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2005-NMCA-054: Marilyn and George Lopez v. Gopal Reddy, M.D.

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Special Insert:
CLE AT·A·GLANCE

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SEMINAR REGISTRATION FORM
State Bar Center

JUNE

8, 22

2005 Professionalism
Lawyers Concerned for Lawyers
Substance Abuse and Addiction Issues in the
New Mexico Legal Community
Video Replay • Wednesday, June 8 and June 22
10 a.m. - Noon • State Bar Center
2.0 Professionalism CLE Credits

Co-Sponsor: SBNM Commission on Professionalism

The 2005 Commission on Professionalism course, LAWYERS CONCERNED FOR LAWYERS: Substance Abuse and Addiction Issues in the New Mexico Legal Community, will focus on the serious issue of addiction and substance abuse. Over 15 million Americans suffer from the disease of alcoholism -- roughly 10 percent of the general population. The percentage of professional men and women, including lawyers and judges who are chemically dependent, appears to be even higher with estimates as high as 15 to 20 percent for attorneys.

The 2005 Commission on Professionalism program will feature justices of the New Mexico Supreme Court and members of the State Bar’s Lawyers Assistance Committee in an informative and broad look at substance abuse. Participants will also receive a perspective from the UNM School of Law and the Disciplinary Board. The program will give participants the tools necessary to help identify abuse and addiction problems, address confidentiality issues, provide resources for how to handle such situations and offer guidance to those who may be suffering through an illness.

☐ Standard Fee $59

17

Annual Tax Symposium
Live Program • Friday, June 17, 2005
State Bar Center, Albuquerque • 9.0 General CLE Credits

Co-Sponsor: SBNM Taxation Section

The Annual Tax Symposium will feature problems currently facing the federal tax system and the role and response of the Taxpayer Advocate Service; new securities law requirements under Sarbanes Oxley and its effects on corporate tax departments; the IRS's new tax shelter reporting requirements and its potential impact on attorneys, accountants, and financial advisors; and an update on important tax cases and IRS decisions issued in the last year. Recent legislative tax initiatives in New Mexico; as well as court and administrative tax decisions, current hot topics specific to New Mexico, and a final session on the complexities of tax free Section 1031 exchanges will also be explored.

☐ Standard and Non-Attorney $209
☐ Tax Section Member, Government & Paralegal $189

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 ____________________________
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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:
When hearings or depositions are cancelled, I will notify opposing counsel,
necessary parties and the court (or other tribunal) as early as possible.

Meetings

June
6  Attorney Support Group, 5:30 p.m., First Methodist Church
9  Public Law Section Board of Directors, noon, Risk Management Division,
    Santa Fe
9  Business Law Section Board of Directors, 4 p.m., State Bar Center
10  International and Immigration Law
    Section Board of Directors, 1:30 p.m., State Bar Center
11  Ethics Advisory Committee, 10 a.m., State Bar Center
13  Taxation Law Section Board of
    Directors, noon, via teleconference

State Bar Workshops

June
8  Social Security Disability, 1 p.m., Dona Ana Senior Center, Las Cruces
8  Family Law Workshop, 6 p.m., State Bar Center
22  Family Law Workshop, 5:30 p.m., Branigan Library, Las Cruces
22  Consumer Debt/Bankruptcy Workshop, 6 p.m., State Bar Center
23  Consumer Debt/Bankruptcy Workshop, 5:30 p.m., Branigan Library, Las Cruces

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

COURT NEWS

Supreme Court
Notice on Address Changes

All New Mexico attorneys must notify the Supreme Court and the State Bar of any changes in address or telephone number. Information may be e-mailed to the Supreme Court, Suprvm@nmcourts.com; faxed to (505) 827-4837; or mailed to PO Box 848, Santa Fe, NM 87504-0848.

Information may be e-mailed to the State Bar, at address@nmbar.org; faxed to (505) 828-3755; or mailed to the State Bar, PO Box 92860, Albuquerque, NM 87199-2860. The State Bar keeps both mailing and directory addresses. Contact the State Bar for more information.

Judicial Performance Evaluation Commission
Upcoming Meeting

The Judicial Performance Evaluation Commission was created by the New Mexico Supreme Court for the purpose of providing voters with fair, responsible and constructive evaluations of trial and appellate judges and justices seeking retention in general elections. The results of the evaluations also provide judges with information that can be used to improve their professional skills as judicial officers. The commission’s next meeting will be from 8 a.m. to 5 p.m., June 24 at the Ninth Judicial District Court, 700 N. Main, Ste. 14, Clovis. For more information on the commission or with regard to the next scheduled meeting, call (505) 827-4960.

NM Board of Legal Specialization
Comments Solicited

The following attorney is applying for certification as specialist in the area of law identified. Application is made under the New Mexico Board of Legal Specialization, Rules 19-101 through 19-312 NMRA. The Rules of the New Mexico Board of Legal Specialization provide that the names of those seeking to qualify shall be released for publication. Further, any person may comment upon the applicant’s qualifications within 30 days after the independent inquiry and review process carried on by the board and appropriate specialty committee. The board and specialty committee encourage attorneys and others to comment upon any applicant. Address comments to New Mexico Board of Legal Specialization, PO Box 92860, Albuquerque, NM 87199.

Employment and Labor Law
Scott D. Gordon

First Judicial District Court
Family Law Brownbag Meeting

The First Judicial Court will host its family law brownbag meeting at noon, June 14 in the Grand Jury Room, second floor of the Steve Herrera Judicial Complex in Santa Fe. The event will feature a meeting with Margaret Kegel, the domestic violence domestic relations hearing officer. For more information, or to suggest agenda items to be discussed, contact Elege Simons, (505) 982-3610 or esimons@rubinkatzlaw.com. Provide $1, your name and bar number and receive 1.0 general CLE Credit.

Second Judicial District Court
Children’s Court Monthly Judges’ and Managers’ Meeting

The Second Judicial District Children’s Court will hold its monthly judges’ and managers’ meeting at noon, June 7 in the jury room, John E. Brown Juvenile Justice Center, 5100 Second St. NW, Albuquerque. Children’s Court judges and managers of court-related agencies will meet to discuss ongoing concerns and projects. For a copy of the meeting agenda, call (505) 841-7644.

Destruction of Exhibits: Criminal and Children

Pursuant to the Supreme Court ordered Judicial Records Retention and Disposition Schedules, the Second Judicial District Court will destroy exhibits filed with the court in the criminal cases for years 1980 to 1991, and children cases for years 1985 to 1989, included but not limited to cases which have been consolidated. Cases on appeal are excluded. Exhibits may be retrieved from now until July 16. Attorneys who have cases with exhibits should verify exhibit information with the Special Services Division, at 841-7596/7405, from 8 a.m. to noon, and from 1 to 5 p.m., Monday through Friday. Plaintiff exhibits will be released to counsel of record for the plaintiff(s) and defendant exhibits will be released to counsel of record for the defendant(s) by order of the court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed.

Destruction of Tapes: Domestic Relations

Pursuant to the Supreme Court ordered Judicial Records Retention and Disposition Schedule, the Second Judicial District Court will destroy tapes and logs filed with the court in domestic relations cases for years 1971 to 1986, included but not limited to cases that have been consolidated. Cases on appeal are excluded. Attorneys who have cases with tapes and logs, and wish to have duplicates made, should verify tape and log information with the Special Services Division, (505) 841-6717, from 8 a.m. to noon, and from 1 to 5 p.m., Monday through Friday. Aforementioned tapes will be destroyed after June 12.

Family Court Open Meetings

Second Judicial District Family Court judges will hold open meetings to discuss ongoing concerns and projects at noon on the first business Monday of each month in the Conference Center located on the second floor of the Bernalillo County Courthouse. The next regular meeting will be held on June 6. Contact Sandra Partida, (505) 841-7531, for more information or to have an item placed on the agenda.
Third Judicial District Court Judicial Vacancy

A vacancy on the Third Judicial District Court exists as of May 30 upon the resignation of the Hon. Grace B. Duran. The chair of the Third Judicial District Nominating Commission solicits 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 is 5 p.m., June 6. Applications received after that date are not accepted.

STATE BAR NEWS

Attorney Support Group Monthly Meeting

The next Attorney Support Group meeting will be held at 5:30 p.m., June 6 at the First United Methodist Church at Fourth and Lead SW in Albuquerque. The group meets regularly on the first Monday of each month.

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

Lawyers Assistance Committee

Wanted: Lawyers in Recovery in Las Cruces

The Lawyers Assistance Committee is looking for attorneys in recovery in Las Cruces who are willing to make 12-Step calls. Attorneys who are able to help, call Bill Stratvert at (505) 242-6845.

Paralegal Division Brownbag CLE

Bring a lunch and join the Paralegal Division for their monthly CLE from noon to 1 p.m., June 8 at the State Bar Center. Registration begins at 11:30 a.m. and the cost is $16 for attorneys and $15 for paralegals, legal assistants and secretaries. The topic for this month's CLE is "Children's Law: A Survey," presented by Liz McGrath, co-director of Pegasus Legal Services for Children. For more information, contact Amy Paul, (505) 883-8181, apaul@obrienlawoffice.com, or Cheryl Passalaqua, (505) 890-6089, cpassa@usa.net.

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. For questions about compliance with the rule, please contact Richard Spinello, Esq., Director of Public and Legal Services, State Bar of New Mexico, (505) 797-6050, (800) 876-6227, or rspinello@nmbar.org.

Public Law Section Board Meeting

The next Public Law Section board meeting will be held at noon, June 9 in the Risk Management Division Legal Bureau Conference Room on the first floor of the Montoya Building, 1100 St. Frances Dr., Santa Fe. Contact Deborah Moll, (505) 827-2000, for more information.

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.

Technology Utilization Committee

Tech Up! Court Forms Reviewed

A review of the forms available through the New Mexico Supreme Court's Web site, their quirks and some tips on use will be addressed from 5 to 6 p.m., June 23 at the State Bar Center. The presentation is one of the Technology Committee's ongoing, free series of workshops. The class is limited to 11 attendees. Reservations should be made to CLE Program Coordinator Mary Patrick, mpatrick@nmbar.org or (505) 797-6059. CLE credit will not be provided.

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. “Miranda in a Post-911 Climate” will be the topic of guest speaker 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 "Appeal Late Update" with Ed Ricco of Rodey Law Firm and Tom Bird of Kleeheger & 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 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 on Sept. 6 those attorneys who serve and have served in the U.S. military. 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, abqbar@abqbar.com, Kathy Brandt, kathybrandt@qwest.net, or call (505) 842-1151. These service personnel and veterans need not be members of the Albuquerque Bar Association to participate.

Hispanic National Bar Association

30th Annual Convention

Alan M. Varela, president of the Hispanic National Bar Association has announced the 30th Annual HNBA Convention in Washington D.C. at the Mandarin Oriental Hotel Oct. 16 to 20. The convention provides an opportunity to network with hundreds of the most influential Hispanics...
in the nation and will include world-class legal education seminars focusing on crucial issues facing the legal profession and the nation. On Oct. 19 a professional job fair will be held for law students and experienced attorneys seeking employment with Fortune 500 corporations and the nation’s most prestigious law firms. “Unidos in Washington” will feature social events at various venues, such as the Mexican Cultural Institute for a “Taste of Latin America and the Caribbean.”

Registration for the convention can be found at the HNBA Web site, www.hnba.com, and completed entirely online. The convention is open to all interested legal professionals. There are special discounted rates for HNBA members as well as those who sign up for the early bird rate now until Aug. 31. Job fair employers may also register online at the HNBA Web site for the job fair. The registration fee for job employers includes day passes for two interviewers, prominent listing in the convention program book and one full day of interviews with one of the highest caliber talent pools in the United States. The HNBA is a non-profit, national association that represents the interests of over 27,000 Hispanic American attorneys, judges, law professors, law students and legal professionals throughout the United States and Puerto Rico. For more information go to www.hnba.com or contact the HNBA Washington office, (202) 223-4777.

**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**

**Dismas House Fundraising Party**

Come out and party for a great cause. Dismas House is a non-profit organization assisting motivated adults on probation and parole to transition successfully into society. The organization is hosting a fundraising party at Scalo, in the Nob Hill Business Center, from 5 to 8 p.m., June 12. There will be great food, live music and a cash bar. Tickets are $20, with 100 percent of the proceeds going to Dismas House. To purchase tickets, call Dismas House, (505) 343-0746, or visit Scalo at 3500 Central SE, Albuquerque.

**NM Board of Social Work Examiners Attorney Position Available**

The NM Board of Social Work Examiners is seeking to fill an attorney position on its board that meets six times per year. Attorneys interested in being appointed should contact Vedra Baca, (505) 476-4890.

**NM Center on Law and Poverty Statewide Legal Services Training 2005**

The NM Center on Law and Poverty has announced its annual Statewide Legal Services Conference, a training that addresses poverty law issues. The conference will be held June 22 and 23 at the State Bar Center. The conference will feature a keynote address from Chief Justice Richard C. Bosson of the New Mexico Supreme Court. Training seminars on ethics and professionalism will also be offered. The
conference will feature introductory courses for new attorneys, sessions for support staff, and advanced training on substantive topics of law. Topics to be covered include: consumer law, family law, Medicaid, fair hearings, investigative and discovery techniques, housing law, injunctive relief, and much more. For more information, including how to register for the event, visit www.nmpovertylaw.org or contact Stacey Leaman, (505) 255-2840, stacey@nmpovertylaw.org. CLE credit is pending.

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.

UNM Law Library
Summer Hours
Law Library hours through Aug. 21:
Mon. – Thurs. 8 a.m. to 9 p.m.
Fri. 8 a.m. to 6 p.m.
Sat. 9 a.m. to 6 p.m.
Sun. noon to 9 p.m.

Reference:
Mon. – Fri. 9 a.m. to 6 p.m.
Sat. noon to 4 p.m.
Sun. noon to 4 p.m.

Exceptions:
July 4 Closed

Web Corner
www.nmbar.org
Logging-In
By Veronica Cordova
SBNM Webmaster
This is the first monthly column about the State Bar’s Web site. Many improvements have been made to the site over the years, since its inception in 1997, and it continues to be a work in progress. Improving features, functionality and user friendliness have been key to making the site a practical tool to members and the public.

Each column will address certain features, functionalities or highlight particular areas of the site so visitors can explore the wealth of resources that have been made available.

The first item that I would like to address is the login process. All members of the State Bar have a login that they’re required to use when they wish to pay online for fees or CLE registration, participate in discussion forums, access restricted content, access a personalized area on the site, or to change their address of record.

The login consists of the following:
username = Bar ID number

and
password = last name.

Your password can be changed at any time if so desired.

Since a Bar ID number serves as a username, it is important to keep this information confidential. The State Bar does not print your Bar ID number on any correspondence nor do we disclose private information to anyone.

If you do forget your ID number and wish to access the site, call (505) 797-6039 or e-mail webmaster@nmbar.org for assistance.

Comments and suggestions for continued improvement to the site are welcome and we look forward to informing our members with helpful tidbits of information so your experience on www.nmbar.org is productive and enjoyable. Look for this column next month for more on nmbar.org.
6 DaVinci Code of Scientific Evidence
Teleconference
TRT, Inc.
2.4 G
(800) 672-6253
www.trtcle.com

7 Basics of a New Mexico Divorce Case
VR - State Bar Center, Albuquerque Center for Legal Education of NMSBF
5.3 G, 1.0 E
(505) 797-6020
www.nmbar.org

7 Demystifying Employee Retirement Plans: Guidance for the Non-Specialist
Teleseminar
Center for Legal Education of NMSBF
1.2 G
(505) 797-6020
www.nmbar.org

8 2005 Professionalism: Lawyers Concerned for Lawyers
VR - State Bar Center, Albuquerque Center for Legal Education of NMSBF
2.0 P
(505) 797-6020
www.nmbar.org

8 Burden of Representing Financially-challenged Companies
Teleconference
TRT, Inc.
2.4 E
(800) 672-6253
www.trttele.com

8 Children’s Law: A Survey
Albuquerque
Paralegal Division of New Mexico
1.0 G
(505) 243-1443

8 Employee Discharge and Documentation in New Mexico
Teleconference
Lorman Education Services
2.4 G
(715) 833-3940
www.lorman.com

8 Oil and Gas Law
Roswell
Paralegal Division of New Mexico
1.0 G
(505) 622-6510

8 Ethics Excerpt from Effective Law Office Advertising, Technology Applications and Business Planning
VR - State Bar Center, Albuquerque Center for Legal Education of SBNM
1.3 E
(505) 797-6020
www.nmbar.org

8 Tax, Legal and Financial Planning Options for Small and Mid-sized Business Owners
Satellite Broadcast
Edward Jones
3.4 G
(314) 515-5791

9 2005 Professionalism: Lawyers Concerned for Lawyers
VR - Branigan Library, Las Cruces Center for Legal Education of NMSBF
2.0 P
(505) 797-6020
www.nmbar.org

9 Alimony
Las Cruces
Paralegal Division of NM
1.0 G
(505) 522-2338

9 What Puts Government Lawyers in a Class by Themselves
Teleconference
TRT, Inc.
2.4 E
(800) 672-6253
www.trttele.com

9 Workers Compensation in New Mexico
State Bar Center, Albuquerque
New Mexico Defense Lawyers Association
3.3 G
(505) 797 6021
www.nmbar.org

10-12 24-Hour Workplace Mediation Training
Albuquerque
Common Ground Mediation Services
27.6 G, 0.6 E
(505) 983-3344
www.commonground adr.org

10 Basics of a New Mexico Divorce Case
VR - Branigan Library, Las Cruces Center for Legal Education of NMSBF
5.3 G, 1.0 E
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www.nmbar.org

10 Coping with Sexual Predators Within the Profession
Teleconference
TRT, Inc.
2.4 E
(800) 672-6253
www.trtcle.com

13 Equal Justice: Investigating and Prosecuting Crimes Against Individuals with Disabilities
Las Cruces
New Mexico Coalition of Sexual Assault Programs
7.2 G
(505) 661-7345

