

# BAR BULLETIN

OFFICIAL PUBLICATION OF THE STATE BAR OF NEW MEXICO

JANUARY 22, 2004 • VOLUME 43, No. 3



PRESIDENT DANIEL J. O'BRIEN

## A MESSAGE FROM THE PRESIDENT

Dear Members,

This is my first opportunity as president of the State Bar of New Mexico to brief you on the state of the Bar – where we are

and where we are headed for 2004 and beyond. Here are the significant issues facing the bar this year:

### STATE BAR MANAGEMENT AND FINANCES

2003 was marked by many personnel changes at the State Bar. Because of the departure of the executive director in late 2002, an acting executive director served the first half of 2003 until Joe Conte was hired in July as the permanent executive director. Mr. Conte quickly streamlined the organization by combining and eliminating various positions and implementing other belt-tightening measures. As a result, the State Bar is fiscally sound as we start the New Year and in a position to provide more and better service to its members and the public.

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### OPINIONS

#### New Mexico Supreme Court

**2004-NMSC-001:** State of New Mexico v. Ignacio Rivera

#### New Mexico Court of Appeals

**2004-NMCA-001:** Gerald L. Smith Board v. of County Commissioners, County of Bernalillo, Henry R. Westrich, et al.

**2004-NMCA-004:** Fidel Garcia v. Mario Jeantette

**2003-NMCA-148:** Ronald DeArmond v. Halliburton Energy Services, Inc.

**2003-NMCA-149:** State v. Adrian Joseph Cooley

**2004-NMCA-002:** John C. Blake v. Public Service Company of New Mexico and the City of Albuquerque

**2004-NMCA-003:** Maria Elena Brenneman, Mark Brenneman and on behalf of Paul L. Brenneman and Leah M. Brenneman v. the Board of Regents of the University of New Mexico, as Trustees of the University of New Mexico Health Sciences Center

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OPPOSING PARTIES  
AND THEIR COUNSEL:  
**I** WILL NOT USE  
LITIGATION, DELAY  
TACTICS, OR OTHER  
COURSES OF CONDUCT  
TO HARASS THE  
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OR THEIR COUNSEL

## OPINIONS

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## JANUARY

**27**  
**Bench and Bar Programming  
Subcommittee**  
3 p.m., State Bar Center

**28**  
**Committee on Women and the  
Legal Profession**  
noon, Jontz Dawe Gulley & Crown, P.C.

**30**  
**Client Relations Committee**  
2 p.m., State Bar Center

## FEBRUARY

**2**  
**Lawyers Assistance Committee**  
5:30 p.m., First United Methodist Church  
(Fourth and Lead SW)

**4**  
**Employment and Labor Law Section  
Board of Directors**  
noon, State Bar Center

# WORKSHOPS

## JANUARY

**28**  
**Family Law Workshop**  
5:30 - 7:30 p.m., Branigan Library  
(2<sup>nd</sup> Floor-Pearl Higgins Room)  
Las Cruces, NM

**Consumer Debt/Bankruptcy Workshop**  
6 - 8 p.m., State Bar of New Mexico  
Albuquerque, NM

**29**  
**Lawyer Referral for the Elderly  
Program Workshop & Clinic**  
Topic: Credit/Debt Issues  
1:15 - 4:30 p.m., Meadowlark Senior Center  
Rio Rancho, NM

## FEBRUARY

**11**  
**Family Law Workshop**  
6 - 8 p.m., State Bar of New Mexico  
Albuquerque, NM

*For more information call Marilyn Kelley  
(505) 797-6048 or (800) 876-6227;  
or visit [www.nmbar.org](http://www.nmbar.org).*

## BAR BULLETIN

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# A MESSAGE FROM THE PRESIDENT

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*(continued from front cover)*

—————  
'THE STATE BAR IS

FISCALLY SOUND

AS WE START

THE NEW YEAR'

—————

## **CLIENT PROTECTION FUND**

We have reinstated the client protection fund, which was discontinued last year due to lack of funding. In the past, the client protection program had been funded by temporary dues increases. This year, and hopefully beyond, client protection will be funded by regular dues and special assessments will not be necessary.

## **THE UNION ISSUE**

The Board of Bar Commissioners is hopeful that 2004 will bring to a close the issue of employee unionization. The issue of whether the State Bar of New Mexico falls under the jurisdiction of the NLRB is still on appeal with the National Labor Relations Board. If it is determined the NLRB does have jurisdiction, most, if not all, current board members agree that the employees should be allowed to unionize.

## **BAR CONVENTION**

There will be no bar convention this year. Instead, the State Bar will lend greater support and promotion to the Bench and Bar Conference scheduled for November 4 through 6 at the Sheraton Old Town Inn in Albuquerque. The State Bar will sponsor social events in conjunction with the conference that hopefully will provide a convention-like atmosphere for participants.

## **THE BAR CENTER**

As we start 2004, the amount owed on the bar building is \$963,000. Constructed in 1996 at a cost of \$3.2 million, the Bar Center was partially funded with \$1.2 million in donations from members. The balance is secured by a mortgage and paid in monthly increments that total \$195,600 annually. Annual rental revenues of approximately \$115,500 offset the debt service. The Bar Center continues to be a very popular meeting place.

## **VOLUNTARY V. MANDATORY BAR ISSUE**

In 2003, two members filed a petition with the Supreme Court of New Mexico requesting that it change the State Bar from a mandatory organization to a voluntary organization. Because New Mexico attorneys do not agree on the issue, the BBC did not take a position for or against the petition. Instead, it filed a response pointing out the advantages and disadvantages of both structures. The court has not yet ruled on the petition. The Petition, the BBC's response and the Petitioners' Reply can be obtained on the State Bar's Web site, [www.nmbar.org](http://www.nmbar.org).

## **WEB SITE**

Improvements to the State Bar's Web site were completed in 2003. The redesign incorporated free online legal research for members. In 2004, the BBC will be looking into an improved online legal research program comparable to Westlaw and Lexis that will be provided at no cost to State Bar members.

## **CLE**

Revenues for the Center for Legal Education Department were down in 2003 due to increased competition, personnel changes within the department and an unprofitable bar convention. However, CLE finished the year with numerous well-attended seminars and made up most of the ground lost earlier in the year. A new director of CLE, Rob Koonce, was hired this month and planning is underway for a profitable year. New this year will be a revival of the CLE bar trips that were popular in the late '80s and early '90s (the State Bar sponsored several post convention CLE bar trips to Jamaica, Costa Rica and the Dominican Republic). This year, if new regulations permit, CLE will sponsor a trip to Cuba. Otherwise, arrangements for another tropical destination will be made.

## RELEVANCY OF THE STATE BAR

In the coming year, it is my and the BBC's unoriginal goal to make the State Bar more relevant to the members. To this end, the membership will be surveyed on a number of issues. Unlike surveys in the past based on sporadic voluntary responses, a professional pollster will conduct this year's survey. The results should be scientifically valid and should provide meaningful input as to the direction our members would like this organization to take.

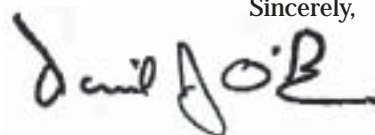
It is no secret that some members view the State Bar as a mandatory evil that provides little benefit to them. This perception results in part because many members are unaware of the benefits and programs that are available through the State Bar. For example, surprisingly few members take advantage of the free online legal research available at the State Bar's Web site. Many members are unaware that hundreds of our members volunteer thousands of hours each year on programs that assist the membership and the public. The State Bar provides important organizational and administrative assistance to these volunteers. This year the BBC will make a special effort to inform the membership about the good deeds and accomplishments of the State Bar and its members and the services they provide.

To reduce the level of estrangement some members feel towards the BBC, this issue of the *Bar Bulletin* contains brief profiles of the commissioners (see insert). Perhaps contrary to some members' perceptions, a very diverse group of lawyers make up the BBC. It has prosecutors (3), criminal defense lawyers (2), solo and small firm lawyers (6), medium firm lawyers (6), large firm lawyers (3), woman lawyers (6), Hispanic lawyers (9), young lawyers (3), senior lawyers (10), small town lawyers (9), plaintiff's personal injury lawyers (2), insurance defense lawyers (3), business lawyers (4), public lawyers (5), general practice lawyers (4), divorce lawyers (3), native New Mexicans (8), and UNM law school graduates (8). You probably figured this out, but there are not 94 commissioners – there are 21 and each belongs to two or more of the above categories. These commissioners represent most of the attributes and practice areas of the general membership. Collectively they will donate thousands of hours overseeing the business of the State Bar this year.

Along these same lines, and more importantly, the talented employees of the State Bar will be recognized throughout the year. It is the mission and not the money that draws most, if not all, of these employees to their jobs. To know them is to like and appreciate them. Get to know them if you can. Whether or not you think the BBC is relevant, these employees deserve all the credit for the State Bar's accomplishments and putting our profession in a more favorable light.

It is truly an honor to be allowed to work for and represent New Mexico lawyers. Please feel free to contact me with your comments, questions or ideas.

Sincerely,



Daniel J. O'Brien  
President

[dobrien@obrienlawoffice.com](mailto:dobrien@obrienlawoffice.com)

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‘HUNDREDS OF  
OUR MEMBERS  
VOLUNTEER THOUSANDS  
OF HOURS EACH YEAR  
ON PROGRAMS THAT  
ASSIST THE MEMBERSHIP  
AND THE PUBLIC.’

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# NOTICES

## COURT NEWS

### N.M. Board of Legal Specialization Comments Solicited

The following attorney is applying for certification as a specialist in the area of law identified. Application is made under the New Mexico Board of Legal Specialization, NMSA 19-101 et. Seq. The rules and regulations of the New Mexico Board of Legal Specialization provide that the names of those seeking to qualify shall be released for publication. Further, any person may comment upon the applicant's qualifications within 30 days after the independent inquiry and review process carried on by the board and appropriate specialty committee. The board and specialty committee encourage attorneys and others to comment upon any applicant. Address comments to New Mexico Board of Legal Specialization, PO Box 92860, Albuquerque, NM 87199.

*Real Estate Law*  
David S. Campbell

### First Judicial District Court Mastering Settlement Facilitation

The First Judicial District Court, through the Alternative Dispute Resolution Program, is sponsoring a complimentary CLE (with attorneys responsible for the MCLE fee of \$1 per hour). The CLE is intended for those attorneys who participate or wish to participate as settlement referees in the voluntary settlement conferences of the First Judicial District Court.

The workshop will be held from 8:30 a.m. to 4 p.m., Feb. 19 in Santa Fe at Plaza Resolana. Credit for 6.9 hours of general credit has been requested of the Minimum Continuing Legal Education Board.

There will be three presenters: Mark Bennett of Decision Resources, who is a professional mediator and author of books on mediation; Professor Scott Hughes of UNM is the ADR specialist at the College of Law and has conducted many ADR trainings; and David Levin, director of the Second Judicial District's Court Alternatives Program, who has

### Bench Bar Conference Notice to Members

The State Bar of New Mexico will not hold an annual convention in 2004, so mark your calendars for Nov. 4-6, and plan to attend the 2004 State Bar Bench and Bar Conference at the Sheraton Old Town in Albuquerque. The Bench and Bar Relations Committee has begun planning this biannual event which provides attorneys and judges the opportunity to address issues of the New Mexico legal profession in an informal, relaxed setting.

Not only will the conference offer a majority of the year's CLE credit requirements, but it will also be the venue for the State Bar annual award presentations and annual membership meeting. Watch the *Bar Bulletin* and [www.nmbar.org](http://www.nmbar.org) for more details.

also conducted many settlement and mediation trainings.

This conference will address the incorporation of mediation techniques in settlement facilitation along with other pertinent topics designed to improve ADR skills.

Contact Carolyn Lumbard, ADR Coordinator, (505) 827-5072 to register. Space is limited.

### Notice of Judicial Assignment Changes

There has been a general reassignment of all probate and sequestered (PB PQ and SA) cases in the First Judicial District effective Jan. 19. The following cases have been reassigned:

– All Santa Fe and Los Alamos probate and sequestered cases (PB, PQ, SA) will be reassigned to Judge Carol J. Vigil, Division III.

– All Rio Arriba probate and sequestered cases (PB, PQ, SA) will be reassigned to Judge Tim Garcia, Division V.

Parties who have not previously exercised their right to challenge or excuse will have 10 days from Jan. 20 to challenge or excuse the judge pursuant to Rule 1-088.1.

Unless otherwise notified by the court, the new judge will maintain scheduling orders and trial setting on reassigned cases.

### Second Judicial District Court Children's Court Monthly Judges' and Managers' Meeting

The Second Judicial District Children's Court will hold its monthly judges' and managers' meeting at noon, Feb. 3, in the jury room, John E. Brown Juvenile Justice Center, 5100 Second St. NW, in Albuquerque. Children's Court judges and managers of court-related agencies will meet to discuss ongoing concerns and projects. For a copy of the meeting agenda, call (505) 841-7644.

### Destruction of Tapes and Logs, Domestic Cases, 1971-85

Pursuant to the Supreme Court Ordered Judicial Retention and Disposition Schedules, the Second Judicial District Court will destroy tapes and logs filed with the court, in domestic relations cases for years 1971 to 1985 (excluding cases on appeal). Attorneys who may have cases with tapes and logs, and wish to have duplicates made, may verify tape and log information with the Special Services Division at (505) 841-6787, from 8 a.m. to noon, and from 1 to 5 p.m. Monday through Friday. Aforementioned tapes and logs will be destroyed after Feb. 6.



## Family Court Open Meetings

The Second Judicial District Family Court judges will hold open meetings to discuss ongoing concerns and projects at noon on the first business Monday of each month in the Conference Center, located on the third floor of the Bernalillo County Courthouse. The next regular meeting will be held on Feb. 2. Contact Mary Lovato, (505) 841-6778, for more information or to have something placed on the agenda.

## Swearing-In Ceremony

Denise Barela Shepherd will be formally sworn in as a Second Judicial District Court judge, Division XVIII, at 4:30 p.m., Feb. 5 in Judge W. John Brennan's courtroom, #338, at the Bernalillo County Courthouse, 400 Lomas Blvd. NW. A reception will follow at La Posada de Albuquerque.

## Bernalillo County Metropolitan Court Announcement of Vacancy

One judicial vacancy on the Bernalillo County Metropolitan Court will exist as of Jan. 16, due to the selection of Judge Denise Barela Shepherd by Gov. Bill Richardson to serve as judge of the Second Judicial District Court.

The chair of the Bernalillo County Metropolitan Court Nominating Commission solicits nominations and applications for this position from lawyers who meet the statutory qualifications in Article 8A, Section 34-8A-4 of the New Mexico Statutes Annotated. Applications may be obtained via the Judicial Selection Web site, [www.unm.edu/~nmjudsel](http://www.unm.edu/~nmjudsel), or from the UNM School of Law, 1117 Stanford NE, Albuquerque, or requested to be mailed or e-mailed by calling Reva Chapman, (505) 277-4700. The deadline for applications/nominations is 5 p.m., Jan. 30.

## U.S. Bankruptcy Court Brownbag Meeting – Exemptions

A brownbag session is scheduled for noon, Feb. 13, at the U.S. Bankruptcy Court, 10th floor conference room. The topic for discussion will be “Exemptions” or “How to Avoid an Objection

## 2004 License and Dues

- The 2004 License and Dues forms were mailed on Dec. 5, 2003.
- Without exception, dues and license fees are due on Feb. 2. Members who have not received the form should notify the State Bar, (505) 797-6083 / (505) 797-6035.
- For members' convenience, dues may also be paid online through secured e-commerce at [www.nmbar.org](http://www.nmbar.org).
- License and disciplinary fees are mandatory for active attorneys and must be paid to maintain license status (inactive and judges exempt from disciplinary fees).
- The Supreme Court approved a fee increase of \$30 for the Disciplinary Board, bringing the total Disciplinary Fee for 2004 to \$130. **This is not a State Bar fee.**
- Late fees will be assessed if payment is not postmarked by Feb. 2.

to Exemptions by the Trustee.” The session will be presented by Linda Bloom, chapter 7 trustee, and Kelley Skehen, chapter 13 trustee. For more information call (505) 243-1335.

## STATE BAR NEWS

### Bankruptcy Law Section Outstanding Bankruptcy Lawyer Award

The State Bar Bankruptcy Law Section is soliciting nominations for its Outstanding Bankruptcy Lawyer Award for 2003. The award is given to an individual who, among other criteria, has demonstrated excellence as a bankruptcy attorney and whose personal character and dedication to bankruptcy law and service furthers the integrity and repute of the legal profession.

Submit nominations by Feb. 9 to Robert H. Jacobvitz, 500 Marquette NW, Ste. 650, Albuquerque, NM 87102; or e-mail [rjacobvitz@jtwlawfirm.com](mailto:rjacobvitz@jtwlawfirm.com).

## Employment and Labor Law Section Board Meetings Open to Section Members

The Employment and Labor Law Section Board of Directors welcomes section members to attend its meetings. The board meets at noon on the first Wednesday of each month at the

State Bar Center. The next meeting will be Feb. 4. (Lunch is not provided.)

For information about the section, visit the State Bar Web site, [www.nmbar.org](http://www.nmbar.org), or call Eric Miller, section chair, (505) 995-8287.

## Lawyers Assistance Committee Monthly Meeting

The Lawyers Assistance Committee will meet at 5:30 p.m., Feb. 2, at the First United Methodist Church at Fourth and Lead SW in Albuquerque. The group meets regularly on the first Monday of the month.

For more information, contact Bill Stratvert, (505) 242-6845.

## Paralegal Division Paralegal Compensation Survey

The State Bar Paralegal Division is conducting a Paralegal Compensation, Utilization and Benefits Survey during the month of January. The division is urging every paralegal practicing in New Mexico to complete the survey. The complete survey was published as a special insert in the Jan. 15 (Vol. 43, No. 2) *Bar Bulletin*. A link to the online survey can be found on the State Bar Web site, [www.nmbar.org](http://www.nmbar.org), and the survey can also be downloaded, completed and e-mailed to [PD@nmbar.org](mailto:PD@nmbar.org) (type “survey” in subject line) or printed and mailed to Paralegal Division Survey, PO Box 1923, Albuquerque.

# NOTICES

que, NM 87103. Deadline for submission of the survey is Feb 10. Confidentiality of all personally identifiable information will be strictly maintained at all times.

## Public Law Section Board Meeting

The Public Law Section board meeting will be held at noon, Feb. 12 at the New Mexico Municipal League, 1229 Paseo de Peralta (across from the state capitol), Santa Fe. For a map or driving instructions, contact Randy Van Vleck, (505) 982-5573, or Deborah Moll, (505) 827-2000.

## Nominations Sought for Public Lawyer Award

The State Bar Public Law Section is currently accepting nominations for the eighth annual public lawyer of the year award, which will be presented on the day before Law Day, April 30. Prior recipients of the award include Florence Ruth Brown, Frank Katz, Douglas Meiklejohn, Marty Daly, Nick Estes, Mary McInerney, Jerry Richardson and Peter T. White. Send nominations by 5 p.m., March 1 to Douglas Meiklejohn, by e-mail at [dmeiklejohn@nmelc.org](mailto:dmeiklejohn@nmelc.org); or by mail at New Mexico Environmental Law Center, 1405 Luisa St., Ste. #5, Santa Fe, NM 87505. The selection committee (comprised of the three immediate past chairs of the Public Law Section) will consider all nominated candidates and may nominate candidates on its own.

The following are factors that will be considered in making this award. An applicant need not meet all of these criteria. The work or service recognized by the award must have occurred in New Mexico. A candidate must be admitted to practice in New Mexico, but does not have to be a member of the Public Law Section to be eligible.

1. Significant length of service in government, which does not have to be continuous, or for one specific employer or for work as an attorney;
2. Excellence as an attorney/advisor and/or advocate;
3. Training or education of the public or bar concerning public issues; mentorship of junior attorneys in the public sector;
4. Role model for other public lawyers;

5. Involvement in one particularly difficult or important case or negotiation that significantly advanced a governmental policy or purpose;
6. Service to social welfare organizations, charitable institutions or non-profit entities connected with the practice or enhancement of an area of public law;
7. Advocacy of or work on issues or legislation of importance in the public sector, such as open meetings and public records, public procurement and administrative procedures;
8. A lawyer who is not likely to be recognized for his or her outstanding work as a public lawyer;
9. A lawyer whose personal character and dedication to public law and public service furthers the integrity and repute of the legal profession.

## OTHER BARS

### Southwest Bench/Bar Conference Conference Date and Location Set

The Southwest Bench/Bar Conference will be held Feb. 6-7, at the Las Cruces Hilton. The conference will be geared toward attorneys and judges in the Third, Sixth, Seventh and Twelfth judicial districts.

The conference will feature the debut of the 2004 Professionalism course put on by the Commission on Professionalism, which will be an historical perspective on professionalism in New Mexico's legal history.

For more information, contact Mark Filosa, committee chair, (505) 894-7161 or [filosa@zianet.com](mailto:filosa@zianet.com); Bill Lutz, (505) 526-2449 or [martin@nm.net](mailto:martin@nm.net); James Roggow, (505) 526-2449 or [martin@nm.net](mailto:martin@nm.net); or Mary Torres, (505) 848-1800 or [mtorres@modrall.com](mailto:mtorres@modrall.com).

## OTHER NEWS

### Center for Civic Values Mock Trial Judges Needed

Judges are needed for the Albuquerque and Las Cruces regional mock trial competitions (to be held Feb. 21) and for the state finals competition to be

held March 19 and 20 in Albuquerque. Interested individuals may register online at the Center for Civic Values' Web site [http://www.civicvalues.org/MT\\_registration.htm](http://www.civicvalues.org/MT_registration.htm), or may print a registration form to mail or fax from the same page.

To receive a judging registration packet by mail, leave a voice mail including name and address at (505) 764-9417, ext. 13, or e-mail name and address to [mocktrial@civicvalues.org](mailto:mocktrial@civicvalues.org), specifying "request judging packet" in the subject line. For questions or additional information, visit the mock trial pages on the CCV Web site and then contact the mock trial program via telephone or e-mail.

