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2006 License and Dues
- The 2006 License and Dues forms have been mailed.
- License and dues fees are due on or before Feb. 1, 2006.
- Members who have not received the form by the end of December should notify the State Bar, (505) 797-6092 or (505) 797-6035.
- For members’ convenience, dues may also be paid online through secured e-commerce at www.nmbar.org.
- License and disciplinary fees are mandatory and must be paid to maintain license status.
- Without exception, fees are due regardless of whether members receive a form.
- Late fees may be assessed if payment is not postmarked by Feb. 1, 2006.

Special Insert:
Daniels-Head Professional Liability Insurance
December 4, 2006

Dear Members,

This year, I urge you to provide the demographic information requested on this year’s Dues and Licensing Form, which was mailed on December 6. This optional, voluntary information is sought for several important reasons. First, political affiliation is requested solely for the purpose of establishing Judicial Nominating Commissions. These commissions are designated through Executive, Legislative and Judicial appointments and the final partisan balance is determined by the State Bar President. Providing your party affiliation will facilitate this process by offering the State Bar President an ample pool of lawyers from which to choose.

Second, we ask that you provide race/ethnicity data. The Court and the State Bar are frequently asked for statistics about members’ race and ethnicity. Currently, this information is incomplete and does not accurately reflect the membership. In 2007, the State Bar’s Diversity Committee will begin work on the third study of minorities in the profession, with a release date of 2009. This study will analyze the general status of minority attorneys in New Mexico. The Committee, under the direction of Arturo Jaramillo and Mary Torres, will examine the involvement of minority lawyers in the activities and leadership of the State Bar. The Committee will also identify barriers that may exist to the complete integration of minority lawyers within the legal system. The study will include a review of many areas of the legal profession, including law school admissions, bar exam statistics, discipline, judicial representation and career preferences.

Your participation is needed in order to ensure that the Committee’s report is meaningful and accurate. Please take an extra moment and complete this portion of your dues and licensing statement.

Thank you for your participation.

Yours truly,

Richard C. Bosson
Chief Justice
When it comes to protecting what you value most, we have all the right cards. For generations, individuals, families and businesses have looked to us for personalized solutions to their financial needs. And, we do it with experience and expertise that exceed any in the industry. TRUST SERVICES • ASSET MANAGEMENT • FINANCIAL PLANNING

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### SEMINAR REGISTRATION FORM

**CLE PROGRAMS - State Bar Center**

**DECEMBER 19 - VIDEO REPLAYS**

<table>
<thead>
<tr>
<th>Seminar</th>
<th>Date and Time</th>
<th>CLE Credits</th>
<th>Fee</th>
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<tr>
<td><strong>Divorce Practice with Larry Rice</strong></td>
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<tr>
<td>State Bar Center</td>
<td>Tuesday, December 19</td>
<td>9:00 a.m. – 3:30 p.m.</td>
<td>6.0 General CLE Credits</td>
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<td><strong>The Ethical Use of Paralegals in New Mexico</strong></td>
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<td>Tuesday, December 19</td>
<td>9:30 – 10:30 a.m.</td>
<td>1.0 Ethics CLE Credits</td>
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<td>Tuesday, December 19</td>
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<td>1.0 General CLE Credits</td>
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<td><strong>Genetic Testing and Employment Discrimination</strong></td>
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<td>Tuesday, December 19</td>
<td>12:30 – 3:45 p.m.</td>
<td>3.2 General CLE Credits</td>
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<tr>
<td><strong>How To Do Your First Personal Injury Case</strong></td>
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<td>Tuesday, December 19</td>
<td>8:30 a.m. - 3:00 p.m.</td>
<td>5.0 General &amp; 1.0 Ethics CLE Credits</td>
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**FOUR WAYS TO REGISTER**

**PHONE:** (505) 797-6020, Monday - Friday, 9 a.m. - 4 p.m. (Please have credit card information ready)

**FAX:** (505) 797-6071, Open 24 hours

**INTERNET:** www.nmbar.org, click CLE, then area of interest

**MAIL:** CLE, PO Box 92860, Albuquerque, NM 87199

- Name ________________________________
- NM Bar # ________________________________
- Street ________________________________
- City/State/Zip ________________________________
- Phone __________ Fax __________
- E-mail ________________________________

**Program Title**

**Program Date**

**Program Location**

**Program Cost**

- ☐ Purchase Order (Must be attached to be registered)
- ☐ Check enclosed $ __________
  Make check payable to: CLE
- ☐ VISA ☐ MC ☐ American Express ☐ Discover
  Credit Card # ________________________________
  Exp. Date ________________________________
  Authorized Signature ________________________________
Contributions and announcements to the Bar Bulletin are welcome but the right is reserved to select material to be published. Unless otherwise specified, publication of any announcement or statement is not deemed to be an endorsement by the State Bar of New Mexico of the views expressed therein, nor shall publication of any advertisement be considered an endorsement by the State Bar of the product or service involved. Editorial policy is available upon request.

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Professionalism Tip

With respect to parties, lawyers, jurors and witnesses:
I will do my best to ensure that court personnel act civilly and professionally.

Meetings

December

13 Children’s Law Section Board of Directors, noon, Juvenile Justice Center
13 Criminal Law Section Board of Directors, noon, State Bar Center
14 Business Law Section Board of Directors, 4 p.m., State Bar Center
15 Natural Resources, Energy and Environmental Law Section Annual Meeting, 12:15 p.m., State Bar Center
15 Board of Bar Commissioners Meeting, 12:30 p.m., State Bar Center
16 Young Lawyers Division Board of Directors, 10 a.m., State Bar Center
19 Solo and Small Firm Practitioners Section Board of Directors, 11:30 a.m., Section meeting at noon
20 Bankruptcy Law Section Board of Directors, noon, U.S. Bankruptcy Court, 10th floor conference room
21 Public Law Section Board of Directors, noon, Risk Management Division
21 Senior Lawyers Division Board of Directors, 4:30 p.m., Reception at 5 p.m., State Bar Center
N.M. Supreme Court
2006 Holiday Closures
All judicial branch courts and agencies will be closed on Dec. 22 and Dec. 29 from 1 to 5 p.m.

2007 Legal Public Holidays
The following legal public holidays will be observed by the judicial branch of government in 2007.

New Year’s Day will be observed on Jan. 1
Dr. King’s Birthday will be observed on Jan. 15
President’s Day will be observed on Feb. 19
Memorial Day will be observed on May 28
Independence Day will be observed on July 4
Labor Day will be observed on Sept. 3
Columbus Day will be observed on Oct. 8
Veterans’ Day will be observed on Nov. 11
Thanksgiving Day will be observed on Nov. 22
Christmas Day will be observed on Dec. 25

Board of Legal Specialization Comments Solicited
The following attorney is applying for recertification as a specialist in the area of law identified. Application is made under the New Mexico Board of Legal Specialization, Rules 19-101 through 19-312 NMRA. The Rules of the New Mexico Board of Legal Specialization provide that the names of those seeking to qualify shall be released for publication. Further, any person may comment upon any of the applicant’s qualifications within 30 days after the independent inquiry and review process carried on by the board and appropriate specialty committee. The board and specialty committee encourage attorneys and others to comment upon any applicant. Address comments to New Mexico Board of Legal Specialization, PO Box 93070, Albuquerque, NM 87199.

Donald E. Swaim
Estate Planning, Trusts & Probate Law

Legal Library
Open Monday–Friday, 8 a.m.–6 p.m.
Closed Saturdays and Sundays

Holiday Closings:
Dec. 22 at 1 p.m.
Dec. 25

Dec. 29 at 1 p.m.
Jan. 1, 2007
Phone: (505) 827-4850; fax: (505) 827-4852; e-mail: libref@nmcourts.com; Web site: www.supremecourtlawlibrary.com.

The Rules of Civil Procedure Committee is considering whether to recommend proposed amendments to the Rules of Civil Procedure for the District Courts for the Supreme Court’s consideration.

Rule 1-088: Comments must be received by the Clerk on or before Dec. 18 to be considered by the Court. For reference, see the Nov. 27 (Vol. 45, No. 48) Bar Bulletin.

Rule 5-604: Comments must be received by the Clerk on or before Dec. 18 to be considered by the Court. For reference, see the Nov. 27 (Vol. 45, No. 48) Bar Bulletin.

To comment on the proposed amendments before they are submitted to the Court for final consideration, send written comments by the dates indicated to:

Kathleen J. Gibson, Clerk
New Mexico Supreme Court
PO Box 848
Santa Fe, New Mexico 87504-0848

Swearing-In Ceremony for New Chief Justice
The Honorable Edward L. Chávez will be sworn-in as Chief Justice of the New Mexico Supreme Court at 3:30 p.m., Jan. 10, 2007. The ceremony will be held in the Supreme Court courtroom with a reception following in the law library atrium. Members of the State Bar are cordially invited.

First Judicial District Court
Restructure of Exhibits
Pursuant to the Supreme Court ordered Judicial Records Retention and Disposition Schedules, the 1st Judicial District Court will destroy exhibits filed with the Court, in criminal, civil, children’s court, domestic, incompetency/mental health, adoption and probate cases for years 1975 to 1989, included but not limited to cases that have been consolidated. Cases on appeal are excluded. Counsel for parties are advised that exhibits can be retrieved through Jan. 26, 2007. Attorneys who may have cases with exhibits may verify exhibit information with the Special Services Division, (505) 827-4687, from 8 a.m. to 5 p.m., Monday through Friday. Plaintiff exhibits will be released to counsel of record for the plaintiff(s), and defendant(s) exhibits will be released to counsel of record for the defendant(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

Second Judicial District Court
Restructure of Exhibits
Pursuant to the Supreme Court Ordered Judicial Records Retention and Disposition Schedules, the 2nd Judicial District Court will destroy exhibits filed with the Court in domestic cases for the years 1981 to 1989, civil cases for the years 1982 to 1992, LR (Metro Court cases) for the years 1988 to 1995 and criminal cases from 1986, included but not limited to cases which have been consolidated. Cases on appeal are excluded. Counsel for parties are advised that exhibits may be retrieved beginning Oct. 12 to Dec. 21. Attorneys who have cases with exhibits should verify exhibit information with the Archives and Special Services Division, at 841-7596/5452, from 8 a.m. to noon and from 1 to 5 p.m., Monday through Friday. Plaintiff exhibits will be released to counsel of record for the plaintiff(s) and defendant exhibits will be released to counsel of record for the defendant(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

Destruction of Exhibits
Pursuant to the Supreme Court Ordered Judicial Records Retention and Disposition Schedules, the 2nd Judicial District Court will destroy exhibits filed with the Court in the civil cases for the year 1993, including but not limited to cases which have been consolidated. Cases on appeal are excluded. Counsel for parties are advised that exhibits may be retrieved beginning Oct. 19 to Dec. 28. Attorneys who have cases with exhibits should verify exhibit information with the Archives and Special Services Division, (505) 827-4687, from 8 a.m. to 5 p.m., Monday through Friday. Plaintiff exhibits will be released to counsel of record for the plaintiff(s), and defendant(s) exhibits will be released to counsel of record for the defendant(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

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Services Division, (505) 841-7596/5452, from 8 a.m. to noon and from 1 p.m. to 5 p.m., Monday through Friday. Plaintiff’s exhibits will be released to counsel of record for the plaintiff(s) and defendant’s exhibits will be released to counsel of record for the defendant(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

Bernalillo County Probate Court Holiday Closures

Dec. 22–Dec. 26  Closed
Dec. 27–Dec. 29  Open
New Year’s Day  Closed

Attorneys needing to file a probate case during the time the Court is closed should contact the 2nd Judicial District Court, (505) 841-7451 or (505) 841-7425, regarding its holiday hours.

U.S. District Court for the District of New Mexico Proposed Amendments to Local Civil Rules

Proposed amendments to the Local Civil Rules of the United States District Court for the District of New Mexico are being considered. The proposed amendments are to D.N.M.I.R-Civ 5.5(a) Electronic Filing Authorized, 7.6(a) Timing of and Restrictions on Responses and Replies, 16.1 Joint Status Report, 26.3(d) Required Initial Disclosure, 83.1(a) Prohibition Against Cameras, Transmitters, Receivers, and Recording Equipment, 83.2 Bar Admissions, Membership and Annual Dues, 83.3 Appearance and Admission of Attorney, 83.4 Entry of Appearance, 83.8 Withdrawal of Appearance, and 83.12 Complaints of Judicial Misconduct or Disability. “Redlined” versions (with proposed additions underlined and proposed deletions stricken out) as well as “clean” versions are posted on the Court’s Web site at www.nmcourt.fed.us. Attorneys needing to file a probate case during the time the Court is closed should contact the 2nd Judicial District Court, (505) 841-7451 or (505) 841-7425, regarding its holiday hours.

Replacement of the Initial Pretrial Report (IPTR)

At U.S. District Court, the Initial Pretrial Report in all civil cases is being replaced by a Joint Status Report and Provisional Discovery Plan (JSR). The Court will soon be ordering JSRs, rather than Initial Pretrial Reports, in all civil cases. For more information, including the JSR form, visit the Court’s Web site at www.nmcourt.fed.us.

State Bar News

Attorney Support Group

The next Attorney Support Group meeting will be held at 5:30 p.m., Jan. 8, 2007, at the First United Methodist Church at Fourth and Lead SW, Albuquerque. The group meets regularly on the first Monday of the month; but has rescheduled this meeting due to the holiday. For more information, contact Bill Stratvert, (505) 242-6845.

Board of Bar Commissioners Election Results

The 2006 election of commissioners for the State Bar of New Mexico Board of Bar Commissioners was held on Nov. 30. Only the 1st Bar Commissioner District had a contested election. The results of that election and the uncontested districts are as follows:

1st Bar Commissioner District (Bernalillo County)
Henry A. Alaniz (three-year term)
Danny W. Jarrett (two-year term)
Carla C. Martinez (three-year term)

3rd Bar Commissioner District (Los Alamos, Sandoval, Santa Fe and Rio Arriba counties)
Jessica A. Perez (three-year term)
Carolyn A. Wolf (one-year term)

4th Bar Commissioner District (Colfax, Guadalupe, Harding, Mora, San Miguel, Taos and Union counties)
Gary D. Alsop (one-year term)

6th Bar Commissioner District (Chaves, Eddy, Lea, Lincoln and Otero counties)
Andrew J. Cloutier (one-year term)
Stephen S. Shanor (three-year term)

7th Bar Commissioner District (Catron, Dona Ana, Grant, Hidalgo, Luna, Sierra, Socorro and Torrance counties)
Hans William Voss (three-year term)

Meeting Agenda

12:30 p.m., State Bar Center
1. Approval of Nov. 2 meeting minutes
2. Finance Committee report
3. Acceptance of Oct. financials
4. Appointment to N.M. Commission on Access to Justice
5. Appointments to N.M. Legal Aid Board
6. Appointments to Supreme Court boards and committees and regulatory discussion
7. Approval of amendment to State Bar bylaws
8. Update on Pro Hac Vice Fund and reconstitute committee
9. Fair Judicial Elections Committee report and recommendation
10. Unauthorized Practice of Law Statute changes
11. Amendment to Elder Law Section bylaws
12. Amendment to International and Immigration Law Section bylaws
13. Reconsider section e-blast policy
14. Consider section carryover requests
15. N.M. Sentencing Commission report
16. President’s report
17. Executive Director’s report
18. Division reports
19. Appointments to internal Board committees
20. Presentation of outgoing commissioner plaques
21. New business

Casemaker Online Legal Research

Training in Silver City

Casemaker, the State Bar’s newest membership service, is free online legal research that includes New Mexico and federal materials, as well as access to 25 other state libraries. Trainings on how to use Casemaker will be held from 5:30-6:30 p.m. on Jan. 17 and from 9 to 10 a.m. on Jan. 18 in Silver City. The training will be conducted in the Grant County Administration Building, Commissioner’s Meeting Room, 1400 Highway 180 East, Silver City. Seating is limited. To reserve a space, call (505) 797-6000. The training is approved for 1.0 CLE general credit.

NREEL Section Annual Meeting and CLE

The Natural Resources, Energy and Environmental Law Section will hold its
annual meeting at 12:15 p.m., Dec. 15, in conjunction with the CLE program, *Climate Change Impacts, Laws and Policies*. Agenda items should be sent to Chair Kyle Harwood, ksharwood@ci.santa-fe.nm.us or call (505) 955-6511. Attendees will earn 3.8 general, 1.0 ethics and 1.0 professionalism CLE credits. The cost of the CLE program is $169 ($159 for section members, government and legal services attorneys and paralegals). Lunch will be provided. See the *CLE At-a-Glance* insert in the Nov. 20 (Vol 45, No. 47) Bar Bulletin for more information. To register, call (505) 797-6020; fax (505) 797-6071; visit www.nmbar.org and select CLE; or mail CLE, PO Box 92860, Albuquerque, NM 87199.

### Senior Lawyers Division Oral History Project Meeting/Reception

The Senior Lawyers Division board of directors will meet at 4:30 p.m., Dec. 21, at the State Bar Center. Excerpts from a DVD oral history of John Robb from the Rodey Law Firm will be shown. All division members and Elder Law Section members are invited to attend. A reception will follow at 5 p.m. R.S.V.P. by Dec. 19 to membership@nmbar.org.

### Young Lawyers Division 2006 Election Results

The State Bar Young Lawyers Division is governed by a board of directors whose members are elected by the active, in-state members of the division to staggered two-year terms. All members of the State Bar who have practiced law in any state for five years or less and those State Bar members who are under the age of 36 are members of the division and are eligible for office.

The 2006 election closed on Nov. 22. Jason M. Burnette, Nasha Martinez and Roman Romero petitioned for director-at-large, position 2. Roxanna M. Chacon and Mateo S. Page petitioned for director-at-large, position 4. J. Brent Moore petitioned for region 2 director and was unopposed. There were no petitions made for the region 4 director position.

Ballots were mailed to the YLD membership, and the vote tally was finalized on Nov. 29 in favor of Nasha Martinez and Roxanna M. Chacon. The full 2007 YLD Board of Directors will be as follows:

- **Erika A. Anderson**
  - Chair, 2007
  - Director-At-Large, Position 5, 2006-2007

- **Joseph Sawyer**
  - Region 1 Director, 2006-2007
  - J. Brent Moore
  - Region 2 Director, 2007-2008
  - Dustin K. Hunter
  - Region 3 Director, 2006-2007
  - Steven Lorenzo Almanza*
  - Region 4 Director, 2007-2008
  - S. Carolyn Ramos
  - Past Chair, 2007
  - Region 5 Director, 2006-2007
  - Briana Zamora
  - Director-At-Large, Position 1, 2006-2007
  - Nasha Martinez
  - Director-At-Large, Position 2, 2007-2008
  - Joseph A. Sapien
  - Director-At-Large, Position 3, 2006-2007
  - Roxanna Marie Chacon
  - Director-At-Large, Position 4, 2007-2008
  - Patrick Hart
  - UNM Student Liaison

*Per Bylaws Article VI, Section 6.1, a vacancy in the Region Director position may be filled by the Board of Directors until the next annual election. In the case of the Region Director, the Board may fill the vacancy only by appointment of an individual whose principal place of practice is in the designated region.

### Young Lawyers Division/UNM Mock Interview Program

**Volunteers Needed**

The Young Lawyers Division is seeking 25 volunteer attorneys to serve as interviewers at the 17th Annual Young Lawyers Division-UNM Mock Interview Program. The interviews will be held at the UNM Law School Clinic from 9 a.m. to 1 p.m., Feb. 24. A training session on the “do’s and don’ts” of interviewing prospective attorneys will be held preceding the interviews from 8:15 to 8:50 a.m. The program allows UNM law students to experience mock interviews with attorneys from around the state to prepare them for actual interviews, with constructive critiques following. Attorneys are needed from small and large commercial and civil firms, solo practitioners, the district attorney’s office, the public defender’s office and public interest firms. Judge volunteers are also needed. Interested attorneys should contact Briana Zamora at bh Zamora@btblaw.com or Martha Chicoski at Martha@roblesrael.com.

### Other Bars

**American Bar Association Center for Professional Responsibility**

**Michael Franck Award**

Applications are now being accepted for the 2007 Michael Franck Professional Responsibility Award. The award spotlights individuals whose career commitments in areas such as legal ethics, disciplinary enforcement and lawyer professionalism inspire public confidence in the legal profession. The 2007 award will be presented during the 33rd National Conference on Professional Responsibility, May 31, 2007 in Chicago, Illinois. The deadline for nominations is Dec. 15, Visit http://www.abanet.org/cpr/awards/franck.html for a nomination form and more information about the award and past recipients or e-mail the Center for Professional Responsibility, cpr@abanet.org.

### Other News

**Business and Employer Workshops**

The New Mexico Taxation and Revenue Department and the Internal Revenue Service are offering free, one-day workshops in Albuquerque for businesses with or without employees. All workshops will be held at the New Mexico Taxation and Revenue Department, 5301 Central NE (Bank of the West building), 10th Floor, Conference Room A, 8:15 a.m. to 3:45 p.m., with a one-hour lunch.

For additional information, call (505) 841-6200.
State Bar of New Mexico Report on Professional Liability Insurance

By Briggs Cheney, Chair
Lawyers Professional Liability Committee

By Supreme Court Order of July 29, 2005, the State Bar began collecting data on members’ professional liability insurance status in 2006. The State Bar will again collect this information in 2007 as part of the dues and licensing statement mailed to members on Dec. 6. While the State Bar collects this data, it is not made available to the public. The following are the results from 2006, along with tips on shopping for insurance and a list of companies that write lawyers professional liability insurance in New Mexico.

The State Bar had 6,021 total members at the time these results were compiled. Of those, 2,408 reported that they were private practice attorneys, in-state with insurance coverage. Those who reported practicing in-state and having no insurance coverage numbered 724. Thus, the total number of members in private practice was 3,132.

Members who reported their status as “exempt” numbered 375. Finally, 2,514 members reported being employed as government or public lawyers, corporate counsel, or out-of-state members. These numbers translate to the following statistics:

- 87.9 percent of members carry coverage or are exempt (5,276/6,000 = 87.9)
- 23.1 percent of active private practice attorneys do not carry coverage (724/3,132 = 23.1)
- 76.9 percent of active private practice attorneys do carry coverage (2,408/3,132 = 76.9)

After presenting the above information to the Supreme Court, the Justices thought it would be beneficial to provide these statistics to members, offer some tips on shopping for coverage, and provide a list of known companies that write in New Mexico.

Shopping for Legal Malpractice Insurance

Shop Early. The first “art” of shopping for legal malpractice insurance is to shop early. If you wait until the Christmas Eve of the renewal of your professional liability insurance, you will lose the opportunity to shop for the best policy at the best price. I would recommend that you begin shopping no later than 60 days before your current policy’s renewal date, and 90 days is better.

Shop the Market Every Year. The current professional liability insurance market is not what one would characterize as a tight market. There are sufficient companies currently providing coverage to New Mexico lawyers. However, as is discussed below, the number of companies now writing in New Mexico should not lull a lawyer into a sense of complacency. You should solicit a bid or quote from each of these companies. While it is all right to utilize staff to assist in this process, the lawyer (or a member of the firm) should be intimately involved in this process. Longevity with a company (renewing with the same company) is often very desirable. However, even if you will likely renew with your present carrier, it is wise to shop the market. Price is seldom a good reason for choosing one carrier over another, and you will find that the various companies in the market will be reasonably comparable in terms of price. The reason you want to shop every year is for policy and coverage issues (defense within limits, amount of indemnity coverage, disciplinary coverage, tail or prior acts coverage, etc.).

Utilize the brokers. Develop relationships with the brokers and be honest. You want them to know all your problems. Where the professional liability insurance market has changed is in the decision to aggressively engage in underwriting. For years, the legal malpractice carriers seemed to pay little attention to the details of an individual lawyer’s law firm’s claim history and instead relied on regional loss data. In the last five years this has changed. Companies are now focusing on each insured, and through the application process companies are gathering detailed information on claims, losses, cost of defense information on past claims, information on disciplinary complaints and more precise information on an applicant’s practice in terms of areas of practice. Based on this information, companies are making decisions on whether to insure and are adjusting premiums accordingly.

