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2004-NMCA-061: Frank Garza v. State of New Mexico Taxation and Revenue Department, Motor Vehicle Division


Special Insert:
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Dear Members:

We need some cheering up. Recent events have cast a depressing cloud over our profession. There is no explanation of these recent events that will satisfy or comfort our clients, friends or family. Nor should there be. But that doesn’t mean we are doomed to a professional life of low self-esteem. While others debate the fate of our judiciary and legal profession, we all still have to get up each day and solve the problems of our clients. The vast majority of you do this well without fanfare. It is important and you should feel good about that. We just need to continue representing our clients ethically and professionally and, in time, we will get past this rock in the road.

Every once in a while, one of our members does something – probably not intentionally, but by default – that hurts the rest of us. It has happened before and it will probably happen again. That is because lawyers are human. In fact, if measured by the incidence of depression or substance abuse, lawyers are almost certainly more human than the general population. But that is not an excuse. It is a predictor – a predictor that yet another one of us may very well take an embarrassing wrong turn in the future.

So why not work together to find and help those lawyers on the verge of self-destruction? Would that not be a more useful and compassionate thing to do than publicly speculating about the duration and depth of the problems of our fallen judge? While the latter may give a fleeting sense of superiority, it helps no one and betrays a self-centeredness that is part of the problem.

If nothing else, let the legal profession be known as one that tries to take care of its own. This does not mean that we should ever hide our problems at the public’s expense. But it does mean we should watch out for each other and try to prevent the personal calamities that lead to more formal policing or harm to the public. And it means we should not gratuitously pile on our members who have publicly tripped and gone astray.

After all, if we cannot respect and care for each other, how can we expect respect from the public for the profession we represent?

Sincerely,

Daniel J. O’Brien, President

The Lawyers’ Assistance Program is a statewide network of recovering lawyers and substance abuse professionals dedicated to helping others within the profession get the help they need. Discuss your concerns with professional staff who will answer your questions, provide information, give support and offer a plan of action. At your request, you may be put in touch with an attorney in recovery who can share his or her experience with you. Free Confidential* 24-Hour Hotline, Albuquerque (505) 228-1948; statewide (800) 860-4914.

*The NM Rules of Professional Conduct (Rule 16-803) and the NM Code of Judicial Conduct (Rule 21-300) provide for strict confidentiality.
2004 Tax Symposium: Matters Affecting Federal and State Tax Practice  
Friday, June 25, 8 - 5:30 p.m. • State Bar Center • 9.6 General CLE Credits  
Co-Sponsors: Tax Law Section of the State Bar of New Mexico and  
Modrall, Sperling, Roehl, Harris & Sisk, PA  
Presenters: Martin J. McMahon, University of Florida College of Law; Ira B. Shepard, University of Houston Law Center; Curtis W. Schwartz, Modrall, Sperling, Roehl, Harris & Sisk, PA., and George W. Rombach, Chief Legal and Accounting Officer, Telenetics Corp.  
Two nationally known commentators will present an in-depth examination of regulatory and court decisions affecting recent developments in federal income taxation. A leading New Mexico practitioner will discuss state taxation of interstate business activity, and a noted corporate attorney and CPA will explore techniques that can be used to protect assets from tax collectors and other creditors.  
☐ $199 Standard and Non-Attorney  ☐ $179 Tax Law Section Member, Gov’t. and Paralegal   

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**TELESEMINARS**

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**"Metadata" In Litigation: What Your Clients (and their computer files) Are Unwittingly Revealing About Their Cases**  
☐ Thursday, July 15, 11 a.m. MT • 1.2 General CLE Credits • $67  

**Spyware, Adware and Popups: Fom Annoyance to Illegality**  
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**SELF-STUDY**

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2.0 Professionalism Self-Study CLE Credits**  
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☐ DVD  ☐ VHS • $59 (plus $5 shipping and handling)   

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Fax: (505) 797-6071, Open 24 hours  
Internet: www.nmbar.org, click CLE, then Calendar of Events  
Mail: CLE of the SBNM, PO Box 92860, Albuquerque, NM 87199  

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| Name: ___________________________ | NM Bar #: ___________________________ |  
| Street: ___________________________ | City/State/Zip: ___________________________ |  
| Phone: ___________________________ | Fax: ___________________________ | Email: ___________________________ |  
| Purchase Order (Must be attached to be registered) | Check enclosed $ ________ Make check payable to CLE of the SBNM |  
| ☐ VISA | ☐ Master Card | ☐ American Express | ☐ Discover |  
| Credit Card #: ___________________________ | Exp. Date: ___________________________ |  
| Authorized Signature: ___________________________ |  

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*With respect to other judges:*

*I will be courteous, respectful and civil in my opinions.*

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### June

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Natural Resources, Energy & Environmental Law Section Board of Directors, noon, State Bar Center

### July

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Employment & Labor Law Section Board of Directors, noon, State Bar Center

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Public Law Section Board of Directors, 3:30 p.m., State Bar Center

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Real Property, Probate & Trust Section Board of Directors, 4 p.m., State Bar Center

## State Bar Workshops

### June

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Consumer Debt/Bankruptcy Workshop* 6 – 8 p.m., State Bar Center  
Albuquerque, NM

Family Law Workshop 5:30 – 7:30 p.m., Branigan Library  
Las Cruces, NM

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Lawyer Referral for the Elderly Program Workshop & Clinic  
1:15 – 4 p.m., Meadowlark Senior Center  
Rio Rancho, NM

Consumer Debt/Bankruptcy Workshop* 5:30 – 7:30 p.m., Branigan Library  
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Consumer Debt/Bankruptcy Workshop* 2 – 4 p.m., Mesalands Community College, Room A122, Tucumcari, NM

*Consumer Debt/Bankruptcy workshops include a one-on-one consultation with an attorney. For more information, call Marilyn Kelley at (505) 797-6048 or 1-800-876-6227, or visit the SBNM Web site, www.nmbar.org.

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Contributions and announcements to the Bar Bulletin are welcome, but the right is reserved to select material to be published. Unless otherwise specified, publication of any announcement or statement is not deemed to be an endorsement by the State Bar of New Mexico of the views expressed therein, nor shall publication of any advertisement be considered an endorsement by the State Bar of the product or service involved. Editorial policy available upon request.

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**Board of Bar Commissioners - Officers**

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**Board of Editors**


**Executive Director** – Joe Conte  
**Editor** – Diana Sandoval  
**Layout** – Diana Sandoval / Julie Schwartz  
**Account Executive** – Marcia C. Ulbrich, (505) 797-6058; **Fax** (505) 797-6075  
**Printers** – Brian Sanchez

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NOTICES

COURT NEWS

N.M. Supreme Court Proposed Revision of the Commentary to Rule 16-102 NMRA of the Rules of Professional Conduct

The Supreme Court has authorized the publication of the proposed revision of the commentary to Rule 16-102 of the Rules of Professional Conduct for comment. The rule is not being amended. Attorneys and/or judges who would like to comment on the proposed amendments should send written comments by June 25 to: Kathleen J. Gibson, chief clerk, New Mexico Supreme Court, PO Box 848, Santa Fe, NM 87504-0848.

For reference: The proposed revision was published in the June 3 (Vol 43, No. 22) Bar Bulletin.

N.M. Board of Legal Specialization Legal Specialists Announced

The New Mexico Supreme Court Board of Legal Specialization has announced the following attorneys as certified specialists:

- Employment & Labor Law
  - George Christian Kraehe
- Family Law
  - Roberta Suzanne Batley
- Real Estate Law
  - David S. Campbell

To receive information on any of the certified specialty areas, call the Legal Specialization administrative office, (505) 797-6057; or go to www.nmbar.org and click on “Other Bars/Legal Groups.”

First Judicial District Court

Notice of Court Closure

The First Judicial District Court will close early on June 25 for “Employee Appreciation/Recognition Day.” The Steve Herrera Judicial Complex in Santa Fe will close at noon and the Rio Arriba County Courthouse will close at 11 a.m. The court will reopen with regularly scheduled hours on June 28.

Second Judicial District Court

Children’s Court Monthly Judges’ and Managers’ Meeting

The Second Judicial District Children’s Court will hold its monthly judges’ and managers’ meeting at noon, July 6 in the jury room, John E. Brown Juvenile Justice Center, 5100 Second St. NW, in Albuquerque. Children’s Court judges and managers of court-related agencies will meet to discuss ongoing concerns and projects. For a copy of the meeting agenda, call (505) 841-7644.

Destruction of Exhibits, Domestic Cases, 1985-90

Pursuant to the Supreme Court Ordered Judicial Records Retention and Disposition Schedules, the Second Judicial District Court will destroy exhibits filed with the court in domestic cases for years 1985-90 (excluding cases on appeal). Counsel for parties are advised that exhibits may be retrieved through July 21. Attorneys who may have cases with exhibits may verify exhibit information with the Special Services Division, (505) 841-7596/6711, from 8 a.m. to noon and from 1 to 5 p.m., Monday through Friday. Plaintiff exhibits will be released to counsel of record for the plaintiff(s) and defendant exhibits will be released to counsel of record for the defendant(s). All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

Notice Regarding Mail Delivery

The Second Judicial District Court receives a large volume of mail every day simply addressed to “Clerk of the Court, Juanita M. Duran,” or “Second Judicial District Court.” The mail must be opened and sorted before it can be routed to the proper clerk’s division.

In order to expedite processing of paper work and to ensure it is delivered directly to the correct division, patrons are asked to use the following example when mailing in paperwork or requests:

- ATTN: Civil (or specific case category**)
  - Second Judicial District Court
  - PO Box 488
  - Albuquerque, NM 87103

- or-

- ATTN: Civil (or specific case category**)
  - Second Judicial District Court
  - 400 Lomas Blvd. NW
  - Albuquerque, NM 87102

Case Categories**

- Criminal (CR, ER, LR, CS, SW) — criminal, extraditions, lower court appeals, search warrants
- Domestic Relations (DR, DV) — divorce, custody, paternity, child support, domestic violence restraining orders
- Children’s Court (JR, YR, JQ, SA, SQ, SI, JS) — juvenile delinquent, youthful offender, emancipation, kinship, guardianship, abuse and neglect, termination of parental rights, adoptions (minors and adults), mental health

Note: Children’s Court cases should be mailed to: Children’s Court, 5100 2nd St., Albuquerque, NM 87107.

Eleventh Judicial District Court

Water Law Mediation

The Eleventh Judicial District Court in Aztec is currently assessing the feasibility of establishing a water law mediation program. A minimum of five attorneys interested in mediating water law disputes on the San Juan River Basin in San Juan County would be needed in order to begin.

Those interested in participating in the program should contact Weldon J. Neff, court administrator, 103 S. Oliver, Aztec, NM 87410; or e-mail: aztdwjn@nmcourts.com, no later than June 21 and provide a resume detailing water law and mediation experience. Answers to questions and further information may be obtained by calling Neff, (505) 334-6151.

District Court

Children’s Court

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Bernalillo County Metropolitan Court Court Closure

The Bernalillo County Metropolitan Court will close at 3:30 p.m., June 25, to allow employees to attend the open house and dedication ceremony for the new Metropolitan Courthouse.

Dedication Ceremony and Open House

Bernalillo County Metropolitan Court officials will host a dedication ceremony and open house for the Metropolitan Courthouse from 4 to 7 p.m., June 25 at the new courthouse (northwest corner of 4th Street and Lomas). Paid parking is available in the Metro Park facility located directly north of the courthouse, 5th Street entrance. Cell phones, camera capable devices and pagers are not allowed in the building. Check-in service will be available.

U.S. District Court for the District of New Mexico Public Notice Concerning Reappointment of Part-time U.S. Magistrate Judge

The current term of office for incumbent part-time U.S. Magistrate Judge Robert W. Ionta, will expire on Feb. 10, 2005. The U.S. District Court is required by law to establish a panel of citizens to consider the reappointment of Judge Ionta to a new four-year term.

The duties of a magistrate judge are defined in 28 U.S.C. § 636(a) and involve the trial of federal petty and minor offenses as per 18 U.S.C. § 3401; imposition of conditions of release under 18 U.S.C. § 3146; conducting arraignments and non-guilty pleas; upon designation, conducting hearings and submitting to the judges proposed findings of fact and recommendations for dispositive motions or prisoner petitions; and performing such other duties as conferred or imposed by law or by the Federal Rules of Criminal Procedure and/or the Rules of the United States District Court for the District of New Mexico.

The public is invited to submit comments as to whether the reappointment of Judge Ionta to a new term of office should be considered. All comments will be kept confidential and should be submitted by Sept. 3 to the personal attention of William B. Keleher, chairman, U.S. Magistrate Merit Selection Panel, PO Drawer AA, Albuquerque, NM 87103.

STATE BAR NEWS

Board of Bar Commissioners

Appointments to New Mexico Commission on Access to Justice

The Board of Bar Commissioners will make three appointments to the newly created New Mexico Commission on Access to Justice (see page 13). The commission is an independent, statewide body dedicated to expanding and improving civil legal assistance in New Mexico and is composed of 18 members representative of the bar, judiciary and legal aid providers. The commission will also consider relevant topics, including expansion of resources, increased public awareness through communications and message development, pro bono matters and other areas including training and technology. The commission will initially meet to organize and thereafter as necessary at the call of the co-chair persons or at the request of a majority of the committee members.

For information on what other states are doing, visit the Access to Justice Support Project Web site, www.ATJsupport.org. Members wishing to serve on the commission should send a letter of interest and brief resume by July 9 to Joe Conte, executive director, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; or fax to (505) 828-3765.

Employment and Labor Law Section Board Meetings Open to Section Members

The Employment and Labor Law Section Board of Directors welcomes section members to attend its meetings. The board meets at noon on the first Wednesday of each month at the State Bar Center. The next meeting will be July 7. (Lunch is not provided.)

For information about the section, visit the State Bar Web site, www.nmbar.org, or call Eric Miller, section chair, (505) 995-1017.

Lawyers Assistance Committee Monthly Meeting

Due to the July 5 holiday, the Lawyers Assistance Committee will meet at 5:30 p.m., July 12 at the First United Methodist Church at Fourth and Lead SW in Albuquerque. The group meets regularly on the first Monday of the month.

For more information, contact Bill Stratvert, (505) 242-6845.

Leadership Training Institute Deadline for Application July 1

The State Bar of New Mexico is accepting applications for the 2004 Leadership Training Institute. The mission of the institute is to identify and train lawyers for current and future opportunities in leadership roles.

The institute takes place over four weekends (Friday afternoon and Saturday), with most courses being held at the Bar Center in Albuquerque. The dates are Aug. 20-21, Sept. 10-11, Oct. 22-23 and Nov. 12-13. The institute is limited to 25 students through a competitive enrollment process.

All active New Mexico licensed lawyers are welcome to apply. The tuition is $300 per person. Limited financial assistance and scholarships are available. For a complete Leadership Training Institute brochure and to apply, visit www.nmbar.org. The deadline to apply is July 1. For more information, contact Joe Conte, executive director, (505) 797-6099 or jconte@nmbar.org.

Public Law Section Board Meeting

The next Public Law Section board meeting will be held at noon, July 8 at the New Mexico Municipal League in Santa Fe. Contact Randy Van Vleck, (505) 982-5573, or Deborah Moll, (505) 827-2000, for more information.
Other Bars
American Bar Association
Comments Sought on Draft Revisions of Portions of the Model Code of Judicial Conduct

The American Bar Association Joint Commission to Evaluate the Model Code of Judicial Conduct recently released for comment preliminary drafts of revised Canons 1 and 2 of the ABA Model Code of Judicial Conduct.

Commission Chair Mark I. Harrison of Phoenix encouraged public comment on the drafts and highlighted a few specific areas for comment, including provisions related to the appearance of impropriety and rules on judicial disqualification. The preliminary drafts do not represent formal recommendations for revisions to ABA policy, but rather are a step in the development of such recommendations.

The current model code contains a preamble and a definitions section, followed by five canons governing judicial conduct. Each canon contains provisions to provide guidance for judges and standards for judicial disciplinary enforcement. The drafts of revised Canons 1 and 2 recognize and modify many of the provisions in the first three canons of the current model code. They are posted on the ABA Web site, http://www.abanet.org/judicialethics/drafts.html. The current model code is posted at www.abanet.org/cpr/mjc/mjc_home.html. Comments should be directed to Commission Counsel Eileen Gallagher by July 15 at gallaghe@staff.abanet.org; or at the ABA Justice Center, 321 N. Clark St., Chicago, IL 60610.

Other News
Workers’ Compensation Administration
Upcoming Conference

The New Mexico Workers’ Compensation Administration is hosting the combined annual conference of two multi-state workers’ compensation associations June 21-25 in Santa Fe, headquarted at the Inn at Loretto.

The conference will combine the Southern Association of Workers’ Compensation Administrators (SAWCA) and the Western Association of Workers’ Compensation Boards (WAWCB). New Mexico is one of only two states belonging to both organizations.

Scheduled sessions will cover topics including new developments in workers’ compensation, bankruptcy law reform, medical issues, self-insurance and others. The conference has been approved for 7.2 general MCLE credits. Registration information, including forms and a complete schedule, is available on the Workers’ Compensation Administration Web site, www.state.nm.us/wca/.

State Bar of New Mexico
2004 Leadership Training Institute
Application Deadline July 1

Participants will learn what it means to be a leader and how to communicate, motivate, inspire and succeed.

The Institute takes place over four weekends (Friday afternoon and Saturday), August 20-21, September 10-11, October 22-23 and November 12-13, with most courses being held at the State Bar Center in Albuquerque. The Institute is limited to 25 students through a competitive enrollment process. Topics covered include:

- team building
- leadership principles
- managing a practice
- communications and media skills
- New Mexico Judiciary
- emotional intelligence
- strategic planning
- quality of life
- fundraising
- time management
- public service

All active New Mexico licensed lawyers are welcome to apply, deadline is July 1. Tuition is $300 per person. Limited financial assistance and scholarships are available. For a complete Leadership Training Institute brochure and to apply, visit www.nmbar.org or see page 51 for application form.

For more information, contact Executive Director Joe Conte, (505) 797-6099 or jconte@nmbar.org.
The State appeals the trial court’s pretrial dismissal, with prejudice, of the criminal charge against Defendant Ronald Jackson, arguing that the court committed an abuse of discretion when it sanctioned the Third Judicial District Attorney (the prosecution) for discovery delays committed by Doña Ana County (the County), the Doña Ana County Detention Center (DACDC), and the private civil attorney representing them in related civil litigation. The State argues that the trial court erred in dismissing the prosecution’s case because (1) the trial court in essence punished the prosecution for the delaying tactics of the County and its agents and (2) there was no showing that Defendant suffered any prejudice. Because the record does not show that the dismissal was warranted, we reverse and remand the case for trial.

**FACTUAL AND PROCEDURAL BACKGROUND**

Defendant was indicted by a grand jury in August 1999 for criminal sexual penetration, in violation of NMSA 1978, § 30-9-11 (A), (D) (2001). The charge stemmed from the alleged rape of a female inmate at DACDC while Defendant was employed there as a detention officer. The prosecution timely filed a disclosure statement and list of witnesses. The prosecution also attempted unsuccessfully to obtain documents requested as discovery by Defendant that were in the possession of the County or DACDC. Discovery requests to these entities were being handled by a private law firm representing the County in separate civil liability cases arising from sexual assaults by DACDC detention officers. The same law firm also represented the New Mexico Association of Counties, which is the risk management insurer for Doña Ana County, and the Doña Ana County Board of County Commissioners.

Defendant informed the trial court in January 2000 of problems with the County’s compliance with discovery. During discovery, Defendant had requested that the prosecution provide him with copies of standard operating procedure manuals from the jail, the medical records of the victim, and a copy of an investigative report prepared by a private investigator under contract with the County’s civil lawyer. At a hearing held on January 11, 2000, the prosecution told the trial court that although it had produced all pertinent documents in its possession, some of the requested documents and information were in the possession of the County, the County’s attorneys, or DACDC which were outside the prosecution’s control. The prosecution also commented that it had advised Defendant to seek the trial court’s guidance in getting the documents because the prosecution had been unable to obtain the requested documents from the County or DACDC.

At a hearing on discovery matters held on February 15, 2000, the prosecution informed the trial court that the County was not providing the prosecution with copies of records the County had given the Defendant. The trial court then stated that both sides would get whatever discovery DACDC or any other County agency disclosed to Defendant. After another hearing on discovery with the parties and the private civil attorney representing the County on February 21, 2000, the trial court entered orders compelling disclosure by the County. These orders required disclosure by the County of the names of any private investigators or other individuals who were inquiring into the allegations of sexual assaults. The orders also compelled disclosure by DACDC and its employees of all information collected in the course of the internal investigation, the victim’s jail file, and the personnel file of Defendant.

In May 2000, Defendant issued subpoenas duces tecum to six witnesses, including the County’s private attorney and DACDC’s custodians of architectural, medical, housing, inmate, and payroll records. In response, the County’s private attorney moved to quash the subpoenas and requested a sequestered hearing, contending, among other objections, that the investigative report was not subject to disclosure because it was confidential attorney work product prepared for the Association of Counties in anticipation of litigating their potential civil liability for the assaults at DACDC. Additionally, on May 12, 2000, the County’s private attorney filed a motion for a protective order from the discovery demands for county employees. The trial court, by order from another discovery ruling on May 18, 2000, determined that the investigative report was privileged as confidential but should be provided to the parties with the proviso that they not disclose it to anyone else. In response to the court’s action, the Association of Counties moved...
to stay the criminal proceedings pending the filing of an emergency petition for writ of error with the Court of Appeals regarding attorney-client privilege and release of the investigator’s report. We denied this writ on June 28, 2000, advised the Association that a petition for a writ of supervening control with the New Mexico Supreme Court would be the proper remedy, and transferred the matter to that Court. The Supreme Court denied the petition on July 5, 2000.

