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2005-NMSC-011: Justin Baker and Robbie Baker v. BP America Production Company, f/k/a Amoco Production Company

2005-NMSC-012: Gerald L. Smith v. Board of County Commissioners, County of Bernalillo, and Henry R. Westrich

2005-NMCA-045: Mark Headley and Patricia Headley v. Morgan Management Corporation

# 2005 Annual Meeting - Back to the Basics: Building Blocks to a Better Practice

**Thursday - Saturday, September 22-24, 2005**

**Ruidoso Convention Center - Ruidoso, NM**

## Thursday, September 22

<table>
<thead>
<tr>
<th>Time</th>
<th>Event</th>
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<tbody>
<tr>
<td>5 – 6:30 p.m.</td>
<td>Registration/Welcoming Reception</td>
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<tr>
<td>8 – 10 a.m.</td>
<td><strong>Plenary: Seven Keys to Maintaining a Safe and Successful Practice</strong> (Professionalism) Dustin A. Cole, President and Master Practice Advisor Attorneys Master Class</td>
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<tr>
<td>10 – 10:30 a.m.</td>
<td>Break</td>
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| 10:30 a.m. – Noon | CLE Session One   
|                | Senior Lawyers Division                                             |
|                | Appellate Practice Section                                           |
|                | Pro Bono                                                            |
| Noon – 1:30 p.m.| Awards Luncheon                                                    |
| 1:30 – 5 p.m.  | Registration/Exhibits                                               |
| 1:30 – 3 p.m.  | **CLE Session Two**                                               
|                | Elder Law Section                                                  |
|                | Family Law Section                                                 |
|                | Solo & Small Firm Practitioners Section                            |
|                | Paralegal Division                                                 |
| 3 – 3:30 p.m.  | Break                                                               |
| 3:30 – 5 p.m.  | **CLE Session Three**                                              
|                | Alternative Dispute Resolution Committee                           |
|                | Health Law Section                                                 |
|                | Law Office Management Committee                                    |
|                | Trial Practice Section                                              |

## Friday, September 23

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<tr>
<td>7 a.m. – Noon</td>
<td>Registration/Exhibits Open</td>
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<tr>
<td>7 – 8 a.m.</td>
<td>Continental Breakfast</td>
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<tr>
<td>8 – 10 a.m.</td>
<td><strong>Plenary: Seven Keys to Maintaining a Safe and Successful Practice</strong> (Professionalism) Dustin A. Cole, President and Master Practice Advisor Attorneys Master Class</td>
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## Saturday, September 24

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<tr>
<td>7 a.m. – Noon</td>
<td>Registration/Exhibits</td>
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<tr>
<td>7 – 8 a.m.</td>
<td>Continental Breakfast</td>
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| 8 – 10 a.m.   | **Plenary: Ethics Rock!**                                            
|                | Jack Marshall and ProEthics, Ltd.                                    |
| 10 – 10:30 a.m. | Break                                                             |
| 10:30 a.m. – 12:15 p.m. | CLE Session Four       
|                | Bankruptcy Law Section                                              |
|                | Business Law Section                                                |
|                | Employment & Labor Law Section                                      |
| 12:15 – 1:30 p.m.| Awards Luncheon                                                    |
| 2 – 4:45 p.m.  | Video Replay (optional add-on)                                      |
| 2 – 5 p.m.     | Golf Tournament at The Links at Sierra Blanca                      |
| 6 – 10 p.m.    | Reception, Dinner and Entertainment at Alto Country Club            |

**NOTE:** All events will be held at the Ruidoso Convention Center unless otherwise noted.

7.5 General, 1.8 Ethics and 2.4 Professionalism CLE Credits - Plus optional add-on General Credits TBA (Video Replay)

Schedule is subject to change without notice
2005 Annual Meeting - Back to the Basics:
Building Blocks to a Better Practice
Thursday - Saturday, September 22-24, 2005
Ruidoso Convention Center - Ruidoso, NM

Name ___________________________ NM Bar No. ___________________

Name for Badge (if different than above) __________________________________________

Address ________________________________________________________________

City ___________________________ State ________ Zip __________

Phone __________________ Fax __________________ Email ______________

Guest 1 __________________ Guest 2 __________________

EARLY REGISTRATION FEE (Must be postmarked by September 1)

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SEPARATELY TICKETED EVENTS (Transportation will be provided to the Flying J Ranch and Alto Country Club from Hawthorn Suites)

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Total __________________

PAYMENT OPTIONS

- Enclosed is my check in the amount of $________________________ (Make Checks Payable to: State Bar of NM)
- VISA   - Master Card   - American Express   - Discover   - Purchase Order (Must be attached to be registered)

Credit Card Acct. No. ___________________________ Exp. Date __________________

Signature __________________________________________

Internet: www.nmbar.org

Mail: SBNM, P.O. Box 92860,
Albuquerque, NM 87199-2860

Phone: (505) 797-6036; Monday - Friday, 9 a.m. - 4 p.m.
Fax: (505) 797-6019; Open 24 Hours

Cancellations & Refunds: If you find that you must cancel your registration, send a written notice of cancellation via fax by 5 p.m., one week prior to the program of interest. A refund, less a $50 processing charge will be issued. Registrants who fail to notify CLE by the date and time indicated will receive a set of course materials via mail following the program. No refunds of registration fees will be issued unless the registrant is unable to attend due to a medical emergency or death in the immediate family. Registration cancellations must be received by SBNM no later than Thursday, September 22, 2005.

MCLE Credit Information: Courses have been approved by the New Mexico MCLE Board. CLE will provide attorneys with necessary forms to file for MCLE credit in other states. A separate MCLE filing fee may be required.

Hotel information is available on the State Bar Web Site at www.nmbar.org or the February 28th Bar Bulletin.
Administration of Family
Limited Partnerships

National Teleseminar • Tuesday, May 17, 2005
11 a.m. • State Bar Center, Albuquerque
1.2 General CLE Credits

Family Limited Partnerships are among the most popular choices of entity for implementing estate plans. Although they offer numerous tax benefits, they are under constant challenge by the IRS. One of the biggest challenges of successfully defending against those challenges is proper administration of FLPs. This program will review those areas where the administration of FLPs most commonly falter, thus giving rise to successful IRS challenges, and provide practical tips for timely identifying those areas, preventing against them and mitigating damage.

☐ Standard Fee $67

New Mexico and the West:
Facing Our Water Reality

The University of New Mexico School of Law
Second Annual Water Policy Seminar
Friday, May 20, 2005 • 8:30 a.m. - 4:30 p.m.
(Lunch Provided) • University of New Mexico
School of Law • Albuquerque, New Mexico
7.8 General CLE Credits

Co-Sponsors: The Utton Transboundary Resources Center and The Center for Legal Education, New Mexico State Bar Foundation


Despite this year’s plentiful precipitation, the long-term water reality for New Mexico and the West is one of uncertainty and water scarcity. This year’s water policy seminar examines institutional responses to drought at the federal and state levels both in New Mexico and on the Colorado River. National and local legal experts will address the effect of state and federal laws and policies on water supply. The New Mexico State Engineer’s Active Water Resources Management Regulations will be discussed by a panel of attorneys representing different and sometimes conflicting users. The new New Mexico court rules for adjudications and the effect of water rates on water use will also be examined.

☐ Standard and Non-Attorney $189
☐ Government & Paralegal $179

FOUR WAYS TO REGISTER

PHONE: (505) 797-6020, Monday - Friday, 9 a.m. - 4 p.m.
(Please have credit card information ready)
FAX: (505) 797-6071, Open 24 hours
INTERNET: www.nmbar.org, click CLE, then area of interest
MAIL: CLE, PO Box 92860, Albuquerque, NM 87199

Name
NM Bar #
Street
City/State/Zip
Phone Fax Email

Program Title
Program Date
Program Location
Program Cost
☐ Purchase Order (Must be attached to be registered)
☐ Check enclosed $ 
Make check payable to: CLE
☐ VISA ☐ MC ☐ American Express ☐ Discover
Credit Card # 
Exp. Date 
Authorized Signature
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Professionalism Tip

With respect to the courts and other tribunals:
I will refrain from filing frivolous motions.

Meetings

May

17
Solo and Small Firm Practitioners
Section Board of Directors, 11:30 a.m.,
Section Meeting, noon, State Bar Center

18
Bankruptcy Law Section Board of
Directors, noon, U.S. Bankruptcy Court

19
Health Law Section Board of Directors,
7:30 a.m., State Bar Center

19
Appellate Practice Section Board of
Directors, 3 p.m., Montgomery &
Andrews, PA, Santa Fe

19
Real Property, Probate and Trust
Section Board of Directors, 4 p.m,
Miller, Stratvert, PA

19
Senior Lawyers Division Board of
Directors, 4:30 p.m., State Bar Center

20
Indian Law Section Board of Directors,
9 a.m., State Bar Center

State Bar Workshops

May

19
Lawyer Referral for the Elderly
Workshop, 10:30 a.m., Ancianos Inc. Senior
Citizens Program, Taos

25
Consumer Debt/Bankruptcy Workshop*,
6 p.m., State Bar Center

25
Family Law Workshop, 5:30 p.m., Branigan
Library, Las Cruces

26
Consumer Debt/Bankruptcy Workshop*,
5:30 p.m., Branigan Library, Las Cruces

26
Lawyer Referral for the Elderly
Workshop, 1:15 p.m., Meadowlark Senior
Center, Albuquerque

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

Bar Bulletin - May 16, 2005 - Volume 44, No. 19
NOTICES

COURT NEWS

NM Supreme Court Court Reporter Provisional Licensing

The New Mexico Supreme Court has approved a pilot project to be administered by the Board Governing the Recording of Judicial Proceedings. It will permit graduating court reporters to hold a two-year provisional license to provide court-reporting services under the supervision of a New Mexico certified court reporter. For specific requirements of the provisional license, contact Linda McGee, CCR Board Administrator, PO Box 92648, Albuquerque, NM 87199-2648.

Law Library Closure

The Supreme Court Library will be closed May 28-30 for Memorial Day Weekend. Call (505) 827-4850 for more information.

First Judicial District Court Criminal Bench and Bar Brownbag

The First Judicial District Court Criminal Bench and Bar will have a brownbag meeting at noon, May 17 in the courtroom of Judge Michael E. Vigil. Issues and topics for discussion may be submitted to any of the First Judicial District Court's Criminal Divisions.

Second Judicial District Court Announcement of Vacancy

A vacancy on the Second Judicial District Court will exist as of July 1 due to the creation of a new judgeship position by the NM State Legislature. The chair of the Second Judicial District Court Nominating Commission now solicits nominations and applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 14 of the New Mexico Statutes Annotated 1978. Applications may be obtained from the Judicial Selection Web site, http://lawschool.unm.edu/judsel/index.htm, or e-mailed/faxed/mailed by calling Reva Chapman, (505) 277-4700. The deadline for applications/nominations has been set for 5 p.m., June 3. Applications received after that time are not considered.

Eleventh Judicial District Court Announcement of Vacancy

A vacancy on the Eleventh Judicial District Court will exist as of July 1 due to the creation of a new judgeship position by the NM State Legislature. The chair of the Eleventh Judicial District Court Nominating Commission now solicits nominations and applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 14 of the New Mexico Statutes Annotated 1978. Applications may be obtained from the Judicial Selection Web site, http://lawschool.unm.edu/judsel/index.htm, or e-mailed/faxed/mailed by calling Reva Chapman, (505) 277-4700. The deadline for applications/nominations has been set for 5 p.m., June 3. Applications received after that time are not considered.

Bernalillo County Metropolitan Court Announcement of Vacancy

Two judicial vacancies on the Bernalillo County Metropolitan Court will exist as of July 1 due to the creation of a new judgeship position by the NM State Legislature. The chair of the Bernalillo County Metropolitan Court Nominating Commission now solicits nominations and applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 14 of the New Mexico Statutes Annotated 1978. Applications may be obtained from the Judicial Selection Web site, http://lawschool.unm.edu/judsel/index.htm, or e-mailed/faxed/mailed by calling Reva Chapman, (505) 277-4700. The deadline for applications/nominations has been set for 5 p.m., June 3. Applications received after that time are not considered.

Santa Fe County Magistrate Court Judicial Vacancy

Gov. Bill Richardson is seeking candidates from Santa Fe County who are interested in serving as magistrate. This judgeship was created through the governor’s efforts in the 2005 Legislature to create additional judge-ships in the districts with the most crowded dockets. The new magistrate appointed by the governor will begin serving on July 1 and will stand for election in 2006. Each interested candidate must send a letter of interest, resume and letters of recommendation to Gov. Bill Richardson, Attention Legal Division, State Capitol Building, Suite 400, Santa Fe, New Mexico 87501 by 5 p.m., May 17. Materials may be sent via U.S. Mail or by fax to (505) 476-2207. After submitting their letters of interest, candidates may be required to undergo a criminal background check.
STATE BAR NEWS

Board of Bar Commissioners
DNA - People’s Legal Services, Inc. Appointments

The Board of Bar Commissioners will make two appointments to the DNA - People’s Legal Services, Inc., Board for two-year terms. Members wishing to serve on the board should send a letter of interest and brief resume by May 18 to Executive Director Joe Conte, State Bar of New Mexico, P.O. Box 92860, Albuquerque, NM 87199-2860; or fax to (505) 828-3765.

Meeting Agenda
The State Bar Board of Bar Commissioners will meet at noon, May 20 at Alpine Village in Taos. The meeting agenda follows:

1. Approval of April 7, 2005 meeting minutes
2. Finance committee report
3. Acceptance of March financials
4. Acceptance of 2004 audit and management letter
5. Approval of request to change the Bar’s 401K administrator
6. Personnel committee report
7. Bylaws/Policies committee report
8. Approval of Board of Editors survey of members
9. Lawyers Professional Liability Committee report, proposed Supreme Court Orders and recommendations regarding mandatory insurance disclosure
10. Approval of Client Protection Fund recommendations
11. Appointments to DNA - People’s Legal Services Board
12. Membership and Communications Department report
13. President’s report
14. Executive Director’s report
15. Division reports
16. New business

Pro Hac Vice
The New Mexico Supreme Court has established a new rule for practice by non-admitted lawyers before state courts (Pro Hac Vice). The new Rule 24-106 NMRA, is effective for cases filed on or after Jan. 20, 2005. Attorneys authorized to practice law before the highest court of record in any state or territory wishing to enter an appearance, either in person or on court papers, in a New Mexico civil case should consult the new rule. This rule requires non-admitted lawyers to file a registration certificate with the State Bar of New Mexico, file an affidavit with the court and pay a nonrefundable fee of $250. Fees collected under this rule will be used to support legal services for the poor. For more information on the rule, a copy of the registration certificate and sample affidavit, go to www.nmbar.org.

Solo and Small Firm Practitioners Section
Brownbag Meeting
The Solo and Small Firm Practitioners Section Meeting will be held May 17 at the State Bar Center. The section board will meet at 11:30 a.m. followed by a brownbag section meeting from noon to 1:30 p.m. Mark Keller will speak on “Solo Practice within the Metro Court” to be followed by a roundtable discussion among the members. The event is open to everyone.

Taxation Section Annual Meeting
The Taxation Section will hold its annual meeting immediately following the Third Annual Tax Symposium June 17. The Tax Symposium is a full-day CLE and will be held from 8:30 a.m. to 5 p.m. at the State Bar Center. Contact Marjorie Rogers, (505) 848-1844 or mrogers@modrall.com, to place an item on the agenda.

OTHER BARS

Albuquerque Bar Association Monthly Luncheon
The Albuquerque Bar Association’s monthly luncheon will be held June 7 at noon at the Albuquerque Petroleum Club. The luncheon speaker will be Gary Stuart, President of the University of Arizona Board of Regents and author of “Miranda: The Story of America’s Right to Remain Silent.” The CLE program will be Appellate Update with Ed Ricco of Rodey Law Firm and Tom Bird of Keleher & McLeod. The CLE will begin following the lunch at 1:30 p.m. for 1.0 General CLE Credits. Lunch is $20 for members and $25 for non-members; lunch and CLE cost is $40 members and $55 for non-members. Register online at www.abqbar.com, by e-mail to abqbar@abqbar.com, by phone at (505) 243-2615, or by mail to 400 Gold SW, Suite 620, Albuquerque, NM 87102.

Special Luncheon
The Albuquerque Bar Association luncheon will acknowledge those attorneys who serve and have served in the U.S. military Sept. 6. The Albuquerque Bar will prepare a roster of attorneys with names, branch of military service, dates of service and rank. Attorneys should send the Albuquerque Bar their relevant information as soon as possible. Contact Jeanne Adams at abqbar@abqbar.com, Kathy Brandt at kathybrandt@qwest.net or call (505) 842-1151. These service personnel and veterans need not be members of the Albuquerque Bar Association to participate.

First Judicial District Bar Association Monthly Luncheon
The First Judicial District Bar Association will host its monthly luncheon May 16 at the St. Francis Hotel in Santa Fe. Gov. Bill Richardson will be the featured speaker. For information regarding membership or to attend the event, contact Dana Hardy, (505) 466-2548 or dhardy@simonsfirm.com.

Sandoval County Bar Association April Monthly Meeting
The Sandoval County Bar Association will hold its next monthly meeting and offer a sneak preview of the new Sandoval County Courthouse from noon to 1 p.m., May 26 at the Sandoval County Judicial Complex, 1500 Idalia Road, Bernalillo. Lunch will be catered so anyone interested in attending should RSVP to (505) 892-1050 by May 24.

New Mexico Defense Lawyers Association Member Luncheon
The New Mexico Defense Lawyers Association will host a member luncheon from
11:30 a.m. to 1 p.m., June 9 at the State Bar Center. Dr. Barry Diskant will make a presentation on “New Development in Invasive Spine Care - Artificial Disc Replacements.” Call Rhonda Dahl, (505) 797-6021 or visit the NMDLA Web site at www.nmdla.org.

