Official Publication of the State Bar of New Mexico

Bar Bulletin

February 26, 2020 • Volume 59, No. 4

HorisontNr5, by Gordon Skalleberg (see page 3) www.gordonskalleberg.com

Inside This Issue

CLE programming from the Center for Legal Education

35th Annual Bankruptcy Year in Review Seminar

Friday, March 6, 2020
8:30 a.m.–5 p.m.
6.0 G 1.0 EP
Live at the State Bar Center
Also available via Live Webcast!
$278 Live Fee
$309 Webcast Fee

How to Practice Series

How to Practice Series: Adult Guardianship

Friday, March 13, 2020
9 a.m.–4:30 p.m.
4.0 G 2.0 EP
Live at the State Bar Center
Also available via Live Webcast!
$251 Live Fee
$279 Webcast Fee

2020 Family Law Institute

featuring Dr. Mindy F. Mitnick, licensed psychologist who specializes in work with families in the divorce process and with victims of abuse and their families

Friday, March 20, 2020
8:30 a.m.–5 p.m.
5.0 G 2.0 EP
Live at the State Bar Center
Also available via Live Webcast!
$278 Live Fee
$309 Webcast Fee

Saturday, March 21, 2020
9 a.m.–3:15 p.m.
5.0 G
Live at the State Bar Center
Also available via Live Webcast!
$215 Live Fee
$239 Webcast Fee

Bundle both days of the Family Law Institute to save money, and earn your **"10 and 2" for the year!**

Upcoming Webinars

The CLE format that is gaining popularity! Quick and convenient one hour CLEs that can be viewed from anywhere! Webinars are available online only through your computer, iPad or mobile device with internet capabilities. Attendees will receive live CLE credit after viewing.

Impeach Justice Douglas!

Wednesday, March 4, 2020
11 a.m.–2 p.m.
3.0 EP
Online only
$199 Standard Fee

Thurgood Marshall's Coming!

Friday, March 13, 2020
11 a.m.–1:30 p.m.
2.5 EP
Online only
$169 Standard Fee

New Mexico State Bar Foundation
Center for Legal Education

LinkedIn
505-797-6020 • www.nmbar.org/cle
5121 Masthead NE • PO Box 92860, Albuquerque, NM 87199

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address@nmbar.org • www.nmbar.org

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Noon, State Bar Center

28
Cannabis Law Section Board
9 a.m., State Bar Center

28
Immigration Law Section Board
Noon, teleconference

March

3
Health Law Section Board
9 a.m., teleconference

4
Employment and Labor Law Section Board
Noon, teleconference

Workshops and Legal Clinics

February

26
Consumer Debt/Bankruptcy Workshop
6–8 p.m., State Bar Center, Albuquerque, 505-797-6094

March

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

12
Common Legal Issues for Senior Citizens
Workshop Presentation 10-11:15 a.m., Artesia Senior Center
202 W. Chisum Ave. Artesia, N.M. 88210
1-800-876-6657

25
Consumer Debt/Bankruptcy Workshop
6–8 p.m., State Bar Center, Albuquerque, 505-797-6094

About Cover Image and Artist: Gordon Skalleberg is primarily self-taught as an artist. As a teenager he became interested in photography and darkroom development. He found he had a keen eye and started taking artistic photos. In the beginning he tried to go to as many museums and galleries as possible, reading books about art history and various artists' lives and experiences. He observed and soaked up techniques, styles, materials, and more. At a visit to Dunkers Museum in Helsingborg, he saw a show with a Swedish painter, Rolf Hansson, who did not paint on canvas, rather on some kind of board. This inspired Skalleberg to try to paint on plywood. Soon he found that he did not need to prepare the surface, but rather paint directly on the untreaded plywood and since then he was stayed with painting wood and plywood, both pine, birch and other boards. As a result the grain and the naturally unique patters in the wood are more or less aparent in his work. He always uses oil paints with various mediums, today mainly Liquin by Winsor & Newton.

Notices

Court News

New Mexico Supreme Court

Rule-Making Activity

To view recent Supreme Court rule-making activity, visit the Court's website at https://supremecourt.nmcourts.gov/. To view all New Mexico Rules Annotated, visit New Mexico OneSource at https://nmonesource.com/nmos/en/nav.do.

Supreme Court Law Library

The Supreme Court Law Library is open to the legal community and public at large. The Library has an extensive legal research collection of print and online resources. The Law Library is located in the Supreme Court Building at 237 Don Gaspar in Santa Fe. Building hours: Monday-Friday 8 a.m.-5 p.m. Reference and circulation hours: Monday-Friday 8 a.m.-4:45 p.m. For more information call: 505-827-4850, email: libref@nmcourts.gov or visit https://lawlibrary.nmcourts.gov.

U.S. District Court of New Mexico

Open House for U.S. District Judge Kea W. Riggs

Please join us for an open house hosted by the Federal Bench and Bar of the U.S. District Court for the District of New Mexico for the Honorable Kea W. Riggs and her chambers staff. Judge Riggs was sworn in as a U.S. District Judge for the District of New Mexico on Dec. 31, 2019. An open house will be held on Feb. 18 from 4–6 p.m. at the U.S. Courthouse in Las Cruces (100 N. Church Street, Third Floor) and on March 20 from 3-5 p.m. at the Pete V. Domenici United States Courthouse (333 Lomas Blvd NW, Suite 770) in Albuquerque. All members of the bench and bar are cordially invited to attend either or both events. R.S.V.P., if attending, to Cynthia Gonzales at 505-348-2001, or by email to usdcevents@nmd.uscourts.gov.

Bernalillo County Metropolitan Court

Volunteers are Needed for Legal Clinics

The Legal Services and Programs Committee of the State Bar and the Bernalillo County Metropolitan Court hold a free legal clinic from 10 a.m. until 1 p.m. the second Friday of every month. Attorneys answer legal questions and provide free consultations at the Bernalillo County Metropolitan Court, 9th Floor, 401 Lomas Blvd NW, in the following areas of law: landlord/tenant, consumer rights, employee wage disputes, debts/bankruptcy, trial discovery preparation. Clients will be seen on a first-come, first-served basis and attendance is limited to the first 25 persons.

Professionalism Tip

With respect to opposing parties and their counsel:

In depositions, negotiations and other proceedings, I will conduct myself with dignity, avoiding groundless objections and other actions that are disrupting and disrespectful.

First Judicial District Court

Notice of Mass Case Reassignment

Effective Jan. 27, a mass reassignment of all Division II Family Court cases previously assigned to Judge Maria Sanchez-Gagne will occur pursuant to NMSC Rule 23-109, the Chief Judge Rule. The Honorable Shannon Broderick Bulman has been appointed to Division III of the First Judicial District and will maintain a Family Court docket. Parties who have not previously exercised their right to challenge or excuse will have ten days from March 11 to challenge or excuse Judge Shannon Broderick Bulman pursuant to Rule 1-088.1. Effective Jan. 27, a mass reassignment of all Division III cases previously assigned to Judge Raymond Z. Ortiz will occur pursuant to NMSC Rule 23-109, the Chief Judge Rule. The Honorable Maria Sanchez-Gagne will now maintain a civil docket in Division II of the First Judicial District. Parties who have not previously exercised their right to challenge or excuse will have ten days from March 11 to challenge or excuse Judge Maria Sanchez-Gagne pursuant to Rule 1-088.1.

Fifth Judicial District Court

Candidate Announcement

The Fifth Judicial District Court Nominating Commission convened on Jan. 28 in Roswel and completed its evaluation of the one candidate for the one vacancy on the Fifth Judicial District Court. The Commission recommends the following candidate to Governor Michelle Lujan Grisham: **Jared Garner Kallunki**.

Eleventh Judicial District Court

Announcement of Vacancy

A vacancy will exist in the Eleventh Judicial District Court in Gallup due to the retirement of the Honorable Lyndy D. Bennett, effective Feb. 29. Inquiries regarding additional details or assignment of this judicial vacancy should be directed to the chief judge or the administrator of the court. Sergio Pareja, chair of the Judicial Nominating Commission, solicits applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 8 of the New Mexico Constitution. Applications may be obtained from the judicial selection website: http://lawschool.unm.edu/judsel/application.php. The deadline for applications has been set for March 16 at 5 p.m. Applications received after that date and 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 Judicial Nominating Commission will meet at 9 a.m. on March 30 at the Gallup District Courthouse, located at 207 W. Hill Ave, Gallup to evaluate the applicants for this position. The Commission 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 speak.

Thirteenth Judicial District Court

Court Reconvened

The Thirteenth Judicial District Nominating Commission reconvened Feb. 3 in Bernalillo in accordance with the governor's request that the commission submit additional names to her. The commission interviewed seven additional applicants at its Feb. 3 meeting and completed a full evaluation of those additional applicants. A majority of the commission did not recommend any of those additional applicants for consideration by the governor. As a result, the commission continues to recommend that the governor make her appointment from among the three previous names sent to her by the commission: **Steven Paul Archibeque, James Andrew Noel, and Christopher G. Perez**.

State Bar News

Access to Justice

Fund Grant Commission

The Access to Justice Fund Grant Commission seeks grant applications from nonprofit organizations that provide civil

legal services to low income New Mexicans within the scope of the State Plan. The 2020-21 RFP is available at nmbar.org/ATJFundGrant. The application due date is noon, April 17 and the grant period will be July 1, 2020 – June 30, 2021 (12 months). Approximately $900,000 will be awarded. Contact Vannessa Sanchez at vsanchez@nmbar.org with any questions.

Legal Services and Programs Committee

Seeking Sponsors for Breaking Good High School Video Contest

The Legal Services and Programs Committee will host the sixth annual Breaking Good Video Contest for 2020. The Video Contest aims to provide an opportunity for New Mexico high school students to show their creative and artistic talents while learning about civil legal services available to their communities. The LSAP Committee would like to invite a member or firm of the legal community to sponsor monetary prizes awarded to first, second, and third place student teams and the first place teacher sponsor. The Video Contest sponsors will be recognized during the presentation of the awards, to take place at the Legal Services & Programs Annual Conference, and on all promotional material for the Video Contest. For more information regarding details about the prize and scale and the Video Contest in general, or additional sponsorship information, visit nmbar.org/BreakingGood.

Minimum Continuing Legal Education

Compliance Deadline

Dec. 31 was the last day to complete 2019 Minimum Continuing Legal Education requirements without additional fees. To check your compliance, the schedule of fees and deadlines, and find listings of up-coming, pre-approved courses, visit www.nmbar.org/MCLE. Contact MCLE with questions at 505-797-6054 or mcle@nmbar.org.

New Mexico Judges and Lawyers Assistance Program

We're now on Facebook! Search 'New Mexico Judges and Lawyers Assistance Program' to see the latest research, stories, events and trainings on legal well-being!

Recovery Possibilities

- March 4, noon-1 p.m.
- March 18, noon-1 p.m.
- April 1, noon-1 p.m.

This support group explores non-traditional recovery approaches and has a focus on meditation and other creative tools in support of the recovery process from addiction of any kind. It meets at the District Courthouse, 225 Montezuma Ave, Room 270, Santa Fe. For more information, contact Victoria at 505-620-7056.

People with Wisdom

- March 4, 5:30-7 p.m.
- March 18, 5:30-7 p.m.
- April 1, 5:30-7 p.m.

The purpose of this group is to address the negative impact anxiety and depression can have in people's lives and to develop the skills on how to regulate these symptoms through learning and developing several different strategies and techniques that can be applied to their life. The process will help the individual to understand and manage cognitive, behavior, and physiological components of anxiety and depression. You are not required to sign up in advance, so feel free to just show up! The group meets at 320 Osuna Rd, N.E., #A, Albuquerque and is led by Janice Gjertson, LPCC.Contact Tenessa Eakins at 505-797-6093 or teakins@nmbar.org for questions.

Attorney Support Groups Substance Abuse

- March 2, 5:30 p.m.
- March 9, 5:30 p.m.
- March 16, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library. 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.

Employee Assistance Program

Managing Stress Tool for Members

A negative working environment may lead to physical and mental health problems, harmful use of substances or alcohol, absenteeism and lost productivity. Workplaces that promote mental health and support people with mental disorders are more likely to reduce absenteeism, increase productivity and benefit from associated economic gains. Whether in a professional or personal setting, most of us will experience the effects of mental health conditions either directly or indirectly at some point in our lives. The NM Judges and Lawyers Assistance Program is available to assist in addition to our contracted Employee Assistance Program (EAP). No matter what you, a colleague, or family member is going through, The Solutions Group, the State Bar's FREE EAP, can help. Call 866-254-3555 to receive FOUR FREE counseling sessions per issue, per year! Every call is completely confidential and free For more information, https://www.nmbar.org/jlap or https://www.solutionsbiz.com/Pages/default.aspx.

Young Lawyers Division

Volunteer Attorneys/Paralegals Needed for Bernalillo Wills for Heroes

The Young Lawyers Division will be hosting the first 2020 Wills for Heroes event in Bernalillo County on Saturday, Feb. 29. Wills for Heroes volunteer attorneys provide wills, advance healthcare directives and powers of attorney free of charge to New Mexico first-responders. Volunteer paralegals will serve as witnesses and notaries. For more information and to sign up, please visit nmbar.org/Wills-ForHeroes.

UNM School of Law

Law Library Hours

Spring 2020

Through May 16

Building and Circulation

Monday–Thursday	8 a.m.–8 p.m.
Friday	8 a.m.–6 p.m.
Saturday	10 a.m.–6 p.m.
Sunday	Closed.

Exceptions

Monday-Thursday, March 15-22: During Sprink Break the library will be open to the public from 8 a.m.-6 p.m.

Reference

Monday–Friday	9 a.m.–6 p.m.

Closures

Monday, Jan. 20 (Martin Luther King Day)

Other Bars

Christian Legal Aid

Fellowship Luncheons and Breakfasts

Christian Legal Aid invites members of the legal community to fellowship luncheons/breakfasts which are an opportunity for current attorney volunteers, and those interested in volunteering, to meet to learn about recent issues NMCLA attorneys have experienced in providing legal counseling services to the poor and homeless through the NMCLA weekly interview sessions. They are also opportunities to share ideas on how NMCLA volunteer attorneys may become more effective in providing legal services to the poor and homeless. Upcoming dates are: April 7 at 7 a.m. at The Egg and I; June 4 at noon at Japanese Kitchen; and Aug. 12 at 7 a.m. at Stripes at Wyoming and Academy. For more information, visit nmchristianlegalaid.org or email christianlegalaid@hotmail.com

Albuquerque Bar Association's

2020 Membership Luncheons

- March 3: Dean Sergio Pareja presenting an update from UNM School of Law
- April 14: Morris Chavez, Esq., presenting a legislative update (1.0 G)
- May 1: Law Day presenting on the 19th amendment (1.0 G)

Please join us for the Albuquerque Bar Association's 2020 membership luncheons. Lunches will be held at the Embassy Suites, 1000 Woodward Place NE, Albuquerque from 11:30 a.m.-1 p.m. The costs for the lunches are $30 for members and $40 for non-members. There will be a $5 walk-up fee if registration is not received by 5 p.m. on the Friday prior to the Tuesday lunch. To register, please contact the Albuquerque Bar Association's interim executive director, Deborah Chavez at dchavez@vancechavez.com or 505-842-6626. Checks may be mailed to PO Box 40, Albuquerque, N.M. 87103.

Albuquerque Lawyers Club

Monthly Lunch Meeting

The Albuquerque Lawyers Club invites members of the legal community to its March lunch meeting. The lunch meeting will be held at noon on March 4 at Seasons Restaurant, located at 2031 Mountain Road, NW, Albuquerque. The cost is $30 for non-members and free for members. For more information, please email ydennig@gmail.com or call 505-844-3558.

Mexican American Law Student Association

Annual Fighting for Justice Banquet

The Mexican American Law Student Association asks you to save the date for the annual Fighting for Justice Banquet on April 18 at Hotel Albuquerque.

Legal Education

February

26 **Responding to Demand Letters: Tone and Substance**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

26 **Cornucopia of Law: Practical Application for Paralegals and Lawyers (2019)**
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

26 **Clarence Darrow – A One-Man Play Starring Judge Sandy Brooks (2019 Annual Meeting)**
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

26 **Meet John Adams: A Lively and Revolutionary Conversation with America's Second President (2019 Annual Meeting)**
1.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

26 **Ethics and Malpractice Potpourri (2019)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

28-March 1 **Taking and Defending Depositions**
31.0 G, 4.5 EP
Live Seminar
UNM School of Law
http://lawschool.unm.edu/cle/live_programs/depositions.html

March

4 **Impeach Justice Douglas!**
3.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

4 **Office Leases: Current Trends & Most Highly Negotiated Provisions**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

6 **35th Annual Bankruptcy Year in Review Seminar**
6.0 G, 1.0 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

6 **Live Oak CLE**
6.0 G, 1.0 EP
Live Seminar
LIve Oak CLE
www.nevadacle.com

12 **Practical Tech and eDiscovery Advice for the Non-Tech Attorney**
1.5 G
Live Seminar
International Litigation Services
888-313-4457

13 **Thurgood Marshall's Coming!**
2.5 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

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

13 **Governance for Nonprofit and Exempt Organizations**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

17 **Basics of Trust Accounting: How to Comply with Disciplinary Rule 17-204**
1.0 EP
Live Seminar, Alamogordo
Center for Legal Education of NMSBF
www.nmbar.org

19 **Indemnification & Hold Harmless Agreements in Real Estate Transactions**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

20 **2020 Family Law Institute**
5.0 G, 2.0 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

21 **2020 Family Law Institute**
5.0 G
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

23 **Health Care Issues in Estate Planning**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

24 **Ethics and Conflicts with Clients, Part 1**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

25 **Ethics and Conflicts with Clients, Part 2**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

26 **Abuse and Neglect Cases in Children's Court (2019)**
3.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

26 **2020 Americans with Disabilities Act Update**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

26 **Who's Your Biggest Critic? Your Boss? A Colleague? Or You?**
1.5 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

26 **Using Metrics and Analytics for Ethical Solo and Small Firm Marketing (2019)**
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

27 **Regional Seminar**
17.2 G, 1.0 EP
Live Seminar
Trial Lawyers College
307-432-4042

27 **Collateral Consequences: More Than Meets the Eye**
5.0 G, 1.0 EP
Live Seminar
New Mexico Criminal Defense Lawyers Association
www.nmcdla.org

27-29 **Taking and Defending Depositions**
31.0 G, 4.5 EP
Live Seminar
UNM School of Law
http://lawschool.unm.edu/cle/live_programs/depositions.html

30 **Business Law 101: Back to Basics**
4.5 G, 1.5 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

30 **Immigration Law: Updates and Best Practices in Preparing VAWA Applications**
1.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

30 **Introduction to Legal Research on Fastcase 7 (2019 Annual Meeting)**
1.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

30 **The Sandwich Generation: Strategies for Caregivers (2019 Annual Meeting)**
1.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

April

8 **Drafting LLC Operating Agreements, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **Drafting LLC Operating Agreements, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

15 **2020 Uniform Commercial Code Update**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

21 **Drafting Ground Leases, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

22 **Drafting Ground Leases, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

24 **Basics of Trust Accounting: How to Comply with Disciplinary Rule 17-204**
1.0 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **Lawyer Ethics in Real Estate Practice**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

A MESSAGE FROM YOUR State Bar President

Dear Fellow State Bar Members:

In December, the State Bar leadership team was sworn in by Chief Justice Judith Nakamura. This year, I will help lead the State Bar along with Carla Martinez (President-Elect) and Carolyn Wolf (Secretary/Treasurer). I have been involved in State Bar related activities for most of my professional career and I am especially excited to serve as President.