{6} On July 6, 2000, Defendant moved for dismissal for failure to produce relevant exculpatory evidence, “which is in the possession of the State or its political subdivisions or agencies.” A hearing was held on Defendant’s motion on July 14. After argument of counsel, the trial court determined that there was an insufficient record to support a ruling from the court and set an evidentiary hearing on the motion to dismiss. The trial court ordered that subpoenas duces tecum be issued to those entities that Defendant alleged had not provided discovery to Defendant or the prosecution, ordering them to appear before the court. On the day of the hearing, the County’s private civil attorney filed a motion for recusal to bar the trial court from presiding over the hearing and filed another protective order for the County employees who had been served subpoenas for the hearing. The trial court rejected the motions as being untimely, and the hearing proceeded. Testimony was taken from the physician who treated the victim when she was an inmate, an investigator for the Doña Ana County sheriff’s office, a deputy district attorney, and the private civil attorney representing Doña Ana County, DACDC, and the Association of Counties. The civil attorney brought to the hearing several boxes of materials which he testified contained all the requested discovery. The trial court also ordered that the relevant mental health records of the victim be produced as confidential documents to the prosecution and Defendant by July 24, 2000. At the close of the hearing, the trial court, in response to argument by Defendant, refused to make a finding that the prosecution had been responsible for the delay in producing discovery. The trial court further observed that the failure of the government to timely disclose information germane to the case had prejudiced both the prosecution and Defendant in preparation of their cases. The court explained that when it referred to the government, it did not mean the prosecution which he described as having acted diligently. Rather, the court stated, it meant the County administration and DACDC which the court concluded had been “less than diligent” and “less than candid” in disclosing materials and information.

{7} Defendant amended his motion to dismiss on July 26, 2000, and again requested dismissal for lack of disclosure of evidence. He attached a supplemental exhibit acknowledging the 759 new pages of discovery released by the County. The prosecution, in response to the motion, noted that the County had turned over 700 pages of documents that had been produced by the County’s private attorney to Defendant on July 21, 2000, and that the County’s private contractor for mental health services at DACDC had released its records for the victim on July 24, 2000.

{8} In the meantime, on July 24, 2000, the prosecution obtained from the Supreme Court an extension of time for the trial through November 29, 2000, and sought a continuance from the trial court. The trial court continued the trial to a later date, subsequent to the expiration of the extension on November 29, 2000.

{9} With a different judge presiding at a hearing on Defendant’s motion to dismiss, the trial court issued an order of dismissal based on the letter written by the original trial judge. The prosecution moved for reconsideration “to determine whether prejudice as required by law can be established and whether any lesser sanction would achieve the desired results.” The motion was heard in January 2001 before the original judge. At that hearing, the prosecution argued against attributing the discovery delay caused by the County to the prosecution, contending that the County’s actions had been at cross-purposes with the prosecution’s goal of prosecuting Defendant and that dismissal of the charges would serve to reward the County’s obstructionist tactics. Moreover, the prosecution contended, Defendant had failed to show that he had been prejudiced by the delayed disclosure of discovery in July for a trial that had been extended until November. The trial court subsequently issued an order of dismissal reaffirming the earlier dismissal of the case. In its order of dismissal, the court faulted the actions of the “Government” for depriving Defendant of due process, hampering Defendant’s ability to present a defense, and denying him a speedy trial. Further, the Court held that the Government was “100% responsible” for nondisclosure of discovery to Defendant and condemned the “egregious, arrogant, and callous actions of the Government.” Although the trial court acknowledged in the order that the prosecution was “not particularly at fault in causing the delays,” it concluded that dismissal of the case against Defendant was necessary to sanction a pattern of discovery violations by the County and DACDC. The State appealed the court’s ruling.

DISCUSSION

Standard of Review

{10} Sanctions for noncompliance with discovery orders are discretionary with the trial court. Mathis v. State, 112 N.M. 744, 747, 819 P.2d 1030, 1035 (1991); accord State v. Wilson, 2001-NMCA-032, ¶ 39, 130 N.M. 319, 24 P.3d 351. A showing of noncompliance is insufficient to entitle a defendant to dismissal or other sanctions—the prejudice resulting from the violation must also be established. State v. Bartlett, 109 N.M. 679, 680, 789 P.2d 627, 628 (Ct. App. 1990); accord State v. Griffin, 108 N.M. 55, 58, 766 P.2d 315, 318 (Ct. App. 1988). A reviewing court undertakes an “analysis of [a] case with the premise that dismissal is an extreme sanction to be used only in exceptional cases.” Bartlett, 109 N.M. at 680, 789 P.2d at 628. “[A]n abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances in the case.” Mathis, 112 N.M. at 747, 819 P.2d at 1305 (citation omitted).

Disclosure by the State

{11} The State maintains that the trial court erred by dismissing the case, arguing that the record does not show any failure by the State to disclose the materials to which it had access. The State argues that the trial court’s decision to sanction the State for the discovery delays caused by the vigorous resistance of the County and its agencies was an abuse of discretion and was based on a misapplication of the prosecution team concept articulated in State v. Wisniewski, 103 N.M. 430, 435, 708 P.2d 1031, 1036 (1985). During the motion hearing on July
18, the trial court had stated there was an effort by representatives of the government to withhold evidence that both the prosecution and Defendant were entitled to have. The court further observed that although the prosecution had acted in good faith and had no control over the discovery “in reality,” it did “in theory.” The trial court relied on Wisniewski for this proposition. We agree with the State that this interpretation of Wisniewski was erroneous.

12 We note as a preliminary matter that although Wisniewski dealt with discovery using the analysis articulated in Brady v. Maryland, 373 U.S. 83 (1963), in this case the trial court did not find, and Defendant did not argue below or on appeal, that the discovery involved a Brady issue of suppression of exculpatory evidence by the prosecution. See id., 373 U.S. at 85. The Court in Wisniewski concluded that the obligation to disclose exculpatory evidence imposed by Brady v. Maryland, 373 U.S. 83, 85 (1963) applied not just to the prosecutor but to all members of the prosecution team as well. Wisniewski, 103 N.M. at 435, 708 P.2d at 1036; accord Kyles v. Whiteley, 514 U.S.419, 437 (1995) (stating that the Brady disclosure requirement applies to others acting on the prosecutor’s behalf in the case, including police officers). Information within the custody of police officers or other persons who are part of the prosecution team was presumed to be within the control of the prosecution.


13 In New Mexico, the State has a duty to disclose “any books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the state[,]” Rule 5-501(A)(3) NMRA 2004. The State is ordinarily not charged with disclosure of material in the possession of government agencies that are not investigative arms of the prosecution and have not participated in the investigation of the case. State v. Bustamante, 91 N.M. 772, 774, 581 P.2d 460, 462 (Ct. App. 1978) (holding, in a drug possession case, that the State was not required to produce a report regarding the feasibility of evaluating crime laboratories when the report was not in the possession, custody, or control of the State). “[T]he prosecutor does not have ‘possession or control’ of materials held by the court, by private firms, or by other, unrelated agencies.” ABA Standards for Criminal Justice, Discovery and Trial by Jury § 11-2.1(a) (3d ed. 1996).

14 In this case, the documents being sought were in the possession of the County or DACDC. There is nothing in the record to indicate that the County or DACDC acted as an investigative arm of the prosecution or that they turned this material over to the prosecution until compelled to do so by the trial court. Neither of those entities was acting on behalf of the prosecution or reporting to the prosecution; rather, they were conducting an independent investigation of the assaults at DACDC. “[T]he government has no duty to produce evidence outside of its control[,]” United States v. Hughes, 211 F.3d 676, 688 (1st. Cir. 2000). We hold that the prosecution did not violate Rule 5-501 when it failed to turn over material it neither possessed nor controlled. Because the prosecution was not in control of the material, it was error for the trial court to hold them responsible for the delay in producing the discovery.

The Sanction of Dismissal

15 Although we are sympathetic to the trial court’s obvious frustration at the repeated discovery delays by the County, sanctioning the prosecution for those delays was against the logic and effect of the facts and circumstances of this case and thereby constituted an abuse of discretion. As we have noted, dismissal is an extreme sanction to be used only in exceptional cases. Bartlett, 109 N.M. at 680, 789 P.2d at 628. “The sanction of dismissal punishes the public, not the prosecutor, and results in a windfall to the prosecution.” State v. Theriault, 590 So. 2d 993, 996 (Fla. Dist. Ct. App. 1991). The sanction of dismissal is “wasteful of judicial and investigative resources, and should be imposed only where no less severe sanction will remedy the violation.” ABA Standards for Criminal Justice, § 11-7.1(a).

16 At the hearing on the motion for reconsideration, the trial court stated that the sanction of dismissal was necessary to “send a message to anybody that would be thinking about doing and acting in the same way in the future.” However, the United States Supreme Court has stated that “deterrence is an inappropriate basis for reversal . . . where means more narrowly tailored to deter objectionable . . . conduct are available.” United States v. Hastings, 461 U.S. 499, 506, (1983). The Court held that the lower court had erred because the reversal failed to strike a balance between disciplining misconduct with society’s interest in the prompt administration of justice and the welfare of the victims. Id. at 509. Similarly, in United States v. Blue, 384 U.S. 251, 255 (1966), the Court stated that the sanction of dismissal went too far and would serve to “increase to an intolerable degree interference with the public interest in having the guilty brought to book.”

17 Although the trial court apparently believed that it had no power to sanction the County’s behavior directly, we note that Rule 5-511(E) NMRA 2004 provides that “[t]he court may, upon its own motion, or upon motion of a party or parties, and upon a showing of good cause, order the discovery issues to be heard and determined by the judge de novo. Id.

Prejudice to Defendant

18 In the order dismissing the case, the trial court stated that Defendant had been denied due process because the delay in producing the discovery had hampered his ability to defend himself. Although the trial court denominated the statements in the order as findings, they are a mix of findings of fact and conclusions of law. We defer to the trial court with respect to the finding of facts so long as there is substantial evidence in the record to support the findings. State v. Attaway, 117 N.M. 141, 144-146, 870 P.2d 103, 106-108 (1994). The application of the law to those facts is a matter this court reviews de novo. Id.

19 The order speaks of the nondisclosure of evidence even though the court found that while it still had some uncertainty about whether all the evidence had been disclosed, “it appears to have been.” The question before the court, however, was one of delayed disclosure rather than nondisclosure. “When the issue is one of delayed disclosure rather than of nondisclosure, . . . the test is whether defendant’s counsel was prevented by the delay from using the disclosed material effectively in preparing . . . the defendant’s case.” United States v. Ingraldi, 793 F.2d 408, 411-12 (1st. Cir. 1986).

The trial court described the delayed discovery as being material evidence, yet then stated that “[w]hether the evidence benefits the defense is irrelevant.” However, this statement contradicts itself. Evidence is material and due process violated only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. State v. Chavez, 116 N.M. 807, 811-13, 867 P.2d 1189, 1193-95 (Ct. App.1993). Moreover, there is nothing in
the record that indicates the nature of the evidence contained in the documents disclosed by the County and DACDC; there has been no showing that the evidence was material. On appeal, Defendant asserts that he was prejudiced by the delayed disclosure of evidence. In support of this claim, he refers to the testimony of the prosecution’s investigator regarding the difficulties he had in obtaining documents from the County and DACDC. However, that testimony was given prior to the County’s civil attorney having disclosed the requested discovery. Defendant also argues that with the passage of time the memory of witnesses is affected and the crime scene was changed with the remodeling of the detention center. We recognize that the delay in discovery may have resulted in difficulty for Defendant, but these consequences do not justify dismissal. Defendant has not met his burden of showing his defense was impaired by any delay in obtaining discovery. See Bartlett, 109 N.M. at 680, 789 P.2d at 628 (stating that “the defendant must establish prejudice resulting from the violation”).

{20} The trial court also concluded in its order that Defendant had been denied a speedy trial. It may be that the court believed that a delay in providing discovery equated to a speedy trial violation. However, as the Supreme Court explained in State v. Rojo, 1999-NMSC-001, ¶ 51, 126 N.M. 438, 971 P.2d 829, the issue of delay in discovery is “analytically distinct from the issue of whether Defendant’s constitutional right to a speedy trial was violated, and a ruling on one of these issues does not necessarily imply a ruling on the other.” The court raised this issue sua sponte but provided no findings of fact or any basis for its conclusion in the dismissal order. “[A]n appropriate motion to protect constitutional speedy-trial rights [requires] the weighing of factors that are factually based, and fact-finding is a function of the district court.” Id. ¶ 52 (citations and quotation marks omitted). Even if this issue were properly before us, there is no record for us to review.

CONCLUSION

{21} We hold that the State was improperly sanctioned for discovery delays and that dismissal of Defendant’s case would frustrate the ends of justice. Because the dismissal was premised on an erroneous conclusion of law, and because there is no basis in the record for dismissal, we reverse the trial court’s dismissal of the rape charge against Defendant. The case is remanded for trial.

{22} IT IS SO ORDERED.

IRA ROBINSON, Judge
WE CONCUR:
MICHAEL D. BUSTAMANTE, Judge
CELIA FOY CASTILLO, Judge

Certiiorari Denied, No. 28,469, April 19, 2004

FROM THE NEW MEXICO COURT OF APPEALS

Opinion Number: 2004-NMCA-056

JOHN ROBERTSON, Plaintiff-Appellee, and
PAUL McGregor and ANGELA McGregor,
Defendants/Cross Appellees,
versus
CARMEL BUILDERS REAL ESTATE
and CHARLIE M. COOKSON, JR.,
Defendants-Appellants.
No. 22,176 (filed: November 21, 2003)

APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY
ALVIN F. JONES, District Judge

MARK A. REEVES
Alamogordo, New Mexico
for Appellee

LYNNE PRUETT
HAKANSON & PRUETT, P.C.
Alamogordo, New Mexico
for Appellant

STEVEN K. SANDERS
Albuquerque, New Mexico
for Cross-Appellees

Opinion

IRA ROBINSON, JUDGE

{1} On the Court’s own motion, the opinion filed on this case on November 10, 2003, is hereby withdrawn and the following is substituted therefor.

{2} This controversy arises from a real estate deal gone awry. The parties involved are qualifying broker, Charlie M. Cookson, d/b/a Carmel Builders Real Estate (CBRE); associate broker, Dixie Babcock; Paul and Angela McGregor (“Sellers”); and John Robertson (“Buyer”).

{3} Defendant Cookson appeals the judgment against him and in favor of both Buyer and Sellers for fraudulent misrepresentation. Cookson raises several issues. He alleges: (1) the trial court erred in finding that Babcock and Cookson were in a principal/agent relationship; (2) the trial court did not establish the quantum of proof used to reach its determination; (3) the evidence was insufficient to establish the elements of fraud and the trial court failed to make the necessary findings to establish fraud; and (4) fraud was not pled with sufficient particularity.

{4} Cookson also challenges the propriety of the damages awarded to Buyer and Sellers. He argues: (1) punitive damages were improperly assessed against Cookson under the doctrine of respondeat superior; (2) punitive damages were not separately assessed between Babcock and Cookson;
and (3) punitive damages should not have been awarded without actual damages. He contends the trial court erred in awarding attorney fees and costs because it awarded Sellers costs twice and included costs which are not allowed under Rule 1-054(D) NMRA 2000.

{5} We reverse the judgment of the trial court for that portion of the award which involved payment of per diem and travel expenses to Sellers in connection with appearing as witnesses in this matter. We affirm the remainder of the judgment.

BACKGROUND

{6} In December 1994, Babcock formally listed Sellers' land for a period of six months. When the listing expired, Sellers permitted Babcock to keep a CBRE sign on the property. Cookson, the qualifying broker for CBRE, described the informal listing as an oral "pocket listing," meaning that Sellers would pay a commission to CBRE if Babcock found a buyer and Sellers accepted the buyer's offer. He stated that the listing was in effect until the day of his testimony. Babcock also had a formal listing for Sellers' home at this time. The house sale discussions were simultaneous with the land sale discussions between Sellers and Babcock.

{7} In January 1997, Buyer's real estate agent, A.A. ("Web") Webster contacted Babcock to check the status of the listing on the land and to initiate negotiations on behalf of Buyer. Webster testified that he assumed CBRE had a listing agreement on the land, based on Babcock's subsequent negotiations with Buyer and on Cookson's letters reflecting knowledge of the details of the transaction. Further, CBRE never informed Webster that it had no listing agreement. Webster testified that Babcock "implied" that she had a listing agreement or "had one on the way" and said that Seller had told her to bring an offer and she would get a listing. Webster also testified, on cross examination, that he could have contacted Sellers directly if Babcock had no listing agreement, but that Babcock directly told him she had a listing agreement. If Babcock had informed him there was no listing agreement, Webster would not have been required to split a commission on the sale. The trial court found that Babcock "represented that she had a listing" for the land, and solicited an offer from Buyer. Babcock testified that Babcock was an independent contractor, not an employee of CBRE, that he would not have received any part of a commission on the land sale, and did not receive any commission on the sale of Sellers' house. He testified that Babcock paid him a monthly fee only, and it would not matter whether she sold one piece of property or fifty. Cookson also testified that he was aware of Buyer's offer on the day Webster delivered the purchase agreement to CBRE, and that he discussed with Babcock how to get a signed listing agreement because "that's how Realtors get paid." He believed Babcock had a duty to keep him informed of the sale, and she kept him informed on a routine basis. Cookson was also aware of two contingencies in the purchase agreement: dirt work and financing.

{9} Mr. McGregor testified that he would have given Babcock a listing if the sale had gone through, and that Babcock tried to convince Sellers to give her the listing several times. Babcock always used CBRE letterhead, CBRE fax cover sheets, and signed documents as an associate broker for CBRE when dealing with Sellers, and had Cookson's authorization to do so. Babcock never said she was an independent contractor.

{10} When Webster notified Babcock that Buyer was interested in purchasing the land, Babcock faxed him a three-year-old disclosure statement Sellers made when they originally gave Babcock a listing on the land. The out-of-date disclosure, which indicated that utilities were at the property line of the land, was no longer accurate because Sellers had sold an adjacent lot. Neither Babcock nor Cookson informed Sellers that the old disclosure had been sent to Webster.

{11} On January 21, 1997, Babcock called Sellers and asked whether the land was still for sale. Sellers told Babcock they would sell the land for $100,000. The same day, Buyer made a written offer for $62,500. Babcock presented Buyer's offer to Sellers and when Mr. McGregor saw the offer, he told Babcock that he would not take less than $100,000 for the land. Sellers submitted a counter offer for $100,000 with a January 28, 1997 deadline. Buyer submitted a counter offer on January 27, 1997 of $80,000, which expired at 6:00 p.m. January 29, 1997.

{12} Without making any other written offers, Sellers told Babcock they would not sell for less than $100,000. Babcock told Buyer that Sellers would take no less than $100,000. Buyer made an offer to purchase the land for $100,000 on January 30, 1997, assuming the accuracy of the 1994 disclosure statement Babcock had faxed to Webster, stating that the utilities were on the property. Buyer's offers were contingent on getting dirt work done on the land and obtaining financing.

{13} After Babcock informed Sellers that Buyer had consulted an attorney regarding the utilities, Sellers informed Babcock they did not want to go through with the sale, even if the offer had been for $150,000. Sellers did not acknowledge Buyer's $100,000 offer in any way, and explicitly told Babcock they did not intend to proceed in any further dealings with Buyer. Buyer's agent testified that Babcock gave him a "verbal Counteroffer Number 3," which Buyer accepted, although there was nothing in writing to show Sellers had made a counteroffer. Sellers believed that negotiations were at an end, there was no contract of sale, and the negotiations were "dead," and told Babcock so on January 29.

{14} Cookson knew Sellers considered the deal to be "dead." Cookson testified that he attempted to get a written listing agreement from Sellers even after Sellers had told Babcock the deal was dead "so we would be paid." (Emphasis added). Buyer testified that he would never have made an offer on the land at all if he had known CBRE had no formal listing agreement on it, and he would not have hired an appraiser, contracted for backhoe work, and had blueprints done if he had known there was no valid contract for sale of the land. Cookson authorized the backhoe work on Sellers' land and also personally negotiated getting power to the property. Sellers never authorized digging on their land. The trial court found that as Buyer invested in improvements, the agents "sought to coerce or otherwise persuade [Sellers] to sell their tract."

{15} Buyer did not know that Sellers believed there was no valid contract until he received letters from Cookson, dated April 16, 1997 and April 30, 1997, stating that the contract had contingencies which had to be removed in order to close and that Sellers felt there was no contract. On April 30, 1997, Webster wrote a letter to CBRE removing the contingencies. Buyer attended the May 1, 1997, closing on the land, but Sellers, Babcock and Cookson did not. The trial court found that at the time of closing on the land, it became apparent to everyone that there had been a sale agreement. The trial court found that Babcock, at all material times, had been acting as an agent under Cookson, her qualifying broker, and that Babcock and Cookson had
damaged both Buyer and Sellers through their fraudulent misrepresentations.

{16} The trial court awarded compensatory damages to Buyer in the amount of $26,362.47 including his land-related expenditures, attorney fees, and costs against Babcock and Cookson. In addition, the trial court awarded Buyer $20,000 in punitive damages assessed against Babcock and Cookson. The trial court awarded compensatory damages to Sellers in the amount of $27,500, including attorney fees, costs, and personal expenses, and also awarded them $20,000 in punitive damages assessed against Babcock and Cookson. Default judgment was entered against Babcock for failure to appear, and her counsel withdrew based on lack of communication and inability to locate her. Buyer’s claims against Sellers were dismissed. Even though Sellers had made a counterclaim against Buyer as well as a cross-claim against Babcock and Cookson, Sellers made a full recovery for all damages prayed for. “Where a judgment declares the rights and liabilities of the parties to the underlying controversy, a question remaining to be decided thereafter will not prevent the judgment from being final if resolution of that question will not alter the judgment or moot or revise the decisions therein.” *Kelly Inn No. 102 v. Kapinson*, 113 N.M. 231, 238, 824 P.2d 1033, 1040 (1992).

**DISCUSSION**

The Relationship Between Cookson and Babcock

{17} We must determine whether a principal/agent relationship existed between Cookson and Babcock. Cookson argues that the trial court erred in finding that Babcock was his agent and by attributing fraudulent conduct by Babcock to him under the doctrine of respondeat superior. Cookson also argues about whether an agency relationship existed between Babcock and Sellers or himself and Sellers. To the extent that the relationship between the real estate agents and Sellers is relevant, it is discussed in the section addressing whether substantial evidence exists to support the finding of fraud against Sellers’ agents, Babcock and Cookson.

{18} “An agent is a person who, by agreement with another called the principal, represents the principal in dealings with third persons or transacts some other business, manages some affair or does some service for the principal, with or without compensation.” *Madsen v. Scott*, 1999-NMSC-042, ¶ 8, 128 N.M. 255, 992 P.2d 268 (quoting UJI 13-401 NMRA 1999). Defining an agency relationship presents a mixed question of law and fact requiring application of the substantial evidence standard for review of the facts and then a de novo review of the trial court’s application of the law to those facts. *State v. Reynolds*, 119 N.M. 383, 384, 890 P.2d 1315, 1316 (1995). However, where the material facts are undisputed and susceptible of but one logical inference, the existence of such a relationship becomes a conclusion of law. *Madsen* 1999-NMSC-042, ¶ 9.

