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Guide to Member Benefits

For more information visit www.nmbar.org; or contact State Bar of New Mexico Membership Services, 5121 Masthead NE, Albuquerque, NM 87109
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Please allow 2-4 weeks for delivery. For more information contact Veronica at (505) 797-6039.
18  Expanding Equal Access to Credit Through Civil Rights and Consumer Protection Laws  
Live Program • 9 a.m - 4 p.m.  
6.6 General CLE Credits

Co-Sponsors: Project Change Fair Lending Center, Institute of Public Law, National Community Reinvestment Coalition

This workshop will provide tools for expanding equal access to credit through civil rights and consumer protection laws. Topics include recent case law, emerging issues in debt servicing, testing programs, community reinvestment act, and regulatory challenges. The afternoon session will include a New Mexico legislative update. In addition, participants will learn how to develop effective partnerships with community organizations that assist clients with lending issues. The session will conclude with an overview of the New Mexico foreclosure process as it relates to predatory lending.

☐ $159 Standard & Non-Attorney  ☐ $149 Gov’t & Paralegal

22  Tax Treatment of Contingency Fee Awards After Banaitis v. Commissioner  
Teleseminar • 11 a.m - Noon  
1.2 General CLE Credits

The federal income tax treatment of contingency fees is in dispute. Today, geography – the location of the client – determines how taxable damage awards are treated for federal income tax purposes. Some federal appellate circuits have adopted the rule that contingency fees are taxable twice – once to the taxpayer and again to the attorney who drafted the contingency fee arrangement. Other circuits hold that a taxable damages award is taxable only once. Where a client resides has a dramatic impact on their tax position and impacts how an attorney should draft contingency fee arrangements to reduce their adverse tax impact. This program will discuss the majority and minority rule, the role of state law, and the Supreme Court’s pending decision on this matter in Banaitis v. Commissioner.

☐ $67

23  Update on Leasing Under UCC Article 2A  
Teleseminar • 11 a.m - Noon  
1.2 General CLE Credits

The 15-year process of revising the Uniform Commercial Code has concluded with revisions to UCC Article 2A governing leases of goods. This program will review revisions to UCC Article 2A and recent case law, including a discussion of consumer and business leases, warranties and the impact of Article 2A on electronic information transactions.

☐ $67

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4  Bar Bulletin - February 14, 2005 - Volume 44, No. 6
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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Professionalism Tip
With respect to opposing parties and their counsel:
I will not make improper statements of fact or of law.

Meetings

February
14 Taxation Section Board of Directors, noon, via teleconference
15 Children’s Law Section Board of Directors, noon, Juvenile Justice Center 13th floor
15 Criminal Law Section Board of Directors, noon, State Bar Center
16 Bankruptcy Law Section Board of Directors, noon, U.S. Bankruptcy Court, 13th floor
17 Appellate Practice Section Board of Directors, 3 p.m., Tucker Law Firm, Santa Fe
17 Real Property Section Board of Directors, 4 p.m., Miller Stratvert, P.A.
18 Family Law Section Board of Directors, 9 a.m., via teleconference

State Bar Workshops

February
16 Lawyer Referral for the Elderly Workshop, 10 a.m., Jemez Pueblo Elderly Program, Jemez Pueblo
22 Lawyer Referral for the Elderly Workshop, 10 a.m., Chavez County J.O.Y. Center, Roswell
23 Lawyer Referral for the Elderly Workshop, 10 a.m., Ft. Sumner Senior Center, Ft. Sumner
23 Family Law Workshop, 5:30 p.m., Branigan Library, Las Cruces
23 Consumer Debt/Bankruptcy Workshop*, 6 p.m., State Bar Center
24 Lawyer Referral for the Elderly Workshop, 10 a.m., Meadowlark Senior Center, Rio Rancho

*Consumer Debt/Bankruptcy workshops include a one-on-one consultation with an attorney. For more information, call Marilyn Kelley at (505) 707-6048 or 1-800-876-6227; or visit the SBNM Web site, www.nmbar.org.
NOTICES

COURT NEWS

NM Supreme Court
Proposed Amendments to Domestic Relations Form 4A-313 NMRA

The Supreme Court is considering proposed amendments to Domestic Relations Form 4A-313 NMRA. Attorneys who would like to comment on the proposed revisions should send written comments by Feb. 18 to: Kathleen J. Gibson, Chief Clerk, New Mexico Supreme Court, PO Box 848, Santa Fe, NM 87504-0848.

For reference: The proposed amendments were printed in the Jan. 31 (Vol. 44, No. 4) Bar Bulletin.

Proposed Amendments to the Magistrate, Metropolitan and Municipal Court Rules and Civil Forms

The Supreme Court is considering proposed Amendments to the Magistrate, Metropolitan and Municipal Court rules and civil forms. Attorneys who would like to comment on the proposed revisions should send written comments by Feb. 18 to: Kathleen J. Gibson, Chief Clerk, New Mexico Supreme Court, PO Box 848, Santa Fe, NM 87504-0848.

For reference: The proposed amendments were printed in the Jan. 31 (Vol. 44, No. 4) Bar Bulletin.

Proposed New Children’s Court Form 10-471 NMRA

The Supreme Court is considering a proposed new Form 10-471 NMRA of the Children’s Court Rules. Attorneys who would like to comment on the proposed revisions should send written comments by Feb. 18 to: Kathleen J. Gibson, Chief Clerk, New Mexico Supreme Court, PO Box 848, Santa Fe, NM 87504-0848.

For reference: The proposed amendments were printed in the Jan. 31 (Vol. 44, No. 4) Bar Bulletin.

Judicial Performance Evaluation Commission
Upcoming Meeting

The Judicial Performance Evaluation Commission was created by the New Mexico Supreme Court for the purpose of providing voters with fair, responsible and constructive evaluations of trial and appellate judges and justices seeking retention in general elections. The results of the evaluations also provide judges with information that can be used to improve their professional skills as judicial officers. The commission’s next meeting will be from 8 a.m. to 5 p.m., Feb. 25 at the State Bar Center in Albuquerque. For more information on the commission or with regard to the next scheduled meeting, call (505) 827-4960.

NM Compilation Commission
Volume 135 of NM Reports and 2004 NM Taxation Handbook Available

Volume 135 of the New Mexico Reports is now available for sale. The cost is $63. The New Mexico Selected Taxation and Revenue Laws and Regulation and CD ROM are also available. The price is $36.75.

To order, send a check to the New Mexico Compilation Commission, PO Box 15549, Santa Fe, NM 87592-5549.

First Judicial District Court
Destruction of Exhibits

Pursuant to the Supreme Court Retention and Disposition Schedule, the First Judicial District Court will destroy exhibits filed with the court, in criminal, civil, children’s court, domestic, incompetency/mental health and probate cases for years 1970 to 1987. Counsel for parties are advised that exhibits can be retrieved through April 9. Attorneys who may have cases with exhibits may verify exhibit information with the Special Services Division, (505) 476-0196, from 8 a.m. to 5 p.m., Monday through Friday. Plaintiff exhibits will be released to counsel of record for the defendant(s) by order of the court, domestic, incompetency/mental health and probate cases for years 1970 to 1987. Counsel for parties are advised that exhibits can be retrieved through April 9. Attorneys who may have cases with exhibits may verify exhibit information with the Special Services Division, (505) 476-0196, from 8 a.m. 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) by order of the court. 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.

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, March 1 in the jury room, John E. Brown Juvenile Justice Center, 5100 Second St. NW, 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.

U.S. Bankruptcy Court Brownbag Support Staff Discussion

A brownbag session for Chapter 13 attorneys’ support staff is scheduled for 11:30 a.m. to 1:30 p.m., March 4 at the Chapter 13 Trustee’s office, 625 Silver SW, Suite 350, Albuquerque. Attendees should bring their own lunch. The discussion will touch on various topics of importance to both debtor and creditor attorney staff members. Members of the Chapter 13 Trustee’s staff will present the session. The event is an opportunity for legal assistants and paralegals to meet and to determine how best to work together. Call (505) 243-1335, ext. 3020 for more information or to R.S.V.P.

STATE BAR NEWS

14th Summer Law Clerk Program

The State Bar of New Mexico is partnering with major New Mexico law firms and governmental law departments to provide employment opportunities for diverse and deserving law students at the University of New Mexico School of Law. The Summer Law Clerk Program provides law students with capable research and writing skills the opportunity to demonstrate the drive and excellence that law firms and agencies value most in making employment decisions.

The State Bar and its participating firms and agencies recognize that differences in the social, educational and economic backgrounds of individual law students can often create barriers to employment that have nothing to do with performance or the potential for success as an attorney. The rigorous application and interview process combines a unique learning experience for law students with a unique insight into the qualifications and potential of our applicants.

Working with law firms and agencies who are committed to the ideal of diversified applicant pools, the Summer Law Clerk Program has been bringing down artificial barriers to employment, producing quality law clerks and diversifying attorney applicants for nearly a generation.

Law firms or agencies interested in participating in the 2005 Summer Law
Clerk Program should contact Art Jaramillo, ajaramillo@aol.com by 5 p.m. March 1. Interviews will be held at UNM on March 5.

### 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 March 2. (Lunch is not provided.)

For information about the section, visit the State Bar Web site, www.nmbar.org, or call Cindy Lovato-Farmer, section chair, (505) 667-3766.

### International and Immigration Section

**Section Meeting**

The International and Immigration Section will hold its next meeting at 1 p.m., March 10, following “The ABC’s of Immigration Law” at the State Bar. The meeting is open to both current section members and those considering joining the section. Since the section has been recently reactivated, the new board encourages section members to attend and provide input on future activities.

The CLE begins at 8:30 a.m. and attendees will receive 4.2 general CLE credits. The cost is $79 for section members, $89 for government and paralegals and $99 for standard and non-attorneys. Refer to the CLE insert in the Feb. 7 Bar Bulletin for more information.

Lunch will be provided free of charge to section members attending the 1 p.m. meeting. To assist in planning, R.S.V.P. to thorvat@nmbar.org by March 8.

### Paralegal Division

**Brownbag CLES for Attorneys and Paralegals**

There will not be a February meeting of the division’s lunch time CLE program, but check the Bar Bulletin for the schedule of upcoming CLEs. Contact Debi Shoemaker-Scott, (505) 243-1443 with questions, speaker suggestions or to be added to the e-mail list.

### Prosecutors’ Section

**Annual Awards**

The State Bar Prosecutors’ Section is soliciting nominations for awards that the Section will present to five prosecutors at the Association of District Attorneys’ 2005 Spring Conference on May 12. The five award categories are as follows:

- **Prosecutor of the Year** – must have five or more years of full-time prosecution experience. The nomination should address the individual’s outstanding characteristics, prosecution history, work with the public and contributions to the quality of prosecution, and the image of prosecutors.
- **Law Enforcement Prosecutor** – this nomination should address the support and assistance the prosecutor has provided to law enforcement agencies, and the prosecutor’s commitment of time in assisting law enforcement.
- **Community Service Prosecutor** – this nomination should address the service this prosecutor has provided to the community and the results of those efforts (for example – volunteering at rape crisis centers, nursing homes, youth mentorship organizations, etc.).
- **Legal Impact Prosecutor** – this nomination should address the significant impact that resulted from the prosecutor’s efforts in a criminal prosecution(s) and the significant and positive impact or effect on the law, along with the prosecutor’s outstanding character.
- **Rookie Prosecutor of the Year** – must have been prosecuting for no more than two years. The nomination should address the prosecutor’s dedication to criminal prosecution and commitment to making prosecution a career.

Nominations should be submitted for receipt by March 18 to Michael P. Sanchez, section chair, c/o Fifth Judicial District Attorney’s Office, 110 East 4th St., Roswell, NM 88201-6273; or msanchez@da.state.nm.us. The nominees will be presented to a committee for selection.

### Public Law Section

**Nominations Sought for Public Lawyer Award**

The State Bar Public Law Section is currently accepting nominations for the ninth annual public lawyer of the year award, which will be presented on Law Day, May 2. Prior recipients include Florence Ruth Brown, Frank Katz, Douglas Meiklejohn, Marty Daly, Nick Estes, Mary McInerny, Jerry Richardson, Peter T. White and Robert M. White. Send nominations by 5 p.m., March 1 to Doug Meiklejohn by e-mail, dmeiklejohn@nmelc.org or by mail to New Mexico Environmental Law Center, 1405 Luisa St. #5, Santa Fe, NM 87505. The selection committee (comprised of past chairs of the Public Law Section) will consider all nominated candidates and may nominate candidates on its own.

A complete listing of the qualifications for candidates can be found in the Jan. 24 issue of the Bar Bulletin (Vol. 44, No. 3).

### Young Lawyers Division

**2005 Summer Fellowship**

The Young Lawyers Division (YLD) of the State Bar is currently accepting applications from law students interested in working in public interest law or the government sector during the summer of 2005. The purpose of the fellowship is to enable one law student to work in public interest law or the government sector in an unpaid legal position. The fellowship award is intended to provide the opportunity for a law student to work in a position that might not otherwise be possible because the position is unpaid. The fellowship award, depending on the circumstances of the position, could be up to $3,000 for the summer.

To be eligible for the fellowship, the applicant must be a current law student in good standing. Applications for the fellowship must include the following: a letter of interest from the applicant that details the student’s interest in public interest law or the government sector; a resume of the applicant; and a written offer of employment to the applicant for an unpaid legal position in public interest law or the government sector for the summer of 2005. Applications must be submitted by 5 p.m., March 31. Applications must be postmarked by March 31. Any questions regarding the fellowship should be directed to J. Brent Moore at (505) 476-3783.
**OTHER BARS**

**NM Defense Lawyers Association**

Managing Partners Luncheon for Civil Defense Firms

The New Mexico Defense Lawyers Association encourages civil defense firms around the state to send their managing partners to a luncheon from 11:30 a.m. to 1 p.m., Feb. 17 at the State Bar Center in Albuquerque. This will be an opportunity to discuss hot topics affecting defense firms’ practice locally and nationally. Discussions include:

- Hourly Rates in NM - Are We Selling Ourselves Too Cheap?
- Periodic Performance Review for Partners.
- Accounts Receivable - What is the Best Way to Deal with Clients Who are Slow or No Pay?
- Reciprocity in New Mexico - Good Idea or Bad?

For more information, visit the NMDLA Web site at www.nmdla.org or call Rhonda Dahl, (505) 797-6021.

**OTHER NEWS**

**Center for Civic Values**

Judges Needed

Judges are needed for the regional rounds of the high school mock trial competition in Albuquerque and Las Cruces. Regionals are Feb. 19 and 20. Attorneys interested in participating, should register online at www.civicvalues.org/MT_registration.htm.

The mock trial program is a cosponsored activity of the Center for Civic Values, the State Bar of New Mexico and the UNM School of Law.

**UNM Peace Studies Program**

Peace Fair

The University of New Mexico Peace Studies program will host Albuquerque’s first Peace Fair, free and open to the public, from noon to 8 p.m., March 1 in the Student Union Building ballroom.

UNM’s School of Law, Students Organizing Action for Peace (SOAP), International Programs, Women Studies, Women’s Resource Center, the sociology, political science, anthropology and communication and journalism departments, Religious Studies and College of Arts and Sciences are co-sponsors.

Peace Studies is dedicated to the study of the causes of violence and alternatives to violence and the practice of conflict resolution on all levels – from the interpersonal to societal to international. Call (505) 277-4032 for more information.

**UNM School of Law**

Terrorist Defense Counsel to Speak

“Tortured Reasoning: Has the United States Abandoned the Geneva Conventions After 9/11?” is the title of a free talk at the UNM School of Law from noon to 1 p.m., Feb. 17 in the forum. Joshua Dratel, defense counsel in several high profile U.S. terrorism prosecutions, is the guest speaker. Dratel has written and lectured on terrorism issues, the USA Patriot Act, the Classified Information Procedures Act and the Foreign Intelligence Surveillance Act. The talk is presented by the UNM School of Law faculty and co-sponsored by the law school’s chapter of the National Lawyer’s Guild.

To find the most current contact information regarding active and inactive State Bar members go to www.nmbar.org and click on the Attorney/Firm Finder link.
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<td>Albuquerque, Carlsbad, Gallup, Hobbs, Las Cruces, Portales, Raton and Santa Fe 2.0 P</td>
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<td>Center for Legal Education of SBNM (505) 797-6020 <a href="http://www.nmbar.org">www.nmbar.org</a></td>
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<tr>
<td>25</td>
<td>Protecting Business Assets Through Effective Lawyering</td>
<td>Teleconference TRT, Inc. 2.4 G (800) 672-6253 <a href="http://www.trtcle.com">www.trtcle.com</a></td>
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<td>27</td>
<td>2005 Professionalism: Lawyers Concerned for Lawyers</td>
<td>VR - Las Cruces Center for Legal Education of SBNM 2.0 P (505) 797-6020 <a href="http://www.nmbar.org">www.nmbar.org</a></td>
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<td>27</td>
<td>ABC’s of Immigration Law</td>
<td>State Bar Center, Albuquerque Immigration Law Section and Center for Legal Education of SBNM 4.2 G, 1.0 E, 2.0 P (505) 797-6020 <a href="http://www.nmbar.org">www.nmbar.org</a></td>
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<td>27</td>
<td>Avoiding Legal Malpractice</td>
<td>Roswell Paralegal Division of New Mexico 1.0 G (505) 622-6510</td>
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<td>27</td>
<td>Coping with Sexual Predators Within the Profession</td>
<td>Teleconference TRT, Inc. 2.4 G (800) 672-6253 <a href="http://www.trtcle.com">www.trtcle.com</a></td>
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**March**

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<th>Program Title</th>
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<td>1</td>
<td>New Mexico Gross Receipts and Compensating Tax: Beyond the Basics</td>
<td>Albuquerque National Business Institute 8.0 G (715) 835-8525 <a href="http://www.nbi-sems.com">www.nbi-sems.com</a></td>
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<td>3</td>
<td>Burden of Representing Financially-challenged Companies</td>
<td>Teleconference TRT, Inc. 2.4 E (800) 672-6253 <a href="http://www.trtcle.com">www.trtcle.com</a></td>
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<tr>
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<td>20th Annual Bankruptcy Year in Review Seminar</td>
<td>Albuquerque Bankruptcy Law Section and Center for Legal Education of SBNM 7.4 G, 1.0 E (505) 797-6020 <a href="http://www.nmbar.org">www.nmbar.org</a></td>
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<td>4</td>
<td>Justice in the Jury Room</td>
<td>Teleconference TRT, Inc. 2.4 E (800) 672-6253 <a href="http://www.trtcle.com">www.trtcle.com</a></td>
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<td>7</td>
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<td>Albuquerque National Business Institute 6.2 G, 1.0 E (715) 835-8525 <a href="http://www.nbi-sems.com">www.nbi-sems.com</a></td>
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<td>7</td>
<td>Sanctions and the Goldilocks Test - Too Soft, Too Hard, or Just Right?</td>
<td>Teleconference TRT, Inc. 2.4 E (800) 672-6253 <a href="http://www.trtcle.com">www.trtcle.com</a></td>
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<td>8</td>
<td>Understanding the Federal Tax Aspect of Forming Limited Liability Companies</td>
<td>Teleseminar Center for Legal Education of SBNM 1.2 G (505) 797-6020 <a href="http://www.nmbar.org">www.nmbar.org</a></td>
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<td>9</td>
<td>Managing Absent Employees So It Doesn’t Make You Absent-minded</td>
<td>Teleconference TRT, Inc. 2.4 G (800) 672-6253 <a href="http://www.trtcle.com">www.trtcle.com</a></td>
</tr>
</tbody>
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**Legal Education**

G = General  E = Ethics  P = Professionalism  VR = Video Replay

Programs have various sponsors; contact appropriate sponsor for more information.
| 10 | Military Justice | Las Cruces Paralegal Division of NM | 1.0 G | (505) 522-2338 |
| 11 | Basics of Real Estate | VR - Las Cruces Center for Legal Education of SBNM | 5.6 G, 1.2 E | (505) 797-6020 | www.nmbar.org |
| 11 | Major Issues in Mediation | Teleconference TRT, Inc. | 2.4 G | (800) 672-6253 | www.trtcle.com |
| 14 | What Puts Government Lawyers in a Class by Themselves | Teleconference TRT, Inc. | 2.4 E | (800) 672-6253 | www.trtcle.com |
| 15 | The Tangled Webs of Impaired Lawyers | Teleconference TRT, Inc. | 2.4 P | (800) 672-6253 | www.trtcle.com |
| 16 | ADR for the Civil Defense Practitioner | State Bar Center, Albuquerque New Mexico Defense Lawyers Association | 3.0 G, 1.0 E | 505 797-6021 | www.nmdla.org |
| 17 | Electronic Discovery Needn't Be Shocking | Teleconference TRT, Inc. | 2.4 G | (800) 672-6253 | www.trtcle.com |
| 17 | Limited Liability Entities - 2005 | ALN - Satellite Broadcast State Bar Center, Albuquerque Center for Legal Education of SBNM | 4.4 G | (505) 797-6020 | www.nmbar.org |
| 18 | How to win Your Next Jury Trial Using the Power Trial Method | State, Bar Center, Albuquerque Trial Practice Section and Center for Legal Education of SBNM | 7.2 G | (505) 797-6020 | www.nmbar.org |
| 18 | Protecting Business Assets Through Effective Lawyering | Teleconference TRT, Inc. | 2.4 G | (800) 672-6253 | www.trtcle.com |
| 22 | DUI in New Mexico | State Bar Center, Albuquerque Center for Legal Education of SBNM | 6.7 G | (505) 797-6020 | www.nmbar.org |
| 22 | Junk Science or Scientific Evidence? | Teleconference TRT, Inc. | 2.4 G | (800) 672-6253 | www.trtcle.com |
| 22 | Professional Liability Issues for Estate Planning Professionals | Teleconference Cannon Financial Institute | 1.8 E | (800) 775-7654 | www.cannonfinancial.com |
| 23 | Fair Labor Standards Act | Albuquerque Lorman Education Services | 8.0 G | (715) 833-3940 | www.lorman.com |
| 23 | Fundamentals of Arbitration | Teleconference TRT, Inc. | 2.4 G | (800) 672-6253 | www.trtcle.com |
| 24 | Personal Injury Case Evaluation and Intake - Make Your Accountant and Malpractice Insurer Happy | Teleconference TRT, Inc. | 2.4 G | (800) 672-6253 | www.trtcle.com |
| 25 | They Took My Stuff! How Do I Get it Back? | Teleconference TRT, Inc. | 2.4 G | (800) 672-6253 | www.trtcle.com |
| 28 | Burden of Representing Financially-challenged Companies | Teleconference TRT, Inc. | 2.4 E | (800) 672-6253 | www.trtcle.com |
| 29-1 | Advocacy in Action Conference | Albuquerque NM Crime Victims Reparation Commission | 21.5 G | (505) 266-3451 |
### EFFECTIVE FEBRUARY 9, 2005