As always, the State Bar will be busy this year improving our organization and providing new opportunities and benefits for members of the legal community. What follows is a short summary of some of the initiatives which we will be working on in 2020!

Three-Year Strategic Plan

In September 2019, the Board of Bar Commissioners met and developed a comprehensive three-year strategic plan. We intend to focus our resources in these four areas:

1) Expansion of State Bar services to all members. Initiatives include greater state-wide attorney engagement, continued development of attorney well-being programs, and an improved association management system and website.
2) Continue to cultivate a collaborative partnership with the New Mexico Supreme Court with the intent to improve regulatory efficiency and effectiveness. Initiatives include implementation of a legal specialization program, roundtable conversations with the judiciary, and judicial pipeline initiatives such as the 2020 Judicial Clerkship Program. The State Bar has cultivated and nurtured a strong and collaborative relationship with our judiciary. We are thankful to the members of our Supreme Court for the opportunity to work on programs with the Court which benefit the profession.
3) Enhance the State Bar's connection with members through an improved communications plan. Initiatives include continued growth of print publications, analysis of electronic communications, and improvements to the State Bar website.
4) Focus inward on organizational infrastructure to ensure the State Bar can better lead the profession in a more sustainable manner. Initiatives include appropriate governance and programmatic relationship between the State Bar and Bar Foundation, consolidating the MCLE website with the State Bar website, and improved IT infrastructure.

Annual Meeting

The Annual Meeting is a great opportunity to connect with fellow State Bar members and earn continuing legal education credits. I am particularly excited about this year's Annual Meeting as we are partnering with the New Mexico Judiciary for a historic event. Both the State Bar Annual Meeting and the New Mexico Judicial Conclave will be held in Santa Fe the same week and there will be opportunities for both groups of the bench and bar to connect and engage in continuing education. The State Bar Annual Meeting will be June 17-20 at the Eldorado Hotel and Spa. We are still finalizing the CLE program track, but we have many exciting events in the works. Visit www.nmbar.org/annualmeeting for more information about programming, events, and lodging.

Diversity Initiatives

Later this year, the survey results for the Committee on Diversity in the Legal Profession and Committee on Women in the Legal Profession will be published in final reports. Both committees worked tirelessly last year to develop the

survey and have since worked diligently to ensure we, as a profession, have a clear understanding of strides that have been made in the arena of diversity and identifying areas that require further attention. The Committee on Diversity (lead by co-chairs Denise Chanez and Leon Howard) is also working with the Young Lawyers Division (Chair Allison Block-Chavez) and Justice David Thomson to launch the inaugural Judicial Clerkship Program. This clerkship program is modeled after the Arturo L. Jaramillo Summer Law Clerk Program which has provided law students with employment opportunities in our state for well over twenty years. The State Bar values the work of both committees and looks forward to continuing our support of their initiatives.

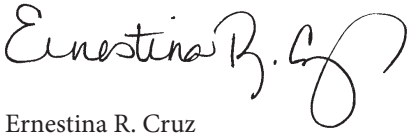
Member Services and State-wide Outreach
As a member of the State Bar practicing in Taos, I understand the need for improved connection with members throughout the state. In this regard, each bar district will be hosting an event so that members can connect with State Bar leadership, members of the judiciary, and other members in their area. In addition, we will also be brainstorming additional ideas to provide resources and activities to members state-wide.

Association Management System and Website
We recognize the need for the State Bar to continue to improve in the area of technology. We recently identified a vendor to provide a new Association Management System which will replace our current database and website. We will be able to offer members new resources through our online presence, member information-tracking, and member benefits. State Bar staff have many exciting ideas and later this year we look forward to showing you the much-needed improvements.

BBC
I would like to thank our outgoing Immediate Past President, Wesley Pool (SBNM President 2018) and our current Immediate Past President, Jerry Dixon (SBNM President 2019) for their service to the State Bar and leadership with the Board of Bar Commissioners. Both Wes and Jerry represented our State Bar with a sense of diligence and joy. Serving as State Bar President is no small task and Wes and Jerry served the legal community well. For their tireless efforts, we say "Thank You"!

In closing, I hope to see and meet many of you at events throughout the state. If you have questions about a State Bar program or event, I encourage you to reach out to me (tina.cruz@cruzlaw-nm.com), your local bar commissioner, or a member of the State Bar professional staff. I genuinely appreciate the opportunity to serve as State Bar President this year!

Sincerely,



Ernestina R. Cruz
President, State Bar of New Mexico

The House of Representatives

of the

State of New Mexico

FIFTY-FOURTH LEGISLATURE
SECOND SESSION, 2020

Recognizes

The New Mexico Commission on Access to Justice

for

Fifteen Years of Exemplary Service to the People of New Mexico

***WHEREAS**, the New Mexico Commission on Access to Justice was founded in 2004 by the New Mexico Supreme Court and is an established independent, statewide body dedicated to expanding and improving civil legal assistance to New Mexicans living in poverty; and*

***WHEREAS**, approximately one-fourth of New Mexico's population lives at or below the federal poverty level standards; and*

***WHEREAS**, New Mexicans living in poverty have a variety of legal needs in areas such as family law, housing, consumer affairs, employment, health, community issues, wills and public benefits; and*

***WHEREAS**, the resulting inability of people experiencing poverty to meaningfully access the civil justice system is of concern to the New Mexico Supreme Court, the judiciary, the legal profession and the people of New Mexico; and*

***WHEREAS**, the New Mexico Commission on Access to Justice aims to expand civil legal assistance resources to New Mexicans living in poverty, increase public awareness of the need for civil legal assistance and encourage more pro bono work by attorneys; and*

***WHEREAS**, the New Mexico Commission on Access to Justice developed the ten-step pro bono plan that recognized the severe unmet need for assistance in civil legal cases and identified steps to promote pro bono representation; and*

***WHEREAS**, as a result of the ten-step pro bono plan, the state benefits from mandatory pro bono reporting for all attorneys licensed in New Mexico, pro bono committees in each of the thirteen judicial districts that organize pro bono clinics for self- represented litigants, a statewide pro bono coordinator housed at New Mexico Legal Aid, the establishment of the volunteer attorney program overseen by New Mexico Legal Aid and a dramatic increase in volunteer service by attorneys throughout the state; and*

***WHEREAS**, the New Mexico Commission on Access to Justice has, and continues to, identify the civil legal needs of New Mexicans by working with providers and national organizations and collecting ongoing data; and*

***WHEREAS**, the New Mexico Commission on Access to Justice has made several recommendations about rule changes to the New Mexico Supreme Court designed to increase civil legal resources and attorney representation for people who are not able to afford an attorney; and*

***WHEREAS**, on the New Mexico Commission on Access to Justice's recommendation, the New Mexico Supreme Court has established Rule 16-102(C), Limited Scope Representation, in the New Mexico Rules of Professional Conduct, recognizing that many people do not need full-scale representation to help them with their legal issues and that limited scope representation can be a cost-effective way to ensure that people have access to legal resources; and*

***WHEREAS**, based on the New Mexico Commission on Access to Justice's recommendation, the New Mexico Supreme Court has established Rule 15-301.2, Legal Services Provider Limited Law License, in Rules Governing Admission to the Bar, to increase pro bono representation by:*

A. allowing attorneys who are or have been licensed in another state or who have an inactive New Mexico license to obtain a limited license to practice in New Mexico if they are working in conjunction with a legal services agency;

B. allowing New Mexico legal services agencies to collaborate with attorneys in other states who have expertise in a particular legal area; and

C. allowing attorneys who are new to New Mexico or retired to provide pro bono services through legal services agencies without needing to become re-licensed in New Mexico; and

***WHEREAS**, the New Mexico Commission on Access to Justice received a grant from the National Center for State Courts and developed a strategic action plan, using the national Justice for All Initiative as a model, to better serve New Mexicans living in poverty by providing assistance with essential legal needs; and*

***WHEREAS**, the New Mexico Commission on Access to Justice's "Justice for All" plan has been adopted by the New Mexico Supreme Court and contains a number of new initiatives, including community input from people directly impacted by the legal system, technology innovations to provide legal information and referrals and initiatives to make courts more user-friendly;*

***NOW, THEREFORE, BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES OF THE STATE OF NEW MEXICO** that recognition be extended to the New Mexico Commission on Access to Justice for fifteen years of exemplary service to the people of New Mexico and for expanding civil legal assistance resources to New Mexicans living in poverty.*

SEAL OF THE STATE OF NEW MEXICO · GREAT · CRESCIT EUNDO · 1912

Signed and Sealed at the Capitol
in the City of Santa Fe

BRIAN EGOLF, SPEAKER OF THE HOUSE

LISA M. ORTIZ McCUTCHEON, CHIEF CLERK

REPRESENTATIVE ANTONIO MAESTAS

ACCESS TO JUSTICE DAY

Celebrating Public Service in New Mexico

Photos by Pamela Moore

Allison Block-Chavez, Tina Cruz, Judge Zach Ives, Justice Shannon Bacon, Justice David Thomson, ATJ Commission Co-Chair Liz McGrath, and ATJ Commission Director Grace Spulak

On Thursday, January 23, 2020, the State Bar of New Mexico honored members of the Access to Justice Commission with recognition at the Roundhouse in Santa Fe. Gov. Michelle Lujan Grisham proclaimed the day as Access to Justice Day. View the proclamation on pages 11-12.

Tina Cruz, Justice Shannon Bacon, and Liz McGrath

Bar Commissioners Lucy Sinkular, Allison Block-Chaez, Carolyn Wolf, Tina Cruz, and Aja Brooks join Grace Spulak.

Thank you for your exceptional service to the bar and State of New Mexico!

Opinions

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

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

Effective Jan. 31, 2020

PUBLISHED OPINIONS

A-1-CA-36044	T Lopez v. Devon Energy	Reverse/Remand	01/28/2020
A-1-CA-37142	Sacred Garden v. Taxation & Revenue	Reverse	01/28/2020
A-1-CA-36397	J Sandel v. J Sandel	Affirm/Remand	01/30/2020
A-1-CA-37577	A Dunn v. NM Game & Fish	Affirm	01/31/2020

UNPUBLISHED OPINIONS

A-1-CA-37413	State v. J Grantham	Affirm/Remand	01/27/2020
A-1-CA-37473	G Davis v. The Citizen's Bank	Affirm	01/27/2020
A-1-CA-37893	CYFD v. Stacy H.	Affirm	01/27/2020
A-1-CA-38230	CYFD v. Tony B	Affirm	01/27/2020
A-1-CA-36335	Wells Fargo v. J Moore	Affirm	01/28/2020
A-1-CA-36823	G Miller v. Bank Of America	Reverse/Remand	01/28/2020
A-1-CA-37067	Gyros v. M Mahon	Affirm	01/29/2020
A-1-CA-38068	CYFD v. Jacqueline P	Affirm	01/29/2020
A-1-CA-36923	State v. J Cordova	Affirm	01/30/2020
A-1-CA-36936	State v. T Sosa	Affirm/Reverse/Remand	01/30/2020
A-1-CA-37672	State v. J Torres	Affirm	01/30/2020

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

Opinions

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Effective Feb. 7, 2020

PUBLISHED OPINIONS

A-1-CA-37558	State v. S Jones	Reverse/Remand	02/04/2020

UNPUBLISHED OPINIONS

A-1-CA-36222	M Jury vs. Farmers Insurance	Affirm	02/03/2020
A-1-CA-37033	State v. J Selph	Affirm	02/04/2020
A-1-CA-36071	G Billy v. Curry County Comm	Reverse/Remand	02/05/2020
A-1-CA-37931	State v. S Desersa	Affirm	02/05/2020
A-1-CA-38074	State v. J Rubio	Affirm	02/05/2020
A-1-CA-36754	State v. R Martinez	Affirm	02/06/2020
A-1-CA-37035	R Salazar v. Los Alamos National Laboratory	Affirm	02/06/2020
A-1-CA-37985	J Storm v. R Simpson	Affirm/Reverse	02/06/2020

Slip Opinions for Published Opinions may be read on the Court's website:
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From the New Mexico Court of Appeals

Opinion Number: 2019-NMCA-049
No. A-1-CA-36657 (filed June 13, 2019)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
PATRICK MARTINEZ,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF VALENCIA COUNTY
CINDY M. MERCER., DISTRICT JUDGE

Released for Publication September 24, 2019.

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Opinion

Megan P. Duffy, Judge.

{1} Defendant appeals his conviction for speeding, contrary to NMSA 1978, Section 66-7-301 (2002, amended 2015) after a de novo trial in district court. We affirm.

BACKGROUND

{2} Defendant was stopped and cited for speeding by an officer with the Isleta Police Department. Following his trial and conviction in magistrate court for speeding, Defendant filed a de novo appeal in the district court. After a half-day bench trial, the district court found Defendant guilty of speeding for driving 55 miles per hour in a posted 45 mile-per-hour speed zone. On appeal to this Court, Defendant argues that the speed regulation statutes, Section 66-7-301 and NMSA 1978, § 66-7-303 (1996), are ambiguous and should be construed to allow motorists to accelerate in advance of an increased speed limit sign once the sign is visible.

DISCUSSION

{3} We consider an issue of first impression in New Mexico, at what point in relation to a speed limit sign does a speed limit become effective such that a driver can be cited for a violation of Section 66-7-301. This is a question of statutory interpretation that we review de novo. *See State v. Tarin*, 2014-NMCA-080, ¶ 6, 331 P.3d 925.

> In construing a statute, we must ascertain and give effect to the intent of the Legislature. To accomplish this, we apply the plain meaning of the statute unless the language is doubtful, ambiguous, or an adherence to the literal use of the words would lead to injustice, absurdity or contradiction, in which case the statute is to be construed according to its obvious spirit or reason. . . . While the consideration of public policy is the province of the Legislature, where a statute is ambiguous, we may consider the policy implications of varying constructions of the statute.

State v. Tafoya, 2010-NMSC-019, ¶ 10, 148 N.M. 391, 237 P.3d 693 (internal quotation marks and citations omitted).

{4} We begin by looking at the plain meaning of the speed limit statutes, Sections 66-7-301 and -303. Section 66-7-301(A) sets forth default speed limits for certain types of roads and conditions, but also states in Subsection (C) that these speed limits may be altered as authorized in Section 66-7-303(B). Section 66-7-303(B) states in relevant part "that [an altered] speed limit shall be authorized and effective when appropriate signs giving notice thereof are erected at that particular part of the highway[.]" Thus, the plain language of Section 66-7-303(B) indicates that a speed limit is effective at the point where the sign is located.

{5} This interpretation is supported by several provisions found in the New Mexico Department of Transportation's 2008 *Signing and Striping Manual*,[1] (the NMDOT Manual), a document issued in compliance with the Legislature's mandate that the state transportation commission "adopt a manual and specifications for a uniform system of traffic-control devices consistent with the provisions of [the Motor Vehicle Code]." NMSA 1978, § 66-7-101 (2003). The NMDOT Manual recognizes that "[u]niformity of the meaning and application of traffic control devices is vital to their effectiveness." NMDOT Manual, ch. 1, § 1.1.3. Further, in a section addressing signage and captioned, "Standardization of Location," it states:

> The longitudinal displacement between a sign and the corresponding roadway element varies *from zero in the case of a speed limit sign (or most regulatory signs) that is physically placed at the point where the speed limit (or regulation) begins or ends*, to 1 mile or more in the case of an advance guide sign.

NMDOT Manual, ch. 2, § 2.1.16, at 2.1-20 (2008) (emphasis added); *see also* NMDOT Manual, ch. 2, § 2.2.2, at 2.2-6 (2008) (providing that a speed limit sign be installed "[t]o show the beginning of a new speed limit . . . at the physical location where the speed limit changes"); NMDOT Manual, ch. 2, Exhibit 2.2-C, at 2.2-7 (2008) (indicating, in a table headed "Suggested Spacing for Speed Limit Signs[,]" that for every type of road listed, the "normal placement" for speed limit signs is "at the beginning of the speed limit"). Moreover, our State Transportation Commission, the National Committee on Uniform Traffic Control Devices, the Federal Highway Administration, and the U.S. Secretary

[1]http://dot.state.nm.us/content/dam/nmdot/Infrastructure/SignandStripingManual.pdf

of Transportation all agree that the speed limit is effective at the point where the sign is located.[2]

{6} Were we to accept Defendant's argument that a speed limit becomes effective at the point where the sign can be read, we would disrupt uniformity in the application of well-established local and national practices governing the placement of speed limit signs. We decline to depart from the sound reasoning articulated by the Transportation Commission in the NMDOT Manual, given its particularized knowledge and experience in promoting uniformity of traffic control devices. Moreover, Defendant's proposed interpretation of Sections 66-7-301 and -303 would render speed limits and their boundaries subjective, based upon the unique point of view of each driver approaching a speed limit sign, thereby eliminating meaningful, standardized enforcement of speed limits throughout the state. Interpreting these statutes as Defendant suggests would produce an unworkable and absurd result. *See United States v. Block*, 452 F. Supp. 907, 909-10 (M.D. Fla.1978) ("To hold that changing traffic speed zones become effective when the posted signs become visible would result in the law being variable, uncertain, and relative to individual motorists' eyesight. The effect would be theoretically confusing, as well as practically impossible."); *see generally Tarin*, 2014-NMCA-080, ¶ 8 (rejecting a party's proposed interpretation of a statute where doing so "would produce an unworkable situation and absurd result"). For all of these reasons, we hold that "the speed limit starts at the physical location of the sign and continues to be in effect until it ends at the next different speed limit sign." *Shafron v. Cooke*, 190 P.3d 812, 814 (Colo. App. 2008) (noting that a driver's "sight[ing] of a forty mile per hour sign did not allow him to increase his speed above twenty-five miles per hour until he reached that sign").

{7} We are similarly unpersuaded by Defendant's argument that because drivers often decelerate in anticipation of a slower speed limit, he should have been allowed to speed up in anticipation of a faster one. Defendant misapprehends that posted speed limits represent the maximum traveling speed, and as one court explained,

> [A] speed limit sign for a slower speed zone requires a motorist to have his speed reduced by the time he reaches the sign. Slower speed zones, in short, are mandatory. On the other hand, a speed limit sign indicating a faster speed zone simply means that a motorist may proceed at a faster speed than he is presently permitted once he has reached that sign. The speed limit sign for a faster speed zone does not require that a motorist be driving at the faster speed when he reaches the sign, but simply allows him to begin doing so once he has reached the sign. Faster speed zones are permissive.

Block, 452 F. Supp. at 910. Just as with speed limit increases, however, slower speed limits become applicable at the point that the sign is posted.

