Inside This Issue

Table of Contents .......................................................5

From the New Mexico Court of Appeals

2009-NMCA-075, No. 27,402:
State v. Lee ...............................................................17

2009-NMCA-076, No. 28,358:
State v. Thompson ..................................................20

2009-NMCA-077, No. 27,938:
State v. Pickett .......................................................23

2009-NMCA-078, No. 27,470:
Kilgore v. Fuji Heavy Industries Ltd .....................28

2009-NMCA-079, No. 28,018:
State v. Soliz .............................................................39

2009-NMCA-080, No. 27,910/28,318:
Skeen v. Boyles .......................................................46

www.nmbar.org
Hats Off to our Volunteers

The Indian Law Section of the State Bar of New Mexico would like to thank all participants of its Summer Mixer held on Friday, July 31, 2009.

WELCOME
New Section Members:
Herbert A. Becker
Elena Moreno
Lynn Trujillo
William Parnall
Thomas Birdbear - Associate Member

The Indian Law Section appreciates the door prizes donated by:
American Indian Law Center, Inc.
and
Mekko M. Miller & Elaine Suazo-Miller
AN INVITATION

COMES TO SANTA FE
HOSTED BY SPIRIT PRODUCTIONS AND
SANTA FE CHAMBER OF COMMERCE

Brought to you by the Membership Services Committee

Where: Spirit Productions
#10 Rudy Rodríguez Drive
Santa Fe, NM 87508

Date: Tuesday, September 29, 2009
Time: 5:30-7:00 pm

Presentation: Spirit Productions will have a 10-minute presentation on how to present your business on the Web. SBNM members will have an opportunity to meet with members of the Santa Fe Chamber of Commerce.

Food and beverages.
Drawing for the “The Painted Pony” (DVD) along with several other giveaways.

For more information or to RSVP, please contact
Marcia Ulibarri, Account Executive, State Bar of New Mexico
505.797.6058  |  mulibarri@nmbar.org

Make Your Business a Star!
Constitution Day

Seeking attorney volunteers across
New Mexico to teach 5th graders about the Constitution!

Constitution Day is designated by Public Law 108-447 Sec. 111 Division J - SEC. 111(b) which states that all levels of educational institutions receiving federal funds are required to educate students about the U.S. Constitution.

Constitution Day is an event taking shape across the country designed to teach 5th graders about the Constitution. Each fifth grader participating will receive a pocket-size Constitution!

During the week of September 14-18, volunteer attorneys will be partnered with 5th grade teachers in their area to co-teach a lesson on the Constitution. Suggested course materials will be provided, and you will get to deliver pocket-sized Constitutions to the children! Each presentation should last 1-1.5 hours per classroom.

Volunteer attorneys will be given the teacher’s name and contact information in advance so that specific planning may take place.

☐ YES! I’d like to be a Constitution Day Volunteer!*
(*requires $30 donation from each attorney to cover classroom materials)

☐ I am unable to volunteer my time but I would like to donate toward the effort of putting a pocket-size constitution in the hands of all New Mexico fifth graders (Amount $_________)

NAME_____________________________________________________ Bar ID ____________
ADDRESS ___________________________________________________________________
____________________________________________________________________________
(city)        (state)                              (zip)
____________________________________________________________________________
(phone)    (fax)    (email)

Send this completed form to Marilyn Kelley
Email: mkelley@nmbar.org; or fax (505) 797-6074; or US mail:
New Mexico State Bar Foundation, Public & Legal Services Department
Attention Marilyn Kelley
PO Box 92860, Albuquerque, NM 87199
Table of Contents

Notices .................................................................................................................................6
Legal Education Calendar .................................................................................................9
Writs of Certiorari ...............................................................................................................11
List of Court of Appeals’ Opinions ..................................................................................13
Recent Rule-Making Activity ............................................................................................14

From the New Mexico Court of Appeals

2009-NMCA-075, No. 27,402: State v. Lee ................................................................. 17
2009-NMCA-076, No. 28,358: State v. Thompson ....................................................... 20
2009-NMCA-077, No. 27,938: State v. Pickett ............................................................ 23
2009-NMCA-078, No. 27,470: Kilgore v. Fuji Heavy Industries Ltd ....................... 28

Advertising .........................................................................................................................52

Professionalism Tip

With respect to opposing parties and their counsel:
I will not serve motions and pleadings that will unfairly limit the other party’s
opportunity to respond.

Meetings

August
31
Real Property, Trust and Estate Section, noon, via teleconference

September
2
Bankruptcy Law Section Board of Directors, noon, U.S. Bankruptcy Court
4
Employment and Labor Law Section Board of Directors, noon, State Bar Center
9
Young Lawyers Division Roundtable Against Violence, 11:30 a.m., State Bar Center
9
ADR Education Group, noon, 2nd Judicial District Court
9
Children’s Law Section Board of Directors, noon, Juvenile Justice Center
9
Membership Services Committee, noon, via teleconference

State Bar Workshops

September
10
Lawyer Referral for the Elderly Workshop
10 a.m.–12:30 p.m., Presentation
1:30–5 p.m., Clinics
Española Senior Center, Española
11
Lawyer Referral for the Elderly Workshop
10 a.m.–11:30 p.m., Presentation
1–4 p.m., Clinics
Phil Lovato Senior Center, Taos
16
Lawyer Referral for the Elderly Workshop
10–11:15 a.m., Presentation
12:30–3:30 p.m., Clinics
Edgewood Senior Center, Edgewood
23
Consumer Debt/Bankruptcy Workshop
6 p.m., State Bar Center, Albuquerque

October
28
Consumer Debt/Bankruptcy Workshop
6 p.m., State Bar Center, Albuquerque

Susan Weeks is an inactive attorney-turned watercolorist. Originally from Tennessee, she came to New Mexico to work as a librarian at the UNM School of Law Library. Her watercolors, painted in a hyper-realistic style, are of subjects that often come from her travels. Her work can be seen on her Web site at www.susanweeks.com. To see the cover art in its original color, visit www.nmbar.org and click on Attorneys/Members/Bar Bulletin.
COURT NEWS

N.M. Supreme Court
Minimum Continuing Legal Education Board

One vacancy exists on the Minimum Continuing Legal Education Board. Attorneys interested in volunteering time on this board may send a letter of interest and/or resume to:
Kathleen Jo Gibson, Chief Clerk
PO Box 848
Santa Fe, NM 87504-0848.
Deadline for submissions is Sept. 21.

Proposed Revisions to the Rules of Civil Procedure for the District Courts

The Rules of Civil Procedure Committee is considering whether to recommend proposed amendments to the Rules of Civil Procedure for the District Courts for the Supreme Court’s consideration. To comment on the proposed amendments before they are submitted to the Court for final consideration, submit a comment electronically through the Supreme Court’s Web site at http://nmsupremecourt.nmcourts.gov/, or send written comments to:
Kathleen J. Gibson, Clerk
New Mexico Supreme Court
PO Box 848
Santa Fe, NM 87504-0848
Comments must be received by the clerk on or before Sept. 8 to be considered by the Court. Note that any submitted comments may be posted on the Supreme Court’s Web site for public viewing. For reference, see the Aug. 17 (Vol. 48, No. 33) Bar Bulletin.

Thirteenth Judicial District Court
New Hours for Clerks’ Offices

The 13th Judicial District clerks’ offices located in Bernalillo, Grants, and Los Lunas have new business hours. All business with the clerks’ offices, in person or by telephone, will be conducted from 9 a.m. to noon and 1 p.m. to 5 p.m. For further information, contact Greg Ireland, (505) 865-2422.

U.S. District Court, District of New Mexico Seminar

The Federal Bar Association and the U.S. District Court, District of New Mexico, will present The Best Federal Bar Seminar Ever Oct. 15 (8:30 a.m.–5:15 p.m.) and Oct. 16 (8:30 a.m.–12:30 p.m.) at the Albuquerque Convention Center. The program will offer 10.0 general CLE credits. Federal judges and legal scholars will discuss and share insights on practicing before the federal court. Topics include “The Removal and Remand Game: How to Tiptoe Through the Minefield,” “Sentencing Issues;” “Federal Grand Jury Practice;” “Voire Dire in Federal Court” and much more. For complete program information, agenda and registration, go to www.nmcourts.gov.

STATE BAR NEWS

Appellate Practice Section Practice Institute and Annual Meeting

The Appellate Practice Section will present the 20th Annual Appellate Practice Institute Sept. 11 at the State Bar Center (6.9 general CLE credits). The standard fee is $219; the fee for section members, government and legal services attorneys, and paralegals is $189. Information about this year’s program may be accessed at www.nmbarcle.org. See the CLE-At-a-Glance insert in the July 27 (Vol. 48, No. 30) Bar Bulletin for details. To register call (505) 797-6020; fax (505) 797-6071; visit www.nmbar.org and select CLE; or mail CLE, PO Box 92860, Albuquerque, NM 87199.

The section’s annual membership meeting will be held during the lunch break. Contact Chair Jocelyn Drennan, JDrennan@rodey.com, to place an item on the agenda.

Attorney Support Group

• Afternoon groups meet regularly on the first Monday of the month:
  Sept. 14, 5:30 p.m. (due to holiday)
• Morning groups meet regularly on the third Monday of the month:
  Sept. 21, 7:30 a.m.
Both groups meet at the First United Methodist Church at Fourth and Lead SW, Albuquerque. For more information, contact Bill Stratvert, (505) 242-6845.

Children’s Law Section Noon Knowledge

The Honorable Monica Zamora will address updates to the Children’s Court Rules at noon, Sept. 11, in conference rooms A and B at the Juvenile Justice Center, 5100 2nd Street, NW, Albuquerque. Contact Judy Flynn-O’Brien, jafob@unm.edu or (505) 277-1050, to R.S.V.P. so that adequate seating and materials will be available.

Judicial Records Retention and Disposition Schedules

Pursuant to the Judicial Records Retention and Disposition Schedules, exhibits (see specifics for each court below) filed with the courts 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 (see specifics for each court below) can be retrieved by the dates shown below. Attorneys who have cases with exhibits may verify exhibit 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 not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

<table>
<thead>
<tr>
<th>Court</th>
<th>Exhibits</th>
<th>For Years</th>
<th>May be Retrieved Through</th>
</tr>
</thead>
<tbody>
<tr>
<td>1st Judicial District Court</td>
<td>Exhibits in Criminal, Civil, Domestic Relations, Children’s Court, and Probate Cases</td>
<td>1974–1993</td>
<td>October 30</td>
</tr>
</tbody>
</table>
Scholarships

The Children’s Law Section is accepting scholarship applications from UNM law students and New Mexico attorneys who have been practicing for no more than three years. The scholarship is being offered to increase awareness of and expertise in the field of children’s law by supporting the attendance of law students and recently admitted attorneys at the 2010 Children’s Law Institute, or alternate children’s law conference, through payment of the recipient’s conference registration fee. Forward a completed application to Kelly Waterfall, kkwaterfall@netzero.com or (505) 480-4148. The application must be submitted by Sept. 15. For more information and an application, visit www.nmbar.org/AboutSBNM/sections/ChildrensLaw/childrenscholarship.html.

Employment and Labor Law Section
Annual Meeting and CLE

The Employment and Labor Law Section will hold its annual meeting during lunch, Oct. 9, in conjunction with the 2009 Employment and Labor Law Institute at the State Bar Center. Agenda items should be sent to Chair Danny Jarrett, jarrettd@jacksonlewis.com or (505) 878-0515. The cost of the CLE program is $199; the fee for section members, government and legal services attorneys and paralegals is $169. Lunch will be provided and attendees will earn 5.0 general and 1.0 ethics CLE credits. See the CLE At-a-Glance insert in the July 27 (Vol. 48, No. 30) Bar Bulletin for more information. To register call (505) 797-6020; visit www.nmbar.org and select CLE; or mail CLE, PO Box 92860, Albuquerque, NM 87199.

Board Meeting

The Employment and Labor Law Section board of directors welcomes section members to attend its meetings on the first Wednesday of each month. The next meeting will be held at noon, Sept. 2, at the State Bar Center. Lunch is provided to those who R.S.V.P. to membership@nmbar.com or visit the State Bar Web site, www.nmbar.org and select CLE; or mail CLE, PO Box 92860, Albuquerque, NM 87199.

Paralegal Division
Luncheon CLE Series

The Paralegal Division invites members of the legal community to bring a lunch and attend Natural Resources Law presented by Stuart Butzier of Modrall, Sperling, Roehl, Harris & Sisk PA. The program will be held from noon to 1 p.m., Sept. 9, at the State Bar Center and offers 1.0 general CLE credit. The registration fee is $16 for attorneys, $10 for members of the Paralegal Division, and $15 for non-members. Registration begins at the door at 11:30 a.m. For more information, contact Cheryl Passalaqua, (505) 247-0411.

Public and Legal Services Commission
Constitution Day Volunteers Needed

The Public and Legal Services Commission and the New Mexico State Bar Foundation are coordinating participation in Constitution Day, designated by Public Law 108-447 which requires educational institutions receiving federal funds to educate students about the U.S. Constitution. During the Week of Sept. 14–18, volunteer attorneys will be partnered with fifth grade teachers to co-teach lessons. Over 100 schools have already expressed interest. For more information and to volunteer, see page 4 of this issue of the Bar Bulletin or visit the State Bar Web site at http://www.nmbar.org/Public/educationalprograms.html.

Public and Legal Services Department
Federal Workers’ Compensation Attorney Needed

Attorney James Chakeres has retired and is in need of locating a federal workers’ compensation attorney to take over cases. Contact Marilyn Kelley, (505) 797-6048.

Public Law Section
Annual Meeting and CLE

The Public Law Section will hold its annual meeting at 12:30 p.m., Sept. 18, in conjunction with the Craig Othmer Memorial Procurement Code Institute at the State Personnel Office Auditorium, 2600 Cerrillos Rd., Santa Fe. All section members are encouraged to attend. Agenda items should be sent to Chair Stephen Ross, sross@co.santa-fe.nm.us or (505) 986-6279. The cost of the CLE program is $149; the fee for section members, government and legal services attorneys and paralegals is $129. See the CLE At-a-Glance insert in the July 27 (Vol. 48, No. 30) Bar Bulletin for more information. To register call (505) 797-6020; fax (505) 797-6071; visit www.nmbar.org and select CLE; or mail CLE, PO Box 92860, Albuquerque, NM 87199.

The ABA Retirement Funds

The ABA Retirement Funds have been providing retirement plan solutions to the legal community for more than 40 years. Whether you operate a solo practice or a larger firm, the ABA Program can provide a 401(k) or profit sharing plan to meet your needs. Call 1-800-826-8901 or e-mail abaretirement@us.ing.com for a free cost comparison, plan consultation and a prospectus.

Solo and Small Firm Section
Section Meeting

New Mexico Senate Majority Leader Michael S. Sanchez will be the guest speaker at the section meeting to be held at noon, Sept. 15, at the State Bar Center. Sanchez will speak about the upcoming 2010 legislative session and will address issues related to the budget, the legislative process, and other important issues facing our state. Lunch will be provided to section members compliments of the section. Non-members may purchase lunch for $7.50 per person. Non-members are encouraged to join the section for a $15 membership fee, which will pay for lunch and for section membership dues through 2010. Join the section and pay the annual dues prior to the section meeting and speaker presentation. R.S.V.P. to Tony Horvat, thorvat@nmbar.org.

connections

The ABA Retirement Funds

The ABA Retirement Funds have been providing retirement plan solutions to the legal community for more than 40 years. Whether you operate a solo practice or a larger firm, the ABA Program can provide a 401(k) or profit sharing plan to meet your needs. Call 1-800-826-8901 or e-mail abaretirement@us.ing.com for a free cost comparison, plan consultation and a prospectus.
Young Lawyers Division Reception with HNBA

The Young Lawyers Division is hosting a joint reception with the YLD of the Hispanic National Bar Association from 5:30 to 6:30 p.m., Sept. 4, at Hotel Albuquerque during HNBA’s 34th Annual Convention and First Judicial Summit. All are welcome to attend. R.S.V.P. to Roxanna Chacon at lcrdrmc@nmcourts.gov.

Wills for Heroes Volunteers Needed in Ruidoso

The Young Lawyers Division is seeking attorneys, paralegals (to serve as witnesses) and notaries for a Wills for Heroes event in Ruidoso. Attorneys will draft, free of charge, wills and healthcare powers of attorney for qualified first responders from 9 a.m. to 4 p.m., Sept. 19, at the Ruidoso Fire Department, 313 Cree Meadows Drive, Ruidoso. No prior experience with wills or estate planning is needed. This is a great opportunity to honor first responders and provide a valuable service at the same time. Volunteers must have their own laptop computers (no Macs) with MS Word. Everything else will be provided and supervised. For more information or to volunteer, contact Martha Chicoski, mary.martha.chicoski@farmers.com, by Sept. 10.

OTHER BARS
Albuquerque Bar Association Member Luncheon

The Albuquerque Bar Association’s Member Luncheon will be held at noon, Sept. 1, at the Embassy Suites Hotel, 1000 Woodward Pl. NE, Albuquerque. Professor Erik Gerding of the UNM School of Law will present Grading the Obama Administration’s Financial Reform Proposals. The CLE (1.0 ethics and 1.0 professionalism CLE credits) will immediately follow the luncheon from 12:15 to 1:15 p.m. Judge Bill Lang will moderate a judges’ panel on May It Peeve the Court 2009.

Lunch only: $25 members/$35 non-members with reservations; lunch and CLE: $85 members/$115 non-members with reservations; CLE only: $60 members/$80 non-members. To register:
1. log onto www.abqbar.com;
2. e-mail abqbar@abqbar.com;
3. call (505) 842-1151 or (505) 243-2615;
4. by fax to (505) 842-0287; or
5. by mail to PO Box 40, Albuquerque, NM 87103.

Hispanic National Bar Association 34th Annual Convention

The Hispanic National Bar Association will host its 34th Annual Convention and First Judicial Summit Sept. 2–6 at Hotel Albuquerque in Albuquerque. Over a thousand Latino legal professionals, including judges, government and private sector attorneys, law professors and non-profit lawyers from across the nation will gather to discuss the advances Latinos have made within the profession and the significance of the historic confirmation of HNBA Member Justice Sonia M. Sotomayor. The program will feature prominent national leaders and many distinguished speakers. To register and to view a full convention agenda, visit http://www.hnbaconvention.com.

UNM School of Law
Fall Library Hours to Dec. 19
Building and Circulation
Monday–Thursday 8 a.m.–11 p.m.
### LEGAL EDUCATION

#### AUGUST

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>31</td>
<td>Lawyer Substance Abuse Addictions and Consequences</td>
<td>Telephone Seminar&lt;br&gt;TRT, Inc.&lt;br&gt;1.0 E, 1.0 P&lt;br&gt;1-800-672-6253&lt;br&gt;www.trtcle.com</td>
</tr>
</tbody>
</table>

#### SEPTEMBER

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>6th Annual Elder Law Seminar</td>
<td>Video Replay&lt;br&gt;Center for Legal Education of NMSBF&lt;br&gt;2.9 G, 1.0 P&lt;br&gt;(505) 797-6020&lt;br&gt;www.nmbarcle.org</td>
</tr>
<tr>
<td>1</td>
<td>Attorneys Guide to Good Lawyering for People with Disabilities</td>
<td>Video Replay&lt;br&gt;Center for Legal Education of NMSBF&lt;br&gt;1.0 P&lt;br&gt;(505) 797-6020&lt;br&gt;www.nmbarcle.org</td>
</tr>
<tr>
<td>1</td>
<td>Kinship Guardianship</td>
<td>Video Replay&lt;br&gt;Center for Legal Education of NMSBF&lt;br&gt;4.0 G, 1.0 E, 1.0 P&lt;br&gt;(505) 797-6020&lt;br&gt;www.nmbarcle.org</td>
</tr>
<tr>
<td>1–2</td>
<td>Understanding the Economics of LLC Deals, Parts 1 and 2</td>
<td>Teleseminar&lt;br&gt;Center for Legal Education of NMSBF&lt;br&gt;2.0 G&lt;br&gt;(505) 797-6020&lt;br&gt;www.nmbarcle.org</td>
</tr>
<tr>
<td>3</td>
<td>Oil Gas and Mineral Land Law</td>
<td>Albuquerque Halfmoon, LLC&lt;br&gt;6.0 G&lt;br&gt;(715) 835-5900</td>
</tr>
<tr>
<td>5</td>
<td>Need to Tame or Train the Billable Beast?</td>
<td>Teleconference&lt;br&gt;TRT, Inc.&lt;br&gt;2.0 E&lt;br&gt;1-800-672-6253&lt;br&gt;www.trtcle.com</td>
</tr>
<tr>
<td>8</td>
<td>Title Insurance Update</td>
<td>Teleseminar&lt;br&gt;Center for Legal Education of NMSBF&lt;br&gt;1.0 G&lt;br&gt;(505) 797-6020&lt;br&gt;www.nmbarcle.org</td>
</tr>
<tr>
<td>9</td>
<td>Family Law</td>
<td>Santa Fe Paralegal Division, Santa Fe&lt;br&gt;1.0 G&lt;br&gt;(505) 986-2502</td>
</tr>
<tr>
<td>9</td>
<td>Natural Resources Law</td>
<td>Paralegal Division, Albuquerque&lt;br&gt;1.0 G&lt;br&gt;(505) 247-0411 or (505) 222-9356</td>
</tr>
<tr>
<td>11</td>
<td>20th Annual Appellate Practice Institute</td>
<td>State Bar Center&lt;br&gt;Center for Legal Education of NMSBF&lt;br&gt;6.9 G&lt;br&gt;(505) 797-6020&lt;br&gt;www.nmbarcle.org</td>
</tr>
<tr>
<td>15</td>
<td>2008 Estate Planning Symposium</td>
<td>Video Replay&lt;br&gt;Center for Legal Education of NMSBF&lt;br&gt;6.0 G, 1.0 E&lt;br&gt;(505) 797-6020&lt;br&gt;www.nmbarcle.org</td>
</tr>
<tr>
<td>15</td>
<td>Attorneys Guide to Good Lawyering for People with Disabilities</td>
<td>Video Replay&lt;br&gt;Center for Legal Education of NMSBF&lt;br&gt;1.0 P&lt;br&gt;(505) 797-6020&lt;br&gt;www.nmbarcle.org</td>
</tr>
<tr>
<td>15</td>
<td>Avoiding Oops! Uh-oh and Yikes! Some Ethical Dilemmas for Lawyers</td>
<td>Video Replay&lt;br&gt;Center for Legal Education of NMSBF&lt;br&gt;1.0 E&lt;br&gt;(505) 797-6020&lt;br&gt;www.nmbarcle.org</td>
</tr>
<tr>
<td>15</td>
<td>Medicare Set Asides</td>
<td>Video Replay&lt;br&gt;Center for Legal Education of NMSBF&lt;br&gt;2.7 G&lt;br&gt;(505) 797-6020&lt;br&gt;www.nmbarcle.org</td>
</tr>
<tr>
<td>15</td>
<td>Retirement Benefits and Estate Planning</td>
<td>Teleconference&lt;br&gt;Cannon Financial Institute&lt;br&gt;1.5 G&lt;br&gt;(706) 353-3346</td>
</tr>
<tr>
<td>15</td>
<td>Special Issues in Small Trusts</td>
<td>Teleseminar&lt;br&gt;Center for Legal Education of NMSBF&lt;br&gt;1.0 G&lt;br&gt;(505) 797-6020&lt;br&gt;www.nmbarcle.org</td>
</tr>
</tbody>
</table>

G = General  E = Ethics  P = Professionalism  VR = Video Replay
Programs have various sponsors; contact appropriate sponsor for more information.
18 Craig Othmer Memorial Procurement Code Institute
Santa Fe
Center for Legal Education of NMSBF
3.0 G, 1.0 E
(505) 797-6020
www.nmbarcle.org

18 Health Care Regulation Fundamentals
Albuquerque
The Point CLE
5.5 G
(303) 242-6837

21 When a Prosecutor Withholds Exculpatory Evidence
Teleconference
TRT, Inc.
2.0 E
1-800-672-6253
www.trtcle.com

21 Advanced Sales and Use Tax
Albuquerque
Lorman Education
6.6 G
(866) 352-9539
www.lorman.com

21 Lawyer Exposure in Public Offerings
Teleconference
TRT, Inc.
2.0 E
1-800-672-6253
www.trtcle.com

22 Understanding “Earn-Outs”: Proving the Value of a Business Over Time
Teleseminar
Center for Legal Education of NMSBF
1.0 G
(505) 797-6020
www.nmbarcle.org

22 Should Corporate Counsel be Corporate Conscience?
Teleconference
TRT, Inc.
1.0 E
1-800-672-6253
www.trtcle.com

22 Civil Court Judicial Forum
Albuquerque
NBI, Inc.
6.0 G
1-800-930-6182
www.nbi-sems.com

22 Legal Ethics of Representing Unpopular Causes and Clients
Teleconference
TRT, Inc.
2.0 E
1-800-672-6253
www.trtcle.com

23 When a Prosecutor Withholds Exculpatory Evidence
Teleconference
TRT, Inc.
2.0 E
1-800-672-6253
www.trtcle.com

23 Lawyer Exposure in Public Offerings
Teleconference
TRT, Inc.
2.0 E
1-800-672-6253
www.trtcle.com

24 Understanding E-Discovery in Small Cases
Teleseminar
Center for Legal Education of NMSBF
1.0 G
(505) 797-6020
www.nmbarcle.org

24 Lawyer Exposure in Public Offerings
Teleconference
TRT, Inc.
2.0 E
1-800-672-6253
www.trtcle.com

25 Annual Employment Law Update
Las Cruces
Southern New Mexico Society for Human Resources
4.5 G
(575) 525-8827

25 Lawyer Substance Abuse Addictions and Consequences
Telephone Seminar
TRT, Inc.
1.0 E, 1.0 P
1-800-672-6253
www.trtcle.com

26-28 Canada and New England Fall Discovery Cruise
Center for Legal Education of NMSBF
1.5 E, 1.0 P
(505) 797-6020
www.nmbarcle.org

28 Sit, Stay, Roll Over No More
Telephone Seminar
TRT, Inc.
1.0 E, 1.0 P
1-800-672-6271
www.trtcle.com

29 Estate Planning and Tax Symposium
State Bar Center
Center for Legal Education of NMSBF
13.6 G (Both Days)
(505) 797-6020
www.nmbarcle.org

29 Estate and Gift Tax Audits
Teleseminar
Center for Legal Education of NMSBF
1.0 G
(505) 797-6020
www.nmbarcle.org

29 Ethics Workout: Mental Aerobics for Solving Ethics Problems
Teleconference
TRT, Inc.
2.0 E
1-800-672-6253
www.trtcle.com

30 When a Prosecutor Withholds Exculpatory Evidence
Teleconference
TRT, Inc.
2.0 E
1-800-672-6253
www.trtcle.com

30 Lawyer Exposure in Public Offerings
Teleconference
TRT, Inc.
2.0 E
1-800-672-6253
www.trtcle.com
**WRITS OF CERTIORARI**