{19} The trial court found, based on Cookson’s admission that he was the “qualifying broker” for CBRE and that Babcock was an associate broker, that Babcock was Cookson’s agent as a matter of law. We agree. A qualifying broker has a duty to supervise activities of associate brokers, has a duty to maintain a written contract or employment agreement and, upon termination or discharge of an associate broker, within forty-eight (48) hours must mail or deliver the license of the associate to the Real Estate Commission. 16.61.16.9 (D), (J) NMAC 2002. An associate broker may not engage in real estate activities requiring a real estate license without the knowledge and supervision of a qualifying broker and may not receive commissions or fees related to real estate activities requiring a real estate license from anyone other than a qualifying broker. 16.61.17.9 NMAC 2002. An associate broker must conduct all real estate related business for others in the trade name of the brokerage, and remit all monies of others related to transactions to the qualifying broker as soon after receipt as is practicably possible. *Id.* As our Supreme Court noted, in accordance with these rules, a “real estate salesperson is his or her qualifying broker’s agent” and [because] a real estate salesperson must work under a broker, when a principal buyer or seller engages a real estate salesperson as an agent, the principal also engages the salesperson’s qualifying broker as an agent, thus extending the fiduciary duty owed to the principal buyer or seller up the salesperson’s chain of command to the broker.

1 In citing to the NMAC rules all citations are to the 2002 version which is in all relevant parts substantially the same as the version which was in effect at the time this controversy arose.
had an “independent contractor” agreement with him. We are not persuaded by this argument. The majority rule, which is also the rule in New Mexico, is that “the manner in which the parties designate a relationship is not controlling, and if an act done by one person on behalf of another is in its essential nature one of agency, the one is the agent of the other, notwithstanding he is not so called.” Id.

{23} Cookson also argues that the trial court’s ruling cannot support liability under a respondent superior theory because the court failed to make the specific finding that Babcock was Cookson’s “employee” rather than his agent. However, under a respondent superior theory, “the liability of a principal for the tortious act of an agent is the same as the liability of an employer for the tortious act of an employee.” Tercero, 2002-NMSC-018, ¶ 21. Accordingly, there was no need for the trial court to find that Babcock was Cookson’s employee rather than his agent.

Evidence of Fraud
Quantum of Proof

{24} Cookson cites Sands v. American G.I. Forum of N.M., Inc., 97 N.M. 625, 629, 642 P.2d 611, 615 (Ct. App. 1982), for the proposition that, where it cannot be determined from the trial court’s findings and conclusions what standard of proof was used, the case must be remanded for specific findings. However, in Sands, unlike the present case, there was evidence that the trial court had likely applied the wrong standard of proof. The trial court in Sands specifically stated that it was applying a preponderance of the evidence standard. Id. at 628, 642 P.2d at 614.

{25} At trial, Cookson correctly argued that Buyer was required to prove fraud by clear and convincing evidence. See Rodriguez v. Horton, 95 N.M. 356, 359, 622 P.2d 261, 264 (Ct. App. 1980) (stating fraud must be established by clear and convincing evidence). Although the trial court did not state in its judgment what quantum of proof was applied, there is no indication in the record that the trial court applied any standard other than the clear and convincing standard to which the trial court was alerted. This Court remands for specific findings “[w]here doubt or ambiguity exists as to the basis for the court’s ruling.” Corlett v. Smith, 106 N.M. 207, 211, 740 P.2d 1191, 1195 (Ct. App. 1987). The burden is on the appellant to clarify how the trial court erred. Farmers, Inc. v. Dal Mach. & Fabricating, Inc. 111 N.M. 6, 8, 800 P.2d 1063, 1065 (1990). Cookson did not provide any testimony or statement to indicate that the trial court applied the wrong quantum of proof. Accordingly, we will not presume error. {26} Cookson also argues that the trial court failed to make the ultimate factual findings required to prove fraud. “Findings are to be liberally construed in support of the judgment. The findings are sufficient if a fair construction of all of them, taken together, justify the trial court’s judgment.” H. T. Coker Constr. Co. v. Whitfield Transp., Inc., 85 N.M. 802, 804, 518 P.2d 782, 784 (Ct. App. 1974) (internal citations omitted). The elements of fraud are a false representation, knowingly or recklessly made, with the intent to deceive, on which the other party acted to his detriment. Sauter v. St. Michael’s College, 70 N.M. 380, 384-385, 374 P.2d 134, 138 (1962). Cookson argues that the trial court failed to make any findings establishing that Cookson knowingly or recklessly made the false representation with the intent to deceive Buyer, and that the trial court failed to make any of the requisite findings with regard to defrauding Sellers. {27} The trial court made numerous factual findings regarding the fraudulent actions of Cookson and Babcock. Although the court did not specifically state which facts are related to each of the elements, “the court nonetheless defined a general nexus between the findings of fact and conclusions of law sufficient to establish the tort of fraud.” Register v. Roberson Constr. Co.Inc. 106 N.M. 243, 246, 741 P.2d 1364, 1367 (1987). The trial court found that because Buyer invested in improvements, Cookson “sought to coerce or otherwise persuade [Sellers] to sell their tract,” and that Babcock at all material times had been acting as an agent under Cookson, her qualifying broker, and that Babcock and Cookson had damaged both Buyer and Sellers through their intentional misrepresentations. A fair construction of all of the court’s findings and conclusions, taken together, supports the trial court’s judgment in this case.

Substantial Evidence

{28} Cookson also contends that there was no substantial evidence to support the trial court’s finding of fraud. The parties cite Varbel v. Sandia Auto Elec., 1999-NMCA-112, ¶ 13, 128 N.M. 7, 988 P.2d 317, for the proposition that whole record review is appropriate in this case. The court in Varbel, however, provides the applicable standard of review with regard to administrative proceedings, id., not trial court proceedings. In determining whether or not there is substantial evidence to support the trial court’s findings, we look only at the evidence favorable to the appellees. Galvan v. Miller, 79 N.M. 540, 546, 445 P.2d 961, 967 (1968). It is for the fact finder, not the appellate court, to weigh the evidence. Rodriguez, 95 N.M. at 359, 622 P.2d at 264. We determine that there is substantial evidence establishing fraud on the part of Cookson in relation to both Buyer and Sellers.

{29} Cookson argues that the evidence is insufficient to support a finding that Cookson, as opposed to Babcock, engaged in fraudulent conduct in this regard. Since we are affirming the trial court’s holding that Babcock was Cookson’s agent, the evidence is sufficient to support a finding of fraud on the part of Cookson if there is substantial evidence on the record that Babcock committed fraud. We need not determine if there is substantial evidence in the record that Cookson’s actions alone constituted fraud.

{30} There is substantial evidence in the record that Babcock, as Cookson’s agent, acted fraudulently towards both Buyer and Sellers. As the trial court found, there was testimony that, despite having no listing agreement, Babcock represented that the property was listed with CBRE. There was testimony that Cookson was aware that Sellers informed Babcock on January 29, 1997, that negotiations were at an end and that they had no intention of selling the property to Buyer; and that the agents continued to negotiate on behalf of Sellers and to lead Buyer to believe he had purchased the property. There was also testimony that Buyer and Sellers relied on these misrepresentations to their detriment.

{31} Cookson makes the additional argument that he cannot be held liable for breaching any duties to Sellers by failing to disclose the subsequent unauthorized negotiations with Buyer because the acts constituting fraud against Sellers largely consist of failures to disclose or inform, and there was no written agency agreement between Sellers and CBRE establishing such a duty. This argument misses the point. The trial court did not hold Cookson liable for breaching a contractually imposed fiduciary duty to Sellers, but instead for committing the intentional tort of fraud. “An omission as well as an act, may constitute fraud. When one is under the duty to speak,
but remains silent and so fails to disclose a material fact, he may be liable for fraud.”


(32) We find that a continuing duty to disclose had been triggered by the actions of Babcock and Cookson. Since these two agents, Babcock and Cookson, continued conducting negotiations on Sellers’ behalf despite being instructed by Sellers to discontinue these negotiations, they were under a duty to disclose to Sellers the fact that negotiations had not yet halted and that, in fact, they were working towards closing the deal with Buyer. The real estate agents had a special relationship with Sellers, arising not only from that which had already been disclosed, but also from the “definite fiduciary” relationship between the parties, and the Sellers’ trust reposed in the agents from previous sales. See R.A. Peck, Inc. v. Liberty Fed. Sav. Bank, 108 N.M. 84, 89, 766 P.2d 928, 933 (Ct. App. 1988)(enumerating categories of existing relationships that give rise to a duty to disclose); see also Swallows v. Laney, 102 N.M. 81, 84, 691 P.2d 874, 877 (1984) (“A fiduciary relationship exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of one reposing the confidence.”) (internal citation and quotation marks omitted).

Sufficiency of the Pleadings

(33) Cookson also alleges that the judgment should be reversed due to both Buyer’s and Sellers’ failure to plead fraud with specificity, as required by Rule 1-009 (B) NMRA 2003. Cookson preserved this issue in his motion in limine.

(34) We are not persuaded. The evidentiary details of a claim of fraud need not be alleged. Steadman v. Turner, 84 N.M. 738, 740, 507 P.2d 799, 801 (Ct. App. 1973). There is sufficient particularity in the pleading if the facts alleged are facts from which fraud will be necessarily implied and the claim asserted should be clear to Cookson. See Id.

(35) Cookson complains that both Buyer’s and Sellers’ complaints fail to state specifically that the allegations of fraud were based on Cookson’s failure to inform Buyer that Sellers considered the deal to be “dead,” and do not state the facts surrounding the fraud. Cookson also claims that Buyer’s complaint was limited to the allegation that the continued presence of a “for sale” sign on the property constituted fraud. However, the facts pled do not limit the allegations of fraud to the continued presence of the sign and, in the complaints of both Buyer and Sellers, the general and specific allegations of ongoing false representations by Babcock and Cookson regarding cessation of negotiations are of sufficient particularity to apprise Cookson of the claims asserted against him.

Punitive Damages

(36) Cookson also challenges the propriety of the punitive damages awarded to Buyer and Sellers. He argues that punitive damages were improperly assessed against him under the doctrine of respondeat superior and that the trial court erred by not separately assessing the punitive damages between Babcock and him. Cookson also argues that punitive damages were improperly awarded to Sellers since they were not awarded any actual damages. We review the trial court’s findings regarding punitive damages for abuse of discretion. Eckhardt v. Charter Hosp., Inc., 1998-NMCA-017, ¶ 57, 124 N.M. 549, 953 P.2d 722.

(37) “[A] principal can only be held liable for punitive damages when the principal has in some way authorized [or] ratified . . . its agent.” Rhein v. ADT Auto., Inc., 1996-NMSC-067, ¶ 31, 122 N.M. 646, 930 P.2d 783 (quoting Albuquerque Concrete Coring Co., Inc. v. Pan Am World Servs., Inc., 118 N.M. 140, 143, 879 P.2d 772, 775 (1994)). Cookson argues that there is no substantial evidence demonstrating that he authorized, ratified, or participated in the fraudulent acts of Babcock. We disagree.

(38) Because an appellate court does not reweigh the evidence, we only examine whether substantial evidence supports the trial court’s ruling after viewing the facts and all reasonable inferences in the light most favorable to the prevailing party. Eckhardt, 1998-NMCA-17, ¶ 57. Cookson testified: that Babcock kept him informed of all developments in the real estate transaction; that Babcock, with Cookson’s authority, always used CBRE letterhead, CBRE fax cover sheets; that Babcock signed documents as an associate broker for CBRE when dealing with the parties; that he attempted to get a written listing agreement from Sellers even after Sellers had told Babcock the deal was dead “so we would be paid” (emphasis added); and that he authorized the backhoe work on Sellers’ land and also personally worked on getting power to the land. There is substantial evidence that Cookson participated in, authorized, and ratified Babcock’s fraudulent acts.

(39) Cookson correctly alleges that punitive damages generally must be separately determined when assessed against two or more defendants. Vickrey v. Dunivan, 59 N.M. 90, 94, 279 P.2d 853, 856 (1955). This case, however, is easily distinguished from Vickrey. In Vickrey, the jury awarded punitive damages against multiple defendants, one of whom was subsequently released from liability, leaving no possible way to determine the remaining defendants’ share of the punitive damages. Id. at 93-94, 279 P.2d at 855-56. Each defendant in that case was being held individually liable. Id.

(40) In this case, we are presented with a judgment for punitive damages against a principal and his agent, not simply two co-defendants. The trial court made the award of punitive damages to both Buyer and Sellers against “Defendants Babcock and Cookson in the amount of $20,000.00.” The trial court did not parse out who was responsible for what amount, but rather found the two defendants to both be liable for the $20,000 awarded to each party. The liability of a principal for his agent is vicarious in nature. Samedan Oil Corp. v. Neeld, 91 N.M. 599, 603, 577 P.2d 1245, 1249 (1978) (stating that there is no “vicarious liability for punitive damages on the part of a master or principal absent participation, authorization or ratification of the tortuous conduct.”) (Emphasis added). Therefore, a principal who ratifies or participates in fraudulent acts of an agent is held responsible for the fraud, by operation of law, to the same extent as the agent.

(41) Accordingly, we hold that when a principal is held liable under the theory of respondeat superior, and punitive damages are appropriate due to the principal’s ratification of or participation in an intentional tort, there is no need to allocate separate awards of punitive damages against the principal and agent, as their liability is equal. Cookson is liable for $20,000 in punitive damages to Buyer and $20,000 in punitive damages to Sellers.

(42) Cookson argues that the trial court did not award any compensatory damages to Sellers and that accordingly there is no basis for an award of punitive damages to Sellers. Cookson cites Garcia v. Coffman, 1997-NMCA-092, 124 N.M. 12, 946 P.2d 216, for the assertion that an award of punitive damages must be supported at least by
an award of nominal damages. In Garcia, we stated that “proof of actual damages was not necessary to sustain [the] plaintiff’s cause of action for fraud and that it was within the province of the judge or jury to award nominal damages to acknowledge that the cause of action was established and punitive damages to punish [the defendant] for violating Plaintiff’s rights.

Id. ¶ 36 (emphasis added). First, we note that it is not clear that the trial court did not award nominal damages to Sellers. In its judgment, the trial court awarded Sellers for attorney fees, costs, and personal expenses. We read the award of personal expenses as the functional equivalent of nominal damages.

{43} In any case, this Court in Garcia did not require an award of nominal damages to demonstrate that a cause of action has been established. The language in Garcia is permissive and under Sanchez v. Clayton, 117 N.M. 761, 877 P.2d 567 (1994), upon which Garcia relies, we believe an award of nominal damages, although permitted, is not required. In Sanchez, our Supreme Court stated:

[The] most reasonable interpretation of the supposed actual damages requirement is that it is really a defective formulation of an entirely different idea—that the plaintiff must establish a cause of action before punitive damages can be awarded.

. . Once the facts accepted by the trier show a valid cause of action, however, there seems no reason to deny punitive damages merely because the plaintiff’s damages are not pecuniary, or because the jury awards nominal damages, or because it lumps all damages under the punitive label. Indeed, if the defendant’s conduct otherwise warrants punitive liability, the need for punishment or deterrence may be increased by reason of the very fact that the defendant will have no liability for compensatory damages. Sanchez, 117 N.M. at 767, 877 P.2d at 573. Sanchez further states that in suits based on intentional torts, it is not necessary that the party allege actual damages. Id.

{44} In Archer v. Roadrunner Trucking, Inc., 1997-NMSC-003, ¶ 13, 122 N.M. 703, 930 P.2d 1155, our Supreme Court interpreted Sanchez as holding that an award of general damages, whether actual, compensatory, or nominal, is not required to recover punitive damages. The Court stated:

In Sanchez, we held that before a plaintiff may recover punitive damages he or she must state a cause of action under which he or she is entitled to actual, compensatory, or nominal damages depending on the nature of the case. . . Following the logic of Sanchez, while the injured person need not in fact have recovered general damages in order for his or her spouse to recover loss-of-consortium damages, the injured spouse must have been entitled to an action for general damages.

¶ 13(emphasis in original).

{45} The trial court found that Sellers established a valid cause of action for fraud, and in accordance with Sanchez, we see no reason to deny Sellers punitive damages because the court either labeled nominal damages as personal expenses or lumped all damages under the punitive label. See Sanchez, 117 N.M. at 767, 877 P.2d at 573.

{46} We conclude that the punitive damages awarded to Buyer and Sellers were proper in all respects.

Attorney Fees and Costs

{47} Both parties agree that it was within the trial court’s discretion to award attorney fees in an action for fraud. The only issue raised is the reasonableness of the fee award. We will not reach issues not raised by the parties. State v. Fish, 102 N.M. 775, 777, 701 P.2d 374, 376 (Ct. App. 1985) (stating that if a party fails to brief an issue that party waives review of it). Accordingly, we do not address the overall propriety of attorney fees in a fraud case, but merely the reasonableness of the award in this case.

{48} The trial court has broad discretion in setting attorney fees, and an award will not be reversed unless there is an abuse of discretion. Miller v. Johnson, 1998-NMCA-059, ¶ 34, 125 N.M. 175, 958 P.2d 745. We have previously explained that “[a] trial court abuses its discretion when its decision is contrary to logic and reason.” Roselli v. Rio Communities Serv. Station, Inc., 109 N.M. 509, 512, 787 P.2d 428, 431 (1990).

{49} Buyer’s attorney fees were based on an affidavit by attorney Mark Reeves. The pretrial and post-trial work on the case was done by Reeves, and his fee affidavit states that the fees were “necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed.” Cookson complains that the fees were not itemized, but instead lists a lump sum and is thus per se unreasonable. Cookson cites no authority for this proposition. Absent cited authority, we will not review the issue. In re Adoption of Doe, 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984). Cookson also fails to cite where in the record he allegedly objected to the affidavit. See Pinnell v. Bd. of County Comm’rs, 1999-NMCA-074, ¶ 11, 127 N.M. 452, 982 P.2d 503 (noting where party failed to cite to any portion of the record supporting its allegation, argument would not be considered).

{50} Sellers’ fees were based on bills entered into evidence over Cookson’s objection on relevancy grounds. Cookson argues that he should not be liable for attorney fees resulting from the legal actions between Buyer and Sellers and also that the fees were generally excessive and unreasonable. This argument was preserved in Cookson’s motion in limine.

{51} The trial court expressly found that all of the attorney fees resulted from Defendants’ fraudulent conduct. Also, Sellers were forced to contest Cookson’s affirmative defenses. As we stated in First Nat’l Bank v. Diane, Inc., 102 N.M. 548, 555, 698 P.2d 5, 12 (Ct. App. 1985)(quoting Sorenson v. Fio Rito, 413 N.E. 2d 47, 52 (Ill. App. Ct. 1980)):

had the plaintiff been forced to hire an accountant to repair the damage caused by the defendant’s conduct, she would undoubtedly have been entitled to recover the accountant’s fee as an ordinary element of damages. There is no basis in logic for denying recovery of the same type of loss merely because the plaintiff required an attorney instead of an accountant to correct the situation caused by the defendant’s neglect. In holding the defendant liable for the plaintiff’s losses, we are not violating the policy against “penalizing” a litigant for defending a lawsuit. We are simply following the general
rule of requiring a wrongdoer to bear the consequences of his misconduct.

{52} There is nothing in the record to indicate that the fees claimed were unreasonable. The trial court did not abuse its discretion in its awards of attorney fees to each Buyer and Sellers. Accordingly, we affirm the trial court’s award of attorney fees.

{53} Cookson also alleges that the trial court awarded Sellers costs twice and included costs which are not allowed under Rule 1-054(D), specifically deposition costs, copies and postage, and per diem and travel costs. The assessment of costs is entrusted to the sound discretion of the court. In re Adoption of Stailey, 117 N.M. 199, 203, 870 P.2d 161, 165 (Ct. App. 1994). We will not interfere with an award of costs absent a showing of an abuse of discretion. Id.

{54} Sellers filed an itemized cost bill. Cookson subsequently filed a motion to quash the itemized cost bill, in which he argued that the cost bill had been filed prematurely by Sellers and that Sellers were not entitled to costs for per diem and travel in connection with Sellers being subpoenaed as witnesses. Cookson did not object to allowing costs for taking Buyer’s deposition or for postage and copies. “It is well-settled that objections must be raised below to preserve an issue for appellate review.” State v. Lucero, 104 N.M. 587, 590, 725 P.2d 266, 269 (Ct. App. 1986). Hence we address only the propriety of the costs awarded for travel and per diem. We do not find that Sellers were awarded costs twice. In the trial court’s order on Sellers’ cost bill the trial court specifically stated that those costs, totaling $2090.96, “shall be allowed in addition to the judgment previously entered.” Cookson cites no evidence, and we could find none, showing that the costs awarded by the trial court in the order are duplicative.

{55} The trial court awarded Sellers costs of transportation and per diem in the sum of $440.00 for travel from Lubbock, Texas, to Alamogordo, New Mexico for trial. We agree it was error to award travel and per diem to Sellers as a cost. Costs are recoverable only when they come within the ambit of a statute. Swallows, 102 N.M. at 86, 691 P.2d at 879. As a general rule, a party is not entitled to per diem or mileage expenses for appearing as a witness in his own case. Id. Sellers argue that the general rule is inapplicable since they received a subpoena too close to trial for their motion for protective order to be filed. Sellers cite no authority for an exception to the rule that parties are not entitled to be treated as ordinary witnesses and we did not find any.

CONCLUSION

{56} The judgment of the trial court is affirmed except for the portion of the cost bill which allowed Sellers to recover per diem and travel costs. As to that issue, the matter is reversed and remanded for entry of an amended judgment eliminating the award of Sellers’ per diem and travel costs.

{57} IT IS SO ORDERED.

IRA ROBINSON, Judge

WE CONCUR:

JAMES J. WECHSLER, Chief Judge
A. JOSEPH ALARID, Judge

Opinion

CYNTHIA A. FRY, Judge

{1} Appellant Jicarilla Apache Nation (the Nation) appeals a decision by the Rio Arriba County Valuation Protests Board (the Board), affirming in relevant part a June 2000 amended notice of valuation issued by the Rio Arriba County Assessor (the Assessor), for a 32,075.8–acre property known as the Lodge at Chama (the Ranch). We consider the statutes and regulations governing the special mode of valuation for agricultural property and conclude that the Board’s interpretation of this law was erroneous. We reverse the Board’s determination.