**WRITS OF CERTIORARI**

AS UPDATED BY THE CLERK OF THE NEW MEXICO SUPREME COURT

Kathleen Jo Gibson, Chief Clerk
New Mexico Supreme Court
PO Box 848 • Santa Fé, NM 87504-0848 • (505) 827-4860

**PETITIONS FOR WRIT OF CERTIORARI FILED AND PENDING:**

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<th>Case Name</th>
<th>Decision No.</th>
<th>Date Petition Filed</th>
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<tr>
<td>29,065</td>
<td>State v. Chavez (COA 25,182)</td>
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<td>29,064</td>
<td>State v. Lucero (COA 24,890)</td>
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<td>29,062</td>
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<td>State v. Boergadine (COA 23,766/23,767)</td>
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<td>29,060</td>
<td>McIntire v. Janeca (12-501)</td>
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<td>State v. Edens (COA 24,342/24,587)</td>
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<td>29,054</td>
<td>State v. Stone (COA 24,096)</td>
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<td>State v. Warren (COA 24,096)</td>
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<td>State v. Talk (COA 24,857)</td>
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<td>State v. Hinzo (COA 25,047)</td>
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<td>State v. Lopez (COA 25,165)</td>
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<td>State v. Frank G. (COA 23,165/23,497)</td>
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<td>State v. Pamela R. (COA 24,397/23,787)</td>
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<td>State v. Freeze (COA 24,766)</td>
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<td>State v. Williams (COA 25,032)</td>
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<td>State v. Watson (COA 24,879)</td>
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<td>State v. Trujillo (COA 24,191)</td>
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<td>Markey v. Sanchez (COA 23,876)</td>
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<td>State v. Jackson (COA 25,151)</td>
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<td>State v. Raiche (COA 25,044)</td>
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<td>State v. Morales (COA 24,061)</td>
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<td>29,019</td>
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**CERTIORARI GRANTED BUT NOT SUBMITTED:**

(Submission = date of oral argument or briefs-only submission)

ALL CASES HELD IN ABEYANCE PENDING DISPOSITION IN NO. 28,670, **STATE V. SHAY**

<table>
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<td>State v. Monger (COA 23,944/23,993)</td>
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<td>28,704</td>
<td>State v. Lopez (COA 23,531)</td>
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<td>28,703</td>
<td>State v. Armenta (COA 24,311)</td>
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<td>28,751</td>
<td>State v. Perez (COA 24,474)</td>
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<td>State v. Horcasitas (COA 24,274)</td>
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<td>State v. Tave (COA 24,114)</td>
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(Submission = date of oral argument or briefs-only submission)

ALL CASES HELD IN ABEYANCE PENDING DISPOSITION IN NO. 28,698, **STATE V. EUBANKS**

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</table>
## WRITS OF CERTIORARI

**AS UPDATED BY THE CLERK OF THE NEW MEXICO SUPREME COURT**

Kathleen Jo Gibson, Chief Clerk New Mexico Supreme Court  
PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860  

**EFFECTIVE FEBRUARY 9, 2005**

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<td>Jouett v. Growney (COA 23,669)</td>
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<td>Chavez v. Sandoval (COA 24,232)</td>
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<td>Cerrillos Gravel v. County Commissioners (COA 23,630/23,634)</td>
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<td>28,812</td>
<td>Battishill v. Farmers Insurance (COA 24,196)</td>
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### NO. 28,821  State v. Maese (COA 23,793)  2/16/05

### NO. 28,634  State v. Dang (COA 22,982)  2/28/05

### NO. 28,791  State v. Franco (COA 23,719)  2/28/05

### NO. 28,759  State v. Cearley (COA 23,707)  2/28/05

### NO. 28,537  State v. Garcia (COA 24,226)  3/11/05

### NO. 28,631  State v. Garcia (COA 23,353)  3/11/05

### NO. 28,660  State v. Johnson (COA 23,463)  3/11/05

### NO. 28,847  Sanchez v. Allied Discount (COA 23,437/23,715)  3/12/05

### NO. 28,810  State v. Pereia (COA 23,557)  3/28/05

### NO. 28,369  State v. Beltron (COA 24,234)  3/28/05

### NO. 28,234  State v. Blea (COA 24,032)  3/28/05

### NO. 28,913  Mannick v. Wakeland (COA 24,280/24,078)  3/28/05

### PETITION FOR WRIT OF CERTIORARI DENIED:

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<th>No.</th>
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<td>Patscheck v. Snodgrass (12-501)</td>
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*Please note: The above information is a sample of the content structured in a readable and logical format.*
OPINION

RODERICK T. KENNEDY, JUDGE

{1} The formal opinion filed on November 19, 2004, is withdrawn. This opinion is filed in its stead.

{2} Plaintiffs appeal from a district court order dismissing their claims against Defendants New Mexico Federation of Teachers-TVI, Albuquerque TVI Faculty Federation Local No. 4974 AFT, NMFT (Local), and American Federation of Teachers-TVI (AFT) with prejudice pursuant to Rule 1-012(B)(6) NMRA. Plaintiffs’ former employer was not named in the complaint, so that all causes of action were brought against the unions only. Plaintiffs argue that the district court erred in granting Defendants’ motion to dismiss their action for: (1) breach of a collective bargaining agreement by third-party beneficiaries; (2) breach of duty of fair representation; (3) third-party beneficiary breach of contract; (4) breach of implied covenant of good faith and fair dealing; (5) breach of fiduciary duty; (6) negligence and gross negligence claims; and (7) holding that union members are required to exhaust administrative remedies under the New Mexico Public Employee Bargaining Act, NMSA 1978, §§ 10-7D-1 to -26 (1992) (repealed in 1999) (PEBA). We consider the question of whether union members have a cause of action against their union for misfeasance or malfeasance when the union represents the members’ interests against an employer. We conclude that the union members may maintain such an action. Based on the following, we reverse the district court.

FACTUAL AND PROCEDURAL BACKGROUND

{3} The facts of this case are not in dispute. “[I]f a district court grants a motion to dismiss pursuant to Rule 12(b)(6), then the allegations pleaded in the complaint must be taken as true for purposes of an appeal.” Envtl. Improvement Div. of N.M. Health & Env’t Dep’t v. Aguayo, 99 N.M. 497, 499, 660 P.2d 587, 589 (1983). We thus assume the truth of the following well-pleaded allegations when assessing whether they are sufficient to state a cause of action.

{4} Plaintiffs were union employees of the Albuquerque Technical Vocational Institute (TVI) when they were summarily terminated from their positions without notice or explanation. Defendants were labor unions which had a collective bargaining agreement with TVI. Defendants represented Plaintiffs in their grievance action regarding the termination of their employment. As provided by TVI’s collective bargaining agreement and the PEBA statute, Defendants were the sole representatives for Plaintiffs in employment-related arbitration matters. Plaintiffs attempted to utilize the contractual provisions of the collective bargaining agreement for settling disputes.

{5} Despite actual knowledge of their legitimate defense to the termination and actual knowledge that the penalty of termination was in violation of TVI rules, regulations, and the collective bargaining agreement, Defendants only instituted a perfunctory defense, and did not consult with Plaintiffs before dismissing their grievances and refusing an arbitration hearing, and did not ever ascertain why TVI terminated Plaintiffs. Further, Defendants turned on Plaintiffs, supporting TVI in a pending federal lawsuit in order to gain an advantage with TVI for themselves. Defendants’ actions kept Plaintiffs from being able to “take appropriate steps to defend themselves.”

{6} Defendants contend that while the PEBA and TVI’s policies granted them the status of exclusive representative for collective bargaining purposes, these policies did not allow Defendants to wield that power in the grievance process. They claim that under Sec-

1 The complaint for damages was based on NMSA 1978, § 10-7D-1 to-26 (1992), which was repealed in 1999 and replaced with the current statute, NMSA 1978, § 10-7E-1 to-26 (2003). The events of this action occurred during the time the original PEBA was in effect and we will use that version of the PEBA to decide this case.
tion 10-7D-15, Plaintiffs had the option of acting individually in “present[ing] a grievance without the intervention of the exclusive representative.” Further, Defendants argue that Plaintiffs’ case is foreclosed because they failed to exhaust their administrative remedies under PEBA when Plaintiffs went to court rather than bring their grievances against Defendants to the TVI Labor Relations Board or the Public Employee Labor Relations Board (PELRB). Defendants argue that the lack of an exclusive duty to represent Plaintiffs, and Plaintiffs’ failure to seek redress under the collective bargaining agreement, means that Plaintiffs cannot later pursue an action in district court for the claims alleged in their complaint.

With regard to the breach of contract claim, the district court determined that Plaintiffs claimed that they are third-party beneficiaries to the collective bargaining agreement between Defendants and TVI and therefore must stand in the place of TVI and allege a promise made by Defendants in the collective bargaining agreement to TVI that Defendants later breached. The district court decided that Plaintiffs alleged no such promise that Defendants could have breached. Because no breach of contract claim could be maintained, the district court decided that Plaintiffs claims for breach of the implied covenant of good faith and fair dealing could not be maintained either.

The claim for breach of fiduciary duty was dismissed because the claim could not “lie under the facts asserted by Plaintiff[s].” The claims for negligence and breach of duty of fair representation were dismissed because the district court found that Defendants had broad discretion concerning their bargaining unit members and were not subject to a common law negligence standard. Further, it found that while Defendants “did owe a duty to Plaintiffs to fairly represent them in their grievances,” PEBA was in effect and possessed an administrative enforcement scheme which must be exhausted.

Plaintiffs timely appealed the district court’s order dismissing its complaint.

DISCUSSION

Standard of Review

The dismissal of Plaintiffs’ complaint was for failure to state a cause of action, and therefore, the district court did not consider any matters outside the pleadings. A motion to dismiss under Rule 1-012(B)(6) is properly granted only when it appears that a plaintiff cannot recover or be entitled to relief under any state of facts provable under the claim. Kirkpatrick v. Introspect Healthcare Corp., 114 N.M. 706, 709, 845 P.2d 800, 803 (1992) (“A motion to dismiss should be granted only when it appears that the plaintiff is not entitled to recover under any facts provable under the complaint.”); Jones v. Int’l Union of Operating Eng’rs, 72 N.M. 322, 325, 383 P.2d 571, 573 (1963). We treat all of the complaint’s well-pleaded allegations as true but disregard conclusions of law and unwarranted factual deductions. See Saencz v. Morris, 106 N.M. 530, 531, 746 P.2d 159, 160 (Ct. App. 1987). We apply a de novo standard of review to determine whether the law was correctly applied to the facts. See Kropinak v. ARA Health Servs., Inc., 2001-NMCA-081, ¶ 4, 131 N.M. 128, 33 P.3d 679.

Exclusive Representation Clause is Irrelevant to Defendants’ Claim

Although TVI’s policy provides for exclusive representatives to act for and represent all employees in the appropriate bargaining unit and negotiate collective bargaining agreements, the policy also permits an employee, acting individually, to present a grievance without the intervention of the exclusive representative. Defendants seek to rely on Plaintiffs ability to represent themselves as a way around liability for acts they undertook. Just because Defendants had no initial duty to act on Plaintiffs’ behalf does not preclude the formation of a special relationship with Plaintiffs that gives rise to a special duty to Plaintiffs when Defendants did choose to represent employees.

Despite Defendants’ arguments, this grievance procedure under TVI policy Section 12(E) is “to be used for the settlement of disputes pertaining to employment terms and conditions and related personnel matters.” This procedure does not apply in a case such as this one where employees are suing their unions for claimed breach of duty of fair representation, breach of covenant of good faith and fair dealing, breach of fiduciary duties, and the other claims relating to Defendants’ treatment of Plaintiffs’ grievances against TVI. As stated above, Plaintiffs’ cause of action arises precisely because Defendants undertook their representation in the grievance against TVI and then acted inimically to their interests. The issue is not whether Plaintiffs could have chosen another course; it is that Defendants allegedly injured Plaintiffs by representing them in the course taken on their behalf.

Therefore, once Defendants started representing Plaintiffs in the grievance procedure, they had a duty to fairly represent Plaintiffs, and neither the TVI policy nor PEBA contemplates employees taking individual action against their representative union in the midst of the grievance procedure that is already set in motion. This is particularly true when claims have already been “settled” with the employer, by Defendants giving up what Plaintiffs wanted: reinstatement.

Section 10-7D-15(B) does permit public employees such as Plaintiffs, acting individually, to present a grievance without the intervention of the exclusive representative. However, in this case, Plaintiffs chose to be represented by Defendants, and as such, Defendants owed Plaintiffs a duty to fairly and adequately represent their interests. We do not have case law on point for this issue. In this case, Plaintiffs contend that they relied on Defendants to fairly represent them, and that by the time Defendants “settled” their claims with TVI, it was too late to go after Defendants since the policies and settlement disallowed reinstatement of Plaintiffs. Additionally, if all the allegations in the complaint are taken as true, we have to conclude that Defendants undertook to be the exclusive representatives for arbitration of Plaintiffs’ grievances. Thus, Defendants had the duty to represent Plaintiffs fairly and adequately.

Exhaustion of Administrative Remedies

Defendants assert that Plaintiffs did not exhaust their administrative remedies. There is an administrative scheme in place which handles certain types of complaints. One of the provisions of PEBA creates the PELRB, which administers PEBA. See Section 10-7D-8.2

2 Under Section 10-7D-10, the Albuquerque TVI Community College Governing Board assumed the powers and the duties of the PELRB, which include promulgating rules and regulations, Section 10-7D-9(A), overseeing collective bargaining between public employees and their employers, Section 10-7D-9(A)(1)(2), and enforcing the provisions of PEBA “through the imposition of appropriate administrative remedies.” Section 10-7D-9(F).
The PELRB, or in this case, TVI’s Governing Board, is responsible for hearing and determining “complaints of prohibited practices” included in the Act. Section 10-7D-9(A)(3). Defendants argue that Plaintiffs should have filed such a prohibited practices complaint with TVI’s Labor Relations Board or the PELRB after Defendants abandoned representation of Plaintiffs in April 1999.

{16} Generally, unless the available legal or statutory administrative remedies are inadequate, a plaintiff must exhaust all administrative remedies before filing a claim in court for relief. See Sonntag v. Shaw, 2001-NMSC-015, ¶ 13, 130 N.M. 238, 22 P.3d 1188; Franco v. Carlshad Mun. Schs., 2001-NMCA-042, ¶ 20, 130 N.M. 543, 28 P.3d 531. The exhaustion doctrine is closely related to the finality doctrine because if the plaintiff “has not yet exhausted an available administrative remedy, the agency’s action is not yet final.” Richard J. Pierce, Jr., Administrative Law Treatise § 15.1 at 966 (4th ed. 2002) (hereinafter Pierce). One justification for the exhaustion requirement is that “the legislature creates an agency for the purpose of applying a statutory scheme to particular factual situations.” Pierce, supra § 15.2 at 970. Yet, we do not require a plaintiff “to exhaust an administrative remedy when that would be an exercise in futility.” Id. at 977.

{17} Plaintiffs focus their argument on the contention that neither the PEBA nor the TVI labor policies state that unfair representation claims are at any point required to be determined by the TVI Labor Relations Board. Plaintiffs argue that the dismissal of their grievance prevented them from exhausting their contractual remedies. They further contend that they have exhausted all internal remedies provided for by the collective bargaining agreement. They argue that any further exhaustion of remedies with respect to their termination has been waived by Defendants, or would be futile, because after Defendants dismissed and “settled” their grievances at the arbitration level, Plaintiffs could no longer demand an arbitration of their terminations. Plaintiffs maintain that Defendants are not being sued for failing to comply with any provision of the collective bargaining agreement because that agreement does not provide provisions detailing the rights of Plaintiffs alleging a cause of action against Defendants. Rather, Plaintiffs contend that Defendants “are being sued for failing to protect [Plaintiffs’] rights by not pursuing a meritorious grievance when [Defendants were] the only entity that could file a demand for arbitration of [Plaintiffs’] dismissal[s].”

{18} Section 10-7D-15(B) does allow Plaintiffs to present a grievance without the intervention of the exclusive representative; in this case, Defendants. However, neither this statute nor any other actually requires Plaintiffs to act individually. TVI is not expressly empowered to determine claims of breach of the duty of fair representation between union members, like Plaintiffs, and unions like Defendants. Plaintiffs thus believe that their claims should survive because there is no comprehensive administrative scheme that deals with such disputes, and Plaintiffs’ claims are based on New Mexico common law tort and contract principles, plus the duty of fair representation that is based upon the law set out in Jones, 72 N.M. at 330, 383 P.2d at 576.

{19} In developing this argument with regard to exhaustion of administrative remedies, both sides rely on Barreras v. State of New Mexico Corrections Department, 2003-NMCA-027, 133 N.M. 313, 62 P.3d 770. In Barreras, we held “that when an employee’s contractual claim arises from the State Personnel Act, as well as attendant rules, regulations, and agency personnel policies, the employee’s remedies are limited to those set forth in the State Personnel Act.” Id. ¶ 2. Although Barreras concerned the State Personnel Act (SPA) and not PEBA, our analysis there concerning whether administrative remedies prevail is much the same.

{20} In Barreras, the plaintiffs were former state employees who had been discharged from employment in violation of the SPA. Id. ¶ 3. The Barreras plaintiffs attempted to bypass an administrative appeal to the State Personnel Board (SPB) by filing a lawsuit directly in district court against their former employer, alleging breach of implied contract of employment based on the SPA. Id. ¶¶ 2-4. The district court concluded that the plaintiffs’ claims were barred as a matter of law. Id. ¶ 4. We affirmed that decision after determining that the administrative scheme in place was comprehensive since the SPB in that case was “expressly empowered to hear appeals from adverse employment actions.” Id. ¶ 12. In doing so, this Court assessed several factors in determining whether the SPA’s administrative remedies prevailed over an action for damages in district court in light of the fact that the Act “contains no express language that its administrative remedies either are, or are not, exclusive.” Id. ¶ 11. “Those factors include[d] the comprehensiveness of the administrative scheme, the availability of judicial review, and the completeness of the administrative remedies afforded.” Id. The general rule is “that an individual employee must show that he has exhausted the grievance procedures provided by the agreement as a condition to his right to maintain an action in court.” Jones, 72 N.M. at 326, 383 P.2d at 574.

{21} Unlike Barreras, there is no express empowerment under PEBA as it relates to TVI for the TVI Labor Relations Board to determine claims of breach of the duty of fair representation by a union in an employment dispute. There is also no specific right under PEBA to bring an action against Defendants before the TVI Labor Relations Board for breach of duty of fair representation, breach of fiduciary duties, breach of the union members’ contractual rights, or for breach of Defendants’ promise to file an arbitration. Sections 10-7D-1 to -26. There is simply no provision for the TVI Labor Relations Board to hear such a dispute at all. Thus, there could be no complete remedy because the TVI Labor Relations Board could not order Defendants to reinstate Plaintiffs with back pay when that underlying claim was settled to Plaintiffs’ detriment (and against their claims) by Defendants with no resolution of Plaintiffs’ termination claims. In this case, Plaintiffs’ claims against Defendants are based on common-law contract labor principles, not directly upon PEBA. See Jones, 72 N.M. at 327-28, 383 P.2d at 575-76. There is no comprehensive scheme arising from PEBA that deals with disputes between unions and their members; Plaintiffs cannot therefore be required to exhaust non-existent administrative remedies in this case. See Vaca v. Sipes, 386 U.S. 171, 185-86 (1967); see also Fetterman v. Univ. of Conn., 473 A.2d 1176, 1185 (Conn. 1984); 48A Am. Jur. 2d Labor and Relations § 3278 (1998).

Public Collective Bargaining Agreements and the Duty Owed by Unions to Their Members

{22} The contract in this case is one between TVI and Defendants. Plaintiffs are not parties to the collective bargaining agreement, which raises the question of whether they may enforce its terms. Although Plaintiffs are not parties to the agreement, they have an interest in the agreement as third-party beneficiaries whom Defendants represented. “There has always been trouble with tripartite relationships and the labor field has additional complications. The parties affected are the union, the employer, and individual employees, many of whom have conflicting interests.” Jones, 72 N.M. at 329, 383 P.2d at 576. In Jones, which concerned a collective bargaining agree-
ment in the private sector under the National Labor Relations Act (NLRA), a former employee brought an action against his former employer for wrongful discharge and against his labor union. Id. at 324, 383 P.2d at 572. The former employee sought damages against his labor union for its arbitrary, fraudulent, and bad faith violation of its trust as sole bargaining agent, in that it refused to demand that the employee’s grievance be submitted to arbitration. Id. Our Supreme Court held that the employee’s complaint, which was grounded upon an alleged breach of the collective bargaining agreement, stated a cause of action. Id. at 332, 383 P.2d at 577. Although Jones concerned a collective bargaining agreement in the private sector, we should here extend its analysis to this case dealing with public employees.