{8} Finally, Defendant advocates for the rule of lenity here, arguing that the speeding statute is ambiguous because it does not clearly state where any particular speed limit starts and ends. "The rule of lenity counsels that criminal statutes should be interpreted in the defendant's favor when insurmountable ambiguity persists regarding the intended scope of a criminal statute." *State v. Johnson*, 2009-NMSC-049, ¶ 18, 147 N.M. 177, 218 P.3d 863 (internal quotation marks and citation omitted). Finding no ambiguity in the relevant statutes, we reject Defendant's rule of lenity argument.

CONCLUSION

{9} For the foregoing reasons, we affirm Defendant's conviction for speeding.

{10} IT IS SO ORDERED.

MEGAN P. DUFFY, Judge

WE CONCUR:

M. MONICA ZAMORA, Chief Judge

KRISTINA BOGARDUS, Judge

[2]The New Mexico Transportation Commission's determination that speed limit changes take effect at the point where a speed limit sign is placed is consistent with the approach taken by the American Association of State Highway Officials in its 2009 *Manual on Uniform Traffic Control Devices* (MUTCD), *available at* https://mutcd.fhwa.dot.gov/pdfs/2009r1r2/mutcd2009r1r2edition.pdf, which is developed jointly with the Federal Highway Administration and approved by the U.S. Secretary of Transportation. *See* MUTCD § 2B.13, ¶¶ 3-4 (2009) (providing that "Speed Limit . . . signs . . . shall be located at the points of change from one speed limit to another. . . . At the downstream end of the section to which a speed limit applies, a Speed Limit sign showing the next speed limit shall be installed").

From the New Mexico Court of Appeals

Opinion Number: 2019-NMCA-050

No. A-1-CA-35863 (filed June 14, 2019)

DONALD L. SCHMIDT, Individually, MARY LEE SCHMIDT, Individually, LAURA TWEED, and PEGASUS PLANES LLC, as Power of Attorney for DONALD L. SCHMIDT and MARY LEE SCHMIDT,
Plaintiffs-Appellants,
v.
TAVENNER'S TOWING & RECOVERY, LLC, and FRED GARNER,
Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF TORRANCE COUNTY
JACQUELINE R. MEDINA, District Judge

Released for Publication September 24, 2019.

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Opinion

Jacqueline R. Medina, Judge.

{1} Plaintiffs, Donald and Mary Schmidt, owners of a Glastar aircraft (the airplane), sued Defendant, Tavenner's Towing & Recovery, LLC (Tavenner's), on claims for negligence, breach of implied contract, and breach of the implied covenant of good faith and fair dealing, after the airplane caught fire and was completely destroyed while being towed by Tavenner's.[1] The district court granted Tavenner's Rule 1-012(B)(6) NMRA motion to dismiss, arguing that the Federal Aviation Administration Authorization Act (FAAAA), 49 U.S.C. § 14501(c)(1) (2012), preempted Plaintiffs' claims. We reverse and remand.

BACKGROUND

{2} The facts alleged in the amended complaint are as follows. In late 2014, Plaintiffs' airplane crashed in Torrance County, New Mexico. The Torrance County Sheriff's Department contacted Tavenner's to pick up the airplane. Tavenner's took possession of the airplane, loaded it onto a tow truck, and was in the process of towing the airplane when it caught fire and was completely destroyed. All claims were based on allegations that Tavenner's failed to properly load, care for, and transport the airplane and that this caused the airplane's destruction. The complaint alleges no other conduct resulting in the damages claimed.

{3} Tavenner's filed a motion to dismiss under Rule 1-012(B)(6), arguing that "Plaintiffs' allegations concern the transportation of personal property from a crash site in Moriarty, New Mexico, to Tavenner's Towing & Recovery in Moriarty, NM" and that the FAAAA expressly preempts Plaintiffs' claims. After briefing and a hearing on the matter, the district court entered a memorandum of decision stating that it had reviewed the cases cited by the parties and concluded that Plaintiffs' claims against Tavenner's should be dismissed on the basis of preemption. This appeal followed.

STANDARD OF REVIEW

{4} "A district court's decision to dismiss a case for failure to state a claim under Rule 1-012(B)(6) is reviewed de novo." *N.M. Pub. Schs. Ins. Auth. v. Arthur J. Gallagher & Co.*, 2008-NMSC-067, ¶ 11, 145 N.M. 316, 198 P.3d 342 (internal quotation marks and citation omitted). Preemption is a question of law reviewed de novo. *See Humphries v. Pay & Save, Inc.*, 2011-NMCA-035, ¶ 6, 150 N.M. 444, 261 P.3d 592.

{5} A motion to dismiss under Rule 1-012(B)(6) "merely tests the legal sufficiency of the complaint[,]" by inquiring whether the complaint alleges facts sufficient to establish the elements of the claims asserted. *Envtl. Improvement Div. of N.M. Health & Env't Dep't v. Aguayo*, 1983-NMSC-027, ¶ 10, 99 N.M. 497, 660 P.2d 587; *see C & H Constr. & Paving, Inc. v. Found. Reserve Ins. Co.*, 1973-NMSC-076, ¶ 9, 85 N.M. 374, 512 P.2d 947. Under this inquiry, "the well-pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted." *C & H. Constr. & Paving, Inc.*, 1973-NMSC-076, ¶ 9 (internal quotation marks and citation omitted). "A complaint may be dismissed on motion if clearly without any merit; and this want of merit may consist in an absence of law to support a claim of the sort made, or of facts sufficient to make a good claim[.]" *Id.* (alteration, internal quotation marks, and citation omitted).

{6} Courts addressing motions to dismiss based on the argument that claims are expressly preempted by federal law ask whether the complaint's allegations show that the preemption provision at issue encompasses a plaintiffs' claims. *See Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1428-31 (7th Cir. 1996) (stating, on appeal from an order treating a motion to dismiss common-law claims based on express preemption by the Airline Deregulation Act of 1978 (ADA) as a Fed. R. Civ. P. 12(b)(6) motion and granting that motion, that the court "must determine if the plaintiffs can prove any set of facts that would entitle them to relief" and that this required the court "to interpret whether the ADA's express preemption provision encompasses the plaintiffs' common law claims" while "accepting all the well-pleaded allegations in the complaint as true"); *cf. Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 260 (2013) (stating, in addressing FAAAA preemption argument raised on summary judgment, that "our task is to identify the domain expressly pre[]empted" (internal

[1]Plaintiffs also sued Fred Garner for declaratory relief. Garner is not a party to this appeal.

quotation marks and citation omitted)); *Boyz Sanitation Serv., Inc. v. City of Rawlins*, 889 F.3d 1189, 1198 (10th Cir. 2018) (analyzing FAAA preemption argument raised on summary judgment by inquiring whether state and local regulations concerning garbage collection fall within the FAAAA's "preemptive scope" and, if so, whether the impact "is too insignificant to warrant preemption").

PREEMPTION

{7} The preemption doctrine is rooted in the Supremacy Clause of the United States Constitution, which provides that "the Laws of the United States . . . shall be the supreme Law of the Land[.]" U.S. Const. art. VI. "Congress has the power to preempt state law." *Choate v. Champion Home Builders Co.*, 222 F.3d 788, 791 (10th Cir. 2000); *see Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591 (2015) (explaining that, as a consequence of the Supremacy Clause, Congress may "pre[]empt, i.e., invalidate, a state law through federal legislation"). "In the interest of avoiding unintended encroachment on the authority of the [s]tates, however, a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre[]emption. Thus, pre[]emption will not lie unless it is the clear and manifest purpose of Congress." *CSX Transp, Inc. v. Easterwood*, 507 U.S. 658, 663-64 (1993) (internal quotation marks and citation omitted); *see Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516-17 (1992) (stating that "[c]onsideration of issues arising under the Supremacy Clause starts with the assumption that the historic police powers of the [s]tates are not to be superseded by Federal Act unless that is the clear and manifest purpose of Congress" and that "Congress' enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not preempted" (alterations, omission, internal quotation marks, and citation omitted)); *see also Palmer v. St. Joseph Healthcare P.S.O., Inc.*, 2003-NMCA-118, ¶¶ 38-39, 134 N.M. 405, 77 P.3d 560 (stating the general preemption principles applied by appellate courts in New Mexico, including the "strong presumption against preemption" (internal quotation marks and citation omitted)).

{8} Tavenner's argues that the FAAAA expressly preempts Plaintiffs' state common-law claims. Accordingly, "we must use ordinary principles of statutory interpretation to evaluate whether the state law falls within the scope of the federal provision precluding state action[,]" and "focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre[]emptive intent." *Boyz Sanitation Serv., Inc.*, 889 F.3d at 1198 (internal quotation marks and citation omitted); *see Dan's City*, 569 U.S. at 260 (stating that courts attempting to "identify the domain expressly pre[]empted" must "focus first on the statutory language, which necessarily contains the best evidence of Congress' pre[]emptive intent" (internal quotation marks and citations omitted)). "[T]he defendant bears the burden of showing Congress' intent to preempt." *Self v. United Parcel Serv., Inc.*, 1998-NMSC-046, ¶ 7, 126 N.M. 396, 970 P.2d 582.

DISCUSSION

A. The FAAAA

{9} The preemption provision at issue here evolved from a statute concerning deregulation of the domestic airline industry, summarized by the United States Supreme Court as follows:

> The [ADA], 92 Stat. 1705, largely deregulated the domestic airline industry. In keeping with the statute's aim to achieve "maximum reliance on competitive market forces," Congress sought to "ensure that the [s]tates would not undo federal deregulation with regulation of their own." Congress therefore included a preemption provision, now codified at 49 U.S.C. § 41713(b)(1), prohibiting [s]tates from enacting or enforcing any law "related to a price, route, or service of an air carrier."
>
> Two years later, the Motor Carrier Act of 1980, 94 Stat. 793, extended deregulation to the trucking industry. Congress completed the deregulation 14 years therefore, in 1994, by expressly preempting state trucking regulation. Congress did so upon finding that state governance of intrastate transportation of property had become "unreasonably burdensome" to "free trade, interstate commerce, and American consumers." Borrowing from the ADA's preemption clause, but adding a new qualification, § 601(c) of the FAAAA supersedes state laws "related to a price, route, or service of any motor carrier with respect to transportation of property."

Dan's City, 569 U.S. at 255-56 (omission and citations omitted).

{10} Section 14501 of the FAAAA, entitled "Federal authority over intrastate transportation," provides in relevant part:

> [A s]tate . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property.

49 U.S.C. § 14501(c)(1). This case involves the interaction between the FAAAA's preemption provision and Plaintiffs' common-law claims.

{11} "[S]tate common-law rules fall comfortably within the language of the [FAAAA] pre[]emption provision." *Nw., Inc. v. Ginsberg*, 572 U.S. 273, 281 (2014). "[T]he current version of this provision applies to state 'laws, regulations, or other provisions having the force and effect of law[.]' " *Id.* at 281-82 (alterations omitted). The United States Supreme Court has explained that "[i]t is routine to call common-law rules 'provisions[,]' " *id.* at 282, and further:

> Exempting common-law claims would . . . disserve the central purpose of the [FAAAA]. The [FAAAA] eliminated federal regulation of rates, routes, and services in order to allow those aspects of [motor] transportation to be set by market forces, and the pre[]emption provision was included to prevent the [s]tates from undoing what the [FAAAA] was meant to accomplish.

Id. at 283. "What is important, therefore, is the effect of a state law, regulation, or provision, not its form, and the [FAAAA's] deregulatory aim can be undermined just as surely by a state common-law rule as it can by a state statute or regulation." *Id.* The questions, then, are whether the FAAAA applies and whether Plaintiffs' common-law claims have the prohibited effect.

{12} Under the FAAAA, "motor carrier" means "a person providing motor vehicle transportation for compensation."[2] 49 U.S.C. § 13102(14) (2012). "Transportation" under the FAAAA includes "a motor vehicle . . . or equipment of any kind related to the movement of passengers and property . . . and services related to that movement, including arranging for, receipt, delivery, elevation, . . . handling, . . . and interchange of . . . property." 49 U.S.C. § 13102(23). The FAAAA's preemption provision contains the following exemption for state regulation of the price charged for nonconsensual tows:

[2]The complaint contains no allegations concerning compensation. As noted, Tavenner's bears the burden to prove that Plaintiffs claims fall within the scope of the FAAAA's preemption provision. *Self*, 1998-NMSC-046, ¶ 7. While lack of compensation would undermine Tavenner's preemption argument, Plaintiffs do not make this argument and so we analyze the preemption question as if this definitional requirement is met.

> does not apply to the authority of a [s]tate . . . to enact or enforce a law, regulation, or other provision relating to the *price* of for-hire motor vehicle transportation by tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

49 U.S.C. § 14501(c)(2)(C) (2012) (emphasis added). This exemption "plainly indicates that tow trucks qualify as 'motor carriers of property[.]' " *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 430 (2002) (alteration, internal quotation marks, and citation omitted); *see Stucky v. City of San Antonio*, 260 F.3d 424, 431 (5th Cir. 2001), *abrogated on other grounds by Ours Garage & Wrecker Serv.*, 536 U.S. 424 ("The purpose of th[e FAAAA preemption] provision was to eliminate overlapping state and municipal regulations, which increased costs, decreased efficiency and reduced competition and innovation in the *towing services industry*." (emphasis added)). The explicit limitation to laws "relating to the price of for-hire motor vehicle transportation by tow truck," however, renders the exemption inapplicable to the claims asserted in this case, which involve allegations of damages arising from the towing of an airplane (not a motor vehicle) and do not involve a dispute about "price." *Cf. Ours Garage & Wrecker Serv.*, 536 U.S. at 429-30 (explaining that "nonconsensual tows" are tows of "illegally parked or abandoned vehicles").

{13} Federal courts interpreting the FAAAA's preemption language often refer to decisions interpreting the nearly identical preemption provision in the ADA. *See* ADA, 49 U.S.C. § 41713(b)(1) (2012) (stating that "a [s]tate . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier"); *Dan's City*, 569 U.S. at 260 (stating that its reading of the FAAA's preemption clause was informed by decisions interpreting the parallel language in the ADA's preemption clause"); *see also Bedoya v. Am. Eagle Express, Inc.*, 914 F.3d 812, 818 (3d Cir. 2019) (observing that, because of the parallels between the ADA and FAAAA, ADA cases are instructive regarding the scope of FAAAA preemption).

{14} The United States Supreme Court has interpreted the phrase "related to" to "embrace[] state laws having a connection with or reference to carrier rates, routes, or services, whether directly or indirectly." *Dan's City*, 569 U.S. at 260 (internal quotation marks and citation omitted). Significantly, however, the Court also has cautioned that the FAAAA does not preempt "state laws affecting carrier prices, routes, and services in only a tenuous, remote, or peripheral manner." *Id.* at 261 (omission, internal quotation marks, and citation omitted); *see also Boyz Sanitation*, 889 F.3d 1189 at 1198-1200 (concluding that, even if state and local regulations concerning garbage collection fell within the FAAAA's preemptive scope, the impact "is too insignificant to warrant preemption"). Courts have interpreted Supreme Court precedent as prohibiting the development of "broad rules concerning whether certain types of common-law claims are preempted[,]" and as requiring that courts instead "examine the underlying facts of each case to determine whether the particular claims at issue 'relate to' [motor carrier] rates, routes or services." *Travel All Over the World*, 73 F.3d at 1433 (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992)).

B. Negligence

{15} The amended complaint asserts a negligence claim based on allegations that Tavenner's failed to load and transport the airplane properly, did not do "all it could to preserve the [a]irplane[,]" and "did not follow industry standards for towing, transporting and protecting the airplane. Tavenner's contends that the FAAAA preempts common-law negligence claims because they seek to impose state-based standards of care on motor carriers. We disagree.

{16} First, the purpose of the FAAAA's preemption clause is to prohibit states from effectively re-regulating the motor carrier industry and to promote "maximum reliance on competitive market forces[.]" 49 U.S.C. § 40101(a)(6) (2012); *see Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 372 (2008) (stating that the state law in question "produces the very effect that the federal law sought to avoid, namely, a [s]tate's direct substitution of its own governmental commands for 'competitive market forces' "). Plaintiffs' negligence claim is directed specifically at the manner in which Tavenner's carried out the service of loading and transporting Plaintiffs' property. Although Plaintiffs' negligence claim relates to the transportation of property, the claim does not target or affect the regulation of motor carriers in general. In such instances, courts have declined to find preemption under the FAAAA, concluding that the relation or effect on a motor carrier's rates, routes, or services to be too tenuous to be preempted. *See Rowe*, 552 U.S. at 370-71 (stating that state laws forbidding gambling would be too tenuous, remote, or peripheral to be preempted); *Bedoya*, 914 F.3d at 821 ("Laws that are directed at members of the general public and that are not targeted at motor carriers are usually viewed as not having a direct effect on motor carriers." (internal quotation marks and citation omitted)); *Lupian v. Joseph Cory Holdings LLC*, 905 F.3d 127, 134-35 (3rd Cir. 2018) (finding no preemption of class action suit against motor carrier alleging violation of state wage payment and collection act, because the act did not significantly impact or frustrate the FAAAA's deregulatory objectives); *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 340 (5th Cir. 1995) (en banc) (holding that a negligence cause of action was not preempted when it made no specific reference to services and would not significantly affect services); *Nyswaner v. C.H. Robinson Wordwide Inc.*, 353 F. Supp. 3d 892, 896 (D. Ariz. 2019) (holding that a negligent hiring claim was not preempted by the FAAAA because "[n]egligent hiring claims are generally applicable state common law causes of action that apply to a wide variety of industries"). We similarly find the relationship between Plaintiffs' negligence action to a motor carrier's prices, routes, and services too tenuous to be preempted by the FAAA. *See Dan's City*, 569 U.S. at 261 (cautioning that "state laws affecting carrier prices, routes, and services in only a tenuous, remote, or peripheral manner" are not preempted by the FAAAA (omission, internal quotation marks, and citation omitted)); *Boyz Sanitation*, 889 F.3d 1189 at 1198-1200 (concluding that, even if state and local regulations concerning garbage collection fell within the FAAAA's preemptive scope, the impact "is too insignificant to warrant preemption").

{17} Second, because the FAAAA does not provide for alternative sources of damage recovery, Plaintiffs would be left without judicial remedy should their claims be preempted. "It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984). In light of the Supreme Court's caution "that federal courts should not displace police powers by federal law unless that was the clear and manifest purpose of Congress[,]" federal courts have reasoned that the absence of any alternative judicial remedy or recourse is evidence that common-law actions to recover for personal injury or property damage are not preempted. *Hodges*, 44 F.3d at 338 (analyzing preemption by the ADA); *Nyswaner*, 353 F. Supp. 3d at 896 (analyzing preemption by the FAAAA and stating "[h]ere it seems . . . unlikely that Congress meant to exempt transportation brokers from tortious conduct they would otherwise be liable for at common law"); *Gill v. JetBlue Airways Corp.*, 836 F. Supp. 2d 33, 42 (D. Mass. 2011) (applying the same analysis to preemption by the ADA). In *Dan's City*, the Supreme Court stated that the result of leaving damaged parties without any judicial recourse to

recover damages "can[not] be attributed to a rational Congress." 569 U.S. at 265.