BACKGROUND

{2} The Ranch is a 32,075.8–acre property located near Chama, New Mexico, formerly known as the “Chama Land and Cattle Company.” The name was changed to the “Lodge at Chama” in 1989 or 1990. The Nation purchased the Ranch in 1995. In 1996, and in all subsequent years through 1999, the Assessor valued 32,061 acres of the Ranch as agricultural land and imposed ad valorem livestock taxes on the Nation’s private elk herd. In June 2000 the Assessor issued an amended notice of valuation that revoked the Ranch’s long-standing agricultural-use classification, reclassi-
fied the property as “miscellaneous non-residential,” and assessed its full value at $21,301,191, which constituted nearly a ten-fold increase over the 1999 tax year value. The Assessor gave three reasons for its reclassification: (1) privately owned elk are not “livestock,” (2) the primary use of the Ranch had changed to non-agricultural, and (3) non-agricultural income at the Ranch exceeded agricultural revenues.

{3} The Nation protested the amended valuation, and the Assessor requested a hearing before the Board. Prior to the hearing, the Nation and the Assessor resolved several matters by stipulation. Among other things, the parties stipulated to the valuation of the westernmost 5,035 acres of the ranch: 5,000 acres are subject to a grazing lease and are considered agricultural land; 20 acres qualify as irrigated agricultural land; 11 acres are valued as miscellaneous land; and the remaining 4 acres upon which the actual lodge and various residences are located are also valued as non-agricultural land. The parties agreed that the only issue before the Board was “whether the remaining 27,040.80 acres . . . should be classified and valued as agricultural land.” They also stipulated that, “since at least 1996, the County [had] issued annual notices of property valuation recognizing 32,061 acres of the [Ranch] as used primarily for agricultural purposes.”

{4} The Nation introduced the testimony of Frank Y. Simms, the president and general manager of the Ranch, who has been with the Ranch since 1990. He described the Nation’s activities on the Ranch as being “livestock grazing and related elk production,” timber production, a commercial lodge, and recreational use.

{5} The Nation grazes a private elk herd on 6400 acres of the disputed property, and from 1996 to 1999 the Nation paid livestock taxes on the herd. The private herd has been at the Ranch for more than forty years. The Nation extensively manages the 6400 acres by irrigating to produce feed, and it subjects the private herd to a rigorous genetic improvement breeding program. The elk are then harvested through organized hunts, although some elk are sold commercially to other farms. Hunt packages, which include food, lodging, and guide services, cost each hunter between $5,500 and $13,000. Ninety-nine percent of the hunters who harvest elk at the Ranch take the entire animal with them in the form of cut, wrapped, and frozen meat, and ninety-eight percent have the animal mounted.

{6} The Nation manages the remaining portion of the disputed property “for the production, quality, and health of the wild elk herd there.” This management includes manipulation of the Nation’s timber stand to maximize the production of forage for the wild herd. The Nation then sells permits, obtained via contract from the State, to hunters who harvest elk that are part of the wild herd.

{7} At the conclusion of the hearing, the Board affirmed the Assessor’s valuation and concluded that “the use of that property is primarily as a habitat for elk, [and] that all other uses, including arguably agricultural uses, are secondary and incidental to that primary use.” Because the Board concluded that elk are not “livestock” for purposes of the Property Tax Code (the Code), NMSA 1978, §§ 7-36-1 to -33 (1973, as amended through 2001), it also concluded that the use of the Ranch primarily for elk habitat “does not pass muster as land used primarily for agricultural purposes under [Section 7-36-20].”

{8} The Board found that the Assessor first learned in November 1999 about the Nation’s “new business plans and goals and income information” for the Ranch via a letter to the Nation’s president from the acting regional director of the Bureau of Indian Affairs (BIA). This letter constituted the BIA’s evaluation of the Nation’s request that the Ranch be conveyed to the United States to hold in trust for the Nation. The Board found that this letter along with internet websites advertising the Ranch as a “recreational retreat[ ]” supported the Assessor’s determination that the Ranch was used primarily for non-agricultural purposes.

{9} The Board further found that, although the Ranch’s timber and grazing activities were bona fide agricultural uses, the Ranch’s other activities, such as fishing, elk hunting, and skeet-shooting, were non-agricultural. In addition, the Board found that the Nation’s soil conservation agreement with the United States Department of Agriculture (USDA) had, “as its primary purpose, the development and maintenance of a habitat suitable for the maintenance of elk,” and that a significant portion of the Ranch was used for producing elk for big game hunting. Thus, because the Board found that elk are not “livestock,” it found that the Ranch’s primary activities did not constitute agricultural use as defined by Section 7-36-20(B). The Board also found that the Ranch’s non-agricultural income exceeded its agricultural income.

{10} The Nation appealed the Board’s decision to the district court and filed a motion asking the district court to certify the appeal to this Court. The district court granted the motion and we accepted certification.

DISCUSSION

Certification

{11} We asked the parties to address whether this Court has the discretion to set aside the district court’s certification order. The trial court certified this case under NMSA 1978, § 39-3-1.1(F) (1999), a subsection of the statute governing judicial review of certain agency final decisions, which provides as follows:

The district court may certify to the court of appeals a final decision appealed to the district court, but undecided by that court, if the appeal involves an issue of substantial public interest that should be decided by the court of appeals. The appeal shall then be decided by the court of appeals.

For the reasons that follow, we find that the district court properly certified this case as invoking issues of substantial public interest. We also find that the statutory language “shall then be decided” plainly requires this Court to decide the appeal. See NMSA 1978, § 12-2A-4(A)(1997). See also High Ridge Hinkle Joint Venture v. City of Albuquerque, 1998-NMSC-050, ¶ 5, 126 N.M. 413, 970 P.2d 599 (recognizing that “plain language of a statute is the primary indicator of legislative intent”) (internal quotation marks and citation omitted).

{12} An issue of “substantial public interest” necessarily affects entities beyond the parties themselves. Moreover, both common sense and case law suggest that an issue is one of “substantial public interest” when it raises a question of first impression that is likely to recur, and when the need for uniformity is great. Although we are not aware of case law interpreting Section 39-3-1.1(F), we find support for our view in Supreme Court decisions accepting certification from this Court on questions of first impression. See, e.g., Sunwest Bank of Albuquerque v. Nelson, 1998-NMSC-012, ¶ 13, 125 N.M. 170, 958 P.2d 740 (accepting certification to resolve as a matter of first impression whether “a national banking association . . . [was] a resident of New Mexico for purposes of venue selection”); Carmona v. Hagerman
The Parties’ Arguments on the Merits

{14} The Nation makes one primary argument and several sub-arguments in support of its view that the Board erred in upholding the Assessor’s decision to reclassify the Ranch as non-agricultural. The Nation’s main argument is that the use of the property has been consistent and ongoing since the Nation acquired ownership, the Board’s decision upholding the change in classification is unsupported by substantial evidence, and contrary to law.

{15} The crux of the parties’ dispute, and the focus of the Nation’s sub-arguments, is whether the Nation’s primary use of the Ranch is indeed “agricultural use” as that term is defined by statute, regulation, and case law. The Nation contends that its present use of the Ranch is agricultural because: (1) pursuant to the Code, the soil conservation agreement between the Nation and the USDA constitutes agricultural use; (2) the Nation’s active management of the Ranch to produce elk and the feed and habitat necessary to support elk all constitute the agricultural use of the land, either because elk are “livestock” or because the food, hide, pelts, and other by-products of the elk are agricultural products; and (3) although it is problematic to rely on income in order to determine use, the Ranch’s income, if calculated properly, is primarily agricultural.

{16} The Assessor contends that the prior valuation of the Ranch as agricultural property was a mistake due to the Assessor’s unfounded understanding that elk are “livestock” as that term is used in the Code. Because the Assessor learned at a training session that the Department of Taxation and Revenue does not consider elk to be livestock, and because the Ranch’s primary focus is the breeding and support of elk, it would be a mistake to continue to view the Nation’s use of the Ranch as agricultural. In addition, the Assessor claims that the BIA letter and the Ranch’s website suggested that the use of the Ranch had changed from a ranch-type property to a recreational luxury resort. Finally, although some activities conducted by the Ranch were bona fide agricultural activities, the primary use of the Ranch was non-agricultural, as evidenced by the Ranch’s income for the previous three years. The Board affirmed the Assessor’s change in valuation, and the Assessor claims the Board’s decision is supported by substantial evidence and consistent with law.

Standard of Review

{17} We review the Board’s decision to determine whether it is “supported by substantial evidence or whether the decision is arbitrary, unlawful, unreasonable, or capricious.” Alexander v. Anderson, 1999-NMCA-021, ¶ 23, 126 N.M. 632, 973 P.2d 884 (internal quotation marks and citation omitted). While we do not substitute our own judgment for that of the Board’s, id., we are not bound by the Board’s interpretation of the applicable law. Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm’n, 2003-NMSC-005, ¶ 13, 133 N.M. 97, 61 P.3d 806.

Presumption of Correctness

{18} We initially address a procedural issue underlying this appeal. Pursuant to Section 7-36-20(A) and the parties’ stipulation, the protest hearing commenced with the presumption that the Ranch continued to be entitled to the agricultural use method of valuation. See § 7-36-20(A) (“If the land was valued under this section in one or more of the three tax years preceding the year in which the determination is made and the use of the land has not changed since the most recent valuation under this section, a presumption is created that the land continues to be entitled to that valuation.”). As a result of this presumption, the Assessor had the burden of proof. The Board concluded that the Assessor met this burden at the close of its case-in-chief and overcame the presumption favoring the Nation. The Board concluded that at this point NMSA 1978, § 7-38-6 (1981), conferred on the Assessor’s valuation a “statutory presumption of correctness” and the burden of proof shifted to the Nation to overcome that presumption. We conclude that the Board incorrectly determined that Section 7-38-6 had any applicability in this case.

Section 7-38-6 provides: Values of property for property taxation purposes determined by the division or the county assessor are presumed to be correct. Determinations of tax rates, classification, . . . and the computation and determination of property taxes made by the officer or agency responsible therefor under the Property Tax Code . . . are presumed to be correct.

In Black v. Bernalillo County Valuation Protests Bd., 95 N.M. 136, 141, 619 P.2d 581, 586 (Ct. App. 1980), we held this presumption to be applicable only to the value of property and inapplicable when the question is whether a taxpayer “is entitled to the special method of valuation provided for in § 7-36-20.” The present case concerns this precise question, and consistent with Black, we hold that Section 7-38-6 is not applicable. Accordingly, there is no statutory presumption that the Assessor’s valuation is correct, nor has the burden of proof shifted to the Nation.

Section 7-36-20 Special Method of Valuation for Land Used Primarily for Agricultural Purposes

{19} The statute governing the issues in this appeal provides in relevant part: A. The value of land used primarily for agricultural purposes shall be determined on the basis of the land’s capacity to produce agricultural products. Evidence of bona fide primary agricultural use of land for the tax year preceding the year for which determination is made of eligibility for the land to be valued under this section creates a presumption that the land is used primarily for agricultural purposes.
purposes during the tax year in which the determination is made. If the land was valued under this section in one or more of the three tax years preceding the year in which the determination is made and the use of the land has not changed since the most recent valuation under this section, a presumption is created that the land continues to be entitled to that valuation.

B. For the purpose of this section, “agricultural use” means the use of land for the production of plants, crops, trees, forest products, orchard crops, livestock, poultry or fish. The term also includes the use of land that meets the requirements for payment or other compensation pursuant to a soil conservation program under an agreement with an agency of the federal government.

§ 7-36-20(A)(B).

{20} We last addressed the agricultural method of property valuation in Alexander, where we interpreted Section 7-36-20. Although the legislature rewrote the burden-of-proof portions of the statute after Alexander was decided, 1997 N.M. Laws ch. 162, § 1, the requirements for agricultural valuation remain the same: the land must be primarily used for bona fide agricultural purposes. Section 7-36-20(B) expressly defines “agricultural use” as “the use of land for the production of plants, crops, trees, forest products, orchard crops, livestock, poultry or fish . . . [and] the use of land that meets the requirements for payment or other compensation pursuant to a soil conservation program under an agreement with an agency of the federal government.” Alexander made it clear that the enumerated uses of the subject property must be “bona fide agricultural use[s]” and the “primary uses” of the property in order to qualify for the special method of valuation. Alexander, 1999-NMCA-021, ¶¶ 11-12 (internal quotation marks and citation omitted).

The Board’s Reliance on Section 7-36-15 Was Erroneous

{21} The Board relied heavily on the Assessor’s analysis of the Ranch’s income in concluding that the Ranch was used primarily for non-agricultural purposes. The Board concluded that income analysis was appropriate pursuant to Section 7-36-15(B), which provides that “the value of property for property taxation purposes shall be its market value as determined by application of the sales of comparable property, income or cost methods of valuation or any combination of these methods.” (Emphasis added.) However, the statute also states that these methods of valuation apply “[u]nless a method or methods of valuation are authorized in Sections 7-36-20 through 7-36-33.” § 7-36-15(B) (emphasis added). Here we are concerned with Section 7-36-20, which is titled “Special method of valuation; land used primarily for agricultural purposes.” Therefore, by its plain terms, the income method set forth in Section 7-36-15 does not apply to land classified as agricultural. Moreover, Section 7-36-20(A) provides that “[t]he value of land used primarily for agricultural purposes shall be determined on the basis of the land’s capacity to produce agricultural products.” (Emphasis added.) Thus, agricultural land is to be valued based on its capacity to produce, not on its actual production.

{22} Although the method of valuation applicable to agricultural land also provides for an income method of valuation, see 3 NMAC 6.5.27(D)(1) (2003), the critical point is that valuation is distinct from classification. The issue in this case is whether the Ranch may properly be classified as agricultural land, not whether it was valued properly for taxation purposes. It makes no sense to classify property in the first instance by looking to its income potential or value, a step that should not take place until the property has first been classified. Cf. Black, 95 N.M. at 141, 619 P.2d at 586 (explaining that valuation of property is distinct from special method of valuation under Section 7-36-20). Thus, we hold that the Board’s reliance on the valuation portions of the Code was improper.

{23} We note that the Assessor and the Board expressly did not rely on 3 NMAC 6.5.27(A)(2), other than as indirect support for their reliance on Section 7-36-15. That regulation provides that “[a] presumption exists that land is not used primarily for agricultural purposes if income from non-agricultural use of the land exceeds the income from agricultural use of the land.” Id. The Assessor and the Board apparently refrained from relying on this presumption because this Court questioned its validity in Black, where we noted: “Although we question the authority of the Department to create presumptions of fact by way of regulations, we do not decide the issue because the ‘presumption’ is not applicable to the facts in this case. There is no income from a nonagricultural use of the land.” Id. at 141, 619 P.2d at 586. Because the Board did not rely on the regulatory presumption, we need not address it, and we express no opinion regarding the Department’s authority to create the presumption or whether the presumption, if valid, would be applicable in this case.

{24} In a related argument, the Assessor relies on County of Bernalillo v. Ambell, 94 N.M. 395, 611 P.2d 218 (1980), and argues that the Ranch’s relatively large income militates against a finding of agricultural use. In Ambell, the Court considered whether a statutory ten percent limit on property tax increases applied to property whose valuation increased because of a change from agricultural to non-agricultural use. Id. at 395, 611 P.2d at 218. In holding that the ten percent limit did not apply under such circumstances, the Court noted that “the legislative intent behind this special method of property tax valuation [for land used primarily for agricultural purposes] is to aid the small subsistence farmers in our state.” Id. at 397, 611 P.2d at 220. Thus, the Assessor contends that the Nation cannot benefit from Section 7-36-20 because it is not a “small subsistence farmer.” We disagree. The statement in Ambell is dictum unnecessary to the holding that the ten percent limit did not apply to reclassified land. See, e.g., Kent Nowlin Constr. Co. v. Gutierrez, 99 N.M. 389, 390-91, 658 P.2d 1116, 1117-18 (1982). The language in Ambell is not “persuasive with regard to the present circumstance.” Moffat v. Branch, 2002-NMCA-067, ¶ 25, 132 N.M. 412, 49 P.3d 673.

The Private Elk Herd Is Livestock

{25} Aside from its reliance on the Ranch’s income figures, the Assessor conceded that many of the Nation’s activities were bona fide agricultural uses, such as the Nation’s soil conservation agreement with the USDA and its timber management program. However, the Assessor maintained and the Board agreed that these activities were secondary to the Nation’s development and maintenance of elk and elk habitat. Therefore, because elk are no longer considered “livestock” under the Code, the Assessor argued that the Nation’s bona fide agricultural uses cannot be deemed primary uses and the property cannot enjoy the benefit of agricultural assessment. However, the Assessor’s primary witness,
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“useful to man” as buffalo; both produce mals, and the tameness of elk under these specifically deemed to be domestic ani-
tameness of buffalo, which are by statute see no meaningful distinction between the is entirely supervised and controlled. We eight-foot fence and the animals’ breeding Nation’s private elk herd is confi ned by an International Dictionary, Unabridged, 671 122 N.M. 618, 930 P.2d 153. A “domestic
ous.

and refrain from further interpretation

produce purposes but that elk are notably absent. However, buffalo, mules, and raffles are not mentioned in the Order either, despite their express inclusion in the definition of livestock in Section 7-35-2. Thus, the absence of an animal from the Order cannot be deemed conclusive or even to provide guidance in the interpretation of Section 7-35-2. See Jones v. Employment Servs. Div., 95 N.M. 97, 99, 619 P.2d 542, 544 (1980) (“If there is a conflict or inconsist-
siety between statutes and regulations promulgated by an agency, the language of the statutes shall prevail.”).

PTD General Order No. 99-25 to support the proposition that elk cannot be classified as livestock. They note that the Order lists many animals for valuation purposes but that elk are not specifically listed, the question is whether they can be deemed “other domestic animals useful to man.”  § 7-35-2(C). Because elk are not specifically listed, the Code defines livestock as: “cattle, buffalo, horses, mules, sheep, goats, swine, raffles [i.e., ostriches, rhea, and emu] and other domestic animals useful to man.” § 7-35-2. Although the Code is not specific about domesticated animals that are used or raised on a farm or ranch, including the carcasses thereof, and exotic animals in captivity and includes horses, asses, mules, cattle, sheep, goats, swine, bison, poultry, ostriches, emus, rhea, camelds and farmed cervices upon any land in New Mexico.” NMSA 1978, § 77-2-1.1(A) (2001) (emphasis added). Cervidae are deer, elk, or moose.

Several years ago ostriches and emus were not typically tamed or raised for human consumption. However, entrepreneu-

change over time.

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Agapito Candelaria, acknowledged that if the Code considered elk to be livestock, then he would change his opinion regarding the non-agricultural use of the property.

In concluding that elk are not livestock, the Board relied on Candelaria’s testimony and on “PTD General Order No. 99-25” issued by the director of the Property Tax Department (PTD). In the four years preceding the assessment in question, Candelaria had personally classified the Nation’s private elk herd as livestock for purposes of the Code based on his agricultural background and the buying, selling, and trading of elk that the Nation engaged in. However, Candelaria attended a workshop for assessors at which he was told that the Code does not classify elk as livestock. In addition, PTD General Order No. 99-25 lists “value of livestock for property taxation purposes” for tax year 2000 pursuant to Section 7-36-21. The Order does not mention elk.

We look first to the Code, because as Candelaria acknowledged, it is only the interpretation of the statutes that might pre-
cclude classifying elk as livestock. There is no question that the use of land to produce livestock is an agricultural use. Section 7-36-20(B) (providing that “agricultural use” is “the use of land for the production of plants, crops, trees, forest products, orchard crops, livestock, poultry or fish.”) The Code defines livestock as: “cattle, buffalo, horses, mules, sheep, goats, swine, raffles [i.e., ostriches, rhea, and emu] and other domestic animals useful to man.” § 7-35-2(C). Because elk are not specifically listed, the question is whether they can be deemed “other domestic animals useful to man.”

We give effect to a statute’s language and refrain from further interpretation when the language is clear and unambiguous. Sims v. Sims, 1996-NMSC-078, ¶ 17, 122 N.M. 618, 930 P.2d 153. A “domestic animal” is “any of various animals (as the horse, ox, or sheep) which have been dom-

esticated by man so as to live and breed in a tame condition.” Webster’s Third New International Dictionary, Unabridged, 671 (1986). The evidence established that the Nation’s private elk herd is confined by an eight-foot fence and the animals’ breeding is entirely supervised and controlled. We see no meaningful distinction between the tameness of buffalo, which are by statute specifically deemed to be domestic ani-

mals, and the tameness of elk under these circumstances. Elk in a private herd are as “useful to man” as buffalo; both produce meat, pelts, and hides. The legislature obviously intended to specify well-known domestic animals as livestock and leave a catch-all category to include those inadvertently overlooked in the specific listing or those animals that ultimately develop through agricultural practice into “domestic animals useful to man.” Compare 1993 N.M. Laws ch. 166, § 1 (adopting former version of livestock definition that did not include raffles) with 1993 N.M. Laws ch. 39, § 1 (amending statute to add raffles to list of animals deemed to be livestock).

Both the Assessor and the Board relied on PTD General Order No. 99-25 to support the proposition that elk cannot be classified as livestock. They note that the Order lists many animals for valuation purposes but that elk are notably absent. However, buffalo, mules, and raffles are not mentioned in the Order either, despite their express inclusion in the definition of livestock in Section 7-35-2. Thus, the absence of an animal from the Order cannot be deemed conclusive or even to provide guidance in the interpretation of Section 7-35-2.

