Mandatory Disclosure of Professional Liability Insurance Coverage

Dear Colleagues,

For the past several years, the New Mexico Board of Bar Commissioners and the Lawyers Professional Liability Committee have been studying the issue of professional liability insurance coverage as applicable to the New Mexico Bar. After much discussion and debate, both the Board of Bar Commissioners and the Lawyers Professional Liability Committee have recommended to the Supreme Court that disclosure of attorneys’ insured status be mandatory.

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Legal Education Calendar

Writs of Certiorari

Clerk Certificates

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2005-NMCA-090: Summit Properties, Inc. v. Public Service Company of New Mexico


2005-NMCA-092: State v. Ernesto Flores

2005-NMCA-093: State v. Peter P. Gutierrez

Special Insert:

CLE AT A GLANCE
Mandatory Disclosure of Professional Liability Insurance Coverage

The Supreme Court is adopting this recommendation, per Order No. 05-8500, printed in this issue of the Bar Bulletin. After significant consideration, the Court believes that this approach is an important first step to assessing the current insured status of New Mexico attorneys, and ultimately better serving the interests of the public in New Mexico. I wish to emphasize that no decision has been made, or is anticipated in the near future, regarding mandatory professional liability coverage for non-exempt attorneys. The current action refers strictly to disclosure.

In your next annual registration statement, you will find a disclosure form that requests information regarding your type of practice, insured status, primary region of practice within the State, and the size of your firm. Please take the time to provide accurate and complete information; this information will not be made available to the public. Thank you very much for your participation with this effort.

Yours Truly,

[Signature]

Richard C. Bosson
Chief Justice

Paralegal Day

By proclamation of Governor Bill Richardson, August 26 is hereby proclaimed to be Paralegal Day in celebration of the 10th anniversary of the Paralegal Division, formerly known as the Legal Assistants Division

The Division was created by the Supreme Court to:

• encourage a high order of ethical and professional attainment
• further education among its members
• carry out programs within the State Bar
• and establish good fellowship among Division members, the State Bar of New Mexico and the members of the legal community.


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- New Mexico Federal Judicial Decisions
- New Mexico Federal Rules
- New Mexico Attorney General Opinions
- New Mexico Session Laws
- New Mexico Administration Code
- Prior versions of the Official New Mexico Statutes Annotated from 1989 to present
- New Mexico Session Laws from the 1993 regular session to present

State agency and local public body subscribers to New Mexico One Source of Law™ will automatically receive updates to the One Source of Law CD-ROM or the One Source of Law DVD. If you are not a current subscriber and would like to be, please contact the New Mexico Compilation Commission at 505-827-4821.
12
The Annual Review of Civil Procedure

Friday, August 12, 2005 • 8:30 a.m. - 5:15 p.m.
State Bar Center, Albuquerque
7.5 General and 1.2 Ethics CLE Credits

Co-Sponsor: UNM School of Law
Presenters: Professor Norman Bay, Professor Michael Browde,
Professor Ted Occhialino, Adjunct Professor Andrew Schultz
This year’s annual review will feature an in depth look at significant changes in New Mexico civil procedure, New Mexico case law affecting civil procedure, and an ethics presentation entitled “Coming Attractions” in the New Mexico Rules of Professional Conduct.

☐ Standard & Non-Attorney $209
☐ Government & Paralegal $199

19
16th Annual Appellate Practice Institute: A Sophisticated Approach

Friday, August 19, 2005 • 8:20 a.m. - 4:30 p.m.
State Bar Center, Albuquerque
6.4 General and 1.0 Ethics CLE Credits

Co-Sponsor: Appellate Practice Section
Presenters: Steven L. Tucker, Esq., Edward Ricco, Esq.,
Jane B. Yohalem, Esq., Hon. Gene E. Franchini, Kerry Kiernan, Esq.,
Bruce R. Rogoff, Esq., Andrew S. Montgomery, Esq.,
Thomas C. Bird, Esq., Hon. Edward L. Chavez,
Hon. Pamela B. Minzner, Hon. Cynthia A. Fry, Hon. Lynn Pickard
This seminar goes beyond the basics of appellate practice. It is designed to develop appellate skills in various post-trial proceedings, interlocutory appeals and writ practice. It is for those practitioners who wish to broaden their appellate practice and learn more about various sub-topics within the general field of appeals.

☐ Standard & Non-Attorney $179
☐ Government & Paralegal $169
☐ Appellate Practice Section Member $159
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• Professionalism Tip •

With respect to the public and to other persons involved in the legal system:

I will strive to set a high standard of professional conduct for others to follow.

Meetings

August
11
Public Law Section Board of Directors, noon, RMD Legal Bureau, Santa Fe
11
Business Law Section Board of Directors, 4 p.m., State Bar Center
13
Ethics Advisory Committee, noon, State Bar Center
15
Lawyers Professional Liability Committee, noon, State Bar Center
16
Children’s Law Section Board of Directors, noon, Juvenile Justice Center
17
Bankruptcy Law Section Board of Directors, noon, U.S. Bankruptcy Court
17
Law Office Management Committee, noon, State Bar Center

State Bar Workshops

August
10
Landlord/Tenant Workshop - Landlords, 6 p.m., State Bar Center
11
Lawyer Referral for the Elderly Workshop, 10 a.m., Belen Senior Center, Belen
24
Family Law Workshop, 5:30 p.m., Branigan Library, Las Cruces
24
Consumer Debt/Bankruptcy Workshop*, 6 p.m., State Bar Center
25
Consumer Debt/Bankruptcy Workshop*, 5:30 p.m., Branigan Library, Las Cruces
29
Consumer Debt/Bankruptcy Workshop*, 6 p.m., Gallup City Council Chambers, Gallup

*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.
COURT NEWS
Supreme Court
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., Aug. 26 at the Seventh Judicial District Court, 200 Church St., Socorro. For more information on the commission or with regard to the next scheduled meeting, call (505) 827-4960.

First Judicial District Court
Family Law
Brownbag Meeting
The First Judicial District Court will host its family law brownbag meeting at noon, Aug. 9 in the Grand Jury Room, second floor, of the Steve Herrera Judicial Complex in Santa Fe. The event will feature a meeting with local agencies that deal with issues relating to family law. For more information, or to suggest an agency to be invited, 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
Destruction of Tapes
Pursuant to the Judicial Records Retention and Disposition Schedules, the Second Judicial District Court will destroy tapes filed with the court, in the criminal cases for years 1980 to 1984 included but not limited to cases that have been consolidated. Cases on appeal are excluded. Should attorneys have cases with tapes, and wish to have duplicates made, they should verify tape 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 Aug. 26.

Eleventh Judicial District Court
Judicial Appointment
Gov. Bill Richardson has appointed Judge Robert A. Aragon to the bench for the Eleventh Judicial District Court. Aragon, a native of Gallup, has worked for Aragon & DePaul as an attorney since 1989. He also served the Eleventh Judicial District as district attorney from 1985 to 1988. Aragon is a graduate of Gallup High School and holds both a bachelor's degree and law degree from the University of New Mexico.

Bernalillo County Metropolitan Court
Judicial Appointments
Gov. Bill Richardson has appointed Judge Rosemarie L. Allred and Judge Clyde DeMersseman to the Bernalillo County Metropolitan Court bench. Allred will serve in Division 18 as a criminal judge and DeMersseman will serve in Division 17 as a civil judge.

Allred has worked as a sole practitioner since 1997. She has also served as assistant district attorney for the Second Judicial District from 1996 to 1997 and for the Eleventh Judicial District from 1995 to 1996. Allred holds a bachelor’s degree from the University of Wisconsin and a law degree from Creighton University in Nebraska.

DeMersseman has worked at the Law Offices of James P. Lyle, PC since 2004 and for the Branch Law Firm from 1998 to 2004. He has also served in various positions at the district attorney’s office in the Second Judicial District. DeMersseman received a bachelor’s degree from the University of Colorado at Boulder and holds a law degree from the University of Denver College of Law.

U.S. District Court for the District of New Mexico
Service on Court Committees and Panels
U.S. District Court for the District of New Mexico Chief Judge Martha Vázquez would like to solicit interest of Federal Bar members in future service on the following court committees: Bench and Bar Fund Committee, Pro Se Civil Litigants Committee, Magistrate Judge Merit Selection Panel, CJA Panel Committee, and the Tenth Circuit Advisory Committee. All interested Federal Bar members in good standing should respond indicating their preference to Matthew Dykman, Clerk of the Court, U.S. District Court, Pete V. Domenici Courthouse, 333 Lomas Blvd. NW, Albuquerque, NM 87102, or by e-mail to jbullington@nmcourt.fed.us.

STATE BAR NEWS
2005 Section Elections
I. Procedure:
In accordance with the section bylaws, each State Bar section is required to appoint a nominating committee for its annual election and provide notice of the election so that any section member may indicate to the committee his or her interest in serving on the board of directors.

Any section member who wishes to be considered for nomination to the section board of directors, or who wishes to recommend a section member for nomination, should contact a member of the section’s nominating committee before Sept. 30.

Candidates must be members in good standing of the State Bar and a member of the section for 30 days prior to election. There is no restriction on consecutive terms or on the number of terms a board member may serve.

Each section nominating committee is expected to publish its nominations in the Bar Bulletin. After publication, additional nominations may be made in the form of a petition signed by at least 10 attorneys who have been members of the section for 30 days or more. The petition must identify the position and term sought, and state that the member has agreed to the nomination.

II. Positions to be Filled:

Appellate Practice Section
Position 1 2005 – 2007 term
Position 2 2006 – 2008 term
Position 3 2006 – 2008 term
Position 4 2006 – 2008 term

Bankruptcy Law Section
Position 1 2005 – 2007 term
Position 2 2006 – 2008 term
Position 3 2006 – 2008 term

Business Law Section
Position 1 2006 – 2008 term
Position 2 2006 – 2008 term
Position 3 2006 – 2008 term

Children’s Law Section
Position 1 2004 – 2006 term
Position 2 2006 – 2008 term
Position 3 2006 – 2008 term
Position 4 2006 – 2008 term
Commercial Litigation Section
Position 1 2004 – 2006 term
Position 2 2005 – 2007 term
Position 3 2006 – 2008 term
Position 4 2006 – 2008 term
Position 5 2006 – 2008 term

Criminal Law Section
Position 1 2006 – 2008 term
Position 2 2006 – 2008 term
Position 3 2006 – 2008 term

Elder Law Section
Position 1 2006 – 2008 term
Position 2 2006 – 2008 term
Position 3 2006 – 2008 term

Employment and Labor Law Section
Position 1 2005 – 2006 term
Position 2 2006 – 2007 term
Position 3 2006 – 2007 term
Position 4 2006 – 2007 term

Family Law Section
Position 1 2006 – 2008 term
Position 2 2006 – 2008 term
Position 3 2006 – 2008 term

Health Law Section
Position 1 2004 – 2006 term
Position 2 2005 – 2007 term
Position 3 2006 – 2008 term
Position 4 2006 – 2008 term
Position 5 2006 – 2008 term

Indian Law Section
Position 1 2006 – 2008 term
Position 2 2006 – 2008 term

International and Immigration Law Section
Position 1 2006 – 2008 term
Position 2 2006 – 2008 term
Position 3 2006 – 2008 term

Natural Resources, Energy and Environmental Law Section
Position 1 2005 – 2007 term
Position 2 2006 – 2008 term
Position 3 2006 – 2008 term
Position 4 2006 – 2008 term

Prosecutors Section
Position 1 2004 – 2006 term
Position 2 2006 – 2008 term
Position 3 2006 – 2008 term

Public Law Section
Position 1 2006 – 2008 term
Position 2 2006 – 2008 term

Real Property, Probate, and Trust Section
Position 1 2004 – 2006 term
Position 2 2006 – 2008 term
Position 3 2006 – 2008 term
Position 4 2006 – 2008 term

Solo and Small Firm Practitioners Section
Position 1 2006 – 2008 term
Position 2 2006 – 2008 term
Position 3 2006 – 2008 term

Taxation Practice Section
Position 1 2006 – 2008 term
Position 2 2006 – 2008 term

Trial Practice Section
Position 1 2005 – 2007 term
Position 2 2006 – 2008 term
Position 3 2006 – 2008 term
Position 4 2006 – 2008 term

III. Nominating Committees:
Nominating committees for the Appellate Practice Section and Health Law Section have been appointed; others will be published as the information is received.

Appellate Practice Section
Bruce R. Rogoff, Chair
(505) 827-4877
cobbr@nmcourts.com
Bryan P. Biedscheid
(505) 988-1668
bryan@swpc.com
Sue A. Herrmann
(505) 827-3909
sherrmann@nmpd.state.nm.us
Kerry C. Kiernan
(505) 888-4300
kkiernan@eb-b.com
Mark Terrence Sanchez
(505) 397-6551
marksanchez@leaco.net

Health Law Section
John A. Bannerman, Chair
(505) 837-1900
jab@nmcounsel.com
Caralyn Banks
(505) 522-7500
lglclb@zianet.com
J. Douglas Compton
(505) 764-5416
dcompton@lrlaw.com
Kay C. Jenkins
(505) 622-6221
kjenkins@atwoodmalone.com
Rod M. Schumacher
(505) 622-6221
rschumacher@atwoodmalone.com

IV. Election Timeline:
Sept. 30 Nominating Committee reports (nominees and biographies) due to the State Bar
Oct. 10 Publish Nominating Committee reports
Oct. 31 Last day to seek office via petition
Nov. 10 Mail ballot to section members for any contested election

Annual Meeting Resolutions and Motions
The 2005 Annual Meeting of the State Bar of New Mexico will be held at noon, Sept. 23, at the Ruidoso Convention Center in Ruidoso. Resolutions and motions to be considered must be submitted in writing and received in the office of Joe Conte, executive director, PO Box 92860, Albuquerque, NM 87199; fax, (505) 828-3765; or e-mail, jconte@nmbar.org, by 5 p.m., Aug. 23.

Appellate Practice Section
Annual Meeting
The annual meeting of the Appellate Practice Section will take place at 1 p.m., Aug. 19 at the State Bar Center. It will be held in conjunction with the 16th Annual Appellate Practice Institute, which will be held that day at the State Bar Center from 8:20 a.m. to 4:30 p.m. All members of the section and other interested persons are invited to attend and to participate.

Children’s Law Section
Annual Poster and Writing Contest
The Children’s Law Section will sponsor its third annual poster and writing contest. This event is a great way for attorneys, their firms, or organization to assist in changing the lives of New Mexico’s troubled youths by supporting children’s artistic talent, and to promote mentorship for positive behavior to children in the delinquency system. The contest is for children who are either currently detained, or involved in such programs as the Youth Reporting Center, Drug Court and anti-domestic violence programs.
Contestants in Bernalillo, Sandoval, Valencia and Santa Fe Counties will be asked to create a work based on the theme “My Hero, My heroine.”

Sponsorship opportunities include cash donations or prizes to award contest winners. Recognition will be given through press releases of the event, thank you signs at each exhibit and special in-person thanks at the awards ceremony at each exhibit location. Awards ceremonies will be held in mid October or early November. Donations will enable contest organizers to purchase art supplies, prizes and set up the exhibit. Monetary donations may be made by Aug. 15 to: Children’s Law Section, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860. Call Linda Yen, (505) 841-5164, or Lorette Enochs, (505) 841-5001, for more information.

Commission on Professionalism
Public Member Vacancies

The State Bar of New Mexico is seeking candidates to fill two public member vacancies on the Commission on Professionalism. Both of the public members positions are for two-year terms. Members who know a nonattorney who would be interested in serving on the commission, should contact Executive Director Joe Conte, (505) 797-6099 or jconte@nmbar.org. Letters of interest should be sent to PO Box 92860, Albuquerque, NM 87199-2860.

International and Immigration Law Section Annual Section Meeting

The International and Immigration Law Section will conduct its annual section meeting at 3 p.m., Aug. 26 at the State Bar Center. Section members are also invited to attend a happy hour and receive a free drink at the Pyramid immediately after the meeting. Attendees are asked to R.S.V.P. to Tony Horvat, (505) 797-6033 or thorvat@nmbar.org.

Paralegal Division Brownbag CLE

Bring a lunch and join the Paralegal Division for their monthly CLE from noon to 1 p.m., Aug. 10 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 “State and Municipal Sex Offender Registration Laws in New Mexico,” presented by Kari Morrissey, Esq. For more information, contact Cheryl Passalaqua, (505) 890-6089 or Amy Paul, (505) 883-8181.

NM Paralegal Day

Gov. Bill Richardson has declared Aug. 26 as Paralegal Day in New Mexico. That date marks the 10th anniversary of the organizational meeting of the Paralegal Division of the State Bar of New Mexico. The Paralegal Division, formerly known as the Legal Assistants Division, was created by the New Mexico Supreme Court to serve the needs of paralegals throughout the state with the following specific goals: to encourage a high order of ethical and professional attainment; to further education among its members; to carry out programs within the State Bar; and to establish good fellowship among division members, the State Bar of New Mexico and the members of the legal community. The Division will honor its founders, current members and the legal community with a reception at the Albuquerque Museum from 2 to 5 p.m., Aug. 27. For more information about the Paralegal Division or the paralegal profession in New Mexico, visit its Web site at www.nmbar.org.

Public Law Section Board Meeting

The next Public Law Section board meeting will be held at noon, Aug. 11 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.

Technology Utilization Committee Using Excel in the Legal Environment

The Technology Utilization Committee will be holding a free workshop from 5 to 6 p.m., Aug. 18 at the State Bar Center, Albuquerque. In this one-hour session, participants will learn how easy it is to use Excel for sorting lists and quickly finding information amongst large amounts of data using the Filter and SubTotal tools. Paralegals, attorneys and support staff are all invited to attend. Class is limited to 11 attendees. Reservations should be made by Aug. 16 with Mary Patrick, CLE program coordinator, mpatrick@nmbar.org or (505) 797-6059. CLE credit will not be provided.

Other Bars

Albuquerque Bar Association
Monthly Luncheon and CLE

The Albuquerque Bar Association’s monthly luncheon will be held at 11:45 a.m., Sept. 6 at the Albuquerque Petroleum Club. Attorneys who serve and have served in the U. S. military will be acknowledged. These veterans need not be members of the Albuquerque Bar Association to participate. The luncheon address, “Military Law and Lawyers in the New Paradigm,” will be presented by John Hutson, dean and president of the Franklin Pierce Law Center in Concord, N.H. Hutson served as a judge advocate in the U.S. Navy from 1972 to 2000 and was judge advocate general of the Navy from 1997 to 2000.

The CLE, “How to Effectively Represent Your Client in Mediation,” will be presented by Wendy York, mediator and former district court judge, with a portion of the program to include a panel of mediators presenting techniques or approaches that lawyers have used in mediation that help … or hurt … the chances of settlement. The CLE from is from 1:30 to 4 p.m. for 2.5 general CLE credits. The luncheon is $20 for members and $25 for non-members; the luncheon and CLE is $70 for members and $100 for non-members; the CLE only is $50 for members and $75 for non-members. Register online at www.abqbar.com; by e-mail at abqbar@abqbar.com; or phone the Albuquerque Bar office, (505) 243-2615.

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 nonprofit, 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.

National Association of Counsel for Children
28th National Children’s Law Conference

This summer, the National Association of Counsel for Children will hold its annual national child advocacy training Aug. 25 to 28 at the Hollywood Renaissance Hotel in Los Angeles. Each year in America, over one million children suffer abuse and neglect. These are serious incidents of beatings, sexual assault, and the kind of neglect that results in serious health problems. NACC members serve as child advocates for these children and guide them through the difficult legal process that determines their fate. The NACC is a nonprofit agency that provides the professional training and technical assistance the child advocates need to do their work. For more information, contact NACC at (888) 828-6222, or visit its Web site at www.NACCchildlaw.org.

Advanced Trial Techniques

The NM Defense Lawyers Association will present a CLE program Aug. 25 at the State Bar Center entitled “Advanced Trial Techniques.” Registration information will be available soon. Visit the NMDLA Web site at www.nmdla.org or contact Rhonda Dahl, (505) 797-6021, for more information.

OTHER NEWS

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.

