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www.nmbar.org
You’re invited to serve as a judge for the 2008 high school mock trial competition, cosponsored by the Center for Civic Values, the State Bar of New Mexico and the UNM School of Law.

Regionals, Four Rounds, Friday and Saturday, February 15 and 16 (Northern: Albuquerque; Southern: Las Cruces)

State Finals, Two Rounds and Championship Round, Friday and Saturday, March 14 and 15 (Albuquerque)

Morning rounds are preceded by continental breakfast and orientation; afternoon rounds are preceded by lunch and orientation.

Please complete and return the Judge Registration Form on the opposite page as soon as possible, but not later than January 12, 2008, OR sign up online at http://www.civicvalues.org/MT_registration.htm.

Twice as many judges are needed for the February events, as for those in March. During January, you will be notified of the rounds to which you have been assigned for both regionals and finals.

THANK YOU for your commitment to helping provide this quality educational experience to our state’s younger citizens.

CCV extends sincere thanks to the State Bar of New Mexico, IOLTA, and the UNM School of Law for their cosponsorship of the 2008 mock trial program.
Center for Civic Values
New Mexico High School Mock Trial Program
Judge Registration Form

Please complete and return by January 12 to
PO Box 2184, Albuquerque NM, 87103-2184, or via fax to 505-242-5179

Name (title, first, middle, last, generation, suffix)

Firm/Position

Address

City, State, Zip

Work Phone/Extension

Home Phone (for emergencies only)

Work Fax

E-Mail

Years Participating in MT (including 2008)

I AM AVAILABLE TO SERVE DURING THESE ROUNDS (please check all that apply):

☐ Northern Regionals (in Albuquerque)
☐ Southern Regionals (in Las Cruces)
☐ State Finals (in Albuquerque)

I WILL SERVE DURING THESE ROUNDS (please check all that apply):

☐ Regionals, Round 1
   Friday, February 15
   8:00 AM - 11:30 AM

☐ Regionals, Round 2
   Friday, February 15
   12:30 PM - 4:00 PM

☐ Regionals, Round 3
   Saturday, February 16
   8:00 AM - 11:30 AM

☐ Regionals, Round 4
   Saturday, February 16
   12:30 PM - 4:00 PM

☐ Finals, Round 1
   Friday, March 14
   12:30 PM - 4:00 PM

☐ Finals, Round 2
   Saturday, March 15
   8:00 AM - 11:30 AM

☐ Finals, Round 3
   Saturday, March 15
   1:30 PM - 4:00 PM

I WILL SERVE AS A: (Only attorneys and members of the judiciary may serve as presiding judges)

☐ Presiding Judge
☐ Scoring Judge
☐ Either

The New Mexico High School Mock Trial Program is cosponsored by
the Center for Civic Values, the State Bar of New Mexico, and the UNM School of Law.
### THREE WAY 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  
**MAIL:** CLE, PO Box 92860, Albuquerque, NM 87199

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**G = General**  **E = Ethics**  **P = Professionalism**
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Professionalism Tip
I will make all reasonable efforts to decide cases promptly.

Meetings

December
17
Attorney Support Group, 7:30 a.m., First United Methodist Church
17
Bankruptcy Law Section Board of Directors, noon, Quarters on Yale
19
Law Office Management Committee, noon, State Bar Center
20
Health Law Section Board of Directors, noon, State Bar Center
21
Trial Practice Section Board of Directors, noon, State Bar Center

State Bar Workshops

January
23
Consumer Debt/Bankruptcy Workshop 6 p.m., State Bar Center, Albuquerque
31
Consumer Debt/Bankruptcy Workshop 5:30 p.m., Branigan Library, Las Cruces

February
27
Consumer Debt/Bankruptcy Workshop 6 p.m., State Bar Center, Albuquerque
28
Consumer Debt/Bankruptcy Workshop 5:30 p.m., Branigan Library, Las Cruces
**Notices**

**Court News**

**N.M. Supreme Court**

**Address Changes**

All New Mexico attorneys must notify both the Supreme Court and the State Bar of any changes in address or telephone number.

**Supreme Court**
- E-mail: suprvm@nmcourts.com; or
- Fax: (505) 827-4837; or
- Mail to: PO Box 848
  - Santa Fe, NM 87504-0848

**State Bar**
- E-mail: address@nmbar.org; or
- Fax: (505) 828-3755; or
- Mail to: PO Box 92860,
  - Albuquerque, NM 87199; or
  - www.nmbar.org

**Committee Vacancies**

**Judicial Education and Training Advisory Committee**

Three vacancies exist for judges on the Judicial Education and Training Advisory Committee (JETA) due to the expiring terms of three members. JETA provides general oversight and feedback, policy direction, budget oversight and constituency communication for the Judicial Education Center. Judges interested in volunteering time on this committee may send a letter of interest and/or resume to:
- Kathleen Jo Gibson, Chief Clerk
  - PO Box 848
  - Santa Fe, N.M. 87504-0848.
- Deadline is Jan. 4, 2008.

**Law Library**

Open Monday–Friday, 8 a.m.–6 p.m.
Closed Saturdays and Sundays
Closed Dec. 24–25, Dec. 31—Jan. 1
Phone: (505) 827-4850
Fax: (505) 827-4852
E-mail: libref@nmcourts.com

**N.M. Board of Legal Specialization**

**Comments Solicited**

The following attorneys are applying for certification as specialists in the area of law identified. Application is made under the New Mexico Board of Legal Specialization, Rules 19-101 through 19-312 NMRA, which provide that the names of those seeking to qualify shall be released for publication. Attorneys and others are encouraged to comment upon any of the applicants’ qualifications within 30 days after the publication of this notice. Address comments to New Mexico Board of Legal Specialization, PO Box 93070, Albuquerque, NM 87199.

- Leonard S. Katz
  - Real Estate Law
- Carlos G. Martinez
  - Workers’ Compensation Law
- Daniel J. O’Brien
  - Trial Practice in Civil Law
- Ellis G. Vickers
  - Natural Resources Law

**N.M. Compilation Commission**

A meeting of the N.M. Compilation Commission will be held to review and take action upon the proposed recommendations of the NMSA Advisory Committee for the continued publication of the NMSA 1978, appellate court opinions and Supreme Court rules of procedure. The meeting will take place at 9 a.m., Dec. 17, at the Supreme Court Building, Room 208. Call the New Mexico Compilation Commission, (505) 827-4821, for a copy of the agenda.

**Second Judicial District Court**

**Judicial Vacancy**

A vacancy on the 2nd Judicial District Court will exist in Albuquerque as of Jan. 1, 2008, upon the retirement of the Honorable Mark Macaron. The chair of the Nominating Commission solicits applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 14, of the New Mexico Statutes Annotated 1978. Applications may be obtained from the Judicial Selection Web site at http://lawschool.unm.edu/judsel/application.php, or by e-mail/fax/mail by calling Sandra Bauman, (505) 277-4700. The deadline for applications is 5 p.m., Dec. 17. Applications received after that date are not considered.

**Seventh Judicial District Court**

**Temporary Relocation**

The 7th Judicial District Court will be temporarily relocating to 855 Van Patten, Truth or Consequences. The mailing address will remain PO Box 3009, Truth or Consequences, NM 87901. The telephone and fax numbers will remain the same: phone (505)

**Destruction of Exhibits and Tapes**

Pursuant to the Judicial Records Retention and Disposition Schedules, exhibits or tapes filed with the court for the years and courts shown below, including but not limited to cases that have been consolidated, are to be destroyed. Cases on appeal are excluded. Counsel for parties are advised that exhibits and tapes can be retrieved by the dates shown below. Attorneys who have cases with exhibits, or who have cases with tapes and wish to have duplicates made, may verify exhibit or tape information with the Special Services Division at the numbers shown below. Plaintiff(s) exhibits will be released to counsel of record for the plaintiff(s), and defendant(s) exhibits will be released to counsel of record for defendant(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits and tapes not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

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894-7167 and fax (505) 894-7168. Regular business hours will remain in effect at the new address.

**Tenth Judicial District Court**  
**Change in Office Hours**  
Effective Dec. 17, the office hours for the 10th Judicial District Court will be 8 a.m. to noon and 1 to 4 p.m. The emergency number for after-hours is (505) 403-7705.

**Bernalillo County Probate Court**  
**Holiday Closures**  
The Bernalillo County Probate Court will be closed all day Dec. 24–25 and will close at noon Dec. 31 due to the county’s holiday schedule. The Probate Court will be open all other weekdays in December. The Court reopens on Jan. 2, 2008. Plan filings accordingly.

**Tenth Circuit Court of Appeals**  
The 10th Circuit Court of Appeals, the United States District Court for the Western District of Oklahoma and the Oklahoma offices of the Federal Public Defender will present *Practical Matters for the Criminal Defense Practitioner in Federal Court* (2007), from 9 a.m. to 5:30 p.m., Jan. 23, in Oklahoma City. Depending on registrations, the program will tentatively be held in the jury pool room at the U.S. Courthouse at 200 NW Fourth Street, Oklahoma City. CLE credit has been applied for. Registration is free. For more information and to R.S.V.P., e-mail SueAnn_Fitch@ca10.uscourts.gov.

**State Bar News**  
**Attorney Support Group**  
The Attorney Support Group offers two meeting opportunities:  
- **Afternoon meeting**, 5:30 p.m., Jan. 7, 2008 (meets regularly on the first Monday of the month)  
- **Morning meeting**, 7:30 a.m., Dec. 17 (meets regularly on the third Monday of the month)  
Both groups meet at the First United Methodist Church at Fourth and Lead SW, Albuquerque. For more information, contact Bill Stratvert, (505) 242-6845.

**Board of Bar Commissioners**  
**Election Results**  
The 2007 election of commissioners for the State Bar of New Mexico Board of Bar Commissioners was held on Nov. 30. Only the 1st Bar Commissioner District had a contested election. The results of that election and the uncontested districts are as follows:  
- **1st Bar Commissioner District** (Bernalillo County)  
  - Alan M. Malott (three-year term)  
  - Twila B. Larkin (one-year term)  
- **3rd Bar Commissioner District** (Los Alamos, Sandoval, Santa Fe and Rio Arriba counties)  
  - Carolyn A. Wolf (three-year term)  
  - Gary D. Alsup (three-year term)  
- **5th Bar Commissioner District** (Curry, DeBaca, Quay and Roosevelt counties)  
  - Nancy G. English (one-year term)  
- **6th Bar Commissioner District** (Chaves, Eddy, Lea, Lincoln and Otero counties)  
  - Andrew J. Cloutier (three-year term)  
- **7th Bar Commissioner District** (Catron, Dona Ana, Grant, Hidalgo, Luna, Sierra, Socorro and Torrance counties)  
  - Richard M. Jacquez (three-year term)  

The division representatives to the Board for 2008 are:  
- **Young Lawyers Division Chair**  
  - J. Brent Moore  
- **Paralegal Division Liaison**  
  - Robin Gomez  
- **Senior Lawyers Division Delegate**  
  - Daniel J. Behles  

**Meeting Summary**  
The Board of Bar Commissioners met on Nov. 30 at the State Bar Center in Albuquerque. Action taken at the meeting follows:

- Approved the Sept. 28, 2007, meeting minutes;  
- Accepted the September financials and executive summaries;  
- Reviewed the accounts receivable aging report as well as the directors’ travel reimbursements and credit card file;  
- Approved the 2008 New Mexico State Bar Foundation and Client Protection Fund budgets;  
- The 2008 license and dues forms have been mailed.  
- License and dues fees are payable on Jan. 1, 2008 and are late after Feb. 1, 2008.  
- Members who have not received the form by mid December should notify the State Bar office, (505) 797-6092 or (505) 797-6035.  
- Fees may also be paid online through secured eCommerce at www.nmbar.org.  
- License and disciplinary fees are mandatory and must be paid to maintain license status.  
- Without exception, fees are due, whether or not you received your form.  
- Late fees may be assessed if payment is not postmarked by Feb. 1, 2008.
• Received proposed bylaws and a petition signed by 50 members for the formation of an Intellectual Property Section and approved the formation of the new section;

• Approved a new health insurance plan for State Bar staff with increased co-pays to help offset the 20 percent increase in health insurance costs;

• Approved a request to donate 50,000 frequent flyer miles of the State Bar to assist pro bono attorneys with travel expenses to the Immigration Court in El Paso;

• Approved a request to fund airfare for three people (two from the Fair Judicial Elections Committee and one member or officer) to attend a judicial elections campaign workshop in Dallas in January;

• Appointed Nancy G. English to the Board from the 5th Bar Commissioner District to replace Donald C. Schutte who received a judgeship; the term will run through December 2008;

• Appointed Daniel J. O’Brien to the Client Protection Fund Commission for a three-year term;

• Appointed Mark T. Baker, Paula I. Forney and Elizabeth Gutierrez to the New Mexico Legal Aid Board;

• Approved an amendment to the State Bar Bylaws, Article IX, to add a new Section 9.5 to enable the president, with Board approval, to establish commissions;

• Approved an amendment to the Committee Policy to require a majority of the full committee when an e-mail vote is taken;

• Approved an amendment to the Family Law Section Bylaws, Article VII, Section 7.2, Chair, to allow the chair to serve more than one term;

• Approved revisions to the Employee Handbook regarding updates to the Computer, Internet, Intranet and Online Services Policy and the Record Retention and Disposal Policy to comply with the new federal rules regarding e-discovery;

• Pursuant to the new sunset provision in the State Bar and Section Bylaws, received petitions from the Children’s Law Section, Committee on Women and the Legal Profession, Historical Committee and Prosecutor’s Section, and approved continuing those sections and committees for another five years;

• Approved renaming the State Bar’s Professionalism and Outstanding Advocacy for Women Awards and the Leadership Training Institute in honor of Justice Pamela B. Minzner;

• Received the Fair Judicial Elections Committee 2007 Annual Report and approved increasing the committee from 13 to 15 members to serve for three-year staggered terms and for the committee to publish decisions in response to judicial complaints;

• Approved the appointment of a committee to review the Board composition and explore redistribution of bar commissioner districts;

• Referred a request to review and update the Statement of Principles Relating to the Responsibilities of Attorneys and Psychologists and their Inter-Personal Relationships to the Family and Children’s Law sections;

• Received a report from the Board’s Legislative Committee and will purchase a subscription to the bill locator, receive legislative alerts and make further recommendations;

• Approved the Membership Services Committee’s recommendations to add DHL and Sprint to the State Bar’s Alliance Program;

• Approved the Real Property, Probate and Trust Section’s request to change its name to Real Property, Trust and Estate Section;

• Provided the 2008 Board meeting dates as follows: Feb. 29, May 9, July 17, Sept. 12, Oct. 24 and Dec. 12; and

• Presented plaques to commissioners with terms ending this year: Erika Anderson, YLD Liaison; Carolyn Cochran, Paralegal Division Chair; and Virginia Dugan, 1st Bar Commissioner District.

Note: The minutes in their entirety will be available on the Bar’s Web site following approval by the Board at the Feb. 29 meeting.

The Honorable Pamela B. Minzner 2008 Leadership Training Institute

Applications are now being accepted for The Honorable Pamela B. Minzner 2008 Leadership Training Institute. The fast-track program trains lawyers on what it means to be a leader and how to communicate, motivate, inspire and succeed for future opportunities in leadership roles. The Institute takes place over one and one-half days each month for four months and is scheduled for March 7-8, April 3-4, May 2-3, and June 5-6. The tuition is $350, and the class size is limited through a competitive selection process, depending on the number of applications received by the deadline of Jan. 18, 2008. For more information and an application form, visit the State Bar’s Web site at www.nmbar.org.

Other Bars

First Judicial District Bar Association

The 1st Judicial Bar Association is working to help the New Mexico Court of Appeals hold oral arguments at Capital High School in Santa Fe on Dec. 19. Volunteers are needed to speak to student classrooms in advance of the oral arguments. Do not miss this opportunity to make a positive impact on the lives of our young people. Interested volunteers are encouraged to contact Dana Hardy, (505) 988-5600 or dhardy@simonsfirm.com.

N.M. Defense Lawyers Association

Roadrunner Food Bank Virtual Food Drive

Help us help others who are less fortunate in New Mexico. The Roadrunner Food Bank is able to get more of the goods that hungry New Mexicans really need than they can through a traditional food drive. With monetary contributions made through the Virtual Food Drive, Roadrunner Food Bank is able to quickly respond and obtain the items that their partner agencies are requesting. Roadrunner buys overstock, closeout, and code date items from selected vendors in large quantities at large savings. In many cases, they can buy over four times as much as obtainable at the grocery store for the same money, and they get exactly the food items that are needed most. Visit their Web site at http://www.rfwb.org/vfd2.htm. When filling out the online donation form, select N.M. Defense Lawyers Association as the “group affiliation.”

UNM School of Law

Winter Library Hours

Building and Circulation

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

Reference

Monday–Friday 9 a.m. to 6 p.m.
Closed Dec. 24 through Jan. 1, 2008
IN LINE TO LEAD 2008 State Bar President Craig A. Orraj

Your State Bar, through the Board of Bar Commissioners, has elected Craig A. Orraj to serve as the 2008 State Bar president.

Orraj, a past chair of the New Mexico Young Lawyers Division and active leader in the American Bar Association, welcomes this important opportunity. As a practicing attorney for almost 20 years and a bar commissioner for the past 5 years, “I’ve enjoyed listening to the concerns of our legal community and developing programs to address those concerns,” Orraj said in an interview.

In 2008, the State Bar will celebrate its 122nd anniversary as it continues to provide numerous programs and services to approximately 7800 active and inactive members. With this rich history, Orraj commented, “Becoming president of the State Bar is a commitment of some magnitude, one I would not have made unless I was convinced of the exceptional momentum of the State Bar and the positive direction that Executive Director Joe Conte and his staff have taken it.”

A graduate of Arizona State University and the University of Arizona College of Law, Orraj is currently the managing attorney for the Law Offices of Craig A. Orraj and staff counsel for Farmers Insurance Exchange & Affiliates. He and his wife Donna have two children, Sydney and Dylan.

“It is a privilege to be president of a unified bar association that is first rank. I am proud to be a New Mexico lawyer and will work hard to strengthen our profession. I look forward to deepening the State Bar ties to those persons and institutions who strive to improve our legal system and to uphold the rule of law,” said Orraj.

LETTER TO THE EDITOR

Dear Editor,

Your article on Judge Pope [Judge Pope and the U.S. Supreme Court, by Mark Thompson, Dec. 10, 2007, Vol. 46, No. 50, Bar Bulletin] mentions the Judge missed “his ‘trial of the century’. . .the prosecution of lawyer Elfego Baca (and others) for conspiracy involving the escape from federal custody . . . by Mexican General José Inés [his family usually spells it "Inez"] Salazar.” New Mexico lawyers might be interested to know that Gral. Salazar has several grandchildren living in New Mexico, one of whom is a lawyer and another is married to a lawyer—me. They also include teachers, a social worker, owner of a drilling company, a congressional staff person and a lawyer’s ex-wife.

Of special note is that a grandchild is, as was the General, working for social and economic justice in México (and here, too). This past August there was an event in Casas Grandes, Chihuahua, honoring the memories of a dozen or so prominent heroes of the Mexican revolution who were from Chihuahua, including Gral. Salazar. As far as we could ascertain, the only one of them who has a descendant continuing his work is Gral. Salazar’s grandson, a resident of Albuquerque, when he’s not in México.

Legend has it that Gral. Salazar’s escape from the Albuquerque jail was aided by three generales and a coronel sent here for that purpose by his compadres who had also sent lawyer Baca a $25,000 fee to defend against charges of violating the Neutrality Act (subtext, being a revolutionary). Baca’s legal efforts were to no avail. The legend says that as Gral. Salazar and they who sprung him (minus the Albuquerque woman who had lured the guard to her home with a promise of favors) were riding the streetcar down Central Avenue from the jail to the train station, past the bars during happy hour, the General shouted “Adiós, mi abogado.” A few years ago I was not allowed to use that line in an argument in a Taos courtroom because the court reporter erupted “You can’t speak Spanish in here.”

Reber Boult
Albuquerque

The Board of Editors authorizes publication of letters to the editor as a vehicle for responding to previously published articles and letters and for encouraging discussion of topics of substantive legal interest among members of the State Bar. The Board will exercise its discretion in publication decisions and will edit submissions for length and content.
ADMINISTRATIVE CLOSURES IN PROBATE?

By James F. Beckley, Esq.

A recent letter from the Chief Judge William F. Lang of the 2nd Judicial District Court clarifies how probate cases are treated differently from general civil matters when administratively closed.

As a lawyer who frequently handles probates in district court, I receive orders from judges in the 2nd Judicial District captioned, “Dismissal for Lack of Prosecution,” which state: “This file may be reactivated by Motion of the Personal Representative and subsequent Order of this Court.” Some of the orders cite Rule 1-041E(2) of the Rules of Civil Procedure for the District Court wherein the court, on its own motion or upon the motion of a party, may dismiss without prejudice the action if the party filing the action has failed to take any significant action within 180 days. These orders confuse clients, their lawyers and some judges. Rule 1-041F(3) states: “This rule shall not apply to proceedings commenced pursuant to the provisions of the Probate Code.” This makes perfect sense, but probate cases continue to be dismissed for lack of prosecution.

The Uniform Probate Code adopted in 1975 supports the concept that the court-appointed personal representative administers an estate in accordance with the Probate Code. Generally, the district court is not directly involved unless specifically requested by an interested party. In uncontested probate administrations, the court appoints the personal representative, admits any last will and testament to probate, and then remains available to the personal representative, heirs, devisees, and creditors to assist in resolving disputes. Many estates take a year or more to administer without involving the court. The personal representative settles creditors’ claims, files tax returns and pays taxes owed, and distributes the estate to the heirs and/or devisees. Many estates are closed by filing a sworn statement of the personal representative. So far, there is no problem, even if the case has been “administratively closed,” because filing the sworn statement informsally closes the estate without court involvement. However, if the court clerk’s office refuses to allow further filing until a motion and order are filed reopening the case, or if the personal representative wants to be discharged from further responsibility immediately by closing formally, this involves a petition to close the estate, notice to interested parties by mail and by publication, and a formal court hearing.

Does the attorney first have to file a motion to reopen, request a setting and obtain an order before filing the petition to close? I have experienced this with some judges, but others accept my oral motion and reopen the case at the time of the hearing before formally closing the estate and discharging the personal representative. The underlying premise of the Probate Code is at odds with Rule 1-041E(2). That appears to be why subsection F(3) was added, making it inapplicable to probate matters. There appears to be a lack of unanimity in how each judge handles a dismissal for lack of prosecution in probate matters.

In his letter of clarification, Chief Judge Lang wrote, “Unlike general civil matters where a case is closed for lack of prosecution if no action is taken within 180 days, probate matters are not so closed.” In probate cases, he specifically advised that:

1. You need not file anything requiring reopening of the case.
2. The order has no effect on the personal representative’s authority or that of the instruments of the PR’s authority.
3. No additional steps to achieving complete settlement are occasioned by the prior entry of the administrative order.

“It is just that; an administrative order,” he wrote, adding that he hoped the clerk’s office was not handling probate matters other than as he had indicated.

Hopefully, the distinguished judges of our district courts will accept the wisdom of his advice and not require probate cases to be reopened. Perhaps judges in other judicial districts will, too.

About the Author
James F. Beckley, Esq. is a New Mexico Board of Legal Specialization certified specialist in estate planning, trusts and probate law. He has practiced law in Albuquerque for 38 years.
## LEGAL EDUCATION

### DECEMBER

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<td>Medical School for Attorneys</td>
<td>VR, State Bar Center Center for Legal Education of NMSBF</td>
<td>12.0 G, 1.0 E, 1.0 P (505) 797–6020 <a href="http://www.nmbarcle.org">www.nmbarcle.org</a></td>
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<td>New Mexico Administrative Law Institute (2006)</td>
<td>VR, State Bar Center Center for Legal Education of NMSBF</td>
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**G = General  E = Ethics  P = Professionalism  VR = Video Replay**

Programs have various sponsors; contact appropriate sponsor for more information.
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### Writs of Certiorari

**Effective December 17, 2007**

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

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**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 DECEMBER 7, 2007**

### Published Opinions

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

IN THE MATTER OF THE AMENDMENTS OF RULE 7-504 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 Rules Committee to amend Rule 7-504 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 Patricio M. Serna, Justice Petra Jimenez Maes, and Justice Richard C. Bosson concurring;

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

IT IS FURTHER ORDERED that the amendments of Rule 7-504 NMRA of the Rules of Criminal Procedure for the Metropolitan Courts shall be effective for cases filed on and after November 15, 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 rule by publishing the same in the Bar Bulletin and NMRA.