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

Kathleen Jo Gibson, Chief Clerk New Mexico Supreme Court

PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860

**Effective August 31, 2009**

<table>
<thead>
<tr>
<th>Petitions for Writ of Certiorari Filed and Pending:</th>
<th>Date Petition Filed</th>
</tr>
</thead>
<tbody>
<tr>
<td>NO. 31,922 State v. Terrazas</td>
<td>(COA 27,613)</td>
</tr>
<tr>
<td>NO. 31,919 Sedillo v. Hatch</td>
<td>(12-501)</td>
</tr>
<tr>
<td>NO. 31,916 State v. Trujillo</td>
<td>(COA 27,999)</td>
</tr>
<tr>
<td>NO. 31,915 Caruso v. Los Ranchos</td>
<td>(COA 29,660)</td>
</tr>
<tr>
<td>NO. 31,914 State v. Sprayberry</td>
<td>(COA 29,277)</td>
</tr>
<tr>
<td>NO. 31,912 State v. Baca</td>
<td>(COA 29,368)</td>
</tr>
<tr>
<td>NO. 31,910 State v. Henderickson</td>
<td>(COA 29,349)</td>
</tr>
<tr>
<td>NO. 31,909 State v. Barea</td>
<td>(COA 27,589)</td>
</tr>
<tr>
<td>NO. 31,908 State v. Gutierrez</td>
<td>(COA 29,004)</td>
</tr>
<tr>
<td>NO. 31,907 Edward C. v. City of Albuquerque</td>
<td>(COA 27,864)</td>
</tr>
<tr>
<td>NO. 31,911 Gardea v. Gardea</td>
<td>(COA 29,275)</td>
</tr>
<tr>
<td>NO. 31,904 State v. Duran</td>
<td>(COA 29,123)</td>
</tr>
<tr>
<td>NO. 31,902 State v. Sipes</td>
<td>(COA 29,156)</td>
</tr>
<tr>
<td>NO. 31,901 State v. Montoya</td>
<td>(COA 29,464)</td>
</tr>
<tr>
<td>NO. 31,900 State v. Saucedo</td>
<td>(COA 29,284)</td>
</tr>
<tr>
<td>NO. 31,899 Torres v. Heredia</td>
<td>(12-501)</td>
</tr>
<tr>
<td>NO. 31,898 Vasquez v. Heredia</td>
<td>(12-501)</td>
</tr>
<tr>
<td>NO. 31,859 State v. Thyberg</td>
<td>(COA 27,015)</td>
</tr>
<tr>
<td>NO. 31,896 Clark v. Sims</td>
<td>(COA 27,782)</td>
</tr>
<tr>
<td>NO. 31,892 State v. Guerrero</td>
<td>(COA 29,373)</td>
</tr>
<tr>
<td>NO. 31,891 State v. Gonzales</td>
<td>(COA 29,297)</td>
</tr>
<tr>
<td>NO. 31,890 Lucero v. Merced</td>
<td>(COA 29,323)</td>
</tr>
<tr>
<td>NO. 31,889 State v. Pinto</td>
<td>(COA 29,281)</td>
</tr>
<tr>
<td>NO. 31,888 State v. Perry</td>
<td>(COA 28,983)</td>
</tr>
<tr>
<td>NO. 31,886 Deluca v. Janecka</td>
<td>(12-501)</td>
</tr>
<tr>
<td>NO. 31,885 State v. Dorris</td>
<td>(COA 29,230)</td>
</tr>
<tr>
<td>NO. 31,884 Moongate v. Las Cruces</td>
<td>(COA 26,936)</td>
</tr>
<tr>
<td>NO. 31,883 State v. James</td>
<td>(COA 29,264)</td>
</tr>
<tr>
<td>NO. 31,881 State v. Portis</td>
<td>(COA 29,201)</td>
</tr>
<tr>
<td>NO. 31,880 State v. Cline</td>
<td>(COA 29,173)</td>
</tr>
<tr>
<td>NO. 31,879 State v. Harris</td>
<td>(COA 28,887)</td>
</tr>
<tr>
<td>NO. 31,906 Kennedy v. Heredia</td>
<td>(12-501)</td>
</tr>
<tr>
<td>NO. 31,877 State v. Cauffman</td>
<td>(COA 29,012)</td>
</tr>
<tr>
<td>NO. 31,875 Esquibel v. City of Santa Fe</td>
<td>(COA 27,548)</td>
</tr>
<tr>
<td>NO. 31,871 State v. Jordan</td>
<td>(COA 29,303)</td>
</tr>
<tr>
<td>NO. 31,872 State v. Dombos</td>
<td>(COA 28,994)</td>
</tr>
<tr>
<td>NO. 31,869 State v. Thompson</td>
<td>(COA 29,419)</td>
</tr>
<tr>
<td>NO. 31,868 State v. Martinez</td>
<td>(COA 29,199)</td>
</tr>
<tr>
<td>NO. 31,867 State v. Shelby</td>
<td>(COA 29,100)</td>
</tr>
<tr>
<td>NO. 31,780 Lacour v. Heredia</td>
<td>(12-501)</td>
</tr>
<tr>
<td>NO. 31,845 Guzman v. Laguna Development Corp.</td>
<td>(COA 27,827)</td>
</tr>
<tr>
<td>NO. 31,746 State v. Kirby</td>
<td>(COA 28,828)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Certiorari Granted but not yet Submitted to the Court:</th>
<th>Date Petition Issued</th>
</tr>
</thead>
<tbody>
<tr>
<td>NO. 31,839 State v. Lopez</td>
<td>(COA 27,862)</td>
</tr>
<tr>
<td>NO. 31,828 Kavel v. Romero</td>
<td>(12-501)</td>
</tr>
<tr>
<td>NO. 31,734 Santiago v. Tapia</td>
<td>(12-501)</td>
</tr>
<tr>
<td>NO. 31,806 Loera v. Moya</td>
<td>(12-501)</td>
</tr>
<tr>
<td>NO. 31,799 Garcia v. Tapia</td>
<td>(12-501)</td>
</tr>
<tr>
<td>NO. 31,701 State v. Brusuelas</td>
<td>(COA 27,107)</td>
</tr>
<tr>
<td>NO. 31,728 Garcia v. State (On rehearing)</td>
<td>(12-501)</td>
</tr>
<tr>
<td>NO. 31,430 State v. Ochoo</td>
<td>(COA 28,175)</td>
</tr>
<tr>
<td>NO. 31,287 Waterhouse v. Heredia</td>
<td>(12-501)</td>
</tr>
<tr>
<td>NO. 31,491 Ideal v. Burlington Resources Oil &amp; Gas</td>
<td>(COA 29,025)</td>
</tr>
<tr>
<td>NO. 31,526 State v. Phillips</td>
<td>(COA 27,019)</td>
</tr>
<tr>
<td>NO. 31,549 City of Santa Fe v. Travelers Casualty</td>
<td>(COA 28,944)</td>
</tr>
<tr>
<td>NO. 31,433 Romero v. Philip Morris, Inc.</td>
<td>(COA 26,993)</td>
</tr>
<tr>
<td>NO. 31,510 State v. Smith</td>
<td>(COA 27,704)</td>
</tr>
<tr>
<td>NO. 31,100 Allen v. LeMaster</td>
<td>(12-501)</td>
</tr>
<tr>
<td>NO. 31,546 Gomez v. Chavarria</td>
<td>(COA 28,072/28,073)</td>
</tr>
<tr>
<td>NO. 31,567 State v. Guthrie</td>
<td>(COA 27,022)</td>
</tr>
<tr>
<td>NO. 31,603 Guest v. Allstate Ins. Co.</td>
<td>(COA 27,253)</td>
</tr>
<tr>
<td>NO. 31,602 Allstate Ins. Co. v. Guest</td>
<td>(COA 27,253)</td>
</tr>
<tr>
<td>NO. 31,612 Ortiz v. Overland Express</td>
<td>(COA 28,135)</td>
</tr>
<tr>
<td>NO. 31,656 State v. Rivera</td>
<td>(COA 25,798)</td>
</tr>
<tr>
<td>NO. 31,637 Akins v. United Steel Engineering</td>
<td>(COA 27,132)</td>
</tr>
<tr>
<td>NO. 31,686 McNeill v. Rice Engineering</td>
<td>(COA 29,207)</td>
</tr>
<tr>
<td>NO. 31,717 State v. Johnson</td>
<td>(COA 27,867)</td>
</tr>
<tr>
<td>NO. 31,719 State v. Lara</td>
<td>(COA 27,166)</td>
</tr>
<tr>
<td>NO.</td>
<td>Case Title</td>
</tr>
<tr>
<td>-------</td>
<td>-------------------------------------------------</td>
</tr>
<tr>
<td>31,738</td>
<td>State v. Marlene C.</td>
</tr>
<tr>
<td>31,723</td>
<td>State v. Mendez</td>
</tr>
<tr>
<td>31,733</td>
<td>State v. Delgado</td>
</tr>
<tr>
<td>31,724</td>
<td>Albuquerque Commons v. City of Albuquerque</td>
</tr>
<tr>
<td>31,732</td>
<td>State v. Smile</td>
</tr>
<tr>
<td>31,739</td>
<td>State v. Marquez</td>
</tr>
<tr>
<td>31,740</td>
<td>State v. McCorkle</td>
</tr>
<tr>
<td>31,743</td>
<td>State v. Marquez</td>
</tr>
<tr>
<td>31,741</td>
<td>State v. Gardner</td>
</tr>
<tr>
<td>31,775</td>
<td>State v. Warren</td>
</tr>
<tr>
<td>31,703</td>
<td>State v. Nez</td>
</tr>
<tr>
<td>31,813</td>
<td>State v. Soliz</td>
</tr>
<tr>
<td>31,750</td>
<td>Kilgore v. Fuji</td>
</tr>
<tr>
<td>31,791</td>
<td>State v. Actitty</td>
</tr>
<tr>
<td>31,854</td>
<td>State v. Albarez</td>
</tr>
<tr>
<td>31,812</td>
<td>State v. Sena</td>
</tr>
</tbody>
</table>

**Certiiorari Granted and Submitted to the Court:**

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

<table>
<thead>
<tr>
<th>NO.</th>
<th>Case Title</th>
<th>Submission Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>30,657</td>
<td>State v. Nick R.</td>
<td>10/29/08</td>
</tr>
<tr>
<td>30,787</td>
<td>Cable v. Wells Fargo Bank (On reconsideration)</td>
<td>12/15/08</td>
</tr>
<tr>
<td>30,937</td>
<td>State v. Garcia</td>
<td>12/16/08</td>
</tr>
<tr>
<td>30,953</td>
<td>State v. Santiago</td>
<td>1/12/09</td>
</tr>
<tr>
<td>31,329</td>
<td>Kirby v. Guardian Life (COA 27,624)</td>
<td>2/9/09</td>
</tr>
<tr>
<td>30,956</td>
<td>Davis v. Devon (COA 28,147/28,154)</td>
<td>2/9/09</td>
</tr>
<tr>
<td>30,957</td>
<td>Ideal v. America (COA 28,148/28,153)</td>
<td>2/9/09</td>
</tr>
<tr>
<td>30,958</td>
<td>Smith v. Conocophillips (COA 28,151/28,152)</td>
<td>2/9/09</td>
</tr>
<tr>
<td>31,263</td>
<td>Garcia v. Gutierrez</td>
<td>2/10/09</td>
</tr>
<tr>
<td>31,192</td>
<td>Reule Sun Corporation v. Valles (On rehearing)</td>
<td>3/9/09</td>
</tr>
<tr>
<td>31,258</td>
<td>Marchstadt v. Lockheed (COA 27,222)</td>
<td>3/11/09</td>
</tr>
</tbody>
</table>

**Petition for Writ of Certiorari Denied:**

<table>
<thead>
<tr>
<th>NO.</th>
<th>Case Title</th>
<th>COA No.</th>
</tr>
</thead>
<tbody>
<tr>
<td>31,515</td>
<td>State v. Wyman</td>
<td>31,539</td>
</tr>
<tr>
<td>31,279</td>
<td>Lions Gate v. D’Antonio</td>
<td>28,668</td>
</tr>
<tr>
<td>31,116</td>
<td>State v. Anaya</td>
<td>27,114</td>
</tr>
<tr>
<td>31,244</td>
<td>State v. Slayton</td>
<td>27,892</td>
</tr>
<tr>
<td>31,374</td>
<td>Schultz v. Pojoaque Tribal Police Dept.</td>
<td>28,508</td>
</tr>
<tr>
<td>31,365</td>
<td>State v. Lucero</td>
<td>27,364</td>
</tr>
<tr>
<td>31,215</td>
<td>State v. Johnson</td>
<td>26,878</td>
</tr>
<tr>
<td>30,766</td>
<td>State v. Jones</td>
<td>27,342</td>
</tr>
<tr>
<td>31,363</td>
<td>Hanosh v. King</td>
<td>28,175</td>
</tr>
<tr>
<td>31,364</td>
<td>Mountain States v. Allstate Ins. Co.</td>
<td>28,686</td>
</tr>
<tr>
<td>31,325</td>
<td>Kersey v. Hatch</td>
<td>12-501</td>
</tr>
<tr>
<td>31,288</td>
<td>State v. Savedra</td>
<td>27,288/27,289/27,290</td>
</tr>
<tr>
<td>31,265</td>
<td>State v. Hill</td>
<td>27,401</td>
</tr>
<tr>
<td>31,416</td>
<td>Carlsbad Hotel Associates v. Patterson</td>
<td>27,922</td>
</tr>
<tr>
<td>31,539</td>
<td>McGary v. AMS Staff Leasing</td>
<td>28,867</td>
</tr>
<tr>
<td>31,308</td>
<td>State v. Sosa</td>
<td>26,863</td>
</tr>
<tr>
<td>31,151</td>
<td>State v. Munoz</td>
<td>26,956</td>
</tr>
<tr>
<td>31,245</td>
<td>State v. Littlefield</td>
<td>27,504</td>
</tr>
<tr>
<td>31,186</td>
<td>State v. Bullcoming</td>
<td>26,413</td>
</tr>
<tr>
<td>31,360</td>
<td>State v. Morales</td>
<td>26,469</td>
</tr>
</tbody>
</table>
### Published Opinions

<table>
<thead>
<tr>
<th>No.</th>
<th>Court Dist</th>
<th>Case Name</th>
<th>Opinion</th>
<th>Date Filed</th>
</tr>
</thead>
<tbody>
<tr>
<td>27168</td>
<td>2nd Jud Dist Bernalillo</td>
<td>CR-94-2016, STATE v H RIVERA (affirm in part, reverse in part)</td>
<td></td>
<td>8/19/2009</td>
</tr>
<tr>
<td>28353</td>
<td>9th Jud Dist Roosevelt</td>
<td>CV-07-201, OS FARMS v NM AMERICAN WATER (remand)</td>
<td></td>
<td>8/19/2009</td>
</tr>
<tr>
<td>27891</td>
<td>9th Jud Dist Curry</td>
<td>CR-06-707, STATE v D LOPEZ (affirm in part, reverse in part and remand)</td>
<td></td>
<td>8/20/2009</td>
</tr>
</tbody>
</table>

### Unpublished Opinions

<table>
<thead>
<tr>
<th>No.</th>
<th>Court Dist</th>
<th>Case Name</th>
<th>Opinion</th>
<th>Date Filed</th>
</tr>
</thead>
<tbody>
<tr>
<td>27606</td>
<td>11th Jud Dist San Juan</td>
<td>CR-06-848, STATE v D TANNER (affirm)</td>
<td></td>
<td>8/17/2009</td>
</tr>
<tr>
<td>27927</td>
<td>11th Jud Dist San Juan</td>
<td>CR-06-1038, STATE v M MONTOYA (affirm)</td>
<td></td>
<td>8/17/2009</td>
</tr>
<tr>
<td>28023</td>
<td>2nd Jud Dist Bernalillo</td>
<td>CV-02-9124, N VIGIL v PROGRESSIVE (reverse and remand)</td>
<td></td>
<td>8/18/2009</td>
</tr>
<tr>
<td>28299</td>
<td>4th Jud Dist San Miguel</td>
<td>CR-07-110, STATE v J RUDOLPH (vacate)</td>
<td></td>
<td>8/18/2009</td>
</tr>
<tr>
<td>28393</td>
<td>2nd Jud Dist Bernalillo</td>
<td>CV-02-9124, N VIGIL v PROGRESSIVE (reverse and remand)</td>
<td></td>
<td>8/18/2009</td>
</tr>
<tr>
<td>28902</td>
<td>1st Jud Dist Rio Arriba</td>
<td>DM-04-122, V MUNIZ v E ESTRADA (affirm)</td>
<td></td>
<td>8/18/2009</td>
</tr>
<tr>
<td>29446</td>
<td>10th Jud Dist Quay</td>
<td>CV-08-129, NM BANK &amp; TRUST v G CORLISS (dismiss)</td>
<td></td>
<td>8/19/2009</td>
</tr>
<tr>
<td>28405</td>
<td>3rd Jud Dist Dona Ana</td>
<td>CR-06-282, STATE v F MURIEL (affirm)</td>
<td></td>
<td>8/20/2009</td>
</tr>
<tr>
<td>28384</td>
<td>13th Jud Dist Valencia</td>
<td>CV-01-527, RODEO v COLUMBIA CASUALTY (affirm in part, reverse in part)</td>
<td></td>
<td>8/20/2009</td>
</tr>
<tr>
<td>28445</td>
<td>13th Jud Dist Valencia</td>
<td>CV-01-527, E BACA v RODEO INC (affirm in part, reverse in part)</td>
<td></td>
<td>8/20/2009</td>
</tr>
<tr>
<td>28511</td>
<td>11th Jud Dist San Juan</td>
<td>JR-07-301, STATE v ROBERT F (affirm)</td>
<td></td>
<td>8/21/2009</td>
</tr>
<tr>
<td>29369</td>
<td>WCA-08-370, I HERNANDEZ v E MANZANARES (affirm)</td>
<td></td>
<td>8/21/2009</td>
<td></td>
</tr>
</tbody>
</table>

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

### Recent Rule-Making Activity

**Effective August 24, 2009**

- To view pending **proposed rule changes** visit the New Mexico Supreme Court’s Web site: [http://nmsupremecourt.nmcourts.gov/](http://nmsupremecourt.nmcourts.gov/)
- To view recently **approved rule changes**, visit the New Mexico Compilation Commission’s Web site: [http://www.nmcompcomm.us/](http://www.nmcompcomm.us/)

#### Pending Proposed Rule Changes

<table>
<thead>
<tr>
<th>Rule</th>
<th>Description</th>
<th>Comment Deadline</th>
</tr>
</thead>
<tbody>
<tr>
<td>1-096</td>
<td>Challenge of nominating petition (Rules of Civil Procedure for the District Courts)</td>
<td>09/08/09</td>
</tr>
<tr>
<td>13-1636</td>
<td>Malicious abuse of process defined; general statement of elements (UJI Civil)</td>
<td>08/24/09</td>
</tr>
<tr>
<td>13-1637</td>
<td>Malicious abuse of process; “judicial proceeding” defined (UJI Civil)</td>
<td>08/24/09</td>
</tr>
<tr>
<td>13-1638</td>
<td>Malicious abuse of process; “active participation” defined (UJI Civil)</td>
<td>08/24/09</td>
</tr>
<tr>
<td>13-1639</td>
<td>Misuse of process; lack of probable cause (UJI Civil)</td>
<td>08/24/09</td>
</tr>
<tr>
<td>13-1640</td>
<td>Misuse of process; procedural impropriety, defined (UJI Civil)</td>
<td>08/24/09</td>
</tr>
<tr>
<td>13-1641</td>
<td>Malicious abuse of process; illegitimate motive (UJI Civil)</td>
<td>08/24/09</td>
</tr>
<tr>
<td>13-1642</td>
<td>Malicious abuse of process; bifurcated trial; instructions prior to bifurcated claim of malicious abuse of process (UJI Civil)</td>
<td>08/24/09</td>
</tr>
<tr>
<td>3-202</td>
<td>Summons (Rules of Civil Procedure for the Metropolitan Courts)</td>
<td>08/10/09</td>
</tr>
<tr>
<td>9-102B</td>
<td>Certificate of recusal (Criminal forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>9-103B</td>
<td>Notice of recusal (Criminal forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>4-225</td>
<td>Court’s certificate of service (Civil forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>9-222</td>
<td>Court’s certificate of service (Criminal forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>4-221</td>
<td>Certificate of service (Civil forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>4-221A</td>
<td>Party’s certificate of service (Civil forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>9-221</td>
<td>Certificate of service (Criminal forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>9-221A</td>
<td>Party’s certificate of service (Criminal forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>4-102</td>
<td>Certificate of excusal or recusal (Civil forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>4-103</td>
<td>Notice of excusal (Civil forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>4-104</td>
<td>Notice of recusal (Civil forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>4-102A</td>
<td>Certificate of excusal or recusal (Civil forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>4-103A</td>
<td>Notice of excusal (Civil forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>4-104A</td>
<td>Notice of recusal (Civil forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>4-104B</td>
<td>Notice of assignment (Civil forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>9-103C</td>
<td>Notice of assignment (Criminal forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>6-701</td>
<td>Judgment (Rules of Criminal Procedure for the Magistrate Courts)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>8-701</td>
<td>Judgment (Rules of Procedure for the Municipal Courts)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>6-703</td>
<td>Appeal (Rules of Criminal Procedure for the Magistrate Courts)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>8-703</td>
<td>Appeal (Rules of Procedure for the Municipal Courts)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>2-105</td>
<td>Assignment and designation of judges (Rules of Civil Procedure for the Magistrate Courts)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>6-105</td>
<td>Assignment and designation of judges (Rules of Criminal Procedure for the Magistrate Courts)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>9-612</td>
<td>Order on direct criminal contempt (Criminal forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>9-613</td>
<td>Judgment and sentence on indirect criminal contempt (Criminal forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>9-614</td>
<td>Order on direct civil contempt (Criminal forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>9-615</td>
<td>Order on indirect civil contempt (Criminal forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>9-616</td>
<td>Conditional discharge order (Criminal forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>9-617</td>
<td>Final order of discharge (Criminal forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>9-618</td>
<td>Order finding no violation of probation (Criminal forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>9-619</td>
<td>Order finding probation violation and continuing sentence (Criminal forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>9-620</td>
<td>Probation violation, judgment, and sentence (Criminal forms)</td>
<td>07/27/09</td>
</tr>
<tr>
<td>10-313.1</td>
<td>Representation of multiple siblings (Children’s Court)</td>
<td>07/20/09</td>
</tr>
<tr>
<td>12-502</td>
<td>Certiorari to the Court of Appeals (Rules of Appellate Procedure)</td>
<td>05/04/09</td>
</tr>
<tr>
<td>10-343</td>
<td>Adjudicatory hearing; time limits; continuances (Children’s Court Rules)</td>
<td>04/17/09</td>
</tr>
</tbody>
</table>

#### Recently Approved Rule Changes

**Since Release of 2009 NMRA**

<table>
<thead>
<tr>
<th>Rule</th>
<th>Description</th>
<th>Effective Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>1-096.1</td>
<td>Review of election recall petitions.</td>
<td>09/04/09</td>
</tr>
<tr>
<td>1-016</td>
<td>Pretrial conferences; scheduling; management.</td>
<td>05/15/09</td>
</tr>
<tr>
<td>1-026</td>
<td>General provisions governing discovery.</td>
<td>05/15/09</td>
</tr>
<tr>
<td>1-033</td>
<td>Interrogatories to parties.</td>
<td>05/15/09</td>
</tr>
<tr>
<td>1-034</td>
<td>Production of documents and things and entry upon land for inspection and other purposes.</td>
<td>05/15/09</td>
</tr>
<tr>
<td>1-037</td>
<td>Failure to make discovery; sanctions.</td>
<td>05/15/09</td>
</tr>
<tr>
<td>1-038</td>
<td>Jury trial in civil actions.</td>
<td>12/15/08</td>
</tr>
<tr>
<td>1-045</td>
<td>Subpoena.</td>
<td>05/15/09</td>
</tr>
<tr>
<td>1-045</td>
<td>Subpoena.</td>
<td>08/07/09</td>
</tr>
<tr>
<td>1-045.1</td>
<td>Interstate subpoenas.</td>
<td>08/07/09</td>
</tr>
</tbody>
</table>
1-071.1 Statutory stream system adjudication suits; service and joinder of water rights claimants; responses. 04/08/09
1-071.2 Statutory stream adjudication suits; stream system issues and expedited inter se proceedings. 04/08/09
1-071.3 Statutory stream adjudication suits; annual joint working session. 04/08/09
1-071.4 Statutory stream adjudication suits; ex parte contacts; general problems of administration. 04/08/09
1-071.5 Statutory stream adjudication suits; excusal or recusal of a water judge. 04/08/09
1-074 Administrative appeals; statutory review by district court of administrative decisions or orders. 12/15/08
1-075 Constitutional review by district court of administrative decisions and orders. 12/15/08
1-088 Designation by judge. 04/08/09
1-125 Domestic Relations Mediation Act programs. 05/18/09

RULES OF CIVIL PROCEDURE FOR THE MAGISTRATE COURTS

2-802 Garnishment. 12/31/08

CIVIL FORMS

4-805 Application for writ of garnishment. 09/04/09
4-805B Application for writ of garnishment. 09/04/09
4-803 Claim of exemptions on execution. 05/06/09
4-805B Application for writ of garnishment. 12/31/08

RULES OF CRIMINAL PROCEDURE FOR THE DISTRICT COURTS

5-104 Time. 05/06/09
5-121 Orders; preparation and entry. 05/06/09
5-207 Withdrawn. 04/06/09
5-604 Time of commencement of trial. 11/24/08
5-614 Motion for new trial. 05/06/09
5-704 Death penalty; sentencing. 05/06/09
5-801 Modification of sentence. 05/06/09
5-802 Habeas corpus. 05/06/09

RULES OF CRIMINAL PROCEDURE FOR THE MAGISTRATE COURTS

6-108 Non-attorney prosecutions. 12/31/08
6-110A Audio and audio-visual appearances of defendant. 12/31/08
6-113 Victim’s rights. 12/31/08
6-201 Commencement of action. 12/31/08
6-401 Bail. 12/31/08
6-403 Revocation of release. 12/31/08
6-502 Plea and plea agreements. 12/31/08
6-506 Time of commencement of trial. 01/15/09
6-703 Appeal. 01/15/09

RULES OF CRIMINAL PROCEDURE FOR THE METROPOLITAN COURTS

7-110A Audio and audio-visual appearance of defendant. 09/10/09
7-502 Pleas and plea agreements. 09/10/09
7-106 Excusal; recusal; disability. 01/15/09
7-401 Bail. 02/02/09
7-506 Time of commencement of trial. 01/15/09
7-602 Jury trial. 01/15/09
7-703 Appeal. 01/15/09

RULES OF PROCEDURE FOR THE MUNICIPAL COURTS

8-103 Rules; forms; fees. 12/31/08
8-109A Audio and audio-visual appearances of defendant. 12/31/08
8-111 Non-attorney prosecutions. 12/31/08
8-201 Commencement of action. 12/31/08
8-401 Bail. 12/31/08
8-403 Revocation of Release. 12/31/08
8-501 Arraignment; first appearance. 12/31/08
8-502 Pleas. 12/31/08
8-506 Time of commencement of trial. 01/15/09
8-703 Appeal. 01/15/09

CRIMINAL FORMS

9-102 Certificate of excusal or recusal. 09/10/09
9-102A Certificate of excusal or recusal. 09/10/09
9-406A Guilty plea or no contest plea proceeding. 12/31/08
9-408A Plea and disposition agreement. 12/31/08
9-604 Judgment and Sentence. 05/06/09
9-701 Petition for writ of habeas corpus. 05/06/09

RULES OF APPELLATE PROCEDURE

12-202 Appeals as of right; how taken. 09/04/09
12-308 Computation of time. 09/04/09
12-505 Certiorari to the district court; decisions on review of administrative agency decisions. 09/04/09
12-603 Appeals in actions challenging candidates or nominating petitions; primary or general elections; school board recalls and recalls of elected county officials. 09/04/09
12-302 Appearance, withdrawal or substitution of attorneys. 05/06/09
12-305 Form of papers prepared by parties. 05/25/09
12-404 Rehearings. 05/06/09
12-501 Certiorari to the district court from denial of habeas corpus. 05/06/09
12-607 Certification from other courts. 04/08/09

UJI CIVIL

13-110A Instruction to jury. 12/31/08
13-110B Oath to interpreter. 12/31/08
13-1406 Strict products liability; care not an issue. 05/15/09
RULE-MAKING ACTIVITY

13-1430 Breach of implied warranty of merchantability. 02/02/09
13-305 Causation (proximate cause). 02/02/09
13-306 Independent intervening cause. 02/02/09
13-820 Third-party beneficiary; enforcement of contract. 12/31/08

UJI CRIMINAL
14-5120 Ignorance or mistake of fact. 09/16/09
14-5181 Self defense; nondeadly force by defendant. 09/16/09
14-5183 Self defense; deadly force by defendant. 09/16/09
14-5185 Self defense against excessive force by a peace officer; nondeadly force by defendant. 09/16/09
14-5186 Self defense against excessive force by a peace officer; deadly force by defendant. 09/16/09
14-6018 Special verdict; kidnapping. 09/16/09
14-111 Supplemental jury questionnaire. 02/02/09
14-120 Voir dire of jurors by court. 02/02/09
14-203 Act greatly dangerous to life; essential elements. 02/02/09
14-2212 Aggravated battery on a peace officer with a deadly weapon; essential elements. 02/02/09
14-2217 Aggravated fleeing a law enforcement officer. 02/02/09

RULES GOVERNING ADMISSION TO THE BAR
15-301.2 Legal services provider limited law license for emeritus and non-admitted attorneys. 01/14/09

RULES OF PROFESSIONAL CONDUCT
16-104 Communication (Rules of Professional Conduct) 11/02/09

RULES GOVERNING DISCIPLINE
17-204 Required records. 01/01/10

RULES FOR MINIMUM CONTINUING LEGAL EDUCATION
18-203 Accreditation; course approval; provider reporting. 12/31/08

CODE OF JUDICIAL CONDUCT
21-400 Disqualification. 09/04/09
21-300 A judge shall perform the duties of office impartially and diligently. 03/23/09

RULES GOVERNING THE RECORDING OF JUDICIAL PROCEEDINGS
22-202 Licensing of firms engaged in court reporting or tape monitoring. 09/10/09
22-201 Licensing of court reporters and monitors; power to administer oaths. 12/31/08

RULES GOVERNING REVIEW OF JUDICIAL STANDARDS COMMISSION
27-104 Filing and service. 09/04/09

LOCAL RULES FOR THE SECOND JUDICIAL DISTRICT COURT
LR2-123 Opposed motions and other opposed matters; filings; hearings. 06/01/09
LR2-504 Court clinic mediation program and other services for child-related disputes. 05/18/09
LR2-Form T Court clinic referral order. 05/18/09
OPINION

JONATHAN B. SUTIN, Judge

[1] Defendant challenges his convictions for forgery and attempted fraud over $250 stemming from the same conduct as violative of double jeopardy. We reverse Defendant’s conviction for attempted fraud.

BACKGROUND

[2] Defendant was charged in October 2005 and, following a jury trial, was convicted of forgery in violation of NMSA 1978, Section 30-16-10 (1963) (amended 2006) and of attempted fraud over $250 in violation of NMSA 1978, Section 30-16-6 (1987) (amended 2006) and Section 30-28-1 (1963). At trial, the State presented evidence that on July 5, 2005, Defendant attempted to cash a $1000 check at the Bank of the Southwest (the Bank) in Roswell, New Mexico. According to the testimony of an employee of the Bank, Defendant drove up to the Bank’s drive-up window and presented a check from Delton’s Plumbing Company, Inc. made payable to “Nicklas Pina,” along with a driver’s license bearing Defendant’s picture but with the name and signature of “Nicklas Pina.” The employee noticed that the signature on the check did not match her recollection of the signature on file with the Bank for Delton’s Plumbing. The employee asked her supervisor to pull the signature card for Delton’s Plumbing and handed the check and driver’s license to him. At that point, the supervisor noticed that it appeared the name on the license had been altered. The signature on the check was compared to the signature on the Bank’s signature card, and they did not match. The supervisor told Defendant that someone from Delton’s Plumbing was coming to verify the check, and he immediately drove away leaving the check and driver’s license behind.