The Assessor, relying on State ex rel. Sefoico v. Heffernan, 41 N.M. 219, 67 P.2d 240 (1936), further argues that it is without the authority to “define” unspecified animals as “other domestic animals useful to man” because the legislature cannot properly delegate to an agency the discretion to establish substantive law. Id. at 230-31, 67 P.2d at 246-47. Sefoico involved a statute conferring on the State Game Commission the authority to define which animals were “game animals” and to determine hunting seasons and approved methods of hunting. 1931 N.M. Laws ch. 117, § 3. While the Court concluded that only the legislature could define game animals, it also stated that “some situations require the vesting of some discretion in public officials, as, for instance, where it is difficult or impracticable to lay down a definite, comprehensive rule.” Sefoico, 41 N.M. at 228, 67 P.2d at 245 (citation and internal quotation marks omitted). Section 7-35-2 demonstrates such a situation. The legislature has conferred discretion on as-

sessment to determine what constitutes “other domestic animals useful to man” because, as the situation with raffles illustrates, the types of animals domesticated by man can
do not concern the same subject matter. Both codes address the term “livestock” in some detail, and therefore, we “presume that the legislature did not intend to enact a law inconsistent with existing law.” State ex rel. Quintana v. Schnedar, 115 N.M. 573, 575, 855 P.2d 562, 564 (1993). This Court harmonized the Gross Receipts and Compensating Tax Act with the Bingo Act in Quantum Corp., 1998-NMCA-050, ¶ 14-21, and we have no difficulty similarly harmonizing the two codes in this case. Because the Nation’s private elk herd is considered livestock for purposes of the disease eradication and other provisions of the Livestock Code, we see no reasonable basis for considering the herd to be anything other than livestock for purposes of the Code.

{34} Determining that the private elk herd is properly classified as livestock does not end the inquiry into whether the Nation’s property is used primarily for agricultural purposes because the private herd utilizes only 6400 acres of the 27,040.8-acre tract at issue. In addition to the private elk herd, there is a herd of wild elk, which we refer to as the public herd, that grazes the remaining portion of the disputed property, referred to as the “upland” portion. All of the Ranch, including this upland portion of the property, is utilized consistent with the Nation’s conservation agreement with the USDA. The Nation acknowledges that the primary purpose of the land management strategies contemplated by this agreement is “to promote the vitality of the wild elk herd grazing on the Property, to maximize the income from elk harvest permits, and thereby compensate the corporation for its production of natural forage for the wild herd.”

{35} By the same analysis we employed with respect to the private elk herd, we hold that the public elk herd, which utilizes the Nation’s property and for which the Nation sells hunting permits and guide services, cannot be classified as livestock because the elk in that herd do not constitute “other domestic animals useful to man.” The public herd is not domestic or domesticated, and the Nation does not engage in any breeding programs with respect to that herd. The question then becomes whether the Nation’s USDA agreement can be deemed primary agricultural use.

The Soil Conservation Program

{36} Although the Assessor conceded that the USDA agreement was a bona fide agricultural use of the property, the Board did not agree. The Board found that the USDA agreement did not qualify as a “soil conservation program” as that term is used in Section 7-36-20(B) because the agreement “has, as its primary purpose, the development and maintenance of a habitat suitable for the maintenance of elk, not soil conservation.”

{37} Section 7-36-20(B) provides:

For the purpose of this section, “agricultural use” . . . includes the use of land that meets the requirements for payment or other compensation pursuant to a soil conservation program under an agreement with an agency of the federal government.

Thus, in order to be an agricultural use under this definition, an agreement with a federal agency must qualify for compensation and must be pursuant to a soil conservation program. See High Ridge Hinkle Joint Venture, 1998-NMSC-050, ¶ 5 (stating that language of statute is to be given its ordinary meaning unless legislature indicates a contrary intent).

{38} The Nation’s agreement with the USDA was part of that agency’s Environmental Quality Incentives Program (EQIP). See 16 U.S.C. § 590h(b)(1) (2003); 16 U.S.C. §§ 3839aa to -9 (2003). As such, the agreement met the requirements of Section 7-36-20(B). First, the agreement provided for compensation in the form of cost-sharing. Second, the agreement is pursuant to a soil conservation program. Although the information in the record refers variously to “resources conservation” and “soil conservation,” it is apparent that the agreement substantively results in conservation of the soil as well as other resources. For example, the agreement requires the Nation to manage irrigation water to “minimize soil erosion” and to manage pasture and hayland “to maintain enough cover to protect the soil.” (Emphasis deleted.) Moreover, it appears that several of the federal government’s soil conservation programs for agricultural use fall within the purview of the broad EQIP. Consequently, certain soil conservation agreements with federal agencies will necessarily be part of an EQIP agreement encompassing natural resources in addition to soil, rather than a conservation agreement strictly restricted to soil. Therefore, we hold that the Nation’s EQIP agreement with the USDA qualifies as a soil conservation program, which is a bona fide agricultural use under Section 7-36-20(B).

{39} The next question is whether the Nation’s EQIP agreement constitutes primary use of the disputed property. Alexander, 1999-NMCA-021, ¶ 11. The Department’s regulation, 3 NMAC 6.5.27, persuades us that it is. 3 NMAC 6.5.27(A) provides:

(1) When applying for classification of land as land used primarily for agricultural purposes, the owner of the land bears the burden of demonstrating that the use of the land is primarily agricultural. This burden cannot be met without submitting objective evidence that:

(a) the plants, crops, trees, forest products, orchard crops, livestock, poultry or fish which were produced or which were attempted to be produced through use of the land were:

(i) produced for sale or home consumption in whole or in part;

(ii) used by others for sale or resale;

(iii) used, as feed, seed or breeding stock, to produce other such products which other products were to be held for sale or home consumption;

(b) the use of the land met the requirements for payment or other compensation pursuant to a soil conservation program under an agreement with an agency of the federal government;

(c) the owner of the land was resting the land to maintain its capacity to produce such products in subsequent years.

Although this regulation states that the burden of proof is on the taxpayer, which was the scheme before Section 7-36-20 was amended in 1997, the regulation’s definition of primary agricultural use is still applicable. The regulation sets out three alternative circumstances that will qualify property for primary agricultural use: (1) land on which certain agricultural products were produced or attempted to be produced with the intent that they be sold, consumed at home, used by others for sale, or used to produce other agricultural products; (2) land meeting the requirements for a conservation program under an agreement with a federal agency; or (3) land being left fallow to maintain its capacity to produce agricultural products. Because each option is separated by the
disjunctive ‘or,’ we conclude that any one of the three alternatives qualifies the land for primary agricultural use. See Hale v. Basin Motor Co., 110 N.M. 314, 318, 795 P.2d 1006, 1010 (1990) (stating that ‘‘or’’ should be given its normal disjunctive meaning unless the context of a statute demands otherwise’’); N.M. Dep’t of Health v. Ulibarri, 115 N.M. 413, 416, 852 P.2d 686, 689 (Ct. App. 1993) (‘‘We construe administrative agency rules in the same manner as we interpret statutes.’’). Consequently, the Nation’s use of the disputed property pursuant to its EQIP agreement with the USDA qualifies as ‘‘primary agricultural use’’ under the regulation.

{40} The Board concluded that the EQIP agreement could not qualify as primary agricultural use because the Nation’s primary purpose in carrying out the agreement was to develop habitat for the wild herd. An examination of the regulation’s provisions regarding the various agricultural uses recognized by Section 7-36-20 reveals that the Board’s conclusion rests on an erroneous interpretation of 3 NMAC 6.5.27. Cf. High Ridge Hinkle Joint Venture v. City of Albuquerque, 119 N.M. 29, 38, 888 P.2d 475, 484 (Ct. App. 1994) (explaining that reviewing court does not consider or defer to agency’s interpretation of agency-enacted code unless the code is ambiguous). With respect to the agricultural uses set forth in Section 7-36-20(B) that involve ‘‘the production of plants, crops, trees, forest products, orchard crops, livestock, poultry [and] fish,’’ the regulation clarifies that these uses will be deemed primary only if the specified items are ‘‘produced for sale or home consumption,’’ ‘‘used by others for sale or resale,’’ or ‘‘used, as feed, seed or breeding stock, to produce other such products which other products were to be held for sale or home consumption.’’ 3 NMAC 6.5.27(A)(1)(a); see also Alexander, 1999-NMCA-021, ¶ 16 (holding that the regulation provides a reasonable method for determining whether a purported agricultural use is the primary use of the property). By contrast, with respect to the other agricultural use set forth in Section 7-36-20(B) at issue here—‘‘meet[ing] the requirements for payment or other compensation pursuant to a soil conservation program under an agreement with an agency of the federal government’’—the regulation adds no further requirements necessary to qualify such use as primary. 3 NMAC 6.5.27(A)(1)(b). Thus, we conclude that if a taxpayer’s primary use of property meets the requirements for compensation under a federal soil conservation agreement, and if the taxpayer has actually entered into such an agreement, then the taxpayer’s use will be deemed to be primarily agricultural. We suggested this interpretation of the regulation in Alexander, 1999-NMCA-021, ¶¶ 31-32, when we held that a taxpayer’s land was not primarily used for agricultural purposes because, among other reasons, he did not prove that he had entered into a soil conservation agreement even though he qualified for such an agreement.

{41} The record establishes that the Nation’s use of the upland property for wild elk habitat met the requirements for compensation under the EQIP agreement with the USDA. The district conservationist for the USDA’s Natural Resources Conservation Service wrote a letter stating that the Nation ‘‘has in effect an approved conservation plan and cost-sharing contract’’ and that the Ranch qualified for the program ‘‘because the land is used to produce livestock or other animals such as wildlife for food or fiber.’’ Pursuant to 3 NMAC 6.5.27(A)(1)(b), the Nation’s qualification for compensation under this agreement constituted primary agricultural use of the upland portion of the property.

{42} We conclude that the plain meaning of Section 7-36-20 and the regulations promulgated under that statute compel the conclusion that the disputed land is utilized primarily for agricultural purposes. The Board’s contrary conclusion resulted from an erroneous interpretation of the law. We therefore reverse the Board’s affirmance of the Assessor’s amended notice of valuation.

CONCLUSION

{43} For the foregoing reasons, we reverse the Board’s determination affirming the Assessor’s amended notice of valuation and remand to the Board for proceedings consistent with this opinion.

{44} IT IS SO ORDERED.

CYNTHIA A. FRY, Judge

WE CONCUR:
MICHAEL D. BUSTAMANTE, Judge
CELIA FOY CASTILLO, Judge
Defendant Richard Johnson appeals his conviction of criminal damage to property on two grounds: (1) that the trial court erred in denying his motion to suppress the out-of-court and in-court identifications by two witnesses and (2) that the trial court improperly sentenced him to thirty days of jail time for his failure to admit guilt at sentencing. We hold that the trial court improperly denied Defendant’s suppression motion. We reverse Defendant’s conviction and remand for a new trial. We do not address the merits of the sentencing issue.

1. BACKGROUND

{2} During the early morning of April 30, 2000, while it was dark, Arturo Montano noticed a car stopped in front of his house with two or three people arguing in it; the car then moved farther up the street and parked. The area in front of Montano’s house where the car initially stopped was well lit; the area where the car finally parked was not lit as well. Two individuals (perpetrators) got out of the car; Montano saw them shaking spray cans. He returned to his house and alerted his roommate, Michael Flores, that there was some activity going on; Flores joined Montano outside to observe the activity. They saw the two perpetrators across the street and down a couple of houses by the car of a neighbor, Selena Garcia. One perpetrator was standing by a fence, watching while the other was spray-painting Garcia’s car; the two perpetrators then exchanged places. According to Montano, the perpetrators were also spray-painting another vehicle next to Garcia’s car; he thought the other vehicle might have been a truck. Flores was between 60 and 75 to 80 yards away from the perpetrators; Garcia’s car was in an area well lit by streetlights. Montano could see the perpetrators “pretty good”; Flores indicated he had no trouble seeing what was going on. He watched the two perpetrators spray-painting for fifteen to twenty minutes; Montano watched for up to forty-five minutes.

{3} At some point, Montano walked within 10 feet of the perpetrators’ car so that he could get the license plate number. It is unclear how far away that car was from Garcia’s car, but it was “pretty dark” in that area. After getting the license plate number, Montano called the police from a pay phone. At some point, he wrote the number down on a piece of paper as 37566N. The two perpetrators drove off in the car in which they arrived; Flores believed the car was a gold, yellow, or off-tan later model Ford with square lights. Montano did not know the make or model of the car but indicated it was not new, was beige, and had square lights. He noticed the car was damaged toward the front, maybe on the bumper or grill. Flores did not remember any body damage.

{4} That morning, Garcia called the police after finding her car vandalized. A police officer was dispatched to her home. At the request of Garcia, the officer later returned to speak for the first time with the two witnesses, Montano and Flores. Montano gave the officer the license plate number he had written down. Flores told the officer that one of the perpetrators was African-American, between 6 feet and 6 feet 2 inches, with a slim build, and wearing a T-shirt with “an emblem on it that stood out big time.” Flores was unable to describe the second perpetrator, whom he had heard but never saw. There is no indication in the record that on April 30, Montano gave the officer any description of either perpetrator.

{5} On May 10, at the request of the police, Montano and Flores went to a business parking lot and were asked to identify the vehicle they had observed on April 30. They were driven around the parking lot in a police car. There were five to eight other vehicles in the lot; only one was brown or beige. Flores immediately spotted a car that was “very similar” to the one he remembered from April 30. It took Montano “a while . . . to figure it out”; he did so when he realized the license plate matched in part the plate number he had written down. He also noticed the car had the square lights he remembered from April 30. The actual number on the license plate was 375GGK; the car was a Pontiac LE owned by Defendant.

{6} Montano and Flores then sat in a police car across the street from Defendant’s place of business while police conducted a showup. In the showup, police told the witnesses that an officer was going to bring out an individual; the witnesses were asked to see if they recognized him. According to Flores, the car was about 400 or 500 yards away from the individual. The record does not specify what the witnesses said to the police at the showup; but, evidently, both witnesses indicated they recognized the individual from the scene of the crime.

{7} Defendant subsequently moved to suppress the identification of him made by Montano and Flores. At the motion hearing, Montano testified that he recognized Defendant on May 10 because of his features; his bald head and his ears looked “pretty close” to that of one of the perpetra-
At trial, Flores testified that he observed one perpetrator “very well” on April 30 and that he did not get a good look at the other perpetrator because Flores “was concentrating on the one gentleman that was right there . . . in the street that was very clearly visible.” Flores further testified that although he was a good distance away from Defendant’s place of business during the showup on May 10, he could see people “very clearly.” Flores said he had “[n]ot a question at all” in mind that it was Defendant he saw on April 30. Montano, other than to say he was able to give the police “somewhat of a description” of one perpetrator, gave no trial testimony as to what he told the police on April 30 about what the perpetrators looked like; he did testify that “[o]ne of them was more distinct” and that one looked African-American, while the other looked like a “light Hispanic or white guy.” Montano said he was “100% [ ] percent sure” that the car in the photographs submitted as evidence at trial was the same car he saw on April 30.

II. DISCUSSION

Before proceeding with our analysis, we briefly address two matters: whether the trial court mistakenly analyzed the showup identification as a credibility question for the jury, as Defendant asserts, and whether Defendant filed a motion to suppress identification of the car.

The trial court’s ruling included the statement “I think it’s a matter of credibility of evidence, to the jury, so the motion to suppress is denied.” Defendant presents this as evidence of the trial court’s refusal to evaluate for itself the reliability of the identification, as required under the totality of the circumstances test. We disagree. The court clearly stated that its decision was based on the totality of the circumstances. Furthermore, once the court made the decision to admit the testimony, the identification was indeed a matter of credibility for the jury. See State v. Cheadle, 101 N.M. 282, 286, 681 P.2d 708, 712 (1983) (“Once a court finds that the evidence is admissible, it becomes a jury determination as to the accuracy of a witness’[s] identification.”).}

There is no indication from the record that the trial court failed to apply the totality of the circumstances test to determine the reliability of the showup identification or that the trial court otherwise “refused [its] function as gatekeeper,” as Defendant claimed.

(11) Defendant’s counsel suggested at oral argument that a motion to suppress identification of the car was “lumped in together” with the motion to suppress identification of Defendant. We do not interpret the motion submitted to the trial court in such a fashion. Defendant specifically moved the trial court to “[s]uppress the identification of Mr. Johnson.” Our opinion, therefore, concerns the suppression of that identification, not of the identification of the car.

A. Standard of Review

(12) The parties disagree as to the standard of review. Defendant, without citing authority, urges de novo review in the reply brief. The State, citing State v. Maes, 100 N.M. 78, 82, 665 P.2d 1169, 1173 (Ct. App. 1983), requests us to review the court’s decision for abuse of discretion. We disagree that Maes sets an abuse of discretion standard for suppression of identification testimony. When, as here, the trial court’s decision involved factual and legal questions, this Court will defer to the trial court’s purely factual assessment; however, we are not bound by the court’s application of law to the facts. See State v. Attaway, 117 N.M. 141, 144-46, 870 P.2d 103, 106-08 (1994) (discussing standards of review for fact-finding and for mixed questions of fact and law). This standard is the same as that used in suppression cases where our review is “whether the law was correctly applied to the facts, viewing them in the manner most favorable to the prevailing party[,] and drawing all reasonable inferences in support of the court’s decision.” State v. Salgado, 1999-NMSC-008, ¶ 16, 126 N.M. 691, 974 P.2d 661 (internal quotation marks and citation omitted). Because the trial court’s ultimate conclusion drawn from the facts was a legal determination, that is, that the witnesses’ testimony did not violate Defendant’s due process rights, we review it de novo. See Attaway, 117 N.M. at 144-46, 870 P.2d at 106-08.

B. Identification

1. Out-of-Court Identification

(13) In reviewing the admissibility of showup identification, we analyze whether the procedure used was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification and, if so, whether the identification is nonetheless reliable under the totality of the circumstances. See Patterson v. Lemaster, 2001-NMSC-013, ¶ 22, 130 N.M. 179, 21 P.3d 1032; State v. Padilla, 1996-NMCA-072, ¶ 20, 122 N.M. 92, 920 P.2d 1046; see also State v. Stampley, 1999-NMSC-027, ¶ 14, 127 N.M. 426, 982 P.2d 477; State v. Nolan, 93 N.M. 472, 476, 601 P.2d 442, 446 (Ct. App. 1979). Reliability of the identification is a due process requirement. Patterson, 2001-NMSC-013, ¶ 20. To assess reliability, “courts weigh the corrupting effect of the suggestive identification” against five factors. Id. (internal quotation marks and citations omitted). Those factors are (1) the witness’s opportunity to view the perpetrator at the time of the crime, (2) the witness’s degree of attention at the time of the crime, (3) the accuracy of the witness’s pre-identification description, (4) the certainty of the witness, and (5) the time elapsed between the crime and the identification. Id.; Cheadle, 101 N.M. at 284, 681 P.2d at 710.

(14) Showup identifications are inherently suggestive, and their use “should be avoided.” Patterson, 2001-NMSC-013, ¶ 21; see Padilla, 1996-NMCA-072, ¶ 19. Citing these two cases, Defendant’s appellate counsel insists that New Mexico prohibits any use of showup identifications, unless courts first find that exigent circumstances made a showup the only feasible means of identifying a perpetrator. When questioned at oral argument, defense counsel suggested that when our Supreme Court in Patterson wrote that showups “should be avoided,” it meant to write “should be avoided, unless it’s necessary.” In further support of her exigency theory, counsel also referred to language in Padilla where this Court quoted from 1 Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 7.4(f), at 590 (1984): “In particular, showups should be deemed to violate due process absent the most imperative circumstances.” Padilla, 1996-NMCA-072, ¶ 19 (internal quotation marks and citation omitted). That line was quoted in our response to Padilla’s request that we reexamine New Mexico precedent on showups; we recognized in Padilla that showups have been sharply criticized and that their use has been discouraged elsewhere, absent exigent circumstances. Id. But we declined to establish an exigency rule in Padilla, and our Supreme Court did not do so in Patterson. We therefore reject counsel’s interpretation of those cases. Counsel suggests in the brief in chief that
other states have “focused on the need to show exigent circumstances as a matter of state constitutional law.” To the extent that she requests we establish an exegesis rule in this case, we find that the state constitutional issue was not preserved below. *See State v. Gomez*, 1997-NMSC-006, ¶¶ 22, 23, 122 N.M. 777, 932 P.2d 1 (stating preservation requirements for a party’s assertion that the state constitution offers greater protection than the federal). We therefore do not address it; we return now to our analysis.

{15} As indicated above, showup identifications are inherently suggestive. *Patterson*, 2001-NMSC-013, ¶ 21; *Padilla*, 1996-NMCA-072, ¶ 20. Although Defendant was not sitting in the back of a police vehicle during the showup, as in *Patterson*, or spotlighted by the headlights of a police vehicle, as in *Padilla*, we nevertheless find the circumstances around the showup highly suggestive. In particular, we are concerned that the showup occurred immediately following the witnesses’ identification of the car they saw on April 30. This sequence could have led the witnesses to believe that the person whom police brought out for the showup was the owner of that car. In addition, the police showed the witnesses both the car and Defendant on May 10 while the witnesses were together. These circumstances contribute to making the procedure used highly suggestive. The indicia of reliability must be significant to outweigh the suggestiveness. *Patterson*, 2001-NMSC-013, ¶ 22. We next evaluate the reliability of the identification by considering the five factors.

{16} There is no doubt that the witnesses had the opportunity to view the perpetrators for an appreciable period of time: Flores watched the activity for fifteen to twenty minutes; Montano, for up to forty-five minutes. Although there was testimony that the area around the perpetrators’ car was “pretty dark,” the area around Garcia’s car, which the perpetrators were spray-painting, was well lit. We are concerned, however, about the distance between the witnesses and the perpetrators and about the absence of evidence that either witness saw the face of the perpetrator they identified. Flores was between 60 and 75 to 80 yards away from Garcia’s car. Montano does not clearly testify as to his distance from the perpetrators; we presume from the conversation that took place between Montano and Flores about phoning the police that Montano was standing at least part of the time with Flores while watching the spray-painting. Montano may have had a closer view of the perpetrators when they initially drove up in front of his house; the testimony, however, indicates only that he could not tell whether there were two or three people in the car.

{17} The distance and lack of facial identity make this case very different from others in which our Courts concluded that the witnesses had opportunity to view the perpetrators. *See State v. Jacobs*, 2000-NMSC-026, ¶ 32, 129 N.M. 448, 10 P.3d 127 (stating that the witnesses spoke with the perpetrator before accepting a ride with him and that they observed what he looked like during the fifteen-minute car drive); *Stampley*, 1999-NMSC-027, ¶ 24 (explaining how the witnesses directly looked at the perpetrator’s face and therefore had ample opportunity to view him); *Cheadle*, 101 N.M. at 284-85, 681 P.2d at 710-11 (discussing how all four witnesses either talked directly to the perpetrator within inches of his face or saw him up close and stating that two witnesses testified as to his facial or hair features); *Nolan*, 93 N.M. at 473, 601 P.2d at 443 (noting that the witness was able to observe the perpetrator at close range and describe his beard, hair, and eye color).

