laws, ch. 260, codified at Section 30-22-1.1(A), established the crime of aggravated fleeing from a law enforcement officer:

> Aggravated fleeing [from] a law enforcement officer consists of a person willfully and carelessly driving his vehicle in a manner that endangers the life of another person after being given a visual or audible signal to stop, whether by hand, voice, emergency light, flashing light, siren or other signal, by a uniformed law enforcement officer in an appropriately marked law enforcement vehicle in pursuit in accordance with the

provisions of the [LESPA].

Section 30-22-1.1(B) provides that aggravated fleeing is a fourth degree felony.

{6} Section 30-22-1.1(A) presumably is patterned after NMSA 1978, Section 30-22-1(C) (1981) . Section 30-22-1, which was first enacted in 1963, established the misdemeanor crime of resisting, evading, or obstructing an officer. As amended, *see* 1981 N.M. Laws, ch. 248, § 1(C), the crime is committed by, among other actions, "willfully refusing to bring a vehicle to a stop when given a visual or audible signal to stop, whether by hand, voice, emergency light, flashing light, siren or other signal, by a uniformed officer in an appropriately marked police vehicle[.]" Section 30-22-1(C).

{7} Section 30-22-1(C) in turn appears to be patterned after a provision, Section 11-911(a), of the Uniform Vehicle Code that was added in 1968:

> Any driver of a motor vehicle who willfully fails or refuses to bring his or her vehicle to a stop, or who otherwise flees or attempts to elude a pursuing police vehicle when given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a misdemeanor. The signal given by the police officer may be by hand, voice, emergency light or siren. The officer giving such signal shall be in uniform, prominently displaying the officer's badge of office, and the officer's vehicle shall be appropriately marked showing it to be an official police vehicle.

Nat'l Comm. on Unif. Traffic Laws & Ordinances, *Uniform Vehicle Code & Model Traffic Ordinance* § 11-911(a) (2000). A number of states have laws similar to Section 30-22-1(C) and Section 30-22-1.1(A), *see, e.g.*, Ga. Code Ann. § 40-6-395(a) (2012); N.D. Cent. Code § 39-10-71 (2011), although we are aware of none with identical language.

I. UNIFORMED LAW ENFORCEMENT OFFICER

{8} We first address whether Deputy Russ was "uniformed", i.e., wearing a uniform on September 4, 2013, within the meaning of Section 30-22-1.1(A). Defendant generally argues that the street clothes Russ was wearing that day do not constitute a uniform. The State maintains that Russ's badge alone was a uniform. Alternatively, the State argues, because he was required to wear dress shoes, pants, and shirt with tie, those items combined with his badge, handcuffs, and firearm together constituted a uniform.

{9} "When an appeal presents an issue of statutory construction, our review is de novo." *State v. Tafoya*, 2010-NMSC-019, ¶ 9, 148 N.M. 391, 237 P.3d 693. Challenges to the sufficiency of the evidence supporting a conviction that raise an issue of statutory interpretation are subject to the same de novo review standard. *See State v. Erwin*, 2016-NMCA-032, ¶ 5, 367 P.3d 905, *cert. denied*, 2016-NMCERT- ___ (No. S-1-SC-35753, Mar. 8, 2016).

A. The Plain Meaning of "Uniform"

{10} Section 30-22-1.1(A) does not define "uniformed." Therefore, we interpret its meaning based on rules of statutory construction. "Our primary goal when interpreting statutory language is to give effect to the intent of the [L]egislature." *State v. Torres*, 2006-NMCA-106, ¶ 8, 140 N.M. 230, 141 P.3d 1284. A court begins the search for legislative intent of a statute "by looking first to the words chosen by the Legislature and the plain meaning of the Legislature's language." *State v. Davis*, 2003-NMSC-022, ¶ 6, 134 N.M. 172, 74 P.3d 1064 (internal quotation marks and citation omitted).

{11} *Webster's Third New International Dictionary* 2498 (Unabridged ed. 1986) defines "uniform" as "*dress* of a *distinctive* design or fashion adopted by or prescribed for members of a particular group . . . and serving as a means of identification[.]" (Emphases added.); *accord Uniform*, *New Oxford American Dictionary* 1890 (3d ed. 2010) (defining a uniform as "the distinctive clothing worn by members of the same organization or body"). "Dress," in turn, is defined as "utilitarian or ornamental covering for the human body: as . . . clothing *and* accessories suitable to a specific purpose or occasion[.]" *Dress*, *Webster's Third New Int'l Dictionary* 689 (Unabridged ed. 1986) (emphasis added).

{12} This definition of uniform is significant in two respects. First, a uniform consists of clothing, as distinguished from, for example, only a law enforcement officer's badge. Stated another way, equipment alone, without distinctive clothing, is not "dress of a distinctive design or fashion[,]" i.e., it is not a uniform. *Cf.* 2.110.3.8(B)(2) NMAC (distinguishing between "holsters, . . . uniforms, belts, badges and related apparatus" as items eligible for purchase with funds from the Law Enforcement Protection Fund Act, NMSA 1978, §§ 29-13-1 to -9 (1993, as amended through 2017)). Second, a uniform is clothing that distinguishes the wearer from the general public, i.e., identifies him or her as a member of a particular group.

{13} Deputy Russ's clothing was not of a distinctive design or fashion and did not serve to identify him as a law enforcement officer. On the contrary, the purpose of his outfit was, if anything, to allow him to blend in with the general public. For purposes of applying the plain meaning of uniform, it matters not that as an investigator Russ was required to wear civilian clothes: they did not distinguish him from the general public any more than the dress clothing that lawyers generally must wear in court constitutes a uniform that distinguishes them from persons who work in other occupations where dress clothes are the norm. Further, Russ's badge was not an article of clothing, even though it, too, may be a separate indicia of law enforcement officer status. Similarly, handcuffs and a holstered firearm may identify the person wearing them as a law enforcement officer, but they do not amount to clothing. Thus, absent some basis for not applying the plain meaning rule, which we now consider, Deputy Russ was not "uniformed" as that term is used in Section 30-22-1.1(A).

B. Other Statutes

{14} In addition to looking to its plain meaning, in construing a statute, a court will consider related statutes. Statutory language "may not be considered in a vacuum, but must be considered in reference to the statute as a whole and in reference to statutes dealing with the same general subject matter." *State v. Rivera*, 2004-NMSC-001, ¶ 13, 134 N.M. 768, 82 P.3d 939 (internal quotation marks and citation omitted). "[W]henever possible, [the appellate courts] must read different legislative enactments as harmonious instead of as contradicting one another." *Id.* (omission, internal quotation marks, and citation omitted). In addition to looking at the statutory language, "we also consider the history and background of the statute [and w]e examine the overall structure of the statute and its function in the comprehensive legislative scheme." *State v. Smith*, 2004-NMSC-032, ¶ 10, 136 N.M. 372, 98 P.3d 1022 (internal quotation marks and citations omitted).

{15} We discern no inconsistency between Section 30-22-1.1(A), construed in accordance with the plain meaning of "uniform," and Section 30-22-1(C) quoted above, as well as several other New Mexico statutes that address law enforcement

officers' uniforms and authority to stop motorists. On the contrary, these statutes are harmonious.

{16} First, NMSA 1978, Section 29-2-13 (1989), and NMSA 1978, Section 29-2-14 (2015), address the uniforms and badges of the New Mexico State Police. Section 29-2-13 provides that "[a] suitable and distinctive uniform shall be prescribed by the secretary [of public safety]. The secretary shall provide and issue to each commissioned officer a uniform *and* an appropriate badge. . . . The prescribed uniform *and* badge shall be worn at all times when on duty[.]" (Emphases added.) Section 29-2-14(A), (C) create the petty misdemeanor crime of unauthorized wearing of a State Police uniform or badge. It consists of "wearing or requiring the wearing, without authorization by the secretary, of a uniform *or* badge *or both* whose material, color or design, or any combination of them, is such that the wearer appears to be a member of the New Mexico [S]tate [P]olice." Section 29-2-14(A) (emphases added). These statutes distinguish between a uniform and a badge. They can be understood to reflect the Legislature's understanding that, while a uniform and a badge are both indicia of law enforcement officer status, the two are different—i.e., a badge is not simply a part of a uniform. Uniform Vehicle Code Section 11-911 also distinguishes between a police officer's uniform and badge, requiring that the officer be in uniform as well as that the badge be "prominently" displayed.

{17} Second, the statutory history of NMSA 1978, Section 66-8-124(A) (2007), is consistent with this distinction between a uniform and a badge. The statute currently reads,

> No person shall be arrested for violating the Motor Vehicle Code [NMSA 1978, Section 66-1-1 to -8-141 (1978, as amended through 2017)] or other law relating to motor vehicles punishable as a misdemeanor except by a commissioned, salaried peace officer who, at the time of arrest, is wearing a uniform clearly indicating the peace officer's official status.

When enacted in 1961, Section 66-8-124(A) contained the following second sentence: "In the Motor Vehicle Code, 'uniform' means an official badge prominently displayed, accompanied by a commission of office." NMSA 1953, § 64-22-8.1 (1961). However, in 1968 the Legislature deleted the second sentence from the statute. *Compare* 1961 N.M. Laws, ch. 213, § 3, *with* 1968 N.M. Laws, ch. 62, § 162. The most logical inference to be drawn from the 1968 amendment is that which is consistent with the Legislature's enactment of Section 29-2-14(A) three years later: the Legislature determined that a badge should not be considered part of a uniform and instead is a separate indicia of law enforcement officer status.

{18} Third, Section 66-8-125(C) parallels the current language of Section 66-8-124(A):

> Members of the New Mexico [S]tate [P]olice, sheriffs, and their salaried deputies and members of any municipal police force may not make arrest for traffic violations if not in uniform; however, nothing in this section shall be construed to prohibit the arrest, without warrant, by a peace officer of any person when probable cause exists to believe that a felony crime has been committed or in nontraffic cases.

{19} Fourth, Section 66-7-332(A), originally enacted in 1978, provides that:

> Upon the immediate approach of an authorized [by the state police or a local law enforcement agency] emergency vehicle displaying flashing emergency lights or when the driver is giving audible signal by siren the driver of every other vehicle shall yield the right of way and shall immediately drive to a position parallel to, and as close as possible to, the right-hand edge or curb of the roadway clear of any intersection *and shall stop and remain in that position until the authorized emergency vehicle has passed, except when otherwise directed by a police officer*.

(Emphasis added.) This statute therefore mandates, independent of Section 30-22-1(C) and Section 30-22-1.1(A), that drivers pull off the road and stop when they see or hear a law enforcement or other authorized vehicle with its emergency lights and/or siren engaged. Section 66-8-116 imposes a fifty-dollar penalty for violating Section 66-7-332.