13 Junk Science or Scientific Evidence?
Teleconference
TRT, Inc.
2.4 G
(800) 672-6253
www.trttele.com

14 Asset Protection
Teleconference
Lorman Education Services
1.8 G
(715) 833-3940
www.lorman.com

14 Child Custody and Visitation in New Mexico
Albuquerque
National Business Institute
6.7 G, 0.5 E
(715) 835-8525
www.nbi-sems.com
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<td>Personal Injury Case Evaluation and Intake - Make Your Accountant and Malpractice Insurer Happy</td>
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<td>Environmental Liability in Real Estate Transactions</td>
<td>Teleseminar Center for Legal Education of NMSBF</td>
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<td>(505) 797-6020</td>
<td><a href="http://www.nmbar.org">www.nmbar.org</a></td>
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<td>(800) 672-6253</td>
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<td>Teleconference Lorman Education Services</td>
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<td>(715) 833-3940</td>
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<td>16</td>
<td>Managing Absent Employees So It Doesn’t Make You Absent-minded</td>
<td>Teleconference TRT, Inc.</td>
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<td>(800) 672-6253</td>
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<td>16</td>
<td>Overtime Requirements and Exemptions in New Mexico</td>
<td>Lorman Education Services</td>
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<td>17</td>
<td>Third Annual Tax Symposium</td>
<td>State Bar Center, Albuquerque Taxation Section and Center for Legal Education of NMSBF</td>
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<td>(505) 797-6020</td>
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<td>18</td>
<td>Equal Justice: Investigating and Prosecuting Crimes Against Individuals with Disabilities</td>
<td>Gallup New Mexico Coalition of Sexual Assault Programs</td>
<td>7.2 G</td>
<td>(505) 661-7345</td>
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<td>Equal Justice: Investigating and Prosecuting Crimes Against Individuals with Disabilities</td>
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<td>(505) 661-7345</td>
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<td>20</td>
<td>Fundamentals of Water Law in New Mexico Protecting Water Rights Use and Quality</td>
<td>Albuquerque National Business Institute</td>
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<td>(715) 835-8525</td>
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<td>Legal Resources on the Web: Inexpensive Ways to Meet a Newly Emerging Research Standard of Competence</td>
<td>Silver City Center for Legal Education of NMSBF</td>
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<td>21</td>
<td>The Quality of Justice</td>
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G = General  E = Ethics  P = Professionalism  VR = Video Replay

Programs have various sponsors; contact appropriate sponsor for more information.
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**July**

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<td>5</td>
<td>DUI in New Mexico: Practical Problems and Possible Solutions</td>
<td>6</td>
<td>June</td>
<td>Environmental Law Update</td>
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<td>5</td>
<td>Sanctions and the Goldilocks Test - Too Soft, Too Hard, or Just Right?</td>
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<td>June</td>
<td>The High Price of Billables</td>
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<td>What, Why and How Much?</td>
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**Bar Bulletin - June 6, 2005 - Volume 44, No. 22**
**WRITS OF CERTIORARI**

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

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

**EFFECTIVE JUNE 1, 2005**

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

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<td>State v. Lunares (COA 25,279)</td>
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<td>Peterson v. LeMaster (COA 25,062)</td>
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<td>State v. UU Bar Ranch (COA 23,418/24,055)</td>
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<td>NO. 29,226</td>
<td>Upton v. Clovis (COA 24,051)</td>
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<td>Belser v. Presbyterian Healthcare Svcs. (COA 24,380)</td>
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<td>State v. Maldonado (COA 23,637)</td>
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<td>HBS v. Aircos (COA 23,746)</td>
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<td>Beauvais v. Dickinson (COA 24,512)</td>
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**CERTIORARI GRANTED BUT NOT SUBMITTED:**

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<td>State v. Rodriguez (COA 23,455)</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 JUNE 1, 2005

CERTIORARI GRANTED AND SUBMITTED:
(Submission = date of oral argument or briefs-only submission)
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REMANDED TO DISTRICT COURT:

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UNPUBLISHED DECISION FILED:

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RULES/ORDERS

From the New Mexico Supreme Court

NO. 05-8110
IN THE MATTER OF THE ESTABLISHMENT OF THE COMMITTEE ON CONFIDENTIAL HEALTHCARE

ORDER

WHEREAS, the State Bar of New Mexico’s Lawyers Assistance Program provides confidential peer assistance to State Bar members in need of help because of alcohol and/or substance abuse, mental illness, or emotional distress;

WHEREAS, this Court recognizes that, generally, members of the judiciary may not seek out assistance from the Lawyers Assistance Program believing that availability is limited to members of the bar; and

WHEREAS, this Court being desirous of assuring that the benefits of the Lawyers Assistance Program are also made available to members of the judiciary, their staff and families, and the Court being sufficiently advised, Chief Justice Richard C. Bosson, Justice Pamela B. Minzner, Justice Patricio M. Serna, Justice Petra Jimenez Maes, and Justice Edward L. Chávez concurring;

NOW, THEREFORE, IT IS ORDERED that the Committee on Confidential Healthcare is established;

IT IS FURTHER ORDERED that the committee shall have as its primary objective the assistance of judges, their staff, and family to deal with stress, depression, alcohol, substance or other abuses. To accomplish this objective the committee shall, among other things, identify the resources available to provide such assistance; develop educational programs and materials to assist judges, staff, and families in (1) identifying issues concerning alcohol and/or substance abuse, mental illness, or emotional distress, (2) understanding what resources are available for such care, and (3) identifying the providers who are available to provide such healthcare;

IT IS FURTHER ORDERED that the committee shall make recommendations to this Court regarding appropriate orders or rules to further the committee’s objectives and the provision of confidential healthcare to judges, their staff, and family; and

IT IS FURTHER ORDERED that the following members hereby are appointed to serve on the Committee on Confidential Healthcare:

Justice Edward L. Chávez, Chair
Hon. Teddy L. Hartley
Hon. William F. Lang
Amy Plank
Dr. Samuel Roll
William K. Stratvert
Jill Anne Yeagley

IT IS SO ORDERED.

Done at Santa Fe, New Mexico, this 25th day of May, 2005.

Chief Justice Richard C. Bosson
Defendant appeals the district court order denying his motion to suppress the evidence obtained from a traffic stop. Defendant entered a conditional guilty plea to driving while intoxicated (DWI), reserving the right to appeal the denial of his motion to suppress. On appeal, Defendant argues that the traffic stop and his detention and arrest are illegal because Navajo Tribal Officer Franklin Begaye (Officer Begaye) lacked the power to act as a New Mexico peace officer with authority to enforce the Motor Vehicle Code on non-Indian land in the City of Gallup by virtue of NMSA 1978, § 29-1-11(C)(8) (2002). Defendant’s remaining arguments, challenging the legality of his stop, detention, and arrest, are all predicated on Officer Begaye’s lack of authority to act in the City of Gallup. We do not agree, however, with Defendant’s argument that Section 29-1-11(C)(8) precludes Officer Begaye from enforcing the law as a commissioned deputy in Gallup. Mindful of Defendant’s burden to demonstrate error on appeal and considering only those arguments properly raised and developed in Defendant’s briefs, we hold that Defendant failed to establish error. On these grounds, we affirm the district court’s denial of the motion to suppress the evidence.

FACTUAL AND PROCEDURAL BACKGROUND

Officer Begaye was uniformed, on duty, and driving his squad car through the City of Gallup, not his usual area of patrol, when he observed a white vehicle traveling off a highway exit. The vehicle pulled out in front of Officer Begaye, who had to swerve to avoid a collision as he was traveling through an intersection. Officer Begaye followed the vehicle and noticed that it was not traveling safely in one lane. In response, Officer Begaye turned on his squad car’s emergency lights and followed the vehicle, which eventually pulled over and stopped. Officer Begaye then contacted the City of Gallup Metro Dispatch for assistance and exited his squad car to investigate the driver for possible drunk driving. The driver, identified as Defendant, gave Officer Begaye his driver’s license, registration, and proof of insurance. Officer Begaye smelled the odor of intoxicating liquor on Defendant’s breath and noticed that Defendant’s eyes were red and watery, and observed clues from the field sobriety tests indicating that Defendant was intoxicated. Believing that Defendant was intoxicated over the legal limit for operating a motor vehicle, Deputy Justice arrested Defendant and transported him to the McKinley County Detention Center.

Defendant moved to suppress the evidence, challenging the legality of the stop and arrest on the grounds that Officer Begaye lacked authority to stop and detain him in Gallup. The district court denied the motion without entering findings and conclusions. Defendant plea’d guilty to DWI, reserving the right to appeal the denial of his motion to suppress.

DISCUSSION

On appeal, Defendant’s brief in chief asserts several grounds on which the stop, detention, and arrest of Defendant are illegal, all
based on the notion that Officer Begaye is not duly commissioned to act as a New Mexico peace officer with authority to enforce the Motor Vehicle Code in Gallup. The brief in chief asserts only one basis to challenge Officer Begaye’s claimed commissioned authority. Defendant argues that Section 29-1-11(C)(8) expressly precludes tribal officers from exercising commissioned law enforcement authority in the City of Gallup. Defendant makes this argument while apparently conceding that Officer Begaye was properly commissioned as a deputy sheriff. It is undisputed that Officer Begaye testified that he was commissioned as a deputy sheriff and produced his commission card in court. The brief in chief states, “Sheriff Gonzales testified that the cross-commissioned officers (deputies) had the authority to do [respond to] a traffic offense or a domestic violence matter within the City of Gallup, but the authority granted did not ‘create or supercede any statutes.’” (Brackets in original.) It also states, “The factual issue of whether Officer Begaye is, in fact, a cross-commissioned officer does not resolve the issue of the legality of his motor vehicle stop. Even if Officer Begaye was a cross-commissioned officer, he lacked authority to stop and arrest [Defendant] based solely on the location of the stop.”

[6] In response, the State argues that Section 29-1-11 governs only agreements between New Mexico tribes and the New Mexico State Police. The State contends, as it did below, that Officer Begaye was cross-commissioned, not by the state police, but by the McKinley County Sheriff’s Office, which has law enforcement jurisdiction over the City of Gallup.

[7] At district court, much of the parties’ debate concerned Officer Begaye’s claimed authority as a cross-commissioned county deputy. Nevertheless, Defendant failed to argue against this basis for affirmance in his brief in chief. Rather, in his reply brief, Defendant presents a cursory and poorly articulated argument, unsupported by authority, suggesting that our statutes do not expressly give county sheriffs cross-commissioning power, and his reply brief continues his brief in chief argument, relying on Section 29-1-11, that “Officer Begaye could not have acted as a New Mexico peace officer in the Municipality of Gallup, whether cross-commissioned or not.” See Rule 12-213 NMRA; State v. Druktenis, 2004-NMCA-032, ¶ 122, 135 N.M. 223, 86 P.3d 1050 (refusing to reach an issue raised for the first time in a reply brief), Largo v. Atchison, Topeka & Santa Fe Ry. Co., 2002-NMCA-021, ¶ 31, 131 N.M. 621, 41 P.3d 347 (refusing to reach an issue raised for the first time in a reply brief where it deprives opposing party the opportunity to respond); see also State v. Southworth, 2002-NMCA-091, ¶ 53, 132 N.M. 615, 52 P.3d 987 (refusing to reach the defendant’s cursory Fourth Amendment argument presented without citation to authority or explanation). Defendant’s conclusory assertion in his reply brief and his failure to argue against affirmance on these grounds in his brief in chief, drains the State of an effective rebuttal as contemplated by the rules, is not sufficient to present the issue for our review or to demonstrate error. Thus, we need not consider the assertion concerning cross-commissioning by county sheriffs further. See, e.g., Klopp v. Wackenhut Corp., 113 N.M. 153, 162 n.6, 824 P.2d 293, 302 n.6 (1992) (noting that where a party “for the most part has directed her argument” to a specific point, the Court elected not to consider other matters “without the benefit and guidance of briefing”).

[8] For these reasons, we limit our review to Defendant’s argument challenging Officer Begaye’s authority to act as a cross-commissioned peace officer in Gallup under Section 29-1-11(C)(8), and we do not decide whether Officer Begaye was duly commissioned as a county deputy under a different statutory provision. Accordingly, our inquiry on appeal is a narrow question of statutory construction. We review this pure question of law de novo. See State v. McClendon, 2001-NMSC-023, ¶ 2, 130 N.M. 551, 28 P.3d 1092.

[9] Our Supreme Court has stated that “[t]he starting point in every case involving the construction of a statute is an examination of the language utilized by [the Legislature] in drafting the pertinent statutory provisions.” State v. Rivera, 2004-NMSC-001, ¶ 10, 134 N.M. 768, 82 P.3d 939 (internal quotation marks and citations omitted). “Under the plain meaning rule of statutory construction, ‘[w]hen a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation.”’ Id. (citation omitted). Also, where the statute contains several sections, we read them together in a manner that gives effect to all parts. See High Ridge Hinkle Joint Venture v. City of Albuquerque, 1998-NMSC-050, ¶ 5, 126 N.M. 413, 970 P.2d 599.

[10] Defendant correctly observes that Section 29-1-11 is a statute that authorizes tribal and pueblo officers, not otherwise permitted, to act as New Mexico peace officers pursuant to commission agreements. See § 29-1-11(A), (B); see also Russell G. Donaldson, Annotation, Validity, in State Criminal Trial, of Arrest Without Warrant by Identified Peace Officer Outside of Jurisdiction, When Not in Fresh Pursuit, 34 A.L.R.4th 328, 332-33 (1984) (recognizing that, without authorization, whether statutory or otherwise, an officer may not stop or apprehend a suspect in an official capacity outside the territorial boundaries of his or her jurisdiction). We agree with the State’s arguments, however, that Section 29-1-11 involves only commissions issued by the state police and does not apply to Officer Begaye’s claimed commission by the county sheriff.

[11] Section 29-1-11(B) states the following:

The chief of the state police is granted authority to issue commissions as New Mexico peace officers to members of the police or sheriff’s department of any New Mexico Indian tribe or pueblo or a law enforcement officer employed by the bureau of Indian affairs to implement the provisions of this section. The procedures to be followed in the issuance and revocation of commissions and the respective rights and responsibilities of the departments shall be set forth in a written agreement to be executed between the chief of the state police and the tribe or pueblo or the appropriate federal official.

(Emphasis added.) Tribal officers, duly commissioned by the chief of the state police pursuant to a written agreement under Section 29-1-11(B), may be “recognized and authorized to act as New Mexico peace officers … to enforce state laws in New Mexico, including the power to make arrests for violation of state laws.” Section 29-1-11(A). Section 29-1-11(C) imposes conditions on the commission agreements “referred to in [Section 29-1-11(B)],” including the condition that “[t]he municipalities of Cuba and Gallup and the villages of Thoreau and Prewitt are excluded from the grant of authority that may be conferred in any written agreement.” Section 29-1-11(C)(8). Reading these subsections together, we apply their plain meaning and construe them to govern commissions issued only by the chief of the state police, including the exclusion of Gallup from the grant of cross-commissioned authority. Because Officer Begaye claims to have been deputized by the McKinley County Sheriff, we hold that Section 29-1-11(C)(8) does not defeat his claimed authority to act as a cross-commissioned county deputy. Therefore, we hold that Defendant has not met his burden of demonstrating error. See State v. Aragon, 1999-NMCA-060, ¶ 10, 127 N.M. 393, 981 P.2d 1211 (recognizing that there is a presumption of correctness in the rulings of the trial court, and the party claiming error bears the burden of showing such error).
OPINION

RODERICK T. KENNEDY, JUDGE

{1} Alliance Health of Santa Teresa, Inc. and its affiliates (Alliance) appeals the district court’s dismissal of its claim for monetary damages against Defendants National Presto Industries, Inc. (National Presto) and The Araz Group (Araz) (collectively, Defendants). In the course of litigation, dismissals of various claims against Defendants occurred at different times. Despite an early dismissal of claims against Araz, Araz continued to act as a party in the case, and we hold that its active role in the proceedings preserved Alliance’s ability to timely appeal.

{2} In this opinion, we hold that a third-party healthcare provider is not preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1144 (2000) (ERISA), from seeking payment of claims based on theories sounding in contract and promissory estoppel under state law. In short, where such a party alleges that the insurer or its agent promised payment of claims to a provider, that promise stands independently, and can support a lawsuit that ERISA does not preempt to collect the promised funds. Accordingly, we reverse the grant of Defendants’ motions to dismiss Alliance’s state law claims owing to ERISA preemption, and remand for further proceedings.

{3} The controversy in this case is whether National Presto, Araz, or both, are obligated to pay for hospital services that Alliance rendered to a patient, and if so, how much.

{4} ERISA preemption has been generously called a “quagmire of conflicting precedent.” Forest Springs Hosp. v. Ill. New Car & Truck Dealers Ass’n, 812 F. Supp. 729, 733 (S.D. Tex. 1993). One commentator describes the area as one in which “courts cannot agree whether ERISA preempts [or does not preempt the cause of action] . . . ; in fact, they cannot even agree on how to analyze the issue.” Jay Conison, ERISA and the Language of Preemption, 72 Wash. U. L.Q. 619, 620 (1994). Against this less than promising history, we try to make clear one corner of the problem. We discern a pattern of law allowing courts to distinguish between the issues arising from ERISA-covered plans, plan principals, and plan administration, and those interests that are outside the perimeters of ERISA’s

Certiiorari Not Applied For

From the New Mexico Court of Appeals

Opinion Number: 2005-NMCA-053

ALLIANCE HEALTH OF SANTA TERESA, INC.,
d/b/a ALLIANCE HOSPITAL OF SANTA TERESA
and ALLIANCE BEHAVIORAL HEALTH SERVICES
OF SOUTHERN NEW MEXICO, INC. d/b/a THE
ADOLESCENT POINTE, ARTC,
Plaintiffs-Appellants,
versus
NATIONAL PRESTO INDUSTRIES, INC. and THE ARAZ
GROUP, JOHN DOE NO. 1, MARY ROE, and JOHN DOE NO. 2,
Defendants-Appellees.
No. 23,301 (filed March 29, 2005)

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
Jerald A. Valentine, District Judge

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The question with which we are presented is whether a third-party health care provider such as Alliance can maintain an action under state law against entities that provide and administer health insurance for services provided to an insured based on the insurer’s promises to pay or whether such state claims are preempted by ERISA.

{12} The remainder of the arguments that were properly raised in Defendant’s brief in chief presume that he successfully challenged Officer Begaye’s authority to stop and detain Defendant by operation of Section 29-1-11(C)(8). Because we reject Defendant’s reading of the statute, we need not reach Defendant’s remaining arguments.

CONCLUSION

{13} For the reasons discussed above, we affirm the district court’s denial of Defendant’s motion to suppress the evidence.

{14} IT IS SO ORDERED.
LYNN PICKARD, Judge

WE CONCUR:
JONATHAN B. SUTIN, Judge
CELIA FOY CASTILLO, Judge
The remaining question of agency kept the potential claim against Araz alive.

