

# BAR BULLETIN

OFFICIAL PUBLICATION OF THE STATE BAR OF NEW MEXICO

FEBRUARY 26, 2004 • VOLUME 43, No. 8



Kelley S. Hestir

Cibola County Complex, Grants, NM

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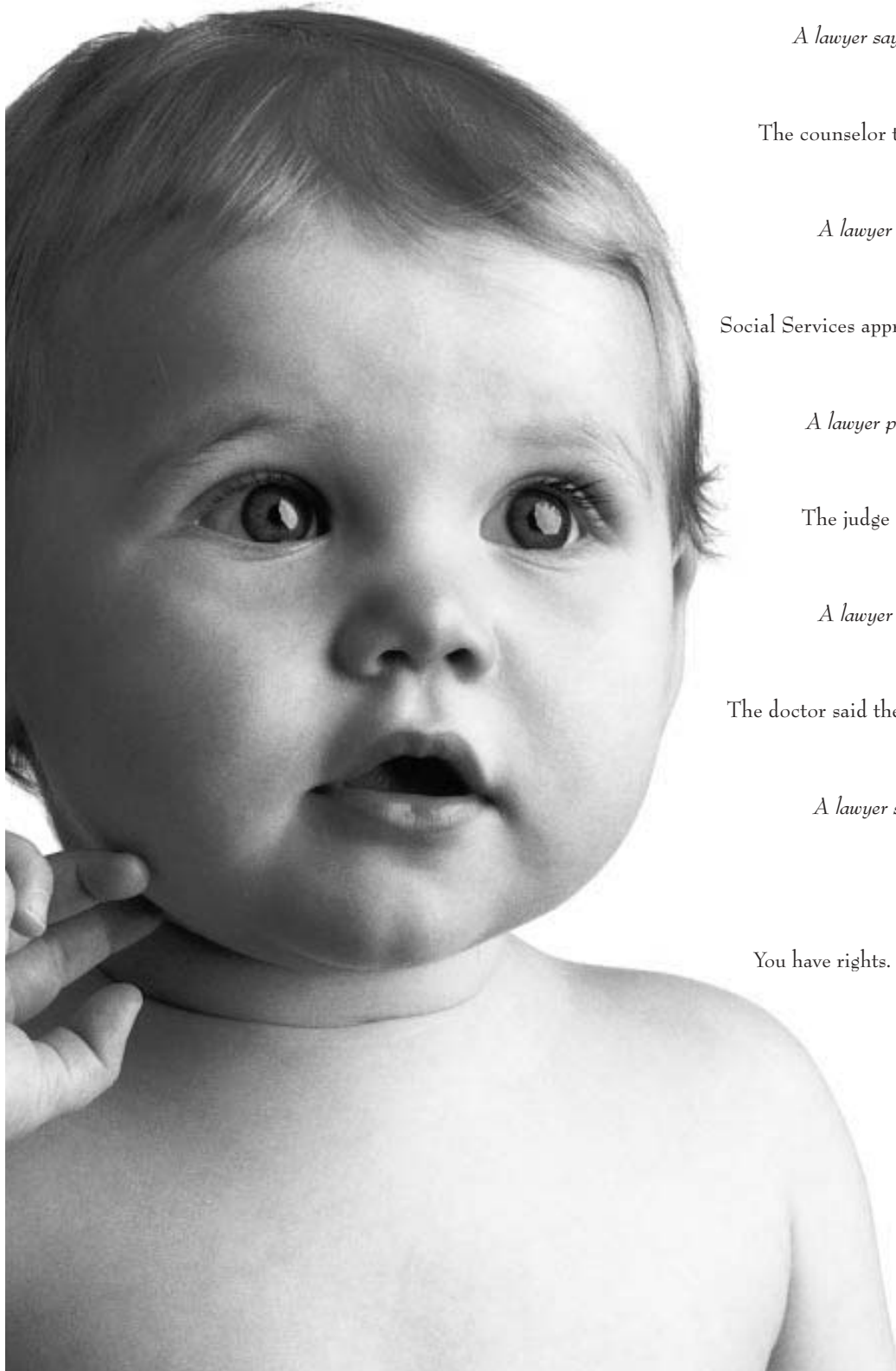
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**2004-NMCA-018:** Lajusta Sam, Estate of Tyler Dexter Sam v. the Estate of Benny Sam, Jr., and Arizona School Risk Retention Trust, Inc.

**2004-NMCA-020:** Prakongsri Rhoades v. Daniel K. Rhoades



The doctor says they can't have a child.

*A lawyer says they can adopt.*

The counselor tells them five years.

*A lawyer tells them one.*

Social Services approves them for adoption.

*A lawyer puts it in writing.*

The judge signs the order.

*A lawyer makes it final.*

The doctor said they couldn't have a child.

*A lawyer said they could.*

You have rights. Lawyers protect them.



# It's Not Too Late to Get Involved!



By joining a State Bar committee you will:

- Help Strengthen the Legal Profession
- Work on Legal Causes of Interest
- Improve Public Understanding
- Increase Access to the Legal System

**E**ach year the State Bar president appoints members to committees that accomplish these goals. The following committees are currently accepting new members. Review the descriptions and complete the form below to request an appointment.

Please check the committee(s) you wish to join.

- |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
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| <p><input type="checkbox"/> <b>Alternative Methods of Dispute Resolution (ADR)</b> – Promotes and provides legal education and training in the use of alternative dispute resolution processes.</p> <p><input type="checkbox"/> <b>Bench and Bar Relations</b> – Plans the statewide Bench and Bar Conference.</p> <p><input type="checkbox"/> <b>Committee for the Delivery of Legal Services to People with Disabilities</b> – Provides information and assistance to ensure access to counsel for persons who have a disability.</p> <p><input type="checkbox"/> <b>Committee on Diversity in the Legal Profession</b> – Promotes opportunities for minorities in the legal profession and encourages participation by minorities in bar programs and activities.</p> <p><input type="checkbox"/> <b>Ethics Advisory</b> – Assists attorneys with interpretation and application of the Code of Professional Conduct.</p> <p><input type="checkbox"/> <b>Historical</b> – Acquires, maintains and submits for publication historical information relating to the bar.</p> <p><input type="checkbox"/> <b>Law Office Management</b> – Develops and provides resources for attorneys, especially solo and small firm practitioners and young lawyers, to more effectively manage law practices.</p> <p><input type="checkbox"/> <b>Lawyers' Assistance</b> – Provides confidential peer assistance to State Bar members in need of help because of substance abuse, mental illness or emotional distress.</p> <p><input type="checkbox"/> <b>Lawyers' Professional Liability</b> – Advises the State Bar regarding risk management activities.</p> <p><input type="checkbox"/> <b>Legal Services and Programs: Planning Subcommittee</b> – Recommends to the State Bar and other appropriate legal service organizations systemic approaches to the effective and efficient delivery of legal services to the poor.</p> | <p><input type="checkbox"/> <b>Legal Services and Programs: Pro Bono Subcommittee</b> – Facilitates cooperation and coordination of pro bono opportunities available to the State Bar and the UNM School of Law.</p> <p><input type="checkbox"/> <b>Membership Services Advisory</b> – Evaluates and makes recommendations regarding in-house programs. Advises the State Bar on alliance partner agreements with vendors of products and services.</p> <p><input type="checkbox"/> <b>Public Legal Education</b> – Provides information and education about the legal profession, the law and services available through the State Bar and other law-related entities.</p> <p><input type="checkbox"/> <b>Quality of Life</b> – Examines issues such as depression, dissatisfaction and balance in order to provide recommendations that will help to alleviate the stress of modern law practice.</p> <p><input type="checkbox"/> <b>Technology Utilization</b> – Assists with the development and promotion of electronic technology applications for the legal profession.</p> |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

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**MAIL TO:** State Bar of New Mexico  
 Membership and Communications Department  
 PO Box 92860 • Albuquerque, NM 87199-2860  
 Fax: (505) 828-3765

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TO MY CLIENTS:  
**I** WILL ADVISE MY  
CLIENT THAT  
CIVILITY AND  
COURTESY ARE  
NOT WEAKNESSES

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# MEETINGS

## MARCH

**1**  
**Lawyers Assistance Committee,**  
5:30 p.m., First United Methodist Church

**3**  
**Employment & Labor Law Section Board  
of Directors,** noon, State Bar Center

**Trial Practice Section Board of Directors,**  
4:30 p.m., State Bar Center

**5**  
**Board of Bar Commissioners**  
noon, State Bar Center

**Indian Law Section Board of Directors,**  
9 a.m., State Capitol, Room 411

**Quality of Life Committee,**  
noon, State Bar Center

**8**  
**Taxation Section Board of Directors**  
noon, via teleconference

**11**  
**Public Law Section Board of Directors,**  
noon, NM Municipal League, Santa Fe

# STATE BAR WORKSHOPS

## MARCH

**3**  
**Social Security Disability Workshop**  
6 - 8 p.m., State Bar of New Mexico  
Albuquerque, NM

**4**  
**Lawyer Referral for the Elderly Program  
Workshop & Clinic**  
11 a.m., Neighborhood Senior Center  
Gallup, NM

**11**  
**Lawyer Referral for the Elderly Program  
Workshop & Clinic**  
11 a.m., Quemado Senior Center  
Quemado, NM

**18**  
**Consumer Debt/Bankruptcy Workshop**  
6 - 8 p.m., New Mexico Highlands University  
University Ave., Las Vegas, 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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Contributions and announcements to the *Bar Bulletin* are welcome, but the right is reserved to select material to be published. Unless otherwise specified, publication of any announcement or statement is not deemed to be an endorsement by the State Bar of New Mexico of the views expressed therein, nor shall publication of any advertisement be considered an endorsement by the State Bar of the product or service involved. Editorial policy available upon request.

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# NOTICES

## COURT NEWS N.M. Supreme Court

### Request for Comments on Differentiated Case Management Rules

In 2000 the Supreme Court approved the use of differentiated case management (DCM) rules as a pilot project for the Third and Eighth judicial districts. Both the Third and Eighth judicial districts have requested that the court permanently approve these rules. The rules of Civil Procedure Committee is requesting comments from members of the New Mexico bar on its experience with the DCM programs in these districts and whether these rules should be permanently adopted.

The District Court Civil Rules Committee would like to receive comments from the bench and bar on the Differentiated Case Management Rules of the Third and Fifth judicial districts. These rules are published as LR3-501 to LR3-503, LR3-2.12 to LR3-2.15 NMRA and LR8-401 to LR8-405 and LR8-Forms 1 to 5 NMRA. Send written comments by March 12 to: Rules of Civil Procedure Committee, New Mexico Supreme Court, PO Box 848, Santa Fe NM, 87504-0848.

### The Board Governing the Recording of Judicial Proceedings Expired CCR Certifications

The following list includes the names and certification numbers of those court reporters whose New Mexico certifications are no longer in effect:

Abeyta, Diana (expired)	168
Benavides, Leslie Nalene (expired)	125
Bond, Gary (expired)	072
Borden, Harold (retired)	147
Bumkens, Linda Lou (expired)	128
Feuer, Michael (expired)	146
Huseby, Sydney (expired)	304
Johns, Roger (expired)	042
Mahan, Michael (retired)	191
Malone, Patrick (expired)	080
Mickel, Tenneley (expired)	009

## 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, March 2, 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 Exhibits, Domestic Cases, 1986-91

Pursuant to the Supreme Court ordered Judicial Records Retention and Disposition Schedules, the Second Judicial District Court will destroy exhibits filed with the court in the domestic cases for years 1986 to 1991 (excluding cases on appeal). Counsel for parties are advised that exhibits may be retrieved through April 12. Attorneys who may have cases with exhibits may verify exhibit information with the Special Services Division, (505) 841-7596/8767 from 8 a.m. to noon and from 1 to 5 p.m., Monday through Friday. Plaintiff exhibits will be released to counsel of record for the plaintiff(s) and defendant exhibits will be released to counsel of record for the defendant(s). All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

### 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 March 1. Contact Mary Lovato, (505) 841-6778, for more information or to have something placed on the agenda.

## Nominees Announced

The District Court Judges Nominating Commission met on Feb. 20 in Albuquerque and completed its evaluation of the nine applicants for the vacancy on the Second Judicial District Court. The commission recommends the following four applicants (in alphabetical order) to Gov. Bill Richardson:

**Timothy V. Flynn-O'Brien**  
**Stanley D. Harada**  
**J. Michael Kavanaugh**  
**Linda M. Vanzi**

## Thirteenth Judicial District Court

### Destruction of Exhibits, 1983 to 2003

Pursuant to the Supreme Court Ordered Judicial Records Retention and Disposition Schedules, the Thirteenth Judicial District Court will destroy exhibits filed with the court in civil cases, criminal cases, domestic cases, probate cases and children's cases for the years 1983 to 2003 (excluding cases on appeal.) Counsel for parties are advised that exhibits may be retrieved through April 19. Attorneys who may have cases with exhibits may verify exhibit information with the Sandoval County District Court (505) 867-2376, ext. 29, Monday through Friday from 8 a.m. to noon and from 1 to 5 p.m. Plaintiff exhibits will be released to counsel of record for the plaintiff(s) and defendant exhibits will be released to counsel of record for the defendant(s). All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

## STATE BAR NEWS

### Board of Bar Commissioners Meeting Agenda

The Board of Bar Commissioners will meet at noon, March 5 at the State Bar Center in Albuquerque. The meeting agenda follows.

1. Approval of Jan. 23 meeting minutes

2. Finance Committee Report
3. Acceptance of Financials
4. Casemaker report
5. Update on electronic distribution of the *Bar Bulletin*
6. President's report
  - A. Bar commissioner district lists regarding target marketing
  - B. NCBP midyear meeting
  - C. Communications Committee meeting
  - D. Commission on Professionalism meeting
  - E. Other
7. Executive director's report
8. Membership Survey report
9. Bylaws/Policies Committee report
  - A. Proposed revisions to Children's Law Section bylaws
  - B. Grievance policy
  - C. PTO (Paid Time Off) policy
  - D. State Bar/BBC policies
  - E. Executive sessions of the board
10. Approval of Client Protection Fund recommendation
11. Approval of new Committee on Human Rights
12. Section legislative advocacy compliance report
13. Division reports
  - A. Young Lawyers Division
  - B. Senior Lawyers Division
  - C. Paralegal Division
14. FYI/New Business

## Center for Legal Education CLE to Present Regular Teleseminars

In an effort to better accommodate the entire State Bar membership, to include those who reside in both rural and urban settings, the Center for Legal Education (CLE) will begin offering teleseminars on a regular basis beginning Feb. 27. This alternative format will provide CLE the opportunity to offer a broader variety of topics from national speakers to its members and also provide an alternative technology to members who struggle with download problems that are often associated with Internet-based seminars.

## Seminar on NLRA Representation Matters

The State Bar Center for Legal Education and the Employment and Labor Law

Section will present "Inside the NLRA-Representation Matters" from 3 to 5 p.m., March 9, at the State Bar Center. This course offers 2.4 general CLE credits.

The featured speaker is George Cherpelis, trial attorney, Seventh Region, National Labor Relations Board, (Detroit, Michigan); labor relations attorney, General Motors legal staff; director, legal staff and senior labor counsel, Burroughs Corp., (since merged with Sperry Rand to form UNISYS). Cherpelis has concentrated in labor relations law for more than 45 years, serving as the management member of the city of Albuquerque Labor Relations Board for 20 years, and as the management member of the Bernalillo County Labor Relations Board for five years.

The costs for the seminar are \$69 (standard and non-attorney fee); \$49 for members of the Employment and Labor Law Section; and \$39 for government attorney and paralegals. To register, visit the State Bar Web site, [www.nmbar.org](http://www.nmbar.org); e-mail, [cle@nmbar.org](mailto:cle@nmbar.org); fax, (505) 797-6071; or call (505) 797-6020, 9 a.m. to 4 p.m.

## Commission on Professionalism Articles Sought for Publication

The State Bar of New Mexico's Commission on Professionalism is accepting submissions of articles to be published in the *Bar Bulletin* and submitted to various newspapers. The commission is requesting articles on good deeds of lawyers or judges and "Be a Pro" articles that demonstrate professionalism in action. The articles will be reviewed and selected for publication by the Communications Subcommittee of the Commission on Professionalism. Contact Kris Becker, (505) 797-6038 or [kbecker@nmbar.org](mailto:kbecker@nmbar.org), to request editorial guidelines and/or to submit articles. Articles may also be mailed on disk to the Commission on Professionalism Communications Subcommittee, c/o Kris Becker, SBNM, PO Box 92860, Albuquerque, NM 87199-2860.

## 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 March 3. (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) 995-1017.

## Lawyers Assistance Committee

### Monthly Meeting

The Lawyers Assistance Committee will meet at 5:30 p.m., March 1, 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, NM 87103. Deadline for submission of the survey is March 1. Confidentiality of all personally identifiable information will be strictly maintained at all times.

# NOTICES



## **Bar Bulletin: Call for Cover Images**

The State Bar of New Mexico is seeking additional courthouse images to be featured on the cover of the weekly *Bar Bulletin*. A different image of a New Mexico courthouse — either still in use or historical —

will be featured each week. Please send photograph images by mail or e-mail to the attention of Diana Sandoval, editor, PO Box 92860, Albuquerque, NM 87199-2860; or dsandoval@nmbar.org. Images will be used as a reference for original drawings by State Bar artist, Kelley S. Hestir.

## **Prosecutors' Section Annual Awards**

The State Bar Prosecutor's Section will be presenting awards to five prosecutors at the District Attorney's spring conference.

Nominations should be submitted by March 19 to Julie Ann Meade, section chair, PO Box 1508, Santa Fe, NM 87504-1508; or jmeade@ago.state.nm.us. The nominees will be presented to a committee for selection.

For a complete list of award categories, see the Feb. 19 (Vol. 43, No. 7) *Bar Bulletin*.

## **Public Law Section Board Meeting**

The Public Law Section board meeting will be held at noon, March 11, 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 McNerny, Jerry Richardson and Peter T. White. Send nominations by 5 p.m., March 1 to Douglas Meiklejohn, by e-mail at 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.

For a complete list of award criteria, see the Jan. 22 (Vol. 43, No. 3) *Bar Bulletin*.

## **Solo and Small Firm Practitioners' Section 2004 Luncheon Speaker Schedule**

The State Bar Solo and Small Firm Practitioners' Section will host monthly luncheon meetings on the third Tuesday through May at the Petroleum Club, 500 Marquette Ave., in Albuquerque.

For all new, first-time members, the first lunch is free. Contact Helen Stirling at the number below to make a free reservation.

Luncheon meetings will begin at noon with a speaker program. Members, guests and any member of the bar are welcome. The charge is \$14 in advance and \$16 at the door.

Reservations are required. Contact Helen Stirling, Esq., (505) 345-2800. Make the check payable to "State Bar of New Mexico," c/o Helen Stirling, 6125 Fourth St. NW, Ste. A, Albuquerque, NM 87107.

**March 16, noon:** "Unification of City and County Government – What's Next?," David S. Campbell, Albuquerque attorney, Vogel, Campbell & Blueher, P.C.

Upcoming luncheon dates are: April 20 and May 18.

## **Toastmasters to Form Albuquerque Group for Lawyers**

Toastmasters International, a non-profit organization devoted to helping members learn the arts of speaking, listening and thinking, is inviting interest in forming a club for lawyers in the Albuquerque area.

At Toastmasters, members learn by speaking to groups and working with others in a supportive environment. A typical Toastmasters club is made up of 20 to 30 people who meet regularly for about an hour. Annual dues are minimal and the club leadership is elected from within its own membership. Each meeting gives participants an opportunity to practice:

- conducting meetings;
- giving impromptu speeches;
- presenting prepared speeches; and
- offering constructive evaluation.

Members interested in learning more about a Toastmasters Club for attorneys are invited to attend an informational meeting at 5:30 p.m., March 3 at the State Bar Center, 5121 Masthead NE, Albuquerque. For more information and to reserve a space, contact Joe Conte, executive director (505) 797-6099, or jconte@nmbar.org.

## **OTHER BARS Albuquerque Bar Association**

### **Monthly Luncheon Program**

The Albuquerque Bar Association will host its monthly luncheon program at noon, March 2 at the Petroleum Club. The topic will be "Kirtland Air Force Base Legal Leadership." Marianne Hill, attorney with Sandia National Laboratory; Becky Kraus, general counsel and corporate secretary for Sandia National Laboratory; Beth Osheim, chief counsel for DOE Nuclear Security Administration Service Center; and Lt. Col. Neil Whiteman, Kirtland AFB JAG commander will be the featured speakers.



## American Bar Association Nominations Sought for 2004 Jefferson Fordham Awards

The American Bar Association Section of State and Local Government Law is seeking nominations for its Seventh Annual Jefferson Fordham Awards, to be presented in August during the 2004 ABA Annual Meeting in Atlanta. The submission deadline is March 20.

The awards honor outstanding state and local government lawyers and law firms that have achieved professional excellence within their area of practice, and are presented in four categories: Law Office Accomplishment, Lifetime Achievement, Advocacy and Up and Comers.

The section established the awards program in 1998 in honor of Jefferson B. Fordham, the first chair of the ABA Section of Local Government Law in 1949. During Fordham's years of outstanding service, the section became the distinguished national resource for the advancement of state and local government law practice.