## Health Centers of Northern New Mexico Board Vacancy for Legal Professional

Health Centers of Northern New Mexico, a New Mexico nonprofit corporation with 15 clinics in 13 communities throughout northern New Mexico, seeks to fill a vacancy on its Board of Directors with someone from the legal profession. Board membership requires attending a full board meeting one day a month, usually in Santa Fe, as well as one or two committee meetings a month (usually by teleconference.) Travel is reimbursed. For more information, call Pat Sanchez, (505) 747-5911 or (800) 284-7284.

## U.N.M. Law Library Spring Semester Hours

The University of New Mexico Law Library has resumed for the spring academic semester and will operate under the following schedule from Jan. 12 through May 14:

### Building & Circulation Desk

Monday - Thursday:

7:30 a.m. - midnight

Friday: 7:30 a.m. - 6 p.m.

Saturday: 9 a.m. - 6 p.m.

Sunday: noon - midnight

### Reference Desk

Monday - Thursday:

9 a.m. - 9 p.m.

Friday: 9 a.m. - 6 p.m.

Saturday and Sunday:

noon - 4 p.m.

**Extended Final Exam Hours**

April 30 and May 7:

7:30 a.m. - midnight

May 1 and 8:

9 a.m. - midnight

**Workers' Compensation Administration****Notice of Public Hearing**

The New Mexico Workers' Compensation Administration will conduct a public hearing on the emergency rule change to Part 7 of the Workers' Compensation Rules. The hearing will also consider changes to the medical fee schedule (MAP). The hearing will be conducted at 1:30 p.m., Jan. 29 at the Workers' Compensation Administration, 2410 Centre Ave. SE, Albuquerque. Videoconferencing may also be made available in the WCA Field Offices. Contact Renee Blechner, (505) 841-6083, by Jan. 22 to reserve videoconferencing. Proposed rule changes and the proposed fee schedule will be available on Jan. 13.

Comments made in writing and at the public hearing will be taken into consideration. Written comments pertaining to these issues will be accepted until the close of business Feb. 23. Oral comments will be limited to five minutes per speaker.

For more information, call (505) 841-6000. Inquire at the WCA Clerk's Office for copies of the fee schedule. If requesting a copy by mail, inquire at the WCA Clerk's Office about the postage cost and envelope size needed to accommodate the request. Plan on including postage and self-addressed envelope.

Individuals with a disability who are in need of a reader, amplifier, qualified sign language interpreter, or any form of auxiliary aide or service to attend or participate in the hearing or meetings, should contact Renee Blechner, (505) 841-6083, or inquire about assistance through the New Mexico relay network, (800) 659-8331.

We want to **HEAR** from you.



In order to better communicate with you regarding State Bar activities, including CLE programs, please take a moment to complete and return this form indicating the areas of law in which you practice or have an interest. This will help us to better serve your individual needs and eliminate unwanted information from being mailed or e-mailed to you.

Please select no more than three areas in which to receive program information:

- |   |  |
|---|--|
| <input type="checkbox"/> ADR • Mediation • Arbitration                      | <input type="checkbox"/> Health                                    |
| <input type="checkbox"/> Bankruptcy • Debtor • Creditor • Consumer          | <input type="checkbox"/> Indian • Gaming                           |
| <input type="checkbox"/> Business • Corporations                            | <input type="checkbox"/> Intellectual Property                     |
| <input type="checkbox"/> Constitutional • Civil Rights                      | <input type="checkbox"/> Labor • Employment                        |
| <input type="checkbox"/> Criminal   | <input type="checkbox"/> Real Property • Landlord - Tenant         |
| <input type="checkbox"/> Environmental • Natural Resources • Transportation | <input type="checkbox"/> Torts • Personal Injury • Property Damage |
| <input type="checkbox"/> General Practice                                   | <input type="checkbox"/> Other _____                               |
| <input type="checkbox"/> Estate Planning • Taxation • Probate • Wills       | <input type="checkbox"/> Please send notices on all CLE activities |
| <input type="checkbox"/> Family • Domestic Relations                        |  |
| <input type="checkbox"/> Government • Program Eligibility                   |  |

Please mail to: State Bar of New Mexico • Systems  
PO Box 92860 • Albuquerque NM 87199-9842



## JANUARY

- |  |  |   |
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| <p>27 <b>Arbitrator Ethics and Disclosure</b><br/>Albuquerque<br/>American Arbitration Assoc.<br/>3.0 E<br/>(602) 734-9319</p>   | <p>28 <b>Back to the Future: Lawyering and Problem Solving</b><br/>VR - State Bar Center - Albuquerque<br/>Center for Legal Education of SBNM<br/>2.0 P<br/>(505) 797-6020<br/>www.nmbar.org</p> | <p>29 <b>Tax for Beginners: Forms and Definitions</b><br/>Albuquerque<br/>Lorman Education Services<br/>8.0 G<br/>(715) 833-3940<br/>www.lorman.com</p>           |
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| <p>27 <b>Advance Westlaw Class</b><br/>State Bar Center - Albuquerque<br/>Thomson West<br/>1.8 G<br/>(800) 310-9650, x 7101<br/>www.westgroup.com/training</p>                   | <p>28 <b>Practical Applications of Employment Law</b><br/>Amarillo, TX<br/>Sterling Education Services<br/>7.8 G<br/>(715) 855-0495<br/>www.sterlingeducation.com</p>                            | <p>30 <b>Employee Benefit Planning</b><br/>Albuquerque<br/>Lorman Education Services<br/>8.0 G<br/>(715) 833-3940<br/>www.lorman.com</p>                          |
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# WRITS OF CERTIORARI

As Updated by the Clerk of the New Mexico Supreme Court, Effective January 20, 2004

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

## PETITIONS FOR WRIT OF CERTIORARI FILED AND PENDING:

NO. 28,459 State v. Montano (COA 24,111) 1/13/04  
NO. 28,458 Parson v. Snedeker (12-501) 1/12/04  
NO. 28,455 State v. McDaniel (COA 23,030) 1/9/04  
NO. 28,454 State v. Smith (COA 24,071) 1/8/04  
NO. 28,453 State v. Roman (COA 24,151) 1/8/04  
NO. 28,452 State v. Vega (COA 24,006) 1/8/04  
NO. 28,449 Lucero v. Tafoya (12-501) 1/8/04  
NO. 28,448 Gaby v. Gersonde (COA 22,015) 1/7/04  
NO. 28,447 Gaby v. Gersonde (COA 22,015) 1/7/04  
NO. 28,446 Mercado v. Miller (COA 23,756) 1/7/04  
NO. 28,443 McIntire v. Snedeker (12-501) 1/6/04  
NO. 28,445 State v. Haskins (COA 24,312) 1/5/04  
NO. 28,442 Valles v. Walmart (COA 23,174) 1/5/04  
NO. 28,441 Gormely v. Coca Cola (COA 22,722) 1/5/04  
NO. 28,444 Armjo v. Williams (12-501) 12/31/03  
NO. 28,424 Cowan v. Velasquez (COA 22,819) 12/31/03  
NO. 28,440 State v. Uranga (COA 24,266) 12/30/03  
NO. 28,439 Gonzales v. LeMaster (12-501) 12/30/03  
NO. 28,438 Marquez v. Allstate (COA 23,385) 12/30/03  
NO. 28,437 Truong v. Allstate (COA 24,291) 12/30/03  
NO. 28,436 Corliss v. Snedeker (12-501) 12/29/03  
NO. 28,435 Gallup LLC v. City of Gallup (COA 22,308) 12/24/03  
NO. 28,431 Albuquerque v. Park & Shuttle (COA 24,221) 12/23/03  
NO. 28,410 State v. Romero (COA 22,836) 12/22/03  
NO. 28,425 State v. Herrera (COA 22,416) 12/19/03  
NO. 28,422 State v. O'Neal (COA 24,292) 12/18/03  
NO. 28,421 State v. Reveles (COA 24,260) 12/18/03  
NO. 28,420 State v. Martinez (COA 23,751) 12/18/03  
NO. 28,419 Henry v. Daniel (COA 23,356) 12/18/03  
NO. 28,417 Harris v. Snedeker (12-501) 12/18/03 *time to consider petition extended to 1/30/04*  
NO. 28,341 Lucero v. State (12-501) 11/18/03 *time to consider petition extended to 1/30/04*  
NO. 28,384 Casados-Lujan v. Lujan (COA 22,984) 11/17/03  
**EFFECTIVE 11/1/03, RULE 12-502 AMENDED AND SUBPARA. E (30 DAYS DEEMED DENIED) WAS REMOVED**  
NO. 28,091 Ramos v. State (12-501) 5/29/03 *time to consider petition extended to 1/30/04*

## CERTIORARI GRANTED AND UNDER ADVISEMENT:

NO. 26,910 Jaramillo v. UNM Bd of Regents (COA 20,805) 5/9/01  
NO. 27,269 Kmart v. Tax & Rev (COA 21,140) 1/9/02  
NO. 22,283 State ex rel. Martinez vs. City of Las Vegas (COA 14,647) 1/16/02  
NO. 27,409 State v. Rodriguez (COA 22,558) 4/3/02  
NO. 27,817 Tomlinson v. George (COA 22,017) 1/8/03  
NO. 27,816 Warford v. Herrera (COA 22,848) 2/4/03  
NO. 27,823 Gill v. Public Employees Retirement Board (COA 21,818) 2/4/03

NO. 27,868 State v. Alvarez-Lopez (COA 22,189) 2/4/03  
NO. 27,869 State v. Alvarez-Lopez (COA 22,189) 2/4/03  
NO. 27,872 Martinez v. St. Paul Ins (COA 22,343/22,344) 2/11/03  
NO. 27,912 State v. Lopez (COA 23,456) 3/11/03  
NO. 27,938 State v. Barber (COA 22,706) 3/20/03  
NO. 27,950 Breen v. Carlsbad Schools (COA 22,858/22,859) 4/1/03  
NO. 27,966 Montano v. Allstate (COA 22,614) 4/7/03  
NO. 27,969 Hovet v. Allstate (COA 22,276) 4/7/03  
NO. 27,945 State v. Munoz (COA 23,094) 4/14/03  
NO. 27,939 Patscheck v. Snodgrass (12-501) 4/21/03  
NO. 27,995 State v. Flenniken (COA 22,715) 4/21/03  
NO. 27,996 State v. Augustin M. (COA 22,900) 4/21/03  
NO. 28,002 Chase Manhattan v. Candelaria (COA 22,625) 4/28/03  
NO. 28,009 Reynoso v. Allstate (COA 23,131) 5/13/03  
NO. 28,016 State v. Lopez (COA 23,424) 5/13/03  
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NO. 28,017 State v. Renfro (COA 23,206) 5/30/03  
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NO. 28,068 State v. Gallegos (COA 22,888) 6/6/03  
NO. 28,077 Slack v. Robinson (COA 23,189) 6/11/03  
NO. 28,061 State v. Lara (COA 22,936) 6/25/03  
NO. 28,076 Celaya v. Hall (COA 22,211) 6/25/03  
NO. 28,128 Jicarilla Apache Nation v. Rodarte (COA 22,336) 7/15/03  
NO. 28,156 State v. Anita T. (COA 23,652/23,653/23,651) 8/5/03  
NO. 28,107 State v. Joanna V. (COA 22,876) 8/8/03  
NO. 28,007 State v. Ruiz (on reconsideration) (COA 22,282) 8/11/03  
NO. 28,198 Lentz v. Benson (COA 23,762) 9/3/03  
NO. 28,178 State v. Daniel G. (COA 22,769/22,772) 9/3/03  
NO. 28,119 State v. Dominguez (COA 23,286) 9/3/03  
NO. 28,183 State v. Ochoa (COA 23,840) 9/3/03  
NO. 28,176 State v. Golden (COA 22,769) 9/3/03  
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NO. 28,253 Miller v. Brock (COA 24,124) 10/10/03  
NO. 28,249 Miller v. Brock (COA 24,125) 10/10/03  
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NO. 28,261 State v. Dedman (COA 23,476) 10/10/03  
NO. 28,272 Lester v. City of Hobbs (COA 22,250) 10/10/03  
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From the New Mexico  
Supreme Court

Opinion Number:  
2004-NMSC-001

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..... **Appeal and Error:**  
..... Stay Pending Appeal  
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.. Probation; and Probation  
..... Revocation  
..... **Jurisdiction:** District  
..... Court  
.. **Statutes:** Interpretation;  
..... and Legislative Intent

STATE OF NEW MEXICO,  
Plaintiff-Petitioner,  
versus  
IGNACIO RIVERA,  
Defendant-Respondent.  
No. 27,952  
(filed: December 2, 2003)

**ORIGINAL PROCEEDING ON  
CERTIORARI**  
STEPHEN BRIDGFORTH,  
District Judge

PATRICIA A. MADRID,  
Attorney General  
JOEL JACOBSEN,  
Assistant Attorney General  
Santa Fe, New Mexico  
for Petitioner

JOHN BIGELOW,  
Chief Public Defender  
WILLIAM A. O'CONNELL,  
Assistant Appellate Defender  
Santa Fe, New Mexico  
for Respondent

**OPINION**

**MINZNER, Justice**

{1} The State petitioned this Court to review an opinion of the Court of Appeals, which held that the district court lacked jurisdiction to act upon the State's petition to revoke Defendant's probation while his

appeal from the underlying conviction was pending. See *State v. Rivera*, 2003-NMCA-059, 133 N.M. 571, 66 P.3d 344. We granted certiorari pursuant to NMSA 1978, § 34-5-14(B) (1972). See also Rule 12-502 NMRA 2003. We now hold that the filing of a notice of appeal does not preclude the district court from holding a probation revocation hearing or revoking a defendant's probation. Since the district court did not lack jurisdiction to act upon the State's petition, we reverse the Court of Appeals.

**I**

{2} Defendant was convicted by a jury of various crimes, including aggravated battery and aggravated assault against a household member. On August 15, 2000, Defendant was sentenced to six years in prison less one day; however, the district court suspended the sentence and placed Defendant on probation for five years. On September 13, Defendant filed a timely notice to appeal his conviction. Defendant did not request an appeal bond, the district court did not set an appeal bond, and Defendant began serving his probationary sentence.

{3} While his appeal was pending, on September 30, Defendant was arrested on several charges stemming from a DWI investigation. This arrest violated the probation order that was filed by the district court on October 3. On December 19, the State petitioned the district court to revoke Defendant's probation based on these violations. The district court held a hearing on March 5, 2001, at which Defendant admitted to violating the terms of his probation. The district court accepted his admission and announced it would set sentencing on the violations at a later date.

{4} In the meantime, Defendant's appeal to the Court of Appeals had been pending. On March 29, the Court of Appeals affirmed Defendant's conviction. Defendant filed a motion to dismiss the State's petition to revoke his probation on the ground that the district court lacked jurisdiction to consider the petition while his case was on appeal. On June 4, the district court denied Defendant's motion to dismiss the State's petition, and, on June 26, the court revoked Defendant's probation based on his admission at the March 5 hearing. The court again sentenced Defendant to probation.

**II**

{5} The specific issue presented in this case is one of first impression. We must determine whether the district court could act upon the State's petition to revoke probation while Defendant's appeal was pending. Resolution of this issue requires inquiry into the meaning and legislative intent of NMSA 1978, § 31-11-1(A) (1988), which provides that "[a]ll appeals and writs of error in criminal cases have the effect of a stay of execution of the sentence of the district court until the decision of the supreme court or court of appeals."

{6} The Court of Appeals held that Section 31-11-1(A) indicates a legislative intent that a defendant's sentence of probation be stayed pending appeal and thus the district court lacked jurisdiction to act on the State's petition to revoke probation. *Rivera*, 2003-NMCA-059, ¶¶ 9, 11. The Court reasoned that Section 31-11-1 codified the general common law rule that a trial court is divested of jurisdiction during the pendency of an appeal. *Id.* ¶¶ 10-11. The Court found support for its analysis in *State v. Ramirez*, 76 N.M. 72, 412 P.2d 246 (1966) and *State v. Cordova*, 100 N.M. 643, 674 P.2d 533 (Ct. App. 1983). In *Ramirez*, this Court held that a defendant may not waive his or her right to an appeal bond in order to receive credit against the defendant's sentence for his or her time of confinement during the appeal. 76 N.M. at 76, 412 P.2d at 249. In *Cordova*, the Court of Appeals stated that the defendant was "under no legal duty except moral, perhaps, to make any restitution during the pendency of his or her first appeal." 100 N.M. at 648, 674 P.2d at 538. The Court of Appeals concluded that the only proper mechanism the district court had to control Defendant's behavior while his appeal was pending was an appeal bond with conditions of release. *Rivera*, 2003-NMCA-059, ¶ 20.

{7} Judge Castillo dissented. She distinguished both *Ramirez* and *Cordova* on their facts, *id.* ¶¶ 28-29, 32-33 (Castillo, J., dissenting), and concluded that a trial court is not divested of jurisdiction to hear matters unrelated to the issues on appeal, *id.* ¶ 36 (Castillo, J., dissenting). We agree with Judge Castillo that neither opinion is particularly helpful in resolving this appeal.

{8} Since 1966, the law regarding credit for time served has changed. See NMSA 1978,

§ 31-20-11 (1977) (granting credit for time served for period spent in confinement during appellate review). Thus, Ramirez has been modified by statute. Cordova is also distinguishable. It is unclear whether an appeal bond was executed by the defendant in that case. If we assume that an appeal bond was in fact executed in Cordova, that case is not inconsistent with this Court's holding today. The posting of an appeal bond in Cordova would have stayed the defendant's probation, thus giving him no legal duty to make restitution while his appeal was pending. See *infra* ¶ 26. Additionally, unlike other conditions of probation, "requiring victim restitution is declarative of [a] public policy to make whole the victim of the crime to the extent possible." *State v. Lack*, 98 N.M. 500, 505, 650 P.2d 22, 27 (Ct. App. 1982); see also NMSA 1978, § 31-17-1 (1993) (allowing the court to order a defendant to make full or partial payment to the victim of the actual damages that would be recoverable in a civil action). Staying execution of victim restitution will generally not defeat the Legislature's goal of prompt and effective defendant rehabilitation in a way that staying the entire probationary sentence may. See *infra* ¶ 24. For the foregoing reasons, we believe this case turns on the proper construction of Section 31-11-1(A), which is an issue of first impression.

### III

{9} "Interpretation of a statute is a matter of law, which we review *de novo*." *State v. Rowell*, 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995). Likewise, "[t]he determination of whether the language of a statute is ambiguous is a question of law," which we also review *de novo*. *Leo v. Cornucopia Rest.*, 118 N.M. 354, 357, 881 P.2d 714, 717 (Ct. App. 1994).

### A

{10} "The starting point in every case involving the construction of a statute is an examination of the language utilized by [the Legislature] in drafting the pertinent statutory provisions." *State v. Johnson*, 2001-NMSC-001, ¶ 6, 130 N.M. 6, 15 P.3d 1233 (quoting *State v. Wood*, 117 N.M. 682, 685, 875 P.2d 1113, 1116 (Ct. App. 1994)) (alteration in original). Under the plain meaning rule of statutory construction, "[w]hen a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation." *State v. Jonathan M.*, 109 N.M. 789, 790, 791 P.2d 64, 65 (1990).

{11} However, applying the plain meaning

rule is not always as simple as the statement of that rule may imply. As Chief Justice Montgomery eloquently cautioned this Court

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

*State ex rel. Helman v. Gallegos*, 117 N.M. 346, 353, 871 P.2d 1352, 1359 (1994).

{12} Application of the plain meaning rule often does not end the analysis when construing a statute. Rather, the rule is a tool used by courts during the course of seeking and effectuating the legislative intent underlying the statute. See *id.* ("[W]e believe it to be the high duty and responsibility of the judicial branch of government to facilitate and promote the legislature's accomplishment of its purpose . . ."); *Sims v. Sims*, 1996-NMSC-078, ¶ 21, 122 N.M. 618, 930 P.2d 153 (noting that the plain meaning rule "is only a primary source of understanding, not conclusive, and it must yield on occasion to an intention otherwise discerned in terms of equity, legislative history, or other sources") (quoted authority and quotation marks omitted). This recognition of the plain meaning rule as a tool of statutory construction is not intended to minimize its doctrinal importance. Looking simply to the plain meaning of the language

employed by the Legislature will resolve many issues of statutory construction. See, e.g., *Cooper v. Chevron U.S.A., Inc.*, 2002-NMSC-020, ¶ 16, 132 N.M. 382, 49 P.3d 61 (holding that the plain meaning of "resides" controls when interpreting NMSA 1978, § 38-3-1(F) (1988)).

{13} Nevertheless, we have not relied upon the literal meaning of a statute when such an application would be absurd, unreasonable, or otherwise inappropriate. See *Helman*, 117 N.M. at 351-52, 871 P.2d at 1357-58. In performing our task of statutory interpretation, not only do we look to the language of the statute at hand, we also consider the history and background of the statute. *State ex rel. Kline v. Blackhurst*, 106 N.M. 732, 735, 749 P.2d 1111, 1114 (1988). Furthermore, we closely examine the overall structure of the statute we are interpreting, see *State v. Calvert*, 2003-NMCA-028, ¶ 15, 133 N.M. 281, 62 P.3d 372, cert. denied, 133 N.M. 413, 63 P.3d 516 (2003) as well as the particular statute's function within a comprehensive legislative scheme, see *Sims*, 1996-NMSC-078, ¶ 21 ("When attempting to unravel a statutory meaning we begin with the presumption that the statutory scheme is comprehensive."). In other words, "a statutory subsection may not be considered in a vacuum, but must be considered in reference to the statute as a whole and in reference to statutes dealing with the same general subject matter." 2A Norman J. Singer, *Statutes and Statutory Construction* § 46:05, at 165 (6th ed., rev. 2000). In considering the statute's function in relation to related statutes passed by the Legislature, "[w]henver possible . . . we must read different legislative enactments as harmonious instead of as contradicting one another." *State v. Muniz*, 2003-NMSC-021, ¶ 14, 134 N.M. 152, 74 P.3d 86 (quotation marks and quoted authority omitted).