{23} Unions representing public employees have broad discretion in handling claims of their members, “and in determining whether there is merit to such claim which warrants the union’s pressing the claim through all of the grievance procedures, including arbitration, and the courts will interfere with the union’s decision not to present an employee’s grievance only in extreme cases.” Id. at 331, 383 P.2d at 577. Thus, a union should only be liable to its members if it acted arbitrarily or in bad faith in its representation or its failure to represent a member against his or her employer. Id. The Jones court implied that unions were under a duty to fairly represent employees in the grievance procedure. Id. at 330, 383 P.2d at 576; see also Vaca, 386 U.S. at 190 (stating that a breach of the duty of fair representation occurs only when a union’s conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith). In this case, taking Plaintiffs’ well-pleaded allegations as true, we conclude that the complaint alleged conduct arising to the level required by Vaca and Jones, and we therefore determine that Defendants can be sued for the alleged breach of their duties as provided by statute and TVI policy. Contrary to Defendants’ contention, although Plaintiffs do not and cannot sue TVI for wrongful discharge, that does not mean that Plaintiffs cannot bring claims against Defendants. We conclude that unions such as Defendants owe a fiduciary duty to their union members such as Plaintiffs to represent those members fairly. Plaintiffs have adequately stated a cause of action and should be able to proceed with it.

{24} Defendants also rely on TVI’s policies and PEGA Section 10-7D-20(B), (D), and (E), for the proposition that Plaintiffs’ only remedy for Defendants’ actions under these provisions was to file a prohibited practices complaint with the TVI Labor Relations Board with the PERLB under Sections 10-7D-8, -9. We disagree. PEGA and TVI policies, cited for Defendants’ proposition, prohibit organizations such as Defendants from interfering with, restraining, or coercing employees in the exercise of their rights under PEGA or the TVI policies. Section 10-7D-20(B). These policies and statutes also prohibit a union from violating the collective bargaining agreement. Section 10-7D-20(D), (E). Such reliance is inapposite. In this case, Defendants undertook to represent Plaintiffs to secure redress under the collective bargaining agreement. That Defendants may have done this poorly or nefariously so as to tortiously injure Plaintiffs stems from the relationship between Plaintiffs and Defendants, not from the third-party relationship between Plaintiffs and TVI under the collective bargaining agreement. Violation of or interference with collective bargaining rights sets up a measure for consequential damages stemming from the quality of Defendants’ representation, but not the cause of action for the tortious conduct itself.

Rights as Third-Party Beneficiaries for Breach of Contract Claim

{25} A collective bargaining agreement is a contract between a labor organization and the employer. In this case, Plaintiffs are third-party beneficiaries of the contract and may have an enforceable right against a party to the contract. Fleet Mortgage Corp. v. Schuster, 112 NM. 48, 49, 811 P.2d 81, 82 (1991). Third-party beneficiaries generally have no greater rights in a contract than does the promisee. See id. at 49-50, 811 P.2d at 82-83; see also Leyba v. Whitley, 120 N.M. 768, 771, 907 P.2d 172, 175 (1995) (stating that third-party beneficiaries are accorded the traditional contract remedies with respect to the bargain intended for their benefit); Archunde v. Int’l Surplus Lines Ins. Co., 120 N.M. 724, 729, 905 P.2d 1128, 1133 (Ct. App. 1995). Thus, having based their action upon an alleged breach of the collective bargaining agreement, Plaintiffs’ right to recover damages is determined by the terms and conditions of that agreement.

{26} The purpose of PEGA is to guarantee public employees the right to organize and bargain collectively with their employers, to promote harmonious and cooperative relationships between public employers and public employees and to protect the public interest by ensuring, at all times, the orderly operation and functioning of the state and its political subdivisions.

Section 10-7D-2. With this in mind, Plaintiffs as third-party beneficiaries of the collective bargaining agreement alleged in their complaint that they were entitled to an arbitration hearing for what they claimed was an unfair termination.

Breach of the Duty of Fair Representation

{27} The collective bargaining agreement between TVI and Defendants refers to PEGA, which states that no union or its representative shall “refuse or fail to comply with a collective bargaining or other agreement with the public employer.” Section 10-7D-20(D). Plaintiffs argue that the collective bargaining agreement requires that Defendants represent employees in all actions against the employer, and this creates a duty of fair representation between Defendants and Plaintiffs. Plaintiffs argue that they lost the ability to remedy breaches of the agreement between TVI and Defendants through the grievance process, due to Defendants’ alleged breach of its duty of fair representation. See Vaca, 386 U.S. at 186.

{28} Here, Defendants agreed to undertake representation of Plaintiffs. As a result of their dismissal of Plaintiffs’ claims, allegedly without Plaintiffs’ consent or consultation, Defendants impaired Plaintiffs’ rights under the collective bargaining agreement. In undertaking to represent Plaintiffs, Defendants should have realized that Plaintiffs would not simultaneously seek to represent themselves. See Restatement (Second) of Torts § 305 (1965) (“An act may be negligent if the actor intends to prevent, or realizes or should realize that it is likely to prevent, another or a third person from taking action which the actor realizes or should realize is necessary for the aid or protection of the other.”). Furthermore, Defendants’ undertaking to represent Plaintiffs created a special relationship between them. See, e.g., Smith v. Bryco Arms, 2001-NMCA-090, ¶ 25, 131 N.M. 87, 33 P.3d 638 (“At times a duty is found based on the existence of a ‘special relationship’ between plaintiff and defendant . . . [which] can be . . . voluntarily undertaken.”) (citation omitted); Wark v. United States, 269 F.3d 1185 (10th Cir. 2001) (“A party may assume duties of care by voluntarily undertaking to render a service.”) (internal quotation marks and citations omitted); Air Line Pilots Ass’n Int’l v. O’Neill, 499 U.S. 65, 75 (1991) (“[A] union
owes employees a duty to represent them adequately as well as honestly and in good faith.”). This duty is similar to the duty of good faith that trustees owe their beneficiaries, attorneys owe their clients, and corporate officers owe their shareholders. Id. As stated in the Restatement (Second) of Torts § 323:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other’s person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm, or
(b) the harm is suffered because of the other’s reliance upon the undertaking.

We hold that the duty of fair representation arises from Defendants’ undertaking to act as the exclusive bargaining agent of Plaintiffs. Plaintiffs thus may bring their suit for their claim in this case.

**Dismissal of Defendant AFT**

{29} The district court’s order dismissing Plaintiffs’ claims with prejudice did not specifically rule on this issue regarding whether Defendant AFT was a proper party. Suit may be brought only against the parties to the contract. Defendants maintain that the Local, not the AFT, was the contracting party. Defendants argue that where the local union is designated as the exclusive bargaining agent responsible for representing employees in the prosecution of grievances, only the local union can be held responsible. See Sine v. Local No. 992, Int’l Bhd. of Teamsters, 730 F.2d 964, 966 (4th Cir. 1984); Teamsters Local Union No. 30 v. Helms Express, Inc., 591 F.2d 211, 216-17 (3d Cir.1979). However, the agreement includes AFT as part of the “Federation,” which is the exclusive representative of Plaintiffs. Therefore, although the complaint states that the written collective bargaining agreement was entitled “AGREEMENT BY AND BETWEEN ALBUQUERQUE TVI COMMUNITY COLLEGE GOVERNING BOARD AND ALBUQUERQUE TVI FACULTY FEDERATION LOCAL NO. 4974 NMFT[,]” AFT is included in the definition of “Federation.” Thus, taking all the facts alleged in the complaint as true, we cannot conclude that AFT was not the bargaining agent for Plaintiffs, or a party to the collective bargaining agreement.

**CONCLUSION**

{30} We have held that: (1) Plaintiffs were not required to exhaust administrative remedies; (2) Plaintiffs adequately stated a cause of action in that unions owe a fiduciary duty to their members to represent them fairly, and Plaintiffs have the right to enforce a collective bargaining agreement as third-party beneficiaries; (3) Plaintiffs, as third-party beneficiaries, may bring a third-party claim against Defendants; (4) in undertaking to represent Plaintiffs, Defendants created a special duty to do so adequately and in good faith; and (5) AFT could be a party to the collective bargaining agreement, and thus, suit against it was proper.

{31} Having so held for the reasons set forth above, we reverse the district court’s dismissal of Plaintiffs’ claims against Defendants.

{32} IT IS SO ORDERED.

RODERICK T. KENNEDY,
Judge

WE CONCUR:
A. JOSEPH ALARID, Judge
IRA ROBINSON, Judge
OPINION

MICHAEL D. BUSTAMANTE, JUDGE

[1] Defendant appeals his conviction for Child Abuse, NMSA 1978, § 30-6-1(D)(1), (2) (2001), and sentencing as a serious violent offense pursuant to NMSA 1978, § 33-2-34(L)(4)(n) (2004). The issues raised are whether: (1) the jury was properly instructed on negligent child abuse, (2) an acquittal on intentional child abuse and subsequent prosecution for negligent abuse violates double jeopardy, (3) character evidence was improperly excluded, (4) there is sufficient evidence for the conviction, and (5) the district court’s findings support its determination that Defendant’s conviction is a serious violent offense. We affirm.

FACTS AND PROCEEDINGS

[2] Defendant was indicted on August 9, 2000, for intentional child abuse resulting in great bodily harm, or in the alternative, negligent child abuse resulting in great bodily harm. At the first trial, the jury acquitted Defendant of charges relating to intentional child abuse, but hung on whether he committed negligent abuse. An order declaring a mistrial was entered on March 20, 2002. On September 17, 2002, Defendant was retried on one count of negligent child abuse. Defendant was convicted after a five-day jury trial. The testimony elicited at trial supports the following facts.

[3] On June 20, 2001, “DT” was delivered five weeks premature. According to the baby’s treating physician, Dr. Vigil, DT was released from the hospital on June 27 and examined by him on July 5, 19, and 21, 2000. Other than a mild case of bronchitis, Dr. Vigil observed DT to be a normal and healthy newborn.

[4] During this period, DT’s mother (Mother) dated Defendant, and testified that she usually stayed at his home a couple of nights a week. Mother testified that she and DT stayed with Defendant on July 23 and 24. At 3:20 p.m. on July 24, 2000, Mother left DT alone with Defendant at his home for the first time. She had arranged for Defendant to take care of DT so that she could go to work. Defendant agreed to take care of DT for about an hour and a half until the baby’s grandmother got off work and could pick him up. According to Mother, she changed and fed DT before leaving, then laid him on the sofa with his back against the sofa. She testified that DT was normal and healthy, up to and including July 23 through July 24 at 3:20 p.m.

[5] Two hours later, at 5:30 p.m., Defendant and the baby appeared at DT’s great-grandmother’s house. Defendant told DT’s great-grandmother that DT had rolled off the sofa and that there was a problem. She saw that DT had vomited and while cleaning him, noticed he was very pale, limp, and “just staring.” After making a brief call to her daughter for advice, she took DT to a nearby urgent care clinic where he was examined and taken to UNM Hospital via ambulance.

[6] Medical tests revealed that DT had a severe subdural hematoma, retinal hemorrhages, and brain injury resulting in total blindness. The State’s experts on shaken baby syndrome, Dr. Campbell and Dr. Wood, and two treating physicians testified that DT’s injuries were diagnostic of major head trauma, resulting from a high-speed car crash or a fall from two or three stories, or abusive head trauma, known as “shaken baby syndrome.” In their opinions, however, the injuries were consistent with shaken baby syndrome resulting from violently shaking the baby. Dr. Campbell explained that DT had no external injuries indicative of an impact-type injury, and that his injuries were consistent with shaken baby syndrome and inconsistent with falling off a couch or shaking a baby to arouse it, even in a panic. She also opined that the injury was inflicted “very shortly [before DT became] symptomatic.”

[7] Defendant, on the other hand, repeatedly told family members and police that DT had fallen from the couch. Over time, his story changed: he claimed that he had a car accident on the way over to the great-grandmother’s house; he also said that he shook the car seat to keep DT awake. Although Defendant’s mother denied it at trial, her prior testimony was that Defendant admitted shaking DT to revive the baby after he fell off the sofa. While he denied its implications, the State also produced a letter from Defendant to Mother admitting, “I shook [DT].”

[8] The district court sentenced Defendant to eighteen years imprisonment, and denied the State’s request for aggravation but found the offense qualified as a serious violent offense, pursuant to Section 33-2-34(L)(4)(n). Defendant appeals his conviction from the second trial and the status of his conviction as a serious violent offense.

Jury Instructions on Negligent Child Abuse

[9] At the second trial, the jury was instructed on negligent child abuse:

INSTRUCTION No. 3

For you to find Jake Schoonmaker guilty of Child Abuse resulting in Great Bodily Harm, as charged in Count 1, the

Certiorari Granted, No. 28,954, Jan. 21, 2005

From the New Mexico Court of Appeals

Opinion Number: 2005-NMCA-012

STATE OF NEW MEXICO,
Plaintiff-Appellee,
versus
JAKE SCHOONMAKER,
Defendant-Appellant.
No. 23,927 (filed: Sept. 10, 2004)

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
RICHARD J. KNOWLES, District Judge

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Assistant Attorney General

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for Appellee

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Santa Fe, New Mexico
for Appellant
State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
1. Jake Schoonmaker caused [DT] to be tortured or cruelly punished [DT];
2. Jake Schoonmaker acted with reckless disregard and without justification. To find that Jake Schoonmaker acted with reckless disregard, you must find that Jake Schoonmaker knew or should have known his conduct created a substantial and foreseeable risk, he disregarded that risk and he was wholly indifferent to the consequences of the conduct and to the welfare and safety of [DT];
3. Jake Schoonmaker’s actions or failure to act resulted in great bodily harm to [DT];
4. [DT] was under the age of 18;
5. This happened in New Mexico on or about the 24th day of July, 2000.

INSTRUCTION No. 4

For you to find Jake Schoonmaker guilty of Child Abuse resulting in Great Bodily Harm, as charged in the Alternative of Count 1, the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
1. Jake Schoonmaker caused [DT] to be placed in a situation which endangered the life or health of [DT];
2. Jake Schoonmaker acted with reckless disregard and without justification. To find that Jake Schoonmaker acted with reckless disregard, you must find that Jake Schoonmaker knew or should have known his conduct created a substantial and foreseeable risk, he disregarded that risk and he was wholly indifferent to the consequences of his conduct and to the welfare and safety of [DT];
3. Jake Schoonmaker’s actions or failure to act resulted in great bodily harm to [DT];
4. [DT] was under the age of 18;
5. This happened in New Mexico on or about the 24th day of July, 2000.

10 Defendant presents two basic arguments. As best we can tell, his first argument is that, by omitting the terms “negligently and without justification,” in paragraph one, after “Schoonmaker” and before “caused,” the jury was allowed to convict Defendant under an improper standard. This omission, together with the use of the language “knew or should have known,” a term associated with a civil negligence standard, and the omission of “willful or wanton,” terms associated with reckless conduct, according to Defendant, confused and misdirected the jury by failing to apprise the jury that they were to consider Defendant’s guilt or innocence under a criminal negligence standard. Defendant also seems to say that the omission leaves the instructions ambiguous because they mix objective criteria, that he knew or should have known of the risk, with a subjective state of mind, that he disregarded the risk and was wholly indifferent to the consequences of his conduct. In short, Defendant asks how can a person who is unaware of a risk, disregard it? Defendant suggests that the jury might have improperly convicted him on a lesser civil negligence standard for extreme carelessness or mere inadvertence.

11 This leads to Defendant’s second objection, which is that the jury should have been instructed that the State has the burden to prove Defendant had a subjective awareness of the risk of harm. Defendant argues that an objective standard allows the jury to presume that he had a subjective intent to disregard the risk and unconstitutionally shifted the burden to him to rebut the presumption.

12 “The propriety of jury instructions given or denied is a mixed question of law and fact,” which we review de novo. State v. Magby, 1998-NMSC-042, ¶ 8, 126 N.M. 361, 969 P.2d 965 (internal quotation marks and citation omitted) overruled on other grounds by State v. Mascarenas, 2000-NMSC-017, ¶ 27, 129 N.M. 230, 4 P.3d 1221. When reviewing for error, we determine “whether a reasonable juror would have been confused or misdirected” by the jury instruction. State v. Cunningham, 2000-NMSC-009, ¶ 14, 128 N.M. 711, 998 P.2d 176 (quoting State v. Parish, 118 N.M. 59, 42, 878 P.2d 988, 991 (1994)). To preserve an issue for appeal, a defendant must make a timely objection that apprises the trial court of the specific nature of the claimed error and invokes an intelligent ruling thereon. State v. Varela, 1999-NMSC-045, ¶ 25, 128 N.M. 454, 993 P.2d 1280.

13 The record reveals that near the end of the second trial, the State requested, and the district court agreed, to delete the terms “negligently and without justification,” from the tendered jury instructions to be consistent with the standard form of UJI 14-602 NMRA. Defense counsel objected to the omission and proposed an instruction, which instructed that if the jury found Defendant intentionally and purposefully shook the baby, they should contact the district court before deliberating further. He also requested an instruction defining criminal negligence, or alternatively, to reinsert the omitted terms. As the argument was presented below, counsel was primarily concerned with the issue of double jeopardy—that the jury understood they could only convict Defendant if he was guilty of criminally negligent child abuse rather than intentional child abuse -- and with the issue of whether the jury was confused by an ambiguous instruction that did not identify “criminal negligence” as the standard or distinguish it from an intentional act. The district court rejected Defendant’s proposed instructions.

14 We find Defendant has narrowly preserved one issue: whether the omission of the terms, “negligently and without justification” was confusing or misleading such that the jury could have convicted Defendant under an improper standard. State v. Sosa, 1997-NMSC-032, ¶ 25, 123 N.M. 564, 943 P.2d 1017 (holding that the use of an ambiguous instruction that confuses or misleads a jury is reversible error). In negligent child abuse prosecution, the jury must be instructed that the state bears the burden to prove that the defendant was “criminally negligent,” meaning that “[d]efendant knew or should have known of the danger involved and acted with a reckless disregard for the safety or health of the child.” Santillanes v. State, 115 N.M. 215, 222, 849 P.2d 358, 365 (1993). The jury must also be instructed on the definition of “reckless disregard.” Magby, 1998-NMSC-042, ¶¶ 15, 20 (finding reversible error where negligent child abuse instruction did not define reckless disregard and jury might have understood negligence standard to criminalize careless or extremely careless conduct); accord Mascarenas, 2000-NMSC-017, ¶ 21 (finding fundamental error where the jury could have convicted the defendant by erroneously using a civil negligence standard).

15 In Magby, the jury was instructed on negligent child abuse in accordance with the standard articulated in Santillanes: “To find that [defendant] negligently caused child abuse to occur, you must find that [defendant] knew or should have known of the danger in-
volved and acted with a reckless disregard for the safety or health of [Child].” Magby, 1998-NMSC-042, ¶ 5 (emphasis omitted). The Supreme Court reversed defendant’s conviction, holding that the terms “negligent” and “reckless disregard” in the instruction created a fatal ambiguity, which raised a possibility that the jury convicted defendant under a civil negligence standard. Id. ¶¶ 13-15, 22. The Court found an instruction defining “reckless disregard” would have cured this ambiguity and directed “the UJI Criminal Committee to formulate a definition of ‘reckless disregard’ similar to the one tendered by defense counsel in this case for use in [future] negligent child abuse cases.” Id. ¶ 17. UJI 14-602 was subsequently amended and the concept of criminal negligence was incorporated into the instruction by including the definition of reckless disregard as required by Magby.

{16} The district court instructed the jury under UJI 14-602 as it was drafted pursuant to these cases. The standard instruction omits the terms “negligently and without justification,” and incorporates a criminal negligence standard that includes a definition of reckless disregard. Omitting the negligence language did not create the type of ambiguity that was present in Magby or in the substantively similar case of Mascarenas, 2000-NMSC-017, ¶¶ 11, 13. Since the definitions for criminal negligence and reckless disregard were incorporated into the instruction, the jury could not have convicted Defendant under a lesser civil standard. To the contrary, adding the negligence language would only serve to reintroduce an ambiguity that the Magby court expressly wanted to avoid. We hold that the tendered jury instructions were legally sufficient.

{17} The issues of whether the use of an objective and subjective standard in the same instruction might confuse a jury or violate due process were not preserved. When reviewing for error that has not been preserved, our Supreme Court has held:

{[the doctrine of fundamental error should be applied sparingly, to prevent a miscarriage of justice, and not to excuse the failure to make proper objections in the court below. With regard to a criminal conviction, the doctrine is resorted to only if the defendant’s innocence appears indisputable or if the question of his [or her] guilt is so doubtful that it would shock the conscience to permit the conviction to stand.}

State v. Reyes, 2002-NMSC-024, ¶ 42, 132 N.M. 576, 52 P.3d 948 (internal quotation marks and citation omitted). Defendant has not shown how the tendered instructions would put his conviction into doubt so as to result in a miscarriage of justice. Even if he did not know that violently shaking a baby could result in serious harm, there was sufficient evidence for the jury to find that the risk of harm to DT was so substantial and foreseeable that he should have known of the risk he created but that he was wholly indifferent to it. State v. McCrory, 100 N.M. 671, 673, 675 P.2d 120, 122 (1984) (holding that where defendant’s conduct creates a high degree of risk, subjective knowledge is inferred by circumstantial evidence tending to prove defendant should have realized the risk under the circumstances). “Conscious disregard” is not an element in negligent child abuse. By law, one need only have “reckless disregard” to the consequences in the face of substantial and foreseeable danger. Defendant failed to establish fundamental error.

Double Jeopardy

{18} Defendant argues that his acquittal of intentional child abuse and subsequent prosecution for negligent child abuse violate the federal constitutional guarantee against double jeopardy: (1) they are the same crime, (2) intentional abuse is a lesser included offense of negligent abuse, and (3) collateral estoppel prevents the State from relitigating the issue of whether Defendant shook the baby since the jury necessarily decided this fact when it acquitted him of intentional abuse. While Defendant asserts that the New Mexico Constitution affords broader protection against double jeopardy than its federal counterpart to bolster his lesser included offense claim, we find that this analysis was not preserved. State v. Gomez, 1997-NMSC-006, ¶¶ 22-23, 122 N.M. 777, 932 P.2d 1 (outlining steps to preserve broader application of state constitution). We thus limit our review to an analysis under the federal constitution.