Guidelines for submission of nominations are available from Jackie Baker, (312) 988-5652 or [jlbaker@staff.abanet.org](mailto:jlbaker@staff.abanet.org), or by visiting <http://www.abanet.org/statelocal>.

## Nominations Sought for Sixth Annual Paul G. Hearne Award

The American Bar Association Commission on Mental and Physical Disability Law is seeking nominees for the 2004 Paul G. Hearne Award, which honors an individual or organization that has performed exemplary service in furthering the rights, dignity, and access to justice for some of the 54 million Americans with disabilities.

The award, which was established in 1999, is presented in conjunction with the National Organization on Disability and includes a \$1,000 cash award provided by Aetna and a commemorative plaque from the ABA Commission on Mental and Physical Disability Law. The deadline for making nominations is March 31.

## COURT REGULATED PROGRAMS

MCLE – [mcle@nmbar.org](mailto:mcle@nmbar.org) or [www.nmmcle.org](http://www.nmmcle.org)

## Planning Your Legal Education Calendar For 2004?

Search for approved courses on [www.nmmcle.org](http://www.nmmcle.org). Choose "Course Search" on the Web site main menu. The only required field for the search engine is the end date. Optional searches include all New Mexico courses, by a specific course provider, the type of law and type of credit. Or you can "Browse by Subject" to the left of the Course Search engine. Course titles are the links to registration information and provider Web sites. Please contact MCLE if you have additional questions regarding an approved course.

**2003 Annual Compliance Reports** will be sent to active licensed NM attorneys at the end of February. Check your records online at [www.nmmcle.org](http://www.nmmcle.org) to ensure you have completed the 2003 credit requirements.

LEGAL SPECIALIZATION – [ls@nmbar.org](mailto:ls@nmbar.org)

## Congratulations 2004 Board Certified Specialists

The Board of Legal Specialization is pleased to announce the following attorneys as certified specialists:

### *Bankruptcy Law - Business*

George M. Moore

### *Employment & Labor Law*

Carol L. Dominguez

George R. McFall

### *Natural Resources - Water Law*

James C. Brockmann

Jay F. Stein

### *Workers' Compensation*

Richard Crollett

## Effective Feb. 16, 2004

The Supreme Court of New Mexico will adopt amendments to the Rules of Legal Specialization. The amended rules were published in the Jan. 29 (Vol. 43, No. 4) edition of the *Bar Bulletin*, and will be published in the NMRA.

For additional information regarding the Legal Specialization program including a list of Board Recognized Specialists, go to [www.nmbar.org](http://www.nmbar.org), "Other Bars/Legal Groups," use the Court Regulated Programs tab in the *2003-04 Bench & Bar Directory*, or call (505) 797-6057.



Paul G. Hearne, for whom the award was named, was born with a connective tissue disorder that physically limited his growth and restricted his movement. Yet through tenacity, intelligence and initiative, he created opportunities for himself and others and proved a leader for all people with disabilities.

Nominations are welcome from individuals (lawyers, administrators, directors, or nonlawyer advocates), as well as organizations (law firms, local or state bar associations, nonprofit legal services programs, law school clinics or academic-affiliated programs), or other law-related programs providing representation for people with disabilities.

For more information about the Paul G. Hearne Award or the nomination process, contact Cathleen West, (202) 662-1573 or westa@staff.abanet.org.

### Tax Section Pro Bono Committee

This year, the Pro Bono Committee of the American Bar Association's Tax Section is raising the level of participation in the IRS's Volunteer Income Tax Assistance ("VITA") program.

The VITA Program is available for taxpayers who are in need of assistance in preparing and filing their returns. The complexities of the tax laws can frustrate many low-income, elderly, disabled and limited English proficient taxpayers' effort to complete their own return.

Because commercial tax preparers may not be a viable option for low-income taxpayers, the VITA Program provides a location where these taxpayers can come for assistance. Members of the community – including professionals, students and other volunteers – donate their time to help taxpayers complete their returns. Local legal and tax professionals are asked to check

www.abanet.org/tax/vita for VITA location information, including when and how to volunteer at those locations.

For more information on this and other tax pro bono projects, visit www.abanet.org/tax/groups/probono.

## OTHER NEWS

### U.N.M. School of Law Third Annual Fundraiser/ Benefit

The University of New Mexico School of Law Association of Public Interest Law and Student Bar Association will host the Third Annual "Monte Carlo on the Rio" fundraiser/benefit from 7 to 11 p.m., March 5 at the Doubletree Hotel, 201 Marquette NW, Albuquerque. For more information call Carmen Rawls, (505) 277-8184.

We want to



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:

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|-----------------------------------------------------------------------------|--------------------------------------------------------------------|
| <input type="checkbox"/> ADR • Mediation • Arbitration                      | <input type="checkbox"/> Government • Program Eligibility          |
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| <input type="checkbox"/> General Practice                                   | <input type="checkbox"/> Torts • Personal Injury • Property Damage |
| <input type="checkbox"/> Estate Planning • Taxation • Probate • Wills       | <input type="checkbox"/> Other _____                               |
| <input type="checkbox"/> Family • Domestic Relations                        | <input type="checkbox"/> Please send notices on all CLE activities |

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

# When professional responsibility becomes professional liability . . .

BY BRIGGS CHENEY

‘Time for some ol’ time religion.’

**I**n the beginning, at least for many of the older members of the bar, professional liability (legal malpractice) was almost unheard of. Our profession seemed almost beyond sin. In those earlier days there were some transgressions, but they were so few and seemed so obvious, it was not difficult for the profession to turn a blind eye. *Van Orman v. Nelson*, 78 N.M. 11, 427 P.2d 896 (1967). But then came *Sanders v. Smith*, 83 N.M. 706, 496 P.2d 1102 (1972). Our Supreme Court, possibly for the first time, raised the specter of legal malpractice. But when the court affirmed summary judgment in favor of a brother lawyer at the bar, the case was not the burning bush it probably should have been for us all.

It may have taken seven days to create other things, but it was seven years before our courts addressed legal malpractice again.

In 1979 both the Supreme Court in *Jaramillo v. Hood*, 93 N.M. 433, 601 P.2d 66 (1979) and the Court of Appeals in *George v. Caton*, 93 N.M. 370, 600 P.2d 822 (Ct. App. 1979), almost in unison, preached to all of us again that legal malpractice was a viable cause of action in this jurisdiction. As a profession, we should have started to “see the light,” but it almost seemed as if the court was “preaching to the choir” and we weren’t listening to the sermon – that lawyers can be held accountable for their transgressions.

The rest is not in the Good Book, but it is in the case books. For those of us who haven’t gotten the message, our appellate courts are still preaching and it is worth reading their most recent messages to the flock: *Meiboom v. Carmody*, N.M. Bar Bull. Vol. 43, No. 1 (01/08/04) and *Andrews v. Saylor, et al.*, N.M. Bar Bull. Vol. 42, No. 48 (11/27/03).

For many of us in the bar, the older ones, our introduction to the religion of our profession came through a mandatory ethics class we sat through in our third year of law school. In that two-semester hour class we were introduced to the Canons of Ethics. We came for our two semester hours, we dutifully memorized the “Thou Shalt Nots,” we regurgitated them on a final exam, and graduated to the practice of law where, it seemed, the real rules which governed were “no holds barred” and “rough and tumble.” We [seemed] to forget the Canons and our “Thou Shalt Nots.”

For the younger members of the bar, the Canons of

Ethics were like the Dead Sea Scrolls - legal artifacts. In the 1980’s the American Bar Association promulgated its Model Rules of Professional Conduct replacing the Canons. Our Supreme Court, not long thereafter adopted, almost in their entirety, the ABA Model Rules in what we now refer to in New Mexico as our Code of Professional Responsibility.

While it is not suggested that the Code of Professional Responsibility has been ignored by the bar, the Supreme Court in *Garcia v. Rodey*, 106 N.M. 757, 750 P.2d 118 (1988), did make clear that, “the rules [the Code of Professional Responsibility] are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.” 106 N.M. at 762.

But our Supreme Court didn’t want the members of the flock to get the wrong message from *Garcia v. Rodey* and in an effort to help the bar to be “aspirational,” the court in the late 1980s instituted rules requiring minimum continuing legal education – one hour of which each year was required to be in ethics.

The flock, however, didn’t seem to be getting the message and in 1998, the Supreme Court added to the bar’s annual continuing legal education, not only the one hour of ethics, but two additional hours on professionalism – a little Golden Rule training for all of us.

The Supreme Court has not been alone in trying to spread the word. Several of the professional liability companies have also weighed in, offering annual risk management seminars for their insureds, luring them to half-day seminars with the enticement of discounts on their professional liability insurance premiums. And many of us came, we listened, and we left with our five or so percent discounts on our malpractice premiums.

The foregoing is somewhat irreverent, cynical and overstated. If I have offended, I apologize. That is not my intention nor purpose. It is my hope that there are many in the bar who are believers. For those who have been the object of a legal malpractice claim, that ordeal almost always makes the lawyer a believer in the importance of risk management. For those of us who have represented colleagues in legal malpractice cases, we have witnessed firsthand this conversion –

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the baptism by trial and the emergence of new believers in the Code of Professional Responsibility. When “professional responsibility” suddenly turns into “professional liability,” when money passes hands from the lawyer or his professional liability insurance company to a former client, when there are suddenly consequences for our not being professionally responsible, then we get religion. Which brings me to the real purpose of my comments.

At the risk of being too cute, let me use a line from Meredith Willson’s *Music Man* and suggest to the bar that, “There is trouble, right here in River City, and it begins [with U and ends in G]” and I don’t know what it rhymes with, but it is “underwriting.” In the 1980s the legal profession experienced what has often been referred to as the

“hard market.” The insurance companies began pulling out of the professional liability market; coverage was extremely difficult to find. There just were very few carriers who were willing to write insurance for lawyers. The bar and the profession responded in many ways. The state of Oregon established its own professional liability company and made professional liability insurance mandatory for all lawyers practicing law in that state. Other bars sponsored insurance companies to provide some source of professional liability coverage for its members. Today there is a group of bar sponsored companies around the country that are often referred to as the “NABRICO” companies – National Association of Bar Related Insurance Companies.

Today the situation is different. It is not a “hard market” in the sense it was in the 1980s; there is not a shortage of insurance companies who are willing to write coverage. Currently, there are no less than 12 insurance companies writing professional liability insurance in New Mexico. The problem which now confronts our profession and New Mexico lawyers is that for the first time (and by the “first time” I mean for the last several years) professional liability insurance companies are underwriting. By “underwriting,” I mean they are looking very hard at who they will insure. For years, a lawyer’s or firm’s claim history didn’t seem to be that important. This was due to many factors which go beyond the expertise of this writer and this article. Five years ago, a little sin may have gone unnoticed; today we are being held accountable. Professional liability insurance companies are looking long and hard at past claim histories. They are taking very seriously disciplinary complaints. They are refusing to write insurance for law firms who have problem lawyers. And, much to the dismay of this writer, some companies seem to also be penalizing lawyers and firms for complying with their insurance contract obligation of

reporting “potential” or “threatened claims.” We are seeing lawyers and law firms who *cannot* get professional liability insurance – not because there aren’t more than enough insurance companies writing in this state, but because the companies are not interested in lawyers and law firms who have not demonstrated professional responsibility in their practices.

So what does this all mean? It means that it is time to get that old fashioned religion of professional responsibility. It means that avoiding professional claims is not just a matter of professional responsibility, it is a matter of dollars and cents. Sometimes, the pocket book or the bottom line is what it takes to get religion.

I have kidded above about the ABA’s Canon of Ethics being the “Dead Sea Scrolls.” Well, soon our Code of Professional Re-

sponsibility, as we know it, may also be relegated to the annals of legal history and replaced by the new testament, if you will – the product of the ABA’s *Ethics 2000* – the ABA’s Model Rules of Professional Conduct. Taking a bold step, the ABA’s new rules provide in their *Scope* provisions after stating that a “[v]iolation of a Rule should not itself give rise to a cause of action against a lawyer ... Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer’s violation of a Rule may be evidence of breach of the applicable standard of conduct.” And this is just one of many changes in the Model Rules.

The practice of law is not getting easier. Our professional obligations and responsibilities are continually being re-defined. Now more than ever, a lawyer must be religious about his/her professional responsibilities. The State Bar has a very active Lawyer Professional Liability Committee. The committee is redoubling its efforts this next year to spread the word. Committee members are available to present risk management CLEs to sections and committees and the committee will, over the next year, provide articles on specialized areas of risk management and professional liability insurance. The State Bar in conjunction with PALMS (Practicing Attorneys Liability Management Society, Inc.) makes available to the members of our bar a risk management/ethics hotline, 1-800-326-8155. There is also a Lawyer’s Assistance confidential hotline, 228-1948 in Albuquerque or 1-800-860-4914, statewide, where anyone – family, colleague, legal assistants, the suffering lawyer him- or herself – can get confidential help for the lawyer who is struggling with the disease of alcoholism or addiction.

The resources and help are there. You just have to reach out.

*Briggs Cheney is the chair of the State Bar Lawyers’ Professional Liability Committee.*

Professional  
liability insurance companies  
are looking long and hard at  
past claim histories.  
They are taking very seriously  
disciplinary complaints.  
They are refusing  
to write insurance for law firms  
who have problem lawyers.’

## MARCH

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| <p>3 New Mexico Probate Beyond the Basics<br/>Albuquerque<br/>National Business Institute<br/>7.5 G / 0.5 E<br/>(800) 930-6182<br/>www.nbi-sems.com</p>                                                                | <p>Representation Matters<br/>State Bar Center - Albuquerque<br/>Employment and Labor Law<br/>Section and Center for Legal<br/>Education of SBNM<br/>2.4 G<br/>(505) 797-6020<br/>www.nmbar.org</p> | <p>12 2004 Professionalism -<br/>An Historical Perspective<br/>UNM Media Technology<br/>Services (live program) -<br/>Albuquerque (live webcast;<br/>seven broadcast satellite<br/>locations in New Mexico)<br/>Center for Legal<br/>Education of SBNM<br/>2.0 P<br/>(505) 797-6020<br/>www.nmbar.org</p> |
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| <p>8 Just WHO is the Client<br/>Teleconference<br/>TRT, Inc.<br/>2.4 E<br/>(800) 672-6253<br/>www.trtcle.com</p>                                                                                                       | <p>11 When Lawyers Cross the Line<br/>Teleconference<br/>TRT, Inc.<br/>2.4 P<br/>(800) 672-6253<br/>www.trtcle.com</p>                                                                              | <p>17 Electronic Document</p>                                                                                                                                                                                                                                                                             |
| <p>9 Ethics and Negligence Issues<br/>Affecting Estate Planning<br/>Professionals<br/>Teleconference<br/>Cannon Financial<br/>Institute<br/>1.8 G<br/>(706) 353-3346</p>                                               |                                                                                                                                                                                                     |                                                                                                                                                                                                                                                                                                           |

G = General

E = Ethics

P = Professionalism VR = Video Replay

Programs have various sponsors; contact appropriate sponsor for more information.



## MARCH

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|    | Retention Policies and Electronic Discovery Teleconference TRT, Inc. 2.4 G (800) 672-6253 www.trtcle.com                                                                                                                      | 18    | Banking Law Las Cruces SBNM Paralegal Division 1.0 G (505) 526-2449                                                   | 22 | When Counsel's Duties Conflict Teleconference TRT, Inc. 2.4 P (800) 672-6253 www.trtcle.com                                                 |
| 17 | Five Most Common Injuries in Workers' Compensation Albuquerque Lorman Education Services 7.2 G (715) 833-3940 www.lorman.com                                                                                                  | 18    | How to Make a Private Company Acquisition Teleconference TRT, Inc. 2.4 G (800) 672-6253 www.trtcle.com                | 23 | Analytical Sources and Forms on Westlaw State Bar Center - Albuquerque Thomson West 1.8 G (800) 310-9650, x 7101 www.westgroup.com/training |
| 17 | Medical Malpractice in New Mexico Albuquerque National Business Institute 6.2 G / 1.0 E (800) 930-6182 www.nbi-sems.com                                                                                                       | 18-19 | Federal Court Practice in New Mexico Albuquerque US District Court of NM 6.3 G / 2.8 P (505) 348-2012                 | 23 | Is the Attorney-Client Privilege on the Ropes? Teleconference TRT, Inc. 2.4 E (800) 672-6253 www.trtcle.com                                 |
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| 17 | 2003 Professionalism - Still in the Dark: Disappointing Images of Professionalism VR - State Bar Center - Albuquerque Commission on Professionalism and Center for Legal Education of SBNM 2.0 P (505) 797-6020 www.nmbar.org | 22    | Beginning Westlaw State Bar Center - Albuquerque Thomson West 1.8 G (800) 310-9650, x 7101 www.westgroup.com/training | 23 | Statutory Research State Bar Center - Albuquerque Thomson West 1.8 G (800) 310-9650, x 7101 www.westgroup.com/training                      |
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# WRITS OF CERTIORARI

AS UPDATED BY THE CLERK OF THE NEW MEXICO SUPREME COURT

Kathleen Jo Gibson, Chief Clerk New Mexico Supreme Court  
PO Box 848 • Santa Fé, NM 87504-0848 • (505) 827-4860  
EFFECTIVE FEBRUARY 24, 2004

## PETITIONS FOR WRIT OF CERTIORARI FILED AND PENDING:

- NO. 28,516 State v. Afsprung (COA 23,591) 2/23/04  
NO. 28,515 State v. Grant (COA 24,100) 2/20/04  
NO. 28,514 State v. Jones (COA 24,077) 2/20/04  
NO. 28,512 State v. Schells (COA 24,301) 2/19/04  
NO. 28,511 King v. Allstate (COA 23,130) 2/19/04  
NO. 28,510 Valenzuela v. Ulibarri (12-501) 2/19/04  
NO. 28,509 Pincheira v. Allstate (COA 22,760) 2/19/04  
NO. 28,508 Flores v. Ulibarri (12-501) 2/19/04  
NO. 28,507 Paragon v. SRC (COA 22,726) 2/19/04  
NO. 28,506 State v. Peterson (COA 24,079) 2/18/04  
NO. 28,505 State v. Trujillo (COA 24,257) 2/18/04  
NO. 28,495 State v. Vega (COA 23,269) 2/18/04  
NO. 28,504 State v. Bradley (COA 24,483) 2/17/04  
NO. 28,503 State v. Dimas (COA 22,850) 2/16/04  
NO. 28,502 State v. Craig (COA 24,149) 2/16/04  
NO. 28,501 State v. Roman (COA 24,150) 2/16/04  
NO. 28,500 Manning v. New Mexico Energy & Minerals (COA 23,396) 2/13/04  
NO. 28,499 State v. Kennedy (COA 24,329) 2/12/04  
NO. 28,498 Thompson v. NM Probation & Parole Dept. (12-501) 2/12/04  
NO. 28,496 Martinez v. Lemaster (12-501) 2/10/04  
NO. 28,494 State v. Rodriguez (COA 24,316) 2/9/04  
NO. 28,493 State v. Hernandez (COA 24,337) 2/9/04  
NO. 28,488 State v. Siegert (COA 23,237) 2/5/04  
NO. 28,487 State v. Gomez (COA 23,033) 2/5/04  
NO. 28,485 State v. Eubanks (COA 23,006) 2/3/04  
NO. 28,390 Ballejos v. Ulibarri (12-501) 2/2/04 time to consider petition extended to 3/12/04  
NO. 28,473 Deaton v. Gutierrez (COA 22,409) 1/29/04  
NO. 28,472 Equicredit v. Salazar (COA 24,091) 1/28/04  
NO. 28,471 State v. Brown (COA 23,610) 1/27/04  
NO. 28,470 Escamilla v. Ulibarri (12-501) 1/27/04 time to consider petition extended to 3/12/04  
NO. 28,469 Robertson v. Carmel (COA 22,176) 1/27/04  
NO. 28,466 State v. Duran (COA 23,412) 1/26/04  
NO. 28,465 Manuel v. Snedeker (12-501) 1/23/04 time to consider petition extended to 3/12/04  
NO. 28,464 Hoffman v. Snedeker (12-501) 1/21/04 time to consider petition extended to 3/12/04  
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. 28,443 McIntire v. Snedeker (12-501) 1/6/04 time to consider petition extended to 3/12/04  
NO. 28,444 Armjo v. Williams (12-501) 12/31/03 time to consider petition extended to 3/12/04  
NO. 28,436 Corliss v. Snedeker (12-501) 12/29/03 time to consider petition extended to 3/12/04  
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. 28,341 Lucero v. State (12-501) 11/18/03 time to consider petition extended to 3/12/04  
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 3/12/04

## 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. 27,823 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. 27,912 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. 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  
NO. 28,038 Paule v. Santa Fe County Commissioners (COA 22,988) 5/14/03  
NO. 28,046 Apodaca v. AAA Gas Company (COA 21,946) 5/28/03  
NO. 28,017 State v. Renfro (COA 23,206) 5/30/03  
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. 28,128 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  
NO. 28,241 State v. Duran (COA 22,611) 9/3/03  
NO. 28,242 Didyoung v. Dow (COA 23,417) 9/15/03  
NO. 28,233 Palmer v. St. Joseph Healthcare (COA 22,718) 9/15/03  
NO. 28,225 Huntley v. Cibola General Hospital (COA 23,916) 9/15/03  
NO. 28,234 State v. Blea (COA 24,032) 9/16/03  
NO. 28,228 State v. Sharpe (COA 23,742) 10/10/03  
NO. 28,253 Miller v. Brock (COA 24,124) 10/10/03  
NO. 28,249 Miller v. Brock (COA 24,125) 10/10/03  
NO. 28,237 State v. McDonald (COA 22,689) 10/10/03  
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  
NO. 28,270 State v. Paredes (COA 24,082) 10/27/03