DONE at Santa Fe, New Mexico, this 28th day of September, 2007.

Chief Justice Edward L. Chávez  
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 its possession, custody and control that are material to the preparation of the defense or are intended for use by the prosecution at the trial or were obtained from or belong to the defendant. Such disclosure shall include a written list of the names and addresses of all witnesses whom the prosecution intends to call at the trial, together with any statement made by the witness and any record of any prior convictions of any such witness that is within the knowledge of the defendant.

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.

---

**NO. 07-8300-33**

**IN THE MATTER OF THE AMENDMENT OF FORMS 9-511 AND 9-512 NMRA OF THE RULES OF CRIMINAL PROCEDURE FOR THE DISTRICT COURTS**

**ORDER**

WHEREAS, this matter came on for consideration by the Court upon the recommendation of the Rules of Criminal Procedure for the District Courts Committee to amend Forms 9-511 and 9-512 NMRA, and the Court having considered said recommendation and being sufficiently advised, Chief Justice Edward L. Chávez, Justice Patricio M. Serna, Justice Petra Jimenez Maes, and Justice Richard C. Bosson concurring;

NOW, THEREFORE, IT IS ORDERED that the amendments of Forms 9-511 and 9-512 NMRA of the Rules of Criminal Procedure for the District Courts hereby are APPROVED;

IT IS FURTHER ORDERED that the amendments of Forms 9-511 and 9-512 NMRA of the Rules of Criminal Procedure for District Courts shall be effective for cases filed on and after November 15, 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 form by publishing the same in the *Bar Bulletin* and NMRA.

DONE at Santa Fe, New Mexico, this 28th day of September, 2007.

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

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**9-511. Waiver of six month trial rule.**

[For use with Magistrate Court Rule 6-506 NMRA and Municipal Court Rule 8-506 NMRA.]

**STATE OF NEW MEXICO**

[COUNTY OF _______________

[CITY OF _________________]

IN THE __________________ COURT

No. ____________

[STATE OF NEW MEXICO]

[CITY OF ______________________]

v.

________________________________

**WAIVER OF SIX MONTH TRIAL RULE**

I understand that I have a right to have the trial in this case begin within one hundred eighty-two (182) days after my arraignment. I understand my signature on this form means I give up my right to have the charges in this case dismissed with prejudice if the trial does not begin within one hundred eighty-two (182) days after my arraignment, as by provided by rule.

I further understand that I am not giving up any right to a speedy trial under either the United States or New Mexico constitutions.

After reading and understanding all of the above, and consulting with counsel, I knowingly and voluntarily give up my right to have the trial in this case begin within the time limits provided by court rule.

___________________________  ___________________________
Signature of defendant

---

**CERTIFICATE OF DEFENSE COUNSEL**

*(To be completed if the defendant is represented by counsel)*

I have explained to the defendant the right to trial within one-hundred eighty two (182) days and that this right may be waived by the defendant and I am satisfied that the defendant understands the waiver of the right to trial within the time provided by court rule.

___________________________  ___________________________
Defense counsel     Date

---

**APPROVAL OF JUDGE**

Permission to waive trial within the time limits provided by court rule is:

[ ] granted under the following conditions __________________________

(list any conditions).

[ ] denied.

___________________________  ___________________________
Judge     Date

---

**USE NOTE**

This form is to be used when the defendant wishes to permanently waive rights under Rule 6-506 NMRA or Rule 8-506 NMRA.

[Effective November 15, 2007.]
9-512. Extension of time for commencement of trial.
[For use with Magistrate Court Rule 6-506 NMRA and Municipal Court Rule 8-506 NMRA.]

STATE OF NEW MEXICO
[COUNTY OF _______________]
[CITY OF ________________]
IN THE __________________ COURT
No. ___________

[STATE OF NEW MEXICO]
[CITY OF ________________]
v.

________________________________

EXTENSION OF TIME FOR
COMMENCEMENT OF TRIAL
The court orders the following:
(check and complete applicable alternative)

____ The court approves the stipulation of the parties to extend the time for commencement of trial for _________ days (not to exceed sixty (60) days).

____ The court finds good cause and therefore grants defendant’s motion to extend the time for commencement of trial for _________ days (not to exceed thirty days).

Trail must be commenced on or before ____________, _______ (date).
The time for commencement of trial expires on ____________, _______ (date).

____________________   _____________________________
Date        Judge

APPROVED

Defendant or counsel

Prosecutor\(^1\)

USE NOTES
1. Signature of the prosecutor is not necessary for approval by the court of a motion to extend the time for trial for thirty (30) days.
2. This form is to be used when the defendant agrees to a limited extension under Rule 6-506 NMRA or Rule 8-506 NMRA.
[Effective November 15, 2007.]
CERTIORARI GRANTED, NO. 30,656, OCTOBER 29, 2007

From the New Mexico Court of Appeals

Opinion Number: 2007-NMCA-144

JAMIE DURHAM and TRAVIS DURHAM, Plaintiffs-Appellants, versus SUZANNE GUEST, Defendant-Appellee.

No. 26,123 (filed: August 31, 2007)

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
MARGARET KEGEL, District Judge
MICHAEL E. VIGIL, District Judge

DAVID J. BERARDINELLI
BERARDINELLI LAW FIRM
Santa Fe, New Mexico
for Appellants

KIM E. KAUFMAN
Albuquerque, New Mexico
for Appellee

RUDOLPH A. LUCERO
MILLER STRATVERT, P.A.
Albuquerque, New Mexico
for Amicus Curiae

RANDI MCGINN
MCML, P.A.
Albuquerque, New Mexico

DAVID JARAMILLO
GADDY & JARAMILLO
Albuquerque, New Mexico
for Amicus Curiae

MARGARET KEGEL, District Judge

AMICA FOY CASTILLO, JUDGE

I. BACKGROUND

This case comes to us on the district court’s dismissal of a complaint under Rule 1-012(B)(6) NMRA. We affirm the district court.

On March 11, 1997, Plaintiffs were involved in an automobile accident caused by an uninsured driver who was driving while intoxicated. Plaintiffs hired an attorney, who, on March 13, 1997, made a claim for UM coverage under the policy. On March 25, 1997, Plaintiffs’ attorney put Allstate on notice that the claim would go to arbitration, and she named her choice of arbitrator.


On March 24, 1998, Defendant wrote Plaintiffs’ attorney regarding matters related to the arbitration, such as suggested dates, panel members, discovery details, and potential witness lists. On October 13, 1998, Allstate offered to settle Plaintiffs’ claims for $13,300—$5,800 for Jamie’s claim and $7,500 for Travis’s claim. The arbitration was held, and in late November 1998, the arbitration panel awarded $45,000, plus costs, to Plaintiffs. The arbitration award, exclusive of costs, exceeded the settlement offer by more than $31,000.

On January 30, 2002, Plaintiffs filed a complaint against Defendant, Allstate, and the Allstate agent who sold the policy to Plaintiffs. The complaint alleges fourteen separate causes of action arising out of the claims processing and litigation tactics used during the handling and arbitration of Plaintiffs’ UM claims. The claims against Allstate and its agent are not the subject of this appeal. Here, we address exclusively the claims against Defendant.

Plaintiffs assert that Defendant’s duties in her role as arbitration counsel included adjusting, investigating, and evaluating Plaintiffs’ claim, which Defendant carried out in accordance with Allstate’s claims handling and litigation protocols. In their complaint, Plaintiffs allege that in following Allstate’s protocols, Defendant aided Allstate in the breach of its fiduciary duty to Plaintiffs. Plaintiffs also allege that Defendant engaged directly in various statutory violations; in addition, Plaintiffs allege that Defendant, together with Allstate, maliciously abused the legal processes of subpoenas and arbitration. Plaintiffs allege that Defendant’s wrongful actions occurred between March 2, 1998, and November 19, 1998, when Defendant was representing Allstate in the arbitration of Plaintiffs’ claims.

Specifically, Plaintiffs’ complaint alleges six named causes of action against Defendant: Count VII—violation of the Trade Practices and Frauds Act; Count VIII—aiding and abetting a violation of fiduciary duty; Count IX—unjust enrichment; Count X—malicious abuse of process; Count XI—malicious defense; and Count XII—prima facie tort. Defendant

DEFENDANT'S RELATION TO ALLSTATE

Defendant is an attorney with The Farlow Law Firm. On March 24, 1998, Defendant wrote Plaintiffs’ attorney regarding matters related to the arbitration, such as suggested dates, panel members, discovery details, and potential witness lists. On October 13, 1998, Allstate offered to settle Plaintiffs’ claims for $13,300—$5,800 for Jamie’s claim and $7,500 for Travis’s claim. The arbitration was held, and in late November 1998, the arbitration panel awarded $45,000, plus costs, to Plaintiffs. The arbitration award, exclusive of costs, exceeded the settlement offer by more than $31,000.

On January 30, 2002, Plaintiffs filed a complaint against Defendant, Allstate, and the Allstate agent who sold the policy to Plaintiffs. The complaint alleges fourteen separate causes of action arising out of the claims processing and litigation tactics used during the handling and arbitration of Plaintiffs’ UM claims. The claims against Allstate and its agent are not the subject of this appeal. Here, we address exclusively the claims against Defendant.

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Specifically, Plaintiffs’ complaint alleges six named causes of action against Defendant: Count VII—violation of the Trade Practices and Frauds Act; Count VIII—aiding and abetting a violation of fiduciary duty; Count IX—unjust enrichment; Count X—malicious abuse of process; Count XI—malicious defense; and Count XII—prima facie tort. Defendant
 filed two motions to dismiss these claims under Rule 1-012(B)(6), and the district court issued two orders, which together dismissed all counts against Defendant. 9 Plaintiffs do not appeal the district court’s dismissal of Counts IX, XI and XII. Therefore, we do not consider the causes of action for unjust enrichment, malicious defense, or prima facie tort. See Garcia v. Rodey, Dickason, Sloan, Akin & Robb, P.A., 106 N.M. 757, 760, 750 P.2d 118, 121 (1988) (stating that a claim that is not briefed on appeal is deemed abandoned); State ex rel. State Highway & Transp. Dep’t v. City of Sunland Park, 1999-NMCA-143, ¶ 11, 128 N.M. 371, 993 P.2d 85 (stating that issues not argued on appeal will not be considered).

10 On appeal, Plaintiffs contend that the complaint states a cause of action under five theories: (1) aiding and abetting Allstate’s breach of its fiduciary duty to Plaintiffs; (2) aiding and abetting Allstate’s violation of various provisions in the New Mexico Insurance Code (Insurance Code), see NMSA 1978, § 59A-1-1 (1993); (3) direct violations of various provisions in the Insurance Code; (4) tortious interference with contractual rights; and (5) malicious abuse of process. We address each issue in turn.

11 We conclude that because an arbitration is an adversarial proceeding, an attorney who is representing a client in an arbitration is not liable for aiding and abetting a breach of the client’s fiduciary duty, unless the attorney acted outside the scope of representation, acted only in his or her own self-interest and contrary to the client’s interest, or acted in a manner that would fall within the “crime or fraud” exception to the attorney-client privilege provided in the rules of professional conduct. We further conclude that an attorney who does not meet the statutory definition of “adjuster,” pursuant to Section 59A-13-2, is not liable for direct violations of the TPFA. Finally, we determine that under these circumstances, an arbitration proceeding is not a judicial proceeding for purposes of a claim for malicious abuse of prosecution. We decline to reach Plaintiffs’ remaining claims because they failed to preserve these arguments. In light of the allegations in Plaintiffs’ complaint and their arguments made below and on appeal, we hold that Plaintiffs have failed to state a claim upon which relief can be granted. Accordingly, we affirm the district court’s orders granting Defendant’s motions to dismiss.

II. DISCUSSION

A. Standard of Review

12 In reviewing the grant of Defendant’s motions to dismiss pursuant to Rule 1-012(B)(6), we accept all of the facts in Plaintiffs’ complaint as true, and we review de novo the question of whether the district court properly applied the law to those facts. See R & R Deli, Inc. v. Santa Ana Star Casino, 2006-NMCA-020, ¶ 2, 139 N.M. 85, 128 P.3d 513; Butler v. Deutsche Morgan Grenfell, Inc., 2006-NMCA-084, ¶ 6, 140 N.M. 111, 140 P.3d 532 (“We review a district court’s grant of a motion to dismiss de novo, accepting as true all of the appellant’s well-pleaded allegations.”). “[G]eneral allegations of conduct are sufficient, as long as they show that the party is entitled to relief and the averments are set forth with sufficient detail so that the parties and the court will have a fair idea of the action about which the party is complaining and can see the basis for relief.” Schmitz v. Smentowski, 109 N.M. 386, 389-90, 785 P.2d 726, 729-30 (1990).

13 Plaintiffs attached exhibits to their complaint, which were not excluded for purposes of Defendant’s motions to dismiss. Therefore, relying on the facts alleged in the complaint and those admitted in Plaintiffs’ exhibits, we review the district court’s decision to dismiss each claim against Defendant pursuant to Rule 1-012(B)(6). See Rule 1-010(C) NMRA (“A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.”); cf. GCM, Inc. v. Ky. Cent. Life Ins. Co., 1997-NMSC-052, ¶¶ 11-13, 124 N.M. 186, 947 P.2d 143 (reviewing the grant of a summary judgment motion as a motion to dismiss while relying on the facts alleged in the defendant’s complaint and affidavit attached to a reply below).

B. Aiding and Abetting a Breach of Fiduciary Duty

14 Plaintiffs assert that the facts alleged in their complaint were sufficient to support a claim against Defendant for aiding and abetting a breach of fiduciary duty. Plaintiffs rely on the Restatement (Second) of Torts § 876(b) (1979), which recognizes the tort of aiding and abetting as follows: “For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . knows that the other’s conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself.”

15 Our Supreme Court recognized the tort of aiding and abetting a breach of fiduciary duty in GCM, Inc., 1997-NMSC-052, ¶ 17. To recover under this theory in our case, Plaintiffs must prove (1) that Allstate breached a fiduciary duty owed to Plaintiffs, (2) that Defendant knew Allstate owed Plaintiffs a fiduciary duty, (3) that Defendant intentionally provided substantial assistance or encouragement to Allstate to commit the act that Defendant knew was a breach of duty, and (4) that Plaintiffs suffered damages as a result. See id. ¶¶ 6, 17, 25 (concluding that the primary tortfeasor did not owe a duty to the plaintiff), Defendant must have acted in a role of accomplice in relation to Allstate.

16 The district court dismissed the claim of aiding and abetting a breach of fiduciary duty on grounds that an adversarial proceeding was clearly anticipated at the time Defendant was hired by Allstate. The court relied on Garcia, 106 N.M. at 761, 750 P.2d at 122, which holds that “[a]n attorney has no duty . . . to protect the interests of a non-client adverse party for the obvious reasons that the adverse party is not the intended beneficiary of the attorney’s services and that the attorney’s undivided loyalty belongs to the client.” Plaintiffs admit the essential fact on which the district court relied—that Defendant is an attorney who was hired by Allstate to represent its interest during the arbitration of Plaintiffs’ claim against Allstate. Plaintiffs argue, however, that they are not adverse parties to Allstate because it owes a fiduciary duty to Plaintiffs and that Garcia therefore does not apply.

17 In support of this argument, Plaintiffs rely on Hendren v. Allstate Insurance Co., 100 N.M. 506, 510, 672 P.2d 1137, 1141 ( Ct. App. 1983). In Hendren, this Court discussed the relationship between an insurer and its insured under a UM policy. Id. at 509-10, 672 P.2d at 1140-41 (observing that on one hand, the insurer has an obligation to the insured because the insurer sold the policy, and on the other hand, “the insurer assumes an adversary role as to questions involving the uninsured motorist’s negligence and any available defenses he might have”). We agree with Plaintiffs that the relationship between an insurer and an insured under a UM policy is different from the relationship between an insurer and a third-party stranger to the contract. However, we do not agree that Hendren limits the situations in which an
adverse relationship may develop between an insurer and an insured with a UM policy. See id. at 508, 672 P.2d at 1139 (stating that the insurer, in providing coverage for the uninsured motorist, was negotiating from an adversary position). Plaintiffs appear to contend that once liability is established, the insurer has no right to dispute the amount of damages. The parties in *Hendren*, however, did not dispute the amount of the plaintiff’s injuries and damages; so this Court never reached the issue. *Id.*. Thus, *Hendren* cannot stand for the proposition, as argued by Plaintiffs, that an insurer and an insured cannot become adversary parties in regard to the amount of damages. See *Fernandez v. Farmers Ins. Co. of Ariz.*, 115 N.M. 622, 627, 857 P.2d 22, 27 (1993) ("[C]ases are not authority for propositions not considered." (internal quotation marks and citation omitted)).

{18} To the contrary, an adversarial relationship can develop when a fiduciary relationship exists between a client and a third party. See *Leyba v. Whitley*, 120 N.M. 768, 771, 778, 907 P.2d 172, 175, 182 (1995) (recognizing that an adversarial relationship can develop between the client and a third party to whom the client owes a fiduciary duty). Moreover, adversarial relationships exist in arbitration proceedings. See *Fernandez*, 115 N.M. at 626, 857 P.2d at 26 (stating that the district court’s review of an arbitration award is limited because otherwise, adversarial proceedings would be prolonged, rather than expedited). In our case, when Plaintiffs demanded arbitration, an adversarial relationship began.

{19} We recognize that Plaintiffs generally allege in their complaint that Defendant “is contracted by Allstate to adjust, investigate and evaluate claims by Allstate insureds” and used Allstate’s allegedly wrongful litigation protocols in adjusting, investigating, and evaluating Plaintiffs’ claims. However, Plaintiffs specifically state in their factual allegations that Defendant “was hired by Allstate to act as counsel for Allstate in the arbitration of Plaintiffs’ UM claims” and that Defendant’s acts aided and abetted Allstate’s wrongful conduct during the period of time in which she was representing Allstate in the arbitration proceedings, from March 2, 1998, to November 19, 1998. We therefore read Plaintiffs’ complaint as alleging that Defendant adjusted, investigated, and evaluated Plaintiffs’ claims in the course of her representation of Allstate in the arbitration proceedings. Plaintiffs do not allege that Defendant’s actions took place prior to Plaintiffs’ demand for arbitration. Nor do Plaintiffs allege that Defendant’s actions took place prior to her being hired as counsel for the arbitration proceedings. We thus conclude that in light of *Garcia*, Plaintiffs failed to allege facts that would support their allegations that Defendant aided and abetted Allstate’s breach of fiduciary duty.

{20} To determine otherwise would have a chilling effect on representation. If we were to accept Plaintiffs’ argument, the following would result: anytime a plaintiff alleged that a defendant had breached a fiduciary duty to the plaintiff, an additional claim against the defendant’s counsel for aiding and abetting that breach would withstand a Rule 1-012(B)(6) motion, even though the defendant’s counsel had simply been representing the client’s position in an adversarial proceeding. Before agreeing to represent a client, an attorney faced with this dilemma would have to evaluate the merits of his client’s position and the attendant risks, then would have to monitor the case during the representation in order to evaluate the ongoing risk of liability. This would have a detrimental effect on the representation and would defeat the policy underlying the holding in *Garcia*. See 106 N.M. at 761, 750 P.2d at 122 (stating that “the attorney’s ongoing and justifiable concern with being sued for negligence would detrimentally interfere with the attorney-client relationship”); *Toles v. Toles*, 113 S.W.3d 899, 910 (Tex. App. 2003) (discussing the attorney’s duty to zealously represent his or her client and observing that the imposition of liability on an attorney who is fulfilling his or her duties to a client “would act as a severe and crippling deterrent to the ends of justice” (internal quotation marks and citation omitted)); see also *Restatement (Third) of the Law Governing Lawyers* § 51 cmt. b (2000) (“Making lawyers liable to nonclients . . . could tend to discourage lawyers from vigorous representation.”); id. cmt. h, at 365 (“[A] lawyer subsequently consulted by a fiduciary to deal with the consequences of a breach of fiduciary duty committed before the consultation began is under no duty to inform the beneficiary of the breach or otherwise to act to rectify it. Such a duty would prevent a person serving as fiduciary from obtaining the effective assistance of counsel with respect to such a past breach.”); id. (stating that an attorney owes no duty to a beneficiary of a fiduciary if the “duty would create conflicting or inconsistent duties that might significantly impair the lawyer’s performance of obligations to the lawyer’s client in the circumstances of the representation” and that liability should thus not exist when the lawyer is assisting or representing the fiduciary in an open dispute with the beneficiary regarding a matter affecting the fiduciary’s interest). Even if we were to assume that Allstate owes a fiduciary duty to Plaintiffs and that Allstate’s actions constitute a breach of fiduciary duty, Plaintiffs have failed to allege facts concerning Defendant’s conduct that would support a claim for aiding and abetting in that context. We therefore hold that under these circumstances, Defendant cannot be liable for aiding and abetting a breach of fiduciary duty.

{21} Our holding today comports with the *Restatement (Third)* of the Law Governing Lawyers, which addresses, in the context of an attorney’s duty to nonclients, the circumstances under which an attorney is liable for a client’s breach of fiduciary duty. *See id.* § 51(4). Significantly, an attorney has no duty to the nonclient beneficiary of a client fiduciary, even when the attorney represents the client in the client’s role as a fiduciary, if such a duty would significantly impair the performance of the attorney’s obligations to his or her client. *Id.* § 51(4)(d); *see id.* § 51 cmt. h, at 363 (recognizing that a duty to a nonclient may be recognized only when, inter alia, “action by the lawyer would not violate applicable professional rules”). Although we recognize that the tort of aiding and abetting requires no duty running from the attorney to the nonclient, *see GCM, Inc.*, 1997-NMSC-052, ¶ 8, 17, we conclude that the potential impairment of Defendant’s obligations to Allstate demands the same result. *See Restatement (Third)* of the Law Governing Lawyers § 56 cmt. a, at 417 ("[A] lawyer is not liable to a nonclient for advising a client whether proposed client conduct would be lawful or for counseling a client to break a contract in the client’s interest. The social benefit of proper legal advice and assistance often makes it appropriate not to hold lawyers liable for activities in the course of a representation." (citations omitted)); *cf. Leyba*, 120 N.M. at 778, 907 P.2d at 182 (holding that an attorney’s duty to a third-party statutory beneficiary of an action is subject to an adversarial exception, which negates that duty when an adversarial relationship exists and when “the third party knows or should know that he or she cannot rely on the attorney to act for his or her benefit”).

{22} Other jurisdictions have reached similar conclusions. Those jurisdictions hold that an attorney is not liable for activities
conducted in the course of representation but is liable when acting outside the scope of representation. In Reynolds v. Schrock, 142 P.3d 1062 (Or. 2006) (en banc), the court held that an attorney is subject to joint liability for a client’s breach of fiduciary duty only when the plaintiff shows that the attorney was acting outside the scope of the attorney-client relationship. Id. at 1063; see also Kahala Royal Corp. v. Goodstill Anderson Quinn & Stifel, 151 P.3d 732, 752 (Haw. 2007) (concluding that the plaintiff failed to allege that the attorneys “possessed a desire to harm [that was] independent of the desire to protect their clients”) (original alterations, internal quotation marks, and citation omitted)); Alpert v. Crain, Caton & James, P.C., 178 S.W.3d 398, 407 (Tex. App. 2005) (stating that an action for aiding and abetting a breach of fiduciary duty would not lie, absent allegations of a tortious act or misrepresentation committed outside of the attorney’s representation of the defendant). The court in Reynolds extended to the attorney-client relationship a qualified privilege like that provided for the principal-agent relationship. 142 P.3d at 1068-69 (stating that an attorney who is acting on a client’s behalf and within the scope of the attorney-client relationship is protected by the privilege afforded a person acting as an agent or on behalf of another).