YWCA
Women on the Move Awards

Celebrate the Universe of Women with the YWCA by nominating someone for the Women on the Move Awards. Nominations are due by Aug. 12 for the Women on the Move Awards banquet Sept. 15 at the Embassy Suites Hotel and Conference Center in Albuquerque. Contact Elizabeth Armijo, (505) 254-9922 or EArmijo@ywca-nm.org for more information and a nomination packet.

Post Your Opinion

Share your opinion with everyone on the State Bar Web site’s Readers’ Forum. The forum is designed for “Letters to the Editor” type postings to encourage a constructive dialogue among members of the legal community in New Mexico. Postings must address State Bar policies and practices, or issues directly affecting the practice of law in the state.

Letters should be submitted to the State Bar of New Mexico editor by e-mail at notices@nmbar.org. Letters must include the author’s full name and telephone number. Letters should not exceed 250 words. Authors’ names will be published with letters.

The State Bar of New Mexico reserves the right not to publish a submission. Visit the State Bar’s Web site at www.nmbar.org for information on the Readers’ Forum.
2005 State Bar Annual Award Recipients

The awards will be presented during the State Bar’s Annual Meeting Sept. 23-24 at the Ruidoso Convention Center in Ruidoso. To register for the luncheons or to review a complete schedule of events and programs for the Annual Meeting, see the insert in the July 25 issue of the Bar Bulletin or visit the State Bar’s Web site at www.nmbar.org.

--- Frida, September 23 ---

Distinguished Bar Service Award
Briggs F. Cheney

Distinguished Bar Service – Non Lawyer Award
Kay L. Homan

Outstanding Section Award
Bankruptcy Law Section

Outstanding Contribution to People with Disabilities Award
Tara C. Ford

Outstanding Young Lawyer of the Year Award
Morris J. “Mo” Chavez

--- Saturda, September 2y ---

Outstanding Judicial Service Award
Judge John W. Pope

Outstanding Local Bar Award
Sandoval County Bar

Outstanding Program Award
New Mexico Hispanic Bar Association Scholarship Program

Professionalism Award
John G. Baugh (posthumously)
Lawrence M. Pickett
Lowell Stout (posthumously)

Quality of Life – Lawyer Award
Susan E. Page

Quality of Life – Legal Employer Award
Aguilar Law Offices, P.C.

Fifty-Year Practitioners
William F. Brainerd
John P. Eastham
Douglass K. Fischer
Leland B. Franks
Glen L. Houston
Daniel A. Sisk
Justice Harry E. Stowers, Jr.
J. Penrod Toles
Matias A. Zamora
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<thead>
<tr>
<th>Week</th>
<th>Program Title</th>
<th>Sponsor</th>
<th>Description</th>
<th>Contact Information</th>
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</thead>
<tbody>
<tr>
<td>8</td>
<td>Managing Absent Employees So It Doesn’t Make You Absent-minded</td>
<td>TRT, Inc.</td>
<td>Teleconference</td>
<td>(800) 672-6253, <a href="http://www.trtcle.com">www.trtcle.com</a></td>
</tr>
<tr>
<td>9</td>
<td>Electronic Discovery Needn’t Be Shocking</td>
<td>TRT, Inc.</td>
<td>Teleconference</td>
<td>(800) 672-6253, <a href="http://www.trtcle.com">www.trtcle.com</a></td>
</tr>
<tr>
<td>9</td>
<td>Expert Witnesses: From Hiring to Testimony</td>
<td>Center for Legal Education of NMSBF</td>
<td>Teleseminar</td>
<td>(505) 797-6020, <a href="http://www.lorman.com">www.lorman.com</a></td>
</tr>
<tr>
<td>9</td>
<td>Like Kind Real Estate Exchanges</td>
<td>Lorman Education Services</td>
<td></td>
<td>(715)833-3940, <a href="http://www.lorman.com">www.lorman.com</a></td>
</tr>
<tr>
<td>10</td>
<td>State and Municipal Sex Offender Registration Laws in New Mexico</td>
<td>Paralegal Division of NM</td>
<td></td>
<td>(505) 243-1443</td>
</tr>
<tr>
<td>11</td>
<td>Coping with Sexual Predators Within the Profession</td>
<td>TRT, Inc.</td>
<td>Teleconference</td>
<td>(800) 672-6253, <a href="http://www.trtcle.com">www.trtcle.com</a></td>
</tr>
<tr>
<td>11</td>
<td>Current Legailities and Realities of the End-of-Life Debate</td>
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<td>(800) 672-6253, <a href="http://www.trtcle.com">www.trtcle.com</a></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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EFFECTIVE AUGUST 5, 2005

WRITS OF CERTIORARI
AS UPDATED BY THE CLERK OF THE NEW MEXICO SUPREME COURT
Kathleen Jo Gibson, Chief Clerk New Mexico Supreme Court
PO Box 848 • Santa Fé, NM 87504-0848 • (505) 827-4860

PETITIONS FOR WRIT OF CERTIORARI FILED AND PENDING:

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CERTIORARI GRANTED BUT NOT SUBMITTED:

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**Certiorari Granted And Submitted:**

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CLERK CERTIFICATES
FROM THE NEW MEXICO SUPREME COURT

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To find the most current contact information regarding active and inactive State Bar members go to [www.nmbar.org](http://www.nmbar.org) and click on the Attorney/Firm Finder link.
NO. 05-8500
IN THE MATTER OF MANDATORY DISCLOSURE OF PROFESSIONAL LIABILITY INSURANCE COVERAGE

ORDER

WHEREAS, this matter came to the Court upon the recommendation of the New Mexico Board of Bar Commissioners and the New Mexico State Bar’s Lawyers Professional Liability Committee after significant study and consideration by both organizations;

WHEREAS, the Court recognizes the obligation of New Mexico attorneys to protect the public seeking professional legal advice, and to protect themselves in the event they require professional liability insurance;

WHEREAS, the Court acknowledges the importance of ascertaining the insured status of attorneys licensed in the State of New Mexico, in anticipation of assessing the future course of action, if any, regarding the possibility of allowing public access to information of a similar nature; and

WHEREAS, the Court having considered said recommendation and 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, pursuant to Rule 17-202(A) NMRA of the Rules Governing Discipline, the State Bar of New Mexico shall include in the annual registration statement, certification of the following information:

1) Whether the attorney is engaged in the private practice of law or whether the attorney is exempt from the provisions of this Order because the attorney’s entire compensation derived from the practice of law is received in the attorney’s capacity as an employee handling legal matters of a corporation or organization, or any agency of the federal, state, local government, or a member of the judiciary who is prohibited by statute or ordinance from practicing law;

2) The county of the attorney’s primary practice and the number of practitioners in the attorney’s firm;

3) If engaged in the private practice of law, whether the attorney currently maintains in force and effect professional liability insurance, other than an extended reporting endorsement; and, if so, disclosing to the State Bar the amount of coverage, the amount of the deductible; and the name of the insurer; and

4) Whether the attorney intends to continuously maintain professional liability insurance during the period of time the lawyer is engaged in the private practice of law.

IT IS FURTHER ORDERED that the foregoing information shall be certified by each attorney admitted to the active practice of law in New Mexico in such form as may be prescribed by the State Bar of New Mexico as approved by this Court. The information submitted pursuant to this order is designed for internal use by the New Mexico State Bar and the Supreme Court only;

IT IS FURTHER ORDERED that full participation is essential so that this Court is apprized of the status of professional liability coverage within the Bar. Noncompliance with this order or supplying false information shall be treated as seriously as failure to pay annual license fees, see Rule 17-202 NMRA, and may lead to suspension, as outlined in Article II, Section 2.3 of the State Bar Bylaws;

IT IS FURTHER ORDERED that, if certification of the required information is not received before the last day of March, the Board of Bar Commissioners, through its Executive Director, shall certify to this Court the names of all active members failing to comply with the requirements set forth in this order; and

IT IS FURTHER ORDERED that the adoption of this order shall not make the State Bar of New Mexico, its officers, directors, representatives, or membership liable in any way to any person who has suffered loss by error or omission of an attorney. This order is adopted solely for the purposes stated herein and not for the purpose of making the State Bar of New Mexico, its officers, directors, representatives, or membership insurers or guarantors for clients with respect to the attorney-client relationship. This order does not create a claim against the State Bar of New Mexico for failure to provide accurate information or a report on the insured status of any attorney, or for implementation of any provision of this order.

IT IS SO ORDERED.

Done in Santa Fe, New Mexico, this 29th day of July, 2005.

Chief Justice Richard C. Bosson
Justice Pamela B. Minzner
Justice Patricio M. Serna
Justice Petra Jimenez Maes
Justice Edward L. Chávez
OPINION

MICHAEL E. VIGIL, JUDGE

{1} Broadway Vista Partners (Owner) contends that the lien of Wilger Enterprises, Inc. (Contractor) is invalid because Contractor did not give Owner a written prelien notice of its right to claim a lien in the event of nonpayment under NMSA 1978, Section 48-2-2.1 (1993). We hold that Section 48-2-2.1 did not require Contractor to provide Owner with a prelien notice and affirm the district court order granting Contractor summary judgment on its complaint to foreclose its mechanic’s lien.

BACKGROUND

{2} Owner and Furr’s Supermarkets, Inc., agreed to build a shopping center on land owned by Owner in Albuquerque, New Mexico through the mechanism of a twenty-five year lease with options to renew for four additional periods of five years each. “As a material part of the consideration” to Owner, Furr’s agreed to build a “48,000 square foot Furr’s supermarket building together with sidewalks adjacent to the building, a loading dock and all on-site improvements.” Furr’s was also required to share in 71.11% of the costs for the “off-site improvements” which were to be installed by Owner. The “off-site improvements” Owner agreed to install included “traffic control devices, street paving, storm drains, curbs, curb cuts, gutters, median strips, sidewalks, street lights,” and “necessary utilities to the property line of the Shopping Center.” Since the lease provided that Owner would own the supermarket after Furr’s constructed it, Owner agreed to reimburse Furr’s for its costs to construct the supermarket up to a total of $3,017,522 in four periodic progress payments. During the construction, Furr’s was to pay “interim rent” to Owner, which was adjusted upward as Owner installed the “off-site improvements” and made the periodic payments to Furr’s. After construction was completed, Furr’s was to pay rent to Owner plus “bonus rent,” equal to one and one-half percent of Furr’s gross sales each year that exceeded its gross sale during its fifth year of operation. The lease also required Furr’s to purchase casualty and fire insurance during the lease term, naming Owner and Furr’s as the insureds “as their respective interests may appear” and it also provided a formula for disbursing an award to the Owner and Furr’s in the event of a total or partial condemnation of the premises.

{3} Furr’s then contracted with Contractor to construct the supermarket. Before construction on the supermarket started, Furr’s told Contractor that Owner was going to reimburse Furr’s for the construction costs, which Contractor verified in a call to Owner. When Contractor sent Furr’s its first pay request, Furr’s asked Owner to make the progress payments directly to Contractor rather than reimbursing Furr’s as specified in the lease. Everyone agreed. Under this arrangement, Owner paid the Contractor directly after Contractor submitted an application for payment to Owner, and the application was approved by the architect and the civil engineer hired by Furr’s for the project. Owner made five payments to Contractor following this procedure. Owner refused to make two additional payments requested by Contractor because they would have resulted in Owner paying more than the $3,017,522 it was obligated to pay under its lease with Furr’s.

{4} Contractor then recorded a Claim of Lien with the Bernalillo County Clerk and filed a complaint to foreclose its mechanic’s lien on
Owner’s property to recover the amount due for its work on the supermarket. In ruling on cross-motions for summary judgment filed by Contractor and Owner, the district court granted Contractor’s motion for summary judgment, and Owner appeals.

STANDARD OF REVIEW

Summary judgment is appropriate where “there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.” Rule 1-056(C) NMRA. The facts are not disputed. In particular, it is undisputed that Contractor never gave Owner a written prelien notice under Section 48-2-2.1. The issue presented is whether Contractor was required to provide Owner with a written prelien notice under Section 48-2-2.1 to have an enforceable mechanic’s lien. We review this legal question de novo. See Jaslin v. Gregory, 2003-NMCA-133, ¶ 6, 134 N.M. 527, 80 P.3d 464 (stating that application of a statute is a question of law when the facts are undisputed); Blackwood & Nichols Co. v. N.M. Taxation & Revenue Dep’t, 1998-NMCA-113, ¶ 5, 125 N.M. 576, 964 P.2d 137 (“Construction of a statute is a question of law that we review de novo.”).

DISCUSSION

The prelien notice statute at Section 48-2-2.1(B) states:

“No lien of a mechanic or a materialman claimed in an amount of more than five thousand dollars ($5,000) may be enforced by action or otherwise unless the lien claimant has given notice in writing of his right to claim a lien in the event of nonpayment and that notice was given not more than sixty days after initially furnishing work or materials, or both, by either certified mail, return receipt requested, [f]ax with acknowledgement or personal delivery to:

(1) the owner or reputed owner of the property upon which the improvements are being constructed; or
(2) the original contractor, if any.

However, a prelien notice does not have to be given to perfect “claims of liens made by mechanics or materialmen who contract directly with the original contractor” and an “original contractor” is defined as “a contractor that contracts directly with the owner.” Section 48-2-2.1(A).

Owner argues that Contractor’s lien is unenforceable under the literal terms of the statute because Contractor failed to give Owner a written prelien notice of its right to claim a lien in the event of nonpayment as provided in the statute. Contractor responds that it is an “original contractor” and, properly construed, the statute does not require an “original contractor” to give an owner a prelien notice of its right to claim a lien in the event of nonpayment.

We first determine whether Contractor is an “original contractor” under Section 48-2-2.1. Owner argues that because the written contract to build the Furr’s supermarket was between Contractor and Furr’s and not between Contractor and Owner, Contractor is not an “original contractor.” We reject Owner’s argument because nothing in the statutory definition of “original contractor” excludes a contract made by an owner with a contractor through an agent. See Warshaw v. Pyms, 266 So. 2d 355, 357 (Fla. Dist. Ct. App. 1972) (“An owner of real estate can become directly obligated to an engineer, for performance by the latter of services relating to his property, by a contract which is made with the engineer by the owner through an agent, as effectively as if the parties made such contract face-to-face.”); Armstrong v. Blackadar, 118 So. 2d 854, 861 (Fla. Dist. Ct. App. 1960) (“Florida [law] does not preclude an owner of property from contracting through an agent for improvements to be made on his property so as to subject the property to a lien”).

Owner and Furr’s were jointly engaged in the undertaking of constructing the supermarket for their mutual benefit. A joint venture “is generally considered to be a partnership for a single transaction,” Lightsey v. Marshall, 1999-NMCA-147, ¶ 18, 128 N.M. 353, 992 P.2d 904 (internal quotation marks and citation omitted), and the relationship between Furr’s and Owner established by the lease to construct the supermarket has the earmarks of a joint venture. “A joint venture exists when two or more parties (1) enter into an agreement, (2) to combine their money, property or time in the conduct of some particular business deal, (3) agree to share in the profits and losses of the venture jointly, and (4) have the right of mutual control over the subject matter of the enterprise or over the property.” Id. ¶ 13 (internal quotation marks and citation omitted). In addition to the relationship created by the lease, Owner directly involved itself in the project when it agreed to pay Contractor directly instead of reimbursing Furr’s as provided in the lease. Those payments were made only after approval was given by the civil engineer and architect hired by Furr’s. The supermarket was constructed at the instance of Owner through Furr’s and Owner directly paid Contractor for its work and materials. Under these circumstances, Owner could not disclaim liability for Contractor’s lien under NMSA 1978, Section 48-2-11(1953) (allowing an owner to post a notice that he is not responsible for improvements made on his land within three days of learning of the construction, alteration, or repair, or intended construction, alteration, or repair). See Arctic Lumber Co. v. Borden, 211 F. 50, 51, 54-55 (9th Cir. 1914) (stating that where the owner of land leased his property under a contract obligating the lessee to construct a building, and the lessee was held to be an agent of the owner, the owner was precluded from eluding liability by posting a notice of non-liability) (discussed with approval in Skidmore v. Eby, 57 N.M. 669, 672, 262 P.2d 370, 373 (1953)).

In Stroh Corp. v. K & S Dev. Corp., 247 N.W.2d 750, 751 (Iowa 1976), the owner of a vacant lot entered into a lease which required the lessee to construct a car wash and gasoline facility on the lot pursuant to plans approved by the owner at an estimated cost of $50,000. When the final construction costs were verified, the owner was to reimburse lessee up to the sum of $50,000. Id. The initial lease term was for fifteen years with options for two consecutive five-year terms. When completed, title to all the real estate improvements vested in lessee. Id. at 752. Lessee contracted with a contractor to construct the facility, which in turn subcontracted mechanical work to Stroh Corporation. Lessor paid lessee, who in turn paid the contractor. However, contractor did not pay Stroh Corporation, which then filed a mechanic’s lien against lessor’s lot, and subsequently successfully foreclosed on the lien. Id. Affirming, the Iowa Supreme Court held that in these circumstances, the lessee was lessee’s agent. Id.; see also Bay v. Bavenie, 421 N.E.2d 6, 7, 9 (Ind. Ct. App. 1981) (stating that an excavator who enters into a subcontract with one partner of a land development partnership can recover from the partnership); Seaboard Sur. Co. v. Richard F. Kline, Inc., 603 A.2d 1357, 1362-64 (Md. Ct. Spec. App. 1992) (holding that subcontractor who contracted with joint venturer had a “direct contract” with the joint venture itself where it was undisputed that joint venturer was acting on behalf of and with the authority of the joint venture when contracting with the subcontractor); Bell v. Tollefsen,
We agree with the reasoning of the foregoing authorities as applied to the facts of this case. We therefore hold that, for the purpose and in the application of the prelien notice statute, Section 48-2-2.1, and under the undisputed facts evidencing the relationships between Owner and Furr’s, Owner and Furr’s were joint venturers in the construction of the supermarket. As such, Contractor’s contract with Furr’s constituted as well a direct contract with Owner. Therefore, Contractor is an “original contractor” under Section 48-2-2.1.

Next, we determine whether Section 48-2-2.1(B) requires an “original contractor” to give an owner a written prelien notice of its right to claim a lien in the event of nonpayment as a prerequisite to an enforceable lien. Our primary goal in interpreting the statute is to ascertain and give effect to the legislature’s intent. To do so, we first look to the plain meaning of the words used in the statute. See Hovet v. Allstate Ins. Co., 2004-NMSC-010, ¶ 10, 135 N.M. 397, 89 P.3d 69. This approach, however, does not always disclose the legislative intent:

[The plain meaning rule’s] beguiling simplicity may mask a host of reasons why a statute, apparently clear and unambiguous on its face, may for one reason or another give rise to legitimate (i.e., nonfrivolous) differences of opinion concerning the statute’s meaning. In such a case, it can rarely be said that the legislation is indeed free from all ambiguity and is crystal clear in its meaning. While ... one part of the statute may appear absolutely clear and certain to the point of mathematical precision, lurking in another part of the enactment, or even in the same section, or in the history and background of the legislation, or in an apparent conflict between the statutory wording and the overall legislative intent, there may be one or more provisions giving rise to genuine uncertainty as to what the legislature was trying to accomplish. In such a case, it is part of the essence of judicial responsibility to search for and effectuate the legislative intent—the purpose or object—underlying the statute.


A literal reading of Section 48-2-2.1(B) allows an original contractor, who by definition contracts directly with the owner, to give itself, and not the owner, written notice of its right to claim a lien in the event of nonpayment to perfect a lien that is subsequently filed of record under NMSA 1978, Section 48-2-6 (1979). Contractor argues, and we agree, that this hardly seems reasonable. Where there is an ambiguity in the statute, or where the literal meaning of the words renders the statute absurd or unreasonable, we construe the statute according to its purpose or object. See Rivera, 2004-NMSC-001, ¶ 13; State v. Davis, 2003-NMSC-022, ¶ 6, 134 N.M. 172, 74 P.3d 1064. To do so, we consider the history and background of the statute, including historical amendments. See State v. Smith, 2004-NMSC-032, ¶ 10, 136 N.M. 372, 98 P.3d 1022; Rivera, 2004-NMSC-001, ¶ 13.