Other News

Albuquerque Association of Legal Professionals Court Clerk’s Workshop

The Albuquerque Association of Legal Professionals is hosting the Annual Court Clerk’s Workshop from 7:45 a.m. to 3:30 p.m., June 4 at the UNM Continuing Education Complex, 1634 University Blvd. NE, Albuquerque. All members and interested persons of the legal community are welcome to participate. The workshop provides an opportunity for legal support staff to obtain the most current and up to date information about court procedures and rules from each of the local court clerks and their staff members. The workshop provides 5.75 general CLE credits. For further information about AALP/NALS, contact Vince Lipinski, (505) 315-9193 or lipinskiv@hotmail.com.

Taxation and Revenue Department Managed Audit Program

The New Mexico Taxation and Revenue Department is taking a closer look at individuals who legally should be filing New Mexico personal income tax returns as residents. There is a significant amount of income going unreported by people who live in New Mexico full time but claim their residence to be one of the seven states that does not have an income tax, despite the 185-day physical presence statute that went into effect in 2003. Attorneys may want to advise taxpayers who are concerned they should have previously filed resident New Mexico tax returns to take advantage of the Taxation and Revenue Department’s Managed Audit Program. Taxpayers can avoid paying both penalty and interest if eligible for the program and if the assessment is paid within 30 days from the assessment date. Call (505) 827-0929 for more information about the Managed Audit Program.

Workers’ Compensation Administration Brownbag Meeting

The Workers’ Compensation Administration will hold a brownbag meeting at noon, May 18 at the Workers’ Compensation Administration Headquarters, 2410 Centre SE, Albuquerque. Participants may also attend by videoconference from any of the administration’s field offices. Please call Margaret Padilla, (505) 841-6029 for more information.

2005 Leadership Training Institute

Applications Being Accepted

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

The Institute takes place over four sessions, August 12-13, September 1-2, September 29-30 and November 3-4, with all but one session being held at the State Bar Center in Albuquerque. Class size is limited through a competitive enrollment process. Topics covered include:

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

All active New Mexico licensed lawyers are welcome to apply, deadline is June 20. Tuition is $350. Limited financial assistance and scholarships are available. For a complete Leadership Training Institute brochure and to apply, visit www.nmbar.org. For more information, contact Executive Director Joe Conte, (505) 797-6099 or jconte@nmbar.org.
New Mexico Legal Community Celebrates Law Day

By Keith Thompson

In 1957 Henry Fonda starred in the movie "12 Angry Men," a film that took a hard look at the American jury. That same year Charles Rhyne, the American Bar Association president, envisioned a national day set aside to celebrate the rule of law.

Jump ahead to 2005 and Law Day, established by President Dwight D. Eisenhower and now in its 47th year, celebrated the jury with this year’s Law Day theme of "The American Jury: We the People in Action."

Law Day, traditionally celebrated May 1, is meant to underscore how law and the legal process have contributed to America. The celebration has outgrown its one-day observance and now encompasses a host of activities.

"Through the thousands of activities and programs that will be presented throughout the country on Law Day, we seek to deepen American’s understanding of how juries helped us to win our freedoms and how, even today, they help us to maintain them," said Robert J. Grey, president of the ABA, in a statement on Law Day.

The legal community in New Mexico celebrated Law Day with a variety of activities, and Supreme Court Chief Justice Richard C. Bosson took things one step further declaring the week of May 2-6 Juror Appreciation Week.

Metropolitan Court Jury Appreciation Week

Bernalillo County Metropolitan Court made jury duty a little easier to swallow by providing free meals throughout Jury Appreciation Week, according to Margaret Williams, Metro Court’s jury division director.

Jurors are typically left to fend for themselves, but this week none went hungry doing their civic duty. "We provided breakfast and snacks throughout the week and the State Bar provided lunch on Monday and Tuesday," Williams said.

In addition to the munchies, Williams said the court put up banners made by local schools thanking them for their service. The court also chose the week to begin their new policy of giving jurors a certificate of appreciation signed by Chief Judge Judith K. Nakamura.

Williams said the week went well and the jurors were appreciative of the extra attention. "We got a lot of positive feedback," she said.

Law Day Luncheon

The Albuquerque Bar Association hosted its annual Law Day Luncheon at the Hyatt Regency Hotel in Albuquerque May 2. The luncheon’s featured speaker was Delano Lewis, former U.S. ambassador to South Africa, who delivered a keynote address on “The Role of the American Lawyer in a Global Society.”

Lewis spoke of his experiences as a law school student at Washburn University and as a young attorney working in the U.S. Department of Justice and later for the Equal Opportunity Commission in the 1960s. He went on to relate his experiences serving in the Peace Corps in Nigeria and Uganda, where he eventually was named director of the East and Southern Africa Division.

He also talked of his experiences in the corporate world where he worked his way through the ranks of C&P Telephone in Washington, D.C., to become the president and CEO. He then went on to become CEO of National Public Radio in 1994.

Lewis told of how his experiences helped him when President Bill Clinton appointed him as an ambassador in 1999.

The former ambassador and Las Cruces resident encouraged those at the luncheon to become “expert craftsmen of the law” and to use their life and law experiences to help others in the world.

“My challenge to you on Law Day 2005 is to begin to use that expertise for others,” he said. “To me the highest calling is service to others.”

High School Essay Contest

Three New Mexico high school students will go to college with a little extra money in their pockets and some legal writing experience in their repertoires thanks to their winning entries in the State Bar’s 16th annual James T. Sperling High School Essay Contest.

The winning contestants were presented their prizes of $1,000, $500 and $250 at the Law Day Luncheon. The contest is open to all New Mexico high school juniors and seniors who author an essay in response to a scenario and questions developed by the State Bar’s Public Legal Education Committee.

This year’s essay topic and questions were developed by Mark Fitzgerald, an attorney with Los Alamos National Laboratory, and dealt with Fourth Amendment issues of search and seizure. The scenarios and essay guidelines were then sent to high schools statewide.

Volunteers from the PLEC committee then read through and scored all 109 submitted essays. The top essays were sent to a panel of finalist judges who then selected the top three. This year’s finalist judges were, Chief Judge Nakamura, Bernalillo County Metropolitan Court; Judge John...
Pope, Thirteenth Judicial District Court; and Chief Judge Stephen Quinn, Ninth Judicial District Court.

Darshan Nilesh Patel, a senior at Albuquerque Academy, penned this year’s winning entry. Patel is president of his school’s student senate and is a national competitor in speech. He has also been selected by his peers to receive an Academy Award for leadership and service to the school. Patel plans to attend either Brown University in Rhode Island or Georgetown University in Washington.

Kristian A. Macaron, a senior at Evangel Christian Academy in Albuquerque, took second. Macaron participates in mock trial, cheer leading, basketball and is her school’s yearbook editor. Macaron plans to attend the University of New Mexico where she has been awarded a Presidential Scholarship. Macaron wants to be an attorney or a writer.

The third-place essay came from Jessica Carlisle, a senior at Aztec High School in Aztec. Carlisle participates in marching band, jazz band, soccer, basketball, track and several honor societies. Carlisle will attend Austin College in Texas where she’s planning to double major in journalism and political science.

The contest has been put on yearly since 1991 by the State Bar’s Public Legal Education Committee and is named for James T. Sperling, former president of the contest’s sponsoring law firm, Modrall, Sperling, Roehl, Harris and Sisk, PA. Sperling practiced with the firm from 1946 until his death in 1991.

Patel’s winning essay is printed on page 11 of this issue.

Public Lawyer of the Year Award

The State Bar Public Law Section presented its annual Public Lawyer of the Year Award to Paul Biderman May 2 at the State Capitol Rotunda in Santa Fe.

The Public Lawyer of the Year Award is given to recognize the accomplishments of an attorney in the public sector, including significant length of service in government, excellence as an attorney, acting as a role model for other public lawyers and serving charitable institutions or nonprofit entities connected with the practice of law. Additionally, a recipient’s character and dedication to public law and public service furthers the integrity and repute of the legal profession.

Since coming to New Mexico in 1970, immediately after his graduation from NYU Law School, Biderman has devoted almost his entire career to public interest work on behalf of many causes, including the interests of consumers, ethnic minorities, the developmentally disabled, victims of domestic violence, and the environment. He has worked diligently on these problems not only through litigation, but also through the building of strong and lasting institutions of government, through teaching, and through service on non-profit organization boards.

Biderman has worked as a DNA Legal Services attorney, in private practice representing many consumer clients, in the Attorney General’s Consumer Division, as Northern New Mexico Legal Services’ litigation director, as the secretary of the Energy and Minerals Department, and is currently an associate director for the UNM School of Law’s Institute of Public Law.

Chief Justice Bosson, State Bar President Charles J. Vigil and Chief Deputy Attorney General Stuart M. Bluestone spoke at the event.

Workshops

Several law firms and local bar associations around the state teamed up with the State Bar’s Public and Legal Services Outreach program to hold workshops in conjunction with Law Day, according to Christine Joseph, assistant director for the State Bar’s Public and Legal Services Department.

The Quay County Bar Association, with funding from the New Mexico Legal Services Commission, sponsored three free workshops in Tucumcari May 2. The workshops dealt with advanced healthcare directives and were held at the Pioneer Senior Center, Mesalands Community College and Dean Border’s law office. The event attracted 81 participants.

In Gallup, attorney Robert Rosebrough presented a workshop on estate planning and elder law issues May 5.

Joseph also said that the Public and Legal Services Department is helping to sponsor the Dialogue on the American Jury program that puts attorneys in schools to help educate the state’s youth on the jury system and the legal profession.

Attorneys interested in participating in the Dialogue on the American Jury or volunteering for a workshop should contact the Public Legal Services Department at (505) 797-6054.

Young Lawyers Division

Law Day Call-in

The State Bar’s Young Lawyers Division staffed the phones for the “Ask-A-Lawyer” legal assistance call-in program May 7. The Young Lawyers set up call centers in Albuquerque, Farmington and Las Cruces and took calls on a myriad of legal issues from 9 a.m. to 1 p.m.

The Albuquerque site had a total of 12 volunteer attorneys, the Las Cruces Young Lawyers provided six for their call center and Farmington had five lawyers on the line, according to Lizeth Cera-Cruz from the State Bar’s Public and Legal Education Department who helped organize the event.
Essay Topic:

It was 7 p.m. and Deborah was just starting her homework when the phone started to ring. It stopped ringing abruptly, indicating that someone had answered it elsewhere. Seconds later she heard her mother yell from downstairs that the phone call was for her. Deborah picked up the phone in her room and yelled downstairs that she had it. Putting the phone to her ear she heard the audible click of the phone being set back on the downstairs receiver.

On the line was Deborah's longtime boyfriend Jake. Though they were close, Deborah had been distancing herself from Jake, as he had been hanging with a crowd of friends that she did not like. It was a rough crowd that was into drugs, fighting, and theft. Nonetheless, she responded to Jake with a happy hello. Jake's voice sounded strained as soon as he responded. He asked her if she had time to go out that evening. Deborah declined, saying that she had a friend on her way over to work on a school project. She asked him what was wrong. Jake hesitated for a moment and then blurted out that he was in serious trouble.

He then went on to describe an incident that had occurred after school, where he and his friends had gone into town. Jake described how they had broken a window of a car and stole a purse they saw sticking out from under the driver's seat. Jake further described that a passerby had noticed their actions and yelled at them as he began dialing on a cell phone. Within minutes, as they ran from the car, Jake described hearing police sirens, and he was quite certain that the passerby would be able to give a good description of him to the police.

He then asked Deborah what she thought he should do. Deborah was shocked. Even though she had known he was hanging with the wrong crowd, she could not believe that Jake would have done such a thing. She told him that she would think about it and give him a call back later. Then she hung up.

Downstairs, Deborah's mother stood in the kitchen, also in shock. Earlier, when she had set down the receiver, she had pushed the speaker button in order to listen to her daughter's conversation. She had a healthy dislike for her daughter's boyfriend Jake, and did not feel the slightest tinge of guilt for listening in on the conversation. She was determined to do something about this situation.

She then picked up the phone and called a friend of hers that worked in the town's sheriff's department. She then relayed to her friend what she had overheard. Within an hour, Jake was picked up by Sheriffs deputies and placed under arrest for his participation in the crime.

The prosecuting attorney plans on using Deborah's mother as a witness to provide testimony concerning the phone call, since the passerby was unable to identify Jake. Jake's court appointed defense attorney made a motion to suppress the evidence provided through Deborah's mother as he believed it violated the State of New Mexico's statute on interference with communications (privacy).

ESSAY QUESTIONS:

1. Should a Motion to Suppress the evidence collected as a result of the overheard conversation be granted?
2. What rights, if any, does a concerned parent have concerning the conduct of their underage children?
tangible or intangible. Clearly, the conversation Deborah had with her boyfriend is constitutionally protected. The government cannot use that conversation in a court of law unless interception was authorized by a valid warrant. To understand how law has evolved as society has progressed we must analyze the history of privacy rights.

In the first part of the 1900’s as new technology pushed the limits of police power, important constitutional questions about how far the government was allowed to penetrate personal space to fight crime needed to be answered. At first the court ruled in Olmstead v. United States, 277 U.S. 438 (1928) that the Fourth Amendment only applied to physical trespassing and only to tangible things. Then the Federal Communications Act of 1934 signaled that Congress was catching up with cutting edge technology, for the Act applied Fourth Amendment protection to all communication, including telephones.

The Warren Court years saw an expansion of constitutional rights including a rethinking of the scope of the Fourth Amendment. Under Katz v. United States, 389 U.S. 347 (1967) and Berger v. New York, 388 U.S. 41 (1967) the Court finally overruled Olmstead and declared that eavesdropping and wiretapping are to be regarded as searches and intercepted communications as seizures under the Fourth and the Fourteenth Amendments. By ruling that Olmstead was no longer controlling, the court established that the Fourth Amendment protects people rather than places. The court recognized that without an updated opinion, the new technologies would only add to the government’s level of intrusiveness into individual rights.

There was a need for a balance between a citizen’s level of expectation of privacy and a government’s level of intrusiveness. Justice Stewart in the majority opinion of Katz wrote that “the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements.” Surely, with new advancements in technology and science, what constitutes private property will have to be redefined. When this occurs, the court will undoubtedly find it necessary to weigh and balance the interests of both the government and the individual.

b. Exclusionary Rule

The courts have adopted a mechanism to prevent law enforcement officers from conducting illegal searches and seizures. Mapp v. Ohio, 81 S.Ct. 1684 (1961) applied the exclusionary rule to the states and said that evidence states illegally obtain cannot be used in a court of law. In Burdeau v. McDowell, 41 S.Ct. 574 (1921) the Supreme Court established that the exclusionary rule does not apply to purely private individuals. In United States v. Price, 86 S.Ct. 1152 (1965) the Court then decided that the exclusionary rule does apply to individuals acting under “color of law”. This means that ordinary civilians are subject to Fourth Amendment search and seizure restrictions only if they are collaborating with law enforcement officials. This rule is what the defense attorney is considering when moving to suppress Deborah’s mother’s testimony.

c. Why the Fourth Amendment Does Not Apply to This Case

The Constitution does not protect our privacy from other individuals who are not acting in concert with law enforcement officials. This does not prevent states from creating additional privacy rights and protections through statutory law. Because it is not the state or federal government encroaching upon Deborah’s privacy, the Fourth Amendment does not apply. One cannot justify that the mother was acting under “color of law” because the facts do not state that she was collaborating with law enforcement officials. This means that it was not unconstitutional under these grounds for the mother to listen in on Deborah’s conversation. Therefore, a motion to suppress her testimony cannot rest on these grounds. So now the motion to suppress, if it is to be granted, must rest on a violation of statutory law.

III. STATUTORY ANALYSIS

The sections of New Mexico State Law that are applicable in this case are NMSA § 30-12-1 and § 30-12-8. These two sections deal specifically with interference with communications and motions to suppress, respectively. In NMSA § 30-12-1, Subsection B and Subsection C are the parts of the statute that need to be specifically addressed. We must determine if Deborah was “in the lawful possession or control of” the phone and if Deborah gave her mother any “prior consent” to listen in on her phone calls.

Under NMSA § 30-12-8, the legislature has embedded its own exclusionary rule into the statute. If “the communication was unlawfully intercepted,” then it “shall not be received as evidence.” This section of the statute only comes into effect if any part of NMSA § 30-12-1 has been violated.

IV. CASE LAW ANALYSIS

First, we must consider the legal relationship between a child and a parent. The majority opinion in New Mexico State Department of Human Services v. Minjares, 98 NM 198 (1982) states that a “parent’s rights are among the most basic rights of our society and go to the very heart of our social structure.” The court then recognized under this case “the fundamental liberty interest of natural parents in the care, custody and management of their child.”

If we interpret the care, custody and management of a child to mean keeping a child safe, then it only follows that Deborah’s mother should have been allowed to listen in on her minor child’s telephone conversations. We must also consider that according to the National Center for Missing and Exploited Children, one in five children are sexually solicited online. If parents have the right to greatly censor, prohibit and monitor what their children do and see on the internet, it only seems applicable for the parent to do the same with their children’s phone calls.

It is not only New Mexico cases that rule in favor of parent’s rights. The Supreme Court ruled in Wisconsin v. Yoder, 406 U.S. 205 (1972) that the state cannot impose its will and method of rearing children on its citizens for it violates the Free Exercise Clause of the First Amendment. Raising their children in a manner they see fit is a due process right under the Fourteenth Amendment that all American parents are afforded.

Therefore the relationship between a child and a parent is special and one that must be taken under consideration. Parents must be allowed to control what their children experience and be permitted to keep them safe. This means that parents not only have the right to protect their children from predators and unseemly characters, but also from questionable boyfriends. Accordingly, Deborah’s mother was only exercising her constitutionally protected right to raise her child. Her intent to further a constitutionally protected parental interest outweighs her nonexistent intent to further a state interest. We cannot apply these statutes in a way that will prevent parents from managing and protecting their children.