See generally Restatement (Second) of Torts § 890 (1979) (discussing privileges). The court emphasized that the burden rests on the plaintiff to show that an attorney’s actions occurred outside the scope of the attorney-client relationship. Reynolds, 142 P.3d at 1069. The court also stressed that the privilege does not protect attorney conduct unrelated to representation of the client or undertaken only to serve the attorney’s own self-interest, which are contrary to the client’s interest. Id.

{23} In this light, we review the complaint to determine whether Plaintiffs allege that Defendant acted outside the scope of her employment. An example is found in paragraph 45, wherein Plaintiffs allege that Defendant knowingly or willfully or intentionally or maliciously engaged in unfair or deceptive or fraudulent acts or practices with respect to the handling of Plaintiffs’ UM claim, including but not limited to: unnecessary investigation of irrelevant matters concerning Plaintiffs for the purpose of extorting a lower settlement or post[-] verdict retaliation, refusal to pay the reasonable value of Plaintiffs’ claim when liability therefor was reasonably clear, [and] forcing Plaintiffs to undergo protracted and unnecessary litigation to obtain substantially the same amounts as claimed prior to litigation under [Allstate’s] litigation protocol.

Each of these alleged acts took place within Defendant’s scope of employment as the legal representative of Allstate in the arbitration proceedings. Nowhere in Plaintiffs’ thirty-three–page complaint do they allege that Defendant acted outside the scope of her employment. To the contrary, Plaintiffs allege that Defendant’s actions were taken pursuant to Allstate’s instructions, which were directed to Defendant in the scope of her employment.

{24} Moreover, Plaintiffs do not allege actions on the part of Defendant that would fall outside of a qualified litigation privilege. Plaintiffs allege generally that Defendant engaged in wrongful acts, “including but not limited to forcing insureds to endure protracted and unnecessary litigation.” Plaintiffs also allege specifically that Defendant “knowingly, maliciously and intentionally ignored and violated [a] protective order for the purpose of implementing Allstate’s [protocols] and improving her own rating with Allstate in order to ensure more referrals from Allstate.” As per the allegations, these acts occurred during the period of Defendant’s representation of Allstate. Plaintiffs do not allege that Defendant’s acts were taken contrary to Allstate’s interest or outside of Defendant’s role as Allstate’s counsel in the arbitration proceedings. Nor do Plaintiffs’ allegations include conduct that would fall within the crime or fraud exception to the attorney-client privilege provided in the rules of professional conduct. See Reynolds, 142 P.3d at 1069 (stating that the qualified privilege “does not protect lawyers who are representing clients but who act only in their own self-interest and contrary to their clients’ interest” and does not protect lawyers whose actions “fall within the ‘crime or fraud exception’ to the attorney-client privilege provided in the rules of professional conduct); see also Rule 16-102(D) NMRA (discussing crime or fraud in the context of scope of representation); Rule 16-106(B), (C) NMRA (discussing crime or fraud in the context of confidentiality). In summary, Plaintiffs do not allege facts indicating that Defendant had a desire to harm Plaintiffs independent of her desire to protect her client. See Kahala Royal Corp., 151 P.3d at 752. Accordingly, we cannot conclude that Plaintiffs’ broad allegations concerning Defendant’s actions are sufficient to support Plaintiffs’ cause of action for aiding and abetting.

C. Violations of the Insurance Code

{25} On appeal, Plaintiffs contend that their complaint states sufficient facts to support their statutory claims. Specifically, Plaintiffs allege that Defendant directly violated the insurance Trade Practices and Frauds Act (TPFA), NMSA 1978, §§ 59A-16-1 to -10 (1984, as amended through 2006), the Domestic Abuse Insurance Protection Act (DAIPA), NMSA 1978, § 59A-16B-1 to -10 (1997), and the “Unfair Claims Practices Act.” See § 59A-16-20. Plaintiffs also allege that Defendant aided and abetted Allstate in its statutory violations. We read Plaintiffs’ unfair claims practices argument as alleging that Defendant violated or aided and abetted Allstate in violations of Section 59A-16-20 (having the title “Unfair claims practices defined and prohibited”) of the TPFA. See Hovet v. Allstate Ins. Co., 2004-NMSC-010, ¶ 9, 135 N.M. 397, 89 P.3d 69; cf. Unfair Practices Act (UPA), NMSA 1978, §§ 57-12-1 to -24 (1967, as amended through 2005). Plaintiffs do not cite to any specific statutory provision of the UPA. We begin by addressing Defendant’s contentions regarding preservation of these claims.

1. Defendant’s Preservation Arguments

{26} Defendant asserts that Plaintiffs failed to preserve the claim of direct violation of DAIPA and the claim of aiding and abetting Allstate in its violations of various provisions of the Insurance Code. The district court did not address a cause of action based on the DAIPA; nor did it consider whether Defendant aided and abetted Allstate in violations of the Insurance Code. Defendant therefore argues that this issue should be affirmed because Plaintiffs’ complaint does not contain the causes of action of aiding and abetting violations of the statutes and because Plaintiffs failed to argue these causes of action to the district court before dismissal. Thus, Defendant argues, Plaintiff failed to preserve the issue for appellate review.

{27} Based on our review of the complaint, the record proper, and the transcripts of the hearings, we agree with Defendant. See Liberty Mut. Ins. Co v. Salgado, 2005-NMCA-144, ¶ 18, 138 N.M. 685, 125 P.3d 664 (stating that an appellate court reviews the case actually litigated below and that
failure to argue an issue at the trial court level will result in affirmance as to that issue on preservation grounds. Plaintiffs have failed to preserve these arguments. See Crutchfield v. N.M. Dep’t of Taxation & Revenue, 2005-NMCA-022, ¶ 14, 137 N.M. 26, 106 P.3d 1273 (“To preserve error for review, a party must fairly invoke a ruling of the district court on the same grounds argued in this Court.”). By failing to preserve this argument, Plaintiffs did not give Defendant the opportunity to respond to, or the district court the chance to rule on, the specific arguments they now make. See Diversey Corp. v. Chem-Source Corp., 1998-NMCA-112, ¶ 38, 125 N.M. 748, 965 P.2d 332 (explaining that preservation serves the purposes of (1) allowing the trial court an opportunity to correct any errors and thereby avoiding the need for appeal and (2) creating a record from which the appellate court can make informed decisions).

(28) In Plaintiffs’ reply brief, they argue that the allegations in the complaint state sufficient facts to support all of Plaintiffs’ claims on appeal. Plaintiffs appear to contend that this is sufficient to preserve the unnamed theories of relief they now allege. However, Plaintiffs fail to point to any arguments presented below that would have alerted Defendant or the district court to Plaintiffs’ contentions in regard to Defendant’s direct violations of DAIPA or the aiding and abetting violations of the Insurance Code. Liberty Mut. Ins. Co., 2005-NMCA-144, ¶ 16 (stating that normal rules of preservation apply to review of a Rule 1-012(B)(6) motion).

(29) In a footnote in Plaintiffs’ reply brief, they assert that the DAIPA is incorporated by reference in the unfair claims practices section of the TPFA; thus, Plaintiffs appear to imply that this cause of action was contained in the complaint. Even if this were a valid argument, Plaintiffs do not cite to any place in the record where they alerted the district court to this argument now made on appeal. Without more, Plaintiffs have failed to establish that this cause of action was preserved. Accordingly, we do not address Plaintiffs’ claim of DAIPA violations or their claim of aiding and abetting Allstate’s alleged violations of the TPFA.

2. Direct Violations of the TPFA

(30) The district court dismissed Plaintiffs’ claim against Defendant for violations of the TPFA and unfair claims practices, Count VII. The court stated that the plain language of Section 59A-1-13 makes it clear—the legislature did not intend for the TPFA to apply to an attorney representing an insurance company. See § 59A-1-13 (defining “transacting insurance” and thereby identifying actions that are subject to the Insurance Code). On appeal, Plaintiffs rely on their general allegation that Defendant was acting as an adjuster. Plaintiffs assert that the complaint “alleges that [Defendant] was hired to represent or act for Allstate—and to perform its first[-]party contractual duties—as a claims ‘adjuster’ and ‘investigator.’” Plaintiffs rely on Section 59A-13-2 to argue that the district court erred because the express language of the Insurance Code specifically includes an attorney who “represent[s] as an adjuster.” See § 59A-13-2(B)(1); see also § 59A-13-2(A)(1). We are not persuaded.

(31) We begin by discussing the language of Section 59A-13-2. For the purposes of the Insurance Code, Section 59A-13-2(A)(1) defines “adjuster” in two parts. An “adjuster” is one who “(a) investigates, negotiates, settles or adjusts a loss or claim arising under an insurance contract on behalf of an insurer, insured or self-insurer, for a fee, commission or other compensation . . . and (b) advises the insured of his rights to settlement and his rights to settle, arbitrate and litigate the dispute.” Section 59A-13-2(A)(1) (emphasis added). Section 59A-13-2(B) sets forth the exceptions to Section 59A-13-2(A)(1), including the following: “[A]adjuster doe[s] not include . . . an attorney-at-law who adjusts insurance losses or claims from time to time incidental to practice of law and who does not advertise or represent as an adjuster[.]” Section 59A-13-2(B)(1).

(32) We observe first that Plaintiffs’ complaint alleges the first part of Section 59A-13-2(A)(1), that is, that Defendant “is contracted by Allstate to adjust, investigate and evaluate claims by Allstate insureds.” See § 59A-13-2(A)(1)(a). However, Plaintiffs fail to allege facts in support of the second part of Section 59A-13-2(A), since Plaintiffs do not allege that Defendant’s duties extended to advising Plaintiffs of their rights. See § 59A-13-2(A)(1)(b). Second, Plaintiffs fail to allege facts that would exclude Defendant from the exception provided for attorneys in Section 59A-13-2(B). Plaintiffs do not allege that Defendant adjusted, investigated, or evaluated Plaintiffs’ claims outside of Defendant’s role as an attorney representing Allstate in the arbitration proceedings. In addition, contrary to Plaintiffs’ assertion, the complaint fails to allege that Defendant advertised or represented herself to be an “adjuster” as that term is used in the Insurance Code. Thus, in light of the plain language of Section 59A-13-2, we conclude that Plaintiffs have failed to allege sufficient facts to support Plaintiffs’ allegations that Defendant directly violated any provisions of the TPFA.

(33) Our Supreme Court reached a similar conclusion on different grounds in Hovet. The Court held that “defense attorneys may not be named as party-defendants in claims brought under the unfair claims practices section.” Hovet, 2004-NMSC-010, ¶ 27 (stating that “[i]n New Mexico, defense attorneys do not owe opposing parties any common-law duty of care” and that “[t]he same is true with respect to any statutory duties under the Insurance Code”). The Court further stated that in a private right of action, a defense attorney cannot be held liable for a violation of any statutory duties under the Insurance Code because the private right of action is limited to violations by insurance companies and their agents—“attorneys are not included.” Id.; see § 59A-16-30 (stating that “[a]ny person covered by [the TPFA] who has suffered damages as a result of a violation of that article by an insurer or agent is granted a right to bring an action in district court to recover actual damages”).

(34) We acknowledge that the plaintiffs in Hovet were third parties with claims for liability against the defendant, whereas Plaintiffs in our case are insureds making claims for UM coverage. See 2004-NMSC-010, ¶¶ 1-8. We conclude, however, that this distinction does not preclude applying our Supreme Court’s conclusion in Hovet to the case before us. See id. ¶ 27. Section 59A-16-30 is not limited to liability claims but, rather, applies to the TPFA in its entirety.

(35) Plaintiffs appear to argue that Defendant was not acting as a defense attorney and that Hovet therefore does not apply in this case. Defendant’s complaint admits, however, that Defendant was hired to represent Allstate in the arbitration proceedings, and as discussed in paragraph 18 of our opinion, an arbitration is an adversarial proceeding. With this fact, we cannot conclude that Defendant was not acting as a defense attorney.

(36) In a footnote in Plaintiffs’ brief in chief, they attempt to distinguish Hovet from the case at hand. Plaintiffs argue that defense lawyers are not subject to Section 59A-16-20 “in third party claims . . . because the statutory duty under the TPFA is not legally established until after final
resolution of the third party litigation and termination of the defense lawyer’s representation.” We do not read Hovet in this manner. See 2004-NMSC-010, ¶ 25 (stating that a third-party unfair claims practices action based on failure to settle may be filed only after the underlying negligence litigation is concluded and after a judicial determination of fault has been entered in favor of the third party and against the insured). As discussed in paragraph 33 of our opinion, our Supreme Court concluded that attorneys were excluded from liability in a private right of action under the Insurance Code because the plain language of Section 59A-16-30 does not include attorneys. See Hovet, 2004-NMSC-010, ¶ 27. Thus, Plaintiffs’ argument is without merit. For all of the foregoing reasons, we hold that Defendant cannot be held liable for direct violations of the TPFA.

**D. Tortious Interference with Contractual Rights**

{37} Defendant asserts that Plaintiffs failed to preserve their claim of tortious interference with contractual rights. Again, Plaintiffs argue that their complaint contains sufficient allegations to support the claim. While this may be true, a review of the record discloses that Plaintiffs did not make this argument to the district court; thus, this contention is first made on appeal.

{38} In their reply brief to this Court, Plaintiffs argue that the claim was preserved when they asserted, in their response to Defendant’s motion to dismiss, that Defendant conspired with Allstate to interfere with their contractual rights. In Plaintiffs’ response below, they stated the following: “[I]t is . . . clear that Plaintiffs are again alleging a conspiracy agreement between [Defendant] and Allstate to deprive Plaintiffs of their contractual rights under both common law and statutory claims.” This brief allusion to contractual rights in a fifteen-page response is insufficient to alert the district court or the opposing party of Plaintiffs’ claim of liability based on an unnamed theory of tortious interference with contractual rights. In our review of the record, we found no other argument that would have alerted the court below or Defendant to this argument, and Plaintiffs cite to none. Because Plaintiffs failed to preserve their argument, we decline to address this cause of action.

**E. Malicious Abuse of Process**

{39} In their complaint, Plaintiffs allege two separate causes of action: malicious abuse of process and malicious defense. On appeal, they do not directly address the claim of malicious defense but ask the Court to recognize their claim for malicious abuse as part of the claim for malicious abuse of process. Plaintiffs therefore rely on the allegations in both claims to support the one claim against Defendant for malicious abuse of process.

{40} We begin by reviewing the elements necessary for proving malicious abuse of process. In New Mexico, there are no longer separate torts of abuse of process and malicious prosecution; these two torts were restated as a single cause of action, known as malicious abuse of process. DeVaney v. Thriftway Mktg. Corp., 1998-NMCA-001, ¶ 1, 124 N.M. 512, 953 P.2d 277, abrogated on other grounds, Fleetwood Retail Corp. of N.M. v. LeDoux, 2007-NMSC-047, ¶ 30, 133 N.M. 91, 61 P.3d 823 (reaffirming the one claim against Defendant for malicious abuse of process).

{41} In our case, Plaintiffs fail to allege specific facts supporting the first element of the cause of action. First, Plaintiffs fail to allege that an arbitration is a judicial proceeding. To the contrary, at the hearing on Defendant’s motion to dismiss Count X, Plaintiffs’ attorney conceded that an arbitration is not a judicial proceeding. Second, Plaintiffs fail to allege that Defendant initiated or actively participated in initiating the arbitration. See Valles v. Silverman, 2004-NMCA-019, ¶ 13, 135 N.M. 91, 84 P.3d 1056 (holding that a nonlitigant to the action below may be liable if the nonlitigant was an active participant in the underlying proceeding). To the contrary, Plaintiffs acknowledge in their complaint that Defendant was not hired until the arbitration was anticipated. In fact, Plaintiffs’ trial counsel demanded arbitration almost a year before Defendant was hired. Moreover, in the hearing below, Plaintiffs’ counsel conceded that Plaintiffs were not claiming Defendant “had anything to do, in essence, with the arbitration, the bringing of it or not.” Because Plaintiffs have failed to allege facts supporting the first element of this cause of action, Plaintiffs’ claim for malicious abuse of process must fail.

{42} Based on their contention that the first element requirement of “initiation of judicial proceedings” should be reasonably understood to include the “initiation of judicial process,” Plaintiffs argue that the complaint alleges sufficient facts. Plaintiffs contend that DeVaney detailed two distinct methods in which liability can be found for malicious abuse of process: filing an action without probable cause or, in the alternative, misusing the legal process through some conduct that was formerly actionable under the tort of abuse of process. Thus, Plaintiffs urge us to read DeVaney to allow the cause of action based on the improper use of process, even when a defendant does not initiate a judicial proceeding. Plaintiffs misread DeVaney. Our Supreme Court did not substitute the improper use of process for the first element and thereby eliminate the requirement of judicial proceedings. Rather, the Court detailed two methods as alternative grounds for satisfying the second element, that is, that an improper act or misuse of process had occurred. DeVaney, 1998-NMCA-001, ¶¶ 20-28. The Court stated that the mere filing of a complaint was not enough and that in addition, the plaintiff must establish a misuse of process. Id. ¶ 21.

{43} Plaintiffs rely on several out-of-state cases to support Plaintiffs’ contention that abuse of process claims are not limited to the filing of a complaint by the defendant but are applicable to either party who misuses process after an action commences. While the out-of-state cases cited by Plaintiffs generally stand for these propositions, the case law of those states is different from the case law of New Mexico. First, in each case cited by Plaintiffs, the court did not address a tort comparable to New Mexico’s malicious abuse of process. Compare Crackle v. Allstate Ins. Co., 92 P.3d 882, 887 (Ariz. Ct. App. 2004) (addressing the two elements of an abuse of process claim in Arizona, which do not include the initiation of judicial proceedings against the plaintiff by the defendant), Hopper v. Drysdale, 524 F. Supp. 1039, 1041-42 (D. Mont. 1981) (addressing the three elements of an abuse of process claim in Montana,
which do not include the initiation of judicial proceedings against the plaintiff by the defendant, and Givens v. Mullikin ex rel. Estate of McElwaney, 75 S.W.3d 383, 400 (Tenn. 2002) (addressing the two elements of an abuse of process claim in Tennessee, which do not include the initiation of judicial proceedings against the plaintiff by the defendant), with Devaney, 1998-NMSC-001, ¶ 17 (restating the torts of abuse of process and malicious prosecution as one cause of action encompassing four elements, one of which requires the initiation of judicial proceedings against the plaintiff by the defendant).

{44} Second, in Devaney, our Supreme Court discussed the tort of malicious abuse of process in the context of a court proceeding. See 1998-NMSC-001, ¶ 19 ("Because of the potential chilling effect on the right of access to the courts, the tort of malicious prosecution is disfavored in the law."). Nowhere in New Mexico law is the definition of “judicial proceeding” expanded to include contractual arbitration proceedings conducted before the judicial system has been accessed. Cf. Medina v. Found. Reserve Ins. Co., 1997-NMSC-027, ¶ 10, 123 N.M. 380, 940 P.2d 1175 (describing arbitration as “a special statutory proceeding”). As a consequence, it does not appear that Plaintiffs’ position has any support under current New Mexico law. We also observe that in each of the out-of-state cases on which Plaintiffs relied, an underlying action was initiated in the judicial arena prior to the alleged improper acts. See Crackel, 92 P.3d at 886; Hopper, 524 F. Supp. at 1040; Givens, 75 S.W.3d at 391. Given our Supreme Court’s express requirement of judicial proceedings and the reminder that the tort of malicious abuse of process should be construed narrowly, we decline to expand its application to arbitration proceedings when a complaint has not been filed in the underlying action. See State ex rel. Martinez v. City of Las Vegas, 2004-NMSC-009, ¶ 22, 135 N.M. 375, 89 P.3d 47 (stating that the New Mexico Court of Appeals is bound by New Mexico Supreme Court precedent).

III. CONCLUSION

{45} Based on the above, we affirm the district court’s orders granting Defendant’s motions to dismiss.

{46} IT IS SO ORDERED.

CELIA FOY CASTILLO, Judge

WE CONCUR:

RODERICK T. KENNEDY, Judge

MICHAEL E. VIGIL, Judge

Certiﬁorari Granted, No. 30,698, November 5, 2007

From the New Mexico Court of Appeals

Opinion Number: 2007-NMCA-145

EVAN ULLRICH, Petitioner-Appellant, versus PAUL BLANCHARD, Respondent-Appellee.

No. 27,130 (filed: September 19, 2007)

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY

DEBORAH DAVIS WALKER, District Judge

ROBERT D. LEVY

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Albuquerque, New Mexico

for Appellant

ROBERTA S. BATLEY

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Albuquerque, New Mexico

for Appellee

OPINION

LYNN PICKARD, Judge

{1} Petitioner appeals from the district court’s order granting summary judgment in favor of Respondent, Petitioner’s alleged natural father. Below, the district court concluded that Petitioner’s suit to establish paternity and to recover retroactive child support was barred by the doctrines of res judicata and collateral estoppel based on a previous suit filed by Petitioner’s mother. We hold that the district court erred in determining that res judicata and collateral estoppel barred Petitioner’s suit. However, we disagree with Petitioner’s assertion that earlier payments made by Respondent should not be considered by the district court in determining the amount of retroactive child support owed should paternity be established on remand. We reverse and remand for further proceedings.

BACKGROUND

{2} Petitioner was born on November 9, 1987. Petitioner was born with spina bifida and is conﬁned to a wheelchair as a result. Approximately six years after Petitioner’s birth, Petitioner’s mother ﬁled a petition for custody and to establish child support against Respondent. The petition was subsequently amended to add Petitioner as a party. Respondent ﬁled a response denying that he was Petitioner’s father.

{3} In December 1993, Petitioner’s mother signed a stipulation agreeing to release all claims against Respondent relating to his alleged paternity of Petitioner in exchange for five annual payments of $10,000. Four years later, after Respondent had made his final payment to Petitioner’s mother, the district court entered a judgment and order (1997 Order) ﬁnding that Respondent was not the father of Petitioner and that a parent-child relationship between Respondent and Petitioner did not exist. The court ordered the petition dismissed with prejudice.

{4} Less than ninety days after the district court entered its judgment and order, Petitioner’s mother ﬁled a Rule 1-060(B) NMRA motion for relief from judgment and for genetic testing. The motion alleged that at the time the stipulation was entered into, Petitioner was only six years old and his full medical needs were unknown. The motion further alleged that Petitioner’s needs were not adequately represented in the matter.

{5} The district court referred the parties to a mediator. A guardian ad litem (GAL) was also appointed to represent Petitioner’s interests. The parties eventually agreed to settle the motion for relief and entered into a second stipulated agreement. As part of this agreement, Respondent agreed to pay Petitioner’s mother, for the beneﬁt of Petitioner, $9,000 a year until Petitioner

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reached the age of eighteen. After that date, no further payments would be owed by Respondent.

[6] Prior to a hearing before the district court regarding the stipulated agreement, the GAL sent a letter to the parties. In the letter, the GAL expressed his concerns with letting Respondent “off the hook” with respect to the obligations of parenthood. The GAL nonetheless acquiesced to the settlement on the ground that the finding in the 1997 Order that Respondent was not the father of Petitioner be set aside. The GAL elaborated that he believed that it was “important to leave the issue of paternity open so that the minor child will have the ability to pursue that claim, if and when he chooses.” The GAL added that he would not approve any settlement that would attempt to limit Petitioner’s right to pursue the paternity issue.

[7] The court approved the stipulation of the parties and adopted it as a final judgment and order (1999 Order). In addition to the provisions of the stipulated agreement, the final judgment and order stated that “[t]here is no finding that [Respondent] is the natural father of [Petitioner].” The judgment also stated that the GAL believed that the settlement was in the best interests of Petitioner.