Since 1880, New Mexico law has provided labor, services, or materials to improve real estate with a lien against the real estate improved to secure payment of the contract or agreed upon charge. The purpose of the lien is to “protect those who, by their labor, services, skill, or materials furnished, have enhanced the value of the property sought to be charged.” Hobbs v. Spiegelberg, 3 N.M. 357, 363, 5 P. 529, 531 (1885). As applied to this case, the historical mechanism for imposing a lien has been straightforward. First, the statutes have provided that “[e]very person performing labor upon” a building or other improvement “or furnishing materials to be used in the construction, alteration, or repair” of a building or other improvement “has a lien upon the same for the work or labor done” for the specific contract or agreed upon charge when the labor or materials have been provided “at the instance of the owner of the building . . . or his agent.” 1880 N.M. Laws ch. 16, § 2 (codified at NMSA 1978, Section 48-2-2 (1993)). Second, the statutes have stated that “[t]he land upon which any building, improvement, or structure, is constructed” is “also subject to the lien, if at the commencement of the work, or of the furnishing the materials for the same, the land belonged to the person who caused said building, improvement or structure to be constructed, altered, or repaired,” but “if such person owned less than a fee simple estate in such land, then only his interest therein is subject to such lien.” 1880 N.M. Laws ch. 16, § 4 (codified at NMSA 1978, Section 48-2-4 (1993)). Finally, the statutes have provided that every such building or other improvement “constructed upon any lands with the knowledge of the owner” is “held to have been constructed at the instance of such owner” with the result that the owner’s interest in the land “shall be subject to any lien” filed unless after three days within “obtain[ing] knowledge” of the “construction, alteration, or repair, or the intended construction, alteration, or repair” he gives notice that he will not be responsible “by posting a notice in writing to the effect, in some conspicuous place upon said land, or upon the building or other improvement situated thereon.” 1880 N.M. Laws ch. 16, § 11 (codified at Section 48-2-11).

As we have noted, the lien arises when the building or improvement is constructed, altered, or repaired “at the instance of the owner . . . or his agent.” To achieve the statutory purpose, New Mexico law has also provided since 1880 that “[e]very contractor, subcontractor, architect, builder, or other person having charge . . . of the construction, alteration or repair, either in whole or in part, of any building or other improvement . . . shall be held to be the agent of the owner, for the purposes of this [section].” 1880 N.M. Laws ch. 16, § 2 (now codified at Section 48-2-2). The owner of the property is therefore in privity of contract by force of the statute with any person who supplies services or materials to any contractor or subcontractor of the building or improvement. See Hobbs, 3 N.M. at 363, 5 P. at 531. The owner would not otherwise be liable for the debt because he did not contract it. Id.; see Vulcraft v. Midtown Bus. Park, Ltd., 110 N.M. 761, 765, 800 P.2d 195, 199 (1990) (reiterating that the purpose of the lien statute is “to protect those who, by their labor, services, skill, or materials furnished, have enhanced the value of the property sought to be charged,” and that “statute creates privity of contract between the owner and those contributing to the enhancement of the property” (internal quotation marks and citation omitted)).
{17} Under New Mexico law, second, third, fourth, and beyond subcontractors, and virtually anyone dealing with them who perform work could therefore subject an owner’s property to a lien. Vulcraft, for example, holds that where a business supplied raw material to a middleman, who in turn manufactured steel goods in accordance with project specifications pursuant to its contract with a general contractor but did no work at the site, the middleman could be classified as a “subcontractor” under Section 42-2-2, thereby creating a statute-based privity between the supplier and the owner, and entitling the supplier to file a lien. Vulcraft, 110 N.M. at 763, 765-66, 800 P.2d at 197, 199-200. Vulcraft adds:

It also should be noted that our statute allows liens to be filed by materialmen or laborers performing at the instance of the owner or his agent, and defines statutorily certain entities as agents. A plain reading of Section 48-2-2 does not limit the agency relationship only to those enumerated entities. Accordingly, to be entitled to file a lien, a supplier or laborer can establish an agency relationship through alternative means without necessarily demonstrating that the middleman was a subcontractor or otherwise within the enumerated class of statutory agents.

Id. at 767, 800 P.2d at 201.

{18} In this context, the prelien notice statute, Section 48-2-2.1, entitled, “Procedure for perfecting certain mechanics’ and materialmen’s liens” was enacted in 1990. (The statute was amended in 1993 with changes that are not significant to our decision here. 1993 N.M. Laws ch. 252, § 2). As we construe the statute, an original contractor and its first level subcontractors are not required to give notice in writing of a right to claim a lien in the event of nonpayment. However, all third level and higher subcontractors and those in privity with them must give such a notice to the owner or original contractor or they will not have an enforceable lien. Our reasoning follows.

{19} On the one hand, all persons who perform labor upon or furnish materials to be used in the construction, alteration, or repair of a building are entitled to be paid. The statutory mechanism of creating privity between the owner and virtually anyone who does so, coupled with a right to impose a lien upon the owner’s property to secure payment for the labor or materials, accomplishes this result.

{20} The statute itself determines at which level the notice must be provided to the owner. It specifically states that no prelien notice must be given for “claims of liens made by mechanics or materialmen who contract directly with the original contractor,” Section 48-2-2.1(A), and “original contractor” is defined to mean “a contractor that contracts directly with the owner.” Id. First level subcontractors—those who contract directly with the “original contractor”—are excluded from having to provide a written prelien notice. Anyone who does not contract directly with the “original contractor” is therefore required to provide a prelien notice as a prerequisite to having an enforceable lien.

{21} We therefore conclude that the legislature did not intend to require an original contractor to provide prelien notice. By definition, the owner contracts directly with the original contractor and therefore already knows all the information that is required to be provided by Section 48-2-2.1(D) in a written prelien notice. See Dave Kolb Grading, Inc. v. Lieberman Corp., 837 S.W.2d 924, 936 (Mo. Ct. App. 1992) (“An owner of property contracts with an original contractor and knows whether the original contractor has been paid; thus, the owner does not need notice of the filing of a lien.”). Requiring the “original contractor” to comply with the prelien notice requirement but not subcontractors who contract directly with the “original contractor” makes no sense and serves no practical purpose. We therefore hold that the legislature did not intend Section 48-2-2.1 to require an “original contractor” to give a prelien notice to have an enforceable lien.

{22} Because we conclude that it was an original contractor, Contractor was not required to perfect its lien by providing Owner with written notice of its right to claim a lien against Owner’s property. Therefore, we hold that the district court properly enforced Contractor’s mechanic’s lien.

CONCLUSION

{23} We affirm the order of the district court’s granting Contractor’s motion for summary judgment.

{24} IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

CYNTHIA A. FRy, Judge
OPINION
MICHAEL D. BUSTAMANTE,
CHIEF JUDGE

{1} Defendant was charged with custodial interference in violation of NMSA 1978, § 30-4-4 (1989). The charges were based on a foreign custody order from Missouri. After pleading no contest, Defendant sought to withdraw his plea. The district court denied the motion to withdraw the plea, and Defendant appeals. We reverse the decision of the district court denying Defendant’s motion to withdraw his plea, and remand for proceedings consistent with this opinion. We also hold that the district court violated defendant’s motion to withdraw double jeopardy protections by sentencing Defendant to consecutive terms.

FACTS AND PROCEDURAL HISTORY

{2} Defendant and his ex-wife, Patricia Smith (mother), were granted a divorce in Poplar Bluff, Butler County, Missouri in April 1992. The original divorce decree granted Defendant physical custody of their three minor children, and provided mother with supervised visitation in Defendant’s presence. Defendant testified that he moved to New Mexico with the children in 1994. Although the record is not clear, it appears that mother moved to Texas in 1991, prior to the divorce. The parties entered into a stipulated agreement in 1995 that was signed before a notary in Missouri, but was never filed with any court. The stipulated agreement purports to change custody to the mother, and grants permission for the children to leave the State of Missouri.

{3} Defendant was served a summons from the Butler County court in May 1997 notifying him that mother was asking the court for a change in custody. Defendant testified that he contacted a civil attorney who told him that the State of Missouri did not have jurisdiction to enter a modification because neither the parents nor the children were living in Missouri. Defendant testified that he wrote to the Missouri court contesting jurisdiction and the court responded by saying he should get a lawyer. The Missouri court then entered an order modifying the original decree on June 13, 1997, finding that Defendant defaulted by having not appeared, and granting primary custody of the minor children to mother. Two days later, mother went to the Alamogordo police in an attempt to take custody of the children. The police refused to intervene, stating that this was a civil matter that required proper entry of a foreign judgment and resolution in the civil courts. Mother then returned to Texas.

{4} Defendant heard nothing else of the matter until April 2001 when he was contacted by Officer Yost of the Alamogordo police department. In a sworn affidavit, Officer Yost presented the following testimony that led to the arrest of Defendant on charges of custodial interference:

#2. Affiant learned on 03-31-01 from Ms. Patricia Smith that in 1997 she had petitioned for and was granted a modification to a divorce decree that was originally issued in Poplar Bluff, Butler County, Missouri on 04-14-1992.

#3. Affiant learned from Ms. Smith the original decree granted the defendant physical custody of their three minor children . . . ; the court found sufficient evidence on June 13, 1997 to reverse it’s [sic] original decision there by [sic] giving Ms. Patricia Diane Smith physical custody of their children.

#4. Affiant learned from[] Ms. Smith after having been awarded custody of her three minor children she came to the city of Alamogordo, Otero County, State of New Mexico attempting to get the physical custody of her children awarded to her by the Butler county court, only to be told this was a civil matter and she would need to file a complaint with the court that issued the modification.

. . . .

#6. Affiant learned from[] Ms. Smith since 1997 the only contact she’d had with her children has been via telephone, that at no time has she been allowed by the defendant to have the physical custody awarded to her by the Butler County court, Ms. Smith acknowledged she would be allowed to visit with the children but only in the defendant’s home, that she would not be allowed to have any transportation other than that which the defendant would be willing to provide.

#7. Affiant . . . was able to speak with the defendant on or about 04-02-01 over the telephone in reference to custodial interference, [and] was advised by . . . defendant this was a civil matter and he refused to make any other comments, when [affiant] attempted to explain because there had been a modification to the original order and it appeared he was in noncompliance with the more current court order, he became belligerent in a loud tone demanding to know why she was not under arrest for non-payment of child support, this conversation ended with the defendant hanging up the telephone. This officer

Certiiorari Granted, No. 29,258, July 11, 2005

From the New Mexico Court of Appeals

Opinion Number: 2005-NMCA-089

STATE OF NEW MEXICO,
Plaintiff-Appellee,
versus

DAVID HUNTER,
Defendant-Appellant.

No. 24,166 (filed April 19, 2005)

APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY
FRANK K. WILSON, District Judge

PATRICIA A. MADRID  JOHN BIGELOW
Attorney General  Chief Public Defender
ANN M. HARVEY  SUE A. HERRMANN
Assistant Attorney General  Appellate Defender
Santa Fe, New Mexico  Santa Fe, New Mexico
for Appellee  for Appellant

Bar Bulletin - August 8, 2005 - Volume 44, No. 31  23
attempted to have two more similar conversations with the . . . defendant which also ended similarly.

5 Based on this affidavit, Defendant was arrested on August 18, 2001, and charged with one count of custodial interference contrary to Section 30-4-4. A grand jury then indicted Defendant on three counts of custodial interference, one for each child. Defendant testified that he believed the 1997 modification was invalid because the Missouri court did not have jurisdiction to enter the modification, and because this was a civil matter. Defendant believed the arrest was illegal and that he was in compliance with the 1992 custody order, which was the only existing valid order. Defendant was originally released on bond under the condition that he not leave Otero County. Mother contacted Officer Yost after Defendant’s release and alleged that Defendant traveled to Texas and removed two of the children from mother, thereby violating the terms of his release. Defendant was again arrested and then held in jail without bond, and charged with escape from a peace officer in violation of NMSA 1978, § 30-22-10 (1963).

6 Defendant was represented by three different trial attorneys in this matter. Defendant entered a plea of not guilty and waived arraignment on September 7, 2001. Defendant’s first attorney filed a motion to dismiss as a matter of law on November 14, 2001, although she later testified that she felt there was no merit to the motion, and filed it only at Defendant’s insistence. On December 17, 2001, prior to a hearing on the motion, Defendant entered a no contest plea to three counts of custodial interference and escape from a peace officer. At the plea hearing, the district court ordered a forensic evaluation of Defendant. The forensic evaluation was never done. Within three weeks of entering a no contest plea, Defendant indicated to his attorney that he wanted to withdraw the plea. A motion to withdraw as defense counsel and motion for consideration of Defendant’s request to withdraw his change of plea were jointly filed on January 9, 2002.

7 Defendant’s second attorney entered her appearance on January 25, 2002, and another motion to withdraw plea of no contest was filed on March 26, 2002. Defendant asserted several grounds for withdrawal of the plea. First, Defendant alleged the plea was not voluntary because at the time he entered the plea, he had just found out that his daughter had been raped. Second, Defendant alleged that a manifest injustice would result if he was not allowed to withdraw his plea because Officer Yost wrongly enforced the custody order without jurisdiction. Finally, Defendant asserted that his plea was not knowing, voluntary, and intelligent because he did not have a good relationship with his attorney who he felt was not assisting him in preparing any defenses for trial.

8 On the day of the hearing on the motion, Defendant’s second attorney requested an order allowing her to withdraw as counsel. Defendant initially opposed the motion, but later agreed to the withdrawal if new, competent counsel was appointed. Defendant’s third attorney entered his appearance on June 27, 2002. Defendant filed pro se another motion to withdraw his plea of no contest and a motion to dismiss as a matter of law for lack of jurisdiction on February 5, 2003. The district court denied both motions without a hearing. Defendant filed a supplemental motion to withdraw his plea for lack of jurisdiction on March 21, 2003. The district court issued an order again denying the supplemental motion to withdraw, finding that “defendant’s [m]otion does not raise any issues not previously litigated at the Hearing on the Defendant’s Motion to Withdraw Plea on September 3, 2002 and September 9, 2002.” The court sentenced Defendant on May 28, 2003, to eighteen months on each count of custodial interference, and eighteen months for escape from a peace officer, each to run consecutively for a total of six years, suspending all but thirty months; including one year of parole, and forty-two months probation.

9 Defendant raises five issues on appeal, which we consolidate into three. Defendant argues that the district court erred (1) in not allowing him to withdraw his no contest plea, (2) by refusing to address the issue of whether the Missouri court had jurisdiction to modify the 1992 divorce decree by the 1997 order, and (3) in convicting and sentencing Defendant on three separate counts of custodial interference in violation of double jeopardy protections. We take this opportunity to address the appropriate standard for the grant or denial of a pre-sentence motion to withdraw a plea.

10 We begin by discussing the district court’s refusal to address the issue relating to the Missouri court’s jurisdiction to modify the decree, followed by a discussion of the appropriate standard of review for pre-sentence plea withdrawals, and then address the issue of double jeopardy.

**Jurisdiction**

11 Defendant contends that the issue of whether or not the district court has jurisdiction is a legal question to be decided by the court, and is not a jury issue that can be waived by entering a plea of no contest. Defendant argues that the district court erred in refusing to address the Missouri jurisdictional issue after the plea was entered. Therefore, Defendant argues that the district court erroneously believed that the jurisdiction of the Missouri courts to modify the decree was an element of the State’s proof at trial and thus was waived by the Missouri jurisdictional issue after the plea was entered. Therefore, Defendant argues that the district court erroneously believed that the Missouri court had jurisdiction to enter the 1997 custody modification, which forms the basis for Defendant’s conviction for custodial interference. We do not resolve this issue; rather, we explain it because of its significance in relation to the issue of whether the district court erred in not allowing Defendant to withdraw his plea.

**New Mexico Jurisdiction**

12 “[T]he district court acquires jurisdiction of a criminal case upon the filing of the information.” Mascarenas v. State, 80 N.M. 537, 538, 458 P.2d 789, 790 (1969). Legal and factual defenses to charges normally will not implicate the district court’s basic power to hear cases brought before it. We see nothing extraordinary here and therefore hold that the district court had subject matter jurisdiction over the criminal charges brought against Defendant.

**Missouri Jurisdictional Issue**

13 Whether or not a state court has subject matter jurisdiction to modify a custody order is governed by the Uniform Child-Custody Jurisdiction and Enforcement Act, NMSA 1978, §§ 40-10A-101 to -403 (2001). However, Section 40-10A-403 provides that a motion made in a custody proceeding which was commenced before the effective date of the UCCJEA “is governed by the law in effect at the time the motion . . . was made.” Id. We therefore look to the earlier version of the Act, the Child Custody Jurisdiction Act, NMSA 1978, §§ 40-10-1 to -24 (1981, as amended through 1989) (repealed 2001) (CCJA). Similar provisions were in effect in Missouri at the time the modification was entered. Mo. Ann. Stat. § 452.450 (1978). The relevant provision of the custodial interference statute and the CCJA is
as follows:

   B. Custodial interference consists of any person, having a right to custody of a child, maliciously taking, detaining, concealing or enticing away or failing to return that child without good cause and with the intent to deprive permanently or for a protracted time another person also having a right to custody of that child of his right to custody.

Section 30-4-4(B).

{14} The “right to custody” means the “right to physical custody or visitation of a child arising from . . . a parent-child relationship between the child and a natural or adoptive parent absent a custody determination; or [] a custody determination.” Section 30-4-4(A)(5). A “custody determination” is defined as a “judgment or order of a court of competent jurisdiction providing for the custody of a child, including visitation rights.” Section 30-4-4(A)(2) (emphasis added).

{15} The jurisdictional provision of the Uniform CCJA under the Missouri law in 1997 was as follows:

   1. A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

      (1) This state:

         (a) Is the home state of the child at the time of commencement of the proceeding; or
         (b) Had been the child’s home state within six months before commencement of the proceeding and the child is absent from this state for any reason, and it is in the best interest of the child that a court of this state assume jurisdiction because:

            (a) The child and his parents, or the child and at least one litigant, have a significant connection with this state; and
            (b) There is available in this state substantial evidence concerning the child’s present or future care, protection, training, and personal relationships; or

      (2) It is in the best interest of the child that a court of this state assume jurisdiction because:

         (a) The child has been abandoned; or
         (b) It is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse, or is otherwise being neglected; or

      (4) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with subdivision (1), (2), or (3), or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and it is in the best interest of the child that this court assume jurisdiction.

   2. Except as provided in subdivisions (3) and (4) of subsection 1 of this section, physical presence of the child, or of the child and one of the litigants, in this state is not sufficient alone to confer jurisdiction on a court of this state to make a child custody determination.

   3. Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine custody.


{16} Defendant argues that the Missouri court did not have jurisdiction under the CCJA to modify the original custody order granting him physical custody of the children. According to Defendant, the Missouri court was therefore not a court of competent jurisdiction as defined in the custodial interference statute. Thus, Defendant asserts, if the Missouri court did not have jurisdiction, then the modification is invalid. “A judgment from a court lacking subject matter jurisdiction is not properly rendered and is not entitled to full faith and credit.” Thoma v. Thoma, 1997-NMCA-016, ¶ 22, 123 N.M. 137, 934 P.2d 1066. In support of this argument, Defendant asserts that he and the children have lived continuously in New Mexico since 1994, and neither he nor his ex-wife lived in Missouri at the time the order was entered. In other words, Defendant contends that none of the criteria for jurisdiction in Missouri was present at the time the modification was entered. Furthermore, the Missouri court did not indicate in the 1997 modification the grounds upon which it was asserting jurisdiction.

{17} The State argues in response that even if the Missouri modification in 1997 is invalid, there are other grounds upon which Defendant can be found guilty of custodial interference. The State contends that Defendant’s interference with mother’s visitation rights under either the 1992 Missouri order or the 1995 stipulated agreement are viable theories of custodial interference upon which Defendant could be charged. We find this argument without merit. The State inconsistently argues that the 1992 order was never admitted into evidence and is not part of the record proper, and therefore should not be considered, and yet asserts that the 1992 order could be a basis for custodial interference if the 1997 order is invalid. Furthermore, it is clear from the affidavit of Officer Yost and the grand jury indictment that Defendant’s charges stemmed from a violation of the 1997 Missouri court modification.

