Official Publication of the State Bar of New Mexico

Bar Bulletin

December 12, 2018 • Volume 57, No. 50

Submergence Violet Cross, by Angela Berkson (see page 3)

EXHIBIT/208

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NEW MEXICO Lawyer

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Tax Law

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Dec. 18 **Live/Webcast: 2018 Mock Meeting of the Ethics Advisory Committee** 2.0 EP
Dec. 18 **Live/Webcast: Pretrial Practice in Federal Court** 2.5 G, 0.5 EP
Dec. 19 **Live/Webcast: Ethics Puzzles: The Wrongful Death Act, Negligent Settlements and the Search for Silver Bullets** 3.0 EP
Dec. 19 **Live/Webcast: Recent Developments in Civil Procedure** 2.0 G
Dec. 21 **Teleseminar: Ethics, Satisfied Clients & Successful Representations** 1.0 EP

Bundle O— Save $128

Dec. 17 **Live/Webcast: Practice Management Skills for Success** 5.0 G, 1.0 EP
Dec. 18 **Live/Webcast: 2018 Mock Meeting of the Ethics Advisory Committee** 2.0 EP
Dec. 18 **Live/Webcast: Pretrial Practice in Federal Court** 2.5 G, 0.5 EP
Dec. 21 **Webinar: Bad Review? Bad Response? Bad Idea!: Ethically Managing your Online Reputation** 1.0 EP

Bundle P—Save $119

Dec. 20 **Live/Webcast: Gain the Edge! Negotiation Strategies for Lawyers** 5.0 G, 1.0 EP
Dec. 21 **Live/Webcast: Recent Developments in New Mexico Natural Resource Law** 5.2 G, 1.0 EP

Bundle Q—Save $158

Dec. 26 **Live/Webcast: What Drug Dealers and Celebrities Teach Lawyers about Professional Responsibility** 3.0 EP
Dec. 26 **Live/Webcast: The Fear Factor—How Good Lawyers Get into Bad Ethical Trouble** 3.0 EP
Dec. 27 **Live/Webcast: Find it Fast and Free (and Ethically with Google, Fastcase 7, and Social Media Sites** 4.0 G, 2.0 EP

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The *Bar Bulletin* (ISSN 1062-6611) is published weekly by the State Bar of New Mexico, 5121 Masthead NE, Albuquerque, NM 87109-4367. Periodicals postage paid at Albuquerque, NM. Postmaster: Send address changes to *Bar Bulletin*, PO Box 92860, Albuquerque, NM 87199-2860.

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

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Meetings

December

13
Business Law Section Board
4 p.m., teleconference

13
Public Law Section Board
Noon, Legislative Finance Committee, Santa Fe

14
Prosecutors Law Section Board
Noon, State Bar Center

14
LSAP Committee
10:30 a.m., State Bar Center

14
New Mexico Supreme Court ATJ Commission
Noon, State Bar Center

15
Young Lawyers Division
10 a.m., State Bar Center

Workshops and Legal Clinics

December

19
Family Law Clinic
10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

January

2
Civil Legal Clinic
10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

4
Civil Legal Clinic
10 a.m.–1 p.m., First Judicial District Court, Santa Fe, 1-877-266-9861

11
Civil Legal Clinic
10 a.m.–1 p.m., Bernalillo County Metropolitan Court, Albuquerque, 505-841-9817

About Cover Image and Artist: Angela Berkson is an Albuquerque based artist who works in acrylic medum and encastic (beeswax-based) medium to create a variety of abstract colorful panting. Berkson studied art in Los Angeles, New York and Texas, but returned to her hometown of Albuquerque to pursue her professional art practice. She also works part-time a s a legal assistant. Berkson's work is represented in Albuquerque by EXHIBIT/208. More of her work can be viewed at www.angelaberkson.com.

Notices

Court News

New Mexico Supreme Court

New Mexico Supreme Court Retirement Reception

Join the New Mexico Supreme Court reception in honor of the outstanding judicial careers of
The Hon. Petra Jimenez Maes
The Hon. Charles W. Daniels
The Hon. Gary L. Clingman
Beginning at 4-6 p.m. on Dec. 20, at the Supreme Court Law Library, 237 Don Gaspar Avenue, Santa Fe, join the New Mexico Supreme Court in extending well wishes and appreciation to all three judges upon their impending retirements from the New Mexico State Judiciary.

New Mexico Commission on Access to Justice Meeting

The next meeting of the Commission is from noon-4 p.m., on Dec. 14, 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. We will be engaged in a strategic planning process at this meeting and would like to strongly encourage interested members of the public and bar to attend. More information about the Commission is available at accesstojustice.nmcourts.gov.

Notice of Revised Alimony Guideline Worksheet

The Supreme Court has approved the recommendation of the Domestic Relations Rules Committee and its Statewide Alimony Guidelines Subcommittee to revise the Alimony Guideline Worksheet for use beginning Jan. 1, 2019, in light of upcoming changes to the federal tax law treatment of alimony payments under the Tax Cut and Jobs Act of 2017. The Court's Order, revised Alimony Guideline Worksheet, and report of the Statewide Alimony Guidelines Subcommittee are available on the Court's website at https://nmcourts. gov/.

New Mexico Court of Appeals

Announcement of Vacancy

Due to the Nov. 6 elections, one vacancy on the New Mexico Court of Appeals Court will exist as of Jan. 1, 2019, to fill the seat of Judge Michael E. Vigil. Inquiries regarding the details or assignment of this judicial vacancy should be directed to the administrator of the court. Sergio Pareja, chair of the Appellate Court Judicial Nominating Commission, invites applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 28 of the New Mexico Constitution. Applications may be obtained from the Judicial Selection website, http://lawschool.unm.edu/judsel/application.php, or emailed to you by contacting the judicial selection office at 505-277-4700. The deadline for applications has been set for Dec. 18, at 5 p.m. Applications received after that time will not be considered.Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the Office of the Secretary of State. The Appellate Court Judicial Nominating Commission will meet on Jan. 11, 2019, to interview applicants for the position at the Supreme Court Building, 237 Don Gaspar Avenue in Santa Fe. The Commission meeting is open to the public and anyone who wishes to be heard about any of the candidates will have an opportunity to be heard.

First Judicial District Court

Notices of Mass Reassignment

Effective Dec. 17, a mass reassignment of all Division IX family court cases previously assigned to Judge Matthew J. Wilson will occur pursuant to NMSC Rule 23-109, the chief judge rule. The cases will be reassigned to the Hon. Maria Sanchez-Gagne, who has been elected to Division II of the First Judicial District, and who will maintain a family court docket. Parties who have not previously exercised their right to challenge or excuse will have 10 days from Dec. 17 to challenge or excuse Judge Maria Sanchez-Gagne pursuant to Rule 1-088.1.

Effective Dec. 17, a mass reassignment of all Division II cases previously assigned to Judge Gregory S. Shaffer will occur pursuant to NMSC Rule 23-109, the chief judge rule. The cases will be reassigned to the Hon. Matthew J. Wilson who will now maintain a Civil Docket in Division IX of the First Judicial District. Parties who have not previously exercised their right to challenge or excuse will have ten days from Dec. 17 to challenge or excuse Judge Matthew J. Wilson pursuant to Rule 1-088.1.

Notice to Family Law Attorneys

The First Judicial District Court will hold open-court sessions to review and approve marital settlement agreements and to enter final decrees during the month of December due to the request by parties and attorneys to finalize pending divorce actions before Jan. 1, 2019. Judge LaMar and Judge Sanchez-Gagne's courts will be open from 8:30-9:30 a.m. to review documents on the following dates: Dec. 20, 21, 24, 26, 27, 28 and 31, 2018. If there is a snow delay, the court will be available from 10:30-11:30 a.m. on the same dates.

Second Judicial District Court

Announcement of Civil Vacancy

The Second Judicial District Court announces the retirement of the Hon. Judge Nan Nash effective, Jan. 1, 2019. This judicial vacancy will be for Division XVII (civil), inquires regarding specific details for the judicial vacancy should be direct to the Chief Judge or the administrator of the court. Dean Sergio Pareja of the UNM School of Law, designated by the New Mexico Constitution to chair the District Court Nominating Committee, solicits applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 14 of the New Mexico Constitution. Applications, as well as information related to qualifications for the position, may be obtained from the Judicial Selection website: http://lawschool.unm.edu/judsel/application.php, or by email by contacting Beverly Akin at 505 -277-4700. The deadline for applications has been set for Jan. 7, 2019, at 5 p.m. Applications received after that date will not be considered. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the Office of the Secretary of State. The Judicial Nominating Committee will meet at 9 a.m. on Jan. 24, 2019, at the Second Judicial District Court

Professionalism Tip

With respect to parties, lawyers, jurors, and witnesses:

I will not employ hostile, demeaning or humiliating words in opinions or in written or oral communications.

located at 400 Lomas Blvd NW, Room 338, Albuquerque, to evaluate the applicants for this position. The committee meeting is open to the public and members of the public who wish to be heard about any of the candidates will have an opportunity to be heard.

Announcement of Criminal Vacancy

Due to the Nov. 6 elections, one vacancy on the Second Judicial District Court will exist as of Jan. 1, 2019, to fill the seats of Judge Briana Zamora; this judicial vacancy will be for the Division VI (criminal). Inquiries regarding specific details for this judicial vacancy should be directed to the Chief Judge or the Administrator of the court. Dean Sergio Pareja of the UNM School of Law, designated by the New Mexico Constitution to chair the District Court Nominating Committee, solicits applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 14 of the New Mexico Constitution. Applications, as well as information related to qualifications for the position, may be obtained from the Judicial Selection website: http://lawschool.unm.edu/judsel/application.php, or by email by contacting Beverly Akin at 505- 277-4700. The deadline for applications has been set for Jan. 8, 2019 at 5 p.m. Applications received after that date will not be considered. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the Office of the Secretary of State. The Judicial Nominating Committee will meet at 9 a.m. on Jan. 25, 2019, at the Second Judicial District Court located at 400 Lomas Blvd NW, Room 338, Albuquerque, to evaluate the applicants for this position. The committee meeting is open to the public and members of the public who wish to be heard about any of the candidates will have an opportunity to be heard.

Notice to Attorneys

Pursuant to the Constitution of the State of N.M., Judge Benjamin Chavez, Division XIX, will be transferring from the Criminal Court to the Civil Court. Effective Jan. 2, 2019, Judge Chavez will be assigned cases previously assigned to Judge Alan Malott, Division XV. Pursuant to Supreme Court Rule 1-088.1 parties who have not yet exercised a peremptory excusal will have 10 days from Dec. 26, to excuse Judge Benjamin Chavez.

Retirement Reception for Chief Judge Nan G. Nash

Join the Second Judicial District Court at 2-4 p.m., on Dec. 21, for a retirement reception honoring Chief Judge Nan G. Nash at the Bernalillo County Court, 400 Lomas Blvd. NW. For more information contact Kevin Ybarra at 505-841-7425.

Third Judicial District Court

Mass Reassignment

Effective Dec. 28, a mass reassignment of all Division VIII cases previously assigned to Judge Jeanne H. Quintero will occur pursuant to NMSC Rule 23-109 Judge Grace B. Duran has been elected to fill the vacancy in Division VIII. Parties who have not previously exercised their right to challenge or excuse will have ten days from Dec.28, to challenge or excuse Judge Grace Duran pursuant to Rule 1-088.1.

Destruction of Exhibits

Pursuant to 1.21 .2.617 NMAC (New Mexico Administrative Code), the Third Judicial District Court will destroy exhibits filed with the Court in civil, domestic, criminal, and probate cases for the years of 1980-2017, including but not limited to cases which have been consolidated. cases on appeal are excluded. Parties are advised that exhibits may be retrieved beginning Nov. 26-Dec. 31. Should you have cases with exhibits, verify exhibit information with the Clerk's Office at 523-8200 from 8 a.m.-4 p.m., Mon.-Fri. Plaintiff/Petitioner's exhibits will be released to counsel for the plaintiff(s)/petitioner(s) and defendant/respondent's exhibits will be released to counsel ofrecord for defendants(s)/respondent(s). All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed.

CLE Lecture

The Third Judicial District Court has been approved by the State Bar MCLE to be a provider of Continuing Legal Education Courses. The Third Judicial District Court is hosting its first one-hour CLE on Dec. 13. This seminar is scheduled from 11:45 a.m.-1:15 p.m. Guest lecturer will be William D. Slease, Chief Disciplinary Counsel, who will speak for one hour on Legal Ethics. The cost is $5.00 which will pay for lunch and the filing of CLE credit with the State Bar for 1.0 EP credit. Payment of $5.00 can be placed in a basket when signing in for the seminar. The Third Judicial District Court will take care of filing credit with the State Bar MCLE immediately following the seminar. The CLE lecture will be held in the Multipurpose Room in the Doña Ana County Courthouse, 201 West Picacho Avenue, Las Cruces. Due to space limitation lecture will only take up 70 participants. R.S.V.P. to Ana Reyes, TCAA to Judge Mary W. Rosner at 575-523-8235, no later than noon Dec. 11.

Tenth Judicial District Court

Destruction of Exhibits

Exhibits in criminal cases for years 2005-2015 may be retrieved on Jan. 25, 2019. For more information contact Tenth Judicial District Court of County of Quay at 575-461-2764.

Bernalillo County Metropolitan Court

Announcement of Vacancy

Due to the Nov. 6 elections, two vacancies on the Bernalillo County Metropolitan Court will exist as of Jan. 1, 2019, to fill the seats of Judge Kenny Montoya and Judge Edward Benavidez. Inquiries regarding the details or assignment of these judicial vacancies should be directed to the administrator of the court. Sergio Pareja, chair of the Bernalillo County Metropolitan Court Judicial Nominating Commission, invites applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 28 of the New Mexico Constitution. Applications may be obtained from the Judicial Selection website: http://lawschool.unm.edu/judsel/application.php, or emailed to you by contacting the Judicial Selection Office at 505-277-4700. The deadline for applications has been set for Dec. 13, by 5 p.m. Applications received after that time will not be considered. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the Office of the Secretary of State.The Bernalillo County Metropolitan Court Nominating Commission will meet beginning at 9 a.m. on Jan. 18, 2019, to interview applicants for the positions at the Metropolitan Courthouse, located at 401 Lomas NE, Albuquerque, New Mexico. The Commission meeting is open to the public, and anyone who wishes to be heard about any of the candidates will have an opportunity to be heard.

Court Closure Notice

The Bernalillo County Metropolitan Court will be closing its doors briefly from 11 a.m.-1:30 p.m. on Dec. 14, for the Court's annual holiday lunch. The outdoor bonding window will remain open for the posting of bonds and to accept any urgent filings.

Retirement Reception for Hon. Sharon D. Walton

Join the Bernalillo County Metropolitan Court on Dec. 18, at 3 p.m. for a retirement reception honoring Judge Sharon D. Walton. The reception will take place in Bernalillo County Metropolitan Court's second floor Jury Assembly Room.

U.S. Courts Library

Library Holiday Open House

The U.S. Courts Library will host a holiday open house on Dec. 13. U.S. Court Library encourages all State and Federal Bar members to stop by between 10 a.m.-5 p.m. to meet the staff, enjoy some cookies and punch, peruse newly relocated and renovated collection and discover how the U.S.Court Library can become part of members legal research team. Members will find the U.S. Court Library on the third floor of the Pete V. Domenici U.S. Courthouse at the northeast corner of Fourth St. and Lomas Blvd. in downtown Albuquerque. The U.S. Court Library usual hours of operation are 8 a.m.-noon, and 1-5 p.m., Mon-Fri. For more information call 505-348-2135.

State Bar News

Board of Bar Commissioners

2018 Election Results

The 2018 election for the Board of Bar Commissioners in the First Bar Commissioner District (Bernalillo County) was held on November 30. The results are as follows: Hon. Kevin L. Fitzwater (ret.), Clara Moran and Benjamin I. Sherman were re-elected for three-year terms. Joseph F. Sawyer was re-elected by acclamation for a three-year term in the Second Bar Commissioner District (Cibola, McKinley, San Juan and Valencia counties), and Constance G. Tatham was re-elected by acclamation for a three-year term in the Third Bar Commissioner District (Los Alamos, Rio Arriba, Sandoval and Santa Fe counties). No nomination petitions were received for the Sixth Bar Commissioner District (Chaves, Eddy, Lea, Lincoln and Otero counties), so an e-blast will be sent out to members in that district, and the Board will make the appointment at its Dec. 13 meeting.

Meeting Agenda

The next meeting of the Board of Bar Commissioners will be held on Dec. 13 at the N.M. Supreme Court in Santa Fe. For a copy of the agenda, visit www.nmbar.org/nmbardocs/aboutus/governance/meetings/BBCAgenda-1218.pdf. For more information, contact Kris Becker at 505-797-6038 or kbecker@nmbar.org.

Cannabis Law Section

Board of Directors Meeting Open to Membership

On Aug. 9, the Board of Bar Commissioners approved a membership petition to form a State Bar of New Mexico Cannabis Law Section. The Section's Board of Directors will meet from 9-10 a.m., Dec. 20, at the State Bar Center and the general State Bar membership is invited to attend, share ideas and enroll in the Section. Please R.S.V.P. to Breanna Henley bhenley@nmbar.org. Visit www.nmbar.org/sections to join the Section.

Center for Legal Education

Business of Law Practice Management Survey

The State Bar and the State Bar Foundation's Center for Legal Education are planning a seminar for the fall of 2019 that will address the business needs of its members engaged in a small firm or solo practice. To help us determine what issues are most important, we have developed a survey geared at members currently practicing in a small firm or solo setting, or thinking about transitioning into a small firm or solo practice. The survey will be open until Dec. 14. Visit https://www.surveymonkey.com/r/9R78PJH to take the survey.

Minimum Continuing Legal Education

Compliance Deadline Approaching

Dec. 31 is the last day to complete 2018 Minimum Continuing Legal Education requirements. Jan. 31, 2019, is the last day to submit 2018 credits without penalty. For a list of upcoming MCLE approved courses, visit www.nmbar.org/MCLE. Contact MCLE with questions at 505-821-1980 or mcle@nmbar.org.

New Mexico Judges and Lawyers Assistance Program

Attorney Support Groups

- Dec 17. 19, 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#.
- Jan. 7, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (The group normally meets the first Monday of the month.)
- Dec. 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#.

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

Trial Practice Section

Mixer Open to State Bar Members

The Trial Practice Section of the State Bar invites members to celebrate the holiday season with the section on, Dec. 14, at The Hotel Parq Central's Apothecary Lounge, 806 Central Avenue Drive, Albuquerque. Join for hor d'oeuvres and a cash bar. The Trial Practice Section would like to get to know members and to help build a supportive legal community. R.S.V.P. to bhenley@nmbar.org.

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

Notices continued on page 9

A letter from State Bar President Wesley Pool

Dear Members:

The Board of Bar Commissioners recently approved the 2019 Budgets for the State Bar of New Mexico and the New Mexico State Bar Foundation. During this process, we began some much needed strategic planning for our future. We are committed to serving members by providing law practice management tools, improved electronic resources, and the efficient and timely dissemination of information. I would like to give you an update on some of the changes and initiatives that came from this process.

Improving Online Experiences

One of our main priorities is to improve our electronic resources and the experience for our members. We know that the practice of law has changed. An attorney's office is no longer just at his or her workplace. Today's attorneys need to be able to access data and resources anywhere they practice law. As a result, we are allocating significant resources to researching and developing electronic options for our members. We hope that as a part of a multi-year project we'll be able to present a new website, database, and updated access for members' mobile devices. The database and website projects are necessary to improve the way that each of you can find resources on our website, register for CLE courses, complete necessary licensing requirements and report and track your MCLE compliance. Additionally, we are working on improved ways to communicate with you by email and social media. We will keep you updated about this project as it develops.

Online Calendar, Notices, and *Bar Bulletin* Resources

I am excited to announce some new resources that will allow you to access information printed in the *Bar Bulletin* in a more efficient and timely manner. Though the State Bar staff works very hard to produce and print each *Bar Bulletin* efficiently, there is still a two-week delay from the time we begin production on each issue to the time it gets into your hands.

First, we have a brand new online events calendar. It includes meetings, events, CLE courses, and legal fairs from the State Bar, our courts, and other legal organizations and groups. The calendar is easy to use and customized to the view that works best for you. It also allows you to download events to your Google, Outlook, or Apple calendar. Visit **www.nmbar.org/eventscalendar** to view the calendar.

Second, we implemented an online archive of notices including important deadlines and announcements from the New Mexico legal community. Information on these pages will include State Bar election information, judicial vacancies, calls for nominations for awards, exhibit destruction notices, and more. We have also begun archiving court documents that are printed in the *Bar Bulletin* online (Clerk's Certificates, Recent Rule-Making Activity Report, Opinions from the New Mexico Supreme Court and Court of Appeals, etc.). Archived court documents plus online events, notices and deadlines will allow you to get more of the information you need more quickly. You can find this new resource at **www.nmbar.org/deadlines**.