{14} Finally, while we would be exceeding the bounds of our role as an appellate court by second-guessing the clear policy of the Legislature, see *State ex rel. State Engineer v. Lewis*, 1996-NMCA-019, 121 N.M. 323, 327, 910 P.2d 957, 961, when the statute is ambiguous, we may nonetheless consider the policy implications of the various constructions of the statute. See *Ortiz v. BTU Block & Concrete Co.*, 1996-NMCA-097, ¶ 13, 122 N.M. 381, 925 P.2d 1. We must now apply these principles of statutory construction to interpret the legislative purpose and meaning of Section 31-11-1(A), which provides, "[a]ll



appeals and writs of error in criminal cases have the effect of a stay of execution of the sentence of the district court until the decision of the supreme court or court of appeals.”

## B

{15} Defendant has argued that under the plain meaning of Section 31-11-1(A) the trial court lacked jurisdiction to revoke or otherwise modify his probation while his conviction was on appeal. Notwithstanding the force of the language on which Defendant relies, a closer examination of the original language and internal structure of Section 31-11-1, its history and background, its function within the comprehensive statutory scheme, and general policy considerations compel a different construction.

{16} We do look first to the statutory text in construing Section 31-11-1; however, we look not only to what is explicitly stated by the language of Section 31-11-1 but we also take special notice of what has been omitted from the purview of the statute. See 2A Singer, *supra*, § 47:23, at 304-07 (“[W]here a form of conduct, the manner of its performance and operation, and the persons . . . to which it refers are designated, there is an inference that all omissions should be understood as exclusions.”) (footnotes omitted). Nowhere within the language of Section 31-11-1 has the Legislature expressly prohibited a probationer’s sentence from running during the pendency of his or her appeal. This omission is particularly telling in light of the specificity with which the Legislature addresses those defendants who have been given a sentence of death or any term of imprisonment. See § 31-11-1(B)-(C). While the apparently broad language of Section 31-11-1(A) would seem to encompass sentences of probation, the absence of any reference to such sentences in later sections leads us to suspect that the statute was directed at sentences other than probation. That suspicion requires a review and analysis of the history of Section 31-11-1.

{17} The original language of Section 31-11-1 was drafted in 1907. This language read in whole:

All appeals in criminal cases shall have the effect of a stay of execution of the sentence of the court until the decision of the supreme court upon said appeal. And whenever the sentence of the district court shall be that of death

or imprisonment for life, the party convicted shall remain in close confinement until the decision of the supreme court shall be pronounced upon appeal; and in all other cases of appeal the party taking the appeal shall be entitled to give bail by filing a bond in the sum and with conditions to be fixed by the district court sufficient to secure the due execution of the sentence of the court in case the judgment of the court be affirmed by the supreme court.

1907 N.M. Laws, ch. 57, § 58 (emphasis added). Even a cursory glance of the original statute reveals that the first sentence of the 1907 enactment is substantially the same as Section 31-11-1(A). This clause has only been amended twice since it was drafted over ninety years ago, and neither of these amendments materially altered the meaning of the clause. See 1927 N.M. Laws, ch. 93, § 10 (incorporating “writs of error” within the statute); see 1966 N.M. Laws, ch. 28, § 59 (dividing the statute into subsections, removing the word “shall” and adding “court of appeals”). We can infer from these minor amendments that the original meaning of the language used by the Legislature for the most part still controls. We believe the Legislature’s original intent was to provide certain criminal defendants with a right to bail during the pendency of their appeal, which those defendants were not constitutionally guaranteed and which was not available under the common law as a matter of right. See Annotation, *Bail Pending Appeal from Conviction*, 45 A.L.R. 458, 459 (1926) (noting that bail pending an appeal from conviction is generally a creature of statute). The Legislature also may have intended to avoid the traditional rule that a criminal appeal was moot once the defendant’s sentence was fully satisfied. See 5 Wayne R. LaFave et al., *Criminal Procedure* § 27.5(a), at 910 (2d ed. 1999).

{18} We conclude the language used by the 1907 Legislature and the subsequent history of Section 31-11-1 supports a different construction than the one given the statute by the Court of Appeals. A strictly literal construction of the first sentence of the 1907 enactment would render as a nullity the subsequent provision providing for the right to bail in all cases other than those with a sentence of death or life imprisonment. If the execution of a

defendant’s sentence was automatically stayed once he or she appealed, then the defendant would have had no need for a statutory right to post an appeal bond. We are generally unwilling to construe one provision of a statute in a manner that would make other provisions null or superfluous. See *Katz v. N.M. Dep’t of Human Servs.*, 95 N.M. 530, 534, 624 P.2d 39, 43 (1981) (“A statute must be construed so that no part of the statute is rendered surplusage or superfluous.”); *Sec. Trust v. Smith*, 93 N.M. 35, 38, 596 P.2d 248, 251 (1979) (“[A] statute should not be construed in such a way as to nullify certain of its provisions.”).

{19} Furthermore, trial courts today have more sentencing options than they did at the time of the 1907 enactment. By its plain meaning, the 1907 enactment appears to apply only to three types of sentences—death, life imprisonment, and all other terms of imprisonment. However, sentencing, and in particular the system of probation, has changed dramatically in New Mexico since the 1907 enactment. See *Probation and Parole Act*, 1963 N.M. Laws, ch. 301, §§ 1-21 (codified as amended at NMSA 1978, §§ 31-21-3 to -19); see also 1963 N.M. Laws, ch. 303, § 29-17 (codified as amended at NMSA 1978, § 31-20-5) (providing authority for the court to place defendants receiving suspended or deferred sentences on probation). Thus, the legislators in 1907 who passed the original act could not have contemplated the applicability of that act to this state’s current sentencing scheme that emphasizes constructive rehabilitation. See NMSA 1978, § 31-21-4 (1963). We have delineated our task as follows:

As nearly as we can, we must put ourselves in the place of those who uttered the words, and try to divine how they would have dealt with the unforeseen situation; and, although their words are by far the most decisive evidence of what they would have done, they are by no means final.

*Helman*, 117 N.M. at 354, 871 P.2d at 1360 (quoting *D’Avignon v. Graham*, 113 N.M. 129, 131, 823 P.2d 929, 931 (Ct. App. 1991)). In short then, our task is to determine how the original drafters of Section 31-11-1(A) would have applied the act to sentences of probation. Of course, we ought to consider subsequent acts by the Legislature, as well as the current sentencing scheme into which this statutory provision has

been compiled.

{20} We therefore review Section 31-11-1(A) in light of current sentencing procedures. Under the current sentencing scheme, upon the entry of a judgment of conviction, the sentencing court has four options: (1) sentence the defendant and commit the defendant to jail or prison, NMSA 1978, § 31-20-2 (1993); (2) "enter an order deferring the imposition of sentence," NMSA 1978, § 31-20-3(A) (1985); (3) "sentence the defendant and enter an order suspending in whole or in part the execution of the sentence," Section 31-20-3(B) (1985), or (4) commit the defendant to a period of diagnosis prior to sentencing, NMSA 1978, Section 31-20-3(C) (1985). *State v. Clah*, 1997-NMCA-091, ¶ 19, 124 N.M. 6, 946 P.2d 210. If the sentencing court elects to either defer or suspend the defendant's sentence, the trial court has the authority to place the defendant on probation. NMSA 1978, Section 31-20-5 (1985). Trial courts routinely act to initially place defendants on probation in lieu of imprisonment based on the assumption that "the [defendant] can be rehabilitated without serving that portion of the sentence which is suspended." *State v. Sinyard*, 100 N.M. 694, 696, 675 P.2d 426, 428 (Ct. App. 1983).

{21} The probation statutes themselves are structured in such a manner to give the sentencing court the broad power to ensure that the goal of rehabilitation is indeed being achieved. See § 31-21-4. Under NMSA 1978, § 31-21-15 (1989), the court has the power to hold a hearing, and upon a showing of a violation by the defendant of his or her conditions of release the court may revoke the defendant's probation. Our Court of Appeals has held on more than one occasion that this power of revocation is so broad as to allow the court to revoke a defendant's probation based on a defendant's misbehavior occurring before the commencement of probation. *State v. Martinez*, 108 N.M. 604, 775 P.2d 1321 (Ct. App. 1989); *State v. Padilla*, 106 N.M. 420, 744 P.2d 548 (Ct. App. 1987). In *Padilla*, the court stated that "[t]he sentencing court retains jurisdiction to revoke a suspended sentence for good cause shown at any time subsequent to the entry of judgment and prior to the expiration of the sentence." 106 N.M. at 422, 744 P.2d at 550. Thus, we view the probation provisions of our state's criminal code, especially Sections 31-20-5 and 31-21-15, as indicative of the Legislature's intent to give trial courts broad discretion to sen-

tence defendants to probationary terms and strictly monitor their compliance with an eye toward the goal of prompt and effective rehabilitation. A literal reading of Section 31-11-1(A) would seriously undermine this goal when a defendant seeks to appeal his or her conviction. Cf. *State v. Peterson*, 841 P.2d 666, 667 (Or. Ct. App. 1992) (holding that state probation statutes reflect a legislative policy that trial judges have "maximum flexibility" to oversee probation that would be contravened by divesting those courts of jurisdiction during an appeal).

{22} Furthermore, our interpretation of Section 31-11-1(A) should be consistent with the procedures and purposes of the appeal bond. The majority opinion of the Court of Appeals in this case reasoned that the purpose of the appeal bond is to assure the defendant's appearance at subsequent proceedings. *Rivera*, 2003-NMCA-059, ¶ 19. We would add that the defendant's appearance is necessary to ensure that he or she will "submit to the punishment to be imposed by the court." *State v. Cotton Belt Ins. Co.*, 97 N.M. 152, 154, 637 P.2d 834, 836 (1981) (quoting *Ex parte Parks*, 24 N.M. 491, 493, 174 P. 206, 207 (1918)) (emphasis added in original). Clearly, if a defendant remains on probation during the pendency of his or her appeal, an appeal bond becomes unnecessary since the defendant is already submitting to the punishment that an appeal bond would be fashioned to prevent the defendant from attempting to evade. Thus, one of the primary purposes of Section 31-11-1 as a whole—preventing the defendant from avoiding the consequences of his or her conviction and sentence—is inapplicable once the defendant is placed on probation.

{23} The State urges us to apply the common law rule that "a district court does not lose jurisdiction to take further action when the action will not affect the judgment on appeal and when, instead, the further action enables the trial court to carry out or enforce the judgment." *Gonzales v. Surgidev Corp.*, 120 N.M. 151, 156, 899 P.2d 594, 599 (1995) (quoting *Kelly Inn No. 102 v. Kapnison*, 113 N.M. 231, 241, 824 P.2d 1033, 1043 (1992)). Because the Legislature has addressed the issue, we hesitate to rely on these cases. However, in her dissenting opinion in this case, *Rivera*, 2003-NMCA-059, ¶ 23, Judge Castillo was correct in noting that the common law rule, as stated in *Gonzales* and *Kelly Inn*, supports a "more flexible pragmatic

approach" than that which would be achieved by an unduly formalistic interpretation of Section 31-11-1(A). While those civil cases are not controlling in this case, they do shed some light on the Legislature's intent. See 2B Singer, *supra*, § 50:01, at 137 ("Where the language of the statute is subject to reasonable doubt, reference to common-law principles may provide a valuable clue as to whether a particular situation is controlled by the statute."). Specifically, we do not believe that during the pendency of an appeal the Legislature would have intended to so strictly circumscribe the trial court's power to act in criminal cases, while allowing the same court to act on all sorts of collateral matters in civil cases.

{24} Finally, we see no practical policy justification for preventing a defendant's probationary sentence from running during the pendency of his appeal. The primary goal of probation, which is defendant rehabilitation, may be defeated by delaying the commencement of a defendant's probationary sentence pending appeal. "In a situation where the appeal is unsuccessful, the defendant [may] start under probation supervision after so long a time that the conditions of probation imposed at the time of initial sentencing may no longer appropriately relate either to the defendant's need for rehabilitation or to the community's need for protection." Fed. R. Crim. P. 38 advisory committee's note "(1972 amendments)". Therefore, under federal law and a number of states' statutes, a defendant's probationary sentence is not automatically stayed while his appeal is pending. See, e.g., Fed. R. Crim. P. 38(d) ("If the defendant appeals, the court may stay a sentence of probation." (emphasis added)); Cal. Penal Code § 1243 (West Supp. 2003) ("An appeal . . . does not stay the execution of the judgment or order granting probation . . . unless the trial or appellate court shall so order."); Nev. Rev. Stat. 177.125 (2002) ("An order placing the defendant on probation may be stayed if an appeal is taken.").

{25} Defendants may prefer to begin serving their probationary sentences during the pendency of their appeal for at least one of two reasons. First, many defendants placed on probation will lack the funds to post an appeal bond. Requiring such defendants to choose between posting an appeal bond they have difficulty affording or deciding against appealing would place those defendants in an untenable position. That position is likely

to have a chilling effect on the exercise of their constitutional right to an appeal as provided for by Article VI, Section 2 of the New Mexico Constitution. Second, many defendants may opt to remain on probation during the pendency of their appeal in order to accrue credit for time served. See § 31-21-15(B) (requiring credit to be given for time served on probation if a defendant's probation is revoked); see also NMSA 1978, § 31-20-11 (1967) (granting credit for time served for period spent in confinement during appellate review). This is especially true when the typical alternative is an appeal bond with conditions of release that may be as onerous as the comparable conditions of probation, yet no credit will be received for that time if the conviction is affirmed. On the other hand, even Defendant's attorney admitted at oral argument that there is no persuasive policy rationale in favor of a literal reading of Section 31-11-1(A). While the Court of Appeals points out the danger of a defendant partially or wholly serving a potentially undeserved sentence while his case is on appeal, see *Rivera*, 2003-NMCA-059, ¶ 11, this danger is at least mitigated (if not eliminated) by allowing that defendant to seek an appeal bond rather than remain on probation during his or her appeal. Cf. *State v. Formaro*, 638 N.W.2d 720, 727 (Iowa 2002) (stating that the purpose of an appeal bond is "to suspend the execution of the judgment

and maintain the status quo pending appellate review").

{26} We conclude that the Legislature intended Section 31-11-1 to function as an appellate bail bond statute. Under this construction, defendants are given a qualified opportunity for release pending appeal. See § 31-11-1(C). As a condition of release, the district court may order the defendant to post an appeal bond. See Rule 12-205 NMRA 2003 ("Upon motion, the district court shall initially set conditions of release pending appeal."); Rule 5-402(C) NMRA 2003 (granting the district court the power to set conditions of release pending appeal, including requiring the defendant to post bond). It is only when bond has been posted and accepted by the trial court that the defendant's sentence is stayed. Cf. *NMSA 1978, § 39-3-22 (1966)* (providing for supersedeas in civil cases after filing notice of appeal); *Devlin v. State ex rel. N.M. State Police Dep't*, 108 N.M. 72, 74, 766 P.2d 916, 918 (1988) (noting that Section 39-3-22 permits the district court to stay the execution of judgment once an appeal bond has been posted by the appellant). Under this construction, Defendant's sentence of probation was not stayed since he failed to post an appeal bond.

#### IV

{27} We hold that the Court of Appeals erred in holding that the district court lacked jurisdiction to act upon the State's petition to revoke Defendant's probation

while his conviction was being appealed. Thus, we reverse the Court of Appeals and remand to the district court for proceedings consistent with this opinion.

{28} **IT IS SO ORDERED.**

**PAMELA B. MINZNER, Justice**

**WE CONCUR:**

**PETRA JIMENEZ MAES, Chief Justice**

**PATRICIO M. SERNA, Justice**

**RICHARD C. BOSSON, Justice**

**EDWARD L. CHÁVEZ, Justice**

## WRITS OF CERTIORARI

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 NO. 28,337 *Colonias Dev. Council v. Rhino Envtl. Svcs.*  
 (COA 22,932) 12/2/03  
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 NO. 28,359 *State v. Moses M.* (COA 23,250) 12/2/03  
 NO. 28,380 *Angel Fire v. Wheeler* (COA 24,295) 12/3/03  
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 NO. 28,416 *Blancett v. Blancett* (COA 24,282) 1/13/04

NO. 28,423 *Marquez v. Allstate* (COA 23,385) 1/13/04

### PETITIONS FOR WRIT OF CERTIORARI DENIED:

NO. 28,300 *Archuleta v. Blair* (12-501) 11/10/03  
 NO. 28,413 *Hill v. Williams* (12-501) 12/22/03  
 NO. 28,398 *State v. Sosa* (COA 23,357) 12/31/03  
 NO. 28,399 *State v. Matta* (COA 24,259) 12/31/03  
 NO. 28,415 *Turner v. Tipton* (12-501) 1/7/04  
 NO. 28,411 *Doak v. Tipps* (COA 23,562) 1/8/04  
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 1/15/04  
 NO. 28,432 *State v. McGee* (COA 23,203) 1/15/04  
 NO. 28,434 *State v. Grubbs* (COA 24,356) 1/15/04

### WRIT OF CERTIORARI QUASHED:

NO. 27,814 *State v. Hertel* (COA 23,153) 1/13/04

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**Certiorari Granted, No. 28,374,  
December 19, 2003**

**From the New Mexico  
Court of Appeals**

**Opinion Number:  
2004-NMCA-001**

GERALD L. SMITH,  
Plaintiff-Appellant,  
versus  
BOARD OF COUNTY  
COMMISSIONERS,  
COUNTY OF BERNALILLO,  
Defendant-Appellee,

HENRY R. WESTRICH, et al.,  
Intervenors-Appellees.  
No. 22,766  
(filed: October 22, 2003)

**APPEAL FROM THE  
DISTRICT COURT OF BERNA-  
LILLO COUNTY**  
WENDY E. YORK, District Judge

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CHRISTOPHER D. IMLAY  
BOOTH, FRERET, IMLAY & TEP-  
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Silver Spring, Maryland  
for Amicus Curiae

## **OPINION**

**WECHSLER, Chief Judge**

{1} The opinion filed in this case on September 23, 2003 is hereby withdrawn and the following submitted therefor. The motion for rehearing is otherwise denied.

{2} In this appeal, we consider the proper interpretation of the Bernalillo County zoning ordinance and a related limited federal preemption doctrine as applied to the placement of two 140-foot amateur radio antenna towers. Plaintiff was given stop work notices after initially receiving approval by the County for construction of the towers. He responded by filing a declaratory judgment action in district court. After remanding the matter for administrative proceedings, the district court denied Plaintiff's requested relief, concluding that the County properly exercised its authority under the zoning ordinance and did so in a manner that did not violate the federal preemption doctrine. Plaintiff appeals, arguing that (1) amateur radio antenna towers are a permissive use not subject to height restrictions; (2) recent amendments to the zoning ordinance do not prohibit the towers; and (3) the County and district court interpretation of the zoning ordinance is invalid as a matter of law because it allows administrative exercise of legislative authority and constitutes a violation of the limited federal preemption doctrine. We affirm.

### *Factual and Procedural Background*

{3} Plaintiff has been involved with amateur radio operations for over 40 years and is licensed as an amateur radio operator by the Federal Communications Commission (FCC). Over the years, he has used his skills to provide emergency communications and assistance to governmental entities and military personnel. Plaintiff moved to New Mexico in 1999 and set out to find property that would allow him to continue to pursue his hobby. He testified that he looked for property that did not have any restrictions in the nature of terrain obstructions, governmental regulations, or covenants. Plaintiff also spoke with a County employee, who assured him that there would be no height restrictions. In addition, Plaintiff obtained a copy of the zoning manual, which he interpreted to specifically exclude height restrictions on amateur radio towers. With this research, in July 1999, Plaintiff purchased five acres and a home in the A-2 (rural residential) zone in the East Mountain area north of Edgewood.

{4} After purchasing the property, Plaintiff applied for a building permit for the two towers. He submitted a site plan that was prepared by a licensed professional engineer. The plan called for two towers that would each be 130 feet high, topped by 10-foot masts and secured by multiple guy wires and able to support numerous

Yagi antennas. Yagi antennas are similar in design to television antennas, with a horizontal boom and a number of horizontal elements extending perpendicular to the boom. Plaintiff testified that the boom and elements could be 35 feet in length. Plaintiff testified that he chose these specifications so that he could have a strong world-wide radio signal that could also be used for local emergency communications. He also intended to participate in contests that are regularly scheduled among amateur radio enthusiasts.

{5} The County approved the plan in August 1999, and several County employees visited the site in October 1999 to confirm that the towers were being constructed in compliance with the specifications that Plaintiff submitted. Plaintiff was told that the construction was in compliance and could proceed. By late November 1999, some neighbors began to complain to County officials about the construction of the towers. In early December, County officials again returned to the property, but this time they issued a stop work notice. The County officials did not specify the reason for the notice, except for the claim that the construction "does not comply with zoning ordinance."

{6} Plaintiff obtained counsel and filed an administrative appeal of the stop work notice, thereby triggering a stay of the notice under the County building code. Without hearing the appeal, the County issued a second stop work notice, from which Plaintiff filed another appeal, which also was never heard. Plaintiff completed construction of the towers while he pursued relief in district court. The district court denied the County's request for a temporary restraining order.

{7} Plaintiff originally made claims for declaratory relief, inverse condemnation, and damages. He ultimately limited his request to declaratory relief, and the district court remanded the matter to the County Planning Commission (CPC) so that a factual record could be developed. Specifically, the district court instructed the CPC to consider whether the towers satisfied that part of the ordinance which allowed uses that were "customarily incidental" to the primary use of the property. After a hearing, the CPC agreed that the towers were in violation of the zoning ordinance, making these findings:

1. This case is a remand from District Court to allow the County Planning Commission to review an administrative decision made regarding



construction of two 140-foot amateur radio antennas at 44 Crestview Lane.

2. The zoning regulations regarding amateur radio antennas were amended by the Bernalillo County Board of County Commissioners in May 1999; these amendments became effective in June 1999.