1 Alliance also sued Doe 2 and his parents, although Alliance's claims against them are not at issue in this appeal.
ing agent’s authority to bind principal precludes summary judgment). Alliance’s complaint alleged quite clearly that Araz was acting as National Presto’s agent and benefits administrator throughout its transactions with Defendants concerning Doe 2’s treatment. The allegation that Araz was representing National Presto as its agent, with authority to bind National Presto to providing coverage under its plan to Doe 2, is accepted as true by us for purposes of reviewing the district court’s dismissal of the state law counts. See Padwa v. Hadley, 1999-NMCA-067, ¶ 8, 127 N.M. 416, 981 P.2d 1234. It is this agency by which Araz continued to recognize its possible liability as long as National Presto’s liability to provide coverage was still an active issue. National Presto’s liability under ERISA was not determined until May 2002; Araz’s possible liability continued as well.

Even After the February 2001 Dismissal, Araz Continued to Participate in the Case as If It Was a Party

{17} Araz’s continuing connection with the case does not rest on its possible liability alone. From February 2001 through the end of the case in June 2002, Araz continued to participate in the case and file pleadings in the district court. Araz responded to discovery, and in December 2001 filed a motion to dismiss for failure to prosecute. This was denied on December 17, 2001. Araz also filed a second motion to dismiss based on Alliance’s failure to prosecute on March 27, 2002.

{18} In its motion to dismiss filed on December 13, 2001, Araz sought dismissal of the case against it for failure to prosecute. In that motion, it asserted that it had answered interrogatories, arranged depositions, and had received correspondence alleging failure to answer interrogatories from Alliance—all after the dismissal of the counts against it on February 26, 2001. In that motion, it sought dismissal of all claims against it with prejudice, even though the counts in which Araz itself was named were dismissed on February 26, more than nine months previously. Araz then filed a second certificate of service to Alliance’s interrogatories on December 19, 2001, and a scheduling report on December 28, in which it listed its witnesses for trial, stated that its discovery would take another five to six months, and further stated its intention to “[pursue] summary judgment” of the “remaining claims against the corporate defendants.”

{19} Clearly, Araz was acting as if it were still a party to the action with a need to defend against Alliance’s claims. Araz’s continued participation in the case in discovery might well be consistent with a party who had been dismissed from a case but was still a witness. Araz’s filing of the second motion to dismiss for failure to prosecute in March 2002, a motion to extend the mediation deadline filed the same day, and in May 2002, another motion to dismiss following National Presto’s successful motion for summary judgment, all speak to Araz’s understanding that it was not finished with the suit—or more accurately, that the suit was not finished with Araz. Araz further filed a letter in support of National Presto’s motion for summary judgment attempting to draw the district court’s attention to relevant case law supporting ERISA preemption of claims resulting from modification of health care plan terms.

{20} This is not the behavior of a party who has been dismissed from a suit almost a year and a half previously. Araz’s pleadings recognize possible continued liability in the case should it be found to have operated as National Presto’s agent while dealing with Doe 2. Arguing for dismissal on the merits of the claim indicates to us that Araz considered itself a functioning defendant in the case, even if the counts against it had, as it said, “technically” been dismissed in February 2001.

The February 26, 2001, Order Was Not a Final Order

{21} Despite its activity and seeking a dismissal of “all claims” against it in December 2001, Araz argues that the order of February 26, 2001, was a final order as to all claims against it, and that Alliance’s appeal is therefore not timely. Alliance responds that the February 26, 2001, order dismissing state law claims against Araz based on ERISA preemption was not a final order under Rule 1-054 NMRA. We agree with Alliance, and hold that the dismissal of the case was not final until May 2002 when all claims against Araz and National Presto were finally dismissed.

{22} Furthermore, the order of dismissal entered by the district court in February 2001 was not a final order in the case. It did not resolve all claims in the case against Araz under Rule 1-054. Given the continued participation of Araz, and the trial court’s specific finding of jurisdiction over Araz, the issue of Araz’s liability as an agent of National Presto was one that could still be litigated up to the point of the dismissal of Count VI claiming benefits of National Presto under ERISA should Araz’s agency become an issue. Given the actions of the parties, the policy behind hearing appeals on the merits, where it can be done without impeding or confusing administration or perpetrating injustice.”Trujillo v. Serrano, 117 N.M. 273, 276, 871 P.2d 369, 372 (1994) (internal quotation marks and citation omitted). Here, Araz’s active participation in the case, including seeking “final” dismissals for lack of prosecution and as a result of dismissal of the ERISA claim against National Presto that laid to rest the question of its liability as an agent, all recognize that Alliance’s claims still carried potential impact on Araz’s rights. Araz’s clear acknowledgment of this fact to the district court reinforces our decision in this regard.

The Appeal Was Timely

{24} The May 28, 2002, order of dismissal by its own terms dismissed “all claims against [Araz]” with prejudice. We hold that order to be the final, appealable order as to claims against Araz. By filing its appeal on June 26, 2002, Alliance timely filed its appeal of the order dismissing Araz as a defendant in this case.

II. The District Court Erred in Ruling that Alliance’s State Law Claims Brought Against Defendants are Preempted by ERISA

Standard of Review and Background

{25} The district court dismissed Alliance’s promissory estoppel, fraud, and breach of contract claims against National Presto and Araz. In doing so, the district court found that these state law claims were “preempted by [ERISA] as such claims affect the benefits and administration of the Plan.” “Whether Defendants were entitled to judgment as a matter of law based on federal preemption is a legal question we review de novo.” Largo v. Atchison, Topeka & Santa Fe Ry., 2002-NMCA-021, ¶ 5, 131 N.M. 621, 41 P.3d 347. “We interpret the intention of Congress and the meaning of its statutes de novo.” Palmer v. St. Joseph Healthcare P.S.O., Inc., 2003-NMCA-118, ¶ 17, 134 N.M. 405, 77 P.3d 560, cert. granted, 134 N.M. 374, 77 P.3d 278 (2003). Furthermore, in reviewing a motion
to dismiss, “all well-pleaded factual allegations” are accepted as true, and all doubts are resolved “in favor of the sufficiency of the complaint.” Padwa, 1999-NMCA-067, ¶ 8. The only question is “whether the plaintiff might prevail under any state of facts provable under the claim.” N.M. Life Ins. Guar. Ass’n v. Quinn & Co., 111 N.M. 750, 753, 809 P.2d 1278, 1281 (1991); Valles v. Silverman, 2004-NMCA-019, ¶ 6, 135 N.M. 91, 84 P.3d 1056.

26 Alliance argues that it is entitled to reversal of the district court’s ruling that its state law claims are preempted by ERISA. It asserts that false or negligent representations of Doe 2’s coverage and promises of payment made by Araz, who was alleged to be National Presto’s agent or representative or both, bound National Presto to pay for services Alliance provided. It states that without such promises, Alliance would not have rendered medical services and would not thus have suffered financial injury. Alliance maintains that it relied in good faith upon Defendants’ misrepresentations that National Presto would pay for the services provided by Alliance. Alliance further argues that it is entitled to full payment for services from Defendants because it relied on Araz’s representations that services were medically necessary as a further guarantee that these services were covered by National Presto’s insurance plan.


28 Alliance asserts these claims under state law, asserting National Presto’s and Araz’s liability for misrepresenting the extent of Doe 2’s coverage, and that National Presto would pay. Defendants assert that to allow such an action to proceed would violate ERISA’s federal statutory preemption of actions under state law that relate to and affect benefit plan funds and their administration. Defendants also contend that dismissal of Alliance’s claims was proper because Araz is not an agent or representative of National Presto. This contention is outside the scope of our review. There was no ruling on the principal-agent issue as the district court dismissed the state law claims based on ERISA preemption. Although the record reflects that the issue concerning agency and the authority of Araz was discussed during the district court proceedings, facts concerning the relationship between National Presto and Araz were not fully developed, and there was no district court ruling on this factual issue. See J. A. Silversmith, Inc. v. Marchiondo, 75 N.M. 290, 293, 404 P.2d 122, 124 (1965) (stating that “matters not raised or brought into issue by the pleadings, and upon which no ruling of the trial court was invoked, are not preserved for review on appeal”).

29 Because we accept the allegations in Alliance’s complaint as true, we do not decide whether Araz was other than Alliance described, or if there are factual questions about Araz’s agency. Thus, for purposes of this appeal, we assume that Araz made representations to Alliance that Doe 2 was covered by National Presto’s plan, and that payment would be forthcoming for services Alliance rendered to Doe 2. We also assume that these representations were made by Araz as an agent of National Presto, and that both parties would be liable if these facts were proven at trial. The question, therefore, is simply whether the fraud, promissory estoppel, and breach of contract claims are preempted by federal law.

**ERISA PREEMPTION**

30 Although ERISA is federal legislation, Araz urges us to focus on New Mexico state case law for guidance on this preemption issue. It is true that we have some New Mexico cases concerning preemption and its relation to ERISA, and, of course, we take those cases into consideration. However, our case law recognizes that federal cases are more informative on these issues, and we also look to pertinent federal law for guidance. See Sonntag v. Shaw, 2001-NMCA-015, ¶ 27, 130 N.M. 238, 22 P.3d 1188 (stating that “[w]ithout binding New Mexico law to interpretations made by the federal courts of the federal statute,” we apply the guidelines articulated in the applicable federal law (internal quotation marks and citations omitted)).

31 Under the Supremacy Clause of the United States Constitution, U.S. Constitution article VI, clause 2, federal preemption of state law may be “explicitly mandated by Congress, compelled due to an unavoidable conflict between the state law and the federal law, or compelled because the state law is an obstacle to the full accomplishment of congressional objectives.” In re Timberon Water Co., 114 N.M. 154, 158, 836 P.2d 73, 77 (1992) (citation omitted). ERISA’s preemption provision, 29 U.S.C. § 1144(a), provides that the provisions of this Act “shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.” (Emphasis added.) Thus, we must decide whether Alliance’s state law claims “relate to” National Presto’s employer benefit plan because if they do, they are preempted.

32 The United States Supreme Court has interpreted the phrase “relates to” in a broad sense to include laws that have a “connection with or reference to such a plan.” Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 100 n.21 (1983); Lunn v. Time Ins. Co., 110 N.M. 73, 74, 792 P.2d 405, 406 (1990); Sappington v. Covington, 108 N.M. 155, 156, 768 P.2d 354, 355 (Ct. App. 1988). The scope of the ERISA preemption clause is thus “broad, [but] not in

Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996). There is a presumption against the preemption of state laws in areas of traditional state regulation and those laws that do not intrude on either ERISA’s general purpose or its preemption clause purpose. See, e.g., DeBucco v. NYS-ILA Med. & Clinical Servs. Fund, 520 U.S. 806, 815 (1997) (suggesting that where existence of a pension plan is not critical to a state law cause of action preemption would not apply); N.Y. State Conference v. Travelers Ins. Co., 514 U.S. 645, 659 (1995) (finding that mandatory state surcharges by hospitals on bills where insurance coverage was provided by ERISA plans were not preempted because they have only an “indirect economic influence” on employee plans); Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc., 519 U.S. 316, 325 (1997) (holding that “[w]here a State’s law acts immediately and exclusively upon ERISA plans . . . or where the existence of ERISA plans is essential to the law’s operation . . . that ‘reference’ will result in pre-emption”) (citations omitted) (hereinafter Dillingham).

{34} Construing the “relates to” language of the preemption clause is difficult. Dillingham refers to the “‘unhelpful text’ of ERISA’s pre-emption provision.” Id. at 324; see also Travelers Ins. Co., 514 U.S. at 655-56 (recognizing the problem of a too expansive reading of “relate to” and looking to Congress’s intent in creating the ERISA statute in order to interpret the scope of preemption); Conison, supra at 623-29. Because of this difficulty in interpreting the “relate to” language of 28 U.S.C. § 1144 to determine and measure the extent of the relation for purposes of preemption, we must look “to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive[,]” as well as to the nature of the effect of the state law on the ERISA plan. Travelers Ins. Co., 514 U.S. at 656 (acknowledging that the text of the ERISA preemption provision is unhelpful and looking to Congressional intent for guidance in the interpretation and application of that provision); Dillingham, 519 U.S. at 325 (looking both to ERISA’s objectives and to the nature of the state law’s effect on ERISA plans); Gonzalez v. Surgidev Corp., 120 N.M. 133, 139, 899 P.2d 576, 582 (1995) (“Thus we must look to the [federal] statute to determine whether it displaces state courts as forums for considering claims involving medical devices.”).

{35} ERISA was enacted to protect . . . the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

29 U.S.C. § 1001(b) (2000). Further, in enacting ERISA, Congress was concerned with the mismanagement of funds accumulated to finance employee benefits and the failure to pay employees benefits from accumulated funds. . . . It established extensive reporting, disclosure, and fiduciary duty requirements to insure against the possibility that the employee’s expectation of the benefit would be defeated through poor management by the plan administrator.

Dillingham, 519 U.S. at 326-27 (internal quotation marks and citation omitted).

{36} To this end, the preemption language in 29 U.S.C. § 1144 indicates Congress’s intent to establish the regulation of employee welfare benefit plans “as exclusively a federal concern.” Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523 (1981). This preemption section of the ERISA statutory framework shows Congress’s intent to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government . . . [and to prevent] the potential for conflict in substantive law . . . requiring that tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction.

Travelers Ins. Co., 514 U.S. at 656-57 (internal quotation marks and citation omitted) (alterations in original). “The basic thrust of the pre-emption clause, then, was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans.” Id. at 657.

{37} We keep in mind that the purpose of ERISA was to nationally standardize the relationships between participants and beneficiaries in employee benefit plans, and to provide ready access to the federal courts for those who had disputes. Prior to ERISA, the lack of such standardization and proliferation of state laws and regulations had a serious impact upon the insurance industry that in turn had a negative impact upon the consumer. The authority to preempt state actions that relate to an employee benefit plan was broad, but with one singular exception. “Some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law ‘relates to’ the plan.” Shaw, 463 U.S. at 100 n.21. In the ensuing years of litigation filling in the blanks that Shaw left behind, the lower federal courts have been left to sort out its language with mixed results. See Jeffrey A. Brauch, Health Care Providers meet ERISA: Are Provider Claims for Misrepresentation of Coverage Preempted?, 20 Pepp. L. Rev. 497, 500 (1993).

Tests for What “Relates to” a Plan

{38} “Relation to” an ERISA plan has been held to exist if the law “has a connection with or reference to such a plan.” Lunn, 110 N.M. at 74, 792 P.2d at 406 (internal quotation marks and citation omitted). Although Lunn recognized a federal intention to interpret preemptive clauses broadly, it recognized that certain claims under state law are not preempted. Id. In its answer brief, National Presto characterizes Alliance’s claim in Count VI for payments of benefits under ERISA as Doe 2’s surrogate as one that “attempted to advance . . . an equitable estoppel/detrimental reliance claim, not a claim based upon any actual benefit provided by the Plan.” It is precisely this problem—what is not a claim “related to” a benefit plan—with which we are concerned here.

{39} We agree with Defendants to the extent that if Alliance were attempting to stand in the shoes of Doe 2 to collect benefits to which the plan entitled him, such causes of action would be preempted by ERISA. It is expressly for this reason that the dismissal of Alliance’s claim under ERISA for payment of benefits to which Doe 2 was entitled was properly based on ERISA preemption. Clearly such a claim directly “relates to” the relationship between plan principals (insurer, insured/beneficiary, fiduciaries), seeks a construction of what is available to Doe 2 under terms of the plan by inserting the third-party provider as a surrogate for the beneficiary, and
seeks to challenge the internal administration of claim evaluation and benefit payment under the plan itself. These three considerations unequivocally trigger ERISA preemption. It should be noted that this discussion is illustrative only, as Alliance does not contest the dismissal of its claim pursuant to ERISA.

40] Defendants attempt to characterize Counts I-III in this case as ones that are preempted by ERISA because Alliance seeks to collect benefits as little more than a proxy of Doe 2’s rights as a plan beneficiary. Looking at it through the lens suggested above, National Presto’s argument that the ERISA action is not “a claim based upon any actual benefit provided by the Plan” will ultimately be dispositional of the issues concerning state law claims.

41] In the federal circuits, a minority and majority view has developed of preemption where, as here, a provider is basing its action on state causes of action amounting to claims arising from misrepresentation of the existence or extent of benefits by a plan or its agents. Defendants rely on Cromwell v. Equi-Care-Equitable HCA Corp., 944 F.2d 1272 (6th Cir. 1991), which represents the minority view. In Cromwell, a provider of home health care had called the administrator of the plan, allegedly receiving verification of coverage for such services. Id. at 1274-75. The provider paid for a time, but then the administrator learned that the plan did not actually cover the services and stopped paying claims, though it did not notify the provider until some two and a half months later that it would no longer pay. Id. at 1275. The provider sued in state court alleging breach of contract, promissory estoppel, negligence, and breach of the duty of good faith. Id. The administrator removed the case to federal court, where it was dismissed as preempted by ERISA. Id. The Sixth Circuit affirmed, rejecting the “tenuous or peripheral effect” argument of the provider, holding instead that the goal of the action was no more than to seek the recovery of an ERISA plan benefit due its patient. Id. at 1275-76. The court further held that to allow such recovery would affect the relationship between plan principals by allowing recovery of what essentially would be a plan benefit. Id. at 1276. This position has been called “extreme.” Scott C. Walton, ERISA Preemption of Third-Party Provider Claims: A Coherent Misrepresentation of Coverage Exception, 88 Iowa L. Rev. 969, 983 (2003). The dissent in Cromwell, however, looked to the Fifth Circuit’s Memorial Hospital System v. Northbrook Life Insurance Co., 904 F.2d 236 (5th Cir. 1990) (hereinafter Memorial Hospital), and would hold that provider misrepresentation actions do not involve a claim under the plan, but rather a claim brought because there is no coverage under the plan, which does not affect the relations among the ERISA plan principals. Cromwell, 944 F.2d at 1283-84.

42] Viewing the goal of the action and whether litigation affects the relationships between plan principals are but two of at least six tests that are used by the courts to resolve questions involving the possible ERISA preemption of provider claims for damages against plans for what is essentially misrepresentation by plans or their agents concerning benefit availability or promises to pay to the provider upon which the provider relies. In general, these factors are (1) the goal of the action; (2) the administrative effect of an application of state law; (3) economic impact on the plan; (4) the role of the plan document in the litigation; (5) the effect of applying state law on the relationship between the principal ERISA entities, namely the employer, plan, fiduciary, and beneficiary; and (6) the existence of a remedy to the plaintiff. Brauch, supra, at 501-11.

43] Not all factors apply to all cases. We find the four questions set forth in Walton to be a sensible operational blend of these factors when looking at this issue.