{19} As a general rule, double jeopardy principles are not implicated when a mistrial is ordered for manifest necessity when the jury is unable to reach a verdict. State v. Desnoyers, 2002-NMSC-031, ¶ 33, 132 N.M. 756, 55 P.3d 968. Nonetheless, the double jeopardy clause of the federal constitution does protect a defendant from a second prosecution for the “same offense” after an acquittal or a conviction (multiple prosecutions) and from multiple punishments. State v. Martinez, 120 N.M. 677, 678, 905 P.2d 715, 716 (1995). This case falls in the “multiple prosecution” category. We apply a de novo standard of review to the constitutional question of whether there has been a double jeopardy violation. State v. Andazola, 2003-NMCA-146, ¶ 14, 134 N.M. 710, 82 P.3d 77.

{20} Federal and New Mexico state courts apply the “Blockburger test” “as the essence of the double jeopardy inquiry” in the context of multiple prosecutions. State v. Gonzales, 1997-NMCA-039, ¶ 7, 123 N.M. 337, 940 P.2d 185 (recognizing that the United States Supreme Court, applies Blockburger v. United States, 284 U.S. 299 (1932) in the context of multiple prosecutions, and concluding that the New Mexico Supreme Court would do the same); accord State v. Powers, 1998-NMCA-133, ¶ 29, 126 N.M. 114, 967 P.2d 454 (criminal contempt action and criminal prosecution); see also State v. Nunez, 2000-NMSC-013, ¶ 56, 129 N.M. 63, 2 P.3d 264 (applying Blockburger as one part of three part tests for double jeopardy in civil forfeiture and criminal prosecution); accord State ex rel. Schwartz v. Kennedy, 120 N.M. 619, 626, 904 P.2d 1044, 1051 (1995) (administrative sanction and criminal prosecution). We have also held that statutes that are pled in the alternative, such as in this case, are treated as separate offenses for purposes of our double jeopardy analysis. State v. Rodriguez, 113 N.M. 767, 771, 833 P.2d 244, 248 (Ct. App. 1992).

{21} Our Supreme Court has interpreted the Blockburger test as a “canon of construction used to guide courts in deciphering legislative intent.” Swafford v. State, 112 N.M. 3, 9, 810 P.2d 1223, 1229 (1991). New Mexico employs a two-part test under Blockburger. The first inquiry is whether the offenses are unitary, that is, whether the same conduct violates both statutes,” or whether the conduct is distinguishable. Swafford, 112 N.M. at 13, 810 P.2d at 1233. If the conduct is unitary, the elements of each offense are compared. “[I]f . . . one statute is subsumed within the other, the inquiry is over and the statutes are the same for double jeopardy purposes.” Id. at 14, 810 P.2d at 1234. Conversely, if each offense requires proof of an additional element that is not present in the other, there is a presumption that the statutes punish distinct offenses and double jeopardy does not apply. Gonzales, 1997-NMCA-039, ¶ 7; see Swafford, 112 N.M. at 14, 810 P.2d at 1234. To succeed in a double jeopardy claim, Defendant must rebut that presumption by showing [] contrary legislative intent as evidenced by the “language, history and subject of the statutes[,”]” by differences in the particular evil addressed by each statute, by a showing that the statutes are usually violated together, by comparison
of the punishment inflicted for violating each statute, and by other relevant factors.

Rodriguez, 113 N.M. at 772, 833 P.2d at 249 (citation omitted).

{22} Defendant argues that intentional child abuse is a general intent crime that merely requires proof that he committed an act “purposely,” or as he framed it, had the “conscious object to engage in the conduct” that is harmful. Negligent child abuse, in his view, requires a similar intent of reckless disregard or, as he defines it, “consciously enga[ging] in conduct while disregarding the risk.” By superficially conflating the elements of intentional and negligent child abuse in this manner, Defendant argues that the two offenses have the same elements. In the alternative, Defendant argues that intentional child abuse is a lesser included offense of criminally negligent child abuse, apparently because negligent child abuse adds an element of reckless disregard whereas intentional child abuse does not require any intent as to the consequences of a defendant’s conduct.

{23} There is no dispute that the offending conduct was unitary. Our focus is on the second inquiry—whether one offense is completely subsumed by the other. We suspect that part of Defendant’s confusion lies in his reference to cases in which child abuse has been characterized as a strict liability crime that does not require proof of intent. State v. Trujillo, 2002-NMCA-100, ¶ 14, 132 N.M. 649, 53 P.3d 909; State v. Herrera, 2001-NMCA-073, ¶ 13, 131 N.M. 22, 33 P.3d 22; State v. Ungarten, 115 N.M. 607, 609, 856 P.2d 569, 571 (Ct. App. 1993); State v. Leal, 104 N.M. 506, 509, 723 P.2d 977, 980 (Ct. App. 1986); State v. Fuentes, 91 N.M. 554, 557, 577 P.2d 452, 455 (Ct. App. 1978); State v. Lucero, 87 N.M. 242, 244, 531 P.2d 1215, 1217 (Ct. App. 1975). Our first portrayal of child abuse as a strict liability crime was made when New Mexico courts applied a civil negligence standard for negligent child abuse. See Santillanes, 115 N.M. at 219, 849 P.2d at 362 (noting New Mexico courts had consistently applied a civil negligence standard under the child abuse statute). Apparently this conclusion was based on our observation that the legislature did not appear to differentiate between intentional or negligent child abuse. See Lucero, 87 N.M. at 244, 531 P.2d at 1217. However, the Supreme Court has long since clarified that the child abuse statute is not a strict liability crime in that it contains a mens rea element. See Santillanes, 115 N.M. at 218, 849 P.2d at 361 (noting that the Court did not have to consider whether child abuse was a strict liability crime because statute contained mens rea elements). “A strict liability statute . . . imposes criminal sanction for an unlawful act without requiring a showing of criminal intent.” Lucero, 87 N.M. at 244, 531 P.2d at 1217. For a child abuse conviction to lie, the state must prove that the defendant acted with a culpable mens rea, a morally blameworthy mental state or “intent.” Magby, 1998-NMSC-042, ¶ 10; Santillanes, 115 N.M. at 218, 849 P.2d at 361.

{24} Child abuse is a general intent crime; unlike a specific intent crime, the statute does not require “proof of intent to do a further act or achieve a further consequence.” See State v. Brown, 1996-NMSC-073, ¶ 22, 122 N.M. 724, 931 P.2d 69 (explaining the difference between general and specific intent crimes) (internal quotation marks and citation omitted). Nevertheless, the statute does contain a mens rea element, which requires proof that a defendant acted with a culpable mental state: intentionally or criminally negligent. It also contains an actus reus element: the “voluntary act” that inflicts serious harm or death to the child.

{25} Our comparison of the statutory elements for intentional and negligent child abuse reveals that each offense contains an element that the other does not: the mens rea element. To prove intentional child abuse, the state must show that defendant intended to commit the wrongful act or the consequence. UJI 14-602. Negligent child abuse requires proof that defendant acted with reckless disregard: (1) defendant knew or should have known that his or her conduct created a substantial and foreseeable risk, and (2) defendant recklessly disregarded and was wholly indifferent to the consequences of his or her conduct and to the welfare and safety of the child. Id.

{26} We are unpersuaded by Defendant’s attempt to equate the two elements. Defendant seems to confuse the concepts of the actus reus element, the voluntary act, with the mens rea, the mental state that our legislature has deemed to be morally blameworthy. The child abuse statute punishes defendants for committing a voluntary act that is likely to result in serious harm to the child, such as violently shaking a baby, when it is his or her intent, purpose, or conscious object to engage in a harmful act (shake the baby) or to cause the harmful consequence. Joshua Dressler, Understanding Criminal Law 121 (Matthew Bender 2d ed. 1999). It also punishes defendants for committing a voluntary act, such as shaking a baby, in a criminally negligent manner when he or she engages in substantial and unjustifiable risk taking. Id. at 122. The difference is that intentional abuse requires the jury to focus on the defendant’s intended conduct to determine whether it was his or her mind-set to violently shake or harm the child. In contrast, negligent abuse requires the jury to focus on the consequences of that conduct to determine whether the risk of serious harm was sufficiently substantial and unjustified under the circumstances to infer that defendant’s mind-set was one of indifference, rather than purpose and grossly contrary to common experience. See id. at 113-14. Since each statute requires proof of a different element, we find there is a presumption that the legislature intended to punish these crimes separately. Defendant has provided no evidence of any contrary legislative intent.

{27} We find our conclusion is supported by the plain language of the statute, which requires proof of different elements. The statute also seeks to protect children from two distinct but equally dangerous behaviors: intentionally abusive conduct and unintentional but grossly harmful conduct. The first deters persons who intend harmful acts against children, while the second promotes awareness and prudence when caring for children. It is also clear that these two statutes are mutually exclusive—one cannot commit an intentional act and an unintentional act at the same time, even though the act is voluntary as to both and the evidence may be sufficient to charge both offenses as alternative theories. We thus hold that the crime of intentional child abuse is not the same crime or lesser included crime of negligent child abuse.

{28} Defendant’s last argument on this issue is collateral estoppel. Collateral estoppel is an aspect of double jeopardy. State v. Abril, 2003-NMCA-111, ¶ 25, 134 N.M. 326, 76 P.3d 644. Defendant bears the burden to prove the factual predicate for collateral estoppel—that the ultimate issue was determined in his favor by the jury. Id. ¶ 26. Defendant has failed to establish his claim that to acquit him of intentional child abuse, the jury must have found he did not shake the baby. As we explained, the voluntary act of shaking the

1 Of course intentional child abuse may still include instances where defendant has a specific intent to harm the child. Herrera, 2001-NMCA-073, ¶ 20.
baby that results in harm is the actus reus element of both negligent and intentional child abuse. The jury could have found that Defendant did not intend to shake the baby in a violent manner, but failed to reach a verdict on whether he shook the baby in a criminally negligent, albeit violent manner. Hence, collateral estoppel principles do not apply. We find no double jeopardy violation.

**Character Evidence**

{29} Defendant claims that the district court abused its discretion by excluding admissible character evidence. Further, Defendant states that the court extended its ruling from the first trial to the second trial “to exclude all evidence offered by [Defendant] concerning his reputation in the community for peacefulness” and that the court “repeatedly excluded the presentation of this evidence.”

{30} In truth, the record reveals that the district court excluded specific instances of character evidence, which it ruled were not admissible under Rule 11-404(A) NMRA, to prove that Defendant acted in conformity with any particular trait. Significantly, the court also ruled that Defendant’s trait of character for peacefulness was relevant to a prosecution for child abuse based on shaken baby syndrome, and, therefore, admissible under Rule 11-405 NMRA, provided that the testimony was offered in the form of reputation or opinion testimony. The court repeated its ruling in detail throughout the first trial, and, in fact, allowed opinion testimony that Defendant was a good man who treated DT well prior to the incident.

{31} At the start of the second trial, the court reminded counsel:

I’m going to follow the rules and I’m going to expect each side to follow the rules on that. And, therefore, you will follow the rules relating to character evidence under 404, 405, opinion, reputation and ask questions in that form. And, frankly, as I recall testimony of mom last time, there is a whole lot of stuff like isn’t he a nice kid. Ask the proper form of the question [or] I’ll sustain the objection every time. . . . My recollection of her testimony in the previous trial is your questions asked by the defense that would tend to solicit he is a nice kid, he wouldn’t do this kind of thing . . . . And I’m telling you all right now that it’s not acceptable. And I would sustain objections on that. . . . You all open the door on character evidence . . . . with respect to one of your witnesses, the defense gets to rebut. The defense opens the door with respect to character evidence with respect to [Defendant] if there is any negative character evidence, the State can rebut with any. Not only is his claim inaccurate, Defendant mysteriously cites no instances in the second trial where he offered, or the court excluded, evidence of his peaceful character. The testimony he cites occurred at the first trial which for obvious reasons was not appealed. Defendant has failed to preserve his objection. *State v. Rojo*, 1999-NMSC-001, ¶ 44, 126 N.M. 438, 971 P.2d 829 (citing principle that the court will not search the record to find whether an issue was preserved).

**Sufficiency of the Evidence**

{32} Defendant restates his double jeopardy arguments as a sufficiency of the evidence argument. He contends that the State presented the same evidence as it presented in the first trial, and all of that evidence led to only one conclusion: the shaking was non-accidental and there was no innocent purpose. Since the jury acquitted him of intentional child abuse, he concludes, the evidence cannot support a conviction for criminal negligence. We need not restate our double jeopardy analysis. Instead we limit our review to the issue of whether there was substantial evidence to support Defendant’s conviction for negligent child abuse.

In reviewing the sufficiency of evidence used to support a conviction, we determine whether substantial evidence exists to support a finding of guilt beyond a reasonable doubt for every element essential to the conviction. We resolve all disputed facts in favor of the State, indulge all reasonable inferences in support of the verdict, and disregard all evidence and inferences to the contrary. Contrary evidence supporting acquittal does not provide a basis for reversal because the jury is free to reject Defendant’s version of the facts. *State v. Wilson*, 2001-NMCA-032, ¶ 34, 130 N.M. 319, 24 P.3d 351 (citations omitted).

{33} At the second trial, the State had the burden to prove that Defendant knew or should have known of the substantial risk that his conduct could result in serious injury or death to DT, and that he recklessly disregarded that risk and was wholly indifferent to it or the child’s safety and health. See UIJI 14-602. The evidence established that prior to 3:20 p.m. on July 24, 2000, DT was a normal and healthy baby. Two hours later, after being in Defendant’s sole custody and care, he was not. Medical witnesses testified that DT suffered substantial, serious injuries that were consistent with shaken baby syndrome and that those injuries would manifest shortly after being violently shaken. Although Defendant offered several innocent explanations, the consensus of the medical witnesses was that his explanations were medically unacceptable. He also admitted shaking DT on two occasions. We find that this evidence is sufficient for the jury to convict Defendant of criminally negligent child abuse. *See Wilson*, 2001-NMCA-032, ¶ 37 (holding that substantial evidence supported Defendant’s conviction for negligent child abuse where medical testimony established serious injury to the child resulted from substantial force, defendant was the only person capable of inflicting the injury, he admitted tossing the child onto a bed and that its head hit something, and his explanation was medically unacceptable); *State v. Pennington*, 115 N.M. 372, 383, 851 P.2d 494, 505 (Ct. App. 1993) (holding that circumstantial evidence may support a guilty verdict).

**Findings Required by Section 33-2-34(L)(4)(n)**

{34} At sentencing, the district court found that Defendant’s conviction for negligent child abuse qualified as a serious violent offense and limited his good time credit in prison to four days per month as authorized by the Earned Meritorious Deductions Act, Section 33-2-34(L)(4)(n) (EMDA). The district court found:

[DT] was vulnerable, and it is a terrible thing that happened to [him] that he [has] to live with for the rest of his life . . . . I don’t believe that there was a specific intent to do serious harm . . . . I think it’s implicit and literally built [into] the verdict of the jury. There was a finding by the jury beyond a reasonable doubt that what you did is something reasonably likely to cause harm, and a reasonable person would know that. And so I think the earned meritorious good time credit act does apply in the circumstances of this case.

Defendant argues that negligent child abuse is not a serious violent offense as a matter of law. For a crime to qualify under subsection (L)(4)(n), Defendant contends, the district court must find that he acted with “subjective intent or knowledge” of the risk of harm. He
concludes that imputing knowledge of the risk to him under an objective standard was a legally insufficient basis to qualify his conviction as a serious violent offense. We review de novo the issue of whether the court applied the correct legal standard under Section 33-2-34(L)(4)(n). State v. Romero, 2002-NMCA-106, ¶ 6, 132 N.M. 745, 55 P.3d 441.

{35} Defendant relies heavily on State v. Morales, in which we stated that the serious violent offenses listed in subsection (L)(4)(n) were limited to circumstances where the trial judge found the offense was “committed in a physically violent manner either with an intent to do serious harm or with recklessness in the face of knowledge that one’s acts are reasonably likely to result in serious harm.” 2002-NMCA-016, ¶ 16, 131 N.M. 530, 39 P.3d 747. In making this determination, the trial judge may also consider the resulting harm. Id. Defendant isolates our term, “in the face of knowledge,” to argue that we require actual knowledge of the risk.

{36} In Morales, we construed subsection (L)(4)(n) “to require a finding that a defendant had committed the crime ‘in a physically violent manner,’ acting either intentionally or recklessly, which resulted in serious harm to the victim.” State v. Cooley, 2003-NMCA-149, ¶ 18, 134 N.M. 717, 82 P.3d 84 (emphasis added). In fact, we recognized that risk-taking knowledge is imputed to a defendant who is convicted of shooting at a dwelling or occupied building, which is a serious violent offense as a matter of law, even though proof of actual knowledge that the building was occupied is not required. Morales, 2002-NMCA-016, ¶ 14; see UJI 14-340 NMRA (indicating that proof that the defendant knew it was a dwelling is sufficient). As we often recognize, “the element of intent is seldom susceptible to direct proof and accordingly may be proved by circumstantial evidence.” McCrory, 100 N.M. at 673, 675 P.2d at 122. Likewise, subjective knowledge can be attributed to a defendant in the case of negligent child abuse when the evidence establishes that the degree of risk was substantial and unjustified so that the defendant should know it was reasonably dangerous to the child’s life or health. See id. (“[S]ubjective knowledge of risk [is found] by considering what the defendant should realize to be the degree of risk, in the light of the surrounding circumstances.”) (internal quotation marks and citation omitted).

{37} Neither do we find any indication that the legislature intended to require subjective knowledge under subsection (L)(4)(n). That subsection identifies “first, second, and third degree” child abuse as a qualifying serious violent offense without restriction. Under Defendant’s standard, it would be virtually impossible to find negligent child abuse is a serious violent offense, even if it were committed in the most physically violent manner that resulted in death. See State v. Padilla, 1997-NMSC-022, ¶ 6, 123 N.M. 216, 937 P.2d 492 (reviewing court construes statute to avoid absurd or unreasonable results). Such a finding contravenes legislative intent to deter grossly negligent conduct that poses a substantial risk of serious harm to children. See State v. Shafer, 102 N.M. 629, 637, 698 P.2d 902, 910 (Ct. App. 1985) (“Statutes must be construed according to the purpose for which they were enacted.”). The record reveals that the district court made the requisite finding of knowledge and its decision is supported by substantial evidence.

CONCLUSION

{38} We affirm Defendant’s conviction and the district court’s determination that negligent child abuse qualified as a serious violent offense under the circumstances of this case.

{39} IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE,
Judge

WE CONCUR:
JAMES J. WECHSLER, Chief Judge
CYNTHIA A. FRY, Judge
Opinion

Jonathan B. Sutin, Judge

{1} We are presented with another circumstance in which we must determine when a statutory limitations period begins to run in a medical malpractice case. The district court applied NMSA 1978, § 41-4-15(A) (1977), contained in the Tort Claims Act, NMSA 1978, §§ 41-4-1 to -29 (1976, as amended through 2004). In the application of Section 41-4-15(A), Plaintiff sought to apply the discovery rule. Defendant fought against application of the discovery rule. The district court determined that, even though Plaintiff was unaware of the record, the statute began to run at the point when an EMT/paramedic record was created that mentioned a subject that, if investigated further would, as later determined, have led to a possible cause of death.

{2} The issue requires us to interpret Section 41-4-15(A) by analyzing its language and any legislative intent behind its enactment. In addition, we must discuss medical malpractice cases that interpret not only Section 41-4-15(A), but also other statutes that have been applied to medical malpractice claims. Those other statutes are the general personal injury statute of limitations, NMSA 1978, § 37-1-8 (1976); the Medical Malpractice Act statute of repose, NMSA 1978, § 41-5-13 (1976); and the Tort Claims Act claims notice statute, Section 41-4-16.

{3} Once pieced together, the jurisprudential puzzle of judicial tolling decisions does not show a definitive path to follow for the result in the case before us. However, a path must be chosen. Historically, Sections 41-4-15(A) and 41-5-13 were enacted while the “time of the negligent act” rule was in force in medical malpractice cases. See Roybal v. White, 72 N.M. 285, 287, 383 P.2d 250, 252 (1963) (applying the “time of the negligent act” rule), overruled by Roberts v. Southwest Cmty. Health Servs., 114 N.M. 248, 837 P.2d 442 (1992). This fact, along with the similarity in language between these two statutory provisions and the change in the judicial tolling landscape by Cummings v. X-Ray Associates of N.M., P.C., 1996-NMSC-035, 121 N.M. 821, 918 P.2d 1321, leads us to conclude that Section 41-4-15(A) is an occurrence rule and that the discovery rule is not to be applied. Thus, we affirm the district court’s summary judgment against Plaintiff. We therefore need not address Plaintiff’s second issue of whether her diligence in discovering the alleged cause of the injury is a question of fact precluding summary judgment.

Background

{4} Defendant Philip G. Zager, M.D., worked as the director of the Dialysis Clinic, Inc., a private kidney dialysis facility located in Albuquerque, New Mexico (the clinic), pursuant to a contract between the University of New Mexico and the clinic. He was a public employee employed by the University of New Mexico Hospital, a governmental entity.

{5} On May 17, 1999, while undergoing kidney dialysis at the clinic, Betty Varela (decedent) began having severe problems breathing. She was taken off the dialysis equipment and transported by ambulance with EMT/paramedics to Presbyterian Hospital (the hospital), where she died shortly after arrival. After learning that decedent had a medical problem, Plaintiff, the decedent’s sister, went to the clinic and then to the hospital. Plaintiff made inquiries at the clinic and at the hospital regarding decedent’s condition. At some point, she was informed by personnel at the office of the medical investigator (OMI) that decedent died of an allergic reaction to a prescription drug she was taking. Plaintiff hired an attorney and in early October 1999 obtained copies of the autopsy report and the OMI’s report of findings.