{18} We find the circumstances here to be more like those in *Padilla* and *Patterson*. In *Padilla*, the witness observed the criminal activity from across the street and did not testify as to seeing the perpetrator’s face. *Padilla*, 1996-NMCA-072, ¶¶ 16, 21. We concluded that the reliability of the witness’s identification was questionable. *Id.* ¶ 21. In *Patterson*, the witnesses, although perhaps in close proximity to the perpetrator, had a very limited view of the perpetrator’s face and hair, both of which were concealed. Our Supreme Court determined that the perpetrator’s most distinct physical characteristics were not visible to the witnesses; it held that the lack of an opportunity to view those characteristics weighed against the reliability of the identification. *Patterson*, 2001-NMSC-013, ¶¶ 4, 5, 23. Similarly, here, the witnesses’ distance from the perpetrator they identified and the absence of testimony as to having seen his face lead us to conclude that the witnesses did not have the opportunity to view the perpetrator’s most distinctive characteristics. The first factor, therefore, does not indicate reliability.

{19} There is no evidence that the witnesses’ degree of attention was impaired during the period of time they observed the perpetrators. The second factor, therefore, weighs toward reliability.

{20} There is, however, no indication of reliability from the third factor, accuracy of the pre-identification description. Flores testified at the motion hearing that he described one perpetrator to the police as African-American, 6 feet to 6 feet 2 inches tall, with a slim build, and wearing a T-shirt with “an emblem on it that stood out big time.” Flores did not suggest what the emblem looked like, so there is no way of assessing whether it made the T-shirt an uncommon item of clothing or not. Defendant is African-American, so Flores accurately described his race. While the trial court and jury had the opportunity to assess Defendant’s height and build, there is nothing in the record indicating Defendant’s height or build. Even if we assumed Defendant to be 6 feet to 6 feet 2 inches and slim, it would not be enough to indicate reliability. *See Patterson*, 2001-NMSC-013, ¶ 24 (concluding that descriptions of height, weight, and age are “very sketchy” and that although they may bolster an otherwise detailed physical description, they do not by themselves signify reliability). There was no testimony on whether Defendant owned the T-shirt with the emblem described by Flores.

{21} Montano provided details of features at the motion hearing, when he testified that Defendant looked like one of the perpetrators Montano saw on April 30; he testified that he recognized Defendant on May 10 by his bald head and his ears. Montano also stated that the perpetrator was wearing a windbreaker with a medical emblem on it, although he was not sure if it was indeed a medical emblem. However, there is no evidence that any of these descriptions were given to the police before the showup. Montano merely stated at trial that he gave the police “somewhat of a description.” Montano did testify that he gave the police the license plate number of the car he saw on April 30; as we stated above, however, Defendant’s motion to suppress identification concerned the witnesses’ identification of him, not of the car. We cannot conclude, therefore, that the reliability of Flores’s or Montano’s identification of Defendant at the showup was supported by the accuracy of their pre-identification descriptions.

{22} The fourth factor is the level of the witnesses’ certainty of identification. As we stated above, we are unable to assess from the record exactly what either wit-
ness told the police at the showup itself. However, Flores expressed no doubt at the motion hearing that he recognized the individual at the showup as the one he saw on April 30. In Patterson, our Supreme Court noted that when the witness finally identified the perpetrator at the showup, he did so on the basis of common items of clothing worn by the perpetrator, rather than any distinctive physical characteristics, which the witnesses never had the opportunity to view. Patterson, 2001-NMSC-013, ¶¶ 24-25. The Court concluded that this factor did not indicate reliability. Id. ¶ 25. We therefore temper Flores’s certainty with the absence of evidence that Flores saw any of the perpetrator’s distinctive physical characteristics.

{23} Montano provided scant testimony on the certainty of his identification. When asked by defense counsel at the motion hearing if there was any question in his mind as to whether the individual the police showed him on May 10 was the same individual he saw on April 30, Montano did not directly answer the question. His only response was that he was wondering about “the other guy, the white guy or the light Hispanic.” Montano testified that the African-American was “[m]ore distinctive,” but we are unable to gauge the certainty of the showup identification from this remark or from any of Montano’s other testimony. This factor does not weigh in favor of the reliability of Montano’s identification; it weighs slightly in favor of Flores’s identification.

{24} The length of time between the crime and the identification, the fifth factor, is ten days and unlike the length of time in other showup cases. See, e.g., Patterson, 2001-NMSC-013, ¶¶ 7, 8, 25 (stating there was “little time” between the crime and the showup, occurring immediately afterwards); Padilla, 1996-NMCA-072, ¶ 16 (observing the showup occurred shortly after the crime); see also Nolan, 93 N.M. at 477, 601 P.2d at 447 (stating only a “few short hours” elapsed between the crime and the photographic identification). But see Stampley, 1999-NMSC-027, ¶ 29 (holding that “[a] one-month lapse of time [for a photographic identification] is not unreasonable, particularly under these circumstances where the witnesses had an opportunity to view the shooter and where their attention . . . was focused directly on the shooter”). Defendant argues, without citation or authority, that “the memory of the perpetrators was no longer fresh in [the witnesses’] minds” by the time of the showup; we find no testimony to that effect. We are not willing to conclude in this case that ten days is impermissibly long. However, we conclude that the length of time between the crime and the identification neither strengthens nor undermines the existence of reliability, given Montano’s absence of certainty and the weakness of Flores’s certainty of identification, as well as the lack of an opportunity either witness had to view the perpetrator.

{25} Having considered each of the factors, we determine that the showup identification lacked the indicia of reliability necessary to overcome the suggestiveness of the identification procedure. We next turn to the in-court identification.

2. In-Court Identification

{26} In-court identification is only admissible if it is independent of and not tainted by extrajudicial identification. Cheadle, 101 N.M. at 285, 681 P.2d at 711. We concluded above that the showup was highly suggestive and that the witnesses’ identification of Defendant at the showup was unreliable. Under these circumstances, we hold that the showup identification tainted the in-court identification by both witnesses. Cf. Stampley, 1999-NMSC-027, ¶ 31 (holding that since the pretrial identification procedures were not unduly suggestive, they could not have tainted any subsequent identification); Nolan, 93 N.M. at 477, 601 P.2d at 447 (concluding that in-court identification was not tainted, based upon the reliability of the out-of-court identification). As a result, the in-court identification is inadmissible.

{27} We hold that the trial court incorrectly denied Defendant’s motion to suppress the out-of-court and in-court identifications of Defendant. Without the identifications, we cannot say that the State was able to prove beyond a reasonable doubt that Defendant intentionally damaged the property of another. See State v. Esguerra, 113 N.M. 310, 315, 825 P.2d 243, 248 (Ct. App. 1991) (“Error in the admission of evidence in a criminal trial must be held prejudicial . . . if there is a reasonable possibility that the evidence complained of might have contributed to the conviction.”). We therefore reverse Defendant’s conviction.

III. CONCLUSION

{28} We reverse Defendant’s conviction and remand for a new trial consistent with this opinion.

{29} IT IS SO ORDERED.

CELIA FOY CASTILLO,
Judge

WE CONCUR:
CYNTHIA A. FRY, Judge
MICHAEL E. VIGIL, Judge
A. JOSHDRE ALARID, JUDGE

{1} The State Motor Vehicle Division (MVD) filed a notice of appeal from an order of the district court that reinstated Frank Garza’s driver’s license. The parties briefed the issues of the proper method of appellate review, the timeliness of Garza’s motion for reconsideration before the district court, and the use of the breath test results in revoking his driver’s license. We affirm the district court’s order reinstating Garza’s license.

PROPER PROCEDURE FOR APPEL- LATE REVIEW

{2} While this case was pending on appeal, this Court clarified that the proper procedure for MVD to appeal the district court order was by writ of certiorari under Rule 12-505(A)(2) NMRA 2004 rather than by direct appeal. See Dixon & Strickland v. State Taxation & Revenue Dep’t, Nos. 22,787 & 22,827 (N.M. Ct. App. Feb. 17, 2004). Since MVD filed its notice of appeal within twenty days of the district court’s order, however, we exercise our discretion to treat the notice of appeal as a petition for writ of certiorari and to reach the merits of the issues raised in this case. See id. ¶ 10; W. Gun Club Neighborhood Ass’n v. Extraterritorial Land Use Auth., 2001-NMCA-013, ¶ 3, 130 N.M. 195, 22 P.3d 220. In reviewing those merits, “we will conduct the same review of an administrative order as the district court sitting in its appellate capacity, while at the same time determining whether the district court erred in the first appeal.” See Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm’n, 2003-NMSC-005, ¶ 16, 133 N.M. 97, 61 P.3d 806. We review the order of revocation “to determine if it is arbitrary, capricious, or an abuse of discretion; not supported by substantial evidence in the record; or, otherwise not in accordance with law.” Id. ¶ 17.

TIMELINESS OF THE MOTION TO RECONSIDER

{3} The district court initially entered an order affirming the hearing officer’s revocation of Garza’s license. This order was entered on December 18, 2001. On January 3, 2002, Garza filed his motion to reconsider, re-asserting the issue of the foundational requirement for the admission of the breath test results. A hearing was held on January 31, 2002, and the district court orally ruled on the motion. The district court then entered its order on February 12, 2002, reversing the hearing officer and reinstating Garza’s driving privileges. See Sanchez v. Saylor, 2000-NMCA-099, ¶¶ 28-29, 129 N.M. 742, 13 P.3d 960 (determining that an oral granting of a post-judgment motion within the required thirty days was valid and the court retained jurisdiction after the thirty days to enter a written order conforming to its oral ruling).

{4} MVD argues that Garza’s motion to reconsider was not timely filed. Under Rule 1-074(R) NMRA 2004, Garza was required to file his motion for reconsideration within ten days of the date of the district court’s December 18, 2001, final order. Under Rule 1-006(A) NMRA 2004 when the time for filing is less than eleven days, intermediate Saturdays, Sundays, and legal holidays are excluded from the computation of time. MVD argues that Rule 1-006 should not apply, noting that Rule 1-074(R) specifically states the “three (3) day mailing” provision of Rule 1-006(D) does not apply. We are not persuaded that the exclusion of one provision of a rule automatically implies exclusion of the entire rule. The computation of time provision for filing periods of less than eleven days and the provision allowing an extra three days if the pleading is served by mail are distinct provisions of Rule 1-006. We reject MVD’s argument that Rule 1-006(A) does not apply to filing motions under Rule 1-074(R). Garza’s motion was timely filed since, excluding intermediate weekends and legal holidays, the tenth day after December 18, 2001, was January 3, 2002.

THE BREATH TEST RESULTS

Preservation of the Issue

{5} During the license revocation hearing, the breath test results were admitted into evidence during the direct examination of the police officer. The hearing officer had proposed to admit the test results into evidence and specifically asked Garza’s counsel if he had any objection. Garza’s counsel stated “I do not.” During the cross-examination of the police officer, however, Garza’s counsel elicited testimony that the police officer had “no idea” whether the required annual certification of the breathalyser by the Scientific Laboratory Division (SLD) had been conducted. The police officer testified that he was not a key operator and was not responsible for making sure the machine was up to date in its annual certification. During closing argument, Garza’s counsel objected to the breath test on the ground that MVD had not met the foundational requirement of proving the annual certification. The hearing officer rejected this argument, asserting that annual certification was not a foundational requirement.

{6} In State v. Onsurez, 2002-NMCA-082,
¶ 13, 132 N.M. 485, 51 P.3d 528, this Court held, “in cases where the defendant properly
preserves the objection, the State must show
that the machine used for administering a
breath test has been certified by SLD.” In
that case, involving a criminal conviction
after a magistrate court trial, we determined
that the defendant had not preserved the is-

issue because he did not specifically argue
the issue he sought to appeal. Id. ¶ 14. Because
the issue was not preserved during trial, we
reviewed it only for plain or fundamental
error. Id. ¶ 15.

{7} In other cases involving administra-
tive hearings rather than trials, however,
we have noted that the formal rules of
procedure do not have to be applied to ad-
ministrative hearings. See Fitzhugh v. N.M.
Dep’t of Labor, 1996-NMSC-044, ¶ 46, 122
N.M. 173, 922 P.2d 555 (observing that
“[t]he record in administrative cases can
be characterized by procedural informality
and inadequate documentation that would
not be acceptable in a trial setting.”). See
also Chicharello v. Employment Sec. Div.,
1996-NMSC-077, ¶ 4, n.1, 122 N.M. 635,
930 P.2d 170. In Chicharello, our Supreme
Court rejected the argument that an issue
involving the failure to follow progressive
disciplinary policy had not been preserved
during the unemployment compensation
hearing. Id. The Court rejected this argu-
ment not only because the formal rules of
procedure do not apply in administrative
hearings, but also because the disciplinary
manual had been admitted into evidence
and testimony was elicited during the
hearing that the procedures had not been
followed. Id. The Court also noted that
“[t]he Board of Review’s dissent expressly
stated that [employer] had not followed its
disciplinary policy.” Id.

¶ 8 Although Garza did not object to the
admission of the breath test results at the
time they were admitted into evidence, he
did elicit evidence concerning the lack of
foundational and invoked a ruling from the
hearing officer on this issue. Because a
ruling was invoked and because the relevant
testimony was elicited during the cross-ex-
amination of the police officer, we determine
the issue was sufficiently preserved during
the administrative hearing. See id.

The Annual Certification Requirement
¶ 9 MVD argues that Onsurez should
be given prospective application and the
revocation should be upheld based on the
test results admitted into evidence. For
the reasons that follow, we disagree.

{10} In Onsurez, this Court cited State v.
Gardner, 1998-NMCA-160, ¶ 9, 126 N.M.
125, 967 P.2d 465 as stating, “‘following the
1993 amendments to the DWI laws, in
order for persons to be deemed to have
given their consent to blood or breath alco-
hol tests, and in order for those test results
to be admitted into evidence, the tests
must have been taken in accordance with
department of health regulations.’” See Onsurez,
2002-NMCA-082, ¶ 13. Our court noted
that these regulations included a require-
ment for certification and that previously
acknowledged foundational requirements such
as weekly calibration were only one
requirement for certification. Id. Because
of this, this Court concluded that, if the de-
fendant preserved the issue, the State must
prove certification by SLD. Id.

¶ 11 Although the particular issue of
annual certification as a foundational
requirement had not been addressed by
New Mexico courts before the decision in
Onsurez, we are not persuaded that Onsurez
overturns prior case law or establishes a
new rule of law. See generally Santillanes
v. State, 115 N.M. 215, 223, 849 P.2d 358,
366 (1993) (“The issue of retroactive effect
arises only when a court’s decision over-
turns prior case law or makes new law when
law enforcement officials have relied on the
prior state of the law.”). The determination
in Onsurez that annual certification by SLD
was a foundational requirement for admis-
sion of breath test results was premised on
the 1998 ruling in Gardner that required the
test be taken in accordance with the depart-
ment of health regulations. See Gardner,

¶ 12 As noted in Onsurez, “the founda-
mental requirements cited by the State
remain viable, but the regulations require
more.” Onsurez, 2002-NMCA-082, ¶ 13. The
decision in Onsurez did not overturn
prior case law or establish a new rule of
law. It applied the existing case law of
Gardner to the existing department of
health regulations. We are not persuaded
the reasoning in Onsurez should be applied
only prospectively.

¶ 13 MVD also argues that the ruling
in Onsurez will defeat the purpose of the
Implied Consent Act, which is designed
to expedite revocation hearings and limit
the number of issues. To the extent this
argument asks this Court to revisit our
determination that annual certification of
the breathalyser machine is a foundational
requirement for admission of breath test
results, we decline to do so.

¶ 14 Finally, MVD argues that the Brans-
ford case should control the foundational
requirements for admission of breath test
results in administrative hearings. See
Bransford v. State Taxation & Revenue Dep’t,
1998-NMCA-077, 125 N.M. 285,
960 P.2d 827. We agree—to the extent that
Bransford defined the method of proving
the foundational requirements. In Brans-
ford, this Court reiterated the determina-
tion that, upon proper objection, the State
must establish that the breathalyser machine
provides valid results. Id. ¶ 7. In answering
the question of how the State must make
a threshold showing in license revocation
hearings, this Court determined that the
evidence may be set forth by affidavit or
certification by an appropriately qualified
witness. Id. ¶ 10.

¶ 15 Because the foundational require-
ment at issue in Bransford was the calibra-
tion of the machine, this Court adopted by
analogy the metropolitan court rule allow-
ing proof by calibration testing records. Id.
¶ 11-12. These same procedures would
apply to the foundational requirement of
showing annual SLD certification, namely
that the State could satisfy its threshold
showing by affidavit, certification by an
appropriately qualified witness, or proof
of annual certification records. The fact
that calibration was at issue in Bransford
and not annual certification does not limit
the foundational requirements as stated in
Gardner and embodied in the departmen
t of health regulations.

CONCLUSION

¶ 16 Because there was no evidence of any
nature to establish SLD certification in this
case, the breath test results were improperly
admitted and the district court’s order re-
versing the hearing officer and reinstating
Garza’s driving privileges is affirmed.

¶ 17 IT IS SO ORDERED.

A. JOSEPH ALARID, Judge

WE CONCUR:
MICHAEL D. BUSTAMANTE, Judge
CELIA FOY CASTILLO, Judge
OPINION

RODERICK T. KENNEDY, Judge

{1} This appeal invites us to reverse the district court’s summary judgment granted to Defendants State Farm Mutual Automobile Insurance Company (State Farm) and Safeco National Insurance Company (Safeco), thus extending uninsured motorist (UM) coverage to Robert Miera Jr. when he was shot and killed by an occupant of an uninsured vehicle after Miera got out of the car in which he was riding and was in a confrontation with the occupants of the uninsured vehicle.

{2} We first hold that when Miera severed both his physical contact with the insured vehicle in which he rode and departed from the functional purpose of his occupancy in it, he ceased to be “occupying” that car. Consequently, he was no longer an “insured” under the vehicle’s State Farm UM policy. Summary judgment for State Farm was therefore appropriate, and we affirm the district court’s judgment on that issue.

{3} Second, we hold that summary judgment was improper as to Safeco because material issues of fact exist as to the elements allowing recovery under UM coverage. We accordingly reverse the district court’s granting of summary judgment in favor of Safeco.

FACTUAL AND PROCEDURAL BACKGROUND

{4} On April 22, 1998, Miera, Ruben Baros, Tara Hardern, and two other friends were in Hardern’s Chevy Tahoe going to a party. As the Tahoe approached a stop sign, its occupants noticed a Ford Mustang approaching the intersection. The Mustang was driven by its owner Andreas Yates and Robbie McGrew was his passenger. The Mustang made a U-turn and stopped approximately twenty feet behind the Tahoe. The purpose of the U-turn and stop is disputed. There is evidence that Yates thought the occupants of the Tahoe “were flipping [him] off” and that he looked menacingly at them as he passed and pulled up behind them. A few moments later, Miera and Baros demanded to be let out of the Tahoe and approached the Mustang. An argument and confrontation ensued between Miera and Baros and the occupants of the Mustang. Miera spat and threw beer cans at the Mustang and poked Yates. Within minutes, McGrew took Yates’ .40-caliber Glock pistol from the middle console of the Mustang and shot Miera to death.

{5} Hardern’s Tahoe was insured by State Farm; her policy included UM coverage. Miera, who lived at home, had UM coverage under his father’s Safeco policy. Yates’ Mustang was uninsured. Both Safeco and State Farm moved for and were granted summary judgment in the district court. Both alleged that under their policies Miera was not covered by their UM insurance.

DISCUSSION

Standard of Review


State Farm’s Insurance Policy Does Not Provide UM Coverage for Miera’s Death Because Miera Was Not “Occupying” the Tahoe When He Was Shot

{7} As a passenger in Hardern’s Tahoe, Miera was a class-two insured for purposes of UM coverage under her State Farm policy. According to the terms of the State Farm policy, UM coverage applies only if Miera could be considered to have been “occupying” the Tahoe when he was shot and killed. Under State Farm’s policy, “occupying” means “in, on, entering or alighting from.” In consideration of New Mexico case law on this issue, we hold that Miera was not “occupying” the Tahoe.

{8} It is true that Miera was in close proximity to the Tahoe at the time of the shooting; however, contrary to Plaintiff’s contention, this does not mean that Miera was “occupying” the Tahoe. In this case, Miera got out of the Tahoe to pursue an altercation on the
road. “Alighting” is an action that Miera had completed before he reached the Mustang. There was no causal connection between Miera’s being shot and his occupation of the Tahoe. The altercation occurred after Miera got out of the Tahoe, and his actions once out of the vehicle were not oriented to the use of the Tahoe. See Allstate Ins. Co. v. Graham, 106 N.M. 779, 780, 750 P.2d 1105, 1106 (1988) (holding claimant was not an occupant because she was “not engaged in a transaction oriented to the use of the [insured vehicle],” when engaged in changing the tire on another vehicle); see also State Farm Mut. Auto. Ins. Co. v. Baldonado, 2003-NMCA-096, ¶¶ 17, 18, 134 N.M. 196, 75 P.3d 413 (holding that the passenger “was not injured while occupying [the insured vehicle],” but rather was in retreat from the other car when shot). But see Cuevas, 2001-NMCA-038, ¶¶ 12, 13 (holding that the plaintiff was occupying the insured car at the time of the accident because he was engaged in repairing the insured car at the time of the accident, was within close proximity of the insured car, and there was a causal connection between the plaintiff and the insured car at the time of the accident).

In Cuevas, we applied Graham and other factors presented by case law in evaluating whether persons are occupants of a vehicle for purposes of extending UM coverage to them. Id. The factors that we considered there, as we will consider here are whether: “(1) there is a causal relationship between the injury and the vehicle; (2) there is a geographical proximity between the person and the vehicle; (3) the person was oriented to the vehicle; and (4) the person was engaging ‘in a transaction essential to the use of the vehicle at the time.’” Id. ¶ 8. Considering the factors that our courts have used to construe the meaning of “occupying” for the purpose of UM coverage, id. ¶¶ 8-11, we hold that Miera is not covered under State Farm’s policy. It is not enough that Miera was within close proximity of the Tahoe or that he in all likelihood would have returned to the Tahoe after the altercation and resumed on the way to his destination. The facts show that Miera engaged himself in a confrontation that he participated in away from the Tahoe. Demanding to be let out to pursue a confrontation with occupants of another car in this case was a transaction unrelated to the use of the Tahoe for purposes of UM coverage. Miera therefore severed any causal connection to the use or occupancy of the Tahoe. By doing so, he ceased to be the Tahoe’s occupant, and the district court did not err in granting summary judgment to State Farm.