The first question in this paradigm asks whether the provider is suing derivatively or upon a significant independent relationship breached by the plan or its administrators. The second inquiry examines whether finding no preemption would substantially negate an express plan provision. Third, the court should consider whether the economic impact of the claim upon the plan is so substantial and direct as to require preemption. Finally, the analysis inquires whether allowing preemption substantially alters the relationships between the participants, the beneficiaries, the employer, the plan’s fiduciaries, and the plan itself. Walton, supra, at 988-89.

44] It is the Fifth Circuit’s decision in Memorial Hospital that forms the basis for the majority view that claims such as Alliance’s are not preempted, and which we follow in this case. 904 F.2d 236. Memorial Hospital further distilled the application of preemption to two situations where: “(1) the state law claims address areas of exclusive federal concern, such as the right to receive benefits under the terms of an ERISA plan; and (2) the claims directly affect the relationship among the traditional ERISA entities—the employer, the plan and its fiduciaries, and the participants and beneficiaries.” Id. at 245. The Fifth Circuit concluded that a suit for misrepresentation of the existence of coverage by a provider fits neither category where the provider was asserting its state law claim as an independent, third-party provider of medical services. Cypress Fairbanks Med. Ctr. Inc. v. Pan-Am. Life Ins. Co., 110 F.3d 280, 283 (5th Cir. 1997).

45] The effect of applying state law to plans and their administrators and the effect that application might have on the interests ERISA seeks to protect by preemption—plan terms, plan administration, and the relationships between ERISA-covered principals—determines the extent to which such claims may trigger preemption. Although Defendants attempt to distinguish the federal cases which have held that under certain circumstances state law claims are not preempted, we are unpersuaded by these arguments. We follow the reasoning used in the federal court cases which have considered this issue in similar situations, allowing third parties to bring state law claims. See, e.g., In Home Health, Inc. v. Prudential Ins. Co., 101 F.3d 600, 602 (8th Cir. 1996) (reversing the district court’s finding that a provider’s “claim for negligent misrepresentation based on state law was preempted by ERISA”); The Meadows v. Employers Health Ins., 47 F.3d 1006, 1007 (9th Cir. 1995) (affirming the district court’s finding that ERISA did not preempt the provider’s claims for “negligent misrepresentation, estoppel, and breach of contract arising out of an inquiry concerning coverage”); Airports Co. v. Custom Benefit Servs., 28 F.3d 1062, 1063 (10th Cir. 1994) (reversing the district court’s finding of ERISA preemption because it found that the claims did not “relate to an ERISA plan”); Lordmann Enters., Inc. v. Equi-Care, Inc., 32 F.3d 1529, 1530, 1532-33 (11th Cir. 1994) (holding that ERISA did not preempt a provider’s negligent misrepresentation claim); Hospice of Metro Denver, Inc. v. Group Health Ins., 944 F.2d 752, 756 (10th Cir. 1991) (per curiam) (holding that a provider’s state common law claim for promissory estoppel was not preempted by ERISA).

[C]ourts are more likely to find that a state law relates to a benefit plan if it affects relations among the principal ERISA
entities—the employer, the plan, the plan fiduciaries, and the beneficiaries—that if it affects relations between one of these entities and an outside party, or between two outside parties with only an incidental effect on the plan.

_Memorial Hospital_, 904 F.2d at 249 (internal quotation marks and citation omitted). The Tenth Circuit has recognized four categories of laws which have been preempted. _Airparts Co._, 28 F.3d at 1064-65. These categories include

- laws that regulate the type of benefits or terms of ERISA plans. Second, laws that create reporting, disclosure, funding, or vesting requirements for ERISA plans. Third, laws that provide rules for the calculation of the amount of benefits to be paid under ERISA plans. Fourth, laws and common-law rules that provide remedies for misconduct growing out of the administration of the ERISA plan.

Id. (internal quotation marks and citation omitted). Clearly, these relate directly to the internal workings and relationships of plan principals and participants. This case does not fall within these problem areas.

Alliance’s Claims Are Not Derivative of Doe 2’s Entitlement to Benefits

{46} Alliance contends that the law established by the Tenth Circuit has “firmly established that state law claims brought by a third party health care provider against the plan sponsor, plan administrator, and/or claims administrator of an ERISA governed group health employee benefit plan are not preempted by ERISA.” Alliance argues that it does not seek to claim any rights under the plan, nor does it contend that its state law causes of action seek to enforce or modify the terms of the plan. Rather, Alliance contends it seeks “damages for an independent cause of action separate and apart from the plan.”

{47} Here, Alliance seeks recovery for treatment rendered to Doe 2 that was promised but did not exist under the plan. As mentioned above, in commercial circumstances where federal law does not involve itself, misrepresentation as to insurance coverage or that benefits of a policy will be paid are legitimate claims for damages in New Mexico. In contrast, Alliance’s claim in Count VI of its complaint specifically sounds under ERISA to compel National Presto to pay benefits owed Doe 2 under the terms of the benefit plan. By asserting Doe 2’s rights under the National Presto plan, Alliance seeks by its claim to stand in the shoes of Doe 2 to assert contractual rights under the benefit plan, something clearly preempted by ERISA.

{48} Alliance avers that its state law claims “do not relate to the plan but to representations of coverage made to a third party, that is not a participant or beneficiary of the plan, and [that] do not implicate the administration of the plan.” Alliance points out that none of Defendants’ alleged conduct relates to the processing of claims or the administration of the plan, or impinges upon the rights or responsibilities of plan principals—simply, the cause of action sounds in Defendants’ misrepresentation to Alliance that its services were covered and would be paid for.

{49} Defendants argue that Alliance’s claims clearly affect and relate to the structure, administration, and type of benefits provided by National Presto’s ERISA health care plan and are preempted by ERISA, as Alliance’s claims “equated to a demand for reimbursement from the Plan.” They assert that the language of the plan regarding the terms of treatment services as a covered benefit is clear, maintaining that payment has been made to Alliance as an assignee in the maximum amount owed to it under the terms of the plan.

Alliance’s Suit Does Not Affect Any Plan Provision

{50} The conceptual line between Alliance seeking benefits that exceed Doe 2’s coverage under the plan and seeking damages for misrepresentation of an ability and inclination to pay for Doe 2’s treatment seems thin at first blush. However, National Presto’s own argument is that Alliance seeks to recover where there was no coverage for Doe 2 at all, and that argument begins to demonstrate that Alliance’s state law claims are separate. The nature of the commercial transaction itself, as explained in _Memorial Hospital_, shows how the two are quite distinct. 904 F.2d 236. “[O]ne of the first steps in accepting a patient for treatment is to determine a financial source for the cost of care to be provided.” Id. at 246. “[W]hen an insurance company [or its agent] erroneously informs a health care provider . . . that a patient is covered by health insurance, state law, which allocat[es] . . . risks between commercial entities that conduct business in a state, normally provides a remedy.” _Cypress Fairbanks Med. Ctr. Inc._, 110 F.3d at 283 (internal quotation marks and citation omitted). The state law claim does not arise due to the patient’s coverage, but “precisely because there is no ERISA plan coverage.”

_Memorial Hospital_, 904 F.2d at 246. Allowing a state law cause of action in this case where there is no relation to the terms or conditions of the plan that covered Doe 2, or affects its administration only tangentially by encouraging plans to check their facts before confirming coverage and guaranteeing payment, thus does not transgress any area ERISA seeks to protect.

{51} Alliance’s state law claims do not seek to enforce or modify any rights under National Presto’s plan, do not allege that any of the plan terms have been breached, and do not relate to the administration of the plan. _See Airparts Co._, 28 F.3d at 1065 (“The state laws involved do not regulate the type of benefits or terms of the plan; they do not create reporting, disclosure, funding, or vesting requirements for the plan; they do not affect the calculation of benefits; and they are not common law rules designed to rectify faulty plan administration.”). By allowing this suit to go forward, there is no threat to the structural integrity or the purpose of the ERISA statutory framework. _See id._ The terms of the plan are immaterial to Alliance’s state law claims. “It does not matter what the plan provided in the way of coverage for the patient. The only relevant questions, whether of fact or law, are whether the defendant . . . made a promise that the law will enforce[,]” _Suburban Hosp., Inc. v. Sampson_, 807 F. Supp. 31, 33 (D. Md. 1992). Although Alliance’s damages would be measured in part by the amount of benefits it would have received had there been no misrepresentation regarding coverage, this is incidental in relation to the plan. _See Memorial Hospital_, 904 F.2d at 247. In _Memorial Hospital_, the court discussed the preemption question in relation to an ERISA plan’s refusal to pay hospital expenses after the plan had orally represented that there was coverage.

The court stated:

If a patient is not covered under an insurance policy, despite the insurance company’s assurances to the contrary, a provider’s subsequent civil recovery against the insurer in no way expands the rights of the patient to receive benefits under the terms of the health care plan. If the patient is not covered under the plan, he or she is individually obligated to pay for the medical services received. The only question is whether the risk of non-payment should remain with the provider or be shifted to the insurance company, which through its agents misrepresented to the provider the patient’s
coverage under the plan. A provider’s state law action under these circumstances would not arise due to the patient’s coverage under an ERISA plan, but precisely because there is no ERISA plan coverage.

Id. at 246.

The State Law Claims Do Not Affect the Relationship Between Plan Principals, or the Administration of the Plan

{52} The argument that ERISA preemption is triggered in this case because the state law claims affect the primary administrative function of the benefit plan in that the plan beneficiary’s benefit and the amount of that benefit are at issue does not ring true. National Presto argues that the “most important factor under the circumstances of the instant case would appear to be [Alliance’s] state law claims’ effects on the relations between the alleged principal ERISA entities.” This argument arises out of the contention that Araz is National Presto’s agent and/or representative and the claim would require an examination of the relations between two ERISA entities. In fact, Araz “denies that its certification that treatment was medically necessary was a guarantee and/or representation that services were covered and payment would be forthcoming.” It also denies an agency relationship with National Presto or that Araz is the plan administrator. Araz contends that it simply contracted with National Presto to perform “utilization review and utilization management for [National] Presto’s insureds,” i.e., only “to certify whether a proposed treatment was medically necessary.” Araz also denies that it was retained by National Presto to verify coverage. The true relationship between Araz and National Presto as plan administrator, agent, or merely reviewer of medical necessity for final coverage decisions by National Presto is one to be established at trial or through other proceedings. The nature of representations and Alliance’s reliance on them to its detriment establish the cause of action for misrepresentation.

{53} Alliance has not alleged any conduct on the part of Araz which relates to the administration of the plan, to the processing of Doe 2’s claims, or which impinges on or modifies an employee’s or beneficiary’s rights under the plan. See Clark v. Coats & Clark, Inc., 865 F.2d 1237, 1243-44 (11th Cir. 1989) (holding that tort claims had no effect on the administration of an ERISA plan and were therefore not preempted); Ethridge v. Harbor House Rest., 861 F.2d 1389, 1404 (9th Cir. 1988) (“ERISA preempts only those state law claims that arise out of the administration of a covered plan.”); cf. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 48 (1987) (holding that ERISA preempts a state law claim brought by a plan participant or beneficiary alleging improper processing of a claim for plan benefits superseded by statute on other grounds as stated in Hunter v. Ameritech, 779 F. Supp. 419, 421 (N.D. Ill. 1991); Ramirez v. Inter-Cont’l Hotels, 890 F.2d 760, 762, 764 (5th Cir. 1989) (same). Here, Alliance is not a plan participant or beneficiary and sues for damages for a breach of promised representations of coverage to pay for services, irrespective of plan benefits. Coverage and payment in this case are questions of fact and exist outside the relationship between Doe 2 and his insurer and its agent. Allowing Alliance’s suit to go forward does not impact or alter the relationship between Araz and National Presto; its success stands or falls based on the nature of the relationship only as to who bears responsibility for a misrepresentation on which Alliance relied to its detriment. Alliance is not seeking benefits due Doe 2 under the plan, but damages for having provided treatment based on misrepresentations that payment would be forthcoming. The relationship of the beneficiary to the plan and its agents is not an issue, nor are the terms of the plan itself germane to Alliance’s claims here.

{54} Defendants argue that Lunnen is dispositive on the preemption issue because that is a New Mexico Supreme Court case which held that state law claims directly relating to an ERISA plan are preempted. Lunnen, 110 N.M. at 75, 792 P.2d at 407. However, in that case the breach of the insurance contract claim sought benefits under the plan, and the bad faith and misrepresentation claims directly related to the administration of the plan. Id. (stating that “the suit was for benefits under the plan and damages for alleged bad faith in its administration”). We determine that other cases more directly answer the ERISA preemption issue presented and follow their analysis. See, e.g., Hospice of Metro Denver, Inc., 944 F.2d at 756 (allowing state law claims by providers where such claims do not involve a relationship among “the principal ERISA entities” and to hold such claims preempted by ERISA “would stretch the ‘connected with or related to’ standard too far”).

Without the State Law Claims, Alliance Is Left Without a Remedy

{55} Alliance further argues that if its state law claims are preempted, it will have no recourse because as a third party, it has no standing to bring a claim under the plan. It points out that because the ERISA framework only permits a participant in or beneficiary of an employee welfare benefit plan to maintain a civil action to recover benefits due under the terms of the plan. See 29 U.S.C. § 1132(a)(1)(B).

{56} Here, if its state law claims are preempted, Alliance has no recourse, as it concedes that its ERISA claim under the plan in Count VI of its complaint against National Presto was properly dismissed. See Lunnen, 110 N.M. at 75, 792 P.2d at 407. It is true that “preemption normally is not dependent upon the availability of ERISA remedies.” Hospice of Metro Denver, Inc., 944 F.2d at 755. The United States Supreme Court has stated that “[t]he policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA.” Pilot Life Ins. Co., 481 U.S. at 54 (emphasis added). However, in this case, Alliance is not a participant or a beneficiary and therefore lacks alternative remedies in the event of preemption. Hospice of Metro Denver, Inc., 944 F.2d at 755 (noting that where the plaintiff is neither a participant nor beneficiary, “its lack of alternative remedies in the event of preemption is deserving of consideration”); 29 U.S.C. § 1132(a)(1)(B) (stating ERISA’s civil enforcement scheme).

Alliance’s State Law Claims Are Not Preempted

{57} Although there is no simple test for determining when a state law relates to an ERISA plan, we conclude that the state law claims at issue do not fall within any of the categories listed above and have no direct connection with National Presto’s ERISA-governed plan. Alliance’s state law claims do not seek to enforce or modify any rights under National Presto’s plan, do not allege that any of the plan terms have been breached, and do not relate to the administration of the plan. See Airparts Co., 28 F.3d at 1065 (“The state laws involved do not regulate the type of benefits or terms of the plan; they do not create reporting, disclosure, funding, or vesting requirements for the plan; they do not affect the calculation of benefits; and they are not common law rules designed to rectify faulty plan administration.”). By allowing this suit to go forward, there is no threat to the structural integrity or the purpose of the ERISA statutory
framework. See id. at 1066. The terms of the plan are immaterial to Alliance’s state law claims. What matters is “whether the defendant . . . made a promise that the law will enforce.” Suburban Hosp., Inc., 807 F. Supp. at 33.

{58} Although Alliance’s damages would be measured in part by the amount of benefits it would have received had there been no misrepresentation regarding coverage, this is incidental in relation to the plan. See Memorial Hospital, 904 F.2d at 247. Further, we acknowledge that breach of contract claims have been held to be preempted. See, e.g., id. at 245; Lunn, 110 N.M. at 75, 792 P.2d at 407. However, in this case Alliance’s breach of contract claim does not refer to the assignment of benefits or attempt to enforce the plan, and thus we see no direct connection or relation between this claim and the plan. The alleged contract at issue is not based on the terms of the insurance policy, but rather, it is based upon the alleged communications between representatives of National Presto, Araz, and Alliance. Furthermore, the promissory estoppel or fraud counts do not arise from the actual contractual terms of National Presto’s plan. Finally, the court in Memorial Hospital stressed the consideration of commercial realities in making its preemption determination, recognizing that if the third-party health care providers had no recourse under either ERISA or state law, health care providers would be reluctant to provide healthcare without prepayment. 904 F.2d at 247. In this case, the state claims may proceed because issues of material fact exist whether a contract was formed between Alliance and Defendants and whether representations were made by Defendants to Alliance regarding the coverage and obligation to pay for Alliance’s health services.

{59} Araz further argues that even if Alliance’s promissory estoppel claim is not preempted, summary judgment was appropriate on that claim because Alliance failed to establish that Defendants acted with the requisite scienter necessary to bring an estoppel claim in New Mexico. See Capo v. Century Life Ins. Co., 94 N.M. 373, 377, 610 P.2d 1202, 1206 (1980); Gonzales v. Pub. Employees Ret. Bd., 114 N.M. 420, 427, 839 P.2d 630, 637 (Ct. App. 1992). However, the matter was before the trial court on a motion to dismiss, not a summary judgment. The complaint alleges facts concerning the representations of Defendants, and if Alliance can prove the elements of the estoppel claim, then its suit on this claim should proceed. Again, absent a motion for summary judgment, the facts surrounding the claims must be determined by the finder of fact.

Mootness and Standing

{60} Having held that Alliance asserts its claim for injury without regard to the relationship of Araz to Doe 2, we determine that a factual basis exists for Alliance to allege damages based on its reliance on Araz’s representations of coverage and payment due. Alliance has standing to assert a claim for damages. As we find above, Alliance is not asserting its entitlement to payment because of Doe 2’s relationship to the plan, or because the plan is alleged to provide benefits that would pay Alliance for its treatment of him. Alliance asserts entitlement to payment because of independent promises made to it by Defendants. Because the state causes of action brought by Alliance all allege its own pecuniary injury as a result of Defendants’ misrepresentation of coverage and the promise of payment, it is the real party in interest entitled to bring suit in its name.

{61} The fact that judgment for some of the hospital bill has been rendered against Doe 2’s parents as responsible parties, or that Medicaid has paid some of the claim, does not render Alliance’s claim moot. Again, the facts that Alliance was paid for some services that all agree were covered or that someone else paid or is responsible for paying other portions is not the issue in this suit—the issue is the responsibility of Defendants for making good on their promises, if any exist, to pay for care that was not covered under the plan. Hamman v. Clayton Mun. Sch. Dist. No. 1, 74 N.M. 428, 429, 394 P.2d 273, 274 (1964) (stating that “[a] case is moot when it does not involve any actual controversy [or][w]here the issues involved in the trial court no longer exist” (internal quotation marks and citation omitted)). Thus, we reverse the district court and allow Alliance to go forward to prove its claims for monetary damages against Araz and National Presto. The issue of Defendants’ responsibility to Alliance is hotly contested, and will be the continued subject of much heated debate, but the claims are certainly not moot.