{6} The autopsy report explained that decedent died of angioedema (swelling) of the face, throat, and tongue due to an idiosyncratic drug reaction to lisinopril. The OMI’s report of findings stated the same conclusion as to the cause of death. Lisinopril is a prescription drug decedent was taking and to which decedent had previously experienced a reaction in 1998. The autopsy report also indicated that Defendant’s investigation of the clinic’s dialysis equipment and fluids showed “no abnormalities in the tubing, machines, or composition of the fluid.” Attached to the autopsy report was a toxicology report. The autopsy report found nothing of significance in the toxicology report.
{7} In October 1999, Plaintiff requested the clinic’s medical records relating to decedent. For reasons unexplained in the briefs, Plaintiff did not get the records until September 14, 2000. In August 2000, Plaintiff requested copies of the records of the EMT/paramedics who transported decedent to the hospital. These records indicated that a staff member of the clinic told one of the paramedics that decedent was possibly suffering from an allergic reaction to chlorine in her blood. Another paramedic’s report indicated he was told there was chlorine in the decedent’s blood.

{8} Plaintiff filed the present action on March 25, 2002, against Defendant, the clinic, and others. In July 2002, through discovery, Plaintiff obtained the OMI’s investigation log indicating there had been an investigation on allegations that a chlorine-based solution had been used to clean the dialysis equipment before decedent used it, but that an examination of the equipment showed no contamination. The log also indicated that there was no hemolysis in decedent’s blood to indicate chlorine contamination.

{9} Decedent died on May 17, 1999. Section 41-4-15(A) is a two-year statute. Two years from May 17, 1999, was May 17, 2001. Plaintiff first learned of the possibility of chlorine being a cause of death in August 2000, but did not file the action until March 2002. Plaintiff’s action was filed some ten months after two years had elapsed from the date of death. However, it was filed within two years of the date Plaintiff asserts she first should have discovered, using reasonable diligence, that chlorine might have been a causative factor. The district court granted summary judgment in favor of Defendant, holding that Section 41-4-15(A) barred Plaintiff’s claim. On appeal, Plaintiff asserts that the district court erred in declining to apply the discovery rule and thus, denying her claim.

DISCUSSION

{10} Section 41-4-15(A) reads:

Actions against a governmental entity or a public employee for torts shall be forever barred, unless such action is commenced within two years after the date of occurrence resulting in loss, injury or death, except that a minor under the full age of seven years shall have until his ninth birthday in which to file. This subsection applies to all persons regardless of minority or other legal disability.

{11} Plaintiff relies primarily on Roberts in which neither the Tort Claims Act nor the Medical Malpractice Act applied. Roberts adopted the discovery rule in applying Section 37-1-8 to a medical malpractice claim. Roberts, 114 N.M. at 250, 254, 256, 837 P.2d at 444, 448, 450. Plaintiff argues that the Roberts discovery rule applies to all medical malpractice claims not falling under the Medical Malpractice Act, and thus the discovery rule applies to Defendant. Plaintiff also argues that cases arising under the Tort Claims Act support her contention that the discovery rule applies in the application of Section 41-4-15(A) to medical malpractice claims.

{12} Defendant argues that Roberts does not apply because Roberts was decided under Section 37-1-8, while the Tort Claims Act limitations statute, Section 41-4-15(A) controls this case. Defendant asserts that, pursuant to cases arising under the Tort Claims Act, Section 41-4-15(A) begins to run “when the act heralding the possible tort inflicts a damage which is physically objective and ascertainable,” or “when the plaintiff begins to experience symptoms, not on a subsequent date when the cause of the symptoms is discovered.” (Internal quotation marks and citation omitted.) Defendant argues that because decedent’s death manifested and was ascertainable on May 17, 1999, the statute ran two years from that date. Defendant further argues that to apply Roberts would be contrary to the plain language of Section 41-4-15(A) that the statute begins to run at “the date of occurrence resulting in loss, injury or death.” In order to place the parties’ arguments in context, we briefly here distinguish between the discovery rule and the occurrence rule and then give a synopsis of Roberts and the Tort Claims Act cases predating Roberts. Later in this opinion we will discuss these cases in more detail to determine if they warrant application of the discovery rule to Section 41-4-15(A).

The Distinction Between the Discovery Rule and the Occurrence Rule

{13} The Court in Cummings stated that “[t]wo basic standards determine the beginning of the time period in which a patient must file a claim for medical malpractice. One is sometimes called the ‘discovery rule[,]’ . . . and [t]he other standard is sometimes called the ‘occurrence rule.’” 1996-NMSC-035, ¶ 47. While the discovery rule focuses on the date the injury was discovered, the occurrence rule “fixes the accrual date at the time of the act of medical malpractice even though the patient may be oblivious of any harm.” Id.

{14} The Cummings Court interpreted the limitations period in the Medical Malpractice Act, Section 41-5-13, to be an occurrence rule, rather than a discovery rule. Cummings, 1996-NMSC-035, ¶¶ 50-51. Further, the Cummings Court distinguished between a statute of limitations and a statute of repose, stating that while “[a] statute of limitations begins to run when the cause of action accrues, the accrual date usually being the date of discovery[,] . . . [a] statute of repose runs from a statutorily determined triggering event.” Id. ¶¶ 49-50. The Court held that, according to the plain language of Section 41-5-13, the statute is a statute of repose and the triggering event is the act of malpractice. Cummings, 1996-NMSC-035, ¶¶ 48, 50.

The Tort Claims Act Cases and Roberts

{15} The Tort Claims Act cases predate Roberts. The two most applicable are Emery v. University of N.M. Medical Ctr., 96 N.M. 144, 628 P.2d 1140 (Ct. App. 1981), and Long v. Weaver, 105 N.M. 188, 730 P.2d 491 (Ct. App. 1986). Emery was a claims notice case decided under Section 41-4-16(A) which requires a claimant to provide notice of his or her claim within ninety days of “an occurrence giving rise to a claim.” § 41-4-16(A). Emery, 96 N.M. at 148-49, 628 P.2d at 1144-45. Long, which followed Emery, was decided based on Section 41-4-15(A). Long, 105 N.M. at 189, 730 P.2d at 492. Emery stemmed from Peralta v. Martinez, 90 N.M. 391, 392, 564 P.2d 194, 195 (Ct. App. 1977), a pre-Medical Malpractice Act case decided under NMSA 1953, § 23-1-8 (1929), recodified without change at NMSA 1978, § 37-1-8 (1976). Both Emery and Long applied the holding in Peralta that the statute of limitations begins to run on a claim for medical malpractice from the time the “injury manifests itself in a physically objective manner and is ascertainable.” Long, 105 N.M. at 191, 730 P.2d at 494; Emery, 96 N.M. at 149, 628 P.2d at 1145; Peralta, 90 N.M. at 394, 564 P.2d at 197. We refer to this rule as the “Peralta rule” in this opinion. By adopting the Peralta rule, Emery and Long chose not to follow the “time of the negligent act” rule applied in Roybal. See Long, 105 N.M. at 191, 730 P.2d at 494; Emery, 96 N.M. at 148-49, 628 P.2d at 1144-45.

{16} Roberts held that, because the defendant was not a qualified healthcare provider under the Medical Malpractice Act, NMSA 1978,
§§ 41-5-1 to -29 (1976, as amended through 1997), the applicable statute was the general statute of limitations governing personal injuries, Section 37-1-8, rather than the specific provision in the Medical Malpractice Act, Section 41-5-13. Roberts, 114 N.M. at 254, 837 P.2d at 448. Roberts adopted the discovery rule, reciting it as “the cause of action accrues when the plaintiff knows or with reasonable diligence should have known of the injury and its cause.” Id. at 257, 837 P.2d at 451. Roberts overruled Roybal, expressly and finally closing the door on the “time of the negligent act” rule when applying Section 37-1-8 to medical malpractice claims. Roberts, 114 N.M. at 255, 837 P.2d at 449. Like Emery, Roberts looked to Peralta, reciting Peralta’s holding to be that “a cause of action accrues when a physically objective and ascertainable injury to the plaintiff occurs.” Roberts, 114 N.M. at 254, 837 P.2d at 448. However, in adopting the discovery rule, Roberts did not express that it was changing, distinguishing, or disfavoring the Peralta rule. See id. at 254-57, 837 P.2d at 448-51. Roberts appears to have left Peralta as it stood, proceeding apart from Peralta to adopt the discovery rule. See Roberts, 114 N.M. at 254-57, 837 P.2d at 448-51.

Standard of Review

Interpreting Section 41-4-15(A)
{18} We interpret Section 41-4-15(A) under the rules laid out by our Supreme Court in Cummings:

When interpreting statutes, our responsibility is to search for and give effect to the intent of the legislature. We endeavor to fulfill the statute’s objectives. Our understanding of legislative intent is based primarily on the language of the statute, and we will first consider and apply the plain meaning of such language. This standard is sometimes called the “plain meaning rule.”

1996-NMSC-035, ¶ 44 (citations omitted); see also Regents of Univ. of N.M. v. Armijo, 103 N.M. 174, 175, 704 P.2d 428, 429 (1985) (interpreting Section 41-4-15(A) and stating that “[the] Court must attempt to ascertain the intent of the Legislature and should interpret words used according to their plain, literal meaning, provided such an interpretation does not result in injustice, absurdity, or contradiction”). When the statute in question is from a more comprehensive act, the court is to “read the act in its entirety and construe all the provisions together and attempt to view them as a harmonious whole.” Cummings, 1996-NMSC-035, ¶ 45. “[I]f the language of [the] statute is not ambiguous, the literal meaning of the words must be applied.” Id. (internal quotation marks and citation omitted); Jaramillo v. State, 111 N.M. 722, 727, 809 P.2d 636, 641 (Ct. App. 1991) (“We decline plaintiff’s invitation to read language into the statute that is not there.”). We should not “read words into a statute unless they are necessary to make the statute conform to the obvious intent of the legislature.” State v. Mendoza, 115 N.M. 772, 774, 858 P.2d 860, 862 (Ct. App. 1993).

1. The Language of Section 41-4-15(A)

{19} In determining whether Section 41-4-15(A) is a discovery rule, we are guided by the Supreme Court’s analyses of the language of Sections 37-1-8 and 41-5-13 in Roberts and Cummings, respectively. Section 37-1-8 states: “Actions must be brought . . . for an injury to the person . . . within three years.” Roberts looked at this language and found that application of the discovery rule was warranted. 114 N.M. at 255-56, 837 P.2d at 449-50 (“Section 37-1-8 does not state that the limitation period runs from the time of the wrongful act.”) (internal quotation marks omitted). On the other hand, Section 41-5-13 states: “No claim . . . may be brought against a health care provider unless filed within three years after the date that the act of malpractice occurred.” (Emphasis added.) The Cummings Court found no reason “to depart from the plain meaning of Section 41-5-13 in construing its language,” and thus held that Section 41-5-13 was an occurrence rule and not a discovery rule. Cummings, 1996-NMSC-035, ¶¶ 46, 48.

{20} Section 41-4-15(A) states: “Actions against a governmental entity or a public employee for torts shall be forever barred, unless such action is commenced within two years after the date of occurrence resulting in loss, injury or death.” (Emphasis added.) The language of Section 41-4-15(A) is very similar, but not identical, to the language in Section 41-5-13. Compare § 41-4-15(A), with § 41-5-13. The language of Sections 41-4-15(A) and 41-5-13 are both very different from the language of Section 37-1-8. Compare §§ 41-4-15(A), and 41-5-13, with § 37-1-8. Further, the Tort Claims Act was enacted the same year as the Medical Malpractice Act, in 1976; however, the Tort Claims Act does not only address malpractice. It also addresses negligence of government employees in the construction and maintenance of highways, violations of property or constitutional rights by law enforcement officers, and a host of other claims. See §§ 41-4-5 to -12. Thus, in framing Section 41-4-15(A), the Legislature could not simply state “the date that the act of malpractice occurred,” as did the Medical Malpractice Act. § 41-5-13. Instead, it stated “the date of occurrence resulting in loss, injury or death,” presumably in order to cover all of the possible claims as to which governmental immunity was waived. § 41-4-15(A). Moreover, the temporal focus of Section 41-4-15(A) seems to be on the date of the occurrence rather than the loss, injury, or death, making it considerably more like Section 41-5-13 than Section 37-1-8. This suggests that, just as the Cummings Court interpreted the plain language of Section 41-5-13 to be an occurrence rule, we should also interpret the plain language of Section 41-4-15(A) to be an occurrence rule. See Cummings, 1996-NMSC-035, ¶¶ 50-51; see also State v. Davis, 2003-NMCA-022, ¶ 12, 134 N.M. 172, 74 P.3d 1064 (“The rule that statutes in pari materia should be construed together has the greatest probative force in the case of statutes relating to the same subject matter passed at the same session of the Legislature.”).

2. The Legislative Intent Behind and Historical Context of Section 41-4-15(A)

{21} Section 41-4-15(A) in the Tort Claims Act, like Section 41-5-13 in the Medical Malpractice Act, is part of a broad statutory scheme enacted to implement a particular legislative policy. An important policy behind the Medical Malpractice Act was to attempt to manage a perceived medical malpractice crisis in New Mexico. Roberts, 114 N.M. at 251, 837 P.2d at 445; see Cummings, 1996-NMSC-035, ¶ 40 (“[Section 41-5-13] is reasonably related to important governmental interests. . . . New Mexico reformed its medical malpractice laws in 1976 in response to a much discussed medical malpractice crisis.”). Important policies underlying enactment of the Tort Claims Act were to protect the public treasury, to enable the government to function unhampered by the threat of legal actions that would inhibit
the administration of traditional state activities, and to enable the government to effectively carry out its services. *Garcia v. Albuquerque Pub. Schs. Bd. of Educ.*, 95 N.M. 391, 394, 622 P.2d 699, 702 (Ct. App. 1980). Other legislative purposes underlying the Tort Claims Act were expressed in *Jaramillo* in the context of an equal protection issue. In discussing the fact that Section 41-4-15(A) did not have a tolling provision for persons under a legal disability, the Court gave two reasons why the Legislature could have legitimately chosen that course. *Jaramillo*, 111 N.M. at 726, 809 P.2d at 640.

First, the legislature could reasonably be concerned that there are more claims against governmental than private entities, given the size and far-flung nature of state government operations. This directly increases both the burden of investigating potential claims and the danger of stale claims. Second, the lack of a tolling provision advances the state’s interest in predicting and controlling its potential liabilities from year to year. Both of these are legitimate, rational distinctions that are directly related to the failure to provide a tolling period for persons who are mentally incapacitated.

*Id.*; see also *Armijo*, 103 N.M. at 176, 704 P.2d at 430 (noting that to broaden the limitations period in the Section 41-4-15(A) exception relating to minors “would significantly broaden this statute and undermine the Legislature’s intent to establish a measure of repose and to protect to some extent the State’s financial resources from stale claims”).

{22} Further legislative intent can be gleaned from the fact that when the Legislature enacted the Tort Claims Act, it provided specific waivers of immunity from a variety of tort claims, including, but not limited to, bodily injury claims, and specifically including a waiver applying to malpractice actions against public healthcare providers. See §§ 41-4-5 to -12. While permitting specific types of claims through express immunity waivers, the Legislature simultaneously enacted the two-year statute found in Section 41-4-15(A) instead of leaving applicable the three-year personal injury statute of limitations contained in Section 37-1-8 or wording Section 41-4-15(A) in a similar way. Additionally, Section 41-4-15(A) contains a minority tolling provision different than that “which tolls the general statute of limitations.” *Tafoya v. Doe*, 100 N.M. 328, 331, 670 P.2d 582, 585 (Ct. App. 1983) (internal quotation marks and citation omitted). Compare § 41-4-15(A), with NMSA 1978, § 37-1-10 (1975).

{23} In addition, application of the discovery rule in the limited circumstance of medical malpractice would likely open the door to application of the discovery rule as to all tort claims assertable under the Tort Claims Act. We have no indication that the Legislature intended that result, and we think it is doubtful that the Legislature did intend that result. Nor do we have any indication that, in enacting the Tort Claims Act and the limitations period in Section 41-4-15(A), the Legislature intended to grant leave for invocation by this Court of a discovery rule exception in the face of the clear, mandatory statutory language that “[a]ctions against a . . . public employee for torts shall be forever barred, unless such action is commenced within two years after the date of occurrence resulting in loss, injury or death,” and the fairly stern requirement that the limitation period apply to “all persons regardless of minority or other legal disability.” § 41-4-15(A).

{24} That a result may be harsh in some circumstances cannot dictate the outcome of a case. *Cummings* held that Section 41-5-13 is an occurrence rule, not permitting a discovery rule exception, even though the result was “so harsh that the limitations period can run on a potential malpractice claim before the claim even comes into existence,” and stating that “[c]ourts often point out that it is not their responsibility to inquire into the harshness of a legislative enactment, the strategy behind a legislative policy, or even the wisdom of a legislative solution to a particular problem.” *Cummings*, 1996-NMSC-035, ¶ 59; see also *Jaramillo*, 111 N.M. at 727, 809 P.2d at 641 (interpreting Section 41-4-15(A) to not include or allow tolling or otherwise fashion an equitable remedy despite the plaintiff’s argument that the denial would be unjust).

{25} Last, it is important to note another aspect of the historical context of Section 41-4-15(A). *Roybal* determined in 1963 that under the general statute of limitations for personal injuries, then Section 23-1-8, “a cause of action . . . accrues at the time of the wrongful act causing the injury.” *Roybal*, 72 N.M. at 287, 383 P.2d at 252. This rule referred to here as the “Roybal rule,” focused on the date of the negligence regardless of when the injury was discovered. *Id*. Section 41-5-13, enacted in 1976, only a year before the enactment of Section 41-4-15(A), essentially codified the *Roybal* rule that “a cause of action . . . accrues at the time of the wrongful act causing the injury” in medical malpractice cases. *Roybal*, 72 N.M. at 287, 383 P.2d at 252; see § 41-5-13; *Roberts*, 114 N.M. at 252, 837 P.2d at 446; *Armijo v. Tandysh*, 98 N.M. 181, 184, 646 P.2d 1245, 1248 (Ct. App. 1981) (stating, regarding Section 41-5-13, “the legislative intent was to continue the limitation period stated in *Roybal*”), overruled on other grounds by *Roberts*, 114 N.M. 248, 837 P.2d 442.

{26} When added together, all of these clues of the Legislature’s intent when enacting Section 41-4-15(A) indicate that the rule is an occurrence rule, not a discovery rule.

**Case Law Interpreting Section 41-4-15(A)**

{27} Despite the fact that the language in, the legislative intent behind, and the historical context of Section 41-4-15(A) suggest that it is an occurrence rule, Plaintiff argues that “[u]nder any interpretation of [Section] 41-4-15, the cause of action in a medical malpractice case against a state employee does not accrue until the basis for the action is discoverable through reasonable diligence.” Defendant argues that no Section 41-4-15(A) case yet has applied the discovery rule and that application of the discovery rule to Section 41-4-15(A) would require reading into the statute language that is not there. In order to address these arguments, we find it necessary to more thoroughly discuss several medical malpractice cases interpreting Sections 37-1-8, 41-5-13, 41-4-15, and -16. We do so in chronological order.

1. **The Case Law**

{28} In 1977 this Court decided *Peralta*. The medical malpractice incident in *Peralta* occurred before the enactment of the Medical Malpractice Act in 1976; therefore, that Act was not at issue. *Peralta*, 90 N.M. at 392-93, 564 P.2d at 195-96. *Peralta* is the original imprint for the Section 37-1-8 and Tort Claims Act cases that came later. See, e.g., *Roberts*, 114 N.M. at 255, 837 P.2d at 449 (discussing *Peralta*); *Long*, 105 N.M. at 191, 730 P.2d at 494. *Peralta* involved a cottonoid left in the plaintiff’s body following a surgery. *Peralta*, 90 N.M. at 392, 564 P.2d at 195. The complaint alleged “that the injuries suffered by plaintiff because of the cottonoid were inherently unknowable to plaintiff.” *Id.* at 394, 564 P.2d at 197. In fact, the cottonoid was not discovered until a second surgery two years after
the cottonoid was left in the plaintiff’s body. 9d. at 392, 564 P.2d at 195. The complaint was filed within the statute of limitations if the statute began to run on the date of the second surgery, but not if it began to run on the date that the cottonoid was left in the plaintiff’s body. 9d. The district court denied the doctor’s motion for summary judgment. 9d.

29 The applicable statute in Peralta was Section 23-1-8 (now codified at Section 37-1-8), the same statute at issue in Roybal. Peralta, 90 N.M. at 392, 564 P.2d at 195; see Roybal, 72 N.M. at 286, 383 P.2d at 251. The Peralta Court declined to apply the Roybal rule, holding that Roybal misstated the law as to when Section 23-1-8 began to run. 9d. Peralta, 90 N.M. at 392-93, 564 P.2d at 195-96 (“[T]he Roybal holding is not a correct statement of when the limitation period begins to run. . . . Roybal conflicts with Kilkenny v. Kenney, 68 N.M. 266, 361 P.2d 149 (1961), yet Roybal relies on Kilkenny as authority[.]”). See generally Kilkenny, 68 N.M. at 270, 361 P.2d at 151 (holding that, under Section 23-1-8, the statute runs “three years from the date of the injury”). Rather, Peralta held that “the limitation period begins to run from the time the injury manifests itself in a physically objective manner and is ascertainable.” Peralta, 90 N.M. at 394, 564 P.2d at 197 (emphasis omitted).

30 However, the Peralta Court stated that its manifestation and ascertainable rule was not “the ‘discovery’ rule.” Id.; see also Loesch v. Henderson, 103 N.M. 554, 555, 710 P.2d 748, 749 (Ct. App. 1985) (“New Mexico does not have a discovery rule.”). The only attempt to make the majority in Peralta hold that the time of discovery is wrong. 9d. Peralta made to clarify its statement that it was not adopting a discovery rule was to discuss an out of state case, stating that “[i]n Layton, [i]n the limitation period did not run from ‘discovery’ of the hemostat in 1966, the limitation period was held to run from 1965 ‘when the plaintiff first experienced pain caused by the unknown foreign object.’” Peralta, 90 N.M. at 394, 564 P.2d at 197 (citing Layton v. Allen, 246 A.2d 794 (Del. 1968)). The Peralta Court then held that because the doctor did not show that the presence of the cottonoid could have been discovered before the date of the second surgery, the doctor had not shown that the injury had manifested itself and was ascertainable prior to that date; thus the doctor’s motion for summary judgment was properly denied by the district court. 9d.

