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Special Insert:
New Mexico Hispanic Bar Newsletter
Res Publica

www.nmbar.org
Currently taking space reservations for our newest publication
• Quarterly 12-page supplement to the Bar Bulletin

Please contact: Marcia Ulibarri
505.797.6058 • mulibarri@nmbar.org
TIME MASTERY FOR LAWYERS: 68 WAYS TO MAXIMIZE YOUR PRODUCTIVITY AND SATISFACTION

Friday, April 20, 2007 • State Bar Center, Albuquerque
4.5 General, 1.0 Ethics & 1.0 Professionalism CLE Credit

Presenter: Frank Sanitate
Moderator: TBA
☐ Standard Fee $219

As Frank Sanitate, president of Frank Sanitate Associates, will tell you the value of time management is not control of your time, but how you can best use your time to enhance your effectiveness. Sanitate is a frequent speaker for state and provincial bar associations throughout North America and he has taught tens of thousands of lawyers and other professionals over the past two decades how to better manage their professional practices. Using his book Don't Go To Work Unless It's Fun: State-of-the-Heart Time Management, Sanitate will provide attendees with sixty-eight tips on how to increase their productivity by better managing their legal practice.

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.nmbarcle.org
MAIL: CLE, PO Box 92860, Albuquerque, NM 87199

Name ___________________________________________ NM Bar # _________________________
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☐ Purchase Order (Must be attached to be registered)  ☐ Check enclosed $ ____________ Make check payable to: CLE

Credit Card # ____________________________ Exp. Date ____________________________
Authorized Signature __________________________________

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☐ Purchase Order (Must be attached to be registered)  ☐ Check enclosed $ ____________ Make check payable to: CLE

Credit Card # ____________________________ Exp. Date ____________________________
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FOURTH ANNUAL ELDER LAW SEMINAR

Friday, April 13, 2007 • 1 p.m.
State Bar Center, Albuquerque
2.7 General & 1.0 Ethics CLE Credits

Co-Sponsor: Elder Law Section

☐ Standard Fee $129
☐ Elder Law Section Member, Legal Services Attorney, Government, Paralegal $119

FOURTH ANNUAL ELDER LAW SEMINAR

Friday, April 13, 2007 • 1 p.m.
State Bar Center, Albuquerque
2.7 General & 1.0 Ethics CLE Credits

Co-Sponsor: Elder Law Section

☐ Standard Fee $129
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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.nmbarcle.org
Mail: CLE, PO Box 92860, Albuquerque, NM 87199

Please Note: For all Webcasts, you must register online at www.nmbarcle.org

Name ____________________________________________ NM Bar # __________________
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City/State/Zip ______________________________________________________________________
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E-mail ____________________________________________________________

☐ Purchase Order (Must be attached to be registered)  ☐ Check enclosed $ ____________ Make check payable to: CLE
Credit Card #: ________________________ Exp. Date ______________________
Authorized Signature _____________________________________________________________
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**Professionalism Tip**

With respect to my clients:

I will be courteous to and considerate of my client at all times.

### Meetings

#### April

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<td>10</td>
<td>Real Property, Probate and Trust Section Board of Directors, 4 p.m.,</td>
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<tr>
<td></td>
<td>via teleconference</td>
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<tr>
<td>11</td>
<td>Children’s Law Section Board of Directors, noon, Juvenile Justice</td>
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<tr>
<td></td>
<td>Center</td>
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<tr>
<td>12</td>
<td>Public Law Section Board of Directors, noon, Risk Management Division,</td>
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<td></td>
<td>Montoya Building, Santa Fe</td>
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<tr>
<td>12</td>
<td>Appellate Practice Section Board of Directors, 3 p.m., Heard Robbins</td>
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<td>Firm, Santa Fe</td>
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<tr>
<td>12</td>
<td>Business Law Section Board of Directors, 4 p.m., State Bar Center</td>
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<tr>
<td>13</td>
<td>Board of Editors, 8 a.m., State Bar Center</td>
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<tr>
<td>13</td>
<td>Elder Law Section Annual Meeting, 11:30 a.m., State Bar Center</td>
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### State Bar Workshops

#### April

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<tr>
<td>11</td>
<td>Common Legal Questions Affecting Seniors 10:15 a.m., Ruidoso Downs Zia</td>
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<td>Senior Center, Ruidoso</td>
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<tr>
<td>12</td>
<td>Common Legal Questions Affecting Seniors 10 a.m., Alamogordo Senior</td>
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<td>Center, Alamogordo</td>
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<td>25</td>
<td>Consumer Debt/Bankruptcy Workshop 6 p.m., State Bar Center, Albuquerque</td>
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<tr>
<td>26</td>
<td>Consumer Debt/Bankruptcy Workshop 5:30 p.m., Branigan Library, Las</td>
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#### May

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<th>Date</th>
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<tr>
<td>15</td>
<td>Common Legal Issues Affecting Seniors 10:30 a.m., Truth or Consequences</td>
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<td>Senior Center</td>
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**Cover Artiste:** Penny Thomas Simpson (pennyartworks@charter.net or (505) 434-1953) is an award-winning Alamogordo artist. She works in acrylics, watercolors and colored pencil. She has an annual booth at the Weem’s Artfest in November. To see the cover art in its original color, visit www.nmbar.org and click on *Bar Bulletin*.  

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**Bar Bulletin** - April 9, 2007 - Volume 46, No. 15
CourT NeWS

N.M. Supreme Court
Law Library
Open Monday–Friday, 8 a.m.—6 p.m.
Closed Saturdays and Sundays
Phone: (505) 827-4850; fax: (505) 827-4852; e-mail: libref@nmcourts.com; Website: www.supremecourtlawlibrary.com.

First Judicial District Court
Family Law Brown-Bag
The 1st Judicial District Court will host its family law brown-bag meeting at noon, April 10, in the Grand Jury Room, second floor, Steve Herrera Judicial Complex, Santa Fe. First Judicial District Judge Raymond Ortiz will be presenting on the The Pro Se Crisis. For more information or to suggest agenda items to be discussed, contact Elege Simons Harwood, (505) 988-5600, or esimonsharwood@simonsfirm.com. Provide one dollar, name and State Bar number and receive 1.0 CLE general credit.

Fourth Judicial District Court
Court Closure
The 4th Judicial District Court clerk's office in Las Vegas and Santa Rosa will be closed from April 18 through April 20 so that staff may attend the Statewide District Court Staff Conference in Albuquerque. In an attempt to meet attorney needs during staff's absence, both Judge Mathis and Judge Aragon will be available to file emergency pleadings in open court during regular business hours.

All mail and/or fax documents received during that time frame will be file-stamped or receipted as of April 23. Attorneys should contact the district court clerk's office, (505) 425-7281 ext. 10, to make prior arrangements if this schedule will interfere with the timeliness of filings. Regular business hours will resume on April 23.

U.S. Bankruptcy Court
Brown-Bag Presentations
The U.S. Trustee will present brown-bag presentations in Roswell and Las Cruces on completing the means test form (Official Form 22A).

The first presentation will be held at 11:30 a.m. or immediately following the conclusion of the §341 docket, April 19, at 500 N. Richardson, Roswell.

The second presentation will be held at 1:30 p.m. or immediately following the conclusion of the §341 docket, April 25, at the Staybridge Suites, Suite 137, 2651 Northrise Drive, Las Cruces. Contact Tamara Barner, bankruptcy analyst, Tamara.L.Barner@usdoj.gov, for more information.

State Bar News
2007 Annual Awards
Call for Nominations
Nominations are being accepted for the 2007 annual awards to recognize those who have distinguished themselves or who have made exemplary contributions to the State Bar or legal profession in 2006 or 2007. The awards will be presented during a special reception at the 2007 Annual Meeting, July 13, at the Inn of the Mountain Gods in Mescalero, N.M.

A letter of nomination for each nominee should be sent to: Joe Conte, Executive Director, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; faxed to (505) 828-3765; or e-mailed to sbnm@nmbar.org. Deadline for nomination submissions is April 27. See the March 19 (Vol. 46, No. 9) issue of the Bar Bulletin for more information.

Annual Meeting
According to its bylaws, the State Bar is required to hold an annual meeting of its members. As part of this year’s annual meeting, which will be held at the Inn of the Mountain Gods in Mescalero, the State Bar will conduct a CLE session on discussion topics from 3 to 4:45 p.m., July 12. Possible discussion topics include non-partisan judicial elections, reciprocity, tort reform and electronic filing. Members who have suggestions on other possible topics, are interested in speaking to a specific topic or moderating a discussion, should contact Joe Conte, (505) 797-6099 or jconte@nmbar.org.

Bankruptcy Law Section
Eighth Annual Golf Outing
The State Bar Bankruptcy Law Section will host the eighth annual golf outing at 12:30 p.m., May 11, at the Four Hills Country Club. The cost of $65 includes a round of golf, a golf cart and hors d’oeuvres. A cash bar will also be available.

Non-golfing section members are encouraged to attend the reception following the tournament at 5 p.m., also at the Four Hills Country Club, 911 Four Hills Rd. SE, Albuquerque. For more information or to register, contact Gerald Velarde, (505) 248-0500 or gvelarde@mac.com. Reservations must be made by May 7. Participants must provide their own golf clubs.

Board of Bar Commissioners
Meetings with Bar President
State Bar of New Mexico President Dennis E. Jontz will meet with local attorneys in five locations April 15–17 to discuss the state of the State Bar and issues facing the profession. More information will be forthcoming. Contact jconte@nmbar.org with any questions.

Hobbs: 6 p.m., April 15, Cattle Baron Restaurant Roswell:* Noon, April 16, Kwan Den Restaurant Carlsbad: 5 p.m., April 16, Best Western Stevens Inn Alamogordo:* Noon, April 17, TBA Las Cruces: 5 p.m., April 17, Hotel Encanto de Las Cruces *Held in conjunction with the regular local bar meeting.

Board Appointment
Access to Justice Commission
The Board will make one appointment to the New Mexico Access to Justice Commission for the remainder of an unexpired term through December 2008.

Members wishing to serve should send a letter of interest and brief resume by April 13 to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; fax to (505) 828-3765; or e-mail jconte@nmbar.org.

Attorney Support Group
The next Attorney Support Group meeting will be held at 5:30 p.m., May 7, at the First United Methodist Church at Fourth and Lead SW, Albuquerque. The group meets regularly on the first Monday of the month. For more information, contact Bill Stratvert, (505) 242-6845.

Board Appointment
DNA–People’s Legal Services, Inc.
The Board will make two appointments to the board of DNA–People’s Legal
Services, Inc. for two-year terms. Board members agree to provide direction, leadership and stewardship that ensure DNA’s ability to provide high quality legal services to its clients. The function of the board is to provide governance for DNA, represent the organization in the community and accept ultimate legal authority for the organization.

Members wishing to serve should send a letter of interest and brief resume by April 13 to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; fax to (505) 828-3765; or e-mail jconte@nmbar.org.

Casemaker Training and Technology Workshop
Free Training Available

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.

Training on using Casemaker will be held from 3 to 4 p.m., April 23, at the State Bar Center, Bigbee Auditorium. Seating is limited. Call (505) 797-6000 to register.

Committee on Diversity in the Legal Profession Reception and Third Study of Status of Minority Attorneys in New Mexico

The State Bar’s Committee on Diversity in the Legal Profession will host a reception from 3 to 6:30 p.m., June 22, at the State Bar Center to commemorate the work of the committee and celebrate the beginning of the third study of minorities in the profession. The study will be a comprehensive look over the past three decades at bar passage rates, disciplinary matters, bar leadership, judicial selection and more. All members are welcome and encouraged to attend this important event. R.S.V.P. to 797-6000 by June 8.

Committee on Women and the Legal Profession Lunch Meeting Featuring April Land

The Committee on Women and the Legal Profession will host a lunch meeting from noon to 1:30 p.m., April 27, at Slate Street Café, 515 Slate NW, Albuquerque (one block north of Lomas between 5th and 6th streets). This lunch meeting will feature UNM Professor April Land speaking on Balancing the Profession of Law with Family.

The meeting is open to everyone, and all are invited to attend. Lunch is ordered off the restaurant menu with payment made directly to Slate Street Café. Advance reservations are required. To confirm attendance no later than April 25, R.S.V.P. to Elizabeth Garcia, (505) 222-9353 or e-mail egarcia@nmjsc.org.

Elder Law Section Annual Meeting, CLE and Reception

The Elder Law Section will hold its annual meeting at 11:30 a.m., April 13, at the State Bar Center prior to the 4th Annual Elder Law Seminar. Details on the CLE program can be found in the March 12 (Vol. 46, No. 11) Bar Bulletin, CLE At-A-Glance. Send agenda items to Chair Amanda Hartmann, ahhlaw@comcast.net, or call (505) 401-7832. Lunch will be provided and reservations are required. E-mail membership@nmbar.org or call (505) 797-6033.

Paralegal Division Compensation, Utilization and Benefits Survey

The Paralegal Division of the State Bar is conducting a Paralegal Compensation, Utilization and Benefits Survey from March 1 to April 15. The division is urging every paralegal practicing in New Mexico to take just a few minutes to complete this very important survey. An easy link to the online version of the survey can be found on the State Bar Web site, www.nmbar.org: a printed survey is available in the March 5 (Vol. 46, No. 10) issue of the Bar Bulletin; or e-mail PD@nmbar.org. Send the completed printed surveys to Paralegal Division Survey, PO Box 1923, Albuquerque, NM 87103. The deadline for submission of the survey is April 15. Confidentiality of all personally identifiable information will be strictly maintained at all times.

Monthly Brown-Bag CLE

The Paralegal Division invites members of the legal community to bring a lunch and attend Medical Malpractice, presented by Lori McCamey Bencoe, Bencoe Law Firm. The program will be held from noon to 1 p.m., April 11, at the State Bar Center and offers 1.0 general CLE credit. Registration begins at the door at 11:30 a.m. The cost is $16 for attorneys and $15 for paralegals and support staff. For more information, contact Cheryl Pasalaqua, (505) 872-7469, or Evonne Sanchez, (505) 222-9356.

Spring Meet and Greet

The Paralegal Division will host a “Meet and Greet” reception with State Bar staff at 4:30 p.m., April 12, in the auditorium at the State Bar Center. Hors d’oeuvres and beverages will be provided. Paralegal Division members, as well as all other New Mexico paralegals are welcome and encouraged to attend.

Public Law Section Public Lawyer Award

The State Bar Public Law Section will present its annual Public Lawyer of the Year Award to Chief Deputy Attorney General Stuart M. Bluestone at 4 p.m., May 1, at the State Capitol Rotunda in Santa Fe. A reception will follow.

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

New Mexico Supreme Court Chief Justice Edward L. Chavez, State Bar President Dennis E. Jontz and Attorney General Gary K. King will speak at the event.

Senior Lawyers Division Oral History Project and Annual Meeting

At its second quarterly meeting of the year held March 22, the Senior Lawyers Division reaffirmed its commitment to move forward with its Oral History Project based upon the recommendations of the project subcommittee and authorized the presentation of awards to judges who have served on the bench for 25 years or more.

The board further approved a social event to be held at 5:30 p.m., July 13, at the Inn of the Mountain Gods during the State Bar’s annual meeting in coordination with the division’s annual meeting. Also during the State Bar’s annual meeting, the division
plans to conduct several oral histories. Any member in attendance who would like to be interviewed should contact Terrence Revo, (505) 293-8888.

Solo and Small Firm Practitioners Section Luncheon Presentation

Dr. Moss Aubrey, forensic psychologist and expert on evaluating alleged sexual conduct, will speak before the Solo and Small Firm Practitioners Section on Psychological Testing of Sexual Interests: A Civil and Criminal Attorney’s Guide.

The meeting will be held at noon, April 17, at the State Bar Center, and lunch will be served to those who R.S.V.P. by April 15 to Tony Horvat, thorvat@nmbar.org, or (505) 797-6033. Each attendee should bring a $5 check made payable to the State Bar Solo and Small Firm Practitioners Section to help defray the cost of the lunch. The board of directors will meet at 11:30 a.m.

Other Bars

N.M. Defense Lawyers Association

2007 Outstanding Civil Defense Lawyer Nominations

Nominations are being accepted for the 2007 Outstanding Civil Defense Lawyer. The award will be presented at the 2007 DLA Annual Meeting on October 18 in Albuquerque. This award is given to one or more attorneys who, over long and distinguished legal careers, have, by their ethical, personal, and professional conduct, exemplified for their fellow attorneys the epitome of professionalism and ability.

Letters of nomination should be sent to: NMDLA, PO Box 94116, Albuquerque, NM 87199; fax to (505) 858-2597; or e-mail nmdefense@nmdla.org

Deadline for submissions is May 31.

UNM

Library Spring Hours

Building and Circulation

Monday–Thursday 8 a.m. to 11 p.m.
Friday 8 a.m. to 6 p.m.
Saturday 9 a.m. to 6 p.m.
Sunday Noon to 11 p.m.

Reference

Monday–Friday 9 a.m. to 6 p.m.
Saturday Closed
Sunday Noon to 4 p.m.
**LEGAL EDUCATION**

**APRIL**

9  Corporate Practice–Screening and Conflict Issues  
Teleconference  
TRT  
2.0 E  
(800) 672-6253  
www.trtcle.com

10–11 Update for Attorneys Advising MDs, Part 1 and 2  
Teleseminar  
Center for Legal Education of NMSBF  
2.0 G  
(505) 797–6020  
www.nmbar.org

10  Corporate Practice–Screening and Conflict Issues  
Teleconference  
TRT  
2.0 E  
(800) 672-6253  
www.trtcle.com

11  Legislative Process  
Santa Fe  
Paralegal Division  
1.0 G  
(505) 986-2502

11  New Mexico Special Education Law  
Albuquerque  
National Business Institute  
5.0 G, 1.0 E  
(715) 835-8525  
www.nbi-sems.com

11  Tsunami on the Horizon–Ethics of Transnational Law  
Teleconference  
TRT  
2.0 E  
(800) 672-6253  
www.trtcle.com

12  Ethical Use of Paralegals in New Mexico  
VR–Las Cruces  
Center for Legal Education of NMSBF  
1.0 E  
(505) 797–6020  
www.nmbar.org

12  Lawyer As Problem Solver: 2007 Professionalism  
VR–Las Cruces  
Center for Legal Education of NMSBF  
1.0 P  
(505) 797–6020  
www.nmbar.org

12  Special Districts in New Mexico  
Albuquerque  
Lorman Education Services  
5.8 G, 0.7 E  
(715) 833-3940  
www.lorman.com

12–13 Spring Seminar  
Albuquerque  
N.M. Municipal League  
8.0 G  
(505) 982-5573

12  Surprising Legal Ethics Outcomes  
Teleconference  
TRT  
1.0 E, 1.0 P  
(800) 672-6253  
www.trtcle.com

12  Truck Accident Litigation in a Nutshell  
Center for Legal Education of NMSBF  
3.7 G  
(505) 797–6020  
www.nmbar.org

12  What Every Lawyer Should Know About IP  
VR–Las Cruces  
Center for Legal Education of NMSBF  
2.7 G  
(505) 797–6020  
www.nmbar.org

13  Ethical Standards and Government Lawyering  
Teleconference  
TRT  
2.0 E  
(800) 672-6253  
www.trtcle.com

13  Fourth Annual Elder Law Seminar  
Center for Legal Education of NMSBF  
2.7 G, 1.0 E  
(505) 797–6020  
www.nmbar.org

13  How to Prepare and Defend a Medical Malpractice Case  
Center for Legal Education of NMSBF  
3.0 G  
(505) 797–6020  
www.nmbar.org

13  White Collar Crime CLE: Defending Politicians, Lawyers, Doctors, Businesspeople and Other Co-Conspirators  
Albuquerque  
NMCDLA  
6.25 G  
(505) 992-0050  
www.nmcdla.org

16  Getting Ready For Your Client’s Deposition  
Teleconference  
TRT  
2.0 G  
(800) 672-6253  
www.trtcle.com

17  Experts–Discovery and Work–Product Issues  
Teleconference  
TRT  
2.0 G  
(800) 672-6253  
www.trtcle.com

17–18 Fair Housing Training for Attorneys  
Albuquerque  
Albuquerque Human Rights Office  
10.0 G, 1.0 E, 1.0 P  
(505) 924-3380

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**Programs have various sponsors; contact appropriate sponsor for more information.**
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<td>Albuquerque National Business Institute</td>
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## Writs of Certiorari

**As Updated by the Clerk of the New Mexico Supreme Court**

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

**Effective April 9, 2007**

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

<table>
<thead>
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<tr>
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<td>Jones v. Ulibarri  (12-501)</td>
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### Certiorari Granted but not yet Submitted to the Court:

**Date Writ Issued**

- NO. 29,890 State v. Granville  (COA 25,005) 9/22/06
- NO. 29,881 State v. Carpenter  (COA 25,999) 9/22/06
- NO. 29,909 State v. Quintana  (COA 25,107) 9/25/06
- NO. 29,951 State v. Cardenas  (COA 26,238) 9/29/06
- NO. 29,947 State v. Padilla  (COA 25,380) 9/31/06
- NO. 29,796 Case v. Hatch  (12-501) 9/6/06
- NO. 29,987 Orozco v. Lighthouse Financial  (COA 26,503) 9/21/06
- NO. 30,000 State v. Romero  (COA 25,007/25,008) 10/3/06
- NO. 30,016 State v. Ochoa  (COA 24,720) 10/12/06
- NO. 30,035 Blanchett v. Dial Oil  (COA 26,951) 10/27/06
- NO. 30,044 State v. O’Kelly  (COA 26,292) 11/13/06
- NO. 30,057 Romero v. Board of Commissioners  (COA 24,147/24,180) 11/29/06
- NO. 30,079 State v. Carreon  (COA 26,048) 11/29/06
- NO. 29,799 Albuquerque Commons v. City of Albuquerque  (COA 24,425) 11/29/06
- NO. 29,791 Albuquerque Commons v. City of Albuquerque  (COA 24,026/24,027/24,042) 11/29/06
- NO. 30,089 Stockham v. Farmers Insurance  (COA 26,057) 12/4/06
- NO. 30,122 State v. Martinez  (COA 26,137) 12/14/06
- NO. 30,123 State v. Ortiz  (COA 26,045) 12/14/06
- NO. 30,124 State v. Hitchcock  (COA 26,001) 12/14/06
- NO. 30,125 State v. Castillo  (COA 26,051) 12/14/06
- NO. 30,127 State v. Armendariz  (COA 24,448) 12/14/06
- NO. 30,131 State v. Vargas  (COA 24,880) 12/14/06
- NO. 30,129 Heath v. La Mariana Apts.  (COA 24,991) 1/2/07
- NO. 30,118 Sedillo v. Department of Public Safety (COA 25,914) 1/2/07
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NO. 30,140 State v. Jimenez (COA 25,056) 1/2/07
NO. 30,165 Ferrell v. Allstate Insurance Company (COA 26,058) 1/23/07
NO. 30,180 State v. Funderburg (COA 25,591) 1/30/07
NO. 30,142 Albq. Redi Mix v. Scottsdale Ins. Co. (COA 26,872) 1/30/07
NO. 30,169 Cook v. Anding (COA 27,139) 1/30/07
NO. 30,193 State v. Hand (COA 25,931) 2/1/07
NO. 30,162 McNeill v. Burlington (COA 25,469) 2/9/07
NO. 30,199 State v. Stephen F. (COA 24,077) 2/16/07
NO. 30,019 State v. Lizzol (COA 25,794) 3/12/07
NO. 30,258 State v. Ellis (COA 25,506) 3/13/07
NO. 30,225 State v. Montoya (COA 26,067) 3/26/07
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NO. 30,269 State v. Martinez (COA 23,710) 4/2/07
NO. 30,272 State v. McClaugherty(COA 24,409) 4/2/07
NO. 30,281 State v. Edwards (COA 25,675) 4/2/07