3. With the amended zoning language, amateur radio antennas could no longer be considered as incidental uses in the A-2 zone, but would require a zone change or issuance of a Special Use Permit for a Specific Use.

4. The permit issued for construction of the two amateur radio antennas was issued in error, since the Zoning Code amendment regarding these antennas took effect approximately six weeks prior to submittal of the building permit application.

5. In order to construct the two amateur radio antennas, the owner would have to obtain either a change of zoning or a Special Use Permit for a Specific Use.

6. To date, the applicant has not applied for a zone change which would allow for the placement of the antennas on this site.

7. Two 140-foot amateur radio antennas and their related equipment are not an incidental use on the subject property.

8. Since the applicant has not applied for the proper zoning for this use and allowed this body to consider such a request, he has failed to demonstrate that the County has not reasonably accommodated his request.

9. A-2 zoning requires a higher standard of preservation of natural and scenic values than some other zones.

10. The federal guidelines speak in terms of reasonableness in height considerations.

11. The height of these towers is unreasonable for an A-2 rural zone as a customarily incidental use.

{8} The district court issued findings of fact and conclusions of law that were essentially consistent with those made by the CPC. Plaintiff appealed to this Court, and we note that the federal preemption arguments made by Plaintiff have been supplemented by an amicus curiae brief filed by the American Radio Relay League, Incorporated, which represents the interests of 650,000 radio amateurs licensed by the FCC.

*Standard of Review*

{9} We initially address the nature of this appeal. This case was not before the district court as an appeal of a final administrative decision under NMSA 1978, § 39-3-1.1 (1999). The district court remanded this case to the CPC for a factual determination. It thereby created a proceeding within a proceeding in which the CPC issued findings after a hearing based on its record. The district court thereafter decided the issues before it affording deference to the CPC's interpretation of the zoning ordinance contained in the Bernalillo County Code. The parties do not argue that this case should be treated as an administrative appeal under Section 39-3-1.1, and we do not do so.

{10} The parties dispute the applicable standard of review. Plaintiff argues that the interpretation of an ordinance involves the same rules of construction that apply to statutes and calls for de novo appellate review. See *Rutherford v. City of Albuquerque*, 113 N.M. 573, 574, 829 P.2d 652, 653 (1992). The County disputes that a de novo standard of review applies, referring us to cases recognizing a deferential review of administrative interpretation of ambiguous language in an ordinance. See, e.g., *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 119 N.M. 29, 38, 888 P.2d 475, 484 (Ct. App. 1994) (*Hinkle I*); *West Bluff Neighborhood Ass'n v. City of Albuquerque*, 2002-NMCA-075, ¶ 41, 132 N.M. 433, 50 P.3d 182, overruled on other grounds by *Rio Grande Chapter of Sierra Club v. N.M. Mining Comm'n*, 2003-NMSC-005, ¶ 16, 133 N.M. 97, 61 P.2d 806. We agree that an administrative interpretation of ambiguous language might, over time, bind the agency to a particular construction of the ordinance. See *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998-NMSC-050, ¶ 9, 126 N.M. 413, 970 P.2d 599 (*Hinkle II*).

{11} In its reply brief, Plaintiff argues that the County is not entitled to anything less than a de novo review because its interpretation of the zoning ordinance

was a policy determination without any administrative precedent. We only partially agree. The district court remanded the case to the CPC to interpret the "customarily incidental" provision of the zoning ordinance and to consider the federal protections given amateur radio towers. In reviewing the interpretation given the zoning ordinance by the CPC and the district court, we employ the following analysis:

The first rule is that the "plain language of a statute is the primary indicator of legislative intent." *General Motors Acceptance Corp. v. Anaya*, 103 N.M. 72, 76, 703 P.2d 169, 173 (1985). Courts are to "give the words used in the statute their ordinary meaning unless the legislature indicates a different intent." *State ex rel. Kline v. Blackhurst*, 106 N.M. 732, 735, 749 P.2d 1111, 1114 (1988). The court "will not read into a statute or ordinance language which is not there, particularly if it makes sense as written." [*Burroughs v. Bd. of County Comm'rs*, 88 N.M. 303, 306, 540 P.2d 233, 236 (1975)]. The second rule is to "give persuasive weight to long-standing administrative constructions of statutes by the agency charged with administering them." *TBCH, Inc. v. City of Albuquerque*, 117 N.M. 569, 572, 874 P.2d 30, 33 (Ct. App. 1994); see *Molycorp, Inc. v. State Corp. Comm'n*, 95 N.M. 613, 614, 624 P.2d 1010, 1011 (1981). The third rule dictates that where several sections of a statute are involved, they must be read together so that all parts are given effect. This includes amendments. *Methola v. County of Eddy*, 95 N.M. 329, 333, 622 P.2d 234, 238 (1980).

*Hinkle II*, 1998-NMSC-050, ¶ 5. We do not invoke the second rule because the County has not had a long-standing interpretation of the zoning ordinance as applied to amateur radio antennas.

{12} The CPC, however, did more than interpret the zoning ordinance. It held a hearing at which interested parties had the opportunity to be heard. The CPC also had before it an administrative record which included proposed findings by Plaintiff

and the County and documentation and information pertinent to the towers. Thus, the CPC determined the issues before it in a fact-based, quasi-judicial proceeding. See *Southworth v. Santa Fe Servs., Inc.*, 1998-NMCA-109, ¶ 14, 125 N.M. 489, 963 P.2d 566 (stating that an administrative agency acts in its quasi-judicial role when it investigates or ascertains the existence of facts, holds hearings, and draws conclusions from them).

{13} Although we review de novo the district court's acceptance of the CPC's interpretation of the "customarily incidental" provision of the zoning ordinance, the CPC's finding of unreasonableness, which was implicitly included within the district court's conclusion that the towers are not a customarily incidental use, is subject to an administrative standard of review applicable to the quasi-judicial administrative proceedings. See *Rio Grande Chapter of Sierra Club*, 2003-NMSC-005, ¶ 16 (holding that this Court may apply administrative standard of review even in appeal under Section 39-3-1.1, overruling *C.F.T. Development, LLC v. Board of County Commissioners*, 2001-NMCA-069, 130 N.M. 775, 32 P.3d 784); *Huning Castle Neighborhood Ass'n v. City of Albuquerque*, 1998-NMCA-123, ¶ 8, 125 N.M. 631, 964 P.2d 192 (holding that quasi-judicial zoning action was subject to administrative standard of review). Under this standard, a reviewing court reviews the whole record to determine if the administrative decision is supported by substantial evidence. *Rio Grande Chapter of Sierra Club*, 2003-NMSC-005, ¶ 17. Therefore, in the unusual circumstances of this case in which the district court remanded to the CPC for a factual record, if we agree that the determination of customarily incidental use includes the issue of reasonableness, we review the CPC's finding of unreasonableness for substantial evidence in the entire record. See *id.*

#### *Effect of the 1999 Amendments*

{14} The parties dispute the impact of amendments to the office and institutional (O-1) zone that took effect in 1999 prior to Plaintiff's submission of his building permit. Before the amendments, antennas in the O-1 zone were permitted up to 65 feet, with conditional approval up to 100 feet. Amateur and noncommercial radio towers were specifically exempted from these height regulations. In 1999, the County amended that portion of the zoning ordinance addressing "regulations for telecommunications towers, anten-

nas and related facilities." The amending ordinance (1999 amendment) added a number of definitions and regulations concerning wireless communications and appears to have been primarily aimed at controlling the growing use of cellular telephone facilities. Significantly, the amendments changed the previously unregulated height of amateur radio antennas. The 1999 amendment subjected them to the same regulations that apply to other towers, that is, up to 65 feet, with conditional approval up to 100 feet. The 1999 amendment also provided for conditional approval of amateur radio antennas up to 100 feet in the neighborhood commercial zone.

{15} Plaintiff's home is in the A-2 Rural Agricultural Zone. Bernalillo County Code Zoning § 8 (1996) (Zoning Ordinance). The district court agreed with the CPC's conclusion that under the 1999 amendment amateur towers are no longer considered a permissive use in the A-2 zone, and Plaintiff would have to either seek rezoning or a special use permit. The district court concluded that because the O-1 zone limits antennas to 65 feet, it would be inconsistent with the language of the ordinance to allow antennas more than twice that height in the A-2 zone, a zone requiring a higher standard of preservation of natural scenic values. We agree with Plaintiff's argument that the adoption of the 1999 amending language in the O-1 zone does not automatically amend uses in the A-2 zone.

{16} If the County Commission intended to limit uses in the A-2 zone, it could have expressly amended the A-2 zone or amended the supplemental language exempting amateur radio towers from height restrictions. In addition, the County's suggested options do not provide Plaintiff with the type of "reasonable accommodation" required under federal law. The first option, a zone change, might constitute illegal spot zoning. See generally *Bennett v. City Council for Las Cruces*, 1999-NMCA-015, ¶¶ 17-20, 126 N.M. 619, 973 P.2d 871 (discussing spot zoning). The second option, a special use permit, is even less likely because the zoning ordinance's list of specific uses that are eligible for special use permits does not include amateur radio towers, although it does mention commercial antennas. Zoning Ordinance, *supra*, § 18(B)(26). Accordingly, we conclude that the 1999 amendment did not remove amateur radio towers as a permissive use

in the A-2 zone. Because we reach this conclusion, we do not address Plaintiff's argument that the County's interpretation of the zoning ordinance contravenes the limited federal preemption on regulation of amateur radio use.

#### *Customarily Incidental Use*

{17} The primary issue in this case is whether Plaintiff's two towers, as constructed, are permissible under that portion of the zoning ordinance allowing any use that is "customarily incidental" within the A-2 zone. *Id.* § 8(B). The ambiguity in the zoning ordinance arises from the fact that it does not define "customarily incidental." However, there are a number of provisions that provide guidance. The A-2 zone is similar to the A-1 Rural Agricultural Zone except that it limits one dwelling unit for every two acres, whereas the A-1 zone allows denser development with one dwelling unit per acre. *Id.* §§ 7(B)(1)(c), 8(B)(1)(a). Otherwise, all uses permitted in the A-1 zone are allowed in the A-2 zone. *Id.* § 8(B)(1)(a). These uses include any "[a]ccessory building or structure customarily incidental to [a residential dwelling]." *Id.* § 7(B)(1)(d). The A-2 zone specifies height restrictions of 26 feet or two and one-half stories for buildings and structures, except as exempted in the supplemental regulations. *Id.* § 8(C).

{18} Plaintiff refers us to the following language in the supplemental height regulations to support his contention that the zoning ordinance prohibited the County's actions: "The height regulations as prescribed in this ordinance shall not apply to: . . . Amateur or noncommercial radio towers." *Id.* § 22(B)(1)(a). Other exempted structures include bellfries, chimneys, church spires, silos, conveyors, cooling towers, elevator bulkheads, fire towers, flag poles, monuments, ornamental towers and spires, smokestacks, stage towers or scenery lofts, tanks, water towers, and windmills. *Id.* § 22(B)(1)(b)-(q). Plaintiff maintains that this exemption means that no height restriction may apply. We do not agree. The exemption refers to the height limit and simply means that a 26-foot height limit does not apply to the structures listed in the exemption.

{19} The independent inquiry remains as to whether the particular structure constitutes a "customarily incidental" use under the zoning ordinance. This inquiry cannot be completed without context, including the physical characteristics of the structure and the nature of the site. In other words, a structure that may be

customarily incidental to a residential use at some level of scale may no longer satisfy the ordinance if it is oversized in the context of the stated purpose of the zone. The larger scale may not be reasonable as a customarily incidental use.

{20} The zoning ordinance provides guidance for what is reasonable in the A-2 zone:

The purposes of this zone are to preserve the scenic and recreational values in the National Forests and similar adjoining land, to safeguard the future water supply, to provide open and spacious development in areas remote from available public services and to recognize the desirability of carrying on compatible agricultural operations and spacious home developments in areas near the fringes of urban development.

Id. § 8(A). In light of this stated purpose, we reject the view that amateur radio antennas automatically either fall within the category of a customarily incidental use or not. Instead, we believe that a case-by-case application must be made, taking into consideration all of the factors unique to the site of the antennas.

{21} As such, we are not persuaded by the parties' reference to varying case law on this matter. Compare *Town of Paradise Valley v. Lindberg*, 551 P.2d 60, 62 (Ariz. Ct. App. 1976) (holding that 90-foot tower was accessory use and within the 100-foot height limitation); *Village of St. Louis Park v. Casey*, 16 N.W.2d 459, 461 (Minn. 1944) (holding that a 60-foot pole and other antennas were customarily incidental to residential use); *Wright v. Vogt*, 80 A.2d 108, 110 (N.J. 1951) (holding that 60-foot tower was customary incidental use); *Skinner v. Zoning Bd. of Adjustment*, 193 A.2d 861, 865 (N.J. Super. Ct. App. Div. 1963) (holding that 100-foot tower permitted as "accessory use"); *Dettmar v. County Bd. of Zoning Appeals*, 273 N.E.2d 921, 922 (Ohio Misc. 1971) (holding that 64-foot antenna tower was permitted, subject to ordinance restriction to lawful and safe height), with *Marchand v. Town of Hudson*, 788 A.2d 250, 253 (N.H. 2001) (holding that it was unreasonable for zoning board to conclude that three 100-foot towers were "accessory use"); *Presnell v. Leslie*, 144 N.E.2d 381, 386 (N.Y. 1957) (holding that 44-foot tower was not an accessory use customarily incidental to the highly

classified residential area).

{22} These cases are not helpful because they are specific to the language of the ordinances in question, and they do not involve the site-specific inquiry that we believe is contemplated by the stated purpose of the A-2 zone. Nor do they take into account the reasonable accommodation mandated by the limited federal preemption.

#### *Finding of Unreasonableness*

{23} The CPC found that the height of the towers is "unreasonable for an A-2 rural zone as a customarily incidental use." We have concluded as a matter of law that reasonableness is a consideration in determining "customarily incidental" use under this zoning ordinance as well as in determining the application of federal preemption. As we have discussed, the issue of reasonableness is based upon the physical characteristics of the structure in its particular site. We review the agency's determination for substantial evidence based on the whole record. See *Huning Castle Neighborhood Ass'n, 1998-NMCA-123*, ¶ 8.

{24} The facts in the record concerning the height of the towers and the stated purpose of the A-2 zone are undisputed. As to reasonableness, Plaintiff took the position at the CPC hearing that the towers would be reasonable at any height. Neighbors stated at the hearing that the towers are "over four times the height of surrounding houses," that the towers stood "way above the mountain line" and were clearly visible from a distance of about one-half mile, that there was nothing in the area similar to the towers and that the towers detrimentally affected the scenic view, and that the towers reflected bright light toward the window of one neighbor's home. The record contained a letter from a neighbor stating that the towers and attached lines "are an eye sore that reflect the sun throughout the day and spoil views of South Mountain."

{25} Although the County Zoning Director stated at the hearing that the towers were exempted from height restrictions under a permissive use category, we have concluded that this interpretation of the zoning ordinance was incorrect. The purposes of the A-2 zone include the preservation of scenic values of the National Forest and similar adjoining land and the provision of open and spacious development. Zoning Ordinance, *supra*, § 8(A). Given the height of the towers and the stated purpose of the A-2 zone, there was substantial evi-

dence in the record as a whole for the CPC to find that the height of the towers was unreasonable as a customarily incidental use in the A-2 zone.

#### *Conclusion*

{26} Although the zoning ordinance could have been drafted with language that would better assist administrative officials and courts in interpreting the scope of regulatory authority over amateur radio antennas in the A-2 zone, the zoning ordinance is sufficient for purposes of authorizing the exercise of regulatory oversight in this case. Amateur radio towers are a permissive use under A-2 zoning subject to the requirement that they be customarily incidental to the residential use. Such a determination is made on a case-by-case basis and includes a consideration of reasonableness for the A-2 zone. We hold that the district court had a proper basis for denying Plaintiff's request for declaratory relief on the finding that the two 140-foot towers are unreasonable for an A-2 zone as a customarily incidental use. Accordingly, we affirm.

{27} **IT IS SO ORDERED.**

**JAMES J. WECHSLER, Chief Judge**

**WE CONCUR:**  
**CELIA FOY CASTILLO, Judge**  
**RODERICK T. KENNEDY, Judge**

**Certiorari Not Applied For**

**From the New Mexico  
Court of Appeals**

**Opinion Number:  
2004-NMCA-004**

FIDEL GARCIA,  
Intervenor-Appellant,  
versus  
MARIO JEANTETTE,  
Petitioner-Appellee.

No. 22,784

(filed: September 23, 2003)

**APPEAL FROM THE DISTRICT  
COURT OF TAOS COUNTY**  
PEGGY J. NELSON, District  
Judge

SAMUEL M. HERRERA  
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Taos, New Mexico  
for Appellant

BRIGITTE URSULA LOTZE  
JERRY J. HAMILTON  
BRIGITTE LOTZE LAW FIRM  
Taos, New Mexico  
for Appellee

**OPINION**

**WECHSLER, Chief Judge**

{1} We address in this appeal whether the district court had authority under NMSA 1978, § 40-4-7(A) (1997), to order an intervening third party to pay attorney fees incurred by a divorcing party who was required to bring a separate action to collect on a judgment entered in the divorce proceeding. We hold that Section 40-4-7 does not authorize an award of attorney fees under these circumstances. We also decline to uphold the district court's judgment as an award of sanctions against the third party under its inherent authority. We therefore reverse the award of attorney fees.

*Background*

{2} During their marriage, Petitioner Susan Rita Jeantette (Wife) and Respondent Mario Jeantette (Husband) owned a house in Taos, New Mexico, on land historically belonging to Wife's family. Wife's parents, Fidel and Eva Garcia, had given the land

to Husband and Wife as a gift. The property was part of the family compound on which Fidel and other relatives lived. When Husband and Wife built their house on the property, they obtained mortgage loans from First State Bank and Peoples Bank to finance the construction. Fidel assisted in building the house and also co-signed the mortgage in favor of First State Bank. On March 21, 1994, after ten years of marriage, Wife filed for divorce from Husband in Taos County District Court. While the divorce proceeding was pending, Husband and Wife defaulted on their mortgage payments to First State Bank and Peoples Bank. Consequently, on February 8, 1995, First State Bank filed a foreclosure action against Husband, Wife, and Fidel in Taos County District Court. Peoples Bank later joined the action and filed a cross-complaint against Husband and Wife to foreclose on the mortgage it held against the property.

{3} On July 5, 1995, First State Bank obtained judgments of foreclosure against Husband, Wife, and Fidel. Meanwhile, neighbors made an offer to purchase the subject property for \$115,000, and the district court ordered a sale of the property to avoid a foreclosure sale. However, before this sale could be consummated, Fidel, apparently in an effort to thwart the sale and keep the property, purchased the judgments in favor of First State Bank and the note and mortgage held by Peoples Bank, thereby terminating the banks' interests in the foreclosure action. On August 23, 1995, the district court entered an order consolidating the foreclosure action with the domestic relations action, thus allowing Fidel to intervene in the divorce proceeding as a third-party respondent.

{4} On December 16, 1996, after two-and-a-half years of bitter litigation over the subject property and other issues, the district court entered a final judgment, decree and order, dissolving the marriage, dividing the community assets and debts, determining the custody and support of the two minor children, and ordering Husband and Wife to seek counseling for anger management, domestic violence, and parenting. The district court also determined the parties' rights and interests in the foreclosed property. It awarded ownership of the residence to Fidel and Wife, but ordered them to pay Husband his community share of the equity in the property. In reaching this decision, the district court found that Fidel and Wife had willfully evaded its order that the property be sold by blocking access to the property,

harassing potential buyers, and otherwise making it difficult to show the house. It also found that Fidel "engaged in his own manipulations" to keep the house within the family, rescue his daughter from debt, and leave Husband "penniless." Finally, it found that Fidel's actions in the foreclosure proceeding were designed to divest Husband of his interest in the equity in the house.

{5} Consequently, the district court imposed a judgment lien on the subject property for \$23,600, the net value of Husband's equity interest in the property. It also imposed other judgment liens on the property for rent and Wife's share of community debts. On October 21, 1997, after further proceedings to clarify and correct its findings, the district court entered an order modifying the final judgment, decree and order. Fidel sought to appeal the district court's division of the foreclosed property, but this Court, in a memorandum opinion, declined to reach the foreclosure issues on the ground that they were not timely appealed.

{6} On December 29, 1999, Husband filed a separate action against Wife and Fidel in Taos County District Court to foreclose on the judgment liens entered in the divorce case. On October 27, 2000, the district court granted partial summary judgment in favor of Husband on his claims against Wife and Fidel for his share of the equity in the house and against Wife for a hospital debt. Husband withdrew his rental value claim and the district court denied his other claims. To avoid a foreclosure sale of the property, Fidel elected to pay the judgment in favor of Husband for his share of the equity in the house and the hospital debt.

{7} In collecting on the judgments from the divorce action, Husband incurred attorney fees of \$9553.31, which were to be paid to his attorney under a contingency fee agreement. Although Husband waived his request for attorney fees in the foreclosure action, he later filed a motion in the divorce action seeking to recover his attorney fees incurred in the foreclosure action pursuant to Section 40-4-7(A).

{8} Fidel did not timely respond to Husband's motion for attorney fees. Although he was granted several extensions of time within which to respond to the motion, he did not file a response until June 29, 2001, fourteen days after the last extension deadline had expired. Thus, on June 26, 2001, the district court entered a judgment for attorney fees in favor of Husband pursuant to Rule 1-007.1 NMRA



2003. The judgment held Fidel and Wife "jointly and severally" liable for Husband's attorney fees in the amount of \$9553.31 plus post-judgment interest.

{9} On August 2, 2001, Fidel filed a motion to set aside the judgment for attorney fees on the ground that he did not receive proper notice of the entry of the judgment under Rule 1-055 NMRA 2003. Following a hearing, the district court entered an order refusing to set aside the judgment for attorney fees. Fidel appeals from the denial of the motion to set aside the judgment, attacking the underlying award of attorney fees against him. Wife does not contest the judgment for attorney fees or the denial of the motion to set aside the judgment; she is not a party to this appeal.