CONCLUSION

{62} Based on the foregoing, we reverse the district court’s dismissal of Alliance’s state law claims against Araz and National Presto. We remand the case to the district court for further proceedings.

IT IS SO ORDERED.
RODERICK T. KENNEDY,
Judge

WE CONCUR:
LYNN PICKARD, Judge
IRA ROBINSON, Judge
In this case, we review whether the trial court abused its discretion in deciding that a medical expert, without expertise in surgical techniques, was not qualified to testify regarding the standard of care required for the surgical removal of tissue identified for biopsy. Plaintiffs appeal from the trial court’s order excluding the testimony of their expert medical witness and granting summary judgment to Defendant in this medical malpractice case. We affirm the trial court’s ruling.

I. BACKGROUND

[2] Plaintiff and her husband (Plaintiffs) filed a medical negligence suit against Defendant, who performed a biopsy of Plaintiff’s breast; the alleged negligence was his failure to remove all of the tissue identified by the radiologist as suspicious and subject to biopsy. The issue is whether the failure to remove all of the identified tissue was malpractice.

A. Negligence Claim

[3] In September 1998, Plaintiff was experiencing a problem associated with her right breast. She was referred for a mammogram by her primary-care physician. Based on the results of the mammogram, additional tests were performed, which identified suspicious tissue in the breast. Plaintiff consulted with Defendant, a general and vascular surgeon, who recommended surgery. On October 27, 1998, radiology tests identified the location of the suspicious tissue, and Defendant performed the surgery. In March 1999, Plaintiff developed the same symptom and returned for additional imaging studies. In comparing Plaintiff’s imaging studies performed before surgery to those done after surgery, the radiologist stated that “it was clear that the same filling defect and the same mass I had seen prior to surgery [were] still there.” The radiologist also informed Plaintiff that it was “possible that the lesion was missed.” Plaintiff then consulted Dr. Sylvia Ramos, who performed surgery on Plaintiff and used a different technique for identifying the tissue that needed to be removed. Additional pertinent facts are set out in our discussion of the issues.

B. Procedural History

[4] Plaintiffs filed suit against Defendant with five claims: battery, medical negligence, breach of contract, negligent misrepresentation, and loss of consortium. By the date specified in the pretrial scheduling order, Plaintiffs had not identified an expert witness to testify on their behalf, and Defendant subsequently filed a motion for summary judgment. In response, Plaintiffs requested additional time to obtain new counsel to represent them and moved for a continuance.

[5] At Plaintiffs’ continuance hearing, they identified Dr. Barry Singer as their medical expert witness and submitted an affidavit from Dr. Singer, which is not in the record. At that time, Defendant withdrew his motion for summary judgment. Following the deposition of Dr. Singer, Defendant filed a motion with two parts: first, Defendant moved to exclude Dr. Singer’s testimony; and second, Defendant moved for summary judgment. Defendant argued that Dr. Singer was not qualified to provide testimony on the relevant standard of care and causation under Rule 11-702 NMRA; Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); and State v. Alberico, 116 N.M. 156, 861 P.2d 192 (1993). With Dr. Singer’s testimony excluded, Defendant asserted that Plaintiffs were unable to establish the essential elements of their claims and that Defendant was therefore entitled to judgment as a matter of law. Plaintiff responded with a memorandum in opposition and another affidavit from Dr. Singer.

[6] At the motion hearing, the trial court placed the burden on Defendant to produce an affidavit from a surgeon asserting that only a surgeon could address the issues in this matter and that Dr. Singer, a non-surgeon, would therefore not be qualified to testify as to the standard of care. The court denied Defendant’s motion because he had not produced such an affidavit.

[7] Subsequently, Defendant submitted a motion for reconsideration with a supporting affidavit from his expert, Dr. Leo Gordon, which stated that the applicable standard of care involved surgical technique and that Plaintiffs’ expert was not qualified in this area. Plaintiffs responded with an additional affidavit from Dr. Singer. After reviewing the affidavits and other material, the trial court concluded that Dr. Singer was not qualified to provide testimony on the decisions that were made during the surgical procedure in this case. Accordingly, the trial court granted Defendant’s motion and dismissed the case with prejudice. Plaintiffs now appeal.

II. DISCUSSION

[8] Plaintiffs appeal on the ground that the trial court erred in holding that Dr. Singer was not qualified to testify and that summary judgment was therefore improper. In support of their argument, Plaintiffs assert that contrary to existing New Mexico law, the trial court held Dr. Singer to a higher standard by applying the Daubert and Alberico evidentiary standard to his testimony. Specifically, Plaintiffs...
maintain the following: (1) Dr. Singer was qualified to testify in this matter, (2) Defendant’s evidence was insufficient to disqualify Dr. Singer, and (3) the public policy effect of the trial court’s decision would act as a disincentive for patients to file malpractice suits against doctors. We address these arguments in turn.

A. Admissibility of Expert Testimony

{9} The testimony of a medical expert is generally required when a physician’s standard of care is being challenged in a medical negligence case. Lopez v. Southwest Cnty. Health Servs., 114 N.M. 2, 7, 833 P.2d 1183, 1188 (Ct. App. 1992) (holding that “[i]n a medical malpractice case, because of the technical and specialized subject matter, expert medical testimony is usually required to establish departure from recognized standards in the community”). The trial court in this case concluded that expert testimony was necessary, and neither party disagrees with that determination. Thus, the exclusion of Dr. Singer’s testimony, as Plaintiffs’ only medical expert, precludes Plaintiffs’ cause of action.

{10} Admission or exclusion of a medical expert’s testimony is governed by Rule 11-702, which is as follows:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

Rule 11-702 “makes witness qualifications a question for the trial court.” Baerwald v. Flores, 1997-NMCA-002, ¶ 8, 122 N.M. 679, 930 P.2d 816. Plaintiffs argue that the trial court could only have reached its decision to exclude Dr. Singer’s testimony by requiring him to possess specialized qualifications, in addition to his medical license, and that this requirement is contrary to New Mexico law. Plaintiffs assert that this heightened standard was a result of the trial court’s incorrect application of the Daubert and Alberico standard to this case. While we agree that Alberico must be utilized in certain cases where there is a Rule 11-702 question, the trial court in this instance correctly applied Rule 11-702 without employing the Alberico analysis. We explain below.

{11} In 1993, the United States Supreme Court adopted new standards related to the validity and reliability of scientific testimony. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. at 594-95. The New Mexico Supreme Court immediately adopted a similar approach in Alberico. 116 N.M. at 158, 166-68, 861 P.2d at 194, 202-04. Alberico clarified that Rule 11-702 establishes three prerequisites for admission of expert testimony: (1) the expert must be qualified, (2) the scientific evidence must assist the trier of fact, and (3) the expert may only testify to “scientific, technical or other specialized knowledge.” Id. at 166, 861 P.2d at 202 (internal quotation marks and citation omitted). In Alberico, the experts’ qualifications were not at issue; therefore, Alberico only addressed the second and third elements of Rule 11-702, dealing with scientific evidence. Alberico, 116 N.M. at 166, 861 P.2d at 202. The Alberico case established “evidentiary reliability as the hallmark for the admissibility of scientific knowledge,” and outlined factors to consider when evaluating such testimony. State v. Torres, 1999-NMSC-010, ¶¶ 24-26, 29, 127 N.M. 20, 976 P.2d 20.

{12} Subsequently, a number of New Mexico cases have addressed the application of the Alberico standard when the reliability of scientific methods was at issue. See, e.g., State v. Stills, 1998-NMSC-009, ¶¶ 24-27, 125 N.M. 66, 957 P.2d 51 (explaining the third element for a specific method of DNA analysis); State v. Anderson, 118 N.M. 284, 291-92, 296-301, 881 P.2d 29, 36-37, 41-46 (1994) (addressing the second and third elements as related to DNA evidence). The reliability of scientific methods, however, was not at issue in this case. Here, the question before the trial court was whether Dr. Singer was qualified to testify on the given subject matter. Alberico does not address this element of Rule 11-702; accordingly, whether the trial court erred in applying Alberico evidentiary standards to this medical negligence case is not an issue that is necessary for this Court to reach in rendering a decision. Additionally, while Defendant argued below and on appeal that the Alberico standard for admissibility of expert testimony applies to Dr. Singer’s testimony, there is no evidence in the record that the trial court utilized the Alberico standard in reaching the decision. In fact, as discussed in the following section and contrary to Plaintiffs’ argument, it would have been unnecessary for the trial court to apply Alberico in order to reach a decision that Dr. Singer was not qualified to testify on the standard of care in this case.

{13} In a related argument, Plaintiffs urge this Court to extend the reasoning in Banks and Fuyat as a bar to the application of Daubert and Alberico in this case. Banks v. IMC Kalium Carlsbad Potash Co., 2003-NMSC-026, ¶ 1, 134 N.M. 421, 77 P.3d 1014 (holding that “Daubert/Alberico does not apply to the testimony of a health care provider under the Workers’ Compensation Act); Fuyat v. Los Alamos Nat’l Lab., 112 N.M. 102, 105-06, 811 P.2d 1313, 1316-17 (Ct. App. 1991) (rejecting the argument that in a workers’ compensation case, physicians’ testimony was required to demonstrate general acceptance of the scientific techniques employed). As we have stated, Alberico is inapplicable to the issue at hand. Additionally, Banks and Fuyat are workers’ compensation cases, in which the use of experts is subject to particular statutory standards; therefore, we decline to rely on these cases, as their holdings are limited to a different type of case from the one before us. Banks, 2003-NMSC-026, ¶ 1; Fuyat, 112 N.M. at 104-05, 811 P.2d at 1315-16.

B. Exclusion of Dr. Singer’s Testimony

{14} It is widely recognized that Federal Rule of Evidence 702 and its New Mexico analogue, Rule 11-702, impose a “gate-keeping” function on a trial court judge as to the admissibility of an expert’s opinion. See Ralston v. Smith & Nephew Richards, Inc., 275 F.3d 965, 969 (10th Cir. 2001) (internal quotation marks and citation omitted); Baerwald, 1997-NMCA-002, ¶ 17. In determining whether an expert witness is competent or qualified to testify, “[t]he trial court has wide discretion . . . , and the court’s determination of this question will not be disturbed on appeal, unless there has been an abuse of this discretion.” Wood v. Citizens Standard Life Ins. Co., 82 N.M. 271, 273, 480 P.2d 161, 163 (1971). The ruling “will not be disturbed . . . [u]nless [it] is manifestly wrong or the trial court has applied wrong legal standards in the determination.” Dahl v. Turner, 80 N.M. 564, 568, 458 P.2d 816, 820 (Ct. App. 1969) (internal quotation marks and citation omitted). We therefore review the trial court’s decision to exclude Dr. Singer’s testimony under an abuse of discretion standard.

{15} Under Rule 11-702, “a witness must qualify as an expert in the field for which his or her testimony is offered before such testimony is admissible.” Torres, 1999-NMSC-010, ¶ 45. In most cases, this means that the “calling party must qualify the witness to testify as an expert first, before any substantive testimony is given.” Id. (internal quotation marks and citation omitted).
that a medical witness is not a specialist goes to the weight, not to admissibility, of the witness’ expert testimony.”

In a medical negligence case, in which this Court stated that “[w]here expert testimony is required, the mere fact testimony were available to the court as exhibits to the motions. In the affidavit, Dr. Singer acknowledged that the pathology reports from both surgeries did not show discrete papillomas, which had been indicated by the radiology tests. Because Plaintiffs assert that Defendant failed to remove all of the tissue that made the biopsy necessary, i.e., the two papillomas, an expert would need to address the relationship between the radiology reports and the surgical decision on the amount and location of tissue to be removed, as well as the significance of the disparity between the radiology and pathology reports.

Dr. Singer presented his qualifications and the basis of his opinion to the trial court in his affidavits; further, parts of his deposition testimony were available to the court as exhibits to the motions. In the affidavits, Dr. Singer clearly stated that he was not commenting on the surgical technique employed by Defendant. We summarize Dr. Singer’s description of his qualifications and rationale as follows:

(1) He is a medical doctor licensed to practice in Pennsylvania and having been in practice since 1968.
(2) He has medical privileges in internal medicine, hematology, and oncology.
(3) Although he does not perform surgery, he reviews the results of surgical procedures done by surgeons on his cancer patients.
(4) He maintains that he is “perfectly capable of determining whether a surgeon has in fact removed all of the tissue which was meant to be removed during the surgery.”
(5) He previously performed biopsies, during his residency training under the supervision of surgeons.
(6) These surgeons instructed that unless there was some reason why it was either imprudent or impossible, all of the tissue that made the biopsy necessary should be removed; in the present case, the records did not indicate that it would be imprudent or impossible.
(7) In arriving at his opinion of Defendant’s breach of the standard of care, Dr. Singer reviewed the medical records in the case from before and after both surgeries, as well as the deposition testimony of Dr. Ramos, which supports Dr. Singer’s conclusion.

Based on the foregoing, Dr. Singer opined that Defendant’s failure to remove all of the tissue identified by the radiology report breached the standard of care.

Plaintiffs contend that under New Mexico law, Dr. Singer is qualified to testify on the issues in this case, even though he is not a specialist in the same field as Defendant. As support for this proposition, Plaintiffs cite to Sewell v. Wilson, 97 N.M. 523, 641 P.2d 1070 (Ct. App. 1982), a medical negligence case, in which this Court stated that “[w]here expert testimony is required, the mere fact that a medical witness is not a specialist goes to the weight, not to admissibility, of the witness’ expert testimony.”

The pertinent holding in that case was that “a non-specialist can testify as to the standards of care owed by a specialist in the same field as Defendant. As support for this proposition, Plaintiffs cite to Blauwkamp v. University of New Mexico Hospital, 114 N.M. 228, 233, 836 P.2d 1249, 1254 (Ct. App. 1992), where this Court concluded that the plaintiffs were not required to produce an expert who was a specialist in the identical field of practice as the defendants in order to withstand a summary judgment motion. Contrary to Plaintiffs’ assertion, however, Blauwkamp does not stand for the proposition that a court may never require that a proposed expert have specific expertise. See 4 Jack B. Weinstein & Margaret A. Berger, Weinstein’s Federal Evidence § 702.04[2], at 702-58 (2d ed. 2004) (stating that “[i]n some instances, it will be appropriate for the trial court to insist that a proposed expert witness have specific expertise before allowing him or her to testify”); Ralston 275 F.3d at 969-70 (upholding a lower court finding that the expert, a board-certified orthopedic surgeon, was not qualified to testify about intramedullary nailing, since she had no familiarity with the field of intramedullary nailing).

Additionally, the case at hand is distinguishable from Blauwkamp by the differences in the qualifications of the Blauwkamp expert as compared to those presented by Dr. Singer. In Blauwkamp, the issue was alleged medical negligence during pregnancy and at the birth of the plaintiffs’ brain-damaged child. 114 N.M. at 229, 836 P.2d at 1250. The expert provided an affidavit showing that he received doctoral degrees in pharmacy and medicine, had served as an extern and a resident in obstetrics and gynecology, maintained a private practice in obstetrics and gynecology, and served on the medical faculty of a few schools of medicine. Id. at 234, 836 P.2d at 1255. This Court found that the doctor had “extensive experience in obstetrics and family practice” and that the affidavit was “sufficient to establish a prima facie showing of the doctor’s qualifications.”

In the present case, the trial court evaluated Dr. Singer’s qualifications and found them wanting. Our review is based on an abuse
of discretion standard. While we agree that Dr. Singer’s qualifications would allow him to testify on a number of subjects, we find no abuse of discretion in determining that he lacked the qualifications to testify as to the standard of care applicable to Defendant in performing the breast biopsy in this case.

{23} Dr. Singer’s experience with biopsies was based on his residency more than thirty years ago. His training concerning the standard of care for biopsies is therefore three decades old. Defendant presented evidence that medical science and surgical techniques have changed since that time. Dr. Singer presented no evidence showing that he has kept up with these advances or that advances in the area of biopsies had not subsequently changed that standard of care. His expertise is in internal medicine, hematology, and oncology, and his review of surgical procedures is limited to those performed by surgeons on his cancer patients. Plaintiff was not a cancer patient, and there was no evidence that the tissue removed was cancerous.

{24} At oral argument, Plaintiffs’ counsel acknowledged that a trial court could view this case in two ways: (1) as a surgical technique case or (2) as a case where Defendant did not finish the job. Plaintiffs’ counsel also acknowledged that the question of whether it was imprudent or impossible to remove certain tissue is one that is decided by the surgeon, based on his or her judgment, and that if the case is characterized as dealing with surgical techniques or methods, an expert in surgical techniques would be necessary. However, Plaintiffs’ counsel urged this Court to consider the case as analogous to one where the doctor only cut off half of a leg, instead of the entire leg. The trial court viewed this case as a surgical technique case, and we agree with that view. Admission of this expert testimony was left to the discretion of the trial court, and having reviewed the record, we find no abuse in the exercise of that discretion.

C. Summary Judgment

{25} “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.” Hagen v. Faherty, 2003-NMCA-060, ¶ 6, 133 N.M. 605, 66 P.3d 974. Such a legal question is reviewed de novo. Id. We view the facts in the light most favorable to the party opposing summary judgment, Gonzalez v. Gonzalez, 103 N.M. 157, 164, 703 P.2d 934, 941 (Ct. App. 1985), and draw all inferences in favor of that party. Baer v. Regents of Univ. of Cal., 118 N.M. 685, 687-88, 884 P.2d 841, 843-44 (Ct. App. 1994).

{26} Defendant’s motion for summary judgment included an affidavit from Dr. Gordon, a board certified surgeon who performs breast biopsies; the affidavit stated that Defendant was within the standard of care in his treatment of Plaintiff. As discussed above, Plaintiffs’ expert was not qualified to offer testimony to rebut this showing; therefore, no issue of material fact was in dispute, and summary judgment was proper. See Blauwkamp, 114 N.M. at 232, 836 P.2d at 1253 (stating that summary judgment in a medical malpractice case is appropriate when the “‘nonmoving party’s evidence is insufficient to establish an essential element of the nonmoving party’s claim’” (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 331 (1986)); see also Cervantes v. Forbis, 73 N.M. 445, 449, 389 P.2d 210, 213 (1964) (upholding summary judgment in the absence of expert testimony as to how a defendant surgeon’s conduct fell below the standard of care because there could be no genuine issue of material fact), modified on other grounds by Pharmaseal Labs., Inc. v. Goffe, 90 N.M. 753, 757, 568 P.2d 589, 593 (1977).