# WRITS OF CERTIORARI

AS UPDATED BY THE CLERK OF THE NEW MEXICO SUPREME COURT

Kathleen Jo Gibson, Chief Clerk New Mexico Supreme Court  
PO Box 848 • Santa Fé, NM 87504-0848 • (505) 827-4860  
EFFECTIVE FEBRUARY 24, 2004

- |                                                                             |                                                               |
|-----------------------------------------------------------------------------|---------------------------------------------------------------|
| NO. 28,286 State v. Graham (COA 22,913) 11/3/03                             | NO. 28,408 Federal Express v. Abeyta (COA 23,519) 1/13/04     |
| NO. 28,210 Cassidy-Baca v. County Comm'r (COA 24,046) 11/3/03               | NO. 28,414 State v. O'Kelley (COA 23,272/23,364) 1/13/04      |
| NO. 28,317 Turner v. Bassett (COA 22,877) 11/6/03                           | NO. 28,416 Blancett v. Blancett (COA 24,282) 1/13/04          |
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| NO. 28,386 State v. Flores (COA 24,067) 12/16/03                            | NO. 28,481 Jouett v. Growney (COA 23,669) 2/16/04             |
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| NO. 28,376 Ryan v. Highway Dept. (COA 22,615) 12/19/03                      | NO. 28,477 State v. Smith (COA 24,253/24,254/24,258) 2/16/04  |
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- |                                                             |                                                        |
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- NO. 27,816 Warford v. Herrera filed 1/26/04  
NO. 27,692 State v. Sanchez-Lara filed 2/5/04

# ADVANCE OPINIONS

FROM THE NEW MEXICO SUPREME COURT AND COURT OF APPEALS

FROM THE NEW MEXICO SUPREME COURT

**Opinion Number: 2004-NMSC-004**

**TOPIC INDEX:**

**Insurance:** Bad Faith

**Jury Instructions:** Civil Jury Instructions; and Modifications of Jury Instructions

**Remedies:** Punitive Damages

IN RE: JOSEPH  
EDWARD SLOAN, Debtor

JOSEPH EDWARD SLOAN and BYRON Z. MOLDO, Chapter 7  
Trustee, Plaintiffs-Appellants and Cross-Appellees,  
versus  
STATE FARM MUTUAL AUTOMOBILE INSURANCE  
COMPANY, Defendant-Appellee and Cross-Appellant.  
No. 27,928 (filed: January 20, 2004)

**CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

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LISA K. VIGIL

OPINION

EDWARD L. CHÁVEZ, JUSTICE

{1} In this insurance-bad-faith case, arising from an insurance company's failure to settle a third-party lawsuit against its insured, we are asked to clarify whether a culpable mental state in addition to bad faith is required for the imposition of punitive damages. The following question was certified to us by the United States Court of Appeals for the Tenth Circuit, in accordance with Rule 12-607 NMRA 2003:

Is an instruction for punitive damages required in every insurance bad faith case in which the plaintiff has produced evi-

dence supporting compensatory damages as suggested by [UJI 13-1718 NMRA 2003], or is the New Mexico Court of Appeals correct that subsequent New Mexico Supreme Court authority requires a culpable mental state beyond bad faith for imposition of punitive damages in insurance bad faith cases? Teague-Strebeck Motors, Inc. v. Chrysler Ins. Co., [1999-NMCA-109, ¶¶ 76-90, 127 N.M. 603, 985 P.2d 1183].

Sloan v. State Farm Mut. Auto. Ins. Co. (In re Sloan), 320 F.3d 1073, 1073 (10th Cir. 2003).

{2} Exercising jurisdiction under NMSA

1978, § 39-7-4 (1997), we answer that under New Mexico law, a punitive-damages instruction should be given to the jury in every common-law insurance-bad-faith case where the evidence supports a finding either (1) in failure-to-pay cases (those arising from a breach of the insurer's duty to timely investigate, evaluate, or pay an insured's claim in good faith), that the insurer failed or refused to pay a claim for reasons that were frivolous or unfounded, or (2) in failure-to-settle cases (those arising from a breach of the insurer's duty to settle a third-party claim against the insured in good faith), that the insurer's failure or refusal to settle was based on a dishonest or unfair balancing of interests. An insurer's frivolous or unfounded refusal to pay is the equivalent of a reckless disregard for the interests of the insured, and a dishonest or unfair balancing of interests is no less reprehensible than reckless disregard, which has historically justified an award of punitive damages. To ensure the jury has found a culpable mental state before awarding punitive damages, we modify UJI 13-1718 to reflect that punitive damages may only be awarded when the insurer's conduct was in reckless disregard for the interests of the plaintiff, or was based on a dishonest judgment, or was otherwise malicious, willful, or wanton.

I.

{3} This matter comes to us in the course of an appeal from a jury trial in federal district court. The trial court granted Defendant State Farm's motion for judgment as a matter of law on Plaintiffs' claim for punitive damages against Defendant for bad-faith failure to settle. Sloan, 320 F.3d at 1074. The court submitted Plaintiffs' insurance-bad-faith claims to the jury without the instruction for punitive damages, UJI 13-1718 NMRA 2003. Even though Plaintiffs' claims primarily involved bad-faith failure to settle, the court included in its instructions to the jury both the bad-faith standard in a failure-to-settle action, that is, a dishonest or unfair balancing of interests (Jury Instruction No. 6, below), and the bad-faith standard in a first-party failure-to-pay action, that is, any frivolous or unfounded refusal to pay (Jury Instruction No. 8, below). Because the trial court gave the jury both instructions, we shall address the standard for punitive damages under both causes of action. The jury instructions relevant to Plaintiffs'



bad-faith claim given at trial were:  
Jury Instruction No. 6

A liability insurance company has a duty to timely investigate and fairly evaluate the claim against its insured, and to accept reasonable settlement offers within policy limits.

An insurance company's failure to conduct a competent investigation of the claim and to honestly and fairly balance its own interests and the interests of the insured in rejecting a settlement offer within policy limits is bad faith. If the company gives equal consideration to its own interests and the interests of the insured and based on honest judgment and adequate information does not settle the claim and proceeds to trial, it has acted in good faith.

See UJI 13-1704 NMRA 2003.

Jury Instruction No. 8

An insurance company acts in bad faith when it refuses to pay a claim of the policyholder for reasons which are frivolous or unfounded. An insurance company does not act in bad faith by denying a claim for reasons which are reasonable under the terms of the policy.

In deciding whether to pay a claim, the insurance company must act reasonably under the circumstances to conduct a timely and fair investigation and evaluation of the claim.

A failure to timely investigate, evaluate or pay a claim is a bad faith breach of the duty to act honestly and in good faith in the performance of the insurance contract.

See UJI 13-1702 NMRA 2003.

{4} The jury found that State Farm acted in bad faith in its dealings with Plaintiffs and that its bad faith proximately caused Plaintiffs' damages. The jury awarded Plaintiffs \$600,000 in compensatory damages, later reduced to \$540,000 on motion for remittitur. Plaintiffs appealed to the United States Court of Appeals for the Tenth Circuit, arguing that under New Mexico law, where there is sufficient evidence to submit an insurance-bad-

faith claim to the jury, the jury must also receive an instruction on punitive damages. The Court of Appeals then certified the above question to us because it was unclear under New Mexico law whether in an insurance-bad-faith action, a finding of bad faith, without an additional finding of a culpable mental state, permitted an award of punitive damages.

{5} This case presents an opportunity to assess the New Mexico Court of Appeals' holding in Teague-Strebeck that an award of punitive damages in an insurance-bad-faith case requires a culpable mental state in addition to the bad faith required for compensatory damages. See *Teague-Strebeck Motors, Inc. v. Chrysler Ins. Co.*, 1999-NMCA-109, ¶ 78, 127 N.M. 603, 985 P.2d 1183. Although we denied the petition for certiorari in that case, such denial in itself expresses no opinion on the merits of the case. See *State v. Breit*, 1996-NMSC-067, ¶ 13, 122 N.M. 655, 930 P.2d 792. In our denial of certiorari in *Teague-Strebeck*, we avoided having to reconcile various statements we have made about the standard for punitive damages in insurance-bad-faith claims. We now take the opportunity to clarify the law on this point.

{6} For the reasons that follow, we conclude that under New Mexico law, bad-faith conduct by an insurer typically involves a culpable mental state, and therefore the determination whether the bad faith evinced by a particular defendant warrants punitive damages is ordinarily a question for the jury to resolve. To the extent *Teague-Strebeck* would, in every insurance-bad-faith case, require a showing of an additional culpable mental state to permit an instruction on punitive damages, *Teague-Strebeck* is overruled. In so holding, we reaffirm our statement in *Jessen v. National Excess Insurance Co.*, 108 N.M. 625, 627, 776 P.2d 1244, 1246 (1989) that "[b]ad faith supports punitive damages upon a finding of entitlement to compensatory damages." Accordingly, an instruction on punitive damages will ordinarily be given whenever the plaintiff's insurance-bad-faith claim is allowed to proceed to the jury. We do, however, somewhat limit the per se *Jessen* rule by affording the trial court the discretion to withhold a punitive-damages instruction in those rare instances in which the plaintiff has failed to advance any evidence tending to support an award of punitive damages.

II.

{7} *Teague-Strebeck* held that in insurance-bad-faith cases, New Mexico requires "the presence of aggravated conduct beyond that necessary to establish the basic cause of action in order to impose punitive damages." 1999-NMCA-109, ¶ 78. In reaching this conclusion, the *Teague-Strebeck* court analyzed two New Mexico Supreme Court rulings, *Paiz v. State Farm Fire & Casualty Co.*, 118 N.M. 203, 880 P.2d 300 (1994) and *Allsup's Convenience Stores, Inc. v. North River Insurance Co.*, 1999-NMSC-006, 127 N.M. 1, 976 P.2d 1, and determined from the language of those opinions that this Court intended to raise the standard of conduct required for an award of punitive damages in insurance-bad-faith cases. The *Teague-Strebeck* court determined that *Paiz* and *Allsup's* "superseded" the *Jessen* formulation and that "New Mexico now requires a showing of a culpable mental element to allow imposition of punitive damages." *Teague-Strebeck*, 1999-NMCA-109, ¶ 90.

{8} In its original opinion, the *Teague-Strebeck* court affirmed the trial court's denial of the plaintiffs' claim for punitive damages arising from an insurance-bad-faith claim. *Id.* ¶¶ 70-73. The plaintiffs had argued that they were automatically entitled to punitive damages once compensatory damages were awarded and that the trial court therefore misapplied the legal standard for the award of punitive damages. *Id.* ¶¶ 71-72. *Teague-Strebeck* interpreted *Paiz* as requiring evidence of "an evil motive or a culpable mental state," in addition to bad faith, for a plaintiff to be entitled to punitive damages. Accordingly, it held the trial court did not abuse its discretion by refusing punitive damages. *Id.* ¶¶ 72-73.

{9} In a separate published order on rehearing, appended to the original published opinion, the *Teague-Strebeck* court reinforced its initial holding, and again relied on *Paiz* and *Allsup's* for the proposition that "there is a real distinction between 'bad faith' sufficient to support an award of compensatory damages and 'bad faith' meriting exemplary damages." *Id.* ¶ 85. The *Teague-Strebeck* court also noted that UJI 13-1718, as it currently stands, "clearly contemplates the giving of a punitive damages instruction in every bad faith case submitted to a jury." *Id.* ¶ 82 n.1. The court then stated, "Given the holding in *Paiz*, and the language in

Allsup's, upon which we rely, it would seem appropriate to reconsider this approach." *Id.*

{10} As we reconsider UJI 13-1718 and the law of punitive damages in insurance-bad-faith claims, we first consider the analyses of Paiz and Allsup's in Teague-Strebeck.

A.

{11} The Teague-Strebeck court began its analysis of Paiz by characterizing it as "a first party insurance-bad-faith case." 1999-NMCA-109, ¶ 79. Although Paiz began as an insurance-bad-faith case, by the time it reached the appellate courts it was reduced to a breach-of-contract case. At the trial level the plaintiffs had filed claims sounding in negligence, insurance bad faith, and breach of contract. Before submitting the case to the jury, however, the trial court directed a verdict against the plaintiffs with respect to their insurance-bad-faith claim. Paiz, 118 N.M. at 210, 880 P.2d at 307. The judge then submitted the case to the jury under a breach-of-contract theory and under the plaintiffs' tort claims of "negligent misrepresentation, negligent investigation, and negligent delay in making payment." *Id.* at 206, 880 P.2d at 303. The jury returned a verdict in favor of the plaintiffs. "[T]he trial judge viewed the damages awarded as arising from State Farm's breach of contract instead of from any of Defendants' various negligent acts." *Id.* at 207, 880 P.2d at 304. We agreed, holding the jury's award was "grounded in breach of contract and not as damages for commission of one or more torts." *Id.*

{12} Importantly, the claim of insurance bad faith was never raised as an issue on appeal. The plaintiffs did not appeal the directed verdict against them and therefore "conceded the correctness of the trial court's ruling" rejecting the bad-faith claim. *Id.* at 210, 880 P.2d at 307. "[C]ases are not authority for propositions not considered." *Sangre de Cristo Dev. Corp. v. City of Santa Fe*, 84 N.M. 343, 348, 503 P.2d 323, 328 (1972). We conclude Paiz ought not be relied upon in answering the certified question and was not dispositive in answering the question raised in Teague-Strebeck, because in Paiz this Court as well as the trial court focused on the contractual nature of the claims, rather than the degree to which they also sounded in tort.

{13} Teague-Strebeck interprets Paiz as directly applicable to the tort of insurance

bad faith. Teague-Strebeck, 1999-NMCA-109, ¶ 79. As we read Paiz, however, the holding is more narrowly drawn: "[W]e hold that such [a punitive-damages] award for a breach of contract may no longer be based solely on the breaching party's 'gross negligence' in failing to perform the contract." Paiz, 118 N.M. at 204, 880 P.2d at 301. Because the tort of insurance bad faith is fundamentally distinct from a claim for breach of contract, and because insurance bad faith was not before the Court in that case, the opinion in Paiz is properly confined to the standard for punitive damages in a case for breach of contract.

B.

{14} The Teague-Strebeck court further advanced certain language from Allsup's as supporting its conclusion that this Court had raised the standard for punitive damages in insurance-bad-faith cases. Allsup's involved an insurer's appeal of a jury award of punitive damages in an insurance-bad-faith claim. 1999-NMSC-006, ¶ 44. The insurer, North River, argued its due process rights were violated by a jury instruction suggesting the jury would merely have to find unreasonable conduct, as opposed to bad faith, in order to be held liable for punitive damages. *Id.* The instruction at issue there, essentially identical to UJI 13-1705 NMRA 2003, read:

Under the "bad faith" claim, what is customarily done by those engaged in the insurance industry is evidence of whether the insurance company acted in good faith. However, the good faith of the insurance company is determined by the reasonableness of its conduct, whether such conduct is customary in the industry or not. Industry customs or standards are evidence of good or bad faith, but they are not conclusive.

Allsup's, 1999-NMSC-006, ¶ 44. North River interpreted this instruction as permitting the slightest unreasonableness to render an insurance company liable for punitive damages. *Id.* ¶ 45. This, North River argued, conflicted with our statement in *McGinnis v. Honeywell, Inc.*, 110 N.M. 1, 9, 791 P.2d 452, 460 (1990) that a culpable mental state is a prerequisite to punitive damages.

{15} To resolve the alleged conflict, we

examined another jury instruction given at trial that stated in part, "Allsup's contends and has the burden of proving that any bad faith actions on the part of North River were malicious, reckless or wanton, and, therefore punitive damages should be awarded." 1999-NMSC-006, ¶ 46 (emphasis omitted). Reading the two instructions together, we concluded the jury must have found "malicious, reckless, or wanton conduct before it could award punitive damages." *Id.* Thus, Allsup's held, North River suffered no due process violation in the imposition of punitive damages. As we read Allsup's, its holding is strictly designed to resolve the question whether the jury was adequately instructed on the standard for punitive damages to survive a due process challenge. See *id.* ¶ 44. Accordingly, the presence of the second instruction on punitive damages enabled this Court to avoid the precise issue before us now, which is whether a greater standard than that required for compensatory damages in insurance-bad-faith litigation is required before instructing on punitive damages. As a result of these considerations, we believe the Teague-Strebeck court, understandably, may have been misled by our opinion in Allsup's in regard to what we now hold is the correct analysis of New Mexico law on the standard for punitive damages in insurance-bad-faith cases.

{16} In our current analysis, we conclude that Allsup's in fact supports our view that a punitive-damages instruction will ordinarily be given whenever the plaintiff is entitled to have the jury instructed on his or her insurance-bad-faith claim. In analyzing UJI 13-1705, the Allsup's court reasoned that "[w]hile bad faith and unreasonableness are not always the same thing, there is a certain point, determined by the jury, where unreasonableness becomes bad faith and punitive damages may be awarded." 1999-NMSC-006, ¶ 45 (emphasis added). In other words, there comes a point at which the insurer's conduct progresses from mere unreasonableness to a culpable mental state. Because the resolution of precisely where this point lies in each case depends on an assessment of the complex factual determinations surrounding the insurer's conduct and corresponding motives, such a question must ordinarily be reserved for the factfinder to resolve. As a general proposition, therefore, once a plaintiff has made a prima facie showing sufficient

to submit his or her bad-faith claim to the jury, the determination whether the insurer's bad-faith conduct is deserving of punitive damages is for the jury to decide.

### III.

{17} Although we overrule Teague-Strebeck's holding that an award of punitive damages in such cases always requires evidence of culpable conduct beyond that necessary to establish basic liability, we agree with its statement that "bad faith" may include a culpable mental state, but it is not necessarily so." 1999-NMCA-109, ¶ 85. We agree with this statement because of the manner in which the jury instructions for basic liability, UJI 13-1702 and 13-1704, are currently written. While these instructions properly convey the two standards we have previously articulated for a finding of a culpable mental state—a frivolous or unfounded refusal to pay, see UJI 13-1702, and a failure to honestly and fairly balance the interests of the insured and its own, see UJI 13-1704—we acknowledge the instructions as written might be interpreted, in some circumstances, as permitting merely unreasonable conduct to support a finding of bad faith sufficient for an award of punitive damages. This is because these instructions, particularly UJI 13-1702, include concepts of reasonableness along with concepts which may evince a culpable mental state. Because punitive damages are imposed for the limited purposes of punishment and deterrence, a culpable mental state is a prerequisite to punitive damages. See McGinnis, 110 N.M. at 9, 791 P.2d at 460. While the unreasonable conduct described in these instructions may support an award of compensatory damages, such conduct does not support an award of punitive damages. Thus, there may be cases in which a plaintiff, despite having advanced evidence sufficient to submit his or her bad-faith failure-to-pay claim to the jury, nevertheless fails to make a prima facie showing that the insurer's conduct exhibited a culpable mental state.

{18} Under New Mexico law, an insurer who fails to pay a first-party claim has acted in bad faith where its reasons for denying or delaying payment of the claim are frivolous or unfounded. See State Farm Gen. Ins. Co. v. Clifton, 86 N.M. 757, 759, 527 P.2d 798, 800 (1974). In Clifton we concluded that in order to recover damages in tort under this claim, there

must be evidence of bad faith or a fraudulent scheme. *Id.* We further announced that "bad faith" means "any frivolous or unfounded refusal to pay." *Id.* (internal quotation marks and quoted authority omitted). We have defined "frivolous or unfounded" as meaning an arbitrary or baseless refusal to pay, lacking any support in the wording of the insurance policy or the circumstances surrounding the claim:

"Unfounded" in this context does not mean "erroneous" or "incorrect"; it means essentially the same thing as "reckless disregard," in which the insurer "utterly fail[s] to exercise care for the interests of the insured in denying or delaying payment on an insurance policy." [Jessen, 108 N.M. at 628, 776 P.2d at 1247.] It means an utter or total lack of foundation for an assertion of nonliability—an arbitrary or baseless refusal to pay, lacking any arguable support in the wording of the insurance policy or the circumstances surrounding the claim. It is synonymous with the word with which it is coupled: "frivolous."

*Jackson Nat'l Life Ins. Co. v. Receconi*, 113 N.M. 403, 419, 827 P.2d 118, 134 (1992). By refusing or delaying payment on a claim for reasons that are frivolous or unfounded, the insurer has acted with reckless disregard for the interests of the insured; such reckless disregard supports a claim for punitive damages.