[8] When Petitioner reached the age of majority, he filed a petition to establish paternity and order support against Respondent. Respondent subsequently filed a motion to dismiss arguing, among other defenses, that the petition was barred by res judicata and collateral estoppel. In deciding whether Petitioner’s petition was barred, the district court took judicial notice of the earlier paternity case filed by Petitioner’s mother. The court also considered the letter written by Petitioner’s GAL in the earlier proceeding, as well as an affidavit signed by the GAL. Recognizing that matters outside the pleadings were being considered, the court treated the motion to dismiss as one for summary judgment. The court then concluded that the 1997 Order was the law of the case, and that the finding in the 1997 Order that Respondent was not Petitioner’s father was not inconsistent with the finding in the 1999 Order that there was “no finding” that Respondent was Petitioner’s father. As such, the court decided that the 1999 Order did not set aside, modify, or supersede the 1997 Order. The court further concluded that Petitioner’s petition was barred by the doctrines of res judicata and collateral estoppel. This appeal follows.

DISCUSSION

[9] On appeal, Petitioner contends that the district court’s findings and conclusions were erroneous as a matter of law. Specifically, Petitioner asserts that the 1999 Order superseded the 1997 Order and that the doctrines of res judicata and collateral estoppel do not bar his paternity claim. Petitioner also argues in his reply brief that Respondent’s payments made pursuant to the earlier proceedings do not constitute child support and therefore should not be considered in determining the amount of retroactive child support Petitioner is entitled to. After briefly stating the applicable standard of review, we will address each issue in turn.

Standard of Review


The 1997 Order was Superseded by the 1999 Order

[11] Below, the district court concluded that the 1997 Order was the law of the case and relied on the provisions of that order to determine whether Petitioner’s current action was barred. Respondent similarly relies on the 1997 Order on appeal. Petitioner, however, maintains that the 1997 Order was superseded by the district court’s decision to reopen the case and enter a new judgment and order in 1999. We agree.

[12] As previously noted, Petitioner’s mother filed a motion for relief from judgment under Rule 1-060(B) less than ninety days after the 1997 Order was entered. See Rule 1-060(B) (allowing a party, “[o]n motion and upon such terms as are just,” to seek relief “from a final judgment, order or proceeding”). By considering the motion, directing the parties to mediation, and subsequently entering a new order and judgment, we believe that the district court in effect vacated the earlier order. See Nichols v. Nichols, 98 N.M. 322, 262-27, 648 P.2d 780, 784-85 (1982). Notably, “[t]he fact that the court did not state in the second judgment that the first had been vacated or withdrawn is irrelevant, especially in light of the rule that when there are two conflicting judgments rendered by a court upon the same rights of the same parties that which is later in time prevails.” Id.; see Gilmore v. Gilmore, 106 N.M. 788, 790-91, 750 P.2d 1114, 1116-17 (Ct. App. 1988) (concluding that based on the law of successive judgments, the more recent judgment supersedes any earlier judgments); Hort v. Gen. Elec. Co., 92 N.M. 359, 360, 588 P.2d 560, 561 (Ct. App. 1978) (holding that a second judgment controls over an earlier judgment entered in the same case).

[13] Further, we observe that Respondent does not challenge the district court’s authority to enter the 1999 Order and that he appears to have been a willing participant in the mediation and stipulation leading to the 1999 Order. Moreover, Respondent does not cite any authority on appeal to contradict Petitioner’s assertion that the 1997 Order was superseded by the 1999 Order. Finally, as we discuss in paragraph 18, the findings regarding paternity in the 1999 and 1997 Orders were inconsistent. As such, we conclude that the district court erred in determining that the 1997 Order was not superseded by the latter order. Thus, any reliance on the 1997 Order by Respondent is misplaced.

Res Judicata & Collateral Estoppel

Do Not Bar Petitioner’s Petition for Paternity or Child Support

[14] Because we conclude that the 1999 Order superseded the 1997 Order, our inquiry in the present case is whether the 1999 Order bars Petitioner’s current petition under the doctrines of res judicata and collateral estoppel. As the party seeking to bar Petitioner’s claims, Respondent has the burden of establishing that the elements of res judicata or collateral estoppel are met. Cagan v. Vill. of Angel Fire, 2005-NMCA-059, ¶ 7, 137 N.M. 570, 113 P.3d 393. We do not believe that Respondent met this burden.

[15] “Under the doctrine of res judicata, a prior judgment on the merits bars a subsequent suit involving the same parties or privies based on the same cause of action.” Myers v. Olson, 100 N.M. 745, 747, 676 P.2d 822, 824 (1984). For res judicata to apply, the second suit must be identical with the prior action in four respects: 1) the parties must be the same or in privity; 2) the subject matter must be identical; 3) the capacity or character of persons for or against whom the claim is
made be the same; and 4) the same cause of action must be involved in both suits.

Id. Petitioner does not dispute that the above elements are met, but instead argues that an exception to res judicata is applicable in the present case. We agree.

{16} Res judicata does not apply where “issues or matters are not determined or are reserved for future adjudication or litigation.” State ex rel. Bliss v. Casarez, 52 N.M. 406, 408, 200 P.2d 369, 370 (1948) (internal quotation marks and citation omitted); see Apodaca, 2003-NMCA-085, ¶ 85 (recognizing the “express reservation of the plaintiff’s right to maintain a second action” as an exception to the doctrine of res judicata). According to Petitioner, the “1999 Order was clearly intended to reserve the claim of paternity” and the district court therefore erred when it concluded that res judicata barred Petitioner’s claim.

{17} In his letter regarding the proposed stipulation between the parties, the GAL discussed the importance of leaving “the issue of paternity open so that the minor child will have the ability to pursue that claim, if and when he chooses.” As such, the GAL refused to approve any settlement that would attempt to limit Petitioner’s right to pursue the paternity issue. The GAL reiterated his intentions in an affidavit considered by the district court below. In the affidavit, the GAL stated that he approved the stipulation between the parties because the stipulation “kept open the issue of paternity for [Petitioner] to pursue if or when he decided to do so.” Additionally, the GAL explained in his affidavit that he believed that by leaving the question of paternity open in the 1999 Order, the issue of child support was also being left open.

See Sisneroz v. Polanco, 1999-NMCA-039, ¶ 8, 126 N.M. 779, 975 P.2d 392 (“Children born out-of-wedlock must first adjudicate paternity before a court can enforce their interest in child support.”).

{18} The GAL’s impressions regarding the issue of paternity in the 1999 Order are also supported by a comparison between the language used in the 1997 and 1999 orders. In the 1997 Order, the district court made a finding that Respondent was “not the father of the minor child, [Petitioner].” Conversely, the 1999 Order states that “[t]here is no finding that [Respondent] is the natural father of [Petitioner].” Although Respondent argues that there are no material differences between the two findings, we disagree. The 1997 Order contains an express finding that Respondent was not Petitioner’s father. The 1999 Order, on the other hand, indicates that there is “no finding” regarding paternity and therefore leaves the question of paternity open. This interpretation of the court’s finding is supported by the letter and affidavit of the GAL, both of which were considered by the district court below. It is also supported by the 1999 Order, which expressly had the approval of the GAL, which approval was conditioned on his insistence that paternity not be decided one way or the other. Because we believe that the 1999 Order left open the ability of Petitioner to pursue paternity and child support claims against Respondent, we hold that res judicata does not bar Petitioner’s claim.

{19} “[C]ollateral estoppel, also called issue preclusion, prevents a party from re-litigating “ultimate facts or issues actually and necessarily decided in a prior suit.” Deflon v. Sawyer’s, 2006-NMSC-025, ¶ 13, 139 N.M. 637, 137 P.3d 577 (quoting Adams v. United Steelworkers of Am., 97 N.M. 369, 373, 640 P.2d 475, 479 (1982)). In order for collateral estoppel to apply, four elements must be met: “[1] the parties in the current action were the same or in privity with the parties in the prior action, [2] the subject matter of the two actions is different, [3] the ultimate fact or issue was actually litigated, and [4] the issue was necessarily determined.” City of Sunland Park v. Macias, 2003-NMCA-098, ¶ 10, 134 N.M. 216, 75 P.3d 816.

{20} We conclude that collateral estoppel is inapplicable because the ultimate issues in the present case were not litigated or decided in the first lawsuit. State ex rel. Bd. of County Comm’rs v. Williams, 2007-NMCA-036, ¶ 28, 141 N.M. 356, 155 P.3d 761. As previously discussed, the question of paternity was not resolved by the earlier proceedings, and it is doubtful that the annual payments by Respondent can be construed as satisfying his potential child support obligation, particularly since Petitioner was a party to the earlier proceeding and agreed to the settlement amount and because the payments were paid to Petitioner’s mother on his behalf. Cf. Mask v. Mask, 95 N.M. 229, 231, 620 P.2d 883, 885 (1980) (“[I]n a proceeding for the enforcement of a support order, any valid defense against payment may be raised, including the defense of payment from some other source.”).

{21} Petitioner argues that Respondent’s payments made pursuant to the earlier stipulations do not constitute child support and therefore should not be considered in determining the amount of retroactive child support Petitioner may be entitled to. Although Petitioner raises this argument for the first time in his reply brief, we nonetheless address it because the issue may arise on remand, depending on the district court’s decision on Respondent’s defenses of estoppel, waiver, unclean hands, or other defenses, that have yet to be determined.

{22} In awarding retroactive child support, a court should consider any “applicable equitable defenses in deciding whether and how long to order retroactive support.” Webb v. Menix, 2004-NMCA-048, ¶ 3, 135 N.M. 531, 90 P.3d 989 (quoting NMSA 1978, § 40-11-15(C)(2) (2004)). We similarly hold that the district court on remand should consider the effect of Respondent’s previous payments should paternity be determined and the issue of retroactive child support arise. As a matter of equity, we believe that such payments may be used to offset Respondent’s potential child support obligation, particularly since Petitioner was a party to the earlier proceeding and agreed to the settlement amount and because the payments were paid to Petitioner’s mother on his behalf. Cf. Mask v. Mask, 95 N.M. 229, 231, 620 P.2d 883, 885 (1980) (“[I]n a proceeding for the enforcement of a support order, any valid defense against payment may be raised, including the defense of payment from some other source.”).

CONCLUSION

{23} We reverse the district court’s grant of summary judgment and remand for further proceedings.

{24} IT IS SO ORDERED.

LYNN PICKARD, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge
CYNTHIA A. FRY, Judge
From the New Mexico Court of Appeals

Opinion Number: 2007-NMCA-146

STATE OF NEW MEXICO,
Plaintiff-Appellee,

versus

JOSE S.,
Defendant-Appellant.

No. 24,988 (filed: September 18, 2007)

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
LARRY RAMIREZ, District Judge

GARY K. KING
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for Appellee

for Appellant

— December 17, 2007 - Volume 46, No. 51

Certiorari Granted, No. 30,696, November 7, 2007

Opinion

CYNTHIA A. FRY, JUDGE

{1} Child-Defendant Jose S. appeals the trial court’s imposition of an adult sentence, alleging that the trial court’s procedural and substantive errors in conducting his amenability hearing require reversal. We consider the proper procedures that a trial court must follow in determining a youthful offender’s amenability to treatment and, in the event that a youthful offender is determined not to be amenable to treatment, the proper procedures for sentencing the youthful offender to adult sanctions under NMSA 1978, §§ 32A-2-17, -20 (2005). We reverse Child’s sentence based on the trial court’s failure to follow the statutory procedures.

BACKGROUND

{2} In order to put the facts of this case in context, we first set out applicable portions of the Delinquency Act in the New Mexico Children’s Code. NMSA 1978, §§ 32A-2-1 to -33 (1993, as amended through 2005). New Mexico law categorizes juveniles who commit crimes into three groups. “[S]erious youthful offender[s]”—children fifteen to eighteen years of age who are “charged with and indicted or bound over for trial for first degree murder”—are exempt from the Children’s Code and subject only to adult penalties. § 32A-2-3(H) (internal quotation marks omitted). “[Y]outhful offender[s]”—children fourteen to eighteen years of age at the time they commit the offense who are adjudicated as having committed statutorily specified crimes—may be subject to either adult or juvenile sanctions. § 32A-2-3(I) (internal quotation marks omitted). “[D]elinquent offender[s]” are subject only to juvenile sanctions and include all other juvenile offenders. § 32A-2-3(C) (internal quotation marks omitted). In this case, Child was adjudicated a youthful offender.

{3} Once a child is adjudicated a youthful offender, the trial court must determine whether to impose adult or juvenile penalties. This determination is guided by Section 32A-2-20, which outlines the procedure to be followed and the substantive considerations that must be made. It provides in part:

A. The court has the discretion to invoke either an adult sentence or juvenile sanctions on a youthful offender. The children’s court attorney shall file a notice of intent to invoke an adult sentence within ten working days of the filing of the petition.[1]

B. If the children’s court attorney has filed a notice of intent to invoke an adult sentence and the child is adjudicated as a youthful offender, the trial court shall make the following findings in order to invoke an adult sentence:

(1) the child is not amenable to treatment or rehabilitation as a child in available facilities; and

(2) the child is not eligible for commitment to an institution for children with developmental disabilities or mental disorders.

C. In making the findings set forth in Subsection B of this section, the judge shall consider the following factors:

(1) the seriousness of the alleged offense;

(2) whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner;

(3) whether a firearm was used to commit the alleged offense;

(4) whether the alleged offense was against persons or against property, greater weight being given to offenses against persons, especially if personal injury resulted;

(5) the sophistication and maturity of the child as determined by consideration of the child’s home, environmental situation, emotional attitude and pattern of living;

(6) the record and previous history of the child;

(7) the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the child by the use of procedures, services and facilities currently available; and

(8) any other relevant factor, provided that factor is stated on the record.

§ 32A-2-20(A)-(C).

{4} In June 2003, Child was adjudicated a youthful offender. He was convicted of aggravated battery, aggravated escape or attempt to escape from custody of the Children, Youth and Families Department (CYFD), criminal damage to property, breaking and entering, and kidnapping. Child’s convictions were based on Child’s beating and handcuffing of a guard at the CYFD facility in which Child was housed at the time, Child’s damage to CYFD property, and Child’s attempt to escape the facility.

{5} At a single, combined hearing, the trial court first found that Child was not amenable to treatment and then sentenced Child to an adult sentence. Child’s position

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at the amenability hearing was that he was amenable to treatment. Both the expert psychologist hired by Child, Dr. Thompson, and the State’s expert psychologist, Dr. Caplan, testified that Child was amenable to treatment and that a specific CYFD treatment facility could provide the services that Child needed for treatment. Despite this expert testimony, the trial court found that Child was “not amenable to treatment or rehabilitation,” and that Child was “not eligible for a commitment to an institution.” The trial court sentenced Child to a term of twenty-five years and six months, suspending all but twelve years, in the custody of the New Mexico Corrections Department.

{6} Child raises the following arguments on appeal: (1) the finding of non-amenability to treatment should be reversed because of the trial court’s failure to follow the procedures mandated by the Delinquency Act, specifically its failure to order reports required by Section 32A-2-17; (2) the sentence imposed by the trial court should be reversed because of the trial court’s failure to follow the same procedures, and because Child was denied the opportunity to speak on his own behalf at sentencing; (3) the trial court’s finding of non-amenability should be reversed because Child’s due process rights were violated when the State used statements and records at the amenability hearing that were not disclosed to Child; and (4) this Court should reverse the trial court’s findings on amenability and sentencing because “the entire proceeding was fundamentally flawed.” Additionally, Child contends that the judge was prejudiced and requests that we remand to a different judge.

DISCUSSION
Procedures for Determining Amenability and Disposition

{7} At the amenability hearing, the trial court heard testimony from both Child’s and the State’s expert psychologists that Child was amenable to treatment and that the New Mexico Sequoyah Adolescent Treatment Facility (Sequoyah) would be an appropriate facility in which Child could receive such treatment. Dr. Caplan, the expert for the State called as a witness by Child, testified that in order for Child to receive appropriate treatment, Child would need to be placed in a “highly structured environment,” and opined that it would take six to twelve months to treat Child in such a highly structured, preferably locked, environment, followed by continuing treatment with gradually decreasing controls, coupled with education and training. Dr. Caplan concluded that Sequoyah would be an appropriate facility for Child.

{8} Dr. Thompson agreed with Dr. Caplan that Child was amenable to treatment. He testified that the three-and-a-half years remaining until Child turned twenty-one years of age would be enough time for Child to receive basic treatment, psychotherapy, and medication, and that Sequoyah would be an appropriate facility for treatment.

{9} After hearing testimony from the psychologists and the victim, among other witnesses, the trial court ruled from the bench that adult sanctions, as opposed to juvenile disposition, was appropriate. The trial court said that “[a] very long-term rehabilitation would be necessary, much longer than would be available in the juvenile system.” After making additional oral findings in support of its conclusion that Child was not amenable to treatment, the trial court proceeded to sentence Child to a term of twenty-five years. The trial court did not conduct a separate sentencing hearing.

{10} Child argues that the trial court failed to follow the required procedures outlined in Section 32A-2-17 in two ways. First, Child contends that Section 32A-2-17(A)(3) requires a trial judge to obtain a predisposition report from CYFD regarding Child’s amenability to treatment and the trial court’s failure to follow this procedure requires reversal. Second, Child argues that, upon finding a youthful offender not to be amenable to treatment, Section 32A-2-17(A)(3)(b) requires a trial court to obtain a predisposition report from the adult corrections department and conduct a sentencing hearing separate from and subsequent to the amenability hearing.

{11} The State argues that the language of the statute regarding the obtaining of reports is discretionary as opposed to mandatory. Alternatively, the State contends that even if the statute requires the trial court to order the predisposition reports, Child did not show that he was prejudiced by the trial court’s failure to follow the statute.

{12} We review questions of statutory construction de novo. State v. Guerra, 2001-NMCA-031, ¶ 6, 130 N.M. 302, 24 P.3d 334. “Our primary goal in interpreting statutes is to give effect to the Legislature’s intent.” Id. ¶ 7. To determine legislative intent, we first look to the plain meaning of the language of the statute, considering the statute’s structure and the individual statute’s purpose within the larger statutory framework. T-N-T Taxi, Ltd. v. N.M. Pub.

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Regulation Comm’n, 2006-NMSC-016, ¶ 5, 139 N.M. 550, 135 P.3d 814. “We apply statutes according to their plain meaning, unless adherence to the literal meaning would lead to injustice, absurdity, or internal contradiction.” N.M. Petroleum Marketers Ass’n v. N.M. Envtl. Improvemt Bd., 2007-NMCA-060, ¶ 11, 141 N.M. 678, 160 P.3d 587. As we explain below, the statute in question is internally inconsistent as to whether the reports are mandatory or discretionary. We therefore interpret this particular statute within the context of the entire statutory scheme to “seek to achieve a harmonious result.” Guerra, 2001-NMCA-031, ¶ 7.

{13} Section 32A-2-17 provides in part:

A. After a petition has been filed and either a finding with respect to the allegations of the petition has been made or a notice of intent to admit the allegations of the petition has been filed, the court may direct that a predisposition study and report to the court be made in writing by [CYFD] or an appropriate agency designated by the court concerning the child, the family of the child, the environment of the child and any other matters relevant to the need for treatment or to appropriate disposition of the case. The following predisposition reports shall be provided to the parties and the court five days before actual disposition or sentencing:

1. the adult probation and parole division of the corrections department shall prepare a predisposition report for a serious youthful offender;

2. the department shall prepare a predisposition report for a serious youthful offender who is convicted of an offense other than first degree murder;

3. the department shall prepare a predisposition report for a youthful offender concerning the youthful offender’s amenability to treatment and if:

a. the court determines that a juvenile disposition is appropriate, the department shall prepare a subsequent predisposition report; or

b. the court makes the findings necessary to impose an adult sentence pursuant to Section 32A-2-20 . . . , the adult probation and parole division of the correc-
specifically, the policy of the Delinquency Act within the Children’s Code is to remove from children committing delinquent acts the adult consequences of criminal behavior, but to still hold children committing delinquent acts accountable for their actions to the extent of the child’s age, education, mental and physical condition, background and all other relevant factors, and to provide a program of supervision, care and rehabilitation, including rehabilitative restitution by the child to the victims of the child’s delinquent act to the extent that the child is reasonably able to do so.[16]

§ 32A-2-2(A). In light of this policy, we resolve the inconsistency in Section 32A-2-17(A) in favor of obtaining more information, not less, to guide the trial court in making an educated and appropriate disposition. Our holding that Subsection (A)(3) requires CYFD and the corrections department to prepare the reports advances the public policy favoring rehabilitation and treatment over punishment and deterrence in most juvenile cases. Consistent with our holding, Subsection (A)(3) required the trial court to request a report from CYFD on Child’s amenability.

{17} We also hold that the trial court, upon making a finding of non-amenability, should have ordered a subsequent predisposition report from the adult department of corrections and then conducted a separate sentencing hearing at a later time under Subsection (A)(3)(b). Because Subsection (A)(3)(b) uses the word “subsequent” to describe the predisposition report from the department of corrections, we conclude that the trial court must order the second report after the court makes a determination that a child is not amenable to treatment. We recognize that the statute does not expressly require a separate sentencing hearing for a child who will receive adult penalties. However, the legislature clearly contemplated that the predisposition report by the adult corrections department would be prepared after the finding of non-amenability. This logically leads to the conclusion that there should be a subsequent hearing, prior to which a child could prepare for sentencing.

{18} In light of the policies underlying the Delinquency Act, we recognize the desirability of having a second sentencing hearing if a youthful offender is found to be not amenable to treatment. The child in that event becomes subject to sentencing as an adult, and the adult corrections department can better advise the trial court about what sentence would be appropriate and what treatment options are available within the adult corrections system. Relying solely on an amenability report by the department, as required by Subsection (A)(3)(a), does not seem adequate when a child is subject to adult sanctions.

{19} Having decided that the trial court misinterpreted the statute, we address the appropriate remedy. The Rules of Criminal Procedure for the District Courts apply “in all proceedings in the Children’s Court in which a notice of intent has been filed alleging the child is a ‘youthful offender’, as that term is defined in the Children’s Code.” Rule 10-101(A)(2)(b) NMRA. Rule 5-113(A) NMRA of the Rules of Criminal Procedure provides that

error or defect in any ruling, order, act or omission by the court or by any of the parties is not grounds for granting a new trial or for setting aside a verdict, for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take any such action appears to the court inconsistent with substantial justice.

{20} We therefore address whether the trial court’s failure to follow the statutory requirements is inconsistent with substantial justice. “In the absence of prejudice, there is no reversible error.” State v. Fernandez, 117 N.M. 673, 676, 875 P.2d 1104, 1107 (Ct. App. 1994); cf. In re Ernesto M., Jr., 1996-NMCA-039, ¶ 10, 121 N.M. 562, 915 P.2d 318 (concluding that the child failed to show how the trial court’s determination that the child was not amenable to treatment would have been different had trial court weighed statutory factors in a different order).

{21} The State argues that Child cannot demonstrate prejudice from the absence of the reports in question and that this Court must therefore affirm the trial court’s sentence. We agree that Child has not demonstrated prejudice. However, Child is thwarted in his attempt to show prejudice because the reports do not exist. Child has no way of demonstrating that the reports

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would be favorable to him and contrary to the trial court’s determination because the reports were never created. This inability to demonstrate prejudice is itself prejudicial to Child.

{22} It thus appears appropriate to remand for new hearings on amenability and disposition with the benefit of the reports from CYFD and the department of corrections. However, we realize that remand for new hearings is complicated by the fact that Child is too old to be sentenced as a juvenile because he is twenty-one. Child acknowledges this fact in his reply brief and asks only that this Court remand for a new sentencing hearing. We therefore remand for a new sentencing hearing after the trial court has requested and obtained the report required by Section 32A-2-17(A)(3)(b).

{23} Because we reverse and remand Child’s sentence based on the trial court’s error in applying Section 32A-2-17(A), we do not address Child’s remaining arguments regarding sentencing. Nor do we address Child’s request that the case be remanded to a different trial court judge because of alleged prejudice. The trial court judge who presided over Child’s case is no longer on the bench, so this issue is moot. “An appeal is moot when no actual controversy exists, and an appellate ruling will not grant the appellant any actual relief.” State v. Sergio

CONCLUSION

{24} For the foregoing reasons, we reverse Child’s sentence and remand for a new sentencing hearing according to procedures outlined in this opinion.