Because Deborah is a minor living in her mother’s home, an argument can be made that Deborah implicitly consented to her mother listening in on her telephone conversations. Not only is it valid that Deborah’s mother has the right to keep her daughter safe, but according to previous rulings by other courts, the person who owns the phone line also is entitled to broader rights in the use of that phone. Under Britton v. Britton, 223 F.Supp 2d 276 (2002), legal ownership of the phone line entitles the owner to listen in on any conversations had on that line. Although the facts of this inter-spousal dispute are different, the fundamental findings can be applied to the present case. Because Deborah’s mother presumably owns the line, then she has the right to listen in on conversations.

In the New Mexico case of State v. Coyazo, 123 NM 200 (1997), a prisoner was warned that the phone calls he made could be tapped before he placed a call. Because he was warned, his expectation of privacy was limited because he, as a party to the conversation, consented to a third party listening in. Therefore the court could not lawfully grant a motion to suppress evidence collected from that phone call because it was not illegally obtained.
Using this reasoning, it is possible that Deborah gave legally implied prior consent to her mother in the instant case. Although the consent may not have been as obvious as it was with the prisoner, it may still be legally viable. Additionally, Deborah's expectation of privacy may already have been limited as she was a minor talking on her mother's phone.

Second, we must consider the merits of the motion to suppress Deborah's mother's testimony. In Maine, where Britton v. Britt was heard, and in New Mexico where State v. Coyazo was considered, statutes provide that only the consent of one party to the conversation is required for interception. New Mexico is one of 39 states that either requires only one party to consent or the statute is silent on this point. The remaining eleven require all parties to consent before an intercepted communication is admissible.

As pointed out by the court in State of Washington v. Oliver C. Christensen (2004), “The federal wiretap statute, which makes interception of communications legal where one party consents, has been interpreted to permit parents acting to protect the welfare of a child, to consent vicariously for their child to the recording of their child's conversations.” Because the State of Washington does not have a specific parental exception to its sweeping “all-parties” consent requirement, the author of this opinion, Justice Tom Chambers, saw it unnecessary to overlay this federal standard on this state case. Because the State of New Mexico does not have many precedent cases, it might be wise for us to consider this decision from the State of Washington. However, considering New Mexico's commitment to a parent's rights, it might be wise to apply the federal approach to this case. The State of Washington chose to go beyond existing federal statutes and national norms and deny a parental exception. Because the New Mexico statute allows for only one party to consent, we should create a parental exception that is consistent with the federal statute's judicially created exception.

Early on, the Supreme Court of the United States held in Rathbun v. U.S., 355 U.S. 107 (1957) that one of the parties to a conversation can constitutionally allow a third party to listen in. Consequently, each party to the conversation takes the risk of a third party intercepting the phone call. Since this interception has been authorized, it is legal. Applying this principal to the current case, the defendant, Jake, also provided implied consent to her mother to listen in on Deborah's conversation under the grounds that she was keeping her daughter out of harm's way.

Because Deborah's mother owns the telephone and because Deborah is a minor, Deborah did provide legally recognized implied consent to her mother to listen in on her conversations. Additionally, based on the precedent set by previous U.S. Supreme Court cases, the defendant, Jake, also provided implied consent because the risks of interception by Deborah's mother were previously known. It is reasonable under Rathbun to expect all parties to be aware that their conversations could be intercepted in these circumstances.

Many recent state cases echo what Rathbun held. Mitchell v. State, 235 SE 2d 509 (1977) in Georgia also held that eavesdropping only occurs when a third party is listening in. New Mexico's Robinson v. Katz, 94 NM 314 (1980) states, “the consent of one of the parties to a third person listening to the conversation is all that is necessary to remove the activity from the purview of the statute (30-12-1).”

V. CONCLUSIONS
1. Deborah's mother's interception of her phone call does not have protection under the Fourth Amendment's search and seizure restrictions because she was not acting “color of law.” The Exclusionary rule is therefore inapplicable because the phone call was not unlawfully intercepted.
2. The management and protection of children by their parents is a fundamental right guaranteed in New Mexico. The state has no constitutional right to mandate how parents should raise their children. Consequently, Deborah's mother was legally allowed to listen in on Deborah's conversation under the grounds that she was keeping her daughter out of harm's way.
3. Because Deborah's mother owns the telephone and because Deborah is a minor, Deborah did provide legally recognized implied consent to her mother to listen in on her conversations.
4. Under NMSA § 30-12-1, the consent of one party is sufficient for a legal interception of electronic communication. Since there was implied consent between Deborah and her mother, there is no violation of the statute.
5. Additionally, based on the precedent set by previous U.S. Supreme Court cases, the defendant, Jake, also provided implied consent because the risks of interception by Deborah's mother were previously known. It is reasonable under Rathbun to expect all parties to be aware that their conversations could be intercepted in these circumstances.

In deciding this case we must effectively balance the mother's parental rights and the state's interest in prosecuting a crime against the expectations of privacy of the minor in a conversation with a boyfriend on her mother's phone.

According to the facts of the case and already established legal precedent and standards, the court must rule in favor of the prosecution. The exclusionary rule does not take effect and the intercepted phone call should be entered into evidence. The motion to suppress should be denied.

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2005 Annual Awards Nominations

Nominations are being accepted for the 2005 annual awards to recognize those who have distinguished themselves or who have made exemplary contributions to the State Bar in 2004 or 2005. Awards will be presented at the 2005 Annual Meeting, Sept. 23-24 at the Ruidoso Convention Center, Ruidoso. A letter of nomination for each nominee should be sent to: Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; or faxed to (505) 828-3765. Deadline for nomination submissions is June 17, 2005.

For a full description of each award, see the May 2 (Vol. 44, No. 17) Bar Bulletin.

1. Professionalism Award
2. Seth D. Montgomery Distinguished Judicial Service Award
3. Outstanding Judicial Service Award
4. Courageous Advocacy Award
5. Robert H. LaFollette Pro Bono Award
6. Distinguished Bar Service Award - Lawyer
7. Distinguished Bar Service Award - Nonlawyer
8. Outstanding Contribution Award
9. Outstanding Section/Committee Award
10. Outstanding Local Bar Award
11. Outstanding Program Award
12. Pioneer Award
13. Outstanding Young Lawyer of the Year Award
14. Outstanding Contribution to People with Disabilities Award
15. Quality of Life - Legal Employer Award
16. Quality of Life - Lawyer Award
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<td><a href="http://www.trtle.com">www.trtle.com</a></td>
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## 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

**EFFECTIVE MAY 11, 2005**

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

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### CERTIORARI GRANTED BUT NOT SUBMITTED:

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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

EFFECTIVE MAY 11, 2005

CERTIORARI GRANTED AND SUBMITTED:
(Submission = date of oral argument or briefs-only submission)
Submission Date

NO. 27,950  Breen v. Carlsbad Schools
(COA 22,858/22,859)  9/30/03

NO. 28,038  Paule v. Santa Fe County Commissioners
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NO. 27,945  State v. Munoz (COA 23,094)  11/18/03

NO. 27,817  Tomlinson v. George (COA 22,017)  12/15/03

NO. 28,068  State v. Gallegos (COA 22,888)  2/3/04

NO. 28,272  Lester v. City of Hobbs (COA 22,250)  3/16/04

NO. 28,241  State v. Duran (COA 22,611)  3/31/04

(COA 22,932)  6/14/04

NO. 28,374  Smith v. Bernalillo County Commissioners
(COA 22,766)  8/9/04

NO. 28,380  Angel Fire v. Wheeler (COA 24,295)  8/9/04

NO. 28,481  Jouett v. Growney (COA 23,669)  8/10/04

NO. 28,486  Jouett v. Growney (COA 23,669)  8/10/04

NO. 28,482  Jouett v. Growney (COA 23,669)  8/10/04

NO. 28,426  Sam v. Estate of Sam (COA 23,288)  9/13/04

NO. 27,409  State v. Rodriguez (COA 22,558)  9/15/04

NO. 28,016  State v. Lopez (COA 23,424)  9/15/04

NO. 28,471  State v. Brown (COA 23,610)  9/15/04

NO. 28,423  Marquez v. Allstate (COA 23,385)  9/15/04

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NO. 28,648  Fernandez v. Espanola School (COA 23,032)  12/14/04

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NO. 28,780  Cerrillos Gravel v. County Commissioners
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NO. 28,812  Battishill v. Farmers Insurance (COA 24,196)  2/16/05

NO. 28,821  State v. Maese (COA 23,793)  2/16/05

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NO. 28,791  State v. Franco (COA 23,719)  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
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NO. 28,913  Mannick v. Wakeland (COA 24,280/24,078)  3/28/05

NO. 28,820  State v. Heinsen (COA 23,716)  4/11/05

NO. 29,027  State v. Salas (COA 24,416)  4/11/05

NO. 28,386  State v. Flores (COA 24,067)  5/9/05

NO. 28,816  Romero v. City of Santa Fe (COA 24,775)  5/9/05

NO. 28,910  Pincheira v. Allstate (COA 25,070)  5/9/05

NO. 28,640  State v. Waterhouse (COA 24,392)  5/10/05

NO. 28,760  State v. Still (COA 24,525)  5/10/05

NO. 28,760  Tarin v. Tarin (COA 23,428)  5/10/05

NO. 28,898  Deilon v. Sawyers (COA 23,013)  5/10/05

NO. 28,916  Solorzano v. Bristow (COA 23,776)  5/10/05

NO. 28,228  State v. Sharpe (COA 23,742)  5/10/05

NO. 28,823  Payne v. Hall (COA 22,383)  6/13/05

NO. 29,157  State v. Martinez (COA 25,146)  4/26/05

NO. 29,175  Stills v. Ulibarri (12-501)  4/26/05

PETITION FOR WRIT OF CERTIORARI DENIED:

NO. 29,157  State v. Martinez (COA 25,146)  4/26/05

NO. 29,175  Stills v. Ulibarri (12-501)  4/26/05
OPINION

EDWARD L. CHÁVEZ, JUSTICE

{1} Appellant Russell Fennema appeals a district court summary judgment in favor of State Farm Mutual Automobile Insurance Company. The district court held that State Farm was not liable for underinsured motorist benefits to Fennema because Fennema breached a contract provision requiring Fennema to obtain the written consent of State Farm before settling his claim with the tortfeasor and her insurance carrier (consent-to-settle provision). Fennema argues that despite his breach of contract, recent developments in New Mexico insurance law require State Farm to show that it was substantially prejudiced by the breach before it can escape liability.

{2} For the first time we consider whether an insurance company must demonstrate substantial prejudice from the breach of a consent-to-settle provision before it can be relieved from paying underinsured motorist benefits. We answer this question in the affirmative. Consistent with the approach outlined in Roberts Oil Co. v. Transamerica Ins. Co., 113 N.M. 745, 833 P.2d 222 (1992), we hold that for an insurer to justify foreclosing an insured’s right to underinsured motorist benefits, the insurer must demonstrate it was substantially prejudiced by the insured’s breach of the consent-to-settle provision. Although the insurer has the ultimate burden of persuasion, proof that the insured breached the consent-to-settle provision creates a presumption of substantial prejudice. See id. at 755, 833 P.2d at 232. In this case no genuine issues of material fact exist and State Farm is still entitled to summary judgment because Fennema did not offer evidence that could meet or rebut the presumption of substantial prejudice.

Facts

{3} Defendant Moses (tortfeasor) negligently struck the rear of the vehicle driven by Fennema, causing serious injuries to Fennema. The tortfeasor had a $25,000 liability policy. Fennema paid premiums for three $25,000 uninsured/underinsured motorist policies issued by State Farm. The parties seem to agree that these policies could be stacked, affording Fennema $75,000 in uninsured/underinsured motorist coverage. Assuming tortfeasor’s negligence proximately caused at least $75,000 in damages to Fennema, Fennema would be entitled to $50,000 from State Farm for underinsured motorist benefits having already collected $25,000 directly from the tortfeasor’s insurer.

{4} However, the consent-to-settle provision in the State Farm policy denies uninsured/underinsured motorist coverage “for any insured who, without [State Farm’s] written consent, settles with any person or organization who may be liable for the bodily injury or property damage.” (Emphasis added.) Fennema settled with the tortfeasor, accepting $25,000 from the tortfeasor’s insurer and as consideration gave a complete release of liability to the tortfeasor and her insurer. Fennema admits he breached the consent-to-settle provision of the policy because he did not obtain the written consent of State Farm to settle his claim against the tortfeasor.

1 We accepted certification from the Court of Appeals pursuant to NMSA 1978, § 34-5-14(C) (1972) because we believe the issue before us is one of substantial public interest.
Insurer Must Demonstrate Substantial Prejudice from Breach of Consent-to-Settle Provision

{5} In 1965 this Court held it was “well established” that if an insured, without the knowledge of his insurer, effectively releases a wrongdoer from liability, the insured destroys any right of subrogation the insurer may have against the wrongdoer and is, thereafter, precluded from recovering from his insurer. Armijo v. Foundation Reserve Ins. Co., 75 N.M. 592, 596, 408 P.2d 750, 752 (1965). This principle of law was applied to underinsured motorist claims in March v. Mountain States Mutual Casualty Co., 101 N.M. 689, 687 P.2d 1040 (1984) (upholding a consent-to-settle provision in an underinsured motorist policy, and holding an insured’s breach of such a provision precluded the insured from collecting underinsured motorist benefits). However, we subsequently held in Roberts Oil that when the insured breached a “voluntary payment” provision in the policy, the insurer was required to show “substantial prejudice” before voiding the policy. 113 N.M. 745, 833 P.2d 222 (clarifying for the first time that the substantial evidence rule could apply to claims involving injury to an insured rather than simply innocent third parties). The court of appeals, in Eldin v. Farmers Alliance Mut. Co., 119 N.M. 370, 890 P.2d 823 (Ct. App. 1994), extended the substantial prejudice rule in Roberts Oil to cover an insured’s breach of misrepresentation and concealment provisions.

{6} Fennema argues that the court of appeals’ adoption of the substantial prejudice rule in Eldin requires that March be modified or overruled. While we disagree that March must be overruled, we do agree it must be modified. In March, we considered the limited question of whether a consent-to-settle provision in an underinsurance policy was valid and enforceable. See March, 101 N.M. at 690, 687 P.2d at 1041. Although both Roberts Oil and Eldin contained broad discussions of contract law and public policy that are certainly relevant to the consent-to-settle provisions at issue here and in March, neither case mentioned March or questioned its holding. Thus, we believe the basic holding of March is still good law, although we modify its holding in light of the adoption of the substantial prejudice rule in both Roberts Oil and Eldin.

{7} The substantial prejudice rule provides that an insurer “must demonstrate substantial prejudice as a result of a material breach of the insurance policy by the insured before it will be relieved of its obligations under a policy.” Foundation Reserve Ins. Co. v. Esquibel, 94 N.M. 132, 134, 607 P.2d 1150, 1152 (1980). The rationale for the rule is that failure by an insurer to show substantial prejudice by an insured’s breach will frustrate the insured’s reasonable expectation that coverage will not be denied arbitrarily. Roberts Oil, 113 N.M. at 751-52, 833 P.2d at 228-29. “[T]he rule implements a fundamental characteristic of all, or nearly all, insurance contracts—namely, the essential nature of the contract as a promise by the insurer to indemnify and defend the insured against certain risks, in exchange for the insured’s payment of the premium.” Id. at 751, 833 P.2d at 228. Although an insurer must demonstrate substantial prejudice, a presumption of substantial prejudice arises upon proof of a breach of a policy provision. Id. at 755, 833 P.2d at 232. The ultimate issue of substantial prejudice is, in most cases, a question for a jury. Eldin, 119 N.M. at 375, 890 P.2d at 828.

{8} We believe it is consistent with the purpose of our uninsured motorist statute to require a showing of substantial prejudice before allowing an insurer to void an underinsured motorist policy when an insured breaches a consent-to-settle provision. The uninsured motorist statute was intended to expand insurance coverage to protect an insured against financially irresponsible motorists, thereby indemnifying the insured when the tortfeasor fails to do so. Romero v. Dairyland, 111 N.M. 154, 156, 803 P.2d 243, 245 (1990); see Sorensen v. Farmers Ins. Exch., 927 P.2d 1002, 1005 (Mont. 1996). This is accomplished by assuring that, in the event of an accident with an underinsured motorist, an insured motorist will receive at least the sum certain in underinsurance coverage purchased for his or her benefit. See Fasulo v. State Farm Mut. Auto. Ins., 108 N.M. 807, 811, 780 P.2d 633, 637 (1989).

{9} On the other hand, the purpose of a consent-to-settle provision is to allow the insurer an opportunity to protect its subrogation interest. March, 101 N.M. at 692, 687 P.2d at 1043. Consent-to-settle provisions also protect insurers from collusion between an insured and a tortfeasor. Roberts Oil, 113 N.M. at 752, 833 P.2d at 229 (internal citation omitted). The insurer determines how to best protect this interest by investigating the merits of the liability case against the tortfeasor, the extent of damages suffered by its insured, the estimated expense of litigating against the tortfeasor and whether the tortfeasor has sufficient assets to give the insurer a realistic possibility of collecting a judgment against the tortfeasor. If the insurer elects to withhold consent to settle, it may tender the amount of the tortfeasor’s liability coverage that was offered to its insured. See 18 A.L.R. 4th 249, § 11 (supp. 2004) (citing Lambert v. State Farm Mut. Auto. Ins. Co., 576 So. 2d 160 (Ala. 1991)). This allows the insurer to preserve its subrogated interest while placing its insured in the same position he or she would have been in, had the insured been authorized to settle with the tortfeasor.

{10} In reconciling these two policy concerns, it would be inconsistent with the purpose of the underinsured motorist statute to deny an insured indemnification when the insured’s breach of a consent-to-settle provision has no real effect on the insurer’s ability to recover from an insolvent tortfeasor through subrogation. See Sorensen v. Farmers Ins. Exch., 927 P.2d at 1005. Rather, requiring an insurer to demonstrate substantial prejudice strikes a proper balance between protecting the insurer’s subrogation interest and avoiding forfeiture of an insured’s coverage when an insurer has not been injured. See State Farm Mut. Auto. Ins. Co. v. Green, 89 P.3d 97, 104 (Utah 2003). To hold otherwise would frustrate a consumer’s reasonable expectation that coverage will not be denied arbitrarily. See Roberts Oil, 113 N.M. at 752, 833 P.2d at 229.