Professional Liability Markets in New Mexico

The Lawyers Professional Liability Committee has compiled a list of companies known to write coverage in New Mexico (see page 10). This list may not be all inclusive, but will be helpful in requesting bids for coverage. If you would like more information from the committee, please do not hesitate to contact me.

See page 10 for a list of companies known to write coverage in New Mexico
Professional Liability Markets in New Mexico

[Note: Underlined below indicates that there is question about the reliability of the information. For the carriers that offer their products through any broker ("open brokerage"), your general insurance agent may be able to access the market for you.]

Attorneys Liability Protection Society, A Risk Retention Group (ALAS)
Contact the company directly.
Nancy Montroy, VP
Directory of Underwriting
311 S. Wacker Drive, Suite 5700
Chicago, IL 60606
Phone: (312) 697-6972
(Coverage available only to firms of 35 or more attorneys.)

Attorneys Liability Protection Society, A Risk Retention Group (ALPS)
Contact the company directly.
111 N. Higgins, Suite 200
PO Box 9169
Missoula, MT 59807
Phone: (800) 367-2577
FAX: (406) 728-7416
E-mail: alpsnet.com

Clarendon National Insurance
Open Brokerage

Chubb Professional & Healthcare
Chubb Specialty Insurance
Christopher M. Mango, Esq.
2001 Bryan Tower, Suite 3400
Dallas, TX 75201-3068
(214) 551-0894

Continental Insurance Companies (CNA)
Contact the exclusive broker for firms under 35.
Health Agencies of the West, Inc.
Ann Waters or Susan Scheffler
500 North State College, Suite 500
Orange, California 92868
Phone: (800) 556-0800
FAX: (714) 769-3010

Gulf Insurance Group Open Brokerage

MedMarc Casualty Insurance Company
(aka PROMARC)
Contact the exclusive broker.
Carol & Associates
Anna Madrid or Brenda Wooster
21 Fairly Road
Santa Fe, NM 87507
Phone: (800) 803-2229
FAX: (505) 471-4358

Navigators Insurance Company
Open Brokerage

Philadelphia Insurance Companies
Open Brokerage

Professionals Direct Insurance Company (ProDirect)
(Formerly Michigan Lawyers Mutual)
Contact the company directly.
Mary King
161 Ottawa NW, Suite 607
Grand Rapids, MI 49503
Phone: (800) 558-6688
FAX: (800) 730-8810

St. Paul Fire & Marine
Open Brokerage
St. Paul - Defense Research Institute
Steve Anhook
Willis of Massachusetts
Three Copley Place, Suite 300
Boston, MA 02116
Phone: (617) 351-7531

Westport Insurance Corporation
Contact the exclusive broker.
Cress Insurance Consultants
Donna Beaumont
6101 Moon St NE, Suite E
Albuquerque, NM 87111

Zurich American Insurance Group
Open Brokerage
Brokers that specialize in lawyer's professional liability insurance in New Mexico include:
Cress Insurance Consultants, Inc.
(Now answering phone Insurance Services)
6101 Moon Street NE, Suite 1000
Albuquerque, New Mexico 87111
Phone: (505) 822-8114

Western Assurance
Betsy Carlson
2001 Carlisle Blvd., NE
Albuquerque, NM 87110
Phone: (505) 265-8481

Health Agencies of the West, Inc.
Ann Waters
500 N. State College Blvd., Suite 880
Orange, CA 92868
Phone: (714) 769-3020

Daniels-Head Insurance Services, Inc.
6620 Gulton Court NE, Suite B
Albuquerque, New Mexico 87109
(505) 922-8881
(877) 922-8881
E-mail: dh32mdhianm.com

LA1 Professional Insurance Programs
21 Fairly Road
Santa Fe, NM 87507

Summit Global Partners
of New Mexico, Inc.
4700 Montgomery Blvd. NE
Albuquerque, New Mexico 87109
Phone: (505) 256-3529

Brown Seligman & Thomas
7906 Menaul Blvd.
Albuquerque, New Mexico 87110
Phone: (505) 292-8000
FAX: (505) 292-0900

Professional Liability Consultants, Inc.
200 Union Blvd., Suite 305
Lakewood, CO 80228
Phone: (303) 627-9002 or
(800) 491-5715
FAX: (303) 627-9605
E-mail: B.Plc@ibl-tisusa.net

Writing for the following companies:

General Star National
Greenwich Insurance Company
Hartford Insurance
ProDirect Insurance
Brent Epply
2300 Clarendon Blvd. Suite 700
Arlington, VA 22201
Phone: (800) 491-5715

Wright & Co.
2300 Clarendon Blvd. Suite 700
Arlington, VA 22201

Fox Point Programs, Inc.
Providing nonstandard coverage for lawyers
Jennifer A. Evans has joined Modrall Sperling as an associate with a focus in the natural resources and litigation departments. Her primary practice interests are in water, environmental and mining law. She received her J.D. from William and Mary Law School.

The New Mexico Hispanic Bar Association presented its 2006 Attorney of the Year Award to UNM School of Law alumnus Benedicto Naranjo. The Liberty and Justice Awards were presented to UNM School of Law professor emeriti Frederick Hart and Robert Desiderio.

David H. Kelsey, managing partner of Atkinson & Kelsey, P.A., will be listed in the 2007 edition of Best Lawyers in America. He has been listed in every New Mexico edition for the past 25 years and is the only practicing New Mexico family law attorney to achieve this distinction.

Trevor A. Rigler announces the opening of his solo law practice in Albuquerque. The Rigler Law Office will focus primarily on criminal defense. Trevor, a 2002 graduate of the UNM School of Law, is a former assistant district attorney for the 2nd Judicial District and a former assistant city attorney for the City of Albuquerque.

The Federal Bar Association of the U.S. District Court has appointed attorney Theresa W. Parrish to serve as a member of its management committee. Parrish is a director in the Rodey Law Firm and a member of the firm’s executive committee. She practices in the litigation department with an emphasis on labor and employment law and litigation, general complex litigation, commercial litigation and professional liability.

Dana Cox recently joined the Bernalillo County Metropolitan Court as trial court staff attorney. She joins Raymond Mensack, the general counsel for the court, to focus on various business matters and employment law matters for the court as well as matters pertaining to jurisdiction and the civil and criminal cases before the court. Cox is a graduate of UNM and earned her J.D. degree at Baylor University School of Law.

The Liaison Committee on Medical Education (LCME) appointed UNM Law Professor Emeritus Peter Winograd as a public member for a three-year term. The LCME, sponsored by the Association of American Medical Colleges and the American Medical Association, is the nationally recognized accrediting agency for medical programs leading to the M.D. degree in U.S. and Canadian medical schools.

Elizabeth A. Mercer has joined the Inocente P.C. law firm as an associate after working for the company as a law clerk while she earned her law degree at UNM.

Derek T. Rollins recently joined Modrall Sperling as an associate practicing in the litigation department with an emphasis primarily on employment law, products liability, and commercial litigation. Rollins received his J.D. from the University of Texas School of Law. He served on the Texas International Law Journal and was also a mentor in the Gloria K. Bradford Society. He studied internationally at the University of Reading School of Law in England.

Fermin A. Rubio, a lieutenant colonel in the U.S. Air Force Reserve, has been selected to serve as the New Mexico Air National Guard (NMANG) state judge advocate. He will advise the assistant adjutant general for air on legal matters arising out of NMANG operations and will act as legal advisor to the Joint Force Headquarters staff. In his civilian capacity, Rubio, a graduate of the UNM School of Law, is the Las Cruces city attorney.

Charles J. Vigil has been elected president and managing director of the Rodey Law Firm. Vigil has been a director and shareholder in the firm since 1995. He practices in the litigation department with an emphasis on employment law, civil rights, commercial litigation, products liability and professional liability law. Vigil, a graduate of the University of Michigan Law School, is the immediate past president of the State Bar of New Mexico.

The St. Bernadette Institute of Sacred Art recently inducted Susan K. Tomita as a laureate of the 2006 Mother Teresa Awards. She was acknowledged for her role as a friend and servant of the elderly and those with special needs. Her practice focuses on advocacy for and service to senior citizens and persons suffering from disability.

Anna Natividad Martinez has joined Starrs Mihm and Caschette, L.L.P., as an associate practicing general civil litigation including business and corporate litigation, business tort litigation, and employment litigation. Martinez was a law clerk for Chief Justice Mary Mullarkey of the Colorado Supreme Court. She received her bachelor’s degree from Columbia University and her law degree from the UNM School of Law.

Suzanne W. Bruckner has joined the Albuquerque office of Sutin Thayer & Browne. She received her B.S., cum laude, from St. Lawrence University and her law degree, magna cum laude, and M.B.A. from UNM. Bruckner concentrates her practice primarily in the areas of state and federal taxation, multi-state tax planning, audit defense and tax controversies.
Tammy Jasionowski, J.D., has joined the law firm of Salazar & Sullivan. Her practice will focus on medical negligence. She is double board certified in anatomic pathology and clinical pathology and also has a law degree from UNM.

Amanda C. Sanchez has joined the Rodey Law Firm as an associate practicing in the business department with an emphasis on banking, financing, commercial lending and real estate transactions. She received her J.D. from the UNM School of Law, graduating cum laude. Sanchez clerked for Justice Pamela B. Minzer of the New Mexico Supreme Court.


Joan D. Marsan recently joined Modrall Sperling as an associate in the firm’s natural resources and environmental law and Indian law practice areas. Marsan received her J.D. from the University of Colorado School of Law. She served as a judicial intern for U.S. Senior District Judge John L. Kane.

The Best Lawyers in America 2007 has selected eight attorneys from Keleher & McLeod P.A.: Tracy J. Ahr, employee benefits law; Thomas C. Bird, real estate law; Margaret A. Foster, William B. Keleher, corporate and real estate law; Charles A. Pharris, commercial and personal injury litigation; W. Spencer Reid, commercial litigation; Elizabeth E. Whitefield, family law; and Clyde F. Worthen, energy law.

Kenneth L. Harrigan, shareholder of Modrall Sperling, has been recognized as a leader in product liability law by being selected as an author in the recently released book, Product Liability Client Strategies: Leading Lawyers on Interpreting Laws, Negotiating Settlements, and Litigating Cases, published by Aspatore Books. Harrigan is a former adjunct professor at the UNM School of Law. Harrigan’s practice is concentrated primarily in complex business and tort litigation, including breach of contract and other commercial disputes, product liability, insurance, malpractice, aviation, and negligence.

Nasha Y. Martinez has joined the Rodey Law Firm as an associate in the litigation department focusing primarily in the areas of labor and employment law. Her particular area of interest is representing employers on immigration matters. Martinez received her J.D. from the UNM School of Law and her B.B.A. undergraduate degree from the UNM, Anderson Schools of Management, specializing in Human Resources.

Daniel J. O’Brien of O’Brien & Ulibarri, P.C. has been appointed to the American Bar Association Standing Committee on Bar Activities and Services by American Bar Association President Karen Mathis.

Nancy Farrington Higgins, legal services director of Resources, Inc./Domestic Violence Legal Resources, was recognized as Attorney of the Year by Haven House, Sandoval County’s domestic violence services provider and shelter. Higgins, a 1993 graduate of LTNM School of Law, was selected for her responsiveness, helpfulness, knowledge and professionalism in providing legal assistance to victims of domestic violence.

Michael Browde, professor at the UNM School of Law, has been named Outstanding Lawyer of the Year by the Albuquerque Bar Association. Browde joined UNM’s law faculty in 1977 after having served as law clerk to the Honorable Luther Youngdahl of the U.S. District Court for the District of Columbia, followed by a seven-year stint with the Legal Aid Society of Albuquerque. He teaches primarily in the area of Constitutional law.

Soha F. Turfler has joined the Rodey Law Firm as an associate in the litigation department. Turfler will focus her practice primarily in the areas of medical malpractice defense, personal injury defense and general civil defense. She received her J.D., magna cum laude, from Washington and Lee University and her B.A. degree, magna cum laude, from UNM.

Cody Rogers and Spring V. Webb have joined the law firm of Keleher & McLeod. Rogers will represent clients in civil litigation issues. She is a member of the American Bar Association and the American Health Lawyers Association. She earned her law degree from UNM.

Webb will work with clients in the areas of medical malpractice defense. She is a member of the American Bar Association and the Order of the Coif academic society. She earned her law degree from UNM.

The Mesalands Community College board of trustees honored attorney Marcia Lubar for 11 years of service to the college. Lubar, who is retiring from the Albuquerque firm of Beall & Bichler, was presented with an engraved rocking chair. The board voted to keep the Beall & Bichler as its legal firm.
In Memoriam

Edward F. Benavidez, 58, a resident of Albuquerque, passed away on Oct. 30. Benavidez is survived by his mother, Marina O. Benavidez; two sons, Mario M. Benavidez and Javier R. Benavidez; his sister, Rosella Garcia and husband, Frank; a granddaughter on the way; and many nieces, nephews, aunts, uncles, cousins, and friends. Benavidez was preceded in death by his father, Edward Benavidez and his brother, Michael Benavidez. He was a proud attorney born and raised in New Mexico who loved his community and spent his life fighting for justice for those underrepresented. He was counselor of the Supreme Court of the United States, a founding member and president of the N.M. Hispanic Bar Association, served as a commissioner to the Civil Legal Services Commission, was appointed by the U.S. secretary of state to the Administrative Conference of the U.S., and served on the national board of directors of the Mexican American Legal Defense and Education Fund. He was national vice president of the National Council on Legal Education Opportunity, national and state legal advisor to the American G.I. Forum, vice president of La Compania de Teatro de Alburquerque and vice president of the Hispanic Chamber of Commerce of Santa Fe. He also served as a commissioner for judicial appointments to the N.M. Supreme Court, Court of Appeals, 2nd Judicial District Court, and Bernalillo County Metropolitan Court. He received various awards and honors from the N.M. Hispanic Bar Association, the Hispanic National Bar Association, the Mexican American Legal Defense and Education Fund, La Hispanidad, the Council on Legal Education Opportunity, American University, and the Whitney Foundation. In 2000 he was honored with the Liberty and Justice Award for “exemplary lifetime commitment to promoting liberty and justice for all.”

Derek Lawrence Brooks, 36, cherished husband of Alicia and father of Anna Catherine, died at his home in Roswell on June 2. Brooks, a partner at the law firm of Hinkle, Hensley, Shanor and Martin, had been suffering for over a year from mediastinal non-seminoma, germ-cell cancer. He was born in 1969 in New York City and attended Carleton College in Northville, Minn., majoring in geology. After earning a master’s degree in geology at the University of Wyoming, Brooks earned a Doctorate of Jurisprudence at Washington and Lee University Law School in Lexington, Va. Derek and Alicia were married in Roswell in 1997 and made their home there. Brooks restarted Boy Scout Troop 149 and was proud that the troop produced five eagle scouts. He instilled in the boys a love of the outdoors and relished camping, backpacking and sharing stories and jokes with his scouts. He devoted many of his vacation days to them. Brooks also enjoyed the scope of his legal practice, which included civil and criminal cases. He was deeply interested in just solutions to complex problems. Shortly before his death, Brooks expressed his gratitude for being able to practice law, working within the collegiality and integrity of the Bar. His life was dedicated to faith, family and the highest values of the legal profession. Friends and family recall that Derek was in love with life; every day was beautiful, every person was interesting; and the generosity of his spirit continues to illuminate and change lives.

State District Judge Silvia Cano-Garcia has died after a five-year battle with cancer. She was 44 when she died Sept. 4. Cano-Garcia had been a deputy district attorney for four years when she was appointed as a Doña Ana County magistrate in July 2001 by then-Gov. Gary Johnson. She remained a magistrate until she was elected to the district court bench in November 2002. State District Judge Stephen Bridgforth said Cano-Garcia was a tireless worker who came up with lots of ideas about how to streamline the docket.

C.N. “Bill” Morris passed away July 26 at Fort Bayard Medical Center. He was 83. Morris was born in Atwood, Oklahoma, to Hubert and Daisy May Morris. He graduated from high school in Carlsbad. Morris was a pilot in the Army Air Corps during World War II, and while stationed at Strother Field in Kansas, he met and married Doris Shipp of Arkansas City, Kansas. Bill and Doris had twin sons and a daughter. Morris graduated from South Western College in Winfield, Kansas, and earned his law degree from Washburn University School of Law in Topeka. He practiced law in Carlsbad for eight years and then become the city attorney in Eunice. He also practiced law in Lovington and was an assistant district attorney in Carlsbad. He married Betty Nelson in 1969. Morris formed a partnership with Bill Martin, an old friend and longtime Silver City attorney, and practiced law in Silver City for 30 years. Morris was an avid reader and had a curious mind about many subjects. There were many afternoons when the political problems of world were solved by Morris and his friends. Morris is survived by son Fred Morris and his wife Deborah; by son Jeff and his wife Carol; by grandson Tim Morris and granddaughter Amanda; and by one brother Dick and his wife Bennie of Hobbs. Morris was a loving son, brother, husband, father, grandfather and great-grandfather. He will be greatly missed by all who knew him.
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<td><strong>Helping Your Client Survive a Child Custody Evaluation</strong></td>
<td>VR Albuquerque National Business Institute</td>
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<td>800 930-6182</td>
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<td><strong>Immigration Fundamentals: Keeping Families Together</strong></td>
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<td><strong>Lurking Dangers and What Lawyers Should Know About the New Mexico Real Estate Contract</strong></td>
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<td><strong>Employment Law from A to Z</strong></td>
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<td>(715) 833-3940</td>
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<td><strong>Ethical Considerations in Estate Planning</strong></td>
<td>Santa Fe Paralegal Division, State Bar</td>
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<td><strong>Prevention, Reporting and Representation of Victims of Identify Theft</strong></td>
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<td>- Strategies for Legal Research on the Web</td>
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<td>- Climate Change Impacts, Laws and Policies</td>
<td>State Bar Center</td>
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<td>- How to Get Evidence and Expert Testimony Admitted into Court</td>
<td>Albuquerque</td>
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<td>- Internet Sources and Resources</td>
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<td>- Experts: Work Products and Discovery</td>
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<td>- Family Feuds: Planning to Avoid Estate Litigation</td>
<td>Teleseminar</td>
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### WRITS OF CERTIORARI

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

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

**Effective December 11, 2006**

#### Petitions for Writ of Certiorari Filed and Pending:

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**Petition for Writ of Certiorari Denied:**

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Slip Opinions for Published Opinions may be read on the Court’s Web site:

Daniels-Head Insurance Agency (NM), Inc.
2701 San Pedro NE, Suite 15
Albuquerque, NM 87110-3399

For more information please contact our office.
Daniels-Head Insurance Agency (NM), Inc.
505-922-8881 or dj32@dhianm.com
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<td>State:</td>
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<td>Business Phone:</td>
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<td>Email:</td>
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All attorneys must be listed to be considered as Insureds. Of Counsel attorneys need not be listed unless individual coverage is desired. If you are a sole practitioner, please list yourself. Attach sheet if additional attorneys are to be listed.

<table>
<thead>
<tr>
<th>Attorney Name</th>
<th>D/C*</th>
<th>Social Security Number</th>
<th>Years in Practice</th>
<th>Date Joined Firm #</th>
<th>Print Area Expiration Date #</th>
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</thead>
</table>

O=Officers, Directors or Shareholders of the corporation who are licensed as lawyers
E=Employed Lawyers (must be employee of applicant)
C=Of Counsel attorneys for whom coverage is desired (provide average number of hours worked per week on behalf of applicant firm)
P=Part-time Lawyer (must work less than 24 hours per week in the private practice of law solely on behalf of the applicant firm)

Current Insurance (Complete this Section or Send copy of your Current Declaration Page)

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<th>Deductible</th>
<th>Desired Limits and Deductible (if different than current)</th>
<th>Desired Limits</th>
<th>Desired Deductible</th>
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Expiring Annual Premium:

Firm's Retrospective Date:

Are you aware of any claims against your firm or any incidents that could result in a claim against your firm within the past 5 years? If "YES", how many? 

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Donald J. Letherer
Vice President
OPINION
IRA ROBINSON, Judge

{1} The State contends that, even though the district court directed a verdict and acquitted Defendant of the charge of DWI, it is entitled to appeal the district court’s ruling excluding a document relating to Defendant’s blood alcohol test results.

{2} We must determine whether the State had a right to appeal the exclusion of the blood alcohol report pursuant to NMSA 1978, § 39-3-3(B)(2) (1972), and whether double jeopardy precludes the State from retrying Defendant after the jury had been impaneled. To ensure a fully informed decision, we requested supplemental briefing by the parties to address whether Defendant is afforded the protection of the double jeopardy clause of the United States Constitution and the New Mexico Constitution. We conclude that, under the facts presented, the State cannot appeal the exclusion of an inadmissible blood alcohol report under Section 39-3-3(B)(2), and double jeopardy precludes the State from retrying Defendant again because the State refused to present any evidence to satisfy the elements of the charged offense after the jury was impaneled.

I. BACKGROUND

{3} The district court’s order, directing a verdict and judgment of acquittal, stated:

THIS MATTER came before the [district] court for a [ ] jury [ ] trial on December 3, 2003 and the State and Defendant announced they were ready to proceed and a jury was impaneled.

Prior to impanelling the jury, . . . [D]efendant made objection about the late disclosure of a witness on the day prior to trial. The [S]tate had amended its witness disclosure to remove the name of the nurse who did the blood draw and substituted therefor a human resources employee from the hospital. After impanelling the jury, the [district] court took up . . . [D]efendant’s objection. The [district] court did so to resolve the issue of foundation for admission of the blood test results. It appeared to the [district] court necessary to do so prior to opening statements because it would be highly prejudicial to . . . [D]efendant if the [S]tate were allowed to make reference to the results in opening statement and subsequently it was determined there was no foundation for admission of the results.

The [district] court heard testimony and arguments of counsel outside the presence of the jury and ruled that the evidence was insufficient to establish a foundation for admission of the results of a blood alcohol test. The [S]tate took exception to the [district] court’s ruling and upon the request of the [S]tate, a recess was taken to allow the [S]tate to decide how it wished to proceed in light of the [district] court’s evidentiary ruling on the inadmissibility of the blood alcohol evidence. After this recess, the [S]tate announced its intent to proceed with an immediate appeal pursuant to NMSA Section 39-3-3(B)(2). The [district] court ruled that the evidentiary ruling complained of was not immediately appealable under that statute. The [S]tate was granted a second recess to again determine how it wished to proceed in light of the [district] court’s rulings. After the second recess[, the [S]tate announced its intent to proceed with an immediate appeal and said that it was ready to proceed “on appeal.” The [S]tate did not offer any further testimony.

IT IS THEREFORE ORDERED that, after a jury having been impaneled and the [S]tate not presenting any evidence to support a charge of [DWI], the [district] court directs a verdict of not guilty be entered in this matter.

IT IS THEREFORE ADJUDGED AND DECREED that . . . [D]efendant is acquitted of the charge of [DWI] and is discharged from any further obligation to the [district] court.

Additional facts relating to these issues are set forth in our analysis.

II. DISCUSSION

Standard of Review

{4} The State contends on appeal that it has a constitutional and statutory right to appeal the district court’s ruling excluding Defendant’s blood alcohol report. Specifically, the State argues that, “[b]y excluding a crucial and significant exhibit, the
[district] court denied the State its one, fair opportunity to marshal its resources to obtain a conviction on its complaint.” This Court reviews de novo whether the district court’s decision to exclude evidence was based upon a misapprehension of the law. See State v. Romero, 2000-NMCA-029, ¶ 6, 128 N.M. 806, 999 P.2d 1038.