{18} Defendant also contends on appeal that the district court should have held a Founlenfont-type hearing to determine the issue of whether the 1997 Missouri modification was valid. In State v. Founlenfont, 119 N.M. 788, 790, 895 P.2d 1329, 1331 (Ct. App. 1995), this Court held that a district court has authority under pretrial rules to consider purely legal issues before trial. Defendant’s initial attorney did not request such a hearing because she felt Defendant had no valid defenses, and that he needed to contact a civil attorney to challenge the Missouri order. As a practical matter, a Founlenfont hearing would be appropriate—and perhaps required—in a case like this. A district court should determine, as a matter of law, whether the order upon which the charge is based is valid before proceeding with the criminal charges in this case. There is no need to wait for a civil determination of the validity of the order, in particular, if the civil process is likely to be delayed.

Summary as to Jurisdiction

{19} We hold that the district court did not err in refusing to address Defendant’s argument regarding the jurisdiction of the Missouri court after he entered his plea. Defendant’s challenge to the jurisdiction of the Missouri court is a defense to the charges of custodial interference. Defendant waived the defense when he entered a no contest plea. See State v. Hodge, 118 N.M. 410, 414, 882 P.2d 1, 5 (1994). However, as we discuss later in this opinion, the district court has discretion to consider the jurisdictional issue as a factor in deciding whether to
allow Defendant to withdraw his plea.

**Withdrawal of the Plea**

[20] We now turn to Defendant’s argument that the district court erred in not allowing him to withdraw his plea. The parties agree the standard of review to be abuse of discretion. A district court exercises its discretion when deciding whether to permit a pre-sentence plea withdrawal, and we review the court’s ruling “to determine whether, under the facts offered in support of the motion, the trial court abused its discretion.” *State v. Lozano*, 1996-NMCA-075, ¶ 9, 122 N.M. 120, 921 P.2d 316; see Rule 5-304 NMRA (citing in Committee commentary *State v. Brown*, 33 N.M. 98, 263 P. 502 (1927)). “A court abuses its discretion when it is shown to have acted arbitrarily, or committed a manifest error.” *State v. Garcia*, 121 N.M. 544, 546, 915 P.2d 300, 302 (1996) (internal quotation marks and citation omitted). “Even when we review for an abuse of discretion, however, we review the application of the law to the facts de novo.” *Becenti v. Recenti*, 2004-NMCA-091, ¶ 6, 136 N.M. 124, 94 P.3d 867 (internal quotation marks and citation omitted); accord *New Mexico Right to Choose/NARAL v. Johnson*, 1999-NMSC-028, ¶ 7, 127 N.M. 654, 986 P.2d 450 (same).

[21] Rule 5-304, which covers pleas, does not expressly address withdrawal of pleas. However, the committee commentary to Rule 5-304, citing the recommendations of the American Bar Association Standards Relating to Pleas of Guilty, Section 2.1 (Approved Draft 1968), provides guidance. We recognize that the committee commentary, while not binding on this Court, is persuasive authority. *State v. Moore*, 85 N.M. 442, 512 P.2d 1278 (Ct. App. 1973), the defendant requested a plea withdrawal prior to sentencing because he was alerted by the police of the existence of a defense he was unaware of at the time of the plea, that if proven, could lead to an acquittal. Id. at 443, 512 P.2d at 1279. The majority held that since the plea was voluntary, and defendant was aware of the consequences of her acts, there was no denial of due process in denying a motion to withdraw his plea. *State v. Rutherford*, 95 N.M. 340, 343, 622 P.2d 245, 248 (Ct. App. 1980). Our cases generally hold that a plea can only be withdrawn to correct a manifest injustice when the defendant can prove he was denied effective assistance of counsel, he did not ratify the plea, or the plea was involuntary or entered without the requisite knowledge. *See Garcia*, 121 N.M. at 549-50, 915 P.2d at 305-06 (holding defendant should be allowed to withdraw plea where district court did not substantially comply with rules governing the taking of pleas because plea was not knowing and voluntary); *State v. Kincheloe*, 87 N.M. 34, 36, 528 P.2d 893, 895 (Ct. App. 1974) (holding district court abused its discretion in denying motion to withdraw guilty plea where court-appointed counsel did not discuss defenses with defendant). This standard for plea withdrawal is consistent with subparagraph (a) of the committee commentary, but it ignores subparagraph (b) of the commentary which allows pre-sentence withdrawals for any fair and just reason. Our existing case law does not provide adequate guidance or explanation as to why the appellate courts have chosen this path.

[22] For example, in *State v. McClarron*, 85 N.M. 442, 512 P.2d 1278 (Ct. App. 1973), the defendant requested a plea withdrawal prior to sentencing because she was alerted by the police of the existence of a defense she was unaware of at the time of the plea, that if proven, could lead to an acquittal. *Id.* at 443, 512 P.2d at 1279. The majority held that since the plea was voluntary, and defendant was aware of the consequences of her acts, there was no denial of due process in denying a motion to withdraw the plea. *Id.* The majority found no difference between the withdrawal request in the case that was made before sentencing and a plea withdrawal request in a companion case that was made after sentencing. *Id.* The dissent disagreed, arguing that the standard for pre-sentence withdrawals is different, and so long as the defendant presents a fair and just reason, the withdrawal should be granted. *Id.* (Sutin, J., dissenting).

[23] The issue resurfaced in *State v. Moore*, 2004-NMCA-035, ¶ 10 n.3, 135 N.M. 210, 86 P.3d 635. In *Moore*, the defendant moved before sentencing to set aside his plea, challenging the plea procedure. *Id.* ¶ 10. This Court, in a footnote, raised the issue of whether a pre-sentence motion to withdraw a plea should be reviewed under what might be interpreted as a different standard or a variation of the abuse of discretion standard. *Id.* ¶ 10 n.3. We referred to the committee commentary of Rule 5-304 allowing pre-sentence withdrawals for any fair and just reason, and further noted that the federal courts follow this rule. *Id.* This Court in *Moore* left the question to be answered another day. *Id.*

[25] As noted in *Moore*, federal courts follow the American Bar Association Standards for pre-sentence plea withdrawals. The general rule in federal courts is that a defendant who enters a guilty plea has no automatic “right to withdraw it.” *United States v. Hickok*, 907 F.2d 983, 985 (10th Cir. 1990) (internal quotation marks and citation omitted). The defendant bears the burden of demonstrating a fair and just reason for withdrawal of a guilty plea before sentencing, but so long as the defendant meets this burden, the plea may be withdrawn. *Id.*
While a motion for withdrawal before sentencing should be viewed with favor and defendant given a great deal of latitude, the decision is yet within the sound discretion of the district court. See United States v. Rhodes, 913 F.2d 839, 845 (10th Cir. 1990) (noting that the district court is permitted to allow “withdrawal of a plea prior to sentencing upon a showing by the defendant of any fair and just reason” a motion for withdrawal “should be viewed with favor” and “[t]he defendant should be given a great deal of latitude” (internal quotation marks and citations omitted)). Unless the defendant shows that the district court acted unfairly or unjustly, there is no abuse of discretion. Hickok, 907 F.2d at 986; United States v. Harrison, 303 F. Supp. 2d 1242, 1243-44 (D.N.M. 2004) (observing that defendant should be allowed to withdraw plea for any fair and just reason).

{26} Federal Rule of Criminal Procedure 11(d)(2)(B) states that, “A defendant may withdraw a plea of guilty or nolo contendere[] after the court accepts the plea, but before it imposes sentence if[] the defendant can show a fair and just reason for requesting the withdrawal.” In determining whether a defendant has met his burden, federal courts look to the following factors: (1) whether the defendant asserted his innocence, (2) whether the government will be prejudiced if the motion is granted, (3) whether the defendant delayed in filing the motion, (4) the inconvenience to the court if the motion is granted, (5) the quality of the defendant’s assistance of counsel, (6) whether the plea was knowing and voluntary, and (7) whether the granting of the motion would cause a waste of judicial resources. Hickok, 907 F.2d at 985 n.2; Harrison, 303 F. Supp. 2d at 1244.

{27} Many state courts also follow the American Bar Association Standard allowing for pre-sentence plea withdrawal if defendant can show a fair and just reason. For example, in Colorado, a defendant is entitled to withdraw a plea prior to sentencing if the defendant can show a fair and just reason for the withdrawal. People v. Luna, 852 P.2d 1326, 1328 (Colo. Ct. App. 1993) (finding that lack of knowledge of deportation consequences was fair and just reason to allow plea withdrawal). In Wyoming, withdrawal of pleas is governed by the rules of criminal procedure, which state that before a sentence is imposed, “the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason. At any later time, a plea may be set aside only to correct manifest injustice.” Haddock v. State, 909 P.2d 974, 975 (Wyo. 1996) (internal quotation marks and citation omitted); see also State v. Carlson, 619 N.W.2d 832, 837 (Neb. 2000) (holding “[a]fter the entry of a plea of guilty or no contest, but before sentencing, a court, in its discretion, may allow a defendant to withdraw his or her plea for any fair and just reason, provided that the prosecution has not been or would not be substantially prejudiced by its reliance on the plea entered”); Commonwealth v. Kioske, 487 A.2d 420, 422 (Pa. Super. Ct. 1985) (observing courts, in their discretion, may “permit or direct a plea of guilty to be withdrawn at any time prior to sentencing [and requests to withdraw guilty pleas prior to sentencing are to be] liberally allowed for any fair and just reason unless the Commonwealth will suffer substantial prejudice” (internal quotation marks and citation omitted)). Finally, we note that 5 LaFave et al. Criminal Procedure § 21.5(a) at 195-97 (2d ed. 1999), supports the procedure followed by the federal courts and many states.

{28} After reviewing Rule 5-304, the committee commentary citing the American Bar Association Standards, the federal rules and case law, the law and procedure from other states, and secondary sources, we hold that in reviewing a pre-sentence plea withdrawal request, the district court in its discretion may allow the defendant to withdraw a plea of guilty or no contest for any fair and just reason unless the prosecution has been substantially prejudiced by reliance upon the defendant’s plea. The defendant has the burden of proving a fair and just reason exists for the withdrawal of the plea. In evaluating whether a fair and just reason exists, we adopt the factors used by the federal courts. See Hickok, 907 F.2d at 985; Harrison, 303 F. Supp. 2d at 1244. The standard for post-sentencing plea withdrawals which is manifest injustice, remains unchanged.

{29} With the standard for reviewing pre-sentence plea withdrawals clarified, we now turn to Defendant’s argument that the district court erred in denying his motion to withdraw his no contest plea. Defendant raises several arguments in support of his motion to withdraw his plea. Defendant is not challenging the plea procedure itself under Rule 5-303(E) NMRA. As discussed in the previous section, Defendant contends that the Missouri court lacked jurisdiction, therefore the custody modification order upon which the custodial interference charges are based is invalid. Defendant also argues that his plea was entered upon the advice of ineffective counsel. Defendant asserts that his lawyer erroneously advised him that he had no defenses to the charges against him. Defendant also argues that his attorney advised him that if he entered a no contest plea, he would only get probation, and that entering the plea was the quickest way to get out of jail to be with his daughter who had recently been raped.

{30} The district court, in denying Defendant’s first motion to withdraw his plea, stated the following:

IT IF [SIC] THE FINDING OF THE COURT that there is insufficient evidence to require the Court to set aside its prior finding that the plea was knowing, intelligent and voluntary and further that the tape of the plea hearing reflects that the Defendant clearly understood the advice by the Court that “once we finish this process here today, there won’t be any changing your mind later as to your plea.”

{31} The district court denied Defendant’s subsequent motions to withdraw his plea without a hearing. The language of the court’s finding indicates that the court believed Defendant had to establish a manifest error to withdraw his plea. As we discussed, pre-sentence plea withdrawals may be granted upon the showing of a fair and just reason. Defendant does not necessarily need to establish that the plea was not knowing, intelligent, and voluntary or that he had ineffective assistance of counsel. Defendant only needs to establish a fair and just reason for the withdrawal, taking into account the seven criteria we have adopted.

{32} We find the following facts in the record to be important in evaluating Defendant’s request to withdraw his plea. Defendant entered a “straight-up” plea of no contest, meaning he received nothing from the State in return for his plea. Defendant’s attorney testified that she did not discuss the possibility of a conditional plea with Defendant, which would have allowed the jurisdictional issue to be addressed and not waived by the entry of a plea. Defendant’s attorney further testified that she did not believe Defendant had any valid defenses, and she advised him to contact a civil attorney to challenge the Missouri order. Over the course of the case, Defendant was represented by three different counsel. We also note that the crime of custodial interference requires intent. Section 30-4-4(B). If, as Defendant testified, he contacted a civil attorney and believed at all times he had a valid custody order granting him custody of the children, Defendant may have a complete factual defense to the charges. While we make no determination based on these limited facts about the effectiveness of
Defendant’s counsel, these facts clearly raise concerns that may establish a fair and just reason for his plea to be withdrawn. {33} We remand this issue to allow the district court to review Defendant’s request for withdrawal of his plea under the standard set forth in this opinion. If the plea is withdrawn, the court may conduct a Foulenfont-type hearing to determine whether the Missouri order upon which these charges are based is valid before proceeding further. We believe remand is warranted in this case because the record is insufficient for us to make a determination as to whether Defendant has presented a fair and just reason for withdrawal, and to what extent, if any, the State would be prejudiced.

**Double Jeopardy**

{34} We address the issue of double jeopardy because it may arise on remand if Defendant is not allowed to withdraw his plea. Defendant argues that the district court violated double jeopardy requirements by charging and sentencing him consecutively for three counts of custodial interference, one for each child. “Where a defendant is charged with multiple violations of a single statute and raises a double jeopardy challenge, we determine whether the legislature intended to permit multiple charges and punishments under the circumstances of the particular case.” State v. Soto, 2001-NMCA-098, ¶ 13, 131 N.M. 299, 35 P.3d 304. This type of claim, that a defendant was subjected to multiple punishments for the “same offense” is analyzed under the rubric “unit of prosecution” or is considered a “unit of prosecution case.” State v. Barr, 1999-NMCA-081, ¶ 11, 127 N.M. 504, 984 P.2d 185. If the units of prosecution are not clearly defined in the statute, we consider whether the conduct is unitary and different offenses are separated by sufficient indicia of distinctness, including: “(1) the temporal proximity of the acts; (2) location of the victim(s) during each act; (3) existence of an intervening event; (4) sequencing of acts; (5) defendant’s intent as evidenced by his conduct and utterances; and (6) the number of victims.” Soto, 2003-NMCA-098, ¶ 13 (internal quotation marks and citation omitted). While “multiple victims will likely give rise to multiple offenses[,] this is not always the case, especially if the other factors militate against multiple units of prosecution.” State v. Castaneda, 2001-NMCA-052, ¶ 13, 130 N.M. 679, 30 P.3d 368 (internal quotation marks and citation omitted). We review this issue de novo. Soto, 2001-NMCA-098, ¶ 13.

{35} Defendant argues that maintaining custody of his children was a singular, continuous act as defined by this Court in Castaneda. The defendant in Castaneda was found guilty of driving while intoxicated with three of her children in the car, and found guilty of three counts of child abuse, one for each child. On appeal, this Court held that the three counts of child abuse merged “because the abuse of the three children occurred during a single criminally negligent act and therefore constituted only one violation of the statute.” Id. ¶ 18. Similarly, in State v. Cuevas, 94 N.M. 792, 794, 617 P.2d 1307, 1309 (1980) overruled on other grounds by State v. Pitts, 103 N.M. 778, 714 P.2d 582 (1986), the Court held that a teacher who demonstrated a method of drinking tequila to approximately twenty students at a party was held to have committed only one act of contributing to the delinquency of a minor.

{36} We are persuaded that Defendant’s acts in this case are like those in Castaneda and Cuevas. The district court determined that the conduct of Defendant was not unitary and the offenses did not merge because the dates as to one of the charges was different. We disagree. Counts I and II charged Defendant with custodial interference “on or between June 13, 1997 through August 18, 2001.” Count III charged Defendant with custodial interference “on or between June 13, 1997 through January, 2001.” There is no evidence in the record indicating that Count III resulted from a different act, or with a different intent than Counts I and II. A date on an indictment or charge is not, in and of itself, sufficient to establish that the offenses are not unitary and should not merge.

{37} The custodial interference statute refers to “child” in the singular, stating the “taking, detaining, concealing or enticing away or failure to return that child . . . is guilty of a fourth degree felony.” Section 30-4-4(B). The unit of prosecution is not clear from the statute, so we turn to the factors set forth in Soto and Castaneda. Defendant maintained custody of his children during the period of time in question. This required essentially one act over time, thus the temporal proximity of the acts is that they occurred at the same time. The children were all in Defendant’s household, and thus the location of the children during each act was the same. Defendant’s intent, as evidenced by his statements, was to raise his children. His conduct and utterances do not indicate that he had a separate intent as to each daughter. In fact, Defendant testified that he believed he legally had custody of “the children” on the dates in question. Finally, we note that the charges stem from one custody order regarding the children. Although there are three children involved, the alleged violation relates to only one custody order. The district court violated double jeopardy requirements in convicting Defendant on three counts of custodial interference, and sentencing Defendant consecutively on each count. We therefore reverse and remand to the district court for entry of a sentence consistent with this opinion, if Defendant is not allowed to withdraw his plea.

**CONCLUSION**

{38} To summarize, we hold that the district court did not err in refusing to address Defendant’s jurisdictional issue after he entered a no contest plea. We remand to the district court for further proceedings to determine whether Defendant presented a fair and just reason to withdraw his plea. We also hold that the district court violated double jeopardy requirements in convicting and sentencing Defendant on three separate counts of custodial interference, and remand.

{39} IT IS SO ORDERED,

MICHAEL D. BUSTAMANTE,
Chief Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

JONATHAN B. SUTIN, Judge
OPINION
LYNN PICKARD, JUDGE

{1} Summit Properties (Summit), a real estate developer, sued the Public Service Company of New Mexico (PNM) and the City of Santa Fe (City) for, among other things, breach of contract and violation of the Unfair Practices Act (UPA). Summit settled its claims against the City. A trial was held on the claims against PNM, which resulted in the jury’s awarding damages to Summit. The trial court also entered an order granting PNM an offset against the judgment based on Summit’s settlement with the City. PNM appeals, and Summit cross-appeals. We affirm.

FACTS

{2} PNM owned and operated a water utility in Santa Fe under the name of Sangre de Cristo Water Company (SDCW) (hereinafter we may refer to both entities as PNM). Summit purchased property in the City for development. Before Summit purchased the property, PNM represented to Summit that it planned to expand its water utility system to serve the area where the property was located. After the purchase of the property, PNM withdrew its plan to construct an expansion of its water utility system into the area to be developed. Although Summit was prepared to construct a private water system to serve its 26 lots, the City would approve Summit’s development plans only on the condition that PNM’s water utility system be expanded to cover Summit’s property, as well as other developments in the area. Following discussions between PNM and Summit, PNM agreed to provide water service to the development area based on the terms of a special and unique contract between PNM and Summit under a line extension policy authorized by the New Mexico Public Service Commission (Commission), SDCW “Rule 19.” Rule 19 generally sets forth the requirements for line extensions and provides that they are to be paid by the customer to whose property the services are run. Rule 19 also provides that where unusual circumstances exist, an extension may be made under a special long-term contract providing the contract terms are such that no adverse affects [sic] will be imposed on Company’s existing customers; and further providing any such contracts entered into shall be filed with [the] New Mexico Public Service Commission.

{3} This special contract between PNM and Summit was filed with the Public Service Commission on October 16, 1990 (1990 Contract). The essence of the contract was that Summit would construct a water system including a 500,000 gallon water storage tank, transmission lines, and a pump station (Facilities) to serve approximately twenty times the number of customers than it originally contemplated for its own development. This expansion system would be designed by PNM and would be transferred to PNM at no cost under the 1990 Contract. Upon this transfer, PNM would collect hook-up fees from the other customers not in Summit’s development, which PNM would then pay over to Summit, allowing Summit to recoup the investment not required by its own development.

{4} The financial arrangements by which Summit would recoup its investment in the water system from PNM under the 1990 Contract were contained in what the contract called a “Rebate Provision.” The Rebate Provision provided that the Facilities would provide water service in a designated area to 523 single family residences. Third-party users of the Facilities would be allowed to connect to the Facilities by paying “a proportionate share of the cost of the Facilities as a Connection Fee” determined by a specific formula. Additionally, the Rebate Provision provided a method for determining the cost of the Facilities, which cost would be determined at the time the Facilities were transferred to PNM. The Connection Fee was to be collected by PNM “at the time it would normally collect service line extension charges” and would be paid to Summit within thirty days of its receipt by PNM. The 1990 Contract did not set
a specific amount for the Connection Fee.