{20} Section 66-7-332 together with Section 66-8-116, Section 30-22-1(C), and Section 30-22-1.1(A) can be viewed as evincing a common general legislative intent: enforcing, by means of progressively greater sanctions for disobedience, the public policy imperative that a motorist must promptly pull off to the side of the road and stop when he or she notices a law enforcement vehicle that has its emergency lights and/or sound equipment engaged. Section 66-8-116 sanctions a motorist with a fine for failure to comply with Section 66-8-332's general requirement to take that action in those circumstances. Section 30-22-1(C) sanctions as a misdemeanor the willful failure to stop where it is objectively clear (based on visual and audible signals, a uniform, and appropriate markings on a vehicle) that it is a law enforcement officer who is signaling the motorist to stop. *See State v. Padilla*, 2008-NMSC-006, ¶ 22, 143 N.M. 310, 176 P.3d 299 (explaining that the intent of Section 30-22-1.1(A)'s uniform and appropriately marked law enforcement vehicle requirements is to "establish[] a defendant's knowledge that he is fleeing a police officer"). And in order to advance LESPA's apparent goal of reducing the risk of injuries and fatalities resulting from high-speed police chases, Sections 30-22-1.1(B) sanctions as a fourth degree felony the same failure to stop under circumstances that endanger the life of another person.

C. *Archuleta* and *Maes*

{21} The State argues that *State v. Archuleta*, 1994-NMCA-072, 118 N.M. 160, 879 P.2d 792, and *State v. Maes*, 2011-NMCA-064, 149 N.M. 736, 255 P.3d 314, hold that a badge without more suffices as a "uniform" as that term is used in Sections 66-8-124(A) and Section 66-8-125(C). It urges that we extend that precedent to Section 30-22-1.1(A). We are not persuaded.

{22} Initially, we observe that the defendants in *Archuleta* and *Maes* were not arrested and prosecuted for violating Section 30-22-1.1(A) or even Section 30-22-1(C). In *Archuleta*, the defendant was stopped for speeding. 1994-NMCA-072, ¶ 2. The question whether the arresting police officer was wearing a uniform arose only because, as discussed above, Section 66-8-124(A) and Section 66-8-125(C) require an arresting officer to be in uniform to make an arrest for a traffic offense. *Archuleta*, 1994-NMCA-072, ¶ 7. Similarly, in *Maes*, the defendant initially was stopped on the basis of traffic infractions but following a search of his vehicle ultimately was charged with drug offenses. 2011-NMCA-064, ¶ 3. He challenged the legality of the search based on the claimed impropriety of the stop under Section 66-8-124(A) and Section 66-8-125(C). *Maes*, 2011-NMCA-064, ¶ 4.

{23} We note also that the facts of *Archuleta* and *Maes*, and as a result the questions to be resolved, were different than those of the case at bar. In *Archuleta*, the police officer, a member of the Albuquerque Police Department (APD), was in civilian clothes but driving a marked police vehicle on a major street in Albuquerque, New Mexico. 1994-NMCA-072, ¶ 2. The defendant, who was a former police officer, pulled up in his vehicle alongside the police officer. *Id.* ¶¶ 2, 4. The defendant looked at the police officer and then immediately accelerated to a speed that exceeded the posted speed limit. *Id.* ¶ 2. After the police officer turned on his emergency lights, the defendant immediately braked, pulled over to the shoulder, and stopped. *Id.* At that point the police officer put on a windbreaker issued by APD which had "a cloth shield on the front which [said] 'Albuquerque Police' and a patch on the shoulder which [had] the State of New Mexico emblem on it. That emblem also [had] the words 'Albuquerque Police' on it." *Id.* (The opinion does not indicate whether the police officer had his badge attached to his clothing.) When the police officer approached the defendant's vehicle, the defendant argued with the officer that he could not stop him because he was not in uniform. *Id.* ¶ 3.

{24} In *Maes*, two State Police officers wearing "Basic Duty Uniforms" (BDUs) and driving an unmarked vehicle stopped the defendant for traffic infractions. 2011-NMCA-064, ¶¶ 1, 3. Following a license plate check, the officers learned the defendant had outstanding warrants and arrested him. *Id.* ¶ 3. During a search incident to arrest, they discovered the drugs for which the defendant ultimately was prosecuted. *Id.* The BDUs consisted of black pants, a black vest, a black long-sleeve shirt

> with the words 'STATE POLICE' in large bold yellow lettering on the sleeves, the word 'POLICE' in large bold white lettering on the right shoulder area, a smaller triangular cloth patch with the words 'STATE POLICE' also on the right shoulder; and, on the back of the shirt, the word 'POLICE' in large bold white lettering in two places; an equipment belt, holster, and firearm; and a metal police badge hung from one of the front pockets.

Id. ¶ 11. Thus, the practical question in *Archuleta* and *Maes* was not whether, as here, a badge without more suffices as a uniform (indeed, the significance of a badge to the determination of whether a law enforcement officer is in uniform was not addressed at all in either opinion), but whether Section 66-8-124(A) and Section 66-8-125(C) required a *full* uniform as opposed to the APD windbreaker in *Archuleta* or the BDUs in *Maes*.

{25} The State argues that Deputy Russ's attire satisfied a two-part test articulated in *Archuleta* for being in a "uniform" as that term is used in these statutes:

> [W]e adopt two alternative tests for determining if an officer is in "uniform" within the intent of the statute; one, whether there are sufficient indicia that would permit a reasonable person to believe the person purporting to be a peace officer is, in fact, who he claims to be; or, two, whether the person stopped and cited either personally knows the officer or has information that should cause him to believe the person making the stop is an officer with official status.

1994-NMCA-072, ¶ 11. With respect to the objective prong of this test, the State argues that a reasonable person would believe that Russ was a law enforcement officer because, like other investigators with the Curry County Sheriff's Office, he was wearing a shirt and tie, a badge, a gun, and handcuffs."Indeed, the badge alone clearly indicated Russ's official status[.]" We disagree. First, the mere fact that all other Curry County Sheriff's Office investigators wear civilian clothes does not convert those clothes into a "uniform" within the plain meaning of the word, nor, indeed, do we believe it would lead a reasonable person in Curry County or elsewhere to believe that Russ was a law enforcement officer. A shirt and tie do not have the distinctive markings and lettering present on the APD windbreaker and State Police BDU described in *Archuleta* and *Maes*, respectively. Second, as discussed above, pursuant to Section 29-2-13 and Section 29-2-14, a badge is not part of a uniform, but rather a separate indicia of law enforcement officer status. Third, we note that the record in this case is devoid of any description of the badge that Russ wore, in particular, any description of its wording or the size of the lettering. Therefore, we cannot reach any conclusions regarding what information about his law enforcement officer status the badge reasonably may have conveyed to Defendant. Fourth, and similarly, while Undersheriff Reeves testified that Curry County Sheriff's Office investigators normally carry firearms and handcuffs, Russ did not testify and nothing else in the record establishes that he was carrying a gun when he arrested Defendant on September 4, 2013—although Russ did testify that he handcuffed Defendant after the vehicles came to a stop. But even assuming, based on Undersheriff Reeves' habit/routine testimony, *see* Rule 11-406 NMRA, we can infer that Russ had both a gun and handcuffs, for the reasons discussed above, we do not agree that such equipment would suffice to constitute a uniform within the meaning of Section 30-22-1.1(A) in the absence of some distinctive clothing—such as the APD windbreaker or the State Police BDUs—that would identify Russ as a law enforcement officer.

{26} With respect to the subjective prong of the test, the State maintains that the evidence showed that Defendant recognized Deputy Russ as a law enforcement officer, because he did not simply fail to pull over when signaled to stop and instead "reacted to Russ's presence by turning down various streets, driving through stop signs, and accelerating to 55 miles per hour." The mere fact that a motorist speeds away from a vehicle that engages emergency lights does not prove that he or she knows that the driver of the other vehicle is a law enforcement officer. Another plausible inference is that the motorist suspects that the driver is someone who is only posing as a law enforcement officer. Moreover, it certainly would not follow from Defendant's response that he recognized Russ—who was still inside the vehicle—as a law enforcement officer on the basis of his clothing, badge and equipment as opposed to Russ engaging his vehicle's flashing and alternating lights. The State's argument effectively would eliminate the uniform element of the aggravated fleeing crime, a proposition we decline to accept. In any event, there is no evidence in the record to support the State's supposition. In fact, Russ testified that he did not know what Defendant was thinking.

{27} Our more fundamental concern with applying the two-part *Archuleta* test to Section 30-22-1.1(A) is that it permits a determination that a law enforcement officer is in "uniform" to be made on the basis of considerations unrelated to what he or she is wearing. In *Archuleta*, the court relied on the fact that the officer was driving a "marked police unit" in concluding

that both the objective and the subjective prongs of the test were met. 1994-NMCA-072, ¶¶ 11-12. Section 30-22-1.1(A), however, requires that an officer be both "uniformed" *and* in "an appropriately marked law enforcement vehicle." "The [L]egislature is presumed not to have used any surplus words and each word has a meaning." *State v. Doe*, 1977-NMCA-092, ¶ 6, 90 N.M. 776, 568 P.2d 612. "We will not assume that the [L] has adopted useless language in the statute." *In re Francesca L.*, 2000-NMCA-019, ¶ 10, 128 N.M. 673, 997 P.2d 147, *overruled on other grounds by State v. Adam J.*, 2003-NMCA-080, ¶ 10, 133 N.M. 815, 70 P.3d 805.

{28} Lastly, the State points to the discussion in *Archuleta* of the 1968 amendment of Section 66-8-124(A) as support for its position that Deputy Russ's badge, without more, constituted a uniform. *See Archuleta*, 1994-NMCA-072, ¶ 10. As discussed above, in 1968 the Legislature amended Section 66-8-124(A), which prohibits arrests for violations of the Motor Vehicle Code except by a uniformed peace officer, by deleting its second sentence which had read, "[I]n the [M]otor [V]ehicle [C]ode, 'uniform' means an official badge prominently displayed, accompanied by a commission of office." *Archuleta*, 1994-NMCA-072, ¶ 10. The *Archuleta* panel noted this amendment and commented, "We believe that the deletion of that language suggested that the [L]egislature intended the definition of 'uniform' to be *less restrictive*, no doubt recognizing that modern day police officers may have more than one uniform or may on occasion wear combinations thereof." *Id.* (emphasis added). The State seizes on this language:

> Deputy Russ's attire clearly would have qualified as a uniform under this [pre-1968] definition, because he was a certified peace officer, wearing his badge on his chest pocket, 'prominently displayed'. . . . Logically, if Deputy Russ's attire qualified as a uniform under this more restrictive definition, it also must qualify under today's *less restrictive* definition.