{19} We acknowledge, however, that the reasonableness of the insurer's conduct is generally an element of the jury's inquiry in determining whether compensatory damages should be awarded. For this reason, the bracketed second sentence of our jury instruction reads, "In deciding whether to pay a claim, the insurance company must act reasonably under the circumstances to conduct a timely and fair [investigation or evaluation] of the claim." UJI 13-1702 NMRA 2003. In failure-to-pay claims, therefore, a plaintiff under these circumstances might make a proper showing that the insurer acted unreasonably in denying or delaying a claim, entitling the plaintiff to compensatory damages, without having made a prima facie showing that the refusal to pay was frivolous or unfounded. In such circum-

stances, it is proper for the trial court to submit the plaintiff's bad-faith claim to the jury for consideration of an award of compensatory damages but withhold the punitive-damages instruction.

{20} On the other hand, while New Mexico recognizes a common-law cause of action for bad-faith failure to settle within policy limits, we do not recognize a cause of action for negligent failure to settle. *Ambassador Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 102 N.M. 28, 690 P.2d 1022 (1984). To be entitled to recover for bad-faith failure to settle, a plaintiff must show that the insurer's refusal to settle was based on a dishonest judgment. By "dishonest judgment," we mean that an insurer has failed to honestly and fairly balance its own interests and the interests of the insured. An insurer cannot be partial to its own interests, but rather must give the interests of its insured at least the same consideration or greater. See *Lujan v. Gonzales*, 84 N.M. 229, 236, 501 P.2d 673, 680 (Ct. App. 1972). In caring for the insured's interests, "the insurer should place itself in the shoes of the insured and conduct itself as though it alone were liable for the entire amount of the judgment." *Dairyland Ins. Co. v. Herman*, 1998-NMSC-005, ¶ 14, 124 N.M. 624, 954 P.2d 56 (internal quotation marks and quoted authority omitted). As we stated in *Ambassador*, "[The insurer's] decision not to settle should be an honest decision. It should be the result of the weighing of probabilities in a fair and honest way." 102 N.M. at 31, 690 P.2d at 1025 (quoted authorities omitted). This element of a dishonest or unfair balancing of interests is the key element in determining whether, in bad-faith failure-to-settle claims, the insurer's conduct merits punitive damages.

{21} In such failure-to-settle claims, evidence of an insurer's negligence in researching a claim does not give rise to its own cause of action, but rather provides one possible means of demonstrating that an insurer acted in bad faith. As we said in *Ambassador*:

[W]hen failure to settle the claim stems from a failure to properly investigate the claim or to become familiar with the applicable law, etc., then this is negligence in defending the suit (a duty expressly imposed upon the insurer under the insurance contract) and is strong evidence of bad faith

in failing to settle. Here, basic standards of competency can be imposed, and the insurer is charged with knowledge of the duty owed to its insured. In this sense, such negligence becomes an element tending to prove bad faith, but not a cause of action in and of itself.

Id. at 31, 690 P.2d at 1025. Thus, if the insurer fails to meet "basic standards of competency" in investigating a claim or researching the applicable law, such conduct is "strong evidence" of bad faith, but is not in itself sufficient to support the plaintiff's bad-faith failure-to-settle claim.

{22} In *Ambassador*, we predicated an insurer's honest judgment on its diligent, competent investigation of the claim:

In order that [the insurer's decision whether to settle] be honest and intelligent it must be based upon a knowledge of the facts and circumstances upon which liability is predicated, and upon a knowledge of the nature and extent of the injuries so far as they reasonably can be ascertained.

This requires the insurance company to make a diligent effort to ascertain the facts upon which only an intelligent and good-faith judgment may be predicated.

Id. (quoted authorities omitted). Our current uniform jury instruction reflects this standard of conduct when it states an insurer "has a duty to timely investigate and fairly evaluate the claim against its insured." UJI 13-1704 NMRA 2003. Nevertheless, we conclude the competence and timeliness of the insurer's investigation of the claim, while strong evidence of whether the insurer conducted itself fairly and in good faith, is not the dispositive element in a failure-to-settle claim. Even where the insurer's investigation was both competent and timely, the insurer is nevertheless liable for bad faith when its refusal to settle within policy limits is based on a dishonest judgment. In many respects, a dishonest judgment in these circumstances may be more reprehensible than where the insurer bases its decision not to settle on a negligent investigation. We conclude, therefore, in failure-to-settle cases, it is the insurer's

failure to treat the insured honestly and in good faith, giving "equal consideration to its own interests and the interests of the insured," id., that renders the insurer liable for insurance bad faith and also merits an instruction on punitive damages.

#### IV.

{23} As a result of the foregoing analysis, we conclude that in most cases, the plaintiff's theory of bad faith, if proven, will logically also support punitive damages. To ensure, however, that a jury only awards punitive damages for bad-faith conduct manifesting a culpable mental state, and not for conduct that may fall short of such reprehensibility, we find it necessary to augment the punitive-damages instruction to reflect the requisite standard for a culpable mental state. Accordingly, we modify the first sentence of UJI 13-1718 to read as follows:

If you find that plaintiff should recover compensatory damages for the bad faith actions of the insurance company, and you find that the conduct of the insurance company was in reckless disregard for the interests of the plaintiff, or was based on a dishonest judgment, or was otherwise malicious, willful, or wanton, then you may award punitive damages.

The trial court should include also the definitions of "dishonest judgment"— "a failure by the insurer to honestly and fairly balance its own interests and the interests of the insured"—along with the definitions of "reckless," "malicious," "willful," and "wanton." See UJI 13-1827 NMRA 2003. We believe this revised instruction will ensure the jury will award punitive damages only in those cases where the insurer's conduct is shown to have manifested a culpable mental state.

{24} Finally, in answering as we do that a punitive-damages instruction will ordinarily be given every time the jury is instructed on the plaintiff's insurance-bad-faith claim, we acknowledge the prospect that in certain instances a plaintiff's evidence of bad-faith conduct, though sufficient to entitle the plaintiff to compensatory damages, may be, as a matter of law, insufficient to warrant a punitive-damages instruction. Where the trial court determines, based on the evidence marshaled at trial, that no reasonable jury could find the insurer's

conduct to have manifested a culpable mental state, then the trial court may withhold the giving of a punitive-damages instruction. Accordingly, we also modify the Use Note for UJI 13-1718 to reflect that this instruction must ordinarily be given whenever UJI 13-1702, -1703, or -1704 is given; the instruction will not be given only in those circumstances in which the plaintiff fails to make a prima facie showing that the insurer's conduct exhibited a culpable mental state.

{25} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,  
Justice

WE CONCUR:  
PETRA JIMENEZ MAES,  
Chief Justice  
PAMELA B. MINZNER, Justice  
PATRICIO M. SERNA, Justice  
RICHARD C. BOSSON, Justice



Certiorari Granted, No. 28,441,  
January 26, 2004

FROM THE NEW MEXICO  
COURT OF APPEALS

**Opinion Number:  
2004-NMCA-021**

DON GORMLEY,  
Plaintiff-Appellant,  
versus  
COCA-COLA ENTERPRISES,  
Defendant-Appellee.  
No. 22,722  
(filed: December 16, 2003)

**APPEAL FROM THE DISTRICT  
COURT OF LEA COUNTY**

GARY L. CLINGMAN,  
District Judge

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OPINION

CELIA FOY CASTILLO, JUDGE

{1} Don Gormley (Plaintiff) appeals the district court's grant of summary judgment on his claims of breach of implied employment contract, constructive discharge, age discrimination, and disability discrimination. We reverse in part and remand on the sole issue of breach of contract for duties and hours.

I. BACKGROUND

{2} Plaintiff was employed by Southwest Coca-Cola (Southwest) at its Hobbs, New Mexico, facility beginning in 1983. For approximately ten years, Plaintiff was a route driver and deliveryman, a job requiring manual labor and lifting. Around 1994,

at age fifty-eight, Plaintiff was assigned to a warehouse position, in which he performed lighter duties, including loading and checking in trucks, doing janitorial work, performing cashier duties, making bank deposits, filling out paperwork, going to the post office and bus station, getting gas for the forklifts, stacking shelves, and cleaning the trailers of trucks. He had not complained about the work he had been doing on the truck route.

{3} Plaintiff presented deposition testimony of Robert Bolin, regional manager for Southwest at the time of Plaintiff's assignment to the warehouse. In his testimony about the transfer, Bolin explained that at the time, Plaintiff was healthy and "running the route okay" but management was concerned that Plaintiff might be hurt in the future because of his age and workload. Bolin testified that Plaintiff was to continue with fifty-five hours of work per week after his assignment to the warehouse so that Plaintiff would make the same amount he was making as a route driver. Bolin also testified that he discussed with Plaintiff leaving him "in that position until he was ready to retire." Plaintiff testified that Bolin guaranteed him fifty-five hours of work per week and that Bolin "just wanted to make sure that I want to stay with Coke as long as I could, until I got ready to retire, and he didn't want me to get [hurt by] lifting heavy stuff."

{4} In June 1998, Coca-Cola Enterprises (Defendant) acquired Southwest by merger; Defendant acknowledged in oral argument that all of Southwest's legal obligations were assumed through the merger. For a brief period of time after the merger, Plaintiff continued with his "same [warehouse] duties" and with the "same hours." Around July 1998, however, Plaintiff's new supervisor, Ruben Cardona, reduced Plaintiff's hours by five and made it clear that Plaintiff was no longer guaranteed fifty-five hours of work per week. Plaintiff did not protest this decision. Defendant subsequently further decreased Plaintiff's hours and changed certain of his job duties. Plaintiff submitted a letter of resignation to Defendant on August 21, 1999, to be effective September 17, 1999. Plaintiff never received written reprimands or discipline concerning his job performance from Southwest or from Defendant.

{5} In May 2000, Plaintiff filed his initial complaint against Defendant, setting forth his contract and constructive discharge claims and alleging that Defendant's conduct violated public policy against age discrimination, as articulated in the New Mexico Human Rights Act, NMSA 1978, §§ 28-1-1 to -15 (1969, as amended through 2003) (Act). Plaintiff did not file a grievance with the Human Rights Commission, as provided for under the Act. See § 28-1-10. In his complaint, Plaintiff sought reinstatement and damages. On March 9, 2001, Defendant filed a motion for summary judgment on all of Plaintiff's claims. Six days later, Plaintiff filed a motion to amend his complaint to add a count for discrimination, based on perceived disability and failure to continue to reasonably accommodate. The district court granted partial summary judgment on the claims of breach of implied contract, constructive discharge, and age discrimination. The district court later granted summary judgment on Plaintiff's disability discrimination claim, finding that the claim did "not sound in common law tort" and that Plaintiff was required first to pursue the administrative procedure under the Act.

II. DISCUSSION

A. Standard of Review

{6} Summary judgment is proper where there is no evidence raising a reasonable doubt that a genuine issue of material fact exists. *Cates v. Regents of the N.M. Inst. of Mining & Tech.*, 1998-NMSC-002, ¶ 9, 124 N.M. 633, 954 P.2d 65. "When reviewing a [district] court's grant of summary judgment, we view the facts in the light most favorable to the party opposing summary judgment, drawing all inferences in favor of that party." *Stieber v. Journal Publ'g Co.*, 120 N.M. 270, 271-72, 901 P.2d 201, 202-03 (Ct. App. 1995).

B. Plaintiff's Claims

{7} Plaintiff's claims can be divided into those alleging discrimination and those related to an implied contract of employment. We address these issues in turn.

1. Age and Disability Discrimination Claims

{8} We agree with the district court that Plaintiff's age and disability claims must be pursued under the administrative procedures available in the Act and do not lie in common law tort. We have permitted employees to pursue claims without filing

a human rights complaint under three tort theories: retaliatory discharge, *Gandy v. Wal-Mart Stores, Inc.*, 117 N.M. 441, 445, 872 P.2d 859, 863 (1994); intentional infliction of emotional distress, *Phifer v. Herbert*, 115 N.M. 135, 139, 848 P.2d 5, 9 (Ct. App. 1993), overruled on other grounds, *Spectron Dev. Lab. v. Am. Hollow Boring Co.*, 1995-NMCA-025, ¶¶ 31-32, 123 N.M. 170, 936 P.2d 852; and prima facie tort, *Beavers v. Johnson Controls World Servs., Inc.*, 120 N.M. 343, 351, 901 P.2d 761, 769 (Ct. App. 1995). At oral argument, Plaintiff acknowledged that he is not pursuing any of these tort theories. Instead, he requests that we create new torts for age discrimination and disability discrimination. We decline to accede to this request.

{9} Plaintiff bases his request on a broad reading of *Phifer*, in which this Court held that the plaintiff could pursue a sexual discrimination claim outside of the Act. *Phifer*, 115 N.M. at 139, 848 P.2d at 9. Because a sexual discrimination claimant need not exhaust administrative remedies under the Act, Plaintiff contends, neither should one raising age and disability discrimination claims. We decline to interpret *Phifer* so broadly. The *Phifer* case was not decided on the basis of the sexual discrimination claim but rather on the basis that the allegations of sexual discrimination were sufficient to support a separate claim for intentional infliction of emotional distress. *Id.* As conceded by Plaintiff, his complaint is insufficient to support a claim for intentional infliction of emotional distress or claims for retaliatory discharge or prima facie tort.

{10} At oral argument, Plaintiff also pointed this Court to a memorandum opinion, *Andazola v. Northern Automotive Corp.*, No. 18,708 (N.M. Ct. App. Nov. 13, 1997) (unpublished opinion), in support of his argument. While an unpublished opinion of this Court is of no precedential value, it may be presented to this Court for consideration if a party believes it persuasive. Rule 12-405(C) NMRA 2003; *State v. Gonzales*, 110 N.M. 218, 227, 794 P.2d 361, 370 (Ct. App. 1990). We do not find it persuasive, however. At issue in *Andazola* was whether exhaustion of administrative remedies under the Act is a prerequisite to proceeding with an independent tort claim. *Andazola*, No. 18,708, slip op. at 1. We reiterated in that

opinion that exhaustion is not a prerequisite, and we allowed the plaintiff to pursue his intentional infliction of emotional distress and prima facie tort claims. *Id.* at 2. But Plaintiff here is not pursuing one of those tort claims; and we do not read *Andazola* as supporting the creation of new independent torts of discrimination, as sought by Plaintiff.

{11} We decline to permit employees to pursue age and discrimination claims outside of the Act that do not contain allegations sufficient to meet the elements of retaliatory discharge, intentional infliction of emotional distress, prima facie tort, or other existing independent torts. To do so would eviscerate the Act our legislature adopted. Because we conclude that Plaintiff must pursue the administrative remedies contained in the Act, we do not determine the substance of his discrimination argument. We hold that the district court did not err in granting summary judgment on the discrimination claims.

#### 2. Constructive Discharge

{12} Plaintiff alleges that he was constructively discharged in violation of an implied employment contract with Defendant. Constructive discharge is a prerequisite to a wrongful termination claim when an employee, such as Plaintiff, resigns. See *Pollard v. High's of Baltimore, Inc.*, 281 F.3d 462, 472 (4th Cir. 2002) (stating that in order to establish wrongful termination, employee must show she was discharged in the first place); *Karch v. BayBank FSB*, 794 A.2d 763, 774 (N.H. 2002) (holding that "properly alleging constructive discharge satisfies the termination component of a wrongful discharge claim"); *Pitka v. Interior Reg'l Hous. Auth.*, 54 P.3d 785, 790 (Alaska 2002). Plaintiff's complaint is not as clear as would be preferred, but we will read it broadly to conclude that the allegations regarding constructive discharge are meant to satisfy the termination element of a claim of breach of implied contract to terminate for just cause only. See *Phifer*, 115 N.M. at 138, 848 P.2d at 8 (reiterating that pleadings may be liberally construed and that general allegations are sufficient as long as the parties and the court have a fair idea of the cause of action about which the party is complaining). In order to prevail on a wrongful termina-

tion claim, Plaintiff must not only prove constructive discharge but must also independently show the existence and breach of an implied contract to discharge for just cause only. See *Jeanes v. Allied Life Ins. Co.*, 300 F.3d 938, 942 (8th Cir. 2002); *Starzynski v. Capital Pub. Radio, Inc.*, 105 Cal. Rptr. 2d 525, 530 (Ct. App. 2001). We proceed with our analysis of constructive discharge because it is determinative of Plaintiff's alleged wrongful termination claim.

{13} We find no New Mexico cases regarding the elements necessary to prove constructive discharge in the context of a claim for breach of an employment contract. Similarly, we find no cases relating to summary judgment on this issue. We therefore look to other jurisdictions.

{14} An employer constructively discharges an employee when the employer makes working conditions so difficult that a reasonable employee would feel compelled to resign. *Derr v. Gulf Oil Corp.*, 796 F.2d 340, 343-44 (10th Cir. 1986). In evaluating the work environment, courts have considered such factors as an employer's threats of discharge or suggestions to resign and significant demotions or significant reductions in pay. *James v. Sears, Roebuck and Co.*, 21 F.3d 989, 993 (10th Cir. 1994) (finding constructive discharge when older employees were "threatened, pressured and systematically 'written up' over quotas" and told they would be fired or transferred to lower-paying positions if they did not retire); *Brock v. Mut. Reports, Inc.*, 397 A.2d 149, 152 (D.C. 1979) (finding that a corporate vice president was constructively discharged when offered a position that materially reduced his rank); cf. *Gioia v. Pinkerton's, Inc.*, 194 F. Supp. 2d 1207, 1228 (D. N.M. 2002) (determining no constructive discharge where employee was not demoted from a supervisory position and his change in duties and pay reduction were not material). Courts have also considered whether employees have been involuntarily transferred and whether they have been subjected to unreasonable criticism of their work. See *Trapkus v. Edstrom's, Inc.*, 489 N.E.2d 340, 344 (Ill. App. Ct. 1986) (concluding that employee was constructively discharged when relieved of all managerial responsibilities and ordered to perform menial tasks); *Clowes v. Allegheny Valley Hosp.*,

991 F.2d 1159, 1162 (3d Cir. 1993) (cautioning that unreasonably exacting standards of job performance may amount to constructive discharge in conjunction with other aggravating factors). Additionally, courts consider the length of time an employee remains on the job after the onset of allegedly intolerable working conditions. See, e.g., *Yearous v. Niobrara County Mem'l Hosp.*, 128 F.3d 1351, 1357 (10th Cir. 1997); *Colores v. Bd. of Trs.*, 130 Cal. Rptr. 2d 347, 356 (Ct. App. 2003). Some courts also require the employer to give the employee an opportunity to resolve the employee's problem. See, e.g., *Howard v. Burns Bros.*, 149 F.3d 835, 842 (8th Cir. 1998) (holding that an employer is not liable for constructive discharge if the employee quits without allowing the employer to resolve the problem); *Woodward v. City of Worland*, 977 F.2d 1392, 1402 (10th Cir. 1992).

{15} To survive a motion for summary judgment on constructive discharge, an employee must allege facts sufficient to find that an employer has made working conditions so intolerable, when viewed objectively, that a reasonable person would be compelled to resign. *Spulak v. KMart Corp.*, 894 F.2d 1150, 1154 (10th Cir. 1990); *Derr*, 796 F.2d at 343-44. A plaintiff must show that there was no "other choice [for the employee] but to quit." *Yearous*, 128 F.3d at 1356 (internal quotation marks and citations omitted). Neither the employee's subjective view of the working conditions nor the employer's subjective intent on discharge is relevant. *Jeffries v. Kansas*, 147 F.3d 1220, 1233 (10th Cir. 1998).

{16} Plaintiff bases his constructive discharge claim on three facts: (1) loss of assignment to lighter duties at the Hobbs plant facility, (2) loss of the guaranteed fifty-five hours a week of work, and (3) reduction in pay. We find the evidence in the record concerning these facts insufficient to withstand summary judgment on constructive discharge. Plaintiff did not receive threats of discharge. He was never disciplined; nor did he receive written warnings or reprimands. Plaintiff did suggest that his supervisor, Cardona, continually picked on Plaintiff and pressured him by criticizing him for not properly cleaning the restrooms or offices, but Plaintiff also said that Cardona never told

Plaintiff his job was in danger. Plaintiff thought he remembered, but was not sure, that Cardona told him once that he could lose his job if he did not properly perform his required duties. Plaintiff was transferred from a truck route to light duty, but we find no evidence that he opposed the transfer. Nor do we find a material alteration in the light duties assigned to Plaintiff. He was subsequently relieved of certain cashier duties but apparently retained other light warehouse duties. Plaintiff alleges that he was assigned heavy work in the warehouse, which he describes as building loads for trucks. But he also testified that he had help on all his loads from two others in the warehouse, who "took a lot of slack off me because all I'd do is kind of some of the light work that needed to be done." Bolin testified that Cardona asked Plaintiff to run truck routes when someone called in sick or when someone was otherwise needed to run routes.

{17} The record indicates that Plaintiff's overtime was ultimately reduced by ten hours. The reduction in pay apparently resulted from the loss of overtime hours; there is no indication that Plaintiff's regular hours or rate of pay were reduced. Indeed, Plaintiff testified that he retired before his overtime hours were cut further. Plaintiff does not suggest that he gave his supervisor an opportunity to resolve Plaintiff's concerns. Instead, Plaintiff decided not to talk to Cardona "[b]ecause I knew anything I said to Ruben, it wouldn't make any difference." Furthermore, Plaintiff remained on the job for more than a year after the initial loss of overtime hours. Before making a decision to leave, Plaintiff considered the financial impact. He investigated how much social security income he would receive if he retired at his then age of sixty-two, and he decided to take early social security retirement. Plaintiff finally submitted a letter of resignation dated August 21, 1999, to be effective September 17, 1999. Upon receiving the letter, Cardona asked Plaintiff to think over his decision to resign; Plaintiff decided to go ahead with the resignation. Almost a month elapsed between delivery of the letter and Plaintiff's effective date of resignation.