CERTIORARI GRANTED AND SUBMITTED TO THE COURT:

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

NO. 29,160 Benavidez v. City of Gallup (COA 25,373) 12/13/05
NO. 29,218 Montoya v. Ulifbarri (12-501) 4/10/06
NO. 29,476 Salazar v. Torres (COA 23,841) 4/11/06
NO. 29,286 State v. Gutierrez (COA 25,279) 5/22/06
NO. 29,712 Smith v. City of Santa Fe (COA 24,801) 6/12/06
NO. 29,336 State v. Kerby (COA 24,350) 6/13/06
NO. 29,624 Maes v. Audubon Indemnity Ins. Group (COA 25,598) 8/15/06
NO. 29,699 Wood v. Educational Retirement Board (COA 24,819) 9/11/06
NO. 29,513 State v. Grogan (COA 25,699) 9/12/06
NO. 29,344 State v. Hughey (on rehearing) (COA 24,732) 11/14/06
NO. 29,768 Luna v. Lewis Casing Crews (COA 26,338) 11/15/06
NO. 29,725 McMinn v. MBF Operating Acquisition Corp. (COA 25,006) 11/27/06
NO. 29,257 State v. Kirby (COA 24,845) 12/12/06
NO. 29,857 State v. Lucero (COA 24,891) 12/12/06
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NO. 29,223 State v. Ransom (COA 25,171) 2/13/07
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NO. 29,174 State v. Vincent (COA 23,832) 4/9/07
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NO. 29,835 State v. Rogers (COA 25,950/25,968) 4/30/07
NO. 29,105 State v. Cook (COA 25,137) 4/30/07
NO. 29,687 State v. Worrick (COA 24,557) 4/30/07
NO. 29,990 Heimann v. Kinder (COA 25,735) 4/30/07
NO. 29,521 State v. Parra (COA 25,484) 4/30/07

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NO. 30,234 Nakashima v. State Farm (COA 26,155) 3/1/07
NO. 30,308 Torres v. State (12-501) 3/26/07
NO. 30,249 State v. Dominguez (COA 27,076) 3/27/07
NO. 30,220 Lovato v. Archuleta (COA 26,785) 3/27/07
NO. 30,260 State v. Crabb (COA 26,890) 3/27/07
NO. 30,261 Rusk v. Ferguson (COA 25,701) 3/27/07
NO. 30,312 Dominguez v. Dominguez (COA 26,904) 3/27/07
NO. 30,206 Rathbone v. Elebario (12-501) 3/28/07
NO. 30,146 State v. Sanchez (12-501) 3/29/07
NO. 30,271 State v. Werkmeister (COA 27,025) 3/29/07
NO. 30,270 State v. McBride (COA 25,505) 3/29/07
NO. 30,268 State v. Aguilar (COA 26,087) 3/29/07
NO. 30,277 State v. Jacko (COA 26,354) 3/29/07
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NO. 30,274 State v. Cordova (COA 26,309) 3/29/07
NO. 30,282 State v. Milligan (COA 26,966) 3/29/07
NO. 30,280 State v. Mendoza (COA 26,670) 3/29/07

UNPUBLISHED DECISION:

NO. 29,058 Sanchez v. Pellicer 3/22/07
OPINIONS

AS UPDATED BY THE CLERK OF THE NEW MEXICO COURT OF APPEALS
Gina M. Maestas, Chief Clerk New Mexico Court of Appeals
PO Box 2008 • Santa Fe, NM 87504-2008 • (505) 827-4925
EFFECTIVE MARCH 30, 2007

PUBLISHED OPINIONS

Date Opinions Filed


UNPUBLISHED OPINIONS

Date Opinions Filed

No. 26578 2nd Jud Dist Bernalillo CR-02-3568, STATE v E HILL (affirm) 3/26/2007
No. 26960 5th Jud Dist Lea DM-05-492, T MORRIS v L MORRIS (dismiss) 3/30/2007
No. 27149 WCA-05-2745, E WIDNER v PATTERSON UTI (dismiss) 3/30/2007
No. 27339 2nd Jud Dist Bernalillo JQ-05-158, CYFD v AMBER T (affirm) 3/30/2007

Slip Opinions for Published Opinions may be read on the Court’s Web site:
IN THE MATTER OF THE AMENDMENTS OF RULES 7-504 AND 7-606 NMRA OF THE RULES OF CRIMINAL PROCEDURE FOR THE METROPOLITAN COURTS

ORDER

WHEREAS, this matter came on for consideration by the Court upon the recommendation of the Metropolitan Courts Rule Committee to amend Rules 7-504 and 7-606 NMRA of the Rules of Criminal Procedure for the Metropolitan Courts, and the Court having considered said recommendation and being sufficiently advised, Chief Justice Edward L. Chávez, Justice Pamela B. Minzner, Justice Patricio M. Serna, Justice Petra Jimenez Maes, and, Justice Richard C. Bosson concurring;

NOW, THEREFORE, IT IS ORDERED that the amendments of Rules 7-504 and 7-606 NMRA of the Rules of Criminal Procedure for the Metropolitan Courts hereby are APPROVED;

IT IS FURTHER ORDERED that the amendments of Rules 7-504 and 7-606 NMRA of the Rules of Criminal Procedure for the Metropolitan Courts shall be effective for cases filed on and after May 21, 2007; and

IT IS FURTHER ORDERED that the Clerk of the Court hereby is authorized and directed to give notice of the amendments of the above-referenced rules by publishing the same in the Bar Bulletin and NMRA.

DONE at Santa Fe, New Mexico, this 27th day of March, 2007.

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

7-504. Discovery; cases within metropolitan court trial jurisdiction.

A. Disclosure by prosecution. Unless a different period of time is ordered by the trial court, within thirty (30) days after arraignment or the date of filing of a waiver of arraignment, the prosecution shall disclose and make available to the defendant for inspection, copying and photographing any records, papers, documents and statements made by witnesses or other tangible evidence in possession, custody and control of defendant which are intended for use by the defendant at trial.

B. Disclosure by defendant. Unless a different period of time is ordered by the trial court, within forty-five (45) days after arraignment or the date of filing of a waiver of arraignment, the defendant shall disclose and make available to the prosecution for inspection, copying and photographing any records, papers, documents and statements made by witnesses or other tangible evidence in possession, custody and control of defendant which are intended for use by the defendant at trial.

C. Pre-trial interviews by statement or deposition.

(1) Statements. If requested by either party, any person, other than the defendant, with information that is subject to discovery, shall give a statement. A party may obtain the statement by serving a written notice of statement upon the person to be examined and upon the other party not less than fourteen (14) days before the date scheduled for the statement. The party requesting the statement must make reasonable efforts to confer in good faith with opposing counsel and the person to be examined regarding scheduling of a statement before serving a notice of statement. A subpoena, signed by the judge assigned to the case, may also be served to secure the presence of the person to be examined or the materials to be examined during the statement. A subpoena will only be issued upon a showing that the party requesting the subpoena made good faith efforts to procure the appearance of the witness without the need for a subpoena. Either party may record the statement.

(2) Depositions. A deposition may be taken pursuant to this rule upon:

(a) agreement of the parties; or
(b) order of the court, upon a showing that the deposition is necessary to avoid injustice.

D. Scope of discovery. Unless otherwise limited by order of the court, the parties may obtain discovery regarding any matter not privileged, that is relevant to the offense charged or the defense of the accused person, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

E. Time and place of statement or deposition. Unless agreed to by the parties, any statement or deposition allowed under this rule shall be conducted at such time and place as ordered by the court.

F. Deadline for statement or deposition. Absent the prior approval of the assigned trial judge, a statement or deposition may not be scheduled more than one hundred (100) days after arraignment or the filing of a waiver of arraignment. If a party needs an extension of time, the party must obtain court approval prior to the expiration of the one hundred (100) day period. Failure to comply with this rule shall be deemed a waiver of the right to take a statement or deposition.

G. Continuing duty to disclose. If a party discovers additional material or witnesses that the party previously would have been under a duty to disclose and make available at the time of such previous compliance if it were then known to the party, the party shall promptly give notice to the other party of the existence of the additional material or witnesses.

H. Failure to comply. If at any time during the course of the proceedings it is brought to the attention of the court that a
party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection of materials, grant a continuance, or prohibit the party from calling a witness, or prohibit the party from introducing in evidence the material, or it may enter such other order as it deems appropriate under the circumstances, including but not limited to holding an attorney, party or witness in contempt of court.

I. Statement defined. As used in this rule, “statement” means:

(1) a written statement made by a person and signed or otherwise adopted or approved by such person;
(2) any mechanical, electrical or other recording, or a transcription thereof, which is a recital of an oral statement; and
(3) stenographic or written statements or notes which are in substance recitals of an oral statement.

7-606. Subpoena.
A. Form; issuance.
(1) Every subpoena shall:
(a) state the name of the court from which it is issued;
(b) state the title of the action and action number;
(c) command each person to whom it is directed to attend a trial, hearing, statement or deposition and give testimony or to produce designated books, documents or tangible things in the possession, custody or control of that person;
(d) state the time and date of the hearing, trial, statement or deposition, the name of the judge before whom the witness is to appear or produce documents; and
(e) be substantially in the form approved by the Supreme Court.
(2) All subpoenas shall issue from the court for the court in which the matter is pending.
(3) In matters involving trial, hearings or production of documents or tangible things, the judge or clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. The judge or clerk may issue a subpoena duces tecum to a party only if the subpoena duces tecum is completed by the party prior to issuance by the judge or clerk. An attorney authorized to practice law in New Mexico and who represents a party, as an officer of the court, may also issue and sign a subpoena on behalf of the court in which the case is pending.
(4) In matters involving statements or depositions, no subpoena to appear to give a statement or deposition shall be valid unless signed by the trial judge.
(5) Proof of service when necessary shall be made by filing with the clerk of the court a return substantially in the form approved by the Supreme Court.

B. Service.
(1) A subpoena may be served by any person who is not a party and is not less than eighteen (18) years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and, if that person’s attendance is commanded:
(a) if the witness is to be paid from funds appropriated by the legislature to the administrative office of the courts for payment of state witnesses or for the payment of witnesses in indigency cases, by processing for payment to such witness the fee and mileage prescribed by regulation of the administrative office of the courts;
(b) for all persons not described in Subparagraph (1)(a) of this paragraph, by tendering to that person the full fee for one day’s expenses provided by Subsection A of Section 10-8-4 NMSA 1978 as per diem for nonsalaried public officers attending a board or committee meeting and the mileage provided by Subsection D of Section 10-8-4 NMSA 1978. The fee for per diem expenses shall not be prorated. If attendance is required for more than one (1) day, a full day’s expenses shall be paid prior to commencement of each day attendance is required. When the subpoena is issued on behalf of the state or an officer or agency thereof, fees and mileage need not be tendered. When the subpoena is issued on behalf of the defendant in criminal actions and when the person whose attendance is commanded is an officer or agent of the state or any agency thereof, fees and mileage need not be tendered. Prior to or at the same time as service of any subpoena commanding production of documents and things or inspection of premises before trial, notice shall be served on each party in the manner prescribed by Rule 7-209 NMRA;
(2) Proof of service when necessary shall be made by filing with the clerk of the court a return substantially in the form approved by the Supreme Court;
(3) Personal service of the subpoena may be completed by serving the individual or, in the case of a police officer or agent of the state, by serving an on-site supervisor or a representative designated by the agency that employs the individual to be served.

C. Protection of persons subject to subpoenas.
(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney’s fee.
(2) Unless specifically commanded to appear in person, a party commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things need not appear in person at the hearing or trial.
(b) Subject to Subparagraph (2) of Paragraph D of this rule, a person commanded to produce and permit inspection and copying may, within fourteen (14) days after service of the subpoena or before the time specified for compliance if such time is less than fourteen (14) days after service, serve upon all parties written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court by which the subpoena was issued. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.
(3) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if:
(i) fails to allow reasonable time for compliance;
(ii) requires disclosure of privileged or other protected matter and no exception or waiver applies;
or

(iii) subjects a person to undue burden.

(b) The court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena if a subpoena:

(i) requires disclosure of a trade secret or other confidential research, development or commercial information;

(ii) requires disclosure of an unretained expert’s opinion or information not describing specific events or occurrences in dispute and resulting from the expert’s study made not at the request of any party; or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than one hundred (100) miles to attend trial.

If the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

D. Duties in responding to subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications or things not produced that is sufficient to enable the demanding party to contest the claim.

E. Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court punishable by fine or imprisonment.
A Message from the President

Frank Baca, Esq.

I have been recently asked the question “What is it that you all do?” As I started to answer the question, I realized two things. First, the New Mexico Hispanic Bar Association does a lot and second, we don’t do a very good job of telling people what it is that we do. Therefore, I decided to try and rectify the situation by telling you a little about what it is that we do.

The NMHBA has two main components. The organization serves as a networking opportunity for our members, professionally and socially. Secondly and more importantly, the NMHBA has maintained a steady focus on community involvement, primarily in promoting educational opportunities for the youth of our community.

In regards to networking, the Board is comprised of 24 members from a diverse backgrounds and areas of practice and we currently have over 250 paid members. This group has provided numerous opportunities for each other in terms of jobs, case referrals and social contacts. We routinely send our notices of employment opportunities to our membership and are developing a system to make case referral to members.

Many of our members have positions that allow them to be aware of job opportunities and have input into the hiring decision. Governor Richardson, in his keynote address at our most recent banquet, commented that the NMHBA has been his bullpen for numerous appointments within his administration. Many of our Board members are politically active and develop contacts that help them in furtherance of their political aspirations. Finally, some of our members have great office parties.

In regards to education, the NMHBA has a number of projects underway that demonstrate a commitment to help those interested in a career in the legal profession as well as to simply encourage kids to consider furthering their post-secondary education. In this edition of Res Publica you will find information about the law camp that we co-sponsor as well as a leadership camp put on by the National Hispanic Bar Association. You will also find information about scholarships given to UNM law students who are preparing for the bar exam as well as stipends awarded to 1st and 2nd year students. We have also provided a significant stipend to students interested in environmental law.

Over the last several years, we have extended our involvement to the younger students. We have awarded scholarships to deserving high school students who have demonstrated an interest in college and a commitment to community involvement. We are also collaborating with other organizations to develop a mentorship program that includes a “pipeline” aspect that begins with law students and extends to undergraduates and down into the high school and mid-schools.

This is just a taste of what we do. I hope it helps answer the question of what it is that we do. But I also hope it encourages you to become part of this great organization.
Dismas House Law Firm Challenge

The NMHBA Board of Directors has voted to participate in the Dismas House of New Mexico Law Firm Challenge. Each year Dismas House challenges law firms and legal organizations to serve as volunteer cooks for their residents. The organization or law firm that volunteers most frequently is given a table and is recognized at the Dismas House Annual Banquet. Dismas House provides a transitional home with a family atmosphere to nonviolent parolees who are transitioning back into society. Dismas House provides assistance to its residents to help them seek gainful employment and a successful recovery. We are hoping that the NMHBA will make a strong showing in this year’s Dismas House Law Firm Challenge and strongly encourage you to volunteer. If you are interested in volunteering please contact Carol Boss with Dismas House at carol@dismashousenewmexico.org or NMHBA Board Member Briana Zamora at bhzamora@btblaw.com.

ABA Fellowship

The NMHBA is again co-sponsoring a fellowship with the ABA Section of Environment, Energy and Resources. (The NMHBA funds half of a $5,000 fellowship award). The ABA fellowship is designed to encourage minority law students to study and pursue careers in environmental, energy and resources law; an area of law within which minority participation is low. Each student must work for a government agency or public interest organization in New Mexico for a minimum of 10 weeks, on legal matters involving the environment. If you would like more information about this program, please contact NMHBA Board Members Tina Cruz at tcruz@narvaezlawfirm.com or Briana Zamora at bhzamora@btblaw.com.
The 2006 Minority Environmental Law Fellowship, supported by the NMHBA, allowed me an opportunity that would have otherwise not been available to me. I had the pleasure of being a part of the NM Environmental Law Center because of the fellowship. Without the fellowship, I would have not been able to obtain this position. Prior to the summer, I had no experience in environmental law, or in any environmental work. All that I had was a concern for the environment and an interest in the topic. After the summer, because of the fellowship, and because of the support of the NMHBA, I was able to obtain valuable experience in environmental law which has opened up other possibilities of environmental legal work that I would now be able to obtain on my own.

My mother is from the South Valley of Albuquerque, and was born in the house that my grandmother still lives in. It is a poor, primarily Hispanic area. My mother was the first person in her family to obtain a college degree. Because of her example, as well as that of my father, I understood the importance of a college education, and the opportunities that it can bring. I believe it was easier for me to obtain a college degree than others who don't have that example in their lives. However, no one in my family is a lawyer, and I have no connections in the business community from my family. This is the direct result of my minority status, the fact that my mother came from a poor, Hispanic family. My mother and her family did not have the same opportunities when they were growing up because they are Hispanic. Times have changed, and I have many more opportunities as a Hispanic than my mother did, though discrimination still exists in many areas of business.

Remedying the effects of past discrimination is not as easy in a world where who you know is just as important as what you know. Because of my background, I don't have the same connections or know the same people that someone with a different background in a family full of lawyers and professionals would. The effects of past discrimination can be remedied by the NMHBA through their support of minority fellowships. Minority fellowships create opportunities and business connections for minorities that would be difficult or impossible to obtain without it.
Christina A. Vigil handles all sectors of employment law including:

- Discrimination/Sexual Harassment
- State Personnel Board Hearings/Appeals
- Federal/State Litigation
- Constitutional and Civil Rights Violations
- EEOC and NM Human Rights Division Proceedings
- Unemployment Hearings/Appeals
- Federal EEO
- Federal MSPB
- Social Security Representation
- Medical and Nursing Board Hearing

*REFERRALS ARE WELCOMED AND APPRECIATED*

The Law Office of Christina A. Vigil expresses sincere gratitude to the New Mexico Hispanic Bar Association’s longstanding commitment to diversity, education, and advocacy to the legal community of New Mexico.
Certiorari Denied, No. 30,054, November 15, 2006
From the New Mexico Court of Appeals

Opinion Number: 2007-NMCA-030

JESSICA NICHOLE RUEGSEGGER,
Plaintiff-Appellant/Cross-Appellee,
versus
THE BOARD OF REGENTS OF WESTERN NEW MEXICO UNIVERSITY and
JOHN COUNTS, Ph.D, AND CHRIS FARREN, Ph.D, individually and
in their official capacities as President and Vice President of WMNU,
Defendants-Appellees/Cross-Appellants.
No. 25,960 (filed: August 16, 2006)

APPEAL FROM THE DISTRICT COURT OF GRANT COUNTY
GARY M. JEFFREYS, District Judge

SHERRY J. TIPPETT
Albuquerque, New Mexico
PETER THOMAS WHITE
Santa Fe, New Mexico
for Appellant

JOSH A. HARRIS
BEALL & BIEHLER, P.A.
Albuquerque, New Mexico
for Appellees

Opinion
LYNN PICKARD, Judge

{1} Plaintiff, Jessica Nichole Ruegsegger, appeals an order dismissing her complaint for breach of contract against Defendants, the Board of Regents of Western New Mexico University (WNMU), John Counts, Ph.D., and Chris Farren, Ph.D., and a second order refusing to allow Plaintiff to file an amended complaint. Defendants cross-appeal from the portion of the amended order awarding dismissal under Rule 1-012(B)(6) NMRA, instead of summary judgment. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

{2} Plaintiff was attending WNMU on an athletic scholarship in the spring of 2004. On April 13, 2004, Plaintiff was allegedly raped by two WNMU football players. Plaintiff was dissatisfied with the ensuing investigation by WNMU and, on August 19, 2004, she filed a complaint against Defendants for intentional infliction of emotional distress, violation of Title IX, breach of contract, and breach of an implied covenant of good faith and fair dealing. Plaintiff alleged that WNMU officials breached their contractual obligations by deliberately failing to follow WNMU policies and procedures in investigating the sexual attack, failing to provide a school free from harassment and hostility, and failing to provide reasonable support for her following the assault. The case was removed to federal court which, pursuant to Plaintiff’s unopposed motion and the stipulation of the parties, dismissed the Title IX claim and remanded to state court.

{3} Defendants filed a motion to dismiss pursuant to Rule 1-012(B)(6), claiming governmental immunity and arguing that there was no contract, express or implied, between Plaintiff and WNMU as a matter of law. They also filed an expedited motion for a protective order to stay discovery until the district court ruled on their motion to dismiss. In response to the motion for a protective order, Plaintiff stated that no discovery requests of any kind had yet been made, but also acknowledged that she had been attempting to set depositions for WNMU officials without success.

{4} In response to the motion to dismiss, Plaintiff claimed that she had an enforceable, written contract with WNMU in the form of three Athletic Scholarship Agreements and that she had an implied contract based upon the WNMU Student Handbook. She conceded that Defendants were entitled to immunity on her intentional infliction of emotional distress claim and sought leave to file a stipulated motion to amend her complaint to omit the emotional distress claim and to proceed on the breach of contract claim.

{5} As exhibits to her response, Plaintiff attached copies of two Athletic Scholarship Agreements dated April 23, 2002, and May 1, 2003, respectively. She also attached a copy of her affidavit stating that she had attempted to obtain her most recent Athletic Scholarship Agreement and a letter of intent, but she was denied immediate access to those documents by WNMU employees. She concluded by asking for summary judgment in her favor.

{6} In reply, Defendants claimed that by attaching exhibits Plaintiff had transformed the motion into one for summary judgment. They also argued that Plaintiff’s breach of contract claim failed because the Scholarship Agreements only require WNMU to provide scholarship funds and only require Plaintiff, but not WNMU, to comply with university regulations. Finally, they noted that Plaintiff could not recover against the individual Defendants due to governmental immunity.

{7} After a hearing, the district court granted Defendants’ motion to dismiss. The court also found that Plaintiff had turned the motion to dismiss into a motion for summary judgment by attaching evidence outside of the pleadings.

{8} Plaintiff filed a motion to reconsider and a motion for leave to file an amended complaint. She attached a proposed amended complaint alleging claims for breach of contract and breach of an implied covenant of good faith and fair dealing, with copies of the WNMU Student Handbook and the Scholarship Agreement dated May 1, 2003, attached.

{9} The district court denied Plaintiff’s motion for reconsideration by issuing an amended order granting Defendants’ motion to dismiss. In the amended order, the court found that Plaintiff did not turn the motion to dismiss into a motion for summary judgment. Defendants filed a motion to reconsider the district court’s ruling that Plaintiff did not convert the motion to dismiss into a motion for summary judgment, which was not ruled upon and therefore deemed denied. The district court
also denied Plaintiff’s motion for leave to file an amended complaint.

{10} Plaintiff appeals the order dismissing her complaint and the order denying her motion for leave to file an amended complaint. Defendants cross-appeal, claiming that Plaintiff’s attachments converted the motion into one for summary judgment instead of dismissal on the pleadings.

STANDARD OF REVIEW

{11} “A motion to dismiss for failure to state a claim under Rule 1-012(B)(6), ‘tests the legal sufficiency of the complaint, accepting all well-pleaded factual allegations as true.’” Henderson v. City of Tucumcari, 2005-NMCA-077, ¶ 7, 137 N.M. 709, 114 P.3d 389 (quoting Derringer v. State, 2003-NMCA-073, ¶ 5, 133 N.M. 721, 68 P.3d 961). The motion will only be granted if “the law does not support a plaintiff’s claim under any set of facts subject to proof.” Henderson, 2005-NMCA-077, ¶ 7. We review rulings on Rule 1-012(B)(6) motions de novo. Id.