{25} IT IS SO ORDERED.

CYNTHIA A. FRY, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

CELIA FOY CASTILLO, Judge

OPINION

CELIA FOY CASTILLO, Judge

{1} The sole question in this appeal relates to the interpretation of NMSA 1978, § 59A-30-11(A) (1999), the amended statute dealing with the duty of a title insurer or its agent to conduct “a reasonable search and examination of the title” before issuing a title policy. The parties in this case question the application of the amended language to other duties arising under the common law or other statutes. We conclude that Section 59A-30-11(A) does not bar a claim against a title insurer or its agent that is based on a duty other than the duty specified in the statute, that of reasonable care in conduct-

ing a title search. Accordingly, we affirm the trial court’s order.

I. BACKGROUND

{2} The relevant facts are undisputed. The parties’ disagreement arises out of the following events. Nonparty Brent M. Freeze acquired two lots, Lot 8 and Lot 9, from nonparty Andrew L. Turner. When Freeze acquired the two lots, he obtained a title insurance policy from Defendant-Appellant, Fidelity National Title Insurance Company (Fidelity). The title search performed prior to issuing the policy did not reveal any restrictive covenants on the two lots; consequently, the policy did not indicate the existence of any restrictions.

{3} Two months later, Freeze deeded Lots 8 and 9 to Plaintiff-Appellee, Barrington Reinsurance Limited (Barrington). Freeze and Barrington retained Fidelity to act as closing agent, to provide advice, and to prepare documents in regard to the transfer of Lots 8 and 9. Barrington told Fidelity that Barrington intended to sell Lot 8 and Lot 9 separately. Subsequently, during the course of the transfer, Fidelity made various affirmative representations to Barrington, including the following: (1) Fidelity had performed previous title searches on Lots 8 and 9, and the title “was good and clear”; and (2) Barrington did not need to obtain title insurance because the title to the property was “good” and because Barrington was protected by the policy issued to Freeze.

{4} A few months later, Barrington entered into a contract to sell Lot 8 for $480,000 and retained Fidelity to act as closing agent. At that time, Fidelity performed another title search on Lot 8 in order to issue a title policy to the prospective buyer. During this title search, Fidelity discovered a recorded agreement that had been overlooked in Fidelity’s previous title search. The agreement provided that Lot 8 and Lot 9 could not be sold separately and that only one house could be built on the two lots. One house already existed on Lot 9. As a result, Barrington could not sell Lot 8 to the prospective buyer.

{5} After discovering the agreement, Fidelity acknowledged that it had made a mistake and promised to fix the problem. When Fidelity failed to solve the problem, Barrington filed suit and asserted four claims: negligence; negligent misrepresentation; breach of implied or constructive contract; and unfair, deceptive, or unconscionable trade practice. In the complaint and on appeal, Barrington asserts that it relied on the oral representations made by Fidelity in

Certiorari Not Applied For

From the New Mexico Court of Appeals

Opinion Number: 2007-NMCA-147

BARRINGTON REINSURANCE LIMITED, LLC, Plaintiff-Appellee,

versus

FIDELITY NATIONAL TITLE INSURANCE COMPANY, Defendant-Appellant.

No. 26,777 (filed: September 18, 2007)

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY

THERESA BACA, District Judge

NICHOLAS R. GENTRY
LAW OFFICES OF
NICHOLAS R. GENTRY, L.L.C.
Albuquerque, New Mexico
for Appellee

ANGELO J. ARTUSO
MODRALL, SPERLING, ROEHL,
HARRIS & SISK, P.A.
Albuquerque, New Mexico
for Appellant

Bar Bulletin - December 17, 2007 - Volume 46, No. 51 31
regard to the transfer of Lots 8 and 9 from Freeze to Barrington and, in so doing, did not obtain title insurance.

[6] Fidelity, relying solely on the language of Section 59A-30-11(A), moved for summary judgment on all four of Barrington’s claims and argued that the amended language of the statute barred recovery for any claim arising from an alleged defect in the title search. The trial court agreed that Section 59A-30-11(A) barred recovery on the negligence claim and therefore granted Fidelity’s motion for summary judgment as to Count I. Based on the conclusion that the amended statute did not apply to Barrington’s remaining claims, the court denied Fidelity’s motion as to Count II, negligent misrepresentation; Count III, breach of implied or constructive contract; and Count IV, unfair, deceptive, or unconscionable trade practice. See Unfair Practices Act (UPA), NMSA 1978, §§ 57-12-1 to -24 (1967, as amended through 2005). The trial court issued an order, which included the necessary language permitting application for interlocutory appeal. See NMSA 1978, § 39-3-4 (1999). Fidelity applied for interlocutory appeal, which we granted to consider the application of Section 59A-30-11(A) to Counts II-IV of Barrington’s complaint.

[7] Barrington does not cross-appeal the trial court’s grant of summary judgment on the claim for negligence, Count I. Because Fidelity’s motion for summary judgment was premised solely on the application of Section 59A-30-11(A), our review on appeal is narrow. We consider only whether the trial court erred in concluding that Section 59A-30-11(A) did not apply to Barrington’s remaining claims.

II. DISCUSSION

A. Standard of Review

[8] Summary judgment is appropriate when there is no genuine issue of material fact and when the movant is entitled to judgment as a matter of law. Rule 1-056(C) NMRA. We review de novo issues of statutory interpretation and decisions regarding motions for summary judgment. Maestas v. Zager, 2007-NMSC-003, ¶ 8, 141 N.M. 154, 152 P.3d 141. We view the facts in the light most favorable to the nonmoving party and make all reasonable inferences in support of a trial on the merits. Ocana v. Am. Furniture Co., 2004-NMSC-018, ¶ 12, 135 N.M. 539, 91 P.3d 58.

B. Section 59A-30-11(A)

[9] Fidelity argues that all of Barrington’s claims are based on an alleged defect in the title search conducted when Fidelity issued a policy to Freeze. Fidelity therefore contends that Section 59A-30-11(A) bars each claim. We begin by discussing the language and history of Section 59A-30-11(A), which reads as follows:

A. No title insurance policy may be written unless the title insurer or its title insurance agent has caused to be conducted a reasonable search and examination of the title using an abstract plant meeting the requirements of Section 59A-12-13 NMSA 1978 and has caused to be made a determination of insurability of title in accordance with sound underwriting practices. The duty to search and examine imposed by this section is solely for the purpose of enhancing the financial stability of title insurers for the benefit of insureds under title insurance policies. The New Mexico Title Insurance Law [this article] is not intended and should not be construed to create any duty to search and examine that runs to the benefit of, or to create any right or cause of action in favor of, any person other than a title insurer.

(Alteration in original.)

[10] Section 59A-30-11(A) was enacted in 1985 and originally contained only the first sentence, which requires a title insurer or its agent to conduct “a reasonable search and examination” of a title before issuing a policy. See 1985 N.M. Laws, ch. 28, § 11. In 1993, our Supreme Court construed the language of NMSA 1978, § 59A-30-11(A) (1985). In Ruiz v. Garcia, 115 N.M. 269, 270, 272, 850 P.2d 972, 973, 975 (1993), the Court held that the title insurance company owed the plaintiff, a seller of property, a statutory duty to exercise reasonable care in conducting a title search, based on Section 59A-30-11(A) (1985).

[11] Subsequently, our legislature amended Section 59A-30-11(A) by adding the last two sentences, which state that the law is not intended to impose a duty of reasonable care running to the benefit of any person other than a title insurer. See 1999 N.M. Laws, ch. 60, § 20. Thus, Ruiz was superseded by statute. See Benavidez v. Sierra Blanca Motors, 122 N.M. 209, 213, 922 P.2d 1205, 1209 (1996) (stating that we presume the legislature is aware of existing law and intends to change existing law when enacting new law). Consequently, an insurer or its agent who issues a title insurance policy owes no duty of reasonable care in conducting a title search and examination to anyone but a title insurer. See Ruiz, 115 N.M. at 272, 850 P.2d at 975 (stating that there is no common law duty to exercise reasonable care in conducting a title search); see also § 59A-30-11(A).

[12] In our case, Fidelity asserts that all of Barrington’s claims are based on the title search and that Section 59A-30-11(A) therefore bars all of Barrington’s claims. We agree that Fidelity owes no duty to Barrington to exercise reasonable care in conducting a title search, but we do not agree that Section 59A-30-11(A) bars all of Barrington’s claims.

[13] We recognize that the parties’ dispute relates to Fidelity’s failure to uncover the restrictive covenant during its title search. However, Barrington’s claims in Counts II-IV do not rest on actions taken by Fidelity in conducting the title search; rather, the remaining claims rest on affirmative representations made by Fidelity to Barrington in regard to the transfer of Lots 8 and 9 from Freeze to Barrington. Fidelity argues that to draw a distinction between liability based on a defective search and liability based on statements regarding the results of that search would “create an exception that entirely swallows the protection provided by the statute.” The plain language of Section 59A-30-11(A), as amended, reads more narrowly than Fidelity’s position allows. See Qwest Corp. v. N.M. Pub. Regulation Comm’n, 2006-NMSC-042, ¶ 59, 140 N.M. 440, 143 P.3d 478 (“A statute’s plain language is the primary indicator of legislative intent.”).

[14] The language of the statute imposes a requirement on insurers to conduct “a reasonable search and examination of the title,” in accordance with certain procedures. See § 59A-30-11(A). Thus, the statutory duty recognized by Ruiz, and subsequently negated by the legislature’s amendment, addressed only the insurer’s actions in conducting a search and examination of the title. The amended language of Section 59A-30-11(A) specifically states that “[t]he New Mexico Title Insurance Law . . . is not intended and should not be construed to create any duty to search and examine that runs to the benefit of, or to create any right or cause of action in favor of, any person other than a title insurer.” The legislature’s amendment relates to the duty to search and examine title created by Section 59A-30-11. We read the statute to say that it does not create any additional duty, right, or cause of action running to the benefit of anyone other than an insurer.
We do not read Section 59A-30-11(A) to preclude the existence of a duty or prohibit a cause of action that may otherwise exist in common law or by another statute. Based on the plain language of Section 59A-30-11(A), we conclude that the legislature did not intend to preclude liability that is based on a duty arising out of common law or another statute. Cobb v. State Convassing Bd., 2006-NMSC-034, ¶ 34, 140 N.M. 77, 140 P.3d 498 ("In construing a particular statute, a reviewing court’s central concern is to determine and give effect to the intent of the legislature.").

Unlike a claim for negligence in conducting a title search, a claim for negligent misrepresentation rests on a duty to disclose information. See Ruiz, 115 N.M. at 274-75, 850 P.2d at 977-78 (distinguishing the duty of reasonable care under Section 59A-30-11(A) from the duty to disclose information, which is required to establish a claim for negligent misrepresentation); Stotlar v. Hester, 92 N.M. 26, 28-29, 582 P.2d 403, 405-06 (Ct. App. 1978) (discussing negligent misrepresentation with reliance on the Restatement (Second) of Torts § 552 (1977)); see also Restatement (Second) of Torts § 552(1) ("One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.").

In our case, Barrington’s negligent misrepresentation claim rests on a duty to disclose information that may have arisen out of Fidelity’s actions and statements regarding the transfer of Lots 8 and 9 from Freeze to Barrington. "Liability arises when the person furnishing information owes a duty to give it with care and the person receiving it has a right to rely and act upon it and does so to his damage." Valdez v. Gonzales, 50 N.M. 281, 287, 176 P.2d 173, 177 (1946) (internal quotation marks and citation omitted) (stating that a negligent statement, either written or oral, may be the basis for recovery but observing that "[n]ot every casual response, not every idle word, however damaging the result, gives rise to a cause of action" (internal quotation marks and citation omitted)). This duty is clearly distinguishable from the duty of reasonable care, on which Barrington’s claim for negligence was grounded. Thus, we cannot conclude that the failure of Barrington’s claim for negligence affects the merits of Barrington’s claim for negligent misrepresentation.

As we pointed out before, the parties did not argue below, and the trial court did not reach, the question of whether Fidelity owed a duty of disclosure to Barrington. Cf. Ruiz, 115 N.M. at 274, 850 P.2d at 977 ("In addition to finding that [the defendant] undertook no obligation and thus had no duty to [the plaintiff] regarding the condition of the title, the [trial court] found that [the defendant] did not represent the condition of the title to [the plaintiff]."). Therefore, we do not consider the issue. State v. Ware, 118 N.M. 703, 705, 884 P.2d 1182, 1184 (Ct. App. 1994) ("We do not address issues not raised in the trial court, and we do not address issues upon which no record was made.").

2. Counts III and IV—Breach of Implied Contract and Violation of the UPA

In the reply brief for the first time, Fidelity makes additional arguments regarding Barrington’s claims for breach of implied contract and violation of the UPA. As noted earlier, Fidelity’s motion for summary judgment was premised solely on Section 59A-30-11(A). Fidelity’s arguments below did not alert the trial court or Barrington to the issues now raised on appeal. Garcia v. La Farge, 119 N.M. 532, 540, 893 P.2d 428, 436 (1995) (stating that a party must preserve an issue for appeal in order to alert the trial court to any claim of error and to provide the opposing party with a fair opportunity to respond); see also Morningstar Water Users Ass’n v. Farmington Mun. Sch. Dist. No. 5, 120 N.M. 307, 320, 901 P.2d 725, 738 (1995) (stating that the trial record was inadequate because the issues were not briefed or argued below and therefore declining to address the issues that were raised on appeal for the first time). Thus, we decline to address Fidelity’s remaining arguments.

III. CONCLUSION

We conclude that Section 59A-30-11(A) does not bar Barrington’s claims for negligent misrepresentation, implied breach of contract, and violation of the UPA because these claims are not based on a duty to use reasonable care in a title search. Accordingly, we affirm the trial court’s order denying in part summary judgment.

IT IS SO ORDERED.

CElia FoY CaSTILlo, Judge

WE CONCUR:
A. JOSEPH ALARID, Judge
IRA ROBINSON, Judge
OPINION

MICHAEL D. BUSTAMANTE, Judge

[1] Corrections Corporation of America of Tennessee, Inc. and Corrections Management Services, Inc. (collectively CCA) appeal the district court’s denial of CCA’s claim for a refund of gross receipts tax. CCA contends that its agreements with various governmental agencies to incarcerate prisoners constitute leases of real property and, therefore, that receipts from those agreements are deductible under the applicable tax statute. The district court held that the contracts do not constitute leases and thus the denial of the deduction was proper. We affirm, holding that, as a matter of law, the contracts are not leases for real property as contemplated by the Gross Receipts and Compensating Tax Act (the Gross Receipts Act), NMSA 1978, §§ 7-9-1 to -100 (1966, as amended through 2006).

BACKGROUND

[2] CCA, a private company providing prison services, owns and operates three prison facilities in New Mexico. CCA entered into agreements to provide prison services and facilities with the federal Bureau of Prisons (BOP) and the New Mexico Corrections Department (NMCD).

[3] In 1988, CCA and NMCD entered into a “Management Services Agreement,” pursuant to NMSA 1978, § 33-1-17 (1995), the statute that allowed the state to contract with the private prison industry to provide prisons and correctional services for the state of New Mexico. The agreement required CCA “to provide services for the operation of an adult female facility for the State of New Mexico.” The contract allowed for renovation of existing facilities or construction of an entirely new one. The legislature appropriated $1,003,300 to NMCD for the “operation of a two hundred-bed facility.” CCA built the facility according to the specifications detailed in the agreement.

[4] As an “independent contractor,” CCA had “the sole right to supervise, manage, operate, control, and direct the performance of the details [of operating the facility].” CCA had the keys to the entire facility, including “security” areas, whereas NMCD had keys for “administrative” and “programming” areas within the prison facility but not to the housing and secure pods.

[5] NMCD did have access to the prisons and could direct CCA to allow NMCD to enter the facilities. NMCD representatives, the Governor of New Mexico, members of the legislature, and other people as designated by NMCD, had access to the Grants facility at all times. Indeed, by contract, NMCD was required to monitor the quality of CCA’s performance of the corrections services.

[6] In exchange for the corrections services, NMCD paid CCA a “Contractor Per Diem Rate” based on the number of inmates incarcerated at the facility each day. Under the terms of the original 1988 contract, that rate was set at $69.75 per inmate for each inmate exceeding 150 inmates. If NMCD housed 150 inmates or fewer, the per diem rate formula did not apply, and instead NMCD paid a flat rate of $318,234.38 per month.

[7] In 1998, the original payment clause was amended to reflect a change in the per diem rate and the minimum flat rate provision was replaced with the obligation that NMCD keep the facility at 90% of capacity. If NMCD housed fewer than 90% of capacity, the amended contract called for the parties to “renegotiate” a new per diem rate.

[8] Again, in 1999, the contract was amended to reflect another change in the per diem rate. This last change reduced the per diem to $52.28 for the first 322 inmates, $45.28 for the next 194, and $11.28 for the last 80 up to the facility’s then-capacity of 596 inmates.

[9] Under the agreement, NMCD had “first priority on its inmates entering the facility,” but in the event that NMCD did not fill the facility to capacity with inmates, CCA had the right to “increase the inmate population . . . by accepting inmates from other federal or state jurisdictions.”

[10] The agreement provided that in the event CCA defaulted on its obligations to provide correctional services, CCA would have to lease the facility to NMCD “at fair market rental value” and NMCD was free to hire another contractor to perform the correctional services.

THE CIBOLA FACILITY

[11] In June 2000, CCA contracted with BOP to provide a low-security prison and correctional services at the Cibola facility. CCA’s agreement with BOP for the use and
services at the Cibola facility was similar to the agreement with NMCD for the Grants facility. Under the terms of that agreement, CCA was required to take all of BOP’s inmate referrals and CCA could “house only inmates designated to the facility by BOP.” As in the Grants contract, BOP retained the right to monitor CCA’s performance on-site, which included the right to conduct unannounced inspections. Four full-time federal officials worked at the Cibola facility monitoring the institution and the contract performance. CCA could not deny BOP access to the Cibola facility. Although BOP set guidelines for prospective employees and contractors, BOP could not require CCA to hire particular guards; they just set the standards.

CCA contracted with Cibola County to house Cibola County Jail inmates in a “totally separate housing unit within the facility under the same roof.” The CCA assistant warden for the Cibola facility was the assistant warden for the entire facility, not just the part utilized by BOP. In CCA’s original claim for a refund, CCA included information on the percentages of space in the Cibola facility “[i]leased” not only to BOP, but also to Cibola County, the states of New Mexico and Idaho, and to the United States Marshal. Also, with the Grants facility, CCA was paid on the agreement with BOP “based upon a daily official . . . inmate count.”

CCA’s Claim for Refund

CCA filed a claim for a refund with the Taxation and Revenue Department (the Department) based on the theory that some of its receipts were deductible under the Gross Receipts Act. The Gross Receipts Act imposes a five percent tax on all receipts of “any person engaging in business.” § 7-9-4(A). There is a presumption “that all receipts of a person engaging in business are subject to the gross receipts tax.” § 7-9-5(A). Section 7-9-53(A) allows for the deduction of receipts from the gross receipts tax for the sale or lease of real property.

CCA’s original claim for a refund filed with the Department involved receipts from all three facilities; however, it only raised issues in this appeal involving the Grants and Cibola facilities. The original refund claim was for $2,465,276.38 for the period from January 1999 to October 2002. CCA does not specify on appeal the amount for which it seeks a refund; instead, it argues for the application of a specific valuation method. CCA asks this Court to remand for calculation of the amount refunded for the alleged leases. However, because we affirm the district court, we do not address the valuation issue. We also note that some issues presented at trial were not appealed. We explain only the facts necessary to understanding the issues on appeal.

After a bench trial, the district court issued findings of fact and conclusions of law denying CCA’s request for a refund. The district court found that CCA entered into written contracts to provide (1) for the governmental entities’ use of prison facilities, (2) “corrections services at the facilities,” and (3) “certain tangibles to the government agencies for consumption by the inmates.” Denying the claim for a refund, the district court held that the contracts between CCA and the governmental entities were not leases. The district court made the following findings and conclusions in support of this position: (1) The governmental entities relied on CCA to gain access to the prisons; (2) the governmental entities had no right to exclude CCA from the facilities or to use another subcontractor to provide corrections services “without terminating the contracts”; (3) the contracts did not create any interest in real estate, rather they constituted “management services agreements”; (4) the contracts were “similar to arrangements for rooming houses, dormitories . . . where the ‘tenant’ does not have unrestricted access”; and (5) the per diem contracts were not like receipts for operating apartments, but rather they were more like “receipts from operating motels and hotels” because the governmental entities could “reduce [their] obligation[s] merely by sending fewer [inmates] to the prisons on a daily basis.”

CCA makes several arguments in support of its position that the agreements constitute leases for real property as contemplated by the Gross Receipts Act, and therefore that it is entitled to a refund. First, CCA argues that the agreements satisfy the definition of a lease under New Mexico case law because the governmental entities had sufficient dominion and control over the prison premises. In a related argument, CCA argues that certain inconsistencies in the district court findings justify reversal because some of the findings support the conclusion that a lease exists. Finally, CCA argues that to the extent that the district court denied its refund claim because of the district court’s difficulties in computing the value of the claimed refund, such difficulties do not justify the complete denial of a refund. Because we affirm the district court’s denial of CCA’s claim for refund based on the legal conclusion that the agreements are not leases of real property, we only address CCA’s first argument.

Discussion

CCA argues that the statutory definition, applicable case law, and the Department’s own rulings support its position that the agreements with BOP and NMCD constitute leases of real property. In considering this issue, we are faced with questions of statutory construction and interpretation of written contracts between CCA and the governmental entities. We review the interpretation of unambiguous written contracts and of statutory language under a de novo standard. See Grogan v. N.M. Taxation & Revenue Dep’t, 2003-NMCA-033, ¶ 10, 133 N.M. 354, 62 P.3d 1236; Campbell v. Millennium Ventures, LLC, 2002-NMCA-101, ¶ 15, 132 N.M. 733, 55 P.3d 429. We are mindful that in state taxation cases, although we apply the de novo standard, we consider the issues through the lens of a presumption that the Department’s assessment is correct. TPL, Inc. v. N.M. Taxation & Revenue Dep’t, 2003-NMSC-007, ¶ 10, 133 N.M. 447, 64 P.3d 474.

The Gross Receipts Act provides for a deduction of receipts from leasing real property, § 7-9-53(A). The Act defines “leasing” as “an arrangement whereby, for a consideration, property is employed for or by any person other than the owner of the property, except that the granting of a license to use property is not a lease.” § 7-9-3(E). Our courts have further interpreted “lease” as “an agreement under which the owner gives up the possession and use of his property for a valuable consideration and for a definite term. The tenant must acquire some definite control and dominion of the premises.” Quantum Corp. v. State Taxation & Revenue Dep’t, 1998-NMCA-050, ¶ 9, 125 N.M. 49, 956 P.2d 848 (internal quotation marks and citations omitted). Section 7-9-53(B) specifically exempts the following from the definition of taxable gross receipts: “[r]eceipts received by hotels, motels, rooming houses, campgrounds, guest ranches, trailer parks or similar facilities,” paid by “lodgers, guests, roomers or occupants.” Id. The statute is silent on the issue of prisons.

Although the agreements between CCA and the governmental entities are not entitled “leases,” we look at the details contained within the agreements to determine their substance. Transamerica Leasing Corp. v. Bureau of Revenue, 80 N.M. 48, 51-52, 450 P.2d 934, 937-938 (Ct. App. 1969) (“Under general law, the character
of the instrument is not to be determined by its form, but from the intention of the parties as shown by the contents of the instrument.