The dispute in this case centered around the elements that should be included in the Facilities Cost pursuant to which the Connection Fee was calculated. Summit and PNM signed a bill of sale establishing a Facilities Cost, following which PNM wrote to the Commission, stating that the Connection Fee would be that amount divided by 523. Summit, on the other hand, claimed that this figure excluded certain costs and that Summit signed the bill of sale under economic coercion because otherwise PNM would not accept the water system Summit had built, leaving Summit with a development without water service. Summit also had a number of related claims about how PNM was charging third parties.

PNM entered into an agreement to sell SDCW, including the Facilities, to the City on February 28, 1994. On February 24, 1994, Summit had entered into a contract with the City for water and sewer service (Water and Sewer Service Agreement). The Water and Sewer Service Agreement recognized that Summit had built the Facilities at its own expense under the 1990 Contract. On July 3, 1995, PNM sold the Facilities to the City. An Operating Agreement was signed which authorized PNM to continue managing and operating the Facilities. The sale was approved by the Commission.

On appeal, PNM claims that (1) the trial court erred in allowing Summit to bring claims arising before the sale of the Facilities to the City because the Commission had exclusive jurisdiction over those claims; (2) Summit’s claims under the UPA were barred as a matter of law; and (3) Summit’s claims arising after the sale of the Facilities should have been dismissed because PNM’s liability was precluded by the doctrines of abandonment, novation, and impracticability/impossibility. In the cross-appeal, Summit challenges the trial court’s grant of an offset of the damages award, claiming that PNM was solely liable on certain breach of contract claims, and Summit and the City had expressly agreed that the settlement was for attorney fees and not for damages. Some arguments made by the parties involve legal questions, and some involve factual questions. The parties are not completely in agreement regarding the standard of review. We review questions of law under a de novo standard of review and questions of fact under a substantial evidence standard of review. See Jicarilla Apache Nation v. Rodarte, 2004-NMSC-035, ¶ 24, 136 N.M. 630, 103 P.3d 554. As discussed in this opinion, we affirm.

**DISCUSSION**

**Jurisdiction**

PNM makes two main jurisdictional arguments on appeal. Under the broader argument, PNM claims that, as a matter of New Mexico statutory and common law, the Commission has exclusive jurisdiction over the matters raised in this case, and a breach of contract lawsuit cannot be used to litigate those matters. More narrowly, PNM claims that Summit’s attack on the Connection Fees should not have been allowed because those fees amounted to “filed rates,” and, under the filed-rate doctrine, a contract or tort lawsuit cannot be used to change a filed rate.

**Statutory and Common-Law Jurisdiction Arguments**

PNM contends that the Commission has exclusive jurisdiction under our statutes to regulate and supervise rates and service regulations of a public utility. Relying on NMSA 1978, § 62-3-3(H), (J) (2003), PNM argues that the term “rates” is broadly defined to include “every practice, act or requirement ‘in any way relating’ to charges for utility service,” and that the term “service regulations” is even more broadly defined to include “every practice, act or requirement relating to the service or facility of a utility.” PNM claims that the Connection Fees that were to be charged under the 1990 Contract were “charges to be imposed upon third parties as a condition to obtaining water service,” and are therefore “rates.” PNM also claims its “acts and practices in implementing” the 1990 Contract related to “service regulations.” Therefore, because the Connection Fees are “rates” and because PNM’s acts with regard to the 1990 Contract were “service regulations,” PNM concludes that the Commission has exclusive jurisdiction over the 1990 Contract and the Connection Fees.

In addition, relying on New Mexico common law, PNM claims that this case involves a matter in controversy that affects the public and does not involve a purely private dispute. See Southwestern Pub. Serv. Co. v. Artesia Alfalfa Growers’ Ass’n, 67 N.M. 108, 117-18, 353 P.2d 62, 68-69 (1960) (discussing rule that the power of the Commission is limited to matters and controversies involving the rights of a utility and the public and does not extend to acts by the utility that do not affect its public duties). PNM claims, in this case, that the matter in controversy -- the 1990 Contract -- is of public concern because it has to do with Connection Fees that were to be charged in conjunction with the development of 523 residences.

PNM’s argument is far too broad. PNM’s position would create a situation where no public utility could be sued for any matter related to its activities. The general rule, however, is to the contrary—that jurisdiction over contract or tort claims made against a public utility usually rests with the courts. See Nev. Power Co. v. Eighth Judicial Dist. Ct., 102 P.3d 578, 586 (Nev. 2004); see also Campbell v. Mountain States Tel. & Tel. Co., 586 P.2d 987, 990-92 (Ariz. Ct. App. 1978) (discussing the doctrine of primary jurisdiction and the rule that construction of contracts and determination of their validity are judicial functions for the courts); Ethyl Corp. v. Gulf States Util., Inc., 836 So. 2d 172, 176 (La. Ct. App. 2002) (noting that courts have no jurisdiction over fixing and regulating rates by utility and commission has no jurisdiction over contract disputes with utility); State ex rel. GS Techs. Operating Co. v. Pub. Serv. Comm’n, 116 S.W.3d 680, 696 (Mo. Ct. App. 2003) (determining that controversies over contracts are enforceable by courts, not the commission, because courts can enforce contract and enter judgment); Bell Tel. Co. v. Uni-Lite, Inc., 439 A.2d 763, 765 (Pa. Super. Ct. 1982) (reasoning that claims related to rates and service are within expertise and jurisdiction of commission, but contract disputes are not). In New Mexico, as in most other states, the Commission has no power to award damages where a contract with a utility has been breached. See Southwestern Pub. Serv. Co., 67 N.M. at 117-18, 353 P.2d at 68 (noting that Commission has power to decide whether utility can enter into a given contract, but once entered into, the construction and interpretation of the contract are to be determined by the courts); see also NMSA 1978, § 62-6-4 (2003) (discussing powers and duties of the Commission). The only exclusive power given to the Commission is to “regulate and supervise” every public utility. See § 62-6-4(A). This does not preempt lawsuits involving contracts a utility enters into with private parties. See Southwestern Pub. Serv. Co., 67 N.M. at 117-18, 353 P.2d at 68.

The Nevada Power Co. case is instructive. In that case, an electric utility was sued for breach of contract, breach of the covenant of
good faith and fair dealing, and unfair practices. 102 P.3d at 581. The claims arose out of the placement of meters, which can be placed on the primary side of a transformer before the voltage level of electricity is converted to an amount that can be used by the customer, or on the secondary side of the transformer after the voltage level is converted. Id. at 581-82. The meter is typically placed on the secondary side, after the conversion has taken place, in order to avoid charging the customer for the energy that is lost in the conversion process. Id. at 582. The utility represented to its customers that it would be to their benefit to place the meters on the primary side of the transformers. Id. The plaintiffs claimed that the utility had deceptively advised them that placement of the meters in a particular location would be in their best interest, when, in fact, the placement of the meters allowed the utility to charge a higher rate for the electricity used. Id. at 583. The utility claimed that the Nevada Public Utilities Commission had exclusive jurisdiction over the customers’ claims because the claims constituted challenges of tariff rates and placement of the meters and, as in New Mexico, the Commission retained exclusive jurisdiction to regulate and supervise public utilities and the setting of rates charged to customers. Id. at 584. The Nevada court held that the general rule that the courts have original jurisdiction “over claims sounding in tort, contract, and consumer fraud” applied and that the court had original jurisdiction over the plaintiffs’ claims. Id. at 586-87. In so holding, the court pointed out that the plaintiffs were not challenging the reasonableness of the rates approved by the Commission. Id. at 586. Instead, they were challenging misrepresentations made by the utility that resulted in certain rates being charged to the plaintiffs. Id. at 587.

{13} Similarly, in this case, Summit has not challenged the reasonableness of any rates established or approved by the Commission. In fact, as discussed below, the Commission had no role in establishing or approving the Connection Fees. Instead, Summit challenged PNM’s failure to carry out its obligations under a contract that was intended to compensate Summit for advancing the costs of the Facilities. Summit claimed, for example, that PNM had incorrectly calculated the cost of the Facilities, had failed to collect certain Connection Fees, and had allowed connections for service from the Facilities by third parties outside the service area. These claims are not related to the reasonableness of any rates established by the Commission. Even though the means chosen to supply the compensation for the costs advanced by Summit were based on Connection Fees to be charged to new third-party customers, the Commission did not therefore obtain exclusive jurisdiction over Summit’s claims. See id. at 586-87. The dispute between the parties remains a private dispute concerning the construction of the Facilities and compensation due to Summit as a result.

{14} As noted above, PNM also maintains that the Commission had exclusive jurisdiction over this dispute because, according to PNM, the dispute was a matter of public concern, rather than simply a private dispute between PNM and Summit. PNM points out that the 1990 Contract for water service affected 523 residences, “or their equivalent.” We disagree that the dispute was a matter of public concern. The point of the 1990 Contract was not to establish Connection Fees that were reasonable or fair for the public. Rather, the 1990 Contract established fees that would allow Summit to recover the monies expended to build the Facilities. Although other members of the public might be affected by the collection of the Connection Fees, the dispute in this case is a private one over PNM’s actions in executing the terms of the 1990 Contract.

{15} In addition, the Commission had no part in establishing the amount of the Connection Fees or in regulating or approving that amount. According to the testimony of Steve Schwebke, an engineering bureau chief who was employed by the Commission, there are no requirements under the line extension policy “for the Commission to approve any of [these] special or specific contracts that might be submitted”; the special contracts are submitted to the Commission “for informational purposes only.” Schwebke stated that it was his understanding that “there is no specific authorization or approvals that are implied by the Commission just as a result of the contract being filed.” Schwebke also testified that, in his experience, when reviewing a filed contract, such as the one in this case, he would initial the filing to show that he reviewed it and found no particular problem that would require further action by the Commission staff. If a staff member identified a problem when reviewing a special contract, the staff member would likely convert an informal investigation to a formal one by filing a motion to bring the contract to the attention of the Commission. Schwebke testified that the Commission staff is not an official body itself, that an action by the staff does not constitute an official act by the Commission, and that official acts by the Commission would likely be reflected in the form of an order. As established by Schwebke’s testimony, the fact that a staff member of the Commission cursorily reviewed the 1990 Contract and found nothing glaringly wrong does not automatically grant the Commission exclusive authority to resolve all disputes arising out of the contract, particularly where the Commission cannot compensate Summit for all of the harm it suffered from PNM’s failure to abide by the terms of the 1990 Contract.

Filed-Rate Doctrine

{16} PNM argues that the main thrust of Summit’s lawsuit was to attack the amount of the Connection Fees. PNM claims that Summit asked for damages that included an increase in the Connection Fees. PNM argues that the Connection Fees were “filed rates” and Summit’s breach of contract lawsuit cannot be used to change a filed rate. We note that PNM’s argument regarding filed rates affects only those damages awarded that concerned the amount of the Connection Fees and not other damages such as Connection Fees that should have been, but were not, collected from third parties that connected to the Facilities. These other damages are not in any way attacks on the amount of the Connection Fees, and the filed-rate argument is therefore not applicable to them.

{17} A filed rate is one that is approved by the regulatory agency and is “per se reasonable and unassailable in judicial proceedings brought by ratepayers.” Valdez v. State, 2002-NMSC-028, ¶ 5, 132 N.M. 667, 54 P.3d 71 (internal quotation marks and citations omitted). In this connection, PNM claims that mere filing, without positive approval, is sufficient to create a filed rate. However, the authorities cited by PNM do not stand for that proposition. In Keogh v. Chicago & Northwestern Railway, 260 U.S. 156 (1922), the rates were “published,” had been challenged in hearings before the commission, and had not gone into effect until the commission approved them. Id. at 161, 163. In Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409 (1986), the rates were filed with the commission and “allowed to go into effect” by the commission. Id. at 417. Here, the Commission played no role in setting or approving the Connection Fees. PNM has pointed to no evidence in the record showing that the Commission had the power to approve or disapprove of the amount of the Connection Fees.

{18} The purposes behind the filed-rate doctrine are to prevent price discrimination by requiring similarly situated customers to pay...
the same rates for service, to preserve the role of regulatory agencies in approving rates, and to keep courts out of rate-making. *Valdez*, 2002-NMSC-028, ¶ 5. PNM claims that the Connection Fee referred to in the 1990 Contract qualifies as a filed rate because the Commission received, reviewed, and approved the 1990 Contract entered into pursuant to Rule 19, and the Facilities’ Cost and Connection Fee were reported to the Commission by a letter on August 18, 1994. According to PNM, the letter and the filing of the 1990 Contract provided the Commission with “all of the information required to judge the reasonableness of the Connection Fee” and the Commission did not disapprove of the Connection Fee.

{19} As discussed above, the testimony by Schwebke demonstrated that the Commission did not give its approval of the 1990 Contract. Instead, a member of the Commission staff merely reviewed the 1990 Contract for glaring problems. The 1994 letter sent to the Commission provided notice that the Facilities were completed, indicated that PNM believed that the Connection Fee should be in the amount of $2,013.08, and alleged that the 1990 Contract was “one of the specific contracts” being assumed by the City as part of the sale of the Facilities. There is nothing to indicate that the Commission reviewed or approved the letter or its contents. In particular, there is nothing to indicate that the Commission approved of the specific amount to be rebated to Summit in the form of Connection Fees. Without approval by the Commission, the Connection Fees cannot be categorized as “filed rates.” Therefore, the filed-rate doctrine does not apply to this case.

{20} The Connection Fees under the 1990 Contract were set not for public benefit, but for the private benefit to Summit in rebating its costs for the Facilities. PNM, in breaching the contract, prevented Summit from recovering its costs. The 1990 Contract involves matters of private concern between Summit and PNM, and therefore the Commission does not have exclusive jurisdiction over the matter.

{21} PNM, in passing, states that where “the Commission has exclusive jurisdiction, a plaintiff must exhaust his administrative remedies, even when the plaintiff seeks damages.” Exhaustion of remedies concerns the “timing of judicial review” of an administrative action and applies only in situations where “an administrative agency has original jurisdiction.” *See Nevada Power Co.*, 102 P.3d at 586 (internal quotation marks and citations omitted). As discussed above, the Commission did not have original jurisdiction over Summit’s claims. Therefore, the exhaustion of remedies doctrine does not apply to this case.

{22} Finally, PNM argues that Summit attempted to have the jury enforce PNM’s utility obligations, enforceable only by the Commission, by asking the jury during closing argument to “make [PNM] live up to the standard of fair, just and reasonable.” However, Summit used these words in closing, not to ask the jury to approve what it thought to be fair, just, and reasonable rates, but instead to rebut what PNM’s witnesses appeared to contend, which was that PNM engaged in the conduct complained of because of its perceived obligation to be fair, just, and reasonable. Summit’s closing argument does not demonstrate to us that it was doing anything other than seeking to enforce a private obligation.

**Post-Sale Contract Defenses**

{23} PNM argues that claims based on its post-sale conduct were barred, as a matter of law, under theories of abandonment, novation, and impracticability/impossibility.

**Abandonment**

{24} PNM sold the Facilities to the City after obtaining approval from the Commission for the sale. PNM contends that the Commission’s approval was also for PNM’s abandonment of the water utility, “including the utility services addressed” in the 1990 Contract. PNM also contends that Summit expressly consented to its abandonment of utility services. In other words, PNM claims that Summit and the Commission, by agreeing to the sale of the Facilities, also agreed to the abandonment by PNM of its 1990 Contract with Summit. The abandonment issue was submitted to the jury, and PNM is therefore, by necessity, arguing that there was abandonment in this case as a matter of law.

{25} A contract is abandoned “where the acts of one party inconsistent with its existence are acquiesced in by the other party.” *See Keeth Gas Co. v. Jackson Creek Cattle Co.*, 91 N.M. 87, 91, 570 P.2d 918, 922 (1977); *see also Lansdale v. Geerlings*, 523 P.2d 133, 136 (Colo. Ct. App. 1974) (stating that a contract may be abandoned if the act or conduct of the parties is inconsistent with the “continued existence of the contract, and mutual assent to abandon a contract may be inferred from the attendant circumstances and conduct of the parties”). Abandonment of a contract involves questions of fact to be determined from the particular circumstances. *Keeth*, 91 N.M. at 91, 570 P.2d at 922. As Summit points out, none of the documents created in connection with the sale of the Facilities contained any mention of any party’s intentions regarding continued enforcement of the 1990 Contract. There is no evidence that PNM asked to be relieved of its obligations under the 1990 Contract or that Summit consented to such a request. In fact, Summit continued to negotiate with PNM concerning the execution of the Rebate Provision of the 1990 Contract long after PNM and the City had executed the sale agreement.

{26} PNM’s only argument, in essence, that Summit’s agreement not to contest the sale to the City must constitute abandonment as a matter of law. We disagree; at most, this evidence raised a factual issue concerning abandonment, which was properly submitted to, and rejected by, the jury.

{27} PNM attempts to bolster its abandonment and as-a-matter-of-law arguments by pointing out that the Commission approved the sale. By doing so, PNM argues that the Commission essentially approved abandonment of the 1990 Contract as well. Furthermore, PNM argues that the Commission had the power to set aside the Rebate Provision. Although PNM entitles this theory “regulatory abandonment,” it is not really an “abandonment” proposition, since it does not rely on abandonment by Summit, the other party to the 1990 Contract. Instead, PNM appears to be arguing that the Commission’s actions terminated PNM’s obligations under the 1990 Contract as a matter of law, no matter what Summit’s intentions toward the Contract might have been. One problem with this argument is that PNM has pointed to no evidence that the Commission even considered the 1990 Contract when it approved the sale from PNM to the City. As discussed above, PNM did not request permission to do anything with respect to its obligations under the 1990 Contract. PNM can only argue, therefore, that the Commission implicitly approved of its abandonment of the 1990 Contract by approving of the termination of PNM’s status as a utility. Because there is no evidence that the 1990 Contract was before the Commission in any way,
we cannot agree with this proposition.

Novation

{28} PNM claims that its obligations under the 1990 Contract were discharged through novation. PNM’s only argument is that, as a matter of law, the 1994 Water and Sewer Service Agreement between the City and Summit was to be substituted for the 1990 Contract between PNM and Summit. In other words, PNM claims that, as a matter of law, the City was substituted as obligor under the 1990 Contract when the Facilities were sold. Contrary to PNM’s argument, the trial court ruled that, as a matter of law, the 1994 agreement was not a novation or agreement to substitute the City for PNM under the 1990 Contract.

{29} Novation requires “(1) an existing and valid contract, (2) an agreement to the new contract by all parties, (3) a new valid contract, and (4) an extinguishment of the old contract by the new one.” Sims v. Craig, 96 N.M. 33, 35, 627 P.2d 875, 877 (1981). For a novation, “there must be a clear and definite intention on the part of all concerned that such is the purpose of the agreement, for it is a well-settled principle that novation is never to be presumed.” Id. (internal quotation marks and citation omitted). As argued by Summit, PNM was not a party to the 1994 agreement, and Summit was not a party to PNM’s sale of the Facilities to the City. In addition, the 1994 Water and Sewer Service Agreement includes no language regarding “extinguishment” of the 1990 Contract, and there is no language in the sale agreement between PNM and the City regarding “extinguishment” of the 1990 Contract. In sum, there is nothing that would show a “clear and definite intention” by all parties, and in particular by Summit, that the purpose of the 1994 Water and Sewer Service Agreement was to replace the 1990 Contract, including all of PNM’s obligations under the 1990 Contract. Therefore, while there was an existing and valid contract (the 1990 Contract), and a new valid contract (the 1994 Water and Sewer Service Agreement), there was no agreement to a new contract by all parties, and there was no extinguishment of the old contract by the new one. The 1994 Water and Sewer Service Agreement, standing alone, does not qualify as a novation of the 1990 Contract.