Third, we now subscribe to a digital publishing platform called Issuu which allows for an improved electronic *Bar Bulletin* reading experience. The presentation is modern and easy to use and the program comes with an app so that you can read it on your phone and get a push notification when we publish a new issue. You can access this new feature and read the most recent issue of the *Bar Bulletin* (and find archived issues) at **www.nmbar.org/barbulletin.** Flip to the next page for details regarding all of these resources.

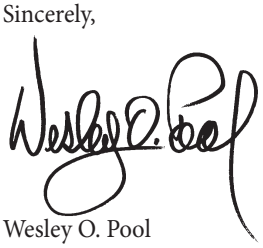
Bar Bulletin

As some of you may know, we print the *Bar Bulletin* each week at the State Bar Center. We've made the decision to downsize our printing center in an effort to focus on providing greater resources to members and achieve a cost savings. As a result of this, the frequency of the *Bar Bulletin* will change in 2019 to every other week. As our printing center changes so will our delivery. Starting in November 2019, and continuing into 2020 and the future, the *Bar Bulletin* will be published electronically. We expect the general content and structure of the *Bar Bulletin* to stay consistent.

While I understand that these changes are significant and may be a concern to many of you, I hope you will be assured by the level of consideration and discussion that was involved in the decision as well as the research we did in preparation. Our first priority is to provide the smoothest transition possible. Many of the resources I just mentioned and others that the staff is working on will help ease the transition. The State Bar staff and the Board of Bar Commissioners will be monitoring the transition thoughtfully, and we will do our best to respond to concerns and make adjustments when necessary.

I am optimistic for these changes and I have every confidence in the staff of the State Bar to implement them. As always, I encourage you to reach out to the staff, myself, or your local Bar Commissioner with concerns or questions.

Sincerely,



Wesley O. Pool
President, State Bar of New Mexico

Online Events Calendar

- Events from the State Bar, courts, local and voluntary bars, UNM, ect.
- Choose from multiple calendar viewing options
- Search by categories: CLE, Events, Meetings, Deadlines, etc.
- Download to your Google, Apple or Outlook calendar

www.nmbar.org/eventscalendar
www.nmbar.org > News and Events > Events Calendar

Announcements and Deadlines

- Announcements and deadlines from the State bar, courts, local/voluntary bars, UNM and more
- Exhibit destruction notices, judicial vacancies, election notices, board vacancies, award nominations and more
- Updated weekly

www.nmbar.org/deadlines
News and Events > Announcements and Deadlines

Check out what's new!

Digital Publishing Platform

- View the *Bar Bulletin* with a modern and eye catching display
- View on your computer or mobile device
- Get push notifications when we post a new issue

www.nmbar.org/barbulletin
News and Events > *Bar Bulletin* > Read

*You can choose to read the *Bar Bulletin* with the digital publishing platform Issuu or with a standard PDF.

Archived Court Documents

- New Mexico Supreme Court opinions
- New Mexico Court of Appeals opinions
- Recent Clerk's Certificates
- Recent Rule-Making Activity Reports
- and more
- Updated weekly

www.nmbar.org/courtdocuments
News and Events > *Bar Bulletin* > Court Documents

Online Classified Ads and Career Center

We are now posting all of the classified ads in the *Bar Bulletin* online at no extra cost. The webpage is updated weekly so you can place/view ads online more quickly than in the *Bar Bulletin*.

www.nmbar.org/classifieds
About Us > Career Center

STATE BAR of NEW MEXICO

Visit nmbar.org/barbulletin for a production schedule, deadlines and more resources.

Justice Mary Walters 2019 Honoree Nomination

Each year, the Women's Law Caucus chooses an outstanding woman in the New Mexico legal community to honor in the name of former Justice Mary Walters, the first woman appointed to the New Mexico Supreme Court. The Women's Law Caucus will be accepting nominations until Dec. 15. The nomination form can be found at https://drive.google.com/file/d/19kiBUImYt9AGnjJAHgFBw0gPtQaNKVo/view?usp=sharing. Email the form to the Law Caucus at: UNMWomensLawCaucus@Gmail.com.

Other Bars

Alaska Bar Association

CLE by the Sea in Honolulu, Hawaii

Join Alaska Bar Association members along with 16 other bar association members as they attend continuing legal education programs, network at optional excursions, and enjoy the warm weather at a beautiful location. The 2019 CLE by the Sea is scheduled for Feb. 10-15, 2019, at the Prince Waikiki – Honolulu Luxury Hotel. This program is accredited for 12 total CLE credits (4.0 G, 8.0 EP) by New Mexico Minimum Continuing Legal Education. For more information, call 907-272-7469 or email Mary DeSpain, CLE director at mary@alaskabar.org, or visit https://alaskabar.org/cle-mcle/cle-by-the-sea/.

New Mexico Criminal Defense Lawyers Association Upcoming CLE

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gguzman.uwc@gmail.com

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

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PO Box 2008 • Santa Fe, NM 87504-2008 • 505-827-4925

Effective November 30, 2018

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Certiorari Denied, October 26, 2018, No. S-1-SC-37287

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-071

No. A-1-CA-35762 (filed August 30, 2018)

MELINDA L. WOLINSKY,
Plaintiff-Appellant,
v.
NEW MEXICO CORRECTIONS DEPARTMENT,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
Francis J. Matthew, District Judge

DANIEL M. FABER
Albuquerque, New Mexico
for Appellant

ZACHARY R. CORMIER
SEAN OLIVAS
KELEHER & MCLEOD, P.A.
Albuquerque, New Mexico
for Appellee

Opinion

Stephen G.French, Judge

{1} This case requires this Court to resolve whether the Fair Pay for Women Act (the FPWA) provides state employees the same right to pursue sex-based wage discrimination claims that persons employed by private employers possess. We answer this question affirmatively, and therefore reverse the order of the district court dismissing Plaintiff's case.

BACKGROUND

{2} Melinda Wolinsky (Plaintiff) sued her employer, the New Mexico Corrections Department (Defendant), for sex-based pay discrimination in violation of the FPWA. She alleged that her salary was approximately $8,000 less than that of a male employee also employed as a "Lawyer-A" in Defendant's Office of General Counsel. Defendant moved to dismiss under Rule 1-012(B)(1) NMRA and Rule 1-012(B)(6) NMRA. Defendant first argued that the FPWA does not apply to Defendant because, in providing a cause of action against an employer, the FPWA does not define "employer" to include the state and its agencies. Defendant contrasted the language of the FPWA with that of other employment-related statutes, such as the New Mexico Human Rights Act (the NMHRA), wherein the definition of "employer" expressly includes the state. *See* NMSA 1978, § 28-1-2(A), (B) (2007). Second, Defendant argued that the "general grant of immunity" in the Tort Claims Act (the TCA) applies. *See* NMSA 1978, § 41-4-4(A) (2001) (stating that "[a] governmental entity and any public employee while acting within the scope of duty are granted immunity from liability for any tort" except as waived by the provisions of the TCA and other named statutes). The district court granted Defendant's motion to dismiss, concluding that Defendant is not subject to the FPWA.

DISCUSSION

A. Standard of Review

{3} Dismissals for lack of subject matter jurisdiction pursuant to Rule 1-012(B)(1) based on Defendant's claim of sovereign immunity and for failure to state a claim upon which relief can be granted pursuant to Rule 1-012(B)(6) are reviewed de novo. *Ping Lu v. Educ. Tr. Bd. of N.M.*, 2013-NMCA-010, ¶ 7, 293 P.3d 186; *Moriarty Mun. Schs. v. Pub. Schs. Ins. Auth.*, 2001-NMCA-096, ¶¶ 5, 17 131 N.M. 180, 34 P.3d 124. This appeal also involves interpretation of the FPWA. "Statutory interpretation is an issue of law, which we review de novo." *N.M. Indus. Energy Consumers v. N.M. Pub. Regulation Comm'n*, 2007-NMSC-053, ¶ 19, 142 N.M. 533, 168 P.3d 105. We address Defendant's argument that Plaintiff's claim is barred by sovereign immunity and then turn our attention to the FPWA itself.

B. Common Law Sovereign Immunity Has Been Abolished in New Mexico

{4} In *Hicks v. State*, the New Mexico Supreme Court abolished common law sovereign immunity for tort actions. 1975-NMSC-056, ¶ 9, 88 N.M. 588, 544 P.2d 1153 (stating that "[c]ommon law sovereign immunity may no longer be interposed as a defense by the [s]tate, or any of its political subdivisions, in tort actions"), *superseded by statute as stated in Upton v. Clovis Mun. Sch. Dist.*, 2006-NMSC-040, ¶ 8, 140 N.M. 205, 141 P.3d 1259; *see Hydro Conduit Corp. v. Kemble*, 1990-NMSC-061, ¶ 13, 110 N.M. 173, 793 P.2d 855 (recognizing the abolishment of the common law doctrine of sovereign immunity); *Lucero v. Richardson & Richardson, Inc.*, 2002-NMCA-013, ¶ 7, 131 N.M. 522, 39 P.3d 739 ("The legal landscape changed in 1975, however, when our Supreme Court abolished common law sovereign immunity[.]"). In *Hicks*, our Supreme Court concluded that, in the context of tort claims, sovereign immunity was "causing a great degree of injustice[,]" to such an extent that it rendered the doctrine unjustifiable. 1975-NMSC-056, ¶ 10.

{5} In response to *Hicks*, the Legislature enacted the TCA the following year. *See* NMSA 1978, §§ 41-4-1 to -27 (1976, as amended through 2015); *Smith v. Vill. of Corrales*, 1985-NMCA-121, ¶ 5, 103 N.M. 734, 713 P.2d 4 (describing the enactment of the TCA as a response to the decision in *Hicks*). The TCA expressly reinstated the state's sovereign immunity for tort claims, but then expressly waived immunity in several specifically enumerated circumstances. *See* §§ 41-4-5 to -12; *Smith*, 1985-NMCA-121, ¶ 5; *see also Upton*, 2006-NMSC-040, ¶ 8 ("The TCA grants all government entities and their employees general immunity from actions in tort, but waives that immunity in certain specified circumstances.").

{6} The same year that it enacted the TCA, the Legislature enacted another statute addressing the state's liability for contract claims. *See* NMSA 1978, § 37-1-23 (1976); *Hydro Conduit Corp.*, 1990-NMSC-061, ¶ 13. Section 37-1-23(A) grants immunity to the state in actions based on contract except for claims based upon a valid, written contract. *See Hydro Conduit Corp.*, 1990-NMSC-061, ¶ 17 (explaining that

the legislative history of the statute indicates that the purpose of enacting Section 37-1-23 "was to reinstate the sovereign immunity which had been abolished by *Hicks* . . . , subject to certain exceptions[,]" including "the acceptance of liability for claims based on valid written contracts"). **{7}** Our Supreme Court has since read *Hicks* as "generally abolish[ing] the common law doctrine of sovereign immunity *in all its ramifications*, whether in tort or contract or otherwise[.]" *Torrance Cty. Mental Health Program v. N.M. Health and Env't Dep't*, 1992-NMSC-026, ¶ 14, 113 N.M. 593, 830 P.2d 145 (emphasis added); *see also State ex rel. Hanosh v. State ex rel. King*, 2009-NMSC-047, ¶ 10, 147 N.M. 87, 217 P.3d 100 ("Although [*Hicks*] specifically challenged the state's common[]law immunity from actions in tort, no one should doubt the broader scope of what this Court has previously described as *Hicks's* sweeping abolition of sovereign immunity.") (internal quotation marks and citations omitted); *Methola v. Cty. of Eddy*, 1980-NMSC-145, ¶ 9, 95 N.M. 329, 622 P.2d 234 (describing the holding in *Hicks* broadly as abolishing judicially recognized sovereign immunity in New Mexico). The breadth of *Hicks* is bolstered by the fact that the "opinion itself prefaced its holding by citing to a variety of New Mexico opinions and not just cases sounding in tort." *Hanosh*, 2009-NMSC-047, ¶ 11.

{8} Thus, the existence and extent of the state's immunity post-*Hicks* now depends upon the Legislature. "The common law now recognizes a constitutionally valid statutory imposition of sovereign immunity, and such immunity must be honored by the courts where the [L]egislature has so mandated." *Torrance Cty.*, 1992-NMSC-026, ¶ 16 (alteration, internal quotation marks, and citation omitted); *see e.g. Hydro Conduit Corp.*, 1990-NMSC-061, ¶ 22 (holding that a claim against the state for restitution based on unjust enrichment was barred by sovereign immunity as reinstated by Section 37-1-23). The availability of the state's defense of sovereign immunity does not depend on whether the Legislature provided a *waiver* of immunity within a statute. Rather, the state may defend a suit based on sovereign immunity only insofar as the Legislature has *invoked* immunity within or otherwise in connection with the statute under which the plaintiff brings its suit against the state. *See Torrance Cty.*, 1992-NMSC-026, ¶ 23. Sovereign immunity now exists only "as implemented by statute or as might otherwise be interposed by judicial decision for sound policy reasons." *Id.* ¶ 14; *see also Hanosh*, 2009-NMSC-047, ¶ 7 (discussing *Hicks* and noting that "courts are very much able to expand, contract, or eliminate altogether common[]law sovereign immunity, *subject of course to the power of the state legislature to codify immunity in its place*") (emphasis added); *Smith*, 1985-NMCA-121, ¶ 5 ("In New Mexico, sovereign immunity is a statutory creation."); *Marrujo v. N.M. State Highway Transp. Dep't*, 1994-NMSC-116, ¶ 24, 118 N.M. 753, 887 P.2d 747 ("The right to sue the government is a statutory right and the [L]egislature can reasonably restrict that right.").

C The FPWA

{9} Plaintiff's claim here arises solely under one state statute: the FPWA. Defendant asserts sovereign immunity, "not under federal law or principles of federalism," but "under what [Defendant] perceives to be vestigial remains of our state common[]law sovereign immunity." *Hanosh*, 2009-NMSC-047, ¶ 9. However, common law sovereign immunity no longer exists. Therefore, we must determine whether the Legislature invoked the state's sovereign immunity in the FPWA. Alternatively, even in the absence of an express statutory invocation, we must determine whether the Legislature intended the state to be subject to the statute. *See Lucero*, 2002-NMCA-013, ¶¶ 3, 7, 9 (recognizing the need to determine whether a statutory cause of action applies to government entities).

1. The FPWA Does Not Expressly Invoke Sovereign Immunity

{10} When the Legislature invokes the state's sovereign immunity, it does so expressly. Other statutes that invoke the state's sovereign immunity—namely, the TCA and Section 37-1-23—demonstrate a clear invocation of immunity. The TCA straightforwardly provides that "[a] governmental entity and any public employee while acting within the scope of duty are granted immunity from liability for any tort." Section 41-4-4(A). Similarly, in Section 37-1-23(A), the Legislature clearly invokes the state's immunity for contract claims by stating that "[g]overnmental entities are granted immunity from actions based on contract[.]" The FPWA does not contain any similar language, and it does not refer to sovereign immunity at all. *See* NMSA 1978, §§ 28-23-1 to -6 (2013) (lacking language addressing the state's immunity from suits alleging violation of the conduct prohibited). We therefore conclude that Defendant has no sovereign immunity from liability under the TCA or the FPWA. We next examine the language of the FPWA to determine whether the Legislature intended the state to be a liable party.

2. The State Is an "Employer" Subject to Claims Brought Under the FPWA by Public Employees

{11} The FPWA prohibits an "employer" from discriminating between employees on the basis of sex by paying wages to employees at a rate less than the rate that the employer pays wages to employees of the opposite sex for equal work. Section 28-23-3(A). The FPWA defines "employer" as "a person employing four or more employees and any person acting for an employer." Section 28-23-2(E). The FPWA does not, however, define "person."

{12} In the absence of contradictory language in the FPWA, the provisions of the Uniform Statute and Rule Construction Act (the USRCA) apply. *See* NMSA 1978, § 12-2A-1(B) (1997). "The [USRCA] applies to a statute enacted or rule adopted on or after the effective date of that act unless the statute or rule expressly provides otherwise, the context of its language requires otherwise[,] or the application of that act to the statute or rule would be infeasible." *Id.* The Legislature enacted the FPWA sixteen years after the passage of the USRCA. Section 28-23-1; Section 12-2A-1. The FPWA does not provide that the USRCA does not apply; the context of the FPWA does not require that the USRCA does not apply; and the application of the USRCA to the FPWA is feasible. Therefore, the USRCA supplies the meaning of terms not defined in the FPWA.

{13} The USRCA defines "person" as "an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture or any legal or commercial entity[.]" NMSA 1978, Section 12-2A-3(E) (1997). A "legal entity" is "[a] body, other than a natural person, that can function legally, sue or be sued, and make decisions through agents." *Black's Law Dictionary* 1031 (10th ed. 2014). The state, an entity capable of suing and being sued, is, therefore, a legal entity that falls within the definition of "person" and thus is subject to suit for violating the terms of the FPWA. *See, e.g.,* NMSA 1978, § 10-16C-4 (2010) (providing a cause of action against the state); *State v. Davisson*, 1923-NMSC-045, ¶ 11, 28 N.M. 653, 217 P. 240 (explaining that the board of county

commissioners is entitled to sue for sums due to the county).

{14} Finally, we address Defendant's argument that the Legislature must not have intended the USRCA's definition of "person" to include the state because the USRCA separately defines "state." *See* § 12-2A-3(E), (M). Defendant reasons that if "person" included the state, there would have been no need to provide a definition for "state." We are not persuaded by this argument. The USRCA defines "state" as "a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico or any territory or insular possession subject to the jurisdiction of the United States." *Id.* All items within the definition of "state" are geographic locations. Section 12-2(A)-3(M). The items within the definition of "person" are different in kind; all but one of the items in the definition is a body or an entity created by law. As a result, the definition of "state" is not superfluous. It simply defines the geographic locations that are included by use of the term "state" on its own in a statute, whether or not the statute also uses the term "person."

CONCLUSION

{15} We conclude that the Legislature intended for the state to be subject to claims brought under the FPWA and we reverse the order of the district court granting Defendant's motion to dismiss.

{16} IT IS SO ORDERED.

STEPHEN G. FRENCH, Judge

WE CONCUR:

M. MONICA ZAMORA, Judge

HENRY M. BOHNHOFF, Judge

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-072

No. A-1-CA-35677 (filed August 30, 2018)

JOSE M. HERNANDEZ,
Plaintiff-Appellant,
v.
GRANDO'S LLC,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY
Lisa B. Riley, District Judge

ROBERT E. RIOJAS
RIOJAS LAW FIRM, P.C.
El Paso, Texas
for Appellant

GREGORY L. BIEHLER
RYAN GOODHUE
LEWIS BRISBOIS BISGAARD & SMITH, LLP
Albuquerque, New Mexico
for Appellee

Opinion

Henry M. Bohnhoff, Judge

{1} Plaintiff Jose M. Hernandez, an employee of Creed, Inc. (Creed), injured himself while exiting a commercial truck that Creed had leased from Defendant Grando's, LLC (Grando's). After Hernandez brought suit against Grando's based on theories of negligence, strict product liability, and breach of implied warranty, the district court granted summary judgment in favor of Grando's and dismissed Hernandez's complaint. On appeal, Hernandez argues that the district court erred in granting summary judgment on his negligence claim because (1) Grando's is bound by its admission in its answer to Hernandez's original complaint that it was a motor carrier and owed him a duty to maintain and repair the leased truck; (2) alternatively, Grando's is a motor carrier under federal and state law and therefore owed duties imposed on motor carriers by those laws; and (3) even assuming Grando's is not a motor carrier, as a lessor it still owed Hernandez a common law duty of care. Hernandez also argues that, because Grando's principal was aware of the condition of the truck at all times, the company is strictly liable for the defect. We reverse on the basis of Hernandez's third negligence argument. However, because the first and second negligence arguments and the strict liability argument would be likely to arise again on remand, we affirm as to them in the interest of judicial efficiency. *See Medina v. Hunemuller Constr., Inc.*, 2005-NMCA-123, ¶ 16, 138 N.M. 472, 122 P.3d 839, *overruled on other grounds by Hidalgo v. Ribble Contracting*, 2008-NMSC-028, ¶ 22, 144 N.M. 117, 184 P.3d 429; *Sena v. N.M. State Police*, 1995-NMCA-003, ¶ 25, 119 N.M. 471, 892 P.2d 604.

BACKGROUND

{2} Hernandez worked for Creed in Loving, New Mexico, as a truck driver. On June 21, 2013, while at work, Hernandez attempted to exit from a Creed truck. The truck's sidestep had been kept in place with a wire and collapsed when Hernandez stepped on it. Hernandez sustained injuries to his knee and back from the fall. At the time of the incident, the truck was leased from Grando's to Creed pursuant to a written agreement. Adan "Sonny" Granados (Granados) was the sole and managing member of Grando's as well as the president of Creed, and signed the lease as both lessor and lessee.