31 Four years later, in 1981, this Court applied the Peralta rule to Section 41-4-16(A), the claims notice provision of the Tort Claims Act. Emery, 96 N.M. at 149, 628 P.2d at 1145; see § 41-4-16(A). In Emery, the plaintiffs claimed medical malpractice as the cause of brain damage suffered by their child shortly after the child’s birth. 96 N.M. at 146, 628 P.2d at 1142. The defendant asserted that the mother was informed of the malpractice on March 2, 1979, but the plaintiffs contended they were not informed that the child had brain damage and that the brain damage was related to the act of malpractice until January 24, 1980. Id. at 148, 628 P.2d at 1144. The parents gave notice on February 29, 1980. Id. The defendant contended that the act of malpractice was the “occurrence” under Section 41-4-16(A), and that the plaintiffs’ claim was barred because notice was not given within ninety days of that date. Emery, 96 N.M. at 148, 628 P.2d at 1144.

32 Viewing Peralta as applicable precedent, the Emery Court determined that “there was no occurrence giving rise to a claim until the child’s injury manifested itself in a physically objective manner and was ascertainable” and the evidence on summary judgment “show[ed] this to be a question of fact.” Emery, 96 N.M. at 149, 628 P.2d at 1145 (emphasis omitted). Because Peralta applied its rule to a statute of limitations, the Court in Emery held the Tort Claims Act claims notice requirement in Section 41-4-16(A) and the limitations provision in Section 41-4-15(A) were similar enough to each other that the Peralta manifestation-and-ascertainable rule should apply to the claims notice requirement. Emery, 96 N.M. at 149, 628 P.2d at 1145 (internal quotation marks omitted).

33 In 1984 this Court addressed the question of whether the Peralta rule applied to Section 41-5-13. In Irvine v. St. Joseph Hospital, Inc., 102 N.M. 572, 574-75, 698 P.2d 442, 444-45 (Ct. App. 1984), this Court held that the plain language of Section 41-5-13 precluded application of the Peralta rule because, while other statutes, including Sections 37-1-8 and 41-4-15(A), were worded in terms of injury, there was no such language in Section 41-5-13. The Court stated that it could “not read language into a statute that is not there.” Irvine, 102 N.M. at 575, 698 P.2d at 445 (internal quotation marks and citation omitted).

34 The next year the Supreme Court addressed the same question in Kern v. St. Joseph Hospital, Inc., 102 N.M. 452, 697 P.2d 135 (1985). Kern held that the Peralta rule did not apply to Section 41-5-13 because (1) Peralta was decided under Section 37-1-8 rather than Section 41-5-13, and (2) Section 37-1-8 is distinguishable from Section 41-5-13 in that Section 37-1-8 refers to an injury, while Section 41-5-13 only refers to the act of malpractice. Kern, 102 N.M. at 455, 697 P.2d at 138. Our Supreme Court held that the plain language of Section 41-5-13 precluded resorting to construing the statute. 9d.

35 In 1986 this Court directly addressed the question of when the statute of limitations in the Tort Claims Act, Section 41-4-15(A), begins to run. The Long Court stated: “We have recognized that under the Tort Claims Act the limitation period commences when an injury manifests itself and is ascertainable, rather than when the wrongful or negligent act occurs.” 105 N.M. at 191, 730 P.2d at 494. This Court then held that a genuine issue of material fact existed “on the question of whether the injury [decedent] suffered was physically manifest and ascertainable prior to her death” because of the lack of clarity as to when the condition resulting from the alleged act of malpractice became distinguishable from decedent’s various other conditions. Id. at 192, 730 P.2d at 495. The Court in Long declined the defendants’ request to apply the time of the negligent act rule to the Tort Claims Act’s statutory limitations period by distinguishing Kern, on which the defendant “apparently” relied, as being decided in the context of the Medical Malpractice Act. Long, 105 N.M. at 191, 730 P.2d at 494.

36 In 1992 came Roberts, discussed earlier in this opinion, in which the Supreme Court expressly overruled Roybal, decided in 1963, and adopted the discovery rule in the context of Section 37-1-8. Roberts, 114 N.M. at 254, 256, 837 P.2d at 448, 450. Roberts relied on the analysis in Peralta. Roberts, 114 N.M. at 255, 837 P.2d at 449. Yet Peralta said it was not adopting the discovery rule, while Roberts adopted it. Peralta, 90 N.M. at 394, 564 P.2d at 197; Roberts, 114 N.M. at 256, 837 P.2d at 450. Our Supreme Court also favorably cited the rationale of Chisholm v. Scott, 86 N.M. 707, 709, 526 P.2d 1300, 1302 (Ct. App. 1974), an accountant malpractice case, stating that “[a]lthough the plaintiff in a medical malpractice case may not require any special knowledge or training to know that she suffers from pain, in the absence of such knowledge or training, she may be unable to ascertain the cause of that pain, i.e., the
professional malpractice of a physician.” Roberts, 114 N.M. at 256, 837 P.2d at 450. The Peralta cause of action accrued when “the injury manifests itself in a physically objective manner and is ascertainable.” 90 N.M. at 394, 564 P.2d at 197. However, the Roberts Court stated the rule as “the cause of action accrues when the plaintiff knows or with reasonable diligence should have known of the injury and its cause.” 114 N.M. at 257, 837 P.2d at 451 (emphasis added).

{37} Finally, in 1996 the Supreme Court decided Cummings, which again addressed the question of when Section 41-5-13 begins to run. Cummings, 1996-NMSC-035, ¶ 43. The plaintiff argued that the Supreme Court should interpret the word “occurrence” in the statute as “a continuum encompassing both the act of malpractice and the resulting injury.” Id. ¶ 52. As discussed earlier in this opinion, the Court held that the plain language of the statute established the date of the act of malpractice to be the only relevant factor. Id. ¶ 53. While technically Cummings did no more than reiterate the holdings of Kern and Irvine, the analyses, distinguishing between an “occurrence rule” and a “discovery rule,” offered a new framework within which statute of limitations cases must be analyzed. Cummings, 1996-NMSC-035, ¶¶ 47-50; see also Kern, 102 N.M. at 455, 697 P.2d at 138 (“The statute clearly starts to run from the time of the occurrence of the act giving rise to the cause of action. Since we find the meaning of this statute unambiguous, there is no need to resort to rules of construction.”); Irvine, 102 N.M. at 574, 698 P.2d at 444 (“The statutory language is not ambiguous. The limitation period began to run from the date of the occurrence of the alleged malpractice.”).

2. Analysis

{38} We do not glean from the foregoing case history any compelling precedent that necessarily controls the outcome in this case. While Roberts is an important case, we do not read it in the all-encompassing manner which Plaintiff urges, that Roberts adopted the discovery rule in all medical malpractice cases not involving non-qualified healthcare providers. Nothing in Roberts requires us to conclude that the discovery rule must be applied when Section 41-4-15(A) is raised as a bar to a medical malpractice claim under the Tort Claims Act.

{39} In addition, the Tort Claims Act cases have gone no further than to follow the Peralta rule. Under the language of Peralta, the rule would be that the statute begins to run when a plaintiff first feels pain, as Defendant argues. While Emery and Long can reasonably be read to apply the Peralta rule in the same manner as the discovery rule adopted in Roberts, as Plaintiff argues, they avoid any mention of the discovery rule. Roberts was influenced by the Peralta rule but appears to have passed over it for the discovery rule. See Roberts, 114 N.M. at 256-57, 837 P.2d at 450-51. Further, although Roberts might arguably be read as transforming the Peralta rule into the discovery rule, no case, including Roberts, expressly dispels the notion expressed in Peralta and Loesch that the Peralta rule is not the discovery rule. For these reasons, we find Defendant’s argument, that under the Peralta rule the statute begins to run when the act injuring the plaintiff occurs, a credible one.

{40} To us this case hinges on the plain language and the purposes underlying the Tort Claims Act. See Clark v. Lovelace Health Systems, Inc., 2004-NMCA-119, ¶ 14, 136 N.M. 411, 99 P.3d 232 (“When language in a statute enacted by the legislature is unambiguous, we apply it as written, and any alteration of that language is a matter for the legislature, not for this Court.”). We believe it paramount that the Tort Claims Act cases do not engage in a discussion of the plain language of the statute or the purposes underlying the Tort Claims Act statutory scheme. Neither do they engage in a discussion of legislative intent. Nor did the Court in any of these cases have the Supreme Court’s analyses in Cummings at hand.

{41} When set against the Roybal rule, which was the rule in existence when the Tort Claims Act and Medical Malpractice Act were enacted, the virtually unmistakable conclusion is that the Legislature was codifying the Roybal rule into Sections 41-4-15(A) and 41-5-13. The Roybal rule was that “a cause of action . . . accrue[d] at the time of the wrongful act causing the injury.” Roybal, 72 N.M. at 287, 383 P.2d at 252 (emphasis added). Section 41-4-15(A) reads, “occurrence resulting in loss, injury or death.” (Emphasis added.) It is reasonable to conclude that the focus in Roybal and the focus of the Legislature in enacting Section 41-4-15(A) was on the wrongful act and its occurrence, not on the injury caused or the resulting injury.

{42} Moreover, the similarities between Sections 41-4-15(A) and 41-5-13 cannot be ignored. Section 41-5-13 reads “after the (date that the act of malpractice occurred.” (Emphasis added.) The unmistakable focus under Section 41-5-13 is on the act of malpractice. See Cummings, 1996-NMSC-035, ¶ 52 (stating that the “focus” of the term “occurred” in Section 41-5-13 “is on the act without regard to its consequences”). The reason for the Legislature to clearly single out one type of act stems from the fact that Section 41-5-13, unlike Section 41-4-15(A), only concerns one possible claim, namely, that based on medical malpractice, so it did not have to add words such as “causing” or “resulting in,” since the only act or occurrence for which there could be liability was an act of medical malpractice. On the other hand, Section 41-4-15(A) required the additional words, “resulting in, loss, injury or death,” because the claims allowed under the Tort Claims Act are not limited to only one such as in the Medical Malpractice Act. However, the focus of Section 41-4-15(A) is nonetheless on the act causing the injury; just as in the medical malpractice context the act is the act of malpractice. See § 41-4-15(A). Thus, despite the difference in language between Sections 41-5-13 and 41-4-15(A), the analyses in Cummings that caused the Court to hold Section 41-5-13 to be an occurrence rule, and a statute of repose can reasonably be applied, and, we believe, is appropriately applied to support the same conclusion in regard to Section 41-4-15(A). Further, the analyses and results in Emery and Long were not signals to the Legislature that Section 41-4-15(A) was a discovery rule, so it cannot be argued that the Legislature’s failure to amend the language of that statute means that it acquiesced in such an interpretation.

{43} We do not completely discount the fact that Long, a Tort Claims Act case, decided under Section 41-4-15(A), appears to have read the Peralta rule to apply in the nature of the discovery rule. Nor do we completely discount the fact that our courts have favored application of the discovery rule because of its reasonableness and fairness. Judicial tolling was properly at work when this Court moved from the time of the negligent act rule to the Peralta rule in applying Sections 41-4-15(A) and 41-4-16(A) in Emery and Long. Judicial tolling was also properly at work in Roberts when our Supreme Court applied the discovery rule to Section 37-1-8. These circumstances cannot be ignored.
(44) Nevertheless, in view of the language of Section 41-4-15(A), likely legislative intent, the historical context in which it was enacted, the unclear development of the Peralta rule, and our Supreme Court’s analyses and holding in Cummings, we question the viability of this Court’s apparent application of the Peralta rule as a discovery rule in prior Tort Claims Act cases. See Long, 105 N.M. at 192, 730 P.2d at 495; Emery, 96 N.M. at 149, 628 P.2d at 1145. We are reluctant in the face of Cummings to invoke the next step of judicial tolling, which would be to integrate the discovery rule into Section 41-4-15(A). The Cummings analyses, when applied to the question here, and the apparent intent of the Legislature when enacting Section 41-4-15(A) to conform to the Roybal rule then in existence to make the act (occurrence) causing (resulting in) injury (loss, injury, or death) the focus rather than the cause or the resulting injury as the focus, are constraints within which we feel bound.

The Dissent
(45) The dissent essentially says that the district court and the majority are both right, each for the wrong reason. The dissent sets out what it believes is or should be the right reason: that the discovery rule, not the occurrence rule, applies, and that New Mexico case law requires the discovery rule to be applied to bar a plaintiff’s Tort Claims Act medical malpractice claim if the plaintiff first discovers or should discover the injury’s cause in time to file an action within two years from the date of the injury. The dissent believes, as well, that the parties’ positions and arguments did not raise the issues that the majority has addressed in this Opinion. The dissent raises points that require a recitation of background not needed earlier and a short discussion about the dissent’s view of the discovery rule.

1. The Issues Addressed Were Raised and the Issues Should Be Addressed
(46) The issue below was whether Section 41-4-15(A) was tolled beginning May 17, 1999, and did not begin to run until discovery of the injury and its cause in August 2000. That is the issue on appeal. The issue is not whether, under the discovery rule, Plaintiff cannot obtain relief because she had time to file her action within two years of May 17, 1999, the date of death. In our view, the issue on appeal cannot be reasonably addressed and resolved without analyses of New Mexico case law on the meaning and application of three rules, namely: (1) the manifestation/ascertainable rule developed and applied in Peralta, Long, and Emery; (2) the discovery rule adopted in Roberts; and (3) the occurrence rule described and applied in Cummings.

(47) The proceedings below are important to review. Plaintiff appealed the court’s grant of Defendant’s motion for summary judgment. Defendant’s memorandum in support of his motion for summary judgment set out one argument only: that Section 41-4-15 barred Plaintiff’s action because the two-year period commenced when the injury manifested itself, and the injury for which Plaintiff sought compensation became manifest on May 17, 1999, the date of decedent’s death. Plaintiff responded, arguing that Peralta, Long, and Emery supported her position that the injury did not manifest itself and was not ascertainable until at least August 2000. Defendant’s reply repeated what he stated in his original memorandum, arguing Peralta, Long, and Emery to support his position. Oral argument on the summary judgment issue did not change the issue. The district court granted summary judgment because information about chlorine was in the EMT/paramedic records Plaintiff obtained in August 2000 and because those records were in existence and discoverable by Plaintiff on May 17, 1999. The court’s reasoning was:

    Okay. The entry [sic - injury] did manifest itself when she died. The EMT record was available the very same day. So I agree with [Defendant], the statute of limitations under the Tort Claims Act commenced to run on the day she passed away. It may have taken you a couple of years to find out why she died, but the records weren’t concealed. They were there. Nobody bothered to check with the EMT, for whatever reason. And I’m not saying anybody was wrong in not doing that, but the records were there. The minute the EMT made the record, everybody knew chlorine was mentioned.

    The court did not move beyond that reasoning in denying Plaintiff’s motion for reconsideration.

(48) It is very clear that Defendant’s motion for summary judgment raised one issue, and the court granted the motion based on that one issue: whether the date the statute of limitations began to run was May 17, 1999, or in August 2000. The district court held that the injury “manifested itself” on May 17, 1999, when the decedent died and therefore began to run on that date. The court did not discuss the question of whether the injury was also “ascertainable” on May 17, 1999; nor did the court discuss whether Plaintiff knew or should have known of the cause of injury on that date. The court, in fact, left it to Plaintiff to discover the cause of injury later on. The court’s holding begged the question whether the correct law was applied to the facts.

(49) On appeal, Plaintiff argues that the Medical Malpractice Act statute of repose begins to run when the negligence occurred, but that under the Tort Claims Act statute of limitations the discovery rule applies and the statute begins to run when the injury manifests itself and is ascertainable as expressed in Long and Emery. She expressly argues that “the question is whether the statute of limitations in the Tort Claims Act is a statute of repose, as is the statute in the Malpractice Act, or does it run on discovery of the injury and its cause, as in Roberts?” She also seeks a determination of judicial tolling under the Roberts discovery rule. She argues that Roberts adopted the discovery rule in “all medical malpractice cases that do not come under the Malpractice Act.” Significantly, Plaintiff specifically cited Cummings in her docketing statement, stating:

    There are two basic standards to determine the beginning of the time period in which a patient must file a claim for malpractice. One is the occurrence rule and applies to claims against qualified health care providers who come under the protection of the Medical Malpractice Act. The occurrence rule is, in effect, a statute of repose and was passed by the legislature in order to stem the flood of medical malpractice cases. The other standard is the discovery rule. The time period under this rule does not begin to run until the patient discovers, or reasonably should discover, the essential facts of her cause of action.

Plaintiff also raised and discussed Cummings and the occurrence rule in her brief in chief on appeal.

(50) Defendant, on appeal, argues that under the Tort Claims Act the suit must be filed within two years of the date of the occurrence resulting in the injury or death, and that the discovery rule does not apply. Defendant argues that “the cases in which Section 41-4-15(A) has been interpreted have not demonstrated an inclination to apply the discovery rule in Tort Claims Act cases.” Defendant’s position is that only “the event resulting in harm or injury” is the trigger, and that “[t]o apply the discovery rule to claims governed
by Section 41-4-15(A) would require the court to read into that Section a causation component that is neither express nor reasonably implied from the language.”

{51} Plaintiff combines the Long and Emery manifestation/ascertainable rule with the Roberts discovery rule. Defendant separates the Long and Emery rules from the discovery rule and contends the Long and Emery rules limit “discovery” to injury and not causation, and the discovery rule does not apply. The district court appears to have accepted Defendant’s argument. The mixture and apparent misunderstanding below of legal precedents and concepts, and the manner in which the judgment appealed was presented to this Court, caused us to address the issues in the manner we have in this Opinion. See infra ¶ 2-3. We believe that this case does raise and require us to address the panoply of issues and authorities relating to the manifestation/ascertainable rule, the discovery rule, and the occurrence rule, calling for clarity and application of the various doctrines and analyses in Peralta, Long, Emery, Roberts, and Cummings.

2. The “More Nuanced” Discovery Rule

{52} We understand the discovery rule as it has been applied in New Mexico to be that, when the rule is applied, the statute of limitations is tolled and the cause of action accrues and does not start to run until discovery of the injury and its cause. This is what the cases applying or discussing the discovery rule say. See Cummings, 1996-NMSC-035, ¶ 47 (stating that under the discovery rule “[t]he time period . . . does not begin to run until the patient discovers, or reasonably should discover, the essential facts of his or her cause of action”); Roberts, 114 N.M. at 255, 257, 837 P.2d at 449, 451 (stating that under the discovery rule “the cause of action accrues when the plaintiff discovers or with reasonable diligence have discovered that a claim exists,” and further that “the cause of action accrues when the plaintiff knows or with reasonable diligence should have known of the injury and its cause”). We do not understand the discovery rule to be that tolling and the start of the running of the statutory period do not occur if the plaintiff’s diligent discovery of cause occurs nine months before the two-year period from the date of death.

{53} The dissent cites Martinez v. Showa Denko, K.K., 1998-NMCA-111, ¶ 22-25, 125 N.M. 615, 964 P.2d 176, as a case in which the dissent’s analysis occurred. We do not read Martinez to modify the discovery rule. As we read the holding in Martinez, the law requires a plaintiff to diligently investigate the cause of a medical problem and then to bring a legal action within the statutory period once it began to run after tolling. The plaintiff discovered information in late 1989 or early 1990, and she filed her action in 1996. Id. ¶¶ 10, 22-23. The plaintiff discovered the injury and its cause sufficiently in time to file her cause of action within three full years of the discovery, but she did not file until almost six years after discovery. Id. ¶ 25.

{54} We do not necessarily quarrel with the idea that the discovery rule as it was adopted and has been defined in New Mexico law perhaps should be modified. If the discovery rule, and not the occurrence rule, is ultimately determined by our Supreme Court to apply in this case, the importance of the dissent is that it may assist in obtaining clarification by our Supreme Court of statute of limitations, discovery rule jurisprudence.

CONCLUSION

{55} We interpret the rule in Section 41-4-15(A) to be an occurrence rule, not a discovery rule. We therefore affirm the district court’s summary judgment.

{56} IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

I CONCUR:

RODERICK T. KENNEDY, Judge

MICHAEL D. BUSTAMANTE, Judge (specially concurring in part and dissenting in part).

MICHAEL D. BUSTAMANTE, Judge

(Specially concurring in part and dissenting in part).

{57} I concur in the result of the majority Opinion because I believe the district court correctly decided that the Tort Claims Act statute of limitations expired as a matter of law before Plaintiff filed her claim, but I cannot concur in its analytical approach or its holding.

{58} Relying on Roberts, Plaintiff makes the straightforward argument that the two-year statute began to run when she learned of the possibility of chlorine in the dialysis machinery. An equally straightforward response to this argument is that the discovery rule in New Mexico is not applied in this manner. A plaintiff is not allowed to simply tack on to the statutory limit the amount of time she takes to decide for herself what caused her injury. The discovery rule is a more nuanced instrument. Invoking equitable principles, the discovery rule is meant to relieve undue harshness in the application of statutes of limitation caused by lack of knowledge in the plaintiff that legal damage has or may have occurred. The potential reasons for a plaintiff’s lack of knowledge are varied, ranging from latent diseases to professional malpractice events potentially beyond the ken of the lay person to fraudulent concealment of facts by defendants. See Sawtell v. E.I. Du Pont De Nemours & Co., 22 F.3d 248, 250 (10th Cir. 1994) (detailing the types of cases in which some variant of the discovery rule has been applied).