{20} CCA argues that the facts of this case are analogous to those in Quantum. In Quantum, this Court held that agreements between the taxpayer and non-profit organizations that conducted bingo games on taxpayer’s premises were leases, and thus, the taxpayer was entitled to a deduction for the receipts under the Gross Receipts Act. Quantum, 1998-NMCA-050, ¶ 22. The agreements were for one-year terms whereby four or five times a week the taxpayer gave up possession and use of the property for sessions usually lasting less than four hours. Id. ¶ 13. The non-profit organizations paid a flat fee of $100 per session regardless of whether they actually conducted a gaming session. Id. ¶¶ 3, 6. The taxpayer customized the bingo spaces for the purpose of operating bingo games, id. ¶ 19, and the contracts contained provisions regarding “public liability insurance, security guards, parking, thermostat settings, bankruptcy, and right of entry,” that tended to show the taxpayer retained control over the property. Id. ¶ 20. This Court in Quantum noted that, because of statutory requirements regulating bingo gaming, the contracts between the taxpayer and the non-profit organizations reflected limitations on the non-profit organizations’ control of the premises and did not resemble typical commercial leases. Id. ¶ 21. But because of “[t]he payment of rent, possession for definite periods of time, exclusive possession of the floor safes and secure storage closets, and the inability of the taxpayer to revoke at will,” this Court ultimately held that the substance of the agreement was a lease of real property, id., and that even though the taxpayer retained “some degree of control over the premises,” such control was “not uncommon to modern commercial leasing.” Id. ¶ 20.

{21} In addition to Quantum, other law in New Mexico has addressed the issue of determining the existence of leases for real property for purposes of deductions under the Gross Receipts Tax. See Grogan, 2003-NMCA-033 (affirming a hearing officer’s determination that contracts between taxpayer, a retail store owner, and cigarette manufacturers, where representatives of the manufacturers set up and stocked the shelves and counter displays of the store once a month and the taxpayer refilled them throughout the month were not leases under the Gross Receipts Act because the representatives lacked dominion and control); see also N.M. Taxation & Revenue Dep’t Ruling No. 430-94-2, 05/01/1994 (holding that monthly rental from an assisted living facility is deductible because the lease of property is not like a rooming house and is more like an apartment and receipts from services, though not billed separately, are not deductible). These cases all seem to turn on whether the taxpayer-lesser releases dominion and control over the property to the lessee.

{22} CCA argues that, as in Quantum, although the terms of the contract were not typical of a standard commercial lease, the governmental entities had “exclusive possession” of the prison facilities, had “unlimited twenty-four hour access to [the] prisons,” had the right to designate others to access the prisons, and had the “sole ability to admit and remove inmates,” all of which show that the governmental entities had the requisite dominion and control to create a lease.

{23} The Department counters that Quantum is distinguishable because in this case CCA, not the governmental entities, retained ultimate control over the prison facilities. The Department points to the following facts: (1) CCA kept the keys to the premises and therefore literally controlled the access to enter and leave the prison facilities; and (2) CCA employees physically occupied the prisons as guards and the governmental entities merely “retained the right to supervise CCA[].” The Department also argues that this case is different from Quantum because in that case the taxpayer did not run the bingo games, whereas in this case, CCA provides correctional services to the governmental entities on its own premises.

{24} As a preliminary matter, we do not wish to confuse the fact that CCA provided correctional services with the issue of whether CCA “leased” the prison facilities to NMCD and BOP. See N.M. Taxation & Revenue Dep’t Ruling No. 440-98-2, 12/17/1998 (holding that taxpayer who had receipts from both leasing of real property and performing services could separately identify the receipts from the leases and the receipts from the services so as to receive the deduction). We do not consider the Department’s arguments to the extent they argue that CCA’s provision of correctional services necessarily negates the existence of a lease.

{25} Based on the facts with which we are presented in this case, it is unclear whether CCA or BOP and NMCD had “exclusive control” over the prison premises. The issue of control in this case is quite complicated. It is difficult to make any meaningful distinctions between CCA’s possession of the keys to the prison and the governmental entities’ unlimited right to have CCA open and close the doors to the premises. Fortunately, we need not do so here because another aspect of the agreements between CCA and the governmental entities, provides a meaningful and clear distinction between this case and those cases where our courts have held that the agreements constituted leases.

{26} In Chavez v. Commissioner of Revenue, 82 N.M. 97, 476 P.2d 67 (Ct. App. 1970), as in Quantum, this Court held that a taxpayer was entitled to deduct receipts from a non-traditional lease. The taxpayer in Chavez owned a motel which the taxpayer had previously operated as a motel. Id. at 98, 476 P.2d at 68. The taxpayer then leased the entire motel property to a railroad company “on an annual basis.” Id. (internal quotation marks omitted). During the period in question, the railroad paid a “fixed daily amount [that] had no relationship to the number of rooms actually occupied.” Id. at 99, 476 P.2d at 69. At that time, the motel was not open to the public. Id. The taxpayer furnished bed linens and cleaned the bathrooms of the property, but the railroad paid all the utilities and provided all other services. Id. at 100, 476 P.2d at 70. Furthermore, the railroad, not the taxpayer, determined “who should occupy” the premises. Id. This Court allowed a deduction for the taxpayer, holding that the railroad was a lessee of the taxpayer’s premises, and not merely a “lodger, guest, roomer or occupant.” Id. at 101, 476 P.2d at 71.

{27} In both Quantum and Chavez, this Court emphasized the fact that the “tenants” paid the same rental rates regardless of whether the bingo session was actually held or the rooms were actually occupied. In this case, the amount of “rent” paid to CCA is calculated based on the number of inmates housed on any given day as a “per-diem rate.” If the governmental entities did not utilize the maximum capacity of the prisons, CCA retained the right to house inmates from other jurisdictions’ correctional agencies.

{28} We assume that part of the reason the governmental entities contracted with CCA to pay based on a “per-diem rate” is because CCA provides services, the cost of which depends on the number of inmates. Regardless of the rationale, however, this
payment arrangement and the ability of CCA to accept inmates from others militates against any notion that these contracts are leases. Because the governmental entities did not pay a fixed amount in exchange for the guarantee of physical real property to house inmates, there is no lease for real property as contemplated by the Gross Receipts Act. The fact that CCA had the right to fill up any extra space with inmates from other jurisdictions coupled with the governmental entities' paying based on the number of inmates housed, makes these agreements look more like those between “hotels, motels, rooming houses, and other facilities,” and “lodgers or occupants” than leases for real property.

{29} Our holding that the contracts are not leases for real property under the Gross Receipts Act is supported by the legislature’s stated policy in favor of taxation, see Section 7-9-5(A), and in general, our presumption in favor of the Department’s assessment. TPL, 2003-NMSC-007, ¶ 10. We find nothing in our law to support CCA’s position that we should expand the definition of “lease for real property” under the Gross Receipts Act to include agreements between governmental entities and private prison companies. To the contrary, we construe deductions narrowly. See Chavez, 82 N.M. at 99, 476 P.2d at 69 (“[T]he provision for a deduction must be narrowly but reasonably construed.”).

{30} Because we decide that, as a matter of law, these agreements are not leases for real property, we need not address CCA’s additional arguments that the district court’s findings of fact do not support its conclusion. Similarly, because we affirm, we need not address CCA’s argument on the valuation issue.

CONCLUSION

{31} For the reasons set forth above, we affirm the district court’s denial of a refund under the Gross Receipts Act.

{32} IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE, 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-149

LISA MARIE ZAVALA and ROBERT ZAVALA,
as Personal Representatives of the Estate of their deceased daughter, NICOLE ROSEMARIE ZAVALA, Plaintiffs-Appellants,

versus

EL PASO COUNTY HOSPITAL DISTRICT,
dba R.E. THOMASON GENERAL HOSPITAL;

ARTURO A. HERNANDEZ, M.D.; and GILBERT HANDEL, M.D., Defendants-Appellees.

No. 25,971 (filed: September 25, 2007)

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY

ROBERT E. ROBLES, District Judge

JOHN P. HAYS
CASSUTT, HAYS & FRIEDMAN, P.A.
Santa Fe, New Mexico
for Appellants

KEN SLAVIN
J. SCOTT MANN
KEMP SMITH, L.L.P.
El Paso, Texas
for Appellees

Arturo A. Hernandez, M.D., and
Gilbert Handal, M.D.

MATTHEW P. HOLT
HOLT BABINGTON MYNATT, P.C.
Las Cruces, New Mexico
for Appellee

El Paso County Hospital District

Opinion

JAMES J. WECHSLER, Judge

{1} This case involves a medical malpractice and wrongful death lawsuit filed by Plaintiffs on behalf of their daughter. Plaintiffs appeal the dismissal of their lawsuit. The lawsuit was filed against Thomas Packard, a New Mexico doctor, and Memorial Medical Center, Inc., a New Mexico hospital (New Mexico Defendants), as well as two Texas doctors, Arturo A. Hernandez and Gilbert Handal (Doctors), and R.E. Thomason General Hospital, a Texas hospital (Hospital). The district court dismissed the claims against both Hospital and Doctors and stayed the proceedings against New Mexico Defendants. We affirm the district court’s determination that it lacked personal jurisdiction over Doctors. We reverse the district court’s implied conclusion that it had personal jurisdiction over Hospital. Because the district court lacked personal jurisdiction, we do not address Hospital’s arguments that Texas law applies to the case and that Hospital is immune from suit, and we remand to the district court for entry of an order dismissing the suit against Hospital and Doctors without prejudice.

BACKGROUND

{2} Plaintiffs’ six-year-old daughter, Nicole, was diagnosed with strep throat on January 16, 2002. Despite treatment with antibiotics, her condition worsened. On February 1, 2002, Plaintiffs took Nicole to Memorial Medical Center in Las Cruces. On that same day, the physician treating Nicole requested that Nicole be transferred
to Hospital in El Paso, Texas, and Plaintiff Lisa Zavalta, Nicole’s mother, signed a form stating that Nicole’s medical condition and the risks and benefits of transfer had been explained to her, that she desired that Nicole be transferred, and that she chose that her daughter be transferred to another facility. The name of Hospital was listed on the transfer form. Nicole was transferred to Hospital; she died the next day, February 2, 2002.

{3} Plaintiffs filed a complaint for medical malpractice and wrongful death against New Mexico Defendants on March 28, 2003. On January 28, 2005, Plaintiffs filed an amended complaint adding Hospital and Doctors. Plaintiffs claimed that, when the lawsuit was originally filed, they had no medical records from Hospital, but when they finally were able to depose one of the nurses at Hospital, the nurse’s testimony “strongly incriminated” Hospital and Doctors. Plaintiffs alleged that, although medical personnel knew or should have known that Nicole needed to be intubated, she was instead given a sedative, which “depressed her respiratory condition to the point of causing her arrest and subsequent death.”

{4} Hospital and Doctors did not file an answer to the amended complaint. Instead, they filed separate motions to dismiss the amended complaint. Doctors argued that dismissal was appropriate based on lack of personal jurisdiction. Hospital claimed that the district court lacked personal jurisdiction over it, that it had not been given proper notice, and that it was immune from suit under the Texas Tort Claims Act, Tex. Civ. Prac. & Rem. Code Ann. §§ 101.001-101.109 (Vernon 2005), and immunity had not been waived. After hearing argument from the parties, the district court found that Doctors did not have sufficient contacts with New Mexico and granted their motion to dismiss. The district court did not directly address the issue of personal jurisdiction over Hospital. Instead, it impliedly found that it had jurisdiction, as evidenced by its finding that Texas law applied to the claims against Hospital and that Hospital was therefore immune from suit. The district court stayed the proceedings as to the remaining New Mexico Defendants. Plaintiffs appealed the district court’s decisions.

{5} After the briefing of this case in this Court, our Supreme Court issued an opinion in Sam v. Estate of Sam, 2006-NMSC-022, 139 N.M. 474, 134 P.3d 761, reversing the opinion of this Court. In that case, our Supreme Court discussed issues of comity and the statute of limitations under our Tort Claims Act, NMSA 1978, §§ 41-4-1 to -27 (1976, as amended through 2006), with respect to a foreign governmental entity’s immunity. At the Hospital’s request, we allowed supplemental briefing addressing the issues discussed by the Supreme Court in Sam. Hospital argues that Plaintiffs’ claims are barred by the statute of limitations under either the New Mexico Tort Claims Act or the Texas Tort Claims Act.

{6} We begin by addressing Plaintiffs’ argument that the district court’s rulings on personal jurisdiction were premature because they did not have sufficient time for discovery. We then address the merits of Plaintiffs’ arguments that the district court had jurisdiction over Hospital and Doctors. Because we conclude that the district court did not have jurisdiction, we do not address the other issues raised on appeal.

PLAINTIFFS’ REQUEST FOR ADDITIONAL DISCOVERY

{7} Plaintiffs argue that the district court’s decisions on jurisdiction were premature because Plaintiffs were not permitted to conduct sufficient discovery. With respect to Doctors, they claim only that they were unable to determine whether Dr. Hernandez is registered as a New Mexico Medicaid provider. Plaintiffs have not made any argument that discovery would have provided additional jurisdictional facts about Hospital. We review Plaintiffs’ claim under an abuse of discretion standard. See Roberts v. Piper Aircraft Corp., 100 N.M. 363, 368, 670 P.2d 974, 979 (Ct. App. 1983).

{8} Doctors filed their motion to dismiss on February 24, 2005. Hospital filed its motion to dismiss on March 2, 2005. The district court granted both motions at the hearing on May 18, 2005. Although an order entered May 5, 2005 stayed discovery, it explicitly excluded discovery pertaining to jurisdiction. Plaintiffs therefore had several months to conduct discovery related to jurisdiction.

{9} In their response to the motions to dismiss, Plaintiffs claimed that they would require discovery before an “ultimate determination” of the jurisdiction issue, stating that “[i]f the Court has any doubt on the issue of personal jurisdiction, it should allow Plaintiffs sufficient time to engage in discovery to determine jurisdictional facts before ruling on the motion.” In the hearing on the motions to dismiss, Plaintiffs stated, “[I]f we need additional information, I’m happy to take additional depositions.” Plaintiffs did not ask the district court to continue the matter, file motions to allow further discovery, or provide specific details as to their need to discover other than Dr. Hernandez’s status as a Medicaid provider. Cf. Butler v. Deutsche Morgan Grenfell, Inc., 2006-NMCA-084, ¶¶ 32-33, 140 N.M. 111, 140 P.3d 532 (rejecting the plaintiff’s argument that additional discovery should be permitted as “nothing more than a bare assertion that if he were allowed to pursue discovery, he might find something to support his contention that he could not have discovered his claims through the exercise of reasonable diligence within the limitations period”). Plaintiffs cannot appear at a hearing, present their evidence, and then argue that they should have been permitted additional discovery simply because the district court ruled against them. See Culp v. Chevron U.S.A., Inc., 1996-NMSC-062, ¶ 22, 122 N.M. 537, 928 P.2d 263 (stating that a party waives the right to appeal discovery issues by “not indicating to the trial court that its resolution of the [issue in question] should be deferred until the court [has] resolved any discovery issues”); Roberts, 100 N.M. at 369, 670 P.2d at 980 (stating that the district court did not abuse its discretion in refusing to allow more time for discovery when the plaintiffs “had not sought discovery . . . although they knew that proof of jurisdiction would be necessary at the hearing”). Furthermore, as we discuss below, the evidence Plaintiffs sought to discover would not have been sufficient to allow the exercise of personal jurisdiction.

PERSONAL JURISDICTION

{10} Both Hospital and Doctors assert that the district court lacked personal jurisdiction over them. Because neither Hospital nor Doctors were served in New Mexico, the question is whether the district court had jurisdiction under our long-arm statute, NMSA 1978, § 38-1-16 (1971). Although our long-arm statute enumerates acts that may subject non-resident defendants to personal jurisdiction in New Mexico, the necessity of a technical determination of whether a defendant committed such an act has been removed. See Santa Fe Techs., Inc. v. Argus Networks, Inc., 2002-NMCA-030, ¶ 13, 131 N.M. 772, 42 P.3d 1221; see also Alto Eldorado P’ship v. Amrep Corp., 2005-NMCA-131, ¶ 30, 138 N.M. 607, 124 P.3d 585. Therefore, for purposes of personal jurisdiction, we do not focus on whether the acts of Hospital and Doctors “technically fall within the purview of the first prong of the long-arm statute,” but on whether Hospital and Doctors had the requisite minimum contacts with New Mexico.
{11} Due process is satisfied when a defendant has engaged in acts within the state that indicate that the defendant reasonably anticipated being brought into a New Mexico court. Id. ¶ 31. In other words, the plaintiff must show that the defendant engaged in “some act by which the defendant purposefully avail[ed] itself of the privilege of conducting activities within the forum [s]tate, thus invoking the benefits and protections of its laws.” Id. (internal quotation marks and citation omitted). For “purposeful availment,” we look at the activities by the defendant that were directed toward New Mexico. Santa Fe Techs., 2002-NMCA-030, ¶ 22; see also Cronin v. Sierra Med. Ctr., 2000-NMCA-082, ¶ 23, 129 N.M. 521, 10 P.3d 845 (holding that minimum contacts with the state were not established with respect to the defendants who “did not purposefully initiate any activities in this [s]tate”). “[R]andom, fortuitous, or attenuated contacts” are insufficient to fulfill the requirement. Sanchez v. Church of Scientology of Orange County, 115 N.M. 660, 664, 857 P.2d 771, 775 (1993).

{12} Due process may be satisfied in two ways. If a defendant has “continuous and systematic contacts with [New Mexico] such that the defendant could reasonably foresee being haled into court in that state for any matter,” New Mexico has general personal jurisdiction and the plaintiff need not demonstrate a connection between the defendant’s contacts and the cause of action. Anthem Ins. Cos. v. Tenet Healthcare Corp., 730 N.E.2d 1227, 1234 (Ind. 2000), superseded by statute on other grounds, Ind. R. Trial P. 4.4, see also Alto Eldorado P’ship, 2005-NMCA-131, ¶ 29 (addressing specific personal jurisdiction but acknowledging the existence of general personal jurisdiction); Sublett v. Wallin, 2004-NMCA-089, ¶ 28, 136 N.M. 102, 94 P.3d 845 (discussing specific jurisdiction but acknowledging the existence of general jurisdiction). If a defendant’s contacts do not rise to that level, but the defendant nonetheless “purposefully established contact with [New Mexico],” New Mexico will have jurisdiction only if the cause of action arose out of the contacts with New Mexico. Anthem Ins. Cos., 730 N.E.2d at 1235. Both general and specific personal jurisdiction require a showing that exercise of jurisdiction would not “offend traditional notions of fair play and substantial justice.” Alto Eldorado P’ship, 2005-NMCA-131, ¶ 31 (internal quotation marks and citation omitted); see also Anthem Ins. Cos., 730 N.E.2d at 1240-41.

{13} Plaintiffs have the burden of making a prima facie showing of personal jurisdiction. See Cronin, 2000-NMCA-082, ¶ 10. If the district court does not hold an evidentiary hearing, as in this case, the plaintiffs’ burden is “somewhat lessened” in that affidavits and pleadings will be considered in the light most favorable to jurisdiction. Doe v. Roman Catholic Diocese of Boise, Inc., 121 N.M. 738, 742, 918 P.2d 17, 21 (Ct. App. 1996). The question of whether Hospital and Doctors are subject to the personal jurisdiction in New Mexico is one of law, which we review de novo. See Cronin, 2000-NMCA-082, ¶ 10.

A. HOSPITAL

{14} Hospital moved to dismiss Plaintiffs’ claims, arguing that the district court lacked personal jurisdiction over Hospital, that proper notice was not given under the Texas Tort Claims Act, and that, even if personal jurisdiction was established, Hospital was immune from suit under the Texas Tort Claims Act. As previously discussed, the district court impliedly found that it had jurisdiction over Hospital. See Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 584 (1999) (stating that personal jurisdiction is “an essential element of the jurisdiction of a district . . . court, without which the court is powerless to proceed to an adjudication”) (omission in original) (internal quotation marks and citation omitted).

{15} Plaintiffs rely on several facts in support of their argument that the district court had personal jurisdiction over Hospital. Plaintiffs point to the agreement between Memorial Medical Center and Hospital, which addresses issues related to the transfer of patients between hospitals. Plaintiffs argue that the number of New Mexico patients treated at Hospital, which apparently generates approximately seven percent of Hospital’s income, also supports a finding of personal jurisdiction. As additional support, Plaintiffs note that Hospital maintains a website that is accessible in New Mexico, is registered as a Medicaid provider in New Mexico, and is accredited as a regional trauma center by the American College of Surgeons, and is located “in the border region” and therefore knew that it would regularly treat New Mexicans. Hospital counters by asserting that it has not advertised in New Mexico or otherwise directed its activities toward New Mexico and that the facts Plaintiffs assert show only a “response to the unilateral activity of New Mexicans who [choose] to go to [Hospital] for services” rather than an attempt to attract New Mexico patients. Hospital asserts that, although seven percent of its revenue comes from New Mexico patients, Hospital “does not market itself to New Mexicans, and loses money by treating New Mexicans.”

{16} Although we address each of the facts Plaintiffs rely on in turn, we are mindful that the combination of a number of individually insufficient contacts might support a finding of personal jurisdiction. See Anthem Ins. Cos., 730 N.E.2d at 1239; see also Kathrein v. Parkview Meadows, Inc., 102 N.M. 75, 76, 691 P.2d 462, 463 (1984) (concluding that all of the defendant’s acts “taken together” were sufficient to justify exercise of personal jurisdiction). We begin by considering whether Hospital has had continuous and systematic contacts that would support general jurisdiction. We also consider whether Hospital has purposefully availed itself of the benefits and protections of our laws to the extent that would support specific personal jurisdiction under the facts of this case. Finally, we address the fairness of exercising personal jurisdiction in circumstances such as these. We conclude that Plaintiffs have shown some limited contacts with New Mexico. Even if we were to conclude that these contacts taken together would be sufficient to support general jurisdiction, we nonetheless conclude that principles of fundamental fairness do not permit the exercise of personal jurisdiction over Hospital.

I. General Personal Jurisdiction

{17} We begin by considering the number of New Mexicans treated at Hospital, who generate approximately seven percent of the income of Hospital. Plaintiffs argue that the district court has personal jurisdiction under Cronin. In Cronin, we held that a Texas hospital established minimum contacts with New Mexico sufficient to support a finding of personal jurisdiction when it “intentionally, purposefully, and persistently solicit[ed] the business of New Mexico customers.” Cronin, 2000-NMCA-082, ¶ 22. We noted that “advertisements support the conclusion that [the hospital]
intentionally initiated commercial activities in New Mexico for the purpose of realizing pecuniary gain.” *Id.* Plaintiffs argue that Cronin supports a finding of personal jurisdiction in this case because Cronin also premises its conclusion on the fact that the hospital had “previously performed health care services for other New Mexico customers.” *Id.* We disagree. Cronin focused on the advertisements directed at New Mexico customers in its determination that New Mexico had personal jurisdiction.

{18} Notably, Plaintiffs have presented no evidence that Hospital intentionally solicited New Mexico patients. See *id.* In Cronin, we stated that

the residence of a recipient of personal services [such as medical services] rendered elsewhere is irrelevant and totally incidental to the benefits provided by the defendant at his own location. It is clear that when . . . a patient travels to receive professional services without having been solicited . . ., then the client, who originally traveled to seek services apparently not available at home, ought to expect that he will have to travel again if he thereupon complains that the services sought by him in the foreign jurisdiction were therein rendered improperly.

*Id.* ¶ 25 (internal quotation marks and citation omitted); see also *Tarango v. Pastrana*, 94 N.M. 727, 729-30, 616 P.2d 440, 442-43 (Ct. App. 1980).