#### *Preservation*

{10} Fidel argues that the district court erred in awarding attorney fees against him because Section 40-4-7(A) does not provide a basis for awarding fees against an intervening third party who is not a party to the divorce. Husband, however, contends that Fidel waived this argument by filing an untimely response to the motion for attorney fees and by not further challenging the district court's authority to award fees against him in his motion to set aside the judgment or at the hearing on the motion to set aside.

{11} Fidel's response to the motion of attorney fees specifically challenged the authority of the district court to award attorney fees against Fidel under Section 40-4-7, asserting that Husband's reliance on the domestic relations statute "perverts the purpose" of the statute. However, as Husband contends, the response was not timely filed. Because the response was not timely filed, the district court entered a judgment for attorney fees against Fidel pursuant to Rule 1-007.1. Fidel later moved to set aside the judgment, arguing that he was not given proper notice of the entry of the judgment under Rule 1-055.

{12} Our review of the transcript of the hearing on the motion to set aside the judgment indicates that at the hearing, the district court allowed the attorneys for the parties to fully reargue the grounds for, and the defenses to, the motion for attorney fees. Besides arguing that the judgment was entered without notice to him, Fidel argued that "the domestic statute" should not apply to him and that the issue of fees should have been litigated in the foreclosure action, not the divorce action. He further argued that Husband "waived

attorney fees" by declining to request them in the foreclosure action. Finally, he argued that Husband was not entitled to attorney fees on the basis of equity. In response, Husband's counsel reargued the grounds of his motion, recounting the procedural history of the case. After questioning counsel during their respective arguments, the district court ruled on the merits of the motion for attorney fees, determining that fees were justified on the ground that the foreclosure action arose from issues in the divorce action.

{13} Although a reviewing court generally will not review a claim of error unless the appellant timely objected below, it will do so when the trial court addressed the untimely objection on the merits. See *State v. Diaz*, 100 N.M. 210, 212, 668 P.2d 326, 328 (Ct. App. 1983). In this case, when the district court considered the arguments in Fidel's untimely response, and Husband had an opportunity to respond to the arguments at the hearing on the motion to set aside the judgment. As a result, Fidel's arguments on appeal were properly preserved. See *DeFillippo v. Neil*, 2002-NMCA-085, ¶ 12, 132 N.M. 529, 51 P.3d 1183 (stating that the primary purposes of the preservation rule are to alert the trial court to the potential error so the court has an opportunity to avoid mistakes and to give opposing parties a fair opportunity to meet the objection); *Gracia v. Bittner*, 120 N.M. 191, 195, 900 P.2d 351, 355 (Ct. App. 1995) (stating that "the preservation requirement should be applied with its purposes in mind, and not in an unduly technical manner to avoid reaching issues that would otherwise result in reversal"); cf. *In re Estate of Keeney*, 121 N.M. 58, 60-61, 908 P.2d 751, 753-54 (Ct. App. 1995) (holding that when the trial court proceeded to consider affidavits submitted with motion to reconsider summary judgment, the affidavits were properly before the appellate court for purposes of reviewing the propriety of the trial court's grant of summary judgment).

#### *Standard of Review*

{14} Ordinarily, when a party appeals from the denial of a motion to set aside a judgment, the scope of appellate review is limited to the correctness of the denial of the motion and does not extend to the judgment sought to be reopened. See *James v. Brumlop*, 94 N.M. 291, 294, 609 P.2d 1247, 1250 (Ct. App. 1980). In this case, however, the district court, in refusing to set aside the judgment, ultimately addressed the merits of the underlying

motion for attorney fees, ruling that Husband was entitled to an award of fees under Section 40-4-7(A). Under these circumstances, we will review the propriety of the district court's ruling on the question of attorney fees.

{15} The decision whether to grant or deny a request for attorney fees rests within the sound discretion of the district court. See *Quintana v. Eddins*, 2002-NMCA-008, ¶ 33, 131 N.M. 435, 38 P.3d 203. Thus, we review the district court's ruling on attorney fees only for an abuse of discretion. *Bustos v. Bustos*, 2000-NMCA-040, ¶ 24, 128 N.M. 842, 999 P.2d 1074. "An abuse of discretion occurs if the decision is against the logic and effect of the facts and circumstances of the case." *Id.* Even when we review for an abuse of discretion, however, we review the application of the law to the facts *de novo*. *N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-028, ¶ 7, 127 N.M. 654, 986 P.2d 450. Similarly, when called upon to consider questions of law, such as issues of statutory interpretation, we review these questions *de novo*. *Quintana*, 2002-NMCA-008, ¶ 9; *Pub. Serv. Co. v. Diamond D Constr. Co.*, 2001-NMCA-082, ¶ 48, 131 N.M. 100, 33 P.3d 651 ("Issues of statutory construction and interpretation are questions of law, which we review *de novo*").

#### *Applicability of Section 40-4-7(A) to Support Attorney Fee Award Against Fidel*

{16} Generally, a party may recover attorney fees only when authorized by statute, court rule, or an agreement expressly providing for their recovery. *Monsanto v. Monsanto*, 119 N.M. 678, 681, 894 P.2d 1034, 1037 (Ct. App. 1995). In this case, the district court awarded attorney fees to Husband pursuant to Section 40-4-7(A), which provides in part: "The court may make an order, relative to the expenses of the proceeding, as will ensure either party an efficient preparation and presentation of his case." The question presented by this appeal is whether the legislature, in enacting Section 40-4-7(A), intended to allow a divorcing party to recover from an intervening third party attorney fees incurred in a separate action to collect on a judgment lien imposed in the divorce action.

{17} "A statute should be interpreted to mean what the Legislature intended it to mean, and to accomplish the ends sought to be accomplished by it." *State ex rel. Newsome v. Alarid*, 90 N.M. 790, 794, 568 P.2d 1236, 1240 (1977). If the meaning of

the statute is plain, we give effect to the language as written and refrain from further statutory interpretation. *Sims v. Sims*, 1996-NMCS-078, ¶ 17, 122 N.M. 618, 930 P.2d 153. Thus, “we consider the language of the statute, the purpose of the legislation, and the wrongs it was intended to remedy.” *Styka v. Styka*, 1999-NMCA-002, ¶ 21, 126 N.M. 515, 972 P.2d 16.

{18} According to the plain language of Section 40-4-7(A), the purpose of the provision allowing for attorney fees in domestic relations cases is to “ensure either party an efficient preparation and presentation of his case.” *Id.* (emphasis added). “Either party,” as that term is used in Section 40-4-7(A), can logically only refer to the parties to the underlying domestic relations proceeding, that is, husband and wife. Compare *NMSA 1978, § 40-4-1* (1973) (emphasis added) (providing that district court may decree dissolution of marriage upon petition of “either party to a marriage”); *NMSA 1978, § 40-4-3* (1973) (emphasis added) (providing that when “the husband and wife have permanently separated and no longer live or cohabit together as husband and wife, either may institute proceedings” for a division of property or disposition of children or alimony); *NMSA 1978, § 40-4-4* (1973) (emphasis added) (providing that proceeding for dissolution of marriage, division of property, or disposition of children or alimony may be brought in the county where “either of the parties resides”). Thus, a plain reading of Section 40-4-7(A), particularly when viewed in the context of similarly worded statutes related to the dissolution of marriage, supports the conclusion that the provision for award of attorney fees in domestic relations cases applies only to proceedings “for the dissolution of marriage, division of property, disposition of children or spousal support” involving husband and wife. Section 40-4-7(A); see *Meridian Oil, Inc. v. N.M. Taxation & Revenue Dep’t*, 1996-NMCA-079, ¶ 12, 122 N.M. 131, 921 P.2d 327 (explaining that in ascertaining legislative intent, we begin by reading and examining the text of the statute and drawing inferences about the meaning from its composition and structure); *Herrera v. Sedillo*, 106 N.M. 206, 207, 740 P.2d 1190, 1191 (Ct. App. 1987) (“Statutes which relate to the same class of things are in *pari materia*” and “should, as far as reasonably possible, be construed together as though they constitute one law.”).

{19} We believe this interpretation of the

statutory language to be consistent with the customary approach of New Mexico courts in determining whether to award attorney fees in divorce cases. Our case law recognizes that the central purpose of an award of attorney fees under Section 40-4-7(A) is to remedy any financial disparity between the divorcing parties so that each may make an efficient and effective presentation of his or her claims in the underlying divorce case. *Quintana*, 2002-NMCA-008, ¶ 33 (“In determining whether to award attorney fees, a showing of economic disparity, the need of one party, and the ability of the other to pay, has been characterized as the primary test in New Mexico.”) (internal quotation marks and citation omitted); see also *Alverson v. Harris*, 1997-NMCA-024, ¶ 26, 123 N.M. 153, 935 P.2d 1165 (“The most important factor the trial court considers in deciding whether to award attorney fees is economic disparity between the parties.”) (internal quotation marks and citation omitted); *Monsanto*, 119 N.M. at 681, 894 P.2d at 1037 (stating that “if economic disparity exists between the parties, such that one party may be inhibited from preparing or presenting a claim, the trial court should liberally exercise its discretion so as to remove that inhibition and assist the needy party”). In this case, an allowance of attorney fees against an intervening third party, particularly when incurred in a collateral proceeding to enforce a judgment, would do nothing to advance the statutory purpose of equalizing the economic resources between the divorcing parties.

{20} We acknowledge that divorce actions may sometimes include parties, other than husband and wife, who join in the action because they assert a right or interest in the subject of the dissolution proceedings. See *Greathouse v. Greathouse*, 64 N.M. 21, 23, 322 P.2d 1075, 1076 (1958) (recognizing that “either party to a divorce action may bring in third parties who claim an interest in the property alleged to be community, or third parties themselves may intervene and have their rights therein determined”); *Ruybalid v. Segura*, 107 N.M. 660, 663, 763 P.2d 369, 372 (Ct. App. 1988) (involving attempt by husband’s mother to intervene in divorce action based upon her interest in community property); see also *NMSA 1978, § 40-9-2(A)* (1999) (allowing district court to grant reasonable visitation privileges to grandparent who intervenes in dissolution proceeding). However, the statute authorizing the award of attorney fees in

domestic relations cases, as it is currently written and interpreted by our courts, appears to apply only to the parties to the underlying proceeding and does not extend to third-party litigants. See § 40-4-7(A).

{21} Husband argues that the district court, in awarding attorney fees against Fidel, could properly consider whether Fidel’s actions caused Husband to incur attorney fees by requiring enforcement through litigation. He relies upon *Bustos*, 2000-NMCA-040, ¶ 26 (recognizing that a party’s actions that require enforcement through litigation is a factor to be considered in determining whether to award attorney fees under statute), and *Herrera v. Herrera*, 1999-NMCA-034, ¶ 20, 126 N.M. 705, 974 P.2d 675 (holding that wife was entitled to attorney fees when court enforced marital settlement agreement which husband refused to sign, thus requiring enforcement through litigation and causing wife to incur attorney fees which would otherwise not have been incurred). *Bustos* and *Herrera*, however, involve enforcement proceedings between husband and wife that occurred within the divorce action. In this case, Husband sought enforcement against his former father-in-law in a separate foreclosure action that was not part of the divorce action. Based on the language and purpose of Section 40-4-7(A), there is no statutory authority for an award of attorney fees against an intervening third party in a divorce case. The general rule that a party bears responsibility for his or her own attorney fees applies. Because Wife does not appeal the district court’s award of attorney fees against her, we do not reach the more challenging question of whether, under Section 40-4-7(A), Husband is entitled to recover from Wife attorney fees that were incurred in the separate foreclosure proceeding.

#### *Availability of Sanctions as Alternative Basis for Attorney Fee Award*

{22} Husband further urges this Court to uphold the award of attorney fees against Fidel as sanctions for his bad faith litigation conduct during the divorce proceeding. Husband points to findings in the district court’s final judgment entered on December 16, 2001 as substantial evidence in the record to support the imposition of sanctions. As discussed above, the findings relate to Fidel’s and Wife’s actions in obstructing the sale of the marital property and preventing Husband from taking his share of the equity in the property and were the

basis of the district court's imposition of a judgment lien against the property.

{23} As Husband correctly notes, courts have inherent power to impose sanctions on both litigants and attorneys to regulate their docket, promote judicial efficiency, and deter frivolous filings. *State ex rel. N.M. State Highway & Transp. Dep't v. Baca*, 120 N.M. 1, 4, 896 P.2d 1148, 1151 (1995); *Seipert v. Johnson*, 2003-NMCA-119, ¶ 11, 134 N.M. 394, 77 P.3d 298. [No. 22,304, slip op. at 8 (N.M. Ct. App. July 29, 2003)]. "Although the district court's authority to impose sanctions does not extend to pre-litigation conduct, under its inherent power, the court may in appropriate cases impose attorney's fees as sanctions for bad faith, vexatious litigation, or acts in defiance of a court order, where such acts arise out of post-litigation conduct." *Martinez v. Martinez*, 1997-NMCA-096, ¶ 23, 123 N.M. 816, 945 P.2d 1034 (citation omitted).

{24} In this case, however, Husband did not request sanctions against Fidel in his motion for attorney fees. Instead, Husband predicates his motion solely on the district court's authority to award attorney fees in a domestic relations action pursuant to Section 40-4-7(A). The motion does not contain any allegations of bad faith litigation conduct on the part of Fidel. It alleges only the existence of the judgment liens imposed in the divorce action, the refusal of Wife and Fidel to pay the judgment liens, and the necessity of filing a separate foreclosure action to collect on the judgment liens. Although Husband attached a copy of the final judgment, decree and order to the motion for attorney fees, it appears to have been submitted only for the purpose of establishing the existence of the judgment liens against the property. These factual allegations, without more, do not support an award of sanctions against Fidel for attorney fees incurred in the separate foreclosure action. *Cf. Baca*, 120 N.M. at 7, 896 P.2d at 1154 (explaining that a court cannot award attorney fees as sanction for "conduct that gave rise to

the underlying cause of action"); *Martinez*, 1997-NMCA-096, ¶ 23.

{25} Moreover, at the hearing on the motion to set aside the judgment, neither the parties nor the district court specifically discussed any of the findings concerning Fidel's alleged misconduct now being advanced by Husband. Rather, in determining whether to uphold the grant of attorney fees, the district court looked solely at whether the issues in the foreclosure action arose out of the divorce case. It did not examine the conduct of the parties leading up to the foreclosure action. Under these circumstances, we decline to construe the award of attorney fees as sanctions against Fidel. See *Tres Ladrones, Inc. v. Fitch*, 1999-NMCA-076, ¶ 13, 127 N.M. 437, 982 P.2d 488 (discussing that party generally may not be granted affirmative relief not requested in the pleadings).

{26} Husband additionally argues that this Court should affirm the district court's judgment if it is right for any reason. See *Meiboom v. Watson*, 2000-NMSC-004, ¶ 20, 128 N.M. 536, 994 P.2d 1154. An appellate court, however, will not affirm on an alternate ground not argued below if doing so would be unfair to the appellant. *Id.*; *McElhannon v. Ford*, 2003-NMCA-091, ¶ 14, 134 N.M. 124, 73 P.3d 827. It would be unfair to Fidel to affirm on a fact-dependent ground not raised either in the motion for attorney fees or at the hearing on the motion to set aside the judgment. See *Meiboom*, 2000-NMSC-004, ¶ 20. Moreover, we are not convinced that the district court would have awarded sanctions against Fidel based solely upon findings made by a different district judge in a different context several years earlier, particularly when it appears that certain of the judgment liens were disputed by Fidel, and Husband did not prevail on all his claims in the subsequent foreclosure action.

#### *Conclusion*

{27} We hold that, in a divorce case, Section 40-4-7(A) does not authorize an award

of attorney fees against an intervening third party. We also decline to uphold the award of attorney fees against Fidel as sanctions against him. Accordingly, we reverse the district court's decision as to Fidel and remand for further proceedings consistent with this opinion.

{28} **IT IS SO ORDERED.**

**JAMES J. WECHSLER, Chief Judge**

#### **WE CONCUR:**

**MICHAEL D. BUSTAMANTE, Judge  
CELIA FOY CASTILLO, Judge**

**Certiorari Denied, No. 28,366,  
December 17, 2003**

**From the New Mexico  
Court of Appeals**

**Opinion Number:  
2003-NMCA-148**

RONALD DeARMOND,  
Plaintiff-Appellant,  
versus  
HALLIBURTON ENERGY  
SERVICES, INC.,  
Defendant-Appellee.  
No. 22,802  
(filed: September 25, 2003)

APPEAL FROM THE DISTRICT  
COURT OF SAN JUAN COUNTY  
GEORGE A. HARRISON,  
District Judge

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## **OPINION**

**CASTILLO, Judge**

{1} In this case, we decide whether the trial court correctly determined that Plaintiff Ronald DeArmond (DeArmond) and Defendant Halliburton Energy Services, Inc., (Halliburton) entered into a valid contract agreeing to arbitrate work-related problems, thus waiving any right to a jury trial on these issues. We hold that the record is not sufficient to support the trial court's decision, and we therefore reverse the trial court's order granting Halliburton's motion to compel arbitration. We remand for reconsideration of Halliburton's motion.

### **I. BACKGROUND**

{2} DeArmond was employed by Halliburton as a senior equipment operator. In November 1998, he was injured on the job; and as a result, he needed surgery to

correct a torn pectoral muscle. DeArmond requested the necessary leave from Halliburton. In January 1999, Halliburton laid DeArmond off, and his health benefits were terminated.

{3} DeArmond sued Halliburton on February 2, 2000, in state district court. The suit alleged (1) discrimination based on race and medical condition in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e to -17 (2000), and the New Mexico Human Rights Act, NMSA 1978, §§ 28-1-10 to -15 (1969, as amended through 1995); (2) breach of implied employment contract; and (3) abusive discharge. Halliburton removed the case to federal court on April 18, 2000. DeArmond amended his complaint to dismiss the federal claim and secured a remand to state district court on September 19, 2000. On August 14, 2001, Halliburton filed its motion to compel arbitration, asserting that its arbitration agreement with DeArmond was enforceable under the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16 (2000), and, alternatively, the New Mexico Uniform Arbitration Act, NMSA 1978, §§ 44-7-1 to -22 (1971) (Act). Although DeArmond requested a hearing, the trial court made its decision based on the pleadings and affidavits without entering specific findings of fact. The trial court did not address the question of whether the agreement was governed by the federal and/or state arbitration statutes.

### **II. DISCUSSION**

#### **A. Standard of Review**

{4} The trial court held no evidentiary hearing and made no findings or conclusions; therefore, it appears the trial court determined as a matter of law that an agreement to arbitrate existed. In this regard, the court's order compelling arbitration was similar in nature to a grant of a summary judgment motion. *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.*, 636 F.2d 51, 54 n.9 (3rd Cir. 1980). As with a summary judgment motion, a motion to compel arbitration may only be granted as a matter of law when there is no genuine issue of material fact as to the existence of an agreement. *Avedon Eng'g, Inc. v. Seatex*, 126 F.3d 1279, 1283 (10th Cir. 1997). Only when there is no genuine issue of fact concerning the formation of an arbitration agreement should the court decide the existence of the agreement as a matter of law. *Par-Knit Mills, Inc.*, 636 F.2d at 54. "The district court, when considering a motion to compel arbitration which is opposed on the ground that no agreement to arbitrate had been made between the

parties, should give to the opposing party the benefit of all reasonable doubts and inferences that may arise." *Id.* We review de novo the grant of the motion to compel arbitration in the same manner we would review a grant of a summary judgment motion. See *Avedon Eng'g, Inc.*, 126 F.3d at 1283; *Campbell v. Millennium Ventures, LLC*, 2002-NMCA-101, ¶¶ 13-14, 132 N.M. 733, 55 P.3d 429 (reviewing de novo trial court's order granting summary judgment and compelling arbitration). We may reverse the order to compel arbitration if we determine that there are genuine issues of material fact as to whether an agreement to arbitrate exists. See *Par-Knit Mills, Inc.*, 636 F.2d at 55.

#### **B. The Arbitration Agreement**

{5} In late 1997, Halliburton adopted a company-wide Dispute Resolution Program (DRP) with an effective date of January 1, 1998. Thereafter, in November 1997, Halliburton mailed a notice of the DRP to all employees at their addresses of record. The mailing included a memorandum, a twenty-two-page Plan Document, the DRP Rules, a summary brochure, and a cover letter of explanation. The cover letter stated that "[t]he Halliburton Dispute Resolution Program binds the employee and the Company to handle workplace problems through a series of measures designed to bring timely resolution." The memorandum further explained that as of January 1, 1998, all "Halliburton employee disputes" would be referred through the DRP for resolution, that both Halliburton and DeArmond would be bound by the agreement, and that "[y]our decision to . . . continue your current employment after January 1, 1998 means you have agreed to and are bound by the terms of this Program as contained in the Plan Document and Rules (all enclosed)." DeArmond continued employment after January 1, 1998.

{6} Halliburton, on appeal, drops its alternative argument that the DRP is enforceable under the Act. Since DeArmond neither contests application of the FAA nor argues for application of the Act, we proceed under the assumption that the FAA governs.

{7} A primary purpose of the FAA is to require courts to compel arbitration in cases where the parties agree to arbitrate; the law was enacted "to reverse the long-standing judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as oth-



er contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). The FAA applies in state as well as federal courts, *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 684 (1996), and provides that

[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. Section 2 of the FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements[.]" *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Thus, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration[.]" *Id.* at 24-25; *Gilmer*, 500 U.S. at 25.