{30} In its reply brief, PNM appears to claim that, at a minimum, there is an issue of fact about whether there was a novation, and the issue should have been submitted to the jury. PNM did not make this argument in the brief-in-chief, despite its protestations to the contrary. Instead, PNM’s only argument, made in a footnote, was that its impracticability defense should have been submitted to the jury. PNM did not assert that the novation defense should have also been submitted to the jury. PNM’s cursory statement in the footnote that an instruction given by the trial court “negat[ed] jury consideration of PNM’s affirmative defenses” is not sufficient to raise the argument that the jury should have been instructed on the defense of novation. Since this argument was made for the first time in the reply brief, we will not consider it. See State v. Castillo-Sanchez, 1999-NMCA-085, ¶ 20, 127 N.M. 540, 984 P.2d 787.

{31} Moreover, even if the argument had been preserved, PNM has failed to demonstrate that there was a factual issue allowing the novation defense to be presented to the jury. The 1994 Water and Sewer Service Agreement does not raise an issue of fact about novation because it does not meet the requirements for a novation. Similarly, Summit’s agreement not to contest the sale of SDCW to the City, with no evidence of Summit’s intentions concerning the 1990 Contract, does not raise an issue of fact as to novation. PNM has pointed to no other evidence that might have supported a finding of a “clear and definite intention” by all parties to substitute the 1994 Water and Sewer Service Agreement for the 1990 Contract. Therefore, the trial court correctly refused to submit this issue to the jury.

Impracticability/Impossibility

{32} The trial court found that, as a matter of law, it was not impracticable or impossible for PNM to comply with the terms of the 1990 Contract after the Facilities were sold to the City. The doctrine of impracticability, which is sometimes referred to as impossibility, applies in situations where performance by a party “is made impracticable without his fault by the occurrence of an event[,] the non-occurrence of which was a basic assumption on which the contract was made.” In re Estate of Duncan, 2002-NMCA-069, ¶ 27, 132 N.M. 426, 50 P.3d 175 (quoting Restatement (Second) of Contracts § 261 (1979)), rev’d on other grounds by Estate of Duncan v. Kinsolving, 2003-NMSC-013, 133 N.M. 821, 70 P.3d 1260. In order for PNM to assert this defense, the condition creating the impossibility must have arisen through no fault of PNM. See Kama Rippa Music, Inc. v. Schekeryk, 510 F.2d 837, 842 (2d Cir. 1975) (noting that party pleading defense of impossibility must show that “it took virtually every action within its powers to perform its duties under the contract”); see also Restatement (Second) of Contracts § 261 (1981). An impracticability defense requires a showing by PNM that (1) a supervening event made performance on the contract impracticable, (2) the non-occurrence of the event was a basic assumption on which the contract was based, (3) the occurrence of the event was not PNM’s fault, and (4) PNM did not assume the risk of the occurrence. See Seaboard Lumber Co. v. United States, 308 F.3d 1283, 1294-95 (Fed. Cir. 2002); see also Bradford Dyeing Ass’n, Inc. v. J. Stog Tech GMBH, 765 A.2d 1226, 1238 (R.I. 2001) (stating that one cannot create an impossibility preventing performance on a contract and then be shielded from obligations under the contract “by hiding behind that self-[created ‘impossibility’ defense’]).

{33} In this case, the undisputed fact is that PNM voluntarily agreed to the sale of SDCW and the Facilities to the City. The Agreement to Purchase and Sell SDCW and the Facilities was between the City and PNM, and no other party. PNM argues that it was not at fault for “causing a regulatory order” to be entered. However, PNM agreed to the sale and, based on its own duties as a utility, sought authorization for the sale from the Commission, obtaining an order allowing it to go forward with the sale and with its plan to discontinue its utility status. These actions were initiated by PNM and not by the Commission or Summit. PNM entered into a contract with Summit, a private entity, to have the Facilities constructed and then entered into an agreement with the City to sell the Facilities. PNM cannot create the impossibility of performing under the contract with Summit by entering into an agreement with the City to sell the Facilities and then hide behind the impossibility that it helped create. The trial court correctly determined that the impossibility defense was not available to PNM as a matter of law.

{34} To the extent that PNM contends that the jury should have been instructed on the impossibility defense, there were no factual issues for the jury to decide. The evidence was undisputed that PNM procured the regulatory ruling that it contends created the impossibility. As discussed above, the defense of impracticability/impossibility is not available under those circumstances. See Thompson Drilling, Inc. v. Romig, 105 N.M. 701, 705, 736 P.2d 979, 983 (1987) (holding that a party is entitled to have a jury instructed on a legal theory if the theory is supported by the evidence).
In one sentence, PNM argues that the fact that it procured the approval of the Commission to abandon its status as a utility cannot be used to deny PNM the defense of impracticability, because to do so would violate PNM’s constitutional right to petition the government. We do not address this argument because it has not been developed sufficiently to allow us to consider it. A citation to two cases, United Mine Workers v. Pennington, 381 U.S. 657, 670 (1965), and Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136 (1961), both generally exempting from the anti-trust act concerted action seeking to influence public officials, without any explanation of how those cases support PNM’s position, is not sufficient to obtain a ruling from this Court on a constitutional claim such as the one PNM apparently raises.

PNM also contends that the impossibility was created with Summit’s acquiescence because Summit agreed not to challenge the sale of SDCW to the City. PNM has cited no authority for the proposition that a self-created impossibility can still be a defense to a contract action if the other party to the contract acquiesced in the creation of the impossibility. See Wilburn v. Stewart, 110 N.M. 268, 272, 794 P.2d 1197, 1201 (1990) (“Issues raised in appellate briefs that are unsupported by cited authority will not be reviewed . . . on appeal.”). Although we need not consider this contention, as it is not supported by any authority, we note that Summit’s acquiescence in the sale appears to be relevant only to PNM’s other defenses, such as the abandonment defense that was submitted to the jury. It does not seem correct that a party to a contract would be absolved of its role in creating an impossibility simply because the other party to the contract did not object to the action creating the claimed impossibility.

Due to our decision on this argument, we need not address Summit’s contention that PNM remained in charge of operating SDCW as an independent contractor after the sale. Summit contends that PNM therefore retained the ability to carry out the terms of the 1990 Contract. PNM, on the other hand, claims that it had no authority or responsibility toward Summit after the sale because PNM was only an agent at that point. While we do not resolve this issue, we note that PNM provided no facts concerning its powers or duties as operator of SDCW following the sale. It may be true, therefore, that PNM had the necessary authority to carry out the duties required by its pre-existing contract with Summit.

Post-Sale UPA Claims

Prior to trial, the trial court granted PNM’s motions for summary judgment in part, dismissing the UPA claims to the extent that the claims were “based on conduct occurring before July 3, 1995.” The trial court believed that the Commission’s adoption of Rule 19, the provisions of the 1990 Contract under Rule 19(G), and review of the 1990 Contract by the Commission staff constituted “sufficient active supervision to meet the standards required under Section” 57-12-7. NMSA 1978, § 57-12-7 (1999) states that the UPA shall not apply to actions or transactions expressly permitted under laws administered by a regulatory body. With respect to claims based on actions occurring after July 3, 1995, the trial court stated that it was PNM’s burden to “affirmatively establish that the active supervision continued after the City took over direction of the water company.” The trial court found that the undisputed facts did not support a conclusion that “such active supervision exists.” Based on its findings, the trial court denied summary judgment with respect to claims arising after July 3, 1995 (post-sale). We do not comment on the correctness of the trial court’s ruling that the pre-July 3, 1995 (pre-sale), actions were exempt.

On appeal, PNM argues that the trial court erred in allowing the post-sale claims to go to the jury. PNM makes two major arguments regarding the UPA claims. First, PNM states that the UPA claims were based on “the very same actions and representations made before that date, and the district court determined that those actions or transactions were exempt” under the UPA. Second, PNM contends that, since its actions before and after the sale of the Facilities had not changed, the finding that its pre-sale actions were exempt would, as a matter of law, apply also to its post-sale actions even though the Commission no longer had authority to supervise PNM’s actions with respect to the Facilities.

Summit argues that these arguments were not made below and therefore were not preserved for appeal. Summit contends that PNM instead argued only that the City regulated the Facilities after the sale, and the City’s regulation was sufficient to entitle PNM to the UPA exemption contained in Section 57-12-7. NMSA 1978, § 57-12-7 (1999) states that the UPA shall not apply to actions or transactions expressly permitted under laws administered by a regulatory body. With respect to claims based on actions occurring after July 3, 1995, the trial court stated that it was PNM’s burden to “affirmatively establish that the active supervision continued after the City took over direction of the water company.” The trial court found that the undisputed facts did not support a conclusion that “such active supervision exists.” Based on its findings, the trial court denied summary judgment with respect to claims arising after July 3, 1995 (post-sale). We do not comment on the correctness of the trial court’s ruling that the pre-July 3, 1995 (pre-sale), actions were exempt.

Even if PNM had properly preserved its “continued exemption” argument, we would find that argument to be without merit. First, to the extent that PNM is arguing that approval and supervision by the Commission of its pre-sale actions extended to its post-sale actions, we point out that the statute requires that the actions be expressly permitted by a regulatory body. What is important therefore is whether PNM’s actions after the sale were expressly permitted. See § 57-12-7. Even if we accept PNM’s claim that the Commission’s “approval” carried over to its post-sale actions, those actions could not have been expressly permitted by the Commission because, after the sale, the Commission no longer had the authority to supervise actions connected to the Facilities.

Second, PNM argues that the claims made by Summit involve “alternative interpretations of uncertain contract terms,” which are not actionable under the UPA. PNM claims that it merely had a different interpretation than Summit of an ambiguous contract, and therefore, as a matter of law, any dispute about the contract terms cannot be the basis for a claim under the UPA. PNM concedes that the trial court correctly instructed the jury that no violation of the UPA would result if PNM gave “its interpretation of terms of the 1990 Agreement for which Summit has asserted a different interpretation or for PNM to perform the Agreement in accordance with its version.” However, PNM argues that this instruction was not a correct statement of the law because the UPA does not preclude a jury from finding a violation of the UPA when the parties have different interpretations of the UPA terms.
with its interpretation provided its interpretation is reasonable.” The jury was therefore given an opportunity to decide whether PNM’s interpretation of the 1990 Contract was reasonable and decided that it was not.

In order to avoid that decision, PNM contends in effect that its interpretation of the 1990 Contract was reasonable as a matter of law. PNM’s argument is as follows: (1) The trial court found that PNM’s actions with respect to the 1990 Contract before the sale were approved by the Commission; (2) PNM and the City continued to act in exactly the same manner after the sale; and (3) therefore, the prior approval by the Commission makes PNM’s and the City’s post-sale conduct reasonable as a matter of law, even if PNM’s interpretation might have been a mistaken interpretation of the 1990 Contract. However, the trial court’s ruling was not that the Commission approved everything PNM did in carrying out its obligations under the 1990 Contract. The trial court’s ruling was clearly directed only at the Commission’s approval, allowing utilities to enter into special contracts under Rule 19 concerning line extensions, as well as the “approval” of the 1990 Contract itself by the Commission. The trial court never found that the Commission approved all of the conduct PNM engaged in while executing its duties under the 1990 Contract. In addition, there were different allegations of pre-sale and post-sale conduct. The trial court’s ruling therefore does not support PNM’s claim that its actions were reasonable as a matter of law. Accordingly, the reasonableness of PNM’s actions was a factual issue for the jury to resolve.

Offset of Settlement Amount

Summit and the City reached a settlement on the breach of contract claim against the City. In exchange for $100,000, Summit released the City from all claims arising to the date of the settlement agreement. Summit claims that, as part of the settlement agreement, the parties expressly agreed that this sum was not attributable to any of the actual damages allegedly caused by the City’s breach of contract, but rather that the settlement payment was for legal fees Summit incurred litigating its claims against the City. After the jury awarded damages against PNM, PNM moved to have the damages amount offset by the $100,000 settlement amount. The trial court granted the motion, and Summit appeals that decision. Summit makes three arguments with respect to the order allowing the offset: (1) the settlement funds are from a collateral source from which PNM cannot benefit, (2) the settlement funds do not represent a duplicative recovery, and (3) the City and Summit agreed that the settlement was for attorney fees incurred in litigating claims against the City and not to cover damages for any breach of contract by the City.

Collateral Source

Summit contends that the settlement is from a collateral source and cannot be used to offset the damages award against PNM. As asserted by Summit, McConal Aviation, Inc. v. Commercial Aviation Insurance Co., 110 N.M. 697, 799 P.2d 133 (1990) (McConal), states that the general rule is that a plaintiff may not recover more than his or her actual loss. Id. at 700, 799 P.2d at 136. An exception to that general rule is the collateral source rule, which provides that a plaintiff may recover his or her “full losses from the responsible defendant, even though he may have recovered part of his losses from a collateral source.” Id. McConal involved a plaintiff who sued an insurance company, agent, and broker for damages based on the insurance company’s failure to issue an insurance policy. Id. at 698, 799 P.2d at 134. The plaintiff sued the broker for negligence and the insurance company for breach of contract, the broker settled with the plaintiff prior to trial, and the plaintiff was awarded damages at trial based on the breach of contract claim against the insurance company. Id. The Supreme Court held that an offset of the settlement amount should not be applied toward the damage award. Id. at 700, 799 P.2d at 136. Summit claims that this case is like McConal.

We disagree. As pointed out by PNM, McConal was later limited by the decision in Sanchez v. Clayton, 117 N.M. 761, 765, 877 P.2d 567, 571 (1994), to situations where there are no facts showing that the parties were jointly liable for the damages caused to the plaintiff. In addition, as pointed out by PNM, Restatement (Second) of Contracts § 294(3) (1981), provides that payments from a joint obligor on a contract are credited toward the amount received from other joint obligors. This principle is based on the idea that a contracting party is not entitled to double recovery. See, e.g., Evanow v. M/V Neptune, 163 F.3d 1108, 1119 (9th Cir. 1998) (noting that the rule under the Restatement of Contracts is “simply a manifestation of the rule that a contracting party should not receive more than was bargained for”). "New Mexico does not allow duplication of damages or double recovery for injuries received." Hale v. Basin Motor Co., 110 N.M. 314, 320, 795 P.2d 1006, 1012 (1990). Here, the trial court found that PNM and the City were jointly liable under the 1990 Contract after the sale in July 1995. It appears that the finding was, in part, based on Summit’s argument. Summit does not challenge that finding. Therefore, there is no dispute that PNM and the City were joint obligors for damages arising after the sale of SDCW and the Facilities. Based on this, we conclude that the settlement payment cannot be considered to be from a collateral source.

Duplication of Damages

Summit claims that PNM failed to show that the settlement amount was a duplication of damages that Summit was awarded, or that the settlement amount, along with the damage award, was more than the total amount of damages suffered by Summit. Summit claims that there was a period of time when PNM was solely liable for the damages to Summit, that the joint liability of PNM and the City did not begin until after the sale, and that for a portion of that time PNM was necessarily solely liable because the City was successful in asserting a statute of limitations defense. Summit cites no authority for the proposition that a finding of joint and several liability is legally changed to sole liability where one of the joint obligors is successful in asserting a statute of limitations defense. See Wilburn, 110 N.M. at 272, 794 P.2d at 1201 (“Issues raised in appellate briefs that are unsupported by cited authority will not be reviewed . . . on appeal.”). Moreover, this argument was not raised in the trial court. See Woolwine, 106 N.M. at 496, 745 P.2d at 721.

On the merits of this issue, in this case, the jury was not asked to separate the damages and award damages only for the pre-sale period of time or only for the period of time between the sale and December 11, 1997, when the statute of limitations defense no longer applied. The jury’s damage award, therefore, was a comprehensive award that included both pre-sale and post-sale damages, and the award was intended to compensate Summit for all of the damages it suffered as a result of conduct by PNM and the City. Therefore, the settlement amount was in addition to all of the damages suffered by Summit and was duplicative of a portion of those damages.

We also disagree with Summit’s argument that it requested a higher amount of damages than the jury awarded, and therefore the payment by the City could be attributed to the amount of damages the jury refused to award. The flaw in this argument is obvious: the
jury was asked to determine the total amount of damages suffered by Summit and found that the amount was lower than the amount Summit claimed. The jury’s determination of damages is the measure of the true amount of damages suffered by Summit. Therefore, the payment by the City cannot be considered “compensation” for damages that, according to the jury, Summit did not in fact incur.

**Express Agreement in Settlement**

{50} Summit argues that when it entered into the settlement agreement with the City, the parties expressly agreed that the settlement was for legal fees incurred by Summit in its suit against the City. Summit cites to no statutory or contractual authority giving Summit a legal right to recover such attorney fees from the City. In the absence of such statutory or contractual authority, a party to a lawsuit is not entitled to recover attorney fees from an opposing party. See *N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-028, ¶ 9, 127 N.M. 654, 986 P.2d 450 (reiterating that New Mexico follows American Rule that absent statutory or other legal authority, parties are responsible for their own attorney fees). The agreement between Summit and the City, therefore, provided compensation to Summit that it was not otherwise entitled to receive. As provided in Restatement (Second) of Contracts § 294(3), where a joint obligor provides consideration to a plaintiff, that consideration must be credited against the obligation of other joint obligors, and any agreement to the contrary is of no effect.

The agreement between the City and Summit to characterize the settlement as payment for attorney fees, where there was no legal right to those fees, appears to be an effort to circumvent this rule. Under the Restatement, such agreements should not be given effect. See *id.* In addition, allowing Summit to avoid crediting a joint obligor for the amount of the settlement by characterizing the settlement as attorney fees Summit was not entitled to recover in the lawsuit for breach of contract would violate the rule against double recovery of damages and the principles underlying the theory of joint obligations. See, e.g., *Hood v. Fulkerson*, 102 N.M. 677, 680, 699 P.2d 608, 611 (1985) (“Duplication of damages or double recovery for injuries received is not permissible.”); *Washington v. Atchison, Topeka & Santa Fe Ry.*, 114 N.M. 56, 58, 834 P.2d 433, 435 (Ct. App. 1992) (stating that function of offset is to achieve equity and justice and that fundamental fairness does not permit double recovery).

{51} Summit claims that reliance on Restatement (Second) of Contracts § 294(3), would ignore precedent that encourages courts to consider the intent of the parties when deciding whether a “non-settling, co-defendant has been released.” Summit points to three cases as precedent. See *McConal*, 110 N.M. at 700, 799 P.2d at 136; *Gallegos v. Citizens Ins. Agency*, 108 N.M. 722, 779 P.2d 99 (1989); *Johnson v. Aztec Well Servicing Co.*, 117 N.M. 697, 875 P.2d 1128 (Ct. App. 1994). As we noted above, *McConal* was limited by *Sanchez* to situations, unlike the one in this case, where there are no facts showing that the parties were jointly liable for the damages. *Sanchez*, 117 N.M. at 765, 877 P.2d at 571. To the extent that the decisions in *Gallegos* and *Johnson* stand for the proposition that courts must decide whether a party has been released by settlement by looking at the intent of the parties and whether an injured party has been fully compensated, we disagree. *See Gallegos*, 108 N.M. at 730, 779 P.2d at 107; *Johnson*, 117 N.M. at 701, 875 P.2d at 1132. However, the intent of the parties cannot override principles against double recovery in the context of joint obligors. As discussed above, characterizing the settlement as attorney fees when Summit had no legal right to those fees appears to be an attempt to evade those principles. Furthermore, both *Gallegos* and *Johnson* require a court to examine whether the injured party has been fully compensated. *Gallegos*, 108 N.M. at 730, 779 P.2d at 107; *Johnson*, 117 N.M. at 701, 875 P.2d at 1132. In this case, the judgment against PNM fully compensated Summit for all damages found by the jury, and the payment by the City to Summit was purportedly for damages Summit was not entitled to recover. Therefore, allowing the offset in this case is consistent with both of these cases.

**CONCLUSION**

{52} Based on the foregoing, we affirm on all issues raised in the appeal and the cross-appeal.

{53} IT IS SO ORDERED.

LYNN PICKARD, Judge

WE CONCUR:

CYNTHIA A. FRY, Judge
RODERICK T. KENNEDY, Judge
Certiorari Granted, No. 29,272, July 15, 2005

From the New Mexico Court of Appeals

Opinion Number: 2005-NMCA-091

U.S. XPRESS, INC., a Nevada corporation, M.S. CARRIERS, INC., a Tennessee corporation, and SWIFT TRANSPORTATION COMPANY, INC., an Arizona corporation, Individually and on behalf of a class of all similarly situated taxpayers, Plaintiffs/Appellants, versus

STATE OF NEW MEXICO, NEW MEXICO TAXATION AND REVENUE DEPARTMENT and JAN GOODWIN, SECRETARY OF THE NEW MEXICO TAXATION AND REVENUE DEPARTMENT, Defendants-Appellees.