{5} We must address whether the State has a right to appeal under the facts presented and whether this Court has jurisdiction. Under Section 39-3-3(B)(2), the State is permitted to appeal “a decision or order of a district court suppressing or excluding evidence . . . if the district attorney certifies to the district court that the appeal is not taken for the purpose of delay and that the evidence is a substantial proof of fact material in the proceeding.” Id. In Romero, the State argued that it had statutory authority under Section 39-3-3(B)(2) to appeal the exclusion of evidence that was a critical part of its prosecution. 2000-NMCA-029. This Court held that “[t]he excluded evidence went to the heart of the case required to establish an essential element of the State’s case.” Id. ¶ 9. It reasoned that, since “[t]he [district] court’s ruling made it impossible for the State to prove an element of its case[,] [w]e have jurisdiction to entertain this appeal under Section 39-3-3(B)(2).” Id.

{6} In this case, Defendant was charged with DWI, contrary to NMSA 1978, Section 66-8-102 (1999), and for a conviction the State must prove beyond a reasonable doubt, in relevant part, that (1) “[D]efendant operated a motor vehicle;” and (2) “at that time, . . . [D]efendant had an alcohol concentration of eight one-hundredths (.08) grams or more in [one hundred milliliters of blood].” UJI 14-4503 NMRA (1997). But the State had another choice of proof that is easier to accomplish than the former. For instance, the State can prove beyond a reasonable doubt that, at the time Defendant operated the motor vehicle, he “was under the influence of intoxicating liquor, that is, as a result of drinking liquor . . . [D]efendant was less able to the slightest degree, either mentally or physically, or both, to exercise the clear judgment and steady hand necessary to handle a vehicle with safety to the person and the public.” UJI 14-4501 NMRA (1997).

{7} Here, the State, pursuant to Section 39-3-3(B)(2), certified in its notice of appeal that the appeal was not taken for the purpose of delay, and the evidence is a substantial proof of a fact in the proceedings. However, without elaborating, the district court ruled that the evidentiary ruling complained of was not appealable under Section 39-3-3(B)(2). Contrary to Romero, exclusion of the inadmissible blood alcohol report here does not go to the heart of the charged offense and does not eliminate the “one, fair opportunity . . . to obtain a conviction” as the State contends. For instance, when Officer Tutor discovered Defendant, he appeared to be unconscious, or asleep, in the front seat of his truck with the door wide open at 10:35 a.m. After waking Defendant, Officer Tutor asked Defendant if he had been drinking and Defendant replied that he had “a little.” Officer Tutor detected a strong odor of alcohol on or about Defendant, and noticed that he had difficulty standing and that his speech was slurred. Lastly, Defendant failed numerous field sobriety tests and was then placed under arrest. The State refused to present any of the aforementioned evidence to prove the essential element that Defendant was less able to the slightest degree, either mentally or physically or both, to exercise the clear judgment and steady hand necessary to handle a vehicle with safety to the person and the public. See UJI 14-4501. The district court’s ruling to exclude the blood alcohol report did not make it impossible for the State to prove the elements of its case. Therefore, we agree with the district court that the exclusion of an inadmissible blood alcohol report is not appealable under Section 39-3-3(B)(2) and that the blood alcohol report was not a substantial proof of a fact that eliminated the State’s only opportunity to obtain a conviction. Introduction of the blood alcohol report would have provided evidence of aggravated DWI, but is unnecessary for a charge of simple DWI, and that is what Defendant was charged with. Although the blood alcohol report may have been a substantial proof of material fact to the charged offense of aggravated DWI, the exclusion of it did not prevent the State from proceeding because it had ample evidence to meet its burden to prove Defendant’s DWI charge, and it was the State that refused to present that evidence. Thus, unlike Romero, the excluded evidence here did not go to the heart of the proof required to establish DWI. Therefore, this Court will not disturb the district court’s exclusion of the blood alcohol report. Consequently, jurisdiction remained in the district court and nothing prevented the district court from proceeding with the case, except the State’s adamant refusal to continue with the trial and prosecute its case.

Double Jeopardy

{8} The State recognized that the question of double jeopardy may be raised at any time. NMSA 1978, § 30-1-10 (1963). The State is forbidden to appeal when jeopardy would bar a retrial. § 39-3-3(C). However, the State asks this Court to expand the holding in State v. Arevalo, 2002-NMCA-062, ¶ 7, 132 N.M. 306, 47 P.3d 866, where this Court treated a directed verdict before any evidence had been heard by an unsworn jury as a pretrial dismissal to permit appeals such as this. The State also suggests that the district court’s ruling was erroneous and that it should be permitted to challenge such decisions on appeal where neither the court, nor the jury, has heard any evidence.

{9} This Court reviews double jeopardy claims de novo. State v. Fielder, 2005-NMCA-108, ¶ 10, 138 N.M. 244, 118 P.3d 752. The double jeopardy clause of the United States Constitution and the New Mexico Constitution guarantees that no person shall be put in jeopardy twice for the same offense. See U.S. Const. Amend. V; N.M. Const. art. II, § 15. “Jeopardy begins or attaches when the trier of fact is empowered to decide guilt or innocence and jeopardy terminates upon an acquittal.” State v. Vaughn, 2005-NMCA-076, ¶ 8, 137 N.M. 674, 114 P.3d 354; State v. Angel, 2002-NMSC-025, ¶ 8, 132 N.M. 501, 51 P.3d 1155 (stating that, in a criminal trial, jeopardy attaches at the moment the trial of fact is empowered).

{10} In this case, the jury was sworn and impaneled to determine Defendant’s innocence or guilt. At this time, the State notified the court that it had been unable to obtain service of process on Ginger Stubbs, a nurse, who would testify that Defendant’s blood was drawn in accordance with the Scientific Laboratory Division (SLD) regulations. The State amended its witness list the previous day to include a human resources employee to verify Ginger Stubbs’ employment. Defendant objected to this witness being called and to the admission of the blood alcohol content report because the State did not have a witness who could testify that proper SLD procedures were followed for the blood draw. Since the jury was impaneled, the State proffered a substitute witness, Officer Jason Tutor, to establish whether or not the officer could testify that the blood was drawn pursuant to SLD regulations. This was not a pretrial motion and clearly the trial had commenced. Therefore, jeopardy attached the moment the jury was impaneled.

{11} The State then called Officer Tutor. He testified that he had no independent recollection of the blood draw, but stated that, if he signed the report, he must have witnessed the test. On cross-examination, Officer Tutor testified that he did not recall witnessing the blood draw and did not know if the nurse followed those procedures. The
court then excluded the blood test results for failing to lay the proper foundation and recessed the proceedings to allow the prosecution time to reassess its case.

{12} After reconvening, the State announced it would appeal the court’s ruling. The district court denied the request. The State requested an additional recess, which the court granted. After reconvening again, the State noted its intention to file an interlocutory appeal. The district court then asked the State to present its evidence and proceed with its case, but the State refused. The district court then entered a directed verdict of acquittal.

{13} This Court has noted that “[t]he United States Supreme Court has said that it is ‘the most fundamental rule’ that a defendant cannot be re-tried after a verdict of acquittal, even if that verdict is egregiously erroneous.” Vaughn, 2005-NMCA-076, ¶ 9 (quoting United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977)). In his order, the district court expressly ruled that Defendant was acquitted of the charge of DWI. Thus, based on this ruling, Defendant cannot be retried.

{14} Moreover, “[t]he [United States] Supreme Court has also instructed that what constitutes an acquittal ‘is not to be controlled by the form of the judge’s action. Rather, we must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged’ and the focus is on ‘substance as well as form.’” Id. (quoting Martin Linen Supply Co., 430 U.S. at 571-72). As noted, Defendant was charged with DWI, contrary to Section 66-8-102 (1999) and the State’s inability to lay the proper foundation for the admissibility of Defendant’s blood alcohol content report, pursuant to NMSA 1978, § 66-8-103 (1967), was a failure of proof under UJI 14-4503.

{15} Furthermore, as mentioned earlier, the State had ample evidence to present for the charged offense of DWI, which the State refused to present. When the State refused to proceed with its case, it failed to prove the essential element that Defendant was less able to the slightest degree to handle a vehicle with safety to the person and the public. See UJI 14-4501. Therefore, since the State failed to present any factual elements of the charged offense, the district court correctly issued a directed verdict and acquitted Defendant of DWI. “After an acquittal, any type of fact-finding proceeding going to elements of the charged offense violates the federal double jeopardy clause.” Vaughn, 2005-NMCA-076, ¶ 9; § 39-3-3(C) (“No appeal shall be taken by the [S]tate when the double jeopardy clause of the United States constitution or the constitution of the [S]tate of New Mexico prohibits further prosecution.”).

{16} Moreover, since the district court’s ruling was based on the merits of the evidence, a retrial is precluded. See Burks v. United States, 437 U.S. 1, 16 (1977) (stating that a retrial will not be permissible “when a defendant’s conviction has been overturned due to failure of proof at trial, in which case the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble”); see also State v. Gardner, 1998-NMCA-160, 126 N.M. 125, 967 P.2d 465. In Gardner, this Court discussed the interplay between the DWI statutes and the Implied Consent Act and administrative regulations, stating that “compliance with these regulations would be a condition precedent to admissibility.” Id. at ¶ 11. If the exclusion of evidence is a result of trial error from which the State could appeal, and after which if appeal were to be successful, Defendant could be retried. See County of Los Alamos v. Tapia, 109 N.M. 736, 790 P.2d 1017 (1990). In Tapia, our Supreme Court confronted an issue similar to that presented in this case: Whether the State’s appeal is barred when jeopardy has attached, but the trial was aborted by a ruling of the district court before the jury determined the guilt or innocence of the defendant. In that case, the district court ordered a dismissal of the criminal charge when it ruled, during mid-trial, that the defendant’s arrest was unlawful and that all evidence in support of the charged must be suppressed. Id. at 737, 790 P.2d at 1018. Our Supreme Court held that double jeopardy is not offended when a mid-trial dismissal results from “trial error,” as opposed to a factual determination, or lack thereof, of the guilt or innocence of the defendant. Id. at 738-41, 790 P.2d 1019-22.

{17} For blood sample collection, the regulations require that the “[b]lood samples be collected in the presence of the arresting officer or other responsible person who can authenticate the samples. Blood samples shall be collected by veni-puncture as authorized by the New Mexico Implied Consent Act, NMSA 1978, Sections 66-8-105 et. seq.” 7.33.2.12 NMAC. Furthermore, “[t]he initial blood samples should be collected within two hours of arrest . . . [that] ethyl alcohol shall not be used as a skin antiseptic in the course of collecting blood samples . . . [and] the samples shall be dis-
MICHAEL D. BUSTAMANTE, Chief Judge, specially concurring
CYNTHIA A. FRY, Judge, specially concurring

BUSTAMANTE, Chief Judge (specially concurring).

{22} I concur in the result of Judge Robinson’s opinion. I do not agree with the analytical path Judge Robinson’s opinion takes. In particular, I do not think it is appropriate to question the district attorney’s certification under Section 39-3-3(B)(2) for the first time on appeal. In addition, I believe the opinion’s double jeopardy discussion is wrong in two respects. First, it misinterprets the holding of County of Los Alamos v. Tapia, 109 N.M. 736, 790 P.2d 1017 (1990), and its concept of “trial error” and, second, it is improper to decide the merits of the evidentiary issue in order to determine that there was no “trial error” under the Tapia rubric. Finally, it is illogical to decide the evidentiary issue while at the same time holding that the State does not have the right to appeal the issue. Opinion, ¶¶ 16-17. Were I the original author, I would resolve the case as follows.

{23} The State appeals asserting that it has a right to an immediate appeal under Section 39-3-3(B)(2) from a ruling—issued midtrial—excluding evidence. We reject the State’s contention and affirm the district court.

FACTS AND PROCEEDINGS

{24} A criminal complaint was filed against Defendant Gomez on May 11, 2001, charging him generically with violating Section 66-8-102 (DWI). The facts underlying the complaint are contained in an attached affidavit signed by Officer Jason Tutor. According to the affidavit, Defendant was found “unconscious or asleep” lying across the front seat of his truck with the driver’s door open. The engine was off and the keys were not in the ignition. The keys were later found in Defendant’s pants pocket. Defendant was in a state of dishevelment, wearing no shirt or shoes, pants unzipped, belt unfastened and smelling of alcohol. When asked for his driver’s license, Defendant tried to give the officer a bank card. Defendant could not complete field sobriety tests and was taken to a medical facility to “have blood drawn to determine his blood alcohol concentration and to obtain a clearance for the Chaves County Detention Center.”

{25} The case was dismissed in September 2001 because the district court felt the complaint did not establish there was probable cause to believe Defendant was driving while under the influence. This ruling was reversed by the Court of Appeals in an unpublished opinion (State v. Gomez, Ct. App. No. 22,577, filed Dec. 27, 2001), and the reversal was affirmed by our Supreme Court, State v. Gomez, 2003-NMSC-012, 133 N.M. 763, 70 P.3d 753. The case was mandated back to the district court in early June 2003.

{26} The case was set for jury trial on December 3, 2003. Before seating a jury, the district court held a brief meeting with counsel to deal with certain administrative details generally irrelevant here. The State had filed a motion in limine asking that domestic violence allegations against one of the arresting officers not be brought to light. The judge stated he would prefer to take the matter up after the jury was impaneled, but before testimony. Defense counsel asked that the district court deal with “late witness disclosure issues” at that time also. On inquiry, the State’s counsel informed the court that “we could not locate the nurse” so the State had available someone else to testify that the missing witness was a registered nurse at the time she drew Defendant’s blood. The court stated that “we’ll deal with all of that in the interval after we pick the jury.” Neither trial counsel pressed the district court to take the matter up sooner.

{27} After the jury was sworn, the district court addressed the late witness disclosure issue. The State filed an amended witness list the day before trial dropping the nurse who drew Defendant’s blood. Defense counsel complained about the late change because the nurse had been identified as a witness since mid-November. Defendant’s counsel also asserted that Officer Tutor had admitted to counsel that he could not recall anything about the blood draw.

{28} After some discussion, the district court decided to receive a proffer of evidence concerning the blood draw. The State called only Officer Tutor who identified his signature on a standardized form that he signed as a witness to the blood draw. The officer admitted he had no independent recollection of the draw and he did not know whether the nurse followed proper procedures or not.

{29} After argument by counsel, the district court ruled that the State had not provided sufficient foundation for the blood alcohol report because no one could say whether the State Laboratory protocol for blood draws was followed. The district court ruled it would not allow the blood test as evidence.

{30} Expressing surprise at the district court’s ruling, the State asked for a recess to reevaluate the case. Following the recess, the State orally moved for an immediate appeal of the ruling under Section 39-3-3(B)(2), asserting that the passage of time and circumstances had overtaken it. The State asserted that a case involving a similar issue was currently pending before our Supreme Court. The State specifically asked the district court not to declare a mistrial. The prosecutor also stated “If I had known this was coming up before the jury was empaneled, we could have handled it differently.”

{31} In response, the district court expressed some dissatisfaction with the State’s lack of diligence in preparing the case for trial—which it repeated later in the colloquy with State’s counsel. The district court also focused on the fact that the request for an appeal was being made midtrial. The district court was skeptical whether a mistrial appeal as of right was possible under any statutory provision. The district court also stated that it was “not inclined to stop this trial for an appeal” asserting that it perceived the primary issue in the case to be “control of the vehicle, it’s not intoxication.” The judge also observed that he did not view his ruling as a suppression, but rather as a foundation issue.

{32} The State continued to assert it could appeal as a matter of right. Apparently, viewing any appeal the State might have as interlocutory, the district court stated that it would not certify the matter for appeal. The district court expressed its view that the State could not appeal after the jury had been empaneled.

{33} The conversation continued thereafter with the State explaining how the ruling weakened its case and the district court expressing its frustration with the fact that the State had only “yesterday” discovered that the nurse was unavailable having assured the district court repeatedly over the course of six hearings that it was ready to proceed with trial. After making clear to the State that in its opinion the State could not appeal, the district court called a second recess.

{34} Upon reconvening, the State’s counsel again asserted that the State had a “right as a matter of course to appeal the case.” The State filed a notice in open court. The district court twice expressed its amazement at this turn and reiterated its view that “there is no appeal.” The district court asked if the State was ready to proceed and the State stated only that it was ready to proceed on appeal. After another extended colloquy about the situation, defense counsel asked the district court either to instruct the State to call a witness or to dismiss the case because the State “isn’t going forward
with the prosecution.”

35 The district court confirmed with the State that it would not be calling any witnesses. Receiving confirmation, the judge directed a verdict of acquittal and dismissed the State’s case. The judge informed the jury of the situation and that he had directed a verdict of acquittal.

36 The district court entered an order Directing Verdict and Judgment of Acquit which succinctly summarized the events described above. The decratal language of the Order makes clear the district court’s intent to render a decision on the merits:

IT IS THEREFORE ORDERED that, after a jury having been impaneled and the [S]tate not presenting any evidence to support a charge of Driving While Intoxicated, the court directs a verdict of not guilty be entered in this matter.

DISCUSSION

37 Section 39-3-3(B)(2) provides:

B. By the state. In any criminal proceeding in district court an appeal may be taken by the state to the supreme court or court of appeals, as appellate jurisdiction may be vested by law in these courts:

(2) within ten days from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property, if the district attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

The State argues that this provision gives it an absolute and automatic right to immediately appeal rulings suppressing or excluding evidence even when the ruling is issued midtrial; that is, after jeopardy has attached. To our knowledge, this argument has never been made before a New Mexico appellate court, and we reject it.

38 Though not entirely clear, the State seems to posit a “plain meaning of the statute” argument. The State’s Brief in Chief simply quotes the statute and asserts a “clear legislative intent” to grant the State a right to appeal in situations such as we have here. The State does not discuss in any detail the practical or theoretical difficulties posed by its position. It does acknowledge, though quite obliquely, the interlocutory nature of the appeal it seeks to prosecute by citing State v. Ahasteen, 1998-NMCA-158, ¶ 10, 126 N.M. 238, 968 P.2d 328, for the notion that we should give the concept of finality a practical construction.

39 Our primary task in interpreting a statute is discerning legislative intent. State v. Martinez, 2006-NMCA-068, ¶ 5, 139 N.M. 741, 137 P.3d 1195. We start by examining the plain language of a statute. If the language is clear we enforce it unless it is contrary to constitutional principles or would lead to absurd results. State v. Gutierrez, 115 N.M. 551, 552, 854 P.2d 878, 879 (Ct. App. 1993). The language of Section 39-3-3(B)(2) is deceptively simple and direct. It grants a ten-day time frame within which the State may appeal “a decision or order of a district court suppressing or excluding evidence.” It does not explicitly address or make any distinction between pretrial versus midtrial rulings.

40 We have observed that appeal of a suppression order is fundamentally an interlocutory appeal. State v. Alvarez, 113 N.M. 82, 84, 823 P.2d 324, 326 (Ct. App. 1991) (holding that the ten-day time to appeal Section 39-3-3(B) controls the timing of appeals of suppression orders). We stated that the “mandatory nature of suppression order appeals is rooted in Section 39-3-3(B), not the constitution.” Id. In practice we have routinely accepted appeals from pretrial suppression and exclusionary orders entered by our district courts, though we have been careful to limit such appeals to the letter of the statute. See State v. Griego, 2004-NMCA-107, ¶ 6, 136 N.M. 272, 96 P.3d 1192 (noting that denial of a motion in limine seeking to restrict impeachment of the victim did not meet the requirements of Section 39-3-3(B)(2) and was not appealable under it).

41 To our knowledge we have never accepted, or been asked to accept as an automatic interlocutory matter, an appeal from a suppression or exclusionary ruling issued after the start of trial unless the trial was brought to an orderly conclusion releasing the jury or the district judge exercised his discretion to allow an appeal. For example, in State v. Joe, 2003-NMCA-071, ¶ 15, 133 N.M. 741, 69 P.3d 251, we considered an appeal of a midtrial suppression order that resulted in a directed verdict on one of the pending charges. There were other charges unaffected by the suppression ruling, but the district court granted a mistrial as to them, to which no one objected. Here, the State specifically requested the district court not to enter a mistrial. In Romero, 2000-NMCA-029, ¶ 6, we considered an appeal of an exclusionary evidentiary ruling apparently midtrial. There was no question raised about appealability there because the State moved to appeal under Section 39-3-3(B)(2), and the district court granted the motion. Here, of course, the district court explicitly refused to certify or grant an interlocutory appeal. We note that the State has never argued that the district court abused its discretion by its refusal.

42 We think it is clear why the issue has not been presented before: it is simply unworkable and absurd to allow automatic appeals from midtrial rulings given the havoc such a procedure could wreak with trials. In any trial, district court judges have to make numerous evidentiary rulings. It is the better part of a district judge’s job. Some rulings will be more difficult and serious than others, but many will meet the criteria of Section 39-3-3(B)(2). It would be an intolerable burden on jurors, witnesses, defendants, the district courts, and even the State, to allow automatic suspension of ongoing trials for months or years. Contrary to the beguiling simplicity and clarity of Section 39-3-3(B)(2), we do not believe the legislature intended to give the State the power to disrupt ongoing trials at its discretion. The timing of the ruling—whether it comes pretrial or after jeopardy has attached—is critical to the meaning of the statute. We hold that Section 39-3-3(B)(2) does not provide an automatic appeal from suppression or exclusionary orders entered after jeopardy has attached in a trial.

43 Because the State did not have the right to appeal, we dismiss this appeal. Given our resolution of the case we do not need to, and in fact cannot, deal with the merits of the district court’s evidentiary ruling. To avoid continued litigation on remand, we hold that the district court’s dismissal constitutes an acquittal and prevents the State from reprosecuting Defendant for this incident. The State’s refusal to present any evidence resulted, as the district court noted, in a failure of proof and the district court’s order was an adjudication of innocence based on that failure of proof. The State’s actions caused the dismissal and double jeopardy principles preclude retrial. See Joe, 2003-NMCA-071, ¶ 16, citing Tapia, 109 N.M. at 739-40, 790 P.2d at 1020-21.

MICHAEL D. BUSTAMANTE, Chief Judge

FRY, Judge (specially concurring).

44 I concur in the result of Judge Robinson’s opinion, but I do not agree with the rationale supporting the result. I concur fully in Chief Judge Bustamante’s concurring opinion.

CYNTHIA A. FRY, Judge
about another child well after the vomiting.

{7} Mother spoke to Gore again around 2 p.m. Gore told her that Latasha had watched Angelina and two other children (Destiny and Andrew) while Gore was out moving Latasha’s belongings. Gore told Mother that when he returned about a half hour to an hour later, Latasha said that Angelina had vomited again. Gore did not question Latasha about the vomiting. Later in the day, Gore noticed a bruise on Angelina’s forehead, and asked Latasha about it, but Latasha did not know how it happened. When Mother called Gore again at 4 p.m., Gore told her that Angelina seemed to be feeling slightly better.

{8} Mother picked up Gore and Angelina at approximately 5 to 5:30 p.m. Gore later told the social worker investigating the case that around this time, he noticed that Angelina was not herself and appeared sick. Mother told the social worker that she did not notice anything about Angelina except that Angelina was tired. Mother also testified that because Angelina was sleeping when Mother arrived, Angelina looked groggy, as if she had just woken up. Mother stated that Angelina typically took a nap around that time. Mother then testified that when she brought Angelina to her car, she brushed back Angelina’s hair and discovered a small bruise on Angelina’s forehead. She asked Gore what had happened, and he told her he did not know. Mother admitted that she looked at Angelina more upon noticing this bruise, but claimed it was all she noticed.

{9} Mother, Gore, and Angelina then went to store for ten to fifteen minutes. Mother testified that she brought Angelina into the store with her and that Angelina was still sleepy during this time. According to Mother’s testimony, at some time between 5:45 and 6 p.m., the three arrived at the house of Anna Marie Castlow, who is Angelina’s grandmother on Mother’s side. (Mother told the social worker they arrived at 6 to 6:30 p.m.)