{18} We do not rely on Plaintiff's subjective view of his working conditions. *Id.*

Based on these facts and the use of an objective standard, the conditions in Plaintiff's workplace were not such that a reasonable employee would have felt compelled to resign. On the contrary, the facts show that Plaintiff's resignation was planned over a period of time and was tendered only after Plaintiff received information about retirement and social security, thus demonstrating that the resignation was done of his own free will. See *Heno v. Sprint/United Mgmt. Co.*, 208 F.3d 847, 858 (10th Cir. 2000) (stating that employee will not be held to have been constructively discharged when resignation is of own free will, even when resignation is the result of employer's actions). Plaintiff chose his date of resignation. *Cf. Yearous*, 128 F.3d at 1356 (noting that employee's selection of effective date of resignation indicates that resignation is not a constructive discharge). Plaintiff provides no evidence to show that he complained about his treatment or did anything to address the allegedly intolerable working conditions. This failure undermines any possibility of finding that Plaintiff had "no other choice but to quit." *Id.* Even considering the evidence in the light most favorable to Plaintiff, an objective view of the facts does not support a conclusion that the work environment was so intolerable that Plaintiff had no other option but to resign. We agree with the district court's grant of summary judgment on constructive discharge.

### 3. Breach of Implied Contract

#### Claim

{19} In his implied contract claim, Plaintiff appears to argue both breach of the terms and conditions of employment prior to his resignation and breach of an implied contract to discharge for just cause only, or wrongful termination. We have already addressed and rejected Plaintiff's constructive discharge argument; therefore, even if an implied contract to discharge for just cause were to exist, any claim Plaintiff may have for breach of that contract by wrongful termination necessarily fails. We now consider the alleged implied contract for minimum hours and light duties. Specifically, Plaintiff argues that Defendant made an implied contract guaranteeing him lighter duties at the warehouse and fifty-five hours per week of work until retirement and that this

implied contract was breached when Defendant restricted his overtime hours, reduced his hours, and relieved him of duties. Defendant responds that Bolin's single verbal statement, made six years before Plaintiff retired, did not create an enforceable implied contract. Indeed, Defendant argues that "there is no evidence to demonstrate that the parties intended to alter [the] at-will [employment] relationship" or that they made a contract for Plaintiff to work a certain number of hours until retirement.

{20} New Mexico follows the general rule that employment is terminable at will by either the employee or the employer, absent an express contract to the contrary. *Lopez v. Kline*, 1998-NMCA-016, ¶ 10, 124 N.M. 539, 953 P.2d 304. An exception to the general rule is the existence of an implied contract that limits an employer's authority to discharge. *Id.* ¶ 11. Whether such an implied contract, modifying the at-will employment relationship, exists is generally a fact question. *Hartbarger v. Frank Paxton Co.*, 115 N.M. 665, 669, 857 P.2d 776, 780 (1993). A fact-finder must examine the totality of circumstances surrounding the employment relationship when considering whether an employer made a promise modifying the employment relationship. *Lopez*, 1998-NMCA-016, ¶ 12. An implied contract may be found in written or oral representations, in the conduct of the parties, or in a combination of representations and conduct. *Newberry v. Allied Stores, Inc.*, 108 N.M. 424, 427-28, 773 P.2d 1231, 1234-35 (1989). To support the existence of an implied contract, an oral representation must be sufficiently explicit and definite. *Garrity v. Overland Sheepskin Co. of Taos*, 1996-NMSC-032, ¶ 12, 121 N.M. 710, 917 P.2d 1382. A factual showing of additional consideration or mutual assent to the terms of the implied contract is not required. *Hartbarger*, 115 N.M. at 670-71, 857 P.2d at 781-82.

{21} In this case, Plaintiff and Bolin essentially agree on the conversation giving rise to the alleged implied contract. Bolin admitted he discussed with Plaintiff his remaining on the job at fifty-five hours per week until retirement. Specifically, Bolin testified, "The way I positioned it with Don was we weren't going to cut his pay and as long as he performed his

job duties, he wasn't going to get hurt on pay as far as, you know, we was [sic] going to base it off of the 55 hours" and that "we'd leave him in that position until he was ready to retire." But Bolin also testified that he realized anyone's job could change and that Plaintiff could have been fired. Plaintiff, on the other hand, alleges that oral representations by Bolin created a guarantee of hours and duties until retirement, as well as an agreement that he could be terminated only for just cause. In addition to oral representations, the record discloses that after the conversation with Bolin, Plaintiff was transferred to lighter duties in the warehouse and was allowed to work fifty-five hours per week. This continued for more than three years, until 1998, when Southwest merged with Defendant; thereafter, Plaintiff's hours changed, as well as certain of his duties. Reviewing this evidence in the light most favorable to Plaintiff, we conclude that Plaintiff is entitled to have the factual issue of whether an implied contract exists resolved by a fact-finder at a trial on the merits. Consequently, we reverse summary judgment as to breach of implied contract for minimum hours and light duties.

{22} The resolution of this issue depends on the fact-finder's determination regarding Plaintiff's employment status. Was he an at-will employee, or did the statements by Bolin and the totality of circumstances create an implied contract requiring just cause for job termination? This case is particularly odd in that we have already determined there is no basis to find that Plaintiff was terminated; he voluntarily resigned. Therefore, there can be no breach of contract as to wrongful termination. His employment status, however, still has an effect on his claim for breach of contract regarding hours and duties. If the fact-finder determines that Plaintiff's employment was no longer at will, the fact-finder must also decide if the implied contract also precluded changing Plaintiff's hours or duties and, if so, whether the change caused Plaintiff to suffer damages and in what amount. If, however, a fact-finder determines that Plaintiff remained an at-will employee, then any claims regarding breach of contract as to hours and duties would necessarily fail. See *Stieber*, 120 N.M. at 273, 901 P.2d at 204 (holding that

an at-will employee accepts modifications in the terms of employment when the employee continues to work subsequent to the modifications). In this case, as in *Stieber*, it is undisputed that Plaintiff knew of the change in work conditions. See *id.* at 272, 901 P.2d at 203. As such, Plaintiff would have accepted the modification by continuing to work. See *id.* at 273, 901 P.2d at 204.

{23} We do not address Plaintiff's promissory estoppel argument, raised for the first time in his reply brief, to support his position on the existence of an implied contract. See Rule 12-216(A) NMRA 2003; *State v. Castillo-Sanchez*, 1999-NMCA-085, ¶ 20, 127 N.M. 540, 984 P.2d 787 (stating that the appellate court "will not consider arguments raised for the first time in a reply brief").

### III. CONCLUSION

{24} We reverse the district court's grant of summary judgment on Plaintiff's claim that Defendant breached an implied contract regarding hours and duties, and we remand for further proceedings in accordance with this opinion. We affirm summary judgment on all other claims.

{25} IT IS SO ORDERED.

CELIA FOY CASTILLO, Judge

### I CONCUR:

RODERICK T. KENNEDY, Judge

IRA ROBINSON, Judge (concurring in part and dissenting in part)

ROBINSON, Judge (concurring in part and dissenting in part).

{26} I concur in the majority's decision to reverse and remand on the Plaintiff's claim that Defendant breached an implied contract regarding hours and duties. I disagree, however, with the majority's holding that the trial court did not err in granting summary judgment in favor of Defendant, as to constructive discharge. There were issues of material fact concerning whether Defendant made Plaintiff's employment intolerable, leading to constructive discharge. I conclude that the trier of fact should have considered these issues rather than disposing of Plaintiff's claims by summary judgment.

{27} After many years of employment, Plaintiff saw his promised duties and employment conditions of the predecessor-owner changed by the new owner, the Defendant, one by one. First, his hours



were reduced, which in turn resulted in a cut in pay. Then his duty was made less safe, which in turn made Plaintiff more susceptible to injury. Then his hours were cut even more a second time, and his pay was reduced again. When Plaintiff was 58 years old, the predecessor-owner placed him on "light duty" for safety and health reasons. Under the new owner, however, Plaintiff's "light duty" status was changed to include more strenuous activity; Plaintiff was 62 years old at the time of this change. In addition, despite the fact that Plaintiff was never "written up" for disciplinary action, he testified that his supervisor continually picked on him by criticizing the quality of Plaintiff's cleaning of the restrooms and offices, which were just two of his various duties.

{28} The majority focuses on the fact that Plaintiff remained on the job for more

than a year after the initial reduction in hours. Thus, it seems that the majority would penalize Plaintiff for not immediately resigning after the first punitive action taken against him by Defendant. They believe that Plaintiff's waiting almost a year after first having his hours cut and his pay reduced and staying on through a change in job duties that made him less safe and more susceptible to injury, only to have his hours and pay further reduced, works against his constructive discharge claim.

{29} I view this just the opposite. By not resigning immediately after the first punitive action against him, Plaintiff showed great restraint and waited until his employment became unbearable and really intolerable, leaving him, as a reasonable man, no other choice but to resign. The majority seems concerned with the tim-

ing of Plaintiff's resignation. It is cruel to say that a worker, now aged 62, must be penalized for checking to see when his Social Security payments would kick in, before taking the final step of resigning, under constructive discharge. I see Plaintiff's actions as that of a reasonable man, not a fool who just gets mad and says "I quit" at the first provocation. Hence, constructive discharge. The trial court erred in granting summary judgment in favor of Defendant as to constructive discharge.

{30} For these reasons, I respectfully concur in part and dissent in part.

IRA ROBINSON, Judge

Certiorari Denied, No. 28,455,  
February 3, 2004

FROM THE NEW MEXICO  
COURT OF APPEALS

**Opinion Number:  
2004-NMCA-022**

STATE OF NEW MEXICO,  
Plaintiff-Appellee,  
versus  
DOUG McDANIEL,  
Defendant-Appellant.  
No. 23,030  
(filed: January 5, 2004)

**APPEAL FROM THE DISTRICT  
COURT OF DOÑA ANA COUNTY**  
STEPHEN BRIDGEFORTH, Dis-  
trict Judge

PATRICIA A. MADRID  
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KATHERINE ZINN  
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JOHN BIGELOW  
Chief Public Defender  
SHEILA LEWIS  
Assistant Appellate Defender  
Santa Fe, New Mexico  
for Appellant

## OPINION

IRA ROBINSON, JUDGE

{1} Following a jury trial in July 2001, Defendant Doug McDaniel was convicted of one count of criminal sexual penetration (CSP) of a child under thirteen years of age, one count of CSP of a minor by a person in authority, one count of attempt to commit CSP of a child under thirteen years of age, six counts of criminal sexual contact (CSC) of a child under thirteen years of age, two counts of CSC of a minor by a person in authority, and one count of contributing to the delinquency of a minor. He was acquitted of three additional counts of CSP of a minor, and the trial court entered a directed verdict on two other charges.

{2} On appeal, Defendant challenges his convictions, arguing that the untimely disclosure of a State's witness led to fundamental error during his trial. Defendant raised additional claims of error in his docketing statement but did not address them in his brief-in-chief. Those issues are abandoned. *State v. Aragon*, 109 N.M. 632, 634, 788 P.2d 932, 934 (Ct. App. 1990) ("All issues raised in the docketing statement but not argued in the briefs have been abandoned."). We affirm.

I. FACTS

{3} In August 2000, the Doña Ana sheriff's department received a referral from the Children, Youth and Families Department (CYFD) regarding the victim. A neighbor

of the victim and her family had reported possible sexual abuse of the victim by Defendant. The victim, who was then living with her father and stepmother, was the daughter of Defendant's live-in girlfriend. After an investigation by the sheriff's department, which included a safe house interview with the victim, a grand jury indicted Defendant on the seventeen charges for which he was tried. The charges covered a period of time from 1995 to 2000.

{4} The victim testified at trial about an escalating and continuing pattern of sexual abuse beginning with intimate fondling by Defendant when she was in second grade and culminating in penile penetration when she was in the sixth grade. She also testified about smoking marijuana with Defendant. Defendant and the victim's mother testified on his behalf. During his testimony, Defendant denied the sexual abuse described by the victim. He maintained that he had not treated her any differently than his own children and further stated that he had never smoked marijuana in front of the victim or encouraged her to smoke marijuana. The mother testified that she had never seen anything inappropriate occur between Defendant and the victim. She too denied that Defendant had ever given marijuana to the victim or smoked it in front of her. The neighbor who had called CYFD testified as a rebuttal witness. She described having smoked marijuana with Defendant and the mother on several oc-

casions when the victim and her younger brother had been present and that, on at least one of those occasions, the victim was stoned. The neighbor also testified about conduct by Defendant toward the victim which had concerned her, including two episodes she had seen involving Defendant and the victim sitting on a recliner, and her suspicions about the length of time it took Defendant and the victim to answer the door on occasion.

## II. DISCUSSION

{5} On the morning of trial, Defendant objected to the State's plan to call as its first witness someone who had not been disclosed on the State's filed witness list. The proposed witness was the neighbor who had called CYFD. Defendant argued that the State had violated Rule 5-501(A)(5) NMRA 2003 when it failed to disclose the neighbor and her address on the witness list. The prosecutor responded that the witness had just been located and interviewed the day before trial and that she had shown Defendant her notes from the interview. Moreover, the prosecutor observed, the neighbor's name, telephone number, and substance of her complaint were all provided in the CYFD report disclosed to Defendant earlier as part of discovery. After additional argument of counsel, the trial court ruled that the prosecutor could not use the witness in the State's case-in-chief but instead permitted the witness to be held in abeyance for possible use as a rebuttal witness, should the need arise. Neither party objected to the trial court's ruling. On appeal, Defendant argues that he was prejudiced by the ruling.

### A. Standard of Review

{6} This Court reviews a trial court's decision with regard to discovery for an abuse of discretion. *State v. Desnoyers*, 2002-NMSC-031, ¶ 25, 132 N.M. 756, 55 P.3d 968. "[R]emedies for violation of discovery rules or orders are discretionary with the trial court." *State v. Wilson*, 2001-NMCA-032, ¶ 39, 130 N.M. 319, 24 P.3d 351. In order to find an abuse of discretion, we must conclude that the decision below was against logic and not justified by reason. *State v. Brown*, 1998-NMSC-037, ¶ 32, 126 N.M. 338, 969 P.2d 313. "Failure to disclose a witness' identity prior to trial in itself is not grounds for reversal . . . . The objecting party must show that he [or she] was prejudiced by such non-disclosure." *State v. Griffin*, 108 N.M. 55, 58, 766 P.2d 315, 318 (Ct. App. 1988) (internal citation

omitted). The prejudice must be more than speculative. See *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."). The admission of rebuttal testimony is also within the discretion of the trial court and will not be disturbed absent an abuse of discretion. *State v. Simonson*, 100 N.M. 297, 302, 669 P.2d 1092, 1097 (1983). Additionally, it is within the court's discretion to control the order of witnesses, mode of interrogating witnesses, and presentation of evidence. Rule 11-611(A) NMRA 2003.

{7} In addition to his claim regarding discovery, Defendant raises as additional claims of error that his right to effectively confront the rebuttal witness was violated by the late disclosure and that her testimony exceeded the scope of proper rebuttal testimony. Because Defendant failed to object to these alleged errors below, the claims have not been preserved for appeal. See Rule 12-216(A) NMRA 2003 (describing preservation requirements for appellate review). In order to preserve an issue for appeal, a party must make a timely objection that specifically apprises the trial court of the claimed error and invokes an intelligent ruling thereon. *State v. Varela*, 1999-NMSC-045, ¶ 25, 128 N.M. 454, 993 P.2d 1280. However, an appellate court may exercise its discretion to review for fundamental error under Rule 12-216(B)(2). The principle of fundamental error is applied to prevent a miscarriage of justice. *State v. Osborne*, 111 N.M. 654, 662, 808 P.2d 624, 632 (1991).

### B. Late Disclosure of Evidence

{8} In considering whether late disclosure of evidence requires reversal, a reviewing court will consider the following factors: "(1) whether the State breached some duty or intentionally deprived the defendant of evidence; (2) whether the improperly non-disclosed evidence was material; (3) whether the non-disclosure of the evidence prejudiced the defendant; and (4) whether the trial court cured the failure to timely disclose the evidence." *State v. Mora*, 1997-NMSC-060, ¶ 43, 124 N.M. 346, 950 P.2d 789.

#### 1. The State's Duty to Disclose

{9} Rule 5-501 of the Rules of Criminal Procedure governs discovery disclosure by the State. Rule 5-501(A)(5) requires the State to disclose to a defendant, within ten days after arraignment or the waiver of arraignment, "a written list of the names

and addresses of all witnesses which the prosecutor intends to call at the trial, together with any statement made by the witnesses and any record of prior convictions of any such witness which is within the knowledge of the prosecutor[.]" A continuing duty to disclose additional material or witnesses is prescribed by Rule 5-505(A) NMRA 2003 which requires a party who discovers an additional witness to "promptly give written notice to the other party." Failure to comply with discovery requirements is addressed in Rule 5-505(B) which permits the court to order disclosure, grant a continuance, prohibit the calling of an undisclosed witness, introduce in evidence the non-disclosed material, or "enter such other order as it deems appropriate under the circumstances[.]"

{10} Defendant asserts that the State breached its duty to disclose under Rule 5-501(A)(5). In response, the State points out that neither the trial court nor Defendant expressed doubt about the prosecutor's statement that the witness had not been found until the day before trial. Therefore, the State argues, the prosecutor did not violate the continuing duty to disclose or intentionally deprive Defendant of evidence but instead promptly informed Defendant about the witness as soon as the witness was located, as required by Rule 5-505(A). We agree with the State that the prosecutor's actions fall under Rule 5-505(A); the prosecutor did not act to intentionally deprive Defendant of evidence. There was no breach of the duty to disclose.

#### 2. Materiality of the Witness's Testimony

{11} The New Mexico Supreme Court has defined the second factor in the following manner: "Whether evidence is material depends on 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.'" *State v. Allison*, 2000-NMSC-027, ¶ 17, 129 N.M. 566, 11 P.3d 141 (quoting *State v. Fero*, 107 N.M. 369, 371, 758 P.2d 783, 785 (1988)).

{12} As we understand Defendant's argument, he is claiming that the neighbor's testimony was material because it was the only testimony offered in support of the victim's testimony. He contends that the importance of her testimony is also

reflected in the jury's written request, which was denied by the trial court, to see a copy of the CYFD report during its deliberations. We are not persuaded by this contention because, in the same request, the jury also asked to see a copy of the report prepared by the investigator for the sheriff's department. As the State points out, the jury's request might well have been prompted by Defendant's closing argument in which he invited the jury to compare the various statements of the witnesses for possible inconsistencies.

{13} More important, this is not the test for materiality. The question to be resolved on appeal is whether the outcome of the trial would have been different if the witness had been disclosed earlier, and Defendant does not indicate how early disclosure would have affected the outcome of his trial. Defendant does not challenge the sufficiency of the evidence that led to his convictions or claim that earlier disclosure would have changed his defense at trial. Cf. Allison, 2000-NMSC-027, ¶ 17 (concluding that earlier disclosure of the defendant's arrest record would have affected defense counsel's tactical trial decisions). Although Defendant denied sexually abusing victim, it is the fact finder's role "to resolve any conflict in the testimony of the witnesses and to determine where the weight and credibility lay." See State v. Roybal, 115 N.M. 27, 30, 846 P.2d 333, 336 (Ct. App. 1992). The jury may reject a defendant's account of events. State v. Salazar, 1997-NMSC-044, ¶ 44, 123 N.M. 778, 945 P.2d 996. Defendant has not shown a reasonable probability that, had the witness been disclosed earlier, the outcome of the trial would have been different.

### 3. Prejudice to Defendant

{14} The third factor is whether Defendant was prejudiced by the late disclosure of the witness. Defendant contends that he was prejudiced because the late disclosure had the effect of denying him his constitutional right to effectively cross-examine the witness. Defendant did not raise this claim of error below. See State v. Lucero, 104 N.M. 587, 590-91, 725 P.2d 266, 269-70 (Ct. App. 1986) (holding that an alleged denial of the right to confrontation may not be raised for the first time on appeal). Moreover, Defendant has not shown how his cross-examination would have been improved by an earlier disclosure or how he would have prepared differently for trial. See

State v. Vallejos, 2000-NMCA-075, ¶ 35, 129 N.M. 424, 9 P.3d 668. Although he argues that with more notice he would have been able to determine the witness's reputation for honesty, whether she had a criminal record, whether she had made any other CYFD reports, and whether she had committed any non-criminal acts of dishonesty, he does not claim that such evidence exists. The question of whether additional discovery "[might] have benefited the defense is pure speculation." Desnoyers, 2002-NMSC-031, ¶ 25 (quoted authority omitted).