{19} We are therefore not convinced that the number of New Mexico patients Hospital treats indicates that it purposefully attracted those patients. Although it may be a factor to consider, treatment of some New Mexico patients is not in itself sufficient to support the exercise of personal jurisdiction over Hospital. See *Harlow v. Children’s Hosp.*, 432 F.3d 50, 66 (1st Cir. 2005) (stating that “[t]reating patients from Maine in Massachusetts, even on a regular basis, is not the same as engaging in continuous and systematic activity in Maine”); *Anthem Ins. Cos.*, 730 N.E.2d at 1239 (stating that “the percentage of . . . business that is conducted in [the forum state] . . . is by no means the only or dominant factor”); see also *Wolf v. Richmond County Hosp. Auth.*, 745 F.2d 904, 911-12 (4th Cir. 1984) (concluding that South Carolina lacked sufficient contacts despite the fact that approximately twenty percent of the defendant’s income came from South Carolina patients); *Mosier v. Kinley*, 702 A.2d 803, 806, 808 (N.H. 1997) (stating that, although approximately fifteen percent of the defendant’s patients were New Hampshire residents, “[j]urisdiction . . . is not warranted simply because some of the defendant’s patients are New Hampshire residents and the defendant has accepted payments from New Hampshire insurance and Medicare providers”). *But see Soares v. Roberts*, 417 F. Supp. 304, 308-09 (D.R.I. 1976) (concluding that sufficient contacts existed when five percent of a clinic’s patients were Rhode Island residents and the clinic “solicited customers directly through local and regional advertising and indirectly by soliciting referrals from local organizations”).

{20} Plaintiffs also point to Hospital’s website in support of their argument that the district court had jurisdiction. They claim that Hospital advertised its services by means of its website and that internet publication “is equivalent to advertising in a nationally circulated magazine.” We disagree. Establishment of a passive website that can be viewed internationally is not sufficient to support general personal jurisdiction absent some showing that the website targeted New Mexico. See GTE New Media Servs. Inc. v. Bellsouth Corp., 199 F.3d 1343, 1349-50 (D.C. Cir. 2000) ("[P]ersonal jurisdiction surely cannot be based solely on the ability of [forum] residents to access the defendants’ websites, for this does not by itself show any persistent course of conduct by the defendants in the [forum]."). Plaintiffs have not made any such showing. The fact that Hospital’s website states that it is “the only Level 1 trauma facility within a 250-mile radius of El Paso” is not sufficient evidence that the website is directed toward New Mexico.

{21} We also consider the effect of Hospital’s registration as a Medicaid provider in the State of New Mexico. Although some cases have relied on Medicaid registration in the forum state to support personal jurisdiction, see, e.g., *Cubbage v. Merchant*, 744 F.2d 665, 668 (9th Cir. 1984), other cases have held that registration is insufficient. See, e.g., *Harlow*, 432 F.3d at 63-64 (stating that Medicaid registration in the forum state is not sufficient in itself to create personal jurisdiction, even if it is connected to the cause of action in the case); *Nicholas v. Ashraf*, 655 F. Supp. 1418, 1419 (W.D. Pa. 1987) (“Neither casual solicitation not directed to plaintiff nor the fact that Pennsylvania funds may be used to pay for medical bills rises to the level of contacts required by due process[.]”); *Jafarzadeh v. Feisec*, 776 A.2d 1, 3-4 (Md. Ct. Spec. App. 2001) (finding no general jurisdiction despite the defendant’s licensing as a physician and as a Medicaid provider in the forum state). We are persuaded that the better rule is that Medicaid registration may be a factor to consider, but that it is not necessarily sufficient by itself to justify the exercise of general personal jurisdiction. *Cf. Tarango*, 94 N.M. at 728, 616 P.2d at 441 ("[I]t would be neither fair nor just to subject defendants to in personam jurisdiction on the basis that statements for payment of services rendered in Texas were mailed to plaintiffs in New Mexico.").

{22} Plaintiffs rely on *Presbyterian University Hospital v. Wilson*, 654 A.2d 1324 (Md. 1995), to support its argument that Medicaid registration supports jurisdiction. In Wilson, the Maryland court determined that due process would not be offended by the exercise of specific personal jurisdiction over a Pennsylvania hospital. *Id.* at 1326. Doctors at the Pennsylvania hospital had arranged travel and accommodations to the hospital for the patient, had advised the patient to remain there despite a lack of insurance, and had engaged in extensive negotiations with the State of Maryland to obtain payment for a liver transplant for the patient. *Id.* The State of Maryland had approved the Pennsylvania hospital as its sole provider of liver transplants. *Id.* at 1331-32. Although Wilson is similar to this case in some respects—both hospitals registered as Medicaid providers in the forum state—Wilson also relied on the hospital’s “inviting” the patient “and arranging for” his treatment, “convincing him to remain,” and “initiating discussions regarding coverage . . . with various insurance providers in Maryland.” *Id.* at 1335. No such facts appear in the present case. Furthermore, Wilson held that the contacts were sufficient only to support specific personal jurisdiction. *Id.* at 1332. Because there is no evidence that the cause of action in this case is related to Medicaid registration, specific jurisdiction cannot be based on that fact.

{23} We are also unpersuaded that Hospital’s agreement concerning the transfer of patients to and from Memorial Medical Center, Hospital’s accreditation with the American College of Surgeons, and Hospital’s location in El Paso support the exercise of jurisdiction over Hospital. We begin with the agreement between Hospital and Memorial Medical Center. The purpose of the agreement is to promote the continuity of care and the timely transfer of patients
and records between the facilities. The purpose of the agreement is not to get more business for either hospital or to guarantee a minimum number of referrals. Rather, the agreement sets forth guidelines to be followed when a patient is transferred, once the referring physician determines that a particular patient needs the services of the other hospital.

{24} The agreement also talks to the expectation of the parties as to where they can be sued. As to violations, if Memorial Medical Center brings a claim of breach of contract against Hospital, it must do so in Texas, and Texas law applies. Conversely, if Hospital has a claim against Memorial Medical Center, it must bring it in New Mexico. Also, the agreement provides that each party, to the extent allowed by the laws of its state, will indemnify the other party from all liabilities arising from the party’s tortious acts or omissions. This language supports the conclusion that the parties meant for claims against Hospital to be brought in Texas and claims against Memorial Medical Center to be brought in New Mexico. While this language is not dispositive as to the jurisdictional question when suit is brought by a patient, it does provide direction as to what was anticipated by the parties when they made the agreement. See Alto Eldorado P’ship, 2005-NMCA-131, ¶ 31 (looking to the activities of a non-resident to determine if the non-resident “should reasonably anticipate being haled into court” in the forum state) (internal quotation marks and citation omitted).

{25} Further, the agreement does not provide that Memorial Medical Center will transfer a certain number of patients, patients with certain medical conditions, or, in fact, any patients at all. In the absence of some indication that the agreement made it more likely that patients would be transferred between hospitals, we cannot say that this contact with New Mexico was substantial, much less “continuous and systematic.” Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447-48 (1952) (concluding that due process would not be violated by the exercise of personal jurisdiction over a corporation whose president lived in the forum state and performed many corporate functions in the forum state, including sending correspondence and funds, conducting meetings, and keeping office files). Similarly, the language of the agreement does not provide for any type of patient solicitation in the other state. Nor is there any evidence that Hospital advertised or otherwise tried to attract patients from New Mexico.

{26} Likewise, we see no reason to exercise personal jurisdiction simply because Hospital referred to itself and, apparently, registered itself, as a “regional” trauma center. Such a reference does not indicate that Hospital actively sought out patients from New Mexico. Finally, as we have noted, there is no indication in the record that Hospital was located in El Paso for the purpose of attracting New Mexico patients. Rather, it seems likely that Hospital was located in El Paso for the purpose of treating Texas patients. We cannot justify the exercise of personal jurisdiction based solely upon a close proximity between Hospital and New Mexico and the contacts that arise from such proximity. See Kopff v. Battaglia, 425 F. Supp. 2d 76, 89 & n.17 (D.D.C. 2006) (“The Court is aware of no legal authority that would support the proposition that mere proximity to the forum is sufficient to confer personal jurisdiction, irrespective of political borders.”).

{27} We agree with Plaintiffs that Hospital has some contacts with New Mexico. Most notably, Plaintiffs have shown that Hospital treated a large number of New Mexico patients and arranged to be paid as a New Mexico Medicaid provider. Even if we were to consider the contacts sufficient to support the exercise of general jurisdiction, principles of fairness do not permit the existence of personal jurisdiction.

2. Specific Personal Jurisdiction

{28} As we have stated, we may exercise specific personal jurisdiction over a defendant despite the absence of continuous and systematic contacts if the defendant has “certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice” and the cause of action is related to those contacts. Sublett, 2004-NMCA-089, ¶ 14 (alteration in original) (internal quotation marks and citation omitted). Plaintiffs have pointed to only one contact with the State of New Mexico that is related to the cause of action in this case: the agreement with Memorial Medical Center.

{29} In Cronin, we stated that we would not exercise personal jurisdiction over non-resident physicians “without any evidence that [they] reached into the forum state in order to attract the patient’s business.” Cronin, 2000-NMCA-082, ¶ 26. We have already concluded that the agreement in this case did not show an intent to attract New Mexico patients. The agreement therefore cannot be sufficient in itself to support the exercise of specific personal jurisdiction over Hospital.

3. Fair Play and Substantial Justice

{30} Although we have determined that Hospital did have some contacts with New Mexico, we conclude that jurisdiction would nonetheless be inappropriate because it would offend traditional notions of fair play and substantial justice. See Alto Eldorado P’ship, 2005-NMCA-131, ¶ 31. “[T]he weaker the plaintiff’s showing on [purposeful availment], the less a defendant need show in terms of unreasonableness to defeat jurisdiction.” Ticketmaster-N.Y., Inc. v. Alioto, 26 F.3d 201, 210 (1st Cir. 1994).

New Mexico’s interest in adjudicating this case and Plaintiffs’ interest in litigating within New Mexico are significantly outweighed by the burden on Hospital and interests in efficiency and other public policies. See Burger King Corp., 471 U.S. at 476-77.

{31} Although New Mexico certainly has an interest in providing its residents with a forum to allow resolution of conflicts, see DeVaney v. Thriftway Mkgt. Corp., 1998-NMSC-001, ¶ 14, 124 N.M. 512, 953 P.2d 277 (recognizing “the interest in protecting litigants’ right of access to the courts”), its interest in this case is lessened because the injury did not take place within the state. See Harlow, 432 F.3d at 67 (“Although a forum state has a significant interest in obtaining jurisdiction over a defendant who causes tortious injury within its borders, that interest is diminished where the injury occurred outside the forum state.”) (internal quotation marks and citation omitted).

{32} On the other hand, requiring Hospital to defend against this lawsuit in New Mexico would place a significant burden on Hospital. As an entity of the government of the State of Texas, Hospital is immune from certain types of lawsuits under the Texas Tort Claims Act when it is sued in Texas. The Texas Tort Claims Act might or might not apply in New Mexico courts. See Sam, 2006-NMSC-022, ¶ 27 (concluding that the New Mexico Tort Claims Act statute of limitations applies to the State of Arizona when it is sued in New Mexico courts under principles of comity); see also Harlow, 432 F.3d at 67 (stating that one factor to consider is whether the forum state’s law would be applicable). Regardless of whether it would apply, Hospital has a significant interest in defending this litigation in the state in which it is located.

{33} Furthermore, it will be more efficient for this lawsuit to proceed in Texas.
Although Plaintiffs have also sued New Mexico Defendants, the basis for liability on the part of those Defendants is not as closely linked to Hospital’s potential liability as to that of Doctors. It will therefore be most efficient if Hospital and Doctors are sued together in the same lawsuit. Because, as we discuss later in this opinion, we conclude that the district court properly determined that it lacked personal jurisdiction over Doctors, we also conclude that interests in efficiency will be best met by a refusal to exercise personal jurisdiction over Hospital in this case.

{34} Finally, we address the public policy interests of both New Mexico and Texas. We first note that “[a] court should normally refrain from exercising jurisdiction when another state has expressed a substantially stronger sovereignty interest and that state’s courts will take jurisdiction.” Cubbage, 744 F.2d at 671. In this case, Hospital is not only located in Texas but it is also an entity of the government of the State of Texas. It is therefore clear that Texas has a substantially stronger sovereignty interest.

{35} When we consider the limited nature of the contacts together with the Burger King factors, we conclude that traditional notions of fair play and substantial justice would be offended by the exercise of personal jurisdiction over Hospital. See Burger King Corp., 471 U.S. at 476-78. The district court erred in exercising personal jurisdiction over Hospital.

B. DOCTORS

{36} Plaintiffs argue that they have presented “a colorable claim of minimum contacts with the state by Doctors . . . that may subject them to personal jurisdiction in New Mexico.” In particular, Plaintiffs claim that Dr. Handal is registered as a New Mexico Medicaid provider, both Doctors are employees of Texas Tech University Health Sciences Center, which is also registered as a New Mexico Medicaid provider, both Doctors worked at Hospital, which Plaintiffs allege “purposefully directed its activities to New Mexico and its residents.” Dr. Hernandez accepted Nicole’s transfer to Hospital, and both Texas Doctors provided medical services to Nicole at Hospital.

{37} Plaintiffs focus their argument on the alleged contacts of Hospital with New Mexico. Plaintiffs attempt to establish personal jurisdiction over Hospital and then extend that jurisdiction to Doctors based on the fact that they were working at Hospital when Nicole died. Plaintiffs’ argument that Doctors worked at Hospital and provided care to Nicole, whether they were acting as employees of Hospital, as independent contractors, or in some other capacity, fails to support the existence of jurisdiction. The acts of a defendant determine whether New Mexico has personal jurisdiction, not the acts of other defendants or third parties. See Sublett, 2004-NMCA-089, ¶ 28. Even if Hospital’s actions could be ascribed to Doctors, we have concluded that the district court did not have personal jurisdiction over Hospital.

{38} We also reject Plaintiffs’ suggestion that the agreement between Memorial Medical Center and Hospital and/or the transfer form listing Dr. Hernandez as an accepting physician demonstrate that Doctors had sufficient minimum contacts with New Mexico for purposes of personal jurisdiction. There is nothing to show that Doctors were involved in any way in the agreement between the hospitals. Furthermore, although the transfer form lists Dr. Hernandez, there is nothing to show that the form was shown to him or that he signed the form, and there is nothing to indicate that the fact that his name was listed on the form meant that he agreed with Nicole’s transfer to Hospital or had been consulted in any way prior to the transfer.

{39} Plaintiffs have not met their burden of demonstrating the requisite minimum contacts with New Mexico by Doctors. To find otherwise under the facts presented by Plaintiffs would offend “traditional notions of fair play and substantial justice.” Alto Eldorado P’ship, 2005-NMCA-131, ¶ 31 (internal quotation marks and citation omitted). We hold that the district court was correct in determining that it had no personal jurisdiction over Doctors.

COMITY

{40} The parties filed supplemental briefs on the issues presented by the Supreme Court decision in Sam. In Sam, our Supreme Court determined that principles of comity govern whether other states have sovereign immunity when sued in New Mexico district court. Sam, 2006-NMSC-022, ¶ 8. Because we have concluded that the district court lacked personal jurisdiction to proceed, we need not address what law would be applicable to Hospital if a lawsuit against it were to proceed in New Mexico district court.

CONCLUSION

{41} We affirm the district court’s determination that Doctors lacked the requisite contacts to confer personal jurisdiction on them in New Mexico and reverse the district court’s implicit determination that it had personal jurisdiction over Hospital. We remand for entry of a dismissal without prejudice as to both Doctors and Hospital.

{42} IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

CELIA FOY CASTILLO, Judge
BACKGROUND

1. Jarrett Scanlon was a student at Las Cruces High School when he was suspended for one year for possessing marijuana and a weapon on school property. Jarrett’s parents, Ted Scanlon and Ruth Scanlon-Christopher, appeal his suspension on his behalf, claiming: (1) that the school hearing authority should not have considered evidence obtained in violation of Jarrett’s federal and state constitutional rights to be free from unreasonable searches and seizures, and (2) that Jarrett’s right to procedural due process was violated when he was not permitted to cross-examine the students who told school officials that the marijuana they were smoking belonged to Jarrett. We hold that the hearing authority could base its decision on the testimony of the assistant principal who investigated the incident, since due process does not require that Jarrett be permitted to cross-examine the students who gave the assistant principal his information. Accordingly, we affirm the district court.

2. After a school groundskeeper reported that he saw four people smoking something inside Jarrett’s car, which was parked in the school parking lot, school employees searched the car and found marijuana in the passenger compartment and a decorative sword in the trunk. Jarrett ran away from the school employees, but the other students who had been in the car were taken to Assistant Principal Carlos Romero’s office, where they stated that the marijuana belonged to Jarrett and that all four of them had smoked it.

3. Jarrett and his parents were given notice that the Las Cruces Public Schools (LCPS) sought to suspend him for one year. At the suspension hearing, the assistant principal testified about what the three other students told him. The students did not testify. The three-member LCPS hearing authority found that Jarrett had violated school policies against possessing drugs and weapons, and suspended him for one year. Jarrett was offered the opportunity to enroll in an alternative school for one year. Jarrett was denied the opportunity to enroll in an alternative school in the Las Cruces Public Schools system. The Scanlons appealed the hearing authority’s decision to the superintendent, who affirmed the suspension.

4. The Scanlons filed a petition for a writ of certiorari with the district court pursuant to Rule 1-075 NMRA. Before the district court, the Scanlons argued that Jarrett was denied procedural due process in the suspension hearing because he was not permitted to confront his student accusers. They also argued that school officials did not have reasonable suspicion to search the trunk of Jarrett’s car, and that even if they did have reasonable suspicion, they could not search the trunk without either a warrant or exigent circumstances. The district court determined that due process did not require LCPS to permit Jarrett to cross-examine the students. The district court then determined that school officials lacked “probable cause” to search the trunk of Jarrett’s car, despite the fact that both parties had argued that the proper standard is whether the officials had “reasonable suspicion” that the search would uncover evidence that the student violated the law or school rules.

5. LCPS appealed the district court’s use of the incorrect legal standard, and the Scanlons filed a cross-appeal raising several additional claims of error. This Court assigned the case to the summary calendar pursuant to Rule 12-210(D) NMRA. Our notice of proposed summary disposition proposed to reverse and remand for the district court to apply the reasonable suspicion standard to the search of the trunk. We made no mention of the arguments the Scanlons raised in their cross-appeal. Neither party filed a memorandum in opposition to the notice of our proposed disposition; consequently, we issued a memorandum opinion reversing the district court for the reasons given in the notice. On remand, the district court concluded that school officials had reasonable suspicion to search the trunk of Jarrett’s car, and affirmed the decision of the LCPS hearing authority to suspend Jarrett. The Scanlons appeal.

DISCUSSION

The Scanlons’ Failure to File a Memorandum in Opposition in the Prior Appeal

6. As a threshold matter, we must decide whether the Scanlons’ claims are properly before us. The issues the Scanlons raise in this appeal are essentially the same as those raised in their earlier cross-appeal. LCPS suggests that—with the exception of the Scanlons’ argument that there was no reasonable suspicion to search the trunk of Jarrett’s car—these claims were “implicitly rejected” when this Court issued its order reversing the district court for its improper use of the probable cause standard. Therefore, LCPS argues, the law of the case doctrine requires us to find that the law applied in the first appeal is binding.
in the second appeal, and that the Scanlons cannot reargue these claims of error. We do not agree.

{7} Under the law of the case doctrine, “[i]f an appellate court has considered and passed upon a question of law and remanded the case for further proceedings, the legal question so resolved will not be determined in a different manner on a subsequent appeal.” *Ute Park Summer Homes Ass’n v. Maxwell Land Grant Co.*, 83 N.M. 558, 560, 494 P.2d 971, 973 (1972). Our notice of proposed disposition did not reflect any evidence that this Court “considered and passed upon” the issues raised by the Scanlons in their cross-appeal, since it made no mention of the issues at all. Id. Facing such a notice, the Scanlons might reasonably have believed that this Court wished to reserve judgment on the remaining issues until the district court applied the correct law. While it would have been advisable for the Scanlons to file a memorandum in opposition to the proposed disposition in order to seek clarification, under the circumstances of this case, we will not penalize the Scanlons for the ambiguity of our notice. See *State v. Breit*, 1996-NMSC-067, ¶ 12, 122 N.M. 655, 930 P.2d 792 (noting that application of the doctrine of law of the case is discretionary with the court and stating that an appellate court “will not apply this doctrine to perpetuate an obvious injustice”). Accordingly, we address any of the Scanlons’ claims on appeal that were preserved below.

The Admissibility of Evidence Obtained During the Search of Jarrett’s Vehicle on School Grounds

{8} Relying on *State v. Gomez*, 1997-NMSC-006, 122 N.M. 777, 932 P.2d 1, the Scanlons argue that school officials could not search Jarrett’s vehicle without a warrant even if there were exigent circumstances. In *Gomez*, our Supreme Court departed from federal precedent to hold that under Article II, Section 10 of the New Mexico Constitution, a warrantless search of an automobile requires both probable cause and a particularized showing of exigent circumstances. See *Gomez*, 1997-NMSC-006, ¶ 39. Recognizing that when a search is conducted by school officials on school grounds, the standard is the lower standard of reasonable suspicion, see *In re Josue T.*, 1999-NMCA-115, ¶¶ 15, 23, 128 N.M. 56, 989 P.2d 431, the Scanlons argue that a warrantless search of an automobile by school officials must be justified by both reasonable suspicion and exigent circumstances.

{9} Even if the Scanlons are correct, the constitutional violation would affect Jarrett’s suspension only if the evidence obtained during the search could not be considered as a basis for the hearing authority’s disciplinary action. Because we conclude that the exclusionary rule does not apply in school disciplinary hearings, any violation of Jarrett’s constitutional rights would not alter the evidence before the hearing authority. As a consequence, we need not address the Scanlons’ claim that the search violated Jarrett’s rights under Article II, Section 10 of the New Mexico Constitution.

{10} We conclude that the exclusionary rule does not apply in school disciplinary proceedings because the purpose of the exclusionary rule is not advanced in such proceedings. We first consider the purpose of the rule under the federal constitution and then discuss the somewhat different purpose served by the rule under the state constitution.

{11} Under the federal constitution, the exclusionary rule is not a personal constitutional right, but is instead a prudential rule intended to deter governmental actors from committing future Fourth Amendment violations. See *Withrow v. Williams*, 507 U.S. 680, 686 (1993). Because the United States Supreme Court has found that the exclusionary rule is not a constitutional right and has declined to extend its use to civil proceedings, see *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 362-69 (1998) (holding that the exclusionary rule does not apply in parole revocation proceedings because the deterrent effect would be minimal), Jarrett has no federal constitutional right to exclude from his disciplinary hearing any evidence found during an illegal search by school officials. See *Thompson v. Carthage Sch. Dist.*, 87 F.3d 979, 981-82 (8th Cir. 1996) (holding that the exclusionary rule does not apply in a high school disciplinary hearing).

{12} In contrast, the New Mexico Supreme Court has interpreted Article II, Section 10 of the New Mexico Constitution to imply a personal constitutional right to exclude illegally obtained evidence. See *State v. Gutierrez*, 116 N.M. 431, 444-47, 863 P.2d 1052, 1065-68 (1993). Under our state constitution, the exclusionary rule is not based on a policy of deterring official misconduct, but is instead intended to safeguard the right to be protected from unreasonable searches and seizures by putting the parties in the same position they would have been in had the constitutional violation not occurred. Id. at 446, 863 P.2d at 1067. Whether the exclusionary rule applies to a school disciplinary proceeding is a question of first impression that we review de novo. See *State v. Marquart*, 1997-NMCA-090, ¶ 7, 123 N.M. 809, 945 P.2d 1027.

{13} Gutierrez explains that while Article II, Section 10 of the New Mexico Constitution “expresses the fundamental notion that every person in this state is entitled to be free from unwarranted governmental intrusions,” its core application is in “the context of criminal prosecution brought to bear after violation of that right.” *Gutierrez*, 116 N.M. at 444, 863 P.2d at 1065. Nonetheless, since our Supreme Court decided *Gutierrez*, New Mexico has recognized that the exclusionary rule applies to at least one type of proceeding that is not a criminal trial. See *Marquart*, 1997-NMCA-090, ¶ 17. In Marquart, this Court held that illegally obtained evidence must be excluded from probation revocation hearings. Id. Although probation revocation hearings are not criminal trials, and the “full panoply of rights possessed by a defendant in a criminal prosecution do not apply,” id. ¶ 9, we note that the liberty interest at stake in a probation revocation hearing is the same as the liberty interest at stake in a criminal proceeding. In either case, someone who is entitled to be free may be imprisoned, depending on the outcome. Thus, a probation revocation proceeding is closely related to the core purpose of preventing the use of illegally obtained evidence against a person accused of a crime.