A Question of Fact Exists Whether Safeco’s Insurance Policy Provides UM Coverage for Miera’s Death

(10) Plaintiff argues that he is entitled to collect damages under Safeco’s policy because Yates’ Mustang was uninsured at the time of the shooting. Miera was living with his father at the time of the incident and is therefore a household member covered under his father’s Safeco policy. Plaintiff contends that the shooting was an accident as defined by the policy and Miera’s death arose out of the operation, maintenance, or use of the Mustang. Under the Safeco policy, it will pay damages, caused by an “accident,” which an insured is legally entitled to recover from the owner or operator of an uninsured motor vehicle, but the owner’s or operator’s liability for damages “must arise out of the ownership, maintenance or use of the uninsured motor vehicle[.]” We hold that whether Yates bears any legal responsibility for the shooting, and whether his actions give rise to Safeco’s liability involve a dispute over facts that are sufficiently material as to defeat summary judgment.

(11) The Safeco policy extends coverage only when the owner or driver of the uninsured vehicle is legally liable to the injured person. Thus, in this case, because Yates, the owner and operator of the Mustang, did not shoot Miera, we must determine whether Yates can be held responsible when his passenger, McGrew, shot Miera using Yates’ gun. See Britt v. Phoenix Indem. Ins. Co., 120 N.M. 813, 814-15, 907 P.2d 994, 995-96 (1995). We determine whether there was a sufficient causal nexus between the use of the Mustang and the resulting injury to Miera, whether an act of independent significance broke the causal link between the use of the Mustang and the shooting, and whether the vehicle was put to its normal use. Under the analysis set forth by Britt and its progeny, see, e.g., Barncastle v. Am. Nat’l Prop. & Cas. Co., 5, 2000-NMCA-095, 129 N.M. 672, 11 P.3d 1234; Farmers Ins. Co. of Arizona v. Sedillo, 2000-NMCA-094, 129 N.M. 674, 11 P.3d 1236, there are issues of material fact about whether Miera’s shooting death arose out of the use of Yates’ Mustang.

(12) Though Safeco argues a different interpretation of the facts, other surrounding facts support a view of Yates’ conduct that night that could support a jury’s finding him legally culpable. Yates and McGrew had been drinking that afternoon, and Yates regarded McGrew as a “crack-head” with a “reputation for violence” who “doesn’t think straight.” Neither party disputes that Yates had his pistol in the car, in a location accessible to McGrew, and that Yates’ pistol was the one with which McGrew fatally shot Miera. Yates kept the gun in the car because he had been shot at in the past. Twenty-eight cartridges and casings from different calibers of ammunition were taken from his car by the police. Because Yates believed that McGrew’s collection of guns was mostly stolen, Yates told McGrew that he would bring his gun so McGrew would not need to bring one of his own. Yates stated that he did not want to be stopped by the police with a stolen gun in his car. At the same time, he made a U-turn to come up behind the Tahoe, thinking that its occupants were either “flipping us off” or “flagging us down,” either one of which had potential for a confrontation of some sort.

(13) These facts, though disputed, could fairly establish Yates’ culpability and connection to McGrew’s use of the gun. The next step is to evaluate the connection between Yates’ behavior and the use or operation of the car.

(14) To avoid summary judgment the incident must be shown to “arise out of the ownership . . . or use of the uninsured motor vehicle[.]” As Yates and McGrew drove around that night, Yates’ car amounted to little more than a holster on wheels. It held both a person and an instrumentality Yates knew to be dangerous—McGrew and a large-caliber handgun. Plaintiff can fairly argue that Yates used the car to maneuver to a point that accelerated the confrontation with Miera and Baros. This passes Britt’s test requiring Yates’ “active participation in or facilitation of the passenger’s commission of the harmful act.” Britt, 120 N.M. at 818, 907 P.2d at 999.

(15) There are triable issues of fact about whether the Mustang was used to initiate contact with the Tahoe; whether using the Mustang to carry the accessible weapon resulted in the Mustang being used to facilitate McGrew’s intentional tort; and thus whether the incident was shown to “arise out of the ownership . . . or use of the uninsured motor vehicle.” Therefore, the district court erred in granting summary judgment in favor of Safeco.

CONCLUSION

(16) We affirm the summary judgment entered in favor of State Farm and reverse the summary judgment in favor of Safeco.

(17) IT IS SO ORDERED.

RODERICK T. KENNEDY, Judge

WE CONCUR:
LYNN PICKARD, Judge
MICHAEL E. VIGIL, Judge
OPINION

CELIA FOY CASTILLO, JUDGE

{1} Plaintiff Aspen Landscaping, Inc., (Aspen) appeals, and Defendants Longford Homes of New Mexico, Inc., Longford at Albuquerque, a limited partnership, and Longford at Paradise Skies, a limited partnership, (collectively Longford) cross-appeal from a judgment awarding Aspen $27,534.14, plus prejudgment interest, and denying the parties’ motions for attorney fees, costs, and expenses of litigation. We affirm.

{2} Aspen raises four issues on appeal, and Longford raises three issues in its cross-appeal. We have consolidated and reordered the issues for the convenience of the reader. We hold that (1) the trial court did not abuse its discretion by denying Aspen’s untimely motion for a jury trial, (2) Longford’s reference to its 1999 offer of judgment in its proposed findings and conclusions was not improper, (3) the trial court properly awarded Aspen prejudgment interest on the amount due under the contract, and (4) the trial court correctly interpreted the contract.

I. BACKGROUND

{3} Aspen is a landscaping contractor in Albuquerque. Longford Homes of New Mexico, Inc., is a New Mexico corporation that is licensed as a general contractor in New Mexico. It is also the general partner in three limited partnerships, which are the developers of residential subdivisions in Albuquerque known as Crystal Ridge, Mountain View, and Paradise Skies. Two of the limited partnerships are defendants in this case: Longford at Albuquerque and Longford at Paradise Skies.


{5} On or about February 2, 1999, John Murtagh came to Albuquerque. He is the president of Longford Homes of New Mexico, Inc., and owner of all its stock. During his stay, John Murtagh and other Longford people went to Crystal Ridge and Paradise Skies to inspect the progress of the work at those subdivisions. John Murtagh was very unhappy with the railroad tie retaining walls at both subdivisions. On that date, John Murtagh told Chris Murtagh, the head of the Albuquerque operation, to get rid of the contractor. On February 2, 1999, Longford sent Aspen a letter telling Aspen to cease work immediately at Crystal Ridge, Mountain View, and Paradise Skies.

Each side tells a somewhat different story concerning the events from February 2, 1999, until March 30, 1999. It is undisputed, however, that on March 30, 1999, Longford sent Aspen a letter terminating the contracts between Longford and Aspen and asking for a summary and bill for the work in progress at the time. At that time, Aspen was owed $27,534.14 for materials and labor already provided. We refer to this as the Work in Progress, or WIP, amount.

{6} On May 20, 1999, Aspen filed suit against Longford—seeking damages, including punitive damages, for breach of contract. Within days, Longford offered to pay Aspen the WIP amount, plus interest, and Aspen refused the offer. Longford filed a counterclaim for breach of contract, negligence, and prima facie tort. In June 2000, Aspen filed a request for a jury trial, acknowledging that its request was not timely. Longford objected, and the trial court denied Aspen’s request.

{7} A bench trial was held on April 1 and 2, 2002. During Longford’s closing argument, it voluntarily dismissed its counterclaim. The trial court issued a letter decision on April 10, 2002. The letter decision indicated Aspen was entitled to the WIP amount, denied all other claims by Aspen for compensatory and punitive damages, and indicated the trial court had tentatively determined that each side should bear its own fees and costs. The letter decision contained some statements favorable to Aspen’s position on the merits and invited the parties to submit proposed findings of fact and conclusions of law if an appeal was contemplated.

{8} Both sides submitted proposed findings and conclusions. Contrary to its representations in its brief in chief, Aspen proposed, among other things, that the trial court determine that Aspen was the prevailing party and should, under the contracts, receive its attorney fees, costs, and expenses. Longford proposed that the trial court determine that Aspen was not the prevailing party, in part because Aspen had turned down Longford’s 1999 offer of judgment for the WIP amount, plus interest, and Aspen had not done better at trial. The trial court’s findings and conclusions determined, among other things, that Aspen was not the prevailing party because it did not do better after trial than either Longford’s early settlement offer or Longford’s offer of...
judgment, both of which were made within the first few months after suit was filed.

[9] The trial court’s judgment was filed on May 14, 2002. It awarded Aspen $27,534.14, plus interest thereon from April 2, 1999, until paid. No party was awarded attorney fees, costs, or expenses of litigation. Two days later, Longford filed pleadings, in which it sought a determination that it was the prevailing party and therefore was entitled to its reasonable attorney fees, costs, and expenses of litigation. Longford’s theory was that since the trial court had determined that Aspen was not the prevailing party, Longford must be the prevailing party. The trial court denied the motion and reiterated its determination that each side should bear its own fees and costs.

[10] Additional facts will be discussed in connection with the issues raised on appeal.

II. DISCUSSION

A. Motion for a Jury Trial

[11] Aspen argues that the trial court abused its discretion in denying its untimely request for a jury trial. In support of this, Aspen points out that the trial court has the discretion under Rule 1-039(A) NMRA 2003 to grant a jury trial even if the request for a jury is not timely. On appeal, we review the trial court’s ruling on such a request only for abuse of discretion. Carville v. Cont’l Oil Co., 81 N.M. 484, 486-87, 468 P.2d 885, 887-88 (Ct. App. 1970). The trial court’s ruling is presumed valid, and the burden is on Aspen to show how the trial court abused its discretion. Id. This Court has previously held that the failure to file a timely request for a jury trial waives the jury trial and that a trial court does not abuse its discretion in denying a later request for a jury trial under Rule 1-039. Myers v. Kapnison, 93 N.M. 215, 216-17, 598 P.2d 1175, 1176-77 (Ct. App. 1979).

[12] Aspen relies on Bates v. Board of Regents of Northern New Mexico Community College, 122 F.R.D. 586 (D.N.M. 1987), which, in Aspen’s view, establishes that the motion should be granted because there was no compelling reason to deny it. Aspen is mistaken. In Bates, for a year and a half, the parties and the trial court had treated the case as one that would be tried to a jury, and they only discovered that there had been no jury demand when the case was set for trial on a non-jury docket. Id. at 587. Thus, the court in Bates decided to exercise its discretion to allow a jury trial, even though Plaintiff had failed to file a timely demand for a jury. Id. at 588-89. In this case, the parties had planned to try the case to a judge, until Aspen filed its untimely demand for a jury. In short, Bates does not persuade us that the trial court abused its discretion in this instance. The fact that one trial court exercises discretion in a certain manner does not compel a reversal when another trial court does not exercise discretion in the same manner. See Cadle Co. v. Phillips, 120 N.M. 748, 750, 906, P.2d 739, 741 (Ct. App. 1995).

B. Longford’s 1999 Offer of Judgment

[13] Aspen contends that Longford’s proposed findings and conclusions improperly referred to Longford’s 1999 offer of judgment. Aspen argues that under Rule 1-068 NMRA 2003, an offer of judgment is admissible only in a proceeding to determine costs. Aspen asserts, without citation to authority, that the submission of proposed findings and conclusions is not such a proceeding. See In re Adoption of Doe, 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984) (“We assume where arguments in briefs are unsupported by cited authority, counsel after diligent search, was unable to find any supporting authority. We therefore will not do this research for counsel.”). Under the circumstances of this case, we disagree. The trial court had already indicated its tentative ruling on the issue and had asked for proposed findings and conclusions. In addition, there was evidence during the trial that Longford did not object to paying Aspen the WIP amount and in fact had offered to pay it to Aspen a few days after the suit was filed. Finally, although the trial court altered the rationale for its decision between the time of the letter decision and the entry of findings and conclusions, the fact remains that the trial court’s result was always the same: Aspen was entitled only to the $27,534.14 WIP amount. Thus, we do not perceive any prejudice to Aspen flowing from Longford’s mention of the offer of judgment in its proposed findings.

C. Contract Interpretation

[14] Aspen argues that the trial court erred in its interpretation of the contracts. In the absence of ambiguity, the interpretation of language in a contract is an issue of law, which we review de novo on appeal. Peck v. Title USA Ins. Corp., 108 N.M. 30, 33, 766 P.2d 290, 293 (1988); Collado v. City of Albuquerque, 2002-NMCA-048, ¶ 15, 132 N.M. 133, 45 P.3d 73. Neither party has argued that the terms of the contract are ambiguous. “A contract must be construed as a harmonious whole, and every word or phrase must be given meaning and significance according to its importance in the context of the whole contract.” Bank of N.M. v. Sholer, 102 N.M. 78, 79, 691 P.2d 465, 466 (1984).

[15] Aspen argues that certain paragraphs of the contract, when read together, required Longford to give Aspen notice of the defective work and an opportunity to cure the problem before Longford could terminate the contract. We do not agree.

[16] The paragraphs in question read as follows:

9. Should Subcontractor at any time refuse or neglect to supply a sufficient amount of skilled workmen or materials of the proper quality and quantity, or fail in any respect to perform the Work with promptness and diligence or in a good and workmanlike manner, or cause by any act of commission or omission the stoppage or delay of or interference with the work of Contractor, or of any other subcontractor on the project, or fail in the performance of any of its agreements herein, and should any such failure or other action or inaction as outlined above continue for twenty-four (24) consecutive hours after Subcontractor’s receipt of written notice specifying the particulars of such failure or action or inaction, served personally or mailed or sent by receipted facsimile to the Subcontractor, Contractor may:

A) Provide through itself or through others, any such labor or materials necessary to perform the Work until, in the sole judgment of the Contractor, the deficiencies of the Subcontractor’s Work have been corrected, and deduct the cost thereof from any money due to Subcontractor from Contractor, or thereafter to become due to Subcontractor under this Agreement. If such cost shall exceed any money due or otherwise to become due, the Subcontractor shall pay the difference to Contractor, or

B) Terminate this Agreement, in which event Contractor may complete the Work included in this Agreement. In case of such
termination, Subcontractor shall not be entitled to receive any further payment under this Agreement. If the expense of finishing the Work shall exceed any unpaid balance otherwise due from Contractor to Subcontractor, then Subcontractor shall pay the difference to Contractor. The expense incurred by Contractor shall include any damages, excess costs to other subcontractors, legal fees or court costs incurred because of the default of the Subcontractor.

10. Notwithstanding any other provision herein, Contractor may, in its sole discretion, cancel this Agreement at any time, and shall be liable to Subcontractor only for labor and materials rendered or supplied up to the date this Agreement is cancelled.

(Emphasis added.)

{17} Aspen argues that under paragraph 9, it was entitled to notice and an opportunity to cure any problems before Longford terminated the contract. Longford pointed out that the language in paragraph 9 was permissive and that even if it were not, paragraph 10 gave Longford the right, in its sole discretion, to cancel the agreement at any time.

{18} We agree with the trial court that paragraph 9 simply gives Longford options to use if it chooses to use them and that paragraph 10 gives Longford the option of cancelling the contract at any time, with or without cause. Such a reading gives effect to all the provisions of the contract.

{19} Aspen contends that this case is similar to Public Service Co. of New Mexico v. Diamond D Construction Co., 2001-NMCA-082, 131 N.M. 100, 33 P.3d 651. Aspen is mistaken. In Diamond D, the contract between the parties specifically required both parties to “use their best efforts to amicably and promptly resolve the dispute.” Id. ¶ 5. The contracts between Aspen and Longford do not contain such a provision.

{20} Aspen also argues that the trial court erred in failing to award Aspen compensatory damages. We note, however, the contracts specifically limit Longford’s liability, in the event of termination of the contract, to the amount of labor and materials already used—what the parties have referred to as the WIP amount. Thus, the trial court did not err in limiting Aspen’s recovery to the WIP amount.

D. Prevailing Party

{21} A trial court’s determination concerning an award of attorney fees is reviewed only for abuse of discretion. Hedicke v. Gunville, 2003-NMCA-032, ¶ 23, 133 N.M. 335, 62 P.3d 1217. When a contract provides that the prevailing party in the litigation shall be awarded reasonable attorney fees and costs, a trial court may abuse its discretion if it fails to award attorney fees. Denison v. Marlowe, 108 N.M. 524, 526-27, 775 P.2d 726, 728-29 (1989); Hedicke, 2003-NMCA-032, ¶ 23. The contracts in this case provided that

[1] in the event either party hereto shall prevail in any legal or equitable action to enforce any of the terms of this Agreement, such party shall be entitled to receive from the other party all court costs, reasonable attorney’s fees and all other expenses incurred in such litigation and the preparation thereof including any appeal thereof.

The meaning of this provision of the contract is an issue of law, which we review de novo on appeal. Peck, 108 N.M. at 33, 766 P.2d at 293; Collado, 2002-NMCA-048, ¶ 15. The trial court’s determination concerning an award of costs is reviewed only for abuse of discretion. Mascarenas v. Jaramillo, 111 N.M. 410, 415, 806 P.2d 59, 64 (1991).

{22} Initially, Aspen points out that the trial court entered a judgment in its favor in the amount of $27,534.14, plus interest from April 2, 1999, until paid. Thus, Aspen contends that it prevailed and is entitled to its attorney fees, costs, and expenses, including gross receipts tax, in the amount of $60,022.60. Aspen also argues that it prevailed on the counterclaim because the trial court entered judgment in its favor on the counterclaim.

{23} Aspen relies on Dunleavy v. Miller, 116 N.M. 353, 360, 862 P.2d 1212, 1219 (1993), which indicates that the prevailing party is the plaintiff who recovers a judgment against a defendant. However, Dunleavy was a simple personal injury case with no counterclaims. This case involves multiple claims and counterclaims. Moreover, Dunleavy did not involve a situation in which the defendant was always willing to pay what it was ultimately determined to owe. Thus, Dunleavy is distinguishable.

{24} In Hedicke, this Court was faced with a more complex dispute, involving multiple claims and counterclaims and a contract that provided that the prevailing party was entitled to reasonable attorney fees. In that case, the trial court had determined that each party should bear its own fees and costs incurred during the litigation. On appeal, this Court reversed. We held that the phrase “prevailing party” should be given its ordinary meaning. Hedicke, 2003-NMCA-032, ¶¶ 26-27. However, in determining whether there was a prevailing party, we considered all the claims made by both sides in the lawsuit, and we determined that when one party prevailed on four of five claims, that party was the prevailing party. Id. ¶¶ 28-30. We specifically recognized that there can be situations in which neither side is a prevailing party. Id. ¶ 28.

{25} Applying Hedicke to this case, we hold that the trial court did not abuse its discretion in determining that Aspen was not the prevailing party, despite the fact that it obtained a judgment for some amount in its favor. Aspen’s complaint in this case was not limited to seeking the WIP payment. Instead, Aspen alleged that Longford breached the contracts; that Longford’s termination of the contracts was in bad faith, willful, and malicious; and that Longford had entered into the contracts under false pretenses. At trial, Aspen sought slightly more than $1 million in compensatory damages, which it claimed were caused by Longford’s alleged breach of the contract. This included amounts Aspen had to pay for unemployment benefits for workers it had to lay off, amounts paid to the Internal Revenue Service for fines and penalties, and hundreds of thousands of dollars of lost gross profits and interest on lost gross profits. The trial court specifically found against Aspen on all its claims, except the WIP amount. As to this amount, the trial court found that Longford offered to pay the WIP amount, plus interest, within days after the suit was filed. Under these circumstances, we affirm the trial court’s determination that Aspen was not a prevailing party.

{26} By the same token, we hold that the fact that judgment was entered in Aspen’s favor on the counterclaim does not, by itself, make Aspen the prevailing party on the counterclaim. Longford’s counterclaim sought damages for Aspen’s breach of contract or, in the alternative, negligence in performing its work and for prima facie tort based on Aspen’s having cancelled the permits issued for construction of the walls.
The counterclaim was tried to the court and then dismissed by Longford during its closing argument. The trial court found and concluded that Aspen breached the contract between the parties and that the work Aspen performed was not performed according to the plans and specifications or in a workmanlike manner. Thus, we hold that the trial court did not abuse its discretion in determining that Aspen was not a prevailing party on the counterclaim.

{27} Aspen has asserted in its brief in chief, without citation to the record, that at trial, (1) Longford admitted that Aspen’s work was in conformance with the contract and (2) Longford’s initial claim of defective work was conceded to be untrue. We learned at oral argument that Aspen based this representation on Longford’s abandonment of its counterclaim during trial. Because there was no citation to the record, neither Longford nor this Court understood what Aspen was referring to, and it appeared to us that Aspen was simply making up facts out of whole cloth. A simple citation to the portion of the proceedings where Longford abandoned its counterclaim would have enabled Longford to have responded to Aspen’s contention and would have enabled this Court to decide the issue thus joined.

{28} In Aspen’s reply brief, it asserts in bold print that “[t]here was absolutely no evidence in the record whatsoever that Aspen failed in any way to adequately perform under the contract.” We learned at oral argument that Aspen’s “no evidence” assertion was related to its interpretation of the evidence as to the timing of Longford’s concerns about the walls and the problems Longford discovered, which we later discuss. However, in order to challenge the trial court’s findings of fact as not supported by substantial evidence, Aspen must clearly indicate the findings that it wishes to challenge and must provide this Court with a summary of all the evidence bearing on the finding, including the evidence that supports the trial court’s determination, regardless of interpretation. 

Martinez v. Southwest Landfills, Inc., 115 N.M. 181, 184, 848 P.2d 1108, 1111 (Ct. App. 1993). In reviewing such a challenge, this Court views the evidence in the light most favorable to the finding below. Las Cruces Prof’l Fire Fighters v. City of Las Cruces, 1997-NMCA-044, ¶ 12, 123 N.M. 329, 940 P.2d 177. To the extent that the evidence on a particular issue was conflicting, we disregard evidence and inferences that are contrary to the trial court’s finding. Aspen’s “no evidence” claim again appeared to be a misstatement of the evidence, when in fact it was a failure to explain its argument with reference to all of the evidence, both favorable and unfavorable, followed by an explanation of why the unfavorable evidence does not amount to substantial evidence, such as is necessary to inform both the appellate and the Court of the true nature of the appellant’s arguments. Cf. Martinez, 115 N.M. at 184-85, 848 P.2d at 1111-12 (explaining the process of appellate argument in the analogous situation of whole record review).