{18} In addition, the FAAAA's inclusion of a provision requiring motor carriers to carry liability insurance "sufficient to pay . . . for each final judgment . . . for bodily injury to, or death of, an individual resulting from the negligent operation, maintenance, or use of motor vehicles, or *for loss of or damage to property*[,]" 49 U.S.C. § 13906(a)(1) (2012) (emphasis added),[3] is strong evidence Congress did not intend to preempt claims for damages resulting from motor carrier negligence. *See Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186, 194 (3d Cir. 1998) ("It would make little sense to require insurance to pay for bodily injury claims if [motor carriers] were insulated from such suits by the preemption provision."); *Hodges*, 44 F.3d at 338 ("A complete preemption of state law in [the areas of state tort actions] would have rendered any requirement of insurance coverage nugatory."); *Harris v. Velichkov*, 860 F. Supp. 2d 970, 980-81 (D. Neb. 2012) ("The purpose of requiring such proof of financial responsibility is to ensure that the public is adequately protected from the risks created by a motor carrier's operations."); *Creagan v. Wal-Mart Transp., LLC*, 354 F. Supp. 3d. 808, 814 (N.D. Ohio 2018) (holding that personal injury claim brought against brokers of motor transport is preempted because the liability insurance requirement only applies to motor carriers themselves, and stating that the insurance requirement "affirmatively establish[es] that a motor carrier may be liable for these types of negligence actions").

{19} We conclude that the FAAA does not preempt Plaintiffs' negligence claim.

C. Breach of Implied Contract

{20} Plaintiffs' amended complaint asserts a claim for "breach of implied contract," without any allegations establishing the existence of a contract affording Plaintiffs a right to recover from Tavenner's for its breach. The only allegation even suggesting the existence of a contract is this: "As a direct result of [Tavenner]'s breach and failure to protect and transport the [a]irplane as agreed upon, Plaintiffs have been damaged and are entitled to compensatory damages in an amount to be proved at trial." There is no allegation establishing the existence of a contract between Tavenner's and *Plaintiffs*. To the contrary, the complaint elsewhere alleges that Tavenner's "agreed to take the [a]irplane in its possession after being contacted by the Torrance County Sheriff's Department." Thus, to the extent the complaint may be deemed to allege the existence of any agreement, that agreement was between Tavenner's and Sheriff, and there is no allegation establishing a legal basis entitling Plaintiffs to recover against Tavenner's for breach of that agreement. The question whether the complaint sufficiently alleges a contract claim affording Plaintiffs a right to recover against Tavenner's for its breach was not argued or ruled on by the district court and is not before us. *See* Rule 12-321(A) NMRA ("To preserve an issue for review, it must appear that a ruling or decision by the trial court was fairly invoked."); *Batchelor v. Charley*, 1965-NMSC-001, ¶ 6, 74 N.M. 717, 398 P.2d 49 (declining to review issue where the appellant failed to meet the burden "to show that the question presented for review was ruled upon by the trial court"). Given the presumption against preemption and that Tavenner's bears the burden to prove preemption, we conclude that the allegations are insufficient to permit analysis of the question that is before us—whether the FAAAA expressly preempts the claim. *See Self*, 1998-NMSC-046, ¶ 7. Accordingly, we reverse and remand without reaching the question and leave the issue for the district court to decide in the first instance.

D. Breach of the Covenant of Good Faith and Fair Dealing

{21} Plaintiffs' claim for breach of the covenant of good faith and fair dealing presents a similar problem. If there is no contract, there can be no covenant and therefore no breach of the covenant. *See Sanchez v. The New Mexican*, 1987-NMSC-059, ¶ 13, 106 N.M. 76, 738 P.2d 1321 (stating that no good faith and fair dealing claim may be brought when there is no contract "upon which the law can impose the stated duty to exercise good faith and fair dealing"). The allegations in the amended complaint are insufficient to permit analysis of the question whether the FAAAA preempts the claim for breach of the covenant of good faith and fair dealing, and we reverse and remand without reaching the question, again leaving the question for the district court to decide.

CONCLUSION

{22} We reverse the district court's dismissal of Plaintiffs' claims and remand for proceedings consistent with this opinion.

{23} IT IS SO ORDERED.
JACQUELINE R. MEDINA, Judge

WE CONCUR:
LINDA M. VANZI, Judge
MICHAEL D. BUSTAMANTE, Judge Pro Tempore

[3]The ADA similarly mandates liability insurance coverage "sufficient to pay . . . for bodily injury to, or death of, an individual or for loss of, or damage to, property to others[.]" 49 U.S.C. § 41112(a) (2012).

From the New Mexico Court of Appeals

Opinion Number: 2019-NMCA-051

No. A-1-CA-36098 (filed June 24, 2019)

STATE OF NEW MEXICO,
Plaintiff-Appellant,
v.
GABRIEL ALVARADO,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF TORRANCE COUNTY
GARY L. CLINGMAN, District Judge

Released for Publication September 24, 2019.

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Opinion

Megan P. Duffy, Judge.

{1} The State appeals, pursuant to NMSA 1978, Section 39-3-3(B)(2) (1972), the district court's order suppressing Defendant's written statements, made while he was alone in a room at the police station after he had invoked his right to counsel. We reverse and remand.

BACKGROUND

{2} Defendant, a certified massage therapist, allegedly penetrated Victim's vagina with his finger during a session. Victim reported the incident to the police later that day. After Victim underwent a sexual assault nurse examiner (SANE) exam the following afternoon that confirmed injury to her vaginal walls and a tear to her labia, the police went to Defendant's home and asked him to come to the station to give a statement. Defendant agreed and drove himself to the station that afternoon. An officer interviewed Defendant in an audio and video-recorded interview room.

{3} After some introductory conversation, Defendant made several potentially incriminating statements. The officer advised Defendant of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), after which the following exchange took place:

> Defendant: I would rather speak first with an attorney. Can I do that?
> Officer: That's your—That's your right.
> Defendant: Can I do that right now without going to jail? Can I get an attorney first, get together with you in this same room if we have to, and talk to you?
> Officer: I'm gonna make a phone call . . . and we're going to make a decision on that.

The district court found that that this was an invocation of Defendant's right to an attorney. Defendant and the officer continued talking for about ten more minutes before the officer ended the interview.

{4} In that period, Defendant continued to talk with the officer, discussing his religion, family, and a prior conviction. Defendant did not specifically discuss the incident with Victim, and the officer did not ask Defendant questions about the incident. The officer finally ended the interview, saying, "You know what, take a second. Let me take a break. You know, we'll take a break from each other. Give—give me a minute; I gotta run and get something anyway."

{5} Defendant asked if he could call his mother with his phone since she might be worrying about him. The officer said, "I'll tell you what, . . . let me run and get something and I'll come—I'll come right back." Defendant asked if he could have a piece of paper and a pen, and the officer said yes and provided them to Defendant. The officer asked Defendant if he had any weapons, briefly searched him, and took his keys. The officer said he would find out if Defendant would be able to call his mother. Defendant began to respond, saying, "That's fine, I'll decide that here in a second, just let me just write down my—" when the officer interrupted, "Take a minute. Think about it. Okay?" as he left the room.

{6} Immediately after the officer left the room, it is unclear whether Defendant started writing or whether he only held the pen above the paper. The officer returned briefly to give Defendant his phone and left again. Defendant called his sister, asking her to tell his mother he was okay. About eight minutes after the officer left, Defendant clearly started writing. He stopped for a while, waved at both of the cameras in the room, then started writing again.

{7} About twenty minutes after initially leaving Defendant alone, the officer came back and asked, "So what'd you do with the paper here, just drawing?" Defendant said, "I just kind of needed to bounce ideas off of myself," and "I started writing stuff down and I just started processing mentally." Another officer placed Defendant under arrest, at which time a third individual asked Defendant, "Do you want your notes with you?" Defendant said, "No, sir" as he walked out.

{8} Defendant's notes included a page stating, "I tell them everything" connected with a line to "I go to Jail." Another page says, "I have to self destruct[] and that sucks. But that's my own fault. Im [sic] a product of my decisions. So I can handle the results. I must find my way [b]ack to God." Defendant signed this page and drew a picture of a bomb.

{9} The State charged Defendant with two counts of second-degree criminal sexual penetration, contrary to NMSA 1978, Section 30-9-11(E)(3) (2009). Defendant moved to suppress all written and oral statements made after he invoked his right to counsel. The district court found that Defendant had invoked his right to counsel when he said, "Can I get an attorney first, then get with you, in this same room if we have to, and talk to you?" and suppressed all statements and written evidence occurring after that point, including the written statements at issue here. The State filed a pretrial appeal challenging the district court's suppression of the written statements. *See* § 39-3-3(B)(2) (permitting the state to appeal "within ten days from

a decision or order of a district court suppressing or excluding evidence . . . if the district attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding").

DISCUSSION

{10} The State argues that the district court erred in suppressing Defendant's written statements because they were volunteered. "Appellate review of a motion to suppress presents a mixed question of law and fact. We review factual determinations for substantial evidence and legal determinations de novo." *State v. Paananen*, 2015-NMSC-031, ¶ 10, 357 P.3d 958 (internal quotation marks and citations omitted); *see State v. Pisio*, 1994-NMCA-152, ¶ 17, 119 N.M. 252, 889 P.2d 860 (reviewing de novo the question of whether a statement was "volunteered").

{11} "*Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980); *State v. Edwards*, 1981-NMCA-119, ¶¶ 12-14, 97 N.M. 141, 637 P.2d 572 (applying *Innis*). "*Miranda* requires that if at any point a defendant invokes the right to counsel by indicating that he wishes to consult with an attorney before speaking or invokes the right to remain silent by indicating that he does not wish to be interrogated, all interrogation must cease." *State v. Madonda*, 2016-NMSC-022, ¶ 17, 375 P.3d 424 (internal quotation marks and citation omitted). However, "[t]he federal constitution does not preclude the use of incriminating statements against the accused if those statements can be characterized as volunteered." *Pisio*, 1994-NMCA-152, ¶ 15. "Volunteered statements of any kind are not barred by the Fifth Amendment[,]" and we have said that "[a] question may qualify as volunteered, even though it is made by one who had previously requested counsel." *Id.* (internal quotation marks and citation omitted); *see id.* ("Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence[.]" (quoting *Miranda*, 384 U.S. at 478)). "Most volunteered statements fall into one of two categories: statements which the police have made no attempt to elicit, and statements which respond to a police question or which occur during the course of interrogation, but which are totally unresponsive to the question asked." *Id.* ¶ 16 (quoting 3 William E. Ringel, *Searches and Seizures, Arrests and Confessions* § 27.4(a), at 27-26.6 (2d ed. 1994)).

{12} Our initial inquiry in this case is whether Defendant's written statements were the product of an interrogation or its functional equivalent. *See Edwards*, 1981-NMCA-119, ¶ 12 (stating that the threshold inquiry when a defendant alleges a violation of *Miranda* rights is whether there was an interrogation). "Whether a person is interrogated depends on the facts and circumstances of each case." *State v. Juarez*, 1995-NMCA-085, ¶ 8, 120 N.M. 499, 903 P.2d 241. "Interrogation occurs when an officer subjects an individual to questioning or circumstances which the officer knows or should know are reasonably likely to elicit incriminating responses." *State v. Fekete*, 1995-NMSC-049, ¶ 41, 120 N.M. 290, 901 P.2d 708 (quoting *State v. Cavanaugh*, 1993-NMCA-152, ¶ 5, 116 N.M. 826, 867 P.2d 1208). "The concern of the Court in *Miranda* was that the interrogation environment created by the interplay of interrogation and custody would subjugate the individual to the will of his examiner and thereby undermine the privilege against compulsory self-incrimination." *Innis*, 446 U.S. at 299 (internal quotation marks and citation omitted); *see id.* (discussing police practices that do not involve direct questioning but are nevertheless reasonably likely to lead to incriminating statements, such as "the use of line-ups in which a coached witness would pick the defendant as the perpetrator" and other psychological ploys). We too have said that "[i]nterrogation is not limited to express questioning. It can include other, less-assertive police methods that are reasonably likely to lead to incriminating information, but which are beyond those normally attendant to arrest and custody." *Juarez*, 1995-NMCA-085, ¶ 8. "This includes repeated efforts to wear down a suspect's resistance and make the suspect change his mind about invoking the rights described in the *Miranda* warnings." *Madonda*, 2016-NMSC-022, ¶ 19 (alterations, internal quotation marks, and citation omitted).

{13} Defendant contends that the police maintained an interrogation environment even after the officer left the room, and that his written statements must be suppressed because the officer's continued questioning violated the "bright-line rule" that all interrogation must cease after a defendant invokes his right to an attorney. *See id.* ¶ 18 ("[A]ll questioning must cease after an accused requests counsel." (emphasis omitted) (quoting *Smith v. Illinois*, 469 U.S. 91, 98 (1984)). To the extent that the officer continued questioning Defendant after he had invoked his right to counsel, the "bright-line rule" implicates Defendant's responses to that questioning, which are not at issue in this appeal. *See id.* The interview, however, had ended before Defendant made his written statements, and we find no basis to determine that those statements were made in response to interrogation. *State v. Greene*, 1977-NMSC-111, ¶¶ 26, 28, 91 N.M. 207, 572 P.2d 935 (holding that the defendant's incriminating statements regarding the identification of a body in a newspaper article, after he had been advised of his *Miranda* rights, were volunteered because they were not made in response to police questioning and were the product of choice, rather than compulsion).

{14} The circumstances in this case are substantially similar to *Pisio*, where, after the defendant had invoked his right to counsel, the police ceased questioning the defendant and he sat in silence in the detective's office while the detective completed paperwork. 1994-NMCA-152, ¶ 12. While the officer was "silently completing paperwork[,]" the defendant asked the officer if he would "take the rap" if his alleged rape victim had sex with someone else. *Id.* ¶¶ 12, 18. We rejected the defendant's argument that "even silence on the part of a police officer can be the functional equivalent of direct questioning" and found "no basis for determining that the police should have anticipated [the defendant's] response or that [the defendant] framed the question in response to anything specific the detective had said or done." *Id.* ¶¶ 14, 17. The same conclusion is required here.

{15} In this case, the officer ceased interviewing Defendant and left Defendant alone in the room for approximately twenty minutes, during which time Defendant created his written statements. Like the defendant in *Pisio*, Defendant apparently knew that he was being recorded or observed while alone in the room when he waived to the camera, and he did not make the written statement in response to any questioning or prompting. *See id.* ¶¶ 14, 17 (declining to hold that the defendant was subject to an interrogation when the detective was silent, but "was ready to turn the tape back on if Defendant made a statement with 'evidentiary value' "); *see also Arizona v. Mauro*, 481 U.S. 520, 523-25 (1987) (holding that an accused, who had asserted right to counsel, was not subjected to interrogation or its functional equivalent when police allowed his wife to speak with him in the presence of an officer, who tape-recorded their conversation). There is no indicia of police efforts designed to wear down Defendant's resistance or induce Defendant to make incriminating statements. *See Madonda*, 2016-NMSC-022, ¶¶ 21-24 (holding that the defendant's incriminating statements must be suppressed where right after the defendant invoked his right to counsel, the police "proceeded with techniques they had specifically planned to employ during the interrogation" and "undermined the very warnings which had prompted Defendant to invoke his rights in the first place"). Nor is there any indication

that Defendant's time alone was merely a break in a longer, continuing interrogation, as Defendant suggests. Consequently, we find no basis for determining that the officer should have anticipated Defendant's written statements. *See Pisio*, 1994-NMCA-152, ¶ 17. We conclude that Defendant's notes were volunteered statements and hold that the district court erred in suppressing them.

CONCLUSION

{16} We reverse the portion of the district court's November 10, 2016 order suppressing the written evidence obtained during Defendant's interview on June 18, 2015, and remand for further proceedings consistent with this opinion.

{17} IT IS SO ORDERED.

MEGAN P. DUFFY, Judge

WE CONCUR:

M. MONICA ZAMORA, Chief Judge

KRISTINA BOGARDUS, Judge

From the New Mexico Court of Appeals

Opinion Number: 2019-NMCA-052

No. A-1-CA-36233 (filed June 24, 2019)

STATE OF NEW MEXICO,
Plaintiff-Appellant,
v.
JASON RADLER,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF TORRANCE COUNTY
GARY L. CLINGMAN, District Judge

Released for Publication September 24, 2019.

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for Appellee

Opinion

Jennifer L. Attrep, Judge.

{1} In this refiled concurrent jurisdiction case, Defendant Jason Radler moved to dismiss, alleging a violation of his constitutional right to a speedy trial. Eight months after the charge was originally filed in magistrate court and five months after the charge was dismissed and then refiled in district court, the district court granted Defendant's motion. The State appealed. We reverse.

BACKGROUND

{2} The State charged Defendant in magistrate court with aggravated driving under the influence of intoxicating liquor, in violation of NMSA 1978, Section 66-8-102(D)(1) (2010, amended 2016). After spending three days in jail, Defendant was arraigned on March 28, 2016, and released on bond. On April 11, counsel for Defendant entered an appearance and made a pro forma demand for speedy trial. On June 27, the State dismissed the magistrate court case and refiled the charge in district court. The district court set trial for December 19.

{3} On November 4, Defendant moved to dismiss. He contended that, because his trial had not commenced before the expiration of the 182-day period that would have governed his case in magistrate court, his right to a speedy trial had been violated and Rule 5-604(B) NMRA (the rule governing the commencement of trials in refiled concurrent jurisdiction cases) contemplated dismissal. The State responded by observing that Rule 5-604(B) sets out familiar factors from our speedy trial case law—i.e., the length of delay, the reasons for delay, the defendant's assertion of the right, and the prejudice to the defendant from the delay. *See State v. Garza*, 2009-NMSC-038, ¶ 13, 146 N.M. 499, 212 P.3d 387. With respect to the length of delay, the State noted our Supreme Court in *Garza* had adopted "one year as a benchmark for determining when a simple case may become presumptively prejudicial." *Id.* ¶ 48. The State contended that benchmark constitutes a kind of threshold, and if a defendant cannot establish a delay exceeding the benchmark, the district court need not even consider the other factors set forth in the case law and the rule. Defendant's case had been pending just eight months since the original filing in magistrate court, and the State thus argued his motion should be denied for failure to establish delay exceeding the *Garza* benchmark.

{4} The district court heard argument on Defendant's motion in November 2016. Defendant presented testimony at the hearing, without objection from the State, regarding potential prejudice he had suffered. Defendant explained he had been "offered an opportunity to apply to the academy at Los Alamos County Fire Department" (the Department), but he did not apply because of his pending case. He noted the application window had recently closed, and thus he had missed the opportunity. The State did not cross-examine Defendant.

{5} The district court observed the delay was "not excessive," but concluded it nonetheless weighed against the State because it extended beyond the period that would have governed in magistrate court. The court added that the State's reasons for dismissing and refiling the case were permissible, and thus the reason for delay factor weighed in the State's favor. Finally, the court observed Defendant had introduced evidence of prejudice, which the State had not countered, and thus the prejudice factor weighed against the State. The district court concluded Defendant's trial had been impermissibly delayed and granted Defendant's motion to dismiss. After a motion for reconsideration and additional argument, the court entered an order dismissing Defendant's charge, finding "the [m]agistrate [c]ourt trial should have been commenced [80 days before the scheduled district court trial and that] Defendant suffered actual prejudice[,]" and concluding the speedy trial factors weighed in favor of Defendant.