D. Public Policy Concerns

{27} In their reply brief, Plaintiffs argued for the first time that if the trial court decision is upheld, we will be undertaking de facto tort reform by requiring that “an expert [be] identical in every way to the [d]efendant” in a medical malpractice case. They contend that this will make it more difficult to prosecute those claims. Plaintiffs repeated this argument at oral argument. Although we need not consider arguments made for the first time in a reply brief, State v. Castillo-Sanchez, 1999-NMCA-085, ¶ 20, 127 N.M. 540, 984 P.2d 787 (stating that an appellate court will not consider arguments raised for the first time in a reply brief), we believe Plaintiffs’ fears are unwarranted. Each malpractice case turns on its own facts. Our holding does not mandate a certain type of expert in every malpractice case; on the contrary, we are making no changes to the requirement that the trial court continue to act as a gatekeeper and determine if the particular expert tendered has the qualifications to testify in the particular case, as set forth in Rule 11-702. Absent an abuse of discretion, the trial court’s determination will stand. As explained above, this is the state of the law in New Mexico currently.

Blauwkamp, 114 N.M. at 234, 836 P.2d at 1255; Sewell, 97 N.M. at 527, 641 P.2d at 1074.

III. CONCLUSION

{28} For the foregoing reasons, we affirm the trial court’s ruling.

{29} IT IS SO ORDERED.

CELIA FOY CASTILLO,
Judge

WE CONCUR:
LYNN PICKARD, Judge
CYNTHIA A. FRY, Judge
OPINION

LYNN PICKARD, JUDGE

[1] Respondent (sometimes called Motor Vehicle Division or MVD) appeals from the district court’s granting of Petitioner’s petition for a writ of mandamus by a final order, ordering that his plea of guilty to a traffic offense, made pursuant to signing a uniform traffic citation, be withdrawn and that the metropolitan court proceed to trial on the matter. We affirm because the defects about which Respondent complains were waived or are without merit, and any potentially meritorious issues were raised on appeal for the first time in the reply brief, which is considered too late to raise an issue for consideration on appeal. See Jaramillo v. Fisher Controls Co., 102 N.M. 614, 625, 698 P.2d 887, 898 (Ct. App. 1985) (“An issue raised for the first time in the reply brief will not be considered.”).

FACTS

[2] Petitioner’s unverified petition alleged that he was accused of driving ten miles over the speed limit and that the officer gave him the option of “sign[ing] the citation or hav[ing] a trial contesting guilt.” The petition further alleged that he did not know of other legal options and, as a result, he “inadvertently wa[v]ed his right to a day in court . . . and to [s]eek [a] deferred sentence.” There was no certification of service in the record, but a notice of hearing was mailed to MVD, following which MVD led a notice of excusal of the assigned judge, Judge Baca.

[3] The matter was assigned to Judge York and was set for hearing, with another notice being mailed to MVD. MVD did not appear at the hearing. A recess was taken during which the judge’s office attempted unsuccessfully to contact the attorney for MVD or someone from his office, and the hearing commenced again. Following the hearing, the district court entered a final order, withdrawing Petitioner’s guilty plea and ordering MVD to return a copy of the uniform citation to metropolitan court for trial on the merits. This order recited that MVD was served with a verified petition and a writ of mandamus, but there is nothing in the record indicating any verification of the petition, any writ of mandamus, or any service on MVD other than the mailing of requests for and notices of hearing.

[4] After MVD filed its brief in this case, Petitioner did not respond and the case was submitted in accordance with Rule 12-312(B) NMRA. However, because this case is one of several raising similar issues, we perceived the matter to be of public importance, and we invited the participation of the New Mexico Criminal Defense Lawyers Association as amicus curiae. We are grateful for its participation, which has provided Petitioner with advocacy. When we refer in this opinion to Petitioner’s contentions, we are referring to arguments made on their behalf by amicus.

DISCUSSION

[5] MVD contends that the district court never acquired jurisdiction over it because neither it nor the Attorney General was ever personally served with process allowing the district court to acquire jurisdiction over it. MVD also contends that the district court did not acquire jurisdiction over it because the petition was not verified. Petitioner responds that MVD waived its issues, that the facts were never in dispute and the requirement of verification is a technicality under such circumstances, that he substantially complied with applicable service requirements, and this Court should not reverse the issuance of the writ because his entitlement to the writ was clearly shown due to his allegation of an involuntary plea. MVD argues the merits of the allegation of an involuntary plea for the first time in its reply brief.

[6] Although we decline to reach the merits of the involuntary plea issue, we express our reservations about Petitioner’s claim on the merits as we did in Trujillo v. Goodwin, ___-NMCA-___, ¶ 7, ___ N.M. ___, ___ P.3d ___ [No. 24,115 (Mar. 30, 2005)]. Further, we
agree with MVD on the merits that the absence of service in this case would ordinarily preclude the district court from binding the MVD by any judgment. See id. ¶¶ 8-10.

{7} However, in this case, as soon as MVD received notice of the hearing before Judge Baca, it filed a notice of peremptory challenge pursuant to Rule 1-088.1 NMRA. MVD argues that it did not understand the filing of its challenge to constitute a general appearance. But our courts have “consistently followed the rule” that

If the appearance be for the purpose of objecting to the jurisdiction of the court, and is confined solely to the question of jurisdiction, then the appearance is special; but any action upon the part of the defendant, except to object to the jurisdiction, which recognizes the case as in court, will amount to a general appearance.

*Guthrie v. Threlkeld Co.*, 52 N.M. 93, 96, 192 P.2d 307, 308 (1948) (internal quotation marks and citations omitted). Thus, MVD waived any objection to personal jurisdiction. For the same reasons, because the notice of peremptory challenge was made by counsel in his capacity as “Special Assistant Attorney General,” we hold that any objection to personal jurisdiction based on a failure to serve the Attorney General would also be without merit.

{8} We next determine whether the failure to verify the petition for the writ was fatal to the jurisdiction of the district court. MVD argues that petitions for writs of mandamus are analogous to motions for orders to show cause why a person should not be held in contempt, which must be verified if they are not initiated by the judge for conduct occurring in the presence of the court. See *In re Byrnes*, 2002-NMCA-102, ¶ 37, 132 N.M. 718, 54 P.3d 996. Since contempt can result in a fine or imprisonment, we are not persuaded that the formalities applicable to contempt apply to writ of mandamus procedure.

{9} To be sure, the governing rule requires a verified pleading. See Rule 1-065(C), NMRA. The statutes, however, are silent on the matter. See NMSA 1978, §§ 44-2-1 to -14 (1884, as amended through 1887). Furthermore, our cases hold that defects in the pleadings in mandamus cases can be waived. *City of Sunland Park v. N.M. Pub. Regulation Comm’n*, 2004-NMCA-024, ¶ 8, 135 N.M. 143, 85 P.3d 267. This is particularly the case where the facts are not contested. *Id.* ¶ 9. Because MVD appeared generally in the case and subsequently did not answer or appear at any hearing, we hold that MVD waived any formal defects in the petition for writ.

**CONCLUSION**

{10} Because MVD waived below the issues it properly raised on appeal and because we do not reach the issues not properly raised on appeal, we affirm the district court’s final order.

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

LYNN PICKARD, Judge

**WE CONCUR:**

MICHAEL D. BUSTAMANTE,
Chief Judge

A. JOSEPH ALARID, Judge
OPINION
LYNN PICKARD, Judge

[1] Respondent (sometimes called Motor Vehicle Division or MVD) appeals from the district court’s granting of Petitioners’ petitions for writs of mandamus, ordering that their pleas of guilty to traffic offenses, made pursuant to signing uniform traffic citations, be withdrawn and that the metropolitan court proceed to trial on the matters. We first resolve jurisdictional questions concerning the finality of the orders from which the appeals are taken and the proper method of appellate review. We then summarize address the two issues raised in these cases, which are whether the facts that the petitions were not verified, that proper service was not made on MVD, and that service was not made on the Attorney General were fatal to the district court’s exercise of jurisdiction. We hold that they are not and, because MVD did not raise any other issues relating to the merits of these cases until its reply brief, we affirm. We consolidate these cases for decision.

FACTS
[2] Petitioner Zambrano’s unverified petition alleged that she was accused of driving ten miles over the speed limit and that the officer gave her the choice of either “sign[ing] the citation [and] acknowledging guilt . . . or . . . appear[ing] in court at a later date to contest guilt.” The petition further alleged that Zambrano did not know of the other legally valid options that the officer did not mention and as a result “inadvertently waived her right to a day in court . . . [and] to seek a deferred sentence.” There was no certificate of service in the record, but a notice of hearing was mailed to MVD, following which there was a hearing. No transcript of that hearing was designated, and no transcript of that hearing was filed. Counsel for MVD appeared at that hearing and objected to the court’s subject matter jurisdiction, but, apart from MVD’s acknowledgment in its written response, the district court entered judgment. Counsel for MVD also alleged in its written response, the district court entered judgment. Counsel for MVD also alleged that MVD did not make on the Attorney General were fatal to the district court’s exercise of jurisdiction. We hold that they are not and, because MVD did not raise any other issues relating to the merits of these cases until its reply brief, we affirm. We consolidate these cases for decision.

[3] Petitioner Collado’s unverified petition alleged that she was accused of driving eleven miles over the speed limit. Collado’s petition further alleged that she “pleaded Not Guilty” and “forthrightly signed the citation with the guilty box checked without the full understanding that the direction of travel did not pass by the [roads identified on the citation,]” and “she was wrongfully identified as the supposed speeding vehicle.” She further alleged that she “misunderstood the implications of signing the citation with the guilty box checked.” She later amended her petition to contain allegations similar to Zambrano’s, but the petition was still not verified. Collado replied that she did not receive a confirmed date of the original hearing. Without further hearing, but following MVD’s filing of its written response, the district court entered a final order, withdrawing Zambrano’s guilty plea and ordering MVD to return a copy of the uniform citation to metropolitan court for trial on the merits. MVD appeals. Our notice assigning the case to the general calendar ordered the parties to brief the issues of the finality of the order and the proper procedures for appealing orders from district court mandamus proceedings that require lower court trials.

[4] On the date of the hearing, Collado did not appear, and the proceedings were dismissed without prejudice. Collado moved to reinstate, and MVD filed a response to that motion, stating that its appearance was still limited, but asking the court for sanctions in the event of reinstatement. Collado replied that she did not receive a confirmed date of the original hearing. At the hearing on the motion to reinstate, MVD began by op-
posing the motion to reinstate on the merits, indicating that the writ itself, which was served on MVD by Collado by mail, contained the hearing date. MVD then said, “we need to clear the jurisdictional defects before we proceed.” The court entered a final order, withdrawing Collado’s guilty plea and ordering MVD to return a copy of the uniform citation to metropolitan court for trial on the merits.

After MVD filed its brief in these cases, Petitioners did not respond, and the cases were submitted in accordance with Rule 12-312(B) NMRA. However, because these cases are two of several raising similar issues, we perceived the matter to be of public importance, and we invited the participation of the New Mexico Criminal Defense Lawyers Association as amicus curiae. We are grateful for its participation, which has provided Petitioners with advocacy. When we refer in this opinion to Petitioners’ contentions, we are referring to arguments made on their behalf by amicus.

DISCUSSION

Finality of Order

The issue of finality arises because the district court’s orders did not end the cases, but instead remanded them to metropolitan court for trial on the merits. Ordinarily, an order remanding a case is not a final order, sufficient to allow this Court to exercise jurisdiction. High Ridge Hinkle Joint Venture v. City of Albuquerque, 119 N.M. 29, 33-34, 888 P.2d 475, 479-80 ( Ct. App. 1994). However, there are exceptions to the general rule, and one such exception applies the doctrine of practical finality to hold that a remand order is sufficiently final for appeal if the party opposing remand would be unable to have the propriety of the remand heard at a later date. Id. at 34-36, 888 P.2d at 480-82. It is apparent that if Petitioners have their way in metropolitan court, they could well be acquitted or could well be allowed deferred adjudications of guilt or deferred sentences, from which MVD would have no ability to appeal. See State v. Ahasteen, 1998-NMCA-158, ¶¶ 11-13, 126 N.M. 238, 968 P.2d 328 (stating that where a remand to magistrate court could well result in a judgment of acquittal, this Court would hear the State’s appeal).

Accordingly, the remand orders are sufficiently final to hear the appeals now.

Proper Appellate Procedure

The issue of proper appellate procedure arises because of NMSA 1978, § 44-2-14 (1887), which states that “in all cases of proceedings by mandamus in any district court of this state, the final judgment of the court thereon shall be reviewable upon appeal of error in the same manner as now provided by law in other civil cases.” Our Rules of Appellate Procedure now provide for review of certain orders by writ of error. Rule 12-503 NMRA. We review collateral orders under writ of error procedure. See Carrillo v. Rostro, 114 N.M. 607, 617, 845 P.2d 130, 140, 149 (1992). However, we have reviewed district court mandamus orders, requiring hearings in the lower courts, as direct appeals, indicating that we have jurisdiction to do so. See State ex rel. Whitehead v. Vescovi-Dial, 1997-NMCA-126, ¶ 2, 124 N.M. 375, 950 P.2d 818. We see no reason, and no party has argued any reason, to depart from this practice in this case.

Merits

The issues raised in MVD’s brief in chief in these cases are limited to its contentions that the district court lacked jurisdiction to grant the relief requested because the petitions were not verified and were not properly served. As in Barreras v. N.M. Motor Vehicle Div., 2005-NMCA-055, ¶ 1, __ N.M. ___, __ P.3d ___ [No. 24,207 (Mar. 30, 2005)], we do not consider contentions that were not raised in the briefs in chief. Also, as in Barreras, we do not consider the fact that the petitions were not verified to be fatal. See id. ¶ 9. In Zambrano’s case, MVD admitted below that Zambrano swore to the contents of the petition in open court. In Collado’s case, as in Barreras, there was no indication below, nor any indication on appeal, that MVD in any way contests the facts alleged in the petition. Instead, even on the merits, MVD’s position is a challenge to the legal effect of those facts. Under these circumstances, we reject MVD’s contention that the district court lacked subject matter jurisdiction because the initial petitions were not verified.

With regard to the service aspects in Zambrano’s case, we resolve the issues on the basis that MVD did not provide us with a record sufficient to review the issues. By not designating the transcript of the only hearing that occurred in this case, which appeared to be one that dealt with MVD’s initial objections to jurisdiction, MVD has deprived us of a record sufficient to review its issues. As we have held in Barreras that defects in service can be waived, see id. ¶ 7, we apply the rule that we presume that missing portions of the record would support the trial court’s judgment, and we therefore presume that any defects in service were waived or cured at the hearing for which we do not have a transcript. See State v. Kurley, 114 N.M. 514, 518, 841 P.2d 562, 566 ( Ct. App. 1992) (“When the record provided by defendant is incomplete, this court will presume that the absent portions of the record support the trial court’s actions.”).

With regard to the service aspects in Collado’s case, as in Barreras, we apply the rule that any action on the part of the defendant, except solely objecting to jurisdiction, will constitute a general appearance and waive any defects in service. Barreras, 2005-NMCA-055, ¶ 7. In Collado’s case, despite attempting to be careful to enter only limited appearances to contest jurisdiction, when the court proposed to dismiss the case for Collado’s failure to appear, MVD cooperated in the court’s dismissal without arguing that the court first needed to reach the jurisdictional issues it raised. At the hearing, MVD pointed out to the court that the date proposed for the hearing was in the writ itself. The court announced that it would dismiss the case and said to MVD, “If you would like to submit an order for my signature, you can do so within ten days.” MVD said, “Thank you. I will submit that directly to the Court.” This cooperation constituted “any action upon the part of the defendant, except to object to the jurisdiction, which recognizes the case as in court, [and it] will amount to a general appearance.” Id. (quoting Guthrie v. Threlkeld Co., 52 N.M. 93, 96, 192 P.2d 307, 308 (1948)).

CONCLUSION

We hold that we have jurisdiction in these cases, and we affirm the trial court’s orders.

IT IS SO ORDERED.

LYNN PICKARD, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE,
Chief Judge

A. JOSEPH ALARID, Judge

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OPINION
LYNN PICKARD, JUDGE

[1] Respondent (sometimes called Motor Vehicle Division or MVD) appeals from the district court’s granting of Petitioner’s petition for a writ of mandamus, ordering that his plea of guilty to a traffic offense, made pursuant to signing a uniform traffic citation, be withdrawn and that the metropolitan court proceed to trial on the matter. We reverse because MVD did not have a clear duty to forward a penalty assessment traffic citation to the metropolitan court when Petitioner’s allegations did not rise to the level of what would be required to entitle him to withdraw his guilty plea.

FACTS
[2] Petitioner’s petition alleged that he was accused of driving 72 miles per hour in a zone where the speed limit was 50 miles per hour. He alleged that he was given the choice of “sign[ing] the citation acknowledging guilt” or “appear[ing] in court at a later date to contest guilt.” Petitioner alleged that he was driving with the flow of traffic, but could not truthfully testify that he was not speeding. He further alleged that he had since learned that his speedometer was not working. His basic complaint, however, was that the officer did not advise him that he could appear in court and acknowledge factual guilt, but request that the court defer adjudication of guilt in light of his excellent driving record. As a result, he claimed to have “inadvertently and unknowingly waived his right to seek a deferred sentence.”

[3] After several hearings addressing service of process issues, MVD filed a response on the merits and the matter came before the district court for a hearing on the merits. At that hearing, Petitioner could not remember what happened when he received his ticket, so the court had Petitioner read the factual allegations of his petition and swore him in with the intent of having this procedure substitute for Petitioner’s current testimony. MVD then argued its position on the merits.

[4] Its position, which it reiterates on appeal, is that (1) it had no clear duty to allow withdrawal of the penalty assessment inasmuch as the officer told Petitioner his two choices, Petitioner chose one, and the statutes do not allow him to change his mind; (2) Petitioner had an adequate remedy at law in that he could appeal his license suspension when he did not pay the fine; (3) Petitioner failed to join an indispensable party—the officer; and (4) laches. The district court granted the petition, withdrawing Petitioner’s guilty plea and ordering MVD to return a copy of the uniform citation to metropolitan court for trial on the merits. MVD appeals, arguing the four issues raised above, and in addition arguing an issue concerning the alleged lack of verification of the petition for the writ. As this last issue was not called to the district court’s attention at the final hearing, prior to which problems with service and verification were supposed to have been resolved, we do not reach the issue. See Collado v. N.M. Motor Vehicle Div., 2005-NMCA-056, ¶ 8, ___ N.M. ___, ___ P.3d ___ [No. 23,938 (Mar. 30, 2005)].