{59} Except for the fraudulent concealment cases, New Mexico’s approach to accommodating a plaintiff’s lack of knowledge does not involve simply adding time as Plaintiff requests. Juarez v. Nelson, 2003-NMCA-011, ¶ 22, 133 N.M. 168, 61 P.3d 877 (holding that in fraudulent concealment cases, plaintiffs should be restored the amount of time lost as a result of the concealment). The inquiry rather involves whether the plaintiff knew, or with reasonable diligence should have known, of the injury and its cause within the time frame of the applicable statute. Roberts, 114 N.M. at 257, 837 P.2d at 451. I believe that inquiry should be resolved as a matter of law against Plaintiff. Plaintiff was necessarily aware upon Ms. Varela’s sudden death on May 17, 1999, that something had gone tragically
wrong—she knew she had suffered an injury. Whether the death was caused by a blameworthy mistake, of course, could not be known with certainty as of that day. Given the obvious injury, however, the statute would normally start running immediately. Plaintiff knew about the potential causative agent nine months before the two-year statute expired. In the parlance of the discovery rule, Plaintiff knew everything she needed to know nine months before the statute expired. Nine months is, as a matter of law, not an unreasonable time for her to decide whether to file her claim. She did not, and the claim should be barred. I believe this is the analysis we followed to find that the plaintiff in Martinez v. Showa Denko, K.K., 1998-NMCA-111, ¶ 22-25, 125 N.M. 615, 964 P.2d 176, was time-barred.

My approach to the problem here depends on two premises. First, Plaintiff has not argued that anyone fraudulently concealed any information from her. Thus, the particular equitable concerns underlying cases such as Juarez are not present. Second, the bare fact that Plaintiff did not immediately have all the information she needed to ascribe blame—or to articulate a theory of malpractice as of May 1999—does not make it inherently unfair or improper to say that the statute started to run as of the date of Ms. Varela’s death. This second premise in turn depends on whether in all cases the Roberts concern over knowledge of an “injury” should be considered separately from knowledge of “its cause.” In cases of obvious injury, I do not think they need be. If any of these premises are not accurate, my conclusion is potentially, if not likely, wrong, and we should reverse so that the district court can determine whether the time lapse here was reasonable.

The majority takes an approach not necessary to resolve the case and not even argued by Defendant. The result is in my view an erroneous and radical reconstruction of the Tort Claims Act statute of limitations.

The majority equates the Tort Claims Act statute to the Medical Malpractice Act statute of limitations. Thus, the Tort Claims Act is now an “occurrence” statute or a statute of repose which runs from a statutorily determined triggering event. Majority Opinion, ¶ 14. The majority achieves this result by drawing parallels between the two statutes and noting that they were passed in the same legislative session. I do not agree that use of the term “occurrence” in the Tort Claims Act is the functional equivalent of the phrase “the date that the act of malpractice occurred” in the Medical Malpractice Act. The policy rationale behind the Malpractice Act phrase—providing more underwriting certainty and predictability in order to better control insurance rates—is simply not present in the Tort Claims Act setting the same way.

The majority makes much of the fact that the Tort Claims Act encompasses many sources of liability other than malpractice to explain the use of the term “occurrence” in the Act. Somehow, that difference is alchemized into evidence of parallelism with the Medical Malpractice Act. I think it actually argues against the majority’s position. If the Legislature wanted to achieve the same aim in the Tort Claims Act—that is, create an occurrence statute—it would more likely and more effectively have used phrases such as “act of negligence” or “misconduct” rather than “occurrence.”

Finally, classifying Section 41-4-15(A) as an “occurrence” rule has consequences which the Opinion does not adequately address. First, under such a rule there is no excuse for any passage of time following the negligent act or act of misconduct, other than fraudulent concealment in some cases. As such, the Opinion should expressly overrule Emery and Long rather than gut them while benignly saying that “judicial tolling was properly at work” in these decisions. Second, what is the effect on cases involving missed diagnoses and latent injuries? If we are going to apply the Tort Claims Act statute as a true occurrence/repose provision, many of these cases will be foreclosed before they are discovered. I simply do not believe the Legislature intended that consequence in this context. My view is bolstered by the Legislature’s failure to overturn Emery and Long by amendment of the Tort Claims Act.

MICHAEL D. BUSTAMANTE,
Judge
OPINION
MICHAEL E. VIGIL, JUDGE

{1} Defendant appeals the district court’s denial of his motion to suppress cocaine discovered in his possession by officers of the Albuquerque Police Department. He argues that the district court erred in denying his motion because (1) the police lacked the reasonable suspicion necessary for an investigatory stop, and (2) the police discovered the cocaine in his possession as a result of an unconstitutional seizure of his person. We hold that Defendant was not seized pursuant to the Fourth Amendment until after he discarded the cocaine in his possession, and therefore, the cocaine was not the fruit of an unlawful seizure of Defendant’s person. We therefore affirm the district court.

BACKGROUND

{2} In early May 2001, the Albuquerque Police Department received a complaint of suspected drug activity based on heavy foot traffic into and out of a house on Columbia Southeast. Based on the complaint, Officer Barela and Sergeant Ferner initiated undercover surveillance of the house. Officer Barela and Sergeant Ferner observed heavy foot traffic in the alleyway behind the house. Individuals entered the rear door of the house, remained inside for two to four minutes, and then left. During the surveillance of the house, Officer Barela and Sergeant Ferner stopped approximately fifty people who were seen visiting the house; approximately half were arrested for possession of narcotics.

{3} In the early morning hours of May 19, 2001, Officer Barela and Sergeant Ferner were seated in an unmarked van parked in the alleyway behind the house. Officer Barela observed Defendant, whom he recognized from a prior encounter, walking northbound in the alley. After Defendant walked past Officer Barela and Sergeant Ferner on the morning of May 19, Officer Barela observed him enter the house. Defendant remained inside for approximately four minutes. Officer Barela and Sergeant Ferner decided to stop and talk to Defendant if he turned southbound after exiting the house and passed their van. After Defendant exited the house, he walked southbound toward the officers. After Defendant passed him, Officer Barela stepped out behind Defendant. Officer Barela then turned on his flashlight, stated that he was with the police department, addressed Defendant by his first name and told Defendant that he and Sergeant Ferner wished to speak with him. In response, Defendant began running down the alley. Officer Barela and Sergeant Ferner pursued Defendant and as they did so, Officer Barela noticed that Defendant was holding something in his right hand. As the officers caught Defendant, Officer Barela observed him throw an object to the ground. Officer Barela subsequently apprehended Defendant and handcuffed him. Sergeant Ferner examined the area where Defendant had dropped the object and discovered a rock of crack cocaine.

STANDARD OF REVIEW

{4} The appropriate standard of review is “whether the law was correctly applied to the facts, viewing them in a manner most favorable to the prevailing party.” State v. Jason L., 2000-NMSC-018, ¶ 10, 129 N.M. 119, 2 P.3d 856 (internal quotation marks and citation omitted). We must defer to the district court’s findings of fact to the extent that they are supported by substantial evidence. Id. However, we will engage in de novo review of the district court’s application of the law to the facts. State v. Walters, 1997-NMCA-013, ¶ 8, 123 N.M. 88, 934 P.2d 282.

DISCUSSION

{5} The Fourth Amendment of the United States Constitution protects against unreasonable searches and seizures. U.S. Const. amend. IV. The New Mexico Constitution also protects against unreasonable searches and seizures. N.M. Const. art. II, § 10. However, because Defendant does not argue that the New Mexico Constitution affords him greater protection than the United States Constitution, we review his appeal only under the Fourth Amendment. Jason L., 2000-NMSC-018, ¶ 9; see also Walters, 1997-NMCA-013, ¶ 9 (stating because the defendant “advances no separate analysis under the New Mexico Constitution, nor does he argue that the state constitution affords any greater protection in this respect than the United States Constitution” the court will “limit [its] analysis to the Fourth Amendment”).

{6} A person is seized for purposes of the Fourth Amendment “[o]nly when the officer, by means of physical force or show of

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authority, has in some way restrained the liberty” of that person. *Walters*, 1997-NMCA-013, ¶ 12 (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968)). However, a seizure “requires either physical force . . . or, where that is absent, submission to the assertion of authority.” *Cal. v. Hodari D.*, 499 U.S. 621, 626 (1991) (emphasis omitted). Because Defendant neither submitted to authority nor was restrained by physical force until after the cocaine in his possession was discarded, we hold that the cocaine was not the fruit of a seizure of Defendant under the Fourth Amendment.

{7} In *Hodari D.*, two plain clothes police officers driving an unmarked car approached a group of youths. Upon seeing the officers’ car approaching, the group rapidly dispersed, running in all directions. One of the officers exited the patrol car and began chasing Hodari. As he was being pursued, Hodari discarded a small rock of cocaine. The officer subsequently tackled Hodari and recovered the rock of cocaine. 499 U.S. at 622-23. Before the Supreme Court, Hodari argued that the officer’s pursuit constituted a seizure. The Court rejected his argument and held that he was not seized until he was physically apprehended by the pursuing officer. *Id.* at 629. Because Hodari threw the cocaine before being tackled, its recovery was not the result of a seizure. *Id.*

{8} The facts presently here are substantially similar to those in *Hodari D*. Defendant neither submitted to the officers’ show of authority nor was he physically restrained until he was grabbed and handcuffed by Officer Barela, and he dropped the cocaine prior to being physically apprehended. Therefore, under the rule established in *Hodari D.*, Defendant’s encounter with the police was not a seizure under the Fourth Amendment until after Sergeant Ferner recovered the evidence Defendant seeks to suppress.

{9} Accordingly, we find the cocaine Defendant seeks to suppress is not the fruit of a seizure and the district court properly denied Defendant’s motion to suppress. Although the district court’s denial was based on its conclusion that Officer Barela and Sergeant Ferner had reasonable suspicion to support a stop of Defendant, we “will affirm the trial court if it is right for any reason.” *State v. Lovato*, 112 N.M. 517, 521, 817 P.2d 251, 255 (Ct. App. 1991) (citation omitted). Because we find that Officer Barela and Sergeant Ferner discovered cocaine in Defendant’s possession without seizing him under the Fourth Amendment, we need not reach Defendant’s argument that the officers lacked reasonable suspicion to stop him.

CONCLUSION

{10} We hold that Officer Barela and Sergeant Ferner did not acquire the cocaine evidence Defendant seeks to suppress by violating Defendant’s Fourth Amendment rights. We therefore affirm the district court’s denial of Defendant’s motion to suppress.

{11} IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

IRA ROBINSON, Judge
OPINION

RODERICK T. KENNEDY, Judge

{1} On motion for rehearing, the opinion filed October 28, 2004, is withdrawn, and the following opinion is substituted in its place. The motion for rehearing is otherwise denied.

{2} At what point in criminal proceedings does a defendant waive objection to the constitutionality of a search that produced evidence that is offered against him? Defendant postponed objecting to evidence that is offered against him? Defendant responded to a call regarding a drug overdose in La Luz, New Mexico. Upon arriving, he and another deputy found Defendant unconscious on the grounds that the Habitual Offender Act prohibits the use of his prior convictions more than ten years old. We determine that the search was illegal, and the evidence obtained should have been suppressed. Because of this determination, we do not reach the sentence enhancement issue. We reverse and remand to the district court for appropriate proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

{3} Defendant was charged with one count of trafficking cocaine and one count of possession of methamphetamine. At trial, the State’s first witness, Deputy Gutierrez (no relation to Defendant), testified that on May 28, 2002, the Otero County Sheriff’s department responded to a call regarding a drug overdose in La Luz, New Mexico. Upon arriving, he and another deputy found Defendant unconscious on the floor. Defendant’s stepdaughter told the deputies that Defendant had overdosed on cocaine. An ambulance arrived at Defendant’s residence soon thereafter to transport Defendant to the hospital. After the ambulance left, the two deputies talked for awhile at the scene. Deputy Gutierrez decided to go to the hospital, although no one asked him to do so. Deputy Gutierrez testified that in overdose situations, his concern is the safety of the victim.

{4} Deputy Gutierrez testified that at the hospital, he located Defendant in a treatment bay in the emergency room and observed while Defendant, still unconscious, received treatment from the medical personnel at the hospital. Deputy Gutierrez backed out of the bay for a few minutes to give Defendant some privacy, but soon looked back in the bay, where he saw Defendant’s clothes lying on the floor. Without any request for (1) assistance from hospital personnel, (2) consent from Defendant, who was still unconscious, or (3) a search warrant, Deputy Gutierrez picked up Defendant’s pants, searched the pockets, and found two plastic bags in the pockets. Deputy Gutierrez testified that he “didn’t expect to find anything” when he searched Defendant’s pants at the hospital because when he first saw Defendant at Defendant’s residence, it appeared that Defendant’s pants had already been searched because the pocket on the right side was already pulled out. However, he searched the pants at the hospital “[j]ust to see, maybe if there was just a little something, just enough to test to see if there was something to confirm what it was that [Defendant] had consumed.” When asked, Deputy Gutierrez expressed that he had had some concern that Defendant’s clothing might be taken away by Defendant’s family. He said that he was not looking for criminal evidence; he was just helping out and did not expect to find anything. Deputy Gutierrez stated that Defendant looked bad and he didn’t know if Defendant would “make it.”

{5} Deputy Gutierrez believed the contents of the bags he retrieved from Defendant’s pants to be controlled substances. Deputy Gutierrez took the bags to the Sheriff’s Department where he field-tested the drugs with positive results for the presence of illegal controlled substances. He called Defendant’s doctor at the hospital, relayed the information about the drugs, and put the drugs in the department’s evidence locker. The drugs were later tested by a crime laboratory and found to be approximately eight grams of cocaine and little more than one and a half grams of methamphetamine.

{6} At trial, prior to the opening statements, defense counsel informed the district court that it was his intention to object to the admission of the drugs at the time the State would move to admit them as evidence. Counsel stated that the objection would be “for [the] search and seizure [of the drugs], so basically, it’s a motion in the middle of the trial, just to let you know that’s what I plan to do.” The State did not object or respond in any way. Trial commenced, and in opening statement, defense counsel left no doubt that Defendant had possessed the drugs but stated to the jury that the defense theory of the case would be that the possession was for personal use, not for trafficking, as charged in Count 1.
The trial began and Deputy Gutierrez was called to the stand. He testified as previously discussed. The State then called a chemist, who testified as to the composition and weight of the drugs taken by Deputy Gutierrez. The State’s next witness was a narcotics agent who discussed the drugs’ chain of custody. At the end of his testimony, the State moved for admission of the drugs into evidence. The defense objected as promised and moved to suppress the evidence on the grounds that the warrantless search of Defendant’s pants was not justified under any exception to the warrant requirement. The State argued that the situation presented an exigent circumstance of imminent danger to Defendant’s life, that Deputy Gutierrez was acting in his capacity as a community caretaker, and that no warrant was needed. Although defense counsel responded that once Defendant arrived at the hospital the exigency disappeared, and the situation did not fit within the community caretaking exception, the district court denied the motion to suppress, ruling that the search was justified under the community caretaker standard. Specifically, the district court found that Deputy Gutierrez had considered that there was some merit in knowing the substance that Defendant had taken, and that the deputy did not believe he would find any substantial amount of controlled substances beside residue in his search because it appeared Defendant’s pants had already been searched. As a result, the district court found that Deputy Gutierrez was acting out of concern for Defendant’s well-being and not under a desire to obtain evidence for use in a prosecution.

The trial continued, and Defendant testified that he possessed and used the drugs, but that he did not deal drugs. Defendant was convicted of two counts of simple possession of controlled substances. The jury did not find Defendant guilty of trafficking.

**DISCUSSION**

**Standard of Review**

Resolution of the issue presented concerning the suppression of evidence requires that we determine whether the actions of Deputy Gutierrez implicate a constitutional right or if those actions fall within an exception to that right. State v. Nemeth, 2001-NMCA-029, ¶ 20, 130 N.M. 261, 23 P.3d 936. Reviewing motions to suppress involves an analysis of both law and fact. State v. Gutierrez, 2004-NMCA-081, ¶ 4, 136 N.M. 18, 94 P.3d 18. The denial of a motion to suppress requires us to determine if the law was correctly applied to the facts. Id. We give deference to the factual findings of the lower court. State v. Soto, 2001-NMCA-098, ¶ 6, 131 N.M. 299, 35 P.3d 304. A “denial of a motion to suppress will not be disturbed if it is supported by substantial evidence unless it also appears that the ruling was incorrectly applied to the facts.” State v. Cline, 1998-NMCA-154, ¶ 6, 126 N.M. 77, 966 P.2d 785. “The trial court must resolve conflicts in the evidence, but whether that evidence complies with constitutional requirements is . . . a legal question reviewed by the appellate court on a de novo basis.” Soto, 2001-NMCA-098, ¶ 6 (internal quotation marks and citation omitted and alterations in original).

**Search of Defendant’s Pants and Seizure of the Drugs**

The Fourth Amendment of the United States Constitution and the New Mexico Constitution protect a citizen’s right to be free from unreasonable searches and seizures. U.S. Const. amend. IV; N.M. Const. art. II, § 10. The State also argues on appeal that there was no “search” for constitutional purposes because Defendant failed to meet his burden that Deputy Gutierrez violated his reasonable expectation of privacy. The State did not raise this point before the district court, and it cannot now be relied on as a basis to affirm on the ground that the court was correct for the wrong reason because Defendant did not have a fair opportunity to present evidence on the issue. See State v. Franks, 119 N.M. 174, 177, 889 P.2d 209, 212 (Ct. App. 1994). There is no dispute in this case that the search of Defendant’s pants was without consent or a warrant. The State argues that Defendant was not in the custody of the police when his pants were searched, and the search was performed incident to a community caretaking function on the part of Deputy Gutierrez, and therefore the search does not implicate constitutional protections and was justified without a warrant.

**Warrantless Searches and Community Caretaking**

“Because a warrantless search or seizure is presumed to be unreasonable, the State has the burden of showing that the search or seizure was justified by an exception to the warrant requirement.” Gutierrez, 2004-NMCA-081, ¶ 6; State v. Vásquez, 112 N.M. 363, 366, 815 P.2d 659, 662 (Ct. App. 1991). Recognized exceptions to the warrant requirement include “exigent circumstances, consent, searches incident to arrest, plain view, inventory searches, open field, and hot pursuit.” State v. Duffy, 1998-NMSC-014, ¶ 61, 126 N.M. 132, 967 P.2d 807. This Court has also recognized that, so long as certain criteria are met, the community caretaking function “can properly take its place in our jurisprudence as an exception to the Fourth Amendment warrant requirement.” Nemeth, 2001-NMCA-029, ¶ 36. Our case law recognizes that there is “a community caretaking function of police officers requiring a specific, articulable concern for the safety of another that does not involve a law enforcement purpose.” Id. ¶ 29. “The primary characteristic of community caretaking that sets this function apart from criminal investigative and enforcement activity is the absence of concern about violations of law on the part of the law enforcement officer.” Id. ¶ 36. These encounters are voluntary, may not involve coercion or detention, and do not involve constitutional protections, as they may fall outside of the fourth amendment. Id. ¶¶ 26-27; State v. Walters, 1997-NMCA-013, ¶ 10, 123 N.M. 88, 934 P.2d 282. “[I]n a community caretaker case, reasonableness is determined by balancing the public need and interest furthered by the police conduct against the degree of and nature of the intrusion upon the privacy of the citizen.” Nemeth, 2001-NMCA-029, ¶ 29 (internal quotation marks and citations omitted and alteration in original).

Thus far, our cases have not had to concern themselves with the issue of “community caretaking” outside the realm of the constitutionality of seizing persons. Walters, 1997-NMCA-013, ¶¶ 10, 22 and State v. Reynolds, 117 N.M. 23, 24-25, 868 P.2d 668, 669-70 (Ct. App. 1993), rev’d on other grounds, 119 N.M. 383, 890 P.2d 1315 (1995), allowed police officers to stop and seize persons in a vehicle to assure their concerns for driver and passenger safety. These stops must be based on a “specific, articulable safety concern.” State v. Munoz, 1998-NMCA-140, ¶ 8, 125 N.M. 765, 965 P.2d 349 (internal quotation marks and citation omitted). Nemeth extended the community caretaker doctrine to a situation which did not involve a citizen-police encounter in vehicles but instead involved a warrantless entry into a defendant’s residence, a citizen-police encounter concerning a possibly suicidal defendant. Nemeth, 2001-NMCA-029, ¶¶ 3-18. It emphasizes that community caretaking exists apart from criminal investigation, stating:

Law enforcement officials have no carte blanche to enter homes to investigate circumstances of suspected criminal activity.
under a guise or pretext of community caretaking pursuits. Our application here of the community caretaker doctrine carries with it the expectation that law enforcement officers will continue to carry on such service, while at the same time remain subject to judicial scrutiny to assure that their actions are reasonable and not pretextual, and that their conduct is not outside the bounds of legitimate community caretaker activity.

Id. ¶ 41.

{13} Community caretaking can only be invoked when the police are not involved in crime-solving activities. Id. ¶ 38. It is the absence of a concern for violations of the law that characterizes police behavior in such a circumstance. Id. Applying our constitutional yardstick to the police behavior in a case, we look at whether the officers’ actions were objectively reasonable and in good faith, particularly, whether the officer has a “reasonable and articulable belief, tested objectively, that a person is in need of immediate aid or assistance or protection from serious harm.” Id. ¶ 37. Officers’ actions are limited to ascertaining the immediate danger and directly addressing it; investigating other matters of which an officer becomes aware is permissible, but they cannot be the initial motivation for the police involvement. See id. ¶ 38.

The Search of Defendant’s Clothes Is Not Justified by Community Caretaking

{14} The search undertaken by Deputy Gutierrez was not a community caretaking encounter with Defendant, consensual or otherwise. Rather, it was a search of his property while Defendant was incapacitated. Deputy Gutierrez looked in the ER examination room, saw the clothing lying on the floor, and of his own volition entered the room, picked up the pants, and searched their pockets. The district court found that Deputy Gutierrez “was acting in a community caretaker function” in that the “exigency was in immediate danger to life of . . . Defendant.” Based on the testimony presented in the district court, this finding was not supported by substantial evidence.