[3] Defendant’s uncle and aunt own Delton’s Plumbing and, up until April 2005, Defendant had “come and gone several times.” Defendant’s aunt told Detective Miguel Lopez that the person in the driver’s license picture was her nephew. On that same day, she also noticed that about eight checks were missing from the business, including the one Defendant attempted to cash. Defendant’s uncle testified at trial that he had not authorized issuance of the check that Defendant tried to cash. Defendant’s aunt also testified at trial that she had not authorized issuance of the check that Defendant tried to cash. Defendant’s cousin, the secretary and bookkeeper of Delton’s Plumbing, who was also authorized to sign the business’s checks, further testified at trial that she had not authorized issuance of the check that Defendant tried to cash. The jury found Defendant guilty of forgery and attempted fraud over $250.

{4} Before sentencing, Defendant moved to merge the forgery count and the attempted fraud over $250 count. He asserted that because passing the check was a single act and both convictions stemmed from the same unitary act, sentencing for both counts violated the double jeopardy clauses of the United States and New Mexico Constitutions. After a hearing on the motion, the district court determined that different acts were involved in presenting the check to try to get money for it and in forging the check with the intent to deceive or injure, and the court denied Defendant’s motion. On appeal, Defendant challenges his forgery and attempted fraud convictions on double jeopardy grounds. We discuss the offenses in more detail in our double jeopardy analysis.

DISCUSSION


Multiple Punishments

[6] We analyze this multiple punishment, double-description, double-jeopardy challenge pursuant to Swafford v. State, 112

1. Unitary Conduct

[7] First, we determine if Defendant’s conduct underlying the offenses was unitary. Swafford, 112 N.M. at 13, 810 P.2d at 1233. To make this determination, we evaluate “whether Defendant’s acts are separated by sufficient indicia of distinctness,” including any separation “in time and space, the quality and nature of the acts, and the objectives and results of the acts.” Schackow, 2006-NMCA-123, ¶ 18 (internal quotation marks and citations omitted). “If sufficient indicia of distinctness exist and a defendant’s behavior may be viewed as two distinct acts, the inquiry ends because double jeopardy does not bar multiple convictions when the conduct is non-unitary.” Caldwell, 2008-NMCA-049, ¶ 7.

[8] The State argues that the acts we are to consider are forgery of the check and attempted fraud by presenting the check to the Bank and argues that these were distinct acts because Defendant presented the check after it had already been forged. We disagree. The facts in this case appear to be similar to those in Caldwell, where the defendant presented a forged check to a retail store to be cashed, carried away the proceeds, and was charged with both forgery and fraud. Id. ¶ 9. This Court concluded that the defendant’s convictions were based on “a discrete act, not separated by time or space, and not distinguishable based on the nature, quality, or result of the act, or [the defendant’s] objective in performing the act” and determined that the conduct was unitary. Id. We conclude that Defendant’s conduct in this case was unitary. As we discuss in more detail later in this opinion, Defendant’s forgery conviction was based on giving or delivering a check knowing it to have a false signature and with the intent to deceive the Bank. Defendant’s attempted fraud conviction was based on his attempt to misrepresent the validity of the check to the Bank and with the intent to deceive the Bank. The convictions were based on the same conduct and constituted a single, discrete act. When the conduct is unitary, we continue the Swafford analysis and determine if the Legislature intended multiple punishments for the unitary conduct. 112 N.M. at 14, 810 P.2d at 1234. We therefore turn to the second prong of the Swafford analysis. See Caldwell, 2008-NMCA-049, ¶ 9.

2. Legislative Intent

[9] “The sole limitation on multiple punishments is legislative intent.” Id. ¶ 10 (internal quotation marks and citation omitted). “Absent a clear expression of legislative intent, a court first must apply the Blockburger [v. United States, 284 U.S. 299 (1932),] test to the elements of each statute.” Swafford, 112 N.M. at 14, 810 P.2d at 1234. In applying the Blockburger test, this Court compares the elements of each crime with the elements of the other to determine whether the Legislature intended separate punishments under each statute. Swafford, 112 N.M. at 14, 810 P.2d at 1234. If this test “establishes that one statute is subsumed within the other, the inquiry is over and the statutes are the same for double jeopardy purposes—punishment cannot be had for both.” Id. However, “if we conclude that each statute requires proof of an element that the other does not, then a presumption arises that our [L]egislature intended for the conduct to result in separately punishable offenses.” Caldwell, 2008-NMCA-049, ¶ 11. That presumption, nevertheless, can be rebutted by other indicia of legislative intent such as language, history, subject of the statutes, and the quantum of punishment. Swafford, 112 N.M. at 14-15, 810 P.2d at 1234-35.

3. Applying the Blockburger Test

[10] We see no clear expression of legislative intent as to imposing multiple punishments for forgery and attempted fraud. See Caldwell, 2008-NMCA-049, ¶ 11 (stating that there are no clear legislative expressions in either the forgery or fraud statute as to whether to impose multiple punishments). Therefore, we apply the Blockburger test. Caldwell, 2008-NMCA-049, ¶ 11.

[11] The forgery offense contained in the criminal information filed against Defendant set out the elements of forgery contained in Section 30-16-10(A) and (B). Subsection (A) proscribes “falsely making or altering any signature”; and Subsection (B) proscribes “issuing or transferring a forged writing.” In regard to the check, however, the jury was not instructed based on elements in Subsection (A). The jury was instructed that for it to find Defendant guilty of forgery related to the check, the State was required to prove that “[t]he [D]efendant gave or delivered to [the] Bank . . . a check knowing it to have a false signature intending to injure, deceive or cheat [the] Bank.” This instruction contained only elements of Subsection (B) of the forgery statute, and Defendant was therefore found guilty and convicted only under Subsection (B) and only under the statutory element of “transferring” in that section. Section 30-16-10(B). Although the forgery statute provides for alternate ways of prosecuting forgery, when applying the Blockburger test to offenses, such as forgery, that may “be charged in alternate ways, we look only to the elements of the statute[] as charged to the jury and disregard the inapplicable statutory elements.” Caldwell, 2008-NMCA-049, ¶ 13 (alteration in original) (internal quotation marks and citation omitted).

[12] As to the attempted fraud charge, the jury was instructed that for it to find Defendant guilty of attempt to commit fraud over $250, it had to find that Defendant “began to do an act which constituted a substantial part of the crime of fraud over $250 but failed to complete the crime.” The jury was also instructed on what it must find as to fraud, namely, that “[t]he [D]efendant, by any words or conduct, misrepresented a fact to [the] Bank . . . intending to deceive or cheat [the] Bank” and “[b]ecause of the misrepresentation and [the] Bank[s] . . . reliance on it, [D]efendant obtained $1000.”

[13] While at first glance, it would appear that Caldwell controls this elements issue, on closer look we do not think Caldwell is controlling. In Caldwell, the defendant was convicted of forgery and fraud. Id. ¶ 1. To convict under the fraud statute, the prosecution had to prove a misappropriation of money, an element that is not required under the forgery statute. In the present case, the State did not have to prove that Defendant misappropriated something of value, only that he attempted to misappropriate something of value; that is, that he began to do an act which constituted a substantial part of the crime of fraud over $250, but failed to commit the crime. Thus, in comparing elements in the two crimes, each crime involved the elements of a false writing that Defendant handed to the Bank and the intent to cheat or deceive the Bank in order to obtain money from the Bank. The amount involved exceeded $250. Along with the fact that a check was involved, these were the essential facts and elements of both offenses that went to the jury.

[14] In this case, in order for the false-writing element of forgery to be met, the element of attempted fraud using a false writing was also necessarily met. See Schackow, 2006-NMCA-123, ¶ 23 (concluding that in order for the elements of
assault with intent to commit criminal sexual penetration to be met, the elements of attempted criminal sexual penetration in the third degree must also necessarily be met). Thus, looking at the elements of the offenses as given to the jury, the forgery offense was subsumed within the attempted fraud offense. Where one offense is subsumed within another, “the inquiry is over and the statutes are the same for double jeopardy purposes.” Swafford, 112 N.M. at 14, 810 P.2d at 1234.

{15} We recognize that the attempted fraud offense as given to the jury contained an element not required in the forgery offense, namely, that the writing had a value over $250. However, we are hard pressed to determine that the $250 value element in the fraud offense is a sufficiently material element to preclude a conclusion that the forgery offense is subsumed within the attempted fraud offense. The primary elements of fraud are an intentional misappropriation or taking of anything of value. Section 30-16-6. Particular values are significant only for division of gravity from a petty misdemeanor ($100 or less) to a second degree felony (over $20,000). See § 30-16-6 (1987). We see no reasonable basis on which to figure the particular value into the double jeopardy analysis. See Schackow, 2006-NMCA-123, ¶ 21 (stating that “[i]n considering the elements of the offenses, we note that the enumeration of different aggravating factors . . . [do] not evince a legislative intent to authorize multiple punishments for the same act” (second alteration in original) (internal quotation marks and citation omitted)); see also Santillanes, 2001-NMSC-018, ¶ 48 (Minzner, J., dissenting) (stating that “[t]he existence of the greater-inclusive/lesser-included offenses is determined by the elements of offenses, not by the degree of felony”).

{16} Forgery carries the greater punishment and attempted fraud carries the lesser punishment. When double jeopardy exists, the offense carrying the lesser punishment is to be vacated. See Schackow, 2006-NMCA-123, ¶ 25 (reading Santillanes, 2001-NMSC-018, ¶ 28, to require that the “lesser” offense in terms of the level of punishment be vacated). Therefore, Defendant’s conviction for attempted fraud must be vacated.

CONCLUSION

{17} We hold that Defendant’s convictions violated double jeopardy and reverse his attempted fraud conviction. We remand to the district court and instruct the court to vacate Defendant’s conviction and sentence for attempted fraud.

{18} IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:

CELCIA FOY CASTILLO, Judge

LINDA M. VANZI, Judge
Certiorari Denied, No. 31,729, June 23, 2009

From the New Mexico Court of Appeals

Opinion Number: 2009-NMCA-076

Topic Index:
Criminal Law: Driving While Intoxicated
Criminal Procedure: Substantial or Sufficient Evidence
Evidence: Admissibility of Evidence; Blood/Breath Tests; and Substantial or Sufficient Evidence

STATE OF NEW MEXICO,
Plaintiff-Appellee,
versus
JAMES THOMPSON,
Defendant-Appellant.
No. 28,358 (filed: May 11, 2009)

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
CARL J. BUTKUS, District Judge

GARY K. KING
Attorney General
Santa Fe, New Mexico
JACQUELINE R. MEDINA
Assistant Attorney General
Albuquerque, New Mexico

HUGH W. DANNER
Chief Public Defender
Santa Fe, New Mexico
LINDA YEN
Assistant Public Defender
Albuquerque, New Mexico

for Appellee

OPINION

JONATHAN B. SATAIN, Judge

Defendant James Thompson was convicted of driving while intoxicated (DWI) after a jury trial in the metropolitan court. The metropolitan court sentenced Defendant for aggravated DWI third offense. Defendant appealed his conviction to the district court arguing that the lower court erred in admitting his breath-alcohol test (BAT) results due to lack of foundation to establish a valid twenty-minute deprivation period because the officer used two unsynchronized time devices to establish the beginning and end of the deprivation period and because the officer offered contradictory testimony of when and how he began and ended the deprivation period. We affirm the admission of the BAT results and remand to the metropolitan court for re-sentencing for DWI third offense.

BACKGROUND

Albuquerque Police Officer Joshua Otzenberger witnessed a truck make a lane change around another vehicle and then return back to the original lane of travel. It was based on that maneuver that the officer believed Defendant’s truck was traveling faster than the posted speed limit. The officer conducted a traffic stop, informed Defendant of the reason for the stop, and asked Defendant to produce his driver’s license, proof of insurance, and registration. Defendant gave the officer his license and registration, but he did not have proof of insurance. Officer Otzenberger noticed a strong odor of alcoholic beverage coming from Defendant’s person and that Defendant had bloodshot, watery eyes.

Based on the signs of intoxication, the officer asked Defendant to step out of his truck to perform field sobriety tests. He then checked Defendant’s mouth to make sure he did not have anything in it. When Defendant was asked if he had had anything to drink that night, he stated that he had not. Defendant failed the three field sobriety tests administered by the officer. After failing the field sobriety tests and prior to his arrest, Defendant stated that he had had three beers. The officer placed Defendant under arrest for DWI.

Defendant was provided by the computer-aided dispatch (CAD) system, and the time for the first BAT was provided by the clock on the Intoxilyzer machine itself. During cross-examination, Officer Otzenberger...
conceded that the two time devices are not synchronized and when defense counsel suggested that the two time pieces might be two or three, possibly four, five minutes behind, he responded, “possibly.” However, Officer Otzenberger rejected defense counsel’s suggestion that the deprivation period in this case was invalid even though he could not testify with 100 percent certainty that the period was twenty minutes. During redirect, Officer Otzenberger testified that he had no reason to believe that the time on the Intoxilyzer clock and the CAD system were off by five minutes and that based on his experience the times on the two time devices were very close if not to the same minute.

[8] The defense objected to the admission of Defendant’s BAT results and the metropolitan court held a side-bar conference to hear both parties’ arguments regarding their admission. The recording of the side-bar conference is inaudible. The court admitted Defendant’s BAT results, Officer Otzenberger read the results for the jury and for the record, and the prosecution rested.

[9] The defense moved for a directed verdict on the DWI and speeding charges based on the argument that the timing devices that Officer Otzenberger used were not synchronized and that they could have been off by several minutes. The court denied the motion. The jury found Defendant guilty of DWI. During sentencing, the court inadvertently sentenced Defendant for aggravated DWI third offense instead of straight, non-aggravated DWI third offense.

[10] Defendant appealed his conviction for DWI to the district court arguing that (1) the twenty-minute deprivation period was invalid and therefore the BAT results were erroneously admitted, and (2) there was insufficient evidence of DWI. The district court affirmed Defendant’s conviction and alerted the parties that, contrary to the metropolitan court’s judgment and sentence, Defendant was not convicted of aggravated DWI.

DISCUSSION

[11] On appeal to this Court, Defendant asserts that the admission of his BAT results was error. We examine the admission or exclusion of evidence for abuse of discretion, and the trial court’s determination will not be disturbed absent a clear abuse of that discretion. State v. Worley, 100 N.M. 720, 723, 676 P.2d 247, 250 (1984). “An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case.” State v. Woodward, 121 N.M. 1, 4, 908 P.2d 231, 234 (1995) (internal quotation marks and citation omitted).

[12] Breath tests taken under the Implied Consent Act, NMSA 1978, §§ 66-8-105 to -112 (1978, as amended through 2007), must comply with the regulations of the scientific laboratory division (SLD) of the Department of Health. Section 66-8-107; State v. Gardner, 1998-NMCA-160, ¶ 11, 126 N.M. 125, 967 P.2d 465. “Thus, when these administrative requirements are not complied with, the State has failed to lay a proper foundation of accuracy for admission.” Id. ¶ 12. Admission of evidence for which the necessary foundation has not been laid is an abuse of discretion. Id. ¶ 5.

[13] The SLD regulation applicable to the deprivation period is 7.33.2.12(B)(1) NMAC, which provides in part that: Breath shall be collected only after the Operator or Key Operator has ascertained that the subject has not had anything to eat, drink or smoke for at least 20 minutes prior to collection of the first breath sample. If during this time the subject eats, drinks or smokes anything, another 20 minutes deprivation period must be initiated. The two breath samples shall be taken not more than 15 minutes apart.

“the purpose of complying with the waiting period requirements for breath alcohol tests is to ensure the accuracy of these tests.” Gardner, 1998-NMCA-160, ¶ 12. Because the purpose of 7.33.2.12(B)(1) NMAC is to ensure accuracy of the BAT, foundational requirements must be met for the admission of BAT results. See State v. Dedman, 2004-NMSC-037, ¶ 13, 136 N.M. 561, 102 P.3d 628 (concluding that “the Legislature intended . . . to mandate the exclusion of test results whenever proof of compliance with a regulation intended to ensure accuracy is missing”).

[14] Rule 11-104(A) NMRA governs the admission of BAT results, and whether the BAT results may be “admitted into evidence is a matter decided solely by the trial court and is not contingent upon its relevancy being established by other facts submitted to the jury.” State v. Martinez, 2007-NMSC-025, ¶ 17, 141 N.M. 713, 160 P.3d 894. Rule 11-104(A) provides: Questions of admissibility generally. Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court, subject to the provisions of Paragraph B. In making its determination it is not bound by the rules of evidence except those with respect to privileges.

When applying Rule 11-104(A) in the consideration of the admissibility of BAT results, the trial court need only be satisfied by a preponderance of the evidence that the prosecution has met the foundational requirement. Martinez, 2007-NMSC-025, ¶ 19, 21.

[15] Defendant contends that the metropolitan court erred by admitting the BAT results when the State failed to meet its burden of showing compliance with the twenty-minute deprivation period. Defendant argues that Officer Otzenberger’s use of two unsynchronized time devices to determine the beginning and end of the deprivation period is not a sound methodology consonant with the SLD accuracy-ensuring regulation. Defendant further argues that Officer Otzenberger gave inconsistent testimony on when and how he determined the beginning and end of the deprivation period.

[16] Although Officer Otzenberger testified that it was possible that the two time devices could be off by several minutes, he also testified that based on his experience, the times on the two time devices were very close if not to the same minute. He also testified that Defendant did not eat, smoke, regurgitate, vomit, drink, or put anything in his mouth during the deprivation period. Defendant was never off the officer’s observation area. Defendant’s hands were placed securely behind his back in handcuffs after his arrest, and there was no food, drink, or cigarettes in the back of the patrol car. Based on this testimony, the metropolitan court could reasonably have been satisfied by a preponderance of the evidence that the foundational requirement had been met. Other jurisdictions have considered arguments similar to Defendant’s. Although not bound by these rulings, we believe they are instructive. See State v. Snuggerud, 956 P.2d 1015, 1020 (Or. Ct. App. 1998) (holding that an officer is not required to use the same time piece to measure the beginning and end of the observation period); State v. Edwards, 781 P.2d 1233, 1234-35 (Or. Ct. App. 1989) (holding that the officer’s use of different time pieces to begin and end the deprivation period, along with the officer’s testimony that he had never noticed a discrepancy between the two timing devices was sufficient to show compliance
with the fifteen-minute deprivation period required by regulation).

[17] Defendant relies on State v. Willie, 2008-NMCA-030, ¶ 16, 143 N.M. 615, 179 P.3d 1223 (filed 2007), cert. granted, 2008-NMCERT-002, 143 N.M. 667, 180 P.3d 674, in asserting that the deprivation period in the present case did not commence until the officer checked Defendant’s mouth. Defendant asserts that Officer Otzenberger stopped Defendant at 9:22 p.m., explained to Defendant why he stopped him, requested Defendant’s driver’s license, insurance, and registration, asked Defendant to step out of his vehicle to conduct field sobriety tests, and then checked Defendant’s mouth. Therefore, Defendant argues, several minutes passed before the deprivation period actually commenced.

[18] Willie centered on the regulation’s requirement that the operator ascertain that a suspect not have anything in his or her mouth during the deprivation period. Id. The question of when the deprivation period began was not at issue. Because cases are not authority for propositions not considered, Willie does not stand for the proposition advanced by Defendant that the deprivation period commences only at the point in time that an officer checks the defendant’s mouth. See Fernandez v. Farmers Ins. Co., 115 N.M. 622, 627, 857 P.2d 22, 27 (1993).

[19] Moreover, Willie is distinguishable because in that case there was “no evidence, hearsay or otherwise, of ascertainment,” since the officer never looked into the defendant’s mouth. 2008-NMCA-030, ¶ 15.

This case is more in line with Martinez, where the court concluded that an officer’s testimony that the breathalyzer sticker showed that SLD certified the machine for the date the officer conducted the BAT at issue sufficiently established the necessary foundation. 2007-NMSC-025, ¶ 23.

[20] Here, Officer Otzenberger testified that Defendant’s deprivation period was twenty-two minutes, and he gave a detailed explanation of how he determined when the period began and when it ended. He also testified that, based on his experience, the two devices indicating time were very close if not to the same minute. Inconsistencies in testimony, if any, were before the court, and it is apparent that the court determined there was a preponderance of evidence to establish the necessary foundation. See State v. Neal, 2007-NMSC-043, ¶ 15, 142 N.M. 176, 164 P.3d 57 (recognizing that “the district court has the best vantage from which to resolve questions of fact and to evaluate witness credibility”). Given the facts in this case, the metropolitan court could reasonably have concluded that looking at Defendant’s mouth shortly after the deprivation period began confirmed that the period of time up to that point was properly part of the deprivation period.

[21] Furthermore, other than the evidence provided by Officer Otzenberger’s testimony during cross-examination, Defendant has not shown that the deprivation period was invalid. See Snuggerud, 956 P.2d at 1020 (stating that the defendant failed to identify evidence in the record showing any discrepancy between the two time pieces that the officer might have used to start and end the required fifteen-minute observation period); cf. DeBoer v. Neb. Dep’t of Motor Vehicles, 751 N.W.2d 651, 655-56 (Neb. Ct. App. 2008) (concluding, based on substantial evidence, that the officer who performed the breath test failed to observe the driver for the required fifteen minutes before conducting the test). Reviewing the facts in the light most favorable to the prevailing party and deferring to the implicit findings of the trial court, we conclude that the court did not abuse its discretion in admitting the BAT results because Officer Otzenberger’s testimony provided substantial evidence to support those findings. See State v. Urioste, 2002-NMSC-023, ¶ 6, 132 N.M. 592, 52 P.3d 964 (reviewing the facts in the light most favorable to the prevailing party and deferring to the district court’s factual findings as long as substantial evidence exists to support those findings).

CONCLUSION

[22] We affirm the admission of Defendant’s BAT results. Because the metropolitan court inadvertently sentenced Defendant for aggravated DWI third offense, we remand the matter to the metropolitan court to re-sentence Defendant for the crime of DWI third offense and to amend the judgment and sentence accordingly.

[23] IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:

CYNTHIA A. FRY, Chief Judge

ROBERT E. ROBLES, Judge

22 BAR BULLETIN - AUGUST 31, 2009 - VOLUME 48, NO. 35
OPINION

JAMES J. WECHSLER, JUDGE

[1] NMSA 1978, Section 66-8-102(A) (2005) (amended 2008) provides that “[i]t is unlawful for a person who is under the influence of intoxicating liquor to drive a vehicle within this state.”

A person is under the influence of intoxicating liquor if “as a result of drinking liquor [the driver] was less able to the slightest degree, either mentally or physically, or both, to exercise the clear judgment and steady hand necessary to handle a vehicle with safety to [the driver] and the public.” State v. Sanchez, 2001-NMCA-109, ¶ 6, 131 N.M. 355, 36 P.3d 446 (alterations in original) (quoting UJI 14-4501 NMRA).


[2] Defendant Lamont Pickett, Jr. appeals the judgment of the district court affirming his conviction in the metropolitan court of driving under the influence of intoxicating liquor (DWI) in violation of Section 66-8-102(A). He contends that the metropolitan court improperly admitted evidence of his blood alcohol content (BAC) results in violation of Rule 11-401 NMRA and Rule 11-403 NMRA because they were not relevant and because they were more prejudicial than probative as there was no evidence relating the BAC results back to the time of driving. He further contends that there was insufficient evidence to prove impairment beyond a reasonable doubt. We hold that the BAC results were relevant to demonstrate that Defendant had alcohol in his system and that their consideration by the metropolitan court judge was not improper. We further hold that substantial evidence supports Defendant’s conviction. We affirm.

BACKGROUND

[3] At Defendant’s bench trial in metropolitan court, the evidence showed that Defendant was stopped after Albuquerque Police Officer Richard Locke observed him weaving out of his lane, coming within a foot of colliding with another vehicle. Defendant pulled over in a lawful manner and provided his driver’s license, registration, and proof of insurance without difficulty. Officer Locke noticed an odor of alcohol and that Defendant had bloodshot, watery eyes. Defendant admitted that he had consumed alcohol. Officer Locke called Officer Bret White to continue the investigation because Officer Locke was going off duty. Defendant told Officer White that he had “two beers, maybe one,” and he agreed to take field sobriety tests.

[4] Officer White testified that the first test he administered was the horizontal gaze nystagmus (HGN) test, during which Defendant continued to emit an odor of alcohol. Officer White did not testify as to the results of the HGN test or give an opinion as to whether Defendant had passed the test. During the one-leg-stand test, Defendant held his foot up for the required thirty seconds and did not hop, but he swayed and lifted his arms from his sides. These two factors were considered “clues” to Officer White in his evaluation of Defendant’s driving performance, with two “clues” being a significant number. During the instruction phase of the walk-and-turn test, Officer White had to explain the turn four times before Defendant said he understood. Defendant missed one step as he turned toe to toe on three of the first nine steps. After the first nine steps, Defendant again asked for an explanation of the turn. Upon being told to do it as it had been previously described by Officer White, however, Defendant performed the turn correctly. Defendant held his arms away from his body during the entire test. Officer White recorded five of eight possible “clues” during the walk-and-turn test.

[5] Officer White placed Defendant under arrest and transported him to a police substation. After the required twenty-minute observation period, Officer White administered two breath tests on an Intoxilyzer 5000 machine. The first test indicated a BAC of .07. The second test, three minutes later, indicated a BAC of .08.

[6] Defendant was charged under Section 66-8-102. The complaint did not distinguish between Section 66-8-102(A), the “impaired to the slightest degree” part
of the statute, and Section 66-8-102(C), the “per se” part of the statute. The latter subsection makes it unlawful to drive with a BAC of .08 or more, whether or not impaired driving has been shown. The metropolitan court judge convicted Defendant under Section 66-8-102(A), stating, “I believe that given the State’s evidence, . . . Defendant was impaired to the slightest degree, given the driving, the field sobriety test, and the breath breath score combined together.” The district court affirmed Defendant’s conviction on appeal.

ADMISSION OF BAC RESULTS


[8] At trial in the metropolitan court, Defendant moved to exclude the breath card from the Intoxilyzer 5000 machine that showed Defendant’s BAC results of .07 and .08, arguing that no evidence had been presented extrapolating the BAC results back to the time of driving, as required by this Court’s then-recent decision in State v. Day, 2006-NMCA-124, 140 N.M. 544, 144 P.3d 103, rev’d, 2008-NMSC-007, 143 N.M. 359, 176 P.3d 1091. Defendant’s BAC was tested approximately forty-seven minutes after the stop. Defendant argued that in the absence of extrapolation evidence, the breath card was not relevant and was more prejudicial than probative.

[9] In Day, the defendant was convicted of per se DWI under Section 66-8-102(C). Approximately one hour and six minutes after the defendant’s arrest, his BAC was .08, thus raising the question of whether it had been .08 at the time of driving. Day, 2006-NMCA-124, ¶ 2. We held, and our Supreme Court agreed (although reversing the result, 2008-NMSC-007, ¶ 26), that in a per se DWI case, the state must prove the BAC at the time of driving through scientific retrograde extrapolation evidence. Day, 2006-NMCA-124, ¶¶ 26-28. We note that subsequent statutory amendment provides that it is unlawful to drive with a BAC of .08 or higher as measured “within three hours of driving the vehicle and the alcohol concentration results from alcohol consumed before or while driving the vehicle.” Section 66-8-102(C)(1).

[10] Rule 11-402 NMRA declares relevant evidence to be admissible. Rule 11-401 defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable.” Rule 11-403 provides: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” Defendant argues in this appeal that his BAC results were not a relevant consideration to his impairment under Section 66-8-102(A). He further argues that the admission of the evidence was highly prejudicial because the metropolitan court judge relied on the results in her guilty verdict. We do not agree.

[11] We first note the limited applicability of Day to this case. Day was a per se case under Section 66-8-102(C). The BAC results were essential to the case. See Day, 2006-NMCA-124, ¶¶ 28-29. Although the time of driving is also relevant under the language of Section 66-8-102(A), only impairment, not any particular BAC, need be shown. In this case, the metropolitan court found that the State did not prove a per se case apparently because of the absence of relation back evidence.

[12] However, to prove a Section 66-8-102(A) violation, the State needed to prove that Defendant was “less able to the slightest degree” to drive “as a result of drinking liquor.” Sanchez, 2001-NMCA-109, ¶ 6 (internal quotation marks and citation omitted). The BAC results are evidence that Defendant had alcohol in his system and, regardless of the numerical BAC, tended to show that Defendant’s poor driving, as stated in the testimony, was “a result of drinking liquor.” Cf. State v. Montoya, 2005-NMCA-078, ¶ 21, 137 N.M. 713, 114 P.3d 393 (stating that evidence of alcohol in the defendant’s system four hours after an accident was relevant evidence in a vehicular homicide case). The BAC results were relevant evidence.

[13] Defendant argues that the BAC results were so prejudicial as to require the metropolitan court to exclude them under the balancing test of Rule 11-403 and that the judge improperly used the BAC results in her conclusion that Defendant was impaired to the slightest degree. We disagree. The balancing test of Rule 11-403 is designed to enable a trial judge to act as a gatekeeper to insulate the jury from prejudice and confusion. There was no jury in this case. Moreover, when admissibility of evidence is challenged at a bench trial, we generally “presume that a judge is able to properly weigh the evidence, and thus the erroneous admission of evidence in a bench trial is harmless unless it appears that the judge must have relied upon the improper evidence in rendering a decision.” State v. Hernandez, 1999-NMCA-105, ¶ 22, 127 N.M. 769, 987 P.2d 1156.