{11} Our holding today is consistent with the approach increasingly used in New Mexico as well as nationally. Our courts have applied the substantial prejudice rule to cooperation provisions, voluntary payment provisions, and misrepresentation and concealment provisions. See Foundation Reserve Ins. Co. v. Esquibel, 94 N.M. 132, 607 P.2d 1150; Roberts Oil, 113 N.M. 745, 833 P.2d 222; Eldin, 119 N.M. 370, 890 P.2d 823. We see no reason not to apply the rule to consent-to-settle provisions as well, which embody similar policy concerns of avoiding prejudice to the insured’s right to protect its contractual interests. See Roberts Oil, 113 N.M. at 752, 833 P.2d at 229 (analogizing the policy concerns of cooperation provisions and voluntary payment provisions). In addition, growing numbers of jurisdictions apply the substantial prejudice rule to consent-to-settle provisions. See, e.g., State Farm Mut. Auto. Ins. Co. v. Green, 89 P.3d at 103-04; Ferrando v. Auto-Owners Mut. Ins. Co., 781 N.E.2d 927, 945-47 (Ohio 2002); Taylor v. Gov’t Employees Ins. Co., 978 P.2d 740, 748-49 (Haw.1999); Greenvall v. Maine Mut. Fire Ins. Co., 715 A.2d 949, 954 (Me. 1998); Sorensen v. Farmers Ins. Exch., 927 P.2d at 1005; see also 3 Alan I. Widiss, Uninsured and Underinsured Motorist Insurance § 43.5 (2d ed. 1998) (“There is now a
significant body of judicial precedents for the proposition that in order to justify foreclosing an insured’s right to indemnification from an otherwise applicable underinsured motorist insurance coverage, an insurer must show that it was prejudiced by the settlement of the tort claim.”). Requiring an insurer to establish substantial prejudice protects the “fundamental characteristic” of insurance contracts, the indemnification of the insured in exchange for the payment of premiums. Roberts Oil, 113 N.M. at 751, 833 P.2d at 228.

{12} We do not believe that requiring an insurer to establish substantial prejudice in this context is an unreasonable burden. An insurer is subject to a common law and statutory duty of good faith. See NMSA 1978, § 59A-16-20(E) (1997); Dairyland Ins. Co. v. Herman, 1998-NMSC-005, ¶¶ 12, 124 N.M. 624, 954 P.2d 56. The insurer must act reasonably under the circumstances to investigate a claim and to evaluate whether to consent to a settlement between its insured and the tortfeasor. See Sloan v. State Farm Mut. Auto. Ins. Co., 2004-NMSC-004, ¶¶ 3, 19, 135 N.M. 106, 85 P.3d 230. In light of its duty to make a timely and fair investigation, the insurer’s decision of whether to pursue subrogation is made relatively quickly, despite the fact that a judgment in New Mexico is valid and enforceable for fourteen years. NMSA 1978, § 37-1-2 (1983). By requiring an insurer to show it will be substantially prejudiced by an insured’s breach of a consent-to-settle provision, i.e., by demonstrating the tortfeasor was unlikely to be judgment-proof, we are not requiring an insurer to provide any more evidence than it would already have obtained through its ordinary investigation.

{13} Moreover, although the insurer shall have the ultimate burden of persuasion to demonstrate substantial prejudice, a presumption of substantial prejudice arises from proof that an insured has breached a consent-to-settle provision. See Eldin, 119 N.M. at 375, 890 P.2d at 828. That presumption permits the fact finder to infer that the insurer was in fact substantially prejudiced, although the presumption is rebuttable. See Roberts Oil, 113 N.M. at 756, 833 P.2d at 233. The presumption may be met or rebutted by the insured by presenting evidence that the insurer was not substantially prejudiced. See, e.g., Rafferty v. Progressive American Insur. Co., 558 So.2d 432 (Fla. Dist. Ct. App. 1990); Roberts Oil, 113 N.M. at 756, 833 P.2d at 234. The insurer can attempt to meet its ultimate burden of persuasion by presenting evidence that the tortfeasor did have resources with which to pay a tort judgment.

{14} In this case, it is undisputed that Fennema breached the consent-to-settle provision of the policy. Therefore a presumption of substantial prejudice was created. Fennema attempted to meet or rebut the presumption by attaching answers to interrogatories that he obtained from the tortfeasor to his Brief in Opposition to the Motion for Summary Judgment. Viewed in a light most favorable to Fennema, see Rummel v. St. Paul Surplus Lines Ins. Co., 1997-NMSC-042, ¶ 9, 123 N.M. 767, 945 P.2d 985, the tortfeasor’s answers establish that at the time of answering the interrogatories, the tortfeasor was a graduate assistant at the University of New Mexico Psychology Department.

{15} Without more, this evidence does not, as a matter of law, meet or rebut the presumption of substantial prejudice. State Farm may have had a realistic possibility of recovering from the tortfeasor, who, as a graduate student in psychology, was likely to be gainfully employed in the near future. Judgments in New Mexico may be enforced in the state for fourteen years by, among other things, attaching real estate or garnishing wages. See NMSA 1978, §§ 39-4-1 through -3 (1953); § 37-1-2. Fennema failed to present any evidence to demonstrate that State Farm would be unlikely to collect from tortfeasor within this period as a matter of law.

{16} Although underinsured motorist benefits are designed to protect the insured against financially irresponsible motorists, enforcement of an insurer’s subrogation right has the equally important policy objective of holding wrongdoers accountable for irresponsible conduct that results in injury. Underinsured motorist benefits are not for the benefit of the tortfeasor, and when there exists a realistic potential for the insurer to recover from the tortfeasor, courts must carefully preserve the right of subrogation and enforce consent-to-settle provisions.

Conclusion

{17} We modify March to conform to the concerns in Roberts Oil and Eldin. An insurer must demonstrate it was substantially prejudiced by an insured’s breach of a consent-to-settle provision before avoiding liability for paying underinsured motorist benefits. Proof that the insured breached the consent-to-settle provision creates a presumption of substantial prejudice. Here, Fennema failed to meet or rebut this presumption. Consequently we affirm the summary judgment in State Farm’s favor.

{18} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Justice

WE CONCUR:
RICHARD C. BOSSON, Chief Justice
PAMELA B. MINZNER, Justice
PATRICIO M. Serna, Justice
PETRA JIMENEZ MAES, Justice
OPINION

RICHARD C. BOSSON, CHIEF JUSTICE

{1} In this appeal we decide where venue lies in an action involving multiple defendants, all of which are foreign corporations. See NMSA 1978, § 38-3-1 (1988). The district court ruled that venue was proper in any county as to nine of the foreign corporations because these defendants did not maintain a statutory agent in the state. The court then concluded that venue was also proper in any county against Defendant British Petroleum (BP), although BP maintains a statutory agent with a residence in Lea County, New Mexico. On certiorari, BP contends that the district court wrongfully denied its motion to dismiss for improper venue. Applying our venue statute, we reverse the district court.

We also take this opportunity to reverse in part a prior decision of the Court of Appeals, Toscano v. Lovato, 2002-NMCA-022, 131 N.M. 598, 40 P.3d 1042.

BACKGROUND

{2} Plaintiffs Justin and Bobby Baker, both California residents, filed a personal injury action in Santa Fe County after an oilfield accident in San Juan County, New Mexico. Plaintiff Justin Baker alleged an injury due to a defective drilling rig that was manufactured and distributed by nine foreign corporations (Manufacturing Defendants). None of the Manufacturing Defendants are admitted to do business in New Mexico, or have a statutory agent in the state. Plaintiffs also sued BP, as operator of the well, on a theory of ultra-hazardous or inherently dangerous activity. Pursuant to our corporate registration and venue statutes, BP is admitted to do business in New Mexico and maintains a statutory agent in the state. Plaintiffs’ original complaint and venue statute, we reverse the district court.

{3} In response to the complaint, BP moved to dismiss for improper venue under Rule 1-012(B), arguing that the venue statute did not authorize venue in Santa Fe County for BP. The relevant subsections of the venue statute provide:

All civil actions commenced in the district courts shall be brought and shall be commenced in counties as follows and not otherwise:

A. First, except as provided in Subsection F of this section relating to foreign corporations, all transitory actions shall be brought in the county where either the plaintiff or defendant, or any one of them in case there is more than one of either, resides; or second, in the county where the contract sued on was made or is to be performed or where the cause of action originated or indebtedness sued on was incurred; or third, in any county in which the defendant or either of them may be found in the judicial district where the defendant resides.

F. Suits may be brought against transient persons or non-residents in any county of this state, except that suits against foreign corporations admitted to do business and which designate and maintain a statutory agent in this state upon whom service of process may be had shall only be brought in the county where the plaintiff, or any one of them in case there is more than one, resides or in the county where the contract sued on was made or is to be performed or where the cause of action originated or indebtedness sued on was incurred or in the county where the statutory agent designated by the foreign corporation resides.

From the New Mexico Supreme Court

Opinion Number: 2005-NMSC-011

TOPIC INDEX:

Appeal and Error: Appeal and Error, General; Certiorari; and Interlocutory Appeal
Civil Procedure: Move to Dismiss; and Venue
Jurisdiction: Venue
Statutes: Interpretation; Legislative Intent; and Rules of Construction

JUSTIN BAKER and BOBBIE BAKER, Plaintiffs-Respondents, versus BP AMERICA PRODUCTION COMPANY, f/k/a AMOCO PRODUCTION COMPANY, a foreign corporation, Defendant-Petitioner.
No. 28,654 (filed March 31, 2005)

ORIGINAL PROCEEDING ON CERTIORARI
James A. Hall, District Judge

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Section 38-3-1. Given that Plaintiffs resided out-of-state, BP contended that venue was proper only in San Juan County, the site of the accident, or in Lea County, the residence of its statutory agent. See § 38-3-1(F). BP does not dispute that Santa Fe County is a proper venue for the Manufacturing Defendants.

4) The district court denied BP’s motion. In so doing, the court correctly held that the Manufacturing Defendants can be sued in any county in New Mexico, including Santa Fe County, because the Manufacturing Defendants are not admitted to do business and did not designate statutory agents in New Mexico. The district court then concluded that because venue was proper in Santa Fe County for the Manufacturing Defendants, venue was also proper for BP. The court relied on Toscano. 2002-NMCA-022, ¶ 27 (holding that venue is proper in any New Mexico county for an action against a non-resident insurance company, and that therefore the same venue is proper for a resident defendant who resided in another county). The district court cited its ruling for interlocutory appeal, but the Court of Appeals declined to accept review. This Court granted BP’s petition for writ of certiorari, finding the proper interpretation of the venue statute to be a matter of substantial public interest. See Rule 12-502(C)(4)(d) NMRA 2005.

5) We now decide whether a proper venue for a foreign corporation that has no statutory agent in New Mexico can also establish venue for a foreign corporation that does have an appointed statutory agent, but in a different county.

**DISCUSSION**

6) A motion to dismiss for improper venue based on the meaning of the venue statute involves questions of law, which we review de novo. Cooper v. Chevron U.S.A., Inc., 2002-NMSC-020, ¶ 5, 132 N.M. 382, 49 P.3d 61. Venue “relates to the convenience of litigants “and “reflect[s] equity or expediency in resolving disparate interests of parties to a lawsuit in the place of trial.” Team Bank v. Meridian Oil Inc., 118 N.M. 147, 150, 879 P.2d 779, 782 (1994) (quoted authorities omitted). Our courts have noted that New Mexico’s venue statute is expansive and provides plaintiffs with broad discretion in choosing where to bring an action. See Sunwest Bank v. Nelson, 1998-NMSC-012, ¶ 10, 125 N.M. 170, 958 P.2d 740; Toscano, 2002-NMCA-022, ¶ 7. Yet we have also said that “the venue rules reflect an attempt to balance the common-law right of a defendant to be sued in his most convenient forum (usually the county of his residence) with the right of the plaintiff to choose the forum in which to sue.” Team Bank, 118 N.M. at 150, 879 P.2d at 782.

7) We begin by considering the text of the venue statute. One of the ways the legislature attempts to balance the rights of the parties is by giving plaintiffs wide latitude in selecting a forum under Section 38-3-1(A), while also providing a special rule in actions against foreign corporations under Section 38-3-1(F). The residence of the defendant determines which subsection applies. See Cooper, 2002-NMSC-020, ¶ 5. If the defendant is a New Mexico resident, then Section 38-3-1(A) allows the lawsuit to be filed in any county in which a plaintiff or a defendant resides. Subsection A provides that when there is more than one resident plaintiff or defendant, venue is proper in any county where one of the parties resides.

8) If the defendant is a foreign corporation, however, Subsection A directs our attention to Subsection F. See § 38-3-1(A) (“[E]xcept as provided in Subsection F of this section relating to foreign corporations . . . .”). According to Subsection F, if the foreign corporation defendant does not have a registered statutory agent in New Mexico, then the corporation is treated as any other type of non-resident and venue lies in any county in New Mexico. However, if the foreign corporation defendant “maintain[s] a statutory agent in this state upon whom service of process may be had,” venue is proper in the county where the statutory agent resides, in the county where the plaintiff is a resident, or where the cause of action originated. Section 38-3-1(F).

9) Despite the language in Subsection F limiting venue for foreign corporations with statutory agents, Plaintiffs allege that venue is still appropriate in Santa Fe County. They argue that the Manufacturing Defendants are non-resident corporations that may be sued in Santa Fe County, and that once a proper venue is established for the Manufacturing Defendants, it is also proper for BP. To support their interpretation of the venue statute, Plaintiffs rely on the prior interpretation of the statute by our Court of Appeals in Toscano, 2002-NMCA-022. We turn to that case and its interpretation of the venue statute.

10) In Toscano, 2002-NMCA-022, ¶ 1, an automobile accident victim joined an out-of-state insurance company in an action against an alleged tortfeasor. See Raskob v. Sanchez, 1998-NMSC-045, ¶ 7, 126 N.M. 394, 970 P.2d 580 (holding that an insurance company could be joined as a defendant in an action arising out of an automobile collision when insurance coverage is mandated for the benefit of the public). Even though both drivers, the plaintiff and the defendant, resided in Bernalillo County where the accident took place, the plaintiff filed her action in Santa Fe County claiming that county was a proper venue for a foreign insurance company.

11) The Court of Appeals held that an insurance company was a non-resident, and thus subject to suit in any county within the state. Toscano, 2002-NMCA-022, ¶ 27. The court then concluded that because venue was proper in Santa Fe County as to the out-of-state insurer, venue was also proper as to the other defendant, the resident driver from Bernalillo County. Id. (“Because venue was proper as to Dairyland, venue was proper as to Defendant Lovato as well.”). Therefore, even though both drivers resided in Bernalillo County, and the Bernalillo County was the site of the accident, the defendant driver in Toscano was forced to defend in Santa Fe County purely because it was a proper venue as to the joined insurer. It appears that the defendants in Toscano did not seek certiorari review in this Court.

12) BP argues forcefully that Toscano is an anomaly that this Court needs to address, and we agree. BP points to the plain language of Subsection A, which provides that if one or more of the parties to an action is a resident of New Mexico then “all transitory actions shall be brought in the county where either the plaintiff or defendant, or any one of them in case there is more than one of either, resides.” Section 38-3-1(A) (emphasis added). In contrast, Subsection F deletes the reference to multiple defendants, merely stating the action “shall only be brought in the county where the plaintiff, or any one of them in case there is more than one, resides.” Section 38-3-1(F).

BP argues that the Toscano court erred in extending the express provisions for multiple resident defendants in Subsection A to multiple non-resident defendants in Subsection F. Thus, as BP sees it, the Toscano court improperly created an overly broad rule that venue for any party always establishes venue for other defendants.

13) We agree with BP that the Court of Appeals’ opinion in Toscano leads to the wrong result. To explain our disagreement, we return to the venue statute. In construing the language of a statute, our goal is to give effect to the intent of the legislature. See Roth v. Thompson, 113 N.M. 331, 332, 825 P.2d 1241, 1242 (1992). Section 38-3-1(F) provides that suits against non-residents may be brought in any county except for suits against foreign corporations with a statutory agent. Subsection F then limits the proper venues
in an action against a foreign corporation with a statutory agent to: the county of the plaintiff’s residence; the county where the foreign corporation’s statutory agent resides; and the county where the action originated. As previously noted, Subsection F does not contain the same language in Subsection A that allows the residency of any one defendant to establish venue for all.

{14} As we read the venue statute, Toscano’s conclusion that venue for one is venue for all is overly broad as applied in Toscano, and as applied in these circumstances. The statute instructs that if an action is against a resident defendant, then venue based on that defendant’s residence is proper for all resident defendants. See § 38-3-1(A). Venue based on a defendant’s residence would certainly be proper for a non-resident defendant, including a foreign corporation without a statutory agent, because venue is proper for such defendants in any New Mexico county. See § 38-3-1(F). However, the statute does not authorize venue for residents and foreign corporations with statutory agents based on proper venue for a non-resident, including a foreign corporation without a statutory agent. See § 38-3-1. Thus, when the only defendants are foreign corporations, Subsection F clearly designates the limited venues where a foreign corporation with a statutory agent can be sued. To rule otherwise would allow a plaintiff to subvert the distinct rules the legislature has designed for both resident defendants and foreign corporations with statutory agents.

{15} In Toscano, the Court of Appeals candidly recognized that its broad interpretation of the venue statute appeared contrary to legislative intent. 2002-NMCA-022, ¶ 27 (“This result might not comport with the intent of the legislature in drafting the venue statute. Subsection F is designed to protect foreign corporations from being subject to suit anywhere in the state by limiting the options available to plaintiffs.”). Nevertheless, the Court of Appeals felt compelled to reach the opposite result based on the special situation of insurance companies, which like banks are excluded from the Business Corporation Act. Id. ¶¶ 21-22 (relying on Sunwest Bank, 1998-NMSC-012, ¶¶ 15-16). We also acknowledge that the Court of Appeals was driven to its result based on the unusual joinder rule for insurers providing mandatory automobile insurance. See id. ¶ 1 (framing the opinion as addressing the implications of Raskob on the issue of venue). While we understand the rationale behind the Court of Appeals’ holding, we find that those policy considerations do not justify the court’s overly broad interpretation of the venue statute and of our precedent.