{3} Hernandez received workers' compensation benefits for his injuries. Hernandez subsequently filed a complaint in district court against Grando's alleging strict liability, negligence, and breach of warranty. In its answer, Grando's admitted the following allegations of the complaint: (1) "[Grando's] had a duty to comply with all statutory and regulatory provisions that pertain or apply to trucks to be used in interstate commerce"; (2) "[Grando's] owed a duty to all persons who used their [sic] trucks to inspect, repair, and maintain their [sic] trucks in a safe condition so that persons who used its trucks would not be injured"; (3) "[Grando's] as a provider of trucks to be used in intrastate and/or interstate commerce, was required to abide by state and/or federal laws, statutes, regulations, and safety codes, including Part 396 of the Federal Motor Carrier Safety Act, concerning systematic inspection, repair, and maintenance of its trucks by a qualified inspector." One month later, Grando's retained new counsel.

{4} Grando's moved for summary judgment, arguing that (1) Grando's did not owe Hernandez any common law or statutory duty to maintain or repair the truck because it is not a motor carrier, did not employ Hernandez, and delegated all duties concerning the truck to Creed; (2) Hernandez could not establish a strict products liability claim because there was no evidence that the truck was defective at the time Grando's leased it to Creed; and (3) Hernandez could not establish a breach of implied warranty claim because Grando's disclaimed all implied warranties. In his response to Grando's motion Hernandez argued (1) Grando's was bound by its admissions in its answer; (2) Grando's had knowledge of the defective step and did not repair it; (3) Grando's is a motor carrier and subject to the statutory and regulatory duties of a motor carrier; and (4) Granados's affidavit submitted in support of Grando's motion was not enough evidence to disprove strict liability. In its reply Grando's further argued that (1) it is irrelevant whether Granados had knowledge of the broken step because the duty to repair fell exclusively on Creed; and (2) Grando's answer was filed by its previous attorney, the admissions in question were erroneous, and Grando's would seek leave to amend its answer and correct the erroneous admissions.

{5} Following the filing of Hernandez's summary judgment response, Grando's moved to amend its answer and rescind the previous admissions. The district court never ruled on that motion and instead granted Grando's motion for summary judgment and dismissed the case.[1]

DISCUSSION

{6} Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 1-056(C) NMRA. After the moving party makes a prima facie showing that he or she is entitled to summary judgment, the party opposing the motion has the burden to show "by affidavit or other admissible evidence that there is a genuine issue of material fact." *Associated Home & RV Sales, Inc. v. Bank of Belen*, 2013-NMCA-018, ¶ 29, 294 P.3d 1276 (internal quotation marks and citation omitted). "An issue of fact is 'genuine' if the evidence before the court considering a motion for summary judgment would allow a hypothetical fair-minded fact[-]finder to return a verdict favorable to the non-movant on that particular issue of fact." *Id.* ¶ 23 (internal quotation marks and citation omitted). Courts reviewing a motion for summary judgment must review the facts and make all reasonable inferences in the light most favorable to the non-moving party. *Phx. Funding, LLC v. Aurora Loan Servs., LLC*, 2017-NMSC-010, ¶ 17, 390 P.3d 174. "Our review is conducted in light of our traditional disfavor of summary judgment and our preference for trials on the merits." *Madrid v. Brinker Rest. Corp.*, 2016-NMSC-003, ¶ 16, 363 P.3d 1197.

{7} "However, if no material issues of fact are in dispute and an appeal presents only a question of law, we apply de novo review and are not required to view the appeal in the light most favorable to the party opposing summary judgment." *City of Albuquerque v. BPLW Architects & Eng'rs, Inc.*, 2009-NMCA-081, ¶ 7, 146 N.M. 717, 213 P.3d 1146. "We review questions of statutory interpretation de novo." *Cobb v. State Canvassing Bd.*, 2006-NMSC-034, ¶ 33, 140 N.M. 77, 140 P.3d 498 (internal quotation marks and citation omitted). "Whether a duty exists is a question of law for the courts to decide." *Herrera v. Quality Pontiac*, 2003-NMSC-018, ¶ 6, 134 N.M. 43, 73 P.3d 181 (internal quotation marks and citation omitted).

A. Grando's Admissions of Hernandez's Conclusions of Law in His Complaint Were Not Material to the District Court's Summary Judgment Analysis

{8} Hernandez argues that the district court erred in granting summary judgment because Grando's admitted in its answer to Hernandez's complaint that it was a motor carrier and owed him duties to maintain its trucks in safe condition. Hernandez maintains that Grando's should be bound by its answer.

{9} Under New Mexico law, parties are not bound by conclusions of law set forth in their pleadings. "[Summary judgment] shall be rendered . . . if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 1-056(C). "[I]n ruling on a motion for summary judgment, a court is not wed to a party's assertion of conclusions of law whether in a petition, complaint, or motion for summary judgment, even if the conclusions are admitted by the opposing party." *Vives v. Verzino*, 2009-NMCA-083, ¶ 10, 146 N.M. 673, 213 P.3d 823; *see also GCM, Inc. v. Ky. Cent. Life Ins. Co.*, 1997-NMSC-052, ¶ 13, 124 N.M. 186, 947 P.2d 143 (holding that, when a party admits for purposes of summary judgment the veracity of the allegations in the complaint, the appellate courts "will accept the facts as alleged . . . for purposes of this motion and determine whether, as a matter of law, [the defendant] is entitled to judgment").

{10} Grando's admissions in its answer upon which Hernandez predicated his argument concerned its legal duties, i.e., were conclusions of law.[2] Under Rule 1-056(C), the district court was not obligated to accept them and, on the contrary, had an obligation independently to determine the accuracy of Hernandez's assertions of duty on the part of Grando's. Therefore, Grando's admissions as to its duty in its answer were not material to the district court's determination whether disputed issues of fact precluded summary judgment in favor of Grando's.

B. Grando's Is Not a Motor Carrier and Is Not Subject to the Federal and State Statutory and Regulatory Duties of Maintenance and Repair Imposed on Motor Carriers

{11} In an affidavit submitted in support of Grando's summary judgment motion, Granados averred that Grando's business was limited to leasing trucks to Creed. On that basis, Grando's argued that it was not a motor carrier; further, no statute or regulation imposes on the owner of a truck, solely on the basis of such ownership, the duties of inspection, maintenance, and repair to which motor carriers are subject. Hernandez does not dispute that Grando's business was limited to leasing trucks to Creed, i.e., he does not contend that Grando's was engaged in transportation of goods or services for compensation. Instead, in his complaint, summary judgment response, and on appeal, Hernandez maintains that, as an owner of a commercial vehicle, Grando's was subject to federal and state statutory and regulatory duties that are imposed on motor carriers. In other words, Hernandez effectively equates ownership of the subject truck with motor carrier status.

[1]Before addressing Hernandez's arguments, we note that his brief in chief and Grando's answer brief both fail to comply with the requirement in Rule 12-305(D)(1) NMRA to use fourteen-point or larger font. Further, Hernandez failed to comply with Rule 12-318(A)(4) NMRA by not including a statement in his brief in chief explaining how any of the issues were preserved in the court below, and Grando's answer brief exceeded the 11,000-word limit established by Rule 12-318(F)(3). Grando's request that we sanction Hernandez for his failure to comply with the Rules of Appellate Procedure is denied. Both parties are admonished to comply with these rules. Notwithstanding his failure to comply with Rule 12-318(A)(4), Hernandez preserved his three arguments by advancing them in either his complaint or his response to Grando's summary judgment motion.

[2]In admitting paragraph 17 of Hernandez's complaint, Grando's admitted that it was required to abide by state and federal laws, including those to which motor carriers are subject, concerning systematic inspection, repair, and maintenance of trucks. However, Hernandez is incorrect in claiming that Grando's admitted that it was a motor carrier.

NEW MEXICO
Lawyer
December 2018 Volume 13, No. 4
www.nmbar.org

Updates *in Tax Law*

Tax Law Section

Too Big, Too Small or Just Right?

Tax Benefits for New Mexico Families Under the Tax Cuts and Jobs Act

By Grace Allison

The personal income tax provisions of the Tax Cuts and Jobs Act (the "Act"), enacted on Dec. 22, 2017, and generally effective from 2018 through 2025, reshape the tax landscape for New Mexico families, suspending some benefits while temporarily enhancing others. Some of the most important of these temporary changes are the suspension of most itemized deductions,[1] the suspension of the personal and dependency exemptions previously allowed under I.R.C. Section 151, the reduction in income tax rates, and the near-doubling of the standard deduction.

With a much larger standard deduction and only a handful of itemized deductions, fewer middle class families will itemize. More very poor families are likely to have zero taxable income—and to pay zero income tax. For this population, the absence of taxable income will make the fully refundable earned income tax credit even more valuable, because the essence of a fully refundable credit is that all of its benefits can be received even if the credit exceeds the family's tax liability. Changes to the Child Tax Credit and the creation of a new nonrefundable Dependent Tax Credit are likely to be most important to the middle class.

As always, there are unintended consequences. The U.S. Government Accountability Office estimates that 21 percent of taxpayers will be underwithheld in 2018 under the Act's provisions, versus 18 percent under prior law, and that 73 percent will be overwithheld, versus 76 percent under prior law.[2] In other words, several million taxpayers will have an unwelcome surprise, including those finding themselves with far fewer itemized deductions. Even so, the IRS will not be releasing a new withholding form until 2020. Given the applicable penalties and interest, all New Mexican households should check their withholding using the best tool currently available, the IRS withholding calculator at apps.irs.gov/app/withholdingcalculator.

Under prior law, family-based tax benefits were available for "dependents" described in I.R.C. Section 152, i.e. for a "qualifying child" or a "qualifying relative." A "qualifying child" must, *inter alia*, meet certain relationship, residence and age requirements and may not provide more than half of her own support. A "qualifying relative" must, *inter alia*, receive more than half of his support from the taxpayer and may have only a minimal amount of gross income.

These definitions remain important under the new Act. It is something of a disconnect: the dependency exemption granted in I.R.C. Section 151 and further described in I.R.C. Section 152 is suspended until 2026, but, in the interim, Section 152 remains the lodestar for determining which households can claim family-based tax benefits.

Child Tax Credit and Additional Child Tax Credit

Under prior law, a maximum $1,000 Child Tax Credit could be claimed under I.R.C. Section 24 by those with a "qualifying child" under age 17. The old CTC was fully refundable, subject to minimum earnings requirements and was available to immigrants whose children did not have a valid social security number. The benefits of the CTC under prior law were primarily limited to lower and middle-class taxpayers-because the CTC began to phase out at adjusted gross income of $110,000 for marrieds filing jointly.

The Act turns prior law on its head: doubling the CTC to $2,000—but limiting the amount of CTC that can be refunded to $1,400; making the CTC fully available to those with adjusted gross income of $400,000 or less; and requiring that each child for whom CTC is claimed have a valid social security card.

The refundable portion of the CTC is known as the "Additional Child Tax Credit." As amended by the Act, CTC is

now refundable in an amount equal to the lesser of $1,400 or 15 percent of the taxpayer's earned income above $2,500. This is a liberalization of prior law, which limited refunds to the lesser of $1,000 or 15 percent of earned income above $3,000.

However, doing the math, only those with earned income in excess of $11,833 will be eligible to receive the entire $1,400 refund. As a result, many of the poorest families will still find themselves ineligible for the CTC because of the minimum earnings requirement. The Urban Institute estimates that nationwide "29 million children under 17 will miss out on the full [$1,000] increase [in the CTC] because their families earn too little or owe too little tax."[3]

Dependent Tax Credit

The newly created and nonrefundable Dependent Tax Credit is potentially available to anyone with a dependent (as defined in I.R.C. Section 152) who is not eligible for the CTC, whether a "qualifying child" or a "qualifying relative." In other words, while the CTC is available only to those with "qualifying children" under 17, the Dependent Tax Credit is available to anyone with a dependent who cannot be claimed for the CTC, whether a "qualifying child" or a "qualifying relative."

For New Mexicans, for whom family ties are so important, this is a significant change. Taxpayers who support aunts, uncles, parents and/or grandparents may now be entitled to a nonrefundable $500 credit for each. In addition, the Dependent Tax Credit may be claimed for qualifying children between 17 and 24 who are students as well as for otherwise qualifying children without a social security card. The Dependent Tax Credit is also potentially available to unmarried taxpayers who support their partners and/or their partners' children. However, because it is nonrefundable, it will be unavailable to those without income tax liability.

In audit situations, practitioners have in the past looked to birth certificates, leases, utility bills and/or school and medical records to document eligibility for family-based tax credits. The same will be true in the future for audits of the Dependent Tax Credit, which, like the CTC, is fully available to taxpayers with adjusted gross incomes up to $400,000.

Earned Income Tax Credit

In 2017, the fully refundable Earned Income Tax Credit brought New Mexico's low and middle-income working families roughly $512 million in refunds and tax offsets, delivering a significant boost to the local economy.[4] It is virtually unchanged under the Act – only the measure used to inflation-adjust the credit has been permanently modified, from the Consumer Price Index for Urban Consumers ("CPI-U") to the less generous Chained Consumer Price Index for Urban Consumers ("C-CPI-U"). In 2018, EIC maximum benefits are $519 for workers with no children; $3,461 for workers with one "qualifying child"; $5,716 for workers with two "qualifying children"; and $6,431 for workers with three or more "qualifying children."

Dependent Care Credit; American Opportunity Tax Credit; Adoption Credit

The Dependent Care Credit and the American Opportunity Tax Credit are not inflation-adjusted and are unaffected by the Act. The Adoption Credit is now C-CPI-U inflation-adjusted.

IRS Form 8332

Under the Act, IRS Form 8332 (which in its latest draft is still titled "Release/ Revocation of Release of Claim to *Exemption* for Child by Custodial Parent") remains the only way to allocate child-based tax benefits from the custodial to the non-custodial parent where parents do not live together. *See* I.R.C. § 152(e). As under prior law, the custodial parent must first sign the Form, which allows each named child to be treated as the "qualifying child" of the non-custodial parent. The non-custodial parent must then file Form 8332 with their Form 1040 for each year that s/he claims tax benefits that require having a "qualifying child." Under current law, as under prior law, Form 8332 is necessary to allocate CTC, Additional Child Tax Credit and American Opportunity Tax Credit. The big changes are that there is no longer a dependency exemption to allocate—and that Form 8332 is also required to allocate the Dependent Tax Credit. As under prior law, you can't use Form 8332 to allocate EIC.

Too big, too small or just right?

A Tax Policy Center study estimates that in 2018, all changes made by the Act (i.e. not just the changes to family-based tax benefits) will increase after-tax household income nationwide on average by 2.2 percent, about $1,610 per family. For New Mexico, with median household income in 2016 of $45,674, increases are estimated to be smaller because the tax cuts are estimated to favor those who generally pay the most tax. For families with income up to $25,000, the TPC forecasts an increase of $60; for those with income between $25,000 and $48,600, a $380 increase; between $48,600 and $86,000, $900; and at $149,400, $1810.

Endnotes

[1] *See*, e.g. I.R.C. § 67(g), which suspends the deduction for miscellaneous itemized deductions, such as unreimbursed employee business expenses.

[2] U.S. Government Accountability Office, *Federal Tax Withholding* (July 2018).

[3] Elaine Maag, *Who Benefits from the Child Tax Credit Now?*, Urban Institute (February 2018).

[4] U.S. Conference of Mayors, *Dollar Wise: The Best Practices on the Earned Income Tax Credit* (2008).

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Gross Receipts TAX REFORM in New Mexico—

SOME POTENTIAL CONSIDERATIONS

By Mark Chaiken

New Mexico's system of state and local gross receipts taxation, requires reform. The current Gross Receipts and Compensating Tax Act, NMSA 1978, §§ 7-9-1 to 115 (the "GRT Act"), and Municipal Local Option Gross Receipts Taxes Act, NMSA 1978, §§ 7-19D-1 to 18 and County Local Option Gross Receipts Taxes Act, NMSA 1978, §§ 7-20E-1 to 28 (collectively, the "Local Option GRT Acts"), as well as other local GRT tax acts, have too many deductions and exemptions, creating a tax base that is too narrow, with correspondingly higher rates on the remaining taxable receipts.[1] New Mexico's GRT system, while it is more like a traditional sales tax and less like a true gross receipts tax, in that it seeks to avoid the taxation of all receipts or business inputs at all levels of production, still does result in some "pyramiding" of taxes, so that by the time a product comes to market, it may have been subject to more than one imposition of gross receipts tax, resulting in higher costs to businesses and consumers.

Finally, the Local Option GRT Acts create a patchwork of gross receipts tax rates across the various counties and municipalities of the state. The Local Option GRT Acts currently permit the imposition of various increments of local option tax, such as a municipal environmental services gross receipts tax, NMSA 1978, § 7-19D-10 (an additional one-sixteenth of one percent), or the municipal infrastructure gross receipts tax, NMSA 1978, § 7-19D-11 (which may be imposed in increments of one-sixteenth of one percent, up to a total of one-fourth of one percent). Cognate local option taxes exist for counties. *See, e.g.,* NMSA 1978, § 7-20E-17 (the county environmental services gross receipts tax), and § 7-20E-19 (the county infrastructure gross receipts tax). Collectively these gross receipts taxes, plus additional optional taxes not included in the Local Option GRT Acts, can add substantially to the overall gross receipts tax rate in a particular political subdivision. According to the most recent data from the Taxation and Revenue Department, gross receipts tax rates across the state vary from as low as 5.500 percent (which is inclusive of the 5.125 percent

state GRT rate) in Catron and Lea Counties, to as high as 9.0625 percent in the City of Espanola. These differing rates not only have a potentially distortive effect on business and investment decisions as well as consumer purchasing, but also result in GRT rates that begin to have punitive economic consequences.

Because of these acknowledged problems in the GRT and the negative impact they have on New Mexico's economic growth, several proposals have been made in recent legislative sessions to reform the Local Option GRT Acts.[2] Both proposed bills sought to broaden the GRT tax base by eliminating some deductions and exemptions, allowing a lowering of the rate. And both bills sought to regularize the GRT tax rate across the state by eliminating the ability of counties and municipalities to impose most of the current local option gross receipts taxes.

However, it may not be so easy to eliminate existing local option GRTs that have already been imposed, as many of the political subdivisions that have imposed these taxes have bonded against them, pledging the revenues derived from those taxes to pay on long-term debt issued to finance public improvements. Eliminating already-imposed taxes whose revenues have been pledged is possibly unconstitutional, and may violate various covenants contained in relevant bond documents. Recent tax reform experience in Michigan and Pennsylvania indicates that any tax whose revenues have been pledged to payment of public debt likely will need to remain valid until the relevant debt has been paid off.

Counties and municipalities have the authority to pledge certain of their local option GRT revenues to repayment of debt incurred to finance specific projects. *See, e.g.*, NMSA 1978, §§ 3-31-1, *et seq.* (permitting the issuance of gross receipts tax revenue bonds for specific public purposes, and to which certain local option GRT revenues may be pledged); NMSA 1978, §§ 4-62-1, *et seq.* (similar authorities for counties). Many municipalities and counties throughout the State have issued such debt in order to finance public improvements, and have pledged some of their local option GRT revenues to repayment. As a result, it may not be easy to repeal such taxes. In the first place, some were imposed pursuant to an election, and voters may have a say in whether they are to be repealed. The bond or loan documents evidencing the debt will also usually contain covenants assuring investors and lenders that the taxes supporting the debt will not be

repealed; no change in the repayment pledge can be made, at least without the consent of the holders of the bonds or debt instrument. Finally, and most significantly, the bond or loan documents are considered contracts, and any attempt to repeal the taxes would likely run afoul of the prohibition against the impairment of contracts contained both in Article I, Section 10 of the United States Constitution, and Article II, Section 9 of the New Mexico Constitution. It is well-settled law that a municipality violates the Contracts Clause when it attempts to repeal revenues pledged to repayment of public debt. *See, e.g., State of Louisiana ex rel. Elliott v. Jumel*, 107 U.S. 711 (1883).

Both of the bills proposed in New Mexico sought to repeal the Local Option GRT Acts, substituting instead a new gross receipts or sales tax. The proposed Senate Bill would have allowed an affected county or municipality to impose additional increments of a new local option GRT to continue to repay the debt. S.B. 49, 54th Leg., 1st Sess. § 69 (N.M. 2017). But such a substitution would still require the consent of all holders of the revenue bonds. This consent may not be forthcoming, as bondholders would, under the new arrangement, share in revenues now applicable to more than one debt.[3] Bondholders might not consider the substituted revenues to be as secure as the original pledge.

House Bill 412 also proposed to repeal the Local Option GRT Acts. However, it only impressed the new, general sales tax revenues with the obligation to repay the debt, and did not allow the imposition of additional local GRT to make up for the lost revenue. H.B. 412, 53rd Leg. Sess. §§ 151-52, 328. This would not only impair the existing bond and debt contracts, but would also potentially leave some counties and municipalities without sufficient revenue to both repay their debt and conduct regular government operations.