{29} We respectfully question this inference in *Archuleta*. Prior to the 1968 amendment, a law enforcement officer attired in gym shorts and a t-shirt perhaps could arrest a motorist for a misdemeanor violation of the Motor Vehicle Code or other law relating to motor vehicles so long as he or she displayed a badge of office; after the amendment, we submit, this would not be permitted. Thus, it is difficult to understand how *eliminating* language that a badge, without more, constitutes a uniform makes less restrictive the requirement in Section 66-8-124(A) that the law enforcement officer be in uniform. Again, the more straightforward inference is that the Legislature wanted to make clear, consistent with its enactment of Section 29-2-14(A) three years later, that a badge is *not* a uniform or even part of a uniform. (The amendment also made Section 66-8-124(A) consistent with Section 66-8-125(C).) In any event, we do not believe that this comment in *Archuleta* was intended to suggest that a badge, without more, constitutes a uniform. Indeed, there was no reference at all in the case to whether the police officer in question had a badge on his person, and instead the issue was whether the APD windbreaker qualified as a uniform. In that context, and given the panel's observation that "modern day" police officers have more than one uniform, we understand the "less restrictive" point to be only that Section 66-8-124(A) does not require that a law enforcement officer be in *full* uniform to make an arrest for violating the Motor Vehicle Code.[1] *Archuleta*, 1994-NMCA-072, ¶ 10.

{30} To be clear, we have no quarrel with the conclusion in *Archuleta* and *Maes* that a law enforcement officer need not be in *full* uniform in order to stop, cite, and/or arrest a motorist for a misdemeanor traffic or other motor vehicle violation pursuant to Section 66-8-124(A) and Section 66-8-125(C) or to satisfy the "uniformed" element of Section 30-22-1.1(A). The APD officer's windbreaker in *Archuleta* and the State Police officers' BDU uniform in *Maes* sufficed. However, because it conflicts with the plain meaning of "uniform," we decline to extend *Archuleta*'s two-part test to construction of Section 30-22-1.1(A).[2]

D. Applying the Plain Meaning of "Uniform" to Sections 30-22-1.1A and 30-22-1(C) Does Not Lead to a Result That Is Absurd or Contrary to Clearly Manifested Legislative Intent

{31} While "the plain meaning rule is not absolute," it is the norm. *Chavez v. Mountain States Constructors*, 1996-NMSC-070, ¶ 24, 122 N.M. 579, 929 P.2d 971. "We may depart from the plain language only under rare and exceptional circumstances." *Padilla*, 2008-NMSC-006, ¶ 41, (Chavez, J., dissenting) (internal quotation marks and citation omitted). Thus, we give effect to the meaning of the words of a statute "unless this leads to an absurd or unreasonable result." *State v. Marshall*, 2004-NMCA-104, ¶ 7, 136 N.M. 240, 96 P.3d 801; *accord Chavez*, 1996-NMSC-070, ¶ 24 (explaining that a court will "avoid any literal interpretation that leads to an absurd or unreasonable result and threatens to convict the [L]egislature of imbecility" (internal quotation marks and citation omitted)).

{32} Does application of the plain meaning of "uniform" to Section 30-22-1.1(A) necessarily yield an unreasonable or absurd result? No. Requiring as an element of the crime that the pursuing officer be in uniform, i.e., clothing that in addition to a badge objectively identifies him or her as a law enforcement officer, is unreasonable only if one assumes that the intent of the statute is to criminalize all refusals to comply with a signal to stop, even by a nonuniformed officer. But that would render meaningless, contrary to the foregoing rules of construction, the word "uniformed" in the statute. It also would conflict with Section 29-2-13 and Section 29-2-14, which distinguish between uniforms and badges. Thus, if anything, the

[1]We note as well that the second sentence of Section 66-8-124(A) was never applicable to more than the Motor Vehicle Code, i.e., it cannot be invoked to support interpretation of Sections 30-22-1(C) or -1.1(A).

[2]The State's final argument regarding the uniform issue relies on Section 29-2-14, which prohibits, as a petty misdemeanor, wearing a badge without authorization. The State reasons that Deputy Russ's badge, clearly indicated his official status, and, therefore, qualified as a uniform. The logic is flawed. First, Section 29-2-14 applies only to State Police uniforms. To our knowledge, it is not a crime to wear a Clovis County Sheriff's Office badge without authorization. Second, and more fundamentally, it ignores the distinction drawn, by not only Section 29-2-14 but also Section 29-2-13, between a badge and a uniform. Whether or not a law enforcement officer's badge might indicate his or her official status, Section 30-22-1.1(A) still requires, as an element of the crime, that the pursuing officer be in uniform, and a uniform is not the same as a badge.

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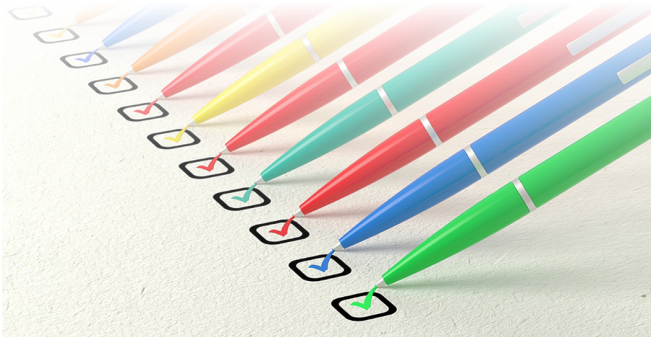

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Friday, Sept. 28, 2018
11 a.m.–Noon
1.0 EP
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The California New Rules Review

Friday, Sept. 28, 2018
Noon–1 p.m.
1.0 EP
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The California Supreme Court adopted new ethics rules that go into effect in November. Stuart Teicher, Esq., (the CLE Performer) will explain critical parts of those new ethics rules. He'll touch on conflicts, self promotion, misrepresentation and more. It's a must-hear for lawyers who want to know what's new in the Golden State!

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Saturday, Sept. 8, 2018
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$438 Family Law section members, government and legal services attorneys, and Paralegal Division members
$487 Standard/Webcast Fee

How to Practice Series

Civil Litigation, Pt. II—Taking and Defending Depositions

Thursday, Sept. 13, 2018
9 a.m.-5 p.m.
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29th Annual Appellate Practice Institute

Friday, Sept. 14, 2018
8:30 a.m.-4:45 p.m.
5.5 G 1.0 EP
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The program will feature an update on recent developments in appellate practice, reports from the appellate court clerks, a chance to hear from Bonnie Stepleton, the new appellate mediator, and segments on administrative appeals, post-trial issues, and oral argument. Judge Harris L. Hartz from the Tenth Circuit Court of Appeals will be the keynote speaker.

Registration and payment for the programs must be received prior to the program date.
A $20 late fee will be incurred when registering the day of the program. This fee does not apply to live webcast attendance.

2018 Annual Tax Symposium

Friday, Sept. 21, 2018
8:25 a.m.–4:30 p.m.

Three ways to register!

6.0 G | 1.0 EP

8.0 recommended CPE credits
(7.0 Technical, 1.0 Ethics)

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All Day
$278 Tax Section members, government and legal services attorneys, Young Lawyer and Paralegal Division members
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Morning Session: Federal and State Tax Updates (3.0 G)
$143 Tax Section members, government and legal services attorneys, Young Lawyer and Paralegal Division members
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Afternoon Session: Tax Law Special Topics (3.0 G, 1.0 EP)
$188 Tax Section members, government and legal services attorneys, Young Lawyer and Paralegal Division members
$209 Standard/Webcast Fee

2018 Collaborative Law Symposium

Three ways to register!

The Basics: Thursday, Sept. 27, 2018
8:30 a.m. -5 p.m.
Advanced: Friday, Sept. 28, 2018
8:30 a.m.-5 p.m.

13.0 G | 1.0 EP

Live at the State Bar Center

The Basics (6.0 G, 1.0 EP)
$278 NMCPG members, government and legal services attorneys, Young Lawyer and Paralegal Division members
$309 Standard Fee

Advanced: Working with Conflicting Perspectives of Reality: Practical Strategies on Dealing with Self-Justification, Rationalization, and Other Sources of Resistance (7.0 G)
$278 NMCPG members, government and legal services attorneys, Young Lawyer and Paralegal Division members
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Both Days
$467 NMCPG members, government and legal services attorneys, Young Lawyer and Paralegal Division members
$519 Standard Fee

2018 Employment and Labor Law Institute

Friday, Oct. 5, 2018
9:30 a.m.-4:30 p.m.

5.0 G | 1.0 EP

Live at the State Bar Center
Also available via Live Webcast!

$228 Early bird fee (Registration must be received by Sept. 5)
$251 Employment and Labor Law section members, government and legal services attorneys, Young Lawyer and Paralegal Division members
$279 Standard/Webcast Fee

2018 Health Law Symposium

Friday, Oct. 12, 2018
8:30 a.m.-5:10 p.m.

Live at the State Bar Center
Also available via Live Webcast!

$266 Early-bird fee (Registration must be received by Sept. 12)
$292 Health Law Section members, government and legal services attorneys and Paralegal Division members
$325 Standard/Webcast Fee

2018 Administrative Law Institute

Friday, Oct. 19, 2018
9 a.m.-4:30 p.m.
Live at the State Bar Center
Also available via Live Webcast!

$229 Early bird fee (Registration must be received by Sept. 19)
$251 Public Law Section members, government and legal services attorneys, Young Lawyer and Paralegal Division members
$279 Standard/Webcast Fee

Children's Code: Delinquency Rules, Procedures and the Child's Best Interest

Thursday, Oct. 25, 2018
1:30-4:15 p.m.

1.5 G | 1.0 EP

Live at the State Bar Center
Also available via Live Webcast!

$121.50 Children's Law Section members, government and legal services attorneys, Young Lawyer and Paralegal Division members
$135 Standard/Webcast Fee

2018 Elder Law Institute: A Whole New World: Changes and Reforms in the Adult Guardianship System in New Mexico

Thursday, October 26, 2018
8:30 a.m.–4:15 p.m.
5.5 G | 1.0 EP
Live at the State Bar Center
Also available via Live Webcast!

$241 Early bird fee (Registration must be received by Sept. 26)
$265 Elder Law section members, government and legal services attorneys, Paralegal Division members and Young Lawyers Division members
$295 Standard/Webcast Fee

Remaining Opportunities to Attend the Disciplinary Board's Required Trust Accounting CLE

The Basics of Trust Accounting: How to Comply with Disciplinary Board Rule 17-204

1.0 EP
$55 Standard Fee
$65 Webcast Fee

Effective December 31, 2016, the New Mexico Supreme Court adopted modifications to Rule 17-204 NMRA which requires that an attorney must take a trust accounting class at least once every three years, or within the first year of being licensed in New Mexico. This program fulfills the requirement of Rule 17-204 NMRA, and is one of the New Mexico Disciplinary Board's ongoing programs designed to educate attorneys on proper practices and procedures. Currently, the State Bar of New Mexico Center for Legal Education is the only approved course provider. Please see below for upcoming opportunities to attend the required ethics course. For more information, lawyers should carefully read Rule 17-204 NMRA.

Register online at www.nmbar.org/CLE or call 505-797-6020

Remaining dates and times:

Tuesday, Sept. 18, 9 a.m.

Thursday, Oct. 25, Noon

Friday, Nov. 9, 3:30 p.m.