[14] The metropolitan court judge considered all of the evidence combined together, including the BAC results. As a consequence, it could be argued that the metropolitan court judge was prejudiced by that evidence. Yet, she was entitled to consider the BAC results in so far as they were relevant as evidence of alcohol in Defendant’s system that would indicate that Defendant’s poor driving was due to his consumption of liquor. The dissent stresses that the metropolitan court judge did not state that she relied on the BAC results to conclude that Defendant had consumed alcohol and further asserts that the presence of alcohol in Defendant’s system was not an issue in this case, in part because Defendant had admitted to drinking. However, the metropolitan court judge did not specify that she relied on Defendant’s statements about consuming alcohol. She based her finding of guilt on three express aspects of the State’s evidence: Defendant’s driving, the field sobriety tests, and the BAC results. Of these, only the BAC results directly indicate Defendant’s consumption of alcohol.

[15] While the metropolitan court judge was not permitted to relate the BAC results back to the time of driving to find a particular level of blood alcohol at that time, she did not do so. Indeed, the metropolitan court judge specifically found that there was no per se violation. Therefore, even though the metropolitan court judge considered the BAC results along with the other evidence, there is no indication that she “must have” considered the BAC results in an inappropriate way. See id. The metropolitan court judge did not abuse her discretion in admitting the BAC results because she did not inappropriately use the results in her ruling. Cf. Montoya, 2005-NMCA-078, ¶¶ 18, 21-22 (expressing concern in a vehicular homicide case that a jury would improperly use a BAC score that had been taken four hours after the accident and, therefore, only allowing evidence that the defendant had some amount of alcohol in his blood).

SUFFICIENCY OF THE EVIDENCE

[16] Defendant also makes several arguments concerning the sufficiency of the evidence. “[T]he test to determine the sufficiency of evidence in New Mexico . . . is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every

(7) To convict Defendant, the State needed to prove that as a result of Defendant drinking alcohol, he was less able to the slightest degree to safely handle a vehicle. Sanchez, 2001-NMCA-109, ¶ 6 (internal quotation marks and citation omitted). Officer Locke testified that Defendant was driving. His testimony that he saw Defendant weave out of his lane and come within a foot of colliding with another vehicle provided evidence that Defendant “was less able to the slightest degree . . . to exercise the clear judgment and steady hand necessary to handle a vehicle with safety.” Id. (internal quotation marks and citation omitted). The breath tests, without any attributed numerical result, showed that Defendant had alcohol in his system. See Montoya, 2005-NMCA-078, ¶ 18. Although not included in the metropolitan court judge’s ruling, additional evidence that Defendant’s poor driving was a result of drinking liquor included testimony that he had admitted drinking beer and Officer Locke had noticed an odor of alcohol when he stopped Defendant.

(18) Defendant argues that inconsistencies between the testimonies of Officer Locke, Officer White, and Defendant’s passenger undermine Officer Locke’s testimony. However, in making this argument, Defendant is asking us to re-weigh the evidence and resolve the inconsistencies in his favor. On appellate review, we may not weigh the evidence or substitute our judgement for that of the factfinder. Sutphin, 107 N.M. at 131, 753 P.2d at 1319. We view the evidence in the light most favorable to the prevailing party, resolving all conflicts in favor of the verdict. Id.

(19) Defendant also argues that Officer White’s testimony about the field sobriety tests was “lay testimony cloaked in scientific terminology” and thus not evidence supporting Defendant’s conviction. This argument is based on Officer White’s purportedly having impermissibly testified, without being qualified as an expert, beyond that which is allowed by Rule 11-701 NMRA. We note that Defendant does not argue that the metropolitan court should not have allowed the testimony, presumably because he did not object to the testimony when it was offered. Because the State does not argue lack of preservation, we turn to Defendant’s argument.

(20) Rule 11-701 provides:

If the witness is not testifying as an expert, the witness’s testimony in the form of opinions or inferences is limited to those opinions or inferences which are

A. rationally based on the perception of the witness,
B. helpful to a clear understanding of the witness’s testimony or the determination of a fact in issue, and
C. not based on scientific, technical or other specialized knowledge within the scope of Rule 11-702 NMRA.

Defendant asserts that Officer White’s references to “clues” as indicated by his observation of the tests goes beyond what a “normal person” would use to form an opinion about whether a driver was impaired by alcohol. See State v. Luna, 92 N.M. 680, 684-85, 594 P.2d 340, 344-45 (Ct. App. 1979) (stating that “[t]he requirement of a rational basis is satisfied if the opinion or inference is one which a normal person would form on the basis of the observed facts”).

(21) Officer White’s testimony, however, included both information a normal person would not likely be qualified to use in forming an opinion as well as information a normal person would so use. In addition to testimony about the number of “clues” Defendant exhibited in performing the one-leg-stand test and the walk-and-turn test, Officer White also testified as to specific observations he made that might lead a normal person to believe a driver was intoxicated. The latter included Defendant’s swaying and failing to keep his arms at his side as instructed during the one-leg-stand test and, during the walk-and-turn test, moving his foot to the side for balance, failing to touch heel to toe on several steps, holding his arms away from his side, and requesting that the instructions for the turn be repeated several times. Again, we presume that the judge in a bench trial is able to properly weigh the evidence and that erroneous admission of evidence is harmless “unless it appears that the judge must have relied upon the improper evidence in rendering a decision.” Hernandez, 1999-NMCA-105, ¶ 22. Given the balance problems Defendant exhibited during the tests and his difficulty in following instructions, Officer White’s testimony about the number of “clues” Defendant exhibited during the tests, even if erroneously admitted, was not essential to the judge’s ruling.

(22) Finally, Defendant’s performance on the tests was only one of the three bases recited by the metropolitan court judge for her ruling that Defendant was impaired, and she specified that she based her ruling on the three factors “combined together.”

Thus, even if we were to agree that the three types of evidence, if considered individually, might not support a finding of guilt beyond a reasonable doubt, we conclude that the totality of the evidence was sufficient to convict Defendant.

CONCLUSION

(23) We affirm Defendant’s conviction.

(24) IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

I CONCUR:

CYNTHIA A. FRY, Chief Judge
MICHAEL E. VIGIL, Judge

Vigil, Judge (dissenting).

(25) The majority does not take into account that the crime of DWI can be committed in different ways under Section 66-8-102, and that each has different, discrete elements. When these differences are taken into account, it is apparent that reversible error was committed by the metropolitan court judge. Since the majority disagrees, I dissent.

(26) Section 66-8-102(C)(1) describes one way to commit the crime. In 2006, when the complaint against Defendant was filed, this subsection in pertinent part provided: “It is unlawful for a person who has an alcohol concentration of eight one hundredths or more in his blood or breath to drive a vehicle within this state.” Day, 2008-NMSC-007, ¶ 16 (internal quotation marks and citation omitted). I refer to this crime as “old per se DWI.” In a prosecution alleging old per se DWI for breath, the elements are: (1) “the defendant operated a motor vehicle,” and (2) “at that time, the defendant had an alcohol concentration of eight one-hundredths (.08) grams or more in two hundred ten liters of breath.” State v. Baldwin, 2001-NMCA-063, ¶ 7, 130 N.M. 705, 30 P.3d 394 (quoting the 2001 version of UJI 14-4503 NMRA) (emphasis added; brackets and inapplicable language in brackets removed).
omitted). Thus, old per se DWI is a strict liability crime. See State v. Harrison, 115 N.M. 73, 78, 846 P.2d 1082, 1087 (Ct. App. 1992) (concluding that by enacting per se DWI, the Legislature intended to create a strict liability offense). It is defined in terms of a specific BAC of .08, and whether the driver is actually impaired is not an element of the offense. The Legislature has determined that it is unacceptable for any person to drive with a BAC of .08, regardless of how that level of alcohol affects any particular driver. This is why the crime has been traditionally referred to as “per se” DWI. The variations of responses which different people may exhibit to consuming identical dosages of alcohol under similar conditions is not a consideration in whether a crime was committed. However, an essential component of old per se DWI is having a BAC of .08 at the time of driving, rather than when the test is later administered. Day, 2008-NMSC-007, ¶ 16. Thus, we held in Day (and our Supreme Court subsequently agreed, Day, 2008-NMSC-007, ¶ 26) that the BAC at the time of driving must be proven by the State through scientific retrograde extrapolation evidence. Day, 2006-NMCA-124, ¶¶ 26-28.

{27} Apparently in response to the difficulty of having to prove BAC at the time of driving, the Legislature amended Subsection (C)(1) in 2007, effective for cases committed after April 1, 2007. Although not applicable to Defendant’s case, I discuss this statute because the majority analysis suggests it relates to the issues raised by Defendant. The statute now provides in pertinent part that it is unlawful for a person to drive a vehicle within this state if the person has a BAC of .08 or more “within three hours of driving the vehicle and the alcohol concentration results from alcohol consumed before or while driving the vehicle.” 2007 N.M. Laws, ch. 322, § 1, codified at Section 66-8-102(C)(1) (2007). I refer to this statute as “new per se DWI.” The elements for new per se DWI for breath tests are: (1) “[t]he defendant operated a motor vehicle”; and (2) “[a]t the time, the defendant was under the influence of intoxicating liquor, that is, as a result of drinking liquor the defendant was less able to the slightest degree, either mentally or physically, or both, to exercise the clear judgment and steady hand necessary to handle a vehicle with safety to the person and the public.” UJI 14-4501. In this species of DWI, an individual’s personal reaction to alcohol consumption determines whether a crime was committed, irrespective of the BAC. See State v. Gutierrez, 1996-NMCA-001, ¶ 4, 121 N.M. 191, 909 P.2d 751 (noting that the defendant was not convicted of having a particular BAC level, but of the more general offense of driving while intoxicated). The variations of responses which different people exhibit to consuming identical dosages of alcohol under similar conditions determine whether one person commits DWI and another does not.

{29} In this case, the complaint does not refer to a particular subsection of the statute. It simply alleges that Defendant violated Section 66-8-102. The BAC test was administered to Defendant forty-seven minutes after he was stopped, and the results were .07 and .08. Majority Opinion ¶ 8. As discussed, if the State intended to prove a violation of old per se DWI, our Day opinion required the State to introduce evidence at trial of Defendant’s BAC at the time of driving through scientific retrograde extrapolation evidence. However, as Defendant alleged prior to trial, the State had no such evidence. As such, the BAC test result was irrelevant to a charge of old per se DWI. However, the metropolitan court judge did not find Defendant guilty of old per se DWI.

{30} The metropolitan court judge found Defendant guilty of impaired DWI. “[G]iven the driving, the field sobriety test, and the breath score combined together,” the metropolitan court judge concluded the State proved that Defendant was “impaired to the slightest degree.” Thus, the metropolitan court judge specifically stated that she considered the BAC test results and relied upon them in finding Defendant guilty. The metropolitan court judge did so without any evidence showing that the BAC affected Defendant’s physiology and ability to drive. That is to say, there was no evidence that the .07 and .08 test results specifically affected Defendant’s driving behavior. A .03 BAC result would not have entitled Defendant to a directed verdict regardless of his driving, and the .07 and .08 test results do not prove Defendant’s under the influence DWI without scientific evidence of how those levels of alcohol affected him specifically. Without proof, the metropolitan court judge improperly assumed that the BAC results established that Defendant’s driving was impaired because of alcohol consumption. Judges are not scientists. Without this essential link, the BAC test results were not relevant.

{31} The majority concludes that the metropolitan court judge could properly consider the BAC evidence insofar as it was relevant as evidence of alcohol in Defendant’s system. Majority Opinion ¶ 14. There are two answers to this supposition. First, the metropolitan court judge clearly stated she relied on the BAC test results to conclude that Defendant was guilty of impaired DWI, and not for the limited purpose of concluding that Defendant consumed alcohol. Second, as the majority acknowledges, Officer Locke testified that when he stopped Defendant, he admitted to Officer Locke that he had consumed alcohol. Majority Opinion ¶ 3. At trial, Defendant did not deny drinking alcohol, and his passenger, who testified on Defendant’s behalf, said that they both had consumed alcohol. Therefore, whether Defendant had alcohol
in his system was not at issue in the case. *Compare Montoya*, 2005-NMCA-078, ¶¶ 5, 18, 21 (concluding that the trial court properly excluded the BAC test result itself from the jury’s consideration when the test result could not be related to the time of driving, and properly allowed the jury to consider the BAC only to show that alcohol was in the defendant’s system when the defendant was evasive about the subject of drinking to police and passers-by who had stopped to give assistance, and the defendant would not at first submit to a blood draw authorized by a search warrant by adopting a fighting stance and telling the officers they would have to “take [him] down”) (alteration in original).

{32} I respectfully disagree with the majority conclusion that the State established that the BAC test results were relevant to the issues tried in this case. Rule 11-401 (defining “relevant evidence” as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence”). They were not relevant to old per se DWI because they were not related to the time of driving, and they were not relevant to impaired DWI because the results were not related by evidence to whether Defendant was in fact impaired. Moreover, they did not tend to prove a contested issue in the case. All they did was corroborate Defendant’s admission, and evidence he himself presented, that he did in fact consume alcohol. Not being relevant, the BAC test results were not admissible into evidence. Rule 11-402 (“Evidence which is not relevant is not admissible.”).

{33} Finally, I disagree with the majority that “there is no indication that [the metropolitan court judge] ‘must have considered the breath score in an inappropriate way.’” Majority Opinion ¶ 15. The metropolitan court judge clearly and unambiguously stated that she relied on the “breath score” to find Defendant guilty of impaired DWI. The score itself was considered by the metropolitan court judge in finding Defendant guilty of impaired DWI. Therefore, this is not a case in which we can presume that the metropolitan court judge disregarded the improper evidence. See *State v. Gutierrez*, 1996-NMCA-001, ¶ 4 (stating that in a bench trial for DWI, it can be presumed that the trial court disregarded improper evidence, but when it appears that the trial court must have relied on the improper evidence in reaching its decision, its admission constitutes reversible error). Finally, even if the BAC evidence was somehow relevant, it was so prejudicial that it should have been excluded under Rule 11-403. The BAC evidence clearly affected the metropolitan court judge’s decision. She assumed, without evidence, that these BAC results proved Defendant’s driving was impaired by alcohol. Impaired DWI requires more than such an assumption.

{34} The issues raised by this case could have been avoided if a pretrial determination had been made that the case would be tried either as a per se DWI or as an impaired DWI. This would have greatly streamlined the issues and simplified the trial. Until prosecutors voluntarily elect to proceed under one theory or another, or judges order an election pursuant to a motion, evidentiary issues such as those presented in this case will continue to arise.

{35} The BAC evidence was not admissible in this DWI trial. Furthermore, even if the evidence was somehow relevant, it should have been excluded as unduly prejudicial. Since the majority has decided otherwise, I dissent.

MICHAEL E. VIGIL, Judge
OPINION

JONATHAN B. SUTIN, JUDGE

[1] This case centers on a defective seatbelt buckle claim in a vehicle rollover accident. Plaintiff Carole Kilgore was seriously injured. Plaintiff Donald Kilgore, her husband, was driving. The trial resulted in a defense verdict. Plaintiffs tried this case on the theory that the buckle design created a risk of accidental or inadvertent release, recognizing that the precise identification of what depressed the seatbelt buckle release button could never be known with certainty.

[2] More specifically, Plaintiffs sought to prove that the release button “was needlessly and dangerously exposed and demonstrably susceptible to unintended contact, opening the buckle and releasing the [seatbelt].” Their approach was to show that “such inadvertent contact could come from a hand, an elbow, or a variety of other objects loose in the passenger compartment of the car, which could have accidentally contacted and depressed the exposed button during a rollover collision.” Plaintiffs’ theories of recovery presented to the jury were negligence and product liability.

[3] Plaintiffs moved for a new trial. The district court denied the motion without a hearing. Plaintiffs assert reversible error in denying their motion for a new trial based on claims of juror misconduct, improper comments in Defendants’ opening statement, and two erroneous evidentiary rulings. We hold these claims do not require a new trial. On juror misconduct, we hold Plaintiffs failed to meet the preliminary requirement that they show there was a reasonable likelihood that extraneous information a juror received would have an effect on the verdict or on a typical juror and thus that there was a reasonable possibility that the information prejudiced Plaintiffs. We further hold that defense counsel’s opening statement comments do not warrant a new trial. We also hold that the district court did not abuse its discretion in excluding evidence of other incidents or in allowing a defense expert’s deposition testimony that the buckle in question could arguably meet certain test requirements. We therefore affirm the defense verdict.

[4] The record proper in this case consists of thirty-two volumes consuming 5366 pages. There are thirty-two separate transcripts of various proceedings. Experts and other witnesses testified on the issues of negligence, product defect, and
when, during the rollover, Mrs. Kilgore may have suffered the permanent spinal cord injury for which she seeks damages. Trial before a panel of twelve jurors took about three weeks. The jury’s verdict was unanimous. Nothing presented to us in the briefs indicates that this was not a fully and professionally tried case.

BACKGROUND

[5] Mr. Kilgore was driving a 1998 Subaru Legacy Outback wagon at the time of the accident. Mrs. Kilgore was in the back seat behind Mr. Kilgore, and their seven-year-old granddaughter was in the front passenger seat. All were wearing their seatbelts. The car went out of control, rolled over, and landed upside down at the bottom of an embankment. Mr. Kilgore and his granddaughter remained belted and were hanging upside down, suspended in their seatbelts. They did not suffer serious injuries. Mrs. Kilgore was found lying on the roof, facing up toward the sky, and was not suspended by her seatbelt. No direct evidence was presented as to how Mrs. Kilgore came to be unbelted.

[6] Plaintiffs sued Fuji Heavy Industries Ltd. (Fuji), which designed the car; and Takata Corporation (Takata) and Takata Seatbelts, Inc. (Takata Seatbelts), which designed and manufactured, respectively, the car’s seatbelt system. Plaintiffs contended that the Takata AB buckle in the Subaru’s seatbelt system was negligently designed, tested, and selected and was defective because it accidentally or inadvertently unlatched during the rollover, resulting in a permanent spinal cord injury that left Mrs. Kilgore a ventilator-dependent quadriplegic. Obvious questions for the jury were at what point did the buckle release and what likely caused it to release. We refer to Fuji, Takata, and Takata Seatbelts, together, as Defendants.

[7] The jury was instructed that to establish negligence on the part of Defendants, Plaintiffs had the burden of proving that Fuji failed to exercise ordinary care in designing, testing, or selecting the seatbelt system and that Takata failed to exercise ordinary care in designing and testing the seatbelt system. The jury was also instructed that, to establish a claim of defective product on the part of Defendants, Plaintiffs had the burden of proving that the seatbelt system created an unreasonable risk of injury to Mrs. Kilgore and that the seatbelt system was defective when it reached the user or consumer.

[8] The jury rendered a special verdict in favor of Defendants. The jury specifically found that Fuji was not negligent in designing, testing, or selecting the seatbelt system and that Takata was not negligent in designing or testing the seatbelt system. The jury also specifically found that no negligence of Fuji or Takata was a cause of Mrs. Kilgore’s spinal cord injury and related damages. In addition, the jury specifically found that the seatbelt system in Plaintiffs’ car that was supplied by Defendants was not defective. The verdict was rendered on September 29, 2006, and the court entered a final judgment on the verdict and in Defendants’ favor on December 11, 2006.

[9] A legal assistant for Plaintiffs’ counsel conducted an investigation into the jury’s verdict from October through December 2006 that discovered a juror had received extraneous information. Based on this discovery and also on alleged prejudicial error in evidentiary rulings, Plaintiffs filed a motion for a new trial on December 22, 2006. Accompanying the motion was Plaintiffs’ thirty-six page memorandum containing twenty-six exhibits. Plaintiffs appeal the court’s denial of that motion.

DISCUSSION

Juror Misconduct

[10] Through the post-verdict investigation, Plaintiffs learned that one juror, likely early in the trial, spoke to the owner of a Subaru-specific repair shop, Michael Griego (the owner), where the juror’s brother worked as a mechanic. Plaintiffs then presented to the court an affidavit of the owner dated December 12, 2006. In its entirety, the affidavit states:

The affiant, Michael Griego[,] first being duly sworn deposes and says as follows:

1. My name is Michael Griego. I am an adult and I am competent to make this affidavit. The facts stated in this affidavit are true and are based upon my own personal knowledge.

2. I read an article in the newspaper about the trial in Santa Fe in which a woman was suing Subaru because she was paralyzed in a rollover accident because her [seatbelt] came off. I believe the article was in September of [2006].

Plaintiffs’ motion for a new trial was in part based on their view that the juror engaged in misconduct as shown by the conversation described in the owner’s affidavit.

Standard of Review

[11] “The essence of cases involving juror . . . misconduct . . . is whether the circumstance[s] unfairly affected the jury’s deliberative process and resulted in an unfair jury.” State v. Mann, 2002-NMSC-001, ¶ 20, 131 N.M. 459, 39 P.3d 124. We will not overturn a district court’s denial of a motion for a new trial based on juror misconduct unless the court abused its discretion. Id., ¶ 17. An abuse of discretion in this context occurs if the court’s ruling is arbitrary, capricious, or beyond reason. Id. The district court is in the best position to decide whether to grant a new trial. Id.

The Affidavit’s Shortcomings

[12] The owner’s affidavit constitutes the sole evidence Plaintiffs presented to the court as evidence of the juror’s conduct relating to the receipt of extraneous information. The circumstances set out in the owner’s affidavit are not, in our view, to be characterized as “jury tampering,” as occurs when a person purposefully initiates contact with a juror and then says something to influence the juror. See id., ¶ 20-21 (discussing cases involving jury tampering). Nor does this case involve “juror bias.” See id., ¶ 20-21, 25-26.
the contact here was not equal to unauthorized social visits with court personnel or lawyers involved in the case. Compare Gonzales v. Sargent Corp., 120 N.M. 133, 148, 899 P.2d 576, 591 (1995) (deciding not to reach whether a bailiff’s lunch with the plaintiff fell within the category of extraneous prejudicial information because it was shown that no prejudice resulted), with State v. Pettigrew, 116 N.M. 135, 140, 860 P.2d 777, 782 (Ct. App. 1993) (determining that the court did not commit reversible error in excusing a seated juror for the appearance of impropriety when the juror was seen leaving in his vehicle with an intern from the public defender’s office during a recess in the trial). The owner’s affidavit is unclear as to whom initiated a discussion in regard to seatbelt buckles. Were it shown that the juror asked the owner about seatbelt buckles unlatching, this case would appear to fall more in line with what our Supreme Court in Mann characterized as misconduct, which involved the initiation of a conversation by a juror with another person in an attempt to obtain information relevant to the case contrary to the instructions of the court. See 2002-NMSC-001, ¶ 22, 24 (discussing juror misconduct and distinguishing between knowledge of extraneous facts that are and that are not directly related to the specific case).

The affidavit shows only that a conversation occurred in which the juror told the owner that she was a juror in “the Subaru trial,” that the owner said he had never heard of an incident of a buckle trial, “that the owner said he had heard of an incident of a buckle trial,” that the owner said he had never heard of an incident of a buckle trial,” and that the juror indicated that she was not supposed to be talking to the owner about the case. The affidavit does not specifically state the sequence of the statements in the conversation and it gives no clue as to what caused the owner to say what he did or what motivated the juror to say what she did. The affidavit does not expressly state that the juror initiated the conversation. If we assume she said, all we would know is that she said that she was a juror in the Subaru trial. Without more, we will not conclude that the juror disobeyed an instruction of the court not to discuss case-related issues or facts with others. Nevertheless, the juror did receive extraneous information relating to an issue in the case.

**Presumption of Prejudice and Preliminary-Showing Requirement**

In determining whether a new trial is required based on the juror’s receipt of extraneous information, we look at whether the information that was imparted to the single juror gave rise to a presumption of prejudice requiring Defendants to rebut the presumption or at least requiring the district court to hold an evidentiary hearing and to question one or more jurors. Early in New Mexico criminal law, our Supreme Court established a presumption of prejudicial error in relation to a court’s communication with the jury. See State v. Beal, 48 N.M. 84, 89-94, 146 P.2d 175, 178-82 (1944) (holding that reversible error occurred upon a showing that the court improperly communicated with the jury regarding the case after the matter had been submitted to the jury, and the communication was not in the presence of the parties in open court). The Court in Beal emphasized that once the improper communication was shown, the burden was not on the appellee who was claiming prejudice to show prejudice, but instead was on the appellee who was claiming that there was no prejudice to overcome the presumption of prejudicial error by showing a lack of prejudice. Id. at 91-92, 94, 146 P.2d at 180, 181-82.

Ten years after Beal, in Remmer v. United States, the United States Supreme Court broadly stated that “[i]n a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties.” 347 U.S. 227, 229 (1954). In Remmer, the propriety involved jury tampering, in that a person remarked to a juror that the juror could profit by bringing in a verdict favorable to the defendant. Id. at 228.

In State v. Doe, 101 N.M. 363, 365, 367, 683 P.2d 45, 47, 49 (Ct. App. 1983), this Court discussed the Beal presumption in connection with a newspaper story regarding witness intimidation that came to a juror’s attention during a recess. This Court did not determine whether the communication constituted prejudicial extraneous information that reached the jury; rather, the matter was remanded for a hearing for findings on “whether extraneous information reached the jury” and “whether the extraneous information prejudiced the jury.” Doe, 101 N.M. at 366, 683 P.2d at 48. In stating that the burden is on the movant to obtain a new trial, this Court stated:

The party seeking a new trial on the basis that extraneous evidence reached the jury must make a preliminary showing that material extraneous to the trial actually reached the jury. If the party makes such a showing, and if there is a reasonable possibility the material prejudiced the defendant, the trial court should grant a new trial. The trial court has a duty to inquire into the possibility of prejudice. In an appropriate case, the trial court should conduct an evidentiary hearing. Id. (citations omitted). Our Supreme Court confirmed this approach in Mann. See Mann, 2002-NMSC-001, ¶ 19.

The presumption expressed in Beal and Doe has continued in New Mexico in both criminal and civil cases in various contexts. Criminal cases: see, e.g., State v. Sanchez, 2000-NMSC-021, ¶¶ 23-24, 129 N.M. 284, 6 P.3d 486 (involving the post-submission substitution of a juror); State v. Sena, 105 N.M. 686, 687-88, 736 P.2d 491, 492-93 (1987) (involving a juror’s statement during deliberations about guilt of the defendant and that this view was not based on anything the juror heard in the courtroom); State v. McCarter, 93 N.M. 708, 711, 604 P.2d 1242, 1245 (1980) (involving the court’s communication with the jury in the absence of the defendant); State v. Melton, 102 N.M. 120, 123, 692 P.2d 45, 48 (Ct. App. 1984) (involving a jury’s consideration of dictionary definitions); State v. Gutierrez, 78 N.M. 529, 530, 433 P.2d 508, 509 (Ct. App. 1967) (involving an unknown person who brushed against a juror during a break and told the juror “to make a wise decision,” which was presented to the court before jury deliberations). Civil cases: see, e.g., Goodloe v. Bookout, 1999-NMCA-061, ¶ 20, 127 N.M. 327, 980 P.2d 652 (involving jurors discussing personal knowledge of facts among themselves during deliberations); Hurst v. Citadel, Ltd., 111 N.M. 566, 570-71, 807 P.2d 750, 754-55 (Ct. App. 1991) (involving a bailiff’s misstatement of law to the jury); Prudencio v. Gonzales, 104 N.M. 788, 789-90, 727 P.2d 553, 554-55 (Ct. App. 1986) (involving a bailiff’s direct and inappropriate contact with jurors); Budagher v. Amrep Corp., 100 N.M. 167, 171, 667 P.2d 972, 976 (Ct. App. 1983) (involving an improper set of instructions in the jury room and the court noting a number of improper-communication-with-jury cases...
in New Mexico since Beal, applying the presumption-of-prejudice test and determining that the error in the case at hand was “serious” and that the presumption was supported by the record.

{18} We note that, in Mann, our Supreme Court specifically indicated that the United States Supreme Court has distanced itself from Remmer’s presumption of prejudice. Mann, 2002-NMSC-001, ¶ 36; see also Goodloe, 1999-NMCA-061, ¶ 20 (noting United States v. Sylvester, 143 F.3d 923, 933-34 (5th Cir. 1998), as suggesting that the Remmer presumption has been abandoned by the United States Supreme Court). However, Mann found it “unnecessary to reconcile existing New Mexico precedent with this more recent articulation by the Supreme Court.” 2002-NMSC-001, ¶ 36. In the present case, Defendants claim that a majority of jurisdictions have now rejected a presumption of prejudice in civil cases. Defendants do not, however, ask this Court to reconcile existing New Mexico precedent with what may be a change in the law in the federal courts and perhaps in other states. We do not attempt any such reconciliation in this opinion.