{12} In addition to challenging the dismissal of her original complaint, Plaintiff claims that the district court should have granted her leave to file an amended complaint. The trial court’s decision on a motion to amend is reviewed for abuse of discretion. Dominguez v. Dairyland Ins. Co., 1997-NMCA-065, ¶ 17, 123 N.M. 448, 942 P.2d 191. Although, in general, leave to amend is freely granted, whenever the insufficiency or futility of the proposed amended pleading is apparent on its face, leave to amend may be denied because granting the motion “would serve no purpose.” Stinson v. Berry, 1997-NMCA-076, ¶ 9, 123 N.M. 482, 943 P.2d 129 (recognizing that the futility of an amended complaint is a reasonable basis for denying leave to amend); see Thompson v. Montgomery & Andrews, P.A., 112 N.M. 465, 467, 816 P.2d 532, 536 ( Ct. App. 1991) (holding that the district court did not err in refusing to allow the plaintiff to amend his complaint because the plaintiff failed to demonstrate that he had any “viable alternative claim against these defendants”).

{13} If we conclude that the district court correctly ruled that Plaintiff failed to state a valid claim for breach of contract in her original complaint and that failure was not corrected in the proposed amended complaint, we will affirm the district court’s decision to deny Plaintiff’s motion for leave to file the amended complaint. See, e.g., Home & Land Owners, Inc. v. Angel Fire Resort Operations, L.L.C., 2003-NMCA-070, ¶ 33, 133 N.M. 733, 69 P.3d 243 (affirming the district court’s denial of plaintiff’s motion to amend when the proposed amendment sought to assert claims that were premised on the same contention that was previously rejected). Therefore, in reviewing the dismissal of the breach of contract claim pursuant to Rule 1-012(B)(6), and the refusal of the district court to allow Plaintiff to file her proposed amended complaint, we consider (1) the contents of Plaintiff’s complaint and the proposed amended complaint, assuming that the facts alleged therein are true, and (2) the attached documents which purport to constitute an enforceable contract. See Kirkpatrick v. Introspect Healthcare Corp., 114 N.M. 706, 709, 845 P.2d 800, 803 (1992).

DISCUSSION

The Complaint and Proposed Amended Complaint

{14} In support of her claim for breach of contract, Plaintiff’s complaint includes the following allegations: “[T]here are several elements of breach of contract. Plaintiff’s coach . . . [who] did not direct or recommend that the Defendant contact the police and . . . did not instruct the Plaintiff to get immediate medical attention to preserve evidence of the rape.” Defendant’s coach was immediately directed by WNMU officials to “cease any assistance to Plaintiff.” Neither Defendant WNMU nor its agents convened a “Crisis Intervention Team” as required by the WNMU Student Handbook.” After promising Plaintiff that she would receive findings and conclusions from the “Student Appeals Hearing Committee” within two days of the investigation, Plaintiff was never given written findings. Plaintiff was verbally informed that the Student Appeals Committee had determined that WNMU would not take any disciplinary action in the matter “because alcohol had been used by all parties.” WNMU officials told local newspapers that an investigation was still ongoing two days after Plaintiff was verbally informed that no disciplinary action would be taken. Plaintiff was “intentionally misinformed and misled [sic] by Defendant and its agents since reporting the rape to her coach.” Defendants’ deliberate indifference to Plaintiff’s sexual assault caused her to resign from the basketball team and discouraged other female students from reporting acts of sexual assault to WNMU administration. Defendants represented to Plaintiff “verbally and in writing, that WNMU would provide Plaintiff with a school free from harassment and hostility and that it would follow its policies and procedures.” Defendants subjected Plaintiff to “humiliation and unfair treatment by deliberately failing to follow[]” WNMU’s policies and procedures after the rape.” Defendants failed to “provide reasonable support following the assault.”

{15} In her proposed amended complaint, Plaintiff reiterates the allegations set forth in her original complaint. She also adds allegations that (1) her contract with WNMU referenced the WNMU Student Handbook by stating that Plaintiff must “comply with team athletics department and regulations of the institution”; (2) the only document containing WNMU rules and regulations is the Student Handbook; (3) the WNMU Student Handbook applies mutually to the students and to WNMU; and (4) Defendants’ deliberate indifference to Plaintiff’s assault, failure to support her, and failure to take any disciplinary action resulted in a hostile environment that “deprived Plaintiff of access to the educational opportunities and benefits provided by the school, including playing with [the] women’s basketball team.”

{16} Taking these allegations as true, as we must for purposes of a motion to dismiss, we now turn to the provisions of the Scholarship Agreements and the Student Handbook to determine whether, as Plaintiff alleges, WNMU was contractually obligated to provide investigatory and support services after Plaintiff was sexually assaulted. See Envtl. Control, Inc. v. City of Santa Fe, 2002-NMCA-003, ¶ 6, 131 N.M. 450, 38 P.3d 891.

The Scholarship Agreement

{17} The only explicit written contracts between Plaintiff and WNMU are the Scholarship Agreements. The provisions of the Scholarship Agreements are unambiguous, so we need only apply them as written. See R & R Deli, Inc. v. Santa Ana Star Casino, 2006-NMCA-020, ¶ 13, 139 N.M. 85, 128 P.3d 513; Envtl. Control, Inc., 2002-NMCA-003, ¶¶ 14-15.

{18} Pursuant to these agreements, WNMU promises (1) to provide the specified amount of financial aid if Plaintiff fulfills her portion of the contract and (2) not to increase, reduce, or cancel the promised aid due to athletic performance or ability to contribute to the team’s success or if Plaintiff is prevented from participating in athletics due to injury, illness, or any other athletic reason.” The Scholarship Agreements provide that the aid can be immediately reduced or cancelled if Plaintiff voluntarily withdraws from the sport for personal reasons or fails to “comply with team, athletic department, or university regulations.” The Agreements make no reference to any duty on the part of WNMU to comply with any university regulations
or to investigate claims of harassment, sexual assaults, or any other misbehavior by other students.

{19} The Scholarship Agreements only purport to bind Plaintiff, not Defendants, to comply with university “regulations” as a condition of the contract. Plaintiff is correct that a valid contract requires mutuality of obligation. See Bd. of Educ. v. James Hamilton Constr. Co., 119 N.M. 415, 420, 891 P.2d 556, 561 (Ct. App. 1994). However, mutuality does not require that the consideration provided by both parties be identical and, in this case, there is mutuality of obligation in the terms of the Scholarship Agreements. The Scholarship Agreements require Plaintiff to maintain acceptable academic performance, play basketball, and comply with WNMU’s regulations. In exchange, WNMU is obligated to provide Plaintiff with scholarship assistance for her education.

{20} Based upon the express terms of the Scholarship Agreements, Plaintiff’s complaint and proposed amended complaint fail to state a cognizable claim for breach of contract because neither the complaint nor the proposed amended complaint contains any allegations that Defendants breached their contractual duty to provide scholarship assistance in the form of financial payments.

The Student Handbook

{21} Plaintiff argues that the Student Handbook is also part of the “contract” because the Scholarship Agreements require her to comply with team, athletic department, and university regulations. She argues that all of the rules and regulations in the Handbook are integrated into the contract by this reference in the Scholarship Agreements.

{22} As an initial matter, we address Defendants’ contention that they are immune from liability because the terms of the Student Handbook are at most either implied-in-fact in the Scholarship Agreements or an implied-in-fact contract. Defendants contend that governmental immunity is waived for claims based on a contract only if the contract is written. See NMSA 1978, § 37-1-23(A) (1976). Thus, they argue that they are immune from liability for claims based upon the Student Handbook because, pursuant to Section 37-1-23(A), implied-in-fact contracts are not “written contracts” for which immunity is waived, except in the employment context. See Campos de Suenos, Ltd. v. County of Bernalillo, 2001-NMCA-043, ¶ 26, 130 N.M. 563, 28 P.3d 1104 (expressing this Court’s “grave reservations” concerning whether implied-in-fact contracts should override governmental immunity outside of the employment context). We apply a de novo review to the application of Section 37-1-23(A) to the facts of this case. Univ. of N.M. Police Officer’s Ass’n v. Univ. of N.M., 2005-NMSC-030, ¶ 8, 138 N.M. 360, 120 P.3d 442; Campos de Suenos, Ltd., 2001-NMCA-043, ¶ 10. While acknowledging the reservations expressed by this Court in Campos de Suenos, for purposes of this case we can assume without deciding that Section 37-1-23(A) does not bar Plaintiff’s claim based upon the terms of the Student Handbook because we hold that Plaintiff has failed to state a valid claim for breach of contract based upon the language of the Student Handbook.

{23} The question of whether a student handbook creates a contractual relationship between a student and a post-secondary educational institution is an issue of first impression in New Mexico. We look to cases that have arisen in the employment context for guidance.

{24} To establish a claim for breach of implied contract based upon the terms of the Student Handbook, Plaintiff was required to demonstrate that those terms created a reasonable expectation of contractual rights. Cf. Hartbarger v. Frank Paxton Co., 115 N.M. 665, 672, 857 P.2d 776, 783 (1993) (“An implied contract is created only where an employer creates a reasonable expectation.”). The reasonableness of the student’s expectation is measured by the definiteness, specificity, or explicit nature of the representation at issue. Id. Although the determination of whether an implied contract exists may be an issue of fact in most cases, we first consider whether, as a matter of law, based upon the language of the Student Handbook, Plaintiff could reasonably expect that WNMU would be obligated to perform a more comprehensive investigation into her claims and to provide her with more “support” after she informed WNMU officials of the assault. Cf. Kiedrowski v. Citizens Bank, 119 N.M. 572, 575, 893 P.2d 468, 471 (Ct. App. 1995) (recognizing that, to defeat the employer’s prima facie case for summary judgment, the employee had to persuade the court that her expectations satisfied “a certain threshold of objectivity”).

{25} The Handbook contains (1) a student code of conduct and sanctions that can be imposed against a student who violates the code, (2) a description of academic standards and procedures that will be used when considering the imposition of sanctions for poor academic performance and appeal of those sanctions, (3) a provision for a disciplinary committee that hears cases involving student discipline without specifying the type of hearings that should be conducted except to recognize a student’s right to due process, (4) a drug and alcohol policy with specified procedures for any student who violates the policy, and (5) a general nondiscrimination policy.

{26} The Student Handbook also contains a section on the Student Appeals Committee, which pertains to appeals from various committees including the disciplinary committee. This section confers upon students the right to be present, bring witnesses, be accompanied by an attorney, and have no one but committee members present. The section provides that “[t]he student” will be given verbal notification of the committee’s decision and written notification will follow “in a timely manner.” This section does not clarify whether the phrase “[t]he student” refers to the student being disciplined, the complaining student, or both.

{27} The Handbook’s “sexual harassment policy statement” consists of a general statement of WNMU’s commitment to maintaining an environment free of sexual discrimination and “objectionable and disrespectful conduct and communication of a sexual nature.” Students who feel they have been harassed are encouraged to contact the Director of Affirmative Action/EOO. Students are also encouraged to report “[c]onduct of a sexual nature” to “their immediate supervisor, and/or appropriate vice president, and/or Affirmative Action.”

{28} The handbook also contains a section titled “RESPONSE TO AN ALLEGED SEXUAL ASSAULT” which states that “[t]he University has established the following Crisis Intervention Team to respond to any emergencies concerning sexual assaults.” It then states that the “Crisis Team is as follows” and lists (along with phone numbers) campus police, Vice President of Student Affairs, Vice President of Counseling, and Vice President of Housing. This section recommends that at least two team members respond to any emergency and that the team should include male and female members when possible. It appears undisputed that this team neither convened nor responded in Plaintiff’s case. There is no reference in the sexual harassment policy statement or the section addressing sexual assaults to investigatory procedures, investigatory rights, supportive services (beyond the listing of telephone numbers), or sanctions that should be imposed upon students found to have committed sexual assaults or harassment.

{29} Finally, the Handbook states that
its provisions “are not to be regarded as a contract” and WNMU specifically reserves the right to amend the handbook at any time “as required for effective management of the University.”

{30} Review of these Handbook provisions indicates that, instead of contractually guaranteeing a right to specific types of investigation, support, and sanctions in the event of a sexual assault, they provide guidelines for the operation of WNMU. Therefore, they do not constitute the terms of an implied contract and do not contractually guarantee the rights asserted by Plaintiff. See Sanchez v. The New Mexican, 106 N.M. 76, 79, 738 P.2d 1321, 1324 (1987) (affirming the dismissal of an implied contract claim on grounds that “the handbook lacked specific contractual terms which might evidence the intent to form a contract . . . [insofar as the] language is of a non-promissory nature and merely a declaraton of defendant’s general approach”); Stieber v. Journal Publ Co., 120 N.M. 270, 274, 901 P.2d 201, 205 (Ct. App. 1995) (holding that general policy statements in a handbook are “insufficient to create an implied contract” because they are merely declarations of a general approach to the subject matter); see also Goodman v. President & Trustees of Bowdoin Coll., 135 F.Supp. 2d 40, 56 (D. Me. 2001) (holding that handbook language that “‘[d]iscrimination . . . has no place in an intellectual community . . . [and] [s]uch practices violate both the ideals of the College and its Social Code and are subject to appropriate disciplinary sanctions’” does not indicate a contractual obligation by the college to refrain from discrimination). Even though the Student Handbook sets out a general framework of policies, we are not persuaded that the language contractually obligates WNNU to conduct any specific type of investigation, to provide support services, or to impose specific discipline.

{31} Likewise we are unpersuaded that Plaintiff’s allegation that Defendants failed to convene a crisis intervention team states a claim for breach of contract. The Student Handbook never requires that such a team be “convened” nor does it require any specific responsive action by such a “team.”

{32} Plaintiff cites to a number of cases in which courts have held that the relationship between students and post-secondary educational institutions is contractual in nature. See, e.g., Johnson v. Schmitz, 119 F. Supp. 2d 90, 93 (D. Conn. 2000); Wickstrom v. N. Idaho Coll., 725 P.2d 155, 157 (Idaho 1986); Peretti v. Montana, 464 F. Supp. 784, 786 (D. Mont. 1979), rev’d on other grounds, 661 F.2d 756 (9th Cir. 1981); Behrend v. Ohio, 379 N.E.2d 617, 620 (Ohio Ct. App. 1977); Smith v. Ohio State Univ., 557 N.E.2d 857, 859 (Ohio Ct. Ct. 1990); Aase v. S.D. Bd. of Regents, 400 N.W.2d 269, 270 (S.D. 1987); Marquez v. Univ. of Wash., 648 P.2d 94, 96 (Wash. Ct. App. 1982). However, all of these cases involve claims by students that their respective educational institutions had breached promises relating to academic matters or access to educational programs. See, e.g., Peretti, 464 F. Supp. at 786-87 (holding that a vocational institution had an implied contractual obligation to allow a student who had completed three out of the six quarters of an aviation technology course to complete the remaining quarters needed to obtain a diploma); Behrend, 379 N.E.2d at 620-21 (holding that a student could establish an action for breach of contract when the school lost its accreditation); cf. Aase, 400 N.W.2d at 270-71 (holding that students who had enrolled at one campus for the 1983-84 school year had no contractual rights against the Board of Regents to continue their education at that same campus for the following years once the legislature decided to close that campus).

{33} None of the cases cited by Plaintiff support her conclusion that, merely because there is a contractual relationship between a university and a student, the university is contractually bound to honor every provision found in a student handbook. See Marquez, 648 P.2d at 97 (recognizing that the prelaw handbook did not create “a right in the applicant to obtain a law degree absent his meeting and maintaining reasonable standards established by the Law School”). Instead, these cases recognize that, like all obligations imposed pursuant to implied contractual terms, the contractual obligations imposed by the language in a student handbook center around what is reasonable. See Peretti, 464 F. Supp. at 787. It is reasonable that a school would promise to offer the classes specified in a handbook and to confer certain degrees or licenses listed in a handbook in exchange for the payment of tuition, satisfactory performance of the academic requirements, and compliance with school regulations concerning matters such as honesty. See, e.g., Johnson, 119 F. Supp. 2d at 96 (describing a claim that the school failed in its express and implied contractual duties to “safeguard students from academic misconduct, to investigate and deal with charges of academic misconduct, and to address charges of academic misconduct in accordance with its own procedures” (emphasis added)); Peretti, 464 F. Supp. at 786 (interpreting the contract between the student and school as one in which “the student agrees to pay all required fees, maintain the prescribed level of academic achievement, and observe the school’s disciplinary regulations, in return for which the school agrees to allow the student to pursue his course of studies and be granted a diploma upon the successful completion thereof”) (internal quotation marks and citation omitted)). Absent terms expressly guaranteeing a right to non-academic services, we disagree that it is reasonable for Plaintiff to expect that WNNU has promised such services.

{34} Plaintiff has failed to cite to any case law, and we are unaware of any, in which a school, pursuant to a handbook or catalogue, was found to have contractually guaranteed to perform certain investigatory procedures into allegations of sexual assault perpetrated by other students. Plaintiff cites to George v. University of Idaho, 822 P.2d 549 (Idaho Ct. App. 1991), to support her claim, alleging that WNNU has “precisely the same contractual obligation” to her based on the student handbook as the University of Idaho had to the student in George. We disagree.

{35} George involved a law student’s claim that one of her professors was sexually harassing her by using threats and coercion in attempting to make her resume a relationship with him. Id. at 550-51. The court held that the University had an implied contractual obligation to investigate the suspected harassment and take appropriate corrective measures in order to “fulfill its responsibilities in pursuit of the academic goals and objectives of all members of the university community.” Id. at 557 (internal quotation marks omitted). The obligation imposed in George, to protect a student from harassment or pressure perpetrated by a professor or another person in power, is distinct from the protection that Plaintiff seeks in this case, to wit, an after-the-fact investigation into wrongdoing perpetrated by another student. The former situation presents a much stronger case for requiring the school to address the problem. See id. at 553 (defining harassment in the handbook as “unwelcome sexual advances, . . . when . . . submission to such conduct is made either explicitly or implicitly a term or condition of a student’s grade or . . . a basis for a decision affecting that student” (internal quotation marks and citation omitted)).
to perform the investigatory and support services claimed by Plaintiff in her complaint. Contrary to Plaintiff’s contentions, dismissal of her lawsuit does not indicate that students in New Mexico are entitled to less contractual protection than students elsewhere. Instead, dismissal only indicates that students’ contractual protections, absent explicit language to the contrary, will be confined to the scope of their academic relationship with an educational facility. Based upon the foregoing, the district court did not err in dismissing Plaintiff’s complaint and denying her motion to file an amended complaint because Plaintiff failed to state a cognizable claim for breach of contract, express or implied, against WNMU.

{37} In light of our holding that Plaintiff failed to allege a cognizable claim for breach of contract against any Defendant in her complaint or proposed amended complaint, we need not address Plaintiff’s contention that in seeking leave to file an amended complaint, she was not acting in bad faith or with a dilatory motive. Plaintiff’s motives and the timing of her motion to amend are irrelevant in light of her failure to allege a cognizable claim for breach of contract in her proposed amended complaint.

Implied Covenant of Good Faith and Fair Dealing

{38} In her complaint and proposed amended complaint, Plaintiff alleges a breach of an implied covenant of good faith and fair dealing. As an initial matter, we note that New Mexico courts have yet to address whether a claim for breach of an implied covenant of good faith and fair dealing would be recognized in a contract or implied contract between a university and a student. Again, assuming without deciding that such a claim might be recognized in some situations, we hold that Plaintiff failed to state a cognizable claim for breach of an implied covenant of good faith and fair dealing in this case.

{39} “The concept of the implied covenant of good faith and fair dealing requires that neither party do anything that will injure the rights of the other to receive the benefit of their agreement.” Bourgeois v. Horizon Healthcare Corp., 117 N.M. 434, 438, 872 P.2d 852, 856 (1994). As previously discussed in this opinion, Plaintiff failed to show that the parties had an agreement as to the type of investigation that WNMU must conduct, the type of support services that WNMU must provide, or the sanctions that it must impose when a student brings allegations of sexual assault. There is nothing in the language of the Scholarship Agreements or the Student Handbook indicating that WNMU’s refusal to conduct additional investigation, to provide support, or to impose sanctions on the persons who assaulted Plaintiff deprived Plaintiff of the benefit of her Scholarship Agreements or access to the academic resources of WNMU. See Smoot v. Physicians Life Ins. Co., 2004-NMCA-027, ¶¶ 13, 14, 135 N.M. 265, 87 P.3d 545 (stating that covenant of good faith is not breached when a party is given the product or service bargained for). In the absence of a showing that Defendants’ actions deprived Plaintiff of the benefit of her agreement, Plaintiff could not, as a matter of law, prevail on a claim that her contractual rights were violated in an intentional way or with bad faith. See Paiz v. State Farm Fire & Cas. Co., 118 N.M. 203, 212-13, 880 P.2d 300, 309-10 (1994) (“[T]he implied covenant of good faith and fair dealing protects only against bad faith—wrongful and intentional affronts to the other party’s rights, or at least affronts where the breaching party is consciously aware of, and proceeds with deliberate disregard for, the potential of harm to the other party.” (footnote omitted)), limited on other grounds by Sloan v. State Farm Mut. Auto. Ins. Co., 2004-NMSC-004, ¶ 12, 135 N.M. 106, 85 P.3d 230.

Cross-appeal

{40} We now turn to Defendants’ cross-appeal. Defendants contend that Plaintiff converted the motion to dismiss into a motion for summary judgment by attaching three exhibits to her response to the motion to dismiss. We disagree.

{41} In a breach of contract action, provisions that are integral to the contract may be attached to pleadings without converting the motion into one for summary judgment. See Envtl. Control, Inc., 2002-NMCA-003, ¶¶ 5-7 (reviewing the dismissal of the plaintiff’s complaint for breach of contract and breach of an implied covenant of good faith and fair dealing based upon a prior settlement agreement between the parties which was attached to the complaint as an exhibit); Goodman, 135 F. Supp. 2d at 46-47 (recognizing that the attachment of the honor code and student handbook to a motion to dismiss the student’s claims for breach of contract and civil rights violations did not convert the motion into one for summary judgment because such documents were central to the plaintiff’s allegations of a contractual relationship). Plaintiff’s breach of contract and breach of implied contract claims are dependent on the terms of the Scholarship Agreements and the Student Handbook. Therefore, these documents effectively merge into the pleadings and can be reviewed in deciding a motion to dismiss. See Envtl. Control, Inc., 2002-NMCA-003, ¶¶ 6-7; Goodman, 135 F. Supp. 2d at 46-47.

{42} We are aware that Plaintiff also attached an affidavit to her response. However, review of the affidavit indicates that Plaintiff was only seeking to explain her inability to obtain a copy of her most recent Scholarship Agreement. The district court could rely on the two Scholarship Agreements that were attached and thus had no need to rely on Plaintiff’s affidavit in rendering its decision. Therefore, Plaintiff’s attachment of the affidavit did not convert the motion into one for summary judgment.