Friday, Dec. 28, 9 a.m.

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Sept. 20

The Lifecycle of a Trial, from a Technology Perspective (2017)
4.3 G | 1.0 EP
9 a.m–4:10 p.m
$255 Standard Fee

2017 ECL Solo and Small Business Bootcamp Parts I and II (2017)
3.4 G | 2.7 EP
9 a.m.–4:10 pm
$279 Standard Fee

Bankruptcy Law: The New Chapter 13 Plan (2017)
3.1 G
8:30 a.m.–Noon
$159 Standard Fee

Oct. 18

Ethics for Government Attorney (2017)
2.0 EP
9 -11 a.m.
$109 Standard Fee

Trust and Estate Update: Recent Statutory Changes that are Overlooked and Underutilized
1.0 G
1–2 p.m.
$55 Standard Fee

Reforming the Criminal Justice System (2017)
6.0 G
8:30 a.m.–4:15 p.m.
$279 Standard Fee

Fourth Annual Symposium on Diversity and Inclusion-Diversity Issues Ripped from the Headllines, II
5.0 G | 1.0 EP
8:55 a.m.–4:15 p.m.
$279 Standard Fee

Mark Your Calendar

Save the date for these exciting programs down in your calendar and stay tuned for further details including credit hours, presenters and prices.

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Nov. 1

ADR Institute
Nov. 2

Business Law Institute
Nov. 14

Probate Institute
Nov. 15

Animal Law: Updates, Causes of Action, and Litigation
Nov. 29

Paralegal Division CLE
Nov. 30

Real Property Institute
Dec. 5

Intellectual Property Law CLE
Dec. 6

Immigration Law CLE
Dec. 6

Ethicspalooza
Dec. 11

Mediation Training
Dec. 12

Criminal Rules Hot Topics: Prosecutors Perspective
Dec. 12

How to Practice Series: Civil Litigation Pt. III – Motion Practice and Mediations
Dec. 13

Trial Practice: Presence, Power, Persuasion: Why We Do What We Do in the Courtroom
Dec. 14

Practice Management Skills for Success
Dec. 17

Lawyers Professional Liability and Insurance Committee CLE
Dec.19

Gain the Edge! Negotiation Strategies for Lawyers
Dec. 20

Natural Resources, Energy, and Environmental Law CLE
Dec. 21

Stuart Teicher's Ethics Courses
Dec. 26

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Dec. 27

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CENTER FOR LEGAL EDUCATION

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absurd or unreasonable result is reached by *not* applying the plain meaning of "uniform." An interpretation of Section 30-22-1.1(A) that imposes the felony sanction only where it is clear (from, among other indicators, the uniform) that the person who has signaled the motorist to stop is a law enforcement officer is reasonable and, in fact, advances the apparent legislative intent.

{33} We emphasize that construing Section 30-22-1.1(A) in accordance with the plain meaning of "uniform" does not give motorists license to simply ignore law enforcement officers who signal them to stop. Section 66-7-332(A) remains in effect and requires motorists to pull over whenever any emergency vehicle, including a law enforcement vehicle whether or not its occupant is in uniform, has engaged its lights and/or sirens. Section 66-8-125 remains in effect as well: all law enforcement officers, whether or not in uniform, retain their authority to make arrests for all nontraffic offenses and all felonies where probable cause exists. Giving effect to the plain meaning of "uniform" in Section 30-22-1.1(A) prevents a law enforcement officer who is not in a uniform only from arresting a motorist for violation of Section 30-22-1.1(A) itself.[3] This is not an absurd result. Rather, it gives meaning to the Legislature's inclusion of the word "uniformed" in the statutes and carries out the apparent intent in doing so: to "establish[ ] a defendant's knowledge that he is fleeing a police officer." *Padilla*, 2008-NMSC-006, ¶ 22.

{34} It matters not that an argument might be made that it would be better policy to allow nonuniformed law enforcement officers to make arrests for violation of Section 30-22-1.1(A)."[W]e must assume the [L]egislature chose its words advisedly to express its meaning unless the contrary intent clearly appears." *State v. Maestas*, 2007-NMSC-001, ¶ 22, 140 N.M. 836, 149 P.3d 933 (alterations, internal quotation marks, and citation omitted). "[A] statute must be read and given effect as it is written by the Legislature, not as the court may think it should be or would have been written if the Legislature had envisaged all the problems and complications which might arise in the course of its administration." *Id.* ¶ 14 (internal quotation marks and citation omitted). Stated another way, courts generally "are not at liberty to disregard the plain meaning of words in order to search for some other conjectured intent." *State v. Carroll*, 2015-NMCA-033, ¶ 4, 346 P.3d 372 (omission omitted).

II. APPROPRIATELY MARKED LAW ENFORCEMENT VEHICLE

{35} We now address whether an "unmarked" police vehicle, that is, one with no lettering or insignia anywhere on the exterior, nevertheless may constitute an "appropriately marked" law enforcement vehicle for purposes of Section 30-22-1.1(A). The aggravated fleeing statute does not define "appropriately marked." As previously mentioned, the term appears in Section 30-22-1(C) but is not defined in that statute either.

A. The Plain Meaning of "Appropriately Marked"

{36} Our analysis again begins with the plain meaning of "appropriately marked." *Webster's Third New International Dictionary* 1383 (Unabridged ed. 1986) defines "marked" as "having a mark." More usefully, *Webster's* then broadly defines "mark" as "something that gives evidence of something else." *Marked*, *Webster's Third New Int'l Dictionary* 1382 (Unabridged ed. 1986). Within that general definition, *Webster's* provides the following subdefinition, among others: "a character, *device*, label, brand, seal, or other sign put on an article esp[ecially] to show the maker or owner, to certify quality, or for identification[.]" *Id.* (emphasis added). The reference in this subdefinition to "device" is notable, in that a mark is not necessarily graphic, or even visual. "Appropriate" means "specially suitable," and "appropriately" means "in an appropriate manner." *Webster's Third New Int'l Dictionary* 106 (Unabridged ed. 1986).

{37} In the context of Section 30-22-1.1(A), we understand the plain meaning of "appropriately marked" to be that the vehicle in question is marked in a manner that is suitable for being driven by a law enforcement officer and identified as such. We consider it significant that the Legislature did not specifically refer to insignia or lettering, and instead used only the broader term, "mark." Emergency lights and a siren are devices that can evidence, i.e., identify, a law enforcement vehicle. Thus, absent some basis for not applying the plain meaning rule, Deputy Russ's vehicle was "appropriately marked" as that term is used in Section 30-22-1.1(A).

B. Resolving the Ambiguity in "Appropriately Marked"

{38} Notwithstanding our conclusion that the plain meaning of "appropriately marked," as used in Section 30-22-1.1(A), encompasses emergency lights and sirens, we acknowledge that a "marked" police car commonly refers to a vehicle with lettering, insignia, or striped paint that would indicate the driver of the vehicle is a law enforcement officer, and conversely an "unmarked" police car refers to a vehicle without any such graphic markings on the exterior. *See, e.g.*, *People v. Mathews*, 75 Cal. Rptr. 2d 289, 291 (Cal. Ct. App. 1998) (addressing whether "an unmarked police vehicle equipped with a siren, a red light mounted on the front dashboard, and headlights which flashed in an alternating, 'wigwag' pattern" was "distinctively marked" within the meaning of California's analog to Section 30-22-1.1(A) (internal quotation marks and citation omitted)). Indeed, the district court acknowledged this colloquial terminology during Defendant's trial, concluding that Deputy Russ's Ford Expedition "was not a marked vehicle." *See* 10.5.400.8(C)(1)(a) NMAC (Department of Public Safety regulation specifying that "both marked and unmarked [State Police vehicles]" will be used only for official business).

{39} A statute's ambiguity is one circumstance in which we will not apply the plain meaning rule to construe it. "We do not depart from the plain language of a statute unless we must resolve an ambiguity[.]" *Progressive Nw. Ins. Co. v. Weed Warrior Servs.*, 2010-NMSC-050, ¶ 6, 149 N.M. 157, 245 P.3d 1209 (internal quotation marks and citation omitted). "A statute is ambiguous when it can be understood by reasonably well-informed persons in two or more different senses." *Maestas v. Zager*, 2007-NMSC-003, ¶ 9, 141 N.M. 154, 152 P.3d 141 (internal quotation marks and citation omitted). Given the divergence between the plain meaning and the common understanding of a marked law enforcement vehicle, the phrase "appropriately marked" in Section 30-22-1.1(A) is ambiguous.

{40} "When a statute's language is ambiguous or unclear, we look to legislative intent to inform our interpretation of the statute." *Ortiz v. Overland Express*, 2010-NMSC-021, ¶ 18, 148 N.M. 405, 237 P.3d

[3]Even if the plain meaning of uniform were applied to Section 66-8-124(A) and Section 66-8-125(C), a question we do not address herein, a law enforcement officer who is not in a uniform still would be prevented only from arresting a motorist for a nonfelony Motor Vehicle Code or other traffic or motor vehicle offense.

707; *see also Helen G. v. Mark J.H.*, 2006-NMCA-136, ¶ 11, 140 N.M. 618, 145 P.3d 98 (noting that ambiguous provisions require the court to ascertain a statute's legislative purpose), *rev'd on other grounds by* 2008-NMSC-002, 143 N.M. 246, 175 P.3d 914. In *Padilla*, our Supreme Court articulated the legislative intent behind Section 30-22-1.1(A)'s "appropriately marked" requirement in the context of its discussion of the statute's scienter requirement:

> [T]he officer's conduct, wearing his uniform, being in a marked car, and signaling the defendant to stop, establishes a defendant's knowledge that he is fleeing a police officer. As such, it is a fair inference that *the Legislature intended to make those parts of the officer's conduct that establishes scienter*, i.e., the accused's knowledge that he is fleeing an officer, *elements of the crime of aggravated fleeing*.

Padilla, 2008-NMSC-006, ¶ 22 (emphases added). Thus, the intent of Section 30-22-1.1(A)'s requirement that the police vehicle be "appropriately marked" is the same as that statute's requirement that the officer be in uniform: to establish that the motorist knows that he is fleeing a law enforcement officer.

{41} Given this intent, are the siren and flashing emergency lights on Deputy Russ's vehicle properly understood to be "appropriate marks" that identified it as a law enforcement vehicle? Defendant argues generally that a motorist cannot know that a vehicle that lacks identifying insignia or lettering is a law enforcement vehicle, because "lots of vehicles have flashing lights." Defendant's point is that, without an insignia or lettering specifically indicative of law enforcement, it is not possible to distinguish a vehicle with flashing lights from, for example, fire department vehicles or ambulances. Thus, Defendant would have us conclude it is necessary for a vehicle to have insignia or lettering in order to meet the legislative intent: establishing that it is a law enforcement officer who is pursuing the motorist and signaling him or her to stop.