{10} When Castlow came home at 6:15 p.m., Mother and Gore were in the kitchen doing dishes. Castlow testified that the other children in the house rushed at her in greeting, but that due to the commotion, she only saw Angelina briefly and in passing. Castlow testified that Angelina was sitting on the floor by herself. Mother, on the other hand, testified that Angelina was playing with another child. Castlow went into the kitchen to greet Mother. When Castlow came back out, she sat on the couch and picked up Angelina. Castlow testified that she looked at Angelina and then “double look[ed] again.” Brushing Angelina’s hair back, she saw that the side of Angelina’s face was the “size of a grapefruit” and her eye was partially swollen. Castlow further stated that Angelina looked like she was not “all there,” was glossy-eyed, that she looked “severely injured,” and that her head was so swollen it was up against her ear. Castlow said that Angelina’s appearance was “horrifying.”

{11} Gore’s statement to the social worker also confirmed Castlow immediately
noticed the swelling on Angelina’s head. Mother, however, was adamant in her testimony that Castlow had held Angelina for five to eight minutes before noticing the swelling, and only noticed it after commenting on the messiness of Angelina’s hair and pulling it “all the way back.” Mother also asserted that the swelling on Angelina’s head was not the size of a grapefruit until later on at the hospital.

(12) Soon after calling a nurse hotline, Mother and Gore took Angelina to the hospital. Angelina arrived at the hospital with a fractured skull, subdural hematoma, and multiple bruises to her chest, sternum, head, and back. A detective interviewed Mother and Gore that evening, and Mother was unresponsive and would not answer questions. Gore answered the detective’s questions, but could not explain Angelina’s injuries.

(13) The next day, Angela Teertstra, a senior social worker with CYFD, sat in on the detective’s next interview with Mother and Gore. Neither Mother nor Gore offered an explanation for Angelina’s injuries at that time. During the interview, Mother did not state that she had noticed the swelling on Angelina’s head before Castlow noticed it and Gore also denied seeing any swelling or bruising (other than the bruise on the forehead) during the day.

(14) When Teertstra spoke to Mother and Gore the day after that, on February 10, both stated that they did not know what had happened to Angelina. Teertstra also spoke to seven-year-old Destiny, Gore’s younger sister. Destiny was with Latasha and Angelina most of the time that Angelina was at Latasha’s house. Destiny told Teertstra that she did not see anyone hit Angelina or see Angelina fall, but that while she was in another room, she heard Angelina crying and calling for her, then heard Gore tell Angelina not to go. Destiny’s mother stated that ever since the day Angelina was injured, Destiny had been jumpy and overly apologetic.

(15) After taking Angelina into custody, CYFD filed an abuse and neglect petition against Mother and Gore. At trial, Mother testified that Angelina had no significant prior injuries, but that she had once fallen out of her highchair while in Gore’s care. Mother had come home and taken Angelina to the hospital. Mother further insisted that Angelina’s head swelling was not as large as Castlow claimed and was not visible until the moment Castlow pulled back Angelina’s hair. When asked what had happened to Angelina, Mother stated, “I wasn’t there; I wouldn’t know.” When asked if she thought her daughter’s injuries were accidental, Mother replied “I wouldn’t know; I wasn’t there.” Mother also testified that only after Gore was taken in for questioning in a later interview with the detective, he informed her that Angelina’s injuries were caused by a fall from a trampoline.

(16) The trial court, in ruling, found the trampoline story “a bunch of bologna” and Mother’s testimony “absolutely unbelievable.” The trial court accepted Gore’s no contest plea to the abuse and neglect petition. In its written findings of fact and conclusions of law, it found that Angelina was an abused child within the purview of the Children’s Code, NMSA 1978, §§ 32A-1-1 to 32A-23-8 (1993, as amended through 2005), and that:

6. There is clear and convincing evidence that [Mother] had care of the child early in the day before she went to work and that while she was at work she was told that the child was vomiting and was “not herself”. The child suffered physical abuse pursuant to [S]ection 32A-4-2 B(2) of the Children’s Code.

7. There is clear and convincing evidence that [Mother] did not respond appropriately to the child’s injuries when she saw the child after work and it wasn’t until the child’s grandmother saw the child’s injuries that the child was taken to the hospital. The child was at risk of further harm pursuant to [S]ection 32A-4-2 B(1) of the Children’s Code.

8. There is clear and convincing evidence that [Mother] knew or should have known that the child could be injured in the care of . . . Gore, pursuant to [S]ection 32A-4-2 E(3) of the Children’s Code, since the child had previously been hurt when she reportedly fell out of her highchair when in her care.

9. There is clear and convincing evidence that the child was negligently endangered by [Mother] when she left the child with . . . Gore and when the child was left without medical care for several hours after sustaining the injuries on February 8, 2005.

(17) Mother appeals from this judgment, and we affirm.

DISCUSSION
This Court Has Jurisdiction Over This Appeal

(18) We review de novo the question of whether this Court should accept jurisdiction where the notice of appeal from an adjudication of abuse and neglect is filed late. See State ex rel. Children, Youth & Families Dep’t v. Shavonna C., 2005-NMCA-066, ¶ 24, 137 N.M. 687, 114 P.3d 367 (stating that questions of law are reviewed de novo). In State ex rel. Children, Youth & Families Department v. Robert E., 1999-NMCA-035, 126 N.M. 670, 974 P.2d 164, this Court allowed an appeal from a termination of parental rights where the notice of appeal was filed late. Id. ¶¶ 9-10. Applying a presumption of ineffective assistance of counsel to such cases, we deemed the appeal timely filed because the parent’s fundamental liberty interest in the care, custody, and management of their children was at stake. Id. Arguing that adjudications of abuse and neglect also affect this fundamental right, Mother asks this Court to extend the presumption of ineffective assistance of counsel to such proceedings, and deem her appeal timely filed.

(19) As we explained in State v. Upchurch, 2006-NMCA-076, 139 N.M. 739, 137 P.3d 679, we do not routinely excuse all untimely appeals. Id. ¶ 4. In order for the presumption of ineffective assistance of counsel to apply, the party must have a right to effective assistance of counsel. See id. We recognize a right to effective assistance of counsel in termination cases. See State ex rel. Children, Youth & Families Dep’t v. Vanessa C., 2000-NMCA-025, ¶ 32, 128 N.M. 701, 997 P.2d 833. Whether we will recognize that right in adjudications of abuse and neglect has not yet been addressed by our courts.

(20) In New Mexico, a parent’s right to counsel at adjudications of abuse and neglect is statutory. See § 32A-4-10(B). This right to counsel exists from “the inception of an abuse or neglect proceeding.” Id. In In re Termination of Parental Rights of James W.H., 115 N.M. 256, 849 P.2d 1079 (Ct. App. 1993), this Court recognized a parent’s statutory right to counsel in termination proceedings “is worthless unless that right includes the right to effective counsel.” Id. at 257, 849 P.2d at 1080 (internal quotation marks and citation omitted). While noting that a parent’s right to custody of the parent’s child is also constitutionally protected, we concluded that “the legislature would not have statutorily guaranteed an indigent parent the right to counsel without also guaranteeing that the court-appointed counsel be effective.” Id. at 258, 849 P.2d at 1081. Applying this rationale to the case before us, we hold
that parents in an adjudication of abuse and neglect have a statutory right to effective assistance of counsel.

{21} Because we base this holding on a parent’s statutory right to counsel, we do not address whether parents’ rights to effective assistance of counsel during these proceedings is also constitutionally guaranteed or the standard to be applied to those claims. Since Mother requests that a presumption of ineffective assistance of counsel be applied, we do not address the factors Mother claims weigh in favor of our review. In our view, the presumption that Mother seeks only requires a sufficient impact on her fundamental right to the care, custody, and management of her child. We thus decline to review Mother’s claim that her attorney demonstrated other instances of ineffective representation or that the late filing was only a minimal delay.

{22} We agree with Mother that adjudicatory proceedings affect a parent’s fundamental right in the care, custody, and management of their children. See State ex rel. Children, Youth & Families Dep’t v. Maria C., 2004-NMCA-083, ¶¶ 24-28, 136 N.M. 53, 94 P.3d 796 (noting that, because “[a] parent’s fundamental liberty interest in the care, custody, and management of their children is well established,” “a parent, like a criminal defendant, has a constitutional right to . . . an opportunity to participate in all critical stages of abuse and neglect proceedings”). Under Section 32A-4-22(B)(1), if the trial court finds that a child is abused or neglected, the trial court may allow the child to remain with the parent “subject to those conditions and limitations the court may prescribe.” The trial court may also give CYFD supervision of the child or transfer legal custody to the noncustodial parent or an agency. Section 32A-4-22(B)(2), (3). If the parent is not allowed to retain custody of the child, the parent will be allowed to visit the child “unless the court finds that the best interests of the child preclude any visitation.” Section 32A-4-22(D). These statutes demonstrate that an adjudication of abuse and neglect can seriously impact a parent’s care, custody, and management of a child. We hold that this adjudication’s serious impact on Mother’s fundamental interest in Angelina, combined with her right to effective assistance of counsel at this stage of proceedings, warrants an extension of the rule articulated in Robert E., 1999-NMCA-035, ¶ 10. We hold that in this case, where a notice of appeal from an adjudication of abuse and neglect is filed late, this Court will presume that counsel was ineffective and accept jurisdiction over the appeal.

There Was Sufficient Evidence That Mother Abused and Neglected Child

{23} Mother argues that there was not sufficient clear and convincing evidence from which the trial court could find that Mother had abused and neglected Angelina. See Shawna C., 2005-NMCA-066, ¶ 7. “For evidence to be clear and convincing, it must instantly tilt the scales in the affirmative when weighed against the evidence in opposition and the fact finder’s mind is left with an abiding conviction that the evidence is true.” Id. (internal quotation marks and citation omitted). However, this Court does not reweigh the evidence. See Vanessa C., 2000-NMCA-025, ¶ 24. This Court will not substitute its judgment for that of the fact finder as to any factual matter. Id. Our standard of review is thus narrow, confined to the question of “whether, viewing the evidence in the light most favorable to the prevailing party, the fact finder could properly determine that the clear and convincing evidence standard was met.” Shawna C., 2005-NMCA-066, ¶ 7 (internal quotation marks and citation omitted).

{24} Mother challenges the trial court’s findings numbers six through thirteen. Regarding the trial court’s finding number seven, the trial court found that Angelina was an abused child and at risk of further harm under Section 32A-4-2(B)(1). The trial court found that Mother “did not respond appropriately to the child’s injuries when she saw the child after work and it wasn’t until the child’s grandmother saw the child’s injuries that the child was taken to the hospital.” Mother argues that “there was no definitive expert testimony” demonstrating how long it would take for the “full extent of the swelling and bruising” to appear, “and that there was no way to determine the exact time the injury occurred.” Mother also contends that “there was apparent agreement that the full extent of Angelina’s injury was partially hidden by her hair.” Mother thus mainly contends that when she picked up Angelina, Angelina’s injuries could not reasonably have been apparent to her.

{25} We hold that there was sufficient evidence to support the trial court’s finding number seven. Dr. Coleman testified that when she examined Angelina two days after the incident, Angelina had bruises on the right side of her forehead, around her right eye, chest, right forearm, and most significantly, a great deal of soft tissue swelling on her scalp, from the right side of her head and extending to the left side. Both Gore and Mother testified to only seeing a small bruise on Angelina’s forehead, and Castlow did not testify to seeing any bruising, so that there was no evidence that the bruising resulting from Angelina’s injuries would have been apparent to Mother when picking Angelina up.

{26} Regardless, Angelina’s skull was “broken into many pieces.” Dr. Coleman determined that Angelina’s injuries were caused by “great force,” such as seen in children who fall from second or third story windows or who, in motor vehicle accidents, are unrestrained or improperly restrained and hit the windshield. Dr. Coleman opined that in the absence of one of these events, Angelina’s injuries were consistent with child abuse.

{27} Dr. Coleman described Angelina’s injuries as “life-threatening,” and stated that at the time of the injury, Angelina would have been “immediately symptomatic,” and “noticeably ill appearing,” would not have been herself, been vomiting, and either incredibly fuzzy or very sleepy. Although she conceded that there was no way to date Angelina’s injuries, Dr. Coleman stated that one had to look at when the child was last seen healthy and when the child became symptomatic. Mother testified that at 7:30 a.m., Angelina was healthy. Teertstra testified that Mother related that she had spoken to Gore around 11 a.m. and that he had told Mother that Angelina had spit up earlier, appeared sick, and was not quite acting like herself that morning. Mother was also aware that Angelina had vomited again sometime before 2 p.m. Mother testified that she was not there when the injuries occurred, strengthening the inference that the injuries must have occurred before Mother picked up Angelina and Gore. The trial court could have therefore reasonably inferred that Angelina’s injuries occurred before she became symptomatic, which was at or before 11 a.m.

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1We would hesitate to extend our opinion in this direction since the parties did not address this issue and our opinion could be taken to hold that parents have a constitutional right to counsel at this stage of the proceedings. That is not the issue before us, and we decline to address it.
{28} At trial, Mother argued that Angelina’s head swelling was not as large as Castlow stated, that it worsened at the hospital, and that the eye swelling was not visible at all until then. Mother further argued that the injury could not be seen until Angelina’s hair was completely pulled back and that fourteen-month-old Angelina’s hair was thicker at the time of the incident than in photographs, apparently taken after the incident, that were shown to her at trial. The fact finder may freely reject such self-serving testimony, see State v. Hunter, 2001-NMCA-078, ¶ 16, 131 N.M. 76, 33 P.3d 296, and apparently did so in this case when it declared Mother’s testimony “absolutely unbelievable” and rejected Gore’s untimely explanation of Angelina’s injuries as “bo. lo.gna.” See Ledbetter v. Webb, 103 N.M. 597, 604, 711 P.2d 874, 881 (1985) (noting that the trial court’s verbal comments can be used to clarify a finding).

{29} There was expert testimony that following the injury, Angelina would have looked incredibly sick and that her condition would be “immediately apparent.” When Mother picked up Angelina, she knew that Angelina had been ill that day. She conceded that she noticed a bruise on Angelina’s forehead, and that she looked at her more closely at this time. She still took Angelina, who was suffering from a shattered skull and extensive bruising, to the store with her for ten to fifteen minutes before going to Castlow’s home, where Angelina languished alone in the living room before Castlow noticed her injuries. Castlow confirmed that, although one had to push back Angelina’s hair to see the full extent of the head swelling, that after one quick glance, something in Angelina’s appearance had caused her to “double look” at Angelina. Whether or not the extensive swelling was partially concealed by Angelina’s hair, Castlow testified that the side of Angelina’s face was the “size of a grapefruit” and her eye was partially swollen. Castlow further stated that Angelina looked like she was not “all there,” was glossy-eyed, that she looked severely injured, and that Angelina’s appearance was “horrifying.” This assessment is consistent with Dr. Coleman’s testimony that Angelina would have immediately appeared ill upon being injured. We hold that this was sufficient clear and convincing evidence to support the trial court’s judgment that, under Section 32A-4-2(B)(1), Mother’s inaction in the face of her daughter’s apparent and life-threatening injuries caused Angelina to be at risk of serious harm.

{30} This same evidence is also sufficient to support the trial court’s finding that Mother negligently endangered Angelina by leaving the child without medical care for several hours. See § 32A-4-2(E)(2). Our holding in In re Melissa G., 2001-NMCA-071, 130 N.M. 781, 32 P.3d 790, stands in contrast to the facts of the case before us. In Melissa G., we reversed the trial court’s conclusion that, under what is now Section 32A-4-2(E)(2), a mother had neglected her child. Melissa G., 2001-NMCA-071, ¶¶ 16, 21. In Melissa G., a mother had failed to discover that her young daughter had been sexually assaulted. Id. ¶ 18. The mother had taken a prescription pain medication and was in bed when the father of her child (and the alleged perpetrator of the abuse) brought the child home. Id. ¶¶ 16, 18. The father had remained in the home for awhile and put the child to bed. Id. ¶ 18. During the night, the mother had changed the child in the dark as she usually did when the child wet the bed. Id. The child did not cry out during the night. Id. In the morning, the child had dressed herself, and did not complain of anything. Id. The child went to school, where extensive bruising and signs of sexual assault were discovered. Id. ¶ 5. We held that, without a history or pattern of abuse or neglect, this evidence was insufficient “to put a reasonable parent on notice that something was amiss.” Id. ¶¶ 20-21. In this case, on the other hand, Mother was aware that something was wrong with Angelina before she even picked up her child, in addition to the expert testimony that injuries like Angelina’s would result in immediately apparent signs of trauma. These signs were sufficient to have put Mother on notice that Angelina required immediate medical attention, which was not sought until after 7 p.m. that evening.

{31} Regarding finding number six, Mother argues that there was no evidence that Mother inflicted Angelina’s injuries or that Gore’s reports of Angelina vomiting and not acting like herself should have alerted Mother to Angelina’s condition. The trial court’s finding number six found that Angelina had suffered physical abuse under Section 32A-4-2(B)(2) because Mother had cared for Angelina earlier in the day, then was told that Angelina was vomiting and was not herself. Section 32A-4-2(B)(2) defines an “abused child” as one who has suffered physical abuse “inflicted or caused by the child’s parent, guardian or custodian.” While we agree that the trial court’s factual findings do not support a legal conclusion that Mother “inflicted or caused” Angelina’s physical abuse under Section 32A-4-2(B)(2), we consider this finding superfluous in light of our discussion above. See Ratzlaff v. Seven Bar Flying Serv., Inc., 98 N.M. 159, 165, 646 P.2d 586, 592 (Ct. App. 1982) (stating that a finding that is not necessary to support the trial court’s judgment may be disregarded). We also consider the trial court’s finding number eight and its discussion in finding number nine that Mother knew or should have known of Gore’s abuse due to Angelina’s previous fall from a high chair while in Gore’s care, to be equally superfluous. Finally, since Mother did not provide an argument for her challenge to the remainder of the trial court’s findings, we do not address them either. See Rule 12-213(A)(4) NMRA (requiring that findings of fact be specifically attacked). The trial court’s judgment that Angelina was abused was supported by substantial evidence.

CONCLUSION

{32} We affirm.

{33} IT IS SO ORDERED.

RODERICK T. KENNEDY, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Chief Judge

JAMES J. WECHSLER, Judge
OFPIN

JUST 0. 8. UTHIN, JUDG

{1} Defendant Valerie Kent appeals her conviction of the crime of accessory to attempt to manufacture methamphetamine on the grounds of insufficient evidence and error in denying admission of a photograph. We affirm.

BACKGROUND

{2} The State presented three law enforcement witnesses. One or more of the officers witnessed a person they identified as Defendant purchase ten boxes of matches at a convenience store. Knowing that the striker plates on the matchboxes consist of red phosphorous, a key ingredient for the manufacture of methamphetamine, the officers followed Defendant, who was driving a grey Chevy pickup, to a second convenience store where Defendant purchased ten more boxes of matches. The officers then followed Defendant to a third convenience store where Defendant purchased ten more boxes of matches. This occurred once again at a fourth convenience store, where Defendant purchased five more boxes of matches. The officers knew from their training and experience that purchases of large quantities of matchbooks, particularly thirty-five boxes of matches indicated the likelihood of a methamphetamine lab. At least two of the officers involved specifically identified Defendant as the person who purchased the matches.

{3} The officers then followed Defendant to an apartment, where they continued surveillance until almost midnight, when a green minivan pulled up with a female inside. Two officers testified that a white bag was put into the minivan. Another officer testified that the two females transferred items from the pickup to the minivan. The pickup and minivan then left the apartment location and stopped at the residence of Sherman Kent. After that, the two vehicles traveled to a Wal-Mart store. The convenience stores and the Wal-Mart store are located in Portales, New Mexico.

{4} Defendant and the other female, identified as Defendant’s sister, Jan Carter, entered Wal-Mart where one or both purchased a gallon of Coleman fuel and a gallon of distilled water. Those items were placed in the minivan. The officers knew that these items were also ingredients used to manufacture methamphetamine. After the purchase, Ms. Carter drove the minivan to Clovis, New Mexico. Defendant and Sherman Kent drove off in the pickup. The officers followed the minivan to Clovis because the items about which they were concerned were in the minivan. They arrested Ms. Carter and obtained the items they had seen transferred into the minivan. The items included the matchboxes. Defendant and Sherman Kent drove off in the pickup. Early the next morning, Defendant was asked to come to the Portales police station because her sister had been arrested. Defendant agreed to go to the police station. During an interview with the police officers, Defendant admitted that she had purchased all of the matches, that she knew that the matches were going to be used to manufacture methamphetamine, and that she knew that matchboxes were scraped for the red phosphorous that was used in the manufacture of methamphetamine. Defendant also admitted that on previous occasions she had bought matches for her sister for the manufacture of methamphetamine.

{5} At trial, Defendant did not claim that she was not at the apartment where the officers had seen her with her sister, nor did she claim that she did not go to Wal-Mart. Defendant testified that she paid for the items purchased at Wal-Mart. The officer who witnessed the two sisters in Wal-Mart testified that it was Ms. Carter that purchased the items.

{6} However, Defendant testified that it was her sister who purchased the matches at the various convenience stores, and that the officers had mistaken the identity of the person who purchased the matches. In support of this defense, Defendant sought to introduce a photograph of Ms. Carter to show that there was a striking resemblance between the sisters. The district court refused to admit the photograph, agreeing with the State that the evidence should be excluded under Rule 5-508 NMRA for Defendant’s failure to give notice of an alibi defense.


{8} The jury was instructed that to convict Defendant of attempt to manufacture...
methamphetamine it had to find, beyond a reasonable doubt, that (1) Defendant intended to commit the crime of trafficking a controlled substance (methamphetamine) by manufacturing, and (2) Defendant began to do an act that constituted a substantial part of the crime of trafficking a controlled substance (methamphetamine) by manufacturing but failed to commit the crime of trafficking a controlled substance (methamphetamine) by manufacturing. See id.; UJI 14-2801 NMRA. The jury was also instructed that it could convict Defendant of attempt to manufacture under a theory of accessory liability if it found, beyond a reasonable doubt, that (1) Defendant intended that the crime be committed, (2) an attempt to commit the crime was committed, and (3) Defendant helped, encouraged, or caused the attempt to commit the crime. See NMSA 1978, § 30-1-13 (1972); UJI 14-2820 NMRA.

9] Defendant claims on appeal that the conviction was based on insufficient evidence and that the district court’s refusal to admit the photograph of Ms. Carter was error and violated Defendant’s due process right to present a defense.

DISCUSSION
A. The Evidence Was Sufficient

1. Standard of Review

10] Substantial evidence review requires analysis of whether direct or circumstantial substantial evidence exists and supports a verdict of guilt beyond a reasonable doubt with respect to every element essential for conviction. State v. Sutphin, 107 N.M. 126, 131, 753 P.2d 1314, 1319 (1988); State v. Brenn, 2005-NMCA-121, ¶ 4, 138 N.M. 451, 121 P.3d 1050. We determine whether a rational factfinder could have found that each element of the crime was established beyond a reasonable doubt. State v. Garcia, 114 N.M. 269, 274, 837 P.2d 862, 867 (1992); Brenn, 2005-NMCA-121, ¶ 4. “We view the evidence in the light most favorable to the supporting the verdict and resolve all conflicts and indulge all inferences in favor of upholding the verdict.” State v. Hernandez, 115 N.M. 6, 26, 846 P.2d 312, 332 (1993); Brenn, 2005-NMCA-121, ¶ 4. Appellate courts do not weigh the evidence or substitute any judgment for that of the jury. State v. Lankford, 92 N.M. 1, 2, 582 P.2d 378, 379 (1978); Brenn, 2005-NMCA-121, ¶ 4.

11] We review de novo whether an insurmountable statutory ambiguity persists such that we should apply the rule of lenity. See State v. Davis, 2003-NMSC-022, ¶¶ 6, 14-15, 134 N.M. 172, 74 P.3d 1064; see also State v. Rael, 1999-NMCA-068, ¶ 5, 127 N.M. 347, 981 P.2d 280 (recognizing that review of a district court’s denial of a motion for directed verdict may turn upon resolution of matters of statutory interpretation, subject to de novo review).