{43} We also disagree that Plaintiff’s conclusory request for summary judgment in her response to the motion to dismiss indicates that Plaintiff intended to convert Defendants’ motion into one for summary judgment. See Dunn v. McFeeley, 1999-NMCA-084, ¶ 13, 127 N.M. 513, 984 P.2d 760 (observing that “we can see no incentive for a plaintiff opposing dismissal to try to convert the proceeding to a hearing on a motion for summary judgment”). We note that Plaintiff was seeking to amend her complaint and to depose the individual Defendants. This suggests that Plaintiff intended to conduct additional discovery before making a dispositive motion. If Plaintiff had been treating the motion as one for summary judgment, she would have, in all likelihood, opposed Defendants’ request for a protective order. Based upon our holding that the complaint was properly dismissed on the pleadings, Plaintiff’s contentions as to discovery need not be addressed. See id. ¶ 17.

CONCLUSION

{44} For the reasons set forth above, we affirm the trial court’s order dismissing Plaintiff’s complaint and the denial of Plaintiff’s motion to amend. We also affirm the district court’s amended order stating that the motion was not converted into one for summary judgment.

{45} IT IS SO ORDERED.

LYNN PICKARD, Judge

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

JOSEPH ALARID, Judge

{1} This matter having come before the Court on Petitioner-Appellant’s motion for rehearing, it is hereby ordered that the opinion issued on September 29, 2006, is withdrawn and the following opinion substituted in its place, and Petitioner-Appellant’s motion for rehearing is denied.

{2} This case requires us to decide whether a county clerk may refuse to accept and record a survey plat, duly certified by a licensed professional surveyor as a boundary survey plat, on the ground that the plat has not been reviewed by county authorities for compliance with state and county subdivision law. We hold that a county clerk has statutory authority to independently review survey plats presented for recordation to determine whether a given survey accomplishes a subdivision of land; and that a county clerk may enlist the aid of county zoning and planning officials in conducting this review. We also hold that a county clerk’s authority to conduct a substantive review of the contents of a survey plat is limited to the threshold question of whether a plat accomplishes a subdivision of land.

BACKGROUND

{3} The operative facts are uncomplicated. Petitioner-Appellant Adriano Valdez is a licensed surveyor. Valdez prepared a boundary survey plat for a client whose land is located within the Tierra Amarilla Land Grant in Rio Arriba County. Valdez included the following statement on the plat: “I further certify that this survey is not a subdivision as defined in the New Mexico Subdivision Act and that this instrument is a boundary survey plat of an existing tract or tracts.” On October 27, 2003, Valdez presented the boundary survey plat for filing at the Tierra Amarilla office of Respondent-Appellee Rio Arriba County Clerk Fred J. Vigil. Respondent-Appellee Rio Arriba County has an unwritten, but firmly-established, policy requiring all survey plats, as a condition precedent to acceptance and recordation by the county clerk’s office, to bear a stamp and signature indicating that the plat has been submitted to county planning and zoning officials for review for compliance with state and county land use and subdivision laws. A deputy clerk pointed out that the survey plat did not have the required stamp indicating that it had been reviewed and approved by county planning and zoning officials. The chief deputy clerk directed Valdez to take the survey plat to the county planning and zoning department for review and approval. Valdez asserted that the plat was a “boundary survey” and that there was no requirement that such a survey be reviewed and approved by county officials prior to recordation by the county clerk. The county clerk’s office refused to accept and record the survey plat, returning it to Valdez.

{4} Valdez filed a petition for a writ of mandamus in the Rio Arriba County District Court. The district court upheld the county clerk’s policy of refusing to record survey plats that did not bear a stamp and signature indicating prior review by the county planning and zoning officials. Because the survey had not been submitted to county planning and zoning officials pursuant to the county’s policy—which the district court had upheld—the district court ruled that the county clerk had no duty to accept and record the survey. The district court entered an order denying Valdez’s petition for a writ of mandamus.

DISCUSSION

{5} The focus of this case is the following statute:

A. For those surveys that do not create a division of land but only show existing tracts of record, . . . a professional surveyor shall file and the county clerk shall accept and record a plat of survey entitled “boundary survey plat” that shall:

1. contain a printed certification of the professional surveyor stating that “this is a boundary survey plat of an existing tract”, or existing tracts, if appropriate, and that “it is not a land division or subdivision as defined in the New Mexico Subdivision Act . . .”;

2. identify all tracts by the uniform parcel code designation or other designation established by the county assessor, if applicable;

3. meet the minimum standards for surveying in New Mexico as established by the board;

4. not exceed a size of eighteen inches by twenty-four inches and be at least eight and one-half inches by eleven inches; and

5. consist of two black-line copies, one of which the county clerk’s office may require to be a mylar copy, made by the surveyor...
from a mylar original, which shall be maintained in the professional surveyor’s files.


{6} We begin with an analysis of the grammatical structure of Section 61-23-28.2(A). The portion of Subsection (A) quoted above consists of a single sentence composed of two clauses: (1) an initial independent clause, and (2) an extended dependent clause beginning with the words “that shall.” The dual subjects of the initial clause are “a professional surveyor” and “the county clerk”; the action is conveyed by the verbs “shall file” and “shall accept and record”; and the object of the independent clause is the phrase “a plat of survey entitled ‘boundary survey plat.’” The dependent clause beginning with “that shall” modifies “a plat of survey entitled ‘boundary survey plat.’”

{7} An inanimate object such as a survey plat obviously cannot create itself or determine its own contents. When the Legislature uses the grammatical structure, “[an inanimate object] that shall” followed by a list of criteria, it implicitly is imposing an obligation on some human actor or actors to comply with the statutory criteria. Although Subsection (A) refers to two actors—surveyors and county clerks—it does not expressly identify the actor (or actors) who are responsible for insuring that the survey plat conforms to the criteria of paragraphs (1)-(5).

{8} A further complication results from the principle of statutory construction that the auxiliary verb “shall” can “express a duty, obligation, [or] requirement” and a “condition precedent.” NMSA 1978, § 12-2A-4(A) (1997). It is not clear in what sense the Legislature used “shall” in the subordinate clause beginning with “that shall.” Section 61-23-28.2(A). Some of the criteria in Subsection 61-23-28.2(A)(1)-(5) clearly express duties imposed on the surveyor preparing the plat, as for instance, in Subsection (A)(3) the requirement is that a survey “meet the minimum standards for surveying in New Mexico.” Other criteria such as the Subsection (A)(1) certification or the dimensions specified in Subsection (A)(4) can readily be read both as imposing a duty on the surveyor preparing the plat and as creating a condition precedent to a county clerk’s duty to accepting and recording a survey plat.

{9} On balance, we are persuaded that Subsection (A)(1)-(5) is principally addressed to surveyors, on whom they impose duties in preparing and submitting a plat. We consider it significant that the Legislature included the criteria of Subsection (A)(1)-(5) in NMSA 1978, Chapter 61, Section 23, which is generally concerned with the regulation of the professions of engineering and surveying, rather than in NMSA 1978, Chapter 14, Section 8, which is generally concerned with recordation or NMSA 1978, Chapter 47, Section 6, which is generally concerned with county regulations of subdivisions. Further, in contrast to a county clerk, a surveyor preparing a plat has direct control over the contents of the plat and is qualified by training and experience to ensure that a given plat satisfies the substantive criteria of Subsection 61-23-28.2(A)(1)-(5). Lastly, determining whether a given survey “meet[s] the minimum standards for surveying in New Mexico” seems to us to be an inquiry generally beyond the expected competence of county clerks. Section 61-23-28.2(A)(3). We therefore hold that the Legislature intended the substantive criteria of Subsection (A)(1)-(5) primarily to impose duties on the surveyor preparing the plat, and that Subsection (A)(1)-(5) does not of itself authorize a county clerk to engage in a substantive review of the contents of a boundary survey plat. A county clerk’s responsibilities under Subsection (A)(1)-(5) are ministerial, such as reviewing a boundary survey plat to determine that it contains a surveyor’s certification or that it does not exceed eighteen inches by twenty-four inches.

{10} Respondents argue that apart from Subsection (A)(1)-(5), the introductory clause of Subsection (A) creates a threshold question of whether a given survey is in fact a “boundary survey plat” as opposed to a subdivision plat. We agree.

{11} As Respondents point out, we should not read Subsection (A) in isolation: understanding the legislative intent underlying Subsection (A) requires consideration of other statutes in pari materia. Roth v. Thompson, 113 N.M. 331, 334, 825 P.2d 1241, 1244 (1992) (observing that “[a] fundamental rule of statutory construction is that all provisions of a statute, together with other statutes in pari materia, must be read together to ascertain the legislative intent”). Accordingly, our construction of Subsection (A) is informed by consideration of Subsection (C), which provides as follows:

For those surveys that do create a division of land, the survey shall be completed in conformity with the board’s minimum standards and in conformity with the New Mexico Subdivision Act and any applicable local subdivision ordinances. Filing procedures shall be prescribed in the board’s minimum standards. The record of survey required to be filed and recorded pursuant to this subsection shall be filed within sixty calendar days after completion of the survey or approval by the governing authority.

Subsection 61-23-28.2(C) (emphasis added). Section 61-23-28.2 clearly reflects the Legislature’s intent to distinguish “those surveys that do not create a division of land,” which are governed by Subsection (A), from “those surveys that do create a division of land,” which are governed by Subsection (C). Subsection (C) expressly incorporates the New Mexico Subdivision Act and applicable local subdivision law, and expressly refers to “approval by the governing authority.”

{12} We also must consider the New Mexico Subdivision Act, NMSA 1978, §§ 47-6-1 to -29 (1973, as amended through 2005) (the NMSDA), which is referred to in both Subsections 61-23-28.2(A), (C). The NMSDA defines a subdivision as follows:

L. “subdivision” means the division of a surface area of land, including land within a previously approved subdivision, into two or more parcels for the purpose of sale, lease or other conveyance or for building development, whether immediate or future; but “subdivision” does not include:

(7) the division of land resulting only in the alteration of parcel boundaries where parcels are altered for the purpose of increasing or reducing the size of contiguous parcels and where the number of parcels is not increased.]
Section 47-6-9(A). A boundary survey as defined in Subsection 61-23-28.2(A) does not create a division of land, and therefore is inherently inconsistent with the NMSDA’s basic definition of a subdivision, which requires “the division of a surface area of land.” Section 47-6-2(L). Moreover, even if a boundary survey that alters boundaries shown on a prior survey plat might in some sense be considered a division of land, such surveys are expressly excepted from the definition of subdivision by Subsection 47-6-2(L)(7). Because a Subsection 61-23-28.2(A) survey does not fall within the NMSDA’s definition of subdivision, a Subsection (A) survey does not trigger a county’s regulatory authority under the NMSDA.

The NMSDA contains one other provision that we view as essential to our understanding of the legislative intent underlying Subsection 61-23-28.2(A):

The county clerk shall not accept for filing any final plat subject to the New Mexico Subdivision Act . . . that has not been approved as provided in the New Mexico Subdivision Act.

Section 47-6-6 (emphasis added). The significance of this section of the NMSDA will become apparent in the discussion that follows.

We think that in enacting Subsection 61-23-28.2(A), the Legislature included the certification requirement of Subsection (A)(1) to aid county clerks in determining whether a given plat accomplishes a subdivision of land within the meaning of the NMSDA. A surveyor’s Subsection (A)(1) certification, if unrebutted, is sufficient to support a determination that the survey in question does not accomplish a subdivision of land. See Goodman v. Brock, 83 N.M. 789, 792-93, 498 P.2d 676, 679-80 (1972) (observing that a “prima facie showing” is evidence that, if unrebutted, permits a factfinder to find the fact in question). However, in view of Section 47-6-6, we do not believe that the Legislature intended a county clerk to be bound by a surveyor’s Subsection 61-23-28.2(A) certification. Section 47-6-6 expressly prohibits a county clerk from accepting a plat that is “subject to the [NMSDA and] that has not been approved as provided in the [NMSDA].” Section 47-6-6 was enacted in its current form in 1995, and therefore existed prior to the enactment of Subsection 61-23-28.2(A)’s certification requirement in 1999.

Thus, when Section 47-6-6 was enacted, the Legislature could not have intended for county clerks to defer to a surveyor’s certification. We hold that the duty to not accept a plat subject to the NMSDA unless it has been approved, necessarily implies the authority to independently review a plat, including a plat labeled as a boundary survey plat, to determine the threshold substantive question of whether the survey plat accomplishes a subdivision of land within the meaning of the NMSDA. See Kennecott Copper Corp. v. Employment Sec. Comm’n, 78 N.M. 398, 402, 432 P.2d 109, 113 (1967) (observing that a power conferred by statute implies those further powers necessary to carry out the power expressly granted). In carrying out the statutory duty under Section 47-6-6, a county clerk is not bound by a surveyor’s certification and may look to the face of the survey or to other documents in the county clerk’s records in determining whether a survey plat certified as a boundary survey plat in fact accomplishes a division of land within the meaning of the NMSDA. See Eldorado Utils., Inc. v. State ex rel. D’Antonio, 2005-NMCA-041, ¶¶ 12-13, 137 N.M. 268, 110 P.3d 76 (holding that the State Engineer has discretion to refuse to accept for filing amended declarations of water rights pertaining to water rights that are not vested, and that the State Engineer may rely on information contained in his own records in exercising this discretion).

We see no reason why a county clerk, in confirming the accuracy of a surveyor’s certification, should be precluded from obtaining the aid of county employees with expertise in land use matters. Valdez has not referred us to any statute or ordinance that prohibits a county clerk from relying on the expertise of other county employees in carrying out the duties imposed by Sections 47-6-6 and 61-23-28.2. It is essential for county clerks and other county officials assisting the county clerk to bear in mind that a county clerk conducting a threshold review to determine if a given plat falls within or without of the county’s regulatory jurisdiction is exercising a statutory grant of authority under Sections 47-6-6 and 61-23-28.2 that is entirely independent of, and more limited than, the authority to review subdivision plats granted to a board of county commissioners (or its delegates) under the NMSDA. County officials enlisted to assist a county clerk in reviewing a survey plat review must take care to distinguish the narrow threshold review contemplated by Sections 47-6-6 and 61-23-28.2 from plenary review of subdivision by a county commission pursuant to the NMSDA.

County clerks are “ex-officio recorders in their respective counties.” NMSA 1978, § 14-8-1 (1915). As the recorders, county clerks have a duty to record “papers which by law should be recorded.” NMSA 1978, § 14-8-2 (1915). This duty is more specifically described as follows:

When any land title, or other document, shall be delivered to the county clerk to be recorded, it shall be his duty to endorse immediately on that document, or other paper, the day, month and year in which he received it, and he shall record it in the book of record as soon as possible, and the said documents from the date on which they were delivered to the county clerk shall be considered as recorded.

NMSA 1978, § 14-8-6 (1915). We perceive a potential conflict between Section 14-8-6, which imposes a duty to “endorse immediately” and to record “as soon as possible,” Section 14-8-2, which limits the duty to only those documents that are recordable, and Section 47-6-6, which imposes an unqualified duty not to accept an unapproved subdivision plat for filing. We think these provisions can be harmonized and a conflict avoided by treating a Section 14-8-6 endorsement on a boundary survey plat merely as a conditional acceptance, pending review to confirm that the plat does not reflect a subdivision of land within the meaning of the NMSDA. Furthermore, regardless of whether a county clerk conducts an in-house review of a boundary survey plat or delegates the review to county employees, the county clerk remains subject to the duty to record “as soon as possible” those boundary survey plats that do not reflect a subdivision of land. Section 14-8-6. Finally, Section 14-8-6 provides that the plat, once recorded, will be considered recorded as of the date on which it was delivered to the county clerk.

Acceptance and recording of a survey plat by a county clerk acting as ex officio recorder is not a substitute for approval of the plat by the board of county commissioners. The risk that a plat certified as a boundary survey plat is in fact a subdivision plat ultimately is borne by the surveyor, who may be subject to professional discipline or possible criminal or civil liability for erroneously certifying a subdivision plat as a boundary survey plat, NMSA 1978, § 61-23-27.11 (2005); and by the subdivider, who may be exposed to civil and criminal
liability for failure to comply with the platting requirements of the NMSDA, Sections 47-6-4, -26, -27, -27.1. If a subdivision plat improperly has been certified as a boundary survey plat and erroneously recorded by a county clerk, the board of county commissioners, the district attorney, or the attorney general may bring an action in district court seeking mandatory injunctive relief to compel compliance with the NMSDA and county subdivision regulations. Section 47-6-26(A).


We reverse the order of the district court denying the petition for a writ of mandamus and direct the district court to issue a writ of mandamus directing the county clerk to conditionally accept the survey for recording upon re-submission by Valdez and to immediately make the endorsement described by Section 14-8-6. The county clerk may conduct a limited substantive review of the plat to determine whether the plat does or does not reflect a subdivision of land within the meaning of the NMSDA. The county clerk may also conduct a ministerial review to determine whether the plat facially complies with the requirements of Subsection 61-23-28.2(A)(1)-(5). If the plat constitutes a boundary survey plat as defined in Subsection 61-23-28.2(A) and facially satisfies the criteria of paragraphs (1)-(5), then the county clerk shall record the plat “as soon as possible” after re-submission. Section 14-8-6.

CONCLUSION

{19} We reverse and remand for further proceedings in accordance with this opinion.

{20} IT IS SO ORDERED.

A. JOSEPH ALARID, Judge

WE CONCUR:

CELIA FOY CASTILLO, Judge

RODERICK T. KENNEDY, Judge

BACKGROUND

{3} Haar began treatment with Thomas Carey, Ph.D., and with Defendant, a psychiatrist, in early December 1999. He had five office visits with Defendant during the period December 6, 1999, through March 8, 2000. The March 8 office visit was unscheduled. Haar and his girlfriend, Lauren Frost, “simply appeared,” and, after waiting and then meeting with Defendant, Haar left the office, telling Frost that “[Defendant] doesn’t give a shit.” In addition, Frost testified in her deposition that she thought Haar had also told her that “if he never saw [Defendant] again, that would be fine.”

{4} During the January-February 2000 time frame, Haar told his mother, Debra Haar, that he did not like Defendant, and that Defendant “was cold, impersonal, and didn’t really care, or didn’t want to take the time to care.” His mother told Haar, “Well, then, we need to find somebody else.” The March 8, 2000, visit was the last time that Haar saw Defendant. Defendant’s records show that Haar missed appointments scheduled for March 13 and 15, 2000.

{5} Haar was admitted to a hospital as an inpatient on March 17, 2000. This admission was voluntary on Haar’s part, since he had sought admission at his mother’s urging. On the same day that Haar was admitted to the hospital, Haar’s mother called Defendant to inform him that Haar was being admitted. Defendant was not consulted in regard to the admission. While hospitalized as an inpatient, Haar was under the care of G. Michael Dempsey, M.D., a psychiatrist. Haar was discharged from the
hospital at his own request on March 20, 2000. However, on March 21, 2000, he was admitted to the hospital as an outpatient. He attended outpatient sessions and treatment on March 22, 24, 27, and 29, 2000, but he was discharged from outpatient treatment on March 27 for nonattendance.

{[6]} After discharge from the hospital, Haar participated in treatment by Dr. Carey, consisting of individual and group therapy sessions on March 31, and April 6 and 13, 2000. Haar failed to attend one or more other individual and group therapy sessions. Haar died on May 3, 2000, allegedly by suicide, at the age of twenty-one years, in the back yard of Frost’s home.

{[7]} Except for the telephone call from Haar’s mother to Defendant on March 17, 2000, in which Defendant was informed of Haar’s admission to the hospital, from March 8, 2000, until sometime after Haar’s death, no one contacted Defendant regarding Haar. Dr. Dempsey’s hospital discharge summary relating to Haar stated that Haar had been seeing Defendant, who had prescribed certain medications. The discharge summary also stated that Haar was discharged to the Day Program, that he did not attend the program regularly, and that he “was discharged to return to follow-up with [Defendant] and [Dr. Carey].” There is no evidence that Defendant ever saw this discharge summary before Haar’s death, or that Dr. Dempsey communicated with Defendant before Haar’s death. Defendant stated in deposition that despite the history following Haar’s last visit with Defendant, he would have been willing to see Haar if he had called or returned.

{[8]} Plaintiffs are Haar’s estate, of which Patrick Haar is the personal representative, and Patrick and Debra Haar, Haar’s parents, individually. Pointing to Plaintiffs’ description of Defendant’s duty as one to prevent Haar from committing suicide, Defendant moved for summary judgment and contended that “no duty to prevent suicide is applicable to him.” Plaintiffs responded, asserting that Defendant and Haar “had a special relationship that continued until Mr. Haar’s death because there was no appropriate termination of the treatment relationship.” The district court granted Defendant’s motion and stated on the record, “[T]here is no ability to control the patient in this case. He missed two appointments, went to new doctors. The [c]ourt will not impose a duty on [Defendant] in this case.”

{[9]} Plaintiffs appealed from the court’s order granting Defendant’s motion for summary judgment and dismissing Plaintiffs’ complaint with prejudice. On appeal, Plaintiffs assert that (1) Defendant owed a duty of care in an outpatient environment to Haar and (2) genuine issues of material fact concerning Defendant’s failures in care and ultimately his abandonment of Haar precluded summary judgment.

DISCUSSION
Standard of Review
{[10]} Summary judgment is properly granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Johnstone v. City of Albuquerque, 2006-NMCA-119, ¶ 5, 140 N.M. 596, 145 P.3d 76. We review a summary judgment based on undisputed facts de novo. Id. “Summary judgment may be proper even though some disputed issues remain, if there are sufficient undisputed facts to support a judgment and the disputed facts relate to immaterial issues.” Fikes v. Furst, 2003-NMSC-033, ¶ 11, 134 N.M. 602, 81 P.3d 545 (internal quotation marks and citation omitted). Summary judgment is appropriate where the defendant “negates an essential element of the plaintiff’s case by demonstrating the absence of an issue of fact regarding that element.” Mayfield Smithson Enters. v. Com-Quip, Inc., 120 N.M. 9, 16, 896 P.2d 1156, 1163 (1995). When the moving party makes a prima facie showing that summary judgment is proper, the party opposing summary judgment has the burden to show specific evidentiary facts in the form of admissible evidence that require a trial on the merits. Johnstone, 2006-NMCA-119, ¶ 5. Mere argument or bare contention offered by the opposing party that a material issue of fact exists cannot overcome the moving party’s prima facie showing. Id.


Duty of Care Contention
{[12]} Plaintiffs begin with the general duty of a physician to “possess and apply the knowledge and to use the skill and care ordinarily used by reasonably well-qualified specialists practicing under similar circumstances, giving due consideration to the locality involved.” UJI 13-1102 NMRA. Plaintiffs also specifically contend that psychiatrists owe a duty of care “to provide appropriate treatment for potentially suicidal patients, whether the patient is hospitalized or not”; that is, Plaintiffs assert that the duty is not limited to treatment on an inpatient basis, but is applicable to treatment on an outpatient basis. In Plaintiffs’ view, the summary judgment favoring Defendant eliminated that duty.

{[13]} The question of duty in the present case cannot, however, be resolved simply by reciting the general rules that Plaintiffs assert control. The question is whether the undisputed material facts are sufficient to establish that from the point of Haar’s missed appointments after March 8, 2000, to the point of Haar’s death, Defendant continued to have a duty of care to treat Haar in a manner that would protect against Haar’s suicide. Plaintiffs’ argument assumes that Defendant did have that duty. The district court did not think so. Neither do we.

{[14]} “The general rule is that a person does not have a duty to act affirmatively to protect another person from harm.” Lee v. Corregedore, 925 P.2d 324, 329 (Haw. 1996) (holding that counselors had no duty to prevent suicides of noncustodial clients); see Restatement (Second) of Torts § 314 (2006) (“The fact that the actor realizes or should realize that action on his part is necessary for another’s aid or protection does not of itself impose upon him a duty to take such action.”); see also Kocckelman v. Segal, 71 Cal. Rptr. 2d 552, 556-57 (Ct. App. 1998) (stating, in a case involving a treating psychiatrist and a suicidal patient, that “[u]nder traditional tort law principles, a person is not ordinarily liable for the actions of another and is under no duty to protect another person from harm”).