{42} We are not persuaded. Pursuant to Section 66-7-332(A) discussed above, a motorist who sees a vehicle with flashing emergency lights and/or hears its siren must pull off the road and stop. Therefore, whether the motorist can differentiate a police vehicle from, say, an ambulance, is of no consequence for purposes of establishing the initial obligation to stop. Stated another way, a law enforcement vehicle is "appropriately marked" so long as it has sufficient equipment to trigger the motorist's obligation under Section 66-7-332 to come to a stop. Once the motorist's and the law enforcement officer's vehicles have come to a stop and the officer (assuming he is in uniform) emerges from his vehicle, the officer's identity as law enforcement will be confirmed. If at that point the motorist drives off, he or she will violate Section 30-22-1(C) and, potentially, Section 30-22-1.1(A). Thus, a vehicle equipped with emergency lights, flashing lights, and siren, i.e., one consistent with the plain meaning of "appropriately marked," also meets the legislative intent underlying Section 30-22-1.1(A).

{43} We also observe that Deputy Russ's vehicle in any event had multiple sets of specialized lights to distinguish it from civilian and other emergency vehicles. He described the vehicle as being equipped with red and blue flashing lights. In addition, the vehicle was equipped with wigwag headlights that flashed in an alternating sequence. Defendant did not establish on cross-examination of Russ or Undersheriff Reeves, or through other evidence presented as part of the defense case, whether any non-law-enforcement emergency vehicles have flashing red and blue emergency lights that are located inside the vehicle or on its grill as opposed to on the top of the vehicle. Regardless, we can note that the absence of any flashing lights attached to the *top* of the vehicle would appear to distinguish Russ's vehicle from any other emergency vehicle. Further, Defendant did not establish that any emergency vehicles other than law enforcement vehicles are equipped with wigwag headlights. On the basis of similar facts, the court in *People v. Estrella*, 37 Cal. Rptr. 2d 383, 386-87 (Cal. Ct. App. 1995), concluded that an "unmarked" vehicle was "distinctively marked" within the meaning of California's aggravating fleeing statute, Cal. Vehicle Code § 2800.1(a)(3) (2006): "We find it incredible to believe or even seriously argue that a reasonable person, upon seeing a vehicle in pursuit with flashing red and blue lights, wigwag headlights and hearing a siren, would have any doubt that said pursuit vehicle was a police vehicle." *Estrella*, 37 Cal. Rptr. 2d at 386, 388 (distinguishing flashing red and blue lights on a light bar ("emergency lights") from the wigwag lights ("alternating lights")). For these reasons, we conclude that the siren along with the combination of flashing and alternating lights on Russ's vehicle were sufficient to enable Defendant to know immediately, not only that it was an emergency vehicle, but that it was a law enforcement vehicle in particular. That is, even assuming a siren and emergency flashing lights would not meet Section 30-22-1.1(A)'s legislative intent, Russ's siren, flashing lights *and* wigwag lights would accomplish this goal and thus satisfy the "appropriately marked" element of the crime.

C. Section 30-22-1.1(A)'s "Visual or Audible Signal to Stop" Language Is Not Surplusage

{44} New Mexico courts will avoid construing one portion of a statute in a manner that renders another portion superfluous. *State v. Juan*, 2010-NMSC-041, ¶ 39, 148 N.M. 747, 242 P.3d 314; *State v. Indie C.*, 2006-NMCA-014, ¶ 14, 139 N.M. 80, 128 P.3d 508. Defendant argues that, if "appropriately marked" is not construed to require that the law enforcement vehicle have insignia or lettering and instead that element of Section 30-22-1.1(A) is satisfied by flashing lights and siren, then the requirement that the officer give the motorist "a visual or audible signal to stop, whether by hand, voice, emergency light, flashing light, siren or other signal," will be rendered surplusage and meaningless. Section 30-22-1.1(A).

{45} We disagree for several reasons. First, as the State points out, under Section 30-22-1.1(A), the "visual or audible signal to stop" may be given by any number of means, including hand or voice. Thus, the flashing lights and/or siren that satisfy the appropriately marked vehicle element will not necessarily be the, or at least the only, visual or audible signal to stop that the officer gives. Second, and related, Section 30-22-1.1(A)'s examples of the visual or audible signal to stop are set out in the disjunctive. For example, only a siren, an emergency light *or* a flashing light is required. The siren, flashing red and blue lights, *and* wigwag lights activated on Deputy Russ's vehicle therefore were not all required to satisfy the "visual or audible signal to stop" element. Third, and more fundamentally, in our view the fact that in the case at bar the flashing lights might serve the purposes underlying both elements—communicating the instruction to stop *and* making clear that the person giving the instruction is a law enforcement officer—does not render either element of

the crime superfluous or meaningless. *See People v. Hudson*, 136 P.3d 168, 177 (Cal. 2006) (Moreno, J., dissenting) (concluding that "the requirement that a police vehicle must be distinctively marked can be satisfied, in part, by the same evidence used to establish the additional requirements that the vehicle exhibit a red lamp . . . and sound a siren"). Thus, it is not necessary to construe "appropriately marked" to require that the law enforcement vehicle have insignia or lettering to avoid rendering meaningless "a visual or audible signal to stop."

{46} We are sensitive to the public concern expressed over the past several decades

about persons posing as law enforcement officers in vehicles equipped with emergency lights and sirens who stop and prey upon other motorists. "It is an all too sad fact that persons have been victimized as a result of their trusting criminals who were impersonating police officers to facilitate crimes." *A.F. v. State*, 905 So. 2d 1010, 1012 (Fla. Dist. Ct. App. 2005) (internal quotation marks and citation omitted); *see also Archuleta*, 1994-NMCA-072, ¶ 15 (noting the risk to the public posed by police impersonators); *State v. Kenneth*, No. A-1-CA-33281, mem. op. (N.M. Ct. App. Nov. 12, 2015) (nonprecedential) (affirming conviction of person who posed as police officer and sexually assaulted a motorist). However, we have no evidence that this consideration entered into the motivation of any of the members of our Legislature in enacting Section 30-22-1.1(C). For this reason, it does not inform our construction of Section 30-22-1.1(A). Our Legislature nevertheless may wish to consider imposing sanctions, beyond the petty misdemeanor established by Section 29-2-14(A) for wearing a uniform or badge that appears to be that of a New Mexico State Police officer, on individuals who impersonate law enforcement officers by means of vehicle equipment and attire. Such a law would tend to promote the legislative goal—ensuring that motorists stop when they see another vehicle with emergency lights or siren engaged—underlying Section 66-7-332, Section 30-22-1(C), and Section 30-22-1.1(A).

CONCLUSION

{47} The foregoing rules of statutory construction require that, as used in Section 30-22-1.1(A), "uniformed" and "appropriately marked" cannot be stripped of all meaning, and instead will be interpreted in accordance with their plain meaning. So construed, however, these phrases do not mandate that the law enforcement officer who signals the motorist to stop must be in full or formal uniform and in a fully marked vehicle. The statute requires only that the officer be in a vehicle that objectively establishes that the vehicle is an emergency vehicle for which, pursuant to Section 66-7-332(A), the motorist must pull off to the side of the road and stop; and wearing a uniform that, by the time the officer emerges from the vehicle, objectively establishes that he is in fact a law enforcement officer. The sirens, flashing red and blue emergency lights, and alternating wigwag headlights on Deputy Russ's vehicle met Section 30-22-1.1(A)'s "appropriately marked" standard. While the informal uniforms at issue in *Archuleta* and *Maes* would have met the statute's "uniformed" standard, Russ's street clothes and equipment, even with his badge affixed to his shirt, did not.

{48} We reverse Defendant's conviction for aggravated fleeing in violation of Section 30-22-1.1(A).

{49} IT IS SO ORDERED.
HENRY M. BOHNHOFF, Judge
WE CONCUR:
LINDA M. VANZI, Chief Judge
STEPHEN G. FRENCH, Judge (dissenting)

FRENCH, Judge (concurring in part and dissenting in part).

{50} I concur in the Majority Opinion's application of "appropriately marked" to the vehicle driven by Deputy Russ relative to the aggravated fleeing statute, as that term appears in Section 30-22-1.1(A). In dissenting, I take issue with the Majority Opinion's holding that Deputy Russ was not in uniform when he pursued and arrested Defendant for aggravated fleeing.

{51} To determine whether Deputy Russ—adorned in a dress shirt, pants, a tie, and accessorized by his holster, sidearm, extra sidearm magazines, handcuffs, and his official sheriff's department badge pinned upon his chest—was in uniform for purposes of Section 30-22-1.1(A), our precedent uniformly, plainly, and consistently directs application of a straightforward objective test. Rejected by the Majority today, the test asks simply whether sufficient indicia of law enforcement authority was displayed such that a reasonable person ought conclude that the person purporting to be a peace officer in fact is. Yet today, the Majority upends that which a reasonable person might readily conclude for a rigid, cloth-specific, requirement that officers dress only in clothing that is itself marked, and diminishes law enforcement authority when those officers wear something other than that exact uniform. Specifically, because Deputy Russ's clothing did not demonstrably reiterate what his badge made clear, the Majority concludes he was not a "uniformed law enforcement officer" pursuant to Section 30-22-1.1(A). To so hold, the Majority discards this Court's objective test and applies a dictionarial approach to glean the plain meaning of uniform—as the dress or actual cloth worn—to the exclusion of Deputy Russ's official badge. I respectfully dissent.

{52} "Our primary goal when interpreting statutory language is to give effect to the intent of the [L]egislature." *State v. Torres*, 2006-NMCA-106, ¶ 8, 140 N.M. 230, 141 P.3d 1284. "We do this by giving effect to the plain meaning of the words of [the] statute, unless this leads to an absurd or unreasonable result." *Marshall*, 2004-NMCA-104, ¶ 7. In *Archuleta*, we first construed the plain meaning of uniform—"uniform plainly indicating his official status"—to give effect to the intention of the Legislature. 1994-NMCA-072, ¶ 9; *see id.* ("[T]he intention of the [L]egislature in requiring the officer to wear a uniform plainly indicating his official status was to enable the motorist to be certain that the officer who stops him is, in fact, a police officer."). The officer making the stop in *Archuleta* was dressed in plain clothes bearing no indicia that he was an officer. 1994-NMCA-072, ¶ 2. Upon exiting his patrol car, he donned a police department windbreaker with a cloth shield on the front indicating "Albuquerque Police" and cloth shoulder patch to the same effect. *Id.* Applying our objective test to discern the legislative intent in the plain meaning of the words—"uniform clearly indicating the peace officer's official status[,]" and "in uniform[,]"—we held that sufficient indicia of law enforcement authority was clearly evinced with the addition of the cloth shield and patch. Sections 66-8-124(A) and -125(C); *see also Archuleta*, 1994-NMCA-072, ¶¶ 11-12. Here, Deputy Russ's official Curry County Sheriff's badge was at all times prominently displayed on his chest. Indeed, subsequent to Defendant's willful and careless fleeing and crashing his car, when Deputy Russ ordered Defendant to "show his hands" he did so, evidencing his compliance with and acknowledgment

of the officer's official status and directive.