{29} Failure to provide citations and challenge findings affect this Court’s ability to decide the issues. Clearly, counsel for all litigants are more effective advocates when they observe the Rules of Appellate Procedure. As regards the issues in this case, even if we were inclined to treat Aspen’s assertions as a proper challenge to the findings, which we are not, the trial court’s findings in this case would be easily affirmed. John Murtagh testified that he stood on a wall in Crystal Ridge, the wall fell down, and he was able to kick the railroad tie away. He also testified to a lack of silt fabric on the wall. Mark Kleist, one of Longford’s employees, testified in great detail concerning the problems with Aspen’s work. Aspen’s interpretation of this evidence was for the trial court to weigh and determine.

{30} In the trial court, Longford argued that since the trial court had determined that Aspen was not a prevailing party, Longford must be the prevailing party. On appeal, it argues that it is entitled to its reasonable attorney fees, costs, and expenses of litigation, which total $86,333.64.

{31} We recognize that Longford successfully defended itself against Aspen’s claims. However, Longford also filed counterclaims that were tried to the court and were withdrawn only during Longford’s closing argument. In the absence of a judgment in its favor under the counterclaims, we do not think that Longford was a prevailing party in an action to enforce the contract.

{32} Moreover, the trial court’s order that each side bear its own fees and costs is easily understandable. The main issues in this case were legal issues concerning the meaning of the provisions of the contract. These were issues of law that could have and, with the benefits of hindsight, probably should have been resolved early in the case by a motion for summary judgment. See Peck, 108 N.M. at 33, 766 P.2d at 293. Instead, both sides in this case staked out their positions and pressed them vigorously. Both sides, having grown dissatisfied with the attorneys who originally represented them, switched attorneys. As a result, each side incurred attorney fees, costs, and general expenses that were several times the amount that either side could reasonably have expected to gain from the litigation. Under these circumstances, we agree with the trial court that no one really prevailed in this case.

E. Interest

{33} The award of prejudgment interest is governed by statute in New Mexico. See, NMSA 1978, §§ 56-8-3 (1983), 56-8-4 (1993). The meaning of a statute is a question of law, which we review de novo on appeal. Souter v. Ancae Heating & Air Conditioning, 2002-NMCA-078, ¶ 8, 132 N.M. 608, 52 P.3d 980.

{34} Longford argues that Section 56-8-3 permits prejudgment interest only if a party obtains damages for breach of contract. However, the statute does not use the term “damages.” Instead, it refers to “money due by contract.” Section 56-8-3(A). Moreover, our Supreme Court has held that “[a]n injured party is entitled to prejudgment interest as a matter of right when the amount due under the contract can be ascertained with reasonable certainty.” Kueffer v. Kueffer, 110 N.M. 10, 12, 791 P.2d 461, 463 (1990).

{35} Moreover, “one of the foremost equitable considerations before a trial court is the fact that a plaintiff has been denied the use of the money during the pendency of the lawsuit.” Ranch World of N.M., Inc. v. Berry Land & Cattle Co., 110 N.M. 402, 404, 796 P.2d 1098, 1100 (1990). Thus, the fact that Longford offered to pay the WIP amount before trial does not persuade us that it was inequitable for the trial court to award Aspen prejudgment interest on the WIP amount. Having found that the award of interest was proper under Section 56-8-3(A), we need not address Longford’s arguments concerning a possible award of interest under Section 56-8-4(B).

III. CONCLUSION

{36} The judgment of the trial court is affirmed. The parties shall bear their own fees and costs for this appeal.

{37} IT IS SO ORDERED.

CELIA FOY CASTILLO, Judge

WE CONCUR:
LYNN PICKARD, Judge
IRA ROBINSON, Judge
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- Conduct in-depth medical and literature searches that provide scientific foundation for a persuasive case;
- Help identify and locate expert witnesses; and
- Accompany clients to Independent Medical Evaluations.

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- Conduct in-depth medical and literature searches that provide scientific foundation for a persuasive case;
- Help identify and locate expert witnesses; and
- Accompany clients to Independent Medical Evaluations.
SIXTH JUDICIAL DISTRICT COURT
REQUEST FOR PROPOSALS

The Sixth Judicial District Court is requesting proposals for one-year contracts that, pursuant to NMSA 1978, §3-1-150, may be extended up to four years. The term of the initial contract will be from July 1, 2004, to June 30, 2005. Only attorneys licensed to practice law in New Mexico will be considered for the following contracts:

Guardian ad Litem (two contracts)

1. Guardian ad Litem, Grant County
2. Guardian ad Litem, Luna and Hidalgo counties

The contractor shall represent children who are either the subject of abuse or neglect proceedings or the subject of Family in Need of Court Ordered Services (FINS) proceedings, including proceedings for the termination of parental rights, adoption proceedings, matters under the Uniform Parentage Act or other abuse/neglect or FINS proceedings as designated by the court. The contractor shall also represent indigent respondents concerning: mental health and development disability commitments, alcoholism commitments, guardianship matters where a person is allegedly incompetent under the Probate Code and proceedings in which a person is allegedly incapacitated pursuant to the Adult Protective Service Act. Applicants may apply for a combined contract for all three counties, and shall include a proposal for any travel or mileage compensation.

Attorney for the Respondent

3, 4. Attorney for the Respondent, Grant County (two contracts)
5, 6. Attorney for the Respondent, Luna and Hidalgo counties (two contracts)

The contractor shall represent indigent respondents who are the subject of either abuse or neglect proceedings or Family in Need of Court Ordered Services (FINS) proceedings, including proceedings for the termination of parental rights or any other proceeding in which the court finds it necessary to appoint respondent representation, such as indigent respondents who are allegedly in contempt of court.

7. Pro-Se Officer, Grant County
8. Pro-Se Officer, Luna and Hidalgo counties

The contractor shall provide guidance (not legal advice) to self-represented litigants for cases filed in the Sixth Judicial District Court in which at least one party in not represented by counsel, as directed by the Court. Applicants may apply for a combined contract for all three counties and shall include a proposal for any travel or mileage compensation.

Time and Place for Submitting a Proposal

All interested attorneys should submit both a proposal and a résumé not later than 5 p.m., Friday, June 18, 2004. All requests for proposal shall be sealed and clearly marked “Request for Proposal” on the envelope. All requests shall specify which contract the applicant is applying for and the amount requested. Requests that are not timely received or which do not comply with the proposal procedure may be rejected at the court’s discretion.

Melissa Cook, Court Administrator
Sixth Judicial District Court
PO Box 608
Lordsburg, NM 88045

If you have questions concerning these Requests for Proposal you may contact:

Mike Lewis, Staff Attorney
Sixth Judicial District Court
PO Box 2339
Silver City, NM 88062
**Positions**

**Attorney Vacancy**
Opening for experienced attorney in the Federal Trade Commission, Southwest Region, Dallas, TX. Incumbent will perform a variety of investigative, litigative and advisory functions relating to consumer protection and/or enforcement policy under various statutes enforced by the FTC or the agency’s obligations under existing statutory requirements. Fluency in the Spanish language required. Applicants must have actual trial experience. Please go to www.jobsearch.usajobs.opm.gov for details on how to apply.

**Professional Services Program Coordinator**
for statewide trade association to handle programs and provide support to committees. Qualifications: College degree, two years’ relevant experience, strong organizational, administrative and interpersonal skills. Must be detail-oriented, self-starter, able to follow established procedures and work with complex documents. Organized, tactful and able to handle multiple priorities. Skilled in computer applications. Some travel. Prefer individual with prior office/administrative experience or paralegal/legal secretary. Experience with nonprofit association helpful. Send resume, cover letter and salary history to: EVP, 2201 Brothers Rd., Santa Fe, NM 87505; fax: (505) 983-8809. No phone calls. EOE

**Part-Time Legal Secretary**
Busy downtown Santa Fe law office seeking experienced, self-motivated legal secretary. Proficient in MS Word, typing, transcription, legal document prep. Excellent organizational and filing skills required and able to work under pressure. Salary DOE. Mail resume to: Roth, VanAmberg, Rogers, Ortiz & Yepa, LLP, Attention Manager, PO Box 1447, Santa Fe, NM 87504.

**Helpline Attorney and Paralegal**
Part-time 25-30 hrs/wk. Law Access New Mexico, a statewide telephone helpline serving low income New Mexicans, seeks a part-time helpline attorney and paralegal to join its staff. All client services are by telephone. Qualifications: New Mexico licensed attorney or certified paralegal with a minimum of two years of experience, computer proficient, knowledge of poverty law, domestic relations and housing issues is highly desirable. Spanish or Navajo speaking a plus. Excellent working environment. Send resume to: Kathleen Brockel, kathleen@lawaccess.org.

**Office of the State Engineer/Interstate Stream Commission**
**State of New Mexico**
The New Mexico State Engineers Office/Interstate Stream Commission is seeking a Lawyer – Advanced Level to represent the OSE/ISC in federal and state court litigation and at administrative hearings, water right adjudication’s and natural resources issues. Experience in the practice of law in the area of administrative hearings matters, water right adjudication’s and natural resources issues. Work experience/education requirements (minimum qualifications): REQUIRED - Licensure as an attorney by the Supreme Court of New Mexico. Must be a member in good standing of State Bar and eligible to obtain New Mexico Attorney General Commission. Experience in the practice of law in the area of administrative hearings matters, water right adjudication’s and natural resources totaling four years. The position is located in Santa Fe. Salary range is $42,322 to $75,240. Please refer to job order #40839 when applying. Applications are being accepted by the Department of Labor from June 14, 2004, to June 25, 2004. Please send an additional copy of your resume, bar card and a writing sample to J. Schleicher at the OSE/ISC, PO Box 25012, Santa Fe, NM 87504-5102. Office of the State Engineer is an EOE.

**NOTE: NEW SUBMISSION DEADLINES**

All classified advertisements must be submitted in writing, either typed or clearly printed. Advertisement deadline is 5 p.m., Wednesday for the issue of the following week. Display and classified advertising will be accepted for publication in the Bar Bulletin in accordance with standards and ad rates set by the editor 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 requests. The editor reserves the right to review and edit classified ads, to request that an ad be revised prior to publication, or to reject ads. Cancellations must be received in writing by 10 a.m., Thursday. Rate sheets and insertion orders available upon request. Call (505) 797-6058 for advertising information, or e-mail your ad, ads@nmbar.org.

**Associate Attorney**
position available with growing medium-sized general civil law practice. Minimum of two to three years’ experience required. Must be a highly motivated team player. Excellent benefits and growth potential. Salary DOE. Please send resume, along with salary requirements and references to PO Box 92860, Albuquerque, NM 87199-2860. Attn: Box C.
Seventh Judicial District Court (Sierra County) Judicial Supervisor
The Seventh Judicial District Court in T or C, NM is accepting applications for the full-time classified position of Judicial Supervisor. Current Hiring Salary $15,815 - $19,769 per hour. Manages, supervises and participates in the work of subordinate staff in the clerk’s office of the Truth or Consequences District Court, including case management and accounting functions. Plans, organizes, integrates and coordinates the office work and hires, trains, evaluates and disciplines subordinate staff. Ensures compliance with established court rules and procedures. More information, contact Kim C. Padilla, court administrator, (505) 835-0050, ext. 20; or logon to the Judiciary’s Web site at www.nmcourts.com under “Job Opportunities.” Applications along with resumes must be submitted by 4 p.m., July 2, 2004 to: Kim C. Padilla, Court Administrator, PO Drawer 1129, Socorro, NM 87801. EOE.

Assistant District Attorney
The Sixth Judicial District Attorney’s Office has an opening for an Assistant District Attorney based in Deming, NM. Deming is a progressive community with easy access to great recreational opportunities and the established office staff is a pleasure to work with. The position is a general fund (not grant funded) position. Salary will depend on experience. Admission to the State Bar of New Mexico is required. Prefer attorney with prosecution experience, but will consider training the right person with the right attitude: conscientious, a team player, with a good personality. This position will handle a variety of cases, depending on experience, including the juvenile case load in that office. Interested applicants please submit your resume with a cover letter stating your interest in this position to Mary Lynne Newell, District Attorney, PO Box 1025, Silver City, NM 88062; e-mail mnnewell@da.state.nm.us; fax, (505) 388-5184. Position is open until filled.

Legal Secretaries - Join the Team!
Office Team, the leader in specialized administrative staffing is looking for qualified legal secretaries in the Albuquerque and Santa Fe areas. The ideal candidates must be self-starters with one+ years’ legal experience. Experience putting together pleadings and litigations and proficiency in Word or WordPerfect are required. OFFICETEAM Specialized Administrative Staffing. Call today, (505) 888-4002; 6501 Americas Parkway NE, Albuquerque, NM 87110. www.officeteam.com. EOE.

Hearing Officer - Las Cruces
The New Mexico Taxation and Revenue Department Hearing Bureau seeks a Part-time Staff Attorney (20 hours/week) to conduct administrative hearings to determine whether the driver’s license of persons who are arrested for driving while intoxicated (DWI) should be revoked pursuant to the implied Consent Act. The position is located in Las Cruces and travel is required. The position is at a pay band 75, with the hourly range from $18.041 to $32.073. This term position requires that the applicant be a member of the State Bar of New Mexico. Experience in criminal law preferred. Applicants must apply through the New Mexico Department of Labor (DOL), 301 W. De Vargas St., Santa Fe, NM 87501; or through any DOL field office. Refer to job order #NM40301. Please send a duplicate resume, a copy of your State Bar card and a writing sample to Steven Dichter, Deputy District Attorney, NM Taxation and Revenue Department, PO Box 630, Santa Fe, NM, 87504-0630. Applications must be received no later than June 26, 2004.

Legal Secretary
Busy insurance defense firm seeks full-time litigation secretary with five plus years’ experience in insurance defense or civil rights. Position requires a team player with strong word processing skills including proficiency with Word Perfect, knowledge of court systems and superior clerical and organizational skills. Should be skilled transcriptionist, attentive to detail and accurate. Minimum typing speed of 75 wpm. Excellent work environment, salary and benefits. Send resume and references to Office Administrator at Riley, Shane & Hale, PA, 4101 Indian School Rd. NE, Ste. 420, Albuquerque, NM 87110 or fax to (505) 883-4362.

11th Judicial District Attorney’s Office, Division I (San Juan County) is accepting resumes for positions of Attorney I to Senior Trial Prosecutor. Salary is $36,000 to $46,000 DOE. Please send resume to: Gregory M. Tucker, District Attorney, 710 E. 20th St., Farmington, NM 87401. EOE.

Attorney Needed for New Position
with growing law firm involving banking, litigation and real estate matters. Must be able to handle multiple tasks in high-volume, fast-paced office. Great environment and benefits include holidays, vacation, health, dental, retirement plan and more. Submit in confidence cover letter, resume, salary history and requirements to: 3803 Atrisco Blvd., Ste. A, Albuquerque, NM 87120; fax (505) 833-3040; or e-mail admin@littledranttel.com.

13th Judicial District Court Notice to Receive Bids
Neglect and Abuse Proceedings/Families in need of Court Services. In accordance with the state of New Mexico Procurement Code, the 13th Judicial District Court, counties of Valencia, Sandoval and Cibola, are accepting proposals (bids) from licensed New Mexico attorneys to furnish professional services for indigent persons by serving as (1) guardian ad litem, or (2) attorney for the primary custodian(s), and (3) attorney for conflict custodian(s) for the 2005 fiscal year, beginning July 1, 2004, and ending June 30, 2005. If mailed, bids are to be sealed and marked “BID” on the envelope sent to PO Box 1089, Los Lunas, NM 87031. Bids can also be sent by fax to (505) 865-0969; or e-mailed to lhdmlx@nmcourts.com. Please specify for which county you are bidding. Bids are due by 5 p.m., Monday, June 21, 2004, in the Court Administration Office at the Valencia County Courthouse, to the attention of Myra Lucero. Please call (505) 865-4291, ext. 120, for bid packet.

Attorney
The Regulation and Licensing Department has a position open for an entry-level Attorney with zero to three years’ experience as a lawyer, law clerk or legal assistant. The salary range is $33,469 to $59,503 depending on experience. Interested parties should apply through the Department of Labor, 301 W. DeVargas, Santa Fe, NM 87501. In addition, please send a copy of resume to: Regulation & Licensing Department, ATTN: Bea Ortiz, 2550 Cerrillos Rd., Santa Fe, NM 87505. Additional information about the position may be obtained from Bea Ortiz, HR Administrator, (505) 476-4527; or via e-mail, bea.ortiz@state.nm.us. The state of NM is an EOE.

Supervising Attorney
Poverty law program seeks experienced attorney to provide supervision for advocates handling a range of poverty law cases. This position also requires handling an active caseload. Opportunity to aggressively address poverty and social injustice through the legal system. Qualifications: Dedication and commitment to serving the needs of persons living in poverty; excellent research, writing and interviewing skills; supervisory experience preferred. Salary DOE; generous leave and benefits package. Send resume, three references and short writing sample to: Angelica Anaya Allen, General Counsel, New Mexico Legal Aid, angelica@nmlegalaid.org. NMLA is an EOE.
**Associate Trial Attorney - Eighth Judicial District (Taos County)**

The Eighth Judicial District Attorney’s Office is accepting applications for the position of Associate Trial Attorney (ATA) in the Taos Office. This position will have primary responsibility for DWI and misdemeanor prosecutions. The ATA may also handle some juvenile and felony cases under supervision. Salary will be based upon experience and the District Attorney Personnel and Compensation Plan. Please send resumes to Donald Gallegos, District Attorney, 920 Salazar Rd., Ste. A, Taos, NM 87571. Position open until selection made.

**Attorney/Operations Director**

Larry Zamok seeks bright, non-smoker to handle H/R, standards compliance, more at very successful collection practice. Hours depend on responsibilities; P/T possible. Fax letter of interest and CV to (505) 898-7313.

**Legal Secretary**

Sheehan, Sheehan & Stelzner, PA, seeks experienced full-time legal secretary. Position requires excellent computer skills, including Word Perfect and Microsoft Word. Our firm offers an excellent benefits package, competitive salary and great work environment. Please forward cover letter and resume to Office Manager, PO Box 271, Albuquerque, NM 87103; or e-mail to te@ssslawfirm.com.

**Paralegal**

General practice law firm seeking full-time paralegal to work in a fast-paced environment. Legal experience required. Family law experience helpful. You must be motivated, organized, detail-oriented, and have great people skills. Excellent benefits available. Salary DOE. Send resume to PO Box 92860, Albuquerque, NM 87199-2860, Box C.

**Litigation Secretary**

Need experienced litigation secretary for busy litigation firm. Full-time position to work for two attorneys. At least three years’ experience preferred. E-mail resume to info@eatonlaw-nm.com; or mail to PO Box 25305, Albuquerque, NM 87125.

**Associate Attorney**

Litigation firm seeks attorney, five-seven years’ experience, motivated, with excellent skills. Experience in employment law preferred. Fax resume to (505) 828-3900; or mail to Beall & Biehler, 6715 Academy Rd. NE, Albuquerque, NM 87109.

**Associate Attorney**

Busy Clovis law firm is seeking associate attorney with interest in litigation. Two years’ minimum litigation experience required. Excellent professional and financial opportunity. Please send resume and cover letter to PO Box 5246, Clovis, NM 88102-5246.

**Associate Trial Attorney**

Wanted for immediate employment with the Seventh Judicial District Attorney’s Office, which includes Catron, Sierra, Socorro and Torrance counties. Minimum qualifications: based on the New Mexico District Attorney’s Personnel and Compensation Plan. Admission to the State Bar of New Mexico. Salary will be commensurate with experience and budget availability. Send resume to: Seventh Judicial District Attorney’s Office, Attn: J.B. Mauldin, PO Box 1099, Socorro, NM 87801.

**Legal Secretary**

Slease & Martinez, PA, seeks experienced full-time legal secretary who is detail-oriented and able to multi-task. Position requires excellent computer skills, including Word Perfect. Our firm offers an excellent benefits package, competitive salary and great work environment. Please forward cover letter and resume to Office Manager, PO Box 1805, Albuquerque, NM 87103-1805.

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**Associate Attorney**

Busy Clovis law firm is seeking associate attorney with interest in litigation. Two years’ minimum litigation experience required. Excellent professional and financial opportunity. Please send resume and cover letter to PO Box 5246, Clovis, NM 88102-5246.

**Associate Trial Attorney**

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State Bar of New Mexico

2004 Leadership Training Institute

- Application Form -

Please complete the entire application form and return to the State Bar of New Mexico, Attn: Leadership Training Institute, P. O. Box 92860, Albuquerque, NM 87199-2860; or fax to (505) 828-3765. Applicants may submit no more than two additional pages of information for the selection committee to consider. Applications must be received no later than 5 p.m., on July 1, 2004. You will be notified the week of July 19 regarding your participation in the Institute. Please print or type your responses.

Name: ___________________________________________________________________________________

Employer and Mailing Address: ________________________________________________________________

Phone: __________________________ Fax: ______________________ E-mail: ____________________

Years in Practice: ________ Practice Area: ____________________________________________________

1) List your involvement or membership in any Bar-related activity (e.g., committee, section, newsletter editor, Supreme Court committee, pro bono volunteer, referral program participant, etc.) __________
   _______________________________________________________________________________________
   _______________________________________________________________________________________
   _______________________________________________________________________________________

2) List your involvement in any community or service activities or organizations: ________________
   _______________________________________________________________________________________
   _______________________________________________________________________________________

3) Are you willing to commit to attending ALL of the Leadership Training sessions?
   Yes ___ No ____ Unable to answer definitely at this time ___

4) Have you ever participated in a workshop or conference dealing with motivational or leadership training (e.g., “Leadership Albuquerque” “Leadership Roswell” or “HBA Bar Leadership Institute”)?
   Yes ____ No ____ If yes, please describe: ____________________________________________________
   _______________________________________________________________________________________
   _______________________________________________________________________________________

5) Why do you wish to participate in the State Bar’s Leadership Training Institute and what training and skills do you hope to obtain? ______________________________________________________________________________________
   _______________________________________________________________________________________
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6) Are there additional accomplishments, honors, training, or educational experiences that you wish to share with the Selection Committee? Please list below or attach a brief description or resume.
   _______________________________________________________________________________________
   _______________________________________________________________________________________
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7) Please submit one letter of recommendation which addresses characteristics that would make you a good candidate for this Institute.

8) Do you need financial assistance?     Yes ___ No ___

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