{16} In reaching its decision in Toscano, the Court of Appeals relied on Teaver v. Miller, 53 N.M. 345, 208 P.2d 156 (1949). In Teaver, this Court stated that “the residence of one of the defendants determines the venue of the action against all.” Id. at 349, 208 P.2d at 159 (quoted authority omitted) (emphasis added). Unlike the case before us, Teaver involved multiple resident defendants, a situation expressly addressed by the plain terms of what is now Section 38-3-1(A) of the statute. We find the application of Teaver to the situation in Toscano unsupported by the express terms of Subsection F and contrary to legislative intent. Nothing in the statute indicates that the legislature intended plaintiffs to be able to overlook the residency of the parties to an automobile accident, and instead base venue for all solely on a proper venue for an insurance company.

{17} As a direct result of Toscano, a litigant can file an action in a county different from the scene of an accident and from the residency of any party. Even heeding the expansive nature of our venue statute, we cannot conclude that the legislature intended to give any party such unbridled discretion. As we noted previously, our venue rules attempt to balance the interests of the parties. Team Bank, 118 N.M. at 150, 879 P.2d at 782. Venue is not a substantive right, but a procedural matter designed for the convenience of the litigants and for allocating judicial resources. See Torres v. Gamble, 75 N.M. 741, 744, 410 P.2d 959, 961 (1966). It makes little sense to conclude that a foreign corporation that has complied with the venue statute by designating a statutory agent cannot take advantage of the protections offered by the legislature, simply because other foreign corporate defendants in the lawsuit did not. As we have explained above, we do not read the venue statute to stand for that proposition.

{18} Toscano’s rule undermines the venue statute by allowing a party to pick a forum convenient to no one, a result contrary to the limited venues the venue statute authorizes for residents and foreign corporations with a statutory agent. Because it is contrary to the venue statute, we overrule Toscano’s holding that venue proper for a non-resident is also proper for a resident. This result is not contrary to the general rule we cited approvingly in Teaver, 53 N.M. at 349, 208 P.2d at 159, that “the residence of one of the defendants determines the venue of the action against all,” because here the question is whether a proper venue for a non-resident establishes venue for all.

{19} We hold that venue for a non-resident defendant, including a foreign corporation without a statutory agent, cannot determine proper venue for a foreign corporation with a statutory agent, nor can venue for a non-resident defendant determine proper venue for a resident defendant. Consistent with legislative intent, Subsection F should be interpreted to “give foreign corporations that are admitted to do business and that have designated and maintained a statutory agent in this state the same ‘weight’ in the venue balance as resident defendants.” Team Bank, 118 N.M. at 150, 879 P.2d at 782. Thus, in this action, venue is proper as to BP only in San Juan County or in Lea County. As part of our holding, we also overrule that portion of Toscano that allows venue to be established for resident defendants solely on the basis of the venue of a non-resident insurance company.

CONCLUSION

{20} We reverse the district court’s order that venue is proper in Santa Fe County as to Defendant BP.

{21} IT IS SO ORDERED.

RICHARD C. BOSSON,
Chief Justice

WE CONCUR:

PAMELA B. MINZNER, Justice
PATRICIO M. Serna, Justice
PETRA JIMENEZ MAES, Justice
EDWARD L. CHAVEZ, Justice

1 In so holding, we do not address situations involving other combinations of multiple defendants such as residents and foreign corporations with statutory agents or multiple foreign corporations with statutory agents in different counties. Cf. Cooper, 2002-NMSC-020, ¶ 20 (dicta).
OPINION

RICHARD C. BOSSON, CHIEF JUSTICE

{1} Plaintiff Gerald Smith applied for and received a permit to build two 130-foot amateur radio towers on his residential property in the East Mountain area of Bernalillo County, New Mexico. The zoning ordinance did not expressly prohibit or restrict construction of the towers in that location, and supplementary regulations specifically exempted radio towers from height restrictions. After neighbors complained, the County changed its mind, tried unsuccessfully to stop the construction, and devised new reasons why Plaintiff’s radio towers should not be allowed. The district court agreed with the County’s rationale but also adopted another reason for prohibiting the towers. On appeal, the Court of Appeals rejected the first rationale but sided with the County on the second. Smith v. Bd. of County Comm’rs., 2004-NMCA-001, 134 N.M. 737, 82 P.3d 547. We granted certiorari and reverse.

BACKGROUND

{2} Plaintiff is a federally licensed amateur radio operator who has engaged in “ham” radio as a hobby for more than forty years. In 1998, Plaintiff moved to New Mexico primarily to find a piece of residential property suitable for the construction of an amateur radio antenna system. He wanted to build a system capable of achieving a strong signal so that he could communicate across the world, assist with local emergency operations, and participate in amateur radio contests. Plaintiff conducted extensive research looking for property with the right terrain and not subject to covenants or zoning restrictions that would limit the height of amateur radio antenna towers.

{3} After finding a five-acre parcel with a home in the East Mountain area of Bernalillo County that was zoned A-2 (rural residential), Plaintiff consulted several Bernalillo County zoning employees and officials, including the zoning director, about his desire to build two 130-foot towers. The County assured him that amateur radio towers were permitted on A-2 zoned property and that a regulation specifically exempted them from height restrictions. Plaintiff was told he only needed to apply for a building permit.

{4} To confirm the County’s interpretation, Plaintiff and his attorney both studied the Bernalillo County zoning code. According to the code, the A-2 zone includes as permissive uses one dwelling for every two acres and any accessory building or structure “customarily incidental” to “rural residential activities.” See Bernalillo County, N.M., Zoning Ordinance §§ 7(B)(1)(a), (d), 8(B)(1)(a) (1996). The ordinance restricts the height of structures in the A-2 zone to twenty-six feet, except as provided in the supplementary height regulations. Id. § 8(C). The supplementary regulations expressly exempt from the height limitation a number of structures, including amateur radio towers. Id. § 22(B)(1) (stating that height regulations shall not apply to amateur radio towers). The ordinance does not further define “permissive use” or “customarily incidental,” nor does it provide standards for determining whether something is a permissive use or is customarily incidental. The ordinance does, however, define “incidental use” as “[a] use which is appropriate, subordinate, and customarily incidental to the main use of the lot.” Id. § 5.

{5} Plaintiff also reviewed amendments to the zoning ordinance that went into effect in June 1999. Designated Ordinance 1999-6, the amendments were passed to regulate commercial cellular towers in Bernalillo County. See Bernalillo County, N.M., Zoning Ordinance 1999-6 (1999). Prior to the amendments, the County allowed an “antenna” up to sixty-five feet as a permissive use in an office and insti-
ordinance but argued that Ordinance 1999-6 changed all that. The Planning Commission took the position that the 1999 amendment to

the term was not de

mission to develop a factual record regarding the County's prior interpretation of "customarily incidental" as used in the ordinance. Noting
towers were "customarily incidental" to the residential use, and therefore a permissive use within the meaning of the zoning ordinance.

the O-1 zone eliminated amateur radio antennas as incidental uses in the A-2 zone. Thus, the Planning Commission concurred with the

Counties administrative decision to halt construction of the towers and adopted all of the

amendments, the ordinance imposed no height restrictions on amateur radio towers in the A-2 zone.

Based on the County's representation and his own research, Plaintiff bought the property and applied for a building permit for the
two towers. He submitted a site plan that was prepared by a licensed professional engineer. The plan called for two 130-foot towers with
ten-foot masts, which would support multiple antennas and be secured by guy wires. The County approved the plan and issued a building

permits in August 1999, which Plaintiff posted on his property. In October 1999, county employees twice inspected the construction and
told Plaintiff he was in compliance with the site plan.

In November 1999, some of Plaintiff's neighbors began to complain to County officials about the height of the towers under con-
struction. At first, the County told the neighbors that the building permit was in order and the time to appeal had expired, fifteen days after
the permit was issued. On December 8, 1999, however, County officials arrived at Plaintiff's house with a stop work notice. The notice
did not specify the nature of the problem but simply stated that the construction "does not comply with zoning ordinance." According to
Plaintiff, the officials were not able to elaborate on the nature of the violation, but said they had received complaints from neighbors and
needed some time.

Plaintiff hired a land-use attorney who wrote two letters to the County demanding a legal reason for the stop work notice. Although County
officials spoke with Plaintiff several times, it was not until January 28, 2000, that Plaintiff received a written response from the County
explaining its position. In the letter, the county attorney stated that, due to the amendments made to the O-1 non-residential zone in June 1999 (Ordinance 1999-6), amateur radio antennas were no longer a permissive or conditional use on Plaintiff's property. Thus, the
permit, which was approved six weeks after those amendments became law, was now supposedly issued in error.

Sanford Fish, the director of the zoning, building and planning department, testified that when he first spoke with Plaintiff about his
plans he told Plaintiff that amateur radio towers were allowed as permissive or incidental uses and that language in the ordinance exempted
towers from height restrictions. Fish admitted that he knew about the 1999 amendments when he first advised Plaintiff about his towers. It
was not until Plaintiff's neighbors complained in phone calls, e-mails, and letters that the County decided to reassess the ordinance in
light of the amendments "to make sure that we weren't missing anything." Fish testified that after a detailed review he "realized" the effect of
the amendments in the O-1 zone on amateur radio towers in the A-2 zone. Now that amateur radio antennas were expressly enumerated as a permissive or conditional use in the non-residential zones, he said, such towers could no longer be considered incidental uses in the residential zones. It was now his opinion that a use expressly listed in the O-1 zone could not be a customarily incidental use in the lower A-2 zone. This was the first time Fish came to such an opinion, and it led to a result directly contrary to the position the County had previously taken.

In response to the stop work notice, Plaintiff filed an administrative appeal. Interpreting the appeal as triggering a stay of the notice
under the county building code, Plaintiff continued building his towers. The County issued a second stop work notice "under emergency
conditions," which Plaintiff also appealed. Neither appeal was ever heard. To force Plaintiff to stop building his towers, the County re-
quested a temporary restraining order, which the district court denied.

Meanwhile, Plaintiff sought a declaratory judgment in district court that would uphold the permit and withdraw the stop work notices.
In Plaintiff's view, which was previously the County's view as well, amateur radio towers are customarily incidental to residential use
because they are used in conjunction with a home-based hobby. Thus, amateur radio towers qualify as a permissive use in the A-2 zone and
are not subject to height restrictions in the A-2 zone. To Plaintiff, the express exclusion of amateur radio towers from height restrictions
reinforced the intent that towers are considered permissive uses. Otherwise, towers would not be listed.

The district court denied Plaintiff's motion for summary judgment, then remanded the matter to the Bernalillo County Planning Com-
mmission to develop a factual record regarding the County's prior interpretation of "customarily incidental" as used in the ordinance. Noting
that the term was not defined, the district court directed the Planning Commission to consider whether Plaintiff's amateur radio antenna
towers were "customarily incidental" to the residential use, and therefore a permissive use within the meaning of the zoning ordinance.

As noted above, the County conceded that prior to 1999 it had considered amateur radio antennas as a permissive use under the ordinance
but argued that Ordinance 1999-6 changed all that. The Planning Commission took the position that the 1999 amendment to the O-1 zone eliminated amateur radio antennas as incidental uses in the A-2 zone. Thus, the Planning Commission concurred with the County's administrative decision to halt construction of the towers and adopted all of the findings proposed by the planning department. But the Planning Commission also adopted three new findings:

9. A-2 zoning requires a higher standard of preservation of natural and scenic values than some other zones.
10. The federal guidelines speak in terms of reasonableness in height considerations.
11. The height of these towers is unreasonable for an A-2 rural zone as customarily incidental.

These findings were necessary to respond to another question on remand: whether the zoning ordinance made reasonable accommodation
for amateur radio towers, as required by federal law. (The issue of whether federal laws protecting amateur radio towers preempt the local
zoning regulations is not before us on certiorari.)

Back at the district court, however, the unreasonable height of the towers in general, and not as related to federal preemption, became
a new, alternative basis for the County to reject Plaintiff's plans. The district court accepted the Planning Commission's first rationale,
concluding that because the O-1 zone limits antennas to sixty-five feet, it would be inconsistent with the language of the ordinance to
allow antennas more than twice that height in an A-2 zone, which requires a higher standard of preservation of natural and scenic values.
The district court did find that, until Plaintiff’s case, the County generally had treated amateur radio towers as customarily incidental to residential activities in the A-2 zone. The court concluded, however, that even if there had been no amendments to the ordinance the County has the right to determine that certain towers were too tall, and thus unreasonable, to be considered customarily incidental to residential use. The district court entered judgment in favor of the County.

{15} Plaintiff appealed. The Court of Appeals agreed with Plaintiff, contrary to the district court, that the adoption of the 1999 amending language did not automatically remove amateur radio towers as a permissive use in the A-2 zone. See Smith, 2004-NMCA-001, ¶¶ 15-16 (stating that if the County “intended to limit uses in the A-2 zone, it could have expressly amended the A-2 zone or amended the supplemental language exempting amateur radio towers from height restrictions”). The County has not challenged that holding on certiorari, and it is not before us. However, the Court of Appeals did affirm the district court by holding that, even though amateur radio towers are expressly exempted from the height regulations, height restrictions may still apply. Id. ¶ 18. The court reasoned that an independent inquiry remains as to whether a particular structure is “reasonable” in a particular zone. Id. ¶ 19. Therefore, the County could bar an otherwise permissive use that had been expressly exempted from height regulation on the ground that the height was “unreasonable” as a customarily incidental use in a rural residential zone.

{16} We granted certiorari. On appeal, Plaintiff contends that the Court of Appeals’ interpretation of the zoning ordinance is unprecedented and contrary to law because it allows county zoning officials unfettered discretion. Zoning officials now can determine whether a particular land use that otherwise complies with all zoning restrictions can nonetheless be denied solely because it is “unreasonable.” This kind of boundless discretion, Plaintiff argues, opens the door to arbitrary and ad hoc decision-making by governmental officials who are supposed to make decisions according to standards and precedent. He further contends that accepting this interpretation permits the County to devise a post hoc, or after-the-fact, rationale for its decisions. In this case, Plaintiff argues, the County justified reversing its position regarding whether the towers were a permissive use based on a rationale that had never been used and had never even been articulated before Plaintiff’s towers were well along in construction.

{17} The sole issue we now address is whether the County could properly grant a permit to build amateur radio towers and later determine without ascertainable standards that the use was “unreasonable,” when the County had previously interpreted the zoning ordinance to allow such structures as a permissive use without height restrictions.

DISCUSSION

Standard of Review

{18} Interpretation of a zoning ordinance is a matter of law that we review de novo using the same rules of construction that apply to statutes. See High Ridge Hinkle Joint Venture v. City of Albuquerque, 1998-NMCA-050, ¶ 4, 126 N.M. 413, 970 P.2d 599 (Hinkle II); Rutherford v. City of Albuquerque, 113 N.M. 573, 574, 829 P.2d 652, 653 (1992). In its review of the Planning Commission’s interpretation of the “customarily incidental” provision of the zoning ordinance, as accepted by the district court, the Court of Appeals relied on three rules of statutory construction. See Smith, 2004-NMCA-001, ¶ 11 (citing Hinkle II, 1998-NMCA-050, ¶ 5). First, the “plain language of a statute is the primary indicator of legislative intent.” Id. Second, a reviewing court should “give persuasive weight to long-standing administrative constructions of statutes by the agency charged with administering them.” Id. Third, when “several sections of a statute are involved, they must be read together so that all parts are given effect.” Id. In our view, these same rules of statutory construction lead to a conclusion significantly different from that of the Court of Appeals.

Plain terms of ordinance indicate amateur radio towers are exempt from height restrictions

{19} We begin by looking at the language of the ordinance itself. Cf. State v. Johnson, 2001-NMSC-001, ¶ 6, 130 N.M. 6, 15 P.3d 1233 (“When a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation.”) (quoted authority omitted). In interpreting an ordinance, courts give words their ordinary meaning, without adding terms the enacting body did not include, unless a different intent is indicated. See Hinkle II, 1998-NMCA-050, ¶ 5.

{20} Plaintiff argues that under a straightforward interpretation of the zoning ordinance, amateur radio towers are a permissive use without height limitation in the A-2 zone. In his view, amateur radio towers are permitted in A-2 zones because operating a ham radio is a hobby “customarily incidental” to rural residential activity. See Zoning Ordinance §§ 7(B)(1)(a), (d), 8 (B)(1)(a). The ordinance does not expressly enumerate amateur radio towers as a permissive use, but it does expressly exclude them, along with a number of other structures, from the height limitation of twenty-six feet. Id. § 22(B)(1) (providing in the supplemental regulations that height restrictions shall not apply to amateur radio towers and other structures such as belfries, chimneys, flagpoles, smokestacks, silos, water towers, and windmills). Under the plain meaning of the words used in the ordinance, Plaintiff contends, this express exemption tends to indicate that the County contemplated amateur radio towers as permitted structures in the A-2 zone, and viewed them as customarily incidental to residential use.

{21} The Court of Appeals, on the other hand, concluded that the ordinance was ambiguous because it did not define “customarily incidental.” See Smith, 2004-NMCA-001, ¶ 17. Rather than interpret the supplemental regulations as a blanket exemption from height restrictions, the Court of Appeals read Section 22 as simply meaning structures such as amateur radio towers were not subject to the twenty-six-foot height limitation. Id. ¶ 18. The court found that an independent inquiry remains as to whether the particular structure constitutes a “customarily incidental” use under the zoning ordinance, an inquiry that takes place in context, considering the physical characteristics of the structure and the nature of the site. Id. ¶ 19.