{53} In noting that the Legislature had removed language from what is now Section 66-8-124—which provided "uniform means an official badge prominently displayed, accompanied by a commission of office"—the *Archuleta* Court concluded that the Legislature intended the definition of "uniform" to be "less restrictive, no doubt recognizing that modern day police officers may have more than one uniform or may on occasion wear combinations thereof." 1994-NMCA-072, ¶ 10 (internal quotation marks omitted).

{54} In affirming this expression of legislative intent and applying *Archuleta's* objective test for determining whether an officer is in uniform, our Court in Maes held that non-traditional dress or garments, adorned with police lettering and accompanied by police badge, would constitute a uniform as that term is used in Section 66-8-124(A) and Section 66-8-125(C). *Maes*, 2011-NMCA-064, ¶¶ 9-11; *see id.* ¶ 11 (holding garments consisting of cloth marked with "STATE POLICE" and "POLICE[,]" equipment belt, holster, firearm, and metal police badge, satisfied objective test that reasonable person would believe that person wearing such garments is, in fact, a police officer).

{55} There can be little doubt that we may infer that Deputy Russ's official badge conveyed words and symbols to the same effect as the cloth shield on the windbreaker in *Archuleta* or cloth garments in *Maes*—such as "Sheriff's Department" or "Sheriff." The Majority's rejection of the objective sufficient indicia of law enforcement authority test, in favor of a plain meaning of the word "uniformed" analysis, is inapposite to our Court's precedent. In so doing, the Majority would displace this Court's prior discernment of legislative intent for "uniform" and "in uniform," thus leading "to an absurd or unreasonable result." *Marshall*, 2004-NMCA-104, ¶ 7. Here, the unreasonable result is manifest: indicia of law enforcement authority that is stitched into or printed upon a clothing garment itself is sufficient to being "uniformed," whereas indicia of law enforcement authority imprinted or stamped into an official badge, or the forged official badge itself, pinned upon a clothing garment is not, regardless of the attendant sidearm, holster, and other law enforcement tools.

{56} Because I would hold that the tie, dress shirt, dress pants, badge, and the accouterments of law enforcement authority worn and displayed by Deputy Russ would sufficiently notify any reasonable person that the man they encountered was not Mr. Russ, but Deputy Russ, I respectfully dissent.

STEPHEN G. FRENCH, Judge

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-048

No. A-1-CA-35371 (filed May 7, 2018)

CLARK EVANS SLOANE, KIM E. DAVIS, QUEENA KIEN, MINDI M. SHULTZ, and ANTHNETTE SPENCER, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellants,
v.
REHOBOTH MCKINLEY CHRISTIAN HEALTH CARE SERVICES, INC. d/b/a REHOBOTH MCKINLEY CHRISTIAN HOSPITAL, a New Mexico Non-Profit Corporation,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF MCKINLEY COUNTY
Louis E. DePauli, Jr., District Judge

SHANE YOUTZ
STEPHEN CURTICE
JAMES A. MONTALBANO
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for Appellee

Opinion

Daniel J. Gallegos, Judge

{1} This is a wage-and-hour putative collective and class action alleging that Defendant, Rehoboth McKinley Christian Health Care Services, Inc. (Rehoboth), failed to pay Plaintiffs and other non-exempt employees for time they spent working during meal breaks. This Court granted Plaintiffs' application for interlocutory appeal to consider two questions: (1) whether the district court erred in denying conditional certification for a collective action under the Minimum Wage Act (MWA), NMSA 1978, §§ 50-4-19 to -30 (1955, as amended through 2013); and (2) whether the district court erred in denying class certification for Plaintiffs' unjust enrichment claim. For the reasons that follow, we reverse the district court's denial of conditional certification for the MWA claim, and we affirm the district court's denial of class certification for the unjust enrichment claim.

BACKGROUND

{2} Rehoboth is a non-profit, integrated healthcare delivery system that operates a sixty-bed acute care hospital in Gallup, New Mexico. Plaintiffs are a group of Rehoboth employees considered to be non-exempt for purposes of calculating minimum wage and overtime wages. During the relevant period, Rehoboth employed hundreds of such non-exempt employees at its Gallup facility. The non-exempt employees were all subject to Rehoboth's employee handbook. Particularly relevant to this case, the handbook outlined Rehoboth's policy on meal breaks.

{3} Under Rehoboth's meal break policy, non-exempt employees involved in direct patient care or support services received unpaid meal breaks. In order to carry out this policy of unpaid meal breaks, Rehoboth's timekeeping system automatically deducted time for meal breaks in half-hour increments. Basically, this means that non-exempt employees were provided with an unpaid half hour during their shift in which to eat, and the purpose of the automatic deduction was to ensure that this period was accounted for without the employee having to clock out and then clock back in. If an employee had to work through a meal break, the policy provided that the employee must get his or her supervisor's permission and must affirmatively punch the "no lunch" button on the time clock at the end of his or her shift. The "no lunch" option thus allowed the employee to be compensated for a meal period for which he or she worked. In addition, the employee could also report—after the fact—that he or she had worked through a meal break, and several avenues existed to reverse the automatic deduction. Specifically, the employee, supervisor, or payroll department could make changes to the employee's pay report.

{4} Plaintiffs are five non-exempt employees of Rehoboth who allege that they worked through their meal periods, but due to the automatic deduction, they were not compensated for the time that they worked. They were employed in various capacities at Rehoboth's Gallup facility, including a technician on the overnight shift in the emergency department; a technician on the weekday shift in the radiology department; a certified nursing assistant (CNA) on the day shift in the medical/surgery department and emergency department; a CNA and patient care technician on the day shift in the emergency department; and a registered nurse on the overnight shift in the emergency department. The allegations common to all of Plaintiffs' claims are that supervisors at Rehoboth discouraged non-exempt employees from using the "no lunch" button and told employees that they were to find a way to take an uninterrupted meal break, but that employees were often called back to work or took calls for service during their meal breaks due to staffing issues. One Plaintiff alleges that he punched the "no lunch" button after one such occasion, but a supervisor revoked that entry.

{5} Plaintiffs brought suit under the MWA, alleging that Rehoboth's failure to compensate them for the time they worked during meal breaks resulted in a failure to pay them overtime wages. Plaintiffs also brought suit for unjust enrichment, basically alleging that Rehoboth was unjustly enriched by Plaintiffs' uncompensated labor. Relatively early in the litigation, Plaintiffs moved for conditional certification of a collective action under the MWA and certification of a class action for the unjust enrichment claim. After full briefing, the

district court denied certification of both the collective action and the class action. The district court certified its order for interlocutory appeal, pursuant to NMSA 1978, Section 39-3-4 (1999). Plaintiffs filed an application for interlocutory appeal, which this Court granted.

DISCUSSION

Collective Action Under the New Mexico Minimum Wage Act

{6} Plaintiffs allege that, as a result of Rehoboth's failure to pay them for the time they worked during meal breaks, they were not properly compensated under the MWA for time they worked beyond forty hours per week. *See* § 50-4-22(D) ("An employee shall not be required to work more than forty hours in any week of seven days, unless the employee is paid one and one-half times the employee's regular hourly rate of pay for all hours worked in excess of forty hours."). Plaintiffs brought suit on behalf of themselves and on behalf of other employees similarly situated. *See* § 50-4-26(C) ("[A]n employer who violates any provision of Section 50-4-22 . . . shall be liable to the employees affected in the amount of their unpaid or underpaid minimum wages plus interest, and in an additional amount equal to twice the unpaid or underpaid wages."); *see also* § 50-4-26(D) ("An action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and on behalf of the employee or employees and for other employees similarly situated[.]"). Later, Plaintiffs moved to conditionally certify a collective action. The district court's denial of Plaintiffs' motion is a subject of this interlocutory appeal.

{7} This Court first dealt with MWA collective actions in *Armijo v. Wal-Mart Stores, Inc.*, 2007-NMCA-120, ¶ 1, 142 N.M. 557, 168 P.3d 129. In *Armijo*, as in this case, the plaintiffs sought to certify the MWA claims for collective action on behalf of similarly situated employees. *Id.* ¶¶ 15, 47. Noting that no appellate decision in New Mexico had defined "similarly situated," we looked to federal cases dealing with a similar provision in the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 to 219 (2012).[1] *Armijo*, 2007-NMCA-120, ¶ 47. In so doing, we recognized that federal courts have adopted or discussed at least three approaches to the issue. *Id.* ¶ 48. After discussing each of the various approaches, we concluded that the two-tiered/ad hoc approach adopted in *Thiessen v. General Electric Capital Corp.*, 267 F.3d 1095, 1105 (10th Cir. 2001), is the proper standard to apply to collective actions under the MWA. *Armijo*, 2007-NMCA-120, ¶ 50.

{8} Under the two-tiered/ad hoc approach, "a court typically makes an initial notice stage determination of whether plaintiffs are similarly situated." *Thiessen*, 267 F.3d at 1102 (internal quotation marks and citation omitted). In effect, the court determines whether a collective action should be certified for purposes of sending notice of the action to potential class members who may wish to opt in. *See Zavala v. Wal Mart Stores Inc.*, 691 F.3d 527, 536 (3d Cir. 2012) (explaining that conditional certification is "not really a certification[,]" but is simply the exercise of a district court's discretionary power to facilitate the sending of notice). At this initial stage, the court requires nothing more than "substantial allegations that the putative class members were together the victims of a single decision, policy, or plan." *Armijo*, 2007-NMCA-120, ¶ 48 (internal quotation marks and citation omitted).

{9} "At the second stage, which typically follows discovery and/or a motion to decertify the class, the court must revisit its initial determination, only now under a stricter standard of similarly situated." *Id.* (internal quotation marks and citation omitted). "Under this stricter analysis, the court should consider several factors in determining whether the putative class members are similarly situated," including the following: "(1) whether the class members have disparate factual and employment settings, (2) whether the available defenses to the claims are individual to each class member, and (3) whether there are any fairness or procedural considerations relevant to the action." *Id.*

{10} The initial question on appeal, which we address de novo, is whether the district court applied the proper legal standard. *See Thiessen*, 267 F.3d at 1105. The district court here indicated that it considered this case to be at the initial notice stage. Neither party takes issue with the district court's determination, and we also conclude that the district court applied the correct legal standard given the fact that very little discovery on the merits has been conducted. *See id.* at 1102-03 (stating that the second stage certification analysis occurs "[a]t the conclusion of discovery").

{11} The next question, then, is whether the district court abused its discretion in denying Plaintiffs' motion for conditional certification under the initial notice-stage standard. *See id.* at 1105. Under this less stringent standard, Plaintiffs need present "*nothing more* than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan." *Id.* at 1102 (emphasis added) (internal quotation marks and citation omitted); *see also Bustillos v. Bd. of Cty. Comm'rs of Hidalgo Cty.*, 310 F.R.D. 631, 663 (D.N.M. 2015) (observing that federal courts of appeals "that have considered the meaning of 'similarly situated' have consistently defined the phrase to require a minimal showing").