2. The Merits of the Sufficiency Issue

12] Defendant contends that “[t]he State failed to prove that [Defendant] took a single step toward manufacturing methamphetamine, let alone ‘an act that constituted a substantial part of manufacturing.’” Defendant argues: (1) the purchase of boxes of matches is not producing, preparing, compounding, converting or processing; (2) there is no evidence that Defendant went to Ms. Carter’s home in Clovis or that the officers found any necessary ingredients inside that home for manufacture of methamphetamine by any means; and (3) there is no evidence as to the amount of red phosphorous needed to manufacture methamphetamine, why the number of matches is relevant, or that the boxes of matches purchased were altered in any way.

13] In addition, Defendant contends that under the rule of lenity this Court should conclude that Section 30-28-1 should not be extended to this circumstance of “an otherwise lawful purchase of goods given to someone that may or may not use them for an illegal purpose.” Defendant analogizes the circumstances in this case to those involving the conspiracy charge in State v. Maldonado, 2005-NMCA-072, 137 N.M. 699, 114 P.3d 379. The issue in Maldonado was “a recurring question in the law of conspiracy[,]” Id. ¶ 9. The majority considered the issue to be one of statutory construction, subject to de novo review. Id. In Maldonado, the Court held that the crime of conspiracy as defined and intended by the Legislature did not extend to the defendant’s actions and knowledge. See id. ¶¶ 13, 18. In Maldonado, the defendant purchased one box and was in the process of attempting to shoplift four more boxes of pseudoephedrine tablets with the intent to sell them to another person whom he knew used such goods for the manufacture of methamphetamine. Id. ¶ 2-3. Defendant also argues that “Section 30-28-2(A) does not clearly and unequivocally alert a person in [Defendant’s] position to the possibility of prosecution and punishment as an accessory to an attempt to manufacture methamphetamine” under the circumstances in this case. NMSA 1978, § 30-28-2(A) (1979) sets out the definition of conspiracy. Because conspiracy was not charged in the present case, we assume that Defendant meant to refer to Section 30-28-1.

14] The evidence most favorable to the verdict, with all reasonable inferences indulged in favor of the verdict, shows or gives rise to reasonable inferences that Defendant took steps and overtly acted in furtherance of manufacturing methamphetamine. That evidence is that Defendant purchased thirty-five boxes of matches from several different stores, one right after the other; that the matchboxes contain red phosphorous, a key ingredient in the manufacture of methamphetamine; that Defendant bought the boxes of matches for her sister and turned them all over to her sister; that Defendant knew that the matchboxes were scraped for red phosphorous and she knew the substance was used in the manufacture of methamphetamine; that the matchboxes were going to be used in the manufacture of methamphetamine; and that together with her sister she purchased or financed the purchase of other products that were ingredients commonly used in the manufacture of methamphetamine, namely, Coleman fuel and distilled water.

15] We have no doubt that a rational jury could reasonably infer from the evidence, and conclude beyond a reasonable doubt, that Defendant’s actions constituted a substantial part of trafficking activity, including acting as an accessory by intending that the crime be committed and by helping, encouraging, or causing an attempt to commit the crime. See Brenn, 2005-NMCA-121, ¶ 14 (stating that “even slight acts in furtherance of the crime will constitute an attempt” (alteration omitted) (internal quotation marks and citation omitted)); see also State v. Carrasco, 1997-NMSC-047, ¶ 7, 124 N.M. 64, 946 P.2d 1075 (stating that “intent can be inferred from behavior which encourages [an] act”); State v. Bankert, 117 N.M. 614, 619, 875 P.2d 370, 375 (1994) (“Intent may be proved by inference from the surrounding facts and circumstances.”) (internal quotation marks and citation omitted).

16] Relying on Maldonado, Defendant argues that we should apply the rule of lenity. We disagree. “The rule of lenity counsels that criminal statutes should be interpreted in a defendant’s favor when insurmountable ambiguity persists regarding the intended scope of a criminal statute.” Davis, 2003-NMSC-022, ¶ 14. The holding in Maldonado is limited to its facts and to the conspiracy statute at issue in the case. See Maldonado, 2005-NMCA-072, ¶¶ 8, 9, 14. The facts and statute at issue in Maldonado distinguishes it from the present case. Not only was the holding specific to the “recurring question in the law of conspiracy,” id. ¶ 9, critical in Maldonado was the distinction between “merely knowing that the purchaser may commit a felony and sharing the purchaser’s purpose to commit
a felony.” *Id.* ¶ 19. In the present case, there was evidence from which the jury could rationally and reasonably have inferred and concluded that Defendant knew about the intended use of the items purchased. The State did not have to prove the element necessary for a conspiracy conviction, namely that Defendant and her sister had a shared purpose in regard to manufacturing methamphetamine. In addition, Section 30-28-1 is not rendered ambiguous, unclear, or lacking in notice, merely because the act in furtherance of the crime consists in part of the purchase of otherwise lawful goods. We see no insurmountable ambiguity or even a lack of clarity in Section 30-28-1 that would require application of the rule of lenity in this case. The jury could have rationally and reasonably fit the facts of the present case into the elements of the attempt statute. There exists no need to or purpose to be gained by attempting to limit the scope of Section 30-28-1 in this case, or to apply the rule of lenity.

{17} We hold that there was sufficient evidence to convict Defendant of attempted manufacture of methamphetamine.

**B. The Photograph Was Properly Excluded**


**2. The Merits of the Evidence Issue**

{19} The district court refused admission of Ms. Carter’s photograph because Defendant had not given notice of alibi as required under Rule 5-508, which states in relevant part:

A. Notice. In criminal cases . . . upon the written demand of the district attorney, . . . a defendant who intends to offer evidence of an alibi . . . as a defense shall, not less than ten (10) days before trial or such other time as the district court may direct, serve upon such district attorney a notice in writing of the defendant’s intention to introduce evidence of an alibi . . . .

. . .

D. Failure to give notice. If a defendant fails to serve a copy of such notice as herein required, the court may exclude evidence offered by such defendant for the purpose of proving an alibi, except the testimony of the defendant himself.

In the present case, the State served a written demand five months before trial that required Defendant to serve a notice of any alibi Defendant intended to assert as a defense. Defendant failed to respond to the State’s written demand.

{20} The district court has discretion to preclude evidence as a sanction for failure to comply with a demand for notice of alibi. Rule 5-508; see *State v. Watley*, 109 N.M. 619, 621, 788 P.2d 375, 377 (Ct. App. 1989). In asserting the defense that it was her sister that purchased the matchboxes, Defendant contends that the defense is one of mistaken identity, not that of alibi. Alternatively, Defendant contends that even if the defense is that of alibi, the district court abused its discretion by not declaring a mistrial because Defendant’s counsel’s failure to give notice of alibi constituted ineffective assistance of counsel.

{21} We are unpersuaded by Defendant’s argument that the mistaken identity defense she asserts is not an alibi defense. In essence, the defense was that, during the time in question, she was not in the convenience stores but, rather, was at her sister’s apartment watching her sister’s grandchildren, and therefore, because of the close resemblance of the sisters, it was easy for the officers to have mistaken her (Defendant) as the one purchasing the matchboxes. We agree with the State that her mistaken identity argument is simply evidence to support her alibi, notice of which she was obliged to give.

{22} As to the district court’s application of Rule 5-508 to exclude the photograph, Defendant nowhere indicates that she sought a district court analysis and balancing of “the potential for prejudice to the prosecution against the impact on the defense and whether the evidence might have been material to the outcome of the trial.” *Watley*, 109 N.M. at 621, 788 P.2d at 377 (internal quotation marks and citation omitted). She sets out no such analysis on appeal. She simply argues that the photograph was “worth a thousand words” and was highly probative on an issue central to her defense: “mistaken identity.” Defendant provides no facts or argument to persuade us that admission of the photograph might have been material to the outcome of the trial. We cannot fault the district court under the abuse of discretion standard for denying admission of the photograph. The photograph could reasonably have been considered cumulative evidence, with its exclusion non-prejudicial, in that in addition to Defendant’s testimony that she and her sister looked remarkably similar, two officers who testified agreed that Defendant and Ms. Carter closely resembled one another. Furthermore, the testimony of the officers as to Defendant’s identity was unequivocal. The officers positively identified Defendant as the person who purchased the matchboxes and testified as to the differences they saw between the two women that distinguished them. Moreover, Defendant admitted in an interview that it was she (Defendant) who purchased the matches.

{23} Further, Defendant did not establish a prima facie case of ineffective assistance of counsel. *See State v. Baca*, 1997-NMSC-059, ¶ 24, 124 N.M. 333, 950 P.2d 776 (stating that a defendant has the burden of overcoming the presumption of effective assistance of counsel). A prima facie case of ineffective assistance of counsel is made by showing that defense counsel’s performance fell below the standard of a reasonably competent attorney and, as a result of that deficient performance, the defense was prejudiced. *Id.* To establish prejudice, Defendant must show that there is a reasonable probability that, but for the deficient representation, the result would have been different. *State v. Dartez*, 1998-NMCA-009, ¶ 26, 124 N.M. 455, 952 P.2d 450.

{24} We need not address the first prong of the test, whether counsel’s performance was deficient. Defendant failed to establish a prima facie case of prejudice. The officers had no difficulty identifying Defendant or distinguishing Defendant and her sister. Defendant had adequate opportunity to argue mistaken identity based on her own testimony, and that of the officers, that Defendant and her sister looked alike, and that it was her sister who purchased the matchboxes. Defendant, as well, made very damaging admissions. Defendant has shown nothing to persuade us that admission of the photograph would have changed the result.

**CONCLUSION**

{25} We affirm Defendant’s conviction.

{26} IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:

A. JOSEPH ALARID, Judge

JAMES J. WECHSLER, Judge
From the New Mexico Court of Appeals

Opinion Number: 2006-NMCA-135


APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
JAMES A. HALL, District Judge

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RICHARD B. COLE LAW & RESOURCE PLANNING ASSOCIATES Albuquerque, New Mexico for Appellee

Opinion

MICHAEL E. VIGIL, Judge

1. This is a condemnation action filed by the Board of Education, Moriarty Municipal School District (School District) against Thunder Mountain Water Company (Thunder Mountain). As a public utility customer of Thunder Mountain, the School District was charged and paid a fee for installation of a water line extension to one of its schools as a “contribution in aid of construction” (CIAC). The School District thereafter brought an action to condemn that same water line extension and asserted it was entitled to deduct the CIAC charge from the compensation due to Thunder Mountain. The district court disagreed and granted Thunder Mountain summary judgment. We conclude that a CIAC charge is used for the purpose of setting utility rates, that it is not equivalent to the fair market value of property in a condemnation action, and that deducting the CIAC charge from the condemnation award will result in an unconstitutional taking of property without just compensation. We therefore affirm the district court.

FACTUAL AND PROCEDURAL HISTORY

2. The property that is the subject of this condemnation action is a part of the water distribution system owned by Thunder Mountain, which was providing water service to Edgewood Middle School. The School District was constructing Edgewood Middle School in 1999, and wanted to obtain water for consumptive use and fire protection at the school, so it entered into a “Construction Contract and Water Service Agreement” (Agreement) with Thunder Mountain to obtain the water service. The Agreement required the School District to furnish Thunder Mountain all necessary easements and rights-of-way for the construction and maintenance of the water line extension. Pursuant to the Agreement, Thunder Mountain tapped into its main on the road that fronts the school and installed the water line extension on the school campus. The School District in turn paid Thunder Mountain $60,715 for installing the water line extension as a CIAC charge.

Thunder Mountain is a public utility that is regulated by the New Mexico Public Regulation Commission (PRC) and the provision in the Agreement providing for the CIAC charge was required by regulations of the PRC under which Thunder Mountain operates. The Agreement further provided that Thunder Mountain was responsible for the maintenance and upkeep of the new system, that the School District would purchase water for consumptive use for the life of the school, and that Thunder Mountain would provide water for consumptive use and fire protection for the life of the school “in accordance with the rules and regulations set forth by the New Mexico Public Regulation Commission.”

3. In February 2002, the School District terminated the Agreement and decided to obtain water for the school from one of its own wells, claiming that the water provided by Thunder Mountain was corrosive and damaged the school’s plumbing system. The School District then demanded that Thunder Mountain convey title of the water line extension and associated property to the School District, asserting that when it paid the CIAC charge pursuant to the Agreement, it paid for the property. Thunder Mountain refused and the School District filed its petition for eminent domain to condemn the water line extension and associated property pursuant to the Eminent Domain Code, NMSA 1978, Sections 42A-1-1 to -33 (1981, as amended through 2001) and the Special Alternative Condemnation Procedures Act, NMSA 1978, Sections 42-2-1 to -16 (1959, as amended through 1981). The specific property consists of 2,700 linear feet of eight-inch water transmission line, a water meter and related valves, and approximately ten feet of stub-out of a fire protection line. The parties agree that the property has an actual value of $60,715.

4. The School District acknowledged in its petition that Thunder Mountain owned the property, but asserted that no compensation was owed Thunder Mountain because it paid for the property when it paid the CIAC charge. In its answer, Thunder Mountain denied that the School District was entitled to deduct the CIAC charge from the value of the property and asserted that it was entitled to compensation damages equal to the value of the property as well as other damages not at issue in this case. After the School District deposited $60,877 with the clerk of the district court and the School District was given permanent possession of the property, the only question to be decided by the district court was the amount of compensation owed to Thunder Mountain. The parties then filed motions for summary judgment and responses addressing the compensation issue.

5. The district court determined that Thunder Mountain was entitled to damages for the actual value of all the property taken by the School District, including the property contributed to Thunder Mountain as a CIAC charge and that the School District is not entitled to deduct the CIAC charge under Section 42A-1-24(D), because this statute is not applicable to contributed property. Judgment in favor of Thunder Mountain was entered in the amount of...
$60,715, plus statutory interest, with title to the property vesting in the School District upon payment of the judgment. The School District appeals.

[6] The material facts are undisputed. We therefore apply a de novo standard of review to the legal conclusions made by the district court. See Whittington v. State Dep’t of Pub. Safety, 2004-NMCA-124, ¶ 5, 136 N.M. 503, 100 P.3d 209 (stating that our review of a summary judgment order is de novo when the material facts are undisputed); Vill. of Wagon Mound v. Mora Trust, 2003-NMCA-035, ¶ 26, 133 N.M. 373, 62 P.3d 1255 (stating that on appeal from a summary judgment order, this Court decides the legal interpretation of the facts de novo when the relevant facts are undisputed).

[7] The precise issue presented is the amount of compensation Thunder Mountain is entitled to receive for the property from the School District in light of its payment of the CIAC charge to Thunder Mountain. In this case, the CIAC charge is equivalent to the fair market value of the property condemned. Relying on cases that address the rate-making process of a regulated utility, the School District argues that it is entitled to a dollar-for-dollar credit as a matter of law. Otherwise, it asserts, the “practical effect” is to require the School District to pay for the same property twice, and Thunder Mountain will receive more than the just compensation it is entitled to for the property. The School District also argues it is entitled to deduct the CIAC payment from the compensation due to Thunder Mountain under Section 42A-1-24(D).

ABSENCE OF DOUBLE RECOVERY

[8] Thunder Mountain is a regulated utility monopoly. As such, it has agreed to exchange the freedom to determine whom it will serve, what it will charge for its service, and how it will finance or invest its resources for the freedom from competition that it enjoys. See Doña Ana Mut. Domestic Water Consumers Ass’n v. N.M. Pub. Regulation Comm’n, 2006-NMSC-032, ¶ 16, __ N.M., __ P.3d __, [No. 29,242 (N.M. Sup. Ct. June 20, 2006)]. As a regulated utility, the rates it is allowed to charge for its services must be “just and reasonable” as determined by the PRC. NMSA 1978, § 62-8-1 (1953) (“Every rate made, demanded or received by any public utility shall be just and reasonable.”); NMSA 1978, §§ 62-6-4 to -26.1 (2005) (establishing the PRC and setting out rate-making powers, associated duties, and procedures).

In setting just and reasonable rates, the PRC “must balance the investor’s interest against the ratepayer’s interest.” Behles v. N.M. Pub. Serv. Comm’n (In re Application of Timberon Water Co.), 114 N.M. 154, 161, 836 P.2d 73, 80 (1992). The “traditional elements” of the rate base/rate of return rate-making process to establish the revenue requirements of a regulated utility are “(1) determination of the costs of the operation, (2) determination of the rate base which is the value of the property minus accrued depreciation, and (3) determination of the rate of return.” Hobbs Gas Co. v. N.M. Pub. Serv. Comm’n, 94 N.M. 731, 733, 616 P.2d 1116, 1118 (1980) (citing Charles F. Phillips, Jr., The Economics of Regulation 178 (1972)). This case concerns the rate base, which is “the measure of the current value of property or investments owned by the utility in rendering service to the public.” Id. Property owned by a utility such as Thunder Mountain that is obtained through a CIAC charge is not included in its rate base. In Timberon Water Co., 114 N.M. at 157, 836 P.2d at 76, our Supreme Court explained that CIAC is “cost-free capital to the utility” and is therefore deducted from the rate base for rate-making purposes with the result that depreciation on the contributed property is not permitted. Id. This approach is appropriate because depreciation permits a utility to recoup its investment, but when the property is contributed, there is nothing to be recovered. Id. Rate base should not be called upon to assist a utility in recovering an investment that the utility acquired without incurring any costs. See Rangeley Water Co. v. Rangeley Water Dist., 1997 ME 32, ¶ 17, 691 A.2d 171 (“In a rate proceeding, contributed property is not included in a utility’s rate base because it would be unfair to allow the utility’s investors to recoup from ratepayers money that the utility did not expend.”).

[10] The School District asks us to consider Timberon and other rate-making cases to conclude that because the CIAC property is subject only to the bare legal title of Thunder Mountain, is considered a liability in the PRC’s uniform system of accounts and is not included in Thunder Mountain’s rate base, it should not be considered an asset of the utility. See Cogent Pub. Serv., Inc., 688 P.2d 698; Princess Anne Util. Corp. v. Commonwealth ex rel. State Corp. Comm’n, 179 S.E.2d 714, 716 (Va. 1971) (concluding it was proper to exclude contributions in aid of construction from rate base in petition to increase rates for sewage service); City of Hagerstown v. Pub. Serv. Comm’n, 141 A.2d 699, 702, 705 (Md. 1958) (approving deduction of CIAC in setting rates for city water utility). We first note that although CIAC is a liability of a utility under the PRC uniform system of accounts, Thunder Mountain had no liability as a result of the School District’s contribution because the system extension to serve the School District could not be further extended to serve other customers. As to the nature of the CIAC as an asset, the School District asks in particular that we consider City of South Bend v. Users of Sewage Disposal Facilities, 402 N.E.2d 1267, 1274-75 (Ind. Ct. App. 1980) in which the court in dictum approved deducting CIAC in fixing reasonable compensation in a municipality’s statutory acquisition of a utility. However, we do not find the reasoning of City of South Bend persuasive or applicable here because a traditional condemnation action was not used in that case as in this case, and the entire discussion upon which the School District relies is dictum and acknowledged as such by that court itself.

[11] We conclude that the rate making cases the School District asks us to follow are inapplicable. In United Water New Mexico, Inc. v. Public Utility Commission, 121 N.M. 272, 910 P.2d. 906 (1996), the question presented to our Supreme Court was whether the Public Utilities Commission (PUC) should have jurisdiction over condemnation actions. Id. at 275, 910 P.2d at 909. Concluding that such jurisdiction by the PUC was not appropriate, the United Water court cited Dade County v. General Waterworks Corp., 267 So. 2d 633, 640 (Fla. 1972), in recognizing that there is a “complete dissimilarity between rate-making concepts and the just or full compensation standards which govern eminent domain,” and that rate-making concepts are not properly a basis for determining fair market value. United Water, 121 N.M. at 279, 910 P.2d at 913 (internal quotation marks and citation omitted). Furthermore, the United Water court observed that the amount of compensation to be determined in an eminent domain case “cannot be limited by an administrative agency either directly or indirectly.” Id. We therefore turn to condemnation cases and principles to answer the question presented in this case. [12] The School District exercised its right to acquire the water line extension belonging to Thunder Mountain by eminent domain. The Takings Clause of the Fifth Amendment to the United States Consti-
tution provides, “[P]rivate property [shall not] be taken for public use, without just compensation” and Article II, Section 20 of the New Mexico Constitution states, “Private property shall not be taken or damaged for public use without just compensation.” Thunder Mountain is constitutionally entitled to “just compensation” for the taking. See Manning v. Mining & Minerals Div., 2006-NMSC-027, ¶10, ___ N.M. ___, P.3d ___, No. 28,500 (N.M. Sup. Ct. June 1, 2006) (stating that just compensation is the specific remedy of the Takings Clause in the Fifth Amendment); City of Sunland Park v. Santa Teresa Servs. Co., 2003-NMCA-106, ¶43, 134 N.M. 243, 75 P.3d 843 (“The primary condition to the exercise of eminent domain is the constitutional requirement to pay just compensation.”). It is entitled to the fair market value of the property on the date of the taking. UJI 13-703 NMRA.

Condemnation cases teach that property contributed to the utility by a CIAC is not excluded from just compensation.

The case which we find most similar to the one before us is Rangeley Water Co. v. Rangeley Water Dist., 1997 ME 32, 691 A.2d 171. The condemning authority challenged the valuation of the assets of a water company it condemned, including a 1200 foot water line which attached to a main line and extended to a three-building condominium complex to provide water service to nine condominiums in three buildings. Id. ¶¶ 1, 13. Specifically, the condemning authority claimed that the line should not have been included in the valuation because the water line was contributed property (i.e., CIAC) and the water company did not pay to acquire it. Id. ¶ 17. The Maine Supreme Court rejected this argument and held that the water company was entitled to be compensated for the water line because rate-making cannot be equated with eminent domain as a basis for determining fair market value in light of the “complete dissimilarity” between just compensation standards and rate-making concepts. Id. ¶ 18. The Maryland Court of Appeals has also considered the same question and arrived at the same conclusion. Wash. Suburban Sanitary Comm’n v. Util., Inc. of Md., 775 A.2d 1178, 1194 (Md. 2001) (holding that a statute that required that the value of all property that was contributed to the utility as CIAC be deducted in an eminent domain proceeding violated the constitutional prohibition against a taking without just compensation); see also Dade County, 267 So. 2d at 639-40 (agreeing that because of differences between rate-making and condemnation, a utility property owner is entitled to be compensated for property taken by eminent domain that was contributed to the utility as CIAC); Onondaga County Water Auth. v. N.Y. Water Serv. Corp., 139 N.Y.S.2d 755, 763 (N.Y. App. Div. 1955) (“[B]y virtue of the vast distinction between the value for rate-making and the value of property for purchase or condemnation, this measure of value should not, and seldom does, carry much weight in the determination of just compensation.”).

The nub of this case is whether the unique circumstances presented require a different result. Unlike Rangeley, in this case the condemning authority contributed the property at issue. In addition, the amount of the School District’s contribution is, by stipulation of the parties, the fair market value of the property. The transparency of the circumstances gives appeal to the School District’s argument that it is unfair for the School District to pay twice for the property.

But this argument fails based on condemnation principles. Unless the School District, as condemnor, pays for the property, Thunder Mountain will not receive its just compensation for the property in the condemnation. The School District’s CIAC is a separate act from the condemnation. The CIAC enabled Thunder Mountain, as a regulated utility, to provide service to the School District. Because the School District paid the charge, required by the PRC, the cost was not passed on to other customers of Thunder Mountain, thus achieving the statutory goal of imposing just and reasonable rates for all of Thunder Mountain’s customers. The School District, thereafter, decided to change course and provide its own service. Because Thunder Mountain had established the system through the CIAC and had undertaken the service, the School District had to undertake condemnation proceedings. In those proceedings, Thunder Mountain is entitled to just compensation. Regardless of the manner in which Thunder Mountain acquired the property or carries it in its books, it has the title to the property and has used it to provide utility service.