{[15]} “To impose a duty, a relationship must exist that legally obligates a defendant to protect a plaintiff’s interest,” and in the absence of such a relationship, “there exists no general duty to protect others from harm.” Johnstone, 2006-NMCA-119, ¶ 7. In determining whether a duty exists, we may be required to consider foreseeability and policy. Id. ¶¶ 8-9. The policy consideration is whether the responsibility or obligation asserted against a defendant “is one to which the law will give recognition and effect.” Id. ¶ 9. The foreseeability consideration is intertwined with issues of causation. Id. ¶ 10.

{[16]} The issue before us is one of first impression in New Mexico. Presently, our medical malpractice cases relating to whether a duty exists are cases addressing whether a physician owes a duty to a third person who is injured by a patient. See Lester, 1998-NMSC-047; Wilschinsky
and recognized, as one of two sources of duty, the existence of “a special relationship between doctor and patient, which creates a special duty to control that patient’s actions.” 108 N.M. at 513, 775 P.2d at 715. In Lester, as in Wilschinsky, the Court concluded that “liability under these facts must stem from the doctor’s control over his offices and the administration of powerful drugs in those offices.” Lester, 1998-NMSC-047, ¶ 13 (internal quotation marks, citation, and alteration omitted). According to Lester, the Wilschinsky holding was “an exception from the general rule that a physician does not owe a duty to third party non-patients,” an exception Lester would not extend to prescription cases. 1998-NMSC-047, ¶ 13.

{17} In Wilschinsky, a physician administered drugs to his patient in the physician’s office, and the drugs had known side effects of drowsiness and impairment of judgment. 108 N.M. at 512-13, 775 P.2d at 714-15. After the patient left the physician’s office, the patient drove a car and was involved in an accident, injuring a third party. Id. The injured party sued the physician in federal court, and the federal court certified to our Supreme Court the question whether a physician owed a duty to a third party, such as the injured party plaintiff in the pending action. Id. As described in Lester, 1998-NMSC-047, ¶ 1, the Court in Wilschinsky “held that a physician owes a duty to persons injured by patients driving automobiles from a doctor’s office when the patient has just been injected with drugs known to affect judgment and driving ability.” (Internal quotation marks and citation omitted.)

{18} Lester also involved the determination of an issue certified to our Supreme Court from a federal court, namely, whether a physician owed a duty to a third party injured by the physician’s patient in an automobile accident where five days before the accident the physician prescribed a medication that allegedly impaired the patient’s driving ability on the date of the accident. 1998-NMSC-047, ¶ 2. The negligence alleged was the physician’s failure to properly monitor the medication, and failure to warn the patient that the medication could impair driving ability. Id. Specifically declining to “extend the duty articulated in Wilschinsky to prescription cases under [the Lester] fact pattern,” Lester, 1998-NMSC-047, ¶ 1, the Court in Lester concluded that “under the principles articulated in Wilschinsky and the public policy of New Mexico,” the physician did not owe a duty to the third party; the Court thus “join[ed] a substantial number of jurisdictions declining to extend physicians’ duties to non-patients for prescription-involved situations.” Id. ¶ 3.

{19} Although Wilschinsky and Lester involve the issue of whether a doctor owes a duty to a third party who is injured by the physician’s patient, we can look to those cases for underpinnings of duty. Wilschinsky recognized, as one of two sources of duty, the existence of “a special relationship between doctor and patient, which creates a special duty to control that patient’s actions.” 108 N.M. at 513, 775 P.2d at 715. In Lester, as in Wilschinsky, the Court concluded that “liability under these facts must stem from the doctor’s control over his offices and the administration of powerful drugs in those offices.” Lester, 1998-NMSC-047, ¶ 13 (internal quotation marks, citation, and alteration omitted). According to Lester, the Wilschinsky holding was “an exception from the general rule that a physician does not owe a duty to third party non-patients,” an exception Lester would not extend to prescription cases. 1998-NMSC-047, ¶ 13.

{20} In Weitz, a third party sued a mental health provider for negligence after the third party’s sister and niece were shot by the sister’s husband. 214 F.3d at 1176-77. The husband had received counseling services from the mental health provider. Id. at 1177. After he shot his wife and daughter, the husband took his own life. Id. To decide the case before it, the Tenth Circuit Court of Appeals turned to particular statements in Wilschinsky and first noted that one of the circumstances under which a physician may be liable to a third party is when the physician exerts control over a patient. Weitz, 214 F.3d at 1181. In regard to control, the federal court also noted the Wilschinsky Court’s explanation that “[i]n the control cases, courts have relied upon Section 315 of the Restatement (Second) of Torts to find a special relationship between doctor and patient, which creates a special duty to control that patient’s actions.” Weitz, 214 F.3d at 1181 (internal quotation marks and citation omitted); see Restatement (Second) of Torts § 315 (2006) (“There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person’s conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection.

{21} Stating that New Mexico apparently had “not established whether a health care provider can owe a duty to third parties arising from control where the individual is being treated on an outpatient basis,” the court in Weitz stated that “[t]he strong weight of authority suggests that New Mexico would not find such a duty exists under these circumstances.” 214 F.3d at 1181-82. The court went on to state:

In most instances, the relationship a psychiatric outpatient has with the health care provider is less involved than that of an inpatient. In the latter circumstance, the medical professional is typically both responsible for and able to administer almost all aspects of the patient’s well-being. By contrast, the outpatient relationship usually requires that the treated individual care for most of his or her daily needs, and affords the health care provider only limited opportunity to supervise the patient. As a result, imposing a duty to control in the outpatient context would require providers to exercise a degree of care and oversight that would be practically unworkable.

. . . Thus, it would be unreasonable to conclude that [the mental health care provider] had the sort of substantial relationship with [the patient] giving rise to a duty, much less the practical ability, to control him.

Id. at 1182.

{22} Based on the foregoing analyses, the Weitz Court held that the mental health care provider owed no duty to control the patient or to warn third parties regarding the patient and could not be held responsible for the patient’s conduct. Id. at 1183. Like Wilschinsky and Lester, Weitz assists in our analysis of duty in the present case, in that Weitz focuses on special relationship and control as essential aspects of duty.

{23} In regard to the elements of special relationship and control, we also note this Court’s decision in Grover v. Stechel, 2002-NMCA-049, 132 N.M. 140, 45 P.3d 80, in which the plaintiff, stabbed by the defendant’s son, sued the defendant for damages. Id. ¶ 2. We recognized the general rule that “an individual has no duty to protect another from harm,” and stated that “[i]n order for [the p]laintiff to prevail, there must be a special relationship that places on [the d]efendant a legal duty to protect [the p]laintiff.” Id. ¶ 11. In addition, we stated that “[i]n order to create a duty based on a special relationship, the relationship must include the right or ability to control another’s conduct.” Id. ¶ 12. In affirming a Rule 1-012(B)(6) NMRA dismissal, Grover, 2002-NMCA-049, ¶ 8, this Court held that the defendant had no duty to control her son or protect the plaintiff. Id. ¶ 18.
[24] Johnstone is also noteworthy. Johnstone involved an action against a defendant whose stepdaughter used the defendant’s firearm to commit suicide. 2006-NMCA-119, ¶ 1. In Johnstone, we recognized the Restatement Section 314 rule that there is no general duty to aid or protect others and also the exception to the general rule where a special relationship exists involving “treatment relationships, such as mental health professionals and their patients, and persons having direct custody and control over the decedent.” Id. ¶ 14 (citing Restatement (Second) of Torts § 314 cmt. a (1999)).

[25] We see no reason why the foregoing rules in New Mexico cases relating to special relationship and ability to control as essential aspects of duty should not apply to a psychiatrist under circumstances such as those in the present case. Plaintiffs do not argue otherwise. Instead, they argue that Defendant continued after March 8, 2000, to have the relationship and ability to control necessary to create a duty because he did not formally terminate the physician-patient relationship that existed as of March 8, 2000, and because, following Haar’s discharge from the hospital, Defendant was required to affirmatively monitor Haar’s medication, enhance Haar’s compliance with treatment, and schedule follow-up appointments.

[26] The facts indicate otherwise as a matter of law. After the March 8, 2000, visit with Defendant, Haar failed to attend two scheduled appointments with Defendant, then voluntarily hospitalized himself as an inpatient, where he consented to treatment from a new psychiatrist, then voluntarily submitted to outpatient treatment at the hospital by the same psychiatrist, and then voluntarily continued further treatment with Dr. Carey, and never called or returned to Defendant for any purpose. Defendant had no part in admitting Haar to the hospital on either an inpatient or outpatient basis. Defendant was not asked by anyone to become involved in any care related to Haar for the fifty-six days between March 8 and May 3, 2000.

[27] Plaintiffs did not present testimony on professional standards of acceptable medical practice that would require Defendant to have interposed his views and treatment without having been requested by Haar or someone on Haar’s behalf to do so. We heed our Supreme Court’s admonitions in Lester that in determining duty, the principles are to be applied with careful balancing and with caution, 1998-NMSC-047, ¶ 5, and that our Legislature’s limitations in regard to health care provider liability requires the court to exercise sparingly its authority to recognize a duty. Id. ¶ 11.

[28] Under the circumstances, we see no affirmative duty, much less a right, on the part of Defendant to have intervened in the ongoing treatment by the other mental health care providers, treatment that Haar chose and continued with to the exclusion of Defendant and without having sought Defendant’s assistance in any regard. Haar showed no interest in maintaining any semblance of a physician-patient relationship with Defendant. We therefore think it unreasonable to place upon Defendant a requirement that he have imposed his views or treatment recommendations on Haar or Drs. Dempsey and Carey for the purpose of guarding against Haar’s suicide. Further, under circumstances such as those in the present case, we are concerned about the consequences of burdening therapists generally with such a requirement. See id. ¶ 5 (stating that in ascertaining whether there is a duty, the court applies, with caution, a balancing test in which consideration is to be given in part to “the magnitude of the burden of guarding against [injury] and the consequences of placing that burden upon the defendant” (internal quotation marks and citation omitted)).

[29] Further, under the circumstances in this case, we determine that reasonable minds could not differ on the issue of termination by Haar of the physician-patient relationship. The once-existing special relationship and ability to control Haar’s treatment disintegrated as a result of Haar’s failure after March 8, 2000, to seek Defendant’s assistance in any regard and Haar’s having chosen other mental health providers to handle his treatment and medication. See Millbaugh v. Gilmore, 285 N.E.2d 19, 21 (Ohio 1972) (holding that the physician-patient relationship terminated when the patient missed a scheduled appointment and did not see the physician again, and that the relationship did not continue despite the fact the patient later secured a refill of a prescription that was prescribed during the relationship); cf. Paradies v. Benedictine Hosp., 431 N.Y.S.2d 175, 176-78 (App. Div. 1980) (refusing to impose on a hospital a continuing duty to protect a suicidal patient by involuntary commitment when the patient voluntarily admitted himself and then demanded his discharge and after discharge committed suicide).

[30] Plaintiffs failed to overcome Defendant’s prima facie case showing the absence of the ongoing special relationship and ability to control that are necessary to give rise to a duty. Absent those essential ingredients of duty, we hold that Defendant did not have a duty to treat Haar in a manner that reasonably attempted to reduce the risk of committing suicide, much less a duty to prevent Haar’s suicide.

Fact Issue Contentions

[31] Plaintiffs also seek to overturn the summary judgment on the ground that genuine issues of material fact exist as to asserted failures in care before the time the relationship was terminated, and also as to an asserted unilateral termination by Defendant of treatment without notice to Haar, which Plaintiffs characterize as an abandonment. We first examine the facts and theories Plaintiffs asserted in the district court that Plaintiffs now call upon for their appellate arguments. We next address the validity of Plaintiffs’ arguments on appeal and conclude that there exist no genuine issues of material fact that would preclude summary judgment.

[32] In the district court, in an attempt to dispute Defendant’s stated fact that Haar was treated by Dr. Dempsey while Haar was in the hospital, Plaintiffs asserted in their written response that, while at the hospital, Haar was also under the care of Defendant, in that Defendant “failed to properly withdraw from treatment.” In support of this assertion, Plaintiffs cited UJI 13-1115 NMRA, which states: “A doctor’s duty to a patient who is in need of care continues until the doctor has withdrawn from the case. A doctor cannot abandon the patient who is in need of continuing care. A doctor can withdraw by giving the patient reasonable notice under the circumstances.”

Plaintiffs also asserted as an undisputed fact that Defendant “improperly terminated his treatment of Eric Haar when he was in need of continuing care because he gave no reasonable notice under the circumstances.”

Plaintiffs further asserted that the question of abandonment was generally a question of fact for the jury.

[33] In addition, Plaintiffs stated as an undisputed fact that “other clinicians thought that [Defendant] was still treating Eric Haar after his discharge from [the hospital],” in that the discharge summary indicated that Haar was discharged to return to follow up with Defendant. In support of their argument, Plaintiffs also listed as undisputed facts that Defendant “failed to communicate with Dr. Carey while engaged in the collaborative treatment of Eric Haar,” and that “[i]n part, due to the absence of com-
munication with Dr. Carey while engaged in the collaborative treatment of Eric Haar, [Defendant] failed to see Mr. Haar with sufficient frequency.”

{34} Having determined that Defendant owed no duty of care to Haar after Haar missed his appointments and obtained treatment from others, and that it was Haar, not Defendant, who terminated the physician-patient relationship, we reject Plaintiffs’ arguments that Defendant either improperly terminated treatment of Haar or abandoned Haar. In a medical negligence case, there can be no breach of duty absent a physician-patient relationship, since duty flows from the existence of such a relationship. King v. Fisher, 918 S.W.2d 108, 112 (Tex. App. 1996); see also Molloy v. Meier, 660 N.W.2d 444, 450 (Minn. Ct. App. 2003) (stating that the existence of a physician-patient relationship is a prerequisite for finding that a physician owes a duty to a claimant); Knapp v. Eppright, 783 S.W.2d 293, 295 (Tex. App. 1989) (“Appellant’s theory of abandonment also does not apply because the evidence shows that appellant terminated the doctor-patient relationship. There can be no abandonment when the patient has voluntarily chosen not to return to her doctor.”). Also, it is immaterial that Dr. Dempsey’s discharge summary indicated that Haar was discharged to return to follow-up care with Defendant and Dr. Carey. Haar did not return to or seek any follow-up care by Defendant, and under the circumstances, Defendant had no duty to commence any follow-up care. Thus, there exists no genuine issue of material fact with respect to Plaintiffs’ contentions.

{35} Plaintiffs nevertheless contend that Defendant had a duty to treat Haar before the relationship ended between Haar and Defendant, that Defendant breached that duty by failing to effectively communicate with Dr. Carey, and that this failure of communication was a cause of Haar’s death. Plaintiffs argue that genuine issues of material fact exist as to whether Defendant breached the duty of care in this regard.

{36} To support this argument, Plaintiffs relied on the testimony of an expert psychiatric witness, William Reid, M.D. Dr. Reid’s testimony focused for the most part on Dr. Carey. Dr. Reid viewed Dr. Carey as seeing Haar “essentially in a vacuum” and not appearing to care much about what Defendant saw, what Defendant had to say, or what Defendant diagnosed. It appeared to Dr. Reid that the entire course of Haar’s treatment by Dr. Carey indicated “that Dr. Carey sends a note to [Defendant] telling him what to prescribe and [Defendant] apparently initially prescribes it and that piece of paper that was carried by the patient is, so far as I can tell in their entire course of this treatment, the only communication that the record reflects.” Dr. Reid concluded that the foregoing was not good care. He then further stated the following:

Corroboration treatment or collaborative treatment, which this is, requires communication, requires coordination. Things that [Defendant] sees need to be communicated to Dr. Carey and vice versa, and it simply didn’t occur.

If it had – let’s get to the causation part. If it had, then my opinion is that [Haar] would have been better served and more likely to be treated in such a way that his risk would have been reduced. That’s my point.

Dr. Reid criticized Dr. Carey’s abominable lack of communication with the other treaters, with [Defendant] in particular, with regard to getting information that was apparently available had he looked for it, with regard to receiving – with regard to sharing what he saw the various times that he interacted with Mr. Haar, with regard to ascertaining that he and [Defendant] were on the same page in terms of their coordinated treatment of the patient[.] In further discussions about communication and causation, Dr. Reid stated, “Had the communication been different and sufficiently better to allow all the caregivers to understand substantially more about Mr. Haar’s problems and give him the opportunity for better treatment, I believe to a reasonable degree of medical certainty that [Haar] would not have died on that day.” When Dr. Reid was asked if he was saying that better communication would have prevented the suicide in question, he stated, “I don’t want to put it in terms of just better communication. The package is communication among the three caregivers that would have led to better care by [Defendant], better care by Dr. Carey, better coordinated care, better recognition by Dr. Dempsey of what [Defendant] and Dr. Carey could or should do.”

{37} We fail to see how Dr. Reid’s testimony created any genuine issue of material fact on the issue whether Defendant breached any duty of care Defendant had before termination of the physician-patient relationship, much less on the issue whether any such breach was a cause of Haar’s death. Dr. Reid’s testimony was too ambiguous and too broad to present a jury question as to a breach of duty. Furthermore, Dr. Reid did not testify that any particular failure in collaboration or communication, or failure to more frequently see Haar, on Defendant’s part, constituted a failure “to use the skill and care ordinarily used by reasonably well-qualified specialists practicing under similar circumstances, giving due consideration to the locality involved.” See UJI 13-1102 (stating the duty of a medical specialist); Cervantes v. Forbes, 73 N.M. 84, 966 P.2d 792 (1996) (stating that expert testimony is generally required to establish a causal connection between the alleged malpractice and the injury), modified on other grounds, Pharmaseal Labs., Inc. v. Goffe, 90 N.M. 753, 568 P.2d 589 (1977); Jaramillo v. Kellogg, 1998-NMCA-142, ¶7, 12, 17, 126 N.M. 84, 966 P.2d 792 (stating that, different from a claim of negligence, a claim of medical malpractice requires deviation from the proper standard of medical practice recognized in the community and that expert testimony is usually required to establish that departure, and determining that the expert failed to establish that standard but instead only opined what he would have done); see also Skodje v. Hardy, 288 P.2d 471, 474 (Wash. 1955) (holding that malpractice was not a jury issue where there was a lack of medical evidence that the defendant’s alleged failure to correctly diagnose “was due to the fact that he failed to use care, skill, and diligence ordinarily possessed and exercised by members of the medical community”; cited in the committee comment for UJI 13-1115).

{38} For the same reasons, Dr. Reid’s testimony was insufficient as a matter of law to establish a causal connection between any specific negligent act on Defendant’s part and Haar’s death. The testimony criticizes Dr. Carey’s treatment, and only does so very broadly and tangentially, and with no rational attenuation. Moreover, the testimony implicates Defendant in a failure to engage in collaborative care and then only relative to the period after the physician-patient relationship had been terminated by Haar. Such testimony cannot suffice in this case to create a genuine issue of material fact as to whether Defendant committed malpractice that caused Haar’s suicide.

{39} Doubtlessly, collaborative involvement among treating physicians can be important in treating certain medical
OPINION

CELIA FOY CASTILLO, Judge

{1} In response to the motion for reconsideration filed by Plaintiffs’ attorney, we have filed an order. Additionally, we now withdraw the opinion filed on December 15, 2006, and substitute this opinion in its stead.

{2} In this appeal, we must answer the question expressly left unresolved in Ellis v. Cigna Property & Casualty Cos., 1999-NMSC-034, ¶ 1, 128 N.M. 54, 989 P.2d 429: When does the six-year limitations period for contract actions begin to accrue on a claim raised under an uninsured motorist (UM) policy? This issue comes to us on cross-motions for summary judgment arising out of Plaintiffs’ petition for declaratory judgment and to compel Defendant to arbitrate Plaintiffs’ underinsured motorist (UIM) claim. The district court denied Defendant’s motion, granted Plaintiffs’ motion, and ordered arbitration. Defendant appeals from that order.

{3} In this opinion, we treat UIM and UM policies as equivalents and often use the terms interchangeably. See Allstate Ins. Co. v. Stone, 116 N.M. 464, 465 & n.1, 863 P.2d 1085, 1086 & n.1 (1993) (noting that UIM policies are equivalent to UM policies for purposes of stacking); see also NMSA 1978, § 66-5-301(B) (1983) (governing UM coverage and expressly including UIM coverage for those protected by an insured’s policy). In deciding this case, we follow the trend in our case law that treats UIM and UM claims as contract-based actions, and we join the majority view in holding that the statute of limitations on a UIM claim begins to run upon breach of the insurance contract, where neither the UM statute nor the insurance policy provide otherwise.

{4} We affirm the district court’s summary judgment in favor of Defendant.

{5} In January 1997, Plaintiff Ryan Brooks (Ryan) suffered injuries in a car accident and notified Defendant on the day of the accident. At the time of the accident, Ryan was a minor residing with his mother, Plaintiff Donna Brooks, who was the named policyholder on the insurance policy at issue in this case. The driver of the other vehicle was at fault in the accident, was insured by Allstate Insurance Company (Allstate), and carried minimum liability coverage for the accident in the amount of $25,000. Plaintiffs obtained consent from Defendant to settle Ryan’s liability claim with Allstate for less than the amount of alleged damages and did so for the sum of $21,000, while preserving his UIM claim against Defendant.

{6} In February 2004, Plaintiffs filed the current action for declaratory judgment and to compel Defendant to arbitrate Ryan’s UIM claim. Arbitration is the method required under the insurance policy to resolve insured-insurer UIM disputes. In its answer, Defendant raised the statute of limitations as an affirmative defense. Defendant then
filed a memorandum in support of its motion for summary judgment and contended that the statute of limitations for Plaintiffs’ UIM coverage bars any recovery and thus precludes arbitration. Plaintiffs filed a countermotion for summary judgment requesting that the district court declare that the statute of limitations had not lapsed. The court denied Defendant’s motion, granted Plaintiffs’ motion, and ordered the parties to arbitrate Ryan’s UIM claim. Defendant appeals.

II. DISCUSSION
A. Standard of Review
{7} “Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law.” Self v. United Parcel Serv., Inc., 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582. Similarly, on appeal, we determine whether judgment is appropriate as a matter of law. See id. The parties in the present case agree upon the same set of material facts. Their countermotions for summary judgment dispute when a cause of action under an insurance policy providing UIM coverage accrues for purposes of the statute of limitations, a pure issue of law. See Wiste v. Neff & Co., CPl, 1998-NMCA-165, ¶ 7, 126 N.M. 232, 967 P.2d 1172 (stating that where essential facts are not in dispute, the accrual date for a cause of action for limitations purposes is a pure question of law). Because the material facts are undisputed, we are left with legal questions, which we decide de novo. See State Farm Mut. Auto. Ins. Co. v. Barker, 2004-NMCA-105, ¶ 4, 136 N.M. 211, 96 P.3d 336.