{12} In the present case, after reviewing Plaintiffs' allegations and accompanying exhibits, the district court found that

> [t]his evidence establishes, at best, . . . Plaintiffs were discouraged from using the "no lunch" button and that their work circumstances, based on [Rehoboth's] scheduling practices, sometimes required them to work through meal breaks for which they were sometimes not compensated.

Despite this finding, the district court determined that Plaintiffs had not met their relatively minimal burden. The district court reached this conclusion based on its findings that Plaintiffs had not alleged an illegal policy or plan; Plaintiffs did not provide any evidence of a corporate atmosphere or culture to improve the bottom line; and Plaintiffs did not present methodologies by which they expected to demonstrate that uncompensated work during meal breaks was a widespread problem. We address each of these in turn.

{13} With respect to the illegality of the policy or plan, the district court—apparently convinced by Rehoboth's argument that the requirement that the putative class be "victims" of a single decision, policy, or plan, means that the policy or plan must

[1]Unlike the FLSA, the MWA does not have extensive accompanying regulations defining and interpreting the statutory language. However, New Mexico courts have frequently looked to interpretations of the FLSA in order to interpret similar language in the MWA. *See, e.g.*, *Williams v. Mann*, 2017-NMCA-012, ¶¶ 29-30, 388 P.3d 295; *Armijo*, 2007-NMCA-120, ¶ 47.

itself be illegal—found that

> these facts taken singularly or together do not establish substantial allegations of an *illegal* policy on the part of [Rehoboth]. No illegality is alleged, such as [Rehoboth], as a policy, disciplining or sanctioning Plaintiffs or putative class members required to work through a lunch break, or that [Rehoboth], as a policy, knowingly refus[ed] to pay employees for working through their lunch break. The failure to allege something potentially *illegal* like the example above, precludes a finding of substantial allegations being made by . . . Plaintiffs.

(Emphases added.) The district court's reasoning appears to be undergirded by Rehoboth's contention that an automatic meal break deduction is not, in and of itself, unlawful. On this discrete point, we agree with Rehoboth. *See Fengler v. Crouse Health Found.*, 595 F. Supp. 2d 189, 195 (N.D.N.Y. 2009) (stating that "the mere existence and implementation of a policy or practice of making automatic deductions for scheduled meal breaks in and of itself does not violate the FLSA"). However, we recognize that "[i]t is the failure of an employer to compensate employees who work through those unpaid meal breaks, and to police and oversee hourly workers and their supervisors to ensure that when working through or during unpaid meal breaks they are compensated, that potentially runs afoul of the [FLSA]." *Id.*

{14} These same failures likewise potentially run afoul of the MWA and, consequently, are potentially unlawful notwithstanding the lawfulness of the automatic deduction itself. Put another way, Plaintiffs' allegations, accompanied by supporting affidavits, appear to set forth a potential violation of the MWA—that the putative class of Plaintiffs was sometimes required to work through meal breaks, but not compensated for such work—and that such violation stems from a single policy or plan to not only schedule workers in such a way that missing meal periods was sometimes unavoidable, but also to discourage employees from using the "no lunch" button that would have resulted in full compensation for time worked. In concluding otherwise—that these allegations did not set forth a potentially unlawful or illegal policy—the district court relied on *Blaney v. Charlotte-Mecklenburg Hospital Authority*, No. 3:10-CV-592-FDW-DSC, 2011 WL 4351631 (W.D.N.C. Sept. 16, 2011), and *Barron v. Henry County School System*, 242 F. Supp. 2d 1096 (M.D. Ala. 2003). We are not convinced that either case supports the district court's conclusion.

{15} In *Blaney*, the only system-wide policy in place required full compensation for all hours worked. 2011 WL 4351631 at *8. The policy, requiring compensation for interrupted meal breaks, was entirely dependent on decentralized management practices to ensure its enforcement throughout thirteen medical care facilities (including nine primary hospital facilities). *Id.* at *1, *8. In essence, the discretionary and decentralized nature of enforcement reflected a policy against having a formal policy. *Id.* at *8. Viewing the facts in that light, the court in *Blaney* made no finding regarding the lawfulness of the policy; instead, the court found that there was no *common* policy at all. *Id.* In comparison, Plaintiffs in the present case allege a policy in a single facility that applied evenly to the purported class of Plaintiffs. Given this contrast, along with the *Blaney* court's acknowledgment that, in that case, "[p]laintiffs have presented no evidence of any unwritten policy which discouraged full compensation for even interrupted breaks, nor have [p]laintiffs presented evidence of any requests for reversals of the auto-deduction that were denied[,]" *id.* at *9, we are not convinced that *Blaney* is applicable or persuasive here.

{16} The district court also relied on *Barron* to conclude that Plaintiffs did not allege an illegal common policy or plan. We observe, however, that in *Barron*, the court indicated that the Eleventh Circuit does not require proof of a common policy to establish that employees are similarly situated. 242 F. Supp. 2d at 1106. The court also treated the case as a pattern and practice claim and relied on evidence of a pattern of FLSA violations to conditionally certify a collective action, even in the absence of proof of a policy of knowingly and purposefully failing to pay overtime wages. *Id.* at 1105. Thus, *Barron* is inapposite and unconvincing for two reasons: first, Plaintiffs' case against Rehoboth is not based on a pattern and practice, but rather on allegations of a common policy or plan; and second, *Barron* does not bear on the issue at hand—whether Rehoboth's alleged policy is potentially unlawful.

{17} Next, the district court determined that Plaintiffs failed to present sufficient evidence to support their allegation that Rehoboth fostered an unlawful corporate atmosphere or culture of requiring employees to work without pay in order to improve Rehoboth's bottom line, and that Plaintiffs failed to present methodologies through which they hoped to demonstrate that missed and uncompensated meal breaks were a widespread problem. The district court, relying on *Armijo*, appears to have viewed these as requirements for collective action.

{18} *Armijo* had a different procedural posture from that of the present case. In *Armijo*, we recognized that although the case had been ongoing for six years and extensive discovery had been completed, there had in fact been no discovery on the merits. 2007-NMCA-120, ¶ 52. Consequently, we analyzed the case as occurring at the initial notice stage, reiterating that a plaintiff's burden is a low one. *Id.* ¶ 53. Nevertheless, in conducting the notice-stage analysis, we mentioned and considered evidence that had been produced during the six years of discovery—namely, methodologies for demonstrating a widespread corporate atmosphere and pattern and practice of forcing or coercing missed rest breaks and off-the-clock work in an attempt to minimize labor costs. *Id.* ¶¶ 52, 54. Our consideration of this evidence was not unusual. *See White v. Osmose, Inc.*, 204 F. Supp. 2d 1309, 1313 n.2 (M.D. Ala. 2002) (stating that where there had been extensive discovery, the court would "carefully consider the submissions of the parties with respect to the class allegations, rather than merely relying on the handful of affidavits [supporting the plaintiff's] position"). And although we considered that particular evidence in *Armijo* in determining whether the plaintiffs had met their notice-stage burden, we did not indicate that the absence of such evidence would be fatal to a plaintiff's attempt to conditionally certify a collective action under Section 50-4-26(D). We take this opportunity to reiterate that the only requirement at the initial notice stage is that a plaintiff make substantial allegations that similarly situated employees were the victims of a single decision, policy, or plan.

{19} Here, although acknowledging that this case is at the initial notice stage—and nominally applying the notice-stage standard—the district court actually applied a standard more closely resembling the more stringent second-stage standard. *See Thiessen*, 267 F.3d at 1103. That is, the district court looked at Plaintiffs' methods of proof, or lack thereof, in deciding whether to conditionally certify a collective action. This constitutes an abuse of discretion on the

part of the district court, which should have determined simply whether Plaintiffs made substantial allegations that similarly situated employees were the victims of a single decision, policy, or plan. Further, to the extent that the district court relied on the inapposite and unpersuasive reasoning in *Blaney* and *Barron* to find that Plaintiffs failed to allege that they were victims of a single decision, policy, or plan, we conclude that the district court abused its discretion by misapprehending the law. *See Harrison v. Bd. of Regents of Univ. of N.M.*, 2013-NMCA-105, ¶ 14, 311 P.3d 1236 ("[E]ven when we review for an abuse of discretion, our review of the application of the law to the facts is conducted de novo. Accordingly, we may characterize as an abuse of discretion a discretionary decision that is premised on a misapprehension of the law." (internal quotation marks and citations omitted)).

{20} We conclude that Plaintiffs' allegations, supported by affidavits, that the putative class was sometimes required to work through meal breaks, but not compensated for such work, and that such potential violations of the MWA stemmed from a single policy or plan to not only schedule workers in such a way that missing meal periods was sometimes unavoidable, but also to discourage employees from using the "no lunch" button that would have resulted in full compensation for time worked, satisfy the minimal standards associated with the notice stage. *See Brown v. Money Tree Mortg., Inc.*, 222 F.R.D. 676, 679 (D. Kan. 2004) ("The standard for certification at this notice stage, then, is a lenient one that typically results in class certification."). We therefore reverse the district court's denial of conditional class certification under the MWA.

Class Certification for Plaintiffs' Unjust Enrichment Claim

{21} Plaintiffs also moved for class certification under Rule 1-023 NMRA for their unjust enrichment claim. The district court denied the motion. We review the district court's order denying class certification for an abuse of discretion. *See Brooks v. Norwest Corp.*, 2004-NMCA-134, ¶ 7, 136 N.M. 599, 103 P.3d 39 ("Within the confines of Rule 1-023, the district court has broad discretion whether or not to certify a class."). "If the district court has applied the correct law, we will uphold its decision if it is supported by substantial evidence." *Berry v. Fed. Kemper Life Assurance Co.*, 2004-NMCA-116, ¶ 25, 136 N.M. 454, 99 P.3d 1166.

{22} In determining whether class certification is appropriate, a district court must engage in a "rigorous analysis" to decide whether the requirements of Rule 1-023 are met. *Brooks*, 2004-NMCA-134, ¶ 9. At this stage, "it is essential for the court to understand the substantive law, proof elements of, and defenses to the asserted cause of action to properly assess whether the certification criteria are met." *Id.* ¶ 31; *see also Romero v. Philip Morris Inc.*, 2005-NMCA-035, ¶ 38, 137 N.M. 229, 109 P.3d 768 ("The district court's rigorous analysis often involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." (internal quotation marks and citation omitted)). However, even though the party seeking class certification has the burden of demonstrating that each requirement of Rule 1-023 is met, "a district court should avoid examining the merits of the moving party's case at the time class certification is sought." *Armijo*, 2007-NMCA-120, ¶ 21. *But see Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011) ("Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped.").[2]

{23} "Class certification is appropriate under Rule 1-023 when all four prerequisites of Rule 1-023(A) and at least one of the requirements of Rule 1-023(B) are met." *Armijo*, 2007-NMCA-120, ¶ 25 (internal quotation marks and citation omitted). "Failure to establish any one requirement is a sufficient basis for the district court to deny certification." *Id.* (internal quotation marks and citation omitted). Here, the district court found that Plaintiffs failed to establish two requirements: (1) the prerequisite that there be questions of law or fact common to the class, Rule 1-023(A)(2), usually referred to as "commonality," *see Berry*, 2004-NMCA-116, ¶ 42; and (2) the requirement that the questions of fact or law common to members of the class predominate over any questions affecting only individual members, Rule 1-023(B)(3), commonly referred to as "predominance," *see Berry*, 2004-NMCA-116, ¶ 48.