{19} As New Mexico law stands, the presumption of prejudice does not arise unless a sufficient preliminary or threshold showing is made to invoke it. This Court indicated in our most recent civil case on juror misconduct that “rather than stating that courts always presume prejudice, it may be more accurate to state that the threshold question for the trial court is whether the unauthorized conduct creates a presumption of prejudice.” Goodloe, 1999-NMCA-061, ¶ 20 (internal quotation marks and citation omitted). This includes consideration of whether “there is a reasonable probability or a likelihood that the extrinsic communications or conduct would have an effect upon the verdict upon the typical juror.” Id. (internal quotation marks and citation omitted). This Court further stated that “courts apply common sense to evaluate the likelihood of prejudice arising from the communication.” Id. Similar to Goodloe’s “threshold question” language in Doe, repeated in Mann, that the new-trial movant who asserts juror misconduct “must make a preliminary showing [with] competent evidence that . . . extraneous [information] actually reached the jury.” Mann, 2002-NMSC-001, ¶ 19 (internal quotation marks and citation omitted); Doe, 101 N.M. at 366, 683 P.2d at 48.

When Extrinsic Information Is Brought to the District Court’s Attention

{20} The preliminary-showing requirement in Doe and Mann and Goodloe’s threshold-question requirement indicate that upon receipt of the evidence of juror receipt of extraneous information the district court is to make an assessment whether evidence exists that requires invocation of the presumption-of-prejudice error. See also Budagher, 100 N.M. at 172, 667 P.2d at 977 (determining as a threshold matter that misconduct was “serious” and that the presumption was supported by the record). As Mann indicates, we should focus on whether extraneous information “unfairly affected the jury’s deliberative process and resulted in an unfair jury.” 2002-NMSC-001, ¶ 20; see also Goodloe, 1999-NMCA-061, ¶ 20 (stating that the court is to consider whether there was “a reasonable probability or a likelihood that the extrinsic [information] would have an effect upon the verdict or upon a typical juror” (internal quotation marks and citation omitted)); Doe, 101 N.M. at 366, 683 P.2d at 48 (stating that if a party makes the required preliminary showing and “if there is a reasonable possibility the material prejudiced the defendant, the trial court should grant a new trial”). We make no distinction between “preliminary” and “threshold,” and from here on we use “preliminary.” Defendants contend that Plaintiffs failed to make the requisite preliminary showing and, therefore, the evidence did not give rise to a presumption of prejudice or require the district court to conduct any inquiry or have an evidentiary hearing. We address this point.

{21} A juror’s testimony or affidavit in regard to the juror’s or the jury’s deliberations are forbidden under Rule 11-606(B) NMRA. Thus, while under Rule 11-606(B), evidence of “extraneous prejudicial information . . . brought to the jury’s attention” can be shown by a juror’s testimony or affidavit, courts must make decisions in regard to a mistrial or a new trial without the benefit of knowing the jury’s deliberations. The court must instead base its ruling on the likelihood that potentially prejudicial, extraneous information “actually reached the jury.” See Mann, 2002-NMSC-001, ¶ 19. The difficulty of making that ruling, however, does not end the inquiry.

{22} New Mexico cases have not specifically analyzed whether one juror’s receipt of extraneous information is sufficient to invoke the presumption of prejudice where there is no evidence that the extraneous information actually reached other members of the jury. Mann states that the district court is to assess whether the evidence indicates “that material extraneous to the trial actually reached the jury.” 2002-NMSC-001, ¶ 19; see also Rule 11-606(B) (stating that a juror may testify as to “whether extraneous prejudicial information was improperly brought to the jury’s attention”). Doe, 101 N.M. at 366, 683 P.2d at 48 (“The party seeking a new trial on the basis that extraneous evidence reached the jury must make a preliminary showing that movant has competent evidence that material extraneous to the trial actually reached the jury.”).

{23} A bit differently, this Court in Goodloe and Prudencio stated that courts are to determine “whether there is a reasonable probability or a likelihood that the extrinsic communications or conduct would have an effect upon the verdict or upon a typical juror.” Goodloe, 1999-NMCA-061, ¶ 20 (internal quotation marks and citation omitted); Prudencio, 104 N.M. at 790, 727 P.2d at 555. Furthermore, Remmer states that “any private communication . . . with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial.” 347 U.S. at 229. In addition, one decision of this Court might be construed as supporting a holding that extraneous information obtained or received by one juror can be presumptively prejudicial although there is no evidence that other jurors were affected. See Pettigrew, 116 N.M. at 140, 860 P.2d at 782 (determining that a juror’s unauthorized contact with an intern from the public defender’s office that created an appearance of impropriety was presumptively prejudicial).

Lack of Sufficient Preliminary Showing

{24} We need not try to resolve the foregoing issue because we think the evidence in the present case falls short of the required preliminary showing. To begin with, a reasonable inference can be drawn from the affidavit that the juror was conscious of her duty not to investigate on her own or to seek information outside of the evidence. The owner’s affidavit does not say or contain facts that directly show that the juror sought from the owner specific facts about the type of seatbelt buckle in question. Also, at the start of trial, the court instructed the jury as to “a number of important rules governing your conduct during the trial.” The jury
was told that during recesses and adjournments, while the case was in progress, “do not discuss the case with anyone other than yourselves.” Jurors were informed that in order to “minimize the risk of accidentally overhearing something that is not in evidence in this case,” jurors were to wear their jury badges around the courthouse. Jurors were admonished that “[i]t is natural to visit with people you meet, please do not talk with any of the attorneys, parties, witnesses or spectators either in or out of the courtroom.” Of particular importance, the court instructed the jurors to “not consider anything you may have read or heard about this case outside the courtroom.” The jurors were told not “to attempt to research, test, experiment, or any other investigation” and that “[s]uch conduct also runs contrary to the rule that your verdict must be based solely upon the evidence presented to you.” The court impressed upon jurors not to attempt to decide the outcome of the case before deliberations. Further, the jurors were told that the rules the court was giving the juror, and to avoid forming a fixed opinion about the case before deliberations. At the close of the trial, the court instructed the jury that it was their “duty to determine the true facts from the evidence produced here in open court” and that their “verdict should not be based on speculation, guess or conjecture.”

We presume that the jurors followed the instructions given by the court. See State v. Benally, 2001-NMSC-033, ¶ 21, 131 N.M. 258, 34 P.3d 1134 (“We presume that the jury followed the instructions given by the trial court, not the arguments presented by counsel.”); State v. Smith, 2001-NMSC-004, ¶ 40, 130 N.M. 117, 19 P.3d 254 (observing that the jury was instructed not to draw any inference of guilt from the fact that the defendant did not testify and that such fact should not be discussed by the jurors or enter into their deliberations in any way, and stating that “[j]uries are presumed to have followed the written instructions”); State v. Case, 100 N.M. 714, 719, 676 P.2d 241, 246 (1984) (stating that there is a presumption that the jury will adhere to the court’s admonition that they will not discuss the case or the evidence with anyone, and they will keep an open mind until the case is completed and submitted); State v. Sellers, 117 N.M. 644, 650, 875 P.2d 400, 406 (Ct. App. 1994) (stating that “[t]here is a presumption that the jury follows the instructions they are given”).

The owner’s affidavit states that the juror in question indicated to the owner “at least twice, that she was not supposed to be talking to me about the case.” This indicates that the juror was aware of the court’s instructions. The affidavit does not present facts that show that the juror actually violated any instruction. And there is nothing in evidence showing that she actually breached any duty or engaged in misconduct in relation to the statements between herself and the owner.

Further, the owner’s affidavit does not state that he knew or was informed about the facts in the present case other than, it would appear, that a seatbelt buckle in a Subaru vehicle was involved. There exists only the owner’s bare statement that he had not heard of an accidental unbuckling. This was not a definitive statement, nor was it an opinion, as to whether the buckle could or could not accidentally or inadvertently open or had never opened under circumstances analogous to those in the present case or, for that matter, under any circumstance. Plaintiffs did not present to the court any foundational statements from the owner in regard to his knowledge and experience relating to defective AB buckles in Subarus. Moreover, the owner’s statement seems almost inconsequential in comparison to the substantial testimony at trial, including expert testimony, relating to whether the buckle was negligently designed or was defective and how the buckle may have opened. In addition, Plaintiffs were unable in this case to present evidence of an accidental unbuckling from any particular object, such as a hand, elbow, or other object loose in the vehicle. As we indicated earlier in this opinion, the juror heard the owner’s statement fairly early in the trial, before or during the extensive testimony about seatbelts, and well before the jury’s deliberations.

Plaintiffs mention the juror’s failure to report to the court what the owner said. In their memorandum in support of their motion for a new trial, Plaintiffs stated that this failure to report compounded “the problem” because, had the court known what the owner stated, it could have addressed the issue during trial. In oral argument before this Court, Plaintiffs’ counsel appeared to indicate that the failure to report was misconduct that would require a new trial. We reject these notions insofar as they are intended to constitute rationales for a new trial. We are supplied no argument or authority to support them. As well, even were the failure to report relevant to some issue in this case, one can only speculate as to what the juror might have reported and how the court would have handled the report.

Based on the foregoing discussion, we doubt that there was a reasonable likelihood that the owner’s statement had a significant effect on the juror’s vote in the present case. Nor is there any reason to believe that the owner’s statement reached another member of the jury. There exists no evidence from which such an inference can be reasonably drawn. Cf. Saucedo v. Winger, 850 P.2d 908, 914 (Kan. 1993) (stating that if a juror’s misconduct is “not such as to influence the jury, the misconduct will not vitiate a verdict[,] [b]ut if facts outside of the evidence are brought before the jury based on the personal knowledge of a juror and those facts are likely to have influenced the minds of other jurors, the verdict should be set aside”). We are aware that a rational counter-argument is that there is no evidence to the contrary, that is, no evidence that the juror did not discuss the information with one or more other jurors. Nevertheless, we see nothing in the owner’s statement that requires us to conclude that the juror would have thought so strongly about the matter or have thought the information sufficiently significant that she likely would have conveyed the information to other jurors.

With nothing before us beyond what is in the owner’s affidavit, we hold that Plaintiffs did not sustain their burden to preliminarily show there was a reasonable likelihood that the information would have an effect on the verdict or even on a typical juror. We cannot conclude that there was a reasonable possibility that the information prejudiced Plaintiffs. Thus, a presumption of prejudice did not arise in this case.

Question of Evidentiary Hearing or District Court Investigation

Plaintiffs nevertheless contend that they are entitled to a new trial because the district court failed to hold an evidentiary hearing or otherwise investigate once
presented with the owner’s affidavit. We disagree and hold that the court was not required to conduct an evidentiary hearing or to otherwise investigate further when Plaintiffs failed to make the required preliminary showing. Mann, 2002-NMSC-001, ¶ 19; State v. Chamberlain, 112 N.M. 723, 733, 819 P.2d 673, 683 (1991) (holding that the district court did not abuse its discretion by denying a motion for further inquiry because there was no evidence that new evidentiary facts reached the jury during deliberations); Sena, 105 N.M. at 688, 736 P.2d at 493 (holding that the district court did not abuse its discretion by denying a motion for an evidentiary hearing because the affidavit alleging misconduct “does not indicate that extraneous material reached the jury”).

{33} Furthermore, in the face of Defendants’ argument that Plaintiffs failed to request an evidentiary hearing, Plaintiffs have not shown that they requested the court with any degree of specificity to investigate, to call jurors in for questioning, or to schedule an evidentiary hearing because Plaintiffs intended to present testimony in support of their claim of misconduct. In support of their contention that they did request an evidentiary hearing, Plaintiffs assert that when they submitted a December 22, 2006, hearing package to the district court relating to their motion for a new trial, they stated in a cover letter the “possible need for an evidentiary hearing on the juror misconduct issue.”

{34} Nothing in Plaintiffs’ hearing package or in their motion for a new trial and supporting memorandum discusses the need for or specifically asks the court to hold an evidentiary hearing on the juror-misconduct issue. Nor is there any request in these documents that the court investigate or call jurors in, and there is no discussion about or authority showing a duty on the part of the court to do so. A party serious about an evidentiary hearing on a juror-misconduct issue surely would proceed more forcefully than to merely indicate a “possible need for an evidentiary hearing.” Further, in a separate request for hearing, Plaintiffs requested only one and one-half hour for a hearing on the entirety of their motion for a new trial and said nothing about the need for an evidentiary hearing on the juror-misconduct issue. We see nothing in the record or briefs indicating that Plaintiffs alerted the district court or Defendants that Plaintiffs intended to subpoena jurors or others or to ask the court to do so.

{35} At no time after December 22, 2006, did Plaintiffs request an evidentiary hearing or request the court to conduct any sort of investigation. On January 17, 2007, one day after Defendants’ responses to Plaintiffs’ motion for a new trial were filed, Plaintiffs submitted a request for an expedited hearing on their motion for a new trial. This request, which reduced the estimated hearing time to only one hour, did not mention or in any way alert the district court that Plaintiffs wanted an evidentiary hearing specifically on the juror-misconduct issue. On the same date, the court denied Plaintiffs’ motion for a new trial without granting the hearing Plaintiffs had requested.

{36} Plaintiffs nonetheless assert that “[t]he trial court has a duty to inquire into the possibility of prejudice” and that “[i]n an appropriate case, the trial court should conduct an evidentiary hearing.” Doe, 101 N.M. at 366, 683 P.2d at 48. We agree that a district court has a duty in the appropriate case to conduct such an evidentiary hearing. See id. However, we are not persuaded that this is the appropriate case or that the court abused its discretion when it did not schedule an evidentiary hearing or otherwise investigate further on the juror-misconduct issue.

{37} Given the thinness of the affidavit evidence presented to the district court, we think it was incumbent on Plaintiffs to at the very least have provided foundational evidentiary support beyond what was in the owner’s affidavit. In fact, Plaintiffs’ counsel’s law firm had a legal assistant who had sat through the entire trial making “numerous attempts to contact jurors” after the trial. The legal assistant stayed in Santa Fe for several days following trial for this purpose. He traveled several times from Detroit, Michigan, the law firm’s place of business, to Santa Fe to explore information regarding the juror who spoke to the owner of the Subaru repair shop, and ultimately obtained the owner’s signature on the affidavit. As far as we can discern from the record, Plaintiffs failed to provide any explanation to the district court regarding the legal assistant’s or anyone else’s attempts to contact any jurors other than the juror in question. Without more for the court to go on, and without Plaintiffs having specifically requested the court to call jurors in, to otherwise explore the matter further, or to hold an evidentiary hearing, we cannot say that the court abused its discretion in not proceeding on its own to obtain the presence of jurors to testify or to otherwise investigate or hold an evidentiary hearing, or in denying the motion for a new trial on the extraneous information.

Exclusion of Evidence of Other Incidents and Complaints

{38} In their case in chief, in anticipation of defense witness testimony, Plaintiffs sought to show, through an expert witness, four incidents or occurrences in the form of lawsuit claims involving “real world accidents and claims of AB buckles opening.” The court did not allow the evidence. Plaintiffs appeal the court’s exclusion of the evidence.

{39} “Admission or exclusion of evidence is a matter within the discretion of the trial court and the court’s determination will not be disturbed on appeal in the absence of a clear abuse of that discretion.” Coates v. Wal-Mart Stores, Inc., 1999-NMSC-013, ¶ 36, 127 N.M. 47, 976 P.2d 999 (internal quotation marks and citation omitted). We review the admission or exclusion of evidence for abuse of discretion. Hourigan v. Cassidy, 2001-NMCA-085, ¶ 21, 131 N.M. 141, 33 P.3d 891. “An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case.” Coates, 1999-NMSC-013, ¶ 36 (internal quotation marks and citation omitted). Furthermore, an abuse of discretion will be found only if we can characterize the district court’s ruling “as clearly untenable or not justified by reason.” Id. (internal quotation marks and citation omitted). “When there exist reasons both supporting and detracting from a trial court decision, there is no abuse of discretion.” State v. Moreland, 2008-NMSC-031, ¶ 9, 144 N.M. 192, 185 P.3d 363 (internal quotation marks and citation omitted). “We do not find an abuse of discretion unless the court’s ruling exceeds the bounds of all reason or is arbitrary, fanciful or unreasonable.” Mayeux v. Winder, 2006-NMCA-028, ¶ 34, 139 N.M. 235, 131 P.3d 85 (filed 2005) (internal quotation marks and citation omitted). If evidence is erroneously admitted or excluded, the complaining party must show prejudice to obtain a reversal. See id. ¶ 37. “[W]e will reverse the trial court only when it is clear that the court has abused its discretion.” Behrmann v. Phototron Corp., 110 N.M. 323, 372, 795 P.2d 1015, 1019 (1990).

{40} Plaintiffs claim that without the evidence of what they contend are similar real-world accidents in which AB buckles opened, they were unable to defend against the anticipated defense witness testimony “that 169 million AB buckles had been
manufactured representing ‘tens of millions of . . . cars years of exposure or experience’”; “that AB buckles do not release . . . in real[-]world accidents”; “that the vehicle and buckle manufacturers had procedures by which they would learn about any problems with their vehicles or [seatbelts] and that there was not a single report of an AB [seatbelt] buckle ever releasing in any accident and that it could never happen in the ‘real world’”, and “that ‘Takata has manufactured many buckles . . . and we have never heard [of] a buckle opening in the marketplace.’” Plaintiffs’ purpose was to show that Defendants did have notice of AB buckles opening and to thereby rebut the aforementioned anticipated defense testimony. Plaintiffs go a bit too far in their brief in chief claiming they could not give the jury important evidence on the likelihood of injury or the risk of injury resulting from the condition of the buckle as they are entitled to do pursuant to UJI 13-1406 NMRA. This is not the evidence they sought to present. Our review of the transcript of the hearing on this issue indicates that Plaintiffs’ stated purpose of offering the evidence was solely “to show that indeed there are claims out in the world, there are allegations of buckle openings against Takata customers involving this buckle” and was intended to rebut Defendants’ evidence as to not having received notice of such claims from customers.

According to Plaintiffs, one of their expert witnesses was prepared to testify that he conducted investigations in respect to the four cases and concluded that Takata AB buckles had released during the crash. In their briefs on appeal, Plaintiffs nowhere specifically describe any details, variables, or other aspects relating to these claimed similar incidents or to their expert’s anticipated testimony. Plaintiffs appear to leave it to this Court to search the record and to analyze and set out details as to the incidents and Plaintiffs’ positions and arguments. We choose not to do so. “We are not obligated to search the record on a party’s behalf to locate support for propositions a party advances or representations of counsel as to what occurred in the proceedings.” Muse v. Muse, 2009-NMCA-003, ¶ 42, 145 N.M. 451, 200 P.3d 104 (filed 2008); see Bintliff v. Setliff, 75 N.M. 448, 450, 405 P.2d 931, 932 (1965) (determining that our Supreme Court would not consider the argument of the appellant’s counsel due to the failure to provide specific references to the record in violation of a Supreme Court rule); Murken v. Solv-Ex Corp., 2005-NMCA-137, ¶ 14, 138 N.M. 653, 124 P.3d 1192 (“[W]e decline to review . . . arguments to the extent that we would have to comb the record to do so.”); In re Estate of Heeter, 113 N.M. 691, 694, 831 P.2d 990, 993 (Ct. App. 1992) (“This [C]ourt will not search the record to find evidence to support an appellant’s claims.”).

All Plaintiffs offered were four occurrences that were the subjects of four lawsuits that never went to trial and that consisted of claims that were never proved. Defendants show that the claimed occurrences involved different vehicles and other crash-related variables and that there were no conclusions as to any one cause of a buckle opening. The district court determined that the proposed evidence had “tenuous relevance to the purpose for which it would be offered as well as the prejudice would outweigh the probative value and could become an inefficient presentation of evidence.”

Plaintiffs’ briefing is insufficient to persuade us that the circumstances of the four cases are sufficiently probative to hold that the district court abused its discretion in excluding the cases from consideration. The appellate courts afford the district courts wide latitude and discretion in deciding whether the prejudicial impact of tendered evidence outweighs its probative value. See State v. Coffin, 1999-NMSC-038, ¶ 35, 128 N.M. 192, 991 P.2d 477; Norwest Bank N.M., N.A. v. Chrysler Corp., 1999-NMCA-070, ¶ 39, 127 N.M. 397, 981 P.2d 1215. Furthermore, the district court has discretion to reject evidence with tenuous relevance because of the inordinate time and efficiency that could be lost in conducting what might essentially be separate trials on the other occurrences. See Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917, 935 (10th Cir. 1984) (affirming a district court’s conclusion that “certain tenders of evidence of other flight incidents, after the crash [in question], would constitute a mini-trial within a trial, resulting in undue delay, waste of time, and needless presentation of cumulative evidence” contrary to Federal Rule of Evidence 403). We reject what appears to be Plaintiffs’ argument that they were entitled to show little more than AB buckles allegedly opening in four other lawsuits.

In addition to attempting to present the foregoing evidence of other incidents, in cross-examining a defense expert, Plaintiffs also sought to use complaints which consisted of verbal claims made by consumer call-in to a National Highway Transportation Safety Administration “hotline” about buckle release in vehicles with Takata AB seatbelts. Plaintiffs state that a defense expert testified “about the process by which consumer complaints about [seatbelts] are passed on to vehicle manufacturers through a [nationwide] ‘Hot Line’” and that a Subaru engineer “testified that he had ‘never heard of any instance or incident where the [seatbelt] in our vehicle released an occupant.’” According to Defendants, Plaintiffs sought to use three complaints to counter that testimony. The court determined that this evidence was of limited, if any, relevance and that its probative value was outweighed by prejudice and confusion.

Again, Plaintiffs nowhere detail in their briefs of what the complaints specifically consisted or how the claims and circumstances were substantially similar to Plaintiffs’ claims and the circumstances in the present case. Also problematic is that it appears that no evidence indicated that any complaint was confirmed or investigated. It is unclear whether the circumstances and seatbelts involved were shown to be similar to those in the present case. Again, we will not comb the record to find evidence to support a party’s position on appeal. Muse, 2009-NMCA-003, ¶ 42; see Bintliff, 75 N.M. at 450, 405 P.2d at 932; Murken, 2005-NMCA-137, ¶ 14; In re Estate of Heeter, 113 N.M. at 694, 831 P.2d at 993. And again, based on what Plaintiffs have set out in their briefs, the district court did not abuse its discretion in precluding use of the hotline complaints.

In sum, Plaintiffs’ general, broad-swathe assertions of exclusion of evidence of allegedly similar incidents and hotline complaints are insufficient to sustain Plaintiffs’ contention that the district court abused its discretion, and do not pass muster under our briefing rules. From what Plaintiffs have presented in their briefs, we hold that the court could rationally and reasonably have found, as it did, that the evidence had only tenuous or limited relevance, if any, that prejudice outweighed probative value, and that admission of the evidence would cause inefficiency, if not also confusion, in the trial. See Rule 11-403 NMRA; Olson v. Ford Motor Co., 481 F.3d 619, 623 (8th Cir. 2007) (stating, in a product-liability case involving a vehicle’s unexpected acceleration and power-brake system, that the reason for the “extremely deferential standard of review” under federal Rule 403 is that the ruling “depends on
factors that are uniquely accessible to the trial judge who is present in the courtroom and uniquely inaccessible to an appellate judge who must take the case on a cold record’’); C.A. Assoc. v. Dow Chem. Co., 918 F.2d 1485, 1489 (10th Cir. 1990) (stating, in a product-liability case involving a masonry mortar additive, that in federal Rule 403 rulings, the deference accorded ‘‘to the trial judge who is most familiar with the circumstances . . . is particularly fitting in lengthy trials involving [a] magnitude of highly technical expert testimony’’ (citation omitted)).

Surprise Theory in Opening Statement

{47} During trial, Plaintiffs filed an expedited motion in limine to exclude any evidence, whether from a defense expert or otherwise, on what Plaintiffs considered to be a ‘‘surprise theory’’ of the defense, which they asserted was first asserted in Defendants’ counsel’s opening statement to the jury. The surprise theory about which Plaintiffs complained below and now complain on appeal is embodied in the following statements of defense counsel relating to Mrs. Kilgore: After saying that somebody unbuckled Mrs. Kilgore’s seatbelt after the car stopped, then asking the question, ‘‘Who?’’, and finally suggesting it could have been one among ‘‘a lot of people at the scene who left,’’ defense counsel said, ‘‘And there’s another person who was at the scene who doesn’t remember anything, [Mrs.] Kilgore.’’ Following this, defense counsel asked whether Mrs. Kilgore, like Mr. Kilgore and the granddaughter, could have unbuckled her own seatbelt. Defense counsel then explained that an expert witness, Dr. Whitman McConnell, would explain that the soft tissue around Mrs. Kilgore’s ‘‘hairline [neck bone] fracture’’ began to swell to the point where it impinged on her spinal cord and that up to the point at which that impingement caused paralysis, Mrs. Kilgore was not paralyzed and could use her right arm to unbuckle the belt.

{48} In their motion in limine, Plaintiffs stated that Dr. McConnell, a medical doctor, was the only defense expert designated by Defendants who was possibly qualified to testify on the sufficiency of Mrs. Kilgore’s functioning motor skills to unbuckle her seatbelt. Plaintiffs complained that Defendants had never ‘‘disclosed that [Dr.] McConnell [would] opine regarding [Mrs.] Kilgore’s remaining motor skills.’’ Plaintiffs also complained that Dr. McConnell’s pretrial depositions were ‘‘silent on this subject.’’ Plaintiffs therefore asked the district court to ‘‘preclude the defense from introducing any evidence that [Mrs.] Kilgore was capable of, or did unlatch her [seatbelt] at the conclusion of the rollover’’ and from making this argument to the jury. The district court denied Plaintiffs’ motion in limine.

{49} Plaintiffs do not assert on appeal that the court erred in denying this motion in limine. Plaintiffs’ point on appeal is that ‘‘[t]here was no competent evidence to support the surprise defense theory that [Mrs.] Kilgore unbuckled her own [seatbelt],’’ and they seek a new trial because of defense counsel’s opening statement comments. They base this assertion on the alleged prejudicial effect of the statements. Plaintiffs complain that the facts defense counsel referred to in the opening statement could not be proved by Dr. McConnell or otherwise, and Plaintiffs assert that, because of the non-disclosure of Defendants’ theory until opening statement, their ability to cure the prejudicial comments was significantly impaired. Citing to only a portion of two pages of a two-hour closing argument, Plaintiffs complain that this new theory became the centerpiece of Defendants’ arguments to the jury.

{50} For the several reasons that follow, we do not see how Plaintiffs can complain. First and foremost, Dr. McConnell had testified, and his theory was neither new nor surprising. Second, Plaintiffs failed to object to defense counsel’s opening statement comments. See Rule 12-216(A) NMRA. ‘‘To preserve an issue for review on appeal, it must appear that [the] apppellant fairly invoked a ruling of the trial court on the same grounds argued in the appellate court.’’ Woolwine v. Furr’s, Inc., 106 N.M. 492, 496, 745 P.2d 717, 721 (Ct. App. 1987); see also State v. Varela, 1999-NMSC-045, ¶ 25, 128 N.M. 454, 993 P.2d 1280 (stating that in order to preserve an issue for appeal, the defendant must make a timely objection that specifically apprises the district court of the nature of the claimed error and invokes an intelligent ruling thereon). The primary purposes for the preservation rule are: (1) to specifically alert the district court to a claim of error so that any mistake can be corrected at that time, (2) to allow the opposing party a fair opportunity to respond to the claim of error and to show why the district court should rule against that claim, and (3) to create a record sufficient to allow this Court to make an informed decision regarding the contested issue. State v. Lope, 2008-NMCA-002, ¶ 8, 143 N.M. 274, 175 P.3d 942 (filed 2007); Diversey Corp. v. Chem-Source Corp., 1998-NMCA-112, ¶ 38, 125 N.M. 748, 965 P.2d 332; cf. State v. Boergadine, 2005-NMCA-028, ¶ 31, 137 N.M. 92, 107 P.3d 532 (considering a prosecutor’s opening statement comments for fundamental error because, due to lack of objection, the issue of prosecutorial misconduct was not preserved, and holding that even though the comments were ‘‘intentional and inappropriate, the statements are not sufficiently ‘egregious’ to constitute fundamental error’’); State v. Neswood, 2002-NMCA-081, ¶ 18, 132 N.M. 505, 51 P.3d 1159 (stating that, generally, the objection must be made at the time the evidence is offered). Generally, a motion for a new trial cannot be used to preserve issues not otherwise raised during the proceedings. Goodloe, 1999-NMCA-061, ¶ 13. Lastly, evidence given by Dr. McConnell was not fact, but opinion evidence, as Plaintiffs properly stated in their motion in limine.

{51} Also significant, Plaintiffs took the opportunity to address the issue two days after opening statements with an expert of their own. Dr. Martha Bidez, an expert in biochemical engineering and injury causation, testified at some length about the manner in which Mrs. Kilgore was injured. Dr. Bidez testified that Mrs. Kilgore’s neck fracture and paralysis could only have occurred after the seatbelt buckle released; that is, at the point of the neck fracture, Mrs. Kilgore was instantly paralyzed and could not have unbuckled her own seatbelt. Since Plaintiffs’ counsel were aware of opposing counsel’s opening statement theories and expectations of evidence to be presented to the jury, they were able to so inform their expert. As well, Dr. Bidez had read Dr. McConnell’s pretrial depositions. She was therefore able to read his first deposition testimony that Mrs. Kilgore’s ‘‘fracture occurred as a result of her head impacting the roof as the roof impacted the ground as she was restrained in the vehicle.’’ Dr. McConnell also testified at deposition, based on witness Joe Russom’s statements that Mrs. Kilgore ‘‘had[d] some hand movement’’ and appeared to be suspended above the roof, and that ‘‘at that point, an individual certainly could push the button to the restraint system and release it.’’ Dr. Bidez nevertheless believed that Mr. Russom lacked credibility. Her opinion does not negate Dr. McConnell’s testimony, it only disputes it, leaving the fact for the jury to decide.