B. Accrual of Cause of Action for UIM Coverage
{8} As we have stated, the issue presented has been expressly undisputed in New Mexico by our Supreme Court’s opinion in Ellis, in which the Court determined that the six-year statute of limitations for contract actions applies to UIM claims. 1999-NMSC-034, ¶¶ 6-7 (citing Section 66-5-301). The Court observed that “[t]he more difficult question is when the limitation[s] period begins to run” but declined to answer this question — in recognition of the possibilities that the insurance policy could have dictated the accrual date for the UM claim and that the parties failed to make the policy part of the appellate record. Ellis, 1999-NMSC-034, ¶¶ 1, 7. Without a record that indicated the accrual date and noting that the UM statute in New Mexico does not specify the accrual date, the Court stated that these circumstances required the courts to make that determination. Id. ¶ 7 (citing Section 66-5-301, the UM/UIM statute, which does not contain a limitations period or date of accrual). In discussing the date from which the limitations period begins to run, the Court listed four possibilities: (1) the date of the accident, (2) the date the tortfeasor is adjudged as uninsured or underinsured, (3) the date set forth in the insurance policy, and (4) the date of a breach of the insurance contract. Ellis, 1999-NMSC-034, ¶ 7.

{9} Premising its arguments on the first and third options, Defendant contends that either the date of the accident or, if the policy controls, the end of the policy’s thirty-day period after notification of the accident triggers the running of the six-year statute of limitations on Ryan’s UIM claim. Therefore, according to Defendant, the limitations period lapsed in either January or February 2003, and either date is at least a year before Plaintiffs filed the current petition to compel arbitration of the dispute. Plaintiffs rely on the fourth option and argue that the limitations period begins to run when there is a breach as evidenced by a refusal to arbitrate, a denial of the UIM claim under the insurance contract, or another violation of the insurance contract. We agree with Plaintiffs.

{10} New Mexico case law and public policy support our conclusion that a cause of action for UIM coverage begins to accrue when the insurance contract is breached. The Ellis court applied the statute of limitations for contract actions to UIM claims because liability for UM coverage is predicated on the insurance contract. Id. ¶ 6. Defendant’s argument that the accident triggers the limitations period mistakenly views an action to recover UIM coverage as a tort-based theory of recovery, rather than a contract-based theory. The decision in Ellis rejects this view. Id. Defendant’s argument that a claim for UIM benefits is not a claim for breach of contract ignores the distinction between the right to make a claim under a contract and the right to sue for breach of the contract. While we generally agree with Defendant’s statement that a claim for UIM benefits is merely “a claim for payment of benefits under the contract” and not a claim for breach of contract, once the claim for payment of benefits is denied, the right to claim benefits under a contract becomes a right to sue for breach of that contract. Defendant claims that “it makes no sense . . . to establish a trigger for the running of the statute of limitations that bears no relation to the nature of the underlying claim being asserted.” We conclude, however, that the “claim being asserted” is the right to sue for breach of contract, not the right to make a claim under the contract.

{11} Accordingly, the predicate to the current suit is Plaintiffs’ contention that Defendant refused to arbitrate or has otherwise breached the insurance contract. It is a fundamental principle of contract law that “[t]he statute of limitations on a breach of contract claim runs from the date the contract is breached.” Nashan v. Nashan, 119 N.M. 625, 633, 894 P.2d 402, 410 (Ct. App. 1995). Therefore, we join the majority of jurisdictions in holding that an action for UIM accrues on the date of the earliest event in the nature of a breach of the insurance contract. See, e.g., Shelter Mut. Ins. Co. v. Nash, 184 S.W.3d 425, 428-29 (Ark. 2004) (concluding, after a review of courts that recognize the majority position, that the limitations period begins to run on a cause of action for UIM benefits when the insurance contract is breached).

{12} Defendant contends that New Mexico case law and the insurance policy itself support the proposition that a cause of action to recover UIM damages accrues on the date of the accident. Defendant argues that because case law allows an insured to immediately assert a claim for UIM benefits directly against the carrier without first bringing an action against an uninsured tortfeasor, the insured’s cause of action accrues for purposes of triggering the statute of limitations when the insured can prove negligence and is entitled to recover damages, which is at the time of the accident. Defendant also points to language in the insurance policy stating that Defendant is not bound by any judgment obtained against the tortfeasor without Defendant’s written consent. This language, according to Defendant, demonstrates that the policy itself recognizes that the date of the accident triggers the limitations period.

{13} We are not persuaded that our case law or the insurance policy demands this result. In Guess v. Gulf Insurance Co., 96 N.M. 27, 28, 627 P.2d 869, 870 (1981), the Supreme Court interpreted the UM statute and emphasized the insurer’s right to request joinder of the tortfeasor in permitting the insured to file a direct action against the insurer without first requiring the insured to bring suit against the uninsured tortfeasor. Neither this case nor any other New Mexico case requires the insured to file an immediate action against the insurer in order to preserve a timely claim. Rather,
our case law recognizes that an insured has this option for claiming UM coverage, and our case law permits the insurer to seek joinder of the tortfeasor in the insured’s suit. In addition, the language contained in Defendant’s policy — that an insurer may refuse to be bound by a judgment obtained against a tortfeasor without the insurer’s consent — simply recognizes the insurer’s interest in the insured/tortfeasor suit; the language does not compel a suit involving the insurer. We are not persuaded that by affording the insured this option, our courts have declared that the insured’s cause of action against the insurer for enforcement of the insurance contract has begun to accrue for purposes of the statute of limitations. Some circumstances may render an immediate suit against the insurer acceptable or even appropriate, but we do not view this possibility as an indicator of the accrual of a UIM or UM claim. We view the holding in Guess as construing the UM statute in a manner that permits contracting parties more flexibility and efficiency in executing appropriate coverage under the agreement and in a manner that serves our preferences for protecting the innocent insured and the expeditious resolution of their claims. See Sandoval v. Valdez, 91 N.M. 705, 708, 580 P.2d 121, 134 (Ct. App. 1978) (stating that the New Mexico UM statute is designed to protect the insured party from the uninsured or unknown motorist); see also Cal. Cas. Ins. Co. v. Garcia-Price, 2003-NMCA-044, ¶¶ 19-22, 133 N.M. 439, 63 P.3d 1159 (recognizing our preference for speedy resolution of UM/UIM claims and our policies favoring coverage for the insured). {14} Faced with the identical argument — that because a suit may be brought immediately against the insurer, the action accrues at the time of the accident — the Arkansas Supreme Court reached the same conclusion on the same rationale that we adopt today. Shelter Mut. Ins. Co., 184 S.W.3d at 429-30. The Arkansas court reviewed the rationale behind the holdings of the majority position cases: prior to a violation of the insurance policy, there is no justiciable controversy upon which to sue, and the limitations period therefore runs from the date of breach of the contract. Id.

The court explained that “[t]hough our UM statutory scheme provides the insured with the option to file a suit against her UIM carrier prior to obtaining a judgment against the tortfeasor . . . . if the insured chooses not to do so, an action for breach of contract will not lie at the time of the accident because the [UIM] carrier has not yet been called upon to fulfill a promise under the contract.” Id.

{15} We agree with the line of cases holding that the limitations period for seeking UIM coverage does not begin to run until there is a justiciable claim based on a “failure to do that which is required under the terms of the policy.” Snyder v. Case, 611 N.W.2d 409, 416 (Neb. 2000). Until that time, the parties are performing according to the bargained-for obligations under the policy, and there is no cause to seek judicial relief. See Allstate Ins. Co. v. Spinelli, 443 A.2d 1286, 1292 (Del. 1982) (“It is only when one party contends the other party has ceased to perform in violation of the contract that a justiciable controversy exists.”).

We believe that this approach encourages cooperation between contracting parties, honors the reasonable expectations of the insured, and conserves judicial resources by avoiding unnecessary litigation. See, e.g., Montano v. Allstate Indem. Co., 2004-NMSC-020, ¶ 25, 135 N.M. 681, 92 P.3d 1255 (observing that New Mexico public policy favors interpreting insurance contracts in a manner that serves the reasonable expectations of the insured).

{16} In addition, as a practical matter, the rule of discovery that “dictates that a cause of action does not accrue for purposes of calculating the limitations period until the plaintiff discovers, or should have discovered, in the exercise of reasonable diligence, the facts that underlie his or her claim” is not served by tying the cause of action to the date of the accident. Butler v. Deutsche Morgan Grenfell, Inc., 2006-NMCA-084, ¶ 26, 140 N.M. 111, 140 P.3d 532. Contrary to Defendant’s contention that the action accrues on the date of the accident because a tortfeasor’s underinsured status is easily determined at that time, the extent of the tortfeasor’s underinsured status and the insurer’s liability for that amount may not be immediately apparent to the innocent insured. Specifically, the insured may not have the necessary information to know that his or her injuries, medical expenses, or possible punitive damages will exceed the tortfeasor’s available coverage or assets of the insured’s UIM coverage. See Shelter Mut. Ins. Co., 184 S.W.3d at 430. Therefore, we agree with other courts that find it “fundamentally unfair” to time-bar an insured from compensation that was bargained for because an insured may not be aware until sometime after the accident that a claim against her underinsured motorist insurer must be pursued. Id. In addition, it may be similarly in the interest of the insurer to first recover from the underinsured tortfeasor before valuing any UIM coverage due under the insurer’s policy. See, e.g., Manzanares v. Allstate Ins. Co., 2006-NMCA-104, ¶¶ 8-10, 140 N.M. 227, 141 P.3d 1281 (offsetting the insured’s UIM coverage by the amount recovered from the tortfeasor, leaving the insurer without liability for recovered punitive damages). For these reasons, we determine that as a practical matter, the date of accident is particularly extraneous to actions for specific performance of a contract to arbitrate involving UIM coverage.

{17} Defendant also argues that another provision in the insurance policy recognizes that the cause of action accrues at the time of accident. Defendant points to the following condition in the policy and contends that it must be met before suit may be filed against the insurer:

2. Suit Against Us

There is no right of action against us:

. . .

c. under uninsured and unknown motorists, medical payments, any physical damage, death, dismemberment and loss of sight and loss of earnings coverages, until 30 days after we get the insured’s notice of accident or loss.

Defendant seems to argue that this provision marks the only condition to suit, indicating that a UIM claim has accrued after the thirty-day period following the insured’s notice of the accident. We disagree. This condition for a right of action states only the date before which a suit cannot be filed; it does not dictate the time before which a suit must be filed. We also note that Defendant’s insurance policy clearly provides that disagreement as to the insured’s entitlement to UM or UIM coverage and the amount thereof “shall be decided by arbitration upon written request of the insured or us.” Therefore, we will not read into the condition for a right of action an intent to trigger the limitations period on an insured’s claim; nor do we pass on the reasonableness or enforceability of such an intent. Cf. Battishill v. Farmers Alliance Ins. Co., 2006-NMSC-004, ¶ 17, 139 N.M. 24, 127 P.3d 1111 (“[A]n insurance policy which may reasonably be construed in more than one way should be construed liberally in favor of the insured.” (internal quotation marks and citation omitted)).

{18} Defendant finally contends that assigning the accrual date of a UIM claim

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to the breach of the contract is unfair and violates public policy by permitting an insured to have unilateral control over the limitations period on the claim. Defendant argues that such a rule would require an insurance company to remain liable for a potential claim until the insured decided to make a demand under the policy. We address Defendant’s concerns. First, the insurer can avoid delay by compelling arbitration of the insured’s UIM claim under the contract. See Berkshire Mut. Ins. Co v. Burbank, 664 N.E.2d 1188, 1192 (Mass. 1996). The insurer can also seek equitable relief in the action for any prejudice caused by the insured’s delay. Id. Additionally, “the insurer is in a position to protect itself against uncertainty and variability by including appropriate time limitations in the insurance contract.” Blutreich v. Liberty Mut. Ins. Co., 826 P.2d 1167, 1171 (Ariz. Ct. App. 1991); see also Jeffrey A. Kelso & Matthew R. Drevlow, When Does the Clock Start Ticking? A Primer on Statutory and Contractual Time Limitation Issues Involved in Uninsured and Underinsured Motorist Claims, 47 Drake L. Rev. 689, 700 (1999) (noting that “[g]enerally, courts will enforce contractual time limitation[s] provisions” when they are reasonable, as well as clear and unambiguous). On balance, we hold that the important policies underlying our decision and the protections available to the insured outweigh the potential for unfairness in requiring a breach of the insurance contract to trigger the limitations period for an insured’s UIM claim.

C. Timely Filing of Plaintiffs’ Action

{19} In our application of the rule we announce herein, we observe that the record does not clearly indicate when the agreement between the parties as to the value of Ryan’s UIM claim ultimately failed and arbitration became appropriate under the contract terms. It is also unclear whether or when Plaintiffs requested arbitration. The record reveals the following facts. The offers Defendant made for Plaintiffs’ UIM coverage between August 2001 and February 2002 appear substantially lower than the claimed recovery, and Defendant’s letter dated October 29, 2003, expressed Defendant’s belief that the claim had expired. See, e.g., Norfleet v. Safeway Ins. Co., 494 N.E.2d 720, 723 (Ill. App. Ct. 1986) (holding that a failure to arbitrate constitutes a breach of the insurance contract). Plaintiffs represent, without citation to the record, that they requested arbitration, an assertion Defendant disputes. In addressing Plaintiffs’ failure to reference the record, we note that although a factual dispute exists, under the circumstances of this case, it is not a material factual dispute that defeats summary judgment. See Wiste, 1998-NMCA-165, ¶ 7. On February 5, 2004, Plaintiffs filed the current action for declaratory judgment and to compel arbitration, required under the policy where the parties fail to agree on the value of a UM/UIM claim.

{20} Based on these facts, it is clear that, counting backwards from the date of Plaintiffs’ suit, the parties were engaged in negotiations over the value of the UIM claim, in compliance with the insurance contract, during the six-year limitations period for bringing contract actions. As long as negotiations in compliance with the insurance contract were ongoing, there was no breach of contract. According to Defendant, negotiations were still ongoing as late as February 21, 2002. Therefore, although we do not point to one particular event in the fact pattern as the breach, we hold that the undisputed facts indicate that Plaintiffs’ filing of the current action must have occurred within six years of any failure to comply with the policy terms. For these reasons, we hold that Plaintiffs timely filed the current action to compel arbitration of the UIM claim under the contract.

III. CONCLUSION

{21} For the reasons discussed above, we hold that Plaintiffs timely filed this action for declaratory judgment and for specific performance of the insurance contract to compel arbitration. As a result, we affirm the district court’s order granting summary judgment in favor of Plaintiffs and ordering the parties to arbitrate the UIM claim.

{22} IT IS SO ORDERED.

CELLA FOY CASTILLO, Judge

WE CONCUR:
CYNTHIA A. FRY, Judge
IRA ROBINSON, Judge
CERTIORARI NOT APPLIED FOR
From the New Mexico Court of Appeals

Opinion Number: 2007-NMCA-034

CITY OF ROSWELL,
Plaintiff-Appellee,
versus
HIRAM HUDSON, JR.,
Defendant-Appellant.
No. 26,085 (filed: February 8, 2007)

APPEAL FROM THE DISTRICT COURT OF CHAVES COUNTY
RALPH D. SHAMAS, District Judge

JUDY A. PITTMAN
PITTMAN & DIERLAM, P.C.
Roswell, New Mexico
for Appellee

HIRAM HUDSON, JR.
Roswell, New Mexico
Pro Se Appellant

Opinion
MICHAELE. VIGIL, JUDGE

{1} This case requires us to determine whether Defendant was obstructing a police officer acting in the lawful discharge of his duties by simply refusing to produce his identification. We conclude he did not and therefore reverse.

FACTS
{2} Officer Trujillo was on patrol duty in Roswell, New Mexico, when she received a call on her cell phone from one of her neighbors who said a vehicle was parked in their neighborhood for the last thirty minutes, which did not belong to anyone in the neighborhood. It was not unusual for neighbors to contact her or other police officers on their cell phones to report suspicious activity because Roswell is an active Neighborhood Watch Community, and the neighbors watch out for each other. There had been recent burglaries in the neighborhood, and such neighborhood vigilance often leads to solving burglaries.

{3} Officer Trujillo called Officer Kuepfer at approximately 11:30 p.m. and asked him to investigate because he was already in the vicinity. Due to the history of burglaries in the area, Officer Kuepfer decided to complete a field investigation card, which describes personal and descriptive information about the people at the scene. The information on the cards can then be used to locate possible suspects if any crime is subsequently reported in the area.

{4} When Officer Kuepfer arrived, a vehicle occupied by the driver and Defendant was parked on the street. Officer Kuepfer parked behind the car, shined his spotlight into the car, and ran a check on the license plate. The license plate first came back as not on file, but after subsequent discussions with the driver and Defendant, Officer Kuepfer determined that this was due to an error at the motor vehicle department.

{5} Officer Kuepfer approached the car and started questioning them about their purpose for being parked on the street. The officer told the driver that he lived in the house and the car was parked in front of, and Officer Kuepfer asked the driver for his identification to verify his address. When the address on his driver’s license did not match where they were parked, the driver stated that it was really Defendant who lived in the house. Officer Kuepfer then asked Defendant for his identification. Defendant told Officer Kuepfer his name and address but refused to produce his identification, stating he did not have to match where they were parked, the driver stated that it was really Defendant who lived in the house. Officer Kuepfer then asked Defendant for his identification. Defendant told Officer Kuepfer his name and address but refused to produce his identification, stating he did not have to produce his identification, and Officer Kuepfer arrested Defendant for obstructing an officer in violation of Roswell City Code Section 10-48 (1999). After handcuffing Defendant, Officer Kuepfer reached into Defendant’s pocket and removed his wallet. He then searched through the wallet, and retrieved Defendant’s driver’s license which provided a positive identification of Defendant. Shortly thereafter, Officer Trujillo arrived at the scene and told Officer Kuepfer that she knew Defendant and that he lived in the house where the car was parked. Nevertheless, Officer Kuepfer issued Defendant a citation for obstructing an officer in violation of Section 10-48 because he refused to present his identification to Officer Kuepfer after being ordered to do so. A de novo appeal to the district court again resulted in a conviction, and Defendant appeals, arguing that the evidence is insufficient to support the guilty verdict.

STANDARD OF REVIEW
{7} Roswell City Code, Section 10-48 makes it illegal to resist or obstruct an officer, and provides in pertinent part that “[r]esisting, obstructing, or abusing any . . . peace officer in the lawful discharge of his duties.” In reviewing the verdict for sufficiency of the evidence, our role is to assess whether the fact finder could determine beyond a reasonable doubt the essential facts necessary to prove these elements. State v. Garcia, 2005-NMSC-017, ¶ 12, 138 N.M. 1, 116 P.3d 72. In doing so, we view the evidence in the light most favorable to the verdict, considering that the City had the burden of proof beyond a reasonable doubt. Id.

THE SEIZURE OF DEFENDANT

{8} The Fourth Amendment to the United States Constitution protects persons against unreasonable searches and seizures. While a police officer does “not need any justification to approach a person and ask that individual questions,” State v. Jason L., 2000-NMSC-018, ¶ 14, 129 N.M. 119, 2 P.3d 856, when a police officer restrains the
person’s freedom to walk away, by either physical force or a show of authority, he has “seized” that person. State v. Lopez, 109 N.M. 169, 170, 783 P.2d 479, 480 (Ct. App. 1989) (internal quotation marks and citation omitted). Therefore, if all of the circumstances surrounding the encounter establish that a reasonable person would believe he is not free to leave, the encounter must be scrutinized for its reasonableness under the Fourth Amendment. Id. We therefore first determine whether Defendant was seized when Officer Kuepfer demanded his identification. While we defer to the district court’s factual determinations for substantial evidence, the question of whether Defendant was free to leave, and therefore seized, is a legal question, which we review de novo. State v. Patterson, 2006-NMCA-037, ¶ 18, 139 N.M. 322, 131 P.3d 1286.

{9} Lopez teaches that when determining whether a reasonable person would feel free to leave, courts should look at all of the factual circumstances, and specifically consider: “(1) the conduct of the police, (2) the person of the individual citizen, and (3) the physical surroundings of the encounter.” 109 N.M. at 171, 783 P.2d at 481. We have continued to adhere to this analysis. See Patterson, 2006-NMCA-037, ¶ 20; State v. Affsprung, 2004-NMCA-038, ¶ 12, 135 N.M. 306, 87 P.3d 1088; Jason L., 2000-NMSC-018, ¶ 15.

{10} In Patterson, a police officer observed a car drive into the parking lot of a closed business at approximately 10:40 p.m. 2006-NMCA-037, ¶ 2. Thinking this behavior was odd, and because there had been several burglaries in the twenty-block area, the officer pulled his patrol car behind the car to investigate why it was stopped at that location. Id. The car was occupied by the driver, the defendant in the front passenger seat, and a passenger in the backseat. Id. A fourth person was standing outside an open rear passenger door on the driver’s side. Id. The officer asked the person outside what they were doing there, and the person said that they were there to pick up a truck from a friend, whose name he did not know. Id. ¶ 3. The officer saw that there was no truck in the area, and found the answer suspicious. Id. As he spoke with the person outside, he saw an open can of beer on the backseat floorboard behind the driver’s side of the car. Id. For officer safety, he conducted a pat-down search of the man he was speaking to and discovered contraband. Id. After the officer handcuffed and secured him in the police car, another officer arrived on the scene. Id. The original police officer then asked the defendant and other occupants of the car for identifications to check for warrants for arrest, to see “who he was dealing with,” and to give him “a point of reference” if there were any burglaries later that evening. Id. ¶ 4 (internal quotation marks omitted). We held that the defendant was seized at the moment when he was asked for identification. Id. ¶ 21.

We based our conclusion on the totality of the circumstances, including: (1) the officer had clearly identified himself as a police officer, although he had not engaged his emergency equipment; (2) the officer had just demonstrated his authority by conducting a pat-down search of the man outside; (3) the request for identification could only be viewed as an integral part of the officer’s ongoing investigatory detention of the occupants of the vehicle; and (4) the officer had an explicit purpose in asking for the identification. Id. ¶¶ 21-22.

{11} In Affsprung, the defendant was a passenger in a vehicle that was stopped by a police officer at 12:43 a.m. in a residential area for a faulty license plate light. 2004-NMCA-038, ¶ 2. The officer did not observe any other illegal or suspicious activity before he pulled the vehicle over using his emergency equipment. Id. The officer asked the driver for his driver’s license, and after informing the driver of the violation, asked the defendant for identification, because it was his routine practice to do so. Id. The defendant did not have a driver’s license or any other form of identification on him, but orally gave the officer his name, date of birth, and social security number. Id. The officer used this information to run a “wants and warrants check” on the defendant while writing the driver the citation. Id. Through this process, the officer learned that there was an outstanding warrant for the defendant’s arrest. Id. ¶ 3. After backup arrived, the defendant was arrested, and contraband was subsequently discovered inside a cigarette box in one of his pockets. Id. We recognized that under the circumstances a reasonable passenger would not feel free to leave and refuse the officer’s request for identification, and that an officer would not likely tolerate a passenger’s refusal to give the information followed by the passenger leaving the area. Id. ¶¶ 15-16. We therefore held “that an ordinary vehicle stop for a traffic violation with a concomitant investigation in which the officer requests both the driver’s and the passenger’s identification in connection with the violation and nothing more than a generalized concern about officer safety is a seizure within the Fourth Amendment as to the passenger whose identification is obtained.” Id. ¶ 18.

{12} Finally, in Lopez, the defendant and his companion were lawfully parked in a pickup on a dead-end street, facing away from the dead end. 109 N.M. at 171, 783 P.2d at 481. While they were parked, a gray van carrying four police detectives drove up and parked at an angle directly in front and about a car length away from the pickup. Id. Four police detectives got out of the van and went toward the defendant’s vehicle, with at least two of the detectives displaying their police badges at shoulder height. Id. One of the officers went to the passenger’s side, and while standing outside, said he saw contraband inside the pickup on the seat between the defendant and his passenger. Id. We concluded the evidence supported a finding that the officers used both a show of force and a show of authority to restrain the defendant and that a reasonable person in defendant’s position would have believed he was free to leave. Id. at 173, 783 P.2d at 483. Thus, the defendant was seized under the Fourth Amendment before the detective stood next to his vehicle and saw the contraband inside. Id.