{15} A review of the record shows that the jury had sufficient information to assess the credibility of the neighbor and her motive for testifying. During cross-examination, defense counsel repeatedly challenged the neighbor's credibility, cross-examining her in detail about her participation in the illegal drug use and the implausibility and speculative nature of her allegations that the victim or Defendant did not answer the door promptly. Defense counsel also confronted the neighbor about her reason for calling CYFD, pointing out that, at the time the neighbor made the call, the victim had not lived with Defendant for several months and suggesting that the neighbor had been motivated to call CYFD because of a subsequent and ongoing argument with the victim's mother. Moreover, the substance of the neighbor's testimony and her telephone number were contained in the CYFD report and Defendant does not contend that the neighbor's testimony was contrary to the information contained in the report. See Vallejos, 2000-NMCA-075, ¶ 35 (observing that the defendant had some notice of the proposed testimony); see also Griffin, 108 N.M. at 58, 766 P.2d at 318 (concluding that the testimony of the undisclosed witness was ascertainable from the State's exhibits). Defendant has not met his burden of showing that he was prejudiced by the late disclosure of discovery.

### 4. Trial Court's Cure of the Failure to Disclose

{16} The trial court addressed the late disclosure of the witness by prohibiting the prosecutor from presenting the testimony of the neighbor in the State's case-in-chief but allowing the neighbor to be called as a rebuttal witness. On appeal, Defendant acknowledges that the trial court's remedy would have been a reasonable compromise for resolving the issue of

late disclosure. However, he contends, the cure was an illusory one because the neighbor's testimony exceeded the scope of proper rebuttal testimony.

{17} Defendant does not challenge the neighbor's testimony regarding marijuana use by Defendant and the mother, recognizing that this testimony constituted proper rebuttal testimony. See Simonson, 100 N.M. at 302, 669 P.2d at 1097 (holding that the State was entitled to correct through rebuttal testimony false impressions given to jury by defense); State v. Smith, 92 N.M. 533, 540, 591 P.2d 664, 671 (1979) (holding that the State is entitled to call police officer to rebut accused's allegation that police officer had threatened his life). He does contend, however, that the remaining testimony about the victim and Defendant sitting in the recliner and not answering the door exceeded the scope of rebuttal. The State counters that the neighbor's testimony about the recliner episodes was proper rebuttal of the evidence offered during the defense. During their direct testimony, both Defendant and the mother had described Defendant's "snuggling" in the recliner as a normal activity that he engaged in with all the children including the victim. During her rebuttal testimony, the neighbor described two episodes involving Defendant and the victim in the recliner which had concerned her. The State argues that this testimony was a proper response to Defendant's and mother's testimony. We agree. See Wilson, 2001-NMCA-032, ¶ 41 (observing that the State was entitled to present evidence rebutting the defense theories). As for the neighbor's testimony about answering the door, Defendant did not object below to this testimony. Moreover, the cross-examination of the neighbor effectively revealed this concern to be essentially a matter of speculation on the witness's part.

### III. CONCLUSION

{18} We hold that there was no abuse of discretion and no prejudice to Defendant in the trial court's admission of the testimony by the rebuttal witness. No fundamental error occurred during the trial. We affirm Defendant's convictions.

{19} IT IS SO ORDERED.

IRA ROBINSON, Judge

WE CONCUR:

CELIA FOY CASTILLO, Judge

RODERICK T. KENNEDY, Judge

Certiorari Denied, No. 28,442, January 29, 2004

FROM THE NEW MEXICO COURT OF APPEALS

**Opinion Number: 2004-NMCA-019**

JOE VALLES, RICHARD KIRSCHNER,  
BOB McCANNON, and ROBERT PRATT,

Plaintiffs-Appellants,

versus

PAUL L. SILVERMAN, GELTMORE, INC.,  
RICHARD B. SAYLOR,

ALBERT KOLB, GLORIA KOLB,

SYLVIA MOCK, PAUL TULENKO,

VALDEMAR PETERSON, DARLENE GARRETT,

DAWN GASTALDO, MERRILL B. THOMAS, and

H. ERNESTINE THOMAS,

Defendants,

No. 23,174 (filed: December 12, 2003)

WAL-MART STORES, INC.,

Defendant-Appellee.

**APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

W. DANIEL SCHNEIDER, District Judge

JANE GAGNE

Albuquerque, New Mexico

PHILIP B. DAVIS

Albuquerque, New Mexico

for Appellants Joe Valles, Richard  
Kirschner, and Bob McCannon

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for Appellant Robert Pratt

CHARLES R. PEIFER

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Albuquerque, New Mexico

for Appellee

OPINION

CELIA FOY CASTILLO, JUDGE

{1} The issue we address in this case is whether a defendant can be liable for malicious abuse of process when that defendant was not a party (a non-litigant) in the underlying civil lawsuit. We hold that in certain limited circumstances, a non-litigant may be liable for civil malicious abuse of process. We further hold that the complaint in this case contains sufficient allegations to state a claim for malicious abuse of process against Defendant Wal-Mart Stores, Inc., (Wal-Mart), a non-litigant in the underlying lawsuit. Finally, we hold that the allegations in the complaint are sufficient to state a claim for civil con-

spiracy against Wal-Mart. We therefore reverse the trial court's dismissal of the claims against Wal-Mart. We remand for further proceedings consistent with this opinion.

I. BACKGROUND

{2} This lawsuit, brought by Plaintiffs Joe Valles, Richard Kirschner, Bob McCannon, and Robert Pratt, is the latest in a series of lawsuits arising from the proposed West Bluff Shopping Center (Project) in Albuquerque, New Mexico. Geltmore, Inc., a developer and a co-defendant in this lawsuit, sought to develop the Project. The single largest store in the Project was to be a Wal-Mart Superstore. Plaintiffs all live near and within neighborhood associations that opposed the development.

Plaintiffs participated in Albuquerque's zoning and City Council meetings and argued that the Project failed to comply with existing land use plans and zoning regulations. Plaintiffs appealed the City Council's approval of the Project first to the district court and then to this Court. This Court upheld the district court's approval of the City Council's decision in *West Bluff Neighborhood Association v. City of Albuquerque*, 2002-NMCA-075, 132 N.M. 433, 50 P.3d 182, overruled on other grounds by Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm'n, 2003-NMSC-005, ¶ 16, 133 N.M. 97, 61 P.3d 806.

{3} Geltmore, Inc., and ten individual property owners then sued Plaintiffs in a nine-count complaint for misuse and violation of the Nonprofit Corporation Act, NMSA 1978, §§ 53-8-1 to -99 (1975, as amended through 1999); misuse and violation of the Albuquerque Neighborhood Association Recognition Ordinance, Albuquerque Code §§ 14-8-2-1 to -7 (rev'd 1994); violations of the New Mexico Unfair Practices Act, NMSA 1978, §§ 57-12-1 to -22 (1967, as amended through 1999); malicious abuse of process; negligent misrepresentation; fraudulent misrepresentation; fraud and false pretenses; prima facie tort; and conspiracy. See *Saylor v. Valles*, 2003-NMCA-037, 133 N.M. 432, 63 P.3d 1152. Wal-Mart was not a party in *Saylor* (underlying lawsuit). This Court affirmed the district court's dismissal of the underlying lawsuit for failure to state a claim upon which relief can be granted. See *id.* ¶ 26.

{4} While *Saylor* was on appeal with this Court, Plaintiffs filed this most recent lawsuit against Geltmore, Inc., Wal-Mart, and eleven other defendants (collectively "Defendants") for malicious abuse of process and civil conspiracy. Plaintiffs allege that Defendants filed the underlying lawsuit to discourage public opposition to the Project. Plaintiffs contend that the underlying lawsuit was a Strategic Litigation Against Public Participation, or a "SLAPP" suit. They also contend that many allegations made by Defendants in the SLAPP suit were false and that Defendants knew or should have known of the falsehoods at the time they filed the SLAPP suit. Although Wal-Mart was not a party in the underlying lawsuit, Plaintiffs argue that Wal-Mart initiated the lawsuit because it "supported, encouraged and funded litigation against [Plaintiffs] in retaliation

for their petitioning activities.”

{5} Wal-Mart moved to dismiss the claims against it, arguing that (1) it could not be liable for malicious abuse of process because it was a non-litigant in the underlying lawsuit; (2) even if a non-litigant could be liable for malicious abuse of process, Plaintiffs’ complaint is insufficient as a matter of law because it fails to allege the requisite elements of a claim for malicious abuse of process against Wal-Mart; and (3) it could not be liable on Plaintiffs’ conspiracy claim because the complaint does not state a claim against Wal-Mart for the predicate tort, malicious abuse of process. The district court granted Wal-Mart’s motion and dismissed all of the claims against Wal-Mart with prejudice.

## II. DISCUSSION

### A. Standard of Review

{6} The claims against Wal-Mart were dismissed under Rule 1-012(B)(6) NMRA 2003 for failure to state a claim upon which relief can be granted. Whether the trial court properly dismissed the claims is a question of law, which this Court reviews de novo. See *Padwa v. Hadley*, 1999-NMCA-067, ¶ 8, 127 N.M. 416, 981 P.2d 1234. “[A]ll well-pleaded factual allegations” are accepted as true, and all doubts are resolved “in favor of the sufficiency of the complaint.” *Id.* The only question is “whether the plaintiff might prevail under any state of facts provable under the claim.” N.M. Life Ins. Guar. Ass’n v. Quinn & Co., 111 N.M. 750, 753, 809 P.2d 1278, 1281 (1991).

### B. Malicious Abuse of Process Claim

{7} Our Supreme Court first recognized the tort of malicious abuse of process in *DeVaney v. Thriftway Marketing Corp.*, 1998-NMSC-001, ¶ 14, 124 N.M. 512, 953 P.2d 277, when it combined the torts of abuse of process and malicious prosecution. The elements of malicious abuse of process (the tort) are as follows:

- (1) the initiation of judicial proceedings against the plaintiff by the defendant;
- (2) an act by the defendant in the use of process other than such as would be proper in the regular prosecution of the claim;
- (3) a primary motive by the defendant in misusing the process to accomplish an illegitimate end; and
- (4) damages.

*Id.* ¶ 17. Wal-Mart contests the adequacy of the complaint as to the first three elements. We address each element in

turn.

### 1. Initiation of Judicial Proceedings

#### a. New Mexico Precedent

{8} Wal-Mart claims that Plaintiffs’ complaint fails to allege, and cannot allege, that Wal-Mart initiated judicial proceedings because it was not a litigant in the underlying lawsuit. Plaintiffs, on the other hand, argue that Wal-Mart may be liable under the tort, even though it was a non-litigant, because it actively participated in procuring the underlying lawsuit. Wal-Mart responds that our Supreme Court in *DeVaney* rejected the theory of active participant liability.

{9} The principle of “active participation” is set forth in the Restatement of Torts in the context of “Wrongful Use of Civil Proceedings.” Restatement (Second) of Torts § 674 (1977) [hereinafter Restatement]. Section 674 provides that “[o]ne who takes an active part in the initiation, continuation or procurement of civil proceedings” may be liable for the wrongful use of civil proceedings. *Id.* Wal-Mart contends that New Mexico has not “adopted this statement of law with regard to abuse of process-type claims” because even though our Supreme Court cited to Restatement § 674 in *DeVaney*, 1998-NMSC-001, ¶¶ 11, 44, it failed to adopt that section or to approve the principle of “procurer liability.”

{10} We do not agree with Wal-Mart that our Supreme Court specifically rejected the active participant theory in *DeVaney*. To the contrary, the only portion of Restatement § 674 that the Court specifically rejected was the requirement that the underlying proceeding be terminated in the plaintiff’s favor. *DeVaney*, 1998-NMSC-001, ¶ 23. The issue of whether a party can be liable as an “active participant” never arose in *DeVaney* because in that case, the defendant in the malicious abuse of process claim was the party who actually filed the underlying lawsuit. *Id.* ¶ 6.

{11} In *DeVaney*, our Supreme Court noted that the formerly recognized tort of malicious prosecution required “initiation of [judicial] proceedings.” *Id.* ¶ 15. But a review of our state’s jurisprudence on malicious prosecution makes clear that the “initiation” element never required that the defendant be a party in the underlying, often criminal, proceeding. See, e.g., *Hughes v. Van Bruggen*, 44 N.M. 534, 538-39, 105 P.2d 494, 497 (1940) (holding that whether or not the

criminal proceedings were initiated by the defendant depends on whether the defendant’s actions were the determining factor in the decision to prosecute or if the defendant knowingly furnished the official with false information); cf. *Johnson v. Weast*, 1997-NMCA-066, ¶ 20, 123 N.M. 470, 943 P.2d 117 (“[M]erely providing information that is not false to the authorities does not initiate proceedings . . . if the decision to proceed is left to the discretion of . . . the prosecutor and the absence of falsity allows the prosecutor to exercise independent judgment.”); *Zamora v. Creamland Dairies, Inc.*, 106 N.M. 628, 633, 747 P.2d 923, 928 (Ct. App. 1987) (“A defendant cannot be held liable for malicious prosecution [in an underlying criminal case] unless he took some active part in instigating or encouraging prosecution.”). Nor is there any indication from our Supreme Court in *DeVaney* or in the subsequent malicious abuse of process case, *Weststar Mortgage Corp. v. Jackson*, 2003-NMSC-002, 133 N.M. 114, 61 P.3d 823 [hereinafter *Weststar*], that it intends to alter the meaning of “initiation of proceedings” from that formerly applicable in claims of malicious prosecution. {12} Wal-Mart argues, however, that there is no precedent for extending non-litigant liability to an underlying civil lawsuit. We are not persuaded that the lack of precedent limits the application of the active participant theory to underlying criminal lawsuits. Indeed, the lack of precedent may be explained on two grounds. First, the tort of malicious prosecution was rarely available based on an underlying civil proceeding because of the need to allege and prove special damages. See, e.g., *Landavazo v. Credit Bureau*, 72 N.M. 456, 457, 384 P.2d 891, 891 (1963) (rejecting claim of malicious prosecution in the absence of any allegations that either the plaintiff was arrested, his property was seized, or he suffered “damages different from those necessarily incident to most if not all litigation”). Furthermore, the tort of abuse of process did not have an initiation requirement. See *Farmers Gin Co. v. Ward*, 73 N.M. 405, 409, 389 P.2d 9, 12 (1964) (distinguishing abuse of process, which requires evidence of an act “after the commencement of the action,” from malicious prosecution, which requires evidence that “the action was maliciously commenced” against the plaintiff without probable cause); *Westland Dev. Co. v. Romero*, 117 N.M. 292, 293, 871 P.2d 388, 389 (Ct. App.



1994) ("Abuse of process requires (1) the existence of an ulterior motive and (2) an act using process other than that process which would be proper in the regular prosecution of the charge.").

{13} Wal-Mart further argues that this Court's dismissal of the malicious abuse of process claim in *Saylor* indicates our unwillingness to recognize malicious abuse of process claims brought by or against non-litigants in the underlying lawsuit. Wal-Mart has incorrectly interpreted *Saylor*. In *Saylor*, this Court held that the plaintiffs could not state a claim for malicious abuse of process because they had not been sued in the underlying litigation. *Id.* ¶¶ 14-15. We rejected the plaintiffs' contention that an interested party under Rule 1-074 NMRA 2003 is a "formal party defendant" for purposes of a malicious abuse of process claim because the plaintiffs cited no authority supporting this proposition. *Saylor*, 2003-NMCA-037, ¶¶ 15-16. The requirement that a plaintiff claiming malicious abuse of process must have been named as a defendant in the underlying proceeding is consistent with the very purpose of the tort of malicious abuse of process, that is, to compensate a plaintiff who was compelled to incur the costs of defending below. See *DeVaney*, 1998-NMSC-001, ¶¶ 36-38. A party who was never named as a defendant in the underlying proceeding could not then claim that it was compelled to incur defense costs in the underlying proceeding.

{14} Finally, Wal-Mart argues that non-litigant liability in the criminal context should be distinguished from non-litigant liability based on an underlying civil proceeding. It contends that non-litigant liability is needed for an underlying criminal proceeding because, otherwise, a wrongfully prosecuted party might be without recourse, due to prosecutorial immunity. Wal-Mart argues that in underlying civil cases, immunity is not an issue because civil cases are "filed and maintained by the real parties in interest and by persons who can be held responsible for them." Wal-Mart may be correct that in this case, Plaintiffs have a remedy by seeking recourse against *Geltmore, Inc.*, and the other plaintiffs in the underlying lawsuit. However, Wal-Mart's theory does not recognize the possibility that a non-litigant may be orchestrating and funding the underlying civil lawsuit and may present the only possible source of

monetary recovery. Cf. *Alexander v. Unification Church of Am.*, 634 F.2d 673, 675-78 (2d Cir. 1980) (holding that although the named plaintiffs in the underlying litigation were church members, the church itself could be liable on the abuse of process claim because the church paid all litigation expenses and would have received any award in the underlying litigation), abrogation on other grounds recognized by *PSI Metals, Inc. v. Firemen's Ins. Co.*, 839 F.2d 42, 43 (2d Cir. 1988).

{15} We do not interpret the initiation requirement for non-litigant liability for malicious abuse of process in underlying civil lawsuits as narrowly as Wal-Mart does. Nor do we read *Weststar*, *DeVaney*, or *Saylor* as creating a rule of law that a non-litigant in a civil lawsuit cannot be liable for malicious abuse of process. We reject Wal-Mart's argument that whenever a malicious abuse of process claim is based upon an underlying civil (as opposed to criminal) proceeding, a plaintiff must show that the defendant initiated, by actually filing, the underlying lawsuit. We also disagree with Wal-Mart's argument that recognizing non-litigant liability will impermissibly broaden the tort to include potential liability for those who are merely friends and supporters of the litigant. We believe that sufficient restrictions will serve "to protect the important interest of access to the courts, thereby preventing any chilling effect on the legitimate use of process" while "allow[ing] victims of groundless suits to obtain adequate redress." *DeVaney*, 1998-NMSC-001, ¶¶ 18, 36. We hold that a non-litigant may be liable under the tort only if the non-litigant is an active participant in the underlying civil proceeding. We next discuss the parameters of active participation.

b. Parameters for "Active Participation" by a Non-litigant in the Initiation or Procurement of an Underlying Civil Proceeding

{16} New Mexico has not addressed the conduct necessary to find active participation in the initiation or procurement of civil proceedings. There is clear direction, however, regarding the types of activity required to establish liability in initiating or procuring criminal proceedings. See, e.g., *Weststar*, 2003-NMSC-002, ¶¶ 12-14 (noting that a non-litigant who furnishes false information to the prosecuting authority may be liable for initiating criminal proceedings but rejecting this Court's

theory that by itself, the furnishing of information, persuasion, or even pressure would be sufficient for liability); *Hughes*, 44 N.M. at 538-39, 105 P.2d at 497 (stating that for a private person to be held responsible for initiating a criminal proceeding, it must appear that the person's "direction, request, or pressure of any kind was the determining factor in the [public] official's decision to commence the prosecution"); *Zamora*, 106 N.M. at 633, 747 P.2d at 928 (reiterating that a private person cannot be liable "for the initiating of proceedings by a public official [unless] his desire to have the proceedings initiated . . . was the determining factor in the official's decision to commence the prosecution or that the information furnished by him upon which the official acted was known to be false") (emphasis, internal quotation marks, and citations omitted). Moreover, our Supreme Court, in *DeVaney*, set out the common policy considerations for the formerly recognized abuse of process and malicious prosecution claims and emphasized the confines of the new malicious abuse of process tort.

Both torts are designed to offer redress to a plaintiff who has been made the subject of legal process improperly, where the action was wrongfully brought by a defendant merely for the purpose of vexing or injuring the plaintiff, and resulting in damage to his or her personal rights. Further, both torts represent an attempt to strike a balance between the interest in protecting litigants' right of access to the courts and the interest in protecting citizens from unfounded or illegitimate applications of the power of the state through the misuse of the courts.

....

Meaningful access to the courts is a right of fundamental importance in our system of justice. Because of the potential chilling effect on the right of access to the courts, the tort of malicious prosecution is disfavored in the law. Thus, we must construe the tort of malicious abuse of process narrowly in order to protect the right of access to the courts.

DeVaney, 1998-NMSC-001, ¶¶ 14, 19 (citations omitted).

{17} The narrowness of the tort, the policy considerations behind it, and New Mexico cases dealing with initiation and procurement of criminal proceedings provide guidance. We also look to other jurisdictions that have already considered what constitutes active participation in the initiation or procurement of civil proceedings. We agree that more is required for active participation than encouragement, advice, or consultation. See *Kirsch v. Meredith*, 440 S.E.2d 702, 703 (Ga. Ct. App. 1994) (holding that a non-litigant who merely reviewed information and provided an expert affidavit, at the request of the plaintiffs in the underlying civil lawsuit, was at most a "passive participant" and not liable); *Chapman v. Grimm & Grimm, P.C.*, 638 N.E.2d 462, 466 (Ind. Ct. App. 1994) (determining that evidence failed to establish that non-litigants did more than encourage or advise the party to file the underlying civil proceeding); see also *Weststar*, 2003-NMSC-002, ¶ 12 (holding that reporting an incident and cooperating with prosecution are not sufficient as a matter of law to establish that the defendant "initiated the criminal proceedings"); but see *Walford v. Blinder, Robinson & Co.*, 793 P.2d 620, 625 (Colo. Ct. App. 1990) (holding that a non-litigant actively instigated an underlying civil proceeding when the non-litigant "gave . . . input" on the facts of the case; was "specifically consulted with"; and although initially against the lawsuit, "participated in the ultimate decision" to file it). Other jurisdictions require the non-litigant to have induced another to bring the lawsuit, by urging or insisting that the lawsuit be brought; they have found active participation when the non-litigant is the primary catalyst or the determining factor in the decision to file the lawsuit. See, e.g., *Checkley v. Boyd*, 14 P.3d 81, 91-92 (Or. Ct. App. 2000) (deciding that a person who is the "primary catalyst" for the suit may be liable for its commencement and finding that allegations that the underlying civil suit would not have been brought without the non-litigants' active encouragement, coercion, and pressure were sufficient to withstand dismissal); see also *Restatement, supra*, § 653 cmt. f; *id.* § 674 cmt. b; cf. *Williamson v. Guentzel*, 584 N.W.2d 20, 24-25 (Minn. Ct. App. 1998) (determining that there was no evidence that the non-litigant insisted or urged

that the underlying civil lawsuit be filed). We therefore hold that a non-litigant may be found to have actively participated in the initiation or procurement of a civil proceeding if the non-litigant's conduct was the determining factor in the decision to file the lawsuit.