{52} While Plaintiffs claim that Dr. Bidez’s testimony was not all they would
have wanted to present to counter Defendants’ surprise theory, Plaintiffs do not explain why, with Dr. McConnell’s deposition testimony in hand, they did not have any other or additional expert available to testify in a manner similar to that of Dr. Bidez and in anticipation of the testimony of Mr. Russom. Cf. Mayaux, 2006-NMCA-028, ¶ 39 (“Here, [the p]laintiffs have alleged no prejudice besides their lack of preparation and ability to counter . . . . [the expert’s] testimony with that of another witness so late in the trial. . . . Nor have [the p]laintiffs shown us that they asked for more time to conduct another deposition or interview of [the expert].” (internal quotation marks omitted)).

[53] Plaintiffs might reasonably have anticipated the theory suggested in opening statement, on the horizon. The joint pretrial order in this case listed as a contested issue of fact “[w]ether someone unbuckled [Mrs.] Kilgore’s [seatbelt] after the car stopped[.]” Dr. McConnell’s pertinent pretrial deposition testimony was as follows:

Q. All right. What I’d like you to do for me, Dr. McConnell, if you would, please, is tell me the opinions and conclusions that you’ve reached in connection with this case.

A. This is a rollover in which [Mrs.] Kilgore . . . . was seated in the left rear seat of a ’98 Subaru Outback SUV-type vehicle. And at the end of the roll, she was found to have a fractured second cervical vertebra. My first opinion is that the fracture occurred as a result of her head impacting the roof as the roof impacted the ground as she was restrained in the vehicle.

She sustained a left parietal hematoma or bruise resulting in a compressive lateral bend to the right that compressed the right side of the C-2 vertebra, producing a crack from the base of the odontoid rightward into the right mass of the second vertebra. In other words, this was a right lateralized fracture. The end result of that was a neurological compromise that resulted in [Mrs.] Kilgore becoming a quadriplegic. That is pretty much the sum total of my opinions. There are [sic] some supporting information that obviously supports that.

Q. Okay. Is it your opinion or have you reached any opinion about whether Mrs. Kilgore was still belted after the accident?

A. I don’t have a scientifically based opinion. I have a speculation, but it’s dependent upon the—the testimony of the witnesses, of which you’re well aware, the differences between those witnesses, and supposition about what happened.

Q. Okay. Well, what you’re going to give me, then, isn’t an opinion that you hold with some reasonable degree of medical certainty or scientific certainty.

Correct?

A. That’s correct.

Q. It’s just a supposition based on what you’ve read and what you kind of think might be the case. Right?

A. That’s correct.

Q. All right. Well, with that proviso, why don’t you go ahead and tell me what our speculation is.

A. I think that she was probably hanging upside down in the restraint system as the vehicle came to rest and as the witnesses came on scene. Joe Russom and his testimony that says that she has some hand movement and she appears to be suspended above the roof. Her head seems to be suspended above the roof. As Dr. Mettler comes on scene and he sees Mrs. Kilgore, his impression is that she’s on the roof, and this is sometime in the same time frame that the apparently undiscovered individual approaches from the other side of the vehicle and goes in to help extricate her from inside the vehicle. At that point, an individual certainly could push the button to the restraint system and release it. And the rest of the findings would be consistent with the exception of [the granddaugther’s] testimony, such as it is.

[54] Further testimony of Dr. McConnell related to swelling. Defendants suggest that this testimony indicated that swelling and its pressure on the spinal cord caused Mrs. Kilgore’s spinal cord injury. The testimony was as follows.

Q. Did you see evidence in your review of the films of the epidural hematoma between the skull base and C-2?

A. There was, but it’s really not very dramatic.

Q. What caused that, in your opinion?

A. Very likely that is an acute injury—acute injury-related finding, and that’s the swelling that you get when you’ve got injured tissue. It’s the body’s response to an injury.

Q. Where was the injury that it was responding to?

A. The fracture at C-2. Possibly a ligamentous injury is in relationship to that.

Q. . . . The diffusely narrowed spinal canal in the area of C-2, was that, in your opinion, caused by the accident, or is that simply a preexisting condition?

A. I think there was more that went along with that, that they were talking about edema [swelling] with diffuse narrowing. And if indeed that was the case, the edema was most likely associated with the injury.

Q. When they talk about narrowing of the canal, I mean, the canal is formed by the hole in the vertebral body. Correct?

A. But it’s lined with the dural lining and the lining of the cord, and both of those can swell when they’re injured.

Q. All right. So the narrowing in the canal in the area of C-2 is most likely associated with her acute injury?

A. I think so.

Defendants suggest that Plaintiffs should have asked follow-up questions relating to the timing of the swelling—questions, for example, such as “How soon after the crash did the swelling start?” or “How long after the swelling started did [Mrs.] Kilgore become paralyzed?” Both parties argue what Plaintiffs might have done with Dr. McConnell’s opinion. The fact is simply that Plaintiffs did not pursue evidence of which they were aware and which they seem to regret now not pursuing. We are not called upon to substitute hindsight regarding trial tactics.

[55] We acknowledge, as Plaintiff’s assert, that in Chavez v. Chenoweth, 89 N.M. 423, 427, 553 P.2d 703, 707 (Ct. App. 1976), this Court stated that it is improper
for counsel to refer to facts in an opening statement which cannot be proved. This statement in Chavez does not require a new trial in the present case. The circumstances in Chavez were considerably different. Furthermore, testimony about Mrs. Kilgore possibly releasing her own belt is not a fact. It is an opinion. Counsel stated that Dr. McConnell would explain that the soft tissue around Mrs. Kilgore’s fracture began to swell to a point it impinged on her spinal cord and caused paralysis, leaving open, based on Mr. Russom’s testimony and other evidence, the possibility that Mrs. Kilgore was not paralyzed and could use her right arm to unbuckle the seatbelt. Dr. McConnell testified in that manner not only in his deposition taken during trial, but also during his trial testimony when he testified that he could not rule out that Mrs. Kilgore might have had motor function and might have unbuckled her seatbelt. We cannot categorically say that counsel in his opening statement stated a fact that could not be proved in this case. Dr. McConnell’s opinion as to the injuries and their effect, or lack thereof, were a matter only of the weight the jury placed on them.

(56) Taking another approach, Plaintiffs also contend on appeal that Dr. McConnell’s “self-unbuckling” testimony was speculative and did not satisfy the reliability requirement under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), as adopted in State v. Alberico, 116 N.M. 156, 861 P.2d 192 (1993). In the district court, Plaintiffs objected to Dr. McConnell’s anticipated testimony only on the ground that it was “mere speculation.” The court allowed the testimony to be read to the jury.

(57) On appeal, Plaintiffs claim reversible error in admitting this testimony on the grounds that (1) the testimony was a critical piece of evidence for Defendants, because without it the AB buckle demonstrably failed Takata’s own test requirements, and with the two-kilogram-force limit added to the test, Defendants intended to show that the buckle passed the test; and (2) the testimony was “incompetent, speculative and false” and should not have been allowed in order to demonstrate that the buckle was not defective because it passed the press-ball test when performed with no more than two kilograms of force to the ball. Thus, Plaintiffs contend that the district court committed prejudicial error by allowing a defense witness to go outside of Takata’s written test protocol and to speculate that the buckle could meet a particular test that Takata used in determining the susceptibility of the buckle to accidental release.

(58) Plaintiffs assert error in the district court’s having permitted certain defense witness deposition testimony in regard to “press-ball test 33” to be read to the jury, along with the other deposition testimony of the expert that was being introduced in regard to Takata’s buckle-test protocol. The offensive deposition testimony, as characterized by Plaintiffs, involved a “speculative two-kilogram force limitation” that was not in any written test protocol. Plaintiffs assert that the written test protocol did not specify how much force on the buckle button was required in order to release it and that adding the objectionable testimony to the written test protocol had the prejudicial effect of changing the testing result in which the buckle “demonstrably failed” into one in which the buckle passed the test.

(59) The deposition testimony at issue was elicited during Plaintiffs’ examination of the witness. When the deposition testimony was presented to the jury, Plaintiffs sought to edit out the testimony of the two kilogram force, primarily, if not solely, on the ground that it was “mere speculation.” The Court allowed the testimony to be read to the jury.

(60) On appeal, Plaintiffs claim reversible error in admitting this testimony on the grounds that (1) the testimony was a critical piece of evidence for Defendants, because without it the AB buckle demonstrably failed Takata’s own test requirements, and with the two-kilogram-force limit added to the test, Defendants intended to show that the buckle passed the test; and (2) the testimony was “incompetent, speculative and false” and should not have been allowed in order to demonstrate that the buckle was not defective because it passed the press-ball test when performed with no more than two kilograms of force to the ball. Thus, Plaintiffs contend that the district court committed prejudicial error by allowing a defense witness to go outside of Takata’s written test protocol and to speculate that the buckle could meet a particular test that Takata used in determining the susceptibility of the buckle to accidental release.

(61) The written test, known as “Test 33” and also apparently referred to as an “elbow test,” involved the use of various diameter steel balls pushed against the AB buckle release button. Plaintiffs’ approach at trial was to show that under Test 33 a thirty-millimeter-diameter ball was used with unmeasured force to test if the buckle would open, and once the buckle failed this test, the result would be that the buckle did not meet Takata’s specifications. Important for Plaintiffs’ arguments, the written protocol for Test 33 did not contain any specification or description of a quantitative maximum force to be applied when pushing on the release button with the thirty-millimeter-diameter ball. One or more of Plaintiffs’ experts demonstrated that the AB buckle could be opened by pressing a thirty-millimeter ball against the buckle release button with a modest but unmeasured force akin to an elbow pressing on the buckle button.

(62) Plaintiffs complain that Defendants had a Takata engineer make up two test conditions that were not in the protocol and were of trivial quantitative force that would not open or deform the buckle when Defendants recognized that the AB buckle failed Takata’s written test protocol.

(63) The testimony on the two-kilogram measurement at issue was essentially as follows:

Q. And is there any measurement of the load or is it just that the person can push the ball with whatever load he is comfortable with so long as it does not bend or deform the housing or other parts?

THE WITNESS: The person who opens doing this testing would be intentionally trying to cause the opening or separation.

Perhaps it is more likely that the separation or opening would occur. [The load is applied at the level that no deformation would be caused.]

So perhaps it would be along the level of two kilograms or so, I would imagine.

Pressed further with the question whether he measured it, the witness answered, “I’m guessing, but it would be about two kilograms.” Thus, Plaintiffs contend that the two-kilogram testimony was speculative; whereas, Defendants contend that it was an estimation based on the witness’s personal involvement in developing the AB buckle for Takata, that the load is such that you do not deform the outer housing of the buckle, and that the issue is not admissibility, but weight and credibility.

(64) We are not persuaded that the district court committed reversible error. “Our
courts have repeatedly recognized that the trial court is in the best position to evaluate the effect of trial proceedings on the jury.”

For this reason, the trial court is vested with broad discretion to determine under Rule 11-403 whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. We will not disturb the trial court’s decision on appeal unless that discretion is abused. We will find an abuse of discretion when the court’s decision is without logic or reason, or that it is clearly unable to be defended.

Norwest Bank N.M., N.A., 1999-NMCA-070, ¶ 39 (internal quotation marks and citations omitted). “[T]he complaining party on appeal must show the erroneous admission . . . of evidence was prejudicial in order to obtain a reversal.” Cumming v. Nielson’s, Inc., 108 N.M. 198, 203-04, 769 P.2d 732, 737-38 (Ct. App. 1988). This burden includes having to show a “high probability that the improper evidence may have influenced the factfinder.” Santa Fe Custom Shutters & Doors, Inc. v. Home Depot U.S.A., Inc., 2005-NMCA-051, ¶ 32, 137 N.M. 524, 113 P.3d 347 (internal quotation marks and citation omitted). “The admission of expert testimony is within the sound discretion of the court and its decision will not be overturned unless an abuse of discretion is shown.” Leitch v. City of Santa Fe, 1997-NMCA-041, ¶ 27, 123 N.M. 353, 940 P.2d 459.

We hold that the district court did not abuse its discretion in allowing the two-kilogram testimony to be read to the jury along with the remainder of the testimony that was elicited by Plaintiffs. The witness’s credibility and the weight to be given to the testimony were for the jury.

CONCLUSION

IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:
RODERICK T. KENNEDY, Judge
LINDA M. VANZI, Judge
CERTIORARI GRANTED, NO. 31,813, JULY 29, 2009

OPINION

LINDA M. VANZI, JUDGE

[1] This interlocutory appeal follows from the district court’s pre-trial ruling that Celina Gallegos’s (Gallegos) statements to a 911 operator that Joseph Soliz (Defendant) had just violently attacked her were inadmissible under the Confrontation Clause of the Sixth Amendment to the United States Constitution. The district court appears to have concluded that Gallegos’s statements during the 911 call were testimonial in nature, pursuant to Davis v. Washington, 547 U.S. 813 (2006), and thus the transcript of Gallegos’s 911 call is inadmissible under Crawford v. Washington, 541 U.S. 36 (2004). We reverse and, without ruling on any other facet of the admissibility of Gallegos’s statements, hold that her statements during the 911 call are nontestimonial in nature and thus do not violate Defendant’s rights under the Sixth Amendment.

BACKGROUND

[2] Defendant was indicted by a grand jury in the Third Judicial District Court on the following four counts: one count of aggravated battery against a household member with a deadly weapon; two counts of aggravated assault against a household member with a deadly weapon; and one count of battery against a household member. Defendant was subsequently arraigned and entered a plea of not guilty.

[3] The charges against Defendant stemmed from events occurring on June 25, 2006. On that date, Gallegos (Defendant’s girlfriend and cohabitant) initiated a 911 call from a neighbor’s house and, in the course of that call, reported that Defendant had just violently attacked her with a heavy metal pole. The seven-page transcript of that call, which Defendant agreed was authenticated and accurate, is attached as an appendix to this opinion.

[4] Defendant was successfully indicted and scheduled for trial. However, repeated attempts by both the State and counsel for Defendant to contact Gallegos and secure her participation as a witness in the criminal prosecution of Defendant failed. As a result, the district court excluded Gallegos as a witness. The parties do not contest this ruling and do not dispute that Gallegos was unavailable.

[5] In light of Gallegos’s unavailability, Defendant submitted two separate motions in limine. The motions are premised on a single underlying legal assertion: that Gallegos’s statements during the 911 call are testimonial, as defined in Davis, and thus the transcript in its entirety is inadmissible pursuant to Crawford. During the hearing on the first motion, the State maintained that the transcript was admissible up to page five, up to the point at which Gallegos provides the 911 operator a call-back number. Up to that point, the State claimed that Gallegos’s statements concerned an ongoing emergency and thus were nontestimonial and posed no Confrontation Clause problem. The State was unconcerned with the portions of the transcript following page five as, the State contends, it contains mere “repetition.” The district court ruled that it would “allow the admission of the [911] tape up to page five” and set a hearing for argument concerning further redaction of the content of those five pages.

[6] During the second hearing, Defendant reiterated his objection, citing Crawford and Davis, that the transcript is inadmissible in its entirety. In the alternative, and in light of the district court’s ruling that the first five pages of the transcript of the 911 call were admissible, Defendant sought redaction of certain statements recorded in those five pages. Pursuant to Defendant’s argument in the alternative, the district court began evaluating the transcript line-by-line and found certain statements made by Gallegos inadmissible. However, the parties’ disagreement over the meaning of Davis and the application of the principles announced therein soon became intractable. Accordingly, the district court discontinued its line-by-line examination and, presumably persuaded by Defendant’s arguments, reversed its previous ruling and summarily concluded—without explanation—that the transcript was inadmissible in its entirety. In response
to this ruling, the State requested certification for interlocutory appeal. That request was granted and forms the basis of this appeal.

**DISCUSSION**

**Standard of Review**

{7} The State’s interlocutory appeal requires us to review the admissibility of Gallegos’s statements, as recorded in the 911 transcript, in light of Defendant’s objections that admission of those statements would violate the Confrontation Clause of the Sixth Amendment to the United States Constitution.

“We apply a de novo standard of review as to the constitutional issues related to [the de]fendant’s rights under the Confrontation Clause.” *State v. Massengill*, 2003-NMCA-024, ¶ 5, 133 N.M. 263, 62 P.3d 354.

**The Sixth Amendment and Crawford**

{8} The Confrontation Clause of the Sixth Amendment to the United States Constitution provides: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. Const. amend. VI. The United States Supreme Court’s Sixth Amendment jurisprudence was altered fundamentally following the issuance of *Crawford.* There, after a lengthy discussion of the history of the Sixth Amendment, the Court concluded that “where testimonial evidence is at issue, . . . the Sixth Amendment demands . . . unavailability and a prior opportunity for cross-examination.” *Crawford*, 541 U.S. at 68. Thus, the *Crawford* Court held that when the declarant is unavailable, out-of-court statements that are testimonial are inadmissible even if they meet an exception to the hearsay rules. *Id.* at 54. In the present matter, it was undisputed that Gallegos is unavailable and Defendant had not had an opportunity to cross examine her. The question we must resolve, then, is whether Gallegos’s statements during the 911 call (as recorded in the transcript of that call) are testimonial in nature.

{9} In *Crawford*, the United States Supreme Court did not establish a comprehensive definition for the term “testimonial,” 541 U.S. at 68, a necessary prerequisite to provide courts adequate guidance in identifying a testimonial statement. Rather, it left “for another day any effort to spell out” such a definition and concluded that “[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.” *Id.* The issue presented in *Davis*—“whether . . . [an] interrogation that took place in the course of [a] 911 call produced testimonial statements,” *Davis*, 547 U.S. at 826—required the Court to “more precisely” define the term testimonial and the qualities that render a statement testimonial in nature. *Id.* at 822.

**{10}** This Court and our Supreme Court have previously adopted and discussed the principles established in *Davis*, see, e.g., *State v. Lopez*, 2007-NMSC-037, ¶¶ 20-21, 142 N.M. 138, 164 P.3d 19 (discussing the admissibility of non-testifying co-defendants’ custodial statements); *State v. Romero*, 2007-NMSC-013, ¶¶ 4-17, 141 N.M. 403, 156 P.3d 694 (evaluating an unavailable witness’s statements to a sexual assault nurse examiner in light of *Davis* and concluding that the statements in question were testimonial in nature). The present matter, however, requires us, as a matter of first impression, to evaluate the principles announced in *Davis* in the context of statements elicited during a 911 call. As it is from *Davis* that we derive analytical guidance to resolve the current matter, it is to *Davis* we turn.

**Davis and the Definition of Testimonial**

{11} *Davis* consolidated two appeals: *Davis v. Washington*, a case from the Supreme Court of Washington, and *Hammon v. Indiana*, a case from the Indiana Supreme Court. *Davis*, 547 U.S. at 817-21. In both cases, the state supreme courts allowed incriminating statements of unavailable victims into evidence over the defendants’ objections that admission of such evidence violated the Confrontation Clause of the Sixth Amendment to the United States Constitution. *Id.* at 819, 821. The facts of *Davis*, the Washington case, are similar to the present matter: a victim of domestic violence (Michelle McCottry) called 911 after she was attacked by the defendant (her former boyfriend). *Id.* at 817-18. During the call, McCottry informed the operator of the identity of the defendant and described the attack. *Id.* McCottry did not participate in the subsequent criminal trial and, in her absence, the state submitted a recording of the 911 call. *Id.* at 819. In *Hammon*, the Indiana case, the victim (Amy Hammon) was violently attacked by the defendant (her husband) at their home. *Id.* at 819-20. After receiving a domestic disturbance report, the police arrived on the scene shortly after the incident. *Id.* at 819. Hammon described the violence that the defendant committed to one of the police officers. *Id.* at 819-820. Like McCottry, Hammon also did not participate in the criminal trial that ensued. *Id.* at 820. In light of this fact, the court permitted the officer who spoke to Hammon to recount what she told him during the defendant’s trial. *Id.* After setting forth additional clarification regarding what constitutes a testimonial statement, the United States Supreme Court highlighted the factual distinctions between the two cases and concluded that McCottry’s statements were nontestimonial in nature, *id.* at 828-29, whereas Hammon’s were testimonial in nature. *Id.* at 829-30. That additional clarification is the key to resolving the present matter and is discussed below.

{12} The Court in *Davis* recognized the futility of attempting to comprehensively classify what is, and is not, a testimonial statement. *Id.* at 822 (acknowledging the infinite variety of statements a person might make in response to police interrogation). Rather, the Court concluded that the following distinction sufficed:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

*Id.* Having established this definitional distinction between testimonial and nontestimonial statements, the Court explained that the determination of the admissibility of McCottry’s and Hammon’s statements was based on whether their statements were given primarily to permit the police to respond to an emergency, or were given for purposes of establishing past acts for purposes.
of a subsequent criminal prosecution. *Id.* at 826-28. The former category of statements, the Court instructed, is nontestimonial and thus presents no Confrontation Clause problem. See *id.* at 821, 828. The latter category is testimonial and is thus inadmissible pursuant to *Crawford.* See *Davis*, 547 U.S. at 821, 829.

{13} In addition to providing a definitional distinction between nontestimonial and testimonial statements, the Court in *Davis* identified four factors to guide courts in their assessment of the category into which a statement falls. *Id.* at 827. The Court observed that a statement is likely nontestimonial if (1) the individual is describing events as they are actually happening rather than describing past events; (2) the individual is facing an ongoing emergency; (3) when viewed objectively, the elicited statements are necessary to resolve a present emergency rather than simply to learn what had happened in the past; and (4) the individual’s statements were not made in the safety of a station house or in response to a series of questions with an officer-interrogator tapping and making notes but were provided over the phone in an environment that was neither tranquil nor safe. *Id.* In a footnote preceding the Court’s discussion of these four factors, the Court stressed that “it is in the final analysis the declarant’s statements, not the interrogator’s questions, that the Confrontation Clause requires us to evaluate.” *Id.* at 822 n.1.

{14} The Court also observed that, given the nature of 911 calls, a 911 call or transcript of that call may contain both testimonial and nontestimonial statements. “This presents no great problem,” the Court explained. *Id.* at 829. “[C]ourts will recognize the point at which, for Sixth Amendment purposes, statements in response to interrogations become testimonial. Through in limine procedure, they should redact or exclude the portions of any statement that have become testimonial.” *Id.* (emphasis omitted). In other words, and as applied in the present matter, the district court was acting appropriately when it initiated a line-by-line review of the transcript of Gallegos’s 911 call. *Davis* specifically charged the district court with this responsibility. The district court erred when it abandoned that task and summarily concluded that the entire transcript was inadmissible.

{15} Having laid out the governing law, we turn now to an application of those legal principles to the case before us. To review, *Davis* makes clear that our primary task is to evaluate Gallegos’s statements in light of the core definitional distinction between nontestimonial and testimonial statements. The four factors laid out in *Davis* serve as a guide in that determination.

**911 Operator as a Law Enforcement Officer**

{16} Because both parties raise this issue, we briefly discuss whether the 911 operator in this case was acting as a law enforcement officer. Citing the fact that in *Davis* the United States Supreme Court left unresolved “whether and when statements made to someone other than law enforcement personnel are ‘testimonial,’” *id.* at 823 n.2, the State argues that statements made to non-law enforcement personnel (such as emergency medical responders) are always nontestimonial. Defendant, on the other hand, contends that under *Davis*, the 911 operator in this case was acting as an agent of law enforcement and the statements are therefore testimonial. We are unpersuaded that this distinction is pertinent in the context of this case. Instead, as in *Davis*, we assume without deciding that the inquiries of the 911 operator amount to “acts of the police.” *Id.*

**Analysis of the Facts in the Present Matter in Light of Davis**

{17} Defendant first argues that Gallegos’s statements were testimonial because there was no ongoing emergency in this case. We disagree. A review of the 911 transcript persuades us that Gallegos’s statements in that transcript are entirely nontestimonial in nature, as that term is defined in *Davis*. Gallegos initiated the 911 call only moments after she was attacked; she told the 911 operator that Defendant had *just* attacked her. She informed the 911 operator that she had just fled from him and that Defendant had initially pursued her while continuing to brandish the instrument with which he had attacked her. She informed the operator that it appeared Defendant was under the influence of alcohol or drugs. Gallegos was crying throughout the call, which reflects her frightened and panicked state and further demonstrates that Gallegos initiated the call at a moment filled with exigency. She informed the operator that she was, at that very moment, experiencing significant pain and described the violent episode which was the source of that pain. When she fled her house, Gallegos left her two small children behind. Contrary to Defendant’s assertion, Gallegos did not tell the operator that Defendant “would not harm the children.” Rather, she stated that she was uncertain whether he might harm them. Given the events that had just transpired, Gallegos was clearly expressing concern for the children’s safety. She provided the 911 operator the identity of her attacker, a description of him, whether he had a proclivity for violence, whether he was likely to flee the area, and whether he was armed with dangerous weapons. These facts were essential to assist the police in safely apprehending Defendant, an immediate and ongoing concern.

{18} These circumstances manifestly indicate that the United States Supreme Court’s conclusion in *Davis* is equally applicable in this matter. “[T]he circumstances of [the 911] interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency.” 547 U.S. at 828. Gallegos “simply was not acting as a witness; she was not testifying. What she said was not a weaker substitute for live testimony at trial. . . . No witness goes into court to proclaim an emergency and seek help.” *Id.* (internal quotation marks and citations omitted). Based on our evaluation of the objective circumstances surrounding Gallegos’s phone call, and in light of the four factors set forth in *Davis*, we are persuaded that any reasonable listener would conclude that Gallegos was facing an ongoing emergency and was describing events as they unfolded.

**Gallegos Was Describing Events as They Were Happening**

{19} Applying the first *Davis* factor, we observe that, although Gallegos told the 911 operator of events that had just occurred, those occurrences served to establish whether Defendant posed a present danger. The facts here plainly contradict Defendant’s assertion that Gallegos was reporting past events. Gallegos’s statements that she was experiencing pain, the cause of that pain, her emotive responses conveying fear, and her uncertainty about the safety of
her children are all statements concerning an immediate and existing state of events. Gallegos’s description of Defendant, his present whereabouts, his proclivity for violent behavior including whether he had harmed Gallegos in the past, whether he was armed, whether he would flee, what he had been doing in the hours preceding the attack, and her observation that Defendant appeared to be under the influence had sufficient “temporal proximity” to the attack itself to permit the court to conclude that the call described an immediate event rather than a past incident. We are equally persuaded that the temporal proximity between the attack and Gallegos’s statements to the 911 operator describing Defendant and how he attacked her—the record reflects that Gallegos made the call as soon as she was able—establishes that she was similarly reporting an occurring event rather than a past incident. To conclude otherwise would ignore, in our view, what is likely a common feature of 911 calls initiated by victims of violence. The call almost universally occurs after the violent incident. Accordingly, the circumstances surrounding the 911 operator’s questioning of Gallegos objectively indicates that the primary purpose was to assist police in meeting an ongoing emergency.

Gallegos Faced an Ongoing Emergency

As to the second Davis factor, a review of the 911 call shows that any reasonable listener would recognize that Gallegos was facing an ongoing emergency. She had just fled her home, partially dressed, after having been violently attacked. Defendant pursued her with the instrument with which he attacked her. She was forced to seek refuge in the home of a stranger and was frightened, injured, and in pain. Defendant contends that Gallegos was not facing an ongoing emergency because having successfully fled from Defendant, she was not in imminent risk of further injury. Defendant focuses on Gallegos’s statement to the 911 operator that she was in a neighbor’s home and did not anticipate any further violence from Defendant. We find Defendant’s assertions unpersuasive for three reasons. First, Defendant punched Gallegos in the head and back and swung the pole at her elbow. When she ran out of the house, he was running behind her. Second, as previously noted, both the United States and New Mexico Supreme Courts have stressed that we must examine the statements made during the interrogation from an objective perspective. Davis, 547 U.S. at 822; State v. Ortega, 2008-NMCA-001, ¶ 29, 143 N.M. 261, 175 P.3d 929 (filed 2007), cert. denied, 2007-NMCERT-012, 143 N.M. 213, 175 P.3d 307 (“At the core of the [Davis] analysis is the objective purpose of the interrogation.”). As such, we find Defendant’s emphatic reliance on Gallegos’s statements that she subjectively believed she was no longer in danger misplaced. Objectively, Gallegos’s statement that she was not at risk of further harm is nothing more than speculation. There is nothing in the record to refute that Gallegos had no objective way of knowing whether Defendant was still a threat to her safety, the safety of her children, the safety of the neighbors who were protecting her, or the safety of other residents in their community.

Our third reason for rejecting Defendant’s argument that the ongoing emergency had ended concerns the scope of the definition of ongoing emergency. Defendant’s assertion that Gallegos’s separation from Defendant neutralized the ongoing emergency is premised on a constrained definition of that term. According to Defendant, the ongoing emergency ended when Gallegos’s physical proximity to Defendant prevented him from further injuring her. This assertion ignores the facts that Gallegos was injured, needed medical attention, was terrified, and was crying; that a criminal offense had just occurred; and that the perpetrator of that offense remained at large. As demonstrated by the following authorities, we conclude that Defendant’s narrow definition of the term ongoing emergency is erroneous.