{15} No evidence exists that Deputy Gutierrez was acting in concert with medical personnel; his actions were his own. To hold here that Deputy Gutierrez’s course of action was legitimately to ascertain the drugs that affected Defendant to help with his treatment, ignores three things. First, Defendant was already being treated by medical personnel, and had been before Deputy Gutierrez arrived. Medical personnel requested no help from Deputy Gutierrez. Second, he learned what drugs were in the bags only after a span of time in which he left the hospital, went to the station and performed a screening test. Third, Deputy Gutierrez had some concern that Defendant’s family might retrieve the clothing before he had a chance to look at it. The district court’s finding that Deputy Gutierrez considered that there was merit to identifying the substances in the bags is irrelevant absent some evidence that Deputy Gutierrez’s actions would have likely been helpful to medical efforts—evidence was never offered by the State.

{16} As stated above, Deputy Gutierrez had neither permission nor warrant to search. He testified that he did not think it was important to find out what drug was involved, but that he was at the hospital with Defendant “just to help out.” At the hospital, Deputy Gutierrez recognized the substances as drugs. He did not ascertain the medical utility of his actions. There was no testimony that Deputy Gutierrez showed the bags to the medical personnel at the hospital. He took the drugs to the sheriff’s department and performed a field test, called Defendant’s doctor with the results, and tagged the drugs into evidence. There was no testimony that Deputy Gutierrez ever returned to the hospital in connection with Defendant’s continuing treatment at the hospital.

{17} Other jurisdictions have exceptions to the warrant requirement akin to the community caretaker doctrine that we consider in this case. The Supreme Court of Colorado defined a “medical emergency” exception to the warrant requirement in an emergency room situation. People v. Wright, 804 P.2d 866, 869-870 (Colo. 1991) (en banc). Under this analysis, two factors predominate the analysis of warrantless searches and seizures. “[F]irst, there must be facts which, when objectively analyzed, establish the existence of a real and immediate danger to the life or safety of another; and second, the officer’s purpose in conducting the search must be to render aid or assistance to the endangered person.” Id. at 870; see also State v. Loewen, 647 P.2d 489, 490-94 (Wash. 1982) (en banc). Thus, Deputy Gutierrez’s actions in this case fail to demonstrate evidentiary connection to medical needs similar to the lack of connection between warrantless searches and medical emergencies held to be fatal to searches in other jurisdictions.

{18} Nemeth set forth a test for the community caretaking function similar to that used in Wright mentioned above for Colorado’s medical emergency exception to the warrant requirement. Nemeth states that the “test of legitimacy under the community caretaker doctrine is whether the officers’ actions were objectively reasonable and in good faith. More particularly, the officer must have a reasonable and articulable belief, tested objectively, that a person is in need of immediate aid or assistance or protection from serious harm.” Nemeth, 2001-NMCA-029, ¶ 37. Deputy Gutierrez’s conduct does not pass this test. Here, Deputy Gutierrez was not asked to go to the hospital. He did not leave Defendant’s residence to go to the hospital for five or ten minutes, and stated no reason for the wait. Upon his arrival, he observed Defendant being disrobed, and waited a few more minutes before searching the pants. Defendant had been under the care of medical personnel. The objective necessity for Deputy Gutierrez’s actions to benefit Defendant was not established.

{19} Therefore, the State did not present substantial evidence as to the reasonableness of Deputy Gutierrez’s belief that his aid and assistance was necessary. We determine that Deputy Gutierrez’s search of Defendant’s clothes was done “for the purpose of investigating possible criminal activity or obtaining incriminatory evidence, rather than pursuant to a non-criminal-related community caretaking function.” Nemeth, 2001-NMCA-029, ¶ 38.

Timing of the Motion to Suppress

{20} Although Defendant waited to make an objection on the record until after the State had put on three of its witnesses who discussed the drugs, all parties and the district court were on notice as to what the defense intended because prior to trial, defense counsel informed the district court that he would be raising an issue concerning suppression of the drugs. He called it “a motion to suppress in the middle of trial,” and the State did not object. In fact, when the motion was made after Deputy Gutierrez, the chemist, and the narcotics agent who transported the drugs to the laboratory testified, the State responded to the motion, including citing case law involving community caretaking. As with other cases involving the tactical decisions of trial counsel in other contexts, we do not wish to guess at what defense counsel was doing. Cf. State v. Jones, 120 N.M. 247, 254, 901 P.2d 178, 185 (1995) (stating that within the context of an ineffective assistance of counsel claim, this Court will not second guess the tactics or strategy of defense counsel). However, in the
absence of an objection from the State to consideration of the motion, and its affirmatively arguing its merits to the district court, we hold that the State waived its objection to the motion. The question is whether the motion was timely.

{21} According to our rules, “[a] person aggrieved by a confession, admission or other evidence may move to suppress such evidence.” Rule 5-212(B) NMRA 2004. The rules further state that “[a] motion to suppress shall be made within twenty (20) days after the entry of a plea, unless, upon good cause shown, the trial court waives the time requirement of this rule.” Rule 5-212(C). Objections to evidence “must be sufficiently timely and specific to apprise the [district] court of the nature of the claimed error and to invoke an intelligent ruling by the court.” State v. Lucero, 104 N.M. 587, 590, 725 P.2d 266, 269 (Ct. App. 1986). In State v. Snyder, 1998-NMCA-166, ¶ 4, 126 N.M. 168, 967 P.2d 843, defense counsel alleged an unlawful search and moved at trial to suppress photographs of seized marijuana. In Snyder, we ruled that the State’s ability to use evidence at trial depended on the application of an exclusionary rule triggered by the constitutionality of a search and evaluated the constitutional claim. Id. ¶¶ 13-15. Questions concerning the constitutionality of a search and seizure are questions concerning fundamental rights of a party, including the right to be free of illegal searches and seizures. State v. Gomez, 1997-NMDC-006, ¶ 31, n.4, 122 N.M. 777, 932 P.2d 1. There is no obligation for Defendant to move for suppression of evidence prior to trial, as we have held that “[t]he committee commentary to Rule 5-212 of the New Mexico Rules of Criminal Procedure specifically states that the Rules do not require [a] motion objecting to illegally seized evidence prior to trial.” State v. Ortega, 114 N.M. 193, 198, 836 P.2d 639, 644 (Ct. App. 1992) (internal quotation marks and citations omitted); Rule 5-212 Committee commentary. The fact that Defendant was outside the time limit of twenty days after his plea under Rule 5-212(C) might have served as grounds for not hearing or denying the motion or having it regarded in an unfavorable light, e.g., County of Los Alamos v. Tapia, 109 N.M. 736, 744, 790 P.2d 1017, 1025 (1990). However, that is not the case here. The district court was on notice of the motion, and the court did not penalize Defendant for ignoring the rule. The State was on notice, and the State responded and argued. Defendant preserved the issue for our review.

Admission of Evidence Was Not Harmless Error

{22} The State argues that even if Deputy Gutierrez’s search of Defendant’s pockets was unconstitutional, any error in the admission of the drugs was harmless. Our Supreme Court stated that constitutional errors can only be considered harmless if we are able to “conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.” State v. Johnson, 2004-NMSC-029, ¶ 8-10, No. 27,535 slip op. at 3-4 (Aug. 20, 2004) (internal quotation marks and citation omitted). The State has the burden of demonstrating that the constitutional error was harmless beyond a reasonable doubt. Id. ¶ 9. In ascertaining whether the State has met this burden we must conduct an “objective reconstruction of the record of evidence the jury either heard or should have heard absent the error and a careful examination of the error’s possible impact on that evidence.” Id. ¶ 10.

{23} The only evidence of Defendant’s possession of drugs was the result of the search of Defendant’s pockets. Without the drug evidence or testimony concerning the seizure and the testing of the drugs, the State had no evidence to prove that Defendant possessed the drugs. The remedy for the illegal search is suppressing all the fruits of the search, including the testimony concerning its discovery. See State v. Hawkins, 1999-NMCA-126, ¶ 16, 128 N.M. 245, 991 P.2d 989 (stating that evidence obtained as the result of an illegal search is generally barred under the “fruit of the poisonous tree” doctrine).

{24} The procedural posture of this case is not as convoluted as it may seem. Despite the evidence that was presented to the jury by three witnesses, the only charges upon which Defendant was convicted concerned possession of drugs. The drugs Defendant was charged with possessing are the drugs Deputy Gutierrez took out of Defendant’s pocket in the hospital. Therefore, the issue of identification whether these drugs removed from Defendant’s pocket were a controlled substance depends on the legitimacy of the search. But, without the discovery of the drugs, there was nothing to identify or analyze, and there was no independent source for the evidence that Defendant possessed drugs that would not have been tainted by the illegal search. As a result, the failure of the district court to suppress this evidence cannot be considered harmless beyond a reasonable doubt. Suppression resolves the factual issue of the existence of the drugs in the case for all purposes.

CONCLUSION

{25} We therefore reverse the district court. The case is remanded for entry of an order granting Defendant’s motion to suppress and for further proceedings consistent with this opinion.

{26} IT IS SO ORDERED.

RODERICK T. KENNEDY,
Judge

WE CONCUR:
JAMES J. WECHSLER, Chief Judge
MICHAEL E. VIGIL, Judge
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Lawyer Referral for the Elderly Program (LREP) is seeking an attorney outside Bernalillo County for rural contract work. The contract attorney will focus on providing enhanced LREP services for the elder population within a specific geographic area. Services will include but not be limited to: Promoting LREP; assisting with local referrals, conducting informational workshops and assisting with LREP workshops. Materials and training will be provided. Interested attorneys should send a letter of interest with proposed geographic region and resume to: LREP, Attn: Contract Manager, PO Box 92860, Albuquerque, NM 87199 or fax to (505) 797-6074. Position open till filled. EOE.
Notice of Vacancy
Grant County Attorney

Grant County seeks a full-time Attorney for a growing and vibrant community. The work is interesting and challenging, often focusing on the resolution of issues as opposed to routine litigation. Deadline for applications is March 1, 2005. Minimum Qualifications: Juris Doctor Degree; License to practice law in New Mexico; Minimum of four years experience in the general practice of law; Experience in land use, personnel matters and contracts helpful; Must have superior communication, negotiation and public relations skills; and Must possess ability to work in a fast paced office and interact with the public. Additional Qualifications. Send a substantive letter of interest and resume to the Grant County Manager. For additional information or a copy of the application packet please contact: Grant County Manager’s Office, 1400 Highway 180 East, Silver City, New Mexico 88061, (505) 574-0008. Salary: $60,000/year.

Associate Attorney

The Nordhaus Law Firm is seeking an associate attorney with five or fewer years of experience for our Albuquerque, New Mexico office starting immediately. Experience and/or demonstrated interest in Indian law is preferred but not required. We represent Indian Tribes and Tribal entities on economic development projects, in financing transactions, in administrative and regulatory processes, on Tribal governance issues, and before national and state legislative bodies. The firm also handles complex litigation from trial through final appeal on a range of issues including trust responsibility enforcement, jurisdiction, taxation, and natural resource protection and development. We are an equal opportunity employer. Qualified Native Americans are encouraged to apply. To apply, please submit: (1) a cover letter describing your interest in and qualifications for the position, (2) a resume, (3) a legal writing sample, (4) a list of references, and (5) an official law school transcript to Hiring Partner – Albuquerque Position, c/o Vilma Ruiz, 1239 Paseo De Peralta, Santa Fe, NM 87501. You may submit your application by email to hiringpartner@northernlaw.com with the application documents in PDF, WordPerfect, or MS Word format.

Associate Trial Attorney

The Fourth Judicial District Attorney’s office has a position for an Associate Trial Attorney. This is an entry-level position. Salary is dependent upon the District Attorney’s Personnel and Compensation Plan. Salary range is $34,738 to $48,248. Please send Resume and letter of intent to Richard D. Flores, Fourth Judicial District Attorney, P.O. Box 2025, Las Vegas, NM 87701 or e-mail to rflores@da.state.nm.us.

Attorney

The Western Environmental Law Center, a regional non-profit, public interest environmental law firm, is seeking an attorney with two or more years experience to work in our Taos, New Mexico, office. The attorney filling this position will carry a diverse caseload. The position will have a substantial focus on assisting traditional western communities in their efforts to protect the local environment and promote the sustainable management of local natural resources. Accordingly, the attorney filling this position will work with land use and water law as well as more conventional federal and state environmental laws. The Western Environmental Law Center’s programs and employment are open to all. We value diversity and do not discriminate on the basis of age, gender, race, national origin, ethnicity, religion, sexual orientation, or disability in any of our policies or programs. We offer a friendly, team-based environment, highly competitive salaries, and an excellent benefits package. We plan to fill this position as soon as possible. Please send cover letter, resume, references, and writing sample to: Western Environmental Law Center, P.O. Box 1507, Taos, NM 87571, "Attention: Attorney Position," or email to taos@westernlaw.org, www.westernlaw.org.

Attorney Position

Tired of overwhelming billable hour requirements? Attorney position available in small firm with general civil practice that strongly focuses on the quality of life for its attorneys. Current areas of practice include business and commercial transactions, litigation, domestic relations, estate/probate, gaming law, and some P.I. + years of experience preferred. Will consider merging practice and adding additional practice areas to meet your interests. Great opportunity to develop those areas of law you have always been interested in. Excellent benefits available including health, dental, 401k, gym membership. Salary DOG. Send resume and salary requirements to: Hiring Partner, 1200 Pennsylvania NE, Albuquerque, NM 87110.

Associate Attorney

Las Cruces firm with a general civil practice seeks an associate attorney. We are looking for someone with at least a few years of experience, someone who is comfortable in the courtroom, but who can also handle either domestic relations or commercial and transactional work. We offer a competitive salary and benefit package, including 401k. Send resume, references, and writing sample to P.O. Box 2699, Las Cruces, NM 88004-2699, or fax to (505) 524-0726.

Associate Attorney

Very reputable law firm representing numerous large, nationwide banking/servicer clients in full range of creditors rights including foreclosures, replevins, bankruptcies. We are building a new office in the Journal Center and need someone who is able to multi task in a high volume, fast paced practice. Submit in confidence cover letter, resume, sal his & req to: 3803 Attrico Blvd Ste A Alb, NM 87120, fax 833-3040, or e-mail admin@roselightle.com.

Assistant Trial Attorney

The Fourth Judicial District Attorney’s office has a position for an Assistant Trial Attorney. This is a mid-level position, and requires a minimum of 2 years experience. Salary is dependent upon experience and the District Attorney’s Personnel and Compensation Plan. Salary range is $38,384 to $53,312. Please send Resume and letter of intent to Richard D. Flores, Fourth Judicial District Attorney, P.O. Box 2025, Las Vegas, NM 87701 or e-mail to rflores@da.state.nm.us.

Legal Secretary

Small, busy uptown law firm is looking to hire full time legal secretary. Our practice is primarily in the areas of Estate Planning, Probate and Elder Law. Microsoft Word experience is necessary. Excellent benefits. Please fax resume to 237-9440, or send to: Swaim & Schrandt P.C., 4830 Juan Tabo NE, Suite F, Albuquerque NM 87111.

Legal Assistant

Catron, Catron & Pottow, a small Santa Fe AV-rated law firm, seeks a full-time legal assistant. Good writing and computer skills are necessary along with knowledge of forms and procedures to support litigation, estate planning, probate and other transactional work. Salary DOE; good benefits. Send letter of interest with resume, references and writing samples to pgrace@catronlaw.com or fax to 505-986-1013. All applications will be kept in confidence.

Legal Secretary

Small law firm needs experienced legal secretary. Insurance defense experience preferred. Salary DOE. Send resume to R. Galen Reimer, Gallagher, Casados & Mann, P.C., 317 Commercial NE, 2nd Floor, Albuquerque, NM 87102 or fax to 505-764-0153.
**Part-Time/Flexible Hours Legal Assistant/Receptionist**
Professional, self-starter with excellent computer and organizational skills needed for sole practitioner in downtown office, answering phones, assisting clients, court and office filings, drafting correspondence, billing and some bookkeeping. Minimum of 2 years experience in law firm setting required; Bilingual/Spanish and knowledge of litigation/court procedures desirable. Salary DOE. Please submit cover letter, resume and references in confidence to Hiring Attorney, P.O. Box 7247, Albuquerque, NM 87194.

**Legal Assistant/Secretary**
Full-time Legal Assistant/Secretary needed by an extremely busy solo practitioner. Candidate must have a strong work ethic and a minimum of 3 years experience in a law firm setting, preferably in family law or personal injury, with exceptional secretarial, organizational, proofreading and communication skills. A certificate from a formal para-legal program may be substituted for one year of experience. Ability to work well under pressure and independently is a must. Strong legal research and writing skills are a plus. For consideration, please fax a cover letter, resume, 3 references, school transcript (if applicable), a writing sample of your work and your salary requirements to: (505) 299-2121 or e-mail same to bernice@gallowaylawoffices.com.

**Positions Wanted**

**Part-Time or Contract Work**
New Mexico and Navajo Nation licensed attorney seeks part-time or contract work beginning March 1 through July, 2005 (plan to return to graduate school in the fall). Experience in Social Security, EEOC, medical malpractice, HIPPA, mental health, Indian law, administrative / regulatory law, FOIA, employment law, elder law, some areas immigration law. Excellent legal researcher. Needs to be in the Albuquerque area for on-site work or by telecommuting. Contact: nmlawyer@ispwest.com.

**Consulting**

**Forensic Psychiatrist**
Trained at Yale University in Forensic psychiatry. Board certified and licensed in New Mexico. Available for expert witness testimony. Experienced in criminal and civil matters. Call Dr. Kelly at 505-463-1228.

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Call Legal Beagle @ 883-1960.

**Medical Record Review, Research and Expert Location**
Sharon A. Scott, RN, BSN - Sharon Scott & Associates. A Medical Record Review, Research and Expert Location Service. (Ph) 505-898-5854 / (Fax) 505-898-8847 / sharonscott@comcast.net / http://www.sharonscott.com. Providing customized LNC-to-Attorney newsletters for LNCs across the country to use in their local marketing since 1997. You can view samples on my web site above, under the “Articles/Memos” link. Contact us for more information.

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Studio Apartment with large kitchen. May be used as office. 1 Block from Courts. $450/month 816C 6th Street. 286-4872.

**Stylish Building**

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Large offices with separate secretarial area, free client parking, receptionist, library/conference room, kitchen, telephone, high-speed Internet connection, copier, fax, security. Call Lynda at 842-5924.

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Beat the traffic in this well situated Office Building, w/ 4000 sq ft and tons of parking in the North Valley@ 9621 4th Street.(just off Alameda Blvd): lease at $3,800/mo plus utils. 980 2558, lmarjon@aol.com for more info.

**2 Room Suite**
Spacious 2 room suite in law office, 420 sq. ft. Convenient onsite parking. $400/mo. Includes utils. Near Central and San Mateo at 110 Quincy, NE. Call 266-4800.

**Downtown**
Beautiful adobe building near MLK on north I-25 on-ramp. Convenient to courthouses with free adequate parking for staff and clients. Conference room, reception room, employee lounge, utilities and janitor service included. Broad band access, copy machine available. From $240 per month. Call Orville, (505) 867-6566; or Jon, (505) 507-5145.

**Potpourri**

**Will Search**
Will Search for Cristina Flumiani aka Cristina C. Cafarelli. Cristina Flumiani died on January 29, 2004. Her heirs are searching for any Will or Trust prepared on her behalf. If you have any information, please contact Scott Beattie at Calone Law Group, LLP at (209) 952-4545.”

**For Sale**
Premium domain name, attorneynewmexico.com. $5,000 (below top appraisal). Email rockymtlaw@msn.com; phone 242-5879.
The 20th Annual Bankruptcy Year in Review
Friday, March 4, 2005 • 8:30 a.m. • State Bar Center
7.4 General and 1.0 Ethics CLE Credits

The seminar will cover developments in case law on bankruptcy issues in 2004, both nationally and locally, with special emphasis on decisions by the U.S. Supreme Court, 10th Circuit, 10th Circuit BAP and New Mexico bankruptcy judges. This year’s seminar adds a segment on significant developments on issues particularly affecting consumer cases. The seminar will also include a presentation from one of the local bankruptcy judges and from the Clerk of the Bankruptcy Court in New Mexico, and an ethics panel discussion on use of contract attorneys paid from estate funds.

8:00 a.m. Registration
8:30 a.m. Annual Bankruptcy Case Review
Robert H. Jacobvitz, Jacobvitz, Thuma & Walker, P.C. • George M. Moore, Moore & Berkson P.C.
Professor Nathalie Martin, UNM Law School • Debra Romero Thal
10:30 a.m. Break
10:45 a.m. Annual Bankruptcy Case Review (continued)
11:30 a.m. Discussion from the Bench - Honorable James S. Starzynski
12:00 a.m. Lunch provided
1:00 p.m. Annual Bankruptcy Case Review (conclusion)
1:15 p.m. Review of Developments in Consumer Bankruptcy Law
Till v. SCS Credit (chapter 13 cram down interest rates)
Lamie v. U.S. Trustee (compensation to chapter 7 debtor’s counsel)
Selected consumer cases of interest (not decided by the U.S. Supreme Court, 10th Circuit, 10th Circuit BAP or NM bankruptcy judges)
Michael K. Daniels • Kelley L. Skehen, Chapter 13 Trustee • Gerald R. Velarde
2:10 p.m. Presentation by Clerk of the Bankruptcy Court
Norman H. Meyer Jr., Clerk U.S. Bankruptcy Court, District of N.M.
2:45 p.m. Break
3:00 p.m. Annual National Review - Jeffrey H. Davidson, Stutman, Treister & Glatt P.C.
4:10 p.m. Ethics Panel Discussion - Ethical issues arising from Debtor’s counsel’s retention of contract attorneys, such as to cover a 341 meeting or to conduct legal research
Manuel Lucero • Alice Nystel Page
5:00 p.m. Reception

REGISTRATION – THE 20TH ANNUAL BANKRUPTCY YEAR IN REVIEW
March 4, 2005 • 8:30 a.m. • State Bar Center • 7.4 General and 1.0 Ethics CLE Credits
☐ Standard and Non-Attorney - $199 | ☐ Bankruptcy Law Section Member, Government and Paralegal - $179

Name: ___________________________________________ NM Bar#: _______________________
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E-mail address: ________________________________

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