{14} The interests at stake in a school disciplinary hearing are of a different sort altogether. While a child’s interest in continuing his education at the school where he is currently enrolled is significant, it is unrelated to the liberty interest at stake in a criminal trial or in a probation revocation proceeding. Because school disciplinary proceedings are so far removed from the context of criminal prosecution brought to bear after violation of the right to be free from unwarranted governmental intrusion, we hold that they are not the intended context for the protections provided by New Mexico’s constitutional exclusionary rule. See *T.M.M. ex rel. D.L.M. v. Lake Oswego Sch. Dist.*, 108 P.3d 1211, 1213-17 (Or. Ct. App. 2005) (holding that while the Oregon state constitution, unlike the federal constitution, provides a personal constitutional right to the exclusionary rule, the rule does not apply in school disciplinary hearings). Therefore, the LCPS hearing authority properly considered the evidence seized from Jarrett’s car.

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Procedural Due Process in the School Disciplinary Hearing

{15} The Scanlons argue that Jarrett was denied procedural due process in the disciplinary proceedings against him because LCPS neither named the students who in-  


ciplied him, nor did it deny procedural due process in the disci-  


plinary proceedings. Instead, the students’ statements were summarized by the assistant principal. Jarrett’s attorney was permitted to cross-examine the assistant principal about the students’ motivation to put the blame on Jarrett, who had run off and was not there to defend himself or to contradict them. We hold that these procedures were constitutionally sufficient.

{16} The Fourteenth Amendment to the United States Constitution prohibits state actors from depriving “any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1. There is no dispute that Jarrett has a property interest in continuing his public education, see Goss v. Lopez, 419 U.S. 565, 572-74 (1975), and LCPS does not argue that its offer of an alternative school setting remedied any deprivation of that interest. The minimum due process requirements for a short-term suspension from school include “oral or written notice of the charges . . . and, if [the student] denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.” Id. at 581. Since the LCPS sought to impose a long-term suspension, Jarrett was given significantly greater procedural protections than the minimum requirements for a short-term suspension established in Goss: he was given notice of the hearing, the right to have an attorney, the right to cross-examine the witnesses who testified at the hearing, and the right to present evidence on his own behalf. Nevertheless, he argues that because LCPS did not disclose the names of his student accusers and because he was unable to confront those students, he was denied due process under both the Fourteenth Amendment to the United States Constitution and Article II, Section 18 of the New Mexico Constitution. We review these constitutional claims de novo. State v. DeGraff, 2006-NMSC-011, ¶ 6, 139 N.M. 211, 131 P.3d 61.

{17} “The requirements of due process are not technical, and no particular form of procedure is necessary for protecting substantial rights.” United Nuclear Corp. v. Gen. Atomic Co., 93 N.M. 105, 123, 597 P.2d 290, 308 (1979). To determine whether the administrative procedures afforded Jarrett with the Fourteenth Amendment, we apply the balancing test established in Mathews v. Eldridge, 424 U.S. 319 (1976). Under Mathews, the factors this Court must weigh are as follows: [f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedure would entail.

Id. at 335.

{18} Under the first Mathews factor, Jarrett has an important interest in continuing his education. However, because LCPS offered him the opportunity to attend high school in an alternative setting, his interest is considerably lower than if he had been entirely deprived of the right to a free public education for the period of the suspension. Therefore, while this factor weighs in Jarrett’s favor, it does so only slightly.

{19} The second factor requires us to consider the risk of erroneous deprivation that is caused by refusing to let Jarrett know who his student accusers are and by refusing to allow him to confront them and the probable value of additional safeguards. The risk of error in this case is relatively low. Because Jarrett was in the car with three other students when school employees approached them, Jarrett can hardly claim that he does not know who his accusers are, even if LCPS has refused to tell him. The fact that he was not allowed to confront them at the hearing creates a greater risk of error, but, as other courts who address this question have noted, the risk is lower in the school disciplinary context than it would be in other settings.

The value of cross-examining student witnesses in school disciplinary cases, . . . is somewhat muted by the fact that the veracity of a student account of misconduct by another student is initially assessed by a school administrator . . . who has, or has available to him, a particularized knowledge of the [accusing] student’s trustworthiness.

Newsome v. Batavia Local Sch. Dist., 842 F.2d 920, 924 (6th Cir. 1988). Nonetheless, because we believe that cross-examination is the “principal means by which the believability of a witness and the truth of his testimony are tested,” Davis v. Alaska, 415 U.S. 308, 316 (1974), we conclude that this factor weighs slightly in Jarrett’s favor.

{20} It is the third Mathews factor that is dispositive of this issue, however. Under the third factor, we weigh the burden that the practice of allowing cross-examination of student witnesses would place on LCPS. The burdens on a school district of having to hold trial-like disciplinary hearings in which they must employ the technical rules of evidence are significant, and could potentially have serious consequences both for school administration and for the safety of the student body. Accordingly, we conclude that the burdens imposed by a requirement that all student accusers must testify at disciplinary hearings and must be subject to cross-examination would significantly outweigh the benefits to the accused student.

{21} The technical rules of evidence generally do not apply to administrative hearings. See Archuleta v. Santa Fe Police Dep’t ex rel. City of Santa Fe, 2005-NMSC-006, ¶ 21, 137 N.M. 161, 108 P.3d 1019. This is for the purpose of both “expediting administrative procedure,” Ferguson-Steere Motor Co. v. State Corp. Comm’n, 63 N.M. 137, 143, 314 P.2d 894, 898 (1957), and avoiding the costs and complexity of adversarial litigation. B.S. ex rel. Schneider v. Bd. of Sch. Trs., Fort Wayne Comty. Sch., 255 F. Supp. 2d 891, 900-01 (N.D. Ind. 2003) (mem. & order). In addition to these considerations of cost and efficiency, administrative bodies made up of school officials are simply not well suited to hold formal, technical trial-like proceedings:

To saddle [school administrators] with the burden of overseeing the process of cross-examination (and the innumerable objections that are raised to the form and content of cross-examination) is to require of them that which they are ill-equipped to perform. The detriment that will accrue to the educational process in general by diverting school board members’ and school administrators’ attention from their primary responsibilities in overseeing the educational process to learning and applying the common law rules of evidence simply outweighs the . . . benefit that will accrue to the fact-finding process by allowing cross-examination.

Newsome, 842 F.2d at 926.
Furthermore, in the context of school disciplinary hearings, there are particular reasons for refusing to require the appearance before the accused student of other students who have informed the administration about the accused student’s misconduct. Courts have expressed concern that if students know they will be required to face a peer who is in trouble at school—and likely at home as well—based on information they have supplied, they may be “understandably reluctant to come forward with information” in the first place, thereby hindering the school’s ability to enforce its rules. B.S. ex rel. Schneider, 255 F. Supp. 2d at 901 (internal quotation marks and citation omitted); see also Newsome, 842 F.2d at 925. Students who do choose to notify school authorities of misconduct may face “ostracism at best and perhaps physical reprisals.” Id. Therefore, we agree with the majority of courts who have addressed this matter that the Fourteenth Amendment permits the rights at stake in a school disciplinary hearing to be determined on the hearsay testimony of the school administrators who investigated the incident. See, e.g., id.; Brewer ex rel. Dreyfus v. Austin Indep. Sch. Dist., 779 F.2d 260, 263 (5th Cir. 1985); Boykins v. Fairfield Bd. of Educ., 492 F.2d 697, 700-02 (5th Cir. 1974); S.W. v. Holbrook Pub. Sch., 221 F. Supp. 2d 222, 229 (D. Mass. 2002); B.S. ex rel. Schneider, 255 F. Supp. 2d at 901; Graham v. Knutzen, 351 F. Supp. 642, 669 (D. Neb. 1972).

The Scanlons argue that even if due process under the Fourteenth Amendment does not require confrontation of student accusers in a disciplinary hearing, the New Mexico Constitution does impose such a requirement. This argument was preserved below as mandated by Gomez. However, we are not convinced by the Scanlons’ arguments regarding the need for greater due process protections under the New Mexico Constitution. Citing to State v. Javier M., 2001-NMSC-030, 131 N.M. 1, 33 P.3d 1, the Scanlons claim that because New Mexico has provided greater protections for minors who are subject to custodial interrogations than the federal constitution requires, we should also provide minors with increased protections during school disciplinary proceedings by allowing them to cross-examine the students who provided the administration with information about the minor’s misconduct. We do not see how one proposition follows the other, and we conclude that the procedural protections afforded Jarrett at his long-term suspension hearing met the requirements of due process under Article II, Section 18 of the New Mexico Constitution.

CONCLUSION

We hold that the exclusionary rule does not apply in school disciplinary proceedings, and we therefore uphold the hearing authority’s consideration of the marijuana and the sword found in Jarrett’s car, without reaching the issue of whether that evidence was obtained in violation of Jarrett’s constitutional rights. We also conclude that under both the federal and state constitutions, due process permitted the school authorities in this case to base their disciplinary decisions on the hearsay statements of the school officials who investigated the alleged misconduct, and that the accused student had no constitutional right to cross-examine the students who provided the school officials with their information. Accordingly, we affirm the decision of the district court.

IT IS SO ORDERED.

CYNTHIA A. FRY, Judge

WE CONCUR:

CELIA FOY CASTILLO, Judge
MICHAEL E. VIGIL, Judge
Cynthia A. Fry, Judge

(1) Defendant Juan Marquez was arrested for driving while under the influence of alcohol (DUI), in Chaves County, just outside the city limits of Dexter, New Mexico. Defendant asks this Court to vacate his conviction, claiming that the evidence of his intoxication was obtained as the result of an illegal traffic stop. As we agree with Defendant that the municipal officer who stopped him was not authorized by the Fresh Pursuit Act, NMSA 1978, § 31-2-8 (1981), to pursue a suspect outside of the territorial limits of the officer’s jurisdiction based on a non-arrestable offense, we conclude that evidence of Defendant’s intoxication should have been suppressed, and the DWI charge dismissed.

BACKGROUND

(2) Defendant was driving within the city limits of Dexter when Officer James Seely of the Dexter Police Department heard a loud noise coming from Defendant’s truck. The noise appeared to be caused by a problem with the muffler. Officer Seely believed that the noise violated either a Dexter city noise ordinance or a state law prohibiting exhibition driving. Officer Seely turned on his emergency lights and followed Defendant in order to cite him for the noise. By the time Officer Seely got Defendant’s attention and Defendant pulled over to stop, he and Officer Seely had left the Dexter city limits and were in Chaves County. During the traffic stop, Officer Seely noticed that Defendant showed signs of intoxication, and, after administering several field sobriety tests, Officer Seely attempted to arrest Defendant for DUI. Officer Seely claimed that Defendant resisted arrest, that Officer Seely sprayed Defendant with pepper spray, and that Defendant then hit him in the chest. Defendant was ultimately charged with aggravated DWI, contrary to NMSA 1978, § 66-8-102 (2004) (prior to amendments), battery on a police officer, contrary to NMSA 1978, § 30-22-24 (1971), and resisting arrest, contrary to NMSA 1978, § 30-22-1(D) (1981).

(3) Prior to trial, Defendant moved to dismiss the DWI charge, arguing that the traffic stop and subsequent arrest were invalid. He maintained that Officer Seely was authorized to make arrests only for violations occurring within the Dexter city limits, and that the Fresh Pursuit Act, Section 31-2-8, did not grant Officer Seely jurisdiction to arrest Defendant for a non-arrestable misdemeanor such as violation of the noise ordinance. The trial court denied Defendant’s motion to dismiss the charge. The court found that the Fresh Pursuit Act permitted Officer Seely to pursue Defendant into Chaves County based on the noise he heard coming from Defendant’s truck in Dexter and on his understanding that the noise violated either the Dexter noise ordinance or the state prohibition against exhibition driving. The court concluded that there was no difference between this case and County of Los Alamos v. Tapia, 109 N.M. 736, 745, 790 P.2d 1017, 1026 (1990), in which our Supreme Court held that the Fresh Pursuit Act applied to both misdemeanors and petty misdemeanors. The trial court also found that Officer Seely was commissioned by the Chaves County sheriff, but stated that the court did not know what significance the commission had and that it was “not material to the [c]ourt’s decision in this case.”

(4) At trial, Defendant was convicted of aggravated DWI and resisting arrest. Defendant asks this Court to vacate his DWI conviction because the traffic stop was illegal and the trial court should have granted his motion to dismiss. Defendant does not challenge his conviction for resisting arrest. The State urges us to affirm, arguing that Officer Seely was authorized to stop and arrest Defendant either by the Fresh Pursuit Act or by his commission as a deputy sheriff of Chaves County.

DISCUSSION

(5) The interpretation of the Fresh Pursuit Act is a question of law that we review de novo. See State v. Roman, 1998-NMCA-132, ¶ 8, 125 N.M. 688, 964 P.2d 852. “Our primary goal when interpreting statutory language is to give effect to the intent of the legislature.” State v. Torres, 2006-NMCA-106, ¶ 8, 140 N.M. 230, 141 P.3d 1284. “We do this by giving effect to the plain meaning of the words of [the] statute, unless this leads to an absurd or unreasonable result.” State v. Marshall, 2004-NMCA-104, ¶ 7, 136 N.M. 240, 96 P.3d 801. In this case, we reverse Defendant’s conviction because we agree that the Fresh Pursuit Act did not authorize the traffic stop. The plain language of Section 31-2-8 permits a city police officer to pursue a suspect outside of the officer’s territorial jurisdiction only if the officer has reason to believe he or she has observed a violation of an arrestable misdemeanor, and the State failed to prove...
that violation of the noise ordinance was an arrestable offense. Because Officer Seely had no authority to stop Defendant, all evidence of Defendant’s intoxication was the fruit of this illegal detention. Therefore, the evidence should have been suppressed, and the DWI charge dismissed.

The Fresh Pursuit Act

6 Absent some exception, a municipal police officer is authorized to enforce the laws only within the territory of the municipality. See NMSA 1978, § 3-13-2(A)(4)(d)(1988) (permitting municipal officers to “apprehend any person in the act of violating the laws of the state or the ordinances of the municipality” only “within the municipality”). The Fresh Pursuit Act provides an exception to this general rule. Under the Act, "any county sheriff or municipal police officer who leaves his jurisdictional boundary while in fresh pursuit of a misdemeanant whom he would otherwise have authority to arrest shall have the authority to arrest that misdemeanant anywhere within this state.[]"

§ 31-2-8(A). “Fresh pursuit of a misdemeanant” means “the pursuit of a person who has committed a misdemeanor in the presence of the pursuing officer.” § 31-2-8(B) (internal quotation marks omitted). Defendant argues that the statutory requirement that the officer must be pursuing a person “whom he would otherwise have authority to arrest” means that the Fresh Pursuit Act authorizes a police officer to leave his jurisdiction only if the misdemeanant he has observed is an arrestable offense. See § 31-2-8(A). We agree. The plain language of Section 31-2-8 limits its scope to offenses for which the officer could arrest the misdemeanant. We conclude, therefore, that the legislature intended to authorize municipal officers to leave their territorial jurisdiction in fresh pursuit of a misdemeanant only if the misdemeanant has committed an arrestable offense.

7 We do not agree with the trial court’s conclusion that Tapia controls the question of whether a non-arrestable petty misdemeanant could provide the basis for a lawful arrest under the Fresh Pursuit Act. Tapia held that Section 31-2-8, which refers only to misdemeanors, also applies to petty misdemeanors. 109 N.M. at 745, 790 P.2d at 1026. Tapia did not address the distinction between arrestable and non-arrestable offenses, and therefore it does not answer the question before us. See Sloan v. State Farm Mut. Auto. Ins. Co., 2004-NMSC-004, ¶ 12, 135 N.M. 106, 85 P.3d 230 (“[C]ases are not authority for propositions not considered.” (alteration in original) (internal quotation marks and citation omitted)).

8 Once Defendant established that the traffic stop was facially invalid because it occurred outside of Officer Seely’s jurisdiction, the burden shifted to the State to prove that Officer Seely’s conduct was authorized by some exception to the general rule that an officer can only enforce the law within his territorial jurisdiction. Cf. State v. Ponce, 2004-NMCA-137, ¶ 7, 136 N.M. 614, 103 P.3d 54 (noting that once the Defendant has met its burden to show that a seizure was illegal on its face because it was conducted without a warrant, the state has the burden of proving that a police officer’s conduct comes within an exception to the warrant requirement). The State failed to meet this burden because it failed to prove that the noise ordinance was an arrestable offense, and that, therefore, the stop was justified by the Fresh Pursuit Act.

9 At the hearing on Defendant’s motion to dismiss, Defendant argued that the violation of the Dexter city noise ordinance was not an arrestable offense because a person who violates the ordinance cannot be jailed on that basis. Because the State did not provide the trial court with the text of the Dexter city ordinance setting out the penalties for a violation of the noise ordinance, the State did not meet its burden of proving that the noise ordinance established a jailable and arrestable offense. Although Officer Seely testified that “any offense can be arrestable,” we are unwilling to permit the State to meet its burden of showing that an offense is arrestable through the testimony of the arresting officer. In order to meet its burden, the State was required to provide the trial court with the text of the Dexter ordinance describing the penalty for a noise violation. See Muller v. City of Albuquerque, 92 N.M. 264, 265, 587 P.2d 42, 43 (1978) (noting that municipal ordinances are matters of fact which must be pleaded and proved as any other fact); 31A C.J.S. Evidence § 27 (“The general rule is that county, town, or municipal laws, ordinances, by-laws, or resolutions themselves are not judicially known to courts having no special function to enforce them[.]”). In the absence of proof that Officer Seely was authorized to arrest Defendant on the basis of the noise violation, the State failed to establish that Officer Seely was authorized to pursue Defendant in order to stop and arrest him under the Fresh Pursuit Act.

10 As for the alleged violation of the state prohibition against exhibition driving, exhibition driving is an arrestable offense under state law. See NMSA 1978, § 66-8-115(D) (1978) (“Any person who violates any provision of this section is guilty of a misdemeanor.”); NMSA 1978, § 66-8-7(B) (1989) (stating that, unless otherwise specified, the penalty for a misdemeanor under the Motor Vehicle Code can include up to ninety days’ imprisonment). Therefore, had Officer Seely observed a violation of this statute, he would have been justified in pursuing Defendant in order to arrest him for that offense. However, we agree with Defendant that there is no evidence in the record to support the trial court’s conclusion that the noise Officer Seely heard coming from Defendant’s vehicle constituted exhibition driving.

11 The relevant provision of the New Mexico Motor Vehicle Code states that no person shall drive a vehicle on a highway in any race, speed competition or contest, drag race or acceleration contest, test of physical endurance, exhibition of speed or acceleration or for the purpose of making a speed record, whether or not the speed is in excess of the maximum speed prescribed by law, and no person shall in any manner participate in any such race, drag race, competition, contest, test or exhibition.

§ 66-8-115(A). Officer Seely’s testimony that Defendant’s vehicle was making noise because of a problem with the muffler is insufficient to establish that Officer Seely observed Defendant engage in an “exhibition of speed or acceleration.” Because Officer Seely did not observe Defendant committing such a violation, he was not authorized to pursue Defendant outside the Dexter city limits on that basis. See § 31-2-8(B).

12 As a postscript, we note that Defendant’s motion was filed prior to our decision in State v. Rodarte, 2005-NMCA-141, 138 N.M. 668, 125 P.3d 647, cert. quashed, 2006-NMCERT-007, 140 N.M. 280, 142 P.3d 361. In that case, this Court held that under Article II, Section 10 of the New Mexico Constitution, an arrest for a non-jailable offense is constitutionally unreasonable in the absence of specific and articulable facts warranting a custodial arrest rather than a citation. Rodarte, 2005-NMCA-141, ¶¶ 14-16. However, Rodarte is not applicable here because the
State does not dispute that a person may not be arrested for an offense that carries no jail time.

**The Officer’s Status as a Commissioned Deputy Sheriff**

{13} The State argues that even if Officer Seely was not authorized under the Fresh Pursuit Act to stop Defendant outside of the Dexter city limits, his commission from the Chaves County sheriff authorized him to pursue and stop Defendant for municipal ordinance violations in Chaves County. Although the trial court did not rely on the fact of Officer Seely’s commission in denying the motion to dismiss the DWI charge, we may affirm a trial court’s decision that is right for any reason, so long as it is not unfair to the appellant for us to do so. See State v. Gallegos, 2007-NMSC-007, ¶ 26, 141 N.M. 185, 152 P.3d 828.

{14} If a city police officer is commissioned by the county sheriff, then the officer has the same authority to stop and arrest as would the sheriff. See State v. Pinela, 113 N.M. 627, 630, 830 P.2d 179, 182 (Ct. App. 1992) (stating that a city police officer who was commissioned by the county sheriff was permitted to serve process by the statute authorizing the sheriff to serve process); see also NMSA 1978, § 4-41-5 (1975) (authorizing county sheriffs to appoint deputies); NMSA 1978, § 4-41-9 (1855–1856) (authorizing deputy sheriffs to exercise all powers of the sheriff). But the State provides this Court with no authority for the proposition that a county sheriff is authorized to enforce a city ordinance such as the noise ordinance at issue in this case. Compare NMSA 1978, § 29-1-1 (1979) (stating that it is “the duty of every sheriff . . . to investigate all violations of the criminal laws of the state”), and NMSA 1978, § 4-37-4(A)(1) (1975) (stating that “[i]t is the duty of every county sheriff . . . to enforce the provisions of all county ordinances”), with § 3-13-2(A)(4)(d) (stating that “[t]he police officer of a municipality shall . . . apprehend any person in the act of violating the laws of the state or the ordinances of the municipality”). See also City of Ash Grove v. Christian, 949 S.W.2d 259, 260-61 n.2 (Mo. Ct. App. 1997) (per curiam) (noting that where city officer was deputized by the county sheriff and the stop for a violation of a city ordinance took place outside the city limits, the stop was illegal since the state failed to prove that county sheriffs were authorized to enforce city ordinances). When a party cites no authority to support an argument, we may assume no such authority exists. In re Adoption of Doc, 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984). Therefore, we do not address the State’s claim that Officer Seely’s commission as a deputy sheriff in Chaves County authorized him to stop Defendant based on the violation of the noise ordinance. See Wilburn v. Stewart, 110 N.M. 268, 272, 794 P.2d 1197, 1201 (1990) (“Issues raised in appellate briefs that are unsupported by cited authority will not be reviewed . . . on appeal.”).

**The Fruit of the Illegal Stop**

{15} The State argues that the question of whether Officer Seely was authorized to stop Defendant for his violation of the noise ordinance is irrelevant since the subsequent arrest was justified by Officer Seely’s independent observations of Defendant’s intoxication after the stop. We agree with the State that once Officer Seely had probable cause to believe that Defendant had been violating state law by driving while intoxicated, he had the authority, as a Chaves County deputy sheriff, to arrest Defendant. See State v. Arroyos, 2005-NMCA-086, ¶ 11, 137 N.M. 769, 115 P.3d 232 (noting that county sheriff’s deputy has jurisdictional authority to arrest for DWI). But regardless of Officer Seely’s authority to execute the arrest in order to protect Defendant and the public, the evidence of Defendant’s intoxication was obtained by means of the initial, invalid stop. As such, the evidence of the DWI should have been suppressed as the fruit of the wrongful traffic stop, and the charge should have been dismissed. See State v. Branham, 2004-NMCA-131, ¶¶ 2, 16, 136 N.M. 579, 110 P.3d 646 (affirming the suppression of evidence of intoxication observed after state police officer executed invalid traffic stop for speeding when officer was without statutory authority to enforce traffic laws on Mescalero Apache Indian Reservation).

**CONCLUSION**

{16} For the foregoing reasons, we reverse Defendant’s conviction for DWI and remand for amendment of his sentence. Defendant’s conviction for resisting arrest was not challenged and therefore stands.

{17} IT IS SO ORDERED.

WE CONCUR:

JAMES J. WECHSLER, Judge
IRA ROBINSON, Judge
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