The same problem was faced in Michigan and Pennsylvania when those states reformed their property tax systems. In both states, local school districts had been allowed to impose varying rates of property tax to fund school improvements, and to pledge the revenue from those taxes to repayment of public debt. *See* S.B. 76, Reg. Sess. (Pa. 2017-18). Ultimately, both states found that the only way to reform their property taxes on a state-wide basis was to allow the local property taxes pledged to debt to continue until the relevant bonds had been paid off. In Michigan, the property tax was repealed for the purpose of funding operations, which are now funded primarily from state sales taxes; the state was unable to figure out a way to decrease inequities in capital funding, and so the property tax is still used for that purpose, leaving highly variable property tax rates across Michigan's school districts.

New Mexico local public bodies that have pledged a particular GRT to debt will also likely need to keep it in place until the debt is paid off. In other words, some existing local GRTs will have to overlap with the new GRT system, perhaps for some time. While it is unfortunate that the local option GRTs would remain, allowing a continuing uneven pattern of GRT rates across the state, the problems and expense of substituting a new revenue stream, which would require consent of bondholders, and which might result in legal action against local public bodies, would likely be costlier and more time-consuming to address.

Endnotes

[1] The current gross receipts tax rate across the state is 5.125%. NMSA 1978, § 7-9-4(A). Also, unlike almost all other states which have either a gross receipts tax or sales tax, New Mexico imposes its gross receipts tax on receipts for most services. NMSA 1978, § 7-9-3.5(A)(1).

[2] The bills were sponsored by Rep. Jason Harper, H.B. 412, 53rd Leg., 1st Sess., (N.M. 2017), and by Sen. William Sharer, S.B. 49, 54th Leg., 1st Sess. (N.M. 2018).

[3] It would also be possible to substitute a different source of revenues, e.g. revenues supplied by the state, or coming from a different tax entirely, or a sinking fund established for this purpose. However, the same problems noted in this article would still arise, along with other issues of fairness to those public bodies without a significant debt burden.

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Tax Lightning and Change of Ownership

By Frank C. Salazar

NMSA 1978, Section 7-36-21.2 (2000, amended 2010) limits the amount residential property may be valued to no higher than three percent of the property's value from the previous tax year, unless certain exceptions apply.[1] *See* Section 7-36-21.2(A). This limitation is a "cap" on property valuation; and when a taxpayer loses the limitation, the result—tax lightning. In some cases, the unanticipated loss of the cap leads residential property owners across the country to be blindsided by hefty property tax bills. Recent Bernalillo County Valuation Protest Board (Board) decisions regarding when a taxpayer loses the limitation due to change of ownership have been appealed to New Mexico State Second Judicial District Court, which in turn has certified the appeals to the New Mexico Court of Appeals. Will the Court limit the lightning strikes? The Court of Appeals decision remains pending.

Many states have imposed similar property valuation caps. *See, e.g.*, Cal. Const. art. XIIIA, 2(b) ("The full cash value base [of real property] may reflect from year to year the inflationary rate not to exceed 2 percent for any given year[.]"); Ariz. Rev. Stat 42-13301(A) (1997, amended 1999) ("The limited property value of property for property taxation purposes is the limited property value of the property in the preceding valuation period plus five percent of that value."); Ark. Const. amend. 79, 1(b)(1)-(c)(1) (stating that for property used for homesteading purposes, increases in the assessed value of such property are limited to five percent of the assessed value of the property for the previous year); Okla. Const. art. X, 8B (stating that the assessed value of property cannot increase by more than five percent in any taxable year); Tex. Const. art. VIII, 1(i) (stating that the legislature may limit increases in the appraised value of a residence homestead for "ad valorem tax purposes" in a given year to 10 percent of that used for the preceding tax year); Mich. Comp. Laws 211.27a(2)(a) (2016) (stating that the taxable value of a parcel of property shall not exceed the taxable value of the parcel "1.05 of the inflation rate" of the immediately preceding year); Fla. Stat. 193.155(3) (2018) (stating that the assessed value of homestead property cannot increase by more than "[t]hree percent of the assessed value of the property for the prior year"). Property valuation caps aim to avoid the unfairness that results when longtime homeowners are forced to sell their homes because they can no longer afford their skyrocketing property taxes and the lightning strikes. *See* Mary LaFrance, *Constitutional Implications of Acquisition Value Real Property Taxation: The Elusive Rational Basis,* 1994 Utah L. Rev. 817, 837 (1994).

The facts underlying the decision of the Board certified to the Court of Appeals are summarized as follows: Taxpayer is trustee and beneficiary of a revocable trust (Trust). The Trust owned an apartment complex. As residential property, the apartments are subject to the valuation cap. To refinance, Taxpayer transferred the apartments from the Trust to a limited liability company. The Trust was the sole owner of LLC. After Taxpayer transferred the property from Trust to LLC, the Bernalillo County Assessor (Assessor) revoked the valuation cap and claimed to have assessed the property at its current value. Taxpayer protested.

The Assessor claimed that because ownership of the apartments changed when Taxpayer transferred them from Trust to LLC, the cap was eliminated. Taxpayer argued no ownership change occurred because the Taxpayer remained the beneficial owner of the property and only the manner in which ownership was held had changed—not the equitable ownership. Being an issue of first impression in New Mexico, Taxpayer relied upon Cal. Code Regs. tit. 18, § 462.180(b) (2014) and *In re Assessments for Year 2005 of Certain Real Property Owned by Askins Properties, L.L.C.*, 2007 OK 25, 151 P.3d 303 (2007), which Taxpayer argued stand for the proposition that a mere change to legal title is not a change of ownership for purposes of a valuation cap when the proportional or equitable ownership does not change.

The Board ruled in favor of Taxpayer, determining that it would be unreasonable for the New Mexico Legislature to have intended to revoke a property

owner's valuation cap any time an owner mortgages, grants an easement over, or has a judgment or lien filed against a property. The Assessor appealed, seeking a writ of certiorari pursuant to 1-075 NMRA,[2] arguing that the Board's decision was inconsistent with two of its prior decisions.[3] The Assessor did not dispute that it does not have a statutory right to appeal decisions of the Board.

Taxpayer responded that (1) the district court had no appellate jurisdiction to review the Board's decision; (2) the Assessor had no standing to appeal the Board's decision; and (3) the Board's decision was in accordance with the law because there was no change of ownership.[4] Specifically, Taxpayer argued that there is no authority that supports the Assessor's contention that the Board was bound to follow its prior decisions and that there is no such thing as administrative state decisions in New Mexico. Taxpayer further argued the Board's decision was in accordance with law because there is no change of ownership when property is transferred between the same beneficial owner. Taxpayer asserted that if single-member limited liability companies are not disregarded for property tax purposes, as they are for income tax purposes, injustice would occur.

In 1996, the Internal Revenue Service sought to simplify the classification of business entities by allowing singly owned entities, such as limited liability companies, to be disregarded as separate entities for purposes of income tax. *See* Katherine A. Cook, Comment, *Limited Liability Companies in New Mexico,* 27 N.M. L. REV. 615, 624 (1997). As a result, "check-the-box" regulations were codified under Title 26 of the Code of Federal Regulations. *See* 26 C.F.R. §§ 301.7701-1-301.7701-3 (1997). Under these regulations, "a single owner can elect to be classified as an association or to be disregarded as an entity separate from its owner" for income tax purposes. 26 C.F.R. § 301.7701-3(a).

Importantly, under NMSA 1978, Section 7-2A-2(E) (2014, amended 2017), New Mexico defines a "corporation" to include limited liability companies that are taxed as corporations under the Internal Revenue Code. As mentioned above, the IRS allows single-member corporations, including singly owned limited liability companies, to be disregarded as separate entities from their owners for income tax purposes. However, many Americans that form single-member limited liability companies operate under the impression that their companies will also be disregarded for property tax purposes. *See* Ethan D. Millar, *State Taxation of LLCs Not Always Black and White: A Georgia Case Study*, 2006 Tax Notes 823 (Sept. 18, 2006).

The Court of Appeals has under the certification all issues raised in the District Court appeal, including the meaning of change of ownership, the jurisdictional issues, and the issue of when the Assessor may be entitled to a Writ of Certiorari. Hopefully, the Court will decide the procedural and substantive issues and provide the much-needed guidance.

About the Author

Endnotes

[1] Section 7-36-21.2 grants certain exceptions to the limitation. New Mexico's valuation cap does not apply, among other exceptions, to residential property that changes ownership the year immediately preceding the tax year in which the property is being valued. A "change of ownership" is broadly defined as "a transfer to a transferee by a transferor of all or any part of the transferor's legal or equitable ownership interest in residential property." Section 7-36-21.2(B).

[2] "Article VI, section 13 of the New Mexico Constitution authorizes district courts to issue writs of certiorari to inferior judges or courts." *Masterman v. State Taxation and Revenue Dep't, Motor Vehicle Div.*, 1998-NMCA-126, ¶ 10, 125 N.M 705, 964 P.2d 869. But writs of certiorari may be issued only when petitioners demonstrate that they are "entitled to relief." Rule 1-075(C)(4). A petitioner is entitled to relief only when "an inferior court or tribunal has proceeded illegally and there is no statutorily specified mode of review." *Id.* ¶ 10. An inferior court or tribunal proceeds illegally when it lacks jurisdiction or when its proceedings were irregular. *See* 14 Am. Jur. 2d *Certiorari* 13 (2018).

[3] See the Board's decisions in: *Decision and Order in the Matter of the Protest of Menaulwood Apartment, LLC* (Aug. 6, 2014) and *Decision and Order in the Matter of the Protest of Desert Vista, LLC* (Aug. 6, 2014). *Menaulwood* involved a transfer of property from a revocable trust to a limited liability company where the ultimate owner remained the same. In *Desert Vista,* property was transferred from a limited liability company to the sole owner of the limited liability company. In each case, the Board determined that the transfer was a change of ownership because a limited liability company is a separate entity from its owners.

[4] Under Rule 1-075, district courts may grant writs of certiorari to "aggrieved" parties. Taxpayer argued the Assessor lacks standing to appeal the Board's decision because a party is not aggrieved merely because it feels aggrieved by a tribunal's ruling. *See State v. Aguilar*, 1981-NMSC-027, ¶ 7, 95 N.M. 578, 624 P.2d 520. Instead, an aggrieved party "is one whose personal interests are adversely affected by an order of the court." *State v. Castillo*, 1980-NMCA-020, ¶ 4, 94 N.M. 352, 610 P.2d 756.

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The Tax Lien Sale That Generated **Two** Lawsuits and **Two** *Pro Se* Appeals ... **And Counting**

By Michael J. Thomas

If you, even rarely, counsel people involved in the purchase of real estate at tax lien sales, or the former owners of such land, you should know about the tax lien sale and ensuing litigation discussed here, which clarified an important legal issue arising from facts that could serve as the basis of a civil procedure exam.

In the interest of disclosure, I represented the purchasers in one appellate stage in 2014 as detailed below.

Tax Lien Sale, Portales, Fall 2011

In October 2011, Allan and Sherry Snyder, formerly of Illinois, were visiting Portales as they scouted retirement areas when they learned of a public auction scheduled at the Roosevelt County Courthouse. They were the only bidders on roughly 4 acres composed of two adjacent parcels outside Portales, owned by the Valenzuelas subject to property tax liens. The Snyders purchased the property for $215, obtained deeds from the New Mexico Taxation and Revenue Department, and recorded the deeds.

In March 2012, the parties signed a short-term rental agreement under which the Valenzuelas continued to use the land (on which they had a mobile home) for $5 per month while the parties discussed a potential sale back to the Valenzuelas. The agreement would terminate if the Valenzuelas removed their home and personal effects. By the end of March, the Valenzuelas, through their counsel, filed a lawsuit against TRD asserting they did not receive proper notice of the auction.

In July 2012, the Valenzuelas filed an amended complaint joining the Snyders as defendants. After some early motions, including the Snyders' unsuccessful attempt to obtain a stay pending resolution of the claim against TRD, the plaintiffs obtained summary judgment against the Snyders on the basis that the $215 purchase price was grossly disproportionate to the fair market value, such that allowing the sale to stand would be unconscionable.

First Appeal

The Snyders appealed in 2013 and prevailed. *Valenzuela v. Snyder*, 2014-NMCA-061. The opinion noted that the Snyders had failed to properly respond to the Valenzuelas' motion for summary judgment in the district court, so the district court had properly deemed as admitted the Valenzuelas' assertion that the property's fair market value was at least $25,000.

However, the Court of Appeals clarified that an inadequate purchase price, i.e. one grossly disproportionate to the property's value, is not a ground for setting aside a tax lien sale under New Mexico law, including the Property Tax Code, NMSA 1978, §§7-35-1 to 7-38-93. The opinion noted that purchasers at such sales may need to file a quiet title action, with the implication being that one should view the purchase price with that reality in mind. *See Valenzuela*, 2014-NMCA-061, ¶ 23. The Court of Appeals reversed and remanded with instructions to enter judgment for the Snyders. A concurrence suggested it may be time for the legislature to reexamine the tax sale provisions of the Property Tax Code to better balance the competing interests of the parties.

The Valenzuelas, through counsel, sought and obtained a writ of certiorari. An *Albuquerque Journal* columnist covered the case in a four-part series, noting that a small tax lien sale case was soon to be heard by the state Supreme Court.[1] I read the first article in August 2014. The case intrigued me, and I believed the process would benefit if formerly *pro se* parties had representation at such a crucial point. I contacted the Snyders and expressed my willingness to assist them in that stage for a nominal, virtually *pro bono*, flat fee,

plus postage and copying expenses. They hired me and I spent more than 40 hours reviewing the record, writing and editing the brief and conducting research.

In November 2014, the court quashed the writ of certiorari, benefitting the Snyders by leaving the Court of Appeals' opinion undisturbed. That ended my professional involvement in the case. Other than those three months, the Snyders have been *pro se* throughout. The case was remanded for a trial to determine whether TRD provided legally sufficient notice to the Valenzuelas before the fall 2011 auction. The Snyders were dismissed from the case in accordance with the Court of Appeals mandate about a week before the bench trial in October 2015.

Trial, Fall 2015

In its Decision Letter after trial, the district court found that Mrs. Valenzuela visited the Roosevelt County Treasurer's Office in early September 2011 upon learning that a TRD employee had delivered two "Courtesy Red Tag Notices" (one for each lot) regarding unpaid taxes for 2007-2010. The court found that, after being informed that the Valenzuelas owed approximately $1,400 (including penalties), Mrs. Valenzuela returned and paid $700, thereby failing to cover the full amount.

However, crucially, the court found the required notices were not sent to the correct address, which was "reasonably ascertainable" by TRD, and concluded that the sale, and the associated deeds issued by TRD's Property Tax Division, were invalid. The court entered its final judgment in December 2015.

Second Appeal

For the second time in three years, the Snyders appealed. In its memorandum opinion issued March 6, 2017 (No. 35,313), the Court of Appeals dismissed the appeal because the Snyders were not "aggrieved parties" as to the judgment invalidating the tax lien sale. The court, describing the procedural history, noted the Snyders were dismissed from the case before the final judgment and, accordingly, the 2015 judgment could not be enforced against the Snyders. The court observed that "[u]ltimately, we are in no position to speculate whether any path remains for Plaintiffs to pursue the return of the property at issue in this case." *Valenzuela v. Snyder*, No. 35,313, mem. op. ¶ 8 (N.M. Ct. App. Mar. 6, 2017) (unpublished).

Second Lawsuit, 2017

In May 2017, five-and-a-half years after the October 2011 tax lien sale, the Valenzuelas filed a new lawsuit, specifically a quiet title action, naming the Snyders and, as expected in such an action, "unknown claimants."

The Snyders asserted the lawsuit was barred by the two-year statute of limitations in NMSA 1978, § 7-38-70(C) ("After two years from the date of sale, neither the former real property owner shown on the property tax schedule as the delinquent taxpayer nor anyone claiming through him may bring an action challenging the conveyance") but were unsuccessful in a motion for summary judgment on that basis. The Snyders submitted a proposed order that would have permitted them to apply to the Court of Appeals for permission to pursue an interlocutory appeal regarding the statute of limitations issue, but the district court declined to approve the order. The Snyders then unsuccessfully sought a writ of mandamus in the New Mexico Supreme Court.

The Valenzuelas went on to obtain a judgment in their favor, and the Snyders have appealed again, asserting that the May 2017 lawsuit was time-barred. The appeal, docketed but not briefed at the time this article was finalized, represents the third pro se appeal by the Snyders in less than six years.

The entire matter is an example of how both sides, even in a relatively low-value matter, can become entrenched (justified or not), particularly when attorneys are added to the mix.[2] A "low"-dollar case can be just as important to the parties as a high-dollar case is to its respective parties. But one may reasonably suggest that both sides would have fared better, considering the value of their time, legal fees, expenses, etc., if both sides had attempted to reach a resolution before years of litigation spread across two separate lawsuits.

As an aside, the fair market value of the land remains unclear. I am not aware of an appraisal being conducted during any time relevant to these proceedings. Days after the district court's October 2015 letter decision, the Valenzuelas' attorney

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Trust & Estates –

Income Tax of Decedents – Collection and Personal Liability

By Patricia Tucker

In mid-2017, two new developments highlighted a changing approach of the IRS to collection of outstanding income tax due from decedents. When the IRS files a formal claim and appears in a formal probate or action in court to close a trust, general lien priority rules apply. In this context, the federal tax lien by statute has priority over administrative expenses and statutory allowances, even those given priority by state statute. IRM 5.17.13.4, IRM. The doctrine of Federal Preemption moves the IRS claims ahead of the state statutory priority statutes, and also takes priority over the state provisions for setting limitations on the filing of claims by giving Notice to Creditors.[1] This brings into play three alternatives to the IRS's traditional practice of filing a formal claim in state court probate or trust closing proceedings.

Chief Counsel Advice 201723018, June 2017, considered a situation in which the IRS filed a proof of claim in a probate proceeding, but failed to object to a Request for Approval of Final Accounting which provided for payment of several debts and expenses that did not have priority over the income tax claims. The advice was that failure to object to that Request for Approval, or to file an appeal, waived not only the claim in the probate, but also waived assertions of transferee liability or fiduciary liability. The advice concluded that the "best practice" for the IRS was to either refrain from participating in the probate and use collection alternatives, or to enter the probate and fully participate.

The IRS is increasingly pursuing three alternatives: (1) imposition of **personal liability on fiduciaries** who pay certain debts of the decedent which are not superior to the IRS liens; (2) **transferee liability** imposed on beneficiaries to the extent of the value of property received; and (3) **foreclosure of liens** on property received by beneficiaries. These three collection mechanisms apply whether or not a probate is filed.

The first two types of liabilities, personal liability of a fiduciary and transferee liability, are not limited to the specific property received. Collection can be made from any property of the fiduciary or a beneficiary otherwise available. Foreclosure of tax liens, however, is limited to seizure of the specific property covered by the lien. Sometimes the Internal Revenue Service has more than one basis on which to proceed to collection. For example, if real property subject to a recorded tax lien passes on a transfer-on-death deed, the IRS may either foreclose on the specific real estate by filing in Federal District Court or proceed against the beneficiary on transferee liability grounds.

1. Personal Liability of a Fiduciary

Personal liability of a fiduciary or executor arises under 31 U.S.C. § 3713. Subsection (a) states that a claim of the U.S. Government will be paid first when the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor. Subsection (b) provides that a representative of a person or an estate who pays any part of a debt of the person or estate before paying a US government claim is personally liable to the U.S. Government to the extent of the payment for unpaid claims of the government. The statute of limitation for assertion of fiduciary liability is not later than 1 year after the liability arises or not later than the expiration of the period for collection

from the decedent, whichever expires later. Sec. 6901(c)(3), IRC.

However, for personal liability purposes under 31 U.S.C. § 3713, covered debts are often held to be limited to debts "of the decedent" incurred prior to his or her death. Expenses or debts which arise after death are not debts of the decedent. The payment of funeral expenses (*Rev. Rul. 80-112*); administrative expenses including attorney fees and court costs, *In Re Estate of Funk*, 849 NE 2d 366 (2006); and family allowances, *Schwartz v. Commissioner*, 560 F.2d 366 (2006), do not create personal liability under 31 U.S.C. § 3713.

Under § 3713, an "executor" must have knowledge of the tax liability. The test is whether the "executor" knew *or should have known* of the tax liability. *McCourt v. Comm., 1950 TC 734*. Knowledge can be inferred from knowledge that no income tax returns had been filed by the decedent, information that returns should be amended, or knowledge that a tax audit is occurring or likely.[2]

For this section, an "executor" is defined as **any person** in possession of property of a decedent, whether through a probate or otherwise. The recipient of property from a decedent, say a stock account on a payable on death transfer, is a person in possession of property of a decedent for this purpose. If the proceeds of the account are used to pay other creditors of a decedent while there is outstanding federal income tax due, the recipient of the funds is an "executor" for the purpose of personal liability. For example, if a probate is opened and the personal representative pays a credit card debt of the decedent, then the personal representative can be personally liable for the decedent's tax to the extent of the credit card payment made.