Therefore, we cannot agree with the School District that Thunder Mountain receives a “windfall” under the district court’s order resulting in unjust compensation. Instead, we conclude that deducting the CIAC payment from the condemnation award would unconstitutionally deprive Thunder Mountain of its property without just compensation.

APPLICABILITY OF SECTION 42A-1-24(D)

The judgment shall credit against the total amount awarded to the condemnee any payments or deposits paid over to him made before the date of entry of judgment by the condemnor as compensation for the property taken, including any funds which the condemnee withdrew from the amount deposited by the condemnor pursuant to the provisions of Section 42A-1-19 or 42A-1-22[.] (emphasis added). The plain language of this statute clearly indicates that the sum paid by the School District as contribution in aid of construction does not entitle the School District to credit against the total amount awarded to Thunder Mountain under the Eminent Domain Code. See Alba v. Peoples Energy Res. Corp., 2004-NMCA-084, ¶17, 136 N.M. 79, 94P.3d 822 (stating that the “primary indicator” of the legislature’s intent is the plain language of the statute, and we are to give the words used in the statute their ordinary meaning unless the legislature indicates a different intent). This statute states that the credit applies to sums paid as “compensation for the property taken.” Section 42A-1-24(D).

The $60,715 paid by the School District in 1999, was a contractual obligation made in “contribution in aid of construction” so that the School District could obtain water service, not so that the School District could take the property by condemnation as it subsequently did in 2002. We therefore decline to extend Section 42A-1-24(D) to apply to the CIAC paid by the School District.

CONCLUSION

For the reason stated above, we affirm the order of the district court.

IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Chief Judge

JAMES J. WECHSLER, Judge
From the New Mexico Court of Appeals

Opinion Number: 2006-NMCA-136

IN THE MATTER OF THE ADOPTION PETITION OF
BOBBY A. ROMERO AND ROSARIO ROMERO
BOBBY A. ROMERO and ROSARIO ROMERO,
Petitioners-Appellees
HELEN G.,
Biological Mother-Appellee
versus
MARK J. H.,
Biological Father-Appellant.
No. 25,877 (filed: September 7, 2006)

APPEAL FROM THE DISTRICT COURT OF VALENCIA COUNTY
JOHN W. POPE, District Judge

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ATENCIO LAW OFFICE, P.C.
Albuquerque, New Mexico
for Appellees Adoptive Parents

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KRISTIN MCKEEVER
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Albuquerque, New Mexico
for Appellee Biological Mother

MARK J. H.
Edgewood, New Mexico
Pro Se Appellant

REBECCA J. LIGGETT
PAULA GANZ
Children, Youth and Families Department
Santa Fe, New Mexico
for Children, Youth and Families Department

OPINION

CYNTHIA A. FRY, Judge

1. Petitioners have filed a motion for rehearing, which we hereby deny. We withdraw the opinion filed July 26, 2006, and substitute this opinion in its stead.

2. In this adoption proceeding, in which the district court terminated the biological father’s parental rights, we consider under what circumstances our statutes require a biological father’s consent to an adoption. Because we conclude the father’s consent was required in this case, we also determine what must be shown to terminate parental rights under our presumptive abandonment statute. NMSA 1978, § 32A-5-15(B), (C) (1995). We conclude that a biological father’s conduct prior to a child’s birth cannot be used as a basis for finding that the father caused the disintegration of the parent-child relationship under the circumstances of this case. We further conclude that the evidence did not support the district court’s finding of presumptive abandonment in this case. We therefore reverse the district court’s judgment terminating the biological father’s parental rights and remand for a consideration of who should have custody of the child. See In re Adoption of J.J.B., 119 N.M. 638, 651, 894 P.2d 994, 1007 (1995) (explaining that reversal of a judgment terminating parental rights in an adoption case results in a separate determination of who should have custody).

BACKGROUND

3. The parties do not dispute the events leading to the biological mother’s pregnancy. (Because the biological mother wishes to retain anonymity, we refer to her and the biological father by their first names, Helen and Mark.) Helen worked at the front desk of a hotel in Albuquerque when she met Mark, an account executive for a chemical company that delivered chemicals to the hotel. Mark helped Helen find a job at another hotel, which is where she worked at the relevant times. Mark and Helen had a sexual relationship from about January 2003 to June 2003; neither used any form of contraception. Mark and Helen ended their relationship in June 2003, and Helen gave birth to the child in February 2004. Mark and Helen had no further communication after their relationship ended, and Helen placed the baby for adoption with Petitioners Bobby Antonio R. and Rosario R. when the child was three days old.

4. Mark testified that he did not know Helen was pregnant and did not know of the child’s existence until he was notified by the adoption agency about two months after the child’s birth. The district court apparently did not believe Mark because it found that Mark “knew or should have known that he fathered a child with [Helen].” The evidence supported this finding. See Vigil v. Fogerson, 2006-NMCA-010, ¶ 26, 138 N.M. 822, 126 P.3d 1186 (explaining that appellate court determines whether substantial evidence supports district court’s findings, resolving all disputes in favor of the successful party). Helen testified that she told Mark twice that she might be pregnant and that he had at least one opportunity to see her when she was visibly pregnant. In addition, one of Helen’s co-workers testified that Mark told the co-worker he knew Helen was pregnant but he did not know if the child was his. It is undisputed that Mark did not provide Helen with any financial support during her pregnancy.

5. Upon receiving notice from the adoption agency, Mark immediately called the adoption agency and met with the agency’s executive director the following day to determine whether he could obtain custody of the child. When he found that he could not, he hired an attorney the same day. He registered with the state’s putative father registry the next day. He filed a paternity petition in April 2004 and contested the adoption petition filed by Petitioners. DNA testing established that Mark was in fact the child’s biological father.

6. At trial, Petitioners sought termination of Mark’s parental rights on the ground of presumptive abandonment pursuant to Section 32A-5-15(B), (C). After hearing the evidence, the district court concluded that Mark’s “actions or lack thereof with regard[] to the [child] has created a presumption of abandonment, which has not been rebutted.” The court ordered termination of Mark’s parental rights and found that it was in the child’s best interests to remain
with Petitioners. Mark appealed.

**DISCUSSION**

{7} We begin with the premise “that the relationship between parent and child is constitutionally protected.” *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978). As the United States Supreme Court said in *Prince v. Massachusetts*, “[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.” 321 U.S. 158, 166 (1944). However, the law also recognizes that a father’s “mere biological relationship with [a] child [does] not warrant the same degree of constitutional protection as a developed parent-child relationship in which an unwed father demonstrates a full commitment to the responsibilities of parenthood.” *In re Adoption of J.J.B.*, 119 N.M. at 646, 894 P.2d at 1002.

{8} It is against this backdrop that we analyze the arguments of the parties in this emotionally fraught and difficult case. Our legislature has imposed a statutory framework governing the rights of parents and prospective adoptive parents, while at the same time keeping a child’s best interests at the forefront. See NMSA 1978, § 32A-5-2 (1993) (stating that purpose of the Adoption Act is to establish protective and secure adoptive family relationships and to “ensure due process protections”); § 32A-5-15(A) (stating that “[t]he physical, mental and emotional welfare and needs of the child shall be the primary consideration for the termination of parental rights”). It is our task to discern and carry out the legislature’s intent in enacting the statutes at issue. See *State v. Lopez*, 2000-NMCA-001, ¶ 3, 128 N.M. 450, 993 P.2d 767.

{9} In this opinion we address two general areas giving rise to the parties’ contentions: (1) whether Mark’s consent was required for the adoption of the child by Petitioners, and (2) whether the evidence supported the district court’s finding that Mark presumptively abandoned the child.

1. **Whether Mark’s Consent Was Required**

{10} The parties make various arguments regarding whether Mark was an “alleged father” or an “acknowledged father,” as those terms are statutorily defined. The parties then argue, based on which label applies, whether Mark’s consent was required for Petitioners’ adoption of the child. Petitioners contend Mark’s consent was not required.

{11} In order to put Petitioners’ argument in context, it is helpful to first review the relevant provisions of the Adoption Act. In the course of this review we will address Petitioners’ contentions about the meaning of the various provisions of the Act. The interpretation of statutes is a question of law that we review de novo. *N.M. Dep’t of Labor v. Echostar Commc’ns Corp.*, 2006-NMCA-047, ¶ 5, 139 N.M. 493, 134 P.3d 780, cert. granted, 2006-NMCERT-004, 139 N.M. 429, 134 P.3d 120. “The language of unambiguous [statutory] provisions must be given effect without further interpretation. Only ambiguous provisions require us to delve into the legislative purpose behind the statute.” *State v. Jose S.*, 2005-NMCA-094, ¶ 6, 138 N.M. 44, 116 P.3d 115 (citation omitted).

{12} NMSA 1978, § 32A-5-36(C) (2003) addresses the situation confronted by the district court in the present case. It provides:

> C. If any person who claims to be the biological father of the adoptee has appeared before the court and filed a written petition or response seeking custody and assuming financial responsibility of the adoptee, the court shall hear evidence as to the merits of the petition. If the court determines by a preponderance of the evidence that the person is not the biological father of the adoptee or that the child was conceived through an act of rape or incest, the petition shall be dismissed and the person shall no longer be a party to the adoption. If the court determines that the person is the biological father of the adoptee, the court shall further determine whether the person qualifies as a presumed or acknowledged father whose consent is necessary for adoption, pursuant to Section 32A-5-17 NMSA 1978. If the court determines that the person is the biological father, but does not qualify as a presumed or acknowledged father, the court shall adjudicate the person’s rights pursuant to the provisions of the Adoption Act.

(Emphasis added.) In this case, the district court determined that Mark is the biological father of the child; therefore, the italicized portion of the statute was applicable, and the district court had to determine whether Mark was a presumed or acknowledged father.

{13} The reason the district court had to make this determination is because the Act provides that “[c]onsent to adoption or relinquishment of parental rights to the department or an agency licensed by the state of New Mexico shall be required of . . . the presumed father of the adoptee . . . or [the] adoptee’s acknowledged father.” NMSA 1978, § 32A-5-17(A)(4), (5) (2005). In addition, the Act provides that

> [t]he consent to adoption or relinquishment of parental rights required pursuant to the provisions of the Adoption Act . . . shall not be required from: . . . an alleged father who has failed to register with the putative father registry within ten days of the child’s birth and is not otherwise the acknowledged father.

NMSA 1978, § 32A-5-19(E) (2001) (emphasis added). Thus, consent to adoption is required of a presumed father and an acknowledged father.

{14} Mark was not a “presumed father,” which is defined as a person who was married to the biological mother at the time of the child’s birth or within a specified time of the child’s birth, or who attempted to marry the child’s mother. NMSA 1978, § 32A-5-3(V) (2005). However, it appears that Mark may have become an “acknowledged father” shortly after the adoption petition was filed.

{15} According to Section 32A-5-3(F), there are four ways a man can be an acknowledged father, only two of which are relevant to the present case. The two relevant ways are, first, when a father “acknowledges paternity of the adoptee pursuant to the putative father registry, as provided for in Section 32A-5-20,” § 32A-5-3(F)(1), or, second, when a father has openly held out the adoptee as his own child by establishing a custodial, personal or financial relationship with the adoptee as follows:

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1The legislature created the putative father registry “to protect the parental rights of fathers who affirmatively assume responsibility for children they may have fathered and to expedite adoptions of children whose biological fathers are unwilling to assume responsibility for their children by registering with the putative father registry or otherwise acknowledging their children.” NMSA 1978, § 32A-5-20(A) (1993).
(a) for an adoptee under six months old at the time of placement: 1) has initiated an action to establish paternity; 2) is living with the adoptee at the time the adoption petition is filed; 3) has lived with the mother a minimum of ninety days during the two-hundred-eighty-day-period prior to the birth or placement of the adoptee; 4) has lived with the adoptee within the ninety days immediately preceding the adoptive placement; 5) has provided reasonable and fair financial support to the mother during the pregnancy and in connection with the adoptee’s birth in accordance with the mother’s means and when not prevented from doing so by the person or authorized agency having lawful custody of the adoptee or the adoptee’s mother; 6) has continuously paid child support to the mother since the adoptee’s birth in an amount at least equal to the amount provided in [NMSA 1978, § 40-4-11.1 (1995)], or has brought current any delinquent child support payments; or 7) any other factor the court deems necessary to establish a custodial, personal or financial relationship with the adoptee.

§ 32A-5-3(F)(4) (emphasis added). Thus, the second way—“establishing a custodial, personal or financial relationship with the adoptee”—can be accomplished by seven specified, alternative means. Id.

{16} Mark registered with the putative father registry a few days after receiving notice of the adoption petition, which was about two months after the child’s birth, thereby seemingly fitting within Section 32A-5-3(F)(1). At about the same time, he filed a paternity petition, which was one of the alternative means listed in Section 32A-5-3(F)(4)(a). Therefore, shortly after receiving the adoption petition, Mark apparently satisfied two statutory definitions of “acknowledged father.”

{17} In their motion for rehearing, Petitioners argue that Mark could not have become an acknowledged father, whose consent was required, by registering with the putative father registry because he did not register within ten days of the child’s birth, as required by Section 32A-5-19(E). That statute provides that consent is not required from “an alleged father who has failed to register with the putative father registry within ten days of the child’s birth and is not otherwise the acknowledged father.” § 32A-5-19(E). Petitioners contend that “[a]bsent some other ground establishing that the father is an ‘acknowledged father’ under [Section] 32A-5-3(F) of the Act, registering as a putative father later than 10 days after the [birth] carries with it no right to veto the adoption.” We agree with Petitioners’ reading of Section 32A-5-19(E) and hold that Mark did not register in time to acquire acknowledged-father status via the putative father registry as provided in Section 32A-5-3(F)(1). Thus, as Petitioners note, in order to be deemed an acknowledged father, Mark had to satisfy one of the other grounds specified in Section 32A-5-3(F)(4). It appears that Mark did establish one of these grounds because he “initiated an action to establish paternity,” as provided in Section 32A-5-3(F)(4)(a)(1).

{18} Petitioners also challenge this basis for acknowledged-father status. In their brief in chief and reply brief on appeal, Petitioners contended Mark was not an acknowledged father because he “did not establish that he met any of the . . . methods of becoming an acknowledged father prior to the time of placement or the time of filing of the Petition for Adoption.” It appears Petitioners’ argument is that acknowledged-father status must be established prior to the child’s placement for adoption or, at minimum, prior to the filing of the adoption petition; otherwise, they contend, the putative father’s consent is not required for the adoption to be finalized.

{19} We do not agree with Petitioners’ interpretation of the statutory scheme for two reasons. First, there is nothing in Section 32A-5-36(C), which prescribes the determinations to be made when a putative father challenges an adoption, that ties a father’s status for purposes of consent to a particular date or event. While it makes sense that finalization of an adoption would cut off any subsequent attempts to achieve acknowledged-father status, that is not the situation in the present case. Thus, Mark’s status as an acknowledged father does not turn on whether he achieved that status prior to the time of placement or prior to the filing of the adoption petition; there is simply no such deadline within this statute.

{20} Second, Section 32A-5-3(F), which defines “acknowledged father,” selectively imposes a time restriction on some, but not all, of the alternative circumstances for establishing acknowledged fatherhood. For example, in order to satisfy the second of the seven alternatives listed in Subsection (F)(4)(a), the putative father must be “living with the adoptee at the time the adoption petition is filed.” § 32A-5-3(F)(4)(a) (emphasis added). Similarly, to satisfy the third alternative in Subsection (F)(4)(a), the father must “have] lived with the mother a minimum of ninety days during the two-hundred-eighty-day-period prior to the birth or placement of the adoptee.” Id. (emphasis added). Thus, the legislature placed time limitations on some of the alternative circumstances leading to acknowledged-father status and chose to place no limit on the alternative applicable in the present case: initiation of a paternity action in accordance with the first alternative listed under Section 32A-5-3(F)(4)(a).

{21} In their motion for rehearing, Petitioners expand their argument and point to specific aspects of Section 32A-5-3(F)(4), which they contend establish that Mark’s paternity petition was filed too late. They claim this is evidenced by the statute’s use of the past tense (i.e., “has openly held out” and, in Subsection (F)(4)(a)(1), “has initiated an action”), and the fact that all other alternative ways of achieving acknowledged-father status under Subsection (F)(4)(a) “uniformly require[] that a relationship has been established prior to the filing of the adoption petition.” We are not persuaded. The statute does not tie its use of the past tense to any particular event, such as the filing of the adoption petition. And, as we previously noted, the fact that the initiation of a paternity suit is the only alternative without a specific time limit suggests that the legislature knew how to impose time limits and purposely omitted the limits with respect to the alternative related to initiation of a paternity action.

{22} Also in their motion for rehearing, Petitioners argue that our recognition of Mark’s status as an acknowledged father is inconsistent with Section 32A-5-36(C), which establishes the procedures a district court must follow if a person claiming to be the biological father appears in an adoption proceeding and files “a written petition or response seeking custody and assuming financial responsibility of the adoptee.” Section 32A-5-36(C) requires the district court to first determine if the purported father is indeed the biological father and, if so, to then determine “whether the person qualifies as a presumed or acknowledged father whose consent is necessary for adoption.” Consequently, Petitioners argue, [il]
paternity in response to a petition for adoption was alone sufficient to meet the definition of “an acknowledged father whose consent is required.” . . . the second step of the inquiry provided for in [Section] 32A-5-36(C) would become entirely superfluous. Every biological father who appears in an adoption proceeding, without exception, would become, as a matter of law, “an acknowledged father whose consent for adoption is required.”

{23} We disagree. Not every purported biological father who appears in an adoption proceeding will file a motion to establish paternity, as Mark did here. We also do not agree that our holding renders superfluous the two-step determination required by Section 32A-5-36(C). While the filing of a paternity petition may give a petitioner automatic acknowledged-father status, thereby satisfying the second step of the district court’s determination, if the court determined that the petitioner was not the adoptee’s biological father, the first step would not be satisfied, and the district court would have to dismiss the petition.

{24} In our view, the legislature has determined that an adoption may not be finalized without a biological father’s consent if the father seeks to shoulder parental responsibility by requesting a paternity determination in the context of the adoption litigation. Thus, as long as he is indeed the biological father, the adoption cannot take place without his consent. We do not agree with Petitioners that our interpretation of the statutory scheme is inconsistent with the legislature’s policy of “encourag[ing] expeditious and uncomplicated adoptions.” We believe the Act strives to balance this policy goal with the goal of providing an unwed father the opportunity to commit to responsible parenthood and participate in his child’s rearing. See Lehr v. Robertson, 463 U.S. 248, 262 (1983) (“When an unwed father demonstrates full commitment to the responsibilities of parenthood by com[ing] forward to participate in the rearing of his child, his interest in personal contact with his child acquires substantial protection under the due process clause.”) (internal quotation marks and citation omitted; alteration in original)). We are not persuaded that the legislature intended to favor expeditious adoptions at the expense of a biological father’s rights.

{25} Petitioners further contend Mark’s consent was not required because the district court concluded as much. Petitioners rely on the following conclusions of law:

1. [The child] is the biological child of Mark . . . , which was determined by DNA testing after the Petition for the Adoption of [the child] was initiated.

2. At all times prior to Mark[s] . . . paternity test he was an “alleged father”.


4. A Court Order for Adoption is not required when the proceedings are conducted by a licensed agency.

5. For purposes of adoption, New Mexico Law does not require the consent of an “alleged father”. [§] 32A-5-17(A).

6. For purposes of adoption, New Mexico Law requires notice to “acknowledged” fathers.

7. [The adoption agency] had not received confirmation that Mark . . . was the biological father at any point prior to the pre-adoption placement of [the child].

8. [The adoption agency] made reasonable efforts to contact [Mark], although he was “alleged” and not an “acknowledged father” or “presumed father”.

9. The pre-adoption placement of [the child] was done properly.

Thus, Petitioners claim the district court found Mark to be an “alleged father” whose consent was not required.

{26} The Act defines an “alleged father” as “an individual whom the biological mother has identified as the biological father, but the individual has not acknowledged paternity or registered with the putative father registry as provided for in Section 32A-5-20.” § 32A-5-3(G). And, as we noted above, Section 32A-5-19(E) states that consent to adoption is not required from “an alleged father who has failed to register with the putative father registry within ten days of the child’s birth and is not otherwise the acknowledged father.”

{27} Petitioners are correct that the district court concluded Mark was an alleged father. But the district court also appears to have concluded that Mark was an alleged father only for a limited time because it stated that “[a]t all times prior to Mark’s . . . paternity test he was an ‘alleged father’.” This conclusion implies that Mark’s status changed after his paternity test. This implication is consistent with Mark’s becoming an “acknowledged father” under Section 32A-5-3(F)(4)(a), once he initiated his paternity petition.

{28} As for the remaining conclusions of law quoted above, they appear to be directed at issues that were contested below but not on appeal: whether the agency complied with statutory requirements when it placed the child with Petitioners and whether Mark received proper notice of the adoption proceeding. The district court ultimately concluded that everything was done appropriately, and the parties do not dispute this on appeal. We do not agree with Petitioners that the district court concluded that Mark’s consent was never required, even after he attained acknowledged-father status by filing a paternity petition. If the adoption could have proceeded without Mark’s consent, there would have been no need to litigate the issue of whether Mark’s parental rights should be terminated due to his alleged presumptive abandonment of the child.

{29} We conclude that Mark’s filing of a paternity petition while the adoption proceeding was pending established his status as an acknowledged father according to the plain language of the Act’s relevant provisions. As a result, his consent to the adoption was necessary. Because Mark did not consent to the adoption, Petitioners sought and obtained termination of his parental rights under the presumptive abandonment statute. § 32A-5-15(B), (C); see In re Adoption of J.J.B., 119 N.M. at 643, 894 P.2d at 999 (“Termination of parental rights eliminates the need for that parent’s consent to any proposed adoption.”). We therefore turn to an analysis of that statute and the district court’s determination.

2. Whether Clear and Convincing Evidence Supported the District Court’s Finding That Mark Presumptively Abandoned the Child

{30} We review the district court’s findings of presumptive abandonment to determine whether they are supported by substantial clear and convincing evidence. In re Adoption of J.J.B., 119 N.M. at 656, 894 P.2d at 1012 (Franchini, J., dissenting), which is evidence that “instantly tilt[s] the scales in the affirmative when weighed against the evidence in opposition and the fact finder’s mind is left with an abiding conviction that the evidence is true.” State ex rel. Children, Youth & Families Dep’t v. Joseph M., 2006-
NMCA-029, ¶ 15, 139 N.M. 137, 130 P.3d 198 (internal quotation marks and citation omitted). We view the evidence in the light most favorable to Petitioners, who were the prevailing parties below. In re Adoption of Doe, 89 N.M. 606, 619-20, 555 P.2d 906, 919-20 (Ct. App. 1976). We review de novo the district court’s application of the law to the facts. State v. Notah-Hunter, 2005-NMCA-074, ¶ 5, 137 N.M. 597, 113 P.3d 867. [31] Subsection B of the statute governing termination of parental rights provides three circumstances under which parental rights shall be terminated. The one relevant to this case is as follows:

(3) [T]he child has been placed in the care of others, including care by other relatives, either by a court order or otherwise, and the following conditions exist:

(a) the child has lived in the home of others for an extended period of time;
(b) the parent-child relationship has disintegrated;
(c) a psychological parent-child relationship has developed between the substitute family and the child;
(d) if the court deems the child of sufficient capacity to express a preference, the child no longer prefers to live with the natural parent;
(e) the substitute family desires to adopt the child; and
(f) a presumption of abandonment created by the conditions described in Subparagraphs (a) through (e) of this paragraph has not been rebutted.

§ 32A-5-15(B)(3)(a)-(f). Section 32A-5-15(C) then provides that “[a] finding by the court that all of the conditions set forth in Subparagraph (a) through (e) of Paragraph (3) of Subsection B of this section exist shall create a rebuttable presumption of abandonment.”