{24} In light of the two infirmities identified by the district court, we are essentially dealing with two overlapping requirements for class certification. *See id.* ¶ 42 (explaining that "the commonality requirement is usually subsumed by the predominance requirement"). That is, commonality asks whether there are issues common to the class and predominance asks whether these common questions predominate over individual issues.

{25} Turning first to commonality, the United States Supreme Court has emphasized that commonality requires that the class members' claims "depend upon a common contention" such that "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 564 U.S. at 350. In order to determine whether Plaintiffs' claim here depends upon a common contention, we look at the elements of the claim. *Brooks*, 2004-NMCA-134, ¶ 31. The elements of unjust enrichment are: "(1) another has been knowingly benefitted at one's expense (2) in a manner such that allowance of the other to retain the benefit would be unjust." *Ontiveros Insulation Co. v. Sanchez*, 2000-NMCA-051, ¶ 11, 129 N.M. 200, 3 P.3d 695. To put the claim simply, Plaintiffs are alleging that Rehoboth benefitted from the purported class members' uncompensated work and that it would be unjust under the circumstances for Rehoboth to retain the benefit of the free labor.

{26} At the outset, we observe that if Rehoboth's employees followed the handbook and policy on meal breaks, they should not have, in the usual course, worked through their meal breaks. In fact, use of the "no lunch" button or the other methods by which an employee can ensure payment would only be necessary in the event that an employee works through his or her meal break. Thus, according to Plaintiffs, an instance in which an employee works through a meal break, and is not compensated for doing so, raises the following questions. Can Rehoboth, as a matter of law, defend its failure to pay for the meal breaks by the mere presence of the "no lunch" button? Were the employees subject to a culture or mindset that discouraged them from utilizing the "no lunch" button? And were Rehoboth's staffing levels such that employees could not take their meal break?

{27} The answers to these questions, according to Plaintiffs, constitute common contentions that will resolve issues central to Plaintiffs' unjust enrichment claim. In other words, Plaintiffs' argument is that Rehoboth benefitted from the employees' uncompensated work and that it would be unjust to allow Rehoboth to retain that benefit where the free work resulted from Rehoboth's staffing issues and concomitant discouragement of employees from using the "no lunch" option.

[2]Rule 1-023 is identical to its federal counterpart. *Brooks*, 2004-NMCA-134, ¶ 8. "Hence, we can look to the federal law for guidance in determining the appropriate legal standards to apply to the Rule." *Id.*

The district court disagreed, determining that these answers would not resolve the unjust enrichment claim in one stroke. *See Dukes*, 564 U.S. at 350.

{28} Normally, we would review whether the district court erred in its commonality determination. However, the district court, in an abundance of caution, went on to analyze whether common issues predominate for purposes of Rule 1-023(B)(3). As we noted above, the commonality requirement is usually subsumed by the predominance requirement. *See Berry*, 2004-NMCA-116, ¶ 42. And for the reasons that follow, even if we assume that there are common issues that satisfy the commonality requirement, we conclude that the district court did not err in finding that Plaintiffs did not establish predominance.

{29} "The end goal of the predominance inquiry is to determine whether a proposed class is sufficiently cohesive to warrant adjudication by representation." *Id.* ¶ 47 (internal quotation marks and citation omitted). Generally, "predominance may be found when the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, predominate over those issues that are subject only to individualized proof." *Id.* ¶ 48 (omission, internal quotation marks, and citation omitted). As a result, "the predominance requirement brings into primary focus the plaintiffs' proposed methods of proof at trial of the elements of their claims." *Armijo*, 2007-NMCA-120, ¶ 32 (internal quotation marks and citation omitted).

{30} The questions for the district court, then, were whether Plaintiffs' common allegations that the employees worked through their meal breaks because Rehoboth's staffing levels required them to and that the employees did not seek compensation for such work because of a culture that discouraged the use of the "no lunch" button were not only susceptible to common proof, but also whether those issues predominated over issues subject to individualized proof. *See Berry*, 2004-NMCA-116, ¶ 49 (observing that the predominance inquiry should focus on the relationship between common and individual issues). The district court resolved the second question in the negative, stating that "issues requiring individualized proof predominate . . . Plaintiff[s'] claims." The district court reached this conclusion based on Plaintiffs' failure to present a methodology by which they intended to prove their allegations on a classwide basis and on the individualized defenses available to Rehoboth. *See id.* ¶ 50 ("The focus for the district court is whether the proof at trial will be predominantly common to the class or primarily individualized.").

{31} We can see no abuse of discretion on the part of the district court in this regard. Specifically, even if we were to assume that the culture issue is susceptible to common proof, through testimony that supervisors discouraged employees from using the "no lunch" button, we are not convinced that the understaffing question can be answered by common proof. That is, proving classwide liability on that point presents particular problems where the putative class encompasses a variety of positions and shifts and where each instance of understaffing may depend on, as Rehoboth argues, the number of patients and the amount of staff on duty on any given shift. While we are not certain that these issues can never be established by common proof, the district court found that Plaintiffs here failed to offer *any* methodology by which they intend to prove, by common evidence, that Rehoboth's understaffing resulted in unjust enrichment.

{32} Our review of Plaintiffs' briefing, both in the district court and in this Court, bears this out. Plaintiffs address their proposed methods of proof in two ways. First, Plaintiffs cite *Romero*, stating somewhat matter-of-factly that "[t]he questions common to the class are, as in *Romero*, subject to common proof." However, Plaintiffs do not in any way describe *how* the common questions particular to this case will be proven, or indeed how Plaintiffs' nondescript proposed methods of proof compare with those in *Romero*. We note that in *Romero*, the plaintiffs met their predominance burden by showing widespread antitrust injury to the class through presentation of various methodologies, including correlation analysis via an economic expert. 2005-NMCA-035, ¶¶ 90-91. In this sense, Plaintiffs' citation to *Romero* actually serves to underscore the lack of methodology proposed here. Second, Plaintiffs refer to representative testimony, citing *Tyson Foods, Inc. v. Bouaphakeo*, ___ U.S. ___, 136 S. Ct. 1036 (2016), as supplemental authority. We note that the United States Supreme Court stated in *Tyson Foods* that "[w]hether a representative sample may be used to establish classwide liability will depend on the purpose for which the sample is being introduced and on the underlying cause of action[,]" and concluded that

"[t]he fairness and utility of statistical methods in contexts other than those presented here will depend on facts and circumstances particular to those cases." *Id.* at 1049. Aside from a relatively bare bones presentation regarding representative testimony, Plaintiffs have not provided us with the facts and circumstances that would justify the use of representative testimony here. In fact, Plaintiffs have not put forth what form their purported representative testimony would take or how it would be used to establish classwide liability. This Court has no duty to review an argument that is not adequately developed. *Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076 (declining to entertain a cursory argument that included no explanation of the party's argument and no facts that would allow this Court to evaluate the claim). "To rule on an inadequately briefed issue, [the appellate courts] would have to develop the arguments itself, effectively performing the parties' work for them." *Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 70, 309 P.3d 53. "This creates a strain on judicial resources and a substantial risk of error. It is of no benefit either to the parties or to future litigants for [the appellate courts] to promulgate case law based on our own speculation rather than the parties' carefully considered arguments." *Id.*

{33} We conclude that sufficient evidence supports the district court's finding that Plaintiffs have failed to produce any methodology by which they intend to establish classwide liability—in particular, that staffing issues caused each purported class member to work through meal breaks uncompensated—whether through representative testimony, statistical evidence, expert testimony, or otherwise. We therefore cannot fault the district court for concluding that Plaintiffs did not meet their burden to demonstrate that common issues predominate over individual ones. Consequently, we are satisfied that the district court did not abuse its discretion by denying class certification.

CONCLUSION

{34} For the reasons stated above, we reverse the district court's denial of conditional certification for Plaintiffs' collective action under the MWA, and we affirm the district court's denial of class certification for Plaintiffs' unjust enrichment claim.

{35} IT IS SO ORDERED.

DANIEL J. GALLEGOS, Judge

WE CONCUR:

STEPHEN G. FRENCH, Judge

EMIL J. KIEHNE, Judge

Classified

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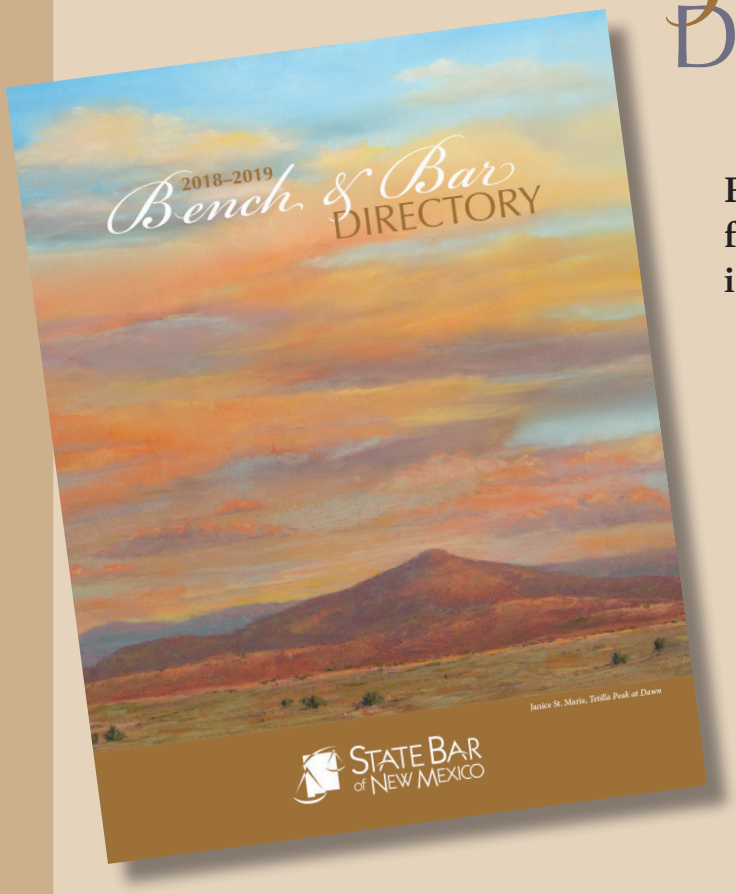

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