The "should have known" basis for liability raises questions as to what steps an executor should take to avoid personal liability. A release of a fiduciary from personal liability issued by a probate court does not release an executor from personal liability under § 3713 unless the tax priorities were actually determined in the probate proceeding and all appeals have been exhausted. *See Leroy New*; *US v. Weisburn, 48 F. Supp. 393 (E.D. Pa, 1943).* A request for release of personal liability of a fiduciary for outstanding tax debt of the decedent may be filed using IRS Form 5495. There may or may not be an audit or request for information after the Form is filed. If the request is not denied, the fiduciary is released nine months after the form is filed.

2. Transferee Liability of a Beneficiary

Transferee liability arises when a transfer is made during insolvency, or created an insolvency of the decedent, the transfer was for no or inadequate consideration and the transfer was made at a time when there were outstanding debts of the transferor or debts were reasonably anticipated. Transferees for these purposes include donees, heirs, devisees, legatees and distributes. Transferee liability is imposed on persons who received property of a decedent who owed federal taxes. *Shimco v. Commissioner*, TC Memo 1972-64.

Transferee liability is assessed in the same manner as income tax assessments. Notice of an anticipated assessment is given to the transferee, and Tax Court determination of liability is available. Liability is general – collection can be made from any assets of the transferee, not just from the property received. The statute of limitations (issuance of a Statutory Notice of Deficiency, for practical purposes) on the initial transferee is one year after the expiration of the statute of limitations on collection from the decedent.

3. Lien Foreclosure

Lien enforcement is a collection method often used in connection with real property that is subject to a federal tax lien. The reason is that liens can be foreclosed without any delay for administrative procedures which would apply in the case of transferee liability or fiduciary personal liability situations.

A tax lien can be foreclosed by an action in federal district court. In most cases, the liability is reduced to judgment and the judgment foreclosed on in the same proceeding.

Practical considerations:

Dealing with an insolvent estate with outstanding federal tax liabilities is a complicated undertaking. Strict procedures need to be followed and care needs to be taken to ensure that any payment of expenses and claims will not subject the fiduciary to personal liability. Understanding of the particular priority rules regarding federal tax liens, and the breadth of possible discretionary waivers of priority for certain expenses, is essential in protecting a fiduciary.

There are a number of steps available to protect against the risk of liability:

A fiduciary is required to file a Form 56 Notice of Fiduciary Relationship with the IRS. After the Notice is filed, the fiduciary will receive a Notice of Tax Due. This will include only tax already assessed. Tax which will be due on returns not yet filed are not included in the Notice, nor are potential audit deficiencies. The Notice is not a claim in any probate or trust closing proceeding. If the IRS wants to file a formal claim, it is done by separate document.

Request a transcript of account on the last six years to ensure that returns were filed and to determine if any audits have been opened or any claims for refund are pending. File any delinquent returns.

File a Form 4810 request for prompt assessment of income tax on any returns for which deficiency assessments are possible. This will shorten the three-year assessment statute period to eighteen months from the request.

Marshall assets from outside the probate estate into the probate to pay the tax claims, or obtain informal payment or contribution from holders of non-probate assets. Property outside of probate is still subject to levy or other collection action.

Request for discharge from personal liability for income tax using a Form 5495.

Endnotes

[1] In mid-2017, the case of *Estate of Frederick Alan Simmons, Raelinn Spiekhout, PR* (May 22, 2017, SD IN) held, on the basis of strong Supreme Court precedent, that a recorded federal tax lien for income tax had precedence over all other claims filed in a probate, including claims with priority from creditors' claims under state law. Such superseded claims included claims for administrative expenses such as PR/Trustee fees, attorney and professional fees, statutory allowances, funeral expenses, etc. *See also Bd. Comm Jackson County v. US*, 308 US 343 (1939); *US v. Summerlin*, 30 US 414 (1940). This is federal preemption at work.

[2] *Leroy New, 48 TC 1967*; *Frost, TC Memo 1993-94*; *Giovanine Terranove, 2 TCM 616 (1943).*

Patricia Tucker has practiced in the area of federal and state tax controversy work since 1972. She is a former adjunct professor at the Anderson Schools of Management, Graduate Division, and the UNM School of Law, has been named Lawyer of the Year – Taxation (Albuquerque) by Best Lawyers in America, and Lawyer of the Year – Tax Litigation and Controversies.

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issued a press release stating that the land was worth $50,000, double the amount claimed in the 2012 amended complaint.[3]

Conclusion

Regardless of the resolution of the issue presented in the latest appeal, a prolonged window of time in which the former owner may file a lawsuit challenging a tax lien sale will tend to discourage people from bidding at a tax lien auction, making it more difficult for the state to obtain payment of unpaid property taxes via public auction.

There are numerous ways in which the tax lien sale procedures can be improved. For example, the provision of notice of an impending tax sale could be made easier than it was decades ago when the Property Tax Code was enacted, by allowing email to be used as an additional means of notice to those who agree to it. Additionally, protection of the delinquent taxpayer could be promoted, in part, by requiring that a winning bid must exceed a minimum percentage of assessed value.

Endnotes

[1] Joline Gutierrez Krueger, "$215 Property Fight Goes to NM Supreme Court," *Albuquerque Journal*, August 9, 2014. The other three articles were published in December 2014, October 2015, and June 2017.

[2] For example, in August 2012, the Valenzuelas offered, through their counsel, to repurchase the land by reimbursing the purchasers the $215 paid at auction, an offer that was rejected in part due to the time and expenses the Snyders had already incurred on the case.

[3] October 26, 2015 press release issued by attorney Eric Dixon of Portales (PDF on file with author). Conversely, the Snyders contended the land was worth about $7,500. Joline Gutierrez Krueger, "Couple loses property bought at tax auction after 4-year battle," *Albuquerque Journal*, October 31, 2015, A1, A4.

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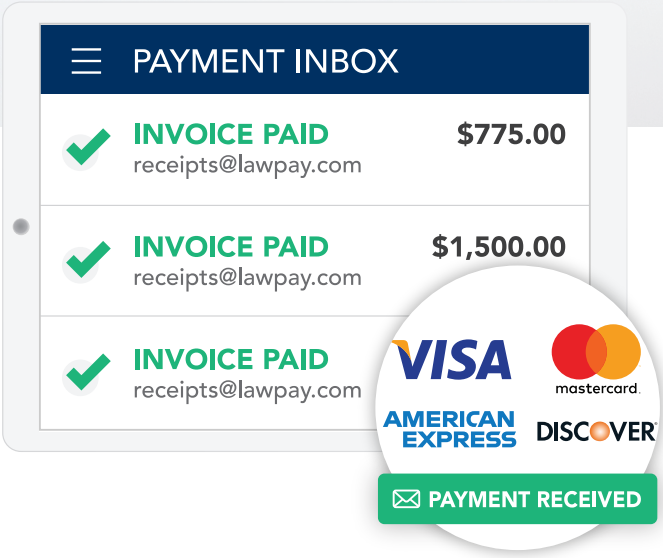

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1. Motor Carrier Status and Duties

{12} 49 U.S.C. § 13102(14) (2012) defines a motor carrier as "a person providing motor vehicle transportation for compensation." *See also* 49 C.F.R. § 390.5 (2017) (defining "motor carrier" as "a for-hire motor carrier or a private motor carrier"; "for-hire motor carrier" as "a person engaged in the transportation of goods or passengers for compensation"; and "private motor carrier" as "a person who provides transportation of property or passengers, by commercial vehicle, and is not a for-hire motor carrier"). 49 U.S.C. § 31136(a)(1) (2012) directs the Secretary of Transportation to prescribe commercial motor vehicle safety regulations that will ensure, at a minimum, that "commercial motor vehicles are maintained, equipped, loaded, and operated safely." 49 C.F.R. § 396.3(a) (2017) in turn provides that "[e]very motor carrier and intermodal equipment provider must systematically inspect, repair, and maintain, or cause to be systematically inspected, repaired, and maintained, all motor vehicles and intermodal equipment subject to its control." *See also* 49 U.S.C. § 31502(b)(1) (2012) (authorizing Secretary of Transportation to prescribe requirements for safety of equipment of a motor carrier); 49 C.F.R. §§ 399.201, .211 (2017) (implementing § 31502(b)(1) and requiring adequate maintenance of all steps on commercial motor vehicles to enhance the safety of motor carrier employees). Thus, federal law requires motor carriers to repair and maintain motor vehicles that are subject to their control.

{13} The New Mexico Motor Carrier Safety Act (the Act) is set forth at NMSA 1978, Sections 65-3-1 to -14 (1989, as amended through 2009). The purpose of the Act is "to protect the New Mexico traveling public by ensuring the safe operation of commercial motor carrier vehicles on New Mexico's highways." Section 65-3-2. The Act does not define "motor carrier." However, the Motor Carrier Act, NMSA 1978, §§ 65-2A-1 to -41 (2003, as amended through 2017), defines a "motor carrier" as "a person offering or providing transportation of persons, property or household goods for hire by motor vehicle, whether in intrastate or interstate commerce[.]" Section 65-2A-3(FF). In the absence of a different definition of "motor carrier" in the Act, we will apply this definition. *See United Rentals Nw., Inc. v. Yearout Mech., Inc.*, 2010-NMSC-030, ¶ 22, 148 N.M. 426, 237 P.3d 728 (holding that the appellate courts will "look to other statutes in pari materia"); *State v. Rivera*, 2004-NMSC-001, ¶ 13, 134 N.M. 768, 82 P.3d 939 (holding that the appellate courts will consider statutory language "in reference to statutes dealing with the same general subject matter" and will attempt to "read different legislative enactments as harmonious instead of as contradicting one another" (internal quotation marks and citations omitted)).

{14} The Act requires the adoption of "rules and regulations concerning the systematic inspection, repair and maintenance of all commercial motor carrier vehicles. The regulations shall not be inconsistent with or more stringent than applicable federal safety standards." Section 65-3-12; *see also* § 65-3-4(A) (directing the adoption of regulations applicable to motor carrier safety that "shall not be inconsistent with or more stringent than applicable federal safety standards"); § 65-3-9 (directing the adoption of regulations "not inconsistent with or more stringent than applicable federal safety standards" concerning various parts and accessories necessary for the safe operation of a commercial motor carrier). Regulations establishing safety requirements for motor carriers and motor vehicles operated by motor carriers are set forth in 18.3.4 NMAC. In particular, 18.3.4.12(F)(1) NMAC (02/13/2015, as amended through 01/30/2018) adopts by reference, for vehicles other than small passenger vehicles and commuter services, the inspection, repair, and maintenance requirements of 49 C.F.R. § 396.3. Thus, New Mexico also requires motor carriers to repair and maintain motor vehicles subject to their control.

{15} New Mexico courts have not addressed whether a lessor of trucks falls within the foregoing federal or state definitions of a motor carrier. However, *Castro v. Budget Rent-A-Car Sys., Inc.*, 65 Cal. Rptr. 3d 430, 437 (Cal. Ct. App. 2007), provides guidance. There, the plaintiff sustained physical injuries in a traffic collision allegedly caused by an overturned truck. *Id.* at 433-34. The defendant had leased the truck to Carlos Diaz, doing business as Carlos Diaz Fresh Produce. *Id.* at 432. At the time of the accident, Diaz's employee was driving the leased truck. *Id.* The plaintiff contended that the defendant "is a federally regulated motor carrier because it is in the business of leasing to others commercial vehicles that will be used to transport goods or property across state lines, and it is compensated for that activity." *Id.* at 437. The court, however, reasoned that because United States Code Title 49 and its regulations do not mention "lessor" in the definitions of "motor carrier," "motor private carrier," or "for-hire" carriage, Congress and the federal Department of Transportation must not have intended to extend to lessors the requirements imposed on motor carriers. *Id.* at 438-39. "[T]he mere act of leasing the truck to Diaz did not qualify [the defendant] as a motor carrier because it did not retain possession or control over the truck or otherwise operate the truck to transport goods. . . . [The defendant] was not a motor carrier within the meaning of the cited federal statutes and regulations." *Id.* at 437, 439; *accord Del Real v. U.S. Fire Ins. Crum & Forster*, 64 F. Supp. 2d 958, 965 (E.D. Cal. 1998). We find the reasoning of *Castro* persuasive and hold that a lessor of trucks is not a motor carrier subject to the foregoing statutory and regulatory duties of inspection, maintenance, and repair.

{16} Hernandez also points to other provisions of federal and state law governing motor carriers that expressly refer to vehicle leases and contends that those statutes impose duties upon lessors. 49 U.S.C. § 14102(a) (2012) provides that "[t]he Secretary [of Transportation] may require a motor carrier . . . that uses motor vehicles not owned by it to . . . have control of and be responsible for operating those motor vehicles in compliance with requirements prescribed by the Secretary on safety of operations and equipment, and with other applicable law as if the motor vehicles were owned by the motor carrier." The implementing regulation, 49 C.F.R. § 376.11(a) (2017), provides that "the authorized carrier may perform authorized transportation in equipment it does not own only under the following conditions: (a) Lease. There shall be a written lease granting the use of the equipment and meeting the requirements contained in § 376.12." 49 C.F.R. § 376.12(c)(1), in turn, specifies that such a lease shall provide that the motor carrier shall have exclusive possession, control and use of the equipment, and assume complete responsibility for the operation of the equipment, for the duration of the lease. Similarly, Section 65-2A-24(A) provides that "[a]n intrastate motor carrier shall not lease a motor vehicle or operate a leased motor vehicle in the course of its transportation service except as provided by commission rule." 18.3.9 NMAC implements Section 65-2A-24(A). In 2013, 18.3.9.10(B) NMAC

(01/01/2005), provided, "If the equipment lease is between an authorized motor carrier and a person who is not an authorized motor carrier, the equipment lease shall specify that the authorized motor carrier shall be responsible for complying with all applicable laws and . . . the safety requirements prescribed in 18.3.4 NMAC, safety requirements." These statutes and regulations impose on a motor carrier *lessee* the obligation to enter into a written lease, pursuant to which the lessee assumes full responsibility for the safe maintenance and operation of the leased vehicle. Reasonably construed in pari materia with the statutes and regulations discussed above, they do not impose any duty on the *lessor* (unless the lessor is also a motor carrier), including any implied duty to maintain the vehicle during the lease term.

2. Grando's Was Not Subject to the Duties of Inspection, Maintenance, and Repair Imposed on Motor Carriers

{17} It is undisputed that Grando's business was limited to leasing trucks to Creed. As a lessor of trucks, Grando's is not a motor carrier within the plain meaning of the term's definitions set forth in the foregoing federal and New Mexico statutes and regulations. That is, Grando's does not provide transportation of persons, property, or household goods for hire or provide transportation for compensation. Further, the federal and New Mexico definitions of motor carrier neither explicitly nor implicitly reference lessors. The absence of any such reference supports the conclusion that obligations imposed on motor carriers are not meant to apply to persons who lease vehicles to motor carriers. This Court "will not read into a statute any words that are not there, particularly when the statute is complete and makes sense as written." *State v. Trujillo*, 2009-NMSC-012, ¶ 11, 146 N.M. 14, 206 P.3d 125. Thus, Hernandez did not establish a disputed question of fact regarding Grando's alleged breach of any statutory or regulatory duties of a motor carrier.

C. The District Court Erred in Granting Summary Judgment in Favor of Grando's on Hernandez's Negligence Claim

{18} Hernandez argues that Grando's owed a common law duty of care to ensure that the vehicles it owns are maintained and repaired in a safe condition, and that Grando's could not escape this duty by entering into a lease agreement with Creed. Hernandez contends that Grando's breached this duty by not properly repairing the defective truck step.

1. Lessor's Divestiture of Duty to Maintain Land or a Chattel in Safe Condition

{19} The owner of land or a chattel who, as a result of a lease, transfers possession and control of the land or chattel to the lessee, generally divests itself of a duty to maintain the land or chattel in a safe condition. For example, in *Grove v. Cornell University*, 54 N.Y.S.3d 260 (N.Y. App. Div. 2017), the court held that the lessor of a boom lift from which an employee of the lessee fell and injured himself while installing windows on a building under construction did not owe the employee a duty of care. Similarly, in *Austin v. Walt Disney Pictures*, No. 329655, 2017 WL 694708, at *1 (Mich. Ct. App. Feb. 21, 2017) (per curiam), the plaintiff, an actress, brought an action alleging that, during filming, she was injured while performing a stunt. Go Stunts had leased the stunt equipment used for the film to Michigan Motion Picture Productions, LLC. *Id.* The plaintiff alleged that Go Stunts owed a duty to inspect and maintain the equipment on site. *Id.* The court disagreed, holding that Go Stunts did not owe a duty to inspect and maintain stunt equipment while the equipment was leased. *Id.* at *2.

{20} While no New Mexico decision directly addresses the question of a chattel lessor's duty, other New Mexico decisions reflect the underlying general principle that the duty of care derives from possession and control. In *Gabaldon v. Erisa Mortgage Co.*, ¶ 1, 1999-NMSC-039, 128 N.M. 84, 990 P.2d 197, our Supreme Court reversed this Court's opinion recognizing a negligent entrustment cause of action against a landlord for conditions on the land that the landlord does not control. The Court stated that "the legal position of a non-possessory landlord is not one of immunity or privilege[;] it is simply the same legal position offered by sellers of property. [Landlords] are simply not, as a matter of law, responsible for what takes place on land they do not possess, and do not have a right to control." *Id.* ¶ 30 (alteration, internal quotation marks, and citation omitted). While *Gabaldon* analyzes a landlord-tenant relationship, it supports the general proposition that lessors who do not have possession or control owe no duty to maintain the leased property in a safe condition to prevent injury to others. *Id.*; *see Gourdi v. Berkelo*, 1996-NMSC-076, ¶ 15, 122 N.M. 675, 930 P.2d 812 (stating that "[t]he duty of a landowner generally to keep the premises in a safe condition arises from its position of control over the premises. . . [and that w]hen . . . a landowner has relinquished the right to possession under a lease, he or she is no longer in the best position to discover and remedy any dangerous condition—the tenant is").

{21} In *Harmon v. Atlantic Richfield Co.*, 1981-NMCA-005, ¶ 1, 95 N.M. 501, 623 P.2d 1015, the plaintiff, an employee of an independent contractor, was injured while gauging a frac tank owned by the defendant. The defendant had entered into a contract with the plaintiff's employer relieving the defendant of any job safety duty. *Id.* ¶¶ 2-3. The plaintiff alleged that the defendant had been negligent in failing to provide the plaintiff with a safe place to work. *Id.* ¶ 1. The opinion[3] concluded that the plaintiff's work was solely under the control and supervision of his employer from whom he received workers' compensation benefits. *Id.* ¶¶ 27, 28. The opinion further concluded that, because the contract between the defendant and the contractor divested the owner of the right to control the contractor's operations, the owner owed no duty to the contractor's employees to provide a safe place to work. *Id.* ¶¶ 25, 28.

{22} The July 1, 2011, Commercial Vehicle/Equipment Lease Agreement (the Agreement) between Grando's and Creed provided for delivery by Grando's of seven vehicles, including the 1995 blue Freightliner tractor from which Hernandez fell on June 21, 2013, to Creed, for a term continuing through November 1, 2013. While not explicitly stating that possession and control was transferred to Creed, the Agreement clearly provided for Creed to take possession of and responsibility for the vehicles. Further, transfer of possession and control was implicit in the term "lease." *Transamerica Leasing Corp. v. Bureau of Revenue*, 1969-NMCA-011, ¶ 16, 80 N.M. 48, 450 P.2d 934 (defining a "lease" as "an agreement under which the owner gives up the possession and use of his property for a valuable consideration and for a definite term"); *Black's Law Dictionary* 800 (5th ed. 1979) (defining a "lease" as "a contract by which one owning such property grants to another the right to possess, use and enjoy it for specified period of time in exchange for periodic payment of a stipulated price, referred to as rent").

[3]Two judges on the panel that decided *Harmon* concurred only in the result.

{23} In Section 9 of the Agreement, Grando's expressly delegated to Creed the obligation to maintain and repair the tractor: "Lessor shall not be obligated to make any repairs or replacements. At Lessee's expense, shall [sic] take good care of the Vehicles, and repair or replace any and all damage done to the Vehicles. . . . Thus without limitation, Lessee, at Lessee's expense, shall provide the following: . . . (b) maintenance and repairs, e.g., all labor and parts that may be required to keep the Vehicles in good operating condition." Consistent with *Harmon*, *Gabaldon*, and *Gourdi*, this relinquishment and transfer of possession and control, and in particular, responsibility for maintenance and repair, divested Grando's of the duty to which it ordinarily would be subject as owner to inspect, repair, and maintain the trucks.