In Smith v. United States, 947 A.2d 1131, 1134 (D.C. 2008), the defendant (the victim’s estranged husband) objected to the admission of the victim’s 911 call arguing that under Davis, his departure from the crime scene after he had attacked the victim indicated that the emergency, and any imminent threat to the victim, had subsided. The District of Columbia Court of Appeals responded that the defendant’s assertion was premised on an “unduly restrictive” definition of the term ongoing emergency. Id. The Court explained that “to make the actual physical presence of the alleged wrongdoer a dominant factor in determining whether there is an ongoing emergency, narrows and distorts the
guiding principle to be applied to a wide range of circumstances.” Id. In a similar case, but in far more colorful language, the California Court of Appeals in its analysis of the ongoing emergency factor of Davis rejected a nearly identical argument. See People v. Brenn, 60 Cal. Rptr. 3d 830, 838 (Ct. App. 2007). The defendant in that case asserted that the statements recorded in a 911 call initiated by the victim he had stabbed did not occur during an ongoing emergency because the victim fled the scene of the stabbing and found refuge in a neighbor’s home where he called 911. Id.

The court’s response to this argument is as well reasoned as it is piquant:

[The defendant] questions whether [the victim] was facing an emergency at all, given that [the victim] had gone next door to call the police. This is an argument much easier to make from a law office than from 100 feet from someone who has just stabbed you. At the time of the call, [the victim] was suffering from a fresh stab wound, [the defendant] was still at large, and it was unclear whether [the defendant] still had any weapons or was searching for [the victim]. . . . It is hard to construct a definition of the word ‘emergency’ that this scenario does not fit.

Id.; accord United States v. Arnold, 486 F.3d 177, 190 (6th Cir. 2007). In light of these authorities, as well as our review of the circumstances surrounding Gallegos’s 911 call, we are persuaded that the call was made during an ongoing emergency.

The Statements Elicited From Gallegos by the 911 Operator Were Necessary to Resolve a Present Emergency

[25] Under the third Davis factor, our review of the questions posed to Gallegos by the 911 operator and the statements those questions elicited, when viewed objectively, reveals that the questions were clearly directed at resolving the present emergency and not to learn what had happened in the past. The 911 operator elicited from Gallegos the following information: what had happened to Gallegos, when the attack had happened, who had attacked her, whether Gallegos was under any imminent threat, where her attacker might be located, whether her attacker was intoxicated, whether her attacker was armed, and whether her attacker had a propensity for violence and posed a threat to the officers dispatched to apprehend him. These are precisely the types of questions a 911 operator would need answered in order to orchestrate an adequate and safe response to a present emergency. See People v. Dominguez, 888 N.E.2d 1205, 1212-13 (Ill. App. Ct. 2008) (discussing the third factor of Davis and concluding that the 911 operator’s questions—“why [the victim] was fleeing [the defendant], what [the victim’s] injuries were, where [the victim] was located, and where [the victim] left [the defendant],”—were clearly designed to resolve a present emergency).

[26] We are not persuaded that the operator’s question regarding whether Defendant had harmed Gallegos previously, and her response that he had, is “obviously . . . [a statement regarding] prior bad acts” and constitutes a testimonial statement. To conclude that this question and Gallegos’s response were directed at unearthing information about Defendant’s prior conduct for purposes of a subsequent criminal prosecution assumes a great deal. Our review of the transcript suggests that this question had a number of possible purposes, most prominently, to calm Gallegos down in a tense and anxiety-filled moment and to ascertain whether Defendant has a penchant for violence and was likely to pose a threat to the responding officers. Furthermore, after asking this question and receiving Gallegos’s response that Defendant had acted violently towards her in the past, the operator asked no follow-up questions. Such questions would be anticipated if the operator’s initial inquiry was for purposes of criminal prosecution. Accordingly, as we have previously stated, we see no reason to exclude the statements derived from Gallegos during this particular exchange on Confrontation Clause grounds.

Gallegos’s Statements Were Provided Over the Phone in an Environment That Was Neither Tranquil nor Safe

[27] Finally, under the fourth Davis factor, despite the fact that Gallegos called 911 from a neighbor’s house and stated that she did not believe she was under any immediate threat from Defendant, we conclude that the circumstances of Gallegos’s call indicate that she was neither safe nor in a tranquil environment during that call. She was in a stranger’s home, facing an uncertain but very real threat, she was injured and frightened, and she was anxiously awaiting the arrival of the police and medical assistance. Our conclusion that these circumstances demonstrate that Gallegos was not in a safe or tranquil environment is supported by the court’s discussion in Davis as to what constitutes a safe and tranquil environment. As used in Davis, the phrase “safe” and “tranquil” environment do not refer to the absence of an immediate threat but to an environment akin to formal police interrogation. See Davis, 547 U.S. at 827.

[28] The court reached the conclusion in Davis that McCottry was not in a safe or tranquil environment by contrasting her circumstances and the circumstances surrounding the statements given by Hammon with the statements of the declarant in Crawford, which the court held were clearly testimonial in nature. The Court observed that “[t]he questioning that generated the declarant’s statement in Crawford . . . was made and recorded while [the declarant] was in police custody, after having been given Miranda warnings.” Davis, 547 U.S. at 822 (discussing Crawford). Based on this distinction, between McCottry’s statements and those in Crawford, the Court concluded that McCottry’s statements were not provided in an environment that was safe or tranquil:

[T]he difference in the level of formality between the two interviews is striking. [The declarant in Crawford was] responding calmly, at the station house, to a series of questions, with the officer-interrogator tapping and making notes of her answers; McCottry’s frantic answers were provided over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe.

Davis, 547 U.S. at 827.

[29] Turning to the Court’s discussion in Davis of the circumstances surrounding the in-person police questioning of Hammon, the Court observed that Hammon’s “interrogation was conducted in a separate room, away from her husband (who tried to intervene), with the officer receiving her replies.” Id. at 830. This type of interrogation, according to the Court, had a “striking resemblance” to the Crawford interrogation. Davis, 547 U.S. at 830. Highlighting the similarities between them, the Court noted that “[b]oth declarants were actively separated from the defendant[s] . . . Both
statements deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed. And both took place some time after the events described were over.” Id.

In this case, unlike the formal police interviews in Crawford and with Hammon in Davis, Gallegos’ conversation with the 911 operator was not calm, formal, or controlled but was more akin to McCottrey’s call in Davis. Indeed, the tape shows Gallegos was crying and frantically answering the 911 operator’s questions in an environment that was neither safe nor tranquil. As with the first three Davis factors, we find that the fourth Davis factor also supports the conclusion that Gallegos’s statements are nontestimonial.

Limitations on Our Holding

We emphasize that our decision that Gallegos’s statements to the 911 operator are admissible is limited to the facts in this case. District courts should conduct an independent analysis of 911 calls applying the four Davis factors to the facts before it. We also emphasize that our opinion addresses only the precise issue of whether the statements are admissible under the Confrontation Clause. At trial, it is possible that some other issue regarding the admissibility of those statements could arise.

CONCLUSION

For the foregoing reasons, we conclude that Gallegos’s statements to the 911 operator were not testimonial and therefore do not violate Defendant’s Sixth Amendment rights under the Confrontation Clause. Accordingly, we reverse the district court’s ruling and remand for further proceedings in accordance with the foregoing opinion.

IT IS SO ORDERED.

LINDA M. VANZI, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge
ROBERT E. ROBLES, Judge

Appendix

Operator: 911 emergency what is the city please?
Woman: I ahh, I need a police officer to come to my house.
Operator: What is your address?
Woman: Um, 320 Lopez in Chamberino

Operator: 320 Lopez?
Woman: Yes sir. (Crying)
Operator: In Chamberino? Okay, what’s going on?
Woman: My boyfriend just hit me across the arm with a, with a with a pole.
Operator: What’s your name?
Woman: Celina (crying)
Operator: What’s your phone number?
Woman: I don’t have, I don’t have a phone, I’m at a neighbor’s house.
Operator: You’re at a neighbor’s house?
Woman: Yes (crying)
Operator: Okay, where is Lopez off of San Luis Avenue on Francisco?
Woman: I’m not sure, we barely moved over here, I just--
Operator: Okay
Woman: I was just, we live in front, in back of the um fire depart, the fire department in Chamberino
Operator: Okay, I (inaudible) think I got it.
Operator: Okay, what’s your name?
Woman: Celina
Operator: Okay, what’s his name?
Woman: Joseph (crying)
Operator: Do you need an ambulance?
Woman: I . . . I don’t know. I just know my elbow hurts like, like really really bad.
Operator: Okay. We’ll get you some help over there. Okay, ahh, oh Jesus. Okay, where is he at?
Woman: He’s at the house with my daughters.
Operator: And you’re at a neighbor’s house?
Woman: Yes.
Operator: Are there any weapons?
Woman: Uhm, no, I don’t think so.
Operator: Okay. And his name is Joseph, you said?
Woman: Yes.
Operator: How old is he?
Woman: I’m sorry?
Operator: How old is he?
Woman: He’s 21.
Operator: Okay, and he’s there with the
daughter?
Woman: Yeah, he . . . yeah, my two daughters.
Operator: Is anybody else hurt over there?
Woman: No.
Operator: How many kids are there at the house?
Woman: Two
Operator: How old are they?
Woman: Ahh, one’s 4 and one’s 1.
Operator: Okay, uhm, has he been drinking or anything?
Woman: No
Operator: Uhm, is he on any drugs?
Woman: No, I don’t think so. He barely came home last night.
Operator: From where?
Woman: From out with some guys.
Operator: Okay. And you don’t know if there’s any weapons or anything?
Woman: No.
Operator: Okay. I want you to calm down, I want you to stay on the phone with me. Would he hurt the girls, do you know? (inaudible)
Woman: I don’t think so.
Operator: Okay. Where else are you hurt at?
Woman: Just my elbow, he just swung the pole at my elbow (inaudible). He was punching me a couple of times on my head and my back, that’s it.
Operator: Okay. Hold on, stay on the line. (Inaudible) . . . I’m talking to her. Okay. Is he in the living room or where?
Woman: I think so.
Operator: Okay. Um, what is he wearing right now?
Woman: A grey shirt with the blue pants.
Operator: Hang on okay. Don’t hang up. Paul? Paul? Ask . . . (inaudible) It’s aah 320 South Lopez, so I can make a copy. Hang on okay . . . (inaudible) . . . Did he follow you out there or anything?
Woman: He was, he was running after me with the pole but I ran over here.
Operator: Okay. Try to calm down okay. We are going to get you some help out there. Did it copy to him? No, okay. Okay. Take a deep breath okay.
Woman: Yes.
Operator: Okay, they’re on their way over there. Okay, what would he be driving if he decided to leave?
Woman: Uhm, he doesn’t have a car. He would just walk.
Operator: No, negative on all that, negative on all of that now.
Woman: (crying) Ouh
Operator: What neighbor’s house are you at?
Woman: I’m sorry
Operator: What neighbor’s house are you at? Is it across the street or?
Woman: No, it’s across the way (inaudible), next to the church.
Operator: What color, what, do you know the address there?
Woman: What’s your address? 702 Convent.
Operator: Convent?
Woman: Yes Ma’am.
Operator: Okay, let me know if anything changes. What’s going on with your arm, is it swelling, is it uh?
Woman: I’m not sure, I can’t even move it, it hurts, like really bad.
Operator: We’re getting help over there okay?
Woman: Okay
Operator: Are you in a trailer or is it that house?
Woman: No, it’s a house.
Operator: Okay, what kind of pole did he hit you with?
Woman: Um, it’s, it’s a gold metal rod kind of pole for, I’m not sure for what it’s for.
Operator: And you don’t know, and you don’t know what it is used for?
Woman: No, it’s a, it’s very thick, I don’t know. (crying)
Operator: Ma’am, I am getting you help okay?
Woman: Okay
Operator: What, so you don’t know your neighbor’s phone number?
Woman: Uh, no they have a cell phone, its [sic] one of their boyfriend’s cell phone.
Operator: Okay, can I have, ask them if I can have that number just in case we, I lose you, I can call you right back.
Woman: The police said if he can have the number so that if anything happens he can call back. [Telephone number provided by the woman omitted.]
Operator: Okay, try to (inaudible) they are on their way okay. Is he still in the house?
Woman: I’m not sure.
Operator: And the girls, where are they at? Are they still in the house?
Woman: Their [sic] inside, their [sic] inside the house.
Operator: Can he see you from where you are at?
Woman: Yeah, he can see?
Operator: Okay, and he wouldn’t go over there to the neighbor’s house.
Woman: Nah, he wouldn’t come over here.
Operator: What are you wearing?
Woman: (Inaudible) with baby blue on them with just a tank top, like a sports bra.
Operator: Has he done this to you before?
Woman: Ah, yeah, we’ve, I’ve called the cops before and oh.
Operator: Okay, (inaudible) they are on their way.
Woman: (moaning)
Operator: And, they said, you said he came home last night from being with his friends. Can you tell if he was drinking or anything?
Woman: Uh no, I don’t know. It looked like he was, he was on something though.
Operator: But there’s no guns or anything in the house?
Woman: No, not that I seen
Operator: He doesn’t carry a knife with him or anything?
Woman: No (crying)
Operator: How is your arm doing?
Woman: It like really hurts really bad.
Operator: (Inaudible)
Woman: My elbow.
Operator: Is it swelling up?
Woman: I’m, I’m not sure, I can’t see cause it’s on it’s on my elbow.
Operator: On your elbow. Can you hear them coming towards you?
Woman: Um yeah, I can hear somebody.
Operator: Okay
Woman: But like really far.
Operator: I think they’re by the church. More close by. What color’s their house?
Woman: I’m sorry
Operator: What color is their house?
Woman: My house is brown. Okay, I see a police going towards my house.
Operator: Okay, I’m gonna go ahead and let you go so you can go speak with them okay?
Woman: Okay
Operator: All right, bye bye.
Woman: Bye

\[1\] The district court concluded that the telephone number Gallegos provided to the operator should be omitted from the record for purposes of privacy. As a matter of prudence, we adopt that conclusion.
This case centers on the effect of a written land ownership and well-sharing agreement (Agreement) entered into some fifty years ago by the owners of adjacent ranches in southern New Mexico. The Agreement contained a provision that the ranch owners—Joseph and Mary Helen Skeen and William and Ramona Treat—would maintain wells located on their respective properties and supply water to each other’s ranches for livestock. Defendants Bob and Jim Boyles (the Boyles) are the Treats’ successors-in-interest. The district court ruled that the Agreement created a reciprocal easement interest. The Boyles argue that the actual damages were no affirmative duty to supply water. The district court awarded compensatory and punitive damages as well as attorney fees to Plaintiffs.

Opinion

Michael D. Bustamante, Judge

{1} This case centers on the effect of a written land ownership and well-sharing agreement (Agreement) entered into some fifty years ago by the owners of adjacent ranches in southern New Mexico. The Agreement created a reciprocal easement appurtenant that ran with the land, that the easement placed a duty on the Boyles, as the Boyles’ successors-in-interest, to supply water to the Skeens, and that the Boyles breached that duty. The district court awarded compensatory and punitive damages as well as attorney fees to Plaintiffs.

{2} The Boyles appeal, arguing that the Agreement at most created a license that was unilaterally revocable or that they had no affirmative duty to supply water. The Boyles argue that the actual damages were improper because the Skeens failed to mitigate and that punitive damages are improper because they lacked culpability sufficient to justify the award. In a separate appeal the Boyles challenge the district court’s award of attorney fees in favor of the Skeens. The award was based on the Skeens’ unopposed motion because the Boyles failed to timely respond, and their request for an extension of time was denied. We consolidate the appeals and affirm all holdings of the district court in the main appeal. We reverse the attorney fee award and remand for further consideration.

Background

{3} The Boyles and the Skeens own adjacent ranches in Lincoln County, New Mexico. Both ranches were, at one time, owned by the Skeens’ ancestors. Mary Helen Skeen, and her late husband Joe, bought their ranch from Joe’s grandmother in 1951. Joe’s grandmother had another grandson, William Treat, who along with his wife Ramona, bought the adjacent property. On February 17, 1959, Joe and Mary Skeen and William and Ramona Treat executed the Agreement clarifying ownership of certain property and agreeing to share water from two wells, one located on each of their respective properties. Pursuant to the Agreement, the Skeens had the right to use water from the Treats’ Dry Pasture Well, and the Treats had the right to use water from the Skeens’ Headquarters Well. The Agreement in its entirety provides:

WHEREAS, William C. Treat and Ramona Treat, his wife, are the holders of a State Lease covering the NW1/4SW1/4 of Section 6, in Township 13 South, Range 19 East, N.M.P.M. in Chaves County, New Mexico, and,

WHEREAS, Joseph R. Skeen and Mary Helen Skeen, his wife, are the owners of the E1/2NE1/4 of Section 23, Township 13 South, Range 18 East, N.M.P.M. in Lincoln County, New Mexico, and

WHEREAS, each party desires to agree as to the ownership and rights to such property and to give to the other a right to obtain water from the premises owned or leased by them for the purpose of watering livestock.

NOW THEREFORE, for considerations received, the receipt of which are hereby acknowledged, William C. Treat and Ramona Treat, his wife, do hereby release and quit claim to Joseph R. Skeen and Mary Helen Skeen, his wife, the E1/2NE1/4 of Section 23, Township 13 South, Range 18 East, N.M.P.M., excepting and reserving to themselves a right to go over and across the NE1/4NE1/4 of Section 23 for the purpose of obtaining water from the well located on the premises in such amount as may be necessary for the purpose of watering livestock.
and Joseph R. Skeen and Mary Helen Skeen, his wife, do hereby release and convey to William C. Treat and Ramona Treat, his wife, any interest they have in and to the NW1/4SW1/4 of Section 6, in Township 14 South, Range 19 East, N.M.P.M., and William C. Treat and Ramona Treat, his wife, hereby grant to Joseph R. Skeen and Mary Helen Skeen, his wife, a right to go over and across this property for the purpose of obtaining water from the well located on these premises, in such amount as may be necessary for the purpose of watering livestock. Each party agrees to maintain the well on the premises owned or leased by them, and to supply such water as may be necessary for the other, and each party agrees to maintain his own tanks and tubs for the purpose of watering livestock.

{4} In 1964 William and Ramona Treat conveyed their ranch, including the Dry Pasture Well, to their son Anthony Treat. Anthony Treat owned the ranch for approximately thirty years. During his tenure on the ranch, Anthony Treat performed the necessary maintenance on the Dry Pasture Well, and always honored the Agreement with the Skeens.

{5} In 1995 Anthony Treat conveyed the ranch to the Boyles. Anthony did not provide the Boyles with a copy of the Agreement, but he orally advised them of the existence of a water sharing agreement concerning the Dry Pasture Well. The district court found that the Boyles were aware of their obligation to provide water to the Skeens. The Boyles acknowledged that they knew of the Agreement, but asserted they thought the obligation could be unilaterally terminated by either party.

{6} In the spring of 2001, in the midst of a severe drought, the Dry Pasture Well quit pumping water. Mike Skeen noticed that the well had stopped producing water and contacted Jim Boyles. Jim Boyles testified that he personally made efforts to get the well back online, but that nothing worked and so he assumed that the water table had dropped. Jim Boyles told Mike Skeen that he was attempting to repair the well and that he had called Keys Windmill for service on the well, but that “the sorry son of a guns would never get out there and get on the job.” However, when Mike Skeen called Keys Windmill to inquire about their unresponsiveness, he was informed that Keys had never received any service call for the Dry Pasture Well. The district court found that Jim Boyles never actually made the request and that he lied about having called Keys Windmill.

{7} In August 2001 Jim Boyles called in a well expert, Ken Wheeler, ostensibly to inspect the Dry Pasture Well. Mr. Wheeler determined that the depth of the well to bottom was 600 feet, and that while there was water in the well starting at 545 feet below the surface, the well cylinder penetrated to a depth of only 505 feet. Thus, there was a forty-foot gap between the water’s surface and the well cylinder. Mr. Wheeler also found that the well had been damaged by a cave-in. Based on his findings, Mr. Wheeler felt the well should be abandoned. Jim Boyles eventually abandoned the well by removing all of the pumping equipment, including the windmill, and installing a welded cap.

{8} In September 2001 Mike Skeen brought in a different well expert, Charlie Lewis, to evaluate the Dry Pasture Well. Mr. Lewis measured the depth of the well, employing two methods of measurement. First, a rod was lowered into the well while measuring the length of cable required to reach the bottom. Next, a sonic measuring device was used to determine the depth to the water. Mr. Lewis’s findings were inconsistent with those of Mr. Wheeler. Based on his measurements, Mr. Lewis determined that the depth to the bottom was 519 feet and that there was water in the well starting 312 feet below the surface. Thus, Mr. Lewis determined that the well was capable of producing because it contained a little more than 200 feet of water. In October of the following year, the Skeens had Mr. Lewis install pumping equipment at the Dry Pasture Well, and it consistently produced twelve to thirteen gallons per minute. Four days later, Mr. Lewis and Mike Skeen recapped the well out of concern that it could be easily ruined if something fell down the pipe. The district court reviewed a video tape of the process employed by Mr. Lewis, including measuring the depth of the well, installing the pumping equipment, and the actual pumping of water from the Dry Pasture Well. The district court determined that Mr. Lewis’s findings most accurately represented the actual characteristics of the well.

{9} Ken Wheeler passed away before this case went to trial. In his deposition testimony, prior to his death, he explained that one possible reason for Mr. Lewis’s conflicting findings could have been that another water strata had broken into the well as a result of an earthquake. However, Mr. Lewis testified that there had been no seismic activity in the area and that he had never heard of any seismic activity effecting the wells in that area.

{10} The district court found that the actual reason for the discrepancies was that the Boyles directed Mr. Wheeler to measure the wrong well. This was based on the court’s findings that the Boyles own another well, the Divide Well, which bears characteristics consistent with the findings of Mr. Wheeler. The court found that there was no way that Mr. Wheeler’s measurements were made at the Dry Pasture Well and that the Boyles intentionally misled Mr. Wheeler by taking him to the Divide Well and telling him that it was the Dry Pasture Well.

{11} Based on Mr. Lewis’s findings, the Skeens were aware as of September 2001 that the Dry Pasture Well could in fact produce water. However, the Skeens did not inform the Boyles of this fact until 2003. In addition, the Skeens did not install a pump at the Dry Pasture Well to begin regularly pumping water until January 2003. When they did install a pump, they found it practically impossible to reinstall a windmill at the site because the sub legs supporting the original windmill tower were cut too short when it was dismantled by the Boyles. The Skeens had to instead bring a gas generator to the site. Since that time, the Skeens have continued to haul gasoline to run the generator, and the Dry Pasture Well has never failed to produce water.

{12} During the period that the well was not operating, from approximately May 2001 through January 2003, the Skeens regularly hauled water to the livestock tank supplied by the Dry Pasture Well. This was a considerable undertaking, requiring the construction of a water hauling trailer and regular four-hour round trips across rugged terrain in order to deliver water to the tank. The district court awarded the Skeens actual damages in the amount of $60,290.62, for damages incurred from the time they first began hauling water to the Dry Pasture Well.

{13} The Boyles argue that the Skeens failed to mitigate their damages. Specifically, the Skeens failed to inform the Boyles that the well was actually operational, and they continued to haul water after September 2001 even after they knew that the Dry Pasture Well could produce. The Boyles argue that reasonable persons under those circumstances would not have continued to haul water to their economic detriment without notifying the Boyles that the well was working or without simply pumping water from the well themselves.
In viewing the facts that were determined by the district court, “[t]he question is not whether substantial evidence exists to support the opposite result, but rather whether such evidence supports the result reached.” Id. (internal quotation marks and citation omitted).

The Boyles are correct that whether an easement has been created is determined according to the intent of the parties. See Olson v. H & B Props. Inc., 118 N.M. 495, 498, 882 P.2d 536, 539 (1994) (stating that an easement should be construed according to the intent of the parties). The Boyles are also correct that the intentions of the parties can be revealed by the language contained in the Agreement.

The district court also awarded punitive damages to the Skeens in the amount of $482,324.96, or eight times the actual damages. This award was based on findings and conclusions that the Boyles misled their well expert, lied about trying to fix the well, intentionally deprived the Skeens of water by intentionally disabling the Dry Pasture Well, and failed to make the well operational even after learning that it could produce water. The district court concluded that these acts were deliberate and deceitful, “reprehensible at best . . . and in gross disregard of the rights of [the] Skeen[s] displaying an arrogant disregard for contractual obligations and any sense of what is right.”

DISCUSSION

The Easement was Appurtenant and Imposed a Duty Upon the Boyles as the Treats’ Successors

The basic issue in the case is whether the Agreement created an easement appurtenant which placed a duty on the Boyles, as the Treats’ successors-in-interest, to supply water to the Skeens from the Dry Pasture Well. The Boyles argue that the Agreement created a license that could be unilaterally revoked at will and that they had no duty under the Agreement to maintain the Dry Pasture Well or supply water to the Skeens. The Boyles point out that the Agreement does not state a duration of effectiveness and does not state that it would bind successors-in-interest. We disagree and affirm the finding of the district court that the Agreement created an easement appurtenant to which the Boyles were subject.

Whether the Agreement created an easement appurtenant imposing a duty on the Boyles is a mixed question of law and fact. We “conduct a de novo review on the Boyles is a mixed question of law and fact. We “conduct a de novo review of the [district] court’s findings of fact for substantial evidence. Reule Sun Corp. v. Valles, 2008-NMCA-115, ¶ 12, 144 N.M. 736, 191 P.3d 1197 (internal quotation marks and citation omitted), cert. granted, 2008-NMCERT-008, 145 N.M. 255, 195 P.3d 1267.

Further, while specific language is not required, the words “grant” or “excepting and reserving” in a document transferring an interest real property reveal an intent to create an easement. In Evans v. Taraszkiewicz, 510 N.Y.S.2d 243, 244 (N.Y. App. Div. 1986), the court considered whether certain language in a deed created an easement or a license to take water from a spring on adjacent land. The relevant language stated that the grantees were “hereby granted the right to use water for domestic purposes from the spring on the lands of the grantees . . . together with the right to lay, maintain and repair the necessary pipes.” Id. at 243 (emphasis added). The court in Evans concluded that an appurtenant easement was created based on several factors: The grant was accomplished with a transfer of interest in real property, the language used included the word “grant,” the grantors did not purport to retain any rights of revocation, and while specific words of inheritance were not used, such words were not required to create a perpetual easement. Id. at 243-44. Similarly, in Kennedy v. Bond, 80 N.M. 734, 735, 460 P.2d 809, 810 (1969), the court determined that an easement was created by a deed containing the language “[e]xcepting and reserving the following” (internal quotation marks omitted). Thus, even though specific language is not required, certain granting language, together with a transfer of an interest in land, is sufficient to create an easement.

Here, the nature of the right created the express language of the Agreement, and the surrounding circumstances indicate the creation of an express easement. The Agreement states that the Treats hereby grant “a right to go over and across” their property. This right is nearly identical to the “right of ingress and egress,” which was found to describe the easement in Martinez v. Martinez, 93 N.M. at 675, 604 P.2d at 368. Specifically, a “right to go over and across” describes a “liberty, privilege, right or advantage which one has in the land of another.” Id. (internal quotation marks and citation omitted). The Agreement is functionally indistinguishable from the instruments in Martinez, Evans, and Kennedy. The Agreement occurred in the context of a land transaction between the Treats and Skeens, wherein the Treats quitclaimed certain land to the Skeens, and the Skeens conveyed the interests they had in the ‘Treats’ property. In this context, the language “hereby grant” describes an express grant of an interest in land, in this case an easement. Given the express terms of the Agreement, together with the surrounding circumstances—the execution of a land transaction—the district court could properly find that an easement had been created.

We also affirm the district court’s conclusion that the easement created was appurtenant and was binding on successors-in-interest. “An appurtenant easement runs with the land to which it is appurtenant, . . . and passes with the land to a subsequent grantee with passage of the title.” Kikua v. Hughes, 108 N.M. 61, 63, 766 P.2d 321, 323 (Ct. App. 1988) (citation omitted). “If the granting instrument does not specify
whether the easement is appurtenant or in gross, the court decides from the surrounding circumstances . . . .” *Luevano v. Group One*, 108 N.M. 774, 777, 779 P.2d 552, 555 (Ct. App. 1989) (internal quotation marks and citation omitted). In making this decision, there is a “strong constructional preference for appurtenant easements over easements in gross.” *Brooks v. Tanner*, 101 N.M. 203, 206, 680 P.2d 343, 346 (1984). “Easements are presumed appurtenant unless there is clear evidence to the contrary.” *Luevano*, 108 N.M. at 777, 779 P.2d at 555.

23Where the circumstances surrounding a grant of an easement benefit the grantees as adjacent landowners, it may be inferred that the grant was of an easement appurtenant. In *Luevano*, we considered whether an easement granted for the purpose of allowing for convenient access of the grantee’s land was appurtenant or in gross. *Id.* We held that since the easement was intended to benefit grantees as owners of adjoining property, an easement appurtenant could be inferred. *Id.* In reaching this conclusion, we recognized that in such cases if a grantee were to sell their land, no benefit would be derived from retaining the easement because they would have little to no need for convenient access to land no longer owned. *Id.* Conversely, there would be considerable benefit to successors-in-interest in the land who would benefit from the convenient access. *Id.* Under such circumstances, it is reasonable to conclude that the intent was to create an easement appurtenant. *Id.*

24Here, we find no evidence to rebut the strong constructional preference and presumption of appurtenance. On the contrary, granting of the easement benefitted the grantees as landowners, and thus, pursuant to *Luevano* it can reasonably be inferred that the Agreement was intended to create an easement appurtenant. For example, the easement benefitted the Skeens only in their capacity as ranchers in need of a water source on their adjoining land. As in *Luevano*, if the Skeens were to sell their ranch to some other ranch operator, and move their livestock to some other area, it would be difficult to envision what benefit would be derived by their personal retention of the easement. Conversely, the record describes how difficult it actually is to truck water into this area, and it would be of considerable benefit to any ranching operation to have access to water from the Dry Pasture Well. Therefore, the easement is appurtenant.