{8} However, a legally enforceable contract is still a prerequisite for arbitration; without such a contract, parties will not be forced to arbitrate. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944-45 (1995) (stating that the presumption in favor of arbitration is reversed when there is a dispute as to the existence of an agreement); *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648 (1986) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." (internal quotation marks and citation omitted)); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) ("[T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute."); *Dumais v. Am. Golf Corp.*, 299 F.3d 1216, 1220 (10th Cir. 2002) ("The presumption in favor of arbitration . . . disappears when the parties dispute the existence of a valid arbitration agreement."); *Avedon Eng'g, Inc.*, 126 F.3d at 1286 ("[T]he FAA was not enacted to force parties to arbitrate in the absence of an agreement.");

{9} Whether a valid contract to arbitrate exists is a question of state contract law. *First Options of Chicago, Inc.*, 514 U.S. at 944-45; *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987); *Avedon Eng'g, Inc.*, 126 F.3d at 1286-87; *Armijo v. Prudential Ins. Co. of Am.*, 72 F.3d 793, 797 (10th Cir. 1995). States may not subject an arbitration agreement

to requirements that are more stringent than those governing the formation of other contracts. *Doctor's Assocs.*, 517 U.S. at 687. For a contract to be legally valid and enforceable, it must be factually supported by an offer, an acceptance, consideration, and mutual assent. *Garcia v. Middle Rio Grande Conservancy Dist.*, 1996-NMSC-029, ¶ 9, 121 N.M. 728, 918 P.2d 7 (internal quotation marks and citation omitted); *Hartbarger v. Frank Paxton Co.*, 115 N.M. 665, 669, 857 P.2d 776, 780 (1993); *UJI 13-801 NMRA 2003* (defining contract). "The general rule in contract actions is that the burden of proof is on the party seeking to prove the existence of a fact." *Newcum v. Lawson*, 101 N.M. 448, 454, 684 P.2d 534, 540 (Ct. App. 1984); *Camino Real Mobile Home Park P'ship v. Wolfe*, 119 N.M. 436, 442, 891 P.2d 1190, 1196 (1995).

{10} DeArmond contends that Halliburton has not proven the existence of a valid, enforceable agreement to arbitrate. Specifically, he argues that three elements essential to a contract are missing: acceptance, consideration, and mutual assent. We agree that there is an absence of proof of acceptance and mutuality; we therefore need not address DeArmond's arguments concerning consideration.

### 1. Acceptance

{11} A pivotal issue in this case is whether DeArmond accepted the modification of his existing employment contract when he continued to work after January 1, 1998. Acceptance of an agreement is essential for the agreement to be binding. *Medina v. Sunstate Realty, Inc.*, 119 N.M. 136, 139, 889 P.2d 171, 174 (1995); *Orcutt v. S&L Paint Contractors, Ltd.*, 109 N.M. 796, 798, 791 P.2d 71, 73 (Ct. App. 1990). Acceptance must be "clear, positive, and unambiguous." *Id.*; *Tatsch v. Hamilton-Erickson Mfg. Co.*, 76 N.M. 729, 733, 418 P.2d 187, 189 (1966); *Ross v. Ringsby*, 94 N.M. 614, 617, 614 P.2d 26, 29 (Ct. App. 1980). A party's acceptance of a written offer may be express or implied by conduct. *Medina*, 119 N.M. at 139, 889 P.2d at 174; *Long v. Allen*, 120 N.M. 763, 764-65, 906 P.2d 754, 755-56 (Ct. App. 1995); *Orcutt*, 109 N.M. at 798-99, 791 P.2d at 73-74; *Restatement (Second) of Contracts* § 19 (1981). Where the offer invites acceptance through performance, rather than in writing, the beginning of invited performance is an implied acceptance. *Long*, 120 N.M. at 765, 906 P.2d at 756. Halliburton invited acceptance through performance by informing employees in the DRP memorandum that

"[y]our decision to . . . continue your current employment after January 1, 1998 means you have agreed to and are bound by the terms of this Program."

{12} Halliburton urges us to apply our holding in *Stieber v. Journal Publ'g Co.*, 120 N.M. 270, 273, 901 P.2d 201, 204, and to conclude that DeArmond accepted arbitration by continuing to work after January 1, 1998. In *Stieber*, this Court applied the principle of implied acceptance to an at-will employment contract. We held that the terms of employment may be modified prospectively as a condition of continued employment and that an employee may accept the proposed modifications by continued employment. *Stieber*, 120 N.M. at 273, 901 P.2d at 204. The modifications in *Stieber* concerned job assignments that an employer gave to an employee; the employee objected to the assignments but performed them, which she claimed effectively demoted her. *Id.* at 272, 901 P.2d at 203.

{13} There is a critical distinction between *Stieber* and this case. In *Stieber*, there was no question that the employee had knowledge of the change in job assignments. Therefore, *Stieber* does not stand for the proposition that a prospective modification of an at-will employment contract may be accepted by continued employment when the employee does not have actual knowledge of the offer.

{14} The question, therefore, is whether DeArmond had actual knowledge of Halliburton's offer and Halliburton's invitation that the offer be accepted by performance. DeArmond argues that Halliburton has not shown that DeArmond received the DRP materials or that he read or understood their contents. We observe that Halliburton did not provide an arbitration agreement for DeArmond to sign, nor is there an acknowledgment form indicating that he received or read the documents. DeArmond's argument is, in essence, that without a showing that he knew about the proposed new contract terms, there can be no proof that he accepted the offer. We agree.

{15} Halliburton correctly asserts that under New Mexico law, materials mailed to a correct address are presumed to have been received. *Garmond v. Kinney*, 91 N.M. 646, 647, 579 P.2d 178, 179 (1978). While receipt may be presumed, we are unwilling under the facts of the case to equate presumed receipt with actual knowledge of the offer. The record leaves us unable to ascertain whether DeArmond saw the en-

velope, opened it, and read it or whether DeArmond was otherwise conscious of the fact that remaining on the job would be construed as acceptance of an arbitration agreement.

{16} Without citing authority, Halliburton further suggests it is entitled to presume employees read the materials sent to them. New Mexico law does impose a duty upon the parties to a contract to read and familiarize themselves with its contents before they sign and deliver it. *Ballard v. Chavez*, 117 N.M. 1, 3, 868 P.2d 646, 648 (1994); *Smith v. Price's Creameries*, 98 N.M. 541, 545, 650 P.2d 825, 829 (1982). However, that presumption is inapplicable to this case, where there is no signed contract.

{17} We base our analysis on general contract law. A trier of fact must first be able to determine that the party performing an act was aware of the offer and aware that his conduct could constitute acceptance. Restatement § 19(2) ("The conduct of a party is not effective as a manifestation of his assent unless he . . . knows or has reason to know that the other party may infer from his conduct that he assents."); 1 Arthur Linton Corbin & Joseph M. Perillo, *Corbin on Contracts* § 3.5, at 326-28 (rev. ed. 1993 & Supp. 2003) (discussing knowledge of the offer as a prerequisite to acceptance and stating that the prerequisite "is quite logical and is consistent with the assumption that 'contract' requires conscious assent to terms proposed by another."). We recognize that the type and extent of knowledge required varies, depending on the context. See, e.g., *In re Estate of Duran*, 2003-NMSC-008, ¶ 17, 133 N.M. 553, 66 P.3d 326 (stating that, generally, notice of an adverse possession claim between cotenants must be an open and unequivocal denial of the title and right to possession by one cotenant to the other); *Collins v. Big Four Paving, Inc.*, 77 N.M. 380, 383, 423 P.2d 418, 420 (1967) (determining that under the worker compensation statute, the purpose of which is to allow employers to investigate accidents, actual knowledge sufficient to overcome the requirement for written notice is not necessarily firsthand knowledge but is knowledge "sufficient to impress a reasonable man" that an accident or compensable injury has occurred); *Jones v. Minn. Mining & Mfg. Co.*, 100 N.M. 268, 274, 669 P.2d 744, 750 (Ct. App. 1983) (defining actual knowledge in a duty to warn tort case as knowledge of the nature and extent of the danger of excessive radiation dosages). In

this case, we need to consider the purpose of the knowledge requirement for an offer: that there was a conscious assent to the offer and a meeting of the minds as to the terms of the offer.

{18} We believe the principle of conscious assent is particularly crucial in the at-will employment context, where acceptance may be manifested by continuing in a routine activity. In order to ascertain whether the employee consciously assented by continuing to work, there must be proof that the employee actually knew of the offer and was aware that remaining on the job constituted acceptance. See *National Rifle Ass'n v. Ailes*, 428 A.2d 816, 822 (D.C. 1981) ("[W]ithout the employee's express agreement to be bound by a change in [an employment] policy, the employer must prove that the employee's knowledge of the change was complete enough for the trier of fact to find, in fairness, that the employee's decision to remain on the job was premised on acceptance of the new policy."). Lack of knowledge of the modified terms precludes the formation of a new contract. To suggest otherwise, particularly when an employee is waiving a fundamental right to a jury trial through an arbitration agreement, offends a basic notion of fairness.

{19} We are aware of at least two other jurisdictions that have held Halliburton employees bound to arbitration agreements when the employees continued to work after receiving DRP materials in the mail. *In re Halliburton Co.*, 80 S.W.3d 566, 569 (Tex. 2002); *Cole v. Halliburton Co.*, No. CIV-00-0862-T, 2000 WL 1531614, at \*\*1, 2 (W.D. Okla. Sept. 6, 2000). These jurisdictions, like New Mexico, imply acceptance of prospective modifications in terms of employment when at-will employees remain on the job. *Id.* Those cases, however, are distinguishable. In one, the employee acknowledged looking at the DRP materials, albeit briefly. *In re Halliburton Co.*, 80 S.W.3d at 568-69. Based on this acknowledgment, the court was satisfied that the employee had knowledge of the changes to the at-will employment contract when he continued to work after January 1, 1998. *Id.* Similarly, in the second case, the employee admitted he received certain of the DRP materials, such that the court was able to conclude from the record that the employee had actual notice of the program and knew that his continued employment bound him to the arbitration agreement. *Cole*, 2000 WL 1531614, at \*\*1, 2. There is no such acknowledgment or

admission in this case, nor does the record otherwise demonstrate that DeArmond knew that continued work after January 1, 1998, would bind him to the agreement.

## 2. Mutual Assent

{20} In addition to the absence of proof as to acceptance, the record reveals a lack of proof as to mutuality. A binding contract requires mutual assent. *Garcia*, 1996-NMSC-029, ¶ 9. Parties can be said to mutually assent to a contract when they have the same understanding of the contract's terms; where they attach materially different meanings to the terms, there is no meeting of the minds. See *United Water N.M., Inc. v. N.M. Pub. Util. Comm'n*, 1996-NMSC-017, 121 N.M. 272, 276, 910 P.2d 906, 910; *Pope v. The Gap, Inc.*, 1998-NMCA-103, ¶¶ 11-12, 125 N.M. 376, 961 P.2d 1283. Without proof that DeArmond knew of the offer, it is impossible to conclude that there was a meeting of the minds as to the terms of the offer. See Restatement § 53 cmt. c at 135 ("The offeree's conduct ordinarily constitutes an acceptance . . . only if he knows of the offer."). In the absence of evidence in the record of a meeting of the minds, the trial court could not find that there was mutual assent.

{21} Halliburton contends that if we determine DeArmond did not accept the arbitration agreement by his continued employment, we will eviscerate New Mexico's at-will employment doctrine. We disagree. Our holding in *Stieber* stands: An employer may still insist on prospective changes in the terms of employment as a condition of continued employment. Continued employment, however, will not constitute acceptance, unless the employer proves that the employee actually knew of the modification. In *Stieber*, actual knowledge of the prospective modification was not an issue because there was no question that the employee knew of the modification in job assignments and was challenging the employer's right to make the modification.

{22} Halliburton also urges us to reject a "heightened 'knowing and voluntary' standard for a party's waiver of jury trial in favor of arbitration[.]" Because Halliburton has not proven that DeArmond even knew of the arbitration agreement, we do not consider this issue.

## III. PROCEDURE

{23} We consider the trial court's order as similar to the grant of a summary judgment motion on this issue. Accordingly, we reverse the trial court's grant of

Halliburton's motion to compel arbitration, and we remand for the trial court to consider the matter in light of our clarification that Halliburton must prove DeArmond had actual knowledge of the offer to arbitrate and of Halliburton's invitation to accept the offer by continued employment. Because the resolution of DeArmond's other issues regarding lack

of consideration and waiver must wait for a determination of this preliminary issue, we direct the trial court to address these remaining issues as necessary.

{24} **IT IS SO ORDERED.**

**CELIA FOY CASTILLO, Judge**

**WE CONCUR:**

**MICHAEL D. BUSTAMANTE, Judge**

**CYNTHIA A. FRY, Judge**

**Certiorari Granted, No. 28,379,  
December 9, 2003.**

**From the New Mexico  
Court of Appeals**

**Opinion Number:  
2003-NMCA-149**

STATE OF NEW MEXICO,  
Plaintiff-Appellee,  
versus  
ADRIAN JOSEPH COOLEY,  
Defendant-Appellant.  
No. 23,253  
(filed: October 22, 2003)

APPEAL FROM THE  
DISTRICT COURT OF BERNALILLO COUNTY  
MARK A. MACARON,  
District Judge

PATRICIA A. MADRID  
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JOHN BIGELOW  
Chief Public Defender  
CORDELIA A. FRIEDMAN  
Assistant Appellate Defender  
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for Appellant

## OPINION

**WECHSLER, Chief Judge**

{1} Defendant Adrian Cooley pleaded no contest to charges of criminal sexual penetration in the third degree contrary to NMSA 1978, § 30-9-11(E) (1995, prior to 2001 amendment); false imprisonment contrary to NMSA 1978, § 30-4-3 (1963); and three counts of battery contrary to NMSA 1978, § 30-3-4 (1963). The charges arose from a sexual assault upon a woman who was 59 years old, some 24 years older than Defendant. Defendant argues on appeal that the district court erred when it determined that the criminal sexual penetration was a serious violent offense under the provisions of NMSA 1978, § 33-2-34(L)(4)(n) (1999), because he did not receive proper notice and because the district court did not make proper findings. We affirm.

### *Plea Hearing*

{2} Defendant pleaded no contest to the charges at a hearing on February 18, 2002. The prosecutor presented the facts underlying the charges, and Defendant agreed that there was a factual basis for each of the charges. In the plea, there had been no agreement between the State and Defendant as to the length of the sentence. During the hearing, the district court ensured that the plea was voluntary and that Defendant understood the rights he was waiving by pleading. The district court also asked Defendant if he understood that he was facing a possible sentence of zero to six years. Defendant responded to the district court's questions in the affirmative. At the conclusion of the hearing, the district court ordered a presentence report to be prepared for use

at sentencing.

### *Sentencing Hearing*

{3} In May 2002, at the sentencing hearing, the prosecutor stated that the victim would not attend the hearing because the attack had devastated her life, and she felt that she did not have the emotional well-being to stand before the court and speak. The prosecutor then described the nature of the sexual assault and the effect it had on the victim. The victim was acquainted with Defendant. On June 24, 2001, the day of the attack, they had been drinking with the same group at a bar. Later, the victim left the bar to call her daughter from a pay phone for a ride home. Defendant followed her and asked her to come home with him. When she refused, Defendant struck her with such tremendous force that the next thing she remembered was being in a van, with her clothing around her ankles.

{4} Defendant anally raped the victim and hit her several times. He also grabbed her head and slammed it into the floor of the van during the course of the rape. At some point, the victim was able to get away and call the police from the pay phone. When the police arrived, they found the victim partially clothed, crying, and upset. Her purse and clothing were found in Defendant's van.

{5} A physical examination of the victim by a sexual assault nurse examiner (SANE) revealed four injuries to the victim's vaginal and rectal area. The victim had also suffered facial injuries from being beaten, including a severe blow to one of her eyes. The prosecutor showed the district court a photograph of the victim's facial injuries taken at the time of treatment by the SANE unit. At the time of the hearing, the victim was still having problems with her vision

resulting from the facial blow and had not been able to work. Based on the brutality of the act, the prosecutor asked the court to follow the sentencing recommendation of the presentence report.

{6} The district court noted that a factual basis existed for Defendant's plea to the charges. The district court sentenced Defendant to a term of six years, with eighteen months suspended. It also ordered Defendant to participate in anger management and substance abuse counseling. Additionally, the district court imposed the following conditions of release: a two-year supervised parole period, restitution to the victim for her counseling expenses, and registration as a sex offender. See NMSA 1978, § 29-11A-4(B) (2000).

{7} The district court attributed three years of the six-year sentence to the crime of criminal sexual penetration in the third degree. NMSA 1978, § 31-18-15(A)(5) (1999). The prosecutor asked the district court to classify the sexual assault as a serious violent offense under Section 33-2-34(L)(4)(n) of the Earned Meritorious Deductions Act (EMDA). The EMDA expressly states that third degree criminal sexual penetration may be deemed a serious violent offense if the court so determines, based upon "the nature of the offense and the resulting harm." Section 33-2-34(L)(4)(n). Under the EMDA, prisoners convicted of serious violent offenses may earn up to four days per month of credit for participation in various programs, while prisoners convicted of nonviolent offenses may earn up to thirty days per month. Section 33-2-34(A)(1), (2).

{8} Defendant objected and claimed that he had not received notice of the EMDA provisions. He argued that the EMDA is similar to the enhancement of a sentence based upon a finding of aggravating circumstances which requires notice of an intent to seek enhancement. The district court determined that notice of the EMDA provisions was not required because, unlike aggravation and enhancement, it does not affect the length of the sentence. The statute itself, the district court concluded, was sufficient notice to a defendant that the defendant could be subject to the EMDA. The district court then concluded that Defendant had committed criminal sexual penetration in an extremely violent manner and that serious harm had been done to the victim. The district court observed that the presentence report stated that the victim continued to suffer serious

emotional harm from the sexual assault. *Notice Under the EMDA*

{9} Defendant argues on appeal that his constitutional right to due process was violated because the State did not give notice of its intent to seek a serious violent offense classification under the EMDA. He contends that the lack of notice left him unprepared to respond to the question of whether his sexual assault upon the victim constituted a serious violent offense. As a result, Defendant asserts, he was unable to provide the district court with information it would have needed in determining whether the criminal sexual penetration was a serious violent offense.

{10} As a preliminary matter, we address Defendant's contention that the State was seeking "a greater period of incarceration than the statutory maximum" by "[enhancing] Defendant's real time [sentence]." This Court has previously rejected this contention in *State v. Wildgrube*, 2003-NMCA-108, ¶ 40, \_\_\_ N.M. \_\_\_, 75 P.3d 862, and in *State v. Morales*, 2002-NMCA-016, ¶ 6, 131 N.M. 530, 39 P.3d 747. As we concluded in those cases, the EMDA affects only the calculation of "good time" and does not change the maximum penalty for a defendant's crime. In this case, the district court's determination that the criminal sexual penetration committed by Defendant was a serious violent offense did not change the prescribed maximum penalty for a third degree felony. Defendant's sentence was still three years after the district court's determination that Defendant's crime was a serious violent offense under the EMDA.

{11} Defendant argued to the district court that his rights were violated because he did not receive notice that the EMDA would be considered at sentencing. The district court rejected Defendant's arguments, distinguishing the EMDA from the aggravation of a sentence because the EMDA did not affect the maximum length of the sentence, and concluded that the statute itself provided notice to Defendant that he could be subject to that provision of the statute. We agree.

{12} As Defendant himself recognizes, the three statutes governing his sentencing are interrelated. The statute dealing with criminal sexual penetration in the third degree, Section 30-9-11, specifies that the offense is a third degree felony. Section 30-9-11(E). The sentencing statute, Section 31-18-15(A)(5), states that the basic sentence for a third degree felony offense is three years imprisonment and

also requires the district court, when imposing a sentence for a felony offense, to "indicate whether or not the offense is a serious violent offense" under the EMDA. See § 31-18-15(F). The EMDA, in Section 33-2-34(L)(4)(n), specifically identifies criminal sexual penetration as a crime that the court may determine to be a serious violent offense depending upon "the nature of the offense and the resulting harm." Therefore, the links between the statutes provided notice as a matter of law that the district court must consider the EMDA at sentencing. Furthermore, we note that Defendant's sentencing hearing was in May 2002. The EMDA has been in effect since July 1, 1999. See § 33-2-34. As we concluded in *Wildgrube*, "[e]nactment of the statute would have put [a defendant] on notice." *Wildgrube*, 2003-NMCA-108, ¶ 42.

{13} In support of his argument regarding notice, Defendant also relies upon *Caristo v. Sullivan*, 112 N.M. 623, 818 P.2d 401 (1991), which involved the enhancement of a sentence. This Court discussed *Caristo* in terms of the question of notice under the EMDA in *Wildgrube*, 2003-NMCA-108, ¶ 41. In *Caristo*, our Supreme Court stated that a defendant was entitled to "notice of the specific aggravating factors on which the state intends to rely so that the defendant will have an opportunity to prepare a response." *Caristo*, 112 N.M. at 631, 818 P.2d at 409. However, the Court in *Caristo* recognized that a defendant would have actual notice if the aggravating factor "was an element of the offense or a fact upon which such an element was established." *Id.* The Court in *Caristo* also stated that a presentence report would typically provide adequate notice of any circumstances that were not established at trial. *Id.* at 632 n.7, 818 P.2d at 410 n.7.

{14} In *Wildgrube*, we concluded that the defendant had sufficient notice of the factors used by the district court in determining that the vehicular homicide in that case was a serious violent offense. *Wildgrube*, 2003-NMCA-108, ¶ 41. In making the determination in that case, the district court relied upon the evidence presented at trial and at the sentencing hearing, as well as a presentence report, all of which were known to the defendant. *Id.* This Court concluded that under the standard articulated in *Caristo*, the defendant had actual notice of the EMDA factors considered at his sentencing hearing. *Wildgrube*, 2003-NMCA-108, ¶ 41.

{15} Similarly, in this case, Defendant

had knowledge of the factual information about the sexual attack presented by the prosecutor at the plea hearing, as well as the information contained in the presentence report. Defendant did not dispute the prosecutor's recitation of the nature of the attack and acknowledged that it was consistent with the account the victim had given to the police at the time of the attack. At the plea hearing, Defendant also acknowledged that there was a factual basis to the charges. At the sentencing hearing, Defendant stated that he regretted that night, which he blamed on alcohol, and "deeply regret[ted] the consequences." Defendant claimed in the presentence report that he and the victim had been in a sexual relationship before the attack, a claim which the victim emphatically denied. The district court responded that even if that claim were true, the attack on the victim was clearly not consensual.