2. Grando's Reservation of a Right to Inspect the Truck

{24} Hernandez argues, however, that because under the lease Grando's retained a *right* to inspect the leased vehicles and prevent their use by Creed if it found that the vehicles were not being properly maintained, Grando's still owed such a *duty* to him. The portions of the lease on which Hernandez relies state:

> 8. Lessor may at all times inspect the Vehicles and observe their use. Lessee whenever requested by Lessor shall advise Lessor of the exact location of all of the Vehicles and their condition. Lessor may immediately remove any Vehicles from any job site, building or other place, without notice or liability to Lessee, if upon inspection, Lessor determines in Lessor's opinion that any of the Vehicles are being used beyond capacity or in any manner improperly cared for or abused.
>
> 9. . . . If Lessee fails to perform any maintenance required hereunder within five (5) days of the occurrence of the need for maintenance Lessor may at Lessor's option and without limitation perform such maintenance and Lessee shall repay the costs for such work incurred by Lessor immediately upon demand, or (b) terminate this Lease upon three (3) days prior written notice from Lessor to Lessee. Lessee shall make no alteration of any of the Vehicles without Lessor's prior written consent.

Thus, under the lease Grando's at all times retained the right to inspect a vehicle, remove it from the job site, and perform necessary maintenance that Creed failed to perform.

{25} In *Gourdi*, a trust had leased the subject premises to the operator of a restaurant. 1996-NMSC-076, ¶ 1. An employee of the tenant slipped on the restaurant floor and sued the trustees for her resulting injuries, alleging that their negligence in failing to maintain a drainage pipe caused liquid to back up on to the floor. *Id.* Under the lease, the tenant was responsible for all maintenance and repair of the premises, but the trust reserved the right to enter the premises to make inspections and repairs. *Id.* ¶ 2. It was undisputed that the trustees had no prior knowledge of any drainage backup problem. *Id.* ¶ 3. Under these circumstances, our Supreme Court held that reservation of the right to inspect and repair did not give rise to a duty to inspect and repair the drainage pipe:

> Only when the landlord who has reserved this right has notice of facts indicating the need to make an inspection should it be charged with knowledge of any dangerous condition that a reasonable inspection would have revealed. Here, as noted, the owner had no knowledge of any accidents, any drainage backups, or any other fact that would have put it on notice prior to [the plaintiff's] accident. Under these circumstances, the owner had no duty to inspect after commencement of the lease.

Id. ¶ 16.

{26} Case law from other jurisdictions reflects that a similar rule applies to lessors of chattels. A lessor's reservation of the right to inspect a leased chattel and take remedial action does not impose on the lessor a duty of maintenance and repair owed to a third party. In *Arriaga v. CitiCapital Commercial Corp.*, 85 Cal. Rptr. 3d 143 (Cal. Ct. App. 2008), the plaintiff was injured when his finger became entangled in a glue speading machine that his employer leased from the defendant's finance company. *Id.* at 146. The plaintiff sued the finance company, arguing that the company reserved the right in the lease to inspect the glue spreader and that this right gave rise to a duty to exercise reasonable care to inspect the machine for defects. *Id.* at 154. On appeal, after the trial court dismissed the plaintiff's negligence claim against the lessor, the California Court of Appeals rejected the argument. *Id.* After noting that the lessor had no notice of the defect, the court held that "the reservation of the right to inspect, in and of itself, does not vest such control over the equipment as to impose on the lessor any such obligation to a third party." *Id.* Similarly, in *Garner v. Todd*, 361 N.W.2d 459, 460 (Minn. Ct. App. 1985), the plaintiff's employer leased a tractor-trailer rig from the defendant. The plaintiff sued the defendant after he fell off the trailer and was injured. *Id.* On appeal following dismissal of the plaintiff's claim, the plaintiff argued that, because the lease agreement granted the lessor the right to inspect and remove the trailer, the lessor owed a duty to ensure that the trailer was safe. *Id.* at 461. The Minnesota Court of Appeals disagreed: "There is no support for appellant's further argument that [the lessor] owed a duty of care under the principles of common law negligence. . . . There is no evidence that [the lessor] . . . assumed a duty to keep the equipment in repair[.]" *Id.*; *cf. Zimprich v. Broekel*, 519 N.W.2d 588, 594 (N.D. 1994) (holding that, under the express terms of the subject truck lease, the *lessor* retained responsibility for maintenance and repairs; lessee, which had only a general right to inspect, owed no duty of maintenance and repair to third party).

{27} The Restatement (Second) of Torts Section 414 (1965) and its comments, while in the context of an independent contractor-employer relationship, further support the general principle that retention of a general right to inspect is insufficient to establish retained control that gives rise to a duty of care owed to third parties:

> [T]he employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail.

Restatement (Second) of Torts § 414 cmt. c (1965); *see, e.g.*, *Schaefer v. Universal*

Scaffolding & Equip., LLC, 839 F.3d 599, 606-07 (7th Cir. 2016) (holding that premises owner did not retain sufficient control over construction of scaffolding to subject it to negligence liability); *Harmon*, 1981-NMCA-005, ¶¶ 19-20 (holding that, while the defendant retained the right to inspect the work in process at all times, it did not retain any control and owed no duty to keep the workplace safe).

{28} Hernandez maintains that Grando's retained control over the maintenance and upkeep of the truck because the Agreement permits Grando's to inspect the vehicle, perform maintenance if Creed fails to do so and remove any vehicle it if determines that the vehicle is being used beyond its capacity. In light of the foregoing authority, Grando's retention of the right to inspect, remove, or perform maintenance upon the truck if Creed failed to meet its maintenance and repair obligations did not, by itself, establish "retained control" sufficient to impose a duty of care on Grando's.

3. A Question of Fact Regarding Grando's Notice of the Truck Step Defect Precluded Summary Judgment on Hernandez' Negligence Claim

{29} As discussed above, *Gourdi* and *Arriaga* stand for the proposition that, while a lessor of land or chattel, respectively, who reserves a right of inspection and repair is not generally subject to a duty to do so, such a duty will arise where the lessor also has notice of a defect or unsafe condition. *See Gourdi*, 1996-NMSC-076, ¶ 16 (holding that "[o]nly when the landlord who has reserved this right has notice of facts indicating the need to make an inspection should it be charged with knowledge of any dangerous condition"); *Arriaga*, 85 Cal. Rptr. 3d at 154 (noting that the lessor had no notice of the defect in the glue spreading machine; holding only that "the reservation of the right to inspect, *in and of itself*, does not vest such control over the equipment as to impose on the lessor any such obligation to a third party" (emphasis added)).

{30} In an affidavit submitted with his response to Grando's summary judgment motion, Hernandez averred, "On many occasions prior to June 21, 2013 I had reported problems with [the 1995 blue Freightliner's] side-step to Carlos Ramirez, my supervisor, and also to . . . Granados. I specifically informed them both that the step was broken, loose. Mr. Granados' response [sic] either to ignore me, do nothing, or he would simply put wire around the step to try and hold it in place[.]" Hernandez's affidavit testimony established a question of fact whether Grando's had notice of the defect, and thus whether it owed and breached a duty to properly and adequately repair the defective truck step. For this reason, the district court erred in granting summary judgment in Grando's favor on Hernandez's negligence claim.

D. The District Court Did Not Err in Dismissing Hernandez's Strict Product Liability Claim

{31} In his affidavit filed in support of Grando's summary judgment motion, Granados stated, "At the time of the lease [by Grando's of trucks to Creed,] the steps on the 1995 blue Freightliner were made of steel and were not defective." Hernandez did not produce any evidence to contradict this assertion, i.e., that the steps were broken or otherwise defective at the time Grando's leased the trucks to Creed. Instead, Grando's argued only that as Grando's owner, Granados necessarily would have been aware at all times of the condition of the trucks.

{32} Strict product liability requires proof, among other elements, that the product was sold or leased in a defective condition. *See Fernandez v. Ford Motor Co.*, 1994-NMCA-063, ¶ 26, 118 N.M. 100, 879 P.2d 101. We can assume for purposes of argument that Grando's principal was aware of the condition of the truck's step at the time it was leased to Creed, but that simply begs the question. Because Hernandez had no evidence with which to establish a question of fact as to whether the truck's steps were in an defective condition at the time the truck was leased to Creed, the district court did not err in dismissing the strict liability claim.[4]

CONCLUSION

{33} We reverse the district court's grant of summary judgment in favor of Grando's and remand for further proceedings consistent with this opinion.

{34} IT IS SO ORDERED.

HENRY M. BOHNHOFF, Judge

WE CONCUR:

M. MONICA ZAMORA, Judge

EMIL J. KIEHNE, Judge

[4]Hernandez challenged the district court's dismissal of his warranty claim in his docketing statement but did not address the point in his brief in chief. For that reason we do not address it. *See Magnolia Mountain Ltd., P'ship v. Ski Rio Partners, Ltd.*, 2006-NMCA-027, ¶ 34, 139 N.M. 288, 131 P.3d 675 (noting that "an issue is abandoned on appeal if it is not raised in the brief in chief").

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-073

No. A-1-CA-35260 (filed September 5, 2018)

PETE VANDERLUGT,
Petitioner-Appellant,
v.
KRISTINA VANDERLUGT,
n/k/a KRISTINA CERVANTES,
Respondent-Appellee.

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
J.C. Robinson, District Judge

CAREN I. FRIEDMAN
Santa Fe, New Mexico
for Appellant

KERRY KIERNAN
KERRY KIERNAN, P.C.
Albuquerque, New Mexico
for Appellee

Opinion

Emil J. Kiehne, Judge

{1} Pete VanderLugt (Husband) appeals the district court's order following a bench trial on property division issues in connection with his divorce from Kristina VanderLugt, n/k/a Kristina Cervantes (Wife). Husband raises four issues: (1) whether the district court erred in determining that Wife had a community lien interest in the assets of an irrevocable trust; (2) whether the district court abused its discretion in limiting Husband's discovery into Wife's various business enterprises; (3) whether the district court abused its discretion in allowing Wife's expert witness on trusts and estate planning to testify about the irrevocable trust at trial; and (4) whether the district court erred in concluding that Wife had separate and community lien interests in proceeds from the sale of Husband's separate property.

{2} This is the second time this case has come before this Court. On the first appeal, we remanded this case to the district court because there was no final, appealable judgment on the irrevocable trust issue. *See VanderLugt v. VanderLugt*, No. 32,950, mem. op. ¶¶ 10-11 (N.M. Ct. App. Feb. 25, 2015) (non-precedential).

{3} We now reverse the district court's decision that there was a community lien interest in the irrevocable trust and that Wife was entitled to a share of it. This ruling makes it unnecessary to decide Husband's claim that Wife's expert witness should not have been allowed to testify about the irrevocable trust. We affirm the district court on all other issues.

BACKGROUND

{4} The parties were married in May 1998 and separated in May 2010. They had two children during the course of their marriage. The district court held a bench trial in March 2013 to decide property division issues that the parties were unable to agree on. Additional facts are developed below as needed to discuss the issues raised by Husband on appeal.

DISCUSSION

I. Wife had no interest in the VanderLugt Irrevocable Trust

{5} We first address Husband's claim that the district court improperly granted Wife a community lien interest in the corpus of an irrevocable life insurance trust set up by Husband before the couple married.

A. Background of the VanderLugt Irrevocable Trust

{6} Husband created the VanderLugt Irrevocable Trust (the Trust) in 1992, funding it in 1994 with a life insurance policy on Husband's life, which is the Trust's only asset. The Trust is the owner of the life insurance policy. Husband's father is the trustee, and the beneficiaries as stated in the Trust instrument are Husband's spouse if he is married at the time of his death, and if he is not married at the time of his death, then the Trust assets are to be held in a separate trust for his children. Fifteen percent of the Trust assets are to be distributed to various charitable organizations. At the time the Trust was set up, Husband was not married, not about to get married, and had no children. The Trust instrument stated that it "is and shall be irrevocable and shall not be altered, amended, revoked, or terminated by the [s]ettlor, or any other person." The parties stipulated that as of February 2012, the net death benefit of the policy was $5,017,376, and the net cash value of the policy was $726,759.91.

{7} For several years after they married, the parties paid premiums on the policy using community funds until the policy became "self-funding," meaning that the premiums were paid using a combination of dividends earned on the policy and loans against its cash value. From 2000-2003, the premium payments made by the community were treated as a gift to the parties' children for tax purposes. At the time of trial, the parties' children were the only beneficiaries of the Trust because Wife lost her status as a beneficiary upon divorcing Husband and Husband had not remarried.

{8} After trial, the district court found that Husband set up the Trust for estate planning purposes and found that the only significant asset in Husband's estate was the life insurance policy. It further found that the community paid $289,128.68 in premiums on the policy before it became self-funding. Further, the district court found that the dividends were partially earned by the community premium payments. Relying on figures provided by Wife's expert witness in accounting, the district court determined that the community had a community lien interest in the Trust of $519,520.12. The district court ordered that Wife receive one-half of the community lien interest, i.e., $259,760.06. After the first appeal, the district court noted that because neither party had joined the trustee or trust beneficiaries to the dissolution of marriage proceeding, it did not have jurisdiction over them, and concluded that Wife would have to bring a separate action to enforce and collect her lien against the Sun Life Policy. The district court also found that "[i]t is inequitable for [Wife] not to receive her interest in the Sun Life Policy particularly when [Husband]'s father is the Trustee and [Husband] can benefit during his lifetime from distributions and loans to a subsequent spouse,

future children and/or the parties children the Trustee determines to be in the beneficiary's interest."

{9} Wife argues that we should uphold the decision of the district court that the community acquired a community lien interest in the Sun Life Policy and that she is entitled to one-half of that interest. She urges this Court to hold that it would be inequitable not to allow her to receive this interest. Husband, on the other hand, argues that the Sun Life Policy, as the sole asset of an irrevocable trust, is neither a community asset nor a separate asset of either party and therefore was not subject to property division.

B. The law governing property division and trusts

{10} Under New Mexico community property law, "property . . . takes its status as community or separate at the time it is acquired, and by manner of acquisition." *Bayer v. Bayer*, 1990-NMCA-106, ¶ 12, 110 N.M. 782, 800 P.2d 216. "Community property consists of all property acquired by either or both spouses during marriage, which is not separate property, and its rents, issues and profits." *Portillo v. Shappie*, 1981-NMSC-119, ¶ 12, 97 N.M. 59, 636 P.2d 878 (internal quotation marks and citation omitted). In divorce proceedings, trial courts are to divide the community property equally. *Irwin v. Irwin*, 1996-NMCA-007, ¶ 10, 121 N.M. 266, 910 P.2d 342. Separate property is not subject to division, but the community may obtain a lien interest in the increased value of separate property of a spouse if community funds or labor are expended which increase the value of the separate property. *See Trego v. Scott*, 1998-NMCA-080, ¶ 8, 125 N.M. 323, 961 P.2d 168; *Jurado v. Jurado*, 1995-NMCA-014, ¶ 19, 119 N.M. 522, 892 P.2d 969; Brett R. Turner, *Division of Third-Party Property in Divorce Cases*, 18 J. Am. Acad. Matrim. Law 375, 377 (2003) [hereinafter *Third-Party Property*] ("[S]eparate property is awarded to the spouse who holds legal title."). A community lien is an interest that the community obtains in the separate property of one of the spouses to a marriage. *See Jurado*, 1995-NMCA-014, ¶ 10 ("The community is entitled to a lien against the separate property of a spouse for the enhanced value of such property attributable to community labor during the marriage."). Wife has the burden of proof of establishing the community interest in the sale of the proceeds. *See Bayer*, 1990-NMCA-106, ¶ 12.

{11} Generally, however, if property does not belong to either spouse, then it is not subject to division in a divorce case. *See Third-Party Property*, *supra*, at 377 ("The general rule is that third-party property is not subject to division [in a divorce proceeding]."). Third-party property is not separate property of either spouse. *Id.* at 379 ("[P]roperty owned by a third party is neither marital nor separate property, but rather a distinct category of property in itself.").

{12} The question before us is a matter of first impression—whether an irrevocable life insurance trust is divisible as community property where neither spouse is a trustee or beneficiary. "A trust may be defined as a fiduciary relationship in which one person holds a property interest, subject to an equitable obligation to keep or use that interest for the benefit of another." Amy Morris Hess, George Gleason Bogert, & George Taylor Bogert, *Bogert's The Law of Trusts & Trustees*, § 1 (June 2018) [hereinafter *Bogert's*] (emphasis omitted). Trusts have been increasingly recognized as legal entities, which consist of the trust estate and the fiduciary relation between the trustee and beneficiaries. Restatement (Third) of Trusts § 2 cmt. a (2018). The trustee holds property for the benefit of the beneficiary. *Id.* Generally, the trustee is considered to hold legal title to the trust property, while the beneficiary holds equitable title to the trust property. *See Bogert's*, *supra* § 1 ("A trustee's title usually is legal, but it may be equitable if the settlor expresses the intent to give such an interest and has the capacity to do so."); Restatement (Third) of Trusts § 2 cmt. d ("Although trust beneficiaries have equitable title, a trustee's title to trust property may be either legal or equitable."). In divorce cases, a court generally may only divide the spouses' equitable interest in the property. *Third-Party Property*, *supra*, at 389.

{13} An irrevocable trust is a trust which cannot be revoked by the settlor—the settlor being the person who creates or contributes property to the trust. *See Bogert's*, *supra* §§ 1, 998; *see also* NMSA 1978, § 46A-1-103(O) (2007, amended 2018) (defining "settlor" as "a person, including a testator, who creates or contributes property to a trust"). Once an irrevocable trust has been created, with few exceptions, the settlor does not have any legal relationship with the beneficiaries or trustee of the trust, and does not have rights, liabilities, or powers over trust administration. *See Bogert's*, *supra* § 42.

{14} An irrevocable life insurance trust, such as the one at issue in this case, is often set up for estate planning purposes. *See id.* §§ 234, 1091.5. By giving up all "incidents of ownership," including the right to change the beneficiary, borrow or withdraw cash values, pledge the policy as collateral for a loan, retain a reversionary interest exceeding 5 percent of the value of the policy, surrender the policy, cancel the policy, assign the policy or revoke prior assignments, the settlor avoids having the policy included in his estate for estate tax purposes. *Id.* § 1091.5.

{15} When a trust is revocable and a spouse is the settlor, the trust is usually considered marital property subject to division because the settlor spouse still has control over the trust's assets, and thus has not given up all incidents of ownership. *See* Brett R. Turner, *Equitable Distribution of Property*, 3d § 6:93 (Nov. 2017) [hereinafter *Equitable Distrib. of Prop.*]; *see also id.* n.1 (citing cases where courts have refused to exclude assets held in a revocable trust from the marital estate). However, in an irrevocable trust, the settlor has given up control over the trust's assets. *See Bogert's*, *supra* § 42.

{16} The prevailing rule in other jurisdictions is that the corpus of an irrevocable trust is not marital property subject to division in a divorce, but if either spouse has a beneficial interest in the trust, then that interest can be divided. *See Third-Party Property*, *supra* at 389, 394. The relevant question is whether a spouse has an interest in the trust's assets or control over them, not the source of the trust's assets. *See In re Marriage of Pooley*, 996 P.2d 230, 232 (Colo. App. 1999) (holding that extent of beneficiary's interest in irrevocable trust, rather than source of funds in the trust, determines whether the trust and the income from it are marital property); *McGinn v. McGinn*, 540 S.E.2d 604, 605 (Ga. 2001) (holding that irrevocable trust of which the husband was co-trustee and co-beneficiary was not marital property, but that "his interest in the trust is one of his assets which is relevant to the determination of his obligations in th[e] divorce case"); *Findlen v. Findlen*, 1997 ME 130, ¶ 15, 695 A.2d 1216 (holding that the trial court could not divide the marital residence, which was placed in an irrevocable trust for benefit of husband and wife, but it could divide the parties' interest in the trust); *Caccamise v. Caccamise*, 747 A.2d 221, 226-27 (Md. Ct. Spec. App. 2000) (explaining that value of irrevocable

trust created by husband for wife's benefit was marital property where the wife had a beneficial interest in the trust); *In re Chamberlin*, 918 A.2d 1, 17-18 (N.H. 2007) (holding that the corpus of an irrevocable trust was not marital property because it was not an asset belonging to either or both of the spouses at the time of their divorce, but that a spouse's right to receive interest payments from an irrevocable trust is marital property); *Guagenti v. Guagenti*, 2017-Ohio-2706, 90 N.E.3d. 297, ¶¶ 61-72 (Ohio Ct. App. 2017) (holding that irrevocable trust was not divisible marital property, but the husband's income received from the trust was); *In re Marriage of Jones*, 973 P.2d 361, 366-67 (Or. Ct. App. 1999) (holding that the trial court could not order division of property in an irrevocable trust, but could order the husband to make payment that represents the wife's share of his interest in the trust); *Wilburn v. Wilburn*, 743 S.E.2d 734, 742-43 (S.C. 2013) (holding that irrevocable trust corpus was not marital property, but the husband's right to receive distributions from trust was marital property); *Endrody v. Endrody*, 914 P.2d 1166, 1169-70 (Utah Ct. App. 1996) (holding that the trial court could properly award the wife half of the husband's beneficial interest in irrevocable trust, but could not award her the trust's assets); *Chilkott v. Chilkott*, 607 A.2d 883, 884-85 (Vt. 1992) (holding that the husband's remainder interest in irrevocable trust is marital property); *see also Tobin v. Comm'r of Internal Revenue*, 183 F.2d 919, 921 (5th Cir. 1950) (holding that where spouses created irrevocable trust for benefit of family members, trust income was not community property).