DISCUSSION

{6} The State reiterates on appeal that the district court erred in even considering Defendant's motion, maintaining the speedy trial factors are only to be weighed once a defendant has established delay exceeding *Garza*'s twelve-month benchmark. Alternatively, the State contends a proper weighing of the factors compels reversal. Defendant responds that Rule 5-604 contemplates consideration of a claimed speedy trial violation even before a case has been pending twelve months. He adds that he established actual prejudice, obviating any need to cross the presumptively prejudicial benchmark described in *Garza*. He further contends the district court correctly weighed the speedy trial factors and properly dismissed the case. Prior to addressing the parties' arguments, we briefly examine the applicable law relating to speedy trial and Rule 5-604.

I. Applicable Law

A. Speedy Trial

{7} In determining whether a defendant has been deprived of the right to a speedy trial, we analyze the four-factor balancing test set out by the United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): "(1) the length of delay in bringing the case to trial, (2) the reasons for the delay, (3) the defendant's assertion of the right to a speedy trial, and (4) the prejudice to the defendant caused by the delay." *State v. Serros*, 2016-NMSC-008, ¶ 5, 366 P.3d 1121. Our Supreme

Court in *Garza* established new guidelines as to when, generally, delays should be characterized as presumptively prejudicial and require scrutiny of the *Barker* factors. *Garza*, 2009-NMSC-038, ¶¶ 47-48 (adopting guidelines of twelve months for simple cases, fifteen months for cases of intermediate complexity, and eighteen months for complex cases). At the same time, the *Garza* Court was careful to note the new guidelines are to be treated as merely guidelines, not rules, and "will not preclude [a] defendant from bringing a motion for a speedy trial violation though the delay may be less than one year." *Id.* ¶ 49. As a specific illustration of that proposition, *Garza* emphasized a defendant might bring a speedy trial motion even before the relevant presumptive period has passed where the defendant can establish actual prejudice resulting from delay. *Id.*

B. Elimination of the Six-Month Rule and Resulting Revisions to Rule 5-604

{8} In the past, our Supreme Court used the "six-month rule" in both limited jurisdiction courts and district courts to "provide the courts and the parties with a rudimentary warning of when speedy trial problems may arise." *Garza*, 2009-NMSC-038, ¶¶ 43, 46 (internal quotation marks and citation omitted). The six-month rule "requir[ed] the commencement of trial in a criminal proceeding within six months of the latest of several different triggering events." *Id.* ¶ 43 (internal quotation marks and citation omitted); *see also* Rule 5-604(B) NMRA (2009) (previous six-month rule applicable to district courts); Rule 6-506 NMRA (current six-month rule still applicable to magistrate courts). There was no rule, however, providing guidance as to how the six-month rules should apply in refiled concurrent jurisdiction cases—i.e., where a case initially filed in magistrate court is later dismissed and then refiled in district court. *State v. Savedra*, 2010-NMSC-025, ¶ 2, 148 N.M. 301, 236 P.3d 20.

{9} In *Savedra*, our Supreme Court examined earlier case law attempting to interpret the rules in this context and expressed dissatisfaction with the focus those cases gave to the propriety of the State's justification for dismissing and refiling. *Id.* ¶¶ 7-8. The Court determined that in district courts, "the six-month rule ha[d] become an unnecessary and sometimes counterproductive method for protecting a defendant's right to a speedy trial" and withdrew the district court rule. *Id.* ¶ 9. The Court directed instead that "defendants may rely upon and assert their right to a speedy trial whenever they believe impermissible delay has occurred; whether that delay is the result of a dismissal and refiling or any other cause." *Id.* Notably, the Court made no explicit reference to periods of presumptively prejudicial delay as thresholds for these challenges, and instead cited *Garza* for its provision of new "time frames" guiding a district court's speedy trial analysis. *Savedra*, 2010-NMSC-025, ¶ 8.

{10} In response to *Savedra*, Rule 5-604 was amended to eliminate the six-month rule in district court. The new rule applies only to refiled concurrent jurisdiction cases. *See* Rule 5-604(A). For these cases, the rule provides:

> If the district court does not initially schedule a refiled case within the trial deadline that would have been applicable had the case remained in the lower court, or if the court grants a continuance beyond that deadline, the defendant may move that the court consider whether the case should be dismissed for violation of the defendant's right to speedy trial, taking into consideration the following factors:
> (1) the complexity of the case;
> (2) the length of the delay in bringing the defendant to trial;
> (3) the reason for the delay in bringing the defendant to trial;
> (4) whether the defendant has asserted the right to a speedy trial or has acquiesced in some or all of the delay; and
> (5) the extent of prejudice, if any, from the delay.
> This paragraph does not prohibit a defendant from filing a motion to dismiss for violation of the right to a speedy trial even if a trial is scheduled within the trial deadline that would have been applicable had the case remained in the lower court.

Rule 5-604(B).

{11} Several features of the revision are noteworthy. The factors set forth in Rule 5-604(B) mirror the *Barker* factors. *See Garza*, 2009-NMSC-038, ¶ 13. Their inclusion is consistent with *Savedra*'s command that evaluation of the propriety of the state's dismissal and refiling "should be done within the context" of the standard speedy trial challenge a defendant might raise in district court. *See Savedra*, 2010-NMSC-025, ¶ 8. Perhaps more importantly, this rule establishes no specific periods of delay as thresholds to be crossed before a defendant in a refiled case might bring a challenge. The text instead provides that whenever a district court fails to schedule trial within the originally applicable six-month period, the defendant may move for consideration of a speedy trial violation—with no limitation on when that motion might occur. *See* Rule 5-604(B). Even where the district court does schedule trial within the originally applicable six-month period, the rule adds that the defendant is not prohibited from asserting a violation. *Id.* These provisions arise from *Savedra*'s directive that defendants in these refiled cases may assert a right to speedy trial "whenever they believe impermissible delay has occurred." 2010-NMSC-025, ¶ 9.

II. It Was Not Error for the District Court to Consider the Merits of Defendant's Motion to Dismiss

{12} We review de novo the threshold issue of whether the district court erred in considering Defendant's motion to dismiss prior to passage of the presumptively prejudicial period of delay. *See State v. Foster*, 2003-NMCA-099, ¶ 6, 134 N.M. 224, 75 P.3d 824 ("We review de novo questions of law concerning the interpretation of Supreme Court rules and the district court's application of the law to the facts of this case."). The text of Rule 5-604(B), coupled with the guidance giving rise to the rule in *Savedra*, dispose of the State's contention that the district court was precluded from considering Defendant's motion before the *Garza* twelve-month benchmark had been met. Regardless when a challenge may be brought in cases originating in district court, the language of the rule makes clear that for refiled concurrent jurisdiction cases, a defendant may assert the challenge whenever the district court fails to "schedule a refiled case within the trial deadline that would have been applicable" in the court of limited jurisdiction. Rule 5-604(B); *see State v. Montoya*, 2011-NMCA-009, ¶ 8, 149 N.M. 242, 247 P.3d 1127 ("[W]e will give effect to the plain meaning of the rule if its language is clear and unambiguous." (alteration, internal quotation marks, and citation omitted)). Because Defendant's district court trial date fell beyond the originally applicable six-month date, we conclude Defendant was entitled to raise a speedy trial challenge and the district court committed no error in considering Defendant's motion. Moreover, because Defendant alleged actual prejudice as a result of the delay, *Garza* and *Savedra* further suggest the district court committed no error by entertaining his motion. *See Garza*, 2009-NMSC-038, ¶¶ 22, 49 (noting guideline periods will not preclude challenge at earlier time where the defendant suffers actual prejudice); *see also Savedra*, 2010-NMSC-025, ¶ 9 (explaining defendants may raise speedy trial challenges whenever they believe impermissible delay has arisen); *cf.* Rule 5-604(B) (placing no time frame on the filing of speedy trial motions in refiled concurrent jurisdiction cases).

{13} While the district court here was free to entertain Defendant's motion to dismiss, whether Defendant established a violation of his right to speedy trial is another matter, which we address below.

III. The District Court Erred in Concluding That Defendant's Right to a Speedy Trial Was Violated

{14} As already noted, in evaluating Defendant's speedy trial claim, we consider the *Barker* factors—the length of delay, the reasons for delay, the defendant's assertion

of the right, and the prejudice to the defendant caused by the delay. *See Garza*, 2009-NMSC-038, ¶ 13; *see also* Rule 5-604(B) (listing speedy trial factors to consider). We weigh these four factors together given "the unique factual circumstances presented in each case." *Garza*, 2009-NMSC-038, ¶ 14. "In analyzing these factors, we defer to the district court's factual findings concerning each factor as long as they are supported by substantial evidence, we independently review the record to determine whether a defendant was denied his speedy trial right, and we weigh and balance the *Barker* factors de novo." *State v. Montoya*, 2015-NMCA-056, ¶ 12, 348 P.3d 1057. To the extent we review the district court's application of Rule 5-604, our review is de novo. *See State v. Wilson*, 1998-NMCA-084, ¶ 8, 125 N.M. 390, 962 P.2d 636.

A. Length of Delay

{15} The parties agree this is a simple case. *Garza* instructs courts evaluating the length of delay to measure the delay against the relevant guideline established for finding presumptive prejudice. *See* 2009-NMSC-038, ¶¶ 23-24. For simple cases, *Garza* established a guideline of twelve months. *Id.* ¶ 48.

{16} The district court weighed the length of delay here against the State, concerned that Defendant's district court trial date had been scheduled eighty days beyond the six-month magistrate court deadline. The district court was, in effect, measuring the length of delay against the magistrate court six-month rule. While Rule 5-604 references the trial deadline in magistrate court, nothing in the rule suggests the length of delay is to be measured against something other than the *Garza* guideline. *See* Rule 5-604(B). And *Savedra* suggests the *Garza* guideline is in fact the applicable measuring stick in these refiled concurrent jurisdiction cases, explaining that a defendant's challenge based on dismissal and refiling should occur in "the context of" the standard speedy trial analysis, and citing *Garza* as providing the relevant "new time frames for engaging in the four-factor *Barker* . . . speedy trial balancing test." *Savedra*, 2010-NMSC-025, ¶ 8. We therefore measure the delay here against the backdrop of *Garza*'s twelve-month guideline.

{17} The parties agree Defendant's case was pending from the date of his magistrate court arraignment, March 28, 2016, until his district court trial date of December 19, 2016. That constitutes a total delay of approximately eight months and three weeks—several months short of the *Garza* guideline. In other cases where delay has barely exceeded the applicable guideline, New Mexico courts have concluded the length of delay weighs in favor of neither party, or only negligibly in favor of the defendant. *See, e.g.*, *State v. Coffin*, 1999-NMSC-038, ¶ 59, 128 N.M. 192, 991 P.2d 477 (concluding delay exceeded guideline only "exceptionally slight[ly]" and weighing the delay "neutrally between the parties"); *State v. Laney*, 2003-NMCA-144, ¶ 16, 134 N.M. 648, 81 P.3d 591 (concluding delay exceeding guideline by "sixty-two days" had "little practical effect on the balancing"). The parties have presented no authority providing guidance as to how to weigh delays not exceeding the relevant guideline, but we conclude faithful application of the principles from the minimal-delay cases compels a conclusion that delays not exceeding the guideline will generally weigh against a defendant.

{18} Because the delay here fell several months short of the relevant guideline, we conclude the length of delay weighs against Defendant. The district court erred in measuring the delay against the magistrate court six-month rule and in weighing the length of delay factor in Defendant's favor.

B. Reasons for Delay

{19} The district court concluded the dismissal and refiling weighed in favor of the State because the State offered reasons for refiling that were considered valid under earlier case law. *Garza*, however, instructs that while the state retains "discretion to dismiss a criminal case in magistrate court and reinstate charges in district court," that discretion will not justify the delay that occurs in the period the case remains pending in magistrate court. 2009-NMSC-038, ¶ 28. This delay instead, in the absence of a showing of intent or bad faith, constitutes negligent delay and weighs against the state. *Id.* The weight assignable to this kind of negligent delay is closely related to the length of delay—the weight increases with the delay's "protractedness," and for shorter periods of delay, negligence will generally weigh only "slightly" against the state. *Id.* ¶¶ 26, 30. The parties agree there was no intentional delay or bad faith established, and the case was only pending in magistrate court for a few months. As a result, we conclude the delay resulting from removal of the case to district court was negligent and weighs slightly against the State. As for the time the case was pending in district court—a period that neither party addresses—it appears the case was proceeding normally and should be weighed neutrally. *See State v. Maddox*, 2008-NMSC-062, ¶ 27, 145 N.M. 242, 195 P.3d 1254 (concluding that period where "case moved toward trial with customary promptness" should be weighed "neutrally between the parties"), *abrogated on other grounds by Garza*, 2009-NMSC-038.

C. Assertion of the Right

{20} The district court gave no apparent consideration to this factor. Generally, a court evaluating this factor should consider the timing and manner of the defendant's assertion of the right, along with the "frequency and force of the defendant's objections to [any] delays." *Garza*, 2009-NMSC-038, ¶ 32 (internal quotation marks and citation omitted). Here, Defendant made only one early, perfunctory demand for speedy trial, and then asked for dismissal as his trial approached. Defendant concedes he did not aggressively assert his speedy trial right and reasons this factor should weigh only slightly in his favor. The State agrees. On the record here, we agree with the parties and conclude this factor weighs only slightly in Defendant's favor. *See Maddox*, 2008-NMSC-062, ¶ 31 (weighing factor slightly in the defendant's favor when the defendant's assertions were "neither timely nor forceful"); *State v. Moreno*, 2010-NMCA-044, ¶ 35, 148 N.M. 253, 233 P.3d 782 (weighing factor only slightly in favor of the defendant when he asserted right once early and generically and later only in a motion to dismiss a few months prior to trial).

D. Prejudice

{21} The district court initially determined Defendant's testimony regarding his lost opportunity at the Department established actual prejudice and concluded this factor weighed in Defendant's favor. The parties later clarified that Defendant had not actually lost a job with the Department, as the district court may have originally understood. Defendant had instead foregone an opportunity to attend the Department's academy, which may have given rise to some unquantified chance at a job offer. The district court acknowledged this distinction but nevertheless concluded the prejudice factor weighed in Defendant's favor.

{22} Here, we note Defendant presented very little evidence regarding his claim of a lost job opportunity. He offered no information regarding how many offers of employment were typically extended to attendees at the academy, or how many were likely to be extended in this instance. And he offered no other information regarding the likelihood that he would ultimately secure employment based on the initial invitation. Given the very sparse record made, we conclude Defendant's claim with respect to a lost job opportunity was at best speculative. *See, e.g.*, *Garza*, 2009-NMSC-038, ¶ 37 (concluding the defendant failed to make any cognizable showing of prejudice where showing was not sufficiently "particularized"); *State v. Urban*, 2004-NMSC-007, ¶ 18, 135 N.M. 279, 87 P.3d 1061 (noting that while the defendant gave testimony regarding a lost witness, he "failed to articulate how this witness may have been able to assist in his defense[,]" and concluding his "claims with respect to lost witnesses are, at best, speculative").

{23} Even if we ignored the limited record made on Defendant's claim of a lost job opportunity and give the claim fuller consideration, New Mexico courts have previously recognized a distinction between the weighty prejudice arising from the loss of an existing job and the lesser prejudice

arising from the loss of a job offer. *Compare State v. Johnson*, 1991-NMCA-134, ¶ 7, 113 N.M. 192, 824 P.2d 332 (concluding the defendant suffered substantial prejudice when he was suspended from his job following indictment), *with State v. Marquez*, 2001-NMCA-062, ¶ 25, 130 N.M. 651, 29 P.3d 1052 ("[The d]efendant never accepted the position offered to him and, at most, it appears that he lost a job opportunity and not a job."). Application of that distinction here is instructive, particularly because Defendant has not claimed even the loss of a job offer like the one at stake in *Marquez*—instead he claims only the loss of an opportunity that may have given rise to some indeterminate chance of a later offer. That kind of nebulous chance has not typically been granted any weight in our case law, and we decline to give it weight here. *See, e.g.*, *Garza*, 2009-NMSC-038, ¶ 36 (requiring that lost exculpatory testimony be stated with particularity); *see also Maddox*, 2008-NMSC-062, ¶ 35 (concluding the defendant failed to show prejudice where he could not establish an earlier trial date would have given him the opportunity to serve sentences concurrently, noting judge retained sentencing discretion); *cf. Marquez*, 2001-NMCA-062, ¶¶ 27-28 (concluding the defendant failed to show loss of employment opportunity where he could not show how pending case or potential jail time prevented him from accepting job offer).

{24} As a result, we conclude the district court erred in determining Defendant established prejudice resulting from the delay in this case. This factor thus does not weigh in Defendant's favor.

E. Balancing the Factors

{25} In weighing our speedy trial factors, we recognize no single consideration is dispositive. *See, e.g.*, *Barker*, 407 U.S. at 533 (explaining "they are related factors and must be considered together with such other circumstances as may be relevant"). Here, although the reasons for delay and assertion of the right factors weigh slightly in Defendant's favor, the length of delay and prejudice factors weigh against him. Generally, where a defendant has failed to establish prejudice, the courts find no speedy trial violation. *See Garza*, 2009-NMSC-038, ¶ 40 ("Because [the d]efendant failed to demonstrate particularized prejudice as a consequence of the ten-month and six-day delay, we cannot conclude that [the d]efendant's right to a speedy trial was violated."). In light of all the factors, we conclude Defendant's right to speedy trial was not violated. *See id.*; *see also Laney*, 2003-NMCA-144, ¶ 30 (concluding no violation occurred where length factor weighed neutrally, reason and assertion factors weighed in the defendant's favor, and no undue prejudice was established).

CONCLUSION

{26} We reverse the ruling of the district court and remand for reinstatement of the criminal charge against Defendant and for further proceedings consistent with this opinion.

{27} IT IS SO ORDERED.
JENNIFER L. ATTREP, Judge

WE CONCUR:
M. MONICA ZAMORA, Chief Judge
LINDA M. VANZI, Judge

From the New Mexico Court of Appeals

Opinion Number: 2019-NMCA-053

No. A-1-CA-36688 (filed June 26, 2019)

THE BANK OF NEW YORK MELLON
f/k/a THE BANK OF NEW YORK, as
Trustee for the CERTIFICATEHOLDERS
OF THE CWABS, INC., ASSET-BACKED
CERTIFICATES, SERIES 2007-9,
Plaintiff-Appellee,
v.
PHUONG T. LUU,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
ALAN M. MALOTT, District Judge

Released for Publication September 24, 2019.

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Opinion

M. Monica Zamora,

Chief Judge.

{1} Defendant Phuong T. Luu appeals from the district court's judgment on the merits and order for foreclosure sale in favor of Plaintiff The Bank of New York Mellon f/k/a The Bank of New York, as Trustee for the Certificate holders of the CWABS, Inc., Asset-Backed Certificates, Series 2007-9. On appeal, Defendant challenges the district court's conclusion that Plaintiff had standing to enforce the promissory note. Specifically, Defendant questions the validity of the note's indorsement, claiming it is fraudulent and therefore ineffective to show that Plaintiff holds the note, and alleges that the district court's determination to the contrary was unsupported by any evidence. Concluding the district court's ruling is supported by substantial evidence, we affirm.