{16} The district court, in making the determination that the crime had been a serious violent offense, relied upon the description at the sentencing hearing of the nature of Defendant's sexual attack of the victim and the effect the rape had upon the victim. The district court also referred to the presentence report's description of the extent of the victim's physical and emotional injuries. None of this information should have been a surprise to Defendant. See *State v. Badoni*, 2003-NMCA-009, ¶¶ 20-21, 133 N.M. 257, 62 P.3d 348 (concluding that the defendant's claim of insufficient notice of a firearm enhancement was without merit given the existence of the statute and that there had been testimony at trial about the gun, the victims' gunshot wounds, and an eyewitness account of the shooting).

{17} Moreover, although Defendant claims that he was unprepared at the sentencing hearing to provide the district court with information about the offense, he did not challenge the factual basis of the prosecutor's account of the attack at that hearing and has not done so on appeal. Defendant does not explain how he would have prepared differently for the hearing or what information the district court was lacking in making its decision. See *State v. Vallejos*, 2000-NMCA-075, ¶ 35, 129 N.M. 424, 9 P.3d 668 (observing that, although the defendant claimed to have been prejudiced by the late disclosure of witnesses, he did not "adequately explain how his cross-examination of the witnesses could have been improved without the late

disclosure"); *In re Ernesto M.*, 1996-NMCA-039, ¶ 10, 121 N.M. 562, 915 P.2d 318 ("An assertion of prejudice is not a showing of prejudice").

#### *Finding of Serious Violent Offense*

{18} Defendant also contends, relying upon *Morales*, 2002-NMCA-016, ¶ 16, that the district court erred because it did not find that he either intended to seriously harm the victim or acted with knowledge that his acts were reasonably likely to result in serious harm. Given the facts established regarding the nature of the sexual attack upon the victim, Defendant, in making this claim, appears to have misapprehended our intention in *Morales*. Our express purpose was to provide guidance to district courts in judging when the offenses listed in Section 33-2-34(L)(4)(n) were serious violent offenses. *Morales*, 2002-NMCA-016, ¶ 16 (stating that a trial judge must have some way of measuring which conduct amounts to serious violent offenses and which does not). In so doing, this Court construed Section 33-2-34(L)(4)(n) of the EMDA to require a finding that a defendant had committed the crime "in a physically violent manner," acting either intentionally or recklessly, which resulted in serious harm to the victim. *Morales*, 2002-NMCA-016, ¶ 16. We disagree with Defendant, however, to the extent that he interprets this discussion to require specific language from the district court. It is sufficient for the district court to make findings consistent with the *Morales* standard.

{19} Nor did the district court solely consider the suffering of the victim, as Defendant argues. The district court found that "the nature of the criminal act in this case was extremely violent under the circumstances before the court." It described those circumstances as Defendant's having sexually assaulted the victim while she was unconscious, after he placed her in that vulnerable state in the first place. The district court's findings about the nature of the offense are supported by the record, and those findings conform with the requirement of the EMDA that the district court consider the nature of the offense and the resulting harm in adjudging a crime to be a serious violent offense under the EMDA. Section 33-2-34(L)(4)(n). The district court's findings, based on the facts before it, necessarily involved a determination that the criminal sexual penetration was committed in a "physically violent manner either with an intent to do serious harm or with recklessness

in the face of knowledge that one's acts are reasonably likely to result in serious harm." See *Morales*, 2000-NMCA-016, ¶ 16. Therefore, the district court did not err in classifying the criminal sexual penetration as a serious violent offense.

#### *Unpreserved Argument*

{20} Finally, Defendant asserts in the conclusion of his brief in chief, without authority or argument, that his right to due process under Article II, Section 18 of the New Mexico Constitution was violated. Defendant did not raise this claim below. He did not argue to the district court and does not argue on appeal that our courts should depart from federal due process analysis or that Article II, Section 18 should be interpreted more broadly than the Fourteenth Amendment. See *State v. Gomez*, 1997-NMSC-006, ¶¶ 22-23, 122 N.M. 777, 932 P.2d 1 (describing preservation requirements for a state constitutional claim). We therefore do not consider this claim.

#### *Conclusion*

{21} For the reasons discussed above, the district court did not err in applying the EMDA to Defendant in finding that the criminal sexual penetration was a serious violent offense under Section 33-2-34(L)(4)(n). Accordingly, we affirm Defendant's sentence.

{22} **IT IS SO ORDERED.**

**JAMES J. WECHSLER, Chief  
Judge**

**WE CONCUR:  
IRA ROBINSON, Judge  
MICHAEL VIGIL, Judge**

**Certiorari Granted, No. 28,383,  
December 19, 2003**

**From the New Mexico  
Court of Appeals**

**Opinion Number:  
2004-NMCA-002**

**TOPIC INDEX:  
Negligence: Duty**

JOHN C. BLAKE,  
Plaintiff-Appellant,  
versus  
PUBLIC SERVICE COMPANY OF  
NEW MEXICO,  
Defendant-Appellee,  
and  
THE CITY OF ALBUQUERQUE,  
Defendant.  
No. 23,671  
(filed: October 30, 2003)

**APPEAL FROM THE  
DISTRICT COURT OF BERNA-  
LILLO COUNTY**  
SUSAN M. CONWAY,  
District Judge

JOHN G. TRAVERS  
Albuquerque, New Mexico  
for Appellant

ROBERT C. CONKLIN  
THOMAS C. BIRD  
MARY R. JENKE  
JOHN K. ZIEGLER  
KELEHER & MCLEOD, P.A.  
Albuquerque, New Mexico  
for Appellee

## **OPINION**

**PICKARD, Judge**

{1} Plaintiff appeals the order of the trial court granting summary judgment in favor of Defendant Public Service Company of New Mexico (PNM). At issue is whether PNM has a duty to the public to maintain streetlights. We hold that PNM has no duty to the public to maintain streetlights under the circumstances of this case, and therefore we affirm the trial court.

### **FACTS**

{2} Plaintiff was struck by a car and injured while crossing the Ortiz SE intersection as he was walking westbound on Zuni SE in Albuquerque at approximately 9:38 in the evening. Though a streetlight was installed

at that intersection in 1977, it had been removed, possibly as many as seventeen years before the accident. Plaintiff alleged in his complaint that PNM had a duty to reasonably maintain, operate, install, re-install, and inspect the street lighting at that corner, and that PNM breached that duty, which proximately caused his injuries.

{3} The City of Albuquerque has a contract with PNM to supply streetlights for the City (the contract). PNM owns the streetlight at issue in this case, but is in dispute with the City about whether it has a duty to inspect and maintain its streetlights. PNM has contracted to maintain service for all lighting facilities, and the City has contracted to refrain from maintaining or repairing PNM-owned lights. However, PNM and the City are also bound by the tariffs that accompany the contract. In Schedule 19, the City assumes a duty to report the failure of any lamp to PNM. PNM argues that PNM's only duty under the contract is to restore light service after the City has notified PNM of any failure, but that it has no duty to inspect for deficiencies. Notably, the contract only obligates PNM to "perform normal operation and maintenance of the lighting system . . . sufficient to maintain an overall lighting efficiency of approximately 70 percent[.]"

{4} PNM moved for summary judgment, arguing that it owed no legal duty to Plaintiff to maintain the streetlight at issue, that there was no legal relationship between it and Plaintiff, and that there was no evidence that PNM breached any duty owed to Plaintiff. The trial court granted summary judgment to PNM, finding:

1. A public utility company owes no duty to the general public based on the lack of street lighting as contracted for with a municipality.
2. Plaintiff John Blake's complaint fails to state a cause of action against Defendant Public Service Company of New Mexico as Defendant Public Service Company of New Mexico as a public utility owed no duty to John Blake for the lack of street lighting.

Plaintiff appeals this order, arguing that PNM is charged with a common law duty to use ordinary care to keep its property safe, making it responsible for reasonable inspection and maintenance of its streetlights.

### **DISCUSSION**

#### **Standard of Review**

{5} Summary judgment is properly grant-

ed when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *Self v. United Parcel Serv., Inc.*, 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582. Though the trial court determined that there were genuine issues of material fact concerning the contract and the removal of the streetlight, summary judgment was granted on the threshold issue of duty. The only issue in this appeal is whether or not PNM owed a duty to Plaintiff, which is a legal question that we review *de novo*. See *id.*

#### **Duty in General**

{6} Though the elements of negligence are generally facts for the jury to determine, "[n]egligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right." *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 99 (1928) "Proof of negligence in the air, so to speak, will not do." *Id.* (internal quotation marks and citation omitted). Thus, the ultimate question of duty is whether the law should give recognition and effect to an obligation from one party to another, which in this case is PNM's obligation to maintain streetlights for the public who may cross a street without benefit of a working streetlight. See *Calkins v. Cox Estates*, 110 N.M. 59, 62, 792 P.2d 36, 39 (1990) ("[Plaintiff] must show that a relationship existed by which defendant was legally obliged to protect the interest of plaintiff.").

{7} Determination of duty is based in part on whether the injury to the plaintiff was foreseeable. See *Ramirez v. Armstrong*, 100 N.M. 538, 541, 673 P.2d 822, 825 (1983) ("If it is found that a plaintiff, and injury to that plaintiff, were foreseeable, then a duty is owed to that plaintiff by the defendant."), rejected on other grounds by *Folz v. State*, 110 N.M. 457, 460, 797 P.2d 246, 249 (1990). In New Mexico, policy also determines duty. *Torres v. State*, 119 N.M. 609, 612, 894 P.2d 386, 389 (1995). In determining issues of policy, we look to "community moral norms and policy views, tempered and enriched by experience, and subject to the requirements of maintaining a reliable, predictable, and consistent body of law." *Sanchez v. San Juan Concrete Co.*, 1997-NMCA-068, ¶ 12, 123 N.M. 537, 943 P.2d 571. Our determination involves an analysis of the relationship of the parties, the plaintiff's injured interests, and the defendant's conduct. *Calkins*, 110 N.M. at 63, 792 P.2d at 40. We look principally to legal precedent, both common law and statutory. *Sanchez*, 1997-NMCA-068, ¶¶ 13-15. "[T]here is a policy in our law to protect certain interests, and thus the



balancing implicit in the legal determination of a duty has been established by our legal tradition." *Calkins*, 110 N.M. at 63, 792 P.2d at 40.

#### Parties' Positions

{8} There is no reported New Mexico case that addresses whether a public utility that contracts with a city to provide streetlights owes a duty to the public to maintain the streetlights. Plaintiff argues that PNM has a duty to use ordinary care, which includes reasonable inspection of its property and correction of known defects. He cites as authority *New Mexico Electric Service Co. v. Montanez*, which states, "[a] public utility has a duty to exercise due care in the erection, maintenance and operation of its line [sic] to those likely to come into contact with them." 89 N.M. 278, 280, 551 P.2d 634, 636 (1976).

{9} PNM argues that New Mexico courts have not recognized a duty on the part of a public utility to provide or maintain streetlights and that there are sound policy reasons for this Court to determine that PNM does not have a duty in this case. We agree with PNM.

#### PNM Has No Duty Pursuant to Contract and Tort Law

{10} We believe that there is a distinct difference between a utility's maintenance of its electrical lines, as was the case in *Montanez*, and the maintenance of one out of hundreds, if not thousands, of streetlights in the City of Albuquerque. See *Montanez*, 89 N.M. at 279, 551 P.2d at 635 (concerning an electrician's helper who came into contact with a live wire while climbing an electric pole to remove some lines); see also *Koenig v. Perez*, 104 N.M. 664, 665-67, 726 P.2d 341, 342-44 (1986) (concerning a plaintiff who knowingly walked through live electrical wires after an electric pole had been knocked down in an accident, and determining that utility had a duty to inspect its operation for defects and a duty to use "due care in the erection, maintenance, and operation of its lines for the benefit of those likely to come into contact with them."). Streetlights can burn out or can be knocked down, but an unlit or unmaintained streetlight does not represent the danger that a high voltage electric wire does. Streetlights are a benefit provided to illuminate the night.

{11} A utility is not an insurer of the general public. *Id.* at 667, 726 P.2d at 344. Nor does a utility have a duty to provide lighting, so an interruption of service or failure to provide service is generally not actionable. 39 Am. Jur. 2d, Highways, Streets, and

Bridges § 434 (1999) ("[A] municipality is generally under no duty to light its streets even though it is given the power to do so, and, thus, its failure to light them is not actionable negligence, and will not render it liable in damages to a traveler who is injured solely by reason thereof."); see also *W. Page Keeton et al., Prosser and Keeton on the Law of Torts* § 93, at 671 (5th ed. 1984) (hereinafter *Keeton*) (stating that tort liability for interruptions of service would be ruinous for utilities who must provide continuous service to all who apply for it under all kinds of circumstances, and that expense of litigation and settling claims could be a greater burden to the rate payer than is socially justified).

{12} The leading case, written many years ago by then Chief Judge Cardozo of the New York Court of Appeals, involved allegations that the utility that contracted with the city to provide water failed to provide sufficient pressure in the fire hydrants, resulting in the destruction of a warehouse by fire. *H. R. Moch Co. v. Rensselaer Water Co.*, 159 N.E. 896, 896-97 (N.Y. 1928). The court in that case stated that the action was not maintainable as one for breach of contract because "a contract between a city and a water company to furnish water at the city hydrants has in view a benefit to the public that is incidental rather than immediate, an assumption of duty to the city and not to its inhabitants." *Id.* at 897. The action was not maintainable as one for a common law tort because the low water pressure was "mere negligent omission, unaccompanied by malice or other aggravating elements." *Id.* at 899. "The query always is whether the putative wrongdoer has advanced to such a point as to have launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument for good." *Id.* at 898. "The failure in such circumstances to furnish an adequate supply of water is at most the denial of a benefit. It is not the commission of a wrong." *Id.* at 899.

{13} Many modern courts have adopted the court's reasoning in *H. R. Moch Co.* in ruling that a public utility under contract with a city owes no duty to a person injured as a result of failure to provide or maintain streetlights. See *Turbe v. Gov't of Virgin Islands*, 938 F.2d 427, 427-28 (3d Cir. 1991) (determining that the utility owed no duty to protect plaintiff from criminal attack that occurred in an area with known broken streetlights); *White v. S. Cal. Edison Co.*, 30 Cal. Rptr. 2d 431, 434 (Ct. App. 1994)

(determining that the utility owed no contractual or common law duty to moped driver injured in a collision that occurred at an intersection where streetlights were not functioning); *Martinez v. Fla. Power & Light Co.*, 785 So. 2d 1251, 1252 (Fla. Dist. Ct. App. 2001) (determining that the utility owed no duty to pedestrian killed by a motor vehicle while crossing a street where streetlight was not functioning); *Quinn v. Ga. Power Co.*, 180 S.E. 246, 247 (Ga. Ct. App. 1935) (determining that the utility owed no duty to motorist killed in a collision that took place in a spot where streetlight was not working); *Shafouk Nor El Din Hamza v. Bourgeois*, 493 So. 2d 112, 114-15 (La. Ct. App. 1986) (determining that the utility owed no duty to pedestrian killed while walking on a road with inadequate and unmaintained lighting); *E. Coast Freight Lines, Inc. v. Consol. Gas, Elec. Light & Power Co.*, 50 A.2d 246, 254-56 (Md. 1946) (determining that utility owed no duty to victims of a car accident that occurred as a result of unlit road); *Vaughan v. E. Edison Co.*, 719 N.E.2d 520, 521-22 (Mass. App. Ct. 1999) (determining that the utility owed no duty to pedestrian injured while in a crosswalk that was unlit due to inoperative streetlights). Cf. *Horneyer v. City of Springfield*, 98 S.W.3d 637, 645 (Mo. Ct. App. 2003) (determining that city owed no duty to motorists to maintain existing streetlights in intersections unless illumination is necessary to avoid dangerous and potentially hazardous conditions); *Thompson v. City of New York*, 585 N.E.2d 819, 820 (N.Y. 1991) (determining that city owed no duty to pedestrian struck while crossing at a place where nearest streetlight was burned out).

{14} The rationales of these cases persuasively draw the distinction recognized by Chief Judge Cardozo between launching an instrument of harm and simply failing to be an instrument of good. *H. R. Moch Co.*, 159 N.E. at 898. The *H. R. Moch Co.* case points out that the surgeon may not be obligated to operate, but once the surgeon does so, he or she is liable for infection caused by negligently sterilized instruments. *Id.* The negligent sterilization is launching an instrument of harm—the infection. *Turbe* uses the example of a lighthouse, which no one is required to build, but if built, it necessarily causes boats to rely on it such that if it is broken, its builder must undertake timely repairs or give warning that it is not operating. *Turbe*, 938 F.2d at 431. *Plattner v. City of Riverside*, 82 Cal. Rptr. 2d 211 (Ct.

App. 1999), uses the similar example of a traffic light: a public entity might not be required to install a traffic signal, but once it does so, it thereby encourages the public to rely on the green light and proceed through the intersection without stopping; thus, if the red light is broken and negligently not fixed, the public entity is liable because the negligence in failing to fix the red light launches an instrument of harm, given the public's reliance on the green light. *Id.* at 213-14. These cases are to be contrasted with the failure to repair a streetlight, which in simply not lighting a dark street does not launch any instrument of harm, given that the darkness of the street is obvious to travelers and given that there are other methods of seeing in the darkness, i.e., automobile headlamps. See *id.* at 214.

{15} Only a few jurisdictions have determined that a utility can be liable for negligence in maintaining streetlights under an assumed duty standard. See *David v. Broadway Maint. Corp.*, 451 F. Supp. 877, 880-81 (E.D. Pa. 1978) (determining that, though the utility did not have a duty to install lights, once installed, it had a duty of reasonable care in maintaining and replacing the lights); *Todd v. Northeast Utils.*, 484 A.2d 247, 248-49 (Conn. Super. Ct. 1984) (determining that the utility has a duty to rectify a dangerous situation if it has notice and it is foreseeable that an inoperable streetlight would cause the type of injury that occurred). Cf. *Greene v. City of Chicago*, 382 N.E.2d 1205, 1209 (Ill. 1978) (stating that "where a city undertakes to provide lights, it is liable for injuries which result from deficient or inadequate ones" (internal quotation marks and citation omitted)).

{16} The cases determining that public utilities owe no duty to the public to maintain streetlights present facts that are very similar to the facts here, concerning a member of the public who was injured due to inadequate or nonexistent streetlights. Here, PNM has a contract with the City of Albuquerque, not individual residents. The City, not the public, is PNM's customer in this instance. Failure to fix a streetlight is not "launching an instrument of harm," as would be failing to fix a downed, live electrical line, but rather a denial of a benefit. We agree with the majority of courts cited above and hold that PNM has no duty to the public to maintain its streetlights. We note, too, that PNM's contract with the city obligates it to maintain streetlights at 70 percent efficiency, and there is no

evidence showing that PNM's performance fell below this standard even if it was known that this particular streetlight was not functioning.

{17} Plaintiff relies heavily on *Lurye v. Southern California Edison Co.*, 84 Cal. Rptr. 2d 225 (Ct. App. 1999) (ordered not published), to support his argument. In *Lurye*, a pedestrian crossing in a marked crosswalk was struck by an automobile, due in part to a described "pool of darkness" left because the streetlight directly above the crosswalk had been damaged and removed by the electric company. *Id.* at 227-28. The court determined that the electric company owed a duty to persons using that crosswalk at night based on the Restatement (Second) of Torts § 324A (1965) (assuming a duty if rendering service to another which is necessary for the protection of a third person), and based on the "peculiar danger" the intersection posed if not lighted. *Lurye*, 84 Cal. Rptr. 2d at 230-31.

{18} *Lurye* is not persuasive in this instance because the facts in that case are significantly different from the facts here. In *Lurye* the crosswalk in question was a marked crosswalk with a streetlight positioned directly above, leading the court to determine that the electric company foresaw that pedestrians crossing in this marked intersection at night would be in greater danger of being struck by a vehicle if the crosswalk was unlit rather than lit. *Id.* at 230. The electric company undertook to provide a streetlight in that location for the safety of pedestrians. *Id.* Therefore, after assuming the duty to light this crosswalk, the electric company was liable for failing to use reasonable care when it failed, for five months, to replace the damaged streetlight. *Id.* at 231-32.

{19} The *Lurye* court also determined that there was a peculiar condition that significantly increased the risk of injury because this was a marked crosswalk, inviting pedestrians to enter the street at that location, making it a trap for the unwary. *Id.* at 233. There was also testimony from a sheriff's department traffic investigator stating that there were numerous other accidents up and down the street where the plaintiff was struck and that he had personally investigated six vehicle-pedestrian incidents at that location. *Id.* at 228. The frequency of prior accidents in the same crosswalk was a significant factor in the court's determination of the peculiar condition. *Id.* at 233. The driver of the vehicle also testified that by the time she

could see the pedestrian in the darkness, it was too late to stop. *Id.* at 227.

{20} In contrast, there is no peculiar or dangerous condition here. There is no indication here that Plaintiff was crossing in a marked crosswalk or that the streetlight in question was positioned to light the way for a pedestrian crossing at that point. There is no evidence that there was any condition making that intersection peculiarly more dangerous for pedestrians than any other intersection. There is no evidence that the driver could not see Plaintiff because it was too dark. Finally, we note that *Lurye* was ordered unpublished by the California Supreme Court, giving it little, if any, authority in California courts. See Cal. Rules of Court Rule 977(a) (2003) (stating that, with narrow exceptions, an unpublished opinion "shall not be cited or relied on by a court or a party in any other action or proceeding"). We determine that Plaintiff's reliance on *Lurye* is misplaced.