#### c. Adequacy of Complaint

{18} Wal-Mart claims that even if a non-litigant in the underlying lawsuit could be liable in theory, the allegations in the complaint fail to state a claim against Wal-Mart for malicious abuse of process. Rule 1-008 NMRA 2003 requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Our standard is one of notice pleading: "[G]eneral allegations of conduct are sufficient, as long as they show that the party is entitled to relief" and are sufficiently detailed to give the parties and the court a fair idea of the plaintiff's complaint and the relief requested. *Schmitz v. Smentowski*, 109 N.M. 386, 389-90, 785 P.2d 726, 729-30 (1990). A motion to dismiss is "properly granted only when it appears that the plaintiff cannot recover or be entitled to relief under any state of facts provable under the claim." *Las Luminarias of the N.M. Council of the Blind v. Isengard*, 92 N.M. 297, 300, 587 P.2d 444, 447 (Ct. App. 1978) [hereinafter *Las Luminarias*]. Applying these principles, we find that the allegations in Plaintiffs' complaint are sufficient, albeit barely, to state a claim against Wal-Mart for malicious abuse of process.

{19} Only five paragraphs of the complaint contain allegations of specific action or involvement on the part of Wal-Mart. Those allegations are as follows:

5. Defendant Wal-Mart Stores, Inc. ["Wal-Mart"] is a foreign corporation authorized to do business in the State of New Mexico, and does business in New Mexico.

....

12. The primary and largest business planned for the Project is Defendant Wal-Mart's Wal-Mart Superstore.

13. Defendants Silverman, Geltmore, Wal-Mart, and Saylor each has a substantial financial interest in the Project.

....

31. On information and belief, Defendant Wal-Mart funded

the [underlying lawsuit] in substantial part.

32. On information and belief, Defendant Wal-Mart sanctioned, encouraged, and participated in the [underlying lawsuit].

{20} In addition to the above five paragraphs, allegations against all of the Defendants, including Wal-Mart, read as follows:

45. Defendants' improper purpose in bringing the [underlying lawsuit] against Plaintiffs was to intimidate, harass, extort cooperation, frighten, silence, and retaliate against Plaintiffs so that Plaintiffs would dismiss their Rule 1-074 Appeal, and cease their public opposition to the Project.

46. Defendants' further improper purpose in bringing the [underlying lawsuit] was to send a message, to chill, deter, and otherwise extort cooperation from other citizens who, like the Plaintiffs whom Defendants targeted, from engaging in lawful opposition to the Project, or to future similar real estate developments.

....

65. Defendants intentionally initiated the [underlying lawsuit] against Plaintiffs, and abused the judicial process, with an improper purpose to intimidate [and] frighten . . . Plaintiffs . . . without any reasonable belief whatsoever in the validity of the allegations of fact or law of the [underlying lawsuit].

{21} However, Plaintiffs further allege that Defendant Silverman "was the controlling and dominating force in the [underlying lawsuit]." There is no such similar allegation against Wal-Mart.

{22} Wal-Mart argues that these allegations are insufficient to state a claim that Wal-Mart initiated judicial proceedings against Plaintiffs because the complaint fails to allege (1) that the non-litigant actively urged or insisted that the lawsuit be filed and (2) that the litigant was not already contemplating the lawsuit. In particular, Wal-Mart points to the absence of allegations that it was the determining factor in the decision to file the underlying lawsuit

or that it caused the underlying lawsuit to be filed.

{23} We disagree with Wal-Mart that the litigant in the underlying lawsuit must not have contemplated the lawsuit or that “but[ ]for” the non-litigant’s suggestion, the lawsuit would not have been filed. But see *Chapman*, 638 N.E.2d at 466 (determining that the evidence did not indicate that the non-litigants encouraged or advised the litigant to bring any action that the litigant was not already contemplating). Indeed, a non-litigant may serve as the primary catalyst in the lawsuit by providing the critical funding for the suit, even though another party had the initial idea for, or was the controlling or dominating force in, the suit. We agree, however, that Wal-Mart’s conduct must have been the determining factor in the filing of the underlying lawsuit. Cf. *Williamson*, 584 N.W.2d at 25 (stating that liability for procuring initiation of a lawsuit may be established by a party insisting or urging that a suit be filed but that mere advisement or supplying information is insufficient for liability).

{24} Contrary to Plaintiffs’ contention in their brief-in-chief, the complaint never specifically alleges that Wal-Mart was a participant by procuring the suit. Likewise, the allegation that Wal-Mart “sanctioned [and] encouraged” the underlying lawsuit, if interpreted as alleging that Wal-Mart supported the underlying lawsuit by offering verbal encouragement, is insufficient to state a claim that Wal-Mart initiated the underlying lawsuit. However, there is also an allegation that Wal-Mart funded the underlying lawsuit in substantial part. The allegations together could be interpreted as stating a claim that Wal-Mart played an active role in initiating the underlying lawsuit by providing the funding without which the suit would not have proceeded. See *Sierra Blanca Sales Co. v. Newco Indus., Inc.*, 84 N.M. 524, 538, 505 P.2d 867, 881 (Ct. App. 1972) (aggregating the two claims of fraud and holding that in the aggregate, they were alleged with sufficient particularity to avoid dismissal). If this is the case, Wal-Mart could very well have been the determining factor, and its conduct would satisfy the requirement for active participation. Therefore, based on our liberal standard of notice pleading, we must uphold the complaint. See *Dunn v. McFeeley*, 1999-NMCA-084, ¶ 20, 127 N.M. 513, 984 P.2d 760 (denying a motion to dismiss if the allegations in the complaint

“could support a cause of action”); *Stock v. Grantham*, 1998-NMCA-081, ¶ 24, 125 N.M. 564, 964 P.2d 125 (denying a motion to dismiss if relief is available “under any state of facts provable under the claim”) (internal quotation marks and citation omitted). We remind Plaintiffs that it must still be determined, following discovery, whether there is sufficient evidence that Wal-Mart’s participation was the determining factor. If the evidence is not sufficient, Wal-Mart has the option of pursuing summary judgment.

#### 2. Remaining Elements

{25} The second element for malicious abuse of process is an “act by the defendant in the use of process other than such as would be proper in the regular prosecution of the claim.” *DeVaney*, 1998-NMSC-001, ¶ 17. This is the “overt act” requirement. See *id.* ¶ 18. Wal-Mart argues that the complaint does not allege any overt act by Wal-Mart in the underlying lawsuit because Wal-Mart did not draft the pleadings or file the underlying lawsuit. However, Plaintiffs do allege that all of the Defendants initiated the underlying lawsuit without “any reasonable belief whatsoever in the validity of the allegations of fact or law.” They further allege that Defendants “knew or should have known that [the allegations] were false.” These allegations are sufficient for the second element. See *id.* ¶ 22 (concluding that the overt act requirement may be met by showing the underlying lawsuit was filed without probable cause, that is, without a reasonable belief that a claim can be established).

{26} The third element of malicious abuse of process is “a primary motive by the defendant in misusing the process to accomplish an illegitimate end.” *Id.* ¶ 17. Plaintiffs allege that Defendants improperly brought the lawsuit “to intimidate, harass, extort cooperation, . . . and retaliate against Plaintiffs so that Plaintiffs would dismiss their Rule 1-074 Appeal.” We find the complaint sufficiently alleges the third element. Because there are sufficient allegations for each of the elements of malicious abuse of process, we hold that the lawsuit may proceed.

#### C. Civil Conspiracy

{27} Civil conspiracy is not in itself a cause of action; it must be accompanied by a civil action against one of the conspirators. *Ettenson v. Burke*, 2001-NMCA-003, ¶ 12, 130 N.M. 67, 17 P.3d 440 (stating that civil conspiracy must involve an in-

dependent unlawful act that itself would give rise to a civil action); *Lindbeck v. Bendzianas*, 84 N.M. 21, 27, 498 P.2d 1364, 1370 (Ct. App. 1972) (“[T]he basis for relief is not the conspiracy but the damages caused by acts committed pursuant to the conspiracy.”). Wal-Mart suggests, without support, that Plaintiffs must be able to recover on the underlying tort against every coconspirator before that coconspirator can be liable for its part in the conspiracy. We disagree. Indeed, adoption of Wal-Mart’s theory would defeat the purpose of civil conspiracy. See *Ettenson*, 2001-NMCA-003, ¶ 12 (“The purpose of a civil conspiracy claim is to impute liability to make members of the conspiracy jointly and severally liable for the torts of any of its members.”); *Adcock v. Brakegate, Ltd.*, 645 N.E.2d 888, 894 (Ill. 1994) (“The function of a conspiracy claim is to extend liability in tort beyond the active wrongdoer to those who have merely planned, assisted or encouraged the wrongdoer’s acts.”), abrogation on other grounds recognized by *Burgess v. Abex Corp. ex rel. Pneumo Abex Corp.*, 725 N.E.2d 792, 795 (Ill. App. Ct. 2000). Wal-Mart correctly states that it must be legally capable of committing malicious abuse of process to be held liable as a coconspirator. See *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 28 Cal. Rptr. 2d 475, 478 (1994) (en banc) (stating that “tort liability arising from conspiracy presupposes that the coconspirator is legally capable of committing the tort”). Wal-Mart is not, however, legally incapable of committing the tort; we therefore reject its conclusion that it cannot be held liable for conspiracy.

{28} Wal-Mart additionally argues that Plaintiffs’ claim fails to allege sufficient facts necessary to support a conspiracy claim. In order to state a claim for civil conspiracy, Plaintiffs must allege “(1) that a conspiracy between two or more individuals existed; (2) that specific wrongful acts were carried out by the defendants pursuant to the conspiracy; and (3) that the plaintiff was damaged as a result of such acts.” *Ettenson*, 2001-NMCA-003, ¶ 12 (internal quotation marks and citation omitted). The existence of the conspiracy must be pled either by direct allegations or by allegation of circumstances from which a conclusion of the existence of a conspiracy may be reasonably inferred. *Saylor*, 2003-NMCA-037, ¶ 25; *Las Luminarias*, 92 N.M. at 300, 587 P.2d at 447.

The complaint contains allegations that Defendants conspired with one another to bring the underlying lawsuit; that the improper purpose of the lawsuit was to intimidate, frighten, silence, and retaliate against Plaintiffs; and that Plaintiffs were damaged as a result of the wrongful acts. Further allegations from which we can infer the existence of a conspiracy claim are that Defendant Silverman was the controlling and dominating force in the underlying lawsuit, while Wal-Mart funded the lawsuit in substantial part, as well as sanctioning, encouraging, and participating in it. We find these allegations sufficient to state a claim for civil conspiracy against Wal-Mart. See *Ettenson*, 2001-NMCA-003, ¶ 12; *Las Luminarias*, 92 N.M. at 300, 587 P.2d at 447

(“The general policy of the Rules [of Civil Procedure] requires that an adjudication on the merits rather than technicalities of procedure and form shall determine the rights of the litigants.”) (internal quotation marks and citation omitted); *Adcock*, 645 N.E.2d at 895 (“[A] plaintiff is not required to allege facts with precision where the necessary information to do so is within the knowledge and control of the defendant and unknown to the plaintiff”).

{29} Plaintiffs still bear the burden of providing sufficient evidence to support the conspiracy claim. See *Morris v. Dodge Country, Inc.*, 85 N.M. 491, 492, 513 P.2d 1273, 1274 (Ct. App. 1973) (“The question [in determining the sufficiency of evidence for conspiracy] is whether the circumstances, considered as a whole,

show that the parties united to accomplish the [tort].”). As with the claim of malicious abuse of process, Wal-Mart has the option of later pursuing a summary judgment motion.

### III. CONCLUSION

{30} We reverse the trial court’s dismissal of the claims against Wal-Mart and remand for further proceedings in accordance with this opinion.

{31} IT IS SO ORDERED.

CELIA FOY CASTILLO, Judge

WE CONCUR:

JAMES J. WECHSLER, Chief Judge

LYNN PICKARD, Judge

Certiorari Not Applied For

FROM THE NEW MEXICO  
COURT OF APPEALS

**Opinion Number:  
2004-NMCA-018**

LAJUSTA SAM, individually and  
as Personal Representative of  
the ESTATE OF TYLER DEXTER  
SAM, deceased, and as next friend  
of BRONTE KIERAN SAM, CORY  
DEYONG SAM, and BRITNEY  
LYNN SAM, minor children,  
Plaintiffs-Appellants,

versus

THE ESTATE OF BENNY SAM,  
JR., and ARIZONA SCHOOL RISK  
RETENTION TRUST, INC., an  
Arizona non-profit  
corporation,  
Defendants-Appellees.

No. 23,288

(filed: December 12, 2003)

**APPEAL FROM THE DISTRICT  
COURT OF MCKINLEY COUNTY**  
JOSEPH L. RICH, District Judge

DAVID W. PETERSON  
KELEHER & MCLEOD, P.A.  
Albuquerque, New Mexico

JUSTIN HEIDEMAN  
ASCIONE & HEIDEMAN, L.L.C.  
Provo, Utah  
for Appellants

KYLE M. FINCH  
BRIONES LAW FIRM, P.A.  
Farmington, New Mexico  
for Appellees

OPINION

RODERICK T. KENNEDY, JUDGE

{1} Plaintiffs appeal the district court's order granting Arizona School Risk Retention Trust, Inc.'s (the Trust) motion to dismiss and its later order granting summary judgment to the Estate of Benny Sam, Jr. (the Estate). Because Plaintiffs did not timely appeal the district's order dismissing the Trust, we affirm the district court's decision to dismiss the Trust. However,

we reverse the order granting summary judgment to the Estate because the district court applied the wrong statute of limitations.

**FACTUAL AND PROCEDURAL BACKGROUND**

{2} Benny Sam, Jr. (Sam) was employed by the Window Rock Unified School District (the District) in Arizona. On June 26, 1998, with the District's permission, Sam took a vehicle owned by the District to his New Mexico home for the weekend. On June 27, 1998, as Sam was backing out of his driveway to unblock his personal car, he ran over and killed Tyler Dexter Sam (Tyler). Since Sam died prior to filing suit, Plaintiffs brought suit against his Estate alleging that Sam was negligent in the operation of the vehicle. Filed on June 26, 2001, the complaint alleges that Sam caused the death of Tyler due to negligent operation of a motor vehicle and is liable for damages caused by the wrongful death. Additionally, Plaintiffs allege that the Trust, as Sam's liability carrier, is also liable for the damages. Lastly, Plaintiffs allege that the Trust refused to negotiate a good faith settlement of Plaintiffs' claims and should be liable for damages caused by such refusal.

{3} On August 2, 2001, the Trust filed a motion to dismiss Plaintiffs' claims with prejudice for failure to state a claim upon which relief could be granted and for failure to file within the statute of limitations provided by Arizona law. On October 3, 2001, the district court granted the Trust's motion to dismiss, concluding that because the Trust is a non-profit corporation funded solely by members of the Arizona Public School District, it is a public entity as defined under Arizona law and therefore has sovereign immunity from suit. Because Plaintiffs "failed to comply with Arizona's notice-of-claim statute with regard to claims against public entities" the complaint was dismissed. The Plaintiffs did not properly appeal this order.

{4} On March 14, 2002, pursuant to Rule 1-056 NMRA 2003, the Estate filed a motion for summary judgment, contending that it was "entitled to judgment as a matter of law on the ground that plaintiffs' complaint [was] barred by the statute of limitations." In its brief in support of its motion, the Estate argued that Sam was an Arizona public employee acting within the scope of his duties when he ran over Tyler, and that actions against Arizona

public employees must be brought within one year after the cause of action accrues under Arizona law. In addition to arguing that Plaintiffs' complaint was barred under Arizona law, the Estate also contended that under New Mexico's Tort Claims Act, NMSA 1978, § 41-4-15(A) (1977), actions against public employees must be brought within two years after the date of the occurrence resulting in death. Therefore, the Estate maintained that because the complaint was filed approximately three years after the occurrence resulting in Tyler's death, the claim was time barred under both the Arizona and New Mexico statutes of limitations. Plaintiffs contended then, as they do now, that both Arizona law and the New Mexico Tort Claims Act are inapplicable to this case. Plaintiffs maintain that because the injury occurred in New Mexico, New Mexico law should apply to this case, and as such, the "action was [timely] brought within the applicable three-year New Mexico statute of limitation for torts."

{5} On May 1, 2002, a hearing was held on the Estate's motion for summary judgment. On June 17, 2002, the district court entered its findings of fact and conclusions of law and granted the Estate's motion for summary judgment, concluding that the action was barred by the statute of limitations of both Arizona and New Mexico because Sam was a public employee, and "[a]ny public employee in either state in the same situation would only be subject to a one or two-year statute [of limitations]." The district court stated that "[t]here is no legal or logical reason to subject [Sam] to a three-year statute simply because of the fortuitous event that the accident occurred in New Mexico, and . . . [t]o allow this suit to go forward on that basis would undermine the policies and laws of both Arizona and New Mexico." On June 25, 2002, Plaintiffs filed a notice of appeal on the order granting summary judgment to the Estate, and on that same day, they also filed an amended notice of appeal which stated that Plaintiffs were appealing "against all parties Defendant including, . . . [the] Trust."

**DISCUSSION**

The District Court's October 3, 2001, Order Dismissing the Trust Was a Final Order

{6} The October 3 order was a final judgment as to the Trust. Rule 1-054(B)(2)



NMRA 2003 governs judgments upon multiple parties, and it states that a "judgment may be entered adjudicating all issues as to one or more, but fewer than all parties." It further states that "[s]uch judgment shall be a final one unless the court . . . expressly provides otherwise and a provision to that effect is contained in the judgment." *Id.* No such provision was provided in the October 3 order. "An order is not considered final unless all issues of law and fact have been determined and the case disposed of by the trial court to the fullest extent possible." *Estate of Griego v. Reliance Standard Life Ins. Co.*, 2000-NMCA-022, ¶ 13, 128 N.M. 676, 997 P.2d 150. The district court's order granting summary judgment as to the Trust dismissed all claims directed at the Trust by Plaintiffs, and was therefore a final order.

**Plaintiffs Did Not Properly Appeal the District Court's Order Dismissing Plaintiffs' Claims Against the Trust**

{7} Plaintiffs did not immediately try to appeal the district court's October 3, 2001, order dismissing the Trust. Rule 12-201(A)(2) NMRA 2003 requires that a notice of appeal must be filed within thirty days after the judgment or order appealed from is filed in district court. See also Rule 12-202 NMRA 2003 (setting forth the time frame in which an appeal shall be taken and specifying the contents that must be included in a notice of appeal). In this case, Plaintiffs filed both a notice of appeal and an amended notice of appeal on June 25, 2002. Therefore, the notice was filed well beyond the thirty-day requirement.

{8} Moreover, the appeal we are concerned with at this time is from the district court's findings of fact and conclusions of law on the Estate's motion for summary judgment and its order granting summary judgment to the Estate. Although the amended notice of appeal mentions that the appeal is taken against all Defendants, including the Trust, the Plaintiffs did not attach a copy of the order dismissing the Trust to the notice of appeal, nor was the October 3 order referenced in the notice, as required by Rule 12-202(B). "[A]n appellant has a duty to specify each order in the notice of appeal from which an appeal is taken." *Mabrey v. Mobil Oil Corp.*, 84 N.M. 272, 274, 502 P.2d 297, 299 (Ct. App. 1972). Although notices of appeal are to be liber-

ally construed, the intent to appeal should be fairly inferred from the notice. *Id.* In this case, it is fair to infer that an appeal was being taken only from the June 17 order granting summary judgment to the Estate.

**Plaintiffs' Appeal of the District Court's Dismissal of the Trust Is Not Timely**  
{9} Nonetheless, Plaintiffs argue that it was proper to wait to appeal the order dismissing the Trust because "the question of the Trust's potential liability in the present case is so connected with the issues involving the Estate that any appeal of the Trust's dismissal before this time would have been improper." Plaintiffs are correct that in cases involving multiple defendants "[i]f the determination of the issues relating to the dismissed defendant will or may affect the determination of the remaining issues, the judgment of dismissal is not appealable." *Klinchok v. W. Sur. Co. of Am.*, 71 N.M. 5, 7, 375 P.2d 214, 216 (1962) (internal quotation marks and citation omitted). Further, in the interest of orderly procedure and judicial economy, we avoid piece-meal appeals. *Id.* at 8, 375 P.2d at 217.