{13} In this case, Defendant was sitting in the passenger side of a car at approximately 11:30 p.m. when Officer Kuepfer arrived in a marked police unit, parked behind the car, and shined his spotlight into the car. As in Lopez, Defendant and the driver were legally parked and not engaged in any illegal or suspicious activity. They were simply sitting in the vehicle. A police car coming behind them, stopping, and shining its spotlight at them at that hour of the night constituted a show of police authority. Officer Kuepfer then walked up to the car in his police uniform, identified himself as a police officer, and started asking the occupants why they were parked on the street. During this interrogation, he demanded identification from the driver, and it was produced. After thus demonstrating his authority as a police officer, Officer Kuepfer then demanded that Defendant produce identification. These circumstances conveyed the message that compliance with his request was required. See Jason L., 2000-NMSC-018, ¶ 14 (noting that while a police officer does not need justification to approach a person and ask questions, the officer may not convey the message that compliance with his request is required). As in Patterson, Officer Kuepfer’s demand
for identification can only be viewed as an integral part of his ongoing investigatory detention of the vehicle, and to complete a field investigation card to use in case any burglaries were later committed in the neighborhood. Finally, Defendant was a passenger in the vehicle, and like the passenger in Affsprung, a reasonable passenger in Defendant’s position would not feel free to simply get out of the car, leave, and refuse Officer Kuepfer’s demand for identification. The fact that Officer Kuepfer arrested Defendant for refusing to produce identification establishes that he did not tolerate Defendant’s refusal and that he would not have allowed Defendant to leave.

{14} Given the totality of the circumstances, when Officer Kuepfer demanded identification from Defendant, he was detained in such a way that a reasonable person would not feel free to leave. See Patterson, 2006-NMCA-037, ¶ 18; Affsprung, 2004-NMCA-038, ¶ 6. We therefore hold that Defendant was seized under the Fourth Amendment when Officer Kuepfer demanded that Defendant produce identification.

**INDIVIDUALIZED REASONABLE SUSPICION**

{15} In “appropriate circumstances” a police officer may detain a person to investigate possible criminal activity consistent with the Fourth Amendment even if there is no probable cause to make an arrest. State v. Galvan, 90 N.M. 129, 131, 560 P.2d 550, 552 (Ct. App. 1977). “Appropriate circumstances” arise from a “reasonable suspicion” that the law is or has been broken. Id. In order for the suspicion to be “reasonable,” it must be based on specific articulable facts, together with rational inferences from those facts, that a particular person, the one actually detained, is breaking, or has broken, the law. State v. Watley, 109 N.M. 619, 624, 788 P.2d 375, 380 (Ct. App. 1989). “Unsupported intuition and inarticulate hunches are not sufficient.” State v. Cobbs, 103 N.M. 623, 626, 711 P.2d 900, 903 (Ct. App. 1985). Whether a police officer acts with a reasonable suspicion is judged by an objective standard: “Would the facts available to the officer warrant the officer, as a person of reasonable caution, to believe the action taken was appropriate?” Galvan, 90 N.M. at 131, 560 P.2d at 552. Finally, the police officer must have a reasonable suspicion at the inception of the detention. See State v. Eli L., 1997-NMCA-109, ¶ 11, 124 N.M. 205, 947 P.2d 162. We reiterated and applied the foregoing principles and authorities in Jason L., 2000-NMSC-018, ¶ 20, but cite the older cases to emphasize that these principles are embedded and well settled in Fourth Amendment jurisprudence.

{16} The City agrees that Officer Kuepfer was required to have a reasonable suspicion to detain Defendant and demand identification from him. Again, while we defer to the district court’s factual determinations if they are supported by substantial evidence, whether Officer Kuepfer acted with a reasonable suspicion presents us with a legal question, which we review de novo. Eli L., 1997-NMCA-109, ¶ 6; Jason L., 2000-NMSC-018, ¶ 20.

{17} In this case, the City contends that Officer Kuepfer had a reasonable suspicion to detain Defendant for the following reasons: (1) a neighbor reported to Officer Trujillo that an unknown vehicle was parked in their neighborhood; (2) there had been recent burglaries in the neighborhood; (3) when Officer Kuepfer arrived to investigate at approximately 11:30 p.m., he found two men sitting in a parked vehicle on the street in that neighborhood; (4) the license plate on the car was initially reported as not on file; (5) the driver claimed that he lived in the house the vehicle was parked in front of; (6) the address on his driver’s license did not match the address his car was parked in front of; and (7) the driver then changed his story and said that Defendant was the one who lived there. The totality of these circumstances fails to establish a reasonable individualized suspicion that Defendant was breaking or had broken the law when Officer Kuepfer demanded Defendant’s identification.

{18} We stress the importance of the need for individualized suspicion, which focuses on the specific conduct of the person who is detained. If a police officer lacks individualized suspicion, “the government’s interest in crime prevention will not outweigh the intrusion into the individual’s privacy” and the detention violates the Fourth Amendment. Patterson, 2006-NMCA-037, ¶ 16. {19} The only facts specific to Defendant are that he was sitting in the vehicle under the circumstances we have described. A general suspicion arising from the fact that a car in which Defendant was a passenger was parked for thirty minutes on a street late at night in a neighborhood where recent burglaries, but none that night, had occurred does not give rise to an individualized suspicion that Defendant was committing or had committed a crime. See id., ¶¶ 2-4, 27-28 (concluding there was no reasonable suspicion entitling the police officer to demand identification from the defendant who was a mere passenger in a car pulling into an empty commercial parking lot at 10:40 p.m. in an area where recent burglaries had occurred).

{20} The initial information that the license plate number on the car was not on file with the motor vehicle department fails to establish a reasonable suspicion concerning Defendant. Before he demanded Defendant’s identification, Officer Kuepfer learned that there was no problem with the car’s registration. To the extent that the driver’s other actions contributed to a reasonable suspicion that the driver had committed or was committing a crime, those actions alone cannot be converted into a reasonable suspicion that Defendant was committing or had committed a crime. See id., ¶ 28 (concluding that the state’s argument did not point to any facts particular to the defendant that would lead to individualized suspicion he was violating the law, although there was individualized suspicion that another passenger in the car was or had been violating the law by possessing an open can of beer in the car); Jason L., 2000-NMSC-018, ¶ 22 (affirming that a police officer could not rely on the behavior of the defendant’s companion to establish individualized suspicion to search the defendant).

{21} The City fails to identify any specific crime it asserts Officer Kuepfer had a reasonable suspicion that Defendant had committed or was committing. Furthermore, Officer Kuepfer’s own testimony negates the City’s general assertion that he was motivated by a reasonable, individualized suspicion in detaining and demanding identification from Defendant. Before reaching the scene, Officer Kuepfer decided to fill out a field investigation card because there had been a problem “with criminal damages in that area.” In order to fill out the card, Officer Kuepfer needed identification from the occupants of the vehicle. On the other hand, he had no intention of arresting Defendant that night, and he acknowledged that “there was no crime at that point that [he] could determine.” Nevertheless, Officer Kuepfer continued demanding to see Defendant’s identification because he wanted to “put it on a little card” for possible use in the future if a crime was reported later that night. Even though Defendant exhibited no indication that he was lying, Officer Kuepfer insisted on the identification “[b]ecause it wouldn’t have been the first time that anyone’s ever lied to [him] about who they are” as people do
it “regularly.” We therefore conclude that Officer Kuepfer did not have a reasonable suspicion that justified detaining Defendant and demanding his identification.

{22} The United States Supreme Court held in Brown v. Texas, 433 U.S. 47 (1979), that the defendant could not be punished for failing to identify himself in the absence of reasonable suspicion permitting the officers to request that he identify himself. Id. at 53. Under the circumstances of this case, in which no officer safety or public safety considerations have been raised, we similarly conclude that Defendant should not have been convicted for refusing to give the officer his driver’s license.

CONCLUSION

{23} The evidence fails to establish that Defendant’s passive refusal to produce his identification obstructed or prevented Officer Kuepfer from performing his duties as a police officer in the circumstances of this case.

{24} IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

WE CONCUR:
JAMES J. WECHSLER, Judge
IRA ROBINSON, Judge

Opinion

Celia Foy Castillo, Judge

{1} Defendant appeals his conviction for aggravated battery with a deadly weapon, a third-degree felony. In our review of this case, we are required to determine if the human mouth can be a deadly weapon, pursuant to NMSA 1978, § 30-1-12(B) (1963) (defining “deadly weapon”), and NMSA 1978, § 30-3-5(C) (1969) (explaining felony aggravated battery). We conclude that a jury could reasonably determine that the human mouth is a deadly weapon if the mouth is used in a manner that could cause death or great bodily harm. We hold that sufficient evidence existed to support the jury’s determination in this case. We also conclude that the trial court erred when it refused to give a jury instruction for misdemeanor aggravated battery as a lesser included offense. Thus, we reverse and remand for a new trial in accordance with this opinion.

I. BACKGROUND

{2} Defendant and Victim were traveling in a vehicle with three other individuals, namely Defendant’s wife, Victim’s friend, and the driver of the vehicle. At some point, a fight occurred in the vehicle. Testimony at trial yielded widely varying accounts of the fight. Defendant admitted, however, that he bit Victim in the course of the altercation, but Defendant claimed that he did so only in self-defense. The driver of the vehicle testified that he heard Defendant say as he was biting Victim, “I hope you die[,] I hope you die.”

{3} Victim was taken to the emergency room, where she was treated for injuries resulting from the fight in the vehicle. Among other injuries, Victim had two bite marks on her left arm — one bite on her upper arm and one on the forearm. In both bites, the skin was broken. Victim recovered from her injuries in about three weeks.

{4} The emergency room doctor offered Victim testing for hepatitis and HIV to determine her possible exposure from the bites inflicted by Defendant. Victim declined the testing at that time, and no evidence was presented indicating whether Victim was later tested. Defendant’s blood was not tested by the State. During the course of the State’s investigation, however, Defendant admitted that he had hepatitis C, and he said that as a result of the disease, he did not expect to live much longer. In addition, Defendant’s wife later testified that Defendant had previously tested positive for hepatitis C and that he had hepatitis C when he bit Victim.

{5} At trial, the doctor provided the following testimony about the nature of hepatitis C. It is a viral illness transmitted primarily by blood through transfusions, needles, and mucosal contact with blood. The virus is also shed in saliva. Although it is not likely that the virus would be transmitted through a human bite, it is “certainly possible.” There are several documented cases in which the only risk factor was exposure through bites. Two percent of those individuals who are exposed to hepatitis C, through saliva or blood, will test positive for the virus as a result. When the virus is transmitted, ninety-five percent of people will have no symptoms; however, twenty percent or more will develop cirrhosis and chronic liver disease, and one to three percent will go on to have liver cancer. Liver cancer caused by hepatitis C can, over a long period of time, result in death.

{6} Defense counsel requested a jury instruction on the lesser offense of misdemeanor aggravated battery. See § 30-3-5(B). The trial court denied the misdemeanor in instruction; the jury was instructed only on aggravated battery with a deadly weapon.
See § 30-3-5(C). The State reasoned that by biting Victim, Defendant used his mouth as a weapon to intentionally injure Victim and that Defendant’s mouth could have caused death or great bodily harm because he had hepatitis C. The jury returned a verdict of guilty, and this appeal followed.

{7} Defendant makes two arguments. First, he argues that there was insufficient evidence to convict him of aggravated battery with a deadly weapon. Second, Defendant argues that the trial court erred by refusing to instruct the jury regarding the lesser offense of misdemeanor aggravated battery.

II. STANDARD OF REVIEW

{8} When reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the State; we resolve all conflicts and indulge all permissible inferences in favor of the verdict. State v. Johnson, 2004-NMSC-029, ¶ 54, 136 N.M. 348, 98 P.3d 998. We must determine if substantial evidence exists to support a verdict of guilt beyond a reasonable doubt with respect to each element necessary for conviction. Id. In so doing, we do not reweigh the evidence or substitute our judgment for that of the jury. State v. Sosa, 2000-NMSC-036, ¶ 6, 129 N.M. 767, 14 P.3d 32. Sufficiency of the evidence to support a conviction and interpretation of a statute are both questions of law, which are reviewed de novo. State v. Traeger, 2001-NMSC-022, ¶ 9, 130 N.M. 618, 29 P.3d 518; State v. Anaya, 98 N.M. 211, 212, 647 P.2d 413, 414 (1982); State v. Shay, 2004-NMCA-077, ¶ 7, 136 N.M. 8, 94 P.3d 8. The issue of whether Defendant’s mouth is a deadly weapon is “one of law, applying the law to the facts and requiring statutory construction; our review is de novo.” State v. Galaz, 2003-NMCA-076, ¶ 4, 133 N.M. 794, 70 P.3d 784.

{9} When reviewing the trial court’s denial of a jury instruction, “[w]e view the evidence in the light most favorable to the giving of the requested instruction.” State v. Hill, 2001-NMCA-094, ¶ 5, 131 N.M. 195, 34 P.3d 139. The question of proper denial of a jury instruction is a mixed question of law and fact, which we review de novo. State v. Gaines, 2001-NMSC-036, ¶ 4, 131 N.M. 347, 36 P.3d 438.

III. DISCUSSION

A. Sufficiency of the Evidence

{10} Defendant argues first that the State failed to meet its burden of proving, beyond a reasonable doubt, each element of the crime of aggravated battery with a deadly weapon. See § 30-3-5(C). Specifically, Defendant contends that the State failed to prove that Defendant used a “deadly weapon.”

{11} The term “deadly weapon” is defined as any firearm, whether loaded or unloaded; or any weapon which is capable of producing death or great bodily harm, including but not restricted to any types of daggers, brass knuckles, switchblade knives, bowie knives, poniards, butcher knives, dirk knives and all such weapons with which dangerous cuts can be inflicted, including swordcanes, and any kind of sharp pointed canes, also slingshots, slug shots, bludgeons; or any other weapons with which dangerous wounds can be inflicted.

Section 30-1-12(B). Instruments or objects that are specifically listed in Section 30-1-12(B) are considered deadly weapons per se, or as a matter of law. Traeger, 2001-NMSC-022, ¶ 10. If an instrument or object is not listed, the jury must determine whether the item is a deadly weapon. Id. ¶ 12. In making this determination, the jury must decide whether the object or instrument is a “weapon which is capable of producing death or great bodily harm” or a weapon “with which dangerous wounds can be inflicted.” Section 30-1-12(B); UJI 14-322 NMRA; State v. Anderson, 2001-NMCA-027, ¶ 15, 130 N.M. 295, 24 P.3d 327. The jury considers the circumstances of the case, including the “character of the instrument and the manner of its use.” Anderson, 2001-NMCA-007, ¶ 16 (internal quotation marks and citation omitted); see also Traeger, 2001-NMSC-022, ¶ 16 (“[T]he question of whether the item is a deadly weapon, given the defendant’s use and the character of the item, should be submitted to the jury for a finding of fact.”).

{12} The jury is specifically instructed that an instrument or object, used as a weapon by a defendant, can be a deadly weapon only if the jury finds that the instrument, “when used as a weapon, could cause death or great bodily harm.” UJI 14-322; see also Traeger, 2001-NMSC-022, ¶ 16 (“[W]e require that a jury determine, given the defendant’s use, if the baseball bat was capable of producing death or great bodily harm.” (internal quotation marks and citation omitted)). Thus, in our case, in order to prove that Defendant committed aggravated battery with a deadly weapon, the State was required to show that Defendant’s mouth, when used as a weapon, could cause death or great bodily harm. The requisite showing that an object was used as a deadly weapon is often made by the state “while establishing other elements of the crime like intent, motive, method, or the resulting injury.” Traeger, 2001-NMSC-022, ¶ 16.

{13} Defendant argues that New Mexico courts have never considered the human mouth to be a deadly weapon; he asserts that in each relevant New Mexico case, the jury has considered an “external instrumentality, something with which a defendant arms himself.” See id. ¶ 1 (baseball bat); State v. Connell, 36 N.M. 253, 255, 13 P.2d 554, 555 (1932) (rock); Anderson, 2001-NMCA-027, ¶ 7 (stick); State v. Montañó, 1999-NMCA-023, ¶ 1, 126 N.M. 609, 973 P.2d 861 (brick wall); State v. Bonham, 1998-NMCA-178, ¶ 1, 126 N.M. 382, 970 P.2d 154 (trivet), abrogated on other grounds, Traeger, 2001-NMSC-022, ¶ 20; State v. Candelaria, 97 N.M. 64, 65, 636 P.2d 883, 884 (Ct. App. 1981) (screwdriver); State v. Gonzalez, 85 N.M. 780, 781, 517 P.2d 1306, 1307 (Ct. App. 1973) (screwdriver). Thus, Defendant contends that our precedent precludes, as a matter of law, the jury from considering the human mouth as a weapon. This question is an issue of first impression in New Mexico.

{14} In other jurisdictions, the majority rule is that body parts, i.e., bare fists and teeth, are not considered weapons. See generally Vitauts M. Gulbis, Annotation, Parts of the Human Body, Other Than Feet, as Deadly or Dangerous Weapons for Purposes of Statutes Aggravating Offenses Such as Assault and Robbery, 8 A.L.R.4th 1268 (1981 & Supp. 2006). In cases that have specifically addressed the mouth or teeth as a weapon, the jurisdictions are split. Compare United States v. Sturgis, 48 F.3d 784, 788 (4th Cir. 1995) (“[A] jury could reasonably have concluded that [the defendant’s] use of his teeth to inflict potentially lethal bite wounds amounted to use of a dangerous weapon.”); United States v. Moore, 846 F.2d 1163, 1168 (8th Cir. 1988) (holding that the defendant’s mouth and teeth could be a deadly weapon); and Brock v. State, 555 So. 2d 285, 287-88 (Ala. Crim. App. 1989) (concluding that teeth can be a deadly weapon but ruling that no evidence was presented that the biting in this case had the capacity to result in serious physical injury), with Commonwealth v. Davis, 406 N.E.2d 417, 420 (Mass. App. Ct. 1980) (holding that teeth and other human body parts should not be considered as dangerous weapons, even on a case-by-case basis).
This definition jury to find that a screwdriver was used as a deadly weapon; thereby usurping the jury's function of deciding whether a trivet is a deadly weapon); and People v. Owusu, 712 N.E.2d 1228, 1229 (N.Y. 1999) (holding that teeth, a body part, do not constitute an "instrument" under the statute (emphasis omitted)). As we explain below, New Mexico statutes and precedent are in line with those out-of-state cases that hold that the mouth or teeth can be considered a deadly weapon, at least when they are in fact used in a manner that could cause death or great bodily harm.

{15} This Court has previously relied on the definition of "weapon" from Black's Law Dictionary 1593 (6th ed. 1990): "An instrument of offensive or defensive combat, or anything used, or designed to be used, in destroying, defeating, threatening, or injuring a person." Montaño, 1999-NMCA-023, ¶ 5; see also Galaz, 2003-NMCA-076, ¶ 10. This definition of "weapon" — anything used to injure a person — is broad enough to include an individual’s mouth. See Montaño, 1999-NMCA-023, ¶ 5 (concluding that this definition is broad enough to include a brick wall). Clearly, the mouth, which includes the teeth and saliva, can be used to injure a person. See Davis, 406 N.E.2d at 418 (observing that the defendant bit off a piece of the victim’s ear); Bachelor, 575 N.W.2d at 627 (observing that the defendant bit off a piece of the victim’s nose); Owusu, 712 N.E.2d at 1229 (stating that the "defendant bit the victim’s finger so severely that nerves were severed"); see also Moore, 846 F.2d at 1167 (relying on a doctor’s testimony that a human bite, which can be more dangerous than a dog bite, is capable of causing serious infection and "can be a very dangerous form of aggression" (internal quotation marks omitted)). Thus, the question of whether the mouth has been used as a deadly weapon is for the jury. Montaño, 1999-NMCA-023, ¶ 6 ("Our Courts have long reserved for the fact finder the question of whether an object not specifically listed by statute, when used by a defendant in committing a crime, is a deadly weapon."); Bonham, 1998-NMCA-178, ¶ 25 (agreeing that the jury instruction "defined a trivet as a deadly weapon, thereby usurping the jury's function of deciding whether a trivet is a deadly weapon"); Candelaria, 97 N.M. at 65, 636 P.2d at 884 (concluding that the victim’s testimony was sufficient for the jury to find that a screwdriver was used as a deadly weapon — the defendant held a screwdriver most of the time he was in the victim’s home; the defendant was on top of the victim on the kitchen floor; the defendant held the screwdriver to the victim’s throat and told her that he was going to kill her); Gonzales, 85 N.M. at 781, 517 P.2d at 1307 (stating that the jury can resolve the question of fact regarding the character of a tire tool and its use as a deadly weapon through hearing or viewing descriptions of the tool and its use or through viewing the tool itself when a description of the tool’s use is provided). New Mexico cases illustrate that a determination regarding an object’s status as a deadly weapon requires a functional inquiry into the manner of use. The test cannot be mechanical or reduced to a question of law. Sturgis, 48 F.3d at 788. The jury must determine, under the circumstances of each case, if the defendant used the object in a manner that could cause death or great bodily harm. See, e.g., id.; Traeger, 2001-NMSC-022, ¶ 10.

{16} The distinction between wielding an object or instrument that is external to the body to cause injury and using one’s mouth to cause injury is an unsupportable difference. See Montaño, 1999-NMCA-023, ¶ 8 (stating that the distinction between wielding a single brick as a weapon and using a brick wall is an “unsupportable difference”). “The aggravated battery statute is directed at preserving the integrity of a person’s body against serious injury.” State v. Vallejos, 2000-NMCA-075, ¶¶ 15, 18, 129 N.M. 424, 9 P.3d 668 (discussing double jeopardy). Thus, we construe the statute to protect an individual from the possibility of serious injury, regardless of the nature of the instrument used to injure. See Sturgis, 48 F.3d at 787 ("[W]hat constitutes a dangerous weapon depends not on the object’s intrinsic character but on its capacity, given the manner of its use, to endanger life or inflict serious physical harm." (internal quotation marks and citation omitted)). “The purpose of aggravating the charge and enhancing the sentence for use of a weapon is to minimize injury to human beings no matter how the injury is inflicted and discourage people from using objects to injure another.” Montaño, 1999-NMCA-023, ¶ 9. With our conclusion today, we serve the purpose of the statute by minimizing the risk of injury from human bites and by discouraging people from using their mouths to injure others. See Sturgis, 48 F.3d at 789 (“The assertion that human teeth can never qualify as a dangerous weapon ignores the harm to those on whom those bites were inflicted.”).

{17} Defendant also argues that even if the mouth could be a deadly weapon for purposes of Sections 30-1-12 and 30-3-5, the evidence is insufficient to prove that Defendant used his mouth as a deadly weapon. As stated earlier, the State did not offer into evidence any medical tests that showed Defendant suffered from hepatitis C. Defendant admitted, however, to having hepatitis C. Moreover, Defendant’s wife testified that Defendant was diagnosed with hepatitis C when they got married in 2001 and that Defendant had the disease at the time he bit Victim. In addition, the doctor testified that transmission of the hepatitis C virus is possible through a bite that breaks the skin and that hepatitis C could result in liver cancer, ultimately leading to death. Finally, a witness testified that Defendant, while biting Victim, told Victim that he hoped she would die. From this evidence, the jury could conclude that Defendant used his mouth in a manner that could cause death and that by definition, Defendant’s mouth was thus used as a deadly weapon. See § 30-1-12(B) (“‘[D]eadly weapon’ means . . . any weapon which is capable of producing death[.]’”); Montaño, 1999-NMCA-023, ¶ 6 (“The determination by the fact finder depends upon the evidence presented about the object and its manner of use.”); see also State v. Kersey, 120 N.M. 517, 520, 903 P.2d 828, 831 (1995) (stating that an appellate court does not consider “the merit of evidence that may have supported a verdict to the contrary” (internal quotation marks and citation omitted)); State v. Jones, 2000-NMCA-047, ¶¶ 19, 129 N.M. 165, 3 P.3d 142 (recognizing that spitting or throwing bodily waste may give rise to a rational concern about communicable disease or infection when such battery is committed by a known carrier of disease or infection).