#### **Duty/Risk Analysis and Other Policy Considerations Support the Conclusion That PNM Has No Duty to the Public to Maintain Streetlights**

{21} In examining policy considerations, we must take into account the burden that would be imposed against a public utility like PNM. See *White*, 30 Cal. Rptr. 2d at 435 ("Duty is an allocation of risk determined by balancing the foreseeability of harm, in light of all of the circumstances, against the burden to be imposed."). "The capacity to bear or distribute loss is a factor to consider in allocating the risk." *Vaughan*, 719 N.E.2d at 523. The *White* court stated these considerations succinctly:

In determining whether a public utility should be liable to motorists for inoperable streetlights, we must consider the cost of imposing this liability on public utilities, the current public utility rate structures, the large numbers of streetlights, the likelihood that streetlights will become periodically inoperable, the fact that motor vehicles operate at night with headlights, the slight chance that a single inoperative streetlight will be the cause of a motor vehicle collision, and the availability of automobile insurance to pay for damages.

30 Cal. Rptr. 2d at 437.

{22} The policy considerations weighing against imposing a duty and concomitant liability on public utilities to maintain street-

lights are particularly strong in New Mexico. Our Constitution mandates that a public regulation commission set utility rates. N.M. Const. art. XI, § 2. New Mexico has declared that public utilities render an essential public service to a large number of the general public and that the public interest requires the regulation and supervision of utilities so that "reasonable and proper services shall be available at fair, just and reasonable rates." NMSA 1978, § 62-3-1 (1967). Utility rates and services are closely regulated and supervised by the public regulation commission. NMSA 1978, § 62-6-4 (2003); see *Hobbs Gas Co. v. N.M. Pub. Serv. Comm'n*, 94 N.M. 731, 733, 616 P.2d 1116, 1118 (1980) (stating that the Commission is responsible for insuring that rates made and received by public utility are just and reasonable, and it has considerable discretion in so determining); cf. *El Paso Elec. Co. v. N.M. Pub. Serv. Comm'n*, 103 N.M. 300, 302-04, 706 P.2d 511, 513-15 (1985) (affirming Commission order deciding that charitable contributions, lobbying expenditures, and promotional or political advertising costs cannot be passed on to ratepayers, but that costs of informational advertising can be passed on because it benefits the ratepayers).

{23} Imposing tort liability on all ratepayers constitutes a burden that other jurisdictions have declined to impose on utility ratepayers. See *White*, 30 Cal. Rptr. 2d at 437 ("The burden on the public utility in terms of costs and disruption of existing rate schedules far exceeds the slight benefit to the motoring public from the imposition of liability."); *Vaughan*, 719 N.E.2d at 523-24 (determining that imposing such tort liability represents a burden to the ratepayer that cannot be socially justified); see also *Keeton*, supra § 93, at 671. Moreover, New Mexico mandates that all residents who own and operate motor vehicles be financially responsible for damages as a result of motor vehicle accidents. NMSA 1978, § 66-5-201.1 (1998). Thus, New Mexico has already determined where much of the burden of tort liability should lie when a motor vehicle is involved in an accident, such as the accident involving Plaintiff.

{24} PNM supplies an important public service to a very large number of customers. It cannot set its own rates and is heavily regulated in all aspects of its operation. We agree with the reasoning in *White* and *Vaughan*, and we decline for policy reasons to impose a duty on PNM to maintain streetlights for the benefit of the public, which would in turn impose a greater

financial burden on all ratepayers.

### **Restatement (Second) of Torts Does Not Apply to Plaintiff's Case**

{25} Plaintiff asks this Court to adopt Restatement (Second) of Torts § 324A, Liability to Third Person for Negligent Performance of Undertaking:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

(a) his failure to exercise reasonable care increases the risk of such harm, or

(b) he has undertaken to perform a duty owed by the other to the third person, or

(c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

{26} Our Supreme Court has stated that "the Restatement is merely persuasive authority entitled to great weight that is not binding on this Court." *Gabaldon v. Erisa Mortgage Co.*, 1999-NMSC-039, ¶ 27, 128 N.M. 84, 990 P.2d 197. Our courts have not adopted this section of the Restatement, and we need not decide whether to do so today. Even were we to accept the principles stated in Restatement (Second) of Torts § 324A, Plaintiff's argument that PNM's actions increased the risk of harm would still fail. Restatement (Second) of Torts § 324A(a). Increase in the risk of harm is an increase relative to the risk that would have existed had PNM never provided the services in the first place. See *Turbe*, 938 F.2d at 432. "Put another way, the defendant's negligent performance must somehow put the plaintiff in a worse situation than if the defendant had never begun the performance." *Id.* As noted above, PNM has no duty to the public to maintain streetlights, so the absence of lights cannot represent an increased risk. See *Plattner*, 82 Cal. Rptr. 2d at 213 (noting that darkness is a naturally occurring condition that a municipality is under no duty to eliminate; thus, the fortuity of locating a light above a crosswalk does not render it more dangerous without the light). Therefore, even if PNM removed the streetlight in question, as Plaintiff alleges, an absence of light at night did not increase the risk to

Plaintiff any more than if PNM had never installed the light in the first place.

{27} To the extent that Plaintiff argues that he relied on the presence of the light because he chose a well-lit, main street as being safer than other routes, we think that Plaintiff's reliance was unreasonable as a matter of law. There was evidence that the streetlight at issue had been missing for seventeen years previous to Plaintiff's injury. It is unreasonable to continue to rely on the existence of a streetlight that has not been lit for seventeen years. We reject Plaintiff's argument that Restatement (Second) of Torts § 324A applies in this case.

### **CONCLUSION**

{28} We hold that a public utility has no duty to the public to maintain streetlights and that PNM owed no duty to Plaintiff under the circumstances of this case. We affirm the trial court's grant of summary judgment in favor of PNM.

{29} **IT IS SO ORDERED.**

**LYNN PICKARD, Judge**

**WE CONCUR:**

**CELIA FOY CASTILLO, Judge**

**MICHAEL E. VIGIL, Judge**

**Certiorari Denied, No. 28,407,  
December 23, 2003**

**From the New Mexico  
Court of Appeals**

**Opinion Number:  
2004-NMCA-003**

MARIA ELENA BRENNEMAN,  
Individually, MARK BRENNEMAN,  
Individually,  
and on Behalf of PAUL L.  
BRENNEMAN and LEAH M.  
BRENNEMAN, Minor Children,  
Plaintiffs-Appellants,  
versus  
THE BOARD OF REGENTS OF  
THE UNIVERSITY OF NEW  
MEXICO, as Trustees of the Uni-  
versity of New Mexico  
Health Sciences Center,  
Defendant-Appellee.  
No. 23,778  
(filed: November 17, 2003)

**APPEAL FROM THE  
DISTRICT COURT OF BERNA-  
LILLO COUNTY**  
ROBERT L. THOMPSON,  
District Judge

PHILIP C. GADDY  
DAVID J. JARAMILLO  
GADDY LAW FIRM  
Albuquerque, New Mexico  
for Appellants

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KENNETH C. DOWNES  
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Albuquerque, New Mexico  
for Appellee

## **OPINION**

**PICKARD, Judge**

{1} This case presents the question of whether loss of consortium damages are recoverable under Sections 41-4-9 and -10 of New Mexico's Tort Claims Act. See NMSA 1978, §§ 41-4-1 to -27 (1976, as amended through 2003) (hereinafter "the Act"). We hold that loss of consortium damages are permissible under the Act's provisions for damages resulting from bodily injury. We

therefore reverse the trial court's dismissal of the loss of consortium claims.

### **FACTS AND PROCEEDINGS**

{2} According to the complaint filed in this case, Maria Brenneman visited the University of New Mexico Health Sciences Center (UNMHSC) Faculty Clinic on December 20, 2000, for treatment of a yeast infection and perineal rash. Ms. Brenneman's urinalysis, ordered on that day, revealed the presence of *Strotococcus pygenes*, a Group A Strep infection. However, UNMHSC did not inform Ms. Brenneman of the presence of that virus, and she did not receive treatment for it. The condition worsened, and a week later Ms. Brenneman was admitted to the hospital for septic shock and renal failure. Eventually the condition required the amputation of her right leg above the knee.

{3} On May 29, 2002, Ms. Brenneman and her husband, Mark Brenneman, (Plaintiffs) filed a complaint against the Board of Regents of the University of New Mexico as the Trustees of UNMHSC (Defendant), alleging negligence in the treatment of Ms. Brenneman. Plaintiffs sought damages for personal injury and loss of spousal consortium, as well as loss of consortium on behalf of their two minor children. Defendant's answer stated that any claim against Defendant is subject to the Tort Claims Act and that recovery for loss of consortium is barred by the Act. Defendant subsequently filed a motion to dismiss the loss of consortium claims. After a hearing, the district court granted Defendant's motion to dismiss and certified the order for interlocutory appeal. In addition to statutory grounds, Plaintiffs noted discrepancies among district court decisions on the issue when they petitioned this Court for an interlocutory appeal. We granted the petition.

### **DISCUSSION**

{4} The issue presented requires us to interpret the Act. We review issues of statutory construction *de novo*. *Morgan Keegan Mortgage Co. v. Candelaria*, 1998-NMCA-008, ¶ 5, 124 N.M. 405, 951 P.2d 1066. The plain language of a statute is the primary indicator of legislative intent. *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998-NMSC-050, ¶ 5, 126 N.M. 413, 970 P.2d 599. Because we undertake this analysis in the context of Defendant's motion to dismiss, we assume the truth of the facts alleged in the complaint. *Gutierrez v. W. Las Vegas Sch. Dist.*, 2002-NMCA-068, ¶ 7, 132 N.M. 372, 48 P.3d 761.

{5} The Legislature enacted the Act in response to the New Mexico Supreme Court's decision to abolish state sovereign

immunity in *Hicks v. State*, 88 N.M. 588, 592, 544 P.2d 1153, 1157 (1975). The Act re-established sovereign immunity, but created eight exceptions, or circumstances under which the state would waive its sovereign immunity and allow suit. The Legislature declared it "to be the public policy of New Mexico that governmental entities and public employees shall only be liable within the limitations of the Tort Claims Act . . . and in accordance with the principles established in that act." Section 41-4-2(A).

{6} The Act waives sovereign immunity for "liability for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation of any hospital" and "while acting within the scope of their duties of providing health care services." Sections 41-4-9 and -10. The Act does not define any portion of the phrase "damages resulting from bodily injury." Section 41-4-3. To examine whether loss of consortium damages are available under this plain language, we must determine whether loss of consortium is a type of damage "resulting from bodily injury."

{7} Loss of consortium was defined in an early case as "the emotional distress suffered by one spouse who loses the normal company of his or her mate when the mate is physically injured due to the tortious conduct of another." *Romero v. Byers*, 117 N.M. 422, 425, 872 P.2d 840, 843 (1994). The jury instructions use a phrase similar to "resulting from bodily injury" in defining loss of consortium:

The emotional distress of \_\_\_\_\_ (plaintiff) due to the loss [of the society], [guidance], [companionship] and [sexual relations] resulting from the injury to \_\_\_\_\_ (name of injured or deceased spouse or child of plaintiff).

UJI 13-1810A NMRA 2003 (emphasis added).

{8} Our Supreme Court has held that language in an insurance policy very similar to the language of the Act did include loss of consortium damages. In *Gonzales v. Allstate Insurance Co.*, 122 N.M. 137, 138-39, 921 P.2d 944, 945-46 (1996), the Court examined whether the plaintiff could bring a claim for loss of consortium separately from the claim for her husband's wrongful death under the terms of their insurance policy. Although that case involved interpretation of an insurance policy contract,

its analysis is relevant here. See *Folz v. State*, 110 N.M. 457, 461, 797 P.2d 246, 250 (1990) (explaining that cases that define the term “single occurrence” in the context of an insurance contract are relevant to interpretations of that same term in the Act). The *Gonzales* Court held:

[U]nder the language of this specific policy, the claim for loss of consortium is subsumed under the compensation for the “bodily injury” suffered by *Gonzales’s* husband because it is encompassed by the phrase, “damages sustained by anyone else as a result of that bodily injury.”

*Gonzales*, 122 N.M. at 138, 921 P.2d at 945 (emphasis added).

{9} The notion that loss of consortium damages result from bodily injury also fits with our characterization of loss of consortium as a derivative claim. See *Archer v. Roadrunner Trucking, Inc.*, 1997-NMSC-003, ¶¶ 11-12, 122 N.M. 703, 930 P.2d 1155 (holding that “[w]here the defendant is not liable to the injured person for physical injuries there can be no derivative claim for [loss of consortium] damages by the injured person’s spouse”); accord *Turpie v. Southwest Cardiology Assocs., P.A.*, 1998-NMCA-042, ¶ 7, 124 N.M. 787, 955 P.2d 716. A “derivative action” is defined as “a [claim] arising from an injury to another person.” *Black’s Law Dictionary* 455 (7th ed. 1999). The plain meanings of “resulting from” and “arising from” are identical. See *The New Shorter Oxford English Dictionary* 2570 (4th ed. 1993) (defining “result” as “arise as an effect, issue, or outcome from some action, process, or design”). Therefore, it is reasonable to construe the derivative claim of loss of consortium as a claim “resulting from bodily injury.”

{10} Even if the phrase “resulting from bodily injury” leaves some ambiguity regarding its inclusion of loss of consortium damages, we reach the same result through construction and interpretation of the Act as a whole. See *Methola v. County of Eddy*, 95 N.M. 329, 333, 622 P.2d 234, 238 (1980). The section of the Act pertaining to legislative findings and the Act’s purpose states, “Liability for acts or omissions under the Tort Claims Act shall be based upon the traditional tort concepts of duty and the reasonably prudent person’s standard of care in the performance of that duty.” Section 41-4-2(B). “The entire basis of the Act is premised on traditional concepts of negligence . . .”

*Methola*, 95 N.M. at 332, 622 P.2d at 237.

{11} The traditional tort concept at issue here is the foreseeability of the plaintiffs seeking to recover loss of consortium damages, specifically, Ms. *Brenneman’s* spouse and minor children. In analyzing the foreseeability of Plaintiffs under the Act, we use the test from *Solon v. WEK Drilling Co.*, 113 N.M. 566, 569, 829 P.2d 645, 648 (1992):

In New Mexico, negligence encompasses the concepts of foreseeability of harm to the person injured and of a duty of care toward that person.

....

Duty and foreseeability have been closely integrated concepts in tort law since the court in [*Palsgraf*] stated the issue of foreseeability in terms of duty. If it is found that a plaintiff, and injury to that plaintiff, were foreseeable, then a duty is owed to that plaintiff by the defendant.

*Lucero v. Salazar*, 117 N.M. 803, 805, 877 P.2d 1106, 1108 (Ct. App. 1994) (emphasis omitted) (internal quotation marks and citation omitted) (finding that the *Solon* analysis is the appropriate method for using traditional tort principles to determine permissible plaintiffs under the Act).

{12} The question of whether Plaintiffs claiming loss of consortium are foreseeable under *Solon* has already been answered affirmatively by the body of cases recognizing and expanding the loss of consortium claim in New Mexico. The *Solon* test was central in determining that spousal loss of consortium plaintiffs are foreseeable. See *Romero*, 117 N.M. at 425-26, 872 P.2d at 843-44. Subsequently, the Court used the *Solon* analysis to determine that grandparental caretakers of minor children and unmarried cohabitants seeking loss of consortium were also foreseeable. See *Fernandez v. Walgreen Hastings Co.*, 1998-NMSC-039, ¶ 30, 126 N.M. 263, 968 P.2d 774; *Lozoya v. Sanchez*, 2003-NMSC-009, ¶¶ 15-17, 133 N.M. 579, 66 P.3d 948.

{13} Defendant correctly summarizes our Tort Claims Act precedents to say that courts are hesitant to expand the obligations of public employees and seek a “specific waiver of immunity” before allowing suit. *Pemberton v. Cordova*, 105 N.M. 476, 478, 734 P.2d 254, 256 (Ct. App. 1987) (holding that a school is not liable for the acts of third parties on school grounds),

limited on other grounds by *Callaway v. N.M. Dep’t of Corrections*, 117 N.M. 637, 642, 875 P.2d 393, 398 (Ct. App. 1994). However, the specific waiver of immunity in this case already exists pursuant to Sections 41-4-9 and -10, making the hospital liable for any negligence by its employees who had a duty to employ reasonable care in providing health care services and operating the facility. Allowing Plaintiffs to recover loss of consortium damages will not impose any new duty on Defendant because “this cause of action imposes no new obligation of conduct.” *Romero*, 117 N.M. at 426, 872 P.2d at 844 (internal quotation marks and citation omitted).

{14} Defendant relies on the language and holding of our 1994 case of *Lucero*, 117 N.M. at 806, 877 P.2d at 1109, to argue that a loss of consortium claim is impermissible under the Act. *Lucero* held that the adult children of a man shot by police officers could not recover damages under the theory that the police violated their constitutional right to associate with and enjoy the guidance of their father. *Id.* at 804, 877 P.2d at 1107. Defendant’s reliance on *Lucero* is misplaced for three reasons. First, *Lucero* interpreted Section 41-4-12 of the Act, which is quite distinct from the rest of the Act. Section 41-4-12 contains a list of the causes of action for which police officers’ sovereign immunity is waived and limits recovery to enumerated, statutory and constitutional causes of action. See Section 41-4-12. Section 41-4-12 does not waive immunity for cases premised on simple negligence. *Blea v. City of Espanola*, 117 N.M. 217, 220, 870 P.2d 755, 758 (Ct. App. 1994). In contrast, Sections 41-4-9 and -10 provide broadly for recovery of “damages . . . caused by the negligence of public employees.” The plain language of these sections reveals that limitations on recoverable damages under Section 41-4-12 are inapplicable to cases under Sections 41-4-9 and -10.

{15} Second, *Lucero* did not bar loss of consortium claims under the Act. The plaintiffs in *Lucero* argued that they had constitutional claims in their own right, not that they were entitled to loss of consortium damages as part of derivative claims.

{16} Third, *Lucero* was decided less than two months after *Romero* recognized the loss of consortium claim in New Mexico, and we did not take note of *Romero*. Therefore, we find that the availability of loss of consortium damages under the Act was not considered as an issue in

Lucero, and, consequently, Lucero cannot be cited to bar a loss of consortium claim. See *Padilla v. State Farm Mut. Auto. Ins. Co.*, 2003-NMSC-011, ¶¶ 3-6, 133 N.M. 661, 68 P.3d 901 (limiting the rule that “cases do not stand for propositions not considered” to cases in which an issue as a whole was not considered). We did “construe the language of Section 41-4-2(A) as evincing a legislative intent not to waive immunity for injuries to indirect or incidental victims of tortious acts committed by government employees.” *Lucero*, 117 N.M. at 806, 877 P.2d at 1109. However, when viewed in light of the body of law establishing loss of consortium, which began at about the time *Lucero* was decided and has since greatly expanded, and the fact that *Lucero* did not directly address the issue, this language cannot be found to bar our decision in the present case.

{17} Defendant also asserts that the Act should be strictly construed because it is in derogation of the common law. This argument is not helpful to our analysis. First, it is difficult to say what parts of the Act are in derogation of the common law. At the time of its enactment, the “common law” of New Mexico abrogated state sovereign immunity and allowed all claims against state government. See *Hicks*, 88 N.M. at 592, 544 P.2d at 1157. Insofar as it re-established sovereign immunity, the Act was in derogation of the common law. But in its exceptions, the Act restored the common law right to sue in those specific situations. And while some of our cases have called for strict construction of some provisions of the Act, other cases have espoused broad interpretations of other provisions. Compare *Methola*, 95 N.M. at 333, 622 P.2d at 238 (calling for strict construction of the term “caused by” in Section 41-4-12), with *Bober v. N.M. State Fair*, 111 N.M. 644, 653, 808 P.2d 614, 623

(1991) (rejecting narrow view of Section 41-4-6), and *Williams v. Cent. Consol. Sch. Dist.*, 1998-NMCA-006, ¶ 10, 124 N.M. 488, 952 P.2d 978 (calling for broad construction of Section 41-4-6).

{18} Because of the unique relationship between the Act and the common law, we find the more useful canon of construction to be that “[i]n interpreting the meaning of a statute, our primary purpose is to give effect to the Legislature’s intent.” *Rutherford v. Chaves County*, 2003-NMSC-010, ¶ 11, 133 N.M. 756, 69 P.3d 1199.

{19} In enacting the Tort Claims Act, the Legislature intended to balance competing considerations:

The legislature recognizes the inherently unfair and inequitable results which occur in the strict application of the doctrine of sovereign immunity. On the other hand, the legislature recognizes that while a private party may readily be held liable for his torts within the chosen ambit of his activity, the area within which the government has the power to act for the public good is almost without limit, and therefore government should not have the duty to do everything that might be done.

Section 41-4-2(A). The Legislature achieved this balance by waiving sovereign immunity with respect to specific people and places which, in the performance of certain governmental functions, give rise to traditional duties to the public. Once a duty is established, loss of consortium damages flow from the principles of tort liability. As loss of consortium is a damage resulting from bodily injury and our courts have repeatedly held that loss of consortium plaintiffs are foreseeable, we believe that loss of

consortium is exactly the type of damage “based upon the traditional tort concepts of duty” that the Legislature intended to include under the applicable waivers of sovereign immunity in the Act.

{20} In the present case, UNMHSC does not contest that it acted in the scope of the Act’s exceptions when it treated Ms. Brenneman and owed her a duty of reasonable care. It was foreseeable that Ms. Brenneman’s spouse and minor children would suffer loss of consortium as a result of any bodily injury that Defendant’s negligence caused Ms. Brenneman. The plain language of the Act, our cases interpreting it, and its legislative history all indicate that loss of consortium damages should be recoverable under Sections 41-4-9 and -10. The trial court erred in granting Defendant’s motion to dismiss the loss of consortium claims.

#### **CONCLUSION**

{21} We reverse the grant of Defendant’s motion to dismiss the loss of consortium claims.

{22} **IT IS SO ORDERED.**

**LYNN PICKARD, Judge**

#### **WE CONCUR:**

**MICHAEL D. BUSTAMANTE, Judge**

**MICHAEL E. VIGIL, Judge**