BACKGROUND

{2} On May 3, 2007, Defendant executed a promissory note in the principal sum of $160,800, payable to Countrywide Home Loans, Inc. d/b/a America's Wholesale Lender (Countrywide). Around the same time, and as security for repayment of the debt evidenced by the note, Defendant executed a mortgage in favor of Mortgage Electronic Registration Systems, Inc., as nominee for Countrywide.

{3} Plaintiff is trustee for a trust created on May 1, 2007. According to the evidence introduced at trial, on May 8, 2007, Defendant's loan was transferred from Countrywide to the Plaintiff trust, which had a cut-off date for receiving loans of June 8, 2007. Defendant's loan was initially serviced by Bank of America until Specialized Loan Servicing (SLS) took over servicing the loan. SLS records show the original note was delivered to Bank of America on May 8, 2007, and thereafter transferred to counsel for Plaintiff on July 10, 2012.

{4} Defendant became delinquent on payments due under the note, and on October 4, 2012, Plaintiff filed its initial complaint for foreclosure against Defendant.[1] Plaintiff attached a copy of the note as an exhibit to that complaint, which was unindorsed and contained a stamp from LandAmerica Albuquerque Title Company certifying the note as a true and correct copy of the original. On October 22, 2014, that complaint was voluntarily dismissed without prejudice. No rulings regarding standing were made prior to dismissal.

{5} On April 21, 2015, Plaintiff filed a second complaint for foreclosure against Defendant, initiating the case that forms the basis for this appeal. In its complaint, Plaintiff alleged it is the holder of the note and the mortgage and is therefore entitled to enforce the note. Plaintiff further alleged that it was in possession of the original note at the time of filing, and attached a copy of the note to the complaint, as well as an affidavit from Plaintiff's counsel attesting to possession of the original note. The note attached to the complaint contains a blank indorsement signed by Michele Sjolander, Executive Vice President of Countrywide. The indorsement is undated, and the parties and the district court agree that the indorsement was signed by stamp, rather than by hand. The note attached to the present complaint does not contain the title company's stamp, as the 2012 copy did.

{6} Defendant filed a motion to dismiss the complaint, arguing Plaintiff lacked standing because the note's indorsement is invalid. In her motion, Defendant claimed it was "suspicious" that the note attached to Plaintiff's prior complaint in 2012 was unindorsed, yet the note attached to the present complaint contains an indorsement, and therefore contended that the indorsement in the present case must be a result of fraud. The district court denied Defendant's motion. Following discovery, Plaintiff moved for summary judgment, which the district court also denied, ruling there was a genuine issue of material fact as to whether Plaintiff had standing because of the dispute over the timing and effectiveness of the note's indorsement.

{7} The matter proceeded to a bench trial, wherein the original note containing the indorsement was presented and admitted as an exhibit, as were other documents concerning Defendant's loan. Based on the evidence admitted at trial, which is discussed in more detail below, the district court concluded that Plaintiff had standing to enforce the

[1]At trial, the district court took judicial notice of the entire case file from the previous district court case, *Bank of N.Y. Mellon v. Luu*, No. D-202-CV-2012-09169.

note and mortgage lien. Rejecting Defendant's argument that the indorsement was fraudulent, the district court determined the indorsement was properly made. Following a bench trial, the district court concluded that Plaintiff had standing and was thus entitled to enforce the note and foreclose the mortgage. The district court issued an order ruling in favor of Plaintiff and ordering a foreclosure sale.

DISCUSSION

{8} Defendant argues the district court erred in finding that the note was indorsed by Ms. Sjolander of Countrywide prior to April 1, 2009, and in ruling that Plaintiff has standing to bring the action as the real party in interest. Defendant similarly argues that the district court erred in ruling that the original note is indorsed in blank and has been transferred by possession alone. In short, these arguments challenge whether the indorsement was effective to show Plaintiff was the holder of the note at the time the complaint was filed and, thus, whether Plaintiff has standing to enforce the note. We first review whether Plaintiff made a prima facie case of standing and then review Defendant's challenge to the legitimacy of the indorsement.

Standard of Review

{9} In this case, we review the district court's conclusion that Plaintiff had standing under a substantial evidence standard of review. *See Deutsche Bank Nat'l Tr. Co. v. Johnston,* 2016-NMSC-013, ¶ 28, 369 P.3d 1046; *Bank of New York v. Romero*, 2014-NMSC-007, ¶ 18, 320 P.3d 1 ("Because the district court determined after a trial on the issue that the Bank of New York established standing as a factual matter, we review the district court's determination under a substantial evidence standard of review."). " 'Substantial evidence' means relevant evidence that a reasonable mind could accept as adequate to support a conclusion." *Johnston*, 2016-NMSC-013, ¶ 28 (quoting *Romero*, 2014-NMSC-007, ¶ 18). In conducting our review, we "resolve all disputed facts and indulge all reasonable inferences in favor of the trial court's findings." *Id.* (internal quotation marks and citation omitted).

I. Plaintiff Made a Prima Facie Showing of Standing

{10} A plaintiff seeking to foreclose a mortgage must show standing at the time of filing by demonstrating that it has the right to enforce the mortgage lien and the underlying promissory note. *Bank of N.Y. Mellon v. Lopes*, 2014-NMCA-097, ¶ 8, 336 P.3d 443. To establish the right to enforce the note, New Mexico's Uniform Commercial Code (UCC) requires a plaintiff to prove it is either: "(i) the holder of the instrument[;] (ii) a nonholder in possession of the instrument who has the rights of a holder[;] or (iii) a person not in possession of the instrument who is entitled to enforce the instrument[.]" NMSA 1978, § 55-3-301 (1992). A plaintiff may show it is the holder of a note and satisfy the requirements of standing by attaching a note indorsed in blank to its complaint. *Johnston*, 2016-NMSC-013, ¶ 23; *BAC Home Loans Servicing, LP v. Smith*, 2016-NMCA-025, ¶ 11, 366 P.3d 714 ("[U]nder the UCC, possession of a note indorsed in blank ordinarily establishes the right of a third party as the holder of that note.").

{11} Plaintiff demonstrated that it was the holder of the note at the time the present complaint was filed. *See* NMSA 1978, § 55-1-201(b)(21)(A) (2005) (defining holder of the note as "the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession"). The complaint alleged the note was indorsed in blank and transferred to Plaintiff. A copy of the indorsed note was included as an exhibit to the complaint. In addition, Plaintiff concurrently filed an affidavit of Plaintiff's counsel attesting to possession of the original note. These facts demonstrate possession of the note indorsed in blank at the time the complaint was filed, and thus Plaintiff made a prima facie showing of standing in accordance with our case law. *See Johnston*, 2016-NMSC-013, ¶ 25 (recognizing that where a party presents a note indorsed in blank with the initial complaint, it is "entitled to a presumption that it could enforce the note at the time of filing and thereby establish standing"). Accordingly, Plaintiff is entitled to a presumption that it has the right to enforce the note. *See id.* Although we conclude Plaintiff made a prima facie showing of standing, this does not dispose of the matter because Defendant takes issue with the validity of the note's indorsement. We must therefore determine whether substantial evidence supports the district court's conclusion as to the legitimacy of the indorsement. *See id.* ¶¶ 28-32 (reviewing the district court's conclusions for substantial evidence).

II. Substantial Evidence Exists to Support the District Court's Conclusion That the Note Was Properly Indorsed

{12} Defendant challenges the legitimacy of the indorsement on the note. Specifically, Defendant argues on appeal that Plaintiff lacks standing to enforce the note because the indorsement on the note is invalid. Defendant bases her argument on the fact that Plaintiff filed a foreclosure complaint against Defendant in 2012 and attached thereto a certified copy of the note that did not contain any indorsements. When Plaintiff filed the present complaint in 2015, it attached a copy of the original note containing a blank indorsement signed by the Countrywide representative Ms. Sjolander. According to Defendant, the copy of the unindorsed note attached to the 2012 complaint was allegedly a copy of the original note as it existed in 2012, and Defendant suggests that the indorsement on the note attached to the present complaint was made after the fact, and therefore must be fraudulent. Moreover, because Countrywide ceased existing after April 1, 2009, Defendant contends Countrywide's indorsement is only effective if it was made prior to that date.

{13} To address whether the note was properly indorsed, the district court was required to resolve a conflict in the evidence. In the district court, two versions of the note were admitted into evidence—one containing the indorsement and one with no indorsement. By "reconcil[ing] inconsistencies[] and determin[ing] where the truth lies," the district court found that, after the note's execution but sometime before April 1, 2009, the note was indorsed in blank by Ms. Sjolander of Countrywide. *N.M. Taxation & Revenue Dep't v. Casias Trucking*, 2014-NMCA-099, ¶ 23, 336 P.3d 436 (alteration, internal quotation marks, and citation omitted). The district court also found that the copy of the note attached to the 2012 complaint was a copy that the title company made at loan closing in 2007. In concluding the note was properly indorsed, the district court rejected Defendant's theory that the indorsement was fraudulent. The district court was entitled to resolve the apparent evidentiary conflict created by the existence of the contrary notes. *Hess Corp. v. N.M. Taxation & Revenue Dep't*, 2011-NMCA-043, ¶ 37, 149 N.M. 527, 252 P.3d 751 ("Resolution of factual conflicts, credibility, and weight is the task of the [district] court." (internal quotation marks and citation omitted)). We will not reweigh the evidence on appeal. *See Clark v. Clark*, 2014-NMCA-030, ¶ 26, 320 P.3d 991 ("We will not reweigh the evidence nor substitute our judgment for that of the fact[-]finder." (alteration, internal quotation marks, and citation omitted)). Rather, "[w]e simply review the evidence to determine whether there is evidence that a reasonable mind would find adequate to support a conclusion." *Charles v. Regents of N.M. State Univ.*, 2011-NMCA-057, ¶ 15, 150 N.M. 17, 256 P.3d 29 (alteration, internal quotation marks, and citation omitted). On appeal, we must indulge all reasonable inferences in favor of the district court's ruling. *Johnston*, 2016-NMSC-013, ¶ 28.

{14} The district court's determination that the note was properly indorsed is supported by substantial evidence. At trial, Nicholas Raab, Assistant Vice President of the High Risk Department at SLS, testified for Plaintiff. At the time of trial, SLS

serviced Defendant's loan for Plaintiff. Mr. Raab had been employed by SLS for over ten years. Mr. Raab testified as to his familiarity with SLS practices and business records, as well as his experience working with loans originated by Countrywide. Based on his knowledge and experience, Mr. Raab explained that a title company typically stamps a copy of the note when the loan closes. Mr. Raab explained that a title company would only be involved with the note at loan closing and that the copy of the note attached to the 2012 complaint was the title company's certified copy of the note made at loan closing. Defendant's loan closed on May 3, 2007. Mr. Raab also explained that Countrywide indorses notes at the time such notes are transferred to the next owner. Defendant's loan was transferred to the trust by a Pooling and Servicing Agreement wherein Countrywide conveyed all of its interest in Defendant's mortgage loan to Plaintiff. The transfer of Defendant's loan took place on May 8, 2007—a few days after the loan closed.

{15} Initially, we address Defendant's concern that Mr. Raab was an unqualified witness. Although Defendant does not specifically challenge on appeal the admission of that evidence, she fleetingly asserts in her reply brief that Mr. Raab's testimony should be deemed inadmissible because it was not based on personal knowledge. We will not consider the admissibility of Mr. Raab's testimony because the issue was raised for the first time in Defendant's reply brief. *See Mitchell-Carr v. McLendon*, 1999-NMSC-025, ¶ 29, 127 N.M. 282, 980 P.2d 65 ("[T]he general rule is that we do not address issues raised for the first time in a reply brief[.]"); *cf.* Rule 12-318(C) NMRA (stating in pertinent part that a reply brief "shall reply only to arguments or authorities presented in the answer brief"). Nonetheless, we note that Mr. Raab's testimony was grounded in his personal knowledge and experience working at SLS. Based on his knowledge, Mr. Raab testified as to practices and procedures and explained SLS business records in detail.

{16} We thus turn to the district court's determination that the certified copy of the note attached to the 2012 complaint was a copy from the title company made at loan origination, and not a copy of the original note as it existed in 2012. Defendant's theory of fraud relies in part on the assumption that the note attached to the 2012 complaint represented the original note as it existed in 2012. However, our review of the evidence, including Mr. Raab's testimony that the title company was only involved at loan closing, does not support Defendant's position. The evidence shows that Defendant's loan closed on May 3, 2007, and that at closing the title company made a copy of the note and stamped the copy to designate it as a certified copy of the original. Further, the evidence supports a conclusion that the title company did not place a stamp on the original note as no such stamp appears on the original note that was introduced at trial, and that the title company would not have made a copy of the note or otherwise have been involved with the note other than at closing. Therefore, the fact that the copy of the note attached to the complaint in 2012 states it is a certified copy does not mean the copy was a copy of the note as it existed in 2012; but only that it was a copy of the original as it existed at loan origination in 2007. Substantial evidence supports the conclusion that the note attached to the 2012 complaint was not a copy of the original note as it existed in 2012.

{17} To the extent Defendant implies that the best evidence rule indicates that we must take the unindorsed note attached to the 2012 complaint as the true copy of the original, we disagree. The accuracy of the copy of the indorsed original note attached to the present complaint was confirmed when the district court made a copy of the actual original note and admitted it into evidence. The requirements of Rule 11-1002 NMRA are thus met because the original note was inspected by the district court, copied, and admitted as an exhibit during trial. Defendant's contention that the provisions of Rule 11-902 NMRA regarding public records affects the authentication of the original note is likewise misplaced because the original note is not a copy of a public record.

{18} Having concluded that substantial evidence supports the district court's conclusion that the note attached to the 2012 complaint was not a copy of the original note as it existed in 2012, we next turn to the court's determination that the note was indorsed prior to April 1, 2009, when Countrywide ceased doing business. Mr. Raab testified that Countrywide indorsed notes at the time of transfer to a subsequent owner. The evidence shows that Defendant's loan was transferred to the trust on May 8, 2007, and that the cut-off date for loans to be transferred to the trust was June 8, 2007. Based on Countrywide's practice of indorsing notes at the time of transfer to a subsequent owner, and the fact that Defendant's loan was transferred to the trust in 2007, it was reasonable for the district court to conclude that the indorsement was made prior to April 1, 2009. Defendant did not present any evidence at trial to refute the foregoing timeline of events, but rather argued that the evidence supported her theory of fraud. We note that the arguments of counsel are not evidence, *Muse v. Muse*, 2009-NMCA-003, ¶ 51, 145 N.M. 451, 200 P.3d 104, and the district court, as the fact-finder, was free to reject Defendant's version of the facts. *See Casias Trucking*, 2014-NMCA-099, ¶ 23 ("It is the sole responsibility of the trier of fact to weigh the testimony, determine the credibility of the witnesses, reconcile inconsistencies, and determine where the truth lies[.]" (internal quotation marks and citation omitted)). On appeal, we will not speculate as to other possible outcomes. *See Las Cruces Prof'l Fire Fighters v. City of Las Cruces*, 1997-NMCA-044, ¶ 12, 123 N.M. 329, 940 P.2d 177. ("The question is not whether substantial evidence exists to support the opposite result, but rather whether such evidence supports the result reached.").

{19} In her briefing, Defendant repeatedly emphasizes the lack of evidence conclusively proving the date on which the indorsement was made, noting that Mr. Raab could not point to a specific piece of evidence showing the indorsement was made prior to April 1, 2009. But this does not foreclose the district court's conclusion that the evidence, *as a whole*, supports that the indorsement was made at some point prior to April 1, 2009. In evaluating the evidence, we accept inferences made by the district court based on the evidence, so long as they are reasonable. *See Smyers v. City of Albuquerque*, 2006-NMCA-095, ¶ 17, 140 N.M. 198, 141 P.3d 542 ("We accept the reasonable inferences made by the fact-finder.").

> In a civil case, circumstantial evidence is competent to prove a fact in issue and it is unnecessary that such proof rise to the degree of certainty to support only one conclusion to the exclusion of all others. Circumstantial evidence consists of proof of facts or circumstances which give rise to a reasonable inference of the truth of the facts sought to be proved.

Alfieri v. Alfieri, 1987-NMCA-003, ¶ 30, 105 N.M. 373, 733 P.2d 4 (citation omitted). Although the district court based its conclusions regarding the timing of the indorsement on circumstantial evidence, the evidence is, nonetheless, sufficient. *See Consol. Elec. Distribs., Inc. v. Santa Fe Hotel Grp., LLC*, 2006-NMCA-005, ¶¶ 13-14, 138 N.M. 781, 126 P.3d 1145 ("[S]ubstantial evidence may be comprised of either direct or circumstantial evidence."). We conclude substantial evidence exists to support the district court's ruling that the original note was indorsed at some point subsequent to execution and prior to April 1, 2009.

III. Defendant Failed to Overcome a Legal Presumption That the Indorsement Is Valid

{20} We therefore turn to Defendant's argument that Ms. Sjolander's signature was fraudulently applied or that there was falsification of her indorsement based on a "robo-signing" theory. Our analysis focuses on the legal presumption addressing

the validity and authenticity of signatures, which we conclude Defendant failed to overcome.

{21} Under the UCC, "[i]n an action with respect to an instrument, the authenticity of, and authority to make, each signature on the instrument is admitted unless specifically denied in the pleadings." NMSA 1978, § 55-3-308(a) (1992). If the validity of a signature is denied in the pleadings, the party claiming under the signature bears the ultimate burden of proving its validity. *See id*. However, the signature is still entitled to a presumption of validity. *See id*. Such presumption remains intact unless evidence supporting the signature's invalidity is introduced. *See id*. cmt. 1 (explaining that "presumed" "means that until some evidence is introduced which would support a finding that the signature is forged or unauthorized, the plaintiff is not required to prove that it is valid"); NMSA 1978, § 55-1-206 (2005) ("Whenever the [UCC] creates a 'presumption' with respect to a fact, or provides that a fact is 'presumed', the trier of fact must find the existence of the fact unless and until evidence is introduced that supports a finding of its nonexistence.").

{22} Defendant claims because she questioned the validity of the indorsement in the pleadings, Plaintiff bears the burden of proving the indorsement's authenticity. Defendant's interpretation of Section 55-3-308 is flawed. Although Defendant is correct that Plaintiff bears the ultimate burden of establishing the indorsement's validity, when Plaintiff's evidence gives rise to the presumption of validity, the obligation to further prove validity only arises when that presumption is overcome by Defendant's evidence. *See* § 55-3-308 cmt. 1. Pursuant to the UCC, Ms. Sjolander's signature in the indorsement on the note is presumed valid until and unless Defendant introduces evidence that would support a finding that the signature is forged or unauthorized. *See id*. In the absence of such evidence, Plaintiff's burden of proof is not triggered; rather, the signature is presumed authentic as a matter of law. *See id*.