No. 24,702 (filed May 17, 2005)

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY

JAMES A. HALL, District Judge

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OPI\V\N

MICH\\EL E. VIGIL, JUDGE

{1} Appellants’ motion for rehearing is denied. The opinion filed in this case on March 23, 2005, is withdrawn and this opinion is substituted in its place.

{2} Plaintiffs appeal an order from the district court denying class certification. Plaintiffs argue that the district court erroneously concluded that the proposed plaintiff class could only include taxpayers who had exhausted their administrative remedies. We agree. Therefore, we reverse and remand for proceedings consistent with this opinion.

BACKGROUND

{3} In December 2002, Plaintiffs filed claims with the New Mexico Taxation and Revenue Department (the Department) for a refund of highway beautification fees, administrative fees, and taxes collected under Section 74-4F-(C) of the Hazardous Materials Transportation Act, NMSA 1978, §§ 74-4F-1 to -8 (1996), and Section 7-15A-10 of the Weight Distance Tax Act, NMSA 1978, §§ 7-15A-1 to -11 (1988, as amended through 2004); see § 74-4F-3(C) and 7-15A-10. However, we note that the provisions of the Hazardous Materials Transportation Act and the Weight Distance Tax Act that provided for the collection of the challenged taxes have since been repealed. See 2004 N.M. Laws ch. 78, § 2 (repealing Section 74-4F-3); see also 2003 N.M. Laws (1st S.S.) ch. 3, §§ 30, 31 (repealing Section 7-15A-10 effective July 1, 2004). The Department granted Plaintiffs’ claims for refunds of the highway beautification fees and for the taxes collected in 1999, 2000, and 2001, under Sections 74-4F-3(C) and 7-15A-103(C) (hereinafter “Uncontested Taxes”). However, the Department denied Plaintiffs’ claim for taxes collected prior to 1999 and for the administrative fees (hereinafter “Contested Taxes”).

{4} On August 4, 2003, Plaintiffs filed a class action complaint alleging that the taxes imposed by Sections 74-4F-3(C) and Section 7-15A-10 were unconstitutional because they violated the Supremacy and Dormant Commerce Clauses of the United States Constitution. On September 23, 2003, Plaintiffs moved to certify the class described in their complaint. Based on section 22 of the Tax Administration Act, NMSA 1978, §§ 7-1-1 to -82 (1965, as amended through 2004), the district court concluded that it “lack[ed] jurisdiction over those members of the proposed class who have not exhausted their administrative remedies,” and held that when the taxpayers who had not exhausted their administrative remedies were excluded, Plaintiffs’ proposed class did not meet the numerosity requirement for class actions. See Rule 1-023(A)(1) NMRA. Therefore, the district court denied Plaintiffs’ request to certify the class on February 23, 2004. They now appeal.

STANDARD OF REVIEW

{5} Resolution of the question before us turns on the proper construction of a statutory administrative exhaustion requirement in the context of a class action. Construction of a statute is a question of law that we review de novo. Morgan Keegan Mortgage Co. v. Candelaria, 1998-NMCA-008, ¶ 5, 124 N.M. 405, 951 P.2d 1066.

DISCUSSION

{6} In this case, we are presented with the question of whether the Tax Administration Act allows the district court to hear the purely legal claims of putative class members who have not exhausted their administrative remedies when administrative review of their claims would be futile and the named plaintiffs have exhausted their administrative remedies in pursuit of identical claims. On the facts before us, we conclude that it does.

{7} The Tax Administration Act provides a taxpayer with two remedies when he believes that a tax has been wrongfully assessed against him. § 7-1-23. He may either (1) refuse to pay the tax and file a written protest with the secretary of the Department under Section 7-1-24, or (2) he may pay the tax and file a claim for a refund with the secretary under Section 7-1-26. Further, no New Mexico court “has jurisdiction to entertain any proceeding by a taxpayer in which the taxpayer calls into question the taxpayer’s liability for any tax” unless the taxpayer has
exhausted one of his administrative remedies. § 7-1-22. Based on this statute, the Department argues that the district court lacks subject matter jurisdiction over the members of the class who had not exhausted their administrative remedies. Therefore, the Department argues that the district court correctly denied Plaintiffs’ motion for class certification.

[8] When this Court interprets the statutes of New Mexico, our “principal objective . . . is to determine and give effect to the intent of the legislature.” Regents of the Univ. of N.M. v. N.M. Fed’n of Teachers, 1998-NMSC-020, ¶ 28, 125 N.M. 401, 962 P.2d 1236 (internal quotation marks and citation omitted). The “primary indicator” of the legislature’s intent is the plain language of the statute. Anthony Water & Sanitation Dist. v. Turney, 2002-NMCA-095, ¶ 10, 132 N.M. 683, 54 P.3d 87. However, our courts “have rejected formalistic and mechanistic interpretation of statutory language.” D’Avignon v. Graham, 113 N.M. 129, 131, 823 P.2d 929, 931 (Ct. App. 1991). For example, “[w]here the literal language of a statute leads to an absurd result . . . we may construe the statute to avoid such a result.” State v. Gutierrez, 115 N.M. 551, 552, 854 P.2d 878, 879 (Ct. App. 1993).

[9] By including an administrative exhaustion requirement in the Tax Administration Act, the legislature demonstrated that it intended the Department to be the forum of first resort for taxpayers. See Neff v. Taxation & Revenue Dep’t, 116 N.M. 240, 244, 861 P.2d 281, 285 (Ct. App. 1993). However, we must determine whether the legislature intended the administrative exhaustion requirement to preclude our courts from exercising jurisdiction over the purely legal claims of the absent members of a class who have not exhausted their remedies when exhaustion would be futile.

[10] The Department correctly points out that a statutory exhaustion requirement is generally less flexible and pragmatic than its common law counterpart. 2 Richard J. Pierce, Jr., Administrative Law Treatise § 15.3, at 982 (4th ed. 2002). Nonetheless, we find that the exhaustion requirement in the Tax Administration Act is motivated by the same basic principles as the common law doctrine. As a general matter, the exhaustion of administrative remedies is “required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review.” Weinberger v. Salfi, 422 U.S. 749, 765 (1975); see also Pierce, supra, § 15.2, at 971-72. Exhaustion “also encourages the use of more economical and less formal means of resolving disputes and is credited with promoting accuracy, efficiency, agency autonomy, and judicial economy.” 2 Am. Jur. 2d Admin. Law § 474, at 402 (footnotes omitted). In particular, the requirement in the Tax Administration Act that administrative remedies be exhausted “respects the fiscal operations of the state and offers to the reviewing courts the benefit of the agency’s findings and conclusions in an area in which agencies have special expertise.” Neff, 116 N.M. at 245, 861 P.2d at 286 (internal quotation marks and citation omitted); see also Bailey v. State, 500 S.E.2d 54, 75 (N.C. 1998) (holding that “[n]otice for fiscal planning purposes is the touchstone” of the exhaustion requirement in a statute allowing taxpayers to sue to recover improperly collected taxes).

[11] We begin our analysis by considering Plaintiffs’ claims for refunds of the Contested Taxes. In this case, we fail to see how requiring every member of the class to exhaust his administrative remedies will further the objectives that underlie the Tax Administration Act’s administrative exhaustion requirement. Each of the named plaintiffs submitted a claim for a refund of the Contested Taxes. In each case, the Department denied their claims. Under these circumstances, we hold that by pursuing their administrative claims Plaintiffs have satisfied the purpose and intent of the exhaustion requirement for the absent class members.

[12] First, Plaintiffs’ claims for refunds of the Contested Taxes are representative of the claims of the absent class members, and have provided the Department with an ample opportunity to address the issue and to correct any errors. See Rule 1-023(A)(3); Salfi, 422 U.S. at 765 (stating that one of the purposes of exhaustion is to give the agency an “opportunity to correct its own errors”). Because the Department has established a uniform pattern of denial of Plaintiffs’ claims for refunds of the Contested Taxes, Plaintiffs have identified a genuine dispute and not merely an instance of error or mistake.

[13] Second, determining the merit of Plaintiffs’ claims (and the claims of the absent class members) does not require the Department to develop a factual record or to apply its expertise. Cf. Ass’n for Cnty. Living v. Romer, 992 F.2d 1040, 1044 (10th Cir. 1993) (holding in part that the plaintiffs had to exhaust their administrative remedies because their claim was “a classic example of the kind of technical questions . . . best resolved with the benefit of agency expertise and a fully developed administrative record” (internal quotation marks and citation omitted)). Plaintiffs’ claims for refunds are based on the allegation that the enabling legislation is facially unconstitutional because it violates the Supremacy and Dormant Commerce Clauses. Any taxpayer who paid the tax has essentially the same claim: the tax is unconstitutional and he or she is entitled to a refund. Therefore, there is no need for an administrative record to be fully developed for each absent member of the class.

[14] Third, the claims of the absent class members are not a surprise that threatens to undermine the State’s fiscal stability. See Bailey, 500 S.E.2d at 75 (stating that the purpose of an administrative exhaustion requirement in a North Carolina taxation statute is “to put the State on notice that a tax, or a particular application thereof, is being challenged as improper so that the State might properly budget or plan for the potential that certain revenues derived from such tax have to be refunded” (emphasis omitted)). Plaintiffs’ claims were sufficient to put the Department on notice that it may have collected unconstitutional taxes and that it may be required to issue refunds to every taxpayer who paid the taxes.

[15] Finally, requiring each member of the proposed class to exhaust his administrative remedies would create inefficiency and waste in the agency and ultimately in the courts. See Foster v. Guerry, 655 F.2d 1319, 1322 (D.C. Cir. 1981) (stating that, despite a statutory exhaustion requirement, “[i]t would be wasteful, if not vain, for numerous employees, all with the same grievance, to have to process many identical complaints with [the Equal Employment Opportunity Commission (EEOC)]” (internal quotation marks, citation, and emphasis omitted)). If we affirm the district court, the Department could be faced with over 3000 identical refund claims. However, because the Department uniformly denied claims for refunds of the Contested Taxes, such claims would be entirely futile. See State ex rel. Norvell v. Credit Bureau of Albuquerque, Inc., 85 N.M. 521, 529, 514 P.2d 40, 48 (1973) (noting that “[t]he doctrine of exhaustion of remedies does not require the initiation of and participation in proceedings . . . which are vain and futile”); see also Anderson v. Bd. of Adjustment for Zoning Appeals, 931 P.2d 517, 521 (Colo. Ct. App. 1996) (holding that exhaustion was not required where the “plaintiffs had notice of the . . . administrator’s interpretation of the pertinent law, [because] for them to have awaited another and different answer on the same question would have been an exercise in futility and would not have served the purposes underlying the exhaustion doctrine”). We note that in Neff, the plaintiffs argued that because the Taxation and Revenue Department lacked the authority to rule on the constitutionality of the Tax Administration Act, it was futile to exhaust their administrative remedies. 116 N.M. at 244, 861 P.2d at 285. We rejected the plaintiffs’ argument because the Tax Administration Act required
that “challenges to the validity of the Act be first presented” to the Department. Id. In the case before us, claims for refunds of the Contested Taxes that are identical to the claims of the putative class members have already been presented to the Department by the named plaintiffs. The Department has uniformly denied such claims. Under these circumstances, it would be futile for every putative class member to present its identical claim for a refund of the Contested Taxes. As a result, we hold that Neff does not bar our consideration of the futility of Plaintiffs’ administrative remedies.

Moreover, the district court’s review of the lawfulness of the Department’s denial of Plaintiffs’ claims will in no way be enhanced by the submission of these additional, identical refund claims to the Department. See Gueroy, 655 F.2d at 1323 (holding that “the appellants have asserted claims of racial discrimination that are so similar to those asserted by the original plaintiffs that no purpose would be served by requiring appellants to file independent racial discrimination charges with EEOC”). Therefore, to the extent that the Department has wrongfully denied Plaintiffs’ claims, exhaustion would be futile and would unnecessarily burden the Department.

None of the objectives underlying the Act’s administrative exhaustion requirement would be served by compelling each member of the proposed class to exhaust his administrative remedies as to the Contested Taxes. Moreover, under these circumstances, administrative exhaustion would serve no useful purpose and would unnecessarily burden the Department, the absent members of the class, and possibly our courts. We refuse to construe the statute so mechanistically as to lead to such an absurd result. Accord Ariz. Dep’t of Revenue v. Dougherty, 29 P.3d 862, 866 (Ariz. 2001) (stating that there is “no reason why the statutory [exhaustion] requirements cannot be satisfied through a single representative claim that provides the requisite information about the representative claimant”).

Class actions are an important procedural device for vindicating the claims of large groups of similarly situated individuals. See Abraham L. Pomerantz, New Developments in Class Actions–Has Their Death Knell Been Sounded?, 25 Bus. Law. 1259, 1259 (1970) (stating that the class action “has become one of the most socially useful remedies in history”). Perhaps most importantly, class actions benefit the courts, attorneys, and litigants by promoting “judicial economy and efficiency.” 1 Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 1:1, at 3 (4th ed. 2002). Instead of consuming scarce judicial resources by litigating a multitude of carbon copy cases, a class action permits the court to determine the rights and obligations of a group of similarly situated persons in a single proceeding. Affirming the district court and requiring each of the 3000 absent members of the class to wait for a denial of his claims for refunds of the Contested Taxes before proceeding to court would increase the likelihood that our courts will be presented with multiple, identical lawsuits.

We conclude that including the taxpayers who have not exhausted their administrative remedies as to the Contested Taxes in the putative class is consistent with the purposes of the Tax Administration Act’s exhaustion requirement. Further, the purposes underlying class actions will be well served by the inclusion of the taxpayers who have not exhausted their administrative remedies. Addressing the claims for refunds of the Contested Taxes in a single proceeding will improve judicial efficiency and reduce the burden borne by the Department and the putative class. Therefore, we hold that the district court erroneously refused to include taxpayers of Contested Taxes who had not exhausted their administrative remedies in the proposed class.

We are unable to determine on the record before us whether the foregoing rationale applies to Plaintiffs’ claims for refunds of the Uncontested Taxes. For example, since the record suggests that the Department has granted all Plaintiffs’ claims for refunds of the Uncontested Taxes, it is unclear whether there is an actual dispute over the Uncontested Taxes or simply an instance of error or mistake by the Department. See Saffi, 422 U.S. at 765 (noting that one of the purposes of administrative exhaustion is to provide the administrative agency with an opportunity to correct its mistakes). For the same reason, we are unable to determine whether the putative class members’ administrative claims for refunds of the Uncontested Taxes would be futile. See Credit Bureau of Albuquerque, Inc., 85 N.M. at 529, 514 P.2d at 48 (holding that exhaustion of administrative remedies is not required if futile to do so). Nevertheless, it was error for the district court to deny class certification relating to the Uncontested Taxes without determining whether administrative review of these claims would be futile and whether the named plaintiffs have exhausted their administrative remedies in pursuit of identical claims. We therefore reverse the district court as to the Uncontested Taxes as well, and remand for further proceedings consistent with this opinion.

The Department and Amicus argue that Section 7-1-22 should be construed as a waiver of sovereign immunity. We are unpersuaded. The Tax Administration Act does not impose sovereign immunity as a bar to suits for tax refunds. Further, the purpose of Section 7-1-22 is not to waive sovereign immunity; its purpose is solely to define our court’s jurisdiction over tax refund claims.

In sum, on remand the district court may entertain in a class action the purely legal claims of putative class members who have not exhausted their administrative remedies where: (1) the named Plaintiffs have exhausted their administrative remedies; (2) the class members’ legal claims are the same as those of the named Plaintiffs; (3) it would be futile to require class members to exhaust their administrative remedies; and (4) determining the merit of each taxpayer’s claim does not require the development of a separate detailed factual record or the application of the Department’s expertise.

CONCLUSION

We hold that, under the circumstances of this case, the named Plaintiffs may, by exhausting their administrative remedies, give the district court jurisdiction over the putative class members’ claims for refunds of the Contested Taxes. However, on this record, we are unable to determine whether the named Plaintiffs’ claims for refunds of the Uncontested Taxes were sufficient to give the district court jurisdiction over the putative class members’ claims. We therefore reverse the district court and remand so that the district court may determine: (1) whether the putative class meets the numerosity requirements of Rule 1-023 when the taxpayers who have not exhausted their administrative remedies with respect to the Contested Taxes are included; and (2) whether, based on the rationale set forth in this opinion, the named Plaintiffs’ claims for refunds of the Uncontested Taxes satisfied the Tax Administration Act’s exhaustion requirement with respect to the claims of the putative class members.

IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

RODERICK T. KENNEDY, Judge
OPINION
RODERICK T. KENNEDY, JUDGE

1. Defendant Ernesto Flores appeals the classification of his sentence as a serious violent offense under the Earned Meritorious Deductions Act, NMSA 1978, § 33-2-34(A)(1), (L)(4) (2004) (EMDA). Among other offenses, Defendant pleaded guilty as an accessory to shooting at or from a motor vehicle under NMSA 1978, § 30-3-8(B) (1993). This offense is one of those enumerated in the EMDA as a “serious violent offense.” See § 33-2-34(L)(4)(j). The district court applied the EMDA to this offense, and Defendant appealed.

2. Defendant argues that the EMDA applies only to principals and not accessories. We disagree. We hold that there is no distinction in the EMDA between convictions as principals or accessories, and we may not read language into the statute to create one. Therefore, the EMDA classification of serious violent offenses is equally applicable to both principals and accessories. We affirm.

FACTUAL AND PROCEDURAL HISTORY

3. On June 1, 2003, shots were fired from the vehicle that Defendant was driving. Defendant was stopped after evading pursuit. Defendant’s passengers admitted shooting at another vehicle. On November 14, 2003, Defendant pleaded guilty to violating Section 30-3-8 (among other offenses not at issue in this appeal) under an accessory theory, agreeing that he “did unlawfully and intentionally help, encourage, or cause” both of his passengers to shoot at the other vehicle. He also conceded that he intended this crime to be committed and that he helped his passengers commit the crime.

4. At sentencing, the State asked that Section 33-2-34(L)(4) of the EMDA be applied to this count as a serious violent offense. The district court applied the statute so that Defendant could not earn credits for good time against 85% of his sentence. Defendant appeals, arguing that because he was convicted as an accessory, and not a principal, to a serious violent offense enumerated in Section 33-2-34(L)(4), the EMDA does not apply.

DISCUSSION

5. Under Section 33-2-34(A), prisoners can earn meritorious deductions. The deductions available for those who commit serious violent offenses as enumerated in Section 33-2-34(L)(4) is a maximum of four days per month. Section 33-2-34(A)(1). If Defendant’s offense had not been classified as a serious violent offense, he would therefore be eligible for a greater number of meritorious deductions. See § 33-2-34(A)(2).

6. Defendant argues that being an accessory, and not a principal, to a shooting at or from a motor vehicle exempts him from the application of Section 33-2-34(A)(1). He argues that the crime of being an accessory to one of the EMDA’s enumerated serious violent offenses is not specifically described in the EMDA, and therefore cannot be subject to it. He claims that because the legislature did not specifically include accessories in its definition of serious violent offenses, the definition only contemplates principals. See § 33-2-34(L)(4). Defendant asserts that the legislature only meant to punish highly egregious conduct, and that even if accessories are punished to the same extent as principals, the less egregious conduct of accessories warrants an exception. These arguments present questions of law which we analyze de novo. See State v. Bennett, 2003-NMCA-147, ¶ 4, 134 N.M. 705, 82 P.3d 72.

7. In New Mexico, a defendant “who aids or abets in the commission of a crime is equally culpable as the principal.” State v. Carrasco, 1997-NMSC-047, ¶ 6, 124 N.M. 64, 946 P.2d 1075; see also NMSA 1978, § 30-1-13 (1972) (defining the theory of accessory liability). Accessories and principals are punished equally under the law. See Carrasco, 1997-NMSC-047, ¶ 6. Accessory liability is merely a different theory of liability, but “is not a distinct offense.” Id. Accessories are therefore not convicted of a separate crime, but of the crime itself. See id. Here, Defendant was convicted for violating Section 30-3-8 as an accessory to the crime. The crime is one enumerated in Section 33-2-34(L)(4)(j). We hold that the fact that he pleaded guilty as an accessory and not a principal is irrelevant for purposes of the EMDA.