{10} Here, Plaintiffs fail to demonstrate how the Trust's liability is so related to or connected with the theory of liability against the Estate so that one affects the other. Therefore, the two appeals need not be considered together, and because Plaintiffs did not timely appeal the October 3 order dismissing the Trust, as required by Rule 12-201, we do not have jurisdiction over the appeal.

**The District Court Erred in Granting Summary Judgment to the Estate**

{11} The Estate contends that the district court was correct in concluding that Plaintiffs' claims should be dismissed under either Arizona or New Mexico law because "in either state in the same situation would only be subject to a one or two-year statute" of limitations. We disagree.

**Standard of Review**

{12} The standard of review for determining whether governmental immunity under the Tort Claims Act bars a tort claim is a question of law which we review *de novo*. *Godwin v. Mem'l Med. Ctr.*, 2001-NMCA-033, ¶ 23, 130 N.M. 434, 25 P.3d 273. "The standard of review for a motion for summary judgment is whether there are any genuine issues of material fact

and whether the moving party is entitled to summary judgment as a matter of law." *Williams v. Cent. Consol. Sch. Dist.*, 1998-NMCA-006, ¶ 7, 124 N.M. 488, 952 P.2d 978; see also Rule 1-056(C) NMRA 2003; *Self v. United Parcel Serv., Inc.*, 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582 (reviewing questions of law *de novo*). We consider the facts in the light most favorable to the party opposing summary judgment. See *Gillin v. Carrows Rests., Inc.*, 118 N.M. 120, 122, 879 P.2d 121, 123 (Ct. App. 1994). If, however, the facts are not in dispute, and only a legal interpretation of the facts remains, summary judgment is appropriate. See *Garrity v. Overland Sheepskin Co.*, 1996-NMSC-032, ¶ 29, 121 N.M. 710, 917 P.2d 1382. The same reasoning applies to review of the grant of a motion to dismiss where all that is before the district court are pleadings and affidavits. *CABA Ltd. Liab. Co. v. Mustang Software, Inc.*, 1999-NMCA-089, ¶ 9, 127 N.M. 556, 984 P.2d 803.

**A. Arizona Law Is Inapplicable**

{13} The Estate argues that Sam was a public employee and as such, according to Arizona law, any action against his estate must have been brought within one year after the cause of action accrued. While this may be correct, New Mexico, as the forum state in this case, is not required to recognize Arizona's statute of limitations attaching or the sovereign immunity granted to its public employees. See *Franchise Tax Bd. of Cal. v. Hyatt*, 123 S. Ct. 1683, 1685 (2003); *Nevada v. Hall*, 440 U.S. 410, 414-21 (1979). Therefore, the one-year limitations period applicable to Arizona public employees is not applicable to actions involving these employees when the cause of action accrues in New Mexico.

**B. The New Mexico Tort Claims Act Is Inapplicable**

{14} Furthermore, the district court erred in concluding that the New Mexico Tort Claims Act was applicable to this case, mandating a two-year limitations period for tort actions against public employees. See Section 41-4-15. While Sam may have been considered a public employee acting within the scope of his duties under Arizona law, a question we need not address, he was not a public employee covered under our Tort Claims Act. The

Tort Claims Act specifies that only public employees employed by New Mexico governmental entities—not simply any governmental entity—are covered by our Tort Claims Act. See NMSA 1978, § 41-4-3(H) (2003). Thus, Sam cannot seek the protection afforded by the New Mexico Tort Claims Act.

{15} This case involves a tort that occurred in New Mexico, and sovereign immunity and public employment are irrelevant to the issues presented in this case. In determining which law to use, New Mexico applies the law of the state in which the wrong occurred. See *Torres v. State*, 119 N.M. 609, 613, 894 P.2d 386, 390 (1995) (applying place of wrong rule). Therefore, because the accident resulting in Tyler's

death occurred in New Mexico, New Mexico's three-year statute of limitations applies to this suit. See NMSA 1978, § 37-1-8 (1976). Because Plaintiffs brought this suit against the Estate within three years, they were within the limitations period, and the district court erred in applying a two-year statute of limitations.

{16} Although the Estate argues that public policy would be furthered by applying the shorter limitations period provided by either Arizona law or New Mexico's Tort Claims Act, it fails to provide us with authority supporting this contention. See *In re Adoption of Doe*, 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984) (stating that arguments not supported by authority will not be reviewed on appeal). We therefore

conclude that this argument concerning public policy has no merit.

CONCLUSION

{17} For the foregoing reasons, we affirm the district court's dismissal of the Trust, and we reverse the grant of summary judgment to the Estate.

{18} IT IS SO ORDERED.

RODERICK T. KENNEDY, Judge

WE CONCUR:

CELIA FOY CASTILLO, Judge

MICHAEL E. VIGIL, Judge

Certiorari Not Applied For

FROM THE NEW MEXICO  
COURT OF APPEALS

**Opinion Number:  
2004-NMCA-020**

PRAKONGSRI RHOADES,  
Petitioner-Appellee,  
versus  
DANIEL K. RHOADES,  
Respondent-Appellant.  
No. 23,663  
(filed: December 15, 2003)

APPEAL FROM THE  
DISTRICT COURT OF BERNA-  
LILLO COUNTY  
ANNE M. KASS, District Judge

KATHLEEN D. CARTER  
CARTER LAW FIRM, P.C.  
Albuquerque, New Mexico  
for Appellee

WILLIAM R. BRUMMETT  
Albuquerque, New Mexico  
for Appellant

OPINION

JONATHAN B. SUTIN, JUDGE

{1} Respondent Daniel K. Rhoades appeals the district court's order requiring him to pay spousal support to Petitioner Prakongsri Rhoades after Petitioner's share of Respondent's retirement pay

benefit was reduced due to an increase in Respondent's disability pay benefit. We affirm.

BACKGROUND

{2} The parties' twenty-two year marriage ended through a final decree and a first amended qualified domestic relations order (the order) both filed in 1994. Petitioner was awarded her appropriate share of Respondent's military retirement pay benefit. In 1996 Respondent became ill, increasing his disability rating and military disability pay, resulting in a reduction in his retirement pay. Petitioner's earlier-awarded share of Respondent's retirement pay benefit was thereby substantially reduced. In 1998 Petitioner sought enforcement of the final decree and the order requiring Respondent to pay Petitioner the full share of retirement pay that was originally awarded to her, plus arrearages.

{3} In 1999 Respondent filed a Chapter 7 proceeding in the United States Bankruptcy Court. Petitioner filed an adversary proceeding seeking a ruling that none of her share of the original retirement pay benefit awarded to her was dischargeable in bankruptcy. The bankruptcy court determined that Petitioner's pro-rata share of Respondent's retirement pay benefit was non-dischargeable. It also determined that neither Respondent nor his bankruptcy estate was liable to Petitioner for the difference between the amount Petitioner was awarded and the amount she was currently receiving.

{4} Due to the reduction in Petitioner's share of Respondent's retirement pay, the

district court entered an order under Rule 1-060(B) NMRA 2003 requiring Respondent to pay Petitioner spousal support. Respondent claims the district court erred because (1) a bankruptcy court determination barred the district court's award under the theory of collateral estoppel (issue preclusion), (2) the court should not have exercised jurisdiction to modify the parties' property settlement in the final decree and convert a portion to spousal support, and (3) the court improperly granted Petitioner relief under Rule 1-060(B).

DISCUSSION

Standard of Review

{5} The questions are all legal ones and we review them de novo. *Martinez v. Segovia*, 2003-NMCA-023, ¶ 9, 133 N.M. 240, 62 P.3d 331; *MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 2003-NMCA-021, ¶ 11, 133 N.M. 217, 62 P.3d 308. Unchallenged findings of fact are conclusive on appeal. *Arnold v. Arnold*, 2003-NMCA-114, ¶ 2, 134 N.M. 381, 77 P.3d 285.

The Collateral Estoppel (Issue Preclusion) Issue

{6} In the bankruptcy court, Petitioner objected to the dischargeability of the difference between her share of the retirement pay benefit awarded under the final decree and the order and the reduced amount she was receiving as a result of the increase in Respondent's disability benefit. Following an evidentiary hearing, the bankruptcy court on July 17, 2001, filed a memorandum opinion and a judgment directly on the issue. The bankruptcy court's memorandum opin-

ion determined that the retirement pay benefit awarded to Petitioner in the final decree and the order was non-dischargeable pursuant to 11 U.S.C. § 523(a)(15), but then, in determining "the amount of the non-dischargeable debt," determined that Respondent was "[not] liable for the difference between the monthly share of military retirement benefit [Petitioner] initially received pursuant to the Final Decree and the [order], and the amount she has been receiving since [Respondent] began receiving an increased disability benefit."

{7} We set out the bankruptcy court's recitation of the factual background contained in its memorandum opinion. The parties do not contest the accuracy of this factual recitation.

The Final Decree, entered April 14, 1994, awarded [Petitioner] a pro-rata share of [Respondent's] military retirement benefits . . . .

The [order], entered in December of 1994, declared the interest in [Respondent's] United States Air Force Retirement Benefits divisible marital property, and awarded [Petitioner] a property interest in her share of the retirement benefits as her sole and separate property. Like the Final Decree, the [order] awarded [Petitioner] a share of the military retirement benefits in accordance with a formula, which, at the time of the entry of the [order], was specified as follows:

$$\frac{20 \text{ (years married)}}{24 \text{ (years in service)}} \times \$1363 \text{ (monthly benefit payment)} \times \frac{1}{2} = \$567.92$$

(non-member Spouse's portion of Monthly benefit payment)

The [order] also provided for direct payment of [Petitioner's] share of the military retirement pay from the U.S. Defense & Accounting Service. Finally, the [order] included the following language:

In the event there is any period of time during which direct payments cannot be made to each respective party by the U.S. Government because of legal or processing difficulties, or because both parties do not qualify, and all retired pay is

being paid only to the Respondent[], then Respondent[], upon receiving such pay, shall promptly pay the appropriate share to the Petitioner[]. Nothing herein shall obligate the Respondent[] to pay retirement benefits to Petitioner[] if in fact he receives none for his service in the United States Air Force.

In accordance with the [order], [Petitioner] began receiving direct payment from the U.S. Defense & Accounting Service in the amount of \$368.79 per month, representing [Petitioner's] share awarded in the Final Decree and [the order], less applicable taxes withheld by the U.S. Defense & Accounting Service prior to distribution.

At the time of the dissolution of marriage, [Respondent] had a thirty percent disability rating. Thereafter [Respondent] suffered a heart attack, and, in 1997, after making application, his disability rating increased to seventy percent. He then began receiving an increased disability benefit that resulted in a corresponding reduction in his monthly retirement benefit. Consequently, [Petitioner] began receiving only \$223.74 per month, representing her share of the monthly military retirement benefit, after taxes, in accordance with the formula set forth in the Final Decree and the [order].

(Citations omitted.)

{8} After stating the law that debts in the nature of support, such as property settlements, were non-dischargeable, the bankruptcy court set out 11 U.S.C. § 523(a)(15)(A) and (B) as exceptions that apply when:

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation,

preservation, and operation of such business; or

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor[.]

The bankruptcy court then elaborated as follows:

Subsection (A) is inapplicable to this proceeding. The Defendant does not contend that he is unable to pay. The evidence shows that, although he is on seventy-percent disability from the military, he manages to work approximately thirty hours a week as a letter carrier for the postal service, and approximately ten hours a week at Burlington Coat Factory. In addition, his veteran's disability benefit is not subject to taxes. Thus, even though the total benefit amount from the retirement and disability combined is the same as it was prior to [Respondent's] increased disability rating, his net benefit after taxes is greater because only the retirement portion of his benefit is subject to taxes.

Under subsection (B), the Court must conduct a balancing test to determine whether the benefit of discharging a debt outweighs the consequences to the non-debtor spouse if the debt were discharged. This analysis requires a consideration of the totality of circumstances.

The evidence here weighs in favor of [Petitioner]. [Petitioner] runs her own business as a seamstress, sewing military patches on uniforms, and doing alterations work. She testified that she works twelve hours a day, Monday through Friday, and often works on weekends. Although expenses for her business were comparable for the years 1999 and 2000, [Petitioner's] net business income after expenses, but before taxes, dropped from \$32,039.49 in 1999 to \$23,162.00 in 2000,

making her average monthly business income \$2,300.00 for the years 1999 and 2000. [Petitioner] continues to drive the 1984 Volvo she received as part of the dissolution of marriage proceedings. The car has suffered mechanical problems in recent years.

[Respondent] continues to live in the marital home, which he received in the dissolution of marriage proceedings. Although his disability has been increased from thirty percent to seventy percent, he continues to work two jobs: 1) part-time regular letter carrier for the postal service, working approximately thirty hours a week for \$18.59 per hour; 2) sales associate at Burlington Coat Factory, working between ten and twenty hours a week for \$10.35 per hour. [Respondent] occasionally picks up additional routes as a letter carrier, working more than thirty hours in those weeks, and he tries to work twenty hours at Burlington Coat Factory as often as he can. Through his work for the postal office he participates in a Thrift Savings Plan and the Federal Employees Retirement System. He is also enrolled in the 401(k) plan offered by Burlington Coat Factory.

(Footnote and citations omitted.)

{9} The bankruptcy court then analyzed federal law, citing to the United States Supreme Court's decision in *Mansell v. Mansell*, 490 U.S. 581, 594-95 (1989), stating that "military retirement benefits that have been waived [under 10 U.S.C. § 1408(a)(4)(B)] in order to receive disability benefits cannot be considered property divisible through dissolution of marriage proceedings." Noting this "harsh result" for former spouses, the bankruptcy court also stated that "some courts have determined that because *Mansell* only prohibits courts from ordering direct payments from disability benefits, a court can enforce an indemnification provision in a marital settlement agreement against the former military spouse provided that the source of payment is not the disability benefit."

{10} The bankruptcy court thought the result to be inequitable. However, the

absence of an indemnification provision and the absence of any testimony or any language in the final decree or in the order clearly evidencing an intent to protect Petitioner against any reduction in her share of the retirement pay benefit led the bankruptcy court to hold against Petitioner. The court found "the evidence . . . insufficient to conclude that the parties intended for [Petitioner] to receive a sum certain from [Respondent's] military retirement benefit which would obligate [Respondent] to pay any difference in the event of [Respondent's] waiver of retirement benefit in favor of an increased disability benefit." The bankruptcy court was also unpersuaded by Petitioner's argument that she was entitled to the benefit on the ground it was a vested property interest and her sole and separate property as some cases have determined. Whereupon, the court entered judgment stating that "neither [Respondent] nor his bankruptcy estate is liable for the difference between the monthly share of military retirement benefit [Petitioner] initially received pursuant to the Final Decree and the [order], and the amount she has been receiving since [Respondent] began receiving an increased disability benefit."

{11} The foregoing facts and bankruptcy court decision would have precluded the district court in the present case under collateral estoppel (issue preclusion) principles from requiring Respondent to turn disability pay over to Petitioner, or from interpreting the final decree or the order to require indemnification to Petitioner for the reduction in her share of the retirement pay benefit. See *Reeves v. Wimberly*, 107 N.M. 231, 233, 755 P.2d 75, 77 (Ct. App. 1988) (setting out the elements of collateral estoppel, or issue preclusion, and stating "[c]ollateral estoppel works to bar the relitigation of ultimate facts or issues actually and necessarily decided in the prior suit by a valid and final judgment"). The district court, however, steered a different course. The district court did not address or decide any issue decided by the bankruptcy court. The district court awarded spousal support pursuant to Rule 1-060(B), seemingly to avoid federal law as to dischargeable bankruptcy debts and to skirt around issue preclusion.

{12} The district court's likely purpose, however, is irrelevant if the court had independent statutory authority to award spousal support. Respondent does not

contest the award or the amount of the award on substantial evidence or abuse of discretion grounds. We need determine only the issue whether the district court had independent statutory or other authority to award spousal support.

The District Court's Authority to Award Spousal Support  
{13} NMSA 1978, § 40-4-7(F) (1997) reads:

The court shall retain jurisdiction over proceedings involving periodic spousal support payments when the parties have been married for twenty years or more prior to the dissolution of the marriage, unless the court order or decree specifically provides that no spousal support shall be awarded.

This statute provides express authority for a district court to award spousal support. However, when the issues were litigated in district court in 2002, the parties and the court believed that Subsection F was not applicable, mistakenly thinking it was not in existence at the time of the 1994 final decree. The provision was effective July 1, 1993, as Section 40-4-7(E) (1993). Knowing that now, Respondent asserts on appeal that even were the provision applicable in 1994, it does not permit modification eight years after the final decree to award spousal support, because the final decree was silent as to spousal support. Respondent cites *Unser v. Unser*, 86 N.M. 648, 654, 526 P.2d 790, 796 (1974), because under then current 1974 law, *Unser* held "a general reservation of jurisdiction [to be] ineffective to uphold an award of alimony allowed after the entry of a final decree of divorce," stating the general rule to be "that where a divorce decree is silent on any award of alimony to the wife, that judgment is *res judicata* on the question of alimony and precludes a later alimony award." *Id.*

{14} Petitioner urges us to determine that Section 40-4-7(E) (1993) was controlling, and that we do not have to reach the propriety of the court's application of Rule 1-060(B), although Petitioner contends that relief under Rule 1-060(B) was appropriate. She asserts that we should sustain the district court's decision if it was right for any reason. See *Meiboom v. Watson*, 2000-NMSC-004, ¶ 20, 128 N.M. 536, 994 P.2d 1154 (upholding a district court decision based on erroneous rationale because it

"will be affirmed if right for any reason" as long as upholding the decision is not unfair to appellant and substantial evidence supports the right reason); *Jaramillo v. Jaramillo*, 113 N.M. 57, 62, 823 P.2d 299, 304 (1991) ("A lower court's decision will be affirmed on review if that decision was correct, even though the court may have used an incorrect rationale in arriving at its result.").

{15} The district court found that the parties were married twenty-two years; there was an enormous difference in education and earning capacity; except for the Respondent's military retirement benefit, there were no significant assets of the marriage at the time of divorce; Respondent converted a significant portion of his retirement benefit into disability pay which became his separate property and not divisible; Petitioner's share of the remaining retirement benefit was considerably less than ordered at the time of the final decree; and Respondent intended to convert all the retirement benefit into disability pay in the near future, which would effectively eliminate Petitioner's award of her share of Respondent's retirement benefit, the only significant asset of the marriage.

{16} The district court then found that the ruling in *Unser* had been changed by Section 40-4-7 (1997), that "[t]wenty years of marriage represents a reservation of jurisdiction," and that this Court should reconsider *Unser* "as being disastrous in its application and in view of the statutory change of law in 199[7]." Thus, due to a misunderstanding of the effective date of the controlling language of the statute, the court did not rule based on Section 40-4-7. Rather, the court invoked "its equity powers" under Rule 1-060B(5) and (6), and "grant[ed] relief from judgment with respect to alimony."

{17} Section 40-4-7(E) (1993) expressly required the court to retain jurisdiction to determine spousal support in marital

dissolutions involving parties married for twenty years or more, "unless the court order or decree specifically provide[d] that no spousal support shall be awarded." We construe Section 40-4-7(E) (1993) to mean what it says: in cases in which the marriage lasted twenty or more years, the court must retain jurisdiction to consider spousal support when the final decree was silent as to such support. Here, the final decree was silent as to spousal support. Section 40-4-7(E) (1993) applied and provided jurisdiction and authority for the district court to award spousal support, making it unnecessary for us to consider whether the court properly applied Rule 1-060(B). See *Meiboom*, 2000-NMSC-004, ¶ 20; *Jaramillo*, 113 N.M. at 62, 823 P.2d at 304.

{18} Furthermore, we read Section 40-4-7(E) (1993), which is presently Section 40-4-7(F) (1997), to permit the award of spousal support where the cause for the award develops from financial inequity resulting from a reduction in a spouse's share of military retirement benefits due to an increase in disability benefits, as in the present case. See *Foutz v. Foutz*, 110 N.M. 642, 644, 798 P.2d 592, 594 (Ct. App. 1990) ("Proper apportionment of community property and debts depends on what is fair, considering all of the evidence with reference to the facts and circumstances of each case."); *Blake v. Blake*, 102 N.M. 354, 368, 695 P.2d 838, 852 (Ct. App. 1985) ("[T]he trial court may make whatever adjustments as necessary to achieve a fair and equitable division and disposition of the parties' property and other interests."). Respondent fails to argue or cite any authority to support his implication that the district court erroneously converted a portion of the final decree to alimony and thereby unlawfully modified the parties' property settlement. We have the prerogative to ignore legal propositions unsupported by citation to authority. See *ITT Educ. Servs., Inc. v. Taxa-*

*tion & Revenue Dep't*, 1998-NMCA-078, ¶ 10, 125 N.M. 244, 959 P.2d 969. We will not consider this issue.

{19} Finally, because the district court had independent statutory authority on which to award spousal support, the bankruptcy court's factual findings, legal conclusions, and judgment had no preclusive effect. No fact determination or legal conclusion on which the bankruptcy court's judgment was entered affected the district court's independent statutory authority to award spousal support under Section 40-4-7(E) (1993).

CONCLUSION

{20} We affirm the district court's spousal support award.

{21} IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:

A. JOSEPH ALARID, Judge

RODERICK T. KENNEDY, Judge