{18} Defendant appears to argue that his mouth could not be a deadly weapon because the prospect of death or great bodily harm was not probable but merely speculative. Defendant’s argument fails, however, because it ignores the terms contained in the statute and the jury instruction. The term “capable of producing” is found in the statutory definition of deadly weapon, while the term “could cause” is used in the jury instruction. Compare § 30-1-12(B), with UJI 14-322. Both terms, however, are similar in that they do not require a certain probability of occurrence, but rather focus on any probability of occurrence. In our case, the jury was instructed as follows: “The Defendant’s mouth is a deadly weap-
on only if you find that the Defendant’s mouth, when used as a weapon, could cause death or great bodily harm[]."

{19} As discussed in paragraph 5, the State provided evidence that a bite from Defendant could cause death. Defendant admitted and his wife testified that he had hepatitis C. Defendant admitted biting Victim, and evidence showed that Defendant’s bites broke the skin. The doctor testified that hepatitis C can be transmitted through saliva, that one to three percent of those testing positive for hepatitis C would go on to have liver cancer, and that liver cancer can cause death. Thus, the jury could determine that Defendant used his mouth as a deadly weapon because the evidence supported a conclusion that Defendant’s mouth “could cause death.” UJI 14-322. Although it was not likely that Victim would develop liver cancer resulting in death, the potential for death was sufficient to meet the standard enunciated in the statute and the jury instruction. See Montañó, 1999-NMCA-023, ¶ 9 (“[A]n enhanced penalty can result when use of an object or instrument increases the severity of injury to the victim to the statutorily[ ]required levels.”).

{20} Moreover, the State offered evidence that a bite from Defendant could cause great bodily harm. The term “great bodily harm” is defined as “an injury to the person which creates a high probability of death; or which causes serious disfigurement; or which results in permanent or protracted loss or impairment of the function of any member or organ of the body.” Section 30-1-12(A). Reading the definitions of deadly weapon and great bodily harm together, we note that the definition of deadly weapon includes any weapon that could cause an injury resulting in impairment to the function of an organ of the body. In our case, Defendant’s teeth could have caused an injury that resulted in impairment of the liver function. The doctor testified that twenty percent of those testing positive for hepatitis C would develop cirrhosis of the liver. Thus, if Victim were one of those two percent at risk who would test positive for hepatitis C, she would have a twenty percent chance of having impaired liver function. This potential for impaired function resulting from the injury, though arguably small, is sufficient to satisfy the standard found in the statute and the jury instruction. See § 30-1-12(B); UJI 14-322; Moore, 846 P.2d at 1167 (“[T]he capacity for harm in the weapon and its use that is significant, not the actual harm inflicted.

. . . [The defendant] used his mouth and teeth in a way that could have transmitted disease.” (citations omitted)). Accordingly, we conclude that an individual’s mouth can be considered a weapon pursuant to Sections 30-1-12(B) and 30-3-5(C) and that the question of whether an individual has used his mouth as a “deadly weapon” is strictly a question of fact, reserved for the jury.

B. Jury Instruction on the Lesser Offense

{21} In regard to his second issue, Defendant contends that the trial court erred by refusing to instruct the jury on the lesser included offense of misdemeanor aggravated battery. See § 30-3-5(B). The State concedes that the court erred in denying Defendant a jury instruction on the lesser included offense and that this denial constituted reversible error. However, we are not bound by the State’s concession; thus, we examine the issue to reach an independent conclusion. See State v. Muñiz, 2003-NMSC-021, ¶ 5, 134 N.M. 152, 74 P.3d 86 (stating that appellate courts have a duty to affirm the trial court if its decision was correct, despite the state’s concession of an issue); see also State v. Martinez, 1999-NMSC-018, ¶ 26, 127 N.M. 207, 97 P.2d 718 (“[A]ppellate courts in New Mexico are not bound by the [a]ttorney [g]eneral’s concession of an issue in a criminal appeal.”).

{22} Defendant is entitled to an instruction on the lesser-included offense when a reasonable view of the evidence could lead a fact-finder to conclude that the lesser offense is the highest degree of crime committed. State v. Brown, 1998-NMSC-037, ¶ 12, 126 N.M. 338, 969 P.2d 313. “Failure to instruct the jury on a lesser included offense of a charged offense is reversible error if [ ] (1) the lesser offense is included in the greater, charged offense; (2) there is evidence tending to establish the lesser included offense and that evidence establishes that the lesser offense is the highest degree of crime committed; and (3) the defendant has tendered appropriate instructions preserving the issue.” State v. Jernigan, 2006-NMSC-003, ¶ 21, 139 N.M. 1, 127 P.3d 537.

{23} Under the facts of our case, misdemeanor aggravated battery is a lesser included offense of aggravated battery with a deadly weapon. An individual commits aggravated battery by unlawfully touching or applying force to the person of another, with an intent to injure. Section 30-3-5(A). Aggravated battery is a misdemeanor when a defendant inflicts “an injury to the person which is not likely to cause death or great bodily harm, but does cause painful temporary disfigurement or temporary loss or impairment of the functions of any member or organ of the body.” Section 30-3-5(B). Aggravated battery is a third-degree felony when the battery is committed, inter alia, with a deadly weapon. Section 30-3-5(C). Misdemeanor aggravated battery is not necessarily a lesser included offense of aggravated battery with a deadly weapon because the misdemeanor element of temporary disfigurement, loss, or impairment is not an element of aggravated assault with a deadly weapon. See State v. Meadows, 121 N.M. 38, 42-43, 908 P.2d 731, 735-36 (1995) (discussing the strict elements approach when the state has requested an instruction on the lesser offense); State v. Muñoz, 2004-NMCA-103, ¶¶ 11, 13, 136 N.M. 235, 96 P.3d 796 (discussing the strict elements approach when the defendant has requested an instruction on the lesser offense). However, under the facts of our case — as alleged in the criminal information, supported by the evidence, and argued by the State — Defendant could not have committed felony aggravated battery without also committing the lesser offense. See Meadows, 121 N.M. at 43-44, 908 P.2d at 736-37 (concluding that a lesser offense is necessarily included when under the facts alleged in the charging document and supported by the evidence, the defendant could not have committed the greater offense without also committing the lesser offense); Muñoz, 2004-NMCA-103, ¶ 7, 15 (concluding that under the state’s theory of the case, the defendant could not have committed the crime of great bodily injury by vehicle without committing the crime of driving while intoxicated); State v. Darkis, 2000-NMCA-085, ¶ 15, 129 N.M. 547, 10 P.3d 871 (“[T]he appropriate focus is not merely upon the specific wording of the information, but also on the facts the [s]tate had arrayed and the theory of its case.”). Considering the State’s theory of our case and the facts as charged and supported by the evidence, the only difference between misdemeanor aggravated battery and felony aggravated battery with a deadly weapon is Defendant’s use of a deadly weapon. Compare § 30-3-5(B), with § 30-3-5(C); cf. Muñoz, 2004-NMCA-103, ¶ 17 (stating that the only element distinguishing the lesser and greater offenses was sufficiently in dispute). Thus, under these circumstances, misdemeanor aggravated battery is a lesser included offense of aggravated battery with a deadly weapon.
In addition, evidence was presented that tended to establish the lesser included offense. Victim testified regarding several injuries, all of which were healed in three weeks. Further, our review of the record leads us to conclude that a rational fact-finder could have determined, based on the evidence, that Defendant did not use a deadly weapon. The State offered no evidence of any permanent disfigurement. Evidence was not presented regarding loss or functional impairment of an organ. The only testimony establishing use of a deadly weapon was the doctor’s testimony that Victim had a chance of being exposed to Defendant’s disease. The element that distinguished the lesser and greater offenses, use of a deadly weapon, was “sufficiently in dispute such that a jury rationally could acquit on the greater offense and convict on the lesser.” Darkis, 2000-NMCA-085, ¶ 14 (quoting Meadors, 121 N.M. at 44, 908 P.2d at 737). Finally, Defendant properly requested an instruction on misdemeanor aggravated battery as a lesser included offense of felony aggravated battery. For these reasons, we conclude that Defendant was entitled to an instruction on misdemeanor aggravated battery; accordingly, we reverse. See Meadors, 121 N.M. at 52, 908 P.2d at 745 (Ransom, J., specially concurring) (discussing the legitimate concern that the lack of an instruction on the lesser crime may result in conviction of the greater offense, even when the lesser offense may be found to be the highest degree of the crime committed, “because acquittal is an alternative that is unacceptable to the jury”); Darkis, 2000-NMCA-085, ¶ 20 (stating that the defendant’s request for an instruction on the lesser offense was “a valid and appropriate defense strategy” because the element at issue was in dispute).

IV. CONCLUSION

We conclude that an individual’s mouth can be a deadly weapon for purposes of the aggravated battery statute and that the ultimate determination depends on the manner of use, which is a question of fact for the jury. We also conclude that sufficient evidence existed to support each element of the crime. We further hold that Defendant was entitled to a jury instruction on the lesser included offense of misdemeanor aggravated battery. Our determination regarding sufficiency of the evidence precludes any double jeopardy concerns regarding retrial. See State v. Sanchez, 2000-NMSC-021, ¶ 30, 129 N.M. 284, 6 P.3d 486. We therefore reverse Defendant’s conviction and remand for a new trial in accordance with this opinion.

IT IS SO ORDERED.

CELIA FOY CASTILLO, Judge

WE CONCUR:
LYNN PICKARD, Judge
CYNTHIA A. FRY, Judge
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Blue Cross and Blue Shield of New Mexico, a Division of Health Care Service Corporation, a Mutual Legal Reserve Company, has an opening in its in-house legal department. The successful candidate will assist the General Counsel on various insurance, regulatory, corporate and litigation matters. Depending on years of practice, the successful candidate will be considered either an Assistant General Counsel (10+ years) or Associate General Counsel (5+ years). The candidate should be licensed to practice law in New Mexico, have excellent verbal and written communication skills, and the ability to work independently. Insurance, regulatory, corporate or healthcare law experience is preferred. We offer a competitive salary and benefits package. Please forward resume to: Blue Cross and Blue Shield of New Mexico, Attn: HR, P.O. Box 27630, Albuquerque, NM 87125-7630. Or fax: (505) 816-5102. Learn more about BCBSNM and this position at www.bcbsnm.com. We are an equal opportunity employer dedicated to workforce diversity and a drug-free and smoke-free workplace. Drug screening and background investigation will be required as a condition of employment.

Full Time Legal Assistant
Guebert, Bruckner & Bootes, P.C., seeks a full time legal assistant with strong writing and organizational skills. The successful candidate will be self-motivated, detail oriented and have the ability to work independently. Must have excellent communication skills and be able to multi-task. Competitive salary and benefit package. Please send resume and references to: Guebert, Bruckner & Bootes P.C., Attention Debbie Primmer, P.O. Box 93880, Albuquerque, NM 87199-3880. All replies are kept confidential. No telephone calls please.

Experienced Paralegal
Large law firm accepting resumes for a commercial/real estate paralegal with 5 years experience. College degree preferred. Candidates must possess excellent writing and proofreading skills, legal terminology proficiency, organization skills, MS Word/Outlook, be self-motivated and able to work with minimal supervision in a fast-paced environment. Competitive salary, excellent benefits and positive work place. Fax resume to Administrator at (505) 243-4408.
Litigation Paralegal
Cadigan Law Firm, P.C. seeks an experienced litigation paralegal for our busy civil and commercial litigation practice. Excellent organizational and writing skills required. Health and retirement plan, pleasant working environment. Please e-mail resume to cadigan@cadiganlaw.com or fax to 830-2385.

Request for Applications
City of Albuquerque
Legal Secretary Position
LEGAL SECRETARY: Legal secretary position available in the Public Safety Division requiring considerable knowledge of legal terminology, litigation procedures, pleadings and other legal documents. Associate’s degree in Business Administration or related field, plus three (3) years of secretarial experience to include two (2) years as a Legal Secretary. Related education and experience may be interchangeable on a year for year basis. (Exception: The Legal Secretary experience is not interchangeable). Please apply online at www.cabq.gov. Application deadline is April 13, 2007

Request For Applications
City Of Albuquerque
Legal Secretary Position
LEGAL SECRETARY: Legal secretary position available in the DWI/Forfeiture Unit requiring considerable knowledge of legal terminology, litigation procedures, pleadings and other legal documents. Associate’s degree in Business Administration or related field, plus three (3) years of secretarial experience to include two (2) years as a Legal Secretary. Related education and experience may be interchangeable on a year for year basis. (Exception: The Legal Secretary experience is not interchangeable). Please apply online at www.cabq.gov. Application deadline is April 13, 2007

Full Time Secretary/Legal Assistant
Law Office of Elliot L. Weinreb, Santa Fe. We need an additional secretary/legal assistant. Competitive salary/benefits. Small, growing office. Attributes: pleasant personality, good computer and language skills, Organized, detail-oriented, likes to learn. We work as a team. Interest in doing a variety of tasks, such as wordprocessing, close document review, interviewing, photographing, learning computer programs, installing new software/hardware. Able to work small amounts of overtime when needed. No commuters. Fax to 505-982-6795.

Forensic Psychiatrist
Board certified in adult and forensic psychiatry, available for psychiatric evaluations, consultation, case review, and expert testimony; CV and case listings available upon request. Contact Dr. Kelly at 1-866-317-7959 or by email at forensicpsychiatry@comcast.net

Downtown Albuquerque
620 Roma Avenue, N.W. $550.00 per month. Includes office, all utilities (except phones), cleaning, conference rooms, access to full library, receptionist to greet clients and take calls. A must see. Call 243-3751.

Hyatt Office Tower
Lawyer office space with great views (15th Floor). Access to copier, postage meter, secretarial space, conference and kitchen facilities. Suite shared with one law firm. Contact: Paul Kienzle at 505/246-8600 or paul@kienzlelaw.com.

Albuquerque Offices
Albuquerque offices for rent, 820 2nd NW, one block from courthouses, copier, fax, high speed internet, off street parking, library, statutes up to date, telephone system, conference room, receptionist, rates depending on space rented $500 to $1000 monthly. Call Ramona @243-7170 for appointment.

Nob Hill Area Law Office
Comfortable, non-smoking environment featuring off-street parking, hardwood floors, and easy access to Law School and Courthouses. Many of the finest restaurants in town are within walking distance. $600.00 monthly rent includes telephone system with voice mail, access to copy/fax machine, DSL line and conference room. Contact Jim Ellis, 118 Wellesley Dr., SE, 266-0800.

Exclusive Downtown
Executive Office
Kiva fireplace-separate reception area-on site parking-900 sq ft. -negotiable lease terms-$500/month. 243-6794 or 259-9013.

Attractive Shared Office Space
Attorneys - Uptown location, 2539 Wyoming, NE, Large private office. Shared reception area, secretary, conference room, DSL, copy machine, fax. $350 plus shared costs. Contact Crystal Pritchard or Burton Broxtermann 296-482.

Downtown Historic Hudson House
One attractive office available in the downtown historic Hudson House. Rent includes telephone, equipment, access to fax, copier, conference rooms, parking, library and reference materials. Referrals and co-counsel opportunities. For more info., call the offices of Leonard DeLayo at 243-3300, ask for Jodi.

For Lease
Lovely historic building near downtown Flying Star, 2208 sq ft, $1385/mo. 286-1228.

Office Space
Three Offices Available
Best location in town, one block or less from the new federal, state, metropolitan courts. Includes secretarial space, phones and service, parking, library, janitorial, security, receptionist, runner, etc. Contact Thomas Nance Jones, (505) 247-2972.

Awesome Space Below Market Value
Crum & Associates, P.C. is moving from 1005 Marquette, NW and for a limited time is leasing this space for below market value. Space is 2500 sq. feet, newly remodeled, hardwood floors, and completely wired. New furniture also available for use with lease. Short walk to all courthouses. Serious inquiries to David Crum: 385-9417 or David@nmlawyers.com
NEW MEXICO COLLABORATIVE PRACTICE SYMPOSIUM

Friday, May 4 & Saturday, May 5, 2007 • State Bar Center, Albuquerque
12.0 General and 1.0 Ethics CLE Credits
CFP Credits (approval pending)
☑ Standard Fee $319 ☐ NMCPG Member $299
Co-Sponsor: New Mexico Collaborative Practice Group

BASIC MULTIDISCIPLINARY TRAINING

Presenters

Attorneys: Janet Clow, Esq., Sarah Bennett, Esq., Jan Gilman-Tepper, Esq.,
Michael J. Golden, Esq., Catherine Oliver, Esq., Kathryn M. Wissel, Esq.

Mental Health Professionals: Max August, MA, Alice Kahle, PhD, Judith B. Lay, PhD, Maurine Polkoff, Maurine Renville, LSW

Financial Professionals: Dee Boyer, CFP, CDFA, CSA, Thomas Burrage, CPA

FRIDAY, MAY 4
9:00 a.m. Collaborative Family Law (CFL) Defined
A brief overview of CFL
The critical elements of CFL
CFL distinguished from other options
1. Pro Se
2. Mediation
3. Traditional litigation
4. Collaborative Family Law

10:15 a.m. Break
10:30 a.m. Preparing to Practice Collaboratively
A. The paradigm shift
B. Skills development
Noon Lunch (provided at the State Bar Center)
1:00 p.m. A Multidisciplinary Approach to Collaborative Family Law
A. The Multidisciplinary Model
B. Role of the Collaborative Attorney
1. Educating and counseling the client
2. Managing conflict
3. Guiding interest-based negotiations
4. Assisting the parties in implementing agreements
C. Role of the Collaborative Coach
1. Emotional containment and management
2. Interventions by coaches to manage emotions
3. Roles for the whole team in emotional management
4. Special topics
   a) The “leaver-leavee distinction”
   b) Important psychological tasks
   c) Affairs
5. Collaborative Coaching versus Therapy

3:05 p.m. Break
3:30 p.m. D. Role of the Child Specialist
1. The Child Specialist’s Relationship with Parents
2. The Child Specialist’s Relationship with Children
3. The Child Specialist’s Relationship with Other Collaborative Team Members

E. Role of the Financial Specialist
1. Neutrality
2. Gathering information
3. The role of education throughout the process
4. Settlement Options Analysis
5. Communication
   a) with Team Members
   b) with Clients
6. Asset Valuation, Tax Advice, Investment Advice

F. Role of Other Third Party Experts and Consultants

5:00 p.m. Adjourn

SATURDAY, MAY 5
9:00 a.m. An Overview of the Collaborative Law Process
A. Case Screening
1. Identifying the Collaborative Case
2. Areas of Concern
B. Client Intake
1. Providing the client with process options
2. Helping the client select the best option
3. Once a client chooses collaborative, what to do next
   a. Attorney
   b. Divorce Coach
   c. Child Specialist
   d. Financial Specialist
C. Establishing the Collaborative Team
D. For the First Meeting
1. Obtaining case & client information
2. The critical importance of client education
3. Identifying the major issues and hot buttons
4. Communication with other Collaborative Professionals
E. The Orientation Meeting (First Four-Way Meeting)
1. Ensuring and understanding of CFL
2. Commitment to CFL process and to ‘Ground Rules’
3. Providing clients with a ‘roadmap’ through the process
4. Initial discussion of ‘values’
5. Attention to critical temporary issues

E. Caucusing (Information Discussions Before or After Collaborative Conferences)

F. Collaborative Conferences
1. Practical details
2. Agenda
3. Conduct of conference
4. Dealing with impasse

12:00 p.m. Lunch
1:00 p.m. Conclusion of the Collaborative Process
A. Withdrawal of Collaborative Counsel
B. Termination of Collaborative Process
C. Formalizing the Agreement

Break

3:15 p.m. Advocacy and Ethics in the Collaborative Process
(1.0 Ethics)
A. Attorney-Client Privilege
B. Limited Representation
C. Zealous Advocacy
D. Malpractice Risk

Practice Groups

5:00 p.m. Adjourn

This training is modeled on the Manual for the practice of Collaborative Family Law in Wisconsin, the Collaborative Family Law Council of Wisconsin, Oct. 15, 2004.
INTERMEDIATE / ADVANCED SYMPOSIUM

11.5 General and 1.0 Ethics (optional) CLE Credits
- Standard Fee $309
- NMCPG Member $289

Presenters: Suzanne L. Brunsting, Esq., Donna M. Maier, CDFA,
David R. Murch, Esq., Association of Collaborative Family Law Attorneys, Rochester, NY

FRIDAY, MAY 4
9:00 a.m.-Noon
Noon-1:00 p.m. Lunch (provided at State Bar Center)
1:00-5:00 p.m.

Energizing Your Collaborative Relationships

This workshop will give practical experience for questioning our assumptions and for staying collaborative and positive throughout the representation of our clients. Added to mutual respect and trust is the commitment by all of the professionals to work together in helping both clients reach a balanced and acceptable result.

- Explore the possibility of incorporating a neutral Facilitator in the process;
- Suspend judgment and question assumptions – the vital role of open inquiry;
- Reframe your thinking about relating to clients and to each other;
- Establish concrete action steps for immediate application to collaborative cases.

SATURDAY, MAY 5
9:00 a.m.-Noon
Noon-1:00 p.m. Lunch (provided at State Bar Center),
1:00-3:00 p.m.

Please Note: See also Ethics Session from 3:30-4:30 p.m. under Basic Multidisciplinary Training

Presenter: William A. Eddy, LCSW, Esq., National Conflict Resolution Center, San Diego, CA

Session 1: Handling High Conflict Personalities In Collaborative Practice

A. Common Dynamics of High Conflict People in legal disputes
B. Four high conflict personalities (borderline, narcissistic, histrionic and antisocial)
C. Understanding their cognitive distortions and resistance to settlement
D. The hidden role of negative advocates (family, friends and professionals) in escalating conflict

Session 2: 10 Tips for Handling High Conflict People in Collaborative Practice
1. Lowering your expectations for change
2. Listening to highly-insistent emotions (without getting hooked)
3. Understanding their fear-based logic
4. Focusing them on tasks (not emotions)
5. Emphasizing their strengths
6. Reality testing
7. Using indirect confrontations
8. Educating them about consequences
9. Including a positive advocate
10. Recommendations

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.nmbarcle.org
MAIL: CLE, PO Box 92860, Albuquerque, NM 87199

Name ___________________________________________ NM Bar # _________________________________
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☐ Purchase Order (Must be attached to be registered) ☐ Check enclosed $ ____________ Make check payable to: CLE

Credit Card # ______________________________ Exp. Date ______________________________
Authorized Signature ______________________________

BAR BULLETIN - APRIL 9, 2007 - VOLUME 46, NO. 15  51
State Bar Employees are holding the auction on July 12-13 at the State Bar of New Mexico Annual Meeting in Ruidoso

Donate your really cool goods and services before June 29th

We’ll pick up or you can deliver 
505-797-6064 
or 
kmulqueen@nmbar.org