{17} When an irrevocable trust is set up for the benefit of third parties and neither spouse is a trustee or has a beneficial interest, the rule in other jurisdictions is that a trial court may not dispose of it, even if one or both of the spouses created or funded it. In a case strikingly similar to this one, *Loomis v. Loomis*, 158 S.W.3d 787 (Mo. Ct. App. 2005), the wife created an irrevocable trust with a life insurance policy to benefit her husband and children. *Id.* at 790. Upon divorce, the husband lost his status as a beneficiary, but their children retained their beneficiary status. *Id.* The appellate court held that the trust was not a marital asset subject to division because neither the husband nor the wife were trustees or beneficiaries, and neither of them had any ownership interest in the trust assets. *Id.*; *see also In re Marriage of Gebhardt*, 783 P.2d 400, 405 (Mont. 1989) (holding that irrevocable trust created by husband for benefit of children was not marital property subject to division).

{18} If neither spouse is a trustee or beneficiary of an irrevocable trust, a court's equitable powers may nevertheless reach the trust's assets if the trust was set up for a fraudulent purpose (such as depriving a spouse of an equitable division of assets) or there was a fraudulent transfer of assets to the trust in anticipation of divorce (even if the trust was originally established for legitimate reasons). *See Equitable Distrib. of Prop., supra* § 6:94 (citing examples of dissolution-of-marriage cases where courts held that an irrevocable trust was being used for an improper purpose); *see also Gibson v. Gibson*, 801 S.E.2d 40, 44 (Ga. 2017) (holding that irrevocable trust was not marital property unless a spouse made a fraudulent transfer of marital property to the trust); *Nicks v. Nicks*, 774 S.E.2d 365, 372-75 (N.C. Ct. App. 2015) (holding that trial court lacked jurisdiction to order equitable division of assets conveyed by the husband and the wife to an irrevocable trust because the trust was not named as a party to the action and neither spouse had legal title to the trust, but noting that the wife would have a strong claim for imposition of a constructive trust due to the husband's control over the assets in the trust and discretion to make distributions to the wife as a beneficiary of the trust); *see also Collins v. Collins*, 2017 VT 70, ¶¶25-32, 173 A.3d 345 (determining that the change in beneficiary by settlor from the husband to the husband's son was not fraudulent where trust was revocable until death of the settlor, thus trust in which the husband lost his status as beneficiary was not a marital asset subject to equitable division).

C. Analysis

{19} We believe the general rules, as expressed in the case law of other jurisdictions, are persuasive. We therefore hold that it was error for the district court to determine that there was a community lien interest in the corpus of the Trust. Husband does not have the power to change the Trust, because it is an irrevocable trust which he reserved no right to modify. The district court correctly noted that it did not have jurisdiction over the Trust itself because it is not owned or controlled by either spouse. Husband is not a beneficiary or a trustee and does not have a property interest in the Trust. Husband also testified that he is not able to access the assets of the Trust. Wife is also not a beneficiary or a trustee and has no property interest in the Trust because she lost her beneficiary status upon divorce. The parties regarded the community funds used to pay the life insurance premiums as gifts and treated them as such for tax purposes. No argument has been made that Husband set up the Trust for an improper or fraudulent purpose, or that he made any fraudulent transfers to the Trust for the purpose of safeguarding assets from division in the divorce. Although Wife relied on, and the district court seemed to have been motivated by, the possibility that the trustee, Husband's father, might use the funds in a way that would unfairly benefit Husband, Wife offered no evidence that the trustee had ever acted improperly in any respect. Wife's concerns are therefore unsupported and speculative. Moreover, no evidence was presented that Wife was defrauded or fooled into paying the life insurance premiums from community funds. We further acknowledge Wife's concern that Husband may remarry, and that under the terms of the Trust, her children could lose any interest they have in the corpus of the Trust, or that the assets of the Trust might be depleted through distributions the trustee could make to Husband if he finds it is in the best interests of the children or of Husband's future spouse. While we sympathize with Wife's position, the Trust was set up for legitimate reasons, and we see no reason why it should not be enforced as written.

{20} The district court's ruling creates unnecessary problems. It subjects Husband to significant personal liability based on assets over which he has no control and from which he may never benefit. Further, if Wife were to file a new lawsuit seeking to obtain assets from the Trust, then neither the trustee, nor the beneficiaries, nor the next district court judge will be bound by the district court's ruling in this case. This issue was briefly discussed the first time this case was on appeal. *See VanderLugt*, No. 32,950, ¶ 9 ("[E]ven if Husband and Wife were to agree that Wife will be paid a share of the policy pursuant to one of the district court's suggested methods of terminating or modifying the irrevocable trust, Wife cannot enforce such an agreement until it is binding on all of the parties required to terminate or modify the trust."). This could subject Husband to conflicting obligations.

{21} Wife urges this Court to conclude that it would be inequitable not to allow

her to recover an interest in the Trust. But "[e]quity jurisdiction has never given the judiciary a roving commission to do whatever it wishes in the name of fairness or public welfare." *United Props. Ltd. Co. v. Walgreen Props., Inc.*, 2003-NMCA-140, ¶ 19, 134 N.M. 725, 82 P.3d 535 (internal quotation marks and citation omitted). Wife failed to show that she or Husband has any beneficial interest in the Trust, or that there was any fraudulent conduct with respect to the Trust that could justify a court in invoking its equitable powers. There was no showing by Wife that the Trust was community property or even Husband's separate property. Instead, it is undisputed that the legal owner of the Trust is the trustee, and the beneficial owners are the parties' children. The powers of equity cannot disturb their ownership in a proceeding to which they are not parties.

{22} Wife relies on *Riechers v. Riechers*, 679 N.Y.S.2d 233 (N.Y. Sup. Ct. 1998), *aff'd*, 267 A.D.2d 445 (N.Y. App. Div. 1999) for the proposition that a court may divide an irrevocable trust in a divorce. But in *Riechers*, the New York court only divided the "value" of the trust, which, the court noted, had likely been set up for fraudulent purposes. *Id.* at 234-36. *Riechers* is thoroughly consistent with the general principles outlined above, on which we rely.

{23} Further, Wife's attempt to distinguish *Loomis* by arguing that its holding was abrogated by two later cases, *Seggelke v. Seggelke*, 319 S.W.3d 461 (Mo. Ct. App. 2010), and *Jenkins v. Jenkins*, 368 S.W.3d 363 (Mo. Ct. App. 2012), fails. These cases merely hold that if a spouse has an equitable interest in a trust, that interest is subject to division. *Seggelke*, 319 S.W.3d at 467; *Jenkins*, 368 S.W.3d at 367-368. That is not the case here.

{24} Additionally, Wife's reliance on *Janosek v. Janosek*, 2007-Ohio-68 (Ohio Ct. App. 2007), is misguided. *Janosek* has few facts and little analysis, and is an unpublished, non-precedential opinion. Thus, it is not persuasive when compared to the great weight of legal authority supporting the opposite position.

{25} This divorce proceeding, in which neither the trustee nor the Trust's beneficiaries were joined, is not the proper avenue for pursuing any potential remedy to address Wife's desire to protect her children's (the current sole beneficiaries) interest in the Trust. *See Collins*, 2017 VT 70, ¶ 28. Our decision is without prejudice to any claim that Wife or the current beneficiaries may assert to seek modification or termination of the Trust in accordance with New Mexico law in a proceeding where the trustee and all beneficiaries are joined. *See* NMSA 1978, §46A-4-410 (2003) (allowing for modification or termination of trust in certain circumstances); NMSA 1978, § 46A-4-411 (2007) (same). We express no opinion on whether Wife or the beneficiaries are entitled to such relief.

{26} We reverse the decision of the district court and hold that the community does not have a community lien interest in the life insurance policy that is the corpus of the Trust. Having so held, we need not consider Husband's claim that the district court should not have allowed Wife's expert witness to testify about the Trust.

II. The district court did not abuse its discretion by restricting Husband's discovery into Wife's business interests

{27} Husband argues that the district court improperly restricted his discovery into Wife's business enterprises. The parties stipulated that Wife's interest in four Cervantes family businesses, two of which she obtained during the marriage, were Wife's separate property, but reserved for trial the question of whether there was a community lien in the Cervantes businesses. Husband argues that it was improper for the district court to refuse to allow discovery into the source and amount of Wife's income because Husband argued that Wife still owed money and interest for credit card charges incurred by the community to pay expenses for her businesses. Husband argues that information regarding Wife's retirement funds, deferred compensation, other benefits, assets earned during marriage, and any matters related to Wife's ownership of these businesses and resulting income, were discoverable for purposes of dividing property and setting child support. Husband argues that this information was particularly relevant because he discovered an unsigned loan application in which Wife stated that her income was greater than what she represented to the court. Husband argues that the court made determinations regarding the parties' businesses and debts without having all of the information needed to do so.

{28} Wife argues that all of relevant financial information was produced because she provided her W-2s, K-1s, 1099s, pay stubs, and a statement on her 401(k)/Rollover IRA. Wife also provided documents and information about the creation, ownership, and purposes of the Cervantes businesses; the PRC Entity Detail for the businesses; documents related to health, dental, and vision insurance provided by the businesses; a statement of the loans Wife received from the businesses; a summary of insurance coverage for two of the businesses; a check register for Wife's reimbursements; and backup documentation and multiple emails and credit card statements. She did not provide information about the interests of other shareholders, partners, owners, or employees in those businesses, or the internal accounting, tax, and business records of those businesses.

{29} At the outset of this case, in December 2010, the district court ordered Wife to produce her W-2s, her K-1s, her 1099s, and certain organizational information, but declined to order production of the tax returns of the other members of the Cervantes businesses. Later, in February 2012, the district court did not order the production of the internal records of the Cervantes businesses because it believed that Wife's interest in them could be ascertained without them. Wife's counsel stated, without contradiction, that Wife worked for one of those businesses and that her income and its method of calculation had been disclosed to Husband. The district court noted that the parties were filing joint tax returns, which would have required reliance on Wife's W-2s, K-1s, and 1099s from the businesses. After a hearing, the district court entered an order concluding that "[t]here is no indicia why the entity financials are discoverable at this time." About nine months after that, the district court sent an email to the parties explaining that the only issue is what Wife's interests in the entities are and stated that these could be shown without an examination of the "internal financials" of the Cervantes businesses.

{30} We review a district court's discovery orders for an abuse of discretion. *See Estate of Romero ex rel. Romero v. City of Santa Fe*, 2006-NMSC-028, ¶ 6, 139 N.M. 671, 137 P.3d 611. "[A]lthough the rules favor allowance of liberal pretrial discovery, the trial court is vested with discretion in determining whether to limit discovery." *Villalobos v. Bd. of Cty. Comm'rs of Doña Ana Cty.*, 2014-NMCA-044, ¶ 16, 322 P.3d 439 (internal quotation marks and citation omitted).

{31} Husband's first argument is that the district court should have allowed more discovery because Wife used the parties' personal credit card to pay for $400,000 in

business expenses of the Cervantes businesses, which were never repaid. Husband argues that the community had a claim against Wife's businesses, and greater discovery should have been allowed so that he could prove that claim. But Husband does not explain why he could not have proven the existence of the debt through the community's financial records. For example, Husband could have used the credit card statements themselves to identify the charges that he contended were incurred to pay expenses of the Cervantes businesses. We agree with the district court's conclusion that "[c]ommunity claims against separate entities can be proven without an evaluation of the separate entities."

{32} Husband also claims that he had a right to discover information about Wife's actual income earned for the purposes of dividing property and setting child support. But Wife's income from the Cervantes businesses would necessarily have been reflected on the W-2s, K-1s, and Form 1099s that were produced to Husband. *See, e.g.*, *Black's Law Dictionary* 1811 (10th ed. 2014) (stating that a "W-2 form" is "[a] statement of earnings and taxes withheld (including federal, state, and local income taxes and FICA tax) during a given tax year"); *Irish v. Ferguson*, 970 F. Supp. 2d 317, 336 n.15 (M.D. Pa. 2013) ("A Schedule K-1 is a tax form used to report a taxpayer's portion of a corporation's income or loss which passes to the taxpayer as a shareholder of the corporation."); *Ginter v. United States*, 815 F. Supp. 1289, 1291 (W.D. Mo. 1993) (stating that Form 1099 contains information about "nonemployee compensation"). As for Husband's claim that information about Wife's businesses was needed to establish the appropriate amount of child support under NMSA 1978, Section 40-4-11.1(C)(2)(b) (2008), the child support issues were resolved before trial by a stipulated court order.

{33} Husband claims that the information he received was insufficient to show what Wife's actual income was because he found an unsigned loan application in Wife's name that reported a higher income than that which she had represented to the district court. The district court rejected reliance on this application because it was unsigned. We note that the district court was free to do so. *See Griffin v. Guadalupe Med. Ctr., Inc.*, 1997-NMCA-012, ¶ 14, 123 N.M. 60, 933 P.2d 859 ("The determination of relevancy, as well as materiality, rests largely within the discretion of the trial court.").

{34} Finally, Husband argues that "[i]n spite of the lack of discovery concerning business financials, the district court ordered Husband to pay Wife $12,441.50 for one-half of an alleged overpayment by Cervantes Enterprises in connection with a credit card reimbursement that was raised for the first time at trial." Husband does not, however, explain what additional information would have been relevant to this claim. We will not review undeveloped claims. *See Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076 ("We will not review unclear arguments, or guess at what [an appellant's] arguments might be."). We affirm the district court's discovery rulings.

III. The district court did not err in its division of the proceeds from Husband's separate property

{35} Husband claims that the district court erred by finding that Wife had separate and community lien interests in the proceeds of the sale of a house on Loma Verde Lane in Las Cruces (Loma Verde) that was his separate property, as opposed to Wife only having a community lien on the pay down of the mortgage principal. We review the district court's findings for substantial evidence. *See Galloway v. White*, 1958-NMSC-116, ¶¶ 10, 12, 64 N.M. 470, 330 P.2d 553 (reviewing the amount of a community lien against a spouse's separate property under a substantial evidence standard). "The question is not whether substantial evidence exists to support the opposite result, but rather whether such evidence supports the result reached." *Las Cruces Prof'l Fire Fighters v. City of Las Cruces*, 1997-NMCA-044, ¶ 12, 123 N.M. 329, 940 P.2d 177. Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion[.]" *State v. Salgado*, 1999-NMSC-008, ¶ 25, 126 N.M. 691, 974 P.2d 661 (internal quotation marks and citation omitted). "In reviewing a sufficiency of the evidence claim, this Court views the evidence in a light most favorable to the prevailing party and disregards any inferences and evidence to the contrary." *Weidler v. Big J Enters.*, 1998-NMCA-021, ¶ 30, 124 N.M. 591, 953 P.2d 1089 (alteration, internal quotation marks, and citation omitted).

{36} As we understand it, Husband's claim is three-fold. First, he asserts that it was error for the district court to award Wife more than reimbursement for principal reduction on the Loma Verde mortgage. Second, Husband claims that the district court erred by awarding Wife a separate interest in proceeds from the sale of Loma Verde. Third, Husband argues that money paid to his separate business, Aldershot of New Mexico, Inc. (Aldershot), from the Loma Verde proceeds was to pay a community debt owed to Aldershot, and Wife was not entitled to reimbursement for those payments. We address each argument in turn.

A. Facts relevant to Loma Verde and the district court's decision

{37} Before the marriage, in May 1991, Husband purchased Loma Verde for $303,384.75 ($311,763.83 with closing costs). Between the purchase date and the date of the marriage, Husband reduced the principal mortgage balance on Loma Verde to $169,394. When the parties married, Loma Verde was worth $330,000. The parties made regular monthly mortgage payments on Loma Verde from their joint checking account.

{38} In June 1999, Wife sold some of her separate property and received proceeds of $21,788, which was deposited into the parties' joint checking account. One year later, in June 2000, the parties made a $10,000 payment to reduce the principal of the Loma Verde mortgage. Wife admitted that she could not trace this $10,000 payment to the proceeds from the sale of her separate property in June 1999.

{39} In October 2000, Wife sold some income-producing apartments, which were her separate property, and received $74,830 from the sale. A week later, a payment of $67,500 was made towards reducing the principal of the mortgage on the Loma Verde property using the proceeds from the sale of Wife's separate property. By selling the apartments, Wife lost future rental income, and by using the proceeds from that sale to pay down the principal on Loma Verde, Wife reduced the amount of interest that Husband would have had to pay to service the Loma Verde mortgage. In December 2000, the parties made another payment of $12,000 from their joint checking account toward the principal of the mortgage on the Loma Verde property.

{40} Several years later, in December 2004, the parties received a reimbursement check for $41,717 in connection with a bridge loan used to purchase their marital residence on Remington Road in Las Cruces. That same day, Husband wrote a check from the parties' joint bank account to his separate business, Aldershot, for $53,000.

{41} The parties sold Loma Verde in September 2005 for $465,000. The parties

used $172,847 of the proceeds from the sale to pay off the Remington bridge loan, and $23,089 to pay the closing costs, which left $267,075 for the parties. Four days after the sale, Husband wrote a check from the parties' joint bank account to Aldershot for $260,000. At trial, Husband testified that this check was to pay back $150,000 that the parties had borrowed from Aldershot.

{42} The parties stipulated that Husband and Wife each had a separate interest in the proceeds from the sale of Loma Verde, and that the marital community also had a lien interest in the proceeds, but disagreed on the amount of the liens. The stipulation does not expressly state whether the parties intended to give Wife an interest in the equity value of the property, but Husband later claimed that was not his intention. Husband concedes that Wife was at least entitled to a community lien for the payments that the parties made from their joint checking account toward reduction of the mortgage principal.

{43} At trial, Wife asked that she be reimbursed for her portion of the Loma Verde proceeds ($313,000) that were used to pay Aldershot. Wife's expert accountant, Ed Street, calculated that she was entitled to a 35.89 percent interest in the Loma Verde proceeds, combining her separate lien interest and her half of the community lien interest, thus entitling her to $112,335.70. Wife's expert assumed that she was entitled to a percentage of the appreciation equity in the home, as opposed to just the amounts used to pay down the mortgage principal. The district court accepted the figure offered by Wife's expert witness, and awarded Wife $112,335.70.

B. New Mexico law governing the apportionment of separate and community interests in a spouse's separately-owned property

{44} In New Mexico, "property acquired by either spouse before marriage" is separate property. NMSA 1978, § 40-3-8(A)(1) (1990). As we previously noted, separate property includes the "rents, issues and profits" of that property. *Portillo*, 1981-NMSC-119, ¶ 12. Any increase in the value of separate property which is attributable to an increase in market value or natural growth belongs to the owner of the separate property. *Bayer*, 1990-NMCA-106, ¶ 21. The marital community, however, may obtain an interest in the increase in value of a spouse's separate property to the extent that the increase is attributable to community funds or labor. *Trego*, 1998-NMCA-080, ¶ 13. Apportionment of that increase in value between the spouses upon divorce "is appropriate only when an asset has been acquired or its equity value increased through the use of both separate and community funds." *Martinez v. Block*, 1993-NMCA-093, ¶ 13, 115 N.M. 762, 858 P.2d 429. To disallow apportionment when a spouse performs substantial labor to greatly increase the value of the separate property of the other spouse "would do substantial injustice." *Portillo*, 1981-NMSC-119, ¶ 18. Apportionment is an equitable remedy, and New Mexico law does not dictate that a district court use any particular method of apportionment; the overriding aim is to achieve "substantial justice" between the spouses. *Dorbin v. Dorbin*, 1986-NMCA-114, ¶ 25, 105 N.M. 263, 731 P.2d 959.

C. Wife was entitled to a share in the appreciation equity in Loma Verde because the increase of Husband's equity in the property was attributable in part to the expenditure of her own separate funds

{45} Husband claims that the district court erred by awarding Wife a share in the appreciated equity of Loma Verde, thereby failing to award him his full separate interest in the Loma Verde proceeds. Loma Verde increased in value from $330,000 at the time of the marriage to $465,000 when it was sold in 2005. Although Husband acknowledges that he stipulated that Wife had a separate lien in the property, he now claims that Wife was not actually entitled to any award for that interest because she did not show that she contributed to the increase in Loma Verde's value. Accordingly, Husband argues that Wife was not entitled to any share of the equity appreciation, but only to her share of the community lien on Loma Verde to the extent that the parties used community funds to reduce the mortgage principal.