{23} Defendant did not introduce any evidence in the district court to support a finding that the note's indorsement was either forged or unauthorized, and, instead only presented her own speculation and inferences. In support of her theory of fraud, Defendant relied on the unindorsed copy of the note attached to Plaintiff's prior complaint and evidence as to the date Countrywide ceased doing business. Defendant contends because the note attached to the prior complaint was unindorsed, the indorsement on the note attached to the present complaint *must* be fraudulent since the evidence does not show the indorsement was made prior to April 1, 2009. Defendant's argument relies on the assumption that if Plaintiff was in possession of the indorsed note in 2012, it would have attached the indorsed note to its complaint rather than attach an unindorsed copy. However, as we discussed above, Defendant provided no actual evidence to support her contention that the unindorsed note was a copy of the original note as it existed in 2012 rather than merely a copy of the note made at some point prior to indorsement.

{24} Indeed, the existence of both an indorsed note and a prior copy of the note made before indorsement is not unusual, and we hold that it is insufficient on its own to support a finding of fraud. Numerous courts applying identical signature presumptions have reached the same conclusion. *See, e.g.*, *In re Phillips*, 491 B.R. 255, 273 (Bankr. D. Nev. 2013) (explaining that the subsequent appearance of an indorsed note that had not initially been filed did not constitute a threshold showing of fraud or forgery); *In re Hunter*, 466 B.R. 439, 449-50 (Bankr. E.D. Tenn. 2012) (concluding the presence of two notes, one indorsed and one with no indorsements, was inadequate to overcome the presumption of indorsement's validity); *In re Wilson*, 442 B.R. 10, 15 n.6 (Bankr. D. Mass. 2010) ("The mere existence of one or more copies of the note that were made from the original before it was indorsed does not create a genuine issue as the timing of the indorsement without further evidence as to when the copies were made from the original.").

{25} Defendant additionally argues that falsification of signatures on notes is widespread and points to cases from other jurisdictions where fraud was alleged in connection with stamped indorsements containing Ms. Sjolander's signature. However, much of what Defendant cites to are merely allegations and not factual findings, and, in any event, we are unconvinced that allegations or even factual findings made in unrelated actions constitute sufficient evidence to support a finding of forgery in this case. *See Muse*, 2009-NMCA-003, ¶ 51 ("The mere assertions and arguments of counsel are not evidence."); *cf. State v. Kerby*, 2005-NMCA-106, ¶¶ 23-25, 138 N.M. 232, 118 P.3d 740 (stating that propensity to act in a certain way or the fact that a defendant has acted in a certain way in the past does not and may not serve as evidence that the defendant has acted in that way in the present case). **{26}** Further, although Defendant implies that the fact that Ms. Sjolander's signature was mechanically applied may reinforce her allegations regarding fraud, she fails to present any evidence or authority that requires such a conclusion, and we are aware of no New Mexico case stating that a mechanically-applied signature is a falsified or fraudulent signature. *See, e.g.*, *Lopes*, 2014-NMCA-097, ¶ 3 (taking no issue with an indorsement that "appear[ed] to be signed by stamp rather than by hand"); *see Curry v. Great Nw. Ins. Co.*, 2014-NMCA-031, ¶ 28, 320 P.3d 482 ("Where a party cites no authority to support an argument, we may assume no such authority exists."). We decline to arrive at such a conclusion now, noting that there is no requirement in the UCC that an indorsement be made by a wet-ink signature rather than a stamp. *See* NMSA 1978, § 55-3-204(a) (1992) (defining "indorsement" as a signature "made on an instrument for the purpose of (i) negotiating the instrument, (ii) restricting payment of the instrument, or (iii) incurring indorser's liability on the instrument"); § 55-1-201(b)(37) (defining "signed" as "any symbol executed or adopted with present intention to adopt or accept a writing").

{27} To overcome the presumption of the indorsement's validity, Defendant was "required to make some sufficient showing" of evidence in support of her claim that the indorsement was invalid. Section 55-3-308 cmt. 1. Based on the foregoing discussion, we conclude Defendant failed to make an adequate showing. The evidence offered by Defendant does not indicate that Ms. Sjolander's signature was invalid, fraudulent, or falsified, and the indorsement was thus entitled to a presumption of validity. *See* § 55-3-308(a). Accordingly, we conclude that the district court did not err in rejecting Defendant's theory of fraud.

IV. The District Court Did Not Err in Concluding That the Note Was Indorsed in Blank and Transferred by Possession

{28} Finally, we turn to Defendant's argument that the district court erred in ruling that the original note was indorsed in blank and was transferred by possession alone. Because Plaintiff established a prima facie case that it had standing based on possession of the original note indorsed in blank, and given that Defendant's argument calling into question the validity of the indorsement has been rejected, we conclude the district court did not err in ruling that the original note is indorsed in blank and has been transferred by possession alone. *See* NMSA 1978, § 55-3-205(b) (1992) ("When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed.").

CONCLUSION

{29} Based on the foregoing, we affirm the district court's judgment.

{30} IT IS SO ORDERED.
M. MONICA ZAMORA, Chief Judge

WE CONCUR:
JULIE J. VARGAS, Judge
MEGAN P. DUFFY, Judge

From the New Mexico Court of Appeals

Opinion Number: 2019-NMCA-054

No. A-1-CA-36478 (filed June 27, 2019)

HELMERICH PAYNE INTERNATIONAL DRILLING CO.,
Protestant-Appellee,
v.
NEW MEXICO TAXATION AND REVENUE DEPARTMENT,
Respondent-Appellant.

APPEAL FROM THE ADMINISTRATIVE HEARINGS OFFICE
ALAN M. MALOTT, District Judge

Released for Publication September 24, 2019.

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Opinion

Kristina Bogardus, Judge.

{1} The New Mexico Taxation and Revenue Department (the Department) appeals from a decision and order of the Administrative Hearings Office (AHO) awarding Helmerich & Payne International Drilling Co. (Helmerich) $50,000 in administrative costs and fees associated with its tax protest. The Department challenges the AHO's subject matter jurisdiction to make the award. The Department further alleges that, assuming the AHO had jurisdiction, the AHO abused its discretion in exercising it. We conclude that the AHO's exercise of jurisdiction was proper and that the AHO did not abuse its discretion in awarding Helmerich the costs and fees. Further, we decline to consider the issue of award amount because the Department failed to preserve it. Accordingly, we affirm the AHO's decision and order (the Decision).

BACKGROUND

{2} The following facts, which the parties do not dispute, are taken from the Decision. The matter at issue in this case was prompted by a 2015 Department corporate income tax audit of Helmerich. Following the Department's assessment against Helmerich for $391,178 in tax, a $78,235.60 penalty, and $21,220.07 in interest, Helmerich filed a formal protest and included in it a request for an award of fees and costs. The Department then requested, and the AHO made preparations for, a hearing on the protest. Before the hearing, Helmerich filed a motion for summary judgment. The Department did not respond, instead, it abated the entire assessment. The Department never explained to Helmerich or the AHO the reason for the abatement.

{3} After the abatement, Helmerich renewed its request for an award of costs and fees. The Department objected, arguing that, because the assessment was abated in its entirety before any ruling by the AHO, the AHO lacked jurisdiction to make the award. The AHO vacated the originally scheduled merits hearing but issued an order on the jurisdictional question in which it concluded that it had jurisdiction to determine the prevailing party in the protest. After a hearing on the prevailing-party issue, the AHO issued the Decision, the subject of this appeal.

DISCUSSION

{4} The Department raises several issues on appeal. Essentially, it argues that (1) the AHO lacked subject matter jurisdiction to hold a hearing on Helmerich's request for costs and fees when the AHO did not decide the underlying issue of tax, interest, and penalty owed; (2) even if the AHO had jurisdiction, it abused its discretion by concluding that Helmerich was the prevailing party, thus entitled to an award of costs and fees; and (3) the AHO abused its discretion in awarding the amount of costs and fees it did.

{5} Helmerich filed a succinct answer brief stating that it materially agrees with the Decision and requesting that we affirm it. Helmerich made no arguments in response to the Department and stated that, to avoid incurring even more costs and fees, it would participate no further in the appeal.

I. The AHO Had Jurisdiction to Decide Whether Helmerich Was the Prevailing Party

{6} Whether the AHO, an administrative agency, had subject matter jurisdiction to hold a hearing on the prevailing-party issue and to make the resulting award is a question we review de novo. *See Citizen Action v. Sandia Corp.*, 2008-NMCA-031, ¶ 12, 143 N.M. 620, 179 P.3d 1228. "The subject matter jurisdiction of an administrative agency is defined by statute, and an agency is limited to exercising only the authority granted by statute." *Id.* In construing a statute, we observe the general principles that "the plain language of a statute is the primary indicator of legislative intent" and that when "several sections of a statute are involved, they must be read together so that all parts are given effect." *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998-NMSC-050, ¶ 5, 126 N.M. 413, 970 P.2d 599 (internal quotation marks and citation omitted).

{7} The resolution of this question of jurisdiction lies in NMSA 1978, Section 7-1-29.1 (2015, amended 2019),[1] which addresses the awarding of costs and fees in tax disputes. Section 7-1-29.1(A) reads:

> In any administrative . . . proceeding that is brought by or against the taxpayer . . . in connection with the determination,

[1]The version of Section 7-1-29.1 in effect on the date Helmerich filed its protest and through the date the Decision was filed, and not the most recent version of that section reflecting 2019 amendments, is referenced throughout this opinion.

> collection or refund of any tax, interest or penalty for a tax governed by . . . the Tax Administration Act, [NMSA 1978, §§ 7-1-1 to -83 (1965, as amended through 2019)] the taxpayer shall be awarded a judgment or a settlement for reasonable administrative costs incurred in connection with an administrative proceeding with . . . the administrative hearings office . . . if the taxpayer is the prevailing party.

In short, if a taxpayer is the prevailing party, it is entitled to an award of reasonable administrative costs.

{8} Subsection (B) of the statute consists of internal definitions. As relevant here, (1) "administrative proceeding" is defined as "any procedure or other action before . . . the [AHO]"; and (2) "reasonable administrative costs" is defined to include AHO and attorney charges incurred in the context of an administrative proceeding. Section 7-1-29.1(B)(1), (3).

{9} Lastly, Subsection (C) of the statute states that a taxpayer (1) is the prevailing party if the taxpayer has "substantially prevailed with respect to the amount in controversy"; and (2) is not the prevailing party if "the hearing officer finds that the position of the [D]epartment in the proceeding was based upon a reasonable application of the law to the facts of the case." Section 7-1-29.1(C)(1)(a), (2). The determination of whether the taxpayer is the prevailing party is made either: (1) by party agreement; (2) "in the case where the final determination with respect to the tax, interest or penalty is made in an administrative proceeding, by the hearing officer"; or (3) "in the case where the final determination is made by the court, the court." Section 7-1-29.1(C)(4).

{10} The Department asserts that the AHO acted outside Section 7-1-29.1's scope and, thus, its jurisdiction. The Department reasons that the prerequisite for the AHO to address the prevailing-party matter—that is, the AHO's deciding the tax issue central to Helmerich's protest—was not met. The Department further argues that, in the absence of an AHO hearing on the tax issue, it is the role of the parties, not the hearing officer, to resolve the prevailing-party issue—specifically, by party agreement. Here, the Department and Helmerich reached no such agreement. Therefore, the Department contends, the AHO wrongly inserted itself in the prevailing-party matter and, in so doing, exceeded its jurisdiction.

{11} We decline to read the statute as leaving an otherwise eligible protesting taxpayer cut off from Section 7-1-29.1's relief by reason only of (1) abatement of the taxpayer's assessed tax; and (2) absence of agreement that the taxpayer is the prevailing party. First, the statute contains no such limitation. Second, such a reading is incompatible with the statute's purpose, which we must help effectuate. *See Valenzuela v. Snyder*, 2014-NMCA-061, ¶ 16, 326 P.3d 1120 (noting that we seek to give effect to the Legislature's intent when interpreting statutes).

{12} The statute gives a taxpayer a remedy for having to defend itself against an unreasonable assessment. In adopting the measure, the Legislature sought to curb unfairness by the Department and expand a taxpayer's opportunity to enforce its rights. The Fiscal Impact Report[2] associated with the measure supports this view; the report states that the measure "seeks to remedy perceived unfair treatment of certain taxpayers by the . . . Department." We note too that the federal corollary to New Mexico's taxpayer award provision, 26 U.S.C. § 7430 (2018), on which New Mexico's provision was closely modeled, was enacted to "deter abusive actions or overreaching by the Internal Revenue Service [(I.R.S.)] and to enable individual taxpayers to vindicate their rights." Dani Michele Miller, *Can the Internal Revenue Service Be Held Accountable for Its Administrative Conduct? The I.R.C. Section 7430 Fee Recovery Controversy*, 18 Golden Gate U. L. Rev. 371, 375 (1988) (alteration, internal quotation marks, and citation omitted).

{13} This taxpayer right is not dispensable. The statute says that a taxpayer "shall" be awarded costs if it is the prevailing party. Section 7-1-29.1(A). The Department thus does not have the discretion to, in effect, deny costs to a prevailing-party taxpayer. *See* NMSA 1978, §§ 12-2A-1, -4(A) (1997) (stating that "shall," used in a statute, expresses a requirement).

{14} The question becomes, which actor or actors will make the prevailing-party determination? The three possibilities are the parties, the AHO, and the court. This matter was initiated through the protest process over which the AHO, not a court, has jurisdiction. The parties did not agree on whether Helmerich was the prevailing party. In the absence of such an agreement, the AHO, then, was the appropriate, indeed the only, entity in a position to determine whether Helmerich was the prevailing party.

{15} Contrary to the Department's assertion, it does not matter that the AHO did not, following a formal hearing or otherwise, make the final determination of Helmerich's tax liability. That determination was made by the Department when it issued the abatement, but its action did not defeat the AHO's jurisdiction over the matter. This is because, for one thing, the prevailing-party issue was outstanding. In other words, not every aspect of the dispute arising from Helmerich's protest had been fully resolved, and so the AHO's jurisdiction continued. *See* 20 Am. Jur. 2d *Courts* § 95 (2019) ("[O]nce a court has acquired jurisdiction of a case, its jurisdiction continues until the . . . cause is finally determined or disposed of, or is resolved, subject to appellate review, that is, all the issues of fact and law are determined and a final judgment is entered." (footnotes omitted)). For another, once the AHO assumes jurisdiction over a taxpayer's protest, the Department cannot deprive the AHO of jurisdiction by abating the assessment. *Cf. McGowan v. Comm'r of Internal Revenue*, 67 T.C. 599, 601, 608 (1976) (holding that the I.R.S.'s concession of an issue in a tax case, which resulted in no taxpayer liability, does not automatically deprive the United States Tax Court of jurisdiction to decide the case on its merits); *Bowman v. Comm'r of Internal Revenue*, 17 T.C. 681, 685-86 (1951) (citing *Last Chance Min. Co. v. Tyler Min. Co.*, 157 U.S. 683, 694-95 (1895) and stating that, once the tax court assumes jurisdiction over a taxpayer's protest of an I.R.S. tax assessment, the I.R.S. cannot deprive the court of jurisdiction by canceling the assessment).

{16} Given Section 7-1-29.1's purpose of deterring Department unfairness and our role to support the Legislature's aim, we reject the Department's narrow reading of Section 7-1-29.1 and reject the notion that, through its action or inaction, the Department may terminate the AHO's jurisdiction. Accordingly, we conclude that the AHO's assertion of jurisdiction to resolve the prevailing-party issue was proper.

II. The AHO Did Not Abuse Its Discretion in Designating Helmerich the Prevailing Party

{17} We next address the basis for the award: the AHO's decision that Helmerich was the prevailing party. We will set aside such a decision only if it is "(1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with the law." NMSA 1978, § 7-1-25(C) (2015). "[E]ven when we review for an abuse of discretion, our review of the application of the law to the facts is conducted de novo. Accordingly, we may characterize as an abuse of discretion a discretionary decision that is premised on a misapprehension of the law." *Harrison v. Bd. of Regents of Univ. of N.M.*, 2013-NMCA-105, ¶ 14, 311 P.3d 1236 (internal quotation marks and citations omitted).

[2]Fiscal Impact Report for H.B. 64, *Taxpayer Bill of Rights*, 1 (Feb. 28, 2003), https://nmlegis.gov/Sessions/03%20Regular/firs/hb0064.pdf.

{18} Again, Section 7-1-29.1(C) provides that a taxpayer (1) is the prevailing party if the taxpayer has "substantially prevailed with respect to the amount in controversy"; and (2) is not the prevailing party if "the hearing officer finds that the position of the [D]epartment in the proceeding was based upon a reasonable application of the law to the facts of the case." The section continues by listing two conditions under which the Department's position is presumptively based on an unreasonable application of law to the facts of the case: (1) when "the department did not follow applicable published guidance in the proceeding"; and (2) when "the assessment giving rise to the proceeding is not supported by substantial evidence determined at the time of the issuance of the assessment[.]" Section 7-1-29.1(C)(2).

{19} In its summary judgment motion, Helmerich maintained that it was the prevailing party because the Department's position in the matter was unreasonable. Helmerich explained how, in its view, the assessment represented an improper application of law to the facts of its case. Following the motion, the Department had several opportunities to rebut Helmerich's status as the prevailing party, but failed to address the issue each time. It failed to respond to Helmerich's motion for summary judgment; it failed to respond to Helmerich's renewed request for an award after the abatement; it failed to file a written argument on the prevailing-party issue; and it failed to present testimony or evidence at the prevailing-party hearing. In summary, the Department never explained how its original assessment was the result of a reasonable application of law to the facts. In the end, the AHO concluded that Helmerich was the prevailing party because it "prevailed as to the entire amount in controversy when the assessment was abated" and because there was insufficient evidence to establish that the Department's position was based on a reasonable application of law to the facts.

A. Prevailing-Party Designation as a Matter of Law

{20} The Department contends first that Helmerich cannot be the prevailing party as a matter of law. The Department quotes case law to suggest that a judgment, court-ordered decree, administrative tribunal decision, or settlement in a party's favor is prerequisite to a party's designation of "prevailing party" in the fee-award context. One of the cases on which the Department relies remarks that it is not a "voluntary change in conduct" that triggers the fee-award shift, but rather an alteration in the legal relationship of the parties. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001). The Department seems to argue that here, given the absence of either an AHO decision on the tax issue or a party settlement, there has been no formal alteration in the legal relationship and thus Helmerich's prevailing-party designation is improper.

{21} We disagree that the AHO's designation of Helmerich as the prevailing party was conditioned on the AHO's deciding the tax issue. First, as previously discussed, premising the fee shift on an AHO or court decision or party settlement would be incompatible with the statute's purpose of targeting Department unfairness. As this case demonstrates, not all tax protests end in one of those formal resolutions. But it is always possible that a given protest began because the Department abused its powers. That abuse is the statute's target, and we will not diminish the statute's force by reading into it the finality requirement proposed by the Department. Second, such a formalistic reading in this case's context would entail overlooking the apparent alteration in the legal relationship between Helmerich and the Department. The facts here suggest something more than merely "voluntary change in conduct[,]" *see id.*, by the Department. The Department does not argue that it reserves the right to revive the assessment at the core of Helmerich's protest. Without such a reservation, the element of finality—which the Department urges us to adopt as a requirement—is materially satisfied. Accordingly, in this instance, Helmerich is a prevailing party under Section 7-1-29.1(C), even in the absence of an AHO decision on the matter central to Helmerich's protest.