In other words, a structure that may be customarily incidental to a residential use at some level of scale may no longer satisfy the ordinance if it is oversized in the context of the stated purpose of the zone. The larger scale may not be reasonable as a customarily incidental use.

Id. Thus, even though the ordinance specifies no height limit at all, the County could determine on a case-by-case basis what height limit should apply.

{22} Unlike the Court of Appeals, we are reluctant to make a legal conclusion that “reasonableness” can be read into the ordinance as a consideration in determining “customarily incidental” use. The court cites no authority for doing so, and the ordinance says no such thing.

“A court may not legislate in the guise of construction by inserting matter in a zoning regulation not included by the legislative body.” 8
Eugene McQuillin, *The Law of Municipal Corporations* § 25.71, at 223 (3d ed., rev. vol. 2000). In our view, the Court of Appeals added terms to the ordinance that were not there. See *Burroughs v. Bd. of County Comm’rs*, 88 N.M. 303, 306, 540 P.2d 233, 236 (1975) (stating that we follow the plain language of an ordinance, and will not read language into it if it makes sense as written).

[23] Rather than remain silent, the County directly addressed amateur radio towers in the ordinance by exemping such structures from height restrictions. If the County intended to limit customarily incidental uses in the A-2 zone, or to limit the height of amateur radio towers and other structures, it could easily have done so in express terms. The County knew how to impose height restrictions in other zones. See Ordinance 1999-6; cf. *Smith*, 2004-NMCA-001, ¶ 16 (offering the same rationale to explain why the 1996 amendments to the O-1 zone did *not* automatically change height restrictions in the A-2 zone). Instead, the ordinance expressly exempted amateur radio towers from all height restrictions.

[24] We observe that the Planning Commission was not unaware of this potential problem. During the hearing on remand from the district court, the commissioners recalled that several years prior to Plaintiff’s case the County zoning staff was asked to develop amendments to the ordinance addressing height regulations for amateur radio antennas above sixty-five to seventy-five feet. No action was taken. While we agree that the Planning Commission could pass regulations to restrict the height of amateur radio towers as a customarily incidental use, the Planning Commission has not done so. We will not read a reasonableness requirement into the ordinance to alleviate a problem that could easily have been avoided some time ago, particularly when the Court of Appeals cites no authority for doing so.1

[25] Our review of cases from other states supports Plaintiff’s belief that amateur radio antennas are generally considered customarily incidental to residential use without adding a reasonableness inquiry. See, e.g., *Town of Paradise Valley v. Lindberg*, 551 P.2d 60, 61-62 (Ariz. Ct. App. 1976) (holding that the erection of a ninety-foot amateur radio tower in conjunction with a homeowner’s hobby as a ham radio operator is a permissible accessory or incidental use); *Skinner v. Zoning Bd. of Adjustment*, 193 A.2d 861, 863-64 (N.J. Super. Ct. App. Div. 1963) (upholding a 100-foot radio antenna tower used as a hobby as an accessory use customarily incidental to the enjoyment of a residential property); *Dettmar v. County Bd. of Zoning Appeals*, 273 N.E.2d 921, 922 (Ohio Ct. Com. Pl. 1971) (finding that even an unusual customarily incidental use is permissible unless specifically excluded by a zoning restriction). Only two states require an independent inquiry into the degree of use. See *Marchand v. Town of Hudson*, 788 A.2d 250, 253 (N.H. 2001) (finding scale relevant in determining that three 100-foot amateur ham radio antenna towers were not an accessory use); *Presnell v. Leslie*, 144 N.E.2d 381, 383 (N.Y. 1957) (observing that scope of amateur radio operator’s hobby may carry it beyond what is customary or permissible).

[26] Based on the plain language of the ordinance and the judicial treatment of the term “customarily incidental” in other jurisdictions, we are not convinced that the ordinance, in leaving “customarily incidental” undefined, implicitly requires or justifies an independent determination of reasonableness. Without adding any words, the ordinance appears to allow amateur radio towers as customarily incidental to residential use and, in express terms, specifically exempts them from height restrictions. Apparently, County zoning officials once read the ordinance that way, and a diligent citizen was induced to rely reasonably on that same interpretation. As we shall see, this is persuasive evidence that the ordinance ought to be construed by the County in a similar manner so as to permit the towers.

**County previously interpreted amateur radio antennas as customarily incidental**

[27] Of greater importance to our inquiry than the plain language of the ordinance is the result we reach when we apply the rule of construction regarding deference to long-standing administrative interpretations. The Court of Appeals concluded that this rule did not apply “because the County has not had a long-standing interpretation of the zoning ordinance as applied to amateur radio antennas.” See *Smith*, 2004-NMCA-001, ¶ 11. We disagree.

[28] First, the record contradicts this conclusion. The County conceded that, until the passage of Ordinance 1999-6, amateur radio antennas had been considered customarily incidental to a permisive residential use. Indeed, by informing Plaintiff that amateur radio towers were allowed, and granting the permit, the County construed the ordinance in a way that was consistent with a permissible use. As we noted in *Hinkle II*, an administrative interpretation of even ambiguous language might bind an agency over time to a particular construction of the ordinance. See 1998-NMSC-050, ¶ 9. We find this principle at play here because we can find no evidence to suggest that a finding of reasonableness was ever required with any other permit for an amateur radio tower.

[29] Before remanding Plaintiff’s case to the Planning Commission, the district court explained that it was “trying to understand whether this customarily incidental definition was really used by the county before this.” Nothing that occurred at the hearing before the Planning Commission indicated that reasonableness had ever been a consideration in deciding if something was customarily incidental. In fact, the record suggests the opposite. At one point, a commissioner asked the County’s zoning director what would happen if a property owner wanted to build a ninety-foot chimney on a house. A chimney is one of the structures, like amateur radio towers, excluded from height regulations. The director testified that if a structure fell within a permisive use category, and was expressly exempted from height restrictions, “we couldn’t really limit it from a height standpoint.”

[30] It was only after neighbors complained that the County concluded that the towers did not comply with the zoning ordinance. These facts strongly suggest that the County was implementing a new policy. Under these circumstances, deference is not appropriate. See *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 119 N.M. 29, 42, 888 P.2d 475, 488 (Ct. App. 1994) (*Hinkle I*) (“Courts generally show little deference to an agency’s interpretation of its own statute when the interpretation is an unexplained reversal of a previous interpretation or consistent practice.”).

[31] We faced a similar situation in *Hinkle II*, 1998-NMSC-050. In *Hinkle II*, the Albuquerque city council rejected a property owner’s plans to build a miniature golf course and arcade with go-carts and bumper boats, which zoning officials had approved as a conditional use. *Id.* ¶ 2. The city council interpreted a phrase in the ordinance so that the planned activities would not be allowed. *Id.* ¶ 3. On appeal, this Court found that, even though the city council had never construed the ordinance until that case, city zoning officials had previously

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1See *Smith*, 2004-NMCA-001, ¶¶ 21-22 (rejecting both parties’ reference to cases from other jurisdictions because they are “specific to the language of the ordinance in question” and “do not involve the site-specific inquiry that we believe is contemplated by the stated purpose of the A-2 zone”).
construed the ordinance to allow outside activities with conditional use approval. Thus, the city council impermissibly applied a new
construction to the property owner’s particular request. *Id. ¶ 7.*

32 As we found in *Hinkle II*, an initial interpretation of an ordinance by an administrative agency constitutes a de facto policy that would be improper for local officials to change non-legislatively. *Id. ¶ 9.* The County zoning director admitted that prior to the 1999 amend-
ments amateur radio towers were permitted as a customarily incidental use. This amounts to a de facto policy that the County attempted
to change non-legislatively by reinterpreting its ordinance after neighbors complained. Similarly, we find no evidence that the County had ever evaluated structures such as amateur radio towers to see if they met the definition of “incidental uses” as a “use which is appropriate, subordinate, and customarily incidental to the main use of the lot.” Even though the County tries to argue that no one had ever tried to build a tower this high, it cannot create a new rule in Plaintiff’s particular situation. See *id.* (“We do not believe that the mere fact that the City Council itself had never interpreted the section in question means that landowners could not justifiably rely on the interpretation it was being given by ‘those responsible for its implementation,’ i.e., zoning agency officials.”). This kind of result-oriented reinterpretation of zoning rules engaged in by the County is exactly what we condemned in *Hinkle II*.

33 We agree with Plaintiff that this newly created reasonableness standard removes the essential characteristics of uniformity and predictability from the land use regulation process. See *Miller v. City of Albuquerque*, 89 N.M. 503, 506, 554 P.2d 665, 668 (1976) (not-
ing importance of promoting “the desirability of zoning classifications upon which the property owner has a right to rely”). With a reasonableness requirement read into the ordinance, zoning officials would be invited to make highly discretionary decisions on a strictly ad hoc basis. Landowners would be burdened by not knowing what uses are allowed on their property. Owners have a right to use their
property as they see fit, within the law, unless restricted by regulations that are clear, fair, and apply equally to all. Ad hoc, standard-less regulation that depends on no more than a zoning official’s discretion would seriously erode basic freedoms that inure to every property

**Purpose to preserve scenic values does not provide adequate standard**

34 In an attempt to read the zoning ordinance as a whole, the Court of Appeals relied on the general purpose of the ordinance as an adequate standard for determining what is reasonable in the A-2 zone. *Smith*, 2004-NMCA-001, ¶ 19. Given the ordinance’s purpose to preserve scenic and recreation values, the Court of Appeals concluded that there was substantial evidence in the record for the Planning Commission to find the height of the towers was unreasonable as a customarily incidental use in the A-2 zone. *Id. ¶ 24.*

35 In some instances, relying on the broader purpose of a statute or ordinance may be a reasonable way to realize the intent of the enact-
ing body. It is doubtless true that a fairly general expression of legislative guidance will suffice to control administrative discretion where it would be impractical and unreasonable to set out more precise standards “without impairing the underlying public purpose.” *See City of Santa Fe v. Gamble-Skogmo, Inc.*, 73 N.M. 410, 417-18, 389 P.2d 13, 18-19 (1964).

36 In this case, however, the County could easily have adopted a specific standard to preserve scenic values in terms of a reasonable height restriction. See *State ex rel. Holmes v State Bd. of Fin.*, 69 N.M. 430, 441-42, 367 P.2d 925, 933 (1961) (noting the failure to provide
detailed standards to guide administrative officials may only be excused where it is difficult or impractical to lay down a definite, compre-

hensive rule or some discretion is necessary to protect public morals, health, safety and general welfare); see also *Gen. Outdoor Adver. Co. v. Goodman*, 262 P.2d 261, 262-63 (Colo. 1953) (en banc) (holding that ordinance requiring signs to be approved by zoning authorities was invalid where no standards were provided and could easily have been prescribed); *Colyer v. City of Somerset*, 208 S.W.2d 976, 977 (Ky. 1947) (holding ordinance invalid that allowed zoning body to determine appropriate setback without any standards). For that reason, we find the Court of Appeals erred in concluding that the general purpose language of the A-2 zone supplies county officials with adequate guidance in applying the standard of reasonableness to determine whether a proposed use should be considered customarily incidental.

37 The results of this case may be unfortunate for the neighbors who understandably regard Plaintiff’s radio towers as an eyesore. But Plaintiff fairly relied on the express language of the ordinance and the assurances of the county zoning officials in buying his property. After the County granted Plaintiff a permit, he complied with its terms in the construction of his radio antenna towers. If the County wanted to prevent towers on this scale, the problem could easily have been avoided by doing exactly what has been done since: expressly amending the ordinance with specific height limitations. See Bernalillo County, N.M., Ordinance 2004-1 (adopted Jan. 27, 2004) (amending the zon-
ing ordinance to provide for amateur radio towers as permissive uses up to sixty-five feet or conditional uses up to 100 feet). The County has every right and responsibility to regulate structures such as amateur radio towers, but it did not do so explicitly and in fact exempted such antenna towers from height restrictions. The County cannot after the fact come up with a new legal rationale to block an unpopular activity, which was previously permitted, to the detriment of a property owner who did everything in his power to follow the rules.

**CONCLUSION**

38 We reverse the decision of the Court of Appeals affirming the district court. We hold that Plaintiff is entitled to a declaratory judgment that the building permit for his antenna towers was properly issued and that the County’s stop work notices are invalid.

39 **IT IS SO ORDERED.**  
RICHARD C. BOSSON,  
Chief Justice  

WE CONCUR:  
PATRICIO M. Serna, Justice  
PETRA JIMENEZ MAES, Justice  
EDWARD L. CHÁVEZ, Justice  
MICHAEL E. VIGIL, Judge  
New Mexico Court of Appeals  
(sitting by designation)
In this appeal, we consider whether Defendant Morgan Management Corporation (MMC) can be sued for negligence, or whether it is protected by the exclusivity provisions of the Workers’ Compensation Act (the Act), NMSA 1978, §§ 52-1-1(E) (1990), -8 (1989), and -9 (1973). The answer depends on the relationship between MMC and Plaintiffs. The district court granted summary judgment in favor of MMC on Plaintiffs’ negligence claim, determining that MMC and Morgan Building and Spa Manufacturing Corporation (MFG) have the “same identity” for purposes of the Act and, therefore, the Act provided Plaintiffs’ sole remedy against MMC. We agree and conclude that Plaintiffs’ tort claim is barred by the exclusivity provisions of the Act.

BACKGROUND

Plaintiff Mark Headley (Worker) was seriously injured while working in MFG’s manufacturing plant in Raton, New Mexico, when a heavy roll of insulation material fell on him. Payments exceeding $200,000 have been paid to him. He brought this negligence action against numerous entities other than MFG. His theory is that MMC negligently placed the roll, or was somehow responsible for the fact that the roll fell on him.

There are a number of Morgan Companies, apparently divided up, based on their essential roles such as manufacturing, transportation, and sales. MMC is separately incorporated, and is the common corporate office of the Morgan Companies, including MFG. Guy Morgan is the sole shareholder of both MMC and MFG. MMC was the named insured on the workers’ compensation policy at the time of Worker’s accident, and all the Morgan Companies, including MFG, were covered by this policy.

Terry Baca, Worker’s supervisor and production manager at the Raton plant on the date of Worker’s accident, was an MMC employee and was paid by MMC. Baca hired Worker and had the authority to fire him. Worker contends that MMC was negligent directly and vicariously through its agent/employee, Terry Baca.

DISCUSSION

STANDARD OF REVIEW

Summary judgment is appropriate when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Self v. United Parcel Serv., Inc., 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582. “If the facts are undisputed and only a legal interpretation of the facts remains, summary judgment is the appropriate remedy.” Bd. of County Comm’rs v. Risk Mgmt. Div., 120 N.M. 178, 179, 899 P.2d 1132, 1133 (1995). We apply a de novo standard of review.

On appeal, the parties have analyzed the issue in terms of whether MMC had a right to control Worker, or whether Worker was an independent contractor. See NMSA 1978, § 52-1-22 (1989) (stating that the Workers’ Compensation Act requirements do not apply to independent contractors). We believe the appropriate analysis depends on whether Worker was an employee of MMC. We have determined that Worker was an employee of MMC.

A. Exclusivity

Under the exclusivity provisions of the Act, NMSA 1978 §§ 52-1-1 to -70 (1929, as amended through 2004), “[n]o cause of action outside the Workers’ Compensation Act shall be brought by an employee . . . against the employer or his representative . . . for any matter relating to the occurrence of or payment for any injury . . . covered by the Workers’ Compensation Act.” § 52-1-6(E). Moreover, an employer’s compliance with the Act results in “a surrender by the employer and the [employee] of their rights to any other method, form or amount of compensation or determination thereof or to any cause of action at law, suit in equity, or statutory or common-law right to remedy or proceeding whatever for or on account of personal injuries or death of the [employee] than as provided in the . . . Act.” § 52-1-6(D).

B. Whether MMC is an Employer of Worker

“If an employment relationship is found, then Section 52-1-6(D) clearly presents a bar to this suit.” Salswedel v. Enerpharm, Ltd., 107 N.M. 728, 730, 764 P.2d 499, 501 (Ct. App. 1988). Our Supreme Court has adopted the Restatement (Second) of Agency to evaluate employee-employer relationships. See Harger v. Structural Servs., Inc., 1996-NMSC-018, 121 N.M. 657, 661, 916 P.2d 1324, 1328. Restatement (Second) of Agency: Torts of Servants § 220(1) (1958) provides that “[a] servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other’s control or right to control.” Some factors to consider in determining whether the right to control exist include: (1) the extent of control which the master may exercise over the details of the work; (2) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (3) the length of time for which the person is employed; (4) the method of
payment, whether by the time or by the job, Id. § 220(2); and (5) “the right to delegate the work or to hire and fire assistants.” Harger, 121 N.M. at 667, 916 P.2d at 1334.

{9} Harger added that “no particular factor should receive greater weight than any other.” Id. Moreover, “the totality of the circumstances should be considered in determining whether the employer has the right to exercise essential control over the work or workers.” Id.; see also Dibble v. Garcia, 98 N.M. 21, 24, 644 P.2d 535, 538 (Ct. App. 1982) (holding that the right to control is a test for determining employer-employee relationship in workmen’s compensation action).

{10} Here, all of MFG management personnel are employed by MMC and receive their paychecks from MMC. MMC also provides workers’ compensation insurance for MFG. The MFG plant manager reports directly to his supervisor in MMC’s office. Terry Baca, who was the production manager of the Raton plant, hired Worker and other employees who worked at the MFG plant. Subsequently, Terry Baca served as the plant manager, which required him to report directly to his supervisor in MMC’s corporate office. Under the totality of the circumstances, MMC made a prima facie showing that MMC, through Terry Baca in his role as plant manager, not only controlled Worker’s objectives, but also controlled Worker’s means and methods of his performance.