{46} Husband's claim lacks merit. Here, the district court did not award Wife more than reimbursement for the principal reduction on Loma Verde because it thought she contributed to the increase in Loma Verde's value on the open market. Rather, the district court made findings of fact, which Husband does not challenge, that Wife sold her separate, income-producing apartments in 2000, thus foregoing future rental income that would have belonged solely to her, and used $67,500 from that sale to pay down the principal on Loma Verde, thus decreasing the total amount of interest that Husband would have had to pay on the mortgage. *See Seipert v. Johnson*, 2003-NMCA-119, ¶ 26, 134 N.M. 394, 77 P.3d 298 ("An unchallenged finding of the trial court is binding on appeal."). If Wife had not done so, Husband would have been obligated to continue paying interest on that portion of the mortgage principal, thus reducing the net proceeds available when Loma Verde was ultimately sold in 2005. Wife's action therefore increased the "equity value" of Husband's separate property, even if it did not increase Loma Verde's price on the real estate market. *See Martinez*, 1993-NMCA-093, ¶ 13 (stating that apportionment is appropriate when increase in "equity value" of property is attributable to expenditure of community or separate funds).

{47} The district court also properly decided to compensate Wife for the sacrifice of the income-producing capacity of her own separate property to increase the value of Husband's separate property. In *Portillo*, our Supreme Court held that a husband's work to improve his wife's separate property, which increased the value of that property, entitled him to a community share of that increased value, and that to deny him that share "would do substantial injustice." 1981-NMSC-119, ¶ 18. To be sure, in *Portillo* the husband's labor was community property, while in this case Wife contributed separate property, but Husband offers no reason why the rule in *Portillo* should not apply to Wife's contribution here. Moreover, the principal aim of apportionment is to achieve "substantial justice" among the parties, *see Dorbin*, 1986-NMCA-114, ¶ 25, but Husband offers no argument why compensating Wife for her contribution is unjust, nor does he offer any argument that justice requires that he be allowed to retain the value of Wife's contribution.

{48} Husband also argues that because some money from the sale of Loma Verde "was used to pay the bridge loan" for the parties' marital residence on Remington Road, "it is not subject to reallocation" because "community money was used to pay a community debt." Husband does not explain why these facts should change the district court's decision and cites no supporting authority, and thus we hold that this argument is waived as undeveloped. *See Headley*, 2005-NMCA-045, ¶ 15 ("We will not review unclear arguments, or guess at what [an appellant's] arguments might be.").

{49} Finally, Husband argues that "proceeds from the sale of Wife's separate properties were commingled with community

funds in the parties' joint account[,]" thus causing the separate funds to lose their character as separate property, meaning that the district court erred by finding that Wife had a separate lien interest. With respect to the $67,500 reduction of principal in 2000, the parties stipulated that this payment came from the sale of Wife's separately owned apartments, and Husband may not retract that stipulation on appeal. *See Olguin v. Manning*, 1986-NMCA-102, ¶ 7, 104 N.M. 791, 727 P.2d 556 ("Courts generally honor stipulations between the parties and uphold such agreements concerning trial of a cause or conduct of litigation if the stipulations are not unreasonable, not against good moral standards or sound public policy, and are within the general sense of the pleadings." (internal quotation marks and citation omitted)). With respect to the $10,000 mortgage payment made in June 2000 from the parties' joint checking account, Husband argues that this payment could not be traced to Wife's deposit of $21,788 in June 1999 from the sale of other separate property. Wife argues, however, that even if the $10,000 principal reduction should not have been credited to her, it does not matter because even if that amount is disregarded, other evidence still supports the amount of money that the district court awarded to her. Husband does not dispute this argument in his reply brief and has thus conceded the issue. *See N.M. State Inv. Council v. Weinstein*, 2016-NMCA-069, ¶ 39, 382 P.3d 923 (holding that where appellant fails to address in its reply brief an issue raised in the answer brief, this Court may consider "such a failure to respond [as] constitut[ing] a concession on the matter" (internal quotation marks and citation omitted)). We therefore conclude that even if Wife was not entitled to apportionment for the $10,000 reduction in principal in June 2000, the district court's error on that point was harmless. An error is harmless unless the complaining party can show that the district court's action was inconsistent with substantial justice or that it affected the substantial rights of that party. *See* Rule 1-061 NMRA.

D. Husband's claim that the money paid to Aldershot was to repay a community debt owed to Aldershot lacks merit

{50} In December 2004, after the parties received a reimbursement check for $41,717 in connection with the bridge loan used to purchase the Remington home, Husband wrote a $53,000 check from the parties' joint bank account to his separate business, Aldershot. Then, after the sale of Loma Verde in 2005, Husband used $260,000 of those proceeds to pay Aldershot. Wife testified that she was never compensated for her share of these payments. The district court found that Wife was entitled to a percentage of the proceeds Husband used to pay Aldershot. The district court concluded that it would be inequitable for Husband to retain the $260,000 from the sale of Loma Verde because Wife had separate and community lien interests in those proceeds. The district court also found that it would be inequitable for Husband to retain the $53,000 from the initial financing of the Remington home and for Wife to receive no reimbursement of her one-half interest because the parties were jointly responsible for the Remington debt.

{51} On appeal, Husband claims that the district court erred because any money Wife was entitled to from the sale of Loma Verde was used up in the course of paying off the community's debt to Aldershot, so there was no money left for the district court to distribute. We review this claim to determine whether substantial evidence supported the district court's findings. *See Roybal v. Morris*, 1983-NMCA-101, ¶ 30, 100 N.M. 305, 669 P.2d 1100 ("On appeal, we are bound by the trial court's findings of fact unless they are demonstrated to be clearly erroneous or not supported by substantial evidence.").

{52} Husband argues that he paid the $53,000 and $260,000 to Aldershot for loans that Aldershot made to the community and that the evidence was "undisputed" that at least the $53,000 payment was to repay a loan from Aldershot. But as Wife correctly points out and as the district court found, Husband did not explain how he calculated the amounts he claimed were owed to Aldershot, he did not trace any amounts borrowed from Aldershot to particular expenditures for the community, nor did he offer any documentary evidence to support his claims, choosing instead to rely solely on his oral testimony. The district court was entitled to, and did, reject Husband's testimony. *See Zemke v. Zemke*, 1993-NMCA-067, ¶ 15, 116 N.M. 114, 860 P.2d 756 ("Where oral testimony is involved, it is well established that only the trier of facts may weigh evidence, determine the credibility of witnesses, reconcile inconsistent or contradictory statements of witnesses, and decide where the truth lies." (alteration, internal quotation marks, and citation omitted)). We reject Husband's claim.

CONCLUSION

{53} For the foregoing reasons, we reverse the district court's ruling that Wife had an interest in the irrevocable trust, we decline to decide whether Wife's expert should have been allowed to testify, and we affirm the district court with regard to all other issues.

{54} IT IS SO ORDERED.
EMIL J. KIEHNE, Judge

WE CONCUR:
M. MONICA ZAMORA, Judge
JULIE J. VARGAS, Judge

THANK You

The State Bar of New Mexico would like to express its appreciation and gratitude to the following attorneys that participate in the **CONSUMER DEBT BANKRUPTCY WORKSHOP**. Thank you for your professionalism, time and service to the community in New Mexico.

Ron Holmes	Arun Melwani	Mike Lash
Mike Daniels	Erik Thunberg	Matthew Gandert
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DNA-People's Legal Services is seeking to hire several fill-time attorney's in Arizona and New Mexico offices: Hopi Public Defenders & Hopi DNA offices are located in Polacca, AZ., other position are in Flagstaff, AZ., Tuba City, AZ., and Farmington, NM. The Flagstaff and Farmington offices are the only two offices located off the Navajo Reservation. All others you will enjoy the convenience of working near a metropolitan area while gaining valuable experiences in a smaller office, which provides the opportunity to advance more quickly than is afforded in larger offices and live the experience on Navajo/Hopi reservations. These positions will remain open until filled. Please mail your resume, letter of interest, writing sample, and references to DNA-People's Legal Services, PO Box 765, Tuba City, AZ 86045, Fax: (928) 774-0653, Direct-line (928) 283-3206, Email Hresources@dnalegalservices.org. For a full job description, please visit our website at www.dnalegalservices.org. We are an equal opportunity employer.

Pre-prosecution Diversion/ Special Program Administrator First Judicial District Attorney

Incumbent will manage specific programs within the First Judicial District Attorney's Office. This person will be responsible for the pre-prosecution diversion program and other related job duties. This program requires extensive knowledge of the legal system, social services, case management, addiction and recovery services resources. Familiarity with community outreach. Preferred Bachelors in Criminal Justice, Social Services, Human Services, counseling or related fields or 2 years related work experience. Bilingual (Spanish/English) preferred. Please submit a letter of interest and resume to Mark Trujillo, District Office Manager: mtrujillo2@da.state.nm.us

Executive Director

The Southwest Women's Law Center is looking for its next Executive Director. The organization works to support the needs of women and girls in New Mexico around issues of fair pay, workers' rights, reproductive health and domestic violence. Please visit our website at swwomenslaw.org for details of the position requirements. Send resume and letter of interest to jgetz@swwomenslaw.org. Applications will receive the best consideration if submitted by 12-31-18

Attorney Associate #54658 Civil Court (FT At-Will)

The Second Judicial District Court is accepting applications for an At-Will Attorney Associate. This position will be assigned to the Civil Division. Summary of position: Under direction review cases, perform legal research, evaluation, analysis, writing and make recommendations concerning the work of the Court. Qualifications: Must be a graduate of a law school meeting the standards of accreditation of the American Bar Association; possess and maintain a license to practice law in the State of New Mexico. Must have three (3) years of experience in the practice of applicable law, or as a law clerk; SALARY: $39.399 hourly, plus benefits. Send application or resume supplemental form with proof of education and writing sample to the Second Judicial District Court, Human Resource Office, P.O. Box 488 (400 Lomas Blvd. NW), Albuquerque, NM, 87102. Applications without copies of information requested will be rejected. Application and resume supplemental form may be obtained on the New Mexico Judicial Branch web page at www.nmcourts.gov. CLOSES: December 21, 2018 at 5:00 p.m.

Personal Injury Law Attorneys

Franklin D. Azar & Associates,P.C., a large and growing Colorado personal injury law firm, is seeking experienced Personal Injury Law attorneys to join its practice in Colorado. Qualified candidate will be able to demonstrate strong dedication to personal injury law and a passion for helping people; will possess strong organizational and writing skills; is energetic, hard-working, and a team-player. Complex litigation experience is preferred. Please submit your resume and cover letter to malcolmo@fdazar.com

Assistant District Attorney/ Chief Deputy District Attorney

The Fifth Judicial District Attorney's office has immediate positions open to a new or experienced attorney's. Salary will be based upon the New Mexico District Attorney's Salary Schedule with starting salary range of an Assistant Trial Attorney to a Senior Trial Attorney ($58,000 to $79,679) and Chief Deputy District Attorney ($77,826-$ 97,283). Please send resume to Dianna Luce, District Attorney, 301 N. Dalmont Street, Hobbs, NM 88240-8335 or e-mail to 5thDA@da.state.nm.us.

Join our team at New Mexico Legal Aid!

Check our website for current opportunities: https://tinyurl.com/NMLAjobs

Law Clerk At-Will

The NM Supreme Court is recruiting for a full-time, Law Clerk At-Will position in Santa Fe, New Mexico. SUMMARY OF POSITION: Under general supervision, work with justices on assigned cases, perform legal research, analysis, writing and editing. Salary: $45,500-$71,095. To apply, please go to: https://www.nmcourts.gov/jobs.aspx

Associate Attorney

The Santa Fe office of Hinkle Shanor LLP is looking for an associate attorney to join its employment and civil rights defense practice. The associate attorney's job duties will be focused on writing and contributing to the employment group's federal and appellate practice. Experience is preferred, and candidates should have a strong academic background, excellent research and writing skills, and the ability to work independently. Applicants must live in or be willing to relocate to Santa Fe. Please send resume, law school transcript, and writing sample to Hinkle Shanor LLP's office manager, Gilbert Romero, at gromero@hinklelawfirm.com.

Associate Attorney

Martha L. King, P.C. seeks an associate with 5-7 years of experience and a passion for justice to join our team. We are a peer rated professional services law firm providing business law services to tribal entities. Requirements: law degree from accredited law school, licensure or willing to become licensed in New Mexico or Arizona; experience in business law, corporations, and employment law; supervisory experience; ability to generate own work; strong writing and analytical skills; and driven by a sincere desire to make a lasting impact in and out of Indian country. Please submit: cover letter, résumé, law school transcript, list of three (3) references, and writing sample to associate@marthakinglaw.com.

Assistant City Attorney

The City of Albuquerque Legal Department is hiring an Assistant City Attorney to provide legal services to the City's Department of Municipal Development ("DMD"). The primary area of focus is construction law. The work includes, but is not limited to: contract drafting, analysis, and negotiations; regulatory law; procurement; general commercial transaction issues; intergovernmental agreements; dispute resolution; and civil litigation. Attention to detail and strong writing skills are essential. Five (5)+ years' experience is preferred and must be an active member of the State Bar of New Mexico, in good standing. Please submit resume and writing sample to attention of "Legal Department DMD Assistant City Attorney Application" c/o Angela M. Aragon, Executive Assistant/HR Coordinator; P.O. Box 2248, Albuquerque, NM 87103, or amaragon@cabq.gov.

Personal Injury Attorney - Elite Law Firm – El Paso Office

Zinda Law Group is a rapidly growing elite personal injury law firm. We handle complex cases and maintain a small docket, enabling us to best serve our clients. Our clients expect top-notch representation and that is exactly what we provide. We pride ourselves on our skills, compassion, and commitment to helping those in need. We are looking for an ambitious, dedicated, and passionate lawyer who aspires to become an elite trial attorney to join our team in our El Paso office. If this sounds like you, please apply. We would love to hear from you. Must be licensed and in good standing with the Texas State Bar. Licensed and in good standing with the New Mexico State Bar is a huge plus. Competitive salary and excellent benefits package including medical, vision, and dental insurance, paid leave, and IRA Plan with company contribution match. To apply, you must submit your resume and cover letter through the following link: https://zdfirm.bamboohr.com/jobs/view.php?id=212 Zinda Law Group, PLLC, https://www.zdfirm.com

Keller & Keller Pre-Litigation Attorney

Keller & Keller is an award winning personal injury law firm located in Albuquerque. Seeking an attorney with 2+ years of experience to join our pre-litigation team. We are proud to offer an attractive compensation and benefits package, including a salary commensurate with experience, medical insurance, 401(k) retirement plan and paid time off. The Pre-Litigation Attorney will work directly with the Managing Attorney and 10-15 Pre-Litigation Case Managers on a daily basis. Responsibilities include: daily client contact; writing and editing demand letters; insurance coverage analysis for auto insurance policies; obtaining settlement authority; negotiating subrogation and lien reductions; handling minors' settlement approval actions; and, handling wrongful death estate actions. We are looking for a person with critical thinking skills and the ability to apply those skills in a fast-paced environment. Excellent interpersonal communication skills with clients and coworkers is a must. Prior management experience is a plus, but is not required. Additionally, the candidate must be able to apply their knowledge and skills to make decisions and take action on cases. Interested candidates should forward cover letter and resume to Zachary Farmer at zfarmer@2keller.com. No phone calls, please. All inquiries will be confidential.

Family Law Associate Attorney

The Law Office of Jill V. Johnson Vigil LLC., a Las Cruces based family law practice, is seeking to add an attorney to our team. Preferably applicants should have 2-3 years experience in family law. All applicants should be highly motivated, able to multi-task and manage a full caseload. The Law Office of Jill V. Johnson Vigil LLC. offers a comfortable and friendly work environment with benefits and competitive salary commensurate with your qualifications and experience. Applicants must be in good standing with NM Bar and willing to relocate to Las Cruces. Spanish speaking is preferred, but not required. If you are ready for the next step in your career, please send your cover letter, resume, writing sample, and three references via email to careers@jvjvlaw.com before January 31, 2019. Please visit us online at www.jvjvlaw.com.

Experienced Litigation Attorney

Do the words gritty, passionate, gets it done, or innovative describe you? Do you want to be a part of a team dedicated to excellent results? We strategically attack challenges and win! Machol & Johannes, LLC, is a World Class law firm operating in Colorado and 7 other states. We offer representation and customer service in the Collection and Creditor rights arenas. We are seeking an experienced Litigation Attorney licensed in NM who is interested in being part of a team with: leadership that truly listens; inspiration that brings out your best; culture that values you. Please contact Lorena.Wiant@mjfirm or visit us at www.mjfirm.com for more information or to submit a resume. We are looking forward to hearing from you!

Attorney

Houser & Allison, APC, a Litigation Law Firm is looking to expand its New Mexico office. We are looking for attorneys with 3-6 years' experience in the New Mexico area, including financial practice experience. The ideal candidate must have strong writing, research and communication skills. The candidate must be a self-starter and able to work independently. Please send Resume to: scleere@houser-law.com

Chief Deputy District Attorney and Deputy District Attorney

Immediate opening for a Chief Deputy District Attorney and a Deputy District Attorney with the Sixth Judicial District Attorney's Office. Salary depends on experience, w/ benefits. Please send resume to Francesca Estevez, District Attorney, FMartinez-Estevez@da.state.nm.us Or call 575-388-1941.

Paralegal
Litigation firm seeks experienced civil litigation legal assistant/paralegal with 3-5 years' experience. Strong Computer skills required including knowledge of Word, Excel, Outlook and Prolaw, E-filing, Tables, Abacus, Legal Solutions. Must be a self-starter with a willingness to work as a team player. Attendance, punctuality, attention to detail and organizational skills are a must. Excellent compensation and benefits. Please include salary requirements when applying. Experience with financial practice and foreclosure law is a plus. Please send Resume to: scleere@houser-law.com

Paralegal
Hatcher Law Group, PA seeks a Paralegal with three plus years civil litigation experience (i.e. insurance defense, workers compensation, employment and civil rights) for our downtown Santa Fe office. We are looking for a motivated individual who is well organized, detail oriented and a team player. A paralegal certificate is required. Proficiency in Word, Microsoft 365, Westlaw and Adobe Pro. Salary contingent upon experience, plus benefit package. Send your cover letter and resume via email to juliez@hatcherlawgroupnm.com

Office Space

Suite in the North Valley
In a quiet area north of Alameda on 4th St., 225 sq ft office available. Includes parking, common areas (bathroom, kitchen, waiting area), Wifi and utilities. $550/mo. Please call or text Dan-681-9574.

Office Space—Santa Fe
Beautiful downtown office at 200 West De Vargas Street (located next to First Judicial Court Building). The property has its own private parking lot. Unit has brick floors, a kiva fireplace, vigas and plenty of natural light. 930 square feet. Contact Ryan Romero @ (505) 660-3274.

Ready for a change – new address???
We have just the spot – 8,000 square feet which includes a reception desk with office, 8 private offices, multi-purpose room, kitchen, walk-in safe, gym and lots of storage. The rooms have new carpet, lots of natural light and built in cabinets. The price is $13.00 per square foot which includes your gas, water and electricity. The complex is gated, has a security system and includes covered parking. It is located on Montano Road, just east of the river in beautiful Los Ranchos de Albuquerque – giving you easy access from either the east side or west side of town. Please call 938-7725 to see this beautiful north valley property located at the Unser Racing Museum complex.

500 Tijeras NW
One beautiful spacious downtown office available with reserved on-site tenant and client parking. Walking distance to court-houses. Two conference rooms, security, kitchen, gated patios and a receptionist to greet and take calls. Please email esteffany500tijerasllc@gmail.com or call 505-842-1905.

Uptown's Best Office Space
1474 SF beautifully developed 4 office suite in the heart of Uptown. Ideal for 2 principal firm. Mountain views. Great access to I-40. On site amenities include Bank of America and companion restaurants. Call John Whisenant or Ron Nelson (505) 883-9662 for more information.

503 Slate NW
503 Slate NW, Affordable, two huge offices for rent, with secretarial area, located within one block of the courthouses. Rent includes parking, utilities, phones, fax, wireless internet, janitorial services. Both offices have large windows and natural lighting with views of the garden and access to a beautiful large conference room. Call 261-7226 for appointment.

Walking Distance to the Albuquerque Courthouses
Office space with parking and walking distance to the Albuquerque Courthouses available. Single offices or up to 3 offices available. Space includes access to 2 conference rooms, gated parking, a breakroom, shared receptionist and utlities. Please contact Antonia Roybal-Mack for more information at (505) 288-3500 or Antonia@roybalmacklaw.com

Miscellaneous

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

Seeking Established Practice To Purchase
Las Cruces general civil practice focusing on real estate, business and family law seeks an established practice to purchase, take over from an attorney retiring or focusing on other areas. Please email: lcnmlaw@gmail.com with inquiries.

Official Publication of the State Bar of New Mexico
BAR BULLETIN

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Assisting attorneys with IOLTA trust accounting issues