[5] After MVD filed its brief in this case, Petitioner did not respond and the case was submitted in accordance with Rule 12-312(B) NMRA. However, because this case is one of several raising similar issues, we perceived the matter to be of public importance, and we invited the participation of the New Mexico Criminal Defense Lawyers Association as amicus curiae. We are grateful for its participation, which has provided Petitioner with advocacy. When we refer in this opinion to Petitioner’s contentions, we are referring to arguments made on his behalf by amicus.

DISCUSSION
[6] We only need address MVD’s assertion that it had no clear duty to return the traffic citation to metropolitan court under the circumstances of this case. See Brantley Farms v. Carlsbad Irrigation Dist., 1998-NMCA-023, ¶ 16, 124 N.M. 698, 954 P.2d 763 (“Mandamus lies only to force a clear legal right against one having a clear legal duty to perform an act[.]”). We agree with MVD under the facts of this case, although we also agree with the district judge that, under different facts, such as when a police officer physically forced a driver to sign the citation, MVD might have such a clear duty. We begin with an explanation of penalty assessment procedure in New Mexico, and then we discuss the due process rights of people entering pleas.

[7] New Mexico law provides that, with certain exceptions, mainly for more serious offenses, see NMSA 1978, § 66-8-122 (1985), persons arrested for motor vehicle violations who are not given warning notices are to be given the choice of appearing in court on their promise to appear, as evidenced by signing the notice to appear section of a uniform traffic citation, or paying the penalty assessment, as evidenced by signing an agreement to pay the assessment on the uniform traffic citation. NMSA 1978, §§ 66-8-117 (1990) & -123 (1989). The penalty as-

Certiorari Not Applied For
From the New Mexico Court of Appeals

Opinion Number: 2005-NMCA-057

Topic Index:
Constitutional Law: Due Process
Criminal Procedure: Guilty Plea
Remedies: Writ of Mandamus

MANUEL VIGIL, Petitioner-Appellee, versus NEW MEXICO MOTOR VEHICLE DIVISION, Respondent-Appellant. No. 24,208 (filed March 30, 2005)

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY WENDY E. YORK, District Judge

MANUEL VIGIL, Pro Se Appellee
Albuquerque, New Mexico

PATRICIA A. MADRID, Attorney General
ALBERT ROLAND FUGERE, Special Assistant Attorney General
Santa Fe, New Mexico

BRIAN A. PORI, INOCENTE, P.C.
Albuquerque, New Mexico

New Mexico Criminal Defense Lawyers Association
sentence amounts for ordinary traffic violations are set forth in NMSA 1978, § 66-8-116 (2003), and range from $10 to $30 for most violations, including speeding up to 15 miles per hour over the speed limit, although there are penalty assessments as high as $200 for speeding over 35 miles per hour over the speed limit and $300 for littering. In addition, there are various fees that must be paid that could add up to $50. See NMSA 1978, § 66-8-116.3 (2003).

[8] If a person elects to accept the penalty assessment, the person’s signature is an admission of guilt and the payment of the assessment is to be made within 30 days. Section 66-8-17. Thereafter MVD remits the payment to the state treasurer for distribution. NMSA 1978, § 66-8-119 (1998). MVD is authorized to suspend the license, without a preliminary hearing, of anyone who its records show has not paid a penalty assessment in a timely fashion. NMSA 1978, § 66-5-30(A)(10) (2003). The person may then request a hearing, which shall be scheduled within 20 days. Section 66-5-30(B). If the driver is not satisfied with the results of the hearing, the driver may appeal to district court. NMSA 1978, § 66-5-36 (1999).

[9] An Attorney General’s opinion answered in the negative the question whether a person who has accepted and signed a penalty assessment can thereafter change his or her position and request an appearance before a magistrate. N.M. Att’y Gen. Op. 69-88 (1969). The opinion reasoned that there is no provision in the statutes for a change of mind, and the opinion found instructive the statutes of a neighboring state that did provide for an opportunity to reconsider. The opinion concluded that the matter of allowing for reconsideration was for the legislature and that, until statutes were changed, drivers could not reconsider their acceptance of penalty assessments.

[10] The voluntariness of a guilty plea is an issue that is governed by due process principles. See State v. Moore, 2004-NMCA-035, ¶ 13, 135 N.M. 210, 86 P.3d 635 (indicating that voluntariness of pleas is essentially a due process issue); State v. Garcia, 121 N.M. 544, 548-49, 915 P.2d 300, 304-05 (1996) (similar). “Because due process is a flexible right, the amount of process due at each stage of the proceedings is reflective of the nature of the proceeding and the interests involved, as well as the nature of the subsequent proceedings.” State ex rel. CYFD v. Maria C., 2004-NMCA-083, ¶ 25, 136 N.M. 53, 94 P.3d 796.

[11] In the criminal area, our cases require that a defendant be advised of the nature of the charge as well as the mandatory minimum penalty, if any, provided by law and the maximum possible penalty. Garcia, 121 N.M. at 548, 915 P.2d at 304 (relying on Rule 5-303(E) NMRA). Another formulation requires that a defendant be advised of the permissible range of sentences. Id. at 549, 915 P.2d at 305. While the maximum possible penalty and any mandatory minimum are generally set forth in the statutes proscribing the offenses, Supreme Court approved forms contain various formulations for non-mandatory minimum penalties, ranging from “a suspended sentence,” Form 9-406 NMRA (paragraph 2), to no statement of a minimum penalty, Form 9-406A NMRA (paragraph 2); Form 9-408A NMRA, to “probation,” Form 9-408 NMRA (paragraph 2 under District Court Approval). No mention is made of conditional discharge or deferred sentencing in these forms, and no form indicates the possibility of being found not guilty or of having the charges dismissed for any one of the myriad other reasons that can result in dismissal.

[12] Nonetheless, because of the ubiquitousness of the language that a defendant must be informed of the permissible range of sentences, see Boykin v. Ala., 395 U.S. 238, 245 n.1 (1969), Petitioner claims that his plea was involuntary because the officer did not advise him that he could appear in court and request a deferral of the prosecution or a deferred sentence. As a result, Petitioner claims he has “absolute constitutional right to withdraw his plea of guilty,” and because mandamus lies to prevent unconstitutional conduct by state officers, he further claims he has a right to a writ of mandamus in this case. See State ex rel. Taylor v. Johnson, 1998-NMSC-015, ¶ 18, 125 N.M. 343, 961 P.2d 768; State ex rel. Clark v. Johnson, 120 N.M. 562, 569, 904 P.2d 11, 18 (1995).

[13] We disagree because, after considering the respective interests involved and the flexibility of the due process response to them, we do not believe that the police officers must advise drivers of all the various possibilities that could happen if one went to court, e.g., the case may be dismissed because the officer does not show up, the judge may be lenient, the judge may give probation, etc. Cf. Jaouad v. City of New York, 4 F. Supp. 2d 311, 313 (S.D.N.Y. 1998) (holding that it is not a violation of due process not to inform ticket recipients of their right to have defective tickets vacated when they are informed that they can pay the ticket or utilize procedures to challenge it); City of Hollywood v. Miller, 471 So. 2d 655, 655-56 (Fla. Dist. Ct. App. 1985) (holding that notice on ticket that required payment of fine or contacting traffic bureau, but did not specifically set forth right to hearing, did not violate due process because “[t]he elements required to be included in the notice are to be tailored to the circumstances of the case and depend upon an appropriate accommodation of the competing private and governmental interests involved.” (internal quotation marks and citation omitted)); see also People v. Krantz, 317 N.E.2d 559, 564 (Ill. 1974) (holding that substantial compliance with rule on admonishments to defendants entering pleas does not include being “informed by the court concerning the possible dispositions by way of periodic imprisonment, probation, conditional discharges in cases of juvenile offenders and fines”), overruled on other grounds by People v. Wills, 330 N.E.2d 505, 508 (Ill. 1975).

[14] Penalty assessment misdemeanors are minor offenses that involve at most a few hundred dollars in fines and usually involve less than $100. While not wishing to minimize the impact of such fines on persons of modest means, we must also consider that the legislature has provided a streamlined method of handling these matters that benefits both the driving public and state government. However, the legislature has not made provisions for drivers having second thoughts about whether it was wise to plead guilty. Given the relatively minor consequences involved to the drivers and the potential disruption of otherwise smoothly working procedures, we do not believe that mandamus would lie except in those situations posited by the court below where there was a plea made under duress or some like circumstance. In this connection, we deem it noteworthy that Petitioner has cited no case that requires the formalities, including those prescribed by Boykin, concerning the waiver of such rights as confrontation and self-incrimination, 395 U.S. at 242, to be observed in cases of minor traffic offenses.

CONCLUSION

[15] As Petitioner’s due process rights were not violated by the choice the officer gave him, MVD did not have a clear duty to return the citation to the metropolitan court. The district court therefore erred in granting mandamus, and we reverse its ruling and remand with instructions to dismiss the petition.

[16] IT IS SO ORDERED.

LYNN PICKARD, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Chief Judge

A. JOSEPH ALARID, Judge

36 BAR BULLETIN - JUNE 6, 2005 - VOLUME 44, NO. 22
OPINION
MICHAEL D. BUSTAMANTE, CHIEF JUDGE

[1] Both Mother and Father appeal from the district court’s custody, timeshare, and child support order that arose from Father’s motion to modify custody, timesharing, and support. The district court sealed the trial on the merits, but allowed a local television station to attend and televise the proceedings, while prohibiting the release of the recording. The court determined that there had been no material change in circumstances to warrant a change in legal and physical custody, but clarified timesharing and support responsibilities of the parents and ordered the parties to pay their own attorney fees. The court also ordered Father to pay Mother’s share of the guardian ad litem’s (GAL) fees and to deduct that amount from his support responsibilities. Mother appeals the rulings on child support and attorney fees; Father appeals the custody ruling. Both parents challenge different aspects of the court’s rulings sealing the hearing but permitting television cameras in the courtroom. We affirm the court’s custody ruling, but for the reasons that follow, we reverse and remand the support issues. In light of our rulings, we also reverse and remand the issue of attorney fees.

BACKGROUND

[2] Father and Mother were never married, but had a child on November 2, 1994. On April 22, 1996, the district court entered a stipulated judgment and decree of custody and child support giving the parents joint legal custody. By that time, Mother and Child were living in Albuquerque, and Father was living in Norman, Oklahoma. The order provided that Mother would have primary physical custody and Father would have periods of visitation, but stated that Child would not sleep away from his own bed and/or Mother until he was at least two and one-half years old. Evidence was presented at trial that Child made his first visit to Oklahoma in December 1998. Between 1999 and 2000, Child made approximately two visits to Oklahoma, with his parents meeting in Amarillo, Texas to transfer him from one parent to the other. In the summer of 2001, when Child was six, he began to fly to Oklahoma, and in the summer of 2002, Father told Mother that he wanted Child to spend most of the summer with him, but Mother wanted Child to stay in Oklahoma for only two to three weeks. Father testified that negotiations about visits became increasingly difficult, and in June 2002 he filed a motion to modify custody due to a significant change in circumstances. In his motion to modify custody, Father sought primary physical custody, claiming that Child wanted to spend more time with him and that Mother was failing to comply with the provisions of the 1996 decree. Father requested the appointment of an expert under Rule 11-706 NMRA to conduct a custody evaluation and to make recommendations as to Child’s best interests.

[3] Following the filing of Father’s motion to modify custody, the relationship between Child’s parents appears to have become increasingly contentious, and a GAL was appointed to represent Child’s best interests. Then in November 2002, the court appointed an expert under Rule 11-706 to perform a custody evaluation. The court-appointed expert completed the psychological evaluation and parenting plan on March 14, 2003, which recommended a continuation of joint legal custody and primary residence with Mother.

[4] By this time, numerous motions had been filed, alleging claims by Father that Mother was not complying with the joint custody and visitation provisions, allegations by the GAL that Mother had made unsubstantiated claims of sexual abuse against Father, and claims by Mother that the GAL was hostile to her and not objective. The conflict between the parties culminated in Father’s filing a motion on March 13, 2003, to modify joint legal custody and award sole legal custody to Father. A hearing on this motion was set for April 29, 2003.

[5] On April 7, 2003, Mother moved to adopt the March 14 parenting plan recommended by the court-appointed expert with only one change concerning the return date from summer vacation. Father objected to this change and requested a two-day evidentiary hearing on the parenting plan. Father and the GAL then filed additional motions alleging that Mother had refused to take Child to see a therapist and refused to allow Father telephone access to Child. At the hearing on April 29, 2003, the court appointed a therapist for Child, ordered the parties to follow the recommendations of the court-appointed expert on a temporary basis, ordered the parties to attend a facilitation before trial, and set a trial date for August 20-21, 2003. The court also ordered that all pending motions would be heard at trial.

Certiorari Not Applied For

From the New Mexico Court of Appeals

Opinion Number: 2005-NMCA-058

FLOYD H. GRANT, III, Petitioner-Appellee/Cross-Appellant, versus

LESLIE D. CUMIFORD, f/k/a LITTLE, Respondent-Appellant/Cross-Appellee.

No. 24,445 (filed March 31, 2005)

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY

DEBORAH D. WALKER, District Judge

SANDRA MORGAN LITTLE
LES W. SANDOVAL
LITTLE & GILMAN-TEPPER, P.A.
Albuquerque, New Mexico

for Appellee/Cross-Appellant

LESLIE D. CUMIFORD
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Pro Se Appellant/Cross-Appellee

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On May 16, 2003, however, the GAL filed an emergency motion to transfer custody from Mother to Father in Oklahoma. In this motion, the GAL made the following allegations: that Mother had unreasonably attempted to block Father’s time with Child; that Mother had gone to great lengths to prevent Father from having a meaningful relationship with Child; that Mother had falsely accused Father of being a pedophile; that Mother had turned against the GAL and the court’s expert for failing to accept her accusations; that Mother refused to take Child to therapy when the therapist did not accept Mother’s accusations; that Father, whom the GAL found credible, had reported Mother was obstructing Father from communicating with Child; that by enrolling Child in a karate program, Mother was attempting to influence Child’s feelings about going to Oklahoma; that Mother had claimed Father had convictions for driving while intoxicated and later acknowledged this was not true; that Mother’s home was toxic and she should receive only supervised visitation; and that Mother had been uncooperative in general with the GAL. On May 20, 2003, a day before the hearing on the GAL’s motion, the court-appointed expert issued an addendum to his psychological evaluation, in which he recommended that Father have temporary sole legal and physical custody of Child for the summer.

Following a hearing on the GAL’s motion, held on May 21, 2003, a week before Child was due to go to Oklahoma for the summer, the court entered a minute order awarding immediate, sole, temporary custody of Child to Father in Oklahoma and awarding one week of supervised visitation to Mother in July. A week after Child left for Oklahoma, Father filed a motion to modify Mother’s summer visitation, requesting that Mother travel to Oklahoma and be supervised at all times. The motion alleged that Mother had published a flyer claiming that Child had been removed from her home without notice and without justification. At a hearing held on June 4, 2003, the court ordered that the GAL had authority to determine whether summer visitation should be modified and noted that the GAL did not intend to modify the visitation at that time.

The GAL initially determined that Child should visit Mother in Albuquerque for seven days from August 3, 2003. However, on July 18, 2003, the GAL filed a report recommending the visit be changed to coincide with Father’s trip to Albuquerque for court-ordered mediation from July 30, 2003, until August 2, 2003. Because Mother was also ordered to participate in the mediation at this time, her access to Child was to be restricted to the evenings until Father picked up Child and took him to a hotel. In addition, the GAL recommended that all of Mother’s visitation be supervised.

On August 11, 2003, the court-appointed expert issued a second addendum to his psychological evaluation, recommending that Father have sole legal custody of Child and Mother have a limited amount of visitation. Less than a week before the trial on the merits, held on August 20-25, 2003, the GAL filed a motion to exclude televised media from the hearing and a motion to seal the hearing on the merits. The court denied the motion to exclude the media, but ordered that the media could “not release the outcomes of the足age to any party or non-party in this matter.” The court also sealed the hearing to all who did not have a direct interest in the matter.

Following the trial, the court ruled that there had not been a material change in circumstances since the 1996 stipulated judgment warranting a change in legal and physical custody. In addition to clarifying timesharing arrangements, the court ordered Father to pay sixty percent and Mother forty percent of Child’s support. The court also abated Father’s support by one-half for June and July 2003, when Child would be with Father. The parties were ordered to pay the court expert and the GAL fees in the same proportion as child support. In addition, the court ordered Father to pay Mother’s share of the GAL fees and then to deduct up to $300 per month from child support to offset those payments. The parties were ordered to pay their own attorney fees. This appeal and cross-appeal followed.

We include the remaining facts pertinent to each appellate issue in our discussion.

DISCUSSION

Mother raises five issues in her appeal: whether the district court (1) abused its discretion in ordering both parties to pay their own attorney fees, (2) erred in imputing salary to Mother, (3) erred in ordering Father to pay the GAL fees and to deduct Mother’s portion from child support payments, (4) improperly abated Father’s summer child support payments on an annual basis, and (5) improperly sealed the hearing on the merits. Father raises two issues in his cross-appeal: whether the court abused its discretion in (1) failing to modify custody; and (2) allowing the news media to be present in the courtroom. Because the issues of support and attorney fees follow from the resolution of the custody issue, we first address the substantive issue of whether the court erred in failing to modify custody.

Child Custody

Father argues that the district court should have given him sole legal and physical custody of Child. He contends that there was overwhelming evidence before the district court that circumstances had substantially changed since the entry in 1996 of a stipulated custody order awarding joint legal custody to both parents and primary physical custody to Mother. As Father acknowledges, there is a presumption that joint custody is in the best interests of the child. NMSA 1978, § 40-4-9.1(A) (1999). And, as this Court has stated, “[a] court may modify a custody order only upon a showing of a substantial change in circumstances since the prior order that affects the best interests of the children.” Thomas v. Thomas, 1999-NMCA-135, ¶ 10, 128 N.M. 177, 991 P.2d 7. “We will overturn the trial court’s custody decision only for abuse of discretion, and we will uphold the court’s findings if supported by substantial evidence.” Id. “An abuse of discretion occurs when a ruling is clearly contrary to the logical conclusions demanded by the facts and circumstances of the case.” Sims v. Sims, 1996-NMSC-078, ¶ 65, 122 N.M. 618, 930 P.2d 153. “To reverse the trial court under an abuse-of-discretion standard, ‘it must be shown that the court’s ruling exceeds the bounds of all reason . . . or that the judicial action taken is arbitrary, fanciful, or unreasonable.’” Edens v. Edens, 2005-NMCA-____, ¶ 13, ___ N.M. ___, P.3d ____ (No. 24,342/24,597) (Jan 13, 2005) (quoting Meiboom v. Watson, 2000-NMSC-004, ¶ 29, 128 N.M. 536, 994 P.2d 1154 (internal quotation marks and citation
Father argues in his cross-appeal that he presented overwhelming evidence at trial to demonstrate a material change in circumstances. Father argues that the court-appointed expert’s May and August reports showed Mother’s actions were causing emotional damage to Child, and that the expert’s May report concluded that Mother was trying to align Child with her and to destroy the Father/Child relationship. Father states that the court acknowledged Mother’s destructive conduct, which demonstrated that there was no evidentiary support for the court’s statement that the parties had worked well together.