{11} Once MMC made a prima facie showing that it was Worker’s employer, the burden shifted to Worker to demonstrate the existence of specific evidentiary facts to rebut this conclusion. See Roth v. Thompson, 113 N.M. 331, 334-35, 825 P.2d 1241, 1244-45 (1992). In an attempt to show that MMC had no right to control his work, Worker presented evidence that he used his own tools on the job. This fact is not determinative. Like in Harger, the nature of the instrumentalities (tools) is but one factor among many to consider. The other factors presented by MMC, as well as the totality of the circumstances, persuade us that MMC was Worker’s employer. MMC hired the workers at the plant, including Worker, and it presumably had the right to terminate anyone it had hired. MMC provided workers’ compensation insurance for all plant workers and it required all managers at the plant to be MMC employees. The plant manager reported directly to MMC. See, e.g., Utah Home Fire Ins. Co. v. Manning, 985 P.2d 243, 246 (Utah 1999) (stating that “[r]egardless of how the parties intended to structure their relationship, a worker is considered to have been an employee [for purposes of the Workers’ Compensation Act] if the employer had the right to control the worker’s manner or method of executing or carrying out the work”); Schwartz v. Riekes & Sons, 240 N.W.2d 581, 584 (Neb. 1976) (stating that where a labor staffing firm provides temporary workers to an ultimate employer, which controls the details of the work done, then the ultimate employer is protected by the exclusivity provisions of workers’ compensation); St. Claire v. Minn. Harbor Serv., Inc., 211 F. Supp. 521, 528 (D.C. Minn. 1962) (holding that worker from temporary agency may not sue ultimate employer if it had a right to control the details of the work).

{12} Normally, the existence of an employment relationship is a question of fact. Garcia v. Am. Furniture Co., 101 N.M. 785, 789, 689 P.2d 934, 938 (Ct. App. 1984); Reynolds v. Swigert, 102 N.M. 504, 508, 697 P.2d 504, 508 (Ct. App. 1984) (stating that whether physician was employee or independent contractor of hospital is a question of fact). However, where reasonable people cannot differ on the issue, the court may grant summary judgment. See N.M. State Highway Dep’t v. Van Dyke, 90 N.M. 357, 360, 563 P.2d 1150, 1153 (1977). We hold that, under the facts here, Worker failed to rebut MMC’s prima facie showing that it had the right to control the work in the MFG plant and that it was therefore Worker’s employer. Thus, the district court properly concluded that MMC is entitled to the protection of the exclusivity provisions in the Act.

{13} If Worker were truly an independent contractor, he would not have been entitled to the $200,000 he has already received in workers’ compensation benefits under MMC’s workers’ compensation policy. See Harger, 121 N.M. at 664-70, 916 P.2d at 1331-37. Additionally, it is inconsistent for Worker to claim that MMC was vicariously negligent through the acts of its employee, Terry Baca, apparently because of his right to control the work at MFG, while at the same time contending that MFG was not an agent of MMC due to MMC’s inability to control the workers at MFG.

C. Discovery

{14} Worker argues that the district court erred in ruling on the motion for summary judgment before he could take the depositions of two corporate officers of MMC. We review the court’s ruling on this issue for an abuse of discretion. See Design Prof’ls Ins. Cos. v. St. Paul Fire & Marine Ins. Co., 1997-NMCA-049, ¶ 18, 123 N.M. 398, 940 P.2d 1193 (stating that the court’s ruling on whether to permit further discovery before ruling on summary judgment motion is reviewed for an abuse of discretion).

{15} Worker’s brief-in-chief contains less than a page devoted to this issue. There is no explanation of his argument, nor are there any facts that would allow us to evaluate this claim. We will not review unclear arguments, or guess at what his arguments might be. See Santisteven v. Centinel Bank of Taos, 96 N.M. 734, 737, 634 P.2d 1286, 1289 (Ct. App. 1980), rev’d on other grounds by, 96 N.M. 730, 634 P.2d 1282 (1981) (stating that we are not required to surmise what argument is being made where a brief is unclear). In his reply brief, Worker makes an equally brief argument, allegedly relying on several facts, but does not cite to the record to support his assertions. We decline to review such an undeveloped argument. See Santa Fe Exploration Co. v. Oil Conservation Comm’n, 114 N.M. 103, 108, 835 P.2d 819, 824 (1992) (stating that we have no duty to entertain arguments when facts are cited without citation to the record, and no authority is presented in support of an argument).

CONCLUSION

{16} We conclude that the facts are clear and undisputed that Worker was an employee of MMC within the meaning of the New Mexico’s Workers’ Compensation Act, and entry of summary judgment was proper. The judgment of the district court is affirmed.

{17} IT IS SO ORDERED.
IRA ROBINSON, Judge

WE CONCUR:
CYNTHIA A. FRY, Judge
RODERICK T. KENNEDY, Judge
OPINION

CYNTHIA A. FRY, JUDGE

{1} WXI/Z Southwest Malls Real Estate Liability Company (Southwest Malls) appeals from an order denying summary judgment against Defendants C.W. and Margaret Ritter (the Ritters) for unpaid rent and other tenant charges that it claims amount to over $200,000. The Ritters, who were assignors of a lease and guarantors of the rent, claim they were entitled to prompt notice from Southwest Malls that an assignee was failing to pay rent. The Ritters also claim that Southwest Malls breached the implied covenant of good faith and fair dealing in the guaranty by failing to provide such notice. For the reasons that follow, we hold that Southwest Malls had no express or implied duty under the guaranty to provide notice of the default prior to filing suit against the Ritters. We also hold that in such an arms-length, commercial transaction, the Ritters have failed to raise genuine issues of material fact as to any breach by Southwest Malls of the implied covenant of good faith and fair dealing. Both holdings are informed by the “long-standing backdrop of New Mexico law enforcing contractual obligations as they are written” and the public interest in ensuring that private parties are secure in the knowledge that their contracts will be enforced. United Props. Ltd. v. Walgreen Props., Inc., 2003-NMCA-140, ¶¶ 12, 10, 134 N.M. 725, 82 P.3d 535.

BACKGROUND

{2} The Ritters leased commercial space in a shopping mall, in which they operated a tavern. The lease period was for slightly more than ten years. Rent and various operating expenses shared by mall tenants were due monthly. Eight years into the lease, the Ritters sought to assign the lease to Frank and Renee Mueller (the Muellers), who would continue to operate the tavern. Southwest Malls, which became the landlord in 1999, consented to the assignment on the condition that the Ritters would continue to be liable for rent and would guarantee the lease. The Ritters signed the document and were listed as “assignor and guarantor.” The assignment contained the following clause:

5. Continuing Liability. Landlord’s consent to the Assignment is granted subject to Assignor remaining primarily liable on the lease, and Assignor, as a Guarantor (jointly and severally) under the Lease, hereby acknowledges such continuing liability to Landlord.

{3} Two months later, the Muellers assigned the lease to Aspen Ventures Accord, Inc. (Aspen), in which they had an interest. Southwest Malls again consented to the assignment, but on the condition that both the Ritters and Muellers remained liable on the lease as guarantors. The Ritters signed the assignment and were listed as “guarantors.” The document contained this language:

5. Continuing Liability. Landlord’s consent to the Assignment is granted subject to Assignor and all Guarantors of the Lease, if any, remaining primarily liable on the lease, and Assignor and all Guarantors, if any, hereby acknowledge the continuing liability of Assignor and Guarantors to Landlord under the Lease.

{4} Aspen failed to pay rent starting in August 2000. Southwest Malls apparently took no action to evict Aspen or terminate the lease, and Aspen did not surrender the premises. During the time that rent was going unpaid, a division of Southwest Malls was in contact with the Ritters regarding a separate dispute about monies owed prior to the assignment to the Muellers. Southwest Malls did not notify the Ritters about Aspen’s default until April 2002, nearly two years after Aspen stopped paying rent, when it sued all three parties (the Ritters, the Muellers, and Aspen) for the unpaid rent and other charges. After the suit was filed, Aspen and the Muellers were both discharged in bankruptcy proceedings, and the trustee for Aspen reported that no assets remained for distribution. Thus, Southwest Malls seeks the full amount owing plus attorney fees from the Ritters under the lease, the assignments, and, in particular, the two guaranty agreements.

{5} The Ritters defend on the grounds that Southwest Malls had a duty under the guaranty contract to timely notify them of Aspen’s default, and that its unjustified delay in doing so both violated the covenant of good faith and fair dealing and allowed damages to

Certiiorari Denied, No. 29,149, April 20, 2005
From the New Mexico Court of Appeals

Opinion Number: 2005-NMCA-046

WXI/Z SOUTHWEST MALLS REAL ESTATE LIABILITY COMPANY,
Plaintiff-Appellant,
versus
FRANK MUELLER, RENEE MUELLER, and ASPEN VENTURES ACCORD, INC.,
Defendants, and
C.W. and MARGARET RITTER,
Defendants-Appellees.
No. 24,492 (filed Feb. 9, 2005)

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
JERALD A. VALENTINE, District Judge

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MARK J. FIDEL
MARY T. TORRES
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for Appellant

MATTHEW P. HOLT
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Las Cruces, New Mexico
for Appellees
pile up. The Ritters contend that had Southwest Malls simply informed them of the situation, they could have applied their extensive experience as restauranteurs either to operate the tavern themselves or locate new, paying tenants. In either case, the Ritters argue that they could have prevented the unpaid rent from growing to the amounts claimed by Southwest Malls.

{6} Southwest Malls moved for summary judgment, which the district court denied. The district court found that the Ritters did guarantee the payment of rent, but that there were two issues of material fact impacting the question of whether Southwest Malls breached the implied covenant of good faith and fair dealing: (1) whether a creditor like Southwest Malls owes a guarantor, like the Ritters, any notice that the principal obligor (Aspen) is in default on the underlying obligation, particularly where periodic payments are due; and (2) the failure by Southwest Malls to provide notice of Aspen’s default, in the context of the ongoing communications with the Ritters, and the purported resulting harm to the Ritters.

{7} The district court issued an order authorizing interlocutory appeal, stating that the case involved controlling questions of law for which there are substantial grounds for difference of opinion and that an immediate appeal would advance the ultimate termination of the litigation. This Court granted the request for a permissive interlocutory appeal pursuant to NMSA 1978, § 39-3-4 (1999) and Rule 12-203(A) NMRA.

DISCUSSION
Standard of Review

{8} We review denials of summary judgment de novo because the issue on appeal is a question of law. Self v. United Parcel Serv., Inc., 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582. Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Id. We consider any facts presented in the light most “favorable to support a trial on the issues because the purpose of summary judgment is not to preclude a trial on the merits if a triable issue of fact exists.” Madsen v. Scott, 1999-NMSC-042, ¶ 7, 128 N.M. 255, 992 P.2d 268 (internal quotation marks and citation omitted). “[S]ummary judgment is not appropriate when the facts before the court are insufficiently developed or where further factual resolution is essential for determination of the central legal issues involved.” Brown v. Taylor, 120 N.M. 302, 307, 901 P.2d 720, 725 (1995) (internal quotation marks and citation omitted). We address in turn each of the concerns that prevented the district court from granting summary judgment to Southwest Malls.

Duty to Notify Guarantor of Principal’s Failure to Pay Monthly Rent

{9} The Ritters contend that even though the guaranty agreement did not expressly require any notice of default by the principal, Southwest Malls had a duty to alert them to the default so that they could take action to mitigate damages once Aspen stopped paying rent. This is a novel issue in New Mexico.

{10} A guaranty is a contract and we apply all of the general rules regarding the application and construction of contracts. See Shirley v. Venaglia, 86 N.M. 721, 724, 527 P.2d 316, 319 (1974) (stating that “[t]he guaranty agreement is a separate, distinct contract”; see also Restatement (Third) of Suretyship and Guaranty § 14 (1996) (stating that standard contract rules apply to secondary obligations). Therefore, we begin with a brief summary of these rules.

{11} “When discerning the purpose, meaning, and intent of the parties to a contract, the court’s duty is confined to interpreting the contract that the parties made for themselves, and absent any ambiguity, the court may not alter or fabricate a new agreement for the parties.” CC Hous. Corp. v. Ryder Truck Rental, Inc., 106 N.M. 577, 579, 746 P.2d 1109, 1111 (1987). “Absent ambiguity, provisions of a contract need only be applied, rather than construed or interpreted.” Richardson v. Farmers Ins. Co., 112 N.M. 73, 74, 811 P.2d 571, 572 (1991). “Parties to a contract agree to be bound by its provisions and must accept the burdens of the contract along with the benefits. When a contract was freely entered into by parties negotiating at arm’s length, the duty of the courts is ordinarily to enforce the terms of the contract which the parties made for themselves.” Nearburg v. Yates Petroleum Corp.,1997-NMCA-069, ¶ 31, 123 N.M. 526, 943 P.2d 560 (internal citation omitted). “[C]ourts may not rewrite obligations that the parties have freely bargained for themselves . . . [i]n the absence of fraud, unconscionability, or other grossly inequitable conduct.” United Props. Ltd., 2003-NMCA-140, ¶ 10 (internal quotation marks and citation omitted).

{12} As for the interpretation and application of a guaranty, “[t]he language of the written guaranty agreement governs the rights of the [g]uarantors and “[t]he parties . . . are free to determine for themselves by contract . . . the duties and obligations which follow.” Levenson v. Haynes, 1997-NMCA-020, ¶ 19, 123 N.M. 106, 934 P.2d 300; see Sunwest Bank v. Garrett, 113 N.M. 112, 116, 823 P.2d 912, 916 (1992) (“The respective rights of the guarantor and the creditor are determined by reference to the terms of the contract between them.”). Generally, a guarantor is entitled to strict construction of the guaranty, cannot be held liable beyond the strict terms or intent of that agreement, and is considered a “favorite of the law”.

{13} Guaranties are categorized into various types, and for reasons that will become apparent, the Ritters characterize their guaranty as being akin to a continuing or open guaranty. Southwest Malls characterizes the agreement as an absolute guaranty. We agree with Southwest Malls, as did the district court, that the Ritters made an absolute guaranty. We summarize the various guaranties and the rules relating to each and apply those rules to this case.

{14} Generally, the law classifies guaranty agreements as either absolute or conditional. See Am. Bank of Commerce v. Covolo, 88 N.M. 405, 409, 540 P.2d 1294, 1298 (1975) (classifying guaranty as unconditional); Bank of N.M. v. N.W. Power Prods., Inc., 95 N.M. 743, 747, 626 P.2d 280, 284 (Ct. App. 1980) (classifying guaranty as conditional); Williams v. Clark, 417 N.W.2d 247, 251 (Iowa Ct. App. 1987) (stating that guaranties are generally classified as either conditional or absolute). See generally 38 Am. Jur. 2d Guaranty § 18 (1999) (comparing absolute and conditional guaranties). A guaranty is conditional when its terms state that a condi-
tion precedent must be met before the guarantor is held liable; otherwise it is absolute. *Williams*, 417 N.W.2d at 251. The distinction is meaningful here because a guarantor who does not impose conditions on his liability is considered automatically liable upon the default of the principal, and the creditor is neither required to first seek payment from the principal nor to notify the guarantor of any default. *Id.*; see *Pavlantos v. Garoufalis*, 89 F.2d 203, 206 (10th Cir. 1937) (“An absolute guaranty is an unconditional undertaking . . . and such a guarantor is liable immediately upon default of the principal without notice.”); *W. States Leasing Co. v. Adturn, Inc.*, 500 P.2d 1190, 1191 (Colo. Ct. App. 1972) (explaining that notice is not required where an unambiguous, absolute guaranty is silent as to notice); *Bowyer v. Clark Equip. Co.*, 357 N.E.2d 290, 293 (Ind. Ct. App. 1976) (“It is well established in Indiana that a guarantor is not entitled to notice of his principal’s default when his undertaking . . . is absolute.”). A guarantor’s promise to pay rent is generally viewed as an absolute guaranty. See 49 Am. Jur. 2d *Landlord and Tenant* §§ 816-17 (1995) (stating that a guaranty of payment of rent is absolute, the guarantor is not entitled to notice, and it is the business of the guarantor to see that the principal pays any rent due). Like the district court, we conclude that the Ritters’ guaranty was absolute because the plain language imposed no condition precedent upon their liability to pay rent. See *Richardson*, 112 N.M. at 74, 811 P.2d at 572 (explaining that unambiguous contracts need only be applied rather than interpreted). Because the guaranty was absolute and was silent as to notice, Southwest Malls was not required to provide notice prior to enforcing the guaranty.

{15} Guaranties are also classified as either continuing or restricted. *Gen. Elec. Capital Corp. v. Dodson Aviation, Inc.*, 286 F. Supp. 2d 1307, 1313 (D. Kan. 2003) (applying Kansas contract law). See generally, 38 Am. Jur. 2d *Guaranty* §§ 20, 22 (1999) (defining continuing and restricted guaranties). A continuing guaranty is one in which a guarantor assumes liability, but the amount of debt or time for payment remains undefined, such as a line of credit. *Levenson*, 1997-NMCA-020, ¶ 23 (stating that a “guaranty is continuing if it contemplates future course of dealing during an indefinite period or series of transactions”); *F.D.I.C. v. Moore*, 118 N.M. 77, 78-80, 879 P.2d 78, 79-81 (1994) (noting a guaranty for an unlimited amount was “continuing”); Restatement (Third) of Suretyship and Guaranty § 16 (defining continuing guaranty as one in which guarantor is bound to all future obligations of the debtor and the guarantor may terminate his guaranty as to future debts); see also 49 Am. Jur. 2d *Landlord and Tenant* § 819 (1995) (explaining that a guaranty to pay rent may be a continuing guaranty if the parties intended for it to extend into successive terms). Some courts have described a continuing guaranty as a series of offers that are accepted by the creditor upon the extension of further credit to the debtor. See *Georgia-Pacific Corp. v. Levitz*, 716 P.2d 1057, 1059 (Ariz. Ct. App. 1986). On the other hand, a guaranty is restricted if the guaranty contemplates a single transaction or a limited number of transactions. 38 Am. Jur. 2d *Guaranty* §§ 20, 22.