25The district court’s ruling is also supported by the testimony of Plaintiff Mary Helen Skeen, the only surviving signatory to the Agreement. Mrs. Skeen testified that the water sharing was oral before it was committed to writing. Recalling what prompted the Agreement, Mrs. Skeen testified that they all (the Treats and Skeens) “decided [to do this] for future generations.” This is a clear indication of an intent to bind successors-in-interest.

26The Boyles argue that even if an easement appurtenant was created, they still had no duty to actually supply water to the Skeens. We disagree. Generally, the owner of a servient estate is under no duty to repair or maintain an easement. *McGary v. Scott*, 2003-NMSC-016, ¶ 21, 134 N.M. 32, 72 P.3d 608. However, a special agreement may impose such a duty. *See id.* (stating that “[t]he owner of the servient estate is under no obligation, in the absence of [a] special agreement, to repair or maintain the way . . . .”) (first alteration in original) (internal quotation marks and citation omitted). Here, the Agreement provides that “[e]ach party agrees to maintain the well on the premises owned or leased by them and to supply such water as may be necessary for the other.” On its face, this language imposes a duty under the easement by special agreement. Therefore, the district court properly found that the Boyles had an affirmative duty to maintain the Dry Pasture Well and to supply water to the Skeens, and that this duty was breached.

The Boyles Had Notice of the Easement and Associated Duty

27Having found that an easement imposing a duty on successors-in-interest was created, we now turn to whether the Boyles may be properly charged with notice of the existence of that duty. We conclude that the Boyles had notice of the easement created by the Agreement because the Agreement was properly recorded and because the Boyles were informed of the Agreement by Anthony Treat.

28New Mexico’s recording statutes provide that all “writings affecting the title to real estate shall be recorded in the office of the county clerk of the county or counties in which the real estate affected thereby is situated.” NMSA 1978, § 14-9-1 (1981). “Such records shall be notice to all the world of the existence and contents of the instruments so recorded . . . .” NMSA 1978, § 14-9-2 (1886). “Notice of an easement will be imputed to a purchaser where the easement is properly recorded or is of such character that a purchaser acting with ordinary diligence would learn of its existence.” *Sedillo Title Guar., Inc. v. Wagner*, 80 N.M. 429, 431, 457 P.2d 361, 363 (1969) (internal quotation marks and citation omitted).

29Here, the Agreement was recorded in both Chaves and Lincoln Counties. This alone is sufficient to have put the Boyles on constructive notice pursuant to the recording statutes. Anthony Treat also testified that he orally advised the Boyles of the existence of a water sharing agreement for the Dry Pasture Well. Although Mr. Treat did not provide an actual copy of the Agreement, his oral advice was sufficient to prompt a person of ordinary diligence to inquire further. Thus, the Boyles had inquiry notice of the Agreement. *See id.* (stating that “[t]he law imputes to a purchaser such knowledge as he would have acquired by the exercise of ordinary diligence [and] the owner of the servient tenement is charged with notice of facts which an inquiry would have disclosed” (internal quotation marks and citation omitted)).

Mitigation of Actual Damages

30The Boyles argue that the Skeens took insufficient or unreasonable measures to mitigate their damages and that, as a result, the award of compensatory damages should have been reduced. First, the Boyles argue that the Skeens’ failure to inform them that the Dry Pasture Well was actually operational in September of 2001 deprived them of the opportunity to take corrective action which would have reduced the Skeens’ damages. Second, they argue that the Skeens would not have accrued their damages if they had begun pumping water themselves in September of 2001, instead of waiting until January 2003. We affirm the district court’s determination that the Skeens acted reasonably in mitigating their damages.

31“It is a well established principle in New Mexico that an injured party has a responsibility to mitigate its damages, or run the risk that any award of damages will be offset by the amount attributable to its own conduct.” *Air Ruidoso, Ltd. v. Executive Aviation Ctr., Inc.*, 1996-NMSC-042, ¶ 14, 122 N.M. 71, 920 P.2d 1025 (citation omitted). “[M]itigation is designed to discourage persons . . . from passively suffering economic loss which could [have been] averted by reasonable efforts.” *Hickey v. Griggs*, 106 N.M. 27, 29, 738 P.2d 899, 902 (1987). Here, the district court concluded that the Skeens reasonably mitigated their damages by hauling water to their storage tank at the Dry Pasture Well and subsequently installing a submersible pump. We will uphold the district court’s award of damages if its determination that these were reasonable mitigation measures is supported by substantial evidence. *Chavarria v. Fleetwood Retail Corp.*, 2006-NMSC-046, ¶ 12, 140 N.M. 478, 143 P.3d 717.

32Substantial evidence supports the district court’s finding that the timing of the Skeens’ disclosure did not constitute a failure.
to mitigate. The Boyles asserted at trial, and continue to maintain, that the Agreement 
created a revocable license under which they 
ever had any affirmative duty to supply 
water. The Boyles also testified that their 
litigation strategy was to keep the status 
quo by continuing to not supply water to 
the Skeens. Other testimony indicated that 
the Boyles did not like having to give water 
to the Skeens, that they planned to cut off 
their water at the Dry Pasture Well, and that 
they were unwilling to make the Dry Pasture 
Well operational. Based on this evidence, 
the court was justified in concluding that 
even if the Skeens would have informed the 
Boyles of their September 2001 findings, the 
Boyles would not have taken any corrective 
action, and that the timing of the Skeens’ 
discovery was not a failure to mitigate. 
These findings support the district court’s 
decision that the Skeens’ efforts to haul water was 
a reasonable mitigation measure, especially 
considering the alternatives of stopping their 
livestock operation in the Dry Pasture Well 
area altogether or allowing their livestock to 
simply waste away from a lack of water. 

Furthermore, the Skeens were not 
required to immediately take the initiative 
to make the Dry Pasture Well operational 
when the Boyles had represented that they 
were in the process of fixing the well them-

selves. The record reflects that the Boyles 
told the Skeens that they were working to 
fix the well. Under these facts, where the 
circumstances presented a reasonable 
indication that the Boyles were in the pro-
cess of remedying the problem, the Skeens 
were justified in their delayed attempts to 
pump water themselves. See Manouchehri 
v. Heim, 1997-NMCA-052, ¶ 21, 123 N.M. 
439, 941 P.2d 978 (holding that it was not 
unreasonable as a matter of law to delay 
mitigating damages based on a reasonable 
reliance on a breaching party’s assurances 
that the breach will be remedied); see also 
Shearson Hayden Stone, Inc. v. Leach, 583 
F.2d 367, 371 (7th Cir. 1978) (stating “if 
assurances are made that performance will 
be forthcoming, or if other circumstances 
indicate that the breaching party intends to 
perform, then, even though the contract has 
been breached, no duty to mitigate arises.”) 
(internal quotation marks and citation omit-
ted)). Thus, even if pumping water from the 
Dry Pasture Well was a more reasonable 
method of mitigation, the district court was 
justified in its conclusion that the Skeens 
acted reasonably in their delay in attempt-
ing to pump water, and hauling water in the 
interim.

Finally, even if the Skeens could have 
pumped water sooner, it was not required 
of them. Mitigation of damages is required 
only to the extent that a loss to the injured 
party could have been avoided without 
undue risk or burden. Manouchehri, 1997-
NMCA-052, ¶ 21. Here, the Skeens were not 
sure of the nature or extent of the problem 
at the well, and the record reflects their 
concern about working on the well at their 
own initiative and possibly creating a “big 
mess.” Furthermore, the Skeens were 
concerned that the well or their equipment could 
be ruined while left unattended. Therefore, 
mitigation did not require the Skeens to bear 
any undue risk associated with pumping water at an earlier time.

Without challenging the actual amount 
awarded, the Boyles argue that punitive 
damages were improper because the Agree-
ment created a revocable license or contract 
under which they had no affirmative duty. 
The Boyles also argue that, even if punitive 
damages could be awarded in this case, they 
lacked the culpability to support such an 
award. Having determined that the Agree-
ment actually created an easement, we 
address only the Boyles’ assertion that they 
lacked the culpable mental state sufficient 
to support an award of punitive damages. 

“To be liable for punitive damages, a 
wrongdoer must have some culpable mental 
state, . . . and the wrongdoer’s conduct must 
rise to a willful, wanton, malicious, reckless, 
oppressive, or fraudulent level.” Clay v. Fer-
rellgas, Inc., 118 N.M. 266, 269, 881 P.2d 
11,14 (1994) (citations omitted). “Punitive 
damages . . . are not awarded as a matter of 
right, but lie within the sound discretion of the 
district court.” Peters Corp. v. N.M. 
Banquet Investors Corp., 2008-NMSC- 
039, ¶ 43, 144 N.M. 434, 188 P.3d 1185 (first 
alteration in original) (internal quotation 
marks and citation omitted). Here, the 
district court determined that punitive 
damages were proper based on its conclusions that 
the Boyles acted willfully and wantonly by 
intentionally disabling the Dry Pasture Well 
and permanently removing the pumping 
equipment. We review the court’s decision 
to award punitive damages based on these 
findings for abuse of discretion and we will 
reverse that decision only if it is “contrary 
to logic and reason.” Id. (internal quotation 
marks and citation omitted).

The court’s conclusions that the 
Boyles actions were “willful, wanton and 
in gross disregard of the [Skeens’] rights” 
are supported by its findings. We recognize 
that the district court heard conflicting evi-
dence on some matters, but we defer to its 
determinations of ultimate fact, given that 
we lack opportunity to observe demeanor, 
and we cannot weigh the credibility of live 
witnesses. Tallman v. ABF (Arkansas Best 
Freight), 108 N.M. 124, 127, 767 P.2d 363, 
366 (Ct. App. 1988), holding modified on 
other grounds by Delgado v. Phelps Dodge 
Chino, Inc., 2001-NMSC-034, ¶ 25, 131 
N.M. 272, 34 P.3d 1148; see also State v. 
Garcia, 2005-NMSC-017, ¶ 27, 138 N.M. 
1, 116 P.3d 72 (concluding that “the trial 
court is in a better position to judge the cred-
ibility of witnesses and resolve questions of 
fact”). Based on its review, the district 
court found that Jim Boyles had contempt 
for Mike Skeen, that the Boyles had been 
planning on shutting off the Skeens’ water 
supply at Dry Pasture Well, that Jim Boyles 
lied about having called for service on the 
well, and that the Boyles had intentionally 
missed their well expert by having him ana-
lyze the wrong well. Despite these findings, 
the Boyles argue that some of their actions 
actually constituted a showing of good faith. 
However, they do not demonstrate how this 
renders the court’s ultimate conclusions that 
they acted willfully and wantonly, contrary 
to logic and reason.

Finally, the Boyles challenge the ul-
fimate finding that they misled their well 
expert. In support of this challenge, they 
argue that the well Mr. Wheeler examined 
had characteristics in common with the Dry 
Pasture Well, including a three inch pipe and 
and a cave-in. The district court was made aware 
of this fact, but made its determination based 
on the depth and water level inconsistencies. 
Given that record evidence supports the 
findings of the court, we must again defer to 
its resolution of these factual issues. Id. 
Absent a more significant challenge, we 
cannot conclude that the court abused its 
discretion by awarding punitive damages. 
Accordingly, we affirm the award.

Attorney Fees

The district court awarded attorney fees 
in favor of the Skeens in the full amount they 
requested, $81,626.53. The award was based on 
the Skeens’ “unopposed” motion arguing 
that attorney fees were justified because the 
Boyles engaged in “bad faith” litigation. 
The Skeens filed their motion on July 30, 
2007, and it was received in the Boyles’ at-
torney’s office on the third of August. The 
record is unclear as to whether the attorney 
knows the motion arrived that day. The 
applicable rule required a response to the motion 
within fifteen days. No response was 
filed until September 4, 2007, accompanied 
by a request for an extension of time. The 
Boyles’ attorney explained that he was gone 
for a three-week vacation when the notice 
arrived at his office and that the motion had 
been misfiled by his secretary. The district 
court denied the request for an extension of
time, determining that it was not justified by excusable neglect. In so ruling, the district court highlighted the fact that the Boyles’ notice of appeal bearing their attorney’s signature was filed within the fifteen day period, when the attorney asserted he was on vacation.

{40} The district court based its decision to deny the Boyles an opportunity to respond on Rule 1-007.1(D) NMRA (2000) as amended through 2005), which stated in relevant part, “[u]less otherwise specifically provided in these rules, any written response . . . shall be filed within fifteen (15) days after service of the motion. Failure to file a response within the prescribed time period constitutes consent to grant the motion, . . . and the court may enter an appropriate order.” “Rule 1-007.1(D) applies to all motions.” Lujan v. City of Albuquerque, 2003-NMCA-104, ¶ 15, 134 N.M. 207, 75 P.3d 423. The district court denied the request for an extension of time to respond pursuant to Rule 1-006(B)(2) NMRA which states in relevant part, “[w]hile these rules . . . an act is required . . . to be done at or within a specified time, the court for cause shown may, at any time in its discretion . . . permit the act to be done where the failure to act was the result of excusable neglect.”

{41} The Boyles challenge the award of attorney fees on several grounds. They argue: (1) that their due process rights were violated by the district court’s refusal to allow them to respond to the merits of the attorney fees issue; (2) that the district court erred in finding that their tardy response was not justified by excusable neglect; (3) that the “bad faith” exception does not apply here because they did not engage in any frivolous or vexatious conduct during the course of litigation; and, finally, (4) that the amount awarded is unreasonably excessive because all of the Skeens’ attorney fees were awarded, instead of just those resulting from any alleged bad faith. The Skeens’ reply is straightforward; the district court acted within its discretion and should be affirmed. Our resolution of the Boyles’ second point is dispositive and we need not discuss the others.

{42} We generally apply an abuse of discretion standard to determine whether the district court erred in denying the extension of time based on an absence of excusable neglect. H-B-S P’ship v. Aircoa Hospitality Servs., Inc., 2008-NMCA-013, ¶ 22, 143 N.M. 404, 176 P.3d 1136 (filed 2007); see also Capco Acquisihub, Inc. v. Greka Energy Corp., 2007-NMCA-011, ¶ 25, 140 N.M. 920, 149 P.3d 1017 (filed 2006) (applying an abuse of discretion standard of review where an extension of time was denied based on an absence of excusable neglect).

{43} The nature of our review is affected by the nature of the order entered by the district court. Our review is more exacting where the order being reviewed grants some sort of final relief without consideration of the merits of a claim or defense. Thus, for example, in Lujan, we reversed a grant of summary judgment in favor of the city premised on the plaintiff’s failure to respond to the motion within the fifteen day limit set by Rule 1-007.1(D). Lujan, 2003-NMCA-104, ¶ 12. The language of Rule 1-007.1(D) notwithstanding, we held that dismissal with prejudice was inappropriate.

{44} Lujan made clear that “[b]efore ordering dismissal with prejudice on a motion for summary judgment for failure to respond, a district court should consider: (1) the degree of actual prejudice to the [opposing party], (2) the amount of interference with the judicial process, and (3) the culpability of the litigant.” (Alteration in original) (internal quotation marks and citation omitted). Because the district court failed to undertake this analysis, this Court reversed under an abuse of discretion standard. 2003-NMCA-104, ¶¶ 8, 12.

{45} Lujan held that given the circumstances of the case—actively litigated for three years and ready for trial in a little over a month after the dismissal—dismissal could not be supported when there was no egregious conduct and no discernible prejudice to the defendant. Id. ¶ 13. The analysis in Lujan was driven by our system’s strong bias toward deciding cases on their merits, thus relegateing dismissal to only the most severe cases. Id. ¶ 11.

{46} On the other end of the spectrum are cases involving the grant of default judgment. Our cases make clear that granting a default judgment or a motion to set aside a default judgment rests within the sound discretion of the district court. Gandara v. Gandara, 2003-NMCA-036, ¶ 9, 133 N.M. 329, 62 P.3d 1211. Just as clearly, however, default judgments are disfavored and “[a] ny doubts about whether relief should be granted are resolved in favor of the defaulting defendant” and, “in the absence of a showing of prejudice to the plaintiff, causes should be tried upon the merits.” Dyer v. Pacheco, 98 N.M. 670, 673, 651 P.2d 1314, 1317 (Ct. App. 1982) (internal quotation marks and citation omitted).

{47} We glean from Lujan a marked reluctance to apply Rule 1.007.1(D) strictly—in the absence of other factors—if doing so results in the loss of a trial on the merits of a case. This reluctance dovetails well with our general concern about granting relief by default; that is without a trial on the merits. In this case, the effect of the trial court’s refusal to allow a late response to the motion for attorney fees was to grant a default judgment. Analogizing to Lujan, the district court applied Rule 1-007.1(D) strictly and granted relief, resulting in the loss of a hearing on the merits of the motion.

{48} We emphasize that the motion sought new and relatively rare monetary relief from the Boyles, attorney fees as a sanction for bad faith litigation. The motion constituted in effect a new claim against the Boyles. There is no indication from the record that the Boyles expected or should have expected the request.

{49} The record of the hearing does not reflect any consideration by the district court of any prejudice to the Skeens or of any potential interference with the judicial process flowing from the Boyles’ failure to comply with Rule 1-007.1(D). In this context we find an abuse of discretion in that the district court did not apply the correct legal standard to the issue. N.M. Right to Choose/NARAL v. Johnson, 1999-NMSC-028, ¶ 7, 127 N.M. 654, 986 P.2d 450 (holding that an abuse of discretion may be found if a discretionary decision is premised on a misapprehension of the law).

CONCLUSION
{50} We affirm all holdings of the district court in the main appeal. We reverse the attorney fee award and remand for further consideration of its merits.

{51} IT IS SO ORDERED.
MICHAEL D. BUSTAMANTE,
Judge
WE CONCUR:
RODERICK T. KENNEDY, Judge
MICHAEL E. VIGIL, Judge

1 Rule 1.007.1(D) has been subsequently amended to remove the language that failure to respond constitutes consent. We apply the version in place at the time of trial.
To schedule an evaluation for your client, please call 505.247.0481 or download our Scheduling Forms at www.drdiskant.com.

Medical Evaluation Center provides the facts necessary for injury case resolution.

As the only full-time Independent Medical Evaluation facility in New Mexico, Dr. Barry M. Diskant and Dr. Juliana Garcia have spent more than 20 years establishing a reputation for fair, consistent, reliable and impartial assessments of injury cases that encompass the interests of both referring clients and patients.

- Independent Medical Evaluations
- Medico-legal Case Analysis
- Second Opinions
- Impairment Evaluations
- Multidisciplinary Panel Evaluations
- Fitness for Duty Evaluations

Need Answers?

Were the examinee's current problems caused by the accident?
Is the examinee at MMI?
What is the impairment rating based on the AMA Guides?
Which future medical treatments are reasonable, necessary and related?

Barry M. Diskant, MD
Juliana Garcia, DO

1400 Central Ave SE • Suite 2200 • Albuquerque, NM 87106

WHEN YOU HAVE an edge in business, you have what it takes to get where you want to go. At the Principal Financial Group®, we're here to help you succeed. From business succession plans, to financial needs analysis for owners and employees.

Robert A. Barnard
Financial Services Representative
1140 E. Idaho Avenue
Las Cruces, NM 88001
Phone: (575) 373-3737
barnard.robert@princor.com

Celebrating 70 years of Joy in Learning®
Manzano Day School
Joy in Learning® Since 1938

Manzano Day School admits students without regard to religion, race, color, creed, gender, gender identification, disability, gender, sexual orientation, or ethnic background.
Bill of Rights Benefit Celebration

Saturday, September 26, 2009 • 6:00 to 9:00 pm
Albuquerque International Balloon Museum

Guest of honor, Susan Herman, national ACLU President
Please join us at our premier event this year.
Enjoy food, drink and live music by Le Chat Lunatique

Honoring
Charles “Kip” Purcell .......... Cooperating Attorney of the Year
Rodey Law Firm
The Weekly Alibi .................... First Amendment Award
Dr. Curtis Boyd, M.D. &
Dr. Bruce Ferguson, M.D. .......... Guardian of Liberty Award
for outstanding work in reproductive freedom

RSVP today at
www.aclu-nm.org
or call 505-266-5915 x1006

Please Contact Carmen Rawls for more information
505-277-8184 or rawls@law.unm.edu

SAVE THE DATE
Alumni Reunion Weekend of September 11 and 12th
Honoring Classes of
http://lawschool.unm.edu/news/reunion-09.php

Steven L. Tucker
Appeal Specialist
www.stevetucker.net
stevetucker47@gmail.com
(505) 982-3467

JANE YOHALEM
Appeals Specialist
(505) 988-2826

WALTER M. DREW
Construction Defects Expert
35 years experience
505-982-9797
walterdrew@earthlink.net
Positions

Associate Attorney
5-10 years experience in Family Law and Civil Litigation. 2019 Galisteo, C3, SF, NM, 87505. Fax 505.989.3440

Family Law Attorney - Great Opportunity
New Mexico Legal Group, PC, is seeking a family law attorney to join our firm. This is an incredible professional and financial opportunity for the right person. Go to www.NewMexicoDivorce.com and click on the Job Listings link for the full job listing.

Attorney
Wolf & Fox, P.C., a rapidly growing law firm with a general practice, is seeking an attorney with a minimum of two years experience for full-time employment. Experience in domestic relations and business transaction helpful. Must be a highly motivated team player. Excellent benefits. Salary DOE. Please email resume to bryan@wolfandfoxpc.com

Legal Nurse Consultant
The Rodey Law Firm is recruiting a Legal Nurse Consultant to assist attorneys in the review of medical records/documents, in the identification of medical-legal issues and in the procurement of experts. Candidate must have a B.S. in Nursing with an extensive background of clinical experience. Must possess a thorough understanding of medical issues and trends related to the total litigation process. Previous legal/risk management experience helpful. Will work directly with attorneys from the intake of the case through the trial process. Requires flexibility and ability to manage multiple deadlines. Need to be a self-starter, willing to take initiative and work as member of a case team. Firm offers congenial work environment, competitive compensation and excellent benefit package. Please forward resume to hr@rodey.com or mail to Manager of Human Resources, Rodey Law Firm, P.O. Box 1888, Albuquerque, NM 87103-1888. EOE

Experienced Legal Secretaries
Description: Skill Supply is a staffing company providing staffing options to law firms in the Albuquerque, Santa Fe, Río Rancho areas. Skill Supply is currently seeking experienced legal secretaries to work in some of the area’s preeminent law firms. These positions are temp-to-hire or may be temporary. If you are a Legal Secretary or have experience in the legal field, or want experience in the legal field, we can help you find the right position. There is no charge to the applicant. Hourly wage rates range between $13.00 and $20.00 for legal secretaries, depending on experience, and between $10.00 and $15.00 for other internal administrative personnel. Requirements: You should be proficient in either MS Word or Wordperfect (still used by many lawyers). Additionally MS Excel and MS Access are used in some firms; Typing skills should be in the area of 60 WPM or higher with good to excellent accuracy; Familiarity with typical legal documents and their format; Must multi task & be able to thrive in a high volume, fast paced practice; Must be able to communicate well with others, including clients, both orally and in writing; Local experience with the NM and federal court system; Experience with e-filing in federal court a plus although not necessary. Please fax resume to (505) 828-4802 or e-mail to info@skill-supply.com.

Billing Assistant
Needed for well-established law firm. Responsible for but not limited to: Cash receipts posting, Invoicing and Collections. Proficient in Excel, Word and TABS preferred. Excellent benefits. Submit resume, references and salary history to P.O. Box 3509, Albuquerque, NM 87190-3509 or fax to 254-4722 ATTN: Accounting Manager

Legal Assistant
Busy sole practitioner looking for motivated F/T legal assistant to help with consumer bankruptcy practice. Must have experience with Word and data processing and the ability to manage large caseload. Must be able to manage calendar events and provide excellent customer service. Bankruptcy experience required. Bilingual a plus. Salary DOE. Send resume and salary requirements to ronholmes@ronholmes.com or fax to 268-3939.

Paralegal Position
Immediate opening for full time paralegal position for a busy general practice in Albuquerque, 5+ years experience preferred. Experience in business transactions, litigation and domestic relations a plus. Salary negotiable based on experience. Great benefits and working environment. Please email Resume to christenh@wolfandfoxpc.com

Legal Assistant
Legal Assistant needed for busy downtown law office with sole practitioner. Legal experience required. Ideal candidate will be self-starter, organized and familiar with civil and bankruptcy law. Responsibilities include: schedule management, transcription, case management, hearing/trial preparation, and drafting correspondence and pleadings. Salary commensurate with experience. Please e-mail resume to: talyoung@yahoo.com for confidential consideration.
Positions Wanted

Freelance Attorney Seeks Project Work
Yale Law School graduate and NM-licensed attorney available for project-based contract research, writing, editing, and review. See www.celesteboyd.com for more information.

Services

Experienced Lawyer Will Research
Creative, innovative, multi-disciplined, reported cases. R. Kelley (505) 503-7587. Rbk102750@yahoo.com

Go Have A Beer – We’ll Handle The Research & Writing
Virtual Litigation Support, LLC provides the highest quality research and writing at irresistibly affordable rates (rates begin at $75/hour). Built-in quality control, all U.S. attorneys, no project too large or too small. VirtualLitigationSupport.com or call today: (877) 727-7176.

Contract Paralegal
Contract paralegal with 20+ years experience in civil litigation available for trial preparation and all paralegal tasks. Excellent references. (505) 899-2918

Office Space

Executive Suites

Only 1,900 Sq. Ft. is Left
The last space in the building. Has wonderful views. Space is being built out as first class office space. Available at $21.50/sq. ft. full service with free covered parking. Building signage available for an additional cost. Call Dan Hernandez at Berger-Briggs Real Estate 505-247-0444.

Downtown Santa Fe Law Firm Has Office Space Available
Excellent law office space available in the Santa Fe downtown area. Location: 347 E. Palace which includes conference room, receptionist, library, including electronic research capabilities, ample parking, security system, janitorial service, copier, fax and phone system. Pleasant work environment, convenient to all courts. Referrals likely - depending upon area of practice. Call (505)988-8979 Loretta.

Positions Wanted

Santa Fe Lease/Purchase
Lease/Purchase 1 or 2 offices in landscaped modern 1700sq. ft. bldg. w/conf. rm. kitchen, reception area in lawyers’ compound on St. Michael’s Dr. near hospital: AC, carpeted, ample parking, high speed machines available. Wi-Fi Comcast. $18 sq. ft. Please contact Mike or Beverly at 505-995-8066 or 505-984-2921.

Top Notch Office Space
Top notch office space approx. 250 sq. ft. Downtown/close to Federal, District, Metro Courts & city-county offices, available August 1st. Share building with well-established law firms at 500 Tijeras NW, Albq. Principal benefits include receptionist [using your existing number], ample on-site parking, 2 large conference rooms, large waiting area, copier/fax equipment with client coding system, stocked kitchen, and more. Must see to appreciate. Good collegiality among 11 attorneys and opportunity for case referrals. Contact Terry Word at 842-1905.

Large Uptown Suite

Beautiful Adobe
Close to downtown, courthouses, hospitals. Reception area, conference rooms, employee lounge included. Copy machine available. Ample free parking and easy freeway access. From $ 195.00 per mo. Utilities included. Oak Street Professional Bldg., 500 Oak St. N. E. Call Jon, 507-5145; Orville or Judy, 867-6566.

Mountain Road Office Condo
I have a very nice almost brand new office condo on Mountain near 12th Street. 1,060 sq. ft. Two very nice offices one with a great balcony, private courtyard, refrigerated A/C for $229,900. Call Dan Hernandez at Berger-Briggs Real Estate for this and others. O: 505-247-0444 C: 505-480-5700

Missing Last Will and Testament/Trust of Richard A. Benson
Mr. Benson died on June 8, 2008. Any person having a copy of the Last Will and Testament of Richard A. Benson or a Trust Agreement in the name of Richard A. Benson, please contact Stevan J. Schoen, Esq., 4 Hillside Drive, Placitas, NM 87043 (505) 867-2802.

Downtown Santa Fe Law Firm Has Office Space Available
Excellent law office space available in the Santa Fe downtown area. Location: 347 E. Palace which includes conference room, receptionist, library, including electronic research capabilities, ample parking, security system, janitorial service, copier, fax and phone system. Pleasant work environment, convenient to all courts. Referrals likely - depending upon area of practice. Call (505)988-8979 Loretta.

SUBMISSION DEADLINES

All advertising must be submitted by e-mail by 5 p.m. Wednesday, two weeks prior to publication (Bulletin publishes every Monday). Advertising will be accepted for publication in the Bulletin in accordance with standards and ad rates set by the publisher and subject to the availability of space. No guarantees can be given as to advertising publication dates or placement although every effort will be made to comply with publication request. The publisher reserves the right to review and edit classified ads, to request that an ad be revised prior to publication or to reject any ad. Cancellations must be received by 10 a.m. on Thursday, two weeks prior to publication.

For more advertising information, contact: Marcia C. Ulibarri at 505.797.6058 or e-mail ads@nmbar.org
He works miracles
but even he doesn’t have all the answers

Catastrophic brain and spinal cord injuries change lives forever – and leave families struggling with questions about care and accountability. Guiding clients through these complex cases can challenge even the best attorney. But we can help. At McBride, Newsome & Sandoval, we have the experience, resources, and track record to give the right answers – and get the right results.

For help evaluating brain and spinal cord injury claims call 505.563.5888
www.mnsfirm.com