Father also argues that the expert’s August report concluded that the conflict between the parents was expected to continue and that Father should have sole custody. In addition, Father argues that the GAL concluded that it was in Child’s best interest to award sole custody to him because Mother’s “fabrication of pedophilia and alcoholism would make it unlikely that joint custody was a workable arrangement.” Father argues that there was evidence that Mother restricted Father’s access to Child at school, that she falsely accused Father of pedophilia, driving while intoxicated, and alcohol abuse, that Mother interfered with Child’s telephone calls to Father, that she refused to let Child go to Oklahoma over the Easter weekend, that she refused to take Child to therapy, and that she tried to brainwash Child against Father. In light of all this evidence, Father contends that the court abused its discretion in not finding a material change in circumstances.

The recorded transcript of the trial, however, indicates that the court was not persuaded by the testimony of the court-appointed psychological expert and the GAL. The court specifically questioned the court-appointed expert about what had caused him to change his recommendation between March 14, 2003—the date of the original report recommending joint legal custody and primary physical custody with Mother—and May 20, 2003—the date of the first addendum to the report recommending temporary sole legal custody and primary physical custody with Father. On cross-examination of the expert, Mother’s counsel challenged the accuracy of the expert’s version of the events he claimed caused him to change his recommendation between March and May 2003.

In addition, the testimony of Mother’s expert psychologist, who was hired to provide a second opinion on the custody recommendation, questioned the court-appointed expert’s conclusions in the May addendum. Mother’s expert noted that the information on which the court’s expert based his first addendum to his report was incomplete and one-sided because the expert never interviewed Mother or Child to obtain their versions of what had occurred, and noted that there was no evidence from the psychological tests to support some of the conclusions the court’s expert had drawn about Mother, stating that the expert appeared to have relied on data provided by Father and the GAL. Mother’s expert also testified that there appeared to have been no major breaches of the parenting plan to justify recommending a change in custody.

Specifically, Mother’s expert stated that if Mother’s version of the facts indicated that, rather than simply refusing to take Child to counseling, Mother had sought clarification from the court about whether such a visit (sought by the GAL in preparation for an additional custody evaluation) was necessary, that information should have been included in the court-appointed expert’s report. She also testified that where the evidence indicated that Child had been involved in a karate class before the summer visitation was to occur, his participation in that program would have been an insufficient basis to recommend a change in custody. Mother’s expert also testified that even if Mother blocked the Easter visitation, Child had made numerous visits to Oklahoma and was due to spend the entire summer there and in her view, that was not a sufficient reason to recommend a change in custody. She also noted that there was consistent phone contact between Father and Child. Moreover, from reviewing the record, Mother’s expert observed, it appeared that the allegations that Father had been convicted of driving while intoxicated were based on faulty information supplied to Mother, and that the allegations were withdrawn shortly after they had been raised, once Mother became aware they were untrue. In addition, Mother explained that Child’s behavior had led her to consult physicians about the possibility of sexual abuse.

The court’s concern about what specifically had occurred between March and May to change the custody recommendation became apparent again when the court questioned Mother’s expert. The court stated that it was trying to evaluate what had happened to change the court-appointed expert’s opinion about custody, resulting in three different reports on March 14, 2003, May 20, 2003, and August 11, 2003. Mother’s expert responded that the recommendations of the court’s expert had changed by May 20, 2003, but that those recommendations were based on incomplete information.

In its oral ruling, the court stated that from 1996 to 2002, the parties had been able to function very well without court intervention, but in June 2002 things had spiraled out of control. The court did not find, however, that there had been a material and substantial change in circumstances warranting a change in custody. From our review of the record, we find no abuse of discretion and affirm the district court’s decision. Therefore, we will proceed to address Mother’s issues regarding child support and attorney fees.

### Child Support

Mother raises three issues concerning the child support award: that the district court erred in imputing income to Mother, in ordering Father to pay the GAL fees and to deduct Mother’s portion from child support payments, and in abating Father’s summer child support payments on an annual basis. “The setting of child support is left to the sound discretion of the trial court as long as that discretion is exercised in accordance with the child support guidelines.” Quintana v. Eddins, 2002-NMCA-008, ¶ 9, 131 N.M. 435, 38 P.3d 203. “[E]ven when we review for an abuse of discretion, our review of the application of the law to the facts is conducted de novo. Accordingly, we may characterize as an abuse of discretion a discretionary decision that [is] premised on a misapprehension of the law.” N.M. Right to Choose/NARAL v. Johnson, 1999-NMSC-028, ¶ 7, 127 N.M. 654, 986 P.2d 450 (internal quotation marks and citations omitted) (alteration in original). Findings made by the district court about the parents’ incomes, as required by the guidelines to apportion child support, are reviewed to determine whether they are supported by substantial evidence.
Imputation of Income

Section 40-4-11.1(C)(1) defines income as “actual gross income of a parent if employed to full capacity or potential income if unemployed or underemployed.” At trial, the district court admitted evidence of Mother’s actual income, which was approximately $51,000 per year. Mother testified that she worked at Sandia Laboratories twenty-five hours per week, but that she worked an additional twenty-five to thirty hours at her own business, which had not yet generated any income. The district court stated when ruling that it had imputed income to Mother because although Mother was entitled to start her own business, she could not do it at Child’s expense.

Mother argues that income should not have been imputed to her because she was fully employed, not underemployed or working part-time. Mother argues that under Boutz v. Donaldson, 1999-NMCA-131, ¶ 4-6, 128 N.M. 232, 991 P.2d 517, the district court should not have imputed income to her because, like the mother in that case, she had made and continued to make a good faith effort to succeed in developing her business. In Boutz, this Court wrote that “[i]t is for the trial judge . . . subject to judicial review, to assess Mother’s efforts, sincerity, conscientiousness, and credibility, and then to decide whether Mother has acted in good faith to earn and preserve as much money to support her children as could reasonably be expected under the circumstances.” Id. ¶ 6. More recently, in Quintana, we reaffirmed the test described in Boutz and stated “that the trial court must determine whether a parent’s career choice is made in good faith and is reasonable under the circumstances.” Quintana, 2002-NMCA-008, ¶ 23. We stated that in the absence of greater legislative guidance, the determination of underemployment “will be left to the sound discretion of the trial court, to be made after considering whether the parent has acted in good faith and whether the parent’s actions are reasonable under the totality of the circumstances.” Id. ¶ 24 (citing Boutz, 1999-NMCA-131, ¶ 5-6).

This is not a case in which Mother is working part-time or is clearly underemployed. Indeed, there was evidence before the district court that Mother was working more than forty hours per week. Therefore, the questions for the district court to consider were whether Mother was acting in good faith in her career choice and whether those actions were reasonable under the circumstances. Because the district court did not provide any explanation or findings and conclusions in relation to Mother’s good faith and the reasonableness of her actions in reaching the ultimate determination of imputation of income to Mother, we remand this issue for reexamination to assure that the court has considered the imputation issue using the test set forth in Quintana.

Deduction of the GAL Fees from Child Support

Mother also argues that the district court erred in ordering Father to pay the GAL fees and to deduct up to $300 per month from child support payments in order to pay Mother’s share of the GAL fees. As we stated earlier, the setting of child support is within the sound discretion of the district court, “exercised in accordance with the child support guidelines.” Quintana, 2002-NMCA-008, ¶ 9. Under NMSA 1978, § 40-4-11.2 (1989), any deviation from the guidelines “shall be supported by a written finding in the decree, judgment or order of child support that application of the guidelines would be unjust or inappropriate.” Section 40-4-11.2 then continues to explain that “[c]ircumstances creating a substantial hardship in the obligor, obligee or subject children may justify a deviation upward or downward from the amount that otherwise be payable under the guidelines.”

Mother argues that nothing in the guidelines provides for a deduction from child support to pay a GAL. She also argues that deducting GAL fees from support constitutes a tax on child support and deprives Mother of the opportunity to dispute the GAL fees. Father argues, on the other hand, that because Mother had previously been ordered to pay the GAL fees and had refused, the court was entitled to deduct the fees from child support.

The court is authorized to appoint a GAL in contested custody cases, pursuant to NMSA 1978, § 40-4-8 (1993), and to allocate expenses, costs, and attorney fees between the parties. However, nowhere in either the child support guidelines or the GAL statute is any specialized procedure outlined to ensure the payment of GAL fees by deducting them from child support. Moreover, our Supreme Court has recognized the “ongoing right of a child to receive support money from his [parent].” Brannock v. Brannock, 104 N.M. 385, 386, 722 P.2d 636, 637 (1986) (internal quotation marks and citation omitted). Although Father argues that Mother cites no law negating the district court’s authority to modify child support payments “to ensure the payment of Mother’s portion of the GAL’s outstanding fees,” Father has cited no law requiring the GAL’s right to payment to take priority over Child’s right to support, especially when the support guidelines indicate that any deviation must be justified by a showing of hardship.

In the absence of legislative guidance to the contrary, therefore, we see no reason why GAL fees should be treated any differently from any other attorney fees, and we reverse that part of the custody and support order requiring Father to pay Mother’s share of the GAL fees and to deduct up to $300 per month from his child support obligation.

Abatement of Summer Child Support

Mother also argues that the court improperly abated Father’s summer child support payments. Mother states that although the district court’s written order states that Father’s child support payments for June and July 2003 are to be abated by one-half, the written worksheet shows an annual abatement. Mother argues that because this ruling effectively modifies the amount of support required by the guidelines, the court should have explained its reasons in the order. Father responds that it was within the discretion to modify the support in this way. Mother also argues that the abatement in the custody and support order only refers to two months in 2003 and not to future years.

The court’s child support worksheet stated that Father’s monthly share of child support was to be $1416. Section 40-4-11.1(F)(1) permits “a partial abatement of child support for visitations of one month or longer” in visitation situations like the one before us.
Mother’s affidavit, he has no knowledge of whether it was received. Thus, the court was not able to consider the information presented in the affidavit.

{31} We hold that an annual abatement of child support of this type is not a deviation from the guidelines, as Mother argues, but is explicitly provided for in those guidelines. Contrary to Mother’s argument, therefore, the court was not required to state in its order its reasons for deviating from the guidelines. Cf. § 40-4-11.1(A) (providing for a statement explaining reasons for deviation from the guidelines). In addition, we are not persuaded that the order only mandates abatement for 2003. The order specifically abates support for 2003 and, consistent with the district court’s oral ruling, calculates future support obligations with the same abatement based on the parties’ timesharing arrangement.

{32} In light of our ruling on the imputation of Mother’s income, however, Mother’s income is currently undetermined. Accordingly, on remand, in determining the precise amount of the parents’ support obligations, the district court should consider whether, and if so, to what extent, the abatement amount should be different.

**Attorney Fees**

{33} Mother argues that the district court failed to properly consider the factors set forth in Rule 1-127 NMRA to determine whether to award Mother her attorney fees. Mother also argues that she was denied the ability to prepare and argue her case. As we understand her, Mother argues that the district court stated on August 25, 2003, that if the parties wanted a hearing on attorney fees, the court would hold one. Mother states, however, that at a hearing on October 3, 2003, which had been moved forward from October 10, 2003, the court refused to hear arguments on the issue. In response, Father argues that the court ruled on attorney fees on August 25, 2003, and that Mother did not preserve any argument on the issue. We are not persuaded by Father’s contentions that the court ruled that the issue of attorney fees had been fully addressed on August 25, 2003, or that Mother’s arguments were not preserved.

{34} The transcript of the trial reveals that following the presentation of evidence on August 22, 2003, the court reviewed all pending motions with the parties. After instructing the parties on how it wanted to deal with the pending motions, the court instructed the parties to come to court on August 25, 2003, with information relevant to the four factors listed in Rule 1-127 regarding attorney fees, and to be prepared to give the court that information orally. The court stated that it would give its recommendation on fees on August 25, 2003. On August 25, 2003, after ruling that all issues raised by the trial and motions had been addressed, the court recommended that each party pay his or her own attorney fees. Neither party sought to introduce evidence of costs and fees at that time, and the court acknowledged that it had not heard evidence on these issues, stating that if the parties wanted another hearing on the issues of costs and fees, the court would give it. Neither party indicated at that time that it wanted a hearing on the issue, and no request for a hearing appears in the record. Mother represents, however, that she filed an attorney affidavit on attorney fees and costs with the court on September 9, 2003. Although this document does not appear in the record, Father’s motion to strike the affidavit, filed on September 16, 2003, states that such a motion was filed. Father represents in his answer brief, however, that although he received a copy of the affidavit, he has no knowledge of whether it was filed with the court. At the October 3, 2003, hearing, however, the court not only noted that it had recommended that each party pay his or her own attorney fees, it also acknowledged receipt of Mother’s affidavit. The court then stated that, having reviewed the entire file and notes from the trial and having considered all the factors required by rule, statute, and case law, it was ruling that each party pay his or her own attorney fees.

{35} By presenting the court with an affidavit, Mother sufficiently alerted the court’s attention to her request for attorney fees to have preserved this issue for appeal. See Marquez v. Marquez, 74 N.M. 795, 799, 399 P.2d 282, 285 (1965) (holding that “[t]he trial court must be alerted to a claimed non-jurisdictional error in order to preserve it for consideration on appeal”). Under NMSA 1978, § 40-4-7(A) (1997), “the determination of whether to grant an award of attorneys’ fees and the amount of such award is within the discretion of the trial court and will be reviewed only to determine whether there has been an abuse of discretion.” Monsanto v. Monsanto, 119 N.M. 678, 681, 894 P.2d 1034, 1037 (Ct. App. 1995). Rule 1-127 requires that the court consider relevant factors presented by the parties, including but not limited to:

A. disparity of the parties’ resources, including assets and incomes;
B. prior settlement offers;
C. the total amount of fees and costs expended by each party, the amount paid from community property funds, any balances due and any interim advance of funds ordered by the court; and
D. success on the merits.

Although the court stated that it had considered these factors, because we have remanded the issue of Mother’s income, we also remand this issue for the district court to determine whether disparity of income combined with success on the merits affects the earlier ruling on attorney fees. Accordingly, Mother’s issue of whether she should have been given more time to prepare an argument on the issue of attorney fees is now moot.

**Limiting Public Access to the Trial**

{36} Mother and Father both raise issues related to the court’s rulings sealing the hearing but allowing the televising, without the release of footage, of the proceedings. Less than a week before the trial on the merits, the GAL filed two motions: (1) to exclude the televised media from the hearing on the merits, and (2) to seal the hearing on the merits to protect the emotional health of the
The court’s written orders denied the motion to exclude the media, but closed the courtroom to all persons not having a direct interest in the matter.

We first address the issue raised by Mother in her brief-in-chief that the court improperly sealed the hearing on the merits. The GAL moved to seal the hearing to protect the emotional health of Child on August 18, 2003. On August 19, 2003, both Father and a local television station responded to this motion. The television station argued that the courtroom should be open and that the GAL had not met his burden of proof to close proceedings. Father’s response supported the GAL’s position. Mother did not respond, and the court heard the motion immediately before trial. Mother only argued very briefly about factual matters, but the issue Mother raises on appeal was clearly before the district court, as argued by the television station, and we will therefore consider Mother’s issue preserved for appeal.

Mother appeals only from the court’s order granting the GAL’s motion to seal the hearing and close the courtroom to all persons not having a direct interest in the matter. The order defined those with a direct interest as the parties, the television station representatives, and the attorneys and members of their staff working on the case. Although we note that the court’s oral ruling also appeared to seal the court records, the written order, signed by the attorneys for all the parties, does not reflect that. Because the court’s written order only ordered the sealing of the hearing on the merits and because that hearing has already occurred, we hold that this issue is moot. See Hamman v. Clayton Mun. Sch. Dist. No. 1, 74 N.M. 428, 429, 394 P.2d 273, 274 (1964) (stating that “[a] case is moot when it does not involve any actual controversy or where the issues involved in the trial court no longer exist” (internal quotation marks omitted)); Insure N.M., LLC v. McGonigle, 2000-NMCA-018, ¶¶ 26-27, 128 N.M. 611, 995 P.2d 1053 (refusing to issue an advisory opinion where a defendant’s claim had been rendered moot).

In his cross-appeal, Father appeals from the order denying the GAL’s motion to exclude the media from the courtroom. Father filed a response supporting the GAL’s position. The court’s order denied the GAL’s motion to exclude the media from the trial, but prohibited it from releasing its footage. The only part of this order that has future effect is the ruling prohibiting the release of footage, and neither party raises an issue from that part of this order. We hold, therefore, that because the hearing has already occurred, the issue Father raises concerning the presence of the media in the courtroom is moot.

CONCLUSION

For the reasons we have given above, we affirm the district court’s ruling that there had been no material change in circumstances justifying a change in legal and physical custody. We reverse that part of the court’s order requiring Father to pay Mother’s share of the GAL fees and to deduct that amount from his monthly support payments. We also reverse the court’s ruling imputing salary to Mother and remand for the district court to determine whether Mother’s choice of self-employment was in good faith and was reasonable under the circumstances. Because Mother’s income remains undetermined, we also remand the issue of whether Mother should have been awarded attorney fees under Rule 1-127. For the same reason, although the district court was authorized to abate Father’s child support payments, we remand that issue for the court to determine what the parties’ support payments should be. Finally, we hold that the issues Mother and Father raise concerning the sealing of the hearing and the presence of the media at the trial on the merits are moot. On remand, the district court should consider whether Appellant is entitled to costs under Rule 1-054(D) NMRA.

IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE,
Chief Judge

WE CONCUR:
JONATHAN B. SUTIN, Judge
CYNTHIA A. FRY, Judge
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* The published advisory opinions are also available at the UNM School of Law Library and the Supreme Court Library.
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