{16} It is well-settled that a creditor must provide notice of a principal’s default to a guarantor in the case of a continuing guaranty. *Bowyer*, 357 N.E.2d at 293 (stating that notice was required where debts were unknown and indefinite and no due date was established); 38A C.J.S. *Guaranty* § 74 (1996) (explaining that a guarantor is only entitled to notice of default “when the guaranty is conditional or uncertain as to amount or accrual”); see also *Davis v. Wells*, 104 U.S. 159, 170 (1881) (holding that in the case of a continuing guaranty, the guarantor could be discharged if the creditor’s delay in giving notice caused actual loss to the guarantor). In a continuing guaranty, the guarantor can intervene to stem potentially limitless liability by terminating the guaranty as to future debts, so it naturally follows that the guarantor must be given notice of a default. See Restatement (Third) of Suretyship and Guaranty § 16, cmt. b (stating that a guarantor of a continuing guaranty can terminate the guaranty and thereby terminate liability for any future debts).

{17} The Ritters characterize their guaranty as more like a continuing guaranty because more than a single payment was contemplated, and therefore it was not a “single obligation.” They further contend that in such a case the law conditions their liability on notice from the creditor that the principal has defaulted. We reject the contention that this guaranty was similar to a continuing guaranty and conclude that this was a restricted guaranty. Here, the district court found that the Ritters’ guaranty was absolute, yet it questioned whether notice still may have been necessary due to the periodic accrual of the obligation to pay rent. The district court’s uncertainty is misplaced. An obligation to pay a reasonably ascertainable rent for a fixed period is not a continuing guaranty because both the depth and duration of the liability can be easily ascertained at the outset. Compare *Bowyer*, 357 N.E.2d at 293 (finding that notice was required for a guaranty where “the liabilities guaranteed have not been created and are uncertain in amount”); with *W. States Leasing Co.*, 500 P.2d at 1191 (stating that where “the maximum amount guaranteed is determinable at the time the guarantee is entered into” and the guaranty is absolute, there is no requirement of notice of default).

{18} The Ritters’ liability on the ten-year lease was created when it was executed—the underlying obligation to pay rent was not created monthly, but was created when the lease began. The lease was a single ten-year obligation and not a series of obligations or transactions. The guaranties signed by the Ritters involved reasonably certain amounts for rents and other charges. The Ritters’ operation of the tavern under this lease for the prior eight years allowed them to assess the typical monthly rent and other charges and they do not contend otherwise. The guaranty was also of limited duration—the lease terms indicate it terminated on January 1, 2002. The fact that rents and charges were due monthly does not convert the quantifiable and finite liability into an obligation analogous to an unlimited line of credit or an obligation with no end date. Because this was a single obligation, and not an open-ended series of obligations, and because the amount guaranteed was reasonably ascertainable, we conclude that this was a restricted guaranty. See *Richardson*, 112 N.M. at 74, 811 P.2d at 572 (explaining that unambiguous contracts need only be applied rather than interpreted). While the guaranty language in this case says that the Ritters guaranty is “continuing,” that refers to the obligation continuing through the term of the lease and is not dispositive of the nature of the obligation.

{19} The conclusion that such a guaranty was for a finite period and sum is bolstered by the rule articulated by our Supreme Court that generally a guarantor is not liable to pay rent forever, even if the guarantor’s principal becomes a holdover tenant under holdover

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terms in a lease. Shirley, 86 N.M. at 724-25, 527 P.2d at 319-20 (stating that a guarantor is released after the lease term has expired unless there is some assent by the guarantor or the guaranty expressly contemplates such extension). In this case, the Ritters signed a restricted absolute guaranty and no notice of default was required prior to Southwest Malls acting to enforce the guaranty. While arguably it may have been potentially of some benefit to the Ritters if Southwest Malls had given them notice, there was simply no legal duty to do so.

20] We note that this is not a case where a creditor and debtor act together to impede a guarantor’s right of recourse against the debtor, as when a creditor discharges the principal debtor. Southwest Malls did not discharge Aspen; it sued Aspen, and the Ritters were not prevented from acting against Aspen. See Venaglia v. Kropinak, 1998-NMCA-043, ¶ 9, 29, 125 N.M. 25, 956 P.2d 824 (adopting the Restatement rule that a guarantor of a negotiable instrument is discharged to the extent that the payee impairs the guarantor’s recourse against the payor); see also Restatement (Third) of Suretyship and Guaranty § 44 (stating that guarantor can be discharged if the creditor impairs a guarantor’s right of restitution from the principal); Restatement (Third) of Suretyship and Guaranty § 50(1) (stating that a creditor’s delay or failure to act against the principal does not discharge the guarantor).

21] We also decline to impose a general affirmative duty on creditors to provide updates to guarantors during the course of the guaranty. Courts have imposed a duty upon creditors to disclose facts to a guarantor, but this duty is limited to situations where the guaranty agreement is not yet executed, cases of a continuing guaranty, or where the guarantor has reserved a right of termination. See Alan Stephens, Annotation, Creditor’s Duty of Disclosure to Surety or Guarantor After Inception of Suretyship or Guaranty, 63 A.L.R.4th 678 (1988); Restatement (First) of Security § 124(1) (1941) (describing guarantor’s defenses based on a creditor’s non-disclosure of facts before the guaranty arises); § 124(2)(imposing on creditor a duty to inform guarantor of facts which would give guarantor a right to terminate the guaranty); Restatement (Third) of Suretyship and Guaranty § 47 (stating that if a creditor fails to disclose events which would give a guarantor the ability to terminate the guaranty, the guarantor is discharged from further liability); see also Me. Nat’l Bank v. Fontaine, 456 A.2d 1273, 1275 (Me. 1983) (imposing a duty on creditor to disclose facts where guaranty is for a series of credit extensions); Georgia-Pacific Corp., 716 P.2d at 1059 (stating that in a continuing guaranty, a creditor may be required to notify the guarantor where the creditor is aware of facts that increase risk to the guarantor, has reason to think the guarantor is unaware of these facts, and has an opportunity to communicate them prior to further extensions of credit). Here, the guaranty had been executed, it was not a continuing guaranty, and the circumstances known to Southwest Malls did not give the Ritters a right to terminate the guaranty. Thus, there was simply no duty for Southwest Malls to reach out to the Ritters to keep them apprised of Aspen’s performance.

22] Finally, while the Ritters are correct that a guaranty must be construed strictly so as to not expand their liability, the guaranty here is clear and unambiguous, and there is nothing to construe. We apply the plain terms of the express contract which indicate that if the assignees failed to pay rent, then the Ritters were obligated to do so. Southwest Malls bargained for an absolute guaranty to which the Ritters agreed, and Southwest Malls should get the benefit of that bargain. The Ritters were free to insist on a notice requirement or any other condition or limitation in their guaranty, but having failed to do so, this Court will not write such a condition in after the fact. Absent one of the few recognized exceptions, which the Ritters do not raise in their appeal, this Court will not re-write the bargain reached by the parties into one that is arguably more fair, even if the agreement results in a hard bargain or substantial risk. United Props. Ltd., 2003-NMCA-140, ¶ 28 (stating that “New Mexico courts do not have discretion either to relieve parties to a commercial lease of their contractual obligations or to interfere with contractual rights and remedies” (internal quotation marks and citation omitted)); see also Cafeteria Operators, L.P. v. Coronado-Santa Fe Assocs., L.P., 1998-NMCA-005, ¶¶ 20, 23, 124 N.M. 440, 952 P.2d 435 (holding that a commercial building had to be removed because the builder violated a shopping mall lease restriction).

23] We also observe that, even without the guaranty, the Ritters would most likely be liable for all unpaid rent as assignors, even if Aspen had abandoned the premises. Jacob v. Spurlin, 1999-NMCA-049, ¶¶ 9-12, 127 N.M. 127, 978 P.2d 334 (stating the general rule that an assignment does not relieve an assignor of the duty to pay rent); Mesilla Valley Mall Co. v. Crown Indus., 111 N.M. 663, 665, 808 P.2d 633, 635 (1991) (stating that unless a landlord accepts a tenant’s surrender of the premises, the landlord has no duty to mitigate damages during the term of the lease). While it is not essential to our analysis, we see no benefit in imposing disparate interpretations of a tenant’s duty under a guaranty compared with the tenant’s obligations under an assignment, particularly where both agreements are intended to facilitate the same activity.

Breach of the Covenant of Good Faith and Fair Dealing

24] The Ritters contend that Southwest Malls breached its contractual duty of good faith and fair dealing by not providing notice to the Ritters that rent was going unpaid. The district court, in denying summary judgment to Southwest Malls, found that a material question of fact did exist on this issue in light of the Ritters’ claims that Southwest Malls failed to notify them of the unpaid rent for approximately twenty months, even though Southwest Malls was in contact with the Ritters on other matters. Even if all of the Ritters’ claims are true, we conclude there is no material question of fact on the issue of whether Southwest Malls violated the covenant of good faith and fair dealing.

25] We start with a review of the standard of good faith and fair dealing.

Whether express or not, every contract in New Mexico imposes the duty of good faith and fair dealing upon the parties in the performance and enforcement of the contract. The breach of this covenant requires a showing of bad faith or that one party wrongfully and intentionally used the contract to the detriment of the other party. Paiz v. State Farm Fire & Cas. Co., 118 N.M. 203, 212, 880 P.2d 300, 309 (1994) (internal quotation marks and citation omitted)
The concept of the implied covenant of good faith and fair dealing requires that neither party do anything that will injure the rights of the other to receive the benefit of their agreement. Denying a party its rights to those benefits will breach the duty of good faith implicit in the contract.

Planning & Design Solutions v. City of Santa Fe, 118 N.M. 707, 714, 885 P.2d 628, 635 (1994); see also Dairyland Ins. Co. v. Herman, 1998-NMSC-005, ¶ 12, 124 N.M. 624, 954 P.2d 56 (stating that “with insurance contracts, as with every contract, there is an implied covenant of good faith and fair dealing that the insurer will not injure its policyholder’s right to receive the full benefits of the contract”); Azar v. Prudential Ins. Co. of Am., 2003-NMCA-062, ¶ 51, 133 N.M. 669, 68 P.3d 909 (“The implied covenant is aimed at making effective the agreement’s promises.”).

The Ritters rely on a case from the insurance context for the notion that one party to a contract must balance its interests against those of the other party to the contract and cannot be partial to its own interests. Lujan v. Gonzales, 84 N.M. 229, 236, 501 P.2d 673, 680 (Ct. App. 1972). The Court in Lujan explicitly stated it was not attempting to give a complete definition of good faith “because of the variety of situations held to involve a question of good faith” and used the term good faith “in this case to mean [that] an insurer cannot be partial to its own interests.” Id. Lujan was limited to its facts involving a contract between an insurer and insured, and we decline to impose on one party a duty to balance its interests with that of the other party in all contracts.

Even if all of the Ritters’ claims are believed, there is no suggestion that Southwest Malls acted to injure the rights of the Ritters to receive the benefit of their agreement or that it acted to negate any of its promises. Dairyland Ins. Co., 1998-NMSC-005, ¶ 12. Southwest Malls promised to allow the Ritters to step out of their role as lessors and operators of the tavern in exchange for the Ritters’ promise to guarantee performance of the lease. We fail to see how Southwest Malls’ failure to notify the Ritters of Aspen’s unpaid rent prevented the Ritters from getting the benefit of their bargain—a bargain that allowed them to assign the remainder of their lease. Smoot v. Physicians Life Ins. Co., 2004-NMCA-027, ¶¶ 13, 14, 135 N.M. 265, 87 P.3d 545 (stating that covenant of good faith is not breached when a party was given the product or service bargained for). As Southwest Malls did not agree to provide the Ritters notice of any missed rental payments and met its obligation to allow the Ritters’ assignment, there is no basis to find a breach of the duty of good faith.

Some courts have found that a creditor may breach a duty of good faith by failing to inform a guarantor of facts that materially increase the guarantor’s risks. See Morris v. Columbia Nat’l Bank of Chicago, 79 B.R. 777, 785-86 (N.D. Ill. 1987) (remanding for factual findings where bad faith could be found under Illinois law from creditors’ acts and omissions toward guarantor); see Stephens, supra. In this case, the plain language of the Ritters’ guaranty anticipates the risk of non-payment of rent for the remainder of the lease term, so we cannot see how Southwest Malls’ inaction materially increased the risks contemplated in the guaranty. We will not re-write the Ritters’ guaranty so as to contemplate no risk whatsoever, or to limit the risk to some arbitrary period less than the remainder of the lease.

Finally, the Ritters point to authority imposing a duty to disclose facts in certain circumstances, particularly where a builder has a duty to disclose facts to buyers of land. Krupiak v. Payton, 90 N.M. 252, 253, 561 P.2d 1345, 1346 (1977). We see no basis to impose a duty on Southwest Malls to disclose the fact that Aspen was not paying rent. In Krupiak, the Supreme Court noted that a duty to disclose facts may arise if a party has superior knowledge that is not within reach of the other party or could not have been discovered by reasonable diligence. Id. Here, there is no contention that Aspen’s failure to pay rent was a matter beyond the reach of the Ritters or that they could not have discovered it by reasonable diligence. Southwest Malls had no affirmative duty to apprise the Ritters of the status of Aspen’s non-payment of rent under the guaranty, nor was it fraudulent for Southwest Malls not to notify the Ritters about the situation.

CONCLUSION

We hold that Southwest Malls is entitled to summary judgment as a matter of law. The Ritters signed an absolute restricted guaranty and therefore Southwest Malls was not required to provide any notice of Aspen’s default in paying monthly rent. Southwest Malls did not breach the implied covenant of good faith and fair dealing because it did not withhold from the Ritters any of the benefits of the bargain the parties struck in allowing the two lease assignments.

We reverse the district court’s denial of summary judgment and remand with instructions to enter judgment in favor of Southwest Malls and to conduct any further proceedings necessary to determine the amount of damages owed under the lease.

IT IS SO ORDERED.

CYNTHIA A. FRY, Judge

I CONCUR:
LYNN PICKARD, Judge
IRA ROBINSON, Judge (dissenting).
IRA ROBINSON, JUDGE
(Dissenting)

{33} Rarely have I seen a fact pattern that demands a dissent as much as this one.

{34} I am concerned that the landlord, Southwest Malls, intentionally chose not to notify or even verbally inform the Ritters that their sublessee, Aspen, had defaulted on the lease payments.

{35} What makes it so improper is that Southwest Malls waited twenty months -- one month at a time and $10,000 at a time -- before notifying the Ritters of the default. And then, how did Southwest Malls finally notify them? It sued them for $200,000 in unpaid rent and other charges.

{36} What is even more disturbing is that Southwest Malls never took any action to evict Aspen or terminate the lease. Southwest Malls allowed Aspen to keep the tavern open, making money, without paying the rent.

{37} What is downright egregious is that, during the time beginning August 2000, when Aspen stopped paying rent, a division of Southwest Malls was in contact with the Ritters over a separate dispute in which it claimed that the Ritters owed it money prior to the Ritters' assignment of the lease to the Muellers, who later assigned it to Aspen with Southwest Malls' approval. What earthly reason or possible justification could Southwest Malls have had not to inform the Ritters, even by telephone, let alone in writing, that they already owed money for Aspen's default?

{38} Citing Richardson, 112 N.M. at 74, 811 P.2d at 572, the majority views the Ritters' guaranty as "a single obligation, and not an open-ended series of obligations, and because the amount guaranteed was reasonably ascertainable, we conclude that this was a restricted guaranty." Majority Opinion ¶ 18.

{39} I do not agree. I see the Ritters' obligation as one that continues on a monthly basis, one month at a time. If the primary obligor, Aspen, pays its rent in a given month, then the Ritters do not need to pay any rent. Then we go on to the next month. If Aspen pays rent during that month, the Ritters have no obligation to pay anything. The same continues to be true each month, one month at a time. Their obligation to pay a month's rent as guarantor only kicks in after Aspen has failed to pay that month's rent. The rent becomes due for the Ritters at the end of a month on which Aspen has defaulted, not at the end of the lease term, twenty months later. But, how can they fulfill their guaranty unless Southwest Malls notifies them of Aspen's default?

{40} The majority acknowledges, citing Morris, 79 B.R. at 785-86, that "a creditor may breach a duty of good faith by failing to inform a guarantor of facts that materially increase the guarantor's risks." Majority Opinion ¶ 28. The majority also states "we cannot see how Southwest Malls' inaction materially increased the risks contemplated in the guaranty." Id. I can.

{41} Any reasonably prudent man who signs a guaranty on a lease where monthly payments are required contemplates that he will be called upon to make a monthly payment at the time the primary obligor fails to do so—not six months later, not twenty months later, not $200,000 later.

{42} After the first month of Aspen's non-payment, the Ritters could have taken reasonable actions to avoid getting stuck with all the remaining monthly payments under the lease in several different ways. Had Southwest Malls only informed them of Aspen's default, the Ritters could have tried to find a new tavern operator to take over the business and the lease, and could have taken steps to force Aspen out. The Ritters could even have gone back in and operated the tavern themselves, having good reason to do so if they were going to get stuck with the remaining twenty lease payments. To say that the Ritters' risk was not increased is incorrect. It was increased as each month went by that Southwest Malls intentionally failed to notify them of Aspen's continuing default in paying the rent.

{43} At any time during the long period of Aspen’s default, the Ritters could have walked through the Mall and would have had no way of knowing that Aspen had stopped paying rent because Southwest Malls let Aspen continue operating the tavern without evicting them.

{44} Since Southwest Malls did not evict Aspen, the Ritters were lulled into a false belief that everything was okay, thanks to Southwest Malls' inaction. I have no doubt that the Ritters suffered prejudice by the action or inaction of Southwest Malls.

{45} Does Southwest Malls' actions or inaction amount to deceit or fraud? Perhaps. Does it amount to bad faith and unfair dealing? It certainly does.

{46} This case reminds me of a puzzle that school children put together. One may think that all the little pieces are being put together in all the correct places. The problem is that when you look at the finished puzzle, you see a picture that is all wrong.

{47} I would affirm the court’s denial of Southwest Malls’ motion for summary judgment. I, therefore, respectfully dissent.

IRA ROBINSON, Judge
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