8. Defendant is laboring under a misconception in arguing that the legislature did not intend to include accessory liability under the EMDA. “We presume that the legislature knows the law when enacting a statute.” Bennett, 2003-NMCA-147, ¶ 11. We therefore believe that the legislature knew that accessory and principal liability are not distinct crimes and are punished equally under the law. See Carrasco, 1997-NMSC-047, ¶ 6. Furthermore, we will not read language into a statute when it makes sense as written. State v. Herrera, 2001-NMCA-073, ¶ 10, 131 N.M. 22, 33 P.3d 22.

9. Defendant’s reliance on Bennett and State v. McDonald, 2004-NMSC-033, 136 N.M. 417, 99 P.3d 667, is misplaced. Both of those cases emphasized that the crimes of which the defendants were convicted were not specifically enumerated in the EMDA. Bennett, 2003-NMCA-147, ¶¶ 4-13 (holding that battery on a household member is not an enumerated offense under the EMDA); McDonald,
CONCLUSION

{10} We affirm.

{11} IT IS SO ORDERED.

RODERICK T. KENNEDY,
Judge

WE CONCUR:
JONATHAN B. SUTIN, Judge
IRA ROBINSON, Judge

Opinion

JAMES J. WECHSLER, JUDGE

{1} Defendant appeals his convictions for intimidation of a witness, aggravated stalking, criminal damage to property, telephone harassment, and evading and eluding a police officer. Defendant argues on appeal that his convictions should be reversed because the prosecutor inappropriately mentioned Defendant’s refusal to submit to a polygraph examination during opening statement. Defendant also argues that the district court erred in denying his motion for directed verdict as to the evading and eluding charge. We conclude that the prosecutor improperly commented on Defendant’s silence but that the comment was harmless beyond a reasonable doubt. We further conclude that there was sufficient evidence to support Defendant’s conviction of evading and eluding. Therefore, we affirm Defendant’s convictions.

Factual and Procedural History

{2} Police arrested Defendant for allegedly stalking the victim in violation of a domestic violence order. See NMSA 1978, § 30-3A-3.1(A)(1) (1997) (defining aggravated stalking as stalking in violation of an order of protection issued by a court). At trial, the State introduced, through the victim, the domestic violence order, which applied to both parties. The victim testified that Defendant stalked her, harassed her with telephone calls, sent letters to her home, placed letters on her car, and continually drove past her home, all in violation of the domestic violence order. The victim testified that she knew Defendant’s writing well and recognized his voice on the telephone, because they had dated periodically for approximately five years and had known each other for approximately fifteen to twenty years. The State introduced into evidence four handwritten letters, which the victim identified as written by Defendant. The victim also testified that she had received additional letters from Defendant, which she threw away, and that she called the police whenever she received a letter or telephone call from Defendant. One of the letters included a comment about “signs.”

{3} The victim testified that signs started appearing “all over the neighborhood.” The State, again using the victim to lay the foundation, admitted into evidence three signs, discovered in her father’s yard, which the victim testified were written by Defendant. The signs included derogatory language about the victim, including calling her a “whore” or a “crack whore,” and also contained her work and home telephone numbers.

{4} In addition to receiving harassing telephone calls from Defendant at her home and work, the victim testified that she received a telephone call from Defendant while she was staying at a local hotel. The victim stated that when she answered the telephone, Defendant stated: “Hello whore” and then she hung up. When the victim checked out of the hotel, she stated that she found that her vehicle had been scratched or “keyed” during the night. The State introduced photographs depicting the victim’s vehicle after the alleged incident. The vehicle was scratched all the way around, with the word “whore” etched into the paint in numerous places. Officer Keith Farkas
stated that he did not dust the vehicle for fingerprints and that it was unlikely fingerprints would be found on the signs because they were made out of cardboard. The victim testified that it cost her nearly $3000 to have the vehicle repaired.

{5} The victim stated that the day after her vehicle was damaged she received another telephone call from Defendant while Officer Russell Gould was at her home investigating the case. Officer Gould testified that the victim told him about the signs, telephone calls, and letters and identified Defendant as the perpetrator. While he was documenting the victim’s statement, Officer Gould said she received a telephone call. The victim answered the telephone, and promptly handed it to Officer Gould whispering: “It’s him.” Officer Gould testified that he heard a male voice say: “What do you think about last night?” The victim also stated that she received a telephone call from Defendant while he was in jail stating: ‘You’re dead.” However, the PIN number required to make telephone calls from jail belonged to another individual, who was not in jail that time.

{6} Detective Keith Bessette was assigned to investigate the victim’s allegations against Defendant. He stated that the victim identified Defendant as the author of the signs and letters that were admitted into evidence. He stated that no fingerprints were taken from the letters or signs because he suspected they had been handled by too many people. He also stated that it was impossible for him to get a handwriting expert to match Defendant’s writing to that on the signs and letters because his department lacked funding and there were not any state facilities that could do the work. He believed the victim because she was “[o]ne hundred percent” positive that Defendant was responsible for the letters and signs.

{7} Detective Bessette interviewed Defendant, who waived his Miranda rights and gave a statement. See Miranda v. Arizona, 384 U.S. 436, 479 (1966). Defendant stated that he had not made any telephone calls to the victim and that he “may” have written some letters to her when he was drunk, but had not written the letters at issue. A jury convicted Defendant of intimidation of a witness, aggravated stalking, criminal damage to property, telephone harassment, and evading and eluding a police officer. The remaining facts will be discussed as they pertain to the particular issues on appeal.

**Comment on Defendant’s Refusal to Submit to a Polygraph Examination**

{8} During the State’s opening statement, the prosecutor commented on Defendant’s refusal to submit to a polygraph examination. Defendant contends that the comment requires reversal. The parties dispute the standard of review we should apply to this issue. The State argues, relying on State v. Casaus, 1996-NMCA-031, ¶ 34, 121 N.M. 481, 913 P.2d 669, that we should apply an abuse of discretion standard because Defendant’s motion for mistrial was denied. Defendant argues that a de novo standard of review is proper because the prosecutor’s statement infringed on his Fifth Amendment right to remain silent and was prosecutorial misconduct because the statement improperly impugned Defendant’s credibility. See, e.g., State v. Estrada, 2001-NMCA-034, ¶ 30, 130 N.M. 358, 24 P.3d 793 (“Where the facts are undisputed, we review de novo the legal question whether the prosecutor improperly commented on Defendant’s silence.”).

{9} This case is distinguishable from Casaus. The prosecutor in Casaus elicited testimony from a police detective that the defendant had been offered the opportunity to take a polygraph examination and that the defendant had stated that he was willing to do so. Casaus, 1996-NMCA-031, ¶ 35. We stated that the testimony did not prejudice the defendant because it tended to aid the defendant by giving the jury the impression that his assent to submit to the polygraph examination indicated that he had nothing to hide. Id. ¶ 36. In addition, because the defendant had waived his Miranda rights prior to being questioned, testimony that he was willing to submit to the test was not an infringement of his rights. Casaus, 1996-NMCA-031, ¶ 37. However, we indicated that the analysis might have been different if the state had sought to introduce evidence that the defendant had refused a polygraph examination. Id. ¶ 36. Therefore, while we generally review a denial of a motion for mistrial for abuse of discretion, the issue presented in this case is whether the prosecutor violated Defendant’s constitutional rights with his comment, an issue we review de novo. See State v. Lopez, 2000-NMSC-003, ¶ 10, 128 N.M. 410, 993 P.2d 727 (stating that when a defendant alerts the trial court to a constitutional issue with a proper objection, he raises an issue of law, which is reviewed de novo); see also State v. Sandoval, 2004-NMCA-046, ¶ 6, 135 N.M. 420, 89 P.3d 92 (stating that constitutional issues are reviewed de novo); Estrada, 2001-NMCA-034, ¶ 30.

{10} During opening statement the prosecutor stated:

Detective . . . Bessette goes, reads the Defendant his rights, asks to talk to him. Defendant says he didn’t [make] the signs, make any calls, he might have [written] the letters while he was drunk. More conversation comes out. Detective asks him, “Okay, your side, [do] you want to take a polygraph?” He says, “No.” Defense counsel objected and requested a mistrial, arguing that it was improper for the State to comment on Defendant’s refusal to submit to a polygraph examination because the jury could inappropriately interpret his refusal as an acknowledgment of guilt. The prosecutor argued that he should be able to use Defendant’s statement because it was not simply a refusal, but an admission of guilt because Defendant repeatedly stated that he would fail the polygraph examination. The district court sustained Defendant’s objection and instructed the jury not to consider anything relating to a polygraph examination or to speculate as to what Defendant’s responses might have been. It did not grant Defendant’s request for a mistrial.

{11} A district court has discretion to admit polygraph examination results as evidence so long as “certain conditions, designed to ensure the accuracy and reliability of the test results, are met.” State v. Sanders, 117 N.M. 452, 459, 872 P.2d 870, 877 (1994); see also Rule 11-707(C) NMRA. However, the issue of whether a prosecutor may comment on a defendant’s refusal to submit to a polygraph examination is an issue of first impression. But see Casaus, 1996-NMCA-031, ¶ 36. We therefore turn to the federal courts and our sister states in search of persuasive authority. Cf. Sundial Press v. City of Albuquerque, 114 N.M. 236, 239, 836 P.2d 1257, 1260 (Ct. App. 1992) (“The reasoning of federal decisions . . ., if not in conflict with controlling New Mexico authority, can be persuasive. However, we are not bound by these federal decisions. They must be of sound logic and based on policies compatible with the law of this state.”) (citation omitted).

{12} Numerous federal courts have stated that it is improper to comment on a defendant’s refusal to submit to a polygraph examination. See United States v. Walton, 908 F.2d 1289, 1294 (6th Cir. 1990) (stating that a reference to a defendant’s failing or refusing
the polygraph examination would be improper because it would implicate “rights of a constitutional magnitude”); United States v. Kiszewski, 877 F.2d 210, 216-17 (2d Cir. 1989) (analyzing the prejudice of a reference to a statement made by a state witness detailing a defendant’s refusal to submit to a polygraph examination and determining that the error in admitting the testimony was harmless); United States v. Stackpole, 811 F.2d 689, 694-95 (1st Cir. 1987) (stating that it was error for the trial court to admit a tape-recorded statement by the defendant that included his refusal to submit to a lie detector test, but finding the error harmless); United States v. Murray, 784 F.2d 188, 188-89 (6th Cir. 1986) (stating that a deliberately introduced comment by an experienced FBI agent that the defendant refused a polygraph examination required reversal when the proof of guilt was not overwhelming); Bowen v. Eyman, 324 F. Supp. 339, 341-42 (D. Ariz. 1970) (stating that testimony concerning the defendant’s refusal to take a polygraph examination was “constitutionally impermissible” because of the “highly prejudicial effect” of the testimony). In addition, several state courts have also held that it is improper to admit evidence of a defendant’s refusal to submit to a polygraph examination. See Melvin v. State, 606 A.2d 69, 72 (Del. 1992) (holding that a trial judge’s reliance on the defendant’s refusal to submit to a polygraph examination violated the defendant’s constitutional rights); State v. Emory, 375 P.2d 585, 588 (Kan. 1962) (stating that admission of evidence that the defendant refused a polygraph examination was improper because it deprived the defendant of his alibi defense); State v. Driver, 183 A.2d 655, 658 (N.J. 1962) (stating that a prosecutor’s reference to a defendant’s refusal to submit to a polygraph examination were improper because the defendant’s refusal could improperly be regarded by the jury as indicating a consciousness of guilt); Kugler v. State, 902 S.W.2d 594, 597 (Tex. Ct. App. 1995) (holding that the defendant’s refusal to submit to a polygraph examination could lead the jury to improperly infer that the defendant had something to hide when the complainant was the only witness who could identify the defendant as her attacker).

{13} The State contends, again relying on Casaus, that the prosecutor’s reference to Defendant’s refusal to submit to a polygraph examination did not violate his rights under the Fifth Amendment because he waived his Miranda rights prior to giving an excusable statement to Detective Bessette. See Casaus, 1996-NMCA-031, ¶ 37. However, as the State acknowledges, we indicated in Casaus that a defendant could be prejudiced by a prosecutor’s reference to his refusal to submit to a polygraph examination. Id. ¶ 36. In addition, we have also stated that a defendant may exercise the right to remain silent, “even if that right is not initially asserted.” State v. Hennessy, 114 N.M. 283, 288, 837 P.2d 1366, 1371 (Ct. App. 1992), overruled on other grounds by State v. Lucero, 116 N.M. 450, 453-54, 863 P.2d 1071, 1074-75 (1993). Defendant’s refusal to submit to a polygraph examination was effectively a statement of a desire to remain silent and therefore not subject to comment by the prosecution. See Wainwright v. Greenfield, 474 U.S. 284, 295 n.13 (1986) (“With respect to post-Miranda warnings ‘silence,’ we point out that silence does not mean only muteness; it includes the statement of a desire to remain silent.”).

{14} But, this determination alone does not end our inquiry. As recently stated by our Supreme Court in State v. Alvarez-Lopez, 2004-NMSC-030, 136 N.M. 309, 98 P.3d 699, and State v. Johnson, 2004-NMSC-029, 136 N.M. 348, 98 P.3d 998, we must determine whether a federal constitutional error was harmless beyond a reasonable doubt. To make this determination, we consider the entire record to ascertain whether “there is a reasonable possibility that the [error] might have contributed to the conviction.” Alvarez-Lopez, 2004-NMSC-030, ¶ 25 (internal quotation marks and citation omitted); see also United States v. Hastin, 461 U.S. 499, 509 (1983). Our harmless error analysis does not exclusively focus on whether the record contains overwhelming evidence of Defendant’s guilt. See Alvarez-Lopez, 2004-NMSC-030, ¶ 30. Instead, we are to affirm Defendant’s conviction only if the State establishes “beyond a reasonable doubt that the jury verdict was not tainted by the constitutional error.” Id. This harmless error standard applies in this context because “even if conviction appears inevitable, there is a point at which an error becomes too great to condone as a matter of constitutional integrity and prosecutorial deterrence.” Id. ¶ 31 (internal quotation marks and citation omitted).

{15} The State argues that this error should be deemed harmless because Defendant’s objection was sustained, and the court gave a curative instruction. See State v. Gonzales, 2000-NMSC-028, ¶ 37, 129 N.M. 556, 11 P.3d 131 (stating the general rule that “the overwhelming New Mexico case law states that the prompt sustaining of [an] objection and an admonition to disregard the answer cures any prejudicial effect of inadmissible testimony”) (internal quotation marks and citation omitted). We do not apply that general rule in this case for two reasons. First, the State concedes that the prosecutor’s conduct was “obviously intentional.” See id. ¶ 39 (stating that when the prosecutor’s conduct was intentional in eliciting improper testimony, the proper analysis is to review whether there was a “reasonable probability that the improperly admitted evidence could have induced the jury’s verdict” even if the trial court admonished the jury). Second, as we have already stated, when analyzing for harmless error beyond a reasonable doubt, we must consider the entire record. See Hastin, 461 U.S. at 509 (“This Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations.”); see also Bowen, 324 F. Supp. at 342 (reviewing for harmless error beyond a reasonable doubt despite an instruction to the jury to ignore polygraph testimony by the court); Murray, 784 F.2d at 188-89 (same); Kugler, 902 S.W.2d at 596-97 (reviewing for harmless error despite curative instruction). We therefore cannot rely on the curative instruction and review the entire record for harmless error.

{16} In doing so, our review convinces us that the prosecutor’s comment was harmless beyond a reasonable doubt because the comment could not have reasonably induced the jury’s verdict. We agree with Defendant that much of the evidence in this case hinged upon the victim’s credibility and, conversely, the jury’s disbelief of Defendant’s assertion of innocence. With regard to the charges of intimidation of a witness, aggravated stalking, criminal damage to property, and telephone harassment, it was the victim’s testimony that identified Defendant as the author of the letters and signs and as the individual who damaged her vehicle. It was also the victim’s testimony that identified Defendant as the caller who had been harassing her at her work and home, and even from jail. But, this case is not one in which “the evidence merely amounts to the complainant’s word against the [defendant’s]” as Defendant argues. The State introduced other evidence at trial that the jury could consider in determining whether to believe Defendant’s assertions of innocence. Detective Bessette testified that after interviewing Defendant, he informed Defendant that he was being charged and served Defendant with a warrant. In response to Defendant’s “smug” look, Detective Bessette stated: “Yeah, yeah, I know you didn’t do it[,]” to which
Defendant responded: “I never said I didn’t do it.” The jury also heard testimony from Officer Gould that Defendant fled when Officer Gould attempted to question him about the victim’s allegations. The jury was free to infer a consciousness of guilt from Defendant’s flight. See State v. Jacobs, 2000-NMSC-026, ¶ 15, 129 N.M. 448, 10 P.3d 127 (recognizing that evidence of flight can show a consciousness of guilt).

Given the entirety of the evidence, the State has met its burden of demonstrating that the prosecutor’s error was harmless beyond a reasonable doubt. See Alvarez-Lopez, 2004-NMSC-030, ¶ 25. However, we take this opportunity to repeat our admonition that prosecutors who inject impermissible comments which affect a defendant’s constitutional rights risk reversal by this Court of convictions secured by such tactics. Hennessy, 114 N.M. at 289, 837 P.2d at 1372; see also Driver, 183 A.2d at 661 (“All too frequently this court is compelled to reverse judgments of guilt in important criminal cases because of overzealous prosecution. It is the duty of prosecuting officers to guard against the introduction of incompetent evidence.”) (internal quotation marks and citation omitted).

**Defendant’s Motion for Directed Verdict for Evading and Eluding**

Defendant essentially contends that there was insufficient evidence to support his conviction for evading and eluding because Officer Gould never informed Defendant that he had legal authority to detain him and because Defendant had no legal obligation to speak with Officer Gould. We disagree.

A motion for directed verdict is a motion that questions whether there is substantial evidence to support the charge. State v. Dominguez, 115 N.M. 445, 455, 853 P.2d 147, 157 (Ct. App. 1993). Substantial evidence is evidence, either direct or circumstantial, “that is acceptable to a reasonable mind as adequate support for a conclusion.” Id. “We view the evidence in the light most favorable to the state, resolving all conflicts in the evidence and indulging all permissible inferences to be drawn from it in favor of the verdict.” Id. We do not reweigh the evidence, nor do we substitute our judgment for that of the jury. Id.

In order to convict Defendant of evading and eluding a police officer, the State had the burden of proving that: (1) Officer Gould was a peace officer engaged in the lawful discharge of his duty; and (2) Defendant, with knowledge that Officer Gould was attempting to apprehend or arrest him, fled, attempted to evade, or evaded Officer Gould. See UJI 14-2215 NMRA; NMSA 1978, § 30-22-1(B) (1981). Officer Gould was looking for Defendant because the victim had called the police alleging that Defendant had driven by her home in violation of the domestic violence order. The victim gave Officer Gould both a description of Defendant and of the truck he was driving. The State introduced evidence at trial that Officer Gould was on duty, wearing his uniform, and driving a marked police car, when he made initial contact with Defendant. Defendant exited his truck and approached a house. Officer Gould testified that he was free to infer that Defendant had knowledge that Officer Gould was attempting to arrest or apprehend him from Defendant’s flight through the house, out the back door, and over the fence. See State v. Driver, 2004-NMCA-042, ¶ 24, 135 N.M. 408, 89 P.3d 80 (stating that intent can be inferred from circumstantial evidence); see also Jacobs, 2000-NMSC-026, ¶ 15. Substantial evidence supported the charge and the district court did not err in denying Defendant’s motion for directed verdict.

**Conclusion**

The prosecutor committed error when he inappropriately mentioned Defendant’s refusal to submit to a polygraph examination during his opening statement. However, because the error is harmless beyond a reasonable doubt, we affirm Defendant’s convictions for intimidation of a witness, aggravated stalking, criminal damage to property, and telephone harassment. We also affirm Defendant’s conviction for evading and eluding.

IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR:

CELIA FOY CASTILLO, Judge

RODERICK T. KENNEDY, Judge
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