B. Procedural and Evidentiary Challenges to Prevailing-Party Designation

{22} The Department next argues that the AHO's determination that Helmerich is the prevailing party suffers from procedural and evidentiary flaws. Namely, the Department cites as error that (1) the AHO and Helmerich violated the Rules of Civil Procedure for the District Courts governing Helmerich's summary judgment motion; and (2) essentially, the AHO did not make findings negating the reasonableness of the Department's position.

{23} The Department's arguments are premised on the assumptions that (1) tax-protest hearings are subject to the Rules of Civil Procedure for the District Courts; (2) Helmerich had the burden of proving that the Department's position in the proceeding was based on an unreasonable application of law to facts; and (3) the AHO was precluded from deeming Helmerich the prevailing party in the absence of evidence of such unreasonableness. The Department's assumptions are faulty.

{24} Concerning the first point, the Rules of Civil Procedure for the District Courts do not apply to tax-protest hearings. *See* NMSA 1978, § 7-1B-6(D)(2) (2019). Instead, 3.1.8 NMAC applies. *See* 3.1.8.2 NMAC. Regulation 3.1.8.16(C) NMAC provides that an opposing party is deemed to have consented to the granting of relief asked for in a motion if the party does not timely respond to the motion. This has two implications relevant here: (1) the Department's assertions predicated on the rules of civil procedure fail; and (2) by not answering Helmerich's motion for summary judgment and its request for an award of costs and fees, the Department in effect consented to the award ultimately granted.

{25} Concerning the second point, we disagree that the burden of proof on the issue of reasonableness fell on Helmerich. Section 7-1-29.1 does not explicitly or implicitly state that it is the taxpayer's burden to prove that the Department's position in a proceeding was based on an unreasonable application of law to facts, one of the considerations controlling the prevailing-party designation. *See* § 7-1-29.1(C). Rather, the statute first sets forth the "substantially prevailed" terms under which a taxpayer is initially entitled to the prevailing-party status. Section 7-1-29.1(C)(1). The statute then provides an exception, a way for the taxpayer to lose that status: "[I]f . . . the hearing officer finds that the position of the [D]epartment in the proceeding was based upon a reasonable application of law to the facts of the case." Section 7-1-29.1(C)(2). The hearing officer would only be able to make this finding if given some basis for it. That basis is more within the Department's ability to establish than it is within the taxpayer's; the Department will have more insight into the underpinnings of its position than will the taxpayer. This observation suggests that the burden to prove the exception and rebut the taxpayer's status as the prevailing party falls on the Department.

{26} Furthermore, the statute uses the term "reasonable," not its inverse, "unreasonable," as construed by the Department. Section 7-1-29.1(C)(2). It stands to reason that the Department, not the taxpayer, would take the position that its application of law to the facts of a case was reasonable. This, too, suggests that the Department has the burden to prove the exception. Consequently, we reject the Department's contention that Helmerich was entitled to an award only upon proving that the Department's position in the proceeding was based on an unreasonable application of law to facts.

{27} Concerning the third point, we disagree that the AHO erred by not making the findings the Department now argues are requisite to the award. The Department had several opportunities to argue in favor

of the reasonableness of its position, yet it remained silent on the question. That the AHO did not make findings to rebut Helmerich's status as the prevailing party is to be expected: the Department supplied no evidence for their support.

{28} We conclude that the AHO did not abuse its discretion in designating Helmerich the prevailing party, thereby entitling it to an award of costs and fees. The Department does not challenge that Helmerich substantially prevailed. Having substantially prevailed, Helmerich was the prevailing party under the statute unless the AHO found that the "reasonable application" exception applied. The Department offered scant evidence that it fell within the exception: that is, that its position was a reasonable application of law to the facts of Helmerich's case. We are not persuaded that Section 7-1-29.1(C) requires the AHO to specifically find that the exception does not apply before designating a substantially prevailing taxpayer the prevailing party. Accordingly, we uphold the AHO's decision to award costs and fees based on its determination that Helmerich was the prevailing party.

III. The Department Did Not Preserve the Award Amount Issue

{29} We lastly address the award amount. Before the prevailing-party hearing, Helmerich requested $50,000, the statutory maximum, in administrative costs. It provided an affidavit that the attorney fees and costs it incurred in connection with the protest exceeded that amount.

{30} On appeal, the Department contends that the award amount was improper because the AHO neither applied objective standards to determine its reasonableness nor provided a reasoned explanation for the award amount.

{31} We decline to review this issue because the Department did not preserve it. *See* § 7-1-25(A) (stating that a party may appeal to this Court for relief from an AHO decision, but only to the same extent and on the same theory as was asserted in the hearing before the hearing officer). The Department did not raise the issue in its pleadings or challenge the amount requested at the prevailing-party hearing. On appeal, the Department does not explain how, nor cite to the record where, it preserved this issue as Rule 12-318(A)(4) NMRA requires. Consequently, we will not address the propriety of the award amount.

CONCLUSION

{32} We affirm.

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

KRISTINA BOGARDUS, Judge

WE CONCUR:

LINDA M. VANZI, Judge

ZACHARY A. IVES, Judge

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Agenda

Sign-in		7:45 – 8:15 a.m.
Introductory Remarks	Jeffrey D. Myers, M.S., J.D.	8:15 – 8:30 a.m.
Federal and State Estate and Gift Tax Update 2020	Vickie R. Wilcox, J.D., LL.M.	8:30 – 9:30 a.m.
Ask the Expert: End of Life Decision Making for Clients, Their Loved Ones, and Their Advisors (Capacity Determination, Agent Designations/Decisions, and More)	Dr. Margaret Nolan, M.D.	9:30 – 10:30 a.m.
Break		10:30 – 10:45 a.m.
Asset Protection Overview: LLCs, Retirement Accounts, and Lifetime Trusts - How Protected *Are* Your Clients' Assets?	Madison R. Jones, J.D., M.B.A.	10:45 – 11:45 a.m.
Lunch: Pizza, Beverages, and Networking in the Charity Exhibit Hall		11:45 – 12:45 p.m.
Native American Art: Special Considerations When Donating, Collecting, or Otherwise Transferring	Kate Fitz Gibbon, J.D.	12:45 – 1:45 p.m.
Electronic Wills: Ready or Not, They May Be Coming Your Way!	Gregory W. MacKenzie, J.D.	1:45 – 2:45 p.m.
Break		2:45 – 3:00 p.m.
Navigating the "Gray" Area of Estate Planning: Ethical Issues of Dealing with Diminished or Diminishing Capacity	Christine E. Long, J.D.	3:00 – 4:00 p.m.

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The Fifth Judicial District Attorney's office has immediate positions open for new or experienced attorneys, in our Carlsbad and Roswell offices. 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). 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.

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Cordell & Cordell, P.C., a domestic litigation firm with over 100 offices across 38 states, is currently seeking an experienced litigation attorney for an immediate opening in its offices in Albuquerque and Santa Fe, NM. The candidate must be licensed to practice law in the state of New Mexico, have minimum of 3 years of litigation experience with 1st chair family law preferred. The position offers 100% employer paid premiums including medical, dental, short-term disability, long-term disability, and life insurance, as well as 401K and wellness plan. This is a wonderful opportunity to be part of a growing firm with offices throughout the United States. To be considered for this opportunity please email your resume with cover letter indicating which office(s) you are interested in to Hamilton Hinton at hhinton@cordelllaw.com

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Pueblo of Laguna seeks proposals from any law firm or individual practicing attorney to provide prosecutorial legal services for adult criminal or juvenile delinquency cases when there is conflict of interest or unavailability of regular prosecutor. Reply by March 4, 2020. RFP details at: www.lagunapueblo-nsn.gov/rfp_rfq.aspx

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The New Mexico Public Education Department (NMPED) is seeking attorneys for its Office of General Counsel. Strong writing and interpersonal skills are essential. More details about positions and how to apply are provided on the State Personnel Office website at http://www.spo.state.nm.us/. Please check the website periodically for updates to the list of available positions.

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Mynatt Martínez Springer P.C., an AV-rated law firm in Las Cruces, New Mexico is seeking associate attorneys with 0-5 years of experience to join our team. Duties would include providing legal analysis and advice, preparing court pleadings and filings, performing legal research, conducting pretrial discovery, preparing for and attending administrative and judicial hearings, civil jury trials and appeals. The firm's practice areas include insurance defense, civil rights defense, commercial litigation, real property, contracts, and governmental law. Successful candidates will have strong organizational and writing skills, exceptional communication skills, and the ability to interact and develop collaborative relationships. Salary commensurate with experience, and benefits. Please send your cover letter, resume, law school transcript, writing sample, and references to rd@mmslawpc.com.

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The City of Albuquerque Legal Department is hiring an Assistant City Attorney for the Litigation Division. The department's team of attorneys represent the City in litigation matters in New Mexico State and Federal Courts, including trials and appeals, and provide legal advice and guidance to City departments. Attention to detail and strong writing skills are essential. Three (3)+ years' experience is preferred, with additional preference for civil defense litigation experience, and must be an active member of the State Bar of New Mexico in good standing. Salary will be based upon experience. Please submit resume and writing sample to attention of "Legal Department Assistant City Attorney Application" c/o Angela M. Aragon, Executive Assistant/HR Coordinator; P.O. Box 2248, Albuquerque, NM 87103, or amaragon@cabq.gov.

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Associate attorney wanted for fast paced, well established, litigation defense firm. Great opportunity to grow and share your talent. Salary DOE, great benefits incl. health, dental & life ins. and 401K match. Inquiries kept confidential. Please e-mail your resume to kayserk@civerolo.com, or mail to Civerolo, Gralow & Hill, PA, PO Box 887, Albuquerque NM 87103.

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The City of Albuquerque Legal Department is seeking a Paralegal to assist an assigned attorney or attorneys in performing substantive administrative legal work from time of inception through resolution and perform a variety of paralegal duties, including, but not limited to, performing legal research, managing legal documents, assisting in the preparation of matters for hearing or trial, preparing discovery, drafting pleadings, setting up and maintaining a calendar with deadlines, and other matters as assigned. Excellent organization skills and the ability to multitask are necessary. Must be a team player with the willingness and ability to share responsibilities or work independently. Competitive pay and benefits available on first day of employment. Please apply at https://www.governmentjobs.com/careers/cabq. Position posting closes March 13, 2020.

Paralegal

Plaintiff's personal injury law firm in Los Lunas seeks paralegal. Successful candidate must be professional, motivated, organized, energetic and capable of multi-tasking in a fast-paced environment. Excellent written and oral communication skills are a must. Will consider legal assistant with excellent potential and motivation to become a paralegal. All responses kept strictly confidential. Please send your cover letter, resume and references to Office Manager, PO Box 2291, Los Lunas, NM 87031.

Senior Policy Analyst/Legal Advisor

The Albuquerque City Council Services Department is seeking a Senior Policy Analyst/Legal Advisor to provide policy research, analysis, and support, and to serve as an in-house legal advisor for the City Council Services Department. Applicants must be admitted to the State Bar of New Mexico with either three years of legal experience, or three years of experience in land use, planning, or public administration. Legal experience as a judicial law clerk, or in an administrative or legislative setting is preferred. For more information please visit: https://www.governmentjobs.com/careers/cabq/jobs/2698914/senior-council-policy-analyst-legal-advisor-e18?keywords=legal%20analyst&pagetype=jobOpportunitiesJobs

Paralegal/Legal Assistant

Well established Santa Fe personal injury law firm is in search of an experienced paralegal/legal assistant. Candidate should be friendly, honest, highly motivated, well organized, detail oriented, proficient with computers and possess excellent verbal and written skills. Duties include requesting & reviewing medical records, sending out LOP & LOR, opening claims with insurance companies and preparing demand packages as well as meeting with clients. We are searching for an exceptional individual with top level skills. We offer a retirement plan (SEP), health insurance, paid vacation, and sick leave. Salary and bonuses are commensurate with experience. Please submit your cover letter and resume to santafelaw56@gmail.com

Administrative Assistant

Lewis Brisbois is a national law firm with 52 offices throughout the United States and over 1,400 attorneys. Our Albuquerque office is seeking an experienced Administrative Assistant to assist our Office Administrator and Managing Partner with the day to day operations of the office. Candidates should have a minimum of 5 years in a legal setting, excellent verbal and written skills and possess the ability to prioritize work and manage large projects. Duties include but are not limited to providing secretarial support, processing various financial information, maintenance and processing of data related to cases, overseeing the creation and distribution of various reports, handling special projects as requested by management, directing overflow work and coverage plans when employees are absent, ordering supplies, handling facility requests with the building landlord and providing clerical assistance on various tasks as needed. Must be proficient in Microsoft office, especially Word, Excel and Outlook. Leadership skills, professionalism and the ability to maintain confidentiality are a must. Contact: Please submit your resume in Word or PDF format and include a cover letter to phxrecruiter@lewisbrisbois.com

Supreme Court of New Mexico Administrative Assistant 2

Come work with us in the historic Supreme Court Building in Santa Fe! The Supreme Court is accepting applications for an administrative assistant to serve as a member of the Court's administrative assistant team. The administrative assistant will work under the direct supervision of the Justices to organize the administrative activities of the chambers, provide customer service, coordinate projects, and perform clerical or administrative tasks. For a detailed description of the job qualifications, duties, and application requirements, please visit the Careers webpage on the New Mexico Judiciary's website at https://nmcourts.gov/jobs.aspx.

Litigation Paralegal

Lewis Brisbois Bisgaard & Smith LLP is seeking a professional, proactive Litigation Paralegal to join our Albuquerque office. Candidates should be proficient in all aspects of the subpoena process, reviewing medical records, and research. Performs any and all other duties as necessary for the efficient functioning of the Department, Office and Firm. Practices and fosters an atmosphere of teamwork and cooperation. Ability to work independently with minimal direction. Ability to work directly with partners, associates, co-counsel and clients. Ability to delegate tasks and engage firm resources in the completion of large projects. Excellent organizational skills and detail oriented. Effective written and oral communication skills. Ability to think critically and analytically in a pressured environment. Ability to multi-task and to manage time effectively. Knowledge of Microsoft Office Suite, familiarity with computerized litigation databases. Ability to perform electronic research using Lexis. QUALIFICATIONS: Minimum of 5+ years of substantive litigation experience; Experienced, well-organized and independent paralegal to provide support to multiple attorneys; Expected to bill a minimum of 1,600 hours annually; E-filing experience in state and federal courts; Comprehensive knowledge of all facets of trial; case management, doc review and trial experience; Proficiency in e-discovery and litigation support; Demonstrated ability to independently manage multiple priorities and have excellent oral and written communication skills Litigation paralegal will exercise excellent judgment and decision making skills, strong organizational skills. CONTACT: All candidates should submit their resume, a writing sample and cover letter and reference ABQ Paralegal in the subject line to: phxrecruiter@lewisbrisbois.com. Please no recruiters and no phone inquiries regarding this posting.

Litigation Secretary
Lewis Brisbois a national firm with 52 offices is seeking two strong litigation secretaries to join our Albuquerque office. Qualified candidates will meet these requirements, thorough knowledge of legal terminology, State and Federal court procedures; Advanced experience in E-Filing with both State and Federal Courts; Calendaring; Ability to manage and maintain high volume of work flow; 5+ years of litigation experience, including trial preparation; Skills will include strong law and motion background. Must be organized, reliable, and attention to detail is a must; Excellent communication and organizational skills. Please send cover letter and resume by e-mail to PHXrecruiter@lewisbrisbois.com.

Paralegal
The law firm of Butt Thornton & Baehr PC has an opening for an experienced litigation Paralegal (4+ years). Must have experience in obtaining, organizing and summarizing medical records. Insurance Defense experience preferred. Excellent organization, computer and word processing skills required. Must have the ability to work independently. Generous benefit package. Salary DOE.Please send letter of interest and resume to, Gale Johnson, gejohnson@btblaw.com

Administrative/Legal Assistant
Busy personal injury law firm in search of FT Administrative/Legal Assistant M-F 8:30-5:00. Individual must have exceptional organizational skills, be able to multitask, work under pressure, and understand the importance of deadlines. Daily tasks include phones, processing all incoming mail, scanning documents, filing and otherwise assisting the paralegals and attorneys as needed. Other daily tasks would include requesting, organizing and maintaining medical records, preparing hearing, deposition, witness and mediation binders, copy, fax and file related to client matters as well as conduct research, including but not limited to Accurint, Internet, etc. The ideal candidate will be proficient with Microsoft Outlook, Word and Excel and be comfortable maintaining office equipment, including scanners, copiers, fax machines, etc. Legal experience and bilingual preferred, but not required. Please send resume with references to NMLegalNH@gmail.com. First Round of Interviews will begin March 2, 2020.

Services

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Miscellaneous

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

2020 *Bar Bulletin* Publishing and Submission Schedule

Starting in January, the *Bar Bulletin* will publish twice a month on the second and fourth Wednesday. Advertising submission deadlines are also on Wednesdays, three weeks prior to publishing by 4 pm.

Advertising will be accepted for publication in the Bar Bulletin in accordance with standards and ad rates set by publisher and subject to the availability of space. No guarantees can be given as to advertising publication dates or placement although every effort will be made to comply with publication request. The publisher reserves the right to review and edit ads, to request that an ad be revised prior to publication or to reject any ad. **Cancellations must be received by 10 a.m. on Thursday, three weeks prior to publication.**

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

The publication schedule can be found at **www.nmbar.org/BarBulletin.**

Torres v Terrell, 2020 Ariz. Lexis 26, 2020 WL 370239

FROZEN EMBRYOS: THE LAW AT A CROSSROADS

In January, the Arizona Supreme Court vacated a decision by an Arizona Court of Appeals concerning seven frozen embryos.

The embryos belonged to Ruby Torres and John Terrell and had been created before Torres was treated for breast cancer – a treatment that was expected to greatly diminish her fertility. During their divorce, Torres sought to preserve the frozen embryos for her future use. Terrell no longer wanted to be a father to Torres' child and wanted the embryos donated to another couple.

When couples opt for in vitro fertilization (IFV), clinics in most states require a contract to be executed by both donors regarding the disposition of the embryos in case of divorce or death of one of the partners. Torres and Terrell had such an agreement.

But their contract, like many others, was problematic. Contracts differ from state to state and clinic to clinic. Even carefully crafted contracts can be open to different interpretations. In the *Torres* case, the trial court, the Appeals Court and the Arizona Supreme Court all came to different conclusions as to the contract and the embryos.

In another recent case, *Bilbao v Goodwin*, 323 Conn. 599, 217A.3d 977, lawyers for the defendant claimed the couple's contract was unenforceable since the embryos were human beings not subject to the rules covering division of marital assets. Several states have enacted statutes to grant protections to "human embryos".

The Arizona Supreme Court held that the Torres-Terrell contract was valid and ordered that the embryos be donated. But what will happen in the next case is anybody's guess.

Read more about this case and WBMH's POV on our blog at wbmhlaw.com/caselaw

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