{32} At trial, Mark stipulated that all elements of presumptive abandonment exist except Subparagraph (b), “the parent-child relationship has disintegrated.” Mark contended below and on appeal that he had nothing to do with the disintegration of his relationship with the child because (1) he did not know that Helen was pregnant or that the child existed until he received notice from the adoption agency; and (2) he did nothing to cause disintegration of the relationship, and in fact he has done everything possible to nourish the relationship since the child’s birth. With respect to Mark’s first contention, the district court found that Mark “knew or should have known that he fathered a child with [Helen],” and we have concluded that substantial evidence supported this finding. We therefore consider Mark’s second point.

{33} Our Supreme Court addressed the requirements of the presumptive abandonment statute in In re Adoption of J.J.B. and stated:

[W]e have emphasized that two factors must both be established to prove abandonment: (1) parental conduct evidencing a conscious disregard of obligations owed to the child, and (2) this conduct must lead to the disintegration of the parent-child relationship. We emphasize that both factors must be established to prove abandonment, and that evidence of the disintegration of the parent-child relationship is of no consequence if not caused by the parent’s conduct. 119 N.M. at 648, 894 P.2d at 1004. Thus, the party seeking termination of parental rights (in this case, Petitioners) has the burden of proving “that the objective parental conduct [is] the cause of the destruction of the parental-child relationship.” Id. at 649, 894 P.2d at 1005. Further, the presumption of abandonment arising from proof of the factors listed in Section 32A-5-15(B)(3) “is completely rebutted by showing that a parent lacks responsibility for the destruction of the parent-child relationship.” In re Adoption of J.J.B., 119 N.M. at 649, 894 P.2d at 1005.

{34} Petitioners claim they proved that Mark’s objective conduct resulted in the destruction of his relationship with the child. They point to evidence that Mark knew or should have known that Helen was pregnant and yet failed to provide Helen with any financial or emotional support during her pregnancy. In fact, they argue, Mark failed to do anything to establish a relationship with the child until after he received notice of the pending adoption petition.

{35} It is true that Mark did nothing during Helen’s pregnancy that would indicate he intended to shoulder any parental responsibilities. However, as we read the presumptive abandonment statute and In re Adoption of J.J.B., Mark’s failure to act prior to the child’s birth in this case could not have “cause[d] . . . the destruction of the parental-child relationship.” Id.

{36} We first consider what is meant by the language of Section 32A-5-15(B)(3)(b), that “the parent-child relationship has disintegrated.” “We give the words of a statute their ordinary meaning in the absence of clear and express legislative intent to the contrary.” Fernandez v. Espanola Pub. Sch. Dist., 2005-NMSC-026, ¶ 33, 138 N.M. 283, 119 P.3d 163.

{37} The ordinary meaning of the statute contemplates a relationship that already exists, because one that does not yet exist cannot “disintegrate.” Petitioners’ arguments and the district court’s findings focus on Mark’s failure to act prior to the child’s birth. But this perspective does not logically fit within the ordinary meaning of the statutory words. Mark could not have a “relationship” with the child in utero, and there was therefore no relationship that could be subject to disintegration until the child was born.

{38} In their motion for rehearing, Petitioners point out that the statutory definition of an acknowledged father provides for the establishment of a relationship with a child before it is born. Section 32A-5-3(F)(4)(a)(5) provides that an acknowledged father includes one who “has openly held out the adoptee as his own child by establishing a custodial, personal or financial relationship with the adoptee” by “provide[ing] reasonable and fair financial support to the mother during the pregnancy and in connection with the adoptee’s birth in accordance with his means.” We agree with Petitioner that a father can establish a pre-natal relationship with a child in this way. However, a father’s “failure” to establish a relationship in this specific way does not mean that he has engaged in objective conduct causing the destruction of the parent-child relationship. In theory, a father who first established a relationship by supporting the mother through her pregnancy and the child’s birth could be subject to the abandonment presumption of Section 32A-5-15(B) if he then repudiated the child, refused to visit the child, and failed to support the child. But that is not the situation in the present case. Here, Mark’s failure to support Helen during her pregnancy means only that he denied himself the opportunity of attaining acknowledged-father status via this particular statutory option; instead, he attained that status by filing a paternity petition.

{39} While we agree with Petitioners that sound morals should compel a prospective father to provide indirect support to
a fetus by assisting the mother during her pregnancy, our statute does not require him to do so. This contrasts with statutes in other states that specifically permit courts to consider a father’s lack of support of a mother during her pregnancy when considering whether the father is entitled to notice of adoption proceedings or whether he has abandoned the child. See, e.g., Ala. Code § 26-10A-9(a)(1) (1992) (providing that pre-birth abandonment constitutes implied consent to adoption); Idaho Code Ann. § 16-1504(2)(b)(iii) (Supp. 2005) (stating that a father of a child born out of wedlock is not a necessary party if he did not provide financial support for the pregnancy and birth under certain circumstances); N.C. Gen. Stat. § 48-3-601(2)(b)(1)-(4) (2005) (similar to Idaho statute). If our legislature is so inclined, it can require putative fathers to do more prior to a child’s birth in order to seize the opportunity of developing a parent-child relationship. See Lehr, 463 U.S. at 262 (“The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child’s future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child’s development.”) (footnote omitted)). Until the legislature does so, however, we must apply the statute as it is now written. See Torres v. State, 119 N.M. 609, 612, 894 P.2d 386, 389 (1995) (stating that “it is the particular domain of the legislature, as the voice of the people, to make public policy”).

{40} According to Section 32A-5-15(B)(3)(b), Mark could not have “cause[d] . . . the destruction of the parent-child relationship,” In re Adoption of J.J.B., 119 N.M. at 649, 894 P.2d at 1005, until there was a relationship in existence to destroy, which in this case means until after the child was born. This being the case, the district court should have focused on Mark’s post-birth “objective parental conduct.” Id. We conclude the district court improperly focused on Mark’s pre-birth conduct, and thus, the court’s finding that Mark presumptively abandoned the child is not supported by substantial evidence.

{41} Of the findings made by the district court regarding Mark’s conduct, none refers to his conduct after the child’s birth. One finding could perhaps be viewed as a statement about Mark’s post-birth conduct by implication: “From the time of the [child’s] birth until Mark . . . was served notice of the adoption proceedings, the [child’s] needs of maintenance, nurturing, guidance, love and affection were met by the Petitioners.” However, proving the relationship-disintegration element of presumptive abandonment requires more than such a vaguely implied suggestion that the parent somehow failed to assume the responsibilities of parenting. See id. at 648, 894 P.2d at 1004 (stating that “we have adopted an objective evidentiary definition of abandonment that focuses on the effect of the parent’s conduct on the child”). The court’s other findings regarding post-birth events relate to other elements of presumptive abandonment, such as the child’s residing with Petitioners for an extended period of time, § 32A-5-15(B)(3)(a), and formation of a psychological bond with Petitioners, § 32A-5-15(B)(3)(c), which are not at issue.

{42} The district court made a conclusory finding that “[t]here is no parent-[c]hild relationship or bond between the biological father and the [child].” While this statement may accurately reflect the circumstances, it underscores the fact that if a parent-child relationship did not exist, Mark could not have caused its disintegration.

{43} In addition, far from showing conduct that Mark caused disintegration of the parent-child relationship, the evidence instead showed that Mark attempted to establish a relationship with the child and had begun to forge a bond or attachment with the child through the visitation ordered by the court. Within three months of the child’s birth, Mark registered with the putative father registry, filed a paternity suit, responded to Petitioners’ adoption petition, and requested visitation. The family intervention specialist who supervised Mark’s visitation with the child testified that the transition from Petitioners to Mark went smoothly and she detected no anxiety in the child during visitation. She observed the child stretching out his arms to Mark and greeting Mark with a big grin, and she noticed that when the child left the room, the child looked around for Mark. The child was very comfortable with Mark, which to her, was attachment. Petitioners cannot point to any post-birth conduct of Mark that caused the destruction of his relationship with the child, and the district court found none. Petitioners failed to prove the elements of presumptive abandonment, and we therefore reverse the district court’s termination of Mark’s parental rights.

{44} Finally, we similarly reject Helen’s contention, in a brief she filed in support of Petitioners, that Mark’s failure to support her pregnancy constitutes abandonment. In support of this contention she cites three out-of-state cases, which do not stand for the proposition she argues and which are distinguishable from the present case. In re Paternity of Baby Doe involved the interpretation of an Indiana statute expressly providing that failure to register with the Indiana putative father registry within 30 days of a child’s birth or the filing of the adoption petition waives notice of adoption proceedings and that such waiver “constitutes the man’s irrevocably implied consent to the child’s adoption.” 734 N.E.2d 281, 283-85 n.6 (Ind. Ct. App. 2000) (quoting Ind. Code § 31-14-20-2 (1997)). Our statutes have no comparable provisions. Similarly, In re Termination of Parental Rights Over Baby Boy K. involved the constitutionality of statutory time limits cutting off a putative father’s entitlement to notice of adoption proceedings. 546 N.W.2d 86, 90-91 (S.D. 1996). Again, our statutes impose no time limits on the specific method Mark employed to attain acknowledged-father status, and notice of the adoption is not at issue in this case. And In re Adoption of S.J.B. concerned the constitutionality of a statute providing that notice need not be given to a putative father who has done nothing at all to grasp the opportunity to parent. 745 S.W.2d 606, 607-08 (Ark. 1988), superseded by statute as stated in R.N. v. J.M., 61 S.W.3d 149 (Ark. 2001). In the present case, by contrast, Mark initiated a paternity action, and, in doing so, became an acknowledged father whose consent to the adoption was required.

3. Remand for Custody Determination

{45} We recognize that our holding will have a powerful impact on the lives of the parties and, most dramatically, on the life of the child. Our Supreme Court wisely recognized that restoring parental rights, as we have done here, “does not mechanically result in the award of custody to the biological parents. The termination of parental rights and the determination of custody are different issues and must be addressed separately.” In re Adoption of J.J.B., 119 N.M. at 651, 894 P.2d at 1007. Thus, as the Court did in In re Adoption of J.J.B., we remand this case to the district court for a determination of who should have custody of the child as prescribed by Section 32A-5-36(H), which provides:

H. If the court determines that any of the requirements for
a decree of adoption pursuant to provisions of Subsections E and F of this section have not been met or that the adoption is not in the best interests of the adoptee, the court shall deny the petition and determine, in the best interests of the adoptee, the person who shall have custody of the child.

Although the district court made a determination at the time of the judgment that “[i]t is in the best interest of [the child] to remain with the Petitioners[,]” that determination was made in connection with the elements required for granting an adoption petition, Section 32A-5-36(F)(7) (requiring the court to find as a prerequisite to adoption that “the best interests of the adoptee are served by the adoption”), not in regard to the custody decision that must be made when an adoption decree has been reversed. Consequently, the district court is required to revisit the issue on remand and consider the factors informing the custody decision, as discussed in In re Adoption of J.J.B., 119 N.M. at 651-55, 894 P.2d at 1007-11. Because Helen never relinquished her parental rights, she is potentially eligible to have custody as well.

The factors the district court must consider specifically include Mark’s and/or Helen’s fitness to parent and “whether there is clear and convincing evidence of gross misconduct such as incapacity, moral delinquency, instability of character, or inability to provide [the child] with needed care.” Id. at 654, 894 P.2d at 1010. In addition, the district court “should determine whether, taking into account all factors, [Mark and/or Helen are] capable of reestablishing a healthy parent-child bond with [the child].” Id. The court may consider all possible options, and we encourage the court to make use of mediation in making its determination. See id. at 651-55, 894 P.2d at 1010-11 (discussing the various possible arrangements that may be considered in determining custody). And, as our Supreme Court noted in In re Adoption of J.J.B., “in resolving the best interests of [the child], the [district] court should not be bound by the traditional bright line solution of awarding the child like a trophy to whichever party wins the litigation. The child’s best interests may be served by applying more equitable principles.” Id. at 654, 894 P.2d at 1010.

CONCLUSION

For the foregoing reasons, we reverse the district court’s judgment terminating Mark’s parental rights and allowing Petitioners’ adoption of the child to proceed. We remand for a determination of who should have custody of the child.

IT IS SO ORDERED.

CYNTHIA A. FRY, Judge

WE CONCUR:
JAMES J. WECHSLER, Judge
MICHAEL E. VIGIL, Judge
OPINION

CYNTHIA A. FRY, Judge

{1} This workplace tort case presents the question of whether our Supreme Court’s decision in Delgado v. Phelps Dodge Chino, Inc., 2001-NMSC-034, 131 N.M. 272, 34 P.3d 1148, applies to acts or omissions that are alleged to have occurred before that decision was issued. Unpersuaded that retroactivity would be unfair to employers or that the presumption of retroactivity is overcome by other considerations, we conclude that a worker may sue in tort using New Mexico’s workers’ compensation scheme. See 2001-NMSC-034, ¶ 1. In 2002, Worker sought medical treatment for breathing difficulty and was diagnosed with usual interstitial pulmonary disease. Worker alleges that his treating physician has determined that the inhalation of the toxic powders was the cause of his illness. Worker filed suit against Employer in 2004 alleging various tort claims including negligence and intentional infliction of emotional distress. Worker died later in 2004 from his illness, and the district court granted a motion to amend the complaint to substitute Worker’s estate as the plaintiff, and to add a claim for wrongful death.

{4} In his suit, Worker alleges that Employer failed to provide protective equipment, safety training, or safe working conditions in spite of known risks from the Employer’s products, and that Employer violated various health and safety regulations. Worker also alleges that Employer dismissed Worker’s attempts to raise health concerns, and that Employer only took action to comply with health and safety regulations when an inspection was expected. Worker has described Employer’s conduct as “willful and intentional” and, therefore, Worker claims that Employer’s culpability rises to the level described in Delgado for a workplace tort claim that falls outside of the exclusivity provisions of the Workers’ Compensation Act (the “Act”), NMSA 1978, §§ 52-1-1 to -70 (1929, as amended through 2005).

{5} In response to Worker’s suit, Employer moved for dismissal on the ground that the exclusivity provision in the Act bars a claim for negligence. In particular, Employer argued to the district court, and argues now on appeal, that because Worker alleges acts or omissions pre-dating the Delgado decision, the willfulness test articulated in Delgado does not apply. Thus, Employer implicitly argues that a more restrictive test, the so-called “actual intent to harm” test, applies to this case. The district court denied the motion to dismiss but authorized an interlocutory appeal on the question of which standard applies to acts or omissions occurring before Delgado was decided. This Court granted the request for an interlocutory appeal pursuant to NMSA 1978, § 39-3-4 (1999) and Rule 12-203(A) NMRA. In addition, this Court granted motions for amicus briefing from the New Mexico Trial Lawyers Association and New Mexico Defense Lawyers’ Association.

DISCUSSION

{6} This case squarely presents the ques-
tion of which standard governs a claim for a workplace tort allegedly occurring prior to the date our Supreme Court issued the Delgado decision. This Court has previously assumed without deciding that Delgado applies retroactively. Dominguez v. Perovich Props., Inc., 2005-NMCA-050, ¶ 23, 137 N.M. 401, 111 P.3d 721. We conclude that Delgado’s test for when a workplace injury is non-accidental, and therefore outside of the scope of the Act, should apply to acts or omissions taking place prior to the date of the Delgado decision.

{7} Despite some dispute below, the parties appear to agree on appeal that Defendants’ motion to dismiss was argued and decided under Rule 1-012(B)(6). Granting a motion for dismissal under Rule 1-012(B)(6) is appropriate only if Plaintiff is not entitled to recover under any theory of the facts alleged in the complaint. We review the denial of a motion to dismiss de novo because such a motion tests the legal sufficiency of the allegations. See Padwa v. Hadley, 1999-NMCA-067, ¶ 8, 127 N.M. 416, 981 P.2d 1234 (describing de novo review for the grant of a motion to dismiss for failure to state a claim); Thompson v. Montgomery & Andrews, P.A., 112 N.M. 463, 464, 816 P.2d 532, 533 (Ct. App. 1991) (stating that “[a] Rule 12(B)(6) motion tests the legal sufficiency of the complaint, not the facts that support it”). The question of whether a judicial decision should be given retroactive effect is also subject to de novo review. Stein v. Alpine Sports, Inc., 1998-NMSC-040, ¶ 6, 126 N.M. 258, 968 P.2d 769.

{8} To provide context, we begin with a brief review of Delgado and its impact on workers’ compensation law in New Mexico. We then turn to the presumption of retroactivity and whether Delgado should be applied to acts or omissions occurring before that decision was issued.

1. Delgado’s Impact

{9} New Mexico’s workers’ compensation system is intended to replace litigation for accidental workplace injuries with a comparatively rapid and efficient system for compensation that disregards the fault of the employer or worker. See Delgado, 2001-NMSC-034, ¶ 12; Morales v. Reynolds, 2004-NMCA-098, ¶ 6, 136 N.M. 280, 97 P.3d 612. For such an accidental injury, the administrative system created by the Act is a worker’s exclusive remedy, and the worker may not sue the employer in court. Id.; § 52-1-8 (stating that an employer who has complied with the Act will not be subject to any other liability to an employee). However, the Act does not cover injuries that are not considered “accidents.” Delgado, 2001-NMSC-034, ¶ 20; Morales, 2004-NMCA-098, ¶ 7. The distinction between an accidental injury and a non-accidental injury is therefore critical because an employee may sue in tort for a non-accidental injury. Id. Our Supreme Court changed the law when, in Delgado, it altered the test for when a worker could show that his injury was not an accident. Morales, 2004-NMCA-098, ¶ 8 (stating that “[i]n Delgado, our Supreme Court broadened the scope of the accident exception with respect to employers”).

{10} Prior to the decision in Delgado, an employer could only be sued outside the scope of the Act’s exclusivity provision if the injured worker could show that the employer had an actual intent to injure the worker. See Dominguez, 2005-NMCA-050, ¶ 12; Morales, 2004-NMCA-098, ¶ 7. See generally Mariposa Padilla Sivage, Workers’ Compensation: Exclusivity, Common Law Remedies, and the Reconsideration of the Actual Intent Test—Delgado v. Phelps Dodge Chino, Inc., 32 N.M. L. Rev. 567, 572-77 (2002) (tracing the development of the scope of exclusivity under the Act). Thus, for an injury to be non-accidental under the actual intent test, a worker had to prove the employer “intended a deliberate infliction of harm upon the employee.” Delgado, 2001-NMSC-034, ¶ 16 (internal quotation marks omitted). As a practical matter, this standard provided employers with “virtually absolute immunity” even when sending a worker to “certain harm or death.” Id. ¶ 18.

{11} In Delgado, our Supreme Court held that, contrary to legislative intent, the actual-intent-to-harm test improperly favored employers and concluded that a worker may sue an employer in tort when an employer “willfully or intentionally injures a worker.” Id. ¶¶ 1, 17. The Court set out a three-part willfulness test to determine when a workplace injury is non-accidental and therefore outside of the scope of the Act. Id. ¶ 1. Such a non-accidental injury arises when:

1. the worker or employer engages in an intentional act or omission, without just cause or excuse, that is reasonably expected to result in the injury suffered by the worker;
2. the worker or employer expects the intentional act or omission to result in the injury, or has utterly disregarded the consequences; and
3. the intentional act or omission proximately causes the injury.

Id. ¶ 26. In Morales, this Court used terms like “egregious” or “extreme employer conduct” to describe the kind of employer error or omission for which a worker should be allowed to sue in tort. 2004-NMCA-098, ¶¶ 13, 16. In Delgado, our Supreme Court made clear that even under the broader willfulness test, it was still describing intentional torts and not negligence. 2001-NMSC-034, ¶ 30. Delgado’s new rule did not impact cases alleging mere negligence. Morales, 2004-NMCA-098, ¶ 27.

2. Applicability of Retroactivity

{12} Against this backdrop, we now turn to the rules on retrospective application of a judicial decision. Absent an express statement that limits a decision to prospective application, our Supreme Court has established the “presumption that a new rule adopted by a judicial decision in a civil case will operate retroactively.” Beavers v. Johnson Controls World Servs., Inc., 118 N.M. 391, 398, 881 P.2d 1376, 1383 (1994). However, this presumption can be overcome if the guidelines articulated in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), overruled by Harper v. Va. Dep’t of Taxation, 509 U.S. 86, 96-97 (1993), provide sufficient justification for avoiding retrospective application. Beavers, 118 N.M. at 398, 881 P.2d at 1383. These guidelines or factors are summarized as: “(1) whether the case creates a new principle of law that has been relied upon; (2) the prior history of the rule; and (3) the inequity of retroactive application.” Stein, 1998-NMSC-040, ¶ 9. For the reasons that follow, we are not persuaded that any of the Chevron Oil Co. factors overcome the presumption of retroactivity.

{13} We note at the outset that our Supreme Court expressed no concern about retroactively applying its decision to the employer in Delgado, even though the employer in that case had no reason to know that the actual intent test would be abandoned. Delgado contains no express declaration that its rule was to be limited to any type of prospective operation. Delgado was decided after Beavers, and therefore we presume that our Supreme Court would have expressly indicated any reservations about applying its decision retroactively. Because of this, the rule in Delgado has presumptive retroactivity. Beavers, 118 N.M. at 398, 881 P.2d at 1383. We now turn to an examination of each Chevron Oil Co. factor.

{14} The first Chevron Oil Co. factor has two parts: an evaluation of whether a new
principle of law has been announced by overruling past precedent and an evaluation of the extent to which the parties or others may have relied on the state of the law before the law-changing decision was issued. Stein, 1998-NMSC-040, ¶¶ 10, 11. We conclude that Delgado did announce a new rule of law because our Supreme Court said its decision “narrowed” the scope of the Act’s exclusivity and expressly overruled those cases applying the actual-intent-to-injure test. Delgado, 2001-NMSC-034, ¶ 23 n.3, 30; see also Morales, 2004-NMCA-098, ¶ 8 (stating that Delgado “broadened the scope of the accident exception with respect to employers”).

{15} Even though Delgado changed the law, we must also consider the degree of the parties’ reliance on the pre-existing law. Beavers, 118 N.M. at 399, 881 P.2d at 1384. In Beavers, our Supreme Court stated that “[t]he extent to which the parties in a lawsuit, or others, may have relied on the state of the law before a law-changing decision has been issued can hardly be overemphasized.” Id. “The reliance interest to be protected by a holding of nonretroactivity is strongest in commercial settings, in which rules of contract and property law may underlie the negotiations between or among parties to a transaction.” Id. While the workplace is of course a “commercial setting” in the general sense, and while employment is contractual in nature, by attempting to sue outside of the Act, Worker is attempting to prove an intentional tort. Thus, we think it crucial that our Supreme Court stated that “[i]n the tort context, however, a party’s reliance interest is seldom as strong as it is in the commercial context” and that “the purposes of tort law do not give rise, generally, to reliance-based conduct,” given the purposes of compensation to the victim and deterrence of the tortfeasor. Id. at 399-400, 881 P.2d 1384-85. Reliance is a weighy concern where property rights or contract-type issues are involved. State ex rel. Martinez v. City of Las Vegas, 2004-NMSC-009, ¶ 53, 135 N.M. 375, 89 P.3d 47 (holding that a water rights doctrine “was likely to induce reliance in the area of commercial transactions”); Stein, 1998-NMSC-040, ¶ 11 n.3 (finding reliance on a procedural rule and equating procedural rules to contractual rules). However, Beavers counsels that an intentional tortfeasor has no right to rely on law that he thought would shield his wrongful actions. 118 N.M. at 400, 881 P.2d at 1385. Delgado made clear that the Act was not “ever intended to immunize employers from liability for intentional torts.” 2001-NMSC-034, ¶ 30. Because we are dealing with an employer’s intentional torts, we are not persuaded that any reliance would be disturbed by applying Delgado retroactively.

{16} In connection with its argument that it relied on the prior actual-intent-to-harm test, Employer also argues that it was unable to insure against a Delgado-type intentional tort claim at the time Worker was employed, so it would be unfair to permit retroactive application. We are unpersuaded. Again, our Supreme Court emphasized that even after it had narrowed the scope of exclusivity, only “intentional torts” were beyond the exclusivity provisions of the Act. Id. Generally, one is not able to insure against an intentional tort. See Ranger Ins. Co. v. Bal Harbour Club, Inc., 549 So. 2d 1005, 1007 (Fla. 1989) (stating that “[i]t is axiomatic in the insurance industry that one should not be able to insure against one’s own intentional misconduct”); Tippmann v. Hensler, 716 N.E.2d 372, 380 (Ind. 1999) (explaining, in a workers’ compensation case, that Indiana “generally denies the ability to insure against intentional torts (internal quotation marks and citation omitted)); see also Knowles v. United Servs. Auto. Ass’n., 113 N.M. 703, 707, 832 P.2d 394, 398 (1992) (noting “the public policy that an insured not be encouraged to act wrongfully because of knowledge that such an act is insured”).

{17} We recognize that in its discussion of reliance in Beavers, our Supreme Court did mention a business’s ability to acquire insurance, citing Lopez v. Mazz, 98 N.M. 625, 651 P.2d 1269 (1982). In Lopez, the Supreme Court changed an existing common law rule by holding that a tavern owner has a duty to third parties not to serve alcohol to intoxicated persons. Id. at 630-31, 651 P.2d at 1274-75. In deciding to apply the rule only prospectively and to the case before it, the Court touched upon reliance by tavern owners on the prior state of the law and their inability to acquire insurance to cover expanded liability for such negligence. Id. at 632, 651 P.2d at 1276. We are not convinced that Lopez militates against retroactivity here because Lopez was imposing a new common law duty on tavern operators against which they could insure. In Delgado, our Supreme Court emphasized that employers have never been free to intentionally injure workers. 2001-NMSC-034, ¶ 30 (stating that the Act was not “ever intended to immunize employers from liability for intentional torts”). Thus, unlike Lopez, we do not think Delgado imposed a substantial new duty upon employers for which they could obtain insurance.

{18} For the first time in its reply brief on appeal, Employer attempts to expand its insurance-related argument by arguing that, even if it could not insure against liability for its intentional conduct, retroactive application of Delgado would be unfair because it would expose Employer to uninsured liability for defending against unfounded claims brought under Delgado. Employer contends that “employers must obtain insurance not only for liability for well founded claims but also for unfounded claims, upon which liability will never attach.” We decline to address this argument for two reasons. First, Employer did not make this argument in the district court. See Crutchfield v. N.M. Dept of Taxation & Revenue, 2005-NMCA-022, ¶ 14, 137 N.M. 26, 106 P.3d 1273 (“To preserve error for review, a party must fairly invoke a ruling of the district court on the same grounds argued in this Court.”). Employer argued only that it obtained insurance and paid premiums based on the pre-Delgado actual intent standard and that retroactive application “deprive[s] Employer of the opportunity to obtain insurance necessary to cover such claims.” As a result, Employer did not give Worker the opportunity to respond to, or the district court the chance to rule on, the specific argument it now makes. See Diversey Corp. v. Chem-Source Corp., 1998-NMCA-112, ¶ 38, 125 N.M. 748, 965 P.2d 332 (explaining that preservation serves the purposes of (1) allowing the trial court an opportunity to correct any errors, thereby avoiding the need for appeal, and (2) creating a record from which the appellate court can make informed decisions). Second, we “will not consider arguments raised for the first time in a reply brief.” State v. Castillo-Sanchez, 1999-NMCA-085, ¶ 20, 127 N.M. 540, 984 P.2d 787.

{19} Not being persuaded by Employer’s other arguments, we think the first Chevron Oil Co. factor is neutral. Even though Delgado clearly articulated a new rule, there was no right to rely on the actual-intent-to-harm test’s protection for intentionally tortious conduct.

{20} The second Chevron Oil Co. factor determines “whether retrospective operation will further or retard its operation” of the rule, considering the new rule’s history, purpose, and effect. Stein, 1998-NMSC-040, ¶ 9 (internal quotation marks and citation omitted); Beavers, 118 N.M.
at 398, 881 P.2d at 1383. Employer and Amicus New Mexico Defense Lawyers’ Association argue that retroactive application of Delgado would impede the Act’s purpose of promoting efficient resolution of workplace injury cases because it would expand the number of cases falling outside the Act. This argument begs the question. Our Supreme Court in Delgado defined the scope of the Act by reference to legislative mandate so that the Act favors neither employers nor employees. 2001-NMSC-034, ¶ 23. Again, the Court stated that “we do not believe that the Act was ever intended to immunize employers from liability for intentional torts.” Id. ¶ 30 (emphasis added). Employer’s argument—that we should allow more intentional tort cases to fall within the scope of the Act in order to promote efficient settlement of those claims—requires us to reject or ignore Delgado’s conclusion that such cases were never intended to be subject to the Act in the first place. We are not persuaded that we can give effect to the Act or advance its objectives by ignoring its boundaries. Were we to apply Delgado only prospectively, we would be thwarting the intention of the legislature to treat workers and employers equally, and we would be disregarding our Supreme Court’s guidance on the proper scope of the Act. We conclude this factor weighs in favor of retroactive application, particularly in light of a core principle underlying the Beavers decision that similarly situated parties be treated equally. 118 N.M. at 402, 881 P.2d at 1387. We cannot see favoring one employer over another simply because one happened to have committed an intentional tort before 2001.

{21} The final Chevron Oil Co. factor requires an evaluation of the inequity, injustice, or hardship that would be imposed upon parties by the retroactive application of a new rule. Beavers, 118 N.M. at 398, 881 P.2d at 1383. Employer implies that imposing Delgado retroactively would be fundamentally unfair and would unash a torrent of claims for acts or omissions that took place long ago. Amicus Defense Lawyers’ Association contends that “[i]njustice and hardship would inure for both employers and employees if Delgado were to be applied retroactively” and that such an application would create a “virtual quagmire of litigation” for the district courts. We disagree. As the Supreme Court noted in Delgado, the newer willfulness rule did not impose a hardship upon employers, and even if it did, the rule was much needed. 2001-NMSC-034, ¶¶ 30-31. The Act continues to provide the exclusive remedy for an employer’s negligent acts or omissions, and thus, if an employer’s acts or omissions pre-dating Delgado were merely negligent, the worker may not sue. Morales, 2004-NMCA-098, ¶ 27. Our cases have set a relatively high threshold for willful workplace torts that are beyond the scope of the Act. Id. ¶¶ 17, 24. We therefore doubt that there will be a large number of cases where a worker will successfully state a Delgado-type claim. We also observe that our statute of limitations for tort actions will limit the number of actions that can be brought for pre-2001 acts or omissions to those presumably uncommon cases where the claimant did not discover the injury until recently. See NMSA 1978, § 37-1-8 (1976) (stating the three-year statute of limitations for personal injury).

{22} An evaluation of inequity also involves consideration of reliance on the prior rule. Beavers, 118 N.M. at 401, 881 P.2d 1386. As noted above, however, we think any reliance on the actual-intent-to-harm test is either misplaced or unreasonable. In addition, Beavers emphasized an evaluation of fairness not only to defendants but also to claimants, and the “potential unfairness to other claimants who have been victimized by conduct occurring before the law-changing decision but who for one reason or another have not asserted their claims until after announcement of the new rule.” Id. at 402, 881 P.2d 1387. We think it would be unfair to workers injured willfully by employers to deny them a claim based only on the date of the act or omission. Thus, the third Chevron Oil Co. factor also does not weigh against retroactive application.

CONCLUSION

{23} We affirm the denial of Employer’s motion to dismiss Worker’s claim and conclude that the willfulness rule from Delgado may be applied retroactively because none of the Chevron Oil Co. factors, either alone or combined, outweigh the presumption of retroactivity. We express no opinion about the merits of Worker’s claim and leave evaluation of whether Worker has stated a claim that meets the three-prong test of Delgado to the district court.

{24} IT IS SO ORDERED.

CYNTHIA A. FRY, Judge

WE CONCUR:

A. JOSEPH ALARID, Judge

JAMES J. WECHSLER, Judge
Certiorari Not Applied For

From the New Mexico Court of Appeals

Opinion Number: 2006-NMCA-138

IVAN S. BENAVIDEZ,
Plaintiff-Appellant,
versus
GINA DENISE BENAVIDEZ and RICHARD P. SALGADO,
Defendants-Appellees.
No. 25,750 (filed: September 13, 2006)

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
ROBERT L. THOMPSON, District Judge

ROGER MOORE
LAW OFFICE OF ROGER MOORE
Albuquerque, New Mexico
for Appellant

RONALD T. TAYLOR
LAW OFFICE OF RONALD T. TAYLOR
Albuquerque, New Mexico
for Appellees

OPINION

CYNTHIA A. FRY, Judge

1 Plaintiff Ivan S. Benavidez appeals from the district court’s order dismissing with prejudice his action for unlawful detainer of property and damages, and from the court’s imposition of sanctions under Rule 1-011 NMRA. In the course of a prior probate proceeding, Plaintiff had agreed to purchase the subject property from the estate of Benjamin Benavidez, and the probate court entered an order allowing Defendant Gina Denise Benavidez to reside on the property until the “closing on the sale of the property.” Plaintiff argues that he obtained legal ownership of the property, along with the right to evict Defendants, upon the execution of a warranty deed on December 11, 2003, even though he did not pay for the property in full until May 26, 2004. We conclude that the district court correctly determined that the closing occurred May 26, 2004, and thus, that Plaintiff had no right to evict Defendants until that date. On the issue of sanctions, Plaintiff contends his belief that his ownership interest began on December 11, 2003, enabled him to file a good faith complaint without incurring sanctions for violating the probate court order. We hold that the record in this case is sufficient to support the district court’s imposition of sanctions. Therefore, we affirm the judgment of the district court.

I. BACKGROUND

2 Plaintiff and Defendants resided in opposite sides of a duplex owned by Benjamin Benavidez until his death. Benjamin was Plaintiff’s father and Defendant Gina Benavidez’s grandfather. Defendant Richard P. Salgado is Gina’s husband. Plaintiff is Gina’s uncle. During probate proceedings in the matter of the estate of Benjamin Benavidez, Plaintiff obtained the court’s approval to purchase the duplex from the estate. Also in the probate proceedings, the court ordered that “[b]y consent of the Estate, Ms. Benavidez can continue to reside at the apartment . . . without charge, until the closing on the sale of the property.”

3 On February 5, 2003, Plaintiff entered into a purchase agreement with his sister, Rebecca Benavidez Carrillo, the personal representative of the estate. This purchase agreement states that the “[b]alance at closing will be paid by purchaser.” On December 3, 2003, Plaintiff paid $18,810.20 in closing costs to Stewart Title Company toward the purchase price of $183,500. On December 11, 2003, the personal representative executed a warranty deed, but Plaintiff did not pay in full until May 26, 2004. It is unclear from the record why payment in full was not made in December 2003. There is nothing in the record indicating that the deed was ever delivered to Plaintiff.

4 In a certified letter dated December 17, 2003, Plaintiff demanded that Defendants surrender and vacate the subject property no later than December 27, 2003. When Defendants did not do so, Plaintiff filed a complaint for unlawful detainer of property and damages. Plaintiff’s verified complaint alleged that on “December 3, 2003, the Plaintiff purchased the subject property from the estate of Benjamin Benavidez, as approved by the Probate Court.” Plaintiff moved for summary judgment and the district court issued a letter decision in his favor. Meanwhile, Defendants found out that the only deed recorded with the Bernalillo County Clerk was dated May 26, 2004. Defendants subpoenaed Glenn Schwerin, the president of Stewart Title, and requested that he produce documents relating to the sale in question. Plaintiff filed a motion for protective order and a request to quash subpoena.

5 At the presentment hearing on summary judgment for Plaintiff, the district court denied the motion for protective order and request to quash subpoena and ordered that the documents from the title company be brought before the court. Mr. Schwerin submitted documents clearly indicating that Plaintiff did not pay the entire balance due on the duplex until May 26, 2004, as well as a letter stating that the “December 3, 2003 closing never took place and the documents [prepared in December] have been destroyed.” In addition, Plaintiff himself admits in his brief in chief that “[t]he balance owed, and full balance of the $183,500.00 was paid by [Plaintiff] at the May 26, 2004 closing.”

6 Upon reviewing this evidence at the next hearing, the district court dismissed the case with prejudice, making an oral ruling that Plaintiff did not close on the property until May 26, 2004, and, therefore, that he had no legal right to evict Defendants before then. The hearing also revealed that Plaintiff never obtained the deed dated December 11, 2003, from the title company. The district court sanctioned Plaintiff for $6,699.28 in attorney fees and costs, pursuant to Rule 1-011. Plaintiff challenges the district court’s ruling as to the date of closing, the imposition of sanctions, and claims there was insufficient evidence to support the district court’s findings of fact.

II. DISCUSSION

A. Transfer of Warranty Deed Without Payment in Full Was Not a Closing

7 Plaintiff argues that the closing on the sale of the property occurred when the personal representative executed the warranty deed on December 11, 2003, not when he paid in full and concluded all paperwork on May 26, 2004. At issue is the interpretation of the order in the probate proceeding that permitted Defendants to continue to reside in the duplex until the closing. The interpretation of writings is a question of law, which we review de novo. See Krieger

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In this case, the personal representative executed a warranty deed on December 11, 2003, but Plaintiff did not pay in full until May 26, 2004. As a result, Plaintiff had not fulfilled all his obligations created by the purchase agreement until May. Consequently, the execution of the warranty deed in December did not constitute a closing. The closing on the sale of the property took place on May 26, 2004, at which time all contractual obligations between the parties concluded.

Plaintiff argues that title transferred to him upon execution of the warranty deed. Even if this were the case, Plaintiff cites no authority supporting his contention that the transfer of title superseded the probate order permitting Defendants to reside in the property until closing. “Issues raised in appellate briefs that are unsupported by cited authority will not be reviewed.” Wilburn v. Stewart, 110 N.M. 268, 272, 794 P.2d 1197, 1201 (1990). In addition, we observe that it does not appear that the deed executed on December 11, 2003, was delivered to Plaintiff. “In order for a deed to be valid, it must be legally delivered.” Vigil v. Sandoval, 106 N.M. 233, 235, 741 P.2d 836, 839 (Ct. App. 1987). Therefore, the events of December 11, 2003, were not a closing.

B. Rule 1-011 Sanctions Were Appropriate

Plaintiff contends that the district court erred in imposing sanctions pursuant to Rule 1-011 because he had a good faith basis to believe that he had purchased the property from the estate of Benjamin Benavidez in December 2003. For the reasons below, we disagree.

We review a lower court’s imposition of sanctions under an abuse of discretion standard. Rivera v. Brazos Lodge Corp., 111 N.M. 670, 674-75, 808 P.2d 955, 959-60 (1991); see also Enríquez v. Cochran, 1998-NMCA-157, ¶¶ 18, 20, 126 N.M. 196, 967 P.2d 1136 (addressing the review of sanctions for abuse of the discovery process). Under this standard, we consider the full record to determine whether the district court’s decision is without logic or reason, or clearly unable to be defended. See Gonzales v. Surgidev Corp., 120 N.M. 151, 158, 899 P.2d 594, 601 (1995). “[T]he question on review is not whether this [C]ourt would have applied the sanction but whether the district court abused its discretion in so doing.” Rivera, 111 N.M. at 675, 808 P.2d at 960.

Rule 1-011 requires “that to the best of the signer’s knowledge, information and belief there is good ground to support” any motion, pleading, or other paper submitted to the court. Furthermore, Rule 1-011 states that for “a willful violation of this rule an attorney or party may be subjected to appropriate disciplinary or other action.” In New Mexico courts, unlike in federal courts, the “good ground” requirement is a subjective standard that “depends on what the attorney or litigant knew and believed at the relevant time and involves the question of whether the litigant or attorney was aware that a particular pleading should not have been brought.” Rivera, 111 N.M. at 675, 808 P.2d at 960. District courts may exercise discretion to impose sanctions when “a pleading or other paper signed by an attorney is not well grounded in fact, is not warranted by existing law or a reasonable argument for its extension, or is interposed for an improper purpose.” Id. at 674, 808 P.2d at 959.

This Court has affirmed district courts when Rule 1-011 sanctions are based on findings of facts that are supported by evidence in the record. In Doña Ana Sav. & Loan Ass’n v. Mitchell, 113 N.M. 576, 580, 829 P.2d 655, 659 (Ct. App. 1991), we upheld the imposition of sanctions against the defendant’s attorney for filing an answer for purposes of delay in a case involving a suit to collect on a promissory note. The answer denied the complaint’s allegations of the defendant’s failure to pay and demanded an accounting of the amount owed. Id. at 577, 829 P.2d at 657. The district court made specific findings of fact and conclusions of law that, combined with the defendant’s own admission that she did not have a meritorious defense, exposed the disingenuous pleading and justified the sanctions. Id. at 580, 829 P.2d at 659. This Court ruled that the findings, conclusions, and admissions were sufficient to satisfy the subjective “good ground” requirement that the defendant willfully acted in bad faith. Id.

In contrast to upholding sanctions that are based on findings and conclusions by the district court, appellate courts may vacate or remand sanctions that lack the support of specific evidence in the record. For example, in Rivera, a quiet title action, the district court entered summary judgment for the defendant and sanctioned the plaintiff and his attorney in accordance with Rule 1-011 for filing a pleading without good faith to support it. Rivera, 111 N.M. at 671, 808 P.2d at 956. The Supreme Court remanded for further proceedings because the district court did not provide specific
findings or conclusions in support of the sanctions. *Id.* at 676, 808 P.2d at 961.

{17} In the present case, the district court based its imposition of sanctions on specific findings of fact and conclusions of law supported by the evidentiary record. As in *Doña Ana Sav. & Loan Ass’n, F.A.*, where the evidence showed that the defendant did not plead with good cause, the closing documents from the title company in this case confirm that Plaintiff did not make payment in full until May. This supports the district court’s finding that Plaintiff could not have pleaded with good cause that the transaction was closed in December. In addition, the letter from the president of Stewart Title stated that “the December 3, 2003 closing never took place.” Unlike the circumstances in *Rivera*, where there was no fact-specific evidence that indicated bad faith, here the title documents signed by Plaintiff show that he knew the transaction had not closed until May. Furthermore, the purchase agreement between Plaintiff and the personal representative of the estate of Benjamin Benavidez stated, “[b]alance at closing will be paid by purchaser.” Plaintiff admits he did not pay the balance due until May. Therefore, the district court’s sanction is supported by Plaintiff’s own admissions and other evidence.

{18} Plaintiff also argues that he filed his complaint in good faith because he subjectively believed that he had title to the property upon receiving the warranty deed in December 2003. We need not determine when title passed because the question at issue is when Plaintiff closed on the sale of the property, not whether he obtained title by the time he evicted Defendants.

{19} The district court did not abuse its discretion in imposing sanctions pursuant to Rule 1-011 because it did so based on findings of fact and conclusions of law that are supported by evidence in the record.

C. Substantial Evidence Supports the District Court’s Findings

{20} Plaintiff challenges several of the district court’s findings of fact and conclusions of law, asserting that they are not supported by substantial evidence. We disagree.

{21} We are deferential to facts found by the district court, but we review conclusions of law de novo. *Strata Prod. Co. v. Mercury Exploration Co.*, 1996-NMSC-016, 121 N.M. 622, 627, 916 P.2d 822, 827. “[W]hen a [district] court makes specific written findings of fact that are supported by substantial evidence, those findings prevail over any inconsistent conclusions of law or an inconsistent judgment.” *State v. Walker*, 1998-NMCA-117, ¶ 7, 125 N.M. 603, 964 P.2d 164. “When a party is challenging a legal conclusion, the standard for review is whether the law correctly was applied to the facts.” *Golden Cone Concepts, Inc. v. Villa Linda Mall, Ltd.*, 113 N.M. 9, 12, 820 P.2d 1323, 1326 (1991).

{22} Plaintiff challenges a finding that Plaintiff stated he had purchased the property on December 3, 2003. This finding is supported by Plaintiff’s own verified complaint and motion for summary judgment. He also challenges the findings that Plaintiff could not provide proof that he had purchased the property on December 3, 2003, and that he knew when he filed his suit that he had not closed on the property on that date. Yet Plaintiff admits that he did not pay in full until the following year “at the May 26, 2004 closing.”

{23} Plaintiff challenges additional findings, but his challenges are unclear because he fails to explain why the evidence relating to the findings is not sufficient, yet he attempts to support his challenge with reasons that are not relevant or specific to the findings. We therefore need not address his challenges. *See Aspen Landscaping, Inc. v. Longford Homes of N.M., Inc.*, 2004-NMCA-063, ¶¶ 28-29, 135 N.M. 607, 92 P.3d 53 (explaining that a party challenging a finding for lack of substantial evidence must refer to “all of the evidence, both favorable and unfavorable, followed by an explanation of why the unfavorable evidence does not amount to substantial evidence, such as is necessary to inform both the appellee and the Court of the true nature of the appellant’s arguments”); *Clayton v. Trotter*, 110 N.M. 369, 373, 796 P.2d 262, 266 (Ct. App. 1990) (explaining that an appellate court need not consider unclear arguments).

{24} The reasons that Plaintiff puts forward do not support his challenges. He challenges a finding that Defendants prevailed because Plaintiff’s verified complaint had been dismissed with prejudice. While acknowledging that this finding is factually accurate, Plaintiff attempts another attack on the court’s determination that the closing occurred on May 26, 2004. However, we have already upheld the court’s determination of the closing date. Plaintiff also challenges the court’s findings that Defendants incurred attorney fees after the submission of an itemized statement and that the fees listed in the statement were reasonable. We conclude these findings are supported by substantial evidence based on the attorney’s itemized statement of fees and the attorney’s attendance at a hearing after the submission of the itemized statement. Plaintiff’s attack on these findings based on an argument that imposition of sanctions was unwarranted is not viable because we have already ruled that the sanctions were warranted.

{25} Plaintiff challenges all of the district court’s conclusions of law, citing *Torres v. Plastech Corp.*, 1997-NMSC-053, ¶ 13, 124 N.M. 197, 947 P.2d 154, which states that “[c]onclusions of law must be supported by findings of ultimate fact.” Plaintiff seems to argue that if the findings of fact are not supported by the evidence, any conclusions of law that rest upon them are flawed. However, we hold that the findings of fact are supported by substantial evidence. Plaintiff does not argue that the district court incorrectly applied the law to the facts in formulating its conclusions of law. *See Golden Cone Concepts, Inc.*, 113 N.M. at 12, 820 P.2d at 1326 (stating that we review challenges to legal conclusions by determining whether the law was correctly applied to the facts). Therefore, we uphold the district court’s findings of fact and conclusions of law.

III. CONCLUSION

{26} For the foregoing reasons, we affirm the district court’s judgment dismissing Plaintiff’s complaint with prejudice and imposing sanctions pursuant to Rule 1-011.

{27} IT IS SO ORDERED.

CYNTHIA A. FRY, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

RODERICK T. KENNEDY, Judge
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8:30 a.m. 2005-2006 Update and Review of New Mexico Civil Procedure: Case Law and Rule Changes, Part One
10:30 a.m. Break
10:45 a.m. 2005-2006 United States Supreme Court Decisions Affecting Civil Procedure
Professor Michael Browde, UNM School of Law
Noon Lunch (provided at State Bar Center)
1:00 p.m. 2005-2006 Update and Review of New Mexico Civil Procedure: Case Law and Rule Changes, Part Two
Professor Ted Occhialino, UNM School of Law
2:30 p.m. Break
2:45 p.m. Sanctions
Professor Ted Occhialino, UNM School of Law
3:45 p.m. Professionalism: The Uses and Misuses of Sanctions (1.0 P)
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